CORPUS JURIS SECUNDUM

CJS

PRUDENTIA JURIS PERPETUA

CITE BY TITLE AND SECTION

Thus

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CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE

AMERICAN LAW

AS DEVELOPED BY

ALL REPORTED CASES

By

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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been two-fold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of Corpus Juris. When the searcher may wish to consult earlier authorities, a specific reference to Corpus Juris makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A

A.	Atlantic Reporter
Abb.	Abbott (U.S.)
Abb.Adm.	Abbott's Admiralty (U.S.)
Abb.App.Dec.	Abbott's Appeals Decisions (N.Y.)
Abb.Dec.	Abbott's Decisions (N.Y.)
Abb.N.Cas.	Abbott's New Cases (N.Y.)
Abb.Pr.	Abbott's Practice (N.Y.)
Abb.Pr.N.S.	Abbott's Practice New Series (N.Y.)
A'Beck.Res. Judgm.	A'Beckett's Reserved Judgments (Vict.)
[1917]A.C.	[1917] Appeal Cases (Can.)
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)
Acton	Acton (Eng.)
Adams	Adams Reports (N.H.)
Add.	Addison (Pa.)
Add.Eccl.	Addams' Ecclesiastical (Eng.)
A.&E.	Adolphus & Ellis (Eng.)
A.&E.Enc.L.	American & English Encyclopædia of Law
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice
Aik.	Aikens (Vt.)
A.K.Marsh.	A. K. Marshall (Ky.)
Ala.	Alabama
Ala.App.	Alabama Appellate Court
Alaska	Alaska
Alb.L.J.	Albany Law Journal
A.L.C.	American Leading Cases
Alc.&N.	Alcott & Napier (Eng.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)
Aleyn	Aleyn (Eng.)
Alison Pr.	Alison's Practice (Sc.)
Allen	Allen (Mass.)
Allen (N.B.)	Allen, New Brunswick
Alta.L.	Alberta Law
A.L.R.	American Law Reports
Am.Bankr.	American Bankruptcy (U.S.)
Ambl.	Ambler (Eng.)
A.M.C.	American Maritime Cases
Am.Corp.Cas.	American Corporation Cases
Am.Cr.	American Criminal
Am.D.	American Decisions
Am.&E.Corp.Cas.	American & English Corporation Cases
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series
Am.&Eng.Ency. Law	American and English Encyclopedia of Law
Am.&E.Eq.D.	American & English Decisions in Equity
Am.&Eng.Pat. Cas.	American and English Patent Cases
Am.&Eng.R.R. Cas.	American and English Railroad Cases
Am.Electr.Cas.	American Electrical Cases
Am.&E.R.Cas.	American & English Railroad Cases
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series
Am.J.Int.L.	American Journal of International Law
Am.L.J.	American Law Journal (Pa.)
Am.L.J.N.S.	American Law Journal New Series (Pa.)
Am.L.Rec.	American Law Record (Ohio)
Am.L.Reg.	American Law Register
Am.L.Reg.N.S.	American Law Register New Series
Am.Law Reg.(O. S.)	American Law Register Old Series
Am.L.Rev.	American Law Review
Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Am.Law Inst.	American Law Institute, Restatement of the Law
Am.Negl.Cas.	American Negligence Cases
Am.Negl.R.	American Negligence Reports
A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Am.Prob.	American Probate
Am.Prob.N.S.	American Probate New Series
Am.Pr.	American Practice
Am.R.	American Reports
Am.R.&Corp.	American Railroad & Corporation
Am.R.Rep.	American Railway Reports
Am.S.R.	American State Reports
Am.St.R.D.	American Street Railway Decisions
And.	Anderson (Eng.)
Andr.	Andrews (Eng.)
Ann.Cas.	American & English Annotated Cases
Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Anstr.	Anstruther (Eng.)
Anth.N.P.	Anthon's Nisi Prius (N.Y.)
App.D.C.	Appeal Cases (D.C.)
App.Cas.	Law Reports Appeal Cases (Eng.)
App.Div.	Appellate Division (N.Y.)
Ariz.	Arizona
Ark.	Arkansas
Ark.Just.	Arkley's Justiciary (Sc.)
Arn.	Arnold (Eng.)
Arn.&H.	Arnold & Hodges (Eng.)
Ashm.	Ashmead (Pa.)
Aspin.	Aspinall's Maritime Cases (Eng.)
Atk.	Atkyn (Eng.)
Austr.C.L.R.	Commonwealth Law Reports, Australia
Austr.Jur.	Australian Jurist
Austr.L.T.	Australian Law Times

B

Bacon Abr.	Bacon's Abridgment (Eng.)
Bail.Eq.	Bailey's Equity (S.C.)
Bailey	Bailey's Law (S.C.)
B.&Ad.	Barnewall & Adolphus (Eng.)
B.&Ald.	Barnewall & Alderson (Eng.)
Baldw.	Baldwin (U.S.)
Balf.Pr.	Balfour's Practice (Sc.)
Ball&B.	Ball & Beatty (Ir.)
Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
Bann.	Bannister (Eng.)
Bann.&A.	Banning & Arden (U.S.)
Barb.	Barbour (N.Y.)
Barb.Ch.	Barbour's Chancery (N.Y.)
B.&Arn.	Barron & Arnold (Eng.)
Barn.	Barnardiston King's Bench (Eng.)
Barn.Ch.	Barnardiston Chancery (Eng.)
Barnes	Barnes' Practice Cases (Eng.)
Barnes Notes	Barnes' Notes (Eng.)
Batty	Batty (Ir.)
B.&Aust.	Barron & Austin (Eng.)
Baxt.	Baxter (Tenn.)
Bay	Bay (S.C.)
B.&B.	Broderip & Bingham (Eng.)
B.C.	British Columbia

B.&C.	Barnewall & Cresswell (Eng.)
B.&Macn.	Browne & Macnamara (Eng.)
B.D.&O.	Blackham, Dundas & Osborne (Ir.)
Beatty	Beatty (Ir.)
Beav.	Beavan (Eng.)
Beav.&Wal.Ry. Cas.	Beavan & Walford's Railway and Canal Cases (Eng.)
Beav.R.&C.Cas.	English Railway and Canal Cases
Beaw.Lex.Mer.	Beawes Lex Mercatoria (Eng.)
Bee	Bee (U.S.)
Bell.	Bellewe (Eng.)
Bell App.Cas.	Bell's Appeal Cases (Sc.)
Bell Cas.	Bell's Cases (Sc.)
Bell C.C.	Bell's Crown Cases (Eng.)
Bell Comm.	Bell's Commentaries (Eng.)
Bell Sc.Cas.	Bell's Scotch Court of Session Cases
Ben.	Benedict (U.S.)
Benl.	Benloe (Eng.)
Benl.&D.	Benloe & Dallison (Eng.)
B.&H.Cr.Cas.	Bennett & Heard Leading Criminal Cases (Eng.)
Bibb	Bibb (Ky.)
Bing.	Bingham (Eng.)
Bing.N.Cas.	Bingham's New Cases (Eng.)
Binn.	Binney (Pa.)
Biss.	Bissell (U.S.)
Bitt.W.&P.	Bittleson, Wise & Parnell (Eng.)
Black	Black (U.S.)
Blackf.	Blackford (Ind.)
Blackstone Comm.	Blackstone Commentaries
Bla.H.	Henry Blackstone's English Common Pleas (Eng.)
Blair Co.	Blair County (Pa.)
Bland	Bland (Md.)
Bland's Ch.	Bland Chancery (Md.)
Blatchf.	Blatchford (U.S.)
Blatchf.&H.	Blatchford & Howland (U.S.)
Blatchf.PrizeCas.	Blatchford's Prize Cases (U.S.)
Bligh	Bligh (Eng.)
Bligh N.S.	Bligh New Series (Eng.)
B.Mon.	B. Monroe (Ky.)
Bond	Bond (U.S.)
Bouvier	Bouvier's Law Dictionary
Boyce	Boyce (Del.)
B.&P.	Bosanquet & Puller (Eng.)
B.&P.N.R.	Bosanquet & Puller's New Reports (Eng.)
Bract.	Bracton de Legibus et Consuetudinibus Angliæ
Bradf.Surr.	Bradford's Surrogate (N.Y.)
Brayt.	Brayton (Vt.)
B.R.C.	British Ruling Cases
Brev.	Brevard (S.C.)
Brewst.	Brewster (Pa.)
Brightly	Brightly (Pa.)
Brightly El.Cas.	Brightly's Election Cases (Pa.)
Bro.Ch.	Brown's Chancery (Eng.)
Brock.	Brockenbrough (U.S.)
Brock.Cas.	Brockenbrough's Virginia Cases
Brod.&B.	Broderip & Bingham (Eng.)
Brod.&Fr.	Broderick & Fremantle's Ecclesiastical Cases
Brodix Am.&E. Pat.Cas.	Brodix's American & English Patent Cases
Bro.Just.	Broun's Justiciary (Sc.)
Brook Abr.	Brook's Abridgments (Eng.)
Brook N.Cas.	Brook's New Cases (Eng.)
Brooke N.C.	Brooke's New Cases
Bro.P.C.	Brown's Parliament Cases (Eng.)
Brown Adm.	Brown's Admiralty (U.S.)
Brown, Ch.	Brown's Chancery Cases (Eng.)
Brown Ecc.	Brown Ecclesiastical (Eng.)
Brown N.P.	Brown's Michigan Nisi Prius
Brown,Parl.Cas.	Brown Parliamentary Cases (Eng.)
Browne	Browne (Pa.)
Brown.&L.	Browning & Lushington (Eng.)
Brownl.&G.	Brownlow & Goldesborough (Eng.)
Bruce	Bruce (Sc.)
Brunn.Coll.Cas.	Brunner's Collective Cases (U.S.)
B.&S.	Best & Smith (Eng.)
B.T.A.	Board of Tax Appeals (U.S.)
Buck	Buck (Eng.)
Buller N.P.	Buller's Nisi Prius (Eng.)
Bulstr.	Bulstrode (Eng.)
Bunb.	Bunbury (Eng.)
Burn.	Burnett (Wis.)
Burr.	Burrows (Eng.)
Burr.S.Cas.	Burrows' Settlement Cas. (Eng.)
Busb.	Busbee (N.C.)
Busb.Eq.	Busbee Equity (N.C.)
Bush	Bush (Ky.)
B.W.C.C.	Butterworth's Workmen's Compensation Cases (Eng.)

C

Cab.&E.	Cababe & Ellis (Eng.)
Cai.	Caines (N.Y.)
Cai.Cas.	Caines' Cases (N.Y.)
Cal.	California
Cal.(2d)	California Reports, Second Series
Cal.App.	California Appellate Court
Cal.App.(2d)	California Appellate Reports, Second Series
Cald.	Caldecott (Eng.)
Call	Call (Va.)
Calthr.	Calthrop (Eng.)
Cal.Unrep.Cas.	California Unreported Cases
Cam.Cas.	Cameron's Cases (Can.)
Campb.	Campbell (Eng.)
Canal Zone	Canal Zone Supreme Court
Can.App.Cas.	Canadian Appeal Cases
Can.Cr.Cas.	Canadian Criminal Cases
Can.Exch.	Canadian Exchequer
Can.L.J.	Canada Law Journal
Can.L.J.N.S.	Canada Law Journal New Series
Can.L.T.Occ. Notes	Canadian Law Times Occasional Notes
Can.R.Cas.	Canadian Railway Cases
Can.S.C.	Canada Supreme Court
Cane&L.	Cane & Leigh Crown Cases Reserved (Eng.)
Car.&K.	Carrington & Kirwan (Eng.)
Car.&M.	Carrington & Marshman (Eng.)
Car.&P.	Carrington & Payne (Eng.)
Car.H.&A.	Carrow, Hamerton & Allen (Eng.)
Carp.P.C.	Carpmael Patent Cases (Eng.)
Carter	Carter (Eng.)
Carth.	Carthew (Eng.)
Cartwr.Cas.	Cartwright's Cases (Can.)
Cary	Cary (Eng.)
Cas.	Casey (Pa.)
Cas.t.Hardw.	Cases temp. Hardwicke (Eng.)
Cas.t.Holt	Cases temp. Holt (Eng.)
Cas.t.King	Cases temp. King (Eng.)
Cas.t.Talb.	Cases temp. Talbot (Eng.)
C.B.	Common Bench (Manning, Granger & Scott) (Eng.)
C.B.N.S.	Common Bench New Series (Manning, Granger & Scott New Series) (Eng.)
C.C.A.	Circuit Court of Appeals (U.S.)
C.C.P.A.	Court of Customs and Patent Appeals
Centr.L.J.	Central Law Journal
[1891] Ch.	Law Reports [1891] Chancery (Eng.)
Chamb.Rep.	Chamber (Ont.)
Chandl.	Chandler (Wis.)
Charlt.R.M.	R. M. Charlton (Ga.)
Charlt.T.U.P.	T. U. P. Charlton (Ga.)
Chase	Chase (U.S.)
Ch.Cas.	Cases in Chancery (Eng.)
Ch.Chamb.	Chancery Chambers (U.C.)
Ch.Col.Op.	Chalmers' Colonial Opinions
Ch.D.	Law Reports Chancery Division (Eng.)
Chest.Co.	Chester County (Pa.)
Chev.	Cheves (S.C.)
Chit.	Chitty (Eng.)
Choyce Cas.Ch.	Choyce Cases in Chancery (Eng.)
Ch.Rep.	Chancery Reports (Eng.)
Ch.Sent.	Chancery Sentinel (N.Y.)
Cinc.L.Bul.	Weekly Law Bulletin (Oh.)
Cinc.Super.	Cincinnati Superior Court Reporter (Oh.)
City Ct.R.	City Court Reports (N.Y.)
City Hall Rec.	City Hall Recorder (N.Y.)

Civ.Proc.Rep.	Civil Procedure Reports (N.Y.)
C.J.	Corpus Juris
C.J.Ann.	Corpus Juris Annotations
C.J.S.	Corpus Juris Secundum
C.&K.	Carrington & Kirwan (Eng.)
C.&L.	Connor & Lawson (Ir.)
Cl.App.	Clark's Appeal Cases (Eng.)
Cl.Ch.	Clarke's Chancery (N.Y.)
Clark &F.	Clark & Finnelly (Eng.)
Clark &Fin.N.S.	Clark's House of Lords Cases (Eng.)
Clarke	Clarke's Chancery (N.Y.)
Clarke &S.Dr.Cas.	Clarke & Scully's Drainage Cases (Ont.)
Clarke Ch.	Clarke's Chancery (N.Y.)
Clayt.	Clayton's Reports, York Assizes (Eng.)
C.L.Chamb.	Chamber's Common Law (U.C.)
Clev.L.Rec.	Cleveland Law Record (Oh.)
Clev.L.Rep.	Cleveland Law Reporter (Oh.)
Cl.&F.	Clark & Finnelly (Eng.)
Clif.El.Cas.	Clifford's Southwick Election Cases
Cliff.	Clifford (U.S.)
C.L.R.	Common Law Reports (Eng.)
C.&M.	Carrington & Marshman (Eng.)
C.M.&R.	Crompton, Meeson & Roscoe (Eng.)
Cock.&Rowe	Cockburn & Rowe's Election Cases
Code Rep.	Code Reporter (N.Y.)
Code Rep.N.S.	Code Reports New Series (N.Y.)
Coff.Prob.	Coffey's Probate (Cal.)
Co.Inst.	Coke's Institutes
Coke	Coke (Eng.)
Col.Cas.	Coleman's Cases (N.Y.)
Col.&C.Cas.	Coleman & Caines' Cases (N.Y.)
Col.C.C.	Collyer's Chancery Cases (Eng.)
Coldw.	Coldwell (Tenn.)
Coll.	Collyer (Eng.)
Col.L.Rep.	Colorado Law Reporter
Col.Law Review	Columbia Law Review
Coll.&E.Bank.	Collier and Eaton's American Bankruptcy Reports
Colles	Colles' Cases in Parliament (Eng.)
Colo.	Colorado
Colo.App.	Colorado Appeals
Colq.	Colquit
Coltm.	Coltman (Eng.)
Comb.	Comberbach (Eng.)
Com.Cas.	Commercial Cases (Eng.)
Com.L.	Commercial Law (Can.)
Comptr.Treas. Dec.	Comptroller Treasury Decisions
Comst.	Comstock (N.Y.)
Comyns	Comyns (Eng.)
Comyns Dig.	Comyns Digest (Eng.)
Con.&Law.	Connor & Lawson (Ir.)
Conf.	Conference Reports (N.C.)
Conn.	Connecticut
Conn.Surr.	Connolly's Surrogate (N.Y.)
Const.	Constitutional Reports (N.C.)
Cooke	Cooke (Eng.)
Cooke	Cooke (Tenn.)
Cooke & A.	Cooke & Alcock (Ir.)
Cook Vice-Adm.	Cook's Vice-Admiralty (L.C.)
Coop.	Cooper's Chancery (Eng.)
Coop.Pr.Cas.	Cooper's Practice Cases (Eng.)
Coop.t.Brough.	Cooper's Cases temp. Brougham (Eng.)
Coop.t.Cott.	Cooper's Cases temp. Cottenham (Eng.)
Coop.t.Eld.	Cooper's Cases *tempore* Eldon (Eng.)
Co.P.C.	Coke's Reports (Eng.)
Corb.&D.	Corbett & Daniell's Election Cases (Eng.)
Court.&Macl.	Courtnay & Maclean (Sc.)
Cow.	Cowen (N.Y.)
Cow.Cr.Rep.	Cowen's Criminal (N.Y.)
Cowp.	Cowper (Eng.)
Cox.Am.T.M.Cas.	Cox's American Trade-Mark Cases
Cox C.C.	Cox's Criminal Cases (Eng.)
Cox Ch.	Cox's Chancery (Eng.)
Cox &Atk.	Cox & Atkinson (Eng.)
C.&P.	Carrington & Payne (Eng.)
C.P.C.	C. P. Cooper's Chancery Practice Cases (Eng.)
C.P.D.	Law Reports Common Pleas Division (Eng.)

Crabbe	Crabbe (U.S.)
Cranch	Cranch (U.S.)
Cranch C.C.	Cranch's Circuit Court (U.S.)
Cranch Pat.Dec.	Cranch's Patent Decisions (U.S.)
Cr.App.	Criminal Appeals (Eng.)
Crawf.&D.	Crawford & Dix (Ir.)
Crawf.&D.Abr. Cas.	Crawford & Dix's Abridged Cases (Ir.)
Cripp's Ch.Cas.	Cripp's Church and Clergy Cases
Cr.L.Mag.	Criminal Law Magazine
Cr.&Ph.	Craig & Phillips (Eng.)
C.Rob.	Christopher Robinson's Admiralty (Eng.)
Cro.Car.	Croke Charles (Eng.)
Cro.Eliz.	Croke Elizabeth (Eng.)
Cro.Jac.	Croke's Reports tempore James (Jacobus) (Eng.)
Cromp.&J.	Crompton & Jervis (Eng.)
Cromp.&M.	Crompton & Meeson (Eng.)
Crosw.Pat.Cas.	Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph.	Craig & Phillips (Eng.)
Ct.Cl.	Court of Claims (U.S.)
Ct.Cust.&Pat. App.	Court of Customs and Patent Appeals
Cunn.	Cunningham (Eng.)
Curt.	Curtis (U.S.)
Curt.Eccl.	Curteis Ecclesiastical (Eng.)
Cush.	Cushing (Mass.)
Cust.A.	United States Customs Appeals
Cyc.	Cyclopedia of Law & Procedure
Cyc.Ann.	Cyclopedia of Law & Procedure Annotations

D

Dak.	Dakota
Dal.C.P.	Dalison's Common Pleas (Eng.)
Dall.	Dallaman's Decisions (Tex.)
Dall.	Dallas (Pa.)
Dall.	Dallas (U.S.)
Dalr.Dec.	Dalrymple's Decisions (Sc.)
Daly	Daly (N.Y.)
Dan.	Daniell (Eng.)
Dana	Dana (Ky.)
Dane Abr.	Dane's Abridgment
Dans.&L.	Danson & Lloyd (Eng.)
D'Anv.Abr.	D'Anver's Abridgment (Eng.)
Dauph.Co.	Dauphin County (Pa.)
Dav.&M.	Davison & Merivale (Eng.)
Davys	Davys (Ir.)
Day	Day (Conn.)
D.B.&M.	Dunlop, Bell & Murray (Sc.)
D.C.	District of Columbia
D.Chipm.	D. Chipman (Vt.)
Deac.	Deacon (Eng.)
Deac.&C.	Deacon & Chitty (Eng.)
Deady	Deady (U.S.)
Dears.&B.	Dearsley & Bell (Eng.)
Dears.C.C.	Dearsley's Crown Cases (Eng.)
Deas & A.	Deas & Anderson (Eng.)
De Gex	De Gex (Eng.)
De G.F.&J.	De Gex, Fisher & Jones (Eng.)
De G.J.&S.	De Gex, Jones & Smith (Eng.)
De G.&J.	De Gex & Jones (Eng.)
De G.M.&G.	De Gex, MacNaghten & Gordon (Eng.)
De G.&Sm.	De Gex & Smale (Eng.)
Del.	Delaware
Del.Ch.	Delaware Chancery
Del.Co.	Delaware County (Pa.)
Dem.Surr.	Demarest's Surrogate (N.Y.)
Den.	Denio (N.Y.)
Den.C.C.	Denison's Crown Cases (Eng.)
Desaus.Eq.	Desaussure (S.C.)
Dev.Ct.Cl.	Devereux's Court of Claims (U.S.)
Dev.L.	Devereux (N.C.)
Dev.&Bat.	Devereux & Battle (N.C.)
Dick.	Dickens (Sc.)
Dill.	Dillon (U.S.)
Dirl.Dec.	Dirleton's Decisions (Sc.)
Disn.	Disney (Oh.)

D.&L.	Dowling & Lowndes (Eng.)
Dods.	Dodson's Admiralty (Eng.)
Dom.L.R.	Dominion Law Reports (Can.)
Donnelly	Donnelly (Eng.)
Dorion	Dorion (L.C.)
Dougl.	Douglas (Eng.)
Dougl.	Douglass (Mich.)
Dougl.El.Cas.	Douglas' Election Cases (Eng.)
Dow	Dow (Eng.)
Dow & Cl.	Dow & Clark (Eng.)
Dow.&L.	Dowling & Lowndes (Eng.)
Dow.N.S.	Dowling, New Series (Eng.)
Dowl.	Dowling's English Bail Court (Practice) Cases
Dowl.P.C.	Dowling's Practice Cases (Eng.)
Dowl.P.C.N.S.	Dowling's Practice Cases New Series (Eng.)
D.&R.	Dowling & Ryland (Eng.)
Draper	Draper (U.C.)
Drew.	Drewry (Eng.)
Drinkw.	Drinkwater (Eng.)
D.&R.Mag.Cas.	Dowling & Ryland's Magistrate Cases (Eng.)
D.&R.N.P.	Dowling & Ryland's Nisi Prius (Eng.)
Dr.&Sm.	Drewry & Smale (Eng.)
Drury	Drury (Ir.)
Dr.&Wal.	Drury & Walsh (Ir.)
Dr.&War.	Drury & Warren (Ir.)
D.&Sw.	Deane & Swabey (Eng.)
Dud.Eq.	Dudley (S.C.)
Dudl.	Dudley (Ga.)
Duer	Duer's Superior Court (N.Y.)
Dunl.B.&M.	Dunlop, Bell & Murray (Sc.)
Dunlop	Dunlop (Sc.)
Dunn.	Dunning (Eng.)
Durie	Durie (Sc.)
Durn.&E.	Durnford & East (Eng.)
Duv.	Duvall (Ky.)
Dyer	Dyer (Eng.)

E

East	East (Eng.)
East.L.R.	Eastern Law Reporter (Can.)
East P.C.	East's Pleas of the Crown (Eng.)
East.T.	Eastern Term (Eng.)
E.&B.	Ellis & Blackburn (Eng.)
E.B.&E.	Ellis, Blackburn & Ellis (Eng.)
E.B.&S.	Ellis, Best & Smith (Eng.)
E.C.L.	English Common Law
Eden	Eden (Eng.)
Edgar	Edgar (Sc.)
Edm.Sel.Cas.	Edmond's Select Cases (N.Y.)
E. D. Smith	E. D. Smith (N.Y.)
Edw.	Edwards (Eng.)
Edw.	Edwards' Chancery (N.Y.)
Edw.Abr.	Edwards' Abridgment of Prerogative Court Cases
Edw.Adm.	Edwards' Admiralty (Eng.)
E.&E.	Ellis & Ellis (Eng.)
Enc.Pl.&Pr.	Encyclopædia of Pleading & Practice
Ency.Law.	American and English Encyclopædia of Law
Eng.Ad.	English Admiralty
Eng.C.C.	English Crown Cases
Eng.Ch.	English Chancery
Eng.Eccl.	English Ecclesiastical Reports
Eng.Ecc.R.	English Ecclesiastical Reports
Eng.Exch.	English Exchequer Reports
Eng.L.&Eq.	English Law & Equity
Eng.Rep.R.	English Reports, Full Reprint
Eng.Ry.&C.Cas.	English Railway and Canal Cases
Eng.&Ir.App.	Law Reports, English and Irish Appeal Cases
Eq.Cas.Abr.	Equity Cases Abridged (Eng.)
Eq.Rep.	Equity Reports (Eng.)
E.R.C.	English Ruling Cases
Esp.	Espinasse's Nisi Prius (Eng.)
Euer	Euer (Eng.)
Exch.	Exchequer (Eng.)
Exch.Cas.	Exchequer Cases (Sc.)
Ex.D.	Law Reports Exchequer Division (Eng.)
Eyre	Eyre's Reports (Eng.)

F

Falc.	Falconer's Court of Sessions (Sc.)
Falc.&F.	Falconer & Fitzherbert (Eng.)
Far.	Farresley (Eng.)
F.Cas.No.	Federal Cases (U.S.)
F.(Ct.Sess.)	Fraser's Court of Sessions Cases (Sc.)
F.	Federal Reporter (U.S.)
F.(2d)	Federal Reporter Second Series
F.R.D.	Federal Rules Decisions
F.Supp.	Federal Supplement
Ferg.Cons.	Ferguson's Consistory (Eng.)
F.&F.	Foster & Finlason (Eng.)
Fish.Pat.Cas.	Fisher's Patent Cases (U.S.)
Fish.Pat.R.	Fisher's Patent Reports (U.S.)
Fish.PrizeCas.	Fisher's Prize Cases (U.S.)
Fitzg.	Fitzgibbon (Eng.)
Fitzh.	Fitzherbert's Abridgment (Eng.)
Fitzh.N.Br.	Fitzherbert's Natura Brevium (Eng.)
Fla.	Florida
Flipp.	Flippin (U.S.)
Fl.&K.	Flanagan & Kelly (Ir.)
Fonb.Eq.	Fonblanque's Equity (Eng.)
Fonbl.	Fonblanque (Eng.)
Fonbl.R.	Fonblanque's English Cases
Forbes	Forbes (Eng.)
Forr.	Forrest (Eng.)
Forrester	Forrester's Cases (Eng.)
Fortesc.	Fortescue (Eng.)
Fost.	Foster (Eng.)
Fost.	Foster (N.H.)
Fost.&Fin.	Foster & Finlason (Eng.)
Fount.Dec.	Fountainhall's Decisions (Sc.)
Fox	Fox Reports (Eng.)
Fox & S.	Fox & Smith (Ir.)
Freem.	Freeman's Chancery (Eng.)
Freem.	Freeman's Chancery (Miss.)
Freem.K.B.	Freeman's King's Bench (Eng.)

G

Ga.	Georgia
Ga.App.	Georgia Appeals
Ga.Dec.	Georgia Decisions
Gale	Gale (Eng.)
Gal.	Gallison (U.S.)
G.Coop.	G. Cooper (Eng.)
G.&D.	Gale & Davidson (Eng.)
Geld.&M.	Geldart & Maddock (Eng.)
Gibb.Surr.	Gibbon's Surrogate (N.Y.)
Giffard	Giffard (Eng.)
Giff.&H.	Giffard and Hemming (Eng.)
Gil.	Gilfillan's Edition (Minn.)
Gilb.	Gilbert's (Eng.)
Gilb.Cas.	Gilbert's Cases (Eng.)
Gilb.C.P.	Gilbert's Common Pleas (Eng.)
Gilb.Exch.	Gilbert's Exchequer (Eng.)
Gill	Gill (Md.)
Gill&J.	Gill & Johnson (Md.)
Gilm.	Gilmer (Va.)
Gilm.&Falc.	Gilmour & Falconer (Sc.)
Gilp.	Gilpin (U.S.)
Glasc.	Glascock (Ir.)
Glyn&J.	Glyn & Jameson (Eng.)
Godb.	Godbolt (Eng.)
Godo.	Godolphin's Abridgment of Ecclesiastical Law
Goeb.	Goebel's Probate Court Cases
Gosf.	Gosford (Eng.)
Gouldsb.	Gouldsborough (Eng.)
Gow	Gow (Eng.)
Gow N.P.	Gow's English Nisi Prius Cases
Grant	Grant's Cases (Pa.)
Grant Ch.	Grant's Chancery (U.C.)
Grant Err.&App.	Grant's Error & Appeal (U.C.)
Gratt.	Grattan (Va.)
Gray	Gray (Mass.)

Green Cr.	Green's Criminal Law (Eng.)
Greene	Greene (Iowa)
Gwill.T.Cas.	Gwillim's Tithe Cases (Eng.)

H

Hadd.	Haddington (Eng.)
Hagg.Adm.	Haggard's Admiralty (Eng.)
Hagg.Cons.	Haggard's Consistory (Eng.)
Hagg.Eccl.	Haggard's Ecclesiastical (Eng.)
Hailes Dec.	Hailes' Decisions (Sc.)
Hale	Hale's Common Law (Eng.)
Hale Ecc.	Hale's Ecclesiastical (Eng.)
Hale P.C.	Hale's Pleas of the Crown (Eng.)
Hall	Hall's Superior Court (N.Y.)
Hall&T.	Hall & Twells (Eng.)
Halsbury L.Eng.	Halsbury's Law of England
Handy	Handy (Oh.)
Han.(N.B.)	Hannay's Reports, New Brunswick
Hard.	Hardin (Ky.)
Hardres	Hardres (Eng.)
Hare	Hare (Eng.)
Harp.Eq.	Harper (S.C.)
Harr.	Harrison's Chancery (Mich.)
Harr.(Del.)	Harrington (Del.)
Harr.(Mich.)	Harrington's Michigan Chancery Reports
Harr.&G.	Harris & Gill (Md.)
Harr.Ch.	Harrison's Chancery (Eng.)
Harr.&H.	Harrison & Hodgins (U.C.)
Harr.&J.	Harris & Johnson (Md.)
Harr.&M.	Harris & McHenry (Md.)
Harr.&R.	Harrison & Rutherford (Eng.)
Harr.&W.	Harrison & Wollaston (Eng.)
Hask.	Haskell (U.S.)
Havil.	Haviland (Pr.Edw.Isl.)
Hawaii	Hawaiian
Hawaii.Fed.	Hawaiian Federal
Hawaiian Rep.	Hawaii Reports
Hawk P.C.	Hawkins' Pleas of the Crown (Eng.)
Hay.Exch.	Hayes Exchequer (Ir.)
Hayes	Hayes (Ir.)
Hayes&J.	Hayes & Jones (Ir.)
Hay&M.	Hay & Marriott (Eng.)
Hayw.	Haywood (N.C.)
Hayw.	Haywood (Tenn.)
Hayw.&H.	Haywood & Hazelton (U.S.)
Haz Reg.	Hazard's Register (Pa.)
H.Bl.	Henry Blackstone (Eng.)
H.&C.	Hurlstone & Coltman (Eng.)
Head	Head (Tenn.)
Heisk.	Heiskell (Tenn.)
Hem.&M.	Hemming & Miller (Eng.)
Hempst.	Hempstead (U.S.)
Hen.&M.	Hening & Munford (Va.)
Het.	Hetley (Eng.)
Het.C.P.	Hetley's Common Pleas (Eng.)
H.&H.	Horn & Hurlstone (Eng.)
Hill	Hill (N.Y.)
Hill S.C.	Hill (S.C.)
Hill &Den.	Hill & Denio (N.Y.)
Hill &Den. Supp.	Lalor's Supplement to Hill & Denio's (N.Y.)
Hilt.	Hilton (N.Y.)
Hil.T.	Hilary Term (Eng.)
H.L.Cas.	House of Lords Cases (Eng.)
H.&N.	Hurlstone & Norman (Eng.)
Hob.	Hobart (Eng.)
Hodg.El.	Hodgins' Election (U.C.)
Hodges	Hodges (Eng.)
Hoffm.	Hoffman's Chancery (N.Y.)
Hoffm.Land Cas.	Hoffman's Land Cases (U.S.)
Hog.	Hogan (Ir.)
Holmes	Holmes (U.S.)
Holt Adm.Cas.	Holt's English Admiralty Cases
Holt Eq.	Holt's Equity (Eng.)
Holt K.B.	Holt's King's Bench (Eng.)
Holt N.P.	Holt's Nisi Prius (Eng.)
Home	Home (Sc.)
Hope Dec.	Hope's Decisions (Sc.)
Hopk.	Hopkins' Chancery (N.Y.)
Hopk.Dec.	Hopkins' Decisions (Pa.)
Hopw.&C.	Hopwood & Coltman (Eng.)
Hopw.&P.	Hopwood & Philbrick (Eng.)
Hosea	Hosea (Ohio)
Houst.	Houston (Del.)
Houst.Cr.	Houston's Criminal Cases (Del.)
How.	Howard (U.S.)
How.(Miss.)	Howard (Miss.)
How.A.Cas.	Howard's Appeal Cases (N.Y.)
How.N.P.	Howell's Nisi Prius (Mich.)
How.Pr.	Howard's Practice (N.Y.)
How.Pr.N.S.	Howard's Practice New Series (N.Y.)
How.St.Tr.	Howell's State Trials (Eng.)
Hud.&B.	Hudson & Brooke (Ir.)
Hughes	Hughes (Ky.)
Hughes	Hughes (U.S.)
Hume	Hume's Decisions (Sc.)
Humphr.	Humphreys (Tenn.)
Hun	Hun (N.Y.)
Hurl.&Gord.	Hurlstone & Gordon (Eng.)
Hurl.&W.	Hurlstone & Walmsley (Eng.)
Hutt.	Hutton (Eng.)

I

Idaho	Idaho
Iddings D.R.D.	Iddings Dayton Term Reports
Ill.	Illinois
Ill.App.	Illinois Appellate Court
Ill.Cir.	Illinois Circuit Court
Ind.	Indiana
Ind.App.	Indiana Appellate Court
Ind.T.	Indian Territory
Ins.L.J.	Insurance Law Journal
Int.Com.Commn.	Interstate Commerce Commission
Int.Com.Rep.	Interstate Commerce Reports
Int.Rev.Rec.	Internal Revenue Record
Iowa	Iowa
[1891]Ir.	Law Reports [1891] Irish
Ir.Ch.	Irish Chancery
Ir.C.L.	Irish Common Law
Ir.Eccl.	Irish Ecclesiastical Reports
Ired.	Iredell (N.C.)
Ir.Eq.	Irish Equity
Ir.Law Rep.	Irish Law Reports
Ir.Law &Eq.	Irish Law and Equity Reports
Ir.R.1894.	Irish Law Reports for year 1894
Ir.R.C.L.	Irish Reports Common Law
Ir.R.Eq.	Irish Reports Equity
Irv.Just.	Irvine's Justiciary Cases (Eng.)

J

Jac.	Jacob (Eng.)
Jac.&W.	Jacob & Walker (Eng.)
J.Bridgm.	John Bridgman (Eng.)
J.&C.	Jones & Carey (Ir.)
Jebb &B.	Jebb & Bourke (Ir.)
Jebb C.C.	Jebb's Crown Cases (Ir.)
Jebb&S.	Jebb & Symes (Ir.)
Jeff.	Jefferson (Va.)
Jenk.	Jenkins (Eng.)
J.J.Marsh.	J. J. Marshall (Ky.)
J.&L.	Jones & La Touche (Eng.)
Johns.	Johnson (Eng.)
Johns.	Johnson (N.Y.)
Johns.Cas.	Johnson's Cases (N.Y.)
Johns.Ch.	Johnson's Chancery (N.Y.)
Johns.V.C.	Johnson's English Vice-Chancellors (Eng.)
Johns.&H.	Johnson & Hemming (Eng.)
Jones Exch.	Jones Exchequer (Ir.)
Jones T.	Sir Thomas Jones' English King's Bench Reports
Jones W.	Sir William Jones' English King's Bench Reports
Jones&Spen.	Jones & Spencer (N.Y.)
Journ.Jur.	Journal of Jurisprudence (Pa.)
J.P.	Justice of Peace (Eng.)
Jur.	Jurist (Eng.)
Jur.N.S.	Jurist New Series (Eng.)
Just.L.R.	Justices' Law Reporter (Pa.)

K

Kames Dec.	Kames' Decisions (Sc.)
Kames Elucid.	Kames' Elucidation (Sc.)
Kames Rem.Dec.	Kames' Remarkable Decisions (Sc.)
Kames Sel.Dec.	Kames' Select Decisions (Sc.)
Kan.	Kansas
Kan.App.	Kansas Appeals
Kay	Kay (Eng.)
Kay&J.	Kay & Johnson (Eng.)
[1917]K.B.	Law Reports [1917] King's Bench (Eng.)
Keane &Gr.	Keane & Grant (Eng.)
Keb.	Keble (Eng.)
Keen	Keen (Eng.)
Keilw.	Keilway (Eng.)
Kel.C.C.	Kelyng's Crown Cases (Eng.)
Kelly	Kelly (Ga.)
Kelyng, J.	Kelyng's English Crown Cases
Kelynge, W.	Kelynge's Chancery (Eng.)
Keyes.	Keyes (N.Y.)
Keyl.	Keilwey (Eng.)
K.&G.	Keane & Grant (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)
Kirby	Kirby (Conn.)
Knapp	Knapp (Eng.)
Knapp&O.	Knapp & Ombler (Eng.)
Kn.&Moo.	Knapp & Moore (Eng.)
Knox	Knox (N.S.Wales)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)
Kulp	Kulp (Pa.)
Ky.	Kentucky
Ky.Dec.	Kentucky Decisions
Ky.L.	Kentucky Law Reporter
Ky.Op.	Kentucky Opinions

L

La.	Louisiana
La.App.	Louisiana Court of Appeals
La.A.(Orleans)	Court of Appeal, Parish of Orleans
La.Ann.	Louisiana Annual
Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
Lack.Leg.N.	Lackawanna Legal News (Pa.)
Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
Lanc.Bar	Lancaster Bar (Pa.)
Lanc.L.Rev.	Lancaster Law Review (Pa.)
Land Dec.	Land Decisions (U.S.)
Lane	Lane (Eng.)
Lans.	Lansing (N.Y.)
Lans.Ch.	Lansing's Chancery Decisions (N.Y.)
Latch	Latch (Eng.)
Law Rep.N.S.	Law Reports New Series (N.Y.)
L.C.	Lower Canada
L.&C.	Leigh & Cave (Eng.)
L.C.Jur.	Lower Canada Jurist
L.C.L.J.	Lower Canada Law Journal
L.C.Rep.S.Qu.	Lower Canada Reports Seignorial Questions
L.D.	Law Dictionary
Ld.Ken.	Lord Kenyon (Eng.)
Ld.Raym.	Lord Raymond (Eng.)
Lea	Lea (Tenn.)
Leach C.C.	Leach's Crown Cases (Eng.)
L.Ed.	Lawyers' Edition United States Supreme Court
Lee Eccl.	Lee's Ecclesiastical (Eng.)
Lee t.Hardw.	Lee temp. Hardwicke (Eng.)
Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)
Leg.Chron.	Legal Chronicle (Pa.)
Leg.Gaz.	Legal Gazette (Pa.)
Leg.&Ins.R.	Legal & Insurance Reporter (Pa.)
Leg.Int.	Legal Intelligencer (Pa.)
Leg.Op.	Legal Opinions (Pa.)
Leg.Rec.	Legal Record (Pa.)
Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
Lehigh Val.L.R.	Lehigh Valley Law Reporter (Pa.)
Leigh	Leigh (Va.)
Leigh &C.	Leigh & Cave's English Crown Cases
Leon.	Leonard (Eng.)
Lev.	Levinz (Eng.)
Lew.C.C.	Lewin's Crown Cases (Eng.)
Ley	Ley (Eng.)
L.G.	Law Glossary
Liberian L.	Liberian Law
Litt.	Littell (Ky.)
Litt.	Littleton (Eng.)
Litt.Sel.Cas.	Littell's Select Cases (Ky.)
L.J.Adm.	Law Journal Admiralty New Series (Eng.)
L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
L.J.Ch.	Law Journal Chancery New Series (Eng.)
L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
L.J.Eccl.	Law Journal Ecclesiastical New Series (Eng.)
L.J.Exch.	Law Journal Exchequer New Series (Eng.)
L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
L.J.K.B.	Law Journal King's Bench New Series (Eng.)
L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
L.J.P.C.	Law Journal Privy Council New Series (Eng.)
L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
L.J.P.&M.	Law Journal Probate & Matrimonial New Series (Eng.)
L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
L.J.Rep.	Law Journal Reports (Eng.)
Ll.&G.t.Pl.	Lloyd & Goold temp. Plunket (Ir.)
Ll.&G.t.S.	Lloyd & Goold temp. Sugden (Ir.)
Ll.&W.	Lloyd & Welsby (Eng.)
L.&M.	Lowndes & Maxwell (Eng.)
L.M.&P.	Lowndes, Maxwell & Pollack (Eng.)
Loc.Gov.	Local Government (Eng.)
Lofft	Lofft (Eng.)
Longf.&T.	Longfield & Townsend (Ir.)
Low.Can.Seign.	Lower Canada Seignorial Reports
Lowell	Lowell (U.S.)
L.R.	Law Reports (U.S.)
L.R.A.	Lawyers' Reports Annotated
L.R.A.1915A.	Lawyers' Reports Annotated 1915A
L.R.App.Cas.	English Law Reports, Appeal Cases (Eng.)
L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
L.R.A.N.S.	Lawyers' Reports Annotated New Series
L.R.C.C.	Law Reports Crown Cases (Eng.)
L.R.Ch.	Law Reports Chancery Appeal Cases (Eng.)
L.R.C.P.	Law Reports Common Pleas Cases (Eng.)
L.R.Eq.	Law Reports Equity Cases (Eng.)
L.R.Exch.	Law Reports Exchequer Cases (Eng.)
L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
L.R.H.L.Sc.	Law Reports House of Lords (Scotch Appeal Cases)
L.R.Indian App.	Law Reports Indian Appeals (Eng.)
L.R.Ir.	Law Reports Irish
L.R.P.C.	Law Reports Privy Council (Eng.)
L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
L.R.Q.B.	Law Reports Queen's Bench Cases (Eng.)
L.T.	Law Times (Pa.)
L.T.N.S.	Law Times New Series (Pa.)
L.T.O.S.	Law Times, Old Series (Eng.)

L.T.Rep.N.S.	Law Times Reports New Series (Eng.)
Lush.	Lushington's Admiralty (Eng.)
Lutw.	Lutwyche (Eng.)
Lutw.Reg.Cas.	Lutwyche's Registration Cases (Eng.)
Luz.Leg.Obs.	Luzerne Legal Observer (Pa.)
Luz.Leg.Reg.	Luzerne Legal Register (Pa.)
Lynd.Prov.	Lyndwood's Provinciales

M

MacA.Pat.Cas.	MacArthur's Patent Cases (D.C.)
MacArth.	MacArthur's District of Columbia Reports
MacAr.&M.	MacArthur & Mackey's District of Columbia Reports
Maccl.	Macclesfield (Eng.)
MacFarl.	MacFarlane (Sc.)
Mackey	Mackey's Reports, District of Columbia
Macl.&R.	Maclean & Robinson (Eng.)
Macn.&G.	Macnaghten & Gordon (Eng.)
Macph.	Macpherson (Sc.)
Macph.S.&L.	Macpherson, Shirreff & Lee (Sc.)
Macq.	Macqueen's Scotch Appeal Cases
Madd.	Maddock (Eng.)
Madd.Ch.Pr.	Maddock's Chancery Practice (Eng.)
Malloy	Malloy (Ir.)
Man.	Manitoba Law
Man.El.Cas.	Manning's Election Cases (Eng.)
Man.Exch.Pr.	Manning's Exchequer Practice (Eng.)
Man.Gr.&S.	Manning, Granger. & Scott (Eng.)
Man.L.J.	Manitoba Law Journal
Man.&Ry.	Manning & Ryland (Eng.)
Man.&Ry.Mag. Cas.	Manning & Ryland's Magistrates' Cases (Eng.)
Man.&S.	Manning & Scott (Eng.)
Mann.Unrep.Cas.	Manning's Unreported Cases (La.)
Manson	Manson (Eng.)
Man.t.Wood	Manitoba temp. Wood
March	March (Eng.)
Mar.Prov.	Maritime Province Reports (Can.)
Mars.Adm.	Marsden's Admiralty (Eng.)
Marsh.	Marshall (Eng.)
Marsh.J.J.	J. J. Marshall (Ky.)
Mart.	Martin Old Series (La.)
Mart.(N.S.)	Martin, New Series (La.)
Mart.	Martin (N.C.)
Marv.	Marvel (Del.)
Mart.N.S.	Martin New Series (La.)
Mart.&Y.	Martin & Yerger (Tenn.)
Mason	Mason (U.S.)
Mass.	Massachusetts
Maule &S.	Maule & Selwyn (Eng.)
Mayn.	Maynard (Eng.)
McAll.	McAllister (U.S.)
McC.	McCahon (Kan.)
McClell.	McClelland (Eng.)
McClell.&Y.	McClelland & Younge (Eng.)
McCord.	McCord (S.C.)
McCrary	McCrary (U.S.)
McG.	McGloin (La.)
McLean	McLean (U.S.)
McMul.	McMullan (S.C.)
Md.	Maryland
Md.Ch.	Maryland Chancery
Me.	Maine
Mees.&Ros.	Meeson & Roscoe (Eng.)
Mees.&W.	Meeson & Welsby (Eng.)
Meg.	Megone (Eng.)
Meigs	Meigs (Tenn.)
Menzies Cape of Good Hope	Menzies Cape of Good Hope
Meriv.	Merivale (Eng.)
Metc.	Metcalf (Mass.)
Metc.	Metcalfe (Ky.)
M.&G.	Manning & Granger (Eng.)
M.&H.	Murphy & Hurlstone (Eng.)
Mich.	Michigan
Mich.N.P.	Michigan Nisi Prius
Mich.T.	Michaelmas Term (Eng.)
Miles	Miles (Pa.)
Mill.Const.	Mill's Constitutional (S.C.)
Mill.Dec.	Miller's Decisions (U.S.)
Mills	Mills (N.Y.)
Milw.	Milward (Ir.)
Minn.	Minnesota
Minor	Minor (Ala.)
Misc.	Miscellaneous (N.Y.)
Miss.	Mississippi
Miss.Dec.	Mississippi Decisions
Miss.St.Cas.	Mississippi State Cases
M.&M.	Moody & Malkin (Eng.)
Mo.	Missouri
Mo.App.	Missouri Appeals
Moak	Moak (Eng.)
Mo.A.R.	Missouri Appeals Reporter
Mod.	Modern (Eng.)
Mod.Cas.L.&Eq.	Modern Cases at Law and Equity (Eng.)
Molloy	Molloy (Ir.)
Mon.	Monaghan (Pa.)
Mont.	Montana
Mont.	Montagu (Eng.)
Mont.Bank.Rep.	Montagu's English Bankruptcy Reports
Mont.L.R.	Montreal Law Reports (Can.)
Mont.&A.	Montagu & Ayrton (Eng.)
Mont.&B.	Montagu & Bligh (Eng.)
Mont.&C.	Montagu & Chitty (Eng.)
Mont.D.&DeG.	Montagu, Deacon & De Gex (Eng.)
Montg.Co.	Montgomery County Law Reporter (Pa.)
Mont.&M.	Montagu & McArthur (Eng.)
Montr.Cond.Rep.	Montreal Condensed Reports
Montr.Leg.N.	Montreal Legal News
Montr.Q.B.	Montreal Law Reports Queen's Bench
Montr.Super.	Montreal Law Reports Superior Court
Moody C.C.	Moody's Crown Cases (Eng.)
Moore C.P.	Moore's Common Pleas (Eng.)
Moore Indian App.	Moore's Indian Appeals (Eng.)
Moore K.B.	Moore's King's Bench (Eng.)
Moore P.C.	Moore's Privy Council Old Series (Eng.)
Moore P.C.N.S.	Moore's Privy Council New Series (Eng.)
Moore&S.	Moore & Scott (Eng.)
Moore&W.	Moore & Walker (Tex.)
Mor.Min.Rep.	Morrison's Mining Reports
Morr.	Morris (Iowa)
Morr.Bankr.Cas.	Morrell's Bankruptcy Cases (Eng.)
Morr.St.Cas.	Morris' State Cases (Miss.)
Mosely	Mosely (Eng.)
M.&P.	Moore & Payne (Eng.)
M.&R.	Manning & Ryland (Eng.)
M.&Rob.	Moody & Robinson (Eng.)
M.&S.	Maule & Selwyn (Eng.)
Mun.Corp.Cas.	Municipal Corporation Cases
Munf.	Munford (Va.)
Murph.	Murphey (N.C.)
Murr.	Murray (Sc.)
M.&W.	Meeson & Welsby (Eng.)
Myl.&C.	Mylne & Craig (Eng.)
Myl.&K.	Mylne & Keen (Eng.)
Myr.Prob.	Myrick's Probate (Cal.)

N

Nat.Bankr.Reg.	National Bankruptcy Register (U.S.)
Nat.Corp.Rep.	National Corporation Reporter
Nat.L.Rep.	National Law Reporter
N.B.	New Brunswick
N.Benl.	New Benloe (Eng.)
N.B.Eq.	New Brunswick Equity
N.C.	North Carolina
N.Chipm.	N. Chipman (Vt.)
N.C.Conf.	North Carolina Conference
N.C.T.Rep.	North Carolina Term Reports
N.D.	North Dakota
N.E.	North Eastern Reporter
N.E.(2d)	North Eastern Reporter Second Series
Neb.	Nebraska
Neb.(Unoff.)	Nebraska Unofficial
Nels.	Nelson (Eng.)
Nels.Abr.	Nelson's Abridgment of the Common Law

Nev.	Nevada
Newb.Adm.	Newberry's Admiralty (U.S.)
Newfoundl.	Newfoundland
Newf.Sel.Cas.	Newfoundland Select Cases
New Rep.	New Reports in all Courts (Eng.)
New Sess.Cas.	New Session Cases (Eng.)
New Zeal.L.	New Zealand Law
N.H.	New Hampshire
N.J.Eq.	New Jersey Equity
N.J.Law	New Jersey Law
N.J.L.J.	New Jersey Law Journal
N.J.Misc.	New Jersey Miscellaneous
N.M.	New Mexico
N.&M.	Nevile & Manning (Eng.)
N.&Macn.	Neville & Macnamara (Eng.)
Nolan	Nolan (Eng.)
North.	Northington (Eng.)
North.Co.	Northampton County Reporter (Pa.)
Northum.	Northumberland County Legal News (Pa.)
Northumb.Co.Leg. N.	Northumberland County Legal News (Pa.)
Notes of Cas.	Notes of Cases (Eng.)
Nott & McC.	Nott & McCord (S.C.)
Noy	Noy (Eng.)
N.&P.	Nevile & Perry (Eng.)
N.S.	Nova Scotia
N.S.Dec.	Nova Scotia Decisions
N.S.Wales	New South Wales
N.S.Wales L.	New South Wales Law
N.S.Wales L.R.Eq.	New South Wales Law Reports Equity
N.W.	North Western Reporter
N.Y.	New York
N.Y.Ann.Cas.	New York Annotated Cases
N.Y.City Ct.	New York City Court
N.Y.City Ct.Suppl.	New York City Court Supplement
N.Y.Civ.Proc.	New York Civil Procedure
N.Y.Civ.Pr.Rep.	New York Civil Procedure Reports
N.Y.Code Reports, N.S.	New York Code Reports, New Series
N.Y.Cr.	New York Criminal
N.Y.Leg.Obs.	New York Legal Observer
N.Y.L.Rec.	New York Law Record
N.Y.Month.L.Bul.	New York Monthly Law Bulletin
N.Y.S.	New York Supplement
N.Y.St.	New York State Reporter
N.Y.Super.	New York Superior Court
N.Y.Wkly.Dig.	New York Weekly Digest

O

O.Ben.	Old Benloe (Eng.)
O.Bridgm.	Orlando Bridgman (Eng.)
Off.Gaz.	Official Gazette
Ohio	Ohio
Ohio App.	Ohio Court of Appeals
Ohio Cir.Ct.	Ohio Circuit Court
Ohio Cir.Ct.N.S.	Ohio Circuit Court New Series
Ohio Cir.Dec.	Ohio Circuit Decisions
Ohio Dec. (Reprint)	Ohio Decisions (Reprint)
Ohio F.Dec.	Ohio Federal Decisions
Ohio L.J.	Ohio Law Journal
Ohio N.P.	Ohio Nisi Prius
Ohio N.P.N.S.	Ohio Nisi Prius New Series
Ohio O.	Ohio Opinions
Ohio Prob.	Ohio Probate
Ohio S.&C.P.	Ohio Superior & Common Pleas Decisions
Ohio St.	Ohio State
Okl.	Oklahoma
Okl.Cr.	Oklahoma Criminal
Olcott	Olcott (U.S.)
Oliv.B.&L.	Oliver, Beavan & Lefroy (Eng.)
O'M.&H.	O'Malley & Hardcastle (Ir.)
Ont.	Ontario
Ont.A.	Ontario Appeals
Ont.El.Cas.	Ontario Election Cases
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Ont.Pr.	Ontario Practice
Ont.W.N.	Ontario Weekly Notes
Ont.W.R.	Ontario Weekly Reporter
Op.Atty.-Gen.	Opinions of Attorneys-General (U.S.)
Op.Sol.Dept. Labor	Opinions of the Solicitor for the Department of Labor dealing with Workmen's Compensation
Or.	Oregon
Orleans App.	Orleans Appeals (La.)
Overt.	Overton (Tenn.)
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P.	Pacific Reporter
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Pa.	Pennsylvania State
Pa.Cas.	Pennsylvania Supreme Court Cases (Sadler)
Pa.Co.	Pennsylvania County Court
Pa.C.Pl.	Common Pleas (Pa.)
Pa.Dist.	Pennsylvania District
Pa.Dist.&Co.	Pennsylvania District and County
Paige	Paige's Chancery (N.Y.)
Paine	Paine (U.S.)
Pa.L.J.	Pennsylvania Law Journal
Pa.L.Rec.	Pennsylvania Law Record
Pa.L.J.R.	Clark's Pennsylvania Law Journal Reports
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Park.	Parker (Eng.)
Park.Cr.	Parker's Criminal (N.Y.)
Park.Exch.	Parker's Exchequer (Eng.)
Park.Ins.	Parker's Insurance (Eng.)
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Pa.Super.	Pennsylvania Superior Court
Paton App.Cas.	Paton's Appeal Cases (Sc.)
Patrick El.Cas.	Patrick's Election Cases (Can.)
Patt.&H.	Patton & Heath (Va.)
P.D.	Law Reports Probate Division (Eng.)
P.&D.	Perry & Davison (Eng.)
Peake N.P.	Peake's Nisi Prius (Eng.)
Pearce C.C.	Pearce's Reports in Dearsly's (Eng.)
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Am.J.Int.Law	American Journal of International Law
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Brooklyn L.Rev.	Brooklyn Law Review
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Com.L.J.	Commercial Law Journal
Cornell L.Q.	Cornell Law Quarterly
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Fed.B.A.J.	Federal Bar Association Journal
Fla.L.J.	Florida Law Journal
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Geo.Wash.L.Rev.	George Washington Law Review
Geo.L.J.	Georgetown Law Journal
Harv.L.Rev.	Harvard Law Review
Ia.L.Rev.	Iowa Law Review
Idaho L.J.	Idaho Law Journal
Ill.L.Rev.	Illinois Law Review
Ind.L.J.	Indiana Law Journal
J.Am.Jud.Soc.	Journal of the American Judicature Society
J.Comp.Leg.	Journal of the Society of Comparative Legislation
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law
John Marshall L.Q.	The John Marshall Law Quarterly
Kan.City L.Rev.	Kansas City Law Review
Kan.St.L.J.	Kansas State Law Journal
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L.J.	Law Journal
L.Lib.J.	Law Library Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series
Law Soc.J.	Law Society Journal
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Marq.L.Rev.	Marquette Law Review
Mass.L.Q.	Massachusetts Law Quarterly
Mercer, Beasley L.Rev.	Mercer, Beasley Law Review
Mich.L.Rev.	Michigan Law Review
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Miss.L.J.	Mississippi Law Journal
Neb.L.B.	Nebraska Law Bulletin
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CORPUS JURIS SECUNDUM

VOLUME THIRTY-SIX

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This Title includes the judicial department of the federal government; nature and scope of the judicial power of the United States in general; establishment, organization and conduct of business of federal courts; their jurisdiction and procedure; and concurrent and conflicting jurisdiction and comity between different federal courts.

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IX. SUPREME COURT

A. IN GENERAL

§ 191. Creation and Constitution

The supreme court was created by, and receives its authority from, the Constitution of the United States.

The supreme court exists by a direct grant from the people of their judicial power.[1] The second clause of article 3, section 2 of the Constitution distributes the jurisdiction conferred by the previous clause into original and appellate jurisdiction.[2]

§ 192. Terms and Sessions

Provision is made by act of congress, Judicial Code §§ 230–232, 28 U.S.C.A. §§ 338–340, derived from Revised Statutes §§ 684–686, for the terms of the supreme court, for the adjournment of the court in case of the want of a quorum, and for orders by less than a quorum of the court.

Examine Pocket Parts for later cases.

B. ORIGINAL JURISDICTION AND EXERCISE THEREOF

§ 193. In General

The constitution confers original jurisdiction on the supreme court in all cases affecting ambassadors, or other public ministers and consuls, and those in which a state is a party, thus making its original jurisdiction dependent on the character of the parties and limiting it to the cases enumerated.

The supreme court is one of limited and special original jurisdiction;[3] its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act.[4]

The constitution gives the supreme court of the United States original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party,[5] thus making the original jurisdiction of the court in any controversy dependent on the parties,[6] and the supreme court may assume the original jurisdiction conferred on it without any act of congress regulating the mode and form in which it shall be exercised.[7] The jurisdiction so conferred is exclusively fixed, the affirmative grant in enumerated cases being construed as excluding original jurisdiction in all other cases.[8] Congress cannot enlarge the original jurisdiction beyond the cases specified in the constitution,[9] and it is held that such jurisdiction should be sparingly exercised and not extended by construction.[10] The original jurisdiction of the court does not include suits of the United States against persons or corporations alone,[11] nor, as appears infra § 194, is it enough to sustain the jurisdiction in such a case that a state has been made a party defendant. The word "original" in the constitutional grant of jurisdiction to the supreme court is used solely in contradistinction to "appellate," and such original jurisdiction is not necessarily exclusive, so that, as appears supra § 2, it is competent for congress to authorize suits in the inferior courts of the United States in respect of matters of which the supreme court has original jurisdiction, thus making the jurisdiction of the supreme court and lower federal courts concurrent in certain cases.[12]

A justice of the supreme court has no authority

1. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 657, 9 L.Ed. 1233.
Constitutional provision for supreme court see supra § 2.

2. U.S.—Louisiana v. Texas, 20 S. Ct. 251, 176 U.S. 1, 44 L.Ed. 347.
N.Y.—Delafield v. Illinois, 2 Hill 159, 26 Wend. 192.

3. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 657, 9 L.Ed. 1233.

4. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, supra—Federal Radio Commission v. General Electric Co., 50 S.Ct. 389, 281 U.S. 464, 74 L.Ed. 969, dismissing certiorari General Electric Co. v. Federal Radio Commission, 31 F.2d 630, 58 App.D.C. 386.

5. U.S.—State of Alabama v. Acacia Mut. Life Ass'n, D.C.Ala., 3 F.2d 697.
25 C.J. p 858 note 67.

6. U.S.—State of Alabama v. Acacia Mut. Life Ass'n, supra.
25 C.J. p 858 note 68.

7. U.S.—Kentucky v. Dennison, Ky., 24 How. 66, 16 L.Ed. 717.

8. U.S.—State of Alabama v. Acacia Mut. Life Ass'n, D.C.Ala., 3 F.2d 697.
25 C.J. p 858 note 70.

9. U.S.—Baltimore & Ohio Railroad Company v. Interstate Commerce Commission, Md., 30 S.Ct. 86, 215 U.S. 216, 54 L.Ed. 164.
25 C.J. p 858 note 71.

10. U.S.—California v. Southern Pac. Co., Cal., 15 S.Ct. 591, 157 U.S. 229, 39 L.Ed. 683.

11. U.S.—U. S. v. State of West Virginia, 55 S.Ct. 789, 295 U.S. 463, 79 L.Ed. 1546.

12. U.S.—U. S. v. State of California, 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing State of California v. U. S., C.C.A.Cal., 75 F.2d 41, certiorari granted U. S. v. State of California, 56 S.Ct. 87, 296 U.S. 554, 80 L.Ed. 391.
25 C.J. p 858 note 73.

Jurisdiction distributed

The jurisdiction conferred by portion of section of Constitution relating to extent of the federal judicial power was merely distributed by second clause of section stating in which cases supreme court should have original, and in which cases appellate, jurisdiction.—Commonwealth of Massachusetts v. State of Missouri, 60 S.Ct. 39, 308 U.S. 1, 84 L.Ed. 3.

to order a district court to reinstate a previously dissolved temporary restraining order in a proceeding which has been dismissed for failure of the complaint to state a cause of action.[13]

Advisory opinions. The supreme court may not be called on to give advisory opinions.[14]

§ 194. Actions to Which State Is a Party

The supreme court has original jurisdiction of cases in which a state is a party, provided the matter in controversy is properly justiciable and the state possesses an actual interest therein. This jurisdiction is exclusive, except in so far as congress has conferred concurrent jurisdiction on inferior courts.

Under article 3, section 2, of the Constitution of the United States the supreme court has original jurisdiction of cases in which a state is a party.[15] This original jurisdiction is not necessarily exclusive, as appears supra § 193, and congress, in the exercise of its power, considered supra § 2, to confer on inferior courts concurrent original jurisdiction of suits over which the supreme court has original jurisdiction, has enacted statutes under which the supreme court has exclusive jurisdiction of all controversies of a civil nature where a state is a party, except where the controversy is between a state and its citizens, or between a state and citizens of other states, or aliens,[16] or, as appears infra this section, text and note 50, in a suit by the United States to recover a penalty for violation of the Federal Safety Appliance Acts, in which latter cases the court has original, but not exclusive, jurisdiction. However, the mere fact that a state is a party is not sufficient to bring a case within the original jurisdiction of the supreme court.[17] To do so the matter in controversy must be properly justiciable;[18] the taking of jurisdiction must be neces-

13. U.S.—Northern Pac. Ry. Co. v. Board of Railroad Com'rs of Montana, D.C.Mont., 34 F.2d 295.

14. U.S.—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798.

Declaratory judgments see Actions § 18.

15. U.S.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179—U. S. v. State of California, 56 S. Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing State of California v. U. S., C.C.A.Cal., 75 F.2d 41, certiorari granted U. S. v. State of California, 56 S.Ct. 87, 296 U.S. 554, 80 L.Ed. 391.

16. U.S.—U. S. v. State of California, supra.

25 C.J. p 741 note 75, p 859 note 75.

Arising under federal constitution and laws

A suit by a state against a federal corporation is not within the exclusive original jurisdiction of the United States supreme court as a controversy of a civil nature in which state is a party, the action being one arising under the laws of the United States, and therefore within the jurisdiction of the district court.—State of Alabama v. Acacia Mut. Life Ass'n, D.C.Ala., 3 F.2d 697.

Concurrent jurisdiction

The supreme court of the United States and the state courts have concurrent jurisdiction over suits by a state against a citizen of another state.—Delafield v. State of Illinois, N.Y., 2 Hill 159, 26 Wend. 192.

Federal corporation as citizen

The interstate commerce commission and the railroad labor board, when sued by a state as corporate entities created by the United States for governmental purposes, are not "citizens" of any state, within the provision fixing the original jurisdiction of the supreme court.—State of Texas v. Interstate Commerce Commission, Tex., 42 S.Ct. 261, 258 U.S. 158, 66 L.Ed. 531.

Restriction on exercise of right

Conceding that congress cannot take away the right of a state to proceed in the supreme court for such remedy as law or equity may afford, a bill in equity by a state to enjoin railroad companies from complying with an order of the interstate commerce commission will not be entertained, in view of statute requiring the United States to be a party to such suits, and requiring them to be brought in the district court, as in a suit in equity the requirements of complete justice and public policy must be taken into account, and the statute indicates the policy of the United States.—State of North Dakota ex rel. Lemke v. Chicago & N. W. Ry. Co., N.D., 42 S.Ct. 170, 257 U. S. 485, 66 L.Ed. 329.

17. U.S.—State of Oklahoma ex rel. Johnson v. Cook, Okl., 58 S.Ct. 954, 304 U.S. 387, 82 L.Ed. 1416—State of Florida v. Mellon, Fla., 47 S.Ct. 265, 273 U.S. 12, 71 L.Ed. 511—Commonwealth of Massachusetts v. Mellon, Minn., 43 S.Ct. 597, 262 U. S. 447, 67 L.Ed. 1078, affirming Frothingham v. Mellon, 288 F. 252, 53 App.D.C. 47.

Within jurisdiction of federal courts

The original jurisdiction of supreme court in cases where a state is a party, granted by second clause of section of Constitution, covering extent of federal jurisdiction, refers to cases in which, according to grant of power made in preceding clause, jurisdiction might be exercised because of party's character, and an original suit instituted in federal court; not to those cases in which an original suit might not be instituted in a federal court.—Commonwealth of Massachusetts v. State of Missouri, 60 S. Ct. 39, 308 U.S. 1, 83 L.Ed. 3.

18. U.S.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179—Commonwealth of Massachusetts v. Mellon, Minn., 43 S.Ct. 597, 262 U. S. 447, 67 L.Ed. 1078, affirming Frothingham v. Mellon, 288 F. 252, 53 App.D.C. 47.

25 C.J. p 711 note 73.

Requisites of justiciable controversy

To constitute a "justiciable controversy" between states giving supreme court original jurisdiction, it must appear that complaining state has suffered a wrong through action of other state furnishing ground for judicial redress, or is asserting a right against other state enforceable at common law or in equity.—Commonwealth of Massachusetts v. State of Missouri, 60 S.Ct. 39, 308 U.S. 1, 84 L.Ed. 3.

Existence of controversy

(1) Failure of state to proceed with construction of bridge under contract with adjoining state because of suit by citizens presented "controversy between states."—Commonwealth of Kentucky v. State of Indiana, 50 S.Ct. 275, 281 U.S. 163, 74 L.Ed. 784.

(2) On petition by state seeking judicial apportionment among several states of unappropriated water of interstate river, justiciable controversy is presented only if state as sovereign state or her citizens have present rights in unappropriated water of river or if privilege to appropriate water is capable of division, and when partitioned may be judicially protected from appropriation by others pending its exercise.—State of Arizona v. State of California, 56 S.Ct. 848, 298 U.S. 558, 80 L.Ed. 1331,

sary for the state's protection;[19] and the state must possess an actual interest therein, as distinguished from the rights and interests of others who are the real beneficiaries.[20] The mere use of the name of a state as a party does not give jurisdiction where the real object of the suit is to enforce a purely private claim.[21] Suits to protect the property rights of a state are within the original jurisdiction of the supreme court;[22] but a pecuniary interest in the controversy is not essential.[23] In determining whether a state is entitled to avail itself of the original jurisdiction of the supreme court in a matter that is justiciable, the interests of the state are not deemed to be confined to those of a strictly proprietary character, but embrace its quasi-sovereign interests which are independent of and behind the titles of its citizens, in all the earth and air within its domain.[24] This principle does not, however, per-

rehearing denied 57 S.Ct. 4, 299 U.S. 618, 81 L.Ed. 456.

(3) Where it appeared that sole legal basis asserted by four states for imposition of death taxes on decedent's intangibles was his domicile at death in the taxing state, that determination of place of decedent's domicile would determine which of four states was entitled to impose tax on intangibles so far as they had no status different from place of domicile, that relation of decedent to each of demanding states was such as to afford substantial basis for claim that decedent was domiciled within such state and that net estate was not sufficient to pay aggregate amount of taxes claimed by the four states and by the federal government, a justiciable "case" between the states was presented within original jurisdiction of supreme court, notwithstanding no relief by way of injunction was sought.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179.

(4) The reciprocal exemption provision in favor of nonresidents contained in inheritance tax statutes of Massachusetts and Missouri, under which state of Massachusetts claimed that it and its residents were entitled to immunity from Missouri tax, did not confer any contractual right on Massachusetts or give rise to any "controversy" of which supreme court would have original jurisdiction.—Commonwealth of Massachusetts v. State of Missouri, 60 S. Ct. 39, 308 U.S. 1, 84 L.Ed. 3.

Rival but mutually exclusive claims

(1) When by appropriate procedure a court possessing equity powers is asked to prevent the loss which might otherwise result from the independent prosecution of rival but mutually exclusive claims against a fund, a justiciable issue is presented for adjudication which is a "case" or "controversy" within constitutional provision defining judicial power of supreme court.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179.

(2) Where prosecution of their claims in independent suits by states possessing rival but mutually exclusive claims will cause real and substantial risk of loss to the state whose claim is valid, a case or controversy within the original jurisdiction of the supreme court is presented.—State of Texas v. State of Florida, supra.

(3) Controversy between states as to which is entitled to impose inheritance taxes on estate of deceased person does not present a justiciable controversy of which the supreme court has original jurisdiction where the estate of deceased is sufficient to pay the claims of both states.—Commonwealth of Massachusetts v. State of Missouri, 60 S.Ct. 39, 308 U. S. 1, 84 L.Ed. 3.

Effect of failure to exercise power of injunction

The fact that supreme court for reasons of policy or convenience does not exercise power which it possesses to grant injunction and which has been traditionally exercised in like cases between private suitors does not deprive suit between states to determine true domicile of decedent as basis of rival claims of four states for death taxes on his estate of its character as a "case" or "controversy" cognizable by the supreme court in an original suit.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179.

19. U.S.—Commonwealth of Massachusetts v. State of Missouri, 60 S.Ct. 39, 308 U.S. 1, 84 L.Ed. 3.

Recovery of taxes

(1) The supreme court would not take original jurisdiction of proceeding by commonwealth of Massachusetts against state of Missouri and Missouri citizens on theory that proceeding was an action against citizens to recover inheritance tax claimed by Massachusetts, irrespective of claim of Missouri, where it did not appear that Massachusetts was without adequate remedy, but that tax might be collected in other courts.—Commonwealth of Massachusetts v. State of Missouri, 60 S. Ct. 39, 308 U.S. 1, 84 L.Ed. 3.

(2) The states of Missouri and Massachusetts were entitled to press their inheritance tax claims against transfer of property held in Missouri under trusts created by deceased resident of Massachusetts without conflict in point of fact or law with the decision of the other, as regards existence of a justiciable controversy between states within the original jurisdiction of the supreme court.—Commonwealth of Massachusetts v. State of Missouri, supra.

20. U.S.—State of Oklahoma ex rel. Johnson v. Cook, Okl., 58 S.Ct. 954, 304 U.S. 387, 82 L.Ed. 1416—Louisiana v. Texas, 20 S.Ct. 251, 176 U.S. 1, 44 L.Ed. 347.

Underlying rule

In determining the scope of original jurisdiction of the supreme court in a case to which a state is a party, the supreme court must look beyond the mere legal title of the complaining state to the cause of action asserted and the nature of the state's interest.—State of Oklahoma ex rel. Johnson v. Cook, Okl., 58 S.Ct. 954, 304 U.S. 387, 82 L.Ed. 1416.

21. U.S.—State of Kansas v. U. S., 27 S.Ct. 388, 204 U.S. 331, 51 L.Ed. 510.

25 C.J. p 859 note 77.

22. U.S.—State of Florida v. Anderson, Fla., 91 U.S. 667, 23 L.Ed. 290.

25 C.J. p 859 note 76.

23. U.S.—State of Kansas v. State of Colorado, 22 S.Ct. 552, 185 U.S. 125, 46 L.Ed. 838.

24. U.S.—State of Oklahoma ex rel. Johnson v. Cook, Okl., 58 S.Ct. 954, 304 U.S. 387, 82 L.Ed. 1416.

Pollution of air

State has interest sufficient to enable it to sue to enjoin the generation and spread of noxious fumes by a factory in another state, because it is a public nuisance in destroying crops and forests within the borders of plaintiff state.—State of Georgia v. Tennessee Copper Co., 27 S.Ct. 618, 206 U.S. 230, 51 L.Ed. 1038, 11 Ann. Cas. 488.

Withdrawal of fuel supply from interstate commerce

Where withdrawal from interstate commerce of natural gas will jeopardize health, comfort, and welfare of private consumers within a state, constituting a substantial portion of its population, the state, as the representative of the public, has an interest apart from that of the individuals affected, which is not merely remote or ethical, but immediate and recognized by law.—Commonwealth of Pennsylvania v. State of West

mit resort to the original jurisdiction of the supreme court in the name of a state but in reality for the benefit of particular individuals,[25] even though the state asserts an economic interest in the claims and declares their enforcement to be a matter of state policy;[26] nor is it enough that a state has acquired the legal title to a cause of action against defendant, where the recovery is sought for the benefit of another who is the real party in interest.[27]

A suit must be of a civil nature in order to be within the original jurisdiction of the supreme court;[28] and the court cannot take original jurisdiction of a suit by a state against persons or corporations of other states, where such suit, although in the form of a civil action, is, in its essential character, one to enforce the penal or criminal legislation of the state,[29] or of controversies concerning political questions which are not the subject of judicial cognizance, but which, were the state an independent nation, could be adjusted only through the ministerial department of its government.[30]

Suits between states. The supreme court has exclusive[31] original jurisdiction of suits between states,[32] provided, as appears supra this section, text and note number 18, the issues involved present a justiciable case or controversy within the meaning of the constitutional provision conferring jurisdiction. This jurisdiction differs from that which is exercised in suits between private parties.[33] It is limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment,[34] that is, to suits by a state for an injury to it in its capacity of quasi sovereign.[35] It is limited to cases and controversies in the result of which the states are directly interested,[36] and does not extend to suits by one state

Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U.S. 671, 68 L.Ed. 499, and affirmed on rehearing 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144.

25. U.S.—Commonwealth of Massachusetts v. State of Missouri, 60 S.Ct. 39, 308 U.S. 1, 84 L.Ed. 3—State of Oklahoma ex rel. Johnson v. Cook, Okl., 58 S.Ct. 954, 304 U.S. 387, 82 L.Ed. 1416.

26. U.S.—State of Oklahoma ex rel. Johnson v. Cook, supra.

27. U.S.—State of Oklahoma ex rel. Johnson v. Cook, supra.

Stockholders' liability

State which has taken legal title to the assets of an insolvent state bank being liquidated and to claims against stockholders of the bank by reason of their statutory liability is not entitled to maintain an original suit in supreme court to enforce a stockholder's statutory liability, since recovery is sought solely for the benefit of the depositors and creditors of the bank. State of Oklahoma ex rel. Johnson v. Cook, supra.

28. U.S.—Chisholm v. Georgia, 2 Dall. 419, 1 L.Ed. 440.

29. U.S.—Wisconsin v. Pelican Ins. Co., 8 S.Ct. 1370, 127 U.S. 265, 293, 32 L.Ed. 239.

25 C.J. p 741 note 76, p 859 note 79.

Enforcement of penal law of foreign state or nation see Conflict of Laws § 4 d.

30. U.S.—Louisiana v. Texas, 20 S.Ct. 251, 176 U.S. 1, 44 L.Ed. 347.

25 C.J. p 859 note 80.

31. U.S.—Riley v. Worcester County Trust Co., C.C.A.Mass., 89 F.2d 59, reversing, D.C., Worcester County Trust Co. v. Long, 14 F.Supp. 754, certiorari granted Worcester County Trust Co. v. Riley, 57 S.Ct. 931, 301 U.S. 678, 81 L.Ed. 678, 81 L.Ed. 1338, affirmed 58 S.Ct. 185, 302 U.S. 292, 82 L.Ed. 268.

Interpleader

If statute authorizing interpleader suits in district court contemplated impleading of states as adverse claimants, it would violate constitutional provision vesting original jurisdiction of suits between states in supreme court. Riley v. Worcester County Trust Co., supra.

32. U.S.—State of Oklahoma v. State of Texas, 42 S.Ct. 406, 258 U.S. 574, 66 L.Ed. 771.

33. U.S.—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798—State of North Dakota v. State of Minnesota, 44 S.Ct. 138, 263 U.S. 365, 68 L.Ed. 342.

Reason for difference

The reason for the difference in jurisdiction grows out of the history of the creation of the power, in that it was conferred by the constitution as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force. State of North Dakota v. State of Minnesota, 44 S.Ct. 138, 263 U.S. 365, 68 L.Ed. 342.

34. U.S.—State of North Dakota v. State of Minnesota, supra.

35. U.S.—State of North Dakota v. State of Minnesota, supra.

Interest independent of citizens

In its capacity of quasi sovereign the state has an interest independent of and behind the titles of its citizens, in all the earth and air of its domain. State of North Dakota v. State of Minnesota, supra.

36. U.S.—State of Louisiana v. State of Texas, 20 S.Ct. 251, 176 U.S. 1, 44 L.Ed. 347.

25 C.J. p 859 note 81.

Corporate agency of state

The Passaic Valley sewerage commissioners, created by an act of the New Jersey legislature to construct a trunk sewer to take care of the sewage of municipalities on the Passaic River contracting for the right to use such sewer, is such a statutory corporate agency of the state that its actual or intended discharge of sewage into Upper New York Bay must be treated as that of the state. People of State of New York v. State of New Jersey, 41 S.Ct. 492, 256 U.S. 296, 65 L.Ed. 937.

Interests sufficient to give original jurisdiction

(1) To restrain diversion of water from an interstate stream. State of Kansas v. State of Colorado, 27 S.Ct. 655, 206 U.S. 46, 51 L.Ed. 956.

25 C.J. p 859 note 81 [a].

(2) To restrain diversion of water from lake on which both states border. State of Wisconsin v. State of Illinois, 49 S.Ct. 163, 278 U.S. 367, 73 L.Ed. 426.

(3) To prevent another state from increasing the flow of an interstate stream, thereby causing an overflow on the property of citizens of plaintiff state. State of North Dakota v. State of Minnesota, 44 S.Ct. 138, 263 U.S. 365, 68 L.Ed. 342.

(4) To prevent the pollution, or threatened pollution, of an interstate stream, lake, or bay, by a state or agency thereof. People of State of New York v. State of New Jersey, 41 S.Ct. 492, 256 U.S. 296, 65 L.Ed. 937—State of Missouri v. State of Illinois, 26 S.Ct. 268, 200 U.S. 496, 50 L.Ed. 572. 25 C.J. p 859 note 81 [d].

(5) Earlier cases see 25 C.J. p 859 note 81 [b], [c].

Suit to enjoin preference of gas consumers in one state

A suit by a state, in behalf of it-

against another for the enforcement of the rights of individuals.[37] This jurisdiction has been frequently invoked for the settlement of disputes as to state boundaries,[38] but it would be impossible to anticipate, and unadvisable to attempt to anticipate by definition, what controversies could or could not be brought within the original jurisdiction of the court.[39] In general this jurisdiction of controversies will not be exercised in the absence of absolute necessity.[40] The threatened injury must be clearly shown to be of serious magnitude. The court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence,[41] and imminent.[42]

Actions between state and its own citizens. The supreme court does not have jurisdiction of an action by a state against its own citizens,[43] even though citizens of other states are joined as codefendants;[44] for, as appears supra § 49, the federal judicial power does not extend to a suit brought by a citizen against his own state without its consent.

Suits between state and United States. The supreme court has original jurisdiction of a suit brought by the United States against a state,[45] provided the United States has a real and direct interest in the matter presented for examination and adjudication and is not just a nominal party.[46] The

self as a large consumer of gas and as representative of consumers within the state, to enjoin another state from enforcing a law in effect requiring companies handling natural gas to prefer consumers within the latter state to those receiving the supply through interstate commerce, on the ground that it constitutes a forbidden interference with interstate commerce, involves a justiciable "controversy between states," within the judiciary article of the Constitution.—Commonwealth of Pennsylvania v. State of West Virginia, 43 S.Ct. 658, 262 U.S. 553, 67 L.Ed. 1117, 32 A.L.R. 300, rehearing granted 44 S.Ct. 4, 263 U.S. 671, 68 L.Ed. 499, and affirmed on rehearing 44 S.Ct. 123, 263 U.S. 350, 67 L.Ed. 1144.

37. U.S.—Commonwealth of Massachusetts v. State of Missouri, 60 S. Ct. 39, 308 U.S. 1, 84 L.Ed. 3—State of North Dakota v. State of Minnesota, 44 S.Ct. 138, 263 U.S. 365, 68 L.Ed. 342.
25 C.J. p 859 note 81 [e].

Rights differentiated
The right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state by prayer for injunction is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state.—State of North Dakota v. State of Minnesota, supra.

Rights of individuals insufficient
Where proposed bill of complaint states that the issues are between alleged states, but no justiciable controversy between such states is shown, original jurisdiction of the supreme court cannot be sustained on the theory that a controversy is presented between plaintiff state and the citizens of defendant state.—Commonwealth of Massachusetts v. State of Missouri, 60 S.Ct. 39, 308 U. S. 1, 84 L.Ed. 3.

38. Miss.—Hill City Compress Co. v. West Kentucky Coal Co., 122 So. 747, 155 Miss. 55.
25 C.J. p 859 note 82.

Distinguishing characteristic
"In this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between states, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts."—State of Virginia v. State of Tennessee, 13 S.Ct. 728, 148 U.S. 503, 37 L.Ed. 537.

Supreme court rule controlling
United States supreme court has authority to define law and rules governing disputes as to boundaries between states.—Hill City Compress Co. v. West Kentucky Coal Co., 122 So. 747, 155 Miss. 55.

Authority of state courts
The supreme court of the United States has exclusive original jurisdiction to establish boundaries between states, and state courts can determine only where the boundary is, and not what it should be.—McCarty v. Carolina Lumber Co., 182 S.W. 909, 134 Tenn. 35.

39. U.S.—Missouri v. Illinois, 21 S. Ct. 331, 180 U.S. 208, 45 L.Ed. 497.
25 C.J. p 860 note 83.

40. U.S.—State of Alabama v. State of Arizona, 51 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798.

41. U.S.—State of Washington v. State of Oregon, 56 S.Ct. 540, 297 U.S. 517, 80 L.Ed. 837—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798.

42. U.S.—State of Alabama v. State of Arizona, supra.

43. U.S.—Minnesota v. Northern Securities Co., 22 S.Ct. 308, 184 U.S. 199, 46 L.Ed. 499—Pennsylvania v. Quicksilver Min. Co., 10 Wall. 553, 19 L.Ed. 998.

44. U.S.—California v. Southern Pac. Co., 15 S.Ct. 591, 157 U.S. 229, 39 L.Ed. 683.
25 C.J. p 860 note 85.

45. U.S.—U. S. v. State of West Virginia, 55 S.Ct. 789, 295 U.S. 463, 79 L.Ed. 1546—State of Oklahoma v. State of Texas, 42 S.Ct. 406, 258 U.S. 574, 66 L.Ed. 771—U. S. v. State of Michigan, Mich., 23 S.Ct. 742, 190 U.S. 379, 47 L.Ed. 1103.
25 C.J. p 740 note 63, p 860 note 87.

Limited by judicial power
The original jurisdiction conferred is only of those cases within the judicial power of the United States. —U. S. v. State of West Virginia, 55 S.Ct. 789, 295 U.S. 463, 79 L.Ed. 1546.

Consent to suit
Consent to be sued was given by state when admitted into the Union. —U. S. v. State of Texas, Tex., 12 S. Ct. 488, 143 U.S. 621, 36 L.Ed. 285.

46. U.S.—U. S. v. State of Minnesota, 46 S.Ct. 298, 270 U.S. 181, 70 L.Ed. 539.

As guardian of Indian rights
United States, as guardian of Indians, is interested party in suit against state to recover swamp land claimed to have been set apart for Indians and erroneously patented to state, so that United States supreme court has original jurisdiction.—U. S. v. State of Minnesota, supra.

Boundary dispute
The United States supreme court had jurisdiction over the subject matter of an original suit by the United States against a state to determine the boundary between the state and a territory.—State of Oklahoma v. State of Texas, 41 S.Ct. 420, 256 U.S. 70, 65 L.Ed. 831.

fact that a state has been made a party defendant is not enough to sustain the original jurisdiction of the court in a suit by the United States against a person or corporation;[47] to do so the bill or complaint must also present a "case" or "controversy" to which the state is a party, and which is within the judicial power granted by the judiciary article of the Constitution.[48] The original jurisdiction of the supreme court does not extend to a suit by a state against the United States without its consent.[49] It does not have exclusive original jurisdiction of a suit by the United States against a state to recover penalties for violation of the Federal Safety Appliance Acts.[50]

§ 195. Actions Affecting Ambassadors, Public Ministers, or Consuls

The supreme court has exclusive jurisdiction over civil suits against ambassadors or other public ministers, and original, but not exclusive, jurisdiction over suits brought by such persons.

The supreme court has exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations, and original, but not exclusive, jurisdiction of all suits brought by ambassadors or other public ministers, or in which a consul or vice consul is a party.[51]

47. U.S.—U. S. v. State of West Virginia, 55 S.Ct. 789, 295 U.S. 463, 79 L.Ed. 1546.

48. U.S.—U. S. v. State of West Virginia, supra.

What constitutes "case" or "controversy"

(1) In suit by United States against state and power companies to enjoin construction of dam on navigable rivers without federal license, allegations that state which had granted license challenged claim of United States that rivers were navigable, and asserted superior right to license their use for power production, failed to establish "case" or "controversy" within original jurisdiction of federal supreme court, where there was no allegation that state threatened to interfere or was aiding in construction of dam or directing illegal construction.—U. S. v. State of West Virginia, supra.

(2) That state had granted license to power companies to construct dam on navigable streams was held not to establish "case" or "controversy" between state and United States within original jurisdiction of federal supreme court, in suit by United States against state and power companies to restrain corporate defendants from constructing dam without federal license and to enjoin state from asserting interest adverse to United States.—U. S. v. State of West Virginia, supra.

(3) Fact that state in prior suit by United States to restrain power companies from constructing dam on navigable streams had asserted its interest in development of power under state license did not establish that present suit for same relief, in which state was made defendant, involved "case" or "controversy" with state, so as to give United States supreme court original jurisdiction.—U. S. v. State of West Virginia, supra.

49. U.S.—State of Kansas v. U. S., 27 S.Ct. 388, 204 U.S. 331, 51 L.Ed. 510.

25 C.J. p 860 note 88.

50. U.S.—U. S. v. State of California, 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing State of California v. U. S., C.C.A.Cal., 75 F.2d 41, certiorari granted U. S. v. State of California, 56 S.Ct. 87, 296 U.S. 554, 80 L.Ed. 391.

51. U.S.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

25 C.J. p 860 note 90.

Jurisdiction of federal courts generally of cases affecting ambassadors, public ministers, or consuls see supra § 14.

Purpose of constitutional provision

The constitutional provision, extending the judicial power to cases "affecting" public ministers, etc., was intended merely to prevent any interference with the person or property of such ministers, and the word "affecting" therein must be given a reasonable and sensible meaning in the light of the purposes of the constitution.—Farnsworth v. Sanford, D.C.Ga., 33 F.Supp. 400, affirmed, C.C.A., 115 F.2d 375, certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

Exclusiveness of jurisdiction

The original jurisdiction given supreme court by Constitution in all cases affecting ambassadors and other public ministers and consuls and cases in which a state shall be a party is not exclusive and congress is free to give concurrent jurisdiction to the lower courts.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming, D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

Allegations as to status of persons unnecessary

If defendants indicted for conspiracy were in fact public ministers within constitutional provision giving supreme court original jurisdiction in all cases affecting public ministers, absence of allegation in indictment to that effect was immaterial.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming, D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

Persons within rule

(1) An attache to an embassy is a "public minister," or, at least, that which affects him affects the ambassador, within constitutional provision giving supreme court original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, but only as long as the attache is attached to the embassy.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming, D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

(2) When an attache to an embassy ceases to be attached and returns to his own country, he is no longer a "public minister" and a case thereafter instituted against him does not affect an ambassador or public minister within meaning of constitutional provision giving supreme court original jurisdiction in all cases affecting ambassadors and other public ministers and consuls.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming, D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

(3) Diplomatic and consular representatives of the United States representing this country abroad are not included within the rule.—Ex parte Gruber, 46 S.Ct. 112, 269 U.S. 302, 70 L.Ed. 280.

§ 196. Issuance of Writs

a. In general
b. Mandamus
c. Prohibition

a. In General

The supreme court has power to issue all writs necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law.

The supreme court has power to issue writs of ne exeat, scire facias, and all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law.[52] Its power as a part of its original jurisdiction to issue writs of habeas corpus is considered in the C.J.S. title Habeas Corpus § 69, also 29 C.J. p 131 note 12.

b. Mandamus

The supreme court has original jurisdiction to issue writs of mandamus in cases where the parties are such that original jurisdiction is conferred on the supreme court by the constitution, and in no other.

In cases where the parties are such that original jurisdiction is conferred on the supreme court, see supra §§ 193–195, it has power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States.[53] In cases other than those enumerated in the Constitution of the United States as cases in which original jurisdiction is conferred on the supreme court it cannot, in the exercise of its original jurisdiction, issue a writ of mandamus;[54] but, as appears infra § 199, to warrant the issue of mandamus in such case, it must be shown that it is an exercise of appellate jurisdiction, or is necessary to enable the court to exercise its appellate jurisdiction. A fortiori the writ will not be granted in a case where the court has neither original nor appellate jurisdiction.[55]

c. Prohibition

In the absence of special authority the supreme court cannot issue writs of prohibition in cases over which it possesses neither original nor appellate jurisdiction, but by virtue of express statutory authorization it may issue such a writ to a district court when proceeding as a court of admiralty and maritime jurisdiction.

(4) Earlier cases see 25 C.J. p 860 note 90 [a], [e].

Citizen conspiring with foreign officials

(1) Where indictment charged American citizen and two ex-attachés to Japanese Embassy with conspiracy under Espionage Act, but the ex-attachés were never arrested and the citizen was arraigned alone, there was a complete severance of the case against citizen as though he alone had been indicted and the prosecution was not a case "affecting" an ambassador or public ministers within constitutional provision giving supreme court original jurisdiction in cases affecting ambassadors and other public ministers and consuls.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming, D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

(2) The supreme court did not have exclusive jurisdiction over prosecution of American citizen alone on indictment charging him and two ex-attachés to Japanese Embassy with conspiracy under Espionage Act, and district court had valid concurrent jurisdiction.—Farnsworth v. Sanford, C.C.A.Ga., 115 F.2d 375, affirming, D.C., 33 F.Supp. 400, and certiorari denied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S.Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

52. U.S.—Ex parte United States, Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283.

25 C.J. p 861 note 6.

Injunction

(1) Supreme court had jurisdiction to enjoin dumping of garbage in ocean in view of consequent injury to property and health of citizens of state, although place where garbage was dumped was without territorial waters of United States.—State of New Jersey v. City of New York, 51 S.Ct. 519, 283 U.S. 473, 75 L.Ed. 1176.

(2) City's compliance with permits of harbor supervisor in respect of places designated for dumping of garbage in ocean did not deprive court of jurisdiction to grant injunction, where nuisance resulted from such dumping.—State of New Jersey v. City of New York, supra.

Bill by state to enjoin private suit

Where two states granted lands which each claimed to be within its borders, and the grantees of the one brought ejectment in its courts against the grantees of the other, the latter state could not cause the prosecution of the action in the courts of the former to be enjoined, not being a party to the ejectment proceedings whose injunctions were sought.—State of New York v. State of Connecticut, 4 Dall., U.S., 1, 1 L.Ed. 715.

53. U.S.—Marbury v. Madison, D.C., 1 Cranch 137, 2 L.Ed. 60.

Issuance of mandamus where an adequate remedy by appeal or writ of error exists see the C.J.S. title Mandamus § 22, also 38 C.J. p 565 note 24–p 568 note 39.

Rules governing issuance of writ see the C.J.S. title Mandamus, also 38 C.J. p 526 et seq.

To whom issued

(1) Mandamus may be issued by supreme court to any courts appointed or persons holding office under United States.—George W. Armbruster Jr., Inc. v. City of Wildwood, D.C.N.J., 41 F.2d 823.

(2) The authority to issue the writ does not extend to any courts or persons except those enumerated, and therefore does not embrace state courts and state officers.—In re Green, 12 S.Ct. 11, 141 U.S. 325, 35 L.Ed. 765—Graham v. Norton, La., 15 Wall., U.S., 427, 21 L.Ed. 177.

54. U.S.—Riggs v. Johnson County, Iowa, 6 Wall. 166, 18 L.Ed. 768, followed in U. S. v. Council of Keokuk, 6 Wall. 518, 18 L.Ed. 918—Marbury v. Madison, D.C., 1 Cranch 137, 2 L.Ed. 60.

55. U.S.—Ex parte Gruber, 46 S.Ct. 112, 269 U.S. 302, 70 L.Ed. 280—In re Green, 12 S.Ct. 11, 141 U.S. 325, 35 L.Ed. 765.

25 C.J. p 861 note 99.

United States consul

Supreme court is without jurisdiction of mandamus proceeding to compel consul general of the United States at Montreal, Canada, to visa a transport or certificate of origin and identity.—Ex parte Gruber, 46 S.Ct. 112, 269 U.S. 302, 70 L.Ed. 280.

In general the supreme court cannot issue writs of prohibition in cases over which it possesses neither original nor appellate jurisdiction;[56] but the statute expressly gives the supreme court power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction.[57]

§ 197. Amount in Controversy

The original jurisdiction of the supreme court is not affected by the amount in controversy.

The original jurisdiction of the supreme court of the United States is conferred by the constitution without limit as to the amount in controversy, and congress has never imposed, if indeed it could impose, any such limit.[58]

§ 198. Procedure in Exercise of Original Jurisdiction

The supreme court is authorized, in the absence of legislation, to prescribe its procedure, no particular mode having been prescribed by the Constitution.

The Constitution prescribes no particular mode of proceeding in suits originally brought in the supreme court, nor is there any act of congress on the subject; and, in the absence of any legislation by congress, the court itself is authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which original jurisdiction was given.[59] The rule established is that the supreme court will frame its proceedings in cases of original jurisdiction according to those which have been adopted in the English courts in similar cases, and the rules of the court in chancery should govern in conducting the case to a final issue,[60] although the court is not bound to follow this practice when it would tend to embarrass the case by unnecessary technicalities, or defeat the purposes of justice.[61] A proceeding against a state may be at law or in equity according to the nature of the relief sought,[62] but a suit in equity is the appropriate remedy for determining the boundary line between two states,[63] or between a territory and a state.[64]

Leave to sue. Bills in equity are filed only on leave first obtained.[65] It has been stated that the usual practice is to hear applications for such leave ex parte, although under special circumstances a different course may be pursued,[66] and that ordinarily leave to sue is granted as a matter of course;[67] but there is other authority which holds that leave will not be granted a state to sue another unless the threatened injury is clearly shown to be of serious magnitude, and imminent.[68] Leave to sue may be granted without intimating any opinion

56. U.S.—In re Commonwealth of Massachusetts, App.D.C., 25 S.Ct. 512, 197 U.S. 482, 49 L.Ed. 845.

Discretion as to grant of writ see the C.J.S. title Prohibition § 5, also 50 C.J. p 656 note 70–p 658 note 88.

Issuance of prohibition where an adequate remedy by appeal or writ of error exists generally see the C.J.S. title Prohibition § 16, also 50 C.J. p 684 note 2–p 687 note 29.

Power of federal courts generally to issue writs of prohibition see supra § 14.

Where no appellate jurisdiction
Prohibition cannot be issued by the supreme court in cases where there is no appellate power given by law or any special authority to issue the writ.—Ex parte Gordon, N.Y., 1 Black, U.S., 503, 17 L.Ed. 134—Ex parte New Orleans City Bank, La., 3 How., U.S., 292, 11 L. Ed. 603.

Until after an appeal was taken from a final decree in the circuit court no power was vested in the supreme court to issue a writ of prohibition to restrain the former court from exercising the jurisdiction conferred on it by the act to enforce the rights of citizens of the United States to vote in the several states.—Ex parte Warmouth, La., 17 Wall., 64, 21 L.Ed. 543.

57. U.S.—In re Muir, N.J., 41 S. Ct. 185, 254 U.S. 522, 65 L.Ed. 383—In re Commonwealth of Massachusetts, App.D.C., 25 S.Ct. 512, 197 U.S. 482, 49 L.Ed. 845.
25 C.J. p 860 note 93.

Proceedings under the Confiscation Act of 1862 § 7, entitled "An act to suppress insurrection," etc., and to "confiscate the property of rebels," etc., and providing that the proceedings against the property seized shall be in rem, and "conform as nearly as may be to proceedings in admiralty," are not proceedings in admiralty within the meaning of the Judiciary Act of 1789, authorizing the supreme court "to issue writs of prohibition to the District Courts when proceeding as courts of admiralty."—Ex parte Graham, La., 10 Wall., U.S., 541, 542, 19 L.Ed. 981.

58. U.S.—Wisconsin v. Pelican Ins. Co., 8 S.Ct. 1370, 127 U.S. 265, 32 L.Ed. 239.

59. U.S.—State of Florida v. State of Georgia, 17 How. 478, 15 L.Ed. 181.

60. U.S.—State of California v. Southern Pac. Co., Cal., 15 S.Ct. 591, 157 U.S. 229, 39 L.Ed. 683.
25 C.J. p 861 note 9.

61. U.S.—State of California v. Southern Pac. Co., supra—Florida v. Georgia, 17 How. 478, 15 L.Ed. 181.

62. U.S.—State of Missouri v. State of Illinois, 21 S.Ct. 331, 180 U.S. 208, 45 L.Ed. 497.

63. U.S.—U. S. v. State of Texas, Tex., 12 S.Ct. 488, 143 U.S. 621, 36 L.Ed. 285.
25 C.J. p 861 note 12.

64. U.S.—U. S. v. State of Texas, supra.

65. U.S.—Georgia v. Grant, 6 Wall. 241, 18 L.Ed. 848.
25 C.J. p 861 note 14.

66. U.S.—State of Washington v. Northern Securities Co., Wash., 22 S.Ct. 623, 185 U.S. 254, 46 L.Ed. 897.

67. U.S.—State of Kansas v. U. S., 27 S.Ct. 388, 204 U.S. 331, 51 L. Ed. 510—State of Washington v. Northern Securities Co., Wash., 22 S.Ct. 623, 185 U.S. 254, 46 L.Ed. 897.

68. U.S.—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798.

Presumption
It will be presumed that no state will attempt to enforce unconstitutional enactment to detriment of another state in absence of specific showing to contrary.—State of Alabama v. State of Arizona, supra.

on a question raised as to want of jurisdiction.[69] A petition by a state for leave to file her bill of complaint against another state will be denied where, if filed, it must be dismissed because of the absence of the United States as a party.[70]

Jurisdictional objections. A motion to dismiss for want of jurisdiction is a proper mode of objecting when jurisdiction does not appear on the face of the proceedings.[71]

Bill to perpetuate testimony. The supreme court may entertain a bill to perpetuate testimony in litigation pending therein, or to be begun therein.[72]

Parties. In a suit between states parties whose presence is necessary or proper for a determination of the case or controversy in issue and are of such character as to be within the original jurisdiction of the supreme court are properly made parties defendant;[73] but, if persons whose presence as parties is necessary to the determination of the controversy cannot be joined as parties because of their citizenship, that fact does not justify the court in proceeding in their absence,[74] and a case will be dismissed where there are absent parties who cannot be made parties to the suit without ousting the jurisdiction of the court.[75] A misjoinder of parties defendant will render a complaint objectionable.[76] A state suing or sued in the supreme court by virtue of its original jurisdiction is deemed to represent all its citizens.[77] Citizens, voters, and taxpayers of a state, merely as such, without a showing of a further and proper interest, have no separate individual right to contest in such a suit the position taken by the state itself.[78] However, an individual citizen may be made a party where relief is properly sought as against him, and in such case

69. U.S.—State of Washington v. Northern Securities Co., Wash., 22 S.Ct. 623, 185 U.S. 254, 46 L.Ed. 897.

70. U.S.—State of Arizona v. State of California, 56 S.Ct. 848, 298 U.S. 558, 80 L.Ed. 1331, rehearing denied 57 S.Ct. 4, 299 U.S. 618, 81 L.Ed. 456.

Ineffectiveness of decree immaterial

Fact that no decree rendered in absence of United States can bind or affect her will not induce supreme court to decide rights of states by decree which, because of absence of United States, can have no finality.—State of Arizona v. State of California, supra.

Apportionment of unappropriated water of navigable river

As respects right of Arizona to maintain bill seeking judicial apportionment among states in Colorado River Basin of unappropriated water of river, contentions that constitutional power of United States to exert control over water stored at Boulder Dam was subject to right of Arizona to equitable share in unappropriated water until such time as commerce actually moved on river, and that congress subordinated that power to Arizona's right by Boulder Canyon Project Act authorizing Arizona, California, and Nevada to enter into agreement as to their relative rights in water of river, could not be judicially determined in proceeding to which United States was not a party.—State of Arizona v. State of California, supra.

71. U.S.—Georgia v. Stanton, 6 Wall. 50, 18 L.Ed. 721—State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 657, 9 L.Ed. 1233.

Jurisdictional objections generally see supra §§ 83–94.

72. U.S.—State of Arizona v. State of California, 54 S.Ct. 735, 292 U.S. 341, 78 L.Ed. 1298.

73. U.S.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S. 398, 83 L.Ed. 817, 121 A.L.R. 1179.

United States

The United States is an indispensable party to any decree granting relief prayed by a bill of complaint by state of Arizona seeking judicial apportionment among states in Colorado River Basin of unappropriated water of river, the United States having paramount power to control Colorado River for purpose of improving navigation.—State of Arizona v. State of California, 56 S.Ct. 848, 298 U.S. 558, 80 L.Ed. 1331, rehearing denied 57 S.Ct. 4, 299 U.S. 618, 81 L.Ed. 456.

Individuals

Individual owners of bonds issued by defendant state, each of which is secured by a separate mortgage of specified shares of railroad stock owned by that state, are not necessary parties defendant to a suit by plaintiff state, as the owner of certain of these bonds, to compel payment and a subjection of the mortgaged property to the satisfaction of the debt.—State of South Dakota v. State of North Carolina, 24 S.Ct. 269, 192 U.S. 286, 48 L.Ed. 448.

74. U.S.—State of Texas v. Interstate Commerce Commission, Tex., 42 S.Ct. 261, 258 U.S. 158, 66 L.Ed. 531.

75. U.S.—State of California v. Southern Pac. Co., Cal., 15 S.Ct. 591, 157 U.S. 229, 39 L.Ed. 683.

25 C.J. p 862 note 17.

76. U.S.—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798.

Considerations of convenience immaterial

Considerations of convenience that in suits between private parties reasonably may justify exercise of discretion in support of joinders of parties defendant and of causes of action have no bearing in suit by state against several states.—State of Alabama v. State of Arizona, supra.

77. U.S.—Commonwealth of Kentucky v. State of Indiana, 50 S.Ct. 275, 281 U.S. 163, 74 L.Ed. 784.

Conclusiveness of representation

The appropriate appearance in the supreme court of a state by its proper officers, either as complainant or defendant, is conclusive that it represents all its citizens.—Commonwealth of Kentucky v. State of Indiana, supra.

78. U.S.—Commonwealth of Kentucky v. State of Indiana, supra.

Contract between states

(1) If the controversy within the original jurisdiction of the supreme court is over a contract alleged to have been made between two states to which an individual defendant is not a party, such an individual defendant, merely as a citizen, voter, and taxpayer of defendant state, is not entitled to enter on a separate contest in relation to the merits of the controversy as far as it relates to the making of the contract by the two states and the obligations that the contract imposes on his state, and does not relate to any separate and proper interest of his own.—Commonwealth of Kentucky v. State of Indiana, supra.

(2) Citizens were improperly made defendants to original suit to require state to proceed with construction of bridge under contract with adjoining state.—Commonwealth of Kentucky v. State of Indiana, supra.

he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted.[79]

Process and appearance. The supreme court has prescribed rules which govern respecting the process in original actions in such courts, the persons on whom it is to be served, and the time of service.[80] Where the action is against a state, service should be made on the governor and attorney general of defendant state the period of time fixed by statute before the return day of the process.[81] If a defendant state fails or refuses to appear, the court will allow plaintiff or complainant to proceed ex parte.[82] In an action against a state the filing of a demurrer to the complainant's bill by the attorney general of the state may be an appearance and compliance with an order giving such state leave to appear and answer the bill.[83] Where a defendant state appears and pleads voluntarily, it does not thereby conclude itself, but may on motion be allowed to withdraw its appearance.[84]

Pleading. The declaration or complaint must allege facts sufficient to constitute a cause of action.[85] A state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor.[86] Cross bills may be filed, when appropriate, in a suit between states, as in other cases.[87] The rules which govern courts of equity as to the allowance of time for filing an answer will not be applied by the supreme court to controversies between states.[88] After overruling a plea on account of multifariousness defendant has been given leave to demur as well as to answer.[89] Where no testimony has been taken, the parties may be allowed to withdraw or to amend the pleadings under such order as the court shall make.[90]

Burden of proof. The burden of proof imposed on a state invoking the original jurisdiction of the supreme court is much greater than that imposed on a complainant in an ordinary suit between private parties.[91]

Trial. The court in equity causes may ascertain facts without a jury, at its discretion, in the ordinary course of equity.[92] After the taking of testimony has closed, additional proofs may be ordered taken, at the discretion of the court.[93] On the argument of a plea in an action between states defendant has the right to open and close.[94] In determining whether relief is to be granted, and if so what relief, the court, in its consideration of the facts alleged and found, is guided by the accepted doctrines of the common law or equity systems of jurisprudence.[95] In the determination of suits between states, federal, state, and international law are considered and applied as the exigencies of the particular case may require;[96] but the determina-

79. U.S.—Commonwealth of Kentucky v. State of Indiana, supra.

80. U.S.—State of Florida v. State of Georgia, 17 How. 478, 15 L.Ed. 181.
25 C.J. p 862 note 18.

81. U.S.—State of New Jersey v. State of New York, 5 Pet. 284, 8 L.Ed. 127.
25 C.J. p 862 note 19.

82. U.S.—Commonwealth of Massachusetts v. State of Rhode Island, 12 Pet. 755, 9 L.Ed. 1272.
25 C.J. p 862 note 20.

83. U.S.—State of New Jersey v. State of New York, 6 Pet. 323, 8 L.Ed. 414.

84. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 755, 9 L.Ed. 1272.

85. U.S.—State of Alabama v. Burr, 6 S.Ct. 81, 115 U.S. 413, 29 L.Ed. 435.

Demurrer
Demurrer to declaration sustained for failure to state cause of action.—State of Alabama v. Burr, supra.

86. U.S.—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798.

87. U.S.—State of Iowa v. State of Illinois, 13 S.Ct. 239, 147 U.S. 1, 37 L.Ed. 55—State of Nebraska v. State of Iowa, 12 S.Ct. 396, 143 U.S. 359, 36 L.Ed. 186.

88. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 13 Pet. 23, 10 L.Ed. 41.

89. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 14 Pet. 210, 10 L.Ed. 423.

90. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 755, 9 L.Ed. 1272, 13 Pet. 23, 10 L.Ed. 41.

91. U.S.—State of Alabama v. State of Arizona, 54 S.Ct. 399, 291 U.S. 286, 78 L.Ed. 798—People of State of New York v. State of New Jersey, 41 S.Ct. 492, 256 U.S. 296, 65 L.Ed. 937.

92. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 12 Pet. 657, 9 L.Ed. 1233.

Reference to master
Where Illinois sought temporary modification of decree limiting its diversion of waters of Great Lakes-St. Lawrence system, on ground that system for sewage treatment had not been completed and would not be completed until end of 1942, and that because of introduction of untreated sewage into stream an obnoxious, unsanitary, and dangerous condition to public health existed, case was referred to special master to investigate facts and make a report.—State of Wisconsin v. State of Illinois, 60 S.Ct. 789, 309 U.S. 569, 84 L.Ed. 953.

93. U.S.—State of New York v. State of New Jersey, 39 S.Ct. 261, 249 U.S. 202, 63 L.Ed. 560.
25 C.J. p 862 note 29.

94. U.S.—State of Rhode Island v. Commonwealth of Massachusetts, 14 Pet. 210, 10 L.Ed. 423.

95. U.S.—State of Texas v. State of Florida, 59 S.Ct. 563, 306 U.S 398, 83 L.Ed. 817, 121 A.L.R. 1179

Adequate remedy at law
In original suit by state to enjoin enforcement of statutes, where in the supreme court was of opinion that there was adequate remedy at law and no danger of irreparable injury shown, the court would consider only the objection that the bill was without equity.—State of California v. Latimer, Cal., 59 S.Ct. 166, 305 U.S. 255, 83 L.Ed. 159.

96. U.S.—State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 356, 283 U.S. 789, 75 L.

tion of the relative rights of contending states does not depend on the same considerations and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right.[97] Controversies between states are considered in the untechnical spirit proper for dealing with a quasi-international controversy.[98] Objections as to multifariousness, laches, and the like, except as far as they affect the merits, are not considered.[99] In a controversy between states the supreme court must pass on every question essential to a determination of the controversy,[1] even though the solution may involve the determination of the effect of local legislation of either state and of acts of congress.[2] A determination of a controversy between states will not be withheld merely because of objections raised by individuals in one state which the state itself declines to sponsor.[3]

Action for adjustment of public debt. In a suit between the commonwealth of Virginia and the state of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia, which was assumed by West Virginia at the time of its creation as a state, it was held that the matter was to be considered by the federal supreme court in an untechnical spirit,[4] and that the extraordinary nature of the suit required that the state of West Virginia be permitted, after the supreme court had adjudged the amount due, to file a supplemental answer setting up credits which would materially reduce the sum so fixed and alleging objections to the allowance of interest, although most of the items set up were contained in the master's report and were, at the time of such report, available for every defense if their consideration had been pressed with the assertions of right subsequently made.[5]

Establishment of boundaries between states. In cases to establish boundaries between states, the supreme court, on pleadings and proofs, or on stipulation, enters a decree establishing the line, and, if necessary, appoints commissioners to trace and mark the lines, who are directed to report to the court, and on confirmation of their report final decree is pronounced.[6] The order confirming the report is merely interlocutory and may be vacated on cause at any time before final decree.[7] Where an application for an order for the identification and restoration of the boundary line between two states was made in pursuance of a decree in respect of such line which gave permission to file the application during the term, but the consideration was postponed to the next term when the motion was denied, it was determined that another application at a subsequent term could not be entertained, as the power of the court ceased with the expiration of the term at which the motion was denied, the denial of the application, however, being without prejudice to the filing of a new bill or petition for the purpose stated.[8]

Ownership of river beds. A decree determining the respective titles of the United States and a state in river beds will not prevent the United States from protecting the navigability of any navigable waters.

Ed. 1416—State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 286, 282 U.S. 660, 75 L.Ed. 602.

97. U.S.—State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 356, 283 U.S. 789, 75 L Ed. 1416—State of Connecticut v. Commonwealth of Massachusetts, 51 S. Ct. 286, 282 U.S. 660, 75 L.Ed. 602.

Municipal law

Municipal law relating to like questions between individuals, although taken into account in determining suits between states, is not of controlling weight.—State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 356, 283 U.S. 789, 75 L.Ed. 1416—State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 286, 282 U.S. 660, 75 L.Ed. 602.

Water rights

Disputes as to the relative rights of contending states in respect of the use of streams flowing through them are to be settled on the basis of equality of right: this does not mean that there must be an equal division of the waters of an interstate stream among the states through which it flows; it means that the principles of right and equity shall be applied having regard to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system, and that, on a consideration of the pertinent laws of the contending states and all other relevant facts, the court will determine what is an equitable apportionment of the use of such waters. —State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 356, 283 U.S. 789, 75 L.Ed. 1416—State of Connecticut v. Commonwealth of Massachusetts, 51 S.Ct. 286, 282 U.S. 660, 75 L.Ed. 602.

98. U.S.—Commonwealth of Virginia v. State of West Virginia, 31 S.Ct. 330, 220 U.S. 1, 55 L.Ed. 353.

99. U.S.—Commonwealth of Virginia v. State of West Virginia, supra.

1. U.S.—Commonwealth of Kentucky v. State of Indiana, 50 S.Ct. 275, 281 U.S. 163, 74 L.Ed. 784.

Contract between states

All questions pertaining to the obligation of the contract involved must be determined.—Commonwealth of Kentucky v. State of Indiana, supra.

2. U.S.—Commonwealth of Kentucky v. State of Indiana, supra.

3. U.S.—Commonwealth of Kentucky v. State of Indiana, supra.

4. U.S.—Commonwealth of Virginia v. State of West Virginia, 31 S. Ct. 330, 220 U.S. 1, 55 L.Ed. 353.
25 C.J. p 862 note 30.

5. U.S.—Commonwealth of Virginia v. State of West Virginia, 34 S. Ct. 889, 234 U.S. 117, 58 L.Ed. 1243.

6. U.S.—State of Tennessee v. State of Virginia, 20 S.Ct. 715, 177 U.S. 501, 44 L.Ed. 863.
25 C.J. p 863 note 32.

7. U.S.—State of Iowa v. State of Illinois, 14 S.Ct. 333, 151 U.S. 238, 38 L.Ed. 145.

8. U.S.—State of Virginia v. State of Tennessee, 15 S.Ct. 818, 158 U. S. 267, 39 L.Ed. 976.

of the United States, but such a provision may be properly included in the decree so as to avoid any misapprehension as to its effect.[9]

Costs. The court has power to award or refuse costs, and in an equity case may, in its discretion, award them against either party,[10] or each party may be ordered to pay its own costs.[11] In suits between states the costs are usually divided equally between the parties.[12]

Enforcement of decision. The rule that judicial power essentially involves the right to enforce the results of its exercise applies to the exercise by the supreme court of original jurisdiction in controversies between the states.[13]

C. APPELLATE JURISDICTION AND EXERCISE THEREOF

1. Source and Extent of Appellate Jurisdiction

§ 199. In General

The appellate jurisdiction of the United States supreme court is derived from the federal Constitution and may be limited and regulated by acts of congress.

Except in cases affecting ambassadors and other public ministers and consuls and those in which a state is a party, in which cases the supreme court may exercise original jurisdiction, it has, under article 3 § 2 clause 2 of the Constitution, appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress shall make, in all the other cases to which, under the constitution, the judicial power of the United States extends.[14] Such appellate powers as are given to the supreme court by the federal Constitution are limited and regulated by acts of congress[15] and must be exercised in accordance with such regulations, and no appellate jurisdiction in a given case can be exercised by the supreme court if congress has made no provision therefor.[16] By statute, 28 U.S.C.A. §§ 344–350, congress has specified the appellate jurisdiction of the supreme court, and the effect is to deny by implication all appellate jurisdiction which is not affirmatively conferred.[17] Congress may give the supreme court appellate jurisdiction in respect of matters as to which, under the constitution, it has original jurisdiction,[18] but jurisdiction granted as original cannot be exercised as appellate.[19]

Existence of actual controversy. The existence of an actual controversy is an essential requisite to the appellate jurisdiction of the supreme court.[20] It is not within the province of the court to decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief.[21] If, pending an appeal, an event occurs which renders it impossible for the court to grant any relief, or renders a decision unnecessary, the question becomes moot.[22]

9. U.S.—U. S. v. State of Utah, 51 S.Ct. 438, 283 U.S. 64, 75 L.Ed. 844.

10. U.S.—Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. 460, 15 L.Ed. 449.

11. U.S.—U. S. v. State of Texas, 16 S.Ct. 725, 162 U.S. 1, 40 L.Ed. 867.

12. U.S.—State of Tennessee v. State of Virginia, 20 S.Ct. 715, 177 U.S. 501, 44 L.Ed. 863.
25 C.J. p 863 note 37.

13. U.S.—State of Virginia v. State of West Virginia, 38 S.Ct. 400, 246 U.S. 565, 62 L.Ed. 883.

14. U.S.—U. S. v. Bitty, N.Y., 28 S.Ct. 396, 208 U.S. 393, 52 L.Ed. 543.

Limitation by court of exercise of jurisdiction

United States supreme court is a court of review and limits exercise of its jurisdiction in accordance with its function.—Landis v. North American Co., 57 S.Ct. 163, 299 U.S. 248, 81 L.Ed. 153, reversing North American Co. v. Landis, 85 F.2d 398, 66 App.D.C. 141, certiorari granted Landis v. North American Co., 57 S.Ct. 30, 299 U.S. 530, 81 L.Ed. 390—Landis v. American Water Works & Electric Co., 57 S.Ct. 163, 299 U.S. 248, 81 L.Ed. 153, reversing American Water Works & Electric Co. v. Landis, 85 F.2d 398, 66 App.D.C. 141, certiorari granted Landis v. American Water Works & Electric Co., 57 S.Ct. 30, 299 U.S. 530, 81 L. Ed. 390—Aero Mayflower Transit Co. v. Georgia Public Serv. Commission, 55 S.Ct. 709, 295 U.S. 285, 79 L.Ed. 1439.

15. U.S—National Exch. Bank v. Peters, Va., 12 S.Ct. 767, 144 U.S. 570, 36 L.Ed. 545.
25 C.J. p 863 note 39.

Mere adoption of state statute as to mode of procedure in a particular case will not govern the right of appeal in opposition to the act of congress defining the appellate jurisdiction.—Baltimore & P. R. Co. v. Sixth Presbyterian Church, D.C., 19 Wall., U.S., 62, 22 L.Ed. 97.

16. U.S.—U. S. v. More, D.C., 3 Cranch 159, 2 L.Ed. 397—Wiscart v. D'Auchy, Va., 3 Dall. 321, 1 L. Ed. 619.

17. U.S.—Durousseau v. U. S., La., 6 Cranch 307, 3 L.Ed. 232.
25 C.J. p 863 note 42—3 C.J. p 319 note 58.

18. U.S.—Cohens v. Commonwealth of Virginia, Va., 6 Wheat. 264, 5 L.Ed. 257, 11 Wheat. 472 note, 6 L.Ed. 523.
25 C.J. p 863 note 44.

19. U.S.—Osborn v. Bank of U. S., Ohio, 9 Wheat. 738, 6 L.Ed. 204.

20. U.S.—Richardson v. McChesney, Ky., 31 S.Ct. 43, 218 U.S. 487, 54 L.Ed. 1121—Pelham v. Rose, Ind., 9 Wall. 103, 19 L.Ed. 602.
3 C.J. p 359 note 85.

21. U.S.—Richardson v. McChesney, Ky., 31 S.Ct. 43, 218 U.S. 487, 54 L.Ed. 1121.
3 C.J. p 358 note 84, p 365 note 6.
Scope and extent of review see infra § 201 p —.

22. U.S.—Brownlow v. Schwartz, 43 S.Ct. 263, 261 U.S. 216, 67 L.Ed. 620, reversing Schwartz v. Brownlow, 50 App.D.C. 279, 270 F. 1019.
3 C.J. p 360 note 89.

Amendment of statute

Whether an order for report was based on Philippine Act 2307 § 16

The question may be rendered moot by the act of the appellant[23] or of the appellee,[24] or of both parties.[25] A question may become moot by operation of law,[26] or by lapse of time,[27] or by the execution of an order of the inferior court.[28]

Where all substantial interest in the controversy has been parted with or extinguished, the court will not hear the appeal merely to determine the right to costs.[29]

Jurisdiction of inferior court. If an inferior court has no jurisdiction of a cause, an appeal from its decision confers no jurisdiction on the supreme court of the merits of the controversy but the court may in such cases entertain an appeal for the purpose of reversing a judgment or order for want of jurisdiction and dismissing the case or directing its dismissal by the lower court,[30] and the court may render a judgment for costs.[31]

Consent of parties. Mere agreement or consent of the parties cannot confer on the supreme court jurisdiction to affirm or reverse a judgment of an inferior or state court.[32]

Determination of jurisdiction. The supreme court must itself determine its appellate jurisdiction and it will not ignore a want of jurisdiction because the question is not raised or discussed by either party.[33]

Mandamus. Under its appellate jurisdiction and

(e), invalid in wrongfully delegating power, contrary to Organic Act c 1369 [32 U.S.St. at L. p 691], becomes a moot question, where, pending appeal from judgment annulling the order, the statute was amended to provide for the report and the details thereof, thus rendering the order inoperative.—Board of Public Utility Com'rs v. Compania General de Tabacos de Filipinas, Philippine, 39 S.Ct. 332, 249 U.S. 425, 63 L.Ed. 687.

War rendering question moot

An appeal from a decree presenting the question whether the Anti-Trust Act of July 2, 1890 was violated by a combination of American, British, and German steamship companies to monopolize ocean carriage presented a moot question by reason of the European War.—U. S. v. American-Asiatic S. S. Co., N.Y., 37 S.Ct. 233, 242 U.S. 537, 61 L.Ed. 479 —U. S. v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, N. Y., 36 S.Ct. 212, 239 U.S. 466, 60 L. Ed. 387, reversing, D.C., United States v. Hamburgh-American S. S. Line, 216 F. 271.

Judicial notice

The occurrence of such an event may be noticed by the court.—Mills v. Green, S.C., 16 S.Ct. 132, 159 U.S. 651, 40 L.Ed. 293.

23. U.S.—Lewis Publishing Co. v. Wyman, Mo., 33 S.Ct. 599, 228 U. S. 610, 57 L.Ed. 989.
3 C.J. p 361 note 91.

24. U.S.—Heitmuller v. Stokes, 41 S.Ct. 522, 252 U.S. 359, 65 L.Ed. 990, reversing 49 App.D.C. 391, 266 F. 1011.

Sale of land in controversy

Where, pending a writ of error from the United States supreme court to review a judgment in a landlord's suit to recover possession of premises, the landlord sold the premises, the case became moot, as a judgment in his favor would not give him possession, and the merits of the case would not be decided.—Heitmuller v. Stokes, supra.

25. Case settled or compromised

U.S.—Buck's Stove & Range Co. v. American Federation of Labor, D. C., 31 S.Ct. 472, 219 U.S. 581, 55 L.Ed. 345.

26. U.S.—Dinsmore v. Southern Express Co., Ga., 22 S.Ct. 45, 183 U.S. 115, 46 L.Ed. 111, affirming 102 F. 794, 42 C.C.A. 623.
3 C.J. p 364 note 98.

27. U.S.—Tennessee v. Condon, Tenn., 23 S.Ct. 579, 189 U.S. 64, 47 L.Ed. 709.
3 C.J. p 364 notes 2, 3.

28. U.S.—Cheong Ah Moy v. U. S., Cal., 5 S.Ct. 431, 113 U.S. 216, 28 L.Ed. 983.

Payment of deficiency execution

Payment by sureties on an appeal bond of a deficiency execution issued on affirmance of the decree relieves the court on appeal from deciding whether the judgment against the sureties for the deficiency was erroneous.—Pease v. Rathbun-Jones Engineering Co., Tex., 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715, Ann.Cas. 1918C 1147, affirming 228 F. 273, 142 C.C.A. 565.

29. U.S.—Heitmuller v. Stokes, 41 S.Ct. 522, 256 U.S. 359, 65 L.Ed. 990, reversing 49 App.D.C. 391, 266 F. 1011.
3 C.J. p 365 note 8.

30. U.S.—U. S. v. Griffin, Ga., 58 S. Ct. 601, 303 U.S. 226, 82 L.Ed. 764 —U. S. v. Corrick, Ill., 56 S.Ct. 829, 298 U.S. 435, 80 L.Ed. 1263, rehearing denied 56 S.Ct. 951, 298 U.S. 692, 80 L.Ed. 1409—Mitchell v. Maurer, Cal., 55 S.Ct. 162, 293 U.S. 295, reversing, C.C.A., 69 F. 2d 233, certiorari granted 55 S.Ct. 71.
3 C.J. p 368 note 20—4 C.J. p 581 notes 30, 31.

31. U.S.—North American Transportation & Trading Co. v. Morrison, Wash., 20 S.Ct. 869, 178 U.S. 262, 44 L.Ed. 1061, reversing, C.C., Morrison v. North American Transp., etc., Co., 85 F. 802.
3 C.J. p 368 note 22.

32. U.S.—People of State of New York ex rel. Bryant v. Zimmerman, 49 S.Ct. 61, 278 U.S. 63, 73 L.Ed. 184, 62 A.L.R. 785, affirming People ex rel. Bryant v. Zimmerman, 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909, which affirmed People of State of New York ex rel. Bryant v. Zimmerman, 210 N. Y.S. 269, 213 App.Div. 414, affirming People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859.
25 C.J. p 863 note 43—3 C.J. p 369 note 30, p 370 note 35.

33. U.S.—Smith v. Apple, Kan., 44 S.Ct. 311, 264 U.S. 274, 68 L.Ed. 678—Barnett v. Kunkle, Okl., 44 S.Ct. 254, 264 U.S. 16, 68 L.Ed. 539, dismissing appeal, C.C.A., Barnett v. Kunkel, 283 F. 24, certiorari denied 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489—Arnold v. U. S. for Use of W. B. Guimarin & Co., S. C., 44 S.Ct. 144, 263 U.S. 427, 68 L.Ed. 371, dismissing error, C.C.A., 280 F. 338—Oneida Navigation Corporation v. W. & S. Job & Co., N. Y., 40 S.Ct. 357, 252 U.S. 521, 64 L.Ed. 697—Collins v. Miller, La., 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616—Northern Pac. Ry. Co. v. Solum, 38 S.Ct. 550, 247 U.S. 477, 62 L.Ed. 1221, reversing Solum v. Northern Pac. Ry. Co., 157 N.W. 996, 133 Minn. 93, and Monarch Elevator Co. v. Northern Pac. Ry. Co., 157 N.W. 998, 133 Minn. 461, and dismissing error Duluth Elevator Co. v. Northern Pac. Ry. Co., 162 N.W. 1087, 126 Minn. 468—Stevirmac Oil & Gas Co. v. Dittman, Okl., 38 S.Ct. 116, 245 U.S. 210, 62 L.Ed. 248.

Regard for substance rather than form

In determining whether litigation presents case within its appellate jurisdiction, supreme court will look to substance, not form.—Nashville, C. & St. L. Ry. v. Wallace, Tenn.,

in aid thereof the United States supreme court has power to issue writs of mandamus.[34] Thus the court may issue the writ to compel an inferior federal court to grant an appeal[35] or to sign a bill of exceptions in a case tried before it.[36] The supreme court may, in a proper case, issue a writ of mandamus requiring a single judge to comply with a statute requiring him to call two other judges for the hearing and determination of an application for an interlocutory injunction.[37] The existence of ultimate discretionary jurisdiction in the supreme court to review the cause gives it power to issue the writ;[38] such ultimate discretionary jurisdiction enables the court to issue the writ to an inferior court although the case is one in respect of which direct appellate jurisdiction is vested in an intermediate appellate court.[39]

§ 200. Pecuniary Limits of Jurisdiction

The pecuniary limits of appellate jurisdiction of the United States supreme court are discussed generally infra § 201 b (2).

Examine Pocket Parts for later cases.

§ 201. Appellate Procedure in General

a. Nature and form of remedy
b. Decisions reviewable
c. Right of review
d. Presentation and reservation in lower court of grounds of review
e. Parties
f. Requisites and proceedings for transfer of cause
g. Effect of transfer of cause or proceedings therefor
h. Supersedeas or stay of proceedings

53 S.Ct. 345, 288 U.S. 249, 77 L.Ed. 730, 87 A.L.R. 1191.

34. U.S.—Ex parte United States, Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283.
25 C.J. p 860 note 94 [b].
Mandamus generally see the C.J.S. title Mandamus § 1 et seq, also 38 C.J. p 541 note 1 et seq.
Issuance of mandamus by:
Federal courts generally see supra § 14.
Supreme court in exercise of original jurisdiction see supra § 196.

Absence of original jurisdiction
To warrant the issue of a mandamus by the supreme court in cases where original jurisdiction has not been conferred by the constitution, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable the court to exercise its appellate jurisdiction.—Ex parte United States, Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283—Marbury v. Madison, D.C., 1 Cranch 137, 2 L.Ed. 60.

Existence of other remedy
The supreme court will not issue a writ of mandamus where remedy by injunctive relief is available.—Ex parte Baldwin, 54 S.Ct. 551, 291 U.S. 610, 78 L.Ed. 1020.

Return to order to show cause as answer
In granting motion for leave to file petition for mandamus in original proceeding to compel vacation of order referring cases to a master for trial, the supreme court treated the return to the order to show cause as an answer to the petition, and granted the relief sought.—McCullough v. Cosgrave, Cal., 60 S.Ct. 703, 309 U.S. 634, 84 L.Ed. 992.

35. U.S.—In re Buder, Mo., 46 S.Ct. 557, 271 U.S. 461, 70 L.Ed. 1036—Ex parte Montgomery & E. R. Co., Ala., 95 U.S. 221, 24 L.Ed. 355—Ex parte Jordan, N.Y., 94 U.S. 248, 24 L.Ed. 123.

Where there is no right to direct appeal to the supreme court from a federal district court, a motion for leave to file a petition for mandamus to compel the court to allow a direct appeal will be denied.—In re Buder, Mo., 46 S.Ct. 557, 271 U.S. 461, 70 L.Ed. 1036.

36. U.S.—Ex parte Crane, N.Y., 5 Pet. 190, 8 L.Ed. 92.

37. U.S.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S. Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, which reversed, D.C., 27 F.2d 1005—Ex parte Northern Pac. Ry. Co., 50 S.Ct. 70, 280 U.S. 142, 74 L.Ed. 233—Ex parte Metropolitan Water Co. of West Virginia, Kan., 31 S.Ct. 600, 220 U.S. 539, 55 L.Ed. 575.

Effect of refusal to issue
United States supreme court's denial of mandamus to compel assembly of three-judge court in suit to enjoin drainage district commissioners from transmitting lists of lands for assessment under state statute was conclusive authority on circuit court of appeals that statute providing for three-judge court was inapplicable.—Everglades Drainage Dist. v. Florida Ranch & Dairy Corporation, C.C.A.Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013.

38. U.S.—Ex parte Abdu, 38 S.Ct. 447, 247 U.S. 27, 62 L.Ed. 966.

Enforcing conformity to court rules
(1) Supreme court may issue mandamus directly to district court to enforce conformity to equity rules.—Los Angeles Brush Mfg. Corporation v. James, 47 S.Ct. 286, 272 U.S. 701, 71 L.Ed. 481.

(2) Under rule of civil procedure authorizing reference to master only under exceptional conditions, the United States supreme court entertained original proceeding for mandamus against district judge, and directed district court to vacate order referring cases to a master, and to try the cases in due course without postponement of trial to that of other cases not entitled to preference, but with such arrangement as respects particular judge conducting trial as might be convenient.—McCullough v. Cosgrave, Cal., 60 S. Ct. 703, 309 U.S. 634, 84 L.Ed. 992.

39. U.S.—Ex parte United States, Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283.

Direct appeal to circuit court of appeals
Supreme court has power to issue mandamus to federal district court, although direct appellate jurisdiction in case is vested in circuit court of appeals, where supreme court has ultimate discretionary jurisdiction by certiorari.—Ex parte United States, Pa., 53 S.Ct. 129, 287 U.S. 241, 77 L.Ed. 283.

Compelling issuance of bench warrant
Supreme Court has power to issue mandamus to compel federal district court to issue bench warrant for accused's arrest under indictment.—Ex parte United States, supra.

Formerly it was held that the supreme court was without authority to issue the writ where a direct review could not be had.—In re Commonwealth of Massachusetts, D.C., 25 S.Ct. 512, 197 U.S. 482, 49 L.Ed. 845—25 C.J. p 700 note 51 [b].

i. Record and proceedings not of record
j. Assignment of errors; briefs
k. Dismissal or withdrawal
l. Hearing and rehearing
m. Review
n. Determination and disposition of cause

a. Nature and Form of Remedy

Proceedings in cases taken to the United States supreme court are governed by acts of congress, the common law, and ancient English statutes.

Proceedings in cases taken to the United States supreme court are governed entirely by acts of congress, the common law, and the ancient English statutes.[40] Decisions are reviewed by the supreme court according to the methods prescribed by statutes[41] and the modes of reviewing decisions of particular courts are discussed infra § 203 et seq. Review is usually by appeal or certiorari; formerly, in certain cases review was had by writ of error but the writ has been abolished by Act Jan. 31, 1928, c. 14 § 1, 45 U.S.St. at L. p 54, 28 U.S.C.A. § 861b, and all relief which was obtained by writ of error is obtainable by appeal.[42] Where a statute confers the right of appeal in certain cases, it impliedly negatives the existence of the right in other cases.[43]

Congress may by appropriate legislation take away the right of appeal to the supreme court.[44] A statute which provides for an appeal or other proceeding for review to or from another federal court is to be regarded, in the absence of anything to show a contrary intention, as a repeal of any previous statute providing for an appeal or other proceeding to or from the supreme court.[45] Unless rights as to pending appeals are preserved by a saving clause,[46] the right of appeal may be taken away by the repeal of the statute giving it even as to causes which have been previously appealed.[47]

Pendency of another proceeding. The supreme court may decline to review a cause when proceedings for review are already pending in a circuit court of appeals.[48] However, where the right to appeal to the two courts is given, and proceedings for review are commenced in the supreme court and

40. U.S.—Camp v. Gress, Va., 39 S. Ct. 478, 250 U.S. 308, 63 L.Ed. 997.
Applicability of Conformity Act see supra § 146.

41. U.S.—Tiglao v. Insular Government of Philippine Islands, Philippine, 30 S.Ct. 129, 215 U.S. 410, 54 L.Ed. 257—Walker v. Dreville, La., 12 Wall. 440, 20 L.Ed. 429.
3 C.J. p 300 note 19.

42. **Appeal as matter of right**
An appeal, in a proper case, is a matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give appellant the means of invoking the jurisdiction of the court.—Brown v. McConnell, Wash., 8 S.Ct. 559, 124 U.S. 489, 31 L.Ed. 495.

Appeal removes entire cause
U.S.—Wiscart v. D'Auchy, Va., 3 Dall. 321, 1 L.Ed. 619.
3 C.J. p 315 note 36 [b].

Writ of error under former practice
(1) A writ of error was an original writ.—Nations v. Johnson, Tex., 24 How., U.S., 195, 16 L.Ed. 628.
(2) The writ lay only in actions at law and proceedings which were according to the course of the common law and did not lie in suits in equity; in equity cases the mode of review was by appeal.—Tiglao v. Insular Government of Philippine Islands, Philippine, 30 S.Ct. 129, 215 U.S. 410, 54 L.Ed. 257—Metropolitan R. Co. v. MacFarland, D.C., 25 S. Ct. 28, 195 U.S. 322, 49 L.Ed. 219—3 C.J. p 310 note 15, p 323 note 89, p 324 notes 91, 93, p 325 note 94.
(3) Under the Judiciary Act the effect of a writ of error was simply to bring the record into court and submit the judgment of the inferior tribunal to reëxamination; it did not in any manner act on the parties; it acted only on the record; it removed the record into the supervising tribunal.—Nations v. Johnson, supra—Cohens v. Commonwealth of Virginia, Va., 6 Wheat., U.S., 264, 5 L.Ed. 257.
(4) The writ was a continuation of the original litigation rather than the commencement of a new suit or proceeding.—Nations v. Johnson, supra.
(5) The writ did not bring up questions of fact for appellate review, but only questions of law.—Stanley v. Board of Sup'rs of Albany County, N.Y., 7 S.Ct. 1234, 121 U.S. 535, 30 L.Ed. 1000—3 C.J. p 306 note 78 [b], p 307 notes 79, 84, p 315 note 36 [b].

Prosecution of both appeal and writ of error
(1) Where there was considerable doubt as to the proper remedy to be pursued on review, a party could prosecute an appeal and writ of error in the same case and at the same time.—Hurst v. Hollingsworth, Tex., 94 U.S. 111, 24 L.Ed. 31—3 C.J. p 343 note 73.
(2) Under Act Sept. 6, 1916, § 4, Comp.St. § 1649a, requiring an appellate court, when a mistake as to the method of review occurs, to disregard it and take the action which would be appropriate, if the proper appellate procedure had been followed, it was unnecessary in cases of doubt both to appeal and bring error.—Essgee Co. of China v. U. S., N.Y., 43 S.Ct. 514, 262 U.S. 151, 67 L.Ed. 917.

Cross writ of error
A party, who escaped reversal of the judgment and remand by permission to file a remission of excessive amount, could not maintain cross-writ of error from federal supreme court.—Woodworth v. Chesbrough, Mich., 37 S.Ct. 583, 244 U.S. 79, 61 L.Ed. 1005, dismissing error Chesbrough v. Woodworth, 37 S.Ct. 579, 244 U.S. 72, 61 L.Ed. 1000, which affirmed 221 F. 912, 137 C.C.A. 482.

43. U.S.—National Exch. Bank v. Peters, Va., 12 S.Ct. 767, 144 U.S. 570, 36 L.Ed. 545.
25 C.J. p 863 note 42—3 C.J. p 319 note 58.

44. U.S.—Gwin v. U. S., Cal., 22 S. Ct. 526, 184 U.S. 669, 46 L.Ed. 741.
3 C.J. p 318 notes 47, 50.

45. U.S.—Laurel Oil & Gas Co. v. Morrison, Ind.T., 29 S.Ct. 394, 212 U.S. 291, 53 L.Ed. 517—Brown v. U. S., Ind.T., 19 S.Ct. 56, 171 U.S. 631, 43 L.Ed. 312.

46. U.S.—Gwin v. U. S., Cal., 22 S. Ct. 526, 184 U.S. 669, 46 L.Ed. 741.

47. U.S.—Gwin v. U. S., supra.

48. U.S.—Columbus Constr. Co. v. Crane Co., Ill., 19 S.Ct. 721, 174 U. S. 600, 43 L.Ed. 1102.

then in the circuit court of appeals, the supreme court, in view of the uncertainty which sometimes attends the determination as to which is the proper appellate tribunal, may proceed to determine the case on its merits.[49]

Existence of other remedies. The existence of another remedy may preclude a review by the supreme court or the review of a particular question,[50] as where there is a remedy in the trial court.[51]

Successive proceedings. Where a party has brought proceedings for review and such proceedings have been determined, he may not again take the same case up for review for the purpose of having determined points which were decided, or might have been decided, in the prior proceeding,[52] although where there have been new proceedings in the case a second appellate proceeding may be prosecuted with reference to alleged errors committed in the new proceedings.[53] Where a case has been brought up by one of the parties and determined, the other party may not subsequently have a review of a question which should have been brought up by cross appeal.[54] If a proceeding for review has been dismissed without a decision on the merits of the case it does not bar seasonable prosecution of another proceeding for review,[55] and where an appeal has been dismissed voluntarily or by the court for failure to comply with some requirement of the law governing the proceeding a second appeal is not barred if taken in due time.[56] A prior appeal which, although not abandoned or dismissed, is for any reason void or ineffectual so that it in no way brings the merits of the case up for review is no bar to the maintenance of a subsequent appeal.[57]

Joinder of proceedings. Two separate and distinct causes resulting in separate judgments should not be brought up for review by a single appeal.[58] A single appeal may, however, be used to obtain review of several causes where they have been completely consolidated into one case.[59]

b. Decisions Reviewable

(1) In general
(2) Dependent on amount in controversy
(3) Dependent on nature and scope of decision
(4) Dependent on rendition, form, or entry of judgment, order, or decree

(1) In General

The decisions reviewable by the supreme court of the United States depend on statutory regulations.

The decisions reviewable by the United States supreme court depend on statutory regulations,[60] and

49. U.S.—Pullman's Palace Car Co. v. Central Transp. Co., Pa., 18 S. Ct. 808, 171 U.S. 138, 43 L.Ed. 108.
3 C.J. p 333 note 61.

50. U.S.—Callan v. May, D.C., 2 Black 541, 17 L.Ed. 281.
3 C.J. p 338 note 15.

51. Motion for new trial
(1) Whether plaintiff should be permitted to make the closing argument to the jury as having the affirmative is purely a question of practice, to be reviewed only by motion for a new trial in the trial court, and cannot be made the subject of a bill of exceptions or writ of error.—Lancaster v. Collins, Mo., 6 S.Ct. 33, 115 U.S. 222, 29 L.Ed. 373—Day v. Woodworth, Mass., 13 How., U.S., 363, 14 L.Ed. 181.
(2) However, where plaintiffs had judgment in a United States circuit court, and sued out a writ of error from the supreme court on the ground of the insufficiency of the damages, an objection that the proper remedy of plaintiffs was by motion for a new trial, and that the question made on the writ of error was substantially a motion for a new trial, was not well founded, where the amount of damages found by the jury was referred to only as showing that their verdict was controlled by the direction of the court.—Tracy v. Swartwout, N.Y., 10 Pet., U.S., 80, 9 L.Ed. 354.

52. U.S.—Tyler v. Magwire, Mo., 17 Wall. 253, 21 L.Ed. 576.

53. U.S.—Tyler v. Magwire, supra.

54. U.S.—Corning v. Troy Iron & Nail Factory, N.Y., 15 How. 451, 14 L.Ed. 768.

Subsequent appeal from affirmed favorable decree
Where a complainant obtains a decree, but not for all the relief prayed by his bill, and respondent appeals, if complainant desires a more favorable decree he must enter a cross appeal, so that, when the decree is considered by the supreme court, he may be heard, and he cannot maintain a subsequent appeal from the decree.—Corning v. Troy Iron & Nail etc., Factory, supra.

55. U.S.—Davis v. Cleveland, C. C. & St. L. R. Co., Iowa, 30 S.Ct. 463, 217 U.S. 157, 54 L.Ed. 708, 27 L. R.A.,N.S., 823, 18 Ann.Cas. 907.
3 C.J. p 348 note 16.

56. U.S.—The Steamer Virginia v. West, Md., 19 How. 182, 15 L.Ed. 594.
3 C.J. p 349 note 18.

57. U.S.—Evans v. State Nat. Bank, La., 10 S.Ct. 493, 131 U.S. 330, 33 L.Ed. 917.

58. U.S.—Brown v. Spofford, D.C., 95 U.S. 474, 24 L.Ed. 508.
3 C.J. p 355 note 57 [a] (2).

59. U.S.—First Nat. Bank of Shreveport v. Louisiana Tax Commission, 53 S.Ct. 511, 289 U.S. 60, 77 L.Ed. 1030, 87 A.L.R. 810, affirming 143 So. 28, 175 La. 19, followed in Commercial Nat. Bank of Shreveport v. Louisiana Tax Commission, 143 So. 32, 175 La. 149, motion denied First Nat. Bank v. Louisiana Tax Commission, 53 S.Ct. 521.

60. U.S.—Beasley v. Texas & P. R. Co., La., 24 S.Ct. 164, 191 U.S. 402, 48 L.Ed. 274—Simms v. Simms, Ariz., 20 S.Ct. 58, 175 U.S. 162, 44 L.Ed. 115.
3 C.J. p 374 note 66.

Cause removed to federal court
Any suit begun in a state court against the Emergency Fleet Corporation can be removed to the courts of the United States and thereafter be subject to review by the supreme court.—Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 386, 258 U.S. 549, 66 L.Ed. 762, reversing, D. C.Wash., 272 F. 132, reversing, D.C. Or., Astoria Marine Iron Works v.

in infra §§ 203–281 the review by the supreme court of decisions of the various federal, state and territorial courts is discussed.

(2) Dependent on Amount in Controversy
(a) In general
(b) Showing and determination of amount or value

(a) In General

Unless statutes impose a pecuniary limit, the appellate jurisdiction of the United States supreme court is not dependent on the amount in controversy.

In the absence of a statutory requirement the appellate jurisdiction of the United States supreme court is not dependent on the amount in controversy.[61] However, in various instances statutes have imposed a pecuniary limit on the appellate jurisdiction of the court, the usual provision being that the amount or matter in dispute shall exceed a certain sum.[62] A statute imposing or changing a pecuniary limitation on appellate jurisdiction applies to causes pending at the time of its adoption[63] unless by the phraseology of the statute pending appeals are exempted.[64] Where the statute requires that the matter in dispute shall exceed a certain sum in dollars, the matter in dispute must have been money or something the value of which can be estimated in money.[65]

The statutes making the right of review depend on the amount in controversy sometimes except from their operation certain classes of cases in which a review may be had without regard to the amount in dispute.[66] The case must fall clearly within an exception or the right to review will be determined by the amount involved.[67] For example, the statutes may except causes involving the validity of patents and copyrights,[68] the validity of a treaty or statute of, or an authority exercised under, the United States,[69] the enforcement of revenue laws[70] or the title to land or a freehold.[71] If the amount involved in the controversy is less than that which gives the court a general jurisdiction and the jurisdiction depends on the jurisdiction of the lower court, the review must be confined to this

U. S. Shipping Board Emergency Fleet Corporation, 270 F. 635, affirming, C.C.A.N.Y., In re Eastern Shore Shipbuilding Corporation, 274 F. 893, leave granted to present petition for rehearing Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 588.

61. U.S.—Kirby v. American Soda Fountain Co., Tex., 24 S.Ct. 619, 194 U.S. 141, 48 L.Ed. 911.
25 C.J. p 864 note 47.

62. U.S.—Wallach v. Rudolph, App. D.C., 30 S.Ct. 587, 217 U.S. 561, 54 L.Ed. 883—Cross v. Burke, D.C., 13 S.Ct. 22, 146 U.S. 82, 36 L.Ed. 896—Parker v. Morrill, Va., 1 S.Ct. 14, 106 U.S. 1, 27 L.Ed. 72—Del Valle v. Harrison, La., 93 U.S. 233, 23 L.Ed. 892.
3 C.J. p 377 note 83, p 378 note 85, p 380 note 99.

By matter in dispute is meant the subject of litigation, the matter on which the action is brought and issue is joined, and with relation to which, if the issue be one of fact, testimony is taken.—Smith v. Adams, Dak., 9 S.Ct. 566, 130 U.S. 167, 32 L. Ed. 895.

Applicability of statutes where United States a party
In the absence of an express exception, statutes imposing pecuniary limitations apply to cases in which the United States is a party.—U. S. v. Broadhead, Cal., 8 S.Ct. 1191, 127 U.S. 212, 32 L.Ed. 147—U. S. v. Union Pac. R. Co., Wyo., 105 U.S. 263, 26 L.Ed. 1021.

Amount equal to sum prescribed
Where the statute provides that the matter in dispute must exceed a certain sum, jurisdiction does not exist because the matter equals the prescribed sum.—Walker v. U. S., La., 4 Wall. U.S., 163, 18 L.Ed. 319.

Statute prescribing jurisdictional amount for inferior court
A statute giving to an inferior federal court original cognizance of cases where the matter in dispute exceeds a certain sum does not affect the pecuniary limit of appellate jurisdiction of the supreme court.—Whitsitt v. Union Depot & R. Co., Colo., 103 U.S. 770, 26 L.Ed. 337.

63. U.S.—Baltimore & P. R. R. Co., D.C., v. Grant, 98 U.S. 398, 25 L. Ed. 231.

64. U.S.—Keller v. Ashford, D.C., 10 S.Ct. 494, 133 U.S. 610, 33 L.Ed. 667.
3 C.J. p 396 note 62.

"Shall hereafter be allowed"
A statute providing that no appeal "shall hereafter be allowed" unless the matter in dispute exceeds a certain sum does not affect pending appeals.—Keller v. Ashford, supra.

65. U.S.—Simms v. Simms, Ariz., 20 S.Ct. 58, 175 U.S. 162, 44 L.Ed. 115—Ritchie v. Mauro, D.C., 2 Pet. 243, 7 L.Ed. 411.
3 C.J. p 381 note 6, p 383 note 33.

66. U.S.—Baltimore & P. R. Co. v. Hopkins, D.C., 9 S.Ct. 503, 130 U. S. 210, 32 L.Ed. 908.

67. U.S.—Cameron v. U. S., Ariz., 13 S.Ct. 184, 146 U.S. 533, 36 L.Ed. 1077—Cogswell v. Fordyce, Cal., 9 S.Ct. 112, 128 U.S. 391, 32 L.Ed. 484.

Certified questions
If the amount in controversy is not sufficient to confer appellate jurisdiction and the jurisdiction is rested on a certificate of division of opinion of the judges in the lower court, the supreme court is without jurisdiction if the case is not properly certified.—Williamsport Nat. Bank v. Knapp, Pa., 7 S.Ct. 274, 119 U.S. 357, 30 L.Ed. 446—3 C.J. p 391 note 20.

68. U.S.—St. Paul Plow Works v. Starling, Minn., 8 S.Ct. 1327, 127 U. S. 376, 32 L.Ed. 251.

Patents for land are not intended, but only patents for inventions and discoveries.—Street v. Ferry, Utah, 7 S.Ct. 231, 119 U.S. 385, 30 L.Ed. 439.

69. U.S.—Washington & G. R. Co. v. District of Columbia, D.C., 13 S.Ct. 64, 146 U.S. 227, 36 L.Ed. 951.
3 C.J. p 392 note 39.

70. **Suit to recover back money collected**
An act of congress authorizing a review by the supreme court of a final judgment in any civil action by the United States for the enforcement of the revenue laws or for the collection of duties without regard to the amount in dispute does not include a suit brought against the collector for the return of duties paid under protest.—Mason v. Gamble, Md., 21 How., U.S., 390, 16 L.Ed. 81.

71. U.S.—Stinson v. Dousman, Minn., 20 How. 461, 15 L.Ed. 966.

Title must be directly in issue
U.S.—Farmers' Bank of Alexandria v. Hooff, D.C., 7 Pet. 168, 8 L.Ed. 646.

particular question, and other questions cannot be considered or decided.[72]

The various statutes providing that the supreme court shall be without appellate jurisdiction unless the matter in dispute exceeds a certain sum of money deprive the court of jurisdiction to review a controversy as to the continuance or dissolution of the marriage relation,[73] a decision as to the custody and care of children,[74] or a judgment in habeas corpus,[75] and unless the jurisdictional amount is shown the court may not review orders or decrees in injunction suits[76] or the action of a lower court on a mandate of the supreme court after a cause is remanded.[77] The emoluments of an office are considered sufficient as the value of that which is in controversy to bring a controversy as to the right to office under the operation of the pecuniary limitations of the statute; if it appears that the emoluments are of a sufficient amount the court will assume jurisdiction.[78] Unless franchises are excepted from the operation of provisions imposing pecuniary limitations on appellate jurisdiction, appeals do not lie from suits involving the acquisition, protection, or forfeiture of a franchise, unless it appears that the value of the franchise reaches the jurisdictional amount.[79] Mandamus proceedings are held to come within the operation of the statutes imposing pecuniary limitations on appellate jurisdiction,[80] and prohibition is likewise brought within the operation of such statutes.[81] When the jurisdictional amount is shown, the court may review judgments, orders, or decrees of the probate courts relating to wills and administration;[82] if the probate of a will has any legal operation and is not merely void, the controversy as to the validity of the probate is a matter in dispute equal to the value of the estate devised away from those seeking to revoke the probate.[83]

(b) Showing and Determination of Amount or Value

The amount in controversy necessary for the exercise of appellate jurisdiction by the United States supreme court must affirmatively appear of record.

The amount in controversy necessary to give the United States supreme court appellate jurisdiction under the various statutes must affirmatively appear of record,[84] the burden being on appellant to establish the jurisdiction.[85] Mere uncertain inference or speculation is not sufficient.[86]

Ordinarily the amount claimed by plaintiff determines the appellate jurisdiction where defendant prevails in the court below;[87] in such case if the amount claimed by plaintiff is not sufficient the court is without jurisdiction.[88] If the judgment below is for plaintiff for less than the jurisdictional amount and defendant appeals, the court ordinarily is without jurisdiction since the amount in controversy, as to defendant, is fixed by the judgment;[89]

72. U.S.—Mississippi Mills v. Cohn, La., 14 S.Ct. 75, 150 U.S. 202, 37 L.Ed. 1052—Ambler v. Eppinger, Fla., 11 S.Ct. 173, 137 U.S. 480, 34 L.Ed. 765.

73. U.S.—Simms v. Simms, Ariz., 20 S.Ct. 58, 175 U.S. 162, 44 L.Ed. 115.

Alimony and counsel fees
The right exists to appeal from a decree for alimony and counsel fees when the amount is sufficient, although the decree as to the divorce itself cannot be reviewed.—Simms v. Simms, supra.

74. U.S.—Perrine v. Slack, App.D.C., 17 S.Ct. 79, 164 U.S. 452, 41 L.Ed. 510—Barry v. Mercein, N.Y., 5 How., U.S., 103, 12 L.Ed. 70.

75. U.S.—Cross v. Burke, D.C., 13 S.Ct. 22, 146 U.S. 82, 36 L.Ed. 896.
3 C.J. p 387 note 89.

76. U.S.—Washington Market Co. v. Hoffman, D.C., 101 U.S. 112, 25 L. Ed. 782.

Decree enjoining prosecution of replevin suit involving less than the prescribed amount is not appealable. —In re Craft, D.C., 8 S.Ct. 509, 124 U.S. 370, 31 L.Ed. 449.

77. U.S.—City Nat. Bank v. Hunter, Tex., 14 S.Ct. 675, 152 U.S. 512, 38 L.Ed. 534.
3 C.J. p 384 note 49.

78. U.S.—U. S. ex rel. Crawford v. Addison, D.C., 22 How. 174, 16 L. Ed. 304.
3 C.J. p 386 note 73.

79. U.S.—El Paso Water Co. v. El Paso, Tex., 14 S.Ct. 494, 152 U.S. 157, 38 L.Ed. 396.

Damages for interference
It must appear in a suit by a corporation having a grant and exclusive privilege from a city, to enjoin interference therewith, that damages to which complainant will be subjected will exceed the jurisdictional limit.—El Paso Water Co. v. El Paso, supra.

80. U.S.—U. S. ex rel. State of South Carolina v. Seymour, 14 S.Ct. 871, 153 U.S. 353, 38 L.Ed. 742—Columbian Ins. Co. v. Wheelright, D.C., 7 Wheat. 534, 5 L.Ed. 516.

81. U.S.—Smith v. Whitney, D.C., 6 S.Ct. 570, 116 U.S. 167, 29 L.Ed. 601.

82. U.S.—Carter v. Cutting, D.C., 8 Cranch 251, 3 L.Ed. 553.

83. U.S.—Carter v. Cutting, supra.

84. U.S.—El Paso Water Co. v. El Paso, Tex., 14 S.Ct. 494, 152 U.S. 157, 38 L.Ed. 396.
3 C.J. p 397 note 67.

Affidavit to show amount
Where the value of the matter in dispute does not appear of record it may be shown by affidavit.—Course v. Stead, Ga., 4 Dall. 22, 1 L.Ed. 724 —25 C.J. p 778 note 92—3 C.J. p 401 note 99.

85. U.S.—Enriquez v. Enriquez, Philippine, 32 S.Ct. 64, 222 U.S. 127, 56 L.Ed. 124—Wilson v. Blair, Neb., 7 S.Ct. 230, 119 U.S. 387, 30 L.Ed. 441.

86. U.S.—Huntington v. Saunders, Mass., 16 S.Ct. 1120, 163 U.S. 319, 41 L.Ed. 174—Cameron v. U. S., Ariz., 13 S.Ct. 184, 146 U.S. 533, 36 L.Ed. 1077.

87. U.S.—Gorman v. Havird, Idaho, 11 S.Ct. 943, 141 U.S. 206, 35 L.Ed. 717.
3 C.J. p 403 note 12.

88. **Allegations held insufficient**
Where the jurisdictional amount was two thousand dollars, exclusive of costs, an allegation that libelant was entitled to recover damages which amounted to the "sum of eighteen hundred dollars and upwards" was insufficient to sustain jurisdiction.—The Falcon, N.Y., 17 How., U. S., 19, 15 L.Ed. 43.

89. U.S.—Walker v. U. S., La., 4 Wall. 163, 18 L.Ed. 319—Bennett v. Butterworth, Tex., 8 How. 124, 12

if in such circumstances plaintiff appeals in order to recover a larger sum, the amount claimed by him in his declaration usually determines the jurisdiction.[90] If plaintiff recovers a part of his demand, then the judgment is against him for that part only which he has failed to recover, and this difference is the criterion of appellate jurisdiction.[91] However, it is not always the sum demanded or claimed which controls, but the jurisdiction depends on the amount or value which is actually in controversy between the parties as the case stands in the supreme court,[92] to ascertain which the supreme court may look into the entire record.[93] The averments of the pleadings will not prevail over the facts pleaded.[94] If the claim is merely colorable or if fictitious demands are inserted or a fictitious amount of damages claimed in order to give jurisdiction, and this latter fact is made to appear, the court will refuse to entertain jurisdiction, because jurisdiction can no more be conferred by improper devices than it can be taken away in such manner.[95]

Particular considerations in determination of amount or value. If plaintiff's claim or the amount involved in the suit is not sufficient to confer appellate jurisdiction at the time of the appeal, the supreme court can acquire no jurisdiction by subsequent enlargement of such claim or amount in controversy by accrual of interest after the entry of the judgment.[96] Where, however, the matter in dispute has reference to the amount at the date of the judgment or decree in the lower court, which includes interest, such interest is properly considered in determining the appellate jurisdiction, as the amount of the whole judgment or decree controls.[97] Where interest on a principal amount is a part of the claim or subject matter involved in the controversy, or where interest is not given eo nomine, as on a contract ascertaining the sum payable, but is part of the damages, it is included in the amount in controversy, and is to be considered in determining appellate jurisdiction.[98] Where the jurisdiction is expressly made to depend on the amount of the judgment recovered or the amount in controversy, exclusive of costs, costs cannot be included, nor will an appeal lie from a judgment for costs only.[99]

Where defendant admits or tenders a part of plaintiff's claim, the balance remaining after deducting the amount admitted or tendered is the amount in controversy.[1] In an action on a bond the amount in controversy is that due as a result of the breach rather than that contained in the penalty of the bond.[2]

It has been held that on appeal by one party, involving an amount sufficient to give jurisdiction, the court will have jurisdiction of an appeal by his opponent from a part of the same judgment against him and in favor of plaintiff, although for less than the jurisdictional amount.[3]

Aggregate of claims, interests, or judgments. Several and separate interests of different appellees cannot be united so as to make up the jurisdictional amount, where such parties could not have united their interests if a recovery had been had against

L.Ed. 1013—Gordon v. Ogden, La., 3 Pet. 33, 7 L.Ed. 592.
3 C.J. p 400 note 95 [a].

90. U.S.—Bennett v. Butterworth, Tex., 8 How. 124, 12 L.Ed. 1013.

91. U.S.—Devere v. The Haverton, La., 11 S.Ct. 35, 137 U.S. 145, 34 L.Ed. 603.
3 C.J. p 404 note 18.

92. U.S.—Gorman v. Havird, Idaho, 11 S.Ct. 943, 141 U.S. 206, 35 L.Ed. 717.
3 C.J. p 401 note 2.

Amount in controversy in lower court
The amount is determined by the case as it stands in the supreme court rather than by the amount in controversy in the lower court.—Gordon v. Ogden, La., 3 Pet., U.S., 33, 7 L.Ed. 592.

93. U.S.—Gorman v. Havird, Idaho, 11 S.Ct. 943, 141 U.S. 206, 35 L.Ed. 717—Gray v. Blanchard, Mich., 97 U.S. 564, 24 L.Ed. 1108.

94. U.S.—Gorman v. Havird, Idaho, 11 S.Ct. 943, 141 U.S. 206, 35 L.Ed. 717.
3 C.J. p 399 note 77.

Bill of particulars
If a greater amount than the sum prescribed is claimed in the declaration and the bill of particulars shows the actual claim to be less than the jurisdictional amount, the bill of particulars determines the jurisdiction.—Gorman v. Havird, supra.

95. U.S.—Magruder v. Armes, D.C., 21 S.Ct. 454, 180 U.S. 496, 45 L.Ed. 638—Northern Pac. R. Co. v. Booth, Minn., 14 S.Ct. 693, 152 U.S. 671, 38 L.Ed. 591—Gorman v. Havird, Idaho, 11 S.Ct. 943, 141 U.S. 206, 35 L.Ed. 717.

96. U.S.—District of Columbia v. Gannon, D.C., 9 S.Ct. 508, 130 U.S. 227, 32 L.Ed. 922.
3 C.J. p 407 note 33.

97. U.S.—Quebec Steamship Co. v. Merchant, N.Y., 10 S.Ct. 397, 133 U.S. 375, 33 L.Ed. 656.
3 C.J. p 408 note 34.

98. U.S.—Woodward v. Jewell, Ga., 11 S.Ct. 784, 140 U.S. 247, 35 L.Ed. 478.
3 C.J. p 408 note 35.

99. U.S.—City Nat. Bank v. Hunter, Tex., 14 S.Ct. 675, 152 U.S. 512, 38 L.Ed. 534.

1. U.S.—Jenness v. Citizens' Nat. Bank of Rome, Mich., 3 S.Ct. 425, 110 U.S. 52, 28 L.Ed. 67—Tintsman v. Mt. Pleasant First Nat. Bank, Pa., 100 U.S. 6, 25 L.Ed. 530.

Defense of usury
Where, in an action to recover a debt, defendant pleads usury and plaintiff's recovery is reduced to that extent, on proceedings brought by plaintiff in the supreme court the amount in controversy between the parties for the purpose of jurisdiction is the difference between the amount of plaintiff's actual recovery and the amount which he sought to recover.—New England Mortg. Security Co. v. Gay, Ga., 12 S.Ct. 815, 145 U.S. 123, 36 L.Ed. 646.

2. U.S.—U. S. v. Hill, Mass., 8 S.Ct. 308, 123 U.S. 681, 31 L.Ed. 275.

3. U.S.—U. S. v. Mosby, Ct.Cl., 10 S.Ct. 327, 133 U.S. 273, 33 L.Ed. 625.
3 C.J. p 432 note 99.

them; nor can the separate and distinct claims or interests of two or more coplaintiffs, codefendants, cointerveners, or other parties to a suit be united for the purpose of giving appellate jurisdiction.[4] Where separate suits involve separate and distinct demands, or subject matters entirely disconnected and independent, appellate jurisdiction cannot be aided by consolidation,[5] although where several suits are actually consolidated so that all the actions are merged and thereafter constitute but a single action the aggregate amount of the claims may be taken as sufficient to confer appellate jurisdiction.[6]

Separate and distinct judgments or decrees cannot be added together in order to give jurisdiction, although the legal questions involved may be identical,[7] but if the subject matter consists of two or more claims by the same person, and the judgment affects the whole of such subject matter, the aggregate value is the amount in controversy;[8] and where several claim under the same title, the validity of which title is necessarily involved in the determination of the cause, the appellate court will have jurisdiction notwithstanding the individual claim of no one of the plaintiffs exceeds the jurisdictional amount, if the whole amount involved is sufficient.[9]

Where several plaintiffs seek one judgment on demands founded on the same liability and the amount decreed against defendant consists of several sums in favor of the various plaintiffs, no one of which sums would come within the jurisdictional amount, but the aggregate of which amount is in excess of the jurisdictional limit, defendant may appeal.[10] However, where a number of separate property owners join in a suit to restrain the collection by a city of special taxes assessed on their separate lots, and to recover back certain parts of the assessments already paid by them respectively, the jurisdictional amount, on an appeal to the supreme court, is to be determined, not by the aggregate of all the assessments, but by the amount assessed against the property of each individual owner; and, if some of such amounts are less than the jurisdictional sum, the appeal must be dismissed as to them.[11] In a proceeding for a peremptory mandamus to compel collection of a tax which has been levied for the joint benefit of the relators the value of the matter in dispute is measured by the whole amount of the tax, and not by the separate amounts into which it is to be divided when collected.[12]

Where the proceeding is by or against several parties jointly, concerning a subject matter of sufficient value to confer appellate jurisdiction, and in which separate and distinct claims are not set up, the value of such property will determine the appellate jurisdiction.[13]

Set-off, counterclaim, and cross bill. Where the only controversy is as to defendant's counterclaim, the amount in controversy, for the purpose of an appeal by defendant, is the difference between the amount claimed by him and the amount recovered.[14] Where there is a judgment against defendant on plaintiff's cause of action and also against him on his counterclaim, the aggregate of the judgment and the counterclaim determines the jurisdiction of an appeal by defendant.[15] Although the amount of the judgment obtained by plaintiff, combined with the amount alleged in the counterclaim, is sufficient to establish the jurisdictional amount, nevertheless the court is without jurisdiction if it appears from an inspection of the record that the evidence proved the existence of a counterclaim for a smaller sum, which, together with the amount of plaintiff's judgment, does not exceed the required jurisdictional amount.[16]

On appeal by defendant from a judgment against him for less than the amount required to give appellate jurisdiction, the amount claimed by him in his cross bill may be added to the amount of the judgment when the matter set up in the cross bill is directly responsive to the averments in the bill, and is directly connected with the transactions which are set up in the bill as the gravamen of

4. U.S.—Chamberlin v. Browning, D. C., 20 S.Ct. 820, 177 U.S. 605, 44 L. Ed. 906.
3 C.J. p 411 note 52, p 429 note 78.

5. U.S.—Gibson v. Shufeldt, Va., 7 S.Ct. 1066, 122 U.S. 27, 30 L.Ed. 1083—Rich v. Lambert & Bro., S. C., 12 How. 347, 13 L.Ed. 1017.

6. U.S.—Baltimore & Ohio Southwestern Railroad Co. v. U. S., Ohio, 31 S.Ct. 368, 220 U.S. 94, 55 L.Ed. 384.
3 C.J. p 413 note 57.

7. U.S.—Hunt v. Bender, Neb., 14 S.Ct. 1163, 154 U.S. 556, 18 L.Ed. 915.
3 C.J. p 413 note 59.

8. U.S.—Hawley v. U. S., Ill., 2 S. Ct. 846, 108 U.S. 543, 27 L.Ed. 820.
3 C.J. p 414 note 65.

9. U.S.—New Orleans Pac. R. Co. v. Parker, La., 12 S.Ct. 364, 143 U.S. 42, 36 L.Ed. 66.

10. U.S.—Shields v. Thomas, Iowa, 17 How. 3, 15 L.Ed. 93.
3 C.J. p 415 note 72.

11. U.S.—Ogden City v. Armstrong, Utah, 18 S.Ct. 98, 168 U.S. 224, 42 L.Ed. 444.

12. U.S.—Davies v. Corbin, Ark., 5 S.Ct. 4, 112 U.S. 36, 28 L.Ed. 627.

13. U.S.—Friend v. Wise, Cal., 4 S. Ct. 695, 111 U.S. 797, 28 L.Ed. 602.
3 C.J. p 416 note 77.

14. U.S.—Carne v. Russ, Ill., 14 S.Ct. 578, 152 U.S. 250, 38 L.Ed. 428.

15. U.S.—Clark v. Sidway, Ill., 12 S.Ct. 327, 142 U.S. 682, 35 L.Ed. 1157.
3 C.J. p 417 note 85, p 418 note 91.

16. U.S.—Bradstreet Co. v. Higgins, Mo., 5 S.Ct. 117, 112 U.S. 227, 28 L.Ed. 715.

plaintiff's case.[17]

Continuing and future rights or liabilities. Payments due and to become due under a decree may be aggregated in order to make up the jurisdictional amount requisite to an appeal.[18] Appellate jurisdiction may be sustained where the value of the right in controversy exceeds the jurisdictional amount, although such value is made up in part of the future exercise of the right, when the continuance of the right is fixed and the value thereof is certainly ascertainable.[19]

Necessity that subject matter be directly involved. The subject matter, the value of which is sought to be made the basis of the appellate jurisdiction, must be directly and actually in issue, and remote consequences and mere incidental or collateral claims will not be considered.[20] Where suit is brought by an individual taxpayer to enjoin the issuance of bonds, the jurisdictional amount is not the amount of the whole issue sought to be enjoined, but the amount of the taxes which complainant will be compelled to pay.[21] The jurisdictional amount must be determined by the amount in controversy in the particular proceeding, and not by the collateral effect of the decision on claims by other parties, or on defendants in another proceeding by the same party.[22]

Effect of agreement or stipulation. Where the case is not one within the appellate jurisdiction by reason of the insufficiency of the actual amount or value involved, the parties cannot, by agreement or stipulation, confer jurisdiction;[23] but such a stipulation may be regarded in a particular case, together with other facts which appear in the record, as sufficient proof of the amount in controversy to sustain the jurisdiction.[24]

Increase or reduction of amount. The trial court may permit an amendment increasing plaintiff's demand, and the amended pleading will determine the amount in controversy.[25] The value of property in dispute, or the amount in controversy, as claimed in plaintiff's amended or supplemental pleading, is the test of appellate jurisdiction, although the amount or value originally alleged was greater.[26]

If the successful party remits a part of the amount in controversy before final judgment the remainder of the claim is the test of jurisdiction on appeal.[27] However, appellate jurisdiction cannot be defeated by a remission after judgment,[28] unless statutes expressly allow a party in whose favor a judgment has been rendered to file a remittitur or release of part of the judgment, and, where such a remittitur or release is duly filed and reduces the amount in controversy below the minimum amount necessary for jurisdiction on appeal, the appeal must be dismissed or otherwise disposed of as though the judgment were for the reduced amount.[29]

After appellate jurisdiction has attached, a partial payment or other satisfaction on a judgment cannot have the effect of preventing a review.[30] However, if a judgment debtor himself procures the partial satisfaction of a judgment by payment, leaving the amount unpaid less than that which is necessary to give appellate jurisdiction, this will be fatal to his right to have the judgment reviewed, since the real matter in dispute in such case is the balance still remaining due on the judgment;[31] and if, pending the action in the trial court, such payment is made or the matter in controversy is partially compromised and settled, the balance left unsettled and unpaid will control the appellate jurisdiction.[32]

Value of property or right involved. Where the subject matter of the controversy is land or other property, real or personal, the right to which is directly in issue, the value of such property is, as a rule, the matter in controversy;[33] if the title to the

17. U.S.—Lovell v. Cragin, La., 10 S. Ct. 1024, 136 U.S. 130, 34 L.Ed. 372.

18. **Payments accruing under separate maintenance decree**
U.S.—Thompson v. Thompson, D.C., 33 S.Ct. 129, 226 U.S. 551, 57 L.Ed. 347.
3 C.J. p 420 note 15 [a].

19. U.S.—Harris v. Barber, D.C., 9 S.Ct. 314, 129 U.S. 366, 32 L.Ed. 697.
3 C.J. p 421 note 16.

20. U.S.—Abadie v. U. S., Cal., 13 S. Ct. 836, 149 U.S. 261, 37 L.Ed. 726, following Cameron v. U. S., Ariz., 13 S.Ct. 184, 146 U.S. 533, 36 L.Ed. 1077.
3 C.J. p 421 note 19.

21. U.S.—Colvin v. Jacksonville, Fla., 15 S.Ct. 866, 158 U.S. 456, 39 L.Ed. 1053.

22. U.S.—U. S. v. Wanamaker, Ga., 13 S.Ct. 279, 147 U.S. 149, 37 L.Ed. 118.
3 C.J. p 422 notes 22, 23.

23. U.S.—Willis v. Eastern Trust & Banking Co., D.C., 17 S.Ct. 739, 167 U.S. 76, 42 L.Ed. 83—Webster v. Buffalo Ins. Co., Mo., 4 S.Ct. 79, 110 U.S. 386, 28 L.Ed. 172.

24. U.S.—U. S. v. Trans-Missouri Freight Assoc., Kan., 17 S.Ct. 540, 166 U.S. 290, 41 L.Ed. 1007.

25. U.S.—Metcalfe v. The Steamship Alaska, N.Y., 9 S.Ct. 461, 130 U.S. 201, 32 L.Ed. 923—Washer v. Bullitt County, Ky., 4 S.Ct. 249, 110 U. S. 558, 28 L.Ed. 249.

26. U.S.—Opelika v. Daniel, Ala., 3 S.Ct. 70, 109 U.S. 108, 27 L.Ed. 873.

27. U.S.—Texas & P. Ry. Co. v. Horn, Tex., 14 S.Ct. 259, 151 U.S. 110, 38 L.Ed. 91.
3 C.J. 423 note 37.

28. U.S.—New York Elevated R. Co. v. Fifth Nat. Bank, N.Y., 7 S.Ct. 23, 118 U.S. 608, 30 L.Ed. 259.

29. U.S.—Simms v. Simms, Ariz., 20 S.Ct. 58, 175 U.S. 162, 44 L.Ed. 115.
3 C.J. p 424 note 41.

30. U.S.—Cooke v. U. S., 2 Wall. 218, 17 L.Ed. 755.

31. U.S.—Thorp v. Bonnifield, Alaska, 20 S.Ct. 533, 177 U.S. 15, 44 L. Ed. 652.

32. U.S.—Cox v. Western Land & Cattle Co., Ill., 8 S.Ct. 162, 123 U. S. 375, 31 L.Ed. 178.

33. U.S.—Kenaday v. Edwards, D.

property claimed or recovered is not in fact in issue, but only a part thereof, the value of that part will control.[34] However, it is not in every case involving property that the value of the property is the matter in dispute.[35] Where the right to the possession only is the matter in controversy, the value of the possession, and not the value of the property, will control as to the amount in controversy.[36]

In a suit involving a mortgage the subject matter involved in a judgment or decree affecting the security is the amount secured by the mortgage.[37] Where the controversy relates only to particular claims in the proceeds of a sale under a mortgage, the amount of the claim or claims governs.[38]

When the controversy relates entirely to the allowance or disallowance of a particular claim out of an entire fund or estate, the amount in controversy is determined by the amount of such claim and not by the value of the whole fund or estate against which it is made.[39] Where the debt of one claiming under an assignment and the fund arising from the property assigned each exceeds the jurisdictional amount, such party is entitled to appeal from an adverse decree in a suit by him against an attaching creditor to have the assignment declared valid, without regard to the amount of the claim of the attaching creditor.[40] If a particular claim against an estate exceeds the jurisdictional amount, the jurisdiction cannot be questioned on the ground that the estate, when distributed, will not yield a sufficient amount.[41] Where the entire fund claimed by two parties is awarded in shares to each, the value of the share of one of the parties who appeals will control the amount in controversy.[42]

In a suit to set aside an alleged fraudulent conveyance or transfer, and to subject the property to the satisfaction of complainant's debt, the debt is the amount involved rather than the value of the property so far as the creditor is concerned.[43]

(3) Dependent on Nature and Scope of Decision

A proceeding for review in the United States supreme court lies only where there has been a decision by a tribunal vested with judicial authority and acting in a judicial capacity. The statutes usually require that the judgment of the inferior court be final.

A proceeding for review in the United States supreme court will lie only where there has been a decision by a tribunal vested with judicial authority and acting in a judicial capacity when making the decision.[44] Although a judgment, order, or decree

C 10 S.Ct. 523, 134 U.S. 117, 33 L.Ed. 853.
3 C.J. p 426 note 55.

Replevin or detinue

(1) In replevin, if it be of goods distrained for rent, the amount for which avowry is made is the value of the matter in controversy; but if the writ be issued to try title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy.—Peyton v. Robertson, D.C., 9 Wheat., U.S., 527, 6 L.Ed. 151.

(2) When in replevin judgment was rendered in favor of plaintiff for a portion of the property delivered under the writ and in favor of defendant for a return of the residue, or its value, the same not being in excess of the jurisdictional amount, the court is without jurisdiction to review the cause at the instance of plaintiff.—Pierce v. Wade, Kan., 100 U.S. 444, 25 L.Ed. 735.

34. U.S.—Vicksburg S. & P. R. Co. v. Smith, La., 10 S.Ct. 728, 135 U.S. 195, 34 L.Ed. 95.
3 C.J. p 426 note 56.

35. Adjudication of possession subject to payment of money

Where plaintiff is adjudged possession and ownership of the property, subject to payment of a money judgment in favor of defendant, and defendant acquiesces, but plaintiff objects to the money judgment, the amount of the money judgment rather than the value of the whole property in controversy is the test of jurisdiction.—Pittsburgh Locomotive & Car Works v. State National Bank of Keokuk, Iowa, 14 S.Ct. 1180, 154 U.S. 626, 24 L.Ed. 270.

Amount claimed on execution

Where a bill was filed to enjoin a marshal from levying execution on certain property, which execution was for a sum less than the jurisdictional amount, an appeal dismissing the bill will not lie although the entire value of the property may exceed the jurisdictional limit.—Ross v. Prentiss, Ill., 3 How., U.S., 771, 11 L.Ed. 824.

36. U.S.—Willis v. Eastern Trust & Banking Co., D.C., 17 S.Ct. 739, 167 U.S. 76, 42 L.Ed. 83.
3 C.J. p 428 note 71.

37. U.S.—Martinez v. International Banking Corporation, Philippine, 31 S.Ct. 408, 220 U.S. 214, 55 L.Ed. 438.

Amount of mortgage or deficiency after foreclosure

Under a bill seeking to reform a deed by which complainant is made to assume payment of a mortgage, the amount in controversy is the amount of the encumbrance and not the amount of the deficiency which may remain after foreclosure.—Elliott v. Sackett, Ill., 2 S.Ct. 375, 108 U.S. 132, 27 L.Ed. 678.

38. U.S.—McMurray v. Moran, Nev., 10 S.Ct. 427, 134 U.S. 150, 33 L.Ed. 814.
3 C.J. p 431 note 90.

39. U.S.—Chapman v. Handley, Utah, 11 S.Ct. 386, 151 U.S. 443, 38 L.Ed. 227.
3 C.J. p 428 note 66.

40. U.S.—Estes v. Gunter, Miss., 7 S.Ct. 851, 121 U.S. 183, 30 L.Ed. 884.
3 C.J. p 428 note 67.

41. U.S.—Clark v. Bever, Iowa, 11 S.Ct. 468, 139 U.S. 96, 35 L.Ed. 88.

42. U.S.—Keogh v. Orient F. Ins. Co., D.C., 14 S.Ct. 1181, 154 U.S. 639, 24 L.Ed. 558.

43. U.S.—Chatfield v. Boyle, Tenn., 105 U.S. 231, 26 L.Ed. 941.
3 C.J. p 429 note 78.

44. U.S.—Campbell v. Boyreau, Cal., 21 How. 223, 16 L.Ed. 96.

Agreed case

It has been held that a writ of error would lie to a judgment entered on an agreed case in a federal circuit court.—U. S. v. Eliason, D.C., 16 Pet., U.S., 291, 10 L.Ed. 968.

Special tribunal

No appeal will lie from the decision of a special tribunal which is not judicial in its nature and which is constituted for a particular purpose.—U. S. v. Ferreira, Fla., 13 How., U.S., 40, 14 L.Ed. 42.

Judgment on appeal from decision of administrative body

Where the procedure in an inferior

is void, and not merely erroneous, it is so far to be considered in existence by the court that it may be reviewed and reversed and the parties restored to the position they originally occupied.[45] The action of a lower court in the exercise of its purely discretionary power will not be reviewed by the supreme court.[46]

Finality of determination. As a general rule, a proceeding for review will not lie from or to an interlocutory decision unless it is expressly permitted by statute; in the absence of such provision, in order that there may be a review, a final judgment, order, or decree must have been rendered in the cause.[47] Ordinarily a judgment, order, or decree which determines the merits of the controversy, or the rights of the parties, and leaves nothing for future determination, is final and appealable.[48] A final judgment is one which disposes of the subject matter of the controversy or terminates the litigation between the parties on the merits;[49] one that leaves nothing to be judicially determined;[50] one which terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.[51] The form of the judgment is conclusive on the question of finality.[52] An order, judgment, or decree which terminates the litigation on the merits of the cause, so that, if there should be an affirmance, the lower court would have nothing to do but execute its decree already entered, is final.[53] A reservation in a decree of a right to apply to the court for any order that may be necessary to the due execution of the decree does not destroy its appealability.[54]

As a general rule an appeal does not lie where a judgment, order, or decree is made or rendered on only part of the issues or causes in the case, leaving others undisposed of.[55] A judgment, order, or decree is not final for the purpose of appeal when it does not settle or adjudicate all the principles or equities of the cause, but only a part of them, or where what is left to be done is something more than is necessary in the mere execution there-

federal court on appeal from the decision of an administrative body contemplates a judicial judgment, the supreme court has jurisdiction, on certiorari, to review the judgment of the inferior court to determine whether or not it is erroneous.—Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., Station WIBO, 53 S.Ct. 627, 289 U.S. 266, 77 L.Ed. 1166, 89 A.L.R. 406, rehearing denied 54 S.Ct. 856, 292 U.S. 613, 78 L.Ed. 1472, and Federal Radio Commission v. North Shore Church, Station WPCC, 54 S.Ct. 856, 292 U.S. 613, 78 L.Ed. 1472, two cases, reversing Nelson Bros. Bond & Mortgage Co. v. Federal Radio Commission, 61 App. D.C. 315, 62 F.2d 854, certiorari granted Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 53 S.Ct. 506, 288 U.S. 597, 77 L.Ed. 974.

Appeals from patent office

(1) Appeal from board of patent appeals' decision denying application for reissue is not within jurisdiction of Supreme Court of United States.—In re Kaser, Cust. & Pat.App., 64 F. 2d 687.

(2) Judgment of court of appeals, refusing to take jurisdiction under the act of March 19, 1930, adopting by § 6, Comp.St. § 9516f, certain provisions of the act of Febr. 20, 1905, 33 U.S.St. at L. p 728, of appeal from commissioner of patents, affirming holding of examiner of interferences, recommending that registration of trade-mark be not canceled, was held not a "judicial judgment," under Act Febr. 20, 1905, § 9, Comp.St. § 9494, but a mere administrative decision, and hence not subject to review by the supreme court, under Const. art. 3.—Postum Cereal Co. v. California Fig Nut Co., App.D.C., 47 S.Ct. 284, 272 U.S. 693, 71 L.Ed. 478.

Judge acting as arbitrator

When a case is referred for arbitration to a judge before whom it does not come in due course of law, no appeal lies from his decision.—Campbell v. U. S., Colo., 32 S.Ct. 398, 224 U.S. 99, 56 L.Ed. 684—Campbell v. Boyreau, Cal., 21 How., U.S., 223, 16 L.Ed. 96.

45. U.S.—Capron v. Van Noorden, N. C., 2 Cranch 126, 2 L.Ed. 229. 3 C.J. p 467 note 88.

46. U.S.—Credits Commutation Co. v. U. S., Neb., 20 S.Ct. 636, 177 U.S. 311, 44 L.Ed. 782, affirming 91 F. 570, 34 C.C.A. 12.

47. U.S.—Louisiana Nav. Co. v. Oyster Commission of Louisiana, La., 33 S.Ct. 78, 226 U.S. 99, 57 L. Ed. 138.
3 C.J. p 433 note 7, p 437 note 13.

48. U.S.—City of Paducah v. East Tennessee Telephone Co., Ky., 33 S. Ct. 816, 229 U.S. 476, 57 L.Ed. 1286.
3 C.J. p 443 note 59, p 444 note 60.

Judgment as a bar

To constitute a final judgment or decree for the purpose of appeal, it is not necessary that it should be a bar to another suit or proceeding.—Beasley v. Texas & P. R. Co., La., 24 S.Ct. 164, 191 U.S. 492, 48 L.Ed. 274, affirming 115 F. 952, 53 C.C.A. 434—3 C.J. p 465 note 73.

Judgment by divided court

The fact that a judgment is rendered by an evenly divided court does not impair its character as a final and appealable judgment.—Hartman v. Greenhow, Va., 102 U.S. 672, 26 L. Ed. 271.

Taxation of costs

A judgment is not deemed final for the purpose of an appeal until the costs are taxed or awarded and inserted therein.—Wheeler v. Harris, N.Y., 13 Wall., U.S., 51, 20 L.Ed. 531—3 C.J. p 465 note 77.

49. U.S.—Bostwick v. Brinkerhoff, N.Y., 1 S.Ct. 15, 106 U.S. 3, 27 L. Ed. 73—Beebe v. Russell, Ark., 19 How. 283, 15 L.Ed. 668.

50. U.S.—Withenbury v. U. S., Ill., 5 Wall. 819, 18 L.Ed. 613.

51. U.S.—Grant v. Phœnix Mut. L. Ins. Co., D.C., 1 S.Ct. 414, 106 U.S. 429, 27 L.Ed. 237.

52. U.S.—Louisiana Nav. Co. v. Oyster Commission of Louisiana, La., 33 S.Ct. 78, 226 U.S. 99, 57 L. Ed. 138.

Face of judgment is test of finality.—Gulf Refining Co. of Louisiana v. U. S., La., 46 S.Ct. 52, 269 U.S. 125, 47 L.Ed. 195, affirming in part and reversing in part, C.C.A., U. S. v. Norvell, 298 F. 281.

53. U.S.—Lewisburg Bank v. Sheffey, Va., 11 S.Ct. 755, 140 U.S. 445, 35 L.Ed. 493.
3 C.J. p 445 note 66, p 586 notes 29, 30.

54. U.S.—Winthrop Iron Co. v. Meeker, Mich., 3 S.Ct. 111, 109 U.S. 180, 27 L.Ed. 898.

55. U.S.—Deslions v. La Compagnie Générale Transatlantique, N.Y., 28 S.Ct. 664, 210 U.S. 95, 52 L.Ed. 973.
3 C.J. p 446 note 88.

of.[56] In the absence of statute, a decree to account is regarded as interlocutory and not appealable;[57] and the fact that the decree grants other relief, such as an injunction,[58] or the payment of money or property into court for preservation,[59] or the setting aside of conveyances,[60] does not affect the rule. However, if the decree disposes of all questions within the pleadings, and nothing remains but to adjust an account between the parties in the execution of the decree, or there is a reference as to a collateral matter only, it is final for the purpose of an appeal;[61] but if a reference is made for a judicial purpose, as to state an account between the parties, on which a further decree is to be entered, the decree is merely interlocutory and an appeal will not lie until after the final decree.[62]

An appeal ordinarily will not lie unless there has been a final disposition of the case, not only as to all the issues, but also as to all of the parties to the suit,[63] although it has been held that a decree may be final for the purpose of appeal as to one or more of several parties in favor of or against whom it finally settles the controversy, although it is interlocutory as to others.[64] An order or decree, final in its nature, which is made in a matter distinct from the general subject of litigation, and which affects only the parties to the particular controversy and those whom they represent, may be appealed from.[65]

There is no final judgment or decree for the purpose of an appeal as long as the cause is still under the control of the trial court by reason of the pendency of a motion for a new trial, for rehearing, to set the judgment aside, or otherwise.[66]

Decisions as to particular matters. The particular matters reviewable by the supreme court usually depend on statutory regulations.[67] Unless otherwise provided by statute, interlocutory orders overruling or sustaining objections as to parties, directing, permitting, or refusing an amendment as to parties, or a substitution or addition of parties, or an order denying a motion to vacate such an order, are not appealable.[68] An order quashing a summons on the ground that defendant was not found within the state, although in form an order to quash and not a dismissal of the suit, is a final judgment reviewable by the supreme court.[69] An order sustaining a demurrer to a pleading, without further action by the court finally determining the particular suit or proceeding, being a mere interlocutory order or decree, is not, in the absence of statute, appealable, but is reviewable only after final judgment or decree.[70] An order striking out an answer and judgment rendered on plaintiff's claim may be reviewed.[71] Whether or not on the transfer of a cause from a state court to a federal court it is necessary to file a new declaration is a question of practice and not subject to review.[72]

A judgment on a plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause.[73] An appeal by a defendant will lie from an order reviving a suit and

56. U.S.—Lodge v. Twell, Mont., 10 S.Ct. 745, 135 U.S. 232, 34 L.Ed. 153.
3 C.J. p 459 note 47.

57. U.S.—Keystone Manganese & Iron Co. v. Martin, Ark., 10 S.Ct. 32, 132 U.S. 91, 33 L.Ed. 275.

58. U.S.—Keystone Manganese & Iron Co. v. Martin, supra.
1 C.J. p 647 note 85.

59. U.S.—Pulliam v. Christian, Va., 6 How. 209, 12 L.Ed. 409.

60. U.S.—Pulliam v. Christian, supra.

61. U.S.—Gulf Refining Co. of Louisiana v. U. S., La., 46 S.Ct. 52, 269 U.S. 125, 70 L.Ed. 195, affirming in part and reversing in part, C.C.A., U. S. v. Norvell, 298 F. 281—Winthrop Iron Co. v. Meeker, Mich., 3 S.Ct. 111, 109 U.S. 180, 27 L.Ed. 898.
1 C.J. p 648 note 90.

62. U.S.—Latta v. Kilbourn, D.C., 14 S.Ct. 201, 150 U.S. 524, 37 L.Ed. 1169.
3 C.J. p 449 note 96.

63. U.S.—Meagher v. Minnesota Thresher Mfg. Co., Minn., 12 S.Ct. 876, 145 U.S. 608, 36 L.Ed. 834.
3 C.J. p 462 note 62.

Decree dismissing bill as to one of several defendants is not final so as to permit an appeal.—Hohorst v. Hamburg-American Packet Co., N.Y., 13 S.Ct. 590, 148 U.S. 262, 37 L.Ed. 443.

64. U.S.—U. S. v. River Rouge Improvement Co., Mich., 46 S.Ct. 144, 269 U.S. 411, 70 L.Ed. 339, reversing, C.C.A., 285 F. 111.
3 C.J. p 464 note 65.

65. U.S.—U. S. v. River Rouge Improvement Co., supra.
3 C.J. p 451 note 8.

66. U.S.—Kingman & Co. v. Western Mfg. Co., Neb., 18 S.Ct. 786, 176 U.S. 675, 42 L.Ed. 1192.
3 C.J. p 465 note 74.

67. U.S.—U. S. ex rel. Mensevich v. Tod, N.Y., 44 S.Ct. 282, 264 U.S. 134, 68 L.Ed. 591.

Change of venue
In the absence of statute an order granting or refusing a change of venue is not subject to review in the supreme court.—Cook v. Burnley, Tex., 11 Wall., U.S., 659, 20 L.Ed. 29—McFaul v. Ramsey, Iowa, 20 How., U.S., 523, 15 L.Ed. 1010.

68. U.S.—Oneida Navigation Corporation v. W. & S. Job & Co., N.Y., 40 S.Ct. 357, 252 U.S. 521, 64 L.Ed. 697—Ex parte Cutting, Mo., 94 U. S. 14, 24 L.Ed. 49.

Intervention
An interlocutory or discretionary order or decree permitting or refusing to permit intervention in the cause is not appealable.—City of New York v. Consolidated Gas Co. of New York, N.Y., 40 S.Ct. 511, 253 U.S. 219, 64 L.Ed. 870, reversing Consolidated Gas Co. of New York v. Newton, 260 F. 1022, 171 C.C.A. 669, which affirmed, D.C., 256 F. 238, certiorari denied 40 S.Ct. 15, 250 U.S. 671, 64 L.Ed. 1199—3 C.J. p 469 note 96 [e] (1), p 478 note 82.

69. U.S.—Rosenberg Bros. & Co. v. Curtis Brown Co., N.Y., 43 S.Ct. 170, 260 U.S. 516, 67 L.Ed. 372, affirming, D.C., 285 F. 879.

70. U.S.—De Armas v. U. S., La., 6 How. 103, 12 L.Ed. 361.

71. U.S.—Fuller v. Claflin, Ark., 93 U.S. 14, 23 L.Ed. 785.

72. U.S.—Ætna Ins. Co. v. Weide, Minn., 9 Wall. 677, 19 L.Ed. 810.

73. U.S.—Fitzpatrick v. Flannagan,

admitting an executor in the place of the deceased complainant, where the original suit has passed to a final decree.[74]

Orders for the production or inspection of books and papers usually are not regarded as final judgments which may be reviewed,[75] and an appeal will not lie from an order merely compelling a witness to appear and testify or to answer certain questions, or holding that certain questions need not be answered;[76] but an order which commits a witness for contempt for refusal to testify is a final order for the purpose of an appeal by him.[77]

An appeal may be taken from a judgment, order, or decree finally dismissing the action or proceeding without plaintiff's consent or granting a judgment or final order of compulsory nonsuit, as such judgment, order, or decree is a final determination of the cause,[78] but, in the absence of a statute, an appeal will not lie at plaintiff's instance from a judgment, order, or decree of dismissal or discontinuance entered at his request or with his consent, or from a voluntary nonsuit.[79] Where an action is dismissed as to one only of two causes of action set up in the bill, declaration, or complaint, leaving the other to stand, an appeal will not lie, unless authorized by statute, while the latter cause of action remains undecided;[80] nor, as a rule, will an appeal lie from a judgment, order, or decree overruling a motion to set aside a dismissal or nonsuit and to reinstate the case.[81] Where a cross bill or cross complaint is dismissed, the order or decree is not appealable before final determination on the original bill or complaint.[82]

Unless the case comes within some special statutory provision, an order granting or denying a motion for a new trial is not reviewable,[83] but the rule does not apply where the question is whether or not the court had jurisdiction to grant or refuse a new trial.[84] An order granting or denying a petition for a rehearing is not appealable.[85]

A judgment finally directing the payment of money is a final judgment which may be reviewed,[86] but an order merely directing the payment of money into court pending litigation as to its ownership is not a final judgment subject to review.[87] A judgment, order, or decree is final for the purpose of appeal where it determines the right to property in contest, real or personal, and directs it to be delivered up or conveyed by one party to the other, and where the party is entitled to have the judgment or decree carried immediately into execution.[88] An order which merely directs a reference is not a final decree subject to review.[89]

An appeal may be taken on matters arising after a final appealable judgment or decree which require the judicial action of the court with relation to the rights litigated in the main suit making necessary a substantive and important order or decree when such order or decree partakes of the nature of a final decision of those rights,[90] although an

Miss., 1 S.Ct. 369, 106 U.S. 648, 27 L.Ed. 211.

Statutory provisions
Under the express provisions of statute there may be no reversal for error in ruling on any plea in abatement other than a plea to the jurisdiction of the court.—Stephens v. Monongahela Nat. Bank of Brownsville, Pa., 4 S.Ct. 336, 111 U.S. 197, 28 L.Ed. 399—Piquignot v. Pennsylvania R. Co., Pa., 16 How., U.S., 104, 14 L.Ed. 863.

74. U.S.—Terry v. Sharon, Cal., 9 S. Ct. 705, 131 U.S. 40, 33 L.Ed. 94.
Denial of reviver may be reviewed. —Ex parte Slater, Mo., 38 S.Ct. 265, 246 U.S. 128, 62 L.Ed. 621.

75. U.S.—Alexander v. U. S., Wis., 26 S.Ct. 356, 201 U.S. 117, 50 L.Ed. 686.
3 C.J. p 496 note 16.
Order of federal court, on petition of interstate commerce commission, filed under Act Febr. 4, 1887, § 12, directing officer of corporation to produce documents called for by the commission, is final, so as to sustain appeal to supreme court.—Ellis v. Interstate Commerce Commission, Ill., 35 S.Ct. 645, 237 U.S. 434, 59 L. Ed. 1036.

76. U.S.—Alexander v. U. S., Wis., 26 S.Ct. 356, 201 U.S. 117, 50 L.Ed. 686.

77. U.S.—Alexander v. U. S., supra.

78. U.S.—Beasley v. Texas & P. R. Co., La., 24 S.Ct. 164, 191 U.S. 492, 48 L.Ed. 274, affirming 115 F. 952, 53 C.C.A. 434.
3 C.J. p 497 note 26.

79. U.S.—Central Transp. Co. v. Pullman's Palace-Car Co., Pa., 11 S.Ct. 478, 139 U.S. 24, 35 L.Ed. 55.
3 C.J. p 501 note 31.

80. U.S.—Ex parte National Enameling & Stamping Co., N.Y., 26 S. Ct. 404, 201 U.S. 156, 50 L.Ed. 707.
3 C.J. p 502 note 42.

81. U.S.—Welch v. Mandeville, D.C., 7 Cranch 152, 3 L.Ed. 299—U. S. v. Evans, Ky., 5 Cranch 280, 3 L. Ed. 101.

82. U.S.—Ayres v. Carver, Miss., 17 How. 591, 15 L.Ed. 179.

83. U.S.—Hume v. Bowie, D.C., 13 S.Ct. 582, 148 U.S. 245, 37 L.Ed. 438.
3 C.J. p 505 note 55.

84. U.S.—Phillips v. Negley, D.C., 6 S.Ct. 901, 117 U.S. 665, 29 L.Ed. 1013.

85. U.S.—Conboy v. First Nat. Bank of Jersey City, N.Y., 27 S.Ct. 50, 203 U.S. 141, 51 L.Ed. 128.

86. U.S.—Wabash & Erie Canal Co. v. Beers, Ind., 1 Black 54, 17 L. Ed. 41—Forgay v. Conrad, La., 6 How. 201, 12 L.Ed. 404.

87. U.S.—Louisiana Nat. Bank v. Whitney, La., 7 S.Ct. 897, 121 U. S. 284, 30 L.Ed. 961.

88. U.S.—Forgay v. Conrad, La., 6 How. 201, 12 L.Ed. 404.
3 C.J. p 513 note 10.

89. U.S.—Grant v. Phoenix Mut. L. Ins. Co., D.C., 7 S.Ct. 849, 121 U.S. 118, 30 L.Ed. 909.

90. U.S.—In re Farmers' Loan & Trust Co., Tex., 9 S.Ct. 265, 129 U.S. 206, 32 L.Ed. 656.
3 C.J. p 518 note 49.

Revival of suit
On a bill in equity to revive, in the name of the executor of plaintiff, a suit in equity which had gone to final decree, a decree of revival, entered after due notice to defendants, and after their appear-

appeal will not lie where the action of the court is in the exercise of a mere ministerial duty.[91] An appeal may lie from a decree, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which originate in it,[92] but, when the decree appealed from is dependent on the decree to execute which it was rendered, it is vacated by the reversal of such prior decree, and in such case the appeal which brings it into review will be dismissed for want of a subject matter on which to operate.[93] An appeal will not lie, unless the case comes within some special statutory provision, from an order setting aside a judgment previously rendered in the cause,[94] unless the court was without jurisdiction to make the order.[95]

Although in particular cases a review has been denied on the ground of want of finality, discretion of the court below, or other special grounds,[96] a review has been allowed from a decree awarding an execution on a judgment[97] and from a judgment refusing to quash or set aside an execution.[98] An appeal will lie from a final decree confirming a judicial sale.[99] An appeal lies from an order or decree ordering the sale of property on foreclosure of a mortgage,[1] although the order or decree is not appealable if it does not ascertain the amount due,[2] or if, without ordering a sale, it directs the cause to stand continued for further order or decree.[3]

As a general rule an appeal will not lie to review a judgment, order, or decree, in so far merely as it awards or denies costs.[4] However, judgments or orders relating to costs may be reviewed where the matter of costs is not a matter of discretion but of positive law, or where, although there is a discretion, such discretion is reviewable.[5]

Where a case is decided on appeal and a mandate issued directing the lower court to enter a specified final judgment or decree, and the court, in obedience to the mandate, enters such judgment or decree, no appeal will lie therefrom.[6] It is otherwise, however, if the lower court renders a judgment or decree different from, or not in substantial compliance with, that directed.[7]

Decisions in particular actions or proceedings. Judgments or orders in attachment proceedings usually are subject to review in the supreme court if they are final,[8] but not, in the absence of statute, if they are merely interlocutory.[9] In partition suits, in the absence of statute no appeal will lie from an order or decree merely appointing commissioners to make a partition and report the same to the court, or from other mere interlocutory orders or decrees.[10] In probate proceedings an appeal will not lie from mere interlocutory orders or decrees, unless

ance and pleading to the bill, is a final decree from which an appeal will lie.—Terry v. Sharon, Cal., 9 S.Ct. 705, 131 U.S. 40, 33 L.Ed. 94.

91. U.S.—Blossom v. Milwaukee & C. R. Co., Wis., 1 Wall. 655, 17 L. Ed. 673.

92. U.S.—Chicago, D. & V. R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 206 U.S. 47, 27 L.Ed. 47.

93. U.S.—Chicago, D. & V. R. Co. v. Fosdick, supra.

94. U.S.—Hume v. Bowie, D.C., 13 S.Ct. 582, 148 U.S. 245, 37 L.Ed. 438.

95. U.S.—Hume v. Bowie, supra.

96. U.S.—Carr v. Hoxie, R.I., 13 Pet. 460, 10 L.Ed. 247.
3 C.J. p 530 note 65 [b], p 531 note 66 [a].

97. U.S.—Clark v. Williard, 54 S. Ct. 615, 292 U.S. 112, 78 L.Ed. 1160, modifying Mieyr v. Federal Surety Co. of Davenport, Iowa, 23 P.2d 959, 94 Mont. 508, certiorari granted Clark v. Williard, 54 S.Ct. 103, 290 U.S. 619, 78 L.Ed. 540.

98. U.S.—New Orleans R. Co. v. Morgan, La., 10 Wall. 256, 19 L.Ed. 892.

Refusal to quash forthcoming bond as part of the process of execution is not a judgment of the court, and much less is it a final judgment subject to review.—Amis v. Smith, Miss., 16 Pet., U.S., 303, 10 L.Ed. 973.

99. U.S.—Sage v. Central R. Co., Iowa, 96 U.S. 712, 24 L.Ed. 641.

1. U.S.—Bronson v. La Crosse & M. R. Co., Wis., 2 Black 524, 17 L.Ed. 347, 359.
42 C.J. p 176 note 13.

2. U.S.—Grant v. Phoenix Mut. L. Ins. Co., D.C., 1 S.Ct. 414, 106 U. S. 429, 27 L.Ed. 237—North Carolina R. Co. v. Swasey, N.C., 23 Wall. 405, 23 L.Ed. 136.

3. U.S.—Burlington, C. R. & N. R. Co. v. Simmons, Iowa, 8 S.Ct. 58, 123 U.S. 52, 31 L.Ed. 73.
42 C.J. p 176 note 18.

4. U.S.—Newton v. Consolidated Gas Co. of New York, N.Y., 44 S. Ct. 481, 265 U.S. 78, 68 L.Ed. 909, setting aside dismissal of appeal and affirming 44 S.Ct. 401, 264 U. S. 571, 68 L.Ed. 855, which dismissed appeal, D.C., Consolidated Gas Co. of New York v. Newton, 291 F. 704.
3 C.J. p 536 note 30.

5. U.S.—Newton v. Consolidated Gas Co. of New York, supra—Florida Internal Impr. Fund v. Greenough, Fla., 105 U.S. 527, 26 L.Ed. 1157.
3 C.J. p 538 note 35.

6. U.S.—Aspen Mining & Smelting Co. v. Billings, Colo., 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.
3 C.J. p 541 note 63.

7. U.S.—In re Sanford Fork & Tool Co., Ind., 16 S.Ct. 291, 160 U.S. 247, 40 L.Ed. 414.
3 C.J. p 541 note 64.

8. U.S.—Fitzpatrick v. Flannagan, Miss., 1 S.Ct. 369, 106 U.S. 648, 27 L.Ed. 211.

Disposition of claim of intervener
Order finally disposing of the issue against the intervening claimant is subject to review.—Gumbel v. Pitkin, La., 5 S.Ct. 616, 113 U.S. 545, 28 L.Ed. 1128.

Order distributing proceeds of sale
Where goods taken in attachment are sold, an order distributing the proceeds of the sale is final, as it disposes of the fund.—Gumbel v. Pitkin, supra.

9. U.S.—Leitensdorfer v. Webb, N. M., 20 How. 176, 15 L.Ed. 891.

10. U.S.—Clark v. Roller, 26 S.Ct. 141, 199 U.S. 541, 50 L.Ed. 300, modifying 19 App.D.C. 539.
3 C.J. p 567 note 38.

it is authorized by some special statutory provision.[11]

An appeal will lie from a final order or decree in a suit for an injunction as from other final orders or decrees, and, as a rule, an order or decree is final for the purpose of appeal when it disposes of the controversy;[12] but, unless the case comes within some special statutory provision, an appeal will not lie from an order or decree granting, continuing, refusing, dissolving, or refusing to dissolve a preliminary injunction or from any other mere interlocutory order or decree.[13]

Decisions of intermediate appellate courts. The statutes regulating reviews by the United States supreme court of decisions of intermediate appellate courts usually require that the judgment, order, or decree of the intermediate court be a final one.[14] A judgment, order, or decree of an intermediate appellate court is not final unless it finally and fully determines the controversy.[15] On the other hand, it is final if it disposes of the controversy and leaves nothing further to be done in the trial court except to carry into effect the mandate of the intermediate court.[16] The judgment of the intermediate court, to be final and appealable, must dispose of the case as to all the parties.[17]

A judgment of an intermediate appellate court dismissing an appeal or writ of error from or to an inferior court for want of jurisdiction, and thus finally disposing of the case so far as the intermediate court is concerned, is subject to review in the supreme court,[18] but a proceeding will not lie to review an order of dismissal where no final judgment has been rendered or entered.[19]

A judgment of affirmance of the intermediate appellate court, if it is final, is reviewable by the supreme court,[20] but, as a rule, a judgment of affirmance which is not final is not subject to review,[21] as in the case of affirmance of a judgment and a remand of the cause for further proceedings.[22]

A judgment of an intermediate appellate court is final and reviewable where it reverses the judgment or decree of the lower court, and either renders judgment of dismissal or other judgment finally disposing of the case, or remands the cause to the lower court with specific directions to dismiss it or to render any other final judgment or decree, so that no further proceedings are to be had in the lower court except to carry the mandate into effect;[23] but,

11. U.S.—Young v. Smith, Ala., 15 Pet. 287, 10 L.Ed. 741.

12. U.S.—Chesapeake & P. Telephone Co. v. Manning, D.C., 22 S.Ct. 881, 186 U.S. 238, 46 L.Ed. 1144—Washington, G. & A. R. Co. v. Bradleys, D.C., 7 Wall. 575, 19 L.Ed. 274.

Appeal from portions of decree in appellant's favor

Where telephone company procured permanent injunction unqualifiedly restraining, as confiscatory, enforcement of public service commission's rate orders, it could not appeal from portions of decree fixing value of its property for 1924, 1926, and 1928, and rate of return to be allowed, since such portions would not be res judicata in event of further legislative action by commission.—New York Telephone Co. v. Maltbie, N.Y., 54 S.Ct. 443, 291 U.S. 645, 78 L.Ed. 1041.

13. U.S.—City of Paducah v. East Tennessee Telephone Co., Ky., 33 S.Ct. 816, 229 U.S. 476, 57 L.Ed. 1286—Buffington v. Harvey, Ill., 95 U.S. 99, 24 L.Ed. 381.

3 C.J. p 559 note 8.

Merger in final decree

(1) Order granting interlocutory injunction is not appealable, where permanent injunction was later granted.—Smith v. Illinois Bell Telephone Co., Ill., 46 S.Ct. 408, 270 U.S. 587, 70 L.Ed. 747.

(2) Where, on application for an interlocutory injunction, the injunction was refused, and a decree entered dismissing the suit, the denial of the interlocutory application was merged in the final decree, and was not appealable.—Shaffer v. Carter, Okl., 40 S.Ct. 221, 252 U.S. 37, 64 L.Ed. 445.

14. U.S.—Warner v. Grayson, D.C., 26 S.Ct. 240, 200 U.S. 257, 50 L.Ed. 470—Loeber v. Schroeder, Md., 13 S.Ct. 934, 149 U.S. 580, 37 L.Ed. 856—Beaupre v. Noyes, Minn., 11 S.Ct. 296, 138 U.S. 397, 34 L.Ed. 991.

3 C.J. p 584 note 21.

Review of decisions of federal, state, and territorial courts see infra §§ 203–281.

15. U.S.—Macfarland v. Brown, D.C., 23 S.Ct. 105, 187 U.S. 239, 47 L.Ed. 159.

3 C.J. p 585 note 26.

16. U.S.—Beasley v. Texas & P. R. Co., La., 24 S.Ct. 164, 191 U.S. 492, 48 L.Ed. 274, affirming 115 F. 952, 53 C.C.A. 434.

3 C.J. p 585 note 27.

17. U.S.—Meagher v. Minnesota Thresher Mfg. Co., Minn., 12 S.Ct. 876, 145 U.S. 608, 36 L.Ed. 834.

18. U.S.—Aztec Mining Co. v. Ripley, N.M., 14 S.Ct. 236, 151 U.S. 79, 38 L.Ed. 80.

3 C.J. p 587 note 42.

19. U.S.—Crawford v. Haller, Wash., 4 S.Ct. 697, 111 U.S. 796, 28 L.Ed. 602.

3 C.J. p 588 note 49.

20. U.S.—Salomon v. State Tax Commission of New York, 49 S.Ct. 192, 278 U.S. 484, 73 L.Ed. 464, affirming In re Hecht's Estate, 159 N.E. 668, 246 N.Y. 602, and In re Simonson's Estate, 159 N.E. 668, 246 N.Y. 601, both of which affirmed In re Hecht's Estate, 220 N.Y.S. 325, 219 App.Div. 656, which affirmed 216 N.Y.S. 321, 127 Misc. 211—Texas & P. R. Co. v. Gentry, Tex., 16 S.Ct. 1104, 163 U.S. 353, 41 L.Ed. 186.

3 C.J. p 589 note 63.

21. U.S.—Missouri & K. I. R. Co. v. Olathe, Kan., 32 S.Ct. 46, 222 U.S. 185, 56 L.Ed. 155.

3 C.J. p 589 note 66.

Taxation of costs

Decree of affirmance without taxation of costs is not a final decree subject to review.—Wheeler v. Harris, N.Y., 13 Wall., U.S., 51, 20 L.Ed. 531—3 C.J. p 596 note 97.

22. U.S.—Arnold v. U. S. for use of W. B. Guimarin & Co., S.C., 44 S.Ct. 144, 263 U.S. 427, 68 L.Ed. 371, dismissing error, C.C.A., 280 F. 338—Missouri & K. I. R. Co. v. Olathe, Kan., 32 S.Ct. 46, 222 U.S. 185, 56 L.Ed. 155.

3 C.J. p 589 note 67.

23. U.S.—Gulf Refining Co. of Louisiana v. U. S., La., 46 S.Ct. 52, 269 U.S. 125, 47 L.Ed. 195, affirm-

in the absence of a statute to the contrary, a judgment of reversal, either in whole or in part, is not final for the purpose of review, where it remands the cause to the lower court for further proceedings in that court;[24] and a judgment reversing an interlocutory order or decree is not final or appealable, unless by special statutory provision.[25] A judgment of the intermediate court reversing the judgment or decree of the lower court in part and affirming it in part is not appealable as a final judgment, unless it is such that no further proceedings can be had in the lower court except to carry the mandate into effect.[26] A judgment of an intermediate court reversing the judgment of the inferior court and ordering a new trial is not a final judgment subject to review.[27]

Where the decision of the intermediate appellate court was discretionary, an appeal will not lie to review it in the absence of an abuse of discretion.[28]

(4) Dependent on Rendition, Form, or Entry of Judgment, Order, or Decree

An order or judgment made or rendered by a judge at chambers is not reviewable by the United States supreme court.

In the absence of statute, an order or judgment made or rendered by a judge at chambers is not reviewable by the United States supreme court,[29] and the fact that an order purports to have been made by the court does not render it appealable when it was, in fact, the order of the individual judge, and not of the court.[30] Where a judgment must be final in order to be reviewable, an appeal will not lie from a judgment which is not signed by the judge where the signature of the judge is necessary to its finality.[31] Mere informalities in the entry of a judgment will not generally prevent a review.[32]

c. Right of Review

Generally, review may be sought in the supreme court by, and only by, parties to the proceeding or determination below, and their representatives and privies, provided they have an interest in the subject matter of the controversy and are injuriously affected by the judgment or decree sought to be reviewed; but the right to obtain review may be lost by waiver or estoppel.

While the right to appeal to the supreme court from a judgment, order, or decree of an inferior court is, broadly speaking, a reciprocal one, which must be accorded to all parties without discrimination,[33] such right may be exercised by, and only by, one who was a party to the action or proceeding below, or to the judgment, order, or decree, or who is a legal representative of, or privy to, a party;[34] and such party, representative, or privy must have or represent an interest in the subject matter of the controversy,[35] and be injuriously affected or aggrieved by the judgment, order, or decree complained of.[36]

ing in part and reversing in part, C.C.A., U. S. v. Norvell, 298 F. 281—Chesapeake & P. Telephone Co. v. Manning, D.C., 22 S.Ct. 881, 186 U.S. 238, 46 L.Ed. 1144.
3 C.J. p 590 note 74.

24. U.S.—Martinez v. International Banking Corp., Philippine, 31 S. Ct. 408, 220 U.S. 214, 55 L.Ed. 438.
3 C.J. p 591 note 76.

25. U.S.—Tippecanoe County v. Lucas, Ind., 93 U.S. 108, 23 L.Ed. 822.
3 C.J. p 591 note 77.

26. U.S.—Earle v. Myers, D.C., 28 S.Ct. 86, 207 U.S. 244, 52 L.Ed. 191—Montana Min. Co. v. St. Louis Min. & Mill. Co., Mont., 22 S. Ct. 744, 186 U.S. 24, 46 L.Ed. 1039.

27. U.S.—Johnson v. Keith, Mo., 6 S.Ct. 669, 117 U.S. 199, 29 L.Ed. 888.
3 C.J. p 592 note 82.

28. U.S.—Conboy v. First Nat. Bank of Jersey City, N.Y., 27 S.Ct. 50, 203 U.S. 141, 51 L.Ed. 128.
3 C.J. p 596 note 1.

29. U.S.—Lambert v. Barrett, N.J., 15 S.Ct. 722, 157 U.S. 697, 39 L.Ed. 865.
3 C.J. p 609 note 1.

Final order at stated term

Although a writ of habeas corpus was granted by a circuit judge at chambers, an appeal was proper where the final order, overruling the return and discharging the prisoner, was made by the court at a stated term.—Harkrader v. Wadley, Va., 19 S.Ct. 119, 172 U.S. 148, 43 L.Ed. 399.

30. U.S.—Carper v. Fitzgerald, Va., 7 S.Ct. 825, 121 U.S. 87, 30 L.Ed. 882.

31. U.S.—New York Life & Fire Ins. Co. v. Wilson, La., 8 Pet. 291, 8 L.Ed. 949.

32. U.S.—New Orleans Railroad v. Morgan, La., 10 Wall. 256, 19 L. Ed. 892.
3 C.J. p 615 note 36.

33. U.S.—The Sydney, N.Y., 11 S. Ct. 620, 139 U.S. 331, 35 L.Ed. 177.
3 C.J. p 616 note 50.

Separate appeals

Different parties to an action who are separately aggrieved by a judgment, order, or decree are entitled separately to appeal therefrom or to sue out separate writs of error.—Cox v. U. S., La., 6 Pet. 172, 8 L. Ed. 359—3 C.J. p 622 note 10.

34. U.S.—In re Leaf Tobacco Bd. of Trade, 32 S.Ct. 833, 222 U.S. 578, 56 L.Ed. 323.
3 C.J. p 616 note 55, p 617 note 57, p 618 note 66.

Privity with parties

(1) The term "privies," within the meaning of the rule, includes, according to the nature of the subject matter and the judgment, heirs, executors and administrators, terre-tenants, or those having an interest in remainder or reversion, or one who is made a party by the law, as he who comes in as a vouchee.—Green v. Watkins, Ky., 6 Wheat. 260, 5 L.Ed. 256.

(2) A writ of error will lie in the name of the heirs of a deceased tenant by a landlord who had undertaken the defense of the suit in the name of his tenant with the latter's consent.—Kellogg v. Forsyth, Ill., 24 How., U.S., 186, 16 L.Ed. 654.

35. U.S.—McCandless v. Pratt, Hawaii, 29 S.Ct. 144, 211 U.S. 437, 53 L.Ed. 271.
3 C.J. p 624 note 18.

36. U.S.—Lewis v. U. S., Mo., 30 S. Ct. 438, 216 U.S. 611, 54 L.Ed. 637.
3 C.J. p 629 note 3.

Correct decision

A party cannot appeal from a decision which is correct as far as his interests are concerned, or which does not affect his interests, however erroneous and prejudicial it may be to the rights and interests

In accordance with the foregoing rules, particular litigants and persons in particular relations may or may not be entitled to obtain review of a judgment or decree, depending on the existence of the requisite interest and prejudice, as, for example, claimants to a particular fund or property,[37] interveners,[38] bankrupts and insolvents,[39] heirs at law of a party,[40] stockholders or bondholders of a corporate party,[41] purchasers at judicial or execution sales,[42] receivers, commissioners, or other like officers,[43] trustees,[44] states and territories,[45] and the United States.[46]

Deprivation or loss of right. While a party cannot, as a rule, be deprived of his right of appeal to the supreme court by the fault of a court or public officer,[47] he may waive such right, or be estopped

of some other party or person.—Crawshay v. Soutter, Wis., 6 Wall. 739, 18 L.Ed. 845.

Injury from part of judgment

A party who is aggrieved by only one part of a judgment or decree cannot by appeal question another part which has no bearing or effect on his rights or interests; he can complain of only such parts of the judgment or decree as affect him.—Sage v. Central R. Co. of Iowa, Iowa, 93 U.S. 412, 23 L.Ed. 933.

Judgment in own favor

(1) A plaintiff or defendant cannot ordinarily appeal or prosecute a writ of error from or to a judgment, order, or decree in his own favor, since he is not aggrieved thereby.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 59 S.Ct. 480, 306 U.S. 204, 83 L.Ed. 608, dismissing appeal, D.C., Brashear Freight Lines v. Public Service Commission of Missouri, 23 F. Supp. 865, rehearing denied Public Service Commission of State of Missouri v. Brashear Freight Lines, 59 S.Ct. 784, 306 U.S. 669, 83 L.Ed. 1063.

(2) Telephone company, which secured decree in its favor in district court, was not entitled to prosecute appeal for purpose of procuring review of findings of court with respect to value of company's property or other findings.—Lindheimer v. Illinois Bell Telephone Co., Ill., 54 S.Ct. 658, 292 U.S. 151, 78 L.Ed. 1182.

(3) However, a party may prosecute a writ of error to reverse a judgment which is in form or partly in his favor, if it does not give him all he is entitled to or is otherwise erroneous and prejudicial.—Capron v. Van Noorden, N.C., 2 Cranch 126, 2 L.Ed. 229.

37. **Diversion of fund**

Party claiming fund has a right to appeal from an order diverting the fund for other purposes.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.

38. U.S.—City of Chicago v. Chicago Rapid Transit Co., Ill., 52 S. Ct. 2, 284 U.S. 577, 76 L.Ed. 501—Savannah v. Jesup, Ga., 1 S. Ct. 512, 106 U.S. 563, 27 L.Ed. 276.

City in rate litigation

In a suit by a railway company against commerce commission and attorney general to restrain the enforcement of a rate order, such defendants not appealing from an injunction, the city, intervening defendant, had no separate standing entitling it to appeal.—City of Chicago v. Chicago Rapid Transit Co., Ill., 52 S.Ct. 2, 284 U.S. 577, 76 L.Ed. 501.

Intervention rejected

(1) As a rule one whose application to intervene, or to be admitted as a party defendant, in a suit has been rejected by the court cannot appeal from the final judgment rendered in the suit.—Guion v. Liverpool, L. & G. Ins. Co., Ind., 3 S.Ct. 108, 109 U.S. 173, 27 L.Ed. 895.

(2) He may not appeal from the judgment, order, or decree dismissing his petition or motion for intervention where such ruling is not appealable because it is discretionary.—Ex parte Cutting, Mo., 94 U.S. 14, 24 L.Ed. 49.

39. **Defendant who receives his discharge** in bankruptcy or insolvency pending an action, and who is protected by such discharge, has no further interest therein, and cannot appeal or bring error to review a judgment rendered against him prior to his discharge.—Knox v. Exchange Bank, Va., 12 Wall. 379, 20 L.Ed. 287.

40. **Action involving realty**

Where a party to a real action involving real property dies pending the action or after judgment, his heirs at law may seek review of a judgment therein.—Green v. Watkins, Ky., 6 Wheat. 260, 5 L.Ed. 256.

41. U.S.—Ex parte Cutting, Mo., 94 U.S. 14, 24 L.Ed. 49.

As parties or quasi parties

If stockholders, bondholders, or noteholders have been made parties or quasi parties to the litigation, or have become parties by intervention, they may appeal or bring error to protect their interests.—Perlman v. U. S., N.Y., 38 S.Ct. 417, 247 U.S. 7, 62 L.Ed. 950—3 C.J. p 652 note 88.

42. U.S.—Williams v. Morgan, La., 4 S.Ct. 638, 111 U.S. 684, 28 L.Ed. 559.

Order refusing to confirm sale is one as to which purchaser has right of review since, by acceptance of his bid, he becomes a party in a sense and has an interest.—Kneeland v. American L. & T. Co., Ind., 10 S.Ct. 950, 136 U.S. 89, 34 L.Ed. 379—3 C.J. p 652 note 91.

Distribution of proceeds

(1) A purchaser cannot appeal from an order making a distribution of the proceeds of the sale.—Central Trust Co. v. Grant Locomotive Works, Ohio, 10 S.Ct. 736, 135 U.S. 207, 34 L.Ed. 97.

(2) Such right exists, however, where, by an agreement recognized by the court, the purchasers are interested in the matter of the distribution to pay expenses and allowances.—Williams v. Morgan, La., 4 S.Ct. 638, 111 U.S. 684, 28 L.Ed. 559.

43. U.S.—Hinckley v. Gilman, C. & S. R. Co., Ill., 94 U.S. 467, 24 L. Ed. 166.

Settlement of account

Receiver may appeal from orders relating to the settlement of his account.—Hinckley v. Gilman, etc., R. Co., Ill., 94 U.S. 467, 24 L.Ed. 166.

Leave to appeal

Allowance of a receiver's appeal by a circuit justice is equivalent to leave by the court to the receiver to take an appeal, so that a motion to dismiss for lack of court permission to appeal will be denied.—Farlow v. Kelly, Ohio, 131 U.S. appendix cci, 26 L.Ed. 427.

44. U.S.—Hassall v. Wilcox, Ind., 6 S.Ct. 189, 115 U.S. 598, 29 L.Ed. 504.

45. U.S.—South Carolina v. Wesley, S.C., 15 S.Ct. 230, 155 U.S. 542, 39 L.Ed. 254—Georgia v. Jesup, Ga., 1 S.Ct. 363, 106 U.S. 458, 27 L. Ed. 216.

46. **Under an act of congress** of March 3, 1887, authorizing suits against the United States, the latter may appeal from any judgment, for any amount, rendered against it.—U. S. v. Davis, Md., 9 S.Ct. 657, 131 U.S. 36, 33 L.Ed. 93.

Private land claims

Being a proper and necessary party to the suit, United States may appeal from a decision by the court of private land claims in favor of a petitioner, although it has no interest in the result of the litigation.—U. S. v. De Conway, 20 S. Ct. 13, 175 U.S. 60, 44 L.Ed. 72.

47. U.S.—New York Mut. L. Ins. Co. v. Phinney, Wash., 20 S.Ct. 906, 178 U.S. 327, 44 L.Ed. 1088—

to assert it,[48] as where he voluntarily acquiesces in, ratifies, or recognizes the validity of, the judgment, order, or decree against him, or otherwise takes a position which is inconsistent with the right to appeal therefrom.[49] So a party's right of review is waived or estopped where the judgment, order, or decree is regularly rendered or made, on agreement or otherwise, with his express or implied assent;[50] but a voluntary compliance with the judgment, order, or decree by payment or performance is not necessarily a bar to obtaining its review, particularly where restitution may be enforced, or the effect of compliance may be otherwise undone, in case of a reversal,[51] except where the payment or performance is by way of compromise or agreement to settle the controversy,[52] or where compliance with the judgment or decree leaves nothing on which a judgment of reversal can operate, so that only a moot question remains.[53] So, also, the voluntary acceptance of benefits accruing under a judgment or decree may operate as a waiver or release of errors, estopping the party from obtaining review,[54] unless the circumstances are such that the action taken is not inconsistent with assertion of the right to obtain review of the determination.[55] As a rule, the right to prosecute an appeal to the supreme court will not be lost by pursuing some other remedy.[56]

Martin v. Hunter, Va., 1 Wheat. 304, 4 L.Ed. 97.

48. U.S.—Elwell v. Fosdick, Ill., 10 S.Ct. 598, 134 U.S. 500, 33 L.Ed. 998.

A formal release of errors, for a valuable consideration, or under seal, will waive the right, or estop the party, to prosecute a writ of error as to such errors as are covered by the release.—Elwell v. Fosdick, supra—3 C.J. p 663 note 7.

Evidence of waiver

Affidavits and other competent evidence dehors the record may be received to establish the fact that appellant or plaintiff in error has, since the judgment, order, or decree complained of, abandoned or waived the right to prosecute the appeal or proceeding in error.—Elwell v. Fosdick, Ill., 10 S.Ct. 598, 134 U.S. 500, 33 L.Ed. 998.

49. U.S.—Crawshay v. Soutter, Wis., 6 Wall. 739, 18 L.Ed. 845.

Acquiescence held not shown

A party cannot be held to have acquiesced in an interlocutory order or decree by proceeding in the case if such action is not inconsistent with an appeal, as where there is no stay of proceedings and it is necessary for him to go on in order to protect his rights, and he has made and entered proper objections and exceptions.—Stone v. South Carolina, S.C., 6 S.Ct. 799, 117 U.S. 430, 29 L.Ed. 962.

50. U.S.—U. S. v. Babbitt, 104 U.S. 767, 26 L.Ed. 921.

Judgment not covered by consent

The consent of a party to a particular judgment, order, or decree will not preclude him from appealing from a subsequent judgment, order, or decree not in conformity to, or covered by, his consent.—Livingston v. Woodworth, Mass., 15 How. 546, 14 L.Ed. 809.

51. U.S.—Dakota County v. Glidden, Neb., 5 S.Ct. 428, 113 U.S. 222, 28 L.Ed. 981—O'Hara v. MacConnell, Pa., 93 U.S. 150, 23 L.Ed. 840.

The involuntary payment, performance, or satisfaction of a judgment, order, or decree does not affect the right to appeal or bring error therefrom.—O'Hara v. McConnell, supra.

Avoiding compulsory enforcement

Whether payment or performances of a judgment, order, or decree is voluntary or involuntary depends upon the circumstances. Payment, performance, or satisfaction of a judgment, order, or decree on execution or to avoid its compulsory enforcement by pending or threatened execution, contempt proceedings, or otherwise, is regarded as coerced, and not voluntary within the rule that a voluntary payment, performance, or satisfaction bars an appeal or proceeding in error for reversal. —O'Hara v. McConnell, supra.

52. U.S.—Little v. Bowers, N.J., 10 S.Ct. 620, 134 U.S. 547, 33 L.Ed. 1016—Dakota County v. Glidden, Neb., 5 S.Ct. 428, 113 U.S. 222, 28 L.Ed. 981.

53. U.S.—American Book Co. v. State of Kansas, Kan., 24 S.Ct. 394, 193 U.S. 49, 48 L.Ed. 613. 3 C.J. p 676 note 1.

54. U.S.—Crawshay v. Soutter, Wis., 6 Wall. 739, 18 L.Ed. 845.

Amount less than claim

Acceptance or collection of amount of judgment for less than amount of claim is sufficient to estop a party from appealing for the purpose of modifying the judgment so as to increase the amount of the recovery. —U. S. v. Benedict, N.Y., 43 S.Ct. 357, 261 U.S. 294, 67 L.Ed. 662, affirming, C.C.A., 280 F. 76.

55. U.S.—Gilfillan v. McKee, App.D.C., 16 S.Ct. 6, 159 U.S. 303, 40 L.Ed. 161.

Right to review not waived or estopped

(1) Where the right to the benefit received is conceded by the opposite party or appellant is entitled thereto in any event, so that it could not be denied if the portions of the judgment or decree granting it should be reversed.—Erwin v. Lowry, La., 7 How. 172, 12 L.Ed. 655.

(2) Where appellant is shown to be so absolutely entitled to the sum collected or accepted that reversal of the judgment or decree will not affect his right to it, as in the case of the collection of an admitted or uncontroverted part of his demand, and in other like cases.—Erwin v. Lowry, supra.

(3) Where the controversy is a separable one and the different parts of the judgment, order, or decree are separate and independent, so that acceptance of a benefit from the part which is favorable is not inconsistent with an appeal from the part which is adverse.—Gilfillan v. McKee, App.D.C., 16 S.Ct. 6, 159 U.S. 303, 40 L.Ed. 161—Terry v. Abraham, Ga., 93 U.S. 38, 23 L.Ed. 794.

(4) The receipt by an appellant of the balance remaining after the satisfaction of prior liens does not estop him from appealing from that part of the decree adjudging the priority of those liens.—Reynes v. Dumont, N.Y., 9 S.Ct. 486, 130 U.S. 354, 32 L.Ed. 934.

(5) The acceptance of a share in a special fund does not operate as a waiver of an appeal from another part of the decree disposing of the general fund.—Gilfillan v. McKee, D.C., 16 S.Ct. 6, 159 U.S. 303, 40 L.Ed. 161.

56. **Bill of review**

The filing and prosecution of a bill of review, or of a petition in the nature thereof, is not a waiver of the right to appeal from the original judgment of decree, at least where there is no action of the court on the petition and answer.—O'Hara v. MacConnell, Pa., 93 U.S. 150, 23 L.Ed. 840.

Motion for new trial

A mere motion or petition, for a new trial not granted, does not

d. Presentation and Reservation in Lower Court of Grounds of Review

As a general rule, questions not raised and properly preserved for review in the trial court, by objections and exceptions to the court's ruling thereon, will not be considered on review by the supreme court.

Necessity and sufficiency in general. Subject to a few exceptions and limitations,[57] the general rule is that questions, of whatever nature, not raised and properly preserved for review in the trial court will not be noticed on appeal to the supreme court;[58] and this is the case, irrespective of consent or waiver by the parties and notwithstanding any stipulations to the contrary into which they may have entered.[59] Accordingly, the supreme court will not consider or entertain particular questions or matters not raised in the court below, as with respect to relief,[60] causes of action or grounds for recovery,[61] grounds of defense or opposition,[62] or con-

waive a writ of error.—U. S. v. Hodge, La., 6 How. 279, 12 L.Ed. 437.

Appeal to circuit court of appeals

The fact that an appeal might have been taken to the supreme court in the first instance does not estop appellant from subsequently appealing to that court from the judgment of the circuit court of appeals to which the cause was first taken.—Northern Pac. R. Co. v. Amato, N.Y., 12 S.Ct. 740, 144 U.S. 465, 36 L.Ed. 596, affirming 49 F. 881, 1 C.C.A. 468.

57. U.S.—Hormel v. Helvering, 61 S.Ct. 719, 312 U.S. 552, 85 L.Ed. 1037, affirming, C.C.A., Helvering v. Hormel, 111 F.2d 1, certiorari granted Hormel v. Helvering, 61 S. Ct. 35, 311 U.S. 626, 85 L.Ed. 397.

Question of administration

Whether supreme court should review a question raised in it for the first time depends on the facts and circumstances disclosed by the particular record; as the rule is for the purpose of orderly administration and the attainment of justice, whether or not the court will follow it is ordinarily a question of administration.—Hormel v. Helvering, supra.

Parties proceeding on mutual mistake

It has been held that an erroneous judgment may be reversed where the parties proceeded on a mutual mistake of the law, although the only ground relied on in the court below against the judgment is not sustained.—Murdock v. Ward, N.Y., 20 S.Ct. 775, 178 U.S. 139, 44 L.Ed. 1009.

58. U.S.—Hormel v. Helvering, 61 S.Ct. 719, 312 U.S. 552, 85 L.Ed. 1037, affirming, C.C.A., Helvering v. Hormel, 111 F.2d 1, certiorari granted Hormel v. Helvering, 61 S. Ct. 35, 311 U.S. 626, 85 L.Ed. 397—Denver Union Stock Yard Co. v. U. S., Colo., 58 S.Ct. 990, 304 U. S. 470, 82 L.Ed. 1469, affirming, D. C., 21 F.Supp. 83—Becker Steel Co. of America v. Cummings, N.Y., 56 S.Ct. 15, 296 U.S. 74, 80 L.Ed. 54, affirming, C.C.A., 75 F.2d 1005, affirming, D.C., 10 F.Supp. 343, certiorari granted 55 S.Ct. 657, 295 U.S. 724, 79 L.Ed. 1677—Duignan v. U. S., N.Y., 47 S.Ct. 566, 274 U.S. 195, 71 L.Ed. 996, affirming, C.C.A., U. S. v. Duignan, 4 F.2d 983.

3 C.J. p 689 note 41.

Actions by or against executors and administrators

U.S.—Walker v. Beal, Mass., 9 Wall. 743, 19 L.Ed. 814.

Public lands

(1) In proceedings relating to public lands it has been held that the objection that the grant was fictitious cannot be raised for the first time in the supreme court.—U. S. v. Larkin, Cal., 18 How. 557, 15 L.Ed. 485.

(2) The same is true of an objection that the receiver took part with the register in the hearing and decision in the land office.—Carr v. Fife, Wash., 15 S.Ct. 427, 156 U.S. 494, 39 L.Ed. 508.

Right to urge other ground to support judgment distinguished

Although respondent or appellee in federal appellate court may, without cross petition or appeal, support judgment in his favor on grounds different from those on which the court below rested its decision, it is only in exceptional cases, and then only in cases coming from the federal courts, that United States supreme court considers questions urged by a petitioner or appellant but not pressed or passed on in the courts below.—McGoldrick v. Compagnie Generale Transatlantique, 60 S.Ct. 670, 309 U. S. 430, 84 L.Ed. 849, reversing Compagnie Generale Transatlantique v. McGoldrick, 18 N.E.2d 28, 279 N.Y. 192, affirming 4 N.Y.S.2d 661, 254 App.Div. 237, reargument denied and remittitur amended 21 N.E.2d 199, 280 N.Y. 691, certiorari granted McGoldrick v. Compagnie Generale Transatlantique, 59 S.Ct. 1043, 307 U.S. 620, 83 L.Ed. 1499.

59. U.S.—McDonald v. Smalley, Ohio, 26 Pet. 620, 7 L.Ed. 287.

60. U.S.—Hull v. Burr, Mass., 34 S.Ct. 982, 234 U.S. 712, 58 L.Ed. 1557, affirming 206 F. 1, 124 C.C.A. 135, rehearing denied 207 F. 543, 125 C.C.A. 221.

61. U.S.—Pennsylvania R. Co. v. Public Utilities Commission of Ohio, Ohio, 56 S.Ct. 687, 298 U. S. 170, 80 L.Ed. 1130—Dayton-Goose Creek Ry. Co. v. U. S., Tex., 44 S.Ct. 169, 263 U.S. 456, 68 L. Ed. 388, 33 A.L.R. 472, affirming, D.C., 287 F. 728—U. S. v. North American Transportation & Trading Co., 40 S.Ct. 518, 253 U.S. 330, 64 L.Ed. 935, affirming North American Transportation & Trading Co. v. U. S., 53 Ct.Cl. 424.

62. U.S.—United Rys. & Electric Co. of Baltimore v. West, 50 S.Ct. 123, 280 U.S. 234, 74 L.Ed. 390, reversing 145 A. 340, 157 Md. 70—City and County of Denver v. Denver Union Water Co., Colo., 38 S.Ct. 278, 246 U.S. 178, 62 L.Ed. 649—Johnson v. Lankford, Okl., 38 S.Ct. 203, 245 U.S. 541, 62 L.Ed. 460.

Inconsistent defense

Text rule is especially true where the defense which is sought to be urged in the supreme court is inconsistent with the defense relied on in the court below.—State of Ohio ex rel. Seney v. Swift & Co., Ohio, 43 S.Ct. 22, 260 U.S. 146, 67 L.Ed. 176, dismissing appeal, C.C.A., 270 F. 141.

Particular defenses

(1) Contributory negligence or assumption of risk—Southern R. Co. v. Gadd, Tenn., 34 S.Ct. 696, 233 U. S. 572, 58 L.Ed. 1099.

(2) Statute of limitations.—Bardon v. Land & River Impr. Co., Wis., 15 S.Ct. 650, 157 U.S. 327, 39 L.Ed. 719—Upton v. McLaughlin, Wyo., 105 U.S. 640, 26 L.Ed. 1197.

Validity of contract

(1) As a rule an objection to the validity of a contract or instrument in suit cannot be urged for the first time in the appellate court.—Robinson v. Belt, Ind.T., 23 S.Ct. 16, 187 U.S. 41, 47 L.Ed. 65—McGahan v. Rondout Nat. Bank, S.C., 15 S.Ct. 347, 156 U.S. 218, 39 L.Ed. 403.

(2) Thus it cannot be objected for the first time on appeal that a contract is usurious.—Ewing v. Howard, Tenn., 7 Wall. 499, 19 L.Ed. 293—Newell v. Nixon, La., 4 Wall., 572, 18 L.Ed. 305.

(3) However, illegality of a contract may be raised for the first time on appeal where it appears on the face of the pleadings, on the face of the contract, or from the

stitutional questions.[63] So, also, a party cannot, when a cause is brought up for review to the supreme court, assume an attitude inconsistent with, or different from, that taken by him at the trial;[64] he is restricted to the theory on which the cause was prosecuted or defended in the court below.[65] So the parties cannot change their theory or position as to the nature of the cause of action,[66] grounds of defense or of opposition,[67] construction of pleadings,[68] relief sought and grounds therefor,[69] evidentiary matters,[70] and the measure of damages or the amount of recovery.[71]

For a matter to have been sufficiently presented before the trial court so as to warrant review on appeal, it must have definitely been called to the trial court's attention sufficiently to obtain a ruling thereon.[72] Even where the constitutionality of a law is questioned in the lower court, new grounds cannot be first urged on appeal.[73]

Objections and motions and rulings thereon. In accordance with the rule stated above that questions not presented in the trial court in some appropriate manner will not be considered on review by the supreme court, it is a rule of general application that objections must be made in the trial court in order to reserve questions for review,[74] except in the case of fundamental or determinative errors which are apparent on the face of the record.[75] To be available the objection must be a timely one,[76] and it must usually be specific and point out the ground or grounds relied on in such a manner as to advise the court and opposing counsel thereof, so that the ruling may be made understandingly and the objection obviated if possible.[77] Only grounds of objection urged in the trial court will be considered on appeal; a party will not be permitted to change them or to add others.[78] A mere objection without a direct ruling or decision thereon by the

admitted facts that the contract is immoral or otherwise contrary to public policy.—Oscanyon v. Winchester Repeating Arms Co., N.Y., 103 U.S. 261, 26 L.Ed. 539—Coppell v. Hall, La., 7 Wall. 542, 19 L.Ed. 244.

63. U.S.—Duignan v. U. S., N.Y., 47 S.Ct. 566, 274 U.S. 195, 71 L.Ed. 996, affirming, C.C.A., U.S. v. Duignan, 4 F.2d 983.
3 C.J. p 710 note 73.

64. U.S.—Texas & P. R. Co. v. Abilene Cotton Oil Co., Tex., 27 S.Ct. 350, 204 U.S. 426, 51 L.Ed. 553, 9 Ann.Cas. 1075.

65. U.S.—San Juan Light & Transit Co. v. Requena, Puerto Rico, 32 S. Ct. 399, 224 U.S. 89, 56 L.Ed. 680—Texas & P. R. Co. v. Abilene Cotton Oil Co., Tex., 27 S.Ct. 350, 204 U.S. 426, 51 L.Ed. 553, 9 Ann. Cas. 1075.

66. U.S.—San Juan Light & Transit Co. v. Requena, Puerto Rico, 32 S. Ct. 399, 224 U.S. 89, 56 L.Ed. 680.

Legal cause of action

The parties by consent cannot compel the appellate court to review as an equitable cause a suit which seeks a legal remedy for a legal cause of action.—Twist v. Prairie Oil & Gas Co., Okl., 47 S.Ct. 755, 274 U.S. 684, 71 L.Ed. 1297, reversing, C.C.A., 6 F.2d 347, certiorari granted 46 S.Ct. 355, 270 U.S. 639, 70 L.Ed. 775.

67. U.S.—Thomas v. Taylor, N.Y., 32 S.Ct. 403, 224 U.S. 73, 56 L.Ed. 673—Texas & P. R. Co. v. Abilene Cotton Oil Co., Tex., 27 S.Ct. 350, 204 U.S. 426, 51 L.Ed. 553, 9 Ann. Cas. 1075.

68. U.S.—San Juan Light & Transit Co. v. Requena, Puerto Rico, 32 S. Ct. 399, 224 U.S. 89, 56 L.Ed. 680.

Particular matters

(1) When an answer setting up affirmative matter is treated as a plea of set-off, counterclaim, cross complaint, or cross petition in the trial court, it will be so treated on appeal.—Perego v. Dodge, Utah, 16 S. Ct. 971, 163 U.S. 160, 41 L.Ed. 113.

(2) Where a case has been tried without objection as though the pleadings raised a certain issue, the objection that the issue was not raised by the pleadings, or that the issues were not complete, cannot be made for the first time in the supreme court.—Campbell v. U. S., Colo., 32 S.Ct. 398, 224 U.S. 99, 56 L.Ed. 684, reversing 170 F. 318, 95 C. C.A. 114.

(3) An objection that an allegation is not sufficiently specific to raise an issue which was tried in the court below cannot be made for the first time in the supreme court.—San Juan Light & Transit Co. v. Requena, Puerto Rico, 32 S.Ct. 399, 224 U.S. 89, 56 L.Ed. 680.

(4) Although the record on appeal contains no reply to an answer alleging new matter, it will be treated as though a reply had been filed, where the case has been tried in the lower court in that manner without objection on account of the want of a reply.—Troxell v. Delaware, L. & W. R. Co., Pa., 33 S.Ct. 274, 227 U.S. 434, 57 L.Ed. 586, reversing 200 F. 44, 118 C.C.A. 272.

69. U.S.—Hull v. Burr, Mass., 34 S.Ct. 892, 234 U.S. 712, 58 L.Ed. 1557.

70. **Facts admitted or conceded**

Where a fact is admitted, conceded, or assumed without objection in the trial court, it cannot be contested in the appellate court or objected to on ground that there was no evidence on the question, but the theory in the trial court will be adhered to.—Texas & P. R. Co. v. Abilene Cotton Oil Co., Tex., 27 S. Ct. 350, 204 U.S. 426, 51 L.Ed. 553.

71. U.S.—New York, L. E. & W. R. Co. v. Estill, Mo., 13 S.Ct. 444, 147 U.S. 591, 37 L.Ed. 292—Roberts v. Graham, Cal., 6 Wall. 578, 18 L. Ed. 791.

72. U.S.—Denver Union Stock Yard Co. v. U. S., Colo., 58 S.Ct. 990, 304 U.S. 470, 82 L.Ed. 1469, affirming, D.C., 21 F.Supp. 83.

73. U.S.—Southwestern Oil Co. v. Texas., Tex., 30 S.Ct. 496, 217 U. S. 114, 54 L.Ed. 688.

74. U.S.—Wood v. A. Wilbert's Sons Shingle & Lumber Co., La., 33 S. Ct. 125, 226 U.S. 384, 57 L.Ed. 264.
3 C.J. p 742 note 3.

75. U.S.—Bennett v. Butterworth, Tex., 11 How. 669, 13 L.Ed. 859—Garland v. Davis, D.C., 4 How. 131, 11 L.Ed. 907.

76. U.S.—American Tobacco Co. v. Werckmeister, N.Y., 28 S.Ct. 72, 207 U.S. 284, 52 L.Ed. 208, 12 Ann. Cas. 595, affirming 146 F. 375, 76 C.C.A. 647.

In order to be timely, the objection must be made during the trial, at the time of the action or ruling to which it is directed or at the earliest opportunity thereafter; a question cannot afterward be raised, for the purpose of appellate review, by an objection made on a motion or argument for a new trial or rehearing.—American Tobacco Co. v. Werckmeister, supra.

77. U.S.—Tevis v. Ryan, 34 S.Ct. 481, 233 U.S. 273, 58 L.Ed. 957, affirming 108 P. 461, 13 Ariz. 120.

78. U.S.—Belk v. Meagher, Mont., 104 U.S. 279, 26 L.Ed. 735—Hinde v. Longworth, Ohio, 11 Wheat. 199, 6 L.Ed. 454.

trial court presents no question for appellate review, for, unless there is a ruling by the court, there can be no predicate for an assignment of error.[79]

Where no such objection was raised in the trial court, a party will not be permitted on appeal to raise a question as to the propriety of the form of the action or the nature of the proceeding,[80] or as to jurisdiction of the person.[81] On the other hand, since consent of parties cannot give a court jurisdiction over the subject matter of an action, the question of jurisdiction of the subject matter may, as a rule, be raised for the first time in the supreme court, or the court may, on its own motion, take notice of such want of jurisdiction.[82] Where, however, a court has general jurisdiction of a class of cases, an objection that, because of irregularities or other special circumstances, it had no jurisdiction of a particular case belonging to that class, or that it had no jurisdiction to render the particular judgment, must generally have been made in the court below.[83]

An objection cannot be raised for the first time in the supreme court as to the capacity or right of plaintiff to sue,[84] the misjoinder of parties, either plaintiff or defendant,[85] the misnomer of a party to a cause,[86] or the want of merely proper or formal parties, or other formal defects as to the parties;[87] but objection may be first made in the supreme court if the defect in parties is not merely formal but amounts to the complete want of a party who is

79. U.S.—Kittredge v. Race, La., 92 U.S. 116, 23 L.Ed. 488.

Objections as to the admission or exclusion of evidence

U.S.—U. S. v. McCoy, Wash., 24 S. Ct. 528, 193 U.S. 593, 48 L.Ed. 805, reversing 113 F. 1021, 51 C.C. A. 688.

80. U.S.—Reavis v. Fianza, Philippine, 30 S.Ct. 1, 215 U.S. 16, 54 L. Ed. 72.

3 C.J. p 750 note 59.

Decree rendered on petition

Rule applies to an objection that decrees were rendered only on petition, when they should have been rendered on a supplemental bill, cross bill, or bill in that nature.—Coburn v. Cedar Valley Land & Cattle Co., Mo., 11 S.Ct. 258, 138 U.S. 196, 34 L.Ed. 876.

Legal or equitable remedy

(1) Generally where an action is brought and tried without objection as an equitable one, neither party can object on appeal that a court of equity had no jurisdiction because there was an adequate remedy at law, or object that the cause of action was of legal cognizance only and should have been tried as a legal action and not as an equitable one.—Louisville & Nashville R. Co. v. F. W. Cook Brewing Co., Ind., 32 S.Ct. 189, 223 U.S. 70, 56 L.Ed. 355, affirming 172 F. 117, 96 C.C.A. 322, 40 L.R.A.,N.S., 798—3 C.J. p 757 note 20.

(2) However, if it is obvious that there is an adequate remedy at law, the supreme court will act sua sponte to preserve the courts of equity as a forum for extraordinary relief.—Petroleum Exploration v. Public Service Commission of Kentucky, Ky., 58 S.Ct. 834, 304 U.S. 209, 82 L.Ed. 1294, affirming, D.C., 21 F. Supp. 254, motion denied 58 S.Ct. 527.

(3) If the cause is one not properly cognizable by a court of equity under any circumstances, or it is not competent to grant the relief, the objection may be raised at any time, as want of jurisdiction of the subject matter is always fatal at any stage of the proceedings.—Allen v. Pullman's Palace Car Co., Tenn., 11 S.Ct. 682, 139 U.S. 658, 35 L.Ed. 303 —3 C.J. p 758 note 23.

Time of objection

An objection to the form of remedy comes too late to be available in an appellate court when first made on a motion for a new trial after verdict.—American Tobacco Co. v. Werckmeister, N.Y., 28 S.Ct. 72, 207 U.S. 284, 52 L.Ed. 208, 12 Ann. Cas. 595, affirming 146 F. 375, 76 C. C.A. 647.

81. U.S.—Bradstreet v. Thomas, N. Y., 12 Pet. 59, 9 L.Ed. 999.

82. U.S.—Twist v. Prairie Oil & Gas Co., Okl., 47 S.Ct. 755, 274 U.S. 684, 71 L.Ed. 1297, reversing, C. C.A., 6 F.2d 347, certiorari granted 46 S.Ct. 355, 270 U.S. 639, 70 L.Ed. 775.

3 C.J. p 752 note 86.

Want of jurisdiction apparent on the face of the record will be taken notice of by the appellate court, whether set up and relied on as a defense in the court below or not.—U. S. v. Corrick, Ill., 56 S.Ct. 829, 298 U.S. 435, 80 L.Ed. 1263, rehearing denied 56 S.Ct. 951, 298 U.S. 692, 80 L.Ed. 1409—Perez v. Fernandez, Puerto Rico, 26 S.Ct. 561, 202 U.S. 80, 50 L.Ed. 942—25 C.J. p 782 note 30.

Jurisdictional amount

It must clearly appear that the necessary amount is not involved before the appellate court will take cognizance of an objection on that ground which was not raised below; failure of the record to show that the jurisdictional amount is in controversy may be disregarded if it appears probable that the defect could be remedied by amendment.—Giles v. Harris, Ala., 23 S.Ct. 639, 189 U.S. 475, 47 L.Ed. 909.

Averments will be liberally construed for the purpose of sustaining the jurisdiction where objection is made for the first time on appeal.—Gordon v. Third Nat. Bank of Chattanooga, Ala., 12 S.Ct. 657, 144 U. S. 97, 36 L.Ed. 360.

83. U.S.—Giles v. Harris, Ala., 23 S.Ct. 639, 189 U.S. 475, 47 L.Ed. 909.

84. U.S.—McCandless v. Furlaud, N. Y., 55 S.Ct. 42, 293 U.S. 67, 79 L. Ed. 202, reversing, C.C.A., 68 F.2d 925, certiorari granted 54 S.Ct. 716, 292 U.S. 617, 78 L.Ed. 1475, rehearing denied 55 S.Ct. 211, 293 U.S. 632, 79 L.Ed. 717.

Rule applied to particular objections

(1) That plaintiff is an alien.—O'Reilly v. Campbell, Utah, 6 S.Ct. 421, 116 U.S. 418, 29 L.Ed. 669.

(2) That suit is brought by wrong person or official.—Fortier v. New Orleans Nat. Bank, La., 5 S.Ct. 234, 112 U.S. 439, 28 L.Ed. 764.

85. U.S.—Herndon v. Chicago, R. I. & P. R. Co., Mo., 30 S.Ct. 633, 218 U.S. 135, 54 L.Ed. 970.

3 C.J. p 767 note 94.

86. U.S.—Breedlove v. Nicolet, La., 7 Pet. 413, 8 L.Ed. 731.

87. U.S.—Lenman v. Jones, App.D. C., 32 S.Ct. 18, 222 U.S. 51, 56 L. Ed. 89.

Conflict with issues

A suggestion as to want of parties below, made after final judgment, is not available on appeal when that suggestion conflicts with the issues as made up and on which the case is tried, and which, if the suggestion be correct, will involve reversing the judgment at the request of appellant because of deceit practiced by him on the court below.—Southern Pine Lumber Co. v. Ward, 28 S.Ct. 239, 208 U.S. 126, 52 L.Ed. 420, affirming 85 P. 459, 16 Okl. 131.

so necessary that a final judgment or decree cannot be rendered without affecting his or her interests.[88] The rule that objections must be raised in the court below to be preserved for review also applies to objections based on defects in process or notice,[89] objections to motions or the hearing or rulings thereon,[90] and objections to provisional remedy proceedings.[91]

A party is generally precluded from objecting for the first time in the supreme court with respect to matters of pleading,[92] as in the case of objections to the absence of pleadings,[93] to the form[94] or sufficiency[95] of pleadings, to the allowance or refusal of amendments thereto,[96] and to variance between the pleadings and the proof;[97] but, if there is a complete failure to state a cause of action, the defect is regarded as a fundamental one which may be raised for the first time in the appellate court.[98]

So, also, the supreme court will not consider objections made for the first time on appeal, as to reference of the cause or questions,[99] the drawing, summoning, or impaneling of the jurors,[1] the time or order of the trial or hearing,[2] the mode or conduct of the trial or hearing,[3] evidence[4] and witness-

88. U.S.—Hooey v. Wilson, D.C., 9 Wall. 501, 19 L.Ed. 762—Coiron v. Millaudon, La., 19 How. 113, 15 L. Ed. 575.

89. U.S.—McDonogh v. Millaudon, La., 3 How. 693, 11 L.Ed. 787.

90. U.S.—Wecker v. National Enameling & Stamping Co., Mo., 27 S.Ct. 184, 204 U.S. 176, 51 L.Ed. 430, 9 Ann.Cas. 757.

Refusal of continuance

On appeal, a party may not object to a refusal of a continuance on grounds not brought to the attention of the court below.—J. S. Keator Lumber Co. v. Thompson, Ill., 12 S.Ct. 669, 144 U.S. 434, 36 L.Ed. 495.

91. **Validity of appointment of receiver**

U.S.—Hollins v. Brierfield Coal & Iron Co., Ala., 14 S.Ct. 127, 150 U.S. 371, 37 L.Ed. 1113.

92. U.S.—George A. Fuller Co. v. McCloskey, App.D.C., 33 S.Ct. 471, 228 U.S. 194, 57 L.Ed. 795.

Sufficiency of objection

No matter how made, the objection must point out the particular defects or grounds relied on, so as to bring the same to the attention of the lower court and opposing counsel, and none other will be considered by the appellate court.—George A. Fuller Co. v. McCloskey, supra.

93. U.S.—Argentine Min. Co. v. Terrible Min. Co., Colo., 7 S.Ct. 1356, 122 U.S. 478, 30 L.Ed. 1140.

Particular objections

(1) That a counterclaim or set-off was not pleaded or filed.—Huse v. U. S., Ct.Cl., 32 S.Ct. 119, 56 L.Ed. 285, 222 U.S. 496.

(2) Absence of replication or reply to a plea or answer setting up new matter or a set-off or counterclaim.—Troxell v. Delaware, L. & W. R. Co., Pa., 33 S.Ct. 274, 227 U. S. 434, 57 L.Ed. 586, reversing 200 F. 44, 118 C.C.A. 272.

3 C.J. p 776 note 9.

94. U.S.—Campbell v. U. S., Colo., 32 S.Ct. 398, 224 U.S. 99, 56 L.Ed. 684, reversing 170 F. 318, 95 C.C.A. 114.

3 C.J. p 778 note 28.

Particular pleadings

(1) Bill or complaint.—Friedenstein v. U. S., N.Y., 8 S.Ct. 838, 125 U.S. 224, 31 L.Ed. 736—The Vaughan and Telegraph, 14 Wall. 258, 20 L. Ed. 807.

(2) Plea, answer, or subsequent pleading.—Campbell v. U. S., Colo., 32 S.Ct. 398, 224 U.S. 99, 56 L.Ed. 684, reversing 170 F. 318, 95 C.C.A. 114.

Particular defects

(1) That a pleading was not filed in time, or that it was not formally or properly filed.—Clements v. Moore, Tex., 6 Wall. 299, 18 L.Ed. 786.

(2) That a certain defense should have been set up by plea or answer and not raised by demurrer.—U. S. v. Freel, N.Y., 22 S.Ct. 875, 186 U. S. 309, 46 L.Ed. 1177, affirming 99 F. 237, 39 C.C.A. 491.

(3) That there is a departure.—Ankeny v. Clark, Wash., 13 S.Ct. 617, 148 U.S. 345, 37 L.Ed. 475.

95. U.S.—Grosjean v. American Press Co., La., 56 S.Ct. 444, 297 U.S. 233, 80 L.Ed. 660, affirming, D.C., American Press Co. v. Grosjean, 10 F.Supp. 161—Johnson v. Lankdord, Okl., 38 S.Ct. 203, 245 U.S. 541, 62 L.Ed. 460—Campbell v. U. S., Colo., 32 S.Ct. 398, 224 U.S. 99, 56 L.Ed. 684, reversing 170 F. 318, 95 C.C.A. 114—Perego v. Dodge, Utah, 16 S.Ct. 971, 163 U. S. 160, 41 L.Ed. 113.

3 C.J. p 779 note 37.

Pleading bad on demurrer

It cannot be objected for the first time on appeal that the cause of action is defectively stated, even though the defect is such that the pleading would have been bad on the demurrer or motion in the lower court.—Grant Bros. Constr. Co. v. U. S., Ariz., 34 S.Ct. 452, 232 U.S. 647, 58 L.Ed. 776—3 C.J. p 781 note 40.

96. U.S.—Clements v. Moore, Tex., 6 Wall. 299, 18 L.Ed. 786.

97. U.S.—Roberts v. Graham, Cal., 6 Wall. 578, 18 L.Ed. 791.

Text rule has no application where the objection could not have been obviated in the court below.—Roberts v. Graham, Cal., 6 Wall. 578, 18 L.Ed. 791.

Sufficiency of objection

If evidence objected to on the ground of variance has been admitted provisionally subject to motion to strike when all the evidence is in, it is necessary to renew the objection by subsequent motion in order to permit its consideration on appeal.—McCandless v. Furlaud, N. Y., 56 S.Ct. 41, 296 U.S. 140, 80 L.Ed. 121, reversing, C.C.A., 75 F.2d 977, certiorari granted 55 S.Ct. 830, 295 U.S. 726, 79 L.Ed. 1677, rehearing denied 56 S.Ct. 304, 296 U.S. 664, 80 L.Ed. 473.

98. U.S.—Teal v. Walker, Or., 4 S. Ct. 420, 111 U.S. 242, 28 L.Ed. 415.

3 C.J. p 786 note 76.

99. U.S.—Newcomb v. Wood, Ohio, 97 U.S. 581, 24 L.Ed. 1085.

1. U.S.—Mima Queen v. Hepburn, D.C., 7 Cranch 290, 3 L.Ed. 348.

2. U.S.—J. S. Keator Lumber Co. v. Thompson, Ill., 12 S.Ct. 669, 144 U.S. 434, 36 L.Ed. 495—Dundee Mortg. & Inv. Co. v. Hughes, Or., 8 S.Ct. 377, 124 U.S. 157, 31 L. Ed. 357.

3. U.S.—Dundee Mortg. & Inv. Co. v. Hughes, supra.

Improper conduct or remarks of trial judge

U.S.—Backus v. Fort St. Union Depot Co., Mich., 18 S.Ct. 445, 169 U.S. 557, 42 L.Ed. 853.

4. U.S.—J. S. Keator Lumber Co. v. Thompson, Ill., 12 S.Ct. 669, 144 U.S. 434, 36 L.Ed. 495.

Rule applied to admission or exclusion of evidence

(1) Generally.—Shields v. Hanbury, Ill., 9 S.Ct. 176, 128 U.S. 584, 32 L.Ed. 565—3 C.J. p 808 note 91, p 825 note 53.

(2) Expert or opinion evidence.—Herencia v. Guzman, Puerto Rico, 31 S.Ct. 135, 219 U.S. 44, 55 L.Ed. 81.

es,[5] arguments and conduct of counsel,[6] and sufficiency of evidence.[7]

Also, if sufficient objection is not made at the trial court, the supreme court will not consider alleged errors or improprieties as to submission of issues or questions of fact to the jury,[8] instructions,[9] the

(3) Documents, exhibits, and records generally.—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 328, 236 U.S. 412, 59 L.Ed. 644, reversing Lehigh Valley R. Co. v. Meeker, 211 F. 785, 128 C.C.A. 311—3 C.J. p 812 note 97.

(4) Deeds and records thereof.—Springer v. U. S., Ill., 102 U.S. 586, 26 L.Ed. 253.

(5) Secondary evidence generally.—Beebe v. U. S., Ala., 16 S.Ct. 532, 161 U.S. 104, 40 L.Ed. 636—Ex p. Spies, Ill., 8 S.Ct. 21, 123 U.S. 131, 31 L.Ed. 80.

(6) Depositions.—Ray v. Smith, Ala., 17 Wall. 411, 21 L.Ed. 666—Brown v. Tarkington, Ind., 3 Wall. 377, 18 L.Ed. 255.

Sufficiency of objection

(1) Objection to admission of evidence must, in order to present any question for consideration by supreme court, specifically state the grounds or reasons which render the evidence inadmissible; no grounds or reasons will be considered other than those that have been specified or urged in the trial court.—Tevis v. Ryan, Ariz., 34 S.Ct. 481, 233 U.S. 273, 58 L.Ed. 957—3 C.J. p 811 note 93, p 819 note 26, p 835 note 24.

(2) Although seasonable objection is made to a question, objection must be renewed by moving to strike the answer where it is not responsive to question asked.—Gould v. Day, Mich., 94 U.S. 405, 24 L.Ed. 232.

Rule applied to other matters

(1) Improper restriction on use of evidence.—Cunningham v. Springer, N.M., 27 S.Ct. 301, 204 U.S. 647, 51 L. Ed. 662, 9 Ann.Cas. 897.

(2) Mode and order of receiving evidence.—Shields v. Hanbury, Ill., 9 S.Ct. 176, 128 U.S. 584, 32 L.Ed. 565.

Text rule does not apply where defect is of such character that its ill effects could under no circumstances have been obviated in the court below.—Houghton v. Jones, Cal., 1 Wall. 702, 17 L.Ed. 503—U. S. v. Auguisola, Cal., 1 Wall. 352, 17 L.Ed. 613.

5. U.S.—Camden v. Doremus, Mo., 3 How. 515, 11 L.Ed. 705.

Particular matters

(1) Competency of witness.—The Palmyra, S.C., 12 Wheat. 1, 6 L.Ed. 531.

(2) Examination of witness.—Burley v. German-American Bank, N. Y., 4 S.Ct. 341, 111 U.S. 216, 28 L.Ed. 406—Schuchardt v. Allens, N.Y., 1 Wall. 359, 17 L.Ed. 642.

No other grounds or reasons than those stated will be considered by the supreme court.—Camden v. Doremus, Mo., 3 How. 515, 11 L.Ed. 705.

6. U.S.—Crumpton v. U. S., Ark., 11 S.Ct. 355, 138 U.S. 361, 34 L.Ed. 958.

Sufficiency of objection

(1) Objection must be made at the time of the improper argument, remark, or other misconduct, and it must be coupled with, or followed by, a request for an instruction or admonition to the jury.—Crumpton v. U. S., Ark., 11 S.Ct. 355, 138 U.S. 361, 34 L.Ed. 958.

(2) Where proper objection is made and exception saved to improper argument, it is not necessary that the objection and exception be repeated on repetition of the improper argument.—Waldron v. Waldron, Ill., 15 S.Ct. 383, 156 U.S. 361, 39 L.Ed. 453.

7. U.S.—Cucullu v. Emmerling, La., 22 How. 83, 16 L.Ed. 300.

3 C.J. p 836 note 29.

Objection must specify grounds therefor, and the particular point on which evidence is wanting; a general objection will not suffice to preserve the point for review.—Grand Trunk R. Co. v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485.

8. U.S.—Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark. v. St. Louis Southwestern Ry. Co., Ark., 42 S.Ct. 250, 257 U.S. 547, 66 L.Ed. 364, affirming, C.C.A., St. Louis Southwestern Ry. Co. v. Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark., 265 F. 524—Louisville & N. R. Co. v. Parker, 37 S.Ct. 4, 242 U.S. 13, 61 L.Ed. 119, affirming 177 S.W. 465, 165 Ky. 658.

9. U.S.—First Unitarian Soc. v. Faulkner, Ill., 91 U.S. 415, 23 L.Ed. 283—Doe v. Watson, Pa., 8 How. 263, 12 L.Ed. 1072.

Defects in instructions given

(1) Generally.—Graham v. U. S., Md., 34 S.Ct. 148, 231 U.S. 474, 58 L. Ed. 319—Gibbs v. Consolidated Gas Co., Md., 9 S.Ct. 553, 130 U.S. 396, 32 L.Ed. 979.

(2) Usually the objection must specifically and definitely point out the particular ground or grounds on which it is based.—Jacobs v. Southern Ry. Co., Va., 36 S.Ct. 588, 241 U. S. 229, 60 L.Ed. 970.

(3) No ground or grounds other than those specified will be considered by the supreme court.—First Unitarian Soc. v. Faulkner, Ill., 91 U.S. 415, 23 L.Ed. 283.

(4) Objection must be made before the retirement of the jury.—U. S. v. Carey, La., 3 S.Ct. 424, 110 U.S. 51, 28 L.Ed. 67—Hunnicutt v. Peyton, Tex., 102 U.S. 333, 26 L.Ed. 113.

Failure to instruct

(1) If instructions given are correct as far as they go, partial failure to instruct on all points in case will not be reviewed unless there has been a request for further or more specific instructions.—Socony-Vacuum Oil Co. v. Smith, N.Y., 59 S.Ct. 262, 305 U.S. 424, 83 L.Ed. 265, affirming, C.C.A., Smith v. Socony Vacuum Oil Co., 96 F.2d 98, certiorari granted Socony-Vacuum Oil Co. v. Smith, 59 S.Ct. 81, 305 U.S. 586, 83 L.Ed. 370—Atlantic Const. Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457, affirming Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41—Kansas City Southern Ry. Co. v. Ellzey, La., 48 S.Ct. 80, 275 U.S. 236, 72 L.Ed. 259, reversing, C.C.A., Ellzey v. Kansas City Southern Ry. Co., 12 F.2d 4, certiorari granted Kansas City So. Ry. Co. v. Ellzey, 46 S.Ct. 638, 271 U.S. 659, 70 L.Ed. 1137—Pennsylvania R. Co. v. Minds, Pa., 39 S.Ct. 531, 250 U.S. 368, 63 L.Ed. 1039, affirming 244 F. 53, 156 C.C.A. 481—St. Louis & S. F. R. Co. v. Brown, 36 S.Ct. 602, 241 U.S. 223, 60 L.Ed. 966, affirming 144 P. 1075, 45 Okl. 143—Southern Ry. Co. v. Gadd, 34 S.Ct. 696, 233 U.S. 572, 58 L.Ed. 1099, affirming 207 F. 277, 125 C.C.A. 21—3 C.J. p 850 note 24, p 854 note 33, p 857 note 49.

(2) A material misdirection in the charge of the court will be reviewed on proper and timely objection alone, without any request having been made for a correct instruction.—St. Paul Fire & Marine Ins. Co. v. Bachman, W.Va., 52 S.Ct. 270, 285 U.S. 112, 76 L.Ed. 648, reversing, C.C.A., 49 F.2d 158, certiorari granted 52 S. Ct. 31, 284 U.S. 605, 76 L.Ed. 518.

(3) Ordinarily the request should specifically refer to the point sought to be made in order to render its refusal available on appeal, and only the point made by the request will be considered.—Gulf, C. & S. F. Ry. Co. v. Moser, 48 S.Ct. 49, 275 U.S. 133, 72 L.Ed. 200, reversing, Tex.Civ.App., 277 S.W. 722, set aside to conform to mandate, Civ.App., 4 S.W.2d 1118, and certiorari granted 46 S.Ct. 489, 271 U.S. 655, 70 L.Ed. 1135.

(4) A defective request may sometimes be sufficient to call the court's attention to a complete failure to instruct on a particular issue.—St. Paul Fire & Marine Ins. Co. v. Bachman, supra.

Modification of requested instruction

U.S.—Seaboard Air Line Ry. Co. v.

form or sufficiency of the verdict,[10] trial, decision, and findings by the court,[11] the amount of recovery and extent of relief,[12] and the judgment, order, or decree,[13] unless the errors therein are fundamental, or apparent of record;[14] and the same rule as to necessity of raising proper objection in the trial court holds true of alleged errors as to execution and enforcement of judgment.[15] On appeal to the supreme court from the judgment of a circuit court, objection cannot be taken for the first time to the proceedings to perfect the appeal to the circuit court or to the proceedings therein, but such objections, to be considered, must have been first taken in the circuit court.[16]

Exceptions. It is a general rule of law that rulings or decisions which affect substantial rights, and on which error is predicated, will not be revised in the supreme court unless an appropriate exception to the alleged error was reserved;[17] but, where the alleged error complained of appears in the record proper, the supreme court may notice it and reverse the judgment of the court below, although no exception was taken.[18] Under the Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, formal exceptions to the rulings or orders of the district courts are no longer necessary, and it is sufficient that a party make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor.

Exceptions, when necessary, must be definite and specific to be sufficient on appeal; and an exception to one ruling or decision, or to one specific error therein, will present no question as to another.[19] Ordinarily the proper time to take exception is at the time the ruling or decision complained of is made.[20] Where, on a trial, a party takes a step or adopts a course directly inconsistent with an exception previously taken by him to some ruling of the trial court, he will be deemed to have waived such exception and cannot take advantage of it on appeal.[21]

Where exceptions are necessary, the failure to

Watson, 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174, dismissing appeal 137 So. 719, 103 Fla. 477.

10. U.S.—National Security Bank v. Butler, Mass., 9 S.Ct. 281, 129 U.S. 223, 32 L.Ed. 682.
3 C.J. p 865 note 50.

11. U.S.—New Orleans, etc., R. Co. v. Lindsay, La., 4 Wall. 650, 18 L.Ed. 328.

Particular defects

(1) Findings inconsistent with the pleadings or not within the issues.—New Orleans, etc., R. Co. v. Lindsay, supra.

(2) That the facts are found inferentially instead of directly.—Mason Lumber Co. v. Buchtel, Mich., 101 U. S. 633, 25 L.Ed. 1072.

(3) Objections to hearing, findings, and report of referee, master, commissioner, or auditor.—Topliff v. Topliff, Ohio, 12 S.Ct. 825, 145 U.S. 156, 30 L.Ed. 658.
3 C.J. p 872 notes 18, 21.

Questions of law

On the trial to the court of an action at law, where the evidence is not contradictory, the proper mode of raising a question of law for review by the appellate court is for each party to submit to the trial court a declaration in his favor on such question.—Martinton v. Fairbanks, Ill., 5 S.Ct. 321, 112 U.S. 670, 28 L.Ed. 862—3 C.J. p 871 note 12.

12. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, N.Y., 56 S.Ct. 387, 297 U.S. 198, 80 L.Ed. 581, modifying, C.C.A., 77 F.2d 834, reversing, D.C., 7 F.Supp. 392, certiorari granted 56 S.Ct. 123, 296 U. S. 566, 80 L.Ed. 399, motion denied 56 S.Ct. 679.
3 C.J. p 880 note 18.

13. U.S.—Adams v. Mills, Ill., 52 S. Ct. 589, 286 U.S. 397, 76 L.Ed. 1184, reversing, C.C.A., Adams v. Mellon, 51 F.2d 620, affirming, D.C., 39 F.2d 80, and certiorari granted 52 S.Ct. 208, 284 U.S. 614, 76 L.Ed. 525.

14. U.S.—Ward v. Joslin, N.H., 22 S. Ct. 807, 186 U.S. 142, 46 L.Ed. 1093.
3 C.J. p 879 note 10.

15. U.S.—Planters' Bank v. Union Bank, La., 16 Wall. 483, 21 L.Ed. 473.

16. U.S.—Bryar v. Campbell, Pa., 20 S.Ct. 794, 177 U.S. 649, 44 L.Ed. 926, affirming 90 F. 690, 33 C.C.A. 236—Semmes v. U. S., La., 91 U.S. 21, 23 L.Ed. 193.

17. U.S.—Gonzales v. Buist, Puerto Rico, 32 S.Ct. 463, 224 U.S. 126, 56 L.Ed. 693.
3 C.J. p 895 note 52.

Rule also applies to equitable issues

U.S.—McLaughlin v. Potomac Bank, D.C., 7 How. 220, 12 L.Ed. 675—Brockett v. Brockett, D.C., 3 How. 691, 11 L.Ed. 786.

18. U.S.—U. S. v. La Franca, La., 51 S.Ct. 278, 282 U.S. 568, 75 L.Ed. 551, affirming, C.C.A., La Franca v. U. S., 37 F.2d 269, which reversed, D. C., U. S. v. La Franca, 26 F.2d 706, and certiorari granted 50 S.Ct. 355, 281 U.S. 713, 74 L.Ed. 1134—Macker v. Thomas, Ky., 7 Wheat. 530, 5 L.Ed. 515.

Want of jurisdiction

No exception may be necessary to enable party to raise the objection that the trial court was without jurisdiction, where its want of jurisdiction is apparent on the record.—Perez v. Fernandez, Puerto Rico, 26 S.Ct. 561, 202 U.S. 80, 50 L.Ed. 942.

19. U.S.—Choctaw, O. & G. R. Co. v. McDade, Tenn., 24 S.Ct. 24, 191 U. S. 64, 48 L.Ed. 96, affirming 112 F. 888, 50 C.C.A. 591.
3 C.J. p 900 note 96.

Individual exceptions

If there are several rulings which are deemed erroneous and which it is desired to have reviewed, an exception must be properly served to each ruling, and not taken in gross or to all the rulings jointly.—McCabe & Steen Constr. Co. v. Wilson, Okl., 28 S.Ct. 558, 209 U.S. 275, 52 L.Ed. 788—3 C.J. p 902 note 5.

20. U.S.—U. S. v. Carey, La., 3 S.Ct. 424, 110 U.S. 51, 28 L.Ed. 67.
3 C.J. p 952 note 24.

Exceptions relating to evidence

Exceptions to rulings on evidence, such as on its admission or rejection, must as a general rule be made at the time of such rulings.—U. S. v. Carey, La., 3 S.Ct. 424, 110 U.S. 51, 28 L.Ed. 67.

Instructions

It will usually be unavailing to except to the charge for the first time after verdict.—Thiede v. Utah, Utah, 16 S.Ct. 62, 159 U.S. 510, 40 L.Ed. 237—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162.

21. U.S.—Kittredge v. Race, La., 92 U.S. 116, 23 L.Ed. 488.

The making of a motion for a new trial does not constitute a waiver of exceptions which have been previ-

follow such procedure may preclude the supreme court from reviewing rulings made with respect to pleadings or the filing thereof,[22] except where the error complained of is apparent on the record on appeal.[23] So, also, the failure to take a proper exception ordinarily precludes review of rulings and orders made before the trial or hearing,[24] or rulings or matters arising during the trial or hearing,[25] such as with respect to conduct or remarks of the presiding judge[26] or counsel,[27] evidence[28] and witnesses,[29] dismissal or nonsuit,[30] instructions[31] and failure or refusal to instruct,[32] verdict or findings of the jury,[33] and decision or findings by the court without a jury.[34]

Also, proper exception in the trial court is ordinarily necessary to obtain review in the supreme court of alleged errors with respect to the judgment or decree,[35] the sufficiency of the evidence to support the verdict or findings,[36] and the report or decision of a referee, master, commissioner, or like officer.[37]

ously noted.—U. S. v. Dashiel, Tex., 4 Wall. 182, 18 L.Ed. 319.

22. U.S.—National Security Bank v. Butler, Mass., 9 S.Ct. 281, 129 U.S. 223, 32 L.Ed. 682.

Particular matters

(1) Rulings on objections with respect to an answer, plea, replication, or reply.—Gonzales v. Buist, Puerto Rico, 32 S.Ct. 463, 224 U.S. 126, 56 L. Ed. 693.

(2) Ruling on a demurrer or exception to a pleading.—German Alliance Ins. Co. v. Hale, Ala., 31 S.Ct. 246, 219 U.S. 307, 55 L.Ed. 229.

3 C.J. p 903 note 16.

23. U.S.—Board of Com'rs of City and County of Denver v. Home Savings Bank, Colo., 35 S.Ct. 265, 236 U.S. 101, 59 L.Ed. 485, affirming 200 F. 28, 118 C.C.A. 256—Snowden v. Ft. Lyon Canal Co., Colo., 238 F. 495, 151 C.C.A. 431.

Whether pleadings support judgment

Whether the pleadings support and warrant the judgment is question which arises on the record proper, and may be reviewed without any exception.—Vicksburg & M. R. R. Co. v. O'Brien, Miss., 7 S.Ct. 118, 119 U. S. 99, 30 L.Ed. 299.

24. U.S.—Fleischmann Const. Co. v. U. S., to Use of Forsberg, Va., 46 S.Ct. 284, 270 U.S. 349, 70 L.Ed. 624, affirming, C.C.A., 298 F. 330, which affirmed, D.C., U. S. v. Fleischmann Const. Co., 298 F. 320, and error allowed, C.C.A., 298 F. 1020.

25. U.S.—Fleischmann Const. Co. v. U. S., to Use of Forsberg, supra—Martinton v. Fairbanks, Ill., 5 S. Ct. 321, 112 U.S. 670, 28 L.Ed. 862.

26. U.S.—Drumm-Flato Commission Co. v. Edmisson, 28 S.Ct. 367, 208 U.S. 534, 52 L.Ed. 606, affirming 17 Okl. 344, 87 P. 311.

27. U.S.—Crumpton v. U. S., Ark., 11 S.Ct. 355, 138 U.S. 361, 34 L.Ed. 958.

Failure to particularize an exception to prejudicial argument by counsel will not, however, preclude supreme court from considering alleged error in permitting such argument where the error in question ought to be considered on appeal, in view of public interest.—New York Cent. R. Co. v. Johnson, Mo., 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, reversing, C. C.A., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, and opinion amended 49 S.Ct. 417.

28. U.S.—Grand Trunk R. Co. v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485.

Rulings as to admission or exclusion

(1) A mere objection to the evidence or ruling, not followed by an exception, is insufficient to preserve the question for review.—Laber v. Cooper, Ill., 7 Wall. 565, 19 L.Ed. 151—Poole v. Fleeger, Tenn., 11 Pet. 185, 9 L.Ed. 680—Scott v. Lloyd, D.C., 9 Pet., 418, 9 L.Ed. 178—3 C.J. p 913 note 97.

(2) Exceptions must be sufficiently specific to identify the evidence and ruling thereon and to point out the particular error relied on, and must not be taken in bulk, where some of the evidence was properly admitted or rejected.—Choctaw, O. & G. R. Co. v. McDade, Tenn., 24 S.Ct. 24, 191 U. S. 64, 48 L.Ed. 96, affirming 112 F. 888, 50 C.C.A. 591.

(3) Where exceptions are properly saved to erroneous rulings on evidence, such rulings may be reviewed without afterward excepting to the instruction on the question.—Boyd v. U. S., Ark., 12 S.Ct. 292, 142 U.S. 450, 35 L.Ed. 1077, reversing, C.C.A., 45 F. 851.

29. Competency

U.S.—Downey v. Hicks, Miss., 14 How. 240, 14 L.Ed. 404.

Examination

U.S.—Scott v. Lloyd, D.C., 9 Pet. 418, 9 L.Ed. 178.

30. U.S.—Gerrard v. Reynolds, 4 How. 123, 11 L.Ed. 903.

31. U.S.—Stewart v. Wyoming Cattle Ranch Co., Neb., 9 S.Ct. 101, 128 U.S. 383, 32 L.Ed. 439.

3 C.J. p 919 note 34.

Specificness

Exceptions to instructions given must be specific rather than general or in gross and must point out the particular matter complained of as error.—Guerini Stone Co. v. P. J. Carlin Const. Co., Puerto Rico, 39 S. Ct. 102, 248 U.S. 334, 63 L.Ed. 275, reversing P. J. Carlin Const. Co. v. Guerini Stone Co., 241 F. 545, 154 C. C.A. 321, certiorari granted Guerini Stone Co. v. P. J. Carlin Const. Co., 38 S.Ct. 9, 245 U.S. 643, 62 L.Ed. 528—3 C.J. p 922 note 40, p 925 note 47, p 926 note 53.

32. U.S.—McCabe & Steen Constr. Co. v. Wilson, Okl., 28 S.Ct. 558, 209 U.S. 275, 52 L.Ed. 788.

3 C.J. p 927 note 55.

Exceptions must be specific and point out the error complained of.—McCabe & Steen Constr. Co. v. Wilson, Okl., 28 S.Ct. 558, 209 U.S. 275, 52 L.Ed. 788—3 C.J. p 927 note 55 [b] (1), p 929 note 58.

33. U.S.—Roach v. Hulings, D.C., 16 Pet. 319, 10 L.Ed. 979.

34. U.S.—Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co., Miss., 41 S. Ct. 524, 256 U.S. 408, 65 L.Ed. 1020, affirming, C.C.A., 261 F. 741—Kirk v. U. S., Ct.Cl., 16 S.Ct. 911, 163 U. S. 49, 41 L.Ed. 66—Morris v. Shriner, Ill., 131 U.S. appendix xci, 19 L.Ed. 903.

A failure or refusal to make or file findings of fact may not be considered in the absence of a request therefor and an exception to the court's refusal or noncompliance with the request.—Law v. U. S., Mont., 45 S.Ct. 175, 266 U.S. 494, 69 L.Ed. 401, reversing, C.C.A., U. S. v. Law, 299 F. 61, which reversed, D.C., Law v. U. S., 290 F. 972.

35. Whether supported by facts found

U.S.—Seeberger v. Schlesinger, Ill., 14 S.Ct. 729, 152 U.S. 581, 38 L.Ed. 560.

36. U.S.—Haws v. Victoria Copper Min. Co., Utah, 16 S.Ct. 282, 160 U. S. 303, 40 L.Ed. 436.

37. U.S.—Coghlan v. South Carolina R. Co., S.C., 12 S.Ct. 150, 142 U.S. 101, 35 L.Ed. 951, affirming, C.C., 32 F. 316.

3 C.J. p 948 note 76.

Determination of court

It was held, however, that, where the determination of the court below is based on an insufficient or erroneous report, no exception to it is necessary to enable the supreme court to inquire into its correctness.

e. Parties

Generally, all parties to the judgment or decree below whose interests will be directly affected if the determination is sustained, reversed, or modified on review may, and usually must, be made parties; but the nonjoinder of parties only precludes adjudication of the interests of the absent parties, although the appeal may be dismissed where the defect is jurisdictional or where there is a misjoinder.

The general rule is that all parties to the record who appear to have any rights or interests that may be directly affected by a judgment on appeal must be made parties to the application for review by proper description therein, or must be given notice thereof, and an opportunity of being heard and defending their rights;[38] but parties who have suffered a default need not be made parties.[39]

Appellants or plaintiffs in error. With the exception of nominal or useless parties,[40] generally all parties against whom the judgment or decree was rendered may, and usually must, be joined as appellants or plaintiffs in error in an appeal by one or more of them,[41] especially where a joint judgment or decree has been rendered against them.[42] However, joinder of all parties is not required where their interests are separate, and only the interests of the party or parties appealing are involved;[43] and, even where there is a joint liability or interest, one or more coparties may maintain separate proceedings for review where there has been a severance of the parties in interest effected by summons and severance, or by an equivalent proceeding appearing in the record,[44] or where the other coparties have refused to join in or prosecute the appeal.[45]

Appellees, respondents, or defendants in error. The general rule is that all parties in favor of whom a judgment or decree has been rendered below, or who are interested in having such a judgment or decree sustained, and all interested coparties of appellant or plaintiff in error, who are not made coappellants or coplaintiffs in error, must be made appellees, respondents, or defendants in error.[46]

—Himley v. Rose, S.C., 5 Cranch 313, 3 L.Ed. 111—Murray v. Schooner Charming Betsey, 2 Cranch 64, 2 L. Ed. 208.

Exception to finding by commission

An exception to the allowance of any amount as a fee for attorney's services was held to be insufficient to raise the point that the amount allowed for such services was excessive in a case heard before a commission.—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 328, 236 U.S. 412, 59 L.Ed. 644, reversing Lehigh Valley R. Co. v. Meeker, 211 F. 785, 128 C.C. A. 311.

38. U.S.—Beardsley v. Arkansas & L. R. Co., Ark., 15 S.Ct. 786, 158 U.S. 123, 39 L.Ed. 919.

3 C.J. p 1003 note 45.

The purpose of the rule is that the successful party may be at liberty to enforce his judgment, decree, or order without delay against those parties who do not desire to have it reversed, and that the supreme court may not be required to decide the same question more than once on the same record.—Masterson v. Herndon, Tex., 10 Wall. 416, 19 L.Ed. 953.

Appeals prosecuted by or against partnerships without setting out the names of the individual members are nugatory, and should be dismissed.—The Protector, Ala., 11 Wall. 82, 20 L.Ed. 47.

Intervention

(1) In the absence of a permissive statute, intervention in an appeal has been denied.—U. S. v. Patterson, La., 15 How. 10, 14 L.Ed. 578.

(2) Persons not parties can be heard originally in the federal supreme court as to the settlement of a decree entered on a mandate from the supreme court directing decree for reorganization of railroad terminal facilities violating Anti-Trust Act July 2, 1890, as far as it operates prejudicially to their rights.—United States v. Terminal R. Ass'n of St. Louis, Mo., 35 S.Ct. 408, 236 U.S. 194, 59 L.Ed. 535.

39. U.S.—Winters v. U. S., Mont., 28 S.Ct. 207, 207 U.S. 564, 52 L.Ed. 340, affirming 148 F. 684, 78 C.C.A. 546.

40. U.S.—Norwich, etc., R. Co. v. Johnson, Conn., 15 Wall. 8, 21 L. Ed. 118.

41. U.S.—Maytin v. Vela, Puerto Rico, 30 S.Ct. 439, 216 U.S. 598, 54 L.Ed. 632.

3 C.J. p 1005 note 55.

42. U.S.—Maytin v. Vela, Puerto Rico, 30 S.Ct. 439, 216 U.S. 598, 54 L.Ed. 632.

3 C.J. p 1012 note 85.

Parties abiding by judgment

Rule applies, even though some of the parties may choose to abide by the judgment or decree sought to be modified or reversed.—Nash v. Harshman, Ohio, 13 S.Ct. 845, 149 U.S. 263, 37 L.Ed. 727.

43. U.S.—Winters v. U. S., Mont., 28 S.Ct. 207, 207 U.S. 564, 52 L.Ed. 340, affirming 148 F. 684, 78 C.C.A. 546.

3 C.J. p 1008 note 71.

44. U.S.—Pflueger v. Sherman, 55 S. Ct. 10, 293 U.S. 55, 79 L.Ed. 193.

3 C.J. p 1009 note 76, p 1010 note 78.

45. U.S.—Wilson v. Kiesel, Utah, 17 S.Ct. 124, 164 U.S. 248, 41 L.Ed. 422.

3 C.J. p 1007 note 69.

46. U.S.—In re Metropolitan Trust Co., N.Y., 31 S.Ct. 18, 218 U.S. 312, 54 L.Ed. 1051.

3 C.J. p 1016 note 1.

Parties differently affected

Where a judgment is favorable to one or more codefendants, and adverse as to others, the latter should be joined in an appeal or writ of error brought by plaintiff to review the action in favor of the former.—Wilson v. Kiesel, Utah, 17 S.Ct. 124, 164 U.S. 248, 41 L.Ed. 422.

In proceedings for review by an intervener, or other indirect party, all the parties to the action, both plaintiff and defendant, should usually be made appellees or defendants in error.—Davis v. Mercantile Trust Co., Ohio, 14 S.Ct. 693, 152 U.S. 590, 38 L.Ed. 563.

Public officers

Where suit was brought against the state attorney general, a county district attorney, and the public service commission, the abolition of the public service commission made it unnecessary to make it a party to an appeal.—Newton v. Consolidated Gas Co. of New York, N.Y., 44 S.Ct. 481, 265 U.S. 78, 68 L.Ed. 909, setting aside dismissal of appeal 44 S.Ct. 401, 264 U.S. 571, 68 L.Ed. 855, and affirming, D.C., Consolidated Gas Co. of New York v. Newton, 291 F. 704.

Mere nominal parties, however, or parties who have no interests that can be affected by the judgment on appeal are neither necessary nor proper parties.—Amadeo v. Northern Assur. Co., Puerto Rico, 26 S.Ct. 507, 291 U.S. 194, 50 L.Ed. 722—Basket v. Hassell, Ind., 2 S.Ct. 415, 107 U.S. 602, 27 L.Ed. 500.

Transfer of interest, or death of party. Where the interests of a party to an appeal devolve on another, a person acquiring such interests will usually be allowed to be substituted in place of the original party, if the proper steps are taken.[47]

It was held that the death of a sole plaintiff in error prior to the assignment of error abated a writ of error,[48] although the death of a merely nominal plaintiff would not prevent the prosecution of a writ of error by the real parties in interest.[49]

An appeal will not abate by reason of the death of appellee before the taking of the appeal.[50] Where pending an appeal or writ of error, appellant or plaintiff in error dies, the appeal or writ is not abated;[51] but, where the judgment below is for defendant, and he dies pending appeal or writ of error prosecuted by plaintiff, the appellate proceedings will abate.[52] Where continuance or revival of an appeal is necessitated by the death of a party,[53] proceedings therefor must be instituted and maintained in the proper time and manner.[54]

Defects, objections, and amendments. Generally, the nonjoinder of parties, either as appellants or plaintiffs in error, or as appellees, respondents, or defendants in error, will have no further effect than to preclude any investigation or adjudication which will affect the rights and liabilities of the parties not joined, but will have this effect;[55] but, if the defect is jurisdictional, the writ of error or appeal will be dismissed.[56] An appeal or writ of error will be dismissed, on motion for a misjoinder of appellees, respondents, or defendants in error.[57] Such defects as those arising from the nonjoinder or misnomer of parties are usually amendable in the supreme court.[58]

Persons who were not parties below and who are not parties to the judgment need not and should not be joined, although interested in the judgment as rendered.—Brewster v. Wakefield, Minn., 22 How. 118, 16 L. Ed. 301—3 C.J. p 1017 note 12.

47. U.S.—Bowden v. Johnson, N.J., 2 S.Ct. 246, 107 U.S. 251, 27 L.Ed. 386.

Substitution permitted

(1) Assignee in bankruptcy for the bankrupt.—Herndon v. Howard, Tex., 9 Wall. 664, 19 L.Ed. 809, 40 How.Pr., N.Y., 288—3 C.J. p 1032 note 27.

(2) Successor of public officer.—Gorham Mfg. Co. v. Wendell, N.Y., 43 S.Ct. 318, 261 U.S. 1, 67 L.Ed. 505.

(3) Appeal is not to be dismissed in injunction suit against official body because some of its members had ceased to hold office pending the appeal where body as a whole maintained its official status and new members were substituted.—Irwin v. Wright, Ariz., 42 S.Ct. 293, 258 U.S. 219, 66 L.Ed. 573.

(4) Before substitution of successor corporation will be allowed, the circumstances under which the old corporation was dissolved and its successor appointed must be clearly shown to the court.—Oklahoma Natural Gas Co. v. State of Oklahoma, Okl., 47 S.Ct. 391, 273 U.S. 257, 71 L. Ed. 634.

Receivers of a state corporation, appointed by state court, will not be substituted as plaintiffs in error in stockholders' suit pending in supreme court, where four years previously a federal court in another state had appointed other receivers for such corporation.—United Copper Securities Co. v. Amalgamated Copper Co., N.Y., 37 S.Ct. 509, 244 U.S. 261, 61 L.Ed. 1119, affirming 223 F. 421, 139 C.C.A. 15.

48. U.S.—Green v. Watkins, Ky., 6 Wheat. 260, 5 L.Ed. 256.

49. U.S.—Amadeo v. Northern Assur. Co., Puerto Rico, 26 S.Ct. 507, 201 U.S. 194, 50 L.Ed. 722.

50. U.S.—Green v. Watkins, Ky., 6 Wheat. 260, 5 L.Ed. 256.

51. Sole appellant

The death of a sole appellant or plaintiff in error pending his appeal or writ of error will not abate the appeal or writ, particularly where the cause of action survives, but the legal representatives of such party will be permitted to prosecute the proceedings to final judgment.—Green v. Watkins, Ky., 6 Wheat. 260, 5 L.Ed. 256.

The death of one of several appellants or plaintiffs in error does not abate a suit or necessitate a revival of it in the appellate court; the cause survives to, and may be prosecuted by, the other plaintiffs in error.—McKinney v. Carroll, Ky., 12 Pet. 66, 9 L.Ed. 1002.

52. U.S.—Iron Gate Bank v. Brady, Va., 22 S.Ct. 529, 184 U.S. 665, 46 L.Ed. 739.

53. Death before appeal

Where a party to an action or suit dies before an appeal has been taken, it is required that there shall be a suggestion of such death and a revival of the action or suit in the name of the legal representatives of decedent as a condition precedent to proceedings for review.—Bigler v. Waller, Va., 12 Wall. 142, 20 L.Ed. 260.

54. U.S.—McClane v. Boon, Or., 6 Wall., 244, 18 L.Ed. 835.

Time for revival or substitution

Where not regulated by statute or by rules of court, the time within which proceedings for revival or substitution of parties are to be commenced is limited only by the discretion of the court.—Noonan v. Bradley, Wis., 12 Wall. 121, 20 L.Ed. 279—Phillips v. Preston, La., 11 How. 294, 13 L.Ed. 702—3 C.J. p 1028 note 89.

In what court prosecuted

Where the death of a party occurs after the appeal or writ of error has been taken, proceedings to substitute the representative of the decedent are properly taken in the supreme court.—Southern Pine Lumber Co. v. Ward, 28 S.Ct. 239, 208 U.S. 126, 52 L.Ed. 420, affirming 85 P. 459, 16 Okl. 131.

Privies may be substituted

U.S.—Moses v. Wooster, 6 S.Ct. 38, 115 U.S. 285, 29 L.Ed. 391—Hook v. Linton, La., 10 Pet. 107, 9 L. Ed. 363.

55. U.S.—Sage v. Central R. Co., Iowa, 93 U.S. 412, 23 L.Ed. 933—Terry v. Abraham, Ga., 93 U.S. 38, 23 L.Ed. 794.

56. U.S.—Texas Land & Cattle Co. v. City of Fort Worth, 55 S.Ct. 658, 295 U.S. 716, 79 L.Ed. 1672, rehearing denied 55 S.Ct. 913, 295 U.S. 769, 79 L.Ed. 1710, dismissing appeal, Tex.Civ.App., 73 S.W. 2d 860—Simpson v. Greeley, Kan., 20 Wall. 152, 22 L.Ed. 338—Hampton v. Rouse, Miss., 13 Wall. 187, 20 L.Ed. 593.

57. U.S.—Davenport v. Fletcher, La., 16 How. 142, 14 L.Ed. 879.

58. U.S.—U. S. v. Schoverling, N.Y., 13 S.Ct. 24, 146 U.S. 76, 36 L.Ed. 893.

3 C.J. p 1036 note 58.

f. Requisites and Proceedings for Transfer of Cause

(1) In general
(2) Application for, and allowance of, appeal
(3) Bond or security
(4) Notice, docketing, and appearance

(1) In General

Appeals to the supreme court must be taken and perfected in accordance with the acts of congress and the rules and practice of the court.

The taking and perfecting of proceedings for review by the supreme court of judgments, orders, or decrees are regulated by acts of congress and the rules and practice of the court,[59] and cross appeals are required to be taken, perfected, and prosecuted under the same conditions or circumstances and in the same manner as other appeals.[60]

A proceeding for the review of the action of a lower court must be taken within the prescribed statutory time,[61] and this rule applies to a second appeal, where the right thereto exists,[62] and to cross appeals.[63] While a justice of the supreme court may extend the time for applying for a writ of certiorari, no provision is expressly made with respect to incapacity of the parties with regard to the time to appeal although under prior statutes the term of disability was excluded in computing the time.[64] The statute prescribing limitations as to the time for taking appeals or proceedings for review starts to operate when entry of the final judgment, order, or decree takes place,[65] and it is the time of actual entry which determines the commencement of the period.[66] With respect to a judgment of reversal on appeal and judgment thereafter entered in the lower court pursuant to the decision on appeal, the time for appeal starts to run from the time of entry of the judgment in the appellate court.[67] If a motion or petition for rehearing, reargument, or new trial, or the like is made or presented properly and in due season, and is entertained by the court, the time does not begin to run until such motion or petition is disposed of, the judgment or decree not taking final effect for the purpose of review until that time,[68] and the same rule applies with respect to a motion to vacate or modify a judgment, order, or decree.[69]

An appeal or proceeding for review in the supreme court is deemed to have been taken and perfected within the statutes of limitation when the conditions precedent in the statutes or rules of the court prescribing the steps for taking and perfecting the same have been complied with, and not until then, and, therefore, whether it has been taken and perfected within the time limited depends on their terms and provisions.[70] It has been held that an appeal is not taken until it is in some way pre

59. U.S.—In re Chateaugay Ore & Iron Co., N.Y., 9 S.Ct. 150, 128 U. S. 544, 32 L.Ed. 508.

60. U.S.—Farrar v. Churchill, Miss., 10 S.Ct. 771, 135 U.S. 609, 34 L.Ed. 246—Hilton v. Dickinson, D.C., 2 S.Ct. 424, 108 U.S. 165, 27 L.Ed. 688—The S. S. Osborne, Ohio, 105 U.S. 447, 26 L.Ed. 1065.

61. U.S.—U. S. v. Pena, 20 S.Ct. 165, 175 U.S. 500, 44 L.Ed. 251.
3 C.J. p 1040 note 12.

62. U.S.—Evans v. State Nat. Bank, La., 10 S.Ct. 493, 134 U.S. 330, 33 L.Ed. 917.

63. U.S.—Farrar v. Churchill, Miss., 10 S.Ct. 771, 135 U.S. 609, 34 L.Ed. 246—Hilton v. Dickinson, D.C., 2 S.Ct. 424, 108 U.S. 165, 27 L.Ed. 688.

64. **Decisions under prior statutes**
U.S.—Chapman v. Barney, Ill., 9 S. Ct. 426, 129 U.S. 677, 32 L.Ed. 800—McDonald v. Hovey, D.C., 4 S.Ct. 142, 110 U.S. 619, 28 L.Ed. 269.

65. U.S.—Cherokee Nation v. Whitmire, Ct.Cl., 32 S.Ct. 200, 223 U.S. 108, 56 L.Ed. 370—Polleys v. Black River Imp. Co., Wis., 5 S.Ct. 369, 113 U.S. 81, 28 L.Ed. 938.

Day of entry excluded
In computing statutory time within which proceedings for review must be brought, the day of entry of the judgment, decree, or order should be excluded.—Smith v. Gale, Dak., 11 S.Ct. 185, 137 U.S. 577, 34 L.Ed. 792.

66. U.S.—Providence Rubber Co. v. Goodyear, R.I., 6 Wall. 153, 18 L.Ed. 762.

67. U.S.—Boylan v. U. S., N.Y., 42 S. Ct. 113, 257 U.S. 614, 66 L.Ed. 397, dismissing error, C.C.A., U. S. v. Boylan, 265 F. 165, which affirms, D.C., 256 F. 468.

68. U.S.—Morse v. U. S., Ct.Cl., 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518, rehearing denied 55 S.Ct. 282, 295 U.S. 768, 79 L.Ed. 1709, dismissing appeal 59 Ct.Cl. 139—Cherokee Nation v. Whitmire, Ct. Cl., 32 S.Ct. 200, 223 U.S. 108, 56 L.Ed. 370.
3 C.J. p 1051 note 10.

Second application
After denial of a motion for a new trial, an application for leave to file motions for new trial and to amend findings was held not to suspend the running of the statutory time for taking an appeal.—Morse v. U. S., Ct.Cl., 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518, rehearing denied 55 S.Ct. 282, 295 U.S. 768, 79 L.Ed. 1709, dismissing appeal 59 Ct. Cl. 139.

69. U.S.—City of Memphis v. Brown, Tenn., 94 U.S. 715, 24 L. Ed. 244.
3 C.J. p 1054 note 19.

Reëntry of judgment
On denial of a motion to set aside a judgment and reëntry of the judgment as of the date of the making of the motion to set aside, a proceeding for review is properly taken on the reëntered judgment.—City of Memphis v. Brown, supra—Brockett v. Brockett, D.C., 2 How. 238, 11 L.Ed. 251.

70. U.S.—Credit Co. v. Arkansas Cent. Ry. Co., Ark., 9 S.Ct. 107, 128 U.S. 258, 32 L.Ed. 448.
3 C.J. p 1064 note 8.

Signifying intention
Where a party may appeal as of right, and he signifies his intention to appeal within the time allowed by statute, the statutory limitation ceases to affect the case.—U. S. v. Adams, Ct.Cl., 6 Wall. 101, 18 L.Ed. 792.

Mere petition insufficient
A petition for an appeal filed in the lower court without an allowance of the appeal by that court does not bring the case up before the supreme court.—Barrel v. Western Transp. Co., Ill., 3 Wall. 424, 18 L. Ed. 168.

sented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause,[71] and that this is done by filing the papers, namely, the petition and allowance of appeal, where there is such petition and allowance, the appeal bond, and the citation.[72] However, where the application for, or allowance of, an appeal ipso facto saves appellant from the bar of the statute, neither notice nor the issuing of the citation nor the giving of bond within the statutory time is jurisdictional,[73] but an appeal taken in open court becomes inoperative when not docketed in the supreme court before the end of the term to which it is made returnable.[74]

Statutes or rules of court which limit the time for appeals or proceedings for review are mandatory and jurisdictional,[75] and the time cannot be extended by the appellate court or a judge thereof or relief granted in case of a failure to proceed in time,[76] as by a nunc pro tunc entry of appeal or allowance thereof;[77] and hence, in the absence of express provision to the contrary, an appeal or proceeding for review which is not taken and perfected within time will be disallowed or dismissed.[78] However, if the appeal is prayed for or otherwise taken in due time, it is not dismissible because of a delay in its allowance.[79]

(2) Application for, and Allowance of, Appeal

A party must ordinarily apply for and obtain an order, within the time prescribed therefor, allowing an appeal to the supreme court.

Under the statutes and rules of the supreme court a party must ordinarily apply for and obtain an order allowing the appeal[80] within the time prescribed therefor,[81] and it has been held that the court cannot allow an appeal by a nunc pro tunc order after expiration of the time for appealing.[82] The application must be made to, and its allowance obtained from, the court, judge, or official designated by statute or rules of court,[83] and, where an appeal is given as a matter of right on compliance with prescribed conditions, the court has no discretion to refuse the appeal, but must grant it as a matter of course, leaving it for the appellate court to say whether it will lie.[84] While some appeals have been considered without any formal order of allowance,[85] the order allowing an appeal should conform to conditions prescribed by statutes or rules of the court.[86] When a statute or rule of court provides that, to entitle a party in certain causes to appeal, the lower court or judge shall make a prescribed certificate, as, for example, of importance, that a question of law is involved which ought to be reviewed, etc., a case within the class of causes specified is not appealable, and the appellate court can acquire no jurisdiction, without the proper certificate.[87] Also an appeal must be taken or the writ made returnable to the term of court or day prescribed by statute, and a failure to comply with the statute in this respect may be ground for dismissal.[88] However, if, by reason of

71. U.S.—Credit Co. v. Arkansas Cent. Ry. Co., Ark., 9 S.Ct. 107, 128 U.S. 258, 32 L.Ed. 448.

72. U.S.—Credit Co. v. Arkansas Cent. Ry. Co., supra.
3 C.J. p 1065 notes 9, 11.

73. U.S.—Dodge v. Knowles, App.D. C., 5 S.Ct. 1108, 114 U.S. 436, 29 L.Ed. 144.
3 C.J. p 1066 note 21.

74. U.S.—Radford v. Folsom, Iowa, 8 S.Ct. 334, 123 U.S. 725, 31 L.Ed. 292.
Entry or docketing generally see infra subdivision f (4) of this section.

75. U.S.—U. S. v. Curry, La., 6 How. 106, 12 L.Ed. 363.

76. U.S.—Credit Co. v. Arkansas Cent. R. Co., Ark., 9 S.Ct. 107, 128 U.S. 258, 32 L.Ed. 448.

77. U.S.—Credit Co. v. Arkansas Cent. R. Co., supra.

78. U.S.—Fowler v. Hamill, N.Y., 11 S.Ct. 663, 139 U.S. 549, 35 L. Ed. 266.
3 C.J. p 1067 note 28, p 1074 note 73.
Defense is properly raised or presented by motion.—Brooks v. Norris, La., 11 How. 204, 13 L.Ed. 665.

79. U.S.—Cardona v. Quinones, Puerto Rico, 36 S.Ct. 346, 240 U.S. 83, 60 L.Ed. 538.

80. U.S.—Tuskaloosa Northern R. Co. v. Gude, Ala., 11 S.Ct. 1004, 141 U.S. 244, 35 L.Ed. 742—Ex parte Ralston, La., 7 S.Ct. 317, 119 U.S. 613, 30 L.Ed. 506—Barrel v. Mohawk Western Transportation Co., Ill., 3 Wall. 424, 18 L.Ed. 168.

81. U.S.—Barrel v. Mohawk Western Transportation Co., supra.
Color of authority
A motion to dismiss, on the ground that the writ of error and citation were not made returnable in time was denied, on the ground that, as appellant had color of authority from the court and a judge thereof, justice would be better served by dealing with the merits.—Beaumont v. Prieto, Philippine, 39 S.Ct. 383, 249 U.S. 554, 63 L.Ed. 770.

82. U.S.—Credit Co., Ltd. v. Arkansas Cent. R. Co., Ark., 9 S.Ct. 107, 128 U.S. 258, 32 L.Ed. 448.

83. U.S.—Richards v. Mackall, D.C., 5 S.Ct. 535, 113 U.S. 539, 28 L.Ed. 1132.
3 C.J. p 1079 note 10.
Lower court or appellate court
Ordinarily an appeal may be allowed by either a judge of the lower court or a justice of the supreme court.—Terminal R. Ass'n of St. Louis v. U. S., Mo., 45 S.Ct. 5, 266 U.S. 17, 69 L.Ed. 150—Sage v. Central R. Co., Iowa, 96 U.S. 712, 24 L.Ed. 641.

84. U.S.—Brown v. McConnell, Wash., 8 S.Ct. 559, 124 U.S. 489, 31 L.Ed. 495—The Douro, N.Y., 3 Wall. 564, 18 L.Ed. 168.

85. U.S.—Brandies v. Cochrane, Ill., 105 U.S. 262, 26 L.Ed. 989.
3 C.J. p 1094 note 40.

86. **Naming appellees**
If the parties appeal from the proceedings, an order allowing an appeal need not name individually all the appellees.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872.

87. U.S.—Colvin v. Jacksonville, Fla., 15 S.Ct. 634, 157 U.S. 368, 39 L.Ed. 736.

88. U.S.—Garrison v. Cass County, Neb., 5 Wall. 823, 18 L.Ed. 491.
3 C.J. p 1097 note 72.

defects in the application or order of allowance or for other reasons, an attempted appeal or proceeding for review is ineffectual, the party may, as a general rule, abandon it and obtain another order of allowance within the time prescribed by statute.[89]

Under the general power of the court over its judgments, decrees, and orders, an order allowing an appeal may be revoked or vacated during the term at which it was made, as long as the appeal remains unperfected and the cause has not passed into the jurisdiction of the appellate court.[90]

In the absence of an affidavit of the inability of appellant to pay, the costs and fees of the officer of the supreme court for docketing and other services must be paid or secured in advance, or within a certain time fixed by statute or rule of court, or the officer may refuse to docket the case or the appeal may be dismissed.[91]

(3) Bond or Security

Ordinarily appellant must give a bond or other security on the taking of an appeal, and such bond or security must comply with statutory provisions and orders of the court.

In accordance with statutory requirements, except in cases brought by the United States or by direction of any department of the government,[92] appellant must ordinarily give a bond, recognizance, or undertaking for payment of costs on the taking of an appeal,[93] since, in the absence of express statutory provision, the fact of poverty or inability to procure sureties does not of itself relieve appellant from the necessity of giving an appeal bond or other security,[94] and statutes merely authorizing persons to sue in forma pauperis have been held not to extend to appeals.[95] However, while the appeal bond or undertaking is essential to the prosecution of the appeal, it has been held not essential to the validity of the appeal in such a sense as to prevent the appellate court from acquiring jurisdiction.[96]

The bond or other undertaking on appeal must comply with statutory provisions,[97] and, where a person appeals in forma pauperis, he must comply with statutory provisions and rules of court, and the affidavit or oath must be made by appellant.[98] The bond or undertaking should give the names of all the parties to the judgment,[99] and should run in favor of the appellee or appellees, or of the party or parties whose interest is adverse to that of the party or parties appealing.[1] It has been held that the bond need not be signed by all of several appellants, even though all must join in the appeal, but that it is sufficient if it appears to have been executed on behalf of all.[2] The bond or undertaking must be for the amount required by statute or fixed by the order of the court,[3] and the fixing of the amount of an appeal bond, when not fixed by statute, is a judicial act, generally within the discretion of the court.[4]

89. U.S.—Evans v. State Bank, La., 10 S.Ct. 493, 134 U.S. 330, 33 L.Ed. 917.

90. U.S.—Aspen Mining & Smelting Co. v. Billings, Colo., 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.
3 C.J. p 1096 note 66.

91. U.S.—Selma & M. R. Co. v. Louisiana Nat. Bank of New Orleans, Ala., 94 U.S. 253, 24 L.Ed. 32—Van Rensselaer v. Watts, 7 How. 784, 12 L.Ed. 913—Owings v. Tiernan, Ky., 10 Pet. 447, 9 L.Ed. 489.

92. U.S.—Pacific Nat. Bank v. Mixter, Mass., 5 S.Ct. 944, 114 U.S. 463, 29 L.Ed. 221.
3 C.J. p 1121 note 87.

93. U.S.—Gallaway v. State Nat. Bank of Ft. Worth, Tex., 22 S. Ct. 811, 186 U.S. 177, 46 L.Ed. 1111.
3 C.J. p 1106 note 54—4 C.J. p 568 note 78.

Applicable to cross appeals
U.S.—The "S. S. Osborne," 105 U.S. 447, 26 L.Ed. 1065.

94. U.S.—Bradford v. Southern R. Co., 25 S.Ct. 55, 195 U.S. 243, 49 L.Ed. 178.

95. U.S.—Bradford v. Southern R. Co., supra.

96. U.S.—Beardsley v. Arkansas & L. R. Co., Ark., 15 S.Ct. 786, 158 U.S. 123, 39 L.Ed. 919.
3 C.J. p 1108 note 61.

97. U.S.—Omaha Hotel Co. v. Kountze, Neb., 2 S.Ct. 911, 107 U. S. 378, 27 L.Ed. 609.

Conditions
(1) A substantial and practical compliance with the statutes or orders of the court as to the conditions of the bond is sufficient.—Omaha Hotel Co. v. Kountze, supra—Gay v. Parpart, Ill., 101 U.S. 391, 25 L.Ed. 841.

(2) However, variations in language cannot be carried to the extent of giving an effect contrary to the intent of the statutes.—Omaha Hotel Co. v. Kountze, supra.

98. U.S.—Pothier v. Rodman, R. I., 43 S.Ct. 374, 261 U.S. 307, 67 L.Ed. 670.

99. U.S.—Kail v. Wetmore, Ill., 6 Wall. 451, 18 L.Ed. 862.

1. U.S.—Davenport v. Fletcher, La., 16 How. 142, 14 L.Ed. 879.

Additional obligees named
The validity of an appeal bond was held not affected by the fact that other parties besides the necessary obligees were named in it as obligees.—Hill v. Chicago & E. R. Co., Ill., 9 S.Ct. 269, 129 U.S. 170, 32 L.Ed. 651.

Bond given in the alternative to the state or to a relator has been held good.—Spalding v. New York, N.Y., 2 How. 66, 11 L.Ed. 181.

Original party dead
It has been held that a defect in a bond because it is payable to the original party to the suit, who has died and whose representatives are parties to the proceedings, and not payable to any of the substituted parties, may be cured by the filing of a new bond.—Bigler v. Waller, Va., 12 Wall. 142, 20 L.Ed. 260.

2. U.S.—Brockett v. Brockett, D.C., 2 How. 238, 11 L.Ed. 251.

3. U.S.—Omaha Hotel Co. v. Kountze, Neb., 2 S.Ct. 911, 107 U.S. 378, 27 L.Ed. 609.

Sureties
A bond was held sufficient where the sureties were not bound jointly and severally for the full amount of the bond, but each of them severally for a specified part only, each being sufficient to the extent of his obligation.—New Orleans Ins. Co. v. E. D. Albro Co., La., 5 S.Ct. 289, 112 U.S. 506, 28 L.Ed. 809.

4. U.S.—Omaha Hotel Co. v.

An objection to an appeal bond should be taken by way of a preliminary motion to dismiss the appeal.[5]

To be sufficient the bond or undertaking must be approved by the judge or justice allowing the appeal,[6] and such power cannot be delegated to any authority other than that named in the statute.[7] In the absence of a statute or court rule requiring that the approval of an appeal bond or undertaking, or of the sureties thereon, shall be made in some prescribed form or mode, the approval need not be in explicit terms, but may be inferred from the facts of the transaction,[8] and where the bond or undertaking is received and filed without objection by the judge his approval will be presumed.[9] When exercising discretion vested in him, the action of a judge in approving a bond is conclusive[10] in the absence of a material change in the circumstances of the case or parties, or in the pecuniary condition of the sureties arising since approval.[11]

There must be a substantial compliance with the requirements of statutes or rules of court as to the manner of filing an appeal bond or undertaking.[12] The court may allow the bond or security to be filed after the time for taking the appeal has expired where the appeal was taken or allowed in time,[13] provided sufficient excuse for failure to file the same in proper time and due diligence are shown,[14] and a stipulation of the parties extending the time for filing an appeal bond has been held equivalent to an order of the same date renewing the allowance of the appeal.[15] However, appeals or proceedings for review have been dismissed where appellant failed to file his bond within a reasonable time.[16]

When an appeal bond is defective in form or substance, but not void so as to deprive the court of jurisdiction, the court may allow an amendment to correct the deficiency, or the filing of a new bond,[17] but the lower court cannot require an amendment of the bond or a new bond after it has lost jurisdiction by perfection of the appeal.[18]

(4) Notice, Docketing, and Appearance

Generally a citation should be issued and served on appellee on the taking of an appeal, and the appeal must be entered or docketed within the time specified. A general appearance will cure defects in the form of process.

Where an appeal is allowed in open court and perfected during the term at which the decree or judgment appealed from was rendered, no citation is necessary,[19] but, if the appeal is not perfected until after the term, a citation must be issued to bring in the parties, unless they voluntarily appear or waive the citation,[20] and, a fortiori, a citation is one of the necessary elements of an appeal taken after the term when the judgment or decree was rendered.[21]

The citation should comply with statutes and rules of court[22] with respect to the return day,[23] and must be signed by a judge of the lower court or by a justice of the supreme court,[24] and should be

Kountze, Neb., 2 S.Ct. 911, 107 U.S. 378, 27 L.Ed. 609.

5. U.S.—Mandeville v. Riggs, D.C., 2 Pet. 482, 7 L.Ed. 493.

6. U.S.—Haskins v. St. Louis & S. E. R. Co., Tenn., 3 S.Ct. 72, 109 U.S. 106, 27 L.Ed. 873.
3 C.J. p 1172 note 95.

7. U.S.—O'Reilly v. Edrington, Miss., 96 U.S. 724, 24 L.Ed. 659.
3 C.J. p 1173 note 3.

8. U.S.—Silver v. Ladd, Or., 6 Wall. 440, 18 L.Ed. 828—Davidson v. Lanier, Miss., 4 Wall. 447, 18 L.Ed. 377—Martin v. Hunter, Va., 1 Wheat. 304, 4 L.Ed. 97.

9. U.S.—Silver v. Ladd, Or., 6 Wall. 440, 18 L.Ed. 828—Davidson v. Lanier, Miss., 4 Wall. 447, 18 L. Ed. 377.

10. U.S.—Jerome v. McCarter, Mich., 21 Wall. 17, 22 L.Ed. 515.

11. U.S.—Williams v. Claflin, S.C., 103 U.S. 753, 26 L.Ed. 606.

12. U.S.—The Dos Hermanos, La., 10 Wheat. 306, 6 L.Ed. 328.

13. U.S.—The Dos Hermanos, supra.
3 C.J. p 1192 note 73.

14. U.S.—Brobst v. Brobst, 2 Wall. 96, 17 L.Ed. 905.

15. U.S.—Goodwin v. Fox, Ill., 7 S. Ct. 779, 120 U.S. 775, 30 L.Ed. 815.

16. U.S.—Beardsley v. Arkansas & L. R. Co., Ark., 15 S.Ct. 786, 158 U.S. 123, 39 L.Ed. 919—Killian v. Clark, D.C., 4 S.Ct. 700, 111 U.S. 784, 28 L.Ed. 599.

17. U.S.—Davis v. Wakelee, N.Y., 15 S.Ct. 555, 156 U.S. 680, 39 L.Ed. 578—Seward v. Corneau, La., 102 U.S. 161, 26 L.Ed. 86.
3 C.J. p 1186 note 37, p 1195 note 5.

Diligence

Appellant must act with reasonable diligence after discovery of the necessity of an amendment or of a new bond.—Beardsley v. Arkansas & L. R. Co., Ark., 15 S.Ct. 786, 158 U.S. 123, 39 L.Ed. 919.

18. U.S.—Keyser v. Farr, D.C., 105 U.S. 265, 26 L.Ed. 1025—Draper v. Davis, D.C., 102 U.S. 370, 26 L. Ed. 121.

19. U.S.—Jacobs v. George, Ariz., 14 S.Ct. 159, 150 U.S. 415, 37 L.Ed. 1127.
3 C.J. p 1204 notes 74, 75.

20. U.S.—Jacobs v. George, supra.

21. U.S.—Jacobs v. George, supra.
3 C.J. p 1202 note 62.
Citation on issuance of writ of error see 3 C.J. p 1205 note 78—p 1210 note 35.

22. **Address to proper parties**
The citation or summons should be addressed to the proper parties as appellees or defendants in error, and to those who are the actual parties at the time the proceeding is allowed and prosecuted.—Bigler v. Waller, Va., 12 Wall. 142, 20 L.Ed. 260.

23. U.S.—Shute v. Keyser, Ariz., 13 S.Ct. 960, 149 U.S. 649, 37 L.Ed. 884—Seagrist v. Crabtree, N.M., 8 S.Ct. 1394, 127 U.S. 773, 32 L.Ed. 323—Yeaton v. Lenox, D.C., 7 Pet. 220, 8 L.Ed. 664.

24. U.S.—Brown v. McConnell, Wash., 8 S.Ct. 559, 124 U.S. 489, 31 L.Ed. 495—Richards v. Mackall, D.C., 5 S.Ct. 535, 113 U.S. 539, 28 L.Ed. 1132—Palmer v. Donner, Cal., 7 Wall. 541, 19 L.Ed. 99.

A citation signed by the clerk of court is invalid.—Villabalos v. U. S., Fla., 6 How. 81, 12 L.Ed. 352—U. S.

properly served,[25] within the time prescribed by statute,[26] on appellee or his attorney if not in some manner personally waived by one of them.[27]

As a rule, errors or defects in the citation or other process, or in the return thereon, which are not imputable to appellant or plaintiff in error, or which are not prejudicial, are not cause for the dismissal of the appeal or writ, but, on a proper and timely application to the court, amendments will be allowed, or a new or alias citation or other process granted.[28]

The citation on appeal may be waived by appellee or by his attorney[29] by express stipulation or agreement.[30] It has been held therefore that no citation is necessary in a case where, in point of fact, by agreement of parties, actual notice of an intention to appeal appears on the record.[31]

Entry or docketing. The appeal or proceedings for review must be entered or docketed[32] within the time specified,[33] and in the absence of a waiver thereof[34] the appeal may be dismissed[35] or the judgment affirmed.[36] The court may permit the appeal to be entered or docketed after the time has expired,[37] as where the delay was due to the neglect or error of the court or the clerk,[38] or to fraud,[39] ignorance of the rules,[40] or alleged oversight;[41] but an entry nunc pro tunc will not be permitted where a large number of cases have intervened.[42]

Payment of the docket or other fees, or security therefor, is usually made a condition precedent to the procurement of an entry, and where the fees are not prepaid or secured the clerk is justified in refusing to docket the appeal.[43]

Appearance in appellate court. It is generally of no importance to appellant whether an appearance for appellee is or is not entered on the record, for, if appellant is entitled to his appeal, and has prosecuted it according to law, the refusal or omission of appellee to appear will not delay a hearing, and a judgment against him will be as conclusive as though an appearance had been entered on the docket,[44] but when a case is called and neither appellant nor appellee appears it is usual to dismiss the appeal.[45] An appearance by an attorney must be authorized by his client,[46] and, although the court

v. Hodge, La., 3 How. 534, 11 L.Ed. 714.

25. U.S.—Lloyd v. Alexander, 1 Cranch 365, 2 L.Ed. 137.

Annulling decision

Where the appellate court has, in ignorance of the fact that no notice has been served, either allowed the submission of the cause or rendered a decision, it will, on motion, annul such action.—Ex parte Crenshaw, Ala., 15 Pet. 119, 10 L.Ed. 682.

Proof of service

In some jurisdictions a citation on appeal or error is no part of the record, and the fact of its having been issued and served may be proved aliunde.—Innerarity v. Byrne, 5 How. 295, 12 L.Ed. 159.

26. U.S.—Hewitt v. Filbert, D.C., 6 S.Ct. 319, 116 U.S. 142, 29 L.Ed. 581—Washington v. Dennison, D. C., 6 Wall. 495, 18 L.Ed. 863—Castro v. U. S., Cal., 3 Wall. 46, 18 L.Ed. 163.

3 C.J. p 1213 note 65.

However, it has been held that jurisdiction of the appeal is not defeated by failure to obtain a citation within the time allowed for taking an appeal, and the court has allowed a citation to issue after such time on a showing of a sufficient excuse for the delay.—Mendenhall v. Hall, La., 10 S.Ct. 616, 134 U.S. 559, 33 L.Ed. 1012—Evans v. State Nat. Bank of New Orleans, La., 10 S.Ct. 493, 134 U.S. 330, 33 L.Ed. 917—Dayton v. Lash, Minn., 94 U.S. 112, 24 L.Ed. 33—3 C.J. p 1211 note 44, p 1213 note 67.

27. U.S.—Tripp v. Santa Rosa St. R. Co., Cal., 12 S.Ct. 655, 144 U. S. 126, 36 L.Ed. 371—U. S. v. Curry, La., 6 How. 106, 12 L.Ed. 363.

3 C.J. p 1214 notes 73, 75.

All parties to the judgment order, or decree below, whose interests may be adversely affected by the result of the appeal or proceeding in error, or persons legally representing them, should be served.—Davis v. Mercantile Trust Co., Ohio, 14 S.Ct. 693, 152 U.S. 590, 38 L.Ed. 563—3 C.J. p 1212 note 62.

28. U.S.—Shute v. Keyser, Ariz., 13 S.Ct. 960, 149 U.S. 649, 37 L.Ed. 884—Davidson v. Lanier, Miss., 4 Wall. 447, 18 L.Ed. 377—Peale v. Phipps, La., 8 How. 256, 12 L.Ed. 1070.

3 C.J. p 1211 note 49, p 1215 note 84.

29. U.S.—U. S. v. Gomez, Cal., 1 Wall. 690, 17 L.Ed. 677.

By approval of bond

The filing of an appeal or supersedeas bond, and the approval of such bond in open court by appellees' counsel, have been held to afford notice to appellee and to do away with the necessity of a citation.—Goodwin v. Fox, Ill., 7 S.Ct. 779, 120 U.S. 775, 30 L.Ed. 815.

30. U.S.—U. S. v. Gomez, Cal., 1 Wall. 690, 17 L.Ed. 677.

31. U.S.—U. S. v. Gomez, supra.

32. U.S.—Green v. Elbert, Colo., 11 S.Ct. 188, 137 U.S. 615, 34 L.Ed. 792—Grigsby v. Purcell, Ky., 99 U. S. 505, 25 L.Ed. 354.

33. U.S.—Radford v. Folsom, Iowa, 8 S.Ct. 334, 123 U.S. 725, 31 L.Ed. 292.

3 C.J. p 1243 note 4.

34. U.S.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872.

3 C.J. p 1246 notes 48, 49.

35. U.S.—Green v. Elbert, Colo., 11 S.Ct. 188, 137 U.S. 615, 34 L.Ed. 792.

3 C.J. p 1244 note 16.

36. U.S.—Davis v. U. S., Ark., 5 S. Ct. 696, 113 U.S. 687, 28 L.Ed. 1149.

37. U.S.—Mutual L. Ins. Co. of New York v. Phinney, Wash., 20 S.Ct. 906, 178 U.S. 327, 44 L.Ed. 1088.

3 C.J. p 1245 note 22.

38. U.S.—Mutual L. Ins. Co. of New York v. Phinney, supra.

39. U.S.—U. S. v. Gomez, Cal., 3 Wall. 752, 18 L.Ed. 212.

40. U.S.—Green v. Elbert, Colo., 11 S.Ct. 188, 137 U.S. 615, 34 L.Ed. 792.

41. U.S.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872.

42. U.S.—Van Rensselaer v. Watts, 7 How. 784, 12 L.Ed. 913.

43. U.S.—Van Rensselaer v. Watts, supra.

3 C.J. p 1246 note 44.

44. U.S.—U. S. v. Yates, La., 6 How. 605, 12 L.Ed. 575.

45. U.S.—Radford v. Craig, 5 Cranch 289, 3 L.Ed. 104.

46. U.S.—Davis v. Wakelee, N.Y., 15

may allow an appearance to be withdrawn in a proper case, leave to withdraw an appearance has been held not to authorize a motion to dismiss the appeal.[47] A general appearance will cure defects in the form of process,[48] but a special appearance for the sole purpose of moving to dismiss for want of jurisdiction is not a waiver of objections.[49]

g. Effect of Transfer of Cause or Proceedings Therefor

On perfection of an appeal to the supreme court, the jurisdiction of the lower court ceases, although it may make orders relating to collateral matters looking to a continuance of the status quo.

Although the jurisdiction of the cause remains in the trial court until the appeal is perfected,[50] yet as soon as that has been done the jurisdiction of the supreme court attaches, and that of the trial court ceases,[51] and the supreme court has exclusive power and authority over the subject matter of the appellate proceeding.[52] However, the lower court may make up the record in due form,[53] and during the trial term the lower court may perfect its judgment or decree[54] and correct obvious mistakes.[55] While a judgment or decree, except in so far as its execution is stayed on appeal, remains in force and is binding on the parties as to every question directly decided until it is reversed or set aside,[56] an appeal, as a rule, does not stay further proceedings in the lower court with reference to rights not passed on or affected by the order or decree appealed from, but only such as affect the execution or operation of such order or decree,[57] and the lower court has power to make orders looking to a continuance of the status quo.[58] Also the pendency of an appellate proceeding does not deprive the trial court of power to hear and determine matters which are independent of, or collateral to, the subject matter before the appellate court,[59] but the lower court cannot take such action as will be, in effect, an execution of its judgment or will destroy the subject of the appeal or place the funds involved where they will be beyond the control of the ultimate judgment or decree.[60]

h. Supersedeas or Stay of Proceedings

A supersedeas or stay of proceedings pending an appeal can be had only on compliance with the terms and conditions prescribed by statutes and rules of court, but when granted it suspends all further proceedings tending to enforce the judgment, order, or decree.

Ordinarily an appeal has no effect as a supersedeas,[61] and a supersedeas or stay can be had only on a compliance with the terms and conditions prescribed by the statutes and rules of court.[62]

S.Ct. 555, 156 U.S. 680, 39 L.Ed. 578.

47. U.S.—U. S. v. Yates, La., 6 How. 605, 12 L.Ed. 575.

48. U.S.—Shute v. Keyser, Ariz., 13 S.Ct. 960, 149 U.S. 649, 37 L.Ed. 884—Goodwin v. Fox, Ill., 7 S.Ct. 779, 120 U.S. 775, 30 L.Ed. 815—Farrar v. U. S., 3 Pet., 459, 7 L.Ed. 741.
3 C.J. p 1241 note 79.

49. U.S.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872—Radford v. Folsom, Iowa, 8 S.Ct. 334, 123 U.S. 725, 31 L.Ed. 292—Grigsby v. Purcell, Ky., 99 U.S. 505, 25 L.Ed. 354.

50. U.S.—Cherokee Nation v. Whitmire, Ct.Cl., 32 S.Ct. 200, 223 U. S. 108, 56 L.Ed. 370—Aspen Mining & Smelting Co. v. Billings, Colo., 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.

The question of when a proceeding has been perfected so as to operate as a transfer of jurisdiction is dependent almost entirely on the provisions of the statutes and rules of court.—Evans v. State Nat. Bank, La., 10 S.Ct. 493, 134 U.S. 330, 33 L.Ed. 917—3 C.J. p 1253 note 30.

51. U.S.—Keyser v. Farr, D.C., 105 U.S. 265, 26 L.Ed. 1025—Draper v. Davis, D.C., 102 U.S. 370, 26 L.Ed. 121.

52. U.S.—Keyser v. Farr, D.C., 105 U.S. 265, 26 L.Ed. 1025.

53. U.S.—Hunnicutt v. Peyton, Tex., 102 U.S. 333, 26 L.Ed. 113.

54. U.S.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.

55. U.S.—Hovey v. McDonald, supra.

56. U.S.—Merrimack River Sav. Bank v. Clay Center, Kan., 31 S.Ct. 295, 219 U.S. 527, 55 L.Ed. 320, Ann.Cas.1912A 513.

57. U.S.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.

Punishing violation of injunction

Where an appeal from a decree enjoining defendant from doing an act does not suspend the operation of the injunction, or where the lower court properly continues an injunction or grants a restraining order pending an appeal, it is usually held that the doing of the act enjoined may be punished by the lower court as a contempt notwithstanding the appeal.—Merrimack River Sav. Bank v. Clay Center, Kan., 31 S.Ct. 295, 219 U.S. 527, 55 L.Ed. 320, Ann.Cas. 1912A 513.

58. U.S.—Newton v. Consolidated Gas Co. of New York, N.Y., 42 S. Ct. 264, 258 U.S. 165, 66 L.Ed. 538, modifying, D.C., Consolidated Gas Co. of New York v. Newton, 267 F. 231, and affirming 274 F. 986—Grant v. Phoenix Mut. L. Ins. Co., D.C., 7 S.Ct. 849, 121 U.S. 118, 30 L.Ed. 909—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.
3 C.J. p 1270 note 42.

59. U.S.—Newton v. Consolidated Gas Co. of New York, N.Y., 42 S. Ct. 264, 258 U.S. 165, 66 L.Ed. 538, modifying, D.C., Consolidated Gas Co. of New York v. Newton, 267 F. 231, and affirming 274 F. 986.
3 C.J. p 1268 note 23.

Investment of funds resulting from the sale of property under an order made pending litigation may be authorized or directed by the lower court.—Spring v. South Carolina Ins. Co., S.C., 6 Wheat. 519, 5 L.Ed. 320.

60. U.S.—Goddard v. Ordway, D.C., 94 U.S. 672, 24 L.Ed. 237—Bronson v. La Crosse & M. R. Co., Wis., 1 Wall. 405, 17 L.Ed. 616.

61. U.S.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.

62. U.S.—Title Guaranty & Surety Co. v. U. S., to Use of General Electric Co., Pa., 32 S.Ct. 168, 222 U.S. 401, 56 L.Ed. 248.
3 C.J. p 1274 note 64.

Taking appeal in time

To entitle appellant to a supersedeas or stay, the appeal must gen-

An appeal from an order or decree granting or dissolving an injunction does not disturb its operative force, even where the party complaining of it has given a bond or undertaking and otherwise complied in all respects with the general requirements for a supersedeas or stay of proceedings.[63] A fortiori the prosecution of an appeal cannot operate as an injunction where none has been granted, as in the case of an appeal from a decree dismissing a bill for an injunction or from an order denying a preliminary injunction.[64] However, even in the case of appeals from such orders or decrees, the lower court or the supreme court has the power, in order to preserve the status quo pending the appeal or to prevent irreparable injury or multiplicity of suits, to issue a supersedeas or stay or to suspend, modify, grant, or continue an injunction.[65]

Allowance by court. Either the lower or the supreme court, according to the circumstances, has power to grant a supersedeas or stay of proceedings pending an appeal,[66] and this power has been held to be inherent in the courts.[67] While a supersedeas or stay is generally allowed as a matter of course on compliance by appellant with prescribed conditions,[68] the court cannot grant a supersedeas or stay in a case which is not within the statute or in the absence of compliance with prescribed conditions.[69]

Bond or security. In accordance with statutory provisions and rules of court, a bond or undertaking must be given in order to obtain or effect a supersedeas or stay pending appeal.[70] Such bond or undertaking must ordinarily be given within the time prescribed,[71] and must conform substantially to the requirements of the statute and orders of the court.[72] Where the court is authorized and required to fix the amount of the bond, it should fix such an amount as will give full protection,[73] but a condition imposed in addition to those required by statute has been held void.[74] The bond or undertaking should sufficiently identify the judgment, order or decree appealed from,[75] and must be prop-

erally be taken or allowed by the court in the manner and within the time prescribed by statute or rule of court.—Title Guaranty & Surety Co. v. U. S. to Use of General Electric Co., supra—Kitchen v. Randolph, Pa., 93 U.S. 86, 23 L.Ed. 810—3 C. J. p 1275 note 71.

63. U.S.—Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, La., 43 S.Ct. 75, 260 U.S. 212, 67 L.Ed. 217.
3 C.J. p 1280 note 11.

64. U.S.—Virginian Ry. Co. v. U. S., W.Va., 47 S.Ct. 222, 272 U.S. 658, 71 L.Ed. 463—Knox County v. Harshman, Mo., 10 S.Ct. 8, 132 U.S. 14, 33 L.Ed. 249.

65. U.S.—Omaha & C. B. St. R. Co. v. Interstate Commerce Commission, 32 S.Ct. 833, 222 U.S. 582, 56 L.Ed. 324—Merrimack River Sav. Bank v. Clay Center, Kan., 31 S. Ct. 295, 219 U.S. 527, 55 L.Ed. 320, Ann.Cas.1912A 513—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.

Notice of application
Except in extraordinary circumstances, notice should be given opposing counsel of an application for an injunction pending appeal from an order denying an interlocutory injunction.—Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, La., 43 S.Ct. 75, 260 U.S. 212, 67 L.Ed. 217.

Application referred to lower court
The supreme court will generally refer applications for injunction pending appeal from the denial of an interlocutory injunction to the court of three judges who heard the application and are familiar with the record.—Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, supra.

Effect of order
The action of the district court, consisting of three judges, denying an application for an interlocutory injunction, in granting an injunction pending an appeal, will not revive or vitalize a void order previously granted by a single judge.—Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, supra.

66. U.S.—Champlin Refining Co. v. Corporation Commission of State of Oklahoma, Okl., 52 S.Ct. 559, 282 U.S. 210, 76 L.Ed. 1062, 86 A.L.R. 403, modifying, D.C., 51 F.2d 823—Merrimack River Sav. Bank v. Clay Center, Kan., 31 S. Ct. 295, 219 U.S. 527, 55 L.Ed. 320, Ann.Cas.1912A 513—Ex parte Ralston, La., 7 S.Ct. 317, 119 U.S. 613, 30 L.Ed. 506—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U. S. 150, 27 L.Ed. 888.
3 C.J. p 1288 note 49.

67. U.S.—Merrimack River Sav. Bank v. Clay Center, Kan., 31 S. Ct. 295, 219 U.S. 527, 55 L.Ed. 320, Ann.Cas.1912A 513.

68. U.S.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.
3 C.J. p 1286 note 36.

69. U.S.—Title Guaranty & Surety Co. v. U. S., to Use of General Electric Co., Pa., 32 S.Ct. 168, 222 U.S. 401, 56 L.Ed. 248—Covington Stock-Yards Co. v. Keith, Ky., 7 S.Ct. 881, 121 U.S. 248, 30 L.Ed. 914—Leonard v. Ozark Land Co., Ark., 6 S.Ct. 127, 115 U.S. 465, 29 L.Ed. 445.

70. U.S.—Western Union Tel. Co. v. Eyser, Colo., 19 Wall. 419, 22 L.Ed. 43.
3 C.J. p 1294 note 19.

71. U.S.—Danville v. Brown, Va., 9 S.Ct. 149, 128 U.S. 503, 32 L.Ed. 507.
3 C.J. p 1299 note 39.

72. U.S.—Omaha Hotel Co. v. Kountze, Neb., 2 S.Ct. 911, 107 U. S. 378, 27 L.Ed. 609—Seward v. Corneau, La., 102 U.S. 161, 26 L. Ed. 86—Gay v. Parpart, Ill., 101 U.S. 391, 25 L.Ed. 841—Orchard v. Hughes, Neb., 1 Wall. 73, 17 L.Ed. 560.

73. U.S.—Stafford v. Union Bank of Louisiana, Tex., 16 How. 135, 14 L.Ed. 876—Catlett v. Brodie, D.C., 9 Wheat. 553, 6 L.Ed. 158.
3 C.J. p 1306 note 79 [a].

Amount held insufficient
Where a defendant against whom a judgment for fourteen thousand dollars was affirmed by the state court procured a review with a supersedeas bond in the sum of two thousand dollars only, which, however, provided that it should not affect the liability on the bond for an appeal to the state court, the supersedeas will be vacated unless a bond for twenty thousand dollars is given by plaintiff in error.—Missouri Pac. R. Co. v. McGrew Coal Co., Mo., 40 S.Ct. 503.

74. U.S.—Omaha Hotel Co. v. Kountze, Neb., 2 S.Ct. 911, 107 U.S. 378, 27 L.Ed. 609.

75. U.S.—New Orleans Ins. Co. v. E. D. Albro Co., La., 5 S.Ct. 289, 112 U.S. 506, 28 L.Ed. 809.

erly approved by the court,[76] but defects may be corrected in a proper case,[77] or permission may be given to file new or additional security.[78]

Modification of stay. On a proper showing an order granting a supersedeas or stay of proceedings may be modified or vacated and set aside on motion in the lower court before it has lost jurisdiction, or in the supreme court after it has acquired jurisdiction.[79] Thus a supersedeas or stay may be set aside and vacated on a showing that it has been improperly issued or ordered,[80] or that it has been obtained by fraud,[81] or, as a general rule, where the supersedeas or stay bond or undertaking is insufficient,[82] but it will not be modified or vacated on motion, where no necessity or good reason therefor is shown.[83] An application to modify or vacate a supersedeas may and should be made by motion to dismiss the order,[84] and it has been held that the propriety of an order granting a supersedeas cannot be considered on a motion to dismiss the appeal.[85]

Operation and effect. A supersedeas suspends all further proceedings on the judgment, order, or decree appealed from and prevents the enforcement thereof in whole or in part pending the appeal,[86] but as a general rule a supersedeas or stay operates from, and only from, the time of the completion of those acts which are requisite to call it into existence.[87] Ordinarily it does not reverse, annul, or undo what has already been done,[88] but, while it does not discharge a previous levy or the lien thereby acquired, it does suspend further proceedings under such levy or lien.[89] However, the supersedeas or stay is confined to proceedings in the suit in which the judgment, order, or decree is rendered or made, and to such as are based on, or touch the enforcement or carrying into effect of, that judgment, order, or decree appealed from,[90] and it does not discharge interlocutory orders made for the preservation of the property or protection of the rights and interests of the parties pending the litigation[91] or prevent the prosecution of collateral or independent actions or proceedings.[92]

Proceedings in violation of a supersedeas or stay may be vacated or set aside,[93] and, where a stay is perfected by the execution of the bond as prescribed by statute, if the trial court undertakes to proceed to exercise an unauthorized jurisdiction pending such stay it may be restrained by a writ of prohibition.[94]

Liability on bonds. Generally the rights, liabilities, and obligations of a surety on a bond given on appeal to the supreme court are governed by applicable statutes and rules of the court.[95]

76. U.S.—Omaha First Nat. Bank v. Omaha, Neb., 96 U.S. 737, 24 L.Ed. 881—O'Reilly v. Edrington, Miss., 96 U.S. 724, 24 L.Ed. 659.

77. U.S.—New Orleans Ins. Co. v. E. D. Albro Co., La., 5 S.Ct. 289, 112 U.S. 506, 28 L.Ed. 809.
3 C.J. p 1312 note 15.

A motion to enlarge security in the appeal bond for the purpose of covering apprehended damages which plaintiff thinks he may sustain by being kept out of the land cannot be granted by the supreme court.—Roberts v. Cooper, Mich., 19 How., U.S., 373, 15 L.Ed. 687.

78. U.S.—Harwood v. Dickerhoff, 6 S.Ct. 669, 117 U.S. 200, 29 L.Ed. 887.
3 C.J. p 1311 note 13.

79. U.S.—Florida Cent. R. Co. v. Schutte, Fla., 100 U.S. 644, 25 L. Ed. 605.
3 C.J. p 1313 note 18.

80. U.S.—Florida Cent. R. Co. v. Schutte, supra.

81. U.S.—Florida Cent. R. Co. v. Schutte, supra.

82. U.S.—Black v. J. W. Zacharie & Co., La., 3 How. 483, 11 L.Ed. 690.

83. U.S.—Western Air-Line Constr. Co. v. McGillis, Ill., 8 S.Ct. 1390, 127 U.S. 776, 32 L.Ed. 324.

84. U.S.—Hudgins v. Kemp, Va., 18 How. 530, 15 L.Ed. 511.

85. U.S.—Hudgins v. Kemp, supra.

86. U.S.—Natal v. Louisiana, La., 8 S.Ct. 253, 123 U.S. 516, 31 L.Ed. 233.
3 C.J. p 1315 note 32.

On removal of cause

(1) On appeal to the supreme court in an action removed from a state court to a federal court, a supersedeas will be limited to the effect of a supersedeas in case of an appeal to the supreme court of the state.—East Tennessee, V. & G. R. Co. v. Southern Tel. Co., Ala., 5 S.Ct. 168, 112 U.S. 306, 28 L.Ed. 746.

(2) A supersedeas issued out of the supreme court of the United States, directed to a circuit court of the United States, on proceedings there for the removal of a cause to such circuit court, has been held not to operate as a stay of proceedings in the original suit in the state court.—National Union Bank v. Dodge, 42 N.J.Law 316.

87. U.S.—Hovey v. McDonald, D.C., 3 S.Ct. 136, 109 U.S. 150, 27 L.Ed. 888.
3 C.J. p 1318 note 41.

88. U.S.—Boise County v. Gorman, Idaho, 19 Wall. 661, 22 L.Ed. 226.

89. U.S.—Boise County v. Gorman, supra.

At common law a supersedeas did not destroy the lien of an execution previously levied or effect a stay of further proceedings thereon.—Boyle v. Zacharie, Md., 6 Pet. 648, 8 L.Ed. 532.

90. U.S.—Grant v. Phœnix Mut. L. Ins. Co., D.C., 7 S.Ct. 849, 121 U.S. 118, 30 L.Ed. 909.

91. U.S.—Grant v. Phœnix L. Ins. Co., supra.

92. U.S.—Natal v. Louisiana, La., 8 S.Ct. 253, 123 U.S. 516, 31 L.Ed. 233.

Suit to enjoin enforcement of judgment

Pendency of an appeal with a supersedeas or stay to reverse a judgment does not prevent a suit to enjoin enforcement of the judgment on grounds independent of the merits of the original controversy.—Johnson v. St. Louis, I. M & S. R. Co., Ark., 12 S.Ct. 124, 141 U.S. 602, 35 L.Ed. 875.

93. U.S.—Stockton v. Bishop, Pa., 2 How. 74, 11 L.Ed. 184.

94. U.S.—Bronson v. La Crosse & M. R. Co., Wis., 1 Wall. 405, 17 L.Ed. 616.

95. **Penalty of bond**

Recovery may be had on an appeal bond to the extent of the penalty of the bond together with interest.—'ves v. Merchant's Bank of Boston, R. I., 12 How., U.S., 159, 13 L.Ed. 936.

i. Record and Proceedings Not of Record

(1) Matters to be shown by record
(2) Scope and contents of record
(3) Necessity of bill of exceptions, case, or statement of facts
(4) Contents, making, and settlement of bill of exceptions
(5) Contents, making, and settlement of statement of facts
(6) Report by trial judge of facts found
(7) Making, form, and requisites of transcript of record
(8) Authentication and certification
(9) Printing, transmission, and filing of record
(10) Defects, objections, amendments, and corrections
(11) Conclusiveness and effect of record
(12) Questions presented for review
(13) Matters not apparent of record

(1) Matters to Be Shown by Record

The record on appeal to, or review by, the supreme court must affirmatively show the taking of all steps and the existence of all facts necessary to confer jurisdiction on such court. It must show the jurisdiction of the lower court, the rendition of an appealable judgment, order, or decree, the objection to proceedings in the lower court, the ruling of the court thereon, and the saving of an exception to such ruling.

The record, on an appeal to the supreme court, must show affirmatively the proper taking of all the steps and the existence of all the facts necessary to confer jurisdiction on such court.[96] It must show the rendition and entry in the lower court of an appealable judgment, decree, or order, presenting a final adjudication against appellant as to some right claimed by him,[97] and the judgment, order, or decree under review must be set out in the record proper, and its absence is not supplied by a mere recital in the bill of exceptions, or other part of the record, that judgment has been entered.[98]

Jurisdictional amount. The record must show affirmatively that the amount or value of the thing or matter in controversy is sufficient to confer appellate jurisdiction on the supreme court;[99] and, while a stipulation of the parties as to the amount is not controlling, it may in the discretion of the court be regarded, with reference to the other facts appearing in the record of the particular case, as sufficient proof of the amount in controversy to sustain its jurisdiction.[1]

Jurisdiction of lower court. The record must show that the lower court had jurisdiction of the

Damages

(1) Where the bond secures a stay of execution or supersedeas, a condition to pay damages and costs may include the amount of the judgment. —Jerome v. McCarter, Mich., 21 Wall. 17, 22 L.Ed. 515—Catlett v. Brodie, D.C., 9 Wheat. 553, 6 L.Ed. 158—4 C.J. p 1291 note 14.

(2) The liability on the bond may cover damages not awarded by the supreme court where the bond is conditioned for the payment of damages resulting from the appeal.—Omaha Hotel Co. v. Kountze, Neb., 2 S. Ct. 911, 107 U.S. 378, 27 L.Ed. 609—Catlett v. Brodie, supra.

(3) There is ordinarily no liability on an appeal bond for a reasonable attorney's fee paid by appellee to his attorney for the appeal, such a liability not being included in a condition to pay damages.—Wayne County Sup'rs v. Kennicott, Ill., 103 U.S. 554, 26 L.Ed. 486—4 C.J. p 1296 note 96.

Foreclosure of liens

(1) If the action is wholly in rem, to subject a specific property or fund to the satisfaction of a claim, as in foreclosure of mortgages or other liens, and no personal judgment for a deficiency is entered, an appeal bond conditioned to satisfy the judgment is not security for such deficiency; such a bond does not cover the rents and profits of such property or fund, but only the deterioration or loss thereof because of the appeal; nor does it cover the value of the use of the mortgaged property pending the appeal.—Omaha Hotel Co. v. Kountze, Neb., 2 S.Ct. 911, 107 U.S. 378, 27 L.Ed. 609—4 C.J. p 1291 note 24.

(2) However, recovery may be had for use of the property where the appeal is from an order confirming a foreclosure sale and directing the immediate execution and delivery of a deed to the purchaser.—Woodworth v. Northwestern Mut. L. Ins. Co., Mo., 22 S.Ct. 676, 185 U.S. 354, 46 L.Ed. 945, following Brown v. Northwestern Mut. L. Ins. Co., Neb., 119 F. 148, 55 C.C.A. 654.

96. U.S.—Suydam v. Williamson, N. Y., 20 How. 427, 15 L.Ed. 978—Amis v. Pearle, 15 Pet. 211, 10 L. Ed. 714.

Filing petition for appeal

Where the record shows the filing of a petition for an appeal, its allowance, the filing and approval of a bond containing a recital that appellant had obtained an appeal and filed a copy thereof in the clerk's office, and the service and filing of the citation, it sufficiently shows that the appeal as allowed was duly filed.—Harkrader v. Wadley, Va., 19 S.Ct. 119, 172 U.S. 148, 43 L.Ed. 399.

97. U.S.—Missouri & Kansas Interurban Ry. Co. v. City of Olathe, Kan., 32 S.Ct. 46, 222 U.S. 185, 56 L.Ed. 155—Haseltine v. Central Nat. Bank, Mo., 22 S.Ct. 49, 183 U. S. 130, 46 L.Ed. 117—Clarke v. McDade, Cal., 17 S.Ct. 284, 165 U.S. 168, 41 L.Ed. 673—National Life Ins. Co. v. Scheffer, Minn., 131 U. S. Appendix celii, 26 L.Ed. 1110—Clinton v. Missouri Pac. R. Co., Neb., 7 S.Ct. 1268, 122 U.S. 469, 30 L.Ed. 1214—McComb v. Commissioners of Knox County, N.C., 91 U. S. 1, 23 L.Ed. 185—Miners' Bank of Dubuque v. U. S., Iowa, 5 How. 213, 12 L.Ed. 121.

98. U.S.—Clarke v. McDade, Cal., 17 S.Ct. 284, 165 U.S. 168, 41 L.Ed. 673.

99. U.S.—Enriquez v. Enriquez, Philippine, 32 S.Ct. 61, 222 U.S. 127, 56 L.Ed. 124—El Paso Water Co. v. City of El Paso, Tex., 11 S.Ct. 494, 152 U.S. 157, 38 L.Ed. 396—Red River Cattle Co. v. Needham, Tex., 11 S.Ct. 208, 137 U.S. 632, 34 L.Ed. 799—Hunt v. Blackburn, Ark., 8 S.Ct. 1395, 127 U.S. 774, 32 L.Ed. 323—Johnson v. Wilkins, Fla., 6 S.Ct. 600, 116 U.S. 392, 29 L.Ed. 671—Parker v. Morrill, Va., 1 S.Ct. 14, 106 U.S. 1, 27 L.Ed. 72.

1. U.S.—U. S. v. Trans-Missouri Freight Ass'n, Kan., 17 S.Ct. 540, 166 U.S. 290, 41 L.Ed. 1007.

case,[2] and if the requisite jurisdiction is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitutes such an allegation, the jurisdiction will be sustained.[3]

Proceedings sustaining judgment, order, or decree. Where there was a trial without the intervention of a jury, the record on appeal must disclose the trial judge's findings of fact and conclusions of law;[4] but this rule does not apply where the appeal is from an adjudication on a claim under a special act of congress, which requires the lower court to exercise equity jurisdiction.[5] It is usually required that the findings of fact and the conclusions of law when contained in the record, should be stated separately,[6] and a defect in the record in this respect is not cured by the fact that the record contains the evidence.[7] Where the right to trial by jury must be expressly waived, the written stipulation of the parties waiving the jury must appear in the record.[8]

Evidence. The evidence in the court below, in an equity proceeding, generally should be made a part of the record on appeal to the supreme court;[9] but it is not necessary that the record show the evidence in a cause which was disposed of on demurrer.[10]

Grounds of review and presentation and reservation thereof. It is the duty of the complaining party clearly and affirmatively to show by the appellate record that prejudicial error was committed in the court below,[11] and such error will not be inferred from a doubtful statement in the record.[12] The record must show that the question sought to be reviewed was presented to, and passed on by, the trial court,[13] that a specific and timely objection was taken to the proceeding deemed erroneous and a ruling obtained thereon,[14] and that a proper and timely exception to the ruling complained of was saved,[15] and that the exception was specific where it is required to be so.[16] In accordance with these rules, where such error is assigned for review, the record must show proper and timely objection, and exception saved, to the ruling of the court with respect to presumptions,[17] the admission or exclusion of evidence,[18] and that the party complaining was prejudiced or aggrieved thereby;[19] the giving or

2. U.S.—Bingham v. Cabot, Mass., 3 Dall. 382, 1 L.Ed. 646.

3. U.S.—Sun Printing & Publishing Ass'n v. Edwards, N.Y., 24 S.Ct. 696, 194 U.S. 377, 48 L.Ed. 1027—Horne v. George H. Hammond Co., Mass., 15 S.Ct. 167, 155 U.S. 393, 39 L.Ed. 197.

Evidence made a part of the record may be looked to to cure a defective averment of citizenship, on the question of jurisdiction.—Sun Printing & Publishing Ass'n v. Edwards, N.Y., 24 S.Ct. 696, 194 U.S. 377, 48 L.Ed. 1027.

4. U.S.—U. S. v. "Old Settlers," Ct. Cl., 13 S.Ct. 650, 148 U.S. 427, 37 L. Ed. 509.

5. U.S.—U. S. v. "Old Settlers," supra—Harvey v. U. S., Ct.Cl., 105 U. S. 671, 26 L.Ed. 1206.

6. U.S.—U. S. v. Clark, Ct.Cl., 94 U. S. 73, 24 L.Ed. 67.

7. U.S.—Graham v. Bayne, Ill., 18 How. 60, 15 L.Ed. 265.

8. U.S.—Bond v. Dustin, Ill., 5 S.Ct. 296, 112 U.S. 604, 28 L.Ed. 835, followed in Spalding v. Manasse, Ill., 9 S.Ct. 649, 131 U.S. 65, 33 L.Ed. 86.

9. U.S.—Blease v. Garlington, S.C., 92 U.S. 1, 23 L.Ed. 521—City of New Orleans v. U. S., La., 5 Pet. 449, 8 L.Ed. 187—Conn v. Penn, Pa., 5 Wheat. 424, 5 L.Ed. 125.
4 C.J. p 55 note 73 [d].

10. U.S.—Missouri, K. & T. Ry. Co. v. Dinsmore, Kan., 2 S.Ct. 9, 108 U.S. 30, 27 L.Ed. 640.

11. U.S.—Florida R. Co. v. Smith, Fla., 21 Wall. 255, 22 L.Ed. 513—Suydam v. Williamson, N.Y., 20 How. 427, 15 L.Ed. 978—Bingham v. Cabot, Mass., 3 Dall. 382, 1 L. Ed. 646.

12. U.S.—Mercantile Trust Co. v. Hensey, 27 S.Ct. 535, 205 U.S. 298, 51 L.Ed. 811, 10 Ann.Cas. 572, affirming 27 App.D.C. 210.

13. U.S.—Phœnix Mut. Life Ins. Co. v. Raddin, Mass., 7 S.Ct. 500, 120 U.S. 183, 30 L.Ed. 644.

14. U.S.—Hanna v. Maas, Mich., 7 S.Ct. 1055, 122 U.S. 24, 30 L.Ed. 1117—Springfield Fire & Marine Ins. Co. v. Sea, Ill., 21 Wall. 158, 22 L.Ed. 511—Turner v. Yates, Md., 16 How. 14, 14 L.Ed. 824.

15. U.S.—Eastman Kodak Co. v. Gray, Pa., 54 S.Ct. 722, 292 U.S. 332, 78 L.Ed. 1291, reversing, C.C. A., Gray v. Eastman Kodak Co., 67 F.2d 190, certiorari granted Eastman Kodak Co. v. Gray, 54 S.Ct. 442, 291 U.S. 655, 78 L.Ed. 1048, reversing, D.C., Gray v. Eastman Kodak Co., 7 F.Supp. 321, and rehearing denied Eastman Kodak Co. v. Gray, 55 S.Ct. 66, 293 U.S. 628, 79 L.Ed. 714—Pacific Express Co. v. Malin, Tex., 10 S.Ct. 166, 132 U.S. 531, 33 L.Ed. 450—Miller v. Brooklyn Life Ins. Co., Md., 12 Wall. 285, 20 L.Ed. 398—Norris v. Jackson, Ill., 9 Wall. 125, 19 L.Ed. 608—Pomeroy's Lessee v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638—Turner v. Yates, Md., 16 How. 14, 14 L.Ed. 824—Hyde v. Booraem & Co., La., 16 Pet. 169, 10 L.Ed. 925.

16. U.S.—The Francis Wright, N.Y., 105 U.S. 381, 26 L.Ed. 1100—Lincoln v. Claflin, Ill., 7 Wall. 132, 19 L.Ed. 106.

17. U.S.—Chesapeake & Delaware Canal Co. v. U. S., Del., 39 S.Ct. 407, 250 U.S. 123, 63 L.Ed. 889, affirming, C.C.A., 240 F. 903.

Presumption of payment
Correctness of ruling that presumption of payment from lapse of twenty years without suit to collect obtains against the United States, not being questioned by appropriate exceptions in record, will not be decided.—Chesapeake & Delaware Canal Co. v. U. S., supra.

18. U.S.—Eagle Min. & Imp. Co. v. Hamilton, N.M., 31 S.Ct. 27, 218 U. S. 513, 54 L.Ed. 1131—Newport News & M. V. Co. v. Pace, Tenn., 15 S.Ct. 743, 158 U.S. 36, 39 L.Ed. 887—San Pedro & Canon del Agua Co. v. U. S., N.M., 13 S.Ct. 94, 146 U.S. 120, 36 L.Ed. 911—U. S. v. Carey, La., 3 S.Ct. 424, 110 U.S. 51, 28 L.Ed. 67—Hutchins v. King, N. H., 1 Wall. 53, 17 L.Ed. 544—U. S. v. Breitling, Ala., 20 How. 252, 15 L.Ed. 900.

19. U.S.—Sire v. Ellithorpe Air-Brake Co., N.Y., 11 S.Ct. 194, 137 U.S. 579, 34 L.Ed. 801.

refusing of instructions,[20] to rulings on motions,[21] and to the judge's findings of fact and conclusions of law.[22] An alleged failure to give a certain instruction is not available on review unless the record discloses a timely and proper request therefor.[23] Exceptions to the report of a master or referee must, as a rule, be incorporated in the record.[24]

(2) Scope and Contents of Record

The record ordinarily consists of the enrolled proceedings and facts of the case, and does not include matters which are not on the record proper unless they are brought in by bill of exceptions or other appropriate means.

The record ordinarily consists of substantially a written history of the enrolled proceedings or facts, from the beginning to the end of the case,[25] and does not include other matters which are not a part of the record proper, unless they are brought in by bill of exceptions or other appropriate means.[26]

Process and appearance. Where the record shows a denial of the right to proceed and the grounds therefor, by defendant who claims that he was never served and never appeared generally, it is not necessary that it be shown by the bill of exceptions even though defendant went to trial on the merits.[27] Withdrawal of appearance is sufficiently made a part of the record on appeal by being put therein by a bill of exceptions or something which is equivalent.[28]

The opinion of the lower court is no part of the record,[29] and the fact that it is required by statute or rule of the supreme court to be annexed to and transmitted with the record does not of itself make it a part of the record.[30] Accordingly the opinion of a state court ordinarily constitutes no part of the record on appeal to the supreme court of the United States;[31] but it has been held that such opinion may be examined, in connection with other portions of the record, to ascertain whether the judgment or decree appealed from involves a federal question within the reviewing power of the supreme court.[32]

20. U.S.—New Orleans & N. E. R. Co. v. Jopes, Miss., 12 S.Ct. 109, 142 U.S. 18, 35 L.Ed. 919—Ex parte Crane, N.Y., 5 Pet. 190, 8 L.Ed. 92.

That proper objections were seasonably made must be shown by the record, where error is assigned to the giving of certain instructions by the trial judge.—Hutchins v. King, N.H., 1 Wall. 53, 17 L.Ed. 544.

21. U.S.—Eastman Kodak Co. v. Gray, Pa., 54 S.Ct. 722, 292 U.S. 332, 78 L.Ed. 1291, reversing, C.C.A., Gray v. Eastman Kodak Co., 67 F.2d 190, certiorari granted Eastman Kodak Co. v. Gray, 54 S.Ct. 442, 291 U.S. 655, 78 L.Ed. 1048, reversing, D.C., Gray v. Eastman Kodak Co., 7 F.Supp. 321, rehearing denied Eastman Kodak Co. v. Gray, 55 S.Ct. 66, 293 U.S. 628, 79 L.Ed. 714.

Motion for judgment

Transcript showing docket entry opposite date before case was submitted to court without jury by stipulation that plaintiff's motion for judgment on verdict and assessment of treble damages was filed was insufficient to show that a motion for judgment on whole record was duly presented and overruled accompanied by adequate exceptions.—Eastman Kodak Co. v. Gray, supra.

Where a motion for new trial is in question, the record should show the trial judge's ruling or order on the motion, and the grounds on which the motion was granted or refused.—Poydras de la Lande v. Louisiana, La., 18 How. 192, 15 L.Ed. 350.

22. U.S.—Eagle Min. & Imp. Co. v. Hamilton, N.M., 31 S.Ct. 27, 218 U.S. 513, 54 L.Ed. 1131.

23. U.S.—Myers v. Pittsburgh Coal Co., Pa., 34 S.Ct. 559, 233 U.S. 184, 58 L.Ed. 906—Andrews v. U. S., Cal., 16 S.Ct. 798, 162 U.S. 420, 40 L.Ed. 1023—Texas & P. Ry. Co. v. Volk, Tex., 14 S.Ct. 238, 151 U.S. 73, 38 L.Ed. 78.

24. U.S.—Topliff v. Topliff, Ohio, 12 S.Ct. 825, 145 U.S. 156, 36 L.Ed. 658—Belford v. Scribner, Ill., 12 S.Ct. 734, 144 U.S. 488, 36 L.Ed. 514.

25. U.S.—U. S. v. Taylor, Tenn., 13 S.Ct. 479, 147 U.S. 695, 37 L.Ed. 335.

A demurrer and the action of the court thereon are parts of the record proper, and no bill of exceptions or case is necessary to procure a review thereof.—Suydam v. Williamson, N. Y., 20 How. 427, 15 L.Ed. 978.

An instrument of which oyer has been given becomes a part of the record.—Suydam v. Williamson, supra.

A petition for removal of a cause to a federal court constitutes a part of the record without a bill of exceptions.—Phœnix Ins. Co. v. Pachner, N.Y., 95 U.S. 183, 24 L.Ed. 427.

26. U.S.—England v. Gebhardt, N.J., 5 S.Ct. 287, 112 U.S. 502, 28 L.Ed. 811—Sargeant v. State Bank of Indiana, Ind., 12 How. 371, 13 L.Ed. 1028.

Exhibits, are not part of the record, unless brought in by bill of exceptions.—Reed v. Gardner, Ga., 17 Wall. 409, 21 L.Ed. 665.

27. U.S.—R. H. Hassler, Inc. v. Shaw, S.C., 46 S.Ct. 479, 271 U.S. 195, 70 L.Ed. 900.

28. U.S.—Rio Grande Irrigation & Colonization Co. v. Gildersleeve, N. M., 19 S.Ct. 761, 171 U.S. 603, 43 L.Ed. 1103.

4 C.J. p 107 note 84.

29. U.S.—Johnson v. U. S., Ct.Cl., 16 S.Ct. 377, 160 U.S. 546, 40 L.Ed. 529—England v. Gebhardt, N.J., 5 S.Ct. 287, 112 U.S. 502, 28 L.Ed. 811.

Facts which appear only from the trial court's opinion will not be considered.—Johnson v. U. S., Ct.Cl., 16 S.Ct. 377, 160 U.S. 546, 40 L.Ed. 529.

30. U.S.—England v. Gebhardt, N.J., 5 S.Ct. 289, 112 U.S. 502, 28 L.Ed. 811—Rector v. Ashley, Ark., 6 Wall. 142, 18 L.Ed. 743—Williams v. Norris, Tenn., 12 Wheat. 117, 6 L.Ed. 571.

4 C.J. p 105 note 63.

Appeals from inferior federal courts

The opinion of the court is not made a part of the record in a case coming from the district court of the United States by a statute of the state in which the court sits.—Parks v. Turner, La., 12 How. 39, 13 L.Ed. 883.

31. U.S.—Gibson v. Chouteau, Mo., 8 Wall. 314, 19 L.Ed. 317—Rector v. Ashley, Ark., 6 Wall. 142, 18 L.Ed. 743—Williams v. Norris, Tenn., 12 Wheat. 117, 6 L.Ed. 571.

32. U.S.—Gross v. U. S. Mortgage Co., Ill., 2 S.Ct. 940, 108 U.S. 477, 27 L.Ed. 795—Murdock v. Memphis, Tenn., 20 Wall. 590, 22 L.Ed. 429—Cousin v. Labatut, La., 19 How. 202, 15 L.Ed. 601.

In Louisiana the opinion of the court is a part of the record, and in cases coming to the United States supreme court on error from the su-

Stipulations of the parties are not ordinarily a part of the record unless brought into the record by bill of exceptions or some substitute therefor;[33] and, moreover, as a general rule the parties cannot, by stipulation, make or add to the record of the court,[34] or present for consideration a question different from that which appears by the record to have been decided in the court below.[35]

An agreed statement of facts may be equivalent to a special verdict or a finding of facts on which the reviewing court may declare the applicable law, if such statement is of the ultimate facts,[36] but not where it is merely a recital of testimony or evidential facts.[37]

Evidence introduced on a trial is not ordinarily a part of the record, and will not be considered on appeal, unless embodied in a bill of exceptions, case-made, or statement, or some statutory substitute therefor;[38] and this rule applies to documentary evidence,[39] such as affidavits[40] and depositions.[41] In an equity suit, testimony which has been objected to and ruled out will not be excluded from the record on appeal in passing on the ruling.[42] A demurrer to the evidence, and the action of the court thereon, makes the evidence a part of the record.[43]

Instructions ordinarily form no part of the record but may be made so by bill of exceptions or other appropriate means;[44] and it is well settled that objections to instructions, given or refused, will not be considered on appeal where such instructions do not appear of record.[45]

A special verdict has the effect of incorporating facts into the record and a bill of exceptions is not necessary to make it a part thereof.[46]

Findings of the court, on issues tried by it, are a part of the record proper,[47] unless they have been filed after the expiration of the time allowed by law.[48]

Intermediate appeals. Whatever is matter of record in the intermediate court constitutes a part of the record on appeal to the supreme court without a bill of exceptions,[49] and accordingly the judgment of the court appealed from is always a part of the record of the case.[50]

Official certificates. A certificate of the clerk, made without legal authority, cannot bring into the record matters which are not properly there in the mode prescribed by law.[51]

preme court of Louisiana the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one which the federal court has authority to review.—Egan v. Hart, La., 17 S.Ct. 300, 165 U.S. 188, 41 L.Ed. 680—4 C.J. p 106 note 66.

33. U.S.—Patrick v. Graham, Colo., 10 S.Ct. 194, 132 U.S. 627, 33 L.Ed. 460—Lanusse v. Barker, N.Y., 3 Wheat. 101, 4 L.Ed. 343.

34. U.S.—U. S. v. Barber, Idaho, 31 S.Ct. 209, 219 U.S. 72, 55 L.Ed. 99.

35. U.S.—Fort Worth City Co. v. Smith Bridge Co., Tex., 14 S.Ct. 339, 151 U.S. 294, 38 L.Ed. 167—Chicago Tire & Spring Works Co. v. Spalding, Tex., 6 S.Ct. 498, 116 U.S. 541, 29 L.Ed. 720.

36. U.S.—U. S. Trust Co. v. New Mexico, N.M., 22 S.Ct. 172, 183 U.S. 535, 46 L.Ed. 315.

37. U.S.—U. S. Trust Co. v. New Mexico, supra.

38. U.S.—Texas & P. Ry. Co. v. Cox, Tex., 12 S.Ct. 905, 145 U.S. 593, 36 L.Ed. 829—Fisher v. Cockerell, Ky., 5 Pet. 248, 8 L.Ed. 114.
4 C.J. p 133 note 45.

39. U.S.—Bassing v. Cady, R.I., 28 S.Ct. 392, 208 U.S. 386, 52 L.Ed. 540—Reed v. Gardner, Ga., 17 Wall. 409, 21 L.Ed. 665.

40. U.S.—Evans v. Stettnisch, Neb., 13 S.Ct. 931, 149 U.S. 605, 37 L.Ed. 866—Stewart v. Wyoming Cattle Ranche Co., Neb., 9 S.Ct. 101, 128 U.S. 383, 32 L.Ed. 439—Baltimore & P. R. Co. v. Sixth Presbyterian Church, D.C., 91 U.S. 127, 23 L.Ed. 260.

Affidavits for new trial
U.S.—Evans v. Stettnisch, Neb., 13 S.Ct. 931, 149 U.S. 605, 37 L.Ed. 866—Stewart v. Wyoming Cattle Ranche Co., Neb., 9 S.Ct. 101, 128 U.S. 383, 32 L.Ed. 439.

41. U.S.—Craig v. Smith, Kan., 100 U.S. 226, 25 L.Ed. 577—Baltimore & P. R. Co. v. Sixth Presbyterian Church, D.C., 91 U.S. 127, 23 L.Ed. 260.

42. U.S.—Blease v. Garlington, S.C., 92 U.S. 1, 23 L.Ed. 521.

43. U.S.—Suydam v. Williamson, N. Y., 20 How. 427, 15 L.Ed. 978.

44. U.S.—Struthers v. Drexel, Pa., 7 S.Ct. 1293, 122 U.S. 487, 30 L.Ed. 1216—Phœnix Ins. Co. v. Lanier, Ga., 95 U.S. 171, 24 L.Ed. 383.

45. U.S.—Andrews v. U. S., Cal., 16 S.Ct. 798, 162 U.S. 420, 40 L.Ed. 1023.

46. U.S.—Suydam v. Williamson, N. Y., 20 How. 427, 15 L.Ed. 978.

47. U.S.—Ætna Ins. Co. v. Boon, Conn., 95 U.S. 117, 24 L.Ed. 395.
Report of judge of facts found see infra subdivision i (6) of this section.

48. U.S.—Kahn v. Central Smelting Co., Utah, 102 U.S. 641, 26 L.Ed. 266.

After entry of judgment, an additional finding, made at the request of either party without notice to the other, forms no part of the record.—Kahn v. Central Smelting Co., supra.

49. U.S.—Clinton v. Missouri Pac. R. Co., Neb., 7 S.Ct. 1268, 122 U.S. 469, 30 L.Ed. 1214.

Briefs
A copy of defendant's brief in the circuit court of appeals, tendered as an exhibit to plaintiff's brief in the supreme court, is not part of the record in the supreme court.—Maryland Casualty Co. v. Jones, Cal., 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960, reversing, C.C.A., 27 F.2d 521.

50. U.S.—Clinton v. Missouri Pac. R. Co., Neb., 7 S.Ct. 1268, 122 U.S. 469, 30 L.Ed. 1214.

Order on motion to dismiss
An order of an intermediate court, on a motion to dismiss an appeal thereto, may be reviewed by the supreme court although no bill of exceptions has been prepared, as the record, of which such order is a part, sufficiently presents the question of law involved.—Clinton v. Missouri Pac. R. Co., supra.

51. U.S.—Knapp v. Troy & B. R. Co., Vt., 20 Wall. 117, 22 L.Ed. 328—Reed v. Marsh, Ohio, 13 Pet. 153, 10 L.Ed. 103—Fisher's Lessee v. Cockerell, Ky., 5 Pet. 248, 8 L.Ed. 114.

(3) Necessity of Bill of Exceptions, Case, or Statement of Facts

A bill of exceptions, case, or statement of facts generally is necessary only for the review of errors, occurring during the trial below, which are not apparent on the record proper, and ordinarily is not necessary in an equity case. No substitute is allowable for a bill of exceptions, case, or statement of facts except as authorized by statute.

Where the error sought to be remedied appears on the record, the party aggrieved may avail himself of it on appeal without bill of exceptions,[52] and accordingly a bill of exceptions is not necessary to raise questions of jurisdiction apparent on the record.[53]

On the other hand, rulings and decisions of the lower court, the correctness of which cannot be determined from the record proper, must be made a part of the transcript or record on appeal by a bill of exceptions in order to secure their review by the supreme court;[54] and, unless such rulings of the lower court, the correctness of which cannot be determined from the record proper, are thus made a part of the record on appeals, the supreme court will consider only those errors that are shown by the judgment roll or record proper.[55] Accordingly, a bill of exceptions, settled and allowed in accordance with the requirements of law, is indispensable to the presentation of errors alleged to have occurred during the trial of the cause, but which do not appear upon the face of the record, together with the grounds of objection to the rulings or decision complained of;[56] and this has been held necessary to the review of decisions of the lower court upon questions of law arising on the trial,[57] as where error is assigned to rulings admitting or excluding evidence[58] or to rulings giving or refusing instructions.[59]

Where case was tried by court, without jury, a bill of exceptions is the appropriate remedy by a party aggrieved by any ruling of the court which would affect the conclusions of fact, as on the admission or rejection of evidence,[60] and if there is no bill of exceptions the only question for review is whether the pleadings and findings sustain the judgment.[61]

In equity all pleadings, evidence, rulings, and decrees are part of the record, and therefore need not be set forth in a bill of exceptions or statement of facts in order to present them on appeal;[62] and a bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity,[63] or, if taken, it can be used only on a motion for new trial made to such court.[64]

Presentation of exceptions taken. Where exceptions to the court's rulings do not appear on the face of the record, a party desiring a review in the supreme court must prepare his bill of exceptions, incorporating all exceptions taken to the rulings of the trial court which he wishes to have reviewed;[65] as in the case of exceptions to the granting or refusing of instructions;[66] and where a bill of exceptions is the proper place for such exceptions to

A certificate of the clerk, that a motion was made for a new trial, and reasons and certain papers filed, on which the motion was founded, which are on the files of the court, is not a part of the record.—Reed v. Marsh, Ohio, 13 Pet. 153, 10 L.Ed. 103.

52. U.S.—Board of Com'rs of City and County of Denver v. Home Sav. Bank, Colo., 35 S.Ct. 265, 236 U.S. 101, 59 L.Ed. 485, affirming 200 F. 28, 118 C.C.A. 256.
4 C.J. p 177 note 22, p 179 note 23.

53. U.S.—Petri v. F. E. Creelman Lumber Co., Ill., 26 S.Ct. 133, 199 U.S. 487, 50 L.Ed. 281.

54. U.S.—Preston v. Prather, Ill., 11 S.Ct. 162, 137 U.S. 604, 34 L.Ed. 788, affirming, C.C., 29 F. 488.
4 C.J. p 180 note 34.

55. U.S.—U. S. v. Archibald McNeil & Sons Co., Pa., 45 S.Ct. 258, 267 U.S. 302, 69 L.Ed. 620—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 67 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 492, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419.
4 C.J. p 183 note 35.

56. U.S.—Knapp v. Troy & B. R. Co., Vt., 20 Wall. 117, 22 L.Ed. 328.

57. U.S.—Springfield Fire & Marine Ins. Co. v. Sea, Ill., 21 Wall. 158, 22 L.Ed. 511.

58. U.S.—Springfield Fire & Marine Ins. Co. v. Sea, supra—Thompson v. Riggs, D.C., 5 Wall. 663, 18 L.Ed. 704.

59. U.S.—Thompson v. Riggs, supra.

60. U.S.—Norris v. Jackson, Ill., 9 Wall. 125, 19 L.Ed. 608—Suydam v. Williamson, N.Y., 20 How. 427, 15 L.Ed. 978.
4 C.J. p 186 note 60.

61. U.S.—Allen v. St. Louis Nat. Bank, Iowa, 7 S.Ct. 460, 120 U.S. 20, 30 L.Ed. 573—City of St. Louis v. Wiggins Ferry Co., Mo., 11 Wall. 423, 20 L.Ed. 192.

The reason for this is that the finding is in the nature of a special verdict and itself becomes a part of the record, thus presenting the question as fully as it could be presented by exceptions.—Allen v. St. Louis Nat. Bank, Iowa, 7 S.Ct. 460, 120 U.S. 20, 30 L.Ed. 573.

62. U.S.—Watt v. Starke, Va., 101 U.S. 247, 25 L.Ed. 826—Ex parte Story, La., 12 Pet. 339, 9 L.Ed. 1108.

Under the Judiciary Act of 1789, a statement of facts was required to accompany the transcript on appeal in chancery cases.—U. S. v. Hooe, D.C., 1 Cranch 318, 2 L.Ed. 121—Jennings v. The Perseverance, R.I., 3 Dall. 336, 1 L.Ed. 625.

63. U.S.—Watt v. Starke, Va., 101 U.S. 247, 25 L.Ed. 826—Johnson v. Harmon, D.C., 94 U.S. 371, 24 L.Ed. 271.

64. U.S.—Watt v. Starke, Va., 101 U.S. 247, 25 L.Ed. 826—Johnson v. Harmon, D.C., 91 U.S. 371, 24 L.Ed. 271.

65. U.S.—Norris v. Jackson, Ill., 9 Wall. 125, 19 L.Ed. 608—Pomeroy's Lessee v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638.

66. U.S.—U. S. v. Rindskopf, Wis., 105 U.S. 418, 26 L.Ed. 1131.

Only instructions excepted to are properly inserted in a bill of exceptions.—U. S. v. Rindskopf, supra—4 C.J. p 89 note 17 [a].

appear, it is insufficient if they are shown only by other parts of the record, or by the record proper.[67] Where an election is made to change a case into a bill of exceptions or special verdict, but no change is in fact made, the supreme court has no record on which to review the action of the lower court, and it is its duty either to dismiss the writ or affirm the judgment of the court below.[68]

Substitutes. Unless authorized by statute, no substitute is allowable for a bill of exceptions, and if matter is brought into the record otherwise than in an authorized manner it will be disregarded.[69] Under the acts of congress defining the appellate jurisdiction of the supreme court, it has been held that there may be substituted for a formal bill of exceptions a finding of facts, or agreed statement of the ultimate facts;[70] but the necessity of a bill of exceptions cannot be dispensed with by an affidavit or deposition[71] or by a signed entry in the minutes of the court.[72] Unless authorized by statute, or by virtue of a stipulation to that effect, a statement made on a motion for a new trial cannot, where no appeal is taken from the order denying the motion, be used as a statement on appeal from the judgment.[73]

Effect of failure to make or file bill, case, or statement. Where appellant fails to make a bill of exceptions, prepared and settled as required by law, the order, judgment, or decree appealed from ordinarily should be affirmed.[74] Where, on an appeal from the supreme court of a territory, no statement of the facts is presented in the record, and the record does not show whether the facts found were sufficient to sustain the judgment rendered, and there were no exceptions taken to the rulings in the admission or rejection of evidence, no question is presented to the court for review.[75] Where, however, the court of the territory determined the case on findings of fact and law together with a statement of the evidence, which statement is not embodied in the record on appeal to the United States supreme court, the latter court may determine the case on the sufficiency of the findings in connection with the pleadings.[76] An original bill of exceptions signed by the trial judge, indorsed by the clerk as properly filed in the trial court, and by the clerk of the territorial supreme court as properly filed therein, may be used in the United States supreme court.[77]

(4) Contents, Making, and Settlement of Bill of Exceptions

(a) In general
(b) Settlement of bill in general
(c) Time of settlement
(d) Mandamus to compel settlement; review
(e) Amendment and correction of bill

(a) In General

A bill of exceptions brings into the record matters which otherwise would not be a part thereof, and presents specific questions of law for review. It usually should be in the form prescribed by statute or rule of court, but informalities or irregularities may be disregarded. It should embrace only matters necessary to present the question of law sought to be reviewed, include evidence adduced at the trial material to the exceptions involved, and specifically point out the action or error complained of and the grounds of objection thereto.

The office or purpose of a bill of exceptions is to preserve in, and make a part of, the record such matters as transpire in the progress of a trial, which otherwise would not become a part thereof.[78] It cannot be used to bring up the whole case,[79] but must be confined to some particular point or question to which exception was taken pending the trial,[80] and generally can be used to present only questions of law which it is wished to have reviewed.[81]

67. U.S.—Pacific Express Co. v. Malin, Tex., 10 S.Ct. 166, 132 U.S. 531, 33 L.Ed. 450—Pomeroy's Lessee v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638.

68. N.Y.—Suydam v. Williamson, N. Y., 20 How. 427, 15 L.Ed. 978.

69. U.S.—Crews v. Brewer, Ill., 19 Wall. 70, 22 L.Ed. 63.
4 C.J. p 205 notes 93, 94.

70. U.S.—Raimond v. Terrebonne Parish, La., 10 S.Ct. 57, 132 U.S. 192, 33 L.Ed. 309.

71. U.S.—Nelson v. Flint, Utah, 17 S.Ct. 576, 166 U.S. 276, 41 L.Ed. 1002.

72. U.S.—Hanna v. Maas, Mich., 7 S. Ct. 1055, 122 U.S. 24, 30 L.Ed. 1117.
4 C.J. p 209 note 18.

73. U.S.—Head v. Hargrave, Ariz., 105 U.S. 45, 26 L.Ed. 1028.

74. U.S.—Bank of New Orleans v. Caldwell, La., 14 S.Ct. 1171, 154 U. S. 592, 21 L.Ed. 305.

75. U.S.—Gonzales v. Buist, Puerto Rico, 32 S.Ct. 463, 224 U.S. 126, 56 L.Ed. 693—Salina Stock Co. v. Salina Creek Irr. Co., Utah, 16 S.Ct. 1036, 163 U.S. 109, 34 L.Ed. 762.
4 C.J. p 214 note 50.

76. U.S.—O'Reilly v. Campbell, Utah, 6 S.Ct. 421, 116 U.S. 418, 29 L.Ed. 669.

77. U.S.—Bassett v. U. S., 11 S.Ct. 165, 137 U.S. 496, 34 L.Ed. 762, reversing 13 P. 237, 5 Utah 131.

78. U.S.—Young v. Martin, Utah, 8 Wall. 354, 19 L.Ed. 418.

79. U.S.—McLanahan v. Universal Ins. Co., Md., 1 Pet. 170, 7 L.Ed. 98.

80. U.S.—Lees v. U. S., Pa., 14 S.Ct. 163, 150 U.S. 476, 37 L.Ed. 1150—Grand Trunk Ry. Co. of Canada v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485—Walton v. U. S., Miss., 9 Wheat. 651, 6 L.Ed. 182.

81. U.S.—Lincoln v. Claflin, Ill., 7 Wall. 132, 19 L.Ed. 106—Zeller v. Eckert, Pa., 4 How. 289, 11 L.Ed. 979—Ex parte Crane, N.Y., 5 Pet. 190, 8 L.Ed. 92.

Under Sup.Ct.Rules, rule 8 par 1, the party excepting must state distinctly the several matters of law in the court's charge to which he excepts.—Hanna v. Maas, Mich., 7 S. Ct. 1055, 122 U.S. 24, 30 L.Ed. 1117.

Form and number. A bill of exceptions ordinarily may and must be in the form prescribed by the applicable statute or rule of court;[82] and if it is defective in any material part it cannot be supplied by any intendment of the court.[83] However, it is generally held that statutes relating to bills of exceptions are remedial in their nature and must be liberally construed,[84] and that whatever brings upon the record, properly verified by the attestation of the judge, the matters of fact occurring at the trial on which the point of law arises which enters into the ruling and decision of the court excepted to, answers sufficiently the description of a proper bill of exceptions,[85] although it is designated by another name, such as "a case and exceptions."[86]

It is the usual practice to include all the exceptions taken on the trial in one bill of exceptions and it is not necessary that a separate bill be made to each ruling or decision.[87]

Contents in general. Although the ultimate decision as to what the bill should contain rests with the trial judge,[88] a bill of exceptions may and must embrace all matters material to the question of law raised by the exception taken;[89] immaterial and unnecessary matters should not be incorporated in the bill.[90]

Incorporating evidence. So much of the evidence given on the trial as may be necessary to present the legal questions raised and noted should be carried into the bill,[91] and this may be done by referring to the evidence so as to make it a part of the record,[92] or, in accordance with the Supreme Court Rules, rule 8 paragraph 2, 28 U.S.C.A. following § 354, the evidence may be reduced to a summarized or narrative statement.[93] The bill should contain all of the evidence where it is essential to a consideration of the error or exception involved.[94]

A document which has been admitted in evidence may be contained in the bill of exceptions by attaching and identifying it as an exhibit and incorporating it by unmistakable reference.[95]

Showing as to grounds of objection and exceptions. Generally a bill of exceptions must specify the action, decision, or ruling complained of, and point out the alleged error therein, and ground of objection thereto,[96] for errors not apparent of record which are not shown in a bill of exceptions will

82. U.S.—Herbert v. Butler, N.Y., 97 U.S. 319, 24 L.Ed. 958.

83. U.S.—Dunlop v. Munroe, D.C., 7 Cranch 242, 3 L.Ed. 329.
4 C.J. p 245 note 7.

84. U.S.—Kleinschmidt v. McAndrews, Mont., 6 S.Ct. 761, 117 U.S. 282, 29 L.Ed. 905.

85. U.S.—Kleinschmidt v. McAndrews, supra—Simpson & Co. v. Dall, Tenn., 3 Wall. 460, 18 L.Ed. 265.

86. U.S.—Herbert v. Butler, N.Y., 97 U.S. 319, 24 L.Ed. 958.
4 C.J. p 223 note 32.

87. U.S.—Lees v. U. S., Pa., 14 S.Ct. 163, 150 U.S. 476, 37 L.Ed. 1150—Pomeroy v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638.
4 C.J. p 224 note 40.

88. U.S.—Ex parte Bradstreet, N.Y., 4 Pet. 102, 7 L.Ed. 796.

89. U.S.—Lees v. U. S., Pa., 14 S.Ct. 163, 150 U.S. 476, 37 L.Ed. 1150—Grand Trunk Ry. Co. of Canada v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485.

90. U.S.—Zeller v. Eckert, Pa., 4 How. 289, 11 L.Ed. 979.

This rule is for the protection of the appellate court, whose convenience and need require that the record should not be uselessly encumbered, and only enough should be included in the bill of exceptions to show all the circumstances constituting error.—Lees v. U. S., Pa., 14 S.Ct. 163, 150 U.S. 476, 37 L.Ed. 1150—4 C.J. p 227 note 69.

91. U.S.—Lincoln v. Claflin, Ill., 7 Wall. 132, 19 L.Ed. 106—DeGroot v. U. S., Ct.Cl., 5 Wall. 419, 18 L.Ed. 700—Russell v. Ely, Wis., 2 Black 575, 17 L.Ed. 258—Johnston v. Jones, Ill., 1 Black 209, 17 L.Ed. 117—Zeller v. Eckert, Pa., 4 How. 289, 11 L.Ed. 979.
4 C.J. p 198 note 39 [m].

92. U.S.—Russell v. Ely, Wis., 2 Black 575, 17 L.Ed. 258.
4 C.J. p 228 note 72 [e].

93. U.S.—Krauss Bros. Lumber Co. v. Mellon, Ala., 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, costs amended 48 S.Ct. 527, 72 L.Ed. 1018, mandate conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008.

Supreme Ct.Rules, rule 8 par 2, 28 U.S.C.A. foll. § 354, provides that only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein may be set forth in full or in condensed or narrative form.

94. U.S.—Krauss Bros. Lumber Co. v. Mellon, supra—Texas & P. R. Co. v. Cox, Tex., 12 S.Ct. 905, 145 U.S. 593, 36 L.Ed. 829.

The words "which was all the testimony offered on the trial of the cause," immediately following the evidence in a bill of exceptions, will be treated as meaning all the evidence, where all the recitals in the bill show that the word "testimony" was used as synonymous with "evidence."—Waldron v. Waldron, Ill., 15 S.Ct. 383, 156 U.S. 361, 39 L.Ed. 453.

Bill held sufficient as containing all the evidence
U.S.—Alexander v. Cosden Pipe Line Co., Okl., 54 S.Ct. 292, 290 U.S. 484, 78 L.Ed. 452, reversing in part, C.C.A., 63 F.2d 663, certiorari granted 54 S.Ct. 48, 290 U.S. 608, 78 L.Ed. 532.

95. U.S.—Krauss Bros. Lumber Co. v. Mellon, Ala., 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, costs amended 48 S.Ct. 527, 72 L.Ed. 1018, mandate conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008—Leftwitch v. Lecanu, La., 4 Wall. 187, 18 L.Ed. 388.

The document to be inserted must be so described as to leave no doubt as to its identity.—Leftwich v. Lecanu, supra—4 C.J. p 233 note 13 [1].

96. U.S.—Springfield F. & M. Ins. Co. v. Sea, Ill., 21 Wall. 158, 22 L.Ed. 511—Young v. Martin, Utah, 8 Wall. 354, 19 L.Ed. 418.

not be considered.[97] The bill of exceptions should also show on its face that a proper exception was seasonably taken at the time the alleged erroneous ruling or decision was made.[98]

(b) Settlement of Bill in General

A bill of exceptions ordinarily is prepared by the appellant or exceptant, and served on the opposite party, and may be settled and allowed only by the judge who presided at the trial at which the proceedings or rulings excepted to were had.

As a general rule, the duty, in the first instance, is on appellant or exceptant, or his attorney, to reduce the exceptions and matters connected therewith to writing in the proper form of a bill of exceptions,[99] and to deliver the bill to the opposite party or his counsel for inspection and correction.[1] The settling and allowance, that is, determining the contents and correctness of a bill of exceptions, is a judicial act to be performed by the exercise of judicial power,[2] and accordingly a bill of exceptions may be settled and allowed only by the judge or judicial officer designated by statute.[3] Under the express provisions of Revised Statutes § 953, 28 U.S.C.A. § 776, ordinarily it may be settled and signed only by the judge who presided at the trial at which the proceedings or rulings excepted to were had,[4] or, if more than one sat, by the presiding judge,[5] and the parties cannot by agreement or stipulation authorize or validate a bill signed by another than such judge.[6] Under this statute, as amended by Act June 5, 1900, c 717 § 1, if the trial judge, by reason of his death, sickness, or other disability, is unable to allow and sign the bill, such duty may be performed by his successor in office.[7]

(c) Time of Settlement

A bill of exceptions ordinarily may be settled and allowed only during the term of court at which the trial was had and judgment rendered, unless a further time is allowed by an order of court or agreement of the parties, entered or made during the term, or by a standing rule of court.

Generally a bill of exceptions should be presented to the trial judge and settled and signed during the term of court at which the trial was had and judgment rendered,[8] or within a further time, after the term, allowed by order of court entered at that term,[9] or by consent of the parties given during the term,[10] or by a standing rule of court.[11] After the term has expired, without the time for settling and

97. U.S.—Glenn v. Fant, D.C., 10 S.Ct. 583, 184 U.S. 398, 33 L.Ed. 969.

98. U.S.—Pomeroy v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638.

99. U.S.—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162—Hanna v. Maas, Mich., 7 S.Ct. 1055, 122 U.S. 24, 30 L.Ed. 1117.

1. U.S.—Waldron v. Waldron, Ill., 15 S.Ct. 383, 156 U.S. 361, 39 L.Ed. 453.

Objection to the failure of appellant's counsel to deliver a bill of exceptions to appellee's counsel, for inspection and correction, within the time fixed by a stipulation for extension of time for settling such bill, must be made when the bill is settled, to be available.—Waldron v. Waldron, supra.

2. U.S.—Maloney v. Adsit, Alaska, 20 S.Ct. 115, 175 U.S. 281, 44 L.Ed. 163.

Authentication of bill of exceptions see infra subdivision i (8) of this section.

3. U.S.—Guardian Assur. Co. of London v. Quintana, Puerto Rico, 33 S.Ct. 236, 227 U.S. 100, 57 L.Ed. 437.

4. U.S.—Krauss Bros. Lumber Co. v. Mellon, Ala., 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, costs amended 48 S.Ct. 527, 72 L.Ed. 1018, mandate conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1006—Guardian Assur. Co. of London v. Quintana, Puerto Rico, 33 S.Ct. 236, 227 U.S. 100, 57 L.Ed. 437—Malony v. Adsit, Alaska, 20 S.Ct. 115, 175 U.S. 281, 44 L.Ed. 163.
4 C.J. p 248 note 30, p 293 note 27.

5. U.S.—Malony v. Adsit, supra.

6. U.S.—Malony v. Adsit, supra.

7. U.S.—Guardian Assur. Co. of London v. Quintana, Puerto Rico, 33 S.Ct. 236, 227 U.S. 100, 57 L.Ed. 437.

Prior to this amendment, if the trial judge was succeeded, before the end of the case, by another judge, the ex-judge, and not his successor in office, was the proper official to settle and sign the bill, on the theory that the successor was a stranger to the judicial proceedings related therein.—Malony v. Adsit, Alaska, 20 S.Ct. 115, 175 U.S. 281, 44 L.Ed. 163.

8. U.S.—Exporters of Mfrs.' Products v. Butterworth-Judson Co., N.Y., 42 S.Ct. 331, 258 U.S. 365, 66 L.Ed. 663—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162—Hunnicutt v. Peyton, Tex., 102 U.S. 333, 26 L.Ed. 113—Müller v. Ehlers, Wis., 91 U.S. 249, 23 L.Ed. 319.
4 C.J. p 273 notes 41, 48.

9. U.S.—Ward v. Cochran, Neb., 14 S.Ct. 230, 150 U.S. 597, 37 L.Ed. 1195—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162.
4 C.J. p 250 note 42, p 275 note 50, p 281 note 3.

It is a settled rule of the supreme court that such extension must be by order made during the trial term, and that an extension thereafter is ineffectual.—Michigan Ins. Bank v. Eldred, supra—4 C.J. p 280 note 96 [e].

10. U.S.—Waldron v. Waldron, Ill., 15 S.Ct. 383, 156 U.S. 361, 39 L.Ed. 453—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162—Herbert v. Butler, N.Y., 97 U.S. 319, 24 L.Ed. 958.
4 C.J. p 275 note 49.

Silence not consent

The silence of counsel for the appellee when a proposed bill of exceptions is presented to the court after the close of the term, and after it has lost all judicial power over the record, does not show consent by the appellee to the filing and allowance of the bill nunc pro tunc.—Jennings v. Philadelphia, B. & W. R. Co., 31 S.Ct. 1, 218 U.S. 255, 54 L.Ed. 1031, affirming 31 App.D.C. 173.

11. U.S.—Gordon v. Randle, D.C., 23 S.Ct. 635, 189 U.S. 417, 47 L.Ed. 875—U. S. v. Jones, La., 13 S.Ct. 840, 149 U.S. 262, 37 L.Ed. 726—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162.
4 C.J. p 282 note 4.

allowing the bill having been extended by order or rule of court, or consent of the parties, the court has no authority to settle and allow a bill of exceptions, then first presented, and if it does so the bill is invalid and cannot be considered[12] unless extraordinary circumstances excuse the delay,[13] or where the application of the general rule that the trial judge cannot sign and allow a bill of exceptions after the expiration of the trial term would work injustice, and the party seeking relief is without fault.[14] After the term at which judgment was rendered has expired, without the time for filing a bill of exceptions having been extended by order of court or agreement of the parties, jurisdiction cannot be restored by a subsequent agreement of the parties extending the time.[15] Where the time has been extended by order of court, the bill must be presented for settlement and filed within the extended time ordered, and, if not presented within such time, allowance thereof may properly be refused by the court, or, if allowed and filed, it does not become a part of the record and will not be considered on appeal.[16]

Under strict common-law practice each exception should be reduced to the form of a bill when taken, and tendered, settled, and signed by the trial judge on the trial before verdict, or before the jury were discharged;[17] but, to meet the convenience of bench and bar, the practice obtained of allowing the bill to be reduced to form and signed after trial or judgment,[18] although the bill in such cases should, however, be signed nunc pro tunc, and purport to be actually in form as though signed during the trial.[19]

In vacation. A trial judge has no authority, in vacation, to extend the time fixed for filing of exceptions.[20]

(d) Mandamus to Compel Settlement; Review

Mandamus may issue from the supreme court to compel the trial court to settle and sign a bill of exceptions which he has erroneously refused to settle and sign.

If the trial court erroneously refuses to settle and sign a true bill of exceptions, a writ of mandamus may be issued by the supreme court to compel it to settle and sign the bill,[21] to effectuate the supreme court's own jurisdiction of the cause on review.[22] As a general rule, however, the writ will not issue to control the judge in the exercise of his judicial discretion, by directing him to decide in a particular way what the bill shall contain. A peremptory writ will not lie to compel the judge to settle the very bill presented,[23] but it has been held that, where the judge has refused to authenticate a particular bill, fair and truthful on its face, actually presented to him, an alternative writ may issue requiring him to authenticate it or to show in his return the reasons why he does not do so.[24] Mandamus has been held not to lie to compel a judge to settle and sign a bill of exceptions where the judge asserts that it contains erroneous or untruthful matter, or where he returns that the bill presented is incorrect.[25]

12. U.S.—Exporters of Mfrs.' Products v. Butterworth-Judson Co., N. Y., 42 S.Ct. 331, 258 U.S. 365, 66 L. Ed. 663—Morse v. Anderson, Ky., 14 S.Ct. 43, 150 U.S. 156, 37 L.Ed. 1037—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162—Müller v. Ehlers, Wis., 91 U.S. 249, 23 L.Ed. 319.
4 C.J. p 276 notes 56, 57.

After a writ of error had been entered in the supreme court.—Michigan Ins. Bank v. Eldred, Wis., 12 S. Ct. 450, 143 U.S. 293, 36 L.Ed. 162.

13. U.S.—Michigan Ins. Bank v. Eldred, supra.
4 C.J. p 273 note 42.

A bill of exceptions signed one day after the extension period may be considered by the supreme court, where the circumstances are exceptional.—Taylor v. U. S., Md., 52 S.Ct. 466, 286 U.S. 1, 76 L.Ed. 951, reversing, C.C.A., 55 F.2d 58.

Where the bill of exceptions has been partially settled by the judge, but, by stipulation of the counsel for the parties, and to suit the convenience of the judge, the matter is postponed and the bill is not signed until after the beginning of the term of the supreme court at which the case is returnable, and during a term of the lower court succeeding that at which the case was tried, it will not be stricken from the record because not allowed and signed in time.—Davis v. Patrick, Neb., 7 S. Ct. 1102, 122 U.S. 138, 30 L.Ed. 1090.

14. U.S.—In re Chateaugay Ore & Iron Co., N.Y., 9 S.Ct. 150, 128 U.S. 544, 32 L.Ed. 508.
4 C.J. p 250 notes 44, 45.

15. U.S.—Exporters of Mfrs.' Products v. Butterworth-Judson Co., N. Y., 42 S.Ct. 331, 258 U.S. 365, 66 L. Ed. 663.

16. U.S.—Michigan Ins. Co. v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162.
4 C.J. p 287 note 53.

17. U.S.—Ex parte Bradstreet, N.Y., 4 Pet. 102, 7 L.Ed. 796—Walton v. U. S., Miss., 9 Wheat. 651, 6 L.Ed. 182.

18. U.S.—U. S. v. Carey, La., 3 S.Ct. 424, 110 U.S. 51, 28 L.Ed. 67.
4 C.J. p 268 note 9.

19. U.S.—Stanton v. Embry, D.C., 93 U.S. 548, 23 L.Ed. 983.
4 C.J. p 268 note 10.

20. U.S.—Müller v. Ehlers, Wis., 91 U.S. 249, 23 L.Ed. 319.

21. U.S.—In re Chateaugay Ore & Iron Co., N.Y., 9 S.Ct. 150, 128 U.S. 541, 32 L.Ed. 508.
4 C.J. p 306 note 39.

22. U.S.—Ex parte Crane, N.Y., 5 Pet. 190, 8 L.Ed. 92.

23. U.S.—Ex parte Bradstreet, N.Y., 4 Pet. 102, 7 L.Ed. 796.

24. U.S.—Ex parte Crane, N.Y., 5 Pet. 190, 8 L.Ed. 92—Ex parte Bradstreet, N.Y., 4 Pet. 102, 7 L.Ed. 796.

25. U.S.—Ex parte Bradstreet, supra.

Mandamus will not be granted to compel the judge to resettle a bill of exceptions, on affidavits that the bill of exceptions as settled and signed by him was incorrect, where a motion in the lower court for such resettlement has been denied.—In re Streep, N.Y., 15 S.Ct. 358, 156 U.S. 207, 39 L.Ed. 399.

A judge need not make oath to his return of the reasons why he refused to sign a bill of exceptions, and his return to an alternative writ of mandamus to show cause why he should not be compelled to settle and sign a bill of exceptions, which states a good reason for his refusal to do so, is conclusive, as, for example, a return stating that his refusal was because the bill did not state the facts truly.[26]

Review. A refusal to settle a bill of exceptions cannot be assigned as error for review where the judge has signed a bill of exceptions taken to his decision refusing to sign one.[27]

(e) Amendment and Correction of Bill

A bill of exceptions may be amended or corrected by the trial judge so as to make it conform to the facts, if application therefor is seasonably made.

The trial court or judge has power, on an application seasonably made, to amend or correct a bill of exceptions, so as to conform to the facts,[28] and such an amendment may be made after the end of the term,[29] and even after an appeal bond has been given and approved.[30] On the other hand, it has been held that any fault or omission in framing the bill, being the act of the party and not of the court, cannot be amended after the expiration of the term at which it is filed.[31] The supreme court cannot correct errors or omissions made in the trial court in framing a bill of exceptions;[32] but it can take cognizance of amendments made below when a proper application for a certiorari has been made and granted, and the amended record sent up in accordance therewith.[33]

(5) Contents, Making, and Settlement of Statement of Facts

A case or statement of facts must state only the ultimate facts, presenting questions of law, and must be settled and signed, and filed, within the time prescribed therefor.

A case made or statement of facts, filed in addition to or as a substitute for a bill of exceptions, see supra subdivision i (3) of this section, must state the ultimate facts of the case, presenting questions of law only,[34] and must not be a mere recital of evidence or circumstances which may tend to prove the ultimate facts, or from which they may be inferred, as such a recital brings nothing before the supreme court for consideration.[35] The case or statement made must be settled and signed by the trial judge and filed within the time prescribed by statute or rule of court, such as before the expiration of the term; otherwise it does not become a part of the record and will not be considered by the supreme court.[36]

(6) Report by Trial Judge of Facts Found

A statement or report by the trial judge of the facts found by him must be of the ultimate facts.

Where, as required or authorized by some statutes, a statement or finding of facts is prepared and filed by the lower court on appeal to the supreme court, as where the parties do not agree on a statement of facts,[37] the statement or finding filed by the court must be of the ultimate facts, and not merely a recital of testimony or evidentiary facts,[38] although a mere incorporation of unnecessary detail

26. U.S.—Ex parte Bradstreet, N.Y., 4 Pet. 102, 7 L.Ed. 796.

27. U.S.—Martin v. Imhsen, La., 21 How. 394, 16 L.Ed. 134.

28. U.S.—Herencia v. Guzman, Puerto Rico, 31 S.Ct. 135, 219 U.S. 44, 55 L.Ed. 81.

29. U.S.—George A. Ohl & Co. v. A. L. Smith Iron Works, Mass., 53 S. Ct. 340, 288 U.S. 170, 77 L.Ed. 681, reversing, C.C.A., 57 F.2d 44, certiorari granted 53 S.Ct. 80, 287 U. S. 586, 77 L.Ed. 512.

30. U.S.—Herencia v. Guzman, Puerto Rico, 31 S.Ct. 135, 219 U.S. 44, 55 L.Ed. 81.

31. U.S.—Michigan Ins. Bank v. Eldred, Wis., 12 S.Ct. 450, 143 U.S. 293, 36 L.Ed. 162—Gayler v. Wilder, N.Y., 10 How., U.S., 509, 13 L. Ed. 517.

32. U.S.—Stimpson v. West Chester R. Co., Pa., 3 How. 553, 11 L.Ed. 722.

33. U.S.—Stimpson v. West Chester R. Co., supra.

34. U.S.—Gonzales v. Buist, Puerto Rico, 32 S.Ct. 463, 224 U.S. 126, 56 L.Ed. 693—Raimond v. Parish of Terrebonne, La., 10 S.Ct. 57, 132 U. S. 192, 33 L.Ed. 309—Pomeroy's Lessee v. State Bank of Indiana, Ind. 1 Wall. 592, 17 L.Ed. 638—Burr v. Des Moines R. & Nav. Co., Iowa, 1 Wall. 99, 17 L.Ed. 561.

35. U.S.—U. S. Trust Co. of New York v. New Mexico, N.M., 22 S.Ct. 172, 183 U.S. 535, 46 L.Ed. 315—Cohn v. Daley, Ariz., 19 S.Ct. 802, 174 U.S. 539, 43 L.Ed. 1077—Raimond v. Parish of Terrebonne, La., 10 S.Ct. 57, 132 U.S. 192, 33 L.Ed. 309—Burr v. Des Moines R. & Nav. Co., Iowa, 1 Wall. 99, 17 L.Ed. 561. 4 C.J. p 340 note 13.

36. U.S.—Cohn v. Daley, Ariz., 19 S. Ct. 802, 174 U.S. 539, 43 L.Ed. 1077—Coughlan v. District of Columbia, D.C., 1 S.Ct. 37, 106 U.S. 7, 27 L.Ed. 74.

Filing in clerk's office

Where provision exists that the case-made or statement on appeal shall be filed in the clerk's office of the court below within a specified time after settlement, such requirement must be complied with.—Cohn v. Daley, Ariz., 19 S.Ct. 802, 174 U. S. 539, 43 L.Ed. 1077.

37. U.S.—Cohn v. Daley, Ariz., 19 S. Ct. 802, 174 U.S. 539, 43 L.Ed. 1077. 4 C.J. p 368 note 92.

Report of judge as not a part of the record

U.S.—Suydam v. Williamson, N.Y., 20 How. 427, 15 L.Ed. 978—Inglee v. Coolidge, Mass., 2 Wheat. 363, 4 L. Ed. 261.

38. U.S.—Gonzales v. Buist, Puerto Rico, 32 S.Ct. 463, 224 U.S. 126, 56 L.Ed. 693—Crowe v. Trickey, Ariz., 27 S.Ct. 275, 204 U.S. 228, 51 L.Ed. 454—Cooper v. Omohundro, Va., 19 Wall. 65, 22 L.Ed. 47—Folsom v. Mercantile Mut. Ins. Co., N.Y., 18 Wall. 237, 21 L.Ed. 827.

A mere report of the evidence is not such a special finding or authorized statement of the case as will allow the supreme court to pass on the judgment given.—Crews v. Brewer, Ill., 19 Wall. 70, 22 L.Ed. 63.

is not fatal, if a sufficient statement is made.[39] Such a statement or finding is of no effect unless it is filed within the time prescribed therefor.[40] A statement of facts made and filed by the trial judge, after the issuance or service of the writ removing the case to the supreme court, without the consent of the parties, is a nullity.[41]

(7) Making, Form, and Requisites of Transcript of Record

The party desiring a review should see to it that there is transmitted to the supreme court a transcript of so much of the record in the court below as may be proper and necessary to the review.

It is the duty of a party desiring a review in the supreme court of an adverse judgment, order, or decree to require a proper and correct transcript of the record from the clerk of the trial court.[42] The transcript should contain all matters and proceedings necessary to a review of the alleged errors, and, if necessary for this purpose, a full and complete transcript of the whole record of the court below should be furnished,[43] together with a brief, as required by Supreme Court Rules, rule 27, with reference to the pages of the record;[44] but, on the other hand, as permitted by some statutes or rules of court, a partial transcript may be furnished, if it is complete in itself and contains sufficient matter clearly to show the errors alleged,[45] and, moreover, the transcript should not be encumbered with useless repetitions and irrelevant matter.[46] Under Equity Rules, rules 75 and 76, 28 U.S.C.A. § 723 appendix, in setting forth evidence material or necessary to the review the evidence should be stated in simple and condensed form, omitting nonessential and mere formal parts,[47] and a violation of such rules may be punished, in the discretion of the supreme court, possibly by a dismissal of the appeal.[48] A case-made or statement of facts, duly settled, signed, and filed, becomes a part of the record.[49]

(8) Authentication and Certification

The transcript of the record must be authenticated or certified as required by law.

It is a general requirement that the transcript on appeal must be authenticated or certified; otherwise it cannot be considered[50] unless the defect is remedied.[51] Papers included in, referred to, or annexed to the transcript must also be duly authenticated and identified, or they will not be considered by the supreme court.[52] The authentication must, in form and substance, be in conformity with the requirements of the statutes or the rules of court.[53] Where authorized by statute, the transcript may be authenticated by the seal of the court below and the signature of the deputy clerk thereof in the name of and for his principal.[54] As a general rule the certificate to the transcript must be under the seal of the court authenticating the transcript,[55] and it must be signed by the proper official.[56]

Bill of exceptions. Under the provisions of Revised Statutes § 953, 28 U.S.C.A. § 776, relating to the authentication of bills of exceptions, a bill of exceptions must be authenticated by the signature of the trial or presiding judge,[57] but it is not nec-

Adoption of findings of trial court by intermediate appellate court has been held sufficient on appeal to the supreme court.—Cannon v. Pratt, Utah, 99 U.S. 619, 25 L.Ed. 446—Stringfellow v. Cain, Utah, 99 U.S. 610, 25 L.Ed. 421.

39. U.S.—Crowe v. Trickey, Ariz., 27 S.Ct. 275, 204 U.S. 228, 51 L.Ed. 454.

40. U.S.—Flanders v. Tweed, La., 9 Wall. 425, 19 L.Ed. 678.

41. U.S.—Avendano v. Gay, La., 8 Wall. 376, 19 L.Ed. 422—Generes v. Bonnemer, La., 7 Wall. 564, 19 L. Ed. 227.

4 C.J. p 358 note 67 [a].

42. U.S.—Union Pac. R. Co. v. Stewart, Kan., 95 U.S. 279, 24 L.Ed. 431.

43. U.S.—Redfield v. Parks, Ark., 9 S.Ct. 642, 130 U.S. 623, 32 L.Ed. 1053.

Omission of pleadings

A case, the complaint in which was dismissed on the merits in the court below, will not be heard where the pleadings are merely referred to, and not set forth in the transcript.—Redfield v. Parks, supra.

44. U.S.—City of Houston v. Southwestern Bell Telephone Co., Tex., 42 S.Ct. 486, 259 U.S. 318, 66 L. Ed. 961, affirming, D.C., Southwestern Telegraph & Telephone Co. v. City of Houston, 268 F. 878.

45. U.S.—Curtis v. Petitpain, La., 18 How. 109, 15 L.Ed. 280—Keene v. Whittaker, La., 13 Pet. 459, 10 L. Ed. 246.

46. U.S.—Union Pac. R. Co. v. Stewart, Kan., 95 U.S. 279, 34 L.Ed. 431—Owens v. Hannay, Ga., 9 Cranch 180, 3 L.Ed. 697.

47. U.S.—City of Houston v. Southwestern Bell Telephone Co., Tex., 42 S.Ct. 486, 259 U.S. 318, 66 L. Ed. 961, affirming, D.C., Southwestern Telegraph & Telephone Co. v. City of Houston, 268 F. 878—Newton v. Consolidated Gas Co. of New York, N.Y., 42 S.Ct. 264, 258 U.S. 165, 66 L.Ed. 538, modifying, D.C., Consolidated Gas Co. of New York v. Newton, 267 F. 231, and affirming 274 F. 986.

48. U.S.—Newton v. Consolidated Gas Co. of New York, supra.

49. U.S.—Cohn v. Daley, Ariz., 19 S.Ct. 802, 174 U.S. 539, 43 L.Ed. 1077.

50. U.S.—Ex parte Century Indemnity Co., 59 S.Ct. 239, 305 U.S. 354, 83 L.Ed. 216, rehearing denied 59 S.Ct. 361, 305 U.S. 676, 83 L.Ed. 438—Idaho & Oregon Land Imp. Co. v. Bradbury, Idaho, 10 S.Ct. 177, 132 U.S. 509, 33 L.Ed. 433.

51. U.S.—Idaho & Oregon Land Imp. Co. v. Bradbury, supra.

52. U.S.—San Pedro & Canon del Agua Co. v. U. S., N.M., 13 S.Ct. 94, 146 U.S. 120, 36 L.Ed. 911.

53. U.S.—Ex parte Parker, Wash., 7 S.Ct. 767, 120 U.S. 737, 30 L.Ed. 818.

54. U.S.—Garnau v. Dozier, Mo., 100 U.S. 7, 25 L.Ed. 536.

55. U.S.—Garnau v. Dozier, supra—Blitz v. Brown, D.C., 7 Wall. 693, 19 L.Ed. 280.

56. U.S.—Blitz v. Brown, supra.

57. U.S.—George A. Ohl & Co. v. A. L. Smith Iron Works, Mass., 53 S.Ct. 340, 288 U.S. 170, 77 L.Ed. 681, reversing, C.C.A., 57 F.2d 44, certiorari granted 53 S.Ct. 80, 287

essary that the seal of the court or judge be affixed.[58] Although signing by initials is not approved, and it has been held that it is not sufficient for the judge merely to affix his initials to the bill of exceptions,[59] such form of signing the bill is sufficient if it is done in such a manner as to refer to the judge's office and characterize his action as official.[60] The signature cannot be waived and the bill validated by express stipulation of counsel.[61]

(9) Printing, Transmission, and Filing of Record

A transcript of the record must be printed, transmitted, and filed in accordance with the rules of the supreme court, and must comply with such rules as to time of filing.

It is generally the duty of the clerk of the lower court to transmit the transcript of the record on appeal,[62] and the performance of this duty may be compelled by mandamus.[63] It is the duty of appellant to cause a proper and sufficient transcript of the record to be filed,[64] and if he fails to do so, without a sufficient excuse for his failure, the supreme court may dismiss the appeal[65] or require appellant to supply a transcript.[66] On a motion to dismiss or affirm, it is necessary to print only so much of the record as will enable the supreme court to act understandingly, without referring to the transcript.[67]

Time of filing. The transcript of the record must be filed within the time prescribed by the statute or rule of court in force at the time,[68] unless a recognized satisfactory excuse for a failure to file in time is made,[69] as where appellant, without fault on his part, is prevented from seasonably obtaining the transcript by the fraud of the other party, or by the ill-founded order of the court, or by the contumacy of its clerk.[70] However, as authorized by statute or rule of court, an extension of time for filing the record may be granted for good cause shown such as to afford ample opportunity to file a record made up in conformity with the views of the court,[71] but it has been held that the time should not be extended because the clerk of the lower court certifies that he cannot, consistently with his other duties, have the record ready in time.[72] Appellant may be guilty of laches in failing to resort to mandamus or other appropriate remedy to procure the transmission and filing of the transcript.[73] If appellant files the record within the prescribed time a copy previously filed by appellee is premature.[74]

If, without fault of appellee, appellant fails to file the transcript of the record within the time prescribed therefor, or within the extension, if any has been granted, such failure constitutes ground for dismissal of the appeal,[75] but it has been held

U.S. 586, 77 L.Ed. 512—Metropolitan R. Co. v. MacFarland, D.C., 25 S.Ct. 28, 195 U.S. 322, 49 L.Ed. 219—Malony v. Adsit, Alaska, 20 S.Ct. 115, 175 U.S. 281, 44 L.Ed. 163—Origet v. U. S., N.Y., 8 S. Ct. 846, 125 U.S. 240, 31 L.Ed. 743.
4 C.J. p 441 note 34.

58. U.S.—Krauss Bros. Lumber Co. v. Mellon, Ala., 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400 and amended 48 S. Ct. 527, 72 L.Ed. 1018, mandate conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008.
4 C.J. p 297 note 51.

At common law it was essential that the bill of exceptions be sealed by the trial judge.—Pomeroy's Lessee v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638.

59. U.S.—Kinney v. U. S. Fidelity & Guaranty Co., Pa., 32 S.Ct. 101, 222 U.S. 283, 56 L.Ed. 200—Origet v. U. S., N.Y., 8 S.Ct. 846, 125 U. S. 240, 31 L.Ed. 743.

60. U.S.—George A. Ohl & Co. v. A. L. Smith Iron Works, Mass., 53 S.Ct. 340, 288 U.S. 170, 77 L.Ed. 681, reversing, C.C.A., 57 F.2d 44, certiorari granted 53 S.Ct. 80, 287 U. S. 586, 77 L.Ed. 512.

61. U.S.—Malony v. Adsit, Alaska, 20 S.Ct. 115, 175 U.S. 281, 44 L.Ed. 163.

62. U.S.—George A. Ohl & Co. v. A. L. Smith Iron Works, Mass., 53 S.Ct. 340, 288 U.S. 170, 77 L.Ed. 681, reversing, C.C.A., 57 F.2d 44, certiorari granted 53 S.Ct. 80, 287 U.S. 586, 77 L.Ed. 512.

63. U.S.—U. S. v. Gomez, Cal., 3 Wall. 753, 18 L.Ed. 212.
4 C.J. p 461 note 23.

64. U.S.—Union Pac. R. Co. v. Stewart, Kan., 95 U.S. 279, 24 L.Ed. 431.

65. U.S.—Florida Cent. R. Co. v. Schulte, Fla., 100 U.S. 644, 25 L. Ed. 605—Veitch & Co. v. Farmers' Bank of Alexandria, D.C., 6 Pet. 777, 8 L.Ed. 578.

66. U.S.—Florida Cent. R. Co. v. Schulte, Fla., 100 U.S. 644, 25 L. Ed. 605.

67. U.S.—Carey v. Houston & T. C. Ry. Co., Tex., 14 S.Ct. 63, 150 U.S. 170, 37 L.Ed. 1041—Walston v. Nevin, Ky., 9 S.Ct. 192, 128 U.S. 578, 32 L.Ed. 544.

68. U.S.—Mesa v. U. S., Cal., 2 Black 721, 17 L.Ed. 350.
4 C.J. p 463 note 33.

Within the term next after the appeal is taken
U.S.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872—Hill v. Chicago & E. R. Co., Ill., 9 S.Ct. 269, 129 U.S. 170, 32 L.Ed. 651—Caillot v. Deetken, Cal., 5 S.Ct. 432, 113 U.S. 215, 28 L.Ed. 983—German v. U. S., Cal., 5 Wall. 825, 18 L.Ed. 502—U. S. v. Gomez, Cal., 3 Wall. 752, 18 L.Ed. 212—Castro v. U. S., Cal., 3 Wall. 46, 18 L.Ed. 163—Mesa v. U. S., Cal., 2 Black 721, 17 L.Ed. 350.

69. U.S.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872.

70. U.S.—U. S. v. Gomez, Cal., 3 Wall. 752, 18 L.Ed. 212.

71. U.S.—U. S. v. U. S. Steel Corp., N.J., 36 S.Ct. 408, 240 U.S. 442, 60 L.Ed. 731.

72. U.S.—Sturgess v. Harold, La., 18 How. 40, 15 L.Ed. 261.

73. U.S.—U. S. v. Gomez, Cal., 3 Wall. 752, 18 L.Ed. 212.

74. U.S.—Hartshorn v. Day, R.I., 18 How. 28, 15 L.Ed. 272.

75. U.S.—Caillot v. Deetken, Cal., 5 S.Ct. 432, 113 U.S. 215, 28 L.Ed. 983—Edmonson v. Bloomshire, Ohio, 7 Wall. 306, 19 L.Ed. 91—German v. U. S., Cal., 5 Wall. 825, 18 L.Ed. 502.
4 C.J. p 470 note 7.

Mistake of clerk no excuse
That the clerk of the lower court,

that this rule does not apply where the transcript is filed before the motion for dismissal is made,[76] or where the delay in transmitting or filing the record occurred through appellee's own fault, or was equally attributable to him,[77] or where the delay was caused entirely by the neglect or fault of the clerk or judge.[78]

Withdrawal and refiling. If the case is not properly before the supreme court, appellant may be permitted to withdraw the transcript and use it in connection with the proper and legal process to bring the case to such court.[79]

(10) Defects, Objections, Amendments, and Corrections

The supreme court may dismiss the appeal, affirm the judgment, or take other appropriate action where the record, because of material defects or omissions therein, fails to comply with the requirements of the statutes or rules of court; or, on timely application therefor, it may permit the record to be corrected by amendment; or it may issue a certiorari to have the record corrected and brought up.

Where the record before the supreme court is so imperfect, by reason of defects or omissions therein, that the rights of the parties cannot properly be determined, the court may dismiss the appeal,[80] or in a proper case it may affirm the judgment below.[81] An appeal will be dismissed where the transcript fails to show that the value or amount in controversy was sufficient to give the supreme court jurisdiction,[82] but it has been held that a deficiency in the record in this respect may be supplied by affidavits or stipulation filed in the supreme court.[83] A failure of a statement of facts found by the lower court to comply with the rules of the supreme court is not necessarily ground for dismissing the appeal, and the record may be remanded for a proper finding;[84] but such a statement of facts not made and filed in time may be disregarded and the judgment affirmed.[85]

Where the appeal record contains all that is necessary to present the questions to be reviewed and for their determination, immaterial defects or omissions are not fatal[86] and may be disregarded,[87] but the costs incident to including immaterial matter may be taxed against the party preparing and presenting the record.[88] Moreover, the whole record may be looked to for the purpose of curing defects in other parts of the record.[89]

Amendment and correction. Defects or errors in a transcript, when not of a jurisdictional character, are as a rule amendable, in the discretion of the court;[90] and the supreme court may make appropriate orders for the amendment or correction of the record of the lower court,[91] and may direct that the amended matters be supplied without issuing a writ of certiorari,[92] but it cannot itself make such amendments or corrections,[93] nor will it consider an amendment which presents matter which was

in preparing the transcript, labored under a mistake as to the time within which the transcript was required to be filed is not a valid excuse for a failure to file the transcript within the prescribed time.—Richardson v. Green, Mich., 9 S.Ct. 443, 130 U.S. 104, 32 L.Ed. 872.

76. U.S.—Bingham v. Morris, 7 Cranch 99, 3 L.Ed. 281.

If appellee does not have the case docketed and dismissed, as he is authorized by rule of court to do where appellant has failed to comply with the rule, appellant's subsequent filing of the record may be in time.—Evans v. State Nat. Bank of New Orleans, La., 10 S.Ct. 493, 134 U.S. 330, 33 L.Ed. 917.

77. U.S.—U. S. v. Gomez, Cal., 3 Wall. 752, 18 L.Ed. 212.

78. U.S.—U. S. v. Vigil, N.M., 10 Wall. 423, 19 L.Ed. 954.

79. U.S.—Ballance v. Forsyth, Ill., 21 How. 389, 16 L.Ed. 143.

80. U.S.—Burr v. Des Moines R. & Nav. Co., Iowa, 1 Wall. 99, 17 L.Ed. 561—Curtis v. Petitpain, La., 18 How. 109, 15 L.Ed. 280.

Defects of a material character in the certificate of authentication of the judge or clerk below will necessitate dismissal of the appeal.—Blitz v. Brown, D.C., 7 Wall. 693, 19 L.Ed. 280.

Defective statement of facts

U.S.—Burr v. Des Moines R. & Nav. Co., Iowa, 1 Wall. 99, 17 L.Ed. 561.

81. U.S.—Greenhood v. Randall, Mont., 4 S.Ct. 699, 111 U.S. 775, 28 L.Ed. 596—James v. Bank of Mobile, La., 7 Wall. 692, 19 L.Ed. 275—Pomeroy's Lessee v. State Bank of Indiana, Ind., 1 Wall. 592, 17 L.Ed. 638—Stevens v. Gladding, R.I., 19 How. 64, 15 L.Ed. 569.

82. U.S.—Hunt v. Blackburn, Ark., 8 S.Ct. 1395, 127 U.S. 774, 32 L.Ed. 323—Johnson v. Wilkins, Fla., 6 S.Ct. 600, 116 U.S. 392, 29 L.Ed. 671.

83. U.S.—U. S. v. Trans-Missouri Freight Ass'n, Kan., 17 S.Ct. 540, 166 U.S. 290, 41 L.Ed. 1007—Red River Cattle Co. v. Needham, Tex., 11 S.Ct. 208, 137 U.S. 632, 34 L.Ed. 799—Johnson v. Wilkins, Fla., 6 S.Ct. 600, 116 U.S. 392, 29 L.Ed. 671.

84. U.S.—U. S. v. Adams, Ct.Cl., 6 Wall. 101, 18 L.Ed. 792.

85. U.S.—Avendano v. Gay, La., 8 Wall. 376, 19 L.Ed. 422—Generes v. Bonnemer, La., 7 Wall. 564, 19 L.Ed. 227.

86. U.S.—Dufau v. Couprey, La., 6 Pet. 170, 8 L.Ed. 359.

Irregular or imperfect authentication

U.S.—Idaho & Oregon Land Imp. Co. v. Bradbury, Idaho, 10 S.Ct. 177, 132 U.S. 509, 33 L.Ed. 433.

87. U.S.—U. S. v. Wilkinson, La., 12 How. 246, 13 L.Ed. 974.

88. U.S.—Union Pac. R. Co. v. Stewart, Kan., 95 U.S. 279, 24 L.Ed. 431.

89. U.S.—Sun Printing & Publishing Ass'n v. Edwards, N.Y., 24 S.Ct. 696, 194 U.S. 377, 48 L.Ed. 1027—Horne v. George H. Hammond Co., Mass., 15 S.Ct. 167, 155 U.S. 393, 39 L.Ed. 197.

90. U.S.—Idaho & Oregon Land Imp. Co. v. Bradbury, Idaho, 10 S.Ct. 177, 132 U.S. 509, 33 L.Ed. 433.

91. U.S.—U. S. v. Adams, Ct.Cl., 9 Wall. 661, 19 L.Ed. 808.

92. U.S.—Stitt v. Huidekopher, Pa., 131 U.S. appendix cxviii, 21 L.Ed. 644.

93. U.S.—Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co., N.Y., 14 S.Ct. 1180, 154 U.S. 635, 24 L.Ed. 368—Continen-

not presented in the trial court.[94] An order remitting or remanding a cause to the lower court in order to allow an amended transcript or return to be filed may be made in the discretion of the appellate court.[95] Any amendments to the record must be properly made a part thereof or they will not be considered.[96]

Time for amendments. Amendments of the record must be applied for and made within a reasonable time, to be determined by the circumstances of the particular case.[97] An application for leave to amend the record must be made prior to the submission of the case to the supreme court;[98] it comes too late after the case has once been decided and while an application for a rehearing is pending,[99] and a rehearing will not ordinarily be granted in order that a party may correct or perfect the record.[1] Furthermore, it is held that if the case should be reached before a return a certiorari to perfect the record will not be regarded as a reason for continuance.[2]

Certiorari to bring up record. After the transcript has been filed in the supreme court, amendments can as a rule be made only by certiorari.[3] The supreme court may issue a certiorari to have a defective record corrected and brought up,[4] as for the purpose of correcting a diminution in the record,[5] or for bringing up matters of record omitted therefrom;[6] but certiorari will not issue for the purpose of bringing up immaterial or unnecessary matter[7] or matters not of record or not considered in the court below.[8] An application for a certiorari may be made by either party,[9] or where, on inspection of the record, it appears that there are defects or omissions in the transcript which may be important, the supreme court may, of its own motion, issue a certiorari.[10] However, a writ of certiorari to bring up a corrected record does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by evidence of the defects alleged to exist.[11]

(11) Conclusiveness and Effect of Record

Generally speaking, the record is the sole and conclusive evidence of the proceedings below.

Generally speaking, the record filed for the purpose of appeal imports absolute verity, and is the sole and conclusive evidence of the proceedings in the lower court,[12] and accordingly it cannot be impeached or varied, on appeal, by affidavits or other

tal Life Ins. Co. v. Rhoads, Pa., 7 S.Ct. 193, 119 U.S. 237, 30 L. Ed. 380.

94. U.S.—Hoe v. Wilson, D.C., 9 Wall. 501, 19 L.Ed. 762.

95. U.S.—Ripley v. U. S., Ct.Cl., 31 S.Ct. 478, 220 U.S. 491, 55 L.Ed. 557—Cervantes v. U. S., Cal., 16 How. 619, 14 L.Ed. 1083.

96. U.S.—Whitten v. Tomlinson, Conn., 16 S.Ct. 297, 160 U.S. 231, 40 L.Ed. 406.

A letter written by the judge to petitioner's counsel, stating the judge's willingness that the record should be amended in a certain way if it could properly be done, has no place in the record, and its insertion therein does not show such an amendment.—Whitten v. Tomlinson, supra.

97. U.S.—Bein v. Heath, 12 S.Ct. 992, 142 U.S. 704, 35 L.Ed. 1174—Redfield v. Parks, Ark., 9 S.Ct. 642, 130 U.S. 623, 32 L.Ed. 1053.

98. U.S.—Redfield v. Parks, supra.

99. U.S.—U. S. v. New York Indians, Ct.Cl., 19 S.Ct. 487, 173 U. S. 464, 43 L.Ed. 769—U. S. v. Adams, Ct.Cl., 9 Wall. 554, 19 L. Ed. 584.

A motion, on appeal, for an order to the lower court to send up the evidence on which it found a certain fact, comes too late, after the supreme court has remanded the case, if the finding of such fact is material to the case.—U. S. v. New York Indians, Ct.Cl., 19 S.Ct. 487, 173 U.S. 464, 43 L.Ed. 769.

1. U.S.—U. S. v. Adams, Ct.Cl., 9 Wall. 554, 19 L.Ed. 584.

2. U.S.—Clark v. Hackett, N.H., 1 Black 77, 17 L.Ed. 69.

3. U.S.—Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co., N.Y., 14 S.Ct. 1180, 154 U.S. 635, 24 L.Ed. 368.

4. U.S.—City of Chicago v. Bigelow, Ill., 131 U.S. appendix xciii, 19 L. Ed. 257—Hudgins v. Kemp, Va., 18 How. 530, 15 L.Ed. 511.

Certiorari to review judgment or decree of circuit court of appeals see infra § 204.

5. U.S.—Hoskin v. Fisher, Cal., 8 S.Ct. 834, 125 U.S. 217, 31 L.Ed. 759—Missouri, K. & T. R. Co. v. Dinsmore, Kan., 2 S.Ct. 9, 108 U.S. 30, 27 L.Ed. 640—U. S. v. Adams, Ct.Cl., 9 Wall. 661, 19 L.Ed. 808—Stimpson v. West Chester R. Co., Pa., 3 How. 553, 11 L.Ed. 722.

6. U.S.—Goodenough Horseshoe Mfg. Co. v. Rhode Island Horseshoe Co., N.Y., 14 S.Ct. 1180, 154 U.S. 635, 24 L.Ed. 368—Hoskin v. Fisher, Cal., 8 S.Ct. 834, 125 U. S. 217, 31 L.Ed. 759—Stimpson v. West Chester R. Co., Pa., 3 How. 553, 11 L.Ed. 722—Holmes v. Trout, Ky., 7 Pet. 171, 8 L.Ed. 647.

7. U.S.—McGuire v. Commonwealth of Massachusetts, Mass., 3 Wall. 382, 18 L.Ed. 164.

8. U.S.—City of Chicago v. Bigelow, Ill., 131 U.S. appendix xcii, 19 L. Ed. 257—Union Pac. Ry. Co. v. U. S., Ct.Cl., 6 S.Ct. 631, 116 U.S. 402, 29 L.Ed. 677—Holmes v. Trout, Ky., 7 Pet. 171, 8 L.Ed. 647.

Defects in the conclusions of the lower court, not deducible from the evidence before it, cannot be supplied by certiorari.—U. S. v. Adams, Ct.Cl., 9 Wall. 661, 19 L.Ed. 808.

9. U.S.—Hoskin v. Fisher, Cal., 8 S.Ct. 834, 125 U.S. 217, 31 L.Ed. 759.

10. U.S.—Sweeney v. Lomme, Mont., 22 Wall. 208, 22 L.Ed. 727—Morgan v. Curtenius, Ill., 19 How. 8, 15 L.Ed. 576.

11. U.S.—Chappell v. U. S., Md., 16 S.Ct. 397, 160 U.S. 499, 40 L.Ed. 510—Grapeshot v. Wallerstein, La., 7 Wall. 563, 19 L.Ed. 83.

12. U.S.—Evans v. Stettnisch, Neb., 13 S.Ct. 931, 149 U.S. 605, 37 L.Ed. 866.

Bill of exceptions as conclusive
U.S.—Chaffee v. Boston Belting Co., Mass., 22 How. 217, 16 L.Ed. 240—Bingham v. Cabot, Mass., 3 Dall. 19, 1 L.Ed. 491.

Statement of facts as conclusive
U.S.—Wiscart v. D'Auchy, Va., 3 Dall. 321, 1 L.Ed. 619.

evidence or matters dehors the record.[13] The bill of exceptions will control as to matters properly appearing therein, as against the opinion of the lower court.[14]

(12) Questions Presented for Review

Such questions only may be reviewed by the supreme court as are properly presented by the record.

As a general rule, such questions only may be reviewed by the supreme court as are properly presented by the record or the requisite part thereof,[15] but any error apparent on the record is open to review regardless of how it is made to appear.[16] The supreme court will review only such errors as are properly presented by the record, relating to the jurisdiction of the lower court,[17] the parties,[18] the pleadings,[19] or to rulings on the admission or exclusion of evidence.[20] Questions which depend on the evidence are generally available on appeal only where such evidence or the relevant portion thereof appears of record;[21] and error in admitting certain evidence, which depends on other evidence, will not be reviewed unless such other evidence is disclosed in the record.[22] A ruling refusing to allow a witness to answer a question will not be reviewed where the record does not show what the answer would have been, or what was proposed to be proved by the question asked.[23] The sufficiency of the evidence may be reviewed only where the record sets forth all or substantially all of the evidence,[24] but it is sufficient if it affirmatively appears from a reasonable construction of the language used that all, or substantially all, the material evidence is preserved,[25] as where the record shows that the bill

General finding of court as conclusive

Where there were no special findings of fact by the court, its general finding, which has the effect of a verdict under Rev.St. § 649, 28 U.S.C.A. § 773, is conclusive on all matters of fact, and, if there were no exceptions to rulings of law in the progress of the trial, authorizing review under Rev.St. § 700, 28 U.S.C.A. § 875, the review is limited to the sufficiency of the complaint.—Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co., Miss., 41 S.Ct. 524, 256 U.S. 408, 65 L.Ed. 1020, affirming, C.C.A., 261 F. 741.

13. U.S.—Guerini Stone Co. v. P. J. Carlin Const. Co., Puerto Rico, 39 S.Ct. 102, 248 U.S. 334, 63 L.Ed. 275, reversing P. J. Carlin Const. Co. v. Guerini Stone Co., 241 F. 545, 154 C.C.A. 321, certiorari granted Guerini Stone Co. v. P. J. Carlin Const. Co., 38 S.Ct. 9, 245 U.S. 643, 62 L.Ed. 528—Evans v. Stettnisch, Neb., 13 S.Ct. 931, 149 U.S. 605, 37 L.Ed. 866—Hudgins v. Kemp, Va., 18 How. 530, 15 L.Ed. 511.

14. U.S.—Guerini Stone Co. v. P. J. Carlin Const. Co., Puerto Rico, 39 S.Ct. 102, 248 U.S. 334, 63 L.Ed. 275, reversing P. J. Carlin Const. Co. v. Guerini Stone Co., 241 F. 545, 154 C.C.A. 321, certiorari granted Guerini Stone Co. v. P. J. Carlin Const. Co., 38 S.Ct. 9, 245 U.S. 643, 62 L.Ed. 528.

15. U.S.—U. S. v. U. S. Fidelity & Guaranty Co., Pa., 32 S.Ct. 101, 222 U.S. 283, 56 L.Ed. 200, affirming 186 F. 477, 108 C.C.A. 455.

16. U.S.—Suydam v. Williamson, N.Y., 20 How. 427, 15 L.Ed. 978.

Application of payments

Where there is no definite expression in record as to whether payments by national bank shareholders to receiver to assist in paying bank's indebtedness were to be applied on shareholders' statutory liability, the supreme court on appeal is required to decide which contention is more reasonable and probable considering all facts and circumstances stipulated and proved.—Korbly v. Springfield Inst. for Savings, Mass., 38 S.Ct. 88, 245 U.S. 330, 62 L.Ed. 326, affirming Pepper v. Springfield Inst. for Savings, 218 F. 814, 134 C.C.A. 502.

17. U.S.—Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co., Md., 19 S.Ct. 268, 172 U.S. 474, 43 L.Ed. 520.

18. U.S.—Landram v. Jordan, D.C., 27 S.Ct. 17, 203 U.S. 56, 51 L.Ed. 88.

19. U.S.—Mercantile Nat. Bank v. Carpenter, Ind., 101 U.S. 567, 25 L.Ed. 815.

An order refusing leave to amend a bill of complaint cannot be reviewed if the record does not show what amendment was desired.—Mercantile Nat. Bank v. Carpenter, supra.

20. U.S.—San Antonio & A. P. Ry. Co. v. Wagner, 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110, affirming, Tex.Civ.App., 166 S.W. 24—Eagle Min. & Imp. Co. v. Hamilton, N.M., 31 S.Ct. 27, 218 U.S. 513, 54 L.Ed. 1131—Murray v. State of Indiana, La., 16 S.Ct. 990, 163 U.S. 101, 41 L.Ed. 87.

21. U.S.—Halbert v. U. S., Wash., 51 S.Ct. 615, 283 U.S. 753, 75 L.Ed. 1389, reversing, C.C.A., U. S. v. Halbert, 38 F.2d 795, U. S. v. Provoe, 38 F.2d 799, U. S. v. Walkowsky, 38 F.2d 805, and U. S. v. Rolfson, 38 F.2d 806—U. S. v. U. S. Fidelity & Guaranty Co., Pa., 32 S.Ct. 101, 222 U.S. 283, 56 L.Ed. 200, affirming 186 F. 477, 108 C.C.A. 455—Corinne Mill, Canal & Stock Co. v. Johnson, Utah, 15 S.Ct. 409, 156 U.S. 574, 39 L.Ed. 537.

Error in the admission of documentary evidence cannot be considered unless such evidence or its substance is preserved in the record.—Jones v. Grover & Baker Sewing-Mach. Co., Pa., 131 U.S. appendix cl, 24 L.Ed. 925.

The action of the trial court, on motions to tax or retax costs or to grant extra allowances, will not be reviewed unless the evidence before the trial court appears on the record.—U. S. v. Harmon, Me., 13 S.Ct. 327, 147 U.S. 268, 37 L.Ed. 164.

22. U.S.—Sire v. Ellithorpe Air-Brake Co., N.Y., 11 S.Ct. 195, 137 U.S. 579, 34 L.Ed. 801.

23. U.S.—Herencia v. Guzman, Puerto Rico, 31 S.Ct. 135, 219 U.S. 44, 55 L.Ed. 81—Patrick v. Graham, Colo., 10 S.Ct. 194, 132 U.S. 627, 33 L.Ed. 460.

24. U.S.—U. S. v. Copper Queen Consol. Min. Co., 22 S.Ct. 761, 185 U.S. 495, 46 L.Ed. 1008, affirming 60 P. 885, 7 Ariz. 80—Cohn v. Daley, Ariz., 19 S.Ct. 802, 174 U.S. 539, 43 L.Ed. 1077—Collier v. U. S., Ct.Cl., 19 S.Ct. 330, 173 U.S. 79, 43 L.Ed. 621.

25. U.S.—Clyatt v. U. S., Fla., 25 S.Ct. 429, 197 U.S. 207, 49 L.Ed. 726—Board of Com'rs of Gunnison County, Colo. v. E. H. Rollins & Sons, Colo., 19 S.Ct. 390, 173 U.S. 255, 43 L.Ed. 689, reversing 80 F. 692, 28 C.C.A. 91.

An indirect recital or certification that all the evidence is preserved in the record may be sufficient, if the implication necessarily flows from the language used, especially where there is nothing in the record to indicate or to suggest that anything has been omitted.—Board of Com'rs of Gunnison County, Colo., v. E. H. Rollins & Sons, supra.

of exceptions contains all the evidence, although such recital is omitted from the bill.[26]

Objection to the giving or refusing of an instruction by the trial court will be reviewed only where the instruction involved is made a part of the record, as explained supra subdivision i (2) of this section, and where an instruction depends on the evidence which was adduced and is proper or otherwise, according to the proof, the supreme court can review the giving or the refusal of the instruction in question, only where the record properly sets out the evidence.[27] In general an assignment of error that the court below failed to give a proper instruction will not be considered unless it affirmatively appears from the record that a proper and timely request therefor was made, as stated supra subdivision i (1) of this section.

(13) Matters Not Apparent of Record

Generally matters not properly included or shown in the record will not be considered by the supreme court.

The supreme court generally will not consider on appeal any matter or question which is not properly included or shown in the record;[28] the sole question which the court is required to determine is whether the judgment which is the subject of review is a legitimate conclusion from the premises which the record contains.[29] Evidence dehors the record, whether by affidavit[30] or otherwise,[31] ordinarily will not be considered by the supreme court, but may be considered to show circumstances occurring subsequently to the appeal, which materially affect the rights involved.[32] Public, but not private, laws may be considered although not found in the record.[33] A copy of a brief in the circuit court of appeals which is tendered as an exhibit, but which was not made a part of the record, cannot be examined in determining whether assignments of error have been waived.[34] Stipulations or agreed statements of fact which are not properly embodied or shown in the record will not be considered.[35]

j. Assignment of Errors; Briefs

Errors not included within a proper assignment of errors will generally not be considered by the supreme court, but the court has discretion to take notice of plain and serious errors even though unassigned. Proper and sufficient briefs must be submitted.

Assignment of errors. Under the supreme court rules, it is generally necessary that appellant shall file a proper assignment or specification of errors relied on, and alleged errors not so assigned are not properly before the supreme court and will not be considered by it.[36] Accordingly, where no errors

26. U.S.—Crowe v. Harmon, 27 S.Ct. 280, 204 U.S. 241, 51 L.Ed. 461, affirming 71 P. 1125, 8 Ariz. 327—Crowe v. Trickey, 27 S.Ct. 275, 204 U.S. 228, 51 L.Ed. 454, affirming 71 P. 965, 8 Ariz. 176.

27. U.S.—New York, L. E. & W. R. Co. v. Madison, Ohio, 8 S.Ct. 246, 123 U.S. 524, 31 L.Ed. 258.
4 C.J. p 543 note 55.

28. U.S.—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 328, 236 U.S. 412, 59 L.Ed. 644, reversing Lehigh Valley R. Co. v. Meeker, 211 F. 785, 128 C.C.A. 311—Gersch v. City of Chicago, Ill., 33 S.Ct. 178, 226 U.S. 451, 57 L.Ed. 295—Behn, Meyer & Co. v. Campbell & Go Tauco, Philippine, 27 S.Ct. 502, 205 U.S. 502, 51 L.Ed. 857—Nelson v. Flint, Utah, 17 S.Ct. 576, 166 U.S. 276, 41 L.Ed. 1002—Clarke v. McDade, Cal., 17 S.Ct. 284, 165 U.S. 168, 41 L.Ed. 673—Claasen v. U. S., N.Y., 12 S.Ct. 169, 142 U.S. 140, 35 L.Ed. 966—Congress & Empire Spring Co. v. Knowlton, N.Y., 103 U.S. 49, 26 L.Ed. 347—Reed v. Gardner, Ga., 17 Wall. 409, 21 L.Ed. 665.
4 C.J. p 553 note 35.

29. U.S.—Davis v. Packard, N.Y., 7 Pet. 276, 8 L.Ed. 684.

30. U.S.—Henneford v. Northern Pac. Ry. Co., Wash., 58 S.Ct. 415, 303 U.S. 17, 82 L.Ed. 619, reversing, D.C., Northern Pac. Ry. Co. v. Henneford, 15 F.Supp. 302.
4 C.J. p 143 note 20.

31. U.S.—Andrews v. Eastern Oregon Land Co., 27 S.Ct. 42, 203 U.S. 127, 51 L.Ed. 119, affirming 77 P. 117, 45 Or. 203—Metropolitan R. Co. v. Macfarland, D.C., 25 S.Ct. 28, 195 U.S. 322, 49 L.Ed. 219.
4 C.J. p 133 note 45.

32. U.S.—Kendall v. Ewert, Okl., 42 S.Ct. 444, 259 U.S. 139, 66 L.Ed. 862, reversing, C.C.A., 264 F. 1021, and leave to present petition for rehearing granted 42 S.Ct. 587—Dakota County v. Glidden, Neb., 5 S.Ct. 428, 113 U.S. 222, 28 L.Ed. 981.

33. U.S.—Leland v. Wilkins, R.I., 6 Pet. 317, 8 L.Ed. 412.

34. U.S.—Maryland Casualty Co. v. Jones, Cal., 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960, reversing, C.C.A., 27 F.2d 521.

35. U.S.—Patrick v. Graham, Colo., 10 S.Ct. 194, 132 U.S. 627, 33 L.Ed. 460—Lanusse v. Barker, N.Y., 3 Wheat. 101, 4 L.Ed. 343.

36. U.S.—Pacific States Box & Basket Co. v. White, Or., 56 S.Ct. 159, 296 U.S. 176, 80 L.Ed. 138, affirming, D.C., Pacific States Box & Basket Co. v. Gehlar, 9 F.Supp. 341—Wiloil Corporation v. Commonwealth of Pennsylvania, 55 S.Ct. 358, 294 U.S. 169, 79 L.Ed. 838, affirming Commonwealth v. Wiloil Corporation, 173 A. 404, 316 Pa. 33, rehearing denied Wiloil Corporation v. Commonwealth of Pennsylvania, 55 S.Ct. 543, 294 U.S. 733, 79 L.Ed. 1262—Herbring v. Lee, 50 S.Ct. 49, 280 U.S. 111, 74 L.Ed. 217, 64 A.L.R. 1430, affirming 269 P. 236, 126 Or. 588, 60 A.L.R. 1165—People of State of New York ex rel. Rosevale Realty Co. v. Kleinert, 45 S.Ct. 618, 268 U.S. 646, 69 L.Ed. 1135, dismissing error 143 N.E. 750, 237 N.Y. 580, which affirmed People ex rel. Rosevale Realty Co. v. Kleinert, 200 N.Y.S. 942, 206 App.Div. 712, and 201 N.Y.S. 935, 207 App.Div. 828—Sunderland v. U. S., Okl., 45 S.Ct. 64, 266 U.S. 226, 69 L.Ed. 259, affirming, C.C.A., 287 F. 468—Southern Ry. Co. v. Gadd, Tenn., 34 S.Ct. 696, 233 U.S. 572, 58 L.Ed. 1099, affirming 207 F. 277, 125 C.C.A. 21.
3 C.J. p 1330 note 44, p 1332 note 52—4 C.J. p 571 note 98.

Purpose is to enable the court, as well as opposing counsel, readily to perceive what points are relied on.—Seaboard Air Line Ry. Co. v. Watson, 53 S.Ct. 32, 34, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174, dismissing appeal 137 So. 719, 103 Fla. 477—3 C.J. p 1329 note 37.

Cross assignment

Appellee or defendant in error

are assigned, or the assignment is insufficient, the supreme court may affirm the judgment,[37] or dismiss or quash the appeal.[38] However, notwithstanding the absence of an assignment of errors, the supreme court may, in its discretion, take notice of a plain and serious error,[39] such as with respect to its own want of jurisdiction,[40] or the lower court's want of jurisdiction over the subject matter.[41]

Assignments of errors must substantially comply as to form and contents, and in other particulars with the requirements of statutes and rules of court governing the matter,[42] and assignments which do not so comply will, in general, be disregarded, even though the opposing party treats them as adequate.[43] Assignments must point out definitely and specifically the particular error or errors relied on;[44] and no one assignment should embrace more than one specification of error.[45] The assignment of errors must be attached to, or made a part of, the record.[46] The practice of assigning a large and unnecessary number of errors is disapproved.[47]

Briefs. Under the supreme court rules, it is required that the parties submit proper and sufficient briefs, and on appellant's failure to comply with such rules, the court may dismiss the appeal;[48] but objections for failure to serve a brief are waived

cannot make a cross assignment of errors unless he himself appeals or takes out a writ of error.—Bolles v. Outing Co., N.Y., 20 S.Ct. 94, 175 U.S. 262, 44 L.Ed. 156—3 C.J. p 1403 note 57.

Questions not preserved for review

Assignments of errors cannot raise questions which were not preserved for review by timely and proper objections and exceptions in the lower court.—Burton v. Driggs, Vt., 20 Wall. 125, 22 L.Ed. 299.

37. U.S.—Stevenson v. Barbour, Ky., 11 S.Ct. 690, 140 U.S. 48, 35 L.Ed. 338.

38. U.S.—Rowe v. Phelps, Tex., 14 S.Ct. 632, 152 U.S. 87, 38 L.Ed. 365.
4 C.J. p 571 note 98.

Appellee's failure to object, and lack of precedent, was held to justify deciding appeal on merits, notwithstanding deficient specifications of error.—Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v. U. S., N.Y., 54 S.Ct. 396, 291 U.S. 293, 78 L.Ed. 804.

39. U.S.—Mahler v. Eby, Ill., 44 S. Ct. 283, 264 U.S. 32, 68 L.Ed. 549.
3 C.J. p 1342 note 78, p 1348 note 56.

Compliance with mandate

Where appeals were from a decree entered under mandate of the supreme court, the court has jurisdiction, of its own motion, to consider whether the mandate has been complied with.—Continental Ins. Co. v. Reading Co., Pa., 42 S.Ct. 540, 259 U.S. 156, 66 L.Ed. 871, modifying, D.C., U. S. v. Reading Co., 273 F. 848.

Error held not "plain" within rule

U.S.—San Antonio & A. P. Ry. Co. v. Wagner, Tex., 36 S.Ct. 626, 241 U.S. 476, 60 L.Ed. 1110, affirming, Civ.App., 166 S.W. 24.

Record not minutely scrutinized

In exercising its option to notice plain errors not assigned, the court will not subject the opinion of the court below to minute scrutiny to discover error of law when, on the whole, it is clear that the facts found by that court justify the judgment.—Behn Meyer & Co. v. Campbell & Go Tauco, Philippine, 27 S.Ct. 502, 205 U.S. 403, 51 L.Ed. 857.

40. U.S.—Fore River Shipbuilding Co. v. Hagg, Mass., 31 S.Ct. 185, 219 U.S. 175, 55 L.Ed. 163.

41. U.S.—Chicago, B., & Q. R. Co. v. Willard, Ill., 31 S.Ct. 460, 220 U. S. 413, 55 L.Ed. 521.
3 C.J. p 1343 note 88.

42. U.S.—Seaboard Air Line Ry. Co. v. Watson, 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174, dismissing appeal 137 So. 719, 103 Fla. 447—Deitsch v. Wiggins, Colo., 15 Wall. 539, 21 L.Ed. 228.
3 C.J. p 1333 note 54.

43. U.S.—Seaboard Air Line Ry. Co. v. Watson, 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174, dismissing appeal 137 So. 719, 103 Fla. 477.

44. U.S.—Seaboard Air Line Ry. Co. v. Watson, supra.

Particularity required

(1) As to alleged error in admitting or excluding evidence.—Van Stone v. Stilwell & Bierce Mfg. Co., Mo., 12 S.Ct. 181, 142 U.S. 128, 35 L.Ed. 961.

(2) As to alleged insufficiency of evidence to support judgment or finding.—Grand Trunk R. Co. v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485.

(3) Assignment should state why instructions complained of are erroneous and should set out or quote them.—Lucas v. Brooks, W.Va., 18 Wall. 436, 21 L.Ed. 779.
3 C.J. p 1378 note 68.

45. U.S.—Pickett v. U. S., Okl., 30 S.Ct. 265, 216 U.S. 456, 54 L.Ed. 566.

Erroneous instruction

Assignment of error directed against a charge embodying several propositions as a whole, or against the giving or refusing of a group of instructions embodying distinct propositions, is insufficient; the portion of the charge complained of, or the instructions, the giving or refusing of which is claimed to be error, should be distinctly designated or pointed out.—Bogk v. Gassert, Mont., 13 S.Ct. 738, 140 U.S. 17, 37 L. Ed. 631.

46. U.S.—Farrar v. Churchill, Miss., 10 S.Ct. 771, 135 U.S. 609, 34 L. Ed. 246.

47. U.S.—Chesapeake & Delaware Canal Co. v. U. S., Del., 39 S.Ct. 407, 250 U.S. 123, 63 L.Ed. 889, affirming, C.C.A., 240 F. 903—Central Vermont R. Co. v. White, 35 S.Ct. 865, 238 U.S. 507, 59 L.Ed. 1433, Ann.Cas.1916B 252, affirming White v. Central Vermont R. Co., 89 A. 618, 87 Vt. 330.
3 C.J. p 1356 note 41.

Unnecessary assignments not considered

Where a great number of assignments have been filed, the court will endeavor to consider only the questions which, in its opinion, seem to be material to the judgment.—Phillips & Colby Constr. Co. v. Seymour, Ill., 91 U.S. 646, 23 L.Ed. 341.

48. U.S.—Benites v. Hampton, Utah, 8 S.Ct. 254, 123 U.S. 519, 31 L.Ed. 260—Schooner Catherine v. U. S., 7 Cranch 99, 3 L.Ed. 281.

Judgment was affirmed in an early case, on failure to submit a brief.—Ryan v. Koch, Mich., 17 Wall. 19, 21 L.Ed. 611.

Requisites of brief

(1) The brief must specify such of the assigned errors as are intended to be urged.—Benites v. Hampton, Utah, 8 S.Ct. 254, 123 U.S. 519, 31 L.Ed. 260.

(2) The errors for which a reversal is sought should be specifically pointed out.—Schooner Catherine v. U. S., 7 Cranch 99, 3 L.Ed. 281.

(3) However, a question as to the want of jurisdiction may be considered, even though it is not urged in the brief.—Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., Ind.,

where the cause is duly submitted on behalf of the opposite party.[49]

k. Dismissal or Withdrawal

The supreme court, in a proper case and on proper grounds, may dismiss an appeal or permit its withdrawal; but on good cause shown, the court may vacate its order of dismissal and reinstate the appeal.

The supreme court, in a proper case and on proper grounds, may dismiss an appeal.[50] As a rule, an appeal may be dismissed or withdrawn by request or consent of all interested parties,[51] or of appellant.[52] An appeal will generally be dismissed where no actual controversy exists between the parties at the time of the hearing;[53] but dismissal will not be ordered where the question involved is a matter of public interest,[54] where the controversy has not ceased to exist,[55] or where merely a part of the controversy has ceased to exist, other questions remaining for decision.[56] An appeal may also be dismissed for want of jurisdiction in the supreme court, if it is patent or can be readily ascertained by an examination of the record,[57] for failure of

6 S.Ct. 644, 116 U.S. 472, 29 L.Ed. 696.

Improper matter

A brief which contains scandalous or abusive matter directed against counsel or the parties may be stricken from the files.—Supreme Council of the Royal Arcanum v. Green, 35 S.Ct. 724, 237 U.S. 531, 59 L.Ed. 1089, L.R.A.1916A 771, reversing Green v. Supreme Council of Royal Arcanum, 129 N.Y.S. 791, 144 App.Div. 761 and 100 N.E. 411, 206 N.Y. 591—3 C.J. p 1433 note 22.

49. U.S.—Thomas & Co. v. Wooldridge, Miss., 23 Wall. 283, 23 L.Ed. 135.

50. U.S.—Commercial Cable Co. v. Burleson, N.Y., 39 S.Ct. 512, 250 U.S. 360, 63 L.Ed. 1030, reversing, D.C., 255 F. 99.

Defects subsequently cured

The supreme court may refuse to dismiss an appeal for defects and irregularities in the proceedings for review when such defects and irregularities have been subsequently cured.—Gates v. Goodloe, Tenn., 101 U.S. 612, 25 L.Ed. 895.

Conditional dismissal

On motion to dismiss for insufficiency of the appeal bond, it may be provided that the dismissal shall be conditioned on the failure to file a new or amended bond within a certain time.—Seward v. Corneau, La., 102 U.S. 161, 26 L.Ed. 86.

51. U.S.—Addington v. Burke, Tex., 8 S.Ct. 1391, 125 U.S. 693, 31 L.Ed. 853.

52. U.S.—Latham v. U. S., Ct.Cl., 9 Wall. 145, 19 L.Ed. 771—U. S. v. Minnesota & N. R. Co., Minn., 18 How. 241, 15 L.Ed. 347.

Appellee need not also consent

U.S.—Latham v. U. S., Ct.Cl., 9 Wall. 145, 19 L.Ed. 772.

53. U.S.—Commercial Cable Co. v. Burleson, N.Y., 39 S.Ct. 512, 250 U.S. 360, 63 L.Ed. 1030, reversing, D.C., 255 F. 99.
4 C.J. p 575 note 80.

Grounds for dismissal shown

(1) Where appellant becomes the sole party in interest and dominus litis on both sides.—Lord v. Veazie, Me., 8 How. 251, 12 L.Ed. 1067.

(2) Where the right in controversy has expired by lapse of the period of time fixed for its continuance.—Travelers' Ins. Co. v. Prewitt, Ky., 26 S.Ct. 316, 200 U.S. 450, 50 L.Ed. 549—Security Mut. L. Ins. Co. v. Prewitt, 26 S.Ct. 314, 200 U.S. 446, 50 L.Ed. 545, dismissing error 83 S.W. 611, 119 Ky. 321, 26 Ky.L. 1239, 1 L.R.A.,N.S., 1019, 84 S.W. 527, 27 Ky.L. 77, 115 Am.S.R. 264.

(3) Where it appears that there has been a valid settlement or adjustment by the parties of all their rights and differences respecting the subject matter of the controversy.—Dakota County v. Glidden, Neb., 5 S.Ct. 428, 113 U.S. 222, 28 L.Ed. 981—4 C.J. p 579 note 12.

(4) Where the judgment or decree appealed from has been satisfied or complied with by appellant.—Codlin v. Kohlhausen, 21 S.Ct. 584, 181 U.S. 151, 45 L.Ed. 793, dismissing appeal 58 P. 499, 9 N.M. 565.

(5) Matters pertaining to the conduct of an election will not usually be determined when, pending the appeal, the election has been held.—Richardson v. McChesney, Ky., 31 S.Ct. 43, 218 U.S. 487, 54 L.Ed. 1121—Mills v. Green, S.C., 16 S.Ct. 132, 159 U.S. 651, 40 L.Ed. 293.

(6) The propriety of the granting of a temporary injunction or restraining order becomes moot after the expiration of the time for the stay.—Tennessee v. Condon, 23 S.Ct. 579, 189 U.S. 64, 47 L.Ed. 709, dismissing error 65 S.W. 871, 108 Tenn. 82.

Costs

Appeal in a case which has become moot will not be retained merely for the purpose of determining the question of costs.—Wingert v. Hagerstown First Nat. Bank, Md., 32 S.Ct. 391, 223 U.S. 670, 56 L.Ed. 605, dismissing appeal 175 F. 739, 99 C.C.A. 315.

54. U.S.—Southern Pac. Terminal Co. v. Interstate Commerce Commission, Tex., 31 S.Ct. 279, 219 U.S. 498, 55 L.Ed. 310.
4 C.J. p 576 note 81–82.

55. U.S.—Newport News Shipbuilding & Dry Dock Co. v. Schauffler, Va., 58 S.Ct. 466, 303 U.S. 54, 82 L.Ed. 646, affirming, C.C.A., 91 F.2d 730, certiorari granted 58 S.Ct. 43, 302 U.S. 673, 82 L.Ed. 519—Abie State Bank v. Weaver, 51 S.Ct. 252, 282 U.S. 765, 75 L.Ed. 690, affirming 227 N.W. 922, 119 Neb. 153—McGrain v. Daugherty, Ohio, 47 S.Ct. 319, 273 U.S. 135, 71 L.Ed. 580, reversing, D.C., Ex parte Daugherty, 299 F. 620.

56. U.S.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F. Supp. 534, rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526—Fidelity & Deposit Co. of Maryland v. Tafoya, N.M., 46 S.Ct. 331, 270 U.S. 426, 70 L.Ed. 664—People ex rel. Woodhaven Gaslight Co. v. Public Service Commission of New York, 46 S.Ct. 83, 269 U.S. 244, 70 L.Ed. 255, affirming 142 N.E. 271, 236 N.Y. 530, which affirmed People ex rel. Woodhaven Gaslight Co. v. Nixon, 196 N.Y.S. 623, 203 App.Div. 369—Standard Fashion Co. v. Magrane-Houston Co., Mass., 42 S.Ct. 360, 258 U.S. 346, 66 L.Ed. 653, affirming 259 F. 793, 170 C.C.A. 593, which granted rehearing 251 F. 559, 163 C.C.A. 553—Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167—Male v. Atchison, T. & S. F. R. Co., N.Y., 36 S.Ct. 351, 240 U.S. 97, 60 L.Ed. 544.

57. U.S.—Nyanza S. S. Co. v. Jahncke Dry Dock No. 1, La., 44 S.Ct. 355, 264 U.S. 439, 68 L.Ed. 777.
3 C.J. p 380 note 99—4 C.J. p 580 note 28.

Transfer to circuit court of appeals

(1) Under Jud.Code § 238a, an appeal taken to the supreme court in a case where it should have been taken to the circuit court of appeals was transferable to that court for determination, as if the appeal had been duly taken to it.—Transportes Maritimos do Estado v. Almeida, N.

appellant to perfect his appeal,[58] or for want of prosecution;[59] and an appeal may be dismissed where circumstances have rendered a determination unnecessary or ineffectual.[60] Although the supreme court may have the power to dismiss an appeal which is manifestly and palpably frivolous and without merit,[61] it will not, as a rule, dismiss on such ground, but will affirm the judgment below.[62]

Motion to dismiss. While the supreme court may in some cases order dismissal of an appeal on its own motion,[63] in other cases a motion to dismiss the appeal must be made by a proper party,[64] in the proper time[65] and manner,[66] and must be made,

Y., 44 S.Ct. 449, 265 U.S. 104, 68 L.Ed. 932, transferred, see, C.C.A., 5 F.2d 151—Smith v. Apple, Kan., 44 S.Ct. 311, 264 U.S. 274, 68 L.Ed. 678—Street v. Shipowners' Ass'n of Pacific Coast, Cal., 44 S.Ct. 119, 263 U. S. 334, 68 L.Ed. 326—Heitler v. U. S., Ill., 43 S Ct. 185, 260 U.S. 438, 67 L. Ed. 338, transferred, see D.C., U. S. v. Heitler, 274 F. 401, in which error dismissed 43 S.Ct. 163, 260 U.S. 703, 67 L.Ed. 472.

(2) Jud.Code § 238a was expressly repealed by Act of Febr. 13, 1925, 43 St. at L. p 942 with a savings clause as to cases pending in the supreme court.—Timken Roller Bearing Co. v. Pennsylvania R. Co., Ohio, 47 S.Ct. 550, 274 U.S. 181, 71 L.Ed. 989, setting aside dismissal 47 S.Ct. 454, 273 U.S. 665, 71 L.Ed. 829.

"Dismissal for want of substantial federal question" of an appeal, by the supreme court, means that every question brought for decision is so clearly undebatable and lacking in merit as to require dismissal for want of substance.—Johnson v. Town of Deerfield, D.C.Mass., 25 F.Supp. 918, affirmed 59 S.Ct. 791, 306 U.S. 621, 83 L.Ed. 1027, rehearing denied 59 S.Ct. 832, 307 U.S. 650, 83 L.Ed. 1529.

58. U.S.—Newman v. Moyers, 40 S. Ct. 478, 253 U.S. 182, 64 L.Ed. 849, reversing 47 App.D.C. 102.

59. U.S.—Yates v. Jones Nat. Bank, Neb., 27 S.Ct. 638, 206 U.S. 158, 51 L.Ed. 1002.
4 C.J. p 582 note 47.

60. U.S.—State of Ohio v. U. S., Ohio, 54 S.Ct. 792, 292 U.S. 498, 78 L.Ed. 1388, affirming, D.C., 6 F. Supp. 386, vacated U. S. v. State of Ohio, 54 S.Ct. 452, 291 U.S. 644, 78 L.Ed. 1041, and U. S. v. Wheeling & L. E. R. Co., 54 S.Ct. 452, 291 U.S. 644, 78 L.Ed. 1041, rehearing granted State of Ohio v. U. S., 55 S.Ct. 66, 293 U.S. 627, 79 L.Ed. 714, affirmed 55 S.Ct. 146, 293 U.S. 528, 79 L.Ed. 638.

Appeal from interlocutory injunction order will be dismissed, where appeal from final judgment making interlocutory injunction permanent is also before supreme court for review.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375, dismissing appeal, D.C., Constantin v. Smith, 57 F.2d 227.

Other judicial proceedings

Appeal may be dismissed where the question in controversy has been settled by another order in the same action or in another action, as where the judgment was vacated subsequent to the appeal.—Sterling v. Constantin, Tex., 53 S.Ct. 190, 287 U.S. 378, 77 L.Ed. 375—Champlin Refining Co. v. Corporation Commission, Okl., 52 S.Ct. 559, 286 U.S. 210, 76 L.Ed. 1062, 86 A.L.R. 403—Pacific Telephone & Telegraph Co. v. Kuykendall, Wash., 44 S.Ct. 553, 265 U.S. 196, 68 L.Ed. 975—Shaffer v. Carter, Okl., 40 S.Ct. 221, 252 U.S. 37, 64 L. Ed. 445—U. S. v. Ayers, Ct.Cl., 9 Wall. 608, 19 L.Ed. 625—4 C.J. p 585 note 65.

Question held not moot

U.S.—Old Colony Trust Co. v. City of Seattle, Wash., 46 S.Ct. 552, 271 U.S. 426, 70 L.Ed. 1019.

Reversal on cross appeal

A writ of error from a judgment of the circuit court of appeals affirming a judgment of a circuit court must, together with a writ of error from a separate and subsequent judgment of the circuit court of appeals on a cross writ of error, reversing the same judgment of the circuit court, and remanding the cause for a new trial on the question presented by such cross writ of error, be dismissed, as the judgment of the circuit court of appeals first rendered ceased to be final by the operation of the second judgment which was itself not final.—Montana Min. Co. v. St. Louis Min. & Mill Co., Mont., 22 S.Ct. 744, 186 U.S. 24, 46 L.Ed. 1039.

61. U.S.—Steele v. Culver, Mich., 29 S.Ct. 9, 211 U.S. 26, 53 L.Ed. 74.

62. U.S.—Amory v. Amory, N.Y., 91 U.S. 356, 23 L.Ed. 436.

Appeal regularly taken and docketed should not be dismissed on the ground that there is no error apparent of record, but the judgment below should be affirmed.—Hecker v. Fowler, N.Y., 1 Black 95, 17 L.Ed. 45.

63. U.S.—Nyanza S. S. Co. v. Jahncke Dry Dock No. 1, La., 44 S. Ct. 355, 264 U.S. 439, 68 L.Ed. 777.

Particular grounds

(1) Want of jurisdiction.—Nyanza S. S. Co. v. Jahncke Dry Dock No. 1, supra—4 C.J. p 589 note 12 [a]—p 590 note 14.

(2) Defects in the proceedings for review.—Hilton v. Dickinson, D.C., 2 S.Ct. 424, 108 U.S. 165, 27 L.Ed. 688—Edmonson v. Bloomshire, Ohio, 7 Wall. 306, 19 L.Ed. 91.

(3) Want of prosecution.—Hilton v. Dickinson, supra.

(4) Want of actual controversy.—East Tennessee, V. & G. R. Co. v. Southern Tel. Co., Neb., 8 S.Ct. 1391, 125 U.S. 695, 31 L.Ed. 853.

64. **Stranger to decree** may not move to dismiss appeal therefrom.—Denver & Rio Grande R. Co. v. Alling, Colo., 99 U.S. 463, 25 L.Ed. 438.

65. U.S.—Sparrow v. Strong, Nev., 3 Wall. 97, 18 L.Ed. 49.

Stage of proceedings

(1) A motion to dismiss for defects or irregularities in the proceedings for review, not going to the jurisdiction, should be made at a preliminary stage or the defects or irregularities will be deemed waived.—Sparrow v. Strong, supra.

(2) However, a motion to dismiss for jurisdictional defects may be made at any stage of the proceedings before a final disposition of the case.—Clark v. Hancock, Cal., 94 U.S. 493, 24 L.Ed. 146—Estis v. Trabue, Miss., 9 S.Ct. 58, 128 U.S. 225, 32 L.Ed. 437.

When motion premature

(1) A motion to dismiss will not lie until after the jurisdiction of the supreme court has attached, by the performance of the conditions requisite to the perfection of the appeal.—Stafford v. Union Bank of La., Tex., 16 How. 135, 14 L.Ed. 876.

(2) Such motion is not premature because the record has not been printed, where the supreme court is advised as to the matter from a printed transcript of the proceedings.—Lazarus, Michel & Lazarus v. Prentice, La., 34 S.Ct. 851, 234 U.S. 263, 58 L.Ed. 1305, dismissing appeal Musica v. Prentice, 211 F. 326, 127 C.C.A. 575.

(3) A motion to dismiss an appeal which has been regularly brought and placed on the calendar and is within the jurisdiction of the court will not be entertained before the cause is reached in its regular order on the calendar.—The Eutaw, N.Y., 12 Wall. 136, 20 L.Ed. 278.

66. **Form and requisites**

(1) A motion to dismiss should set out the facts and the grounds on which it is based and should point out the specific defects or errors complained of.—Power v. Baker, 5 S.Ct. 361, 112 U.S. 710, 28 L.Ed. 825.

according to the decisions, on proper notice.[67] In determining the motion the supreme court will not ordinarily consider or determine the merits of the appeal, or questions involving its merits;[68] and where the facts on which the motion is based are controverted,[69] or where the affidavits filed in support of the motion are conflicting,[70] the motion will be overruled. Dismissal for failure of appellant to file the record within the time required,[71] or for want of prosecution,[72] does not operate as an affirmance of the judgment appealed from.

The supreme court, on a motion addressed to its judicial discretion,[73] may vacate the order of dismissal and reinstate the appeal, on good cause shown.[74]

l. Hearing and Rehearing

The court has discretionary power, in some instances, to advance a cause for hearing. The hearing must be conducted in accordance with applicable statutes and rules of court, and in a proper case, the court may grant a rehearing.

Advancing cause for hearing. While appeals are ordinarily heard in the order in which they are docketed, the supreme court has discretionary power to advance a cause for hearing,[75] and the usual method of procuring such action is by motion or application.[76] The power to advance a cause will not be exercised if there is nothing in the cause proposed to be advanced to distinguish it in character from other cases;[77] and advancement or preference will be usually given only to those causes, or for those grounds, which are designated by statutes,

(2) A certificate of the clerk, or an affidavit, or both, must accompany the motion.—Smith v. Clark, Mass., 12 How. 21, 13 L.Ed. 875—Holliday v. Batson, La., 4 How. 645, 11 L.Ed. 1140.

While motions to dismiss made before record is printed should ordinarily be accompanied by a statement of facts on which they rest, or by printed copies of so much of the record as will enable the court to understand the case, a motion to dismiss, for want of jurisdiction, an appeal to the federal supreme court from a circuit court of appeals is not premature because the record has not been printed, where the supreme court is sufficiently advised as to the situation of the case from a printed transcript of the proceedings in the district court to dispose of the motion without doing injustice to the parties.—Lazarus, Michel & Lazarus v. Prentice, La., 34 S.Ct. 851, 234 U.S. 263, 58 L.Ed. 1305.

67. U.S.—Davidson v. Lanier, Miss., 131 U.S. appendix lxxii, 16 L.Ed. 796.

Notice must designate time for hearing

U.S.—Glenny v. Langdon, Ohio, 94 U. S. 604, 24 L.Ed. 237.

68. U.S.—Hill v. Chicago & E. R. Co., Ill., 9 S.Ct. 269, 129 U.S. 170, 32 L.Ed. 651.

4 C.J. p 602 note 33.

Postponing of consideration of a motion to dismiss a writ of error until hearing of the merits is not a decision in the affirmative of the question of the power to review.—Cerecedo v. United States, Puerto Rico, 36 S.Ct. 3, 239 U.S. 1, 60 L.Ed. 113.

Examination of record

Where, in passing on a motion to dismiss, the court would be required to examine the entire record, the motion will ordinarily not be considered in advance of a hearing on the merits, or will be denied.—Blossom v. Milwaukee, etc., R. Co., Wis., 1 Wall. 655, 17 L.Ed. 673—Day v. Washburn, Ind., 23 How. 309, 16 L.Ed. 551.

Proof dehors the record

Motion to dismiss does not lie where, to support or resist it, proof is necessary dehors the record.—U. S. v. Griffith, Fla., 11 S.Ct. 1005, 141 U.S. 212, 35 L.Ed. 719.

69. U.S.—St. Louis Nat. Bank v. U. S. Insurance Co., Mo., 100 U.S. 43, 25 L.Ed. 547.

70. U.S.—Rector v. Lipscomb, Ark., 12 S.Ct. 83, 141 U.S. 557, 35 L.Ed. 857.

71. U.S.—U. S. v. Gomez, Cal., 23 How. 326, 341, 16 L.Ed. 552, 587.

72. U.S.—Loudon v. Shelby County Taxing Dist., Tenn., 104 U.S. 771, 26 L.Ed. 923.

Condition unchanged

A dismissal for want of prosecution remands the case to the lower court in the same condition as before the appeal was taken.—Newman v. Moyers, 40 S.Ct. 478, 253 U.S. 182, 64 L.Ed. 849, reversing 47 App.D.C. 102.

73. U.S.—Deming's Appeal, Ct.Cl., 10 Wall. 251, 19 L.Ed. 893.

Time for making motion

(1) Due diligence is required of the moving party or the delay will be fatal.—Johnson v. Wilkins, Fla., 6 S.Ct. 1048, 118 U.S. 228, 30 L.Ed. 210—Deming v. U. S., Ct.Cl., 10 Wall. 251, 19 L.Ed. 893.

(2) Motion must be made during the term in which the appeal was dismissed.—Jackson v. Ashton, Pa., 10 Pet. 480, 9 L.Ed. 502.

74. U.S.—James v. McCormack, Va., 105 U.S. 265, 26 L.Ed. 1044—Alviso v. U. S., Cal., 6 Wall. 457, 18 L.Ed. 721.

Defect of jurisdiction

Dismissal solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constitutes no bar to reinstatement.—The Palmyra, S.C., 12 Wheat. 1, 6 L.Ed. 531—4 C.J. p 610 note 27.

75. U.S.—Ward v. Maryland, Md., 12 Wall. 163, 20 L.Ed. 260.

76. U.S.—Kentucky Cent. R. Co. v. Bourbon County, Ky., 6 S.Ct. 601, 116 U.S. 538, 29 L.Ed. 725.

4 C.J. p 615 note 80.

Necessity of record

Such a motion cannot be considered in the absence of a printed record.—Crane Iron Co. v. Hoagland, N. J., 1 S.Ct. 17, 108 U.S. 5, 27 L.Ed. 630.

Statement of grounds

Motion should show the grounds on which it is based, without reference to the record.—Call v. Palmer, Iowa, 1 S.Ct. 2, 206 U.S. 39, 27 L.Ed. 61—4 C.J. p 615 note 81.

77. U.S.—Sage v. Central R. Co., Iowa, 93 U.S. 412, 23 L.Ed. 933.

Concurrence of parties

A motion to advance a cause is not granted as of course, even when both parties concur, as such an order, if improperly made, would prejudice the rights of other parties on the calendar. Miller v. New York, N.Y., 12 Wall. 159, 20 L.Ed. 259.

Assignment of other cases

After a case has been called and has been placed at the foot of the docket, the court cannot take it up, on motion, and assign a day for its argument, when other cases of great public importance have already been assigned for what may be the remainder of the term.—Barry v. Mercein, N.Y., 4 How. 574, 11 L.Ed. 1108.

Appeal without merit

An appeal cannot be brought on out of its order merely on the ground that it is without merit.—Amory v. Amory, N.Y., 91 U.S. 356, 23 L.Ed. 436.

or rules of court.[78]

Hearing. The hearing in the supreme court must ordinarily be conducted in accordance with the applicable statutes and rules of court.[79] Compliance must be had with rules as to limitations on the right to oral argument on motions,[80] and as to submission of a case on printed briefs alone, by consent of the parties.[81] Where all the questions involved in several cases on appeal have grown out of the same transaction and depend on the same facts or principles, the cases may be consolidated and argued together.[82] While causes must generally be ready for hearing when they are reached,[83] the court may, for good cause shown, continue or postpone the hearing of an appeal.[84]

Rehearing. Under the rules of the court, a rehearing may be granted only where some member of the court who concurred in the judgment doubts the correctness thereof and desires a further argument on the subject, and the proposal receives the support of the majority of the court.[85] While a rehearing may be granted by the supreme court on its own motion,[86] ordinarily the party complaining of the decision must file application for rehearing within the time prescribed by court rules.[87] A rehearing will usually be refused if no material fact or principle of law has been overlooked or disregarded;[88] if it is not made to appear that a rehearing would change the result;[89] or if the error is immaterial.[90] A rehearing will not ordinarily be granted because of defects or errors in the record or transcript,[91] or on the ground of after-discovered

78. U.S.—Poindexter v. Greenhow, Va., 3 S.Ct. 8, 109 U.S. 63, 27 L.Ed. 860.
4 C.J. p 613 note 69 [a].

Public importance

(1) Appeal may be advanced where the questions in dispute may embarrass the government or state while such questions remain unsettled.—U. S. v. Fossatt, Cal., 21 How. 445, 16 L.Ed. 185—4 C.J. p 614 note 78.

(2) However, the mere fact that the questions involved in a cause are of public importance will not necessarily entitle the parties to an advancement of such cause to a hearing in preference to others.—Poindexter v. Greenhow, Va., 3 S.Ct. 8, 109 U.S. 63, 27 L.Ed. 860.

Cases to which state is party may be entitled to preference over other causes.—Huntington v. Texas, Tenn., 131 U.S. appendix cx, 20 L.Ed. 550—4 C.J. p 614 note 76.

79. U.S.—Aurrecoechea v. Bangs, Cal., 3 S.Ct. 639, 110 U.S. 217, 28 L. Ed. 125.

Reargument

In cases where constitutional questions are involved, unless a majority of the judges concur in the opinion, the court will not deliver a judgment except in cases of absolute necessity, but will direct that the cases be reargued at the next term.—Briscoe v. Kentucky Bank, Ky., 8 Pet. 118, 8 L. Ed. 887.

80. U.S.—Carey v. Houston & T. C. R. Co., Tex., 14 S.Ct. 63, 150 U.S. 170, 37 L.Ed. 1041.

81. U.S.—Aurrecoechea v. Bangs, Cal., 3 S.Ct. 639, 110 U.S. 217, 28 L.Ed. 125.

Withdrawal of stipulation

Stipulations of counsel to submit case on printed argument alone, cannot be withdrawn by either party without the consent of the other, except by leave of the court on cause shown.—Aurrecoechea v. Bangs, supra—4 C.J. p 618 note 43.

Submission on briefs may be set aside and an oral argument ordered.—Louisiana v. New Orleans, La., 131 U.S. appendix cci, 26 L.Ed. 427.

82. U.S.—Ableman v. Booth, Wis., 18 How. 479, 15 L.Ed. 465.

83. U.S.—Alvord v. U. S., Idaho, 99 U.S. 593, 25 L.Ed. 399.

84. U.S.—New Orleans v. New Orleans, M. & T. R. Co., La., 1 S.Ct. 187, 108 U.S. 15, 27 L.Ed. 635.
4 C.J. p 620 note 61.

Continuances granted

(1) Because of the failure of appellant to enter the appeal at the proper term.—Brown v. Swann, D.C., 8 Pet. 435, 8 L.Ed. 1001.

(2) Because of the death of counsel shortly before the term.—Hunter v. Fairfax, Va., 3 Dall. 305, 1 L.Ed. 613.

85. U.S.—Ambler v. Whipple, D.C., 23 Wall. 278, 23 L.Ed. 127.
4 C.J. p 622 note 3.

Equal division of court on a motion for a rehearing constitutes a denial thereof and leaves the original judgment in force.—Carmichael v. Eberle, N.M., 20 S.Ct. 571, 177 U.S. 63, 44 L.Ed. 672.

86. U.S.—Knickerbocker L. Ins. Co. v. Pendleton, Tenn., 6 S.Ct. 74, 115 U.S. 39, 29 L.Ed. 432.

87. U.S.—Chicago & N. R. Co. v. McKinley, Iowa, 99 U.S. 147, 25 L.Ed. 272.

During term

The petition must be filed before the end of the term at which the case is decided.—Bushnell v. Crooke Min. & Smelting Co., Colo., 14 S. Ct. 22, 150 U.S. 82, 37 L.Ed. 1007—4 C.J. p 638 note 62.

Answer or reply to petition for a rehearing is usually neither necessary or proper.—Ambler v. Whipple, D.C., 23 Wall. 278, 23 L.Ed. 127.

Time of acting on application

The court may take action on a petition after the time limited for making the application has expired, provided such petition was duly filed within the statutory period, and something has been done within the term at which judgment was rendered to keep the case within the jurisdiction of the court.—Goddard v. Ordway, D.C., 101 U.S. 745, 25 L.Ed. 1040.

88. U.S.—Morgan v. U. S., Mo., 58 S. Ct. 999, 304 U.S. 1, 82 L.Ed. 1129, denying rehearing 58 S.Ct. 773, 304 U.S. 1, 82 L.Ed. 1129, reversing, D. C., 23 F.Supp. 380, mandate conformed to 24 F.Supp. 214, reversed on other grounds 59 S.Ct. 795, 307 U.S. 183, 83 L.Ed. 1211, mandate conformed to, D.C., Morgan v. U. S., 32 F.Supp. 546.

Matters fully considered

If no omissions or new authorities or points of law or fact are shown, the supreme court will seldom permit a rehearing simply for the purpose of obtaining a reargument on, and a reconsideration of, points, authorities, and matters which have already been fully considered by the court, on the assertion of counsel that, notwithstanding the court fully considered everything wished to be urged on the rehearing, it reached the wrong conclusion.—Williams v. Bank of U. S., Ohio, 2 Pet. 96, 7 L.Ed. 360.

89. U.S.—Treat v. Jemison, Cal., 131 U.S. appendix cxxxv, 23 L.Ed. 134.

90. U.S.—Bradford v. U. S., Ct.Cl., 33 S.Ct. 1026, 57 L.Ed. 1630, rehearing denied 33 S.Ct. 576, 228 U.S. 446, 57 L.Ed. 912.

91. U.S.—U. S. v. Adams, Ct.Cl., 9 Wall. 554, 19 L.Ed. 584.

evidence;[92] but the petition will be granted where it clearly appears that the decision was based on a mistaken assumption of fact.[93] A second application for a rehearing is generally refused at least where it is made by the same party and on the same grounds as a former application that has been considered and denied.[94]

m. Review

The general principles of review, such as that prohibiting reversal for harmless error, are applied by the supreme court in the exercise of its appellate jurisdiction.

Where the supreme court has once obtained jurisdiction of a cause, it obtains it for all purposes and may give judgment on all points properly presented for decision.[95]

Matters not necessary to decision on review. Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by the supreme court;[96] thus abstract, moot, academic, or hypothetical questions will not be considered or decided, as where the controversy has come to an end,[97] however convenient it might

92. U.S.—U. S. v. Maxwell Land-Grant Case, Colo., 7 S.Ct. 1271, 122 U.S. 365, 30 L.Ed. 1211.

93. U.S.—Security Mut. L. Ins. Co. v. Prewitt, Ky., 26 S.Ct. 619, 202 U.S. 246, 50 L.Ed. 1013, 6 Ann.Cas. 317.

94. U.S.—Williams v. Conger, N.C., 9 S.Ct. 793, 131 U.S. 390, 33 L.Ed. 201.

95. U.S.—James-Dickinson Farm Mortg. Co. v. Harry, Ill., 47 S.Ct. 308, 273 U.S. 119, 71 L.Ed. 569.
4 C.J. p 644 note 48.

Matters stipulated by parties
The court will not consider matters outside of the record and stipulated to by the parties.—Schley v. Pullman's Palace Car Co., Ill., 7 S.Ct. 730, 120 U.S. 575, 30 L.Ed. 789.

Matters of evidence
(1) Matters not offered or introduced in evidence in the lower court will not as a rule be considered.—Mitchel v. U. S., Fla., 9 Pet. 711, 9 L.Ed. 283.

(2) Where bill, when read in light of facts of which court may take judicial notice, may be regarded as sufficient to state cause of action, decision on constitutional questions should not turn on other facts which are proper subjects of evidence and of determination of facts by trial court.—Borden's Farm Products Co. v. Baldwin, N.Y., 55 S.Ct. 187, 293 U.S. 194, 79 L.Ed. 281, reversing, D.C., 7 F.Supp. 352, and mandate granted 55 S.Ct. 239.

Delaying final determination of cause
Supreme court will not determine constitutionality of section of act regulating petroleum production on questions certified by circuit court of appeals on appeal from preliminary injunction restraining production in excess of quotas, where to do so would necessitate ordering up entire record, which would merely bring before court interlocutory order and would result in unnecessary delay in final determination of cause.—Wilshire Oil Co. v. U. S., Cal., 55 S.Ct. 673, 295 U.S. 100, 79 L.Ed. 1329.

An issue raised on an affidavit, and not shown in the bill, will not be considered.—Home Telephone & Telegraph Co. of Spokane v. Kuykendall, Wash., 44 S.Ct. 557, 265 U.S. 206, 68 L.Ed. 982.

Construction of state statutes or constitutions
(1) Where conclusion of lower court on contention that state public utility commission proceeded under wrong subsection of statute in fixing temporary rate for utility was not supported by a state decision, the supreme court will analyze for itself the provisions of the applicable statute.—Driscoll v. Edison Light & Power Co., Pa., 59 S.Ct. 715, 307 U.S. 104, 83 L.Ed. 1134, reversing, D.C., Edison Light & Power Co. v. Driscoll, 25 F.Supp. 192, and rehearing denied Driscoll v. Edison Light & Power Co., 59 S.Ct. 831, 307 U.S. 650, 83 L.Ed. 1529.

(2) When not instructed by some state court decision, supreme court is disposed, in exercising appellate jurisdiction, to accept construction given by lower federal court to state statute, particularly when lower federal court is composed wholly of citizens of state familiar with history of statute, local conditions to which it applies, and character of state laws.—Thompson v. Consolidated Gas Utilities Corporation, Tex., 57 S.Ct. 364, 300 U.S. 55, 81 L.Ed. 510, affirming, D.C., Consolidated Gas Utilities Corporation v. Thompson, 14 F.Supp. 318.

(3) In absence of definitive construction of constitution of state by its highest court, supreme court defers to lower federal court's understanding of state constitution.—Henderson Co. v. Thompson, Tex., 57 S.Ct. 447, 300 U.S. 258, 81 L.Ed. 632, affirming, D.C., 14 F.Supp. 328.

96. U.S.—Southern Pac. Co. v. Gallagher, Cal., 59 S.Ct. 389, 306 U.S. 167, 83 L.Ed. 586, affirming, D.C., Southern Pac. Co. v. Corbett, 23 F.Supp. 193—Great Northern Ry. Co. v. Weeks, N.D., 56 S.Ct. 426, 297 U.S. 135, 80 L.Ed. 532, reversing, C.C.A., 77 F.2d 405, certiorari granted 56 S.Ct. 108, 296 U.S. 558, 80 L.Ed. 99—City of Cincinnati v. Vester, Ohio, 50 S.Ct. 360, 281 U.S. 439, 74 L.Ed. 950, affirming, C.C.A., 33 F.2d 242, 68 A.L.R. 831, certiorari granted 50 S.Ct. 38, 280 U.S. 545, 74 L.Ed. 605—U. S. v. Alaska S. S. Co., N.Y., 40 S.Ct. 448, 253 U.S. 113, 64 L.Ed. 808, reversing, D.C., Alaska S. S. Co. v. U. S., 259 F. 713—City and County of Denver v. Denver Union Water Co., Colo., 38 S.Ct. 278, 246 U.S. 178, 62 L.Ed. 649—Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., Mo., 36 S.Ct. 269, 240 U.S. 251, 60 L.Ed. 629, affirming Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 F. 611, 124 C.C.A. 409.
4 C.J. p 649 note 36.

Constitutional questions
U.S.—Tennessee Pub. Co. v. American Nat. Bank, Tenn., 57 S.Ct. 85, 299 U.S. 18, 81 L.Ed. 13, affirming, C.C.A., In re Tennessee Pub. Co., 81 F.2d 463, certiorari granted Tennessee Pub. Co. v. American Nat. Bank, 56 S.Ct. 943, 298 U.S. 651, 80 L.Ed. 1379—City of Cincinnati v. Vester, 50 S.Ct. 360, 281 U.S. 439, 74 L.Ed. 950, affirming, C.C.A., 33 F.2d 242, 68 A.L.R. 831, certiorari granted 50 S.Ct. 38, 280 U.S. 545, 74 L.Ed. 605.

Effect of law on person not involved in controversy will not be considered.—James Stewart & Co. v. Rivara, 47 S.Ct. 718, 274 U.S. 614, 71 L.Ed. 1234, affirming Rivara v. James Stewart & Co., 149 N.E. 851, 241 N.Y. 259, affirming 210 N.Y.S. 911, 214 App.Div. 737.

Ground of reversal
Where a judgment is reversed on one ground, other grounds of reversal assigned will not ordinarily be passed on, as the same questions may not arise on a subsequent appeal.—Jones v. Randolph, D.C., 104 U.S. 108, 26 L.Ed. 671.

97. U.S.—U. S. v. Northern Pac. Ry. Co., Wash., 61 S.Ct. 264, 311 U.S. 317, 85 L.Ed. 210, conformed to, D.C., 41 F.Supp. 273—Isbrandtsen-Moller Co. v. U. S., N.Y., 57 S.Ct. 407, 300 U.S. 139, 81 L.Ed. 562, af-

be to have the question decided for the government of future cases[98] nor can the supreme court give decisions which are merely advisory.[99]

Review dependent on mode of trial in lower court. In cases tried by the court, as on waiver of a jury by stipulation, if the record discloses no findings of fact there is nothing which the supreme court can review; and under these circumstances the judgment of the lower court will be presumed to be right and will be affirmed if it appears that such court had jurisdiction of the subject matter and of the parties.[1] If the finding is general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions;[2] and such rulings do not include the general findings or conclusions of the court.[3] If the facts are found specially, the court may and should determine whether under the pleadings they are sufficient to support the judgment, but the correctness of the special findings of fact themselves is not open to inquiry.[4]

firming, D.C., 14 F.Supp. 407—Interstate Busses Corporation v. Blodgett, Conn., 48 S.Ct. 230, 276 U.S. 245, 72 L.Ed. 551, affirming, D. C., 19 F.2d 256—U. S. v. Alaska S. S. Co., N.Y., 40 S.Ct. 448, 253 U.S. 113, 64 L.Ed. 808, reversing, D.C., Alaska S. S. Co. v. U. S., 259 F. 713—Lewis Pub. Co. v. Wyman, Mo., 33 S.Ct. 599, 228 U.S. 610, 57 L.Ed. 989, affirming 128 F. 13, 104 C.C.A. 453—Glendale Elastic Fabric Co. v. Smith, Mass., 100 U.S. 110, 25 L.Ed. 547.

Jurisdiction of controversy see supra § 199.

Constitutional questions

(1) The supreme court "will not decide important constitutional questions . . . hypothetically. . . . Questions relating to the constitutional validity of an excess condemnation should not be determined upon conjecture as to the contemplated purpose."—City of Cincinnati v. Vester, Ohio, 50 S Ct. 360, 281 U.S. 439, 74 L.Ed. 950, affirming, C.C.A., 33 F.2d 242, 68 A.L.R. 831, certiorari granted 50 S.Ct. 38, 280 U.S. 545, 74 L.Ed. 605.

(2) Constitutional questions will not be anticipated by supreme court or dealt with abstractly, but will be dealt with only as they are appropriately raised on the record before court.—Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, Wis., 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154.

Theoretical disputes

The supreme court does not deal with theoretical disputes, but only with concrete and specific issues raised by actual cases.—Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, supra.

Questions held moot

(1) Issue of undue prejudice and unjust preference passed on by interstate commerce commission became moot on acquiescence in rate adjustment by carriers.—Alexander Sprunt & Son v. U. S., Tex., 50 S.Ct. 315, 281 U.S. 249, 74 L.Ed. 832, reversing, D. C., 23 F.2d 874.

(2) Validity of provisions of cross license agreements between patentees, voluntarily canceled some months before entry of decree, became moot question, where relief sought was by injunction and related only to future.—Standard Oil Co. (Indiana) v. U. S., Ill., 51 S.Ct. 421, 283 U.S. 163, 75 L.Ed. 926, reversing, D.C., U. S. v. Standard Oil Co. (Indiana), 33 F.2d 617.

(3) Where governor appointed conservator for state bank and conservator accepted special trust deposits and permitted such depositors to withdraw them, question whether, in conducting such restricted business, overhead expenses exceeded net income and jeopardized creditors, held moot, where governor subsequently directed liquidation of bank.—Gibbes v. Zimmerman, S.C., 54 S.Ct. 140, 290 U.S. 326, 78 L.Ed. 342.

Cause held not moot

U.S.—Leonard v. Earle, 49 S.Ct. 372, 279 U.S. 392, 73 L.Ed. 754, affirming 141 A. 714, 156 Md. 252.

98. U.S.—U. S. v. Alaska S. S. Co., N.Y., 40 S.Ct. 448, 253 U.S. 113, 64 L.Ed. 808, reversing, D.C., Alaska S. S. Co v. U. S., 259 F. 713.

99. U.S.—Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co. (Station WIBO) 53 S.Ct. 627, 289 U.S. 266, 77 L.Ed. 1166, 89 A.L.R. 406, reversing Nelson Bros. Bond & Mortgage Co. (Station WIBO) v. Federal Radio Commission, 63 F.2d 854, 61 App.D.C. 315, certiorari granted Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 53 S.Ct. 506, 288 U.S. 597, 77 L.Ed. 974, and rehearing denied Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co. (Station WIBO) 54 S.Ct. 856, two cases, 292 U.S. 613, 78 L.Ed. 1472, and Federal Radio Commission v. North Shore Church (Station WPCC) 54 S.Ct. 856, two cases, 292 U.S. 613, 78 L.Ed. 1472.

1. U.S—Lloyd v. McWilliams, R.I., 11 S.Ct. 173, 137 U.S. 576, 34 L. Ed. 788, affirming, C.C., 31 F. 261.

In absence of stipulation

(1) Under Rev.St. §§ 649, 700, Comp.St. §§ 1587, 1668, relative to trials without a jury, if there be no written stipulation waiving a jury, no questions can arise on writ of error, except those which arise on the process, pleadings, or judgment.—Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark., v. St. Louis Southwestern Ry. Co., Ark., 42 S.Ct. 250, 257 U.S. 547, 66 L.Ed. 364, affirming, C.C.A., St. Louis Southwestern Ry. Co. v. Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark., 265 F. 524, certiorari granted 41 S.Ct. 15, 254 U.S. 626, 65 L.Ed. 445.

(2) "Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in the course of the trial or of the sufficiency of a special finding to support the judgment."—Duignan v. U. S., N.Y., 47 S.Ct. 566, 567, 274 U.S. 195, 71 L. Ed. 996, affirming, C.C.A., U. S. v. Duignan, 4 F.2d 983.

Extent of review

Where a jury was waived in writing, review by the supreme court is limited to the sufficiency of the facts specially found to support the judgment and to rulings excepted to and presented by a bill of exceptions.—Ingram-Day Lumber Co. v. McLouth, Mich., 48 S.Ct. 153, 275 U.S. 471, 72 L.Ed. 378, reversing, C.C.A., 13 F.2d 581, certiorari granted 47 S.Ct. 239, 273 U.S. 684, 71 L. Ed. 839—Lewellyn v. Electric Reduction Co., 48 S.Ct. 63, 275 U.S. 243, 72 L.Ed. 262, reversing, C.C.A., Electric Reduction Co. v. Lewellyn, 11 F.2d 493, reversing, D.C., 8 F.2d 91, and certiorari granted Lewellyn v. Electric Reduction Co., 47 S.Ct. 92, 273 U.S. 696, 71 L.Ed. 834.

2. U.S.—Fleischmann Const. Co. v. U. S., to Use of Forsberg, Va., 46 S.Ct. 284, 270 U.S. 349, 70 L.Ed. 624, affirming, C.C.A., 298 F. 330, affirming, D.C., U. S. v. Fleischmann Const. Co., 298 F. 320, error allowed, C.C.A., 298 F. 1020.

4 C.J. p 654 note 95.

3. U.S.—Miller v. Brooklyn Life Ins. Co., Md., 12 Wall. 285, 20 L. Ed. 398.

4 C.J. p 654 note 96.

4. U.S.—Ingram-Day Lumber Co. v. McLouth, Mich., 48 S.Ct. 153, 275 U.S. 471, 72 L.Ed. 378, reversing, C.C.A., 13 F.2d 581, certiorari

To obtain a review of the conclusions of law, a party must obtain from the trial court special findings which raise the legal propositions, or present the propositions of law and obtain a ruling thereon.[5]

The supreme court may consider the facts admitted and the concessions made by the parties, with the district court's findings of fact, notwithstanding the rule restricting its inquiry to a consideration of the case on the findings.[6]

An appeal in equity has been said to import a broad power of revision.[7] Where, in an equity case, issues are submitted to a jury, the case is to be reviewed on the findings and decision of the court as though there had been no such submission;[8] hence the court will not consider objections based on alleged error in admitting or excluding evidence.[9]

Where a cause is referred by consent of the parties, and the referee's findings and conclusions are adopted by the court, the supreme court may examine the findings and determine whether they support the judgment.[10]

Theory and grounds of decision of lower court. The question for review and determination on appeal is whether the ruling or action of the lower court is correct and not whether the reason given therefor, or the ground on which it professes to be based, is sound or tenable;[11] if the decision or result is correct, it is immaterial whether the grounds or reasons are correct, erroneous, or sufficient.[12] It

granted 47 S.Ct. 239, 273 U.S. 684, 71 L.Ed. 839—Tyng v. Grinnell, N. Y., 92 U.S. 467, 23 L.Ed. 733.

Nature of special finding

(1) A special finding within this rule is not a mere report of the evidence, but is a finding of those ultimate facts on which the law must determine the rights of the parties. —Norris v. Jackson, Ill., 9 Wall. 125, 19 L.Ed. 608.

(2) Opinion of trial judge, dealing generally with issues of law and fact, and giving reasons for conclusion, is not special finding of fact. —Fleischmann Const. Co. v. U. S., to Use of Forsberg, Va., 46 S.Ct. 284, 270 U.S. 349, 70 L.Ed. 624, affirming, C.C.A., 298 F. 330, affirming, D.C., U. S. v. Fleischmann Const. Co., 298 F. 320, error allowed, C.C.A., 298 F. 1020.

An agreed statement of facts, as far as it sets forth ultimate facts as distinct from testimony as to evidential facts, may be considered as taking the place of special findings.—Lehnen v. Dickson, Mo., 13 S. Ct. 481, 148 U.S. 71, 37 L.Ed. 373—4 C.J. p 656 note 26.

5. U.S.—Fleischmann Const. Co. v. U. S., to Use of Forsberg, Va., 46 S.Ct. 284, 270 U.S. 349, 70 L.Ed. 624, affirming, C.C.A., 298 F. 330, affirming, D.C., U. S. v. Fleischmann Const. Co., 298 F. 320, error allowed, C.C.A., 298 F. 1020.
4 C.J. p 657 note 37 [d].

6. U.S.—Reading Steel Casting Co. v. U. S., Pa., 45 S.Ct. 469, 268 U. S. 186, 69 L.Ed. 907, transferred, see, C.C.A., 293 F. 386.

7. U.S.—Radio Corporation of America v. Radio Engineering Laboratories, N.Y., 55 S.Ct. 928, 293 U.S. 1, 79 L.Ed. 163, amending 54 S.Ct. 752, 78 L Ed. 1453, reversing, C.C.A., 66 F.2d 768, reversing, D.C., 1 F.Supp. 65, certiorari granted 54 S.Ct. 373, 290 U.S. 624, 78 L.Ed. 544, amended and rehearing denied 55 S.Ct. 66, 293 U. S. 522, 79 L Ed. 634.

Review of refusal of preliminary injunction

Fair compliance with rule of civil procedure for district courts requiring findings of fact is of the highest importance to proper review of court's action in granting or refusing preliminary injunction.—Mayo v. Lakeland Highlands Canning Co., Fla., 60 S.Ct. 517, 309 U.S. 310, 84 L.Ed. 774, reversing, D.C., Lakeland Highlands Canning Co. v. Mayo, 28 F.Supp. 44.

8. U.S.—Watt v. Starke, Va., 101 U. S. 247, 25 L.Ed. 280.
4 C.J. p 660 note 68.

9. U.S.—Wilson v. Riddle, Ga., 8 S. Ct. 255, 123 U.S. 608, 31 L.Ed. 280.

10. U.S.—Weil v. Neary, N.Y., 49 S.Ct. 144, 278 U.S. 160, 73 L.Ed. 243, reversing, C.C.A., 22 F 2d 893, certiorari granted 48 S.Ct. 338, 276 U.S. 613, 72 L.Ed. 732—Chicago, M. & St. P. R. Co. v. Clark, N.Y., 20 S.Ct. 924, 178 U.S. 353, 44 L. Ed. 1099.

11. U.S.—McClung v. Silliman, Ohio, 6 Wheat. 598, 5 L.Ed. 340.

Speculation as to lower court's action

Where the court of claims rejected requests for additional findings which were filed more than the prescribed sixty days after judgment, not because of the delay, but for reasons which showed that the court misapprehended the nature of the main issue, the supreme court could not say that the court of claims would have rejected the requests because of the delay if it had not done so on the other grounds.—Winton v. Amos, 41 S.Ct. 342, 255 U.S. 373, 65 L.Ed. 684, affirming in part, and reversing in part 51 Ct.Cl. 284, and reversing 52 Ct.Cl. 90.

12. U.S.—J. E. Riley Inv. Co. v. Commissioner of Internal Revenue, 61 S.Ct. 95, 311 U.S. 55, 85 L Ed. 36, affirming, C.C.A., 110 F 2d 655, certiorari granted 60 S Ct. 1077, 310 U.S. 619, 84 L Ed. 1393—Helvering v. Pfeiffer, 58 S.Ct. 159, 302 U.S. 247, 82 L Ed. 231, affirming, C.C.A., Pfeiffer v. Commissioner of Internal Revenue, 88 F.2d 3—Helvering v. Gowran, 58 S.Ct. 154, 302 U.S. 238, 82 L Ed. 224, reversing, C.C.A., Gowran v. Commissioner of Internal Revenue, 87 F 2d 125, certiorari granted Helvering v. Gowan, 57 S.Ct. 924, 301 U.S. 676, 81 L.Ed. 1337, and rehearing denied 58 S.Ct. 478, 302 U.S. 781, 82 L.Ed. 603—U. S. v. Holt State Bank, Minn., 46 S.Ct. 197, 270 U. S. 49, 70 L.Ed. 465, affirming, C. C.A., 294 F. 161—St. Louis & S. F. R. Co. v. Brown, 36 S Ct. 602, 241 U.S. 223, 60 L.Ed. 966, affirming 144 P. 1075, 45 Okl. 143—Pennsylvania R. Co. v. Wabash, St. L. & P. R Co, Ill., 15 S.Ct. 576, 157 U.S. 225, 39 L.Ed. 682.

The exclusion of evidence, even though not proper on the ground, or one of the grounds, stated in the ruling, is not reversible error where it is proper on any ground.—Lewellyn v. Electric Reduction Co., 48 S. Ct. 63, 275 U.S. 243, 72 L Ed. 262, reversing, C.C.A., Electric Reduction Co. v. Lewellyn, 11 F.2d 493, reversed on other grounds 8 F.2d 91, and certiorari granted Lewellyn v. Electric Reduction Co., 47 S.Ct. 92, 273 U.S. 696, 71 L Ed. 834—Silsby v. Foote, N.Y., 14 How. 218, 14 L.Ed. 394.

Examination of record to sustain judgment

If respondents by record can demonstrate that judgment below was right and should be affirmed although given on untenable grounds, supreme court, if satisfied beyond reasonable doubt that it can do so without prejudice to petitioner, may properly refrain from reversal; but in absence of claim of respondents

is only in exceptional cases coming from the federal courts that questions not pressed or passed on below are reviewed by the supreme court.[13]

A party who was successful in the trial court cannot, in the supreme court, support his judgment on a theory other than that on which he brought and tried his case.[14]

An erroneous award of damages will not be upheld, on appeal, as an estimate, where it was not made as such.[15]

Review dependent on nature of decision appealed from. An appeal from a final decree of the circuit court of appeals brings up the entire cause for such disposition as the justice of the case may require.[16] On appeal from a decree pro confesso, the sufficiency of the bill,[17] but not the sufficiency of the evidence,[18] to sustain the decree is open to review; and the sufficiency of the bill to sustain the decree has been declared the only question open for review.[19]

On appeal from a decree dismissing the complaint in limine, questions as to burden of proof or mode of trial are not before the court;[20] and, on appeal from a dismissal for want of jurisdiction, matters pertaining to the merits cannot be considered.[21] On appeal from a judgment dismissing a complaint solely on the ground that it did not state a cause of action, the court may read the complaint in the light of facts of which it may take judicial notice,[22] and the decision on appeal should not turn on other matters which are the proper subjects of determinations of fact by the trial court.[23]

On appeal from an order granting or denying a preliminary or interlocutory injunction, the court will not decide the merits but will consider only whether the court below properly exercised its discretion.[24]

Review dependent on mode of review. In a proceeding by appeal, review extends to the findings of fact as well as to the rulings on questions of law;[25] but the review on a writ of error extended, and was confined, to errors of law apparent on the record,[26] and did not extend to questions of fact.[27] Where a case is properly before the supreme court, an objection which would not have entitled the re-

that, conceding errors exposed by opinion of supreme court judgment below was right, court will not examine record to discover grounds to sustain judgment.—Indiana Farmers' Guide Pub. Co. v. Prairie Farmer Pub. Co., Ind., 55 S.Ct. 182, 293 U.S. 268, 79 L.Ed. 356, reversing, C. C.A., 70 F.2d 3, certiorari granted 55 S.Ct. 72, 293 U.S. 536, 79 L.Ed. 643, rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 718.

13. U.S.—Duignan v. U. S., N.Y., 47 S.Ct. 566, 274 U.S. 195, 71 L.Ed. 996, affirming, C.C.A., U. S. v. Duignan, 4 F.2d 983.

14. U.S.—Virginian Ry. Co. v. Mullens, W.Va., 46 S.Ct. 526, 271 U.S. 220, 70 L.Ed. 915.

Where a case was based on tort, plaintiff cannot, on review in the supreme court, support his judgment on the theory of contract liability. —Virginian Ry. Co. v. Mullens, supra.

15. U.S.—U. S. v. Wyckoff Pipe & Creosoting Co., 46 S.Ct. 503, 271 U.S. 263, 70 L.Ed. 938, reversing Wyckoff Pipe & Creosoting Co. v. U. S., 59 Ct.Cl. 980.

16. U.S.—Kendall v. Ewert, Okl., 42 S.Ct. 444, 259 U.S. 139, 66 L.Ed. 862, reversing, C.C.A., 264 F. 1021, and leave to present petition for rehearing granted 42 S.Ct. 587.

Decree held final

A decree of the circuit court of appeals, dismissing an appeal from a decree for defendant in a suit to set aside an Indian's deed on a finding that his stipulation for dismissal of the suit with prejudice was a final settlement of the issues, is a final decree, an appeal from which brings not only the validity of the stipulation, but the entire cause, to the supreme court for disposition, under Rev.St. § 701, Comp.St. § 1669. —Kendall v. Ewert, supra.

17. U.S.—Ohio Cent. R. Co. v. Central Trust Co., Ohio, 10 S.Ct. 235, 133 U.S. 83, 33 L.Ed. 561—Thomson v. Wooster, Cal., 5 S.Ct. 788, 114 U.S. 104, 29 L.Ed. 105.

18. U.S.—Ohio Cent. R. Co. v. Central Trust Co., Ohio, 10 S.Ct. 235, 133 U.S. 83, 33 L.Ed. 561.

19. U.S.—Masterson v. Howard, Tex., 18 Wall. 99, 21 L.Ed. 764.

20. U.S.—Ætna Life Ins. Co. of Hartford, Conn. v. Haworth, Mo., 57 S.Ct. 461, 300 U.S. 227, 81 L. Ed. 617, 108 A.L.R. 1000, reversing, C.C.A., 84 F.2d 695, affirming, D. C., 11 F.Supp. 1016, certiorari granted 57 S.Ct. 190, 299 U.S. 536, 81 L.Ed. 395, rehearing denied 57 S.Ct. 667, 300 U.S. 687, 81 L.Ed. 889.

Matter treated as admitted

Where a bill to set aside an order of the interstate commerce commission permitting a railroad company to acquire control of railroads alleged as a fact that the commission's finding that such acquisition would be in the public interest was unsupported by evidence, and the motions to dismiss did not suggest that such fact was not well pleaded, or that a copy of the evidence should have been annexed to the bill, such fact will be treated as admitted on appeal from a decree of dismissal.—Chicago Junction Case, Ill., 44 S.Ct. 317, 264 U.S. 258, 68 L. Ed. 667.

21. U.S.—Old Colony Trust Co. v. City of Seattle, Wash., 46 S.Ct. 552, 271 U.S. 426, 70 L.Ed. 1019.

22. U.S.—Borden's Farm Products Co. v. Baldwin, N.Y., 55 S.Ct. 187, 293 U.S. 194, 79 L.Ed. 281, reversing, D.C., 7 F.Supp. 352, mandate granted 55 S.Ct. 239.

23. U.S.—Borden's Farm Products Co. v. Baldwin, supra.

24. U.S.—State of Alabama v. U. S., Ala., 49 S.Ct. 266, 279 U.S. 229, 73 L.Ed. 675—Meccano, Limited, v. John Wanamaker, New York, N.Y., 40 S.Ct. 463, 253 U.S. 136, 64 L.Ed. 822, affirming, 250 F. 450, 162 C. C.A. 520, which reversed, D.C., 241 F. 133, and certiorari granted 39 S.Ct. 10, 248 U.S. 554, 63 L.Ed. 419.

25. U.S.—Panama Mail S. S. Co. v. Vargas, Cal., 50 S.Ct. 448, 281 U. S. 670, 74 L.Ed. 1105, reversing, C. C.A., 33 F.2d 894, certiorari granted 50 S.Ct. 40, 280 U.S. 546, 74 L. Ed. 606.

26. U.S.—Parks v. Turner, La., 12 How. 39, 13 L.Ed. 883.

27. U.S.—Parsons v. Armor, La., 3 Pet. 413, 7 L.Ed. 724.

4 C.J. p 672 note 4.

lator to bring the case to that court by appeal must be considered.[28]

Interlocutory, collateral, and supplementary matters. Orders or rulings on demurrers[29] or on pleas in abatement[30] are reviewable on appeal or writ of error from the final judgment, provided the order or ruling was adverse to appellant. An order refusing to remove the cause from the state to the federal court may be reviewed on appeal from the final judgment.[31]

An appeal from a final decree in equity ordinarily brings up the whole cause on its merits, including interlocutory orders or decrees connected with the final decree and affecting the merits of the controversy,[32] and an appealable interlocutory order or decree may be reviewed on appeal from the final decree.[33]

A previous order, judgment, or decree which is final in its nature and from which an appeal might have been taken is not brought up by, and cannot be considered or reviewed on, an appeal from a subsequent order or decree,[34] such as a decree confirming a sale.[35]

Parties entitled to allege error; estoppel. The court will not entertain assignments of error which appellant bases on rulings, orders, or proceedings in the trial court which may be prejudicial or injurious to others, but are not so as to him;[36] and a decree will not be reversed at the instance of appellant because of alleged errors which concern only parties below who are not parties to the appeal.[37]

An appellee is not entitled to present for review exceptions taken by him to rulings, orders, instructions, decisions, or findings of the trial court, or to attack the judgment entered below, unless he has taken or sued out a separate, or cross, appeal;[38] if he has not done so he cannot go beyond supporting the judgment and opposing every assignment of error.[39] Findings in equity may be revised at the instance of appellant, if they are against the weight of evidence, but not on behalf of appellee if the revision of the findings carries with it as an incident a revision of the judgment.[40]

A party on appeal will not be permitted to take advantage of errors which he himself invited or induced the trial court to commit,[41] and a party

28. U.S.—U. S. ex rel. Mensevich v. Tod, N.Y., 44 S.Ct. 282, 264 U.S. 134, 68 L.Ed. 591.

29. U.S.—Bauserman v. Blunt, Kan., 13 S.Ct. 466, 147 U.S. 647, 37 L.Ed. 316—Mendenhall v. Hall, La., 10 S.Ct. 616, 134 U.S. 559, 33 L.Ed. 1012.

30. U.S.—Fitzpatrick v. Flannagan, Miss., 1 S.Ct. 369, 106 U.S. 648, 27 L.Ed. 211.

31. U.S.—Stone v. South Carolina, S.C., 6 S.Ct. 799, 117 U.S. 430, 29 L.Ed. 962.

32. U.S.—Central Trust Co. v. Seasongood, Ohio, 9 S.Ct. 575, 130 U.S. 482, 32 L.Ed. 985—Porter v. Pittsburgh Bessemer Steel Co., Ind., 7 S.Ct. 741, 120 U.S. 649, 30 L.Ed. 830.

33. U.S.—Buckingham v. McLean, Ohio, 13 How. 150, 14 L.Ed. 91.

34. U.S.—Central Trust Co. of New York v. Grant Locomotive Works, Ohio, 10 S.Ct. 736, 135 U.S. 207, 34 L.Ed. 97—Terry v. Sharon, Cal., 9 S.Ct. 705, 131 U.S. 40, 33 L.Ed. 94.

35. U.S.—Turner v. Farmers' L. & T. Co., Ill., 1 S.Ct. 519, 106 U.S. 552, 27 L.Ed. 273.

36. U.S.—Diaz A. v. Patterson, Canal Zone, 44 S.Ct. 151, 263 U.S. 399, 68 L.Ed. 356, affirming, C.C.A.1922, 281 F. 394—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A.1918C 497, Ann.Cas. 1918B 461, reversing Mitchell v. Hitchman Coal & Coke Co., 214 F. 685, 131 C.C.A. 425, appeal granted 221 F. 1022, 136 C.C.A. 665, certiorari granted 36 S.Ct. 450, 241 U.S. 644, 60 L.Ed. 1218 and which reversed, D.C., Hitchman Coal & Coke Co. v. Mitchell, 202 F. 512, mandate stayed 38 S.Ct. 190, 62 L.Ed. 260—Sage v. Central R. Co., Iowa, 99 U.S. 334, 25 L.Ed. 394.

37. U.S.—Goodwin v. Fox, Ill., 9 S.Ct. 367, 129 U.S. 601, 32 L.Ed. 805.

38. U.S.—Helvering v. Pfeiffer, 58 S.Ct. 159, 302 U.S. 247, 82 L.Ed. 231, affirming, C.C.A., Pfeiffer v. Commissioner of Internal Revenue, 88 F.2d 3—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087, reversing, D.C., American Ry. Express Co. v. U. S., 293 F. 31—Bothwell v. U. S., 41 S.Ct. 74, 254 U.S. 231, 65 L.Ed. 238, affirming 54 Ct.Cl. 203.

4 C.J. p 694 note 98.

Overruling of objection to venue

U.S.—Peoria & P. U. Ry. Co. v. U. S., Ill., 44 S.Ct. 194, 263 U.S. 528, 68 L.Ed. 427.

39. U.S.—Peoria & P. U. Ry. Co. v. U. S., supra—Southern Pine Lumber Co. v. Ward, Okl., 28 S.Ct. 239, 208 U.S. 126, 52 L.Ed. 420—Landram v. Jordan, D.C., 27 S.Ct. 17, 203 U.S. 56, 51 L.Ed. 88.

Urging matter of record

"Appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it."—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 564, 265 U.S. 425, 68 L.Ed. 1087, reversing, D.C., American Ry. Express Co. v. U. S., 293 F. 31.

Decision on wrong ground

The decision below may be sustained without a cross-appeal even though it was rested on a wrong ground.—Helvering v. Pfeiffer, 58 S.Ct. 159, 302 U.S. 247, 82 L.Ed. 231, affirming, C.C.A., Pfeiffer v. Commissioner of Internal Revenue, 88 F.2d 3.

Extent of appellee's contention

Without a cross appeal, an appellee may urge in support of a decree any matter appearing in record, although involving an attack on the reasoning of the lower court or an insistence on a matter overlooked or ignored by it, but may not attack the decree with a view to enlarging his own rights or lessening the rights of his adversary, whether he seeks to correct an error or to supplement the decree.—Morley Const. Co. v. Maryland Casualty Co., Mo., 57 S.Ct. 325, 300 U.S. 185, 81 L.Ed. 593, reversing, C.C.A., 84 F.2d 522, certiorari granted 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389, rehearing denied 57 S.Ct. 505, 300 U.S. 687, 81 L.Ed. 888.

40. U.S.—Morley Const. Co. v. Maryland Casualty Co., supra.

41. U.S.—Alexander v. Cosden Pipe Line Co., Okl., 54 S.Ct. 292, 290 U.S. 484, 78 L.Ed. 452, reversing in part, C.C.A., 63 F.2d 663, certiorari grant-

assigning error to a portion of a decree cannot have it reversed in that particular where he fails to furnish the data necessary for the change requested;[42] but a plaintiff against whom judgment is rendered is not estopped to assert, on appeal or error, that the court to which he resorted had no jurisdiction of the person of defendant.[43] A party who pleads over, or proceeds to trial on the merits, after an adverse decision on his motion for verdict[44] or for nonsuit[45] will not be permitted to allege error in such decision.

Amendment; additional proofs; trial de novo. The amendment of a pleading so as to show jurisdictional facts may now be allowed by the supreme court, under empowering statute, or the court may, in proper circumstances, consider the pleading as so amended;[46] but an amendment of a pleading will not be permitted where it would have the effect of reversing the judgment or in any way affecting a substantial right of the adverse party.[47] A motion to amend a bill, first made in the supreme court, will be overruled where it does not appear that the alleged facts have been recently discovered and there is no affidavit in respect of them.[48]

Defects in proofs cannot be supplied in the supreme court, and that court can determine a cause only on the record of the court below;[49] an appeal to the court is in no sense a trial de novo.[50]

Presumptions. The supreme court will indulge a presumption in favor of the correctness of the judgment, order, or decree from which the appeal was taken,[51] the burden of showing error being on

ed 54 S.Ct. 48, 290 U.S. 608, 78 L.Ed. 532—Minneapolis & St. L. R. Co. v. Winters, 37 S.Ct. 170, 242 U.S. 353, 61 L.Ed. 358, Ann.Cas.1918B 54, affirming Winters v. Minneapolis & St. L. R. Co., 155 N.W. 1103, 131 Minn. 496—New York El. R. Co. v. Fifth Nat. Bank, N.Y., 10 S. Ct. 743, 135 U.S. 432, 34 L.Ed. 231.

4 C.J. p 701 note 49 [a] (6).

Mode of trial generally

Where a party voluntarily adopts a certain form of procedure or agrees to the manner in which his rights shall be submitted for determination in the trial court, he will not be permitted to complain, on appeal or error, that proceedings had in conformity thereto were erroneous.—Perego v. Dodge, Utah, 16 S.Ct. 971, 163 U.S. 160, 41 L.Ed. 113.

Admission of evidence

Appellant or plaintiff in error will not be permitted to assign as error the admission of evidence which he himself has introduced.—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 39 S.Ct. 189, 249 U.S. 186, 63 L. Ed. 552, affirming 235 F. 857, 149 C.C.A. 169—McGillin v. Bennett, Ill., 10 S.Ct. 122, 132 U.S. 445, 33 L.Ed. 422—Avendano v. Gay, La., 8 Wall. 376, 19 L.Ed. 422.

Instructions

A defendant in error will not be heard to allege error in an instruction given at his request by the trial court.—Maxwell Land-Grant Co. v. Dawson, N.M., 14 S.Ct. 458, 151 U.S. 586, 38 L.Ed. 279.

Finding

A party on appeal is precluded from attacking a finding or conclusion amended at his instance.—U. S. v. St. Louis & M. V. Transp. Co., 22 S.Ct. 350, 184 U.S. 247, 46 L.Ed. 520, affirming 33 Ct.Cl. 251.

Judgment or order; amount of recovery

(1) A party who procures the rendition or entry of a judgment, decree, or order, or is responsible for error therein, is estopped to assert, on error, that it is erroneous.—U. S. v. Memphis, Tenn., 97 U.S. 284, 24 L.Ed. 937.

(2) An appellant is precluded from objecting, on appeal, that an excessive allowance was made to his adversary out of a fund in which both of them are interested, where he has received the benefit of a similar allowance.—Terry v. Abraham, Ga., 93 U.S. 38, 23 L.Ed. 794.

42. U.S.—Chicago, M. & St. P. Ry. Co. v. Des Moines Union Ry. Co., Iowa, 41 S.Ct. 81, 254 U.S. 196, 65 L.Ed. 219, modifying, C.C.A., 254 F. 927, 166 C.C.A. 289, in which certiorari is granted 39 S.Ct. 288, 249 U.S. 595, 63 L.Ed. 794.

43. U.S.—Capron v. Van Noorden, N.C., 2 Cranch 126, 2 L.Ed. 229.

44. U.S.—Accident Ins. Co. of North America v. Crandal, Ill., 7 S.Ct. 685, 120 U.S. 527, 30 L.Ed. 740.

45. U.S.—Sigafus v. Porter, N.Y., 21 S.Ct. 34, 179 U.S. 116, 45 L. Ed. 113, reversing 84 F. 430, 28 C. C.A. 443.

46. U.S.—Smith v. McCullough, Okl., 46 S.Ct. 338, 270 U.S. 456, 70 L. Ed. 682, reversing, C.C.A., 285 F. 698—Norton v. Larney, Okl., 45 S. Ct. 145, 266 U.S. 511, 69 L.Ed. 413, affirming, C.C.A., 289 F. 395.

Where enough appears on the face of the papers to give the court jurisdiction, it is within its discretion to allow the pleadings to be amended on motion, provided no new cause of action, affecting the jurisdiction of either court, is thereby introduced.—Kennedy v. Georgia Bank, Ga., 8 How. 586, 12 L.Ed. 1209.

Under former practice, such amendment was permissible only if both parties consented thereto.—Fletcher v. Peck, Mass., 6 Cranch 87, 3 L.Ed. 162—25 C.J. p 780 notes 14, 15.

47. U.S.—Jones v. Meehan, Minn., 20 S.Ct. 1, 175 U.S. 1, 44 L.Ed. 49.

48. U.S.—Hodgson v. Federal Oil & Development Co., Wyo., 47 S.Ct. 502, 274 U.S. 15, 71 L.Ed. 901, 54 A.L.R. 869, affirming, C.C.A., 5 F. 2d 442, affirming, D.C., 285 F. 546.

49. U.S.—Roemer v. Simon, N.J., 91 U.S. 149, 23 L.Ed. 267.

4 C.J. p 724 note 6.

In equity cases, no new evidence can be received in the supreme court.—Blease v. Garlington, S.C., 92 U.S. 1, 23 L.Ed. 521.

50. Cal.—Sanborn v. Pacific Mut. Life Ins. Co., 108 P.2d 458, 42 Cal. App.2d 99.

51. U.S.—Bagnell v. Broderick, Mo., 13 Pet. 436, 10 L.Ed. 235.

Admission and reception of evidence

(1) Where evidence was admitted and the record does not show any ruling on an objection thereto, it may be presumed that the evidence was admitted by consent.—Shields v. Hanbury, Ill., 9 S.Ct. 176, 128 U. S. 584, 32 L.Ed. 565.

(2) If the trial court rejected an offer of testimony, and allowed a bill of exceptions, which shows that the offer was made and refused, and there is nothing else in the record to indicate bad faith, the supreme court must assume that the proof could have been made.—Scotland County v. Hill, Mo., 5 S.Ct. 93, 112 U.S. 183, 28 L.Ed. 692.

Sufficiency of evidence

(1) Where the appeal is on the judgment roll alone, the court "must assume that there was sufficient evidence to sustain the court's decree."—Neblett v. Carpenter, 59 S.Ct. 170, 174, 305 U.S. 297, 83 L.Ed. 182, affirming Carpenter v. Pacific Mut. Life Ins. Co. of Cal., 74 P.2d 761, 10 Cal.2d 307, certiorari granted

Neblett v. Carpenter, 58 S.Ct. 1039, 304 U.S. 555, 82 L.Ed. 1524, certiorari denied 59 S.Ct. 61, 305 U.S. 562, 83 L.Ed. 354, and rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437.

(2) Where the determination of a question presented for review depends on evidence, and the record on appeal does not show or purport to show all the evidence pertaining to it in the manner required by the practice in the particular jurisdiction, it will be presumed that the evidence was sufficient to sustain the ruling or the action of the court.—Cohn v. Daley, Ariz., 19 S.Ct. 802, 174 U.S. 539, 43 L.Ed. 1077.

(3) In case bill of exceptions does not contain all evidence, it will be presumed that evidence omitted was sufficient to justify refusal of directed verdict.—Krauss Bros. Lumber Co. v. Mellon, Ala., 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C. C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008, and amended 48 S.Ct. 527, 72 L.Ed. 1018, mandate conformed to, C.C.A., 30 F.2d 901.

Presumption for reversal

(1) "We will not . . . indulge in any presumptions unfavorable to the judgment, and for the purpose of reversing it, unless they are natural and probable, and such as ought to be drawn from the facts actually found by the court below."—Bear Lake & River Waterworks & Irrigation Co. v. Garland, Utah, 17 S.Ct. 7, 14, 164 U.S. 1, 41 L.Ed. 327.

(2) The court will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.—Collins v. Riley, W.Va., 104 U.S. 322, 26 L.Ed. 752.

Pleading

(1) In case the pleadings are substantially sufficient, but contain a slight defect or omission, it will be presumed that the omission was supplied or the defect cured by the evidence.—Stockton v. Bishop, Pa., 4 How. 155, 11 L.Ed. 918.

(2) On review of an order or judgment dismissing a pleading on the ground of its insufficiency in law, it must be assumed that the allegations thereof are true.—U. S. v. Rio Grande Dam & Irrigation Co., 19 S. Ct. 770, 174 U.S. 690, 43 L.Ed. 1136, reversing 9 N.M. 292, 51 P. 674.

(3) On appeal from judgment granting a motion to dismiss the complaint in an action to enjoin enforcement of an order of the federal communications commission, allegations of complaint must be accepted as true.—Columbia Broadcasting System v. U. S., N.Y., 62 S Ct. 1194, 316 U.S. 407, 86 L.Ed. 1563

(4) Where a case was submitted and decided on the pleadings, every uncontradicted allegation of fact by the unsuccessful party must be taken as true.—Postal Telegraph Cable Co. v. City of Newport, Ky., 38 S.Ct. 566, 247 U.S. 464, 62 L.Ed. 1215, reversing 169 S.W. 700, 160 Ky. 244.

(5) Averments of bill for injunction must be taken as true on appeal from decree granting permanent injunction after motion to dismiss bill was overruled.—Smith v. Illinois Bell Telephone Co., Ill., 46 S.Ct. 408, 270 U.S. 587, 70 L.Ed. 747.

(6) It will be presumed that a court rule concerning the time of filing a plea, but not set out in the record, sustains the refusal of the lower court to permit the filing of the plea.—Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles, D.C., 19 Wall. 611, 22 L.Ed. 203.

(7) In case it does not appear that there was any ruling or action of the lower court on a demurrer, and the case was otherwise disposed of, it will be presumed that the demurrer was waived or abandoned.—Basey v. Gallagher, Mont., 20 Wall. 670, 22 L. Ed. 452.

(8) The issues raised by a plea will be presumed to have been waived or abandoned at the trial, where, after a demurrer to such plea had been sustained without exception taken, defendant went to trial on the merits without objection, and introduced evidence on other issues, and no evidence was offered or introduced on either side relating to the matters set out in such plea.—German Alliance Ins. Co. v. Hale, Ala., 31 S.Ct. 246, 219 U.S. 307, 55 L.Ed. 229.

(9) If the record is complete, the existence of other grounds for striking out a plea or answer than those appearing therein will not be presumed.—Garnharts v. U. S., Ala., 16 Wall. 162, 21 L.Ed. 275.

Dismissal

If, in a suit to enjoin the enforcement of a state statute, the state was required to establish that an inspection fee was not excessive, the state will be deemed, on appeal from a decree dismissing the suit, to have sustained the burden.—Bourjois, Inc. v. Chapman, Me., 57 S.Ct. 691, 301 U.S. 183, 81 L.Ed. 1027.

Verdict and findings

(1) Verdict in action for injuries deemed to establish defendant's negligent failure to furnish safe appliance.—Socony-Vacuum Oil Co. v. Smith, N.Y., 59 S.Ct. 262, 305 U.S. 424, 83 L.Ed. 265, affirming, C.C.A., Smith v. Socony Vacuum Oil Co., 96 F.2d 98, certiorari granted Socony-Vacuum Oil Co. v. Smith, 59 S.Ct. 81, 305 U.S. 586, 83 L.Ed. 370.

(2) Presumptions will not be indulged in favor of a general finding by the court where the findings are based on agreed or stipulated facts and it was not agreed that inferences might be drawn.—Burr v. Des Moines R. & Nav. Co., Iowa, 1 Wall. 99, 17 L. Ed. 561.

(3) The court will indulge in presumptions favorable to the report and findings of a master, referee, auditor, or commissioner.—Camden v. Stuart, W.Va., 12 S.Ct. 585, 144 U.S. 104, 36 L.Ed. 363—Kimberly v. Arms, Ohio, 9 S.Ct. 355, 129 U.S. 512, 32 L. Ed. 764.

(4) Where the evidence is conflicting, the presumption is in favor of the sufficiency of the evidence to support the findings or report of such officer.—Callaghan v. Myers, Ill. 9 S. Ct. 177, 128 U.S. 617, 32 L.Ed. 547.

New trial; rehearing

(1) Where the lower court overruled a motion for a new trial, it will be presumed that it considered all the grounds of the motion.—Haws v. Victoria Copper Mining Co., Utah, 16 S.Ct. 282, 160 U.S. 303, 40 L.Ed. 436.

(2) Where a transcript on appeal shows that on the entry of the decree a motion was made for a rehearing, but fails to show any disposition thereof at the same term, and shows that at the next term an order was made setting the cause for hearing, and that shortly afterward an order was entered nunc pro tunc granting the rehearing, it must be presumed that a rehearing was actually granted at the trial term.—Fowler v. Equitable Trust Co., Ill., 12 S.Ct. 1, 141 U.S. 384, 35 L.Ed. 786.

Judgment or decree

(1) In the absence of a contrary showing, it will be presumed that the judgment appealed from was authorized by the pleadings.—Morgan v. Eggers, Ind., 8 S.Ct. 1041, 127 U.S. 63, 32 L.Ed. 56.

(2) Where it does not appear that all the evidence is before the court, it will be presumed that the missing evidence, together with that in the record, would be sufficient to support the judgment.—Zimmerman v. Harding, Puerto Rico, 33 S.Ct. 387, 227 U. S. 489, 57 L.Ed. 608.

(3) Where the case was tried before the court without a jury, the judgment is presumed to have been based only on the competent evidence.—J. J. McCaskill Co. v. U. S., Fla., 30 S.Ct. 386, 216 U.S. 504, 54 L. Ed. 590.

(4) Where a decree recites that it is by consent, the requisite authority to consent will be presumed to have been found by the lower court on a due showing.—Pacific R. R. v. Ketchum, Mo., 101 U.S. 289, 25 L.Ed. 932.

Taking and perfecting appeal

(1) Presumption in favor of the

the party alleging it.[52] It has been held that every reasonable presumption should be indulged against waiver of a trial by jury,[53] and that the regularity of the transfer of a cause from a state to a federal court will be presumed.[54]

Discretion of lower court. The general principle that the supreme court will not review the actions or rulings of lower courts with respect to matters resting in their judicial discretion, unless an abuse of discretion is clearly shown, has been applied to matters pertaining to parties,[55] pleadings,[56] bail,[57] the grant or denial of a temporary, interlocutory, or preliminary injunction,[58] the appointment of a re-

grant or allowance of the appeal.—Washington, G. & A. R. Co. v. Bradleys, D.C., 7 Wall. 575, 19 L.Ed. 274.

(2) Presumption in favor of the proper amount of the appeal bond or undertaking.—French v. Shoemaker, Va., 12 Wall. 86, 20 L.Ed. 270.

(3) Presumption that the dating of a writ of error, citation, and bond as of a day prior to the rendition of judgment was a clerical error.—Glenn v. Liggett, Mo., 10 S.Ct. 867, 135 U.S. 533, 34 L.Ed. 262.

(4) No presumption that there are other parties than those named in the writ of error.—Gumbel v. Pitkin, La., 5 S.Ct. 616, 113 U.S. 545, 28 L.Ed. 1128.

Bill of exceptions

(1) The court will presume, in the absence of a contrary showing, that the bill of exceptions, case, or statement of facts contains everything necessary and material to a review of the points of error specified.—Arthurs v. Hart, La., 17 How. 6, 15 L.Ed. 30.

(2) Where it appears that the bill of exceptions, case, or statement of facts was settled, it will be presumed, in the absence of a contrary showing, that the settlement was regular.—U. S. v. Hodge, La., 6 How. 279, 12 L.Ed. 437.

(3) In these circumstances, it will also be presumed that the judge or other person who signed and approved the bill, case, or statement had the requisite authority to do so.—Cooke v. Avery, Tex., 13 S.Ct. 340, 147 U.S. 375, 37 L.Ed. 209.

(4) It will be presumed that a filing nunc pro tunc was not improper.—McGavock v. Woodlief, La., 20 How. 221, 15 L.Ed. 884.

(5) The court will not presume that all the evidence is in the bill of exceptions where to do so would necessitate a further presumption of a direct violation of a settled rule of practice that the bill of exceptions should contain only so much of the evidence as is necessary to explain the rulings of the court to which exceptions were taken.—Grand Trunk R. Co. v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485, affirming, C.C., 35 F. 176.

Other matters

(1) Existence of certificate of attorney general presumed.—U. S. v. Winston, Wash., 18 S.Ct. 701, 170 U.S. 522, 42 L.Ed. 1130, affirming 73 F. 149, 19 C.C.A. 419.

(2) There being no evidence to the contrary, the supreme court, on appeal, will adopt the assumption that trustees for shareholder savings banks acted lawfully in making payments to receiver of insolvent national bank.—Korbly v. Springfield Inst. for Savings, Mass., 38 S.Ct. 88, 245 U.S. 330, 62 L.Ed. 326, affirming Pepper v. Springfield Inst. for Savings, 218 F. 814, 134 C.C.A. 502.

(3) On review of conviction for violation of interstate commerce commission's order prescribing preferences for shipments of coal, under statute, the supreme court must assume that an emergency contemplated by the statute existed as found by the Commission and alleged in the indictment.—Avent v. U. S., Ohio, 45 S.Ct. 34, 266 U.S. 127, 69 L.Ed. 202.

(4) Where record does not show that defendants delayed hearing of their motion to transfer equity suit to law side, presumption is that matter was referred to judge sitting in equity to be heard at court's convenience.—Schoenthal v. Irving Trust Co., N.Y., 53 S.Ct. 50, 827 U.S. 92, 77 L.Ed. 185, reversing, C.C.A., Irving Trust Co. v. Schoenthal, 54 F.2d 1079, certiorari granted 52 S.Ct. 459, 285 U.S. 536, 76 L.Ed. 929.

(5) On appeal from the court of claims, which had twice tried a breach of contract case against the post office department, it will be assumed that the court, in fixing damages, gave proper consideration to elements affecting the cost of performance and to the fact that plaintiff did not actually manufacture the goods covered by the contract.—U. S. v. Purcell Envelope Co., 39 S.Ct. 300, 249 U.S. 313, 63 L.Ed. 620, affirming Purcell Envelope Co. v. U. S., 51 Ct. Cl. 211.

(6) On appeal from decree of federal district court dismissing bill on the ground that the controversy was res judicata by reason of denial of petition to state supreme court under Cal. Pub. Utilities Act § 67, for writ of review to the commission, it may be presumed that the petition, not in the record, circumstantially exhibited and submitted to the court the questions it was authorized to entertain, including a determination of whether the commission's order violated any right under the federal constitution.—Napa Valley Electric Co. v. Railroad Commission of California, Cal., 40 S.Ct. 174, 251 U.S. 366, 64 L.Ed. 310, affirming D.C., 257 F. 197.

52. U.S.—Earle v. Myers, 28 S.Ct. 86, 207 U.S. 244, 52 L.Ed. 191, reversing 25 App.D.C. 582—Bagnell v. Broderick, Mo., 13 Pet. 436, 10 L.Ed. 235.

53. U.S.—Hodges v. Easton, Wis., 1 S.Ct. 307, 106 U.S. 408, 27 L.Ed. 169.

54. U.S.—Barnette v. Wells Fargo Nevada Nat. Bank of San Francisco, Cal., 46 S.Ct. 326, 270 U.S. 438, 70 L.Ed. 669, affirming, C.C.A., Wells Fargo Nevada Nat. Bank of San Francisco v. Barnette, 298 F. 689, 43 A.L.R. 916, reversing, D.C., Barnette v. Wells Fargo Nevada Nat. Bank of San Francisco, 277 F. 110—Pittsburg, C. & St. L. R. Co. v. Ramsey, Ill., 22 Wall. 322, 22 L.Ed. 823.

55. **Authorizing new parties**

U.S.—U. S. ex rel. State of Louisiana v. Boarman, La., 37 S.Ct. 605, 244 U.S. 397, 61 L.Ed. 1222.

56. **Rulings on amendments to pleadings**

U.S.—U. S. v. Lehigh Valley R. Co., Pa., 31 S.Ct. 387, 220 U.S. 257, 55 L.Ed. 458—Eberly v. Moore, Tex., 24 How. 147, 16 L.Ed. 612.

4 C.J. p 800 note 54 [b].

Imposition of terms on motion to amend pleading

U.S.—Sheets v. Selden, Ind., 7 Wall. 416, 19 L.Ed. 166.

Accepting or rejecting additional or supplemental pleadings

U.S.—General Inv. Co. v. Lake Shore & M. S. Ry. Co., Ohio, 43 S.Ct. 106, 260 U.S. 261, 67 L.Ed. 244, modifying, C.C.A., 269 F. 235.

4 C.J. p 802 note 66.

57. U.S.—Morsell v. Hall, Md., 13 How. 212, 14 L.Ed. 117.

58. U.S.—Rogers v. Hill, N.Y., 53 S.Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, 88 A.L.R. 744, reversing, C.C.A., 62 F.2d 1079, certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1469, following, C.C.A., 60 F.2d 109—State of Alabama v. U. S., Ala., 49 S.Ct. 266, 279 U.S. 229, 73 L.Ed. 675—United Fuel Gas Co. v. Public Service Commission of West Virginia, W.Va., 49 S.Ct. 157, 278 U.S. 322, 73 L.Ed. 402, affirming, D.C., 14 F.2d 209—Prendergast v. New York Telephone Co., N.Y., 43

ceiver,[59] the grant or denial of a reinstatement of the cause after a dismissal or nonsuit,[60] change of venue,[61] consolidation of causes,[62] course and conduct of trial generally,[63] reception of evidence,[64] qualification[65] or cross-examination[66] of witnesses, the allowance of leading questions,[67] continuance or postponement,[68] the grant or denial of a new trial,[69] proceedings following judgment,[70] the allowance and perfecting of appeals or other proceedings for review,[71] the awarding or taxation of costs,[72] and the construction and application of court rules.[73] Legal discretion vested in a lower

S.Ct. 466, 262 U.S. 43, 67 L.Ed. 853—Meccano, Limited, v. John Wanamaker, New York, 40 S.Ct. 463, 253 U.S. 136, 64 L.Ed. 822, affirming 250 F. 450, 162 C.C.A. 520, reversing, D.C., 241 F. 133, and certiorari granted 39 S.Ct. 10, 248 U. S. 554, 63 L.Ed. 419.

Balance of injury

"Especially will the granting of . . . [a temporary injunction] be upheld, when the balance of injury as between the parties favors its issue."—Prendergast v. New York Tel. Co., N.Y., 43 S.Ct. 466, 469, 262 U.S. 43, 67 L.Ed. 853.

59. U.S.—Milwaukee & M. R. Co. v. Howard, Wis., 131 U.S. appendix lxxxi, 18 L.Ed. 252.

60. U.S.—Spencer v. Lapsley, La., 20 How. 264, 15 L.Ed. 902—Welch v. Mandeville, D.C., 7 Cranch 152, 3 L.Ed. 299.

61. U.S.—Kennon v. Gilmer, Mont., 9 S.Ct. 696, 131 U.S. 22, 33 L.Ed. 110.

62. U.S.—District of Columbia v. Bailey, 18 S.Ct. 868, 171 U.S. 161, 43 L.Ed. 118, reversing 9 App.D.C. 360.

63. U.S.—Philadelphia & T. R. Co. v. Stimpson, Pa., 14 Pet. 448, 10 L. Ed. 535.

Action on demurrer to evidence

U.S.—Van Stone v. Stillwell & Bierce Mfg. Co., Mo., 12 S.Ct. 181, 142 U. S. 128, 35 L.Ed. 961.

Submission of interrogatories or questions for special findings

U.S.—W. B. Grimes Dry Goods Co. v. Malcolm, Ind.T., 17 S.Ct. 158, 164 U.S. 483, 41 L.Ed. 524.

Direction of trial of issue in equity by a jury

U.S.—Idaho & Oregon Land Impr. Co. v. Bradbury, Idaho, 10 S.Ct. 177, 132 U.S. 509, 33 L.Ed. 433.

Instructions

Where matters of set-off are pleaded by defendant in a suit by the United States, the refusal of the trial court to direct the jury to certify the amount which they may find to be due defendant from plaintiff will not be reviewed in the United States supreme court.—Schaumburg v. U. S., Pa., 103 U.S. 667, 26 L.Ed. 599.

64. **Rulings as to experiments**

U.S.—Ball v. U. S., Tex., 16 S.Ct. 1192, 163 U.S. 662, 41 L.Ed. 300.

4 C.J. p 815 note 64 [b].

Order of proof generally

U.S.—Raub v. Carpenter, 23 S.Ct. 72, 187 U.S. 159, 47 L.Ed. 119, affirming 17 App.D.C. 505—Throckmorton v. Holt, 21 S.Ct. 474, 180 U.S. 552, 45 L.Ed. 663, reversing 12 App.D.C. 552.

Admission of evidence in rebuttal

U.S.—St. Paul Plow-Works v. Starling, Minn., 11 S.Ct. 803, 140 U.S. 184, 35 L.Ed. 404, affirmed, C.C., 29 F. 790—Johnston v. Jones, Ill., 1 Black 209, 17 L.Ed. 117.

Reopening case for further evidence after argument has been commenced

U.S.—Union Pac. R. Co. v. Chicago, M. & St. P. R. Co., Neb., 16 S.Ct. 1173, 163 U.S. 564, 41 L.Ed. 265, affirmed 51 F. 309, 2 C.C.A. 174.

65. U.S.—Chateaugay Ore & Iron Co. v. Blake, N.Y., 12 S.Ct. 731, 144 U.S. 476, 36 L.Ed. 510—Congress & Empire Spring Co. v. Edgar, N.Y., 99 U.S. 645, 25 L.Ed. 487.

66. U.S.—Rea v. State of Missouri, Mo., 17 Wall. 532, 21 L.Ed. 707.

67. U.S.—Southwestern Brewery & Ice Co. v. Schmidt, 33 S.Ct. 68, 226 U.S. 162, 57 L.Ed. 170, affirming 107 P. 677, 15 N.M. 232.

68. U.S.—Cox v. Hart, Tex., 145 S. Ct. 376, 12 S.Ct. 962, 36 L.Ed. 741—Spencer v. Lapsley, La., 20 How. 264, 15 L.Ed. 902.

69. U.S.—U. S. v. Socony-Vacuum Oil Co., Wis., 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, reversing, C.C. A., 105 F.2d 809, reversing, D.C., U. S. v. Standard Oil Co. (Indiana), 23 F.Supp. 937, motion denied 24 F.Supp. 575, certiorari granted U. S. v. Socony-Vacuum Oil Co., 60 S. Ct. 124, 308 U.S. 540, 84 L.Ed. 455, and Socony-Vacuum Oil Co. v. U. S., 60 S.Ct. 124, 308 U.S. 540, 84 L. Ed. 455, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421, and U. S. v. Socony-Vacuum Oil Co., 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421—Fairmount Glass Works v. Cub Fork Coal Co., Ind., 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439, reversing, C.C.A., Cub Fork Coal Co. v. Fairmount Glass Works, 59 F.2d 539, certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S.Ct. 24, 287 U.S. 585, 77 L.Ed. 511.

3 C.J. p 505 note 55—4 C.J. p 830 note 45 [e]—17 C.J. p 248 note 3.

Inadequate damages

Where jury awarded only nominal damages, although evidence showed substantial damages, refusal to grant new trial could not be held erroneous as matter of law, where trial court, so far as record shows, did not explain ruling or interpret verdict.—Fairmount Glass Works v. Cub Fork Coal Co., Ind., 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439, reversing, C. C.A., Cub Fork Coal Co. v. Fairmount Glass Works, 59 F.2d 539, certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S.Ct. 24, 287 U.S. 585, 77 L.Ed. 511.

Circumstances justifying review

Denial of new trial may be reviewed if trial court erroneously excluded from consideration matters appropriate to decision on motion therefor, or if trial court acted on mistaken view that there was no jurisdiction to grant motion, or that there was no authority to grant it on grounds advanced.—Fairmount Glass Works v. Cub Fork Coal Co., supra.

70. **Action on application to amend or correct judgment**

U.S.—Ex parte Morgan, Ind., 5 S.Ct. 825, 114 U.S. 174, 29 L.Ed. 135—Slicer v. Bank of Pittsburg, Pa., 16 How. 571, 14 L.Ed. 1063.

Ruling on motion to set aside decree

U.S.—Terry v. Commercial Bank, Ala., 92 U.S. 454, 23 L.Ed. 620.

Ruling on motion to vacate default judgment

U.S.—Rio Grande Irrigation & Colonization Co. v. Gildersleeve, N.M., 19 S.Ct. 761, 174 U.S. 603, 43 L.Ed. 1103.

71. U.S.—The Dos Hermanos, La., 10 Wheat. 306, 6 L.Ed. 328.

Terms, conditions, and sufficiency of appeal bond

U.S.—New Orleans Ins. Co. v. E. D. Albro Co., La., 5 S.Ct. 289, 112 U.S. 506, 28 L.Ed. 809—Jerome v. McCarter, Mich., 21 Wall. 17, 22 L. Ed. 515.

72. U.S.—Newton v. Consolidated Gas Co. of New York, N.Y., 44 S. Ct. 481, 265 U.S. 78, 68 L.Ed. 909, setting aside dismissal of appeal and affirming 44 S.Ct. 401, 264 U.S. 571, 68 L.Ed. 909, dismissing appeal, D.C., Consolidated Gas Co. of New York v. Newton, 291 F. 704.

73. U.S.—Manhattan Life Ins. Co. v. Francisco, Cal., 17 Wall. 672, 21 L. Ed. 698.

court does not extend to a refusal by it to apply well settled principles of law to a conceded state of facts.[74]

Questions of law or fact; verdicts; findings. As a general rule, the supreme court will confine itself to the determination of questions of law,[75] although it has been said that the court, in dealing with mixed questions of law and fact, may review the facts in order to apply the law correctly.[76] What is designated by the trial court as a conclusion of law will be treated on review as a finding of fact if essentially of that character.[77] So the decision of the trial court will be upheld where there is evidence to sustain its findings,[78] unless the trial court has palpably abused its discretion;[79] and the lower court's determination of preliminary questions of fact on which depends the admissibility of evidence[80] or the competency of a witness to testify as an expert[81] is generally held final.

Ordinarily the verdict or findings of a jury will be taken as conclusive and will not be disturbed,[82] as where the case was properly submitted to the jury and no errors were committed in the rulings or in the instructions of the trial court,[83] or where the evidence on which the verdict was founded was sufficient to warrant its submission to the jury[84] or to warrant the jury's finding;[85] and the verdict or findings of a jury will not be disturbed where the evidence is conflicting.[86] On the other hand, the verdict or finding may be disturbed if, under the

74. U.S.—Union Tool Co. v. Wilson, Cal., 42 S.Ct. 427, 259 U.S. 107, 66 L.Ed. 848, affirming, C.C.A., Wilson v. Union Tool Co., 265 F. 669, certiorari granted 41 S.Ct. 14, 254 U.S. 624, 65 L.Ed. 444.

75. U.S.—Panama R. Co. v. Bosse, Canal Zone, 39 S.Ct. 211, 249 U.S. 41, 63 L.Ed. 466, affirming, 239 F. 303, 152 C.C.A. 291—Willoughby v. City of Chicago, 35 S.Ct. 23, 235 U.S. 45, 59 L.Ed. 123, dismissing error City of Chicago v. Willoughby, 94 N.E. 513, 249 Ill. 249—Wabash R. Co. v. McDaniels, Ind., 2 S.Ct. 932, 107 U.S. 454, 27 L.Ed. 605—New York Cent. & H. R R. Co. v. Fraloff, N.Y., 100 U.S. 24, 25 L.Ed. 531.

The credibility of witnesses is a question solely for the determination of the jury.—Southwestern Brewery & Ice Co. v. Schmidt, 33 S.Ct. 68, 226 U.S. 162, 57 L.Ed. 170, affirming 107 P. 677, 15 N.M. 232.

Questions of law held presented

(1) Where the evidence is in writing or consists of, or requires the interpretation or construction of, document or instruments.—U. S. v. King, La., 7 How. 833, 12 L.Ed. 934.

(2) By conclusions from subordinate facts specially found and stated.—U. S. v. Pugh, 99 U.S. 265, 25 L.Ed. 322.

Questions or findings of fact held presented

(1) As to what is a reasonable royalty for the use of a patented invention.—U. S. v. Berdan Firearms Mfg. Co., Ct.Cl., 15 S.Ct. 420, 156 U.S. 552, 39 L.Ed. 530.

(2) Finding that the notice of the location of a claim to mineral lands contained a sufficient description by reference to natural and permanent monuments to identify it, and that the claim was so marked upon the ground that its boundaries could be readily traced.—Eilers v. Boatman, Utah, 4 S.Ct. 432, 111 U.S. 356, 28 L.Ed. 454.

(3) Other matters.—St. Paul Plow-Works v. Starling, Minn., 11 S.Ct. 803, 140 U.S. 184, 35 L.Ed. 404.

Silence of witness

The weight to be given the silence of a witness and the contention that an answer will incriminate is for the tribunal conducting the trial.—U. S. ex rel. Vajtauer v. Commissioner of Immigration at Port of New York, N.Y., 47 S.Ct. 302, 273 U.S. 103, 71 L.Ed. 560, affirming, D.C., U. S. ex rel. Vajtauer v. Curran, 15 F.2d 127.

"Determinations of an administrative board which are merely findings of fact are not reviewable."—Ex parte Williams, 48 S.Ct. 523, 525, 277 U.S. 267, 72 L.Ed. 877.

76. U.S.—First Nat. Bank v. City of Hartford, 47 S.Ct. 462, 273 U.S. 548, 71 L.Ed. 767, 59 A.L.R. 1, reversing 203 N.W. 721, 187 Wis. 290, vacated 214 N.W. 617, 193 Wis. 494.

Reasonable care

Supreme court must consider railway company's failure to sound locomotive's bell or whistle before reaching city crossing and knowledge of special danger to traveler through obstructions on roadbed, narrowing his field of vision, in determining whether he exercised reasonable care.—Pokora v. Wabash Ry. Co., Ill., 54 S.Ct. 580, 91 A.L.R. 1049, reversing, C.C.A., 66 F.2d 166, certiorari granted 54 S.Ct. 346, 290 U.S. 624, 78 L.Ed. 544.

77. U.S.—Eilers v. Boatman, Utah, 4 S.Ct. 432, 111 U.S. 356, 28 L.Ed. 454.

78. U.S.—Gila Valley, G. & N. R. Co. v. Hall, 34 S.Ct. 229, 232 U.S. 94, 58 L.Ed. 521, affirming 112 P. 845, 13 Ariz. 270.

79. U.S.—Stillwell & Bierce Mfg. Co. v. Phelps, Wis., 9 S.Ct. 601, 130 U.S. 520, 32 L.Ed. 1035.

80. U.S.—Gila Valley, G. & N. R. Co., v. Hall, 34 S.Ct. 229, 232 U.S. 94, 58 L.Ed. 521, affirming 112 P. 845, 13 Ariz. 270.

81. U.S.—Stillwell & Bierce Mfg. Co. v. Phelps, Wis., 9 S.Ct. 601, 130 U.S. 520, 32 L.Ed. 1035.

82. U.S.—Lincoln v. Power, Neb., 14 S.Ct. 387, 151 U.S. 436, 38 L.Ed. 224—Ætna Life Ins. Co. v. Ward, N.J., 11 S.Ct. 720, 140 U.S. 76, 35 L.Ed. 371.

Amount of verdict

(1) Excessiveness of verdict is not a ground for review by the supreme court.—St. Louis, I. M. & S. R. Co. v. Craft, Ark., 35 S.Ct. 704, 237 U.S. 648, 59 L.Ed. 1160—4 C.J. p 869 note 96 [a].

(2) Refusal of trial court to direct remittitur because of assumed excessive amount of verdict is not reviewable in supreme court on writ of error.—Texas & P. R. Co. v. Hill, Tex., 35 S.Ct. 575, 237 U.S. 208, 59 L.Ed. 918.

83. U.S.—New York Cent. & H. R. R. Co. v. Fraloff, N.Y., 100 U.S. 24, 25 L.Ed. 531.

84. U.S.—Eastman Kodak Co. of New York v. Southern Photo Materials Co., Ga., 47 S.Ct. 400, 273 U.S. 359, 71 L.Ed. 684, affirming, C.C.A., 295 F. 98, certiorari denied 44 S.Ct. 453, 264 U.S. 597, 68 L.Ed. 868—Herencia v. Guzman, Puerto Rico, 31 S.Ct. 135, 219 U.S. 44, 55 L.Ed. 81—U. S. Express Co. v. Ware, Neb., 20 Wall. 543, 22 L.Ed. 422.

85. U.S.—Northern Ry. Co. v. Page, Mass., 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929, reversing, C.C.A., Page v. United Fruit Co., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U.S. 542, 70 L.Ed. 402—Panama R. Co. v. Bosse, Canal Zone, 39 S.Ct. 211, 249 U.S. 41, 63 L.Ed. 466, affirming 239 F. 303, 152 C.C.A. 291.

86. U.S.—Troxell v. Delaware, L. & W. R. Co., Pa., 33 S.Ct. 274, 227 U.S. 434, 57 L.Ed. 586, reversing 200 F. 44, 118 C.C.A. 272.

testimony, no recovery could be had on the facts shown in any view which could properly be taken of them,[87] or if all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts,[88] or if essential facts are left in the realm of conjecture and speculation;[89] and a judgment will be reversed if, on an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact,[90] or where it is found that the verdict was the result of appeals to passion and prejudice.[91]

It is the general rule that the fact findings of the trial court in a case tried without a jury are, on appeal, to be given the same effect or weight as jury verdicts,[92] that is, if they have proper evidentiary support and are free from legal error, the supreme court will regard the trial court's fact findings as conclusive and binding, and as establishing with finality that the facts are in truth as found;[93] but the question of whether or not the fact findings of the trial court are sufficiently sustained by the record evidence is one which will be passed on by the court.[94] Such findings of fact are to be regarded as adequately supported, and left undisturbed, if the record discloses that they are sustained by any competent evidence,[95] or by substantial evidence,[96] or if the evidence is conflicting;[97] and the mere fact that a finding may appear to be against the weight or preponderance of the evidence will not cause it to be disturbed unless it is clearly, manifestly, or palpably against the great weight of the evidence.[98] A trial court's refusal to make requested findings containing mixed questions of law and fact will not be reviewed;[99] but, where the facts as to which the request is made are established by admitted or undisputed proof, refusals to find present reviewable questions.[1]

87. U.S.—Myers v. Pittsburgh Coal Co., Pa., 34 S.Ct. 559, 233 U.S. 184, 58 L.Ed. 906, reversing 203 F. 221, 121 C.C.A. 427.

88. U.S.—Story Parchment Co. v. Paterson Parchment Paper Co., Mass., 51 S.Ct. 248, 282 U.S. 555, 75 L.Ed. 544, reversing, C.C.A., Paterson Parchment Paper Co. v. Story Parchment Co., 37 F.2d 537, certiorari granted Story Parchment Co. v. Paterson Parchment Paper Co., 50 S.Ct. 334, 281 U.S. 711, 74 L.Ed. 1133.

89. U.S.—New York Cent. R. Co. v. Ambrose, 50 S.Ct. 198, 280 U.S. 486, 74 L.Ed. 562, reversing Ambrose v. New York Cent. R. Co., 144 A. 584, 105 N.J.Law 486—Northern Ry. Co. v. Page, 47 S.Ct. 491, 274 U.S. 65, 71 L.Ed. 929, reversing, C.C.A., Page v. United Fruit Co., 3 F.2d 747, certiorari granted Northern Ry. Co. v. Page, 46 S.Ct. 19, 269 U. S. 542, 70 L.Ed. 402—Chicago, M. & St. P. Ry. v. Coogan, Minn., 46 S. Ct. 564, 271 U.S. 472, 70 L.Ed. 1041.

90. U.S.—Toledo, St. L. & W. R. Co. v. Allen, 48 S.Ct. 215, 276 U.S. 165, 72 L.Ed. 513, reversing Allen v. Ross, Mo., 292 S.W. 732, and mandate conformed to Allen v. Toledo, St. L. & W. R. Co., Civ.App., 12 S.W.2d 1106, and certiorari granted Toledo, St. L. & W. R. Co. v. Allen, 47 S.Ct. 457, 273 U.S. 688, 71 L.Ed. 841.

91. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 51 S.Ct. 501, 283 U.S. 520, 75 L.Ed. 1243, reversing Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 829, 181 Minn. 56, certiorari granted Minneapolis, St. P. & S. S. M. Ry. Co., 51 S.Ct. 105, 282 U.S. 833, 75 L.Ed. 741, reversing Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co., 231 N.W. 920, 181 Minn. 626.

92. U.S.—McCaughn v. Real Estate Land Title & Trust Co., Pa., 56 S. Ct. 604, 297 U.S. 606, 80 L.Ed. 879, reversing, C.C.A., Real Estate Land Title & Trust Co. v. McCaughn, 79 F.2d 602, certiorari granted McCaughn v. Real Estate Land Title & Trust Co., 56 S.Ct. 442, 297 U.S. 699, 80 L.Ed. 988.
4 C.J. p 876 note 78.

93. U.S.—U. S. v. Knott, 56 S.Ct. 902, 298 U.S. 544, 80 L.Ed. 1321, 104 A.L.R. 741, reversing Kelly v. Knott, 163 So. 64, 120 Fla. 580, certiorari granted U. S. v. Knott, 56 S. Ct. 498, 297 U.S. 700, 80 L.Ed. 989, certiorari denied Withers v. Knott, 56 S.Ct. 498, 297 U.S. 706, 80 L.Ed. 993, modified Withers v. Knott, 168 So. 416 127 Fla. 241, mandate conformed to 168 So. 416, 127 Fla. 241 —Groesbeck v. Duluth, S. S. & A. Ry. Co., Mich., 40 S.Ct. 38, 250 U.S. 607, 63 L.Ed. 1167.
4 C.J. p 876 note 78.

In equity findings will ordinarily not be disturbed

(1) If they appear to have sufficient evidentiary support.—Hewitt v. Campbell, D.C., 3 S.Ct. 68, 109 U.S. 103, 27 L.Ed. 873—Tyler v. Campbell, N.Y., 1 S.Ct. 293, 106 U.S. 322, 27 L. Ed. 162—Newell v. Norton, La., 3 Wall. 257, 18 L.Ed. 271.

(2) If they are not manifestly or clearly erroneous or wrong.—Evans v. State Nat. Bank, La., 11 S.Ct. 885, 141 U.S. 107, 35 L.Ed. 654.

(3) If the evidence is oral and conflicting.—McKinley Creek Mining Co. v. Alaska United Mining Co., Alaska, 22 S.Ct. 84, 183 U.S. 563, 46 L.Ed. 331.

(4) If the evidence leaves the mind in doubt so that reasonable minds might disagree as to the facts and the supreme court cannot with confidence or certainty come to a conclusion in favor of either party.—Alviso v. U. S., Cal., 8 Wall. 337, 9 L.Ed. 305.

94. U.S.—Jones Nat. Bank v. Yates, 36 S.Ct. 429, 240 U.S. 541, 60 L.Ed. 788, reversing 139 N.W. 844, 1135, 93 Neb. 121.

Return of property produced under subpœna

A petition for return of property produced in response to subpœna duces tecum is a special proceeding in which no jury can intervene, and on review the supreme court may re-examine the whole record and the findings of the court on both the law and the evidence therein.—Essgee Co. of China v. U. S., N.Y., 43 S.Ct. 514, 262 U.S. 151, 67 L.Ed. 917.

95. U.S.—Dooley v. Pease, Ill., 21 S.Ct. 329, 180 U.S. 126, 45 L.Ed. 457, affirming 88 F. 446, 31 C.C.A. 582.
4 C.J. p 879 note 89.

96. U.S.—Great Atlantic & Pacific Tea Co. v. Grosjean, La., 57 S.Ct. 772, 301 U.S. 412, 81 L.Ed. 1193, 112 A.L.R. 293, affirming, D.C., 16 F.Supp. 499, and rehearing denied 58 S.Ct. 3, 302 U.S. 772, 82 L.Ed. 599—Borden's Farm Products Co. v. Ten Eyck, N.Y., 56 S.Ct. 453, affirming, D.C., 11 F.Supp. 599.

97. U.S.—Gleason v. White, Fla., 25 S.Ct. 782, 199 U.S. 54, 50 L.Ed. 87.
4 C.J. p 883 note 33, p 884 note 37, p 885 note 40.

98. U.S.—Howard v. Perrin, 26 S. Ct. 195, 200 U.S. 71, 50 L.Ed. 374, affirming 76 P. 460, 8 Ariz. 347.

99. U.S.—St. Louis v. Rutz, Ill., 11 S.Ct. 337, 138 U.S. 226, 34 L.Ed. 941.

1. U.S.—The City of New York, N. Y., 13 S.Ct. 211, 147 U.S. 72, 37 L.

Concurring findings of fact by the courts below will be accepted by the supreme court unless clearly erroneous,[2] if there was sufficient evidence to support them,[3] or if no adequate reason is shown for

Ed. 84—The E. A. Packer, N.Y., 11 S.Ct. 794, 140 U.S. 360, 35 L.Ed. 453.

2. U.S.—U. S. v. O'Donnell, Cal., 58 S.Ct. 708, 303 U.S. 501, 82 L.Ed. 980, reversing, C.C.A., O'Donnell v. U. S., 91 F.2d 14, certiorari granted U. S. v. O'Donnell, 58 S.Ct. 146, 302 U.S. 677, 82 L.Ed. 523—Pick Mfg. Co. v. General Motors Corporation, Wis., 57 S.Ct. 1, 299 U.S. 3, 81 L.Ed. 4, affirming, C.C.A., 80 F.2d 641, certiorari granted 56 S.Ct. 748, 298 U.S. 648, 80 L.Ed. 1378, rehearing denied 57 S.Ct. 192, 299 U.S. 622, 81 L.Ed. 458—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 595, 294 U.S. 648, 79 L.Ed. 1110, affirming, C.C.A., In re Chicago, R. I. & P. Ry. Co., 72 F.2d 443, certiorari granted Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 213, 293 U.S. 550, 79 L.Ed. 653, two cases, Chase Nat. Bank of City of New York v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 213, 293 U.S. 550, 79 L.Ed. 653, 55 S.Ct. 214, 293 U.S. 550, 79 L.Ed. 653, Mississippi Valley Trust Co. v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 214, 293 U.S. 550, 79 L.Ed. 653, two cases, Harris Trust & Savings Bank v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 214, 293 U.S. 550, 79 L.Ed. 653, two cases, New York Trust Co. v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 214, 293 U.S. 550, 79 L.Ed. 653, 55 S.Ct. 215, 293 U.S. 550, 79 L.Ed. 653, and Reconstruction Finance Corporation v. Chicago, R. I. & P. Ry. Co., 55 S.Ct. 215, 293 U.S. 550, 79 L.Ed. 653, two cases—U. S. v. Commercial Credit Co., 52 S.Ct. 467, 286 U.S. 63, 76 L.Ed. 978, reversing, C.C.A., Commercial Credit Co. v. U. S., 53 F.2d 977, reversing, D.C., U. S. v. One Fargo Truck, 46 F.2d 171, following, C.C.A., C. I. T. Corporation v. U. S., 53 F.2d 979, and U. S. v. Gordon, 63 F.2d 1018, and certiorari granted U. S. v. Commercial Credit Co., 52 S.Ct. 408, 285 U.S. 534, 76 L.Ed. 928—Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034, affirming, C.C.A., 33 F.2d 13, affirming, D.C., Brotherhood of Railway and Steamship Clerks v. Texas & N. O. R. Co., 24 F.2d 426, 25 F.2d 873, and 25 F. 2d 876, certiorari granted Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608—Road Improvement Dist. No. 1 of Franklin County, Ark. v. Missouri Pac. R. Co., Ark., 47 S.Ct. 563, 274 U.S. 188, 71 L.Ed. 992, modifying, C.C.A., 2 F.2d 340—Charleston, South Carolina, Min. & Mfg. Co. v. U. S., Fla., 47 S.Ct. 348, 273 U.S. 220, 71 L.Ed. 618, affirming, C.C.A., 3 F.2d 1019, which affirmed, D.C., U. S. v. Charleston, S.C., Mining & Mfg. Co., 298 F. 127. Certiorari denied 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162—U. S. v. Chemical Foundation, Del., 47 S.Ct. 1, 272 U.S. 1, 71 L.Ed. 131, modifying, C.C.A., 5 F.2d 191 which affirmed, D.C., 294 F. 300—Del Pozo v. Wilson Cypress Co., 46 S.Ct. 57, 269 U.S. 82, 70 L.Ed. 172, affirming, C.C.A., 299 F. 261, rehearing denied 47 S.Ct. 235, 71 L.Ed. 1339—Norton v. Larney, Okl., 45 S.Ct. 145, 266 U.S. 511, 69 L.Ed. 413, affirming, C.C.A., 289 F. 395—U. S. v. State Inv. Co., N.M., 44 S.Ct. 289, 264 U.S. 206, 68 L.Ed. 639, affirming, C.C.A., 285 F. 128—Yuma County Water Users' Ass'n v. Schlecht, Ariz., 43 S.Ct. 498, 262 U.S. 138, 67 L.Ed. 909, affirming, C.C.A., 275 F. 885—Thomas v. Kansas City Southern Ry. Co., Ark., 43 S.Ct. 440, 261 U.S. 481, 67 L.Ed. 758, affirming, C.C.A., 277 F. 708—Browne v. Thorn, Ark., 43 S.Ct. 36, 260 U.S. 137, 67 L.Ed. 171, affirming, C.C.A., 272 F. 950, certiorari granted 41 S.Ct. 625, 256 U.S. 689, 65 L.Ed. 1172—Bodkin v. Edwards, Cal., 41 S.Ct. 268, 255 U.S. 221, 65 L.Ed. 595, affirming, C.C.A., 265 F. 621, which affirms, D.C., Edwards v. Bodkin, 267 F. 1004—Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., R.I., 41 S.Ct. 1, 254 U.S. 1, 65 L.Ed. 97, affirming, C.C.A., The Walter Adams, 253 F. 20, which reversed, D.C., The William B. Murray, 240 F. 147, and certiorari granted Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 39 S.Ct. 12, 248 U.S. 556, 63 L.Ed. 419—Butte & Superior Copper Co. v. Clark-Montana Realty Co., Mont., 39 S.Ct. 231, 249 U.S. 12, 63 L.Ed. 447, affirming, 248 F. 609, 160 C.C.A. 509, which affirms, D.C., Clark Montana Realty Co. v. Butte & Superior Copper Co., 233 F. 547, and certiorari denied 38 S.Ct. 581, 247 U.S. 516, 62 L.Ed. 1245—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552, affirming 235 F. 857, 149 C.C.A. 169—Luckenbach v. W. J. McCahan Sugar Refining Co., N.Y., 39 S.Ct. 53, 248 U.S. 139, 63 L.Ed. 170, 1 A.L.R. 1522, modifying The Julia Luckenbach, 235 F. 388, 148 C.C.A. 650—Baker v. Schofield, Wash., 37 S.Ct. 333, 243 U.S. 114, 61 L.Ed. 626, affirming 221 F. 322, 136 C.C.A. 320—Montelibano v. La Compania General De Tabacos De Filipinas, Philippine, 36 S.Ct. 617, 241 U.S. 455, 60 L.Ed. 1099—Baugham v. New York, P. & N. R. Co., Va., 36 S.Ct. 592, 241 U.S. 237, 60 L.Ed. 977—Reese v. Philadelphia & R. Ry. Co., Pa., 36 S.Ct. 134, 239 U.S. 463, 60 L.Ed. 384, affirming 225 F. 518, 140 C.C.A. 660—De Villanueva v. Villanueva, Philippine, 36 S.Ct. 109, 239 U.S. 293, 60 L.Ed. 293—National Bank of Athens v. Shackelford, Ga., 36 S.Ct. 17, 239 U.S. 81, 60 L.Ed. 158, affirming 208 F. 677, 125 C.C.A. 575—Minneapolis & St. L. R. Co. v. State of Minnesota, 24 S.Ct. 396, 193 U.S. 53, 48 L.Ed. 614, affirming 91 N.W. 465, 87 Minn. 195—Bear Lake & River Waterworks & Irrigation Co. v. Garland, Utah, 17 S.Ct. 7, 164 U.S. 1, 41 L.Ed. 327.

4 C.J. p 881 note 8, p 1092 notes 72–73.

In equity suit

U.S.—Geddes v. Anaconda Copper Mining Co., Mont., 41 S.Ct. 209, 254 U.S. 590, 65 L.Ed. 425, reversing 245 F. 225, 157 C.C.A. 417, which affirmed, D.C., 222 F. 129.

4 C.J. p 1092 note 72 [c].

Evidence taken before examiner or master

U.S.—Causey v. U. S., La., 36 S.Ct. 365, 240 U.S. 399, 60 L.Ed. 711, affirming 203 F. 1022, 121 C.C.A. 663—Gilson v. U. S., Wash., 34 S.Ct. 778, 234 U.S. 380, 58 L.Ed. 1361, affirming 185 F. 484, 107 C.C.A. 584.

4 C.J. p 1085 note 33.

Conflicting findings in two suits

The rule cannot be strictly applied on review of two patent infringement suits where there were concurrent findings in one suit that the patent was infringed and concurrent findings in another suit that it was not.—Sanitary Refrigerator Co. v. Winters, 50 S.Ct. 9, 280 U.S. 30, 74 L.Ed. 147, affirming, C.C.A.Wis., 24 F.2d 15, certiorari denied 49 S.Ct. 8, 278 U.S. 599, 73 L.Ed. 528, vacated 49 S.Ct. 17, 278 U.S. 587, 73 L.Ed. 521, and reversing, C.C.A.Pa., Winters v. Dent Hardware Co., 28 F.2d 583, which affirmed, D.C.Pa., 20 F.2d 671.

3. U.S.—Alabama Power Co. v. Ickes, 58 S.Ct. 300, 302 U.S. 464, 82 L.Ed. 374, affirming 91 F.2d 303, 67 App.D.C. 230, certiorari granted 57 S.Ct. 946, two cases, 301 U.S. 681, 81 L.Ed. 1339—Mechanics Universal Joint Co. v. Culhane, Ill., 57 S.Ct. 81, 299 U.S. 51, 81 L.Ed. 33, affirming, C.C.A., 80 F.2d 147, certiorari granted 56 S.Ct. 749, 298 U.S. 648, 80 L.Ed. 1378—The Linseed King, N.Y., 52 S.Ct. 450, 285 U.S. 502, 76 L.Ed. 903, reversing, C.C.A., In re Spencer Kellogg & Sons, 52 F.2d 129, affirming, D.C., The Linseed King, 48 F.2d 311, and certiorari granted Spencer, Kellogg & Sons v. Hicks, 52 S.Ct.

challenging their correctness;[4] and where the courts below agree as to the material facts, the supreme court will consider them only as far as needful to pass on questions of law.[5]

The findings of a referee, master, commissioner, or auditor will not be disturbed when supported by sufficient evidence,[6] and will generally be upheld where the evidence is conflicting;[7] they are not to be disturbed merely because they appear to be against the weight of the evidence, but only if they are clearly and manifestly against such weight.[8] These rules apply particularly where such findings were approved by the trial court;[9] but even in that circumstance the reviewing court is not conclusively bound by them, but may, under certain circumstances, review the case and set aside the findings.[10]

The action of the trial court in refusing to direct a verdict will be upheld unless manifestly wrong.[11] A judgment entered on a verdict directed by the court after both parties had moved for such direction must stand unless the court's ruling is wrong as a matter of law;[12] and, where both parties request a peremptory instruction, a finding of fact by the trial court must stand if the record discloses substantial evidence to support it.[13]

Harmless error generally. A party cannot assign as error that which is not prejudicial to him, or which has no effect on the ultimate disposition of the case;[14] error as such, unaccompanied by preju-

126, 284 U.S. 610, 76 L.Ed. 522—Chesbrough v. Woodworth, Mich., 37 S.Ct. 579, 244 U.S. 72, 61 L.Ed. 1000, affirming 221 F. 912, 137 C.C.A. 482, and error dismissed Woodworth v. Chesborough, 37 S.Ct. 583, 244 U.S. 79, 61 L.Ed. 1005.

4. U.S.—Southern Pac. Co. v. Bogert, N.Y., 39 S.Ct. 533, 250 U.S. 483, 63 L.Ed. 1099, modifying Bogert v. Southern Pac. R. Co., 244 F. 61, 156 C.C.A. 489, which affirmed, D.C., 226 F. 500, and certiorari granted Southern Pac. Co. v. Bogart, 38 S.Ct. 190, 245 U.S. 668, 62 L.Ed. 539, leave to present petition for rehearing granted 39 S.Ct. 492.

5. U.S.—Risty v. Chicago, R. I. & P. Ry. Co., S.D., 46 S.Ct. 236, 270 U.S. 378, 70 L.Ed. 641, affirming in part and reversing in part, C. C.A., 297 F. 710, which affirmed, D.C., Chicago, R. I. & P. Ry. Co. v. Risty, 282 F. 364, and certiorari denied Risty v. Chicago, R. I. & P. Ry. Co., 45 S.Ct. 122, 266 U.S. 622, 69 L.Ed. 473, and appeal denied 45 S.Ct. 229—Joseph Schlitz Brewing Co. v. Houston Ice & Brewing Co., Tex., 39 S.Ct. 401, 250 U.S. 28, 63 L.Ed. 822, affirming 241 F. 817, 154 C.C.A. 519.

6. U.S.—Mason v. U. S., La., 43 S. Ct. 200, 260 U.S. 545, 67 L.Ed. 396, modifying, C.C.A., 273 F. 135, and reversing Norvell v. U. S., 273 F. 142—Citizens' Nat. Bank of Kansas City, Mo. v. Donnell, 25 S.Ct. 49, 195 U.S. 369, 49 L.Ed. 238, affirming 72 S.W. 925, 172 Mo. 384.

Confiscatory rate ordinance

In suit to enjoin enforcement of ordinance fixing gas rates, court, having regard for the entire period under investigation, was unable to say that the master erred in holding that ordinance was not shown to have been confiscatory.—Lincoln Gas & Electric Light Co. v. City of Lincoln, Neb., 39 S.Ct. 454, 250 U.S. 256, 63 L.Ed. 968.

7. U.S.—Callaghan v. Myers, Ill., 9 S.Ct. 177, 128 U.S. 617, 32 L.Ed. 547—Tilghman v. Proctor, Ohio, 8 S.Ct. 894, 125 U.S. 136, 31 L.Ed. 664.

8. U.S.—Kimberly v. Arms, Ohio, 9 S.Ct. 355, 129 U.S. 512, 32 L.Ed. 764.

9. U.S.—Earle v. Myers, 28 S.Ct. 86, 207 U.S. 244, 52 L.Ed. 191, reversing Waggaman v. Earle, 25 App.D.C. 582.

4 C.J. p 895 notes 60–62.

Compensation of receiver

The fact that the supreme court if the question of the compensation of a receiver had been an original one, would have awarded a much smaller amount than that allowed by the auditor, with the approval of the courts below, will not justify it in setting aside the findings.—Cake v. Mohun, D.C., 17 S.Ct. 100, 164 U.S. 311, 41 L.Ed. 447.

10. U.S.—Furrer v. Ferris, Ohio, 12 S.Ct. 821, 145 U.S. 132, 36 L.Ed. 649.

11. U.S.—Supreme Lodge K. P. v. Beck, Mont., 21 S.Ct. 532, 181 U. S. 49, 45 L.Ed. 741, affirming 94 F. 751, 36 C.C.A. 467.

Evidence and inferences therefrom

(1) In determining whether verdict should have been directed for defendant, "we assume as established all the facts that the evidence supporting . . . [plaintiff's] claims tends to prove, and that there should be drawn in his favor all the inferences fairly deducible from such facts."—Lumbra v. U. S., Vt., 54 S.Ct. 272, 273, 290 U.S. 551, 78 L.Ed. 492, affirming, C. C.A., U. S. v. Lumbra, 63 F.2d 796, certiorari granted Lumbra v. U. S., 54 S.Ct. 58, 290 U.S. 611, 78 L.Ed. 535.

(2) Evidence held insufficient to support verdict for plaintiff, so that defendant's motion for directed verdict was well taken.—Baltimore & Carolina Line v. Redman, 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636, modifying, C.C.A., Redman v. Baltimore & Carolina Line, 70 F.2d 635, certiorari granted Baltimore & Carolina Line v. Redman, 55 S.Ct. 89, 293 U. S. 541, 79 L.Ed. 646, certiorari denied Redman v. Baltimore & Carolina Line, 55 S.Ct. 98, 293 U.S. 577, 79 L.Ed. 674.

12. U.S.—Sena v. American Turquoise Co., 31 S.Ct. 488, 220 U.S. 497, 55 L.Ed. 559, affirming 98 P. 170, 14 N.M. 511.

13. U.S.—Williams v. Vreeland, N. J., 39 S.Ct. 438, 250 U.S. 295, 63 L.Ed. 989, 3 A.L.R. 1038, affirming 244 F. 346, 156 C.C.A. 632.

14. U.S.—Hitchman Coal & Coke Co. v. Mitchell, W.Va., 38 S.Ct. 65, 245 U.S. 229, 62 L.Ed. 260, L.R.A. 1918C 497, Ann.Cas. 1918B 461, reversing Mitchell v. Hitchman Coal & Coke Co., 214 F. 685, 131 C.C.A. 425, appeal granted 221 F. 1022, 136 C.C.A. 665, and certiorari granted 36 S.Ct. 450, 241 U.S. 644, 60 L.Ed. 1218, and reversing, D.C., Hitchman Coal & Coke Co. v. Mitchell, 202 F. 512 and mandate stayed 38 S.Ct. 190, 245 U.S. 229, 62 L.Ed. 260, L.R.A.1918C 497—Rowland v. Boyle, Ark., 37 S.Ct. 577, 244 U.S. 106, 61 L.Ed. 1022, affirming, D.C., Boyle v. St. Louis & S. F. R. Co., 222 F. 539—U.S. v. U. S. Fidelity & Guaranty Co., Pa., 32 S.Ct. 101, 222 U.S. 283, 56 L.Ed. 200, affirming 186 F. 477, 108 C.C.A. 455—Tubman v. Baltimore & O. R. Co., D.C., 23 S.Ct. 777, 190 U.S. 38, 47 L.Ed. 946—McLanahan v. Universal Ins. Co., Md., 1 Pet. 170, 7 L.Ed. 98.

4 C.J. p 908 note 63.

Technical or formal errors will be deemed harmless on appeal.—Shaw v. Merchants' Nat. Bank, Pa., 101 U.S. 557, 25 L.Ed. 892.

Cure of error by instructions

Error in denying a motion to strike is harmless where it is cured

dice, is not ground for reversal.[15] So, where the judgment is clearly correct on the merits, intervening errors will not operate to reverse it,[16] and appellant cannot complain of errors which were favorable to him.[17] Whether the case comes from a state court or a federal court, the supreme court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record.[18] It has been held, as in the case of the improper admission of evidence over objection,[19] and erroneous instructions to a jury,[20] that the harmlessness of an error must be made to appear affirmatively or beyond doubt.[21]

In the application of these rules, errors of lower courts which have been held harmless by the supreme court, in particular circumstances, include errors consisting of, or with respect to, misjoinder of parties,[22] the permitting of an intervention,[23] improper service of process,[24] rulings on demurrers,[25] the rejection of a juror challenged for cause,[26] the allowance to a party of more than the legal number of peremptory challenges,[27] premature trial,[28] and direction of verdict.[29]

On the other hand, errors which have been held prejudicial include misconduct of counsel in making

by the instructions.—San Juan Light & Transit Co. v. Requena, Puerto Rico, 32 S.Ct. 399, 224 U.S. 89, 56 L.Ed. 680.

Requiring election between several causes of action is not prejudicial error where appellant is not deprived of the benefit of any material fact.—Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co., N.J., 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123, affirming 223 F. 881, 139 C.C.A. 319.

Submission of issues to jury

(1) Where it appears that the objecting party was not injured, error in submitting issues of fact does not constitute ground for reversal.—Texas & P. R. Co. v. Howell, Tex., 32 S.Ct. 601, 224 U.S. 577, 56 L.Ed. 892.

(2) The erroneous submission of questions of law to the jury will not be ground for reversal where no prejudice resulted to appellant.—Waters-Pierce Oil Co. v. Deselms, 29 S. Ct. 270, 212 U.S. 159, 53 L.Ed. 453, affirming 89 P. 212, 18 Okl. 107.

(3) So, there is no prejudicial error where the jury correctly construe a written instrument.—Pence v. Langdon, Minn., 99 U.S. 578, 25 L.Ed. 420.

(4) In an action for personal injuries, defendant did not get less than it was entitled to when the trial court left to the jury the question whether the law of Panama, where the accident occurred, authorized recovery for negligence of employees selected with due care and allowed recovery for pain and suffering.—Panama R. Co. v. Pigott, Canal Zone, 41 S.Ct. 199, 254 U.S. 552, 65 L.Ed. 400, affirming 256 F. 837, 168 C.C.A. 183.

Verdict; judgment

(1) Error merely in the form, and not affecting the substance, of a verdict is not ground for reversal. —Parks v. Turner, La., 12 How. 39, 13 L.Ed. 883.

(2) Merely formal or trivial errors in the judgment are not ground for reversal.—Rice v. Edwards, Minn., 131 U.S. appendix clxxv, 25 L. Ed. 976—Kilbourn v. Sunderland, D. C., 9 S.Ct. 594, 130 U.S. 505, 32 L. Ed. 1005.

New trial

Errors of procedure in connection with a motion for new trial which was properly denied are not prejudicial or a ground for reversal.—Spreckels v. Brown, Hawaii, 29 S. Ct. 256, 212 U.S. 208, 53 L.Ed. 476.

Refusal to stay proceedings

Although suit by defendants, attacking validity of mortgage which plaintiffs sought to foreclose, was pending, refusal of court to stay foreclosure proceedings until determination of first suit was harmless as to defendants, mortgage being upheld in first suit.—Ibanez v. Hongkong & Shanghai Banking Corp., Philippine, 38 S.Ct. 413, 246 U.S. 627, 62 L.Ed. 907.

15. U.S.—Gibbs v. Buck, Fla., 59 S. Ct. 725, 307 U.S. 66, 83 L.Ed. 1111 —Carlisle Packing Co. v. Sandanger, 42 S.Ct. 475, 259 U.S. 225, 66 L.Ed. 927, affirming Sandanger v. Carlisle Packing Co., 192 P. 1005, 112 Wash. 480—Camp v. Gress, Va., 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997, modifying 244 F. 121, 156 C.C.A. 549, certiorari granted 38 S.Ct. 14, 245 U.S. 655, 62 L.Ed. 533—Kanawha & M. Ry. Co. v. Kerse, W.Va., 36 S.Ct. 174, 239 U.S. 576, 60 L.Ed. 448—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 337, 236 U.S. 434, 59 L. Ed. 659, Ann.Cas.1916B 691, reversing Lehigh Valley R. Co. v. Meeker, 211 F. 785, 128 C.C.A. 311.

16. U.S.—McLanahan v. Universal Ins. Co., Md., 1 Pet. 170, 7 L.Ed. 98.

Error as to remedy or procedure

U.S.—Stuart v. Gay, W.Va., 8 S. Ct. 1279, 127 U.S. 518, 32 L.Ed. 191.

17. U.S.—Bethell v. Mathews, La., 13 Wall. 1, 20 L.Ed. 556.

18. U.S.—Yazoo & M. V. R. Co. v. Mullins, 39 S.Ct. 368, 249 U.S. 531, 63 L.Ed. 754, reversing 76 So. 147, 115 Miss. 343.

19. U.S.—Mexia v. Oliver, Tex., 13 S.Ct. 754, 148 U.S. 664, 37 L.Ed. 602.

20. U.S.—Fillippon v. Albion Vein Slate Co., Pa., 39 S.Ct. 435, 250 U.S. 76, 63 L.Ed. 853, reversing, C.C.A., Fillipon v. Albion Vein Slate Co., 242 F. 258, certiorari granted 38 S.Ct. 12, 245 U.S. 648, 62 L.Ed. 530.

21. U.S.—Vicksburg & M. R. Co. v. O'Brien, Miss., 7 S.Ct. 118, 119 U.S. 99, 30 L.Ed. 299.

22. U.S.—Kalanianaole v. Smithies, Hawaii, 33 S.Ct. 169, 226 U.S. 462, 57 L.Ed. 303.

4 C.J. p 925 note 2.

23. U.S.—Texas Co. v. Hogarth Shipping Corporation, N.Y., 41 S.Ct. 612, 256 U.S. 619, 65 L.Ed. 1123, affirming, C.C.A., Texas Co. v. Hogarth Shipping Co., 267 F. 1023, affirming, D.C., 265 F. 375, and certiorari granted 41 S.Ct. 15, 254 U.S. 625, 65 L.Ed. 445.

24. U.S.—Washington, A. & G. R. Co. v. Brown, D.C., 17 Wall. 445, 21 L.Ed. 675.

25. U.S.—Standard Oil Co. v. U. S., Mo., 31 S.Ct. 502, 221 U.S. 1, 55 L. Ed. 619, 34 L.R.A.,N.S., 834, Ann. Cas. 1912D 734, affirming, C.C., 173 F. 177—Home Life Ins. Co. v. Fischer, Fla., 23 S.Ct. 380, 188 U. S. 726, 47 L.Ed. 667.

26. U.S.—Northern Pac. R. Co. v. Herbert, 6 S.Ct. 590, 116 U.S. 642, 29 L.Ed. 755, affirming 13 N.W. 349, 3 Dak. 38.

27. U.S.—Connecticut Mut. L. Ins. Co. v. Hillmon, Kan., 23 S.Ct. 294, 188 U.S. 208, 47 L.Ed. 446.

28. U.S.—Valdes v. Central Altagracia, Puerto Rico, 32 S.Ct. 664, 225 U.S. 58, 56 L.Ed. 980.

29. U.S.—Buckeye Powder Co. v. E. I. Dupont de Nemours Powder Co., N.J., 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123, affirming 223 F. 881, 139 C.C.A. 319—Arthur v. Jacoby, N.Y., 103 U.S. 677, 26 L.Ed. 454.

inflammatory or unjustified remarks,[30] and the dismissal of a bill on the merits when it should have been dismissed for want of jurisdiction.[31]

Harmless error as to evidence. Error in the admission of evidence is not ground for a reversal where it was not prejudicial to the party complaining,[32] as where it was so utterly irrelevant, immaterial, or unimportant that it was obviously harmless,[33] or where it did not affect the result or could not have done so,[34] or where the fact sought to be shown by the improper evidence is fully and clearly established by other evidence which is competent.[35] So, error in admitting evidence without the necessary preliminary proof to render it competent is not ground for reversal where the complaining party was not prejudiced thereby.[36] Error in admitting evidence is harmless where the issue on which it is admitted is found in favor of the complaining party,[37] or is rendered immaterial by a verdict or finding on another issue or issues,[38] or where the court instructs the jury to the effect that the question on which such evidence was admitted is not in issue.[39]

It has been said to be the right and the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered;[40] so, if evidence erroneously admitted is distinctly stricken out or withdrawn by the court, the error is cured,[41] except where it is manifest that the prejudicial effect of the evidence on the jury remained despite its exclusion and influenced their verdict.[42] Likewise, error in the admission of evidence may be cured by an instruction to disregard, or not to consider, the evidence improperly admitted,[43] the view being taken that such an instruction is equivalent to striking the improper evidence out of the case;[44] and such error may also be cured by the withdrawal or striking out of the evidence together with an instruction to disregard it,[45] unless it appears that the evidence admitted is so impressive that in the opinion of the supreme court its prejudicial effect was not removed from the minds

30. U.S.—New York Cent. R. Co. v. Johnson, Mo., 49 S.Ct. 300, 279 U.S. 310, 73 L.Ed. 706, reversing, C.C.A., 27 F.2d 699, certiorari granted 49 S.Ct. 27, 278 U.S. 590, 73 L.Ed. 523, and amended on other grounds 49 S.Ct. 417.

Misstating defense

Repeated statements of plaintiffs' counsel in his argument to the jury, in an action against a railroad for injuries resulting from negligent operation of its trains, that syphilis was the defense, after denial thereof by defendant, coupled with vituperative language and statements that defendant had charged plaintiff with indecency, was held so prejudicial as to require reversal of judgments for plaintiffs, in view of the trial judge's failure to sustain an objection or otherwise make certain that the jury would disregard such appeal to passion and prejudice.—New York Cent. R. Co. v. Johnson, supra.

31. U.S.—Piedmont & N. Ry. Co. v. U. S., S.C., 50 S.Ct. 192, 280 U.S. 469, 74 L.Ed. 551, reversing, D.C., 30 F.2d 421.

32. U.S.—Meeker v. Lehigh Valley R. Co., Pa., 35 S.Ct. 337, 236 U. S. 434, 59 L.Ed. 659, reversing Lehigh Valley R. Co. v. Meeker, 211 F. 785, 128 C.C.A. 311.

Trial of suit in equity

U.S.—J. J. McCaskill Co. v. U. S., Fla., 30 S.Ct. 386, 216 U.S. 504, 54 L. Ed. 590.

Trial by court without jury

(1) Generally.—U. S. v. King, La., 7 How. 833, 12 L.Ed. 934.

(2) Where there is sufficient legal evidence to support the judgment or finding.—Hinckley v. Pittsburgh Bessemer Steel Co., Ill., 7 S.Ct. 875, 121 U.S. 264, 30 L.Ed. 967.

33. U.S.—Fidelity Mut. Life Ass'n v. Mettler, Tex., 22 S.Ct. 662, 185 U.S 308, 46 L.Ed. 922—Holmes v. Goldsmith, Or., 13 S.Ct. 288, 147 U.S. 150, 37 L.Ed. 118.

34. U.S.—Union Consolidated Silver Min. Co. v. Taylor, Nev., 100 U. S. 37, 25 L.Ed. 541.

35. U.S.—Cooper & Co. v. Coates & Co., Ill., 21 Wall. 105, 22 L.Ed. 481—The Webb, N.Y., 14 Wall. 406, 20 L.Ed. 774.

Depositions improperly admitted

U.S.—Wilson v. Hoss, D.C., 131 U.S. appendix ccx 24 L.Ed. 270.

Error is cured if the same facts are afterward substantially established by proper evidence of the same or similar effect.—Meeker v. Lehigh Valley R. Co., Pa. 35 S.Ct. 337, 236 U.S. 434, 59 L.Ed. 659, reversing, 211 F. 785, 128 C.C.A. 311.

36. U.S.—First Unitarian Soc. v. Faulkner, Ill., 91 U.S. 415, 23 L. Ed. 283.

4 C.J. p 996 notes 68, 71.

37. U.S.—Chandler v. Von Roeder, Tex., 24 How. 224, 16 L.Ed. 633.

38. U.S.—Cunningham v. Springer, N.M., 27 S.Ct. 301, 204 U.S. 647, 51 L.Ed. 662, 9 Ann.Cas. 897.

39. U.S.—Hartford Life & Annuity Ins. Co. v. Unsell, Mo., 12 S.Ct. 671, 144 U.S. 439, 36 L.Ed. 496, affirming, C.C., 32 F. 443.

40. U.S.—Waldron v. Waldron, Ill., 15 S.Ct. 383, 156 U.S. 361, 39 L. Ed. 453.

41. U.S.—Throckmorton v. Holt, D. C., 21 S.Ct. 474, 180 U.S. 552, 45 L. Ed. 663—Pennsylvania Co. v. Roy, Ill., 102 U.S. 451, 26 L.Ed. 141.

Withdrawal must be sufficiently definite to identify clearly the evidence to be withdrawn.—Throckmorton v. Holt, D.C., 21 S.Ct. 474, 180 U.S. 552, 45 L.Ed. 663—4 C.J. p 990 note 21.

42. U.S.—Throckmorton v. Holt, supra.

43. U.S.—Turner v. American Security & Trust Co., 29 S.Ct. 420, 213 U.S. 257, 53 L.Ed. 788, affirming 29 App.D.C. 460—New York, L. E. & W. R. Co. v. Madison, Ohio, 8 S.Ct. 246, 123 U.S. 524, 31 L.Ed. 258.

Damages

Admission of improper testimony on the question of damages is not cured by an instruction in general terms on the measure of damages.—Washington Gaslight Co. v. Lansden, D.C., 19 S.Ct. 296, 172 U.S. 534, 43 L.Ed. 543.

44. U.S.—Pennsylvania Co. v. Roy, Ill., 102 U.S. 451, 26 L.Ed. 141.

45. U.S.—Hopt v. People, Utah, 7 S.Ct. 614, 120 U.S. 430, 30 L.Ed. 708—Pennsylvania Co. v. Roy, Ill., 102 U.S. 451, 26 L.Ed. 141.

Where there is other evidence to support verdict, it will be presumed that the instruction was obeyed.—Turner v. American Security & Trust Co., 29 S.Ct. 420, 213 U.S. 257, 53 L.Ed. 788, affirming 29 App.D.C. 460—New York, L. E. & W. R. Co. v. Madison, Ohio, 8 S.Ct. 246, 123 U.S. 524, 31 L.Ed. 258.

of the jury by such withdrawal and instruction.[46]

Error in the exclusion of evidence may be harmless, not prejudicing the complaining party,[47] as where it could not have affected the result;[48] and the exclusion of immaterial evidence is not ground for reversal.[49] In its instructions to the jury, the trial court may cure whatever error it may have committed in ruling out evidence,[50] as where it assumes the existence of proof of the fact sought to be established by the evidence in question and thus gives the party all the benefit which he could have derived from its admission.[51]

Harmless error as to instructions. The giving of an erroneous instruction will not constitute a ground for reversal where the complaining party has not been injured thereby,[52] and, a fortiori, when the erroneous instruction is in fact favorable to the complaining party;[53] and where no prejudice results, it is not reversible error to give an instruction which is informal, inaccurate, incomplete, or lacking in clearness or certainty,[54] or an instruction which is abstract or not authorized by, or applicable to, the pleadings and evidence.[55] On the other hand, when the case has been submitted on erroneous instructions which operate to the prejudice of the complaining party, the judgment will be reversed.[56] The mere repetition of instructions is not considered prejudicial error.[57]

Where it is apparent from the whole record that the verdict is correct on the merits, error in the giving of instructions is harmless.[58]

A party cannot complain of the failure or refusal to given an instruction where no prejudice resulted,[59] or where the instruction was unnecessary or

46. U.S.—Hopt v. People, Utah, 7 S.Ct. 614, 120 U.S. 430, 30 L.Ed. 708.

47. U.S.—Cole v. Ralph, Nev., 40 S.Ct. 321, 252 U.S. 286, 64 L.Ed. 567, reversing, C.C.A., Ralph v. Cole, 249 F. 81, certiorari granted 39 S.Ct. 8, 248 U.S. 553, 63 L. Ed. 418—Chicago & N. W. Ry. Co. v. Gray, 35 S.Ct. 620, 237 U.S. 399, 59 L.Ed. 1018, affirming Gray v. Chicago & N. W. Ry. Co., 142 N. W. 505, 153 Wis. 637—Hornbuckle v. Stafford, Mont., 4 S.Ct. 515, 111 U.S. 389, 28 L.Ed. 468.

Proof by other evidence

The exclusion of documentary evidence is harmless error where the contents thereof, or the claim sought to be supported or defeated by such evidence, is clearly established by other evidence.—Drumm-Flato Commission Co. v. Edmisson, 28 S.Ct. 367, 208 U.S. 534, 52 L.Ed. 606, affirming 87 P. 311, 17 Okl. 344.

48. U.S.—Tennessee Electric Power Co. v. Tennessee Valley Authority, Tenn., 59 S.Ct. 366, 306 U.S. 118, 83 L.Ed. 543, affirming, D.C., 21 F.Supp. 947, appeal dismissed in part 59 S.Ct. 54, 305 U.S. 663, 83 L.Ed. 430, appeal dismissed 59 S.Ct. 154, 305 U.S. 665, 83 L.Ed. 431.

4 C.J. p 1004 note 64.

Trial without jury

Where a case is tried by the court without a jury, error in excluding competent evidence will be regarded as harmless if it appears that no other or different judgment could have been rendered if the evidence had been admitted.—Will v. Tornabells, Puerto Rico, 30 S.Ct. 424, 217 U.S. 47, 54 L.Ed. 660—Reavis v. Fianza, Philippine, 30 S.Ct. 1, 215 U.S. 16, 54 L.Ed. 72.

49. U.S.—Turner v. Fendall, D.C., 1 Cranch 117, 2 L.Ed. 53.

50. U.S.—Fidelity & Deposit Co. of Maryland v. Courtney, Ky., 22 S. Ct. 833, 186 U.S. 342, 46 L.Ed. 1193, affirming 103 F. 599, 43 C.C.A. 331.

51. U.S.—Relfe v. Wilson, Mo., 131 U.S. appendix clxxxix, 26 L.Ed. 212.

52. U.S.—City of San Juan v. St. John's Gas Co., Puerto Rico, 25 S.Ct. 108, 195 U.S. 510, 49 L.Ed. 299, 1 Ann.Cas. 796.

In equity case, or where the verdict is only advisory, error in instructing the jury is not reversible. —McKinley Creek Min. Co. v. Alaska United Min. Co., Alaska, 22 S.Ct. 84, 183 U.S. 563, 46 L.Ed. 331.

Harmlessness shown by special findings

Where special findings by the jury show that the complaining party was not injured by an instruction, error therein will be deemed harmless.—Holloway v. Dunham, Okl., 18 S.Ct. 784, 170 U.S. 615, 42 L.Ed. 1165.

Damages

Error in an instruction as to the measure of damages is harmless where the amount awarded was smaller than the evidence showed, or tended to show, plaintiff was entitled to.—New York, P. & N. R. Co. v. Peninsula Produce Exch. of Maryland, Md., 36 S.Ct. 230, 240 U.S. 34, 60 L.Ed. 511, affirming 89 A. 433, 122 Md. 215.

Court's expression of opinion on facts has been held not prejudicial where such expression in no way invades the province of the jury. —Lawlor v. Loewe, Conn., 35 S.Ct. 170, 235 U.S. 522, 59 L.Ed. 341, affirming 209 F. 721, 126 C.C.A. 445.

53. U.S.—Eastman Kodak Co. of New York v. Southern Photo Materials Co., Ga., 47 S.Ct. 400, 273 U.S. 359, 71 L.Ed. 684, affirming, C.C.A., 295 F. 98, certiorari denied 44 S.Ct. 453, 264 U.S. 597, 68 L.Ed. 868.

54. U.S.—Standard Oil Co. v. Brown, 30 S.Ct. 669, 218 U.S. 78, 54 L.Ed. 939, affirming 31 App.D.C. 371—Spreckles v. Brown, Hawaii, 29 S.Ct. 256, 212 U.S. 208, 53 L.Ed. 476.

55. U.S.—Snyder v. Rosenbaum, 30 S.Ct. 73, 215 U.S. 261, 54 L.Ed. 186, affirming 89 P. 222, 18 Okl. 168.

56. U.S.—Frey & Son v. Cudahy Packing Co., Mo., 41 S.Ct. 451, 256 U.S. 208, 65 L.Ed. 892, affirming Cudahy Packing Co. v. Frey & Son, 261 F. 65, 171 C.C.A. 661—Kansas City Southern R. Co. v. Leslie, 35 S.Ct. 844, 238 U.S. 599, 59 L.Ed. 1478, reversing 167 S.W. 83, 112 Ark. 305, Ann.Cas.1915B 834—Norfolk & W. R. Co. v. Holbrook, Va., 35 S.Ct. 143, 235 U.S. 625, 59 L.Ed. 392, reversing 215 F. 687, 131 C. C.A. 621, error allowed 215 F. 1007, 131 C.C.A. 666.

Errors in particular classes of cases

Actions by servant for injuries.—New Orleans & N. E. R. Co. v. Scarlet, 39 S.Ct. 369, 249 U.S. 528, 63 L. Ed. 752, reversing 76 So. 265, 115 Miss. 285—Yazoo & M. V. R. Co. v. Mullins, 39 S.Ct. 368, 249 U.S. 531, 63 L.Ed. 754, reversing 76 So. 147, 115 Miss. 343.

57. U.S.—Grand Trunk R. Co. v. Ives, Mich., 12 S.Ct. 679, 144 U.S. 408, 36 L.Ed. 485, affirming, C.C., 35 F. 176.

58. U.S.—Henderson Bridge Co. v. McGrath, Ind., 10 S.Ct. 730, 134 U.S. 260, 33 L.Ed. 934—Chicago, M. & St. P. R. Co. v. Ross, Minn., 5 S.Ct. 184, 112 U.S. 377, 28 L.Ed. 787.

59. U.S.—Thomsen v. Cayser, N.Y., 37 S.Ct. 353, 243 U.S. 66, 61 L.Ed. 597, Ann.Cas.1917D 322—Hartranft

related to an immaterial issue.[60] Likewise, the judgment will not be reversed because of the erroneous modification of an instruction, where no prejudice could have resulted.[61]

Waiver of error on appeal. Questions assigned as error by appellant may be deemed to have been abandoned or waived where they are not urged or discussed on appeal,[62] as where they are not properly presented by brief[63] or argument[64] of counsel.

Decisions of intermediate courts. On appeal from the judgment of an intermediate court, the supreme court will not review errors that may have occurred in the trial court;[65] nor will errors be considered which were neither raised in the court of first instance nor assigned for error in the intermediate court,[66] or which could have been, but were not, properly raised and passed on in the intermediate court.[67]

Matters within the sound judicial discretion of an intermediate court will not be reviewed, except in case of manifest and gross abuse,[68] and the correctness of its proceeding and decision will be presumed, in the absence of a clear showing to the contrary.[69]

A judgment of reversal by the circuit court of appeals will be affirmed if any of the errors assigned were well taken.[70]

Subsequent appeals. The supreme court has, in

v. Langfeld, Pa., 8 S.Ct. 732, 125 U.S. 128, 31 L.Ed. 672.

Hypothesis negatived by findings
Error in refusing a requested instruction does not require reversal where specific findings of the jury distinctly negative the hypothesis on which alone the instruction was based.—Kanawha & M. Ry. Co. v. Kerse, W.Va., 36 S.Ct. 174, 239 U. S. 576, 60 L.Ed. 448.

60. U.S.—Myers v. Pittsburgh Coal Co., Pa., 34 S.Ct. 559, 233 U.S. 184, 58 L.Ed. 906.

61. U.S.—George Fuller Co. v. McCloskey, 33 S.Ct. 471, 228 U.S. 194, 57 L.Ed. 795, affirming 35 App.D.C. 595.

62. U.S.—Hegeman Farms Corporation v. Baldwin, N.Y., 55 S.Ct. 7, 293 U.S. 163, 79 L.Ed. 259, affirming, D.C., 6 F.Supp. 297—Eastman Kodak Co. of New York v. Southern Photo Materials Co., Ga., 47 S. Ct. 400, 273 U.S. 359, 71 L.Ed. 684, affirming, C.C.A., 294 F. 98, certiorari denied 44 S.Ct. 453, 264 U.S. 597, 68 L.Ed. 868—Southeastern Express Co. v. Robertson, Miss., 44 S.Ct. 424, 264 U.S. 541, 68 L. Ed. 840.

63. U.S.—Home Benefit Ass'n v. Sargent, N.Y., 12 S.Ct. 332, 142 U.S. 691, 35 L.Ed. 1160—Crawford v. Heysinger, Pa., 8 S.Ct. 399, 123 U.S. 589, 31 L.Ed. 269.

64. U.S.—I. T. S. Rubber Co. v. Essex Rubber Co., Mass., 47 S.Ct. 136, 272 U.S. 429, 71 L.Ed. 335, affirming 1 F.2d 780, certiorari granted 45 S.Ct. 226, 266 U.S. 600, 69 L.Ed. 461.

Errors as to pleadings
U.S.—I. T. S. Rubber Co. v. Essex Rubber Co., supra.

65. U.S.—Ana Maria Sugar Co. v Quinones, Puerto Rico, 41 S.Ct 110, 254 U.S. 245, 65 L.Ed. 246.

Cross appeal
A party to a suit in a territorial court, who did not appeal from the decree of the trial court, cannot have a provision thereof reviewed by the supreme court of the United States by taking a cross appeal from a decree of the territorial supreme court, which affirmed the decree of the trial court.—Harrison v. Perea, 18 S.Ct. 129, 168 U.S. 311, 42 L.Ed. 478, reversing 41 P. 529, 7 N.M. 666.

66. U.S.—Pine River Logging & Impr. Co. v. U. S., Minn., 22 S. Ct. 920, 186 U.S. 279, 46 L.Ed. 1164, affirming 105 F. 1004, 44 C.C.A. 685.
4 C.J. p 1077 note 67.

67. U.S.—Blair v. Oesterlein Mach. Co., 48 S.Ct. 87, 275 U.S. 220, 72 L.Ed. 249, modifying 57 App.D.C. 75, 17 F.2d 663, certiorari granted 47 S.Ct. 591, 274 U.S. 730, 71 L. Ed. 1325—Pierce v. U. S., Mo., 41 S.Ct. 365, 255 U.S. 398, 65 L.Ed. 697, modifying 257 F. 514, 171 C. C.A. 1, rehearing of which was denied 260 F. 158, 171 C.C.A. 194, certiorari denied 40 S.Ct. 15, 250 U. S. 670, 63 L.Ed. 1199.
4 C.J. p 1077 note 68.

Errors in admitting or rejecting evidence, not assigned in the circuit court of appeals, cannot be reviewed in the supreme court.—McLoughlin v. Raphael Tuck & Sons Co., N.Y., 24 S.Ct. 105, 191 U.S. 267, 48 L.Ed. 178, affirming 115 F. 85, 53 C.C.A. 508.

68. U.S.—Rio Grande Irr. & Col. Co. v. Gildersleeve, 19 S.Ct. 761, 174 U.S. 603, 43 L.Ed. 1103, affirming 48 P. 309, 9 N.M. 12.
4 C.J. p 1081 note 4.

Denial of petition for rehearing
U.S.—Conboy v. Jersey City First Nat. Bank, N.Y., 27 S.Ct. 50, 203 U.S. 141, 51 L.Ed. 128.

Affirmance without opinion
The mere fact that the intermediate court affirmed the judgment of the trial court without an opinion is no ground for reversing the trial court.—Texas & P. R. Co. v. Hill, Tex., 35 S.Ct. 575, 237 U.S. 208, 59 L.Ed. 918.

Preliminary injunction
Except for strong reasons, the supreme court will not interfere with the action of the circuit court of appeals on appeal from an order granting a preliminary injunction.—Meccano, Limited v. John Wanamaker, New York, N.Y., 40 S.Ct. 463, 253 U.S. 136, 64 L.Ed. 822, affirming 250 F. 450, 162 C.C.A. 520, which reversed, D.C., 241 F. 133, in which certiorari is granted 39 S.Ct. 10, 248 U.S. 554, 63 L.Ed. 419.

69. U.S.—Reinman v. City of Little Rock, 35 S.Ct. 511, 237 U.S. 171, 59 L.Ed. 900, affirming City of Little Rock v. Reinman, 155 S.W. 105, 107 Ark. 174.
4 C.J. p 1082 note 21.

Presumption of reversal on law questions
Where appellate court reversed the judgment of trial court without making a finding of facts, it will be presumed that appellate court found the facts the same as the trial court, and that it reversed the case on questions of law.—West Chicago St. R. Co. v. People, 26 S.Ct. 518, 201 U. S. 506, 50 L.Ed. 845, affirming 73 N.E. 393, 214 Ill. 9, which affirmed 115 Ill.App. 172.

Sustaining conclusion on conflicting evidence
A decree of the circuit court of appeals will be affirmed where the essential question is one of fact and the evidence, although sharply conflicting, sustains the conclusion reached, despite the disclosure of substantial difficulties.—Varner v. New Hampshire Sav. Bank, Kan., 36 S.Ct. 409, 240 U.S. 617, 60 L.Ed. 828, affirming New Hampshire Savings Bank v. Varner, 216 F. 721, 132 C. C.A. 631.

70. U.S.—Frey & Son v. Cudahy Packing Co., Md., 41 S.Ct. 451, 256 U.S. 208, 65 L.Ed. 892, affirming Cudahy Packing Co. v. Frey & Son, 261 F. 65, 171 C.C.A. 661.

general, adhered to the rule that the decision of an appellate court is the law of the case, on the points presented, throughout all the subsequent proceedings, and that no question necessarily decided on that appeal will be considered on a second appeal in the same case, provided the facts and issues are substantially the same as those on which the first decision rested.[71] The court has been held to be bound by its prior decision only on the points distinctly made and determined, and not on points which might have been raised, but were not.[72]

In accordance with this general rule, where, after a definite determination, the court has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequent to such determination and remand, or other than the propriety of the compliance with its mandate;[73] and if the court below has proceeded in substantial conformity to the directions of the supreme court, its action will not be questioned on a second appeal.[74]

n. Determination and Disposition of Cause

The supreme court generally has the power to affirm, modify, or reverse the judgment below, and to make such disposition of the case as justice requires, including the entry or direction of final judgment or a new trial or other proceedings, and its decision and mandate must be complied with in all further proceedings in the case.

In cases coming from inferior federal courts the supreme court has power not only to correct error in the judgment entered below, but also to make such disposition of the case as justice may require.[75] So the supreme court has full power to enter such judgment or order as the nature of the appeal or writ of error may require,[76] and such determination is to be made without regard to technical er-

71. U.S.—Messinger v. Anderson, Ohio, 32 S.Ct. 739, 225 U.S. 436, 56 L.Ed. 1152—Mutual L. Ins. Co. v. Hill, Wash., 24 S.Ct. 538, 193 U.S. 551, 48 L.Ed. 788, reversing 118 F. 708, 55 C.C.A. 536.
4 C.J. p 1093 note 77, p 1096 note 91.

Reason for rule
It would be impossible for "an appellate court to perform its duties satisfactorily and efficiently if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."—Great Western Tel. Co. Burnham, Wis., 16 S.Ct. 850, 852, 162 U.S. 339, 343, 40 L.Ed. 991.

Res adjudicata distinguished
"The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res adjudicata. One directs discretion; the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission."—Southern Ry. Co. v. Clift, 43 S.Ct. 126, 127, 260 U.S. 316, 67 L.Ed. 283, affirming 131 N.E. 4, 190 Ind. 536.

Records on former appeal may be looked into for the purpose of ascertaining what facts and questions were then before the court, so as to see the correct application of the rule.—Thompson v. Maxwell Land-Grant & R. Co., N.M., 18 S.Ct. 121, 168 U.S. 451, 42 L.Ed. 539.

Mere expressions of opinion respecting matters not actually involved in the decision have no binding force.—Barney v. Winona & St. P. R. Co., Minn., 6 S.Ct. 654, 117 U.S. 228, 29 L.Ed. 858.

Prior and subsequent rulings held not inconsistent
U.S.—Morgan v. U. S., Mo., 58 S.Ct. 999, 304 U.S. 1, 82 L.Ed. 1129, denying rehearing 58 S.Ct. 773, 304 U.S. 1, 82 L.Ed. 1129, reversing, D. C., 23 F.Supp. 380, mandate conformed to 24 F.Supp. 214, reversed on other grounds 59 S.Ct. 795, 307 U.S. 183, 83 L.Ed. 1211, mandate conformed to, D.C., Morgan v. U. S., 32 F.Supp. 546.

Particular questions held concluded by decision on former appeal:
(1) Grounds and right of action.—U. S. Trust Co. v. New Mexico, 22 S.Ct. 172, 183 U.S. 535, 46 L.Ed. 315, affirming 62 P. 987, 10 N.M. 416.
(2) Jurisdiction of supreme court.—Washington Bridge Co. v. Stewart, D.C., 3 How. 413, 11 L.Ed. 658.
(3) Jurisdiction of lower court.—Richardson v. Ainsa, 31 S.Ct. 23, 218 U.S. 289, 54 L.Ed. 1044, affirming 95 P. 103, 11 Ariz. 359—Skillern's Ex'rs v. May's Ex'rs., Ky., 6 Cranch 267, 3 L.Ed. 220.
(4) Sufficiency of pleading.—U. S. Trust Co. v. New Mexico, 22 S.Ct. 172, 183 U.S. 535, 46 L.Ed. 315, affirming 62 P. 987, 10 N.M. 416.

72. U.S.—Mutual L. Ins. Co. v. Hill, Wash., 24 S.Ct. 538, 193 U.S. 551, 48 L.Ed. 788, reversing 118 F. 708, 55 C.C.A. 536.

73. U.S.—Steinfeld v. Zeckendorf, 36 S.Ct. 14, 239 U.S. 26, 60 L.Ed. 125, affirming Zeckendorf v. Steinfeld, 138 P. 1044, 15 Ariz. 335.
4 C.J. p 1097 note 1.

74. U.S.—U. S. v. New York Indians, Ct. Cl., 19 S.Ct. 487, 173 U.S. 464, 43 L.Ed. 769.
4 C.J. p 1098 note 2.

75. U.S.—Watts, Watts & Co. v. Unione Austriaca Di Navigazione, N. Y., 39 S.Ct. 1, 248 U.S. 9, 63 L.Ed. 100, 3 A.L.R. 323, reversing 229 F. 136, 143 C.C.A. 412.

76. U.S.—Camp v. Gress, Va., 39 S. Ct. 478, 250 U.S. 308, 63 L.Ed. 997.
Cases coming from state courts see infra § 281.

Decision of federal question
The supreme court can, if it deems proper, decide the local questions only and omit to decide the federal questions which gave the lower court jurisdiction or decide them adversely to the party claiming their benefit.—Siler v. Louisville & N. R. Co., 29 S.Ct. 451, 213 U.S. 175, 53 L.Ed. 753—25 C.J. p 694 note 91.

Moot issue
(1) Where owing to the moot character of the issue involved the supreme court may not consider the merits, it is at liberty to make such order as is most consonant with justice, in view of the conditions and circumstances of the case.—Heitmuller v. Stokes, 41 S.Ct. 522, 256 U.S. 359, 65 L.Ed. 990, reversing 266 F. 1011, 49 App.D.C. 391.
(2) Dismissal of appeal see supra subdivision k of this section.

Remedies unprejudiced
The court may make its disposition without prejudice to any remedy which the party may be entitled to pursue.—Fidelity Ins. Trust & Safe-Deposit Co. v. McClain, 20 S.Ct. 774, 178 U.S. 113, 44 L.Ed. 998.

Time of decision
While a case before the supreme court should be disposed of without unnecessary delay, decision may be delayed for good cause.—Commonwealth of Virginia v. State of West Virginia, 32 S.Ct. 4, 222 U.S. 17, 56 L.Ed. 71—4 C.J. p 1121 note 20.

Entry of judgment may be made as of a prior date, at which time it might have been entered, when, for any cause, it would be improper to enter it as of the time of the actual entry, this power being commonly

rors, defects, or exceptions which do not affect the substantial rights of the parties.[77] The supreme court will not grant relief to a party who has not appealed or complained in the mode provided by law, of the judgment or decree;[78] and the court may, without determining and disposing of a cause, remand it to the lower court for further proceedings, where the record is not in condition properly to decide the questions presented with justice to all parties concerned.[79] The court must generally decide and dispose of the case in accordance with the law existing at the time of its own decision,[80] and

exercised where a party dies after the submission of the cause and before decision, in which case entry is made as of the day of submission or other day prior to his death.—Louisville & N. R. Co. v. Behlmer, D.C., 20 S.Ct. 209, 175 U.S. 648, 44 L.Ed. 309, reversing 83 F. 898, 28 C.C.A. 229, reversing, C.C., 71 F. 835, and motion denied 18 S.Ct. 502, 169 U.S. 644, 42 L.Ed. 889—4 C.J. p 1207 note 49, p 1208 note 50.

Amendment or vacation of judgment

(1) At a time when the court still has jurisdiction for this purpose, it may amend or modify its judgment on a showing of clerical error.—Elizabeth v. American Nicholson Pavement Co., N.J., 131 U.S. appendix cxlviii, 24 L.Ed. 1059—Bank of Commonwealth of Kentucky v. Wistar, Price & Wistar, Ky., 3 Pet. 431, 7 L.Ed. 731.

(2) Judgment may be vacated at any time on a showing of matters which render it absolutely void.—Ex parte Crenshaw, Ala., 15 Pet. 119, 10 L.Ed. 682.

(3) However, the court will not, by amendment or vacation of its judgment, relieve a party from his own neglect.—Watterson v. Payne, La., 14 S.Ct. 1157, 1214, 154 U.S. 534, 15 L. Ed. 899—Dodge v. Knowles, D.C., 5 S.Ct. 1197, 114 U.S. 430, 29 L.Ed. 144.

77. U.S.—Camp v. Gress, Va., 39 S. Ct. 478, 250 U.S. 308, 63 L.Ed. 997, modifying 244 F. 121, 156 C.C.A. 549, certiorari granted 38 S.Ct. 14, 245 U.S. 655, 62 L.Ed. 533.

78. U.S.—U. S. v. Blackfeather, Ct. Cl., 15 S.Ct. 64, 155 U.S. 180, 39 L. Ed. 114.
4 C.J. p 1113 note 25.

Proof of averments

While the text rule precludes appellee who has failed to make a cross appeal to assert in support of the judgment below appellant's failure to prove certain averments of his bill, the supreme court in reversing the judgment may grant appellee liberty to require appellant to prove such averments below.—Chittenden v. Brewster, Ill., 2 Wall. 191, 17 L.Ed. 839.

79. U.S.—Railroad Commission of Wisconsin v. Maxcy, Wis., 50 S.Ct. 228, 281 U.S. 82, 74 L.Ed. 717—Ballard v. Searls, Mich., 9 S.Ct. 418, 130 U.S. 50, 32 L.Ed. 846.

Insufficient findings of fact

(1) Where the record is in a state to justify such action, the court may remand the cause to the end that full, proper, and consistent findings of fact be made.—Railroad Commission of Wisconsin v. Maxcy, Wis., 50 S.Ct. 228, 281 U.S. 82, 74 L.Ed. 717—Gerdes v. Lustgarten, N.Y., 45 S.Ct. 107, 266 U.S. 321, 69 L.Ed. 309, reversing, C.C.A., In re Lustgarten, 289 F. 481—U. S. v. Adams, Ct.Cl., 6 Wall. 101, 18 L.Ed. 792.

(2) However the court may sometimes examine the record to supply or supplement necessary findings, in order to avoid prolonged litigation necessitated by a remand.—McCardle v. Indianapolis Water Co., Ind., 47 S.Ct. 144, 272 U.S. 400, 71 L.Ed. 316—Gerdes v. Lustgarten, N.Y., 45 S. Ct. 107, 266 U.S. 321, 69 L.Ed. 309, reversing, C.C.A., In re Lustgarten, 289 F. 481.

(3) The court will not remand a case for a finding of additional facts which would not change the legal result.—Sanford & Brooks Co. v. U. S., 45 S.Ct. 341, 267 U.S. 455, 69 L. Ed. 734, affirming 58 Ct.Cl. 158.

Reference

Where a case involving an accounting, or other matters of a detailed and complicated nature, is not in shape to be disposed of on appeal, the appellate court may remand for reference to an auditor, master, or referee.—Chicago, M. & St. P. R. Co. v. Tompkins, S.D., 20 S.Ct. 336, 176 U.S. 167, 44 L.Ed. 417.

Motion to remand for additional findings will be denied as a matter of discretion where due diligence has not been shown in making the motion.—Sanford & Brooks Co. v. U. S., 45 S.Ct. 341, 267 U.S. 455, 69 L.Ed. 734, affirming 58 Ct.Cl. 158.

Remand improper

(1) Affirmance of decree dismissing suit for want of jurisdiction cannot be avoided by motion to remand, for filing of supplemental bill because of matters arising after filing of record in supreme court.—Minneapolis & St. L. R. Co. v. Peoria & P. U. Ry. Co., Iowa, 46 S.Ct. 402, 270 U.S. 580, 70 L.Ed. 743.

(2) It was held that the supreme court has no power to remand an equity cause except to give effect to some judgment of its own and that a motion to remand in order to give opportunity to present new matter to the court below will be denied.—Roemer v. Simon, N.J., 91 U.S. 149, 23 L.Ed. 267.

Affirmance of erroneous judgment

Text rule applies, even though it leads to affirmance of judgment wherein there was error which has since been obviated by a change in the law.—Pugh v. McCormick, La., 14 Wall. 361, 20 L.Ed. 789.

80. U.S.—Hines Secretary of Labor & Industry of Pennsylvania v. Davidowitz, Pa., 61 S.Ct. 399, 312 U. S. 52, 85 L.Ed. 581—Carpenter v. Wabash Ry. Co., Mo., 60 S.Ct. 416, 309 U.S. 23, 84 L.Ed. 558, vacating, C.C.A., 103 F.2d 996, certiorari granted 60 S.Ct. 102, 308 U. S. 539, 84 L.Ed. 454, and rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035—Smallwood v. Gallardo, Puerto Rico, 48 S.Ct. 23, 275 U.S. 56, 72 L.Ed. 152, reversing, C.C.A., Porto Rico Tax Appeals, 16 F.2d 545, certiorari granted Smallwood v. Gallardo, 47 S.Ct. 659, 274 U.S. 732, 71 L.Ed. 1327 and Valdes v. Gallardo, 47 S.Ct. 659, 274 U.S. 732, 71 L.Ed. 1327, and followed in Gallardo v. La Plata Tobacco Co., C.C.A., 21 F.2d 1012, certiorari dismissed Fajardo Sugar Co. of Porto Rico v. Gallardo, 48 S.Ct. 527, 277 U.S. 611, 72 L.Ed. 1015—U. S. v. Preston, La., 3 Pet. 57, 7 L.Ed. 601—The Rachel, La., 6 Cranch 329, 3 L.Ed. 239.
4 C.J. p 1120 note 11.

Enactment or repeal of statute

(1) Where a statute on which the judgment rests has been repealed pending the appeal, the court will take judicial notice of the repeal, and conform its decision thereto.—Berry v. Davis, Iowa, 37 S.Ct. 208, 242 U.S. 468, 61 L.Ed. 441, reversing, D.C., Davis v. Berry, 216 F. 413—4 C.J. p 1119 note 9.

(2) A statute enacted after the decree was rendered below will be given effect in deciding an appeal, where the case involves only relief by injunction, which operates wholly in futuro.—Texas Co. v. Brown, Ga., 42 S.Ct. 375, 258 U.S. 466, 66 L.Ed. 721, affirming, D.C., 266 F. 577.

Vested rights

Generally, however, the court will not by its decision allow a change in the law during the pendency of an appeal to affect vested rights.—Pacific Mail S. S. Co. v. Joliffe, Cal., 2 Wall. 450, 17 L.Ed. 805.

Where necessary to just disposition of case, the supreme court will consider the changes in fact and in law which have supervened since the decree was entered below, especially

the state of facts existing at the time the judgment below was rendered.[81] Concurrence of a majority of the judges passing on the case is ordinarily necessary to a reversal.[82]

Affirmance or modification. In a proper case, the supreme court may affirm the judgment below, on motion of a party,[83] or after hearing, where the existence of reversible error does not appear,[84] or where, notwithstanding an irregularity in the proceedings in the lower court, the questions involved have become abstract, and a new trial would be of no advantage to appellant or plaintiff in error.[85]

in cases tried de novo on appeal.—Watts, Watts & Co. v. Unione Austriaca di Navigazione, N.Y., 39 S.Ct. 1, 248 U.S. 9, 63 L.Ed. 100, 3 A.L.R. 323, reversing 229 F. 136, 143 C.C.A. 412.

81. U.S.—O'Hara v. MacConnell, Pa., 93 U.S. 150, 23 L.Ed. 840—The Vaughan and Telegraph, N.Y., 14 Wall. 258, 20 L.Ed. 807.

However, facts subsequently occurring may sometimes be considered.—Southern Pac. Co. v. Bogert, N.Y., 39 S.Ct. 533, 250 U.S. 483, 63 L.Ed. 1099, modifying Bogert v. Southern Pac. Co., 244 F. 61, 156 C.C.A. 489, affirming, D.C., 226 F. 500, leave to present petition for rehearing granted 39 S.Ct. 492—Watts, Watts & Co. v. Unione Austriaca di Navigazione, N.Y., 39 S.Ct. 1, 248 U.S. 9, 63 L. Ed. 100, 3 A.L.R. 323, reversing 229 F. 136, 143 C.C.A. 412.

Orders of commission

The fact that a state commission, more than seven months after the granting of a temporary injunction against the enforcement of telephone rates temporarily fixed by it, made orders allowing higher rates whose correctness may yet be questioned in appropriate proceedings for review, does not establish that the injunction was rightly granted under the conditions which then existed.—Prendergast v. New York Telephone Co., N.Y., 43 S.Ct. 466, 262 U. S. 43, 67 L.Ed. 853.

82. U.S.—Smith v. U. S., Mo., 5 Pet. 292, 8 L.Ed. 130.

Constitutional questions

The supreme court will not, except in cases of absolute necessity, deliver any judgment in cases where constitutional questions are involved, unless a majority of the whole court concurs.—Briscoe v. Commonwealth Bank of Kentucky, Ky., 8 Pet. 118, 8 L.Ed. 887.

Grounds of decision

Where a majority of the judges agree to reverse the judgment below, it is not material that their conclusions are based on different reasons.—Smith v. U. S., Mo., 5 Pet. 292, 8 L.Ed. 130.

Divided court

(1) Where the judges of the court are equally divided in opinion, the judgment, order, or decree appealed from stands affirmed.—Reeside v. U. S., Ct.Cl., 8 Wall. 38, 19 L.Ed. 391—Coleman v. Hudson River Bridge Co., N.Y., 2 Wall. 403, 17 L.Ed. 876.

(2) Where the court is equally divided on a jurisdictional question, it will remand the case to the lower court without instructions.—Silliman v. Hudson River Bridge Co., N.Y., 1 Black 582, 17 L.Ed. 81—4 C.J. p 1122 note 38.

83. U.S.—Cornell Steamboat Co. v. Phoenix Const. Co., 34 S.Ct. 701, 233 U.S. 593, 58 L.Ed. 1107, affirming Phenix Const. Co. v. Cornell Steamboat Co., 103 N.E. 891, 210 N.Y. 113.

Affirmance held proper

(1) Where the proposition on which the contention as to jurisdiction rests is entirely without foundation.—Cornell Steamboat Co. v. Phoenix Const. Co., supra.

(2) Where the appeal is merely frivolous.—Micas v. Williams, La., 104 U.S. 556, 26 L.Ed. 842.

(3) Where contention on appeal is clearly frivolous and is the sole error asserted.—Pennsylvania Co. v. Donat, Ind., 36 S.Ct. 4, 239 U.S. 50, 60 L.Ed. 139, affirming 224 F. 1021, 139 C.C.A. 665.

(4) In a case turning essentially on questions of fact, where the record shows no clear error in the concurring findings of the two lower courts, and does not contain all the evidence that was before those courts.—Bodkin v. Edwards, Cal., 41 S.Ct. 268, 255 U.S. 221, 65 L.Ed. 595, affirming, C.C.A., 265 F. 621, affirming, D.C., Edwards v. Bodkin, 267 F. 1004.

(5) Where courts of two circuits had reached same conclusion on questions of fact, and questions of law were settled, and rulings clearly right so that the appeal appears without reasonable justification and therefore taken for delay.—Eichel v. U. S. Fidelity & Guaranty Co., Pa., 38 S.Ct. 47, 245 U.S. 102, 62 L.Ed. 177, affirming U. S. Fidelity & Guaranty Co. v. Eichel, 241 F. 357, 154 C.C.A. 237.

(6) Where one of several joint appellants fails to perfect his appeal, the appellee may open the record and pray for an affirmance.—Newman v. Moyers, 40 S.Ct. 478, 253 U. S. 182, 64 L.Ed. 849, reversing 47 App. D.C. 102.

When motion denied

Unless the record is manifestly free from prejudicial error, the motion will be denied.—Guardian Assur. Co. v. Quintana, Puerto Rico, 33 S. Ct. 236, 227 U.S. 100, 57 L.Ed. 437—4 C.J. p 1129 note 50.

Joinder of motions

Under statute providing for joinder of motions to dismiss appeal and to affirm where it is manifest that appeal was taken for delay only, appellee may make motion to affirm only if he also makes a motion to dismiss and there is at least some color of right to the dismissal.—City of Chanute v. Trader, Kan., 10 S.Ct. 67, 132 U.S. 210, 33 L.Ed. 345—4 C.J. p 592 note 26, p 1126 note 2, p 1127 note 14.

84. U.S.—Shapleigh v. Mier, Tex., 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, affirming, C.C.A., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L.Ed. 386—Galveston Electric Co. v. City of Galveston, Tex., 42 S.Ct. 351, 258 U.S. 388, 66 L.Ed. 678, affirming, D.C., 272 F. 147—Bowerman v. Hamner, Idaho, 39 S.Ct. 549, 250 U.S. 504, 63 L. Ed. 1113, affirming McCormick v. King, 241 F. 737, 154 C.C.A. 439—Bienville Water-Supply Co. v. City of Mobile, Ala., 20 S.Ct. 40, 175 U. S. 109, 44 L.Ed. 92.

Cases tried before jury

A judgment will be affirmed, in a case tried before a jury, when no error in rulings of law appears and the evidence is sufficient to sustain the verdict.—Sutton v. Bancroft, Ark., 23 How. 320, 16 L.Ed. 454—Guild v. Frontin, Cal., 18 How. 135, 15 L.Ed. 290.

Proof of unessential fact

However, the failure of plaintiff to prove a fact which a preliminary ruling of the court made it useless for him to prove is not ground for affirmance of a judgment for defendant.—Peck v. Heurich, D.C., 17 S. Ct. 927, 167 U.S. 624, 42 L.Ed. 302.

Affirmance in part

U.S.—J. M. Ceballos & Co. v. U. S., 29 S.Ct. 583, 214 U.S. 47, 53 L. Ed. 904, reversing 42 Ct.Cl. 318.

Court will not grant new trial on affirmance of judgment for defendant below, in absence of justification therefor.—Garrett v. Louisville & N. R. Co., Tenn., 35 S.Ct. 32, 235 U.S. 308, 59 L.Ed. 242, affirming 197 F. 715, 117 C.C.A. 109.

85. U.S.—Texas & P. R. Co. v. Interstate Transp. Co., La., 15 S.Ct. 228, 155 U.S. 585, 29 L.Ed. 271—Glendale Elastic Fabric Co. v. Smith, Mass., 100 U.S. 110, 25 L. Ed. 547.

While an affirmance leaves the judgment of the lower court in full force and effect precisely the same as though no appeal had been taken,[86] it is not necessarily an adoption of the reasoning of the lower court.[87]

Under some circumstances, the supreme court will affirm the lower court's judgment conditionally, as on appellee's performance of some act directed by the court.[88] Where the error in the judgment below is one that can be cured by a modification of the judgment, the court may so act rather than reverse.[89]

Reversal. In a proper case, the supreme court will reverse the judgment below,[90] as where the record does not affirmatively show jurisdiction,[91] or where it appears that there is substantial error;[92]

Costs
Where controversy no longer exists, the merits will not generally be decided merely to determine a question of costs.—Glendale Elastic Fabric Co. v. Smith, supra.

86. U.S.—Steinbach v. Stewart, Cal., 11 Wall. 566, 20 L.Ed. 56.

87. U.S.—Chesapeake & O. R. Co. v. Cockrell, Ky., 34 S.Ct. 278, 232 U.S. 146, 58 L.Ed. 544.

88. U.S.—Hansen v. Boyd, Minn., 16 S.Ct. 571, 161 U.S. 397, 40 L.Ed. 746.

Excessive judgment
(1) Generally, where there is no reversible error in the record except that the judgment is for too much, and the amount of the excess is readily ascertainable, the supreme court need not reverse the judgment and remand the cause for a new trial, but may allow or conditionally require such excess to be remitted, and let the judgment stand for the correct amount.—Hansen v. Boyd, supra—4 C.J. p 1138 note 63, p 1139 note 78, p 1141 notes 86, 89, p 1143 note 10.

(2) Where the court arbitrarily reduces the amount of the judgment without giving the prevailing party any option in the matter, it does not conditionally affirm the judgment.—Kennon v. Gilmer, Mont., 9 S.Ct. 696, 131 U.S. 22, 33 L.Ed. 110.

89. U.S.—McCart v. Indianapolis Water Co., Ind., 58 S.Ct. 324, 302 U.S. 419, 82 L.Ed. 336, modifying, C.C.A., Indianapolis Water Co. v. McCart, 89 F.2d 522, reversing, D.C., 13 F.Supp. 110, certiorari granted McCart v. Indianapolis Water Co., 58 S.Ct. 14, 302 U.S. 665, 82 L.Ed. 513—Woodward v. Brown, D.C., 13 Pet. 1, 10 L.Ed. 31.

If the judgment does not conform to the pleadings, and the error is one which can be cured by a modification of the judgment, the appellate court will not order a new trial, but will itself correct the judgment.—Woodward v. Brown, supra.

Modification as to particular matters
(1) A judgment may be modified so as to change an absolute dismissal to a dismissal without prejudice.—Lacassagne v. Chapuis, La., 12 S.Ct. 659, 144 U.S. 119, 36 L.Ed. 268.

(2) A decree in favor of a person in one representative capacity may be changed so as to be in favor of him in another representative capacity.—Hayes v. Pratt, N.J., 13 S.Ct. 503, 147 U.S. 557, 37 L.Ed. 279.

90. U.S.—McCandless v. U. S., Hawaii, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205, reversing, C.C.A., 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403.

Several parties
(1) Reversal of judgment as to corporate defendant for want of jurisdiction did not require reversal as to individual defendant.—James-Dickinson Farm Mortg. Co. v. Harry, Ill., 47 S.Ct. 308, 273 U.S. 119, 71 L.Ed. 569.

(2) However, where a judgment is entire and jointly binding on or in favor of several coparties, or the cause of action is of such a nature that the rights and issues are interdependent and injustice might result from a reversal as to less than all the parties, the supreme court will reverse the judgment as to all.—Washington Gaslight Co. v. Lansden, D.C., 19 S.Ct. 296, 172 U.S. 534, 43 L.Ed. 543—Elizabeth v. American Nicholson Pavement Co., N.J., 131 U.S. appendix cxlviii, 24 L.Ed. 1059.

Reversal not on merits
Where an intermediate appellate court denied a petition for leave to file a bill of review on the ground that its former decree of affirmance was final, the supreme court is authorized to reverse the judgment, without passing on the merits of the petition.—National Brake & Electric Co. v. Christensen, Wis., 41 S.Ct. 154, 254 U.S. 425, 65 L.Ed. 341, reversing 258 F. 880, 169 C.C.A. 600, certiorari granted 39 S.Ct. 495, 250 U.S. 638, 63 L.Ed. 1184, and prohibition denied 40 S.Ct. 54.

Vacating decision
Where the circuit court of appeals affirmed a decree of the district court which was open to review only by the supreme court, the decision of the circuit court of appeals must be vacated, and the case remanded to it, with direction to dismiss the appeal.—The Carlo Poma, N.Y., 41 S.Ct. 309, 255 U.S. 219, 65 L.Ed. 594, vacating, C.C.A., 259 F. 369, 170 C.C.A. 345, certiorari granted 40 S.Ct. 14, 250 U.S. 656, 64 L.Ed. 1192.

Effect of reversal
(1) Generally, a judgment of reversal is not necessarily an adjudication of any other than the questions in terms discussed and decided.—Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas, 45 S.Ct. 441, 267 U.S. 552, 69 L.Ed. 785, reversing Court of Industrial Relations v. Charles Wolff Packing Co., 227 P. 249, 114 Kan. 487, modifying 219 P. 259, 114 Kan. 304.

(2) On the reversal of a judgment, order, or decree, a dependent order, judgment, or proceeding, ancillary and accessory thereto, shares its fate and falls with it.—Butler v. Eaton, Mass., 11 S.Ct. 985, 141 U.S. 240, 35 L.Ed. 713—Chicago, D. & V. R. Co. v. Fosdick, Ill., 1 S.Ct. 10, 106 U.S. 47, 27 L.Ed. 47.

(3) Rights acquired bona fide by a third person, under a judgment, order, or decree rendered by a court of competent jurisdiction, are not affected by the subsequent reversal thereof.—Bank of U. S. v. Bank of Washington, D.C., 6 Pet. 8, 8 L.Ed. 299.

91. U.S.—Roberts v. Lewis, Neb., 12 S.Ct. 781, 144 U.S. 653, 36 L.Ed. 579—McCormick v. Sullivant, Ohio, 10 Wheat. 192, 6 L.Ed. 300.

Circuit court of appeals without jurisdiction
Appropriate action of supreme court, where circuit court of appeals was without jurisdiction, was to reverse decree and remand case, with directions to dismiss.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing, D.C., 27 F.2d 1005.

92. U.S.—McCandless v. U. S., Hawaii, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205, reversing, C.C.A., 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403—Newman v. Moyers, 40 S.Ct. 478, 253 U.S. 182, 64 L.Ed. 849, reversing 47 App.D.C. 102.
4 C.J. p 1169 note 14.

Particular errors
(1) Material error of the trial court in its rulings on the sufficiency of pleadings.—Mandelbaum v. People, Nev.Terr., 8 Wall. 310, 19 L.Ed. 479—Fowle v. Common Council of Alexandria, D.C., 11 Wheat. 320, 6 L.Ed. 484.

but a judgment need not be reversed for technical errors, defects, or exceptions which do not affect the substantial rights of the parties.[93] The court may direct restitution of property lost by means of the erroneous judgment.[94]

On reversing the judgment below, the supreme court may itself render or direct final judgment in the cause, if the circumstances warrant such action,[95] as where the facts of the case are undisputed,[96] or where the controversy has become moot.[97] On the other hand, the court may in its discretion order a new trial or further proceedings whenever it appears that the ends of justice will be best served by such a course,[98] as where it is desirable that the

(2) Error of the trial court in giving improper, or in refusing to give proper, instructions to the jury.—U. S. v. Tillotson, N.Y., 12 Wheat. 180, 6 L.Ed. 594.

Erroneous ruling which relates to substantial rights of a party is ground for reversal unless it affirmatively appears from the record that the ruling was not prejudicial.—McCandless v. U. S., Hawaii, 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205, reversing, C.C.A., 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403—Williams v. Great Southern Lumber Co., La., 48 S.Ct. 417, 277 U.S. 19, 72 L.Ed. 761, affirming, C.C.A., Great Southern Lumber Co. v. Williams, 17 F.2d 468, reversing, D.C., Williams v. Great Southern Lumber Co., 13 F.2d 246, and certiorari granted 48 S.Ct. 19, 275 U.S. 511, 72 L.Ed. 399.

93. U.S.—Camp v. Gress, Va., 39 S. Ct. 478, 250 U.S. 308, 63 L.Ed. 997 —McLanahan v. Universal Ins. Co., Md., 1 Pet. 170, 7 L.Ed. 98.

Particulars errors

(1) Error with respect to costs.—Newton v. Consolidated Gas Co. of New York, N.Y., 44 S.Ct. 481, 265 U.S. 78, 68 L.Ed. 909, setting aside dismissal of appeal and affirming 44 S.Ct. 401, 264 U.S. 571, 68 L.Ed. 855, dismissing, D.C.N.Y., Consolidated Gas Co. of New York v. Newton, 291 F. 704—Du Bois v. Kirk, Pa., 15 S.Ct. 729, 158 U.S. 58, 39 L.Ed. 895.

(2) Error in ruling on a motion for a rehearing.—U. S. v. Rio Grande Dam & Irrigation Co., 19 S.Ct. 770, 174 U.S. 690, 43 L.Ed. 1136, reversing 51 P. 674, 9 N.M. 292.

Omitting evidence from transcript

Failure to observe rule for including evidence in transcript was a substantial defect not within text rule.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F.2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316.

94. U.S.—Baltimore & O. R. Co. v. U. S., Ill., 49 S.Ct. 492, 279 U.S. 781, 73 L.Ed. 954—Goltra v. Weeks, Mo., 46 S.Ct. 613, 271 U.S. 536, 70 L.Ed. 1074, affirming, C.C.A., Weeks v. Goltra, 7 F.2d 838, certiorari granted Goltra v. Weeks, 46 S.Ct. 102, 269 U.S. 545, 70 L.Ed. 404.

United States

It has been held that the United States government cannot be ordered to refund.—Ex parte Morris, Ala., 9 Wall. 605, 19 L.Ed. 799.

95. U.S.—Newman v. Moyers, 40 S. Ct. 478, 253 U.S. 182, 64 L.Ed. 849, reversing 47 App.D.C. 102—City and County of Denver v. Denver Union Water Co., Colo., 38 S.Ct. 278, 246 U.S. 178, 62 L.Ed. 649.

Particular circumstances

(1) Where the lower court erroneously dismissed the bill on the merits instead of dismissing it for want of jurisdiction, the supreme court may reverse the decree with directions that the suit be dismissed for want of jurisdiction.—Shawnee Severage & Drainage Co. v. Stearns, Okl., 31 S. Ct. 452, 220 U.S. 462, 55 L.Ed. 544 —McGilva v. Ross, Wash., 30 S.Ct. 27, 215 U.S. 70, 54 L.Ed. 95, reversing 164 F. 604, 90 C.C.A. 398.

(2) The court may reverse a decree, erroneous in that it dismisses a bill absolutely instead of dismissing it without prejudice, and render or direct a proper decree of dismissal without prejudice.—Rogers v. Durant, Ill., 1 S.Ct. 623, 106 U.S. 644, 27 L.Ed. 303.

(3) Where, on appeal from a judgment in favor of plaintiff below, the supreme court decides that plaintiff cannot recover in any event on another trial, on reversing the judgment, it will itself render the proper judgment or order it rendered by the lower court.—Baltimore & Carolina Line v. Redman, N.Y., 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636, modifying, C.C.A., Redman v. Baltimore & Carolina Line, 70 F.2d 635, certiorari granted Baltimore & Carolina Line v. Redman, 55 S.Ct. 89, 293 U.S. 541, 79 L.Ed. 646, certiorari denied Redman v. Baltimore & Carolina Line, 55 S.Ct. 98, 293 U.S. 577, 79 L.Ed. 674—4 C.J. p 1189 note 4.

(4) But the court will not order a dismissal or nonsuit because of failure to state a cause of action where plaintiff could amend his petition to state a sufficient cause of action.—Mayo v. Lakeland Highlands Canning Co., Fla., 60 S.Ct. 517, 309 U.S. 310, 84 L.Ed. 774, reversing, D. C., Lakeland Highlands Canning Co. v. Mayo, 28 F.Supp. 44.

96. U.S.—Green County v. Thomas, Ky., 29 S.Ct. 168, 211 U.S. 598, 53 L.Ed. 343, affirming 159 F. 339, 89 C.C.A. 405—City of Ft. Scott v. Hickman, Kan., 5 S.Ct. 56, 112 U.S. 150, 28 L.Ed. 636.

Absence of defense

Where the facts are practically undisputed and the amount of recovery certain, plaintiff has made out a prima facie case, and defendant, although having full opportunity to do so, has established no defense sufficient to prevent or bar the right of recovery, the supreme court, on reversing a judgment in defendant's favor, will sometimes render the proper judgment for plaintiff, or direct the court below to do so.—Retzer v. Wood, N.Y., 3 S.Ct. 164, 109 U.S. 185, 27 L.Ed. 900.

Where wrong judgment is rendered on a proper verdict or findings of fact, the supreme court may reverse and render, or direct, the judgment which should have been given below.—Germania Fire Ins. Co. v. Boykin, S.C., 12 Wall. 433, 20 L.Ed. 442.

97. U.S.—Duke Power Co. v. Greenwood County, S.C., 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178, reversing, C.C.A., Greenwood County, S. C. v. Duke Power Co., 81 F.2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, S.C., 12 F.Supp. 70, remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S.C., 10 F.Supp. 854, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379—Brownlow v. Schwartz, D.C., 43 S.Ct. 263, 261 U.S. 216, 67 L.Ed. 620, reversing, D.C., Schwartz v. Brownlow, 270 F. 1019, certiorari denied 41 S.Ct. 623, 256 U.S. 701, 65 L.Ed. 1178—Atherton Mills v. Johnston, N.C., 42 S. Ct. 422, 259 U.S. 13, 66 L.Ed. 814 —U. S. v. Alaska S. S. Co., N.Y., 40 S.Ct. 448, 253 U.S. 113, 64 L. Ed. 808, reversing, D.C., Alaska S. S. Co. v. U. S., 259 F. 713—Board of Public Utility Com'rs v. Compania Général de Tabacos de Filipinas, Philippine, 39 S.Ct. 332, 249 U.S. 425, 63 L.Ed. 687—U. S. v. American-Asiatic S. S. Co., N.Y., 37 S.Ct. 233, 242 U.S. 537, 61 L. Ed. 479—U. S. v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, N.Y., 36 S.Ct. 212, 239 U. S. 466, 60 L.Ed. 387, reversing, D.C., U. S. v. Hamburgh-American S. S. Line, 216 F. 971.

98. U.S.—Collins v. Yosemite Park

merits of the case be decided below,[99] or where final judgment should not be rendered on appeal in view of the fact that the record is imperfect or confused,[1] the findings are insufficient,[2] the facts in issue are not fully developed or definitely settled,[3] or persons whose rights are involved are not parties to the action.[4] On reversing the judgment below and ordering a new trial, the court may direct a reference[5] or re-reference[6] of the cause, or that the parties amend or be given leave to amend their

& Curry Co., Cal., 58 S.Ct. 1009, 304 U.S. 518, 82 L.Ed. 1502, reversing, D.C., Yosemite Park & Curry Co. v. Collins, 20 F.Supp. 1009—Erie R. Co. v. Tompkins, N. Y., 58 S.Ct. 817, 304 U.S. 64, 82 L.Ed. 1188, 114 A.L.R. 1487, reversing, C.C.A., Tompkins v. Erie R. Co., 90 F.2d 603, certiorari granted Erie R. Co. v. Tompkins, 58 S. Ct. 50, 302 U.S. 671, 83 L.Ed. 518, mandate conformed to, C.C.A., Tompkins v. Erie R. Co., 98 F.2d 49, certiorari denied 59 S.Ct. 108, 305 U.S. 637, 83 L.Ed. 410, rehearing denied 59 S.Ct. 229, 305 U.S. 673, 83 L.Ed. 436—Duke Power Co. v. Greenwood County, S.C., 57 S. Ct. 202, 299 U.S. 259, 81 L.Ed. 178, reversing, C.C.A., Greenwood County, S. C. v. Duke Power Co., 81 F.2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 12 F.Supp. 70, remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 10 F.Supp. 854, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379—Realty Acceptance Corporation v. Montgomery, Del., 52 S.Ct. 215, 284 U. S. 547, 76 L.Ed. 476, affirming, C. C.A., Montgomery v. Realty Acceptance Corporation, 51 F.2d 642, certiorari granted Realty Acceptance Corporation v. Montgomery, 52 S. Ct. 25, 284 U.S. 604, 76 L.Ed. 518—Road Improvement Dist. No. 1 of Franklin County, Ark., v. Missouri Pac. R. Co., Ark., 47 S.Ct. 563, 274 U.S. 188, 71 L.Ed. 992, modifying, C.C.A., 2 F.2d 340—Wiggins Ferry Co. v. Ohio & M. R. Co., Ill., 12 S.Ct. 188, 142 U.S. 396, 35 L.Ed. 1055.

4 C.J. p 1194 note 73.

Errors warranting new trial

(1) Amendable defects in pleadings.—Mandeville v. Burt, D.C., 8 Pet. 256, 8 L.Ed. 936.

(2) Defect of parties.—Caldwell v. Taggart, Va., 4 Pet. 190, 7 L.Ed. 828.

(3) Errors in admission or exclusion of material evidence.—Drummond's Adm'rs v. Magruder & Co.'s Trustees, Va., 9 Cranch 122, 3 L.Ed. 677.

Partial new trial

(1) Where the error in the trial relates only to a certain issue which is in no way dependent for its proper trial on certain other issues already satisfactorily tried and a partial new trial will not work injustice to any of the parties concerned, the cause may be remanded, on reversal, for the trial of the issue erroneously tried, and for that alone.—Willing v. Binenstock, Pa., 58 S. Ct. 175, 302 U.S. 272, 82 L.Ed. 248, reversing, C.C.A., 88 F.2d 474, affirming, D.C., Binenstock v. Willing, 18 F.Supp. 262, certiorari granted Willing v. Binenstock, 57 S.Ct. 932, 301 U.S. 678, 81 L.Ed. 1338—Gasoline Products Co. v. Champlin Refining Co., Me., 51 S.Ct. 513, 283 U. S. 494, 75 L.Ed. 1188, reversing, C. C.A., 39 F.2d 521, certiorari granted 51 S.Ct. 76, 282 U.S. 824, 75 L.Ed. 735.

(2) There are, however, a number of cases in which it has been held that a partial, instead of an entire, new trial would be improper.—Gasoline Products Co. v. Champlin Refining Co., supra.

4 C.J. p 1195 note 92.

Erroneous proceedings after prior remand

Where, on appeal from decree enjoining performance of contract of Public Works Administration for loan to county for construction of hydroelectric plant, circuit court of appeals remanded case with intent that district court should be revested with jurisdiction of entire cause because of substitution of new agreement, but district court misunderstood order and its proceedings were not taken and its decision was not rendered with a consciousness of its power and its duty, and where, on certification of proceedings in district court, circuit court of appeals, notwithstanding such misunderstanding, proceeded to pass on validity of act of congress under which federal loan was to be made, supreme court reversed decree of circuit court of appeals and remanded cause, with directions that decrees of district court be vacated, that parties be permitted to amend pleadings, and that cause be retried on issues thus presented.—Duke Power Co. v. Greenwood County, S. C., 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178, reversing, C.C.A., Greenwood County, S. C. v. Duke Power Co., 81 F.2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 12 F.Supp. 70, remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 10 F.Supp. 854, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379.

Retention for state court proceedings

Where constitutional issues sought to be presented by appeal from decree of federal district court enjoining enforcement of an order of Texas railroad commission would not arise if there was no warrant in state law for the commission's assumption of authority, the decree should be reversed and cause remanded to district court with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in state court for determination of the commission's authority.—Railroad Commission of Texas v. Pullman Co., Tex., 61 S. Ct. 643, 312 U. S. 496, 85 L.Ed. 971, reversing, D.C., Pullman Co. v. Railroad Commission of Texas, 33 F.Supp. 675.

99. U.S.—Oklahoma Natural Gas Co. v. Russell, Ohio, 43 S.Ct. 353, 261 U.S. 290, 67 L.Ed. 659.

1. U.S.—U. S. v. Northern Pac. Ry. Co., Mont., 41 S.Ct. 439, 256 U.S. 51, 65 L.Ed. 825, reversing, C.C.A., 264 F. 898—U. S. v. Rio Grande Dam & Irrigation Co., 22 S.Ct. 428, 184 U.S. 416, 46 L.Ed. 619, reversing 51 P. 674, 9 N.M. 292.

2. U.S.—Public Service Commission of Wisconsin v. Wisconsin Telephone Co., Wis., 53 S.Ct. 514, 289 U.S. 67, 77 L.Ed. 1036.

4 C.J. p 1201 note 44.

3. U.S.—City of St. Louis v. Western Union Tel. Co., Mo., 13 S.Ct. 485, 148 U.S. 92, 37 L.Ed. 380, rehearing denied 13 S.Ct. 990, 149 U. S. 465, 37 L.Ed. 810.

4. U.S.—National Surety Co. v. Coriell, N.Y., 53 S.Ct. 678, 289 U. S. 426, 77 L.Ed. 1300, 88 A.L.R. 1231, reversing, C.C.A., Coriell v. Morris White, Inc., 54 F.2d 255, certiorari granted National Surety Co. v. Coriell, 52 S.Ct. 578, 286 U.S. 537, 76 L.Ed. 1276, certiorari denied 52 S.Ct. 578, 286 U.S. 553, 76 L.Ed. 1288.

5. U.S.—Lincoln Gas & Electric Light Co. v. City of Lincoln, Neb., 32 S.Ct. 271, 223 U.S. 349, 56 L. Ed. 466, reversing, C.C., 182 F. 926.

6. U.S.—Chicago, M. & St. P. R. Co. v. Tompkins, S.D., 20 S.Ct. 336, 176 U.S. 167, 44 L.Ed. 417, reversing, C.C., 90 F. 363.

pleadings,[7] unless the amendment desired would have the effect of making an entirely different case.[8] The court will refuse to order a new trial where it appears that it is unnecessary and would serve no useful purpose.[9]

Mandate and proceedings after remand. On determination of the controversy by the supreme court, it may issue its mandate as to the disposition of the cause to be made by the lower court, frequently the one in which the cause was originally tried.[10] It is a general rule that the decision of the supreme court is the law of the case in further proceedings in the cause in the trial court,[11] except as to matters not decided on the appeal.[12] Accordingly, it is the duty of the lower court, on the remand of the cause, to comply with the mandate of the supreme court and to obey the directions therein;[13] but the

7. U.S.—U. S. v. Shelby Iron Co. of New Jersey, Ala., 47 S.Ct. 515, 273 U.S. 571, 71 L.Ed. 781, reversing, C.C.A., 4 F.2d 829.

4 C.J. p 1195 note 96, p 1196 note 97—25 C.J. p 780 note 18.

Manner and terms of amendment

The supreme court will not give specific directions as to the amendment, but will leave the manner and terms of the amendment to the lower court.—Sheehy v. Mandeville, D.C., 6 Cranch 253, 3 L.Ed. 215.

8. U.S.—Warner v. Godfrey, 22 S.Ct. 852, 186 U.S. 365, 46 L.Ed. 1203, reversing 17 App.D.C. 102.

9. U.S.—Cleveland Rolling-Mill Co. v. Rhodes, Ill., 7 S.Ct. 882, 121 U. S. 255, 30 L.Ed. 920.

10. U.S.—Clerke v. Harwood, Md., 3 Dall. 342, 1 L.Ed. 628.

Payment of costs and fees

(1) The mandate may be withheld until all costs and fees in the case are paid.—Osborn v. U. S., Kan., 131 U.S. appendix cxxxvii, 23 L.Ed. 871.

(2) Mandate may be issued by the clerk on their payment.—Very v. Watkins, Ark., 23 How. 469, 16 L.Ed. 522.

Where application for issuance at unusual time is made notice must be given to the adverse party.—Means v. Dowd, N.C., 9 S.Ct. 793, 128 U.S. 583, 32 L.Ed. 578.

Construction

(1) Where the mandate of the supreme court is ambiguous, the lower court may construe it for the purpose of arriving at its true intent and meaning.—Federal Communications Commission v. Pottsville Broadcasting Co., 60 S.Ct. 437, 309 U.S. 134, 84 L.Ed. 656, reversing Pottsville Broadcasting Co. v. Federal Communications Commission, 105 F.2d 36, 70 App.D.C. 157, certiorari granted Federal Communications Commission v. Pottsville Broadcasting Co., 60 S.Ct. 107, 308 U.S. 535, 84 L.Ed. 451.

(2) In construing the mandate or in otherwise determining what was decided by the supreme court and what was ordered done, the opinion of the supreme court should be examined and consulted.—Gulf Refining Co. of Louisiana v. U. S., La., 46 S.Ct. 52, 269 U.S. 125, 70 L.Ed. 195, affirming in part and reversing in part, C.C.A., U. S. v. Norvell, 289 F. 281—Ohio Oil Co. v. Thompson, C. C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528—4 C.J. p 1212 note 47.

(3) Mandate construed.—United States v. Terminal R. Ass'n of St. Louis, Mo., 35 S.Ct. 408, 236 U.S. 194, 59 L.Ed. 535.

11. U.S.—Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., Ark., 39 S.Ct. 237, 249 U.S. 134, 63 L.Ed. 517, motion denied St. Louis, I. M. & S. R. Co. v. Southern Cotton Oil Co., 39 S.Ct. 387—William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada, C.C.A.N.Y., 42 F.2d 152, certiorari denied Associated Bill Posters of U. S. and Canada v. Wm. H. Rankin Co., 51 S.Ct. 37, 282 U.S. 864, 75 L.Ed. 765—Milwaukee County v. M. E. White Co., D.C.Ill., 17 F. Supp. 759—Street v. Shipowners' Ass'n of Pacific Coast, C.C.A.Cal., 299 F. 5, certiorari denied 45 S.Ct. 95, 266 U.S. 611, 69 L.Ed. 467.

4 C.J. p 1213 note 83, p 1219 note 30.

Lower court cannot rehear or reconsider matters decided by supreme court.—Pease v. Rathbun-Jones Engineering Co., Tex., 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715, Ann.Cas.1918C 1147, affirming 228 F. 273, 142 C.C.A. 565—U. S. v. First National Pictures, D.C.N.Y., 51 F.2d 552, vacating, 34 F.2d 815, reversed 51 S.Ct. 45, 282 U.S. 44, 75 L.Ed. 151—4 C.J. p 1215 notes 88, 92.

12. U.S.—Hartford Life Ins. Co. v. Blincoe, 41 S.Ct. 276, 255 U.S. 129, 65 L.Ed. 549, affirming Barber v. Hartford Life Ins. Co., 214 S.W. 207, 279 Mo. 316, 12 A.L.R. 758—In re Wright, C.C.A.Ind., 126 F.2d 92—U. S. v. Southern Pac. Co., D. C.Utah, 290 F. 443.

4 C.J. p 1216 note 99, p 1232 note 66 [a].

13. U.S.—Federal Communications Commission v. Pottsville Broadcasting Co., 60 S.Ct. 437, 309 U.S. 134, 84 L.Ed. 656, reversing Pottsville Broadcasting Co. v. Federal Communications Commission, 105 F.2d 36, 70 App.D.C. 157, certiorari granted Federal Communications Commission v. Pottsville Broadcasting Co., 60 S.Ct. 107, 308 U.S. 535, 84 L.Ed. 451—Kansas City Southern Ry. Co. v. Guardian Trust Co., Mo., 50 S.Ct. 194, 281 U.S. 1, 74 L.Ed. 659, affirming, C.C.A., Guardian Trust Co. v. Kansas City Southern Ry. Co., 28 F.2d 233, certiorari granted Kansas City Southern Ry. Co. v. Guardian Trust Co., 49 S.Ct. 252, 279 U.S. 827, 73 L.Ed. 978—U. S. v. California Co-op. Canneries, D.C., 49 S.Ct. 423, 279 U.S. 553, 73 L.Ed. 838—United States v. Terminal R. Ass'n of St. Louis, Mo., 35 S.Ct. 408, 236 U.S. 194, 59 L.Ed. 535—Gratz v. McKee, C.C.A. Mo., 9 F.2d 593, certiorari denied 46 S.Ct. 472, 270 U.S. 664, 70 L.Ed. 788—Landon v. Court of Industrial Relations of State of Kansas, D.C. Kan., 269 F. 111—City of Omaha v. Omaha Electric Light & Power Co., Neb., 255 F. 801, 167 C.C.A. 129, certiorari denied 39 S.Ct. 491, 250 U.S. 640, 63 L.Ed. 1184.

4 C.J. p 1221 note 58, p 1222 note 61.

Jurisdiction

(1) Where the supreme court by its decision and directions puts an end to the litigation, the lower court is without jurisdiction except to comply with whatever directions are made.—Evens & Howard Fire Brick Co. v. U. S., 35 S.Ct. 115, 236 U.S. 210, 59 L.Ed. 542—U. S. v. New York Indians, Ct.Cl., 19 S.Ct. 487, 173 U.S. 464, 43 L.Ed. 769.

(2) After a case has been remanded to the trial court for further proceedings, when it is discovered that the trial court lacked jurisdiction the trial court cannot dismiss because of lack of jurisdiction but must comply with the mandate.—Skillern's Ex'rs. v. May's Ex'rs, Ky., 6 Cranch 267, 3 L.Ed. 920.

Vacation or modification of judgment

(1) Generally, after a cause has been determined on appeal and remanded, the lower court is without power to vacate or modify the judgment of the supreme court.—John Simmons Co. v. Grier Bros. Co., Pa., 42 S.Ct. 196, 258 U.S. 82, 66 L.Ed. 475, reversing, C.C.A., Grier Bros. Co. v. Baldwin, 265 F. 481, and motion denied 42 S.Ct. 585, 259 U.S. 576, 66 L.Ed. 1071—In re Sanford Fork & Tool Co., Ind., 16 S.Ct. 291, 160 U.S. 247, 40 L.Ed. 414.

(2) Also, except as directed by the supreme court, the lower court is generally without power to vacate, alter, or modify the judgment originally entered by it.—Gaines v. Cald-

trial court may make any order or direction in the further progress of the cause that is not inconsistent with the decision and directions of the supreme court.[14] So the lower court may have limited powers, after remand of a cause without specific directions, to grant a new trial,[15] or to permit an amendment of pleadings,[16] or findings of fact;[17] and a new trial is proper and necessary where intended by the mandate.[18] On the filing of a mandate or remittitur of the supreme court directing a certain

well, Ark., 13 S.Ct. 611, 148 U.S. 228, 37 L.Ed. 432.

14. U.S.—Sprague v. Ticonic Nat. Bank, Me., 59 S.Ct. 777, 307 U.S. 161, 83 L.Ed. 1184, reversing, C.C.A., 99 F.2d 583, certiorari granted 59 S.Ct. 463, 306 U.S. 623, 83 L.Ed. 1028—Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co., Ark., 39 S.Ct. 237, 249 U.S. 134, 63 L.Ed. 517, motion denied St. Louis, I. M. & S. R. Co. v. Southern Cotton Oil Co., 39 S.Ct. 387—Oregon & C. R. Co. v. U. S., Or., 37 S.Ct. 443, 243 U.S. 549, 61 L.Ed. 890—In re City Nat. Bank, Tex., 14 S.Ct. 804, 153 U.S. 246, 38 L.Ed. 705—Houston v. Commissioner of Internal Revenue, C.C.A., 53 F.2d 445.

Any matters left open by mandate of the supreme court may be passed on by trial court.—In re Potts, Ohio, 17 S.Ct. 520, 166 U.S. 263, 41 L.Ed. 994.

Discretion within limitations

Where the directions given on remand impose limitations either as to subject matter or relief, or both, the trial court has power and discretion only within the limitations imposed.—Latta v. Granger, Ark., 17 S.Ct. 746, 167 U.S. 81, 42 L.Ed. 85—Kneeland v. American L. & T. Co., Ind., 11 S.Ct. 426, 138 U.S. 509, 34 L.Ed. 1052.

Accounting

Lower court may reopen the question and state or restate an account between the parties, where the supreme court has expressly ordered an accounting.—Dunlop v. Hepburn, D. C., 3 Wheat. 231, 4 L.Ed. 377.

Effect of modification of decree

Where a decree dismissing a suit to restrain enforcement of an ordinance fixing a gas rate "with prejudice" provided that, after three years, application might be made for reinstatement, the supreme court's modification of the decree, by substituting "without prejudice" for "with prejudice," did not affect the provision regarding reinstatement, or deprive the district court of power to reinstate the suit.—City of Des Moines, Iowa, v. Des Moines Gas Co., C.C.A.Iowa, 264 F. 506.

15. U.S.—Piza Hermanos v. Caldentey, Puerto Rico, 34 S.Ct. 253, 231 U.S. 690, 58 L.Ed. 439—Ex parte Fuller, Ind.T., 21 S.Ct. 871, 182 U. S. 562, 45 L.Ed. 1230.

When new trial granted

(1) Generally, a new trial cannot be granted by the lower court after remand of a cause to it.—Chaires v. U. S., Fla., 3 How. 611, 11 L.Ed. 749.

(2) But a new trial or rehearing may be granted where the opinion and mandate of the supreme court expressly or impliedly commits this matter to the discretion of the lower court.—Piza Hermanos v. Caldentey, Puerto Rico, 34 S.Ct. 253, 231 U.S. 690, 58 L.Ed. 439—Ex parte Medway, Ct.Cl., 23 Wall. 504, 23 L.Ed. 160.

16. U.S.—Rio Grande Dam & Irr. Co. v. U. S., 30 S.Ct. 97, 215 U.S. 266, 54 L.Ed. 190, affirming 85 P. 393, 13 N.M. 386.

No power to permit amendments

(1) Where the supreme court has determined the case on the merits.—Mackall v. Richards, D.C., 6 S.Ct. 234, 116 U.S. 45, 29 L.Ed. 558—Ex parte Story, La., 12 Pet. 339, 9 L.Ed. 1108—Peavy-Byrnes Lumber Co. v. Commissioner of Internal Revenue, C.C.A.La., 86 F.2d 234, certiorari denied 57 S.Ct. 612, 300 U.S. 674, 81 L. Ed. 879.

(2) Where supreme court has peremptorily ordered dismissal of the bill of complaint.—Ashwander v. Tennessee Valley Authority, D.C.Ala., 14 F.Supp. 11, conforming to mandate 56 S.Ct. 466, 297 U.S. 288, 80 L.Ed. 688, affirming, C.C.A., Tennessee Valley Authority v. Ashwander, 78 F.2d 578, reversing, D.C., Ashwander v. Tennessee Valley Authority, 9 F.Supp. 965 and certiorari granted 56 S.Ct. 145, two cases, 296 U.S. 562, 80 L.Ed. 396, rehearing denied 56 S.Ct. 588, two cases, 298 U. S. 728, 80 L.Ed. 1011.

Amendment permissible

(1) Where no leave or direction has been granted by the supreme court, whether an amendment of pleadings shall be allowed in a particular case is committed primarily to the discretion of the lower court.—In re Sanford Fork & Tool Co., Ind., 16 S.Ct. 291, 160 U.S. 247, 40 L. Ed. 414—4 C.J. p 1224 note 9, p 1225 note 12—25 C.J. p 780 note 19.

(2) Lower court may permit amendment when the supreme court has determined the case on a question of pleading rather than on the merits.—Alexandria Mar. Ins. Co. v. Hodgson, D.C., 6 Cranch 206, 3 L.Ed. 200.

(3) Trial court may allow amendments where, without any specific directions, the cause has been remanded for further proceedings.—City of Texarkana, Tex. v. Arkansas, Louisiana Gas Co., Tex., 59 S.Ct. 448, 306 U.S. 188, 620, 83 L.Ed. 598, reversing C.C.A., Arkansas, Louisiana Gas Co. v. City of Texarkana, Tex., 97 F.2d 5, certiorari granted City of Texarkana, Tex. v. Arkansas, Louisiana Gas Co., 59 S.Ct. 94, 305 U.S. 584, 83 L.Ed. 369.

Nature of amendments permitted

(1) Where lower court has power to grant leave to amend, it may permit an amendment which falls short of constituting a new cause of action.—Rio Grande Dam & Irr. Co. v. U. S., 30 S.Ct. 97, 215 U.S. 266, 54 L.Ed. 190, affirming 85 P. 393, 13 N.M. 386.

(2) The lower court may permit an amendment which supplies omissions and defects, especially where the defect is one on which the reversal was based wholly or in part.—Everhart v. Huntsville Female College, Ala., 7 S.Ct. 555, 120 U.S. 223, 30 L.Ed. 623.

(3) However, a party cannot be allowed so to plead as to open up matters already adjudicated by the supreme court.—Thompson v. Maxwell Land-Grant & R. Co., N.M., 18 S.Ct 121, 168 U.S. 451, 42 L.Ed. 539.

25 C.J. p 781 note 20.

17. **Where cause is remanded with directions,** the lower court cannot correct alleged errors in the findings of fact or amend by making additional findings.—Hickman v. Ft. Scott, Kan., 12 S.Ct. 9, 141 U.S. 415, 35 L.Ed. 775—Kneeland v. American L. & T. Co., Ind., 11 S.Ct. 426, 138 U.S. 509, 34 L.Ed. 1052.

18. U.S.—District of Columbia v. McBlair, D.C., 8 S.Ct. 547, 124 U.S. 320, 31 L.Ed. 449—E. G. Shinner & Co. v. Lauf, D.C.Wis., 36 F.Supp. 709.

When intended

(1) A new trial will be considered intended where the case has been reversed and remanded generally and the facts are disputed.—District of Columbia v. McBlair, D.C., 8 S.Ct. 547, 124 U.S. 320, 31 L.Ed. 449.

(2) Where a case has been remanded to the court of claims for further findings of fact, without an order directly setting aside the judgment or directing the court to set it aside, the order will not be construed as authorizing a new trial, but as limiting the remand to "further findings of fact."—Norris v. U. S., 55 Ct.Cl. 208, affirmed 42 S.Ct. 9, 257 U.S. 77, 66 L.Ed. 136.

Scope of new trial

(1) Where the case has been opened for retrial all pertinent issues left undetermined may be retried, including issues as to matters originally alleged but not tried on the first trial.—Davis v. O'Hara, 45 S.Ct.

judgment, the lower court has no discretion but must comply therewith by entering a judgment conforming to such directions.[19]

The reversal by the supreme court of a judgment or decree ordinarily necessitates restitution to a party who has suffered loss from the enforcement thereof,[20] and such restitution may be enforced by the lower court.[21] Various procedures or remedies are available to obtain enforcement of the supreme court's mandate.[22]

104, 266 U.S. 314, 69 L.Ed. 303, reversing O'Hara v. Davis, 192 N.W. 215, 109 Neb. 615.

(2) Where, however, on remanding a cause, the supreme court has expressly or in effect given directions as to the issues to be tried, the new trial may and should be confined to the issues designated.—New Orleans v. Gaines, La., 11 S.Ct. 428, 138 U.S. 595, 34 L.Ed. 1102—Kneeland v. American L. & T. Co., Ind., 11 S.Ct. 426, 138 U.S. 509, 34 L.Ed. 1052.

19. U.S.—In re Sanford Fork & Tool Co., Ind., 16 S.Ct. 291, 160 U.S. 247, 40 L.Ed. 414.
4 C.J. p 1233 note 84.

When motion considered
The lower court need not give immediate consideration to a motion for judgment in accordance with the mandate.—In re Hall, 17 S.Ct. 723, 167 U.S. 38, 42 L.Ed. 69.

Substitution on appeal is no bar to immediate execution in the lower court against the substituted party after affirmance.—Texas & P. R. Co. v. Anderson, Tex., 13 S.Ct. 843, 149 U.S. 237, 37 L.Ed. 717.

Interest and costs
(1) The lower court is without power to allow interest after affirmance of a judgment not allowing interest.—Ex parte Washington & G. R. Co., D.C., 11 S.Ct. 673, 140 U.S. 91, 35 L.Ed. 339—Boyce's Ex'rs. v. Grundy, Tenn., 9 Pet. 275, 9 L.Ed. 127.

(2) However, the lower court may compute the interest allowed in an affirmed judgment.—Brown v. Van Braam, R.I., 3 Dall. 344, 1 L.Ed. 629.

(3) Where the mandate is silent as to costs, the matter is left open for determination by the lower court, according to the general rule that costs follow the judgment.—McKnight v. Craig, D.C., 6 Cranch 183, 3 L.Ed. 193—Riddle & Co. v. Mandeville & Jamesson, 6 Cranch 86, 3 L. Ed. 161.

20. U.S.—Atlantic Coast Line R. Co. v. State of Florida, Ga., 55 S.Ct. 713, 295 U.S. 301, 79 L.Ed. 1451, reversing, D.C., State of Florida v. U. S., 11 F.Supp. 36, rehearing denied Atlantic Coast Line R. Co. v. State of Florida, 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710, and State of Florida v. U. S., 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710—Baltimore & O. R. Co. v. U. S., Ill., 49 S. Ct. 492, 279 U.S. 781, 73 L.Ed. 954—Northwestern Fuel Co. v. Brock, Iowa, 11 S.Ct. 523, 139 U.S. 216, 35 L.Ed. 151.
4 C.J. p 1235 note 27.

Discretion of court
Restitution of thing received under erroneous judgment is not of mere right, but is ex gratia, resting in exercise of sound discretion, and court will not order it where justice of case does not call therefor.—St. Louis-San Francisco Ry. Co. v. Lawrence, D.C.Okl., 30 F.2d 454—State of Florida v. U. S., D.C.Ga., 11 F.Supp. 36, reversed on other grounds Atlantic Coast Line R. Co. v. State of Florida, 55 S.Ct. 713, 295 U.S. 301, 79 L.Ed. 1451, rehearing denied 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710, and State of Florida v. U. S., 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710.

Restitution pending final determination
(1) Restitution may be denied pending final determination, after decision on appeal determined interlocutory injunction was unnecessary.—St. Louis-San Francisco Ry. Co. v. Lawrence, D.C.Okl., 30 F.2d 454.

(2) Railroad, removing shops pending appeal from interlocutory injunction restraining interference therewith, will not be required to restore shops before final determination.—St. Louis-San Francisco Ry. Co. v. Lawrence, supra.

Remedies
A party entitled to restoration has the remedy of bringing an action of assumpsit for money had and received or following a summary proceeding in the original suit, both remedies being cumulative.—Ex parte Morris & Johnson, Ala., 9 Wall. 605, 19 L.Ed. 799.

One who has received money in behalf of party to the judgment cannot, however, be compelled to restore it after reversal where he has already disbursed the money, in good faith and without notice of an appeal or certiorari.—Penhallow v. Doane, N.H., 3 Dall. 54, 1 L.Ed. 507.

Right to injunction
Failure of railroad, removing shops pending appeal from interlocutory injunction restraining interference therewith, to restore status quo after reversal, did not defeat right to permanent injunction.—Lawrence v. St. Louis-San Francisco Ry. Co., Okl., 49 S.Ct. 106, 278 U.S. 228, 73 L.Ed. 282, affirming, D.C., St. Louis-San Francisco Ry. Co. v. Lawrence, 30 F.2d 458.

21. U.S.—In re Lincoln Gas & Electric Light Co., 42 S.Ct. 2, 257 U.S. 6, 66 L.Ed. 101, denying rehearing 41 S.Ct. 558, 256 U.S. 512, 65 L.Ed. 1066.
4 C.J. p 1236 note 32.

Persons not parties
(1) Strict restitution of thing taken under erroneous judgment is confined to parties to record, and is to be made although court is without jurisdiction over merits, the restitution then being mere change of possession with no adjudication on parties' rights.—State of Florida v. U. S., D. C.Ga., 11 F.Supp. 36, reversed on other grounds Atlantic Coast Line R. Co. v. State of Florida, 55 S.Ct. 713, 295 U.S. 301, 79 L.Ed. 1451, rehearing denied 55 S.Ct. 918, 295 U.S. 769, 79 L. Ed. 1710, and State of Florida v. U. S., 55 S.Ct. 918, 295 U.S. 769, 79 L.Ed. 1710.

(2) Under a supersedeas bond, given by a gas and electric light company to continue in force a temporary injunction against the enforcement of a rate ordinance pending appeal from the decree dismissing the bill, the district court can require the repayment of the overcharges to the consumers, although they were not parties to the action.—Ex parte Lincoln Gas & Electric Light Co., Neb., 41 S.Ct. 558, 256 U.S. 512, 65 L.Ed. 1066, rehearing denied 42 S.Ct. 2, 257 U.S. 6, 66 L.Ed. 101.

Assessment of damages
District court requiring bond pending appeal from interlocutory injunction could, after reversal, refuse to assess damages in restitution until final hearing.—Lawrence v. St. Louis-San Francisco Ry. Co., Okl., 49 S.Ct. 106, 278 U.S. 228, 73 L.Ed. 282, affirming, D.C., St. Louis-San Francisco Ry. Co. v. Lawrence, 30 F.2d 458.

22. U.S.—Baltimore & O. R. Co. v. U. S., Ill., 49 S.Ct. 492, 279 U.S. 781, 73 L.Ed. 954.

Particular remedies
(1) Application may be made to the lower court by motion, petition, or bill of review for correction or amendment of the judgment or decree.—In re Royall, Va., 8 S.Ct. 1392, 125 U.S. 696, 31 L.Ed. 855.

(2) In some cases, where the lower court has refused to carry into effect the mandate, the supreme court has proceeded to enter final judgment and award execution.—Tyler v. Magwire, Mo., 17 Wall. 253, 21 L.Ed. 576—Martin v. Hunter, Va., 1 Wheat. 304, 4 L.Ed. 97.

The supreme court will not recall its mandate for the purpose of reëxamining the cause on the merits,[23] or for the purpose of granting supplemental relief;[24] but the court may recall its mandate where there are clerical errors, fraud, or imposition in the judgment.[25] After a case has been decided and remanded, the supreme court has no jurisdiction to grant a rehearing, at least unless it first recalls the mandate for the purpose of reinvesting itself with jurisdiction.[26] If the court still has jurisdiction, it may modify its judgment in order to correct a clerical misprision.[27]

§ 202. Certification of Questions

a. In general
b. Questions which may be certified
c. Mode and form of certification

a. In General

Before final determination of a case, the circuit court of appeals may in its discretion certify to the supreme court any questions of law concerning which it is in doubt and desires instruction, and the supreme court may either hand down binding instructions as to such questions or require that the whole record and cause be sent up to it for its consideration.

Under statutes so providing, the circuit court of appeals is authorized, in cases within its appellate jurisdiction, to certify to the supreme court any questions or propositions of law concerning which it desires the instruction of that court for its proper decision;[28] and it is provided that on such certification the supreme court may either give its instructions on the questions and propositions certified to it,[29] which shall be binding on the circuit court of appeals in such case,[30] or require that the whole record and cause be sent up to it for its consideration,[31] in which case the supreme court must decide the whole matter in controversy in the same manner as if it had been brought to that court for review by writ of error or appeal.[32] A question may be certified, although the case is not one in which the decision of the circuit court of appeals will be final.[33]

Certification is a matter of discretion with the circuit court of appeals, and cannot be demanded by a party as a matter of right.[34] It is not to be

(3) Supreme court may enforce compliance with its mandate by mandamus.—Baltimore & O. R. Co. v. U. S., Ill., 49 S.Ct. 492, 279 U.S. 781, 73 L.Ed. 954.

(4) Party may appeal from judgment of lower court to determine whether it complies with mandate of supreme court.—Baltimore & O. R. Co. v. U. S., supra—U. S. v. Terminal R. Ass'n of St. Louis, Mo., 35 S.Ct. 408, 236 U.S. 194, 59 L.Ed. 535.

(5) Where reversal would not benefit appellant, it will not be awarded on appeal from action taken under a mandate.—Campbell v. Pratt, D.C., 2 Pet. 354, 7 L.Ed. 449.

23. U.S.—Peck v. Sanderson, Pa., 18 How. 42, 15 L.Ed. 262—Browder v. McArthur, 7 Wheat. 58, 5 L.Ed. 397.

24. U.S.—Sibbald v. U. S., Fla., 2 How. 455, 11 L.Ed. 337.

25. U.S.—Killian v. Ebbinghaus, D. C., 4 S.Ct. 698, 111 U.S. 798, 28 L. Ed. 593.

After expiration of term.

(1) It has been denied that the court has any power to recall its mandate after the expiration of the term at which the judgment was rendered and the mandate issued, in the absence of a special order continuing jurisdiction over the cause. —Le More v. U. S., Ill., 131 U.S. appendix lxxxv, 19 L.Ed. 201.

(2) However, clerk's error in directing payment of costs in mandate may be corrected after term.—St. Louis & S. F. R. Co. v. Spiller, Mo., 48 S.Ct. 96, 275 U.S. 156, 72 L.Ed. 214, denying motion 47 S.Ct. 635, 274 U.S. 304, 71 L.Ed. 1060, affirming in part and reversing in part, C.C.A., Spiller v. St. Louis & S. F. R. Co., 14 F.2d 284, reversing, D.C., North American Co. v. St. Louis & S. F. R. Co., 288 F. 612, and certiorari granted 47 S.Ct. 111, 273 U.S. 680, 71 L.Ed. 837.

26. U.S.—Peck v. Sanderson, Pa., 18 How. 42, 15 L.Ed. 262.
4 C.J. p 1246 note 14.

27. U.S.—Elizabeth v. American Nicholson Pavement Co., N.J., 131 U.S. appendix cxlviii, 24 L.Ed. 1059.

28. U.S.—In re Judith Gap Commercial Co., D.C.Mont., 1 F.2d 508, reversed on other grounds, C.C.A., 5 F.2d 307.
3 C.J. p 1000 note 14—25 C.J. p 864 note 59, p 865 note 71.
Certification of questions by circuit court of appeals to United States supreme court in copyright infringement cases see Copyright and Literary Property § 160.
Decisions under prior statutory provisions for certification of case on divided opinion in circuit court see 3 C.J. p 327 notes 10-13, p 1000 note 13-p 1003 note 44.

Jurisdiction invoked

Certification by circuit court of appeals of question of law invokes supreme court's appellate jurisdiction.—Old Colony Trust Co. v. Commissioner of Internal Revenue, Mass., 49 S.Ct. 499, 279 U.S. 716, 73 L.Ed. 918, answering questions, C.C.A., U. S. v. Boston & Maine R. R., 33 F.2d 889, question answered 49 S.Ct. 505, 279 U.S. 732, 73 L.Ed. 929, conformed to, C.C.A., 33 F.2d 890, reversing, D. C., Boston & Maine R. R. v. U. S., 23 F.2d 343, and conformed to, C.C.A., Old Colony Trust Co. v. Commissioner of Internal Revenue, 33 F.2d 891.

29. U.S.—Dillon v. Strathearn SS. Co., Fla., 39 S.Ct. 83, 248 U.S. 182, 63 L.Ed. 199.
25 C.J. p 864 note 60.

30. U.S.—Dillon v. Strathearn SS. Co., supra.

Reëxamination of facts

A circuit court of appeals which has stated facts to the supreme court as the basis for questions of law certified will not reëxamine such questions of fact on the same record after the instructions of the supreme court have been received.—A. B. Dick Co. v. Henry, N.Y., 198 F. 87, 117 C. C.A. 293—The Folmina, N.Y., 173 F. 615, 97 C.C.A. 557, reversing, D.C., 143 F. 636.

31. U.S.—Graver v. Faurot, Ill., 16 S.Ct. 799, 162 U.S. 435, 40 L.Ed. 1030.
3 C.J. p 1001 note 19 [b]—25 C.J. p 864 note 62.

Cases in which record was brought up

U.S.—Sinclair v. U. S., D.C., 49 S.Ct. 268, 279 U.S. 263, 73 L.Ed. 662.
25 C.J. p 864 note 62 [a].

32. U.S.—Loewe v. Lawlor, Conn., 28 S.Ct. 301, 208 U.S. 274, 52 L.Ed. 488, 13 Ann.Cas. 815.

33. U.S.—U. S. v. Lane, D.C., 38 S. Ct. 94, 245 U.S. 166, 62 L.Ed. 223.
25 C.J. p 865 note 67.

34. U.S.—Dickinson v. U. S., Mass., 174 F. 808, 98 C.C.A. 516—Cella v.

used as a substitute for an appeal,[35] and it should be employed only when the certifying court is in doubt about the specific question certified,[36] and the question is one of gravity and importance.[37] Thus a question of law already decided by the supreme court should not be certified to it for its opinion, notwithstanding the existence of a dissenting opinion to such decision;[38] but affirmances in the supreme court, on equal division of opinion, of rulings of the circuit courts of appeals on a question are not such authoritative determinations of the question as to preclude certification of such question to the supreme court for determination,[39] and where the decisions of several circuit courts of appeals on a particular question are conflicting, and the question has not been presented to the supreme court, the matter is one which may properly be certified to the supreme court for instructions.[40]

After a case has been decided by the circuit court of appeals it should not certify a question in relation thereto to the supreme court.[41] Where, however, the court grants a rehearing, thus vacating its decree, it has power to certify a question,[42] but the court will refuse to grant a rehearing for that purpose if convinced of the correctness of its decision.[43]

Certification by District of Columbia court of appeals. Prior to the enactment of the statute under which the court of appeals for the District of Columbia was authorized to certify questions to the supreme court in any case whatever within its appellate jurisdiction, it was held that such court could certify questions only in a case in which its judgment would be final and not susceptible to review in the supreme court on error or appeal.[44]

b. Questions Which May Be Certified

Certification to the supreme court may be had only of particular questions of law rather than of fact, which the lower court has the right to decide and which are directly involved in the controversy; and the whole case may not be sent up by certificate, for review.

Under the statute authorizing certification of questions of law, the whole case cannot be sent up by certificate,[45] even when its decision turns on a matter of law only,[46] for an attempt to send up the whole case before judgment or decree would be invoking the unlawful exercise of original jurisdiction by the supreme court and could not be sustained, even though congress should expressly authorize it.[47] However, no objection to the submission of a definite and clean cut question of law

Brown, Mo., 144 F. 742, 75 C.C.A. 608, certiorari denied 26 S.Ct. 766, 202 U.S. 620, 50 L.Ed. 1174.

Where record was short and questions raised as to jurisdiction of federal district court to compel action by national railroad adjustment board were as clear and explicit as they could have been presented, in form of questions certified to supreme court, circuit court of appeals refused to certify questions and left it to supreme court to determine whether certiorari should be granted.—Delaware & Hudson R. Corporation v. Williams, C.C.A.Ill., 129 F.2d 11.

35. U.S.—Sigafus v. Porter, N.Y., 85 F. 689, 29 C.C.A. 391.

36. U.S.—Williams v. Order of Commercial Travelers of America, C.C. A.Ky., 41 F.2d 745, certiorari denied Williams v. Order of United Commercial Travelers of America, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 774—Pressed Steel Car Co. v. Union Pac. R. Co., C.C.A.N.Y., 297 F. 788.
3 C.J. p 1000 note 14 [c]—25 C.J. p 865 note 74.
Necessity under prior statutes for actual division of opinion within circuit court see 3 C.J. p 1003 notes 36, 43, 44.

37. U.S.—Ex parte Lau Ow Bew, Cal., 12 S.Ct. 43, 141 U.S. 583, 25 L.Ed. 868.

38. U.S.—Glynn v. Krippner, C.C.A. Minn., 60 F.2d 406, reversing, D.C., 47 F.2d 281.

39. U.S.—Hertz v. Woodman, 30 S. Ct. 621, 218 U.S. 205, 54 L.Ed. 1001.

40. U.S.—U. S. v. Woo Jan, Ky., 250 F. 595, 162 C.C.A. 611.

41. U.S.—Cella v. Brown, Mo., 144 F. 742, 75 C.C.A. 608, certiorari denied 26 S.Ct. 766, 202 U.S. 620, 50 L.Ed. 1174.
25 C.J. p 865 note 79.
Decisions under prior statutes see 3 C.J. p 1003 notes 37–40.

42. U.S.—German Ins. Co. v. Hearne, Pa., 118 F. 134, 55 C.C.A. 84.
25 C.J. p 865 note 80.

43. U.S.—German Ins. Co. v. Hearne, supra.

44. U.S.—Heald v. District of Columbia, App.D.C., 41 S.Ct. 42, 254 U.S. 20, 65 L.Ed. 106—U. S. v. Lane, D.C., 38 S.Ct. 94, 245 U.S. 166, 62 L.Ed. 223.

Jurisdiction

Under Jud.Code § 250, Comp.St. § 1227, providing, relative to writs of error to review judgments of the court of appeals of the District of Columbia, that when the case is not otherwise reviewable the question of jurisdiction alone shall be certified to the supreme court for decision, where a plea to the jurisdiction clearly raises the question, a certificate would add nothing to what the record shows.—Marine Ry. & Coal Co. v. U. S., 42 S.Ct. 32, 257 U.S. 47, 66 L. Ed. 124, affirming 265 F. 437, 49 App. D.C. 285.

45. U.S.—National Labor Relations Board v. White Swan Co., 61 S.Ct. 751, 313 U.S. 23, 85 L.Ed. 1165—Toledo Scale Co. v. Computing Scale Co., C.C.A.Ill., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L.Ed. 1072, and Fidelity & Deposit Co. v. Computing Scale Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073, affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719.
3 C.J. p 1001 note 16—25 C.J. p 865 note 76.

Certification by court of claims which embraces whole case cannot be entertained by supreme court.—Wheeler Lumber Bridge & Supply Co. of Des Moines, Iowa v. U. S., Ct. Cl., 50 S.Ct. 419, 281 U.S. 572, 74 L. Ed. 1047.

46. U.S.—News Syndicate Co. v. New York Cent. R. Co., 48 S.Ct. 39, 275 U.S. 179, 72 L.Ed. 225, motion denied 48 S.Ct. 206, 72 L.Ed. 1016—Biddle v. Luvisch, Kan., 45 S.Ct. 88, 266 U.S. 173, 69 L.Ed. 229, dismissing certified questions, C.C.A., 287 F. 699—Graver v. Faurot, Ill., 16 S.Ct. 799, 162 U.S. 435, 40 L.Ed. 1030.
3 C.J. p 1001 notes 17–20—25 C.J. p 865 note 76.

47. U.S.—Baltimore & O. R. Co. v. Interstate Commerce Commission,

arises out of the fact that the answer may be decisive of the whole controversy.[48]

Only questions of law, and not questions of fact or questions of mixed law and fact, can be certified.[49] The question must be such that the answer will aid the court in the determination of the case,[50] and a proposition which is abstract or which may not arise in the controversy should not be certified.[51] The circuit court of appeals cannot ask for instructions on an issue which it has no right to decide.[52] Under a prior statute authorizing the certification of questions on which there was a division of opinion in the circuit court, the supreme court could not consider questions relating to matters of pure discretion in the trial court;[53] but where a motion resting in the discretion of the court presented for consideration a question going directly to the merits, the decision of which would determine the points in controversy, the reviewing court would nevertheless consider the question on a certificate of division.[54]

c. Mode and Form of Certification

Certification of questions should be made in the proper form and mode; questions of law must be clearly and distinctly set forth, together with the fundamental facts on which they depend, so that they can be definitely answered.

The proper mode and form of certification of questions to the supreme court must be followed in order to obtain consideration of such questions by that court;[55] but even though a certificate from the circuit court of appeals is deficient in specification and somewhat wanting in precision, it is the duty of the supreme court to answer the questions, where the matters not specified are not in dispute and the want of precision is not so fundamental as to mislead or confuse.[56] Questions which are themselves contingent on another question which the court declines to answer need not be answered.[57]

Md., 30 S.Ct. 86, 215 U.S. 216, 54 L. Ed. 164.

48. U.S.—U. S. v. Mayer, N.Y., 35 S. Ct. 16, 235 U.S. 55, 59 L.Ed. 129.
25 C.J. p 865 note 84.

Certificate from court of claims

(1) That decision of certified question will be decisive of case affords no ground for declining to entertain certificate from court of claims.—Indian Motocycle Co. v. U. S., Ct.Cl., 51 S.Ct. 601, 283 U.S. 570, 75 L.Ed. 1277.

(2) Certificate from court of claims was not objectionable as embracing the whole case.—Wheeler Lumber Bridge & Supply Co. of Des Moines, Iowa v. U. S., Ct.Cl., 50 S.Ct. 419, 281 U.S. 572, 74 L.Ed. 1047.

49. U.S.—Pflueger v. Sherman, 55 S. Ct. 10, 293 U.S. 55, 79 L.Ed. 193—Toledo Scale Co. v. Computing Scale Co., C.C.A.Ill., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U. S. 579, 66 L.Ed. 1072, and Fidelity & Deposit Co. v. Computing Scale Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073, affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719.
3 C.J. p 1002 notes 25, 26—25 C.J. p 865 note 82.

50. U.S.—American Bond & Mortgage Co. v. U. S., 51 S.Ct. 118, 282 U.S. 374, 75 L.Ed. 395—White v. Johnson, 51 S.Ct. 115, 282 U.S. 367, 75 L.Ed. 388—Lederer v. McGarvey, Pa., 46 S.Ct. 534, 271 U.S. 342, 70 L.Ed. 977.
25 C.J. p 865 note 83.
Decisions under prior statutes see 3 C.J. p 1001 notes 21–24.

51. U.S.—Lowden v. Northwestern Nat. Bank & Trust Co. of Minneapolis, Minn., 56 S.Ct. 696, 298 U.S. 160, 80 L.Ed. 1114—Triplett v. Lowell, Md., 56 S.Ct. 645, 297 U.S. 638, 80 L.Ed. 949, affirming, C.C.A., Lowell v. Triplett, 77 F.2d 556, certiorari denied Triplett v. Lowell, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441, vacated 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, certiorari granted 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409—Lederer v. McGarvey, Pa., 46 S.Ct. 534, 271 U.S. 342, 70 L.Ed. 977.

52. U.S.—Billings v. U. S., N.Y., 34 S.Ct. 421, 232 U.S. 261, 58 L.Ed. 596.
25 C.J. p 865 note 85.

53. U.S.—U. S. v. Rosenburgh, N.Y., 7 Wall. 580, 19 L.Ed. 263.
3 C.J. p 1002 note 27.

54. U.S.—U. S. v. Thomas, Wis., 14 S.Ct. 426, 151 U.S. 577, 38 L.Ed. 276.
3 C.J. p 1002 note 28.

55. U.S.—Biddle v. Luvisch, Kan., 45 S.Ct. 88, 266 U.S. 173, 69 L.Ed. 229, dismissing certified questions, C.C. A., 287 F. 699.

Rules under former statutes applicable

Certificates by the circuit court of appeals are governed by the same general rules as were formerly applied to certificates of division of opinion of the judges of the circuit court.—Baltimore & O. R. Co. v. Interstate Commerce Commission, Md., 30 S.Ct. 86, 215 U.S. 216, 54 L.Ed. 164—25 C.J. p 866 note 88—3 C.J. p 1000 note 14 [b].

Statement that instruction is desired

In order to invoke the exercise of the jurisdiction of the supreme court in the instruction of the circuit court of appeals as to the proper decision of questions or propositions of law, the certificate must show that the instruction of the supreme court as to the proper decision of such questions or propositions is desired.—Columbus Watch Co. v. Robbins, Ohio, 13 S.Ct. 594, 148 U.S. 266, 37 L. Ed. 445.

Certified questions considered proper and answered

U.S.—Scripps-Howard Radio v. Federal Communications Commission, D.C., 62 S.Ct. 875, 316 U.S. 4, 86 L.Ed. 1229—Gouled v. U. S., C.C.A. N.Y., 264 F. 839, certified questions answered 41 S.Ct. 261, 255 U.S. 298, 65 L.Ed. 647, answers to certified questions conformed to, C.C.A., 273 F. 506.
25 C.J. p 866 note 90.

Certificates dismissed as insufficient

U.S.—State-Planters' Bank & Trust Co. v. Parker, 51 S.Ct. 463, 283 U.S. 332, 75 L.Ed. 1101, dismissing certificate, C.C.A., 50 F.2d 156—American Bond & Mortgage Co. v. U. S., Ill., 51 S.Ct. 118, 282 U.S. 374, 75 L.Ed. 395—White v. Johnson, Ill., 51 S.Ct. 115, 282 U.S. 367, 75 L.Ed. 388.
25 C.J. p 866 note 91.

Certificates held defective in part

U.S.—Quinlan v. Green County, Ky., 27 S.Ct. 505, 205 U.S. 410, 51 L.Ed. 860.
25 C.J. p 866 note 92.

56. U.S.—Boston Store v. American Graphophone Co., Ill., 38 S.Ct. 257, 246 U.S. 8, 62 L.Ed. 551, Ann.Cas. 1918C 447.

57. U.S.—Lowden v. Northwestern Nat. Bank & Trust Co. of Minneapolis, Minn., 56 S.Ct. 696, 298 U.S. 160, 80 L.Ed. 1114—Triplett v. Lowell, Md., 56 S.Ct. 645, 297 U.S. 638, 80 L.Ed. 949, affirming, C.C.A., Lowell v. Triplett, 77 F.2d 556, certiorari denied Triplett v. Lowell, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441, vacated 56 S.Ct. 306, 296 U.S.

The certificate should be carefully and precisely prepared,[58] and each question certified should be distinctly and separately stated.[59] The question certified must be a distinct point or proposition of law and must be stated clearly, so that it can be definitely answered.[60] The supreme court will not undertake to answer a question of objectionable generality,[61] and it will not review proceedings, facts, and circumstances for the purpose of deciding a variety of preliminary questions in order to reach and decide an ultimate question submitted.[62] The certificate should state the fundamental facts on which the question of law arises,[63] but not the evidential facts from which the fundamental facts are found.[64] Where questions certified are not apposite to the facts stated in the certificate, a dismissal is proper.[65]

2. Reveiw of Decisions of Circuit Court of Appeals

§ 203. By Appeal

Appeals to the supreme court from decisions of circuit courts of appeals lie only in a narrow class of cases defined by statute.

The jurisdiction of the supreme court to review by appeal judgments or decrees of the circuit courts of appeals has been materially changed by the Act of February 13, 1925, amending Judicial Code § 240, 28 U.S.C.A. § 347. Under that act appeals to the supreme court from decisions of the circuit courts of appeals lie only from final judgments or decrees of such courts[66] in cases where the validity

570, 80 L.Ed. 402, certiorari granted 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409—American Bond & Mortgage Co. v. U. S., Ill., 51 S.Ct. 118, 282 U.S. 374, 75 L.Ed. 395—White v. Johnson, Ill., 51 S.Ct. 115, 282 U.S. 367, 75 L.Ed. 388.

58. U.S.—Boston Store v. American Graphophone Co., Ill., 38 S.Ct. 257, 246 U.S. 8, 62 L.Ed. 551, Ann.Cas. 1918C 447.

59. U.S.—Pflueger v. Sherman, 55 S.Ct. 10, 293 U.S. 55, 79 L.Ed. 193—News Syndicate Co. v. New York Cent. R. Co., 48 S.Ct. 39, 275 U.S. 179, 72 L.Ed. 225, motion denied 48 S.Ct. 206, 72 L.Ed. 1016.

3 C.J. p 1002 note 32—25 C.J. p 866 note 95.

60. U.S.—News Syndicate Co. v. New York Cent. R. Co., 48 S.Ct. 39, 275 U.S. 179, 72 L.Ed. 225, motion denied 48 S.Ct. 206, 72 L.Ed. 1016.

3 C.J. p 1002 note 30—25 C.J. p 866 note 94.

Categorical answer

The supreme court will not answer questions which are incapable of being categorically answered and which would require it to reframe the questions or give qualified answers to them.—Atlas Life Ins. Co. v. W. I. Southern, Inc., Okl., 59 S.Ct. 657, 306 U.S. 563, 83 L.Ed. 987, conformed to, C.C.A., 105 F.2d 668, modifying, D.C., 23 F.Supp. 334.

61. U.S.—National Labor Relations Board v. White Swan Co., 61 S.Ct. 751, 313 U.S. 23, 85 L.Ed. 1165—Lowden v. Northwestern Nat. Bank & Trust Co. of Minneapolis, Minn., 56 S.Ct. 696, 298 U.S. 160, 80 L.Ed. 1114—Pflueger v. Sherman, 55 S.Ct. 10, 293 U.S. 55, 79 L.Ed. 193—State-Planters' Bank & Trust Co. v. Parker, 51 S.Ct. 463, 283 U.S. 332, 75 L.Ed. 1101, dismissing certificate, C.C.A., 50 F.2d 156—American Bond & Mortgage Co. v. U. S., Ill., 51 S.Ct. 118, 282 U.S. 374, 75 L.Ed. 395—White v. Johnson, Ill., 51 S.Ct. 115, 282 U.S. 367, 75 L.Ed. 388—U. S. v. Stafoff, Mo., 43 S.Ct. 197, 260 U.S. 477, 67 L.Ed. 358, affirming, D.C., 268 F. 417, and modifying U. S. v. Remus, 283 F. 685, and conforming to answers to certified questions, C.C.A.Ariz., Brooks v. U. S., 289 F. 1020.

3 C.J. p 1002 note 31.

Different answers

Court is not required to answer questions which admit of one answer under one set of circumstances and a different answer under another, neither of which is stated to be the basis of the questions certified.—Atlas Life Ins. Co. v. W. I. Southern, Inc., Okl., 59 S.Ct. 657, 306 U.S. 563, 83 L.Ed. 987, conformed to, C.C.A., 105 F.2d 668, modifying, D.C., 23 F.Supp. 334—Lowden v. Northwestern Nat. Bank & Trust Co. of Minneapolis, Minn., 56 S.Ct. 696, 298 U.S. 160, 80 L.Ed. 1114—Triplett v. Lowell, Md., 56 S.Ct. 645, 297 U.S. 638, 80 L.Ed. 949, affirming, C.C.A., Lowell v. Triplett, 77 F.2d 556, certiorari denied Triplett v. Lowell, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441, vacated 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, certiorari granted 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409—American Bond & Mortgage Co. v. U. S., Ill., 51 S.Ct. 118, 282 U.S. 374, 75 L.Ed. 395—White v. Johnson, Ill., 51 S.Ct. 115, 282 U.S. 367, 75 L.Ed. 388.

62. U.S.—Pflueger v. Sherman, 55 S.Ct. 10, 293 U.S. 55, 79 L.Ed. 193.

63. U.S.—Lowden v. Northwestern Nat. Bank & Trust Co. of Minneapolis, Minn., 56 S.Ct. 696, 298 U.S. 160, 80 L.Ed. 1114—State-Planters' Bank & Trust Co. v. Parker, 51 S.Ct. 463, 283 U.S. 332, 75 L.Ed. 1101, dismissing certificate, C.C.A., 50 F.2d 156—Reinecke v. Gardner, 48 S.Ct. 472, 277 U.S. 239, 72 L.Ed. 866.

3 C.J. p 1002 note 33—25 C.J. p 866 note 96.

Other statement of rule

The court will not answer certified questions covering unstated facts lurking in the record.—Atlas Life Ins. Co. v. W. I. Southern, Inc., Okl., 59 S.Ct. 657, 306 U.S. 563, 83 L.Ed. 987, conformed to, C.C.A., 105 F.2d 668, modifying, D.C., 23 F.Supp. 334—Triplett v. Lowell, Md., 56 S.Ct. 645, 297 U.S. 638, 80 L.Ed. 949, affirming, C.C.A., Lowell v. Triplett, 77 F.2d 556, certiorari denied Triplett v. Lowell, 56 S.Ct. 142, 296 U.S. 621, 80 L.Ed. 441, vacated 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, certiorari granted 56 S.Ct. 306, 296 U.S. 570, 80 L.Ed. 402, rehearing denied 56 S.Ct. 745, 298 U.S. 691, 80 L.Ed. 1409.

Construction of questions

Questions certified to supreme court must be read in light of preliminary statement certifying facts out of which questions have arisen.—Hill v. U. S. ex rel. Wampler, Pa., 56 S.Ct. 760, 298 U.S. 460, 80 L.Ed. 1283.

64. U.S.—Sigafus v. Porter, N.Y., 85 F. 689, 29 C.C.A. 391.

Statement must consist of ultimate facts, leaving nothing but a conclusion of law to be drawn.—Jewell v. Knight, Ind., 8 S.Ct. 193, 123 U.S. 426, 31 L.Ed. 190—Sigafus v. Porter, N.Y., 85 F. 689, 29 C.C.A. 391.

65. U.S.—Selm v. Hurd, Ind., 34 S.Ct. 406, 232 U.S. 420, 58 L.Ed. 667, certified questions answered 34 S.Ct. 409, 232 U.S. 428, 58 L.Ed. 670.

66. U.S.—Slaker v. O'Connor, Neb.,

of a state statute is drawn in question on the ground of repugnance to the constitution, treaties, or laws of the United States, and the decision is against its validity.[67] Further provision is also made under the Act of August 24, 1937, c 754 § 2, 28 U.S.C.A. § 349a, for a direct appeal to the supreme court in any proceeding in any federal court to which the United States or its agency, officer, or employee, as such, is a party and in which the decision is against the constitutionality of an act of congress.[68] In all other cases review by the supreme court, if it be had, must be pursuant to a writ of certiorari duly applied for and granted, as appears infra § 204.

In cases where an appeal lies under the Act of February 13, 1925, a litigant may, at his election, either appeal or apply for a writ of certiorari;[69] but if he appeals in such a case a review on certiorari cannot be allowed at the instance of such party, see infra § 204 d, and the review on such appeal will be restricted to an examination and decision of the federal question presented in the case.[70]

Writ of error. While the Act of February 13, 1925, 28 U.S.C.A. § 347, provided for review by the supreme court of decisions of the circuit court of appeals in the class of cases heretofore stated either by appeal or by writ of error, under the Act of January 31, 1928, c 14 § 1, 28 U.S.C.A. § 861a, the writ of error has been abolished and all relief which formerly could be obtained by that writ is now obtainable by appeal.

Former practice. Prior to the Act of February 13, 1925, 28 U.S.C.A. § 347, considered above, judgments and decrees of the circuit court of appeals were not reviewable by the supreme court on appeal or writ of error where the statutes made such judgments or decrees final.[71] Under the statutes, judgments and decrees of the circuit court of appeals were final, and hence not subject to review on appeal or writ of error, in all cases in which the jurisdiction was dependent entirely on the opposite parties to the suit or controversy being aliens and citizens of the United States[72] or citizens of different states,[73] and, according to the decisions

49 S.Ct. 158, 278 U.S. 188, 73 L. Ed. 258, dismissing appeal, C.C.A., O'Connor v. Slaker, 22 F.2d 147.

Certification of questions to supreme court by circuit courts of appeals see supra § 202.

Review by appeal of decisions of circuit courts of appeals in:

- Admiralty cases see Admiralty § 170.
- Bankruptcy cases see Bankruptcy § 625.
- Cases arising under copyright laws see Copyright and Literary Property § 160.

Appeals pending at time of enactment

The act of 1925 expressly left all appeals which were then pending in the supreme court to be disposed of under the old law.—Smith v. McCullough, Okl., 46 S.Ct. 338, 270 U. S. 456, 70 L.Ed. 682, reversing, C.C.A., 285 F. 698—Del Pozo v. Wilson Cypress Co., Fla., 46 S.Ct. 57, 269 U. S. 82, 70 L.Ed. 172, affirming, C.C.A., 299 F. 261, and petition denied 47 S.Ct. 235, 269 U.S. 82, 70 L.Ed. 172.

67. U.S.—Bradford Electric Light Co. v. Clapper, N.H., 52 S.Ct. 118, 284 U.S. 221, 76 L.Ed. 254, dismissing appeal and granting certiorari, C.C.A., 51 F.2d 992, reversed 52 S.Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A.L.R. 696—Slaker v. O'Connor, Neb., 49 S.Ct. 158, 278 U.S. 188, 73 L.Ed. 258, dismissing appeal, C.C.A., O'Connor v. Slaker, 22 F.2d 147.

Decisions merely applying state law

(1) An appeal does not lie from a decision of the circuit court of appeals which merely applied state law.—Baxter v. Continental Casualty Co., Mo., 52 S.Ct. 2, 284 U.S. 578, 76 L. Ed. 502, dismissing appeal, C.C.A., 48 F.2d 467.

(2) Thus an appeal does not lie from a decision which merely applied state, and not federal, law in holding order of state public service commission invalid.—Public Service Commission of Indiana v. Batesville Telephone Co., Ind., 52 S.Ct. 1, 284 U.S. 6, 76 L.Ed. 135, dismissing appeal, C.C.A., Batesville Telephone Co. v. Public Service Commission of Indiana, 46 F.2d 226, which reversed, D.C., 38 F.2d 511.

68. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, and mandate conformed to 23 F.Supp. 998, reversed on other grounds, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

69. U.S.—Bradford Electric Light Co. v. Clapper, N.H., 52 S.Ct. 118, 284 U.S. 221, 76 L.Ed. 254, dismissing appeal and granting certiorari, C.C.A., 51 F.2d 992, reversed 52 S.Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A.L.R. 696.

Review by certiorari in general see infra § 204.

70. U.S.—Public Service Commission of Indiana v. Batesville Telephone Co., Ind., 52 S.Ct. 1, 284 U.S. 6, 76 L. Ed. 135, dismissing appeal, C.C.A., Batesville Telephone Co. v. Public Service Commission of Indiana, 46 F.2d 226, which reversed, D.C., 38 F.2d 511.

71. U.S.—Begg v. City of New York, N.Y., 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946, dismissing appeal, C.C.A., Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, 266 F. 625.

25 C.J. p 871 note 40.

Decree adjudicating question of jurisdiction

Under Jud.Code §§ 128, 238, Comp. St. §§ 1120, 1215, where relator chose to go to the circuit court of appeals, where he presented only the question of jurisdiction, the judgment of that court was final, and an appeal could not be entertained by the supreme court.—State of Ohio ex rel. Seney v. Swift & Co., Ohio, 43 S.Ct. 22, 260 U.S. 146, 67 L.Ed. 176, dismissing appeal, C.C.A., 270 F. 141, certiorari denied 42 S.Ct. 47, 257 U.S. 633, 66 L.Ed. 407.

Review by certiorari of judgments or decrees made final by statute see infra § 204 a.

72. U.S.—Republic of Colombia v. Cauca Co., W.Va., 23 S.Ct. 704, 190 U.S. 524, 47 L.Ed. 1159.

25 C.J. p 869 notes 18–22.

73. U.S.—Baltimore & O. R. Co. v. City of Parkersburg, W.Va., 45 S. Ct. 382, 268 U.S. 35, 69 L.Ed. 834, reversing, C.C.A., City of Parkersburg v. Baltimore & O. R. Co., 296 F. 74—Barnett v. Kunkle, 44 S.Ct. 254, 264 U.S. 16, 68 L.Ed. 539, dismissing appeal, C.C.A., Barnett v. Kunkel, 283 F. 24, certiorari denied 43 S.Ct. 97, 260 U.S. 738, 67 L.

on the subject, in all cases arising under[74] the patent,[75] trade-mark,[76] revenue,[77] or criminal[78] laws; in all cases arising under the copyright laws, see Copyright and Literary Property § 160; in all admiralty cases, see Admiralty § 170; in all proceedings and causes arising under the federal Employers' Liability Act,[79] the Safety Appliance Act,[80] or the Bankruptcy Act, see Bankruptcy § 625; and in all cases originating in the courts of certain territories or outlying possessions.[81] In cases in which the judgment or decree of the circuit court of appeals was not thus made final by statute, an appeal or writ of error would lie under § 241 of the Judicial Code,[82] provided the matter in controversy, exclusive of costs, exceeded one thousand dollars.[83] Accordingly, under this provision, an appeal or writ of error could be had, as a rule, where there was a federal question involved,[84] except in certain specified classes of cases, heretofore considered, involving federal questions, notwithstanding there was also a diversity of citizenship between the parties,[85] provided the federal question involved was sub-

Ed. 489—Davis v. Slocomb, Wash., 44 S.Ct. 59, 263 U.S. 158, 68 L.Ed. 226, dismissing error, C.C.A., 288 F. 352, certiorari denied 44 S.Ct. 6, 263 U.S. 700, 68 L.Ed. 513—Begg v. City of New York, N.Y., 43 S. Ct. 513, 262 U.S. 196, 67 L.Ed. 946, dismissing appeal, C.C.A., Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, 266 F. 625—Weiland v. Pioneer Irr. Co., Colo., 42 S.Ct. 568, 259 U.S. 498, 66 L.Ed. 1027, affirming Pioneer Irr. Co. v. Board of Com'rs of Yuma County, Colo., 251 F. 264, 163 C.C.A. 420—Colorado Cent. Consolidated Mining Co. v. Turck, Colo., 14 S.Ct. 35, 150 U.S. 138, 37 L.Ed. 1030.

25 C.J. p 869 note 23.

74. **What constituted a case "arising under"** one of the classes of laws specified.—Hunt v. U. S., Mo., 17 S. Ct. 609, 166 U.S. 424, 41 L.Ed. 1063—25 C.J. p 869 note 24.

75. U.S.—U. S. v. American Bell Tel. Co., Mass., 16 S.Ct. 69, 159 U.S. 548, 40 L.Ed. 255.

25 C.J. p 869 note 25.

76. U.S.—United Drug Co. v. Theodore Rectanus Co., 39 S.Ct. 48, 248 U.S. 90, 63 L.Ed. 141, affirming 226 F. 545, reversing, D.C., 206 F. 570.

25 C.J. p 870 note 26.

77. U.S.—Anglo-Californian Bank v. U. S., Cal., 20 S.Ct. 19, 175 U.S. 37, 44 L.Ed. 64.

25 C.J. p 870 note 28.

78. U.S.—MacFadden v. U. S., N.J., 29 S.Ct. 490, 213 U.S. 288, 53 L.Ed. 801.

25 C.J. p 870 note 29.

79. **Rule prior to statute** making decisions in such cases final.—Chicago, R. I. & P. R. Co. v. Brown, Ill., 33 S.Ct. 840, 229 U.S. 317, 57 L. Ed. 1204—25 C.J. p 870 notes 35, 38.

80. **Rule prior to statute** making decisions in such cases final.—Chicago Junction R. Co. v. King, Ill., 32 S. Ct. 79, 222 U.S. 222, 56 L.Ed. 173—25 C.J. p 870 notes 37, 38.

81. **Decisions in cases from the district court of Alaska** were final and not reviewable by the supreme court on appeal or writ of error, even though constitutional questions were involved.—Alaska Pac. Fisheries v. Alaska, 39 S.Ct. 208, 249 U.S. 53, 63 L.Ed. 474, followed in Alaska Salmon Co. v. Alaska, 39 S.Ct. 210, 249 U.S. 62, 63 L.Ed. 478—25 C.J. p 871 note 42.

Cases originating in courts of Hawaii or Puerto Rico

(1) Decisions in cases from the supreme court of Hawaii or of Puerto Rico where there was no federal question and no diversity of citizenship were not reviewable by the supreme court on appeal or writ of error.—Inter-Island Steam Nav. Co. v. Ward, Hawaii, 37 S.Ct. 1, 242 U.S 1, 61 L.Ed. 113—25 C.J. p 871 note 43

(2) And decisions in cases from the federal district court for Puerto Rico were likewise not reviewable by the supreme court on appeal.—El Banco Popular De Economias y Prestamos De San Juan, P. R., v. Wilcox, Puerto Rico, 41 S.Ct. 312, 255 U.S. 72, 65 L.Ed. 510, dismissing appeal, C.C.A., Wilcox v. El Banco Popular De Economias y Prestamos De San Juan, P. R., 255 F. 442.

82. U.S.—Del Pozo v. Wilson Cypress Co., Fla., 46 S.Ct. 57, 269 U. S. 82, 70 L.Ed. 172, affirming, C.C.A., 299 F. 261, and petition denied 47 S.Ct. 235, 269 U.S. 82, 70 L.Ed. 172.

3 C.J. p 374 note 66, p 587 note 42—25 C.J. p 867 notes 2–4.

Where a suit was dependent and ancillary, jurisdiction to entertain it was referable to that invoked and existing in the action out of which it arose, and if an appeal would lie in such action an appeal would also lie in the ancillary suit.—Eichel v. U. S. Fidelity & Guaranty Co., Pa., 38 S.Ct. 47, 245 U.S. 102, 62 L.Ed. 177.

83. U.S.—Del Pozo v. Wilson Cypress Co., Fla., 46 S.Ct. 57, 269 U.S. 82, 70 L.Ed. 172, affirming, C.C.A., 299 F. 261, and petition denied 47 S.Ct. 235, 269 U.S. 82, 70 L.Ed. 172.

25 C.J. p 864 note 48, p. 867 note 5, p. 871 note 39.

A stipulation as to the amount in controversy is not binding on the court but it may be considered in connection with other matters appearing in the record.—U. S. v. Trans-Missouri Freight Assoc., Kan., 17 S.Ct. 540, **166** U.S. 290, 41 L.Ed. 1007.

84. U.S.—Duignan v. U. S., N.Y., 47 S.Ct. 566, 274 U.S. 195, 71 L.Ed. 996, affirming, C.C.A., U. S. v. Duignan, 4 F.2d 983—Smith v. McCullough, Okl., 46 S.Ct. 338, 270 U.S. 456, 70 L.Ed. 682, reversing, C.C.A., 285 F. 698—Sperry Oil & Gas Co. v. Chisholm, 44 S.Ct. 372, 264 U. S. 488, 68 L.Ed. 803, affirming in part and reversing in part, C.C.A., 282 F. 93, affirming, D.C., Chisholm v. Creek & Indiana Development Co., 273 F. 589, and certiorari granted Sperry Oil & Gas Co. v. Chisholm, 43 S.Ct. 363, 261 U.S. 611, 67 L.Ed. 826—Weiland v. Pioneer Irr. Co., 42 S.Ct. 568, 259 U.S. 498, 66 L.Ed. 1027, affirming Pioneer Irr. Co. v. Board of Com'rs of Yuma County, Colo., 251 F. 264, 163 C.C.A. 420.

25 C.J. p 867 note **6**.

85. U.S.—Fidelity Nat. Bank & Trust Co. of Kansas City v. Swope, Mo., 47 S.Ct. 511, 274 U.S. 123, 71 L.Ed. 959, reversing, C.C.A., 2 F. 2d 676, affirming, D.C., Abernathy v. Fidelity Nat. Bank & Trust Co., 274 F. 801, motion denied Fidelity Nat. Bank & Trust Co. v. Swope, 45 S.Ct. 636.

25 C.J. p 868 note 8.

Limitations

(1) The text rule, however, was subject to the limitation that, where jurisdiction was originally invoked on the sole ground of diverse citizenship, the finality of the judgment of the circuit court of appeals was not affected by the fact that another ground of federal jurisdiction developed in the course of the proceedings.—Colorado Cent. Consolidated Mining Co. v. Turck, Colo., 14 S. Ct. 35, 150 U.S. 138, 37 L.Ed. 1030—25 C.J. p 868 note 9.

(2) And a similar limitation applied in cases of intervention, the governing status of the case being that existing when the action was brought.—Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946, dismissing appeal, C.C.A., Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, 266 F. 625—25 C.J. p 868 note 10.

stantial and meritorious.[86] In order to be reviewable by the supreme court, however, the decision below was required to be of such final[87] character[88] as to be the subject of appeal or writ of error under the general rules governing such review.

Where the circuit court of appeals erroneously took jurisdiction and decided an appeal to it in a case which was directly reviewable by the supreme court, the latter court had jurisdiction to review the judgment of the circuit court of appeals to the extent of reversing it with directions to dismiss the appeal,[89] or the supreme court could treat the case as a direct appeal.[90]

Appellate procedure in general in the supreme court is considered supra § 201.

§ 204. By Certiorari

a. In general
b. When writ lies
c. Who may institute proceedings
d. Appeal and certiorari in same case
e. Cross writ of certiorari
f. Proceedings to obtain writ
g. Effect of grant or refusal of writ
h. Dismissal of writ
i. Review on certiorari
j. Determination and disposition of cause
k. Costs

a. In General

By certiorari the supreme court may require any cause in the circuit court of appeals to be certified to it for determination.

Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 28 U.S.C.A. § 347, provides that "in any case . . . in a circuit court of appeals . . . it shall be competent for the Supreme Court . . . upon the petition of any party thereto . . . to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted . . . appeal." Under this statute, which as amended eliminated certain former restrictions on certiorari powers of the supreme court,[91] extensive power is

86. U.S.—Weiland v. Pioneer Irr. Co., Colo., 42 S.Ct. 568, 259 U.S. 498, 66 L.Ed. 1027, affirming Pioneer Irr. Co. v. Board of Com'rs of Yuma County, Colo., 251 F. 264, 163 C.C.A. 420.
25 C.J. p 868 note 11.

The mere assertion of a claim of right under federal law was insufficient to warrant a review by the supreme court by appeal or writ of error:

(1) Where the claim was of a frivolous character.—Weiland v. Pioneer Irr. Co., Colo., 42 S.Ct. 568, 259 U.S. 498, 66 L.Ed. 1027, affirming Pioneer Irr. Co. v. Board of Com'rs of Yuma County, Colo., 251 F. 264, 163 C.C.A. 420—G. & C. Merriam Co. v. Syndicate Publishing Co., N.Y., 35 S.Ct. 708, 237 U.S. 618, 59 L.Ed. 1148, dismissing appeal 207 F. 515, 125 C.C.A. 177.

(2) Where the right claimed had been denied by former adjudications of the supreme court.—G. & C. Merriam Co. v. Syndicate Publishing Co., supra—25 C.J. p 868 note 13.

87. U.S.—Moore v. New York Cotton Exchange, N.Y., 46 S.Ct. 367, 270 U.S. 593, 70 L.Ed. 750, 45 A.L.R. 1370, affirming, C.C.A., 296 F. 61, affirming, D.C., 291 F. 681—Smith v. McCullough, 46 S.Ct. 338, 270 U.S. 456, 70 L.Ed. 682, reversing, C.C.A., 285 F. 698—Gulf Refining Co. of Louisiana v. U. S., La., 46 S.Ct. 52, 269 U.S. 125, 47 L.Ed. 195, affirming in part and reversing in part, C.C.A., U. S. v. Norvell, 298 F. 281—Arnold v. U. S. for use of W. B. Guimarin & Co., S.C., 44 S.Ct. 144, 263 U.S. 427, 68 L.Ed. 371, dismissing error, C.C.A., 280 F. 338.
25 C.J. p 869 note 14.

88. **Discretionary orders or decrees** not appealable in absence of abuse of discretion.—Conboy v. First Nat. Bank of Jersey City, N.Y., 27 S.Ct. 50, 203 U.S. 141, 51 L.Ed. 128—3 C.J. p 596 note 1 [a] (21).

89. U.S.—New York v. Consolidated Gas Co. of New York, N.Y., 40 S.Ct. 511, 253 U.S. 219, 64 L.Ed. 870.

90. **Case treated as direct appeal**
Where an appeal should have been taken to the supreme court, but was erroneously taken to the circuit court of appeals, from whose decision appeal was then taken to the supreme court, it was held that since, if the supreme court should reverse the decree of the circuit court of appeals, such reversal would necessarily be accompanied by a direction to that court to transfer the case to the supreme court under the act of Sept. 14, 1922, the supreme court, instead of remanding the case to have it transferred back, would treat the case as before it by appeal from the district court, and dispose of it as would have been done, had the circuit court of appeals formally transferred it to the supreme court.—Wagner Electric Mfg. Co. v. Lyndon, Mo., 43 S.Ct. 589, 262 U.S. 226, 67 L.Ed. 961, dismissing, C.C.A., 282 F. 219, certiorari denied 43 S.Ct. 361, 261 U.S. 614, 67 L.Ed. 827.

91. **Former practice**
(1) Jud.Code 1911 § 240 provided that "in any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

(2) The same express power to review by certiorari was also given by the Act of Sept. 6, 1916, 39 U.S.St. at L. p 727 c 448 § 3, mentioned in 25 C.J. p 870 notes 31–38, wherein judgments and decrees in specified classes of cases were made final save for such review.

(3) The words "or otherwise" used in the statute first mentioned referred only to orders or writs ejusdem generis with a writ of certiorari, and did not include an appeal from a decision of the circuit court of appeals which had been made final by the statute.—Huguley Mfg. Co. v. Galeton Cotton Mills, Ga., 22 S.Ct. 452, 184 U.S. 290, 46 L.Ed. 546, dismissing appeal 94 F. 269, 36 C.C.A. 236.

(4) Under these statutes the certiorari power of the supreme court extended only to cases in which the judgment or decree of the circuit court of appeals was made final by

conferred on the supreme court[92] not only to review by certiorari judgments or decrees of the circuit courts of appeals[93] but also to bring before it by certiorari for determination causes pending in the circuit courts of appeals before final decree is rendered by such lower appellate courts, see infra subdivision b (4) of this section. The purpose of this grant of power was to secure uniformity of decision and to bring up cases of importance which it is in the public interest to have decided by the court of last resort.[94]

Under general power to issue writs. In instances not covered by Judicial Code § 240 as amended, 28 U.S.C.A. § 347, it is nevertheless competent for the supreme court to review on certiorari the action of circuit courts of appeals under its general statutory power to issue all writs necessary for the exercise of its jurisdiction.[95]

Certiorari conventional mode of review. By reason of the Act of February 13, 1925, amending Judicial Code § 240, 28 U.S.C.A. § 347, certiorari has become the conventional method for obtaining a review by the supreme court of judgments or decrees of the circuit courts of appeals, the right to review by appeal being now restricted to a very narrow class of cases, see supra § 203, and the writ of error having been abolished by statute, as appears supra § 203.

Nature of writ. The writ of certiorari is an extraordinary writ,[96] and under Judicial Code § 240 as amended, 28 U.S.C.A. § 347, it is the equivalent

statute.—Sperry Oil & Gas Co. v. Chisholm, Okl., 44 S.Ct. 372, 264 U.S. 488, 68 L.Ed. 803, affirming in part and reversing in part, C.C.A., 282 F. 93, affirming, D.C., Chisholm v. Creek & Indiana Development Co., 273 F. 589, and certiorari granted Sperry Oil & Gas Co. v. Chisholm, 43 S.Ct. 363, 261 U.S. 611, 67 L.Ed. 826—Barnett v. Kunkle, Okl., 44 S.Ct. 254, 264 U.S. 16, 68 L.Ed. 539, dismissing appeal, C.C.A., Barnett v. Kunkel, 283 F. 24, certiorari denied 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489.

25 C.J. p 871 notes 45, 46, 50 [b], p 878 note 16 [a].

(5) And hence the supreme court's certiorari power was, prior to Act Feb. 13, 1925, amending Jud.Code § 240, 28 U.S.C.A. § 347, confined to those cases in which the judgment or decree of the circuit court of appeals was not reviewable by appeal or writ of error.—Sperry Oil & Gas Co. v. Chisholm, Okl., 44 S.Ct. 372, 264 U.S. 488, 68 L.Ed. 803, affirming in part and reversing in part, C.C.A., 282 F. 93, affirming, D.C., Chisholm v. Creek & Indiana Development Co., 273 F. 589, and certiorari granted Sperry Oil & Gas Co. v. Chisholm, 43 S.Ct. 363, 261 U.S. 611, 67 L.Ed. 826—25 C.J. p 872 note 54.

92. U.S.—Gay v. Ruff, Ga., 54 S.Ct. 608, 292 U.S. 25, 78 L.Ed. 1099, 92 A.L.R. 970, affirming, C.C.A., Ruff v. Gay, 67 F.2d 684, reversing, D.C., 3 F.Supp. 264, and certiorari granted Gay v. Ruff, 54 S.Ct. 377, 291 U.S. 654, 78 L.Ed. 1047.

93. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551—Helvering v. Price, 60 S.Ct. 673, 309 U.S. 409, 84 L.Ed. 836, reversing, C.C.A., Price v. Commissioner of Internal Revenue, 106 F.2d 336, certiorari granted Helvering v. Price, 60 S.Ct. 385, 308 U.S. 548, 84 L.Ed. 461—Barnett v. Kunkle, Okl., 44 S.Ct. 254, 264 U.S. 16, 68 L.Ed. 539, dismissing appeal, C.C.A., Barnett v. Kunkel, 283 F. 24, certiorari denied 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489.

25 C.J. p 871 note 47.

Review by certiorari of decisions of circuit court of appeals:

In:

Cases arising under copyright laws see Copyright and Literary Property § 160.

Proceedings, causes, and controversies arising under Bankruptcy Act see Bankruptcy § 625.

On review of order of district court remanding or refusing to remand cause to state court see the C.J.S. title Removal of Causes § 309, also 54 C.J. p 374 note 57–p 375 note 73.

Particular judgments or decrees reviewable

(1) The supreme court has jurisdiction to review, on certiorari, judgment of circuit court of appeals, overruling judgment of supreme court of Puerto Rico holding tutor's sale void.—B. Fernandez & Bros. v. Ayllon, Puerto Rico, 45 S.Ct. 52, 266 U.S. 144, 69 L.Ed. 209, reversing, C.C.A., Ayllon v. Gonzalez, 288 F. 28.

(2) Where, during pendency of libel in admiralty by government for forfeiture of alcohol for violation of customs and navigation laws, alcohol was sold and proceeds deposited in court registry, and where proceeds were ordered to be paid to claimant or assigns, order of circuit court of appeals denying government's petition to have proceeds applied in satisfaction of lien for taxes due on alcohol was reviewable by supreme court on certiorari as against contention that such order merely carried out the other order not sought to be reviewed. U. S. v. Rizzo, N.J., 56 S.Ct. 580, 297 U.S. 530, 80 L.Ed. 844.

94. U.S.—Ruhlin v. New York Life Ins. Co., Pa., 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526, mandate conformed to, D.C., New York Life Ins. Co. v. Ruhlin, 25 F.Supp. 65—Magnum Import Co. v. Coty, N.Y., 43 S.Ct. 531, 262 U.S. 159, 67 L.Ed. 922.

25 C.J. p 874 note 83 [a].

95. U.S.—In re 620 Church Street Bldg. Corporation, Ill., 57 S.Ct. 88, 299 U.S. 24, 81 L.Ed. 16, rehearing denied 57 S.Ct. 229, 299 U.S. 623, 81 L.Ed. 458.

25 C.J. p 872 note 57 [a], [b] (2).

Denying leave to appeal

(1) Action of circuit court of appeals in declining jurisdiction of appeal from order of district court may be reviewed by supreme court on writ of certiorari under general power conferred by Jud.Code § 262, 28 U.S.C.A. § 377, authorizing supreme court to issue writs not specifically provided for by statute which might be necessary for the exercise of its jurisdiction.—In re 620 Church Street Bldg. Corporation, supra.

(2) Under this rule the action of the circuit court of appeals in denying leave to appeal to it in forma pauperis may likewise be reviewed by the supreme court on certiorari.—Holiday v. Johnston, Cal., 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

96. U.S.—Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., Mo., 36 S.Ct. 269, 240 U.S. 251, 60 L.Ed. 629, affirming 206 F. 611, 124 C.C.A. 409, reversing, C.C., 192 F. 930.

of an appeal or writ of error.[97]

b. When Writ Lies

(1) In general
(2) Particular grounds for grant or refusal of writ
(3) In patent cases
(4) At what stage of proceedings
(5) Successive writs

(1) In General

The issuance of certiorari is a matter resting in the sound discretion of the supreme court which ordinarily will not grant the writ except in cases of peculiar gravity or general importance, or in order to secure uniformity of decision.

The jurisdiction of the supreme court to review judgments or decrees of the circuit court of appeals by certiorari is a jurisdiction to be exercised entirely in the discretion of the court,[98] sparingly,[99] and only in extraordinary[1] cases of peculiar gravity and general importance,[2] or in order to secure uniformity of decision;[3] and in the application of these rules certiorari has been granted[4] or refused[5] in a variety of cases.

(2) Particular Grounds for Grant or Refusal of Writ

The supreme court by rule of court has indicated the character of the reasons which will be considered by it as grounds for granting certiorari. Ordinarily the writ will not issue to review the evidence or to bring up questions not of general importance.

Under Supreme Court Rules, rule 38(5), 28 U.S.C.A. following § 354, a writ of certiorari may be granted where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter;[6]

97. U.S.—Huguley Mfg. Co. v. Galeton Cotton Mills, Ga., 22 S.Ct. 452, 184 U.S. 290, 46 L.Ed. 546, dismissing appeal 94 F. 269, 36 C.C.A. 236—Fidelity & Deposit Co. of Maryland v. Davis, C.C.A.Va., 127 F.2d. 780.

98. U.S.—Huguley Mfg. Co. v. Galeton Cotton Mills, Ga., 22 S.Ct. 452, 184 U.S. 290, 46 L.Ed. 546—American Construction Co. v. Jacksonville, T. & K. W. R. Co., Fla., 13 S. Ct. 758, 148 U.S. 372, 37 L.Ed. 486.

99. U.S.—Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., Mo., 36 S.Ct. 269, 240 U.S. 251, 60 L.Ed. 629, affirming 206 F. 611, 124 C.C.A. 409, reversing, C.C., 192 F. 930.
25 C.J. p 874 note 82.

1. U.S.—State of Ohio ex rel. Seney v. Swift & Co., 43 S.Ct. 22, 260 U.S. 146, 67 L.Ed. 176, dismissing appeal, C.C.A., 270 F. 141, certiorari denied 42 S.Ct. 47, 257 U.S. 633, 66 L.Ed. 407—American Construction Co. v. Jacksonville, T. & K. W. R. Co., Fla., 13 S.Ct. 758, 148 U.S. 372, 37 L.Ed. 486.
11 C.J. p 131 note 25.

2. U.S.—Layne & Bowler Corporation v. Western Well Works, Cal., 43 S.Ct. 422, 261 U.S. 387, 67 L.Ed. 712, dismissing certiorari, C.C.A., Western Well Works v. Layne & Bowler Corporation, 276 F. 465, certiorari granted 42 S.Ct. 315, 258 U.S. 615, 66 L.Ed. 792.
25 C.J. p 874 note 83—11 C.J. p 131 note 25.

3. U.S.—Layne & Bowler Corporation v. Western Well Works, supra.
25 C.J. p 874 note 84.

4. U.S.—Griffin v. McCoach, Tex., 61 S.Ct. 1023, 313 U.S. 498, 85 L.Ed. 1481, 134 A.L.R. 1462, reversing, C.C.A., 116 F.2d 261, certiorari granted 61 S.Ct. 807, 312 U.S. 676, 85 L.Ed. 1116.
11 C.J. p 131 note 25 [a].

Writ has been granted

(1) In cases arising under the criminal laws.—Holiday v. Johnston, Cal., 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392—U. S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U. S., 284 F. 90—25 C.J. p 877 note 8.

(2) In cases arising under the Federal Employers' Liability Act.—Erie R. Co. v. Szary, N.Y., 40 S.Ct. 454, 253 U.S. 86, 64 L.Ed. 794—25 C.J. p 878 note 11.

(3) In cases arising under the Federal Safety Appliance Act.—U. S. v. Northern Pac. R. Co., Minn., 41 S. Ct. 101, 254 U.S. 251, 65 L.Ed. 249—25 C.J. p 878 note 12.

(4) In cases arising under the revenue laws.—Ryerson v. U. S., Ill., 61 S.Ct. 656, 312 U.S. 405, 85 L.Ed. 917, affirming, C.C.A., U. S. v. Ryerson, 114 F.2d 150, reversing, D.C., 28 F.Supp. 265, certiorari granted Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408—25 C.J. p 877 note 7.

(5) In cases arising under the trade-mark laws.—Coca Cola Co. v. Koke Co. of America, 41 S.Ct. 113, 254 U.S. 143, 65 L.Ed. 189, reversing 255 F. 894, 167 C.C.A. 214, reversing, D.C., 235 F. 408, certiorari granted 39 S.Ct. 493, 250 U.S. 637, 63 L.Ed. 1183—25 C.J. p 877 note 5.

(6) In cases in which the jurisdiction was dependent on the citizenship or character of the parties.—Niles-Bement-Pond Co. v. Iron Moulders' Union, Ohio, 41 S.Ct. 39, 254 U.S. 77, 65 L.Ed. 145, affirming 258 F. 408, 169 C.C.A. 424, reversing, D.C., 246 F. 851—25 C.J. p 876 notes 2, 3.

(7) In cases of admiralty.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U. S. 494, 79 L.Ed. 1016, affirming, C.C. A., The Ansaldo San Giorgio I, 73 F. 2d 40, reversing, D.C., 3 F.Supp. 579, and certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L. Ed. 654—25 C.J. p 877 note 9.

(8) In cases where the amount in controversy did not exceed one thousand dollars, besides costs.—Spiller v. Atchison, T. & S. F. R. Co., Mo., 40 S.Ct. 466, 253 U.S. 117, 64 L.Ed. 810—25 C.J. p 878 note 13.

5. U.S.—In re Woods, Minn., 12 S. Ct. 417, 143 U.S. 202, 36 L.Ed. 125.
25 C.J. p 874 note 83—11 C.J. p 131 note 25 [b].

6. **Certiorari granted** on this ground.—Griffin v. McCoach, Tex., 61 S.Ct. 1023, 313 U.S. 498, 85 L.Ed. 1481, 134 A.L.R. 1462, reversing, C.C.A., 116 F.2d 261, certiorari granted 61 S.Ct. 807, 312 U.S. 676, 85 L.Ed. 1116—Helvering v. Price, 60 S.Ct. 673, 309 U.S. 409, 84 L.Ed. 836, reversing, C. C.A., Price v. Commissioner of Internal Revenue, 106 F.2d 336, certiorari granted Helvering v. Price, 60 S.Ct. 385, 308 U.S. 548, 84 L.Ed. 461—Ticonic Nat. Bank v. Sprague, Me., 58 S.Ct. 612, 303 U.S. 406, 82 L.Ed. 926, affirming, C.C.A., 90 F.2d 641, certiorari granted 58 S.Ct. 55, 302 U. S. 675, 82 L.Ed. 521—In re 620 Church Street Bldg. Corporation, Ill., 57 S.Ct. 88, 299 U.S. 24, 81 L.Ed. 16, rehearing denied 57 S.Ct. 229, 299 U. S. 623, 81 L.Ed. 458—Stelos Co. v. Hosiery Motor-Mend Corporation, N. Y., 55 S.Ct. 746, 295 U.S. 237, 79 L. Ed. 1414, affirming, C.C.A., 72 F.2d 405, affirming in part and reversing in part, D.C., 60 F.2d 1009, and certiorari granted 55 S.Ct. 514, 294 U.S. 702, 79 L.Ed. 1238, and Hosiery Motor-Mend Corporation v. Stelos Co.,

or has decided an important question of local law in a way probably in conflict with applicable local decisions;[7] or has decided an important question of federal law which has not been, but should be, settled by the supreme court;[8] or has decided a federal question in a way probably in conflict with applicable decisions of the supreme court;[9] or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the supreme court's power of supervision.[10] This rule of court, while indicating the character of reasons which will be considered as grounds for granting certiorari, by its express terms does not fully measure the court's discretion in this matter, and in many cases, particularly before the adoption of this rule, the writ has been issued on the expressed ground of "importance" of the issue presented,[11] or on other grounds similar to those cov-

55 S.Ct. 515, 294 U.S. 702, 79 L.Ed. 1238—Gay v. Ruff, Ga., 54 S.Ct. 608, 292 U.S. 25, 78 L.Ed. 1099, 92 A.L.R. 970, affirming, C.C.A., Ruff v. Gay, 67 F.2d 684, reversing, D.C., 3 F.Supp. 264, and certiorari granted Gay v. Ruff, 54 S.Ct. 377, 291 U.S. 654, 78 L.Ed. 1047—25 C.J. p 875 note 95.

As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari.—Ruhlin v. New York Life Ins. Co., Pa., 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526, mandate conformed to, D.C., New York Life Ins. Co. v. Ruhlin, 25 F.Supp. 65.

7. U.S.—Ruhlin v. New York Life Ins. Co., supra.

Certiorari granted on this ground.—City of Texarkana, Tex. v. Arkansas, Louisiana Gas Co., Tex., 59 S.Ct. 448, 306 U.S. 188, 620, 83 L.Ed. 598, reversing, C.C.A., Arkansas Louisiana Gas Co. v. City of Texarkana, Tex., 97 F.2d 5, certiorari granted City of Texarkana, Tex. v. Arkansas Louisiana Gas Co., 59 S.Ct. 94, 305 U.S. 584, 83 L.Ed. 369—25 C.J. p 875 note 99.

8. U.S.—Postal S. S. Corporation v. The El Isleo, N.Y., 60 S.Ct. 332, 308 U.S. 378, 84 L.Ed. 335, reversing, C.C.A., The Eastern Glade, 101 F.2d 4, affirming, D.C., 20 F.Supp. 373, certiorari granted Postal S. S. Corporation v. The El Isleo, 60 S.Ct. 77, 308 U.S. 532, 84 L.Ed. 448, and Postal S. S. Corporation v. Southern Pac. Co., 60 S.Ct. 77, 308 U.S. 532, 84 L.Ed. 448, mandate conformed to, C.C.A., 112 F.2d 297, certiorari denied Southern Pac. Co. v. The Eastern Glade, 61 S.Ct. 50, 311 U.S. 655, 85 L.Ed. 419, and Southern Pac. Co. v. Postal S. S. Corporation, 61 S.Ct. 50, 311 U.S. 655, 85 L.Ed. 419.

Certiorari granted on this ground

(1) To review decision that maintenance of suit under the Federal Interpleader Act against tax officers of two states to prevent double collection of death taxes violated Eleventh Amendment.—Worcester County Trust Co. v. Riley, Mass., 58 S.Ct. 185, 302 U.S. 292, 82 L.Ed. 268, affirming, C.C.A., Riley v. Worchester County Trust Co., 89 F.2d 59, reversing, D.C., Worcester County Trust Co. v. Long, 14 F.Supp. 754, certiorari granted Worcester County Trust Co. v. Riley, 57 S.Ct. 931, 301 U.S. 678, 81 L.Ed. 1338.

(2) To determine the question as to the right of the secretary of the treasury to discontinue customs inspection service on holidays at toll bridges unless the owners thereof would apply for a special license and agree to pay the extra compensation of customs officers, etc.—International Ry. Co. v. Davidson, N.Y., 42 S.Ct. 179, 257 U.S. 506, 66 L.Ed. 341, reversing, C.C.A., 273 F. 153, affirming, D.C., 271 F. 313.

(3) To determine the statutory function of a three-judge court.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

(4) To determine question of venue.—Camp v. Gress, Va., 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997, modifying 244 F. 121, 156 C.C.A. 549, certiorari granted 38 S.Ct. 14, 245 U.S. 655, 63 L.Ed. 533.

(5) To determine a question of federal trial procedure.—Carpenter v. Winn, N.Y., 31 S.Ct. 683, 221 U.S. 533, 55 L.Ed. 842, reversing 165 F. 636, 91 C.C.A. 301.

9. **Certiorari granted** on this ground.—Department of Treasury of State of Indiana v. Ingram-Richardson Mfg. Co. of Indiana, Ind., 61 S.Ct. 866, 313 U.S. 252, 85 L.Ed. 1313, reversing, C.C.A., Ingram-Richardson Mfg. Co. of Indiana v. Department of Treasury of State of Indiana, 114 F.2d 889, certiorari denied 61 S.Ct. 614, 312 U.S. 687, 85 L.Ed. 1124, certiorari granted Department of Treasury of State of Indiana v. Ingram-Richardson Mfg. Co. of Indiana, 61 S.Ct. 613, 312 U.S. 671, 85 L.Ed. 1113, rehearing denied 61 S.Ct. 1107, 313 U.S. 600, 85 L.Ed. 1552—Helvering v. Price, 60 S.Ct. 673, 309 U.S. 409, 84 L.Ed. 836, reversing, C.C.A., Price v. Commissioner of Internal Revenue, 106 F.2d 336, certiorari granted Helvering v. Price, 60 S.Ct. 385, 308 U.S. 548, 84 L.Ed. 461—National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799, modifying, C.C.A., National Labor Relations Board v. National Licorice Co., 104 F.2d 655, certiorari granted National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 108, 308 U.S. 535, 84 L.Ed. 451—Lane v. Wilson, Okl., 59 S.Ct. 872, 307 U.S. 268, 83 L.Ed. 1281, reversing, C.C.A., 98 F.2d 980, certiorari granted 59 S.Ct. 249, 305 U.S. 591, 83 L.Ed. 374—In re 620 Church Street Bldg. Corporation, Ill., 57 S.Ct. 88, 299 U.S. 24, 81 L.Ed. 16, rehearing denied 57 S.Ct. 229, 299 U.S. 623, 81 L.Ed. 458—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, and certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654—Joplin Mercantile Co. v. U. S., Mo., 35 S.Ct. 291, 236 U.S. 531, 59 L.Ed. 705, affirming 213 F. 926, 131 C.C.A. 160.

10. U.S.—U. S. v. Rizzo, N.J., 56 S.Ct. 580, 297 U.S. 530, 80 L.Ed. 844.

Certiorari granted where the petition alleged that the circuit court of appeals had decided the cause on a ground not presented and argued, and hence had deprived petitioner of his day in court.—Le Tulle v. Scofield, Tex., 60 S.Ct. 313, 308 U.S. 415, 84 L.Ed. 355, affirming, C.C.A., Scofield v. Le Tulle, 103 F.2d 20, certiorari granted Le Tulle v. Scofield, 60 S.Ct. 75, 308 U.S. 531, 84 L.Ed. 447, rehearing denied 60 S.Ct. 465, 309 U.S. 694, 84 L.Ed. 1035.

11. U.S.—Federal Trade Commission v. Raladam Co., 62 S.Ct. 966, 316 U.S. 149, 86 L.Ed. 1336, reversing, C.C.A., Raladam Co. v. Federal Trade Commission, 123 F.2d 34, certiorari granted 62 S.Ct. 631—Williams v. Jacksonville Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, affirming, C.C.A., 118 F.2d 324, affirming, D.C., 25 F.Supp. 267, certiorari granted 62 S.Ct. 64, 314 U.S. 590, 86 L.Ed. 476, rehearing denied 62 S.Ct. 909, 315 U.S. 830, 86 L.Ed. 1224—Pickett v. Un-

ered by the rule,[12] as where there was an apparent conflict in the decisions of the supreme court on the question presented for decision.[13]

Ordinarily, however, certiorari will not be granted to review evidence and to discuss specific facts;[14] and the novelty of the question presented will not,

ion Terminal Co., Fla. & Tex., 62 S.Ct. 659, 315 U.S. 386, 86 L.Ed. 914, affirming, C.C.A., Union Terminal Co. v. Pickett, 118 F.2d 328, reversing, D.C., 33 F.Supp. 244, certiorari denied 61 S.Ct. 1115, 313 U.S. 591, 85 L.Ed. 1546, vacated 62 S.Ct. 55, 314 U.S. 704, 86 L.Ed. 563, certiorari granted 62 S.Ct. 55, 314 U.S. 704, 86 L.Ed. 563—Just v. Chambers, Fla., 61 S.Ct. 687, 312 U.S. 383, 668, 85 L.Ed. 903, reversing, C.C.A., The Friendship II, 113 F.2d 105, certiorari granted Just v. Chambers, 61 S.Ct. 63, 311 U.S. 634, 85 L.Ed. 403—Palmer v. Connecticut Railway & Lighting Co., Conn., 61 S.Ct. 379, 311 U.S. 544, 85 L.Ed. 336, affirming, C.C.A., Connecticut Railway & Lighting Co. v. Palmer, 109 F.2d 568, certiorari granted Palmer v. Connecticut Railway & Lighting Co., 60 S.Ct. 894, 309 U.S. 653, 84 L.Ed. 1003, rehearing denied 61 S.Ct. 609, 312 U. S. 713, 85 L.Ed. 1143—Lane v. Wilson, Okl., 59 S.Ct. 872, 307 U.S. 268, 83 L.Ed. 1281, reversing, C. C.A., 98 F.2d 980, certiorari granted 59 S.Ct. 249, 305 U.S. 591, 83 L.Ed. 374—International Ry. Co. v. Davidson, N.Y., 42 S.Ct. 179, 257 U.S. 506, 66 L.Ed. 341, reversing, C.C. A., 273 F. 153, affirming, D.C., 271 F. 313.

25 C.J. p 875 note 87.

Certiorari granted

(1) Because of the importance of the question presented in the administration of the National Labor Relations Act.—National Labor Relations Board v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 134, 311 U.S. 638, 85 L.Ed. 406—National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799, modifying, C.C.A., National Labor Relations Board v. National Licorice Co., 104 F.2d 655, certiorari granted National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 108, 308 U.S. 535, 84 L.Ed. 451.

(2) Because an important question of judicial administration pertaining to the exercise of federal equity jurisdiction was raised.—Sprague v. Ticonic Nat. Bank, Me., 59 S.Ct. 777, 307 U.S. 161, 83 L.Ed. 1184, reversing, C.C.A., 99 F.2d 583, certiorari granted 59 S.Ct. 463, 306 U.S. 623, 83 L.Ed. 1028.

12. **Judgment hindering administration of law**

Probability that judgment and opinion below will seriously hinder future administration of law justifies issuance of writ of certiorari.—Federal Trade Commission v. American Tobacco Co., 47 S.Ct. 663, 274 U.S. 543, 71 L.Ed. 1193, affirming, C.C.A., American Tobacco Co. v. Federal Trade Commission, 9 F.2d 570, certiorari granted Federal Trade Commission v. American Tobacco Co., 46 S.Ct. 349, 270 U.S. 638, 70 L.Ed. 774.

Before adoption of supreme court rule

In a number of cases heard on certiorari before the adoption of Supreme Court Rules, rule 38(5), 28 U. S.C.A. following § 354, the fact mentioned by the court may be inferred to have been influential in the granting of the writ, such as:

(1) That the jurisdiction of the courts below was in question.—Kingman & Co. v. Western Mfg. Co., Neb., 18 S.Ct. 786, 170 U.S. 675, 42 L.Ed. 1192—25 C.J. p 875 note 89.

(2) That the erroneous decision of the circuit court of appeals was made in deference to intimations of the supreme court concededly tending to support the ruling.—Grigsby v. Russell, Tenn., 32 S.Ct. 58, 222 U.S. 149, 56 L.Ed. 133, 36 L.R.A.,N.S., 642, Ann. Cas.1913B 863.

(3) That the decision of the supreme court cited by the circuit court of appeals in support of its judgment "is not entirely apposite."—U. S. v. Reynolds, Okl., 39 S.Ct. 409, 250 U.S. 104, 63 L.Ed. 873.

(4) That it was to be determined whether the circuit court of appeals correctly decided "a question left open" in a former decision of the supreme court.—Detroit Steel Cooperage Co. v. Sisterville Brewing Co., W. Va., 34 S.Ct. 753, 233 U.S. 712, 58 L. Ed. 1166, reversing 195 F. 447, 115 C. C.A. 349, rehearing denied 195 F. 1023, 115 C.C.A. 669.

(5) That decisions of federal courts in general are in conflict on the question involved.—McMullen v. Hoffman, Or., 19 S.Ct. 839, 174 U.S. 639, 645, 43 L.Ed. 1117, affirming 83 F. 372, 28 C.C.A. 178, reversing, C.C., 75 F. 547, reversing 69 F. 509, and certiorari granted 18 S.Ct. 950, 170 U.S. 705—28 C.J. p 875 note 97.

(6) That the decision of the circuit court of appeals in the instant case was rendered by a divided court.—Empire State Cattle Co. v. Atchison, T. & S. F. R. Co., Kan., 28 S.Ct. 607, 210 U.S. 1, 52 L.Ed. 931, 15 Ann.Cas. 70, affirming 147 F. 457, 77 C.C.A. 607, affirming 147 F. 457, 77 C.C.A. 601, affirming, C.C., 135 F. 135—25 C. J. p 875 note 1.

13. U.S.—U. S. v. Chicago, M., St. P. & P. R. Co., Minn., 61 S.Ct. 772, 312 U.S. 592, 313 U.S. 543, 85 L.Ed. 1064, reversing, C.C.A., 113 F.2d 919, certiorari granted 61 S.Ct. 318, 311 U.S. 642, 85 L.Ed. 409.

14. U.S.—General Talking Pictures Corporation v. Western Electric Co., N.Y., 58 S.Ct. 849, 304 U.S. 175, 546, 82 L.Ed. 1273, affirming, C.C. A., Western Electric Co. v. General Talking Pictures Corporation, 91 F.2d 922, affirming, D.C., 16 F.Supp. 293, certiorari granted General Talking Pictures Corporation v. Western Electric Co., 58 S.Ct. 49, 302 U.S. 674, 82 L.Ed. 520, rehearing granted 58 S.Ct. 1051, 304 U.S. 587, 82 L.Ed. 1548, affirmed 59 S.Ct. 116, 305 U.S. 124, 83 L.Ed. 81, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437—U. S. v. Johnston, N.Y., 45 S.Ct. 496, 268 U. S. 220, 69 L.Ed. 925, reversing, C.C. A., Johnston v. U. S., 290 F. 120. 25 C.J. p 874 note 83 [f].

Certiorari will not be granted to review a decree on the ground that the evidence was not sufficient to establish actual dedication of petitioner's property to public use.—Southern Power Co. v. North Carolina Public Service Co., N.C., 44 S.Ct. 164, 263 U.S. 508, 68 L.Ed. 413, dismissing certiorari, C.C.A., North Carolina Public Service Co. v. Southern Power Co., 282 F. 837, certiorari granted Southern Power Co. v. North Carolina Public Service Co., 43 S.Ct. 94, 260 U.S. 716, 67 L.Ed. 478.

Certiorari granted

Where enforcement of order of the National Labor Relations Board was refused on ground that it was not supported by evidence, petition for writ of certiorari was granted because of the importance in an orderly administration of the National Labor Relations Act that the findings of the board as to the facts, if supported by evidence, be conclusive.—National Labor Relations Board v. Link-Belt Co., 61 S.Ct. 358, 311 U.S. 584, 85 L.Ed. 368, reversing, C.C.A., Link-Belt Co. v. National Labor Relations Board, 110 F.2d 506, certiorari granted National Labor Relations Board v. Link-Belt Co., 61 S.Ct. 31, 311 U.S. 629, 85 L.Ed. 400—National Labor Relations Board v. Independent Union of Craftsmen, 61 S. Ct. 358, 311 U.S. 584, 85 L.Ed. 368, reversing, C.C.A., Independent Union of Craftsmen v. National Labor Relations Board, 110 F.2d 506, certiorari granted National Labor Relations Board v. Independent Union of Craftsmen, 61 S.Ct. 32, 311 U.S. 629, 85 L.Ed. 400—National Labor Relations Board v. Waterman S. S. Corporation, 60 S.Ct. 493, 309 U.S. 206, 84 L.Ed. 704, reversing, C.C.A., Wa-

in the absence of general importance, move the court to grant the writ.[15] The writ may properly be refused where the error complained of does not affect the substantial rights of the parties,[16] where the supreme court has determined that the circuit court of appeals was without jurisdiction of the cause,[17] or where, subsequent to the application for the writ, all occasion for granting it was removed by the supreme court's decision in another case settling the question involved in the proposed certiorari.[18]

(3) In Patent Cases

Certiorari has been frequently granted in patent cases involving questions of general importance or presenting a conflict of decisions; and it has been denied in a number of cases not of this character.

Writs of certiorari have been frequently granted in patent cases,[19] for example, where it was apparent that the circuit court of appeals erroneously interpreted the opinion of the supreme court in a former case involving the same patent,[20] or where circuit courts of appeals were in conflict as to the validity[21] or construction[22] of the patent, or in conflict on the admissibility of evidence to prove liability for infringement by reason of privity with an infringer,[23] or in conflict on other questions in litigation arising out of the same patent,[24] or in conflict on questions of their own appellate jurisdiction and procedure;[25] where the construction of a federal statute giving the United States a license to use patent rights was in question,[26] or where the decision of the circuit court of appeals in the instant

terman S. S. Corporation v. National Labor Relations Board, 103 F.2d 157, certiorari granted National Labor Relations Board v. Waterman S. S. Corporation, 60 S.Ct. 95, 308 U.S. 534, 84 L.Ed. 450, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

15. U.S.—The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., N.Y., 55 S.Ct. 483, 294 U.S. 494, 79 L.Ed. 1016, affirming, C.C.A., The Ansaldo San Giorgio I, 73 F.2d 40, reversing, D.C., 3 F.Supp. 579, and certiorari granted The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 55 S.Ct. 217, 293 U.S. 551, 79 L.Ed. 654.

16. U.S.—Smith v. Vulcan Iron Works, Cal., 17 S.Ct. 407, 165 U.S. 518, 41 L.Ed. 810.

25 C.J. p 874 note 83 [c].

17. U.S.—Good Shot v. U. S., S.D., 21 S.Ct. 33, 179 U.S. 87, 45 L.Ed. 101, denying certiorari 104 F. 257, 43 C.C.A. 525.

25 C.J. p 871 note 44 [a].

18. U.S.—San Pedro, L. A. & S. L. R. Co. v. U. S., Cal., 38 S.Ct. 498, 247 U.S. 307, 62 L.Ed. 1129, dismissing error and denying certiorari 220 F. 737, 136 C.C.A. 343.

19. U.S.—Keller v. Adams-Campbell Co., Cal., 44 S.Ct. 356, 264 U.S. 314, 68 L.Ed. 705, dismissing certiorari, C.C.A., 287 F. 838, certiorari granted 43 S.Ct. 702, 262 U.S. 741, 67 L.Ed. 1209.

25 C.J. p 878 note 16.

Where conflict of decisions unlikely

The supreme court granted certiorari to review decision of circuit court of appeals holding claims of patent valid and infringed, notwithstanding there was no conflict of decisions with respect to claims involved, where the patent dominated a substantial portion of an industry so concentrated in one circuit that litigation in other circuits resulting in a conflict of decisions was unlikely.—Muncie Gear Works v. Outboard, Marine & Manufacturing Co., Ill., 62 S.Ct. 865, 315 U.S. 759, 86 L.Ed. 1171, reversing, C.C.A., Outboard Marine & Mfg. Co. v. Muncie Gear Works, 119 F.2d 404, certiorari granted 62 S.Ct. 100, 314 U.S. 594, 86 L.Ed. 479—Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 92 F.2d 330, certiorari denied Schriber-Schroth Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099, rehearing denied Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 748, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1052, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Aberdeen Motor Supply Co., 92 F. 2d 330, certiorari denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L. Ed. 1100, rehearing denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. F. E. Rowe Sales Co., 92 F.2d 330, certiorari denied F. E. Rowe Sales Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109.

20. U.S.—Minerals Separation v. Butte & Superior Mining Co., Mont., 39 S.Ct. 496, 250 U.S. 336, 63 L.Ed. 1019, motion denied 40 S.Ct. 55.

25 C.J. p 878 note 17.

21. U.S.—Layne & Bowler Corporation v. Western Well Works, Cal., 43 S.Ct. 422, 261 U.S. 387, 67 L.Ed. 712, dismissing certiorari, C.C.A., Western Well Works v. Layne & Bowler Corporation, 276 F. 465, certiorari granted 42 S.Ct. 315, 258 U.S. 615, 66 L.Ed. 792.

25 C.J. p 878 note 18.

22. U.S.—Layne & Bowler Corporation v. Western Well Works, supra.

23. U.S.—Rumford Chemical Works v. Hygienic Chemical Co. of New Jersey, 30 S.Ct. 45, 215 U.S. 156, 54 L.Ed. 137, affirming, N.J., 154 F. 65, 83 C.C.A. 177, affirming, C.C., 148 F. 862, and certiorari granted 28 S.Ct. 257, 207 U.S. 592, 52 L.Ed. 355—Hygienic Chemical Co. of New York v. Rumford Chemical Works, 30 S.Ct. 45, 215 U.S. 156, 54 L.Ed. 137, reversing, N.J., Rumford Chemical Works v. Hygienic Chemical Co., 159 F. 436, 86 C.C.A. 416, reversing, N.Y., Rumford Chemical Works v. New York Baking Powder Co., 134 F. 385, 67 C.C.A. 367.

24. U.S.—Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., Minn., 35 S.Ct. 221, 235 U.S. 641, 59 L.Ed. 398, reversing 183 F. 314, 105 C.C. A. 526.

25. U.S.—Smith v. Vulcan Iron Works, Cal., 17 S.Ct. 407, 165 U.S. 518, 41 L.Ed. 810.

26. U.S.—William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co., Pa., 38 S.Ct. 271, 246 U.S. 28, 62 L.Ed. 560.

C.A. § 347, certiorari proceedings may be instituted by any party to a proceeding in the circuit court of appeals.[39]

d. Appeal and Certiorari in Same Case

While formerly it was a common practice to unite an application for certiorari with an appeal or writ of error, under the present statute an appeal properly taken will preclude a review on certiorari.

Under Judicial Code § 240 as amended, 28 U.S. C.A. § 347, if a party in a case in the circuit court of appeals takes an appeal from the decision of that court to the supreme court in a case in which an appeal will lie, a review on certiorari cannot be allowed at the instance of such party;[40] but an appeal improvidently taken by a party in a case where no appeal lies will not preclude him from thereafter applying for a writ of certiorari.[41]

Prior to the Act of February 13, 1925, 28 U.S. C.A. § 347, restricting review of decisions of the circuit courts of appeals by appeal or writ of error to a very narrow class of cases, see § 203 supra, and prior to the statute, 28 U.S.C.A. § 861a, abolishing the writ of error, it was a common practice, in seeking a review by the supreme court of a decision of the circuit court of appeals, to unite an application for certiorari with an appeal or a writ of error[42] as a jurisdictional precaution.[43] Under this practice, where there was both an appeal or a writ of error and a petition for a writ of certiorari, the court could, on dismissing the appeal or writ of error for lack of jurisdiction, grant the writ of certiorari and permit the record on the appeal or writ of error to stand as the return to the writ;[44] and in some cases where an application for a writ of certiorari was coincidental with an appeal or a writ of error the court allowed the certiorari in order to dispense with the necessity of deciding which was the proper proceeding.[45] So, where one party sued out a writ of error directly from the supreme court on the ground that a constitutional question was involved, and the other party took the case to the circuit court of appeals on another question, which question the circuit court of appeals certified to the supreme court, the latter court could treat the proceeding in the circuit court of appeals as pending in the supreme court on cross writ of certiorari.[46]

Election between certiorari and appeal is considered supra § 203.

e. Cross Writ of Certiorari

A writ and a cross writ of certiorari are often granted and the case is then heard on both writs.

A writ and a cross writ of certiorari are often granted and the case is then heard on both writs.[47]

f. Proceedings to Obtain Writ

Application for the writ of certiorari is made by petition, and proceedings in connection therewith are governed by statutes and rules of court.

Application for the writ of certiorari is made by

39. **United States**
(1) Under the statute as amended the supreme court has jurisdiction on the petition of the United States to bring up criminal cases on writ of certiorari.—U. S. v. Gulf Refining Co., Okl., 45 S.Ct. 597, 268 U.S. 542, 69 L.Ed. 1082, affirming, C.C.A., Gulf Refining Co. v. U. S., 284 F. 90.
(2) Under the statute as it formerly read, the contrary had been held where accused prevailed in the circuit court of appeals.—U. S. v. Dickinson, Mass., 29 S.Ct. 485, 213 U.S. 92, 53 L.Ed. 711, dismissing certiorari 159 F. 801, 86 C.C.A. 625.

40. U.S.—Bradford Electric Light Co. v. Clapper, N.H., 52 S.Ct. 118, 284 U.S. 221, 76 L.Ed. 254, dismissing appeal and granting certiorari, C.C.A., 51 F.2d 992, reversed 52 S. Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A.L.R. 696.
When appeal lies see supra § 203.

41. U.S.—Bradford Electric Light Co. v. Clapper, supra.
When appeal lies see supra § 203.

42. U.S.—Spiller v. Atchison, T. & S. F. R. Co., Mo., 40 S.Ct. 466, 253 U.S. 117, 64 L.Ed. 810, reversing 249 F. 677, 161 C.C.A. 587.
25 C.J. p 873 note 61 [a].

43. U.S.—Duignan v. U. S., N.Y., 47 S.Ct. 566, 274 U.S. 195, 71 L.Ed. 996, affirming, C.C.A., U. S. v. Duignan, 4 F.2d 983.

44. U.S.—Security Trust Co. v. Dent, Minn., 23 S.Ct. 61, 187 U.S. 237, 47 L.Ed. 158, reversing 101 F. 380, 43 C.C.A. 594.
25 C.J. p 873 note 61.

Certiorari granted in lieu of cross appeal
Where a cross appeal to the supreme court from the court of appeals was dismissed as not involving a federal question, but the question involved was of general importance in its relation to the questions involved in the appeal, a certiorari was allowed in lieu of the cross appeal.—Central Trust Co. of Illinois v. Chicago Auditorium Assoc., Ill., 36 S. Ct. 412, 240 U.S. 581, 60 L.Ed. 811.

45. U.S.—Montana Min. Co. v. St. Louis Mining & Milling Co., Mont., 27 S.Ct. 254, 204 U.S. 204, 51 L.Ed. 444, reversing 147 F. 897, 78 C.C.A. 33.
25 C.J. p 878 note 14.

46. U.S.—Rainey v. U. S., N.Y., 34 S.Ct. 429, 232 U.S. 310, 58 L.Ed. 617—Billings v. U. S., N.Y., 34 S.Ct. 421, 429, 232 U.S. 261, 310, 58 L.Ed. 596, 617, affirming in part and reversing in part, C.C., 190 F. 359.

47. U.S.—Stelos Co. v. Hosiery Motor-Mend Corporation, N.Y., 55 S. Ct. 746, 295 U.S. 237, 79 L.Ed. 1114, affirming, C.C.A., 72 F.2d 405, affirming in part and reversing in part, D.C., 60 F.2d 1009, and certiorari granted 55 S.Ct. 514, 294 U.S. 702, 79 L.Ed. 1238, and Hosiery Motor-Mend Corporation v. Stelos Co., 55 S.Ct. 515, 294 U.S. 702, 79 L.Ed. 1238.
25 C.J. p 873 note 63.
Consideration on certiorari of matters urged by respondent not obtaining cross writ see infra subdivision i of this section.
Granting of relief to respondent not obtaining cross writ see infra subdivision j (1) of this section.

petition[48] to the supreme court,[49] and the requirements in connection therewith are specified in the rules of the supreme court which must be complied with.[50]

Time for applying for writ. An application for a writ of certiorari must be made within the time prescribed by statute, the governing statute being 28 U.S.C.A. § 350.[51] Under this statute an application for certiorari to review a judgment or decree of the circuit court of appeals must be made within three months after the entry of such decision unless, for good cause shown, such period is extended by a justice of the supreme court;[52] and an application for certiorari to secure a removal of the case to the supreme court prior to final decree by the circuit court of appeals may be made at any time prior to the hearing and submission in the latter court.[53]

Stay pending application. Under 28 U.S.C.A. § 350 the execution and enforcement of a final judgment or decree of a circuit court of appeals may be stayed for a reasonable time to enable the aggrieved party to obtain a writ of certiorari.[54] The stay may be granted by a judge of the circuit court of appeals or by a justice of the supreme court.[55]

48. U.S.—General Talking Pictures Corporation v. Western Electric Company, N.Y., 58 S.Ct. 849, 304 U.S. 175, 546, 82 L.Ed. 1273, affirming, C.C.A., Western Electric Co. v. General Talking Pictures Corporation, 91 F.2d 922, affirming, D.C., 16 F.Supp. 293, certiorari granted General Talking Pictures Corporation v. Western Electric Co., 58 S.Ct. 49, 302 U.S. 674, 82 L. Ed. 520, rehearing granted 58 S.Ct. 1051, 304 U.S. 587, 82 L.Ed. 1548, affirmed 59 S.Ct. 116, 305 U.S. 124, 83 L.Ed. 81, rehearing denied 59 S. Ct. 355, 305 U.S. 675, 83 L.Ed. 437.
25 C.J. p 871 note 49.

49. U.S.—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.

50. U.S.—General Talking Pictures Corporation v. Western Electric Co., N.Y., 58 S.Ct. 849, 304 U.S. 175, 546, 82 L.Ed. 1273, affirming, C.C. A., Western Electric Co. v. General Talking Pictures Corporation, 91 F.2d 922, affirming, D.C., 16 F.Supp. 293, certiorari granted General Talking Pictures Corporation v. Western Electric Co., 58 S.Ct. 49, 302 U.S. 674, 82 L.Ed. 520, rehearing granted 58 S.Ct. 1051, 304 U.S. 587, 82 L.Ed. 1548, affirmed 59 S. Ct. 116, 305 U.S. 124, 83 L.Ed. 81, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437.
25 C.J. p 872 note 60.

Supreme Court Rules, rule 38, 28 U.S.C.A. following § 354, provides that "a petition for review on writ of certiorari of a decision of . . . a circuit court of appeals . . . shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. . . . The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question; the questions presented; and the reasons relied on for the allowance of the writ. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise." The rule also makes provision for notice of the filing of the petition, briefs in opposition, reply briefs, printing of the record, and other matters.

Complete disclosure as to controversy required

A petition for a writ of certiorari should make a clear, definite, and complete disclosure concerning the controversy, since it is impossible for the court critically to examine the record before ruling on the application, and it must rely largely on preliminary papers.—Southern Power Co. v. North Carolina Public Service Co., N.C., 44 S.Ct. 164, 263 U.S. 508, 68 L.Ed. 413, dismissing certiorari, C.C.A., North Carolina Public Service Co. v. Southern Power Co., 282 F. 837, certiorari granted Southern Power Co. v. North Carolina Public Service Co., 43 S.Ct. 94, 260 U.S. 716, 67 L.Ed. 478—Furness, Withy & Co. v. Yang-Tsze Insurance Association, N. Y., 37 S.Ct. 141, 242 U.S. 430, 61 L.Ed. 409.

51. U.S.—Bradford Electric Light Co. v. Clapper, N.H., 52 S.Ct. 118, 284 U.S. 221, 76 L.Ed. 254, dismissing appeal and granting certiorari, C.C.A., 51 F.2d 992, reversed 52 S. Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A.L.R. 696.

Formerly it was necessary to make the application to the court while in session.—The Conqueror, N.Y., 17 S. Ct. 510, 166 U.S. 110, 41 L.Ed. 937.

52. **Jurisdictional limitation**

Where the supreme court denied a writ of certiorari to review the final decree in a patent infringement suit, it cannot consider the merits of such decree on a writ of certiorari applied for more than three months after final decree for review of a decree subsequently rendered on rule to show cause.—Toledo Scale Co. v. Computing Scale Co., 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719, affirming, C.C.A.Ill., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L. Ed. 1072, and Fidelity & Deposit Co. v. Computing Scale Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073.

When period begins to run

(1) The statutory period begins with the date of the entry of the final judgment of the circuit court of appeals, and not with the date of the entry of the judgment in the district court under the mandate of the circuit court of appeals.—Boylan v. U. S., N.Y., 42 S.Ct. 113, 257 U.S. 614, 66 L.Ed. 397, dismissing error, C.C. A., 265 F. 165—Nelson v. Lewis, D.C. N.Y., 9 F.Supp. 406.

(2) Where circuit court of appeals, though dealing in opinion with matters affecting merits, reversed order granting temporary injunction and directed issuance of mandate in accordance with "this decree," and mandate directed further proceedings in accordance with "decision," such decree was not final; hence petition to supreme court for certiorari to review case on merits, filed within three months after circuit court of appeals affirmed dismissal on merits, was timely.—Rogers v. Hill, N.Y., 53 S.Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, reversing, C.C.A., 62 F.2d 1079, following, C.C.A., 60 F.2d 109, and certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1469.

Rule prior to statute

U.S.—The Conqueror, N.Y., 17 S.Ct. 510, 166 U.S. 110, 41 L.Ed. 937.
25 C.J. p 872 note 59 [b].

53. **Rule prior to statute** is considered in 25 C.J. p 872 note 59 [a].

54. U.S.—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.

55. **Procedure**

(1) An application for a stay should be made in the first instance to the circuit court of appeals since it has complete knowledge of the case.—Magnum Import Co. v. Coty, 43 S.Ct. 531, 262 U.S. 159, 67 L.Ed. 922—Nelson v. Lewis, D.C.N.Y., 9 F. Supp. 406.

(2) The granting of the application in the circuit court of appeals is discretionary.—Magnum Import Co. v. Coty, supra.

g. Effect of Grant or Refusal of Writ

(1) Grant of writ
(2) Refusal of writ

(1) Grant of Writ

A writ of certiorari, when granted, operates as a stay of further proceedings in the courts below.

The primary effect of the grant of a writ of certiorari is, of course, to bring the cause before the supreme court for review and determination.

As stay of proceedings. The effect of a certiorari, when awarded by the supreme court in a cause decided by the circuit court of appeals, is to suspend any action that might be taken by that court, or by the trial court in obedience to its mandate;[56] but it does not restore jurisdiction to the trial court, or give such court authority to set aside orders legally and properly made, in obedience to the mandate of the circuit court of appeals, before the writ of certiorari was awarded.[57]

(2) Refusal of Writ

A refusal to issue certiorari does not affect the district court's jurisdiction nor does it ordinarily indicate an approval by the supreme court of the decision in question.

A refusal by the supreme court to issue a writ of certiorari to review a determination of the circuit court of appeals does not affect the jurisdiction of the district court.[58] While inferences may be drawn in a proper case from such a refusal,[59] it does not ordinarily indicate an approval by the supreme court of the decision of the circuit court of appeals;[60] and even though an interlocutory decision, for review of which a writ of certiorari was refused, may have been treated as settling the law of the case, the supreme court, in reviewing the final

(3) If the stay is refused in that court, it requires an extraordinary showing before it will be granted in the supreme court.—Magnum Import Co. v. Coty, supra.

Stay in district court

(1) Prior to the act of Febr. 13, 1925, 28 U.S.C.A. § 350, the stay should have been applied for in the circuit court of appeals, as was decided in Magnum Import Company v. Coty, 43 S.Ct. 531, 262 U.S. 159, 67 L.Ed. 922, but the act of 1925 changed the procedure and application for a stay may be made in the district court, although under unusual conditions the district court may refuse to grant the stay and compel the party to apply to the circuit court of appeals or to a justice of the supreme court.—Keyes v. U. S. Fidelity & Guaranty Co., D.C.Fla., 44 F.Supp. 723.

(2) Under statute, whether district judge shall grant stay pending application to the United States supreme court for certiorari is a matter resting in the sound discretion of the judge.—Fidelity & Deposit Co. of Maryland v. Davis, C.C.A.Va., 127 F. 2d 780.

(3) The district judge in granting stay of proceedings for collection of judgment in automobile accident case, pending application to supreme court for certiorari, was authorized in exercise of discretion, to require, as a condition of the stay, the giving of a bond to secure payment of the judgment, where no supersedeas bond had been given and judgment was not otherwise secured.—Fidelity & Deposit Co. of Maryland v. Davis, supra.

(4) Where no supersedeas bond was given to stay proceeding for collection of judgment in automobile accident case, pending appeal, and on filing of suit to collect judgment defendant applied for order staying proceedings pending application to supreme court for certiorari, statutory bond given as condition to granting of stay embraced payment of the judgment which was not otherwise secured, and specific language in bond providing for payment of judgment merely made explicit that which would have been implicit under circumstances.—Fidelity & Deposit Co. of Maryland v. Davis, supra.

56. U.S.—Louisville, N. A. & C. R. Co. v. Louisville Trust Co., C.C.Ky., 78 F. 659.

57. U.S.—Louisville, N. A. & C. R. Co. v. Louisville Trust Co., supra.

58. **Jurisdiction not terminated**

The supreme court's denial of certiorari to review order of circuit court of appeals affirming district court's dismissal of proceedings for an agricultural composition or extension of debts did not terminate district court's jurisdiction, but the proceeding was still pending until the subsequent filing of mandate from the circuit court of appeals to the district court.—In re Shyvers, D.C.Cal., 33 F. Supp. 643.

Jurisdiction not enlarged

The supreme court by its denial of certiorari when a case was before it for the first time could not confer on the federal district court jurisdiction which congress has denied where there is no diversity of citizenship.—City of Indianapolis v. Chase Nat. Bank of City of New York, Ind., 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47, reversing, C.C.A., Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, 113 F.2d 217, certiorari granted City of Indianapolis v. Chase Nat. Bank of City of New York, 61 S.Ct. 73, 311 U.S. 636, 85 L.Ed. 405, 61 S.Ct. 74, 311 U.S. 636, 85 L.Ed. 405, Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, 61 S.Ct. 74, 311 U.S. 636, 85 L.Ed. 405 and Chase Nat. Bank of City of New York v. Indianapolis Gas Co., 61 S.Ct. 74, 311 U.S. 636, 85 L.Ed. 405, rehearing denied 62 S.Ct. 355, 356, three cases.

59. U.S.—Boise Commercial Club v. Oregon Short Line R. Co., Idaho, 260 F. 769, 171 C.C.A. 495, error dismissed Oregon Short Line R. Co. v. Boise Commercial Club, 41 S.Ct. 322, 255 U.S. 578, 65 L.Ed. 795.

Particular inferences drawn see 25 C.J. p 873 notes 65 [a], [b].

60. U.S.—Atlantic Coast Line R. Co. v. Powe, 51 S.Ct. 498, 283 U.S. 401, 75 L.Ed. 1142, reversing Powe v. Atlantic Coast Line R. Co., 159 S.E. 473, 161 S.C. 122—Cooper v. Robertson, D.C.Md., 38 F.2d 852, reversed on other grounds C.C.A., Robertson v. Cooper, 46 F.2d 766—Stamey v. U. S., D.C.Wash., 37 F.2d 188—Talcott v. U. S., C.C.A.Cal., 23 F.2d 897, affirming, D.C., 21 F.2d 493, and certiorari denied 48 S.Ct. 601, 277 U.S. 604, 72 L.Ed. 1011—Lockwood v. McGowan, D.C.N.Y., 13 F.Supp. 966, affirmed, C.C.A., 86 F.2d 1005.

D.C.—Fur Workers Union, Local No. 72, v. Fur Workers Union, No. 21238, 105 F.2d 1, 70 App.D.C. 122, certiorari granted Fur Workers Union No. 21238 v. Fur Workers Union Local No. 72, 60 S.Ct. 78, 308 U.S. 537, 84 L.Ed. 453, affirmed 60 S.Ct. 292, 308 U.S. 522, 84 L.Ed. 443.

N.Y.—Mutchnick v. John Hancock Mut. Life Ins. Co., 284 N.Y.S. 565, 157 Misc. 598.

25 C.J. p 873 note 65.

decree on certiorari, is bound to notice and correct any errors which may have occurred in the interlocutory proceeding.[61]

h. Dismissal of Writ

The writ of certiorari will be dismissed where the circumstances in the particular case require such action, as where it was improvidently granted.

The writ of certiorari will be dismissed where the circumstances in the particular case so require,[62] as where the writ was improvidently granted[63] or where the court was without jurisdiction to issue the writ.[64]

i. Review on Certiorari

On certiorari the supreme court has the same power and authority, and will apply much the same rules, as though the case had been brought before it by unrestricted appeal.

Under Judicial Code § 240 as amended, 28 U.S.C.A. § 347, the supreme court on certiorari has the same power and authority as though the case had been brought before it by unrestricted appeal or, under the former practice, writ of error.[65]

In construing the opinion of the court below the supreme court on certiorari will apply general rules of construction[66] and on questions of local law it will look to the trial court for aid.[67]

Scope of review in general. While the entire case may be open for examination by the supreme court on certiorari[68] and it may in a proper case

61. U.S.—Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., Mo., 36 S.Ct. 269, 240 U.S. 251, 60 L.Ed. 629, affirming 206 F. 611, 124 C.C.A. 409, reversing, C.C., 192 F. 930.

62. **Moot question**
Where, since the issue of the writ, the question presented became moot, the writ was dismissed.—Texas Consol. Theatres v. Pittman, Tex., 59 S.Ct. 40, 305 U.S. 3, 83 L.Ed. 5, dismissing certiorari 94 F.2d 203, denying rehearing 93 F.2d 21, certiorari granted 58 S.Ct. 1046, 304 U.S. 556, 82 L.Ed. 1524.

63. U.S.—Moor v. Texas & N. O. R. Co., Tex., 56 S.Ct. 372, 297 U.S. 101, 80 L.Ed. 509, dismissing appeal, C.C.A., 75 F.2d 386, certiorari granted 55 S.Ct. 836, 295 U.S. 728, 79 L.Ed. 1678—Keller v. Adams-Campbell Co., Cal., 44 S.Ct. 356, 264 U.S. 314, 68 L.Ed. 705, dismissing certiorari, C.C.A., 287 F. 838, certiorari granted 43 S.Ct. 702, 262 U.S. 741, 67 L.Ed. 1209—Southern Power Co. v. North Carolina Public Service Co., N.C., 44 S.Ct. 164, 263 U.S. 508, 68 L.Ed. 413, dismissing certiorari, C.C.A., North Carolina Public Service Co. v. Southern Power Co., 282 F. 837, certiorari granted Southern Power Co. v. North Carolina Public Service Co., 43 S.Ct. 94, 260 U.S. 716, 67 L.Ed. 478—Layne & Bowler Corporation v. Western Well Works, Cal., 43 S.Ct. 422, 261 U.S. 387, 67 L.Ed. 712, dismissing certiorari, C.C.A., Western Well Works v. Layne & Bowler Corporation, 276 F. 465, certiorari granted 42 S.Ct. 315, 258 U.S. 615, 66 L.Ed. 792.
25 C.J. p 874 note 77.
In an early case, however, it was said that it may be that the question of propriety in granting a writ of certiorari should be considered as foreclosed by the action of the court in granting the writ.—Forsyth v. Hammond, Ind., 17 S.Ct. 665, 166 U.S. 506, 41 L.Ed. 1095, reversing 71 F. 443, 18 C.C.A. 175.
Remand rather than dismissal
Instead of dismissing the writ as improvidently granted the supreme court may remand the cause for further proceedings where the interest of justice so requires.—Ruhlin v. New York Life Ins. Co., Pa., 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526, mandate conformed to, D. C., New York Life Ins. Co. v. Ruhlin, 25 F.Supp. 65.

64. **Question of power always open**
The question of power to issue the writ, being one of jurisdiction, is always open and must be considered and determined whenever presented.—Forsyth v. Hammond, Ind., 17 S.Ct. 665, 166 U.S. 506, 41 L.Ed. 1095, reversing 71 F. 443, 18 C.C.A. 175—25 C.J. p 874 note 78.

65. U.S.—Federal Trade Commission v. Pacific State Paper Trade Ass'n, 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 534, reversing in part, C.C.A., Pacific States Paper Trade Ass'n v. Federal Trade Commission, 4 F.2d 457, certiorari granted Federal Trade Commission v. Pacific States Paper Trade Ass'n, 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 534.
25 C.J. p 871 note 52.

66. **Particular opinion construed**
U.S.—Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 92 F.2d 330, certiorari denied Schriber-Schroth Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099, rehearing denied Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 748, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted, 58 S.Ct. 1052, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Aberdeen Motor Supply Co., 92 F.2d 330, certiorari denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. F. E. Rowe Sales Co., 92 F.2d 330, certiorari denied F. E. Rowe Sales Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109.

67. **"This court looks to the trial court** for the original examination of local questions and relies for aid upon the explanation of its conclusion."—City of Texarkana, Tex., v. Arkansas, Louisiana Gas Co., Tex., 59 S.Ct. 448, 452, 306 U.S. 188, 620, 83 L.Ed. 598, reversing, C.C.A., Arkansas Louisiana Gas Co. v. City of Texarkana, Tex., 97 F.2d 5, certiorari granted City of Texarkana, Tex. v. Arkansas Louisiana Gas Co., 59 S.Ct. 94, 305 U.S. 584, 83 L.Ed. 369.

68. U.S.—Panama R. Co. v. Napier Shipping Co., N.Y., 17 S.Ct. 572, 166 U.S. 280, 41 L.Ed. 1004, affirming 61

consider and determine the case on the merits,[69] generally it will limit the scope of its review as the record and circumstances in the particular case may require.[70] Thus the supreme court will generally limit its consideration of the case to the questions presented by the petition for the writ;[71] and it will not, as a rule, consider questions not raised or disclosed by the record[72] or which were not con-

F. 408, 9 C.C.A. 553, 50 F. 557, 1 C.C.A. 576.

25 C.J. p 871 note 52 [a].

69. U.S.—Lamar v. U. S., N.Y., 36 S.Ct. 535, 241 U.S. 103, 60 L.Ed. 912, affirming 227 F. 1019, 141 C.C. A. 668.

70. In cases tried without jury

Under Rev.St. §§ 649, 700, 28 U.S. C.A. § 773, 875, supreme court's review, in case jury is waived in writing, is limited to sufficiency of facts specially found to support judgment, and to rulings excepted to and presented by bill of exceptions.—Lewellyn v. Electric Reduction Co., Pa., 48 S.Ct. 63, 275 U.S. 243, 72 L.Ed. 262, reversing, C.C.A., Electric Reduction Co. v. Lewellyn, 11 F.2d 493, reversing, D.C., 8 F.2d 91, and certiorari granted Lewellyn v. Electric Reduction Co., 47 S.Ct. 92, 273 U.S. 696, 71 L.Ed. 834.

Matters not argued

Supreme court will not consider validity of separate provisions of statute defended as whole in trial court.—Farrington v. T. Tokushige, Hawaii, 47 S.Ct. 406, 273 U.S. 284, 71 L.Ed. 646, affirming, C.C.A., 11 F. 2d 710, certiorari granted 47 S.Ct. 99, 273 U.S. 677, 71 L.Ed. 835.

Scope of review in particular cases held limited

(1) To questions of law.—In re 620 Church Street Bldg. Corporation, Ill., 57 S.Ct. 88, 299 U.S. 24, 81 L.Ed. 16, rehearing denied 57 S.Ct. 229, 299 U. S. 623, 81 L.Ed. 458.

(2) To whether the quantum of proof produced formed an adequate basis for a reasoned judgment.—Palmer v. Connecticut Railway & Lighting Co., Conn., 61 S.Ct. 379, 311 U.S. 544, 85 L.Ed. 336, affirming, C.C.A., Connecticut Railway & Lighting Co. v. Palmer, 109 F.2d 568, certiorari granted Palmer v. Connecticut Railway & Lighting Co., 60 S.Ct. 894, 309 U.S. 653, 84 L.Ed. 1003, rehearing denied 61 S.Ct. 609, 312 U.S. 713, 85 L.Ed. 1143.

(3) To whether the findings were sufficient to support the order in question.—National Labor Relations Board v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 134, 311 U.S. 638, 85 L.Ed. 406.

71. U.S.—Dickinson Industrial Site v. Cowan, Ill., 60 S.Ct. 595, 309 U. S. 382, 84 L.Ed. 819, affirming, C.C. A., In re Albert Dickinson Co., 104 F.2d 771, certiorari granted Dickinson Industrial Site v. Cowan, 60 S.Ct. 139, 308 U.S. 543, 84 L.Ed 457, rehearing denied 60 S.Ct. 806, 309 U.S. 698, 84 L.Ed. 1037—Helis v. Ward, La., 60 S.Ct. 283, 308 U. S. 365, 84 L.Ed. 327, affirming, C. C.A., Ward v. Helis, 102 F.2d 519, rehearing denied 103 F.2d 519, reversing, D.C., Helis v. Ward, 20 F. Supp. 514, certiorari granted 60 S. Ct. 76, 308 U.S. 537, 84 L.Ed. 452, rehearing denied 60 S.Ct. 385, 308 U.S. 640, 84 L.Ed. 531—Crown Cork & Seal Co. v. Ferdinand Gutmann Co., N.Y., 58 S.Ct. 842, 304 U.S. 159, 82 L.Ed. 1265, reversing, C.C.A., 86 F.2d 698, modifying, D.C., 14 F. Supp. 255, certiorari granted Crown Cork & Seal Co. v. Ferdinand Gutman Co., 58 S.Ct. 12, 302 U.S. 664, 82 L.Ed. 513, motion denied 58 S. Ct. 1051, 304 U.S. 552, 82 L.Ed. 1523—Helvering v. Taylor, 55 S.Ct. 287, 293 U.S. 507, 79 L.Ed. 623, affirming, C.C.A., Taylor v. Commissioner of Internal Revenue, 70 F. 2d 619, certiorari granted Helvering v. Taylor, 55 S.Ct. 106, 293 U.S. 543, 79 L.Ed. 648—Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, Wash., 54 S.Ct. 105, 290 U. S. 117, 78 L.Ed. 216, reversing, C. C.A., The Pacific Cedar, 61 F.2d 187, certiorari granted Krauss Bros. Lumber Co. v. Dimon S. S. Corporation, 53 S.Ct. 594, 289 U.S. 716, 77 L.Ed. 1469, and modifying, D.C., The Pacific Hemlock, 53 F.2d 492—Steele v. Drummond, Ga., 48 S.Ct. 53, 275 U.S. 199, 72 L.Ed. 238, affirming, C.C.A., Drummond v. Steele, 11 F.2d 595, certiorari granted Steele v. Drummond, 46 S. Ct. 633, 271 U.S. 658, 70 L.Ed. 1136 —Webster Electric Co. v. Splitdorf Electrical Co., Ill., 44 S.Ct. 342, 264 U.S. 463, 68 L.Ed. 792, affirming, C.C.A., Splitdorf Electrical Co. v. Webster Electric Co., 283 F. 83, reversing, D.C., Webster Electric Co. v. Podlesak, 255 F. 907, certiorari granted 43 S.Ct. 92, 260 U.S. 715, 67 L.Ed. 478—Alice State Bank v. Houston Pasture Co., Tex., 38 S.Ct. 496, 247 U.S. 240, 62 L.Ed. 1096, reversing 227 F. 1015, 141 C.C.A. 662, and following Hubbard v. Tod, Iowa, 19 S.Ct. 14, 171 U.S. 474, 43 L.Ed. 246, affirming 76 F. 905, 22 C.C.A. 606.

25 C.J. p 871 note 52 [a] (2).

Questions presented by briefs

(1) The supporting brief on petition for certiorari, whether included in the petition or separately presented, is not a part of the petition, at least for the purpose of stating the questions on which review is sought, and the specifications of error therein do not expand or add to the questions stated in the petition, but merely identify and challenge rulings on which is grounded ultimate decision of the matter involved.—General Talking Pictures Corporation v. Western Electric Co., N.Y., 58 S.Ct. 849, 301 U.S. 175, 546, 82 L.Ed. 1273, affirming, C.C.A., Western Electric Co. v. General Talking Pictures Corporation, 91 F.2d 922, affirming, D.C., 16 F.Supp. 293, certiorari granted General Talking Pictures Corporation v. Western Electric Co., 58 S.Ct. 49, 302 U.S. 671, 82 L.Ed. 520, rehearing granted 58 S.Ct. 1051, 304 U.S. 587, 82 L.Ed. 1518, affirmed 59 S.Ct. 116, 305 U.S. 124, 83 L.Ed. 81, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L. Ed. 437.

(2) Accordingly questions presented by petitioner's brief but not set up in his petition generally will not be considered.—National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 569, 309 U.S. 350, 84 L.Ed. 799, modifying National Labor Relations Board v. National Licorice Co., C.C.A., 104 F.2d 655, certiorari granted National Licorice Co. v. National Labor Relations Board, 60 S.Ct. 108, 308 U.S. 535, 84 L.Ed. 451—General Talking Pictures Corporation v. Western Electric Co., supra—Olson v. U. S., Minn., 54 S.Ct. 704, 292 U.S. 246, 78 L.Ed. 1236, affirming, C.C.A., 67 F.2d 24, certiorari granted 54 S.Ct. 229, 290 U.S. 623, 78 L.Ed. 543—Karlson v. U. S., Minn., 54 S.Ct. 704, 292 U.S. 246, 78 L.Ed. 1236, affirming, C. C.A., 67 F.2d 24, certiorari granted 54 S.Ct. 229, 290 U.S. 623, 78 L.Ed. 543—Brewster v. U. S., Minn., 54 S. Ct. 704, 292 U.S. 246, 78 L.Ed. 1236, affirming, C.C.A., 67 F.2d 24, certiorari granted 54 S.Ct. 229, 290 U.S. 623, 78 L.Ed. 543.

72. U.S.—Department of Treasury of State of Indiana v. Ingram-Richardson Mfg. Co. of Indiana, Ind., 61 S.Ct. 866, 313 U.S. 252, 85 L.Ed. 1313, reversing, C.C.A., Ingram-Richardson Mfg. Co. of Indiana v. Department of Treasury of State of Indiana, 114 F.2d 889, certiorari denied 61 S.Ct. 614, 312 U.S. 687, 85 L.Ed. 1124, certiorari granted Department of Treasury of State of Indiana v. Ingram-Richardson Mfg. Co. of Indiana, 61 S.Ct. 613, 312 U.S. 671, 85 L.Ed. 1113, rehearing denied 61 S.Ct. 1107, 313 U.S. 600, 85 L.Ed. 1552—Edward Hines Yellow Pine Trustees v. Martin, Miss., 45 S.Ct. 543, 268 U.S. 458, 69 L.Ed. 1050, affirming, C.C.A., 296 F. 442.

sidered by the courts below,[73] although it may notice a plain error of a fundamental nature even though it was not assigned as error either in the circuit court of appeals or in the supreme court.[74] Matters not necessary to a proper determination of the case need not be considered,[75] and a matter

Particular question not considered

On review of judgment denying owner of wrecked steamship compensation for transporting its destitute seamen, supreme court would not consider to what extent rights of seamen to wages payable from freight earned on voyage or to wages or salvage from vessel they had helped to save survived statutes regulating duties of owner toward seamen where there was no evidence or finding that wrecked vessel had earned freight on her voyage, or had been salvaged with or without aid of her seamen.—Alaska S. S. Co. v. U. S., Wash., 54 S.Ct. 159, 290 U.S. 256, 78 L.Ed. 302, reversing, C.C.A., 63 F.2d 398, affirming, D.C., 60 F.2d 135, and certiorari granted 54 S.Ct. 49, 290 U.S. 608, 78 L.Ed. 532.

73. U.S.—McGoldrick v. Compagnie Generale Transatlantique, N.Y., 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849—Helvering v. Wood, 60 S.Ct. 551, 309 U.S. 344, 84 L.Ed. 796, affirming, C.C.A., Commissioner of Internal Revenue v. Wood, 104 F.2d 1013, certiorari granted Helvering v. Wood, 60 S.Ct. 139, 308 U.S. 543, 84 L.Ed. 457—Lanasa Fruit Steamship & Importing Co. v. Universal Ins. Co., Md., 58 S.Ct. 371, 302 U.S. 556, 82 L.Ed. 422, reversing, C.C.A., 89 F.2d 545, certiorari granted 58 S.Ct. 10, 302 U.S. 664, 82 L.Ed. 513—Mechanics Universal Joint Co. v. Culhane, Ill., 57 S.Ct. 81, 299 U.S. 51, 81 L.Ed. 33, affirming, C.C.A., 80 F.2d 147, certiorari granted 56 S.Ct. 749, 298 U.S. 648, 80 L.Ed. 1378—Helvering v. Minnesota Tea Co., 56 S.Ct. 269, 296 U.S. 378, 80 L.Ed. 284, affirmed, C.C.A., Minnesota Tea Co. v. Commissioner of Internal Revenue, 76 F.2d 797, certiorari granted Helvering v. Minnesota Tea Co., 56 S.Ct. 107, 296 U.S. 562, 80 L.Ed. 397—Helvering v. Peterson, 56 S.Ct. 269, 296 U.S. 378, 80 L.Ed. 284, affirmed, C.C.A., Peterson v. Commissioner of Internal Revenue, 76 F.2d 806, certiorari granted Helvering v. Peterson, 56 S.Ct. 107, two cases, 296 U.S. 562, 80 L.Ed. 397—Burnet v. Commonwealth Improvement Co., 53 S.Ct. 198, 287 U.S. 415, 77 L.Ed. 399, reversing, C.C.A., Commonwealth Imp. Co. v. Commissioner of Internal Revenue, 57 F.2d 47, certiorari granted Burnet v. Commonwealth Imp. Co., 52 S.Ct. 648, 286 U.S. 541, 76 L.Ed. 1279—Edward Hines Yellow Pine Trustees v. Martin, Miss., 45 S.Ct. 543, 268 U.S. 458, 69 L. Ed. 1050, affirming, C.C.A., 296 F. 442—Pusey & Jones Co. v. Hanssen, Del., 43 S.Ct. 454, 261 U.S. 491, 67 L.Ed. 763, reversing, C.C.A., 279 F. 488, affirming, D.C., Hanssen v. Pusey & Jones Co., 276 F. 296, and certiorari granted 43 S.Ct. 13, 260 U.S. 712, 67 L.Ed. 476.

25 C.J. p 873 note 69 [a].

Matters not considered by court of appeals

(1) Generally rulings not assigned as error in the circuit court of appeals and not considered by it will not be considered by the supreme court.—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming, C.C.A., 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419.

(2) It is within the power of the supreme court, however, to consider and decide an issue which the circuit court of appeals erroneously refused to consider.—Liberty Oil Co. v. Condon Nat. Bank, Kan., 43 S.Ct. 118, 260 U.S. 235, 67 L.Ed. 232, reversing, C. C.A., 271 F. 928, certiorari dismissed 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, rehearing granted 42 S.Ct. 92, 257 U.S. 628, 66 L.Ed. 405, and certiorari granted 42 S.Ct. 93, 257 U.S. 630, 66 L.Ed. 406.

Matters not considered by trial court

Questions passed on by the circuit court of appeals are open for consideration, although not raised in, or considered by, the trial court.—Friend v. Talcott, Ill., 33 S.Ct. 505, 228 U.S. 27, 57 L.Ed. 718, affirming 179 F. 676, 103 C.C.A. 80, 43 L.R.A., N.S., 649.

Questions obscurely presented in courts below

The supreme court was not foreclosed from basing decision regarding validity of patent on statute, which renders a patent invalid in case of public use or sale of device embodying asserted invention more than two years before it was first presented to patent office, because of the obscurity of the presentation of that question in courts below, where the question was fully presented by petition for writ of certiorari and in briefs and argument, and there was no indication that owner of patent had been prejudiced by the obscurity.—Muncie Gear Works v. Outboard, Marine & Manufacturing Co., Ill., 62 S.Ct. 865, 315 U.S. 759, 86 L.Ed. 1171, reversing, C.C.A., Outboard Marine & Mfg. Co. v. Muncie Gear Works, 119 F.2d 404, certiorari granted 62 S.Ct. 100, 314 U.S. 594, 86 L.Ed. 479.

Particular question not considered

On petition by federal power commission to review a judgment reversing an order of the commission relating to reduction of rates of natural gas companies, and on cross petition by companies assailing constitutionality of Natural Gas Act and the authority of commission to make the order, the question of the disposition of excess charges made pending review of the judgment was not before the supreme court for determination.—Federal Power Commission v. Natural Gas Pipeline Co. of America, 62 S.Ct. 736, 315 U.S. 575, 86 L. Ed. 1037, reversing, C.C.A., Natural Gas Pipeline Co. of America v. Federal Power Commission, 120 F.2d 625.

74. **When power exercised**

The supreme court may notice plain error, although not presented by petition for certiorari, but power will be exercised only in clear cases and in exceptional circumstances.—Kessler v. Strecker, La., 59 S.Ct. 694, 307 U.S. 22, 83 L.Ed. 1082, modifying, C. C.A., Strecker v. Kessler, 95 F.2d 976, rehearing denied 96 F.2d 1020, certiorari granted Kessler v. Strecker, 59 S.Ct. 102, 305 U.S. 587, 83 L.Ed. 371.

Error held fundamental

Under civil procedure rule exempting from punishment as for contempt the refusal to obey court order that party submit to a physical or mental examination, district court's treating refusal to comply with such an order as a contempt and committing party therefor was "fundamental error" which would be reviewed by supreme court, notwithstanding district court's action was not assigned as error either in the circuit court of appeals or the supreme court.—Sibbach v. Wilson & Co., Ill., 61 S.Ct. 422, 312 U.S. 1, 85 L.Ed. 479, reversing 108 F.2d 415, certiorari granted 60 S.Ct. 809, 309 U.S. 650, 84 L.Ed. 1001.

75. U.S.—Le Tulle v. Scofield, 60 S. Ct. 313, 308 U.S. 415, 84 L.Ed. 355, affirming, C.C.A., Scofield v. Le Tulle, 103 F.2d 20, certiorari granted Le Tulle v. Scofield, 60 S.Ct. 75, 308 U.S. 531, 84 L.Ed. 447, rehearing denied 60 S.Ct. 465, 309 U. S. 694, 84 L.Ed. 1035—Cities Service Oil Co. v. Dunlap, Tex., 60 S.Ct. 201, 308 U.S. 208, 84 L.Ed. 196, reversing, C.C.A., 100 F.2d 294, rehearing denied 101 F.2d 314, certiorari granted 59 S.Ct. 828, 307 U. S. 617, 83 L.Ed. 1498.

Questions not considered

(1) Where case turns on questions decided favorably to petitioners by supreme court, other questions determined adversely to them by court below will not be noticed.—Sun Ins. Office v. Scott, Ohio, 52 S.Ct. 72, 284 U.S. 177, 76 L.Ed. 229, reversing, C. C.A., Home Ins. Co. of New York v.

which is, or has become, an abstract or moot question will not be reviewed.[76]

As a general rule the supreme court will not interfere where conclusions of the circuit court of appeals depend on appreciation of circumstances which admit of different interpretations;[77] and ordinarily concurrent findings of fact of the district court and the circuit court of appeals which are not plainly erroneous or unsupported by the evidence will be accepted by the supreme court and will not be disturbed or reviewed by it.[78]

Where the writ is granted on the petition of one

Scott, 46 F.2d 10, certiorari granted Sun Insurance Office v. Scott, 51 S. Ct. 487, 283 U.S. 814, 75 L.Ed. 1431.

(2) Supreme court need not examine grounds on which circuit court of appeals put correct decision.—Alpha S. S. Corporation v. Cain, N.Y., 50 S.Ct. 443, 281 U.S. 642, 74 L.Ed. 1086, affirming, C.C.A., Cain v. Alpha S. S. Corporation, 35 F.2d 717, certiorari granted Alpha S. S. Corporation v. Cain, 50 S.Ct. 86, 280 U. S. 549, 74 L.Ed. 607.

Constitutional question

Generally the constitutionality of a statute will not be considered on certiorari unless this is necessary to the final determination of the cause. —Lane v. Wilson, Okl., 59 S.Ct. 872, 307 U.S. 268, 83 L.Ed. 1281, reversing, C.C.A., 98 F.2d 980, certiorari granted 59 S.Ct. 249, 305 U.S. 591, 83 L.Ed. 374.

76. Particular matters

(1) In oil producers' injunction suit attacking National Industrial Recovery Act and provision of petroleum code limiting production, such provision which, without knowledge of parties or courts below, was eliminated by executive order antedating suit, would not be passed on by supreme court, even though such provision was reinstated by executive order pending appeal; but injunction suits attacking regulations of secretary of the interior designed to enforce executive order prohibiting transportation of excess petroleum in interstate and foreign commerce were not moot as to such regulations merely because of amendment thereof subsequent to institution of suits, where amended regulations continued substantially earlier requirements and expanded them and presented same constitutional questions.—Panama Refining Co. v. Ryan, Tex., 55 S. Ct. 241, 293 U.S. 388, 79 L.Ed. 446, reversing, C.C.A., Ryan v. Amazon Petroleum Corporation, 71 F.2d 1, reversing, D.C., Amazon Petroleum Corporation v. Railroad Commission of Texas, 5 F.Supp. 639, and certiorari granted Amazon Petroleum Corporation v. Ryan, 55 S.Ct. 102, 293 U.S. 539, 79 L.Ed. 645, followed in, C.C.A., Ryan v. Panama Refining Co., 71 F.2d 8, certiorari granted Panama Refining Co. v. Ryan, 55 S.Ct. 83, 293 U.S. 539, 79 L.Ed. 645, reversed on other grounds 55 S.Ct. 241, 293 U.S. 388, 79 L.Ed. 446.

(2) In action by United States to enjoin construction of dam without federal license, supreme court would determine the validity of only the challenged license provisions and could not predetermine issues involving mere possibilities of future coercive uses of license power or of future conflicts between the federal government and states in the field of water power rights.—U. S. v. Appalachian Electric Power Co., Va., 61 S. Ct. 291, 311 U.S. 377, 85 L.Ed. 243, reversing, C.C.A., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.

77. U.S.—Federal Trade Commission v. American Tobacco Co., 47 S.Ct. 663, 274 U.S. 543, 71 L.Ed. 1193, affirming, C.C.A., American Tobacco Co. v. Federal Trade Commission, 9 F.2d 570, certiorari granted Federal Trade Commission v. American Tobacco Co., 46 S. Ct. 349, 270 U.S. 638, 70 L.Ed. 774.

Discretionary action of court below

Discretion of trial court in granting interlocutory injunction against infringement of letters patent will not be disturbed on certiorari to the circuit court of appeals which affirmed the injunction order where questions of fact were disputed.—Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co., Mo., 36 S.Ct. 86, 239 U.S. 156, 60 L.Ed. 191, affirming 198 F. 650, 117 C.C.A. 354.

78. U.S.—U. S. v. Bethlehem Steel Corporation, Pa., 62 S.Ct. 581, 315 U.S. 289, 86 L.Ed. 855, affirming, C. C.A., 113 F.2d 301, affirming, D.C., 23 F.Supp. 676—Just v. Chambers, Fla., 61 S.Ct. 687, 312 U.S. 383, 668, 85 L.Ed. 903, reversing, C.C.A., The Friendship II, 113 F.2d 105, certiorari granted Just v. Chambers, 61 S.Ct. 63, 311 U.S. 634, 85 L.Ed. 403—Electric Storage Battery Co. v. Shimadzu, Pa., 59 S.Ct. 675, 307 U.S. 5, 613, 616, 83 L.Ed. 1071, reversing, C.C.A., 98 F.2d 831, affirming, D.C., Shimadzu v. Electric Storage Battery Co., 17 F.Supp. 42, certiorari granted Electric Storage Battery Co. v. Shimadzu, 59 S.Ct. 244, 305 U.S. 591, 83 L.Ed. 373, mandate conformed to, D.C., Shimadzu v. Electric Storage Battery Co., 30 F.Supp. 865—In re Tax Service Ass'n of Illinois, Ill., 59 S.Ct. 131, 305 U.S. 160, 83 L.Ed. 100, affirming, C.C.A., 95 F.2d 373, certiorari granted Harris v. Avery Brundage Co., 58 S.Ct. 1060, 304 U.S. 557, 82 L.Ed. 1525, rehearing denied 59 S. Ct. 247, 305 U.S. 674, 83 L.Ed. 437—General Talking Pictures Corporation v. Western Electric Co., N.Y., 58 S.Ct. 849, 304 U.S. 175, 546, 82 L.Ed. 1273, affirming, C.C.A., Western Electric Co. v. General Talking Pictures Corporation, 91 F.2d 922, affirming, D.C., 16 F.Supp. 293, certiorari granted General Talking Pictures Corporation v. Western Electric Co., 58 S.Ct. 49, 302 U.S. 674, 82 L.Ed. 520, rehearing granted 58 S.Ct. 1051, 304 U.S. 587, 82 L.Ed. 1518, affirmed 59 S.Ct. 116, 305 U.S. 124, 83 L.Ed. 81, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437—Virginian Ry. Co. v. System Federation No. 40, Va., 57 S.Ct. 592, 300 U.S. 515, 81 L.Ed. 789, affirming, C.C.A., Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 84 F.2d 641, affirming, D.C., System Federation No. 40, Railway Employees Department of American Federation of Labor v. Virginian Ry. Co., 11 F.Supp. 621, certiorari granted Virginian Ry. Co. v. System Federation No. 40, Railway Employees Department of American Federation of Labor, 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389—Mechanics Universal Joint Co. v. Culhane, Ill., 57 S.Ct. 81, 299 U.S. 51, 81 L.Ed. 33, affirming, C.C.A., 80 F.2d 147, certiorari granted 56 S.Ct. 749, 298 U.S. 648, 80 L.Ed. 1378—Pick Manufacturing Co. v. General Motors Corporation, Wis., 57 S.Ct. 1, 299 U.S. 3, 81 L.Ed. 4, rehearing denied 57 S.Ct. 192, 299 U.S. 622, 81 L.Ed. 458—Page v. Arkansas Natural Gas Corporation, Ark., 52 S. Ct. 507, 286 U.S. 269, 76 L.Ed. 1096, affirming, C.C.A., 53 F.2d 27, certiorari granted 52 S.Ct. 407, 285 U. S. 532, 76 L.Ed. 927—Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, Tex., 50 S.Ct. 427, 281 U.S. 548, 74 L.Ed. 1034, affirming, C.C.A., 33 F.2d 13, certiorari granted 50 S.Ct. 88, 280 U. S. 550, 74 L.Ed. 608.

Findings as to negligence

Where the district court and the circuit court of appeals agree on a question of negligence, the supreme court will not make a minute analysis of the evidence.—Boehmer v. Pennsylvania R. Co., N.Y., 40 S.Ct. 409,

party alone, only so much of the judgment below as decided in favor of the other party is brought before the court for review,[79] and hence, as discussed infra notes 83–91, matters urged in opposition to the judgment by respondent will not generally be considered.

Questions of jurisdiction. Before considering the questions raised by the petition for certiorari, the court, in cases of doubt, should first determine its own jurisdiction[80] and then that of the court from which the record comes,[81] even though these jurisdictional questions have not been raised by the parties in either court.[82]

Matters urged by respondent. While the supreme court on certiorari has power to review objections to the judgment under review urged by a respondent who has not applied for certiorari,[83] it is not bound to do so[84] and, as a matter of practice, it generally will refuse to consider such objections,[85] respondent not being entitled as a matter of right to urge them[86] even though they were raised in the court below.[87] A respondent who has not applied for certiorari, however, may urge any matter appearing in the record in support of the judgment under review[88] and he is free to sustain it on any legal ground which will support it.[89] Thus he may

252 U.S. 496, 64 L.Ed. 680, affirming 252 F. 553, 165 C.C.A. 3.

When facts considered

In cases involving issues such as the navigability of water courses, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide, and the supreme court may consider the facts found by the two courts and determine for itself whether the proper legal tests have been applied to the facts.—U. S. v. Appalachian Electric Power Co., Va., 61 S.Ct. 291, 311 U.S. 377, 85 L. Ed. 243, reversing, C.C.A., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143.

79. U.S.—Kellogg Co. v. National Biscuit Co., Del., 59 S.Ct. 109, 305 U.S. 111, 83 L.Ed. 73, reversing, C. C.A., National Biscuit Co. v. Kellogg Co., 96 F.2d 873 and 91 F.2d 150, certiorari denied Kellogg Co. v. National Biscuit Co., 58 S.Ct. 120, 302 U.S. 733, 82 L.Ed. 567, rehearing denied 58 S.Ct. 139, 302 U.S. 777, 82 L.Ed. 601, petition denied 58 S.Ct. 280, 302 U.S. 654, 82 L.Ed. 506, certiorari granted 58 S. Ct. 1052, 304 U.S. 586, 82 L.Ed. 1547, rehearing denied 59 S.Ct. 246, 305 U.S. 674, 83 L.Ed. 437, and 59 S.Ct. 247, 305 U.S. 674, 83 L.Ed. 437—Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, N.Y., 53 S.Ct. 167, 287 U.S. 329, 77 L.Ed. 341, affirming in part and reversing in part, C.C.A., 55 F.2d 1048, affirming in part and reversing in part, D.C., 45 F.2d 405, certiorari granted 52 S.Ct. 641, 286 U.S. 539, 76 L.Ed. 1277.

80. U.S.—Treinies v. Sunshine Mining Co., 60 S.Ct. 44, 308 U.S. 66, 84 L.Ed. 85, affirming, C.C.A., 99 F.2d 651, affirming, D.C., Sunshine Mining Co. v. Treinies, 19 F.Supp. 587, certiorari granted Treinies v. Sunshine Mining Co., 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034.

81. U.S.—Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, N.Y., 55 S.Ct. 313, 293 U.S. 449, 79 L.Ed. 583, affirming, C.C.A., 70 F.2d 297, and certiorari granted 55 S.Ct. 95, 293 U.S. 541, 79 L.Ed. 647.

82. U.S.—Treinies v. Sunshine Mining Co., Idaho, 60 S.Ct. 44, 308 U. S. 66, 84 L.Ed. 85, affirming, C.C. A., 99 F.2d 651, affirming, D.C., Sunshine Mining Co. v. Treinies, 19 F.Supp. 587, certiorari granted Treinies v. Sunshine Mining Co., 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, rehearing denied 60 S.Ct. 464, 309 U.S. 693, 84 L.Ed. 1034—Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, N.Y., 55 S.Ct. 313, 293 U.S. 449, 79 L.Ed. 583, affirming, C.C.A., 70 F.2d 297, certiorari granted 55 S. Ct. 95, 293 U.S. 541, 79 L.Ed. 647.

83. U.S.—Lagnes v. Green, Wash., 51 S.Ct. 243, 282 U.S. 531, 85 L.Ed. 520, reversing, C.C.A., The Aloha, 35 F.2d 447, certiorari granted 50 S.Ct. 246, 281 U.S. 708, 74 L.Ed. 1131.

84. U.S.—Lagnes v. Green, supra.

85. U.S.—Mechanics Universal Joint Co. v. Culhane, Ill., 57 S.Ct. 81, 299 U.S. 51, 81 L.Ed. 33, affirming, C.C. A., 80 F.2d 147, certiorari granted 56 S.Ct. 749, 298 U.S. 648, 80 L.Ed. 1378—Lagnes v. Green, Wash., 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520, reversing, C.C.A., The Aloha, 35 F.2d 447, certiorari granted 50 S.Ct. 246, 281 U.S. 708, 74 L.Ed. 1131—Charles Warner Co. v. Independent Pier Co., Pa., 49 S.Ct. 45, 278 U.S. 85, 73 L.Ed. 195, reversing, C.C.A., Independent Pier Co. v. Warner Co., 20 F.2d 111, and certiorari granted Charles Warner Co. v. Independent Pier Co., 48 S. Ct. 204, 275 U.S. 521, 72 L.Ed. 405—Federal Trade Commission v. Pacific State Paper Trade Ass'n, Cal., 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 534, reversing in part, C.C.A., Pacific States Paper Trade Ass'n v. Federal Trade Commission, 4 F.2d 457, certiorari granted Federal Trade Commission v. Pacific States Paper Trade Ass'n, 47 S.Ct. 255, 273 U.S. 52, 71 L.Ed. 534.

86. U.S.—National Labor Relations Board v. Express Pub. Co., 61 S. Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 134, 311 U. S. 638, 85 L.Ed. 406—Ryerson v. U. S., Ill., 61 S.Ct. 656, 312 U.S. 405, 85 L.Ed. 917, affirming, C.C. A., U. S. v. Ryerson, 114 F.2d 150, reversing, D.C., 28 F.Supp. 265, certiorari granted Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408.

Findings may not be attacked

A respondent filing no cross petition for certiorari may not attack concurrent findings of fact of the district court and the circuit court of appeals.—Electric Storage Battery Co. v. Shimadzu, Pa., 59 S.Ct. 675, 307 U.S. 5, 613, 616, 1071, 83 L.Ed. 1071, reversing, D.C., 98 F.2d 831, affirming, C.C.A., Shimadzu v. Electric Storage Battery Co., 17 F.Supp. 42, certiorari granted Electric Storage Battery Co. v. Shimadzu, 59 S.Ct. 244, 305 U.S. 591, 83 L.Ed. 373, mandate conformed to Shimadzu v. Electric Storage Battery Co., 30 F.Supp. 865.

87. U.S.—Le Tulle v. Scofield, Tex., 60 S.Ct. 313, 308 U.S. 415, 84 L.Ed. 355, affirming, C.C.A., Scofield v. Le Tulle, 103 F.2d 20, certiorari granted Le Tulle v. Scofield, 60 S.Ct. 75, 308 U.S. 531, 84 L.Ed. 447, rehearing denied 60 S.Ct. 465, 309 U.S. 694, 84 L.Ed. 1035.

88. U.S.—Le Tulle v. Scofield, supra.

89. U.S.—Ryerson v. U. S., Ill., 61 S.Ct. 656, 312 U.S. 405, 85 L.Ed. 917, affirming, C.C.A., U. S. v. Ryerson, 114 F.2d 150, reversing, D.C., 28 F.Supp. 265, certiorari granted Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408—City of Texarkana, Tex. v. Arkansas, Louisiana Gas Co., Tex., 59 S.Ct. 448, 306 U.S. 188, 620, 83 L.Ed. 598, reversing, C.C.A., Arkansas Louisi-

urge in support of the judgment grounds rejected by the court below;[90] and where the judgment below was rested on an erroneous ground he may justify it in the supreme court on a valid ground.[91]

Presumptions. The supreme court may indulge all natural presumptions and proper conclusions arising from the record;[92] and it may assume that rulings of the court below not specified as error in the petition for the writ are correct.[93] Where an order dismissing a complaint on the pleadings is affirmed by the circuit court of appeals, the supreme court, on certiorari, will assume the truth of the allegations of the complaint[94] in the absence of countervailing facts or explanations.[95]

Burden of showing error. The burden of showing in what respect the judgment under review is erroneous rests on the party bringing it to the supreme court for review.[96]

j. Determination and Disposition of Cause

(1) In general
(2) Remand
(3) Effect of judgment

(1) In General

The supreme court has power not only to correct error in the judgment entered below, but also to make such disposition of the case as justice may at the time require.

The supreme court has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at the time require,[97] to render such judgment as the cir-

ana Gas Co. v. City of Texarkana, Tex., 97 F.2d 5, certiorari granted City of Texarkana, Tex. v. Arkansas Louisiana Gas Co., 59 S.Ct. 94, 305 U.S. 584, 83 L.Ed. 369.

90. U.S.—Helvering v. Lerner Stores Corporation, Md., 62 S.Ct. 341, 314 U.S. 463, 86 L.Ed. 343, reversing, C.C.A., Lerner Stores Corporation v. Commissioner of Internal Revenue, 118 F.2d 455—McGoldrick v. Compagnie Generale Transatlantique, N.Y., 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849—Public Service Commission of Puerto Rico v Havemeyer, Puerto Rico, 56 S.Ct. 360, 296 U.S. 506, 80 L.Ed. 357, reversing, C.C.A., Havemeyer v. Public Service Commission of Puerto Rico, 74 F.2d 637, certiorari granted Public Service Commission of Puerto Rico v. Havemeyer, 56 S. Ct. 97, 296 U.S. 556, 80 L.Ed. 392, rehearing denied 56 S.Ct. 496, 297 U.S. 727, 80 L.Ed. 1010—Stelos Co. v. Hosiery Motor-Mend Corporation, N.Y., 55 S.Ct. 746, 295 U.S. 237, 79 L.Ed. 1414, affirming, C.C.A., 72 F.2d 405, affirming in part and reversing in part 60 F.2d 1009, and certiorari granted 55 S.Ct. 514, 294 U.S. 702, 79 L.Ed. 1238, and Hosiery Motor-Mend Corporation v. Stelos Co., 55 S.Ct. 515, 294 U.S. 702, 79 L.Ed. 1238—Story Parchment Co. v. Paterson Parchment Paper Co., Mass., 51 S.Ct. 248, 282 U.S. 555, 75 L.Ed. 544, reversing, C.C.A., Paterson Parchment Paper Co. v. Story Parchment Co., 37 F.2d 537, certiorari granted Story Parchment Co. v. Paterson Parchment Paper Co., 50 S.Ct. 334, 281 U.S. 711, 74 L.Ed. 1133—Langnes v. Green, Wash., 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520, reversing, C.C.A., The Aloha, 35 F.2d 447, certiorari granted 50 S.Ct. 246, 281 U.S. 708, 74 L.Ed. 1131.

91. U.S.—Ryerson v. U. S., Ill., 61 S.Ct. 656, 312 U.S. 405, 85 L.Ed. 917, affirming, C.C.A., U. S. v. Ryerson, 114 F.2d 150, reversing, D.C., 28 F.Supp. 265, certiorari granted Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408.

92. Particular presumptions or conclusions

(1) Where opinion of circuit court of appeals holding patent valid in infringement suits, in enumerating combination of elements which allegedly constituted invention, included an element described in amendment of the patent application, supreme court would assume, in disposing of the case on certiorari, that circuit court of appeals considered such element essential.—Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 92 F.2d 330, certiorari denied Schriber-Schroth Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099, rehearing denied Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 748, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted, 58 S.Ct. 1052, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 17, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. Aberdeen Motor Supply Co., 92 F.2d 330, certiorari denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S. Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. F. E. Rowe Sales Co., 92 F.2d 330, certiorari denied F. E. Rowe Sales Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109.

(2) In determining whether wartime shipbuilding contracts between government and shipbuilder were obtained by duress, the supreme court could not assume, in absence of evidence, that if negotiations failed to produce contracts acceptable to both sides, shipbuilder would have refused to contribute to the war effort except under legal compulsion. U. S. v. Bethlehem Steel Corporation, Pa., 62 S.Ct. 581, 315 U.S. 289, 86 L.Ed. 855, affirming, C.C.A., 113 F.2d 301, affirming, D.C., 23 F.2d 676.

93. U.S.—Prudence Co. v. Fidelity & Deposit Co. of Maryland, N.Y., 56 S.Ct. 387, modifying, C.C.A., 77 F.2d 834.

94. U.S.—Armour & Co. v. Alton R. Co., Ill., 61 S.Ct. 198, 312 U.S. 195, 85 L.Ed. 771, affirming, C.C.A., 111 F.2d 913, affirming 27 F.Supp. 625, certiorari granted 61 S.Ct. 40, 311 U.S. 627, 85 L.Ed. 398.

95. U.S.—Anderson v. Shipowners' Ass'n of Pacific Coast, Cal., 47 S. Ct. 125, 272 U.S. 359, 71 L.Ed. 298, reversing, C.C.A., 10 F.2d 96, certiorari granted 46 S.Ct. 474, 271 U.S. 652, 70 L.Ed. 1133.

96. U.S.—National Labor Relations Board v. Express Pub. Co., 61 S.Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 131, 311 U.S. 638, 85 L.Ed. 406.

97. U.S.—Watts, Watts & Co. v.

cuit court of appeals should have rendered,[98] and to dispose of all questions arising on the record.[99] Accordingly it may affirm,[1] reverse,[2] vacate,[3] or modify[4] the judgment under review, as the interest of justice may require in the particular case.[5]

Dismissal of suit for want of jurisdiction. Dismissal of the suit will be directed where it appears that the trial court was without jurisdiction.[6]

Disposition more favorable to respondent. On the theory, which has been noted above in subdivision i of this section, that a respondent who has sought no cross writ is entitled to be heard only in support of the decree rendered below, the supreme court generally will decline to render or direct a decree more favorable to such party.[7]

Effect of changes pending review. In the determination and disposition of a cause on certiorari the supreme court must consider material changes

Unione Austriaca di Navigazione, N.Y., 39 S.Ct. 1, 248 U.S. 9, 63 L. Ed. 100, 3 A.L.R. 323, reversing 229 F. 136, 143 C.C.A. 412.
25 C.J. p 871 note 52 [d], p 874 note 71.

98. U.S.—Story Parchment Co. v. Paterson Parchment Paper Co., Mass., 51 S.Ct. 248, 282 U.S. 555, 75 L.Ed. 544, reversing, C.C.A., Paterson Parchment Paper Co. v. Story Parchment Co., 37 F.2d 537, certiorari granted Story Parchment Co. v. Paterson Parchment Paper Co., 50 S.Ct. 334, 281 U.S. 711, 74 L.Ed. 1133—Boston & M. R. Co. v. Gokey, Vt., 28 S.Ct. 657, 210 U.S. 155, 52 L.Ed. 1002, affirming 149 F. 42, 79 C.C.A. 64, affirming, C.C., 130 F. 992.

99. U.S.—Lamar v. U. S., N.Y., 36 S.Ct. 535, 241 U.S. 103, 60 L.Ed. 912, affirming 227 F. 1019, 141 C.C. A. 668—Donovan v. Pennsylvania Co., Ill., 26 S.Ct. 91, 199 U.S. 279, 50 L.Ed. 192, affirming 120 F. 215, 57 C.C.A. 362, 61 L.R.A. 140.

1. U.S.—Ryerson v. U. S., Ill., 61 S. Ct. 656, 312 U.S. 405, 85 L.Ed. 917, affirming, C.C.A., U. S. v. Ryerson, 114 F.2d 150, reversing, D.C., 28 F. Supp. 265, certiorari granted Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408.

2. U.S.—Griffin v. McCoach, Tex., 61 S.Ct. 1023, 313 U.S. 498, 85 L.Ed. 1481, 134 A.L.R. 1462, reversing, C. C.A., 116 F.2d 261, certiorari granted 61 S.Ct. 807, 312 U.S. 676, 85 L. Ed. 1116—Beal v. Missouri Pac. R. R. Corporation, Neb., 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577, reversing, C.C.A., Beal v. Missouri Pac. R. Corporation in Nebraska, 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396.

When reversal proper

(1) The supreme court, on certiorari to review judgment of circuit court of appeals reversing judgment of supreme court of Puerto Rico on a question of local law, will not reverse the decision, unless considered wrong, or there was such plausible ground for the judgment reversed by it that the local decision ought not to be disturbed.—Cami v. Central Victoria, Puerto Rico, 45 S.Ct. 570, 268 U.S. 469, 69 L.Ed. 1056, affirming, C.C.A., Central Victoria v. Cami, 295 F. 809.

(2) Accordingly the supreme court will reverse a judgment of the circuit court of appeals reversing a judgment of the supreme court of Puerto Rico on a question of local law where it becomes impossible for the supreme court to entertain a sense of clear error committed by the supreme court of Puerto Rico, in view of the deference due to the understanding of local courts in matters of purely local concern.—People of Puerto Rico v. Rubert Hermanos, Inc., 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081—Sancho v. Yabucoa Sugar Co., Puerto Rico, 59 S.Ct. 626, 306 U. S. 505, 307 U.S. 613, 83 L.Ed. 946, reversing, C.C.A., Porto Rico Fertilizer Co. v. Sancho, 98 F.2d 398, certiorari granted Sancho v. Yabucoa Sugar Co., 59 S.Ct. 460, 306 U.S. 622, 83 L.Ed. 1027—Matos v. Hermanos, Puerto Rico, 57 S.Ct. 529, 300 U.S. 429, 81 L. Ed. 728, reversing, C.C.A., Hermanos v. Matos, 81 F.2d 930, certiorari granted Matos v. Hermanos, 57 S.Ct. 31, 299 U.S. 527, 81 L.Ed. 387, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365.

3. U.S.—Carpenter v. Wabash Ry. Co., Mo., 60 S.Ct. 416, 309 U.S. 23, 84 L.Ed. 558, vacating, C.C.A., 103 F.2d 996, certiorari granted 60 S. Ct. 102, 308 U.S. 539, 84 L.Ed. 454, rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035—Ruhlin v. New York Life Ins. Co., Pa., 58 S. Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U. S. 681, 82 L.Ed. 526, mandate conformed to, D.C., New York Life Ins. Co. v. Ruhlin, 25 F.Supp. 65—Panama Mail S. S. Co. v. Vargas, Cal., 50 S.Ct. 448, 281 U.S. 670, 74 L.Ed. 1105, reversing, C.C.A., 33 F. 2d 894, certiorari granted 50 S.Ct. 40, 280 U.S. 546, 74 L.Ed. 606.

4. U.S.—National Labor Relations Board v. Express Pub. Co., 61 S. Ct. 693, 312 U.S. 426, 85 L.Ed. 930, reversing, C.C.A., 111 F.2d 588, certiorari granted 61 S.Ct. 134, 311 U. S. 638, 85 L.Ed. 406.

5. U.S.—Ruhlin v. New York Life Ins. Co., Pa., 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C. A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526, mandate conformed to, D.C., New York Life Ins. Co. v. Ruhlin, 25 F.Supp. 65.

6. **Rule held inapplicable**

Rule that federal appellate court must, of its own motion, dismiss suit if it appears that trial court was without jurisdiction, was inapplicable, where objection went, not to trial court's jurisdiction, but to legal capacity of plaintiff as ancillary receiver.—McCandless v. Furlaud, N. Y., 55 S.Ct. 42, 293 U.S. 67, 79 L.Ed. 202, reversing, C.C.A., 68 F.2d 925, certiorari granted 54 S.Ct. 716, 292 U.S. 617, 78 L.Ed. 1475, rehearing denied 55 S.Ct. 211, 293 U.S. 632, 79 L. Ed. 717.

7. **Erroneous judgment affirmed**

(1) A judgment denying separate gift tax exemption claimed by petitioners for each trust beneficiary, but allowing a single exemption for each trust, would be affirmed by the supreme court on certiorari, although no exemption should have been allowed because the gifts were of future interests, in absence of cross petition by the government attacking the judgment.—Ryerson v. U. S., Ill., 61 S.Ct. 656, 312 U.S. 405, 85 L.Ed. 917, affirming, C.C.A., U. S. v. Ryerson, 114 F.2d 150, reversing, D.C., 28 F.Supp. 265, certiorari granted Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408.

(2) Where collector of internal revenue on certiorari by taxpayer did not draw into question so much of judgment as exempted from taxation gain to transferor corporation arising from transfer of its assets and part of liquidating dividend attributable thereto, the supreme court could not afford collector relief from that portion of judgment which was adverse to him.—Le Tulle v. Scofield, Tex., 60 S.Ct. 313, 308 U.S. 415, 84 L. Ed. 355, affirming, C.C.A., Scofield v. Le Tulle, 103 F.2d 20, certiorari granted Le Tulle v. Scofield, 60 S. Ct. 75, 308 U.S. 531, 84 L.Ed. 447, rehearing denied 60 S.Ct. 465, 309 U.S. 694, 84 L.Ed. 1035.

in fact[8] and in law[9] which have supervened since the judgment or decree was entered below, especially in an admiralty case.[10]

(2) Remand

The cause may be remanded to the district court or circuit court of appeals for further proceedings in accordance with directions or instructions given.

The supreme court, in a proper case, may remand the cause to the district court[11] or circuit court of appeals[12] for further proceedings in accordance with directions or instructions given.[13] Thus the cause may be remanded to the proper court for further proceedings where the determination of the court below was based on a wrong theory as to the law applicable,[14] where the circuit court of appeals left undetermined a question material to a proper disposition of the cause,[15] where there has been no

8. **Declaration of war** by the United States considered in suit between alien belligerents.—Watts, Watts & Co. v. Unione Austriaca di Navigazione, N.Y., 39 S.Ct. 1, 248 U.S. 9, 63 L.Ed. 100, 3 A.L.R. 323, reversing, C.C.A., 229 F. 136, 143 C.C.A. 412.

9. U.S.—Watts, Watts & Co. v. Unione Austriaca di Navigazione, supra—Dinsmore v. Southern Express Co., N.D., 22 S.Ct. 45, 183 U.S. 115, 46 L.Ed. 111, affirming 102 F. 794, 42 C.C.A. 623, reversing, C.C., 92 F. 714.

Changes in bankruptcy statute

Where bankruptcy statute invoked in railway receivership proceeding was amended so as to apply to such receiverships, after petition had been filed for certiorari to review a judgment holding that such statute was inapplicable, the supreme court was required to decide the question in harmony with statute as amended, even assuming that the judgment was correct under the law in effect at time of its rendition.—Carpenter v. Wabash Ry. Co., Mo., 60 S.Ct. 416, 309 U.S. 23, 84 L.Ed. 558, vacating, C.C.A., 103 F.2d 996, certiorari granted 60 S.Ct. 102, 308 U.S. 539, 84 L.Ed. 454, rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035.

10. U.S.—Watts, Watts & Co. v. Unione Austriaca di Navigazione, N. Y., 39 S.Ct. 1, 248 U.S. 9, 63 L.Ed. 100, 3 A.L.R. 323, reversing, C.C.A., 229 F. 136, 143 C.C.A. 412.

11. U.S.—Carpenter v. Wabash Ry. Co., Mo., 60 S.Ct. 416, 309 U.S. 23, 84 L.Ed. 558, vacating, C.C.A., 103 F.2d 996, certiorari granted 60 S. Ct. 102, 308 U.S. 539, 84 L.Ed. 454, rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035—Electric Storage Battery Co. v. Shimadzu, Pa., 59 S.Ct. 675, 307 U.S. 5, 613, 616, 83 L.Ed. 1071, reversing, C.C. A., 98 F.2d 831, affirming, D.C., Shimadzu v. Electric Storage Battery Co., 17 F.Supp. 42, certiorari granted Electric Storage Battery Co. v. Shimadzu, 59 S.Ct. 244, 305 U.S. 591, 83 L.Ed. 373, mandate conformed to, D.C., Shimadzu v. Electric Storage Battery Co., 30 F. Supp. 865.

12. U.S.—Postal S. S. Corporation v. The El Isleo, N.Y., 60 S.Ct. 332, 308 U.S. 378, 84 L.Ed. 335, reversing, C.C.A., The Eastern Glade, 101 F.2d 4, affirming, D.C., 20 F.Supp. 373, certiorari granted Postal S. S. Corporation v. The El Isleo, 60 S.Ct 77, 308 U.S. 532, 84 L.Ed. 448, and Postal S. S. Corporation v. Southern Pac. Co., 60 S.Ct. 77, 308 U.S. 532, 84 L.Ed. 448, mandate conformed to, C.C.A., 112 F.2d 297, certiorari denied Southern Pac. Co. v. The Eastern Glade, 61 S.Ct. 50, 311 U.S. 655, 85 L.Ed. 419, and Southern Pac. Co. v. Postal S. S. Corporation, 61 S.Ct. 50, 311 U.S. 655, 85 L.Ed. 419.

25 C.J. p 871 note 52 [c].

13. **Particular causes remanded with directions**

(1) Where bankruptcy statute requiring giving of priority to employees' claims for personal injuries in railroad reorganizations was amended so as to be applicable to receiverships, after petition had been filed for certiorari to review judgment denying priority in equity receivership of railroad, supreme court would not remand the case for district court to determine whether the claim could be entertained under the amendment, but would remand the cause to district court with directions to allow the claim, in view of mandatory effect of the statute.—Carpenter v. Wabash Ry. Co., Mo., 60 S Ct. 416, 309 U.S. 23, 84 L.Ed. 558, vacating, C.C.A., 103 F.2d 996, certiorari granted 60 S.Ct. 102, 308 U.S. 539, 84 L.Ed. 454, rehearing denied 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035.

(2) Other causes.—Beal v. Missouri Pac. R. R. Corporation, Neb., 61 S.Ct. 418, 312 U.S. 45, 85 L.Ed. 577, reversing, C.C.A., Beal v. Missouri Pac. R. Corporation in Nebraska, 108 F.2d 897, certiorari granted 61 S.Ct. 8, 311 U.S. 623, 85 L.Ed. 396—City of Texarkana, Tex., v. Arkansas, Louisiana Gas Co., Tex., 59 S.Ct. 448, 306 U.S. 188, 620, 83 L.Ed. 598, reversing, C.C.A., Arkansas Louisiana Gas Co. v. City of Texarkana, Tex., 97 F.2d 5, certiorari granted, City of Texarkana, Tex., v. Arkansas Louisiana Gas Co., 59 S.Ct. 94, 305 U.S. 584, 83 L.Ed. 369.

14. U.S.—Griffin v. McCoach, Tex., 61 S.Ct. 1023, 313 U.S. 498, 85 L.Ed. 1481, 134 A.L.R. 1462, reversing, C.C.A., 116 F.2d 261, certiorari granted 61 S.Ct. 807, 312 U.S. 676, 85 L.Ed. 1116—New York Life Ins. Co. v. Jackson, Ill., 58 S.Ct. 871, 304 U.S. 261, 82 L.Ed. 1329, vacating, C.C.A., 94 F.2d 288, mandate conformed to 98 F.2d 950, certiorari denied 59 S.Ct. 108, 305 U.S. 640, 83 L.Ed. 413.

State or federal law

Where, after the grant of certiorari to review a decision of the circuit court of appeals, the supreme court announced a decision under which the question involved is governed by the decisions of the appropriate state court, the supreme court will decline to decide the issue of state law, but will vacate the judgment and remand the cause for enforcement of the applicable principles of state law, when the question was regarded below both by courts and by counsel as one of general or federal law. Ruhlin v. New York Life Ins. Co., Pa. 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526, mandate conformed to, D.C., New York Life Ins. Co. v. Ruhlin, 25 F. Supp. 65.

15. U.S.—Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C. A., Cleveland Trust Co. v. Schriber-Schroth Co., 92 F.2d 330, certiorari denied Schriber-Schroth Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1099, rehearing denied Schriber-Schroth Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 718, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted, 58 S.Ct. 1052, 304 U.S. 587, 82 L. Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C. C.A., Cleveland Trust Co. v. Aberdeen Motor Supply Co., 92 F.2d 330, certiorari denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548,

determination on the merits by the circuit court of appeals,[16] where issues of fact remain for solution by the district court,[17] or where the record does not warrant a final disposition of the cause by the supreme court.[18]

It is the duty of the lower court, on remand, to comply with the mandate of the supreme court and to obey the directions therein.[19] As to matters within its compass, the mandate is controlling,[20] but as to other matters it does not deprive the lower court of its freedom of action.[21]

(3) Effect of Judgment

Rules governing the conclusiveness and effect of judgments generally apply to decisions of the supreme court on certiorari.

Rules governing the conclusiveness and effect of judgments generally apply to decisions of the supreme court on certiorari.[22]

k. Costs

Costs may be imposed on petitioner where the writ is dismissed as improvidently granted. In a proper case a litigant may be granted leave to proceed in forma pauperis.

Where a writ of certiorari is dismissed as im-

mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, Ohio, 59 S.Ct. 8, 305 U.S. 47, 573, 83 L.Ed. 34, reversing, C.C.A., Cleveland Trust Co. v. F. E. Rowe Sales Co., 92 F.2d 330, certiorari denied F. E. Rowe Sales Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied F. E. Rowe Sales Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109.

Sufficiency of evidence

Where circuit court of appeals, on ground that statute of limitations did not run against foreign sovereign, reversed judgment of district court denying recovery on claim for bank deposit assigned by Soviet government to United States, but did not determine whether evidence was sufficient to support district court's finding that bank unqualifiedly repudiated liability, the supreme court would remand cause to circuit court of appeals for determination of sufficiency of evidence to warrant dismissal of complaint on motion, in reversing judgment on certiorari.—Guaranty Trust Co. of New York v. U. S., N.Y., 58 S.Ct. 785, 304 U.S. 126, 82 L.Ed. 1224, reversing, C.C.A., U. S. v. Guaranty Trust Co. of New York, 91 F.2d 898, certiorari granted Guaranty Trust Co. of New York v. U. S., 58 S.Ct. 363, 302 U.S. 681, 82 L.Ed. 525, mandate conformed to, C.C.A., U. S. v. Guaranty Trust Co. of New York, 100 F.2d 369.

Question of marketable title

Where the circuit court of appeals erroneously refused to pass on the issue of marketable title, and where the writ of certiorari would not have been granted on that issue alone, the case would be remanded to the circuit court of appeals for consideration and decision.—Liberty Oil Co. v. Condon Nat. Bank, Kan., 43 S.Ct. 118, 260 U.S. 235, 67 L.Ed. 232, reversing, C.C.A., 271 F. 928, certiorari dismissed 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, rehearing granted 42 S.Ct. 92, 257 U.S. 628, 66 L.Ed. 405, and certiorari granted 42 S.Ct. 93, 257 U.S. 630, 66 L.Ed. 406.

16. **Decision on jurisdictional grounds**

The supreme court will not decide a case on the merits on a writ of certiorari to a circuit court of appeals after finding that the latter court erred when it reversed for lack of jurisdiction a decree of the trial court, but will remand the case to the circuit court of appeals to decide the case on the merits.—Brown v. Fletcher, N.Y., 35 S.Ct. 750, 237 U.S. 583, 59 L.Ed. 1128, reversing 206 F. 461, 124 C.C.A. 367.

17. U.S.—U. S. v. Chicago, M., St. P. & P. R. Co., Minn., 61 S.Ct. 772, 312 U.S. 592, 313 U.S. 543, 85 L.Ed. 1064, reversing, C.C.A., 113 F.2d 919, certiorari granted 61 S.Ct. 318, 311 U.S. 642, 85 L.Ed. 409.

18. **Lack of fact findings**

Cause remanded to district court for further proceedings where findings of fact were essential to proper determination of questions presented on certiorari and no specific findings of fact had been made by the lower courts.—Panama Mail S. S. Co. v. Vargas, Cal., 50 S.Ct. 448, 281 U.S. 670, 74 L.Ed. 1105, reversing, C.C.A., 33 F.2d 894, certiorari granted 50 S. Ct. 40, 280 U.S. 546, 74 L.Ed. 606—City of Hammond v. Farina Bus Line & Transportation Co., Ind., 48 S.Ct. 70, 275 U.S. 173, 72 L.Ed. 222, modifying, C.C.A., Farina Bus Line & Transportation Co. v. City of Hammond, 11 F.2d 943, certiorari granted City of Hammond v. Farina Bus Line & Transportation Co., 47 S.Ct. 92, 273 U.S. 675, 71 L.Ed. 834, followed in Schappi Bus Line & City of Hammond, C.C.A., 11 F.2d 940, certiorari granted City of Hammond v. Schappi Bus Line, 47 S.Ct. 92, 273 U.S. 675, 71 L.Ed. 834, and modified on other grounds 48 S.Ct. 66, 275 U.S. 164, 72 L.Ed. 218.

19. U.S.—Sprague v. Ticonic Nat. Bank, Me., 59 S.Ct. 777, 307 U.S. 161, 83 L.Ed. 1184, reversing, C.C.A., 99 F.2d 583, certiorari granted 59 S.Ct. 463, 306 U.S. 623, 83 L.Ed. 1028—Brashear Freight Lines v. Public Service Commission of Missouri, D.C.Mo., 41 F.Supp. 952, conforming to mandate Public Service Commission of State of Missouri v. Brashear Freight Lines, 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., Public Service Commission of State of Missouri v. Brashear Freight Lines, 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, certiorari granted 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

20. U.S.—Sprague v. Ticonic Nat. Bank, Me., 59 S.Ct. 777, 307 U.S. 161, 83 L.Ed. 1184, reversing, C.C.A., 99 F.2d 583, certiorari granted 59 S Ct. 463, 306 U.S. 623, 83 L.Ed. 1028.

21. **Claim for costs as between solicitor and client**

The lower court was free to act on a claim for costs as between solicitor and client where the mandate neither directly nor by implication covered that matter.—Sprague v. Ticonic Nat. Bank, supra.

22. **Decision on certiorari held not conclusive** as to particular issues

(1) Where supreme court determined on certiorari that findings and proof were insufficient to justify enforcement of cease and desist order of federal trade commission, such reasons were not controlling in subsequent proceeding between same parties presenting different facts and different record for consideration.—Federal Trade Commission v. Raladam Co., 62 S.Ct. 966, 316 U.S. 149, 86 L.Ed. 1336, reversing, C.C.A., Raladam Co. v. Federal Trade Commission, 123 F.2d 34, certiorari granted 62 S.Ct. 631, 315 U.S. 790, 86 L.Ed. 1194.

(2) Other matters.—Federal Trade Commission v. Raladam Co., supra.

providently granted, costs may be imposed on petitioner.[23]

Proceedings in forma pauperis. Where because of poverty a litigant is unable to pay the costs of proceedings on certiorari he may apply to the court for an order to proceed in forma pauperis.[24]

3. REVIEW OF DECISIONS OF DISTRICT COURTS

§ 205. In General

Direct review by the supreme court of decisions of the district court may be had only as authorized by statute. When an appeal is improperly taken to the supreme court, the latter may save appellants their proper remedies by appropriate order.

A direct review by the supreme court of an interlocutory or final judgment or decree of a district court may be had in the cases specified in the controlling statutes,[25] and only in such cases.[26] A jurisdictional barrier to an attempted appeal binds the supreme court, even though not invoked by appellees.[27] If a party takes an appeal or writ of error to the circuit court of appeals, he cannot subsequently take a direct appeal or writ of error to the supreme court in the same case.[28]

Only final and complete judgments of the district courts are subject to direct review by the supreme court,[29] except in a limited class of cases.[30]

An indirect review of a judgment of a circuit court of appeals cannot be had on appeal from a judgment entered by a district court pursuant to a mandate of the circuit court of appeals.[31]

Even though the supreme court cannot under a statutory provision for direct appeal hear the merits of a case, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of the statute by an order framed to save appellants their proper remedies,[32]

23. U.S.—Keller v. Adams-Campbell Co., Cal., 44 S.Ct. 356, 264 U.S. 314, 68 L.Ed. 705, dismissing certiorari, C.C.A., 287 F. 838, certiorari granted 43 S.Ct. 702, 262 U.S. 741, 67 L. Ed. 1209.

24. **Leave granted** to proceed in forma pauperis.—Holiday v. Johnston, Cal., 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Showing required

Applicant for copies of records to be prepared without payment of costs for use in applying to supreme court in forma pauperis for certiorari to review decision denying leave to file petition for writ of mandamus must show merit in proposed proceeding, and in absence of such showing, application would be denied. —Stewart v. St. Sure, C.C.A.Cal., 109 F.2d 162, certiorari denied 60 S.Ct. 470, 309 U.S. 653, 84 L.Ed. 1003, rehearing denied 60 S.Ct. 588, 309 U.S. 696, 84 L.Ed. 1036.

25. U.S.—Union Pac. R. Co. v. U. S., Mo., 61 S.Ct. 1064, 313 U.S. 450, 85 L.Ed. 1453, modifying, D.C., U. S. v. Union Pac. R. Co., 34 F.Supp. 4. Rehearing denied 62 S.Ct. 51, 314 U.S. 707, 86 L.Ed. 565—Ethyl Gasoline Corp. v. U. S., N.Y., 60 S.Ct. 618, 309 U.S. 436, 84 L.Ed. 852—Stafford v. Wallace, Ill., 42 S.Ct. 397, 258 U.S. 495, 66 L.Ed. 735, 23 A. L.R. 229.

Direct review of:

Cases involving orders of the interstate commerce commission see Commerce § 148 m.

Decisions in criminal cases see infra § 223.

Decisions, in suits in which United States is party, against constitutionality of federal statute see infra § 220 c.

Orders granting or denying an interlocutory or permanent injunction restraining a state officer from enforcing an unconstitutional state statute or order of an administrative board see infra § 220 a.

Suits to restrain enforcement of federal statute see infra § 220 b.

Prior to amendment in 1935, which specifically provided that appeal could be taken as provided therein, and not otherwise, the Judicial Code did not purport to embody all the laws on the subject.—Judicial Code § 238, 28 U.S.C.A. § 345.—Street & Smith v. Atlas Mfg. Co., Mo., 34 S.Ct. 73, 231 U.S. 348, 58 L.Ed. 262—25 C. J. p 879 note 35.

26. U.S.—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., Okl., 54 S.Ct. 732, 292 U.S. 386, 78 L. Ed. 1318, vacating, D.C., 6 F.Supp. 893—State of Missouri v. Missouri Pac. Ry. Co., Mo., 54 S.Ct. 569, 292 U.S. 13, 78 L.Ed. 1087, rehearing denied 54 S.Ct. 713, 292 U.S. 603, 78 L.Ed. 1466—Moore v. Fidelity & Deposit Co., Or., 47 S.Ct. 105, 272 U.S. 317, 71 L.Ed. 273, dismissing appeal, D.C., Fidelity & Deposit Co. of Maryland v. Moore, 3 F.2d 653—Crouch v. U. S., Va., 45 S.Ct. 71, 266 U.S. 180, 69 L.Ed. 233 —Street v. Shipowners' Ass'n of Pacific Coast, Cal., 41 S.Ct. 119, 263 U.S. 334, 68 L.Ed. 326—Pothier v. Rodman, R.I., 43 S.Ct. 374, 261 U.S. 307, 67 L.Ed. 670—Pronovost v. U. S., Mont., 34 S.Ct. 391, 232 U. S. 487, 58 L.Ed. 696—In re Graves, C.C.A.Mass., 270 F. 181, granting appeal, D.C., Ex parte Crowley, 268 F. 1016—In re Layne, C.C.A. Mass., 270 F. 181, granting appeal, D.C., Ex parte Layne, 269 F. 463—In re Graves, C.C.A.Mass., 270 F. 181, granting appeal, D.C., Ex parte Graves, 269 F. 461.

25 C.J. p 879 notes 27–32, p 863 note 39 [b].

27. U.S.—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 158.

28. U.S.—Carter v. Roberts, N.Y., 20 S.Ct. 713, 177 U.S. 496, 44 L.Ed. 861, dismissing appeal, C.C., 97 F. 496.

25 C.J. p 880 note 40.

29. U.S.—Collins v. Miller, La., 40 S.Ct. 347, 252 U.S. 364, 64 L.Ed. 616.

25 C.J. p 880 note 41.

Denial of motion to intervene held final decree

U.S.—Missouri-Kansas Pipe Line Co. v. U. S., Del., 61 S.Ct. 666, 312 U. S. 502, 85 L.Ed. 975, affirming, D. C., U. S. v. Columbia Gas & Electric Corporation, 32 F.Supp. 474.

30. U.S.—Rochester Telephone Corporation v. U. S., N.Y., 59 S.Ct. 754, 307 U.S. 125, 83 L.Ed. 1147, affirming, D.C., 23 F.Supp. 634.

Decisions in criminal cases see infra § 223.

Interlocutory injunctions see infra § 220.

31. U.S.—Farmers' & Mechanics' Nat. Bank v. Wilkinson, Tex., 45 S.Ct. 144, 266 U.S. 503, 69 L.Ed. 408, amended 45 S.Ct. 351.

25 C.J. p 880 note 43.

32. U.S.—Phillips v. U. S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261—Rorick v. Board of Com'rs of Everglades

as by vacating the decree and remanding the cause to the court which heard it, so that it might enter a fresh decree from which appellants might, if they wished, perfect a timely appeal to the circuit court of appeals.[33] Where, however, appellants had also appealed from the decree to the circuit court of appeals, their remedy will be preserved by dismissing the appeal in the supreme court without more.[34]

§ 206. Where Jurisdiction in Issue

Provision was made by former § 238 of the Judicial Code, derived from the Act of March 3, 1891 § 5, as amended in 1915, for a direct appeal to the supreme court from the district courts in any case in which the jurisdiction of the court was in issue, but this provision was abrogated by the amendment of February 13, 1925, and a direct appeal can be had only in the instances provided by Judicial Code § 238 as it has been amended, 28 U.S.C.A. § 345. For a discussion of the practice under the superseded provisions of the Judicial Code, reference is made to 25 C.J. p 880 note 44–p 911 note 99 and also to the cases arising under such provisions, since the publication of that treatise, which are cited for their historical importance, see infra §§ 208–218.

§ 207. —— Statutory Provisions

As noted supra, § 206, provision was formerly made by the federal statutes for a direct appeal to the supreme court from the district courts in any case in which the jurisdiction of the district court was in issue.

§ 208. —— General Conditions to Appellate Jurisdiction

Other conditions to appellate jurisdiction must have been present to warrant a direct appeal on a jurisdictional question.

Under the prior practice, see supra § 206, there could be no appeal because of the fact that jurisdiction was in issue unless other conditions to appellate jurisdiction were met.[35]

§ 209. —— Respective Jurisdiction of Supreme Court and Circuit Court of Appeals

The supreme court had exclusive jurisdiction where the sole question involved was a directly reviewable question of jurisdiction.

Under the prior practice, see supra § 206, the jurisdiction of the supreme court was exclusive where the sole question decided by the trial court was a directly reviewable question of jurisdiction, but, under some circumstances where the case was decided on the merits, the appeal could be taken to the circuit court of appeals.[36]

Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 458—William Jameson & Co. v. Morgenthau, D. C., 59 S.Ct. 804, 307 U.S. 171, 83 L. Ed. 1189, vacating, D.C., 25 F.Supp. 771—Wilentz v. Sovereign Camp, W. O. W., N.J., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U. S. 243, 82 L.Ed. 1316, vacating, D. C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, mandate conformed to 23 F.Supp. 998, reversed 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., Okl., 54 S.Ct. 732, 292 U. S. 386, 78 L.Ed. 1318, vacating, D. C., 6 F.Supp. 893—Gully v. Interstate Natural Gas Co., Miss., 54 S. Ct. 565, 292 U.S. 16, 78 L.Ed. 1088, reversing, D.C., Interstate Natural Gas Co. v. Gully, 4 F.Supp. 697.

33. U.S.—Phillips v. U. S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 458—William Jameson & Co. v. Morgenthau, D. C., 59 S.Ct. 804, 307 U.S. 171, 83 L. Ed. 1189, vacating, D.C., 25 F.Supp. 771—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U. S. 243, 82 L.Ed. 1316, vacating, D. C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, mandate conformed to 23 F.Supp. 998, reversed 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., Okl., 54 S.Ct. 732, 292 U.S. 386, 78 L.Ed. 1318, vacating, D.C., 6 F. Supp. 893—Gully v. Interstate Natural Gas Co., Miss., 54 S.Ct. 565, 292 U.S. 16, 78 L.Ed. 1088, reversing, D.C., Interstate Natural Gas Co. v. Gully, 4 F.Supp. 697.

34. U.S.—Wilentz v. Sovereign Camp, W. O. W., N.J., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing appeal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23.

35. U.S.—Sovereign Camp, W. O. W. v. O'Neill, Tex., 45 S.Ct. 49, 266 U. S. 292, 69 L.Ed. 293, reversing, D. C., 286 F. 734—Smith v. Apple, Kan., 44 S.Ct. 311, 264 U.S. 274, 68 L.Ed. 678—Wilson v. Republic Iron & Steel Co., Ala., 42 S.Ct. 35, 257 U.S. 92, 66 L.Ed. 144—U. S. v. Babcock, C.C.A.Wash., 293 F. 195, transferred, see D.C., U. S. v. Clausen, 291 F. 231, and error dismissed 45 S.Ct. 126, 266 U.S. 641, 69 L.Ed. 484.
25 C.J. p 882 note 53–p 884 note 83.

36. U.S.—Wagner Electric Mfg. Co. v. Lyndon, Mo., 43 S.Ct. 589, 262 U. S. 226, 67 L.Ed. 961, dismissing appeal, C.C.A., 282 F. 219, in which certiorari is denied 43 S.Ct. 361, 261 U.S. 614, 67 L.Ed. 827—Columbus Construction Co. v. Crane Co., Ill., 19 S.Ct. 721, 174 U.S. 600, 43 L.Ed. 1102—E. T. Seggerman Co. v. Danish Pride Milk Products Co., C. C.A.N.Y., 6 F.2d 874—Chin Wey v. Wixon, C.C.A.Mass., 4 F.2d 247—R. H. Hassler, Inc. v. Shaw, C.C.A. S.C., 3 F.2d 605—Smyth v. Asphalt Belt Ry. Co., Tex., 45 S.Ct. 242, 267 U.S. 326, 69 L.Ed. 629, transferred, see, D.C., 292 F. 876—U. S. v. Brown, C.C.A.Minn., 281 F. 657—American Exch. Nat. Bank v. Garvan, C.C.A.N.Y., 273 F. 43, affirmed Simon v. American Exch. Nat. Bank, 43 S.Ct. 165, 260 U.S. 706, 67

§ 210. —— What Are Questions of Jurisdiction in General

Questions of jurisdiction were limited to questions of federal jurisdiction.

Under the former practice here under consideration, see supra § 206, jurisdiction was limited to questions of jurisdiction as a federal court and did not include questions dependent on principles of general law.[37]

§ 211. —— Particular Classes of Cases Involving Jurisdiction

Direct appeal was permitted in cases of many different classes.

Under the prior practice of direct appeal from the district court, see supra § 206, jurisdiction was invoked in a wide variety of cases including cases removed from state courts.[38]

§ 212. —— Particular Issues Involving Jurisdiction

Any issue involving federal jurisdiction permitted an appeal to the supreme court.

The rules permitting review on direct appeal from the district court on a question of jurisdiction, see supra § 206, were applied generally to all issues involving a question of jurisdiction.[39]

§ 213. —— Judgment or Decree on Mandate of Circuit Court of Appeals

A judgment on a mandate from the circuit court of appeals was not as a rule reviewable.

The supreme court could not review the judgment or decree of a district court entered in compliance with the mandate of the circuit court of appeals to which the case had been previously taken, unless the decision of the circuit court of appeals was absolutely void for want of jurisdiction.[40]

§ 214. —— Decision on Jurisdictional Question by District Court

A jurisdictional question must have been actually decided by the district court.

There could be no direct appeal from the district courts to the supreme court on questions involving the jurisdiction of the lower court under the old practice unless a reviewable question of jurisdiction was regarded as in issue and was actually decided by the trial court; and, if the trial court did no more than pass on the merits of the controversy the appeal was dismissed.[41]

§ 215. —— Certification of Jurisdictional Question or Substitute Therefor

There must have been a certification by the trial court of the question of jurisdiction.

Under the former practice an absolute prerequi-

L.Ed. 474—Consolidated Textile Corporation v. Dickey, C.C.A.Ga., 269 F. 942, reversing, D.C., 266 F. 587—Perrett v. Clara Kimball Young Film Corporation, C.C.A.N.Y., 269 F. 613.

25 C.J. p 884 note 85–p 886 note 13.

37. U.S.—Timken Roller Bearing Co. v. Pennsylvania R. Co., Ohio, 47 S.Ct. 550, 274 U.S. 181, 71 L.Ed. 989, setting aside dismissal 47 S.Ct. 454, 273 U.S. 665, 71 L.Ed. 829—Smyth v. Asphalt Belt Ry. Co., Tex., 45 S.Ct. 242, 267 U.S. 326, 69 L.Ed. 629, transferred, see, D.C., 292 F. 876, amended, C.C.A., 12 F.2d 14—Oliver American Trading Co. v. U. S. of Mexico, N.Y., 44 S.Ct. 390, 264 U.S. 440, 68 L.Ed. 778—Smith v. Apple, Kan., 44 S.Ct. 311, 264 U.S. 274, 68 L.Ed. 678—Binderup v. Pathé Exch., Neb., 44 S.Ct. 96, 263 U.S. 291, 68 L.Ed. 308, reversing, C.C.A., 280 F. 301, in which certiorari is denied 43 S.Ct. 88, 260 U.S. 725, 67 L.Ed. 483—McConaughey v. Morrow, C.C.A.Canal Zone, 279 F. 617, affirmed 44 S.Ct. 78, 263 U.S. 39, 68 L.Ed. 153—In re Anderson, C.C.A.N.Y., 279 F. 525, affirming, D.C., 275 F. 397—I. T. S. Rubber Co. v. Essex Rubber Co., C.C.A.Mass., 276 F. 478, denying dismissal of appeal, D.C., 270 F. 593, in which decree is reversed on other grounds 281 F. 5, and appeal dismissed 42 S.Ct. 45, 257 U.S. 664, 66 L.Ed. 424—Consolidated Textile Corporation v. Dickey, C.C.A.Ga., 269 F. 942, reversing, D.C., 266 F. 587—Boston Acme Mines Corporation v. Salina Canyon Coal Co., C.C.A.Utah, 3 F.2d 729.

25 C.J. p 886 note 11–p 889 note 51.

38. U.S.—Rooker v. Fidelity Trust Co., Ind., 44 S.Ct. 149, 263 U.S. 413, 68 L.Ed. 362—Pothier v. Rodman, R.I., 43 S.Ct. 374, 261 U.S. 307, 67 L.Ed. 670.

25 C.J. p 889 note 55–p 893 note 21.

39. U.S.—Sovereign Camp, W. O. W. v. O'Neill, Tex., 45 S.Ct. 49, 266 U.S. 292, 69 L.Ed. 293, reversing, D.C., 286 F. 734—Nassau Smelting & Refining Works v. U. S., N.Y., 45 S.Ct. 25, 266 U.S. 101, 69 L.Ed. 190—Transportes Maritimos Do Estado v. Almeida, N.Y., 44 S.Ct. 449, 265 U.S. 104, 68 L.Ed. 932, transferred, see, C.C.A., 5 F.2d 151—Hoffman v. McClelland, Tex., 44 S.Ct. 407, 264 U.S. 552, 68 L.Ed. 845, transferred, see, C.C.A., 284 F. 837—Oliver American Trading Co. v. U. S. of Mexico, N.Y., 44 S.Ct. 390, 264 U.S. 440, 68 L.Ed. 778—Wagner Electric Mfg. Co. v. Lyndon, Mo., 43 S.Ct. 589, 262 U.S. 226, 67 L.Ed. 961, dismissing appeal, C.C.A., 282 F. 219, in which certiorari is denied 43 S.Ct. 361, 261 U.S. 614, 67 L.Ed. 827—Davis v. Wallace, N.D., 42 S.Ct. 164, 257 U.S. 478, 66 L.Ed. 325—Robert Mitchell Furniture Co. v. Selden Breck Const. Co., Ohio, 42 S.Ct. 84, 257 U.S. 213, 66 L.Ed. 201—E. T. Seggerman Co. v. Danish Pride Milk Products Co., C.C.A.N.Y., 6 F.2d 874—Boston Acme Mines Corporation v. Salina Canyon Coal Co., C.C.A.Utah, 3 F.2d 729—Nelson v. Hebert, C.C.A.La., 296 F. 445—Hoffman v. McClelland, C.C.A.Tex., 284 F. 837, transferred, see 44 S.Ct. 407, 264 U.S. 552, 68 L.Ed. 845—In re Anderson, C.C.A.N.Y., 279 F. 525, affirming, D.C., 275 F. 397—Consolidated Textile Corporation v. Dickey, C.C.A.Ga., 269 F. 942, reversing, D.C., 266 F. 587.

25 C.J. p 893 note 22–p 901 note 33.

40. U.S.—Farmers' & Mechanics' Nat. Bank v. Wilkinson, Tex., 45 S.Ct. 144, 266 U.S. 503, 69 L.Ed. 408, amended 45 S.Ct. 351.

25 C.J. p 902 notes 37–42.

41. U.S.—State of Arkansas v. Schlierholz, Ark., 21 S.Ct. 229, 179 U.S. 598, 45 L.Ed. 335.

25 C.J. p 903 note 53–p 904 note 59.

site to the exercise of jurisdiction by the supreme court was a valid, sufficient, and timely certificate by the trial court of the question of jurisdiction or the equivalent of such certificate.[42]

§ 216. —— Record and Proceedings Not in Record Respecting Jurisdiction

Under the former practice of direct appeal from the district court on a question of jurisdiction, see supra § 206, the right of the supreme court to review could not rest on matters outside the record, as shown in 25 C.J. p 907 notes 18–36.

§ 217. —— Advancement of Cause on Docket

A case in which jurisdiction was the only question in issue might be advanced on the docket.

Provision was made for the advancement of cases brought to the supreme court on the docket where the question of the jurisdiction of the court below was the only question in issue.[43]

§ 218. —— Determination and Disposition of Jurisdictional Questions

The case was disposed of on the question of jurisdiction of the court below as shown by the entire record.

Under the practice outlined supra § 206, in the case of a direct appeal on a question involving jurisdiction, determination of the case by the supreme court was made on examination of the entire record, and the supreme court would consider only the question of jurisdiction of the court below. In passing on the question, the court would consider whether the conclusion on that question was warranted by the evidence before the court below and disclosed in the record. A case not within the appellate jurisdiction of the court would be dismissed; and the decision of the district court could be affirmed, reversed, or modified, or the case could be remanded with directions, as the circumstances might require.[44]

§ 219. —— Second Appeal

A second appeal could be had under certain conditions.

Under the former practice there might be a second appeal under some circumstances where a directly reviewable question of jurisdiction was involved.[45]

§ 220. Where Constitutional Questions Involved

a. Suit to restrain enforcement of state statute or administrative order
b. Suit to restrain enforcement of federal statute
c. Suits involving United States and federal statute
d. Earlier statutes

a. Suit to Restrain Enforcement of State Statute or Administrative Order

The federal statute authorizing an appeal to the supreme court from an order of a district court of three judges granting or denying an injunction restraining a state officer from enforcing an unconstitutional state statute or order of an administrative board is a technical enactment which will be applied only to cases coming within its terms.

In a case coming within the statute, the supreme court will take jurisdiction of a direct appeal from the district court under Judicial Code § 266, 28 U.S.C.A. § 380, which provides that an appeal may be taken direct to the supreme court from an order of a district court of three judges granting or denying an interlocutory injunction restraining a state officer from enforcing an unconstitutional state statute or order of an administrative board or from a final decree granting or denying a permanent injunction in such suit.[46] This statute is not a measure of

42. U.S.—Smith v. Apple, Kan., 44 S.Ct. 311, 264 U.S. 274, 68 L.Ed. 678.
25 C.J. p 904 note 60–p 907 note 17.

43. U.S.—Aspen Mining & Smelting Co. v. Billings, Colo., 14 S.Ct. 4, 150 U.S. 31, 37 L.Ed. 986.
25 C.J. p 907 notes 37, 38.

44. U.S.—Oliver American Trading Co. v. U. S. of Mexico, N.Y., 44 S.Ct. 390, 264 U.S. 440, 68 L.Ed. 778—State of Ohio ex rel. Seney v. Swift & Co., Ohio, 43 S.Ct. 22, 260 U.S. 146, 67 L.Ed. 176, dismissing appeal, C.C.A., 270 F. 141, certiorari denied 42 S.Ct. 47, 257 U.S. 633, 66 L.Ed. 407—Wilson v. Republic Iron & Steel Co., Ala., 42 S.Ct. 35, 257 U.S. 92, 66 L.Ed. 144.
25 C.J. p 907 note 39–p 911 note 96.

45. U.S.—McDaniel v. Traylor, Ark., 29 S.Ct. 343, 212 U.S. 428, 53 L.Ed. 584.
25 C.J. p 911 notes 97–99.

46. U.S.—Herkness v. Irion, La., 49 S.Ct. 40, 278 U.S. 92, 73 L.Ed. 198, reversing, D.C., 11 F.2d 386—Interstate Busses Corporation v. Blodgett, Conn., 48 S.Ct. 230, 276 U.S. 245, 72 L.Ed. 551, affirming, D.C., 19 F.2d 256—Clark v. Poor, Ohio, 47 S.Ct. 702, 274 U.S. 554, 71 L.Ed. 1199—Palmetto Fire Ins. Co. v. Conn, 47 S.Ct. 88, 272 U.S. 295, 71 L.Ed. 243, affirming, D.C.Ohio, 9 F.2d 202, D.C.Wis., Chrysler Sales Corporation v. Smith, 9 F.2d 666 and, D.C.Me., Chrysler Sales Corporation v. Spencer, 9 F.2d 674—Louisiana Public Service Commission v. Morgan's Louisiana & T. R. & S. S. Co., La., 44 S.Ct. 358, 264 U.S. 393, 68 L.Ed. 756, affirming, D.C., Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Public Service Commission, 287 F. 390.
25 C.J. p 879 note 34, p 915 notes 42, 43.

Final portion of decree
The supreme court had jurisdiction of direct appeal from portion of decree denying permanent injunction restraining public service commission of Missouri from prosecuting suits in enforcing Missouri statute governing motor carriers, and court would not dismiss appeal from decree, notwithstanding it was not a

broad social policy to be construed with great liberality, but is an enactment technical in the strict sense of the term, and is to be applied as such.[47] It was intended by congress as a procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy,[48] and its purpose was to minimize, in an important class of cases, the delay incident to a review of a decree granting or denying an interlocutory injunction.[49]

The statute applies only where there is a substantial claim of invalidity under the federal constitution and where an application for an interlocutory injunction, for the purposes contemplated by the statute, is made and pressed.[50] So a direct appea to the supreme court will lie only if the suit is one to restrain the action of state officers,[51] and the supreme court is without jurisdiction where it appears that a suit to enjoin an alleged unconstitutional order of a state commission directing a gas company to supply a consumer with gas at the prescribed rate was in reality not one to enjoin the action of the state officers, but to enjoin a consumer from prosecuting a suit to recover alleged excess payments for gas.[52]

An attack on lawless exercise of authority in a particular case is not, within the statute, an attack on the constitutionality of a statute conferring the authority, even though a misreading of the statute is invoked as justification;[53] and the enforcement of a statute is not sought to be enjoined merely because a state official seeks shelter under it by way of defense against a charge of lawlessness.[54] On its face the statute precludes a reading which would bring within its scope every suit to restrain the conduct of a state official whenever some enactment may be said to authorize the questioned conduct.[55]

This statute has no application unless there is a proper appeal from a decree granting or denying an interlocutory or permanent injunction,[56] and, so, where no appeal was taken to review a decree denying an injunction, the supreme court had no jurisdiction of an appeal seeking to review a paragraph of the decree dismissing defendant's counterclaim,[57] or of a direct appeal from a judgment dismissing a motion for assessment of damages and costs against plaintiffs and their injunction bond sureties.[58]

A direct appeal can be taken under the statute only if the suit requires the convening of a district court of three judges,[59] and there is no such suit

final one in so far as it authorized recovery on a counterclaim and appointed special master to take necessary accounting.—Eichholz v. Public Service Commission of State of Missouri, Mo., 59 S.Ct. 532, 306 U.S. 268, 622, 83 L.Ed. 641, affirming, D.C., Eichholz v. Hargus, 23 F.Supp. 587.

Merger of appeals

An appeal from an order denying a temporary injunction was merged in appeal from final decree of dismissal, and therefore should be dismissed.—Pacific Telephone & Telegraph Co. v. Kuykendall, Wash., 44 S.Ct. 553, 265 U.S. 196, 68 L.Ed. 975.

Scope of review

On appeal to supreme court on ground of alleged unconstitutionality of state law, it is not desirable that courts should go beyond necessity to instruct officials of state as to meaning of state law.—Palmetto Fire Ins. Co. v. Conn, 47 S.Ct. 88, 272 U.S. 295, 71 L.Ed. 243, affirming, D.C.Ohio, 9 F.2d 202, D.C.Wis., Chrysler Sales Corporation v. Smith, 9 F.2d 666 and D.C.Me., Chrysler Sales Corporation v. Spencer, 9 F.2d 674.

47. U.S.—Phillips v. U. S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261.

48. U.S.—Phillips v. U. S., supra.

49. U.S.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing D.C., 27 F.2d 1005—Moore v. Fidelity & Deposit Co., Or., 47 S.Ct. 105, 272 U.S. 317, 71 L.Ed. 273, dismissing appeal, D.C., Fidelity & Deposit Co. of Maryland v. Moore, 3 F.2d 652.

50. U.S.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing, D.C., 27 F.2d 1005—Moore v. Fidelity & Deposit Co., Or., 47 S.Ct. 105, 272 U.S. 317, 71 L.Ed. 273, dismissing appeal, D.C., Fidelity & Deposit Co. of Maryland v. Moore, 3 F.2d 652—In re Buder, Mo., 46 S.Ct. 557, 271 U.S. 461, 70 L.Ed. 1036.

Ground of allowing or denying injunction

Where three-judge court rightly acquired and proceeded to exercise jurisdiction, appeal would be to supreme court on whatever ground injunction was allowed or denied, provided constitutional question was substantial and not frivolous.—Brucker v. Fisher, C.C.A.Mich., 49 F.2d 759, dismissing appeal, D.C., Fisher v. Brucker, 41 F.2d 774.

51. U.S.—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., Okl., 54 S.Ct. 732, 292 U.S. 386, 78 L.Ed. 1318, vacating, D.C., 6 F.Supp. 893.

52. U.S.—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., supra.

53. U.S.—Phillips v. U. S., Okl., 61 S.Ct. 480, 312 U.S. 246, 85 L.Ed. 800, vacating, D.C., U. S. v. Phillips, 33 F.Supp. 261.

54. U.S.—Phillips v. U. S., supra.

55. U.S.—Phillips v. U. S., supra.

56. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 59 S.Ct. 480, 306 U.S. 204, 83 L.Ed. 608, dismissing appeal, D.C., Brashear Freight Lines v. Public Service Commission of Missouri, 23 F.Supp. 865, and rehearing denied Public Service Commission of Missouri v. Brashear Freight Lines, 59 S.Ct. 784, 306 U.S. 669, 83 L.Ed. 1063.

57. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, supra.

58. U.S.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551.

59. U.S.—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 458—Wilentz v. Sovereign Camp, W. O. W., 59 S.Ct. 709, 306 U.S. 573, 83 L.Ed. 994, dismissing ap-

where the state statutes from which relief was sought do not constitute legislation of general application,[60] or where no preliminary injunction was sought.[61] No appeal lies to the supreme court from an order of a single judge acting without jurisdiction in granting an interlocutory injunction or final decree in such a cause.[62]

In determining the validity of the state statute, the supreme court will accord great weight to the district court's view of the state law.[63] In reviewing the lower court's determination that state statutory regulations were unreasonable, the supreme court will examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain on the whole record whether it is possible to say that the legislative choice is without rational basis.[64] In reviewing the district court's action in assuming jurisdiction, the supreme court will not consider affidavits filed with the supreme court for the purpose of supplementing the record by showing the amount in controversy as to one of the plaintiffs;[65] although the supreme court may receive affidavits establishing its own appellate jurisdiction under a statute prescribing that a specified amount in controversy is prerequisite to appeal, review of the action of the district court in assuming jurisdiction is confined to the record before the district court.[66] Where the allegations of the bill were sufficient to state a cause of action, but the bill had been dismissed without hearing evidence and without findings of fact on which the validity of the legislative classification could be determined, the decree will be reversed and the cause remanded with directions for a final hearing, on pleadings and proofs, and to make findings of fact and conclusions of law.[67] The supreme court's decree on appeal from a decree of the district court restricting findings of confiscatory and reasonable gas rates to a valuation of the gas company's properties as of a certain date must be similarly restricted.[68]

b. Suit to Restrain Enforcement of Federal Statute

The federal statute providing for a three-judge district court and direct appeal to the supreme court in injunction suits involving the constitutionality of a federal statute applies only to the particular class of cases therein described, and is inapplicable unless the questions of constitutionality raised are substantial.

The federal statute, Act of August 24, 1937, 28 U.S.C.A. § 380a, providing for a three-judge district court and direct appeal to the supreme court in injunction suits involving the constitutionality of a federal statute, provides for a procedure analogous to that under Judicial Code § 266, considered supra in subdivision a of this section,[69] but creates a controlling distinction in that § 380a is inapplicable to attacks on administrative regulations or orders.[70] The statute is limited to the particular class of cases there described.[71] It does not pro-

peal, D.C., Sovereign Camp, W. O. W. v. Wilentz, 23 F.Supp. 23—Gully v. Interstate Natural Gas Co., Miss., 54 S.Ct. 565, 292 U.S. 16, 78 L.Ed. 1088, reversing, D.C., Interstate Natural Gas Co. v. Gully, 4 F.Supp. 697—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing, D.C., 27 F.2d 1005—Moore v. Fidelity & Deposit Co., Or., 47 S.Ct. 105, 272 U.S. 317, 71 L.Ed. 273, dismissing appeal, D.C., Fidelity & Deposit Co. of Maryland v. Moore, 3 F.2d 652.

60. U.S.—Rorick v. Board of Com'rs of Everglades Drainage Dist., Fla., 59 S.Ct. 808, 307 U.S. 208, 83 L.Ed. 1242, vacating, D.C., 24 F.Supp. 458.

61. U.S.—Smith v. Wilson, Tex., 47 S.Ct. 385, 273 U.S. 388, 71 L.Ed. 699, dismissing appeal, D.C., 13 F. 2d 1007.

62. U.S.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S. Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing, D.C., 27 F.2d 1005—Grigsby v. Harris, D.C.Tex., 27 F.2d 945.

63. U.S.—Reitz v. Mealey, N.Y., 62 S.Ct. 24, 314 U.S. 33, 86 L.Ed. 21, affirming, D.C., 34 F.Supp. 532, affirmed 61 S.Ct. 841, 313 U.S. 542, 85 L.Ed. 1510, vacated 61 S.Ct. 1084, 313 U.S. 597, 85 L.Ed. 1550.

64. U.S.—South Carolina State Highway Department v. Barnwell Bros., S.C., 58 S.Ct. 510, 303 U.S. 177, 82 L.Ed. 734, reversing, D.C., Barnwell Bros. v. South Carolina State Highway Department, 17 F. Supp. 803.

65. U.S.—Clark v. Paul Gray, Inc., 59 S.Ct. 744, 306 U.S. 583, 83 L.Ed. 1001, reversing, D.C., Paul Gray, Inc. v. Ingels, 23 F.Supp. 946.

66. U.S.—Clark v. Paul Gray, Inc., supra.

67. U.S.—Borden's Farm Products Co. v. Baldwin, N.Y., 55 S.Ct. 187, 293 U.S. 194, 79 L.Ed. 281, reversing, D.C., 7 F.Supp. 352, and mandate granted 55 S.Ct. 239.

68. U.S.—Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, Ky., 54 S.Ct. 154, 290 U.S. 264, 78 L.Ed. 307, reversing, D.C., 60 F.2d 137, motion denied 54 S.Ct. 82.

69. U.S.—William Jameson & Co. v. Morgenthau, D.C., 59 S.Ct. 804, 307 U.S. 171, 83 L.Ed. 1189, vacating, D.C., 25 F.Supp. 771—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F. Supp. 807, mandate conformed to 23 F.Supp. 998, reversed 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

70. U.S.—William Jameson & Co. v. Morgenthau, D.C., 59 S.Ct. 804, 307 U.S. 171, 83 L.Ed. 1189, vacating, D.C., 25 F.Supp. 771.

71. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating Donnelly Garment Co. v. International Ladies' Garment Workers' Union, D.C., 21 F.Supp. 807, mandate conformed to 23 F.Supp. 998, reversed, C.C.A., 99 F.2d 309, certiorari denied International Ladies'

vide for a case where the validity of an act of congress is merely drawn in question, although that question be decided, but only for a case where there is an application for an interlocutory or permanent injunction to restrain the enforcement of an act of congress.[72] The statute is inapplicable unless the questions of constitutionality raised are substantial.[73]

c. Suits Involving United States and Federal Statute

The federal statute providing for direct appeal to the supreme court in any suit in a federal court to which the United States or its agent is a party in which any federal statute is held unconstitutional applies, however the question of constitutionality may arise, and does not require a three-judge court.

Act of August 24, 1937, 28 U.S.C.A. § 349a, providing that in any suit in any federal court to which the United States, or its agency, officer, or employee, as such, is a party, or in which the United States has intervened, and in which the decision is against the constitutionality of any act of congress, an appeal may be taken directly to the supreme court, applies, however the question of constitutionality may arise, provided the United States is or has become a party and the decision is against the validity of the act. The statute does not require a court of three judges, and no provision is made for a direct appeal to the supreme court if the decision is in favor of the constitutionality of the act.[74]

d. Earlier Statutes

Under the provisions of Judicial Code § 238, prior to its amendment by the Act of February 13, 1925, a direct appeal to the supreme court was permitted in cases involving the construction or application of the constitution of the United States, the constitutionality of federal statutes, or the validity of the constitution or laws of a state, as against a claim of violation of the federal Constitution.

Under Judicial Code § 238, 28 U.S.C.A. § 345, prior to its amendment by the Act of February 13, 1925, a direct appeal could be taken to the supreme court from the district courts in any case that involved the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States was drawn in question; and in any case in which the constitution or law of a state was claimed to be in contravention of the constitution of the United States.[75] The amending act made no broad provision for direct appeal in such cases, however, and specifically provided that appeal could be taken as provided therein, and not otherwise; hence direct appeals do not lie from the district court on constitutional questions except such as are considered supra § 220a–c.

§ 221. Where Validity or Construction of Treaties Involved

Under Judicial Code § 238, prior to its amendment in 1925, a direct appeal to the supreme court would lie in a case in which the validity or construction of a treaty of the United States was involved.

Under Judicial Code § 238, 28 U.S.C.A. § 345, prior to its amendment by the Act of February 13, 1925, an appeal or writ of error could be taken di-

Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

72. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., supra.

73. **Question held not substantial**
The contention that Federal Alcohol Administration Act is unconstitutional because Twenty-First Amendment gives states complete control over commerce in intoxicating liquors, to the exclusion of congress, did not raise a substantial question of constitutionality of the act, and hence did not authorize direct appeal to United States supreme court.—William Jameson & Co. v. Morgenthau, D.C., 59 S.Ct. 804, 307 U.S. 171, 83 L.Ed. 1189, vacating, D.C., 25 F.Supp. 771.

74. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., Mo., 58 S.Ct. 875, 304 U.S. 243, 82 L.Ed. 1316, vacating, D.C., Donnelly Garment Co. v. International Ladies' Garment Workers' Union, 21 F.Supp. 807, mandate conformed to 23 F.Supp. 998, reversed, C.C.A., 99 F.2d 309, certiorari denied International Ladies' Garment Workers' Union v. Donnelly Garment Co., 59 S.Ct. 364, 305 U.S. 662, 83 L.Ed. 430.

75. U.S.—W. T. Waggoner Estate v. Wichita County, Tex., 47 S.Ct. 271, 273 U.S. 113, 71 L.Ed. 566, affirming, C.C.A., 3 F.2d 962, affirming, D.C., Waggoner v. Wichita County, 298 F. 818—Salinger v. U. S., S.D., 47 S.Ct. 173, 272 U.S. 542, 71 L.Ed. 398—White v. U. S., Va., 46 S.Ct. 274, 270 U.S. 175, 320, 70 L.Ed. 530, 606, affirming, D.C., 299 F. 855—Metcalf & Eddy v. Mitchell, Mass., 46 S.Ct. 172, 269 U.S. 514, 70 L.Ed. 384, affirming, D.C., Metcalf v. Mitchell, 299 F. 812, and followed in Brown v. Commissioner of Internal Revenue, C.C.A.Ga., 55 F.2d 1076, certiorari denied 53 S.Ct. 8, 287 U.S. 602, 77 L.Ed. 524—State of Colorado v. Toll, Colo., 45 S.Ct. 505, 268 U.S. 228, 69 L.Ed. 927—Brooks v. U. S., S.D., 45 S.Ct. 345, 267 U.S. 432, 69 L.Ed. 699—Avent v. U. S., Ohio, 45 S.Ct. 34, 266 U.S. 127, 69 L.Ed. 202—Wilson v. Illinois Southern Ry. Co., Ill., 44 S.Ct. 203, 263 U.S. 574, 68 L.Ed. 456—McMillan Contracting Co. v. Abernathy, Mo., 44 S.Ct. 200, 263 U.S. 438, 68 L.Ed. 378, remanding appeals, D.C., 284 F. 354, appeal dismissed, C.C.A., 2 F.2d 1018—Brown v. U. S., Idaho, 44 S.Ct. 92, 263 U.S. 78, 68 L.Ed. 171, affirming, D.C., U. S. v. Brown, 279 F. 168—Pothier v. Rodman, R.I., 43 S.Ct. 374, 261 U.S. 307, 67 L.Ed. 670—Lipke v. Lederer, Pa., 42 S.Ct. 549, 259 U.S. 557, 66 L.Ed. 1061, reversing, D.C., 274 F. 493—Merchants' Loan & Trust Co. v. Smietanka, Ill., 41 S.Ct. 386, 255 U.S. 509, 65 L.Ed. 751, 15 A.L.R. 1305—St. Louis, I. M. & S. Ry. Co. v. J. F. Hasty & Sons, Ark., 41 S.Ct. 269, 255 U.S. 252, 65 L.Ed. 614—Smith v. Kansas City Title & Trust Co., Mo., 41 S.Ct. 243, 255 U.S. 180, 65 L.Ed. 577—Berry v. Davis, C.C.A.Okl., 15 F.2d 488—Van Gesner v. U. S., Or., 153 F. 46, 82 C.C.A. 180.
25 C.J. p 911 note 1–p 915 note 38—3 C.J. p 391 notes 23, 24.

rect to the supreme court in any case in which the validity or construction of any treaty made under the authority of the United States was drawn in question.[76] The amending act made no provision for direct appeal in such cases, however, and specifically provided that appeal could be taken as provided therein, and not otherwise.

§ 222. Prize Cases

The Judicial Code formerly made provision for direct appeals from the district court to the supreme court in prize cases.

Prior to its amendment by the Act of February 13, 1925, Judicial Code § 238, 28 U.S.C.A. § 345, provided that appeals and writs of error could be taken from the district courts, direct to the supreme court from the final sentences and decrees in prize causes.[77] The amending act made no provision for direct appeal in such cases, however, and specifically provided that appeal could be taken as provided therein, and not otherwise; hence direct appeals from the district court in prize cases were abolished.

§ 223. Criminal Cases

Direct review by the supreme court of the judgment of district courts in criminal cases may be had only as authorized by the Criminal Appeals Act, which provides for review, in certain specified instances, of decisions adverse to the United States, and which, being an innovation in criminal jurisdiction, cannot be extended beyond its terms.

Under the express provision of the Criminal Appeals Act, 18 U.S.C.A. § 682, 28 U.S.C.A. § 345, for an appeal by or on behalf of the United States from the district courts to the supreme court in the instances specified in the statute, the supreme court will directly review a decision of the district court adverse to the United States where the trial court has quashed, set aside, or sustained a demurrer to, an indictment or any count thereof, and its decision was based on the invalidity or construction of the statute on which the indictment was founded,[78] or where the trial court has sustained a special plea in bar, and defendant has not been put in jeopardy.[79] The statute authorizing such appeals is constitutional,[80] but as far as it is an innovation in criminal jurisdiction in the classes of cases specified, it cannot be extended beyond its terms,[81] although its remedial character is entitled to due weight.[82] Thus, appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment;[83] nor will an appeal lie in a case where the district court has considered the construction of the statute but has also rested its decision on the independent ground of a defect in pleading.[84] When the district court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute on which the indictment is founded, that is necessarily a construction of the statute.[85] A decision that facts alleged in the indictment were immaterial because of

76. U.S.—McMillan Contracting Co. v. Abernathy, Mo., 44 S.Ct. 200, 263 U.S. 438, 68 L.Ed. 378, remanding appeals, D.C., 284 F. 354, appeal dismissed, C.C.A., 2 F.2d 1018—U. S. v. Lee Yen Tai, N.Y., 113 F. 465, 51 C.C.A. 299, certified questions answered 22 S.Ct. 629, 185 U. S. 213, 46 L.Ed. 878.

25 C.J. p 915 note 45–p 916 note 49.

77. U.S.—The Paquete Habana, Fla., 20 S.Ct. 290, 175 U.S. 677, 44 L.Ed. 320.

25 C.J. p 916 notes 50–59.

78. U.S.—U. S. v. Malphurs, Fla., 62 S.Ct. 897, 316 U.S. 1, 86 L.Ed. 1227, vacating, D.C., 41 F.Supp. 817.

25 C.J. p 916 note 80 [a], p 917 note 81.

Informations for the punishment of criminal contempt are criminal cases within the Criminal Appeals Act.—U. S. v. Goldman, Ohio, 48 S.Ct. 486, 277 U.S. 229, 72 L.Ed. 862, reversing, D.C., U. S. v. Whiffen, 23 F.2d 352.

79. U.S.—U. S. v. Murdock, Ill., 52 S.Ct. 63, 284 U.S. 141, 76 L.Ed. 210, 82 A.L.R. 1376, reversing, D.C., 51 F.2d 389.

25 C.J. p 917 note 83.

Plea for abatement of indictment, sustained after running of limitations, was held not in substance a special plea in bar, under statute.—U. S. v. Storrs, Utah, 47 S.Ct. 221, 272 U.S. 652, 71 L.Ed. 460.

Judgment dismissing information

Whether judgment dismissing information as barred by limitations was judgment sustaining special plea in bar must be determined by substance, not form. Sustaining motion to dismiss information as barred by limitations on facts appearing on its face is equivalent to sustaining special plea in bar.—U. S. v. Goldman, Ohio, 48 S.Ct. 486, 277 U.S. 229, 72 L.Ed. 862, reversing, D.C., U. S. v. Whiffen, 23 F.2d 352.

Defendant held not in jeopardy

District court having merely entered preliminary order for taking testimony, defendants were not placed in jeopardy, so as to preclude writ of error to supreme court.—U. S. v. Goldman, supra.

80. U.S.—U. S. v. Bitty, N.Y., 28 S. Ct. 296, 208 U.S. 393, 52 L.Ed. 543.

81. U.S.—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177—U. S. v. Dickinson, Mass., 29 S. Ct. 485, 213 U.S. 92, 53 L.Ed. 711.

82. U.S.—U. S. v. Herr, Colo., 29 S.Ct. 134, 211 U.S. 404, 53 L.Ed. 251.

83. U.S.—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177—U. S. v. Halsey, Stuart & Co., Wis., 56 S.Ct. 299, 296 U.S. 451, 80 L.Ed. 323.

25 C.J. p 917 note 81 [f], [l].

84. U.S.—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177—U. S. v. Hastings, Miss., 56 S.Ct. 218, 220, 296 U.S. 188, 80 L.Ed. 148, disapproving U. S. v. Stevenson, Mass., 30 S.Ct. 35, 215 U.S. 190, 54 L.Ed. 153.

85. U.S.—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177—U. S. v. Hastings, Miss., 56 S.Ct. 218, 296 U.S. 188, 80 L.Ed. 148.

25 C.J. p 917 note 81 [b], [d], [h], [i], [j].

the unconstitutionality of the statute was not a construction of the indictment, but a ruling that it failed to state an offense in view of the act's invalidity.[86] A decision that the false claims statute does not apply to false representations made to obtain benefits under an invalid act was based on a construction of the false claims statute, so that the supreme court had jurisdiction of the appeal.[87]

The whole case is not open to review, but the review must be confined to the decisions enumerated in the statute.[88] The supreme court will not pass on the sufficiency and construction of the indictment,[89] but will accept the district court's interpretation of the indictment and confine its decision to the validity and construction of the statute on which the indictment was founded.[90] A point not specially considered or decided by the district court and not assigned as error by the government, but apparently raised and discussed for the first time on appeal, will not be discussed by the supreme court.[91]

In reversing the lower court's decision on the construction of the statute on which the indictment was based, the supreme court may leave it open to the trial court to pass on such of the grounds of demurrer as were not considered in the former ruling.[92] Where the district court sustained a demurrer to an indictment on the ground that a federal statute was inapplicable to the facts alleged in the indictment, but did not consider the applicability of another federal statute, the supreme court may remand the case for consideration by the court below of the applicability of such other statute.[93]

The Criminal Appeals Act is inapplicable to criminal cases tried in the supreme court of the District of Columbia, notwithstanding such court is designated as a court of the United States and invested with the same power and jurisdiction as federal district courts, such statute not impliedly repealing the appellate system created for the District of Columbia by the code thereof.[94]

Earlier statutes. Judicial Code § 238, 28 U.S.C.A. § 345, providing for direct review by the supreme court of judgments of district courts, excludes direct appeals except as therein provided, and hence the early statutes providing for such appeals in criminal cases are superseded as well as the practice provided for therein.[95]

§ 224. Judgments on Claims against United States

Judgments of the district courts in the exercise of the power conferred on them by the Tucker Act were formerly reviewable exclusively by the supreme court.

Judicial Code § 238, 28 U.S.C.A. § 345, as amended by the Act of February 13, 1925, providing that a direct review by the supreme court of a judgment or decree of a district court may be had as therein provided and not otherwise, makes no provision with respect to judgments on claims against the United States. It was formerly held, however, that judgments of the district courts in the exercise of the power conferred on them by the Tucker Act, Judicial Code § 24 (20), 28 U.S.C.A. § 41 (20), to decide claims against the United States were reviewable directly and exclusively by the supreme court.[96]

86. U.S.—U. S. v. Kapp, Okl., 58 S. Ct. 182, 302 U.S. 214, 82 L.Ed. 205.

87. U.S.—U. S. v. Kapp, supra.

88. U.S.—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177.
25 C.J. p 917 note 89.

89. U.S.—U. S. v. Classic, La., 61 S. Ct. 1031, 313 U.S. 299, 85 L.Ed. 1368, reversing, D.C., 35 F.Supp. 66, and rehearing denied 62 S.Ct. 51, 314 U.S. 707, 86 L.Ed. 565—U. S. v. Hastings, Miss., 56 S.Ct. 218, 296 U.S. 88, 80 L.Ed. 148.

90. U.S.—U. S. v. Classic, La., 61 S. Ct. 1031, 313 U.S. 299, 85 L.Ed. 1368, reversing, D.C., 35 F.Supp. 66, and rehearing denied 62 S.Ct. 51, 314 U. S. 707, 86 L.Ed. 565—U. S. v. Gilliland, Tex., 61 S.Ct. 518, 312 U.S. 86, 85 L.Ed. 598, reversing, D.C., 35 F.Supp. 181—U. S. v. Darby, Ga., 61 S.Ct. 451, 312 U.S. 100, 657, 85 L.Ed. 609, 132 A.L.R. 1430, reversing, D.C., 32 F.Supp. 734—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177—U. S. v. Hastings, Miss., 56 S.Ct. 218, 296 U.S. 88, 80 L.Ed. 148—U. S. v. Yuginovich, Or., 41 S.Ct. 551, 256 U.S. 450, 65 L.Ed. 1043, affirming, D.C., U. S. v. Yuginni, 266 F. 746.
25 C.J. p 917 note 81 [m].

On which statute indictment founded
In prosecution for conspiring to commit an offense against the United States, the statute on which the indictment is founded, within meaning of statute authorizing an appeal direct to supreme court from ruling involving construction of statute on which indictment is founded, is the statute, at the violation of which the conspiracy is aimed.—U. S. v. Kapp, Okl., 58 S.Ct. 182, 302 U.S. 214, 82 L.Ed. 205.

91. U.S.—U. S. v. Classic, La., 61 S. Ct. 1031, 313 U.S. 299, 85 L.Ed. 1368, reversing, D.C., 35 F.Supp. 66, and rehearing denied 62 S.Ct. 51, 314 U.S. 707, 86 L.Ed. 565.

92. U.S.—U. S. v. Pacific & A. R. & Nav. Co., Alaska, 33 S.Ct. 443, 228 U.S. 87, 57 L.Ed. 742.

93. U.S.—U. S. v. Malphurs, Fla., 62 S.Ct. 897, 316 U.S. 1, 86 L.Ed. 1227, vacating, D.C., 41 F.Supp. 817.

94. U.S.—U. S. v. Burroughs, D.C., 53 S.Ct. 574, 289 U.S. 159, 77 L.Ed. 1096.

95. **Decisions under repealed statutes**
U.S.—Hudson v. Parker, Ark., 15 S. Ct. 450, 156 U.S. 277, 39 L.Ed. 424—In re Claasen, N.Y., 11 S.Ct. 735, 140 U.S. 200, 35 L.Ed. 409—Ex parte Gordon, N.Y., 1 Black 503, 17 L.Ed. 134—Stokes v. U. S., Ala., 60 F. 597, 598, 9 C.C.A. 152.
25 C.J. p 916 notes 60–79.

96. U.S.—Reading Steel Casting Co. v. U. S., Pa., 45 S.Ct. 469, 268 U.S. 186, 69 L.Ed. 907, transferred, see, C.C.A., 293 F. 386—Campbell v. U. S., Ohio, 45 S.Ct. 115, 266 U.S. 368, 69 L.Ed. 328.
25 C.J. p 918 notes 91–93.

4. REVIEW OF DECISIONS OF COURTS OF TERRITORIES AND OUTLYING POSSESSIONS

§ 225. In General

As a general rule the United States supreme court pays deference to the understanding of territorial courts on matters of local concern. Where a territory is admitted as a state while appellate proceedings from the territorial court are pending, the supreme court on reversal will remand the case to the state court rather than to the territorial court.

As a general rule the United States supreme court pays deference to the understanding of territorial courts on matters of local concern,[97] and it will not ordinarily review questions of practice in such courts where the practice followed was based on local procedure.[98] Where a territory is admitted as a state pending an appeal from the territorial court to the United States supreme court under a statute permitting a direct appeal, the latter court, on reversing, will remand the cause to the supreme court of the new state.[99] A judgment of a state court in a case transferred to it from a territorial court is not subject to review by the United States supreme court merely because the action was begun in a territorial court.[1] The majority of the decisions rendered by the United States supreme court on appeal from courts of territories which have since become states are no longer of such importance as to require extended consideration, and, therefore, they are merely cited or referred to in the footnote without further discussion.[2]

§ 226. Alaska

Direct appellate jurisdiction of decisions of the district court for the District of Alaska is vested in the circuit court of appeals rather than the United States supreme court under 28 U.S.C.A. § 225, but under 28 U.S.C.A. § 349a a direct appeal to the United States supreme court is permitted under certain circumstances where the decision is against the constitutionality of any act of congress.

Under 28 U.S.C.A. § 225, appellate jurisdiction of decisions of the district court for the District of Alaska, or any division thereof, in all cases, is vested in the circuit court of appeals for the ninth circuit, but under the Act of August 24, 1937 c 754 § 2, 28 U.S.C.A. § 349a, an appeal may be taken directly to the United States supreme court in any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, and in which the decision is against the constitutionality of any act of congress, and, under c 754 § 5 of the Act, 50 U.S.St. at L. p 753, the term "court of the United States" is defined as including the courts of record of Alaska. Under early statutes no longer in force a direct review by the United States supreme court was permitted under certain prescribed circumstances.[3] Review by the supreme court of decisions of the circuit court of appeals generally is considered supra §§ 203, 204. Appellate jurisdiction of the circuit court of appeals, and the procedure therein, is considered infra §§ 287–301.

§ 227. Canal Zone

Under the federal statutes direct appellate jurisdiction of judgments and decrees of the United States district court for the District of the Canal Zone is vested in the circuit court of appeals rather than in the supreme court of the United States.

Appellate jurisdiction of the judgments and decrees of the United States district court for the District of the Canal Zone is vested in the circuit court of appeals for the fifth circuit under Judicial Code § 128, as amended, 28 U.S.C.A. § 225 and 48 U.S. C.A. § 1356, and such appellate jurisdiction, under the express provisions of the Act of September 21,

97. U.S.—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F. 2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U. S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiora· ranted 58 S.Ct. 949, 304 U.S. 553, 82 L. Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Matos v. Hermanos, Puerto Rico, 57 S.Ct. 529, 300 U.S. 429, 81 L.Ed. 728, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—Jones v. Springer, N.M., 33 S.Ct. 64, 226 U. S. 148, 57 L.Ed. 161.

25 C.J. p 838 note 88.

98. U.S.—Schmidt v. Bank of Commerce, N.M., 34 S.Ct. 730, 234 U.S. 64, 58 L.Ed. 1214—Sweeney v. Lomme, Mont., 22 Wall. 208, 22 L.Ed. 727.

25 C.J. p 919 note 98.

99. U.S.—Elliott v. Chicago, M. & St. P. R. Co., Dak., 14 S.Ct. 85, 150 U.S. 245, 37 L.Ed. 1068—Teague v. Maddox, Mont., 14 S.Ct. 46, 150 U.S. 128, 37 L.Ed. 1025.

1. U.S.—Van Dyke v. Cordova Copper Co., 34 S.Ct. 884, 234 U.S. 188, 58 L.Ed. 1273, dismissing appeal 132 P. 94, 14 Ariz. 499.

2. U.S.—Bonnifield v. Price, Wyo., 14 S.Ct. 1194, 154 U.S. 672, 26 L.Ed. 1022—Benites v. Hampton, Utah, 8 S.Ct. 254, 123 U.S. 519, 31 L.Ed. 260—Crawford v. Haller, Wash., 4 S.Ct. 697, 111 U.S. 796, 28 L.Ed. 602—Cannon v. Pratt, Utah, 99 U. S. 619, 25 L.Ed. 446—Stringfellow v. Cain, Utah, 99 U.S. 610, 25 L.Ed. 421.

25 C.J. p 918 note 94 [a], [b], p 825 notes 73, 74—3 C.J. p 391 note 22, p 325 note 94 [a], p 378 note 85, p 405 note 26 [b]—4 C.J. p 185 note 56.

3. U.S.—Itow v. U. S., Alaska, 34 S. Ct. 699, 233 U.S. 581, 58 L.Ed. 1102.

Appeal denied from ruling other than final judgment

U.S.—Pacific Coast SS. Co. v. U. S., Alaska, 23 S.Ct. 157, 187 U.S. 454, 47 L.Ed. 256—Pacific Steam Whaling Co. v. U. S., Alaska, 23 S.Ct. 154, 187 U.S. 447, 47 L.Ed. 253, affirming, D.C., 99 F. 334.

1922, c 370 § 3, 48 U.S.C.A. § 1356, is subject to the right of review by the supreme court of the United States as in other cases authorized by law. Under Judicial Code § 238, as amended January 28, 1915, a question of jurisdiction was appealable direct to the United States supreme court, but the Act of September 21, 1922 c 370 § 3, 48 U.S.C.A. § 1356, rendered Judicial Code § 238 inapplicable in this respect.[4]

Review by the supreme court of decisions of the circuit court of appeals generally is considered supra §§ 203, 204.

Appellate jurisdiction of the circuit court of appeals, and the procedure therein, is considered infra §§ 287–301.

§ 228. Hawaii and Puerto Rico

Under 28 U.S.C.A. § 225 the United States supreme court has no direct appellate jurisdiction of decisions of the supreme courts or district courts of Puerto Rico and Hawaii, but under 28 U.S.C.A. § 349a, a direct appeal to the United States supreme court from courts of record of Puerto Rico and Hawaii is permitted under certain circumstances where the decision is against the constitutionality of any act of congress. In reviewing a case which has originated in the local courts the federal supreme court will, as a general rule, accept their construction of local statutes or their understanding on matters of local concern.

Under former statutes the United States supreme court had direct appellate jurisdiction of decisions rendered by the supreme courts of Puerto Rico and Hawaii.[5] The Act of February 13, 1925 c 229 § 13 abolished this direct appellate jurisdiction, and under other provisions of the Act of February 13, 1925 c 229, 28 U.S.C.A. § 225, the circuit court of appeals has been given jurisdiction of a direct review of the decisions of these courts under certain prescribed circumstances, and of the United States district courts for Hawaii and for Puerto Rico, but, as stated supra §§ 203, 204, the supreme court may in some cases review decisions of the circuit court of appeals. Under the Act of August 24, 1937 c 754 § 2, 28 U.S.C.A. § 349a, an appeal may be taken directly to the United States supreme court in any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party and in which the decision is against the constitutionality of any act of congress, and, under c 754 § 5 of the Act, 50 U.S.St. at L. p 753, the term "court of the United States" is defined as including the courts of record of Hawaii and Puerto Rico. Review of decisions of district courts by the United States supreme court is considered in detail supra §§ 205–224. Appellate jurisdiction of the circuit court of appeals, and the procedure therein, is considered infra §§ 287–301.

The supreme court in reviewing a case which has originated in the courts of Puerto Rico or Hawaii is unwilling to overrule the local tribunals on matters of purely local concern unless the decisions are shown to be clearly wrong, and therefore, as a general rule, it will accept the construction of local statutes or the understanding on matters of local concern by the Puerto Rican[6] or Hawaiian[7] supreme court.

4. U.S.—McConaughey v. Morrow, Canal Zone, 44 S.Ct. 78, 263 U.S. 39, 68 L.Ed. 153, affirming, C.C.A., 279 F. 617.

5. U.S.—Goto v. Lane, Hawaii, 44 S. Ct. 525, 265 U.S. 393, 68 L.Ed. 1070—Balzac v. People of Porto Rico, Puerto Rico, 42 S.Ct. 343, 258 U.S. 298, 66 L.Ed. 627—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming, 251 F. 499, 163 C.C. A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419—Hapai v. Brown, Hawaii, 36 S.Ct. 201, 239 U.S. 502, 60 L.Ed. 407.
25 C.J. p 919 notes 1–3—3 C.J. p 586 note 29 [b].

Time when appeals first allowed

Not until the passage of Act of Congress of March 3, 1905 were appeals allowed from the supreme court of Hawaii to the supreme court of the United States on other than federal questions.—In re Estate of Allen, 35 Hawaii 501.

6. U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., Puerto Rico, 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081, reversing, C.C.A., Hermanos, Inc., v. People of Puerto Rico, 118 F.2d 752—Sancho v. Yabucoa Sugar Co., Puerto Rico, 59 S.Ct. 626, 306 U.S. 505, 307 U.S. 613, 83 L.Ed. 946, reversing, C.C.A., Porto Rico Fertilizer Co. v. Sancho, 98 F.2d 398, certiorari granted Sancho v. Yabucoa Sugar Co., 59 S.Ct. 460, 306 U.S. 622, 83 L.Ed. 1027—Diaz v. Gonzalez, Puerto Rico, 43 S.Ct. 286, 261 U.S. 102, 67 L.Ed. 550, reversing, C.C.A., Lugo v. Benitez, 276 F. 108—Cardona v. Quinones, Puerto Rico, 36 S.Ct. 346, 240 U.S. 83, 60 L.Ed. 538—Nedal v. May, Puerto Rico, 34 S.Ct. 611, 233 U.S. 447, 58 L.Ed. 1040—Kalanianaole v. Smithies, Hawaii, 33 S. Ct. 169, 226 U.S. 462, 57 L.Ed. 303.

Taxing acts of Puerto Rico are purely "local" as respects disposition of federal supreme court to accept construction placed by local court on local statutes and to sustain such construction in the absence of clear and manifest error.—Sancho v. Yabucoa Sugar Co., Puerto Rico, 59 S.Ct. 626, 306 U.S. 505, 307 U.S. 613, 83 L.Ed. 946, reversing, C.C.A., Porto Rico Fertilizer Co. v. Sancho, 98 F.2d 398, certiorari granted Sancho v. Yabucoa Sugar Co., 59 S.Ct. 460, 306 U.S. 622, 83 L.Ed. 1027.

Interpretation accepted by practice of community

Where the interpretation of Puerto Rican statutes by the Puerto Rican courts as permitting a judge other than the one specially designated by statute, but having jurisdiction of the class of cases, to take jurisdiction on submission of the particular case to him, has been accepted by the practice of the community, it should not be disturbed, except on an inescapable conclusion that it is wrong.—Diaz v. Gonzalez, Puerto Rico, 43 S.Ct. 286, 261 U.S. 102, 67 L. Ed. 550, reversing, C.C.A., Lugo v. Benitez, 276 F. 108.

7. U.S.—Inter-Island Steam Nav. Co. v. Territory of Hawaii, by Public Utilities Commission of Hawaii, Hawaii, 59 S.Ct. 202, 305 U.S. 306, 83 L.Ed. 189, affirming, C.C.A., 96 F.2d 412, certiorari granted Inter-

§ 229. Philippine Islands

The United States supreme court has jurisdiction to review by certiorari under prescribed circumstances decisions of the supreme court of the Philippine Islands. As a general rule it will not overrule the local court's decisions on questions of local law, but under particular circumstances it will exercise its own independent judgment.

Under the Act of February 13, 1925 c 229 § 7, 28 U.S.C.A. § 349, and substantially identical provisions of earlier statutes,[8] the United States supreme court has been given appellate jurisdiction in any case in the supreme court of the Philippine Islands wherein the constitution or any statute or treaty of the United States is involved,[9] or wherein the value in controversy exceeds twenty-five thousand dollars,[10] or wherein the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars is involved or brought in question,[11] on the petition of a party aggrieved by the final judgment or decree.[12] The reviewing power was formerly exercised through an appeal or writ of error,[13] but a review by writ of error or appeal is now prohibited, and the supreme court is authorized to require, by certiorari, that the cause be certified to it for review and determination with the same power and authority, and with like effect, as though brought up by writ of error or appeal.[14] The supreme court will not review a question which has become moot.[15]

The United States supreme court is not disposed,

Island Steam Nav. Co. v. Territory of Hawaii by Public Utility Commission, 59 S.Ct. 68, 305 U.S. 580, 83 L.Ed. 366—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, and rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, and rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Lewers & Cooke v. Atcherly, Hawaii, 32 S.Ct. 94, 222 U.S. 285, 56 L.Ed. 202—Kealoha v. Castle, Hawaii, 28 S.Ct. 684, 210 U.S. 149, 52 L.Ed. 998.

Adoption of one of several recognized rules

Where the supreme court of Hawaii adopts one of two or more recognized rules of law involving no federal question, "the federal supreme court would, we think, refuse to disturb that action."—In re Estate of Allen, 35 Hawaii 501.

8. **The Act of July 1, 1902 c 1369 § 10** was substantially identical with the Act of 1925 § 7, except that it provided for review on appeal or by writ of error instead of by certiorari.—Asiatic Petroleum Co., Philippine Islands, v. Insular Collector of Customs, Philippine, 56 S.Ct. 651, 297 U.S. 666, 80 L.Ed. 967.

9. U.S.—Alberto v. Nicolas, Philippine, 49 S.Ct. 317, 279 U.S. 139, 73 L.Ed. 642—Alejandrino v. Quezon, Philippine, 46 S.Ct. 600, 271 U.S. 528, 70 L.Ed. 1071.
25 C.J. p 920 notes 8–11.

Title, right, or privilege of the United States

Under express provisions of former statutes the supreme court also had jurisdiction if any title, right, or privilege of the United States was involved.—Board of Public Utility Comrs. v. Manila Electric R. & Light Co., Philippine, 39 S.Ct. 272, 249 U.S. 262, 63 L.Ed. 596.

Interpretation of organic law

United States supreme court has jurisdiction on certiorari to review judgment of supreme court of Philippine Islands in quo warranto proceedings involving interpretation of organic law.—Alberto v. Nicolas, Philippine, 49 S.Ct. 317, 279 U.S. 139, 73 L.Ed. 642.

Trading with Enemy Act

Supreme court has jurisdiction to review judgment of Philippine Islands supreme court refusing effect to foreign judgment involving construction of Trading with Enemy Act.—Ingenohl v. Walter E. Olsen & Co., Philippine, 47 S.Ct. 451, 273 U.S. 541, 71 L.Ed. 762.

Philippine Tariff Act of 1909 constituted "statute of United States," within federal statute giving United States supreme court jurisdiction to review decision of supreme court of Philippine Islands involving statute of United States, as against contention that Tariff Act was converted into law of Philippine Islands by act giving Philippine legislature concurrent power with congress to amend, alter, or repeal tariff laws.—Asiatic Petroleum Co., Philippine Islands, v. Insular Collector of Customs, Philippine, 56 S.Ct. 651, 297 U.S. 666, 80 L.Ed. 967.

10. U.S.—Gonzalez v. Roman Catholic Archbishop of Manila, Philippine, 50 S.Ct. 5, 280 U.S. 1, 74 L.Ed. 131—Pampanga Sugar Mills v. Trinidad, Philippine, 49 S.Ct. 308, 279 U.S. 211, 73 L.Ed. 665.
25 C.J. p 920 note 13.

11. U.S.—Harty v. Municipality of Victoria, Philippine, 33 S.Ct. 4, 226 U.S. 12, 57 L.Ed. 103.
25 C.J. p 920 note 14.

12. **Finality of judgment**

A judgment of the supreme court of the Philippine Islands which directs the entry of judgment for plaintiff below, in accordance with its decision, but leaves to the lower court the judicial determination of the exact amount for which the judgment shall be entered, is not final for the purpose of seeking a review by the United States supreme court.—Martinez v. International Banking Corp., Philippine, 31 S.Ct. 408, 220 U.S. 214, 55 L.Ed. 438.

13. U.S.—Philippine Sugar Estates Development Co. v. Government of Philippine Islands, Philippine, 38 S.Ct. 513, 247 U.S. 385, 62 L.Ed. 1177—Montelibano v. La Compania General De Tobacos De Filipinas, Philippine, 36 S.Ct. 617, 241 U.S. 455, 60 L.Ed. 1099—De La Rama v. De La Rama, Philippine, 36 S.Ct. 518, 241 U.S. 154, 60 L.Ed. 932—Gsell v. Insular Collector of Customs, Philippine, 36 S.Ct. 39, 239 U.S. 93, 60 L.Ed. 163—Paraiso v. U.S., Philippine, 28 S.Ct. 127, 207 U.S. 368, 52 L.Ed. 249.
3 C.J. p 1330 note 42 [b]—25 C.J. p 921 note 15.

14. U.S.—Alejandrino v. Quezon, Philippine, 46 S.Ct. 600, 271 U.S. 528, 70 L.Ed. 1071.

15. U.S.—Alejandrino v. Quezon, supra.

Suspension of Philippine senator

A question as to whether a Philippine senator was properly suspended and the jurisdiction of the Philippine supreme court to require the senate to rescind its resolution suspending the senator became moot where the period of suspension expired before the hearing in the United States supreme court.—Alejandrino v. Quezon, supra.

Incidental feature in case

Where an incidental feature of a case in which the main features have become moot does not present a proper subject for determination, or is

except for cogent reasons, to overrule the decision of the Philippine supreme court on questions involving the interpretation of the local law and its application to particular facts,[16] but it is free to exercise its independent judgment, and it need not accept the local court's interpretation of the local law.[17] The supreme court will not show the same deference to the local court's interpretation of a local statute involving delicate international relations as to its judgment on purely local matters.[18]

§ 230. Virgin Islands

The United States supreme court has no direct appellate jurisdiction of decisions by the district court of the Virgin Islands.

Under 28 U.S.C.A. § 225, appellate jurisdiction of decisions by the district court of the Virgin Islands is vested in all cases in the circuit court of appeals for the third circuit, and no direct appellate jurisdiction is vested in the United States supreme court. Review by the United States supreme court of decisions of the circuit court of appeals generally is considered supra §§ 203, 204. Appellate jurisdiction of the circuit court of appeals, and the procedure therein, is considered infra §§ 287–301.

5. Review of Decisions of Courts of District of Columbia

§ 231. Court of Appeals

Review by the United States supreme court of decisions of the United States court of appeals for the District of Columbia is considered infra §§ 232, 233. Certification of questions to the United States supreme court is considered generally supra § 202.

§ 232. —— By Appeal

Under specific provisions of the federal statute, 28 U.S.C.A. § 347, the United States supreme court may review decisions of the United States court of appeals for the District of Columbia only by certiorari, but under 28 U.S.C.A. § 349a, an appeal is permitted under certain circumstances where the decision is against the constitutionality of an act of congress.

The provisions of the Act of February 13, 1925 c 229 § 1, 28 U.S.C.A. § 347, which relate specifically to review by the United States supreme court of decisions of the United States court of appeals for the District of Columbia, permit only a review by certiorari and they abolish all other methods of review not provided for therein. Under the former statute, Judicial Code § 250, a review by appeal or writ of error was permissible under certain prescribed circumstances which are considered in 25 Corpus Juris page 922 note 32–page 923 note 41,[19]

not presented so as to afford the supreme court sufficient information concerning it, the court will treat the whole cause as moot.—Alejandrino v. Quezon, supra.

16. U.S.—American Trading Co. v. H. E. Heacock Co., Philippine, 52 S.Ct. 387, 285 U.S. 247, 76 L.Ed. 740—Yu Cong Eng v. Trinidad, Philippine, 46 S.Ct. 619, 271 U.S. 500, 70 L.Ed. 1059—Alzua v. Johnson, Philippine, 34 S.Ct. 27, 231 U.S. 106, 58 L.Ed. 142.
25 C.J. p 920 note 8 [a] (1).

Local practice

On the question whether the original judgment creditors alone can sue on a judgment in favor of a trustee and the beneficiary, where a new trustee has been appointed and the judgment has been assigned to him, the supreme court will not go behind the local practice.—Kalanianaole v. Smithies, Hawaii, 33 S.Ct. 169, 226 U.S. 462, 57 L.Ed. 303.

17. U.S.—American Trading Co. v. H. E. Heacock Co., Philippine, 52 S.Ct. 387, 285 U.S. 247, 76 L.Ed. 740—Yu Cong Eng v. Trinidad, Philippine, 46 S.Ct. 619, 625, 271 U.S. 500, 70 L.Ed. 1059.
25 C.J. p 920 note 8 [a] (2).

Analogy as to construction by state court

"The suggestion has been made in argument that we should accept the construction put upon a statute of the Philippine Islands by their Supreme Court as we would the construction of a state court in passing upon the federal constitutionality of a state statute. The analogy is not complete. The Philippines are within the exclusive jurisdiction of the United States government, with complete power of legislation in Congress over them, and when the interpretation of a Philippine statute comes before us for review, we may, if there be need therefor, re-examine it for ourselves as the court of last resort on such a question."—Yu Cong Eng v. Trinidad, supra.

18. U.S.—Ingenohl v. Walter E. Olsen & Co., Philippine, 47 S.Ct. 451, 273 U.S. 541, 71 L.Ed. 762.

19. **Additional decisions under former statutes**

(1) After the allowance of a writ of error from the United States supreme court to the court of appeals of the District of Columbia, the cause has passed beyond the jurisdiction of the court of appeals.—Heitmuller v. Stokes, 41 S.Ct. 522, 256 U.S. 359, 65 L.Ed. 990, reversing 266 F. 1011, 49 App.D.C. 391.

(2) On appeal or writ of error the supreme court may determine all questions presented by the record.—McGowan v. Parish, 35 S.Ct. 543, 237 U.S. 285, 59 L.Ed. 955, reversing 39 App.D.C. 184—Magruder v. Drury, 35 S.Ct. 77, 235 U.S. 106, 59 L.Ed. 151 reversing 37 App.D.C. 519.

(3) The supreme court may enter the judgment which should have been rendered by the court below.—Baker v. Warner, 34 S.Ct. 175, 231 U.S. 588, 58 L.Ed. 384, reversing 36 App.D.C. 493.

(4) Errors not of a fundamental character, which were not presented to the lower court for consideration, and which were waived, will not be considered on an appeal.—Magruder v. Drury, supra.

(5) A review can be had only in the case of a judgment or a decree which is final in its nature.—Baldwin Co. v. R. S. Howard Co., 41 S.Ct. 405, 256 U.S. 35, 65 L.Ed. 816, dismissing appeal and denying certiorari Howard Co. v. Baldwin Co., 48 App.D.C. 437—25 C.J. p 924 note 49.

(6) A decree of the court of appeals for the District of Columbia, dismissing a bill for want of jurisdiction, is a final decree.—U. S. ex rel. Baldwin Co. v. Robertson, 44 S.Ct. 508, 265 U.S. 168, 68 L.Ed. 962, reversing Robertson v. U. S., ex rel. Baldwin Co., 287 F. 942, 52 App.D.C. 368.

and, under the limitations of the statute, a review by appeal or writ of error was not available in a case arising under the patent laws,[20] the copyright

(7) A decree of the court of appeals of the District of Columbia, affirming and remanding a decree directing that two parcels of land separately covered by trust deeds be sold as an entirety or in parts, in the discretion of the trustees, is not final for the purpose of an appeal to the supreme court of the United States.—Warner v. Grayson, 26 S.Ct. 240, 200 U.S. 257, 50 L.Ed. 470, modifying 24 App.D.C. 55.

(8) Judgment of court of appeals, refusing jurisdiction of appeal from commissioner of patents, is not a "judicial judgment," reviewable by supreme court.—Postum Cereal Co. v. California Fig Nut Co., 47 S.Ct. 284, 272 U.S. 693, 71 L.Ed. 478, dismissing appeal 297 F. 544, 54 App.D.C. 285—48 C.J. p 162 note 64.

(9) An appeal will lie to the supreme court of the United States from a decree of the court of appeals of the District of Columbia reserving a decree of the supreme court of the District for dissolution of a preliminary injunction and remanding the cause for entry of a permanent injunction.—Chesapeake & Potomac Telephone Co. v. Manning, 22 S.Ct. 881, 186 U.S. 238, 46 L.Ed. 1144, reversing 18 App.D.C. 191.

(10) A writ of error, instead of an appeal, is the proper method to review a decision in a proceeding in substance an action at law.—Metropolitan R. Co. v. McFarland, 25 S. Ct. 28, 195 U.S. 322, 49 L.Ed. 219, affirming 20 App.D.C. 421.

(11) Writ of error is properly taken from decree of court of appeals of District of Columbia involving construction of federal statute.—U. S. ex rel. Norwegian Nitrogen Products Co. v. U. S. Tariff Commission, 47 S. Ct. 499, 274 U.S. 106, 71 L.Ed. 949, vacating 6 F.2d 491, 55 App.D.C. 366.

(12) Decree of court of appeals of District of Columbia, in action to enjoin the secretary of the interior and the commissioner of the general land office from issuing a patent to a certain person, on the ground that their determination to issue such patent was in violation of the Act of May 14, 1880, is appealable to the supreme court, under Judicial Code § 250 par 6.—Brady v. Work, 44 S.Ct. 168, 263 U.S. 435, 68 L.Ed. 375, affirming Brady v. Fall, 280 F. 1017, 52 App.D.C. 43.

(13) A writ of error to review a judgment of the court of appeals of the District of Columbia in proceeding involving the construction of the general statutes of the United States, applicable to the Naval Reserve Force and the retirement of its officers, is within the jurisdiction of the United States supreme court, under Judicial Code § 250 par 6.—Denby v. Berry, 44 S.Ct. 74, 263 U.S. 29, 68 L. Ed. 148, reversing 279 F. 317, 51 App. D.C. 335.

(14) Under Judicial Code § 250 subd. 6 the supreme court has appellate jurisdiction of suit against secretary of the interior, to enjoin him from canceling certain selection of lieu lands by railroad, involving construction of the Act of June 22, 1874.—Santa Fé Pac. R. Co. v. Work, 45 S.Ct. 400, 267 U.S. 511, 69 L.Ed. 764, affirming 295 F. 982, 54 App.D.C. 161.

(15) Mere assertion that construction or application of Constitution or federal laws is involved does not authorize supreme court to entertain appeal, it being court's duty to decline jurisdiction if record does not present substantial constitutional or statutory question, properly raised below.—Corrigan v. Buckley, 46 S.Ct. 521, 271 U.S. 323, 70 L.Ed. 969, dismissing appeal 299 F. 899, 55 App. D.C. 30.

(16) The constitutional validity of the building regulations of the District of Columbia, which by the Act of June 14, 1878 are given the effect of congressional legislation, was seasonably raised by request for charge at the trial in the supreme court of the District, and by proper assignment of error in the proceedings for review, so that the question can be reviewed by the United States supreme court under Judicial Code § 250.—Walker v. Gish, 43 S.Ct. 174, 260 U.S. 447, 67 L.Ed. 344, affirming 273 F. 366, 51 App.D.C. 4.

(17) Where court of appeals of the District of Columbia based dismissal of a bill for lack of jurisdiction on the construction of Trade-Mark Act § 9 and Rev.St. § 4915, under Judicial Code § 250 an appeal to United States supreme court was the proper remedy and petition for certiorari should be denied.—U. S. ex rel. Baldwin Co. v. Robertson, 44 S.Ct. 508, 265 U.S. 168, 68 L.Ed. 962, reversing Robertson v. U. S. ex rel. Baldwin Co., 287 F. 942, 52 App.D.C. 368.

(18) Judicial Code § 250, authorizing a review of final judgments of the court of appeals of the District of Columbia in cases in which the jurisdiction of the trial court is in issue, is not limited to the jurisdiction of the trial court as a court of the United States, but embraces a suit by the United States to recover filled-in land on the Virginia side of the Potomac River claimed by defendant, by a plea to the jurisdiction, to be in the state of Virginia.—Marine Ry. & Coal Co. v. U. S., 42 S. Ct. 32, 257 U.S. 47, 66 L.Ed. 124, affirming 265 F. 437, 49 App.D.C. 285.

(19) An appeal in equity brings up the whole record.—Keller v. Potomac Electric Power Co., 43 S.Ct. 445, 261 U.S. 428, 67 L.Ed. 731, dismissing appeal Potomac Electric Power Co. v. Public Utilities Commission of District of Columbia, 276 F. 327, 51 App. D.C. 77.

(20) The statutes and rule requiring an assignment of errors to be filed with the transcript of record in the supreme court of the United States apply on appeal from the court of appeals of the District of Columbia.—Briscoe v. Rudolph, 31 S. Ct. 679, 221 U.S. 547, 55 L.Ed. 848, affirming Briscoe v. MacFarland, 32 App.D.C. 167—Columbia Heights Realty Co. v. Rudolph, 30 S.Ct. 581, 217 U.S. 547, 54 L.Ed. 877, 19 Ann. Cas. 854, affirming Columbia Heights Realty Co. v. MacFarland, 31 App.D. C. 112.

(21) Mandamus will not lie to the court of appeals of the District of Columbia to compel the settling and signing of a bill of exceptions that has not been prepared and presented within the time required by statute or rule of court.—Gordon v. Randle. D.C., 23 S.Ct. 635, 189 U.S. 417, 47 L.Ed. 875.

(22) In suit to restrain enforcement of order of rent commission of District of Columbia, cutting down apartment rents under the Act of Oct. 22, 1919 tit 2, continued in force by the Act of Aug. 24, 1921, reënacted by the Act of May 22, 1922, in which it was claimed that the emergency which justified enactment of statutes authorizing the commission to cut down rents had ceased to exist, the United States supreme court, on appeal from judgment of court of appeals of District of Columbia, affirming district supreme court's decree of dismissal, will reverse the judgment, to enable the supreme court of the District to ascertain the facts as to whether the emergency had ceased to exist, and the law had become inoperative by reason thereof, at time order was made, although the United States supreme court judicially knows that conditions are such that the law has ceased to operate at time of appeal.—Chastleton Corporation v. Sinclair, 44 S.Ct. 405, 264 U.S. 543, 68 L.Ed. 841, reversing 290 F. 348, 53 App.D.C. 373.

20. U.S.—U. S. ex rel. Chott v. Ewing, 35 S.Ct. 571, 237 U.S. 197, 59 L.Ed. 913, dismissing appeal Moore v. U. S. ex rel. Chott, 40 App.D.C. 591.

laws,[21] or the criminal laws.[22] Under the Act of August 24, 1937 c 754 § 2, 28 U.S.C.A. § 349a, an appeal may be taken directly to the United States supreme court in any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party and in which the decision is against the constitutionality of any act of congress, and, under c 754 § 5 of the Act, 50 U.S.St. at L. p 753, the statute is expressly stated to include the United States court of appeals for the District of Columbia.

§ 233. —— By Certiorari

The United States supreme court may review by certiorari judicial decisions of the United States court of appeals for the District of Columbia. It will not ordinarily review decisions which are based on statutes limited to the District or which declare the common law of the District, but it will grant the writ where the decision presents a question national in scope.

Under the Act of February 13, 1925 c 229 § 1, 28 U.S.C.A. § 347, jurisdiction is expressly conferred on the United States supreme court to review by certiorari cases from the United States court of appeals for the District of Columbia. The United States supreme court will not ordinarily review on certiorari decisions of the United States court of appeals for the District of Columbia which are based on statutes limited in their operation to the District of Columbia or which declare the common law of the District,[23] but it will grant the writ where the decision presents a question national in scope.[24] A decision of the court of appeals which is administrative or advisory in nature rather than judicial, rendered on an appeal from an administrative body in accordance with a statute vesting the court of appeals with such jurisdiction, is not reviewable by the supreme court.[25] The supreme court will dispose of the case presented to it as warranted by the circumstances,[26] and it need not consider any question not raised by the petition for

21. U.S.—U. S. ex rel. Chott v. Ewing, supra.

22. U.S.—Hartranft v. Mullowny, 38 S.Ct. 518, 247 U.S. 295, 62 L.Ed. 1123, dismissing 43 App.D.C. 44.
25 C.J. p 923 note 45.

23. U.S.—Del Vecchio v. Bowers, 56 S.Ct. 190, 296 U.S. 280, 80 L.Ed. 229, reversing Bowers v. Hoage, 76 F.2d 996, 64 App.D.C. 226, certiorari granted Del Vecchio v. Bowers, 55 S.Ct. 916, 295 U.S. 728, 79 L.Ed. 1679, motion granted 55 S.Ct. 922.

24. U.S.—Del Vecchio v. Bowers, supra.

Effect of denying writ
Supreme court's denial of writ of certiorari imports no expression of opinion on merits of case.—W. P. Brown & Sons Lumber Co. v. Louisville & N. R. Co., C.C.A.Ky., 82 F.2d 94, affirming, D.C., 7 F.Supp. 593, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 385, affirmed 57 S.Ct. 265, 299 U.S. 393, 81 L.Ed. 301.

25. U.S.—Federal Radio Commission v. General Electric Co., 50 S.Ct. 389, 281 U.S. 464, 74 L.Ed. 969, dismissing certiorari General Electric Co. v. Federal Radio Commission, 31 F.2d 630, 58 App.D.C. 386.

26. **Affirmance of decree**
Decree, reversing order denying motions to dismiss bill for restoration of amounts of deposits, paid to defendants by bank receiver, as to one defendant, and affirming it as to other defendants, without prejudice to trial court's right to arrange order of trial of such suit and receiver's suit against latter defendants to recover assets alleged to have been illegally pledged or resulting preferential payments, will be affirmed, course of procedure being left for determination by trial court in exercise of sound discretion.—U. S. Shipping Board Merchant Fleet Corporation v. Rhodes, 56 S.Ct. 517, 297 U.S. 383, 80 L.Ed. 733, affirming O'Connor v. Rhodes, 79 F.2d 146, 65 App.D.C. 21, certiorari granted 56 S.Ct. 249, 296 U.S. 568, 80 L.Ed. 401 and U. S. Shipping Board Merchant Fleet Corporation v. Rhodes, 56 S.Ct. 249, 296 U.S. 568, 80 L.Ed. 401.

Remand for further proceedings
Supreme court, determining that district court abused its discretion in staying suits to enjoin enforcement of alleged unconstitutional Public Utility Holding Company Act of 1935 until determination of suit instituted in another district to test constitutionality of act and until supreme court's determination of any appeal therefrom, would not determine whether a stay to continue until decision by district court and then ending automatically would be moderate, in view of fact that, following stay order, facts in test case had been settled by stipulation, briefs had been prepared, and case had been argued on merits justifying expectation of decision within reasonable time, but would remand case to district court for reappraisal of facts and new exercise of discretion.—Landis v. North American Co., 57 S.Ct. 163, 299 U.S. 248, 81 L.Ed. 153, reversing North American Co. v. Landis, 85 F.2d 398, 66 App.D.C. 141, certiorari granted Landis v. North American Co., 57 S.Ct. 30, 299 U.S. 530, 81 L.Ed. 390—Landis v. American Water Works & Electric Co., 57 S.Ct. 163, 299 U.S. 248, 81 L.Ed. 153, reversing 85 F.2d 398, 66 App.D.C. 141, certiorari granted Landis v. American Water Works & Electric Co., 57 S.Ct. 30, 299 U.S. 530, 81 L.Ed. 390.

Conclusion of fact by court of appeals
The supreme court would not disturb conclusion of the United States court of appeals for the District of Columbia that federal communications commission's disavowal of alleged fact that commission used as evidence certain data and reports in commission's files, without permitting intervenor before the commission opportunity of inspecting them, was veracious and sufficient.—Federal Communications Commission v. Sanders Bros. Radio Station, 60 S.Ct. 693, 309 U.S. 470, 642, 84 L.Ed. 869, 1037, reversing Sanders Bros. Radio Station v. Federal Communications Commission, 106 F.2d 321, 70 App.D.C. 297, certiorari granted Federal Communications Commission v. Sanders Bros. Radio Station, 60 S.Ct. 294, 308 U.S. 546, 84 L.Ed. 460.

Presumption in favor of trial court's jurisdiction
On certiorari to review judgment affirming decree denying motion to dismiss suit, supreme court would be required to presume in favor of jurisdiction of trial court that plaintiffs might be able to prove allegations in support of right to maintain suit without joinder of United States as party defendant.—Ickes v. Fox, 57 S.Ct. 412, 300 U.S. 82, 81 L.Ed. 525, affirming 85 F.2d 294, 66 App.D.C. 128, certiorari granted 57 S.Ct. 36, 299 U.S. 528, 81 L.Ed. 388, and rehearing denied 57 S.Ct. 504, 300 U.S. 640, 81 L.Ed. 888—Ickes v. Parks, 57 S.Ct. 412, 300 U.S. 82, 81 L.Ed. 525, affirming 85 F.2d 294, 66 App.D.C. 128, certiorari granted 57 S.Ct. 36, 299 U.S. 528, 81 L.Ed. 388, and rehearing de-

certiorari.[27] Where the supreme court on certiorari has held contrary to the opinion of the United States court of appeals for the District of Columbia and has remanded the case directly to the district court of the United States for the District of Columbia, the district court in subsequent proceedings must conform to the rulings of the supreme court.[28]

Former statute. A writ of certiorari was also provided for under the former statute, Judicial Code § 251.[29]

§ 234. District Court of United States

An appeal directly to the supreme court of the United States from the district court of the United States for the District of Columbia, formerly called supreme court of the District of Columbia, is permitted under circumstances in which a direct appeal from a district court of the United States is authorized by statute.

As stated infra § 325, the name of the supreme court of the District of Columbia has been changed to the district court of the United States for the District of Columbia under the Act of June 25, 1936, 49 U.S.St. at L. 1921 c 804. In a proceeding in which this District of Columbia court exercises the jurisdiction of a district court of the United States, an appeal directly to the supreme court of the United States may be had under circumstances in which a direct appeal from a district court of the United States is authorized by statute.[30] Thus an appeal must be taken directly to the United States supreme court in cases where an appeal under the Expediting Act of February 11, 1903, 15 U.S.C.A. § 29, would lie directly to the supreme court from a federal district court.[31] Under the provisions of 18 U.S.C.A. § 682 which permit an appeal directly to the United States supreme court under particular circumstances if the construction or validity of a federal statute is involved, an appeal cannot be so taken where the validity or construction of a federal statute is not involved,[32] or where the construction or validity of the statute involved has been adjudicated and upheld.[33] Under statutes no longer in force the United States supreme court had jurisdiction to review in direct appellate proceedings a decision of the supreme court of the District of Columbia if it involved the validity of any patent or copyright, or the validity of a treaty or statute of, or an authority exercised under, the United States, or if the amount in controversy exceeded the sum of five thousand dollars.[34]

nied 57 S.Ct. 504, 300 U.S. 640, 81 L. Ed. 888—Ickes v. Ottmuller, 57 S.Ct. 412, 300 U.S. 82, 81 L.Ed. 525, affirming 85 F.2d 294, 66 App.D.C. 128, certiorari granted 57 S.Ct. 36, 299 U.S. 528, 81 L.Ed. 388, and rehearing denied 57 S.Ct. 504, 300 U.S. 640, 81 L. Ed. 888.

27. U.S.—Gunning v. Cooley, 50 S.Ct. 231, 281 U.S. 90, 74 L.Ed. 720, affirming 30 F.2d 467, 58 App.D.C. 304, certiorari granted 49 S.Ct. 263, 279 U.S. 828, 73 L.Ed. 979.

28. D.C.—Davis v. Davis, 114 F.2d 492, 72 App.D.C. 341.

29. U.S.—Hartranft v. Mullowny, 38 S.Ct. 518, 247 U.S. 295, 62 L.Ed. 1123, dismissing error 43 App.D.C. 44—Fields v. U. S., 27 S.Ct. 543, 205 U.S. 292, 51 L.Ed. 807, denying certiorari and dismissing error 27 App.D.C. 433.

Allowance of writ as establishing jurisdiction

The supreme court's inadvertent allowance of a writ of certiorari in a proceeding in which no question of jurisdiction was considered does not establish the jurisdiction of the court.—Baldwin Co. v. R. S. Howard Co., 41 S.Ct. 405, 256 U.S. 35, 65 L.Ed. 816, dismissing appeal and denying certiorari Howard Co. v. Baldwin Co., 48 App.D.C. 437.

Character of power to review by certiorari

"The words 'with the same power and authority in the case as if it had been carried by writ of error or appeal to said Supreme Court' express the character of the power, not its conditions, as the power is granted only when a writ of error or appeal does not lie."—George A. Fuller Co. v. Otis El. Co., 38 S.Ct. 180, 181, 245 U.S. 489, 62 L.Ed. 422, reversing, 44 App.D.C. 287.

Finality of judgment

(1) To be reviewed by certiorari the judgment must be final.—Baldwin Co. v. R. S. Howard Co., 41 S. Ct. 405, 256 U.S. 35, 65 L.Ed. 816, dismissing appeal and denying certiorari Howard Co. v. Baldwin Co., 48 App.D.C. 437.

(2) The writ when issued to the court of appeals is not limited to cases in which final judgment has been entered, but only to cases in which the judgment when entered is final.—George A. Fuller Co. v. Otis El. Co., 38 S.Ct. 180, 245 U.S. 489, 62 L.Ed. 422, reversing 44 App.D.C. 287.

Necessity for exception

A writ of certiorari will be dismissed for want of jurisdiction where it appears that the question on which the certiorari was prayed was not before the court below, and is not open for consideration, because no exception concerning the ruling of the trial court on the subject was taken so as to preserve the right of review concerning it.—Tyrrell v. District of Columbia, 37 S.Ct. 361, 243 U.S. 1, 61 L.Ed. 557, dismissing certiorari 41 App.D.C. 463.

30. U.S.—U. S. v. California Co-op. Canneries, D.C., 49 S.Ct. 423, 279 U.S. 553, 73 L.Ed. 838.
D.C.—U. S. v. Denison, 47 F.2d 433, 60 App.D.C. 71.
Jurisdiction of United States supreme court to review decisions of United States district courts see supra §§ 205–224.

31. U.S.—U. S. v. California Co-op. Canneries, D.C., 49 S.Ct. 423, 279 U.S. 553, 73 L.Ed. 838—Swift & Co. v. U. S., D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

32. D.C.—U. S. v. Denison, 47 F.2d 433, 60 App.D.C. 71.

33. D.C.—U. S. v. Denison, supra.

34. U.S.—Washington & G. R. Co. v. District of Columbia, 13 S.Ct. 64, 146 U.S. 227, 36 L.Ed. 951, dismissing appeal 17 D.C. 570—In re Craft, D.C., 8 S.Ct. 509, 124 U.S. 370, 31 L.Ed. 449—Baltimore & P. R. Co. v. Grant, D.C., 98 U.S. 398, 25 L. Ed. 231.

Order to appear as citation

An order to appellee to appear and argue the cause was held to be the legal equivalent of a citation for all the purposes of an appeal to the United States supreme court from the supreme court of the District of Columbia.—Dodge v. Knowles, D.C., 5 S.Ct. 1108, 114 U.S. 436, 29 L.Ed. 144, denying motions 5 S.Ct. 1197, 114 U.S. 430, 29 L.Ed. 296.

6. Review of Decisions of Other Federal and Military Courts

§ 235. Court of Claims

The general statute, Act of February 12, 1925, c 229 § 3, as amended by the Act of May 22, 1939 c 140, 28 U.S.C.A. § 288(b), provides for a review of a judgment or decree of the court of claims by certiorari, but there may be a right to a review by appeal under the Act of August 24, 1937, c 754 § 2, 28 U.S.C.A. § 349a, or under private acts expressly granting the right. Findings of fact by the court of claims are held to be conclusive on the supreme court.

The United States supreme court's power to review decisions by the court of claims is subject to restrictions imposed by congress, and a party has no right to a review other than that which is granted by congress.[35] Under the Act of February 13, 1925 c 229 § 3, and the amendment thereto by the Act of May 22, 1939 c 140, 28 U.S.C.A. § 288(b), the United States supreme court may review the judgment or decree of the court of claims by certiorari on the petition of either party, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. An earlier statute on the subject, Judicial Code §§ 242, 243, which was repealed by the Act of February 13, 1925, provided for an appeal under certain prescribed circumstances.[36] A judgment of the court of claims rendered before the statute abolishing appeals became effective was held not appealable where a motion for new trial was made subsequent to the time the statute took effect.[37] On certiorari from the supreme court to the court of claims the record must include the pleadings, findings, and judgment, to-

35. U.S.—Luckenbach S. S. Co. v. U. S., 47 S.Ct. 186, 272 U.S. 533, 71 L.Ed. 394, affirming 59 Ct.Cl. 628.

Fraud on United States

There is no right to have reviewed a decision of the court of claims as to whether a new trial shall be granted on the motion of the United States under Judicial Code § 175, 28 U.S.C.A. § 282, on the grounds that a fraud, wrong, or injustice has been done the United States, since no such right is granted.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447—Volk v. U. S., 56 Ct.Cl. 395.

36. U.S.—Fred T. Ley Co. v. U. S., 47 S.Ct. 388, 273 U.S. 386, 71 L.Ed. 698, affirming Fred T. Ley & Co. v. U. S., 60 Ct.Cl. 654—Southern Pac. Co. v. U. S., 46 S.Ct. 242, 270 U.S. 103, 70 L.Ed. 489, dismissing appeal and granting certiorari 60 Ct.Cl. 662, and affirmed 47 S.Ct. 123, 272 U.S. 445, 71 L.Ed. 343—Morse v. U. S., 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518, dismissing appeal 59 Ct.Cl. 139, and rehearing denied 55 S.Ct. 828, 295 U.S. 768, 79 L.Ed. 1709—U. S. v. Anderson, 46 S.Ct. 131, 269 U.S. 422, 70 L.Ed. 347, reversing 60 Ct.Cl. 106.

25 C.J. p 921 notes 19–26.

Decisions as to particular matters under earlier statute

(1) The statute authorizing appeals from court of claims does not extend to interlocutory orders.—Standard Steel Car Co. v. U. S., 61 Ct.Cl. 391.

(2) An order of the United States court of claims, on motion of claimant for substitution of attorneys, allowing such a substitution but imposing conditions, is not a final judgment from which claimant can appeal to the supreme court.—Ex parte Desmare, 9 Ct.Cl. 1.

(3) Order of court of claims, refusing a new trial and request for amended findings, is not appealable.—Luckenbach S. S. Co. v. U. S., 47 S.Ct. 186, 272 U.S. 533, 71 L.Ed. 394, affirming 59 Ct.Cl. 628.

(4) An appeal which is filed pending disposition of a motion for a new trial and amended findings is not a nullity because of prematurity.—Luckenbach S. S. Co. v. U. S., supra.

(5) The rules of the supreme court relating to appeals from court of claims provide what shall be incorporated in the record on appeal: "A finding of the Court of Claims of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them"—and they do not contemplate the inclusion therein of "exceptions" filed to such findings.—Gulf Refining Co. v. U. S., 59 Ct.Cl. 104.

(6) The rules of the supreme court require the court of claims to make findings of fact from the evidence submitted, which must be sent up as part of the record on appeal, but there is no rule requiring exceptions to such evidence to be made a part of such record on appeal.—Gulf Refining Co. v. U. S., 58 Ct.Cl. 559.

(7) The supreme court will not consider questions not raised in the court below.—Hathaway v. U. S., 39 S.Ct. 346, 249 U.S. 460, 63 L.Ed. 707, affirming 52 Ct.Cl. 267.

(8) Claimant may not press findings requested in court of claims, without showing that tender was in conformity with rules.—Luckenbach S. S. Co. v. U. S., 47 S.Ct. 186, 272 U.S. 533, 71 L.Ed. 394, affirming 59 Ct.Cl. 628.

(9) In action on canceled government contract, attack on validity of accepted award would not be considered on appeal, in absence of proof of loss or findings justifying petitioner's recovery.—Towar Cotton Mills v. U. S., 46 S.Ct. 211, 270 U.S. 375, 70 L.Ed. 639, affirming 59 Ct.Cl. 841.

(10) Where, in suit by executors to recover legacy taxes paid, no objection was made in court of claims to order restricting scope of the evidence or to the findings made, there may be no complaint in supreme court.—Woerishoffer v. U. S., 46 S.Ct. 33, 269 U.S. 102, 70 L.Ed. 180, affirming 58 Ct.Cl. 410.

(11) The amount claimed in the amended petition rather than that claimed in the original petition determines the amount in controversy for the purpose of conferring appellate jurisdiction on the supreme court.—Journal & Tribune Co. v. U. S., 41 S.Ct. 202, 254 U.S. 581, 65 L.Ed. 415, affirming 53 Ct.Cl. 612.

(12) An appeal under Judicial Code § 242 will be dismissed by reason of Judicial Code § 154, 28 U.S.C.A. § 260, where, pending the appeal, claimant brings suit in the district court on the same cause of action, even though the action in the other court would otherwise be barred by the statute of limitations. Corona Coal Co. v. U. S., 44 S.Ct. 156, 263 U.S. 537, 68 L.Ed. 431, dismissing appeals 57 Ct.Cl. 607, and 56 Ct.Cl. 390.

(13) Motions for leave to file motions for new trial and to amend findings after one motion for a new trial has been denied does not extend the time for appealing.—Morse v. U. S., 46 S.Ct. 241, 270 U.S. 151, 70 L.Ed. 518, dismissing appeal 59 Ct.Cl. 139, and rehearing denied 55 S.Ct. 828, 295 U.S. 768, 79 L.Ed. 1709.

37. U.S.—Southern Pac. Co. v. U. S., 46 S.Ct. 242, 270 U.S. 103, 70 L.Ed. 489, dismissing appeal and granting certiorari 60 Ct.Cl. 662, and affirmed 47 S.Ct. 123, 272 U.S. 445, 71 L.Ed. 343.

gether with the opinion, if any.[38] The findings to be included in the record must be in the nature of a special verdict and they must specifically set forth the ultimate facts.[39] An amended petition which has been filed in the court of claims after the expiration of the period of limitation and hence too late to bring in any additional cause of action or to change the grounds on which plaintiff rested its suit may nevertheless be considered on review to the extent that it gives plaintiff's statement of details of causes of action alleged in the original petition and for comparison with the court's special fact findings,[40] but items of claims in the amended petition which are outside the period covered by the allegations of the original petition and which are not shown by the findings to be within the period are required to be deducted from the judgment.[41] The time within which an application may be made for review in the supreme court under 28 U.S.C.A. § 350 which prescribes the period of limitation does not begin to run until after disposition of a motion for new trial seasonably filed and entertained.[42] Want of jurisdiction of the subject matter may be considered, and appropriate judgment given, at any stage of the proceedings.[43]

Under the Act of August 24, 1937 c 754 § 2, 28 U.S.C.A. § 349a, an appeal may be taken directly to the United States supreme court in any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party and in which the decision is against the constitutionality of any act of congress, and, under c 754 § 5 of the Act, 50 U.S.St. at L. p 753, the term "court of the United States" is defined as including the court of claims.

Nature of review under special acts. A special act of congress which gives a right of appeal from the court of claims as in other cases gives a right of review only by certiorari and not by the technical appeal since the general statute provides only for review by certiorari.[44] A private jurisdictional act providing that either party may appeal from the court of claims to the supreme court "as of right" authorizes either party to take a technical appeal to the supreme court.[45] The determination of a claim by the court of claims under a special act providing for no mode of review is final and no appeal will lie therefrom.[46]

Findings of fact. In the review of cases brought in the court of claims under both general and private or special acts it has been held that the supreme court cannot reëxamine questions of fact decided by the court of claims and that such findings are conclusive,[47] although the supreme court may

38. U.S.—U. S. v. Esnault-Pelterie, 57 S.Ct. 159, 299 U.S. 201, 81 L.Ed. 123, vacating 81 Ct.Cl. 785, certiorari granted 56 S.Ct. 953, 298 U. S. 653, 80 L.Ed. 1380, and motion denied 57 S.Ct. 314.

39. U.S.—U. S. v. Esnault-Pelterie, supra.

40. U.S.—U. S. v. Seminole Nation, 57 S.Ct. 283, 299 U.S. 417, 81 L.Ed. 316, reversing Seminole Nation v. U. S., 82 Ct.Cl. 135, certiorari granted U. S. v. Seminole Nation, 57 S.Ct. 23, 299 U.S. 526, 81 L.Ed. 387.

41. U.S.—U. S. v. Seminole Nation, supra.

42. U.S.—U. S. v. Seminole Nation, supra.

Filing of second motion
Second motion for new trial in suit by Seminole Nation against United States filed May 18, 1936, after granting of application filed May 13, 1936, for leave to file second motion, when original motion timely filed, after judgment entered Dec. 2, 1935, was overruled March 2, 1936, was held to confer jurisdiction on supreme court of certiorari proceeding on petition filed June 8, 1936, since three-month period within which motion was required to be filed did not commence to run until court disposed of second motion.—U. S. v. Seminole Nation, supra.

43. U.S.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515.

44. U.S.—Colgate v. U. S., 50 S.Ct. 22, 280 U.S. 43, 74 L.Ed. 157, dismissing appeal 66 Ct.Cl. 667, certiorari denied 50 S.Ct. 15, 280 U.S. 553, 74 L.Ed. 610.

45. U.S.—U. S. v. Goltra, 61 S.Ct. 487, 312 U.S. 203, 85 L.Ed. 776, modifying Goltra v. U. S., 91 Ct.Cl. 42, motion denied 61 S.Ct. 25, 311 U.S. 613, 85 L.Ed. 389.

46. U.S.—Ex parte Atocha, 17 Wall. 439, 21 L.Ed. 696—Pargoud v. U. S., 4 Ct.Cl. 349.

47. U.S.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516—U. S. v. Wells, 51 S.Ct. 446, 283 U. S. 102, 75 L.Ed. 867, affirming, Ct. Cl., Wells v. U. S., 39 F.2d 998, certiorari granted U. S. v. Wells, 51 S. Ct. 32, 282 U.S. 822, 75 L.Ed. 734—Milliken v. U. S., 51 S.Ct. 324, 283 U.S. 15, 75 L.Ed. 809, affirming, Ct. Cl., 38 F.2d 381, certiorari granted 51 S.Ct. 20, 282 U.S. 817, 75 L.Ed. 730—Chesapeake & Potomac Telephone Co. v. U. S., 50 S.Ct. 343, 281 U.S. 385, 74 L.Ed. 921, affirming 68 Ct.Cl. 273, certiorari granted 50 S.Ct. 81, 280 U.S. 548, 74 L.Ed. 607—Niles Bement Pond Co. v. U. S., 50 S.Ct. 251, 281 U.S. 357, 74 L.Ed. 901, affirming 67 Ct.Cl. 693—Fred T. Ley Co. v. U. S., 47 S.Ct. 388, 273 U.S. 386, 71 L.Ed. 698, affirming Fred T. Ley & Co. v. U. S., 60 Ct.Cl. 654—Jacob Reed's Sons v. U. S., 47 S.Ct. 339, 273 U.S. 200, 71 L.Ed. 608, affirming 60 Ct.Cl. 97—Luckenbach S. S. Co. v. U. S., 47 S. Ct. 186, 272 U.S. 533, 71 L.Ed. 394, affirming 59 Ct.Cl. 628—U. S. v. Swift & Co., 46 S.Ct. 308, 270 U.S. 124, 70 L.Ed. 497, modifying Swift & Co. v. U. S., 59 Ct.Cl. 364—Rogers v. U. S., 46 S.Ct. 275, 270 U.S. 154, 70 L.Ed. 520, affirming 59 Ct.Cl. 464—U. S. v. Anderson, 46 S.Ct. 131, 269 U.S. 422, 70 L.Ed. 347, reversing 60 Ct.Cl. 106—L. Vogelstein & Co. v. U. S., 43 S.Ct. 564, 262 U.S. 337, 67 L.Ed. 1012, affirming 56 Ct. Cl. 362—Robinson v. U. S., 43 S.Ct. 420, 261 U.S. 486, 67 L.Ed. 760, affirming 57 Ct.Cl. 7—Price Fire & Water Proofing Co. v. U. S., 43 S.Ct. 299, 261 U.S. 179, 67 L.Ed. 602, affirming 56 Ct.Cl. 502—Keokuk & Hamilton Bridge Co. v. U. S., 43 S.

inquire whether subordinate or circumstantial findings made by the court of claims override its ultimate findings and show that the judgment in point of law is not sustainable.[48] It has likewise been held that the supreme court may not refer to the evidence[49] or to the opinion of the court of claims[50] for the purpose of eking out, controlling, or modifying the scope of findings which are unambiguous and leave no room for construction, but reference to the opinion of the court of claims[51] and to the pleadings[52] may be made to clarify the meaning of a finding otherwise in doubt. The Act of May 22, 1939 c 140, 28 U.S.C.A. § 288(b), specifically provides that the supreme court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue. A complaint on appeal under a private act regarding the failure of the court of claims to make certain findings cannot be sustained where there is no indication that the court of claims did not consider facts which were embodied in the proposed findings.[53] The principle that judgment on a special verdict cannot be sustained unless the findings extend to all material issues governs in cases brought to the supreme court from the court of claims.[54]

It is not the function of the supreme court in reviewing judgments of the court of claims to make basic findings of fact,[55] and, when the court of claims fails to make findings on a material issue, it is proper to remand the case for such findings.[56] However, the absence of finding of ultimate facts by the court of claims does not require reversal or

Ct. 37, 260 U.S. 125, 67 L.Ed. 165, affirming 55 Ct.Cl. 480.
25 C.J. p 922 note 27.

Limitation to questions of law
Review by the supreme court of judgments of the court of claims is limited to questions of law.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U. S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516.

Mixed question of law and fact
A finding of the court of claims is conclusive, notwithstanding it determines a mixed question of law and fact, unless the supreme court is able so to separate the question as to see clearly what and where the mistake of law is.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516—Stilz v. U. S., 46 S.Ct. 37, 269 U.S. 144, 70 L.Ed. 202, affirming 59 Ct.Cl. 21.

Fraud or mistake
The question of fraud or mistake in the execution of a contract on behalf of the United States, differing from proposals between the parties, is one of fact; a negative finding of the court is conclusive, and cannot be reviewed in the supreme court.—Clark v. U. S., 7 Ct.Cl. 32.

Validity and infringement of patent
In suit in court of claims for compensation for patent infringement, questions of validity and infringement are questions of fact.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U. S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L. Ed. 516—Stilz v. U. S., 46 S.Ct. 37, 269 U.S. 144, 70 L.Ed. 202, affirming 59 Ct.Cl. 21.

48. U.S.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516.

Ultimate findings held supported by subordinate findings
U.S.—U. S. v. Esnault-Pelterie, 58 S. Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516.

49. U.S.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516.

50. U.S.—M. E. Blatt Co. v. U. S., 59 S.Ct. 186, 305 U.S. 267, 83 L.Ed. 167, reversing, Ct.Cl., 23 F.Supp. 461, certiorari granted 59 S.Ct. 69, 305 U.S. 581, 83 L.Ed. 366—U. S. v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming, 58 S.Ct. 794, 304 U.S. 111, 82 L.Ed. 1213, affirming Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. U. S., 85 Ct.Cl. 331, certiorari granted U. S. v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming, 58 S.Ct. 609, 303 U.S. 629, 82 L.Ed. 1090—American Propeller & Manufacturing Co. v. U. S., 57 S.Ct. 521, 300 U.S. 475, 81 L.Ed. 751, reversing, Ct.Cl., 14 F.Supp. 168, modified 17 F.Supp. 215, certiorari granted 57 S.Ct. 491, 300 U.S. 648, 81 L.Ed. 860—U. S. v. Esnault-Pelterie, 57 S.Ct. 159, 299 U.S. 201, 81 L.Ed. 123, vacating 81 Ct.Cl. 785, certiorari granted 56 S.Ct. 953, 298 U.S. 653, 80 L.Ed. 1380, and motion denied 57 S.Ct. 314.

51. U.S.—Chippewa Indians of Minnesota v. U. S., 59 S.Ct. 313, 305 U. S. 479, 83 L.Ed. 300, affirming 87 Ct.Cl. 1—American Propeller & Manufacturing Co. v. U. S., 57 S. Ct. 521, 300 U.S. 475, 81 L.Ed. 751, reversing, Ct.Cl., 14 F.Supp. 168, modified 17 F.Supp. 215, certiorari granted 57 S.Ct. 491, 300 U.S. 648, 81 L.Ed. 860.

52. U.S.—Chippewa Indians of Minnesota v. U. S., 59 S.Ct. 313, 305 U.S. 479, 83 L.Ed. 300, affirming 87 Ct.Cl. 1—American Propeller & Manufacturing Co. v. U. S., 57 S.Ct. 521, 300 U.S. 475, 81 L.Ed. 751, reversing, Ct.Cl., 14 F.Supp. 168, modified 17 F.Supp. 215, certiorari granted 57 S.Ct. 491, 300 U.S. 648, 81 L.Ed. 860.

53. U.S.—U. S. v. Goltra, 61 S.Ct. 487, 312 U.S. 203, 85 L.Ed. 776, modifying Goltra v. U. S., 91 Ct.Cl. 42, motion denied 61 S.Ct. 25, 311 U.S. 613, 85 L.Ed. 389.

54. U.S.—U. S. v. Esnault-Pelterie, 57 S.Ct. 159, 299 U.S. 201, 81 L.Ed. 123, vacating 81 Ct.Cl. 785, certiorari granted 56 S.Ct. 953, 298 U. S. 653, 80 L.Ed. 1380, and motion denied 57 S.Ct. 314.

55. U.S.—Seminole Nation v. U. S., Ct.Cl., 62 S.Ct. 1049, 316 U.S. 286, 651, 86 L.Ed. 1480.

56. U.S.—Seminole Nation v. U. S., supra—U. S. v. Esnault-Pelterie, 57 S.Ct. 159, 299 U.S. 201, 81 L.Ed. 123, vacating 81 Ct.Cl. 785, certiorari granted 56 S.Ct. 953, 298 U.S. 653, 80 L.Ed. 1380, and motion denied 57 S.Ct. 314.

remand of the cause if circumstantial facts as found are such that the ultimate fact follows as a necessary inference.[57] A motion to remand for amended findings will not be allowed where the findings are unambiguous and responsive to the issues.[58]

§ 236. Court of Customs and Patent Appeals

The United States supreme court has jurisdiction to review judgments of the court of customs and patent appeals as provided in the applicable statutes.

In accordance with the provisions of the federal statute, 28 U.S.C.A. § 308, the United States supreme court has jurisdiction to review by certiorari judgments of the court of customs and patent appeals involving constitutional and other questions when properly presented.[59] Under the Act of August 24, 1937 c 754 § 2, 28 U.S.C.A. § 349a, an appeal may be taken directly to the United States supreme court in any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party and in which the decision is against the constitutionality of any act of congress, and, under c 754 § 5 of the Act, 50 U.S.St. at L. p 753, the term "court of the United States" is defined as including the court of customs and patent appeals.

§ 237. Military Tribunals

Proceedings of military tribunals are not subject to a direct review by certiorari by the United States supreme court.

The proceedings of military tribunals cannot be reviewed by the supreme court of the United States by certiorari;[60] but it has been held that a contention that accused was twice punished for the same offense by the sentence of any army court-martial, when raised in a trial court on an application for habeas corpus, may authorize an appeal to the supreme court of the United States.[61]

7. Review of Decisions of State Courts

§ 238. In General

Within the limits prescribed by acts of congress, the United States supreme court has appellate jurisdiction to review decisions of state courts.

As shown supra § 199, the appellate jurisdiction of the United States supreme court is derived from the federal Constitution, and such jurisdiction may be limited and regulated by acts of congress. As early as 1789, Act of September 24, 1789, 1 U.S.St. at L. c 20 § 25, the supreme court was given, by act of congress, authority to review decisions of the state courts of last resort in certain specified cases,[62] and this authority with various changes has been continued by congressional enactments[63] and is presently governed by the Act of February 13, 1925, Judicial Code § 237 as amended, 28 U.S.C.A. § 344.[64] The appellate power so conferred is supported by both the letter and the spirit of the Constitution.[65]

The statutory grant of appellate jurisdiction to the United States supreme court will be strictly construed.[66] The supreme court has no appellate jurisdiction whatever over the state courts with respect to matters not within the scope of the statutory grant,[67] even though by reason of the char-

57. U.S.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516—U. S. v. Wells, 51 S.Ct. 446, 283 U.S. 102, 75 L.Ed. 867, affirming, Ct.Cl., Wells v. U. S., 39 F.2d 998, certiorari granted U. S. v. Wells, 51 S.Ct. 32, 282 U.S. 822, 75 L.Ed. 734.

58. U.S.—Luckenbach S. S. Co. v. U. S., 47 S.Ct. 186, 272 U.S. 533, 71 L. Ed. 394, affirming 59 Ct.Cl. 628.

59. U.S.—Cottman Co. v. Dailey, D. C.Md., 20 F.Supp. 142, affirmed, C. C.A., 94 F.2d 85.

60. U.S.—In re Vidal, Puerto Rico, 21 S.Ct. 48, 179 U.S. 126, 45 L.Ed. 118—Ex parte Vallandigham, 1 Wall. 243, 17 L.Ed. 589.

Reason for rule is that such tribunals are not courts with jurisdiction in law or equity, within the meaning of those terms as used in Const. art. III.—In re Vidal, Puerto Rico, 21 S. Ct. 48, 179 U.S. 126, 45 L.Ed. 118.

61. U.S.—Carter v. McClaughry, Kan., 22 S.Ct. 181, 183 U.S. 365, 46 L.Ed. 236, affirming, C.C., 105 F. 614.

62. U.S.—John P. King Mfg. Co. v. City Council of Augusta, 48 S.Ct. 489, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306.

63. U.S.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L. Ed. 1092—John P. King Mfg. Co. v. City Council of Augusta, 48 S.Ct. 489, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306.

25 C.J. p 924 notes 62, 63.

64. U.S.—U. S. v. Bank of New York & Trust Co., N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C. C.A., 77 F.2d 866, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—U. S. v. President and Directors of Manhattan Co., N.Y., 56 S. Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., 77 F.2d 881, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—U. S. v. Pink, N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., U. S. v. Van Schaick, 77 F.2d 880, certiorari granted U. S. v. Pink, 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—Marsh v. Earle, D.C.Pa., 24 F. Supp. 385.

65. U.S.—Martin v. Hunter, 1 Wheat. 304, 4 L.Ed. 97, reversing 4 Munf. 1, 18 Va. 1.

25 C.J. p 925 note 64.

66. U.S.—McBride v. Hoey, Pa., 11 Pet. 167, 9 L.Ed. 673.

Cal.—Ferris v. Coover, 11 Cal. 175.

67. U.S.—Southern Electric Co. v. Stoddard, 46 S.Ct. 71, 269 U.S. 186,

acter or citizenship of the parties the action might have been brought in a federal court.[68] The fact that a state court in deciding a federal question erroneously declares that no federal question exists does not, however, preclude a review of its decision by the supreme court.[69]

"Federal question." A question the decision of which by the state court is reviewable on appeal, or by certiorari, is usually termed a "federal question,"[70] notwithstanding some hesitancy in one of the earlier cases as to this comprehensive use of the term.[71]

§ 239. Status of Court Rendering Judgment

The appellate jurisdiction of the supreme court of the United States over the decisions of state courts is limited to a review of the judgments of the highest court of the state in which a decision may be had.

Under the statute, now 28 U.S.C.A. § 344, the appellate jurisdiction of the United States supreme court over decisions of state courts is limited to a review of the judgments of the highest court of the state in which a decision could be had.[72] This does not, however, confine a review to the decisions of the highest court of a state, for if under the state law the decisions of a lower court are final in a particular class of cases the supreme court of the United States may review the judgments of that court in such cases.[73] Where the highest court of the state refuses to review the decision of an in-

70 L.Ed. 227, dismissing error In re People, by Phillips, 201 N.Y.S. 933, 207 App.Div. 842.

25 C.J. p 925 note 66.

Declaratory judgments are not within the appellate jurisdiction of the supreme court.—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643.

68. U.S.—French v. Hopkins, Cal., 8 S.Ct. 589, 124 U.S. 524, 31 L.Ed. 536.

Nev.—Hamilton v. Kneeland, 1 Nev. 60.

69. U.S.—Missouri, K. & T. R. Co. v. Elliott, 22 S.Ct. 446, 184 U.S. 530, 46 L.Ed. 673, reversing 77 Mo.App. 652.

Decision by state court on nonfederal ground see infra § 244.

70. U.S.—Godchaux Co. v. Estopinal, La., 40 S.Ct. 116, 251 U.S. 179, 64 L.Ed. 213.

25 C.J. p 926 note 71.

Materiality and decision of federal question see infra § 244.

71. U.S.—Murdock v. Memphis, Tenn., 20 Wall. 590, 618, 22 L.Ed. 429.

25 C.J. p 926 note 72.

72. U.S.—Betts v. Brady, Md., 62 S.Ct. 1252, 316 U.S. 455, 86 L.Ed. 1595—Tenner v. Dullea, Cal., 62 S.Ct. 364, 314 U.S. 692, 86 L.Ed. —— — Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming Pierson v. Lynch, 263 N.Y.S. 259, 237 App.Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431—Southern Electric Co. v. Stoddard, 46 S.Ct. 71, 269 U.S. 186, 70 L.Ed. 227, dismissing error In re People, by Phillips, 201 N.Y.S. 933, 207 App.Div. 842.

25 C.J. p 926 note 73.

To what court writs addressed see infra §§ 277, 278.

What constitutes "court" of state

(1) Whether the decision was rendered by a "court" of the state depends on the status of the tribunal under state law.—Betts v. Brady, Md., 62 S.Ct. 1252, 316 U.S. 455, 86 L.Ed. 1595.

(2) An order of a state judge at chambers in a habeas corpus proceeding is not an order of a "court." —McKnight v. James, Ohio, 15 S.Ct. 248, 155 U.S. 685, 39 L.Ed. 310.

(3) Where chief judge of court of appeals of Maryland, who was the judge of that court from city of Baltimore, had authority to grant writ of habeas corpus, and petition for writ of habeas corpus was presented to him when he was not sitting in term time as member of court, his decision denying the relief sought constituted a judgment of a "court." —Betts v. Brady, supra.

Discretionary power of review in highest state court

If a discretionary power to review exists in the highest court of a state, the exercise of such discretion must be first invoked and refused, before the judgment of the lower court is final so as to be subject to review by the supreme court of the United States.—Matthews v. Huwe, Ohio, 46 S.Ct. 108, 269 U.S. 262, 70 L.Ed. 266—Stratton v. Stratton, Ohio, 36 S.Ct. 26, 239 U.S. 55, 60 L.Ed. 142.

Judgment by division of court reviewable by court en banc

A judgment rendered by division one of supreme court of Missouri affirming a decree which enjoined collection of taxes on Washington University's property, on ground that Missouri constitution and statutes as applied violated university's charter provisions for tax exemption and infringed contract clause of federal Constitution, was not that of the "highest court of a state in which a decision could be had" within Judicial Code restricting United States supreme court's authority to review decisions of state courts to those causes wherein such a judgment has been rendered, in view of provision of Missouri constitution and rule of supreme court of Missouri, providing for review by the court en banc of a decision by a division where a federal question is involved.—Gorman v. Washington University, 62 S.Ct. 962, 316 U.S. 98, 86 L.Ed. 1300, dismissing certiorari Washington University v. Gorman, 153 S.W.2d 35, 318 Mo. 310, certiorari granted Gorman v. Washington University, 62 S.Ct. 301, 314 U.S. 604, 86 L.Ed. 486.

Judgment of lower court cannot be reviewed, although it is in accordance with a decision of the highest court of the state on a former appeal and will necessarily be affirmed by the latter court.—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 163, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—25 C.J. p 926 note 73 [b].

73. U.S.—Grovey v. Townsend, Tex., 55 S.Ct. 622, 295 U.S. 45, 97 A.L.R. 680, 79 L.Ed. 1292—Prudential Ins. Co. of America v. Cheek, Mo., 42 S.Ct. 516, 259 U.S. 530, 66 L.Ed. 1044, 27 A.L.R. 27, affirming Cheek v. Prudential Ins. Co. of America, App., 223 S.W. 754—Andrew Iannetta Funeral Home v. State Board of Undertakers of Department of Health of Pennsylvania, D.C.Pa., 27 F.Supp. 518.

Or.—City of Portland v. McSparran, 129 P.2d 65.

25 C.J. p 926 notes 73 [b] (2), 74.

Last state tribunal to which cause could be brought for review constitutes the "highest court of a state in which a decision could be had" re-

ferior or intermediate court, the United States supreme court may review its judgment where a federal question is involved.[74] However, there has been no decision of the federal question in the highest court of the state in which a decision in the suit can be had, where the highest state court has dismissed an appeal in the suit because of a defect in the parties to such appeal,[75] or because the appeal to the highest court was taken without leave first obtained.[76]

§ 240. Final Character of Judgment

A judgment or decree of a state court which is not final is not reviewable by the United States supreme court.

Under the statute, 28 U.S.C.A. § 344, authorizing and regulating reviews by the United States supreme court of decisions of state courts, the judgment or decree of the state court must be a final one.[77] However, a judgment rendered by the highest court in the state in which a decision could

gardless of particular description or designation which may be applied to it by state statutes.—Gorman v. Washington University, 62 S.Ct. 962, 316 U.S. 98, 86 L.Ed. 1300, dismissing certiorari Washington University v. Gorman, 153 S.W.2d 35, 348 Mo. 310, certiorari granted Gorman v. Washington University, 62 S.Ct. 301, 314 U.S. 604, 86 L.Ed. 486.

Application to state supreme court for certificate of importance and appeal

United States supreme court may grant certiorari to review Illinois appellate court judgment after denial of writ of certiorari by state supreme court, although petitioner did not apply for certificate of importance and appeal.—Chesapeake & O. Ry. Co. v. Mihas, 50 S.Ct. 42, 280 U. S. 102, 74 L.Ed. 207, reversing Mihas v. Chesapeake & O. Ry. Co., 249 Ill. App. 446, certiorari granted Chesapeake & O. Ry. Co. v. Mihas, 49 S.Ct. 251, 279 U.S. 827, 73 L.Ed. 978—Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock, 49 S.Ct. 363, 279 U.S. 410, 73 L.Ed. 766, reversing Rock v. Minneapolis, St. P. & S. S. M. Ry. Co., 247 Ill.App. 600, and rehearing denied Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock, 50 S.Ct. 79.

Judgment of superior court of Massachusetts, pursuant to rescript from supreme judicial court, is a final decision of the highest court reviewable by the United States supreme court.—Central New England Ry. Co. v. Boston & A. R. Co., 49 S. Ct. 358, 279 U.S. 415, 73 L.Ed. 770, affirming New York Cent. R. Co. v. Central New England Ry. Co., 162 N.E. 324, 264 Mass. 128, certiorari granted Central New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 176, 278 U.S. 596, 73 L.Ed. 526—Myers v. International Trust Co., 47 S. Ct. 372, 273 U.S. 380, 71 L.Ed. 692, affirming International Trust Co. v. Myers, 147 N.E. 591, 252 Mass. 94, certiorari granted Myers v. International Trust Co., 45 S.Ct. 640, 268 U. S. 686, 69 L.Ed. 1157—Davis v. L. L. Cohen & Co., 45 S.Ct. 633, 268 U.S. 638, 69 L.Ed. 1129, reversing L. L. Cohen & Co. v. Davis, 142 N.E. 75, 247 Mass. 259.

74. U.S.—Chicago & E. I. R. Co. v. Industrial Commission of Illinois, Ill., 52 S.Ct. 151, 284 U.S. 296, 76 L.Ed. 304, 77 A.L.R. 1367—Western Union Telegraph Co. v. Priester, 48 S.Ct. 234, 276 U.S. 252, 72 L. Ed. 555, reversing 111 So. 199, 21 Ala.App. 587, certiorari granted 47 S.Ct. 574, 274 U.S. 727, 71 L.Ed. 1315, dismissing certiorari 111 So. 200, 215 Ala. 435, certiorari granted 47 S.Ct. 576, 274 U.S. 727, 71 L. Ed. 1135—Virginian Ry. Co. v. Mullens, W.Va., 46 S.Ct. 526, 271 U.S. 220, 70 L.Ed. 915—American Ry. Express Co. v. Levee, La., 44 S.Ct. 11, 263 U.S. 19, 68 L.Ed. 140—Randall v. Board of Com'rs of Tippecanoe County, Ind., 43 S.Ct. 252, 261 U.S. 252, 67 L.Ed. 637, dismissing error 131 N.E. 776, 77 Ind.App. 320.

La.—State ex rel. Muslow v. Louisiana Oil Refining Corporation, App., 177 So. 476, denying motion 176 So. 686, affirmed Arkansas Fuel Oil Co. v. State of Louisiana ex rel. Muslow, 58 S.Ct. 832, 304 U.S. 197, 82 L.Ed. 1287, rehearing denied 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549.

25 C.J. p 927 note 75.

Dismissal by highest state court for lack of jurisdiction

U.S.—Adam v. Saenger, Tex., 58 S. Ct. 454, 303 U.S. 59, 82 L.Ed. 649, reversing, Civ.App., 101 S.W.2d 1046, certiorari granted 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, mandate conformed to Civ.App., 119 S.W.2d 687, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511.

25 C.J. p 926 note 74 [b].

Refusal based on merits

Refusal of a writ of certiorari by the highest court of state on the merits did not take from the refusal its ostensible character of declining jurisdiction to review.—American Ry. Express Co. v. Levee, La., 44 S.Ct. 11, 263 U.S. 19, 68 L.Ed. 140.

75. U.S.—Newman v. Gates, 27 S.Ct. 220, 204 U.S. 89, 51 L.Ed. 385, dismissing error 72 N.E. 638, 165 Ind. 171, 6 Ann.Cas. 649.

76. U.S.—McMaster v. Gould, 48 S. Ct. 299, 276 U.S. 284, 72 L.Ed. 574, dismissing certiorari 152 N.E. 446, 242 N.Y. 604.

77. U.S.—Gorman v. Washington University, 62 S.Ct. 962, 316 U.S. 98, 86 L.Ed. 1300, dismissing certiorari Washington University v. Gorman, 153 S.W.2d 35, 348 Mo. 310, certiorari granted Gorman v. Washington University, 62 S.Ct. 301, 314 U.S. 604, 86 L.Ed. 486—Laclede Gas Light Co. v. Public Service Commission of Missouri, 58 S.Ct. 988, 304 U.S. 398, 82 L.Ed. 1422, dismissing appeal State ex rel. City of St. Louis v. Public Service Commission, 110 S.W.2d 749, 341 Mo. 920.

25 C.J. p 927 note 78—3 C.J. p 586 note 31, p 590 note 68.

Finality of determination generally see supra § 201.

Finality as affected by state court rendering judgment see supra § 239.

Dependent on state law

Whether decision was a final judgment is to be determined in the light of applicable law of state.—Betts v. Brady, Md., 62 S.Ct. 1252, 316 U.S. 455, 86 L.Ed. 1595.

Tests of finality

(1) To give the United States supreme court appellate jurisdiction, the judgment or decree of a state court must terminate the litigation between the parties on the merits, so that, if there should be an affirmance, the court below would have nothing to do but execute the judgment or decree it has rendered.—Georgia Ry. & Power Co. v. Town of Decatur, 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065, reversing 111 S.E. 911, 153 Ga. 329—3 C.J. p 586 note 29.

(2) The finality of a judgment of the highest court of the state is to be tested by the form of the judgment, and the federal supreme court cannot in determining its jurisdiction convert the judgment not on its face final to one final in character.—Bruce v. Tobin, 38 S.Ct. 7, 245 U.S. 18, 62 L.Ed. 123, denying certiorari 162 N.W. 933, 39 S.D. 64—Louisiana Nav. Co. v. Oyster Commission, 33 S.Ct. 78, 226 U.S. 99, 57 L.Ed. 138, dismissing error 51 So. 706, 125 La. 740—Mutual Orange Distributors v. Agricultural

be had is not deprived of its final character because it was rendered on an equal division of opinion among the judges;[78] and if the validity of a judgment of an inferior court is either affirmed or denied by the highest court in the state, by any form of decision, such decision will, if it involves a federal question, be subject to review by the supreme court.[79] The proceeding for a writ of prohibition is a distinct suit, see infra § 242, and the judgment finally disposing of it is a final judgment subject to review by the supreme court.[80]

Petition for rehearing. The mere right of either of the parties for a certain period of time to petition for a rehearing in the state appellate court does not affect the finality of the judgment.[81] However, a judgment cannot be regarded as final when

Prorate Commission of California, D.C.Cal., 30 F.Supp. 937.

Affirmance and remand for further proceedings is not a final judgment.—Laclede Gas Light Co. v. Public Service Commission of Missouri, 58 S.Ct. 938, 304 U.S. 398, 82 L.Ed. 1422, dismissing appeal State ex rel. City of St. Louis v. Public Service Commission, 110 S.W.2d 749, 341 Mo. 920—25 C.J. p 927 note 78 [f]—3 C.J. p 589 note 67.

Affirmance of order denying new trial

Where highest court of state affirmed order denying plaintiff's motion for new trial and plaintiff brought certiorari, writ was dismissed as improvidently granted, it appearing that no final judgment had been entered.—Fox Film Corporation v. Muller, 55 S.Ct. 444, 294 U.S. 696, 79 L.Ed. 1234, dismissing certiorari 255 N.W. 845, 192 Minn. 212, certiorari granted 55 S.Ct. 213, 293 U.S. 550, 79 L.Ed. 653, and followed in United Artists Corporation v. Miller, 255 N.W. 848, 192 Minn. 219, and Fox Film Corporation v. Muller, 260 N.W. 320, 194 Minn. 654, certiorari granted 55 S.Ct. 924, 295 U.S. 730, 79 L.Ed. 1680, certiorari dismissed 56 S.Ct. 183, 296 U.S. 207, 80 L.Ed. 158.

Reversal and remand for further proceedings is not a final judgment.—Great Western Tel. Co. v. Burnham, Wis., 16 S.Ct. 850, 162 U.S. 339, 40 L.Ed. 991—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 163, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—25 C.J. p 927 note 78 [e].

Judgment reversing order granting preliminary injunction is not final.—Tippecanoe County v. Lucas, Ind., 93 U.S. 108, 23 L.Ed. 822—3 C.J. p 591 note 77 [a].

Order overruling motion to quash execution is not a final judgment, and a judgment of the highest court of a state, affirming such an order, is not reviewable.—Loeber v. Schroeder, Md., 13 S.Ct. 934, 149 U.S. 580, 37 L.Ed. 856.

Successive appeals

(1) Where, after affirmance of interlocutory order granting a temporary injunction and remand of the case, the trial court allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict, and entered a final decree, which was affirmed, the decree of affirmance was a final judgment, reviewable by the United States supreme court, although the state supreme court ruled that its former judgment was the law of the case and res judicata.—Georgia Ry. & Power Co. v. Town of Decatur, 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065, reversing 111 S.E. 911, 153 Ga. 329.

(2) Other cases.—Chesapeake & Ohio R. Co. v. McCabe, 29 S.Ct. 430, 213 U.S. 207, 53 L.Ed. 765, reversing 100 S.W. 219, 30 Ky.L. 1009.

25 C.J. p 927 note 78 [d].

Judgments or decrees held final

(1) The refusal of the highest court of a state to discharge defendant on habeas corpus is a "final judgment."—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

(2) Where judgment of chief judge of court of appeals of Maryland who was the judge of that court from city of Baltimore denying relief sought in habeas corpus proceeding was final in sense that it was not reviewable by any other court of Maryland, but petitioner had not exhausted state remedies in the sense that in Maryland a prisoner may apply successively to one judge after another and to one court after another without exhausting his remedies, the denial of relief sought was a "final judgment by highest court of state" in which judgment could be had of the issue joined.—Betts v. Brady, Md., 62 S.Ct. 1252, 316 U.S. 455, 86 L.Ed. 1595.

(3) Judgment of state supreme court affirming refusal of lower court to continue temporary injunction and to grant permanent injunction is a final decree.—North Carolina R. Co. v. Story, 45 S.Ct. 531, 268 U.S. 288, 69 L.Ed. 959, reversing 121 S.E. 433, 187 N.C. 184.

(4) A decree in a suit by a shareholder against a national farm loan association directing the association to retire plaintiff's shares and giving plaintiff judgment against association for the par value thereof, when affirmed by the state court of appeals, was "final" so as to be reviewable by certiorari from the United States supreme court under the statute, although it also provided for a receivership because of the association's inability to pay the judgment.—Knox Nat. Farm Loan Ass'n v. Phillips, Ohio, 57 S.Ct. 418, 300 U.S. 194, 81 L.Ed. 599, 108 A.L.R. 738.

(5) Other judgments or decrees.—U. S. v. Knott, 56 S.Ct. 902, 298 U.S. 544, 80 L.Ed. 1321, 104 A.L.R. 741, reversing Kelly v. Knott, 163 So. 64, 120 Fla. 580, certiorari granted U. S. v. Knott, 56 S.Ct. 498, 297 U.S. 700, 80 L.Ed. 989, certiorari denied Withers v. Knott, 56 S.Ct. 498, 297 U.S. 706, 80 L.Ed. 993, modified Withers v. Knott, 168 So. 416, 127 Fla. 241, mandate conformed to 168 So. 416, 127 Fla. 241.

25 C.J. p 927 note 78 [j].

78. U.S.—Hartman v. Greenhow, Va., 102 U.S. 672, 26 L.Ed. 271.

79. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock, Ill., 49 S.Ct. 363, 279 U.S. 410, 73 L.Ed. 766—Williams v. Bruffy, Va., 102 U.S. 248, 26 L.Ed. 135.

80. U.S.—Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 52 S.Ct. 103, 284 U.S. 8, 76 L.Ed. 136, 78 A.L.R. 826, affirming 293 P. 899, 110 Cal.App. 123—Michigan Cent. R. Co. v. Mix, Mo., 49 S.Ct. 207, 278 U.S. 492, 73 L.Ed. 470, conformed to, Sup., State ex rel. Michigan Cent. R. Co. v. Mix, 22 S.W.2d 1116—State of Missouri ex rel. St. Louis B. & M. Ry. Co. v. Taylor, 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232, affirming State ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474—Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 36 S. Ct. 234, 240 U.S. 30, 60 L.Ed. 507, affirming Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co., 65 So. 287, 186 Ala. 622.

81. **Finality before expiration of time**

A law providing that, within sixty days after the termination of a case by the state supreme court, "either party" may petition for rehearing, does not deprive the judgment of finality on the theory that the successful party, as well as the unsuccessful party, had until the expiration of such time to exercise the right to petition for rehearing.—Southern Ry. Co. v. Clift, 43 S.Ct. 126, 260 U.S. 316, 67 L.Ed. 283, af-

a petition for a rehearing is pending,[82] although when such petition is denied the judgment in the case becomes final for the purpose of review by the supreme court.[83]

§ 241. Citizenship of Parties and Amount in Dispute

The jurisdiction of the United States supreme court to review decisions of state courts is not dependent on the citizenship of the parties or the amount in dispute.

Under the statute, 28 U.S.C.A. § 344, the citizenship of the parties is immaterial as affecting the jurisdiction of the United States supreme court to review a judgment or decree of a state court,[84] and the right of review is not dependent on the amount in dispute.[85]

§ 242. Nature of Proceeding in State Court

A "suit" within the statute conferring appellate jurisdiction on the United States supreme court of decisions of state courts includes any proceeding in a state court by which a person pursues a remedy afforded him by law.

The term "suit" in the statute, 28 U.S.C.A. § 344, conferring on the United States supreme court appellate jurisdiction of decisions of state courts applies to any proceeding in a state court by which an individual pursues that remedy in a court of justice which the law affords him,[86] and includes a criminal prosecution,[87] a proceeding for mandamus[88] or for a writ of prohibition,[89] and habeas corpus proceedings.[90]

§ 243. Substantial Character of Federal Question

The decision of a state court involving a federal question will not be reviewed by the United States supreme court unless such question is real and substantial and a decision thereof is essential to the disposition of the issues presented.

In order that a decision of a state court may be subject to review by the United States supreme court on the ground that a federal question is involved, it is necessary that such question should be real and substantial,[91] and that a decision thereof should be essential to a disposition of the issues pre-

firming 131 N.E. 4, 190 Ind. 536, 14 A.L.R. 385.

82. U.S.—Chicago Great Western R. Co. v. Basham, Iowa, 39 S.Ct. 213, 249 U.S. 164, 63 L.Ed. 534.

83. U.S.—Citizens' Bank of Michigan City, Ind., v. Opperman, 39 S. Ct. 330, 249 U.S. 448, 63 L.Ed. 701, dismissing certiorari 115 N.E. 55, 188 Ind. 212.

25 C.J. p 928 note 82.

84. U.S.—Barrington v. Missouri, 27 S.Ct. 582, 205 U.S. 483, 51 L.Ed. 890, dismissing error 198 Mo. 23, 95 S. W. 235.

25 C.J. p 928 note 83.

85. U.S.—The Paquete Habana, Fla., 20 S.Ct. 290, 175 U.S. 677, 44 L. Ed. 320—Buel v. Van Ness, Vt., 8 Wheat. 312, 5 L.Ed. 624.

86. U.S.—Weston v. Charleston, S. C., 2 Pet. 449, 7 L.Ed. 481.

Voluntary submission of controversy by agreement

A judgment of a state court may be reviewed, notwithstanding the proceeding in which it was rendered was commenced, not by any compulsory process, but pursuant to a statute of the state authorizing a voluntary submission of the controversy by agreement of the parties.—Aldrich v. Ætna Ins. Co., N.Y., 8 Wall. 491, 19 L.Ed. 473.

Proceeding as legislative or judicial

On a motion to dismiss an appeal on the ground that the proceeding in the state supreme court on appeal from an order of the corporation commission was legislative and not a "suit," the supreme court of the United States should not decide that the state provided no means of obtaining judicial review of order of corporation commission, in absence of definite decision by the state supreme court to such effect.—Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, dismissing appeal Southwestern Bell Telephone Co. v. State, 71 P.2d 747, 181 Okl. 246.

87. U.S.—Twitchell v. Pennsylvania, Pa., 7 Wall. 321, 19 L.Ed. 223.

25 C.J. p 928 note 87.

88. U.S.—American Express Co. v. Maynard, 20 S.Ct. 695, 177 U.S. 404, 44 L.Ed. 823, reversing 77 N. W. 317, 118 Mich. 682.

25 C.J. p 928 note 88.

89. U.S.—Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 52 S.Ct. 103, 284 U.S. 8, 76 L. Ed. 136, 78 A.L.R. 826, affirming, Cal.App., 293 P. 899, 110 Cal.App. 123.

25 C.J. p 928 note 89.

90. U.S.—People of State of New York ex rel. Bryant v. Zimmerman, 49 S.Ct. 61, 278 U.S. 63, 73 L.Ed. 184, 62 A.L.R. 785, affirming People ex rel. Bryant v. Zimmerman, 150 N.E. 497, 241 N.Y. 405, 43 A.L. R. 909, which affirmed People of State of New York ex rel. Bryant v. Zimmerman, 210 N.Y.S. 269, 213 App.Div. 414, affirming People ex rel. Bryant v Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859—Holmes v. Jennison, Vt., 14 Pet. 540, 10 L.Ed. 579, 618.

91. U.S.—Patterson v. Stanolind Oil & Gas Co., 59 S.Ct. 259, 305 U.S. 376, 83 L.Ed. 231, dismissing appeal 77 P.2d 83, 182 Okl. 155—People of State of New York ex rel. Consolidated Water Co. of Utica v. Maltbie, 58 S.Ct. 506, 303 U.S. 158, 82 L.Ed. 724, dismissing appeal People ex rel. Consolidated Water Co. of Utica, N. Y., v. Maltbie, 9 N.E.2d 961, 275 N.Y. 357, affirming 282 N. Y.S. 412, 245 App.Div. 866—Honeyman v. Hanan, 57 S.Ct. 350, 300 U. S. 14, 81 L.Ed. 476, vacating 3 N.E. 2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 256 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, reremittitur amended 3 N.E.2d 473, 271 N. Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490—Kammerer v. Kroeger, 57 S.Ct. 196, 299 U. S. 302, 81 L.Ed. 253, dismissing appeal In re American Loan & Savings Ass'n, 2 N.E.2d 823, 131 Ohio St. 330—Abrams v. Van Schaick, 55 S.Ct. 135, 293 U.S. 188, 79 L.Ed. 278, dismissing appeal People by Van Schaick v. New York Title & Mortgage Co., 191 N.E. 522, 264 N.Y. 475, reversing 270 N.Y.S. 450, 150 Misc. 467—Seaboard Air Line Ry. Co. v. Watson, 53 S.Ct. 32, 287 U.S. 86, 77 L.Ed. 180, 86 A.L.R. 174, dismissing appeal 137 So. 719, 103 Fla. 477—State of Missouri ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 47 S.Ct. 311, 273 U.S. 126, 71 L.Ed. 575, revers-

sented in the case.[92]

Questions settled by supreme court decisions. The mere fact that a federal question was involved does not authorize a review by the supreme court where the question has been decided by the supreme court in previous cases so that it cannot be regarded as an open one.[93] However, a review will not be denied on the ground that the federal question relied on to confer jurisdiction has been conclusively foreclosed by prior decisions of the supreme court, where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions on the issue presented, and there is some conflict in the opinions of the various state courts of last resort on the question, and a division of opinion in the court below.[94]

§ 244. Materiality and Decision of Federal Question

To authorize a review by the United States supreme court of a state court decision, it is necessary that a federal question shall have been decided by the state court or necessarily involved in its judgment.

In order to authorize a review by the United States supreme court of a decision of a state court, it is usually necessary that a federal question shall have been decided by the state court[95] or at least

ing 267 S.W. 102, 306 Mo. 149—House v. Road Improvement Dist. No. 2 of Conway County, Ark., 45 S.Ct. 60, 266 U.S. 175, 69 L.Ed. 229, dismissing error House v. Road Improvement Dist. No. 2, Conway County, 251 S.W. 12, 158 Ark. 330, 251 S.W. 21, 158 Ark. 357—Zucht v. King, Tex., 43 S.Ct. 24, 260 U.S. 174, 67 L.Ed. 194, dismissing error, Civ.App., 225 S.W. 267—Miller & Lux v. Sacramento & San Joaquin Drainage Dist., 41 S.Ct. 404, 256 U.S. 129, 65 L.Ed. 859, denying certiorari and dismissing error 187 P. 1041, 182 Cal. 252—Quong Ham Wah Co. v. Industrial Acc. Commission of Cal., 41 S.Ct. 373, 255 U.S. 445, 65 L.Ed. 723, dismissing error 192 P. 1021, 184 Cal. 26, 12 A.L.R. 1190.

Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.

25 C.J. p 928 note 91.

Changes merely in form or method of procedure by which federal rights are finally adjudicated in state courts do not preclude review of adjudication by federal supreme court, provided case retains essentials of adversary proceeding involving real, not hypothetical, controversy finally determined by judgment below.—Nashville, C. & St. L. Ry. v. Wallace, Tenn., 53 S.Ct. 345, 288 U.S. 249, 77 L.Ed. 730, 87 A.L.R. 1191.

Neither prayer for injunctive relief, nor allegation of threatened irreparable injury, is essential to present "case" or "controversy" within federal supreme court's appellate jurisdiction, if controversy is otherwise real and substantial.—Nashville, C. & St. L. Ry. v. Wallace, supra.

Order of state university suspending students

Appeal from judgment of highest state court that order suspending students from land-grant state university for refusal to take prescribed course in military training imposed by regents did not infringe rights of students under federal Constitution and treaty was not so lacking in merit as to require dismissal of appeal for want of substance.—Hamilton v. Regents of University of California, 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, affirming 28 P.2d 355, 219 Cal. 663, and rehearing denied 55 S. Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

92. U.S.—Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, dismissing appeal Southwestern Bell Telephone Co. v. State, 71 P.2d 747, 181 Okl. 246—Lynch v. People of New York ex rel. Pierson, 55 S. Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming Pierson v. Lynch, 263 N.Y.S. 259, 237 App.Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431.

Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.

25 C.J. p 929 note 92.

93. U.S.—Minneapolis, St. P. & S. S. M. Ry. Co. v. C. L. Merrick Co., 41 S.Ct. 142, 254 U.S. 376, 65 L.Ed. 312, dismissing error C. L. Merrick Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 160 N.W. 140, 35 N.D. 331—Manhattan L. Ins. Co. v. Cohen, Tex., 34 S.Ct. 874, 234 U.S. 123, 58 L.Ed. 1245, dismissing appeal, Civ.App., 139 S.W. 51.

25 C.J. p 929 note 94.

94. U.S.—Milheim v. Moffat Tunnel Improvement Dist., 43 S.Ct. 694, 262 U.S. 710, 67 L.Ed. 1194, affirming 211 P. 649, 72 Colo. 268—Louisville & Nashville R. Co. v. Melton, 30 S.Ct. 676, 218 U.S. 36, 54 L.Ed. 921, 47 L.R.A.,N.S., 84, affirming 105 S.W. 366, 127 Ky. 276.

95. U.S.—Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, dismissing appeal Southwestern Bell Telephone Co. v. State, 71 P. 2d 747, 181 Okl. 246—Nashville, C. & St. L. Ry. v. Walters, 55 S.Ct. 486, 294 U.S. 405, 79 L.Ed. 949, reversing Nashville, C. & St. L. Ry. Co. v. Baker, 71 S.W.2d 678, 167 Tenn. 470, appeal dismissed Nashville, C. & St. L. Ry. v. Herndon, 55 S.Ct. 87, 293 U.S. 518, 79 L.Ed. 632—West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S. Ct. 316, 294 U.S. 63, 79 L.Ed. 761, reversing West Ohio Gas Co. v. Public Utilities Commission (City of Lima), 191 N.E. 105, 128 Ohio St. 301, conformed to 196 N.E. 674, 129 Ohio St. 670—Gibbes v. Zimmerman, S.C., 51 S.Ct. 140, 290 U. S. 326, 78 L.Ed. 342.

Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.

Tex.—Jackson v. State, 280 S.W. 202, 103 Tex.Cr. 318, certiorari denied 46 S.Ct. 471, 271 U.S. 661, 70 L.Ed. 1138.

25 C.J. p 929 note 96.

Scope of review see infra § 280.

State laws as rules of decision in federal courts see supra §§ 165–190.

Where decision of state court expressly rested on determination of federal question and not on inapplicability of state law, United States supreme court had jurisdiction.—Commonwealth of Virginia v. Imperial Coal Sales Co., 55 S.Ct. 12, 293 U.S. 15, 79 L.Ed. 171, reversing Commonwealth v. Imperial Coal Sales Co., 167 S.E. 268, 161 Va. 718, adhered to on rehearing 172 S.E. 927, 161 Va. 718, certiorari granted Commonwealth of Virginia v. Imperial Coal Sales Co., 54 S.Ct. 773, 292 U.S. 619, 78 L.Ed. 1476, conformed to Commonwealth v. Imperial Coal Sales Co., 183 S.E. 234, 166 Va. 27.

State courts acting as federal courts

Where a federal question is involved in a case, state courts in passing on it are federal courts in addition to being state courts, their decisions are reviewable by the United States supreme court, and they are bound by that court's judgments.—Montgomery & Atlanta Motor Freight Lines v. Morris, Miss., 8 So.2d 502, overruling suggestion of error 7 So. 2d 826.

necessarily involved in the judgment.[96] Hence a judgment resting on grounds adequate to sustain it, independent of any federal question, is not reviewable,[97] even though the state court actually de-

Decision rendered after rehearing

The United States supreme court, on certiorari to review state supreme court's decision, will consider merely the decision of such court rendered after a rehearing, where the original opinion was withdrawn.—Grayson v. Harris, 45 S.Ct. 317, 267 U.S. 352, 69 L.Ed. 652, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147.

Matter not introduced in evidence in trial court

An official declaration of the commissariat for justice of the Russian Socialist Federated Soviet Republic as to intended effect of Soviet government's decrees nationalizing insurance business on funds of Russian insurance companies outside of Russia was properly before the New York court of appeals on appeal from judgment involving question whether property of New York branch of a Russian insurance company was outside scope of decrees, notwithstanding such declaration was not introduced in evidence on trial, since the declaration constituted "other written law" within New York statute authorizing court to consider, even though not introduced in evidence on trial, a printed copy of the statute or other written law of another state or of a foreign country.—U. S. v. Pink, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 795, reversing 32 N.E.2d 552, 284 N.Y. 555, affirming 20 N.Y.S.2d 665, 259 App.Div. 871, appeal granted 20 N.Y.S.2d 983, 259 App.Div. 886, certiorari granted 61 S.Ct. 960, 313 U.S. 553, 85 L.Ed. 1516.

96. U.S.—Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, dismissing appeal Southwestern Bell Telephone Co. v. State, 71 P.2d 747, 181 Okl. 246—People of State of New York ex rel. Bryant v. Zimmerman, 49 S.Ct. 61, 278 U.S. 63, 75 L.Ed. 184, 62 A.L.R. 785, affirming 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909, affirming 210 N.Y.S. 269, 213 App.Div. 414, affirming People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859—Chicago, R. I. & P. Ry. Co. v. Perry, 42 S.Ct. 524, 259 U.S. 548, 66 L.Ed. 1056, affirming Dickinson v. Perry, 181 P. 504, 75 Okl. 25.

25 C.J. p 929 note 97.

97. U.S.—McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 375, 309 U.S. 2, 84 L.Ed. 536, dismissing certiorari Gulf Oil Corporation v. McGoldrick, 22 N.E.2d 480, 281 N.Y. 647, affirming 9 N.Y.S.2d 544, 256 App.Div. 207, certiorari granted McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 260, 308 U.S. 545, 84 L.Ed. 459, motions granted Gulf Oil Corporation v. McGoldrick, 25 N.E.2d 392, 282 N.Y. 612, and 25 N.E.2d 975, 282 N.Y. 622, reversed McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 664, 309 U.S. 414, 84 L.Ed. 840, certiorari denied Gulf Oil Corporation v. McGoldrick, 60 S.Ct. 718, 309 U.S. 676, 84 L.Ed. 1021, rehearing denied 60 S.Ct. 887, 309 U.S. 699, 84 L.Ed. 1037, vacated McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 512, 309 U.S. 692, 84 L.Ed. 1034—State Tax Commission of Utah v. Van Cott, 59 S.Ct. 605, 306 U.S. 511, 83 L.Ed. 950, vacating Van Cott v. State Tax Commission of Utah, 79 P.2d 6, 95 Utah 43, certiorari granted State Tax Commission of Utah v. Van Cott, 59 S.Ct. 358, 305 U.S. 592, 83 L.Ed. 375, mandate conformed to Van Cott v. State Tax Commission, 96 P.2d 740, 98 Utah 264—Woolsey v. Best, Colo., 57 S.Ct. 2, 299 U.S. 1, 81 L.Ed. 3—U. S. v. Hastings, Miss., 56 S.Ct. 218, 296 U.S. 188, 80 L.Ed. 148—Fox Film Corporation v. Muller, 56 S.Ct. 183, 296 U.S. 207, 80 L.Ed. 158, dismissing certiorari 260 N.W. 320, 194 Minn. 654, certiorari granted 55 S.Ct. 924, 295 U.S. 730, 79 L.Ed. 1680, following 255 N.W. 845, 192 Minn. 212, certiorari granted 55 S.Ct. 213, 293 U.S. 550, 79 L.Ed. 653, certiorari dismissed 55 S.Ct. 444, 294 U.S. 696, 79 L.Ed. 1234—Bell Telephone Co. of Pennsylvania v. Van Dyke, 56 S.Ct. 93, 296 U.S. 533, 80 L.Ed. 379, dismissing appeal Bell Telephone Co. of Pennsylvania v. Lewis, 177 A. 36, 317 Pa. 387—Bass v. Mayor and Aldermen of City of Milledgeville, 55 S.Ct. 926, 295 U.S. 721, 79 L.Ed. 1675, dismissing appeal Bass v. Mayor of Milledgeville, 178 S.E. 529, 180 Ga. 156—Utley v. City of St. Petersburg, 54 S.Ct. 593, 292 U.S. 106, 78 L.Ed. 1155, dismissing appeal 149 So. 806, 111 Fla. 844, rehearing denied 54 S.Ct. 712, 292 U.S. 604, 78 L.Ed. 1466—Susquehanna Power Co. v. State Tax Commission of Maryland, 51 S.Ct. 436, 283 U.S. 297, 75 L.Ed. 1047, dismissing appeal Susquehanna Power Co. v. State Tax Commission, 151 A. 39, 159 Md. 359—Geo. O. Richardson Machinery Co. v. Scott, 48 S.Ct. 264, 276 U.S. 128, 72 L.Ed. 497, dismissing certiorari 251 P. 482, 122 Okl. 125, certiorari granted 47 S.Ct. 587, 274 U.S. 729, 71 L.Ed. 1319—Fox River Paper Co. v. Railroad Commission of Wisconsin, 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279, affirming 208 N.W. 266, 189 Wis. 626—Browne v. Union Pac. R. Co., 45 S.Ct. 315, 267 U.S. 255, 69 L.Ed. 601, affirming 216 P. 299, 113 Kan. 726—Howat v. State of Kansas, 42 S.Ct. 277, 250 U.S. 181, 66 L.Ed. 550, dismissing error State v. Howat, 191 P. 585, 107 Kan. 423, and 198 P. 686, 109 Kan. 376—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., 41 S.Ct. 140, 254 U.S. 370, 65 L.Ed. 310, dismissing error 168 N.W. 684, 40 N.D. 69.

25 C.J. p 930 note 98—12 C.J. p 780 note 96 [a].

Where there is no intent to evade federal question by the state court, its decision on an independent nonfederal ground will not be reviewed.—Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 401, 281 U.S. 537, 74 L.Ed. 1023, dismissing certiorari State v. Broad River Power Co., 153 S.E. 537, 157 S.C. 1, certiorari granted Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 162, 280 U.S. 551, 74 L.Ed. 609, rehearing granted 51 S.Ct. 38, 282 U.S. 795, 75 L.Ed. 717, affirmed 51 S.Ct. 94, 282 U.S. 187, 75 L.Ed. 287—McCoy v. Shaw, 48 S.Ct. 519, 277 U.S. 302, 72 L.Ed. 891, dismissing certiorari McCoy v. Childers, 256 P. 25, 124 Okl. 256, certiorari granted McCoy v. Shaw, 48 S.Ct. 84, 275 U.S. 515, 72 L.Ed. 418.

Judgment resting on two grounds

The supreme court will not take jurisdiction where the judgment of the state court rests on two grounds, one of which does not involve a federal question, or where it does not appear on which of the two grounds the judgment was based, and the nonfederal ground is sufficient in itself to sustain the judgment.—Fox Film Corporation v. Muller, 56 S.Ct. 183, 296 U.S. 207, 80 L.Ed. 158, dismissing certiorari 260 N.W. 320, 194 Minn. 654, certiorari granted 55 S.Ct. 924, 295 U.S. 730, 79 L.Ed. 1680, following 255 N.W. 845, 192 Minn. 212, certiorari granted 55 S.Ct. 213, 293 U.S. 550, 79 L.Ed. 653, certiorari dismissed 55 S.Ct. 444, 294 U.S. 696, 79 L.Ed. 1234—Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming Pierson v. Lynch, 263 N.Y.S. 259, 237 App.Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431—People of State of New York ex rel. Doyle v. Atwell, 43 S.Ct. 410, 261 U.S. 590, 67 L.Ed. 814, dismissing error 133 N.E. 364, 232 N.Y. 96, which affirms 188 N.Y.S. 803, 197 App.Div. 225.

25 C.J. p 930 note 98 [d].

cided the federal question adversely to the party by whom the review is sought.[98]

On the other hand, whether the state court decided a federal question is, in itself, a federal question, which the supreme court determines from an examination of the record.[99] Further, whether the judgment of the state court was based on an adequate, substantial, nonfederal ground is a federal question.[1] A state court cannot, by resting its judgment on some ground of local or general law, defeat the appellate jurisdiction of the supreme court of the United States, in a case where a federal question was so involved that its determination was necessary to the disposition of the issues,[2] especially where the federal right or immunity which was set up or claimed would, if recognized and enforced, require a judgment different from that actually rendered.[3] Where it appears that the decision did rest on a ground involving a federal question, a review is not precluded by the fact that other grounds are stated in the decision;[4] and the supreme court will review a federal question, although it was not put in issue by the pleadings or directly passed on in the opinion, where it is apparent both from the pleadings and the record that the decision in the

Uncertainty as to ground for decision
(1) Where there is considerable uncertainty as to the precise ground for the decision of the state court, the supreme court will decline to review the federal question asserted to be present consistently with the policy of not passing on constitutional questions not clearly necessary to a decision.—State of Minnesota v. National Tea Co., 60 S.Ct. 676, 309 U.S. 551, 84 L.Ed. 920, vacating National Tea Co. v. State, 286 N.W. 360, 205 Minn. 443, certiorari granted State of Minnesota v. National Tea Co., 60 S. Ct. 294, 308 U.S. 547, 84 L.Ed. 460, reinstated National Tea Co. v. State, 294 N.W. 230, 208 Minn. 607.
(2) Remand to amend record to show federal question see infra § 281.

98. U.S.—Petrie v. Nampa & M. Irr. Dist., 39 S.Ct. 25, 248 U.S. 154, 63 L.Ed. 178, dismissing error 153 P. 425, 28 Idaho 227.
25 C.J. p 930 note 98, p 931 note 99.

99. U.S.—Lovell v. City of Griffin, 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed. 949, reversing 191 S.E. 152, 55 Ga. App. 609, vacated and conformed to 197 S.E. 347, 57 Ga.App. 901—Honeyman v. Hanan, 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 246 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490.
Record showing decision of federal question see infra § 279.

1. U.S.—Patterson v. State of Alabama, 55 S.Ct. 575, 294 U.S. 600, 79 L.Ed. 1082, vacating Patterson v. State, 156 So. 567, 229 Ala. 270, and certiorari granted 55 S.Ct. 347, 293 U.S. 554, 79 L.Ed. 656—Lawrence v. State Tax Commission of Mississippi, 52 S.Ct. 556, 286 U.S. 276, 76 L.Ed. 1102, 87 A.L.R. 374, affirming Lawrence v. Mississippi State Tax Commission, 137 So. 503, 162 Miss. 338—Abie State Bank v. Weaver, 51 S.Ct. 252, 282 U.S. 765, 75 L.Ed. 690, affirming 227 N.W. 922, 119 Neb. 153—Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 401, 281 U.S. 537, 74 L.Ed. 1023, dismissing certiorari State v. Broad River Power Co., 153 S.E. 537, 157 S.C. 1, certiorari granted Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 162, 280 U.S. 551, 74 L.Ed. 609, rehearing granted 51 S.Ct. 38, 282 U. S. 795, 75 L.Ed. 717, affirmed 51 S. Ct. 94, 282 U.S. 187, 75 L.Ed. 287—Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, Tex., 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931, reversing Burrell v. Michaux, Com.App., 286 S.W. 176, certiorari denied Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Micheaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, and affirming, Civ.App., 273 S. W. 874—Fox River Paper Co. v. Railroad Commission of Wisconsin, 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279, affirming 208 N.W. 266, 189 Wis. 626.
25 C.J. p 931 note 1.

Supreme court may examine opinion of state court to ascertain whether federal question was raised and decided, and whether state court rested its judgment on adequate nonfederal ground.—State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, reversing State ex rel. Anderson v. Brand, 5 N.E.2d 531, 913, 214 Ind. 347, 110 A.L.R. 778, rehearing denied 7 N.E.2d 777, 214 Ind. 347, 110 A.L. R. 778, certiorari granted State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 262, 302 U.S. 678, 82 L.Ed. 524, and rehearing denied 58 S.Ct. 641, 303 U.S. 667, 82 L.Ed. 1123, mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347.

2. U.S.—Titus v. Wallick, 59 S.Ct. 557, 306 U.S. 282, 83 L.Ed. 653, reversing 15 N.E.2d 140, 133 Ohio St. 612, certiorari granted 59 S.Ct. 80, 305 U.S. 585, 83 L.Ed. 370—McCoy v. Shaw, 48 S.Ct. 519, 277 U.S. 302, 72 L.Ed. 891, dismissing certiorari McCoy v. Childers, 256 P. 25, 124 Okl. 256, certiorari granted McCoy v. Shaw, 48 S.Ct. 84, 275 U.S. 515, 72 L.Ed. 418—Ward v. Love County, 40 S.Ct. 422, 253 U.S. 17, 64 L. Ed. 751, reversing 173 P. 1050, 68 Okl. 287.
25 C.J. p 931 note 1.

Nonfederal ground unsubstantial
Where the purported nonfederal ground put forward by the state court for its refusal to decide the federal question was unsubstantial and illusory, the supreme court may assume jurisdiction.—Lawrence v. State Tax Commission of Mississippi, 52 S.Ct. 556, 286 U.S. 276, 76 L.Ed. 1102, 87 A.L.R. 374, affirming Lawrence v. Mississippi State Tax Commission, 137 So. 503, 162 Miss. 338—Ward v. Love County, 40 S.Ct. 422, 253 U.S. 17, 64 L.Ed. 751, reversing 173 P. 1050, 68 Okl. 287.

3. U.S.—Bowe v. Scott, 34 S.Ct. 769, 233 U.S. 658, 58 L.Ed. 1141, dismissing error 75 S.E. 123, 113 Va. 499.
25 C.J. p 931 note 2.

4. U.S.—St. Louis, Iron Mt., & So. R. Co. v. McWhirter, 33 S.Ct. 858, 229 U.S. 265, 57 L.Ed. 1179, reversing 140 S.W. 672, 145 Ky. 427.
25 C.J. p 931 note 3.

Where nonfederal ground is so interwoven with other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, the court has jurisdiction.—State Tax Commission of Utah v. Van Cott, 59 S.Ct. 605, 306 U.S. 511, 83 L.Ed. 950, vacating Van Cott v. State Tax Commission of Utah, 79 P. 2d 6, 95 Utah 43, certiorari granted State Tax Commission of Utah v. Van Cott, 59 S.Ct. 358, 305 U.S. 592, 83 L.Ed. 375, mandate conformed to Van Cott v. State Tax Commission, 96 P.2d 740, 98 Utah 264—Abie State Bank v. Weaver, 51 S.Ct. 252, 282 U.S. 765, 75 L.Ed. 690, affirming 227 N.W. 922, 119 Neb. 153.

state court could not have been reached except by disposing of such question.[5] A fortiori, where the decision is in fact based on grounds involving a federal question, a review cannot be precluded by the fact that it might have been based on other grounds.[6] A statement in the opinion of a state court that an attack on the validity of a state statute as being in contravention of the federal constitution was "by a proceeding unknown to our practice" does not mean that the court did not necessarily pass on the constitutional question.[7]

Decision on prior appeal in state court. The federal question relied on to sustain the appellate jurisdiction of the supreme court cannot be said not to have been open for discussion or consideration in the state court because of a prior decision in the same case, which was the law of the case, where the state court did consider and decide such question when the case came before it the second time.[8]

§ 245. Correctness of Decision of State Court

The United States supreme court is not deprived of jurisdiction to review the decision of a state court because the federal question involved was correctly decided by the state court.

The power to decide whether a federal question was rightly disposed of by the state court involves the exercise of jurisdiction,[9] and hence the United States supreme court is not deprived of jurisdiction because the federal question was correctly decided by the state court.[10] Conversely, the mere fact that the decision of a state court may be erroneous does not, where no federal question is involved, authorize a review by the supreme court,[11] even though such decision may be contrary to previous decisions of the state court.[12]

§ 246. Nature of Questions Involved

The federal statute conferring appellate jurisdiction on the United States supreme court over decisions of state courts determines the questions which may be reviewed by the supreme court.

As is shown supra §§ 243, 244, appellate jurisdiction of the United States supreme court over decisions of state courts is confined to substantial federal questions decided by the state court. The particular questions which may be reviewed depend on the federal statute, now Act of February 13, 1925, 28 U.S.C.A. § 344, conferring appellate jurisdiction over decisions of state courts.[13] Under the statute a final judgment or decree of a state court may be reviewed by the supreme court of the United States where there is drawn in question the validity of a treaty or statute of the United States;[14] the valid-

5. U.S.—Toledo, St. L., & W. R. Co. v. Slavin, Ohio, 35 S.Ct. 306, 236 U.S. 454, 59 L.Ed. 671.
25 C.J. p 931 note 4.
Raising federal question in state court see infra § 274.

6. U.S.—State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, reversing State ex rel. Anderson v. Brand, 5 N.E.2d 531, 913, 214 Ind. 347, 110 A.L.R. 778, rehearing denied 7 N.E.2d 777, 214 Ind. 347, 110 A.L.R. 778, certiorari granted State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 262, 302 U.S. 678, 82 L.Ed. 524, and rehearing denied 58 S.Ct. 641, 303 U.S. 667, 82 L. Ed. 1123, mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347—International Steel & Iron Co. v. National Surety Co., Tenn., 56 S.Ct. 619, 297 U.S. 657, 80 L.Ed. 961—Grayson v. Harris, 45 S.Ct. 317, 267 U.S. 352, 69 L.Ed. 652, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147.
25 C.J. p 931 note 5.

7. U.S.—Coe v. Armour Fertilizer Works, 35 S.Ct. 625, 237 U.S. 413, 59 L.Ed. 1027, reversing 58 So. 231, 63 Fla. 64.

8. U.S.—Gant v. Oklahoma City, 53 S.Ct. 530, 289 U.S. 98, 77 L.Ed. 1058, affirming 15 P.2d 833, 160 Okl. 62—Southern Ry. Co. v. Clift, 43 S.Ct. 126, 260 U.S. 316, 67 L.Ed. 283, affirming 131 N.E. 4, 190 Ind. 536, 14 A.L.R. 385—Coe v. Armour Fertilizer Works, 35 S.Ct. 625, 237 U.S. 413, 59 L.Ed. 1027, reversing 58 So. 231, 63 Fla. 64.

9. U.S.—Andrews v. Andrews, 23 S. Ct. 237, 188 U.S. 14, 47 L.Ed. 366, affirming 57 N.E. 333, 176 Mass. 92—Penn Mut. L. Ins. Co. v. Austin, Tex., 18 S.Ct. 223, 168 U.S. 685, 42 L.Ed. 626.

10. U.S.—Andrews v. Andrews, 23 S.Ct. 237, 188 U.S. 14, 47 L.Ed. 366, affirming 57 N.E. 333, 176 Mass. 92.
25 C.J. p 931 note 8.
Nature of decision as affecting review see infra § 271.

11. U.S.—Brinkerhoff-Faris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, reversing 19 S.W.2d 746, 233 Mo. 180, certiorari denied 50 S.Ct. 86, 280 U. S. 604, 74 L.Ed. 648, revoked 50 S. Ct. 152, 280 U.S. 550, 74 L.Ed. 608, and certiorari granted 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, conformed to 42 S.W.2d 23, 328 Mo. 836.
25 C.J. p 931 note 9.

12. U.S.—Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.
25 C.J. p 931 note 10.

13. U.S.—Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 S.Ct. 803, 304 U.S. 92, 82 L.Ed. 1202, reversing 70 P.2d 849, 101 Colo. 73, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433—Broad River Power Co. v. State of South Carolina ex rel. Daniel, 51 S. Ct. 94, 282 U.S. 187, 75 L.Ed. 287, affirming 50 S.Ct. 401, 281 U.S. 537, 74 L.Ed. 1023, which dismissed certiorari State v. Broad River Power Co., 153 S.E. 537, 157 S.C. 1, certiorari granted Broad River Power Co. v. South Carolina ex rel. Daniel, 50 S.Ct. 162, 280 U.S. 551, 74 L.Ed. 609, and in which rehearing is granted 51 S.Ct. 38, 282 U.S. 795, 75 L.Ed. 717.
Scope of review see infra § 280.
State laws as rules of decision in federal courts see supra §§ 165–190.

14. U.S.—Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 S.Ct. 803, 304 U.S. 92, 82 L.Ed. 1202, reversing 70 P.2d 849, 101 Colo. 73, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433.
25 C.J. p 932 note 13; p 942 note 78.
Construction of federal statutes and denial of rights thereunder see infra § 266.
Decision for or against validity see infra § 271.

Authority exercised under United States.

Under former statutes a judgment of a state court was reviewable

ity of a statute of any state as being repugnant to the Constitution, treaties, or laws of the United States;[15] or in cases or proceedings wherein

where there was drawn in question the validity of an authority exercised under the United States.—Schaff v. J. C. Famechon Co., 42 S.Ct. 189, 258 U. S. 76, 66 L.Ed. 472, dismissing error 176 N.W. 197, 145 Minn. 108—Stanley v. Schwalby, Tex., 13 S.Ct. 418, 147 U.S. 508, 37 L.Ed. 259—25 C.J. p 932 note 14.

Compact between states sanctioned by congress is not a treaty or statute of the United States within Jud. Code § 237(a), 28 U.S.C.A. § 344(a).—Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 S.Ct. 803, 304 U.S. 92, 82 L.Ed. 1202, reversing 70 P.2d 849, 101 Colo. 73, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L. Ed. 433.

Validity must be involved

U.S.—U. S. Shipping Board Emergency Fleet Corporation v. Sullivan, 43 S.Ct. 292, 261 U.S. 146, 67 L.Ed. 577, dismissing error and denying certiorari Sullivan v. U. S. Shipping Board Emergency Fleet Corporation, 76 Pa.Super. 30.

25 C.J. p 932 note 11 [a].

15. U.S.—Standard Oil Co. of California v. Johnson, 62 S.Ct. 1168, 316 U.S. 481, 86 L.Ed. 1611, reversing 119 P.2d 329, 19 Cal.2d 104—Municipal Investors Ass'n v. City of Birmingham, 62 S.Ct. 975, 316 U. S. 153, 86 L.Ed. 1341, affirming 299 N.W. 90, 298 Mich. 314—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing 192 N.W. 6, 196 Iowa 587—Red Cross Line v. Atlantic Fruit Co., 44 S.Ct. 274, 264 U.S. 109, 68 L.Ed. 582, reversing 135 N.E. 821, 233 N.Y. 373, which reversed In re Red Cross Line, 191 N.Y.S. 949, 199 App.Div. 961.

Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.

25 C.J. p 932 note 16.

Provisions limiting power of congress only see infra § 252.

Decision involving law of public body not a state

(1) A public body not duly organized or admitted into the Union is not a state, and cannot pass a statute within the meaning of the Judiciary Act, and therefore the supreme court has no jurisdiction to review a decision in which the validity of an act passed by such a body is drawn in question.—Scott v. Jones, Mich., 5 How. 343, 12 L.Ed. 181.

(2) Where the validity of a territorial act is drawn in question by a decision in the highest court of the state, the supreme court cannot review such decision. Messenger v. Mason, Iowa, 10 Wall. 507, 19 L.Ed. 1028—Dubuque Miners' Bank v. State of Iowa, 12 How. 1, 13 L.Ed. 867.

What constitutes "statute"

(1) "A statute of any state," within this provision, includes any enactment from whatever source originating to which a state gives the force of law.—Hamilton v. Regents of University of California, 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, affirming 28 P.2d 355, 219 Cal. 663, and rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717—John P. King Mfg. Co. v. City Council of Augusta, 48 S. Ct. 489, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306—Reinman v. Little Rock, Ark., 35 S. Ct. 511, 237 U.S. 171, 59 L.Ed. 900.

(2) Orders of state boards, commissions, and the like, which are instrumentalities of the state, and whose orders are legislative in their nature, are statutes of the state.—Ex parte Williams, Neb., 48 S.Ct. 523, 277 U.S. 267, 72 L.Ed. 877—Sultan Ry. & Timber Co. v. Department of Labor and Industries of State of Washington, 48 S.Ct. 505, 277 U.S. 135, 72 L. Ed. 820, affirming Eclipse Mill Co. v. Department of Labor and Industries of Washington, 251 P. 130, 141 Wash. 172—Live Oak Water Users' Ass'n v. Railroad Commission of State of California, 46 S.Ct. 149, 269 U.S. 354, 70 L.Ed. 305, dismissing error 219 P. 65, 192 Cal. 132—Northern Pac. Ry. Co. v. Department of Public Works of Washington, 45 S.Ct. 412, 268 U.S. 39, 69 L.Ed. 837, reversing 217 P. 507, 125 Wash. 584—Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 43 S. Ct. 675, 262 U.S. 679, 67 L.Ed. 1176, reversing 110 S.E. 205, 89 W.Va. 736—25 C.J. p 932 note 16 [a] (2).

(3) On certiorari to review the constitutionality of an order made by the Wisconsin employment relations board acting under the state Employment Peace Act, which order was passed on by the supreme court of Wisconsin, the federal supreme court reviews the order not as an isolated, self-contained writing but as the order with the gloss of the supreme court of Wisconsin on it.—Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946, affirming 295 N.W. 634, 236 Wis. 329, denying rehearing 294 N.W. 632, 236 Wis. 329.

(4) Order of land grant state University making military training compulsory under state constitutional authority was "statute of any state" within Judicial Code and reviewable on appeal from judgment of highest state court holding that order was not repugnant to federal Constitution.—Hamilton v. Regents of University of California, 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, affirming 28 P.2d 355, 219 Cal. 663, and rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

(5) Municipal ordinances as "statutes" see infra § 265.

Characterization of statute by state court

In determining the validity of a state statute under federal laws, the characterization of the statute by the state court, as distinguished from its interpretation, see infra § 261, is not binding on the supreme court.—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 56 S.Ct. 31, 296 U.S. 113, 80 L.Ed. 91, reversing Commonwealth v. Schuylkill Trust Co., 173 A. 309, 315 Pa. 429—Federal Land Bank of New Orleans v. Crosland, 43 S.Ct. 385, 261 U.S. 374, 67 L.Ed. 703, reversing Crosland v. Federal Land Bank of New Orleans, 93 So. 7, 207 Ala. 456—Truax v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L. Ed. 254, 27 A.L.R. 375, reversing 176 P. 570, 20 Ariz. 7.

Statute contrary to public policy

Contention that section of state Code is contrary to public policy does not present federal question.—Endicott-Johnson Corporation v. Encyclopedia Press, 45 S.Ct. 61, 266 U.S. 285, 69 L.Ed. 288, affirming Encyclopedia Press, Inc. v. Endicott-Johnson Corporation, 138 N.E. 474, 234 N.Y. 627, which affirms 191 N.Y.S. 924.

Authority exercised under state

(1) Under former statutes the supreme court had appellate jurisdiction to review decisions of the state court on writ of error "where is drawn in question the validity of . . . an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of . . . their validity."—John P. King Mfg. Co. v. City Council of Augusta, 48 S.Ct. 489, 491, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306—Jett Bros. Distilling Co. v. City of Carrollton, Ky., 40 S. Ct. 255, 252 U.S. 1, 64 L.Ed. 421.

(2) A state court did not render a decision in favor of the authority exercised under any state where it merely decides a question as to the jurisdiction of a federal court, and where the authority of the state court to decide this matter is not drawn in question.—Abbott v. National Bank of Commerce, 20 S.Ct. 153, 175 U.S. 409, 44 L.Ed. 217, affirming 56 P. 376, 20 Wash. 552.

(3) The general authority of state courts was not contemplated by this provision.—Bethell v. Demaret, La.,

any title,[16] right,[17] privilege,[18] or immunity[19] is specially set up or claimed by either party[20] under the Constitution,[21] or any treaty[22] or any stat-

10 Wall. 537, 19 L.Ed. 1007—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App. Div. 889.

(4) Where a judgment in a petitory action for Louisiana land went for plaintiff on the ground that his predecessors obtained title by virtue of a sale by the state under the Swamp Land Act, defendant's contention that the judgment was erroneous, in that the land in suit at the time of the Swamp Land Act was in private hands and did not pass to the state, did not draw in question the validity of an authority exercised under state law, on the ground that it was repugnant to the Treaty of 1803 with France, and the laws of the United States within Jud.Code § 237, as amended by Act Sept. 6, 1916, Comp.St. § 1214, as to writs of error, since, if the lands in suit were not within the grant, the officials who conveyed them were not exercising an authority under the state.—New Orleans Land Co. v. Brott, 44 S.Ct. 29, 263 U.S. 97, 68 L.Ed. 187, error dismissed Brott v. New Orleans Land Co., 91 So. 653, 151 La. 134.

16. **Compact between states sanctioned by congress** involves a "federal title, right, privilege, or immunity" which, when specially set up or claimed in a state court, may be reviewed in the United States supreme court.—Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey v. Colburn, 60 S.Ct. 1039, 310 U.S. 419, 84 L.Ed. 1287, reversing Colburn v. Delaware River Joint Toll Bridge Commission, 8 A.2d 563, 123 N.J.Law 197, affirming Klement v. Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, 197 A. 896, 119 N.J.Law 600, certiorari granted Delaware River Joint Toll Bridge Commission v. Colburn, 60 S.Ct. 386, 308 U.S. 549, 84 L.Ed. 462.

17. U.S.—Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946, affirming 295 N.W. 634, 236 Wis. 329, denying rehearing 294 N.W. 632, 236 Wis. 329—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092—Fox River Paper Co. v. Railroad Commission of Wisconsin, 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279, affirming 208 N.W. 266, 189 Wis. 626—Love v. Griffith, Tex., 45 S.Ct. 12, 266 U.S. 32, 69 L. Ed. 157, affirming, Civ.App., 236 S.W. 239.

Mo.—State v. Rebasti, 267 S.W. 858, 306 Mo. 336.

25 C.J. p 932 note 22.

All questions on which federal right is necessarily dependent will be reviewed or independently determined by the supreme court.—U. S. v. Pink, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 796, reversing 32 N.E.2d 552, 284 N.Y. 555, affirming 20 N.Y.S.2d 665, 259 App.Div. 871, appeal granted 20 N.Y.S.2d 983, 259 App.Div. 886, certiorari granted 61 S.Ct. 960, 313 U.S. 553, 85 L.Ed. 1516.

18. U.S.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092—Jordan v. K. Tashiro, 49 S.Ct. 47, 278 U.S. 123, 73 L.Ed. 214, affirming K. Tashiro v. Jordan, 256 P. 545, 201 Cal. 236, 53 A.L.R. 1279, certiorari granted Jordan v. K. Tashiro, 48 S.Ct. 527, 277 U.S. 580, 72 L.Ed. 997.

19. U.S.—U. S. Shipping Board Emergency Fleet Corporation v. Sullivan, 43 S.Ct. 292, 261 U.S. 146, 67 L.Ed. 577, dismissing error and denying certiorari Sullivan v. U. S. Shipping Board Emergency Fleet Corporation, 76 Pa.Super. 30.

25 C.J. p 932 note 24.

20. U.S.—Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey v. Colburn, 60 S.Ct. 1039, 310 U.S. 419, 84 L.Ed. 1287, reversing Colburn v. Delaware River Joint Toll Bridge Commission, 8 A.2d 563, 123 N.J.Law 197, affirming Klement v. Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, 197 A. 896, 119 N.J.Law 600, certiorari granted Delaware River Joint Toll Bridge Commission v. Colburn, 60 S.Ct. 386, 308 U.S. 549, 84 L.Ed. 462—Montana v. Rice, 27 S.Ct. 281, 204 U.S. 291, 51 L.Ed. 490, affirming 83 P. 874, 33 Mont. 365.

25 C.J. p 933 note 29, p 934 note 30.

Whether cause of action is cognizable in admiralty only is a point which may be raised in the state court, and, if decided adversely to defendant, can be taken to the supreme court of the United States.—In re Red Cross Line, D.C.N.Y., 277 F. 853.

21. U.S.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092—Fox River Paper Co. v. Railroad Commission of Wisconsin, 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279, affirming 208 N.W. 266, 189 Wis. 626—Love v. Griffith, 45 S.Ct. 12, 266 U.S. 32, 69 L.Ed. 157, affirming, Civ.App., 236 S.W. 239.

25 C.J. p 933 note 25.

Every question arising under federal Constitution may, if properly raised in a state court, come ultimately to the United States supreme court for decision.—Hague v. Committee for Industrial Organization, 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423, modifying, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F. Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028.

State court's opinion is not final on claim arising under federal Constitution.—Brinkerhoff-Faris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, reversing 19 S.W.2d 746, 323 Mo. 180, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 648, revoked 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, and certiorari granted 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, conformed to 42 S.W.2d 23, 328 Mo. 835.

Whether state court denied to rights asserted under local law protection guaranteed by federal Constitution is question on which United States supreme court's judgment may be invoked.—Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 401, 281 U.S. 537, 74 L.Ed. 1023, dismissing certiorari State v. Broad River Power Co., 153 S.E. 537, 157 S.C. 1, certiorari granted Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S. Ct. 162, 280 U.S. 551, 74 L.Ed. 609, rehearing granted 51 S.Ct. 38, 282 U.S. 795, 75 L.Ed. 717, and affirmed 51 S.Ct. 94, 282 U.S. 187, 75 L.Ed. 287.

Ratification of amendment to constitution

The questions raised by mandamus proceeding in supreme court of Kansas by members of Kansas legislature, to compel a proper record of legislative action on proposed child labor amendment to the federal Constitution, constituted "federal questions," since those questions arose under federal constitutional provision conferring power to amend.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092.

22. U.S.—Jordan v. K. Tashiro, 49 S. Ct. 47, 278 U.S. 123, 73 L.Ed. 214, affirming K. Tashiro v. Jordan, 256 P. 545, 201 Cal. 236, 53 A.L.R. 1279, certiorari granted Jordan v. K.

ute[23] of, or commission held or authority exercised under, the United States.

The mode of review of decisions of state courts, by appeal as of right or by certiorari in the discretion of the supreme court, is discussed infra § 272.

§ 247. —— Denial of Due Process of Law

A decision of a state court involving a claim that petitioner has been denied due process of law in violation of the federal Constitution may be reviewed by the United States supreme court.

A claim that a state has, in violation of the federal Constitution, deprived petitioner of life, liberty, or property, without due process of law, or is attempting to do so, is sufficient to support a review by the United States supreme court of a decision of a state court,[24] unless such claim is frivolous, unsubstantial, or contrary to the law as established by the prior decisions of the supreme court.[25]

Tashiro, 48 S.Ct. 527, 277 U.S. 580, 72 L.Ed. 997.
25 C.J. p 933 note 26.

Assignment by foreign country to United States

The claim of the United States against assets of New York branch of a Russian insurance company, based on assignment to the United States by the Russian Soviet government of its claims against American nationals, raises a "federal question," and hence state court's determination of question is not conclusive.—U. S. v. Pink, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 796, reversing 32 N.E.2d 552, 284 N.Y. 555, affirming 20 N.Y.S.2d 665, 259 App.Div. 871, appeal granted 20 N.Y.S.2d 983, 259 App.Div. 886, certiorari granted 61 S.Ct. 960, 313 U.S. 553, 85 L.Ed. 1516.

23. U.S.—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U. S. 205, 78 L.Ed. 755, reversing, C. C.A. Chesapeake & Ohio Ry. Co. v. Moore, 64 F.2d 472, certiorari granted Moore v. Chesapeake & O. R. Co., 54 S.Ct. 60, 290 U.S. 613, 78 L.Ed. 536—Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931, reversing Burrell v. Michaux, Com. App., 286 S.W. 176, certiorari denied Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, and affirming, Civ.App., 273 S.W. 874.
Iowa.—Iowa Nat. Bank v. Stewart, 232 N.W. 445, 214 Iowa 1229, certiorari granted Iowa-Des Moines Nat. Bank v. Stewart, 51 S.Ct. 353, 283 U.S. 813, 75 L.Ed. 1430, reversed on other grounds Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265, reversed on other grounds Des Moines Savings Bank & Trust Co. v. Hunter, 244 N.W. 309.
Ky.—Harrison v. Herzig Building & Supply Co., 161 S.W.2d 908, 290 Ky. 445.
25 C.J. p 933 note 27.
Construction of federal statutes and denial of rights thereunder see infra § 266.

Federal Employers' Liability Act

U.S.—Miles v. Illinois Cent. R. Co., Tenn., 62 S.Ct. 827, 315 U.S. 698, 86 L.Ed. 1129, certiorari granted 62 S.Ct. 177, 314 U.S. 602, 86 L.Ed. 484.

24. U.S.—Chesebro v. Los Angeles County Flood Control Dist., 59 S. Ct. 622, 306 U.S. 459, 83 L.Ed. 921, affirming City of Los Angeles v. Los Angeles County Flood Control Dist., 80 P.2d 479, 11 Cal.2d 395, appeal dismissed in part 59 S.Ct. 104, 305 U.S. 564, 83 L.Ed. 356—Alton R. Co. v. Illinois Commerce Commission, 59 S.Ct. 340, 305 U.S. 548, 83 L.Ed. 344, affirming 15 N.E.2d 508, 368 Ill. 584—Senn v. Tile Layers Protective Union, Local No. 5, 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229, affirming 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N. W. 872, 222 Wis. 383—Johnson Oil Refining Co. v. State of Oklahoma ex rel. Mitchell, 54 S.Ct. 152, 290 U.S. 158, 78 L.Ed. 238, reversing In re Johnson Oil-Refining Co.'s Property, 19 P.2d 168, 162 Okl. 185—Home Ins. Co. v. Dick, 50 S.Ct. 338, 281 U.S. 397, 74 L.Ed. 926, reversing, Tex.Com.App., 15 S.W.2d 1028, affirming, Civ.App., 8 S.W.2d 354—Miller v. Schoene, 48 S.Ct. 246, 276 U.S. 272, 72 L.Ed. 568, affirming Miller v. State Entomologist, 135 S.E. 813, 146 Va. 175, 67 A.L.R. 197—Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3 of Sevier County, Ark., 45 S.Ct. 136, 266 U.S. 379, 69 L.Ed. 335, affirming 246 S.W. 113, 156 Ark. 116.
25 C.J. p 934 note 32.
Due process of law see Constitutional Law §§ 567–707.
State decisions relating to due process as binding federal courts see supra § 189 b.

Application of doctrine of res judicata as denying due process

Where the judgment of a state court ascribing to the judgment of another court the binding force and effect of res judicata is challenged for want of due process, it becomes the duty of the United States supreme court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the "due process of law" which the federal Constitution prescribes.—Hansberry v. Lee, 61 S.Ct. 115, 311 U.S. 32, 85 L.Ed. 22, 132 A.L.R. 741, reversing Lee v. Hansberry, 24 N.E. 2d 37, 372 Ill. 369, certiorari granted Hansberry v. Lee, 60 S.Ct. 889, 309 U.S. 652, 84 L.Ed. 1002.

Determination of existence, etc., of contract

(1) Where it becomes necessary to consider whether a state is depriving or attempting to deprive a railroad company of property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution, and the questions turn on the existence and terms of an asserted contract, the United States supreme court determines for itself whether there is a contract and what are its terms.—Railroad Commission of Texas v. Eastern Texas R. Co., Tex., 44 S.Ct. 247, 264 U.S. 79, 68 L.Ed. 569, affirming, D.C., State of Texas v. Eastern Texas R. Co., 283 F. 584.

(2) Determination as to impairment of obligation of contract see infra § 249.

Public use

(1) Whether a use is public or private is influenced by local conditions, and the supreme court, in enforcing the Fourteenth Amendment to the Constitution, should keep in view the diversity of such conditions, and regard with great respect the judgments of state courts as to what should be deemed public uses.—Milheim v. Moffat Tunnel Improvement Dist., 43 S.Ct. 694, 262 U.S. 710, 67 L.Ed. 1194, affirming 211 P. 649, 72 Colo. 268—Rindge Co. v. Los Angeles County, 43 S.Ct. 689, 262 U.S. 700, 67 L.Ed. 1186, affirming Los Angeles County v. Rindge Co., 200 P. 27, 53 Cal.App. 166.

(2) Public use in condemnation proceedings see Eminent Domain §§ 29–64.

25. U.S.—Butler Bros. v. McColgan, 62 S.Ct. 701, 315 U.S. 501, 86 L.Ed. 991, affirming 111 P.2d 334, 17 Cal. 2d 664, prior opinion, App., 102 P. 2d 776 and certiorari granted 62 S. Ct. 94—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U. S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal. 2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537,

The controlling test in respect of the right of review is not in the form of a state law or its declared purpose, but is to be found in the operation and effect of the law as applied and enforced by the state,[26] and where a state statute is so construed by a state court as to obviate any objection that it violates the guaranty of due process of law, such constitutional objection to the statute is not a ground for review by the supreme court.[27]

§ 248. —— Denial of Equal Protection of Law

The United States supreme court may review a decision of a state court involving a claim that petitioner has been denied the equal protection of the laws guaranteed him by the federal Constitution.

A claim that a state has, in violation of the federal Constitution, denied to petitioner the equal protection of the laws guaranteed him by the federal Constitution is sufficient to support review by the United States supreme court of a decision of a state court,[28] unless such claim is frivolous, unsubstantial, or contrary to the law as established by the prior decisions of the supreme court.[29]

85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391, and rehearing denied 62 S.Ct. 620, two cases, 315 U.S. 826, 86 L.Ed. 1222—Continental Assur. Co. v. State of Tennessee, 61 S.Ct. 1, 311 U.S. 5, 85 L.Ed. 5, dismissing appeal State v. Continental Assur. Co., 137 S.W.2d 277, 176 Tenn. 1, rehearing denied 138 S.W.2d 447, 176 Tenn. 1—Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission, 60 S.Ct. 411, 309 U.S. 30, 84 L.Ed. 563, dismissing appeal 5 A.2d 410, 135 Pa.Super. 218—Hart v. Commonwealth of Virginia, Va., 56 S.Ct. 672, 298 U.S. 34, 80 L.Ed. 1030 —Utley v. City of St. Petersburg, 54 S.Ct. 593, 292 U.S. 106, 78 L.Ed. 1155, dismissing appeal 149 So. 806, 111 Fla. 844, and rehearing denied 54 S.Ct. 712, 292 U.S. 604, 78 L.Ed. 1466—Bevan v. Krieger, 53 S.Ct. 661, 289 U.S. 459, 77 L.Ed. 1316, affirming and dismissing appeal 184 N.E. 393, 126 Ohio St. 126—State of Washington ex rel. Bond & Goodwin & Tucker v. Superior Court of State of Washington for Spokane County, 53 S.Ct. 624, 289 U.S. 361, 77 L.Ed. 1256, 89 A.L.R. 653, affirming State ex rel. Bond & Goodwin & Tucker v. Superior Court of Spokane County, 15 P.2d 660, 169 Wash. 688—State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 50 S.Ct. 228, 281 U.S. 74, 74 L.Ed. 710, 66 A.L.R. 1460, affirming State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 166 N.E. 407, 120 Ohio St. 464—Wick v. Chelan Electric Co., 50 S. Ct. 41, 280 U.S. 108, 74 L.Ed. 212, dismissing appeal State v. Superior Court in and for Chelan County, 259 P. 379, 145 Wash. 129, error dismissed Wick v. Superior Court of State of Washington in and for Chelan County, 49 S.Ct. 94, 278 U. S. 575, 73 L.Ed. 515, and dismissing appeal Chelan Electric Co. v. Wick, 269 P. 827, 148 Wash. 479—Roe v. State of Kansas ex rel. Smith, 49 S.Ct. 160, 278 U.S. 191, 73 L.Ed. 259, dismissing error State ex rel. Smith v. Kemp, 261 P. 556, 124 Kan. 716, 59 A.L.R. 940—Whitney v. People of State of California, 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095, vacating 46 S.Ct. 22, 269 U.S. 530, 70 L.Ed. 396, and affirming People v. Whitney, 207 P. 698, 57 Cal.App. 449, and rehearing granted Whitney v. People of State of California, 46 S.Ct. 120, 269 U.S. 538, 70 L.Ed. 400—City of Trenton v. State of New Jersey, 43 S.Ct. 534, 262 U.S. 182, 67 L.Ed. 937, 29 A.L.R. 1471, dismissing error State v. City of Trenton, 117 A. 158, 97 N.J.Law 241—Rooker v. Fidelity Trust Co., 43 S.Ct. 288, 261 U.S. 114, 67 L.Ed. 556, dismissing error 131 N.E. 769, 191 Ind. 141—Zucht v. King, 43 S.Ct. 24, 260 U.S. 174, 67 L.Ed. 194, dismissing error, Tex. Civ.App., 225 S.W. 267—Missouri Pac. R. Co. v. Clarendon Boat Oar Co., La., 42 S.Ct. 210, 257 U.S. 533, 66 L.Ed. 354—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., 41 S.Ct. 140, 254 U.S. 370, 65 L.Ed. 310, dismissing error 168 N.W. 684, 40 N.D. 69—Leman v. Eastman, 41 S.Ct. 38, 254 U.S. 611, 65 L.Ed. 437, dismissing error Eastman v. Dole, 213 Ill.App. 684.

25 C.J. p 934 note 33.

Substantial character of federal question generally see supra § 243.

Mere errors of judgment as to valuation of intangible property of a railroad by the state tax board under Rev.St.Tex. 1911 arts 7407–7426, are not subject to review in the United States supreme court in support of taxpayer's claim of denial of due process, in absence of evidence of arbitrary action, fraud, or gross error in the system on which the valuation was made.—Baker v. Druesedow, 44 S.Ct. 40, 263 U.S. 137, 68 L.Ed. 212, affirming Druesdow v. Baker, Tex. Com.App., 229 S.W. 493, reversing Baker v. Druesedow, Civ.App., 197 S. W. 1043.

26. U.S.—Coppage v. State of Kansas, Kan., 35 S.Ct. 240, 236 U.S. 1, 59 L.Ed. 441, L.R.A.1915C 960.

25 C.J. p 935 note 34 [a].

27. U.S.—Atlantic Coast R. Co. v. State of Georgia, Ga., 34 S.Ct. 829, 234 U.S. 280, 58 L.Ed. 1312.

Decisions of state courts construing state statutes as reviewable see infra § 264.

Earlier construction of statute denying due process

If state statutes as construed and applied by state court in instant case afforded due process, appellants could not complain on appeal to United States supreme court that in earlier cases statutes were so construed and applied as to deny due process.—Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457, affirming Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41.

28. U.S.—Pierre v. State of Louisiana, 59 S.Ct. 536, 306 U.S. 354, 83 L.Ed. 757, reversing State v. Pierre, 180 So. 630, 189 La. 764, certiorari granted Pierre v. State of Louisiana, 59 S.Ct. 100, 305 U.S. 586, 83 L.Ed. 370—Hart v. Commonwealth of Virginia, Va., 56 S.Ct. 672, 298 U.S. 34, 80 L.Ed. 1030—Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3 of Sevier County, Ark., 45 S.Ct. 136, 266 U.S. 379, 69 L.Ed. 335, affirming 246 S.W. 113, 156 Ark. 116.

25 C.J. p 935 note 36.

Equal protection of the laws see Constitutional Law §§ 502–566.

State decisions relating to equal protection as binding federal courts see supra § 189 b.

29. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391, and rehearing denied 62 S.Ct. 620, two cases, 315 U.S. 826, 86 L.Ed. 1222—Senn v. Tile Layers Protective Union, Lo-

§ 249. —— Impairment of Obligation of Contract

The decision of a state court involving the question of whether the obligation of a contract was impaired by a state law is reviewable by the United States supreme court.

The United States supreme court has jurisdiction to review a decision of a state court wherein the question involved was whether the obligation of a contract was impaired by a state law in violation of the federal Constitution,[30] unless the claim of impairment is frivolous, unsubstantial, or contrary to the law as established by prior decisions of the supreme court.[31] Since the contract clause of the federal Constitution is directed only against impairment by state legislation and not by judgments of state courts, see Constitutional Law § 280, the fact that a decision of a state court, where such decision does not expressly, or by necessary implication, give effect to a subsequent statute of the state, may impair or fail to give effect to a contract is not a sufficient ground for review thereof by the supreme court.[32] A mere change in judicial decision, even though it invalidates a contract previously sustained or impairs the validity of a contract made in reliance on prior decisions, is not such impairment as will sustain a review by the supreme court;[33] a change in the judicial construction of a statute presents no question of impairment which will support a review.[34]

Existence and construction of contract. The judgment of a state court is not subject to review by the United States supreme court where the state court has decided nothing more than that the contract claimed to be impaired is void and never had any legal existence[35] or that it does not confer the rights claimed to have been impaired;[36] but, where the judgment of the state court goes further and

cal No. 5, 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229, affirming 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383—State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 50 S.Ct. 228, 281 U.S. 74, 74 L.Ed. 710, 66 A.L.R. 1460, affirming State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County, 166 N.E. 407, 120 Ohio St. 464—City of Newark v. State of New Jersey, 43 S.Ct. 539, 262 U.S. 192, 67 L.Ed. 943, dismissing error State v. City of Newark, 117 A. 158, 97 N.J.Law 241—City of Trenton v. State of New Jersey, 43 S.Ct. 534, 262 U.S. 182, 67 L.Ed. 937, 29 A.L.R. 1471, dismissing error State v. City of Trenton, 117 A. 158, 97 N.J.Law 241—Rooker v. Fidelity Trust Co., 43 S.Ct. 288, 261 U.S. 114, 67 L.Ed. 556, dismissing error 131 N.E. 769, 191 Ind. 141.

Cal.—Ex parte Collins, 245 P. 1089, 198 Cal. 508.

Substantial character of federal question generally see supra § 243.

30. U.S.—State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, reversing State ex rel. Anderson v. Brand, 5 N.E.2d 531, 913, 214 Ind. 347, 110 A.L.R. 778, rehearing denied 7 N.E.2d 777, 110 A.L.R. 778, certiorari granted State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 262, 302 U.S. 678, 82 L.Ed. 524, and rehearing denied 58 S.Ct. 641, 303 U.S. 667, 82 L.Ed. 1123, mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347—Honeyman v. Hanan, 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, dismissing appeal 9 N.E.2d 970, 275 N.Y. 382, affirming 285 N.Y.S. 527, 246 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, affirmed 3 N.E.2d 186, 271 N.Y. 564, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, vacated 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, reargument granted and remittitur denied 8 N.E.2d 618, 274 N.Y. 490, remittitur amended 11 N.E.2d 788, 275 N.Y. 625—Home Ins. Co. v. Dick, 50 S.Ct. 338, 281 U.S. 397, 74 L.Ed. 926, reversing, Tex.Com.App., 15 S.W.2d 1028 affirming, Civ.App., 8 S.W.2d 354—Millsaps College v. City of Jackson, 48 S.Ct. 94, 275 U.S. 129, 72 L.Ed. 196, affirming 101 So. 574, 136 Miss. 795.

25 C.J. p 935 note 37.

Obligation of contracts see Constitutional Law §§ 274–413.

31. U.S.—Gelfert v. National City Bank of New York, 61 S.Ct. 898, 313 U.S. 221, 85 L.Ed. 1299, 133 A.L.R. 1467, reversing National City Bank of New York v. Gelfert, 29 N.E.2d 449, 284 N.Y. 13, 130 A.L.R. 1472, reversing 13 N.Y.S.2d 600, 257 App.Div. 465, reargument denied 14 N.Y.S.2d 995, 257 App.Div. 1076, certiorari granted Gelfert v. National City Bank of New York, 61 S.Ct. 734, 312 U.S. 674, 85 L.Ed. 1115, reargument granted National City Bank of New York v. Gelfert, 35 N.E.2d 922, 286 N.Y. 569—Guaranty Trust Co. of New York v. Blodgett, 53 S.Ct. 244, 287 U.S. 509, 77 L.Ed. 463, affirming Blodgett v. Guaranty Trust Co. of New York, 158 A. 245, 114 Conn. 207—City of Trenton v. State of New Jersey, 43 S.Ct. 534, 262 U.S. 182, 67 L.Ed. 937, 29 A.L.R. 1471, dismissing error State v. City of Trenton, 117 A. 158, 97 N.J.Law 241.

25 C.J. p 936 note 38.

Substantial character of federal question generally see supra § 243.

32. U.S.—Columbia Ry., Gas & Electric Co. v. State of South Carolina, 43 S.Ct. 306, 261 U.S. 236, 67 L.Ed. 629, reversing State v. Columbia Ry., Gas & Electric Co., 123 S.E. 646, 129 S.C. 68.

25 C.J. p 936 note 39.

33. U.S.—Tidal Oil Co. v. Flanagan, 44 S.Ct. 197, 263 U.S. 444, 68 L.Ed. 382, dismissing error 209 P. 729, 87 Okl. 231.

25 C.J. p 936 note 39 [b].

Change on second appeal

A change in the decision of a state supreme court in construing deeds of trust from an interlocutory decision rendered on a previous appeal does not impair an obligation of contract contrary to the United States Constitution, and therefore does not support a review of the decision of the state supreme court.—Rooker v. Fidelity Trust Co., 43 S.Ct. 288, 261 U.S. 114, 67 L.Ed. 556, dismissing error 131 N.E. 769, 191 Ind. 141.

34. U.S.—Fleming v. Fleming, 44 S.Ct. 246, 264 U.S. 29, 68 L.Ed. 547, dismissing error 174 N.W. 946, 194 Iowa 71, 180 N.W. 206, 194 Iowa 71 and 184 N.W. 296, 194 Iowa 71—Cleveland & P. R. Co. v. City of Cleveland, 35 S.Ct. 21, 235 U.S. 50, 59 L.Ed. 127, dismissing error 102 N.E. 1122, 87 Ohio St. 469.

35. U.S.—Bacon v. State of Texas, Tex., 16 S.Ct. 1023, 163 U.S. 207, 41 L.Ed. 132.

25 C.J. p 936 note 40.

36. U.S.—Missouri, & K. I. R. Co. v. City of Olathe, Kan., 32 S.Ct. 47, 222 U.S. 187, 56 L.Ed. 156.

25 C.J. p 936 note 41.

gives effect to state legislation which might reasonably be claimed to impair the obligation of a contract which one party claims to exist, the supreme court has jurisdiction and may determine for itself the existence, validity, and construction of the alleged contract,[37] even though the decision of the state court was based entirely on the construction of the contract, without determining whether or not its obligation was impaired.[38] Much consideration is, however, accorded to the views of the state court of last resort as to the existence, validity, and construction of the contract.[39]

37. U.S.—Municipal Investors Ass'n v. City of Birmingham, 62 S.Ct. 975, 316 U.S. 153, 86 L.Ed. 1341, affirming 299 N.W. 90, 298 Mich. 314—Irving Trust Co. v. Day, 62 S.Ct. 398, 314 U.S. 556, 86 L.Ed. 452, 137 A.L.R. 1093, affirming In re McGlone's Will, 32 N.E.2d 539, 284 N.Y. 527, reversing 17 N.Y.S.2d 316, 258 App.Div. 596, reversing 13 N.Y.S.2d 76, 171 Misc. 612—American Toll Bridge Co. v. Railroad Commission of California, 59 S.Ct. 948, 307 U.S. 486, 83 L.Ed. 1414, affirming 83 P.2d 1, 12 Cal.2d 184, motion denied American Toll Bridge Co. v. Railroad Commission of State of California, 59 S.Ct. 594—New York Rapid Transit Corporation v. City of New York, 58 S.Ct. 721, 303 U.S. 573, 82 L.Ed. 1024, affirming 9 N.E.2d 858, 275 N.Y. 258, reversing 296 N.Y.S. 1012, 251 App.Div. 710, and rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548—Brooklyn & Queens Transit Corporation v. City of New York, 58 S.Ct. 721, 303 U.S. 573, 82 L.Ed. 1024, affirming 11 N.E.2d 293, 275 N.Y. 454, affirming 296 N.Y.S. 1006, 251 App.Div. 710, and which answered question certified 296 N.Y.S. 1022, 251 App. Div. 798, and rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548—State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, reversing State ex rel. Anderson v. Brand, 5 N.E.2d 531, 913, 214 Ind. 347, 110 A.L.R. 778, rehearing denied 7 N.E.2d 777, 214 Ind. 347, 110 A.L.R. 778, certiorari granted State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 262, 302 U.S. 678, 82 L.Ed. 524, and rehearing denied 58 S.Ct. 641, 303 U.S. 667, 82 L.Ed. 1123, mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347—Hale v. Iowa State Board of Assessment and Review, 58 S.Ct. 102, 302 U.S. 95, 82 L.Ed. 72, affirming 271 N.W. 168, 223 Iowa 321—Phelps v. Board of Education of Town of West New York, 57 S.Ct. 483, 300 U.S. 319, 81 L.Ed. 674, affirming 185 A. 8, 116 N.J.Law 412, affirming Phelps v. State Board of Education, 180 A. 220, 115 N.J.Law 310—Askam v. Board of Education of Town of West New York, 57 S.Ct. 483, 300 U.S. 319, 81 L.Ed. 674, affirming 184 A. 737, 116 N.J.Law 416, affirming Askam v. State Board of Education, 180 A. 220, 115 N.J.Law 310—Schenebeck v. McCrary, 56 S.Ct. 672, 298 U.S. 36, 80 L.Ed. 1031, affirming McCrary v. Schenebeck, 87 S.W.2d 572, 191 Ark. 698—Ingraham v. Hanson, 56 S.Ct. 511, 297 U.S. 378, 80 L.Ed. 728, affirming Hanson v. Burris, 46 P.2d 400, 86 Utah 424—Violet Trapping Co. v. Grace, 56 S.Ct. 386, 297 U.S. 119, 80 L.Ed. 518, affirming State ex rel. Violet Trapping Co. v. Grace, 162 So. 26, 182 La. 405—U. S. Mortg. Co. v. Matthews, 55 S.Ct. 168, 293 U.S. 232, 79 L.Ed. 279, reversing 173 A. 903, 167 Md. 383, certiorari granted 55 S.Ct. 144, 293 U.S. 549, 79 L.Ed. 652—Funkhouser v. J. B. Preston Co., 54 S.Ct. 134, 290 U.S. 163, 78 L.Ed. 243, affirming J. B. Preston Co. v. Funkhouser, 184 N.E. 737, 261 N.Y. 140, 87 A.L.R. 459, modifying 256 N.Y.S. 681, 235 App.Div. 200, and reargument denied 185 N.E. 772, 261 N.Y. 639—Coombes v. Getz, 52 S.Ct. 435, 285 U.S. 434, 76 L.Ed. 866, reversing Coombes v. Franklin, 1 P.2d 992, 213 Cal. 164, rehearing denied 4 P.2d 157, 213 Cal. 164, certiorari denied Coombes v. Getz, 52 S.Ct. 199, 284 U.S. 613, 76 L.Ed. 523—Shriver v. Woodbine Sav. Bank of Woodbine, Iowa, 52 S.Ct. 430, 285 U.S. 467, 76 L.Ed. 884, affirming Woodbine Sav. Bank of Woodbine v. Shriver, 236 N.W. 10, 212 Iowa 196, followed in Woodbine Sav. Bank v. Bladen, 236 N.W. 19, and Woodbine Sav. Bank v. Kneeper, 236 N.W. 20, two cases—John P. King Mfg. Co. v. City Council of Augusta, 48 S.Ct. 489, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306—Appleby v. City of New York, 46 S.Ct. 569, 271 U.S. 364, 70 L.Ed. 992, reversing, 139 N.E. 474, 235 N.Y. 351, affirming 192 N.Y.S. 211, 199 App.Div. 539, and reargument denied 142 N.E. 291, 236 N.Y. 579—Georgia Ry. & Power Co. v. Town of Decatur, 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065, reversing 111 S.E. 911, 153 Ga. 329—People ex rel. Clyde v. Gilchrist, 43 S.Ct. 501, 262 U.S. 94, 67 L.Ed. 883, affirming People ex rel. Clyde v. Wendell, 134 N.E. 567, 232 N.Y. 550, affirming 187 N.Y.S. 949, 197 App.Div. 913—Columbia Ry., Gas & Electric Co. v. State of South Carolina, 43 S.Ct. 306, 261 U.S. 236, 67 L.Ed. 629, reversing State v. Columbia Ry., Gas & Electric Co., 123 S.E. 646, 129 S.C. 68.

25 C.J. p 936 note 42.

Decisions of state courts as binding federal courts on question of impairment of obligation of contract see supra § 189 b.

Ground for state decision obscure

Where the basis for bringing an action was a statute claimed to impair the obligation of a contract, and the trial court gave effect to the statute to some extent, and its judgment was affirmed by the supreme court, although it was plainly wrong, unless based on the statute, jurisdiction will not be declined by the federal supreme court, because the extent to which the state supreme court's decision was based on the statute is obscure.—Columbia Ry., Gas & Electric Co. v. State of South Carolina, supra.

38. U.S.—Columbia Water-Power Co. v. Columbia Electric St. R., Light & Power Co., 19 S.Ct. 247, 172 U.S. 475, 43 L.Ed. 521, affirming 20 S.E. 1002, 43 S.C. 154.

39. U.S.—Higginbotham v. City of Baton Rouge, La., 59 S.Ct. 705, 306 U.S. 535, 83 L.Ed. 968, affirming 183 So. 168, 190 La. 821, and rehearing denied 59 S.Ct. 831, 307 U.S. 649, 83 L.Ed. 1529—Hale v. Iowa State Board of Assessment and Review, 58 S.Ct. 102, 302 U.S. 95, 82 L.Ed. 72, affirming 271 N.W. 168, 223 Iowa, 321—Dodge v. Board of Education of City of Chicago, 58 S.Ct. 98, 302 U.S. 74, 82 L.Ed. 57, affirming 5 N.E.2d 84, 364 Ill. 547—Phelps v. Board of Education of Town of West New York, 57 S.Ct. 483, 300 U.S. 319, 81 L.Ed. 674, affirming 185 A. 8, 116 N.J.Law 412, affirming Phelps v. State Board of Education, 180 A. 220, 115 N.J.Law 310—Askam v. Board of Education of Town of West New York, 57 S.Ct. 483, 300 U.S. 319, 81 L.Ed. 674, affirming 184 A. 737, 116 N.J.Law, 416, affirming Askam v. State Board of Education, 180 A. 220, 115 N.J.Law 310—Millsaps College v. City of Jackson, 48 S.Ct. 94, 275 U.S. 129, 72 L.Ed. 196, affirming 101 So. 574, 136 Miss. 795—Appleby v. City of New York, 46 S.Ct. 569, 271 U.S. 364, 70 L.Ed. 992, reversing 139 N.E. 474, 235 N.Y. 351, affirming 192 N.Y.S. 211, 199 App.Div. 539, and reargument denied 142 N.E. 291, 236 N.Y. 579—Georgia Ry. & Power Co. v. Town of Decatur, 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065, reversing 111 S.E. 911, 153 Ga. 329—People ex rel. Clyde v. Gilchrist, 43 S.Ct. 501, 262 U.S. 94, 67 L.Ed. 883, affirming People ex rel. Clyde v. Wendell, 134 N.E. 567,

§ 250. —— Questions under Full Faith and Credit Clause of Constitution

A decision of a state court is reviewable by the United States supreme court where it involves a claim that the state court has refused to give full faith and credit to the public acts, records, and judicial proceedings of another state.

A claim that a state court has refused to give full faith and credit to the public acts and records and judicial proceedings of another state, as required by the federal Constitution, raises a federal question authorizing a review by the United States supreme court,[40] unless the claim is frivolous, unsubstantial, or contrary to the law as established by prior decisions of the supreme court.[41] A decision of a court of one state which merely construes a statute, or a public act or record, of another state, the validity of which is not assailed, is not reviewable on the ground that a question of full faith and credit is involved,[42] unless such construction is contrary to, or inconsistent with, a construction authoritatively established in such other state.[43]

Judgments of same state. The fact that a state court refuses to give a judgment rendered by a court of the same state its proper effect as an estoppel does not present a federal question reviewable by the supreme court.[44]

§ 251. —— Rights Claimed under Judgments or Proceedings of Federal Courts

A decision of a state court involving rights claimed by reason of a judgment of, or proceedings in, a federal court is reviewable by the United States supreme court.

A decision by a state court with respect to rights claimed by reason of a judgment of, or proceedings in, a federal court involves an authority exercised under the United States, and therefore may be reviewed by the United States supreme court,[45] un-

232 N.Y. 550, affirming 187 N.Y.S. 949, 197 App.Div. 913.
25 C.J. p 937 note 44.

40. U.S.—Adam v. Saenger, 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, reversing, Tex.Civ.App., 101 S.W.2d 1046, certiorari granted 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, mandate conformed to, Civ.App., 119 S.W.2d 687, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511—Ætna Life Ins. Co. v. Dunken, 45 S.Ct. 129, 266 U.S. 389, 69 L.Ed. 342, reversing, Tex. Civ.App., Ætna Life Ins. Co. of Hartford, Conn. v. Dunken, 248 S.W. 165.
25 C.J. p 937 note 45.
Effect of judgments under full faith and credit clause see the C.J.S. title Judgments §§ 888 et seq., also 34 C.J. p 1125 note 44 et seq.

Res judicata under "full faith and credit" clause

Under the "full faith and credit" clause of the Constitution, the local doctrines of res judicata, generally speaking, become a part of national jurisprudence and, therefore, "federal questions" cognizable in the United States supreme court.—Riley v. New York Trust Co., Del., 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885, affirming New York Trust Co. v. Riley, 16 A.2d 772.

United States supreme court must determine for itself how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statutes and judicial proceedings of another state.—Pink v. A. A. A. Highway Express, 62 S.Ct. 241, 314 U.S. 201, 86 L.Ed. 152, 137 A.L.R. 957, affirming 13 S.E.2d 337, 191 Ga. 502, 137 A.L.R. 934, certiorari granted 61 S.Ct. 1096, 313 U.S. 555, 85 L.Ed. 1517, and rehearing denied 63 S.Ct. 477, 314 U.S. 716, 86 L.Ed. 570—Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California, 59 S.Ct. 629, 306 U.S. 493, 83 L.Ed. 940, affirming 75 P.2d 1058, 10 Cal.2d 567, certiorari granted 59 S.Ct. 76, 305 U.S. 563, 83 L.Ed. 355—Titus v. Wallick, 59 S.Ct. 557, 306 U.S. 282, 83 L.Ed. 653, reversing 15 N.E.2d 140, 133 Ohio St. 612, certiorari granted 59 S.Ct. 80, 305 U.S. 585, 83 L.Ed. 370—Adam v. Saenger, 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, reversing, Tex. Civ.App., 101 S.W.2d 1046, certiorari granted 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, mandate conformed to, Civ.App., 119 S.W.2d 687, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511—Alaska Packers Ass'n v. Industrial Accident Commission of California, 55 S.Ct. 518, 294 U.S. 532, 79 L.Ed. 1044, affirming 34 P.2d 716, 1 Cal.2d 250.

41. U.S.—Pink v. A. A. A. Highway Express, 62 S.Ct. 241, 314 U.S. 201, 86 L.Ed. 152, affirming 13 S.E.2d 337, 191 Ga. 502, certiorari granted 61 S.Ct. 1096, 313 U.S. 555, 85 L.Ed. 1517—Manhattan L. Ins. Co. v. Cohen, 34 S.Ct. 874, 234 U.S. 123, 58 L.Ed. 1245, dismissing appeal, Tex. Civ.App., 139 S.W. 51.
25 C.J. p 937 note 46.
Substantial character of federal question generally see supra § 243.

42. U.S.—Hartford L. Ins. Co. v. Johnson, 39 S.Ct. 336, 249 U.S. 490, 63 L.Ed. 722, dismissing certiorari 197 S.W. 132, 271 Mo. 562, affirming 148 S.W. 631, 166 Mo.App. 261.
25 C.J. p 937 note 47.

43. U.S.—Hartford L. Ins. Co. v. Johnson, supra.

44. U.S.—Phœnix F. & M. Ins. Co. v. Tennessee, Tenn., 16 S.Ct. 471, 161 U.S. 174, 40 L.Ed. 660.

45. U.S.—Toucey v. New York Life Ins. Co., Mo., 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967, reversing, C.C.A., 112 F.2d 927, certiorari granted 61 S.Ct. 440, 311 U.S. 643, 85 L.Ed. 410, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1549—Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., Iowa, 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967, reversing, C.C.A., 115 F.2d 1, certiorari granted 61 S.Ct. 550, 312 U.S. 670, 85 L.Ed. 1112—Titus v. Wallick, 59 S.Ct. 557, 306 U.S. 282, 83 L.Ed. 653, reversing 15 N.E.2d 140, 133 Ohio St. 612, certiorari granted 59 S.Ct. 80, 305 U.S. 585, 83 L.Ed. 370—Stoll v. Gottlieb, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, reversing Gottlieb v. Crowe, 12 N.E.2d 881, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing Commonwealth ex rel. Schnader v. Penn General Casualty Co., 173 A. 637, 316 Pa. 1, certiorari granted Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed.

less the claim is frivolous, unsubstantial, or contrary to the law as established by prior decisions of the supreme court.[46] However, the mere fact that such rights may be in some way involved in, or connected with, proceedings in a state court is not of itself sufficient to authorize such review;[47] and so if it is admitted that the judgment of the federal court was valid and the proceedings regular, and the issue relates merely to the title to property as between defendant in execution, or the purchaser under it, and the party making the adverse claim, no federal question is presented;[48] or if the decision of the state court depends wholly on general rules of law or local statutes, no federal question is raised, although the opinion of the supreme court in a former suit is disregarded.[49]

§ 252. —— Constitutional Limitations on Power of Congress

No federal question which will sustain a review by the United States supreme court of a decision of a state court is involved in the contention that action under state authority violated provisions of the federal Constitution limiting the powers of congress or the federal government.

A contention that action under state authority involves a violation of provisions of the federal Constitution which are a limitation on the powers of congress or the federal government only is not sufficient to warrant a review of a decision of a state court by the United States supreme court.[50] This rule has been applied where the question presented was whether religious liberty was impaired by a state law,[51] but, as shown in Constitutional Law § 206, the Fourteenth Amendment to the federal Constitution now safeguards religious liberty from state interference.

§ 253. —— Right to Remove Case to Federal Court

The action of a state court on an application to remove a cause to a federal court usually may be reviewed by the United States supreme court.

The action of a state court on an application to remove a cause to a federal court usually involves a federal question, and may be reviewed by the United States supreme court.[52] However, where a federal court remands a removed cause and the state court thereupon proceeds to a judgment therein, which is affirmed by the court of last resort of the state, such court cannot be said to have decided against any federal right by reason of the proceedings for removal which will render its judgment subject to review by the supreme court, nor is the action of the federal court in remanding the cause

651—Myers v. International Trust Co., 44 S.Ct. 86, 263 U.S. 64, 68 L. Ed. 165, reversing International Trust Co. v. Myers, 135 N.E. 697, 241 Mass. 509.
25 C.J. p 938 note 50.
Mode of review see infra § 272.
Operation and effect of federal judgments in state courts see the C.J.S. title Judgments § 901, also 34 C.J. p 1160 note 57 et seq.

46. U.S.—State of Arkansas ex rel. Utley, for Use and Benefit of Craighead County, Ark., v. St. Louis-San Francisco Ry. Co., 46 S.Ct. 66, 269 U.S. 172, 70 L.Ed. 219, dismissing error State v. St. Louis-San Francisco Ry. Co., 258 S.W. 609, 259 S.W. 415, 162 Ark. 443.
25 C.J. p 938 note 51.
Substantial character of federal question generally see supra § 243.

47. U.S.—Avery v. Popper, 21 S.Ct. 94, 179 U.S. 305, 45 L.Ed. 203, dismissing error 48 S.W. 572, 49 S.W. 219, 50 S.W. 122, 92 Tex. 337, 71 Am.S.R. 849.
25 C.J. p 938 note 52.

48. U.S.—Avery v. Popper, 21 S.Ct. 94, 179 U.S. 305, 45 L.Ed. 203 dismissing error 48 S.W. 572, 49 S.W. 219, 50 S.W. 122, 92 Tex. 337, 71 Am.S.R. 849.
25 C.J. p 938 note 53.

49. U.S.—Leathe v. Thomas, Ill., 28 S.Ct. 30, 207 U.S. 93, 52 L.Ed. 118.
25 C.J. p 938 note 54.

50. U.S.—Gaines v. State of Washington, Wash., 48 S.Ct. 468, 277 U.S. 81, 72 L.Ed. 793.
25 C.J. p 939 note 55.
Necessity for substantial federal question generally see supra § 243.

Guaranty of republican form of government

Whether or not the adoption of an initiative and referendum provision deprives a state of a republican form of government, under U.S.Const. art 4 § 4, is not a federal judicial question which will support a review by the supreme court of the United States.—Marshall v. Dye, Ind., 34 S.Ct. 92, 231 U.S. 250, 58 L.Ed. 206—12 C.J. p 871 note 52.

51. U.S.—Permoli v. Municipality No. 1 of City of New Orleans, La., 3 How. 589, 11 L.Ed. 739.

52. U.S.—Metropolitan Casualty Ins. Co. v. Stevens, 61 S.Ct. 715, 312 U.S. 563, 85 L.Ed. 1044, affirming Stevens v. Northway, 291 N.W. 211, 293 Mich. 31, certiorari granted Metropolitan Casualty Ins. Co. of New York v. Stevens, 61 S.Ct. 74, 311 U.S. 637, 85 L.Ed. 405—Ammond v. Pennsylvania R. Co., C.C.A. Ohio, 125 F.2d 747, certiorari denied 62 S.Ct. 1283, 316 U.S. 691, 86 L.Ed. 1762.
Miss.—Montgomery & Atlanta Motor Freight Lines v. Morris, 8 So.2d 502, overruling suggestion of error, 7 So.2d 826.
S.C.—Jennings v. Southern Ry. Co., 150 S.E. 309, 152 S.C. 322.
25 C.J. p 939 note 57.
Removal of causes to federal courts see the C.J.S. title Removal of Causes § 1 et seq., also 54 C.J. p 208 note 1 et seq.

Circumstances under which no real federal question involved

(1) Where a state court which denies a petition for removal is assured that the federal court will decide promptly the question of removability, it is better practice for the state court to await that decision before proceeding in the cause, but failure to do so is not a denial of a federal right if the cause was not removable.—Metropolitan Casualty Ins. Co. v. Stevens, 61 S.Ct. 715, 312 U.S. 563, 85 L.Ed. 1044, affirming Stevens v. Northway, 291 N.W. 211, 293 Mich. 31, certiorari granted Metropolitan Casualty Ins. Co. of New York v. Stevens, 61 S.Ct. 74, 311 U.S. 637, 85 L.Ed. 405.

(2) Other cases see Deming v. Carlisle Packing Co., 33 S.Ct. 80, 226 U.S. 102, 57 L.Ed. 140, dismissing error 114 P. 172, 62 Wash. 455—25 C.J. p 939 note 57 [a]-[d].

subject to review on proceedings to review the action of the state court.[53]

Where a cause removed to a federal court has been by it remanded to the state court, the denial by the state court of a second petition for removal presenting no different ground therefor is not a denial of a federal right.[54]

§ 254. —— Questions Relating to Public Lands

Questions decided by a state court relating to public lands of the United States, and titles derived from, or confirmed by, the federal government, may constitute federal questions reviewable by the United States supreme court.

Questions decided by a state court relating to the public lands of the United States, entries on, and rights therein, and titles derived from, or confirmed by, the United States, may be federal so as to be within the reviewing power of the United States supreme court,[55] but they are not necessarily of this character.[56] A decision based on the construction of apparently conflicting patents from a state for the land in dispute is not reviewable by the supreme court.[57]

§ 255. —— Questions Relating to Mines or Minerals

Decisions of state courts involving mines and minerals may present federal questions reviewable by the United States supreme court.

The mere fact that an action in a state court relates to mines, minerals, mining claims, or mining lands, does not of itself authorize a review by the United States supreme court,[58] but as rights in minerals or mining lands are based on acts of congress, federal questions authorizing such a review may be, and frequently are, involved in such litigation.[59]

§ 256. —— Questions Relating to Bankruptcy

The United States supreme court may review decisions of state courts involving the federal bankruptcy act.

Decisions of state courts involving the federal bankruptcy act are reviewable by the United States supreme court,[60] but such review is not necessarily

53. U.S.—Metropolitan Casualty Ins. Co. v. Stevens, 61 S.Ct. 715, 312 U.S. 563, 85 L.Ed. 1044, affirming Stevens v. Northway, 291 N.W. 211, 293 Mich. 31, certiorari granted Metropolitan Casualty Ins. Co. of New York v. Stevens, 61 S.Ct. 74, 311 U.S. 637, 85 L.Ed. 405—Yankaus v. Feltenstein, N.Y., 37 S.Ct. 567, 244 U.S. 127, 61 L.Ed. 1036—Nelson v. Maloney, 19 S.Ct. 622, 174 U.S. 164, 43 L.Ed. 934, dismissing appeal 53 N.E. 31, 158 N.Y. 351—Missouri Pac. R. Co. v. Fitzgerald, Neb., 16 S.Ct. 389, 160 U.S. 556, 40 L.Ed. 536.

54. U.S.—McLaughlin v. Hallowell, 33 S.Ct. 465, 228 U.S. 278, 57 L.Ed. 835, dismissing error 111 N.W. 428, 121 N.W. 1039, 136 Iowa 279.

55. U.S.—James Stewart & Co. v. Sadrakula, 60 S.Ct. 431, 309 U.S. 94, 84 L.Ed. 596, 127 A.L.R. 821, affirming Sadrakula v. James Stewart & Co., 20 N.E.2d 1015, 280 N.Y. 651, motion granted 21 N.E.2d 217, 280 N.Y. 730, affirming 5 N.Y.S.2d 260, 254 App.Div. 892, appeal denied 7 N.Y.S.2d 223, 255 App.Div. 784 and 18 N.E.2d 314, 279 N.Y. 686.

25 C.J. p 939 note 60.

Post office site

The supreme court had jurisdiction of appeal from final judgment of New York court awarding damages for accidental death, where New York statute necessarily was sustained against contention that its application to the case violated constitutional provisions as to exclusive authority of United States over a post office site purchased with consent of New York.—James Stewart & Co. v. Sadrakula, supra.

Surrender of legislative power to federal government

(1) Whether state of Washington has yielded exclusive legislative authority to the federal government over land acquired by the United States in connection with the Grand Coulee dam and power plant project involves extent of jurisdiction of the United States and is a "federal question."—Silas Mason Co. v. Tax Commission of State of Washington, 58 S.Ct. 233, 302 U.S. 186, 82 L.Ed. 187, affirming Silas Mason Co. v. State Tax Commission, 61 P.2d 1269, 188 Wash. 98—Ryan v. State of Washington, 58 S.Ct. 233, 302 U.S. 186, 82 L.Ed. 187, affirming Ryan v. State, 61 P.2d 1276, 188 Wash. 115.

(2) The supreme court, if at liberty to construe Washington statute giving consent to acquisition of certain rights by United States, should give great weight to state court's views on intent and limitations of statute in granting consent and cession, and supreme court should accept that construction unless satisfied that it does violence to a federal right based on statute, defeating the reasonable anticipation and purpose of securing through operation of statute an essential and exclusive legislative authority for the federal government.—Silas Mason Co. v. Tax Commission of State of Washington, 58 S.Ct. 233, 302 U.S. 186, 82 L.Ed. 187, affirming Silas Mason Co. v. State Tax Commission, 61 P.2d 1269, 188 Wash. 98—Ryan v. State of Washington, 58 S.Ct. 233, 302 U.S. 186, 82 L.Ed. 187, affirming Ryan v. State, 61 P.2d 1276, 188 Wash. 115.

56. U.S.—Noble v. Oklahoma City, 56 S.Ct. 562, 297 U.S. 481, 80 L.Ed. 816, reversing 44 P.2d 135, 172 Okl. 182, certiorari granted 56 S.Ct. 134, 296 U.S. 560, 80 L.Ed. 395—Higgins v. Oklahoma City, 56 S.Ct. 562, 297 U.S. 481, 80 L.Ed. 816, reversing 44 P.2d 135, 172 Okl. 182, certiorari granted 56 S.Ct. 134, 296 U.S. 560, 80 L.Ed. 395.

25 C.J. p 939 note 61.

57. U.S.—White v. Leovy, La., 19 S.Ct. 604, 174 U.S. 91, 43 L.Ed. 907.

58. U.S.—Speed v. McCarthy, 21 S.Ct. 613, 181 U.S. 269, 45 L.Ed. 855, dismissing error 80 N.W. 135, 12 S.D. 7, 50 L.R.A. 184.

25 C.J. p 940 note 63.

State decisions on questions relating to mines and minerals as binding on federal courts see supra § 189.

59. U.S.—Lavagnino v. Uhlig, Utah, 25 S.Ct. 716, 198 U.S. 443, 49 L.Ed. 1119.

25 C.J. p 940 note 64—40 C.J. p 879 note 80.

60. U.S.—Fischer v. Pauline Oil & Gas Co., 60 S.Ct. 535, 309 U.S. 294, 84 L.Ed. 764, reversing Pauline Oil & Gas Co. v. Fischer, 90 P.2d 411, 185 Okl. 108, certiorari granted Fischer v. Pauline Oil & Gas Co., 60 S.Ct. 103, 308 U.S. 509, 84 L.Ed.

authorized by the mere fact that a decision is connected with a case of bankruptcy.[61]

§ 257. —— Questions Relating to Patents

A decision of a state court against a defendant's contention that the suit arises under the patent laws may be reviewed by the United States supreme court.

A decision of a state court against defendant's contention that the suit arises under the patent laws of which the federal court has exclusive jurisdiction, see supra § 32, is a decision against a claim of immunity under the laws of the United States and may be reviewed by the United States supreme court;[62] but the mere fact that a patent or patent right is concerned in litigation is not sufficient to authorize such review where no federal question is presented.[63]

§ 258. —— Questions Relating to National Banks

Decisions of state courts with reference to the rights, powers, duties, liabilities, etc. of national banks may be reviewed by the United States supreme court.

National banks, being created by act of congress, it follows that decisions of state courts with reference to the rights, powers, duties, liabilities, etc., of such banks, or their officers, directors, or stockholders, ordinarily involve federal questions and may be reviewed by the United States supreme court,[64] but it does not necessarily follow from the mere fact that a decision relates to national banks that it involves a federal question authorizing such review.[65]

§ 259. —— Questions Relating to Commerce and Navigable Waters

A decision of a state court may be reviewed by the United States supreme court where it involves a question relating to interstate commerce or navigable waters.

A question involving the authority of congress over commerce and navigable waters is federal in its nature so as to authorize a review by the United States supreme court of a decision of a state court,[66] although a review may be denied where the contention relied on is frivolous, unsubstantial, or contrary to the law as settled by previous decisions of the supreme court.[67]

435, and rehearing denied 60 S.Ct. 706, 309 U.S. 697, 84 L.Ed. 1037.

25 C.J. p 941 note 65.

State decisions on questions relating to bankruptcy as binding on federal courts see supra § 189 b.

61. U.S.—Thompson v. Fairbanks, 25 S.Ct. 306, 196 U.S. 516, 49 L.Ed. 577, affirming 56 A. 11, 75 Vt. 361, 104 Am.S.R. 899.

25 C.J. p 941 note 66.

62. U.S.—Dale Tile Mfg. Co. v. Hyatt, N.Y., 8 S.Ct. 756, 125 U.S. 46, 31 L.Ed. 683.

63. U.S.—Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, Mich., 11 S.Ct. 528, 139 U.S. 293, 35 L.Ed. 193—Felix v. Scharnweber, Ill., 8 S.Ct. 759, 125 U.S. 54, 31 L.Ed. 687.

64. U.S.—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing 192 N.W. 6, 196 Iowa 587.

25 C.J. p 941 note 71.

State decisions relating to national banks as binding on federal courts see supra § 189 b.

Liability of stockholder for assessment on stock

U.S.—Seabury v. Green, 55 S.Ct. 373, 294 U.S. 165, 79 L.Ed. 834, 96 A.L.R. 1463, reversing 175 S.E. 639, 173 S.C. 235, certiorari granted 55 S.Ct. 143, 293 U.S. 549, 79 L.Ed. 652.

65. U.S.—Seeberger v. McCormick, 20 S.Ct. 128, 175 U.S. 274, 44 L.Ed. 161, dismissing appeal 44 N.E. 381, 162 Ill. 100.

25 C.J. p 941 note 72.

Application of state statute prohibiting branch banking

Whether a state statute prohibiting the maintenance of branch banks applies to national banks is conclusively established by the state court decision.—First Nat. Bank in St. Louis v. State of Missouri at inf. Barrett, 44 S.Ct. 213, 263 U.S. 640, 68 L.Ed. 486, affirming State v. First Nat. Bank of St. Louis, 249 S.W. 619, 297 Mo. 397, 30 A.L.R. 918.

Ruling in state court that state law authorizes taxation claimed to discriminate between national bank shares and moneyed capital invested in competition therewith must be accepted by the United States supreme court.—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing 192 N.W. 6, 196 Iowa 587.

66. U.S.—Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3 of Sevier County, Ark., 45 S.Ct. 136, 266 U.S. 379, 69 L.Ed. 335, affirming 246 S.W. 113, 156 Ark. 116—Davis v. Green, 43 S.Ct. 123, 260 U.S. 349, 67 L.Ed. 299, reversing Hines v. Green, 87 So. 649, 125 Miss. 476—Eureka Pipe Line Co. v. Hallanan, 42 S.Ct. 101, 257 U.S. 265, 66 L.Ed. 227, reversing 105 S.E. 506, 87 W.Va. 396.

Conn.—Moran v. New York, N. H. & H. R. Co., 140 A. 818, 107 Conn. 454.

25 C.J. p 942 note 73.

Whether approval by interstate commerce commission was necessary before consolidated railroad corporation legally could assume obligation of one of its constituent companies on a guaranty of bonds issued by another company presented a "federal question" which was before the supreme court on appeal from state court.—New York, C. & St. L. R. Co. v. Frank, 62 S.Ct. 258, 314 U.S. 360, 86 L.Ed. 277, affirming Frank v. New York, C. & St. L. R. Co., 24 N.Y.S.2d 854, affirming 24 N.Y.S.2d 846, 175 Misc. 902, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1550, motion denied 61 S.Ct. 729.

67. U.S.—Bell Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission, 60 S.Ct. 411, 309 U.S. 30, 84 L.Ed. 563, dismissing appeal 5 A.2d 410, 135 Pa. Super. 218—J. Bacon & Sons v. Martin, 59 S.Ct. 257, 305 U.S. 380, 83 L.Ed. 233, dismissing appeal 116 S.W.2d 963, 273 Ky. 389—Missouri Pac. Ry. Co. v. McGrew Coal Co., 41 S.Ct. 404, 256 U.S. 134, 65 L.Ed. 864, affirming McGrew Coal Co. v. Missouri Pac. Ry. Co., 211 S.W. 984, 280 Mo. 466, 13 A.L.R. 283—Minneapolis, St. P. & S. S. M. Ry. Co. v. C. L. Merrick Co., 41 S.Ct. 142, 254 U.S. 376, 65 L.Ed. 312, dismissing error C. L. Merrick Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 160 N.W. 140, 35 N.D. 331—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., 41 S.Ct. 140, 254 U.S. 370, 65 L.Ed. 310, dismissing error 168 N.W. 684, 40 N.D. 69.

25 C.J. p 942 note 74.

§ 260. —— Questions Relating to Taxation and Assessments

Decisions of state courts relating to taxation and assessments are not reviewable by the United States supreme court unless a federal question is involved.

State decisions with relation to taxation and assessments usually turn on local rather than federal questions, and hence are not subject to review by the United States supreme court.[68] However, state decisions may be reviewed by the supreme court

Unsubstantial nature of question generally see supra § 243.

Fixing place of crossing of railroad tracks

Judgment of state supreme court directing entry of order fixing place of crossing of railroad spur tracks was not in conflict with federal law, whether proposed new track constituted mere spur or extension.—St. Louis Southwestern Ry. Co. v. Missouri Pac. R. Co., 53 S.Ct. 516, 289 U.S. 76, 77 L.Ed. 1042, affirming 49 S.W.2d 1054, 185 Ark. 824, certiorari granted 53 S.Ct. 95, 287 U.S. 589, 77 L.Ed. 515.

Prohibition of diving equipment to take sponges

If the state of Florida had power to prohibit the use of diving equipment in taking sponges from the Gulf of Mexico off the coast of Florida, the supreme court was not concerned from the standpoint of the federal Constitution with ruling of the state court as to extent of territorial waters, and question before the supreme court had to be considered in light of the total power the state possessed.—Skiriotes v. State of Florida, 61 S.Ct. 924, 313 U.S. 69, 85 L.Ed. 1193, affirming 197 So. 736, 144 Fla. 220, and rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1552.

68. U.S.—Graves v. Schmidlapp, 62 S.Ct. 870, 315 U.S. 657, 86 L.Ed. 1097, reversing In re Thayer's Estate, 15 N.Y.S.2d 208, 172 Misc. 426, certiorari granted 62 S.Ct. 135, 314 U.S. 601, 86 L.Ed. 484, affirmed 25 N.Y.S.2d 782, 261 App.Div. 814, motion denied 34 N.E.2d 901, 285 N.Y. 741, affirmed 35 N.E.2d 937, 286 N.Y. 596—Continental Assur. Co. v. State of Tennessee, 61 S.Ct. 1, 311 U.S. 5, 85 L.Ed. 5, dismissing appeal State v. Continental Assur. Co., 137 S.W.2d 277, 176 Tenn. 1, rehearing denied 138 S.W.2d 447, 176 Tenn. 1—Illinois Cent. R. Co. v. State of Minnesota, 60 S.Ct. 419, 309 U.S. 157, 84 L.Ed. 670, affirming State v. Illinois Cent. R. Co., 286 N.W. 359, 205 Minn. 621, and rehearing denied Illinois Cent. R. Co. v. State of Minnesota, 60 S.Ct. 585, 309 U.S. 695, 84 L.Ed. 1035—J. Bacon & Sons v. Martin, 59 S.Ct. 257, 305 U.S. 380, 83 L.Ed. 233, dismissing appeal 116 S.W.2d 963, 273 Ky. 389—Georgia Ry. & Electric Co. v. City of Decatur, 55 S.Ct. 701, 295 U.S. 165, 79 L.Ed. 1365, reversing Georgia Power Co. v. City of Decatur, 176 S.E. 494, 179 Ga. 471—Nickey v. State of Mississippi, 54 S.Ct. 743, 292 U.S. 393, 78 L.Ed. 1323, affirming Nickey v. State, 145 So. 630, 167 Miss. 650, suggestion of error overruled 146 So. 859, 167 Miss. 650, motion overruled 147 So. 324, 167 Miss. 650—Utley v. City of St. Petersburg, 54 S.Ct. 593, 292 U.S. 106, 78 L.Ed. 1155, dismissing appeal 149 So. 806, 111 Fla. 844, and rehearing denied 54 S.Ct. 712, 292 U.S. 604, 78 L.Ed. 1466—Memphis & C. Ry. Co. v. Pace, 51 S.Ct. 108, 282 U.S. 241, 75 L.Ed. 315, 72 A.L.R. 1096, affirming Memphis & C. Ry. Co. v. Bullen, 121 So. 826, 154 Miss. 536—Spokane County v. U. S., 49 S.Ct. 321, 279 U.S. 80, 73 L.Ed. 621, affirming Exchange Nat. Bank of Spokane v. U. S., 265 P. 722, 147 Wash. 176, 62 A.L.R. 139, certiorari granted Spokane County v. U. S., 49 S.Ct. 10, 278 U.S. 585, 73 L.Ed. 520—First Nat. Bank of Greeley v. Board of Com'rs of Weld County, Colo., Colo., 44 S.Ct. 385, 264 U.S. 450, 68 L.Ed. 784—Nickel v. Cole, 41 S.Ct. 467, 256 U.S. 222, 65 L.Ed. 900, affirming and denying certiorari Cole v. Nickel, 177 P. 409, 43 Nev. 12, affirmed Nickel v. State, 185 P. 565, 43 Nev. 12—Hartford Life Ins. Co. v. Blincoe, 41 S.Ct. 276, 255 U.S. 129, 65 L.Ed. 549, affirming Barber v. Hartford Life Ins. Co., 214 S.W. 207, 279 Mo. 316, 12 A.L.R. 758.

25 C.J. p 942 note 75.

State laws and decisions relating to taxation as binding on federal courts see supra § 189.

Sidewalk assessment

U.S.—Campbell v. City of Olney, Tex., 43 S.Ct. 559, 262 U.S. 352, 67 L.Ed. 1021.

Franchise tax

U.S.—Anglo-Chilean Nitrate Sales Corporation v. State of Alabama, 53 S.Ct. 373, 288 U.S. 218, 77 L.Ed. 710, reversing State v. Anglo-Chilean Nitrate Sales Corporation, 142 So. 87, 225 Ala. 141.

Sales tax

(1) Determinations of the supreme court of North Dakota that the purchaser is liable for the sales tax under the North Dakota Sales Tax Act are controlling in the United States supreme court.—Federal Land Bank of St. Paul v. Bismarck Lumber Co., 62 S.Ct. 1, 314 U.S. 95, 86 L.Ed. 65, reversing 297 N.W. 42, 70 N.D. 607, certiorari granted 61 S.Ct. 1105, 313 U.S. 556, 85 L.Ed. 1518.

(2) Under Alabama Sales Tax Act imposing a legal obligation on purchaser to pay the tax which seller is required to add to his sales price and to collect from purchaser on collection of the price, whether the sale is for cash or on credit, who in any particular transaction is a "purchaser" within meaning of act, is a question of state law on which only the supreme court of Alabama can speak with final authority.—State of Alabama v. King & Boozer, 62 S.Ct. 43, 314 U.S. 1, 86 L.Ed. 3, reversing King & Boozer v. State, 3 So.2d 572, 241 Ala. 557, certiorari granted State of Alabama v. King and Boozer, 62 S.Ct. 118, 314 U.S. 599, 86 L.Ed. 482.

Stock-exchange membership tax

Whether a membership in the New York Stock Exchange owned by a resident of Ohio is subjected to taxation by the laws of Ohio is a question of state law, the affirmative answer to which, by the state court of last resort, whose decision is sought to be reviewed, is controlling on the United States supreme court.—Citizens' Nat. Bank of Cincinnati v. Durr, 42 S.Ct. 15, 257 U.S. 99, 66 L.Ed. 149, affirming Anderson v. Durr, 126 N.E. 57, 100 Ohio St. 251.

Sale of property of delinquent taxpayers

The United States supreme court was bound by determination of supreme court of Texas that provisions of Texas civil statutes which govern the levy, seizure, and sale of property of delinquent taxpayers generally are inapplicable to the gasoline tax.—U. S. v. State of Texas, 62 S.Ct. 350, 314 U.S. 480, 86 L.Ed. 356, conforming to, Tex.Civ.App., 159 S.W. 2d 214.

Meaning and effect of contract between a foreign gas corporation delivering gas to a Tennessee distributing company for distribution to Tennessee consumers and the company, so far as they established corporation's participation in, and ownership of, profits derived from the retail sale of gas, so as to render the corporation subject to Tennessee excise tax, were local questions conclusively settled by decision of Tennessee supreme court, save only as the United States supreme court, in performance of its duties to safeguard an asserted constitutional right under the commerce clause, might inquire whether the decision of the state question rested on a fair or substantial basis.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

where for some reason, other than the character of the subject matter of the action, a federal question is involved,[69] although much consideration is given to the views of the state court.[70]

Failure to invoke administrative remedy

United States supreme court will not assume jurisdiction of suit involving validity of special assessment under due process clause, as presenting substantial federal question, where administrative remedy for correction of defects or inequalities was not invoked by landowners.—Utley v. City of St. Petersburg, 54 S.Ct. 593, 292 U.S. 106, 78 L.Ed. 1155, dismissing appeal 149 So. 806, 111 Fla. 844 and rehearing denied 54 S. Ct. 712, 292 U.S. 604, 78 L.Ed. 1466.

69. U.S.—Chesebro v. Los Angeles County Flood Control Dist., 59 S. Ct. 622, 306 U.S. 459, 83 L.Ed. 921, affirming City of Los Angeles v. Los Angeles County Flood Control Dist., 80 P.2d 479, 11 Cal.2d 395, appeal dismissed in part 59 S. Ct. 104, 305 U.S. 564, 83 L.Ed. 356—Nashville, C. & St. L. Ry. v. Wallace, Tenn., 53 S.Ct. 345, 288 U.S. 249, 77 L.Ed. 730, 87 A.L.R. 1191—Blodgett v. Silberman, 48 S.Ct. 410, 277 U.S. 1, 72 L.Ed. 749, affirming in part and reversing in part Appeal of Silberman, 134 A. 778, 105 Conn. 192—Saltonstall v. Saltonstall, 48 S.Ct. 225, 276 U.S. 260, 72 L.Ed. 565, affirming Saltonstall v. Treasurer and Receiver General, 153 N.E. 4, 256 Mass. 519—Millsaps College v. City of Jackson, 48 S.Ct. 94, 275 U.S. 129, 72 L.Ed. 196, affirming 101 So. 574, 136 Miss. 795—Hanover Fire Ins. Co. v. Carr, 47 S.Ct. 179, 272 U.S. 494, 71 L.Ed. 372, 49 A.L.R. 713, reversing 148 N.E. 23, 317 Ill. 366, and conformed to Hanover Fire Ins. Co. v. Harding, 158 N.E. 849, 327 Ill. 590—Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3 of Sevier County, Ark., 45 S.Ct. 136, 266 U.S. 379, 69 L.Ed. 335, affirming 246 S.W. 113, 156 Ark. 116.

Wis.—State v. Sinclair Refining Co., 282 N.W. 624, 230 Wis. 265.

25 C.J. p 942 note 76.

Characterization of state tax

United States supreme court is not bound by characterization of state tax by state court so far as such characterization bears on the question of its constitutional effect under the federal Constitution.—State of Wisconsin v. J. C. Penney Co., 61 S. Ct. 246, 311 U.S. 435, 85 L.Ed. 267, 130 A.L.R. 1229, reversing J. C. Penney Co. v. Wisconsin Tax Commission, 289 N.W. 677, 233 Wis. 286, 126 A.L.R. 1333, certiorari granted State of Wisconsin v. J. C. Penney Co., 60 S.Ct. 1076, 310 U.S. 618, 84 L.Ed. 1392, followed in F. W. Woolworth Co. v. Wisconsin Tax Commission, 289 N. W. 685, 233 Wis. 305, certiorari granted State of Wisconsin v. F. W. Woolworth Co., 60 S.Ct. 1076, 310 U. S. 619, 84 L.Ed. 1393, reversed 61 S. Ct. 395, 311 U.S. 622, 85 L.Ed. 395 rehearing denied 61 S.Ct. 444, followed in Minnesota Mining & Manufacturing Co. v. Wisconsin Tax Commission, 289 N.W. 686, 233 Wis. 306, certiorari granted State of Wisconsin v. Minnesota Mining & Manufacturing Co., 60 S.Ct. 1077, 310 U.S. 619, 84 L.Ed. 1393, reversed 61 S.Ct. 253, 311 U.S. 452, 85 L.Ed. 274, rehearing denied 61 S.Ct. 444, rehearing denied State of Wisconsin v. J. C. Penney Co., 61 S.Ct. 444, and mandate conformed to J. C. Penney Co. v. Wisconsin Tax Commission, 298 N.W. 186, 238 Wis. 69, 134 A.L.R. 908—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 56 S.Ct. 31, 296 U.S. 113, 80 L.Ed. 91, reversing Commonwealth v. Schuylkill Trust Co., 173 A. 309, 315 Pa. 429—Senior v. Braden, 55 S.Ct. 800, 295 U.S. 422, 79 L.Ed. 1520, 100 A.L.R. 794, reversing 193 N.E. 614, 128 Ohio St. 597, affirming Braden v. Senior, 193 N.E. 80, 48 Ohio App. 255—Carpenter v. Shaw, 50 S.Ct. 121, 280 U.S. 363, 74 L.Ed. 478, reversing 272 P. 393, 134 Okl. 29, certiorari granted 49 S.Ct. 349, 279 U.S. 830, 73 L.Ed. 980—Macallen Co. v. Commonwealth of Massachusetts, 49 S.Ct. 432, 279 U.S. 620, 73 L.Ed. 874, 65 A.L.R. 866, reversing Macallen Co. v. Commonwealth, 163 N.E. 75, 264 Mass. 396, and rehearing denied Macallen Co. v. Commonwealth of Massachusetts, 50 S.Ct. 14, 280 U.S. 513, 74 L.Ed. 585—New York, Philadelphia & Norfolk Telegraph Co. v. Dolan, 44 S.Ct. 450, 265 U.S. 96, 68 L.Ed. 916, affirming 121 A. 18, 2 W.W.Harr., Del., 184—St. Louis Cotton Compress Co. v. State of Arkansas, 43 S.Ct. 125, 260 U.S. 346, 67 L.Ed. 297, reversing State v. St. Louis Cotton Compress Co., 227 S.W. 605, 147 Ark. 406.

Exemption on sale to army post exchanges

Where California supreme court concluded that sales of motor vehicle fuel to army post exchanges were not exempt from license tax under California statute making tax inapplicable to fuel sold to the federal government and rested conclusion on its determination concerning relationship between exchanges and the federal government, a relationship controlled by federal law, the court made a determination of a "federal question," and the United States supreme court was not bound by the determination.—Standard Oil Co. of California v. Johnson, 62 S.Ct. 1168, 316 U.S. 481, 86 L.Ed. 1611, reversing 119 P.2d 329, 19 Cal.2d 104.

Federal employee's exemption from state income tax

Where supreme court of Utah determined that salaries paid attorney for Reconstruction Finance Corporation and Regional Agricultural Credit Corporation, both federal agencies, were not subject to Utah income tax law but the court's opinion as a whole showed that the court felt constrained to conclude as it did because of the federal Constitution and the United States supreme court's prior adjudications of constitutional immunity, the United States supreme court was not deprived of appellate jurisdiction on ground that the state court's decision did not involve a "federal question."—State Tax Commission of Utah v. Van Cott, 59 S.Ct. 605, 306 U.S. 511, 83 L.Ed. 950, vacating Van Cott v. State Tax Commission of Utah 79 P.2d 6, 95 Utah 43, certiorari granted State Tax Commission of Utah v. Van Cott, 59 S.Ct. 358, 305 U.S. 592, 83 L.Ed. 375, mandate conformed to Van Cott v. State Tax Commission, 96 P.2d 740, 98 Utah 264.

Situs of property for taxation

Where asserted federal right turns on determination of question of situs of property for taxation, supreme court may analyze facts to apply law, and thus to ascertain whether conclusion of state court has adequate support in evidence.—Johnson Oil Refining Co. v. State of Oklahoma ex rel. Mitchell, 54 S.Ct. 152, 290 U.S. 158, 78 L.Ed. 238, reversing In re Johnson Oil-Refining Co.'s Property, 19 P.2d 168, 162 Okl. 185.

Tax act as applied to national banks

A decision of the supreme court of Colorado adjudging the Public Revenue Service Tax Act of Colorado to be valid as applied to a national bank, after the court had drawn the conclusion that manner of state taxation of national banks must accord with federal statute and must not interfere with federal functions, involved a "federal question" as to validity of statute as tested by Constitution and laws of the United States so as to give supreme court of the United States jurisdiction of appeal.—Colorado Nat. Bank of Denver v. Bedford, 60 S.Ct. 800, 310 U.S. 41, 84 L.Ed. 1067, affirming 98 P.2d 1120, 105 Colo. 373, following Bedford v. Colorado Nat. Bank of Denver, 91 P. 2d 469, 104 Colo. 311.

70. U.S.—Colorado Nat. Bank of Denver v. Bedford, supra—Millsaps College v. City of Jackson, 48 S. Ct. 94, 275 U.S. 129, 72 L.Ed. 196, affirming 101 So. 574, 136 Miss. 795—New York, Philadelphia & Norfolk Telegraph Co. v. Dolan, 44 S.

§ 261. —— Questions Relating to Citizenship

The United States supreme court may review a decision of a state court that a person is not a citizen of the United States under the federal Constitution and laws.

A decision of a state court that a person born in a foreign country and claiming to have become a citizen of the United States by the operation of the federal Constitution and laws is not such citizen, and therefore not eligible to the office of governor of a state, may be reviewed by the supreme court of the United States.[71]

§ 262. —— Questions Relating to Legal Tender

Decisions of state courts involving questions as to what is, or is not, legal tender usually are reviewable by the supreme court of the United States.

Questions in decisions of state courts as to what is, or is not, legal tender and a medium of payment usually involve the validity of a federal statute or the construction of a federal statute under which a right is claimed and are, therefore, reviewable by the United States supreme court.[72]

§ 263. —— Questions Arising under State Constitution

In the absence of a federal question, a decision of a state court with respect to a question arising under the state constitution will not be reviewed by the United States supreme court.

Where no federal question is involved, the United States supreme court cannot review a decision of a state court with respect to a question arising under the constitution of the state,[73] even though the federal Constitution contains a provision, limiting

Ct. 450, 265 U.S. 96, 68 L.Ed. 916, affirming 121 A. 18, 2 W.W.Harr., Del., 184—People ex rel. Clyde v. Gilchrist, 43 S.Ct. 501, 262 U.S. 94, 67 L.Ed. 883, affirming People ex rel. Clyde v. Wendell, 134 N.E. 567, 232 N.Y. 550, affirming 187 N.Y.S. 949, 197 App.Div. 913.

71. U.S.—Boyd v. State of Nebraska, 12 S.Ct. 375, 143 U.S. 135, 36 L.Ed. 103, reversing 48 N.W. 739, 31 Neb. 682, 51 N.W. 602.

72. U.S.—Woodruff v. State of Mississippi, Miss., 16 S.Ct. 820, 162 U. S. 291, 40 L.Ed. 973.
25 C.J. p 942 note 78.

73. U.S.—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 58 S.Ct. 295, 302 U.S. 506, 82 L.Ed. 392, affirming Commonwealth v. Schuylkill Trust Co., 193 A. 638, 327 Pa. 127—Senn v. Tile Layers Protective Union, Local No. 5, 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229, affirming 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383—Powell v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527, reversing Powell v. State, 141 So. 201, 224 Ala. 540, certiorari granted Powell v. State of Alabama, 52 S. Ct. 648, 286 U.S. 540, 76 L.Ed. 1278—Patterson v. State of Alabama, 53 S.Ct. 55, 287 U.S. 45, 77 L. Ed. 158, 84 A.L.R. 527, reversing Patterson v. State, 141 So. 195, 224 Ala. 531, certiorari granted Patterson v. State of Alabama, 52 S.Ct. 648, 286 U.S. 540, 76 L.Ed. 1278—Weems v. State of Alabama, 53 S. Ct. 55, 287 U.S. 45, 77 L.Ed. 158, 84 A.L.R. 527, reversing Weems v. State, 141 So. 215, 224 Ala. 524, certiorari granted Weems v. State of Alabama, 52 S.Ct. 648, 286 U.S. 540, 76 L.Ed. 1278—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of State of California, 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128, affirming 288 P. 775, 209 Cal. 460—Blodgett v. Silberman, 48 S.Ct. 410, 277 U.S. 1, 72 L.Ed. 749, affirming in part and reversing in part Appeal of Silberman, 134 A. 778, 105 Conn. 192—Swiss Oil Corporation v. Shanks, 47 S.Ct. 393, 273 U.S. 407, 71 L.Ed. 709, affirming 270 S.W. 478, 208 Ky. 64.
Tex.—Jackson v. State, 280 S.W. 202, 103 Tex.Cr.R. 318, certiorari denied 46 S.Ct. 474, 271 U.S. 661, 70 L.Ed. 1138.
25 C.J. p 942 note 79.
Decisions of state courts as to validity and construction of state constitutions as binding on federal courts see supra §§ 171, 189.

Powers of municipality
The decision of the state supreme court that a municipality under the constitution and laws of the state had power to contract with electric railway company as to fares, in the absence of action by the state, is controlling on the United States supreme court.—Georgia Ry. & Power Co. v. Town of Decatur, 43 S.Ct. 613, 262 U.S. 432, 67 L.Ed. 1065, reversing 111 S.E. 911, 153 Ga. 329.

Constitutionality of state statutes
(1) Validity of state statutes under state constitution is not a question reviewable by the supreme court.
U.S.—Utley v. City of St. Petersburg, 54 S.Ct. 593, 292 U.S. 106, 78 L.Ed. 1155, dismissing appeal 149 So. 806, 111 Fla. 844, and rehearing denied 54 S.Ct. 712, 292 U.S. 604, 78 L.Ed. 1466—Memphis & C. Ry. Co. v. Pace, 51 S.Ct. 108, 282 U.S. 241, 75 L.Ed. 315, 72 A.L.R. 1096, affirming Memphis & C. Ry. Co. v. Bullen, 121 So. 826, 154 Miss. 536—Lehman v. State Board of Public Accountancy, 44 S.Ct. 128, 263 U.S. 394, 68 L.Ed. 354, affirming Lehmann v. State Board of Public Accountancy, 94 So. 94, 208 Ala. 185—Rindge Co. v. Los Angeles County, 43 S.Ct. 689, 262 U. S. 700, 67 L.Ed. 1186, affirming Los Angeles County v. Rindge Co., 200 P. 27, 53 Cal.App. 166—Thornton v. Duffy, 41 S.Ct. 137, 254 U.S. 361, 65 L.Ed. 304, affirming 124 N.E. 54, 99 Ohio St. 120.
Colo.—Allen v. Bailey, 14 P.2d 1087, 91 Colo. 260.
Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.
25 C.J. p 942 note 79 [b], [d].
(2) Validity of municipal ordinances under state constitution see infra § 265.

Validity of order of commission
Decision of Illinois supreme court upholding an order of the Illinois commerce commission conclusively established that under the Constitution and laws of Illinois the order was valid.—Alton R. Co. v. Illinois Commerce Commission, 59 S.Ct. 340, 305 U.S. 548, 83 L.Ed. 344, affirming 15 N.E.2d 508, 368 Ill. 584.

Delegation of legislative powers
With the question of delegation of legislative or quasi-legislative powers to a state commission or board, the supreme court has no concern.—Neblett v. Carpenter, 59 S.Ct. 170, 305 U.S. 297, 83 L.Ed. 182, affirming Carpenter v. Pacific Mut. Life Ins. Co. of Cal., 74 P.2d 761, 10 Cal.2d 307, certiorari granted Neblett v. Carpenter, 58 S.Ct. 1039, 304 U.S. 555, 82 L.Ed. 1524, certiorari denied 59 S.Ct. 61, 305 U.S. 562, 83 L.Ed. 354, and rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437—Erie R. Co. v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming 103 A. 1052, 90 N.J.Law 672, 673, affirming 98 A. 13, 89 N.J.

the power of congress, practically identical with the provision of the state constitution.[74]

§ 264. —— Construction of State Statutes

A decision of a state court construing the statutes of the state ordinarily is not subject to review by the United States supreme court.

A decision of a state court construing the statutes of the state is not subject to review by the United States supreme court,[75] even though the ef-

Law 57—Passaic Water Co. v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming 103 A. 1053, 90 N.J.Law 714—Western Union Tel. Co. v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming 103 A. 1055, 90 N.J.Law 729—D. Fullerton & Co. v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming 103 A. 1051, 90 N.J.Law 677—Morris & Co. v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming Meyer & De Vogel v. Board of Public Utility Com'rs, 103 A. 1053, 90 N.J.Law 694—Meyer v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming Meyer & De Vogel v. Board of Public Utility Com'rs, 103 A. 1053, 90 N.J. Law 694—Public Service Ry. Co. v. Board of Public Utility Com'rs, 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322, affirming 103 A. 1054, 90 N.J.Law 715, affirming 98 A. 28, 89 N.J.Law 24.

Whether state court exceeded its functions or authority under the state constitution will not sustain the appellate jurisdiction of the supreme court.—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 58 S.Ct. 295, 302 U.S. 506, 82 L.Ed. 392, affirming Commonwealth v. Schuylkill Trust Co., 193 A. 638, 327 Pa. 127—Burt v. Smith, 27 S.Ct. 37, 203 U.S. 129, 51 L.Ed. 121, dismissing of error 73 N.E. 495, 181 N.Y. 1, 2 Ann. Cas. 576.

74. U.S.—Ensign v. Commonwealth of Pennsylvania, Pa., 33 S.Ct. 321, 227 U.S. 592, 57 L.Ed. 1139.
25 C.J. p 943 note 80.
Questions as to the constitutional limitations on power of congress see supra § 252.

75. U.S.—Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 62 S.Ct. 706, 315 U.S. 437, 86 L.Ed. 946, affirming 295 N.W. 634, 236 Wis. 329, denying rehearing 294 N.W. 632, 236 Wis. 329—Bacon & Sons v. Martin, 59 S.Ct. 257, 305 U.S. 380, 83 L.Ed. 233, dismissing appeal 116 S.W.2d 963, 273 Ky. 389—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 58 S.Ct. 295, 302 U.S. 506, 82 L.Ed. 392, affirming Commonwealth v. Schuylkill Trust Co., 193 A. 638, 327 Pa. 127—U. S. v. Knott, 56 S.Ct. 902, 298 U.S. 544, 80 L.Ed. 1321, 104 A.L.R. 741, reversing Kelly v. Knott, 163 So. 64, 120 Fla. 580, certiorari granted U. S. v. Knott, 56 S.Ct. 498, 297 U.S. 700, 80 L.Ed. 989, certiorari denied Withers v. Knott, 56 S.Ct. 498, 297 U.S. 706, 80 L.Ed. 993, modified Withers v. Knott, 168 So. 416, 127 Fla. 241, mandate conformed to 168 So. 416, 127 Fla. 241—Nickey v. State of Mississippi, 54 S.Ct. 743, 292 U.S. 393, 78 L.Ed. 1323, affirming Nickey v. State, 145 So. 630, 167 Miss. 650, suggestion of error overruled 146 So. 859, 167 Miss. 650, motion overruled 147 So. 324, 167 Miss. 650—Hicklin v. Coney, 54 S.Ct. 142, 290 U.S. 169, 78 L.Ed. 247, affirming State ex rel. Coney v. Hicklin, 167 S.E. 674, 168 S.C. 440—Guaranty Trust Co. of New York v. Blodgett, 53 S.Ct. 244, 287 U.S. 509, 77 L.Ed. 463, affirming Blodgett v. Guaranty Trust Co. of New York, 158 A. 245, 114 Conn. 207—Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254, affirming Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508—Coombes v. Getz, 52 S.Ct. 435, 285 U.S. 434, 76 L.Ed. 866, reversing Coombes v. Franklin, 1 P.2d 992, 213 Cal. 164, rehearing denied 4 P.2d 157, 213 Cal. 164, certiorari denied Coombes v. Getz, 52 S.Ct. 199, 284 U.S. 613, 76 L.Ed. 523—Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 52 S.Ct. 103, 284 U.S. 8, 76 L.Ed. 136, 78 A.L.R. 826, affirming 293 P. 899, 110 Cal.App. 123—Brinkerhoff - Faris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, reversing 19 S.W.2d 746, 323 Mo. 180, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 648, revoked 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, and certiorari granted 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, conformed to 42 S.W.2d 23, 328 Mo. 836—Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 401, 281 U.S. 537, 74 L.Ed. 1023, dismissing certiorari State v. Broad River Power Co., 153 S.E. 537, 157 S.C. 1, certiorari granted Broad River Power Co. v. State of South Carolina ex rel. Daniel, 50 S.Ct. 162, 280 U.S. 551, 74 L.Ed. 609, rehearing granted 51 S.Ct. 38, 282 U.S. 795, 75 L.Ed. 717, and affirmed 51 S.Ct. 94, 282 U.S. 187, 75 L.Ed. 287—Ex parte Worcester County Nat. Bank of Worcester, 49 S.Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 987, modifying Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444—Swiss Oil Corporation v. Shanks, 47 S.Ct. 393, 273 U.S. 407, 71 L.Ed. 709, affirming 270 S.W. 478, 208 Ky. 64—American Ry. Express Co. v. F. S. Royster Guano Co., 47 S.Ct. 355, 273 U.S. 274, 71 L.Ed. 642, affirming 126 S.E. 678, 141 Va. 602, certiorari granted 45 S.Ct. 641, 268 U.S. 687, 69 L.Ed. 1157—Hanover Fire Ins. Co. v. Carr, 47 S.Ct. 179, 272 U.S. 494, 71 L.Ed. 372, 49 A.L.R. 713, reversing 148 N.E. 23, 317 Ill. 366, and conformed to Hanover Fire Ins. Co. v. Harding, 158 N.E. 849, 327 Ill. 590—State of Missouri ex rel. Hurwitz v. North, 46 S.Ct. 384, 271 U.S. 40, 70 L.Ed. 818, affirming 264 S.W. 678, 304 Mo. 607—Supreme Lodge, K. P., v. Meyer, 44 S.Ct. 432, 265 U.S. 30, 68 L.Ed. 885, affirming Meyer v. Supreme Lodge, K. P., 189 N.W. 839, 109 Neb. 108—Red Cross Line v. Atlantic Fruit Co., 44 S.Ct. 274, 264 U.S. 109, 68 L.Ed. 582, reversing 135 N.E. 821, 233 N.Y. 373, which reversed In re Red Cross Line, 191 N.Y.S. 949, 199 App.Div. 961—J. E. Raley & Bros. v. Richardson, Ga., 44 S.Ct. 256, 264 U.S. 157, 68 L.Ed. 615—Vigliotti v. Commonwealth of Pennsylvania, 42 S.Ct. 330, 258 U.S. 403, 66 L.Ed. 686, affirming Commonwealth v. Vigliotti, 115 A. 20, 271 Pa. 10—Truax v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375, reversing 176 P. 570, 20 Ariz. 7—Quong Ham Wah Co. v. Industrial Acc. Commission of Cal., 41 S.Ct. 373, 255 U.S. 445, 65 L.Ed. 723, dismissing error 192 P. 1021, 184 Cal. 26, 12 A.L.R. 1190—Hartford Life Ins. Co. v. Blincoe, 41 S.Ct. 276, 255 U.S. 129, 65 L.Ed. 549, affirming Barber v. Hartford Life Ins. Co., 214 S.W. 207, 279 Mo. 316, 12 A.L.R. 758—Thornton v. Duffy, 41 S.Ct. 137, 254 U.S. 361, 65 L.Ed. 304, affirming 124 N.E. 54, 99 Ohio St. 120.

Colo.—Allen v. Bailey, 14 P.2d 1087, 91 Colo. 260.

Mass.—W. & J. Sloane v. Commonwealth, 149 N.E. 407, 253 Mass. 529.

Tex.—State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164, modified on other grounds Lone Star Gas Co. v. State, Sup., 153 S.W.2d 681—Jackson v. State, 280 S.W. 202, 103 Tex.Cr. 318, certiorari de-

nied 46 S Ct. 474, 271 U.S. 661, 70 L.Ed. 1138.

25 C.J. p 943 note 83, p 942 note 79 [c].

Construction of state statute by court of another state see supra § 250.

Decisions construing:

Federal statutes see infra § 266.

Municipal ordinances see infra § 265.

State court decisions as to validity and construction of state statutes as controlling federal courts see supra §§ 171, 189.

Court of Industrial Relations Act

U.S.—Dorchy v. State of Kansas, 47 S.Ct. 86, 272 U.S. 306, 71 L.Ed. 248, affirming State v. Howat, 227 P. 752, 116 Kan. 412—Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas, 43 S.Ct. 630, 262 U.S. 522, 67 L.Ed. 1103, 27 A.L.R. 1280, reversing Court of Industrial Relations v. Charles Wolff Packing Co., 207 P. 806, 111 Kan. 501.

Eminent domain statutes

U.S.—Roe v. State of Kansas ex rel. Smith, 49 S.Ct. 160, 278 U.S. 191, 73 L.Ed. 259, dismissing error State ex rel. Smith v. Kemp, 261 P. 556, 124 Kan. 716, 59 A.L.R. 940.

Labor code

U.S.—Senn v. Tile Layers Protective Union, Local No. 5, 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229, affirming 268 N.W. 270, 222 Wis. 383, rehearing denied 268 N.W. 872, 222 Wis. 383.

Minimum wage law

U.S.—Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, affirming People ex rel. Tipaldo v. Morehead, 200 N. E. 799, 270 N.Y. 233, reversing 282 N.Y.S. 576, 156 Misc. 522, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456.

Teacher's Tenure Act

U.S.—Phelps v. Board of Education of Town of West New York, 57 S. Ct. 483, 300 U.S. 319, 81 L.Ed. 674, affirming 185 A. 8, 116 N.J.Law 412, affirming Phelps v. State Board of Education, 180 A. 220, 115 N.J.Law 310—Askam v. Board of Education of Town of West New York, 57 S. Ct. 483, 300 U.S. 319, 81 L.Ed. 674, affirming 184 A. 737, 116 N.J.Law 416, affirming Askam v. State Board of Education, 180 A. 220, 115 N.J.Law 310.

Workmen's Compensation Acts

U.S.—Cudahy Packing Co. of Nebraska v. Parramore, 44 S.Ct. 153, 263 U.S. 418, 68 L.Ed. 366, 30 A.L.R. 532, affirming Cudahy Packing Co. of Nebraska v. Industrial Commission of Utah, 207 P. 148, 60 Utah 161—Ward & Gow v. Krinsky, 42 S.Ct. 529, 259 U.S. 503, 66 L.Ed. 1033, 28 A.L.R. 1207, affirming Krinsky v. Ward & Gow, 132 N.E. 873, 231 N.Y. 525, which affirms 184 N.Y.S. 443, 193 App.Div. 557—Quong Ham Wah Co. v. Industrial Acc. Commission of California, 41 S.Ct. 373, 255 U.S. 445, 65 L.Ed. 723, dismissing error 192 P. 1021, 184 Cal. 26, 12 A.L.R. 1190.

For purpose of deciding constitutionality of state statute under federal constitution supreme court is required to take the statute as though it read precisely as the state supreme court interpreted it, and any contention that the state court's construction was contrary to the terms of the statute is unavailing.—Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 62 S.Ct. 820, 315 U. S. 740, 86 L.Ed. 1154, affirming 295 N. W. 791, 237 Wis. 164—Hotel & Restaurant Employees' International Alliance, Local No. 122 v. Wisconsin Employment Relations Board, 62 S. Ct. 706, 315 U.S. 437, 86 L.Ed. 946, affirming 295 N.W. 634, 236 Wis. 329, denying rehearing 294 N.W. 632, 236 Wis. 329—State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 60 S.Ct. 523, 309 U.S. 270, 84 L.Ed. 744, 126 A.L.R. 530, affirming 287 N.W. 297, 205 Minn. 545.

Constitutionality of state statute is to be decided on the construction of the state supreme court.—Midland Realty Co. v. Kansas City Power & Light Co., 57 S.Ct. 345, 300 U. S. 109, 81 L.Ed. 540, affirming Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954, 338 Mo. 1141, rehearing denied Midland Realty Co. v. Kansas City Power & Light Co., 57 S.Ct. 504, 300 U.S. 687, 81 L. Ed. 888.

Misconstruction of valid statute by state court gives the supreme court no jurisdiction.—Neblett v. Carpenter, 59 S.Ct. 170, 305 U.S. 297, 83 L. Ed. 182, affirming Carpenter v. Pacific Mut. Life Ins. Co. of Cal., 74 P.2d 761, 10 Cal.2d 307, certiorari granted Neblett v. Carpenter, 58 S. Ct. 1039, 304 U.S. 555, 82 L.Ed. 1521, certiorari denied 59 S.Ct. 61, 305 U.S. 562, 83 L.Ed. 354, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437—Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, affirming People ex rel. Tipaldo v. Morehead, 200 N.E. 799, 270 N.Y. 233, reversing 282 N.Y.S. 576, 156 Misc. 522, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456—Hebert v. State of Louisiana, La., 47 S.Ct. 103, 272 U.S. 312, 71 L.Ed. 270, 48 A.L.R. 1102—25 C.J. p 943 note 83 [b].

Several statutes construed together

(1) Conclusion of state supreme court that several statutes must be taken together is accepted as if written in state statutes themselves.—Gregg Dyeing Co. v. Query, 52 S.Ct. 631, 286 U.S. 472, 76 L.Ed. 1232, 84 A.L.R. 831, affirming 161 S.E. 588, 166 S.C. 117 and City of Greenville v. Query, 164 S.E. 841, 166 S.C. 281.

(2) The meaning derived by the highest state court by construing together several state statutes is as conclusive on the federal supreme court as though such legislation were embodied in a single act.

U.S.—International Harvester Co. v. Kentucky, 34 S.Ct. 853, 234 U.S. 216, 58 L.Ed. 1284, reversing 144 S.W. 1064, 146 S.W. 12, 147 Ky. 564, 147 Ky. 795, and 147 S.W. 1199, 148 Ky. 572.

Tex.—Jackson v. State, 280 S.W. 202, 103 Tex.Cr. 318, certiorari denied 46 S.Ct. 474, 271 U.S. 661, 70 L.Ed. 1138.

Severability

(1) The task of determining the intention of the state legislature as to severability of an unconstitutional provision rests primarily on the state court, and its decision is conclusive on the federal supreme court.—Dorchy v. State of Kansas, 44 S.Ct. 323, 264 U.S. 286, 68 L.Ed. 686, reversing State v. Dorchy, 210 P. 352, 112 Kan. 235.

(2) Where supreme court held part of state license tax statute unconstitutional, operation of statutory saving clause was matter of state law.—Louis K. Liggett Co. v. Lee, 53 S.Ct. 481, 288 U.S. 517, 77 L.Ed. 929, 859 A.L.R. 699, reversing Louis K. Liggett Co. v. Amos, 141 So. 153, 104 Fla. 609, annulled Louis K. Liggett Co. v. Lee, 147 So. 463, 109 Fla. 477, conformed to Louis K. Liggett Co. v. Lee. 149 So. 8, 109 Fla. 477.

(3) Where New Hampshire statute, attacked on ground that it placed unreasonable restraint on freedom of speech, contained two provisions, the first relating to words or names addressed to another in a public place and the second referring to noises and exclamations, and the statute had been authoritatively construed by the highest court of New Hampshire which held that the two provisions were distinct, and that one could stand separately from the other, the United States supreme court would accept that construction of severability and limit its consideration to the first provision under which accused was convicted.—Chaplinsky v. State of New Hampshire, 62 S.Ct. 766, 315 U.S. 568, 86 L.Ed. 1031, affirming State v. Chaplinsky, 18 A.2d 754, 91 N.H. 310.

fect of such construction is to remove any question of repugnancy to the federal constitution.[76] However, where a state statute is so construed as to render it open to the objection of repugnancy to the federal constitution, there is presented a federal question authorizing a review.[77]

§ 265. —— Construction or Validity of Municipal Ordinances

A decision of a state court construing an ordinance of a municipality of the state or a decision as to the validity of an ordinance under state laws is not reviewable by the United States supreme court, although the court may review the validity of an ordinance under federal laws.

A decision of a state court construing an ordinance of a municipality of the state is not reviewable by the United States supreme court.[78] Whether an ordinance is valid, and the extent to which it is so, under the constitution and laws of the state is not subject to review by the supreme court.[79]

A decision of a state court where there is drawn in question the validity of a municipal ordinance on the ground of repugnancy to the constitution, treaties, or laws of the United States may be reviewed by the United States supreme court,[80] although the court may decline to review the decision where the question as to the validity of the ordinance is not sufficiently substantial.[81]

(4) In passing on constitutionality of order entered under the Wisconsin Employment Peace Act, which contained a broad severability clause, the supreme court was not under necessity of treating the act as an inseparable whole, but act was to be read as though it contained only those provisions which authorized the Wisconsin Employment Relations Board to enter orders of the specific type involved.—Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. 1154, affirming 295 N.W. 791, 237 Wis. 164.

When applicability of one state statute depends on construction of another such law, state court's action presents no federal question.

U.S.—Powell v. Brunswick County, Va., 14 S.Ct. 166, 150 U.S. 433, 37 L.Ed. 1134.

Tex.—Jackson v. State, 280 S.W. 202, 103 Tex.Cr. 318, certiorari denied 46 S.Ct. 474, 271 U.S. 661, 70 L.Ed. 1138.

Overruling former case construing statute

State court has power to construe statute and to reëxamine and overrule former case construing such statute.—Brinkerhoff-Faris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, reversing 19 S.W.2d 746, 323 Mo. 180, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 648, revoked 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, and certiorari granted 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, conformed to 42 S.W.2d 23, 328 Mo. 836.

Decision construing order of commission

Court's construction of commission's order is conclusive on United States supreme court.—Sutter Butte Canal Co. v. Railroad Commission of California, 49 S.Ct. 325, 279 U.S. 125, 73 L.Ed. 637, affirming 259 P. 937, 202 Cal. 179.

Absence of state decision

In advance of a decision by the state court construing a statute, the United States supreme court should not adopt a construction which would render the provision of doubtful validity.—State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 60 S.Ct. 523, 309 U.S. 270, 84 L.Ed. 744, 126 A.L.R. 530, affirming 287 N.W. 297, 205 Minn. 545.

76. U.S.—Quong Ham Wah Co. v. Industrial Acc. Commission of California, 41 S.Ct. 373, 255 U.S. 445, 65 L.Ed. 723, dismissing error 192 P. 1021, 184 Cal. 26, 12 A.L.R. 1190.
25 C.J. p 944 note 84.

77. U.S.—Mobile, Jackson & Kansas City R. Co. v. Mississippi, 28 S.Ct. 650, 210 U.S. 187, 52 L.Ed. 1016, affirming 41 So. 259, 89 Miss. 724.

Supreme court exercises independent judgment in determining whether statute as construed and applied violates the federal Constitution.—Hanover Fire Ins. Co., v. Carr, 47 S.Ct. 179, 272 U.S. 494, 71 L.Ed. 372, 49 A.L.R. 713, reversing, 148 N.E. 23, 317 Ill. 366, and conformed to Hanover Fire Ins. Co. v. Harding, 158 N.E. 849, 327 Ill. 590—Ward & Gow v. Krinsky, 42 S.Ct. 529, 259 U.S. 503, 66 L.Ed. 1033, 28 A.L.R. 1207, affirming Krinsky v. Ward & Gow, 132 N.E. 873, 231 N.Y. 525, which affirms 184 N.Y.S. 443, 193 App.Div. 557.

Ex post facto laws

Supreme court, in applying ex post facto prohibition of Constitution to state laws, accepts meaning ascribed to such laws by highest court of state, but will determine for itself from practical operation of laws as applied to case before court whether standards of punishment set up before and after commission of offense differ, and whether later standard is more onerous than earlier within meaning of constitutional prohibition.—Lindsey v. State of Washington, 57 S.Ct. 797, 301 U.S. 397, 81 L.Ed. 1182, reversing State v. Lindsey, 61 P.2d 293, 187 Wash. 364, certiorari granted Lindsey v. State of Washington, 57 S.Ct. 752, 300 U.S. 652, 81 L.Ed. 863.

78. U.S.—Mackay Telegraph & Cable Co. v. Little Rock, 39 S.Ct. 428, 250 U.S. 94, 63 L.Ed. 863, affirming 199 S.W. 90, 131 Ark. 306—Watters v. Michigan, 39 S.Ct. 29, 248 U.S. 65, 63 L.Ed. 129, affirming 158 N.W. 865, 192 Mich. 462.

State decisions construing municipal ordinances as binding on federal courts see supra § 172.

79. U.S.—Lombard v. West Chicago Park Comrs., Ill., 21 S.Ct. 507, 181 U.S. 33, 45 L.Ed. 731.
25 C.J. p 942 note 79 [f], p 943 note 83 [c].

80. U.S.—Lovell v. City of Griffin, Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed. 949, reversing Lovell v. City of Griffin, 191 S.E. 152, 55 Ga.App. 609, vacated and conformed to 197 S.E. 347, 57 Ga.App. 901.

"Statute of any state"

(1) A municipal ordinance is a "statute of any state" within 28 U.S.C.A. § 344(a), providing for reviews of state court decisions by the supreme court.—John P. King Mfg. Co. v. City Council of Augusta, 48 S.Ct. 489, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306—Zucht v. King, 43 S.Ct. 24, 260 U.S. 174, 67 L.Ed. 194, dismissing error, Tex.Civ.App., 225 S.W. 267—25 C.J. p 932 note 16 [a] (3).

(2) What constitutes "statute of any state" generally see supra § 246.

81. U.S.—Hixson v. Oakes, 44 S.Ct. 514, 265 U.S. 254, 68 L.Ed. 1005, dismissing error Ex parte Hixson, 214 P. 677, 61 Cal.App. 200—Zucht v. King, 43 S.Ct. 24, 260 U.S. 174, 67 L.Ed. 194, dismissing error, Tex. Civ.App., 225 S.W. 267.

Substantial character of federal question generally see supra § 243.

§ 266. —— Construction of Federal Statutes and Denial of Rights Thereunder

A decision of a state court denying a right asserted under a federal statute is reviewable by the United States supreme court.

A decision of a state court denying a right set up under a federal statute may be reviewed by the supreme court of the United States.[82] The construction of a federal statute presents a federal question which is determined by the supreme court in the exercise of its own independent judgment.[83] Where the disposition of a case by the state court depended on the construction of federal statutes and the opinion of the state court shows that the statutes were considered and federal rights asserted under them were denied, the supreme court may review the decision.[84]

§ 267. —— Jurisdiction of State Courts

A determination of a state court as to the jurisdiction of the courts of the state ordinarily is not reviewable by the United States supreme court.

Decisions of state courts respecting the jurisdiction of the courts of the state usually are not subject to review by the United States supreme court.[85] However, the decision of a state court may be reviewed where a federal question is involved.[86]

§ 268. —— Construction of Common Law

Unless some federal question is involved, the administration by the state court of the common law according to its own interpretation will not be reviewed by the United States supreme court.

The highest court of a state may administer the common law according to its own understanding and interpretation, without liability to a review in the United States supreme court, unless some right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied.[87] A

82. U.S.—Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931, reversing Burrell v. Michaux, Tex.Com.App., 286 S.W. 176, certiorari denied Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 47 S.Ct. 472, 273 U.S. 690, 71 L.Ed. 842, and affirming, Tex.Civ.App., 273 S.W. 874—People's Trust Co. v. U. S., C.C.A.N.H., 23 F.2d 381, vacating, D.C., U. S. v. People's Trust Co., 17 F.2d 437.

25 C.J. p 933 note 27.

Denial by state court of right of action expressly based on an act of congress presents a federal question which gives the supreme court jurisdiction.—Talbot v. Sioux City First Nat. Bank, 22 S.Ct. 612, 185 U.S. 172, 46 L.Ed. 857, affirming 76 N.W. 726, 106 Iowa 361.

83. U.S.—Ex parte Worcester County Nat. Bank of Worcester, 49 S. Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 987, modifying Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444.

25 C.J. p 933 note 27, p 942 note 78.

Decisions of supreme court construing federal statutes as binding state courts see Courts § 206.

State decisions construing federal statutes as binding federal courts see supra § 187, 189 b.

Securities Act

U.S.—A. C. Frost & Co. v. Coeur D'Alene Mines Corporation, 61 S.Ct. 414, 312 U.S. 38, 85 L.Ed. 500, reversing 98 P.2d 965, 61 Idaho 21, certiorari granted 61 S.Ct. 9, 311 U.S. 624, 85 L.Ed. 396, modified 115 P.2d 928.

Safety Appliance Acts

U.S.—Moore v. Chesapeake & O. Ry. Co., Ind., 54 S.Ct. 402, 291 U.S. 205, 78 L.Ed. 755, reversing, C.C.A., Chesapeake & Ohio Ry. Co. v. Moore, 64 F.2d 472, certiorari granted Moore v. Chesapeake & O. R. Co., 54 S.Ct. 60, 290 U.S. 613, 78 L.Ed. 536.

Misconstruction of federal statute by state court gives the supreme court jurisdiction.—Murray v. Joe Gerrick & Co., 54 S.Ct. 432, 291 U.S. 315, 78 L.Ed. 821, 92 A.L.R. 1259, affirming 20 P.2d 591, 172 Wash. 365, certiorari granted 54 S.Ct. 75, 290 U.S. 615, 78 L.Ed. 537, dismissal of certiorari denied 54 S.Ct. 345.

State statute extended over Indian territory by act of congress becomes in effect a law of the United States and its construction and effect present federal questions to be determined by the supreme court.—Grayson v. Harris, 49 S.Ct. 306, 279 U.S. 300, 73 L.Ed. 700, reversing Harris v. Grayson, 264 P. 623, 129 Okl. 281, and 264 P. 627, 129 Okl. 285, certiorari granted Grayson v. Harris, 49 S. Ct. 7, 278 U.S. 555, 73 L.Ed. 503.

84. U.S.—California v. Deseret Water, Oil & Irrigation Co., Cal., 37 S. Ct. 394, 243 U.S. 415, 61 L.Ed. 821.

85. U.S.—Kersh Lake Drainage Dist. of Jefferson Lincoln and Desha Counties v. Johnson, 60 S.Ct. 640, 309 U.S. 485, 84 L.Ed. 881, 128 A.L. R. 386, affirming Johnson v. Kersh Lake Drainage Dist., 131 S.W.2d 620, 198 Ark. 743, dissenting opinion, 132 S.W.2d 658, 198 Ark. 743, certiorari granted Kersh Lake Drainage Dist. v. Johnson, 60 S.Ct. 468, 309 U.S. 642, 84 L.Ed. 996, and rehearing denied 60 S.Ct. 886, 309 U.S. 699, 84 L.Ed. 1037.

25 C.J. p 944 note 87.

State decisions relating to jurisdiction of state courts as binding federal courts see supra § 189.

86. Commerce clause of federal Constitution

A decision of a state court dismissing, on the ground that the suit was one against the state, a bill to enjoin a state oil inspector from enforcing a state inspection law, on the theory that such law, if applied to the oils in controversy, violates the commerce clause of the federal Constitution, gives effect to such law, and is reviewable.—General Oil Co. v. Crain, 28 S.Ct. 475, 209 U.S. 211, 52 L.Ed. 754, affirming 95 S.W. 824, 117 Tenn. 82, 121 Am.S.R. 967.

Want of jurisdiction of subject matter

In action in unlawful detainer in a justice court wherein it was contended that justices' court had no jurisdiction of the subject matter and that its decision was void under the Fourteenth Amendment, appellate jurisdiction was in the United States supreme court, since proceeding involved a "case" or "controversy" within U.S.Const. art 3 § 2.—Lambert v. Central Bank of Oakland, C.C.A. Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 436, 300 U.S. 658, 81 L.Ed. 867.

87. U.S.—American Ry. Express Co. v. Commonwealth of Kentucky, Ky., 47 S.Ct. 353, 273 U.S. 269, 71 L.Ed. 639.

25 C.J. p 944 note 89.

State court decisions as to general or commercial law as binding on federal courts see supra § 185.

decision enforcing common-law performing rights of the owner of an unpublished play as against the owner of a copyrighted adaptation who stood on his copyright denies a federal right claimed, and hence may be reviewed by the supreme court.[88]

§ 269. —— Questions of Pleading and Practice

Unless a federal question is involved, the United States supreme court will not review the decision of a state court on questions of pleading and practice under state laws.

The decisions of state courts as to questions of state practice or procedure[89] or the sufficiency, con-

Last clear chance doctrine
Supreme court was without jurisdiction to consider whether state court erred in applying doctrine of last clear chance in action for violation of Safety Appliance Act by traveler struck by train at highway crossing, since no federal question was involved, in that the right to enforce liability arising from breach of duty imposed by the act is derived from principles of common law and is not affected by the act.—Fairport, P. & E. R. Co. v. Meredith, 54 S. Ct. 826, 292 U.S. 589, 78 L.Ed. 1446, affirming 189 N.E. 10, 46 Ohio App. 457, certiorari granted 54 S.Ct. 564, 291 U.S. 657, 78 L.Ed. 1050.

Pleading that coöperative marketing association was unlawful trust or combination under common-law rules presented no federal question. —Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L. Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643.

88. U.S.—Ferris v. Frohman, 32 S. Ct. 263, 223 U.S. 424, 56 L.Ed. 492, affirming 87 N.E. 327, 238 Ill. 430, 128 Am.S.R. 135, 43 L.R.A.,N.S., 639.

89. U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex. Civ.App., 89 S.W.2d 1094—Honeyman v. Hanan, 58 S.Ct. 273, 302 U. S. 375, 82 L.Ed. 312, dismissing appeal 9 N.E.2d 970, 275 N.Y. 382, affirming 285 N.Y.S. 527, 246 App. Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, affirmed 3 N.E.2d 186, 271 N.Y. 564, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, vacated 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, reargument granted and remittitur denied 8 N.E.2d 618, 274 N.Y. 490, remittitur amended 11 N.E.2d 788, 275 N.Y. 625—Kammerer v. Kroeger, 57 S.Ct. 196, 299 U.S. 302, 81 L.Ed. 253, dismissing appeal In re American Loan & Savings Ass'n, 2 N.E. 2d 823, 131 Ohio St. 330—Patterson v. State of Alabama, 55 S.Ct. 575, 294 U.S. 600, 79 L.Ed. 1082, vacating Patterson v. State, 156 So. 567, 229 Ala. 270, and certiorari granted 55 S.Ct. 347, 293 U.S. 554, 79 L.Ed. 656—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643—Van Oster v. State of Kansas, 47 S.Ct. 133, 272 U.S. 465, 71 L.Ed. 354, 47 A.L. R. 1044, affirming State v. Brown, 241 P. 112, 119 Kan. 874—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing, 192 N.W. 6, 196 Iowa 587.
Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.
Mass.—Pizer v. Hunt, 148 N.E. 801, 253 Mass. 321.
25 C.J. p 944 note 91, p 934 note 33 [f].

Trial
(1) Determination of the state supreme court that respondents in mandamus to compel railroads to eliminate grade crossings are not entitled to jury trial will be accepted by the federal supreme court as a correct determination of the local law.—Southern Ry. Co. v. City of Durham, N.C., 45 S.Ct. 51, 266 U.S. 178, 69 L.Ed. 231, affirming City of Durham v. Southern R. Co., 117 S.E. 17, 185 N.C. 240.

(2) If federal power is invoked to set aside what a state regards as a fair trial, it must be plain that a federal right has been invaded.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 179, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391, affirmed 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 179.

Substitution of parties
U.S.—City of Boston v. Jackson, 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274, affirming City of Boston v. Treasurer and Receiver General, 130 N.E. 390, 237 Mass. 403.

Nature of remedy to be employed is a question for state determination, and a judgment of the state supreme court that a certain proceeding was appropriate is conclusive, unless it involves a denial of due process of law.—First Nat. Bank in St. Louis v. State of Missouri at inf. Barrett, 44 S.Ct. 213, 263 U.S. 640, 68 L.Ed. 486, affirming State v. First Nat. Bank of St. Louis, 249 S.W. 619, 297 Mo. 397, 30 A.L.R. 218.

Deficiency judgment in mortgage foreclosure
The requirement of state statute that the right to a deficiency judgment should be determined in mortgage foreclosure action as against one who was a party to that action raises no substantial federal question.—Honeyman v. Hanan, 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, dismissing appeal 9 N.E.2d 970, 275 N.Y. 382, affirming 285 N.Y.S. 527, 246 App. Div. 781, reargument denied 285 N. Y.S. 1084, 246 App.Div. 829, affirmed 3 N.E.2d 186, 271 N.Y. 564, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, vacated 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, reargument granted and remittitur denied 8 N.E.2d 618, 274 N.Y. 490, remittitur amended 11 N.E. 2d 788, 275 N.Y. 625.

Whether state court has obtained jurisdiction is generally a question involving procedure only and in such cases the United States supreme court will not review a decision of highest court of state.—Blaustein v. Pan American Petroleum & Transport Co., 297 N.Y.S. 539, 163 Misc. 749, affirmed, 296 N.Y.S. 996, 251 App. Div. 704.

Finality of judgment
(1) State supreme court's determination as to finality of a judgment will not be questioned by the supreme court of the United States.
U.S.—Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., N.J., 11 S.Ct. 301, 138 U.S. 287, 34 L.Ed. 967.
Utah.—Attorney General of Utah v.

struction, etc., of pleadings[90] ordinarily are not reviewable by the United States supreme court, even though the action is brought under a federal statute.[91]

On the other hand, when matters nominally of procedure are actually matters of substance which affect a federal right, the decision of the state court is subject to review.[92] Whether a pleading sets up a sufficient right of action or defense, grounded on the constitution or a law of the United States, is necessarily a question of federal law, and, where a case coming from a state court presents that question, the supreme court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken by the state court.[93]

§ 270. —— Questions of Fact or Evidence

A decision of a state court with respect to a question of evidence will not be reviewed by the supreme court of the United States unless a federal question is involved.

The United States supreme court cannot ordinarily review a decision of a state court as to the propriety of taking or refusing to take judicial notice of a particular matter,[94] or the admissibility[95] or sufficiency[96] of evidence; nor is a mere inference of fact from the evidence subject to such re-

Pomeroy, 73 P.2d 1277, 93 Utah 426, 114 A.L.R. 726.

(2) Finality of judgment as essential to review by United States supreme court see supra § 240.

Issues of fraud and collusion in procurement of decree in Arkansas chancery court that landowners had fully paid benefits accruing to their lands from drainage district construction work raised no questions which the supreme court of Arkansas was not competent finally to decide, as regards whether the decree was binding on holders of certificates of indebtedness issued by the drainage district.—Kersh Lake Drainage Dist. of Jefferson, Lincoln and Desha Counties v. Johnson, 60 S.Ct. 640, 309 U.S. 485, 84 L.Ed. 881, 128 A.L.R. 386, affirming Johnson v. Kersh Lake Drainage Dist., 131 S.W.2d 620, 198 Ark. 743, dissenting opinion, 132 S.W. 2d 658, 198 Ark. 743, certiorari granted Kersh Lake Drainage Dist. v. Johnson, 60 S.Ct. 468, 309 U.S. 642, 84 L.Ed. 996 and rehearing denied 60 S.Ct. 886, 309 U.S. 699, 84 L.Ed. 1037.

90. U.S.—City of Boston v. Jackson, 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274, affirming City of Boston v. Treasurer and Receiver General, 130 N.E. 390, 237 Mass. 403.
Mass.—Pizer v. Hunt, 148 N.E. 801, 253 Mass. 321.
25 C.J. p 945 note 92.

Sufficiency of indictment or information
U.S.—Barrington v. Missouri, 27 S. Ct. 582, 205 U.S. 483, 51 L.Ed. 890, dismissing error 95 S.W. 235, 198 Mo. 23.
Neb.—Chadek v. State, 294 N.W. 384, 138 Neb. 626.

Construction of indictment by state court
United States supreme court was required to take indictment, which charged defendant who assisted in conducting meeting called by Communist Party with violation of Oregon Criminal Syndicalism Law, as construed by Oregon supreme court, which limited charge to defendant's participation in meeting and sustained conviction on that basis, regardless of what was said or done at meeting, since conviction on charge not made would be denial of due process of law.—De Jonge v. State of Oregon, 57 S.Ct. 255, 299 U.S. 353, 81 L.Ed. 278, reversing State v. De Jonge, 51 P.2d 674, 152 Or. 315.

91. U.S.—Lee v. Central of Georgia R. Co., 40 S.Ct. 254, 252 U.S. 109, 64 L.Ed. 482, affirming 94 S.E. 888, 21 Ga.App. 558.
25 C.J. p 945 note 93.

92. U.S.—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—Hill v. Smith, 43 S.Ct. 219, 260 U.S. 592, 67 L.Ed. 419, affirming Smith v. Hill, 122 N.E. 310, 232 Mass. 188, 2 A. L.R. 1667.
25 C.J. p 945 note 94.

Venue
(1) The allowance or denial of federal privilege regarding venue in action under Federal Employers' Liability Act is a matter of "federal law" and not a matter of "state law."—Baltimore & O. R. Co. v. Kepner, 62 S.Ct. 6, 314 U.S. 44, 86 L.Ed. 28, 136 A.L.R. 1222, affirming 28 N.E. 2d 586, 137 Ohio St. 206, and 30 N.E. 2d 982, 137 Ohio St. 409, certiorari granted 61 S.Ct. 621, 312 U.S. 671, 85 L.Ed. 1113, affirmed 61 S.Ct. 841, 313 U.S. 542, 85 L.Ed. 1510, vacated 61 S.Ct. 939, 313 U.S. 596, 85 L.Ed 1550.

(2) The United States supreme court is not bound by state court's decision that director general waived right, under Federal Control Act § 10, Comp.St.1918, and Director General's Orders, orders 18, 18–A, 18–B, 50, 50–A, to be sued in county or district where plaintiff resided, or where the cause of action accrued, and may determine for itself whether he sufficiently asserted and insisted on such right.—Davis v. O'Hara, 45 S.Ct. 104, 266 U.S. 314, 69 L.Ed. 303, reversing O'Hara v. Davis, 192 N.W. 215, 109 Neb. 615.

93. U.S.—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing 192 N.W. 6, 196 Iowa 587.

94. U.S.—Wear v. Brewster, 38 S. Ct. 55, 245 U.S. 154, 62 L.Ed. 214, affirming 140 P. 637, 92 Kan. 169, Ann.Cas.1916B 543.

95. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391, affirmed 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166.
25 C.J. p 945 note 96.

96. U.S.—Whitney v. People of State of California, Cal., 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095—Van Oster v. State of Kansas, 47 S.Ct. 133, 272 U.S. 465, 71 L.Ed. 354, 47 A.L.R. 1044, affirming State v. Brown, 241 P. 112, 119 Kan. 874.
25 C.J. p 945 note 97.
Questions of fact within scope of review see infra § 280.

view.[97]

On the other hand, where a federal question is involved, the supreme court may review a decision of a state court on a question pertaining to evidence.[98] A contention, in an action based on a federal statute, that there was no evidence showing liability thereunder presents a federal question, which may be reviewed by the supreme court,[99] and there is also a right of review where it is claimed that a state court admitted in evidence an instrument which was inadmissible under an act of congress because it was not sufficiently stamped.[1]

§ 271. Nature of Decision

The nature of the decision of the state court on a constitutional question is not as a rule determinative of the right to certiorari although it may be controlling as to the right to an appeal.

Formerly the nature of the decision rendered by the state court had an important bearing on the right to a review by the United States supreme court.[2] However, under the statute governing the jurisdiction of the supreme court on certiorari, the supreme court may exercise jurisdiction where the federal claim is sustained as well as where it is denied,[3] although, as is shown infra § *272*, an appeal will not lie as a matter of right except where the decision is against the validity of a treaty or statute of the United States or in favor of the validity of a statute of a state attacked as repugnant to the constitution, treaties, or laws of the United States.

§ 272. Mode of Review

Decisions of state courts are reviewable in the United States supreme court by appeal or certiorari.

Decisions of state courts are reviewed by the United States supreme court in the manner provided for by statute.[4] Under the present statutes, 28 U.S.C.A. §§ 344, 861a, 861b, review is by appeal or certiorari.[5] Prior to 1914, the jurisdiction of the supreme court to review the judgments and decrees of state courts could be exercised only by writ of error.[6] Review by certiorari was allowed by statute in 1914[7] and until 1928 review was had by means of either a writ of error or a certiorari.[8] In 1928 the writ of error was abolished by statute, 28 U.S.C.A. § 861a, b and an appeal substituted therefor.[9]

Certiorari is granted or refused in the exercise of the court's discretion,[10] while an appeal (former-

97. U.S.—Turner v. New York, N.Y., 18 S.Ct. 38, 168 U.S. 90, 42 L.Ed. 392.

98. **Burden of proof**
Where a discharge in bankruptcy was pleaded as a bar to recovery on plaintiff's judgment, the question of the burden of proving knowledge of the bankruptcy proceeding by a judgment creditor whose judgment was not scheduled is so connected with the substantive rights given to the respective parties by the statute, and so flows from the words of the statute, that the ruling thereon may be reviewed by the United States supreme court.—Hill v. Smith, 43 S.Ct. 219, 260 U.S. 592, 67 L.Ed. 419, affirming Smith v. Hill, 122 N.E. 310, 232 Mass. 188, 2 A.L.R. 1667.

99. U.S.—St. Louis, Iron Mountain & Southern R. Co. v. McWhirter, 33 S.Ct. 858, 229 U.S. 265, 57 L.Ed. 1179, reversing 140 S.W. 672, 145 Ky. 427.

1. U.S.—Hall v. Jordan, Tenn., 15 Wall. 393, 21 L.Ed. 72.

2. U.S.—Elder v. Colorado, Colo., 27 S.Ct. 223, 204 U.S. 85, 51 L.Ed. 381.
25 C.J. p 945 note 2–p 946 note 5.
Correctness of decision of state court as affecting review see supra § 245.

3. **Purpose of statute** was to provide an opportunity for review of decisions of state courts on constitutional questions however the state court might decide them.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092.
Allowance of certiorari as discretionary see infra § 277.

4. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391.
Questions reviewable see supra §§ 246–270.

5. U.S.—Standard Oil Co. of California v. Johnson, 62 S.Ct. 1168, 316 U.S. 481, 86 L.Ed. 1611, reversing 119 P.2d 329, 19 Cal.2d 104—Grobey v. Townsend, Tex., 55 S.Ct. 622, 295 U.S. 45, 97 A.L.R. 680, 79 L.Ed. 1292.

6. U.S.—John P. King Mfg. Co. v. City Council of Augusta, 48 S.Ct. 489, 277 U.S. 100, 72 L.Ed. 801, affirming 138 S.E. 159, 164 Ga. 306.
25 C.J. p 946 note 7.

7. U.S.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092.

8. U.S.—Chicago Great Western R. Co. v. Basham, 39 S.Ct. 213, 249 U.S. 164, 63 L.Ed. 534, dismissing error 154 N.W. 1019, 157 N.W. 192, 178 Iowa 998.
25 C.J. p 946 note 8, p 947 note 9 [a].
Where questions presented were properly before the supreme court on writ of error to the state court, a petition for a writ of certiorari was denied.—Frick v. Commonwealth of Pennsylvania, 45 S.Ct. 603, 268 U.S. 473, 69 L.Ed. 1058, 42 A.L.R. 316, reversing In re Frick's Estate, 121 A. 35, 277 Pa. 242—25 C.J. p 947 note 17.

9. U.S.—Nashville, C. & St. L. Ry. v. White, Tenn., 49 S.Ct. 189, 278 U.S. 456, 73 L.Ed. 452.
Formerly an appeal from the judgment or decree of a state court to the supreme court of the United States would not lie.—Steinfeld v. Zeckendorf, 36 S.Ct. 14, 239 U.S. 26, 60 L.Ed. 125, affirming 138 P. 1044, 15 Ariz. 335—25 C.J. p 947 note 18.

10. U.S.—Betts v. Brady, Md., 62 S.Ct. 1252, 316 U.S. 455, 86 L.Ed. 1595—Ireland v. Woods, 38 S.Ct. 319, 246 U.S. 323, 62 L.Ed. 745, dismissing error 117 N.E. 1081, 221 N.Y. 600, affirming 163 N.Y.S. 991, 177 App.Div. 1—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App.Div. 889.

ly writ of error) is allowed as of right where it appears that the case is of the class designated in the statute and that the federal question is a real and substantial one, and an open one in the supreme court.[11]

Appeal or certiorari. Under the statute, 28 U.S. C.A. §§ 344(a), 861a, a final judgment or decree of a state court may be reviewed by the United States supreme court on appeal where there is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where there is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of its validity.[12] Unless the case comes within the terms of this provision an appeal is not the proper mode of review.[13] An appeal is proper where the validity of a state statute as construed by the state court is drawn in question on the ground of its being repugnant to the federal constitution and the decision of the state court is in favor of its validity.[14] However, to sustain an appeal it is not enough that an appellant could have launched his attack on the validity of a state statute if he has failed to do so.[15]

Under the statute, 28 U.S.C.A. § 344(b), review by certiorari may be had, in the court's discretion, where there is drawn in question the validity of a treaty or statute of the United States; or where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review by certiorari may be exercised by the supreme court as well where the federal claim is sustained as where it is denied.[16] Where the question is as to a right, title, privilege, or immunity claimed under the constitution, laws, or treaties of, or any commission held or authority exercised under, the United States, the decision, whether for or against the claim as-

11. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

Writ of error as of right

U.S.—Ireland v. Woods, 38 S.Ct. 319, 246 U.S. 323, 62 L.Ed. 745, dismissing error 117 N.E. 1081, 221 N.Y. 600, affirming 163 N.Y.S. 991, 177 App.Div. 1—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 182 N.Y.S. 1121, 176 App.Div. 889.

12. U.S.—Ex parte Worcester County Nat. Bank of Worcester, 49 S.Ct. 368, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 987, modifying Petition of Worcester County Nat. Bank of Worcester, 162 N.E. 217, 263 Mass. 444.

Under prior statutes

(1) Formerly, where the federal question was as to the validity of a treaty or statute of, or an authority exercised under, the United States, a judgment against the validity thereof could be reviewed only by writ of error, and a judgment in favor of such validity only by certiorari.—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App.Div. 889—25 C.J. p 947 note 10.

(2) Where the question was as to the validity of a statute of, or an authority exercised under, a state, attacked as repugnant to the constitution, laws, or treaties of the United States, a decision in favor of the validity thereof could be reviewed only by writ of error, and a decision against such validity only by certiorari.—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing 192 N.W. 6, 196 Iowa 587—Dahnke-Walker Milling Co. v. Bondurant, 42 S.Ct. 106, 257 U.S. 282, 66 L.Ed. 239, reversing 215 S.W. 76, 185 Ky. 386—Philadelphia & Reading Coal & Iron Co. v. Gilbert, supra—25 C.J. p 947 note 12.

13. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090—Lisenba v. People of State of California, 62 S. Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092.

Judicial Code was intended to restrict obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

Something more than a claim of a federal right is necessary. The attack must be on the validity of the statute and not merely on the state court's judgment to warrant a review by writ of error (now appeal).—Live Oak Water Users' Ass'n v. Railroad Commission of State of California, 46 S.Ct. 149, 269 U.S. 354, 70 L.Ed. 305, dismissing error 219 P. 65, 192 Cal. 132.

Writ of error

U.S.—Live Oak Water Users' Ass'n v. Railroad Commission of State of California, supra.

14. U.S.—Standard Oil Co. of California v. Johnson, 62 S.Ct. 1168, 316 U.S. 481, 86 L.Ed. 1611, reversing 119 P.2d 329, 19 Cal.2d 104.

Writ of error

U.S.—People of State of New York ex rel. Bryant v. Zimmerman, 49 S.Ct. 61, 278 U.S. 63, 75 L.Ed. 184, 62 A.L.R. 785, affirming 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909, affirming 210 N.Y.S. 269, 213 App. Div. 414, affirming People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859—Fiske v. State of Kansas, 47 S.Ct. 655, 274 U.S. 380, 71 L.Ed. 1108, reversing State v. Fiske, 230 P. 88, 117 Kan. 69—Southern Ry. Co. v. Commonwealth of Kentucky, 47 S.Ct. 542, 274 U.S. 76, 71 L.Ed. 934, reversing and denying certiorari 261 S.W. 850, 204 Ky. 388.

15. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

16. U.S.—Grobey v. Townsend, Tex., 55 S.Ct. 622, 295 U.S. 45, 97 A.L.R. 680, 79 L.Ed. 1292.

serted, is reviewable only by certiorari[17] and the remedy by appeal is not available.[18]

Appeal improvidently sought and allowed. Under the statute, 28 U.S.C.A. § 344(c), 861a, if an appeal (formerly writ of error) is improvidently sought and allowed where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal, but the papers whereon the appeal was allowed shall be regarded and acted on as a petition for certiorari and as though duly presented to the supreme court at the time they were presented to the court or judge by whom the appeal was allowed, provided, where in such a case there appears to be no reasonable ground for granting a petition for certiorari, it shall be competent for the supreme court to adjudge to the respondent reasonable damages for his delay, and single or double costs.[19]

Under this provision if an appeal is improvidently allowed the supreme court may dismiss it,[20] and, treating the papers as a petition for certiorari,[21] the

17. U.S.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092—Jordan v. K. Tashiro, 49 S.Ct. 47, 278 U.S. 123, 73 L.Ed. 214, affirming K. Tashiro v. Jordan, 256 P. 545, 201 Cal. 236, 53 A.L.R. 1279, certiorari granted Jordan v. K. Tashiro, 48 S.Ct. 527, 277 U.S. 580, 72 L.Ed. 997—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App.Div. 889.

Ala.—State v. Parrish, 5 So.2d 828, second case, granting certiorari and reversing, App., 5 So.2d 828, first case.

La.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

Or.—City of Portland v. McSparran, 129 P.2d 65.

25 C.J. p 947 note 14.

Compact between states

(1) Compact between states sanctioned by congress involves a "federal title, right, privilege, or immunity" which, when specially set up or claimed in a state court may be reviewed on certiorari.—Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey v. Colburn, N.J., 60 S.Ct. 1039, 310 U.S. 419, 84 L.Ed. 1287, reversing Colburn v. Delaware River Joint Toll Bridge Commission, 8 A.2d 563, 123 N.J.Law 197, affirming Klement v. Delaware River Joint Toll Bridge Commission Pennsylvania-New Jersey, 197 A. 896, 119 N.J.Law 600, certiorari granted Delaware River Joint Toll Bridge Commission v. Colburn, 60 S.Ct. 386, 308 U.S. 549, 84 L.Ed. 462.

(2) The assent of congress to the compact does not make it a "treaty or statute of the United States" within Jud.Code § 237(a), 28 U.S.C.A. § 344(2), warranting a review by appeal.—Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 S.Ct. 803, 304 U.S. 92, 82 L.Ed. 1202, reversing 70 P.2d 849, 101 Colo. 73, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433.

Defendants on denial of right of removal to federal court by state supreme court on appeal have remedy by certiorari from United States supreme court.—Jennings v. Southern Ry. Co., 150 S.E. 309, 152 S.C. 322.

18. U.S.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092—Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 S.Ct. 803, 304 U.S. 92, 82 L.Ed. 1202, reversing 70 P.2d 849, 101 Colo. 73, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433.

Attack on tax assessment or levy on ground that it infringes a taxpayer's federal rights, privileges, or immunities will not sustain an appeal.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

Writ of error was not available in such a case.—Ex parte Williams, Neb., 48 S.Ct. 523, 277 U.S. 267, 72 L.Ed. 877—Longest v. Langford, 47 S.Ct. 668, 274 U.S. 499, 71 L.Ed. 1170, dismissing error and granting certiorari 242 P. 569, 114 Okl. 50, reversed 48 S.Ct. 218, 276 U.S. 69, 72 L.Ed. 471—Grayson v. Harris, 45 S.Ct. 317, 267 U.S. 352, 69 L.Ed. 652, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147—State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232, affirming State ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474—Supreme Lodge, K. P., v. Meyer, 44 S.Ct. 432, 265 U.S. 30, 68 L.Ed. 885, affirming Meyer v. Supreme Lodge, K. P., 189 N.W. 839, 109 Neb. 108—Zucht v. King, 43 S.Ct. 24, 260 U.S. 174, 67 L.Ed. 194, dismissing error, Tex.Civ.App., 225 S.W. 267—Schaff v. J. C. Famechon Co., 42 S.Ct. 189, 258 U.S. 76, 66 L.Ed. 472, dismissing error 176 N.W. 197, 145 Minn. 108—Yazoo & M. V. R. Co. v. City of Clarksdale, 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, reversing, Miss., 81 So. 178—Citizens' Nat. Bank of Cincinnati v. Durr, 42 S.Ct. 15, 257 U.S. 99, 66 L.Ed. 149, affirming Anderson v. Durr, 126 N.E. 57, 100 Ohio St. 251—New York Cent. & H. R. R. Co. v. York & Whitney Co., Mass., 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016, affirming in part and reversing in part 119 N.E. 855, 230 Mass. 206—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App.Div. 889.

25 C.J. p 947 note 14 [a].

19. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S 617, 85 L.Ed. 391.

20. U.S.—Lisenba v. People of State of California, supra.

Adverse party may move to dismiss writ of error (now appeal).—Longest v. Langford, 47 S.Ct. 668, 274 U.S. 499, 71 L.Ed. 1170, dismissing error and granting certiorari 242 P. 569, 114 Okl. 50, reversed 48 S.Ct. 218, 276 U.S. 69, 72 L.Ed. 471.

Case brought on error and certiorari

Where the case was brought on error and also on petition for certiorari and certiorari was the proper mode of review, the court dismissed the writ of error and granted the petition for certiorari.—Grayson v. Harris, 45 S.Ct. 317, 267 U.S. 352, 69 L.Ed. 352, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147—Supreme Lodge, K. P. v. Meyer, 44 S.Ct. 432, 265 U.S. 30, 68 L.Ed. 885, affirming Meyer v. Supreme Lodge, K. P., 189 N.W. 839, 109 Neb. 108—Yazoo & M. V. R. Co. v. City of Clarksdale, 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, reversing, Miss., 81 So. 178.

21. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacat-

court may grant[22] or deny[23] the petition for certiorari, depending on whether or not the papers disclose a case for review. The party suing out the appeal improvidently may be subject to damages and costs if there appears to be no reasonable ground for granting a petition for certiorari.[24]

§ 273. Persons Entitled to Review

To entitle one to a review by the United States supreme court of a judgment of a state court he must have a personal interest in the matter in question which has been adversely affected by the ruling of the state court.

In order to entitle one to a review by the United States supreme court of a judgment of a state court he must have a personal[25] interest in the matter in question,[26] which has been adversely affected by the ruling of the state court;[27] and he must himself

ed 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391.

Writ of error improvidently allowed
U.S.—Longest v. Langford, 47 S.Ct. 668, 274 U.S. 499, 71 L.Ed. 1170, dismissing error and granting certiorari 242 P. 569, 114 Okl. 50, reversed 48 S.Ct. 218, 276 U.S. 69, 72 L.Ed. 471.

Formerly, where a review was sought in an improper manner, by suing out a writ of error where a review could properly be had only by certiorari, the supreme court denied an application to convert the writ of error nunc *pro* tunc into a writ of certiorari or to treat it as having the effect of a writ of certiorari even where both parties consented to the granting of the application.—Hogarty v. Philadelphia & R. R. Co., 40 S. Ct. 12, 250 U.S. 650, 63 L.Ed. 1180, dismissing error 99 A. 741, 255 Pa. 236—25 C.J. p 947 note 19.

22. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090—Lisenba v. People of State of California, 62 S. Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P. 2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391.

Writ of error improvidently allowed
U.S.—Roche v. McDonald, 48 S.Ct. 142, 275 U.S. 449, 72 L.Ed. 365, 53 A.L.R. 1141, reversing 239 P. 1015, 136 Wash. 322, 44 A.L.R. 444—Longest v. Langford, 47 S.Ct. 668, 274 U.S. 499, 71 L.Ed. 1170, dismissing error and granting certiorari 242 P. 569, 114 Okl. 50, reversed 48 S.Ct. 218, 276 U.S. 69, 72 L.Ed. 471.

23. Writ of error improvidently allowed
U.S.—Wheeler v. Pue, Mont., 48 S.Ct. 19, 275 U.S. 483, 72 L.Ed. 385, denying certiorari and dismissing error Pue v. Wheeler, 255 P. 1043, 78 Mont. 516.

Order to show cause why petition for certiorari should not be denied for lack of a substantial federal question may be issued by the clerk on direction of the court.—Gaines v. State of Washington, Wash., 48 S.Ct. 468, 277 U.S. 81, 72 L.Ed. 793—Wysong v. State of California, Cal., 48 S. Ct. 421, 276 U.S. 608, 72 L.Ed. 729.

24. Writ of error
U.S.—Longest v. Langford, 47 S.Ct. 668, 274 U.S. 499, 71 L.Ed. 1170, dismissing error and granting certiorari 242 P. 569, 114 Okl. 50, reversed 48 S.Ct. 218, 276 U.S. 69, 72 L.Ed. 471.

Twenty-five dollar penalty imposed where writ of error was improvidently sued out and no reasonable ground appeared for granting certiorari.—Chesapeake & O. R. Co. v. Williams Slate Co., Va., 46 S.Ct. 202, 269 U.S. 540, 70 L.Ed. 401.

25. U.S.—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643—Stewart v. Kansas City, 36 S.Ct. 15, 239 U S. 14, 60 L.Ed. 120, dismissing error Kansas City v. Stewart, 136 P. 241, 90 Kan. 846, affirmed 140 P. 876, 92 Kan. 406.
25 C.J. p 947 note 21.
Parties see infra § 275.

Official interest
(1) A county treasurer has no such personal interest in the litigation as entitles him to a review in the federal supreme court of a judgment of a state court compelling him to account to a city under certain taxing statutes in the state, claimed by him to be unconstitutional.—Stewart v. Kansas City, 36 S.Ct. 15, 239 U.S. 14, 60 L.Ed. 120, dismissing error Kansas City v. Stewart, 136 P. 241, 90 Kan. 846, affirmed 140 P. 876, 92 Kan. 406.

(2) Other cases.—Smith v. Indiana, 24 S.Ct. 51, 191 U.S. 138, 48 L.Ed. 125, dismissing appeal 63 N.E. 25, 214, 64 N.E. 18, 158 Ind. 543—25 C.J. p 947 note 21 [a].

Members of state senate who voted against ratification of proposed child labor amendment to Federal Constitution, and who claimed that their votes were sufficient to prevent ratification, had such an interest in mandamus proceeding commenced by them and other legislators questioning validity of the legislative action as to give United States supreme court jurisdiction to review, on certiorari, adverse decision of Kansas supreme court, which had treated the legislators' interest as sufficient to justify it in entertaining and deciding federal questions raised.—Coleman v. Miller, 59 S.Ct. 972, 307 U.S. 433, 83 L.Ed. 1385, 122 A.L.R. 695, affirming 71 P.2d 518, 146 Kan. 390, certiorari granted 58 S.Ct. 758, 303 U.S. 632, 82 L.Ed. 1092.

26. U.S.—Conde v. York, N.Y., 18 S. Ct. 234, 168 U.S. 642, 42 L.Ed. 611.
25 C.J. p 948 note 22.

Executor is entitled to a review of a decision of the supreme court of a state so construing a statute of the United States as to sustain a claim of creditors against the estate which he represents.—Briggs v. Walker, 19 S.Ct. 1, 171 U.S. 466, 43 L.Ed. 243, affirming 43 S.W. 479, 102 Ky. 359, 19 Ky.L. 419.

Expiration of term of office
Federal agent, after expiration of term of office, was without right to complain of judgment against him, or to invoke review by certiorari, and the fact that surety, jointly liable with federal agent for costs, joined in petition for certiorari after expiration of agent's term, did not prevent dismissal.—Davis v. Preston, 50 S. Ct. 171, 280 U.S. 406, 74 L.Ed. 514, dismissing certiorari 16 S.W.2d 117, 118 Tex. 303, certiorari granted 50 S. Ct. 26, 280 U.S. 540, 74 L.Ed. 601, corrected, Com.App., 35 S.W.2d 403, and affirming, Tex.Civ.App., 264 S.W. 331.

27. U.S.—Ocean Ins. Co. v. Polleys, Me., 13 Pet. 157, 10 L.Ed. 105.
25 C.J. p 948 note 23.

United States adversely affected
United States was not precluded from review of judgment denying it priority for debts due it as to securities deposited with state treasurer by insolvent surety company, on ground that it was not adversely affected, because entitled to be paid from surplus, where no order was entered directing payment of surplus to United States after payment of state creditors and it was not clear that surplus would satisfy claim of United States.—U. S. v. Knott, 56 S.Ct. 902, 298 U. S. 544, 80 L.Ed. 1321, 104 A.L.R. 741, reversing Kelly v. Knott, 163 So. 64, 120 Fla. 580, certiorari granted U. S. v. Knott, 56 S.Ct. 498, 297 U.S. 700, 80 L.Ed. 989, certiorari denied Withers

have raised the federal question in the state court.[28] A relator suing in the name of the state and in its behalf, was held not entitled to sue out a writ of error from the supreme court of the United States without the consent of the state.[29]

§ 274. Raising Federal Question in State Court

To warrant a review by the United States supreme court of a decision of a state court it is ordinarily essential that a federal question have been raised in the state court.

It is not sufficient to warrant a review by the United States supreme court of a judgment of a state court that a federal question might have arisen in the case,[30] or that it was intended to raise it,[31] but ordinarily it is essential that such a question should have been actually raised in the state court.[32] Whether the federal question was in fact raised in the state court is itself a federal question to be resolved by the supreme court by an examination of the record.[33]

Showing that question is a federal one. A contention in the state court that there has been a violation of a constitutional guaranty which is contained in both the state and the federal constitutions does not raise a federal question where no reference to the federal Constitution is made, it being presumed in such case that the state constitution was intended.[34]

A party who has raised but one federal question in the state courts cannot, in the United States supreme court, argue, in addition thereto, another, not connected with it, not raised in any of the courts below, and not necessarily arising on the record, although the record discloses facts on which the question might have been raised.[35]

Time and mode of presenting question. Where a federal question has been actually considered and decided by the state court of last resort, the time at which or the method by which such question was presented is immaterial as bearing on the right to a review in the United States supreme court.[36]

v. Knott, 56 S.Ct. 498, 297 U.S. 706, 80 L.Ed. 993, modified Withers v. Knott, 168 So. 416, 127 Fla. 241, mandate conformed to 168 So. 416, 127 Fla. 241.

28. U.S.—Puget Sound Power & Light Co. v. King County, 44 S.Ct. 261, 264 U.S. 22, 68 L.Ed. 541, affirming Puget Sound Power & Light Co. v. City of Seattle, 201 P. 449, 117 Wash. 351, and 207 P. 689, 117 Wash. 351.

25 C.J. p 948 note 24.

Necessity for raising federal question in state court generally see infra § 274.

29. U.S.—Wisconsin v. Frear, 34 S. Ct. 272, 231 U.S. 616, 58 L.Ed. 400, dismissing error 134 N.W. 673, 135 N.W. 164, 148 Wis. 456, L.R.A., 1915B, 569, Ann.Cas.1913A, 1147.

30. U.S.—Osborne v. Clark, 27 S.Ct. 319, 204 U.S. 565, 51 L.Ed. 619, dismissing appeal 80 S.W. 64, 112 Tenn. 483.

25 C.J. p 948 note 26.

31. U.S.—Matheson v. Branch of Bank of State of Alabama at Mobile, Ala., 7 How. 260, 12 L.Ed. 692.

32. U.S.—Great Northern Ry. Co. v. Leonidas, 59 S.Ct. 51, 305 U.S. 1, 83 L.Ed. 3, affirming Leonidas v. Great Northern R. Co., 72 P.2d 1007, 105 Mont. 302, certiorari granted Great Northern Ry. Co. v. Leonidas, 58 S. Ct. 759, 303 U.S. 632, 82 L.Ed. 1092—White River Lumber Co. v. State of Arkansas ex rel. Applegate, 49 S.Ct. 457, 279 U.S. 692, 73 L.Ed. 903, affirming White River Lumber Co. v. State, 2 S.W.2d 25, 175 Ark. 956, and rehearing denied White River Lumber Co. v. State of Arkansas ex rel. Applegate, 50 S.Ct. 78—Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 48 S.Ct. 291, 276 U.S. 71, 72 L.Ed. 473, affirming Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n, 271 S.W. 695, 208 Ky. 643—People of State of New York ex rel. Rosevale Realty Co. v. Kleinert, 45 S.Ct. 618, 268 U.S. 646, 69 L.Ed. 1135, dismissing error 143 N.E. 750, 237 N.Y. 580, affirming People ex rel. Rosevale Realty Co. v. Kleinert, 200 N.Y.S. 942, 206 App.Div. 712, and 201 N.Y.S. 935, 207 App.Div. 828.

Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.

25 C.J. p 948 notes 28, 29.

Decision of federal question by state court see supra § 244.

Persons entitled to review see supra § 273.

Record showing federal question raised in state court see infra § 279.

Scope and extent of review see infra § 280.

Allowance of writ of error (now appeal under statute, 28 U.S.C.A. § 861a) by the highest court of the state did not cure the omission to raise the federal question in the state court.—Hiawassee River Power Co. v. Carolina-Tennessee Power Co., N. C., 40 S.Ct. 330, 252 U.S. 341, 64 L.Ed. 600—25 C.J. p 953 note 46.

Merely setting up a general right under a federal statute did not present a case within the category of "an authority exercised under the United States," where the validity of the statute was not in question.—Telluride Power Transmission Co. v. Rio Grande Western R. Co., 20 S.Ct. 245, 175 U.S. 639, 44 L.Ed. 305, dismissing error 51 P. 146, 16 Utah 125.

33. U.S.—Lovell v. City of Griffin, Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed. 949, reversing Lovell v. City of Griffin, 191 S.E. 152, 55 Ga.App. 609, vacated 197 S.E. 347, 57 Ga. App. 901, conformed to 197 S.E. 347, 57 Ga.App. 901—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 56 S.Ct. 31, 296 U.S. 113, 80 L.Ed. 91, reversing Commonwealth v. Schuylkill Trust Co., 173 A. 309, 315 Pa. 429—Carter v. State of Texas, Tex., 20 S.Ct. 687, 177 U.S. 442, 44 L.Ed. 839.

34. U.S.—Gibbes v. Zimmerman, S. C., 54 S.Ct. 140, 290 U.S. 326, 78 L.Ed. 342.

25 C.J. p 949 note 30.

35. U.S.—Keokuk & H. Bridge Co. v. People of State of Illinois, 20 S.Ct. 205, 175 U.S. 626, 44 L.Ed. 299, affirming 52 N.E. 117, 176 Ill. 267—Dewey v. City of Des Moines, 19 S.Ct. 379, 173 U.S. 193, 43 L.Ed. 665, reversing 70 N.W. 605, 101 Iowa 416.

36. U.S.—Herndon v. Lowry, 57 S. Ct. 732, 301 U.S. 242, 81 L.Ed. 1066, reversing Lowry v. Herndon, 186 S. E. 429, 182 Ga. 582, vacated 192 S. E. 387, 184 Ga. 613—Nickey v. State of Mississippi, 54 S.Ct. 743, 292 U.S. 393, 78 L.Ed. 1323, affirming Nickey v. State, 145 So. 630, 167 Miss. 650, suggestion of error overruled 146 So. 859, 167 Miss. 650, motion overruled 147 So. 324, 167 Miss. 650.

25 C.J. p 949 note 33.

Assignment of error in state supreme court, complaining of the re-

However, in order for a right of review to be fairly predicable on the refusal or omission of the state court to decide a federal question, the question must have been raised and presented at such time and in such manner as to bring it properly before the state court for consideration.[37] Where a party to an action in a state court specially claims a right under the Constitution or laws of the United States, the decision of the state court as to the sufficiency of the allegations to present such claim is not necessarily conclusive on the supreme court,[38] although it is well established that the decision of the state court as to whether or not the claim involving a federal right has been properly asserted in such court is binding on the supreme court when it is clear that such decision was rendered in good faith and not in a spirit of evasion for the purpose of defeating the federal right claimed.[39]

Presenting question in trial court. The reviewing power of the supreme court of the United States being confined to the judgments and decrees of the highest state court in which a decision could be had, see supra § 239, it follows that in the great majority of cases the decision which was brought up for review is one rendered on appeal from, or writ of error to, a lower court of the state, and as it is a rule of almost universal application that questions not raised in the trial court will not be considered on appeal, one who desires to save his right of review by the United States supreme court must raise the federal question on which he relies in the trial court,[40] and one who, on appeal or writ of error to a state court, raises a federal question not set up in the trial court, cannot ask a review by the supreme court of the United States in case the state appellate court declines or omits to consider such question.[41] If, however, a federal question is raised in the highest court of the state and there considered and passed on, the right of review by the United States supreme court exists, regardless of whether such question was raised in the trial court.[42]

fusal of the chancery court to hold that, whether an act of congress or the laws of Mississippi governed a sale under execution, the validity of the execution was a federal question, because the state statutes, if applicable, became federal statutes by adoption, under Rev.St. § 916, sufficiently raised the question whether § 916 conferred validity on the sale to authorize review of that question in the federal supreme court.—Yazoo & M. V. R. Co. v. City of Clarksdale, 42 S.Ct. 27, 257 U.S. 10, 66 L.Ed. 104, reversing, Miss., 81 So. 178.

37. U.S.—Herndon v. State of Georgia, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530, dismissing appeal Herndon v. State, 174 S.E. 597, 178 Ga. 832, rehearing denied 176 S.E. 620, 179 Ga. 597, and rehearing denied Herndon v. State of Georgia, 56 S. Ct. 82, 296 U.S. 661, 80 L.Ed. 471.
25 C.J. p 950 note 34.

Constitutional questions waived by appeal to intermediate court

Under 3 Starr & C.St.Annot.Ill. p 3114 par 89, where case involves constitutional question, it must be taken on error or appeal to the supreme court, and, if taken to the appellate court on other grounds, the constitutional questions are waived, and writ of error from United States supreme court to state supreme court did not lie to review decision refusing to hear constitutional questions because of such waiver, whether the constitutional questions involve state or federal Constitution.—Central Union Telephone Co. v. City of Edwardsville, 46 S.Ct. 90, 269 U.S. 190, 70 L. Ed. 229, dismissing error City of Edwardsville v. Central Union Telephone Co., 141 N.E. 206, 309 Ill. 482, affirming City of Edwardsville v. Central Union Telephone Co., 227 Ill. App. 424.

Question should be raised by pleadings

U.S.—Gibbes v. Zimmerman, 54 S.Ct. 140, 290 U.S. 326, 78 L.Ed. 342.
Ohio.—Stricker v. Braden, 32 Ohio N. P.,N.S., 209.
25 C.J. p 950 note 34 [b].

Validity of state statute

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."—People of State of New York ex rel. Bryant v. Zimmerman, 49 S.Ct. 61, 278 U.S. 63, 73 L.Ed. 184, 62 A.L.R. 785, affirming 150 N.E. 497, 241 N.Y. 405, 43 A.L.R. 909, affirming 210 N.Y.S. 269, 213 App.Div. 414, affirming People ex rel. Bryant v. Sheriff of Erie County, 206 N.Y.S. 533, 123 Misc. 859.

Averments held sufficient

(1) Where Georgia executors, in their statement of claim to stock as against New York administrator with will annexed, alleged in Delaware interpleader proceedings that Georgia courts had determined that testatrix was domiciled in Georgia, pleaded and proved exemplified copies of probate record of Georgia courts and applicable Georgia statutes governing domiciliary probate, and prayed issuance to them of new certificates of stock relying on the full faith and credit clause of the federal Constitution, the pleading and trial contention adequately raised the constitutional question.—Riley v. New York Trust Co., Del., 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885, affirming New York Trust Co. v. Riley, Del., 16 A. 2d 772.

(2) Other cases.—Bellingham Bay & B. C. R. Co. v. City of New Whatcom, 19 S.Ct. 205, 172 U.S. 314, 43 L.Ed. 460, affirming 47 P. 236, 16 Wash. 131—25 C.J. p 950 note 34 [J].

38. U.S.—Covington & L. Turnpike Road Co. v. Sandford, Ky., 17 S. Ct. 198, 164 U.S. 578, 41 L.Ed. 560.

39. U.S.—Hartford L. Ins. Co. v. Johnson, Mo., 39 S.Ct. 336, 249 U.S. 490, 63 L.Ed. 770.
25 C.J. p 951 note 36.

40. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.
25 C.J. p 951 note 39.

41. U.S.—Pennsylvania R. Co. v. Illinois Brick Co., 56 S.Ct. 556, 297 U.S. 447, 80 L.Ed. 796, rehearing denied 56 S.Ct. 666, 297 U.S. 728, 80 L.Ed. 1011.
25 C.J. p 951 note 40.

42. U.S.—Whitfield v. State of Ohio, 56 S.Ct. 532, 297 U.S. 431, 80 L.Ed. 778, affirming 196 N.E. 164, 129 Ohio St. 543, dismissing error 197 N.E. 605, 49 Ohio App. 530, certiorari granted Whitfield v. State of Ohio, 56 S.Ct. 141, 296 U.S. 561, 80 L.Ed. 395—Home Ins. Co. v. Dick, 50 S.Ct. 338, 281 U.S. 397, 74 L.Ed. 926, reversing, Tex.Com.App., 15 S. W.2d 1028, affirming, Civ.App., 8 S.

Question raised on petition for rehearing. It is not sufficient to raise the federal question for the first time in a petition for rehearing after judgment has been rendered by the state court,[43] unless the court entertains the motion and decides the question[44] or unless the first opportunity to present the question was on the motion for the rehearing.[45]

Question raised after decision and remand. Where a state court has decided a case on appeal and remanded it, a federal question raised for the first time after such decision, but not considered on a second appeal, does not warrant a review by the supreme court of the United States.[46]

Question raised on petition for writ of error. It was held that no jurisdiction to review existed where the federal question was raised for the first time in the petition for a writ of error after final judgment in the state court.[47]

§ 275. Parties

General rules have been applied in determining proper parties on review of a decision of a state court by the supreme court of the United States.

General rules have been applied in determining

W.2d 354—Hill v. Smith, 43 S.Ct. 219, 260 U.S. 592, 67 L.Ed. 419, affirming Smith v. Hill, 122 N.E. 310, 232 Mass. 188, 2 A.L.R. 1667—Chicago, R. I. & P. Ry. Co. v. Perry, 42 S.Ct. 524, 259 U.S. 548, 66 L.Ed. 1056, affirming Dickinson v. Perry, 181 P. 504, 75 Okl. 25.

25 C.J. p 903 note 52 [a], p 952 note 41.

Effect of statute

Jud.Code § 237, as amended by Act Sept. 6, 1916, and by Act Febr. 17, 1922, Comp.St.Annot.Suppl. 1923, § 1214, providing that in any suit involving the validity of a contract, wherein it is claimed that a change in the rule of law by the state court would be repugnant to the Constitution of the United States, the supreme court shall, on writ of error, reëxamine the judgment, if said claim is made in the state court at any time before final judgment, did not add to the general appellate jurisdiction of the supreme court, but merely authorized review where a federal question has been raised on petition for rehearing, although court denied petition without opinion.—Tidal Oil Co. v. Flanagan, 44 S.Ct. 197, 263 U.S. 444, 68 L.Ed. 382, dismissing error 209 P. 729, 87 Okl. 231.

43. U.S.—Herndon v. State of Georgia, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530, dismissing appeal Herndon v. State, 174 S.E. 597, 178 Ga. 832, rehearing denied 176 S.E. 620, 179 Ga. 597, and rehearing denied Herndon v. State of Georgia, 56 S.Ct. 82, 296 U.S. 661, 80 L.Ed. 471—McGarrity v. Delaware River Bridge Commission, 54 S.Ct. 565, 292 U.S. 19, 78 L.Ed. 1095, dismissing appeal McGarrity v. Commonwealth, 166 A. 895, 311 Pa. 436, and rehearing denied McGarrity v. Delaware River Bridge Commission, 54 S.Ct. 771, 292 U.S. 607, 78 L.Ed. 1468—American Surety Co. v. Baldwin, 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298, dismissing certiorari Baldwin v. Anderson, 299 P. 341, 50 Idaho 606, certiorari granted American Surety Co. of New York v. Baldwin, 52 S.Ct. 499, 286 U.S. 536, 76 L.Ed. 1275—Baldwin v. American Surety Co., 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298, reversing, C.C.A., American Surety Co. of New York v. Baldwin, 55 F.2d 555, reversing, D.C., 51 F.2d 596, and certiorari granted Baldwin v. American Surety Co. of New York, 52 S.Ct. 500, 286 U.S. 537, 76 L.Ed. 1276—Rooker v. Fidelity Trust Co., 43 S.Ct. 288, 261 U.S. 114, 67 L.Ed. 556, dismissing error 131 N.E. 769, 191 Ind. 141—Citizens' Nat. Bank of Cincinnati v. Durr, 42 S.Ct. 15, 257 U.S. 99, 66 L.Ed. 149, affirming Anderson v. Durr, 126 N.E. 57, 100 Ohio St. 251—Wall v. Chesapeake & O. Ry. Co., 41 S.Ct. 402, 256 U.S. 125, 65 L.Ed. 856, dismissing error 125 N.E. 20, 290 Ill. 227, reversing 210 Ill.App. 136.

25 C.J. p 952 note 42.

44. U.S.—Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254, affirming Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508—Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa., 52 S.Ct. 48, 284 U.S. 23, 76 L.Ed. 146, reversing and remanding causes Greene County Coal Tax Appeals, 152 A. 755, 302 Pa. 179, certiorari granted Cumberland Coal Co. v. Board of Revision of Tax Assessments, 51 S.Ct. 350, 283 U.S. 812, 75 L.Ed. 1430—Fleming v. Fleming, 44 S.Ct. 246, 264 U.S. 29, 68 L.Ed. 547, dismissing error 174 N.W. 946, 194 Iowa 71, 180 N.W. 206, 194 Iowa, 71 and 184 N.W. 296, 194 Iowa 71.

25 C.J. p 952 note 43.

45. U.S.—Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 145, 287 U.S. 358, 77 L.Ed. 360, 85 A.L.R. 254, affirming Sunburst Oil & Refining Co. v. Great Northern Ry. Co., 7 P.2d 927, 91 Mont. 216, certiorari granted Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 53 S.Ct. 7, 287 U.S. 580, 77 L.Ed. 508—Brinkerhoff-Faris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, reversing 19 S.W.2d 746, 323 Mo. 180, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 648, revoked 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, certiorari granted 50 S. Ct. 152, 280 U.S. 550, 74 L.Ed. 608, conformed to 42 S.W.2d 23, 328 Mo. 836—State of Missouri ex rel. Missouri Ins. Co. v. Gehner, 50 S.Ct. 326, 281 U.S. 313, 74 L.Ed. 870, reversing, Mo., 15 S.W.2d 334.

Presentation held not timely

In prosecution under statute for attempt to incite insurrection, where trial court instructed jury to acquit unless evidence indicated that defendant's advocacy would be acted on immediately, and state supreme court ruled that conviction was proper if defendant intended insurrection to happen merely within reasonable time, contention first raised on motion for rehearing that statute as construed by state supreme court violated due process clause of Fourteenth Amendment was not timely presented, requiring dismissal of appeal, defendant being bound to anticipate probability of ruling similar to that made over one year previously in another case construing same statute, and holding that state may suppress threatened danger in its incipiency.—Herndon v. State of Georgia, 55 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530, dismissing appeal Herndon v. State, 174 S.E. 597, 178 Ga. 832, rehearing denied 176 S.E. 620, 179 Ga. 597, and rehearing denied Herndon v. State of Georgia, 56 S.Ct. 82, 296 U.S. 661, 80 L.Ed. 471.

46. U.S.—Yazoo & M. V. R. Co. v. Adams, 21 S.Ct. 240, 180 U.S. 1, 45 L.Ed. 395, reversing 24 So. 200, 317, 28 So. 956, 77 Miss. 194, 60 L.R.A. 33, and rehearing denied 21 S.Ct. 729, 181 U.S. 580, 45 L.Ed. 1011.

25 C.J. p 952 note 44.

47. U.S.—Hiawassee River Power Co. v. Carolina-Tennessee Power Co., N.C., 40 S.Ct. 330, 252 U.S. 341, 64 L.Ed. 600.

25 C.J. p 952 note 45.

proper parties on review of a judgment of a state court by the United States supreme court.[48]

Joint or separate appeal. Where a joint judgment has been rendered against two or more parties in the state court, one of them, alone, is not entitled to a review by the United States supreme court unless there has been a proper summons and severance.[49]

Addition or substitution of parties. After the expiration of the period within which an appeal to the supreme court must be taken, a person will not be permitted to become a party to the appeal.[50] Present members of a state board of election commissioners which, under the statute, is a continuing board, might, it was held, be substituted as plaintiffs in error on a writ to review a judgment of a state court against their predecessors,[51] but where an official petitions for a writ of certiorari after the time for application has expired his successor in office may not be substituted.[52]

§ 276. Proceedings for Review in General

Proceedings for review of decisions of the United States supreme court are regulated by statute and rules of the supreme court.

An appeal to the United States supreme court is allowed as of right where the conditions prescribed by the statute are fulfilled.[53] Whether the proper mode of review is by appeal or certiorari has been discussed supra § 272. An application for an appeal must have been duly made within the time prescribed by statute after entry of the judgment or decree in the state court.[54] The application for, and allowance of, certiorari are discussed infra § 277.

§ 277. Allowance and Issuance of Certiorari

An application for a writ of certiorari to review the judgment of a state court must be made in the manner and within the time prescribed by statute and rules of the United States supreme court.

The application for the writ is made to the United States supreme court.[55] The petition must afford adequate information concerning the record and essential facts and when the case on argument differs radically from the one tendered by the petition on which certiorari was granted the writ will be dismissed.[56] The writ is granted or refused in the exercise of the court's discretion.[57] The court may grant the writ because of the nature and importance of the question raised.[58]

48. **State**

(1) State is a proper party defendant in a writ of error (now appeal) sued out to review the judgment of a state court suspending collection of tolls until the roads were properly repaired, although the state was not a party to the proceeding leading up to the judgment.—Norfolk & S. Turnpike Co. v. Virginia, Va., 32 S.Ct. 828, 225 U.S. 264, 56 L.Ed. 1082.

(2) The United States supreme court did not lack jurisdiction to determine validity and effect of river compact between Colorado and New Mexico in suit by ditch company for a mandatory injunction against Colorado state engineer on ground that Colorado and New Mexico were not parties to suit and could not be made parties.—Hinderlider v. La Plata River & Cherry Creek Ditch Co., 58 S.Ct. 803, 304 U.S. 92, 82 L.Ed. 1202, reversing 70 P.2d 849, 101 Colo. 73, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433.

Persons entitled to review see supra § 273.

49. U.S.—Morganthau v. Stephens, 55 S.Ct. 542, 294 U.S. 720, 79 L.Ed. 1252, denying certiorari Stephens v. Davis, 36 P.2d 316, 140 Kan. 220, time extended Morganthau v. Stephens, 55 S.Ct. 652—Hartford Accident & Indemnity Co. v. Bunn, 52 S.Ct. 354, 285 U.S. 169, 76 L.Ed. 685, dismissing appeal Hartford Accident & Indemnity Co. v. Natchez Inv. Co., 132 So. 535, 161 Miss. 198, suggestion of error overruled 135 So. 497, 161 Miss. 198, motion denied Hartford Accident & Indemnity Co. v. Bunn, 52 S.Ct. 456, 76 L.Ed. 1301.

Summons and severance generally see Appeal and Error § 394.

Form of judgment as controlling

State appellate court's judgment against appellant and surety in appeal bond being joint in form, supreme court could not treat judgment as several, as regards right of separate appeal.—Hartford Accident & Indemnity Co. v. Bunn, supra.

50. U.S.—Hartford Accident & Indemnity Co. v. Bunn, supra.

51. U.S.—Marshall v. Dye, 34 S.Ct. 92, 231 U.S. 250, 58 L.Ed. 206, dismissing appeal 99 N.E. 1, 178 Ind. 336, Ann.Cas.1915C 200.

52. U.S.—Davis v. Preston, 50 S.Ct. 171, 280 U.S. 406, 74 L.Ed. 514, dismissing certiorari 16 S.W.2d 117, 118 Tex. 303, certiorari granted 50 S.Ct. 26, 280 U.S. 540, 74 L.Ed. 601, corrected, Tex.Com.App., 35 S.W.2d 403, and affirming, Civ. App., 264 S.W. 331.

53. U.S.—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

54. U.S.—Hartford Accident & Indemnity Co. v. Bunn, 52 S.Ct. 354, 285 U.S. 169, 76 L.Ed. 685, dismissing appeal Hartford Accident & Indemnity Co. v. Natchez Inv. Co., 132 So. 535, 161 Miss. 198, suggestion of error overruled 135 So. 497, 161 Miss. 198, motion denied Hartford Accident & Indemnity Co. v. Bunn, 52 S.Ct. 456, 76 L.Ed. 1301.

55. **Application to state court** cannot be made.—Seaboard Air Line R. Co. v. Horton, 96 S.E. 954, 176 N.C. 115.

56. U.S.—Erie R. Co. v. Kirkendall, Ohio, 45 S.Ct. 33, 266 U.S. 185, 69 L.Ed. 236.

57. U.S.—Betts v. Brady, Md., 62 S.Ct. 1252, 316 U.S. 455, 86 L.Ed. 1595—Ireland v. Woods, 38 S.Ct. 319, 246 U.S. 323, 62 L.Ed. 745, dismissing error 117 N.E. 1081, 221 N.Y. 600, affirming 163 N.Y.S. 991, 177 App.Div. 1—Philadelphia & Reading Coal & Iron Co. v. Gilbert, 38 S.Ct. 58, 245 U.S. 162, 62 L.Ed. 221, dismissing error Gilbert v. Philadelphia & Reading Coal & Iron Co., 162 N.Y.S. 1121, 176 App. Div. 889.

58. U.S.—Miles v. Illinois Cent. R. Co., Tenn., 62 S.Ct. 827, 315 U.S. 698, 86 L.Ed. 1129, certiorari granted 62 S.Ct. 177, 314 U.S. 602, 86 L.Ed. 484, rehearing denied 62 S.Ct. 1037, 316 U.S. 708, 86 L.Ed. 1775—Riley v. New York Trust Co., 62 S.Ct. 608, 315 U.S. 343, 86 L.Ed. 885, affirming New York Trust Co. v. Riley, Del., 16 A.2d 772—U. S. v. Pink, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 795 reversing 32 N.E.2d 552, 284 N.Y. 555, affirming 20 N.Y.S.2d 665, 259 App.Div. 871, appeal granted 20 N.Y.S.2d 983, 259

Time for application. Under the statute, 28 U.S.C.A. § 350, a writ of certiorari must be applied for within three months after entry of the judgment or decree which it is sought to have reviewed, or the petition therefor cannot be entertained.[59] The running of the time within which application must be made is suspended by the seasonable filing in the state court of a petition for rehearing.[60] However, the period begins to run from the time of the denial or other final disposition of such petition,[61] and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing.[62]

To what court directed. A writ of certiorari should be directed to the state court which holds the proceedings as part of its own records and exercises judicial power over them.[63] Where the highest court of the state has declined to review the judgment of an inferior or intermediate court, the writ is properly directed to the inferior or intermediate court, as the case may be.[64]

Stay pending, and after granting, application for writ. Under the statute, 28 U.S.C.A. § 350, execution and enforcement of a judgment of a state court subject to review in the United States supreme court by certiorari may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari.[65] By its very terms the statute is limited to cases in which the judgment is subject to review by the supreme court on certiorari.[66] The statute permits a stay to be granted by a judge of the court rendering the judgment or decree as well as by a justice of the United States supreme court.[67] The application should first be addressed to one of the justices of the state court.[68]

App.Div. 886, certiorari granted 61 S.Ct. 960, 313 U.S. 553, 85 L.Ed. 1516—Nelson v. Sears, Roebuck & Co., 61 S.Ct. 586, 312 U.S. 359, 85 L.Ed. 888, 132 A.L.R. 475, reversing Sears, Roebuck & Co. v. Roddewig, 292 N.W. 130, 228 Iowa 1273, certiorari granted Roddewig v. Sears, Roebuck & Co., 61 S.Ct. 34, 311 U.S. 630, 85 L.Ed. 401, rehearing denied Nelson v. Sears, Roebuck & Co., 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145, mandate conformed to Sears, Roebuck & Co. v. Nelson, 299 N.W. 398, 230 Iowa 936.

59. U.S.—Gypsy Oil Co. v. Escoe, 48 S.Ct. 112, 275 U.S. 498, 72 L. Ed. 393, denying certiorari 258 P. 906, 126 Okl. 3.
25 C.J. p 953 note 50.

From date highest court of state declines review

Where the Louisiana supreme court, on an application for a writ of certiorari in a case over which it had discretionary jurisdiction, refused the writ, the time for applying to the United States supreme court for writ of certiorari ran from the date the writ of certiorari was refused by the Louisiana supreme court and not from the date of the decision of the Louisiana court of appeal.—American Ry. Express Co. v. Levee, La., 44 S.Ct. 11, 263 U.S. 19, 68 L.Ed. 140.

60. U.S.—Gypsy Oil Co. v. Escoe, 48 S.Ct. 112, 275 U.S. 498, 72 L.Ed. 393, denying certiorari 258 P. 906, 126 Okl. 3.

61. U.S.—Citizens' Bank of Michigan City, Ind., v. Opperman, 39 S.Ct. 330, 249 U.S. 448, 63 L.Ed. 701, dismissing certiorari 115 N.E. 55, 188 Ind. 212.

62. U.S.—Gypsy Oil Co. v. Escoe, 48 S.Ct. 112, 275 U.S. 498, 72 L.Ed. 393, denying certiorari 258 P. 906, 126 Okl. 3.

63. U.S.—Van Huffel v. Harkelrode, 52 S.Ct. 115, 284 U.S. 225, 76 L. Ed. 256, 78 A.L.R. 453, reversing 177 N.E. 587, 123 Ohio St. 674, certiorari granted 51 S.Ct. 650, 283 U.S. 817, 75 L.Ed. 1433.

Writ properly directed to superior court of Massachusetts where judgment of superior court was entered pursuant to rescript from Massachusetts supreme judicial court.—Central New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 358, 279 U.S. 415, 73 L.Ed. 770, affirming New York Cent. R. Co. v. Central New England Ry. Co., 162 N.E. 324, 264 Mass. 128, certiorari granted New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 176, 278 U.S. 596, 73 L.Ed. 526—Myers v. International Trust Co., 47 S.Ct. 372, 273 U.S. 380, 71 L.Ed. 692, affirming International Trust Co. v. Myers, 147 N.E. 591, 252 Mass. 94, certiorari granted Myers v. International Trust Co., 45 S.Ct. 640, 268 U.S. 686, 69 L.Ed. 1157—Davis v. L. L. Cohen & Co., 45 S.Ct. 633, 268 U. S. 638, 69 L.Ed. 1129, reversing L. L. Cohen & Co. v. Davis, 142 N.E. 75, 247 Mass. 259.

64. U.S.—Adam v. Saenger, 58 S. Ct. 454, 303 U.S. 59, 82 L.Ed. 649, reversing, Tex.Civ.App., 101 S W.2d 1046, certiorari granted 58 S.Ct. 668, 82 L.Ed. 515, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123, mandate conformed to, Civ.App., 119 S.W.2d 687, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed 1511—Western Union Telegraph Co v. Priester, 48 S.Ct. 234, 276 U. S. 252, 72 L.Ed. 555, reversing 111 So. 199, 21 Ala.App. 587, certiorari granted 47 S.Ct. 574, 274 U.S. 727, 71 L.Ed. 1315, dismissing certiorari 111 So. 200, 215 Ala. 435, certiorari granted 47 S.Ct. 576, 274 U.S. 727, 71 L.Ed. 1135—American Ry. Express Co. v. Levee, La., 44 S.Ct. 11, 263 U.S. 19, 68 L.Ed. 140.
La.—State ex rel. Muslow v. Louisiana Oil Refining Corporation, App., 177 So. 476, denying motion 176 So. 686, affirmed Arkansas Fuel Oil Co. v. State of Louisiana ex rel. Muslow, 58 S.Ct. 832, 304 U.S. 197, 82 L.Ed. 1287, rehearing denied 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549.
Status of court rendering judgment see supra § 239.

65. La.—State ex rel. Muslow v. Louisiana Oil Refining Corporation, supra.

66. Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.
Decisions of state courts reviewable by certiorari see supra § 272.

67. **State court which may order stay**

(1) Where defendant's application to state supreme court for review of judgment of court of appeal was denied with statement that judgment of court of appeal upholding constitutionality of act was correct, court of appeal thereafter had jurisdiction to issue order staying execution of judgment to permit defendant to prepare appeal to supreme court of United States on ground that act was repugnant to federal Constitution.—State ex rel. Muslow v. Louisiana Oil Refining Corporation, La.App., 177 So. 476, denying motion 176 So. 686, affirmed Arkansas Fuel Oil Co. v. State of Louisiana ex rel. Muslow, 58 S.Ct. 832, 304 U.S. 197, 82 L.Ed. 1287, rehearing denied 58 S.Ct. 1044, 304 U. S. 589, 82 L.Ed. 1549.

(2) State court to which writ of certiorari directed see supra notes 63, 64.

68. U.S.—Magnum Import Co. v.

The suspension by the state court of its decree is a matter wholly within its discretion.[69] If it is made to appear that the case is one that would likely be taken up on certiorari and one in which the balance of convenience requires a suspension of its decree and a withholding of its mandate, the stay order should be granted.[70] If the state court refuses to stay its judgment, the United States supreme court will require an extraordinary showing before it will grant a stay of the decree pending application for certiorari and even after the supreme court has granted a writ of certiorari, it requires a clear case and decided balance of convenience before it will grant a stay.[71]

Effect of denying writ. The denial of a writ of certiorari by the supreme court to review the judgment of a state court imparts no expression on the merits of the case; affirmance of the judgment is not inferable from the denial of the writ.[72]

§ 278. Allowance and Issuance of Writ of Error

The writ of error has been abolished, but the various statutes regulating writ of error are applicable to appeal which is substituted for the writ.

The writ of error has been abolished by statute, Act of January 31, 1928, c 14 § 1, 28 U.S.C.A. § 861a; Act of January 31, 1928, c 14 § 2, as amended Act of April 26, 1928, c 440 § 861b, but the various statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, are applicable to the appeal which is substituted for the writ of error.

A writ of error was allowed either by a justice of the supreme court of the United States or by the chief justice or judge or chancellor of the state court whose judgment it was sought to review.[73] An application for the writ was not allowable as a matter of right, but its allowance was determined from an examination of the record;[74] and if the decision of the state court was plainly right it was proper to deny the writ.[75]

Assignments of error. Assignments of error which simply alleged in various forms that the state court erred in its decision of the cause presented no federal question for consideration by the supreme court.[76] Where the record of a case in the state court was properly brought on writ of error be-

Houbigant, Inc., 43 S.Ct. 531, 262 U.S. 159, 67 L.Ed. 922.

Fla.—Williams v. Keyes, 186 So. 250, 267, 135 Fla. 769.

69. Fla.—Williams v. Keyes, supra.

"It involves no disrespect for the Supreme Court of the United States for the Supreme Court of a state to refuse to withhold its mandate or to suspend the operation of its judgment pending application for certiorari."—Williams v. Keyes, supra.

70. Fla.—Williams v. Keyes, supra.

Interpretation of state statute as affected by state constitution

The balance of convenience does not require suspension of state supreme court's judgment, on which writ of ouster in quo warranto proceeding was predicated, to enable respondents to apply to federal supreme court for writ of certiorari to review judgment, where ultimate question was interpretation of state statute as affected by section of state constitution repeatedly construed as authorizing thing complained of before respondents took office.—State ex rel. Gibbs v. Couch, 190 So. 818, 139 Fla. 709.

Security for stay

In the discretion of the court the stay may be granted without giving security, especially where the judgment is otherwise secured.—State ex rel. Muslow v. Louisiana Oil Refining Corporation, La.App., 177 So. 476, denying motion 176 So. 686, affirmed Arkansas Fuel Oil Co. v. State of Louisiana ex rel. Muslow, 58 S.Ct. 832, 304 U.S. 197, 82 L.Ed. 1287, rehearing denied 58 S.Ct. 1044, 304 U. S. 589, 82 L.Ed. 1549.

Vacation of order staying execution

An order staying execution of judgment to permit defendant to perfect appeal to supreme court of United States on ground that act, validity of which was upheld by court of appeal, was repugnant to federal Constitution, would not be vacated on ground that no federal question was shown by pleadings, since such issue was premature.—State ex rel. Muslow v. Louisiana Oil Refining Corporation, supra.

71. U.S.—Magnum Import Co. v. Houbigant, Inc., 43 S.Ct. 531, 262 U.S. 159, 67 L.Ed. 922.

Fla.—Williams v. Keyes, 186 So. 250, 135 Fla. 769.

72. Conn.—New York, N. H. & H. R. Co. v. California Fruit Growers Exchange, 5 A.2d 353, 125 Conn. 241, certiorari denied California Fruit Growers Exchange v. New York, N. H. & H. R. Co., 60 S.Ct. 79, 308 U.S. 567, 84 L.Ed. 476.

However, it has been stated that, while the denial does not mean that the supreme court approved of the opinion, it does mean that the decision was approved.—Bartosik v. Chicago River & Indiana R. Co., 266 Ill.App. 28, certiorari denied 53 S.Ct. 401, 288 U.S. 609, 77 L.Ed. 983.

Further, it has been said that where the federal question involved was before the supreme court on the petition for the writ the denial of the writ would appear to be conclusive in view of Supreme Court Rules, rule 38.—Campbell River Mills Co. v. Chicago, M., St. P. & P. R. Co., D. C.Wash., 42 F.2d 775, affirmed, C.C.A., Chicago, M. St. P. & P. R. Co. v. Campbell River Mills Co., 53 F.2d 69, certiorari denied 52 S.Ct. 310, 285 U.S. 536, 76 L.Ed. 930.

Judgment remains undisturbed on federal supreme court's dismissal of certiorari writ.—Ætna Ins. Co. v. Hyde, 34 S.W.2d 85, 327 Mo. 115.

Effect of denial of certiorari to circuit court of appeals see supra § 204.

73. U.S.—Butler v. Gage, Colo., 11 S.Ct. 235, 138 U.S. 52, 34 L.Ed. 869.

25 C.J. p 953 note 53—3 C.J. p 1081 note 14.

74. U.S.—Twitchell v. Commonwealth of Pennsylvania, Pa., 7 Wall. 321, 19 L.Ed. 223.

Cal.—Greely v. Townsend, 25 Cal. 604.

75. U.S.—Ex parte Spies, Ill., 8 S. Ct. 21, 123 U.S. 131, 31 L.Ed. 80.

76. U.S.—Stickney v. Kelsey, N.Y., 28 S.Ct. 508, 209 U.S. 419, 52 L.Ed. 863.

cause it involved the validity of a state statute under the federal constitution, see supra § 272, plaintiff in error could also assign any other ground of error based on an adverse decision on any right, title, privilege, or immunity claimed under federal laws although such assignment could have been made the basis only of a writ of certiorari.[77]

Time for issuing writ. The provision in the United States Revised Statutes that a writ of error from the supreme court to a state court must be brought within two years after the entry of the judgment or decree sought to be reviewed, with a saving clause for persons under disability, was not affected by the Circuit Court of Appeals Act of 1891 or by the Judicial Code, the latter containing nothing on the subject; but in 1916 it was enacted that no writ of error to bring up any cause for review by the supreme court should be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of.[78] Where there was a petition for a rehearing, the time did not begin to run until it was finally disposed of.[79]

To what court directed. A writ of error was directed to the state court which held the proceedings as part of its own records and exercised judicial power over them,[80] which was not necessarily the court that rendered the judgment.[81] If the highest state court had, after judgment, sent its record and judgment in accordance with the law of the state to an inferior court and directed entry of the judgment there, a writ of error could be sent either to the highest court or to the inferior court,[82] but, according to general practice, it was sent in such a case only to the inferior court,[83] and it was unnecessary and inadvisable to direct a writ of error to each court.[84] Where the writ of error was sued out before the highest court had thus remitted its judgment and record to the court below, the writ of error was directed to the former court.[85] If the law required the highest court to retain its records, and they were not in practice sent down to the inferior court, the writ of error could go only to the highest court.[86]

In those states, or in those cases, where the highest court did not have possession of the record, and did not render a judgment, but decided questions certified by the inferior courts, and merely issued a rescript directing the latter what judgment to render, the writ was addressed to the lower court.[87]

Security for costs. A party suing out a writ of error from the supreme court to a state court was required to give security for costs.[88]

77. U.S.—Prudential Ins. Co. of America v. Cheek, 42 S.Ct. 516, 259 U.S. 530, 66 L.Ed. 1044, 27 A.L.R. 27, affirming, Cheek v. Prudential Ins. Co. of America, Mo.App., 223 S.W. 754.

78. U.S.—Puget Sound Power & Light Co. v. King County, 44 S. Ct. 261, 264 U.S. 22, 68 L.Ed. 541, affirming Puget Sound Power & Light Co. v. City of Seattle, 201 P. 449, 117 Wash. 351, and 207 P. 689, 117 Wash. 351—Allen v. Southern Pac. R. Co., 19 S.Ct. 518, 173 U. S. 479, 43 L.Ed. 775, dismissing appeal 44 P. 796, 112 Cal. 455—Cummings v. Jones, La., 104 U.S. 419, 26 L.Ed. 824.

What constituted "judgment"

Under Remington Comp.St.Wash. § 10, relating to "decisions" of the departments of the supreme court of Washington, and § 11, relating to hearings en banc, and providing for the issuance of a "judgment" on the decision of a department after a hearing en banc, such judgment of the court en banc, and not a decision of a department, was the "judgment" referred to in Act Sept. 6, 1916, § 6, Comp.St. § 1228a, requiring a writ of error in the United States supreme court to be taken within three months after entry of "judgment" complained of.—Puget Sound Power & Light Co. v. King County, 44 S.Ct. 261, 264 U.S. 22, 68 L.Ed. 541, affirming Puget Sound Power & Light Co. v. City of Seattle, 201 P. 449, 117 Wash. 351, and 207 P. 689, 117 Wash. 351.

79. U.S.—Northern Pac. R. Co. v. Holmes, Wash., 15 S.Ct. 28, 155 U. S. 137, 39 L.Ed. 99.

Writs sued out before and after rehearing

Where writ of error was sued out while an application for rehearing was pending, and after denial of rehearing, a second writ of error was sued out, plaintiff in error could rely on second writ and the one first taken would be dismissed.—Ohio Public Service Co. v. State of Ohio ex rel. Fritz, 47 S.Ct. 480, 274 U.S. 12, 71 L.Ed. 898, reversing 149 N.E. 129, 113 Ohio St. 325.

80. U.S.—Tumey v. State of Ohio, 47 S.Ct. 437, 273 U.S. 510, 71 L.Ed. 749, 50 A.L.R. 1243, reversing Tumey v. State, 155 N.E. 698, 115 Ohio St. 701—Hodges v. Snyder, 43 S.Ct. 435, 261 U.S. 600, 67 L.Ed. 819, affirming 186 N.W. 867, 45 S.D. 149.
25 C.J. p 953 note 63—3 C.J. p 1206 note 85.

Where highest court of state declined to review

U.S.—Randall v. Board of Com'rs of Tippecanoe County, Ind., 43 S.Ct. 252, 261 U.S. 252, 67 L.Ed. 637, dismissing error 131 N.E. 776, 77 Ind.App. 320.
25 C.J. p 953 note 63 [a].

81. U.S.—Webster v. Reid, Iowa, 11 How. 437, 13 L.Ed. 761.

82. U.S.—Atherton v. Fowler, Cal., 91 U.S. 143, 23 L.Ed. 265.
S.D.—Simonson v. Monson, 153 N.W. 1020, 36 S.D. 245.
3 C.J. p 1206 note 86.

83. U.S.—Hodges v. Snyder, 43 S. Ct. 435, 261 U.S. 600, 67 L.Ed. 819, affirming 186 N.W. 867, 45 S.D. 149.
25 C.J. p 954 note 66.

84. U.S.—Denver & R. G. R. Co. v. City and County of Denver, Colo., 39 S.Ct. 450, 250 U.S. 241, 63 L.Ed. 958.

85. U.S.—Murphy v. John Hofman Co., N.Y., 29 S.Ct. 154, 211 U.S. 562, 53 L.Ed. 327—Wurts v. Hoagland, N.J., 105 U.S. 701, 26 L.Ed. 1109.

86. U.S.—Atherton v. Fowler, Cal., 91 U.S. 143, 23 L.Ed. 265.

87. U.S.—National Leather Co. v. Commonwealth of Massachusetts, 48 S.Ct. 534, 277 U.S. 413, 72 L. Ed. 935, affirming 152 N.E. 916, 256 Mass. 419.
25 C.J. p 954 note 70.

88. U.S.—Gallaway v. State Nat. Bank of Ft. Worth, Tex., 22 S.Ct. 811, 186 U.S. 177, 46 L.Ed. 1111.
25 C.J. p 954 note 71.

Citation. When a writ of error was issued by the supreme court to a state court, the citation was required to be signed by the chief justice or judge or chancellor of the court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States.[89] Making a writ of error to a state court and the citation thereon returnable "within thirty days from the date hereof" was a substantial compliance with the rule requiring writs and citations to be made returnable "not exceeding thirty days from the day of signing the citation."[90]

Effect of writ. The allowance of a writ of error by a justice of the United States supreme court was a prima facie showing that a meritorious federal question was involved.[91]

A writ of error from the supreme court to a state court removed the case to the supreme court,[92] and usually suspended the jurisdiction of the state court until it was again restored by some act of the supreme court.[93] The issuance of the writ of error did not, however, vacate the judgment of the state court, but such judgment continued in force until it was reversed.[94] The state court had no power to set aside[95] or pass on the regularity of[96] the writ. Where the order of the chief justice of a state court granting a writ of error from the federal supreme court merely followed the federal statute, petitioner's failure subsequently to comply with the statute by lodging a copy of the writ in the clerk's office for respondent's use did not affect the validity of the order that the writ should operate as a supersedeas.[97]

Where the case involved matters not involved in the writ of error, the state court could proceed with respect to such matters.[98]

Where a writ of error was allowed by the judge of a state supreme court to the United States supreme court, but no writ of error had been issued, the clerk of the state court was not bound to transmit to the United States supreme court a true copy of the record.[99]

§ 279. Necessity and Sufficiency of Showing of Jurisdiction

The facts necessary to give the United States supreme court jurisdiction to review a decision of a state court must either appear on the record or be necessarily deducible therefrom.

On review of a decision of a state court by the United States supreme court the appellant or petitioner has the burden to show affirmatively that the supreme court has jurisdiction.[1] The facts which give the United States supreme court juris-

89. U.S.—Havnor v. New York, 18 S.Ct. 631, 170 U.S. 408, 42 L.Ed. 1087.
25 C.J. p 954 note 72.

90. U.S.—Seaboard Air Line R. Co. v. Horton, 34 S.Ct. 635, 233 U.S. 492, 498, 58 L.Ed. 1062, reversing 78 S.E. 494, 162 N.C. 424.
25 C.J. p 954 note 73.

91. Mich.—Red Star Motor Drivers' Ass'n v. City of Detroit, 210 N.W. 496, 236 Mich. 422, staying execution of decree 208 N.W. 602, 234 Mich. 398, and error dismissed 48 S.Ct. 27, 275 U.S. 486, 72 L.Ed. 386.

92. U.S.—Ex parte Chetwood, Cal., 17 S.Ct. 385, 165 U.S. 443, 41 L.Ed. 782.
25 C.J. p 954 note 74.

93. Kan.—Larabee Flour Mills Co. v. Missouri Pac. R. Co., 116 P. 901, 85 Kan. 214.
Mass.—Duart v. Simmons, 128 N.E. 32, 236 Mass. 225, certiorari denied Simmons v. Duart, 41 S.Ct. 13, 254 U.S. 638, 65 L.Ed. 451.
25 C.J. p 954 note 75.

94. Kan.—Larabee Flour Mills Co. v. Missouri Pac. R. Co., 116 P. 901, 85 Kan. 214.
Mass.—Duart v. Simmons, 128 N.E. 32, 236 Mass. 225, certiorari denied Simmons v. Duart, 41 S.Ct. 13, 254 U.S. 638, 65 L.Ed. 451.

Supersedeas

(1) Where a writ of error was issued by the supreme court of the United States to the supreme court of the state, its allowance did not supersede the judgment, but the taking of the bond and the supersedeas itself was the action of the supreme court which brought about the superseding of the judgment.—Larabee Flour Mills Co. v. Missouri Pac. R. Co., 116 P. 901, 85 Kan. 214.

(2) Where writ of error to United States supreme court, to review judgments of court of appeals on appeal from orphans' court, was sued out later than sixty days after last of judgments to be reviewed, it did not operate as a supersedeas or stay proceedings in the orphans' court.—Marx v. Reinecke, 127 A. 480, 146 Md. 603, error dismissed 46 S.Ct. 204, 270 U.S. 664, 70 L.Ed. 788.

(3) Attachment against deposed executor for failure to obey previous orders and turn over assets of estate will not be suspended pending writ of error sued out to the federal supreme court, taken more than sixty days after last of judgments to be reviewed, where he has persistently refused to comply with orders of orphans' court, notwithstanding granting of repeated indulgences.—Marx v. Reinecke, supra.

95. Ky.—Ohio River Contract Co. v. Gordon, 189 S.W. 451, 172 Ky. 405.
N.C.—State v. Wilson, 28 S.E. 554, 121 N.C. 425, 61 Am.S.R. 672.
25 C.J. p 954 note 77.

96. N.C.—State v. Wilson, supra.

97. Ky.—Ohio River Contract Co. v. Gordon, 189 S.W. 451, 172 Ky. 405.

98. Utah.—Grand Cent. Min. Co. v. Mammoth Min. Co., 104 P. 573, 36 Utah 364, Ann.Cas.1912A 254.
25 C.J. p 955 note 80.

Rehearing

The state supreme court has jurisdiction under its rules to hear a motion for rehearing or modification of judgment to correct mistakes, if filed within time, notwithstanding a writ of error to the supreme court of the United States has been allowed and citation served.—Court of Industrial Relations v. Charles Wolff Packing Co., 227 P. 249, 114 Kan. 487, modifying 219 P. 259, 114 Kan. 304, reversed on other grounds Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas, 45 S.Ct. 441, 267 U.S. 552, 69 L.Ed. 785.

99. U.S.—Ex parte Ralston, La., 7 S.Ct. 317, 119 U.S. 613, 30 L.Ed. 506.

1. U.S.—Gorman v. Washington University, 62 S.Ct. 962, 316 U.S. 98, 86 L.Ed. 1300, dismissing certiorari Washington University v. Gorman,

diction to review a decision of a state court should either appear on the record or be necessarily deducible therefrom.[2] Thus it must affirmatively appear from the record that a federal question was raised in the state court,[3] that its decision of the federal question was necessary to the determination of the cause,[4] and that the federal question was actually decided or that the judgment could not have been given without deciding it.[5] Whether these requirements have been met is itself a federal ques-

Mo., 153 S.W.2d 35, certiorari granted 62 S.Ct. 301, 314 U.S. 604, 86 L.Ed. 486—Memphis Natural Gas Co. v. Beeler, Tenn., 62 S.Ct. 857, 315 U.S. 649, 86 L.Ed. 1090.

2. U.S.—Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S.Ct. 528, 303 U.S. 206, 82 L.Ed. 751, dismissing appeal Southwestern Bell Telephone Co. v. State, 71 P.2d 747, 181 Okl. 246—West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S.Ct. 316, 294 U.S. 63, 79 L.Ed. 761, reversing West Ohio Gas Co. v. Public Utilities Commission (City of Lima), 191 N.E. 105, 128 Ohio St. 301, conformed to 196 N.E. 674, 129 Ohio St. 670.

25 C.J. p 926 note 73 [a], 74 [a], p 955 note 81—3 C.J. p 1081 note 14.

Scope of review see infra § 280.

Summons and severance

(1) Where only one party to a joint judgment seeks a review, the record must disclose summons and severance.—Morganthau v. Stephens, 55 S.Ct. 542, 294 U.S. 720, 79 L.Ed. 1252, denying certiorari Stephens v. Davis, 36 P.2d 316, 140 Kan. 220, time extended Morganthau v. Stephens, 55 S.Ct. 652.

(2) Summons and severance see supra § 275.

Records showing jurisdiction

U.S.—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 56 S. Ct. 31, 296 U.S. 113, 80 L.Ed. 91, reversing Commonwealth v. Schuylkill Trust Co., 173 A. 309, 315 Pa. 429.

25 C.J. p 955 note 81 [e].

Existence and meaning of contract

The fact that omissions in record on appeal from New York court of appeals in a case involving question whether "contract" clause of federal Constitution applied to antenuptial instrument executed by wife and to state statute applied thereto by state courts might have been due to statutory restriction on right of survivor to testify under New York law did not authorize United States supreme court to guess as to existence of a contract or its meaning under applicable rules of law.—Irving Trust Co. v. Day, 62 S.Ct. 398, 314 U.S. 556, 86 L.Ed. 452, 137 A.L.R. 1093, affirming In re McGlone's Will, 32 N.E.2d 539, 284 N.Y. 527, reversing 17 N.Y. S.2d 316, 258 App.Div. 596, reversing 13 N.Y.S.2d 76, 171 Misc. 612.

3. U.S.—International Steel & Iron Co. v. National Surety Co., Tenn., 56 S.Ct. 619, 297 U.S. 657, 80 L.Ed. 961—Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U. S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming 263 N.Y.S. 259, 237 App. Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431—Whitney v. People of State of California, 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095, vacating 46 S. Ct. 22, 269 U.S. 530, 70 L.Ed. 396, and affirming People v. Whitney, 207 P. 698, 57 Cal.App. 449, and rehearing granted Whitney v. People of State of California, 46 S.Ct. 120, 269 U.S. 538, 70 L.Ed. 400—Live Oak Water Users' Ass'n v. Railroad Commission of State of California, 46 S.Ct. 149, 269 U.S. 354, 70 L. Ed. 305, dismissing error 219 P. 65, 192 Cal. 132—House v. Road Improvement Dist. No. 2 of Conway County, Ark., 45 S.Ct. 60, 266 U.S. 175, 69 L.Ed. 229, dismissing error House v. Road Improvement Dist. No. 2, Conway County, 251 S.W. 12, 158 Ark. 330, and 251 S. W. 21, 158 Ark. 357—Missouri Pac. R. Co. v. Hanna, 45 S.Ct. 36, 266 U.S. 184, 69 L.Ed. 235, dismissing error 247 S.W. 1044, 157 Ark. 32—Rooker v. Fidelity Trust Co., 43 S.Ct. 288, 261 U.S. 114, 67 L.Ed. 556, dismissing error 131 N.E. 769, 191 Ind. 141.

25 C.J. p 955 note 82.

Necessity for raising federal question in state court see supra § 274.

That there may be hidden in the record a question which, if it had been raised, would have been of a federal nature is not enough.—Mellon v. O'Neil, 48 S.Ct. 62, 275 U.S. 212, 72 L.Ed. 245, dismissing error and denying certiorari O'Neil v. Davis, 213 N.Y.S. 871, 215 App.Div. 766.

4. U.S.—Honeyman v. Hanan, 57 S. Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 246 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N. Y. 490—Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming 263 N.Y.S. 259, 237 App.Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S. Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431.

25 C.J. p 955 note 82.

Materiality of federal question see supra § 244.

5. U.S.—McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 375, 309 U.S. 2, 84 L.Ed. 536, dismissing certiorari Gulf Oil Corporation v. McGoldrick, 22 N.E.2d 480, 281 N.Y. 647, affirming 9 N.Y.S.2d 544, 256 App. Div. 207, certiorari granted McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 260, 308 U.S. 545, 84 L.Ed. 459, motions granted Gulf Oil Corporation v. McGoldrick, 25 N.E.2d 392, 282 N.Y. 612, and 25 N.E.2d 975, 282 N.Y. 622, reversed McGoldrick v. Gulf Oil Corporation, 60 S. Ct. 664, 309 U.S. 414, 84 L.Ed. 840, certiorari denied Gulf Oil Corporation v. McGoldrick, 60 S.Ct. 718, 309 U.S. 676, 84 L.Ed. 1021, rehearing denied 60 S.Ct. 887, 309 U.S. 699, 84 L.Ed. 1037, vacated McGoldrick v. Gulf Oil Corporation, 60 S.Ct. 512, 309 U.S. 692, 84 L.Ed. 1034—Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming 263 N.Y.S. 259, 237 App. Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431—Mellon v. O'Neil, 48 S.Ct. 62, 275 U.S. 212, 72 L.Ed. 243, dismissing error and denying certiorari O'Neil v. Davis, 213 N.Y.S. 871, 215 App.Div. 766—Whitney v. People of State of California, 47 S. Ct. 641, 274 U.S. 357, 71 L.Ed. 1095, vacating 46 S.Ct. 22, 269 U.S. 30, 70 L.Ed. 396, and affirming People v. Whitney, 207 P. 698, 57 Cal.App. 449, and rehearing granted Whitney v. People of State of California, 46 S.Ct. 120, 269 U.S. 538, 70 L.Ed. 400—Matthews v. Huwe, Ohio, 46 S.Ct. 108, 269 U.S. 262, 70 L.Ed. 266—Rooker v. Fidelity Trust Co., 43 S.Ct. 288, 261 U.S. 114, 67

tion.[6] Nothing outside of the record ordinarily can be taken into consideration in determining whether the supreme court has jurisdiction to review a decision of a state court.[7] The fact that the chief justice of the highest state court allowed a writ of error from the supreme court of the United States does not cure the failure of the record to show that a federal question was raised and decided.[8]

However, if the grounds of a decision given by the highest state court are not shown by the record of such court, the record of the proceedings of the inferior court may be considered in connection therewith in order to ascertain the grounds of such decision;[9] and the opinion of the highest court may be examined, especially where by statute all decisions of such court are required to be in writing, stating the grounds of the decision, and to be recorded.[10]

Certificate or statement by state court. A certificate or statement by the state court or by the chief justice or a presiding justice of the state court that a federal question was raised and determined was not of itself sufficient to give jurisdiction to the supreme court to review a decision,[11] although it might be considered for the purpose of rendering a federal question, which was raised on the record in general and indefinite terms, more certain and specific.[12] It has been held that a recital of a certifi-

L.Ed. 556, dismissing error 131 N. E. 769, 191 Ind. 141.
25 C.J. p 956 note 83.
Necessity for decision of federal question by state court see supra § 244.

6. U.S.—Honeyman v. Hanan, 57 S. Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 246 App. Div. 781, reargument denied 285 N. Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490.

7. U.S.—Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming 263 N.Y.S. 259, 237 App.Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N. E. 141, 266 N.Y. 431—Harding v. Illinois, 25 S.Ct. 176, 196 U.S. 78, 49 L.Ed. 394, dismissing error 66 N.E. 962, 202 Ill. 122.
25 C.J. p 956 note 84.

Additional evidence
On certiorari to review a judgment of the supreme court of Tennessee affirming a judgment dismissing an interstate railroad's suit to set aside the assessment of its property under Tennessee's ad valorem tax law, the United States supreme court could not receive evidence not offered in any of the tribunals below to show absence of equalization and violation of the equal protection clause of the Fourteenth Amendment.—Nashville, C. & St. L. Ry. v. Browning, 60 S.Ct. 968, 310 U.S. 362, 84 L.Ed. 1254, affirming 140 S.W.2d 781, 176 Tenn. 245, certiorari granted 60 S.Ct. 888, 309 U.S. 651, 84 L.Ed. 1002.

Reference to briefs and statements
Claim of jurisdiction cannot be sustained by reference to briefs and statements which are not a part of the record.—Lynch v. People of New York ex rel. Pierson, 55 S.Ct. 16, 293 U.S. 52, 79 L.Ed. 191, dismissing certiorari People ex rel. Pierson v. Lynch, 189 N.E. 684, 263 N.Y. 533, affirming Pierson v. Lynch, 263 N.Y.S. 259, 237 App.Div. 763, certiorari granted Lynch v. People of State of New York ex rel. Pierson, 54 S.Ct. 630, 292 U.S. 616, 78 L.Ed. 1474, and reargument denied People ex rel. Pierson v. Lynch, 195 N.E. 141, 266 N.Y. 431.

Omission is not cured by petition for rehearing or petition for writ of error (now appeal) or assignments of error in the supreme court or the certification of briefs by the clerk of the state court.—Harding v. Illinois, 25 S.Ct. 176, 196 U.S. 78, 49 L. Ed. 394, dismissing error 66 N.E. 962, 202 Ill. 122.
25 C.J. p 956 notes 85–87.

8. U.S.—Hulbert v. Chicago, 26 S.Ct. 617, 202 U.S. 275, 50 L.Ed. 1026, dismissing error 72 N.E. 1097, 213 Ill. 452.

9. U.S.—Neilson v. Lagow, Ind., 12 How. 98, 13 L.Ed. 909.

10. U.S.—Dibble v. Bellingham Bay Land Co., Wash., 16 S.Ct. 939, 163 U.S. 63, 41 L.Ed. 72.
25 C.J. p 956 note 91.

11. U.S.—Honeyman v. Hanan, 57 S. Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 246 App. Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490.
25 C.J. p 957 note 92.

Statement in amendment to remittitur
U.S.—In re Bank of U. S., 3 N.E.2d 472, 271 N.Y. 660, granting amendment of remittitur In re Bank of U. S. in Liquidation, 199 N.E. 679, 269 N.Y. 578, affirming 279 N.Y.S. 986, 244 App.Div. 715, certiorari denied Quintal v. Broderick, 57 S. Ct. 316, 299 U.S. 614, 81 L.Ed. 453.

12. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391—State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, reversing State ex rel. Anderson v. Brand, 5 N.E. 2d 531, 913, 214 Ind. 347, 110 A.L.R. 778, rehearing denied 7 N.E.2d 777, 214 Ind. 347, 110 A.L.R. 778, certiorari granted State of Indiana ex rel. Anderson v. Brand, 58 S. Ct. 262, 302 U.S. 678, 82 L.Ed. 524, rehearing denied 58 S.Ct. 641, 303 U.S. 667, 82 L.Ed. 1123, and mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347—Honeyman v. Hanan, 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 246 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N. Y. 382, remittitur amended 11 N.E. 2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490—International Steel & Iron Co. v. National Surety Co., 56 S.Ct. 619, 297 U.S. 657, 80 L.Ed. 961.
25 C.J. p 957 note 93.

cate of the highest state court, that it was made by order of the court itself to afford record evidence that a federal question raised by a petition for rehearing was adversely determined, justified treating such certificate as bringing into the record necessary proof of a federal question, authorizing review by the supreme court.[13]

Dismissal. The supreme court would dismiss a writ of error where it did not appear from the record that a question of the nature required to give it jurisdiction was involved, even though the jurisdictional question was not raised by either party,[14] although, as shown infra § 281, in certain cases the supreme court might remand the cause for an amendment of the record.

§ 280. Scope and Extent of Review

a. In general
b. Questions of law and fact

a. In General

On a review of a decision of a state court the United States supreme court ordinarily is confined to an examination of the federal questions involved and will not consider questions of state law.

Where a case is removed to the United States supreme court from a state court, the supreme court it authorized to determine all questions as to its jurisdiction and as to the form of the writ, the parties, citation, and service or otherwise.[15] However, as far as the review of the judgment or decree of the state court is concerned, the supreme court is usually confined to an examination of the federal question involved in the case and a determination of the rights, immunities, etc., claimed under the United States,[16] and, with respect to other matters involved in the judgment, it is bound by the decision

True function of certificate or statement of state court by way of amendment of, or addition to, the record is to aid in understanding record, to clarify it by defining the federal question involved with reasonable precision and by showing how question was raised and decided, so that United States supreme court on the record as thus clarified may be able to see that federal question was properly raised and was necessarily determined.—Honeyman v. Hanan, 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 246 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490.

Order of state court, entered after writ of error had been issued and returned to supreme court was sufficient to show federal questions raised and decided.—Whitney v. People of State of California, 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095, vacating 46 S.Ct. 22, 269 U.S. 530, 70 L.Ed. 396, and affirming People v. Whitney, 207 P. 698, 57 Cal.App. 449, and rehearing granted Whitney v. People of State of California, 46 S.Ct. 120, 269 U.S. 538, 70 L.Ed. 400.

13. U.S.—Consolidated Turnpike Co. v. Norfolk & O. V. R. Co., Va., 33 S.Ct. 605, 228 U.S. 596, 57 L.Ed. 982, denying rehearing 33 S.Ct. 510, 228 U.S. 326, 57 L.Ed. 857.

14. U.S.—Palmer v. State of Ohio, 39 S.Ct. 16, 248 U.S. 32, 63 L.Ed. 108, dismissing writ of error Raudabaugh v. State, 118 N.E. 102, 96 Ohio St. 513.
25 C.J. p 957 notes 95, 96.

Where judgment of state court is sustained by determination of local question, writ of error to review such judgment will ordinarily be dismissed, rather than judgment affirmed.—Live Oak Water Users' Ass'n v. Railroad Commission of State of California, 46 S.Ct. 149, 269 U.S. 354, 70 L.Ed. 305, dismissing error 219 P. 65, 192 Cal. 132.

15. U.S.—Ex parte Chetwood, Cal., 17 S.Ct. 385, 165 U.S. 443, 41 L.Ed. 782.

Presumptions

(1) On appeal supreme court will not presume acquiescence in loss of fundamental rights.—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N.E.2d 475, 131 Ohio St. 539.

(2) The supreme court in passing on validity of order entered under state statute will not assume in advance that a state will so construe its law as to bring it into conflict with the federal Constitution or an act of congress.—Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 62 S.Ct. 820, 315 U.S. 740, 86 L.Ed. —, affirming 295 N.W. 791, 237 Wis. 164.

(3) In determining whether Massachusetts workmen's compensation statute is entitled to full faith and credit in California courts, as respects injury in California to Massachusetts employee of Massachusetts employer, United States supreme court may assume that provisions of Massachusetts statute are controlling on the parties in Massachusetts, and, being applicable to the Massachusetts contract of employment, do not infringe due process.—Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California, 59 S.Ct. 629, 306 U.S. 493, 83 L.Ed. 940, affirming 75 P.2d 1058, 10 Cal.2d 567, certiorari granted 59 S.Ct. 76, 305 U.S. 563, 83 L.Ed. 355.

(4) On certiorari to review state court's judgment in favor of person challenging constitutionality of state minimum wage law, federal supreme court must assume that wage rates were fairly made in full compliance with statutory procedure and standards, in absence of details respecting administrative investigation and findings.—Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, affirming People ex rel. Tipaldo v. Morehead, 200 N.E. 799, 270 N.Y. 233, reversing 282 N.Y.S. 576, 156 Misc. 522, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L. Ed. 456.

(5) Other cases.—Atchison, T. & S. F. Ry. Co. v. Scarlett, 57 S.Ct. 541, 300 U.S. 471, 81 L.Ed. 748, reversing Scarlett v. Atchison, T. & S. F. Ry., 60 P.2d 462, 7 Cal.2d 181, certiorari granted Atchison, T. & S. F. Ry. Co. v. Scarlett, 57 S.Ct. 232, 299 U.S. 537, 81 L.Ed. 395, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L. Ed. 1365—Innes v. Tobin, 36 S.Ct. 290, 240 U.S. 127, 60 L.Ed. 562, affirming Ex parte Innes, 173 S.W. 291, 77 Tex.Cr. 351, L.R.A.1916C 1251.

16. U.S.—United Gas Public Service Co. v. State of Texas, 58 S.Ct.

of the state court,[17] although, as shown infra § 281, | under certain circumstances the supreme court may

483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ.App., 89 S.W.2d 1094—Lindsey v. State of Washington, 57 S.Ct. 797, 301 U.S. 397, 81 L.Ed. 1182, reversing State v. Lindsey, 61 P.2d 293, 187 Wash. 364, certiorari granted Lindsey v. State of Washington, 57 S.Ct. 752, 300 U.S. 652, 81 L.Ed. 863—Awotin v. Atlas Exchange Nat. Bank of Chicago, 55 S.Ct. 674, 295 U.S. 209, 79 L.Ed. 1393, affirming 275 Ill. App. 530, and certiorari granted 55 S.Ct. 545, 294 U.S. 703, 79 L.Ed. 1293, followed in Kimen v. Atlas Exchange Nat. Bank of Chicago, 55 S.Ct. 677, 295 U.S. 215, 79 L.Ed. 1398—Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 763, 292 U.S. 398, 78 L.Ed. 1327, 91 A.L.R. 1403, reversing 187 N.E. 7, 127 Ohio St. 109, appeal dismissed 54 S.Ct. 559, 291 U.S. 651, 78 L.Ed. 1045, rehearing denied 54 S.Ct. 639, 292 U.S. 603, 78 L.Ed. 1465, and remanded 193 N.E. 612, 129 Ohio St. 118—Bandini Petroleum Co. v. Superior Court of State of California in and for Los Angeles County, 52 S.Ct. 103, 284 U.S. 8, 76 L.Ed. 136, 78 A.L.R. 826, affirming 293 P. 899, 110 Cal.App. 123—Brinkerhoff-Faris Trust & Savings Co. v. Hill, 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, reversing 19 S.W.2d 746, 323 Mo. 180, certiorari denied 50 S. Ct. 86, 280 U.S. 604, 74 L.Ed. 648, revoked 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, and certiorari granted 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, conformed to 42 S.W.2d 23, 328 Mo. 836—State of Missouri ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 47 S.Ct. 311, 273 U.S. 126, 71 L.Ed. 575, reversing 267 S.W. 102, 306 Mo. 149—First Nat. Bank of Guthrie Center v. Anderson, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295, reversing 192 N.W. 6, 196 Iowa 587.

Miss.—Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 195 So. 667, 189 Miss. 496, appeal dismissed and certiorari denied 61 S.Ct. 25, 311 U.S. 610, 85 L.Ed. 387.

Neb.—Engen v. Union State Bank of Harvard, 236 N.W. 741, 121 Neb. 257, certiorari denied 52 S.Ct. 33, 284 U.S. 655, 76 L.Ed. 555.

S.C.—Green v. Atlantic Coast Line R. Co., 134 S.E. 385, 136 S.C. 337.

25 C.J. p 957 note 99.

Materiality and decision of federal question see supra § 244.

Rate cases

(1) Inquiry in rate cases coming from state court is whether action of state officials is consistent with enjoyment by regulated utility of revenues higher than line of confiscation, and, if such level is attained with suitable opportunity to challenge result, there is due process although proceeding is irregular or erroneous.—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ.App., 89 S.W.2d 1094—West Ohio Gas Co. v. Public Utilities Commission of Ohio, 55 S.Ct. 316, 294 U.S. 63, 79 L.Ed. 761, reversing West Ohio Gas Co. v. Public Utilities Commission (City of Lima), 191 N.E. 105, 128 Ohio St. 301, conformed to 196 N.E. 674, 129 Ohio St. 670.

(2) Order of state public utilities commission, affirmed by state supreme court, prescribing gas rates to consumers of natural gas, was not confiscatory, and hence not subject to revision in United States supreme court.—Dayton Power & Light Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 647, 292 U.S. 290, 78 L.Ed. 1267, affirming 187 N.E. 18, 127 Ohio St. 137.

Questions of foreign law

(1) The question whether the Russian Soviet government's decrees nationalizing insurance business and seizing assets of insurance companies had extraterritorial effect is not to be determined exclusively by the state court, and, while deference will be given to determination of the state court, its conclusion is not accepted as final.—U. S. v. Pink, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 796, reversing 32 N.E.2d 552, 284 N.Y. 555, affirming 20 N.Y.S.2d 665, 259 App.Div. 871, appeal granted 20 N.Y.S.2d 983, 259 App.Div. 886, certiorari granted 61 S.Ct. 960, 313 U.S. 553, 85 L.Ed. 1516.

(2) The supreme court will take such notice of a foreign law as the state court whose judgment is being reviewed could have taken.—U. S. v. Pink, supra.

(3) Where Georgia cases relied on in Delaware proceedings to establish Georgia law were cited in an opinion of the supreme court of Georgia which was pleaded in the proceedings, no objection was made below to the citations, and that opinion was properly in the record, in absence of a contrary ruling by Delaware, those cases could be considered by the United States supreme court under Delaware law.—Riley v. New York Trust Co., 62 S.Ct. 608, 315 U. S. 343, 86 L.Ed. 885, affirming New York Trust Co. v. Riley, Del., 16 A. 2d 772.

Supreme Court would not consider telephone company's objection to public utilities commission's method of allocation to subscribers of excess income of company or problems of going concern value and depreciation reserve, where value of company's physical plant had not been properly ascertained.—Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 57 S.Ct. 724, 301 U.S. 292, 81 L.Ed. 1093, reversing 3 N.E.2d 475, 131 Ohio St. 539.

Estoppel to raise constitutional questions

The effect of a ruling by the state supreme court that a property owner was estopped to attack a tax bill issued against his property on constitutional grounds was not lessened because the court ruled as well on the constitutional questions, so as to require the supreme court to review the ruling on the constitutional questions.—St. Louis Malleable Casting Co. v. George C. Prendergast Construction Co., 43 S.Ct. 178, 260 U.S. 469, 67 L.Ed. 351, affirming 231 S.W. 989, 288 Mo. 197.

17. U.S.—Chaplinsky v. State of New Hampshire, 62 S.Ct. 766, 315 U.S. 568, 86 L.Ed. 1031, affirming State v. Chaplinsky, 18 A.2d 754, 91 N.H. 310—U. S. v. Pink, 62 S.Ct. 552, 315 U.S. 203, 86 L.Ed. 796, reversing 32 N.E.2d 552, 284 N.Y. 555, affirming 20 N.Y.S.2d 665, 259 App. Div. 871, appeal granted 20 N.Y.S. 2d 983, 259 App.Div. 886, certiorari granted 61 S.Ct. 960, 313 U.S. 553, 85 L.Ed. 1516—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S. Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419 certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—Voeller v. Neilston Warehouse Co., 61 S.Ct. 376, 311 U. S. 531, 85 L.Ed. 322, reversing 26 N.E.2d 442, 136 Ohio St. 427, certiorari granted 61 S.Ct. 11, 311 U.S. 624, 85 L.Ed. 396—Fischer v. Pauline Oil & Gas Co., 60 S.Ct. 535, 309 U.S. 294, 84 L.Ed. 764, reversing Pauline Oil & Gas Co. v. Fischer, 90 P.2d 411, 185 Okl. 108, certiorari granted Fischer v. Pauline Oil & Gas Co., 60 S.Ct. 103, 308 U.S. 509, 84 L.Ed. 435, rehearing denied 60 S.Ct. 706, 309 U.S. 697, 84 L.Ed. 1037—United Gas Public Service

consider and decide questions of state law or remand the cause for appropriate action by the state court. The reviewing power ordinarily is further limited to the questions which were raised and decided by the state court, and cannot be extended to a consideration of other questions which might have been, but were not, raised in the court below.[18] On certiorari the court confines itself to the ground on

Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ.App., 89 S.W.2d 1094—Fairport, P. & E. R. Co. v. Meredith, 54 S.Ct. 826, 292 U.S. 589, 78 L.Ed. 1446, affirming 189 N.E. 10, 46 Ohio App. 457, and certiorari granted 54 S.Ct. 564, 291 U.S. 657, 78 L.Ed. 1050—Memphis & C. Ry. Co. v. Pace, 51 S.Ct. 108, 282 U.S. 241, 75 L.Ed. 315, 72 A.L.R. 1096, affirming Memphis & C. Ry. Co. v. Bullen, 121 So. 826, 154 Miss. 536—Todok v. Union State Bank, 50 S.Ct. 363, 281 U.S. 449, 74 L.Ed. 956—Fox River Paper Co. v. Railroad Commission of Wisconsin, 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279, affirming 208 N.W. 266, 189 Wis. 626.

Neb.—Engen v. Union State Bank of Harvard, 236 N.W. 741, 121 Neb. 257, certiorari denied 52 S.Ct. 33, 284 U.S. 655, 76 L.Ed. 555.

25 C.J. p 958 note 1.

State laws as rules of decision in federal courts see supra §§ 165–190.

Existence of riparian right

State court's decision that asserted riparian right, for which constitutional protection was sought, did not exist, was binding on supreme court, in the absence of attempt to evade constitutional issue.—Fox River Paper Co. v. Railroad Commission of Wisconsin, 47 S.Ct. 669, 274 U.S. 651, 71 L.Ed. 1279, affirming 208 N.W. 266, 189 Wis. 626.

When scope of police power is in question, state tribunals' special knowledge of local conditions may have great weight, as regards review of state court's judgment.—Nashville, C. & St. L. Ry. v. Walters, 55 S.Ct. 486, 294 U.S. 405, 79 L.Ed. 949, reversing Nashville, C. & St. L. Ry. Co. v. Baker, 71 S.W.2d 678, 167 Tenn. 470, appeal dismissed Nashville, C. & St. L. Ry. v. Herndon, 55 S.Ct. 87, 293 U.S. 518, 79 L.Ed. 632.

Explicit holding of state court as to basis of its decision cannot be disregarded except for convincing reasons.—Guaranty Trust Co. of New York v. Blodgett, 53 S.Ct. 244, 287 U.S. 509, 77 L.Ed. 463, affirming Blodgett v. Guaranty Trust Co. of New York, 158 A. 245, 114 Conn. 207.

18. U.S.—Municipal Investors Ass'n v. City of Birmingham, 62 S.Ct. 975, 316 U.S. 153, 86 L.Ed. —, affirming 299 N.W. 90, 298 Mich. 314—Veix v. Sixth Ward Building & Loan Ass'n of Newark, 60 S.Ct. 792, 310 U.S. 32, 84 L.Ed. 1061, affirming 8 A.2d 350, 123 N.J.Law 356—McGoldrick v. Compagnie Generale Transatlantique, 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849, reversing Compagnie Generale Transatlantique v. McGoldrick, 18 N.E.2d 28, 279 N.Y. 192, affirming 4 N.Y.S.2d 661, 254 App.Div. 237, reargument denied and remittitur amended 21 N.E.2d 199, 280 N.Y. 691, certiorari granted McGoldrick v. Compagnie Generale Transatlantique, 59 S.Ct. 1043, 307 U.S. 620, 83 L.Ed. 1499—People of State of New York ex rel. Cohn v. Graves, 57 S.Ct. 466, 300 U.S. 308, 81 L.Ed. 666, 108 A.L.R. 721, affirming People ex rel. Cohn v. Graves, 3 N.E.2d 508, 271 N.Y. 353, reversing 286 N.Y.S. 485, 246 App.Div. 335—Wheeling Steel Corporation v. Fox, 56 S.Ct. 773, 298 U.S. 193, 80 L.Ed. 1143, affirming In re Wheeling Steel Corporation Assessment, 177 S.E. 535, 115 W.Va. 553, 104 A.L.R. 802, rehearing denied Wheeling Steel Corporation v. Fox, 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456—International Steel & Iron Co. v. National Surety Co., Tenn., 56 S.Ct. 619, 297 U.S. 657, 80 L.Ed. 961—Aero Mayflower Transit Co. v. Georgia Public Service Commission, 55 S.Ct. 709, 295 U.S. 285, 79 L.Ed. 1439, affirming 176 S.E. 487, 179 Ga. 431—Nashville, C. & St. L. Ry. v. Walters, 55 S.Ct. 486, 294 U.S. 405, 79 L.Ed. 949, reversing Nashville, C. & St. L. Ry. v. Baker, 71 S.W.2d 678, 167 Tenn. 470, appeal dismissed Nashville, C. & St. L. Ry. v. Herndon, 55 S.Ct. 87, 293 U.S. 518, 79 L.Ed. 632—Clark v. Williard, 55 S.Ct. 356, 294 U.S. 211, 79 L.Ed. 865, 98 A.L.R. 347, affirming Mieyr v. Federal Surety Co. of Davenport, Iowa, 34 P.2d 982, 97 Mont. 503, and certiorari granted Clark v. Williard, 55 S.Ct. 118, 293 U.S. 546, 79 L.Ed. 650—Concordia Fire Ins. Co. v. People of State of Illinois, 54 S.Ct. 830, 292 U.S. 535, 78 L.Ed. 1411, modifying People v. Concordia Fire Ins. Co. of Milwaukee, Wis., 183 N.E. 241, 350 Ill.App. 365—Young v. Masci, 53 S.Ct. 599, 289 U.S. 253, 77 L.Ed. 1158, 88 A.L.R. 170, affirming Masci v. Young, 162 A. 623, 109 N.J.Law 453, 83 A.L.R. 869, affirming 157 A. 82, 9 N.J.Misc. 1137—Van Huffel v. Harkelrode, 52 S.Ct. 115, 284 U.S. 225, 76 L.Ed. 256, 78 A.L.R. 453, reversing 177 N.E. 587, 123 Ohio St. 674, certiorari granted 51 S.Ct. 650, 283 U.S. 817, 75 L.Ed. 1433—Pagel v. MacLean, 51 S.Ct. 416, 283 U.S. 266, 75 L.Ed. 1023, vacating In re Hallbom's Estate, 229 N.W. 344, 179 Minn. 402, certiorari granted Pagel v. Hallbom, 51 S.Ct. 25, 282 U.S. 819, 75 L.Ed. 732, and supplemented Pagel v. MacLean, 237 N.W. 21, 183 Minn. 429, conformed to 237 N.W. 21, 183 Minn. 429—Home Ins. Co. v. Dick, 50 S.Ct. 338, 281 U.S. 397, 74 L.Ed. 926, reversing, Tex.Com.App., 15 S.W.2d 1028, affirming, Civ.App., 8 S.W.2d 354—Silver v. Silver, 50 S.Ct. 57, 280 U.S. 117, 74 L.Ed. 221, 65 A.L.R. 939, affirming 143 A. 240, 108 Conn. 371, 65 A.L.R. 943—Saltonstall v. Saltonstall, 48 S.Ct. 225, 276 U.S. 260, 72 L.Ed. 565, affirming 153 N.E. 4, 256 Mass. 519—Bothwell v. Buckbee-Mears Co., 48 S.Ct. 124, 275 U.S. 274, 72 L.Ed. 277, affirming 211 N.W. 478, 169 Minn. 516, certiorari granted 47 S.Ct. 460, 273 U.S. 689, 71 L.Ed. 842—Whitney v. People of State of California, 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095, vacating 46 S.Ct. 22, 269 U.S. 530, 70 L.Ed. 396, and affirming People v. Whitney, 207 P. 698, 57 Cal.App. 449, and rehearing granted Whitney v. People of State of California, 46 S.Ct. 120, 269 U.S. 538, 70 L.Ed. 400—Bass, Ratcliff & Gretton v. State Tax Commission, 45 S.Ct. 82, 266 U.S. 271, 69 L.Ed. 282, affirming People v. State Tax Commission, 133 N.E. 122, 232 N.Y. 42, affirming People ex rel. Bass, Ratcliff & Gretten v. State Tax Commission, 189 N.Y.S. 952, 198 App.Div. 963—Hill v. Smith, 43 S.Ct. 219, 260 U.S. 592, 67 L.Ed. 419, affirming Smith v. Hill, 122 N.E. 310, 232 Mass. 188, 2 A.L.R. 1667—Bullen v. State of Wisconsin, 36 S.Ct. 473, 240 U.S. 625, 60 L.Ed. 830, affirming In re Bullen's Estate, 128 N.W. 109, 143 Wis. 512, 139 Am.S.R. 1114—Chicago, B. & Q. R. Co. v. Railroad Commission of Wisconsin, 35 S.Ct. 560, 237 U.S. 220, 59 L.Ed. 926, reversing 140 N.W. 296, 152 Wis. 654.

25 C.J. p 958 note 2—3 C.J. p 711 note 77, p 712 notes 89, 90.

Only federal questions discussed by state supreme court in its opinion would be reviewed by supreme court, where record did not disclose what federal questions were presented to state supreme court.—Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission, 56 S.Ct. 536, 297 U.S. 471, 80 L.Ed. 810, affirming In re Depreciation Charges for Class A and Class B Telephone Companies, 259 N.W. 362, 128 Neb. 447.

Where federal government did not assert any claim to unclaimed mon-

which the writ was asked or granted.[19]

The action of a federal court in remanding a cause to a state court after its removal was not open to revision on writ of error from the supreme court of the United States to the state court.[20]

b. Questions of Law and Fact

On review of a state court decision by the United States supreme court, questions of law are reviewable, but questions of fact ordinarily may not be reviewed.

On review of a judgment of a state court by the United States supreme court questions of law, as far as they are necessarily involved in the judgment of a state court on a federal question, should be reviewed by the supreme court.[21] However, questions of fact determined in a state court ordinarily are not reviewable by the supreme court,[22] although

eys found by federal district court to be due to bondholders and subsequently transferred from court's registry to federal treasury's account in bank in Pennsylvania, apart from possession acquired under court's decree and federal statutes, supreme court would not consider effect of absence of moneys from state and absence or nonresidence of unknown claimants, if that was the case, on Pennsylvania court's decree declaring escheat of moneys to commonwealth, but those questions could be raised and decided whenever application was made to district court for payment over of moneys.—U. S. v. Klein, 58 S.Ct. 536, 303 U.S. 276, 82 L.Ed. 840, affirming In re Escheat of Moneys in Custody of U. S. Treasury, 192 A. 256, 326 Pa. 260.

19. U.S.—Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, affirming People ex rel. Tipaldo v. Morehead, 200 N.E. 799, 270 N.Y. 233, reversing 282 N.Y.S. 576, 156 Misc. 522, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456—Clark v. Williard, 55 S.Ct. 356, 294 U.S. 211, 79 L.Ed. 865, 98 A.L.R. 347, affirming Mieyr v. Federal Surety Co. of Davenport, Iowa, 34 P.2d 982, 97 Mont. 503, and certiorari granted Clark v. Williard, 55 S.Ct. 118, 293 U.S. 546, 79 L.Ed. 650.

Right to insist on overruling of prior decision

Person who, without challenging principles underlying prior decision of federal supreme court, petitioned for certiorari to state court on ground that case was distinguishable from prior case, was not entitled to contend that prior case should be overruled.—Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, affirming People ex rel. Tipaldo v. Morehead, 200 N.E. 799, 270 N.Y. 233, reversing 282 N.Y. S. 576, 156 Misc. 522, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456.

20. U.S.—McLaughlin v. Hallowell, 33 S.Ct. 465, 228 U.S. 278, 57 L.Ed. 835, dismissing error 111 N.W. 428, 121 N.W. 1039, 136 Iowa 279—Whitcomb v. Smithson, 20 S.Ct. 248, 175 U.S. 635, 44 L.Ed. 303.

21. U.S.—Stanley v. Schwalby, Tex., 16 S.Ct. 754, 162 U.S. 255, 40 L.Ed. 960.

25 C.J. p 958 note 5.

22. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391—Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 61 S. Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U. S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ.App., 89 S.W. 2d 1094—Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 763, 292 U.S. 398, 78 L.Ed. 1327, 91 A.L.R. 1403, reversing 187 N.E. 7, 127 Ohio St. 109, appeal dismissed 54 S.Ct. 559, 291 U.S. 651, 78 L.Ed. 1045, rehearing denied 54 S.Ct. 639, 292 U.S. 603, 78 L.Ed. 1465 and remanded 193 N.E. 612, 129 Ohio St. 118—Merchants' Mut. Automobile Liability Ins. Co. v. Smart, 45 S.Ct. 320, 267 U.S. 126, 69 L.Ed. 538, affirming Smart v. Merchants' Mut. Automobile Liability Ins. Co., 142 N.E. 290, 236 N.Y. 577, dismissing appeal 198 N. Y.S. 949, 206 App.Div. 630—Grayson v. Harris, 45 S.Ct. 317, 267 U.S. 352, 69 L.Ed. 652, reversing Harris v. Grayson, 216 P. 446, 90 Okl. 147—Ætna Life Ins. Co. v. Dunken, 45 S.Ct. 129, 266 U.S. 389, 69 L.Ed. 342, reversing Ætna Life Ins. Co. of Hartford, Conn., v. Dunken, Tex.Civ.App., 218 S.W. 165—Butters v. City of Oakland, 44 S. Ct. 62, 263 U.S. 162, 68 L.Ed. 228, affirming 200 P. 354, 53 Cal.App. 294—Ward & Gow v. Krinsky, 42 S.Ct. 529, 259 U.S. 503, 66 L.Ed. 1033, 28 A.L.R. 1207, affirming Krinsky v. Ward & Gow, 132 N.E. 873, 231 N.Y. 525, affirming 184 N. Y.S. 443, 193 App.Div. 557.

25 C.J. p 958 note 6.

Evidence

(1) Questions of evidence are not within the jurisdiction of the supreme court unless it is sought to give effect to such evidence for other purposes over which the court has jurisdiction.—Mackay v. Dillon, Mo., 4 How. 421, 11 L.Ed. 1038.

(2) Where evidence stricken by the trial court was held immaterial by state supreme court, United States supreme court could treat case as though evidence had been received and held without bearing.—Hans Rees' Sons v. State of North Carolina ex rel. Maxwell, 51 S.Ct. 385, 283 U.S. 123, 75 L.Ed. 879, reversing Maxwell v. Hans Rees' Sons, 153 S.E. 850, 199 N.C. 42.

Where picketing was accompanied by violence, the United States supreme court could not say that a finding of the Illinois supreme court, that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful, so contradicted experience as to warrant rejection, nor could that court say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L. Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon

such court may examine into the facts to such extent as is necessary to determine whether a federal question is involved,[23] and, where conclusions of law and findings of fact are so intermingled as to make it necessary to pass on questions of fact as an incident to a decision on the claim of a denial of a federal right, the supreme court may exercise such power.[24] So also the question whether there is suf-

Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

Availability of equitable remedy in state court

A water company which itself sought review of New York public service commission's determination in rate case by certiorari and did not invoke plenary jurisdiction of an equity court could not, on appeal to United States supreme court, raise question whether it was entitled to a court's independent judgment on the law and facts on issue of confiscation, where it did not appear that a remedy in equity was not available under New York law.—People of State of New York ex rel. Consolidated Water Co. of Utica v. Maltbie, 58 S.Ct. 506, 303 U.S. 158, 82 L.Ed. 724, dismissing appeal People ex rel. Consolidated Water Co. of Utica, N. Y., v. Maltbie, 9 N.E.2d 961, 275 N.Y. 357, affirming 282 N.Y.S. 412, 245 App.Div. 866.

Representation of accused by counsel

On certiorari to review Kansas supreme court judgment denying a writ of habeas corpus, the United States supreme court would accept that court's conclusion that the record showing that petitioner was represented by counsel throughout, and revealing on its face no irregularities in criminal trial, was sufficient refutation of petitioner's unsupported charge that he was denied the right to summon witnesses and testify for himself.—Cochran v. State of Kansas, 62 S.Ct. 1068, 316 U.S. 255, 86 L.Ed. 1453, reversing Cochran v. Amrine, 113 P.2d 1048, 153 Kan. 777, certiorari granted 62 S.Ct. 109, 314 U.S. 588, 86 L.Ed. 474.

23. U.S.—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391—Norris v. State of Alabama, 55 S.Ct. 579, 294 U.S. 587, 79 L.Ed. 1074, reversing Norris v. State, 156 So. 556, 229 Ala. 226, certiorari granted 55 S.Ct. 345, 293 U.S. 552, 79 L.Ed. 655—Consolidated Textile Corporation v. Gregory, 53 S.Ct. 529, 289 U.S. 85, 77 L. Ed. 1047, reversing State v. Gregory, 245 N.W. 194, 209 Wis. 476, and conformed to State ex rel. Consolidated Textile Corp. v. Gregory, 248 N.W. 728, 211 Wis. 583—First Nat. Bank v. City of Hartford, 47 S.Ct. 462, 273 U.S. 548, 71 L.Ed. 767, reversing 203 N.W. 721, 187 Wis. 290, vacated 214 N.W. 617, 193 Wis. 494—Ætna Life Ins. Co. v. Dunken, 45 S.Ct. 129, 266 U.S. 389, 69 L.Ed. 342, reversing Ætna Life Ins. Co. of Hartford, Conn. v. Dunken, Tex. Civ.App., 248 S.W. 165—Davis v. Wechsler, 44 S.Ct. 13, 263 U.S. 22, 68 L.Ed. 143, reversing Wechsler v. Davis, 239 S.W. 554, 209 Mo.App. 570, certiorari granted Davis v. Wechsler, 43 S.Ct. 88, 260 U.S. 713, 67 L.Ed. 477.

25 C.J. p 959 note 7.

Denial of due process of law

U.S.—Ward v. State of Texas, 62 S. Ct. 1139, 316 U.S. 547, 86 L.Ed. 1663, reversing, Tex.Cr., 158 S.W.2d 516, certiorari granted 62 S.Ct. 1040, 316 U.S. 653, 86 L.Ed. 1734—Lisenba v. People of State of California, 62 S.Ct. 280, 314 U.S. 219, 86 L.Ed. 166, affirming People v. Lisenba, 94 P.2d 569, 14 Cal.2d 403, prior opinion 89 P.2d 39, affirmed 61 S.Ct. 832, 313 U.S. 537, 85 L.Ed. 1507, vacated 61 S.Ct. 956, 313 U.S. 597, 85 L.Ed. 1550, certiorari granted 61 S.Ct. 68, 311 U.S. 617, 85 L.Ed. 391—Chambers v. State of Florida, 60 S.Ct. 472, 309 U.S. 227, 84 L.Ed. 716, reversing 187 So. 156, 136 Fla. 568, certiorari granted 60 S.Ct. 127, 308 U.S. 541, 84 L.Ed. 456.

Denial of equal protection of the laws

U.S.—Smith v. State of Texas, 61 S.Ct. 164, 311 U.S. 128, 85 L.Ed. 84, reversing, Tex.Cr., 136 S.W.2d 842, certiorari granted 60 S.Ct. 891, 309 U.S. 651, 84 L.Ed. 1001, conformed to, Tex.Cr., 147 S.W.2d 1118—Pierre v. State of Louisiana, 59 S.Ct. 536, 306 U.S. 354, 83 L.Ed. 757, reversing State v. Pierre, 180 So. 630, 189 La. 764, certiorari granted Pierre v. State of Louisiana, 59 S.Ct. 100, 305 U.S. 586, 83 L.Ed. 370.

Denial of right to assistance of counsel

U.S.—Avery v. State of Alabama, 60 S.Ct. 321, 308 U.S. 444, 84 L.Ed. 377, affirming 188 So. 391, 237 Ala. 616, certiorari granted Avery v. State of Alabama, 60 S.Ct. 119, 308 U.S. 540, 84 L.Ed. 455.

Making findings of fact

Supreme court can make findings of fact based on the evidence which the state courts omitted to make because, under the erroneous construction of the federal statute adopted by them, they considered such findings immaterial.—Merchants' Nat. Bank of Richmond, Va., v. City of Richmond, 41 S.Ct. 619, 256 U.S. 635, 65 L.Ed. 1135, reversing City of Richmond v. Merchants' Nat. Bank of Richmond, 98 S.E. 643, 124 Va. 522.

Purpose of analyzing facts

The supreme court analyzes the facts on an appeal from a state court, not to determine issues of fact arising on conflicting testimony or inferences, and thus to usurp the function of the state court as a trier of the facts, but to perform its own proper function in deciding the question of law arising on the findings which the evidence permits.—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ. App., 89 S.W.2d 1094.

Where the facts were admitted by demurrer, the supreme court, in determining whether a state statute in its application to such facts violates the federal Constitution, must analyze the facts alleged and draw its own inferences as to its ultimate effect, and is not bound by the conclusions of the state supreme court.—Truax v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375, reversing 176 P. 570, 20 Ariz. 7.

24. U.S.—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ.App., 89 S.W. 2d 1094—Great Northern Ry. Co. v. State of Washington, 57 S.Ct. 397, 300 U.S. 154, 81 L.Ed. 573, reversing 52 P.2d 1274, 184 Wash. 648, followed in Northern Pac. R. Co. v. State, 52 P.2d 1279, 184 Wash. 710 and Chicago, M., St. P. & P. R. Co. v. State, 52 P.2d 1279, 184 Wash. 710, rehearing denied Great Northern Ry. Co. v. State of Washington, 57 S.Ct. 504, 300 U.S. 686, 81 L.Ed. 888—Norris v. State of Alabama, 55 S.Ct. 579, 294 U.S. 587, 79 L.Ed. 1074, reversing Norris v. State, 156 So. 556, 229 Ala. 226, certiorari granted 55 S.Ct. 345, 293 U.S. 552, 79 L.Ed. 655—Fiske v. State of Kansas, 47 S.Ct. 655, 274 U.S. 380, 71 L.Ed. 1108, reversing State v. Fiske, 230 P. 88, 117 Kan. 69—

ficient evidence to sustain a finding being one of law is open for examination by the supreme court;[25] and a finding of fact which is so grossly wrong as to amount to an infraction of the federal constitution may be reviewed.[26]

§ 281. Determination and Disposition of Cause

On review of a judgment of a state court the United States supreme court has power not only to correct errors in the judgment entered but to make such disposition of the case as justice may require.

On review of a decision of a state court, the United States supreme court has power not only to correct errors in the judgment entered in the state court but to make such disposition of the case as justice may require.[27] The supreme court may reverse, modify, or affirm the judgment of the state

First Nat. Bank v. City of Hartford, 47 S.Ct. 462, 273 U.S. 548, 71 L.Ed. 767, reversing 203 N.W. 721, 187 Wis. 290, vacated 214 N.W. 617, 193 Wis. 494—Ætna Life Ins. Co. v. Dunken, 45 S.Ct. 129, 266 U.S. 389, 69 L.Ed. 342, reversing Ætna Life Ins. Co. of Hartford, Conn. v. Dunken, Tex.Civ.App., 248 S.W. 165—Truax v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375, reversing 176 P. 570, 20 Ariz. 7.

25 C.J. p 959 note 8.

25. U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex. Civ.App., 89 S.W.2d 1094—Great Northern Ry. Co. v. State of Washington, 57 S.Ct. 397, 300 U.S. 154, 81 L.Ed. 573, reversing 52 P.2d 1274, 184 Wash. 648, followed in Northern Pac. R. Co. v. State, 52 P.2d 1279, 184 Wash. 710 and Chicago, M., St. P. & P. R. Co. v. State, 52 P.2d 1279, 184 Wash. 710, rehearing denied Great Northern Ry. Co. v. State of Washington, 57 S. Ct. 504, 300 U.S. 686, 81 L.Ed. 888—Chicago Great Western R. Co. v. Rambo, 56 S.Ct. 693, 298 U.S. 99, 80 L.Ed. 1066, reversing Rambo v. Chicago, Great Western R. Co., 263 N.W. 112, 195 Minn. 331, certiorari granted Chicago Great Western R. Co. v. Rambo, 56 S.Ct. 574, 297 U. S. 701, 80 L.Ed. 990, rehearing denied 56 S.Ct. 945, 298 U.S. 692, 80 L.Ed. 1409, conformed to Rambo v. Chicago, Great Western R. Co., 268 N.W. 199, 197 Minn. 652—Beidler v. South Carolina Tax Commission, 51 S.Ct. 54, 282 U.S. 1, 75 L. Ed. 131, reversing in part 160 S.E. 264, 162 S.C. 447—Fiske v. State of Kansas, 47 S.Ct. 655, 274 U.S. 380, 71 L.Ed. 1108, reversing State v. Fiske, 230 P. 88, 117 Kan. 69—Davis v. Green, 43 S.Ct. 123, 260 U.S. 349, 67 L.Ed. 299, reversing Hines v. Green, 87 So. 649, 125 Miss. 476—Truax v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254, 27 A.L.R. 375, reversing 176 P. 570, 20 Ariz. 7.

25 C.J. p 959 note 10.

As respects finding that there was no evidence on a certain issue, if in fact there is not such evidence, or if the evidence is conflicting, the supreme court of the United States can inquire no further; but if the uncontradicted evidence affirmatively establishes facts contrary to the finding, neither special findings nor the general verdict precludes the supreme court from so holding.—Baltimore & O. S. W. R. Co. v. Burtch, 44 S.Ct. 165, 263 U.S. 540, 68 L.Ed. 433, reversing 134 N.E. 858, 192 Ind. 199, certiorari granted 43 S.Ct. 95, 260 U. S. 717, 67 L.Ed. 479.

26. U.S.—Milk Wagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, 61 S.Ct. 552, 312 U.S. 287, 85 L.Ed. 836, 132 A.L.R. 1200, affirming Meadowmoor Dairies v. Milk Wagon Drivers' Union of Chicago, No. 753, 21 N.E.2d 308, 371 Ill. 377, certiorari denied Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 128, 308 U.S. 596, 84 L.Ed. 499, rehearing denied Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529, vacated Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1092, 310 U.S. 655, 84 L.Ed. 1419, rehearing denied 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145—Thomas v. Texas, 29 S.Ct. 393, 212 U.S. 278, 53 L.Ed. 512, affirming 95 S.W. 1069, 49 Tex.Cr. 633.

27. U.S.—State of Minnesota v. National Tea Co., 60 S.Ct. 676, 309 U. S. 551, 84 L.Ed. 920, vacating National Tea Co. v. State, 286 N.W. 360, 205 Minn. 443, certiorari granted State of Minnesota v. National Tea Co., 60 S.Ct. 294, 308 U.S. 547, 84 L.Ed. 460, reinstated National Tea Co. v. State, 294 N.W. 230, 208 Minn. 607—State Tax Commission of Utah v. Van Cott, 59 S.Ct. 605, 306 U.S. 511, 83 L.Ed. 950, vacating Van Cott v. State Tax Commission of Utah, 79 P.2d 6, 95 Utah 43, certiorari granted State Tax Commission of Utah v. Van Cott, 59 S.Ct. 358, 305 U.S. 592, 83 L.Ed. 375, mandate conformed to Van Cott v. State Tax Commission, 96 P.2d 740, 98 Utah 264—Honeyman v. Hanan, 57 S.Ct. 350, 300 U. S. 14, 81 L.Ed. 476, vacating 3 N.E. 2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 256 App.Div. 781, reargument denied 285 N.Y.S. 1081, 246 App.Div. 829, and affirmed 9 N.E. 2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312 remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490—Villa v. Van Schaick, 57 S.Ct. 128, 299 U.S. 152, 81 L.Ed. 91, vacating In re People by Van Schaick, 195 N.E. 213, 266 N.Y. 589, remittitur amended 199 N.E. 672, 269 N.Y. 562, and 200 N.E. 320, 270 N.Y. 564, reargument denied 195 N.E. 376, 266 N.Y. 672—Patterson v. State of Alabama, 55 S.Ct. 575, 294 U.S. 600, 79 L.Ed. 1082, vacating Patterson v. State, 156 So. 567, 229 Ala. 270, and certiorari granted 55 S.Ct. 317, 293 U.S. 554, 79 L.Ed. 656—Dorchy v. State of Kansas, 44 S.Ct. 323, 264 U.S. 286, 68 L.Ed. 686, reversing State v. Dorchy, 210 P. 352, 112 Kan. 235.

Disposition of case on face of decree

Where a case clearly presented a substantial claim of the right to free discussion, it would be improper for the supreme court to dispose of the case otherwise than on the face of the state court's decree under review on certiorari.—American Federation of Labor v. Swing, 61 S.Ct. 568, 312 U.S. 321, 85 L.Ed. 855, reversing Swing v. American Federation of Labor, 22 N.E.2d 857, 372 Ill. 91, affirming 18 N.E.2d 258, 298 Ill.App. 63,

court.[28] In disposing of the case the supreme court will lean toward affirmance where error on the part of the state court is not clear,[29] and where the court is convinced that a writ of error was taken only for delay, a motion to affirm the judgment should be granted.[30] It has also been held proper to affirm instead of dismiss where the question raised, although not frivolous, is without merit.[31]

The decision of the supreme court in a case brought before it from the state court is the binding law of the case.[32] Where the supreme court affirms the judgment of the state court, effect must be given thereto,[33] while if the judgment is reversed and remanded the case is then pending in the state court for such disposition as it deems proper, not inconsistent with the opinion of the supreme court.[34] Where a reversal is necessary because of an erroneous construction given to an act of con-

certiorari denied American Federation of Labor v. Swing, 60 S.Ct. 514, 309 U.S. 659, 84 L.Ed. 1007, certiorari granted 60 S.Ct. 1081, 310 U.S. 620, 84 L.Ed. 1393, rehearing denied 61 S.Ct. 735, 312 U.S. 715, 85 L.Ed. 1145.

28. U.S.—Murdock v. City of Memphis, Tenn., 20 Wall. 590, 22 L.Ed. 429.

25 C.J. p 960 note 12 [a].

Judgment affirmed

In action by railroad employee to recover under the Federal Employers' Liability Act for personal injuries caused by negligence of the railroad and another employee, where state supreme court in affirming judgment for injured employee correctly ruled that question of assumption of risk was for the jury, judgment would be affirmed notwithstanding the state supreme court's erroneous ruling as a further ground for affirming judgment that the Federal Employers' Liability Act was one intended to promote the safety of employees and hence that the defense of assumption of risk was barred.—Great Northern Ry. Co. v. Leonidas, 59 S. Ct. 51, 305 U.S. 1, 83 L.Ed. 3, affirming Leonidas v. Great Northern R. Co., 72 P.2d 1007, 105 Mont. 302, certiorari granted Great Northern Ry. Co. v. Leonidas, 58 S.Ct. 759, 303 U.S. 632, 82 L.Ed. 1092.

Judgment reversed

Judgment of state supreme court, erroneously based on assumption that railroad was subject to liability on garnishment process under federal statute, will be reversed by United States supreme court.—Chicago & N. W. Ry. Co. v. Alvin R. Durham Co., 46 S.Ct. 509, 271 U.S. 251, 70 L.Ed. 931, reversing Alvin R. Durham Co. v. Chicago & N. W. Ry. Co., 201 N.W. 503, 229 Mich. 468, certiorari granted Chicago & N. W. Ry. Co. v. Alvin R. Durham Co., 45 S.Ct. 635, 268 U. S. 684, 69 L.Ed. 1156, and reversed Alvin R. Durham Co. v. Chicago & N. W. R. Co., 214 N.W. 132, 239 Mich. 401.

Judgment based on questions of federal law wrongly determined may be reversed and the cause remanded for further proceedings.—Joines v. Patterson, 47 S.Ct. 706, 274 U.S. 544, 71 L.Ed. 1194, reversing Patterson v. Joines, 244 P. 585, 114 Okl. 9.

Action under Federal Employers' Liability Act

In action under Federal Employers' Liability Act, supreme court will examine record, and reverse judgment, if evidence is insufficient as matter of law to show negligence.—Chesapeake & O. Ry. Co. v. Kuhn, Ohio, 52 S.Ct. 45, 284 U.S. 44, 76 L.Ed. 157 —Atlantic Coast Line R. Co. v. Driggers, 49 S.Ct. 490, 279 U.S. 787, 73 L.Ed. 957, reversing Driggers v. Atlantic Coast Line R. Co., 148 S.E. 889, 151 S.C. 164, certiorari granted Atlantic Coast Line R. Co. v. Driggers, 49 S.Ct. 17, 278 U.S. 587, 73 L.Ed. 521 —Atlantic Coast Line R. Co. v. Davis, 49 S.Ct. 210, 279 U.S. 34, 73 L. Ed. 601, reversing Davis v. Atlantic Coast Line R. Co., 147 S.E. 834, 150 S.C. 130—Gulf, M. & N. R. Co. v. Wells, 48 S.Ct. 151, 275 U.S. 455, 72 L.Ed. 370, reversing, Miss., 107 So. 27, certiorari granted 46 S.Ct. 485, 271 U.S. 654, 70 L.Ed. 1134—Chicago, M. & St. P. Ry. Co. v. Coogan, 46 S.Ct. 564, 271 U.S. 472, 70 L.Ed. 1041, reversing Coogan v. Chicago, M. & St. P. Ry. Co., 200 N.W. 477, 160 Minn. 411, certiorari granted Chicago, M. & St. P. R. Co. v. Coogan, 45 S.Ct. 462, 267 U.S. 589, 69 L.Ed. 802.

Where record does not contain all evidence

Judgment of state court awarding shipper damages for payment of rebates to other shippers for a like service should not be reversed on the theory that some of the shipments were destined for points outside the state, where the record does not contain all the evidence, but shows that some of the shipments were listed as "Coal–Intrastate."—Pennsylvania R. Co. v. Mitchell Coal & Coke Co., 35 S.Ct. 787, 238 U.S. 251, 59 L.Ed. 1293, affirming Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 88 A. 743, 241 Pa. 536.

Judgment which cannot be reversed on federal question involved cannot be modified or amended.—Standard Oil Co. v. Missouri, 32 S.Ct. 406, 224 U.S. 270, 56 L.Ed. 760, affirming 116 S.W. 902, 218 Mo. 1—25 C.J. p 960 note 13.

29. U.S.—Milheim v. Moffat Tunnel Improvement Dist., 43 S.Ct. 694, 262 U.S. 710, 67 L.Ed. 1194, affirming 211 P. 649, 72 Colo. 268—Seaboard Air Line R. Co. v. Lorick, 37 S.Ct. 440, 243 U.S. 572, 61 L.Ed. 907.

25 C.J. p 960 note 14.

30. U.S.—Deming v. Carlisle Packing Co., 33 S.Ct. 80, 226 U.S. 102, 57 L.Ed. 140, dismissing error 114 P. 172, 62 Wash. 455—Blythe v. Hinckley, 21 S.Ct. 390, 180 U.S. 333, 45 L.Ed. 557.

31. U.S.—Milheim v. Moffat Tunnel Improvement Dist., 43 S.Ct. 694, 262 U.S. 710, 67 L.Ed. 1194; affirming 211 P. 649, 72 Colo. 268—Hodges v. Snyder, 43 S.Ct. 435, 261 U.S. 600, 67 L.Ed. 819, affirming 186 N. W. 867, 45 S.D. 149—City of Boston v. Jackson, 43 S.Ct. 129, 260 U. S. 309, 67 L.Ed. 274, affirming City of Boston v. Treasurer and Receiver General, 130 N.E. 390, 237 Mass. 403.

25 C.J. p 960 note 16.

32. Miss.—Montgomery & Atlanta Motor Freight Lines v. Morris, 8 So.2d 502, overruling suggestion of error 7 So.2d 826.

25 C.J. p 960 note 17.

33. La.—Thorman v. Broderick, 27 So. 735, 52 La.Ann. 1298—Stewart v. Bloom, 23 La.Ann. 748.

Decisions on federal questions by United States supreme court as binding state courts see Courts § 206.

Attorney's fees and taxation of disbursements

(1) A state statute cannot empower a state court, when assessing damages to a successful plaintiff in mandamus, to allow attorney's fees for services in the federal supreme court on a writ of error unsuccessfully prosecuted by defendant, where such award is in conflict with the settled rule in the federal supreme court.—Missouri Pac. R. Co. v. Larabee, 34 S.Ct. 979, 234 U.S. 459, 58 L. Ed. 1398, reversing 116 P. 901, 85 Kan. 214.

(2) Even if municipal court code permitted taxation of disbursements incurred in resisting application to United States supreme court for writ of certiorari, such an item would be unenforceable as an unauthorized restraint upon free access to United States supreme court.—Jorgensen v. Standard Oil Co. of New Jersey, 36 N.Y.S.2d 318, 178 Misc. 740.

34. U.S.—State of Indiana ex rel.

gress by the state court, which was the sole basis | of its decision, the order of reversal should not pre-

Anderson v. Brand, 58 S.Ct. 443, 303 U.S. 95, 82 L.Ed. 685, 113 A.L.R. 1482, reversing State ex rel. Anderson v. Brand, 5 N.E.2d 531, 214 Ind. 347, 110 A.L.R. 778—State ex rel. Anderson v. Brand, 5 N.E.2d 913, 214 Ind. 347, 110 A.L.R. 778, rehearing denied 7 N.E.2d 777, 214 Ind. 347, 110 A.L.R. 778, certiorari granted State of Indiana ex rel. Anderson v. Brand, 58 S.Ct. 262, 302 U.S. 678, 82 L.Ed. 524, rehearing denied 58 S.Ct. 641, 303 U.S. 667, 82 L.Ed. 1123, mandate conformed to State ex rel. Anderson v. Brand, 13 N.E.2d 955, 214 Ind. 347—Bluford v. Canada, D.C.Mo., 32 F.Supp. 707, appeal dismissed, C.C.A., 119 F.2d 779.

Cal.—Atchison, T. & S. F. Ry. Co. v. Superior Court in and for Contra Costa County, 86 P.2d 85, 12 Cal.2d 549, certiorari denied Atchison T. & S. F. R. Co. v. Superior Court of State of California, 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1055—Coombes v. Getz, 18 P.2d 939, 217 Cal. 320.

Ga.—John Hancock Mut. Life Ins. Co. v. Yates, 190 S.E. 560, 184 Ga. 42, conforming to 57 S.Ct. 129, 299 U.S. 178, 81 L.Ed. 106, vacating 185 S.E. 268, 182 Ga. 213, reversing 179 S.E. 239, 50 Ga.App. 713, certiorari granted 57 S.Ct. 20, 299 U.S. 525, 81 L.Ed. 386, conformed to 191 S.E. 392, 55 Ga.App. 771, vacating 199 S.E. 239, 50 Ga.App. 713—Georgia Power Co. v. City of Decatur, 182 S.E. 32, 181 Ga. 187, affirmed Georgia Ry. & Electric Co. v. City of Decatur, 56 S.Ct. 606, 297 U.S. 620, 80 L.Ed. 925.

Ind.—Storen v. J. D. Adams Mfg. Co., 15 N.E.2d 1016, 214 Ind. 707, conforming to mandate J. D. Adams Mfg. Co. v. Storen, 58 S.Ct. 913, 304 U.S. 307, 82 L.Ed. 1365, 117 A.L.R. 429, modifying 7 N.E.2d 941, 212 Ind. 343.

Iowa.—Sears, Roebuck & Co. v. Nelson, 299 N.W. 398, 230 Iowa 936, conforming to mandate Nelson v. Sears, Roebuck & Co., 61 S.Ct. 586, 312 U.S. 359, 85 L.Ed. 888, 132 A.L.R. 475, reversing Sears, Roebuck & Co. v. Roddewig, 292 N.W. 130, 228 Iowa 1273, certiorari granted Roddewig v. Sears, Roebuck & Co., 61 S.Ct. 34, 311 U.S. 630, 85 L.Ed. 401, rehearing denied Nelson v. Sears, Roebuck & Co., 61 S.Ct. 803, 312 U.S. 715, 85 L.Ed. 1145.

Minn.—Rambo v. Chicago, Great Western R. Co., 268 N.W. 199, 197 Minn. 652, conforming to Chicago, Great Western R. Co. v. Rambo, 56 S.Ct. 693, 298 U.S. 99, 80 L.Ed. 1066, reversing Rambo v. Chicago, Great Western R. Co., 263 N.W. 112, 195 Minn. 331, certiorari granted Chicago Great Western R. Co. v. Rambo, 56 S.Ct. 574, 297 U.S. 701, 80 L.Ed. 990, rehearing denied 56 S.Ct. 945, 298 U.S. 692, 80 L.Ed. 1409.

Mo.—Jenkins v. Kurn, 156 S.W.2d 668, conforming to mandate 61 S.Ct. 934, 313 U.S. 256, 85 L.Ed. 1316, reversing 144 S.W.2d 76, 346 Mo. 904, certiorari granted 61 S.Ct. 740, 312 U.S. 675, 85 L.Ed. 1116—State ex rel. Gaines v. Canada, 131 S.W.2d 217, 344 Mo. 1238, conforming to mandate 59 S.Ct. 232, 305 U.S. 337, 83 L.Ed. 208, reversing 113 S.W.2d 783, 342 Mo. 121, certiorari granted 59 S.Ct. 65, 305 U.S. 580, 83 L.Ed. 365, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 437—Ætna Ins. Co. v. Hyde, 34 S.W.2d 85, 327 Mo. 115.

N.Y.—U. S. v. Pink, 36 N.Y.S.2d 961—Felt & Tarrant Mfg. Co. v. McGoldrick, 20 N.Y.S.2d 858.

S.C.—Beidler v. South Carolina Tax Commission, 160 S.E. 261, 162 S.C. 447, reversed in part on other grounds 51 S.Ct. 54, 282 U.S. 1, 75 L.Ed. 131.

Tex.—Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 50 S.W.2d 1095, conforming to Atchison, T. & S. F. Ry. Co. v. Saxon, 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397, reversing Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 36 S.W.2d 228, rehearing denied 38 S.W.2d 775, reversing Atchison, T. & S. F. Ry. Co. v. Saxon, Civ.App., 21 S.W.2d 686—Adam v. Saenger, Civ.App., 119 S.W.2d 687, conforming to mandate 58 S.Ct. 454, 303 U.S. 59, 82 L.Ed. 649, reversing 101 S.W.2d 1016, certiorari granted 58 S.Ct. 28, 302 U.S. 668, 82 L.Ed. 515, rehearing denied 58 S.Ct. 640, 303 U.S. 666, 82 L.Ed. 1123. Error dismissed, certiorari denied Saenger v. Adam, 59 S.Ct. 832, 307 U.S. 628, 83 L.Ed. 1511.

Wis.—J. C. Penney Co. v. Wisconsin Tax Commission, 298 N.W. 186, 238 Wis. 69, 134 A.L.R. 908, conforming to mandate State of Wisconsin v. J. C. Penney Co., 61 S.Ct. 246, 311 U.S. 435, 85 L.Ed. 267, 130 A.L.R. 1229, reversing J. C. Penney Co. v. Wisconsin Tax Commission, 289 N.W. 677, 233 Wis. 286, 126 A.L.R. 1333, certiorari granted State of Wisconsin v. J. C. Penney Co., 60 S.Ct. 1076, 310 U.S. 618, 84 L.Ed. 1392, rehearing denied 61 S.Ct. 444, 312 U.S. 712, 85 L.Ed. 1143, conforming to mandate State of Wisconsin v. Minnesota Mining & Manufacturing Co., 61 S.Ct. 253, 311 U.S. 452, 85 L.Ed. 274, reversing Minnesota Mining & Manufacturing Co. v. Wisconsin Tax Commission, 289 N.W. 686, 233 Wis. 306, certiorari granted State of Wisconsin v. Minnesota Mining & Mfg. Co., 60 S.Ct. 1077, 310 U.S. 619, 84 L.Ed. 1393, rehearing denied 61 S.Ct. 444, 312 U.S. 712, 85 L.Ed. 1143, conforming to mandate State of Wisconsin v. F. W. Woolworth Co., 61 S.Ct. 395, 311 U.S. 622, 85 L.Ed. 395, reversing F. W. Woolworth Co. v. Wisconsin Tax Commission, 289 N.W. 685, 233 Wis. 305, certiorari granted State of Wisconsin v. F. W. Woolworth Co., 60 S.Ct. 1076, 310 U.S. 619, 84 L.Ed. 1393, rehearing denied 61 S.Ct. 444, 312 U.S. 711, 85 L.Ed. 1143.

25 C.J. p 960 note 19.

Jurisdiction of state court on remand

On mandate of United States supreme court to Oklahoma supreme court, from which appeal was taken, latter is revested with jurisdiction.—Condren v. Marlin, 267 P. 625, 131 Okl. 32, conforming to mandate Marlin v. Lewallen, 48 S.Ct. 248, 276 U.S. 58, 72 L.Ed. 467, reversing Condren v. Marlin, 241 P. 826, 113 Okl. 259, certiorari granted 46 S.Ct. 485, 271 U.S. 651, 70 L.Ed. 1134.

Matters not decided by the supreme court are to be disposed of by the state court.

U.S.—Hallanan v. Eureka Pipe Line Co., W.Va., 43 S.Ct. 411, 261 U.S. 393, 67 L.Ed. 715.

Mo.—State ex rel. Gaines v. Canada, 131 S.W.2d 217, 344 Mo. 1238, conforming to mandate 59 S.Ct. 232, 305 U.S. 337, 83 L.Ed. 208, reversing 113 S.W.2d 783, 342 Mo. 121, certiorari granted 59 S.Ct. 65, 305 U.S. 580, 83 L.Ed. 365, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 437.

Tex.—State v. Lone Star Gas Co., Civ.App., 129 S.W.2d 1164, modified on other grounds, Sup., Lone Star Gas Co. v. State, 153 S.W.2d 681.

25 C.J. p 960 note 19 [a].

Undetermined issues arising under state law exclusively may be considered by state court after mandate of federal supreme court remanding cause.—Engen v. Union State Bank of Harvard, 236 N.W. 741, 121 Neb. 257, certiorari denied 52 S.Ct. 33, 284 U.S. 655, 76 L.Ed. 555.

State courts will be free to decide any federal questions remaining undecided, without prejudice to further presentation of such questions to United States supreme court.—McGoldrick v. Compagnie Generale Transatlantique, 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849, reversing Compagnie Generale Transatlantique v. McGoldrick, 18 N.E.2d 28, 279 N.Y. 192, affirming 4 N.Y.S.2d 661, 254 App.Div. 237, reargument denied and remittitur amended 21 N.E.2d 199, 280 N.Y. 691, certiorari granted McGoldrick v. Compagnie Generale Transatlantique, 59 S.Ct. 1043, 307

clude the right of the state court to consider and pass on the rights of the parties in the light of the statute as correctly construed.[35] Where the statutes and practice of a state provide that an appellate court of such state may, on reviewing a judgment of the court below, render such a judgment as should have been rendered by that court, the United States supreme court may, on reversing the decision of the state appellate court, enter a judgment finally disposing of the case.[36] The supreme court may, in its discretion, award execution.[37] A writ of error to a state court, which incorrectly stated the date of the judgment in the court below, could be dismissed without prejudice to proceedings under a second writ of error, which correctly described the judgment.[38]

U.S. 620, 83 L.Ed. 1499—McGoldrick v. Berwind-White Coal Mining Co., 60 S.Ct. 388, 309 U.S. 33, 84 L.Ed. 876, reversing Berwind White Coal Mining Co. v. McGoldrick, 22 N.E.2d 173, 281 N.Y. 610, affirming Berwind White Coal Mining Co. v. McGoldrick, 8 N.Y.S.2d 668, 255 App.Div. 961, reargument denied and motion granted Berwind-White Coal Mining Co. v. McGoldrick, 22 N.E.2d 764, 281 N.Y. 670, certiorari granted McGoldrick v. Berwind-White Coal Mining Co., 60 S.Ct. 261, 308 U.S. 546, 84 L. Ed. 459.

Filing amended petition asserting additional demand

Remanding of case by highest state court after receiving federal supreme court's mandate reversing judgment, and plaintiff's filing amended petition asserting additional demand, and trial thereon, was not inconsistent with such mandate.—Southern Ry. Co. v. Commonwealth of Kentucky, 52 S.Ct. 160, 284 U.S. 338, 76 L.Ed. 327, affirming Southern Ry. Co. v. Commonwealth, 38 S.W.2d 696, 238 Ky. 638, and mandate stayed Southern Ry. Co. v. Commonwealth of Kentucky, 52 S.Ct. 639, set aside 53 S.Ct. 24, 287 U.S. 561, 77 L.Ed. 495.

Construing state statute to render it constitutional

Where the supreme court holds a state statute invalid, as construed and applied by the state court, and remands the cause for further proceedings not inconsistent with the opinion, the state courts are not precluded from construing the statute so as to eliminate the unconstitutional features.—Schuylkill Trust Co. v. Commonwealth of Pennsylvania, 58 S.Ct. 295, 302 U.S. 506, 82 L.Ed. 392, affirming Commonwealth v. Schuylkill Trust Co., 193 A. 638, 327 Pa. 127.

Abandonment of issue

Where statute was assailed as violating both the state and federal constitutions and on appeal to the supreme court of Iowa validity of the statute under the state constitution was not challenged, question of the validity of the statute under the state constitution was "abandoned" and after decision of the supreme court was reversed by the United States supreme court and cause was remanded appellee was not entitled to a consideration of whether statute violated the state constitution.—Montgomery Ward & Co. v. Nelson, 299 N.W. 401, 230 Iowa 942, conforming to mandate Nelson v. Montgomery Ward & Co., 61 S.Ct. 593, 312 U.S. 373, 85 L.Ed. 897, reversing Montgomery Ward & Co. v. Roddewig, 292 N.W. 142, 228 Iowa 1301, certiorari granted Roddewig v. Montgomery Ward & Co., 61 S.Ct. 34, 311 U.S. 630, 85 L.Ed. 401, rehearing denied Nelson v. Montgomery Ward & Co., 61 S.Ct. 804, 312 U.S. 716, 85 L. Ed. 1145.

Passing on errors of supreme court

It is not the province of the supreme court of Iowa or of the district court to pass on or attempt to correct alleged errors of the supreme court of the United States.—Montgomery Ward & Co. v. Nelson, supra.

Proper construction of mandate of the United States supreme court presents a "federal question" for the determination of that court.—Ex parte State of Texas, 62 S.Ct. 418, 315 U.S. 8, 86 L.Ed. 579, denying petition Lone Star Gas Co. v. State, Tex., 153 S.W.2d 681.

Vacated judgment as "law of the case"

Opinion of state supreme court on federal issue, reviewed on certiorari by United States supreme court and there vacated, does not remain "law of the case" for any purpose, and is without effect.—In re Hallbom's Estate, 249 N.W. 417, 189 Minn. 383, certiorari granted Pagel v. Pagel, 54 S.Ct. 131, 290 U.S. 620, 78 L.Ed. 541, affirmed 54 S.Ct. 497, 291 U.S. 473, 78 L.Ed. 921.

Mandamus to enforce mandate

(1) On motion for leave to file petition for writ of mandamus in United States supreme court against the judges of the supreme court of Texas to bring a judgment of that court into conformity with controlling mandate of the United States supreme court, in a case involving enforcement of an order of the Texas railroad commission, the United States supreme court was required to accept the return of the Texas judges regarding the scope of judicial review of orders of Texas railroad commission as well as their showing regarding the distribution of judicial power within the Texas judicial system, since such matters were matters of "local law".—Ex parte State of Texas, 62 S.Ct. 418, 315 U.S. 8, 86 L.Ed. 579, denying petition Lone Star Gas Co. v. State, Tex., 153 S.W.2d 681.

(2) Where merits of claim of confiscation were not determined by United States supreme court on review of judgment of Texas court of civil appeals entered on an appeal in action to enforce an order of Texas railroad commission fixing rate to be charged by gas company for gas delivered to Texas distributing companies, and subsequently the case was before Texas supreme court which rendered opinion which was susceptible to construction that United States supreme court had ruled on merits of claim of confiscation, and sent case to district court for new trial, and motion was filed in United States supreme court for leave to file mandamus petition to bring Texas supreme court's judgment within controlling mandate of United States supreme court, rule to show cause was discharged and motion was denied on filing of return to rule to show cause by judges of the Texas supreme court which was in effect a disavowal that their action implied that decision of United States supreme court foreclosed a trial on issue of confiscation.—Ex parte State of Texas, supra. 62 S.Ct. 418, denying petition Lone Star Gas Co. v. State, 153 S.W.2d 681.

(3) Mandamus under appellate jurisdiction of supreme court generally see supra § 199.

35. U.S.—Northern Pac. R. Co. v. Concannon, 36 S.Ct. 156, 239 U.S. 382, 60 L.Ed. 342, reversing 135 P. 652, 75 Wash. 591.

36. U.S.—Stanley v. Schwalby, Tex., 16 S.Ct. 754, 162 U.S. 255, 40 L.Ed. 960.

25 C.J. p 960 note 21.

37. **Refusal of state court to execute mandate**

If a cause has been remanded to the state court which refuses to execute the mandate of the supreme court the latter court may, on a second writ, proceed to a final decision and award execution thereon.—Martin v. Hunter's Lessee, Va., 1 Wheat. 304, 4 L.Ed. 97.

38. U.S.—Northern Pac. R. Co. v. Hasse, 25 S.Ct. 305, 197 U.S. 9, 49 L.Ed. 642, reversing 68 P. 882, 28 Wash. 353, 92 Am.S.R. 840—North-

Equally divided court. If the supreme court is equally divided with respect to the federal question presented the judgment of the state court will be affirmed.[39]

Effect of events subsequent to decision by state court. As shown supra § 280, the supreme court on review of a decision of a state court ordinarily considers only federal questions and does not review questions of state law. However, under its power to make such disposition of the case as justice requires, the supreme court may consider questions of state law which arise after the decision of the state court has been rendered, as where new facts have supervened or there has been a change in the law.[40] The court in a proper case may dismiss the appeal or writ[41] or it may decide the state questions or remand the cause for appropriate action by the state court.[42] When the intervening event is of such nature that the judgment of the state court should not be enforced, the supreme court will vacate the judgment and remand the cause rather than dismiss the appeal or writ.[43]

Where, by reason of events occurring subsequent to the rendition by the state court of the judgment which is sought to be reversed, the particular relief sought in that action by plaintiff in error cannot be afforded, the appeal or writ will be dismissed.[44]

Amendment of record. Under its power to make such disposition of the case as justice requires, the supreme court may, instead of dismissing the appeal or writ, vacate the judgment of the state court and remand the cause to the end that the record be amended or clarified.[45] Thus such procedure may be followed where the record fails adequately to state the facts underlying a decision of a federal question,[46] or where the grounds of the state decision are obscure,[47] as where, under the deci-

ern Pac. R. Co. v. Ely, 25 S.Ct. 302, 197 U.S. 1, 49 L.Ed. 639, reversing 65 P. 555, 25 Wash. 384, 54 L.R.A. 526, 87 Am.S.R. 766.

39. U.S.—United Gas Public Service Co. v. State of Texas, 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702, affirming United Gas Public Service Co. v. State, Tex.Civ.App., 89 S.W.2d 1094.

40. U.S.—State of Missouri ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 47 S.Ct. 311, 273 U.S. 126, 71 L.Ed. 575, reversing 267 S.W. 102, 306 Mo. 149—Dorchy v. State of Kansas, 44 S.Ct. 323, 264 U.S. 286, 68 L.Ed. 686, reversing State v. Dorchy, 210 P. 352, 112 Kan. 235—Gulf, C. & S. F. R. Co. v. Dennis, Tex., 32 S.Ct. 542, 224 U.S. 503, 56 L.Ed. 860.

41. U.S.—Pagel v. MacLean, 51 S.Ct. 416, 283 U.S. 266, 75 L.Ed. 1023, vacating In re Hallbom's Estate, 229 N.W. 344, 179 Minn. 402, certiorari granted Pagel v. Hallbom, 51 S.Ct. 25, 282 U.S. 819, 75 L.Ed. 732, and supplemented Pagel v. MacLean, 237 N.W. 21, 183 Minn. 429, conformed to 237 N.W. 21, 183 Minn. 429.

42. U.S.—Mayflower Farms v. Ten-Eyck, 56 S.Ct. 457, 297 U.S. 266, 80 L.Ed. 675, reversing Mayflower Farms v. Baldwin, 195 N.E. 532, 267 N.Y. 9, affirming 275 N.Y.S. 669, 242 App.Div. 881, reargument denied 198 N.E. 371, 268 N.Y. 495—State of Missouri ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 47 S.Ct. 311, 273 U.S. 126, 71 L.Ed. 575, reversing 267 S.W. 102, 306 Mo. 149.

43. U.S.—State Tax Commission of Utah v. Van Cott, 59 S.Ct. 605, 306 U.S. 511, 83 L.Ed. 950, vacating Van Cott v. State Tax Commission of Utah, 79 P.2d 6, 95 Utah 43, certiorari granted State Tax Commission of Utah v. Van Cott, 59 S.Ct. 358, 305 U.S. 592, 83 L.Ed. 375, mandate conformed to Van Cott v. State Tax Commission, 96 P.2d 740, 98 Utah 264—Patterson v. State of Alabama, 55 S.Ct. 575, 294 U.S. 600, 79 L.Ed. 1082, vacating Patterson v. State, 156 So. 567, 229 Ala. 270, and certiorari granted 55 S.Ct. 347, 293 U.S. 554, 79 L.Ed. 656—Pagel v. MacLean, 51 S.Ct. 416, 283 U.S. 266, 75 L.Ed. 1023, vacating In re Hallbom's Estate, 229 N.W. 344, 179 Minn. 402, certiorari granted Pagel v. Hallbom, 51 S.Ct. 25, 282 U.S. 819, 75 L.Ed. 732, and supplemented Pagel v. MacLean, 237 N.W. 21, 183 Minn. 429, conformed to 237 N.W. 21, 183 Minn. 429—State of Missouri ex rel. Wabash Ry. Co. v. Public Service Commission of Missouri, 47 S.Ct. 311, 273 U.S. 126, 71 L.Ed. 575, reversing 267 S.W. 102, 306 Mo. 149—Dorchy v. State of Kansas, 44 S.Ct. 323, 264 U.S. 286, 68 L.Ed. 686, reversing State v. Dorchy, 210 P. 352, 112 Kan. 235—Gulf, C. & S. F. R. Co. v. Dennis, 32 S.Ct. 542, 224 U.S. 503, 56 L.Ed. 860.

44. U.S.—Kimball v. Kimball, N.Y., 19 S.Ct. 639, 174 U.S. 158, 43 L.Ed. 932.

Questions becoming moot

U.S.—Chandler v. Wise, 59 S.Ct. 992, 307 U.S. 474, 83 L.Ed. 1407, dismissing certiorari, 111 S.W.2d 633, 271 Ky. 252, certiorari granted 58 S.Ct. 831, 303 U.S. 634, 82 L.Ed. 1095.

25 C.J. p 958 note 3 [a].

45. U.S.—State of Minnesota v. National Tea Co., 60 S.Ct. 676, 309 U.S. 551, 84 L.Ed. 920, vacating National Tea Co. v. State, 286 N.W. 360, 205 Minn. 443, certiorari granted State of Minnesota v. National Tea Co., 60 S.Ct. 294, 308 U.S. 547, 84 L.Ed. 460, reinstated National Tea Co. v. State, 294 N.W. 230, 208 Minn. 607.

46. U.S.—Villa v. Van Schaick, 57 S.Ct. 128, 299 U.S. 152, 81 L.Ed. 91, vacating In re People by Van Schaick, 195 N.E. 213, 266 N.Y. 589, remittitur amended 199 N.E. 672, 269 N.Y. 562, and 200 N.E. 320, 270 N.Y. 564, reargument denied 195 N.E. 376, 266 N.Y. 672.

47. U.S.—Honeyman v. Hanan, 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, vacating 3 N.E.2d 186, 271 N.Y. 564, affirming 285 N.Y.S. 527, 256 App.Div. 781, reargument denied 285 N.Y.S. 1084, 248 App.Div. 829, and affirmed 9 N.E.2d 970, 275 N.Y. 382, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, reargument granted and amendment of remittitur denied 8 N.E.2d 618, 274 N.Y. 490.

Ambiguous or obscure adjudications by state courts do not bar a determination by the supreme court of the validity under the federal Constitution of state action, and intelligent exercise of its appellate powers compels the supreme court to ask for the elimination of the obscurities and ambiguities from the opinions in such cases so that the court can ascertain whether its jurisdiction to review should be invoked.—State of Minnesota v. National Tea Co., 60 S.Ct. 676, 309 U.S. 551, 84 L.Ed. 920, vacating National Tea Co. v. State, 286 N.W. 360, 205 Minn. 443, certiorari granted State of Minnesota v. National Tea Co., 60 S.Ct. 294, 308 U.S. 547, 84 L.Ed. 460, reinstated Na-

sions of the courts on the question, there is uncertainty as to whether the decision of the state court was based on a federal or nonfederal ground.[48]

X. CIRCUIT COURTS OF APPEALS

A. IN GENERAL

§ 282. Creation of Court

The circuit courts of appeals are statutory courts, created for the purpose of facilitating the prompt disposition of cases and relieving the supreme court from the oppressive burden of general litigation.

The circuit courts of appeals are statutory courts,[49] created for the purpose of facilitating the prompt disposition of cases and relieving the supreme court from the oppressive burden of general litigation, which impedes the examination of cases of public concern and operates to the delay of suitors.[50] There was one court for each of the nine judicial circuits, as originally created by the Judiciary Act of 1891, 28 U.S.C.A. § 211,[51] which took effect immediately notwithstanding provisions that the jurisdiction of the supreme and circuit courts was not thereby to be impaired in cases of appeals taken or pending before July 1, 1891.[52] A tenth circuit was added by Act of February 28, 1929 c 363 § 1, 28 U.S.C.A. § 211, as amended.[53]

§ 283. Personnel of Court

The judges eligible to sit on a circuit court of appeals are the circuit justice assigned to the circuit, the circuit judges, and, when needed, the district judges. The court may consist of three or, in some circuits, of more than three judges.

Under the provisions of the Judicial Code § 289, 28 U.S.C.A. § 430, abolishing circuit courts, and the various related statutes, Judicial Code §§ 117–120, 28 U.S.C.A. §§ 211–216, dealing with the creation and composition of circuit courts of appeals, including the allotment of justices of the supreme court to the circuits, the judges of a circuit court of appeals are drawn from three sources—the chief justice or associate justice of the supreme court assigned to the circuit, the circuit judges, and the district judges.[54] Circuit judges become ex officio judges of the respective circuit courts of appeals,[55] but district judges are drawn on only in case a full court cannot be made up by the circuit justice and the circuit judges.[56] The provisions of the Judicial Code also manifest a purpose to constitute in some circuits a circuit court of appeals of more than three judges.[57] The provision that "the circuit judges in each cir-

tional Tea Co. v. State, 294 N.W. 230, 208 Minn. 607.

48. U.S.—State of Minnesota v. National Tea Co., supra.

49. U.S.—Delaware, L. & W. R. Co. v. Rellstab, C.C.A.N.J., 15 F.2d 137, certiorari granted 47 S.Ct. 247, 273 U.S. 685, 71 L.Ed. 840, reversed on other grounds 48 S.Ct. 203, 276 U. S. 1, 72 L.Ed. 439.

50. U.S.—Lau Ow Bew v. U. S., Cal., 12 S.Ct. 517, 144 U.S. 47, 36 L.Ed. 340, reversing 47 F. 641, 1 C.C.A. 1, certiorari granted Ex parte Lau Ow Bew, 12 S.Ct. 43, 141 U.S. 583, 35 L.Ed. 868.

25 C.J. p 961 note 27.

51. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249, affirming, C. C.A., Commissioner of Internal Revenue v. Textile Mills Securities Corporation, 117 F.2d 62, certiorari granted 61 S.Ct. 830, 312 U.S. 677, 85 L.Ed. 1117—United States v. Winston, Wash., 18 S.Ct. 701, 170 U.S. 522, 42 L.Ed. 1130, affirming 73 F. 149, 19 C.C.A. 419.

25 C.J. p 961 note 25.

52. U.S.—Gulf, C. & S. F. R. Co. v. Shane, Ind.T., 15 S.Ct. 641, 157 U.S. 348, 39 L.Ed. 727.

53. U.S.—McClintock v. U. S., C.C.A. Kan., 60 F.2d 839.

54. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 62 S.Ct. 272, 314 U. S. 326, 86 L.Ed. 249, affirming, C.C. A., Commissioner of Internal Revenue v. Textile Mills Securities Corporation, 117 F.2d 62, certiorari granted 61 S.Ct. 830, 312 U.S. 677, 85 L.Ed. 1117—Lang's Estate v. Commissioner of Internal Revenue, C. C.A., 97 F.2d 867.

55. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 62 S.Ct. 272, 314 U. S. 326, 86 L.Ed. 249, affirming, C.C. A., Commissioner of Internal Revenue v. Textile Mills Securities Corporation, 117 F.2d 62, certiorari granted 61 S.Ct. 830, 312 U.S. 677, 85 L.Ed. 1117.

56. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

"Full court," as used in this connection, refers to the court which contains the permissible complement of judges, as distinguished from a quorum of two, and the permissible complement is a bench of three judges.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

Court composed of district judges alone

In the absence of the chief justice or an associate justice of the supreme court, or of a circuit judge, a circuit court of appeals is legally constituted where made up of three district judges of the circuit, regularly designated by particular assignments to attend as members for the term.—Peters v. Hanger, Va., 136 F. 181, 69 C.C.A. 197.

57. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249, affirming, C. C.A., Commissioner of Internal Revenue v. Textile Mills Securities Corporation, 117 F.2d 62, certiorari granted 61 S.Ct. 830, 312 U.S. 677, 85 L.Ed. 1117.

Three judges under original act

(1) By the original Act of March 3, 1891, 28 U.S.C.A. § 212, each circuit court of appeals was to consist of three judges, of whom two constituted a quorum.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

(2) This act, it has been held, was not amended by the later creation of

cuit shall be judges of the circuit court of appeals in that circuit" manifests the purpose that the size of the circuit court of appeals shall not be less than the number of circuit judges authorized by law in that circuit, notwithstanding the provision that such a court shall consist of three judges,[58] and notwithstanding the further provision that each circuit judge shall sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law.[59] The term "court," as used in these statutes, does not mean three judges when the court is sitting, and all the judges when other functions are performed, but comprises the entire number of judges in each circuit, so that, not merely three, but all the judges in active service of the court in a particular circuit may sit in banc.[60]

§ 284. Rules and Conduct of Business

A circuit court of appeals is governed, as to matters of procedure, by the rules of practice and procedure in the federal courts, although it may establish rules and regulations for the conduct of its business.

In regard to matters of procedure, a circuit court of appeals is governed, not by the rules of practice and procedure in the state court, but by those in the federal courts,[61] such as by the Federal Rules of Civil Procedure, rules 73–76, 28 U.S.C.A. following § 723c, relating to and regulating appeals to a circuit court of appeals.[62]

However, under the provisions of Judicial Code § 122, 28 U.S.C.A. § 219, a circuit court of appeals may establish rules and regulations for the conduct of its business, within its jurisdiction as conferred by law. Such a rule may be established for the purpose of expediting and simplifying the practice and procedure in a circuit court of appeals,[63] and has the force and effect of law, unless it is in conflict with an act of congress.[64] A rule of a circuit court of appeals which allows the court to sit in banc has been held valid.[65]

Judges of the court will not knowingly review, reverse, or overrule decisions of other judges of the same court.[66]

§ 285. Jurisdiction in General

The jurisdiction of the circuit court of appeals is purely statutory and appellate.

The jurisdiction of the circuit court of appeals is purely statutory.[67] Furthermore, by virtue of the

additional circuit judgeships so as to enlarge the number of judges at any session beyond the original limit of three.—Lang's Estate v. Commissioner of Internal Revenue, C.C. A., 97 F.2d 867.

58. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 62 S.Ct. 272, 314 U. S. 326, 86 L.Ed. 249, affirming, C.C. A., Commissioner of Internal Revenue v. Textile Mills Securities Corporation, 117 F.2d 62, certiorari granted 61 S.Ct. 830, 312 U.S. 677, 85 L.Ed. 1117.

59. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

"According to law" refers to time of sitting rather than to section providing that circuit courts of appeals should consist of three judges.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

60. U.S.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

"Court," as used in different sentences

In statute providing that circuit court of appeals should consist of three judges, and in a later sentence prescribing duties of court other than hearing and deciding appeals, the word "court" was used in the same sense, and did not change meaning when the separate sentences were sectionalized in the code, and could not be construed as meaning that court, when sitting, should consist of three judges drawn from a panel drawn from such larger number as might from time to time be authorized.—Textile Mills Securities Corporation v. Commissioner of Internal Revenue, supra.

61. U.S.—Dallas Ry. & Terminal Co. v. Sullivan, C.C.A.Tex., 108 F.2d 581.

25 C.J. p 971 notes 35, 36.

62. U.S.—U. S. ex rel. Rempas v. Schlotfeldt, C.C.A.Ill., 123 F.2d 109—Miller v. U. S., C.C.A.Ill., 117 F. 2d 256, adopting 114 F.2d 267, reversing, D.C., 21 F.Supp. 958, and certiorari denied 61 S.Ct. 1114, 313 U.S. 591, 85 L.Ed. 1545.

Formerly a circuit court of appeals could not adopt any practice inconsistent with the federal equity rules. —Roosevelt v. Missouri State Life Ins. Co., C.C.A.Ark., 70 F.2d 939—Northwestern Mut. Life Ins. Co. v. Keith, Kan., 77 F. 374, 23 C.C.A. 196.

63. U.S.—U. S. ex rel. Rempas v. Schlotfeldt, C.C.A.Ill., 123 F.2d 109.

Power of district courts is not extended by rules of appellate courts.—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443—Hagerman v. Moran, C.C.A.Nev., 75 F. 97.

Rules of court generally see supra § 96.

64. U.S.—In re Hargrove, C.C.A. Tex., 96 F.2d 168.

65. U.S.—Oughton v. National Labor Relations Board, C.C.A., 118 F. 2d 486—Commissioner of Internal Revenue v. Textile Mills Securities Corporation, C.C.A., 117 F.2d 62, certiorari granted Textile Mills Securities Corporation v. Commissioner of Internal Revenue, 61 S. Ct. 830, 312 U.S. 677, 85 L.Ed. 1117, and affirmed 62 S.Ct. 272, 314 U.S. 326, 86 L.Ed. 249.

66. U.S.—Donnelly Garment Co. v. National Labor Relations Board, C.C.A., 123 F.2d 215.

Remedy is in supreme court

Where judges who constituted the circuit court of appeals to which petitions of employer and workers' union to set aside cease and desist order of National Labor Relations Board was finally submitted were not the same judges who originally passed on the sufficiency of the employer's and the union's applications for leave to adduce additional evidence and who denied those applications, the court would not, on final submission of case, consider such applications, and if court erred in denying an opportunity to prove that the board was not an impartial tribunal, the error was one which properly could be corrected only by the United States supreme court.—Donnelly Garment Co. v. National Labor Relations Board, supra.

67. U.S.—Millslagle v. Olson, C.C. A.Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015—Leimer v. State Mut. Life Assur. Co. of

provisions of the Judicial Code § 128, 28 U.S.C.A. § 225, its jurisdiction is purely appellate,[68] and it can pass on the merits of a cause only by way of review.[69] It has no original jurisdiction except such as may be necessary to aid, protect, or enforce its appellate jurisdiction,[70] and it is subject to the supervisory jurisdiction of the supreme court.[71]

§ 286. Issuance of Writs

The circuit court of appeals has power to issue supersedeas, scire facias, habeas corpus, mandamus, prohibition, and other writs, which may be necessary for the exercise of its appellate jurisdiction.

Although the Federal Rules of Civil Procedure do not apply of their own force to the circuit courts of appeals,[72] such courts have general power, under the provisions of the Judicial Code § 262, 28 U.S. C.A. § 377, to issue writs which are necessary for the exercise of their appellate jurisdiction,[73] such as writs of supersedeas,[74] scire facias,[75] habeas corpus,[76] injunction,[77] or prohibition.[78] A circuit

Worcester, Mass., C.C.A.Mo., 106 F. 2d 793 appeal dismissed, 107 F.2d 1003—In re Philadelphia & Reading Coal & Iron Co., C.C.A.Pa., 103 F.2d 901—Dodge Mfg. Co. v. Patten, C. C.A.Ind., 43 F.2d 472—Emlenton Refining Co. v. Chambers, C.C.A. Pa., 14 F.2d 164.

68. U.S.—Stephenson v. Equitable Life Assur. Soc. of U. S., C.C.A. Va., 92 F.2d 406—Hall v. U. S., C. C.A.Okl., 78 F.2d 168—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A., 70 F.2d 545—Federal Trade Commission v. Balme, C.C.A., 23 F.2d 615, certiorari denied Balme v. Federal Trade Commission, 48 S.Ct. 560, 277 U.S. 598, 72 L.Ed. 1007—Delaware, L. & W. R. Co. v. Rellstab, C.C.A.N.J., 15 F.2d 137, certiorari granted 47 S.Ct. 247, 273 U.S. 685, 71 L.Ed. 840, reversed on other grounds 48 S.Ct. 203, 276 U.S. 1, 72 L.Ed. 439—Frankel v. Woodrough, C.C.A.Neb., 7 F.2d 796.

25 C.J. p 963 note 55.

69. U.S.—Stephenson v. Equitable Life Assur. Soc. of U. S., C.C.A.Va., 92 F.2d 406.

70. U.S.—Hall v. U. S., C.C.A.Okl., 78 F.2d 168—Frankel v. Woodrough, C.C.A.Neb., 7 F.2d 796.

25 C.J. p 963 note 55.

No original jurisdiction of receivership proceedings

U.S.—U. S. v. Otley, C.C.A.Or., 116 F. 2d 958.

71. U.S.—Iowa Nat. Bank v. Stewart, 232 N.W. 445, 214 Iowa 1229, certiorari granted Iowa-Des Moines Nat. Bank v. Stewart, 51 S.Ct. 353, 283 U.S. 813, 75 L.Ed. 1430, reversed on other grounds Iowa-Des Moines Nat. Bank v. Bennett, 52 S.Ct. 133, 284 U.S. 239, 76 L.Ed. 265.

72. U.S.—Bethlehem Shipbuilding Corporation v. National Labor Relations Board, C.C.A., 120 F.2d 126.

73. U.S.—McClellan v. Carland, S.D., 30 S.Ct. 501, 217 U.S. 268, 54 L.Ed. 762—Bethlehem Shipbuilding Corporation v. National Labor Relations Board, C.C.A., 120 F.2d 126—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A., 70 F.2d 545—In re Eastman Kodak Co., C.C.A., 48 F.2d 125, 128—Delaware, L. & W. R. Co. v. Rellstab, C.C.A.N.J., 15 F.2d 137, certiorari granted 47 S. Ct. 247, 273 U.S. 685, 71 L.Ed. 840, reversed on other grounds 48 S. Ct. 203, 276 U.S. 1, 72 L.Ed. 439—Frankel v. Woodrough, C.C.A. Neb., 7 F.2d 796.

Decisions of state courts are not controlling in determining the rules governing the issuance of extraordinary writs by circuit court of appeals, but they must be determined from the language of the federal statute and from the decisions of the federal courts.—City of Owatonna v. Interstate Power Co., C.C.A.Minn., 67 F.2d 298, certiorari denied 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062.

Power of federal courts to issue writs generally see supra § 14.

74. U.S.—In re McKenzie, 21 S.Ct. 468, 180 U.S. 536, 45 L.Ed. 657.

75. U.S.—McClellan v. Carland, S.D., 30 S.Ct. 501, 217 U.S. 268, 54 L.Ed. 762.

Federal Rules of Civil Procedure, rule 81(b), 28 U.S.C.A. following § 723c, abolishing writs of scire facias, does not apply to circuit courts of appeals.—Armour & Co. v. Kloeb, C. C.A., 109 F.2d 72, certiorari granted Kloeb v. Armour & Co., 60 S.Ct. 1099, 310 U.S. 621, 84 L.Ed. 1294, reversed on other grounds 61 S.Ct. 213, 311 U. S. 199, 85 L.Ed. 124.

76. U.S.—Ex parte Moran, Okl., 144 F. 594, 75 C.C.A. 396.

25 C.J. p 966 note 76.

Authority of federal courts to issue habeas corpus generally see the C.J.S. title Habeas Corpus §§ 62–69, also 29 C.J. p 124 note 71–p 132 note 37.

77. U.S.—Toledo Scale Co. v. Computing Scale Co., 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719, affirming, C.C.A., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L.Ed. 1072, and Fidelity & Deposit Co. of Maryland v. Computing Scales Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073—In re Philadelphia & Reading Coal & Iron Co., C.C.A.Pa., 103 F.2d 901—Carlisle Lumber Co. v. Hope, C.C.A.Wash., 83 F.2d 92—Harrison Beverage Co. v. Hunsberger, C.C.A.Pa., 65 F.2d 873.

Injunction refused

(1) To holder of permit, to restrain proceedings for revocation of permit pending its appeal from interlocutory order denying injunction against holding of hearing.—Harrison Beverage Co. v. Hunsberger, C.C.A.Pa., 65 F.2d 873.

(2) On appeal from decree refusing to appoint trustee to take possession of assets of debtor undergoing reorganization, to have debtor and other interested parties restrained from proceeding with hearings on proposed plan of reorganization, since that matter had no connection with pending appeal.—In re Philadelphia & Reading Coal & Iron Co., C.C.A.Pa., 103 F.2d 901.

Other form of relief

Where appeal had been from decree refusing to appoint trustee to take possession of assets of debtor undergoing reorganization, appellants, if anticipating harm to them from hearings on proposed plan of reorganization, should not have sought relief from circuit court of appeals, but should have applied to district court for postponement of hearings or should have appealed from order prescribing them.—In re Philadelphia & Reading Coal & Iron Co., supra.

78. U.S.—U. S. v. Mayer, N.Y., 35 S.Ct. 16, 235 U.S. 55, 59 L.Ed. 129—In re Lisman, C.C.A.N.Y., 89 F.2d 898—In re Heilbroner, C.C.A., 69 F.2d 643—In re Eastman Kodak Co., C.C.A., 48 F.2d 125, 128—Henderson Tire & Rubber Co. v. Reeves, C.C.A., 14 F.2d 903, certiorari denied 47 S.Ct. 336, 273 U.S. 744, 71 L.Ed. 870—In re Wingert, D.C.Md., 22 F.Supp. 483—In re Eiler's Music House, C.C.A.Or., 284 F. 815—Muir v. Chatfield, N.Y., 255 F. 24, 166 C.C.A. 352—Zell v. Judges of Circuit Court of U. S. for Eastern Dist. of Virginia, Va., 149 F. 86, 78 C.C.A. 670.

As proper remedy

Motion for prohibition to restrain district court from proceeding with motion to vacate orders is the proper remedy, and will be granted by the circuit court of appeals, in protection of its appellate jurisdiction, where motion to vacate was made after giving of notice of petition to revise,

court of appeals is without any power to issue writs as original process,[79] and accordingly it has no original jurisdiction to issue writs of prohibition[80] or habeas corpus.[81]

The existence of appellate jurisdiction, as a prerequisite to the issuance of original writs, is determined not only by the pendency of the appeal, but also by the question whether or not the proceeding below is within the court's appellate jurisdiction.[82] A situation classed within the protection of appellate jurisdiction is one in which the right of appeal exists but, because of circumstances, a departure from the remedy by appeal becomes necessary, in which situation a circuit court of appeals may employ original writs, as an auxiliary means of giving full force and effect to existing appellate authority and furthering justice;[83] and on this principle, it may issue the writ of certiorari only as auxiliary to a review by appeal or writ of error and not as an original process.[84] The granting of an original writ in such a case is within the court's discretion, limited by the rule that the writ will not issue if the remedy of appeal exists, unless the case is rare and exceptional.[85]

Mandamus. Under its power to issue writs which may be necessary for the exercise of its jurisdiction, a circuit court of appeals may issue a writ of mandamus, before as well as after steps for review have been taken,[86] when, and only when, it is necessary for the protection of its appellate jurisdiction, and strictly in aid of that jurisdiction when it is involved,[87] and to enforce its decrees and man-

and favorable action thereon would take away appellate jurisdiction of circuit court of appeals.—In re St. Lawrence Condensed Milk Corporation, C.C.A.N.Y., 5 F.2d 65.

Who may not obtain

Prohibition will not lie in circuit court of appeals at instance of persons not parties to proceeding in district court to restrain district judge from signing an order taking over administration of two funds in custody of state supreme court in which petitioners are interested.—In re Heilbroner, C.C.A., 69 F.2d 643.

Writ denied for lack of jurisdiction

Where motion to dismiss petition and complaint on ground that court was without jurisdiction of subject matter was denied by the district court, application to the circuit court of appeals for writ of prohibition would be denied for want of jurisdiction and because district judge had not been made a party, although it appeared clear that district court lacked jurisdiction.—New York & Porto Rico S. S. Co. v. U. S., C.C.A. N.Y., 116 F.2d 799.

Issuance of prohibition where an adequate remedy by appeal or writ of error exists generally see the C.J.S. title Prohibition § 15, also 50 C.J. p 684 note 2–p 687 note 29.

Prohibition to inferior court in civil actions generally see the C.J.S. title Prohibition § 11, also 55 C.J. p 671 notes 73–99.

79. U.S.—Whitney v. Dick, Idaho, 26 S.Ct. 584, 202 U.S. 132, 50 L.Ed. 963—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A., 70 F.2d 545.

25 C.J. p 966 note 79.

80. U.S.—Shell Oil Co. v. District Court of U. S. for Northern Dist. of California, Southern Division, C.C.A., 70 F.2d 394—Muir v. Chatfield, N.Y., 255 F. 24, 166 C.C.A. 352.

25 C.J. p 966 note 81.

81. U.S.—Whitney v. Dick, Idaho, 26 S.Ct. 584, 202 U.S. 132, 50 L.Ed. 963—In re Boles, Okl., 48 F. 75, 1 C.C.A. 48.

82. U.S.—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A., 70 F.2d 545.

Where trial court refuses without cause to try prosecution pending therein, appellate jurisdiction of circuit court of appeals is affected and prevented, because its jurisdiction cannot become operative until entry of judgment or decree, and hence jurisdiction of circuit court of appeals to issue original writs in aid of appellate jurisdiction exists.—Frankel v. Woodrough, C.C.A.Neb., 7 F.2d 796.

83. U.S.—In re Lisman, C.C.A.N.Y., 89 F.2d 898—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A., 70 F.2d 545.

84. U.S.—Pickwick-Greyhound Lines, Inc. v. Shattuck, C.C.A.Kan., 61 F.2d 485—Blake v. District Court of U. S. for Southern Dist. of California, Central Division, C.C.A.Cal., 59 F.2d 78—Turner v. U. S., C.C.A., 14 F.2d 360.

25 C.J. p 966 note 83.

Circuit court of appeals may review question on writ of certiorari where plaintiff, within the required time, petitioned for a writ of error to review the question of jurisdiction of the court to make an order vacating a verdict and judgment and granting a new trial, but through no fault of plaintiff no writ of error was filed.—Greyerbiehl v. Hughes Electric Co., C.C.A., 294 F. 802.

Certiorari not available

(1) A petition for writ of certiorari to review preliminary orders of the trade commission denying motions to dismiss the proceedings before the hearing seeks certiorari as an original writ, which the circuit court of appeals has no jurisdiction to issue in a case where it is not in aid of appellate jurisdiction acquired or for the protection of appellate jurisdiction not yet acquired, but which otherwise might be defeated.—Chamber of Commerce of Minneapolis v. Federal Trade Commission of the U. S., C.C.A.Minn., 280 F. 45.

(2) A district court's order refusing to remand to a state court a civil case removed therefrom, is not reviewable by certiorari to the circuit court of appeals.—City of Owatonna v. Interstate Power Co., C.C.A. Minn., 67 F.2d 298, certiorari denied 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062.

85. U.S.—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A., 70 F.2d 545.

On application for original writ, federal appellate courts have jurisdiction to determine whether or not case is rare and exceptional, thereby justifying writ notwithstanding remedy by writ of error or appeal.—Minnesota & Ontario Paper Co. v. Molyneaux, supra.

86. U.S.—Henderson Tire & Rubber Co. v. Reeves, C.C.A., 14 F.2d 903, certiorari denied 47 S.Ct. 336, 273 U.S. 744, 71 L.Ed. 870.

87. U.S.—Delaware, L. & W. R. Co. v. Rellstab, 48 S.Ct. 203, 276 U.S. 1, 72 L.Ed. 439, reversing, C.C.A., 15 F.2d 137, certiorari granted 47 S. Ct. 247, 273 U.S. 685, 71 L.Ed. 840—McClellan v. Carland, S.D., 30 S. Ct. 501, 217 U.S. 268, 54 L.Ed. 762—In re Melekov, C.C.A.Cal., 114 F. 2d 727, denying petition, D.C., Melekov v. Collins, 30 F.Supp. 159—U. S. ex rel. McNeill v. Avis, C.C.A. N.J., 108 F.2d 457—National Bondholders Corporation v. McClintic, C.C.A.W.Va., 99 F.2d 595—Whittel v. Roche, C.C.A.Cal., 88 F.2d 366—U. S. v. Nordbye, C.C.A., 75 F.2d 744, certiorari denied Love v. Nordbye, 56 S.Ct. 103, 296 U.S. 572, 80 L.Ed. 404—Dooley Improvements v. Nields, C.C.A.Del., 72 F.2d 638—U. S. ex rel. Poch v. Hill, C.C.A.

dates.[88] It has no original jurisdiction to issue a writ of mandamus, where its appellate jurisdiction is not involved,[89] such as for the correction of errors in respect of matters within the discretion of the inferior court,[90] or where the case involves only the jurisdiction of the trial court as a federal court;[91] but it has been held that, although the remedy of appeal is available, a writ of mandamus may issue as a substitute where special circumstances exist.[92]

Federal Rules of Civil Procedure, rule 81(b), 28 U.S.C.A. following § 723c, abolishing writs of mandamus, does not apply to circuit courts of appeals,[93]

Pa., 71 F.2d 906, certiorari denied Poch v. Hill, 55 S.Ct. 120, 293 U.S. 597, 79 L.Ed. 690—Harrison Beverage Co. v. Hunsberger, C.C.A.Pa., 65 F.2d 873—Wabash Ry. Co. v. Woodrough, C.C.A.Neb., 29 F.2d 832—Henderson Tire & Rubber Co. v. Reeves, C.C.A., 14 F.2d 903, certiorari denied 47 S.Ct. 336, 273 U.S. 744, 71 L.Ed. 870—Petition of Zeno, C.C.A.Puerto Rico, 14 F.2d 418, certiorari denied Rossy v. Zeno, 47 S.Ct. 244, 273 U.S. 737, 71 L.Ed. 866—In re Gilbough, C.C.A., 13 F.2d 462—Pacific Telephone & Telegraph Co. v. Cushman, C.C.A.Wash., 292 F. 930, petition dismissed 44 S.Ct. 181, 263 U.S. 729, 68 L.Ed. 529—Richfield Oil Co. v. Sawtelle, C.C.A.Ariz., 279 F. 851—U. S. v. Malmin, C.C.A.Virgin Islands, 272 F. 785.

25 C.J. p 966 note 77.

Issuance of mandamus where an adequate remedy by appeal or writ of error exists generally see the C.J.S. title Mandamus § 22, also 38 C.J. p 565 note 24–p 568 note 39.

Mandamus in aid of appeal generally see the C.J.S. title Mandamus § 100, also 38 C.J. p 642 notes 76–88.

Mandamus held proper

(1) To compel district judge to set aside a receivership order, which was in excess of his jurisdiction.—Grable v. Killits, C.C.A.Ohio, 282 F. 185, certiorari denied Bacon Bros. Co. v. Grable, 43 S.Ct. 95, 260 U.S. 735, 67 L.Ed. 488.

(2) To compel a district judge, from whose decision appeals and writs of error would lie to the circuit court of appeals, and who had been lawfully removed and to whom a successor had been unlawfully appointed, to resume the duties of his office.—U. S. v. Malmin, C.C.A.Virgin Islands, 272 F. 785.

(3) To require district court to permit intervention of certificate holders of corporation in receivership.—In re Babcock, C.C.A.Ill., 26 F.2d 153, certiorari denied Babcock v. Wilkerson, 49 S.Ct. 20, 278 U.S. 615, 73 L.Ed. 539.

(4) To require inferior court to proceed to trial and judgment, so that appellate jurisdiction may be exercised.—Petition of Zeno, C.C.A. Puerto Rico, 14 F.2d 418, certiorari denied Rossy v. Zeno, 47 S.Ct. 244, 273 U.S. 737, 71 L.Ed. 866—Bedgisoff v. Cushman, C.C.A.Wash., 12 F.2d 667—Frankel v. Woodrough, C.C.A.Neb., 7 F.2d 796—Schendel v. McGee, C.C.A. Minn., 300 F. 273.

(5) To require district court to take jurisdiction of suit involving aliens.—Ex parte Edelstein, C.C.A.N.Y., 30 F.2d 636, certiorari denied Edelstein v. Goddard, 49 S.Ct. 347, 279 U.S. 851, 73 L.Ed. 994.

(6) To require district court to reinstate judgment, vacated without authority, after affirmance and expiration of term.—Delaware, L. & W. R. Co. v. Rellstab, N.J., 48 S.Ct. 203, 276 U.S. 1, 72 L.Ed. 439, reversing, C.C.A., 15 F.2d 137, certiorari granted 47 S.Ct. 247, 273 U.S. 685, 71 L.Ed. 840.

(7) To compel allowance of appeal.—Richfield Oil Co. v. Sawtelle, C.C.A.Ariz., 279 F. 851.

Where district court refuses to act, circuit court of appeals can ordinarily require district court to act, but cannot direct what that action shall be; and a proceeding in circuit court of appeals to require action by district judge allegedly refusing to perform his duties does not determine rights between parties to litigation, but is directed at the judge, who is a party and has the right to justify his inaction, if he can, by pleading and supporting evidence, and must take the form and have the substance of a mandamus proceeding.—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F.2d 202.

Mandamus in forma pauperis

One imprisoned in United States penitentiary may be granted leave to prosecute his application for a writ of mandamus in forma pauperis.—U. S. ex rel. McNeill v. Avis, C.C.A. N.J., 108 F.2d 457.

Circuit court of appeals has no supervisory jurisdiction over district courts, except in one or two specifically named matters, as in bankruptcy, and therefore has power to issue mandamus directing the district judge to perform his duties only in aid of its appellate jurisdiction as in bankruptcy.—U. S. v. Malmin, C.C.A.Virgin Islands, 272 F. 785.

88. U.S.—Brictson Mfg. Co. v. Munger, C.C.A.Neb., 20 F.2d 793.

89. U.S.—U. S. ex rel. McNeill v. Avis, C.C.A.N.J., 108 F.2d 457—U. S. v. Nordbye, C.C.A., 75 F.2d 744, certiorari denied Love v. Nordbye, 56 S.Ct. 103, 296 U.S. 572, 80 L.Ed. 404—Dooley Improvements v. Nields, C.C.A.Del., 72 F.2d 638—Shell Oil Co. v. District Court of U. S. for Northern Dist. of California, Southern Division, C.C.A., 70 F.2d 394.

25 C.J. p 966 note 80.

90. U.S.—Vacuum Cleaner Co. v. Platt, N.Y., 196 F. 398, 116 C.C.A. 220.

25 C.J. p 966 note 80 [a].

91. U.S.—Hammond Lumber Co. v. U. S. District Court for District of Oregon, Or., 240 F. 924, 153 C.C.A. 610.

25 C.J. p 966 note 80 [b].

Loss of jurisdiction; writ dismissed

Writ of mandamus to compel federal district court to comply with mandate of circuit court of appeals reversing and remanding case would be dismissed where district court had lost jurisdiction by discharge of one of defendants in bankruptcy proceedings by virtue of which district court had exercised jurisdiction.—In re Volland, C.C.A.Ill., 83 F.2d 680.

92. U.S.—In re Lisman, C.C.A.N.Y., 89 F.2d 898.

Circuit court of appeals, but not a single judge thereof, may in exceptional cases by mandamus afford a remedy to a party aggrieved because of error committed by district judge in passing on legal sufficiency of an affidavit of disqualification filed with the district judge.—In re Wingert, D.C.Md., 22 F.Supp. 483.

Mandamus may issue to compel segregation of issues where right to such segregation is clear and remedy by appeal would not be entirely adequate.—Smith Engineering Co. (Pennsylvania) v. Pray, C.C.A.Mont., 58 F.2d 926, affirmed 61 F.2d 687, certiorari denied 53 S.Ct. 594, 289 U.S. 733, 77 L.Ed. 1482.

93. U.S.—Armour & Co. v. Kloeb, C.C.A., 109 F.2d 72, 73, certiorari granted Kloeb v. Armour & Co., 60 S.Ct. 1099, 310 U.S. 621, 84 L.Ed. 1394, reversed on other grounds 61 S.Ct. 213, 311 U.S. 199, 85 L.Ed. 124.

Reason for rule

"The Act of Congress, Title 28 U.S.C.A. § 723b, empowering the Supreme Court to promulgate rules of civil procedure, provides that it 'shall have the power to prescribe, by general rules, for the district courts . . . and for the courts of the District of Columbia, the forms

and even if the rule were construed as forbidding the issuance of a writ of mandamus by the circuit court of appeals, the court could entertain an application, designated as an application for a writ of mandamus, as a motion for relief previously available by mandamus, as authorized by the rule[94]

In an original contempt proceeding pending before the circuit court of appeals, in which it becomes necessary for the court to sit as a trier of controverted facts, it may issue subpœnas ad testificandum and subpœnas duces tecum for purposes of pretrial discovery.[95]

B. APPELLATE JURISDICTION AND PROCEDURE

§ 287. In General

The appellate jurisdiction of the circuit courts of appeals is purely statutory; and such a court must consider the question of its jurisdiction, and that of the lower court, even though the question has not been raised by either party. Abstract or moot questions, not connected with the granting of actual relief, cannot be considered.

The appellate jurisdiction of the circuit courts of appeals is purely of statutory origin, existing only when given by some statutory provision.[96] So, the right of appeal is a matter of privilege rather than a natural, inherent, or vested right,[97] and congress may grant it on such conditions as it deems appropriate;[98] but when provision has been made for appeal, it is, in the cases mentioned, and on the conditions prescribed, a matter of right.[99] A statutory right of appeal may be taken away by repeal of the statute giving it, even as to causes which have been previously appealed.[1]

The jurisdiction of the circuit courts of appeals ends when they find want of jurisdiction in the low-

of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.' While Section 81(b) is general in its terms, it cannot be construed to apply to Circuit Courts of Appeals, since so construed it would be in the exercise of a power not conferred upon the Supreme Court."—Armour & Co. v. Kloeb, supra.

Repeal

Civil procedure rule abolishing writs of mandamus cannot be construed to repeal statute conferring on circuit courts of appeals power to issue writs.—Armour & Co. v. Kloeb, supra.

94. U.S.—Armour & Co. v. Kloeb, supra.

95. U.S.—Bethlehem Shipbuilding Corporation v. National Labor Relations Board, C.C.A., 120 F.2d 126, 127.

By analogy

"Such writs which are appropriate to the exercise of the jurisdiction of the district courts, and now accepted usage therein . . . may, by analogy, be equally appropriate to the exercise of the jurisdiction of a circuit court of appeals."—Bethlehem Shipbuilding Corporation v. National Labor Relations Board, supra.

96. U.S.—Millslagle v. Olson, C.C.A. Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015—Burns v. Ender Coal & Coke Co., C.C.A.Ind., 104 F.2d 964—Raytheon Mfg. Co. v. Radio Corporation of America, C. C.A.Mass., 76 F.2d 943, certiorari granted Radio Corporation of America v. Raytheon Mfg. Co., 56 S.Ct. 99, 296 U.S. 557, 80 L.Ed. 393, affirmed 56 S.Ct. 297, 296 U. S. 459, 80 L.Ed. 327, followed in, C.C.A., Berning v. Louisville & N. R. Co., 92 F.2d 997—In re Gelino's, Inc., C.C.A.Ill., 51 F.2d 875, dismissing appeal, D.C., 43 F.2d 832, and certiorari denied Lamson Co. v. Whittemore, 52 S.Ct. 36, 284 U. S. 659, 76 L.Ed. 558—In re Maryanov, D.C.N.Y., 20 F.2d 939—Emlenton Refining Co. v. Chambers, C.C. A.Pa., 14 F.2d 104, certiorari denied 47 S.Ct. 240, 273 U.S. 731, 71 L.Ed. 863—Stevens v. Clark, Ill., 62 F. 321, 10 C.C.A. 379.

Such statute should be liberally construed in furtherance of the right. —In re Hurley Mercantile Co., C. C.A.Tex., 56 F.2d 1023, certiorari denied Atascosa County State Bank of Jourdanton, Texas v. Coppard, 52 S. Ct. 580, 286 U.S. 555, 76 L.Ed. 1290.

"Jurisdiction is not discretionary; it is settled by statute."—Cohen v. Globe Indemnity Co., C.C.A.Pa., 120 F.2d 791.

Constitutional court

"The Circuit Court of Appeals is a constitutional court . . . and a case or controversy may come before it, provided it involves neither advisory nor executive action by it."—Old Colony Trust Co. v. Commissioner of Internal Revenue, Mass., 49 S. Ct. 499, 502, 279 U.S. 716, 73 L.Ed. 918, answering questions, C.C.A., U. S. v. Boston & Maine R. R., 33 F.2d 889, and question answered 49 S.Ct. 505, 279 U.S. 732, 73 L.Ed. 929, conformed to, C.C.A., 33 F.2d 890, reversing, D.C., Boston & Maine R. R. v. U. S., 23 F.2d 343, and conformed to, C.C.A., Old Colony Trust Co. v. Commissioner of Internal Revenue, 33 F.2d 891.

97. U.S.—Millslagle v. Olson, C.C.A. Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015—Hartmann v. Sloan, C.C.A.Pa., 99 F.2d 942, certiorari denied Hartman v. Sloan, 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039—U. S. ex rel. Angelica v. Hammond, C.C.A.Tex., 99 F.2d 557, rehearing denied U. S. ex rel. Carlisle v. Hammond, 100 F.2d 227, certiorari denied Carlisle v. Hammond, 59 S.Ct. 488, 306 U.S. 638, 83 L.Ed. 1039—In re Maryanov, D. C.N.Y., 20 F.2d 1939.

98. U.S.—Millslagle v. Olson, C.C.A. Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015.

99. U.S.—Alaska Packers Ass'n v. Pillsbury, Cal., 57 S.Ct. 682, 301 U.S. 174, 81 L.Ed. 988, reversing, C.C.A., Pillsbury v. Alaska Packers Ass'n, 85 F.2d 758 and 78 F.2d 587, certiorari granted to both cases Alaska Packers Ass'n v. Pillsbury, 57 S.Ct. 322, 299 U.S. 538, 81 L.Ed. 396—Holliday v. Johnston, C.C.A. Cal., 123 F.2d 867—De La Torre v. National City Bank of New York, C.C.A.Puerto Rico, 110 F.2d 381—Alliance Securities Co. v. Killits, C.C.A.Ohio, 67 F.2d 480.

3 C.J. p 319 note 68.

"Losing party is generally entitled to an appeal as a matter of right."—McBee v. Palmer, C.C.A.Wash., 73 F. 2d 342, 343, dismissing appeal, D.C., In re Thompson, 4 F.Supp. 921.

1. U.S.—U. S. ex rel. Angelica v. Hammond, C.C.A.Tex., 99 F.2d 557, 559, rehearing denied U. S. ex rel. Carlisle v. Hammond, 100 F.2d 227, certiorari denied Carlisle v. Hammond, 59 S.Ct. 488, 306 U.S. 638, 83 L.Ed. 1039.

"There is no vested right in a pending appeal."—U. S. ex rel. Angelica v. Hammond, supra.

er court,[2] although they may, in such a case, entertain an appeal for the purpose of reversing a judgment or order for want of jurisdiction and dismissing the case or directing its dismissal by the lower court.[3] The courts are bound to consider the question of their jurisdiction, and that of the lower court, and to refuse to exercise a jurisdiction not conferred, even though the question was not raised by either party in either court,[4] and even though they protest against such inquiry.[5] The question of jurisdiction is always open.[6] Jurisdiction must af-

2. U.S.—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740, and certiorari denied Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Cramer v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Coburn v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Cramer v. Ætna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Coburn v. Ætna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602.

3 C.J. p 366 note 12.

3. U.S.—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740, and certiorari denied Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Cramer v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Coburn v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Cramer v. Ætna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Coburn v. Ætna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602—U. S. v. Radice, C.C.A.N.Y., 40 F.2d 445.

3 C.J. p 368 note 20—4 C.J. p 581 notes 30, 31.

4. U.S.—Black & Yates v. Mahogany Ass'n, C.C.A.Del., 129 F.2d 227, reversing, D.C., 34 F.Supp. 450—Leishman v. Associated Wholesale Electric Co., C.C.A.Cal., 128 F.2d 204—Alderman v. Elgin, J. & E. Ry. Co., C.C.A.Ill., 125 F.2d 971—In re Prudence-Bonds Corporation, C.C.A. N.Y., 111 F.2d 37, certiorari granted Reconstruction Finance Corporation v. Prudence Securities Advisory Group, 60 S.Ct. 1101, 310 U.S. 622, 84 L.Ed. 1395, reversed on other grounds 61 S.Ct. 331, 311 U.S. 579, 85 L.Ed. 364, Manufacturers Trust Co. v. Prudence Securities Advisory Group, 61 S.Ct. 445, 312 U.S. 649, 85 L.Ed. 1101, Endelman v. Prudence Bonds Corporation, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101, Kelby v. Prudence Securities Advisory Group, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101, Prudence Realization Corporation v. Prudence-Bonds Corporation, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101, and Davison v. Prudence Securities Advisory Group, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101—United Drug Co. v. Helvering, C.C.A., 108 F.2d 637—In re Miller, C.C.A.Ohio, 101 F.2d 748, certiorari granted Miller v. Hatfield, 60 S.Ct. 102, 308 U.S. 534, 84 L.Ed. 450, reversed on other grounds 60 S.Ct. 374, 309 U.S. 1, 84 L.Ed. 535, mandate conformed to, C.C.A., In re Miller, 111 F.2d 28—McCrone v. U. S., C.C.A. Mont., 100 F.2d 322, certiorari granted 59 S.Ct. 591, 306 U.S. 625, 83 L.Ed. 1029, affirmed 59 S.Ct. 685, 307 U.S. 61, 83 L.Ed. 1108—Royalty Service Corporation v. City of Los Angeles, C.C.A.Cal., 98 F.2d 551—American United Life Ins. Co. of Indianapolis, Ind., v. Franklin, C.C.A.Ark., 97 F.2d 76—Credit Bureau of San Diego v. Petrasich, C.C.A.Cal., 97 F.2d 65—Colorado Life Co. v. Steele, C.C.A.Ark., 95 F.2d 535—United Lens Corporation v. Doray Lamp Co., C.C.A.Ill., 93 F.2d 969—Goodyear Tire & Rubber Co. v. Federal Trade Commission, C.C.A., 92 F.2d 677, certiorari granted Federal Trade Commission v. Goodyear Tire & Rubber Co., 58 S.Ct. 747, 303 U.S. 631, 82 L.Ed. 1091, reversed on other grounds 58 S.Ct. 863, 304 U.S. 257, 82 L.Ed. 1326—Schell v. Food Machinery Corporation, C.C.A.Fla., 87 F.2d 385, certiorari denied Food Machinery Corporation v. Schell, 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883—Robinson v. Edler, C.C.A.Nev., 78 F.2d 817—Dodge Mfg. Co. v. Patten, C.C.A.Ind., 43 F.2d 472—Equitable Life Assur. Soc. of U. S. v. Rayl, C.C.A.Kan., 16 F.2d 68—Ward v. Morrow, C.C.A.S.D., 15 F.2d 660—New England Nat. Bank of Kansas City v. Calhoun, C.C.A.N.M., 9 F.2d 272—Elliott v. Empire Natural Gas Co., C.C.A.Kan., 298 F. 299—Norton v. Larney, C.C.A.Okl., 289 F. 395, affirmed 45 S.Ct. 145, 266 U.S. 511, 69 L.Ed. 413—Spencer v. Patey, N.Y., 243 F. 555, 156 C.C.A. 253—Hare v. Birkenfield, Or., 181 F. 825, 104 C.C.A. 335.

25 C.J. p 903 note 50 [d], p 963 note 58, p 964 note 65, p 966 notes 66, 67.

Equity jurisdiction

Under a statute providing that suits in equity shall not be maintained in federal courts where there is a plain and adequate remedy at law, the circuit court of appeals should, where such a remedy is obvious, raise the objection sua sponte, and require transfer of the case to the law side of the court.—Denison v. Keck, C.C.A.Neb., 13 F.2d 384.

Failure to appeal from decree sustaining jurisdiction

Failure of life policy beneficiaries against whom insurer brought bill in equity for cancellation of policy to appeal from that portion of decree sustaining jurisdiction of district court as court of equity, did not preclude circuit court of appeals from noticing and determining matter of jurisdiction, but circuit court of appeals had choice of action in treating matter as waived or not, as might seem to comport with justice.—Mutual Life Ins. Co. of New York, C.C.A.Iowa, 87 F.2d 842.

Court "may receive affidavits for the purpose of establishing its own jurisdiction."—Novo Trading Corporation v. Commissioner of Internal Revenue, C.C.A., 111 F.2d 449.

5. U.S.—Royalty Service Corporation, v. City of Los Angeles, C.C.A. Cal., 98 F.2d 551—Schell v. Food Machinery Corporation, C.C.A.Fla., 87 F.2d 385, certiorari denied Food Machinery Corporation v. Schell, 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883.

6. U.S.—Black & Yates v. Mahogany Ass'n, C.C.A.Del., 129 F.2d 227, reversing, D.C., 34 F.Supp. 450—Mathers & Mathers v. Urschel, C.C.A.Okl., 74 F.2d 591.

3 C.J. p 371 note 44.

"Question of federal jurisdiction is ever present and self-asserting."—Schell v. Food Machinery Corporation, C.C.A.Fla., 87 F.2d 385, 387, certiorari denied Food Machinery Corporation v. Schell, 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883.

Before considering verity of decree, the circuit court of appeals must de-

firmatively appear from the record,[7] and cannot be waived;[8] nor can it be conferred by the consent, agreement, or conduct of the parties[9] or of counsel.[10]

Jurisdiction is confined to the review of error committed in the court below in the cause which is brought up on the appeal, and does not extend to errors committed in other causes.[11]

Since an actual controversy is necessary, it is not within the province of the circuit courts of appeals to entertain or decide abstract, hypothetical, or moot questions, not connected with the granting of actual relief,[12] or the determination of which can serve

termine the issue of the jurisdiction of the trial court, where such jurisdiction is challenged during oral presentation of the appeal.—Bassett v. Massman Const. Co., C.C.A.Mo., 120 F.2d 230, reversing, D.C., Massman Constr. Co. v. Bassett, 30 F.Supp. 813, certiorari denied 62 S.Ct. 92, 314 U.S. 648, 86 L.Ed. 520.

Settlement of question by verdict

It has been held that objection, not raised in district court, that jurisdiction of district court by diversity of citizenship is not shown, is settled by verdict.—Hotel McAllister v. Coburn, C.C.A.Fla., 18 F.2d 100.

On motion for rehearing in the circuit court of appeals, where appellee had submitted the case on the merits and without objection, it was held too late to question the court's jurisdiction.—Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., Tex., 50 F. 785, 1 C.C.A. 668.

7. U.S.—Alderman v. Elgin, J. & E. Ry. Co., C.C.A.Ill., 125 F.2d 971—Equitable Life Assur. Soc. of U. S. v. Raye, C.C.A.Kan., 16 F.2d 68—Ward v. Morrow, C.C.A.S.D., 15 F.2d 660—Cloud v. McLean-Arkansas Lumber Co., D.C.Ark., 28 F. Supp. 623, appeal dismissed, C.C. A., McLean-Arkansas Lumber Co. v. Cloud, 106 F.2d 1004—Elliott v. Empire Natural Gas Co., C.C.A. Kan., 298 F. 299.

8. U.S.—Houston Natural Gas Corporation v. Securities and Exchange Commission, C.C.A., 100 F. 2d 5—Demulso Corporation v. Tretolite Corporation, C.C.A.Okl., 74 F. 2d 805, dismissing appeal, D.C., Tretolite Co. v. Darby Petroleum Corporation, 5 F.Supp. 445—New England Nat. Bank of Kansas City v. Calhoun, C.C.A.N.M., 9 F.2d 272—Cloud v. McLean-Arkansas Lumber Co., D.C.Ark., 28 F.Supp. 623, appeal dismissed, C.C.A., McLean-Arkansas Lumber Co. v. Cloud, 106 F.2d 1004.
3 C.J. p 371 note 44.

9. U.S.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing, D.C., 27 F.2d 1005—Royalty Service Corporation v. City of Los Angeles, C.C.A.Cal., 98 F.2d 551—Goodyear Tire & Rubber Co. v. Federal Trade Commission, C.C. A., 92 F.2d 677, certiorari granted Federal Trade Commission v. Goodyear Tire & Rubber Co., 58 S.Ct. 747, 303 U.S. 631, 82 L.Ed. 1091, reversed on other gounds 58 S.Ct. 863, 304 U.S. 257, 82 L.Ed. 1326—Schell v. Food Machinery Corporation, C.C.A.Fla., 87 F.2d 385, certiorari denied Food Machinery Corporation v. Schell, 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883—Raytheon Mfg. Co. v. Radio Corporation of America, C.C.A.Mass., 76 F.2d 943, certiorari granted Radio Corporaton of America v. Raytheon Mfg. Co., 56 S.Ct. 99, 296 U.S. 557, 80 L.Ed. 393, affirmed 56 S.Ct. 297, 296 U.S. 459, 80 L.Ed. 327, followed in C.C.A., Berning v. Louisville & N. R. Co., 92 F.2d 997—Republic Supply Co. of California v. Richfield Oil Co. of California, C.C.A.Cal., 74 F.2d 907, certiorari denied Cities Service Co. v. Armsby, 56 S.Ct. 94, 296 U.S. 583, 8 L.Ed. 412—Demulso Corporation v. Tretolite Co., C.C.A. Okl., 74 F.2d 805, dismissing appeal, D.C., Tretolite Co. v. Darby Petroleum Corporation, 5 F.Supp. 445—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F.2d 491—Satterlee v. Harris, C.C.A.Okl., 60 F.2d 490—Spencer v. Patey, N.Y., 243 F. 555, 156 C.C.A. 253.
3 C.J. p 369 note 30.

Invoking decision by court in equity

Where both parties on appeal argued the question whether, in view of the incontestability clause of the policy in suit, there was any defense in law on claims for future benefits, they acquiesced in invoking decision of the question by the circuit court of appeals sitting in equity, and hence that court had power to dispose of the question and make the decision res adjudicata between the parties.—Mutual Life Ins. Co. of New York v. Markowitz, C.C.A.Cal., 78 F.2d 396, certiorari denied 56 S.Ct. 148, 296 U.S. 625, 80 L.Ed. 444.

10. U.S.—Robinson v. Edler, C.C.A. Nev., 78 F.2d 817—Ward v. Morrow, C.C.A.S.D., 15 F.2d 660—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 282 F. 523, affirming, D.C., 282 F. 293, and appeal dismissed Eighth Ave. R. Co. v. Hedges, 43 S.Ct. 704, 262 U. S. 736, 67 L.Ed. 1207.

11. U.S.—Headrick v. Larson, Idaho, 152 F. 93, 81 C.C.A. 317.

12. U.S.—Johnson-Kennedy Radio Corporation v. Chicago Bears Football Club, C.C.A.Ill., 97 F.2d 223—Goodyear Tire & Rubber Co. v. Federal Trade Commission, C.C.A., 92 F.2d 677, certiorari granted Federal Trade Commission v. Goodyear Tire & Rubber Co., 58 S.Ct. 747, 303 U.S. 631, 82 L.Ed. 1091, reversed on other grounds 58 S.Ct. 863, 304 U.S. 257, 82 L.Ed. 1326—Model Dairy Co. v. Foltis-Fischer, Inc., C.C.A.N.Y., 91 F.2d 971—Smyth v. Asphalt Belt Ry. Co., C. C.A.Tex., 12 F.2d 14, amending, D. C., 292 F. 876, and transferred, see 45 S.Ct. 242, 267 U.S. 326, 69 L.Ed. 629.
3 C.J. p 358 note 84.

What makes question moot

(1) If, pending an appeal, an event occurs which renders it impossible for the appellate court to grant any relief, or renders a decision unnecessary, the question becomes moot.—Lewis Pub. Co. v. Wyman, Mo., 182 F. 13, 104 C.C.A. 453, affirmed 33 S. Ct. 599, 228 U.S. 610, 57 L.Ed. 989—3 C.J. p 360 note 89.

(2) The occurrence of such an event may be shown by extrinsic evidence, or noticed by the court where it is a matter of judicial notice.—Lisman v. Knickerbocker Trust Co., Mich., 211 F. 413, 128 C.C.A. 85—Keely v. Ophir Hill Cons. Min. Co., Utah, 169 F. 601, 95 C.C.A. 99.

(3) So, where, pending an appeal from a decree in a case involving the infringement of a patent, the patent expires, nothing remains for the judgment of the appellate court to act on.—Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., Mass., 61 F. 208, 9 C.C.A. 450.

(4) The question is rendered moot where, pending the appeal, appellee does, or relinquishes the right to do, the act in respect of which the appeal was taken.—Lewis Pub. Co. v. Wyman, supra—Goldstein v. Behrends, Alaska, 123 F. 399, 59 C.C.A. 203.

(5) The question may be rendered moot by the act of the court where, pending the appeal, some judgment or order rendered or made in the cause renders the determination of the questions presented by the appeal unnecessary.—Keely v. Ophir Hill Cons. Min. Co., supra—3 C.J. p 363 note 95 [a] (5).

(6) Where a litigation has ceased to be between parties having adverse

no beneficial purpose for any party,[13] or from the determination of which no practical relief can follow;[14] and the fact that the parties agree on the presence of an actual controversy is of no importance.[15]

§ 288. Mode of Exercising Jurisdiction

The writ of error has been abolished by statute in all cases, civil and criminal, all relief previously obtainable thereby being obtainable by appeal. The Rules of Civil Procedure for the district courts, adopted by the supreme court, superseded all former methods of appeal in civil cases to which they are applicable.

The circuit courts of appeals have no power to vacate, set aside or modify any order, judgment, or decree of the district court except on proper appellate procedure,[16] and on the hearing of the case as an appellate matter;[17] they cannot on mere motion set aside orders of the district court,[18] or direct the district court to do so.[19] They can act on the lower court only by mandate.[20]

Under the former practice the acts of congress gave to defeated litigants in the national courts the right to a review of final judgments at law against them by writ of error and a right to a review of final decrees in equity or admiralty by appeal, and a decree in equity or admiralty could not be reviewed by a writ of error, nor could a judgment at law be challenged by an appeal.[21] However, un-

interests, the case falls within the general rule as to moot questions.—Arnold v. Woolsey, Neb., 54 F. 268, 4 C.C.A. 319.

Determination of right to costs

Where all substantial interest in the controversy has been parted with or extinguished, the court will not hear the appeal merely to determine the right to costs.—Arnold v. Woolsey, supra—3 C.J. p 365 note 8.

More than declaratory judgment held sought, so that court had jurisdiction of appeal.—Whitney v. Puro Filter Corporation of America, C.C.A. N.Y., 63 F.2d 811.

13. U.S.—Johnson-Kennedy Radio Corporation v. Chicago Bears Football Club, C.C.A.Ill., 97 F.2d 223.

14. U.S.—Griesa v. Mutual Life Ins. Co., Kan., 169 F. 509, 94 C.C.A. 635, certiorari denied 30 S.Ct. 400, 215 U.S. 600, 54 L.Ed. 344.

15. U.S.—Goodyear Tire & Rubber Co. v. Federal Trade Commission, C.C.A., 92 F.2d 677, certiorari granted Federal Trade Commission v. Goodyear Tire & Rubber Co., 58 S Ct. 747, 303 U.S. 631, 82 L.Ed. 1091, reversed on other grounds 58 S.Ct. 863, 304 U.S. 257, 82 L.Ed. 1326.

16. U.S.—U. S. v. Moy Yee Tai, N.Y., 109 F. 1, 48 C.C.A. 203.
25 C.J. p 970 note 19.
Power to superintend and revise in bankruptcy proceedings see Bankruptcy §§ 592–606.

Direction to correct judgment

The circuit court of appeals has not the power to direct the supreme court of Hawaii to correct a judgment reversing a decree, so as to set forth what further action would be compatible to the decision, and to direct the lower judge to take such action, so as to render the decree final in form and appealable.—Rumsey v. New York Life Ins. Co., C.C.A. Hawaii, 267 F. 554, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 459.

Failure to appeal as "technical error"

Failure to appeal, which can alone confer jurisdiction on a circuit court of appeals, cannot be ignored under a statute requiring courts to give judgment without regard to "technical errors," defects, or exceptions which do not affect substantial rights of the parties.—U. S. v. Pennsylvania R. Co., C.C.A.Md., 283 F. 937, modifying, D.C., 283 F. 438, and certiorari denied Pennsylvania R. Co. v. U. S., 43 S.Ct. 96, 260 U.S. 736, 67 L.Ed. 488.

17. U.S.—Strand v. Griffith, Wash., 135 F. 739, 68 C.C.A. 377.

18. U.S.—Strand v. Griffith, supra.
25 C.J. p 970 note 21.

19. U.S.—North Bloomfield Gravel Min. Co. v. U. S., Cal., 83 F. 2, 27 C.C.A. 395.

20. U.S.—North Bloomfield Gravel Min. Co. v. U. S., supra.

21. U.S.—Miami Paper Co. v. American Woodpulp Corporation, C.C.A. Ohio, 5 F.2d 408—Porter v. F. M. Davies & Co., S.D., 223 F. 465, 140 C. C.A. 11, rehearing denied 224 F. 451, 140 C.C.A. 288, followed in 223 F. 1022, 138 C.C.A. 664—Highland Boy Gold Min. Co. v. Strickley, Utah, 116 F. 852, 54 C.C.A. 186—Loveless v. Ransom, Ill., 109 F. 391, 48 C.C.A. 434.
25 C.J. p 963 notes 43 [a], (1), p 970 note 24—3 C.J. p 310 note 15, p 323 note 89, p 324 note 93.

Character of principal action as controlling

(1) Every judgment or order in an action is of the character of the principal action, so that, if such action was at law, the judgment or order, as in intervention, was reviewable on writ of error, and if the action was in equity, it was reviewable by appeal.—U. S. v. Northwestern Dev. Co., Alaska, 203 F. 960, 122 C.C.A. 262—3 C.J. p 311 note 16.

(2) In the absence of a rule of court to the contrary, an action at law in which an equitable defense was pleaded, under Judicial Code § 274b, might be reviewed either by writ of error or appeal.—Maine Northwestern Development Co. v. Northwestern Commercial Co., Wash., 240 F. 583, 153 C C.A. 387, certiorari denied 37 S.Ct. 742, 244 U.S. 655, 61 L.Ed. 1374.

Writ of error had its origin at the common law and was adopted in the United States as a part of the common-law system.—Buessel v. U. S., C.C.A.Conn., 258 F. 811—Nashville Ry. & Light Co. v. Bunn, C.C.A.Tenn., 168 F. 862.

Origin of appeal

The remedy or procedure by appeal is of civil-law origin, and was introduced therefrom into courts of equity and admiralty.—Buessel v. U. S., C.C.A.Conn., 258 F. 811—Nashville Ry. & Light Co. v. Bunn, C.C.A.Tenn., 168 F. 862.

Nature and function of writ of error

(1) "The writ of error is the writ of the appellate court addressed to the judge of the trial court directing him to send the record and proceedings in the case to the appellate court."—Siegelschiffer v. Penn Mut. Life Ins. Co., C.C.A.N.Y., 248 F. 226, 228.

(2) A writ of error could be brought only on a final judgment, and was not the appropriate remedy where a court refused to proceed to the hearing and determination of a cause.—Green v. Underwood, Colo., 86 F. 427, 30 C.C.A. 162.

(3) Certiorari is regarded as in the nature of a writ of error when not ancillary to other process.—Staffords v. King, W.Va., 90 F. 136, 32 C.C.A. 536.

(4) The suing out of a writ of error was the commencement of a new suit or action to annul and set aside the judgment of the court below, and not a continuation of the suit or action below to which it related.—Gould v. U. S., Colo., 205 F. 883, 126 C.C.A. 1—Fitzpatrick v. Graham, N. Y., 119 F. 353, 56 C.C.A. 95.

(5) The writ could challenge not only jurisdiction of district court, but its findings on merits.—Meade

der Act of September 6, 1916, 39 U.S.St. at L. p 727 c 448 § 4, Act of February 13, 1925, 28 U.S.C.A. § 861, error in this respect was disregarded, the reviewing court being required to take the action which would have been appropriate if the proper appellate procedure had been followed;[22] and by Act of January 31, 1928, 28 U.S.C.A. § 861a, the writ of error in civil and criminal cases was abolished, all relief theretofore obtainable by writ of error being thereafter obtainable by appeal;[23] fur-

Fibre Co. v. Varn, C.C.A.S.C., 3 F.2d 520, certiorari denied 46 S.Ct. 23, 269 U.S. 564, 70 L.Ed. 414.

(6) Review as dependent on mode of review see infra § 297 a.

Writ, and not appeal, held proper to review:

(1) Judgment in proceedings for condemnation of property, under Food and Drugs Act.—Goodwin v. U. S., C.C.A.Ohio, 295 F. 856—3 C.J. p 313 note 23 [a] (2), p 324 note 93 [e].

(2) Judgment in action at law by a receiver, authorized by court, to recover a money judgment on an alleged contract.—Quarles v. City of Appleton, C.C.A.Wis., 299 F. 508.

(3) Ruling on a motion made at the close of the evidence in an action tried without a jury, which motion presents a question of law.—Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co., C.C.A.Ind., 1 F.2d 790.

(4) Order directing the issuance of mandamus against a county to compel the levy of a tax to pay a judgment recovered against it.—Carter County v. Schmalstig, Ky., 127 F. 126, 62 C.C.A. 78.

(5) Under Judicial Code § 274b, Comp.St. § 1251b, cross petition setting up an equitable cause of action in an action at law might be treated by the appellate court as a counterclaim, and a judgment dismissing the cross petition reviewed on error.—Miami Paper Co. v. American Woodpulp Corporation, C.C.A.Ohio, 5 F.2d 408.

Appeal, and not writ, held proper to review:

(1) Order dismissing a plea of intervention in equitable proceedings.—Harry Bros. Co. v. Yaryan Naval Stores Co., Miss., 219 F. 884, 135 C.C.A. 454.

(2) Decree in action at law transferred to the equity docket on account of equitable defenses pleaded, and tried as a suit in equity without objection.—Levy v. S. H. Kress & Co., C.C.A.Okl., 285 F. 836, decree modified on other grounds 296 F. 697, and certiorari denied 45 S.Ct. 90, 266 U.S. 601, 69 L.Ed. 462.

(3) Proceeding to enforce an attorney's lien against a judgment in an action at law, in which the attorney by petition asked for equitable relief, and defendant by its answer set up the equitable defense of fraud.—Machcinski v. Lehigh Valley R. Co., C.C.A.N.Y., 272 F. 920.

(4) Where the only controversy in an action at law was on a cross petition setting up an equitable cause of action, a judgment dismissing the cross petition was properly reviewable by appeal.—Miami Paper Co. v. American Woodpulp Corporation, C.C.A.Ohio, 5 F.2d 408.

(5) Other decisions or rulings.—McPherson v. U. S., Ohio, 215 F. 35, 157 C.C.A. 331—Georgia & F. Ry. Co. v. Brotherhood of Locomotive Engineers, Ga., 217 F. 755, 132 C.C.A. 559, affirming, D.C., In re Georgia & F. Ry., 215 F. 195—McNeil v. McNeil, Cal., 170 F. 289, 95 C.C.A. 485.

Decisions of the supreme court of Puerto Rico in law cases were reviewable by the circuit court of appeals only by writ of error.—Ana Maria Sugar Co. v. Quinones, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419—Société Anonyme des Sucreries de St. Jean v. Polanco, C.C.A., 6 F.2d 3.

Canal Zone

Under Act of Aug. 24, 1912 c 390 § 9, 48 U.S.C.A. § 1365, the appellate jurisdiction of the circuit court of appeals of the fifth circuit over decisions of the district court of the Canal Zone was to be exercised in the same manner and under the same regulations and by the same procedure, as nearly as practicable, as in reviewing final judgments and decrees of district courts of the United States; law cases had to come up by writ of error, and equity cases by appeal.—Simkins v. Simkins, C.C.A., 271 F. 87—Panama R. Co. v. Beckford, 231 F. 436, 145 C.C.A. 430.

Virgin Islands

Since the distinction between causes at law and in equity was unknown in the courts of the Virgin Islands, and all judgments were reviewable de novo on the record by the supreme court of Denmark on appeal, such judgments might be similarly reviewed on appeal, both as to facts and law, by the circuit court of appeals, irrespective of whether the cause of action would have been in equity or at law in the courts of the United States.—Clen v. Jorgensen, C.C.A., 265 F. 120.

Where two writs of error were issued within the time limited for an appeal, the court could retain them both until final decision of case and transfer records in one to the other for the purpose of hearing.—Gould v. U. S., Colo., 205 F. 883, 126 C.C.A. 1.

Action on affidavits of bias and prejudice

The action of district judge in overruling affidavits of bias and prejudice "is reviewable in the Circuit Court of Appeals on error," and such action "may be also the subject of certain alternative writs to the Circuit Court of Appeals."—U. S. v. Gilbert, D.C.Ohio, 29 F.Supp. 507, 509.

22. U.S.—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419—People's Nat. Bank of Hot Springs v. Moore, C.C.A.S.D., 25 F.2d 599—National Surety Co. v. County Board of Education of McDowell County, C.C.A.N.C., 15 F.2d 993—Brown v. Leo, C.C.A.N.Y., 12 F.2d 350—Twist v. Prairie Oil & Gas Co., C.C.A.Okl., 6 F.2d 347, certiorari granted 46 S.Ct. 355, 270 U.S. 639, 70 L.Ed. 775, and reversed on other grounds 47 S.Ct. 755, 274 U.S. 684, 71 L.Ed. 1297—Goodwin v. U. S., C.C.A.Ohio, 295 F. 856—McCall Co. v. Bladworth, C.C.A.Conn., 290 F. 365—Swiftwater Plantations Co. v. Davis, C.C.A.Miss., 287 F. 813—Sucesores de Perez Hermanos v. Costa, C.C.A.Puerto Rico, 281 F. 439—Lo Hop v. U. S., Ohio, 257 F. 489, 168 C.C.A. 493—Union Pac. R. Co. v. Syas, Colo., 246 F. 561, 158 C.C.A. 531.

25 C.J. p 970 note 25.

Use of both modes prior to statute

It was held in several cases, prior to the enactment of the statute, that the taking of an appeal and a writ of error to review the same adjudication was permissible where there was doubt as to the proper procedure, and that the reviewing court would dismiss the one which was ineffective and review the ruling in accordance with the rules of the applicable method.—Lockman v. Lang, Colo., 132 F. 1, 65 C.C.A. 621—3 C.J. p 343 note 73.

23. Effective date of statute

Since the statute was not approved until Jan. 31, 1928, writ of error is the proper method of review in a criminal case in which petition for writ of error was filed on Jan. 28, 1928.—Gold v. U. S., C.C.A.Minn., 36 F.2d 16.

Criminal cases

(1) Prior to the enactment of the statute, writ of error was the proper mode of review in criminal cases.—Gold v. U. S., supra—Sena v. U. S., 147 F. 485, 78 C.C.A. 27, reversing 12

ther, by Act of January 31, 1928 c 14 § 2, 45 U.S.St. at L. p 54, as amended April 26, 1928 c 440, 28 U.S.C.A. § 861b, the statutes regulating the right to a writ of error, defining the relief which might be had thereon, and prescribing the mode of exercising that right and of invoking such relief, were made applicable to the appeal thus substituted for a writ of error.[24] In this connection it is to be observed that the word "appeal" has been used in a variety of senses,[25] including appellate jurisdiction, as distinguished from original jurisdiction, without regard to the particular mode by which a cause is transmitted to a superior tribunal;[26] but an appeal has been said to be a rehearing by a superior court on fact and law,[27] its office being to remove the entire cause.[28] It is in substance a new trial,[29] although a continuation of the suit below, and not a new suit.[30]

The Rules of Civil Procedure for the district courts of the United States, adopted by the supreme court pursuant to Act of June 19, 1934 c 651, 28 U.S.C.A. §§ 723b, 723c, superseded all former methods of appeal in civil cases to which they are applicable.[31]

Existence of other remedy. An appeal will not lie where the proper remedy is in the lower court,[32] and a writ of error did not lie where a different remedy for review, such as mandamus, was the proper one;[33] but an original extraordinary writ cannot be used as a substitute for appeal.[34]

A second proceeding may lie to review and determine questions which were not and could not be considered by the appellate court on the former proceeding.[35]

A cross appeal may be allowed where a judgment grants a litigant only part of the relief sought and denies the rest.[36]

Joinder of proceedings. Where separate and distinct causes are consolidated solely for the purpose of trial, and result in separate judgments, the judgments cannot be brought up for appellate review by one appellate proceeding.[37]

N.M. 397, 78 P. 58—De Lemos v. U. S., Ala., 107 F. 121, 46 C.C.A. 196, certiorari denied 21 S.Ct. 925, 181 U.S. 622, 45 L.Ed. 1032—17 C.J. p 12 notes 10–15.

(2) Prior to the enactment of the statute, a prosecution under the National Prohibition Act was an action at law, to be reviewed on writ of error, and not as on appeal in equity.—Sibona v. U. S., C.C.A.N.J., 294 F. 272.

(3) Where both appeal and writ of error are employed in a criminal case, the writ of error will be dismissed, appeal now being the proper remedy for review.—De Mayo v. U. S., C.C.A.Okl., 32 F.2d 472.

(4) In prosecution for violation of National Prohibition Act, appeal, not writ of error, is proper procedure for bringing up record of trial.—English v. U. S., C.C.A.Colo., 30 F.2d 518.

(5) Appeal and writ of error in criminal cases generally see Criminal Law § 1623 et seq.

24. **Application of provision**

(1) "The requirement of the Act . . . applies only to appeals which are substituted for the abolished writs of error; that is, to actions at law."—Territory of Hawaii v. Gay, C.C.A.Hawaii, 52 F.2d 356, 357, certiorari denied 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572.

(2) "The . . . section . . . [applies] only to cases where review theretofore had been obtained by writ of error."—Ross v. White, C.C.A.Tenn., 32 F.2d 750, 751.

25. U.S.—U. S. v. Wonson, C.C. Mass., 28 F.Cas.No.16,750, 1 Gall. 5.

26. U.S.—U.S. v. Wonson, supra.

27. U.S.—Nashville Ry. & Light Co. v. Bunn, C.C.A.Tenn., 168 F. 862.

28. U.S.—Nashville Ry. & Light Co. v. Bunn, supra.

29. U.S.—Nashville Ry. & Light Co. v. Bunn, supra.

30. U.S.—Great Northern Ry. Co. v. General Ry. Signal Co., C.C.A. Minn., 57 F.2d 457.

31. U.S.—National Surety Corporation v. Williams, C.C.A.Ark., 110 F.2d 873, certiorari denied Williams v. National Surety Corporation, 61 S.Ct. 40, 311 U.S. 674, 85 L.Ed. 433.

32. **Dismissal as to one party defendant** available by answer.—Herrup v. Stoneham, C.C.A.N.Y., 15 F.2d 49.

Error in accounting need not be considered on appeal, where trial court prescribed proper formula and reserved jurisdiction to complete or adjust accounting.—Bromfield v. Trinidad Nat. Inv. Co., C.C.A.Colo., 36 F.2d 646, 71 A.L.R. 542.

Invalidity of rule

District court rule, requiring defendants to make a deposit to secure clerk fees before filing a defense, which was enforced against them, cannot be attacked on appeal by defendant from an adverse decree, but must be brought to the appellate court, if at all, by some direct challenge.—King v. Weiss & Lesh Mfg. Co., C.C.A.Tenn., 266 F. 257.

Uncertainty of verdict

If, in trespass to try title, there is anything in the evidence regarding lot lines or fences or other matters tending to render the verdict vague or uncertain, it cannot be inquired into on an appeal raising a question as to its sufficiency in such respect, that being a matter which can only be dealt with by the trial court on a motion for new trial.—Cochran v. Schreiber, Tex., 107 F. 371, 46 C.C.A. 349.

33. U.S.—Collin County Nat. Bank v. Hughes, Colo., 152 F. 414, 81 C.C.A. 556, rehearing denied 155 F. 389, 83 C.C.A. 661.

3 C.J. p 339 notes 29, 33.

34. U.S.—Pickwick-Greyhound Lines v. Shattuck, C.C.A.Kan., 61 F.2d 485.

35. U.S.—Alaska - Treadwell Gold Min. Co. v. Cheney, Alaska, 162 F. 593, 89 C.C.A. 351.

3 C.J. p 346 note 99.

36. U.S.—Cochran v. M. & M. Transp. Co., C.C.A.R.I., 110 F.2d 519.

37. U.S.—American Trust & Savings Bank v. Zeigler Coal Co., Ill., 165 F. 34, 91 C.C.A. 72—Waters-Pierce Oil Co. v. Van Elderen, Ark., 137 F. 557, 70 C.C.A. 255.

Error waived by circuit court, in absence of objection by defendant in error.—Louisville & N. R. Co. v. Summers, Tenn., 125 F. 719, 60 C.C.A. 487, certiorari denied 24 S.Ct. 851, 192 U.S. 607, 48 L.Ed. 585.

Cases considered as one for review

Where, in separate actions on insurance policies consolidated for trial, the beneficiaries were represented by the same guardian, and by order of district court, made upon stipula-

§ 289. Right of Review

a. In general
b. Deprivation or loss of right

a. In General

(1) General rules
(2) Particular litigants and persons in particular relations

(1) General Rules

Ordinarily to be entitled to maintain an appeal in the circuit court of appeals a person must be a party or privy to the judgment, order, or decree complained of, and must have or represent an interest in the subject matter of the suit or controversy, and be injuriously affected or aggrieved by such judgment, order, or decree.

The view has been expressed that doubts respecting the right of appeal to the circuit court of appeals in border line cases should be resolved in favor of the appellant,[38] and it has been broadly stated that any person may appeal if he was a party to the action or proceeding below, either originally or because subsequently made a party, or if he is a party or privy to the judgment, order, or decree complained of,[39] but in the absence of a statute extending the right of review no one can appeal from a judgment, order, or decree, unless he was a party to the action or proceeding below, or to the judgment, order, or decree, or unless he is a legal representative of a party, or his privity of estate, title, or interest appears from the record.[40]

Interest in subject matter or controversy. It is also necessary to a valid appeal that appellant, even when a party, should have or represent an interest in the subject matter of the suit or controversy,[41] and a person who is merely a nominal party to an action, and who has no interest therein, either individually or in a representative capacity, cannot appeal.[42] Broadly speaking, the right of a party to an appeal must be based on a direct, immediate, pecuniary, and substantial interest in the particular litigation in which review is sought.[43] Where a

tion of counsel, the cases are considered as one for the purpose of review and as requiring but one bill of exceptions, one record, one writ of error, etc., the circuit court of appeals will exercise jurisdiction to review the judgments.—American Central Life Ins. Co. v. American Trust Co., C.C.A.Tenn., 5 F.2d 71, affirming, D.C., American Trust Co. v. American Central Life Ins. Co., 5 F.2d 69, and certiorari denied 46 S.Ct. 20, 269 U.S. 559, 70 L.Ed. 411.

Separate appeals held not required

Where suits by members of the Agua Caliente band of Mission Indians to obtain adjudications that allotments of tribal lands had been made to them, and that they were entitled to trust allotment patents, were consolidated for trial, separate appeals by the Indians from adverse decrees were not required.—St. Marie v. U. S., C.C.A.Cal., 108 F.2d 876, affirming, D.C., 24 F.Supp. 237, certiorari denied 61 S.Ct. 35, 311 U.S. 652, 85 L.Ed. 417.

38. U.S.—Victor Talking Mach. Co. v. George, C.C.A.N.J., 69 F.2d 871, certiorari granted George v. Victor Talking Mach. Co., 55 S.Ct. 82, 293 U.S. 544, 79 L.Ed. 649, reversed on other grounds 55 S.Ct. 229, 293 U.S. 377, 79 L.Ed. 439.

39. U.S.—Mitchell v. Lay, C.C.A.Cal., 48 F.2d 79, certiorari denied Lay v. Mitchell, 51 S.Ct. 656, 283 U.S. 864, 75 L.Ed. 1469.

Parties as to whom action dismissed

Generally persons as to whom a suit has been dismissed or discontinued before judgment or decree cannot appeal from the judgment or decree subsequently rendered, or join in an appeal as they are no longer parties, and no longer have any interest in the litigation.—Armstrong v. New La Paz Gold Mining Co., C.C.A.Cal., 107 F.2d 453—Tuttle v. Claflin, N.Y., 88 F. 122, 31 C.C.A. 419.

40. U.S.—In re Rose, C.C.A.Cal., 86 F.2d 69—In re Trust No. 2988 of Foreman Trust & Savings Bank, C.C.A.Ill., 85 F.2d 942, certiorari denied Tetzke v. Trust No. 2988 of Foreman Trust & Savings Bank, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 450—City of Winter Haven v. Gillespie, C.C.A.Fla., 84 F.2d 285, certiorari denied Hartridge-Cannon Co. v. Gillespie, 57 S.Ct. 232, 299 U.S. 606, 81 L.Ed. 447, rehearing denied 57 S.Ct. 927, 301 U.S. 668, 81 L.Ed. 1333—West v. Radio-Keith-Orpheum Corporation, C.C.A.N.Y., 70 F.2d 621—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571, two cases—In re 211 East Delaware Place Bldg. Corporation, D.C.Ill., 15 F.Supp. 947—Taylor v. Logan Trust Co., C.C.A.Ark., 289 F. 51—U. S. ex rel. State of Louisiana v. Boarman, La., 217 F. 757, 133 C.C.A. 487, affirmed 37 S.Ct. 605, 244 U.S. 397, 61 L.Ed. 1222.

3 C.J. p 616 note 55.

41. U.S.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 523, of Tulsa, Okl. v. Keystone Freight Lines, C.C.A.Okl., 123 F.2d 326—Atles v. U. S., C.C.A.N.J., 50 F.2d 808, 78 A.L.R. 435—King v. Buttolph, C.C.A.Hawaii, 30 F.2d 769.

3 C.J. p 624 note 18.

42. U.S.—Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, Or., 223 F. 494, 139 C.C.A. 42, mandamus and certiorari denied Hamilton Trust Co. v. Bisher, 36 S.Ct. 161, 239 U.S. 641, 60 L.Ed. 482.

3 C.J. p 628 note 81.

Right or title to property

The right or title which a party seeking to appeal seeks to establish must be his own and not that of a third person.—Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, supra.

43. U.S.—In re Michigan-Ohio Bldg. Corporation, C.C.A.Ill., 117 F.2d 191—Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, Or., 223 F. 494, 139 C.C.A. 42, mandamus and certiorari denied Hamilton Trust Co. v. Bisher, 36 S.Ct. 161, 239 U.S. 641, 60 L.Ed. 482.

3 C.J. p 627 note 63.

Rights affected by appeal

As a rule an appealable interest in the subject matter exists whenever the interest of the party may be enlarged or diminished or his rights or liabilities affected, by the result of the appeal.—In re Michigan-Ohio Bldg. Corporation, C.C.A.Ill., 117 F.2d 191—Todd Engineering Dry Dock & Repair Co. v. U. S., C.C.A.La., 32 F.2d 734, reversing, D.C., The West Ira, 24 F.2d 858—3 C.J. p 625 note 25.

Lessee's interest sufficient

In an action by the United States, as guardian and trustee of tribal property of the Creek Nation, to quiet title to river bed oil lands, the lessee of a portion of the river bed claiming under a lease from the state, which intervened, and from the receiver, acting during litigation, was held to have an interest in the con-

decision directly affects only one of several defendants, he alone may appeal,[44] and parties who disclaim any interest in the subject matter in litigation cannot appeal, where no costs are taxed against them,[45] and as a general rule a party cannot prosecute an appeal where his interest in the subject matter or controversy has ceased, either before the suit was commenced or pendente lite, by conveyance, sale, assignment, release, or operation of law, so that the judgment, order, or decree does not prejudice him, although it may be erroneous and prejudicial to other parties,[46] but the rule does not apply where appellant, notwithstanding the conveyance, sale, or assignment, retains a sufficient interest to support the appeal.[47]

Necessity for prejudice. In order to maintain an appeal the person or party seeking review must not only be interested in the subject matter of the suit, but must also be injuriously affected or aggrieved by the judgment, order, or decree complained of,[48] and a party who is not aggrieved cannot prosecute a cross appeal.[49] In legal acceptation a party or person is aggrieved by a judgment, order, or decree so as to be entitled to appeal, whenever it operates prejudicially and directly on his property or pecuniary rights or interest, or on his personal rights, and only when it has such effect,[50] and the right invaded must be immediate.[51] Although there are some exceptions,[52] the general rule is that a plaintiff or defendant cannot appeal from a judgment, order, or decree in his own favor, since he is not aggrieved thereby.[53] However, since an

troversy, entitling him to appeal from an adverse decree.—U. S. v. Hayes, C.C.A.Okl., 20 F.2d 873, certiorari denied 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423—U. S. v. Cimarron River Oil Co., C.C.A.Okl., 20 F.2d 873, certiorari denied 48 S Ct. 116, 275 U.S. 555, 72 L.Ed. 423—Riverside Oil & Refining Co. v. Cimarron River Oil Co., C.C.A.Okl., 20 F.2d 873, certiorari denied 48 S.Ct. 115, 275 U.S. 552, 72 L.Ed. 421.

Object to establish liability for fire damage

Where the entire object of the proceeding to perpetuate testimony was to establish defendant's liability for damages resulting from fire while defendant was engaged in repair of a ship, a decree seeking not only to perpetuate evidence against defendant, but also to establish finally its liability for the amount awarded to the commissioner making the report in the event defendant should be held liable in any future suit for damages, made defendant "an interested and prejudiced party" entitled to appeal from the decree.—Todd Engineering, Dry Dock & Repair Co. v. U. S., C.C.A.La., 32 F.2d 734, reversing, D.C., The West Ira, 24 F.2d 858.

44. U.S.—Wells v. Demeter, C.C.A. Okl., 84 F.2d 673.

45. U.S.—Brigham City v. Toltec Ranch Co., Utah, 101 F. 85, 41 C.C. A. 222.

46. U.S.—In re Michigan-Ohio Bldg. Corporation, C.C.A.Ill., 117 F.2d 191—United Puerto Rican Sugar Co. v. Del Toro, C.C.A.Puerto Rico, 80 F.2d 14—Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, Or., 223 F. 494, 139 C.C.A. 42, mandamus and certiorari denied Hamilton Trust Co. v. Bisher, 36 S.Ct. 161, 239 U.S. 641, 60 L.Ed. 482—Northern Union Gas Co. v. Mayer, N.Y., 174 F. 817, 98 C.C.A. 525, modifying, C.C., 173 F. 628.

47. U.S.—Mendez v. Bowie, C.C.A. Puerto Rico, 118 F.2d 435, certiorari denied Mendez Rios v. Bowie, 62 S.Ct. 76, 314 U.S. 639, 86 L.Ed. 513.

Damages to property

Where court had jurisdiction of action for injunction and for an accounting of past damages because of misuse of right of way, sale of land after an adverse judgment would not deprive circuit court of appeals of jurisdiction as a court of equity, since equity will give complete relief where it originally had jurisdiction, even though the court is thereby called on to determine legal rights that otherwise would not be within the range of its authority, particularly since distinction between law and equity has been abolished in the federal courts.—Mendez v. Bowie, supra.

48. U.S.—MacKinnon v. American Agar Co., C.C.A.Cal., 73 F.2d 835. 3 C.J. p 629 note 3.

Judgment on one count

In action in four counts relating to a single injury, where verdict was for defendant on three counts but for plaintiff on fourth count, and single judgment was entered for plaintiff for the full relief asked, plaintiff could not appeal from such judgment or assign cross error in defendant's appeal therefrom.—Cochran v. M & M Transp. Co., C.C.A.R.I., 110 F.2d 519.

Persons held aggrieved

(1) In general.—Chidester v. City of Newark, C.C.A.N.J., 117 F.2d 981, reversing, D.C., 31 F.Supp. 892.

(2) Railroad company denied intervening petition for preferential payment of debts accruing to it from another such company in receivers' hands within six months before receivership, and discontinuance of preferential payments on indebtedness to surety on latter company's appeal bonds because of surety's payment of judgments appealed from. petitioner being injuriously and irreparably affected by such order.—Illinois Cent. R. Co. v. U. S. Fidelity & Guaranty Co., C.C.A.Ala., 87 F.2d 121, reversing, D.C., Gatch Tennant & Co. v. Mobile & O. R. Co., 15 F. Supp. 169.

49. U.S.—Harding v. Federal Nat. Bank, C.C.A.Mass., 31 F.2d 914. 3 C.J. p 631 note 9.

50. U.S.—MacKinnon v. American Agar Co., C.C.A.Cal., 73 F.2d 835—Stearns-Roger Mfg. Co. v. Brown, Colo., 114 F. 939, 52 C.C.A. 559. 3 C.J. p 632 note 15.

51. U.S.—In re Michigan-Ohio Bldg. Corporation, C.C.A.Ill., 117 F.2d 191.

52. **Full relief not obtained**

A party may prosecute an appeal where the judgment does not give him all he is entitled to or is otherwise erroneous and prejudicial.—Cochran v. M & M Transp. Co., C.C. A.R.I., 110 F.2d 519—Galloway v. General Motors Acceptance Corporation, C.C.A.S.C., 106 F.2d 466—Houchin Sales Co. v. Angert, C.C.A.Mo., 11 F.2d 115.

53. U.S.—Galloway v. General Motors Acceptance Corporation, C.C.A. S.C., 106 F.2d 466—In re Schwartz, C.C.A.N.Y., 89 F.2d 172, affirming, D.C., 16 F.Supp. 993—Olsen v. Jacklowitz, C.C.A.N.Y., 74 F.2d 718, affirming, D.C., 6 F.Supp. 102—In re Kane, C.C.A.N.Y., 48 F.2d 96—Harding v. Federal Nat. Bank, C. C.A.Mass., 31 F.2d 914—Houchin Sales Co. v. Angert, C.C.A.Mo., 11 F.2d 115. 3 C.J. p 635 note 40.

Determination of reserved question

The text rule has been applied so as to prevent an appeal merely for the purpose of having a question reserved determined.—Thomas & Betts Co. v. Electrical Fittings Corporation, C.C.A.N.Y., 100 F.2d 403, certiorari granted Electrical Fittings Corpora-

appeal exists only by grace of the statutes and not otherwise, the mere fact that the interests of a person are adversely affected by a decree of court does not necessarily give him a right of appeal.[54]

(2) Particular Litigants and Persons in Particular Relations

The right of particular litigants and persons in particular relations to maintain appeals in the circuit courts of appeal must be determined in the light of the circumstances of the particular case.

A claimant who is permitted to appear in a suit and maintain his title to the property or fund involved is to be regarded as a party, and is entitled to appeal to the circuit court of appeals;[55] and a party who claims a particular fund or property has a right to appeal from an order diverting the fund for other purposes.[56] An appeal may be brought on behalf of an insane or incompetent person by his guardian, guardian ad litem, or next friend;[57] but an executor or administrator cannot appeal if he has no interest in the matter or if he is not aggrieved.[58]

A mortgagor or mortgagee may appeal from a judgment, order, or decree with relation to or affecting the mortgaged property if he is a party, and if he has an interest and is prejudiced or aggrieved by the judgment, order, or decree.[59]

Interveners. One who has been allowed by order of the court to intervene in a cause, or who has been treated as a party thereto, may appeal from a judgment, order, or decree therein affecting his interests,[60] but, as a rule, one whose application to intervene, or to be admitted as a party defendant, in a suit has been rejected by the court cannot appeal from the final judgment rendered in the suit,[61] although if the judgment, order, or decree is appealable he may appeal from the decision dismissing his petition or motion.[62] There can as a rule be no intervention for the purpose of an appeal after trial and judgment.[63]

Creditors. Where the creditor has intervened or otherwise been made a party, or a quasi party, to the action or proceeding, he may secure a review if interested and aggrieved,[64] but a creditor cannot appeal if he is not aggrieved by the judgment or order of which he complains.[65]

Private corporations and stockholders, etc. A private corporation, like a natural person, may appeal from a judgment, order, or decree affecting a matter in which it has an interest and by which it is aggrieved,[66] but if it is not interested, or is not aggrieved by the judgment, order, or decree complained of, it cannot appeal.[67] If stockholders, bondholders, or noteholders have been made parties or quasi parties to the litigation, or have become parties by intervention, they may appeal to protect

tion v. Thomas & Betts Co., 59 S.Ct. 488, 306 U.S. 624, 83 L.Ed. 1029, reversed on other grounds 59 S.Ct. 860, 307 U.S. 241, 83 L.Ed. 1263.

54. U.S.—Ackert v. Baltimore & O. R. Co., C.C.A.Md., 115 F.2d 455, dismissing appeal, D.C., In re Baltimore & O. R. Co., 34 F.Supp. 154, certiorari denied Harvard State Bank v. Baltimore & O. R. Co., 61 S.Ct. 442, two cases, 311 U.S. 717, 85 L.Ed. 467.

55. U.S.—In re Michigan Cent. R. Co., Mich., 124 F. 727, 59 C.C.A. 643.

56. D.C.—Automobile Brokerage Corporation v. U. S., 39 F.2d 288, 59 App.D.C. 243.

3 C.J. p 639 note 9.

57. U.S.—King v. McLean Asylum of Massachusetts General Hospital, Mass., 64 F. 325, 12 C.C.A. 139, 26 L.R.A. 784.

58. U.S.—King v. Buttolph, C.C.A. Hawaii, 30 F.2d 769.

59. U.S.—Robbins v. Newberg, C.C. A.Alaska, 85 F.2d 754.

60. U.S.—State of Texas v. Anderson, Clayton & Co., C.C.A.Tex., 92 F.2d 104, certiorari denied 58 S.Ct. 265, 302 U.S. 747, 82 L.Ed. 578, rehearing denied 58 S.Ct. 366, 302 U. S. 780, 82 L.Ed. 602—Robbins v. Newberg, C.C.A.Alaska, 85 F.2d 754.

61. U.S.—Mackey v. City of Little Rock, C.C.A.Ark., 94 F.2d 546, certiorari denied 58 S.Ct. 1056, 304 U. S. 582, 82 L.Ed. 1544.

3 C.J. p 639 note 15.

62. U.S.—U. S. v. Northwestern Dev. Co., Alaska, 203 F. 960, 122 C.C.A. 262—U. S. v. Philips, 107 F. 824, 46 C.C.A. 660.

63. U.S.—Baltimore Trust Co. v. Inter-Ocean Oil Co., D.C.Md., 30 F. Supp. 484.

64. U.S.—Piabta v. H. M. Reich Co., C.C.A.N.Y., 77 F.2d 888.

Intervening creditors of insolvent corporation

Creditors of an insolvent corporation, who were permitted to intervene below to oppose the payment to another of a fund in which they claimed an interest, have sufficient interest to enable them to maintain an appeal from the order for payment of the fund as against a motion to dismiss.—Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Philadelphia Co., C.C.A.Pa., 266 F. 1.

Parties pro hac vice

A corporation's creditor, made a party pro hac vice to a receiver's proceeding for instructions, was concluded by an order granting the receiver's petition, and hence entitled to appeal therefrom.—West v. Radio-Keith-Orpheum Corporation, C.C.A.N. Y., 70 F.2d 621.

65. U.S.—West v. Radio-Keith-Orpheum Corporation.

66. U.S.—John T. Porter Co. v. Java Cocoanut Oil Co., C.C.A.Cal., 4 F.2d 476, certiorari denied 45 S.Ct. 515, 268 U.S. 697, 69 L.Ed. 1163.

Banks aggrieved by decree requiring payment of dividends

Banks which are brought into a suit for the purpose of requiring them to issue new certificates of stock to complainant, as purchaser under an attachment levy, and who disclaim any interest in the ownership of the stock and offer to abide the decision of the court, are nevertheless directly affected by a decree requiring them to pay to complainant dividends which they had previously paid to others, and may appeal therefrom.—John T. Porter Co. v. Java Cocoanut Oil Co., C.C.A.Cal., 4 F.2d 476, certiorari denied 45 S.Ct. 515, 268 U.S. 697, 69 L.Ed. 1163.

67. U.S.—In re New England Oil-Refining Co., C.C.A.Mass., 9 F.2d 344.

their interests,[68] although in any event where it appears that they are not interested or aggrieved the right of review should be denied.[69]

Purchasers of property. As a general rule, a purchaser at a judicial sale, by acceptance of his bid, becomes a party in such a sense, and acquires such an interest that he may appeal from an order setting aside or refusing to confirm the sale,[70] although an unaccepted bidder may be denied the right of appeal.[71]

Purchasers pendente lite and others succeeding to the rights of a party, either by act of the party or by operation of law, may generally appeal on intervening or being substituted as provided by the statutes.[72]

Receivers, commissioners, etc. As a general rule a receiver, commissioner, or other like officer may appeal from a judgment, order, or decree in a suit brought by or against him, or to which he is otherwise made a party, if he is aggrieved thereby,[73] and in cases in which, although he is not personally interested, an appeal by him is necessary or proper for the protection of the entire estate which he represents;[74] but he cannot appeal from an order respecting the conflicting claims of creditors or other parties, unless the court first authorizes him to do so,[75] and a receiver for a corporate mortgagor has no right of appeal from an order to surrender mortgaged property to purchaser at foreclosure sale, where no equity was disclosed or discretion abused.[76]

As a general rule a receiver may not appeal from a judgment, order, or decree for, or merely affecting, the payment or distribution of the funds or assets in his hands to or among those entitled thereto,[77] except where the receiver is permitted to appeal from a judgment allowing a claim and ordering payment thereof in preference to other claims.[78]

A trustee of property under a will, deed, or otherwise has such an interest or concern in a judgment, order, or decree affecting the interest of his cestuis que trust as entitles him to appeal to protect or recover the trust property or estate,[79] but he cannot appeal in any case where it does not appear that he is interested in the controversy or aggrieved by the judgment, order, or decree of which he complains.[80]

United States, states, and municipalities, etc. The United States may appeal from a judgment for any

68. U.S.—Cohen v. Young, C.C.A. Mich., 127 F.2d 721—Christian v. R. Hoe & Co., C.C.A.N.Y., 63 F.2d 218.
3 C.J. p 652 note 88.

Appearance

A noteholder and stockholder who appeared on the return day of an order to show cause why receivership should not be made permanent and opposed the application may appeal from an order making the receivership permanent.—Christian v. R. Hoe & Co., supra.

69. U.S.—First Nat. Bank of Hagerstown v. Crissinger, C.C.A.Md., 279 F. 818.

Sale of stock pendente lite

The officers and stockholders of a bank whose misconduct resulted in a suit for dissolution of the bank and appointment of a receiver have no interest entitling them to maintain an appeal from the appointment of the receiver after they have sold their stock pendente lite and resigned their offices.—First Nat. Bank of Hagerstown v. Crissinger, supra.

70. U.S.—Investment Registry v. Chicago & M. Electric R. Co., Ill., 212 F. 594, 129 C.C.A. 130.
3 C.J. p 652 note 91.

71. U.S.—Spangelo v. Northern Dakota Ry. Co., C.C.A.N.D., 276 F. 26.

72. U.S.—Andrews v. National Foundry & Pipe Works, Wis., 76 F. 166, 22 C.C.A. 110, 36 L.R.A. 139, rehearing denied 77 F. 774, 23 C.C.A. 454, 36 L.R.A. 153, certiorari denied 17 S.Ct. 996, 166 U.S. 721, 41 L.Ed. 1188.

Assignment after judgment

One taking an assignment of a cause of action after final decree may appeal in his own name, on making himself a party by appropriate application, or in the name of his ancestor without being made a party, he being bound by all that was done before the assignment.—F. A. Mfg. Co. v. Hayden & Clemons, C.C.A.Mass., 273 F. 374.

73. U.S.—Rust v. United Waterworks Co., Colo., 70 F. 129, 17 C.C.A. 16.
3 C.J. p 654 notes 6, 7.

Interest of receiver not discharged after completion of reorganization plans

Where plans for the reorganization of an insolvent railroad company in the hands of a receiver had been perfected but the receiver had not been discharged and was still prosecuting claims, he has sufficient interest to appeal from the allowance of a claim against the company, as has a trustee for holders of the company's notes whose deficiency judgment on mortgage bonds securing them was kept alive by the reorganization plans and had been assigned to the company's successor as one of its assets.—New York Trust Co. v. Carpenter, C.C.A.Ohio, 250 F. 668.

74. U.S.—Lee v. Koppel Industrial Car & Equipment Co., C.C.A.Puerto Rico, 295 F. 23, certiorari denied Koppel Industrial Car & Equipment Co. v. Lee, 44 S.Ct. 459, 265 U.S. 584, 68 L.Ed. 1191.

75. U.S.—Bosworth v. Terminal R. Ass'n, Ill., 80 F. 969, 26 C.C.A. 279 affirmed 19 S.Ct. 624, 174 U.S. 182, 43 L.Ed. 941.

76. U.S.—Nicholson v. Western Loan & Building Co., C.C.A.Cal., 60 F.2d 516, certiorari denied 53 S.Ct. 396, 288 U.S. 605, 77 L.Ed. 980.

77. U.S.—Kirkpatrick v. Eastern Milling & Export Co., C.C.N.J., 135 F. 151.

Receiver is a mere stakeholder, and may not appeal from a decree ordering distribution of trust funds in his hands.—Grier v. Union Nat. Life Ins. Co., D.C.Pa., 217 F. 293.

78. U.S.—Lee v. Koppel Industrial Car & Equipment Co., C.C.A.Puerto Rico, 295 F. 23, certiorari denied Koppel Industrial Car & Equipment Co. v. Lee, 44 S.Ct. 459, 265 U.S. 584, 68 L.Ed. 1191.

79. U.S.—Seaboard Nat. Bank v. Rogers Milk Products Co., C.C.A. N.Y., 21 F.2d 414.
3 C.J. p 656 note 33.

80. U.S.—Hamilton Trust Co. v. Cornucopia Mines Co. of Oregon, Or., 223 F. 494, 139 C.C.A. 42, mandamus and certiorari denied Hamilton Trust Co. v. Bisher, 36 S.Ct. 161, 239 U.S. 641, 60 L.Ed. 482.

amount rendered against it[81] provided it is aggrieved thereby.[82] As a rule appeals may be maintained by cities, counties, and other municipal corporations, or quasi corporations to the same extent and in the same manner as by other litigants, if they are interested parties and are aggrieved by the judgment, order, or decree complained of,[83] but not otherwise.[84]

b. Deprivation or Loss of Right

A person may expressly or impliedly waive his right to appeal to the circuit courts of appeal, as by complying with a judgment, order, or decree, or by the acceptance of benefits accruing thereunder.

As a general rule, where an appeal to the circuit courts of appeal is a matter of right, the party aggrieved by a judgment or decree is not deprived of the privilege of having it reviewed by the fact that he is in contempt of court.[85] The statute giving a party the right to appeal from an interlocutory order or decree within a specified time has been held not to take away his right to appeal from a final decree.[86]

Express agreement. A party may, by express agreement or stipulation before trial or judgment, waive his right to appeal, either wholly or partially, and such agreement will be enforced by dismissal or quashing of an appeal taken in violation thereof, or by refusing to pass on questions covered by the waiver,[87] and a formal release of errors, for a valuable consideration, or under seal, will waive the right, or estop the party, to prosecute an appeal as to such errors as are covered by the release.[88] However, such a right will be held to have been waived only where the intention to waive or release clearly appears from the terms of the agreement or stipulation,[89] and is supported by a sufficient consideration.[90] If, however, the party has already perfected his appeal, and the agreement remains executory, nothing being done under it by way of dismissal of the appeal, he does not forfeit his right to appear and be heard on the appeal.[91]

Implied waiver or estoppel. A party may not only waive his right to appeal by express agreement or stipulation, but a waiver may also be implied from, or the party may be estopped by, an act, course of conduct, or agreement which is inconsistent with such right.[92] A waiver or release of errors cannot be implied, however, nor can an estoppel arise, from acts or agreements which are not clearly inconsistent with the right to appeal, as the right of appeal is favored by the law, and it will not be held to have been waived except on clear and decisive grounds,[93]

81. U.S.—Schaumburg v. U. S., Pa., 103 U.S. 667, 26 L.Ed. 599.
3 C.J. p 658 note 51.

Summary proceedings

The United States has no appeal in summary proceedings against a public officer under the act of congress of May 15, 1820.—U. S. v. Nourse, D.C., 6 Pet. 470, 8 L.Ed. 467—U. S. v. Yukers, Ala., 60 F. 641, 9 C.C.A. 171.

82. U.S.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 13 F.2d 987.

83. U.S.—City of New Orleans v. Peake, La., 52 F. 74, 2 C.C.A. 626, affirmed 60 F. 127, 8 C.C.A. 516.

84. U.S.—Northern Union Gas Co. v. Mayer, N.Y., 174 F. 817, 98 C.C.A. 525, modifying C.C., 173 F. 628.

85. U.S.—Exploration Mercantile Co. v. Pacific Harward & Steel Co., Nev., 177 F. 825, 101 C.C.A. 39.

86. U.S.—Victor Talking Mach. Co. v. George, C.C.A.N.J., 105 F.2d 697, certiorari denied George v. Victor Talking Mach. Co., 60 S.Ct. 176, 308 U.S. 611, 84 L.Ed. 511, rehearing denied 60 S.Ct. 294, 308 U.S. 638, 84 L.Ed. 530, and 60 S.Ct. 466, 309 U.S. 693, 84 L.Ed. 1034—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703—Jones Bros. Co. v. Underkoffler, D.C.Pa., 24 F.Supp. 393.

87. U.S.—Bell v. U. S., C.C.A.Cal., 9 F.2d 820.
3 C.J. p 662 note 96.

88. U.S.—Elwell v. Fosdick, Ill., 10 S.Ct. 598, 134 U.S. 500, 33 L.Ed. 998.
3 C.J. p 663 note 7.

89. U.S.—Kane v. Roxy Theatres Corporation, C.C.A.N.Y., 63 F.2d 751, certiorari denied New York Edison Co. v. Kosch, 53 S.Ct. 695, 289 U.S. 751, 77 L.Ed. 1496.
3 C.J. p 663 note 5 [a].

As to trustee

A stipulation, submitting a cause to a district court for final determination to which a mortgagee trustee is not made a party, and which does not appear to have been signed on behalf of the bondholders' committee by attorneys who represented all of the bondholders, does not show an intention on the part of such trustee to waive right of appeal.—Kane v. Roxy Theatres Corporation, supra.

Agreement is sufficient where it is to the effect that a particular judgment or decree shall be rendered or that the parties will be bound thereby.—McCafferty v. Celluloid Co., N. Y., 104 F. 305, 43 C.C.A. 540.

90. U.S.—Bell v. U. S., C.C.A.Cal., 9 F.2d 820.
3 C.J. p 663 notes 98, 4.

91. U.S.—Ah Tai v. U. S., Mass., 135 F. 513, 68 C.C.A. 225.

92. U.S.—Talbot v. Mason, Mich., 125 F. 101, 60 C.C.A. 145—Albright v. Oyster, Mo., 60 F. 644, 9 C.C.A. 173.

93. U.S.—Robinson v. Hays, Wash., 186 F. 295, 108 C.C.A. 373—Snow v. Hazlewood, Tex., 179 F. 182, 102 C.C.A. 448, amended and rehearing denied 181 F. 966, 104 C.C.A. 430—Woodward v. McConnaughey, Wash., 106 F. 758, 45 C.C.A. 602.

Offer to increase bid at foreclosure sale

A reorganization committee of bondholders, whose purchase of the property of the corporation at foreclosure sale was set aside on the ground that they were parties to a combination to suppress competition at the sale, did not estop themselves to appeal from the decree denying confirmation by offering to increase their bid.—Investment Registry v. Chicago & M. E. R. Co., Ill., 212 F. 594, 129 C.C.A. 130, affirming, D.C., 206 F. 488.

Decree not requiring condition

A decree in a foreclosure suit, which ordered an accounting, and provided that after the account plaintiff might file a petition for the entry of a foreclosure decree for the net amount found due, did not require plaintiff, as a condition precedent to foreclosure to concede reduction, and estop him to appeal from the order of reduction, since the decree, considering all provisions together, did not make plaintiff's right of recovery of the reduced amount conditioned on the filing of such pe-

and, where a judgment or decree involves distinct and severable matters or demands, a waiver or estoppel as to only one or a part thereof will not prevent an appeal as to the residue.[94] A party who voluntarily acquiesces in, ratifies, or recognizes the validity of a judgment, order, or decree against him, or otherwise takes a position which is inconsistent with the right to appeal therefrom, thereby impliedly waives, or is estopped to assert, his right to have such judgment, order, or decree reviewed.[95] As a general rule, if a party, after an order or judgment on demurrer to pleadings is given against him, under leave of court, amends the pleading demurred to, or substitutes another therefor so as to remove the grounds of the demurrer, he acquiesces in the judgment or order on the demurrer, and will not be permitted to appeal therefrom.[96] The right to appeal in such a case is not aided by a stipulation agreeing that the question involved should be submitted to the court of appeals,[97] but the mere fact that the court, on sustaining a demurrer, and without any request therefor, grants leave to amend does not bar an appeal, if the party against whom the demurrer is sustained does not act on such leave, but elects to stand on his pleading.[98] Also the mere fact that a judgment or order was formally entered or recorded on the motion of appellant is not a recognition of its validity and does not affect his right to appeal therefrom, such entry being necessary for appeal.[99] The right to appeal is not waived by taking steps to obviate the objection to maintenance of the first action and bringing a new action.[1]

It is well settled that a party is not aggrieved by a judgment, order, or decree, or ruling regularly rendered or made on agreement or otherwise, with his express or implied consent, and therefore he cannot appeal therefrom,[2] or from a judgment entered in conformity with facts admitted by him.[3] However, a party cannot be held to have waived error or to be estopped on the ground of consent, unless it is plainly made to appear that the judgment, order, or decree was in fact by consent, either by showing express consent or by showing facts from which consent may be clearly implied,[4] and, where the original judgment is entered after trial on the merits, consent by both parties that the judgment be amended to correct an error therein does not make the amended judgment a "consent judgment" so as to preclude an appeal therefrom by the losing party.[5] Also an appeal will lie where the question for decision was whether the trial court gave improper effect to the consent or stipulation of the parties, and whether the consent decree should have been entered at all.[6]

Where the judgment, order, or decree appealed from is of such a nature that compliance therewith leaves nothing on which a judgment of reversal can operate, so that only a moot question remains, the right to appeal to the circuit court of appeals is

tition.—Gardner v. Grand Beach Co., C.C.A.Mich., 29 F.2d 481.

Proceedings before master

Parties at whose instance proceedings were had before a special master cannot be afterward heard to say that they will be injured by having expenses incurred paid out of the fund in the registry of the court.—Edgell v. Felder, Ga., 99 F. 324, 39 C.C.A. 540.

94. U.S.—Snow v. Hazlewood, Tex., 179 F. 182, 102 C.C.A. 448, amended and rehearing denied 181 F. 966, 104 C.C.A. 430—Worthington v. Beeman, Ill., 91 F. 232, 33 C.C.A. 475.

95. U.S.—Investment Registry v. Chicago & M. E. R. Co., Ill., 212 F. 594, 129 C.C.A. 130, affirming, D.C., 206 F. 488.
3 C.J. p 665 note 16.

Acts recognizing the validity of a judgment, order, or decree constitute a waiver of the right to appeal only where such acts clearly show a recognition of the judgment, order, or decree as valid.—Chicago Dollar Directory Co. v. Chicago Directory Co., Ill., 65 F. 463, 13 C.C.A. 8.

96. U.S.—Northern Pac. R. Co. v. Murray, Wash., 87 F. 648, 31 C.C.A. 183.

97. U.S.—Northern Pac. R. Co. v. Murray, supra.

98. U.S.—Woodward v. McConnaughey, Wash., 106 F. 758, 45 C.C.A. 602.

99. U.S.—Grant v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 22 F.2d 488—Butte & B. Consol. Mining Co. v. Montana Ore Purchasing Co., Mont., 121 F. 524, 58 C.C.A. 634.

1. U.S.—Franceschi v. Mercado, C. C.A.Puerto Rico, 269 F. 954.

Removing objection to want of capacity to sue

The right of heirs of mortgagors to appeal from a decree, dismissing their suit to set aside the foreclosure of the mortgage and recover the property, for want of capacity to sue, because of bankruptcy proceedings, was not waived by obtaining an order extinguishing the bankruptcy proceedings and bringing a new suit for the same cause, as the order of extinguishment may not have been rightfully entered, and the second suit may be open to defenses not available in the first suit.—Franceschi v. Mercado, supra.

2. U.S.—In re 4145 Broadway Hotel Co., C.C.A.Ill., 100 F.2d 7—Sacramento Suburban Fruit Lands Co. v. Zdarsky, C.C.A.Cal., 36 F.2d 939—U. S. v. Institute of Carpet Manufacturers of America, D.C.N.Y., 1 F.R.D. 636—U. S. v. Hartford-Empire Co., D.C.Ohio, 1 F.R.D. 424.
3 C.J. p 671 note 69.

Remittitur

The fact that a party voluntarily enters a remittitur in compliance with the lower court's suggestion, rather than have a motion for new trial allowed, waives his right to appeal or bring error.—Chickasha Cotton Oil Co. v. Chapman, C.C.A.Tex., 4 F.2d 319, certiorari denied 45 S.Ct. 636, 268 U.S. 700, 69 L.Ed. 1164.

3. U S.—McCafferty v. Celluloid Co., N.Y., 104 F. 305, 43 C.C.A. 540.

4. U.S.—Woodward v. McConnaughey, Wash., 106 F. 758, 45 C.C.A. 602.

5. U.S.—Becker v. Anchor Realty & Investment Co., C.C.A.Mo., 71 F.2d 355, affirming, D.C., Anchor Realty & Investment Co. v. Becker, 3 F. Supp. 22.

6. D.C.—Laughlin v. Berens, 118 F. 2d 193, 73 App.D.C. 136.

lost,[7] but a voluntary compliance with the judgment, order, or decree of the court by payment or performance, either before or after taking the appeal, is not necessarily a bar to an appeal, particularly where repayment or restitution may be enforced, or the effect of compliance may be otherwise undone, in case of a reversal,[8] nor is the right to appeal waived by acts done by appellant in the exercise of a right which he has independently of the judgment.[9] Even where there is no actual or threatened execution, contempt proceeding, or other legal process, payment or performance of a judgment or decree is regarded as under compulsion and not voluntary in the legal sense, so as to bar an appeal, where it is necessary to the exercise or protection of a legal right, and in other analogous cases,[10] and, a fortiori, the payment or performance is not voluntary where it is made or done under protest.[11]

Where a party, knowing the facts, voluntarily accepts the benefits, or a substantial part thereof, accruing to him under a judgment, such acceptance operates as a waiver or release of errors and estops him from afterward maintaining an appeal from the judgment,[12] when the effect of the appeal may be to annul the judgment as a whole.[13] If the provisions of a judgment, order, or decree are mutually interdependent, so that the acceptance of benefits therefrom is inconsistent with the alleged invalidity in other portions, a party cannot avail himself of that portion which is favorable to him, and accept its benefits, and afterward prosecute an appeal to reverse such portions as are unfavorable to him.[14] However, the right to appeal is not waived where the controversy is a separable one and the different parts of the judgment, order, or decree are separate and independent, so that acceptance of a benefit from the part which is favorable is not inconsistent with an appeal from the part which is adverse.[15] So also there is not such a waiver or estoppel where the right to the benefit received is conceded by the opposite party or appellant is entitled thereto in any event, so that it could not be denied if the portions of the judgment or decree granting it should be reversed,[16] or in the other cases in which the acceptance of the benefit or partial enforcement of the judgment is not inconsistent with an appeal and re-

7. U.S.—Chicago & N. W. Ry. Co. v. Eveland, C.C.A.S.D., 289 F. 783, vacating, D.C., 285 F. 425—Meyers v. Cheesman, Ky., 174 F. 783, 98 C.C. A. 491.

8. U.S.—Puget Sound Nav. Co. v. Nelson, C.C.A.Wash., 59 F.2d 697—Josevig-Kennecott Copper Co. v. James F. Howarth Co., C.C.A. Wash., 261 F. 567.
3 C.J. p 676 note 96.

Partial set-off
If the payment of the entire judgment does not constitute waiver, a fortiori the offering of a prior judgment in partial set-off does not constitute a waiver of the right to appeal from a subsequent judgment.—Puget Sound Nav. Co. v. Nelson, C.C. A.Wash., 59 F.2d 697.

9. U.S.—Idaho Irr. Co. v. Gooding, C.C.A.Idaho, 285 F. 453, affirmed in part and reversed in part on other grounds 44 S.Ct. 618, 265 U.S. 518, 68 L.Ed. 1157.

10. U.S.—Idaho Irr. Co. v. Gooding, supra.

Payments on contract
The making by a party of payments found by a decree to be due on a contract for the purpose of preserving rights under the contract is not such a compliance with the decree as to bar the right to appeal therefrom.—Luedinghaus Lumber Co. v. Luedinghaus, C.C.A.Wash., 299 F. 111.

11. U.S.—Puget Sound Power & Light Co. v. City of Seattle, C.C.A. Wash., 5 F.2d 393, modifying, D.C., 300 F. 441, 443, and certiorari denied City of Seattle v. Puget Sound Power & Light Co., 46 S.Ct. 24, 269 U.S. 565, 70 L.Ed. 414.

12. U.S.—In re Greenpoint Metallic Bed Co., C.C.A.N.Y., 113 F.2d 881, reversing, D.C., 31 F.Supp. 923—Storley v. Armour & Co., C.C.A.N. D., 107 F.2d 499—Kaiser v. Standard Oil Co. of New Jersey, C.C.A. Tex., 89 F.2d 58—Smith v. Morris, C.C.A.Del., 69 F.2d 3—The Velma L. Hamlin, C.C.A.Va., 40 F.2d 852—Finefrk v. Kenova Mine Car Co., C.C.A.W.Va., 37 F.2d 310—Allen v. Bank of Angelica, C.C.A. N.Y., 34 F.2d 658—Armstrong v. Lone Star Refining Co., C.C.A.Kan., 20 F.2d 625—Spencer v. Babylon R. Co., N.Y., 250 F. 24, 162 C.C.A. 196.
3 C.J. p 679 note 21.

Attorney's acceptance of fee
The right, if any, of receivers' attorney to appeal from an order allowing a fee is waived by the attorney's acceptance and retention of the fee allowed him thereby.—Smith v. Morris, C.C.A.Del., 69 F.2d 3.

In bankruptcy proceeding
Where a trustee in bankruptcy, having recovered judgment, under Bankruptcy Act § 67, for net proceeds of sale of property under judgment within four months of bankruptcy, accepted payment of the full amount of the judgment, he was without right to prosecute an appeal because of dissatisfaction with the award of the net proceeds only, rather than the gross proceeds of sale, in that the judgment was based on inseparable claims, and benefit thereof had been received by accepting complete satisfaction.—Allen v. Bank of Angelica, C.C.A.N.Y., 34 F.2d 658.

13. U.S.—In re Minot Auto Co., C. C.A.N.D., 298 F. 853.

14. U.S.—Credit Bureau of San Diego v. Petrasich, C.C.A.Cal., 118 F.2d 470—U. S. v. Flower, C.C.A.Neb., 108 F.2d 298—Altman v. Shopping Center Bldg. Co., C.C.A.Mo., 82 F. 2d 521—Smith v. Morris, C.C.A. Del., 69 F.2d 3.

15. U.S.—The Velma L. Hamlin, C. C.A.Va., 40 F.2d 852—Finefrock v. Kenova Mine Car Co., C.C.A.W.Va., 37 F.2d 310—Mudd v. Perry, C.C. A.Okl., 25 F.2d 85, affirming, D.C., 14 F.2d 430, and certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 529—Armstrong v. Lone Star Refining Co., C.C.A.Kan., 20 F.2d 625—Spencer v. Babylon R. Co., N.Y., 250 F. 460, 162 C.C.A. 196.
3 C.J. p 680 note 25, p 682 note 35, p 683 note 46.

Acceptance of uncontroverted part of claim
Acceptance of the benefit of a judgment giving appellant the uncontroverted part of his claim does not waive his right to appeal as to the other part claimed by him.—Mudd v. Perry, C.C.A.Okl., 25 F.2d 85, affirming, D.C., 14 F.2d 430, and certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 529.

16. U.S.—In re Minot Auto Co., C. C.A.N.D., 298 F. 853—Spencer v. Babylon, N.Y., 250 F. 24, 162 C.C. A. 196.
3 C.J. p 680 note 26.

versal.[17] The acceptance of payment of a judgment for less than the amount claimed has been held not a waiver of the right to appeal where the judgment or decree failed to allow proper interest as damages,[18] or as a penalty.[19] In order that the acceptance of a payment of or on a judgment or decree may be binding, so as to bar an appeal, such acceptance by appellant, or by some one authorized to bind him, must of course be shown, and it must appear, on clear and decisive grounds, that the acceptance or receipt therefor was understood or intended as constituting an acquiescence in the judgment or decree.[20] Thus acceptance of payment by a party has been held not to estop a coparty from appealing where the interests of appellants are separate and distinct, so that one has no authority, express or implied, to bind the other by such acceptance.[21]

Waiver of objections to the right of appeal may be implied from an act on the part of appellee.[22]

§ 290. Decisions Reviewable

a. Decisions reviewable generally
b. Dependent on nature and scope of decision

a. Decisions Reviewable Generally

(1) In general
(2) Decisions of territorial courts, etc.

(1) In General

The jurisdiction of the circuit courts of appeal depends on statutory provisions, and ordinarily an appeal will not lie to such courts unless a judgment, order, or decree has been actually rendered or made in the court below and entered in permanent form as a record of the latter court.

In the absence of express statutory provision to the contrary, an appeal to the circuit court of appeals will lie only where there has been a decision by a tribunal or officer vested with judicial authority, and acting in a judicial capacity when making the decision,[23] and mere preliminary or procedural

17. U.S.—Golden West Brewing Co. v. Milonas & Sons, C.C.A.Cal., 104 F.2d 880.

18. U.S.—McFarland v. Hurley, C.C. A.La., 286 F. 365, reversing, D.C., Liberty Cent. Trust Co., v. Gilliland Oil Co., 279 F. 432.

19. U.S.—McFarland v. Hurley, supra.

20. U.S.—Jones v. Pettingill, Puerto Rico, 245 F. 269, 157 C.C.A. 461, certiorari denied Pettingill v. Jones, 38 S.Ct. 61, 245 U.S. 663, 62 L.Ed. 536.

Judgment on motion of party's attorney
The mere recital in a judgment awarding a sum, that it was granted on motion of plaintiff's attorney, is no acceptance of a benefit under it which could affect his right to appeal.—Grant v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A. N.Y., 22 F.2d 488.

21. U.S.—D. W. Standrod & Co. v. Utah Implement-Vehicle Co., Idaho, 223 F. 517, 139 C.C.A. 65.

Trustee for creditors
A defendant in a foreclosure suit, which was trustee for a number of lien creditors, by accepting payment for one from the proceeds of foreclosure sale did not waive the right to appeal on behalf of the others.—D. W. Standrod & Co. v. Utah Implement-Vehicle Co., supra.

22. U.S.—Ericson v. Slomer, C.C.A. Ill., 94 F.2d 437.

23. U.S.—Dugger v. Cox, C.C.A. Tenn., 110 F.2d 834, supplementing 95 F.2d 999.
3 C.J. p 372 note 56.

Test
Whether a proceeding which results in a grant is a judicial one does not depend on the nature of the thing granted, but on the nature of the proceeding which congress has provided for securing the grant.—Tutun v. U. S., Mass., 46 S.Ct. 425, 270 U.S. 568, 70 L.Ed. 738—Neuberger v. U. S., N.Y., 46 S.Ct. 425, 270 U.S. 568, 70 L.Ed. 738, answering certified questions, C.C.A., 9 F.2d 1020, certifying questions, D.C., In re Neuberger, 6 F.2d 387, reversed on other grounds, C.C.A., Neuberger v. U. S., 13 F.2d 541, certiorari granted U. S. v. Neuberger, 47 S.Ct. 243, 273 U.S. 685, 71 L.Ed. 839, and case remanded 47 S. Ct. 334, 273 U.S. 777, 71 L.Ed. 887.

"In all cases" includes
(1) Disbarment proceedings.—Thatcher v. U. S., Ohio, 212 F. 801, 129 C.C.A. 255, rehearing denied 219 F. 173, 135 C.C.A. 71, appeal dismissed 36 S.Ct. 450, 241 U.S. 644, 60 L.Ed. 1218.

(2) Contempt proceedings.—Bessette v. W. B. Conkey, Ind., 24 S.Ct. 665, 194 U.S. 324, 48 L.Ed. 997—25 C.J. p 961 note 39 [a] (2).

(3) Deportation proceedings.—Gee Cue Beng v. U. S., La., 184 F. 383, 106 C.C.A. 493—25 C.J. p 961 note 39 [a] (3).

(4) Naturalization proceedings.—Tutun v. U. S., Mass., 46 S.Ct. 425, 270 U.S. 568, 70 L.Ed. 738—Neuberger v. U. S., N.Y., 46 S.Ct. 425, 270 U. S. 568, 70 L.Ed. 738, answering certified questions, C.C.A., 9 F.2d 1020, certifying questions, D.C., In re Neuberger, 6 F.2d 387, reversed on other grounds, C.C.A., Neuberger v. U. S., 13 F.2d 541, certiorari granted U. S. v. Neuberger, 47 S.Ct. 243, 273 U.S. 685, 71 L.Ed. 839, and case remanded 47 S.Ct. 334, 273 U.S. 777, 71 L.Ed. 887—U. S. v. Lenore, D.C.N.D., 207 F. 865—2 C.J. p 1126 note 43 [b] (1), (2).

Contra U. S. v. Dolla, Ga., 177 F. 101, 100 C.C.A. 521, 21 Ann.Cas. 665, followed in U. S. v. Neugebauer, Pa., 221 F. 938, 137 C.C.A. 508.

Cases to which reviewing power extends
(1) Generally see 25 C.J. p 961 note 40 [a], [b].

(2) Admiralty see Admiralty § 170.

(3) Customs duties see Customs Duties § 182 note 54.

(4) "This case, being criminal, belongs to a class in which the review ordinarily is to be had in the Court of Appeals. Judicial Code § 128, Comp.St. § 1120."—Salinger v. U. S., S.D., 47 S.Ct. 173, 174, 272 U.S. 542, 71 L.Ed. 398.

A proceeding before a grand jury constitutes a judicial inquiry.—Cobbledick v. U. S., Cal., 60 S.Ct. 540, 309 U.S. 323, 84 L.Ed. 783, affirming, C.C.A., Palmuth v. U. S., 107 F.2d 975, certiorari granted Cobbledick v. U. S., 60 S.Ct. 299, 308 U.S. 547, 84 L.Ed. 460, 461.

An order or judgment of a United States commissioner is not within the appellate jurisdiction of a circuit court of appeals.—U. S. v. Various Documents, Papers and Books of Briggs & Turivas, C.C.A.Ill., 278 F. 944, certiorari denied U. S. v. Various Documents, 42 S.Ct. 271, 258 U.S. 617, 66 L.Ed. 793.

Orders of Securities and Exchange Commission
The statute providing that United States district courts shall have "ex-

orders of an administrative body have been held not reviewable.[24] Also the question whether any particular form of judicial action is appealable to the circuit court of appeals turns on the character of the proceedings which resulted in the order appealed from,[25] and, if a proceeding is regarded as a civil action, statutes relating to appeals in civil cases will apply.[26]

While it has been broadly stated that the circuit court of appeals has jurisdiction to review orders of the district courts,[27] the jurisdiction of the circuit court of appeals to review judgments, orders, and decrees of the district courts depends on statutory provisions,[28] and such courts are without jurisdiction to hear an appeal from an order which is not appealable,[29] and, where the decision, order, judgment, or decree of the federal trial court is one as to which a direct review by the supreme court is authorized, a review must be sought in the supreme court and the circuit court of appeals has no jurisdiction.[30]

clusive jurisdiction" of violations of the Securities Exchange Act must be so interpreted, if possible, as to be consistent with other provisions of the act and not as to repeal provision for review in circuit court of appeals of orders of the Securities and Exchange Commission.—Wright v. Securities & Exchange Commission, C.C.A., 112 F.2d 89.

Decisions not reviewable

(1) Circuit court of appeals has no jurisdiction of appeal from decision affirming registrar of property of Guayama's action denying record of deed, as no legal rights under the deed were ascertained or determined.—Luce & Co. v. Registrar of Property of Guayama, C.C.A.Puerto Rico, 20 F.2d 115.

(2) The entry, ex parte, of an order authorizing a national bank's receiver to execute a contract for the sale of realty constituted neither a "suit at law" nor a "suit in equity," presented no "justiciable controversy," and involved the entry of no judicial "order" or "judgment" which could be reviewed by an appellate court, since the receiver's actions were purely "administrative actions" and the court's approval was merely an administrative "condition precedent" to the congressionally granted executive power to sell, not subject to judicial review.—Mitchell v. Joseph, C.C.A.Ill., 117 F.2d 253.

(3) When a case is referred for arbitration to a judge before whom it does not come in due course of law, no appeal lies from his decision.—Nashville Interurban R. Co. v. Barnum, N.Y., 212 F. 634, 129 C.C.A. 170.

24. D.C.—American Federation of Labor v. National Labor Relations Board, 103 F.2d 933, 70 App.D.C. 62, certiorari granted 60 S.Ct. 76, 308 U.S. 531, 84 L.Ed. 448, affirmed 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347.

25. U.S.—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418.

26. U.S.—U. S. v. New York Cent. & H. R. Co., 164 F. 324, 90 C.C.A. 256. 3 C.J. p 376 note 76.

27. U.S.—Rasquin v. Muccini, C.C.A. N.Y., 72 F.2d 688.

28. U.S.—State of Missouri by Unemployment Compensation Commission v. Todd, C.C.A.Mo., 122 F. 2d 804—Belleair Hotel Co. v. Mabry, C.C.A.Fla., 109 F.2d 390—Schmidt v. U. S., C.C.A.Wash., 102 F.2d 589, certiorari denied 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478, and Northern Pac. R. Co., by Schmidt v. U. S., 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478—In re Gelino's, Inc., C.C.A.Ill., 51 F.2d 875, dismissing appeal, D.C., 43 F.2d 832, and certiorari denied Lamson Co. v. Whittemore, 52 S.Ct. 36, 281 U.S. 659, 76 L.Ed. 558—Electrical Engineers' Equipment Co. v. Champion Switch Co., C.C.A.N.Y., 23 F.2d 600—Starklof v. U. S., C.C.A.Alaska, 20 F.2d 32—U. S. v. Benedict, C.C.A.N.Y., 280 F. 76, affirming conditionally, D.C., Benedict v. U. S., 270 F. 267, and affirmed U. S. v. Benedict, 43 S. Ct. 357, 261 U.S. 294, 67 L.Ed. 662. 3 C.J. p 611 note 16.

29. U.S.—Burns v. Ender Coal & Coke Co., C.C.A.Ind., 104 F.2d 964—Robinson v. Edler, C.C.A.Nev., 78 F.2d 817—In re Gelino's, Inc., C. C.A.Ill., 51 F.2d 875, dismissing appeal, D.C., 43 F.2d 832, and certiorari denied Lamson Co. v. Whittemore, 52 S.Ct. 36, 284 U.S. 659, 76 L.Ed. 558—Rumsey v. New York Life Ins. Co., C.C.A.Hawaii, 267 F. 554, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 459.

30. U.S.—Brucker v. Fisher, C.C.A. Mich., 49 F.2d 759, dismissing appeal, D.C., Fisher v. Brucker, 41 F. 2d 774.

Injunctive proceedings involving state statute

(1) Where no application for a preliminary injunction was pressed and no request for three judges was made in a suit to have a statute declared unconstitutional and defendants enjoined from enforcing it, an appeal from an order of a single judge was held properly taken to the circuit court of appeals.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F. 2d 322, reversing, D.C., 27 F.2d 1005—New York State Electric & Gas Corporation v. Public Service Commission of New York, C.C.A.N.Y., 102 F.2d 453—Peet Stock Remedy Co. v. McMullen, C.C.A.Neb., 32 F.2d 669.

(2) Whether a city charter is within the statute providing for a direct appeal to the supreme court in injunctive proceedings involving the statutes of a state or the action of a state officer or board under or pursuant to state statutes depends on whether that charter is a direct grant from the legislature, so that it is, in effect, a state statute although of local application, and a charter which is an act purely by voters of the locality within a power granted by a state constitution is not within the federal statute, so that an appeal to the circuit court of appeals was held proper. Uhlein v. City of St. Paul, C.C.A.Minn., 32 F.2d 748, certiorari denied 50 S.Ct. 240, 281 U.S. 726, 74 L.Ed. 1113, and followed in, C.C.A., 38 F.2d 1020.

(3) Where three-judge federal district court issued temporary injunction restraining state officials from enforcing a state statute but dissolved injunction on final hearing, and it was mistakenly assumed that defendants' motion for assessment of damages and costs against the plaintiffs and their injunction bond sureties should be passed upon by the three-judge court, judgment dismissing the motion was reviewable by the circuit court of appeals.—Public Service Commission of Missouri v. Brashear Freight Lines, Mo., 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, reversing, C.C.A., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, and rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L. Ed. 1551.

(4) However, no appeal lies from an order of a single district judge acting without jurisdiction in rendering a final decree where an application is made for an interlocutory injunction in a cause involving the validity of state legislation.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emmerson, 30 F.2d 322, reversing, D.C., 27 F. 2d 1005—Riss & Co. v. Hoch, C.C.A. Kan., 99 F.2d 553—Smith v. Dudley, C.C.A.Ark., 89 F.2d 453.

The circuit court of appeals may also review questions involving the jurisdiction of the district court,[31] and the former rules with respect to the appellate jurisdiction of the circuit court of appeals of cases involving no question except the jurisdiction of the trial court as a federal court, the constitutionality of a federal or state statute, etc., which are no longer of any practical value because of the amendment of the statutes relating to a direct review thereof by the supreme court are discussed in 25 C.J. p 964 notes 59–64, p 965 notes 68–71.[32]

The statute does not fix any pecuniary limits with respect to the reviewing power of the circuit court of appeals,[33] except as to appeals from the supreme courts of the Territories of Hawaii and Puerto Rico, discussed infra subdivision a (2) of this section.

Rendition, form, or entry of judgment or decree. The existence in the record of an appealable judgment, order, or decree is a jurisdictional fact and an appeal will not lie unless such a judgment in the court below has been actually rendered or made.[34] The judgment need not be technical and formal, and immaterial defects in form will not render it unappealable,[35] but it must, in substance, show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated,[36] for an appeal will not lie from the verdict of a jury without an entry of judgment thereon,[37] or from the mere finding of facts or conclusions of law by the court not followed by a judgment or decree,[38] and an order or direction for a judgment or decree is not a final judgment, order, or decree, and, as a rule, no appeal can be taken therefrom.[39] Also, in order that a judgment, order, or decree may be reviewed by an appellate court, it must not only be rendered or made, but it must be entered in permanent form as a record of the court,[40] and the mere ruling, decision, or opinion of the court, no judgment or final order being entered in accordance therewith, does not have the effect of a judgment, and is not reviewable.[41]

An appeal will lie from a decree pro confesso on

31. U.S.—Central Paper Co. v. Southwick, C.C.A.Mich., 56 F.2d 593.

32. Other cases involving the superseded rules see Fidelity Nat. Bank & Trust Co. of Kansas City v. Swope, Mo., 47 S.Ct. 511, 274 U.S. 123, 71 L. Ed. 959, reversing, C.C.A., 2 F.2d 676, affirming, D.C., Abernathy v. Fidelity Nat. Bank & Trust Co., 274 F. 801, and motion denied Fidelity Nat. Bank & Trust Co. v. Swope, 45 S.Ct. 636—Smyth v. Asphalt Belt Ry. Co., Tex., 45 S.Ct. 242, 267 U.S. 326, 69 L.Ed. 629, transferred, see, D.C., 292 F. 876—Lemke v. Farmers' Grain Co. of Embden, N.D., 42 S.Ct. 244, 258 U.S. 50, 66 L.Ed. 458, affirming, C.C.A., Farmers' Grain Co. of Embden v. Langer, 273 F. 635, motion granted 42 S.Ct. 95—McNeal-Edwards Co. v. Frank L. Young Co., C.C.A.Mass., 42 F.2d 362, dissenting opinion 43 F.2d 99, modifying 35 F.2d 829 and certiorari granted Frank L. Young Co. v. McNeal-Edwards Co., 51 S.Ct. 89, 282 U.S. 831, 75 L.Ed. 740, reversed on other grounds 51 S.Ct. 538, 283 U. S. 398, 75 L.Ed. 1140 and vacated on other grounds, C.C.A., McNeal-Edwards Co. v. Frank L. Young Co., 51 F.2d 699—Gallardo v. Santini Fertilizer Co., C.C.A.Puerto Rico, 16 F.2d 368, vacating 11 F.2d 587—F. T. Seggerman Co. v. Danish Pride Milk Products Co., C.C.A.N.Y., 6 F.2d 874—Chin Wey v. Wixon, C.C.A.Mass., 4 F.2d 247—R. H. Hassler, Inc., v. Shaw, C.C.A.S.C., 3 F.2d 605—Reading Steel Casting Co. v. U. S., C.C.A.Pa., 293 F. 386, transferred, see, 45 S.Ct. 469, 268 U.S. 186, 69 L.Ed. 907—U. S. v. Babcock, C.C.A.Wash., 293 F. 195, transferring, D.C., U. S. v. Clausen, 291 F. 231, and error dismissed 45 S.Ct. 126, 266 U.S. 641, 69 L.Ed. 484—Hoffman v. McClelland, C.C.A.Tex., 284 F. 837, transferred, see, 44 S.Ct. 407, 264 U.S. 552, 68 L.Ed. 845—McMillan Contracting Co. v. Abernathy, C.C.A.Mo., 284 F. 354, appeals remanded 44 S.Ct. 200, 263 U.S. 438, 68 L.Ed. 378, and appeal dismissed, C.C. A., 2 F.2d 1018—McConaughey v. Morrow, C.C.A.Canal Zone, 279 F. 617, affirmed 44 S.Ct. 78, 263 U.S. 39, 68 L.Ed. 153—Consolidated Textile Corporation v. Dickey, C.C.A.Ga., 269 F. 942, reversing, D.C., 266 F. 587—Grammer v. Fenton, C.C.A.Neb., 268 F. 943—Merritt v. American Steel-Barge Co., Minn., 75 F. 813, 21 C.C.A. 525.

33. U.S.—Kirby v. American Soda Fountain Co., Tex., 24 S.Ct. 619, 194 U.S. 141, 48 L.Ed. 911.
25 C.J. p 963 note 56.

34. U.S.—Cochran v. M & M Transp. Co., C.C.A.R.I., 110 F.2d 519—Certain-teed Products Corporation v. Wallinger, C.C.A.Va., 89 F.2d 427, certiorari denied 58 S.Ct. 26, 302 U.S. 707, 82 L.Ed. 546—Intertype Corporation v. Pulver, C.C.A.Fla., 56 F.2d 992—Nelson v. Wood, Pa., 210 F. 18, 126 C.C.A. 598, error dismissed 36 S.Ct. 445, 239 U.S. 637, 241 U.S. 637, 60 L.Ed. 480, 1215.

35. U.S.—Brown v. Parker, Kan., 97 F. 446, 38 C.C.A. 261.

36. U.S.—In re Witthoft, C.C.A.Ill., 98 F.2d 972.

37. U.S.—Cochran v. M & M Transp. Co., C.C.A.R.I., 110 F.2d 519—U. S. v. Long Branch Distilling Co., C.C. A.Fla., 262 F. 768.

38. U.S.—Rardin v. Messick, C.C.A. Ill., 78 F.2d 643, dismissing appeal, D.C., Messick v. Rardin, 6 F.Supp. 200.
3 C.J. p 601 note 36.

39. U.S.—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918, modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551.

40. U.S.—In re Hurley Mercantile Co., C.C.A.Tex., 56 F.2d 1023, certiorari denied Atascosa County State Bank of Jourdanton, Texas v. Coppard, 52 S.Ct. 580, 286 U. S. 555, 76 L.Ed. 1290.

Entry insufficient
The minute entry of the clerk of the district court, stating that motions had been argued and submitted, that the court filed its opinion, and that "said motions are granted", did not constitute entry of an order," "judgment," or "decree," from which an appeal could be taken.—Wright v. Gibson, C.C.A.Cal., 128 F. 2d 865, dismissing appeal, D.C., 39 F. Supp. 980.

Defects in form
Mere informalities in the entry of a judgment will not, generally, prevent a review by the appellate court.—New Orleans, O. & G. W. R. Co. v. Morgan, La., 10 Wall. 256, 19 L. Ed. 892.

41. U.S.—Wright v. Gibson, C.C.A. Cal., 128 F.2d 865, dismissing appeal, D.C., 39 F.Supp. 980—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918,

the question of the sufficiency of the averments of the bill to support the decree.[42]

Judgments of state courts. The circuit courts of appeals have no jurisdiction to review the judgments of state courts.[43]

(2) Decisions of Territorial Courts, Etc.

In order to review final decisions of the supreme courts of the territories of Hawaii and Puerto Rico there must ordinarily be a substantial federal question involved, or the amount in controversy must be within the statutory requirement.

The appellate jurisdiction of the circuit courts of appeal of cases arising in territorial and other similar courts is regulated by statutory provisions,[44] and under the statute giving the circuit courts of appeals jurisdiction to review by appeal final decisions in the supreme courts of the territories of Hawaii and Puerto Rico in all cases, civil or criminal, wherein the constitution or a statute or treaty of the United States is involved, the appeal must necessarily involve[45] a substantial[46] federal question.[47] The circuit courts of appeals have jurisdiction in

modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551—McGhee v. Leitner, D.C.Wis., 41 F.Supp. 674—In re White's Estate, D.C.D.C., 35 F.Supp. 932.
3 C.J. p 601 note 38.

42. U.S.—City of Winter Haven v. Gillespie, C.C.A.Fla., 84 F.2d 285, certiorari denied Hartridge-Cannon Co. v. Gillespie, 57 S.Ct. 232, 299 U.S. 606, 81 L.Ed. 447, rehearing denied 57 S.Ct. 927, 301 U.S. 668, 81 L.Ed. 1333.

43. U.S.—Lineker v. Marshall, C.C.A.Cal., 7 F.2d 875.
25 C.J. p 963 note 54.

44. U.S.—Lovskog v. American Nat. Red Cross, C.C.A.Alaska, 111 F.2d 88.

**"The Legislature of the territory of Alaska . . . has no power to regulate the jurisdiction and authority of the federal courts hearing appeals from the territory of Alaska."—Hauptman v. U. S., C.C.A.Alaska, 43 F.2d 86, 89, certiorari denied 51 S.Ct. 212, 282 U.S. 900, 75 L.Ed. 793.

Canal Zone

Under act of Sept. 21, 1922, c 370 § 3, 48 USCA § 1356, amended Febr. 16, 1933, c. 91, § 3, 48 USCA 1356, prosecution for illegally purchasing public property from soldier in Canal Zone held not within court's appellate jurisdiction, since offense was not "felony" under article of Canal Zone Penal Code defining felony.—Weil v. Government of Canal Zone, C.C.A., 42 F.2d 448.

Puerto Rico

(1) Construction of local statute by supreme court of Puerto Rico held not binding on circuit court of appeals, where it would deprive that court of its appellate jurisdiction.—Petition of Zeno, C.C.A., 14 F.2d 418, certiorari denied Rossy v. Zeno, 47 S.Ct. 244, 273 U.S. 737, 71 L.Ed. 866.

(2) That plaintiffs failed to amend pleadings after sustaining of demurrer and filed appeal on last day allowed held immaterial on question of jurisdiction of circuit court of appeals over judgment of federal district court of Puerto Rico.—Franceschi v. De Tord, C.C.A., 71 F.2d 95.

(3) That judicial administrator was party to suit for fees in local territorial court brought by defendants and had been ordered to plead thereto did not affect jurisdiction of circuit court of appeals on appeal from federal court's judgment in action by heirs against attorneys for negligence.—Franceschi v. De Tord, supra.

(4) Decisions under former statutes as to review of decisions of United States district court for Puerto Rico see 25 C.J. p 961 note 38 [b].

Decisions under former statutes

(1) As to review of decisions of courts in Alaska.—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F.2d 925—Sumi v. Young, C.C.A.Alaska, 83 F.2d 752, certiorari granted 57 S.Ct. 118, 299 U.S. 534, 81 L.Ed. 393, affirmed 57 S.Ct. 438, 300 U.S. 251, 81 L.Ed. 627, rehearing denied 57 S.Ct. 667, 300 U.S. 687, 81 L.Ed. 889—Stanworth v. U. S., C.C.A.Alaska, 45 F.2d 158—Starklof v. U. S., C.C.A.Alaska, 20 F.2d 32—25 C.J. p 963 note 45.

(2) As to review of decisions in courts in Canal Zone.—Ameglio Hermanos v. Joseph, C.C.A.Canal Zone, 18 F.2d 410—25 C.J. p 963 notes 48, 50.

(3) As to review of decisions of courts of territories generally see 25 C.J. p 963 note 52.

(4) As to review of decisions of courts of Indian Territory see 25 C.J. p 963 note 53.

(5) As to review of decisions of United States Court for China see 25 C.J. p 963 note 43.

(6) Construction of clause "unless otherwise provided by law," originally contained in statute establishing jurisdiction, see 25 C.J. p 962 note 41 [a].

45. U.S.—Barcelo v. Saldana, C.C.A. Puerto Rico, 54 F.2d 852.

46. U.S.—Leon v. Torruella, C.C.A. Puerto Rico, 99 F.2d 851—Succession of Tristani v. Colon, C.C.A. Puerto Rico, 71 F.2d 374—Barcelo v. Saldana, C.C.A.Puerto Rico, 54 F.2d 852—Fukunaga v. Territory of Hawaii, C.C.A.Hawaii, 33 F.2d 396, certiorari denied 50 S.Ct. 39, 280 U.S. 593, 74 L.Ed. 641.

Denial of speedy trial

Contention that defendants were denied speedy trial involved federal question requiring denial of government's motion to dismiss for want of jurisdiction in circuit court of appeals.—Gerardino v. People of Porto Rico, C.C.A.Puerto Rico, 29 F.2d 517.

Questions not reviewable

Purely local questions of admissibility of evidence not reviewable on writ of error to supreme court of Puerto Rico as involving due process.—Carbonell v. People of Porto Rico, C.C.A.Puerto Rico, 27 F.2d 253.

47. U.S.—Public Service Commission of Puerto Rico v. Havemeyer, Puerto Rico, 56 S.Ct. 360, 296 U.S. 506, 80 L.Ed. 357, reversing, C.C.A., Havemeyer v. Public Service Commission of Puerto Rico, 74 F.2d 637, certiorari granted Public Service Commission of Puerto Rico v. Havemeyer, 56 S.Ct. 97, 296 U.S. 556, 80 L.Ed. 392, and rehearing denied 56 S.Ct. 496, 297 U.S. 727, 80 L.Ed. 1010—Russell & Co. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 225, certiorari granted People of Puerto Rico v. Russell & Co., 62 S.Ct. 61, 314 U.S. 589, 86 L.Ed. 475, and affirmed 62 S.Ct. 784, 315 U.S. 610, 86 L.Ed. 1062, rehearing denied 62 S.Ct. 1030, 316 U.S. 708, 86 L.Ed. 1775—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A.Puerto Rico, 65 F.2d 691—Barcelo v. Saldana, C.C.A.Puerto Rico, 54 F.2d 852—Kimbrel v. Territory of Hawaii, C.C.A.Hawaii, 41 F.2d 740.

"Lurking in record" insufficient

Appeal to circuit court of appeals from judgment of the supreme court of Puerto Rico would be dismissed for want of jurisdiction where no constitutional provision, statute or treaty of United States or any authority exercised thereunder was raised before or considered by supreme court of Puerto Rico, since it was not enough that a federal question was "lurking in the record."—Ramos v. Leahy, C.C.A.Puerto Rico, 111 F.2d 955.

all other civil cases of appeals from such courts wherein the value in controversy exceeds the specified statutory amount, exclusive of interest and costs,[48] and the value of the object sought to be protected is the matter in controversy which determines jurisdiction.[49] It is not always the sum demanded or claimed which controls, but the jurisdiction depends on the amount or value which is actually in controversy between the parties[50] as the case stands in the circuit court of appeals,[51] and matters conceded, admitted, or waived by the parties are not considered in determining the appellate jurisdiction.[52] The appellants have the burden of proving the jurisdictional amount,[53] and the statutory provision authorizing affidavits or other competent evidence to show the amount in controversy where such amount is not otherwise satisfactorily disclosed on the record has been held a confirmation of the previously approved practice.[54]

Retrospective construction of statute

Appeal from judgment of Puerto Rico supreme court, in which it was claimed that court gave retrospective construction to statute relative to filiation, held not to involve any substantial federal question within jurisdiction of circuit court of appeals.—Succession of Tristani v. Colon, C.C.A.Puerto Rico, 71 F.2d 374.

Sufficiency of complaint in criminal proceedings

Whether charge in complaint or information is sufficient under territorial statute does not involve federal Constitution or laws so as to support appeal from supreme court of Hawaii.—Kimbrel v. Territory of Hawaii, C.C.A.Hawaii, 41 F.2d 740.

Decisions under former statutes see 25 C.J. p 961 note 37 [b].

48. U.S.—Leon v. Torruella, C.C.A. Puerto Rico, 99 F.2d 851—Central Cambalache v. Martinez, C.C.A. Puerto Rico, 82 F.2d 37—Luce & Co. v. Cintron, C.C.A.Puerto Rico, 73 F.2d 481—Successors of C. & J. Fantanzzi v. Municipal Assembly of Arroyo, Porto Rico, C.C.A.Puerto Rico, 295 F. 803, certiorari granted Municipal Assembly of Arroyo, Porto Rico, v. Successors of C. & J. Fantauzzi, 44 S.Ct. 635, 265 U.S. 577, 68 L.Ed. 1188, and certiorari quashed 45 S.Ct. 635, 268 U.S. 699, 69 L.Ed. 1164.

25 C.J. p 962 note 42.

Amount under former statutes on appeals from United States Court for China see 25 C.J. p 324 note 31.

Suit involving money and title to land

On appeal from a decree of the supreme court of Porto Rico, in a suit involving not only a money award, but also title to land, the value of the land enters into the amount involved for jurisdictional purposes.—Ayllon v. Gonzalez, C.C. A.Puerto Rico, 288 F. 28, certiorari granted B. Fernandez & Bros. v. Ayllon, 44 S.Ct. 5, 263 U.S. 691, 68 L.Ed. 509, and reversed on other grounds B. Fernandez & Bros. v. Ayllon, 45 S.Ct. 52, 266 U.S. 144, 69 L.Ed. 209.

Appeal only as to costs

Circuit court of appeals held without jurisdiction to entertain appeal from order or decree of supreme court of Puerto Rico affirming an order taxing costs, including attorney's fees, against plaintiff in a certain sum, since, after excluding costs, no sum remained in dispute.—Luce & Co. v. Cintron, C.C.A.Puerto Rico, 73 F.2d 481.

49. U.S.—Robert Hind, Limited, v. Silva, C.C.A.Hawaii, 75 F.2d 74.

Suit to cancel release

Rule that probative effect and value of decree in other litigation do not constitute the test of amount in controversy determining jurisdiction was not applicable to suit to cancel release given by person injured in automobile accident, where entire controversy might be settled in one action for damages; and the value in controversy in suit to cancel release given by person injured in automobile accident was held to exceed five thousand dollars jurisdictional amount necessary for appeal of civil case to circuit court of appeals from supreme court of territory of Hawaii where plaintiff had commenced action against defendant for twenty-five thousand dollars damages alleged to have resulted from accident and affidavit alleged that value of right to maintain suit exceeded five thousand dollars exclusive of interest and costs.—Robert Hind, Limited, v. Silva, supra.

50. U.S.—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A. Puerto Rico, 65 F.2d 691.

Hawaii.—Makainai v. Lalakea, 29 Hawaii 846.

Partition suit

Amount in controversy in partition suit was within jurisdiction of circuit court of appeals when decreased value from partition in kind would amount to ten thousand dollars.—Sauri v. Sauri, C.C.A.Puerto Rico, 45 F.2d 90.

To examine corporate books

Mandamus to permit stockholder's examination of corporation's books did not involve five thousand dollars jurisdictional minimum, notwithstanding claim of damages from use of information.—Arias v. Usera, C.C. A.Puerto Rico, 38 F.2d 235.

Suit to vacate attachment

On appeal from judgment of supreme court of Puerto Rico refusing to vacate attachment in aid of judgment on note, the "value in controversy" as determining jurisdiction of reviewing court was not amount of the note, but either the value of property subject to the attachment, or the amount still owing on the judgment debt for which the attached property stood security, whichever was the smaller.—De La Torre v. National City Bank of New York, C.C.A.Puerto Rico, 110 F.2d 381.

51. U.S.—De La Torre v. National City Bank of New York, supra—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A.Puerto Rico, 65 F.2d 691.

To recover back salary

Where appeal was allowed from judgment of supreme court of Puerto Rico, affirming dismissal of mandamus proceeding of civil service employee to obtain reinstatement and payment of back salary of two thousand dollars a year, after more than three years had elapsed since employee had occupied office, amount in controversy held within jurisdiction of circuit court of appeals.—Montes v. Sancho, C.C.A.Puerto Rico, 82 F.2d 25.

52. U.S.—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A. Puerto Rico, 65 F.2d 691.

Admission of part due

An action is not within the jurisdiction of the appellate court where the amount of the judgment, less the amount admitted as due, is less than the jurisdictional limit.—Municipality of Rio Piedras v. Serra, Garabis & Co., supra.

53. U.S.—De La Torre v. National City Bank of New York, C.C.A. Puerto Rico, 110 F.2d 381.

Hawaii.—Kahaulelio v. Ihihi, 24 Hawaii 685.

54. U.S.—De La Torre v. National City Bank of New York, C.C.A. Puerto Rico, 110 F.2d 381.

Dismissal of appeal

On appeal from judgment of Puerto Rico supreme court refusing to vacate attachment in aid of judgment, where neither the petition for appeal nor record of prior appeal from the judgment showed the value in controversy, and three years had elapsed since the time of last valua-

b. Dependent on Nature and Scope of Decision

(1) In general
(2) Decisions as to particular matters
(3) Decisions in particular actions or proceedings
(4) Decisions of intermediate appellate courts

(1) In General

Except as provided otherwise by statute, in order that there may be a review of a decision by a circuit court of appeals, a final judgment, order, or decree must have been rendered in the cause; and ordinarily an appeal will not lie from the action of the lower court in the exercise of its purely discretionary power.

Since the jurisdiction conferred by statute on the circuit courts of appeals is to review by appeal final decisions, an appeal to a circuit court of appeals will not lie from an interlocutory decision except where it is expressly permitted by statute,[55] and in order that there may be a review of a decision, a final judgment, order, or decree must have been rendered in the cause,[56] and the Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723c, have worked no modification of this rule.[57] The appel-

tion shown in the record, petition for appeal might have been disallowed and reviewing court would dismiss the appeal unless appellants would file affidavits within a specified time showing that value in controversy exceeded five thousand dollars.—De La Torre v. National City Bank of New York, supra.

55. U.S.—Public Service Commission of Pennsylvania v. Philadelphia Rapid Transit Co., C.C.A.Pa., 82 F.2d 481, certiorari denied Citizens Passenger Ry. Co. of Philadelphia v. Public Service Commission of Commonwealth of Pennsylvania, 56 S.Ct. 938, 298 U.S. 673, 80 L.Ed. 1395—Childs v. Ultramares Corporation, C.C.A.N.Y., 40 F.2d 474—O'Brien v. Lashar, C.C.A.Conn., 266 F. 215.

Jurisdictional requirement

(1) The existence on the record of a final or an appealable interlocutory judgment, order, or decree is jurisdictional, and, although no objection may be made at the hearing and no motion may be made to dismiss, the court will, on its own motion, notice such question.—Loufakis v. U. S., C.C.A.Pa., 75 F.2d 627—3 C.J. p 437 notes 13, 15.

(2) This was held to be so regardless of how desirable and important a decision on the merits of the case by such court might be.—Florian v. U. S., C.C.A.Ill., 114 F.2d 990, reversed on other grounds U. S. v. Florian, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105, rehearing denied 61 S.Ct. 738, 312 U.S. 715, 85 L.Ed. 1145.

(3) However, it was held that the circuit court of appeals would pass on question whether action by purchasers of securities to recover considerations paid was barred by limitation under Securities Act, notwithstanding orders involving ruling on limitation question were interlocutory and hence not appealable, where injunction granted had effect of paralyzing functioning of trusts and district court passed on question of limitation in issuing injunction.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Deckert, C.C.A.Pa., 123 F.2d 979, reversing, D.C., Deckert v. Independence Shares Corporation, 39 F.Supp. 592.

56. U.S.—Reeves v. Beardall, 62 S.Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478—Leonard v. Socony-Vacuum Oil Co., C.C.A.Wis., 130 F.2d 535, dismissing appeal, D.C., 42 F.Supp. 369—Borg-Warner Corporation v. Whitney, C.C.A.Mich., 121 F.2d 444—Atwater v. North American Coal Corporation, C.C.A.N.Y., 111 F.2d 125—Gillespie v. Schram, C.C.A.Mich., 108 F.2d 39—Bowles v. Commercial Casualty Ins. Co., C.C.A.Va., 107 F.2d 169—Shultz v. Manufacturers & Traders Trust Co., C.C.A.N.Y., 103 F.2d 771—Hunter v. Federal Life Ins. Co., C.C.A.Ark., 103 F.2d 192—Hyman v. McLendon, C.C.A.S.C., 102 F.2d 189, certiorari denied 60 S.Ct. 74, 308 U.S. 563, 84 L.Ed. 472—Houston Natural Gas Corporation v. Securities and Exchange Commission, C.C.A., 100 F.2d 5—Cosme v. Marquez, C.C.A.Puerto Rico, 94 F.2d 908—Thompson v. Murphy, C.C.A.Mo., 93 F.2d 38—Rodriguez v. Arosemena, C.C.A.Canal Zone, 91 F.2d 219—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F.2d 925—Zimmern v. U. S., C.C.A.Ala., 80 F.2d 993, denying rehearing 79 F.2d 703, and certiorari granted 56 S.Ct. 594, 297 U.S. 701, 80 L.Ed. 990, reversed on other grounds 56 S.Ct. 706, 298 U.S. 167, 80 L.Ed. 1115—Jones v. Securities and Exchange Commission, C.C.A.N.Y., 79 F.2d 617, affirming, D.C., Securities and Exchange Commission v. Jones, 12 F.Supp. 210—Republic Supply Co. of California v. Richfield Oil Co. of California, C.C.A.Cal., 74 F.2d 907, certiorari denied Cities Service Co. v. Armsby, 56 S.Ct. 94, 296 U.S. 583, 80 L.Ed. 412—Demulso Corporation v. Tretolite Co., C.C.A.Okl., 74 F.2d 805, dismissing appeal, D.C., Tretolite Co. v. Darby Petroleum Corporation, 5 F.Supp. 445—Cole v. Rustgard, C.C.A.Alaska, 68 F.2d 316—Highway Engineering & Construction Co. v. Hillsborough County, C.C.A.Fla., 67 F.2d 439, certiorari denied 54 S.Ct. 373, 290 U.S. 705, 78 L.Ed. 605—Commonwealth of Pennsylvania, to Use of Nice Ball Bearing Co. v. Sterrett, C.C.A.Pa., 66 F.2d 881—Bronx Fire Ins. Co. v. Wasson, C.C.A.Kan., 62 F.2d 556—Hunt v. U. S., C.C.A.Colo., 53 F.2d 333—R. M. Hollingshead Co. v. Bassick Mfg. Co., C.C.A.Tenn., 50 F.2d 592, rehearing denied 53 F.2d 470—Dodge Mfg. Co. v. Patten, C.C.A.Ind., 43 F.2d 472—Pioneer Grain Corporation v. Chicago, M. & St. P. Ry. Co., C.C.A.Minn., 42 F.2d 1009—Triangle Electric Co. v. Foutch, C.C.A.Mo., 40 F.2d 353—Guaranty Trust Co. of New York v. Chicago, M. & St. P. Ry. Co., D.C.Ill., 15 F.2d 443—City and County of San Francisco v. McLaughlin, C.C.A.Cal., 9 F.2d 390—McGhee v. Leitner, D.C.Wis., 41 F.Supp. 674—The Edgewood, C.C.A.Virgin Islands, 279 F. 348—H. Ward Leonard, Inc., v. Maxwell Motor Sales Co., N.Y., 246 F. 945, 159 C.C.A. 217.

3 C.J. p 433 note 7—25 C.J. p 966 notes 84, 86, p 967 note 87.

Purpose of statute permitting appeals only from final decisions, except in certain cases, is to prevent repeated appeals in same litigation and promote expedition in adjudication of controversies.—Satterlee v. Harris, C.C.A.Okl., 60 F.2d 490.

The words "final decisions," in statute authorizing appeals from such decisions and rule establishing procedure therefor, mean same thing as "final judgments and decrees."—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A.Ill., 108 F.2d 469.

Appeals to circuit court of appeals from final decrees in patent infringement suits see the C.J.S. title Patents § 335, also 48 C.J. p 410 note 93, p. 411 notes 95–4.

57. U.S.—Leonard v. Socony-Vacuum Oil Co., C.C.A.Wis., 130 F.2d 535, dismissing appeal, D.C., 42 F.Supp. 369.

late jurisdiction of the circuit courts of appeals depends on the finality of the lower court's action, and not on the possible effect of the appellate court's decision on the merits of the case.[58]

Interlocutory decisions are otherwise reviewable, in the absence of a permissive statute, only on appeal from or to the final judgment or decree that is rendered in the cause,[59] or when disobedience of the order results in an order punishing the party for contempt.[60] However, a decree interlocutory in form which settles the principal matter in controversy is to be considered as a final decree for the purposes of appeal.[61]

What constitutes final decision generally. The supreme court of the United States, it has been said, has not given the words "final decree," respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction,[62] and ordinarily a judgment, order, or decree which determines the merits of the controversy, or the rights of the parties, and leaves nothing for future determination, is final and appealable.[63] A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question,[64] and a decision on the merits does not lose its character as a final decree because it may itself become the source of future litigation between the parties.[65] Also, a final determination of the particular suit is a final judgment for the purpose of appeal, although it may not necessarily be a final determination of the rights of the parties.[66] A "final" decree has been held to be, or defined as, one that finally disposes of the rights of the parties, either on the entire controversy or on some definite and separate branch thereof;[67] one that ends the litigation in the trial court;[68] one which disposes of the subject matter of the controversy or terminates the litigation between the parties on the merits[69] and leaves nothing to be judicially determined;[70] one which terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been deter-

58. U.S.—Florian v. U. S., C.C.A.Ill., 114 F.2d 990, reversed on other grounds U. S. v. Florian, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105, rehearing denied 61 S.Ct. 738, 312 U. S. 715, 85 L.Ed. 1145.

59. U.S.—Western Electric Co. v. Williams-Abbott Electric Co., Ohio, 108 F. 952, 48 C.C.A. 159.
3 C.J. p 436 note 8.

60. U.S.—Loufakis v. U. S., C.C.A. Pa., 75 F.2d 627.

61. U.S.—Bennell Realty Co. v. E. G. Shinner & Co., C.C.A.Wis., 74 F.2d 491.

Decree not final
In suit by lessee to obtain reappraisement of leased property on which rent was computed on percentage of valuation, decree providing that new appraisal should be had within specified time and that, if such appraisal was not had, suit might proceed to trial and further disposition, was "interlocutory" and not "final decree," and hence not appealable to circuit court of appeals, since value of leased premises constituting principal matter in controversy was not determined by decree and further judicial proceedings were contemplated.—Bennell Realty Co. v. E. G. Shinner & Co., supra.

62. U.S.—In re Farmers' Loan & Trust Co., Tex., 9 S.Ct. 265, 129 U.S. 206, 32 L.Ed. 565—City of Eau Claire v. Payson, Wis., 107 F. 552, 42 C.C.A. 466, rehearing denied 109 F. 676, 48 C.C.A. 608.

63. U.S.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A.Ill., 108 F.2d 469—Gillespie v. Schram, C.C.A.Mich., 108 F.2d 39—Grand Trunk Western R. Co. v. McHie, C.C.A.Mich., 100 F.2d 86—Fields v. Mutual Ben. Life Ins. Co., C.C.A.N.C., 93 F.2d 559—Illinois Cent. R. Co. v. U. S. Fidelity & Guaranty Co., C.C.A.Ala., 87 F.2d 121, reversing, D.C., Gatch Tennant & Co. v. Mobile & O. R. Co., 15 F. Supp. 169—Utah Const. Co. v. Salmon River Canal Co., C.C.A.Idaho, 85 F.2d 769, reargument denied 86 F.2d 326, certiorari denied Salmon River Canal Co. v. Utah Const. Co., 57 S.Ct. 493, 300 U.S. 663, 81 L.Ed. 871—Cox v. Graves, Knight & Graves, C.C.A.Va., 55 F.2d 217—Todd Engineering, Dry Dock & Repair Co. v. U. S., C.C.A.La., 32 F.2d 734, reversing, D.C., The West Ira, 24 F.2d 858—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 282 F. 523, affirming, D.C., 282 F. 293, and appeal dismissed Eighth Ave. R. Co. v. Hedges, 43 S.Ct. 704, 262 U.S. 736, 67 L.Ed. 1207.
3 C.J. p 443 note 59, p 444 note 60.

64. U.S.—U. S. v. 243.22 Acres of Land in Town of Babylon, Suffolk County, C.C.A.N.Y., 129 F.2d 678, affirming, D.C., U. S. v. 243.22 Acres of Land Situate in Village of Farmingdale, Town of Babylon, Suffolk County, State of New York, 41 F.Supp. 469, affirming 41 F. Supp. 805, affirming 43 F.Supp. 561, dismissing appeal 43 F.Supp. 805—Rubert Hermanos, Inc. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 752, certiorari granted 62 S.Ct. 61, 314 U.S. 589, 86 L.Ed. 475, certiorari denied 62 S.Ct. 80, 314 U.S. 641, 86 L.Ed. 514, and reversed on other grounds 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. ——.

65. U.S.—Sanders v. Bluefield Waterworks & Improvement Co., W. Va., 106 F. 587, 45 C.C.A. 475.

66. U.S.—Stevens v. Nave-McCord Mercantile Co., Colo., 150 F. 71, 80 C.C.A. 25—Hendryx v. Perkins, Mass., 114 F. 801, 52 C.C.A. 435.

67. U.S.—Beighle v. Le Roy, C.C.A. N.J., 94 F.2d 30—Demulso Corporation v. Tretolite Co., C.C.A.Okl., 74 F.2d 805, dismissing appeal, D.C., Tretolite Co. v. Darby Petroleum Corporation, 5 F.Supp. 445—Wright v. Taft-Pierce Mfg. Co., C.C.A.R.I., 287 F. 131.

A conditional judgment, order, or decree, the finality of which depends on certain contingencies which may or may not occur, is not final for the purpose of appeal.—Stratton v. Dewey, Tex., 79 F. 32, 24 C.C.A. 435.

68. U.S.—National Brake & Electric Co. v. Christensen, Wis., 258 F. 880, 169 C.C.A. 600, certiorari granted 39 S.Ct. 495, 250 U.S. 638, 63 L.Ed. 1184, prohibition denied 40 S.Ct. 54, and reversed on other grounds 41 S.Ct. 154, 254 U.S. 425, 65 L.Ed. 341.

69. U.S.—Moss v. Kansas City Life Ins. Co., C.C.A.Mo., 96 F.2d 108—U. S. v. Bighorn Sheep Co., C.C.A. Wyo., 276 F. 710.
3 C.J. p 441 note 45.

70. U.S.—France & Canada S. S. Co. v. French Republic, C.C.A.N.Y., 285 F. 290, dismissing appeal, D.C., The Jane Palmer, 270 F. 609, 275 F. 719, and certiorari denied 43 S.Ct. 361, 261 U.S. 615, 67 L.Ed. 828.
3 C.J. p 442 note 47.

mined;[71] one which disposes of all matters in litigation between the parties as shown by the record.[72] Further, an order, judgment, or decree which terminates the litigation on the merits of the cause, so that, if there should be an affirmance, the lower court would have nothing to do but execute its decree already entered, is final,[73] and an order is final and appealable if it settles substantial rights and is operative at once and makes no reservation as to its effect.[74]

It has also been held that the question whether a judgment, order, or decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done thereby.[75] Accordingly, as respects the right of appeal, the retention of jurisdiction to enforce contribution or prorate the proceeds of collateral does not prevent a decree from being final,[76] and, also, the mere reservation of jurisdiction to file an opinion later on, and to make any further orders in the case, is not inconsistent with the finality of the judgment as regards the right of appeal by a person against whom the judgment was entered.[77]

There is no final judgment or decree for the purpose of an appeal as long as the cause is still under the control of the trial court by reason of the pendency of a motion for a new trial, for rehearing, to set the judgment aside, or otherwise,[78] but a stay of execution, where no motion for new trial has been filed, does not prevent the judgment from becoming final.[79]

Determination of part of cause or issues. As a general rule, an appeal does not lie where a judgment, order, or decree is made or rendered on only part of the issues or causes in the case, leaving others undisposed of.[80] However, it has been held that a decree may be "final" in the sense that it may be appealed from, although not "final" in the strict technical sense of the term,[81] and, although there is some early authority to the contrary,[82] it has been held that a party may appeal from a portion of an order or judgment and is not required to appeal from the entire judgment,[83] but there must be an adjudication final in nature of matters distinct from the general subject of the litigation,[84] and a judgment is a final judgment for the purposes of appeal only where it terminates the action with respect to such claim.[85] Where more than one claim for relief is presented, the Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723c, indicate a definite policy to permit the entry of a separate judgment if the claims are entirely distinct and such judgment will frequently be a final judgment and appealable, although no disposition has been made of other claims in the action.[86]

71. U.S.—Milton v. U. S., C.C.A.La., 120 F.2d 794—Cox v. Graves, Knight & Graves, C.C.A.Va., 55 F. 2d 217—U. S. v. Bighorn Sheep Co., C.C.A.Wyo., 276 F. 710.
3 C.J. p 442 note 51.

72. U.S.—Sheppy v. Stevens, N.Y., 200 F. 846, 119 C.C.A. 330.

73. U.S.—State of Washington v. U. S., C.C.A.Or., 87 F.2d 421, reversing, D.C., U. S. v. Columbia River Packers Ass'n, 11 F.Supp. 675—Martin v. National Surety Co., C. C.A.Mo., 85 F.2d 135, certiorari granted 57 S.Ct. 232, 299 U.S. 536, 81 L.Ed. 395, affirmed 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822—Werner v. Zintmaster, C.C.A.Pa., 77 F.2d 74—Cole v. Rustgard, C.C.A.Alaska, 68 F.2d 316.
3 C.J. p 445 note 66.

74. U.S.—Rector v. U. S., C.C.A.Okl., 20 F.2d 845.

75. U.S.—Potter v. Beal, Mass., 50 F. 860, 2 C.C.A. 60.

76. U.S.—Kiehn v. Dodge County, C. C.A.Minn., 19 F.2d 503.

77. U.S.—Johnson v. Wilson, C.C.A. Nev., 118 F.2d 557.

78. U.S.—Suggs v. Mutual Ben. Health & Accident Ass'n, C.C.A.Okl., 115 F.2d 80—Mortgage Loan Co. v. Livingston, C.C.A.Mo., 45 F.2d 28—Baker v. U. S., D.C.Idaho, 15 F.Supp. 982.
3 C.J. p 465 note 74.

79. U.S.—Kiehn v. Dodge County, C. C.A.Minn., 19 F.2d 503.

80. U.S.—Leonard v. Socony-Vacuum Oil Co., C.C.A.Wis., 130 F.2d 535, dismissing appeal, D.C., 42 F.Supp. 369—Hunter v. Federal Life Ins. Co., C.C.A.Ark., 103 F.2d 192—Cosme v. Marquez, C.C.A.Puerto Rico, 94 F.2d 908—Beighle v. Le Roy, C. C.A.N.J., 94 F.2d 30—Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corporation, C.C.A.N.Y., 80 F.2d 862—United Porto Rican Sugar Co. (of Porto Rico) v. Saldana, C.C.A.Puerto Rico, 74 F.2d 409—Pacific Mut. Life Ins. Co. of California v. Andrews, C.C.A. Iowa, 73 F.2d 839—Cole v. Rustgard, C.C.A.Alaska, 68 F.2d 316—Commonwealth of Pennsylvania, to Use of Nice Ball Bearing Co., v. Sterrett, C.C.A.Pa., 66 F.2d 881—Cox v. Graves, Knight & Graves, C. C.A.Va., 55 F.2d 217—Western Electric Co. v. Pacent Reproducer Corporation, C.C.A.N.Y., 37 F.2d 14—Guaranty Trust Co. of New York v. Albia Coal Co., C.C.A.Minn., 36 F.2d 34—Gardner v. Grand Beach Co., C.C.A.Mich., 29 F.2d 481—Herrup v. Stoneham, C.C.A.N.Y., 15 F. 2d 49—Minnesota & Ontario Paper Co. v. Swenson Evaporator Co., C. C.A.Minn., 281 F. 622—Farmers' Irr. Dist. v. New York Trust Co., C. C.A.Neb., 280 F. 797.
3 C.J. p 446 note 88.

81. U.S.—La Nacional Platanera, S. C. L. v. North American Fruit & Steamship Corporation, C.C.A.Ala., 84 F.2d 881—Lewis Invisible Stitch Mach. Co. v. Columbia Blindstitch Mach. Mfg. Corporation, C.C.A.N. Y., 80 F.2d 862.
3 C.J. p 448 note 93.

82. U.S.—Cory Bros. & Co. v. U. S., C.C.A.N.Y., 47 F.2d 607, dismissing appeal, D.C., The Milwaukee Bridge, 43 F.2d 589—Pearson v. Higgins, C.C.A.Cal., 34 F.2d 27, certiorari denied 50 S.Ct. 39, 280 U.S. 593, 74 L.Ed. 641.
3 C.J. p 466 note 81.

83. U.S.—Carter v. Powell, C.C.A. Fla., 104 F.2d 428, rehearing denied 104 F.2d 1012, certiorari denied 60 S.Ct. 173, 308 U.S. 611, 84 L.Ed. 511.

84. U.S.—Leonard v. Socony-Vacuum Oil Co., C.C.A.Wis., 130 F.2d 535, dismissing appeal, D.C., 42 F. Supp. 369—Jones v. St. Paul Fire & Marine Ins. Co., C.C.A.Tex., 108 F.2d 123.

85. U.S.—Reeves v. Beardall, 62 S. Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478.

86. U.S.—Reeves v. Beardall, supra

While a decree to account is regarded as interlocutory and not appealable,[87] a decree, which is final in the sense that it settles the substantial merits of the case, is appealable, although an issue of compensation remains to be determined or the decree contains a reference or orders an accounting between the parties.[88] In this connection, however, the proper distinction is that, if the decree disposes of all questions within the pleadings, and nothing remains but to adjust an account between the parties in the execution of the decree, or there is a reference as to a collateral matter only, it is final for the purpose of an appeal;[89] but, if a reference is made for a judicial purpose, as to state an account between the parties, on which a further decree is to be entered, the decree is merely interlocutory and an appeal will not lie until after the final decree.[90]

A judgment, order, or decree which adjudicates and settles all the equities and substantial merits of the controversy is final for the purpose of an appeal, notwithstanding some incidental or dependent matter may still remain for adjustment, or further proceedings may be contemplated and necessary in the execution of the judgment, order, or decree,[91] although a judgment, order, or decree is not final for the purpose of appeal when it does not settle or adjudicate all the principles or equities of the cause, but only a part of them, or where what is left to be done is something more than is necessary in the mere execution thereof.[92]

The pendency of an undetermined collateral or ancillary proceeding in the same or another court does not affect the finality of a judgment, order, or decree so as to render it unappealable,[93] and ordinarily an order or decree, final in its nature, which is made in a matter distinct from the general subject of litigation, and which affects only the parties to the particular controversy and those whom they represent, may be appealed from.[94]

Finality as to all parties. The general rule is that an appeal will not lie, unless there has been a final disposition of the case, not only as to all the issues, but also as to all of the parties to the suit.[95] This

—Modin v. Matson Nav. Co., C.C.A. Cal., 128 F.2d 194—Jones v. St. Paul Fire & Marine Ins. Co., C.C. A.Tex., 108 F.2d 123—Collins v. Metro-Goldwyn Pictures Corporation, C.C.A.N.Y., 106 F.2d 83, reversing, D.C., 25 F.Supp. 781.

The differing occurrences or transactions form the basis of separate units of judicial action.—Reeves v. Beardall, 62 S.Ct. 1085, 316 U.S. 283, 86 L.Ed. 1478.

Claims held separate

(1) Where action was brought on a note, and for specific performance of contract not to change a will or in alternative for damages, and for an accounting from one who allegedly held assets of deceased to which plaintiff was entitled under the alleged contract, but where the claim on note and on the contract arose out of wholly separate transactions, judgment for deceased's executor on the count for specific performance of the contract was a "final judgment" from which appeal could be taken.—Reeves v. Beardall, supra.

(2) An order granting motion to dismiss first and second causes of action based on violation of rights of privacy was an "appealable order," notwithstanding third cause of action alleging malicious libel remained standing.—Sidis v. F-R Pub. Corporation, C.C.A.N.Y., 113 F.2d 806, affirming, D.C., 34 F.Supp. 19, certiorari denied 61 S.Ct. 393, 311 U.S. 711, 85 L.Ed. 462.

One claim

Where complaint containing two counts set forth only one claim for relief, based in part on the common law and in part on the Securities Act of 1933, neither an order granting motion to dismiss one count nor judgment dismissing such count leaving the other pending would be an appealable "final decision" of the district court.—Wright v. Gibson, C. C.A.Cal., 128 F.2d 865, dismissing appeal, D.C., 39 F.Supp. 980.

87. U.S.—Miller Hatcheries v. Buckeye Incubator Co., C.C.A.Mo., 41 F. 2d 619.

1 C.J. p 647 note 84.

Accounting

(1) A decree determining the right to an account and settling the principles on which the account should be taken has been held interlocutory and not appealable.—Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co., Ohio, 61 F. 705, 10 C.C.A. 20.

(2) A decree requiring the payment of moneys or property into court for preservation, or the setting aside of conveyances has been held interlocutory.—Pulliam v. Christian, Va., 6 How. 209, 12 L.Ed. 408.

88. U.S.—U. S. v. 243.22 Acres of Land in Town of Babylon, Suffolk County, C.C.A.N.Y., 129 F.2d 678, affirming, D.C., U. S. v. 243.22 Acres of Land Situate in Village of Farmingdale, Town of Babylon, Suffolk County, State of New York, 41 F.Supp. 469, affirming 41 F. Supp. 805, affirming 43 F.Supp. 561, dismissing appeal 43 F.Supp. 805.

3 C.J. p 449 note 94.

Rescission of contract

A decree rescinding a contract of sale was final as to all matters pertaining to it, so as to require an appeal based on the time of its rendition for review of failure to give personal judgment, notwithstanding matters reserved for findings by the master and a decree thereon.—Mayer v. White, C.C.A.Kan., 12 F.2d 710.

89. U.S.—Marian Coal Co. v. Peale, Pa., 204 F. 161, 122 C.C.A. 397, certiorari denied 33 S.Ct. 1050, 229 U. S. 623, 57 L.Ed. 1355.

3 C.J. p 449 note 95.

90. U.S.—Dodge Mfg. Co. v. Patten, C.C.A.Ind., 43 F.2d 472—Steel & Tube Co. of America v. Dingess Rum Coal Co., C.C.A.W.Va., 3 F.2d 805—Rauer v. Hatfield, C.C.A.Cal., 295 F. 48—Myles Standish Mfg. Co. v. Champion Spark Plug Co., C.C. A.Neb., 282 F. 961.

3 C.J. p 449 note 96.

91. U.S.—Sanders v. Bluefield Waterworks & Improvement Co., W. Va., 106 F. 587, 45 C.C.A. 475.

92. U.S.—Craighead v. Wilson, La., 18 How. 199, 15 L.Ed. 332.

93. U.S.—Mica Insulator Co. v. Commercial Mica Co., C.C.Ill., 157 F. 92—West v. East Coast Cedar Co., N.C., 113 F. 742, 51 C.C.A. 416.

94. U.S.—Rector v. U. S., C.C.A. Okl., 20 F.2d 845—Voorhies v. U. S., C.C.A.La., 299 F. 275.

3 C.J. p 451 note 8.

95. U.S.—In re Prindible, C.C.A.Pa., 115 F.2d 21, reversing, D.C., 31 F. Supp. 511—Cosme v. Marquez, C.C. A.Puerto Rico, 94 F.2d 908—Cole v. Rustgard, C.C.A.Alaska, 68 F.2d 316—Commonwealth of Pennsylvania, to Use of Nice Ball Bearing Co., v. Sterrett, C.C.A.Pa., 66 F.2d 881—

rule does not apply, however, where a judgment or decree is final as to all who have been made parties and who have been served with process or appeared, although there has been no disposition as to strangers to the suit or persons who, although named as parties, have not appeared or been served.[96] There are some cases in which it has been held that a decree may be final for the purpose of appeal as to one or more of several parties in favor of or against whom it finally settles the controversy, although it is interlocutory as to others, as where it disposes of every ground of contention between the parties, except as to the ascertainment of an amount in a matter separable from the other subjects of controversy and relating only to some of defendants, although retained for the determination of such separable matter,[97] or where it extinguishes every interest which the parties appealing have in the controversy, although it leaves matters undetermined as to others,[98] and it has been held that a judgment or decree dismissing the action or bill as to less than all of several defendants, or a nonsuit as to one of several defendants, is not final so as to permit an appeal,[99] although, where there is but one issue in the case, and a dismissal as to one party will have the effect of finding the other liable, a dismissal as to such party may be considered a final decree for purposes of appeal.[1]

Void judgments, etc. Judgments, orders, or decrees which are absolutely void for want of jurisdiction have been held not appealable.[2]

Discretionary action and matters of practice. While, as a general rule, an appeal will not lie from or to the action of a court in the exercise of its purely discretionary power,[3] although a matter may be addressed to the discretion of the lower court, if that discretion is not absolute but is a legal discretion to be exercised in accordance with established rules of law or principles of equity, the decision of the court is appealable to the extent that it may be reviewed for the purpose of determining whether there has been an abuse of discretion affecting a substantial right of the party complaining.[4] An order fixing an allowance has been held appealable notwithstanding the amount lay within the discretion of the trial court.[5] Orders involving mere questions of practice or procedure are usually within the discretion of the trial court or judge, and are not appealable.[6]

(2) Decisions as to Particular Matters

The rules determining whether a judgment, order, or decree is final in the sense that it is appealable have been applied as to questions of widely variant character arising either before, during, or after trial.

Where decisions are either interlocutory or discretionary, appeals have been held not to lie to the circuit courts of appeals from orders or decisions as to dockets, calendars, etc.,[7] or from an order consolidating two or more actions,[8] but an appeal lies

Cox v. Graves, Knight & Graves, C.C.A.Va., 55 F.2d 217—Western Electric Co. v. Pacent Reproducer Corporation, C.C.A.N.Y., 37 F.2d 14—Herrup v. Stoneham, C.C.A.N.Y., 15 F.2d 49.
3 C.J. p 462 note 62.

96. U.S.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons, Mo., 111 F. 81, 49 C.C.A. 229, reversing, C.C., 99 F. 180.
3 C.J. p 463 note 64.

97. U.S.—Curtis v. Connly, C.C.A.R. I., 264 F. 650, affirming, D.C., Curtis v. Metcalf, 259 F. 961, and affirmed 42 S.Ct. 100, 257 U.S. 260, 66 L.Ed. 222.
3 C.J. p 464 notes 65, 67.

98. U.S.—Thompson v. Murphy, C.C.A.Mo., 93 F.2d 38.
3 C.J. p 464 note 66.

99. U.S.—Atwater v. North American Coal Corporation, C.C.A.N.Y., 111 F.2d 125—Shultz v. Manufacturers & Traders Trust Co., C.C.A. N.Y., 103 F.2d 771—Thompson v. Murphy, C.C.A.Mo., 93 F.2d 38—Bush v. Leach, C.C.A.N.Y., 22 F.2d 296.
3 C.J. p 464 note 68.

1. U.S.—McGill v. Commercial Union Assur. Co. Limited, of London, England, C.C.A.S.C., 5 F.2d 589.

Admission of liability if other not liable

In an action against two insurance companies, in which one company's answer and cross bill in effect admitted that it was liable if the second company was not liable, a decree dismissing the bill as to the second company was a final appealable decree.—McGill v. Commercial Union Assur. Co., Limited of London, England, supra.

2. U.S.—United Porto Rican Sugar Co. v. Del Toro, C.C.A.Puerto Rico, 80 F.2d 14—De Mayo v. U. S., C.C.A.Mo., 58 F.2d 231.

3. U.S.—Federal Land Bank of Springfield v. Hansen, C.C.A.N.Y., 113 F.2d 82—First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 98 F.2d 416, affirming, D.C., Bechtel Trust Co. v. Iowa-Wisconsin Bridge Co., 19 F.Supp. 127, and certiorari denied Phœnix Finance Corporation v. Iowa-Wisconsin Bridge Co., 59 S.Ct. 243, 305 U.S. 650, 83 L.Ed. 420, rehearing denied 59 S.Ct. 356, 305 U.S. 676, 83 L.Ed. 437—Barceloux v. Buffum, C.C.A.Cal., 51 F.2d 82—Steinfur Patents Corporation v. Meyerson, C.C.A., 49 F.2d 765—Barnett v. Conklin, C.C.A.Mo., 268 F. 177, certiorari denied 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791—Central Trust Co. of New York v. U. S. Light & Heating Co., N.Y., 233 F. 420, 147 C.C.A. 356.
3 C.J. p 168 note 93.

4. U.S.—Peterson v. John Hancock Mut. Life Ins. Co. of Boston, Mass., C.C.A.Iowa, 116 F.2d 148—Schram v. Poole, C.C.A.Cal., 97 F.2d 566.
3 C.J. p 472 note 10.

5. U.S.—Cohan v. Richmond, C.C.A. N.Y., 86 F.2d 680.

6. U.S.—Wilmoth v. Hamilton, Pa., 127 F. 48, 61 C.C.A. 581.

7. U.S.—Weaver v. Atlas Oil Co., C.C.A.La., 39 F.2d 847—Schendel v. McGee, C.C.A.Minn., 300 F. 273.
3 C.J. p 472 note 12.

Transfers between law and equity as appealable interlocutory orders see infra § 291.

8. U.S.—Adler v. Seaman, C.C.A.Mo., 266 F. 828, certiorari denied Seaman v. Adler, 41 S.Ct. 218, 254 U.S. 655, 65 L.Ed. 460, and appeal dismissed 41 S.Ct. 320, 254 U.S. 621, 65 L.Ed. 443.
3 C.J. p 473 note 17.

from such an order where the circumstances are such as to render it final.[9]

Conduct of trial, etc. As a general rule no appeal lies from orders and decisions of the court pendente lite as to the conduct of the trial,[10] and, ordinarily, an order granting or refusing to grant a motion for a continuance, postponement, adjournment, or stay of proceedings is not appealable, either because it is not final or because it is a discretionary order,[11] and the proper remedy of a party prejudiced by a stay of proceedings is by application for a mandamus to compel the court to proceed.[12] However, an order suspending proceedings and staying the action is appealable where it in effect amounts to a final disposition of the controversy,[13] or where it can be considered to be one granting an injunction and thus within the purview of Judicial Code § 129, 28 U.S.C.A. § 227, discussed infra § 291.

Parties and process. While it is the general rule that interlocutory orders overruling or sustaining objections as to parties, directing, permitting, or refusing an amendment as to parties, or a substitution or addition of parties, or an order denying a motion to vacate such an order, are not appealable,[14] an order directing that several plaintiffs be dismissed as parties has been held a final order as to those plaintiffs.[15]

Ordinarily an appeal will not lie from an interlocutory or discretionary order or decree overruling a motion to quash or set aside the writ or summons in an action or the service thereof,[16] but appeals have been sustained from orders quashing or setting aside the writ or summons, or the service or return thereof,[17] except where such orders did not constitute final decisions.[18]

Pleadings. Generally an appeal will not lie before final judgment for the review of interlocutory or

9. U.S.—Adler v. Seaman, supra.

Receivership

An order consolidating two suits, and making one subordinate to the other as an intervention, over the objection of complainant in the subordinated suit, and also extending the receivership in his suit to the other, is final and appealable.—Adler v. Seaman, supra.

10. U.S.—Silver v. New York Life Ins. Co., C.C.A.Ill., 116 F.2d 59.

Orders relating to:

(1) Right to open and close argument.—Silver v. New York Life Ins. Co., supra.

(2) Reception of evidence.—Wilmoth v. Hamilton, Pa., 127 F. 48, 61 C.C.A. 584.

(3) Right to trial by jury.—Beaunit Mills v. Eday Fabric Sales Corporation, C.C.A.N.Y., 124 F.2d 563.

Disqualification of trial judge

(1) Orders denying the substitution of a new judge are not appealable.—Baltuff v. U. S., C.C.A.Wash., 35 F.2d 507—McColgan v. Lineker, C.C.A.Cal., 289 F. 253.

(2) An order denying the sufficiency of a disqualifying affidavit filed against a judge is appealable.—Minnesota & Ontario Paper Co. v. Molyneaux, C.C.A.Minn., 70 F.2d 545.

(3) The error of a district judge in passing on the legal sufficiency of an affidavit of disqualification may not be corrected by application to senior circuit judge to exercise his power of designation, but may be remedied by appeal to the circuit court of appeals from the final judgment in the cause.—In re Wingert, D.C.Md., 22 F.Supp. 483.

11. U.S.—Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, N.Y., 55 S.Ct. 313, 293 U.S. 449, 79 L.Ed. 583, affirming, C.C.A., 70 F.2d 297, certiorari granted 55 S.Ct. 95, 293 U.S. 541, 79 L.Ed. 647—Triangle Conduit & Cable Co. v. National Electric Products Corporation, C.C.A.Mich., 127 F.2d 524—Cover v. Schwartz, C.C.A.N.Y., 112 F.2d 566, dismissing appeal, D.C., 30 F.Supp. 261—Zalatuka v. Metropolitan Life Ins. Co., C.C.A.Wis., 108 F.2d 405—Bedgisoff v. Cushman, C.C.A.Wash., 12 F.2d 667.

3 C.J. p 473 note 26.

12. U.S.—Barber Asphalt Pav. Co. v. Morris, Minn., 132 F. 945, 66 C.C.A. 55, 67 L.R.A. 761.

13. U.S.—Hickey v. Johnson, C.C.A. Okl., 9 F.2d 498, mandamus granted Hickey v. Williams, 22 F.2d 787.

14. U.S.—Deckert v. Independence Shares Corporation, Pa., 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F. Supp. 763, certiorari granted 60 S. Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U. S. 648, 84 L.Ed. 1000—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Deckert, C.C.A.Pa., 123 F.2d 979, reversing, D.C., Deckert v. Independence Shares Corporation, 39 F.Supp. 592—Hunteman v. New Orleans Public Service, C.C.A.La., 119 F.2d 465, certiorari denied 62 S.Ct. 89, 314 U.S. 647, 86 L.Ed. 519—Atwood v. National Bank of Lima, C.C.A.Ohio, 115 F.2d 861—Van Cott v. Marion De Vries, Inc., C.C.A.N.Y., 37 F.2d 48—Central California Canneries Co. v. Dunkley Co., C.C.A.Cal., 282 F. 406, dismissing appeal, D.C., Dunkley Co. v. Central California Canneries Co., 277 F. 1001—Sumpter Lumber Co. v. Sound Timber Co., Wash., 257 F. 408, 168 C.C.A. 448.

15. U.S.—Baird v. Peoples Bank & Trust Co. of Westfield, C.C.A.N.J., 120 F.2d 1001, affirming, D.C.N.J., 1 F.R.D. 392.

16. U.S.—Street & Smith Publications v. Spikes, C.C.A.Tex., 107 F. 2d 755.

17. U.S.—Wisconsin Mut. Ins. Co. v. Western Mut. Fire Ins. Co., C.C.A. Wis., 107 F.2d 402—E. I. Du Pont De Nemours & Co. v. Byrnes, C.C. A.N.Y., 101 F.2d 14—Henderson v. Richardson Co., C.C.A.W.Va., 25 F. 2d 225—Mandel Bros. v. Victory Belt Co., C.C.A.Ill., 15 F.2d 610.

18. U.S.—Cole v. Rustgard, C.C.A. Alaska, 68 F.2d 316.

3 C.J. p 479 note 86.

Action not dismissed

An order which quashes the service of a writ of scire facias by publication to revive a judgment, without determining that the writ may not be otherwise served, and without dismissing the action, is not a final decision and is not reviewable by writ of error.—Collin County Nat. Bank of McKinney, Tex. v. Hughes, Colo., 152 F. 414, 81 C.C.A. 556, rehearing denied 155 F. 389, 83 C.C.A. 661.

Bill or complaint

An appeal will not lie from an order or decree setting aside or refusing to set aside the service of a bill or complaint.—Moss v. Kansas City Life Ins. Co., C.C.A.Mo., 96 F.2d 108.

discretionary orders or decisions with respect to pleadings,[19] such as rulings relating to amendments or supplemental pleadings,[20] demurrers and exceptions,[21] and motions to dismiss or strike a pleading,[22] but such order or decree is appealable if it also dismisses the suit or otherwise finally disposes of it as to the party complaining.[23]

Intervention and interpleader. The general rule is that an interlocutory or discretionary order or decree permitting or refusing to permit intervention in the cause is not appealable,[24] this being the rule

19. U.S.—Atwood v. National Bank of Lima, C.C.A.Ohio, 115 F.2d 861—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505, certiorari denied A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 57 S.Ct. 17, 299 U.S. 555, 81 L.Ed. 409.

Judgment on pleadings

An order granting or refusing a motion for judgment on the pleadings has been held not appealable, but reviewable only on appeal from the final judgment.—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F. 2d 202—Fidelity & Casualty Co. of New York v. Turby, C.C.A.Pa., 81 F. 2d 229.

20. U.S.—Werner v. Zintmaster, C. C.A.Pa., 77 F.2d 74—Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co., C.C.A.Ohio, 66 F.2d 81, certiorari denied 54 S.Ct. 121, 290 U.S. 681, 78 L.Ed. 587—Pioneer Grain Corporation v. Chicago, M. & St. P. Ry. Co., C.C.A.Minn., 41 F.2d 439, certiorari denied 51 S.Ct. 86, 282 U.S. 883, 75 L.Ed. 779—Economy Fuse & Mfg. Co. v. Killark Electric Mfg. Co., Mo., 235 F. 130, 148 C.C.A. 614—Hodges v. Kimball, Va., 91 F. 845, 34 C.C.A. 103.

3 C.J. p 480 note 1.

21. U.S.—Dieckmann v. U. S., C.C.A. Ind., 88 F.2d 902—Lockhart v. New York Life Ins. Co., C.C.A.N.C., 71 F.2d 684—Dye v. Farm Mortg. Inv. Co. of Topeka, C.C.A.Kan., 70 F.2d 514—Dyar v. McCandless, C.C.A.S. D., 33 F.2d 578.

3 C.J. p 481 note 8.

Demurrer sustained as to one defendant

An order sustaining a demurrer, even if treated as dismissing the action as against the demurring defendant, would not be appealable as a final judgment, where the complaint sought to allege a joint cause of action against both defendants.—Lockhart v. New York Life Ins. Co., C.C.A.N.C., 71 F.2d 684.

Leave to amend

(1) The rule is especially applicable where leave to amend is granted.—American Broadcasting Co. v. Wahl Co., C.C.A.N.Y., 121 F.2d 412, reversing, D.C., 36 F.Supp. 167—Atwater v. North American Coal Corporation, C.C.A.N.Y., 111 F.2d 125—Cory Bros. & Co. v. U. S., C.C.A.N.Y., 47 F.2d 607, dismissing appeal, D.C., The Milwaukee Bridge, 43 F.2d 589—Western Electric Co. v. Pacent Reproducer Corporation, C.C.A.N.Y., 37 F.2d 14.

(2) At least, no appeal can be taken before expiration of the time to amend.—Western Electric Co. v. Pacent Reproducer Corporation, supra.

22. U.S.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Deckert, C.C.A.Pa., 123 F.2d 979, reversing, D.C., Deckert v. Independence Shares Corporation, 39 F.Supp. 592—Florian v. U. S., C.C.A.Ill., 114 F.2d 990, reversed on other grounds U. S. v. Florian, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105, rehearing denied 61 S.Ct. 738, 312 U.S. 715, 85 L.Ed. 1145—Cono v. Rorick, C.C.A.Fla., 112 F.2d 894—Ritter v. Wyoga Gas & Oil Corporation, C.C.A.Pa., 110 F.2d 524, dismissing appeal, D.C., Wyoga Gas & Oil Corporation v. Schrack, 27 F.Supp. 35, adhering to 29 F. Supp. 582, and certiorari denied Ritter v. Wyoga Gas & Oil Corporation, 61 S.Ct. 29, 311 U.S. 669, 85 L.Ed. 430—U. S. v. Adler's Creamery, C.C.A.N.Y., 110 F.2d 482, certiorari denied Adler's Creamery v. U. S., 61 S.Ct. 12, 311 U.S. 657, 85 L.Ed. 421—Gillespie v. Schram, C.C.A.Mich., 108 F.2d 39—Shultz v. Manufacturers & Traders Trust Co., C.C.A.N.Y., 103 F.2d 771—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 86 F.2d 886—Pacific Mut. Life Ins. Co. of California v. Andrews, C.C.A.Iowa, 73 F.2d 839—Schaffran v. Mt. Vernon-Woodberry Mills, C.C.A.N.J., 70 F.2d 963, 94 A.L.R. 543—U. S. v. Continental Casualty Co., C.C.A.N.Y., 69 F.2d 107—Dyar v. McCandless, C.C.A.S. D., 33 F.2d 578—Pierce v. National Bank of Commerce in St. Louis, C. C.A.Mo., 282 F. 100—Gladys Belle Oil Co. v. Mackey, Okl., 216 F. 129, 132 C.C.A. 373, dismissing appeal, D.C., U. S. v. Mackey, 214 F. 137.

Rule applied to counterclaim, etc.

U.S.—Kneberg v. H. L. Green Co., C. C.A.Ill., 89 F.2d 100—Pioneer Grain Corporation v. Chicago, M. & St. P. Ry. Co., C.C.A.Minn., 42 F.2d 1009.

23. U.S.—Jefferson Electric Co. v. Sola Electric Co., C.C.A.Ill., 122 F. 2d 124—Moreno v. U. S., C.C.A. Mass., 120 F.2d 128, affirming, D.C., 35 F.Supp. 657—Dye v. Farm Mortg. Inv. Co. of Topeka, C.C.A. Kan., 70 F.2d 514—City of Waco, Tex. v. U. S. Fidelity & Guaranty Co., C.C.A.Tex., 67 F.2d 785, certiorari granted 54 S.Ct. 715, 292 U. S. 618, 78 L.Ed. 1476, reversed on other grounds 55 S.Ct. 6, 293 U.S. 140, 79 L.Ed. 244—Hodges v. Kimball, Va., 91 F. 845, 34 C.C.A. 103—Radio Corporation of America v. J. H. Bunnell & Co., C.C.A.N.Y., 298 F. 62.

3 C.J. p 489 note 36.

Dismissal or grant of motion

Where a complaint sets forth, in separate counts, separate claims for relief, a judgment dismissing one of the counts is a "final decision" and is appealable, but an order which merely grants a motion to that effect is not a final decision and is not appealable.—Wright v. Gibson, C.C.A. Cal., 128 F.2d 865, dismissing appeal, D.C., 39 F.Supp. 980.

Right to file supplemental pleading

(1) An order granting leave to file a supplemental bill is neither final nor appealable.—Continental Oil Co. v. Osage Oil & Refining Co., C.C.A. Okl., 57 F.2d 527, certiorari denied 53 S.Ct. 17, 287 U.S. 616, 77 L.Ed. 535.

(2) But an order denying such leave is final and appealable, at least where relief can be granted only by a supplemental bill.—Continental Oil Co. v. Osage Oil & Refining Co., supra.

Dismissing amended and supplemental bills; cross bills

(1) An order dismissing amended and supplemental bills of complaint in equity is final and appealable.—Johnson v. Horton, C.C.A.Nev., 63 F. 2d 950.

(2) However, it has been held that, where a cross bill or cross complaint is dismissed, the order or decree is not appealable before final determination on the original bill or complaint.—Emery v. Central Trust Co., Ohio, 201 F. 965, 123 C.C.A. 287.

24. U.S.—Palmer v. Guaranty Trust Co. of New York, C.C.A.N.Y., 111 F.2d 115—Kennedy v. Bethlehem Steel Co., C.C.A.Pa., 102 F.2d 111—Blumgart v. St. Louis-San Francisco Ry. Co., C.C.A.Mo., 94 F.2d 712, certiorari denied 58 S.Ct. 1041, 304 U.S. 567, 82 L.Ed. 1533—Mackey v. City of Little Rock, C.C.A. Ark., 94 F.2d 546, certiorari denied 58 S.Ct. 1056, 304 U.S. 582, 82 L. Ed. 1544—Aiken v. Cornell, C.C.A. Tex., 90 F.2d 567—State of Washington v. U. S., C.C.A.Or., 87 F.2d 421, reversing, D.C., U. S. v. Columbia River Packers Ass'n, 11 F. Supp. 675—San Antonio Utilities League v. Southwestern Bell Telephone Co., C.C.A.Tex., 86 F.2d 584,

even as against a petitioner denied the right to intervene where the petition is addressed to the sound discretion of the court.[25] Where, however, the right of petitioner or applicant to intervene is absolute, or the denial amounts to a final denial of relief, the decision is reviewable,[26] and a judgment or decree on an intervening complaint or petition is final and appealable if it substantially and completely determines the rights of the parties.[27]

Orders or decrees on interpleaders are appealable where they dismiss the same or otherwise finally determine the rights of the parties;[28] but it is otherwise where they are merely interlocutory.[29]

Abatement and revival of actions. While a judg-

certiorari denied 57 S.Ct. 783, 301 U.S. 682, 81 L.Ed. 1340—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A.Okl., 83 F.2d 532—Stallings v. Conn, C.C.A.Ala., 74 F.2d 189—Baker v. Spokane Sav. Bank, C.C.A.Wash., 71 F.2d 487, affirming, D.C., 5 F.Supp. 538—Shepherd v. St. Louis Public Service Co., C.C.A.Mo., 64 F.2d 612—Lupfer v. Carlton, for Use and Benefit of Board of Public Instruction of Dade County, C.C.A.Fla., 64 F.2d 272—Elkins v. First Nat. Bank, C.C.A.W.Va., 43 F.2d 777—Board of Drainage Com'rs of Pender County Drainage Dist. No. 4 v. Lafayette Southside Bank of St. Louis, C.C.A.N.C., 27 F.2d 286—O'Connell v. Pacific Gas & Electric Co., C.C.A.Cal., 19 F.2d 460—Palmer v. Bankers' Trust Co., C.C.A.Colo., 12 F.2d 747—McKee v. Brezell, C.C.A.Okl., 284 F. 554—Fink v. Bay Shore Terminal Co., Va., 144 F. 837, 75 C.C.A. 665, affirmed 27 S.Ct. 777, 203 U.S. 577, 51 L.Ed. 325.

3 C.J. p 477 note 79, p 469 note 96 [e] (1), p 640 note 18.

25. U.S.—Rowan v. Harburney Oil Co., C.C.A.Kan., 91 F.2d 122—Burrow v. Citizens' State Bank, C.C.A.Miss., 74 F.2d 929—Board of Com'rs of Sweetwater County, Wyo., v. Bernardin, C.C.A.Wyo., 74 F.2d 809, certiorari denied 55 S.Ct. 645, 295 U.S. 731, 79 L.Ed. 1680—Demulso Corporation v. Tretolite Co., C.C.A.Okl., 74 F.2d 805, dismissing appeal, D.C., Tretolite Co. v. Darby Petroleum Corporation, 5 F.Supp. 445—Bethlehem Steel Co. v. International Combustion Engineering Corporation, C.C.A.N.Y., 68 F.2d 952—U. S. v. Radice, C.C.A.N.Y., 40 F.2d 445—County Drainage Dist. No. 4 v. Lafayette Southside Bank of St. Louis, C.C.A.N.C., 27 F.2d 286—Farmers' & Merchants' Bank of Phœnix, Ariz. v. Arizona Mut. Savings & Loan Ass'n, Ariz., 220 F. 1, 135 C.C.A. 577, affirming, D.C., Clark v. Arizona Mut. Savings & Loan Ass'n, 217 F. 640, and certiorari denied Farmers' & Merchants' Bank of Phœnix v. Arizona Mut. Savings & Loan Ass'n, 35 S.Ct. 791, 238 U.S. 628, 59 L.Ed. 1496—Central Trust Co. of New York v. Chicago, R. I. & P. R. Co., N.Y., 218 F. 336, 134 C.C.A. 144.

D.C.—Vertner v. Vertner, 63 App.D.C. 179, 70 F.2d 783.

3 C.J. p 478 note 82.

26. U.S.—In re Dolcater, C.C.A.N.Y., 106 F.2d 30, dismissing appeal, D.C., Dolcater v. Manufacturers & Traders Trust Co., 25 F.Supp. 637—Schmidt v. U. S., C.C.A.Wash., 102 F.2d 589, certiorari denied 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478, and Northern Pac. R. Co., by Schmidt v. U. S., 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478—Blumgart v. St. Louis-San Francisco Ry. Co., C.C.A.Mo., 94 F.2d 712, certiorari denied 58 S.Ct. 1041, 304 U.S. 567, 82 L.Ed. 1533—Rowan v. Harburney Oil Co., C.C.A.Kan., 91 F.2d 122—State of Washington v. U. S., C.C.A.Or., 87 F.2d 421, reversing, D.C., U. S. v. Columbia River Packers Ass'n, 11 F.Supp. 675—San Antonio Utilities League v. Southwestern Bell Telephone Co., C.C.A.Tex., 86 F.2d 584, certiorari denied 57 S.Ct. 783, 301 U.S. 682, 81 L.Ed. 1340—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A.Okl., 83 F.2d 532—Burrow v. Citizens' State Bank, C.C.A.Miss., 74 F.2d 929—Board of Com'rs of Sweetwater County, Wyo., v. Bernardin, C.C.A.Wyo., 74 F.2d 809, certiorari denied 55 S.Ct. 645, 295 U.S. 731, 79 L.Ed. 1680—Demulso Corporation v. Tretolite Co., C.C.A.Okl., 74 F.2d 805, dismissing appeal Tretolite Co. v. Darby Petroleum Corporation, D.C., 5 F.Supp. 445—Shepherd v. St. Louis Public Service Co., C.C.A.Mo., 64 F.2d 612—Ætna Casualty & Surety Co. v. American Surety Co. of New York, C.C.A.W.Va., 64 F.2d 577—Long v. Stites, C.C.A.Ky., 63 F.2d 855, certiorari denied 54 S.Ct. 59, 290 U.S. 640, 78 L.Ed. 556—Deering v. Stites, C.C.A.Ky., 63 F.2d 855, certiorari denied 54 S.Ct. 59, 290 U.S. 640, 78 L.Ed. 556—Universal Ins. Co. v. Old Time Molasses Co., C.C.A.La., 46 F.2d 925—U. S. v. Radice, C.C.A.N.Y., 40 F.2d 445—Bankers' Trust Co. v. Virginia Ry. & Power Co., C.C.A.Va., 273 F. 999, reversing, D.C., Metropolitan Trust Co. of City of New York v. Richmond Passenger & Power Co., 271 F. 38, and certiorari denied Virginia Ry. & Power Co. v. Bankers' Trust Co., 42 S.Ct. 53, 257 U.S. 649, 66 L.Ed. 416, and Virginia Ry. & Power Co. v. O'Connor, 42 S.Ct. 53, 257 U.S. 649, 66 L.Ed. 416—Swift v. Black Panther Oil & Gas Co., Okl., 244 F. 20, 156 C.C.A. 448—Farmers' & Merchants' Bank of Phœnix, Ariz. v. Arizona Mut. Savings & Loan Ass'n, Ariz., 220 F. 1, 135 C.C.A. 577, affirming, D.C., Clark v. Arizona Mut. Savings & Loan Ass'n, 217 F. 640, and certiorari denied Farmers' & Merchants' Bank of Phœnix v. Arizona Mut. Savings & Loan Ass'n, 35 S.Ct. 791, 238 U.S. 628, 59 L.Ed. 1496—Central Trust Co. of New York v. Chicago, R. I. & P. R. Co., N.Y., 218 F. 336, 134 C.C.A. 144.

3 C.J. p 478 note 81, p 469 note 96 [e] (2).

Interest in res subject of suit

Where a party seeking to intervene has a direct and immediate interest in the res, which is the subject of the suit, and cannot otherwise protect his interest, his right of intervention is absolute and a denial thereof appealable.

U.S.—Ætna Casualty & Surety Co. v. American Surety Co. of New York, C.C.A.W.Va., 64 F.2d 577.

D.C.—Vertner v. Vertner, 63 App.D.C. 179, 70 F.2d 783.

27. U.S.—Central Trust Co. v. Madden, S.C., 70 F. 451, 17 C.C.A. 236.

3 C.J. p 493 note 76.

28. U.S.—Standley v. Roberts, Ind. T., 59 F. 836, 8 C.C.A. 305, appeal dismissed 17 S.Ct. 999, 41 L.Ed. 1177.

Denial of rights to party

An order of interpleader, which aligns the parties, prescribes the method of procedure, and finally denies to one of the parties the right to assert a contract obligation against another, is a final order within the statute, from which an appeal can be taken.—Bank of Talwan v. Gorgas-Pierie Mfg. Co., C.C.A.Pa., 273 F. 660.

29. U.S.—Credit Bureau of San Diego v. Petrasich, C.C.A.Cal., 97 F.2d 65—Marine Midland Trust Co. of New York v. Eybro Corporation, C.C.A.N.Y., 58 F.2d 165, dismissing appeal, D.C., Marine Midland Trust Co. of New York v. Irving Trust Co., 56 F.2d 385.

3 C.J. p 494 note 83.

Claim against United States

Where the United States levied distraint on taxpayer's property, taxpayer's assignees recovered judgment, collector of internal revenue made demand on judgment debtor for amount of judgment on ground that assignment was an attempt to evade the levy, and judgment debtor

ment or ruling on a plea or answer in abatement is not final in the sense that it may be appealed from before the final determination of the cause,[30] if a bill of revivor is dismissed, an appeal will lie, since this practically determines the original cause by leaving it in a situation in which no further proceedings can be had in it.[31]

Evidence, discovery, etc. While it has been held that an unconditional order to appear and to produce records is appealable,[32] it has also been held that orders for the production or inspection of books and papers in an action pending in court,[33] or requiring submission to a physical examination,[34] or for an inspection and survey of the locus in quo,[35] are not final so as to be appealable before the final determination of the cause. However, an order quashing a prior order or subpœnas for the production of records for examination has been held to terminate the particular controversy and is appealable,[36] and, if an order commits a witness for contempt for refusal to testify, it is a final order for the purpose of an appeal by him.[37]

A decree relating to the answering of interrogatories, which finally disposes of the proceedings, has been held final and appealable,[38] as well as a decree granting the relief or some part thereof asked in a bill of discovery.[39]

Dismissal, discontinuance, or nonsuit. As a general rule an appeal may be taken from a judgment, order, or decree finally dismissing the action or proceeding without plaintiff's consent or granting a judgment or final order of compulsory nonsuit, as such judgment, order, or decree is a final determination of the cause,[40] this being so even if the dismissal or nonsuit is without prejudice.[41] Of course, if the judgment, order, or decree is merely conditional, or otherwise not final, but merely interlocutory, so that further action is necessary, an appeal will not lie until after entry of final judgment,[42] and an order which merely grants a motion to dismiss an action is not a final decision and is not appealable.[43] However, an appeal will not lie at plaintiff's instance, either at law or in equity, from a judgment, order, or decree of dismissal or discontinuance entered at his request or with his consent, or from a voluntary nonsuit, as he is estopped by his consent.[44] The rule against appeal from a volun-

paid money into court and filed bill of interpleader, order requiring the assignees to interplead was not appealable under statute authorizing appeals in cases adjudicating "claims against the United States," since suit was not one against the United States but in reality by the United States to establish and enforce a lien.—Credit Bureau of San Diego v. Petrasich, C.C.A.Cal., 97 F.2d 65.

30. U.S.—McHie v. McHie, C.C.A. Ind., 78 F.2d 351—Hewitt v. Charles R. McCormick Lumber Co. of Delaware, C.C.A.N.Y., 22 F.2d 925.
3 C.J. p 494 note 87, p 495 note 93.

31. U.S.—American Transp. Co. v. Swift & Co., C.C.A.N.Y., 24 F.2d 310—Sullivan v. Associated Billposters and Distributors of United States and Canada, C.C.A.N.Y., 6 F.2d 1000, 42 A.L.R. 503—Mackaye's Mallory, N.Y., 79 F. 1, 24 C. C.A. 420.

32. U.S.—Brownson v. U. S., C.C.A. Mo., 32 F.2d 844.

33. U.S.—In re Investigation by Attorney General of U. S., re Alleged Violations of Federal Anti-Trust Laws, C.C.A.N.Y., 104 F.2d 658, denying motion, D.C., 27 F.Supp. 997—Apex Hosiery Co. v. Leader, C.C. A.Pa., 102 F.2d 702—Goodyear Tire & Rubber Co. v. Jamaica Truck Tire Service Co., C.C.A.Ill., 66 F.2d 91, certiorari denied Goodyear Tire & Rubber Co. v. Jamaica Truck Tire Service, 54 S.Ct. 209, 290 U.S. 700, 78 L.Ed. 691—Sears, Roebuck & Co. v. Jamaica Truck Tire Service, C.C.A.Ill., 66 F.2d 91, certiorari denied Goodyear Tire & Rubber Co. v. Jamaica Truck Service, 54 S.Ct. 209, 290 U.S. 700, 78 L.Ed. 691—Tucker v. Peiler, C.C.A.Conn., 297 F. 570, certiorari denied 44 S. Ct. 461, 265 U.S. 587, 68 L.Ed. 1193.
3 C.J. p 496 note 16.

34. U.S.—Bowles v. Commercial Casualty Ins. Co., C.C.A.Va., 107 F.2d 169.

35. U.S.—Montana Ore Purchasing Co. v. Butte & B. Consol. Mining Co., Mont., 126 F. 168, 61 C.C.A. 426.

36. U.S.—Martin v. Chandis Securities Co., C.C.A.Cal., 128 F.2d 731, affirming, D.C., 33 F.Supp. 478.

37. U.S.—Butler v. Fayerweather, N. Y., 91 F. 458, 33 C.C.A. 625.
3 C.J. p 497 note 22.

38. U.S.—Keenan v. Texas Production Co., C.C.A.Wyo., 84 F.2d 826.

39. U.S.—Baush Mach. Tool Co. v. Aluminum Co. of America, C.C.A. Conn., 63 F.2d 778, affirming, D.C., 60 F.2d 586, certiorari denied Aluminum Co. of America v. Baush Mach. Tool Co., 53 S.Ct. 658, 289 U.S. 739, 77 L.Ed. 1486.

40. U.S.—Wright v. Gibson, C.C.A. Cal., 128 F.2d 865, dismissing appeal, D.C., 39 F.Supp. 980—Atwood v. National Bank of Lima, C.C.A. Ohio, 115 F.2d 861—Hicks v. Bekins Moving & Storage Co., C.C.A. Wash., 115 F.2d 406—U. S. v. Nordbye, C.C.A.Minn., 75 F.2d 744, certiorari denied Love v. Nordbye, 56 S.Ct. 103, 296 U.S. 572, 80 L.Ed. 404—U. S. v. City Saving Bank & Trust Co. of Alliance, Ohio, C.C.A. Ohio, 73 F.2d 486—Ruff v. Gay, C. C.A.Ga., 67 F.2d 684, reversing, D. C., 3 F.Supp. 264, and certiorari granted Gay v. Ruff, 54 S.Ct. 377, 291 U.S. 654, 78 L.Ed. 1047, affirmed 54 S.Ct. 608, 292 U.S. 25, 78 L.Ed. 1099, 92 A.L.R. 970—Massachusetts Fire & Marine Ins. Co. v. Schmick, C.C.A.S.D., 58 F.2d 130—Rogers v. Watson, C.C.A.Ind., 46 F.2d 753, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1460—Dobson v. U. S., C.C.A.N.Y., 31 F.2d 288, denying motion Dobson v. U. S., 27 F.2d 807, certiorari denied 49 S.Ct. 179, 278 U.S. 653, 73 L.Ed. 563, and affirming, D.C., Haselden v. U. S., 24 F.2d 529—Franceschi v. Mercado, C.C.A.Puerto Rico, 269 F. 954.
3 C.J. p 497 note 26.

41. U.S.—U. S. v. City Sav. Bank & Trust Co. of Alliance, C.C.A.Ohio, 73 F.2d 486.
3 C.J. p 465 note 73 [a].

42. U.S.—Atwater v. North American Coal Corporation, C.C.A.N.Y., 111 F.2d 125—Riverside Oil & Refining Co. v. Dudley, C.C.A.Okl., 33 F.2d 749—City & County of San Francisco v. McLaughlin, C.C.A. Cal., 9 F.2d 390.

43. U.S.—Wright v. Gibson, C.C.A. Cal., 128 F.2d 865, dismissing appeal, D.C., 39 F.Supp. 980.

44. U.S.—Marks v. Leo Feist, Inc., C.C.A.N.Y., 8 F.2d 460.
3 C.J. p 501 note 31.

tary nonsuit, dismissal, or discontinuance applies only to an appeal by plaintiff; defendants may be entitled to appeal therefrom.[45]

While an order dismissing one of several causes of action set up in the pleadings has been held appealable where such cause of action was separate and distinct from the others,[46] as a rule, where an action is dismissed as to one only of two causes of action set up in the bill, declaration, or complaint, leaving the other to stand, an appeal will not lie, unless authorized by statute, while the latter cause of action remains undecided;[47] but a decree of dismissal is final and appealable notwithstanding it orders a reference to a master in a collateral matter.[48]

Since there is no final judgment and the case is still pending, an appeal will not lie from a refusal of the trial court to grant a judgment or decree of dismissal or nonsuit,[49] nor, as a rule, will it lie from a judgment, order, or decree overruling a motion to set aside a dismissal or nonsuit.[50]

Verdict. While an order denying a motion to set aside a verdict has been held not appealable,[51] it has been indicated that refusal of such a motion is appealable.[52]

New trial, rehearing, etc. Generally an appeal will not lie from orders granting or denying motions for a new trial for errors of fact, either because such a motion is addressed to the discretion of the trial court, or because such an order is not a final judgment or order,[53] but such orders are ap-

Nonsuit because of adverse ruling
A nonsuit has been held voluntary within this rule, although plaintiff consented or submitted to it because of an adverse ruling of the court on the trial which would prevent a recovery by him.—Kelly v. Great Atlantic & Pacific Tea Co., C.C.A.N.C., 86 F.2d 296—3 C.J. p 501 note 32.

45. U.S.—Cybur Lumber Co. v. Erkhart, Miss., 247 F. 284, 159 C.C.A. 378—Willis v. Davis, Ky., 184 F. 889, 107 C.C.A. 211.

46. U.S.—Musher Foundation v. Alba Trading Co., C.C.A.N.Y., 127 F. 2d 9.

47. U.S.—Fields v. Mutual Ben. Life Ins. Co., C.C.A.N.C., 93 F.2d 559—Partridge v. Clarkson, C.C.A.Mo., 72 F.2d 108—U. S. v. Bighorn Sheep Co., C.C.A.Wyo., 276 F. 710.
3 C.J. p 502 note 42, p 446 note 88 [e].
Necessity for determination of entire cause of action generally see supra subsection b (1) of this section.

48. U.S.—West v. East Coast Cedar Co., N.C., 113 F. 742, 51 C.C.A. 416.
3 C.J. p 503 note 43.

49. U.S.—Leavitt v. McBee Co., C.C.A.Mass., 124 F.2d 938, reversing, D.C., McBee Co. v. Leavitt, 40 F. Supp. 823—Western Fruit Growers v. U. S., C.C.A.Cal., 124 F.2d 381, modifying, D.C., U. S. v. Western Fruit Growers, 34 F.Supp. 794—Libby, McNeill & Libby v. Malmskold, C.C.A.Wash., 115 F.2d 786, dismissing appeal, D.C., Malmskold v. Libby, McNeil & Libby, 31 F. Supp. 958—Ballard v. Mutual Life Ins. Co. of New York, C.C.A. Fla., 109 F.2d 388—Grand Trunk Western R. Co. v. McHie, C.C.A.Mich., 100 F.2d 86—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, C.C.A.Fla., 87 F.2d 651, certiorari denied Grand International Brotherhood of Locomotive Engineers v. Kenan, 57 S.Ct. 790, 301 U.S. 687, 81 L.Ed. 1344—Miller v. Pyrites Co., C.C.A.Md., 71 F.2d 804, certiorari denied 55 S.Ct. 121, 293 U.S. 604, 75 L.Ed. 696, rehearing denied 55 S.Ct. 508, 293 U.S. 632, 79 L.Ed. 717, certiorari denied Merrell v. Pyrites Co., 55 S.Ct. 121, 293 U.S. 604, 79 L.Ed. 696, rehearing denied 55 S.Ct. 208, 293 U.S. 632, 79 L.Ed. 717—Central Vermont Transp. Co. v. Durning, C.C.A.N.Y., 71 F.2d 273, certiorari granted 55 S.Ct. 100, 293 U.S. 542, 79 L.Ed. 647, affirmed 55 S.Ct. 306, 294 U.S. 33, 79 L.Ed. 741—Satterlee v. Harris, C.C.A.Okl., 60 F.2d 490—Williams v. Southern Cotton Oil Co., C.C.A.Ga., 45 F.2d 387—Oklahoma, K. & M. I. Ry. Co. v. Bowling, Okl., 249 F. 592, 161 C.C.A. 518.
3 C.J. p 503 note 45.

50. U.S.—Hicks v. Bekins Moving & Storage Co., C.C.A.Wash., 115 F. 2d 406—Andris v. De Pont Cellophane Co., C.C.A.Ill., 93 F.2d 421.
3 C.J. p 504 note 50.
Contra Zadig v. Ætna Ins. Co., C.C.A.N.Y., 42 F.2d 142.

51. U.S.—Libby, McNeill & Libby v. Malmskold, C.C.A.Wash., 115 F.2d 786, dismissing appeal, D.C., Malmskold v. Libby, McNeil & Libby, 31 F.Supp. 958—Sheelan v. Nims, C.C.A.Vt., 75 F.2d 293.

52. U.S.—Blair v. National Security Ins. Co., C.C.A.N.J., 126 F.2d 955.

53. U.S.—Youdan v. Majestic Hotel Management Corporation, C.C.A. Ill., 125 F.2d 15—Libby, McNeill & Libby v. Malmskold, C.C.A.Wash., 115 F.2d 786, dismissing appeal, D.C., Malmskold v. Libby, McNeil & Libby, 31 F.Supp. 958—Frank Mercantile Corporation v. Prudential Ins. Co. of America, C.C.A.Pa., 115 F.2d 496—Marshall's U. S. Auto Supply v. Cashman, C.C.A.Kan., 111 F.2d 140, certiorari denied Cashman v. Marshall's U. S. Auto Supply, 61 S.Ct. 26, 311 U.S. 667, 85 L. Ed. 428—Armstrong v. New La Paz Gold Mining Co., C.C.A.Cal., 107 F. 2d 453—Atlantic Greyhound Corporation v. Lyon, C.C.A.Va., 107 F. 2d 157, certiorari denied 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014—Delaware & H. R. Corporation v. Bonzik, C.C.A.Pa., 95 F.2d 959, dismissing appeal, D.C., Bonzik v. Delaware & H. R. Corporation, 20 F. Supp. 554—International Shoe Co. v. Nathews, C.C.A.Ala., 92 F.2d 751—Inland Power & Light Co. v. Grieger, C.C.A.Wash., 91 F.2d 811—Carter Coal Co. v. Nelson, C.C.A. Va., 91 F.2d 651—Gillette Safety Razor Co. v. Triangle Mechanical Laboratories Corporation, C.C.A.N. Y., 87 F.2d 699, reversing, D.C., Gillette Safety Razor Co. v. Triangle Mechanical Laboratories, 13 F.Supp. 194, motion denied 15 F. Supp. 95—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Florini v. Stegner, C.C.A.Pa., 82 F.2d 708—Werner v. Zintmaster, C.C.A.Pa., 77 F.2d 74—Preferred Accident Ins. Co. of New York v. Combs, C.C.A.Neb., 76 F.2d 775—Matheson v. National Surety Co., C.C.A.Alaska, 69 F.2d 914—East Erie Commercial R. Co. v. Denial, C.C.A.Pa., 66 F.2d 555—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569—Sun Oil Co. v. Gregory, C.C.A.Tex., 56 F.2d 108—Hunt v. U. S., C.C.A.Colo., 53 F. 2d 333—Shannon v. Shaffer Oil & Refining Co., C.C.A.Okl., 51 F.2d 878, 79 A.L.R. 851—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L.Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Sentinel Co. v. Dinwiddie, C.C.A.Wis., 41 F.2d 57—Jaslow v. Waterbury Co., C.C.A.N. Y., 296 F. 363—Wright v. Taft-Peirce Mfg. Co., C.C.A.R.I., 287 F. 131—Ft. Dodge Portland Cement Corporation v. Monk, C.C.A.S.D.,

pealable for errors of law.[54] An order denying a motion to set aside a verdict, to amend the minutes, and to move for a new trial nunc pro tunc prior to final judgment has been held not a final order so as to be appealable.[55]

It is generally held that an order granting or denying a motion or petition for a rehearing is not appealable, either because it is within the discretion of the court or because it is not a final judgment, order, or decree,[56] and an appeal does not lie from an order denying a motion for reargument.[57]

Order or judgment directing payment of money. A judgment, order, or decree finally directing the payment of money[58] from a fund in court[59] has been held appealable. To come within the rule, however, there must be a final adjudication or direction of payment, and not a mere allowance leaving payment thereof to be subsequently ordered or decreed.[60] An order merely directing the payment of money into court is generally held to be merely interlocutory and not appealable.[61]

Priority of claims and distribution. In a suit to determine priorities and for distribution of a fund, or for a sale of property and distribution of the proceeds, a decree or order definitely determining the priority of claims or liens and directing distribution is final for the purpose of an appeal;[62] but it is otherwise, as a rule, where the priorities are not finally fixed or where rights in the distribution of the fund remain to be settled.[63]

276 F. 113—Tanners' Produce Co. v. Nulty, C.C.A.N.J., 272 F. 898—Salyers v. U. S., Iowa, 257 F. 255, 168 C.C.A. 339—Farrell v. First Nat. Bank of Philadelphia, Pa., 254 F. 801, 166 C.C.A. 247—City of Goldfield, Colo. v. Roger, Colo., 249 F. 39, 161 C.C.A. 99—Northern Central Coal Co. v. Barrowman, Mo., 246 F. 906, 159 C.C.A. 178—Wolf v. Edmunson, Or., 240 F. 53, 153 C.C.A. 89—Cloquet Lumber Co. v. Burns, Minn., 222 F. 857, 138 C.C.A. 283—Dinet v. Rapid City, S.D., 222 F. 497, 138 C.C.A. 93—Courtnay v. King, Alaska, 220 F. 112, 136 C.C.A. 204.

3 C.J. p 505 note 55, p 469 note 96 [f] (1), (3).

Motion in alternative

Where a party moves in the alternative for judgment notwithstanding the verdict and for a new trial, if the trial judge enters judgment notwithstanding the verdict and in the alternative grants a new trial on any of the grounds assigned therefor, disposition of the motion for new trial would not ordinarily be reviewable and only the action in entering judgment would be ground of appeal.—Montgomery Ward & Co. v. Duncan, Ark., 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147, modifying, C.C.A., Duncan v. Montgomery Ward & Co., 108 F.2d 848, reversing, D.C., 27 F.Supp. 4, and certiorari granted Montgomery Ward & Co. v. Duncan, 60 S.Ct. 809, 309 U.S. 650, 84 L.Ed. 1001, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389.

Conditional order

The action of the trial judge in ordering a remittitur as a condition to denying a motion for new trial is not reviewable on writ of error.—Bristol Gas & Electric Co. v. Boy, C.C.A. Tenn., 261 F. 297.

Mistaken appeal considered

That appellant mistakenly appealed from order overruling motion for new trial could be considered purely a technicality, and in interest of justice and to avoid prolonging litigation for no good purpose, without intending to create precedent, circuit court of appeals could disregard motion to dismiss appeal and decide case on merits.—Milton v. U. S., C.C.A.La., 120 F.2d 794.

54. U.S.—Reisberg v. Walters, C.C.A.Mich., 111 F.2d 595.

An "issue of law" is presented when award of damages exceeds a statutory limit, or is less than an amount undisputed, or was in clear contravention of instructions of trial court.—Reisberg v. Walters, supra.

Jurisdiction of trial court

Where the question is whether or not the court has jurisdiction to grant or refuse a new trial, such decision is appealable.—Manning v. German Ins. Co., Iowa, 107 F. 52, 46 C.C.A. 144, reversing C.C., German Ins. Co. v. Town of Manning, 100 F. 581.

55. U.S.—Nelson v. Wood, Pa., 210 F. 18, 126 C.C.A. 598, error dismissed 36 S.Ct. 445, 239 U.S. 637, 241 U.S. 637, 60 L.Ed. 1215.

56. U.S.—Partridge v. St. Louis Joint Stock Land Bank, C.C.A.Mo., 130 F.2d 281—Gillian v. U. S., C.C.A.Va., 70 F.2d 507, certiorari denied 55 S.Ct. 111, 293 U.S. 587, 79 L.Ed. 682, rehearing denied 55 S.Ct. 140, 293 U.S. 631, 79 L.Ed. 716—McIntosh v. U. S., C.C.A.Va., 70 F.2d 507, dismissing appeal, D.C., U. S. v. McIntosh, 2 F.Supp. 244, rehearing denied 3 F.Supp. 715, and certiorari denied McIntosh v. U. S., 55 S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682—Stradford v. Wagner, C.C.A. Okl., 64 F.2d 749—Marine Midland Trust Co. of New York v. Eybro Corporation, C.C.A.N.Y., 58 F.2d 165, dismissing appeal, D.C., Marine Midland Trust Co. of New York v. Irving Trust Co., 56 F.2d 385—Mortgage Loan Co. v. Livingston, C.C.A.Mo., 45 F.2d 28—Iglesias v. Banco Territorial Y Agricola De Puerto Rico, C.C.A. Puerto Rico, 268 F. 479.

3 C.J. p 509 note 69, p 469 note 96 [f] (2).

Order continuing hearing

An order continuing to a future date hearing on the balance of the petition for rehearing was not appealable.—Clarke v. Hot Springs Electric Light & Power Co., C.C.A. Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443.

57. U.S.—In re Federman, C.C.A.N.Y., 119 F.2d 754.

58. U.S.—In re Michigan Cent. R. Co., Mich., 124 F. 727, 59 C.C.A. 643.

3 C.J. p 510 note 87.

59. U.S.—Tuttle v. Claflin, N.Y., 88 F. 122, 31 C.C.A. 419.

3 C.J. p 511 note 95.

60. U.S.—Colley v. Wolcott, Kan., 187 F. 595, 109 C.C.A. 425.

61. U.S.—Martin v. National Surety Co., C.C.A.Mo., 85 F.2d 135, certiorari granted 57 S.Ct. 232, 299 U.S. 536, 81 L.Ed. 395, affirmed 57 S. Ct. 531, 300 U.S. 588, 81 L.Ed. 822—Iglesias v. Banco Territorial Y Agricola De Puerto Rico, C.C.A. Puerto Rico, 268 F. 479.

3 C.J. p 512 note 4.

62. U.S.—City and County of Denver v. Stenger, C.C.A.Colo., 295 F. 809—Halsted v. Forest Hill Co., C.C.W. Va., 109 F. 820.

3 C.J. p 514 note 20.

Partial distribution

An order for partial distribution has been held final where there is an order for payment.—Stillman v. Hart, Tex., 126 F. 359, 61 C.C.A. 309—3 C.J. p 514 note 25.

63. U.S.—Denison, & N. R. Co. v. Ranney-Alton Mercantile Co., Ind. T., 104 F. 595, 44 C.C.A. 65.

3 C.J. p 514 note 21.

Amount not settled

When the amount to be paid is de-

References. It is generally held that an order or decree which merely directs or refuses a reference to state an account or for other purposes, or an order refusing to set aside such an order, is not appealable, either because it is discretionary, or because it is merely interlocutory and not within the statute allowing appeals from interlocutory orders or decrees in certain cases.[64] Also, no appeal will lie from a judgment, order, or decree entered on the report of a referee, etc., where it is merely interlocutory,[65] but, where the order or judgment finally entered on the report is the judgment of the court, it has been held appealable.[66]

Orders and proceedings after judgment, decree, or prior order. In the absence of a statute to the contrary, decisions made in a cause after a judgment or decree therein are not appealable unless they come within the definition of a final judgment, order, or decree, or are in the nature thereof, and the error complained of originates therein, or unless such subsequent decision was beyond the power of the court.[67] However, an appeal will generally lie to review a judgment or order amending or correcting a prior judgment, order, or decree, or the record thereof,[68] or to review an order denying a motion to amend or correct a prior judgment, order, or decree.[69]

As a general rule an appeal will not lie, in the absence of a statutory provision to the contrary, from a judgment or order opening, vacating, or setting aside a judgment, order, or decree previously rendered in the cause,[70] or from an order refusing to open, vacate, modify, or set aside the same,[71] but except in so far as the action of the court was

pendent on the amount of other claims on the fund, a decree establishing a claim is not final.—Montgomery v. Anderson, Mo., 21 How. 386, 16 L.Ed. 160.

64. U.S.—Deckert v. Independence Shares Corporation, Pa., 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing, C.C.A., Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F.Supp. 763, certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000—Dooley v. Fritz, C.C.A.Mass., 45 F.2d 317, dismissing appeal, D.C., 38 F.2d 123.

3 C.J. p 514 note 29.

An order recommitting a report or a part thereof to a master, auditor, or other referee is not appealable.—In re Strauss, N.Y., 211 F. 123, 127 C.C.A. 521.

Enlarging order of reference

An order denying a motion seeking enlargement of an order of reference to permit a showing that the action of defendant, not served, in defense of the suit was such as to constitute estoppel in any other suit involving the same parties and issues is not an appealable "final order" since it did not terminate the litigation on merits between all parties.—Cleveland Trust Co. v. Simmons Mfg. Co., C.C.A.Ohio, 66 F.2d 134.

65. U.S.—Pearson v. Higgins, C.C.A. Cal., 34 F.2d 27, certiorari denied 50 S.Ct. 39, 280 U.S. 593, 74 L.Ed. 641—In re Pacat Finance Corporation, C.C.A.N.Y., 27 F.2d 810, affirming, D.C., 295 F. 394.

3 C.J. p 516 note 36.

Approving or confirming report

An interlocutory order, confirming a master's report, denying recovery on trust theory, but retaining jurisdiction, is not appealable, and is no bar to a claim of trust on appeal from the judgment.—In re Pacat Finance Corporation, supra.

66. U.S.—Intertype Corporation v. Pulver, C.C.A.Fla., 56 F.2d 992—Mathieson Alkali Works v. Arnold, Hoffman & Co., C.C.A.N.Y., 31 F.2d 1.

3 C.J. p 516 note 35 [b].

Order for judgment

Where an action at law is by consent referred to a referee "to hear and determine" in accordance with the New York statute, it is the practice of the federal court to make an order for judgment on the referee's report, but such order is pro forma only, and the fact that the judgment is entered by the clerk without an order does not deprive the defeated party of the right to have it reviewed.—Steger v. Orth, N.Y., 258 F. 619, 170 C.C.A. 73, certiorari denied 40 S.Ct. 11, 250 U.S. 663, 63 L.Ed. 1196.

67. U.S.—Nelson v. Meehan, Alaska, 155 F. 1, 83 C.C.A. 597, 12 L.R.A., N.S., 374—In re Woerishoffer, Tex., 75 F. 335, 21 C.C.A. 375.

3 C.J. p 517 note 47, p 518 note 49.

68. U.S.—Massachusetts Fire & Marine Ins. Co. v. Schmick, C.C.A.S.D., 58 F.2d 130—American Engineering Co. v. Metropolitan By-Products Co., C.C.A.N.Y., 275 F. 40.

Change to dismissal without prejudice

An order modifying a judgment of dismissal on the merits by striking therefrom words "on merits" and making the judgment one of dismissal without prejudice is appealable as a "final order."—Massachusetts Fire & Marine Ins. Co. v. Schmick, C.C.A. S.D., 58 F.2d 130.

69. U.S.—U. S. v. Trogler, Colo., 237 F. 181, 150 C.C.A. 327, appeal dismissed Trogler v. U. S., 38 S.Ct. 62, 245 U.S. 629, 62 L.Ed. 520.

Stipulation to modify

An order of the trial court, declining to modify a decree according to stipulation presented by the government in a suit to cancel a patent for coal lands, and by the purchasers under a deed of trust entitled to a deed, is appealable.—U. S. v. Trogler, supra.

70. U.S.—Jones v. Thompson, C.C.A. Ark., 128 F.2d 888—Beighle v. Le Roy, C.C.A.N.J., 94 F.2d 30—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418—Board of Sup'rs of Rockland County v. Knickerbocker Ice Co., C.C.A.N.Y., 80 F.2d 248—O'Brien v. Lashar, C.C.A.Conn., 266 F. 215.

3 C.J. p 521 note 11.

Default judgment

U.S.—Mitchell v. Mason, C.C.A.Fla., 4 F.2d 705.

Prior order not appealable

No appeal lies, ordinarily, from an order granting or denying a motion to vacate an order which is not itself appealable.—Republic Supply Co. of California v. Richfield Oil Co. of California, C.C.A.Cal., 74 F.2d 909.

71. U.S.—Safe Harbor Water Power Corporation v. Federal Power Commission, Pa., 124 F.2d 800, affirming, D.C., Safe Harbor Water Power Corporation v. U. S., 37 F.Supp. 9, appeal dismissed 61 S.Ct. 1084, 313 U.S. 546, 85 L.Ed. 1512, and 61 S.Ct. 1085, 313 U.S. 546, 85 L.Ed. 1512, certiorari denied 62 S.Ct. 943, 316 U.S. 663, 86 L.Ed. 1740—Jackson v. Heiser, C.C.A.Cal., 111 F.2d 310—Burns v. Ender Coal & Coke Co., C.C.A.Ind., 104 F.2d 964—In re Colwell, C.C.A.Ill., 93 F.2d 946—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418—Republic Supply Co. of California v. Richfield Oil Co. of California, C.C.A.Cal., 74 F.2d 909—

within its discretion,[72] an order vacating a judgment, decree, or previous order may be a final judgment or order for the purpose of an appeal,[73] or reviewable for want of jurisdiction to make it.[74] However, an appeal will lie from a final judgment, order, or decree on a bill in the nature of a bill of review or an independent suit or petition to impeach and set aside a judgment or decree for fraud, error, or irregularity.[75]

As a rule, an appeal will not lie from a decision on application for leave to appeal, or other decisions of the trial court after judgment and in proceedings for review,[76] but an order vacating an order allowing an appeal is a final decision within the statute, and hence appealable.[77]

Decisions in relation to executions, etc. While a judgment or decree directing or authorizing a sale of land or of personal property is usually final and appealable,[78] even though it may permit the subsequent assertion and litigation of claims on the proceeds of sale,[79] it may not be final in so far as it adjudicates rights as to the proceeds.[80] While it has been held that an appeal lies from an order confirming or refusing to confirm an execution or judicial sale,[81] it has also been held that an order vacating a sale[82] and directing a new sale[83] is not appealable.

An order discharging from imprisonment a defendant held under execution against his person on a judgment in a civil action has been held a final judgment and appealable.[84]

Costs. While, as a general rule, an appeal will not lie to review a judgment, order, or decree in so far as it merely awards or denies costs, either because it is not final or because it is a discretionary matter,[85] judgments or orders awarding or denying costs, where the matter of costs is not a matter of

Lupfer v. Carlton, for Use and Benefit of Board of Public Instruction of Dade County, C.C.A.Fla., 64 F.2d 272—Smith v. U. S. ex rel. Gorlo, C.C.A.Ill., 52 F.2d 848—Cuno Engineering Corporation v. Hudson Auto Supply Co., C.C.A.N.Y., 49 F. 2d 654, second case, dismissing appeal, D.C., 49 F.2d 654, first case—Painter v. Union Trust Co., Ohio, 246 F. 240, 158 C.C.A. 400—Willis v. Davis, Ky., 184 F. 889, 107 C.C.A. 211.

D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F. 2d 785, 70 App.D.C. 262.

Not appeal from original order

An appeal from the denial of a motion to vacate an order is not the equivalent of an appeal from the order itself.—Jones v. Thompson, C.C. A.Ark., 128 F.2d 888.

Stranger to judgment

The refusal to set aside judgment on request of stranger to it is a discretionary order, and not appealable. —Lupfer v. Carlton, for Use and Benefit of Board of Public Instruction of Dade County, C.C.A.Fla., 64 F.2d 272.

72. U.S.—Lupfer v. Carlton, for Use and Benefit of Board of Public Instruction of Dade County, supra.

3 C.J. p 525 note 19.

73. U.S.—Newcomb v. Burbank, C.C. N.Y., 159 F. 569.

3 C.J. p 523 note 14.

Proceeding to abate judgment

It has been held in a federal court that a motion by the executor of a person deceased to abate a judgment entered against him in a criminal action in his lifetime, because of his death after it was entered, is an independent proceeding of a civil nature, and the order or judgment therein may be reviewed on error by the United States.—U. S. v. New York Cent. & H. R. R. Co., N.Y., 164 F. 324, 90 C.C.A. 256.

74. U.S.—Nelson v. Meehan, Alaska, 155 F. 1, 83 C.C.A. 597, 12 L.R.A.,N. S., 374.

3 C.J. p 523 note 15.

75. U.S.—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418.

D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F.2d 785, 70 App.D.C. 262.

3 C.J. p 526 note 24.

Motion as independent action

An order denying motion to vacate default judgment entered in conversion action, to set aside entry of default, and to permit answers to be filed, on ground that judgment was obtained without valid service of process and by fraud, was a "final decision" and was appealable, since the motion instituted in effect an independent action or proceeding.—Jackson v. Heiser, C.C.A.Cal., 111 F.2d 310.

76. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari denied 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395—Application of Sorini, C.C.A.Cal., 4 F.2d 802.

3 C.J. p 529 note 57.

77. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395.

78. U.S.—Glinski v. U. S., C.C.A.Ill., 93 F.2d 418—McCrory v. Harp, D. C.La., 31 F.Supp. 354—Painter v. Union Trust Co., Ohio, 246 F. 240, 158 C.C.A. 400—Maxwell v. McDaniels, W.Va., 184 F. 311, 106 C.C.A. 453—Noojin v. U. S., Ala., 164 F. 692, 90 C.C.A. 513.

3 C.J. p 513 note 13.

79. U.S.—Felker v. Southern Trust Co., C.C.A.Ark., 264 F. 798.

42 C.J. p 176 note 15.

However, if the decree or order does not ascertain the amount due, it is not appealable.—Denison & N. R. Co. v. Ranney-Alton Mercantile Co., Ind.T., 104 F. 595, 44 C.C.A. 65.

80. U.S.—Denison & N. R. Co. v. Ranney-Alton Mercantile Co., supra.

81. U.S.—Painter v. Union Trust Co., Ohio, 246 F. 240, 158 C.C.A. 400—Investment Registry v. Chicago & M. E. R. Co., Ill., 212 F. 594, 129 C.C.A. 130, affirming D.C., 206 F. 488.

3 C.J. p 533 note 90.

Successful bidder for property sold under a decree of foreclosure, whether or not previously a party to the suit, becomes a new party in his capacity as purchaser, and as to him a decree or order denying confirmation of the sale is final and appealable.—Investment Registry v. Chicago & M. E. R. Co., supra.

82. U.S.—Dikeman v. Jewel Gold Mining Co., C.C.A.Alaska, 2 F.2d 665.

83. U.S.—Spangelo v. Northern Dakota Ry. Co., C.C.A.N.D., 276 F. 26.

84. U.S.—Stroheim v. Seimel, Ill., 77 F. 802, 23 C.C.A. 467, certiorari denied 17 S.Ct. 993, 166 U.S. 721, 41 L.Ed. 1188.

85. U.S.—Bankers Securities Corporation v. Ritz Carlton Restaurant & Hotel Co. of Atlantic City, C.C.A. N.J., 99 F.2d 51, reversing, D.C., In re Ritz-Carlton Restaurant & Hotel Co., 24 F.Supp. 78—Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., 254 F. 553, 166 C.C.A. 111, modifying, D.C., 231 F. 550—Stallo

discretion but of positive law, or where, although there is a discretion, such discretion is reviewable, have been held appealable as final judgments or orders.[86] In such cases, however, the order or decree, to be appealable, must be a final one.[87] Also, it has been held that an appeal will lie from judgments, orders, or decrees relating to the taxation of costs,[88] except where the matter is within the discretion of the lower court.[89]

Proceedings after remand by appellate court. Ordinarily where a case is decided on appeal by the supreme court or the circuit court of appeals and a mandate issued directing the lower court to enter a specified final judgment or decree and the court, in obedience to the mandate, enters such judgment or decree, no appeal will lie therefrom,[90] nor will an appeal lie for the purpose of having determined points which were previously decided, or might have been decided, in the prior proceeding.[91] It is otherwise, however, if the trial court renders a judgment or decree different from, or not in substantial compliance with, that directed by the appellate court;[92] and, where there have been new proceedings in the case, a second appellate proceeding may be prosecuted with reference to alleged errors committed in the new proceedings,[93] provided the deci-

v. Wagner, N.Y., 245 F. 636, 158 C. C.A. 64.

3 C.J. p 536 note 30, p 470 note 2 [a] (16), (17).

Construction of statute or enforcement of decree involved

A decree in equity relating to costs alone is not ordinarily reviewable, but may be reviewed by an appellate court where it involves the construction of a statute or questions arising in carrying out a decree and mandate of the appellate court.—Stallo v. Wagner, supra.

86. U.S.—Scatcherd v. Love, Tenn., 166 F. 53, 91 C.C.A. 639.

3 C.J. p 537 note 33.

Extraordinary allowances

The discretion which a court of equity has to award or deny costs, and which prevents an order or decree awarding or denying them from being appealable, generally relates only to those costs in a suit which are denominated "general" or properly "costs in the cause," and not such as may be said to be extraordinary, as where the court directs the costs to be paid out of a particular fund in court, where an extra allowance is made without authority, or where, under special circumstances and a particular state of facts, it may direct counsel fees to be paid by a party either generally or out of a particular fund.—Motion Picture Patents Co. v. Steiner, N.Y., 201 F. 63, 119 C.C.A. 401—3 C.J. p 538 note 35.

Allowance before final decree in cause

In a creditors' suit, an order finally adjudicating the right of complainant's counsel to allowance of fees and payment of disbursements is appealable, although the principal action may not have proceeded to final decree.—Central Trust Co. of New York v. United States Light & Heating Co., N.Y., 233 F. 420, 147 C.C.A. 356.

87. U.S.—Colley v. Wolcott, Kan., 187 F. 595, 109 C.C.A. 425.

88. U.S.—U. S. v. Knowles' Estate, C.C.A.Wash., 58 F.2d 718, followed in U. S. v. Ward, C.C.A.Wash., 58 F.2d 1086.

Items included

An appeal lies to the circuit court of appeals on the question as to what items may be included in costs allowed the successful party.—Williams v. Sawyer Bros., C.C.A.N.Y., 51 F.2d 1004, 81 A.L.R. 1527.

To retax costs

Appeal from an order denying a motion to retax costs is properly granted, where the issue presented involves the court's power to make challenged allowances to witnesses.—Vincennes Steel Corporation v. Miller, C.C.A.Miss., 94 F.2d 347, modifying, D.C., Miller v. Vincennes Steel Corporation, 20 F.Supp. 553.

Right to tax challenged

Appeal, in which the court's right to tax costs against United States, not merely an abuse of discretion in so doing, is challenged, is proper.—U. S. v. Knowles' Estate, C.C.A.Wash., 58 F.2d 718, followed in U. S. v. Ward, C.C.A.Wash., 58 F.2d 1086.

89. U.S.—City of Orlando v. Murphy, C.C.A.Fla., 94 F.2d 426—Walker v. Lee, C.C.A.Cal., 71 F.2d 622.

90. U.S.—Long Beach Dock & Terminal Co. v. Pacific Dock & Terminal Co., C.C.A.Cal., 98 F.2d 833, certiorari denied 59 S.Ct. 361, 305 U.S. 659, 83 L.Ed. 427—Wisdom v. Wisdom, C.C.A.Tex., 87 F.2d 12—White v. Bruce, Ala., 109 F. 355, 48 C.C.A. 400.

3 C.J. p 345 note 94, p 541 note 63.

91. U.S.—St. Louis & S. F. R. Co. v. McLelland, Ind.T., 62 F. 118, 10 C. C.A. 302.

3 C.J. p 345 note 89.

Misapprehension of appellate court

Where reviewing court, in reversing judgment for plaintiff, after verdict for defendant on three counts and for plaintiff on fourth count, erroneously supposed that judgment had been rendered for defendant on the first three counts, and hence limited new trial to fourth count only, and stated in opinion that plaintiff was concluded as respects right to verdict on the first three counts, plaintiff could nevertheless appeal from subsequent judgment rendered for defendant on the first three counts, as against contention that issues on the first three counts were "res judicata."—Cochran v. M. & M. Transp. Co., C.C.A.R.I., 110 F.2d 519.

92. U.S.—Morris v. Securities and Exchange Commission, C.C.A., 116 F.2d 896—In re L. P. Larson, Jr., C. C.A.Ill., 275 F. 535.

3 C.J. p 541 note 64.

Determining conformity to mandate

While questions arising on an accounting before a master under an interlocutory decree are not reviewable by appeal until the master's report has been disposed of by the trial court, the master has no authority to open questions adjudicated by the decree, and, where that was entered on a mandate from the appellate court, the question whether it is being correctly carried into execution may be raised in the appellate court, either by appeal from an order of the trial court or by petition for mandamus.—In re L. P. Larson, Jr., Co., C. C.A.Ill., 275 F. 535.

93. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S.Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 98 F.2d 930—Mutual Orange Distributors v. Agricultural Prorate Commission of California, D.C.Cal., 30 F.Supp. 937.

Remand for determination of amount

Where the circuit court of appeals has affirmed a decree except as to one item and remanded the case to the trial court for determination of the amount thereof, the trial court's order pursuant to the mandate making such allowance was held appealable.—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 76

sion appealed from is a final order, judgment, or decree.[94]

Other matters. Dependent on whether or not the judgment, order, or decree has been considered final, or interlocutory within the terms of the statute, various judgments, orders, or decrees have been held to be appealable[95] and other judgments, orders, or decrees have been held not appealable.[96]

An order making a substitution of attorneys finally determines the rights of the attorney for whom the substitution is made, and is one from which he can appeal,[97] but an order vacating an assignment of counsel has been held not appealable, because interlocutory and not final.[98]

An appeal does not lie from an order denying a motion for a directed verdict,[99] and the denial of a motion for a summary judgment has been held not a final order.[1] Where a party moves in the alternative for judgment notwithstanding the verdict and for a new trial, if the trial court grants judgment notwithstanding the verdict and denies the motion for new trial, the party who obtained the verdict may appeal from that judgment.[2]

(3) Decisions in Particular Actions or Proceedings

Judgments, orders, or decrees in various actions and proceedings have been considered as final or not final within the rule relating to appeals therefrom.

In accordance with the general rule, a judgment or order which is not final, although made in a special proceeding, is not appealable.[3] An appeal will generally lie from a final judgment or decree denying partition, or from a judgment or decree entered on the confirmation of the report of commissioners making a partition, and from other final judgments, orders, or decrees in partition suits or proceedings.[4] The right of appeal in probate proceedings is statutory, and no appeal or writ of error will lie unless it is authorized by statute.[5]

F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443.

94. U.S.—Cohen v. Globe Indemnity Co., C.C.A.Pa., 120 F.2d 791.

95. U.S.—New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns v. Hoffman, D.C.Pa., 26 F.Supp. 556, reversed on other grounds, C.C.A., Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, 106 F.2d 204.

Naturalization

An order granting or denying a petition for naturalization has been held a final decision within the statute relating to appellate jurisdiction of the circuit court of appeals.—Tutun v. U. S., Mass., 46 S.Ct. 425, 270 U.S. 568, 70 L.Ed. 738—Neuberger v. U. S., N.Y., 46 S.Ct. 425, 270 U.S. 568, 70 L.Ed. 738, answering certified questions, C.C.A., 9 F.2d 1020, certifying questions, D.C., In re Neuberger, 6 F.2d 387, reversed on other grounds, C.C.A., Neuberger v. U. S., 13 F.2d 541, certiorari granted U. S. v. Neuberger, 47 S.Ct. 243, 273 U.S. 685, 71 L.Ed. 839, and case remanded 47 S.Ct. 334, 273 U.S. 777, 71 L.Ed. 887.

96. U.S.—Securities and Exchange Commission v. Jones, C.C.A.N.Y., 85 F.2d 17, affirming, D.C., 15 F.Supp. 321, certiorari denied Jones v. Securities and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428.

Determining compensation in condemnation proceedings

An order in condemnation proceeding by the United States directing that compensation be determined by the courts rather than by commissioners was "interlocutory," and appeal therefrom would be dismissed where no compensation had been determined when appeal was taken.—U. S. v. 243.22 Acres of Land in Town of Babylon, Suffolk County, C.C.A.N.Y., 129 F.2d 678, affirming, D.C., U. S. v. 243.22 Acres of Land Situate in Village of Farmingdale, Town of Babylon, Suffolk County, State of New York, 41 F.Supp. 469, affirming 41 F.Supp. 805, affirming 43 F.Supp. 561, dismissing appeal 43 F.Supp. 805.

Nunc pro tunc entry of judgment

Where the only appeal taken by defendant was from the district court's memorandum and findings of fact and law, instead of the final decree subsequently entered, and the district court, after the time for appeal had passed, entered a nunc pro tunc order directing that the final decree be entered as of the date the court's memorandum and findings of fact and law were entered, such order is not appealable.—Rardin v. Messick, C.C.A.Ill., 78 F.2d 643, dismissing appeal, D.C., Messick v. Rardin, 6 F. Supp. 200.

Partial summary judgment

The granting of a partial summary judgment is not appealable, especially where the party is given a right to amend.—Leonard v. Socony-Vacuum Oil Co., C.C.A.Wis., 130 F.2d 535, dismissing appeal, D.C., 42 F.Supp. 369.

97. U.S.—The Flush, C.C.A.N.Y., 277 F. 25, certiorari denied Bulk Oil Transports v. Thompson, 42 S.Ct. 184, 257 U.S. 657, 66 L.Ed. 421.

98. U.S.—Giordano v. City of Asbury Park, C.C.A.N.J., 91 F.2d 455, certiorari denied 58 S.Ct. 267, 302 U.S. 745, 82 L.Ed. 576, rehearing denied 58 S.Ct. 363, 302 U.S. 779, 82 L.Ed. 602.

99. U.S.—Borg-Warner Corporation v. Whitney, C.C.A.Mich., 121 F.2d 444.

1. U.S.—Betmar Hats v. Young America Hats, C.C.A.N.Y., 116 F.2d 956—Florian v. U. S., C.C.A.Ill., 114 F.2d 990, reversed on other grounds U. S. v. Florian, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105, rehearing denied 61 S.Ct. 738, 312 U.S. 715, 85 L.Ed. 1145.

2. U.S.—Montgomery Ward & Co. v. Duncan, Ark., 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147, modifying, C.C.A., Duncan v. Montgomery Ward & Co., 108 F.2d 848, reversing, D.C., 27 F.Supp. 4, and certiorari granted Montgomery Ward & Co. v. Duncan, 60 S.Ct. 809, 309 U.S. 650, 84 L.Ed. 1001, motion denied 60 S. Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389.

3. U.S.—Southern R. Co. v. Postal Tel. Cable Co., N.C., 93 F. 393, 35 C.C.A. 366, affirmed 179 U.S. 641, 21 S.Ct. 249, 45 L.Ed. 355.

Proceedings for punishment of party

An order dismissing proceedings for the punishment of a party and his attorney for contempt in violating an injunction, but reprimanding them for taking unfair advantage of a stay, is a "final order," which can be reviewed by the circuit court of appeals.—McCall Co. v. Bladworth, C.C.A.Conn., 290 F. 365.

4. U.S.—East Coast Cedar Co. v. People's Bank of Buffalo, N.C., 111 F. 446, 49 C.C.A. 422.

5. U.S.—Sumi v. Young, Ark., 57 S. Ct. 438, 300 U.S. 251, 81 L.Ed. 627, affirming, C.C.A., 83 F.2d 752, certiorari granted 57 S.Ct. 118, 299 U.

Whether judgments or orders with relation to arrest and bail in civil actions are appealable depends on the finality of the decision,[6] and an order refusing to vacate an order of arrest is not appealable as a final order.[7]

An appeal will lie from a final order or decree in a suit for an injunction as from other final orders or decrees.[8]

Attachment and garnishment. As a rule judgments or orders in attachment proceedings are subject to appeal or writ of error if they are final,[9] but not if they are merely interlocutory,[10] or if they are discretionary.[11] It is generally held that an appeal will not lie from or to an order made before final judgment either dissolving, quashing, or abating an attachment, or vacating a levy thereof,[12] and orders on motions to quash an attachment have sometimes been held not appealable or reviewable because discretionary.[13] If the judgment or order is a final one and not discretionary, appeal will lie as in other cases of final judgment, and in a number of cases orders finally dissolving or discharging an attachment have been held appealable as final judgments in the attachment proceeding, although the main action is still pending.[14] A judgment in favor of intervening or interpleading claimants in an attachment suit is final and appealable.[15]

Receivers, etc. Except as provided by statute, see infra § 291, an appeal will not lie from mere interlocutory, discretionary, or administrative orders or decrees in receivership or trustee proceedings,[16] such as orders as to payments to or by the receiver, etc.[17] However, an appeal will lie from final orders or decrees affecting substantial rights, either of the parties to the proceedings, of the receiver or trustee, or of intervening third persons claiming rights in the property[18] such as an order refusing

S. 534, 81 L.Ed. 393, rehearing denied 57 S.Ct. 667, 300 U.S. 687, 81 L.Ed. 889.

Statutes construed

Statute providing that order made by district court in probate matters should be deemed a judgment subject to appeal in manner provided for appeals was not intended to permit appeals in probate matters without restriction and relieve them of requirements of statute prescribing circuit court's appellate jurisdiction.—Sumi v. Young, supra.

6. U.S.—McLennan v. U. S., C.C.A. Cal., 12 F.2d 507—Crooker v. Knudsen, Cal., 232 F. 857, 147 C.C. A. 51.

7. U.S.—Crooker v. Knudsen, supra.

8. U.S.—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F. 2d 202—Barnet v. Conklin, C.C.A. Mo., 268 F. 177, certiorari denied 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791.

3 C.J. p 553 note 6.

Appeals from interlocutory orders or decrees as to injunctions, see infra § 291.

9. U.S.—McDermott v. Hayes, Mass., 197 F. 129, 116 C.C.A. 553.

3 C.J. p 548 note 11.

10. U.S.—Assets Collecting Co. v. Barnes-King Dev. Co., N.Y., 209 F. 206, 126 C.C.A. 300.

3 C.J. p 548 note 12.

11. U.S.—Assets Collecting Co. v. Barnes-King Dev. Co., supra.

12. U.S.—Atlantic Lumber Co. v. L. Bucki & Son Lumber Co., Fla., 92 F. 864, 35 C.C.A. 59.

3 C.J. p 550 note 22.

13. U.S.—Assets Collecting Co. v. Barnes-King Dev. Co., N.Y., 209 F. 206, 126 C.C.A. 300.

14. U.S.—McDermott v. Hayes, Mass., 197 F. 129, 116 C.C.A. 553.

3 C.J. p 551 note 26.

15. U.S.—McDermott v. Hayes, supra—Salmon v. Mills, Ind.T., 66 F. 32, 13 C.C.A. 372.

16. U.S.—Belleair Hotel Co. v. Mabry, C.C.A.Fla., 109 F.2d 390—Des Arc & Powhatan Bridge Co. v. Austin Bridge Co., C.C.A.Ark., 94 F. 2d 494—Rheinberger v. Security Life Ins. Co. of America, C.C.A. Ill., 72 F.2d 147, dismissing appeal, D.C., 4 F.Supp. 824—Miller v. Pyrites Co., C.C.A.Md., 71 F.2d 804, certiorari denied 55 S.Ct. 121, 293 U.S. 604, 79 L.Ed. 696, rehearing denied 55 S.Ct. 208, 293 U.S. 632, 79 L.Ed. 717, certiorari denied Merrell v. Pyrites Co., 55 S.Ct. 121, 293 U.S. 604, 79 L.Ed. 696, rehearing denied 55 S.Ct. 208, 293 U.S. 632, 79 L.Ed. 717—Christian v. R. Hoe & Co., C.C.A.N.Y., 63 F.2d 218—Grand Beach Co. v. Gardner, C. C.A.Mich., 34 F.2d 836—In re New England Oil-Refining Co., C.C.A. Mass., 9 F.2d 344—Rubaiz v. Tucson Gas, Electric Light & Power Co., C.C.A.Ariz., 280 F. 267—Guardian Trust Co. v. Shedd, Mo., 240 F. 689, 153 C.C.A. 487.

3 C.J. p 578 note 71.

Orders held not appealable

(1) District court's order dismissing nonassenting debenture holder's petition seeking full payment after supreme court had invalidated corporation's reorganization in suit by other debenture holders.—First Nat. Bank of Cincinnati v. Waters, C.C.A. Pa., 82 F.2d 339.

(2) Order making allowances to receivers and their attorneys.—King v. Hiawatha Silk Mills, C.C.A.N.Y., 296 F. 907.

Appeal by receiver

A receiver is not entitled to appeal from an order directing him to deliver property to the intervener, but other parties joined as respondents in the petition were entitled to appeal. —Kirkpatrick v. Eastern Milling & Export Co., C.C.N.J., 135 F. 151.

17. U.S.—Heinze v. Butte & Boston Cons. Min. Co., Mont., 129 F. 337, 64 C.C.A. 15.

3 C.J. p 578 note 72.

Order held appealable

U.S.—Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Philadelphia Co., C.C.A.Pa., 266 F. 1.

18. U.S.—Dan & Russell v. J. D. Halstead Lumber Co., C.C.A.Cal., 103 F.2d 306—Robbins v. Newberg, C.C.A.Alaska, 85 F.2d 754—Gelberg v. Richardson, C.C.A.Cal., 82 F.2d 314—West v. Radio-Keith-Orpheum Corporation, C.C.A.N.Y., 70 F.2d 621—Gaston v. Rutland R. Co., C. C.A.Vt., 35 F.2d 685, certiorari denied 50 S.Ct. 245, 281 U.S. 728, 74 L.Ed. 1145—Franz v. Buder, C.C.A. Mo., 34 F.2d 353—Rector v. U. S., C.C.A.Okl., 20 F.2d 845—Krietmeyer v. Hemphill, C.C.A.Fla., 19 F.2d 513, reversing, D.C., Krietmeyer v. Baldwin Drainage Dist., 13 F.2d 903, certiorari denied Brown v. Krietmeyer, 48 S.Ct. 117, 275 U.S. 496, 72 L.Ed. 392—In re New England Oil-Refining Co., C.C.A.Mass., 9 F.2d 344—Illinois Printing Co. v. Electric Shovel Coal Corporation, D.C.Ill., 20 F.Supp. 181—American Brake Shoe & Foundry Co. v. New York Rys. Co., C.C.A.N.Y., 282 F. 523, affirming, D.C., 282 F. 293, and appeal dismissed Eighth Ave. R. Co. v. Hedges, 43 S.Ct. 704, 262 U. S. 736, 67 L.Ed. 1207—Adler v. Seaman, C.C.A.Mo., 266 F. 828, cer-

to permit a creditor to intervene in proceedings in which a receiver has been appointed,[19] or an order granting a receiver's petition that additional creditors be joined as plaintiffs,[20] authorizing the receivers to sell all the assets.[21]

Other actions or proceedings. The rules previously discussed as to the appealability of final or interlocutory decisions have been applied in various other actions and proceedings.[22] An application for the return of property seized has been held an inde-

tiorari denied Seaman v. Adler, 41 S.Ct. 218, 254 U.S. 655, 65 L.Ed. 460, and appeal dismissed 41 S.Ct. 320, 254 U.S. 621, 65 L.Ed. 443—Gas & Electric Securities Co. v. Manhattan & Queens Traction Corporation, C.C.A.N.Y., 266 F. 625, appeal dismissed Begg v. City of New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946—Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., Mo., 251 F. 789, 164 C.C.A. 23—Texas Co. v. International & G. N. Ry. Co., Tex., 237 F. 921, 150 C.C.A. 571, certiorari denied Central Trust Co. of New York v. Texas Co., 37 S.Ct. 475, 243 U.S. 647, 648, 61 L.Ed. 945—Empire Trust Co. v. Brooks, Tex., 232 F. 641, 146 C.C.A. 567, certiorari denied Brooks v. Empire Trust Co., 37 S.Ct. 480, 243 U.S. 655, 61 L.Ed. 948, and appeal dismissed 38 S.Ct. 133, 245 U.S. 634, 62 L.Ed. 522—Kansas City Southern Ry. Co. v. Lusk, Mo., 224 F. 704, 140 C.C.A. 244—Odell v. H. Batterman Co., N.Y., 223 F. 292, 138 C.C.A. 534, reversing, D.C., 217 F. 305.

3 C.J. p 579 note 76.

Orders held final and appealable

(1) Decree fixing the amount and priority of claims against an insolvent corporation, and ordering a distribution of the fund arising from a sale of its property.—Halsted v. Forest Hill Co., C.C.A.W.Va., 109 F. 820 —Hoffman v. Knox, Va., 50 F. 484, 1 C.C.A. 535.

(2) Order authorizing a railroad receiver to issue certificates and providing that they shall be a lien on the property prior to preëxisting liens.—Bibber-White Co. v. White River Valley Electric R. Co., Vt., 115 F. 786, 53 C.C.A. 282.

(3) Decree in receivership proceeding, which adjudicated the specific amounts of mortgage debts due mortgagee bank, determined tax priorities asserted by the government of Puerto Rico, and provided that all matters not disposed of were reserved for further adjudication, that any party might apply to the court for further relief in respect of matters not specifically provided for, and that for the purpose of making any further order the term of court was continued, was a "final decree" and was appealable in respect of the tax priorities.—People of Puerto Rico v. Bank of Nova Scotia, C.C.A.Puerto Rico, 116 F.2d 379, certiorari denied 62 S.Ct. 56, 314 U.S. 615, 86 L.Ed. 495.

(4) An order of the supreme court of Puerto Rico appointing a receiver for a dissolved corporation was a "final decision" from which an appeal could be taken to the circuit court of appeals under statute, where the supreme court held that all acts done after date of judgment dissolving corporation were legally void, denied asserted right of directors as statutory liquidating trustees to possess and administer corporate property, and authorized receiver without further order of court to borrow money and as security therefor to create liens which would take precedence over property interests of shareholders.—Rubert Hermanos, Inc. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 752, certiorari granted People of Puerto Rico v. Rubert Hermanos, Inc., 62 S.Ct. 61, 314 U.S. 589, 86 L.Ed. 475, certiorari denied Rubert Hermanos, Inc., v. People of Puerto Rico. 62 S.Ct. 80, 314 U.S. 641, 86 L.Ed. 514.

(5) Decree, allowing claim, filed with corporation's receiver, in part, and denying preference thereof, was held "final decree," and hence appealable, although not terminating receivership proceeding.—Gripton v. Richardson, C.C.A.Cal., 82 F.2d 313.

Leave to apply at the foot of a decree in a receivership proceeding for further relief is very usual, and does not prevent the decree from being final.—American Engineering Co. v. Metropolitan By-Products Co., C.C.A. N.Y., 275 F. 40.

19. U.S.—Elkins v. First Nat. Bank, C.C.A.W.Va., 43 F.2d 777—Illinois Steele Co. v. Ramsey, Okl., 176 F. 853, 100 C.C.A. 323.

20. U.S.—Pianta v. H. M. Reich Co., C.C.A.N.Y., 77 F.2d 888.

21. U.S.—Stokes v. Williams, N.J., 226 F. 148, 141 C.C.A. 146, certiorari denied 36 S.Ct. 728, 241 U.S. 681, 60 L.Ed. 1234.

22. U.S.—In re Investigation by Attorney General of U. S., re Alleged Violations of Federal Anti-Trust Laws, C.C.A.N.Y., 104 F.2d 658, denying, D.C., 27 F.Supp. 997.

Ancillary interpleader suit

(1) An order denying a motion to vacate a temporary injunction order made after hearing is appealable only if based on new facts, not on what was essentially a rehearing of the former motion.—Marine Midland Trust Co. of New York v. Eybro Corporation, C.C.A.N.Y., 58 F.2d 165, dismissing appeal, D.C., Marine Midland Trust Co. v. Irving Trust Co., 56 F.2d 385.

(2) In an ancillary interpleader suit, an order denying a motion to vacate an injunction restraining prosecution of a replevin action pendente lite being essentially made on motion for rehearing, notwithstanding the fact, not given as ground for motion, that movent's codefendant, after injunction, made no claim to res, is not appealable.—Marine Midland Trust Co. of New York v. Eybro Corporation, supra.

Arbitration

(1) An order appointing arbitrators is final and appealable.—Krauss Bros. Lumber Co. v. Louis Bossert & Sons, C.C.A.N.Y., 62 F.2d 1004.

(2) Where arbitration agreement contained no provision whereby court under the act would be authorized to enter summary judgment on the arbitrators' award, district court's order directing that arbitration proceed within the district in accordance with agreement was a "final order," and was appealable.—Continental Grain Co. v. Dant & Russell, C.C.A.Or., 118 F.2d 967.

(3) An order setting aside an award made on a submission in pais is usually appealable.—Nolan v. Colorado Cent. Consol. Min. Co., Colo., 63 F. 930, 12 C.C.A. 585.

Partnership settlements

In an action for a partnership settlement, where it was doubtful whether the decree determining the main controversy was final for the purposes of appeal, an appeal from subsequent decree after sale of property, etc., would not be dismissed.—Halfpenny v. Miller, W.Va., 232 F. 113, 146 C.C.A. 305.

Release of property seized under search warrant

A judgment determining the validity of a seizure under a search warrant is final, and reviewable at once.—Atlanta Enterprises v. Crawford, D.C.Ga., 22 F.2d 834.

Grand jury proceeding

(1) While a proceeding before a grand jury should be safeguarded against undue interruption by intermediate appeals notwithstanding a grand jury proceeding has no defined litigants and that none may emerge from it, an order of the district court denying a motion to quash a subpœna duces tecum directing a witness to appear and produce documents before a United States grand jury is not appealable to the circuit

pendent proceeding and the order refusing the return of the property is final and appealable,[23] and a judgment or order refusing to quash a search warrant and to suppress evidence obtained thereunder, where no indictment was pending, has been held reviewable as against a contention that it was not final.[24]

(4) Decisions of Intermediate Appellate Courts

The general rule that only final judgments, orders, and decrees are appealable has been applied in appeals to the circuit court of appeals from decisions of intermediate appellate courts.

To authorize an appeal to the circuit court of appeals from the decision of an intermediate appellate court, the judgment, order, or decree of the latter court must be a final one.[25] The decision of an intermediate appellate court remanding the cause for further proceedings has been held not appealable,[26] especially where the intermediate appellate court passed on only one branch of the case,[27] although a judgment or decree remanding the cause with directions to dismiss the bill has been held appealable.[28]

§ 291. —— Interlocutory Orders or Decrees as to Injunctions and Receivers

Ordinarily an appeal may, under the statutes, be taken to the circuit court of appeals to review interlocutory orders or decrees of the district court granting, continuing, modifying, or refusing an injunction, or refusing an application to dissolve or modify an injunction, and to review an interlocutory order or decree appointing a receiver, or refusing an order to wind up a pending receivership.

Unless such interlocutory order or decree was entered solely in compliance with a mandate of an appellate court having jurisdiction to issue it,[29] or the order is made in a case in which a direct review by the supreme court may be had,[30] an appeal may be taken to the circuit court of appeals, under Judicial Code §§ 128, 129, 28 U.S.C.A. §§ 225, *227*, to review interlocutory orders of the district court granting, continuing, modifying, or refusing an injunction, or refusing an application to dissolve or modify an injunction,[31] and to review an interlocu-

court of appeals as a "final decision."—Cobbledick v. U. S., 60 S.Ct. 540, 309 U.S. 323, 84 L.Ed. 783, affirming, C.C.A., Palmuth v. U. S., 107 F.2d 975, certiorari granted Cobbledick v. U. S., 60 S.Ct. 299, 308 U.S. 547, 84 L.Ed. 460, 461—International Agricultural Corporation v. Pearce, C.C.A.N.C., 113 F.2d 964—Goodman v. U. S., C.C.A.Cal., 108 F.2d 516, 127 A.L.R. 265.

(2) Rule that refusal of a court to quash subpœna duces tecum does not constitute a "final decision" from which appeal will lie cannot be avoided by recasting application for review of order denying motion to quash in form of a motion for preliminary injunction.—International Agricultural Corporation v. Pearce, C.C.A.N.C., 113 F.2d 964.

23. U.S.—In re Mandel, D.C.N.Y., 44 F.Supp. 670.

24. U.S.—Foley v. U. S., C.C.A.Fla., 64 F.2d 1, certiorari denied 53 S.Ct. 796, 289 U.S. 762, 77 L.Ed. 1505.

25. U.S.—Melchior - Armstrong-Dessau Co. of Delaware v. Banco Commercial de Puerto Rico, C.C.A. Puerto Rico, 23 F.2d 91.
3 C.J. p 584 note 21.

Judgment held final

The judgment of an appellate court, directing entry by the trial court of a judgment for a specific sum of money, with a proviso that, if certain judgments should be released by a party, the amount thereof should not be included in the judgment, was held a final judgment.—De Fries v. Scott, C.C.A.Hawaii, 268 F. 952, reversing Scott v. Pilipo, 23 Hawaii 739, and certiorari denied Scott v. De Fries, 41 S.Ct. 538, 256 U.S. 700, 65 L.Ed. 1178.

26. U.S.—Cosme v. Marquez, C.C.A. Puerto Rico, 94 F.2d 908—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 52 F.2d 847—Gay v. Focke, C.C.A. Hawaii, 291 F. 721.
25 C.J. p 962 note 42 [d].

Directing amendment to render decree final

The circuit court of appeals has not the power to direct the supreme court of Hawaii to correct a judgment reversing a decree, so as to set forth what further action would be compatible to the decision, and to direct the lower judge to take such action, so as to render the decree final in form and appealable.—Rumsey v. New York L. Ins. Co., C.C.A. Hawaii, 267 F. 554, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 459.

27. U.S.—People of Puerto Rico v. United Theatres, C.C.A.Puerto Rico, 79 F.2d 671.

28. U.S.—Hawaiian Pineapple Co. v. Saito, C.C.A.Hawaii, 270 F. 749.

29. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528—S. S. Kresge Co. v. Winget Kickernick Co., C.C.A. Minn., 102 F.2d 740, certiorari denied Winget Kickernick Co. v. S. S. Kresge Co., 60 S.Ct. 79, 308 U.S. 557, 84 L.Ed. 468.

30. **Validity of state statute**

(1) Where the unconstitutionality of a state statute is the basis of an application for an injunction, and such application is heard by three judges, an appeal goes direct to the supreme court and cannot be taken to the circuit court of appeals.—Jackson v. Cravens, Fla., 238 F. 117, 151 C.C.A. 193.

(2) No appeal lies from an order of a single district judge acting without jurisdiction in granting an interlocutory injunction where an application is made therefor in a cause involving the validity of state legislation.—Stratton v. St. Louis Southwestern Ry. Co., Ill., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135, reversing, C.C.A., St. Louis Southwestern Ry. Co. v. Emerson, 30 F.2d 322, which reversed, D.C., 27 F.2d 1005—Smith v. Dudley, C.C.A.Ark., 89 F.2d 453.

(3) Cases involving questions directly appealable to supreme court under superseded statutes see 25 C. J. p 969 note 99.

31. U.S.—Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, N.Y., 55 S.Ct. 313, 293 U.S. 449, 79 L.Ed. 583, affirming, C.C.A., 70 F.2d 297, certiorari granted 55 S.Ct. 95, 293 U.S. 541, 79 L.Ed. 647—Enelow v. New York Life Ins. Co., Pa., 55 S.Ct. 310, 293 U.S. 379, 79 L.Ed. 440, reversing, C.C.A., 70 F.2d 728, certiorari granted 55 S.Ct. 70, 293 U.S. 535, 79 L.Ed. 642—Dwinell-Wright Co. v. National Fruit Product Co., Inc., C.C.A.Mass., 129 F.2d 848, affirming, D.C., National Fruit Product Co. v. Dwinell-Wright Co., 42 F. Supp. 1016—Cone v. Rorick, C.C.A. Fla., 112 F.2d 894—McCulloch v. Mutual Life Ins. Co. of New York, C.C.A.W.Va., 109 F.2d 866, revers-

tory order or decree appointing a receiver,[32] or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder.[33] However, a party need not appeal from such interlocutory order or decree in order to protect his rights,[34] since the statute does not take away his right to appeal from a final decree, as shown supra § 289 b.

While the statute is remedial and should be liberally construed, the right to proceed thereunder should be clear,[35] and the statute has been held to

ing, D.C., Mutual Life Ins. Co. of New York v. McCulloch, 31 F.Supp. 800—Gillespie v. Schram, C.C.A. Mich., 108 F.2d 39—Victor Talking Machine Co. v. George, C.C.A.N.J., 105 F.2d 697, certiorari denied George v. Victor Talking Mach. Co., 60 S.Ct. 176, 308 U.S. 611, 84 L.Ed. 511, rehearing denied 60 S.Ct. 294, 308 U.S. 638, 84 L.Ed. 530, and 60 S.Ct. 466, 308 U.S. 693, 84 L.Ed. 1034—Red Star Laboratories Co. v. Pabst, C.C.A.Ill., 100 F.2d 1—In-a-Floor Safe Co. v. Diebold Safe & Lock Co., C.C.A.Cal., 91 F.2d 341—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 86 F.2d 886—Bank of Hamburg v. Tri-State Savings & Loan Ass'n, C.C.A.Ark., 69 F.2d 436—Johnson v. Manhattan Ry. Co., C.C.A.N.Y., 61 F.2d 934, reversing, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331—National Farmers' Bank of Owatonna, Minn. v. Moulton, C.C.A.Minn., 32 F.2d 78, dismissing appeal, D.C., Moulton v. Farmers' Bank of Owatonna, Minn., 27 F.2d 403—Young v. Southern Pac. Co., C.C.A.N.Y., 15 F.2d 280—Habirshaw Electric Cable Co. v. Habirshaw Electric Cable Co., C.C.A.N.Y., 296 F. 875, 43 A.L.R. 1035, certiorari denied Whitman v. Bondholders' Committee of Dec. 1, 1921, 44 S.Ct. 633, 265 U.S. 587, 68 L.Ed. 1193—Field v. Kansas City Refining Co., C.C.A.Mo., 296 F. 800, certiorari denied 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—Harvey v. Harvey, C.C.A.Wis., 290 F. 653—Lyon Lumber Co. v. Livingston Parish School Board, C.C.A.La., 286 F. 114—Mississippi Valley Trust Co. v. Railway Steel Spring Co., Mo., 258 F. 346, 169 C.C.A. 362—Davis v. Hayden, W.Va., 238 F. 734, 151 C.C.A. 584, certiorari denied Hayden v. Davis, 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941—Lawyers Trust Co. v. W. G. Maguire & Co., D.C.Del., 2 F.R.D. 310.

25 C.J. p 967 note 91–p 969 note 99—3 C.J. p 563 note 16 [a].

Appeal to circuit court of appeals from interlocutory orders as to injunctions in patent infringement suits see the C.J.S. title Patents § 335, also 48 C.J. p 410 note 94.

Dismissal of counterclaim

(1) An order dismissing a counterclaim wherein an injunction was asked has been held appealable.—Meeker v. Baxter, C.C.A.N.Y., 83 F.2d 183.

(2) However, it has also been held that such an order was not so clearly a refusal of an interlocutory injunction as to authorize an appeal.—Allied Metal Stamping Co. v. Standard Electric Equipment Corporation, C.C.A.N.Y., 55 F.2d 221, dismissing appeal, D.C., 53 F.2d 646.

(3) An order dismissing a counterclaim set up in an answer in equity is not a final order, nor is it appealable, although the counterclaim asked, inter alia, for injunctive relief, where no injunction was formally asked for, and no question of the right to such relief raised.—Radio Corporation of America v. J. H. Bunnell & Co., C.C.A.N.Y., 298 F. 62.

Restraint imposed by statute

Motion made in district court to vacate subpœnas served on third parties believed to have property of judgment debtor, and indorsed with section of New York statute enjoining such parties from transferring such property, was motion to dissolve injunction, and appeal lay to circuit court of appeals from order denying motion, notwithstanding statute and not court imposed restraint, but appeal did not lie from order denying motion to vacate unindorsed witness subpœnas.—Capital Co. v. Fox, C.C.A.N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming, D.C., 15 F. Supp. 677.

From district court of Puerto Rico

Circuit court of appeals for first circuit was empowered under statute to review only final judgments or decrees on appeal in equity cases from federal district court for Puerto Rico, interlocutory order, such as one granting or dissolving injunction, not being appealable.—Gorbea v. Soto Gras, C.C.A.Puerto Rico, 82 F.2d 634—25 C.J. p 967 note 89 [a].

32. U.S.—Jones v. Haller, C.C.A.N.Y., 123 F.2d 845—Williams Holding Co. v. Pennell, C.C.A.Fla., 86 F.2d 230—Robbins v. Newberg, C.C.A. Alaska, 85 F.2d 754.

25 C.J. p 968 notes 97, 98—3 C.J. p 576 note 68 [a].

Appointment pendente lite within rule

U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A. Mo., 95 F.2d 703.

Refusal to discharge as appointment

Order refusing to discharge receiver appointed by state court before removal was held appealable as having effect of appointment by federal court.—McLeod v. Hayward, C.C.A. Fla., 17 F.2d 900.

Ancillary receiver; trustee-receiver

(1) Statute permitting appeal from interlocutory order "appointing a receiver" refers only to ordinary equity receiver or similar official of statutory authority, and order appointing "trustee-receiver" to enforce double liability of insolvent joint stock land bank's stockholders was held not appealable, being neither final order nor interlocutory order "appointing a receiver."—Martin v. Partridge, C.C.A.Mo., 64 F.2d 591.

(2) In suit by creditors to enforce statutory liability of resident shareholders of foreign joint stock land bank, decree appointing ancillary receiver was held appealable under statute allowing appeals from certain interlocutory decrees, since district court lacked power to appoint receiver, and receiver actually appointed had only chancery powers.—Holmberg v. Carr, C.C.A.N.Y., 86 F.2d 727.

33. U.S.—Lincoln Printing Co. v. Middle West Utilities Co., C.C.A. Ill., 74 F.2d 779, affirming, D.C., 6 F.Supp. 663, and certiorari denied Pollak v. McCulloch, 55 S.Ct. 659, 295 U.S. 746, 79 L.Ed. 1691.

34. U.S.—Victor Talking Mach. Co. v. George, C.C.A.N.J., 105 F.2d 697, certiorari denied George v. Victor Talking Mach. Co., 60 S.Ct. 176, 308 U.S. 611, 84 L.Ed. 511, rehearing denied 60 S.Ct. 294, 308 U.S. 638, 84 L.Ed. 530, and 60 S.Ct. 466, 308 U.S. 693, 84 L.Ed. 1034.

35. U.S.—Martin v. Partridge, C.C.A.Mo., 64 F.2d 591.

25 C.J. p 967 note 88.

Hearing

(1) Circuit court of appeals was held to have jurisdiction of appeal from order denying ex parte application for rule nisi for an injunction pendente lite with stay meanwhile, as the court denied everything that could have been granted at a hearing.—Association for Legalizing American Lotteries v. Goldman, C.C.A.N.Y., 85 F.2d 67.

(2) Ex parte order granting, on emergency, temporary receivership, and providing for early hearing touching its permanency, is not appealable, but, if ex parte order appoints permanent receivers deliberately and finally with no provision

apply only to injunctions issued in equity.[36] Although, where an injunction was inadvertently included in an interlocutory decree, it was held that an appeal might be taken therefrom,[37] an order or decree has been held not appealable where plaintiff did not seek an injunction, and no hearing on proceedings for injunction was had,[38] or where the injunction did not materially affect the party's interests,[39] or where it was wholly surplusage and without legal effect.[40] A fortiori, an order of decree is not appealable where it contains no provision restraining or enjoining anyone.[41]

Although a mere temporary stay imposed by the district court as part of its control over the cause pending before it has been held not appealable,[42] a judgment or order transferring a count to another docket has been held appealable as an interlocutory judgment granting an injunction restraining further proceedings at law;[43] and, when an order is made requiring or refusing to require that an equitable defense shall first be tried, the court in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted on a bill of complaint in a separate suit for the same purpose, and such order, although interlocutory, is appealable.[44] Also, a decree vacating an order transfer-

for hearing, there is refusal in advance to hear, which is sufficient to justify appeal.—Marion Mortg. Co. v. Edmunds, C.C.A.Fla., 64 F.2d 248.

(3) Ex parte order appointing receivers and subsequent order refusing to complete hearing on motion to vacate previous order and continuing case until return of another judge was held appealable as operating to reappoint receivers "upon a hearing" within statute.—Marion Mortg. Co. v. Edmunds, supra.

(4) However, the phrase has been held not used in a technical sense, and an appeal lies from an order appointing a receiver, although the hearing was ex parte and without notice to defendant, the purpose of the statute being to give the right of appeal to a defendant whose property is taken from his possession by such order.—Joseph Dry Goods Co. v. Hecht, Ga., 120 F. 760, 57 C.C.A. 64.

(5) Where a receiver was appointed ex parte and without notice or a hearing, an appeal lies from a subsequent order confirming such appointment, made on the hearing of an application by defendant for the discharge of the receiver, such order being the first adjudication of the question of the propriety of such appointment made "upon a hearing" and by a fair construction of the statute the one from which it is intended to give the right of appeal.—Pacific Northwest Packing Co. v. Allen, Wash., 109 F. 515, 48 C.C.A. 521.

Denial of motion to remand
On appeal from order enjoining complainant from proceeding further in state court after removal to federal court where trial court had also denied motion to remand, removability of cause is subject to review.—Cray, McFawn & Co. v. Hegarty, Conroy & Co., C.C.A.N.Y., 85 F.2d 516.

Refusal to remove attorneys
The statute does not authorize an appeal from an order refusing to remove attorneys appearing for a codefendant.—Croissant v. Adams, C.C.A. Ill., 27 F.2d 48.

36. U.S.—Stark v. Texas Co., C.C.A. Fla., 88 F.2d 182.
Review of interlocutory decisions in admiralty see Admiralty § 171 j.

37. U.S.—Sheldon v. Moredall Realty Corporation, C.C.A.N.Y., 95 F.2d 48, modifying, D.C., 22 F.Supp. 91.

38. U.S.—Cleveland Trust Co. v. Simmons Mfg. Co., C.C.A.Ohio, 66 F.2d 134.

Consent of one defendant
Where one defendant consented to interlocutory decree providing for injunction and for reference to master for accounting, order denying motion for enlargement of order of reference to permit showing that action of defendant, not served, in defense of suit was such as to constitute estoppel in any other suit involving same parties and issues was not appealable under statute regulating appeals in injunction proceeding.—Cleveland Trust Co. v. Simmons Mfg. Co., supra.

39. U.S.—Bennell Realty Co. v. E. G. Shinner & Co., C.C.A.Wis., 74 F.2d 491.

40. U.S.—Highway Engineering & Construction Co. v. Hillsborough County, Fla., C.C.A.Fla., 67 F.2d 439, certiorari denied 54 S.Ct. 373, 290 U.S. 705, 78 L.Ed. 605.

41. U.S.—Credit Bureau of San Diego v. Petrasich, C.C.A.Cal., 97 F.2d 65.

Denying dismissal of pleading
An order denying a motion to dismiss a bill in a suit for an injunction has been held not appealable.—Reed v. Lehman, C.C.A.N.Y., 91 F.2d 919.

42. U.S.—Triangle Conduit & Cable Co. v. National Electric Products Corporation, C.C.A.Mich., 127 F.2d 524—Cover v. Schwartz, C.C.A.N.Y., 112 F.2d 566, dismissing appeal, D.C., 30 F.Supp. 261.

Denial of motion to stay ancillary interpleader suit was held not appealable because such a stay is not an injunction within the statute.—Marine Midland Trust Co. of New York v. Eybro Corporation, C.C.A.N.Y., 58 F.2d 165, dismissing appeal, D.C., Marine Midland Trust Co. of New York v. Irving Trust Co., 56 F.2d 385.

43. U.S.—Modin v. Matson Nav. Co., C.C.A.Cal., 128 F.2d 194.

44. U.S.—Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, N.Y., 55 S.Ct. 313, 293 U.S. 449, 79 L.Ed. 583, affirming, C.C.A., 70 F.2d 297, certiorari granted 55 S.Ct. 95, 293 U.S. 541, 79 L.Ed. 647—Enelow v. New York Life Ins. Co., Pa., 55 S.Ct. 310, 293 U.S. 379, 79 L.Ed. 440, reversing, C.C.A., 70 F.2d 728, certiorari granted 55 S.Ct. 70, 293 U.S. 535, 79 L.Ed. 642—Raytheon Mfg. Co. v. Radio Corporation of America, C.C.A.Mass., 76 F.2d 943, certiorari granted Radio Corporation of America v. Raytheon Mfg. Co., 56 S.Ct. 99, 296 U.S. 557, 80 L.Ed. 393, and affirmed 56 S.Ct. 297, 296 U.S. 459, 80 L.Ed. 327, followed in, C.C.A., Berning v. Louisville & N. R. Co., 92 F.2d 997.

Dismissal of counterclaim
Where defendant in action at law filed a counterclaim of equitable character, order dismissing counterclaim without hearing on merits was held equivalent to denial of application to stay lawsuit and hence appealable.—Kneberg v. H. L. Green Co., C.C.A.Ill., 89 F.2d 100.

Defense immaterial
Question whether terms of contract sued on prevented federal court from decreeing specific performance of arbitration agreement was held immaterial in determining whether circuit court of appeals had jurisdiction of appeal from stay order based on special defense setting up arbitration agreement.—Shanferoke Coal & Supply Corporation v. Westchester Service Corporation, N.Y., 55 S.Ct. 313, 293 U.S. 449, 79 L.Ed. 583, affirming, C.C.A., 70 F.2d 297, certiorari granted 55 S.Ct. 95, 293 U.S. 541, 79 L.Ed. 647.

Rule in earlier cases
(1) In some early cases, a contrary conclusion was reached.—Cox v. Graves, Knight & Graves, C.C.A.Va., 55 F.2d 217—U. S. v. Amalgamated

ring a case from law to equity has been held appealable as an interlocutory order dissolving an injunction.[45] While an order merely transferring a cause from the equity docket to the law docket has been held not appealable,[46] where the equity suit is for an injunction, an order transferring it to the law side of the court, thereby in effect denying the injunction, has been held appealable.[47]

An appeal will not lie from a temporary restraining order granted without hearing, incident to an order to show cause why a preliminary injunction should not be granted,[48] or from an order refusing to dissolve a temporary restraining order,[49] but an appeal will lie from an order on a hearing of both sides, in effect granting a preliminary injunction, although in terms continuing a temporary restraining order.[50]

An interlocutory order vacating an order appointing a receiver is not appealable,[51] nor is an order denying a motion to vacate a receivership appealable as one refusing to wind up a pending receivership,[52] and an order authorizing a receiver to lease property has been held not an order refusing to take appropriate steps to wind up a pending receivership.[53]

§ 292. Procedure in General

a. General principles
b. Presentation and reservation in lower court of grounds of review
c. Parties

a. General Principles

The procedure on appeal to the circuit courts of appeals is governed exclusively by the acts of congress and the rules and practice of the federal courts.

The circuit courts of appeals are, with respect to the review of judgments and decrees, controlled exclusively by the acts of congress and the rules and practice of the federal courts without regard to state statutes or practice.[54] Where the judgment or order from which the appeal is attempted is criminal in nature, appeal under the criminal appeals rules is proper and necessary.[55]

b. Presentation and Reservation in Lower Court of Grounds of Review

(1) Necessity and sufficency in general
(2) Objections and motions and rulings thereon
(3) Exceptions
(4) Motions for new trial

(1) Necessity and Sufficiency in General

As a general rule, questions not raised and properly preserved for review in the trial court will not be considered on review in the circuit court of appeals, and a party on review cannot assume an attitude inconsistent with, or different from, that taken by him at the trial.

Sugar Co., C.C.A.Utah, 48 F.2d 156—Childs v. Ultramares Corporation, C.C.A.N.Y., 40 F.2d 474—Weaver v. Atlas Oil Co., C.C.A.La., 39 F.2d 847—Emlenton Refining Co. v. Chambers, C.C.A.Pa., 14 F.2d 104, certiorari denied 47 S.Ct. 240, 273 U.S. 731, 71 L.Ed. 863.

(2) In one case it was held that whether appeal may be taken immediately from refusal to stay proceedings at law where defendant interposes statutory equitable plea is matter within rule-making power given by statute, and, no rule having been promulgated as to whether appeal may be taken immediately from refusal to stay proceedings at law on defendant's filing statutory equitable plea, matter of allowing and recognizing such appeal lies within exercise of court's discretion until rule is established.—American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., C.C.A.Fla., 62 F.2d 1018, certiorari denied 53 S.Ct. 595, 289 U.S. 735, 77 L.Ed. 1483.

45. U.S.—New York Life Ins. Co. v. Panagiotopoulos, C.C.A.Mass., 80 F.2d 136.

46. U.S.—Highway Engineering & Construction Co. v. Hillsborough County, Fla., C.C.A.Fla., 67 F.2d 439, certiorari denied 54 S.Ct. 373, 290 U.S. 705, 78 L.Ed. 605.

47. U.S.—Taylor v. Spurway, C.C.A.Fla., 72 F.2d 97—King Mechanism & Engineering Co. v. Western Wheeled Scraper Co., C.C.A.Ill., 59 F.2d 546—Banco Mercantil Americano de Cuba v. Taggart Coal Co., C.C.A.Ga., 276 F. 388.

48. U.S.—Schainmann v. Brainard, C.C.A.Cal., 8 F.2d 11.

49. U.S.—Pack v. Carter, Cal., 223 F. 638, 139 C.C.A. 184.

50. U.S.—McGonigle v. Foutch, C.C.A. Mo., 51 F.2d 455—Schainmann v. Brainard, C.C.A.Cal., 8 F.2d 11—Western Union Telegraph Co. v. United States & Mexican Trust Co., Kan., 221 F. 545, 137 C.C.A. 113.

51. U.S.—U. S. v. Otley, C.C.A.Or., 116 F.2d 958.

52. U.S.—Grand Beach Co. v. Gardner, C.C.A.Mich., 34 F.2d 836.

Where no opportunity to appeal from appointment

Order refusing motion to vacate federal court receivership was held appealable, where party was first brought into court after receiver's appointment.—Mitchell v. Lay, C.C.A. Cal., 48 F.2d 79, certiorari denied Lay v. Mitchell, 51 S.Ct. 656, 283 U.S. 864, 75 L.Ed. 1469.

53. U.S.—Belleair Hotel Co. v. Mabry, C.C.A.Fla., 109 F.2d 390.

54. U.S.—U. S. v. Marsh, C.C.A.Va., 108 F.2d 558, denying rehearing 107 F.2d 173—U. S. v. Rayburn, C.C.A. Iowa, 91 F.2d 162.

25 C.J. p 971 notes 31, 32.

55. U.S.—McCrone v. U. S., C.C.A. Mont., 100 F.2d 322, certiorari granted 59 S.Ct. 591, 306 U.S. 625, 83 L.Ed. 1029, affirmed 59 S.Ct. 685, 307 U.S. 61, 83 L.Ed. 1108.

Appeals from district court of Hawaii

The manner of taking an appeal to the circuit court of appeals from the United States district court for the territory of Hawaii is not controlled by the Criminal Appeals Rules governing appeals from the district courts of the United States, but is controlled by special statutory provision, 28 U.S.C.A. §§ 225, 230.—Mookini v. U. S., Hawaii, 58 S.Ct. 543, 303 U.S. 204, 82 L.Ed. 748, reversing C.C.A., 92 F.2d 126, certiorari granted 58 S.Ct. 53, 302 U.S. 204, 82 L.Ed. 748, and conformed to, C.C.A., 95 F.2d 960.

Subject to some exceptions and limitations,[56] it is the general rule that questions, of whatever nature, not raised and properly preserved for review in the trial court will not be noticed on appeal,[57]

56. U.S.—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30.
3 C.J. p 742 note 99.

Particular exceptions or limitations

(1) As the rule that questions not raised below will not be considered on appeal is for the purpose of orderly administration and the attainment of justice, whether or not the court will follow it is ordinarily a question of administration.—American Legion Post No. 90 of Village of Mamaroneck v. First Nat. Bank & Trust Co. of Mamaroneck, C.C.A.N.Y., 113 F.2d 868.

(2) The rule will be disregarded where it is necessary to do so in order to protect the fundamental rights of the parties or the error is of such a nature that justice requires that it be corrected.—Helvering v. Rubinstein, C.C.A., 124 F.2d 969—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 114 F.2d 526, certiorari denied 61 S. Ct. 141, 311 U.S. 701, 85 L.Ed. 455—Nichols v. Republic Iron & Steel Co., C.C.A.Ala., 89 F.2d 927—Sulzbacher v. Continental Casualty Co., C.C.A. Mo., 88 F.2d 122—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30—Trapp v. Metropolitan Life Ins. Co., C.C.A.Mo., 70 F.2d 976, affirmed 72 F. 2d 374, certiorari denied Metropolitan Life Ins. Co. v. Trapp, 55 S.Ct. 112, 293 U.S. 596, 79 L.Ed. 690—Freeman v. U. S., C.C.A.Colo., 4 F.2d 13.

(3) The right to disregard the rule that an appellate court will not ordinarily consider issues of law or fact not raised below is a right to prevent a clear miscarriage of justice apparent from the record and not a right to afford a defeated litigant another day in court because he thinks that if he were given opportunity to try his case again on a different theory he might prevail.—Helvering v. Rubinstein, C.C.A., 124 F.2d 969.

(4) Questions of a general public nature affecting the interest of the state at large may be determined by the circuit court without having been raised in the trial court.—Primeau v. Granfield, N.Y., 193 F. 911, 114 C.C.A. 549, certiorari denied 32 S.Ct. 839, 225 U.S. 708, 56 L.Ed. 1267.

(5) Since the reason for the rule is to give an opportunity to avoid the effect of an objection, the rule is not applicable where that could not have been done, even though the question had been seasonably raised in the court below.—McConnell v. Dennis, Kan., 153 F. 547, 82 C.C.A. 501.

(6) An objection relating to the jurisdiction of the court over the subject matter may be raised for the first time on appeal, as the parties cannot by consent or waiver vest a court with such jurisdiction.—Caesar v. Burgess, C.C.A.Okl., 103 F.2d 503—Atlantic Brewing Co. v. William J. Brennan Grocery Co., C.C.A.Mo., 79 F.2d 45—The Taigen Maru, C.C.A. Wash., 73 F.2d 922, certiorari granted Van Der Weyde v. Ocean Transport Co., 56 S.Ct. 177, 296 U.S. 567, 80 L. Ed. 401, reversed on other grounds 56 S.Ct. 392, 297 U.S. 114, 80 L.Ed. 515—Tower Hill Connellsville Coke Co. of West Virginia v. Piedmont Coal Co., C.C.A.W.Va., 33 F.2d 703, rehearing denied 35 F.2d 179, certiorari denied 50 S.Ct. 157, 280 U.S. 607, 74 L.Ed. 650—Highway Const. Co. v. McClelland, C.C.A.Mo., 14 F.2d 406, rehearing denied 15 F.2d 187, and certiorari denied McClelland v. Highway Const. Co., 47 S.Ct. 570, 273 U.S. 765, 71 L.Ed. 881—25 C.J. p 785 note 63.

57. U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., Puerto Rico, 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081, reversing, C.C.A., Hermanos, Inc., v. People of Puerto Rico, 118 F.2d 752—Reconstruction Finance Corporation v. Sun Lumber Co., C.C.A.W.Va., 126 F.2d 731, affirming, D.C., In re Eakin Lumber Co., 39 F.Supp. 787—Prudential Ins. Co. of America v. Carlson, C.C.A.Kan., 126 F.2d 607—John R. Alley & Co. v. Federal Nat. Bank of Shawnee, Shawnee County, Okl., C.C.A.Okl., 124 F.2d 995—Lyons v. U. S., C.C.A.Ohio, 123 F. 2d 507—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892—Barnard-Curtiss Co. v. Maehl, C.C. A.Mont., 117 F.2d 7—National Fire Ins. Co. of Hartford, Conn. v. School Dist. No. 68, Sequoyah County, C.C.A.Okl., 115 F.2d 232—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 114 F.2d 526, certiorari denied 61 S.Ct. 141, 311 U.S. 701, 85 L.Ed. 455—McGee v. Nee, C.C. A.Mo., 113 F.2d 543—Falstaff Brewing Corporation v. Iowa Fruit & Produce Co., C.C.A.Neb., 112 F.2d 101—Helvering v. Hormel, C.C.A., 111 F.2d 1, certiorari granted Hormel v. Helvering, 61 S.Ct. 35, 311 U.S. 626, 85 L.Ed. 397, affirmed 61 S.Ct. 719, 312 U.S. 552, 85 L.Ed. 1037—Borchard v. California Bank, C.C.A.Cal., 107 F.2d 96, certiorari granted 60 S.Ct. 721, 309 U.S. 648, 84 L.Ed. 1000, reversed on other grounds 60 S.Ct. 957, 310 U.S. 311, 84 L.Ed. 1222, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472—Hutchinson v. Fidelity Inv. Ass'n, C.C.A.W.Va., 106 F.2d 431, 133 A.L.R. 1061, affirming, D.C., McCammon v. Fidelity Inv. Ass'n, 26 F.Supp. 117—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A.Neb., 101 F.2d 987—Supreme Forest Woodman Circle v. City of Belton, C.C.A.Tex., 100 F.2d 655—Millers' Mut. Fire Ins. Ass'n of Illinois v. Warroad Potato Growers Ass'n, C.C.A.Minn., 94 F.2d 741—Potts v. City of Utica, C.C.A.N.Y., 86 F.2d 616—Coopman v. Citizens State Bank of Omak, C.C.A.Wash., 85 F.2d 799, denying rehearing and supplementing opinion 83 F.2d 815, certiorari denied 57 S.Ct. 431, 300 U.S. 655, 81 L.Ed. 865—Hall v. Ætna Life Ins. Co., C.C.A.Ark., 85 F.2d 447—New York Life Ins. Co. v. Wolf, C.C.A.S.D., 85 F.2d 162, certiorari denied 57 S.Ct. 316, 299 U.S. 614, 81 L.Ed. 453—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 945, denying rehearing 82 F.2d 541, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—Sholtz v. U. S. ex rel. Ben Hur Life Ass'n, C.C.A.Fla., 82 F.2d 780—Century Furniture Co. v. Bernhard's, C.C.A.Cal., 82 F.2d 706—Rohrback v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 82 F.2d 291—U. S. v. Bollman, C.C.A.Iowa, 81 F.2d 1009—Deutser v. Marlboro Shirt Co., C.C.A.Md., 81 F.2d 139, affirming, D.C., Union Central Life Insurance Co. v. Deutser, 13 F. Supp. 313—Liberty Baking Co. v. Kellum, C.C.A.Pa., 79 F.2d 931—Atlantic Brewing Co. v. William J. Brennan Grocery Co., C.C.A.Mo., 79 F.2d 45—Johnstone v. Commissioner of Internal Revenue, C.C.A.Cal., 76 F.2d 55, certiorari denied 56 S. Ct. 89, 296 U.S. 578, 80 L.Ed. 408—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S., for Use and Benefit of Belmont v. Mittry Bros. Const. Co., 4 F.Supp. 216—Caigan v. Plibrico Jointless Firebrick Co., C.C.A.Mass., 74 F.2d 316, certiorari denied 55 S.Ct. 645, first case, 295 U.S. 733, 79 L.Ed. 1682, and 55 S.Ct. 645, second case, 295 U.S. 734, 79 L.Ed. 1682—Commercial Nat. Bank of Philadelphia v. Reber, C.C.A.Pa., 74 F.2d 301—Salt Bayou Drainage Dist. v. Futrall, C.C.A.Ark., 72 F.2d 940—McCullough v. Clinch-Mitchell Const. Co., C.C.A.Mo., 71 F.2d 17, certiorari denied Clinch-Mitchell Const. Co. v. McCullough, 55 S.Ct. 96, 293 U.S. 582, 79 L.Ed. 678—Trapp v. Metropolitan Life Ins. Co., C.C.A.Mo., 70 F.2d 976, affirmed 72 F.2d 374, certiorari denied Metropolitan Life Ins. Co. v. Trapp, 55 S.Ct. 112, 293 U.S. 596, 79 L.Ed. 690—U. S. v. Suomy, C.C.A.Or., 70 F.2d 542—U. S. v. Todd, C.C.A.Or., 70 F.2d

regardless of consent or waiver by the parties and notwithstanding any stipulations to the contrary into which they may have entered.[58] Accordingly review may not be had in the circuit court of appeals of particular questions or matters not raised in the court below, as with respect to the amount of recovery or extent of relief,[59] causes of action or grounds of recovery,[60] grounds of defense or opposition,[61] and as with respect to or with re-

540—Mandel Bros. v. Henry A. O'Neil, Inc., C.C.A.S.D., 69 F.2d 452—Strouse v. Union Indemnity Co., C.C.A.N.Y., 67 F.2d 528—Ford Motor Co. v. Chas. A. Myers Mfg. Co., C.C.A.Ohio, 64 F.2d 942—Standard Oil Co. of Kentucky v. Noakes, C. C.A.Ky., 59 F.2d 897—H. E. Wolfe Const. Co. v. Fersner, C.C.A.S.C., 58 F.2d 27—Williams v. Bank of America Nat. Ass'n, C.C.A.N.Y., 55 F.2d 884—Heidbrink v. McKesson, C.C.A.Ohio, 53 F.2d 321—Buechle v. Montgomery, C.C.A.Mo., 45 F.2d 987—Ex parte Keizo Kamiyama, C.C. A.Cal., 44 F.2d 503—American Surety Co. of New York v. Republic Casualty Co., C.C.A.Minn., 42 F.2d 807—Clarksburg Trust Co. v. Commercial Casualty Ins. Co., C.C.A.W. Va., 40 F.2d 626—Kansas City Southern Ry. Co. v. Littlefield, C. C.A.Okl., 37 F.2d 707—Wolfberg v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A.Mo., 36 F. 2d 171—Harding v. Federal Nat. Bank, C.C.A.Mass., 31 F.2d 914—Weinstein v. Laughlin, C.C.A.Mo., 21 F.2d 740—Hecht v. Alfaro, C.C. A.Okl., 10 F.2d 464, affirming, D.C., 4 F.2d 255—Geiger v. Tramp, C.C. A.Iowa, 291 F. 353—H. W. Paine & Co. v. Manistee Tanning Co., C.C.A. Mich., 279 F. 340—United Mine Workers of America v. Coronado Coal Co., Ark., 258 F. 829, 169 C.C. A. 549, reversed on other grounds 42 S.Ct. 570, 359 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition for rehearing granted 42 S.Ct. 587—Interstate Compress Co. v. Agnew, Okl., 256 F. 655, 168 C.C.A. 49, denying rehearing 255 F. 508, 168 C.C. A. 199—Turner v. Schaeffer, Ohio, 249 F. 654, 161 C.C.A. 564—Towle v. Pullen, Ill., 238 F. 107, 151 C.C. A. 183—Kleman v. Anheuser-Busch Brewing Ass'n, Pa., 237 F. 993, 150 C.C.A. 643—Continental Public Works Co. v. Stein, N.Y., 232 F. 559, 146 C.C.A. 517—J. H. Lane & Co. v. Maple Cotton Mills, S.C., 226 F. 692, 141 C.C.A. 448, reversed on other grounds J. H. Lane & Co. v. Maple Cotton Mills, 232 F. 421, 146 C.C.A. 415—Federal Mining & Smelting Co. v. Hodge, Idaho, 213 F. 605, 130 C.C.A. 197.

D.C.—McLean v. Burkinshaw, 107 F. 2d 665, 71 App.D.C. 107, certiorari denied 60 S.Ct. 616, 309 U.S. 670, 84 L.Ed. 1016.

3 C.J. p 689 note 41, p 692 note 44.

Particular actions or claims

(1) Cases involving the title, ownership, possession, or right to possession of property, real or personal.—In re Advance Oil Co., C.C.A.Pa., 1 F. 2d 442, affirming, D.C., 1 F.2d 440, certiorari denied Franklin Trust Co. v. Advance Oil Co., 45 S.Ct. 197, 266 U.S. 631, 60 L.Ed. 478—Commerce Trust Co. v. Chandler, C.C.A.Mass., 284 F. 737, reversing, D.C., William H. Haskell Mfg. Co. v. Nelson Blower & Furnace Co., 275 F. 206—3 C.J. p 713 note 99, p 714 note 1, p 715 note 14.

(2) Claims in bankruptcy.—Minnich v. Gardner, Pa., 54 S.Ct. 567, 292 U.S. 48, 78 L.Ed. 1116, reversing, C. C.A., 66 F.2d 561, certiorari granted 54 S.Ct. 378, 291 U.S. 654, 78 L.Ed. 1047.

(3) Claims under the internal revenue laws.—Hatch v. Morosco Holding Co., C.C.A.N.Y., 50 F.2d 138, affirming, D.C., 34 F.2d 579, 138, certiorari denied Irving Trust Co. v. U. S., 52 S.Ct. 42, 284 U.S. 668, 78 L.Ed. 565.

(4) Actions involving railroads.—Morgan's Louisiana & T. R. & S. S. Co. v. Issac Joseph Iron Co., Ohio, 243 F. 149, 156 C.C.A. 15.

(5) Actions involving insurance claims.—Golightly v. New York Life Ins. Co., C.C.A.Ark., 85 F.2d 122.

(6) The text rule generally applies in chancery cases as well as at law.—Columbia Pictures Corporation v. Lawton-Byrne-Bruner Ins. Agency Co., C.C.A.Mo., 73 F.2d 18—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918, modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551.

(7) It has been held, however, that in an equity case which is tried on appeal de novo it is not necessary that every reason for or against a decretal order should be presented to the trial court, and if the pleadings warrant the contention and the matter is raised before the appellate court it will consider it.—National Bank of Commerce v. Rockefeller, Mo., 174 F. 22, 98 C.C.A. 8—Business Men's Acc. Ass'n of America v. Schiefelbusch, C.C.A.Okl., 262 F. 354.

Questions sufficiently raised

U.S.—Molesphini v. Bruno, D.C.N.Y., 26 F.Supp. 595.

58. U.S.—U. S. v. Winkle Terra Cotta, C.C.A.Mo., 110 F.2d 919.

59. U.S.—Prudential Ins. Co. of America v. Carlson, C.C.A.Kan., 126 F.2d 607—American Home Fire Assur. Co. v. Hargrove, C.C.A.Okl., 109 F.2d 86—Harrison v. Pullman Co., C.C.A.Mo., 68 F.2d 826—Potter v. Cincinnati, I. & W. R. Co., C.C.A. Ill., 272 F. 688.

3 C.J. p 694 note 52.

In actions involving an accounting, objections to the accounting or to the relief granted cannot, as a rule, be urged for the first time on appeal.—Ruggles v. Buckley, C.C.A. Mich., 23 F.2d 230.

60. U.S.—Buffington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692—Van Norden v. Chas. R. McCormick Lumber Co. of Delaware, C.C.A.Or., 17 F.2d 568, certiorari denied 47 S.Ct. 768, 274 U.S. 758, 71 L.Ed. 1337—Elkan v. Sebastian Bridge Dist., C.C.A.Ark., 291 F. 532.

Set-off or counterclaim

(1) A set-off or counterclaim cannot be set up or relied on on appeal where it was not pleaded or otherwise urged in the court below.—Williams v. Bank of America Nat. Ass'n, C.C.A.N.Y., 55 F.2d 884—American Trading Co. v. Steele, C.C.A. China, 274 F. 774.

(2) Nor, as a rule, can objections to a set-off counterclaim, recoupment, or recovention be urged for the first time on appeal.—Clifton v. Tomb, C. C.A.W.Va., 21 F.2d 893.

3 C.J. p 713 note 97.

61. U.S.—Maloney v. Brandt, C.C.A. Ill., 123 F.2d 779—Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, C.C.A.Ind., 113 F.2d 217, certiorari granted City of Indianapolis v. Chase Nat. Bank of City of New York, 61 S.Ct. 73, 311 U.S. 636, 85 L.Ed. 405, Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, 61 S.Ct. 74, 311 U.S. 636, 85 L.Ed. 405, and Chase Nat. Bank of City of New York v. Indianapolis Gas Co., 61 S.Ct. 74, 311 U.S. 636, 85 L.Ed. 405, reversed on other grounds 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47—Nakdimen v. Baker, C.C. A.Ark., 111 F.2d 778, certiorari denied 61 S.Ct. 22, 311 U.S. 665, 85 L.Ed. 427, rehearing denied 61 S.Ct. 130, 311 U.S. 726, 85 L.Ed. 473—Robbins v. Winters Creek Canal Co., C.C.A.Neb., 109 F.2d 849—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—Northwestern Mut. Life Ins. Co. v. Cohn Bros., C.C.A.Or., 102 F.2d 74—Davilla v. Brunswick-Balke Collender Co. of New York, C.C.A. N.Y., 94 F.2d 567, modifying D.C., 19 F.Supp. 819, certiorari denied 58 S.Ct. 1040, 304 U.S. 572, 82 L.Ed. 1536—St. Paul Fire & Marine Ins.

lation to constitutional questions.[62] It also follows that a party, on review, cannot assume an at-

Co. v. Kaufman Compress Co., C.C. A.Tex., 93 F.2d 156, denying rehearing, D.C., 94 F.2d 744, certiorari denied 58 S.Ct. 751, 303 U.S. 653, 82 L.Ed. 1113—Higgins v. Ledo, C.C.A. N.H., 66 F.2d 265—Bank of Union v. Fidelity & Casualty Co. of New York, C.C.A.Mo., 62 F.2d 1040—Georgia Casualty Co. v. Waldman, C.C.A.Ala., 53 F.2d 24—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 52 F.2d 418—Duval Cattle Co. v. Hemphill, C.C.A.Fla., 41 F.2d 433—Johnston v. Ouachita Nat. Bank of Monroe, La., C.C.A.Ark., 40 F.2d 604—Toll v. Monitor Binding & Printing Co., C.C.A.Mo., 26 F.2d 51—Hercules Powder Co. v. Rich, C. C.A.Ark., 3 F.2d 12, certiorari denied 45 S.Ct. 511, 268 U.S. 692, 69 L.Ed. 1160—New Amsterdam Casualty Co. v. Farmers' Co-op. Union of Lyons, Kan., C.C.A.Kan., 2 F.2d 214—American Thermos Bottle Co. v. W. T. Grant Co., C.C.A. Mass., 282 F. 426, affirming, D.C., 279 F. 151—Scott v. W. R. Grace & Co., C.C.A.N.Y., 275 F. 340—Gans S. S. Line v. Wilhelmsen, C.C.A.N. Y., 275 F. 254, modifying D.C., The Themis, 244 F. 545, certiorari denied Barber & Co. v. Wilhelmsen, 42 S.Ct. 97, 257 U.S. 655, 66 L.Ed. 419—Kennelly v. Frederick Starr Contracting Co., N.Y., 250 F. 229, 162 C.C.A. 365—Hart v. Adair, Or., 244 F. 897, 157 C.C.A. 247—Camp v. Gress, Va., 244 F. 121, 156 C.C.A. 549, certiorari granted 38 S.Ct. 14, 245 U.S. 655, 62 L.Ed. 533, and modified on other grounds 39 S.Ct. 478, 250 U.S. 308, 63 L.Ed. 997—Richardson v. Fajardo Sugar Co., Porto Rico, 237 F. 195, 150 C.C.A. 341—Alaska Salmon Co. v. Territory of Alaska, Alaska, 236 F. 62, 149 C.C.A. 272, certiorari denied 37 S.Ct. 242, 242 U.S. 648, 61 L.Ed. 544, and error dismissed 39 S.Ct. 210, 249 U.S. 62, 63 L.Ed. 478.

3 C.J. p 696 note 61.

Particular defenses

(1) Matters in abatement, not going to the jurisdiction of the subject matter.—Paauhau Sugar Plantation Co. v. Palapala, Hawaii, 127 F. 920, 62 C.C.A. 552—Speer v. Board of Com'rs of Kearney County, Kan., 88 F. 749, 32 C.C.A. 101—3 C.J. p 705 note 25.

(2) Affirmative defenses generally.—Potts v. Village of Haverstraw, C. C.A.N.Y., 93 F.2d 506.

(3) Limitations or laches.—Jackson v. Denver Producing & Refining Co., C.C.A.Okl., 96 F.2d 457—Ashton v. Glaze, C.C.A.Cal., 95 F.2d 427—Ferryboatmen's Union of California v. Northwestern Pac. R. Co., C.C.A. Cal., 84 F.2d 773—Pardue v. United Gas Public Service Co., D.C.La., 28 F.Supp. 847—American Merchant Marine Ins. Co. of New York v. Tremaine, C.C.A.Wash., 269 F. 376—Johnsonburg Vitrified Brick Co. v. Yates, Pa., 177 F. 389, 101 C.C.A. 553.

(4) Grounds of opposition to the defense of limitations.—Foster & Kleiser Co. v. Special Site Sign Co., C.C.A.Cal., 85 F.2d 742, certiorari denied Special Site Sign Co. v. Foster & Kleiser Co., 57 S.Ct. 315, 299 U.S. 613, 81 L.Ed. 452.

(5) Former adjudication of cause.—De Rees v. Costaguta, C.C.A.N.Y., 275 F. 172, certiorari denied 42 S.Ct. 56, 257 U.S. 648, 66 L.Ed. 415—Adams v. Shirk, Ill., 117 F. 801, 55 C.C.A. 25.

(6) Contributory negligence or assumption of risk.—Wabash Ry. Co. v. Lamboy, C.C.A.Mo., 299 F. 124—Cincinnati, N. O. & T. P. Ry. Co. v. Davis, C.C.A.Tenn., 293 F. 481—Boston & M. R. R. v. Baker, Mass., 236 F. 896, 150 C.C.A. 158.

(7) That an agent or alleged agent making a contract or deed was without authority to do so.—Atlantic Brewing Co. v. William J. Brennan Grocery Co., C.C.A.Mo., 79 F.2d 45.

(8) That a contract of a corporation was ultra vires.—Grand Valley Water Users' Ass'n v. Zumbrunn, C.C.A.Colo., 272 F. 943.

(9) Nonperformance of conditions precedent.—Walker v. Gulf & I. Ry. Co. of Texas, C.C.A.Tex., 269 F. 885—City of Charlotte v. Atlantic Bitulithic Co., N.C., 228 F. 456, 143 C.C.A. 38—3 C.J. p 705 note 30, p 706 notes 33, 35.

(10) Waiver or estoppel.—Liberty Petroleum Co. v. California Co., C.C. A.Colo., 114 F.2d 980—Security Sav. Bank of Covington v. First Nat. Bank, C.C.A.Ky., 106 F.2d 542, 127 A.L.R. 116—City of Los Angeles v. Borax Consolidated Limited, C.C.A. Cal., 74 F.2d 901, certiorari granted Borax Consolidated, Limited v. City of Los Angeles, 55 S.Ct. 921, 295 U.S. 729, 79 L.Ed. 1679, affirmed 56 S.Ct. 23, rehearing denied 56 S.Ct. 304, reversing, D.C., 5 F.Supp. 281—U. S. Fidelity & Guaranty Co. v. Leong Dung Dye, C.C.A.Hawaii, 52 F.2d 567, certiorari denied 52 S.Ct. 311, 285 U. S. 537, 76 L.Ed. 930—3 C.J. p 708 note 54.

Alimony decree

In an action for alimony, the contention that the alimony decree was not properly authenticated cannot be raised for the first time on appeal.—De Jan v. De Jan, C.C.A.Canal Zone, 18 F.2d 690.

Notice to surety

Where, in an action on a contractor's bond, the point that notice of the contractor's acts was not given the surety was neither pleaded nor otherwise presented to the trial court, it could not be considered in the circuit court of appeals.—Bankers' Surety Co. v. Town of Holly, Colo., 219 F. 96, 134 C.C.A. 536.

Validity of contract

(1) As a rule an objection to the validity of a contract or instrument in suit must be made in the court below, and cannot be urged for the first time in the circuit court.—Falstaff Brewing Corporation v. Iowa Fruit & Produce Co., C.C.A.Neb., 112 F.2d 101—Hinshaw v. Massachusetts Mut. Life Ins. Co., C.C.A.Mo., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U. S. 583, 84 L.Ed. 488—Simmons v. Stern, C.C.A.N.M., 9 F.2d 256—Walters v. Slimmer, C.C.A.Ill., 272 F. 435—Maynard v. Reynolds, Mo., 251 F. 784, 164 C.C.A. 18, certiorari denied 39 S.Ct. 19, 248 U.S. 478, 63 L.Ed. 429—Northwestern Theatrical Ass'n v. Hannigan, N.Y., 218 F. 359, 134 C.C. A. 167—3 C.J. p 700 notes 77, 82, p 701 note 84, p 702 notes 91, 94.

(2) Rule applies to objection that contract is void and unenforceable under the statute of frauds.—Ford Motor Co. v. Chas. A. Myers Mfg. Co., C.C.A.Ohio, 64 F.2d 942—General Motors Truck Co. v. Texas Supply Co., C.C.A.Md., 64 F.2d 527—3 C.J. p 701 note 87.

(3) Claim that a general release was not under seal is also within rule.—Raytheon Mfg. Co. v. Radio Corporation of America, C.C.A.Mass., 76 F.2d 943, certiorari granted Radio Corporation of America v. Raytheon Mfg. Co., 56 S.Ct. 99, 296 U.S. 557, 80 L.Ed. 393, affirmed 56 S.Ct. 297, 296 U.S. 459, 80 L.Ed. 327, followed in, C.C.A., Berning v. Louisville & N. R. Co., 92 F.2d 997.

(4) However, where it appears on the face of the pleadings, the face of the contract, or from the admitted facts that the contract is immoral or otherwise contrary to public policy the matter may be first raised on appeal.—Jones v. Pettingill, Puerto Rico, 245 F. 269, 157 C.C.A. 461, certiorari denied Pettingill v. Jones, 38 S.Ct. 61, 245 U.S. 663, 62 L.Ed. 536—3 C.J. p 701 note 83.

Manner of presenting defenses

U.S.—International Co. of St. Louis v. Occidental Life Ins. Co. of California, C.C.A.Mo., 98 F.2d 138, certiorari denied International Co. of St. Louis v. Occidental Life Ins. Co., 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 412.

62. U.S.—Hawaii Consol. Ry. v. Borthwick, C.C.A.Hawaii, 105 F.2d 286—Drainage Dist. No. 2 of Crittenden County, Ark., v. Mercantile-Commerce Bank & Trust Co. of St. Louis, Mo., C.C.A.Ark., 69 F.2d 138—Wabash Ry. Co. v. City of St. Louis, C.C.A.Mo., 64 F.2d 921, af-

titude inconsistent with, or different from, that taken by him at the trial;[63] and he is restricted to the theory on which the cause was prosecuted or defended in the court below,[64] unless such theory was compelled by a ruling of the trial court, over his objection.[65] So a party cannot change his theory or position as to the cause of action,[66] the grounds of defense or of opposition,[67] the capacity in which he sues or is sued,[68] the nature and form of the action or proceeding,[69] the construction of the pleadings,[70] the relief sought and grounds therefor,[71]

firming, D.C., City of St. Louis v. Senter Commission Co., 3 F.Supp. 308, certiorari denied Wabash Ry. Co. v. City of St. Louis, Mo., 54 S. Ct. 88, 290 U.S. 668, 78 L.Ed. 577—Pacific Mut. Life Ins. Co. of California v. Barton, C.C.A.Fla., 50 F.2d 362, certiorari denied 52 S.Ct. 29, 284 U.S. 647, 78 L.Ed. 550—Candal De Lopez v. Sociedad Espanola de Auxilio Mutuo y Beneficencia, C.C. A.Puerto Rico, 45 F.2d 331—Garzot v. O'Neill, Puerto Rico, 237 F. 73, 150 C.C.A. 275.
3 C.J. p 710 note 73.

63. U.S.—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 114 F.2d 526, certiorari denied 61 S.Ct. 141, 311 U.S. 701, 85 L.Ed. 455—Beechwood Securities Corporation v. Associated Oil Co., C.C.A.Cal., 104 F.2d 537.

64. U.S.—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892—Jones v. Tower Production Co., C. C.A.Okl., 120 F.2d 779—Parrott Estate Co. v. McLaughlin, C.C.A.Cal., 89 F.2d 188, affirming, D.C., 12 F. Supp. 23—Commerce Trust Co. v. Woodbury, C.C.A.Mo., 77 F.2d 478, modifying, D.C., Woodbury v. Pickering Lumber Co., 10 F.Supp. 761, certiorari denied Woodbury v. Commerce Trust Co., 56 S.Ct. 134, 296 U.S. 614, 80 L.Ed. 435—Osgoodby v. Talmadge, C.C.A.N.Y., 45 F.2d 696 —New York Alaska Gold Dredging Co. v. Walbridge, C.C.A.Alaska, 38 F.2d 199—Loomis v. Wattles, C.C. A.Neb., 266 F. 876—Richmond v. Oregon R. & Nav. Co., Wash., 137 F. 848, 70 C.C.A. 378.
3 C.J. p 718 note 50.

Ground of judgment or order

A judgment or order which was rendered on one ground cannot, in the circuit court, be sustained on another and different ground which was not presented to the court below.—Ulm v. Moore-McCormack Lines, C. C.A.N.Y., 117 F.2d 222, denying rehearing 115 F.2d 492, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L. Ed. 1525—Baker v. Kaiser, Colo., 126 F. 317, 61 C.C.A. 303—3 C.J. p 739 note 75.

65. U.S.—Cole Motor Car Co. v. Hurst, Tex., 228 F. 280, 142 C.C.A. 572.

66. U.S.—U. S. to Use of Merchants & Manufacturers Securities Co. v. Johnson, C.C.A.Mo., 98 F.2d 462.
3 C.J. p 720 note 51.

67. U.S.—Foster & Kleiser Co. v. Special Site Sign Co., C.C.A.Cal., 85 F.2d 742, certiorari denied Special Site Sign Co. v. Foster & Kleiser Co., 57 S.Ct. 315, 299 U.S. 613, 81 L.Ed. 452.
3 C.J. p 721 note 52.

68. U.S.—Dunn v. Clinchfield R. Co., C.C.A.Tenn., 19 F.2d 810, certiorari denied Clinchfield R. Co. v. Dunn, 48 S.Ct. 117, 275 U.S. 557, 72 L.Ed. 424.

69. U.S.—Madden v. McKenzie, Alaska, 144 F. 64, 75 C.C.A. 222.

Particular theories

(1) Action in tort or in contract.—Chicago & N. W. R. Co. v. DeClow, Iowa, 124 F. 142, 61 C.C.A. 34—U. S. v. Marshall, Utah, 122 F. 428, 58 C.C.A. 410.

(2) Action at law or suit in equity.—Cutler v. Cook, C.C.A.Or., 78 F.2d 863—Maryland Casualty Co. v. Portland Const. Co., C.C.A.Vt., 71 F.2d 658 —O'Connell v. Gentry County Bank, C.C.A.Mo., 55 F.2d 806—Curtiss Candy Co. v. Silberman, C.C.A.Tenn., 45 F.2d 451—Corbett v. Winston Elkhorn Coal Co., C.C.A.Ky., 296 F. 577—3 C.J. p 724 note 78.

(3) Whether the case be properly one at law or in equity, where the district court admittedly had jurisdiction of the subject matter, and the parties treated it as a suit in equity, the circuit court may dispose of the case on its merits.—Gelinas v. Buffum, C.C.A.Cal., 67 F.2d 380, modifying 52 F.2d 598, reversing, D.C., Buffum v. Peter Barceloux Co., 51 F.2d 80, reversed, C.C.A., Peter Barceloux Co. v. Buffum, 61 F.2d 145, certiorari granted Buffum v. Peter Barceloux Co., 53 S.Ct. 319, 288 U.S. 595, 77 L. Ed. 972, reversed 53 S.Ct. 539, 289 U.S. 227, 77 L.Ed. 1140, certiorari denied Buffum v. Gelinas, 54 S.Ct. 454, 291 U.S. 670, 78 L.Ed. 1060.

(4) Equitable treatment was held proper, in view of the pleadings and decree, notwithstanding the review proceedings were as though at law.—People's Nat. Bank of Plymouth, Ohio v. Foltz, C.C.A.Ohio, 25 F.2d 295.

Applicability of statutes

The circuit court will consider applicable statutes when the theory below presents the question of its applicability, irrespective of the fact that the statute may not have been called to the trial court's attention.—Thompson v. Hocking Valley Ry. Co., C.C.A.Ohio, 45 F.2d 155—Goodcell v. Graham, C.C.A.Cal., 35 F.2d 586, certiorari granted Graham v. Goodcell, 50 S.Ct. 240, 281 U.S. 708, 74 L.Ed. 1131, and affirmed 51 S.Ct. 186, 282 U.S. 409, 75 L.Ed. 415.

70. U.S.—Kavanaugh v. Fash, C.C.A. Okl., 74 F.2d 435—Continental Casualty Co. v. U. S., for Use of Ainsworth, C.C.A.Ill., 68 F.2d 577, certiorari denied 54 S.Ct. 774, 292 U.S. 641, 78 L.Ed. 1493, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1474—Euclid Candy Co. v. Whitney-Central Trust & Savings Bank, C.C.A.Ohio, 48 F.2d 757—De John v. Alaska Matanuska Coal Co., C. C.A.Alaska, 41 F.2d 612—Houle v. Helena Gas & Electric Co., C.C.A. Mont., 31 F.2d 671—Weaver v. Pennsylvania-Ohio Power & Light Co., C.C.A.Ohio, 10 F.2d 759—W. H. Goff Co. v. Lamborn & Co., C.C.A. Ga., 281 F. 613, certiorari denied 43 S.Ct. 95, 260 U.S. 734, 67 L.Ed. 487 —Thomas v. Kansas City Southern Ry. Co., C.C.A.Ark., 277 F. 708, affirmed 43 S.Ct. 440, 261 U.S. 481, 67 L.Ed. 758—Sudbury v. Penn Worsted Co., C.C.A.N.Y., 263 F. 76—Bassett v. Erickson Const. Co., Wash., 213 F. 810, 130 C.C.A. 468.
3 C.J. p 725 note 84, p 729 notes 4, 5.

Issues raised by pleadings

(1) It is generally held that only such issues as were both raised and relied on in the lower court may be considered on appeal.—Fleishhacker v. Blum, C.C.A.Cal., 109 F.2d 543, modifying, D.C., Blum v. Fleishhacker, 21 F.Supp. 527, certiorari denied Fleishhacker v. Blum, 61 S.Ct. 23, 311 U.S. 665, 85 L.Ed. 427, rehearing denied 61 S.Ct. 130, 311 U.S. 726, 85 L.Ed. 473—Rohrback v. Mutual Life Ins. Co. of New York, C.C. A.Mo., 82 F.2d 291—3 C.J. p 727 note 98.

(2) However, where a case has been tried without objection as though the pleadings raised a certain issue, the objection that the issue was not raised by the pleadings, or that the issues were not complete, cannot be made for the first time in the circuit court.—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182—Lyons v. Empire Fuel Co., C.C.A.Ohio, 262 F. 465—Martin v. Imbrie, C.C.A. N.Y., 262 F. 44—Bjornquist v. Boston & A. R. Co., Mass., 250 F. 929, 163 C.C.A. 179, 5 A.L.R. 951, certiorari denied Boston & A. R. Co. v. Bjornquist, 39 S.Ct. 11, 248 U.S. 573, 63 L. Ed. 427—3 C.J. p 727 note 99.

71. U.S.—Hutchinson v. Fidelity Inv. Ass'n, C.C.A.W.Va., 106 F.2d 431, affirming, D.C., McCammon v. Fidelity Inv. Ass'n, 26 F.Supp. 117

evidentiary matters,[72] and the measure of damages or the amount of recovery.[73]

For a matter to have been presented before the trial court so as to warrant review on appeal, it is sufficient and necessary that it be properly raised in the trial court by the pleadings, evidence, motions, or appropriate requests for rulings.[74]

(2) Objections and Motions and Rulings Thereon

Except in the case of fundamental errors apparent on the record or clear injustice, the circuit court of appeals will not review matters as to which proper and timely objection was not raised in the trial court invoking the ruling of that court, and grounds of objection not urged below will not be considered on appeal.

In accordance with the rule heretofore stated that questions not presented in the trial court in some appropriate manner will not be considered on appeal or error, it is the general rule that objections must be made in the trial court in order to reserve questions for review.[75] However, this rule will not be applied where it would, under the circumstances of the case, result in injustice;[76] and an exception to the rule exists in the case of fundamental or determinative errors, which are apparent on the face of the record.[77] To be available the objection must

—Meloon v. Davis, C.C.A.N.H., 292 F. 82—Ford Motor Co. v. Farrington, Or., 245 F. 850, 158 C.C.A. 190.
3 C.J. p 730 note 20, p 732 note 26, p 733 note 33, p 734 note 43.

72. **Particular theories**

(1) That the issues were triable by the court without the intervention of a jury.—Minneapolis Nat. Bank of Minneapolis, Kan., v. Liberty Nat. Bank of Kansas City, C.C.A. Kan., 72 F.2d 434.

(2) Where a fact is admitted, conceded, or assumed without objection in the trial court, it cannot be contested on appeal that there was no evidence on the question.—Maryland Casualty Co. v. Alford, C.C.A.Okl., 111 F.2d 388, affirming D.C., Alford v. McConnell, 27 F.Supp. 176, and certiorari denied Maryland Casualty Co. v. Alford, 61 S.Ct. 27, two cases, 311 U.S. 668, 85 L.Ed. 429—Palace Cafe v. Hartford Fire Ins. Co., C.C.A.Ind., 97 F.2d 766, Hartford Fire Ins. Co. v. Palace Cafe, 59 S.Ct. 102, 305 U.S. 634, 83 L.Ed. 407—Palace Cafe v. National Security Fire Ins. Co., C.C.A. Ind., 97 F.2d 766, certiorari denied National Security Fire Ins. Co. v. Palace Cafe, 59 S.Ct. 102, 305 U.S. 634, 83 L.Ed. 407—Panama City v. Federal Reserve Bank of Atlanta, C. C.A.Fla., 97 F.2d 499—Wilson v. Byron Jackson Co., C.C.A.Cal., 93 F.2d 572—Wiget v. Becker, C.C.A.Mo., 84 F.2d 706—Andrews v. Drake, C.C.A. Mich., 83 F.2d 767, certiorari denied 57 S.Ct. 35, 299 U.S. 572, 81 L.Ed. 421—Shields v. Barton, C.C.A.Ill., 60 F.2d 351—U. S. Shipping Board Emergency Fleet Corporation v. South Atlantic Dry Dock Co., C.C.A.Fla., 19 F.2d 486—U. S. v. One Reo Truck Automobile, C.C.A.N.Y., 9 F.2d 529—3 C.J. p 735 note 54, p 736 note 56.

(3) Where a party has assumed the burden of proving a fact, he will not be heard to say for the first time on appeal that the burden of proof is on the other party.—Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc., Wash., 146 F. 695, 77 C.C.A. 121.

73. U.S.—McSherry Mfg. Co. v. Dowagiac Mfg. Co., Ohio, 163 F. 34, 89 C.C.A. 512, certiorari denied 29 S.Ct. 694, 214 U.S. 512, 53 L.Ed. 1062.

74. U.S.—Maloney v. Brandt, C.C.A. Ill., 123 F.2d 779—Smith v. S. S. Kresge Co., C.C.A.Mo., 79 F.2d 361—General Motors Truck Co. v. Texas Supply Co., C.C.A.Md., 64 F.2d 527—Routzahn v. Petroleum Iron Works Co. of Ohio, C.C.A.Ohio, 56 F.2d 938—Detroit Tile & Mosaic Co. v. Mason Contractors' Ass'n, C. C.A.Mich., 48 F.2d 729, reversing, D. C., 38 F.2d 284—Santaella & Co. v. Otto F. Lange Co., Iowa, 155 F. 719, 84 C.C.A. 145.

Particular action necessary

(1) Notwithstanding a matter or contention was set up in the pleadings, it must also be pressed in the trial court, and a failure to do so will be deemed, on appeal, a waiver or abandonment thereof.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

(2) Ordinarily, a party seeking to raise an issue must have offered evidence thereon in the trial court.—Mutual Ben. Health & Accident Ass'n v. Warrell, C.C.A.Ark., 96 F.2d 447, certiorari denied 59 S.Ct. 71, 305 U.S. 612, 83 L.Ed. 390, rehearing denied 59 S.Ct. 142, 305 U.S. 671, 83 L.Ed. 435.

Unconstitutionality of statute

(1) Text rule applies to contention that statute is unconstitutional.—Gulf Refining Co. v. City of Philadelphia, C.C.A.Pa., 110 F.2d 661, affirming D.C., 31 F.Supp. 587.

(2) As a rule the objection must be definite.—Pacific Mut. Life Ins. Co. of California v. Barton, C.C.A.Fla., 50 F.2d 362, certiorari denied 52 S.Ct. 29, 284 U.S. 647, 76 L.Ed. 550.

(3) A mere general objection, as in the case of a general or formal objection to evidence, or to the allowance of attorney's fees, etc., is not sufficient.—Brothers v. Cunningham, Mo., 189 F. 884, 111 C.C.A. 146—3 C. J. p 712 note 86.

(4) Unconstitutionality of a statute must be pleaded before it can be raised on appeal.—Rorick v. Board of Com'rs of Everglades Drainage Dist., D.C.Fla., 57 F.2d 1048.

75. U.S.—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A.Neb., 101 F.2d 987—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30—Solomon v. Benjamin, C.C.A.Ill., 75 F.2d 564, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694—Robert Hind, Limited, v. Silva, C.C.A.Hawaii, 75 F.2d 74—Georgia Casualty Co. v. Waldman, C.C.A.Ala., 53 F.2d 24—J. P. Cummings Const. Co. v. Marbleloid Co., C.C.A.N.J., 51 F.2d 906—Ex parte Keizo Kamiyama, C C.A.Cal., 44 F.2d 503—In re Dan ville Hotel Co., C.C.A.Ill., 38 F.2d 10, affirming in part and reversing in part, D.C., 33 F.2d 162—In re Morgan, C.C.A.Ohio, 26 F.2d 183—U. S. Shipping Board Emergency Fleet Corporation v. Tabas, C.C.A. Pa., 22 F.2d 398, affirming, D.C., Tabas v. Emergency Fleet Corporation, 9 F.2d 648—Borderland Coal Sales Co. v. Imperial Coal Sales Co., C.C.A.Ohio, 7 F.2d 116—Texas Co. v. Brilliant Mfg. Co., C.C.A.Pa., 2 F.2d 1—U. S. v. National City Bank of New York, C.C.A.N.Y., 281 F. 754, affirming, D.C., National City Bank of New York v. U. S., 275 F. 855, and error dismissed 44 S.Ct. 32, 263 U.S. 726, 68 L.Ed. 527—Great American Ins. Co. v. Glenwood Irr. Co., C.C.A.Colo., 265 F. 594—Louie Share Gan v. White, Cal., 258 F. 798, 170 C.C.A. 92.

Where exception jurisdictional

Statute of jeofails does not confer appellate jurisdiction on circuit court of appeals which is specifically denied by statute governing appeals in jury-waived cases.—U. S. v. Martin, C.C.A.Kan., 80 F.2d 460.

76. U.S.—Fricke v. General Accident, Fire & Life Assur. Corporation, C.C.A.Mo., 59 F.2d 563, certiorari denied 53 S.Ct. 221, 287 U.S. 662, 77 L.Ed. 571.

77. U.S.—Stromberg Motor Devices

be a timely one,[78] made in the proper mode,[79] and it must usually be specific and point out the ground or grounds relied on in such a manner as to advise the court and opposing counsel thereof.[80] Only grounds of objection urged in the trial court will be considered on appeal; a party will not be permitted to change them or to add others.[81] As a general rule a mere objection without a direct ruling or decision thereon by the trial court presents no question for appellate review, for, unless there is a ruling by the court, there can be no predicate for an assignment of error.[82]

Co. v. Zenith-Detroit Corporation, C.C.A.N.Y., 73 F.2d 62, certiorari dismissed Zenith-Detroit Corporation v. Bendix Stromberg Carburetor Co., 55 S.Ct. 509, 294 U.S. 735, 79 L.Ed. 1263—Rucker v. Kokrda, C.C.A.Colo., 68 F.2d 73—Operators' Oil Co. v. Barbre, C.C.A.Okl., 65 F. 2d 857.

3 C.J. p 744 note 7.

78. U.S.—Scritchfield v. Kennedy, C. C.A.Okl., 103 F.2d 467—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F.2d 889—Concordia Fire Ins. Co. of Milwaukee v. Commercial Bank of Liberty, Mo., C.C.A.Mo., 39 F.2d 826—Sun Oil Co. v. Rhodes, C.C.A. Ark., 15 F.2d 799.

3 C.J. p 745 note 14.

When objection timely

(1) In order to be timely objection must ordinarily be made during the trial and in time to allow the alleged error to be avoided or corrected.—Scritchfield v. Kennedy, C.C.A.Okl., 103 F.2d 467—Arkansas Bridge Co. v. Kelly-Atkinson Const. Co., C.C.A.Mo., 282 F. 802—3 C.J. p 745 note 14.

(2) So the objection must be made at the time of the action or ruling to which it is directed or at the earliest opportunity thereafter.—Missouri State Life Ins. Co. v. Langreder, C. C.A.Ill., 87 F.2d 586—Layne-Bowler Chicago Co. v. City of Glenwood, Iowa, C.C.A.Iowa, 34 F.2d 889—3 C.J. p 745 note 14.

(3) Question cannot afterward be raised, for the purpose of appellate review, by an objection made on a motion or argument for a new trial or rehearing.—Shannon v. Shaffer Oil & Refining Co., C.C.A.Okl., 51 F.2d 878, 78 A.L.R. 851—Cloquet Lumber Co. v. Burns, Minn., 222 F. 857, 138 C.C.A. 283—3 C.J. p 746 note 15.

79. U.S.—Sun Pub. Co. v. Lake Erie Asphalt Block Co., Ohio, 157 F. 80, 84 C.C.A. 584.

3 C.J. p 748 note 31.

80. U.S.—Scritchfield v. Kennedy, C. C.A.Okl., 103 F.2d 467—Krause v. Snyder, C.C.A.Mo., 87 F.2d 723—Southern Kansas Stage Lines v. Gibson, C.C.A.Okl., 87 F.2d 23—Spann v. Commercial Standard Ins. Co. of Dallas, Tex., C.C.A.Ark., 82 F.2d 593—Booth v. Gilbert, C.C.A. Mo., 79 F.2d 790—Hill v. Douglass, C.C.A.Nev., 78 F.2d 851—Carpenter v. Connecticut General Life Ins. Co., C.C.A.Colo., 68 F.2d 69—Massachusetts Bonding & Insurance Co. v. R. E. Parsons Electric Co., C.C. A.Mo., 61 F.2d 264—American Sugar Refining Co. v. Nassau, C.C.A. Mass., 45 F.2d 321—Kennedy Lumber Co. v. Rickborn, C.C.A.S.C., 40 F.2d 228—Monument Pottery Co. v. Imperial Coal Corporation, C.C.A.N. J., 21 F.2d 683, certiorari denied 48 S.Ct. 213, 276 U.S. 618, 72 L.Ed. 734—Arkansas Bridge Co. v. Kelly-Atkinson Const. Co., C.C.A.Mo., 282 F. 802—Raymer v. Netherwood, 257 F. 284, 168 C.C.A. 368, affirming, D.C., Netherwood v. Raymer, 253 F. 515.

An objection of a general or indefinite character is not sufficient to preserve a question for appellate review.—U. S. v. Sessin, C.C.A.Kan., 84 F.2d 667—Lazelle v. Norfolk & W. Ry. Co., C.C.A.Ohio, 73 F.2d 459—3 C.J. p 746 note 16.

Repetition of objection

Objection need not be repeated at a subsequent stage of the trial where the ruling of the court on the first objection clearly covers and authorizes the subsequent proceedings, so that further objection would be a mere idle form.—Mine & Smelter Supply Co. v. Parke & Lacy Co., Colo., 107 F. 881, 47 C.C.A. 34.

81. U.S.—Cockrell v. U. S., C.C.A. Iowa, 74 F.2d 151—Frates v. Eastman, C.C.A.Okl., 57 F.2d 522.

3 C.J. p 892 note 27.

82. U.S.—Ocean Accident & Guarantee Corporation v. J. L. Brandeis & Sons, C.C.A.Neb., 75 F.2d 605, certiorari denied 55 S.Ct. 923, 295 U. S. 764, 79 L.Ed. 1706—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 66 F.2d 965, reversing, D.C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F.Supp. 399, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591—General Motors Co. v. Swan Carburetor Co., C.C.A. Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U.S. 897, 75 L.Ed. 790—Hecht v. Alfaro, C. C.A.Cal., 10 F.2d 464, affirming, D. C., 4 F.2d 255—U. S. v. National City Bank of New York, C.C.A.N.Y., 281 F. 754, affirming, D.C., National City Bank of New York v. U. S., 275 F. 855, and error dismissed 44 S.Ct. 32, 263 U.S. 726, 68 L.Ed. 527.

3 C.J. p 888 note 15.

Ruling by implication may be sufficient.—Georgia Casualty Co. v. Boyd, C.C.A.Cal., 34 F.2d 116.

Rulings held necessary to review of

(1) Demurrer or exceptions to the pleadings.—Pinckney v. Wylie, C.C. A.Tex., 86 F.2d 541—Tampico Banking Co., S. A. v. Barber, C.C.A.Tex., 3 F.2d 136, certiorari denied 45 S.Ct. 636, 268 U.S. 699, 69 L.Ed. 1164.

(2) Plea in abatement.—Tampico Banking Co., S. A. v. Barber, supra.

(3) Objections with relation to the admission or exclusion of evidence.—Kentucky West Virginia Gas Co. v. Woods, C.C.A.Ky., 110 F.2d 94—Grove Laboratories v. Brewer & Co., C.C.A. Mass., 103 F.2d 175—Metropolitan Life Ins. Co. v. Armstrong, C.C.A. Neb., 85 F.2d 187—Lyle v. Phillips Petroleum Co., C.C.A.Ark., 72 F.2d 347—Wourdack v. Becker, C.C.A.Mo., 55 F.2d 840, certiorari denied 52 S. Ct. 501, 286 U.S. 548, 76 L.Ed. 1285—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., Iowa, 215 F. 362, 131 C.C.A. 504—3 C.J. p 890 note 19.

(4) Objections with relation to the sufficiency of evidence.—Maryland Casualty Co. v. Jones, C.C.A.Cal., 35 F.2d 791—Federal Intermediate Credit Bank of Omaha v. L'Herisson, supra—First Nat. Bank v. Litteer, C.C. A.Okl., 10 F.2d 447—Pauchet v. Bujac, C.C.A.N.M., 281 F. 962.

(5) Motions.—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521—Hall v. Ætna Life Ins. Co., C.C.A.Ark., 85 F.2d 447—Fruth v. Benassi, Colo., 219 F. 549, 135 C.C.A. 317—Winter v. Bostwick, Wis., 212 F. 884, 129 C.C.A. 404.

(6) Objections to misconduct of opposing counsel, or to improper remarks made by the opposing counsel in his argument.—Odell Mfg. Co. v. Tibbetts, N.H., 212 F. 652, 129 C.C.A. 188—3 C.J. p 891 note 24.

(7) If evidence is received subject to objection, or a ruling on a motion to strike out is reserved, and a subsequent ruling is not sought by motion or otherwise, the reviewing court will not consider the admissibility of such evidence, because there is no definite or final decision as to its admissibility.—Ewert v. Thompson, C.C.A.Okl., 281 F. 449.

While proper objection in the trial court is necessary to entitle a party to raise an objection in the circuit court of appeals as to the propriety of the form of the action or the nature of the proceeding,[83] or to the consolidation of actions,[84] it is the general rule, subject to certain exceptions,[85] that the question of jurisdiction of the subject matter may be raised for the first time in the circuit court of appeals, or the court may, on its own motion, take notice of such want of jurisdiction,[86] at least where

83. U.S.—Prudential Ins. Co. of America v. Nelson, C.C.A.Tenn., 96 F.2d 487.
3 C.J. p 750 note 59.

Particular objections

(1) That remedy was not in contract but in tort.—Chicago & N. W. R. Co. v. De Clow, Iowa, 124 F. 142, 61 C.C.A. 34.

(2) That garnishment proceedings should have been brought rather than a direct action.—Eagle Indemnity Co. v. Diehl, C.C.A.Or., 27 F.2d 76.

(3) Wrong type or form of pleading.—Garner v. Providence Second Nat. Bank, R.I., 67 F. 833, 16 C.C.A. 86—Moran v. Hagerman, Nev., 64 F. 499, 12 C.C.A. 239.

Legal or equitable remedy

(1) Objection that a cause is of equitable, and not of legal, cognizance cannot be made for the first time on appeal.—M. J. Carroll, Inc. v. Gilmore, C.C.A.S.C., 103 F.2d 560—U. S. v. Illinois Surety Co., Ill., 226 F. 653, 141 C.C.A. 409, affirmed Illinois Surety Co. v. John Davis Co., 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206—3 C.J. p 756 note 15.

(2) Also, if the trial court has jurisdiction of the parties and subject matter in an action at law, an objection that the defense set up was purely equitable cannot be made for the first time on appeal.—Cleveland Nat. Bank v. Kent, C.C.A.Tenn., 100 F.2d 54, certiorari denied Kent v. Cleveland Nat. Bank, 59 S.Ct. 643, 306 U.S. 654, 83 L.Ed. 1053—Schoolfield v. Rhodes, Ark., 82 F. 153, 27 C.C.A. 95.

(3) Where an action is brought and tried without objection as an equitable one, neither party can object on appeal that a court of equity had no jurisdiction because there was an adequate remedy at law, or object that the cause of action was of legal cognizance only and should have been tried as a legal action and not as an equitable one.—Whealton v. Pine Grove Nevada Gold Mining Co., C.C.A.Nev., 104 F.2d 675—Prudential Ins. Co. of America v. Nelson, C.C.A.Tenn., 96 F.2d 487—Brown Paper Mill Co. v. Frazier, C.C.A.La., 76 F.2d 65—Pearson v. Brennan, C.C.A.Mass., 75 F.2d 958, vacating, D.C., Pearson v. Holden, 4 F.Supp. 285—Burlew v. Fidelity & Casualty Co. of New York, C.C.A.Ky., 64 F.2d 976, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591—Fidelity-Phenix Fire Ins. Co. of New York v. Benedict Coal Corporation, C.C.A.Va., 64 F.2d 347, certiorari denied 53 S.Ct. 795, 289 U.S. 762, 77 L.Ed. 1505—Maytag Co. v. Meadows Mfg. Co., C.C.A.Ill., 35 F.2d 403, certiorari denied 50 S.Ct. 250, 281 U.S. 737, 74 L.Ed. 1151—O. L. Standard Dry Goods Co. v. Tackett, C.C.A.Ky., 23 F.2d 919—Andersen, Meyer & Co. v. Fur & Wool Trading Co., C.C.A.China, 14 F.2d 586, certiorari denied 47 S.Ct. 337, 273 U.S. 740, 71 L.Ed. 868—Meriweather-Graham-Oliver Co. v. Bank of Commerce of Earle, Ark., C.C.A.Tenn., 3 F.2d 513, affirming, D.C., Meriweather-Graham-Oliver Co. v. Bank of Commerce, 290 F. 439—Jordan v. Roden, C.C.A.Mich., 292 F. 573, certiorari denied Union Cent. Life Ins. Co. v. Roden, 44 S. Ct. 34, 263 U.S. 705, 68 L.Ed. 516—Becker-Franz Co. v. Shannon Copper Co., Ariz., 256 F. 522, 167 C.C.A. 594—Royal Union Mut. Life Ins. Co. v. Lloyd, Iowa, 254 F. 407, 165 C.C.A. 627, reversing, D.C., Lloyd v. Royal Union Mut. Life Ins. Co., 245 F. 162—City of Omaha v. Venner, Neb., 243 F. 107, 155 C.C.A. 637—Babcock & Wilcox v. American Surety Co. of New York, S.C., 236 F. 340, 149 C.C.A. 472—El Dora Oil Co. v. U. S., Cal., 229 F. 946, 144 C.C.A. 228—Hattiesburg Lumber Co. v. Herrick, Miss., 212 F. 834, 129 C.C.A. 288—3 C.J. p 757 note 20, p 758 note 21.

(4) However, if the cause is one not properly cognizable by a court of equity under any circumstances, or it is not competent to grant the relief, the objection may be raised at any time, as want of jurisdiction of the subject matter is always fatal at any stage of the proceedings.—Church v. Hubbard, C.C.A.Mich., 91 F.2d 406—3 C.J. p 758 note 23.

84. U.S.—Williams S. S. Co. v. Wilbur, C.C.A.Cal., 9 F.2d 622, affirming, D.C., The Willfaro, 9 F.2d 940, certiorari denied Williams S. S. Co. v. Wilbur, 46 S.Ct. 482, 271 U.S. 666, 70 L.Ed. 1140—Turner v. Standard Ice & Fuel Co., C.C.A. Kan., 292 F. 38.

85. U.S.—U. S. v. Ellison, C.C.A.W. Va., 74 F.2d 864, certiorari denied 55 S.Ct. 829, 295 U.S. 750, 79 L.Ed. 1695.

Particular exceptions

(1) Where trial court has general jurisdiction of a class of cases, an objection that, because of irregularities or other special circumstances, it had no jurisdiction of a particular case belonging to that class, or that it had no jurisdiction to render the particular judgment, cannot be first made on appeal.—U. S. v. Ellison, supra—3 C.J. p 753 note 90.

(2) A party who does not, in the court below, challenge the jurisdiction of the court to entertain a cross bill cannot raise that question on appeal.—U. S. v. Duignan, C.C.A.N.Y., 4 F.2d 983, affirmed Duignan v. U. S., 47 S.Ct. 566, 274 U.S. 195, 71 L.Ed. 996—3 C.J. p 754 note 94.

86. U.S.—Cheyne v. Atchison, T. & S. F. Ry. Co., C.C.A.Cal., 125 F.2d 49—Alexander v. Westgate-Greenland Oil Co., C.C.A.Cal., 111 F.2d 769—Jewell v. Cleveland Wrecking Co. of Cincinnati, C.C.A.Mo., 111 F. 2d 305, reversing, D.C., 28 F.Supp. 366—Ackman v. Northern States Contracting Co., C.C.A.Ky., 110 F.2d 774—Lion Mfg. Corporation v. Chicago Flexible Shaft Co., C.C.A.Ill., 106 F.2d 930—Caesar v. Burgess, C.C.A.Okl., 103 F.2d 503—Minnis v. Southern Pac. Co., C.C.A.Cal., 98 F. 2d 913, certiorari denied 59 S.Ct. 461, 306 U.S. 631, 83 L.Ed. 1033—Royalty Service Corporation v. City of Los Angeles, C.C.A.Cal., 98 F.2d 551—Ferguson v. Wachs, C.C. A.Ill., 96 F.2d 910—Colorado Life Co. v. Steele, C.C.A.Ark., 95 F.2d 535—Gavica v. Donaugh, C.C.A.Or., 93 F.2d 173—Oakland County v. Hazlett, C.C.A.Mich., 87 F.2d 795—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C.A.Ark., 84 F.2d 930, affirmed 87 F.2d 457—Electro Therapy Products Corporation v. Strong, C.C.A.Cal., 84 F. 2d 766—Southern Pac. Co. v. McAdoo, C.C.A.Cal., 82 F.2d 121, reversing, D.C., McAdoo v. Southern Pac. Co., 10 F.Supp. 953—Mathers & Mathers v. Urschel, C.C.A.Okl., 74 F.2d 591—The Taigen Maru, C.C.A.Wash., 73 F.2d 922, certiorari granted Van Der Weyde v. Ocean Transport Co., 56 S.Ct. 177, 296 U.S. 567, 80 L.Ed. 401, reversed on other grounds 56 S.Ct. 392, 297 U.S. 114, 80 L.Ed. 515—Athan v. Hartford Fire Ins. Co., C.C.A.N.Y., 73 F.2d 66—Johnson v. Noble, C.C.A.Okl., 64 F.2d 396—Clemons v. Liberty Savings & Real Estate Corporation, C.C.A.Ga., 61 F.2d 448—Plymouth County Trust Co. v. MacDonald, C.C.A.Mass., 53 F.2d 827, reversing, D.C., In re Craig, Reed & Emerson, 46 F.2d 811, certiorari granted MacDonald v. Plymouth County Trust Co., 52 S.Ct. 407, 285 U.S. 533, 76 L.Ed. 928, reversed on other grounds MacDonald v. Plymouth County Trust Co., 52 S.Ct. 505, 286 U.S. 263, 76 L.Ed. 1093, conformed to, C.C.A., Plymouth County Trust Co. v. MacDonald, 60 F.2d 94—Commercial Trust

the defect is apparent on the face of the record.[87] However, an objection to the jurisdiction of the person must usually be made in the trial court, and, if it is not, it will, on appeal, be held to have been waived;[88] and generally, where a judge assumes to act under lawful authority and a cause is tried before him without objection, his authority to try the cause cannot be assailed on appeal.[89]

Failure to make proper and timely objection in the trial court may also preclude a contention in the circuit court of error with respect to venue,[90] capacity or right to sue,[91] want of merely proper or formal parties, or other formal defects as to the parties,[92] or misjoinder of parties;[93] but if the de-

Co. v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 48 F.2d 113—O'Connor v. Slaker, C.C.A.Neb., 22 F.2d 147, appeal dismissed Slaker v. O'Connor, 49 S.Ct. 158, 278 U.S. 188, 73 L.Ed. 258—U. S. Shipping Board Emergency Fleet Corporation v. South Atlantic Dry Dock Co., C.C.A.Fla., 19 F.2d 456—Security Mut. Life Ins. Co. v. Harwood, C.C.A.Mass., 16 F.2d 250—Parks v. Carriere Consol. School Dist., C.C.A.Miss., 12 F.2d 37—Egyptian Novaculite Co. v. Stevenson, C.C.A.Mo., 8 F.2d 576—Venner v. New York Cent. R. Co., C.C.A.Ohio, 293 F. 373—Panama R. Co. v. Johnson, C.C.A.N.Y., 289 F. 964, affirmed 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748—Robertson v. Ingram-Day Lumber Co., C.C.A.Miss., 271 F. 1023—Robertson v. Jordan River Lumber Co., C.C.A. Miss., 269 F. 606—Chicago, R. I. & P. Ry. Co. v. State of Nebraska, Neb., 251 F. 279, 163 C.C.A. 435—Devost v. Twin State Gas & Electric Co., N.H., 250 F. 349, 162 C.C.A. 419, rehearing denied 252 F. 126, 164 C.C.A. 237—Weyman-Burton Co. v. Ladd, N.D., 231 F. 898, 146 C.C.A. 94.

3 C.J. p 752 note 86.

As dependent on amount involved

(1) As a rule the objection that the lower court was without jurisdiction, because the amount involved was below the jurisdictional amount, may be raised for the first time on appeal.—S. S. Kresge Co. v. Amsler, C.C.A.Mo., 99 F.2d 503, certiorari denied 59 S.Ct. 582, 306 U.S. 641, 83 L. Ed. 1041—Supreme Council of Royal Arcanum v. Hobart, Mass., 244 F. 385, 157 C.C.A. 11—Cochran v. Childs, Ill., 111 F. 433, 49 C.C.A. 421.

(2) However, such defect must clearly appear before the circuit court will take cognizance of an objection on that ground.—Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., S.C., 246 F. 232, 158 C.C.A. 392—People's Telephone & Telegraph Co. v. East Tennessee Telephone Co., Tenn., 103 F. 212, 43 C.C. A. 185.

Construction of averments

However, the averments as to jurisdiction will be construed with some degree of liberality, for the purpose of sustaining the jurisdiction, where objection is made for the first time on appeal.—Butchers' & Drovers' Stock-Yards Co. v. Louisville & N. R. Co., Tenn., 67 F. 35, 14 C.C.A. 290—25 C.J. p 785 note 64.

Objection held not to involve jurisdiction so as to permit it to be raised for the first time on appeal.—Feltz v. Central Nebraska Public Power & Irrigation Dist., C.C.A.Neb., 124 F.2d 578.

87. U.S.—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 109 A.L.R. 1179—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715—Carpenter v. Carden, C.C.A.N.Y., 294 F. 515—Thomas v. Anderson, Mo., 223 F. 41, 138 C.C. A. 405.

3 C.J. p 755 notes 8, 10.

88. U.S.—Au Wee Sheung v. U. S., C.C.A.Ill., 44 F.2d 681—U. S. Fidelity & Guaranty Co. v. Vicars, C.C. A. Hawaii, 10 F.2d 474—Klink v. Chicago, R. I. & P. Ry. Co., Colo., 219 F. 457, 135 C.C.A. 169.

3 C.J. p 755 note 11.

Waiver of lack of jurisdiction

Where the trial court has ruled for defendant on the ground of lack of jurisdiction of his person, if plaintiff wishes to preserve for consideration by the circuit court the point that defendant has entered a general appearance waiving the lack of jurisdiction he must present that point in the trial court.—Stewart v. Nebraska Tire & Rubber Co., C.C.A.Iowa, 39 F.2d 309, affirming, D.C., Stewart v. Heisler, 32 F.2d 519, and certiorari denied Stewart v. Nebraska Tire & Rubber Co., 51 S.Ct. 21, 282 U.S. 840, 75 L.Ed. 746.

Diversity of citizenship

It cannot be first contended on appeal that there was no diversity of citizenship entitling the trial court to assume jurisdiction.—Emmke v. De Silva, C.C.A.Mo., 293 F. 17.

89. U.S.—Antoncic v. Baltimore & O. R. Co., C.C.A.Pa., 47 F.2d 97.

90. U.S.—Carter-Crume Co. v. Peurrung, 86 F. 439, 30 C.C.A. 174, affirmed 99 F. 888, 40 C.C.A. 150.

Objection held raised

Where it appears that defendant did not know at the trial that averments of plaintiff's residence were untrue but moved to dismiss during the trial on learning thereof, the right to urge the matter on appeal was not lost by completing the trial on the merits.—Lehigh Valley Coal Co. v. Washko, N.Y., 231 F. 42, 145 C.C.A. 230.

91. U.S.—Tyronza Special School Dist. of Poinsett County v. Speer, C.C.A.Ark., 94 F.2d 825—American Trust Co. v. Harris, C.C.A.Cal., 88 F.2d 541—W. H. Shenners Co. v. Lake Worth Realty & Building Co., C.C.A.Wis., 45 F.2d 297, certiorari denied 51 S.Ct. 366, 283 U.S. 833, 75 L.Ed. 1446—Oregon-Washington R. & Nav. Co. v. Roman, C.C.A. Wash., 293 F. 666.

3 C.J. p 761 notes 54, 58, p 762 note 70, p 763 notes 72, 73.

Limitation to rule

It has been held, however, that the text rule does not apply where it appears that plaintiff has no right at all to sue or is not entitled to any relief.—Sterrett v. Second Nat. Bank of Cincinnati, Ohio, 246 F. 753, 159 C.C.A. 55, 3 A.L.R. 256, certiorari granted 38 S.Ct. 345, 246 U.S. 668, 62 L.Ed. 930, and affirmed 39 S.Ct. 27, 248 U.S. 73, 63 L.Ed. 135.

Want of interest in controversy

An objection to the title under which a plaintiff sues, or that he has no such interest in the controversy as entitles him to maintain the action, will not be considered when raised for the first time in the circuit court.—Davis v. Virginia Ry. & Power Co., Va., 229 F. 633, 144 C.C.A. 43, certiorari denied Virginia Ry. & Power Co. v. Davis, 36 S.Ct. 723, 241 U. S. 672, 60 L.Ed. 1231.

92. U.S.—Frank v. Giesy, C.C.A.Or., 117 F.2d 122—B. Kuppenheimer & Co. v. Mornin, C.C.A.Iowa, 78 F.2d 261, 101 A.L.R. 75, certiorari denied 56 S.Ct. 135, certiorari denied 56 S.Ct. 135, 296 U.S. 615, 80 L.Ed. 436—Baer v. Security Trust Co., C.C.A.W.Va., 33 F.2d 861, certiorari denied Security Trust Co. v. Baer, 50 S.Ct. 37, 280 U.S. 588, 74 L.Ed. 637—De Lano v. City of Tulsa, C. C.A.Okl., 26 F.2d 640, certiorari denied De Lano v. City of Tulsa, 49 S.Ct. 179, 278 U.S. 654, 73 L.Ed. 564—American Creosote Works v. Powell, C.C.A.La., 298 F. 417, certiorari denied 44 S.Ct. 638, 265 U.S. 595, 68 L.Ed. 1198—Scott v. Saunders, C.C.A.Ohio, 290 F. 30—Chicago Bonding & Surety Co. v. U. S., C.C.A.Ill., 261 F. 266.

3 C.J. p 765 note 84.

Misnomer of a party to cause

U.S.—Connell Bros. Co. v. H. Diederichsen & Co., China, 213 F. 737, 130 C.C.A. 251.

93. U.S.—Jordan v. Roden, C.C.A.

fect of parties amounts to the complete want of a party who is so necessary that a final judgment or decree cannot be rendered without affecting his or her interests the objection may be taken for the first time in the circuit court of appeals.[94] An objection may not be first urged on appeal as to want of notice or service of process,[95] rulings on motions,[96] and provisional remedies and proceedings relating thereto.[97]

Where proper objection is not raised in the trial court, a contention of error may not be presented in the circuit court of appeals as to matters of pleading,[98] as with respect to the form[99] or sufficiency[1] of pleadings, to amendments and supplemen-

Mich., 292 F. 573, certiorari denied Union Cent. Life Ins. Co. v. Roden, 44 S.Ct. 34, 263 U.S. 705, 68 L.Ed. 516—Historical Pub. Co. v. Jones Bros. Pub. Co., Pa., 231 F. 638, 145 C.C.A. 524, motion dismissed 231 F. 784, 145 C.C.A. 655.

94. U.S.—McConnell v. Dennis, Kan., 153 F. 547, 82 C.C.A. 501.

95. U.S.—Carter v. Powell, C.C.A. Fla., 104 F.2d 428, rehearing denied 104 F.2d 1012, certiorari denied 60 S.Ct. 173, 308 U.S. 611, 84 L.Ed. 511—Troendle v. Van Nortwick, Ill., 98 F. 785, 39 C.C.A. 286.

96. U.S.—Adams v. Shirk, Ill., 104 F. 54, 43 C.C.A. 407, rehearing denied 105 F. 659, 44 C.C.A. 653.

Specificness

(1) Ordinarily, in reviewing the ruling on a motion, no other objections or grounds than those specified in the lower court will be considered. —Maryland Casualty Co. v. Talley, C.C.A.Tex., 115 F.2d 807—3 C.J. p 770 note 23.

(2) If no specific grounds are assigned in the court below, no question is raised for review.—Adams v. Shirk, Ill., 104 F. 54, 43 C.C.A. 407, rehearing denied 105 F. 659, 44 C.C.A. 653.

(3) However, the fact that a motion was general on the whole record will not preclude a review of the ruling thereon by the circuit court, where it is apparent that the propositions relied on were fully presented to the trial court.—O'Halloran v. McGuirk, Mass., 167 F. 493, 93 C.C.A. 129.

Motion for nonsuit or dismissal

(1) Such motion must usually specify the grounds on which it is based for no grounds than those specified will be considered on appeal.—American Concrete Steel Co. v. Hart, C.C. A.N.Y., 285 F. 322, affirming, D.C., Hart v. American Concrete Steel Co., 278 F. 541.

(2) However, if the error is clear, denial of motion may be reviewed even though it does not specify the supposed defect, particularly where the court expressly declined to hear argument thereon.—U. S. Shipping Board Merchant Fleet Corporation v. Dietrich, C.C.A.N.Y., 27 F.2d 681.

97. U.S.—Stephens v. Hamilton, C.C. A.Ill., 81 F.2d 324.

Particular matters within rule

(1) That no undertaking was ordered or given when an injunction was granted.—Berdie v. Kurtz, C.C. A.Cal., 75 F.2d 898.

(2) Failure of court, on directing a resale at a higher upset price, to allow a successful bidder on the first judicial sale his expenses in connection with his bid.—Shipe v. Consumers' Service Co., C.C.A.Ind., 29 F.2d 321, certiorari denied Tudor v. Schindler, 49 S.Ct. 347, 279 U.S. 850, 73 L.Ed. 993.

(3) Excessive allowance of compensation to receiver.—Hill v. Douglass, C.C.A.Nev., 78 F.2d 851.

(4) However, where an appeal is from an interlocutory order appointing a receiver, the court must consider the question of the equity of the bill on which the order is based, whether or not it was raised in the court below.—Cabaniss v. Reco Min. Co., Ga., 116 F. 318, 54 C.C.A. 190.

98. U.S.—Bengoechea Macias v. De La Torre & Ramirez, C.C.A.Puerto Rico, 84 F.2d 894.
3 C.J. p 749 note 33.

Copies and exhibits

U.S.—Hoskins v. City of Orlando, Fla., C.C.A.Fla., 51 F.2d 901.
3 C.J. p 791 note 21.

Mode of objection

(1) No matter how made, the objection must point out the particular defects or grounds relied on, so as to bring them to the attention of the lower court and opposing counsel, and no others will be considered by the circuit court.—Johnson v. Igleheart Bros., C.C.A.Ind., 95 F.2d 4, certiorari denied 58 S.Ct. 1058, 304 U.S. 585, 82 L.Ed. 1546, rehearing denied 59 S.Ct. 59, 305 U.S. 670, 83 L. Ed. 434.

(2) Ordinarily, where objection is taken by way of demurrer or exception, the court will not consider any other grounds of objection than those specified and relied on in the lower court.—Correa v. Barbour, C.C.A. Puerto Rico, 71 F.2d 9.

(3) However, where the demurrer is on the ground that the complaint does not state a cause of action, points other than those specified in the lower court may be specified on appeal as showing no cause of action.—Mound Coal Co. v. Jeffrey Mfg. Co., W.Va., 233 F.2d 913, 147 C.C.A. 587, affirming, D.C., Jeffrey Mfg. Co. v. Mound Coal Co., 215 F. 222, rehearing granted, C.C.A., Mound Coal Co. v. Jeffrey Mfg. Co., 240 F. 129, and affirmed 240 F. 412.

(4) The amendment of a pleading to which a demurrer has been filed usually necessitates a refiling of the demurrer, and, if this is not done, the demurrer is regarded as waived so that no advantage can be taken of it. —City of Anniston v. Safe-Deposit & Trust Co., Ala., 85 F. 856, 29 C.C.A. 457.

Motions as to pleadings

(1) When objection to a pleading is taken by motion, the objection must state the grounds thereof and specifically point out the alleged defects, and as a rule, grounds not stated will not be considered on appeal. —Cooper v. Gilbert, C.C.A.Okl., 40 F. 2d 260.

(2) Judgment on legal sufficiency of evidence must be invoked by proper motion to authorize court to consider that question.—First Nat. Bank v. Philippine Refining Corporation of New York, C.C.A.Cal., 51 F.2d 218.

(3) Party interposing motion for judgment or declaration of law that he is entitled to judgment may, on appeal, raise question of law whether under evidence he was entitled to judgment.—Perry v. Wiggins, C.C.A. Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529.

99. U.S.—Robert Hind, Limited, v. Silva, C.C.A.Hawaii, 75 F.2d 74—Mortgage Loan Co. v. Livingston, C.C.A.Mo., 45 F.2d 28.
3 C.J. p 778 note 28, p 780 note 38, p 790 note 96.

Absence of, or defect in, verification

U.S.—Shell Petroleum Corporation v. Caudle, C.C.A.Tex., 63 F.2d 296.
3 C.J. p 777 note 22.

1. U.S.—Vigor v. Chesapeake & O. Ry. Co., C.C.A.Ind., 101 F.2d 865, certiorari denied Chesapeake & O. R. Co. v. Vigor, 59 S.Ct. 1031, 307 U.S. 635, 83 L.Ed. 1517—Moore v. Tremelling, C.C.A.Idaho, 100 F.2d 39—United Light & Power Co. v. Grand Rapids Trust Co., C.C.A. Mich., 85 F.2d 331, affirming, D.C., Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., 7 F.Supp. 511, certiorari denied in part United Light & Power Co. v. Grand Rapids Trust Co., 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari granted in part Grand Rapids Trust Co. v. United Light & Power Co., 57 S.Ct. 119, 299 U.S. 534, 81 L.Ed. 393, certiorari dis-

tal pleadings,[2] to bills of particulars,[3] and to issues, proof,[4] and variance between pleadings and proof;[5] but ordinarily if there is a complete failure to state a cause of action the defect is regarded as a fundamental one which may be raised for the first time in the circuit court of appeals.[6]

The circuit court of appeals will not consider objections not properly raised below as to references,[7] proceedings preliminary to trial or hearing,[8]

missed 57 S.Ct. 312, 299 U.S. 619, 81 L.Ed. 456—Bengoechea Macias v. De La Torre & Ramirez, C.C.A. Puerto Rico, 84 F.2d 894—Ricketts v. Waller, C.C.A.Neb., 81 F.2d 977—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897—U. S. v. Grand Canyon Cattle Co., Ariz., 247 F. 446, 159 C.C.A. 500—Conley Camera Co. v. Multiscope & Film Co., Minn., 216 F. 892, 133 C.C.A. 96—Toledo Traction Co. v. Cameron, Ohio, 137 F. 48, 69 C.C.A. 28.

3 C.J. p 779 note 37, p 782 note 41, p 783 notes 43, 45, p 784 note 59, p 788 note 87.

Pleading bad on demurrer

It cannot be objected for the first time on appeal that the cause of action is defectively stated, even though the defect is such that the pleading would have been bad on the demurrer or motion in the lower court.—Robert Hind, Limited, v. Silva, C.C.A.Hawaii, 75 F.2d 74—Woods-Faulkner & Co. v. Michelson, C.C.A. Mo., 63 F.2d 569—Hunn v. Lewis, C. C.A.Iowa, 25 F.2d 271, certiorari denied 49 S.Ct. 30, 278 U.S. 631, 73 L.Ed. 549—Osley v. Adams, C.C.A. Ga., 268 F. 114, affirming, D.C., Adams v. Osley, 255 F. 117—Hocking Valley R. Co. v. New York Coal Co., Ohio, 217 F. 727, 132 C.C.A. 387—L. D. George Lumber Co. v. Daugherty, Va., 214 F. 958, 131 C.C.A. 254, certiorari denied 25 S.Ct. 207, 235 U.S. 703, 59 L.Ed. 433—3 C.J. p 781 note 40.

Particular defects

(1) Misjoinder of causes of action.—Jordan v. Roden, C.C.A.Mich., 292 F. 573, certiorari denied Union Cent. Life Ins. Co. v. Roden, 44 S.Ct. 34, 263 U.S. 705, 68 L.Ed. 516.

(2) Duplicity.—Victor American Fuel Co. v. Tomljanovich, Me., 232 F. 662, 146 C.C.A. 588, affirming, D. C., Tomljanovich v. Victor American Fuel Co., 227 F. 951 and 230 F. 467, certiorari denied 37 S.Ct. 212, 242 U.S. 643, 61 L.Ed. 542.

2. U.S.—American Creosote Works v. Powell, C.C.A.La., 298 F. 417, certiorari denied 44 S.Ct. 638, 265 U. S. 595, 68 L.Ed. 1198.

Particular matters

(1) Allowance or refusal of an amendment.—McCullough v. Clinch-Mitchell Const. Co., C.C.A.Mo., 71 F. 2d 17, certiorari denied Clinch-Mitchell Const. Co. v. McCullough, 55 S.Ct. 96, 293 U.S. 582, 79 L.Ed. 678—U. S. Shipping Board Emergency Fleet Corporation v. Greenwals, C.C.A.N.Y., 16 F.2d 948—Childs v. Missouri, K. & T. Ry. Co., Okl., 221 F. 219, 136 C.C.A. 629—3 C.J. p 792 note 32, p 793 note 33.

(2) Form of amendment or supplemental pleading.—American Creosote Works v. Powell, C.C.A.La., 298 F. 417, certiorari denied 44 S.Ct. 638, 265 U.S. 595, 68 L.Ed. 1198.

(3) Mode of making amendment.—Victor American Fuel Co. v. Tomljanovich, Me., 232 F. 662, 146 C.C.A. 588, affirming, D.C., Tomljanovich v. Victor American Fuel Co., 227 F. 951, and 230 F. 467, certiorari denied 37 S.Ct. 212, 242 U.S. 643, 61 L.Ed. 542.

(4) Discrepancies or inconsistencies between an amendment and the original pleading.—Dairymen's Milk Co. of Pittsburgh, v. McCormick Co., C.C.A.Pa., 114 F.2d 736.

3. U.S.—U. S. Fidelity & Guaranty Co. v. Barber, C.C.A.Mich., 70 F.2d 220—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 54 S. Ct. 786, 289 U.S. 755, 77 L.Ed. 1499.

4. **Objections precluded on appeal**

(1) That certain evidence was inadmissible under the pleadings.—Martin v. Imbrie, C.C.A.N.Y., 262 F. 44—3 C.J. p 801 note 93.

(2) That the pleadings were insufficient to present a certain issue.—Jordan v. Roden, C.C.A.Mich., 292 F. 573, certiorari denied Union Cent. Life Ins. Co. v. Roden, 44 S.Ct. 34, 263 U.S. 705, 68 L.Ed. 516—3 C.J. p 801 note 94.

5. U.S.—Venuto v. Robinson, C.C.A. N.J., 118 F.2d 679, certiorari denied Ross, Agent, Inc., v. Venuto, 62 S.Ct. 58, 314 U.S. 627, 86 L.Ed. 504—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C. A.Iowa, 101 F.2d 493—Chickasha Cotton Oil Co. v. Roden, C.C.A.Okl., 66 F.2d 127—Fred Harvey, Inc., v. Crooks, C.C.A.Mo., 54 F.2d 353, affirming, D.C., 39 F.2d 466—Trainman v. Raddaport, C.C.A.Pa., 41 F. 2d 336, 71 A.L.R. 475—Wabash Ry. Co. v. Beez, C.C.A.Ohio, 36 F.2d 480—New York Underwriters' Fire Ins. Co. v. Malham & Co., C.C.A. Ark., 25 F.2d 415—Transmarine Corporation v. Charles H. Levitt & Co., C.C.A.N.Y., 25 F.2d 275—Asheville Const. Co. v. Southern Ry. Co., C.C.A.N.C., 19 F.2d 32—Pennsylvania R. Co. v. Burgerson, C.C.A.Pa., 296 F. 311—Atlantic Coast Line R. Co. v. Williams, C.C.A.Ga., 284 F. 262—Martin v. Imbrie, C.C.A.N.Y., 262 F. 44—Twin City Fire Ins. Co. v. Stockmen's Nat. Bank of Ft. Benton, Mont., C.C.A.Mont., 261 F. 470—Connell Bros. Co. v. H. Diederichsen & Co., China, 213 F. 737, 130 C.C.A. 251.

3 C.J. p 796 note 81, p 798 note 85, p 799 note 87.

However, variance may be sufficiently plain as to be fatal even though not objected to in the court below, and in such case the court should not ignore it.—Horvath v. McCord Radiator & Mfg. Co., C.C.A. Mich., 100 F.2d 326, certiorari denied Carrier Engineering Corporation v. Horvath, 60 S.Ct. 101, 308 U.S. 581, 84 L.Ed. 486, rehearing denied 60 S. Ct. 171, 308 U.S. 636, 84 L.Ed. 529.

Sufficiency of objection

(1) To be sufficient, the objection must be specific, not general, and must show in what the variance consists, so that, if necessary, an amendment may be made to avoid it, and no other objection than that specified will be considered on appeal.—Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York, Tenn., 63 F. 48, 11 C.C. A. 96—Walsh v. Colclough, Wis., 56 F. 778, 6 C.C.A. 114.

(2) It may also be required that a party request a continuance or adjournment because of surprise or his unpreparedness to meet the evidence.—Arkansas Grand Prairie Oil & Gas Co. v. Davidson, Pa., 233 F. 64., 147 C.C.A. 449.

6. U.S.—U. S. v. Payne, C.C.A.Wash., 73 F.2d 900, certiorari granted Payne v. U. S., 55 S.Ct. 642, 295 U.S. 722, 79 L.Ed. 1675, certiorari dismissed 56 S.Ct. 87, 296 U.S. 659, 80 L.Ed. 469—Griggs v. Nadeau, Minn., 221 F. 381, 137 C.C.A. 189.

3 C.J. p 786 note 76.

Apparently contra U. S. v. Hill, C.C.A.N.Y., 34 F.2d 133.

7. U.S.—Coyner v. U. S., C.C.A.Ill., 103 F.2d 629—Morrison v. Regus, C.C.A.La., 22 F.2d 804, affirming, D.C., Walnut Creek Milling Co. v. Grain Products Co., 21 F.2d 380.

8. **Transfer of cause**

(1) From one court or division to another division.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn. v. Crady, C.C.A.Ohio, 82 F.2d 900, certiorari denied 56 S.Ct. 949, 298 U.S. 681, 80 L.Ed. 1401—Hicks Co. v. Moore, C.C.A.La., 261 F. 773.

(2) From law to equity docket or equity to law docket.—Otoe County Nat. Bank v. Delany, C.C.A.Neb., 88 F.2d 238—Jordan v. Roden, C.C.A. Mich., 292 F. 573, certiorari denied

qualification and selection of jurors,[9] mode and conduct of trial or hearing,[10] and evidence,[11] including objections with respect to its admission,[12] exclusion,[13] and sufficiency,[14] and including ob-

Union Cent. Life Ins. Co. v. Roden, 44 S.Ct. 34, 263 U.S. 705, 68 L.Ed. 516.

9. U.S.—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 23 F.2d 395.

10. U.S.—Schermann v. Yellow Cab Co., C.C.A.Ill., 101 F.2d 363, certiorari denied 59 S.Ct. 1045, 307 U.S. 647, 83 L.Ed. 1527—Brooks v. Great Atlantic & Pacific Tea Co., C.C.A.Cal., 92 F.2d 794—Tull v. Nash, Wash., 141 F. 557, 73 C.C.A. 29.

3 C.J. p 806 note 65.

Improper conduct or remarks of trial judge

U.S.—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 90 F.2d 817, certiorari granted 58 S.Ct. 46, 302 U.S. 670, 82 L.Ed. 517, and reversed on other grounds 58 S.Ct. 500, 303 U.S. 161, 82 L.Ed. 726, 114 A.L.R. 1218—Najera v. Bombardieri, C.C.A.N.M., 46 F.2d 281—Cudahy Packing Co. v. Luyben, C.C.A.Neb., 9 F.2d 32—Panama R. Co. v. Strobel, C.C.A.Canal Zone, 282 F. 52—Wolf v. Edmunson, Or., 240 F. 53, 153 C.C.A. 89—Lane v. Leiter, Ill., 237 F. 149, 150 C.C.A. 295.

3 C.J. p 806 note 79.

11. U.S.—Bitker v. Rosenberg, C.C.A.Wis., 68 F.2d 196—U. S. v. Keppler, C.C.A.N.J., 1 F.2d 315—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385.

3 C.J. p 807 note 88.

Depositions

U.S.—Columbus R. Co. v. Patterson, Ohio, 143 F. 245, 73 C.C.A. 603.

3 C.J. p 834 note 11, p 835 notes 15, 24.

Burden of proof

A party cannot complain for the first time on appeal that the trial court erred in placing on him the burden of proof, where he accepted or assumed the burden without objection.—Frankel v. New York Life Ins. Co., C.C.A.Okl., 51 F.2d 933—Waterloo Min. Co. v. Doe, Cal., 82 F. 45, 27 C.C.A. 50.

12. U.S.—Arizona Power Corporation v. Smith, C.C.A.Ariz., 119 F. 2d 888—Reidy v. Myntti, C.C.A. Alaska, 116 F.2d 725—Peoples Trust & Savings Bank v. Hubbell, C.C.A.Kan., 102 F.2d 754—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435—U. S. v. Triandaplous, C.C.A.Nev., 88 F.2d 957—William C. Barry, Inc., v. Baker, C.C.A.Me., 82 F.2d 79—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Proctor v. Preferred Accident Ins. Co. of New York, C.C.A.Ky., 51 F.2d 15—Northern Nav. Co. v. Minnesota Atlantic Transit Co., C.C.A.Minn., 49 F.2d 203—Brown Sheet Iron & Steel Co. v. Willcuts, C.C.A.Minn., 45 F.2d 390, affirming, D.C., 34 F.2d 969—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Meinrath Brokerage Co. v. Collins-Dietz-Morris Co., C.C.A.Okl., 298 F. 377—Hudson v. Hudson, C.C.A.Tex., 276 F. 547—Vance v. Clark, W.Va., 252 F. 495, 164 C.C.A. 411—Atchison, T. & S. F. Ry. Co. v. U. S., Okl., 243 F. 114, 155 C.C.A. 644—Fernwood & G. R. Co. v. Bessemer Coal, Iron & Land Co., Miss., 213 F. 33, 129 C.C.A. 627.

D.C.—Richardson v. Richardson, 112 F.2d 19, 72 App.D.C. 67.

3 C.J. p 808 note 91.

Particular kinds of evidence

(1) Hearsay evidence generally.—Central R. Co. of New Jersey v. Sharkey, N.Y., 259 F. 144, 170 C.C.A. 212—Fischer v. Neil, C.C.N.Y., 6 F. 89.

(2) Expert or opinion evidence.—Wabash Screen Door Co. v. Black, Tenn., 126 F. 721, 61 C.C.A. 639—Sigafus v. Porter, N.Y., 84 F. 430, 28 C.C.A. 443, reversed on other grounds 21 S.Ct. 34, 179 U.S. 116, 45 L.Ed. 113.

(3) Letters, documents, exhibits, and records generally.—Mankin v. Bartley, C.C.A.Va., 277 F. 960—Sharples Separator Co. v. Skinner, Cal., 251 F. 25, 163 C.C.A. 275—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C.C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539—Cordingly v. Kennedy, Colo., 239 F. 645, 152 C.C.A. 479—3 C.J. p 812 note 97, p 813 note 4, p 814 note 8, p 815 note 9.

(4) Secondary evidence generally.—Barrick v. Pratt, C.C.A.Ala., 32 F. 2d 732—Lohman v. Stockyards Loan Co., supra—3 C.J. p 813 notes 2, 5.

(5) Oral or written, for which a proper foundation has not been laid.—U. S. v. Blackburn, C.C.A.Wash., 53 F.2d 19.

13. U.S.—Baldrich v. Barbour, C.C.A.Puerto Rico, 91 F.2d 650, denying motion 90 F.2d 867—Cudahy Packing Co. v. Narzisenfeld, C.C.A.N.Y., 3 F.2d 567—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C.C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539.

3 C.J. p 824 note 47.

Grounds

If the exclusion of the evidence is proper on any ground, the ruling of the trial court will be sustained, although the proper grounds for exclusion were not urged in the objection to the admission of the evidence.—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873.

Foundation for objection

(1) On objection thereto, a proper offer must be made at the time showing what evidence will be given if the witness is permitted to answer, the purpose and object of the testimony sought to be introduced, and all the facts necessary to establish its admissibility.—Powhatan Mining Co. v. Ickes, C.C.A., 118 F.2d 105—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Roach v. Stastny, C.C.A.Ill., 104 F.2d 559—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F. 2d 56, 89 A.L.R. 279—Thompson v. U. S., C.C.A.S.D., 65 F.2d 897—Kline v. Blackwell, C.C.A.Fla., 63 F.2d 897, certiorari denied 54 S.Ct. 54, 290 U.S. 636, 78 L.Ed. 553—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694—Cropper v. Titanium Pigment Co., C.C.A.Mo., 47 F.2d 1038, 78 A.L.R. 737—Najera v. Bombardieri, C.C.A.N.M., 46 F.2d 281—Williams v. Commissioner of Internal Revenue, C.C.A., 44 F.2d 467—Schnerb v. Caterpillar Tractor Co., C.C.A.N.Y., 43 F.2d 920, certiorari denied 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Chevrolet Motor Co. v. Gladding, C.C.A.Md., 42 F.2d 440, certiorari denied 51 S.Ct. 78, 282 U.S. 872, 75 L.Ed. 770—Sacramento Suburban Fruit Lands Co. v. Miller, C.C.A. Cal., 36 F.2d 922—Central Supply Co. v. Carter Clothing Corporation, C.C.A.N.J., 35 F.2d 172—Hatch v. U. S., C.C.A.Iowa, 34 F.2d 436, certiorari denied 50 S.Ct. 246, 281 U.S. 731, 74 L.Ed. 1147—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Federal Surety Co. v. Standard Oil Co., C.C.A.S.D., 32 F.2d 119—Maryland Casualty Co. v. Simmons, C.C.A.Ga., 2 F.2d 29, certiorari denied 45 S.Ct. 226, 266 U.S. 634, 69 L.Ed. 480—Cleveland & Western Coal Co. v. Main Island Creek Coal Co., C.C.A.Ohio, 297 F. 60, certiorari denied 44 S.Ct. 634, 265 U.S. 588, 68 L.Ed. 1194—3 C.J. p 825 note 53.

(2) However, an offer of proof is unnecessary in some circumstances.—Meaney v. U. S., C.C.A.N.Y., 112 F. 2d 538, 130 A.L.R. 973—Greenhalch v. Shell Oil Co., C.C.A.Utah, 78 F.2d 942.

14. U.S.—Park v. Park, C.C.A.Ga., 123 F.2d 370, reversing, D.C., 37 F.Supp. 185—Ætna Casualty & Surety Co. v. Yeatts, C.C.A.Va., 122 F.2d 350—Austin-Western Road Machinery Co. v. Veal, C.C.A.Ga.,

jections with respect to the competency[15] and examination[16] of witnesses. To preserve a question for appellate review an objection to the admission of evidence[17] or an objection to the suffi-

115 F.2d 112—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 106 F.2d 561, certiorari dismissed 60 S. Ct. 468, 309 U.S. 691, 84 L.Ed. 1033—A. E. Barker & Co. of California v. Gilinsky Fruit Co., C.C.A.Neb., 100 F.2d 863—Harris v. Biszkowicz, C.C.A.Mo., 100 F.2d 854—Mutual Benefit Health & Accident Ass'n v. Bowman, C.C.A.Neb., 99 F.2d 856, conforming to mandate 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, vacating, C.C.A., 96 F.2d 7, certiorari denied 59 S.Ct. 485, 306 U. S. 637, 83 L.Ed. 1038—U. S. v. John II Estate, C.C.A.Hawaii, 91 F. 2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U. S. 746, 82 L.Ed. 577—City of Woodward v. Caldwell, C.C.A.Okl., 86 F. 2d 567—Fierce v. Wyatt, C.C.A. Iowa, 83 F.2d 892—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S., for Use and Benefit of Belmont, v. Mittry Bros. Const. Co., 4 F. Supp. 216—Lazelle v. Norfolk & W. Ry. Co., C.C.A.Ohio, 73 F.2d 459—Divide Creek Irr. Dist. v. Hollingworth, C.C.A.Colo., 72 F.2d 859—Gardner v. U. S., C.C.A.Cal., 71 F. 2d 63, certiorari denied 55 S.Ct. 213, 293 U.S. 619, 79 L.Ed. 707—Mandel Bros. v. Henry A. O'Neil, Inc., C.C.A.S.D., 69 F.2d 452—Town Club of St. Louis v. U. S., C.C.A.Mo., 68 F.2d 620, affirming, D.C., 60 F.2d 628—Jones v. Gill, C.C.A.Mo., 67 F. 2d 159, affirming, D.C., Gill v. Jones, 4 F.Supp. 769—U. S. v. Alberty, C. C.C.A.Okl., 63 F.2d 965—Rosborough v. Chelan County, Wash., C. C.A.Wash., 53 F.2d 198—First Nat. Bank of San Rafael v. Philippine Refining Corporation of New York, C.C.A.Cal., 51 F.2d 218—Quality Realty Co. v. Wabash Ry. Co., C. C.A.Mo., 50 F.2d 1051—Brown Sheet Iron & Steel Co. v. Willcuts, C.C.A. Minn., 45 F.2d 390, affirming, D.C., 34 F.2d 969—Ocean Accident & Guarantee Corporation v. Pearson, C.C.A.Tenn., 37 F.2d 896—Southern Surety Co. v. Lee County Bank, Title & Trust Co. of Ft. Myers, Fla., C.C.A.Mo., 36 F.2d 220—Maryland Casualty Co. v. Jones, C. C.A.Cal., 35 F.2d 791—Cooper v. Sun Co., C.C.A.Pa., 33 F.2d 881—Norfolk & W. Ry. Co. v. Skeens, C.C.A.Ohio, 33 F.2d 508—Henry H. Cross Co. v. Texhoma Oil & Refining Co., C.C.A.Okl., 32 F.2d 442—Dykes v. Little, C.C.A.Okl., 31 F. 2d 744—McFarland v. Central Nat. Bank of Topeka, C.C.A.Kan., 26 F. 2d 890, affirming, D.C., Central Nat. Bank of Topeka, Kan. v. McFarland, 20 F.2d 416, certiorari denied McFarland v. Central Nat. Bank of Topeka, Kan., 49 S.Ct. 12, 278 U.S. 606, 73 L.Ed. 533—Southern Surety Co. of Des Moines, Iowa v. U. S., C.C.A.S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532—Hass v. U. S., C.C.A.Okl., 17 F.2d 894—Oyler v. Cleveland, C. C. & St. L. Ry. Co., C.C.A.Ohio, 16 F.2d 455—Gussman v. Byrd Cattle Co., C.C.A.Tex., 11 F.2d 136—Hecht v. Alfaro, C.C.A. Cal., 10 F.2d 464, affirming, D.C., 4 F.2d 255—First Nat. Bank v. Litteer, C.C.A.Okl., 10 F.2d 447—China Press v. Webb, C.C.A.China, 7 F. 2d 581—Allen v. Cartan & Jeffrey Co., C.C.A.Neb., 7 F.2d 21, denying petition 5 F.2d 1011—Rahilly v. O'Laughlin, C.C.A.N.D., 1 F.2d 1—Pennok Oil Co. v. Roxana Petroleum Co. of Oklahoma, C.C.A.Okl., 289 F. 416—Bank of Italy v. F. Romeo & Co., C.C.A.Cal., 287 F. 5—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 277 F. 625, certiorari denied 42 S.Ct. 589, 259 U.S. 585, 66 L.Ed. 1076—Pabst Brewing Co. v. E. Clemens Horst Co., C.C.A.Cal., 264 F. 909—First Nat. Bank of Casselton v. National City Bank of Chicago, C.C.A.N.D., 261 F. 912—Flour City Ornamental Iron Works v. Schuler, Minn., 260 F. 662, 171 C.C.A. 426—Pederson v. U. S., Wash., 253 F. 622, 165 C.C.A. 248—H. F. Danberg Land & Live Stock Co. v. Day, Cal., 247 F. 477, 159 C.C.A. 531—Security Nat. Bank of Sioux City, Iowa v. Old Nat. Bank of Battle Creek, Mich., Iowa, 241 F. 1, 154 C.C.A. 1—Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., Minn., 240 F. 381, 153 C.C.A. 307—Maryland Casualty Co. of Baltimore, Md. v. Orchard Land & Timber Co., Or., 240 F. 364, 153 C.C.A. 290—Miller & Lux v. Petrocelli, Cal., 236 F. 846, 150 C.C.A. 108—Wear v. Imperial Window Glass Co., Mo., 224 F. 60, 139 C.C.A. 622—Dinet v. Rapid City, S.D., 222 F. 497, 138 C.C.A. 93.

3 C.J. p 836 note 29, p 837 note 31, p 838 notes 32, 35, p 839 note 37.

An exception to the text rule, exists where, by reason of the particular circumstances, the party had no chance to present his objection in the lower court.—Meyer & Chapman State Bank v. First Nat. Bank of Cody, Wyo., 248 F. 679, 160 C.C.A. 579.

Existence of any evidence

It is sometimes held that even the legal question whether there is any evidence tending to support the verdict, findings, or judgment cannot first be raised in the circuit court.—Norfolk & W. Ry. Co. v. Skeens, C.C.A.Ohio, 33 F.2d 508—Keeley v. Ophir Hill Consolidated Mining Co., Utah, 169 F. 598, 95 C.C.A. 96.

15. U.S.—Crancer v. Lowden, C.C.A. Mo., 121 F.2d 645, certiorari granted 62 S.Ct. 108, 314 U.S. 595, 86 L. Ed. 479—Union Electric Light & Power Co. v. Snyder Estate Co., C.C.A.Mo., 65 F.2d 297.

3 C.J. p 828 note 74, p 829 note 75.

Offer of proof

Ruling of incompetency will not be reviewed unless there is an offer or showing of what would have been proved by the witness.—Hass v. U. S., C.C.A.Cal., 31 F.2d 13—Romeo v. U. S., C.C.A.Wash., 24 F.2d 527, denying rehearing 23 F.2d 551.

16. U.S.—U. S. v. Cannon, C.C.A. Mass., 116 F.2d 567—Brown v. Carver, C.C.A.N.Y., 45 F.2d 673—Swift & Co. v. Bowling, C.C.A.W.Va., 293 F. 279—Wolf v. Edmunson, Or., 240 F. 53, 153 C.C.A. 89—Eli Mining & Land Co. v. Carleton, Colo., 108 F. 24, 47 C.C.A. 166.

Form or propriety of questions

U.S.—Morrow v. U. S., C.C.A.Ill., 101 F.2d 654, certiorari denied 59 S. Ct. 836, 307 U.S. 628, 83 L.Ed. 1511—Travelers Ins. Co. v. Drake, C.C. A.Cal., 89 F.2d 47—U. S. v. Sauls, C.C.A.N.C., 65 F.2d 886—Twohy Bros. Co. v. Kennedy, C.C.A.Ariz., 295 F. 462, error dismissed 44 S. Ct. 636, 265 U.S. 575, 68 L.Ed. 1187—Payne v. Connor, C.C.A.Me., 274 F. 497—Sharples Separator Co. v. Skinner, Cal., 251 F. 25, 163 C.C.A. 275—Delano v. Pierce, Neb., 225 F. 976, 141 C.C.A. 98.

3 C.J. p 830 note 84, p 831 note 85.

Objection must be proper and timely

U.S.—American Car & Foundry Co. v. Brinkman, Ill., 146 F. 712, 77 C. C.A. 138.

3 C.J. p 832 note 96, p 833 note 1.

17. U.S.—Byrd v. U. S., C.C.A.Kan., 106 F.2d 821, 126 A.L.R. 425—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—U. S. v. Noble, C.C.A.Mont., 79 F. 2d 842—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97—Washburn v. Douthit, C.C.A.Ark., 73 F.2d 23—Irving Trust Co. v. Jacob Weckstein & Sons, C.C.A.N. Y., 64 F.2d 333—Mineral Development Co. v. Kentucky Coal Lands Co., Ky., 259 F. 118, 170 C.C.A. 186, certiorari denied 39 S.Ct. 492, 250 U.S. 641, 63 L.Ed. 1185.

3 C.J. p 816 note 19.

Time and mode of objection

(1) If the objectionable character of evidence is apparent when it is offered or introduced, the objection should be made then.—Klein v. Darnell, Tex., 239 F. 844, 152 C.C.A. 630.

ciency of evidence[18] must be timely and in proper | form.

(2) If the ground of objection was not earlier apparent, it may be proper and necessary that objection be made by a motion to strike or for an instruction that the evidence be disregarded by the jury.—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Sacramento Suburban Fruit Lands Co. v. Soderman, C.C.A. Cal., 36 F.2d 934—Grand Trunk Pac. Ry. Co. v. Tollard, C.C.A.Minn., 286 F. 676—Tate v. Baugh, C.C.A.Tenn., 264 F. 892—Central R. Co. of New Jersey v. Sharkey, N.Y., 259 F. 144, 170 C.C.A. 212—Frederick Mfg. Co. v. Devlin, N.J., 127 F. 71, 62 C.C.A. 53—3 C.J. p 817 note 20, p 831 note 85.

(3) Where an objection to evidence, was made after the question has been answered, it is not too late to preserve the question for review, if the objection was overruled on the ground that the evidence was incompetent, and not on the ground that the objection was too late.—Grand Trunk Pac. Ry. Co. v. Tollard, supra.

Specification of evidence

At least where any of the evidence is admissible for any purpose, objection should specify the particular evidence or, parts of the evidence which are regarded as objectionable, a general objection or motion directed to the whole evidence being insufficient. —U. S. v. Aspinwall, C.C.A.Or., 96 F. 2d 867—Washburn v. Douthit, C.C.A. Ark., 73 F.2d 23—U. S. v. Stamey, C. C.A.Wash., 48 F.2d 150, reversing, D.C., Stamey v. U. S., 42 F.2d 879—3 C.J. p 818 notes 23, 24.

Specification of grounds

(1) Objection must specifically state the grounds or reasons which render the evidence inadmissible.—Merchants' Ins. Co. v. Buckner, Ky., 110 F. 345, 49 C.C.A. 80—Sampsell v. Anches, C.C.A.Wash., 108 F.2d 945 —Collins v. Streitz, C.C.A.Ariz., 95 F. 2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387—Metropolitan Life Ins. Co. v. Armstrong, C.C.A. Neb., 85 F.2d 187—Columbian Nat. Life Ins. Co. v. Comfort, C.C.A.Mo., 84 F.2d 291, certiorari denied 57 S.Ct. 34, 299 U.S. 571, 81 L.Ed. 420—Lazelle v. Norfolk & W. Ry. Co., C.C.A.Ohio, 73 F.2d 459—Niagara Fire Ins. Co. of New York, N. Y. v. Raleigh Hardware Co., C.C.A.W.Va., 62 F.2d 705—Wirthlin v. Mutual Life Ins. Co., C.C. A.Utah, 56 F.2d 137, 86 A.L.R. 138—Continental Ins. Co. of City of New York v. Fortner, C.C.A.Ky., 25 F.2d 398—Miller v. Estabrook, C.C.A.W. Va., 273 F. 143—Wayne v. Venable, Ark., 260 F. 64, 171 C.C.A. 100—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—R. D. Cole Mfg. Co. v. Mendenhall, N.C., 240 F. 641, 153 C.C.A. 439—Arnold v. Horrigan, Mich., 238 F. 39, 151 C.C.A. 115 —Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 451—3 C.J. p 819 note 26.

(2) A mere general objection, such as one which only states that the party objects, or that the evidence is incompetent, irrelevant, and immaterial, is ordinarily insufficient.—Trucking, Inc. v. Krotzer, C.C.A.Ohio, 106 F.2d 447—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U. S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435—Pacific Alaska Airways v. Mahan, C.C.A.Alaska, 89 F.2d 255, certiorari denied Pacific Alaska Airways v. Mahan, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718—Jeffreys v. O'Neal, C.C.A.N.C., 64 F.2d 284—Pennsylvania Co. v. Clark, C.C.A.Ohio, 266 F. 182—Examiner Printing Co. v. Aston, Cal., 238 F. 459, 151 C.C.A. 395—3 C.J. p 819 note 26.

(3) Failure to specify grounds will not preclude review where the objection could not have been obviated or the evidence is clearly incompetent in any aspect of the case.—Southern Pac. Co. v. McCready, C.C. A.Cal., 47 F.2d 673, certiorari denied 52 S.Ct. 10, 284 U.S. 624, 76 L.Ed. 532—Grandison v. Robertson, N.Y., 231 F. 785, 145 C.C.A. 605, modifying, D.C., 220 F. 985—3 C.J. p 818 note 25.

(4) Also failure to specify is immaterial where the objection is such that the trial court cannot fail to understand the ground on which it is based.—New England Newspaper Pub. Co. v. Bonner, C.C.A.Mass., 68 F.2d 880, certiorari denied 54 S.Ct. 630, 292 U.S. 625, 78 L.Ed. 1480, and Bonner v. New England Newspaper Pub. Co., 54 S.Ct. 631, 292 U.S. 625, 78 L.Ed. 1480.

(5) When a specific objection has been made, the court will consider no grounds or reasons other than those that have been specified or urged in the trial court.—Cuneo Press v. Claybourn Corporation, C.C.A.Ill., 90 F.2d 233—Prudential Ins. Co. of America v. Faulkner, C.C.A.Utah, 68 F.2d 676 —U. S. v. Smith, C.C.A.Wash., 55 F. 2d 141, 81 A.L.R. 926—American Petroleum Co. v. Missouri Pac. Ry. Co., C.C.A.Ark., 25 F.2d 441—Page Steel & Wire Co. v. Blair Engineering Co., C.C.A.N.J., 22 F.2d 403, certiorari denied 48 S.Ct. 303, 276 U.S. 623, 72 L. Ed. 737—Thompson Caldwell Const. Co. v. Young, C.C.A.N.C., 294 F. 145 —International Cotton Mills v. Burnham, C.C.A.Ga., 284 F. 351—Canal-Commercial Trust & Savings Bank v. Bank of Plant City, C.C.A.La., 278 F. 178—Lederer v. Real Estate Title Insurance & Trust Co. of Philadelphia, C.C.A.Pa., 273 F. 933—Miller v. Estabrook, C.C.A.W.Va., 273 F. 143 —Grandison v. Robertson, N.Y., 231 F. 785, 145 C.C.A. 605, modifying, D. C., 220 F. 985—Hunt v. U. S., Mo., 61 F. 795, 10 C.C.A. 74, rehearing denied 63 F. 568, 11 C.C.A. 340, error dismissed 17 S.Ct. 609, 166 U.S. 424, 41 L.Ed. 1063—3 C.J. p 819 note 26, p 893 note 29.

(6) If an improper or wrong reason or ground is assigned in objecting to evidence, the circuit court of appeals will treat the evidence as though no objection had been taken. —U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873.

Renewal of objection

(1) When, after objection has been interposed or sustained, an attempt is made to remove the ground of objection and the evidence is then reoffered, the objection must be renewed.—Paramount Productions v. Smith, C.C.A.Cal., 91 F.2d 863, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579.

(2) Although a question has been excluded on objection, if the witness has nevertheless answered, it is necessary, in order to assert error in permitting the answer to stand, to move to strike or exclude the answer.—Southern Package Corporation v. Mitchell, C.C.A.Miss., 109 F.2d 609.

(3) If the court without a final ruling on its admissibility admits evidence tentatively or conditionally subject to future consideration or action a subsequent objection is necessary.—Paramount Productions v. Smith, supra—Clauson v. U. S., C.C. A.S.D., 60 F.2d 694—Geiger v. Tramp, C.C.A.Iowa, 291 F. 353—Curcuru v. Peninsular Electric Light Co., Mich., 258 F. 785, 170 C.C.A. 79.

Objections held sufficient

U.S.—New England Newspaper Pub. Co. v. Bonner, 68 F.2d 880, certiorari denied 54 S.Ct. 630, 292 U.S. 625, 78 L.Ed. 1480, and Bonner v. New England Newspaper Pub. Co., 54 S.Ct. 631, 292 U.S. 625, 78 L.Ed. 1480—Watkins Salt Co. v. Mulkey, N.Y., 225 F. 739, 141 C.C.A. 11.

18. U.S.—Coggins v. Gregorio, C.C. A.N.M., 97 F.2d 948—Wall v. U. S., C.C.A.Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Century Furniture Co. v. Bernhard's, C.C.A.Cal., 82 F.2d 706—White v. U. S., C.C.A. Okl., 48 F.2d 178—Liberty Oil Co. v. Condon Nat. Bank, Kan., 271 F. 928, petition dismissed 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, rehearing granted 42 S.Ct. 92, 257 U.S.

Also, where no objection is raised in the trial | court, error may not be urged in the circuit court

628, 66 L.Ed. 405, and certiorari granted on rehearing 42 S.Ct. 93, 257 U.S. 630, 66 L.Ed. 406, and reversed on other grounds 43 S.Ct. 118, 260 U.S. 235, 67 L.Ed. 232.
3 C.J. p 839 note 40.

Motion or request for ruling

(1) Appellate court cannot review assignment of error with respect to sufficiency of evidence in absence of motion to test sufficiency thereof.—Rucker v. Kokrda, C.C.A.Colo., 68 F. 2d 73.

(2) It may be sufficient and necessary to raise such objection in a jury case by a motion for a directed verdict.—F. W. Woolworth Co. v. Seckinger, C.C.A.La., 125 F.2d 97—Nailling v. U. S., C.C.A.Tenn., 124 F.2d 431, certiorari denied 62 S.Ct. 1043, 316 U.S. 675, 86 L.Ed. 1749—Stephenson v. Grand Trunk Western R. Co., C.C.A.Ill., 110 F.2d 401, certiorari granted Grand Trunk Western R. Co. v. Stephenson, 60 S.Ct. 1101, 310 U.S. 623, 84 L.Ed. 1395 and 60 S.Ct. 1102, 310 U.S. 623, 84 L.Ed. 1395, certiorari dismissed 60 S.Ct. 1107, two cases, 311 U.S. 720, 85 L.Ed. 469—Taylor v. Merrill, C.C.A.Ariz., 104 F.2d 710, certiorari denied 60 S.Ct. 122, 308 U.S. 593, 84 L.Ed. 496—Equitable Life Assur. Soc. of U. S. v. MacDonald, C.C.A.Wash., 96 F.2d 437, certiorari denied 59 S.Ct. 86, 305 U.S. 624, 83 L.Ed. 399—Western Produce Co. v. Folliard, C.C.A.Tex., 93 F.2d 588—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Luke v. U. S., C.C.A.Ga., 84 F.2d 823—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 945, denying rehearing 82 F.2d 541, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—McConnell v. U. S., C.C.A.Pa., 81 F.2d 639—Milleson v. U. S., C.C.A. Mo., 78 F.2d 60—Hunt v. Standard Brands, C.C.A.Ohio, 72 F.2d 822—Jefferson Standard Life Ins. Co. v. Stevenson, C.C.A.La., 70 F.2d 72, certiorari denied Stevenson v. Jefferson Standard Life Ins. Co., 55 S.Ct. 100, 293 U.S. 585, 79 L.Ed. 681—Combs v. U. S., C.C.A.Mo., 65 F.2d 787—Bergeron v. Goldman, C.C.A.La., 64 F.2d 917—Dayton Rubber Mfg. Co. of Delaware v. Sabra, C.C.A.Ariz., 63 F.2d 865—Frickle v. General Accident, Fire & Life Assur. Corporation, C.C. A.Mo., 59 F.2d 563, certiorari denied 53 S.Ct. 221, 287 U.S. 662, 77 L.Ed. 571—Meandor v. National Liberty Ins. Co. of America, C.C.A.Tex., 53 F.2d 731—Rosborough v. Chelan County, Wash., C.C.A.Wash., 53 F.2d 198—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Swift & Co. v. Daly, C.C.A.Mont., 44 F.2d 40—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Co., 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U.S. 897, 75 L.Ed. 790—Interstate Stage Lines Co., v. Ayers, C.C.A.Mo., 42 F.2d 611—Hard & Rand v. Biston Coffee Co., C.C.A. Mo., 41 F.2d 625—Kennedy Lumber Co. v. Rickborn, C.C.A.S.C., 40 F.2d 228—G. L. Webster Canning Co. v. Hogue-Kellogg Co., C.C.A.Va., 34 F. 2d 10—Hessig-Ellis Drug Co. v. Grinnell Lithographic Co., C.C.A. Tenn., 33 F.2d 449—Ellerd v. Griffith, C.C.A.Tex., 29 F.2d 402, certiorari denied 49 S.Ct. 480, 279 U.S. 864, 73 L.Ed. 1003—Sacramento Suburban Fruit Lands Co. v. Elm, C.C.A.Cal., 29 F.2d 233—American Petroleum Co. v. Missouri Pac. Ry. Co., C.C.A. Ark., 25 F.2d 441—Hotel McAllister v. Coburn, C.C.A.Fla., 18 F.2d 100—Chesapeake & O. R. Co. v. Lushbaugh, C.C.A.Ohio, 17 F.2d 986—Southern Pac. Co. v. Johnson, C.C.A. Cal., 8 F.2d 993—Steil v. Holland, C. C.A.Cal., 3 F.2d 776—Martin v. Richmond, F. & P. R. Co., C.C.A.Va., 3 F.2d 26—United Verde Copper Co. v. Jaber, C.C.A.Ariz., 298 F. 97—Cleveland & Western Coal Co. v. Main Island Creek Coal Co., C.C.A.Ohio, 297 F. 60, certiorari denied 44 S.Ct. 634, 265 U.S. 588, 68 L.Ed. 1194—Slip Scarf Co. v. Wm. Filene's Sons Co., C. C.A.Mass., 289 F. 641—Continental Nat. Bank v. Neville, C.C.A.Cal., 285 F. 565—T. H. Flood & Co. v. Bates, C.C.A.Ill., 283 F. 364—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C. C.A. 240—Victor American Fuel Co. v. Tomljanovich, Me., 232 F. 662, 146 C.C.A. 588, affirming, D.C., Tomljanovich v. Victor American Fuel Co., 227 F. 951 and 230 F. 467, certiorari denied 37 S.Ct. 212, 242 U.S. 643, 61 L. Ed. 542—Crowell Bros. v. Panhandle Grain & Elevator Co., C.C.A.Okl., 271 F. 129, certiorari denied Panhandle Grain & Elevator Co. v. Cromwell Bros., 42 S.Ct. 48, 257 U.S. 635, 66 L. Ed. 403—Sharples Separator Co. v. Skinner, Cal., 251 F. 25, 163 C.C.A. 275—3 C.J. p 841 note 46.

(3) Independent of statute or rule of court, the right of review in a case tried by the court without a jury is preserved by a motion for a judgment or finding in favor of the party objecting.—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695—Hobbs-Western Co. v. Employers' Liability Assur. Corporation, Limited, of London, England, C.C.A. Ark., 102 F.2d 32—Kansas City Life Ins. Co. v. Davis, C.C.A.Cal., 95 F.2d 952—Seaboard Surety Co. v. U. S. for Use and Benefit of Marshall-Wells Co., C.C.A.Idaho, 84 F.2d 348—Provident Life & Accident Ins. Co. of Chattanooga, Tenn. v. Crady, C.C.A. Ohio, 82 F.2d 900, certiorari denied 56 S.Ct. 949, 298 U.S. 681, 80 L.Ed. 1401—Maryland Casualty Co. v. First Nat. Bank, C.C.A.Tex., 80 F.2d 274—Backer Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—Ocean Accident & Guarantee Corporation v. J. L. Brandeis & Sons, C.C.A.Neb., 75 F.2d 605, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706—Chicago, R. I. & P. Ry., Co. v. Maryland Casualty Co., C.C.A.Mo., 75 F.2d 596—Dakota Corporation v. Slope County, N. D., C.C.A.N.D., 75 F.2d 587, certiorari denied 56 S.Ct. 106, 296 U.S. 593, 80 L.Ed. 420—People's Loan & Investment Co. v. Universal Credit Co., C.C.A.Ark., 75 F.2d 545—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—New York Life Ins. Co. v. Doerksen, C.C. A.Kan., 75 F.2d 96—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S., for Use and Benefit of Belmont, v. Mittry Bros. Const. Co., 4 F.Supp. 216—Fidelity & Deposit Co. of Maryland v. U. S., ex rel. Woods, C.C.A.Wash., 72 F.2d 828, affirming, D.C., U. S. ex rel. Woods v. Mayer, 4 F.Supp. 653—Lyle v. Phillips Petroleum Co., C.C.A.Ark., 72 F. 2d 347—Mandel Bros. v. Henry A. O'Neil, Inc., C.C.A.S.D., 69 F.2d 452—Hussey-Hobbs Tie Co. v. Louisville & N. R. Co., C.C.A.Mo., 69 F.2d 92—McLeod v. U. S., C.C.A.Colo., 67 F.2d 740—Greenway v. U. S., C.C.A.Colo., 67 F.2d 738—Davis v. U. S., C.C.A. Colo., 67 F.2d 737—Operators' Oil Co. v. Barbre, C.C.A.Okl., 65 F.2d 857—Kentz v. Mosher, C.C.A.Wyo., 62 F. 2d 827—U. S. v. Douglas, Buchanan & Crow, C.C.A.Iowa, 61 F.2d 821—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14, reversing, D.C., 50 F.2d 219—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694—McPherson v. Cement Gun Co., C.C.A. Okl., 59 F.2d 889—Wourdack v. Becker, C.C.A.Mo., 55 F.2d 840, certiorari denied 52 S.Ct. 501, 286 U.S. 548, 76 L.Ed. 1285—U. S. v. Tyrakowski, C. C.A.Ill., 50 F.2d 766—Brown Sheet Iron & Steel Co. v. Willcuts, C.C.A. Minn., 45 F.2d 390, affirming, D.C., 34 F.2d 969—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C. C.A.S.D., 33 F.2d 841—Edwards v. Robinson, C.C.A.Idaho, 8 F.2d 726—Martin v. Richmond, F. & P. R. Co., C.C.A.Va., 3 F.2d 26—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—Highway Trailer Co. v. City of Des Moines, Iowa, C.C.A.Iowa, 298 F. 71—Blumenfeld v. Mogi & Co., C.C.A. Ga., 295 F. 123—Pauchet v. Bujac, C.C.A.N.M., 281 F. 962—Granite Falls Bank v. Keyes, C.C.A.Minn., 277 F. 796—Stoffregen v. Moore, C.C.A.Mo.,

of appeals as to improper arguments and conduct | of counsel,[19] the submission of,[20] or failure to sub-

271 F. 680, affirming, D.C., 264 F. 232—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.A.N.M., 270 F. 1—Caldwell v. Blodgett, N.D., 256 F. 744, 168 C.C.A. 90—Tiernan v. Chicago Life Ins. Co., Kan., 214 F. 238, 131 C.C.A. 284—3 C.J. p 841 note 47.

(4) Under Fed. Rules of Civ. Proc., rule 52(a), 28 U.S.C.A. foll. § 723c, requests for findings are not necessary for purposes of review in actions tried without a jury.—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695.

(5) A motion for a directed verdict which is not in proper form will be treated as effective in the circuit court where it has not been questioned or objected to in the trial court.—Miller v. Union Pac. R. Co., C.C.A.Mo., 63 F.2d 574, certiorari granted 54 S.Ct. 48, 290 U.S. 607, 78 L.Ed. 532, and reversed on other grounds 54 S.Ct. 172, 290 U.S. 227, 78 L.Ed. 285.

Time of objection

(1) Generally, objection must be raised in the lower court before the case or issue is submitted.—Harper v. U. S., C.C.A.Kan., 98 F.2d 885—Southern Surety Co. of Des Moines, Iowa, v. U. S., C.C.A.S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532.

(2) So the question may not be preserved by a motion for a new trial.—Luke v. U. S., C.C.A.Ga., 84 F. 2d 823.

Renewal of motion

(1) Where defendant has waived his motion for a dismissal or direction of a verdict, made at the close of plaintiff's evidence, by the subsequent introduction of evidence, he must, in order to obtain a review of the sufficiency of the evidence, renew his motion or demurrer at the close of all the evidence.—U. S. v. Salmon, C.C.A.Miss., 42 F.2d 353—J. B. McCrary Engineering Co. v. White Coal Power Co., C.C.A.N.C., 35 F.2d 142—Modoc County Bank v. Ringling, C.C. A.Cal., 7 F.2d 535—Bell v. Union Pac. R. Co., Colo., 194 F. 366, 114 C.C.A. 326.

(2) Renewal is not necessary if the first motion or demurrer is not regarded as waived by the subsequent introduction of evidence.—Lydia Cotton Mills v. Prairie Cotton Co., S.C., 156 F. 225, 84 C.C.A. 129.

Rulings on motions

Objections to rulings on motions for a nonsuit or direction of a verdict not raised in the trial court cannot ordinarily be raised on appeal.—Halges v. Central R. Co. of New Jersey, C.C.A.N.Y., 58 F.2d 169, certiorari denied Central R. Co. of New Jersey v. Halges, 53 S.Ct. 11, 287 U. S. 607, 77 L.Ed. 528—Vance v. Chapman, C.C.A.Okl., 23 F.2d 914—3 C.J. p 841 note 49.

Specificness of objection

(1) Usually an objection that the evidence is not sufficient, whether made by motion for direction of a verdict or otherwise, must, to be available on appeal, specify the grounds therefor and the particular point on which evidence is wanting; a general objection will not suffice.—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383—Adams v. Shirk, Ill., 104 F. 54, 43 C.C.A. 407, rehearing denied 105 F. 659, 44 C.C.A. 653—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726—City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567—Washburn v. Douthit, C.C.A.Ark., 73 F.2d 23—H. F. Wilcox Oil & Gas Co., v. Skidmore, C.C.A.Mo., 72 F.2d 748—U. S. Fidelity & Guaranty Co. v. Howard, C.C.A.Ga., 67 F.2d 382, certiorari denied 54 S.Ct. 439, 291 U.S. 663, 78 L.Ed. 1054, rehearing denied 54 S.Ct. 457, 291 U.S. 648, 78 L.Ed. 1043—General Motors Truck Co. v. Texas Supply Co., C.C.A.Md., 64 F. 2d 527—Bank of Union v. Fidelity & Casualty Co. of New York, C.C.A. Mo., 62 F.2d 1040—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Williams Bros. v. Heinemann, C.C.A.Ark., 51 F.2d 1049—Wharton v. Ætna Life Ins. Co., C.C.A.Ark., 48 F.2d 37, certiorari denied Ætna Life Ins. Co. v. Wharton, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 529—U. S. v. Phillips, C.C.A.Mo., 44 F.2d 689—U. S. v. Schweppe, C.C.A.Mo., 38 F.2d 595—Mansfield Hardwood Lumber Co. v. Horton, C.C.A.Ark., 32 F.2d 851—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 20 F.2d 531, denying rehearing 18 F.2d 11.

Contrary decisions prior to promulgation of Fed. Rules of Civ. Proc., Rule 50(a), 28 U.S.C.A. foll. § 723c.—Pitcairn v. Hunault, C.C.A.Ind., 86 F.2d 664—Lynch v. Darnell, C.C.A. Minn., 265 F. 913, certiorari denied 41 S.Ct. 12, 254 U.S. 638, 65 L.Ed. 451—3 C.J. p 842 note 56.

(2) However, this rule does not apply where the specification of grounds would have been futile or unnecessary to acquaint the parties with the point intended to be raised.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96—Sacks v. Stecker, C.C.A.N.Y., 60 F.2d 73—O'Halloran v. McGuirk, Mass., 167 F. 493, 93 C.C.A. 129.

(3) When specific grounds have been stated no others will be considered.—People's Loan & Investment Co. v. Universal Credit Co., C.C.A. Ark., 75 F.2d 545—Adams v. Shirk, Ill., 104 F. 54, 43 C.C.A. 407, rehearing denied 105 F. 659, 44 C.C.A. 653.

19. U.S.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 807, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S. Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Hartford Accident & Indemnity Co. v. Baugh, C.C.A.Tex., 87 F.2d 240, certiorari denied 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883—Maryland Casualty Co. v. Reid, C.C.A. Tex., 76 F.2d 30.

3 C.J. p 862 note 21.

However, objection may be first made in the circuit court of appeals if the argument or conduct is so prejudicial that it may improperly influence the jury, and is of such a nature that no action of the trial court could remove the harmful effects thereof.—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C.A.Iowa, 101 F.2d 493.

Sufficiency of objection

(1) Proper objection must have been made in the trial court, usually with a request to instruct the jury to disregard the argument or remarks, or a motion to declare a mistrial, and a ruling must have been had on such objection.—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—Continental Casualty Co. v. Pouquette, C.C.A.Ariz., 28 F.2d 958—Grand Trunk Ry. Co. of Canada v. Blay, C.C.A.Vt., 297 F. 605—Brooklyn Heights R. Co. v. Ploxin, C.C.A. N.Y., 294 F. 68, certiorari denied 44 S.Ct. 181, 263 U.S. 719, 68 L.Ed. 524—3 C.J. p 862 note 21, p 863 note 27.

(2) Objection must have been timely.—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 106 F.2d 561, certiorari dismissed 60 S.Ct. 468, 309 U.S. 691, 84 L.Ed. 1033—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C.A.Iowa, 101 F.2d 493—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—3 C.J. p 864 note 36, p 865 note 38.

20. U.S.—U. S. v. Atkinson, C.C.A. Tex., 76 F.2d 564, certiorari granted 56 S.Ct. 123, 296 U.S. 559, 80 L. Ed. 394, affirmed 56 S.Ct. 391, 297 U.S. 157, 80 L.Ed. 555—Buffalo Ins. Co. of City of Buffalo, N. Y., v. Bommarito, C.C.A.Mo., 42 F.2d 53, 70 A.L.R. 1211—Fuller & Sons Mfg. Co. v. Curtis & Co. Mfg. Co., C.C.A.Mich., 295 F. 321.

Where the error is fundamental, however, the court may consider the matter, even though not raised below.—Air Reduction Co. v. Philadelphia Storage Battery Co., C.C.A.Pa., 14 F.2d 734.

mit,[21] issues or questions of fact to the jury, the instructions given,[22] and failure or refusal to give instructions.[23] Review may not be had of a contention of error not raised below as to irregularities in

21. U.S.—Erie Indemnity Co. v. Fisher, C.C.A.Pa., 87 F.2d 990—Freiberg v. Pierce, C.C.A.Okl., 83 F.2d 961—Edwards Mfg. Co. v. Bradford Co., C.C.A.N.Y., 294 F. 176—Hammond v. Crawford, N.Y., 66 F. 425, 14 C.C.A. 109.

22. U.S.—Sinclair Refining Co. v. Bennett, C.C.A.Tenn., 123 F.2d 884—Illinois Cent. R. Co. v. Sigler, C.C.A.Tenn., 122 F.2d 279—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Standard Oil Co. v. Burleson, C.C.A.Fla., 117 F.2d 412—Atchison, T. & S. F. Ry. Co. v. Ballard, C.C.A.Tex., 108 F.2d 768, rehearing denied C.C.A., 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413—Lynch v. Oregon Lumber Co., C.C.A.Or., 108 F.2d 283—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 807, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—Taylor v. Merrill, C.C.A.Ariz., 104 F.2d 710, certiorari denied 60 S.Ct. 122, 308 U.S. 593, 84 L.Ed. 496—Traglio v. Harris, C.C.A.Or., 104 F.2d 439, 127 A.L.R. 803, affirming, D.C., Harris v. Traglio, 24 F.Supp. 402, certiorari dismissed Traglio v. Harris, 60 S.Ct. 125, 308 U.S. 629, 84 L.Ed. 524—Scritchfield v. Kennedy, C.C.A.Okl., 103 F.2d 467—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417—Ocean Accident & Guarantee Corporation v. Southwestern Bell Telephone Co., C.C.A.Mo., 100 F.2d 441, 122 A.L.R. 133, certiorari denied 59 S.Ct. 775, 306 U.S. 658, 83 L.Ed. 1056—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 90 F.2d 817, certiorari granted 58 S.Ct. 46, 302 U.S. 670, 82 L.Ed. 517, and reversed on other grounds 58 S.Ct. 500, 303 U.S. 161, 82 L.Ed. 726, 114 A.L.R. 1218—Radius v. Travelers Ins. Co., C.C.A.Cal., 87 F.2d 412—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Pryor v. Strawn, C.C.A.Neb., 73 F.2d 595—Shell Petroleum Corporation v. Scully, C.C.A.La., 71 F.2d 772—Bryne v. Greene, C.C.A.Me., 70 F.2d 137—Southern Kraft Corporation v. Parnell, C.C.A.Miss., 65 F.2d 785, affirming, D.C., Parnell v. Southern Kraft Corporation, 5 F.Supp. 189—Fidelity & Casualty Co. of New York v. Griner, C.C.A.Cal., 44 F.2d 706—Kansas City Southern Ry. Co. v. Littlefield, C.C.A.Okl., 37 F.2d 707—Toll v. Monitor Building & Printing Co., C.C.A.Mo., 26 F.2d 51—Air Reduction Co. v. Philadelphia Storage Battery Co., C.C.A.Pa., 14 F.2d 734—Herman Chemical Co. v. Burlington Industrial Alcohol Co., C.C.A.N.J., 9 F.2d 289—Adams v. Southern Bell Telephone & Telegraph Co., C.C.A.S.C., 295 F. 586—Western Union Telegraph Co. v. Hall, C.C.A.Md., 287 F. 297—Foreign & Domestic Transp. Corporation v. Curtis, C.C.A.N.H., 269 F. 790—Fronsoe v. Bushnell, Ohio, 251 F. 850, 164 C.C.A. 66.

3 C.J. p 843 note 67.

Particular defects

(1) That the instructions given were not authorized by the pleadings.—Jones v. Zurich General Accident & Liability Ins. Co., C.C.A.N.Y., 121 F.2d 761—Issaquah Coal Co. v. U. S. Fidelity & Guaranty Co., Wash., 126 F. 89, 61 C.C.A. 145.

(2) That the instructions were not sufficiently full.—Armit v. Loveland, C.C.A.Pa., 115 F.2d 308—Hupp Motor Car Corporation v. Wadsworth, C.C.A.Mich., 113 F.2d 827—Clum v. Guardian Life Ins. Co., D.C.Pa., 24 F.Supp. 396, reversed on other grounds, C.C.A., Guardian Life Ins. Co. of America v. Clum, 106 F.2d 592, certiorari denied Clum v. Guardian Life Ins. Co. of America, 60 S.Ct. 592, 309 U.S. 666, 84 L.Ed. 1013—3 C.J. p 846 note 84.

(3) That the instructions misstated or imperfectly stated the pleadings or issues.—Greer v. Catlin & Co., Pa., 171 F. 838, 96 C.C.A. 586.

(4) That the instructions were conflicting or contradictory.—U. S. v. Chicago, B. & Q. R. Co., C.C.A.Minn., 82 F.2d 131.

(5) That the instructions misstated the measure of damages.—Southern Fruit Distributors v. Fulmer, C.C.A.Va., 107 F.2d 456.

(6) That the instructions were not read to the jury before being handed to them.—Gladden v. Gabbert, Miss., 219 F. 855, 135 C.C.A. 525.

Sufficiency of objection

(1) A general objection may be sufficient where the instruction is fundamentally or inherently wrong or erroneous.—Casserly v. Wheeler, C.C.A.Cal., 282 F. 389.

(2) Usually, however, the objection must specifically and definitely point out the particular ground or grounds on which it is based.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296—Husky Refining Co. v. Barnes, C.C.A.Idaho, 119 F.2d 715, 134 A.L.R. 1221—Ralston Purina Co. v. Novak, C.C.A.Neb., 111 F.2d 631—Compagnie Générale Transatlantique v. Tawes, C.C.A.Canal Zone, 111 F.2d 92, certiorari denied 61 S Ct. 46, 311 U.S. 678, 85 L.Ed. 437—Hazeltine v. Johnson, C.C.A.Mont., 92 F.2d 866—Pacific Alaska Airways v. Mahan, C.C.A.Alaska, 89 F.2d 255, certiorari denied Pacific Alaska Airways v. Mahan, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541—U. S. v. Baker, C.C.A.Idaho, 73 F.2d 691—Standard Accident Ins. Co. v. Van Altena, C.C.A.Wis., 67 F.2d 836—Order of United Commercial Travelers of America v. Greer, C.C.A.Okl., 43 F.2d 499—Alaska Treadwell Gold Mining Co. v. Mugford, C.C.A.Alaska, 270 F. 753—Al. G. Barnes Show Co. v. Eichelbarger, C.C.A.Wash., 269 F. 132—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—Campbell v. Krauss, Pa., 249 F. 670, 161 C.C.A. 580—Southern Pac. Co. v. Stewart, Ariz., 233 F. 956, 147 C.C.A. 630, error dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed. 345, rehearing granted 38 S.Ct. 203, 245 U.S. 562, 62 L.Ed. 472, and reversed on other grounds 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350—Atlas Portland Cement Co. v. Hagen, Mo., 233 F. 24, 147 C.C.A. 94, certiorari denied 37 S.Ct. 15, 242 U.S. 631, 61 L.Ed. 537—3 C.J. p 845 note 75.

(3) No ground or grounds other than those specified will be considered by the appellate court.—Wiggins Ferry Co. v. Levinson, Mo., 211 F. 122, 127 C.C.A. 520—Holmes v. Montauk Steamboat Co., N.Y., 93 F. 731, 35 C.C.A. 556.

(4) A motion for a directed verdict is not necessary or appropriate to obtain a review of the objection that a portion of the charge should not have been given as there was no evidence on which it could be based.—O. J. Moore Grocer Co. v. Pacific Rice Mills, C.C.A.Iowa, 296 F. 828.

(5) Objection must be timely.—Delaware & H. R. Corporation v. Cottrell, C.C.A.Pa., 69 F.2d 195, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490—3 C.J. p 846 note 79.

(6) A material misdirection in the charge will be reviewed on proper and timely objection alone, without any request having been made for a correct instruction.—Brabham v. State of Mississippi, for Use of Smith, C.C.A.Miss., 96 F.2d 210, rehearing denied 97 F.2d 251, certiorari denied State of Mississippi for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.

23. U.S.—Sprinkle v. Davis, C.C.A.Va., 104 F.2d 487.

Necessity of request

(1) Usually failure to instruct

the conduct and deliberations of the jury,[24] the form or sufficiency of the verdict,[25] trial, decision, and findings by the court without a jury,[26] the findings

will not be reviewed unless a proper request has been made and refused.—Puget Sound Power & Light Co. v. Public Utility Dist. No. 1 of Whatcom County, C.C.A.Wash., 123 F.2d 286—State Automobile Mut. Ins. Co. of Columbus, Ohio v. York, C.C.A.N.C., 104 F.2d 730, certiorari denied 60 S.Ct. 120, 308 U.S. 591, 84 L.Ed. 495—Ohmer v. Allen, C.C.A.Ohio, 79 F.2d 942.

(2) So, if instructions given are correct as far as they go, it cannot be assigned as error that the court omitted to instruct on all points involved in the case if the attention of the court has not been directed thereto by special requests for instructions on those points.—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A.N.C., 99 F.2d 218—Jasper County Lumber Co. v. McNeil, C.C.A.Tex., 76 F.2d 207, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1705—Garrett Const. Co. v. Aldridge, C.C.A.Ark., 73 F.2d 814—Chesapeake & O. Ry. Co. v. Thomason, C.C.A.Ky., 70 F.2d 860—Lindback v. Milter, C.C.A.Pa., 70 F.2d 454—Delaware & H. R. Corporation v. Cottrell, C.C.A.Pa., 69 F.2d 195, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490—Yellow Cab Co. of Philadelphia v. Kelly, C.C.A.Pa., 62 F.2d 1032—Maryland Casualty Co. v. Kramer, C.C.A.Tex., 62 F.2d 295, certiorari denied 53 S.Ct. 403, 288 U.S. 611, 77 L.Ed. 985—Railway Express Agency v. Little, C.C.A.Pa., 50 F.2d 59, 75 A.L.R. 963—McKay v. Monongahela Ry. Co., C.C.A.Pa., 44 F.2d 150—Order of United Commercial Travelers of America v. Greer, C.C.A.Okl., 43 F.2d 499—Wrather v. Dempster Mill Mfg. Co., C.C.A.Tex., 37 F.2d 648—Hill v. New York Cent. R. Co., C.C.A.Ohio, 35 F.2d 30—Sacramento Suburban Fruit Lands Co. v. Fredericksen, C.C.A.Cal., 34 F.2d 933—Mansfield Hardwood Lumber Co. v. Horton, C.C.A.Ark., 32 F.2d 851—Herman Chemical Co. v. Burlington Industrial Alcohol Co., C.C.A.N.J., 9 F.2d 289—Coast S. S. Co. v. Brady, C.C.A.Ala., 8 F.2d 16, certiorari denied 46 S.Ct. 103, 269 U.S. 578, 70 L.Ed. 421—Wright v. Illinois Cent. R. Co., C.C.A.Ky., 6 F.2d 877—Kingrey v. New York, C. & St. L. R. Co., C.C.A.Ohio, 297 F. 376—Franz Corporation v. Fifer, C.C.A.Mont., 295 F. 106—Tennessee, A. & G. R. Co. v. Drake, C.C.A.Ga., 276 F. 393—Pennsylvania R. Co. v. Minds, Pa., 244 F. 53, 156 C.C.A. 481, affirming, D.C., Minds v. Pennsylvania R. Co., 237 F. 267, and affirmed 39 S.Ct. 531, 250 U.S. 368, 63 L.Ed. 1039—Republic Iron & Steel Co. v. Hines, Ohio, 240 F. 77, 153 C.C.A. 113—Arnold v. Horrigan, Mich., 238 F. 39, 151 C.C.A. 115—Alverson v. Oregon-Washington R. & Nav. Co., Wash., 236 F. 331, 149 C.C.A. 463—McBride v. Neal, Ill., 214 F. 966, 131 C.C.A. 262—3 C.J. p 850 note 24, p 853 note 27.

Particular defects not reviewable where party failed to request instruction remedying alleged error:

(1) That the instructions given are not sufficiently full or complete.—Boston & M. R. R. v. Baker, Mass., 236 F. 896, 150 C.C.A. 158—3 C.J. p 852 note 26.

(2) That the court fails to state or charge on all of the issues or defenses.—National Biscuit Co. v. Litzky, C.C.A.Mich., 22 F.2d 939, 56 A.L.R. 853—Cleveland & Western Coal Co. v. Main Island Creek Coal Co., C.C.A.Ohio, 297 F. 60, certiorari denied 44 S.Ct. 634, 265 U.S. 588, 68 L.Ed. 1194—Keystone Coal & Coke Co. v. Fekete, Ohio, 232 F. 72, 146 C.C.A. 264, certiorari denied 37 S.Ct. 18, 242 U.S. 635, 61 L.Ed. 539.

(3) That an instruction given needs qualification or modification.—U. S. Smelting Co. v. Parry, Utah, 166 F. 407, 92 C.C.A. 159.

(4) That instruction fails to define sufficiently words and terms used.—Order of United Commercial Travelers of America v. Greer, C.C.A.Okl., 43 F.2d 499—Nemaha County, Neb. v. Harmon, C.C.A.Neb., 289 F. 795—3 C.J. p 855 note 39.

Sufficiency of objection

(1) Requests must usually be in proper form.—Jasper County Lumber Co. v. McNeil, C.C.A.Tex., 76 F.2d 207—Indemnity Ins. Co. of North America v. Moses, C.C.A.Tex., 36 F.2d 219.

(2) Further, unless proper exception or objection has been taken below to failure to grant requests, or irregularities in giving them, such matters will not be considered in the court of appeals.—Glynn v. May, C.C.A.Wis., 271 F. 464.

(3) It is sufficient that request was made before case was submitted to jury, and that district court considered request and ruled on it, and that plaintiff saved exception when district court gave no instruction on the subject of the request.—Peterson v. Sheridan, C.C.A.Iowa, 115 F.2d 121.

24. U.S.—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C.C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539.

25. U.S.—Reidy v. Myntti, C.C.A. Alaska, 116 F.2d 725—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A. Puerto Rico, 77 F.2d 891—Washburn v. Douthit, C.C.A.Ark., 73 F.2d 23—Dobbins v. U. S., C.C.A.Cal., 47 F.2d 887—Schneider Brewing Co. v. American Ice-Mach. Co., Colo., 77 F. 138, 23 C.C.A. 89.

26. U.S.—Shira v. New York Life Ins. Co., C.C.A.Okl., 90 F.2d 953, affirming, D.C., 15 F.Supp. 259—Solomon v. Benjamin, C.C.A.Ill., 75 F.2d 564, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694—McCandless v. Haskins, C.C.A.S.D., 28 F.2d 693, affirming, D.C., 20 F.2d 688—Commonwealth Casualty Co. v. Aichner, C.C.A.Mo., 18 F.2d 879, certiorari denied Aichner v. Commonwealth Casualty Co., 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424.

Findings of fact and conclusions of law

(1) As a rule, only objections to the findings of fact or conclusions of law, or to the want thereof, which have properly been brought to the attention of the trial court will be considered on appeal.—Jackson County v. Alton R. Co., C.C.A.Mo., 105 F.2d 633, certiorari denied Alton R. Co. v. Jackson County, Mo., 60 S.Ct. 175, 308 U.S. 610, 84 L.Ed. 510—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695—Esso, Inc. v. Standard Oil Co., C.C.A.Mo., 98 F.2d 1—Becher-Barrett-Lockerby Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 89 F.2d 752—Klineline v. U. S., C.C.A.Ky., 85 F.2d 628—Kelley v. U. S., C.C.A.Ky., 85 F.2d 568—National Carbon Co. v. Richards & Co., C.C.A.Conn., 85 F.2d 490, affirming, D.C., 16 F.Supp. 239—Lando v. Equitable Life Assur. Soc. of U. S., C.C.A.Cal., 84 F.2d 640, affirming, D.C., 11 F.Supp. 729—Aro Equipment Corporation v. Herring-Wissler Co., C.C.A.Iowa, 84 F.2d 619—Seaboard Surety Co. v. U. S. for Use and Benefit of Marshall-Wells Co., C.C.A.Idaho, 84 F.2d 348—Huglin v. H. M. Byllesby Co., C.C.A.Iowa, 72 F.2d 341—Hawthorne v. Bankers' Life Co., C.C.A.Mo., 63 F.2d 971, affirming, D.C., 52 F.2d 309—In re Wisconsin Refining Corporation, C.C.A.Wis., 63 F.2d 159—Thomas E. Basham Co. v. Lucas, C.C.A.Ky., 30 F.2d 97, affirming, D.C., 21 F.2d 550—Macomber v. Goldthwaite, C.C.A.Or., 22 F.2d 638—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715—Calaf v. Fernandez, Puerto Rico, 239 F. 795, 152 C.C.A. 581—Phoenix Securities Co. v. Dittmar, Cal., 224 F. 892, 140 C.C.A. 336—Hosler v. Ireland, Colo., 219 F. 489,

or report of a referee, master, or similar officer,[27] the amount of the recovery or the extent of the relief granted,[28] the judgment, order, or decree in general,[29] costs[30] and attorney's fees[31] and proceedings for obtaining appellate review.[32]

(3) Exceptions

(a) In general

(b) Former practice

(a) In General

Under the Federal Rules of Civil Procedure formal exceptions to rulings or orders of the trial court are unnecessary to save for review alleged errors therein.

Under the Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, formal exceptions to rulings or orders of the trial court are unnecessary to save for review alleged errors in such rulings or orders;[33] but for all purposes for which an

135 C.C.A. 201—National Surety Co. v. U. S., Colo., 200 F. 142, 118 C.C. A. 360—3 C.J. p 870 note 4.

(2) Under Fed. Rules of Civ. Proc., rule 52, 28 U.S.C.A. foll. § 723c, requests for findings are not necessary for purposes of review.—U. S. v. Boston & M. R. R., C.C.A.Mass., 117 F.2d 424, reversing, D.C., 30 F.Supp. 780—Drybrough v. Ware, C.C.A.Ky., 111 F.2d 548—Peebles v. Prudential Ins. Co. of America, C.C.A.Ohio, 110 F.2d 76—Jackson County v. Alton R. Co., C.C.A.Mo., 105 F.2d 633, certiorari denied Alton R. Co. v. Jackson County, Mo., 60 S.Ct. 175, 308 U.S. 610, 84 L.Ed. 510—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695—Stoltz v. U. S., C.C.A.Mont., 99 F.2d 283.

(3) However, the substance of previous practice is retained since it is also required that a party make known to the court the action he desires taken or his objection to that taken by the court and his ground therefor.—Drybrough v. Ware, supra.

(4) Prior to the promulgation of the Federal Rules of Civil Procedure, no reviewable question was presented where a party failed to make a motion for judgment or request special findings of fact or conclusions of law.—Hill v. Ohio Casualty Ins. Co., supra.

(5) General exception taken to judgment rendered by trial court sitting without jury sufficed to raise question whether facts as found supported judgment, but appellate court was bound to accept facts as found. —Shapleigh v. Mier, C.C.A.Tex., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L.Ed. 386, affirmed 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A.L.R. 253.

27. U.S.—In re Elliott, C.C.A.Iowa, 72 F.2d 300.

28. U.S.—American Bureau of Shipping v. Allied Oil Co., C.C.A.Ohio, 64 F.2d 509—Cook-O'Brien Const. Co. v. Crawford, C.C.A.Ariz., 26 F. 2d 574, certiorari denied 49 S.Ct. 29, 278 U.S. 630, 73 L.Ed. 548—Asheville Const. Co. v. Southern Ry. Co., C.C.A.N.C., 19 F.2d 32—Herman Chemical Co. v. Burlington Industrial Alcohol Co., C.C.A.N. J., 9 F.2d 289—Reliance Coal & Coke Co. v. H. P. Brydon & Bro., C. C.A.Ohio, 286 F. 827—Baltimore & O. C. Terminal R. Co. v. Becker Milling Mach. Co., C.C.A.Ill., 272 F. 933—Southern Pac. Co. v. Stewart, Ariz., 233 F. 956, 147 C.C.A. 630, error dismissed 38 S.Ct. 130, 245 U.S. 359, 62 L.Ed. 345, rehearing granted 38 S.Ct. 203, 245 U.S. 562, 62 L. Ed. 472, and reversed on other grounds 39 S.Ct. 139, 248 U.S. 446, 63 L.Ed. 350.

3 C.J. p 880 note 18.

Interest

(1) Ordinarily it may not be first urged on appeal that there was error in allowing or not allowing interest, or in the calculation of the amount of interest allowed.—Eastern Commercial Travelers Accident Ass'n v. Sanders, C.C.A.Mass., 108 F.2d 643—Smith v. Boise City, C.C.A.Idaho, 104 F.2d 933—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Inhabitants of City of Plainfield v. Palmer, C.C.A.N.J., 72 F.2d 312—American Surety Co. of New York v. Savannah Creosoting Co., C.C. A.Ga., 35 F.2d 272—Reliance Life Ins. Co. v. Swanson, C.C.A.Cal., 11 F. 2d 709.

(2) However, the allowance of interest may be a fundamental error which may be considered even though not raised below.—National Fire Ins. Co. of Hartford, Conn. v. School Dist. No. 68, Sequoyah County, Okl., C.C.A.Okl., 115 F.2d 232.

Grounds of objection must be specific

U.S.—Eastern Commercial Travelers Accident Ass'n v. Sanders, C.C.A. Mass., 108 F.2d 643.

29. U.S.—Irving Trust Co. v. Sirotty, C.C.A.N.Y., 60 F.2d 71—Border Nat. Bank of Eagle Pass, Tex., v. American Nat. Bank of San Francisco, Cal., C.C.A.Tex., 282 F. 73, error dismissed and certiorari denied 43 S.Ct. 96, 260 U.S. 701, 732, 67 L.Ed. 471—Wetzel & T. R. R. Co. v. Tennis Bros. Co., W.Va., 145 F. 458, 75 C.C.A. 266, 7 Ann.Cas. 426.

3 C.J. p 874 note 68.

Particular defects within rule

(1) That judgment is several instead of joint or vice versa.—Chicago, M. & St. P. Ry. Co. v. George A. Hormel & Co., Minn., 240 F. 386, 153 C.C.A. 312.

(2) Mere irregularity or informality in entry of judgment.—Thornton v. National City Bank of New York, C.C.A.N.Y., 45 F.2d 127—Stone v. Howell, C.C.A.Alaska, 33 F.2d 701.

(3) It is held, however, that the objection that a judgment does not conform to, and is not supported by, the verdict or findings is a fundamental one, apparent of record, and may be made for the first time on appeal.—Coggins v. Gregorio, C.C.A.N. M., 97 F.2d 948—3 C.J. p 879 note 10.

Apparently contra National Biscuit Co. v. Litzky, C.C.A.Mich., 22 F.2d 939, 56 A.L.R. 853.

Sufficiency of objection

(1) Objection must usually be specific and point out the grounds thereof, and no grounds other than those specified in the lower court will be considered on appeal.—National Surety Co. v. Lincoln County, Mont., 238 F. 705, 151 C.C.A. 555, affirming, D.C., Lincoln County v. Coast Bridge Co., 231 F. 468.

(2) In order to question the correctness of a judgment rendered for defendant on an agreed statement of facts, it is not necessary that plaintiff shall have made a formal motion for judgment on the statement, and then saved an exception to its denial; it is sufficient that he excepted to the judgment when rendered.—Springfield Safe-Deposit & Trust Co. v. Attica, Kan., 85 F. 387, 29 C.C.A. 214, certiorari denied 19 S.Ct. 884, 171 U. S. 689, 43 L.Ed. 1179.

30. U.S.—Smith v. Smith, Colo., 247 F. 461, 159 C.C.A. 515—Williamson v. Electric Service Supplies Co., Pa., 242 F. 873, 155 C.C.A. 461, affirming, D.C., 236 F. 353—The State of Missouri, Ill., 76 F. 376, 22 C. C.A. 239.

3 C.J. p 884 notes 63, 64, p 885 note 65.

31. U.S.—Speh v. Bullard, C.C.A. Fla., 90 F.2d 227—Metropolitan Life Ins. Co. v. Armstrong, C.C.A. Neb., 85 F.2d 187.

32. U.S.—Elkhart Carriage & Motor Car Co. v. Partin, C.C.A.Tenn., 9 F.2d 393—Hugetz v. Compania Transatlantica, C.C.A.N.Y., 270 F. 90—Louisville & N. R. Co. v. Western Union Telegraph Co., Miss., 233 F. 82, 147 C.C.A. 152.

33. U.S.—Sweeney v. United Fea-

exception was formerly necessary it is sufficient that a party, at the time the ruling or order is made or sought, make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor,[34] and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.[35]

(b) Former Practice

Formerly exceptions to alleged error were usually necessary in order that such error might be considered on appeal.

Prior to the adoption of the rule of court considered above dispensing with the necessity for formal exceptions, it was a general rule, subject to some qualifications,[36] that rulings or decisions made by the trial court on which error was predicated would not be revised on appeal unless an appropriate exception to the alleged error was reserved;[37] and, to be appropriate, the exception was required to be

ture Syndicate, C.C.A.N.Y., 129 F. 2d 904—Bucy v. Nevada Const. Co., C.C.A.Idaho, 125 F.2d 213—Ulm v. Moore-McCormack Lines, C.C.A.N. Y., 115 F.2d 492, rehearing denied 117 F.2d 222, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525—Drybrough v. Ware, C.C.A. Ky., 111 F.2d 548—Massachusetts Bonding & Insurance Co. v. Preferred Automobile Ins. Co., C.C.A. Mich., 110 F.2d 764—Stoltz v. U. S., C.C.A.Mont., 99 F.2d 283—Sonken-Galamba Corporation v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 34 F.Supp. 15, denying new trial 33 F.Supp. 814—U. S. v. National Biscuit Co., D.C.N.Y., 25 F.Supp. 329.

34. U.S.—Sweeney v. United Feature Syndicate, C.C.A.N.Y., 129 F. 2d 904—Bucy v. Nevada Const. Co., C.C.A.Idaho, 125 F.2d 213—Drybrough v. Ware, C.C.A.Ky., 111 F. 2d 548—Massachusetts Bonding & Insurance Co. v. Preferred Automobile Ins. Co., C.C.A.Mich., 110 F. 2d 764.

Necessity of objections to court's instructions to jury see supra § 292 b (2).

35. Exceptions are not abolished by rule.—Great Lakes Transit Corp. v. Great Lakes Towing Co., D.C.N.Y., 42 F.Supp. 362.

36. Errors appearing in record proper

(1) Ordinarily, where the alleged error complained of appeared in the record proper, the circuit court of appeals could notice it and reverse the judgment of the court below, although no exception was taken.—Widetzky v. Pilgrim Trust Co., C.C. A.Mass., 108 F.2d 647—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289—U. S. v. Huie, C.C.A.Ga., 73 F.2d 305—Brown v. Carver, C.C.A.N.Y., 45 F.2d 673—Norfolk & W. Ry. Co. v. Skeens, C.C.A.Ohio, 33 F.2d 508—Maxwell v. Ricks, C.C.A.Wash., 294 F. 255, reversing, D.C., 285 F. 656—Griggs v. Nadeau, Minn., 221 F. 381, 137 C.C.A. 189—Chicago, B. & Q. Ry. Co. v. Frye-Bruhn Co., Mo., 184 F. 15, 106 C.C.A. 217—3 C.J. p 898 note 62.

(2) Accordingly the objection that the verdict did not support the judgment, being a question of law appearing on the face of the record, could be assigned as a ground of reversal, although no exception was taken.—East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., Mo., 249 F. 439, 162 C.C.A. 5.

"Plain error" could be noticed without proper exception being taken.—Humphreys Gold Corporation v. Lewis, C.C.A.Mont., 90 F.2d 896.

37. U.S.—Widetzky v. Pilgrim Trust Co., C.C.A.Mass., 108 F.2d 647—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A.Neb., 101 F.2d 987—Baldwin v. Higgins, C. C.A.N.Y., 100 F.2d 405—O'Connor v. Ludlam, C.C.A.N.Y., 92 F.2d 50, certiorari denied 58 S.Ct. 364, 302 U.S. 758, 82 L.Ed. 586—Ocean Accident & Guarantee Corporation v. Olson, C.C.A.N.D., 87 F.2d 465—Mirkowicz v. Reading Co., C.C.A. N.J., 84 F.2d 537, certiorari denied 57 S.Ct. 43, 299 U.S. 579, 81 L.Ed. 426—Pelham Mills v. U. S., C.C.A. S.C., 79 F.2d 552—Solomon v. Benjamin, C.C.A.Ill., 75 F.2d 564, certiorari denied 55 S.Ct. 831, 295 U. S. 749, 79 L.Ed. 1694—Standard Oil Co. of Kentucky v. Noakes, C. C.A.Ky., 59 F.2d 897—Domenech v. Porto Rican Leaf Tobacco Co., C. C.A.Puerto Rico, 50 F.2d 579, certiorari denied 52 S.Ct. 33, 284 U.S. 654, 76 L.Ed. 555—U. S. v. Rhodes, C.C.A.W.Va., 49 F.2d 228—Queensboro Nat. Bank of City of New York v. Kelly, C.C.A.N.Y., 48 F.2d 574, 87 A.L.R. 1172, certiorari denied Kelly v. Queensboro Nat. Bank of City of New York, 52 S. Ct. 9, 284 U.S. 620, 76 L.Ed. 529—S. A. Lynch Enterprise Finance Corporation v. Dulion, C.C.A.Ga., 45 F.2d 6—Ex parte Keizo Kamiyama, C.C.A.Cal., 44 F.2d 503—Buffalo Ins. Co. of City of Buffalo, N. Y. v. Bommarito, C.C.A.Mo., 42 F. 2d 53, 70 A.L.R. 1211—Casals v. Fernandez, C.C.A.Puerto Rico, 40 F.2d 831, certiorari denied 51 S.Ct. 36, 282 U.S. 863, 75 L.Ed. 763—Emmons Coal Mining Corporation v. Sir R. Ropner & Co., C.C.A.Pa., 31 F.2d 948, second case, affirming, D.C., Sir R. Ropner & Co. v. Emmons Coal Mining Corporation, 17 F.2d 386, and affirming on reargument 31 F.2d 948, first case, certiorari denied Emmons Coal Mining Corporation v. Sir R. Ropner & Co., 50 S.Ct. 31, 280 U.S. 577, 74 L.Ed. 628—Weinstein v. Laughlin, C.C.A.Mo., 21 F.2d 740—Fuller Process Co. v. Texas Co., C.C.A.Mo., 16 F.2d 108—Texas Co. v. Brilliant Mfg. Co., C.C.A.Pa., 2 F.2d 1—Ritz Carlton Restaurant & Hotel Co. of Atlantic City v. Gillespie, C. C.A.N.J., 1 F.2d 921—Highway Trailer Co. v. City of Des Moines, Iowa, C.C.A.Iowa, 298 F. 71—Hartford Fire Ins. Co., Hartford, Conn. v. War Eagle Coal Co., C.C.A.W. Va., 295 F. 663—Beck v. Magnolia Co., C.C.A.Tex., 294 F. 896—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641—Camp Mfg. Co. v. Beck, C.C.A.S.C., 283 F. 705—Goldfarb v. Keener, C.C.A. N.Y., 263 F. 357—Southern Pac. Co. v. Stephany, Cal., 255 F. 679, 167 C.C.A. 55—Farley v. Carey Show Print Co., N.Y., 249 F. 476, 161 C.C.A. 434—Mound Coal Co. v. Jeffrey Mfg. Co., W.Va., 233 F. 913, 147 C.C.A. 587, affirming, D.C., Jeffrey Mfg. Co. v. Mound Coal Co., 215 F. 222, rehearing granted Mound Coal Co. v. Jeffrey Mfg. Co., 240 F. 129, 153 C.C.A. 165, affirmed 240 F. 412, 153 C.C.A. 338—International Lumber Co. v. U. S., Minn., 231 F. 873, 146 C.C.A. 69—Paine v. Willson, N.D., 146 F. 488, 77 C.C.A. 44.

3 C.J. p 895 note 52.

The office of an exception was to challenge the correctness of the rulings or decisions of the trial court promptly when made, to the end that such rulings or decisions might be corrected by the court itself, if deemed erroneous, and to lay the foundation for their review, if necessary, by the appellate tribunal.—Bucy v. Nevada Const. Co., C.C.A. Idaho, 125 F.2d 213—American Distilling Co. v. Wisconsin Liquor Co., C.C.A.Wis., 104 F.2d 582, 123 A.L.R. 739—Hazeltine v. Johnson, C.C.A. Mont., 92 F.2d 866—Southern Transp. Co. v. Ashford, C.C.A.La., 48 F.2d 191—S. A. Lynch Enterprise Finance Corporation v. Dulion, C.C.A.Ga., 45

taken in proper time[38] and to be definite and specific.[39] Accordingly proper exceptions were usually required to preserve for consideration on appeal alleged errors in rulings or decisions of the lower court made before,[40] during,[41] or after[42] the trial with respect to pleadings,[43] the mode and conduct

F.2d 6—Atchison, T. & S. F. Ry. Co. v. Nichols, C.C.A.Cal., 2 F.2d 12.
3 C.J. p 895 note 50.

Rule not altered by statute
The statute, 28 U.S.C.A. § 861 a, abolishing writs of error and substituting appeals therefor, did not alter the text rule.—Central Supply Co. v. Carter Clothing Corporation, C.C.A.N.J., 35 F.2d 172.

In cases in which a jury trial was waived exceptions were required to be taken and reserved as though the trial had been to a jury.—Allen v. New York, P. & N. R. Co., C.C.A.Va., 15 F.2d 532, certiorari denied 47 S.Ct. 459, 273 U.S. 756, 71 L.Ed. 876.

An assignment of error was not equivalent to an exception.—Veneri v. Draper, C.C.A.W.Va., 22 F.2d 33, certiorari denied 48 S.Ct. 339, 276 U.S. 633, 634, 72 L.Ed. 742.

Exception to judgment
The suing out of a writ of error to review a judgment was a sufficient exception to the judgment.—Fellman v. Royal Ins. Co., 185 F. 689, 107 C.C.A. 637, denying rehearing 184 F. 577, 106 C.C.A. 557.

Exceptions taken could be waived by exceptant.—Marine City Stave Co. v. Herreshoff Mfg. Co., C.C.R.I., 32 F. 822—3 C.J. p 960 note 77.

United States court for China
Under Act June 30, 1906, creating the United States court for China, practice and procedure therein conformed to that of district and circuit courts, so that, under Rev.St. §§ 649, 700, for review in a case tried by it without a jury, its rulings must have been excepted to at the time and preserved by bill of exceptions.—China Press v. Webb, C.C.A. China, 7 F.2d 581.

38. U.S.—Arthur C. Harvey Co. v. Malley, Mass., 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, which affirmed, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, and motion denied, C.C.A., 61 F.2d 365, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461—American Cast Iron Pipe Co. v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 87 F.2d 250—Fred Harvey, Inc. v. Crooks, C.C.A.Mo., 54 F.2d 353, affirming, D.C., 39 F.2d 466—White v. Maddison, C.C.A.Mass., 45 F.2d 335, affirming, D.C., Maddison v. White, 40 F.2d 564—Denver v. Home Sav. Bank, Colo., 200 F. 28, 118 C.C.A. 256.
3 C.J. p 953 note 27, p 954 notes 31, 32, p 956 note 47.

Cure of omission by bill of exceptions
Exceptions not taken at the proper time could not be incorporated nunc pro tunc in the bill of exceptions.—Fleischmann Const. Co. v. U. S., to Use of Forsberg, Va., 46 S.Ct. 284, 270 U.S. 349, 70 L.Ed. 624, affirming, C.C.A., 298 F. 330, which affirmed, D.C., U. S. v. Fleischmann Const. Co., 298 F. 320, and error allowed, C.C.A., 298 F. 1020—U. S. v. Bertelsen & Petersen Engineering Co., C.C.A.Mass., 95 F.2d 867, affirming, D.C., Bertelsen & Petersen Engineering Co. v. U. S., 14 F.Supp. 868, affirmed C.C.A., U. S. v. Bertelsen & Petersen Engineering Co., 98 F.2d 132, certiorari granted U. S. v. Bertelsen & Petersen Engineering Co., 59 S.Ct. 229, 303 U.S. 590, 83 L.Ed. 373, affirmed U. S. v. Bertelsen & Petersen Engineering Co., 59 S.Ct. 541, 306 U.S. 276, 83 L.Ed. 647.

39. U.S.—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A.Neb., 101 F.2d 987—O'Connor v. Ludlam, C.C.A.N.Y., 92 F.2d 50, certiorari denied 58 S.Ct. 364, 302 U.S. 758, 82 L.Ed. 586—Fidelity & Casualty Co. of New York v. Genova, C.C.A.Ohio, 90 F.2d 874—Southern Kansas Stage Lines v. Gibson, C.C.A.Okl., 87 F.2d 23—Union Bleachery v. U. S., C.C.A.S.C., 79 F.2d 549—Carpenter v. Connecticut General Life Ins. Co., C.C.A.Colo., 68 F.2d 69—New York, O. & W. Ry. Co. v. Jones, C.C.A.Pa., 66 F.2d 556, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592—Howland v. Beck, C.C.A.Cal., 56 F.2d 35—American Sugar Refining Co. v. Nassif, C.C.A.Mass., 45 F.2d 321—McFarland v. Central Nat. Bank of Topeka, C.C.A.Kan., 26 F.2d 890, affirming, D.C., Central Nat. Bank of Topeka, Kan. v. McFarland, 20 F.2d 416, and certiorari denied McFarland v. Central Nat. Bank of Topeka, Kan., 49 S.Ct. 12, 278 U.S. 606, 73 L.Ed. 533—Highway Trailer Co. v. City of Des Moines, C.C.A.Iowa, 298 F. 71—Wear v. Imperial Window Glass Co., Mo., 224 F. 60, 139 C.C.A. 622.
3 C.J. p 900 note 96, p 940 note 20 [d].

An exception was sufficiently specific if it could be clearly seen therefrom that the particular ruling or decision complained of was intended to be excepted to.—Winfrey v. Missouri, K. & T. Ry. Co., Okl., 194 F. 808, 114 C.C.A. 218—3 C.J. p 902 note 99.

Exceptions in gross
A single or general exception to two or more rulings, or to a series of rulings, was of no avail if any one of the rulings was correct.—Chicago, R. I. & P. Ry. Co. v. Hale, Okl., 176 F. 71, 99 C.C.A. 379.

Indefiniteness not cured by assignments of error
An exception which was insufficient in itself could not be aided by a more particular specification in the assignments of error.—McCutcheon v. Hall Capsule Co., Ohio, 101 F. 546, 41 C.C.A. 494.

The scope and extent of an exception was, for purposes of review on appeal, limited to such matters as were specifically excepted to below.—Queensboro Nat. Bank of City of New York v. Kelly, C.C.A.N.Y., 48 F.2d 574, certiorari denied Kelly v. Queensboro Nat. Bank of City of New York, 52 S.Ct. 9, 284 U.S. 620, 76 L.Ed. 529—Swayne & Hoyt v. Barsch, Or., 226 F. 581, 141 C.C.A. 337.

40. U.S.—Nelson v. Devney, C.C.A. Wis., 102 F.2d 487.

Where error arising before trial or hearing was apparent of record, such matter could be considered on appeal without exceptions noted below.—Rausch v. Commercial Travelers' Mut. Accident Ass'n of America, C.C.A.Mo., 38 F.2d 766, certiorari denied 50 S.Ct. 461, 281 U.S. 763, 74 L.Ed. 1171.

41. U.S.—Provident Life & Accident Ins. Co. of Chattanooga, Tenn. v. Crady, C.C.A.Ohio, 82 F.2d 900, certiorari denied 56 S.Ct. 949, 298 U.S. 681, 80 L.Ed. 1401—Northwest Theatres Co. v. Hanson, C.C.A. Mont., 4 F.2d 471—U. S. Shipping Board Emergency Fleet Corporation v. Drew, C.C.A.Pa., 288 F. 374
3 C.J. p 908 note 62.

42. U.S.—Bluegrass Canning Co. v. Steward, Ky., 175 F. 537, 99 C.C.A. 159.

43. **Particular rulings held not reviewable** in the absence of an exception thereto:
(1) Ruling on motion to strike out portion of answer.—Ghost v. U. S., Colo., 168 F. 841, 94 C.C.A. 253—Denver & R. G. R. Co. v. Wagner, Colo., 167 F. 75, 92 C.C.A. 527.
(2) Rulings allowing or refusing to allow amendments.—Previn v. Tenacre, Inc., C.C.A.N.J., 70 F.2d 389, certiorari denied 54 S.Ct. 528, 291 U.S. 677, 78 L.Ed. 1065.

Errors apparent on record
(1) No exception was necessary to review a ruling with respect to pleadings where the question sought to be raised was a question of law apparent on the record.—Western Union Telegraph Co. v. United States & Mexican Trust Co., Kan., 221 F. 545, 137 C.C.A. 113.
(2) Thus rulings on demurrers were reviewable, even though no ex-

of the trial in general,[44] the admission and exclusion of evidence,[45] the reception of evidence or the examination of witnesses,[46] the submission of the case or particular issues therein to the jury,[47] the dismissal of the cause,[48] the giving of instructions,[49] and the granting or refusal of a motion for

ception was taken.—Board of Com'rs of City and County of Denver v. Home Savings Bank, Colo., 35 S.Ct. 265, 236 U.S. 101, 59 L.Ed. 485, affirming 200 F. 28, 118 C.C.A. 256—Rocky Mountain Fuel Co. v. Consolidated Coal & Coke Co., C.C.A.Colo., 276 F. 661, certiorari denied 42 S.Ct. 591, 259 U.S. 589, 66 L.Ed. 1078—Snowden v. Ft. Lyon Canal Co., Colo., 238 F. 495, 151 C.C.A. 431.

(3) But the contrary was held in an early case.—Choctaw, O. & G. R. Co. v. Jackson, Okl., 192 F. 792, 114 C.C.A. 12.

44. U.S.—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C. C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539.

Conduct or remarks of judge or counsel

(1) Of the presiding judge.—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S. Ct. 237, 293 U.S. 623, 79 L.Ed. 710—Wolf v. Edmunson, Or., 240 F. 53, 153 C.C.A. 89—Lane v. Leiter, Ill., 237 F. 149, 150 C.C.A. 295—Illinois Cent. R. Co. v. Griffin, Wis., 80 F. 278, 25 C. C.A. 413—3 C.J. p 909 note 81.

(2) Of counsel.—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 106 F.2d 561, certiorari dismissed 60 S. Ct. 468, 309 U.S. 691, 84 L.Ed. 1033—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—Prudential Ins. Co. of America v. Murphy, C.C.A.Wis., 74 F.2d 544—Southern Pac. Co. v. Marquez, C.C.A. Ariz., 44 F.2d 286—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A.N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629—Brooklyn Heights R. Co. v. Ploxin, C.C.A.N.Y., 294 F. 68, certiorari denied 44 S.Ct. 181, 263 U. S. 719, 68 L.Ed. 524—Akalitis v. Philadelphia & Reading Coal & Iron Co., N.Y., 239 F. 299, 152 C.C.A. 287, certiorari denied 38 S.Ct. 581, 247 U. S. 517, 62 L.Ed. 1245.

3 C.J. p 910 note 82.

45. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—U. S. v. Sparks, C.C.A.Ind., 80 F.2d 392—Rose v. U. S., C.C.A.Ky., 69 F.2d 966—College Inn Food Products Co. v. Loudon Packing Co., C.C.A.Ind., 65 F.2d 833—In re Smolka, D.C.Mich., 58 F.2d 403—Central Supply Co. v. Carter Clothing Corporation, C.C.A.N.J., 35 F. 2d 172—Veneir v. Draper, C.C.A. W.Va., 22 F.2d 33, certiorari denied 48 S.Ct. 339, 276 U.S. 633, 634, 72 L.Ed. 742—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C. C.A.Neb., 20 F.2d 897—Clover Valley Lumber Co. v. Sierra Valley Creamery, C.C.A.Cal., 18 F.2d 858—Geiger v. Tramp, C.C.A.Iowa, 291 F. 353—Central Trust Co. of Des Moines, Iowa v. Fidelity Trust Co., C.C.A.Mo., 282 F. 233—Patterson v. Hamilton, C.C.A.Alaska, 274 F. 363—Mineral Development Co. v. Kentucky Coal Lands Co., Ky., 259 F. 118, 170 C.C.A. 186, certiorari denied 39 S.Ct. 492, 250 U.S. 641, 64 L.Ed. 1185—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C. C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539—Cordingly v. Kennedy, Colo., 239 F. 645, 152 C.C.A. 479.

3 C.J. p 912 notes 92, 95, p 913 note 97, p 914 notes 98, 99, p 915 note 3, p 955 note 44.

Necessity for exception to direction of verdict

Where defendants many times excepted to the trial court's ruling excluding evidence of a warranty and a breach thereof, they were not precluded from a review of such question because of a failure further to except to the court's ruling directing a verdict for plaintiff.—Harris v. Marsh, Mo., 217 F. 555, 133 C.C.A. 407.

46. U.S.—Schermann v. Yellow Cab Co., C.C.A.Ill., 101 F.2d 363, certiorari denied 59 S.Ct. 1045, 307 U.S. 647, 83 L.Ed. 1527.

47. U.S.—Gould & Curry Mining Co. v. Douglass, C.C.A.Nev., 273 F. 681, certiorari denied Gould & Curry Mining Co. v. Douglas, 42 S.Ct. 55, 257 U.S. 645, 66 L.Ed. 414—Lehigh Valley R. Co. v. Normile, N.Y., 254 F. 680, 168 C.C.A. 178—North British & Mercantile Ins. Co. v. Rose, N.J., 228 F. 290, 142 C.C.A. 482.

3 C.J. p 917 note 22.

Direction of verdict; necessity of exception

(1) To be considered on appeal, alleged error on the part of the trial court in taking the case from the jury, or in directing or refusing to direct a verdict, was required to be saved by proper exception.—Humphreys Gold Corp. v. Lewis, C.C.A. Mont., 90 F.2d 896—City of Thomson v. Louisville & N. R. Co., C.C.A.Ga., 86 F.2d 567—McConnell v. U. S., C. C.A.Pa., 81 F.2d 639—Johnson v. Titanium Pigment Co., C.C.A.Mo., 81 F. 2d 529—Jefferson Standard Life Ins. Co. v. Stevenson, C.C.A.La., 70 F.2d 72—McCuing v. Bovay, C.C.A.Ark., 60 F.2d 375—Ætna Casualty & Surety Co. v. Reliable Auto Tire Co., C.C.A. Mo., 58 F.2d 100—S. A. Lynch Enterprise Finance Corporation v. Dulion, C.C.A.Ga., 45 F.2d 6—Andresen v. Kaercher, C.C.A.Minn., 38 F.2d 462—Murray Hospital v. Rasmussen, C.C. A.Mont., 35 F.2d 864—Saunders System of Colorado Springs, Colo. v. Kelley, C.C.A.Colo., 30 F.2d 520—3 C.J. p 918 note 23.

(2) This rule was not altered by the act of Febr. 26, 1919, Comp.St. Suppl., Annot.1919 § 1246, amending Jud.Code § 269, requiring appellate courts to give judgment after examination of the entire record without regard to technical errors.—Landsberg v. San Francisco & P. S. S. Co., C.C.A.Or., 288 F. 560, petition dismissed 46 S.Ct. 11, 269 U.S. 591, 70 L.Ed. 428.

Time of taking exceptions

An exception to the denial of a motion for a directed verdict was required to be timely made.—Sacramento Suburban Fruit Lands Co. v. Tipper, C.C.A.Cal., 36 F.2d 941.

Sufficiency of exceptions to ruling on motion for directed verdict:

(1) Exceptions held sufficient.—Long v. Atlantic Coast Line R. Co., S.C., 238 F. 919, 151 C.C.A. 653—Penn Bridge Co. v. City of New Orleans, La., 222 F. 737, 138 C.C.A. 191, certiorari denied City of New Orleans v. Penn Bridge Co., 36 S.Ct. 160, 239 U.S. 639, 60 L.Ed. 481.

(2) Exceptions held insufficient.—U. S. v. Mobile & O. R. Co., C.C.A. Ala., 8 F.2d 613—Maxwell v. Abrast Realty Co., N.Y., 218 F. 457, 134 C.C. A. 255, dismissing error, D.C., Abrast Realty Co. v. Maxwell, 206 F. 333.

Estoppel

Where a verdict for defendant was directed without motion therefor, and while plaintiff and his counsel were absent by agreement between counsel, defendant was estopped to object that plaintiff did not except at the time the verdict was directed and in the presence of the jury.—Grace v. Louisville & N. R. Co., C. C.A.Miss., 255 F. 843, 167 C.C.A. 171.

48. Necessity of exception

(1) It was generally held that an exception was necessary to warrant a review on appeal of a ruling granting or refusing a motion for a nonsuit or dismissal.—Spencer, White & Prentis v. United Engineers & Constructors, C.C.A.N.J., 68 F.2d 565—Wynne v. Fries, C.C.A.Ohio, 50 F.2d 761—Brown v. Carver, C.C.A.N.Y., 45 F.2d 673.

(2) But in an early case it was held that no exception was necessary to give a right of appeal from an order of dismissal.—Willis v. Davis, Ky., 184 F. 889, 107 C.C.A. 211.

49. Error in giving instructions

(1) Exceptions were usually re-

quired to preserve for consideration on appeal error claimed to have been committed in giving instructions.—Meissner v. Papas, C.C.A.Wis., 124 F.2d 720—Widetzky v. Pilgrim Trust Co., C.C.A.Mass., 108 F.2d 647—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—Western Express Co. v. Smeltzer, C.C.A.Ohio, 88 F.2d 94—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Minn., 84 F.2d 569—Karlson v. U. S., C.C.A.Minn., 82 F.2d 330—McConnell v. U. S., C.C.A.Pa., 81 F.2d 629—Rackoff v. U. S., C.C.A.N.Y., 78 F.2d 671—Century Indemnity Co. v. Shakespeare, C.C.A.Colo., 74 F.2d 392—Garrett Const. Co. v. Aldridge, C.C.A.Ark., 73 F.2d 814—Ralston Purina Co. v. Bansau, C.C.A.Ill., 73 F.2d 430—Washburn v. Douthit, C.C.A.Ark., 73 F.2d 23—H. F. Wilcox Oil & Gas Co. v. Skidmore, C.C.A.Mo., 72 F.2d 748—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76—Chesapeake & O. Ry. Co. v. Thomason, C.C.A.Ky., 70 F.2d 860—Lindback v. Milter, C.C.A.Pa., 70 F. 454—Meyer v. U. S., C.C.A.La., 65 F.2d 509—American Bureau of Shipping v. Allied Oil Co., C.C.A.Ohio, 64 F.2d 509—Fricke v. General Accident, Fire & Life Assur. Corporation, C.C.A.Mo., 59 F.2d 563, certiorari denied 53 S.Ct. 221, 287 U.S. 662, 77 L.Ed. 571—Howland v. Beck, C.C.A.Cal., 56 F.2d 35—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Detroit, T. & I. R. Co. v. Hahn, C.C.A.Ohio, 47 F.2d 59, certiorari denied 51 S.Ct. 489, 283 U.S. 842, 75 L.Ed. 1452—Hill v. New York Cent. R. Co., C.C.A.Ohio, 35 F.2d 30—Fordson Coal Co. v. Jackson, C.C.A.Ky., 32 F.2d 1000—Wisconsin & Arkansas Lumber Co. v. Ward, C.C.A.Ark., 32 F.2d 974—Ellerd v. Griffith, C.C.A.Tex., 29 F.2d 402, certiorari denied 49 S.Ct. 480, 279 U.S. 864, 73 L.Ed. 1003—Boghich v. Louisville & N. R. Co., C.C.A.Fla., 26 F.2d 361—Manjon v. Lebron, C.C.A.Puerto Rico, 23 F.2d 266—Herman Chemical Co. v. Burlington Industrial Alcohol Co., C.C.A.N.J., 9 F.2d 289—Simmons Hardware Co. v. Rhodes, C.C.A.Ark., 7 F.2d 352—Parker v. Elgin, C.C.A.Tenn., 5 F.2d 562—United S. S. Co. v. Barber, C.C.A.Ohio, 4 F.2d 625—Detroit Taxicab & Transfer Co. v. Pratt, C.C.A.Mich., 2 F.2d 193—Simmons Hardware Co. v. Southern Ry. Co., C.C.A.Mo., 279 F. 929, certiorari denied 43 S.Ct. 96, 260 U.S. 739, 67 L.Ed. 490—Tennessee, A. & G. R. Co. v. Drake, C.C.A.Ga., 276 F. 393—Yellow Cab Co. v. Earle, C.C.A.Minn., 275 F. 928, certiorari denied 42 S.Ct. 317, 258 U.S. 624, 66 L.Ed. 797—United Mine Workers of America v. Coronado Coal Co., Ark., 258 F. 829, 169 C.C.A. 549, reversed on other grounds 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition granted 42 S.Ct. 587, 259 U.S. 591, 66 L.Ed. 1071—Consolidated Interstate-Callahan Mining Co. v. Witkouski, Idaho, 249 F. 833, 162 C.C.A. 67—Boston Elevated R. Co. v. Teele, Mass., 248 F. 424, 160 C.C.A. 434—Goelet v. Matt J. Ward Co., N.Y., 242 F. 65, 155 C.C.A. 9—Daly Judge Mining Co. v. Towey, Utah, 240 F. 658, 153 C.C.A. 456—Alverson v. Oregon-Washington R. & Nav. Co., Wash., 236 F. 331, 149 C.C.A. 463—Fisher Mach. Works Co. v. Dougherty, Kan., 231 F. 910, 146 C.C.A. 106—Pennsylvania Co. v. Fanger, Ohio, 231 F. 851, 146 C.C.A. 47—Denison v. McNorton, Ohio, 228 F. 401, 142 C.C.A. 631—Delta Lumber Co. v. Schwarz Wheel Co., D.C.Pa., 218 F. 85—Kesterson v. La Moine Lumber & Trading Co., Or., 193 F. 355, 113 C.C.A. 279—3 C.J. p 919 note 34.

(2) The exceptions were required to be specific and to point out the error complained of.—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Pacific Alaska Airways v. Mahan, C.C.A.Alaska, 89 F.2d 255, certiorari denied Pacific Alaska Airway v. Mahan, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541—Southern Kansas Stage Lines v. Gibson, C.C.A.Okl., 87 F.2d 23—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Hall v. Ætna Life Ins. Co., C.C.Ark., 85 F.2d 447—Southern Pac. Co. v. Smith, C.C.A.Ariz., 83 F.2d 451—Pacific S. S. Co. v. Holt, C.C.A.Or., 77 F.2d 192—New York Life Ins. Co. v. Malgard, C.C.A.Wis., 74 F.2d 489—Maryland Casualty Co. v. Nellis, C.C.A.Ohio, 75 F.2d 23, certiorari denied Nellis v. Maryland Casualty Co., 56 S.Ct. 135, 296 U.S. 615, 80 L.Ed. 436, rehearing denied 56 S.Ct. 168, 296 U.S. 662, 80 L.Ed. 472—First Nat. Pictures v. Robison, C.C.A.Cal., 72 F.2d 37, certiorari denied Robison v. First National Pictures, 55 S.Ct. 125, 293 U.S. 609, 79 L.Ed. 700, rehearing denied 55 S.Ct. 141, 293 U.S. 631, 79 L.Ed. 716—Shell Petroleum Corporation v. Scully, C.C.A.La., 71 F.2d 772—Royal Ins. Co. v. Eastham, C.C.A.Ala., 71 F.2d 385, certiorari denied 55 S.Ct. 110, 293 U.S. 557, 79 L.Ed. 658—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76—Gaillard v. Boynton, C.C.A.N.H., 70 F.2d 552—St. Louis-San Francisco Ry. Co. v. Leach, C.C.A.Tenn., 67 F.2d 491—Allison v. Standard Air Lines, C.C.A.Cal., 65 F.2d 668—Detroit Edison Co. v. Stricker, C.C.A.Mich., 65 F.2d 126—Dayton Rubber Mfg. Co. of Delaware v. Sabra, C.C.A.Ariz., 63 F.2d 865—State Life Ins. Co. v. Sullivan, C.C.A.Cal., 58 F.2d 741—Royal Finance Co. of California v. Miller, C.C.A.Cal., 47 F.2d 24—National Union Fire Ins. Co. v. Kaplan, C.C.A.Ill., 41 F.2d 569, certiorari denied 51 S.Ct. 90, 282 U.S. 887, 75 L.Ed. 782—Sacramento Suburban Fruit Lands Co. v. Weber, C.C.A.Cal., 41 F.2d 514—Kennedy Lumber Co. v. Rickborn, C.C.A.S.C., 40 F.2d 228—Southwestern Gas & Electric Co. v. Rogers, C.C.A.Tex., 37 F.2d 708—Sacramento Suburban Fruit Lands Co. v. Johnson, C.C.A.Cal., 36 F.2d 925—Sacramento Suburban Fruit Lands Co. v. Loucks, C.C.A.Cal., 36 F.2d 921—Firemen's Ins. Co. v. Brooks, C.C.A.Tenn., 32 F.2d 451—Reynolds West Lumber Co. v. Kellum, C.C.A.Miss., 19 F.2d 72—Young v. Goetting, C.C.A.Tex., 16 F.2d 248—Alaska S. S. Co. v. Katzeek, C.C.A.Alaska, 16 F.2d 210—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A.Mo., 14 F.2d 893—Killisnoo Packing Co. v. Scott, C.C.A.Alaska, 14 F.2d 86—Delaware & H. Co. v. Nahas, C.C.A.Pa., 14 F.2d 56—Nocatee Fruit Co. v. Fosgate, C.C.A.Fla., 12 F.2d 250, affirming, D.C., Fosgate v. Nocatee Fruit Co., 299 F. 963, and 3 F.2d 606—J. S. Steel Products Co. v. Noble, C.C.A.N.Y., 10 F.2d 89—Borderland Coal Sales Co. v. Imperial Coal Sales Co., C.C.A.Ohio, 7 F.2d 116—C. W. Young Co. v. Union Oil Co. of California, C.C.A.Alaska, 293 F. 742—Magna Oil & Refining Co. v. White Star Refining Co., C.C.A.Del., 280 F. 52—United Verde Extension Mining Co. v. Koso, C.C.A.Ariz., 273 F. 369—Pennsylvania R. Co. v. Repine, C.C.A.Pa., 272 F. 898—Atlantic Coast Line R. Co. v. Raulerson, C.C.A.Fla., 267 F. 694, certiorari denied 41 S.Ct. 15, 254 U.S. 646, 65 L.Ed. 455—Jones v. U. S., C.C.A.Or., 265 F. 235, affirmed 42 S.Ct. 218, 258 U.S. 40, 66 L.Ed. 453—Morse v. Tillotson & Wolcott Co., N.Y., 253 F. 341, 165 C.C.A. 122, 1 A.L.R. 1485—Hammond v. U. S., Cal., 246 F. 40, 158 C.C.A. 266, reversing, D.C., U. S. v. Hammond, 226 F. 849—May Department Stores Co. v. Runge, Mo., 241 F. 575, 154 C.C.A. 351—Cisco v. Looper, Ark., 236 F. 336, 149 C.C.A. 468—City of Charlotte v. Atlantic Bitulithic Co., N.C., 228 F. 456, 143 C.C.A. 38—Barnes & Tucker Coal Co. v. Vozar, Pa., 227 F. 25, 141 C.C.A. 579—Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 319—Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 471—What Cheer Coal Co. v. Johnson, Iowa, 56 F. 810, 6 C.C.A. 143—3 C.J. p 922 note 40, p 923 note 41, p 925 note 47, p 926 notes 48, 53.

(3) Errors in instructions given, however, could be considered without an appropriate exception where the ends of justice so required.—Walsh v. Segale, C.C.A.Vt., 70 F.2d 698—Sacramento Suburban Fruit Lands Co. v. Jeppson, C.C.A.Cal., 36 F.2d 927—Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 471—Gougar v. Morse, C.C.Mass., 66 F. 702.

judgment.[50] So, also, appropriate exceptions were usually required to preserve for consideration on appeal errors relating to the verdict or findings of the jury,[51] the court's findings of fact and conclu-

(4) Scope and extent of particular exceptions.—Chickasha Cotton Oil Co. v. Roden, C.C.A.Okl., 66 F.2d 127—Marcus v. Forcier, C.C.A.Mass., 38 F.2d 8—Killisnoo Packing Co. v. Scott, C.C.A.Alaska, 14 F.2d 86—Canal Const. Co. v. Henson, C.C.A.Ark., 280 F. 98—Bassell v. Hines, C.C.A. Ohio, 269 F. 231, 12 A.L.R. 1361—Pennsylvania Co. v. Clark, C.C.A. Ohio, 266 F. 182—Port Wells Mill & Lumber Co. v. Crawford, C.C.A.Alaska, 264 F. 935—Eaton v. Clabaugh, Ohio, 251 F. 575, 163 C.C.A. 569—Hammond v. U. S., Cal., 246 F. 40, 158 C.C.A. 266, reversing, D.C., U. S. v. Hammond, 226 F. 849—Ransom & Randolph Co. v. Pinches, N.Y., 234 F. 847, 148 C.C.A. 445—Denison v. McNorton, Ohio, 228 F. 401, 142 C.C. A. 631—Swayne & Hoyt v. Barsch, Or., 226 F. 581, 141 C.C.A. 337.

Errors in failing or refusing to give instructions

(1) Exceptions were usually necessary to save for review errors in failing or refusing to give instructions.—Elzig v. Gudwangen, C.C.A. Minn., 91 F.2d 434—McCoy v. Gaddes, C.C.A.Pa., 88 F.2d 480—Arkansas Oak Flooring Co. v. Pritzen, C.C.A.Ark., 87 F.2d 474—Ohmer v. Allen, C.C.A. Ohio, 79 F.2d 942—Higgins v. Ledo, C.C.A.N.H., 66 F.2d 265—Allison v. Standard Air Lines, C.C.A.Cal., 65 F.2d 668—Howland v. Beck, C.C.A. Cal., 56 F.2d 35—McKay v. Monongahela Ry. Co., C.C.A.Pa., 44 F.2d 150—Mansfield Hardwood Lumber Co. v. Horton, C.C.A.Ark., 32 F.2d 851—Manjon v. Lebron, C.C.A.Puerto Rico, 23 F.2d 266—Head v. Texas Rawhide Paving Co., C.C.A.Tex., 22 F.2d 554—Ford Hydro-Electric Co. v. Neely, C.C.A.Wis., 13 F.2d 361, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L. Ed. 859—Parker v. Elgin, C.C.A. Tenn., 5 F.2d 562—Kingrey v. New York C. & St. L. R. Co., C.C.A.Ohio, 297 F. 376—Republic Iron & Steel Co. v. Hines, Ohio, 240 F. 77, 153 C. C.A. 113—Co-operative Raw Fur Co. v. American Credit Indemnity Co., Mich., 240 F. 67, 153 C.C.A. 103—3 C.J. p 927 note 55.

(2) The exceptions were required to be specific and to point out the error complained of.—O'Connor v. Ludlam, C.C.A.N.Y., 92 F.2d 50—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F.2d 925—Hall v. Ætna Life Ins. Co., C.C.A. Ark., 85 F.2d 447—Delaware & H. R. Corporation v. Cottrell, C.C.A.Pa., 69 F.2d 195, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490—Cromwell v. Slaney, C.C.A.Mass., 65 F.2d 940—Detroit Edison Co. v. Stricker, C.C.A.Mich., 65 F.2d 126—Spokane, P. & S. Ry. Co. v. Cole, C. C.A.Or., 54 F.2d 318—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A. Mo., 14 F.2d 893—Borderland Coal Sales Co. v. Imperial Coal Sales Co., C.C.A.Ohio, 7 F.2d 116—Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 471—3 C.J. p 927 note 55, p 929 note 58.

(3) Alleged error, however, could be considered without noting an appropriate exception where the interests of justice so required.—O'Connor v. Ludlam, C.C.A.N.Y., 92 F.2d 50.

Time of taking exceptions

(1) Usually exceptions to the giving or refusing of instructions were required to be taken before the jury retired.—Fairmount Glass Works v. Cub Fork Coal Co., Ind., 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439, reversing, C.C.A., Cub Fork Coal Co. v. Fairmount Glass Works, 59 F.2d 539, certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S.Ct. 24, 287 U.S. 585, 77 L.Ed. 511—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A.N.C., 99 F.2d 218—Nichols v. Republic Iron & Steel Co., C.C.A.Ala., 89 F.2d 927—American Cast Iron Pipe Co. v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 87 F.2d 250—Great Northern Ry. Co. v. Shellenbarger, C.C.A.Or., 54 F.2d 606, certiorari denied 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1290—Southern Transp. Co. v. Ashford, C. C.A.La., 48 F.2d 191—Ford Hydro-Electric Co. v. Neely, C.C.A.Wis., 13 F.2d 361, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Central Vermont Ry. Co. v. Howard, C. C.A.Vt., 297 F. 566—Brevard Tannin Co. v. J. F. Mosser Co., C.C.A.N.C., 288 F. 725—New York Life Ins. Co. v. Slocomb, C.C.A.Wash., 284 F. 810, certiorari denied 43 S.Ct. 521, 262 U.S. 745, 67 L.Ed. 1211—Central R. Co. of New Jersey v. Sharkey, N.Y., 259 F. 144, 170 C.C.A. 212—Stultz v. Cousins, Tenn., 242 F. 794, 155 C.C. A. 382—Miller & Lux v. Petrocelli, Cal., 236 F. 846, 150 C.C.A. 108—Alverson v. Oregon-Washington R. & Nav. Co., Wash., 236 F. 331, 149 C. C.A. 463—Baltimore & O. R. Co. v. Wood, Pa., 228 F. 625, 143 C.C.A. 147—Barnes & Tucker Coal Co. v. Vozar, Pa., 227 F. 25, 141 C.C.A. 579—Lehigh Valley Coal Co. v. Calausky, N.Y., 222 F. 664, 138 C.C.A. 188—Beatson Copper Co. v. Pedrin, Alaska, 217 F. 43, 133 C.C.A. 29—3 C.J. p 954 note 37, p 955 note 42.

(2) But, where the jury, after retiring, returned for instructions which were given in the absence of counsel, it was sufficient if exceptions were taken as soon as opportunity was offered.—Merchants Exch. Bank v. McGraw, Wash., 76 F. 930, 22 C.C.A. 622.

Necessity of objections to court's instructions to jury under present practice see supra § 292 b (2).

50. U.S.—U. S. v. Blumenthal, C.C. A.Okl., 77 F.2d 219.

Time of taking exception

(1) An exception to the denial of a motion for judgment was required to be timely taken.—Lando v. Equitable Life Assur. Soc. of U. S., C.C.A. Cal., 84 F.2d 640, affirming, D.C., 11 F.Supp. 729.

(2) Procedure where case taken under advisement.—U. S. v. Martin, C.C.A.Kan., 80 F.2d 460.

Effect of exception

(1) Generally an exception to a denial of a motion for judgment in an action tried to the court without a jury presented reviewable questions.—U. S. v. Richards, C.C.A.Ohio, 79 F.2d 797, certiorari denied Richards v. U. S., 56 S.Ct. 595, 297 U.S. 718, 80 L.Ed. 1003—U. S. v. Wyoming Central Ass'n, C.C.A.Wyo., 70 F.2d 869, reversing, D.C., 2 F.Supp. 86—State Bank of New York v. Henderson County, C.C.A., 35 F.2d 859, certiorari denied Henderson County, State of Kentucky v. State Bank of New York, 50 S.Ct. 245, 281 U.S. 728, 74 L.Ed. 1144, 1145.

(2) But such an exception raised no question of law for the circuit court of appeals where there was no evidence before the trial court on which the requested judgment could be found or where the trial court's findings of fact were not findings of all the ultimate facts from which the judgment could be said to follow as a matter of law.—U. S. v. Bertelsen & Petersen Engineering Co., C.C. A.Mass., 95 F.2d 867, affirming, D.C., Bertelsen & Petersen Engineering Co. v. U. S., 14 F.Supp. 868, affirmed, C. C.A., U. S. v. Bertelsen & Petersen Engineering Co., 98 F.2d 132, certiorari granted U. S. v. Bartelsen & Petersen Engineering Co., 59 S.Ct. 229, 305 U.S. 590, 83 L.Ed. 373, affirmed U. S. v. Bertelsen & Petersen Engineering Co., 59 S.Ct. 541, 306 U.S. 276, 83 L.Ed. 647.

51. Particular errors held to require exceptions.—Garfield Aniline Works v. Zendle, C.C.A.N.J., 43 F.2d 537—Detroit United Ry. v. Weintrobe, Mich., 259 F. 68, 170 C.C.A. 136—Goelet v. Matt J. Ward Co., N.Y., 242 F. 65, 155 C.C.A. 9—3 C.J. p 932 note 77.

Errors appearing in record proper

Inasmuch as a verdict is a part of the record, no exception was necessary to support an assignment of error raising the question of its sufficiency.—Patterson v. Robinson, Pa., 180 F. 668, 103 C.C.A. 634.

sions of law,[52] the sufficiency of the evidence to sustain the verdict, findings, or judgment,[53] and the

52. Findings of fact by court

(1) Proper exceptions were usually required to save for consideration on appeal errors relating to findings of fact by the trial court.—Klineline v. U. S., C.C.A.Ky., 85 F.2d 628—Roach v. Minshall, C.C.A.Ohio, 85 F. 2d 614—Kelley v. U. S., C.C.A.Ky., 85 F.2d 568—Aro Equipment Corporation v. Herring-Wissler Co., C.C.A. Iowa, 84 F.2d 619—Wright v. U. S., C.C.A.Okl., 75 F.2d 358—Rose v. U. S., C.C.A.Ky., 69 F.2d 966—Dobbins v. U. S., C.C.A.Cal., 47 F.2d 887—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F. 2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U.S. 897, 75 L.Ed. 790—U. S. v. Wooten, C.C.A.N.M., 40 F.2d 882—Thomas E. Basham Co. v. Lucas, C.C.A.Ky., 30 F.2d 97, affirming D.C., 21 F.2d 550—U. S. v. Edwards, C.C.A.Neb., 23 F.2d 477—Macomber v. Goldthwaite, C.C. A.Or., 22 F.2d 638—Gulf, C. & S. F. Ry. Co. v. Clement Grain Co., C.C.A. Tex., 268 F. 535—3 C.J. p 933 note 84, p 935 note 88.

(2) The exceptions were required to be specific, general exceptions being insufficient to bring up for review specific findings.—Kansas City Marble & Tile Co. v. Penker Const. Co., C.C.A.Va., 86 F.2d 287—Union Bleachery v. U. S., C.C.A.S.C., 79 F.2d 549—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U.S. 897, 75 L.Ed. 790—Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co., C. C.A.Minn., 283 F. 915—Arkansas Bridge Co. v. Kelly-Atkinson Const. Co., C.C.A.Mo., 282 F. 802—3 C.J. p 936 note 96.

(3) Moreover, the exceptions were required to be timely taken.—First Nat. Bank v. U. S., C.C.A.Ill., 102 F. 2d 907, certiorari denied 59 S.Ct. 1038, 307 U.S. 641, 83 L.Ed. 1521, rehearing denied 60 S.Ct. 69, 308 U.S. 633, 84 L.Ed. 527, motion denied 60 S.Ct. 1090, 310 U.S. 658, 84 L.Ed. 1421—Huron College v. Union County Trust Co., C.C.A.S.D., 77 F.2d 609.

(4) But no exception was necessary to raise the question whether the facts found by the court supported the judgment or decree.—Coggins v. Gregorio, C.C.A.N.M., 97 F.2d 948—Sanfeliz v. Bank of Nova Scotia, C.C.A.Puerto Rico, 74 F.2d 338—Salt Bayou Drainage Dist. v. Futrall, C.C.A.Ark., 72 F.2d 940—White v. U. S., C.C.A.Okl., 48 F.2d 178—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U. S. 897, 75 L.Ed. 790—S. A. Gerrard Co. v. American Ry. Express Co., C. C.A.Ohio, 35 F.2d 861—Templar Motors Co. v. Bay State Pump Co., C.C. A.Ohio, 289 F. 24—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701—Philadelphia Casualty Co. v. Fechheimer, Ohio, 220 F. 401, 136 C.C.A. 25, Ann.Cas.1917D, 64—3 C.J. p 942 note 24.

(5) Scope and effect of particular exceptions in general.—Continental Pipe Mfg. Co. v. Poe, C.C.A.Wash., 59 F.2d 694—Thomas E. Basham Co. v. Lucas, C.C.A.Ky., 30 F.2d 97, affirming, D.C., 21 F.2d 550—Blocton Cahaba Coal Co. v. U. S., C.C.A.Ala., 24 F. 2d 130, reversing, D.C., Little Cahaba Coal Co. v. U. S., 15 F.2d 863.

(6) Exceptions to general findings brought up no question for review.—Nevins v. U. S., C.C.A.Ind., 95 F.2d 553—Welch v. Hassett, C.C.A.Mass., 90 F.2d 833, reversing, D.C., 15 F. Supp. 692, and certiorari granted Hassett v. Welch, 58 S.Ct. 56, 302 U.S. 674, 82 L.Ed. 521—American Surety Co. of New York v. Cotton Belt Levee Dist. No. 1 of Phillips County, Ark., C.C.A.Ark., 58 F.2d 234—Stinson v. Business Men's Accident Ass'n, C.C.A.Okl., 43 F.2d 312—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897.

Decisions or conclusions of law

(1) Proper exceptions were usually required to preserve for consideration on appeal errors relating to the lower court's conclusions of law or decision on the facts found.—Klineline v. U. S., C.C.A.Ky., 85 F.2d 628—Kelley v. U. S., C.C.A.Ky., 85 F.2d 568—Rose v. U. S., C.C.A.Ky., 69 F. 2d 966—Kansas City Life Ins. Co. v. Shirk, C.C.A.Kan., 50 F.2d 1046—Thornton v. National City Bank of New York, C.C.A.N.Y., 45 F.2d 127—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U.S. 897, 75 L.Ed. 790—3 C.J. p 937 note 2.

(2) The exceptions were required to be specific.—Geo. A. Hormel & Co. v. Chicago M. & St. P. Ry. Co., C.C.A. Minn., 283 F. 915—Arkansas Bridge Co. v. Kelly-Atkinson Const. Co., C.C. A.Mo., 282 F. 802.

(3) Moreover, the exceptions were required to be timely taken.—First Nat. Bank v. U. S., C.C.A.Ill., 102 F. 2d 907, certiorari denied 59 S.Ct. 1038, 307 U.S. 641, 83 L.Ed. 1521, rehearing denied 60 S.Ct. 69, 308 U.S. 633, 84 L.Ed. 527, motion denied 60 S.Ct. 1090, 310 U.S. 658, 84 L.Ed. 1421—Missouri State Life Ins. Co. v. Langreder, C.C.A.Ill., 87 F.2d 586—Huron College v. Union County Trust Co., C.C.A.S.D., 77 F.2d 609.

Refusal of court to make special findings in a jury waived case was not subject to exception.—Fred W. Mears Heel Co. v. Walley, C.C.A.Me., 71 F.2d 876, affirming, D.C., Walley v. Fred W. Mears Heel Co., 4 F.Supp. 277, certiorari denied Fred W. Mears Heel Co. v. Walley, 55 S.Ct. 122, 293 U.S. 605, 79 L.Ed. 696.

53. Necessity and sufficiency of exceptions

(1) Proper exceptions were usually required to preserve for consideration on appeal the sufficiency of the evidence to sustain the verdict, findings, or judgment.—Maryland Casualty Co. v. Jones, Cal., 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960, reversing, C.C.A., 27 F.2d 521—Eastern Shore of Virginia Produce Exchange v. New York Cent. R. Co., C.C.A.Va., 97 F.2d 565—Union Bleachery v. U. S., C.C.A.S.C., 79 F.2d 549, 102 A.L. R. 204—Wright v. U. S., C.C.A.Okl., 75 F.2d 358—Pocahontas Coal & Coke Co. v. Cook, C.C.A.W.Va., 74 F.2d 878—Mandel Bros. v. Henry A. O'Neil, Inc., C.C.A.S.D., 69 F.2d 452—General Accident Assur. Co. v. Caldwell, C.C. A.Cal., 59 F.2d 473—Kansas City Life Ins. Co. v. Shirk, C.C.A.Kan., 50 F.2d 1046—U. S. v. Rice, C.C.A.Or., 47 F. 2d 749—Home Bldg. & Sav. Ass'n v. New Amsterdam Casualty Co., C.C.A. Ark., 45 F.2d 939—White Co. v. Wells, C.C.A.Ohio, 42 F.2d 460—Maryland Casualty Co. v. Jones, C.C. A.Cal., 35 F.2d 791—Hessig-Ellis Drug Co. v. Grinnell Lithographic Co., C.C.A.Tenn., 33 F.2d 449—People's Bank of Keyser, W.Va. v. International Finance Corporation, C.C. A.W.Va., 30 F.2d 46, affirming, D.C., International Finance Corporation v. People's Bank of Keyser, 27 F.2d 523, and certiorari denied People's Bank of Keyser, W.Va. v. International Finance Corporation, 49 S.Ct. 352, 279 U.S. 858, 73 L.Ed. 999—Associated Industries Ins. Corporation v. New Amsterdam Casualty Co., C. C.A.Tex., 29 F.2d 278—McMillan v. National Wool Warehouse & Storage Co., C.C.A.Idaho, 28 F.2d 793, certiorari denied 49 S.Ct. 251, 279 U.S. 836, 73 L.Ed. 984—Gillespie v. Hongkong & Shanghai Banking Corporation, C.C.A.China, 23 F.2d 670, certiorari denied 48 S.Ct. 420, 276 U.S. 635, 72 L.Ed. 743—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y.,

amount of recovery;[54] and a similar rule was applied with respect to errors in proceedings before referees, masters, and like officers.[55]

An exception to a judgment in a law action tried by the court without a jury, however, presented nothing for review.[56]

(4) Motions for New Trial

A motion for a new trial is not a condition precedent to the taking of an appeal.

While a contrary rule prevails in some jurisdictions under state practice, as appears in Appeal and Error §§ 352–388, a motion for a new trial is not a condition precedent to the taking of an appeal under the federal practice.[57]

c. Parties

(1) In general
(2) Appellants
(3) Appellees
(4) Intervention
(5) Transfer or devolution of interest
(6) Death of party
(7) Designation and description
(8) Defects, objections, and amendments

(1) In General

Generally all parties to the record who appear to have any rights or interests that may be directly affected by a judgment on appeal must be made parties to the appeal.

In the absence of contrary statute or rule of court, the general rule is that all parties to the record who appear to have any rights or interests that may be directly affected by a judgment on appeal must be made parties to the appeal, or must be given notice thereof, and an opportunity of being heard and defending their rights.[58]

17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330—Grainger Bros. Co. v. G. Amsinck & Co., C.C.A.Neb., 15 F.2d 329, certiorari denied 47 S.Ct. 572, 273 U.S. 768, 71 L.Ed. 882—Garwood v. Scheiber, Cal., 246 F. 74, 158 C.C.A. 300, certiorari denied 38 S.Ct. 427, 247 U.S. 506, 62 L.Ed. 1240—Société Nouvelle d'Armement v. Barnaby, Wash., 246 F. 68, 158 C.C.A. 294—Security Nat. Bank of Sioux City, Iowa v. Old Nat. Bank of Battle Creek, Mich., Iowa, 241 F. 1, 154 C.C.A. 1—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C.C.A. 240—McBride v. Neal, Ill., 214 F. 966, 131 C.C.A. 262—3 C.J. p 942 note 26.

(2) Sufficiency of particular exceptions to raise question of sufficiency of evidence.—Fierce v. Wyatt, C.C.A.Iowa, 83 F.2d 892—Southern Pac. Co. v. Smith, C.C.A.Ariz., 83 F.2d 451—Johnson v. First Nat. Bank & Trust Co. of Tulsa, C.C.A.Okl., 78 F.2d 535, affirming, D.C., 8 F.Supp. 788—Kolton v. U. S., C.C.A.Colo., 67 F.2d 741—Greenway v. U. S., C.C.A.Colo., 67 F.2d 738—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, 26, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U.S. 897, 75 L.Ed. 790—Maryland Casualty Co. v. Klickalumber Co., C.C.A.Cal., 41 F.2d 222—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330.

3 C.J. p 943 note 27.

54. U.S.—City of Sedalia v. Chalfant, C.C.A.Mo., 4 F.2d 350—Crocker v. Ingersoll Engineering & Constructing Co., Mich., 249 F. 31, 161 C.C.A. 91.

55. U.S.—Fruit Growers' Express Co. v. Plate Ice Co., C.C.A.N.C., 59 F.2d 605, certiorari denied 53 S.Ct. 91, 287 U.S. 642, 77 L.Ed. 556.

Exceptions to report

(1) Necessity and sufficiency of exceptions to report of referee or master.—Kansas City Southern R. Co. v. Guardian Trust Co., Mo., 36 S.Ct. 334, 240 U.S. 166, 60 L.Ed. 579, affirming Central Imp. Co. v. Cambria Steel Co., 201 F. 811, 120 C.C.A. 121, and 210 F. 696, 127 C.C.A. 184—Cromwell v. Skinner, C.C.A.Okl., 62 F.2d 432, certiorari denied 53 S.Ct. 785, 289 U.S. 754, 77 L.Ed. 1498—American Surety Co. of New York v. James A. Dick Co., C.C.A.N.M., 23 F.2d 464, certiorari denied 49 S.Ct. 26, 278 U.S. 624, 73 L.Ed. 545—Evans v. Crown Gasoline & Oil Co., Pa., 245 F. 933, 158 C.C.A. 221—Cable v. U. S. Life Ins. Co., Ill., 111 F. 19, 49 C.C.A. 216, reversed on other grounds 24 S.Ct. 74, 191 U.S. 288, 48 L.Ed. 188—3 C.J. p 950 notes 90, 92, 95.

(2) For purposes of review exceptions to a referee's report could be considered as equivalent to exceptions to rulings of a district court sitting without a jury "in the progress of the trial."—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330.

Exceptions to rulings of court

(1) Exceptions to the rulings by the trial judge on exceptions to the report of the referee or master were essential to review of such rulings.—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701—Rutan v. Johnson & Johnson, N.J., 231 F. 369, 145 C.C.A. 363—3 C.J. p 950 note 98.

(2) The exceptions were required to be specific.—Philadelphia Casualty Co. v. Fechheimer, Ohio, 220 F. 401, 136 C.C.A. 25.

56. U.S.—Tramel v. U. S., C.C.A.Okl., 56 F.2d 142—Wynne v. Fries, C.C.A.Ohio, 50 F.2d 761—Meyers v. Allen, C.C.A.Neb., 34 F.2d 883—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing, 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—Blumenfeld v. Mogi & Co., C.C.A.Ga., 295 F. 123.

57. U.S.—American Distilling Co. v. Wisconsin Liquor Co., C.C.A.Wis., 104 F.2d 582, 123 A.L.R. 739.

"A motion for a new trial is not indispensable to a review of a ruling or finding of a federal court or of a referee."—Chicago Life Ins. Co. v. Tiernan, C.C.A.Kan., 263 F. 325, 330.

58. U.S.—McLean v. Jaffray, C.C.A.Minn., 71 F.2d 743, certiorari denied 55 S.Ct. 118, 293 U.S. 602, 79 L.Ed. 694.

3 C.J. p 1003 note 45, p 1004 notes 46, 47.

Jurisdictional question

The circuit court of appeals has no power to hear and determine a case unless all the parties substantially affected by the judgment or decree are brought before it.—Babcock v. Norton, C.C.A.N.Y., 5 F.2d 153, certiorari denied Norton v. Babcock, 45 S.Ct. 509, 268 U.S. 689, 69 L.Ed. 1158.

Purpose of this rule has been stated as being that the successful party may be at liberty to enforce his judgment, decree, or order without

(2) Appellants

Under a rule of court so providing, parties interested in a judgment may join in an appeal therefrom, or, without summons and severance, any one or more of them may appeal separately.

Under the Federal Rules of Civil Procedure, rule 74, 28 U.S.C.A. following § 723c, parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal.[59]

Former practice. Prior to the adoption of this rule of court, and prior to the abolition of the writ of error by statute, 28 U.S.C.A. § 861a, the general rule, subject to some qualifications, was that all parties against whom a joint judgment or decree had been rendered were required to join in a writ of error or appeal, unless there had been a severance of the parties in interest effected by summons and severance, or by an equivalent proceeding appearing in the record;[60] but, where a decree or judgment was several in form and substance and the in-

delay against those parties who do not desire to have it reversed, and that the appellate court may not be required to decide the same question more than once on the same record.—Lewis v. Sittel, Ind.T., 165 F. 157, 91 C.C.A. 191—Dodson v. Fletcher, Ark., 78 F. 214, 24 C.C.A. 69, motion denied 79 F. 129, 24 C.C.A. 466—Farmers' Loan & Trust Co. v. McClure, Ark., 78 F. 211, 24 C.C.A. 66.

59. U.S.—In re Braker, C.C.A.Ohio, 127 F.2d 652—In re Barnett, C.C. A.N.Y., 124 F.2d 1005—Schaffer v. Pennsylvania R. Co., C.C.A.Ill., 101 F.2d 369.

Retroactive application

This rule of court does not apply to appeals taken prior to Sept. 16, 1938, the effective date of the rule.—Standard Accident Ins. Co. v. U. S., for Use and Benefit of Stringille, C. C.A.Mass., 103 F.2d 501—Tighe v. Maryland Casualty Co., C.C.A.Cal., 99 F.2d 727, dismissing appeal, D.C., Maryland Casualty Co. v. Tighe, 24 F.Supp. 49.

60. U.S.—Lamb v. Washington Oil Co. of Texas, C.C.A.Tex., 103 F.2d 711—Standard Accident Ins. Co. v. U. S., for Use and Benefit of Stringille, C.C.A.Mass., 103 F.2d 501—Wire Tie Mach. Co. v. Pacific Box Corporation, C.C.A.Cal., 102 F.2d 543, affirmed 107 F.2d 54—Tighe v. Maryland Casualty Co., C.C.A.Cal., 99 F.2d 727, dismissing appeal, D. C., Maryland Casualty Co. v. Tighe, 24 F.Supp. 49—Preston v. Fidelity & Deposit Co. of Maryland, C.C.A. Tenn., 98 F.2d 430—Mackey v. City of Little Rock, C.C.A.Ark., 94 F.2d 546, certiorari denied 58 S.Ct. 1056, 304 U.S. 582, 82 L.Ed. 1544—Hudson v. Pacific Trust Co., C.C.A.Hawaii, 93 F.2d 821—State of Texas v. Anderson, Clayton & Co., C.C.A. Tex., 92 F.2d 104, certiorari denied 58 S.Ct. 265, 302 U.S. 747, 82 L.Ed. 578, rehearing denied 58 S.Ct. 366, 302 U.S. 780, 82 L.Ed. 602—Oakland County v. Hazlett, C.C.A.Mich., 87 F.2d 795—Wells v. Demeter, C.C. A.Okl., 84 F.2d 673—Pflueger v. Sherman, C.C.A.Hawaii, 75 F.2d 84, certiorari denied 56 S.Ct. 94, 296 U.S. 584, 80 L.Ed. 413—The L. I. R. R. No. 18, C.C.A., 67 F.2d 290—City of Shidler v. H. C. Speer & Sons Co., C.C.A.Okl., 62 F.2d 544—Doran v. Charles D. Kaier Co., C. C.A.Pa., 60 F.2d 259—H. E. Wolfe Const. Co. v. Fersner, C.C.A.S.C., 58 F.2d 27—Clarke v. Boysen, C.C. A.Wyo., 39 F.2d 800, certiorari denied 51 S.Ct. 75, 282 U.S. 869, 75 L. Ed. 768—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 38 F.2d 396—Axelrod v. Osage Oil & Refining Co., C.C.A.Okl., 29 F.2d 712—American Baptist Homes Mission Soc. v. Barnett, C.C.A.N.Y., 26 F.2d 350, dismissing appeal, D.C., Barnett v. Equitable Trust Co. of New York, 21 F.2d 325, and certiorari denied American Baptist Home Mission Soc. v. Barnett, 49 S.Ct. 28, 278 U.S. 626, 73 L.Ed. 546—American Surety Co. of New York v. People of State of Colorado, for Use of Little, C.C.A.Colo., 22 F.2d 624—Norrie v. Lohman, C. C.A.N.Y., 16 F.2d 355—Parker v. New England Oil Corporation, D.C. Mass., 15 F.2d 236—Smith v. Collins, C.C.A., 12 F.2d 267—Babcock v. Norton, C.C.A.N.Y., 5 F.2d 153, certiorari denied Norton v. Babcock, 45 S.Ct. 509, 268 U.S. 689, 69 L.Ed. 1158—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A. Ark., 2 F.2d 511—Priest v. Seaman, C.C.A.Mo., 266 F. 844—National Surety Co. v. Leflore County, C.C.A. Miss., 262 F. 325, certiorari denied 40 S.Ct. 583, 253 U.S. 490, 64 L.Ed. 1028, appeal dismissed 41 S.Ct. 447, 255 U.S. 580, 65 L.Ed. 796.

3 C.J. p 1005 note 55, p 1006 note 58, p 1009 note 76, p 1010 note 78, p 1011 notes 79, 81, p 1012 note 85, p 1014 note 87.

Parties in default

The rule applied even where some of the parties had suffered a default to be entered against them.—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., 4 F.Supp. 216.

What constituted summons and severance or its equivalent

(1) Anything in the record which showed that the party not appealing had notice of the appeal and chose to abide by the decree was a sufficient showing of severance.—Wire Tie Mach. Co. v. Pacific Box Corporation, C.C.A.Cal., 102 F.2d 543, affirmed 107 F.2d 54—Brock v. Fidelity & Deposit Co. of Maryland, C.C.A.Ala., 86 F.2d 345, certiorari denied Fidelity & Deposit Co. of Maryland v. Brock, 57 S. Ct. 610, 300 U.S. 672, 81 L.Ed. 878—American Baptist Home Mission Soc. v. Barnett, C.C.A.N.Y., 26 F.2d 350, dismissing appeal, D.C., Barnett v. Equitable Trust Co. of New York, 21 F.2d 325, and certiorari denied American Baptist Home Mission Soc. v. Barnett, 49 S.Ct. 28, 278 U.S. 626, 73 L.Ed. 546—Union Trust Co. v. Beach, Ga., 227 F. 36, 141 C.C.A. 584.

(2) A belated appearance and request to join as appellant, however, was not equivalent to "summons and severance."—American Baptist Home Mission Soc. v. Barnett, supra.

(3) The same was true of belated appearances and waivers by the omitted parties.—Pflueger v. Sherman, C.C.A.Hawaii, 75 F.2d 84, certiorari denied 56 S.Ct. 94, 296 U.S. 584, 80 L.Ed. 413, overruling Richards v. American Bank of Alaska, Alaska, 234 F. 300, 148 C.C.A. 202, certiorari denied American Bank of Alaska v. Richards, 37 S.Ct. 242, 242 U.S. 649, 61 L.Ed. 545.

Filing of summons and severance

Summons and severance, or their equivalents, were required to be filed in the lower court.—Pflueger v. Sherman, C.C.A.Hawaii, 75 F.2d 84, certiorari denied 56 S.Ct. 94, 296 U.S. 584, 80 L.Ed. 413.

On refusal of coparties to join in or prosecute appeal

Where one or more of the coplaintiffs or codefendants refused to join in or prosecute an appeal or writ of error in which they should all unite, on notice or process regularly served, or, after having perfected the appeal, abandon it, the others could prosecute the proceedings alone.—Kelly v. Allen, C.C.A.Ariz., 49 F.2d 876, certiorari denied Allen v. Kelly, 52 S.Ct. 23, 284 U.S. 642, 76 L.Ed. 546—3 C.J. p 1007 note 69.

terest represented by each of the coparties, plaintiff or defendant, or by some of them, was separate and distinct from that of the others, any party who was aggrieved in his separate interest, or several parties who were aggrieved in their united interests, could appeal or sue out a writ of error separately or jointly, as the case might be, to protect his or their own interests without joining coparties adjudged against by the same judgment or decree, but not united in interest with him or them, and without a summons and severance or the equivalent thereof.[61] It was not necessary, however, to join as parties nominal and useless parties.[62] Thus one whose interest was in no way adjudged, although

Person jointly liable for costs

That a decree made a party jointly liable for the costs did not require him to join in an appeal or to be severed.—Higbee v. Chadwick, Tenn., 220 F. 873, 136 C.C.A. 317.

Whether a decree was joint, precluding appeal by one of several defendants only, was determined by the face of the decree.—City of Shidler v. H. C. Speer & Sons Co., C.C.A. Okl., 62 F.2d 544.

61. U.S.—Brock v. Fidelity & Deposit Co. of Maryland, C.C.A.Ala., 86 F.2d 345, certiorari denied Fidelity & Deposit Co. of Maryland v. Brock, 57 S.Ct. 610, 300 U.S. 672, 81 L.Ed. 878—Martin v. National Surety Co., C.C.A.Mo., 85 F.2d 135, certiorari granted 57 S.Ct. 232, 299 U.S. 536, 81 L.Ed. 395, and affirmed 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822—Norristown-Penn Trust Co. v. Cole, C.C.A.Tex., 80 F.2d 888, certiorari denied Cole v. Norristown-Penn Trust Co. v. Cole, 56 S.Ct. 670, 297 U.S. 723, 80 L.Ed. 1007—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., 4 F.Supp. 216—New Jersey Zinc Co. v. Singmaster, C.C.A.N.Y., 71 F.2d 277, modifying, D.C., 4 F.Supp. 967, and certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685—Brotherhood of Locomotive Engineers Securities Corporation of New York v. W. L. Shepherd Lumber Co., C.C.A.Fla., 51 F.2d 153—Clarke v. Boysen, C.C.A.Wyo., 39 F.2d 800, certiorari denied 51 S.Ct. 75, 282 U.S. 869, 75 L.Ed. 768—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 38 F.2d 396—Axelrod v. Osage Oil & Refining Co., C.C.A. Okl., 29 F.2d 712—Hart v. Wiltsee, C.C.A.Mass., 16 F.2d 838, denying motion, D.C., Parker v. New England Oil Corporation, 4 F.2d 392, 8 F.2d 392, and 13 F.2d 158, all of which are vacated, C.C.A., Hart v. Wiltsee, 19 F.2d 903, certiorari denied Wiltsee v. Hart, 48 S.Ct. 119, 275 U.S. 559, 72 L.Ed. 426—Norrie v. Lohman, C.C.A.N.Y., 16 F.2d 355—Adamson v. Black Rock Power & Irrigation Co., C.C.A.Wash., 12 F.2d 437—Union Cent. Life Ins. Co. v. I. Baer Co., C.C.A.La., 10 F.2d 153—National Surety Co. v. Leflore County, Miss., C.C.A.Miss., 262 F. 325, certiorari denied 40 S.Ct. 583, 253 U.S. 490, 64 L.Ed. 1028, and appeal dismissed 41 S.Ct. 147, 255 U.S. 580, 65 L.Ed. 796—Conn v. Drew, Tex., 250 F. 852, 163 C.C.A. 166—Orleans-Kenner Electric Ry. Co. v. Dunbar, La., 218 F. 344, 134 C.C.A. 152, certiorari denied Dunbar v. Orleans-Kenner Electric Ry. Co., 35 S.Ct. 418, 238 U.S. 605, 59 L.Ed. 1485—Columbia River Packers' Ass'n v. McGowan, Wash., 217 F. 196, 133 C.C.A. 190.

D.C.—Robison v. Washington Ry. & Electric Co., 258 F. 515, 49 App. D.C. 43.

3 C.J. p 1007 note 68, p 1008 note 71.

Decree several in fact, although joint in form

As a decree may be several in fact and in law, although it be apparently joint in form, the failure to unite as a party to an appeal one whose interest was clearly separate and distinct from that of the party appealing was not error.—State of Texas v. Anderson, Clayton & Co., C.C.A.Tex., 92 F.2d 104, certiorari denied 58 S. Ct. 265, 302 U.S. 747, 82 L.Ed. 578, rehearing denied 58 S.Ct. 366, 302 U.S. 780, 82 L.Ed. 602—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841.

Action against bank and stockholders

In a suit against a bank and stockholders to enforce a debt and stockholders' liability, defendants' liability being several and not joint, a decree against them could be appealed from by one or more without joining the others.—Hightower v. American Nat. Bank of Macon, C.C.A.Ga., 276 F. 371, affirmed 44 S.Ct. 123, 263 U.S. 351, 68 L.Ed. 334.

Trustees and tax collector where issues unrelated

Where, in a suit by a beneficiary of a trust against the trustees to enjoin them from paying an internal revenue tax, the collector was subsequently brought in and an injunction sought to restrain collection of the tax, the latter issue was so unrelated to the former that on an appeal by the collector a summons and severance, or notice to the trustees, was not necessary.—Reinecke v. Peacock, C.C.A.Ill., 3 F.2d 583, certiorari denied Peacock v. Reinecke, 45 S.Ct. 635, 268 U.S. 699, 69 L.Ed. 1164.

Parties in default

Where the judgment was essentially several in nature, it was not necessary to join as parties persons who had suffered a default.—New York Trust Co. v. Island Oil & Transport Co., C.C.A.N.Y., 33 F.2d 104, 79 A.L.R. 1007—3 C.J. p 1005 note 51 [a].

62. U.S.—Lamb v. Washington Oil Co. of Texas, C.C.A.Tex., 103 F.2d 711—Queenan v. Mays, C.C.A.Okl., 90 F.2d 525, certiorari denied Board of Com'rs of Creek County, Okl. v. Mays, 58 S.Ct. 45, 302 U.S. 724, 82 L.Ed. 559—Brock v. Fidelity & Deposit Co. of Maryland, C. C.A.Ala., 86 F.2d 345, certiorari denied Fidelity & Deposit Co. of Maryland v. Brock, 57 S.Ct. 610, 300 U.S. 672, 81 L.Ed. 878—Martin v. National Surety Co., C.C.A.Mo., 85 F.2d 135, certiorari granted 57 S.Ct. 232, 299 U.S. 536, 81 L.Ed. 395, affirmed 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822—Dugas v. American Surety Co. of New York, C.C.A.La., 82 F.2d 953, certiorari granted 57 S.Ct. 47, 299 U.S. 532, 82 L.Ed. 391, affirmed 57 S.Ct. 515, 300 U.S. 414, 82 L.Ed. 720, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—Axelrod v. Osage Oil & Refining Co., C.C.A.Okl., 29 F.2d 712—Mathis v. Hemingway, C.C.A. Ark., 24 F.2d 951—Prince v. McLaughlin, C.C.A.Mass., 16 F.2d 886, certiorari denied McLaughlin v. Prince, 47 S.Ct. 658, 274 U.S. 746, 71 L.Ed. 1327, and 47 S.Ct. 763, 71 L.Ed. 1341—Higbee v. Chadwick, Tenn., 220 F. 873, 136 C.C.A. 317.

3 C.J. p 1006 note 56.

United States marshal

Where plaintiff sued to enjoin the assignees of a judgment, as well as the United States marshal, from further proceeding under an execution issued on the judgment, whereby it was sought by the assignees to exercise a claimed right of redemption of real property which once had belonged to the judgment debtor, an appeal by the assignees from an adverse judgment would not be dismissed, because the marshal did not join, since the assignees were the real parties in interest.—Benedict v. Setters, C.C.A.Colo., 261 F. 492.

Showing as to interest required

Where a joint judgment was entered against a public contractor and surety, and surety alone appealed without summons and severance, contention that nonjoinder of construction company was not fatal to jurisdiction of appellate court because company had only a nominal

made a party to the suit below, was not required to be made a party.[63]

(3) Appellees

Generally all parties whose interests will be affected by a reversal or modification of the judgment below must be made appellees.

The general rule is that all parties in favor of whom a judgment or decree has been rendered below, or who are interested in having such judgment or decree sustained, or whose interests will necessarily be affected by a reversal or modification of such judgment or decree, must be made appellees.[64] This rule has been applied to lienors, where a judgment places all mechanics' liens on an equality, and one lienor appeals, seeking to obtain priority;[65] in some cases to parties who are in default or have confessed judgment in the court below;[66] to debtors, creditors, and claimants;[67] to parties in a representative or official capacity, such as receivers[68] or assignees in bankruptcy or insolvency;[69] and to purchasers at judicial sales.[70] Mere nominal parties, however, or parties who have no interests that can be affected by the judgment on appeal are not necessary parties.[71] The same is generally true of persons who were not parties below and who are not parties to the judgment, although interested in the judgment as rendered.[72] Consequently a mere stakeholder whose liability has been fixed by stipulation,[73] or one against whom no relief could be granted under the pleadings,[74] need not be made a party.

(4) Intervention

Intervention by persons who were not parties in the court below is generally denied.

It is not the practice of the circuit courts of appeals to allow intervention by persons who were not parties in the court below;[75] and hence intervention is generally denied,[76] particularly where the intervention raises new issues.[77]

(5) Transfer or Devolution of Interest

Where a party to an appeal has transferred or otherwise lost his interest in the appeal, the person acquiring such interest may usually be substituted in his place.

Where the interests of a party to an appeal devolve on another, either by operation of law or by

interest was without merit, where there was nothing to show what the interest of either party affected by the judgment was.—Standard Accident Ins. Co. v. U. S., for Use and Benefit of Stringille, C.C.A.Mass., 103 F.2d 501.

63. U.S.—Axelrod v. Osage Oil & Refining Co., C.C.A.Okl., 29 F.2d 712—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 2 F. 2d 511.

64. U.S.—Interstate Oil Co. v. Gormley, C.C.A.Cal., 105 F.2d 431, certiorari denied 60 S.Ct. 383, 308 U.S. 626, 84 L.Ed. 522, rehearing denied 60 S.Ct. 512, 309 U.S. 694, 84 L.Ed. 1035.
3 C.J. p 1014 note 90.

Defendants in error
Prior to the abolition of the writ of error by statute, 28 U.S.C.A. § 861 a, the same general rule applied as to defendants in error.—Teel v. Chesapeake & O. Ry. Co. of Virginia, Ky., 204 F. 914, 123 C.C.A. 210.

In proceedings for review by an intervener, other interveners and parties whose rights are so involved as to be affected by the result of the appeal should be joined as appellees. —Kidder v. Fidelity Ins., Trust & Safe-Deposit Co., Ill., 105 F. 821, 44 C.C.A. 593.

65. U.S.—Gray v. Havemeyer, Neb., 53 F. 174, 3 C.C.A. 497.

66. U.S.—American Loan & Trust Co. v. Clark, Neb., 83 F. 230, 27 C. C.A. 522.

67. U.S.—Wake Development Co. v. Auburn-Fuller Co., C.C.A.Cal., 71 F.2d 706—Seaboard Nat. Bank v. Rogers' Milk Products Co., C.C.A. N.Y., 16 F.2d 271.
3 C.J. p 1015 note 94.

68. U.S.—Edwards v. Holland Banking Co., C.C.A.Mo., 75 F.2d 713, setting aside, D.C., Holland Banking Co. v. Continental Nat. Bank of Jackson County at Kansas City, Mo., 9 F.Supp. 986—Bennett v. Langworthy, C.C.A.Mo., 49 F.2d 574 —Ex parte Equitable Trust Co. of New York, Cal., 231 F. 571, 145 C. C.A. 457, reversing, D.C., Equitable Trust Co. of New York v. Western Pac. Ry. Co., 231 F. 478.
3 C.J. p 1016 note 3.

General creditors of a receivership estate are sufficiently represented by the receiver in appellate proceedings. —Koppel Industrial Car & Equipment Co. v. Lee, C.C.A.Puerto Rico, 3 F.2d 886.

69. U.S.—Mead v. Platt, C.C.N.Y., 17 F. 509.

70. Appeal from order confirming sale
The purchaser at a judicial sale is a necessary party to an appeal from the order of confirmation.—Interstate Oil Co. v. Gormley, C.C.A.Cal., 105 F.2d 431, certiorari denied 60 S. Ct. 383, 308 U.S. 626, 84 L.Ed. 522, rehearing denied 60 S.Ct. 512, 309 U. S. 694, 84 L.Ed. 1035—McLean v. Jaffray, C.C.A.Minn., 71 F.2d 743, certiorari denied 55 S.Ct. 118, 293 U.S. 602, 79 L.Ed. 694—Taylor v. Logan Trust Co., C.C.A.Ark., 289 F. 51.

71. U.S.—U. S. Fidelity & Guaranty Co. v. Sweeney, C.C.A.Mo., 80 F.2d 235—Lillard v. Lonergan, C.C.A. Kan., 72 F.2d 865, certiorari denied Lonergan v. Lillard, 55 S.Ct. 147, 293 U.S. 615, 79 L.Ed. 704.
3 C.J. p 1017 note 11, p 1018 note 17.

72. U.S.—Galveston, H. & N. Ry. Co. v. House, Tex., 102 F. 112, 42 C.C.A. 205.
3 C.J. p 1017 note 12.

73. U.S.—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 38 F. 2d 396.

74. U.S.—U. S. v. Exploration Co., Colo., 203 F. 387, 121 C.C.A. 491, reversing, C.C., 190 F. 405.

75. U.S.—Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., C.C.A. N.Y., 292 F. 861, denying petitions, 290 F. 625, reversing D.C., 285 F. 73, and certiorari denied Wenbourne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.
"Intervention in an appellate court is certainly unusual."—Morin v. City of Stuart, C.C.A.Fla., 112 F.2d 585.

76. U.S.—Stepp v. McAdams, C.C.A. Cal., 88 F.2d 925—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747, modifying, D.C., 33 F.2d 512, and certiorari denied 50 S.Ct. 497, 281 U.S. 756, 74 L.Ed. 1166—Veitia v. Fortuna Estates, Puerto Rico, 240 F. 256, 153 C.C.A. 182.
3 C.J. p 1029 note 94.

77. U.S.—Morin v. City of Stuart, C.C.A.Fla., 112 F.2d 585—Scrugham v. Shoup, Pa., 256 F. 325, 167 C.C.A. 495.

act of the parties, a person acquiring such interests will usually be allowed to be substituted and to prosecute or defend the appeal in place of the original party.[78] Thus in a proper case and on proper procedure the court will usually permit the substitution of an assignee of the cause of action;[79] of the successor of a corporation which has been dissolved by expiration of its charter or otherwise;[80] or of the successor of a party in an official or representative capacity who has been removed or has resigned, etc., such as a receiver[81] or a public officer.[82]

(6) Death of Party

On the death of a party to the action pending appeal, his personal representative generally may be made a party to prosecute or defend the suit.

Ordinarily an appeal to the circuit court of appeals will not abate upon the death of a party after it has been taken. In such a case, the executor or administrator of decedent generally may be made a party to prosecute or defend the suit.[83]

(7) Designation and Description

Mere clerical or immaterial errors in describing parties to an appeal are not fatal.

Mere clerical or immaterial errors in naming or describing the parties to an appeal, which cannot mislead, are not sufficient cause for dismissal.[84]

(8) Defects, Objections, and Amendments

Material defects as to parties on appeal require a dismissal of the appeal unless they may be and are cured by amendment or waiver.

As a rule the joinder of a person not a party to the action below or not interested or necessary, as an appellant, will not invalidate an appeal as to the proper parties.[85]

Nonjoinder. As a rule, unless joinder is essential to the jurisdiction of the circuit courts of appeals, the nonjoinder of parties, either as appellants or as appellees will generally have no further effect than to preclude any investigation or adjudication which will affect the rights and liabilities of the parties not joined, but will have this effect.[86] It is otherwise, however, if the defect is jurisdictional, in which case the appeal, as a rule, will be dismissed,[87]

78. U.S.—Sumpter Lumber Co. v. Sound Timber Co., Wash., 257 F. 408, 410, 168 C.C.A. 448, quoting **Corpus Juris.**

Effect of denial in trial court
A circuit court of appeals has jurisdiction to entertain an original application for substitution of parties in a suit which has been brought into that court by appeal, regardless of the action of the district court in denying a similar application.—Sumpter Lumber Co. v. Sound Timber Co., Wash., 257 F. 408, 168 C.C. A. 448.

79. U.S.—Wire Tie Mach. Co. v. Pacific Box Corporation, C.C.A.Cal., 102 F.2d 543, affirmed 107 F.2d 54—F. A. Mfg. Co. v. Hayden & Clemons, C.C.A.Mass., 273 F. 374.
3 C.J. p 1032 note 15.

80. U.S.—Atkins v. W. A. Harriman & Co., C.C.A., 69 F.2d 66.

81. U.S.—Myers v. Canton Nat. Bank of Canton, C.C.A.Ill., 109 F.2d 31.

Substitution not required
Where original pleading, in suit against bank, named receiver as a defendant, appeal was addressed to both bank and receiver, appeal bond ran to them, copy of contents of record was served on their counsel, and there was no withdrawal of counsel for either of defendants, appeal would not be dismissed because of failure to make successor receiver a party to the appeal.—Myers v. Canton Nat. Bank of Canton, supra.

82. U.S.—Gile v. Duke, C.C.A.Or., 5 F.2d 952.

Abolition of offices of public officials resulting in lack of parties defendant held to require dismissal of appeal where there was no substitution of parties.—Judith B. Nieva & Co., S.-C. v. Domenech, C.C.A.Puerto Rico, 83 F.2d 981.

83. **Plaintiff's widow** was not entitled to substitution as appellee on suggestion of plaintiff's death pending defendant's appeal, where she had not applied for letters testamentary or of administration.—Madden v. La Cofske, C.C.A.Ariz., 72 F.2d 602.

Delay in substitution of administratrix of estate of plaintiff who died subsequent to rendition of judgment was not ground for dismissal of defendant's appeal where such delay was occasioned by failure of administratrix to inform defendant of her appointment.—U. S. v. Hibbard, C.C. A.Idaho, 83 F.2d 785.

Writ of error taken by trustee
Writ of error taken out by plaintiff, "D. R. Howard, trustee," was held not taken by him as sole trustee, so as to have been abated by his death, and hence it could be revived in the name of his personal administrator.—Howard v. Leete, Ky., 257 F. 918, 169 C.C.A. 68.

84. U.S.—Pitcairn v. Fisher, C.C.A. Iowa, 78 F.2d 649.

85. U.S.—U. S. v. Dieckmann, C.C.A. Ind., 101 F.2d 421.

Writ of error
The same rule applied in the case of a writ of error prior to the abolition of that writ by statute, 28 U.S. C.A. § 861a.—Thomas v. Green County, Ky., 146 F. 969, 77 C.C.A. 487.

86. U.S.—Epstein v. Goldstein, C.C. A.N.Y., 118 F.2d 73.

Uninterested or formal parties
The objection of defect of parties is not available on appeal in a case where the omitted parties are not interested in the result of the proceedings.—Lamb v. Washington Oil Co. of Texas, C.C.A.Tex., 103 F.2d 711—3 C.J. p 1035 note 51.

87. U.S.—Partridge v. Clarkson, C. C.A.Mo., 72 F.2d 108—Copland v. Waldron, 133 F. 217, 66 C.C.A. 271.
3 C.J. p 1035 note 52.

Purchaser at judicial sale
Appeal from order confirming judicial sale was dismissed where purchaser at such sale was not made a party.—Interstate Oil Co. v. Gormley, C.C.A.Cal., 105 F.2d 431, certiorari denied 60 S.Ct. 383, 308 U.S. 626, 84 L.Ed. 522, rehearing denied 60 S.Ct. 512, 309 U.S. 694, 84 L.Ed. 1035—In re Miller, C.C.A.Ohio, 101 F.2d 748, certiorari granted Miller v. Hatfield, 60 S.Ct. 102, 308 U.S. 534, 84 L. Ed. 450, and reversed on other grounds 60 S.Ct. 374, 309 U.S. 1, 84 L.Ed. 535, mandate conformed to C. C.A., In re Miller, 111 F.2d 28—McLean v. Jaffray, C.C.A.Minn., 71 F.2d 743, certiorari denied 55 S.Ct. 118, 293 U.S. 602, 79 L.Ed. 694.

unless, as will appear, the defect may be and is cured by amendment or waiver.

Withdrawal. Where several persons have appealed, any one of them, unless he is a necessary party, may be stricken as a party to the appeal at his own request.[88]

Amendments. Such defects in appellate proceedings as those arising from the nonjoinder or misnomer of parties are usually amendable in the circuit courts of appeals,[89] unless the defect is jurisdictional and fatal,[90] or unless there are other circumstances rendering an amendment improper.[91] Accordingly an omitted appellee usually may be brought in by amendment after the statutory time for appeal has expired;[92] but the defect of nonjoinder of a necessary appellant is not one which can be cured by amendment after the expiration of the time to appeal,[93] since to allow such party to join

Nonjoinder of parties jointly liable

(1) Under the former practice, unless a sufficient cause was shown for the nonjoinder of all parties against whom a joint judgment or decree had been rendered, the writ of error or appeal would be dismissed, unless there had been a proper summons and severance or its equivalent.—Standard Accident Ins. Co. v. U. S., for Use and Benefit of Stringille, C.C.A.Mass., 103 F.2d 501—Wire Tie Mach. Co. v. Pacific Box Corporation, C.C.A.Cal., 102 F.2d 543, affirmed 107 F.2d 54—Tighe v. Maryland Casualty Co., C.C.A.Cal., 99 F.2d 727, dismissing appeal, D.C., Maryland Casualty Co. v. Tighe, 24 F.Supp. 49—Queenan v. Mays, C.C.A.Okl., 90 F.2d 525, certiorari denied Board of Com'rs of Creek County, Okl. v. Mays, 58 S.Ct. 45, 302 U.S. 724, 82 L.Ed. 559—Wells v. Demeter, C.C.A.Okl., 84 F.2d 673—Pflueger v. Sherman, C.C.A.Hawaii, 75 F.2d 84, certiorari denied 56 S.Ct. 94, 296 U.S. 584, 80 L.Ed. 413—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., 4 F.Supp. 216—Doll v. Blasius, C.C.A.N.J., 69 F.2d 225—Spurway v. Walker-Skagseth Food Stores, C.C.A.Fla., 68 F.2d 735—The L. I. R. R. No. 18, C.C.A., 67 F.2d 290—City of Shidler v. H. C. Speer & Sons Co., C.C.A.Okl., 62 F.2d 544—Doran v. Charles D. Kaier Co., C.C.A. Pa., 60 F.2d 259—Babcock v. Norton, C.C.A.N.Y., 5 F.2d 153, certiorari denied Norton v. Babcock, 45 S.Ct. 509, 268 U.S. 689, 69 L.Ed. 1158—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 2 F.2d 511—National Surety Co. v. Leflore County, Miss., C.C.A.Miss., 262 F. 325, certiorari denied 40 S.Ct. 583, 253 U.S. 490, 64 L.Ed. 1028, appeal dismissed 41 S.Ct. 447, 255 U.S. 580, 65 L.Ed. 796—3 C.J. p 1035 note 52.

(2) The question of lack of joinder of parties appellant was jurisdictional, and would, therefore, be considered, even though it had not been raised by counsel.—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841.

(3) Necessity of joining in appeal parties against whom joint judgment or decree has been rendered see supra § 292 c (2).

88. U.S.—Fulton Nat. Bank of Atlanta v. Gormley, C.C.A.Ga., 99 F.2d 464.

89. U.S.—National Surety Co. v. Leflore County, Miss., C.C.A.Miss., 262 F. 325, certiorari denied 40 S.Ct. 583, 253 U.S. 490, 64 L.Ed. 1028, appeal dismissed 41 S.Ct. 447, 255 U.S. 580, 65 L.Ed. 796—Browning v. Boswell, Va., 209 F. 788, 126 C.C.A. 512.

3 C.J. p 1036 note 58.

Appellees

Where a defect in parties on appeal to the circuit court of appeals is in those parties who should have been served with citation as appellees, and the petition for appeal is timely and otherwise properly allowed, citation may be issued and served subsequently to obtain jurisdiction of a necessary appellee, if timely application is made therefor.—Interstate Oil Co. v. Gormley, C.C.A.Cal., 105 F.2d 431, certiorari denied 60 S.Ct. 383, 308 U.S. 626, 84 L.Ed. 522, rehearing denied 60 S.Ct. 512, 309 U.S. 694, 84 L.Ed. 1035.

Discretion of court

The issuance of a citation to obtain jurisdiction of a necessary appellee not previously made a party to the appeal is within the discretion of the circuit court of appeals, and the citation will not be issued unless there is merit in appellant's contentions.—Interstate Oil Co. v. Gormley, supra.

Mode of amendment

Prior to the abolition of the writ of error by statute, 28 U.S.C.A. § 861a, defects as to parties were generally curable by amendment of the writ of error and the issuance of a new citation.—Teel v. Chesapeake & O. R. Co., Ky., 204 F. 914, 123 C.C.A. 210.

90. U.S.—American Baptist Home Mission Soc. v. Barnett, C.C.A.N.Y., 26 F.2d 350, dismissing appeal, D.C., Barnett v. Equitable Trust Co. of New York, 21 F.2d 325, and certiorari denied American Baptist Home Mission Soc. v. Barnett, 49 S.Ct. 28, 278 U.S. 626, 73 L.Ed. 546.

3 C.J. p 1037 note 63.

Amendment not authorized by statute

Defect in appeal by two of three defendants, against whom joint decree had been rendered for failure to join third defendant in appeal or procure order of severance, could not be cured under Rev.St. § 1005, 28 U.S.C.A. § 873, providing for amendment of writ of error.—Babcock v. Norton, C.C.A.N.Y., 5 F.2d 153, certiorari denied Norton v. Babcock, 45 S.Ct. 509, 268 U.S. 689, 69 L.Ed. 1158—3 C.J. p 1037 note 59.

91. U.S.—Interstate Oil Co. v. Gormley, C.C.A.Cal., 105 F.2d 431, certiorari denied 60 S.Ct. 383, 308 U.S. 626, 84 L.Ed. 522, rehearing denied 60 S.Ct. 512, 309 U.S. 694, 84 L.Ed. 1035.

92. U.S.—American Baptist Home Mission Soc. v. Barnett, C.C.A.N.Y., 26 F.2d 350, dismissing appeal, D.C., Barnett v. Equitable Trust Co. of New York, 21 F.2d 325, and certiorari denied American Baptist Home Mission Soc. v. Barnett, 49 S.Ct. 28, 278 U.S. 626, 73 L.Ed. 546—Hart v. Wiltsee, 16 F.2d 838, denying motion, D.C., Parker v. New England Oil Corporation, 4 F.2d 392, 8 F.2d 392, and 13 F.2d 158, all of which are vacated, C.C.A., Hart v. Wiltsee, 19 F.2d 903, certiorari denied Wiltsee v. Hart, 48 S.Ct. 119, 275 U.S. 559, 72 L.Ed. 426—Clinchfield Fuel Co. v. Titus, S.C., 226 F. 574, 141 C.C.A. 330—Teel v. Chesapeake & O. Ry. Co. of Virginia, Ky., 204 F. 914, 123 C.C.A. 210.

3 C.J. p 1037 note 63.

93. U.S.—American Baptist Home Mission Soc. v. Barnett, C.C.A.N.Y., 26 F.2d 350, dismissing appeal, D.C., Barnett v. Equitable Trust Co. of New York, 21 F.2d 325, and certiorari denied American Baptist Home Mission Soc. v. Barnett, 49 S.Ct. 28, 278 U.S. 626, 73 L.Ed. 546.

3 C.J. p 1037 note 63.

But there is authority to the contrary where the omitted party voluntarily appears and submits himself to the appellate court's jurisdiction.—The Seguranca, La., 250 F. 19, 162 C.C.A. 191—The Mary B. Curtis, Tex., 250 F. 9, 162 C.C.A. 181, certiorari denied D. W. Ryan Towboat Co. v. Bowers Southern Dredging Co., 38 S.Ct. 580, 247 U.S. 514, 62 L.Ed. 1243.

Writ of error

The text rule applied in the case of a writ of error prior to the aboli-

as appellant is in effect to grant him an appeal after the statute has forbidden it.[94]

Waiver of objections. Defects and objections with respect to parties on appeal may be expressly or impliedly waived, unless they entirely defeat the jurisdiction of the appellate court.[95]

§ 293. Transfer of Cause and Effect Thereof

a. Requirements in general
b. Time for taking and perfecting
c. Application for, and allowance of, appeal
d. Payment of costs and fees
e. Bond on appeal
f. Service of notice or process; writ of error
g. Entry or docketing
h. Appearance in appellate court

a. Requirements in General

The filing of a proper notice of appeal with the district court constitutes a valid appeal. Failure of appellant to take any of the further steps is not a jurisdictional defect, but such a failure subjects appellant to such action as the circuit court of appeals deems appropriate. The notice is to be liberally construed in determining its sufficiency.

The Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A. following § 723c, governs the manner of appeal to a circuit court of appeals.[96] Under the express provisions of the Rule the filing of a proper notice of appeal with the district court constitutes a valid appeal sufficient to vest jurisdiction in the circuit court of appeals,[97] and failure of appellant to take any of the further steps to secure the review of the judgment is not a jurisdictional defect,[98] but further steps provided for by the Rules are expected to be followed and, unless reasons satisfactory to the circuit court of appeals are advanced as a basis for special relief from their provisions, the court will take such action as it deems appropriate.[99] The notice of appeal must specify the parties taking the appeal, the judgment or part thereof appealed from, and the name of the court to which the appeal is taken.[1] The purpose of the rule is to require that an effectual notice of appeal be given,[2] and that the opposite party be advised that an appeal has been taken from a specific judgment in a particular case.[3] The courts are liberal in determining the sufficiency of the notice of appeal[4] and it is not rendered inef-

tion of that writ by statute, 28 U.S.C.A. § 861 a.—American Surety Co. of New York v. People of State of Colorado, for Use of Little, C.C.A. Colo., 22 F.2d 624—Lewis v. Littel, 165 F. 157, 91 C.C.A. 191, affirming 7 Ind.T. 602, 104 S.W. 850.

Summons and severance
As respects whether appeal was dismissible because of nonjoinder of necessary parties, equivalent to summons and severance, even if it could be filed in appellate court, would not be considered where such equivalent was filed ten months after filing of decree appealed from.—Pflueger v. Sherman, C.C.A.Hawaii, 75 F.2d 84, certiorari denied 56 S.Ct. 94, 296 U.S. 584, 80 L.Ed. 413.

94. U.S.—American Baptist Home Mission Soc. v. Barnett, C.C.A.N.Y., 26 F.2d 350, dismissing appeal, D. C., Barnett v. Equitable Trust Co. of New York, 21 F.2d 325, and certiorari denied American Baptist Home Mission Soc. v. Barnett, 49 S.Ct. 28, 278 U.S. 626, 73 L.Ed. 546.

95. U.S.—Public Service Commission of Puerto Rico v. Havemeyer, Puerto Rico, 56 S.Ct. 360, 296 U.S. 506, 80 L.Ed. 357, reversing, C.C.A., Havemeyer v. Public Service Commission of Puerto Rico, 74 F.2d 637, certiorari granted Public Service Commission of Puerto Rico v. Havemeyer, 56 S.Ct. 97, 296 U.S. 556, 80 L.Ed. 392, rehearing denied 56 S.Ct. 496, 297 U.S. 727, 80 L.Ed. 1010.
3 C.J. p 1038 notes 70, 72.

96. U.S.—St. Marie v. U. S., C.C.A. Cal., 108 F.2d 876, affirming, D.C., 24 F.Supp. 237, certiorari denied 61 S.Ct. 35, 311 U.S. 652, 85 L.Ed. 417.

97. U.S.—Walleck v. Hudspeth, C.C. A.Kan., 128 F.2d 343—United Drug Co. v. Helvering, C.C.A., 108 F.2d 637—Crump v. Hill, C.C.A.Miss., 104 F.2d 36.

98. U.S.—In re Gammill, C.C.A.Ill., 129 F.2d 501, denying motion, D.C., 45 F.Supp. 238—Walleck v. Hudspeth, C.C.A.Kan., 128 F.2d 343.

99. U.S.—In re Gammill, C.C.A.Ill., 129 F.2d 501, denying motion, D.C., 45 F.Supp. 238.

Appeal from district court for Alaska
A party seeking to invoke the aid of an appeal should place himself in a position where he can demonstrate that he has fully complied with the requirements relative to the prosecution of the appeal.—McDonald v. Harding, C.C.A.Alaska, 57 F.2d 119.

Decisions prior to Federal Rules of Civil Procedure
U.S.—Bakelite Corporation v. National Aniline & Chemical Co., C.C.A. N.Y., 83 F.2d 176—Rogers v. Watson, C.C.A.Ind., 46 F.2d 753, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1460.

1. U.S.—St. Marie v. U. S., C.C.A. Cal., 108 F.2d 876, affirming, D.C., 24 F.Supp. 237, certiorari denied 61 S.Ct. 35, 311 U.S. 652, 85 L.Ed. 417.

Order not included in notice
Where notice of appeal did not include order overruling defendant's motion for rehearing in its designation of matter from which an appeal was taken, the circuit court of appeals had not jurisdiction to consider the order.—American Fork & Hoe Co. v. Stampit Corporation, C.C.A.Ohio, 125 F.2d 472.

2. U.S.—St. Marie v. U. S., C.C.A. Cal., 108 F.2d 876, affirming, D.C., 24 F.Supp. 237, certiorari denied 61 S.Ct. 35, 311 U.S. 652, 85 L.Ed. 417.

3. U.S.—Martin v. Clarke, C.C.A.Ill., 105 F.2d 685, 124 A.L.R. 497.

4. U.S.—Martin v. Clarke, supra.
"It is true enough . . . that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harkening back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."—Crump v. Hill, C.C.A.Miss., 104 F.2d 36, 38.
What constitutes proper notice of appeal within statutory period of limitation is considered infra § 293 b (2).

fectual because of a slight or unsubstantial mistake which would not mislead the opposite party.[5] Where cases are consolidated for trial, a notice of appeal signed by attorneys for all complainants and naming all complainants as appealing parties is sufficient, but the better practice is to file a notice of appeal in each case.[6] The part of the judgment not designated in the notice of appeal as appealed from by appellant is not before the circuit court of appeals for review.[7]

Interlocutory order or decree. The manner of taking an appeal from an interlocutory order or decree permitted under 28 U.S.C.A. § 227 is by notice of appeal as provided for in the Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A. following § 723c.[8]

b. Time for Taking and Perfecting

(1) In general
(2) What constitutes taking and perfecting proceedings
(3) Commencement of period of limitation
(4) Extension of time by court or by parties
(5) Premature appeal

(1) In General

Requirements as to the time of appeal from a final judgment or from an interlocutory order or decree are mandatory and jurisdictional.

With respect to appeals from judgments in civil actions, the time for the filing of a notice of appeal referred to in Federal Rules of Civil Procedure, rule 73 (a), 28 U.S.C.A. following § 723c, is the period prescribed by 28 U.S.C.A. § 230.[9] The Act of March 3, 1891, c. 517 § 11, 26 U.S.St. at L. p 829, providing for a review within six months was repealed by the Act of February 13, 1925, c 229 § 8 (c), 28 U.S.C.A. § 230, providing for review within three months;[10] the latter statute was not repealed by the Act of January 31, 1928, or the amendment of April 26 of the same year, 28 U.S.C.A. §§ 861a, 861b, which deals solely with the procedure and method of taking an appeal, and makes no provision as to the time for taking an appeal.[11] Congress has power to adopt a law reducing the time for taking appeals[12] and to have it apply to pending cases;[13] and the Act of February 13, 1925, was held to apply to pending cases in which the judgment was entered after the effective date of the act.[14] The requirement as to the time of appeal is mandatory and jurisdictional,[15] and if it is not complied with the appeal will be disallowed or dismissed.[16] A timely appeal from a particular decree or judgment is not dis-

5. U.S.—Martin v. Clarke, C.C.A.Ill., 105 F.2d 685, 124 A.L.R. 497.

Interchange of designation of plaintiff and defendant

Fact that designations of plaintiff and of defendant in the judgment appealed from are interchanged in notice of appeal does not require dismissal of appeal, where notice contains sufficient information to acquaint appellee as to judgment appealed from and appellee is not prejudiced or misled.—Martin v. Clarke, supra.

Erroneous date of order

Where restraining order was dated Oct. 21, 1941, but was modified by order of October 24, appeal from order allegedly dated October 20 would not be dismissed because erroneous date of order was given in notice of appeal, but the court would treat the appeal as from the order as modified.—Shannon v. Retail Clerks, International Protective Ass'n, C.C.A.Ill., 128 F.2d 553.

6. U.S.—St. Marie v. U. S., C.C.A.Ill., 108 F.2d 876, affirming, D.C., 24 F. Supp. 237, certiorari denied 61 S. Ct. 35, 311 U.S. 652, 85 L.Ed. 417.

7. U.S.—Carter v. Powell, C.C.A.Fla., 104 F.2d 428, rehearing denied 104 F.2d 1012, certiorari denied 60 S. Ct. 173, 308 U.S. 611, 84 L.Ed. 511.

Formal mistake in failure to reach default judgment

Under the provisions of 28 U.S.C.A. § 391, it has been held that the failure of appeal from an order and judgment denying motion to vacate or modify default judgment, to reach the default judgment because of the words used, was a formal mistake, which did not affect substantial rights, and could be disregarded, and the default judgment would be considered by the circuit court of appeals.—U. S. v. Steinberg, C.C.A.N.Y., 100 F.2d 124, mandate modified on other grounds 100 F.2d 405.

8. U.S.—Jordan v. Palo Verde Irr. Dist., C.C.A.Cal., 105 F.2d 601.

9. U.S.—Leishman v. Associated Wholesale Electric Co., C.C.A.Cal., 128 F.2d 204.

10. U.S.—Girard Fire & Marine Ins. Co. v. Commonwealth Building & Loan Ass'n, C.C.A.Tex., 32 F.2d 736.

11. U.S.—Girard Fire & Marine Ins. Co. v. Commonwealth Building & Loan Ass'n, supra.

12. U.S.—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526.

13. U.S.—Vaughan v. American Ins. Co. of Newark, N. J., supra.

14. U.S.—Vaughan v. American Ins. Co. of Newark, N. J., supra.

15. U.S.—Morrow v. Wood, C.C.A. Miss., 126 F.2d 1021—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L. Ed. 395—Bonet v. South Porto Rico Sugar Co., C.C.A.Puerto Rico, 86 F.2d 279—U. S. v. Nordbye, C.C.A., 75 F.2d 744, certiorari denied Love v. Nordbye, 56 S.Ct. 103, 296 U. S. 572, 80 L.Ed. 404—Luce & Co. v. Cintron, C.C.A.Puerto Rico, 73 F.2d 481—Stradford v. Wagner, C. C.A.Okl., 64 F.2d 749—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712—Robie v. Hart, Schaffner & Marx, C. C.A.Minn., 40 F.2d 871—Northwestern Public Service Co. v. Pfeifer, C.C.A.S.D., 36 F.2d 5—Bremner v. Thomas, C.C.A.Iowa, 25 F.2d 301—Broders v. Lage, C.C.A.Iowa, 25 F. 2d 288, dismissing appeal, D.C., In re Lage, 19 F.2d 153—Lutjens v. U. S., C.C.A.Cal., 24 F.2d 102—Sprague v. Chicago, B. & Q. R. Co., C.C.A.Neb., 17 F.2d 768—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526—American Seating Co. v. Bullard, C.C.A. Mich., 290 F. 896—Lewis v. Sittel, Ind.T., 165 F. 157, 91 C.C.A. 191—Green v. Lynn, Mass., 87 F. 839, 31 C.C.A. 248.

25 C.J. p 971 note 26—3 C.J. p 1040 note 12, p 1066 note 27.

16. U.S.—Leishman v. Associated

missible because no appeal was taken from a prior decree or judgment and the time for taking such appeal has expired.[17] A notice of appeal may be filed on the last day after the closing hours of the clerk's office by seeking out the clerk or deputy clerk and delivering the notice of appeal to him.[18]

Computation of time is provided for in Federal Rules of Civil Procedure, rule 6, 28 U.S.C.A. following § 723c. The rules as to the days to be included or excluded in the computation of time are considered in the C.J.S. title Time §§ 12–14, also 3 C.J. p 1047 note 71–p 1048 note 87, 25 C.J. p 971 note 29.

A cross appeal which is not timely will be dismissed.[19]

Second appeal. Where an appeal has been dismissed for defects or want of prosecution it has been held that a second appeal may be taken if perfected within the time fixed by statute.[20]

Interlocutory orders. The time for filing a notice of appeal in an appeal from an interlocutory order or decree as provided for under 28 U.S.C.A. § 227 is thirty days from the entry of the decree or order as prescribed by that statute.[21] The requirement is mandatory and jurisdictional, and the appeal cannot be taken after the expiration of that time,[22] but the expiration of the time does not pre-

Wholesale Electric Co., C.C.A.Cal., 128 F.2d 204—Piganelli v. Reichard, C.C.A.Ky., 123 F.2d 957—United Drug Co. v. Helvering, C.C.A., 108 F.2d 637—Joplin Ice Co. v. U. S., C.C.A.Mo., 87 F.2d 174—John E. Koerner & Co. v. Hunter Milling Co., C.C.A.Kan., 83 F.2d 894—Walters v. Baltimore & O. R. Co., C.C.A.Pa., 76 F.2d 599—Von Holt v. Carter, C.C.A.Hawaii, 56 F.2d 61—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 38 F.2d 396—Kiehn v. Dodge County, C.C.A.Minn., 19 F.2d 503—Muma v. Bodine, C.C.A., 16 F.2d 463—Veritas Oil Corporation v. McLain, C.C.A.Tex., 4 F.2d 389—Farmers' State Bank of Texahoma v. Thompson, C.C.A.Tex., 261 F. 166—Green v. Lynn, Mass., 87 F. 839, 31 C.C.A. 248.

3 C.J. p 1067 note 28—4 C.J. p 566 note 59—65 C.J. p 1430 note 98 [a].

Violation of rule of district court of Hawaii

Appeal from federal district court in Hawaii was dismissed in absence of showing that appeal was brought within time fixed by rule of such court.—Dang Nam v. Bryan, C.C.A.Hawaii, 78 F.2d 720, dismissing appeal 74 F.2d 379.

Absence of requirement under early statute

Under Jud.Code § 244, Act March 3, 1911, c 231, 36 U.S.St. at L. p 1157, and Act Jan. 28, 1915, c 22, 38 U.S.St. at L. p 803, attaching Puerto Rico to the first circuit, which made no provision in terms fixing the time for taking appeals or suing out writs of error for cases from the Puerto Rico supreme court which may be reviewed by the circuit court of appeals, the time for perfecting an appeal was left to be determined by the rule of the circuit court of appeals, and so a motion to dismiss an appeal for two years' delay, was refused where no rule requiring an earlier perfection was in force.—Graham v. O'Ferral, Puerto Rico, 236 F. 717, 150 C.C.A. 49.

Taxation of costs as affecting time for appeal

Judgment for defendants in actions to recover sums forfeited and double damages for presenting false claims against government was held not reviewable on appeal, filed over three months after entry of judgment, although costs were not taxed until two months after such entry.—U. S. v. Nordbye, C.C.A., 75 F.2d 744, certiorari denied Love v. Nordbye, 56 S.Ct. 103, 296 U.S. 572, 80 L.Ed. 404.

Appeal held timely

U.S.—U. S. v. Reed, C.C.A.Fla., 117 F.2d 808—Robinson v. U. S., C.C.A.Tex., 84 F.2d 885—U. S. v. Beaman, C.C.A.Ga., 61 F.2d 493—U. S. v. Nolan, C.C.A.Mo., 57 F.2d 190—U. S. v. Hayes, C.C.A.Okl., 20 F.2d 873, certiorari denied Riverside Oil & Refining Co. v. Cimarron River Oil Co., 48 S.Ct. 115, 275 U.S. 552, 72 L.Ed. 421, certiorari denied U. S. v. Cimarron River Oil Co., 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423, and U. S. v. Hayes, 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423—Painter v. Union Trust Co., Ohio, 246 F. 240, 158 C.C.A. 400.

17. U.S.—Fultz v. Laird, C.C.A.Mich., 24 F.2d 172.

Surplusage

Where an appeal was prayed from an "order, judgment, and decree," and the time had expired in which the order might be appealed from but not so as to the decree the appeal was treated as from the decree and held brought in proper time, where the motion as to which the order was entered was not essential to the right of appeal from the decree, and so much of the petition as prayed an appeal from the judgment and order would be treated as surplusage.—Painter v. Union Trust Co., Ohio, 246 F. 240, 158 C.C.A. 400.

18. U.S.—Casalduc v. Diaz, C.C.A.Puerto Rico, 117 F.2d 915, certiorari denied Casalduc v. Diaz Gonzalez, 62 S.Ct. 74, 314 U.S. 639, 86 L.Ed. 512.

19. U.S.—Kycoga Land Co. v. Kentucky River Coal Corporation, C.C.A.Ky., 110 F.2d 894, certiorari denied 61 S.Ct. 615, 312 U.S. 688, 85 L.Ed. 1125.

20. U.S.—Sutherland v. Pearce, Alaska, 186 F. 787, 108 C.C.A. 657.

21. U.S.—Jordan v. Palo Verde Irr. Dist., C.C.A.Cal., 105 F.2d 601.

22. U.S.—George v. Victor Talking Mach. Co., N.J., 55 S.Ct. 229, 293 U.S. 377, 79 L.Ed. 439, reversing, C.C.A., Victor Talking Mach. Co. v. George, 69 F.2d 871, certiorari granted George v. Victor Talking Mach. Co., 55 S.Ct. 82, 293 U.S. 544, 79 L.Ed. 649—Zalatuka v. Metropolitan Life Ins. Co., C.C.A.Wis., 108 F.2d 405—Victor Talking Mach. Co. v. George, C.C.A.N.J., 105 F.2d 697, certiorari denied George v. Victor Talking Mach. Co., 60 S.Ct. 176, 308 U.S. 611, 84 L.Ed. 511, rehearing denied 60 S.Ct. 294, 308 U.S. 638, 84 L.Ed. 530, and 60 S.Ct. 466, 308 U.S. 693, 84 L.Ed. 1034—Hyman v. McLendon, C.C.A.S.C., 102 F.2d 189, certiorari denied 60 S.Ct. 74, 308 U.S. 563, 84 L.Ed. 472—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703—Gardner v. Grand Beach Co., C.C.A.Mich., 29 F.2d 481—Kelsey Wheel Co. v. Universal Rim Co., C.C.A.Mich., 296 F. 616—Groblewski v. John Chmiell Co., C.C.A.Mass., 264 F. 325—Puritan Cordage Mills v. Sampson Cordage Works, Ky., 232 F. 138, 146 C.C.A. 330—Lawyers Trust Co. v. W. G. Maguire & Co., D.C.Del., 2 F.R.D. 310.

25 C.J. p 969 note 2.

Injunction and accounting

(1) A decree granting an injunction and appointing a special master to take and state the account of profits in a suit for infringement of the common-law right of property in a song was an "interlocutory decree" within the statute limiting time for appeal.—George v. Victor Talking Mach. Co., N.J., 55 S.Ct. 229, 293 U.

vent the review of an interlocutory order on an appeal from the final judgment or decree.[23] The statute does not apply to interlocutory orders other than those concerning injunctions or receivers,[24] nor does it apply to orders or decrees concerning injunctions which are not interlocutory in nature.[25]

(2) What Constitutes Taking and Perfecting Proceedings

The only jurisdictional act required for perfecting an appeal within the period of limitation is the filing of the notice of appeal.

Under the Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A. following § 723c, the only jurisdictional act required for perfecting an appeal within the period of limitation is the filing of the notice of appeal.[26] The filing of the appellee's waiver of notice, his acceptance of designation, and entry of appearance within the required time are substantial compliance with the rule,[27] and the fact that after an appeal is taken in this way appellant files a formal notice of appeal after the required time does not divest the circuit court of appeals of jurisdiction of the appeal.[28] The fact that within the period of limitation an order fixing the amount of the supersedeas bond is entered on motion of appellant, and appellant files a transcript of the stenographer's notes, the supersedeas bond, and the præcipe and designation of record, does not show a sufficient compliance with the rule.[29] Where a review is sought in the supreme court within the time required in order to obtain a review by the circuit court of appeals, and the case is transferred to the circuit court of appeals, although after the time for appeal to that court has expired, the circuit court of appeals has been held to have jurisdiction.[30] In cases in which an application for leave to appeal has been necessary, procedural conduct which does not constitute such an application has been held insufficient as respects whether the appeal is timely taken.[31]

S. 377, 79 L.Ed. 439, reversing, C.C.A., Victor Talking Mach. Co. v. George, 69 F.2d 871, certiorari granted George v. Victor Talking Mach. Co., 55 S.Ct. 82, 293 U.S. 544, 79 L.Ed. 649.

(2) Decree enjoining patent infringements and providing for accounting is interlocutory, and appeal cannot be taken more than thirty days after decree.—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F.2d 491—Western Silo Co. v. Morris, C.C.A.Iowa, 33 F.2d 285—Morey Linotyping Co. of Chicago, Ill. v. Chicago Lino-Tabler Co. of Chicago, Ill., 258 F. 888, 169 C.C.A. 608.

Appeal held timely

An appeal from an interlocutory decree entered Oct. 7, 1938, in proceeding for composition of indebtedness of an irrigation district, if an appeal from an interlocutory decree in equity, was valid and timely, where notice of appeal was filed on Nov. 7, 1938, within thirty days from entry of decree.—Jordan v. Palo Verde Irr. Dist., C.C.A.Cal., 105 F.2d 601.

23. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703—Nashville Syrup Co. v. Coca Cola Co., Tenn., 215 F. 527, 132 C.C.A. 39, Ann.Cas. 1915B 358, affirming, D.C., Coca-Cola Co. v. Nashville Syrup Co., 200 F. 157.

Omission of express reference in final judgment to an interlocutory order as to which review is sought does not alter the rule.—Nashville Syrup Co. v. Coca Cola Co., supra.

24. U.S.—Leonardi v. Chase Nat. Bank of City of New York, C.C.A. N.Y., 81 F.2d 19, reversing, D.C., 11 F.Supp. 85.

Order denying motion to set aside service of process is not within the scope of 28 U.S.C.A. § 227.—Leonardi v. Chase Nat. Bank of City of New York, supra.

25. U.S.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A.Ill., 108 F.2d 469—Historical Pub. Co. v. Jones Bros. Pub. Co., Pa., 231 F. 784, 145 C.C.A. 655, dismissing motion 231 F. 638, 145 C.C.A. 524.

Order restraining collection of state court judgment

An injunctional order of district court restraining proceedings to collect a judgment in state court was "final" and not "interlocutory," and hence appeal from order was not dismissible because notice of appeal was not filed within thirty days from entry of the order, where, if obeyed or enforced, order would have nullified state court judgment and, if set aside, state court judgment would be collected, where there was nothing in order indicating that it was temporary, where nothing in respect to jurisdiction of district court or its power to restrain remained to be litigated and where the facts with respect to state court proceeding were not in dispute.—Ammond v. Pennsylvania R. Co., C.C.A.Ohio, 125 F.2d 747, certiorari denied 62 S.Ct. 1283, 316 U.S. 691, 86 L.Ed. 1762.

26. U.S.—Crump v. Hill, C.C.A.Miss., 104 F.2d 36.

Decisions pertaining to former requirements

U.S.—U. S. v. Tedar, C.C.A.Ind., 41 F.2d 146—Girard Fire & Marine Ins. Co. v. Commonwealth Building & Loan Ass'n, C.C.A.Tex., 32 F.2d 736—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526—Reilly v. U. S. Fidelity & Guaranty Co., C.C.A.Cal., 15 F.2d 314—General Motors Acceptance Corporation v. Lawrence, C.C.A.N.M., 9 F.2d 64—Midland Terminal Ry. Co. v. Warinner, C.C.A.Colo., 297 F. 185—Camden Iron Works Co. v. City of Cincinnati, Ohio, 241 F. 846, 154 C.C.A. 548—Kentucky Coal, Timber, Oil & Land Co. v. Howes, Ky., 153 F. 163, 82 C.C.A. 337.

3 C.J. p 1065 notes 9, 11, 15, p 1066 note 21.

27. U.S.—Crump v. Hill, C.C.A.Miss., 104 F.2d 36.

28. U.S.—Crump v. Hill, supra.

29. U.S.—Morrow v. Wood, C.C.A. Miss., 126 F.2d 1021.

30. U.S.—Smith v. Apple, C.C.A.Kan., 6 F.2d 559.

Dismissal by supreme court after pendency of proceedings

In computing the time within which an appeal must be taken to a circuit court of appeals, the time of the pendency of proceedings for review in the supreme court, which were dismissed for want of jurisdiction, cannot be excluded.—Darnell v. Illinois Cent. R. Co., Tenn., 206 F. 445, 124 C.C.A. 327.

31. U.S.—U. S. v. New National Coal & Mining Co., C.C.A.Ill., 72 F.2d 168—Von Holt v. Carter, C.C.A.Hawaii, 56 F.2d 61—Robie v. Hart, Schaffner & Marx, C.C.A.Minn., 40 F.2d 871—Camden Iron Works Co. v. City of Cincinnati, Ohio, 241 F. 846, 154 C.C.A. 548.

Notice of intention to appeal

(1) Time for appeal is not tolled by filing notice of intention to appeal

(3) Commencement of Period of Limitation
(a) In general
(b) Effect of motions after entry of judgment or decree

(a) In General

The date of the actual entry of the decree or judgment determines the commencement of the period for appeal. If a second judgment supersedes a prior one, the time is to be computed from that last entered. A judgment not affecting one party to the litigation does not commence the running of the period of limitation as against that party.

The date of the actual entry of the decree or judgment determines the commencement of the period for appeal,[32] and the period is not affected by nunc pro tunc orders in the judgment.[33] Where a second judgment or decree in a cause is entered and it supersedes the first, the time for appeal is to be computed from that last entered,[34] and where the court suspends the operation of a decree for the purpose of amendment, the decree does not become final for the purpose of appeal until the amendment is made or the original decree is confirmed.[35] The fact that the costs have not been taxed does not suspend the period of limitation after entry of a judgment which determines the action on the merits.[36]

What constitutes entry. Under the Federal Rules of Civil Procedure, rule 58, 28 U.S.C.A. following § 723c, the notation of a judgment in the civil docket, as provided by rule 79 (a), constitutes the entry of the judgment; and the judgment is not effective before such entry.[37]

Final judgment or decree as to one party or branch of litigation. A judgment not affecting one party to the litigation does not commence the running of the period of limitation as against that party.[38] Where there is a final judgment or decree as to a distinct branch of litigation, so that nothing remains to be adjudged as to that branch, although no final disposition as to other branches of the litigation is involved, appeal from such judgment or decree must be taken within the prescribed time or the right of appeal will be lost.[39]

(b) Effect of Motions after Entry of Judgment or Decree

A motion or petition for rehearing, reargument, new trial, or to vacate or modify the judgment or decree, which is properly presented in due season and is entertained by the court, suspends the commence-

within three months after judgment.—Northwestern Public Service Co. v. Pfeifer, C.C.A.S.D., 36 F.2d 5.

(2) A "petition for severance," giving notice of intention to apply for leave to appeal, was not equivalent to an "application for leave to appeal," as respects whether application was timely made.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395.

Filing in office of clerk

The filing of application for appeal in office of clerk of court where judgment or decree is entered will not be regarded as application duly made under limitation statute, unless sole judge of court or all of its judges are out of the jurisdiction or incapacitated, so that application cannot be made to judge of court within three months' period.—Benitez v. Bank of Nova Scotia supra.

32. U.S.—Neely v. Merchants Trust Co. of Red Bank, C.C.A.N.J., 110 F.2d 525, denying motion, D.C., 26 F.Supp. 130, affirmed, C.C.A., 113 F. 2d 953, certiorari denied 61 S.Ct. 171, 311 U.S. 705, 85 L.Ed. 457, rehearing denied 61 S.Ct. 391, 311 U.S. 730, 85 L.Ed. 475—Moss v. Kansas City Life Ins. Co., C.C.A. Mo., 96 F.2d 108—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—U. S. v. Rayburn, C.C.A.Iowa, 91 F.2d 162—Bronx Fire Ins. Co. v. Wasson, C.C.A.Kan., 62 F.2d 556—In re Hurley Mercantile Co., C. C.A.Tex., 56 F.2d 1023, certiorari denied Atascosa County State Bank of Jourdanton, Texas v. Coppard, 52 S.Ct. 580, 286 U.S. 555, 76 L. Ed. 1290—U. S. v. Stange, D.C.Wis., 43 F.2d 593, supplemented 45 F. 2d 248—U. S. Shipping Board Emergency Fleet Corporation v. Atlantic Corporation, C.C.A.Mass., 16 F.2d 27, dismissing error, D.C., 5 F.2d 529—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A. Ga., 15 F.2d 526—Ellicott Mach. Corporation v. Vogt Bros. Mfg. Co., D.C.Ky., 267 F. 934, affirmed, C.C. A., 267 F. 945, error, certiorari and mandamus denied Vogt Bros. Mfg. Co. v. Ellicott Mach. Corporation, 41 S.Ct. 8, 254 U.S. 607, 629, 65 L. Ed. 435.

3 C.J. p 1049 note 88.

33. U.S.—U. S. v. Rayburn, C.C.A. Iowa, 91 F.2d 162.

34. U.S.—Ray v. U. S., C.C.A.Ind., 121 F.2d 416—Union Guardian Trust Co. v. Jastromb, C.C.A.Mich., 47 F.2d 689.

Intention

Where district court made order granting defendant's motion for summary judgment and subsequently entered another order granting same relief and referring to first order as a memorandum decision, the first order was not intended as a rendition of judgment in favor of defendant, and the second order was the "final decision" of the court and notice of appeal filed three months after second order was timely.—Monarch Brewing Co. v. George J. Meyer Mfg. Co., C.C.A.Cal., 130 F.2d 582, affirming, D.C., 40 F.Supp. 1001.

35. U. S.—Zimmern v. U. S., Ala., 56 S.Ct. 706, 298 U.S. 167, 80 L. Ed. 1118, reversing, C.C.A., 79 F.2d 703, rehearing denied 80 F.2d 993, certiorari granted 56 S.Ct. 594, 297 U.S. 701, 80 L.Ed. 990.

36. U.S.—Allis-Chalmers Co. v. U. S., Ill., 162 F. 679, 89 C.C.A. 471.

37. **Decisions prior to Federal Rules of Civil Procedure**

(1) Entry is deemed to take place, for the purpose of fixing the time for appeal, when the order or judgment is filed by the clerk.—In re Hurley Mercantile Co., C.C.A.Tex., 56 F.2d 1023, certiorari denied Atascosa County State Bank of Jourdanton, Texas v. Coppard, 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1290.

(2) Entering judgment in "law journal" provided for by rules of United States court for southern district of Iowa is "entry" within terms of statute regulating length of time within which appeals may be applied for.—U. S. v. Rayburn, C.C.A.Iowa, 91 F.2d 162.

38. U.S.—American Surety Co. of New York v. Jones, Va., 224 F. 673, 140 C.C.A. 183, reversing, D.C., Woolfolk v. Jones, 216 F. 807.

39. U.S.—Taylor v. Logan Trust Co., C.C.A.Ark., 289 F. 51.

ment of the period limited for taking the appeal until the motion or petition is disposed of.

If a motion or petition for rehearing, reargument, new trial, or to vacate or modify the judgment or decree is made or presented properly and in due season, and is entertained by the court, the time limited for taking or perfecting an appeal does not begin to run until such motion or petition is disposed of.[40] The mere filing of such a motion or petition does not automatically enlarge the statutory period for appeal,[41] but to affect the time within which appeal will lie the motion or petition must be properly and timely made,[42] and it must be entertained by the court.[43] A motion merely to correct clerical or

40. U.S.—Bowman v. Loperno, Cal., 61 S.Ct. 201, 311 U.S. 262, 85 L.Ed. 177, reversing, C.C.A., In re Bowman, 110 F.2d 348, certiorari granted Bowman v. Loperena, 60 S.Ct. 1095, 310 U.S. 621, 84 L.Ed. 1394, conformed to, C.C.A., 118 F.2d 742—Partridge v. St. Louis Joint Stock Land Bank, C.C.A.Mo., 130 F.2d 281—Jones v. Thompson, C.C.A.Ark., 128 F.2d 888—Gulf Refining Co. v. Mark C. Walker & Son Co., C.C.A.Tenn., 124 F.2d 420, certiorari denied 62 S.Ct. 1268, 316 U.S. 682, 86 L.Ed. 1755—Charles Weaver & Co. v. Gulf Refining Co., C.C.A.Tenn., 124 F.2d 420, certiorari denied 62 S.Ct. 1269, 316 U.S. 682, 86 L.Ed. 1755—Chapman v. Federal Land Bank of Louisville, Ky., C.C.A.Ohio, 117 F.2d 321—Ortiz v. Public Service Commission of Puerto Rico, C.C.A.Puerto Rico, 108 F.2d 815—U. S. v. Steinberg, C.C.A.N.Y., 100 F.2d 124, modified on other grounds 100 F.2d 405—Joplin Ice Co. v. U. S., C.C.A.Mo., 87 F.2d 174—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443—W. Horace Williams Co. v. Broward Bank & Trust Co., C.C.A.Fla., 69 F.2d 14—Mitchell v. Maurer, C.C.A.Cal., 67 F.2d 286—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F.2d 491—The Astorian, C.C.A.Cal., 57 F.2d 85—Sauri v. Sauri, C.C.A.Puerto Rico, 45 F.2d 90—Thomas Day Co. v. Doble Laboratories, C.C.A.Cal., 41 F.2d 51—Janus v. U. S. ex rel. Humphrey, C.C.A.Idaho, 38 F.2d 431, reversing, D.C., 30 F.2d 530—Northwestern Public Service Co. v. Pfeifer, C.C.A.S.D., 36 F.2d 5—Michigan Carton Co. v. Sutherland Paper Co., C.C.A.Mich., 29 F.2d 179, modifying, D.C., Sutherland Paper Co. v. Michigan Carton Co., 13 F.2d 884, and 14 F.2d 700—Southern Pac. Co. v. Sartoris, C.C.A.Cal., 27 F.2d 852—U. S. ex rel. Danikas v. Day, C.C.A.N.Y., 20 F.2d 733—Chicago, M. & St. P. Ry. Co. v. Leverentz, C.C.A.Minn., 19 F.2d 915, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416—U. S. Shipping Board Emergency Fleet Corporation v. Galveston Dry Dock & Construction Co., C.C.A.Tex., 13 F.2d 607, certiorari denied Galveston Dry Dock & Construction Co. v. U. S. Shipping Board Emergency Fleet Corporation, 47 S.Ct. 237, 273 U.S. 725, 71 L.Ed. 860—Davis v. Livingston, C.C.A.Cal., 13 F.2d 605—Abruzzino v. National Union Fire Ins. Co., D.C.W.Va., 35 F.Supp. 925—In re Cury, D.C.Va., 34 F.Supp. 526—Baker v. U. S., D.C.Idaho, 15 F.Supp. 982—Montgomery Ward & Co. v. Banque Belge Pour L'etranger, C.C.A.China, 298 F. 446—Idaho Irr. Co. v. Gooding, C.C.A.Idaho, 285 F. 453, affirmed in part and reversed in part on other grounds 44 S.Ct. 618, 265 U.S. 518, 68 L.Ed. 1157—Payne v. Garth, C.C.A.Neb., 285 F. 301—Sanborn v. Bay, S.D., 194 F. 37, 114 C.C.A. 57—Louisville Trust Co. v. Stockton, Fla., 72 F. 1, 18 C.C.A. 408.

3 C.J. p 1051 note 10, p 1054 note 19.

41. U.S.—Wayne United Gas Co. v. Owens-Illinois Glass Co., W.Va., 57 S.Ct. 382, 300 U.S. 131, 81 L.Ed. 557, reversing, C.C.A., 84 F.2d 965, certiorari granted 57 S.Ct. 41, 299 U.S. 528, 81 L.Ed. 389—Ortiz v. Public Service Commission of Puerto Rico, C.C.A.Puerto Rico, 108 F.2d 815—In re Cury, D.C.Va., 34 F.Supp. 526.

42. U.S.—Bernards v. Johnson, Or., 62 S.Ct. 30, 314 U.S. 19, 86 L.Ed. 11, affirming, C.C.A., 103 F.2d 567, certiorari denied 60 S.Ct. 127, 308 U.S. 595, 84 L.Ed. 498, certiorari granted 60 S.Ct. 899, 310 U.S. 616, 84 L.Ed. 1391—Bowman v. Loperno, Cal., 61 S.Ct. 201, 311 U.S. 262, 85 L.Ed. 177, reversing, C.C.A., In re Bowman, 110 F.2d 348, certiorari granted Bowman v. Loperena, 60 S.Ct. 1095, 310 U.S. 621, 84 L.Ed. 1394, conformed to, C.C.A., 118 F.2d 742—Chapman v. Federal Land Bank of Louisville, Ky., C.C.A.Ohio, 117 F.2d 321—Mintz v. Lester, C.C.A.N.M., 95 F.2d 590—Zimmern v. U. S., C.C.A.Ala., 79 F.2d 703, rehearing denied 80 F.2d 993, certiorari granted 56 S.Ct. 594, 297 U.S. 701, 80 L.Ed. 990, and reversed on other grounds 56 S.Ct. 706, 298 U.S. 167, 80 L.Ed. 1118—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443—Harris v. U. S., C.C.A.N.C., 72 F.2d 982, denying rehearing 70 F.2d 897—McIntosh v. U. S., C.C.A.Va., 70 F.2d 507, dismissing appeal, D.C., U. S. v. McIntosh, 2 F.Supp. 244, rehearing denied 3 F.Supp. 715, and certiorari denied McIntosh v. U. S., 55 S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682—Gilliam v. U. S., C.C.A.Va., 70 F.2d 507, certiorari denied 55 S.Ct. 111, 293 U.S. 587, 79 L.Ed. 682, rehearing denied 55 S.Ct. 140, 293 U.S. 631, 79 L.Ed. 716—Stradford v. Wagner, C.C.A.Okl., 64 F.2d 749—Northwestern Public Service Co. v. Pfeifer, C.C.A.S.D., 36 F.2d 5—Wabash Ry. Co. v. Lindley, C.C.A.Neb., 29 F.2d 829—Chicago, M. & St. P. Ry. Co. v. Leverentz, C.C.A.Minn., 19 F.2d 915, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416—Abruzzino v. National Union Fire Ins. Co., D.C.W.Va., 35 F.Supp. 925—Payne v. Garth, C.C.A.Neb., 285 F. 301—U. S. v. Fidelity & Deposit Co., of Maryland, N.Y., 155 F. 117, 83 C.C.A. 577—Coe v. East & West R. Co., Ala., 85 F. 489, 29 C.C.A. 292—Marden v. Campbell Printing-Press & Mfg. Co., Mass., 67 F. 809, 15 C.C.A. 26.

Newly discovered evidence as ground for motion

The purpose of requirement of Federal Rules of Civil Procedure, rule 59(b) 28 U.S.C.A. following § 723c, that after expiration of ten days from entry of judgment motion for new trial, on the ground of newly discovered evidence, can only be made with leave of court obtained on notice and hearing and on a showing of due diligence, is to prevent dilatory use of the motion for new trial on ground of newly discovered evidence to increase the time for filing an appeal.—Abruzzino v. National Union Fire Ins. Co., D.C.W.Va., 35 F.Supp. 925.

Motion made on last day of period

Postponement of motion for new trial and of appeal until the ends of the periods allowed therefor did not require dismissal of appeal for want of diligence, where defendant's first motion for new trial was made promptly but not acted on and the decree was entered without notice to defendants.—Moss v. Equitable Life Ins. Co. of Iowa, C.C.A.Mo., 71 F.2d 795.

43. U.S.—Wayne United Gas Co. v. Owens-Illinois Glass Co., W.Va. 57 S.Ct. 382, 300 U.S. 131, 81 L.Ed. 557, reversing, C.C.A., 84 F.2d 965, certiorari granted 57 S.Ct. 41, 299 U.S. 528, 81 L.Ed. 389.

Necessity to appeal although application for rehearing is pending

A defeated party, who applies for a rehearing and does not appeal with-

other similar unsubstantial errors in the judgment or decree does not extend the time for appeal.[44] Unsubstantial defects in a motion or petition will not prevent extension of time for appeal,[45] and if a motion or petition is in substance one for a new trial or rehearing, although not technically so, it may extend the time for appeal.[46] The serving of a motion for judgment notwithstanding the verdict or for a new trial, within ten days after the entry of the judgment, is sufficient to extend the time for appeal although the motion is not filed within the ten days.[47] The pendency of a petition under the bankruptcy act does not toll the limitations as to an appeal from a decree entered prior to the filing of the petition.[48] A motion to amend the judgment does not extend the time for appeal where it is made after the other party has filed notice of appeal.[49] An appeal from a decree as originally rendered cannot operate as an appeal from the decree as subsequently amended, even though the appeal is filed after the expiration of the time for an appeal from the original decree.[50]

(4) Extension of Time by Court or by Parties.

The time prescribed for taking the appeal cannot be extended either by the court or by the parties.

The time prescribed for taking an appeal cannot be extended, nor relief granted in case of a failure to proceed in time, either by the circuit court of appeals[51] or by the lower court,[52] nor can the time prescribed be extended by agreement or stipulation of the parties or by express or implied waiver.[53] It has been held that if delay in perfecting an ap-

in time limited, takes risk that he may lose right of appeal, as application for rehearing, if court refuses to entertain it, does not extend the time for appeal.—Ortiz v. Public Service Commission of Puerto Rico, C.C.A.Puerto Rico, 108 F.2d 815.

Practice of supreme court of Puerto Rico as indicating entertaining of application

A practice of the supreme court of Puerto Rico to stay mandate, if petition for rehearing is filed within ten days, until petition is disposed of, does not establish that the petition for rehearing will necessarily be entertained, so as to extend time for appeal.—Ortiz v. Public Service Commission of Puerto Rico, supra.

Recital as determinative of entertaining of application

A recital by the supreme court of Puerto Rico in order denying petition for appeal that motion for rehearing previously filed had been denied without hearing or opinion and was not "entertained" by the court was determinative that motion for rehearing had not been "entertained" and had not served to extend time for appeal.—Ortiz v. Public Service Commission of Puerto Rico, supra.

44. U.S.—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F. 2d 491.

45. U.S.—Larkin Packer Co. v. Hinderliter Tool Co., supra—Thomas Day Co. v. Doble Laboratories, C.C. A.Cal., 41 F.2d 51.

46. U.S.—Suggs v. Mutual Ben. Health & Accident Ass'n, C.C.A. Okl., 115 F.2d 80—Nelson v. Devney, C.C.A.Wis., 102 F.2d 487—The Astorian, C.C.A.Cal., 57 F.2d 85—Cavis v. Livingston, C.C.A.Cal., 13 F.2d 605.

47. U.S.—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, 311 U.S. 699, 85 L.Ed. 453, rehearing denied 61 S.Ct. 391, 311 U.S. 736, 85 L.Ed. 475.

48. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F. 2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395, reversed on other grounds 61 S.Ct. 953, 313 U.S. 270, 85 L.Ed. 1324, rehearing denied 62 S.Ct. 51, 314 U.S. 706, 86 L.Ed. 564, conformed to, C.C.A., 125 F.2d 523.

49. U.S.—Fiske v. Wallace, C.C.A. Mo., 115 F.2d 1003, certiorari denied Wallace v. Fiske, 62 S.Ct. 123, two cases, 314 U.S. 663, 86 L.Ed. 531, rehearing denied 62 S.Ct. 174, two cases, 314 U.S. 710, 86 L.Ed. 566, rehearing denied 62 S.Ct. 910, two cases, 315 U.S. 829, 86 L.Ed. 1224, motion granted and motion denied 62 S.Ct. 1286, two cases.

50. U.S.—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F. 2d 491.

51. U.S.—Robertson v. Morganton Full Fashioned Hosiery Co., C.C.A. N.C., 95 F.2d 780—Muckelroy v. Baldwin, C.C.A.Ark., 70 F.2d 728—U. S. ex rel. Kreuter v. Baldwin, C.C.A.Ill., 49 F.2d 262—Sprague v. Chicago, B. & Q. R. Co., C.C.A. Neb., 17 F.2d 768—Veritas Oil Corporation v. McLain, C.C.A.Tex., 4 F. 2d 389.

3 C.J. p 1069 note 42.

52. U.S.—Leishman v. Associated Wholesale Electric Co., C.C.A.Cal., 128 F.2d 204—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S. Ct. 10, 311 U.S. 623, 85 L.Ed. 395, reversed on other grounds 61 S.Ct. 953, 313 U.S. 270 85 L.Ed. 1324, rehearing denied 62 S.Ct. 51, 314 U.S. 706, 86 L.Ed. 564, conformed to, C.C.A., 125 F.2d 523—Von Holt v. Carter, C.C.A.Hawaii, 56 F.2d 61—Robie v. Hart, Schaffner & Marx, C.C.A.Minn., 40 F.2d 871—Donaldson v. Baltimore Acceptance Corporation, C.C.A.Pa., 38 F.2d 215—Collins v. U. S., C.C.A.Iowa, 24 F.2d 823—Chicago, M. & St. P. Ry. Co. v. Leverentz, C.C.A.Minn., 19 F.2d 915, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526—Chicago & A. R. Co. v. U. S., 54 Ct.Cl. 116.

3 C.J. p 1069 note 43.

Nunc pro tunc entry or allowance of appeal is ineffective to extend the time for appeal.—U. S. v. Rayburn, C.C.A.Iowa, 91 F.2d 162—U. S. v. Hall, C.C.A.Mass., 83 F.2d 94, reversed on other grounds 86 F.2d 537—Donaldson v. Baltimore Acceptance Corporation, C.C.A.Pa., 38 F.2d 215—Boatmen's Bank v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 2 F.2d 972, certiorari denied 45 S.Ct. 512, 268 U. S. 692, 69 L.Ed. 1160.

Allowance of time for bill of exceptions

The time for review is not extended by allowance of time for, or delay in, settling or filing a bill of exceptions.—Camden Iron Works Co. v. City of Cincinnati, Ohio, 241 F. 846, 154 C.C.A. 548—Camden Iron Works Co. v. Sater, Ohio, 223 F. 611, 139 C.C.A. 157—Kentucky Coal, Timber, Oil & Land Co. v. Howes, Ky., 153 F. 163, 82 C.C.A. 337.

Order extending time for motion to amend

An order extending time within which to file motion to amend and supplement findings and conclusions could not extend the time for taking an appeal.—Leishman v. Associated Wholesale Electric Co., C.C.A.Cal., 128 F.2d 204.

53. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395, reversed on other grounds 61 S.Ct. 953,

peal is caused by the act or omission of the court or some official thereof, the appeal may be perfected after the expiration of the prescribed time,[54] unless the act or concurrence of the court or officer is not necessary,[55] and so in cases where an allowance of an appeal has been required, an appeal prayed for or otherwise taken in due time is not dismissible because of a delay in its allowance.[56]

(5) Premature Appeal

As a general rule, except in the case of mere irregularity not resulting in prejudice, an appeal which is taken before the right to take an appeal has accrued is premature and will be dismissed.

As a general rule, except in the case of mere irregularity not resulting in prejudice, an appeal which is taken before the right to take an appeal has accrued is premature and will be dismissed,[57] but where an appeal is taken as from a final judgment before the judgment has been entered by the clerk, the court may disregard the technicality and consider the appeal.[58] An appeal from a judgment is not prematurely taken although the other party is entitled at the time to move to amend the judgment.[59]

c. Application for, and Allowance of, Appeal

No application for, or an allowance of, an appeal is necessary under the Federal Rules of Civil Procedure.

Under the Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A. following § 723c, an appeal from a district court of the United States to the circuit court of appeals is taken by merely filing a notice of appeal with the district court, and no application for, or an allowance of, the appeal is necessary.[60] Under the former federal practice, in accordance with the applicable statutes and rules of court in the particular circuit, an application for, and an allowance of, an appeal or a writ of error was necessary.[61] A petition for an appeal from the

313 U.S. 270, 85 L.Ed. 1324, rehearing denied 62 S.Ct. 51, 314 U.S. 706, 86 L.Ed. 564, conformed to, C.C.A., 125 F.2d 523—Muckelroy v. Baldwin, C.C.A.Ark., 70 F.2d 728—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F.2d 491—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712—Robie v. Hart, Schaffner & Marx, C.C.A.Minn., 40 F.2d 871—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526—Veritas Oil Corporation v. McLain, C.C.A.Tex., 4 F.2d 389—Boatmen's Bank v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 2 F.2d 972, certiorari denied 45 S.Ct. 512, 268 U.S. 692, 69 L.Ed. 1160.

3 C.J. p 1075 note 78.

Uurging objection on second appeal

Party who does not object to the tardiness of an appeal from a judgment, but participates in the hearing on appeal and in a second trial of the case, cannot urge that objection on an appeal from the judgment on the second trial.—Jarowski v. Hamburg-American Packet Co., N.Y., 186 F. 332, 108 C.C.A. 410, denying motion 182 F. 320, 104 C.C.A. 548.

Reliance on statements of appellee's counsel

Appeal was dismissible where taken over four months after entry of judgment, despite claim that delay was caused by reliance on statements of appellees' counsel that the pendency of a bankruptcy proceeding involving appellees acted as a restraint on all pending actions.—Muckelroy v. Baldwin, C.C.A.Ark., 70 F.2d 728.

Failure to object to tardy motion for new trial

Failure of appellees to object to filing motion for new trial after expiration of time for appeal did not prevent dismissal of appeal.—Northwestern Public Service Co. v. Pfeifer, C.C.A.S.D., 36 F.2d 5.

Stipulation for stay excepting entry of judgment

Stipulation for stay of the proceedings excepting the entry of judgment does not extend the time for appeal.—Northwestern Public Service Co. v. Pfeifer, supra.

54. U.S.—Toledo Metal Wheel Co. v. Foyer Bros. & Co., Ohio, 223 F. 350, 138 C.C.A. 612.

3 C.J. p 1072 note 69.

55. U.S.—Sprague v. Chicago, B. & Q. R. Co., C.C.A.Neb., 17 F.2d 763.

3 C.J. p 1072 note 68.

56. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395, reversed on other grounds 61 S.Ct. 953, 313 U.S. 270, 85 L.Ed. 1324, rehearing denied 62 S.Ct. 51, 314 U.S. 706, 86 L.Ed. 564, conformed to, C.C.A., 125 F.2d 523—The Ruth, C.C.A.N.J., 20 F.2d 314—Wheeler v. Lumbermen's Mut. Casualty Co., D.C.Me., 6 F. Supp. 532—J. D. Randall Co. v. Foglesong Mach. Co., Ohio, 200 F. 741, 119 C.C.A. 185.

57. U.S.—In re Von Hoffman, C.C.A. N.J., 117 F.2d 222—In re Chicago, R. I. & P. Ry. Co., C.C.A.Ill., 90 F.2d 795—Meeker v. Baxter, C.C.A. N.Y., 83 F.2d 183—Evans v. New Haven Bank, N. B. A., C.C.A.Conn., 72 F.2d 664.

Appeal not dismissed as premature

U.S.—Deckert v. Independence Shares Corporation, Pa., 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing, C.C.A., Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F.Supp. 763, certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000—Wetterlund v. Holm, C.C.A.Kan., 74 F.2d 107—Sauri v. Sauri, C.C.A.Puerto Rico, 45 F.2d 90.

58. U.S.—Milton v. U. S., C.C.A.La., 120 F.2d 794.

59. U.S.—Fiske v. Wallace, C.C.A. Mo., 115 F.2d 1003, certiorari denied Wallace v. Fiske, 62 S.Ct. 123, two cases, 314 U.S. 663, 86 L.Ed. 531, rehearing denied 62 S.Ct. 174, two cases, 314 U.S. 710, 86 L.Ed. 566, rehearing denied 62 S.Ct. 910, two cases, 315 U.S. 829, 86 L.Ed. 1224, motion granted and motion denied 62 S.Ct. 1286, two cases.

60. U.S.—Youdan v. Majestic Hotel Management Corporation, C.C.A. Ill., 125 F.2d 15—De Maurez v. Swope, C.C.A.Wash., 110 F.2d 564—Smith v. Johnston, C.C.A., 109 F.2d 152.

Assignment of errors with petition for appeal

Since a petition for appeal is not necessary, rules of court requiring an assignment of errors to be filed with the petition for appeal are no longer effective.—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633.

61. U.S.—Alaska Packers Ass'n v. Pillsbury, Cal., 57 S.Ct. 682, 301 U.S. 174, 81 L.Ed. 988, reversing, C.C.A., Pillsbury v. Alaska Packers Ass'n, 85 F.2d 758 and 78 F.2d 587, certiorari granted in both cases Alaska Packers Ass'n v. Pills-

supreme court of Hawaii in a case in equity is properly allowed by an associate justice of that court, and an allowance by the chief justice is not necessary.[62]

Vacating order allowing appeal. The district court of Puerto Rico has power to vacate an order allowing an appeal which was improvidently entered on an application made after the expiration of the period of appeal.[63]

d. Payment of Costs and Fees

The clerk of the district court is entitled to the prescribed fee for filing the notice of appeal unless appellant has been permitted to appeal in forma pauperis. A person prosecuting an appeal in forma pauperis is not entitled to the reporter's transcript without paying the cost thereof. The circuit court of appeals may waive its rule prescribing the time for filing fees for printing the transcript.

The clerk of the district court is justified in refusing to file notice of appeal until his fee has been paid or until an order permitting appellant to proceed in forma pauperis is made,[64] and, if payment of the fee is to be avoided, application to proceed in forma pauperis on appeal should be filed with the clerk, and the court's order on the application procured prior to the filing of the notice.[65] A fee for filing an application to proceed in forma pauperis is not required.[66] The established rule is that a person prosecuting an appeal in forma pauperis is not entitled to the reporter's transcript of the testimony without paying the cost thereof,[67] and this rule has not been changed by the Federal Rules of Civil Procedure, rule 80, 28 U.S.C.A. following § 723c.[68] The circuit court of appeals may waive its rule prescribing the time for filing fees for printing the transcript and may, in its discretion, refuse to dismiss the appeal for laches in depositing the fees.[69]

bury, 57 S.Ct. 322, 299 U.S. 538, 81 L.Ed. 396—McCrone v. U. S., C.C.A.Mont., 100 F.2d 322, certiorari granted 59 S.Ct. 591, 306 U.S. 625, 83 L.Ed. 1029, affirmed 59 S.Ct. 685, 307 U.S. 61, 83 L.Ed. 1108—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1499—Brady v. Baltimore & O. R. Co., D.C.W.Va., 56 F.2d 231—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712—Wilmington v. Ricard, N.C., 90 F. 212, 32 C.C.A. 578—Green v. Lyn, Mass., 87 F. 839, 31 C.C.A. 248.

3 C.J. p 1078 note 3.

By whom allowed

U.S.—Wheeler v. Taft, C.C.A.La., 261 F. 978, certiorari denied 40 S.Ct. 584, 253 U.S. 490, 64 L.Ed. 1028—Foote v. Silsby, C.C.N.Y., 9 F.Cas.No.4,917, 1 Blatchf. 542.

3 C.J. p 1079 notes 5, 6, 10, p 1080 note 13.

Proper petition or application

U.S.—Larkin Packer Co. v. Hinderliter Tool Co., C.C.A.Okl., 60 F.2d 491—Jackson v. Norris, C.C.A.Tex., 37 F.2d 511, certiorari denied 50 S.Ct. 462, 281 U.S. 763, 74 L.Ed. 1171—Ross v. White, C.C.A.Tenn., 32 F.2d 750, certiorari denied 50 S.Ct. 35, 280 U.S. 584, 74 L.Ed. 633—American Surety Co. of New York v. People of State of Colorado, for Use of Little, C.C.A.Colo., 22 F.2d 624—Reeder v. Morton-Gregson Co., C.C.A.Neb., 296 F. 785—Brown v. Kossove, S.D., 255 F. 806, 167 C.C.A. 134—Moss v. Gulf Compress Co., Miss., 202 F. 657, 121 C.C.A. 67—Alaska United Gold Min. Co. v. Keating, Alaska, 116 F. 561, 53 C.C.A. 655—Gorham v. Broad River Tp., C.C.S.C., 113 F. 83, affirmed 118 F. 1016, 56 C.C.A. 140—Springfield Safe-Deposit & Trust Co. v. Attica, Kan., 85 F. 387, 29 C.C.A. 214, certiorari denied 19 S.Ct. 884, 171 U.S. 689, 43 L.Ed. 1179.

Action constituting allowance

U.S.—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—Ross v. White, C.C.A.Tenn., 32 F.2d 750, certiorari denied 50 S.Ct. 35, 280 U.S. 584, 74 L.Ed. 633—Weinstein v. Black Diamond S. S. Corporation, C.C.A.N.Y., 31 F.2d 519—Alaska United Gold Min. Co. v. Keating, Alaska, 116 F. 561, 53 C.C.A. 655—Louisville Trust Co. v. Stockton, Fla., 72 F. 1, 18 C.C.A. 408.

Grounds for allowance or refusal and discretion of court

U.S.—Guaranty Trust Co. of New York v. Chicago, M. & St. P. Ry. Co., D.C.Ill., 15 F.2d 443—Ellicott Mach. Corporation v. Vogt Bros. Mfg. Co., D.C.Ky., 267 F. 934, affirmed, C.C.A., 267 F. 945, error, certiorari, and mandamus denied Vogt Bros. Mfg. Co. v. Ellicott Mach. Corporation, 41 S.Ct. 8, 254 U.S. 607, 629, 65 L.Ed. 435—Simpson v. Denver First Nat. Bank, Colo., 129 F. 257, 63 C.C.A. 371—Southern Bldg. & Loan Assoc. v. Carey, C.C.Tenn., 117 F. 325, affirmed 128 F. 1022, 62 C.C.A. 684.

3 C.J. p 1091 note 21.

Order granting application

U.S.—Schmidt v. U. S., C.C.A.Wash., 102 F.2d 589, certiorari denied 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478, and Northern Pac. R. Co., by Schmidt v. U. S., 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478—Donaldson v. Baltimore Acceptance Corporation, C.C.A.Pa., 38 F.2d 215—Standard Oil Co. v. Robins Dry Dock & Repair Co., C.C.A.N.Y., 32 F.2d 182, affirming, D.C., Standard Oil Co., N. J. v. Robbins Dry Dock & Repair Co., 25 F.2d 339—Consolidated Gas Co. of New York v. Prendergast, D.C.N.Y., 6 F.2d 231—Lewis v. Holmes, Ill., 194 F. 842, 116 C.C.A. 408.

3 C.J. p 1094 note 40, p 1095 note 54, p 1096 note 66.

Proof of allowance

U.S.—U. S. v. Beaman, C.C.A.Ga., 61 F.2d 493.

3 C.J. p 1101 note 4.

Mandamus to compel allowance

U.S.—Muma v. Bodine, C.C.A., 16 F.2d 463.

62. U.S.—Territory of Hawaii v. Gay, C.C.A.Hawaii, 52 F.2d 356, certiorari denied 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572.

63. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395.

64. U.S.—Smith v. Johnston, C.C.A., 109 F.2d 152.

65. U.S.—Smith v. Johnston, supra.

66. U.S.—Smith v. Johnston, supra.

67. U.S.—U. S. ex rel. Estabrook v. Otis, C.C.A.Mo., 18 F.2d 689.

68. U.S.—Estabrook v. King, C.C.A.Mo., 119 F.2d 607.

69. U.S.—Despiau v. U. S. Casualty Co., C.C.A.Puerto Rico, 87 F.2d 270.

Where delay not prejudicial

Circuit court of appeals would waive rule requiring deposit for printing and complete printed record of transcript to be filed in time for hearing at next term following notice by clerk of deposit required for printing, where defendant had copy of printed record when transcript was filed and hence was not

e. Bond on Appeal

(1) Necessity
(2) Requisites and sufficiency
(3) Effect of defects; amendments and new or additional bonds

(1) Necessity

(a) In general
(b) Proceedings in forma pauperis

(a) In General

As a general rule the filing of an appeal bond is necessary to the perfecting of an appeal, but it is not a jurisdictional prerequisite.

As a general rule, under 28 U.S.C.A. § 869, the filing of an appeal bond is necessary to the perfecting of an appeal,[70] but it is not essential to the validity of the appeal in such a sense as to prevent the appellate court from acquiring jurisdiction under the Federal Rules of Civil Procedure, rule 73 a, 28 U.S.C.A. following § 723c, which provide that failure of appellant to take any of the further steps subsequent to the notice of appeal does not affect the validity of the appeal; nor was it a jurisdictional prerequisite prior to the adoption of the Rules.[71] Under 28 U.S.C.A. § 870, no appeal bond is required of a corporation all the stock of which is beneficially owned by the United States.[72]

(b) Proceedings in Forma Pauperis

aa. In general
bb. Persons entitled
cc. Procedure
dd. Allowance

aa. In General

The right to appeal in forma pauperis and thereby be excused from filing an appeal bond is entirely statutory and has not been affected by the Federal Rules of Civil Procedure. For the privilege to be available, the appeal must have substantial merit.

One permitted to proceed on appeal as a pauper is not obliged to file a bond.[73] The right to appeal in forma pauperis is purely a privilege given indigent persons to prosecute an appeal, otherwise and independently allowable, without payment of fees and costs incident to such prosecution.[74] The right is entirely statutory,[75] based on the federal statute 28 U.S.C.A. § 832,[76] and it is not affected by the Federal Rules of Civil Procedure.[77] For the privilege of an appeal in forma pauperis to be available the appeal must have substantial merit,[78] and whether there is some merit in an appeal presents a question to be decided by the judge to whom the application is made.[79] Where appellant takes a timely appeal and gives a bond which is approved by the court, the fact that he makes a motion to proceed in forma pauperis after the time allowed for appeal does not require dismissal of the appeal, but the belated effort to proceed in forma pauperis may be treated as surplusage.[80]

Appeals in forma pauperis in admiralty are considered in Admiralty § 199.

bb. Persons Entitled

To be entitled to appeal in forma pauperis, appellant must actually be unable to prepay the costs or to give security therefor, and he must be a citizen of the United States.

To be entitled to appeal in forma pauperis, appellant must be within the class of persons to whom the privilege is granted.[81] Appellant must actually be unable to prepay the costs or to give security therefor,[82] and he must be a citizen of the United

prejudiced and plaintiff gained nothing by delay.—Despiau v. U. S. Casualty Co., supra.

70. U.S.—Gay v. Hudson River Electric Power Co., C.C.N.Y., 184 F. 631, modified on other grounds 186 F. 1022, 108 C.C.A. 663—Kentucky Coal, Timber, Oil & Land Co. v. Howes, Ky., 153 F. 163, 82 C.C.A. 337—U. S. Trust Co. v. Western Contract Co., Ky., 81 F. 454, 26 C.C.A. 472.
3 C.J. p 1106 note 54.

71. U.S.—Mayer v. Kickey, C.C.A. Tex., 67 F.2d 489—Sumpter Lumber Co. v. Sound Timber Co., Wash., 257 F. 408, 168 C.C.A. 448—Herr v. St. Louis & S. F. R. Co., Miss., 174 F. 938, 98 C.C.A. 550.
3 C.J. p 1108 note 61.

72. U.S.—In re New York Investors, C.C.A., 79 F.2d 179, certiorari denied Endelman v. Reconstruction Finance Corporation, 56 S.Ct. 308, 296 U.S. 649, 80 L.Ed. 462.

73. U.S.—Ligare v. Harries, C.C.A. Ill., 128 F.2d 582—Samuels v. Munson S. S. Line, C.C.A.Fla., 63 F.2d 861.

74. U.S.—Millslagle v. Olson, C.C.A. Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015.

75. U.S.—Holiday v. Johnston, C.C.A.Cal., 123 F.2d 867—Smith v. Johnston, C.C.A., 109 F.2d 152—Brown v. Johnston, C.C.A.Cal., 99 F.2d 760—Stanley v. Swope, C.C.A., 99 F.2d 308.
3 C.J. p 1123 note 6.

76. U.S.—Stanley v. Swope, supra.

77. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

78. U.S.—Aninos v. Maguire, C.C.A. Mich., 127 F.2d 817—Smith v. Johnston, C.C.A., 109 F.2d 152—Fisher v. Cushman, C.C.A.Wash., 99 F.2d 918—Schneider v. Lehigh Valley R. Co., C.C.A.N.Y., 94 F.2d 85—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721.

79. U.S.—Fisher v. Cushman, C.C.A. Wash., 99 F.2d 918.

80. U.S.—Fulton Nat. Bank of Atlanta v. Gormley, C.C.A.Ga., 99 F. 2d 464.

81. U.S.—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721—Austin v. U. S., D.C.Ill., 40 F. Supp. 777.

82. U.S.—Rudy v. Federal Land Bank of Baltimore, C.C.A.Pa., 91 F.2d 549—Volk v. B. F. Sturtevant Co., Mass., 99 F. 532, 39 C.C.A. 646, affirmed 104 F. 276, 43 C.C.A. 527—Wickelman v. A. B. Dick Co., N.Y., 85 F. 851, 29 C.C.A. 436.

States.[83] A corporation is not a citizen within the purview of the statute so as to be entitled to appeal in forma pauperis.[84]

An administrator or legal representative may prosecute an appeal in forma pauperis.[85]

cc. Procedure

An application for leave to proceed on appeal in forma pauperis should be made in the first instance to the district court and, if the application is denied for any reason other than a lack of good faith, application can then be made to the circuit court of appeals. The petition and the affidavits must comply with the requirements of the statute.

An application for leave to proceed on appeal in forma pauperis should be made in the first instance to the district court to enable that court with its immediate knowledge of the facts to determine whether the appeal has been taken in good faith,[86] and if the application is denied for any reason other than a lack of good faith application can then be made to the circuit court of appeals.[87] The circuit court of appeals also has the power to entertain the application prior to the filing of the notice of appeal in the district court where the district court fails to act on the application made therein within a reasonable time.[88] If the appeal has been perfected by filing notice and paying costs in the district court without applying for leave to appeal in forma pauperis, the circuit court may entertain the application in the first instance, but applicant should show that the district court has been given an opportunity to certify as to the petitioner's good faith in taking the appeal.[89]

Petition and affidavits. The petition and the affidavits accompanying the petition must comply with the requirements of the statute.[90] Thus they must contain a statement that the petitioner, because of his poverty, is unable to pay costs or give security,[91] and that he believes he is entitled to the redress he seeks,[92] and they must set forth the cause of action or the grounds on which the appeal is based.[93] They must also show the petitioner to be a citizen of the United States.[94] Ordinarily appellant will be granted an opportunity to correct a defective petition or affidavit,[95] but not where the record shows that the appeal is plainly without merit.[96] One applying to the circuit court of appeals for leave to proceed on appeal in forma pauperis after his application to the district court has been denied should allege that he has applied to the district court, that the application was there denied, and that the district court has not certified that the appeal is not taken in good faith.[97]

Every person who joins in an appeal in forma pauperis must file his oath as required by the statute.[98] Where an appeal is prosecuted for the joint benefit of several persons, all persons directly inter-

A showing of hardship alone is not sufficient.—Volk v. B. F. Sturtevant Co., Mass., 99 F. 532, 39 C.C.A. 646, affirmed 104 F. 276, 43 C.C.A. 527.

Litigation for interest of other persons

The statute may not be used by persons not poor persons, in whose interest, although not parties to the suit, the litigation is being conducted, to prosecute an appeal without giving bond for costs.—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721.

83. U.S.—De Maurez v. Swope, C.C. A.Wash., 100 F.2d 530—Johnson v. Nickoloff, C.C.A., 52 F.2d 1074—Austin v. U. S., D.C.Ill., 40 F. Supp. 777—Volk v. B. F. Sturtevant Co., Mass., 99 F. 532, 39 C.C.A. 646, affirmed 104 F. 276, 43 C.C.A. 527.

Declaration of intention to become citizen

The mere fact that appellant has filed a declaration of intention to become a citizen after long residence in Alaska, does not entitle him to prosecute appeal in forma pauperis.—Johnson v. Nickoloff, C.C.A., 52 F. 2d 1074.

Convict in state penitentiary

A convict in a state penitentiary who under state laws is not a fully qualified citizen is not entitled to appeal in forma pauperis in a civil action.—Austin v. U. S., D.C.Ill., 40 F. Supp. 777.

84. U.S.—Atlantic S. S. Corporation v. Kelley, C.C.A.Fla., 79 F.2d 339—Quittner v. Motion Picture Producers & Distributors of America, C.C.A.N.Y., 70 F.2d 331.

85. U.S.—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721.

86. U.S.—Smith v. Johnston, C.C.A., 109 F.2d 152.

Necessity for timely application

One desiring to proceed on appeal in forma pauperis should promptly cause to be delivered to judge of court who heard matter or in his absence some other judge of the court, if there be such judge, the application for leave so to proceed, with accompanying affidavit, in order that any delay of the court in granting application may not prevent timely filing of notice of appeal.—Smith v. Johnston, supra.

87. U.S.—Smith v. Johnston, supra.

88. U.S.—Smith v. Johnston, supra.

89. U.S.—Smith v. Johnston, supra.

90. U.S.—Johnson v. Nickoloff, C.C. A., 52 F.2d 1074—Austin v. U. S., D.C.Ill., 40 F.Supp. 777.

91. U.S.—Volk v. B. F. Sturtevant Co., Mass., 99 F. 532, 39 C.C.A. 646, affirmed 104 F. 276, 43 C.C.A. 527.

92. U.S.—Carter v. Kurn, C.C.A., 120 F.2d 261.

93. U.S.—Johnson v. Nickoloff, C.C. A., 52 F.2d 1074—Austin v. U. S., D.C.Ill., 40 F.Supp. 777.

94. U.S.—De Maurez v. Swope, C.C. A.Wash., 100 F.2d 530—Volk v. B. F. Sturtevant Co., Mass., 99 F. 532, 39 C.C.A. 646, affirmed 104 F. 276, 43 C.C.A. 527.

95. U.S.—Lambert v. Central Bank of Oakland, C.C.A.Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 436, 300 U.S. 658, 81 L.Ed. 867—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721.

96. U.S.—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., supra.

97. U.S.—Bayless v. Johnston, C.C. A., 127 F.2d 531—Smith v. Johnston, C.C.A., 109 F.2d 152.

98. U.S.—Fuller v. Montague, C.C. Tenn., 53 F. 206.

ested in the recovery must present affidavits stating facts which show their financial inability.[99] In an appeal by an administrator the affidavits must show that neither the estate nor the beneficiaries are able to prepay or secure the costs,[1] and an affidavit by the administrator alone that neither he personally nor as such administrator, nor any of the beneficiaries, are financially able to pay the cost of appeal or to give security therefor is insufficient.[2] That plaintiff's attorney has a contingent interest in the proceeds of the litigation by reason of his having contracted for a contingent fee has been held not to require him to file a pauper's oath in order that plaintiff may prosecute the appeal in forma pauperis,[3] but in other circuits it has been held that the attorney must do so.[4]

dd. Allowance

The trial court has a discretion in granting or refusing the allowance of an appeal in forma pauperis. Where it certifies that the grounds for appeal are frivolous or without merit or that in its opinion the appeal is not taken in good faith, the circuit court of appeals has no authority to allow the appeal in forma pauperis.

The trial court has a discretion in granting or refusing the allowance of an appeal in forma pauperis.[5] Where the trial court certifies that the grounds for appeal are frivolous or without merit or that in its opinion the appeal is not taken in good faith, the circuit court of appeals has no authority to allow the appeal in forma pauperis,[6] and it will deny the application therefor.[7] The allowance by the trial court of an appeal in forma pauperis is not the equivalent of a certificate of probable cause and it is entirely separate from the allowance of an appeal.[8]

(2) Requisites and Sufficiency

The bond on appeal must identify the judgment, order, or decree as the one from which the appeal is taken; it need not be signed by all appellants if good and sufficient security is given. The surety must be sufficient and the bond must be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed. The bond is to be filed at the time of filing the notice of appeal, but failure to do so at that time is not a jurisdictional defect. It must be in the sum of two hundred and fifty dollars unless the court fixes a different amount, and if in that sum no approval thereof by the court is necessary.

The bond on appeal must so correctly describe or refer to the judgment, order, or decree as to identify it as the one from which the appeal is taken; otherwise it will be insufficient.[9] The bond need not be signed by all of several appellants if good and sufficient security is taken and no disadvantage to the appellee is shown.[10] That an appeal bond signed by an administrator is not accompanied by any authority from the probate court does not require a dismissal of the appeal.[11]

Sufficiency of sureties and conditions. The Federal Rules of Civil Procedure, rule 73 (c), 28 U.S. C.A. following § 723c, require that the bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. Under former practice it was also required that the surety be responsible and reliable[12] and that the bond be conditioned to answer all costs if appellant fails to make his plea good.[13]

Time of filing. Under Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A. following § 723c, the bond is to be filed with the notice of appeal,

99. U.S.—Carter v. Kurn, C.C.A., 120 F.2d 261—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721—Chetkovich v. U. S., C.C.A., 47 F.2d 894.

1. U.S.—Boggan v. Provident Life & Accident Ins. Co. of Chattanooga, Tenn., C.C.A.Ala., 79 F.2d 721—Reed v. Pennsylvania Co., C.C.A., 111 F. 714.

2. U.S.—Carter v. Kurn, C.C.A., 120 F.2d 261.

3. U.S.—Quittner v. Motion Picture Producers & Distributors of America, C.C.A.N.Y., 70 F.2d 331—U. S. v. Call, C.C.A.Fla., 287 F. 520.

4. U.S.—Chetkovich v. U. S., C.C.A., 47 F.2d 894—U. S. ex rel. Randolph v. Ross, C.C.A., 298 F. 64, 33 A.L.R. 728.

5. U.S.—Millslagle v. Olson, C.C.A. Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015.

6. U.S.—Aninos v. Maguire, C.C.A. Mich., 127 F.2d 817—Holiday v. Johnston, C.C.A.Cal., 123 F.2d 867—Smith v. Johnston, C.C.A., 109 F.2d 152—Waley v. Johnston, C.C.A.Cal., 104 F.2d 760—Brown v. Johnston, C.C.A.Cal., 99 F.2d 760—Stanley v. Swope, C.C.A., 99 F.2d 308.

7. U.S.—Garrison v. Johnston, C.C.A.Cal., 129 F.2d 318—Parker v. Johnston, C.C.A., 109 F.2d 157—Smith v. Johnston, C.C.A., 109 F.2d 152—Stanley v. Swope, C.C.A., 99 F.2d 308—In re Rolfe, C.C.A.Wash., 97 F.2d 338—In re Wragg, C.C.A. Ala., 95 F.2d 252, certiorari denied 59 S.Ct. 80, 305 U.S. 596, 83 L.Ed. 377.

8. U.S.—Millslagle v. Olson, C.C.A. Neb., 130 F.2d 212, denying rehearing 128 F.2d 1015.

9. U.S.—Benjamin v. Hart, D.C.N.Y., 3 Fed.Cas.No.1,302, 4 Ben. 454.

10. U.S.—St. Marie v. U. S., C.C.A. Cal., 108 F.2d 876, affirming, D.C., 24 F.Supp. 237, certiorari denied 61 S.Ct. 35, 311 U.S. 652, 85 L.Ed. 417—King v. Thompson, Ohio, 110 F. 319, 49 C.C.A. 59.

However, it has also been held that where a reasonable doubt is raised as to the genuineness of the signature of two appellants on an appeal bond the justice to whom the bond is presented for approval has the right to refuse to approve it.—U. S. v. Cox, 14 App.D.C. 368.

11. U.S.—Baten v. Kirby Lumber Corporation, C.C.A.Tex., 103 F.2d 272.

12. U.S.—Hobson v. Johnson, C.C. Ill., 12 F.Cas.No.6,553, 4 Biss. 505.

13. U.S.—Peace River Phosphate Co. v. Edwards, Fla., 70 F. 728, 17 C.C.A. 358.

but failure to do so at that time is not a jurisdictional defect. Under former practice it was held that the court could permit a bond to be filed subsequent to the taking of the appeal[14] at any time before it passed on the motion to dismiss,[15] although where the appeal was taken in open court and the bond was not presented within the prescribed time it was held that the appeal must be dismissed.[16]

Amount. In accordance with Federal Rules of Civil Procedure, rule 73 (c), 28 U.S.C.A. following § 723c, the bond when required by law shall be in the sum of two hundred and fifty dollars unless the court fixes a different amount. Under former practice in some circuits the fixing of the amount of the appeal bond in each case was a matter within the discretion of the court,[17] although the court could not require a bond for an unreasonable amount.[18]

Approval. Under Federal Rules of Civil Procedure, rule 73 (c), 28 U.S.C.A. following § 723c, if a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof by the court is necessary.[19]

(3) Effect of Defects; Amendments and New or Additional Bonds

Defects in the form or substance of an appeal bond do not deprive the appellate court of jurisdiction. The district court has jurisdiction to entertain motions concerning the insufficiency of the bond before the action is docketed with the appellate court, and after the action is so docketed the appellate court has such jurisdiction.

Defects in the form or substance of an appeal bond do not deprive the appellate court of jurisdiction under Federal Rules of Civil Procedure, rule 73 (a), 28 U.S.C.A. following § 723c, which provide that failure of the appellant to take any of the further steps subsequent to the notice of appeal does not affect the validity of the appeal. Under the former practice it was also held that such defects were not jurisdictional,[20] and the court could permit them to be cured by amendment or by filing a new bond.[21] Under Federal Rules of Civil Procedure, rule 73 (e), 28 U.S.C.A. following § 723c, the district court has jurisdiction to entertain motions concerning the insufficiency of the bond before the action is docketed with the appellate court, and after the action is so docketed the appellate court has such jurisdiction. Prior to the adoption of the rules it was also held that after transfer of the cause jurisdiction to increase the amount of the bond[22] or to permit an amendment or the filing of a new bond[23] was vested in the circuit court of appeals and not in the district court.

f. Service of Notice or Process; Writ of Error

(1) Notice or process on appeal
(2) Writ of error

(1) Notice or Process on Appeal

Notification of the filing of the notice of appeal is to be given by the clerk in accordance with the provisions of the Federal Rules of Civil Procedure.

Under Federal Rules of Civil Procedure, rule

14. U.S.—Herr v. St. Louis & S. F. R. Co., Miss., 174 F. 938, 98 C.C.A. 550—Wickelman v. A. B. Dick Co., N.Y., 85 F. 851, 29 C.C.A. 436—Schenck v. Diamond Match Co., Pa., 73 F. 22, 19 C.C.A. 352.

Appeal from district court for Alaska
The omission to give a bond at the time of taking an appeal from the district court for the district of Alaska is not ground for dismissal provided the bond is filed within a reasonable time thereafter.—Corcoran v. Kostrometinoff, Alaska, 164 F. 685, 91 C.C.A. 619, 21 L.R.A.,N.S., 399.

15. U.S.—In re Cannon, C.C.A.Ind., 31 F.2d 388—Fisher Hydraulic Stone & Machinery Co. v. Warner, N.Y., 233 F. 527, 147 C.C.A. 413, reversing, C.C., 188 F. 465.

16. U.S.—Cox & Carpenter v. Little, C.C.A.Miss., 53 F.2d 84—Jackson v. Norris, C.C.A.Tex., 37 F.2d 511.

17. U.S.—Phillips v. Governor & Co. of Adventurers of England Trading into Hudson's Bay, C.C.A.Nev., 79 F.2d 971.

Amount of bond held sufficient
U.S.—M. & M. Transp. Co. v. Cochran, C.C.A.R.I. 100 F.2d 207—Phillips v. Governor & Co. of Adventurers of England Trading into Hudson's Bay, C.C.A.Nev., 79 F.2d 971—Wheeling Bridge & Terminal R. Co. v. Cochran, W.Va., 68 F. 141, 15 C.C.A. 321.

18. U.S.—Lewis v. Holmes, Ill., 194 F. 842, 116 C.C.A. 408.

19. **Decisions under former practice**
(1) It is not necessary that the same judge who signed the citation approve the appeal bond.—Brown v. Northwestern Mut. Life Ins. Co., Neb., 119 F. 148, 55 C.C.A. 654.
(2) An approval by the clerk is insufficient.—Chicago Dollar Directory Co. v. Chicago Directory Co., Ill., 65 F. 463, 13 C.C.A. 8, appeal overruled 66 F. 977, 14 C.C.A. 213—Freeman v. Clay, Miss., 48 F. 849, 1 C.C. A. 115, affirmed 52 F. 1, 2 C.C.A. 587.

20. U.S.—Smythe v. New Orleans Land Co., La., 184 F. 892, 107 C.C. A. 214—La Conner Trading & Transportation Co. v. Widmer, Wash., 136 F. 177, 69 C.C.A. 193.

Waiver
An appellee may waive the omission of the appeal bond to run to him as appellee.—Norrie v. Lohman, C.C. A.N.Y., 16 F.2d 355.

21. U.S.—Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co., 73 F. 314, 19 C.C.A. 477, appeal dismissed 84 F. 1017, 28 C.C.A. 681—Chicago Dollar Directory Co. v. Chicago Directory Co., Ill., 65 F. 463, 13 C.C. A.8, appeal overruled 66 F. 977, 14 C.C.A. 213.
3 C.J. p 1186 note 37.

Defects as to parties
U.S.—Blaffer v. New Orleans Water Supply Co., La., 160 F. 389, 87 C.C. A. 341—Swift v. Kortrecht, Tenn., 110 F. 328, 49 C.C.A. 68, affirmed 112 F. 709, 50 C.C.A. 429.
3 C.J. p 1188 note 48.

Defects as to sureties
U.S.—National Harrow Co. v. Hench, C.C.Pa., 81 F. 926.

22. U.S.—Clarke v. Eureka County Bank, C.C.Nev., 131 F. 145.

23. U.S.—Morrin v. Lawler, C.C.N. Y., 91 F. 693.
3 C.J. p 1194 note 98.

73 (b), 28 U.S.C.A. following § 723c, notification of the filing of the notice of appeal is to be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal.

Decisions prior to Federal Rules of Civil Procedure. In decisions prior to the adoption of the Federal Rules of Civil Procedure it was held that notice of appeal, citation, summons, or other process was required to be served in accordance with the applicable rules of court,[24] except where the appeal was allowed or taken in open court,[25] but service of the process or notice was not essential to the jurisdiction of the appellate court, and omission thereof or defects therein would not cause dismissal if the appellee had actual notice and was not prejudiced thereby.[26] The fact that citation was not issued or served within the time prescribed by rule of court or within the time limited for taking the appeal did not defeat the jurisdiction of the appellate court or necessarily constitute ground for dismissal,[27] and the court might allow a citation to issue or service to be made after such time on a showing of a sufficient excuse for the delay,[28] unless the appeal as taken was of no effect.[29] All parties to the judgment, order, or decree below, whose interests might be adversely affected by the result of the appeal or proceeding in error, or persons legally representing them, should have been served.[30] On the other hand, citation or notice need have been served only on those parties whose interests were affected by the judgment, order, or decree appealed from,[31] and if the parties interested were very numerous, notice to

24. U.S.—Pueblo De Taos v. Archuleta, C.C.A.N.M., 64 F.2d 807—Mason v. Ervine, C.C.La., 27 F. 240—The City of Lincoln, C.C.La., 19 F. 460.

3 C.J. p 1202 note 62, p 1204 note 75, p 1212 note 60.

25. U.S.—Mitchell v. Lay, C.C.A. Cal., 48 F.2d 79, certiorari denied Lay v. Mitchell, 51 S.Ct. 656, 283 U.S. 804, 75 L.Ed. 1469—Prince v. McLaughlin, C.C.A.Mass., 16 F.2d 886, certiorari denied McLaughlin v. Prince, 47 S.Ct. 658, 274 U.S. 746, 71 L.Ed. 1327, and 47 S.Ct. 763, 71 L.Ed. 1341—Norrie v. Lohman, C.C.A.N.Y., 16 F.2d 355—Sumpter Lumber Co. v. Sound Timber Co., Wash., 257 F. 408, 168 C.C.A. 448—Edwards v. Bodkin, Cal., 249 F. 562, 161 C.C.A. 488.

3 C.J. p 1204 note 74.

Persons not before court

The rule that, where appeal is taken in term time in open court, service of citation is unnecessary does not apply where defendants had not appeared or been served with process.—Pueblo De Taos v. Archuleta, C.C.A.N.M., 64 F.2d 807.

26. U.S.—In re McCulloch, C.C.A. Ind., 100 F.2d 939—Robertson v. Morganton Full Fashioned Hosiery Co., C.C.A.N.C., 95 F.2d 780—Maryland Casualty Co. v. Kern County, C.C.A.Cal., 83 F.2d 774—The Framlington Court, C.C.A.Tex., 69 F.2d 200, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 294 U.S. 651, 78 L.Ed. 1500—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 38 F.2d 396—Weinstein v. Black Diamond S. S. Corporation, C.C.A.N.Y., 31 F.2d 519—Hunn v. Lewis, C.C.A.Iowa, 25 F. 2d 271—Toledo Metal Wheel Co. v. Foyer Bros. & Co., Ohio, 223 F. 350, 138 C.C.A. 612—Freeman v. Clay, Miss., 48 F. 849, 1 C.C.A. 115.

3 C.J. p 1239 note 59.

The purpose of citation on appeal is to give notice to the appellee.—Martin v. National Surety Co., C.C.A. Mo., 85 F.2d 135, certiorari granted 57 S.Ct. 232, 299 U.S. 536, 81 L.Ed. 395, affirmed 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 294 U.S. 651, 78 L.Ed. 1500—Mitchell v. Lay, C.C.A.Cal., 48 F.2d 79, certiorari denied Lay v. Mitchell, 51 S.Ct. 656, 283 U.S. 864, 75 L.Ed. 1469—Rederiaktiebolaget Amie v. Universal Transp. Co., C.C.A.N.Y., 245 F. 282.

Citation of cross-appellee, already in court as appellant invoking its jurisdiction, may be waived, not being jurisdictional.—Tallassee Power Co. v. Clark, C.C.A.Tenn., 77 F.2d 601.

Error in return day

An error in setting out the return day of the citation or summons is not a fatal defect.—Nome & Sinook Co. v. Ames Mercantile Co., Alaska, 187 F. 928, 109 C.C.A. 650—Love v. Busch, Tex., 142 F. 429, 73 C.C.A. 545—Farmers' L. & T. Co. v. Chicago & N. P. R. Co., Ill., 73 F. 314, 19 C.C.A. 477, appeal dismissed 84 F. 1017, 28 C.C.A. 681.

Amendments and additional process

(1) On a proper and timely application to the court, amendments will be allowed, or a new or alias citation or other process granted.—Nome & Sinook Co. v. Ames Mercantile Co., Alaska, 187 F. 928, 109 C.C.A. 650—3 C.J. p 1215 note 84.

(2) Where all necessary parties to the appeal were not served with a citation, the circuit court of appeals had discretion to authorize issuance of citation to them.—In re Knox-Powell-Stockton Co., C.C.A.Cal., 97 F. 2d 61.

27. U.S.—In re New York Investors, C.C.A.N.Y., 79 F.2d 179, certiorari denied Endelman v. Reconstruction Finance Corporation, 56 S.Ct. 308, 296 U.S. 649, 80 L.Ed. 462—U. S. v. Hairston, C.C.A.Ark., 55 F.2d 825—Mitchell v. Lay, C.C.A.Cal., 48 F.2d 79, certiorari denied Lay v. Mitchell, 51 S.Ct. 656, 283 U.S. 864, 75 L.Ed. 1469—Hart v. Wiltsee, C.C.A.Mass., 16 F.2d 838, denying motion, D.C., Parker v. New England Oil Corporation, 4 F.2d 392, 8 F.2d 392, and 13 F.2d 158, all of which vacated, C.C.A., Hart v. Wiltsee, 19 F.2d 903, certiorari denied Wiltsee v. Hart, 48 S.Ct. 119, 275 U.S. 559, 72 L.Ed. 426.

Issuance before second term

Citation need not be issued sixty days before the second term after the appeal is taken where this is not required by the court rules.—Farmers' Sav. Bank of Grimes, Iowa, v. Allen, C.C.A.Iowa, 41 F.2d 208.

28. U.S.—Mitchell v. Lay, C.C.A.Cal., 48 F.2d 79, certiorari denied Lay v. Mitchell, 51 S.Ct. 656, 283 U.S. 864, 75 L.Ed. 1469—Berliner Gramophone Co. v. Seaman, Va., 108 F. 714, 47 C.C.A. 630.

3 C.J. p 1211 note 44, p 1213 note 67.

29. U.S.—Pueblo De Taos v. Archuleta, C.C.A.N.M., 64 F.2d 807—Kidder v. Fidelity Insurance, Trust & Safe-Deposit Co., Ill., 105 F. 821, 44 C.C.A. 593.

30. U.S.—Browning v. Boswell, Va., 209 F. 788, 126 C.C.A. 512—Gray v. Grand Forks Mercantile Co., N. D., 138 F. 344, 70 C.C.A. 634—Boyd v. Stuttgart & A. R. Co., Ark., 84 F. 9, 28 C.C.A. 262.

3 C.J. p 1212 note 62.

31. U.S.—Jackson v. McWilliams Dredging Co., C.C.A.La., 76 F.2d 795.

3 C.J. p 1213 note 64; p 1217 note 3.

a few of each class, who appeared in good faith in defense of the interests of that class, would be deemed sufficient.[32] The citation or other process should, as a general rule, have been served on appellee or on his attorney,[33] and service made on the attorney was sufficient,[34] but it might also have been served on a trustee appointed by the court for nonresidents who had no attorney of record if such method of service was not shown to be ineffectual or prejudicial.[35] A party entitled to join in an appeal might do so by entering a voluntary appearance in the federal court after the appeal had been perfected therein without giving notice to the opposite party or to the lower court.[36]

(2) Writ of Error

The writ of error has been abolished in the federal courts.

The Act of January 31, 1928 c 14 § 1, 28 U.S.C.A. § 861a abolished the writ of error in the federal courts.[37]

g. Entry or Docketing

Failure of appellant to docket the appeal within forty days from the date of the notice of appeal is subject to such action as the circuit court of appeals may, in its discretion, take. The district court has authority to grant extensions of time but not after the expiration of the period of time as originally prescribed or as extended by a previous order.

Failure of appellant to docket the appeal within forty days from the date of notice of appeal as provided by the Federal Rules of Civil Procedure, rule 73(g), 28 U.S.C.A. following § 723c, is subject to such action as the circuit court of appeals may, in its discretion, take.[38] Where the failure to docket the appeal within the prescribed time is due to inexcusable neglect, the appeal is properly dismissed,[39] and, if no satisfactory reason for failure to docket the appeal within the prescribed time is given, the circuit court of appeals may refuse to permit the appeal to be docketed.[40] The district court may grant extensions of time for docketing an appeal before the period prescribed for docketing has expired, but it has no authority to grant extensions after the expiration of the period as originally prescribed or as extended by a previous order,[41] and an application for extension after the expiration of the time is ineffectual.[42] It was also held under rules of court in force prior to the adoption of the Federal Rules of Civil Procedure that a failure of appellant to enter or docket the appeal within the time prescribed by the court rules justified dismissal of the appeal,[43] but the court in its discretion could refuse to dismiss the appeal if the circum-

Surety on bond or undertaking

A mere surety on a bond or undertaking is not entitled to notice of appeal as a party to the action when he will not be affected by the further proceedings.—The Framlington Court, C.C.A.Tex., 69 F.2d 300, certiorari denied United British S. S. Co. v. Newfoundland Export & Shipping Co., 54 S.Ct. 860, 292 U.S. 651, 78 L.Ed. 1500.

32. U.S.—Kidder v. Fidelity Insurance. Trust & Safe-Deposit Co., Ill., 104 F. 821, 44 C.C.A. 593.

33. U.S.—Martin v. Burford, Alaska, 176 F. 554, 100 C.C.A. 159.
3 C.J. p 1214 note 73.

34. U.S.—Martin v. Burford, supra —Andrews v. National Foundry & Pipe Works, Wis., 77 F. 774, 23 C. C.A. 454, 36 L.R.A. 153, certiorari denied 17 S.Ct. 996, 166 U.S. 721, 41 L.Ed. 1188.

Attorneys in special appearance

Counsel specially appearing to move to quash service of process must be deemed defendant's agents, on whom citation can be served on appeal from an order granting motion.—Henderson v. Richardson Co., C.C.A.W.Va., 25 F.2d 225.

35. U.S.—Martin v. National Surety Co., C.C.A.Mo., 85 F.2d 135, certiorari denied 57 S.Ct. 232, 299 U.S. 536, 81 L.Ed. 395, affirmed 57 S.Ct. 531, 300 U.S. 588, 81 L.Ed. 822.

36. U.S.—Farmers' Loan & Trust Co. v. Longworth, Wash., 83 F. 336, 27 C.C.A. 541.

37. **Decisions prior to statute abolishing writ of error**

(1) Necessity for writ.—Loveless v. Ransom, Ill., 109 F. 391, 48 C.C. A. 434—3 C.J. p 1205 notes 78, 79.

(2) Issuance of writ.—Weinstein v. Black Diamond S. S. Corporation, C.C.A.N.Y., 31 F.2d 519—Siegelschiffer v. Penn. Mut. Life Ins. Co., N.Y., 248 F. 226, 160 C.C.A. 304—3 C.J. p 1205 note 82.

(3) Operation of writ.—Rederiaktiebolaget Amie v. Universal Transp. Co., N.Y., 245 F. 282, 157 C.C.A. 474.

(4) Form and requisites of writ.—Waters-Pierce Oil Co. v. Van Elderen, Ark., 137 F. 557, 70 C.C.A. 255—3 C. J. p 1206 notes 88, 89, p 1207 notes 98, 7.

(5) Service, filing, and entry.—U. S. National Bank v. Little Rock First Nat. Bank, Ark., 79 F. 296, 24 C.C.A. 597—3 C.J. p 1207 note 9.

(6) Return.—Altenberg v. Grant, Ky., 83 F. 980, 28 C.C.A. 244, affirmed 85 F. 345, 29 C.C.A. 185—Cotter v. Alabama Great So. R. Co., Tenn., 61 F. 747, 10 C.C.A. 35—3 C.J. p 1208 note 13, p 1209 note 17.

(7) Defects, objections, and amendments.—Rininger v. Puget Sound Electric Ry., Wash., 220 F. 419, 136 C.C.A. 43, certiorari denied Puget Sound Electric Ry. v. Rininger, 35 S. Ct. 792, 238 U.S. 629, 59 L.Ed. 1496—Thomas v. Green County, Tenn., 146 F. 969, 77 C.C.A. 487—Waters-Pierce Oil Co. v. Van Elderen, Ark., 137 F. 557, 70 C.C.A. 255—3 C.J. p 1209 note 29, p 1210 note 31.

38. U.S.—In re Gammill, C.C.A.Ill., 129 F.2d 501, denying motion 45 F.Supp. 238—U. S. ex rel. Rempas v. Schlotfeldt, C.C.A.Ill., 123 F.2d 109.

Reserving right to appellee to move to dismiss

Where cause is not docketed within forty days from date notice of appeal is given, circuit court of appeals may permit docketing of the cause and reserve right to appellee to renew motion to dismiss when the cause shall come on for argument on the merits.—U. S. ex rel. Rempas v. Schlotfeldt, supra.

39. U.S.—U. S. ex rel. Rempas v. Schlotfeldt, supra.

40. U.S.—In re Gammill, C.C.A.Ill., 129 F.2d 501, denying motion 45 F.Supp. 238—Piganelli v. Reichard, C.C.A.Ky., 123 F.2d 957.

41. U.S.—In re Gammill, C.C.A.Ill., 129 F.2d 501, denying motion 45 F.Supp. 238.

42. U.S.—In re Gammill, supra.

43. U.S.—Wong Sang v. U. S., Mass., 144 F. 968, 75 C.C.A. 383—Chamberlain Transp. Co. v. South Pier

stances of the delay justified a relaxation of the rule.[44]

h. Appearance in Appellate Court

Where appellant neither files a brief nor appears for oral argument, the appeal will usually be dismissed for want of prosecution.

Where appellant neither files a brief nor appears for oral argument, the appeal will usually be dismissed for want of prosecution.[45] A general appearance by appellee cannot give the appellate court jurisdiction of the subject matter of the appeal,[46] but on the other hand, where the appellate court has jurisdiction of the subject matter of the appeal, a general appearance by appellee without objection will give jurisdiction of his person which it would not have but for such appearance, and will also operate as a waiver of all nonjurisdictional omissions and defects in taking or perfecting the appeal.[47]

§ 294. Supersedeas or Stay of Proceedings

a. Definition
b. Operation of appeal as supersedeas or stay
c. Right to, and allowance of, supersedeas or stay
d. Bond
e. Modification or vacation of supersedeas or stay
f. Operation and effect of supersedeas or stay
g. Proceedings in violation of supersedeas or stay
h. Effect of failure to obtain supersedeas or stay
i. Effect of transfer of cause or proceedings therefor

a. Definition

A supersedeas is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from. A supersedeas bond is a bond to answer for the damages which the appellee may sustain by reason of the appeal if it is unsuccessful.

As defined by federal courts, a supersedeas is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if an execution has been issued, it prohibits further proceedings under it.[48] A supersedeas bond is a bond to answer for damages, that is, to pay the damages which appellee may sustain by reason of the appeal if it is unsuccessful.[49]

b. Operation of Appeal as Supersedeas or Stay

An appeal from a final judgment or decree does not per se operate as a supersedeas or stay, and the pendency of an appeal in the absence of a supersedeas or stay does not suspend the force and effect of the judgment or decree appealed from.

An appeal from a final judgment or decree does not per se operate as a supersedeas or stay.[50] If no supersedeas or stay is granted by the court or obtained by giving a statutory bond or undertaking, a judgment or decree which is final and requires no further action in the court below may be enforced by execution or otherwise, notwithstanding the pendency of the appeal.[51] Under express provisions of the Federal Rules of Civil Procedure, rule 62(a), 28 U.S.C.A. following § 723c, an interlocutory or final judgment in an action for an injunction or in a receivership action is not stayed during the pendency of an appeal unless otherwise ordered by the court. Prior to the adoption of the rules it was also held that, in the absence of an order of court, an appeal from an order granting or dissolving an injunction does not stay proceedings in the main case,[52] and it does not disturb the operative force

Coal Co., Ill., 126 F. 165, 61 C.C.A. 109.
3 C.J. p 1244 note 16.

44. U.S.—Colvin v. Sweet, C.C.A. Okl., 100 F.2d 524—Denver Live Stock Commission Co. v. Lee, C.C. A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531—Midland Terminal Ry. Co. v. Warinner, C.C.A. Colo., 294 F. 185—Harris v. Moreland Motor Truck Co., C.C.A.Cal., 279 F. 542.
3 C.J. p 1245 note 22.

Failure of clerk to docket case
Failure to have a case docketed in the appellate court before the return day was not a ground for dismissal, where the record was received before that day by the clerk who did not docket the case until later because the docket fee was not paid.—McMillan Contracting Co. v. Abernathy, C.C.A.Mo., 284 F 354, appeals remanded 44 S.Ct. 200, 263 U. S. 438, 68 L.Ed. 378, and appeal dismissed, C.C.A., 2 F.2d 1018.

45. U.S.—Dickson v. Maryland Casualty Co., C.C.A.La., 102 F.2d 299—Plazuela Sugar Co. v. Alvarez, C. C.A.Puerto Rico, 295 F. 511.

46. U.S.—Henrie v. Henderson, W. Va., 145 F. 316, 76 C.C.A. 196, reversing, D.C., 142 F. 568.
3 C.J. p 371 note 44.

47. U.S.—Lillard v. Lonergan, C.C.A. Kan., 72 F.2d 865, certiorari denied Lonergan v. Lillard, 55 S.Ct. 147, 293 U.S. 615, 79 L.Ed. 704—Baer v. Security Trust Co., C.C.A.W.Va., 33 F.2d 861, certiorari denied Security Trust Co. v. Baer, 50 S.Ct. 37, 280 U.S. 588, 74 L.Ed. 637—Hunn v. Lewis, C.C.A.Iowa, 25 F.2d 271, certiorari denied 49 S.Ct. 30, 278 U. S. 631, 73 L.Ed. 549—Norrie v. Lohman, C.C.A.N.Y., 16 F.2d 355.
3 C.J. p 1241 note 79.

48. U.S.—Staffords v. King, W.Va., 90 F. 136, 32 C.C.A. 536.

49. U.S.—Louisville Trust Co. v. National Bank of Kentucky, D.C.Ky., 3 F.Supp. 925.

50. U.S.—Eureka Productions v. Mulligan, C.C.A.N.Y., 108 F.2d 760.
3 C.J. p 1273 note 59.

Writ of error as supersedeas under former practice
U.S.—McCarley v. McGhee, C.C.Ala., 108 F. 494—Tiernan v. Booth, C.C. Ill., 4 F. 620, 9 Biss. 499, affirmed 3 S.Ct. 122, 109 U.S. 205, 27 L.Ed. 907.

51. U.S.—Lesamis v. Greenberg, Alaska, 225 F. 449, 140 C.C.A. 481.

Enforcement of replevin bond
U.S.—Moore v. American Fidelity Co. of Montpelier, Vt., D.C.Pa., 247 F. 609.

52. U.S.—Pacific Telephone & Telegraph Co. v. Cushman, C.C.A.Wash.,

of the order or decree.[53]

c. Right to, and Allowance of, Supersedeas or Stay

(1) In general
(2) Appeal from order granting or refusing injunction

(1) In General

Either the district court or the circuit court of appeals may grant a supersedeas or stay during the period of time in which it has jurisdiction of the case. To be entitled to a supersedeas or stay appellant must comply with the conditions precedent thereto.

Either the district court[54] or the circuit court of appeals,[55] during the period of time in which it has jurisdiction of the case, may grant a supersedeas or stay pending the outcome of the appeal. It is generally held that a supersedeas or stay is a matter within the discretion of the court,[56] and the court or judge may, in allowing the same, impose such terms or conditions, as to security or otherwise, as in its judgment are necessary for the protection of the parties.[57] However, on the other hand it has been held that after compliance with the conditions imposed by congress appellant is entitled to the supersedeas and the court has no lawful power to refuse it.[58] To be entitled to a supersedeas or stay appellant must comply with the conditions precedent thereto.[59]

As a rule a supersedeas or stay will be granted by the court whenever it appears that without it the objects of the appeal may be defeated,[60] or that it is reasonably necessary to protect appellant from irreparable or serious injury in case of a reversal, and it does not appear that appellee will sustain irreparable or disproportionate injury in case of affirmance.[61] On the other hand, as a rule, a supersedeas or stay will not be granted if no necessity therefor appears.[62]

(2) Appeal from Order Granting or Refusing Injunction

Either the district court or the circuit court of appeals, in the exercise of a sound discretion, may grant a stay in the operation of an order or decree granting, dissolving, or denying an injunction pending the appeal therefrom.

Where an order or decree granting, dissolving, or denying an injunction has been rendered in the district court, either the district court[63] or the circuit court of appeals,[64] during the period of time during which it has jurisdiction of the cause, may grant a stay of the operation of the decree pending the outcome of the appeal. This power is held to be inherent in a court of equity.[65] Appellant is not en-

292 F. 930, petition dismissed Cushman v. Pacific Telephone & Telegraph Co., 44 S.Ct. 181, 263 U.S. 729, 68 L.Ed. 529.

53. U.S.—New River Mineral Co. v. Seeley, C.C.Va., 117 F. 981, reversed on other grounds 120 F. 193, 56 C.C.A. 505.
3 C.J. p 1280 note 11.

54. U.S.—Toledo Newspaper Co. v. U. S., Ohio, 237 F. 986, 150 C.C.A. 636, affirming, D.C., U.S. v. Toledo Newspaper Co., 220 F. 458, which is affirmed Toledo Newspaper Co. v. U. S., 38 S.Ct. 560, 247 U.S. 402, 62 L.Ed. 1186.
3 C.J. p 1287 note 45.

55. U.S.—Tornanses v. Melsing, Alaska, 106 F. 775, 45 C.C.A. 615—Staffords v. King, W.Va., 90 F. 136, 32 C.C.A. 536.
3 C.J. p 1288 note 49.

Power as affected by Alaska statute
The power of the circuit court of appeals to stay or supersede proceedings on appeal from an order appointing a receiver was not interfered with by the provision of Alaska Code § 507, to the effect that on appeal to the circuit court of appeals from interlocutory orders granting or refusing an injunction, or an order to dissolve an injunction, "the proceedings in other respects in the District Court . . . shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."—In re McKenzie, 21 S.Ct. 468, 180 U.S. 536, 548, 45 L. Ed. 657.

Issuance directed by judge rather than by court
A writ of supersedeas issued by the clerk of a circuit court of appeals is not void because its issue was directed by a judge of the court and not by the court as a court.—In re McKenzie, supra—Tornanses v. Melsing, Alaska, 106 F. 775, 45 C.C.A. 615.

56. U.S.—Flint River Pecan Co. v. Fry, C.C.A.Ga., 29 F.2d 457—In re Bowman, D.C.Cal., 24 F.Supp. 381, appeal dismissed, C.C.A., 110 F.2d 348, certiorari granted Bowman v. Loperena, 60 S.Ct. 1095, 310 U.S. 621, 84 L.Ed. 1394, reversed on other grounds Bowman v. Lopereno, 61 S.Ct. 201, 311 U.S. 262, 85 L.Ed. 177, mandate conformed to, C.C.A., In re Bowman, 118 F.2d 742.
3 C.J. p 1289 note 58.

57. U.S.—Kirkpatrick v. Eastern Milling & Export Co., C.C.N.J., 135 F. 151—Fisher v. Meyer, C.C.N.Y., 10 F. 268, 20 Blatchf. 273.

58. U.S.—McCourt v. Singers-Bigger, Colo., 150 F. 102, 80 C.C.A. 56.

Necessity for allowance
Compliance with the conditions of Rev.St. § 1000 operates per se as a supersedeas or stay and no allowance by the court or judge is necessary.—Arnold v. Frost, 1 F.Cas.No. 558, 9 Ben. 267.

59. U.S.—U. S. v. Shaffer, D.C. Wash., 278 F. 549.
3 C.J. p 1274 note 64, p 1275 note 71, p 1291 note 80.

60. U.S.—Janssen v. Belding-Corticelli, C.C.A.Pa., 79 F.2d 828.

61. U.S.—H. P. Hood & Sons v. U. S., C.C.A.Mass., 97 F.2d 677, sustaining, D.C., U. S. v. Whiting Milk Co., 21 F.Supp. 321, vacated, D.C., Green Valley Creamery v. U. S., 105 F.2d 754—Shinholt v. Angle, C. C.A.Tex., 90 F.2d 297.
3 C.J. p 1290 note 66, p 1285 note 34.

62. U.S.—Chadeloid Chemical Co. v. H. B. Chalmers Co., N.Y., 242 F. 71, 155 C.C.A. 15—Gay v. Hudson River Electric Power Co., N.Y., 191 F. 828, 112 C.C.A. 342.

63. U.S.—California Water Service Co. v. City of Redding, D.C.Cal., 22 F.Supp. 910.
3 C.J. p 1282 note 20.

64. U.S.—Sommer v. Rotary Lift Co., C.C.A., 58 F.2d 765—Vacuum Oil Co. v. Grabler Mfg. Co., C.C.A., 53 F.2d 975—Masses Pub. Co. v. Patten, N.Y., 245 F. 102, 157 C.C.A. 398.

65. U.S.—Shinholt v. Angle, C.C.A. Tex., 90 F.2d 297.

titled to the stay as a matter of right but the matter rests in the sound discretion of the court.[66] In general a circuit court of appeals will not suspend an injunction after the trial judge has refused to grant a supersedeas.[67] After dismissal of a bill for an injunction the district court has no power to issue an injunction pending appeal from the order of dismissal.[68]

Grounds for allowance or refusal. It is improper for the court to grant an injunction pending appeal from a decree denying the injunction in the absence of peculiar circumstances which so warrant,[69] and as a rule it will not grant the restraining order where there is no reasonable ground to apprehend irreparable injury to appellant.[70] A supersedeas or injunction pending appeal from an order vacating or denying an injunction has been granted where otherwise the appeal would be ineffective,[71] or where appellant would suffer serious injury.[72] The court will refuse to stay an injunction granted by the decree where by reason of the stay the other party will sustain an irreparable loss.[73]

d. Bond

As a general rule a supersedeas bond is required to stay the execution of a judgment. The bond must be approved by the court and it must be in substantial compliance with the governing statute. An application for additional security may be made to the circuit court of appeals.

As a general rule a supersedeas bond is required to stay the execution of a judgment, and an appeal or cost bond is insufficient,[74] unless it is conditioned to pay all damages and costs, in which case it operates as a supersedeas.[75] It is improper for the court to release the levy of execution if no supersedeas bond is filed.[76] No supersedeas bond is required to stay execution where the appeal is taken under the direction of any department of the United States government.[77] The bond must be approved by the court[78] and it must comply with the governing statute,[79] but a substantial compliance therewith is sufficient.[80] The fact that all appellants do not join in executing the supersedeas bond,[81] or that the bond is executed, although not delivered, before the judgment is finally rendered,[82] does not render it insufficient. The conditions and amount of the bond are provided for under Federal Rules of Civil Procedure, rule 73(d), 28 U.S.C.A. following § 723c.[83]

Effect of Interstate Commerce Act

Power of equity court to maintain status quo pending appeal from a decree changing it is not impaired by Interstate Commerce Act, Jud. Code § 200 et seq, or Act Oct. 22, 1913 c 32, 38 U.S.St. at L. p 219.—Louisville & N. R. Co. v. U. S., D.C. Tenn., 227 F. 273, modifying 258, and reversed on other grounds 37 S.Ct. 61, 242 U.S. 60, 61 L.Ed. 152.

66. U.S.—Vacuum Oil Co. v. Grabler Mfg. Co., C.C.A., 53 F.2d 975—California Water Service Co. v. City of Redding, D.C.Cal., 22 F.Supp. 910.

3 C.J. p 1282 note 23.

Stay refused

U.S.—Camille, Inc. v. F. W. Fitch Co., D.C.Iowa, 27 F.Supp. 752, affirmed, C.C.A., F. W. Fitch Co. v. Camille, Inc., 106 F.2d 635.

67. U.S.—Sommer v. Rotary Lift Co., C.C.A., 58 F.2d 765—American Strawboard Co. v. Indianapolis Water Co., Ind., 81 F. 423, 26 C.C.A. 470, appeal dismissed 84 F. 1014, 28 C.C.A. 678.

68. U.S.—Kelley Bros. & Spielman v. Diamond Drill & Machine Co., C.C.Pa., 142 F. 868, affirmed Birdsboro Steel Foundry & Machine Co. v. Kelley Bros. & Spielman, 147 F. 713, 78 C.C.A. 101.

3 C.J. p 1283 note 26.

69. U.S.—Liberty Nat. Bank of South Carolina, at Columbia v. McIntosh, C.C.A.S.C., 16 F.2d 906, certiorari dismissed 47 S.Ct. 571, 273 U.S. 769, 783, 71 L.Ed. 890.

70. U.S.—Public Utility Investing Corporation v. Utilities Power & Light Corporation, C.C.A.Va., 82 F. 2d 21—California Water Service Co. v. City of Redding, D.C.Cal., 22 F.Supp. 910.

71. U.S.—Merchants Packing Co. v. Rogan, C.C.A., 79 F.2d 1.

72. U.S.—National Broadcasting Co. v. U. S., D.C.N.Y., 44 F.Supp. 688.

73. **Loss to public through false advertisements**

Application for supersedeas pending appeal from order granting preliminary injunction restraining defendant from disseminating alleged false advertisements would be denied where, if injunction were lifted until appeal could be heard, the public would suffer an irreparable loss since defendants would have extracted several million dollars from prospective buyers on the offer of a chance to win prizes.—Federal Trade Commission v. Thomsen-King & Co., C.C.A. Ill., 109 F.2d 516.

74. U.S.—U. S. v. Fidelity & Deposit Co. of Baltimore, Md., C.C.A.Idaho, 88 F.2d 793—Lee v. Jackson Light & Traction Co., C.C.A.Miss., 261 F. 721—Loy v. Alston, Mo., 172 F. 90, 96 C.C.A. 578.

75. U.S.—Martin v. Clarke, C.C.A.Ill., 105 F.2d 685, 124 A.L.R. 497—Louisville Trust Co. v. National Bank of Kentucky, D.C.Ky., 3 F.Supp. 925.

76. U.S.—Loy v. Alston, Mo., 172 F. 90, 96 C.C.A. 578.

77. U.S.—Louisville Trust Co. v. National Bank of Kentucky, D.C.Ky., 3 F.Supp. 925.

Appeal under direction of comptroller of currency

Defendant national bank and receiver thereof appealing under direction of comptroller of currency, was held not required to execute supersedeas bond in order to be entitled to stay of execution and other proceedings on money judgment pending appeal.—Louisville Trust Co. v. National Bank of Kentucky, supra.

78. U.S.—Gay v. Hudson River Electric Power Co., C.C.N.Y., 190 F. 812.

79. U.S.—Peace River Phosphate Co. v. Edwards, Fla., 70 F. 728, 17 C. C.A. 358.

80. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F. Supp. 476, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512—McClellan v. Pyeatt, Ind.T., 49 F. 259, 1 C.C.A. 241.

81. U.S.—McClellan v. Pyeatt, supra.

82. U.S.—Chateaugay Ore & Iron Co. v. Blake, C.C.N.Y., 35 F. 804.

83. **Decisions prior to adoption of Federal Rules of Civil Procedure**

U.S.—Sinclair Refining Co. v. Smith, C.C.A.Tex., 13 F.2d 68, certiorari denied 47 S.Ct. 236, 273 U.S. 725,

Amendments and new or additional security. An application for additional security may be made to the circuit court of appeals under Federal Rules of Civil Procedure, rule 75(j), 28 U.S.C.A. following § 723c.[84] After the jurisdiction of the appellate court over an appeal has attached, power to permit or require new or additional security to be filed exists only in the appellate court.[85] Where appellee does not ask for a bond for damages at the time a stay of injunction pending appeal is granted by the lower court, a bond will not be ordered on his motion in the circuit court of appeals where there has been no substantial change in circumstances.[86]

e. Modification or Vacation of Supersedeas or Stay

An order granting a supersedeas or stay may be modified or vacated and set aside by the court which has jurisdiction of the cause

An order granting a supersedeas or stay of proceedings may, on a proper showing, be modified or vacated and set aside by the court which has jurisdiction of the cause.[87] If the jurisdiction of the appellate court over the appeal has attached, an application for the discharge or vacation of a supersedeas should be addressed to it.[88]

f. Operation and Effect of Supersedeas or Stay

A supersedeas or stay suspends further proceedings on the judgment, order, or decree appealed from and preserves the status quo pending the appeal, but it does not annul the judgment or decree or change its final quality.

The effect of a supersedeas or stay is to suspend further proceedings on the judgment, order, or decree appealed from, or as to any matter embraced therein, and to preserve the status quo pending the determination of the appeal,[89] and it renders further proceedings in violation thereof void,[90] but it does not annul the judgment or decree or change its final quality.[91] The supersedeas or stay is confined to proceedings in the suit in which the judgment, order, or decree is rendered or made, and to such as are based on, or touch the enforcement or carrying into effect of, that judgment, order, or decree appealed from.[92] A supersedeas or stay obtained on appeal to the circuit court of appeals has been held to be operative pending a further appeal to, or other proceeding for review in, the supreme court.[93]

71 L.Ed. 860—Clark v. Patton, C.C. Tenn., 93 F. 342.

3 C.J. p 1303 note 76, p 1304 note 77, p 1308 note 86.

84. U.S.—Powell v. Maryland Trust Co., C.C.A.Va., 125 F.2d 260, certiorari denied 62 S.Ct. 1041, 316 U.S. 671, 86 L.Ed. 1746, and 62 S. Ct. 1046, 316 U.S. 671, 86 L.Ed. 1746.

85. U.S.—Clarke v. Eureka County Bank, C.C.Nev., 131 F. 145.

86. U.S.—Pneumatic Scale Corp. v. Automatic Weighing Mach. Co., Me., 200 F. 572, 119 C.C.A. 52.

87. U.S.—Powell v. Maryland Trust Co., C.C.A.Va., 125 F.2d 260, certiorari denied 62 S.Ct. 1041, 316 U. S. 671, 86 L.Ed. 1746, and 62 S.Ct. 1046, 316 U.S. 671, 86 L.Ed. 1746—Green Valley Creamery v. U. S., C.C.A.Mass., 105 F.2d 754, vacating H. P. Hood & Sons v. U. S., 97 F.2d 677, sustaining. D.C., U. S. v. Whiting Milk Co., 21 F.Supp. 321.

3 C.J. p 1313 note 18.

88. U.S.—Shelby Steel Tube Co. v. Delaware Seamless Tube Co., C.C. Pa., 161 F. 798.

3 C.J. p 1313 note 19.

89. U.S.—Lincoln Mine Operating Co. v. Huron Holding Corporation, C.C.A.Idaho, 111 F.2d 438, reversing, D.C., 27 F.Supp. 720, certiorari granted Huron Holding Corporation v. Lincoln Mine Operating Co., 61 S.Ct. 28, 311 U.S. 625, 85 L.Ed. 397, reversed on other grounds 61 S.Ct. 513, 312 U.S. 183, 85 L.Ed. 725, rehearing denied 61 S.Ct. 840, 313 U.S. 598, 85 L.Ed. 1550—New York Life Ins. Co. v. Panagiotopoulos, C.C.A.Mass., 80 F.2d 136—Lee v. Jackson Light & Traction Co., C.C.A.Miss., 261 F. 721—Hawaiian Pineapple Co. v. Masamari Saito, Hawaii, 260 F. 153, 171 C. C.A. 189—Smith v. Government of Canal Zone, Canal Zone, 249 F. 273, 161 C.C.A. 281—New River Mineral Co. v. Seeley, C.C.Va., 117 F. 981.

3 C.J. p 1315 notes 31, 32.

Order appointing receiver

(1) In an appeal from an order or decree appointing a receiver, the supersedeas suspends the functions of the receiver pending the appeal, and the lower court cannot take any proceedings in execution or carrying out of the order or decree.—Tornanses v. Melsing, 106 F. 775, 45 C.C.A. 615.

(2) However, a supersedeas or stay on appeal from an order or decree appointing or discharging a receiver does not prevent the court from taking such proceedings and making such incidental orders as may be necessary for the preservation of property or assets and the protection of the rights of the parties pending the appeal.—Blinn v. Continental Security Redemption Co., C.C.Ala., 110 F. 265.

3 C.J. p 1326 note 18.

Decree for costs suspended

U.S.—Jennings v. Johnson, Ga., 148 F. 337, 78 C.C.A. 329.

90. U.S.—New York Life Ins. Co. v. Panagiotopoulos, C.C.A.Mass., 80 F. 2d 136.

91. U.S.—Lincoln Mine Operating Co. v. Huron Holding Corporation, C.C.A.Idaho, 111 F.2d 438, reversing, D.C., 27 F.Supp. 720, certiorari granted Huron Holding Corporation v. Lincoln Mine Operating Co., 61 S.Ct. 28, 311 U.S. 625, 85 L.Ed. 397, and reversed on other grounds 61 S.Ct. 513, 312 U.S. 183, 85 L. Ed. 725, rehearing denied 61 S.Ct. 840, 313 U.S. 598, 85 L.Ed. 1550—Lee v. Jackson Light & Traction Co., C.C.A.Miss., 261 F. 721.

3 C.J. p 1317 note 38.

92. U.S.—Fidelity Trust & Safety-Vault Co. v. Mobile St. R. Co., C. C.Ala., 54 F. 26—U. S. v. County Court of Knox County, C.C.Mo., 39 F. 757.

Similar actions

A supersedeas of an injunction on appeal in a patent infringement suit does not bar another action by the patentee against a customer of the infringer in another jurisdiction.—Meccano, Limited v. John Wanamaker, New York, D.C.N.Y., 241 F. 133, reversed on other grounds 250 F. 450, 162 C.C.A. 520, certiorari granted 39 S.Ct. 10, 248 U.S. 554, 63 L.Ed. 419, and affirmed 40 S.Ct. 463, 253 U.S. 136, 64 L.Ed. 822.

93. U.S.—Staffords v. King, W.Va., 90 F. 136, 32 C.C.A. 536.

Pending receipt of mandate and stay of mandate

However, a stay order has been held to be too broad in providing for

g. Proceedings in Violation of Supersedeas or Stay

Any action or proceeding in disregard of a supersedeas or stay is a contempt of the authority and jurisdiction of the court.

Any action or proceeding in disregard and defiance of the force and effect of a supersedeas or stay is also a contempt of the authority and jurisdiction of the court,[94] and it is generally no answer to a proceeding, as for a contempt for the breach of a supersedeas order, that the breach was committed under the advice of counsel.[95]

h. Effect of Failure to Obtain Supersedeas or Stay

A failure to obtain a supersedeas or stay does not affect the right of appellant to a review of the judgment.

A failure to supersede a judgment, or to stay process on it, does not affect the right of appellant to a review of the proceedings which resulted in such judgment.[96]

i. Effect of Transfer of Cause or Proceedings Therefor

After the appeal has been taken jurisdiction of the case is vested in the circuit court of appeals, and the authority of the district court with reference thereto is suspended except as to perfecting the record or other such things as may be necessary for the presentation of the case in the appellate court, or to protect the res pending review.

After the appeal has been taken, jurisdiction of the case is vested in the circuit court of appeals,[97] and thereafter it has power to control the further steps in perfecting and hearing the appeal.[98] The authority of the district court with reference thereto is suspended so that it cannot proceed with the case until the appellate proceeding is heard and determined and the remittitur or mandate is regularly returned and entered on the records,[99] except as to perfecting the record or other such things as may be necessary for the presentation of the case in the appellate court,[1] or to protect the res pending the

stay pending application for certiorari from the supreme court to the circuit court of appeals, and where district court granted a stay for a period of three months or until final determination of any appeals taken, the stay would be operative pending receipt by district court of mandate of circuit court of appeals, which mandate would be stayed in accordance with court rules and on such terms as might be just to permit application for certiorari.—Powell v. Maryland Trust Co., C.C.A.Va., 125 F.2d 260, certiorari denied 62 S.Ct. 1041, 316 U.S. 671, 86 L.Ed. 1746, and 62 S.Ct. 1046, 316 U.S. 671, 86 L.Ed. 1746.

94. U.S.—In re McKenzie, 21 S.Ct. 468, 180 U.S. 536, 45 L.Ed. 468.
3 C.J. p 1327 note 25.

95. U.S.—Tornanses v. Melsing, 106 F. 775, 45 C.C.A. 615.

96. U.S.—Logan v. Goodwin, Kan., 104 F. 490, 43 C.C.A. 658.

97. U.S.—Rothschild & Co. v. Marshall, C.C.A.Wash., 51 F.2d 897, reversing, D.C., 47 F.2d 919—U. S. v. Radice, C.C.A.N.Y., 40 F.2d 445—Morrin v. Lawler, C.C.N.Y., 91 F. 693.
3 C.J. p 1255 note 43.

Jurisdiction of ancillary questions

A circuit court of appeals, before which a final decree was pending for determination, has exclusive jurisdiction, not only of the questions presented on the record transmitted by the trial court, but also of all ancillary questions, presented by independent evidence and hearing on the correctness and justice of the mandate to be entered.—Toledo Scale Co. v. Computing Scale Co., C.C.A.Ill., 281 F. 488, certiorari granted 42 S. Ct. 585, 259 U.S. 579, 66 L.Ed. 1072, 1073, and Fidelity & Deposit Co. v. Computing Scale Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073 and affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719.

Stipulation of parties

(1) After an appeal has been taken, the circuit court of appeals has jurisdiction to recognize and enforce a compromise agreement in settlement of an action pending before it.—Gardner v. Grand Beach Co., C.C.A.Mich., 48 F.2d 491, followed in Grand Beach Co. v. Gardner, C.C.A. Mich., 51 F.2d 1077.

(2) Jurisdiction of circuit court of appeals was not defeated by subsequent stipulation of parties as to printing of record.—U. S. v. Southern Pac. R. Co., C.C.A.Cal., 20 F.2d 529.

98. U.S.—Walleck v. Hudspeth, C.C. A.Kan., 128 F.2d 343.
3 C.J. p 1257 note 45.

99. U.S.—Rogers v. Consolidated Rock Products Co., C.C.A.Cal., 114 F.2d 108—Rothschild & Co. v. Marshall, C.C.A.Wash., 51 F.2d 897, reversing D.C., 47 F.2d 919—Midland Terminal Ry. Co. v. Warinner, C.C.A.Colo., 294 F. 185—Citizens' Bank of Wichita v. Farwell, Kan., 56 F. 539, 6 C.C.A. 30, affirmed 63 F. 117, 11 C.C.A. 108.
3 C.J. p 1252 note 28, p 1255 note 43.

Intervention of new parties

After an appeal has been taken, the district court has no jurisdiction to permit the intervention of new parties, even though the case is an interpleader suit.—Roberts v. Metropolitan Life Ins. Co., C.C.A.Ill., 94 F. 2d 277, certiorari denied 58 S.Ct. 764, 303 U.S. 660, 82 L.Ed. 1119—Smith v. Metropolitan Life Ins. Co., C.C.A. Ill., 94 F.2d 277, certiorari denied 58 S.Ct. 1039, 304 U.S. 570, 82 L.Ed. 1535.

Authority to dismiss appeal

The district court has no authority to dismiss an appeal which has been taken from its judgment.—Miller v. U. S., C.C.A.Ill., 114 F.2d 267, adopted 117 F.2d 256, reversing, D. C., 24 F.Supp. 958.

Applicability of local court rule after appeal

A local district court rule of federal district court for the southern district of New York, providing that an action shall abate where a defendant has neither been served nor appeared generally within three months after issuance of summons, even if valid, was not applicable to proceedings suspended by appeal.—Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y., 117 F.2d 95, certiorari denied 61 S.Ct. 835, 313 U.S. 559, 85 L.Ed. 1520.

1. U.S.—The Charles D. Leffler, C. C.A.N.J., 100 F.2d 759—Alliance Securities Co. v. Killits, C.C.A.Ohio, 67 F.2d 480—In re Bills of Exceptions, C.C.A., 37 F.2d 849—Midland Terminal Ry. Co. v. Warinner, C. C.A.Colo., 294 F. 185—Cochran v. Becker, C.C.A.Mo., 276 F. 280, error dismissed 43 S.Ct. 363, 261 U. S. 607, 67 L.Ed. 824.
3 C.J. p 1254 note 38—4 C.J. p 273 note 46.

Amending notice of appeal

An order amending the notice of appeal in libel proceedings to include

review.[2] The pendency of an appellate proceeding does not deprive the trial court of power to hear and determine matters which are independent of, or collateral to, the subject matter before the appellate court,[3] and an appellate proceeding for the review of an incidental or interlocutory matter does not transfer jurisdiction as to the entire cause, but the trial court or parties may still proceed in matters not involved in the appeal which are entirely collateral to the part of the case taken up.[4] Ineffectual attempts to appeal do not confer jurisdiction on the appellate court or deprive the lower court of further jurisdiction.[5] Under the Federal Rules of Civil Procedure, rule 73(a), 28 U.S.C.A. following § 723c, the filing of the notice of appeal is sufficient to perfect the appeal so as to transfer jurisdiction to the circuit court of appeals.[6]

The effect of the pendency of the appeal as to the force and effect of the judgment or decree appealed from is considered infra § 294 b.

New trial or rehearing. After the cause has been removed by appeal the trial court has no jurisdiction to entertain and no power to grant a motion for new trial or rehearing.[7]

Opening or vacating judgment or order. After an appeal has been taken, the district court cannot vacate or open its judgment or order.[8] If the review is pending and appellant wishes to reopen the decree, the proper procedure is for appellant to apply to the lower court to reopen the decree and for that court to request the appellate court to remit the record.[9]

Modification or amendment of judgment or proceedings. The district court cannot modify or amend its judgment, order, or decree, or change the record on which the order or decree is based, after an appellate proceeding for the review thereof has been perfected,[10] except to correct mistakes due to

notice to counsel for intervening claimant was not void because made after appeal was perfected and jurisdiction was transferred to the circuit court of appeals but was properly entered by the district court to perfect the record.—The Charles D. Leffler, C.C.A.N.J., 100 F.2d 759.

2. U.S.—Midland Terminal Ry. Co. v. Warinner, C.C.A.Colo., 294 F. 185—Blinn v. Continental Security Redemption Co., C.C.Ala., 110 F. 265.

3. U.S.—Mendez v. Eastern Sugar Associates, C.C.A.Puerto Rico, 89 F.2d 399.

3 C.J. p 1268 note 23.

4. U.S.—Foote v. Parsons Non-Skid Co., Ohio, 196 F. 951, 118 C.C.A. 105.

3 C.J. p 1259 note 60.

5. U.S.—Credit Alliance Corporation v. Atlantic, Pacific & Gulf Refining Co., C.C.A.Mo., 77 F.2d 595—In re Columbia Ry., Gas & Electric Co., D.C.S.C., 25 F.2d 329, affirmed, C.C.A., Columbia Ry., Gas & Electric Co. v. State of South Carolina, 27 F.2d 52, 59 A.L.R. 665—Midland Terminal Ry. Co. v. Warinner, C.C.A.Colo., 294 F. 185.

3 C.J. p 1252 note 27, p 1255 note 40.

6. U.S.—Walleck v. Hudspeth, C.C.A.Kan., 128 F.2d 343.

Perfecting proceedings prior to Federal Rules of Civil Procedure

U.S.—U. S. v. Nordbye, C.C.A., 75 F.2d 744—Ross v. White, C.C.A.Tenn., 32 F.2d 750, certiorari denied 50 S.Ct. 35, 280 U.S. 584, 74 L.Ed. 633—Greyerbiehl v. Hughes Electric Co., C.C.A.N.D., 294 F. 802, certiorari denied Hughes Electric Co. v. Greyerbiehl, 44 S.Ct. 402, 264 U.S. 589, 68 L.Ed. 864.

3 C.J. p 1253 notes 30–32.

7. U.S.—Midland Terminal Ry. Co. v. Warinner, C.C.A.Colo., 294 F. 185.

8. U.S.—Miller v. U. S., C.C.A.Ill., 114 F.2d 267, adopted 117 F.2d 256, reversing, D.C., 24 F.Supp. 958—In re McLean Store Fixtures Corporation, C.C.A.Mass., 70 F.2d 217, affirming, D.C., 4 F.Supp. 683—Union Guardian Trust Co. v. Jastromb, C.C.A.Mich., 47 F.2d 689—U. S. v. Radice, C.C.A.N.Y., 40 F.2d 445—Schram v. Safety Inv. Co., D.C.Mich., 45 F.Supp. 636—Z. & F. Assets Realization Corporation v. Hull, D.C., 31 F.Supp. 371, affirmed 114 F.2d 464, 72 App.D.C. 234, certiorari granted 61 S.Ct. 51, 311 U.S. 632, 85 L.Ed. 402, and American Hawaiian S. S. Co. v. Hull, 61 S.Ct. 51, 311 U.S. 632, 85 L.Ed. 402, affirmed Z. & F. Assets Realization Corporation v. Hull, 61 S.Ct. 351, 311 U.S. 470, 85 L.Ed. 288.

3 C.J. p 1265 note 6.

Judgment contrary to controlling state court's decision

After taking of appeal from federal district court's judgment, such court has no jurisdiction to vacate its judgment rendered contrary to a controlling state court's decision, not previously called to federal court's attention, although it would have rendered a contrary judgment if the state court's decision had been brought to its attention, and although state supreme court, in interpreting rule as to time for perfecting appeal thereto, held that filing of claim for appeal does not oust lower court of jurisdiction to grant rehearing within longer time allowed therefor by another rule.—Schram v. Safety Inv. Co., D.C.Mich., 45 F.Supp. 636.

9. U.S.—Baltimore S. S. Co. v. Phillips, C.C.A.N.Y., 9 F.2d 902, certiorari granted 46 S.Ct. 348, 270 U.S. 638, 70 L.Ed. 774, and reversed on other grounds 47 S.Ct. 600, 274 U.S. 316, 71 L.Ed. 1069.

10. U.S.—Bankers Indemnity Ins. Co. v. Pinkerton, C.C.A.Cal., 89 F.2d 194, followed in Bankers Indemnity Ins. Co. v. Lundgren, C.C.A.Cal., 89 F.2d 200, certiorari denied 58 S.Ct. 23, 302 U.S. 703, 82 L.Ed. 543, certiorari denied Bankers Indemnity Ins. Co. v. Pinkerton, 58 S.Ct. 23, 302 U.S. 704, 82 L.Ed. 543—U. S. v. Radice, C.C.A.N.Y., 40 F.2d 445—Parker v. New England Oil Corporation, D.C.Mass., 15 F.2d 236—St. Louis & S. F. R. Co. v. Loughmiller, D.C.Okl., 193 F. 689—Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., Pa., 151 F. 466, 81 C.C.A. 76—McKay v. Neussler, Alaska, 148 F. 86, 78 C.C.A. 154—Honey v. Chicago, B. & Q. R. Co., Iowa, 82 F. 773, 27 C.C.A. 262.

Order of severance of parties

District court after appeal was held without jurisdiction to receive evidence and enter order of severance of parties against whom joint judgment was entered nunc pro tunc.—Parker v. New England Oil Corporation, D.C.Mass., 15 F.2d 236.

After final judgment on review

Even if district court has power to correct and certify errors and omissions in record after appeal has been perfected, such power does not extend to certification of evidence not included in referee's certificate on review which was not before district court until long after final judgment on review had been entered.—In re McLean Store Fixtures Corporation, C.C.A.Mass., 70 F.2d 217, affirming, D.C., 4 F.Supp. 683.

inadvertence which do not change the status or interfere with the rights of the parties.[11]

§ 295. Record and Proceedings Not in Record

a. Matters to be shown by record
b. Scope and contents of record
c. Necessity of bill of exceptions
d. Contents, making, and settlement of bill of exceptions
e. Contents, making, and settlement of statement of case
f. Making, form, and requisites of transcript
g. Authentication and certification
h. Printing, transmission, and filing of record in appellate court
i. Defects, objections, amendments, and corrections
j. Conclusiveness and effect of record
k. Questions presented for review
l. Matters not apparent of record

a. Matters to Be Shown by Record

The record, on appeal to the circuit court of appeals, must show all matters necessary to the jurisdiction of the appellate and of the lower court. It must also show that the action was properly constituted and prosecuted in the court below, that orders or papers, a part of the record, were properly filed there, and that the grounds for review were properly presented and reserved in such court.

The record, on appeal to the circuit court of appeals, must show affirmatively the proper taking of all the steps and the existence of all the facts necessary to confer jurisdiction on the appellate court.[12] Usually this means that the record must show that an appealable judgment, decree, or order, presenting a final adjudication, was rendered and entered in the lower court,[13] that the person seeking to maintain the appeal is interested in, or aggrieved by, the judgment or decree,[14] and that the appeal was taken within the time fixed by law.[15]

Jurisdiction of lower court. The record also must affirmatively show facts essential to the jurisdiction of the trial court,[16] such as the issuance and service of appropriate process,[17] or an appearance by defendant;[18] and, if such jurisdiction is not challenged by the pleading, but the question is raised for the first time in the appellate court, it is sufficient if the jurisdiction appears in any part of the record, including the proofs.[19]

Proceedings sustaining judgment, order, or decree. Although matters which have no bearing on the issues involved need not be included in the record,[20] it must show that the action was properly constituted and prosecuted in the court below.[21]

In case of a trial without a jury, the record on appeal must disclose the trial judge's findings of fact and conclusions of law,[22] and the grounds and

Pleadings

After the case is pending in the appellate tribunal, a pleading cannot be amended in matter of substance.—Western Wheel-Scraper Co. v. Drinnen, C.C.Ill., 79 F. 820—Marsteller v. McClean, D.C., 16 F.Cas.No. 9,140, 2 Cranch C.C. 8.

Procedure to obtain modification after appeal

Where plaintiff's motion to amend district court's conclusions of law and judgment in plaintiff's favor was filed after judgment defendants had taken their appeal, motion did not retain case in jurisdiction of district court. After judgment defendants had appealed, plaintiff had the right to take a cross appeal or file his motion, within time, in district court and within time limited by statute for appeal from judgment apply to circuit court of appeals to remand case for consideration of plaintiff's motion to modify.—Fiske v. Wallace, C.C.A.Mo., 115 F.2d 1003, certiorari denied Wallace v. Fiske, 62 S.Ct. 123, two cases, 314 U.S. 663, 86 L.Ed. 531, rehearing denied 62 S.Ct. 174, two cases, 314 U.S. 710, 86 L.Ed. 566, rehearing denied 62 S.Ct. 910, two cases, 315 U.S. 829, 86 L.Ed. 1224, motion granted and motion denied 62 S. Ct. 1286, two cases.

11. U.S.—Ommen v. Talcott, D.C.N.Y., 180 F. 925—New Liverpool Salt Co. v. Wellborn, Cal., 160 F. 923, 88 C.C.A. 105.

12. U.S.—In re Roney, C.C.A.Ind., 119 F.2d 989—Cloud v. McLean-Arkansas Lumber Co., D.C.Ark., 28 F. Supp. 623, appeal dismissed, C.C.A., McLean-Arkansas Lumber Co. v. Cloud, 106 F.2d 1004.

Necessity of formal filing of writ of error, before abolishment of writ.—Mutual L. Ins. Co. v. Phinney, Wash., 76 F. 617, 22 C.C.A. 425.

13. U.S.—Southwest Dairy Products Co. v. Coffee & Moore, C.C.A.Tex., 62 F.2d 174.

14. U.S.—Fulton Inv. Co. v. Dorsey, Colo., 220 F. 298, 136 C.C.A. 108.

15. U.S.—Dang Nam v. Bryan, C. C.A.Hawaii, 78 F.2d 720, dismissing appeal 74 F.2d 379—Marks v. Northern Pac. R. Co., Wash., 76 F. 941, 22 C.C.A. 630.

16. U.S.—Ferguson v. Wachs, C.C.A. Ill., 96 F.2d 910—Downer v. Goodwin, C.C.A.Kan., 9 F.2d 918—Houston v. Filer & Stowell Co., Ill., 104 F. 163, 43 C.C.A. 457.

17. U.S.—Taylor v. Easton, S.D., 180 F. 363, 103 C.C.A. 509.
4 C.J. p 50 note 1 [d].

18. U.S.—Curtis v. Wilfley, China, 165 F. 893, 91 C.C.A. 571.
4 C.J. p 50 note 2 [b].

19. U.S.—Norton v. Larney, C.C.A. Okl., 289 F. 395, affirmed 45 S.Ct. 145, 266 U.S. 511, 69 L.Ed. 413—Mahoning Valley R. Co. v. O'Hara, Ohio, 196 F. 945, 116 C.C.A. 495—Canyon First Nat. Bank v. Crowley, Tex., 183 F. 578, 105 C.C.A. 450.

20. U.S.—Curtis v. Wilfley, China, 165 F. 893, 91 C.C.A. 571.
4 C.J. p 51 note 21 [a].

Evidence which cannot affect the issues to be passed on by the appellate court need not be made a part of the record.—Curtis v. Wilfley, supra.

In equity, evidence was usually required to be made part of record.—Mears v. Lockhart, N.D., 94 F. 274, 36 C.C.A. 239—4 C.J. p 56 note 76 [b]

21. U.S.—Curtis v. Wilfley, China, 165 F. 893, 91 C.C.A. 571.

22. U.S.—Kentucky Life & Acc. Ins.

reasons for his decision;[23] and a defect in the record in this respect is not cured by the fact that the record contains the opinion of the court.[24] Where the right to trial by jury must be expressly waived, the written stipulation of the parties waiving the jury must affirmatively appear on the record;[25] otherwise the judgment can be reviewed only for error appearing on the face of the pleadings or of the judgment itself.[26]

Filing papers or orders as part of record. The record must show that an order or paper set out in the record, which was required by law to be filed in the lower court, was properly made and filed.[27]

Grounds for review and presentation and reservation thereof. The record must clearly and affirmatively show the error, in the court below, complained of.[28] It must show that the question sought to be reviewed was presented to, and passed on by, the trial court,[29] and ordinarily this means that the record must show the making of a proper objection,[30] that the specific ground or grounds urged in the appellate court were contained therein,[31] and the ruling complained of;[32] and, under the practice existing, prior to the adoption of the Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, providing that formal exceptions to ruling or orders are unnecessary,[33] the record was required to show that a proper and timely exception was saved to such ruling.[34] These rules apply to error of the trial court with regard to jurisdiction,[35] its

Co. v. Hamilton, Ky., 63 F. 93, 11 C.C.A. 42.

Findings of fact and conclusions of law as part of record see infra subdivision b of this section.

Fed. Rules of Civ. Proc., rule 75 (g), 28 U.S.C.A. following § 723c, expressly provides that the record shall contain a copy of the findings of fact and conclusions of law, together with the direction for the entry of judgment.

23. U.S.—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695.

Application to injunction

Although Equity Rules, rule 70½, 28 U.S.C.A. § 723, requiring district courts to state findings of fact and conclusions of law and enter them of record does not apply to decisions on applications for interlocutory injunctions, it is essential to review of such decision that trial court state in record its grounds and reasons for decision.—Sparks v. Mellwood Dairy, supra.

24. U.S.—Kentucky Life & Acc. Ins. Co. v. Hamilton, Ky., 63 F. 93, 11 C.C.A. 42.

Such matters could not be shown, under former practice, by excerpts from the court's opinion not made part of the record by bill of exceptions.—Garth v. Arnold, Mo., 115 F. 468, 53 C.C.A. 200.

25. U.S.—Bowers v. Henry Steers, Inc., N.Y., 241 F. 377, 154 C.C.A. 257—Duncan v. Atchison, T. & S. F. R. Co., Cal., 72 F. 808, 19 C.C.A. 202.

Recital in trial court's judgment entry that jury had been waived by both parties may be sufficient showing of facts.—U. S. v. Perry, C.C.A. Ark., 55 F.2d 819.

26. U.S.—Bowers v. Henry Steers, Inc., N.Y., 241 F. 377, 154 C.C.A. 257.

27. U.S.—Oyler v. U. S., C.C.A.Colo., 98 F.2d 862—In re Friedman, N.Y., 161 F. 260, 88 C.C.A. 306—Kentucky Distilleries & Warehouse Co. v. Lillard, Ky., 160 F. 34, 87 C.C.A. 190.

28. U.S.—Christy v. Schwartzchild & Sulzberger Co., C.C.A.Ill., 160 F. 657.

29. U.S.—U. S. v. Wilson, C.C.A.Kan., 78 F.2d 465—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 77 F.2d 891, vacated on other grounds 81 F.2d 385, certiorari granted Jose Rivera Soler & Co. v. U. S. Firemen's Ins. Co. of Philadelphia, 56 S.Ct. 946, 298 U.S. 651, 80 L.Ed. 1379, reversed on other grounds Jose Rivera Soler & Co. v. United Firemen's Ins. Co. of Philadelphia, 57 S.Ct. 54, 299 U.S. 45, 81 L.Ed. 40—Krumm v. Southwest Finance Co. of California, C.C.A.Cal., 67 F.2d 1—Standard Oil Co. of Kentucky v. Noakes, C.C.A.Ky., 59 F.2d 897—Stinson v. Business Men's Accident Ass'n, C.C.A.Okl., 43 F.2d 312—Federal Intermediate Credit Bank v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Pennok Oil Co. v. Roxana Petroleum Co. of Oklahoma, C.C.A.Okl., 289 F. 416—Pennsylvania Co. v. Fanger, Ohio, 231 F. 851, 146 C.C.A. 47—Southern Ry. Co. v. King, C.C. A.Ga., 160 F. 332.

30. U.S.—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—Southern Power & Light Co. v. U. S., C.C.A.Ark., 72 F.2d 368—Najera v. Bombardieri, C.C.A.N.M., 46 F.2d 281—Federal Intermediate Credit Bank v. L'Herisson, C.C.A. S.D., 33 F.2d 841.

31. U.S.—Ætna Ins. Co. of Hartford, Conn. v. Licking Valley Milling Co., C.C.A.Ky., 19 F.2d 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415.

32. U.S.—Federal Intermediate Credit Bank v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Kalamazoo Ry. Supply Co. v. Duff Mfg. Co., Mich., 113 F. 264, 51 C.C.A. 221.

4 C.J. p 65 note 50 [e].

33. U.S.—Sweeney v. United Feature Syndicate, C.C.A.N.Y., 129 F.2d 904.

Elimination of necessity for formal exceptions see supra § 292 b (3).

34. U.S.—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 77 F. 2d 891, vacated on other grounds 81 F.2d 385, certiorari granted Jose Rivera Soler & Co. v. U. S. Firemen's Ins. Co. of Philadelphia, 56 S.Ct. 946, 298 U.S. 651, 80 L.Ed. 1379, reversed on other grounds Jose Rivera Soler & Co. v. United Firemen's Ins. Co. of Philadelphia, 57 S.Ct. 54, 299 U.S. 45, 81 L.Ed. 40—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—U. S. v. Rhodes, C.C.A.W.Va., 49 F. 2d 228—Najera v. Bombardieri, C.C. A.N.M., 46 F.2d 281—Stinson v. Business Men's Accident Ass'n, C. C.A.Okl., 43 F.2d 312—Federal Intermediate Credit Bank v. L'Herisson, C.C.A.S.D., 33 F.2d 841—United Verde Extension Mining Co. v. Koso, C.C.A.Ariz., 273 F. 369—Haynes Automobile Co. v. Kansas Casualty & Surety Co., C.C.A.Kan., 261 F. 347.

4 C.J. p 80 note 60.

Necessity of showing that exception was specific

U.S.—Marion Phosphate Co. v. Cummer, Fla., 60 F. 873, 9 C.C.A. 279—Northern Pac. R. Co. v. Charles, Wash., 51 F. 562, 2 C.C.A. 380.

35. U.S.—U. S. v. Wilson, C.C.A. Kan., 78 F.2d 465, 467.

"Where jurisdiction of the trial court depends upon the existence of a fact . . . if the losing party complains of error of the trial court with regard to that fact, such error must be preserved in the record below."—U. S. v. Wilson, supra.

ruling on the pleadings[36] or amendments thereto,[37] objection to remarks or conduct of counsel during the trial,[38] and as to objection to a finding of the trial court, and its ruling thereon.[39]

These rules have also been applied with regard to the admission or exclusion of evidence,[40] the examination of witnesses,[41] or the weight and sufficiency of the evidence.[42] With respect to the admission of evidence, the record must show not only a timely objection and the ruling of the court, but also the specific ground of objection.[43]

These rules have also been applied with regard to the action of the court in giving or refusing instructions.[44] The alleged failure to give certain instructions is not available as error, unless the record discloses a timely and proper request,[45] and the ruling on the request and objection thereto;[46] nor is the giving of a special charge available on appeal, unless objection was made to the general charge or to the court's ruling on the special request.[47]

Under former practice, the record was required to show exception saved to the ruling of the court on objection to the verdict,[48] or in granting or refusing a directed verdict;[49] but the grounds or reasons for asking a directed verdict need not be stated by counsel and shown by the record, where the question on which the error is predicated was fully disclosed at the trial by pleadings, evidence, and argument.[50]

Proceedings of intermediate court. On appeal from an intermediate court, the record should show

36. U.S.—Southern Ry. Co. v. Moseley, C.C.A.Ga., 35 F.2d 474—Davis v. Ferd-Brenner Lumber Co., C.C.A.La., 4 F.2d 390—Gartner v. Hays, C.C.A.Kan., 272 F. 896.

37. U.S.—Southern Ry. Co. v. Moseley, C.C.A.Ga., 35 F.2d 474.

38. U.S.—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325.

39. U.S.—Southern Power & Light Co. v. U. S., C.C.A.Ark., 72 F.2d 368—Lyle v. Phillips Petroleum Co., C.C.A.Ark., 72 F.2d 347—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L.Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Eastern Oil Co. v. Holcomb, Okl., 212 F. 126, 128 C.C.A. 642.

40. U.S.—G. L. Webster Co. v. Trinidad Bean & Elevator Co., C.C.A.Va., 92 F.2d 177—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—Jordy v. Dowling Co., C.C.A.Fla., 30 F.2d 937—Davis v. Ferd-Brenner Lumber Co., C.C.A.La., 4 F.2d 390—Lang & Gros Mfg. Co. v. Ft. Wayne Corrugated Paper Co., C.C.A.Ind., 278 F. 483—Keefe v. Worcester Trust Co., Mass., 253 F. 536, 165 C.C.A. 206, affirming, D.C., In re Russell Falls Co., 249 F. 260, certiorari denied Keefe v. Worcester Trust Co., 39 S.Ct. 259, 249 U.S. 602, 63 L.Ed. 797—Parker v. Moore, S.C., 115 F. 799, 53 C.C.A. 369—Kalamazoo Ry. Supply Co. v. Duff Mfg. Co., Mich., 113 F. 264, 51 C.C.A. 221—Massenberg v. Denison, Tex., 107 F. 18, 46 C.C.A. 120.
4 C.J. p 70 note 90 [c], p 77 note 29, p 86 note 99.

41. U.S.—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106.

42. U.S.—Lyle v. Phillips Petroleum Co., C.C.A.Ark., 72 F.2d 347—Krumm v. Southwest Finance Co. of California, C.C.A.Cal., 67 F.2d 1—Federal Intermediate Credit Bank v. L'Herisson, C.C.A.S.D., 33 F.2d 841, 843.

"If a party seeks to have reviewed the question whether the record contains any substantial evidence to support the findings and judgment against him, it is incumbent on him to make a motion for judgment in his favor on that ground, or to request a declaration of law to that effect, or to take some other equivalent step, and secure a ruling by the trial court, and take exception to such ruling."—Federal Intermediate Credit Bank v. L'Herisson, supra.

Account of evidence

Record should affirmatively show that appellate court has accurate account of evidence before lower court together with rulings of court on objections.—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530.

43. U.S.—Clark v. McNeill, C.C.A.Ky., 25 F.2d 247—Bank of Italy v. F. Romeo & Co., C.C.A.Cal., 287 F. 5—Lang & Gros Mfg. Co. v. Ft. Wayne Corrugated Paper Co., C.C.A.Ind., 278 F. 483.
4 C.J. p 71 note 94.

44. U.S.—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76—Jordy v. Dowling Co., C.C.A.Fla., 30 F.2d 937—U. S. Fidelity & Guaranty Co. v. City of Pensacola, C.C.A.Fla., 277 F. 429—W. D. Reeves Lumber Co. v. Leavenworth, Miss., 248 F. 686, 160 C.C.A. 586—Missouri Dist. Telegraph Co. v. Morris & Co., Mo., 243 F. 481, 156 C.C.A. 179, certiorari denied 38 S.Ct. 11, 245 U.S. 651, 62 L.Ed. 531—Alverson v. Oregon-Washington R. & Nav. Co., Wash., 236 F. 331, 149 C.C.A. 463—Beatson Copper Co. v. Pedrin, Alaska, 217 F. 43, 133 C.C.A. 29—Mexico International Land Co. v. Larkin, Kan., 195 F. 495, 115 C.C.A. 405.
4 C.J. p 88 notes 12, 13.

Where there was a full discussion of the point raised which adequately informed the trial court as to the law contended for, and entry of a formal exception would have been a mere technicality, alleged error in refusing plaintiff's charge would be considered on appeal notwithstanding no formal exception appeared in the record.—Sweeney v. United Feature Syndicate, C.C.A.N.Y., 129 F.2d 904.

45. U.S.—Emporia Loan & Investment Co. v. Rees, C.C.A.Kan., 66 F.2d 789, denying rehearing 66 F.2d 225—Jack v. Mutual Reserve Fund Life Ass'n, Miss., 113 F. 49, 51 C.C.A. 36.

46. U.S.—Newman v. Virginia, T. & C. Steel & Iron Co., N.C., 80 F. 228, 25 C.C.A. 382—Emporia Loan & Investment Co. v. Rees, C.C.A.Kan., 66 F.2d 789, denying rehearing 66 F.2d 225—Jack v. Mutual Reserve Fund Life Ass'n, Miss., 113 F. 49, 51 C.C.A. 36.

47. U.S.—Taylor v. U. S., C.C.A.Ala., 71 F.2d 76.

48. U.S.—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L.Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Case v. Hall, 94 F. 300, 36 C.C.A. 259, affirming 46 S.W. 180, 2 Ind.T. 8.

49. U.S.—Montgomery v. Sioux City Seed Co., C.C.A.Wyo., 71 F.2d 926—S. A. Lynch Enterprise Finance Corporation v. Dulion, C.C.A.Ga., 45 F.2d 6—Vance v. Chapman, C.C.A.Okl., 23 F.2d 914.

50. U.S.—Standard Oil Co. of Kentucky v. Noakes, C.C.A.Ky., 59 F.2d 897—Louisville & N. R. Co. v. Womack, C.C.A.Tenn., 173 F. 752.

the findings and opinion of the trial court, containing the rulings on which the judgment was based,[51] should show whether the intermediate court affirmed the findings of the trial court or modified them and, if so, what the modifications consisted of,[52] and should also show the opinion of the intermediate court, showing wherein it agreed or disagreed with the rulings of the trial court.[53]

b. Scope and Contents of Record

Ordinarily the record proper on appeal consists of the process, return, pleadings, orders, verdict or decision, and judgment; and other matters or proceedings become a part of the record in the appellate court only when they are brought into the record in the manner prescribed by statute or rules of court.

The record proper consists of the process, with the return thereon, the pleadings, orders, and the verdict, if tried by a jury, or the decision, if tried by the court, and the judgment.[54] Other matters or proceedings become a part of the record on appeal only when they are brought therein by an order of court,[55] or where they are made a part of the record in accordance with Federal Rules of Civil Procedure, rule 75, 28 U.S.C.A. following § 723c.[56] A mere recital of such matters in the record or transcript does not make them a part of the record.[57] Under the express provisions of rule 75 (e), matter not essential to a decision of the questions presented by the appeal should not be contained in the record,[58] and even before this rule went into effect it was regarded as improper to include such matter in the record,[59] such as colloquies between the court and counsel.[60]

Opinion of lower court. Under the provisions of Federal Rules of Civil Procedure, rule 75 (g), 28 U.S.C.A. following § 723c, a copy of the opinion of the lower court must be transmitted to the appellate court as a part of the record on appeal.[61]

51. U.S.—Cosme v. Marquez, C.C.A. Puerto Rico, 94 F.2d 908.

Appeal from judgment of supreme court of Puerto Rico on review of district court judgment.—Cosme v. Marquez, supra.

52. U.S.—Cosme v. Marquez, supra.

53. U.S.—Cosme v. Marquez, supra.

54. U.S.—Middleton v. Hartford Acc. & Indemnity Co., C.C.A.Tex., 119 F. 2d 721—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289—Champlin Refining Co. v. Thomas, C.C.A.Okl., 93 F.2d 133—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539—Eldorado Coal & Mining Co. v. Mariotti, Ill., 215 F. 51, 131 C.C.A. 359—Cassatt v. Mitchell Coal & Coke Co., Pa., 150 F. 32, 81 C.C.A. 80, 10 L.R.A.,N.S., 99.

A verdict, general or special, is a part of the record proper.—Daube v. Philadelphia & R. Coal & Iron Co., Ill., 77 F. 713, 23 C.C.A. 420.

55. U.S.—Eldorado Coal & Mining Co. v. Mariotti, Ill., 215 F. 51, 131 C.C.A. 359.

56. **Prior to this procedural rule,** matters not a part of the record proper ordinarily could be made a part of the record in the appellate court only by bill of exceptions.—Eldorado Coal & Mining Co. v. Mariotti, supra.

Necessity of bill of exceptions generally see infra subdivision c of this section.

Matters not constituting part of the record proper, and not being a part of the record on appeal unless brought up by bill of exceptions, under former practice.

(1) Bill of particulars.—Central Commercial Co. v. Jones-Dusenbury Co., Ill., 251 F. 13, 163 C.C.A. 263.

(2) Entries in dockets, journals, or order books, or minutes or memoranda of what took place in court.—In re Syracuse Stutz Co., C.C.A.N.Y., 55 F.2d 914—Reilly v. Beekman, C.C. A.N.Y., 24 F.2d 791.

(3) Instrument sued on.—Griffin v. Allen, Mo., 207 F. 61, 124 C.C.A. 621.

(4) Instructions.—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539—Sternenberg v. Mailhos, Tex., 99 F. 43, 39 C.C.A. 408—Case v. Hall, 94 F. 300, 36 C.C.A. 259, affirming 2 Ind.T. 8, 46 S.W. 180—4 C.J. p 151 note 98.

(5) Order extending term for settling bill of exceptions.—U. S. v. Payne, C.C.A.Wash., 72 F.2d 593.

A bill of exceptions, under the former practice, did not become part of the record on appeal unless it was properly and timely filed, and presented to and signed, allowed, or settled by the trial court.—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—Rieke Metal Products Co. v. Finney, C.C.A. Ind., 70 F.2d 509—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A.Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601—Ritter v. Gulf, C. & S. F. Ry. Co., C.C.A.Ark., 56 F.2d 369—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712—Great Northern Life Ins. Co. v. Dixon, C.C.A.S.D., 22 F.2d 655—Atchison, T. & S. F. Ry. Co. v. Nichols, C.C.A.Cal., 2 F.2d 12—Philpott v. Davis, C.C.A.Neb., 291 F. 370—Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., Ga., 236 F. 910, 150 C. C.A. 172.

57. U.S.—Felder v. Reeth, C.C.A. Alaska, 62 F.2d 730.

That papers not in the judgment roll are in the transcript and certified by the clerk does not make them any part of the record on appeal where they are not brought into the record in some other way recognized by law.—Duncan v. Atchison, T. & S. F. R. Co., Cal., 72 F. 808, 19 C.C.A. 202.

Instructions do not become a part of the record merely by being spread on the minutes of the court and copied into the record or transcript.—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539—Sternenberg v. Mailhos, Tex., 99 F. 43, 39 C.C.A. 408.

58. U.S.—Royal Petroleum Corporation v. Smith, C.C.A.N.Y., 127 F.2d 841.

59. U.S.—In re Syracuse Stutz Co., C.C.A.N.Y., 55 F.2d 914.

60. U.S.—Royal Petroleum Corporation v. Smith, C.C.A.N.Y., 127 F. 2d 841—Syracuse Engineering Co. v. Haight, C.C.A.N.Y., 97 F.2d 573—In re Adolf Gobel, Inc., C.C.A.N.Y., 80 F.2d 849, reversing, D.C., 12 F. Supp. 225—In re National Public Service Corporation, C.C.A.N.Y., 68 F.2d 859—In re Syracuse Stutz Co., Inc., C.C.A.N.Y., 55 F.2d 914.

Stenographic reproduction of all argument in court would not be regarded as constituting any part of record on appeal which reviewing court must consider.—In re Adolf Gobel, Inc., C.C.A.N.Y., 80 F.2d 849, reversing, D.C., 12 F.Supp. 225.

61. **Prior to this rule**

(1) The opinion of the trial court ordinarily was no part of the record in the circuit court of appeals.—American Ins. Co. v. Scheufler, C.C.A. Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F. Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—U. S. v. John II Estate, C.C.A.Hawaii, 91 F.

The opinion may also be included as a part of the record by rule of court,[62] or by the trial judge's adopting of it as his findings of fact and conclusions of law.[63] Under Act of March 3, 1887, c 359 § 7, 28 U.S.C.A. § 764, making it the duty of the court, in a suit against the United States, to cause a written opinion to be filed, setting forth the court's findings and conclusions of law and to render judgment thereon, the opinion is not regarded as the usual opinion of the trial judge, but must be accepted as a part of the record.[64] The opinion, findings, and decision of the lower court, in a prior action, on which a motion for a summary judgment is based, and which are filed with the motion papers, become a part of the record on appeal and should be included in such record.[65]

Stipulations and agreed facts. As a general rule parties cannot, by stipulation, make or add to the record of the court,[66] but may, by stipulation made a part of the record, limit the scope of the review,[67] and under Federal Rules of Civil Procedure, rule 75 (f), 28 U.S.C.A. following § 723c, the parties may by stipulation filed with the clerk of the district court designate the parts of the record, proceedings, and evidence to be included in the record on appeal.[68]

Under rule 76, if the questions involved can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case, which may be approved by the lower court and certified as the record on appeal.[69]

Pleadings. As a general rule, the pleadings in a case constitute a part of the record proper,[70] and this rule applies to an amended pleading which is filed in the court below by leave of such court,[71] and if the pleading is so amended as to change the theory with respect to the cause of the suit the original pleading no longer constitutes a part of the record.[72] Federal Rules of Civil Procedure, rule 75 (g), 28 U.S.C.A. following § 723c, expressly provides that the record shall include the pleadings.

Motions, however, do not constitute a part of the record proper, and, under the practice existing prior to rule 75 a motion and the ruling thereon, unless brought up by bill of exceptions, did not constitute a part of the record in the appellate court.[73]

2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Kelly v. U. S., C.C.A.Wash., 84 F.2d 541, denying rehearing 83 F.2d 783, affirming, D. C., In re Carlisle Packing Co., 12 F. Supp. 11, certiorari granted Kelly v. U. S., 57 S.Ct. 42, 299 U.S. 528, 81 L.Ed. 389, and reversed on other grounds 57 S.Ct. 335, 300 U.S. 50, 81 L.Ed. 507, remanding cause, C.C.A., 90 F.2d 73, certiorari denied 58 S.Ct. 54, 302 U.S. 730, 82 L.Ed. 564—Parker v. St. Sure, C.C.A.Cal., 53 F.2d 706—Hayden v. Ogden Sav. Bank, Utah, 158 F. 90, 85 C.C.A. 558—Mutual Reserve Fund Life Ass'n v. Du Bois, Idaho, 85 F. 586, 29 C.C.A. 354, certiorari denied 19 S.Ct. 886, 171 U.S. 688, 43 L.Ed. 1178—4 C.J. p 102 note 41.

(2) A memorandum opinion was not a part of the record.—North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co., S.D., 83 F. 796, 28 C.C.A. 88, modifying, C.C., 76 F. 623—4 C.J. p 105 note 58.

(3) The opinion could be made a part of the record by bill of exceptions.—English v. Hetherington & Berner, C.C.A.Ill., 71 F.2d 613—Garth v. Arnold, Mo., 115 F. 468, 53 C.C.A. 200.

A so-called "decision" wherein, following syllabus, trial court indicated nature of proceeding, stated issues, reviewed evidence, discussed and decided questions involved, cited authorities, and stated that judgment would be signed in conformity therewith, was merely "opinion" which was no part of record, and on which error could not be predicated.—U. S. v. Shingle, C.C.A.Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.

62. U.S.—Pilot Life Ins. Co. v. Owen, C.C.A.S.C., 31 F.2d 862—Hoe v. Kahler, C.C.N.Y., 27 F. 145.

63. U.S.—Parker v. St. Sure, C.C.A. Cal., 53 F.2d 706.

64. U.S.—Massachusetts Protective Ass'n v. U. S., C.C.A.Mass., 114 F. 2d 304, reversing, D.C., 22 F.Supp. 755—Hyams v. U. S., C.C.Mass., 139 F. 997, affirmed 146 F. 15, 76 C. C.A. 523—U. S. v. Swift, C.C.A. Mass., 139 F. 225.

65. U.S.—Loughman v. Braun, D.C. N.Y., 43 F.Supp. 315.

66. U.S.—Reilly v. Beekman, C.C.A. N.Y., 24 F.2d 791—Hayden v. Ogden Savings Bank, Utah, 158 F. 90, 85 C.C.A. 558.

67. U.S.—Lydiard-Peterson Co. v. Woodman, Minn., 205 F. 900, 126 C.C.A. 434.

68. **A stipulation which was not submitted to the trial court** and on which no ruling was made was not a proper part of the record.—The Rethalulew, Official No. 227,860, C.C. A.Cal., 51 F.2d 646—4 C.J. p 119 note 16.

69. **Prior to this rule,** other matters could be made a part of the record by agreement of the parties.—Eldorado Coal & Mining Co. v. Mariotti, Ill., 215 F. 51, 131 C.C.A. 359.

70. U.S.—Eldorado Coal & Mining Co. v. Mariotti, supra.

An exhibit which is the foundation of the action and which is filed as part of the pleading is a part of the record.—U. S. v. Bell, Pa., 135 F. 336, 68 C.C.A. 144.

Pleadings in creditor's suit, as insufficient record under Equity Rules, rule 75(b).—Edwards v. Holland Banking Co., C.C.A.Mo., 75 F.2d 713, setting aside, D.C., Holland Banking Co. v. Continental Nat. Bank of Jackson County at Kansas City, Mo., 9 F.Supp. 986.

71. U.S.—Empire Fuel Co. v. Lyons, Ohio, 257 F. 890, 169 C.C.A. 40, certiorari denied 40 S.Ct. 393, 252 U. S. 582, 64 L.Ed. 727.

That the amendment was made with leave of court must be shown by the record.—Empire Fuel Co. v. Lyons, supra.

72. U.S.—Ripinsky v. Hinchman, Alaska, 186 F. 151, 108 C.C.A. 263.

73. U.S.—Champlin Refining Co. v. Thomas, C.C.A.Okl., 93 F.2d 133—Momand v. Paramount Publix Corporation, C.C.A.Okl., 88 F.2d 578—Wainer v. U. S., C.C.A.Ill., 87 F. 2d 77—Tampico Banking Co., S. A. v. Barber, C.C.A.Tex., 3 F.2d 136, certiorari denied 45 S.Ct. 636, 268 U. S. 699, 69 L.Ed. 1164—Ghost v. U. S., Colo., 168 F. 841, 94 C.C.A. 253.

Particular motions, not part of record except by bill of exceptions:

Evidence. Evidence introduced at the trial, including documentary evidence,[74] as a general rule is no part of the record unless it is brought therein by some authorized mode,[75] and under the provisions of Federal Rules of Civil Procedure, rules 75 (a) – (c), 28 U.S.C.A. following § 723c, this may be done by filing a designation of the portions of the evidence to be contained in the record, see infra subdivision h of this section. Prior to this rule, the evidence did not become a part of the record unless it was made so by bill of exceptions or some substitute therefor,[76] or by stipulation of the parties.[77]

Proceedings on reference. Where the case was referred to a master, the record should contain the report and findings of the master, the exceptions thereto, and the master's certificate of the evidence before him,[78] and under Federal Rules of Civil Procedure, rule 75 (g), 28 U.S.C.A. following § 723c, in an action tried without a jury, the master's report, if any, is always to be included in the record transmitted to the appellate court.[79]

Findings of court. Findings of fact and conclusions of law, in a jury waived case, which are signed by the judge become a part of the record proper, and under the former practice, need not have been embodied in a bill of exceptions,[80] and the question of their sufficiency to support the judgment arises without a contemporaneous objection or exception.[81] However, under the provisions of the Federal Rules of Civil Procedure, rules 52 (a) and 75 (e), only the findings of fact and conclusions of law found by the trial court will be included as part of the record on appeal,[82] and the inclusion of proposed findings and objections thereto in the record is improper.[83]

(1) Motion for dismissal.—Eldorado Coal & Mining Co. v. Mariotti, Ill., 215 F. 51, 131 C.C.A. 359.

(2) Motion for nonsuit.—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.

(3) Motion for new trial.—Champlin Refining Co. v. Thomas, C.C.A. Okl., 93 F.2d 133—D. K. Jeffris Lumber Co. v. Howard Shipyards & Dock Co., C.C.A.Ind., 295 F. 513.

(4) Motion to make pleading more definite and certain.—Momand v. Paramount Publix Corporation, C.C.A. Okl., 88 F.2d 578—Dietz v. Lymer, C. C.A.Neb., 61 F. 792.

(5) Motion for judgment.—Davis v. U. S., C.C.A.Colo., 67 F.2d 737.

(6) Motion to strike the pleading or a part thereof.—Momand v. Paramount Publix Corporation, supra—Vance v. Chapman, C.C.A.Okl., 23 F. 2d 914—Chicago Great Western R. Co. v. Le Valley, C.C.A.Iowa, 233 F. 385—Ghost v. U. S., Colo., 168 F. 841, 94 C.C.A. 253—Dietz v. Lymer, C.C. A.Neb., 61 F. 792.

Motion papers on which a nonreviewable motion is made are no part of the record of the case on final hearing.—Baglin v. Cusenier Co., C.C. N.Y., 156 F. 1019—4 C.J. p 133 note 44.

74. U.S.—Harris v. U. S., C.C.A.N.C., 72 F.2d 982, denying rehearing 70 F.2d 897—Heinz v. Commissioner of Internal Revenue, C.C.A.Ga., 70 F.2d 461—Griffin v. Allen, Mo., 207 F. 61, 124 C.C.A. 621—Travelers' Protective Ass'n v. Gilbert, Ark., 101 F. 46, 41 C.C.A. 180.
4 C.J. p 141 note 2 [f].

Affidavits on motion for summary judgment may be properly included in record on appeal where motion has been denied, but may not be included where motion has not been passed on.—U. S. v. Forness, D.C.N. Y., 2 F.R.D. 160.

Letters

U.S.—U. S. v. Wilson, C.C.A.Kan., 78 F.2d 465.

75. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

Oral evidence is not a part of the record unless reduced to writing and made so.—Middleton v. Hartford Accident & Indemnity Co., supra.

76. U.S.—Heinz v. Commissioner of Internal Revenue, C.C.A.Ga., 70 F. 2d 461—Rosborough v. Chelan County, Wash., C.C.A.Wash., 53 F. 2d 198—Spracklen v. Atchison, T. & S. F. Ry. Co., C.C.A.Cal., 7 F.2d 468—F. C. Austin Mfg. Co. v. Johnson, Kan., 89 F. 677, 32 C.C.A. 309.
4 C.J. p 133 note 45.

Affidavits within rule

U.S.—Guth v. Minnesota Min. & Mfg. Co., C.C.A.Wis., 72 F.2d 385, certiorari denied Minnesota Mining & Mfg. Co. v. Guth, 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245—Gardner Sign Co. v. Claude Neon Lights, C. C.A.Pa., 38 F.2d 233—Staples & Hanford Co. v. Lord, Mass., 148 F. 15, 78 C.C.A. 106—Travelers' Protective Ass'n v. Gilbert, Ark., 101 F. 46, 41 C.C.A. 180.
4 C.J. p 147 note 45 [d].

Depositions within rule

U.S.—Arizona & N. M. Ry. Co. v. Clark, Ariz., 207 F. 817, 125 C.C.A. 305.

Report of court as to excluded testimony, under Equity Rules, rule 46, 28 U.S.C.A. § 723.—Stoody Co. v. Mills Alloys, C.C.A.Cal., 67 F.2d 807, certiorari denied 54 S.Ct. 718, 292 U.S. 637, 78 L.Ed. 1489.

77. U.S.—Spracklen v. Atchison, T. & S. F. Ry. Co., C.C.A.Cal., 7 F.2d 468.

78. U.S.—Hunn v. Lewis, C.C.A. Iowa, 25 F.2d 271, certiorari denied 49 S.Ct. 30, 278 U.S. 631, 73 L.Ed. 549.

79. **Prior to this rule,** a bill of exceptions was necessary to make the master's or referee's report, the evidence upon which it was founded, or his order or ruling, a part of the record.—North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co., C.C.S.D., 76 F. 623—Dietz v. Lymer, Neb., 63 F. 758, 11 C.C.A. 410, affirming 61 F. 792, 10 C.C.A. 71.

80. U.S.—Coggins v. Gregorio, C.C. A.N.M., 97 F.2d 948—Day-Gormley Co. v. National City Bank of New York, C.C.A.N.Y., 89 F.2d 703, certiorari denied Day-Gormley Leather Co. v. National City Bank of New York, 58 S.Ct. 39, 302 U.S. 719, 82 L.Ed. 555—Davis v. U. S., C.C.A.Colo., 67 F.2d 737—Richard Irvin & Co. v. New York Cent. R. Co., D.C.N.Y., 32 F.Supp. 497, modified on other grounds, C.C.A., Richard Irvin & Co. v. Westinghouse Air Brake Co., 121 F.2d 429—Wesson v. Saline County, Ill., 73 F. 917, 20 C.C.A. 227.
4 C.J. p 160 note 68.

81. U.S.—Coggins v. Gregorio, C.C. A.N.M., 97 F.2d 948—Davis v. U. S., C.C.A.Colo., 67 F.2d 737—St. Joseph Stockyards Co. v. U. S., Mo., 187 F. 104, 110 C.C.A. 432, reversing, D.C., 181 F. 625.

82. U.S.—Penmac Corporation v. Esterbrook Steel Pen Mfg. Co., D. C.N.Y., 27 F.Supp. 86, reversed on other grounds, C.C.A., 108 F.2d 695.

83. U.S.—U. S. v. Forness, C.C.A.N. Y., 125 F.2d 928, reversing, D.C., 37 F.Supp. 337, and certiorari denied 62 S.Ct. 1293, 316 U.S. 694, 86 L.Ed. 1764.

c. Necessity of Bill of Exceptions

Since the Federal Rules of Civil Procedure, rules 46, 75, went into effect, a bill of exceptions is not necessary to bring up a question for review.

The Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, which provides that formal exceptions to rulings or orders of the court are unnecessary, and rule 75, which regulates the contents and the manner in which the record, on appeal to a circuit court of appeals, shall be made up, filed, and transmitted, have the effect of abolishing bills of exceptions,[84] and such a bill is therefore no longer necessary to bring up for review, a matter which, under the old practice, otherwise would not have been considered a part of the record.

Former practice. Judicial decisions are listed in the appended notes as to the law, under the former practice in the circuit court of appeals, with respect to a bill of exceptions being unnecessary where the error sought to be remedied was apparent on the record;[85] as to such a bill being necessary where the error, in connection with a ruling or decision of the court was not apparent on, and could not be determined from, the record proper;[86] as to a sub-

Under former practice, before the Federal Rules of Civil Procedure went into effect, a request or motion for findings of fact and conclusions of law was no part of the record, and the purported findings and conclusions could be brought up only by bill of exceptions.—Coggins v. Gregorio, C.C.A.N.M., 97 F.2d 948—Baker Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—Kolton v. U. S., C.C.A. Colo., 67 F.2d 741—McLeod v. U. S., C.C.A.Colo., 67 F.2d 740—Greenway v. U. S., C.C.A.Colo., 67 F.2d 738—Davis v. U. S., C.C.A.Colo., 67 F.2d 737.

84. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

In equity, Equity Rules, rule 75, 28 U.S.C.A. § 723, which is substantially followed in the Federal Rules of Civil Procedure, rule 75, did not require a bill of exceptions on an appeal in equity, but the appeal came up on the whole record, prepared as provided in Equity Rules, rule 75.—Century Building & Loan Ass'n v. Wickersham, C.C.A.Tex., 75 F.2d 812—Struett v. Hill, C.C.A.Wash., 269 F. 247—4 C.J. p 187 note 67.

85. U.S.—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419—Montgomery v. Erie R. Co., C.C.A.N.J., 97 F.2d 289—American Gas Mach. Co. v. Willcuts, C.C.A.Minn., 87 F.2d 924—Pryor v. National Lead Co., C.C.A.Mo., 87 F.2d 461—City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 81 F.2d 385, vacating 77 F.2d 891, certiorari granted 56 S.Ct. 946, 298 U.S. 651, 80 L.Ed. 1379, and reversed on other grounds 57 S.Ct. 54, 299 U.S. 45, 81 L.Ed. 30—Chalaire v. Franklin, C.C.A.China, 81 F.2d 105—National Surety Co. of New York v. Ulmen, C.C.A. Mont., 68 F.2d 330, certiorari denied Ulmen v. National Surety Co. of New York, 54 S.Ct. 629, 292 U.S. 624, 78 L.Ed. 1479—Bisbee Linseed Co. v. Paragon Paint & Varnish Corporation, C.C.A.N.Y., 66 F.2d 595, certiorari denied 54 S.Ct. 228, 290 U.S. 701, 78 L.Ed. 602—Kelly v. Allen, C.C.A.Ariz., 49 F.2d 876, certiorari denied Allen v. Kelly, 52 S.Ct. 23, 284 U.S. 642, 76 L.Ed. 546—Maxwell v. Ricks, C.C.A. Wash., 294 F. 255, reversing, D.C., 285 F. 656—In re Soltmann, N.Y., 249 F. 455, 161 C.C.A. 413—East St. Louis Cotton Oil Co. v. Skinner Bros. Mfg. Co., Mo., 249 F. 439, 162 C.C.A. 5—Mound Coal Co. v. Jeffrey Mfg. Co., W.Va., 240 F. 439, 162 C.C.A. 5—Western Union Telegraph Co. v. United States & Mexican Trust Co., Kan., 221 F. 545, 137 C.C.A. 113—Illinois Cent. R. Co. v. Rogers, La., 221 F. 52, 136 C.C.A. 530—Wilson v. Pauly, Ky., 72 F. 129, 18 C.C.A. 475.

4 C.J. p 177 note 22.

Questions not requiring bill of exceptions under former practice:

(1) Facts agreed to by stipulation entered of record.—American Gas Mach. Co. v. Willcuts, C.C.A.Minn., 87 F.2d 924.

(2) Error in permitting voluntary nonsuit before submission of case.—Worthington v. McGough, Ohio, 192 F. 512, 112 C.C.A. 662.

86. U.S.—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419—Widetzky v. Pilgrim Trust Co., C.C.A.Mass., 108 F.2d 647—U. S. v. Flower, C.C.A. Neb., 108 F.2d 298—Baldwin v. Higgins, C.C.A.N.Y., 100 F.2d 405—Mauck v. U. S., C.C.A.Cal., 94 F.2d 745—Reynolds v. Dorrance, C.C.A.Va., 94 F.2d 184—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—Schneider v. Kessler, C.C.A.N.J., 89 F.2d 1001—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 81 F.2d 385, vacating 77 F.2d 891, certiorari granted 56 S.Ct. 946, 298 U.S. 651, 80 L.Ed. 1379, and reversed on other grounds 57 S.Ct. 54, 299 U.S. 45, 81 L.Ed. 30—Maryland Casualty Co. v. First Nat. Bank, C.C.A.Tex., 80 F.2d 274—Baldwin v. Myers, C.C.A.Ark., 75 F.2d 529—Rieke Metal Products Co. v. Finney, C.C.A.Ind., 70 F.2d 509—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1499—McPherson v. Cement Gun Co., C.C.A. Okl., 59 F.2d 889—Lindner Packing & Provision Co. v. Kokrda, C.C.A.Colo., 54 F.2d 31—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—Cavagnaro v. Latimer, C.C.A.N.J., 50 F.2d 898—White v. U. S., C.C.A.Okl., 48 F.2d 178—Wrather v. Dempster Mill Mfg. Co., C.C.A.Tex., 37 F.2d 648—Flanagan v. Benson, C.C.A.Ark., 37 F.2d 69—North River Ins. Co. of New York v. Guaranty State Bank of Farwell, C.C.A.Tex., 30 F.2d 881—Reilly v. Beekman, C.C.A.N.Y., 24 F.2d 791—Vance v. Chapman, C.C.A.Okl., 23 F.2d 914—Stone v. Bank of Whitecastle, C.C.A.La., 18 F.2d 97—Goetzinger v. Woodley, C.C.A.N.C., 17 F.2d 83—Patterson Oil Co. v. Brodhead, C.C.A.Tex., 2 F.2d 598—Texas Co. v. Brilliant Mfg. Co., C.C.A.Pa., 2 F.2d 1—Philpott v. Davis, C.C.A.Neb., 291 F. 370—Pauchet v. Bujac, C.C.A.N.M., 281 F. 962—Gould & Curry Mining Co. v. Douglass, C.C.A.Nev., 273 F. 681, certiorari denied Gould & Curry Mining Co. v. Douglass, 42 S.Ct. 55, 257 U.S. 645, 66 L.Ed. 414—Northern Idaho & Montana Power Co. v. A. L. Jordan Lumber Co., C.C.A. Mont., 262 F. 765—Fraad Talking Mach. Co. v. Empire Mfg. Co., N.Y., 250 F. 618, 162 C.C.A. 634—Mound Coal Co. v. Jeffrey Mfg. Co., W.Va., 233 F. 913, 147 C.C.A. 587, affirming, D.C., Jeffrey Mfg. Co. v. Mound Coal Co., 215 F. 222, rehearing granted Mound Coal Co. v. Jeffrey Mfg. Co., 240 F. 129, 153 C.C.A. 165, and affirmed 240 F. 412, 153 C.C.A. 338—Chicago Great Western R. Co. v. Le Valley, Iowa,

stitute for such a bill, ordinarily, not being sufficient;[87] as to the appellate court, in the absence of a proper bill of exceptions when necessary, considering only errors shown by the judgment roll or record proper,[88] such as the sufficiency of the pleadings and findings of fact to support the verdict or judgment;[89] and as to a failure to file a proper bill generally resulting in an affirmance of the judgment

233 F. 384, 147 C.C.A. 30, denying rehearing 227 F. 1016, 141 C.C.A. 664—Boatmen's Bank v. Trower Bros. Co., Mo., 181 F. 304, 104 C. C.A. 314—Knight v. Illinois Cent. R. Co., Ky., 180 F. 368, 103 C.C.A. 514—National Cash Register Co. v. Salling, Cal., 173 F. 22, 97 C.C.A. 334—Guarantee Co. of North America v. Phenix Ins. Co., Neb., 124 F. 170, 59 C.C.A. 376—Hildreth v. Grandin, N.D., 97 F. 870, 38 C.C.A. 516.
4 C.J. p 180 note 34–p 190 note 91.

Matters requiring bill of exceptions under former practice:

(1) Exceptions taken to rulings.—Ritz Carlton Restaurant & Hotel Co. of Atlantic City v. Gillespie, C.C.A.N. J., 1 F.2d 921—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 55, 63 L.Ed. 419, and affirmed 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246—Paul v. Delaware, L. & W. R. Co., C.C.N.Y., 130 F. 951—4 C.J. p 80 note 60.

(2) Preserving evidence as to rulings, the correctness of which depends on the evidence.—Mound Coal Co. v. Jeffrey Mfg. Co., W.Va., 233 F. 913, 147 C.C.A. 587, affirming, D. C., Jeffrey Mfg. Co., 214 F. 222, rehearing granted Mound Coal Co. v. Jeffrey Mfg. Co., 240 F. 129, 153 C. C.A. 165, and affirmed 240 F. 412, 153 C.C.A. 338—4 C.J. p 192 note 8 [d].

(3) Refusing to dismiss cause.—Schneider v. Kessler, C.C.A.N.J., 89 F.2d 1001.

(4) Rulings on admission or rejection of evidence.—Byrd v. U. S., C. C.A.Kan., 106 F.2d 821, 126 A.L.R. 425—Jenkins v. Boyd, C.C.A.Cal., 6 F.2d 844—Northwest Theatres Co. v. Hanson, C.C.A.Mont., 4 F.2d 471—Ward v. Blake Mfg. Co., Ark., 56 F. 437, 5 C.C.A. 538—Hanson v. Cole, C.C.A.Mo., 266 F. 67—4 C.J. p 186 note 60, p 192 note 9.

(5) Sufficiency of evidence to sustain the verdict, judgment, or findings.—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539—Willamette Iron & Steel Works v. Baltimore & O. R. Co., C.C.A.Or., 29 F.2d 80, affirming, D.C., 25 F.2d 522—Davis v. Ferd-Brenner Lumber Co., C. C.A.La., 4 F.2d 390—Knight v. Illinois Cent. R. Co., Ky., 180 F. 368, 103 C.C.A. 514.

Statute requiring appellate court to disregard technical errors did not permit consideration of rulings, to which objection or exception was not shown by bill of exceptions.—Vance v. Chapman, C.C.A.Okl., 23 F.2d 914.

87. U.S.—Columbus Compress Co. v. U. S. Fidelity & Guaranty Co., Miss., 186 F. 487, 108 C.C.A. 465.
4 C.J. p 205 note 94.

Substitutes held insufficient

(1) Opinion of court.—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, and certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

(2) Statements in assignments of error.—Jack v. Mutual Reserve Fund Life Ass'n, Miss., 113 F. 49, 51 C.C. A. 36—4 C.J. p 208 note 8.

(3) Stipulation between parties.—McCuing v. Bovay, C.C.A.Ark., 60 F. 2d 375—Reilly v. Beekman, C.C.A.N. Y., 24 F.2d 791—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, and reversed on other grounds 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, and as to costs amended 48 S.Ct. 527, 72 L.Ed. 1018, and mandate conformed to 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008—Stelk v. McNulta, Ill., 99 F. 138, 40 C.C.A. 357.

(4) Stipulation by counsel.—Chang Chow v. U. S., C.C.A.Hawaii, 53 F.2d 637, reversed on other grounds 52 S. Ct. 509, 286 U.S. 530, 76 L.Ed. 1272, conformed to, C.C.A., 63 F.2d 375.

(5) Unauthenticated brief of evidence.—City of Thomson v. Louisville & N. R. Co., C.C.A.Ga., 86 F.2d 567.

Substitutes held sufficient

(1) Agreement between counsel that matters mentioned in stipulation be printed in record and constitute the record.—In re Grove, Pa., 180 F. 62, 103 C.C.A. 416, distinguishing Continental Gin Co. v. Murray Co., Del., 162 F. 873, 89 C.C.A. 563.

(2) Finding of facts, or agreed statement of ultimate facts.—Columbus Compress Co. v. U. S. Fidelity & Guaranty Co., Miss., 186 F. 487, 108 C.C.A. 465.

(3) Statement on motion for new trial.—Alexander v. U. S., Idaho, 57 F. 828, 6 C.C.A. 602.

88. U.S.—Schneider v. Kessler, C.C. A.N.J., 97 F.2d 542, dismissing reargument 89 F.2d 1001—McCann v. New York Stock Exchange, C.C.A. N.Y., 88 F.2d 440—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 81 F.2d 385, vacating 77 F.2d 891, certiorari granted 56 S.Ct. 946, 298 U.S. 651, 80 L.Ed. 1379, and reversed on other grounds 57 S.Ct. 54, 299 U.S. 45, 81 L.Ed. 30—Johnson. v. First Nat. Bank & Trust Co. of Tulsa, Okl., C. C.A.Okl., 78 F.2d 535, affirming, D. C., 8 F.Supp. 788—Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, C.C. A.N.M., 77 F.2d 31—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A.Neb., 74 F.2d 160—Harris v. U. S., C.C.A.N.C., 70 F.2d 897, rehearing denied 72 F.2d 982—Domenech v. Berges, C.C.A.Puerto Rico, 69 F.2d 714—Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., C.C.A.Minn., 68 F.2d 787—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F.2d 889—Yangtsze Rapid S. S. Co. Federal Inc., U S. A. v. Deutsch-Asiatische Bank, C.C.A.China, 59 F.2d 8—H. P. Cummings Const. Co. v. Marbleloid Co., C.C.A.N.J., 51 F.2d 906—U. S. v. Stephanidis, C.C.A.N.Y., 47 F.2d 554—Whiteside v. U. S., C.C.A. Or., 35 F.2d 452—Conklin v. Newton, C.C.A.N.Y., 34 F.2d 612, affirming, D.C., 35 F.2d 541—U. S. v. Hill, C.C.A.N.Y., 34 F.2d 133—McFarland v. Central Nat. Bank of Topeka, Kan., C.C.A.Kan., 26 F.2d 890, affirming, D.C., Central Nat. Bank of Topeka, Kan. v. McFarland, 20 F.2d 416, and certiorari denied McFarland v. Central Nat. Bank of Topeka, Kan., 49 S.Ct. 12, 278 U.S. 606, 73 L.Ed. 533—Chicago Great Western R. Co. v. Le Valley, Iowa, 233 F. 384, 147 C.C.A. 320, denying rehearing 227 F. 1016, 141 C.C.A. 664.

89. U.S.—Detroit Trust Co. v. Woodworth, C.C.A.Mich., 110 F.2d 829, certiorari denied 61 S.Ct. 551, 312 U.S. 682, 85 L.Ed. 1120—Reuter v. McCook, C.C.A.Or., 92 F.2d 267—Day-Gormley Co. v. National City Bank of New York, C.C.A.N. Y., 89 F.2d 703, certiorari denied Day-Gormley Leather Co. v. National City Bank of New York, 58 S.Ct. 39, 302 U.S. 719, 82 L.Ed. 555—Joplin Ice Co. v. U. S., C.C.A. Mo., 87 F.2d 174—City of Woodward v. Caldwell, C.C.A.Okl., 86 F. 2d 567—U. S. v. King & Howe, C. C.A.N.Y., 78 F.2d 693—Hallenbeck v. Leimert, C.C.A.Ill., 72 F.2d 480, certiorari granted 55 S.Ct. 406, 294 U.S. 699, 79 L.Ed. 1236, reversed on other grounds 55 S.Ct. 687, 295 U.S. 116, 79 L.Ed. 1339—Becker v.

or decree appealed from, or a dismissal of the appeal,[90] unless errors were apparent on the face of the record proper,[91] or the applicable practice required only a duly authenticated record.[92] The rule requiring a bill of exceptions was held not to apply to errors committed by an intermediate appellate court, since if it had erred in its judgment, such error would appear on the record of that court.[93]

d. Contents, Making, and Settlement of Bill of Exceptions

Bills of exceptions, in a circuit court of appeals were, when required, governed by general rules except as such rules had been modified by statutes or rules of court.

Prior to the adoption of the Federal Rules of Civil Procedure, rules 46 and 75, 28 U.S.C.A. following § 723c, which superseded bills of exceptions, on appeal to a circuit court of appeals, a bill of exceptions in such court, except in so far as controlled by statute or rule of court, was governed by the rules relating to bills of exceptions on appeals in general, as discussed in Appeal and Error §§ 802–909. In the appended notes are decisions which construed and applied the law to bills of exceptions under the former practice,[94] with respect to the origin[95] and office or purpose[96] of a bill of exceptions; and as to its form and completeness;[97] number required;[98] contents in general;[99] incorporation of evidence therein[1] either in condensed and narrative

Evens & Howard Sewer Pipe Co., C.C.A.Mo., 70 F.2d 596—Bisbee Linseed Co. v. Paragon Paint & Varnish Corporation, C.C.A.N.Y., 66 F. 2d 595, certiorari denied 54 S.Ct. 228, 290 U.S. 701, 78 L.Ed. 602—Bogan v. Hynes, C.C.A.Cal., 65 F. 2d 524, certiorari denied 54 S.Ct. 126, 290 U.S. 690, 78 L.Ed 594—Tramel v. U. S., C.C.A.Okl., 56 F.2d 142—Alexander v. Carter Oil Co., C.C.A.Okl., 53 F.2d 964, affirming, D.C., Carter Oil Co. v. Alexander, 50 F.2d 214—U. S. v. 94 Dozen More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D.C., 48 F.2d 378—Thornton v. National City Bank of New York, C.C.A.N.Y., 45 F.2d 127—Standard Oil Co. v. Robins Dry Dock & Repair Co., C.C.A. N.Y., 32 F.2d 182, affirming, D.C., Standard Oil Co., New Jersey, v. Robbins Dry Dock & Repair Co., 25 F.2d 339—Reilly v. Beekman, C.C.A.N.Y., 24 F.2d 791—City of South Houston v. Carman, C.C.A. Tex., 6 F.2d 358, certiorari denied 46 S.Ct. 22, 269 U.S. 563, 70 L.Ed. 413—Ford v. Grimmett, C.C.A.La., 278 F. 140.

4 C.J. p 184 note 36, p 186 note 62.

90. U.S.—Day-Gormley Co. v. National City Bank of New York, C. C.A.N.Y., 89 F.2d 703, certiorari denied Day-Gormley Leather Co. v. National City Bank of New York, 58 S.Ct. 39, 302 U.S. 719, 82 L.Ed. 555—Buckley v. Verhonic, C.C.A. Alaska, 82 F.2d 730—Turner v. Board of Public Instruction of Broward County, C.C.A.Fla., 75 F. 2d 147—Ritter v. Gulf, C. & S. F. Ry. Co., C.C.A.Ark., 56 F.2d 369—P. H. & F. M. Roots Co. v. U. S., C.C.A.Ind., 17 F.2d 337—Ransome Concrete Machinery v. Moody, C.C. A.N.Y., 282 F. 29—Leitner v. U. S., Tex., 254 F. 304, 166 C.C.A. 44—Robertson v. Cockrell, Miss., 209 F. 843, 126 C.C.A. 567.

91. U.S.—Harris v. Moreland Motor Truck Co., C.C.A.Cal., 279 F. 542.

92. U.S.—Yim Kim Lau v. U. S., Hawaii. 52 S.Ct. 508, 286 U.S. 531, 76 L.Ed. 1272, reversing, C.C.A., 53 F.2d 638, and conformed to, C. C.A., 63 F.2d 377—Chang Chow v. U. S., Hawaii, 52 S.Ct. 509, 286 U.S. 530, 76 L.Ed. 1272, reversing, C.C.A., 53 F.2d 637, and conformed to, C.C.A., 63 F.2d 375.

93. U.S.—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U. S. 555, 63 L.Ed. 419.

94. U.S.—Wilmington Steamboat Co. v. Sturgess, C.C.A.N.J., 55 F.2d 831, affirming, D.C., 52 F.2d 210—Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., Ga., 236 F. 910, 150 C.C.A. 172—Seattle v. Methodist Protestant Church Bd. Home Missions, Wash., 138 F. 307, 70 C.C.A. 597—Reliable Incubator & Brooder Co. v. Stahl, Ill., 102 F. 590, 42 C.C.A. 522.

95. U.S.—Duncan v. Landis, Pa., 106 F. 839, 45 C.C.A. 666.

4 C.J. p 215 note 55–p 216 note 60.

96. U.S.—Bunker Hill & Sullivan Min. & Concentrating Co. v. Oberder, Idaho, 79 F. 726, 25 C.C.A. 171—Baker Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—Roberts v. National Sav. Life Ins. Co., C.C.A. Ark., 75 F.2d 530—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C.A.China, 71 F.2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—Cavagnaro v. Latimer, C.C.A.N.J., 50 F.2d 898—Larabee Flour Mills Co. v. Carignano, C.C.A.Okl., 49 F. 2d 151.

97. U.S.—Goodwin v. U. S., C.C.A. Ohio, 295 F. 856—Long v. Atlantic Coast Line R. Co., S.C., 238 F. 919, 151 C.C.A. 653—Copper River & N. W. R. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648—Bunker Hill & Sullivan Mining & Concentrating Co. v. Oberder, Idaho, 79 F. 726, 25 C.C.A. 171.

98. U.S.—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.

4 C.J. p 224 notes 39, 40.

99. U.S.—Watkins v. Madison County Trust & Deposit Co., C.C.A.N.Y., 24 F.2d 370, certiorari denied 48 S.Ct. 562, 277 U.S. 602, 72 L.Ed. 1010—Cincinnati Traction Co. v. Reebusch, Ohio, 192 F. 520, 113 C. C.A. 76—Prichard v. Budd, W.Va., 76 F. 710, 22 C.C.A. 504.

1. U.S.—Lawrence v. Connecticut Mut. Life Ins. Co., C.C.A.Mich., 91 F.2d 381—City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567—Robinson v. U. S., C.C.A.Tex., 84 F. 2d 885—Spann v. Commercial Standard Ins. Co. of Dallas, Tex., C.C.A.Ark., 82 F.2d 593—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505, certiorari denied A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 57 S.Ct. 17, 299 U.S. 555, 81 L.Ed. 409—Panama R. Co. v. Davies, C.C.A. Canal Zone, 82 F.2d 123—U. S. v. Wilson, C.C.A.Kan., 78 F.2d 465—Desha County, Ark., v. Crocker First Nat. Bank, C.C.A.Ark., 72 F. 2d 359—U. S. v. Densmore, C.C.A. Cal., 58 F.2d 748, certiorari denied Densmore v. U. S., 53 S.Ct. 24, 287 U.S. 598, 77 L.Ed. 521—U. S. v. Nolan, C.C.A.Mo., 57 F.2d 190—Lindner Packing & Provision Co. v. Kokrda, C.C.A.Colo., 54 F.2d 31—Christie-Myers Feed Co. v. Cleveland Grain & Milling Co., C.C.A.W. Va., 6 F.2d 797, certiorari denied 46 S.Ct. 348, 270 U.S. 647, 70 L.Ed. 779—James v. Clement, Ga., 211 F. 972, 128 C.C.A. 470—Cincinnati Traction Co. v. Reebusch, Ohio, 192 F. 520, 113 C.C.A. 76—Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., Pa., 151 F. 466, 81 C.C.A. 76—Streeter v. Sanitary Dist. of Chicago, Ill., 133 F. 124, 66 C.C.A. 190—

form;[2] incorporation of instructions;[3] grounds of objection to the action, decision, or ruling complained of,[4] and the taking of exceptions;[5] and as to the construction and operation of the bill.[6]

Settlement of bill in general. Judicial decisions will be found in the notes as to the law, under the former practice, with respect to the settlement of a bill of exceptions,[7] the presentation for allowance or settlement,[8] the authority to settle a bill,[9] and the effect of the judge, authorized to settle, becoming incapacitated or ceasing to hold office;[10] the service or submission of the proposed bill to the adverse

Detroit v. Grummond, Mich., 121 F. 963, 58 C.C.A. 301.

Incorporation of documentary evidence

U.S.—Garrow, MacClain & Garrow v. Bass, C.C.A.Tex., 88 F.2d 574, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538—Kreiner v. U. S., C.C.A.N.Y., 11 F.2d 722, certiorari denied 46 S.Ct. 639, 271 U.S. 688, 70 L.Ed. 1152—Weaver v. Schumpert, La., 168 F. 43, 93 C.C.A.465—Pittsburg Gas & Coke Co. v. Goff-Kirby Coal Co., Pa., 151 F. 466, 81 C.C.A. 76.

Incorporation of stenographer's report or transcript of the evidence.—St. Louis Southwestern Ry. Co. v. Purcell, La., 135 F. 499, 68 C.C.A. 211.

2. U.S.—Hughes v. U. S., C.C.A.Okl., 83 F.2d 76—Lawhon v. U. S., C.C.A.Okl., 82 F.2d 921—Panama R. Co. v. Davies, C.C.A.Canal Zone, 82 F.2d 123—E. K. Wood Lumber Co. v. Andersen, C.C.A.Wash., 81 F.2d 161, certiorari denied 56 S.Ct. 669, 297 U.S. 723, 80 L.Ed. 1007—U. S. v. Johnson, C.C.A.Okl., 70 F.2d 399—Allen Gasoline Co. v. Franklin Fire Ins. Co. of Philadelphia, C.C.A.Or., 65 F.2d 609, certiorari denied 54 S.Ct. 208, 290 U.S. 698, 78 L.Ed. 600—U. S. v. Howard, C.C.A.Fla., 64 F.2d 533, followed in U. S. v. Dunaway, 64 F.2d 535—Coberth v. Wilson, C.C.A.Or., 63 F.2d 156—Yangtsze Rapid S. S. Co., Federal Inc., U. S. A., v. Deutsch-Asiatische Bank, C.C.A.China, 59 F.2d 8—McDonald v. Harding, C.C.A.Alaska, 57 F.2d 119—Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 43 F.2d 355—Hard & Rand v. Biston Coffee Co., C.C.A.Mo., 41 F.2d 625—McHale v. Hull, C.C.A.Ill., 16 F.2d 781—Christie-Myers Feed Co., v. Cleveland Grain & Milling Co., C.C.A.W.Va., 6 F.2d 797, certiorari denied 46 S.Ct. 348, 270 U.S. 647, 70 L.Ed. 779—McNamara v. Cerf, C.C.A.N.Y., 4 F.2d 997.

4 C.J. p 230 note 93.

3. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F.2d 925—Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co., N.H., 159 F. 824, 86 C.C.A. 648.

4 C.J. p 238 note 55[h].

4. U.S.—Thomson v. Boles, C.C.A.Minn., 123 F.2d 487—Taylor v. Merrill, C.C.A.Ariz., 104 F.2d 710, certiorari denied 60 S.Ct. 122, 308 U.S. 593, 84 L.Ed. 496—U. S. v. Blumenthal, C.C.A.Okl., 77 F.2d 219—Merriam v. Huselton, C.C.A.Mo., 45 F.2d 983—Atlantic Coast Line R. Co. v. Linstedt, S.C., 184 F. 36, 106 C.C.A. 238.

4 C.J. p 241 note 75.

5. U.S.—American Distilling Co. v. Wisconsin Liquor Co., C.C.A.Wis., 104 F.2d 582, 123 A.L.R. 739—Great Northern Ry. Co. v. Taulbee, C.C.A.Mont., 92 F.2d 20, certiorari denied Taulbee v. Great Northern R. Co., 58 S.Ct. 476, 302 U.S. 766, 82 L.Ed. 595—Vance v. Chapman, C.C.A.Okl., 23 F.2d 914—Real Estate-Land Title & Trust Co. v. Town of Fairfax, C.C.A.Okl., 84 F.2d 675, affirming, D.C., 11 F.Supp. 459—Newman v. Virginia, T. & C. Steel & Iron Co., N.C., 80 F. 228, 25 C.C.A. 382.

6. U.S.—Krauss Bros. Lumber Co. v. Mellon, Ala., 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008, and costs amended 48 S.Ct. 527, 72 L.Ed. 1018, and mandate conformed to, C.C.A., 30 F.2d 901—Boultbee v. International Paper Co., Me., 229 F. 951, 144 C.C.A. 233—Illinois Cent. R. Co. v. Warren, Miss., 149 F. 658, 79 C.C.A. 350—Penny v. Central Coal & Coke Co., Ark., 138 F. 769, 71 C.C.A. 135—Alaska Commercial Co. v. Dinkelspiel, Alaska, 126 F. 164, 61 C.C.A. 108.

7. U.S.—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—Whiteside v. U. S., C.C.A.Or., 35 F.2d 452.

Nature of act of settlement

U.S.—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—Lindner Packing & Provision Co. v. Kokrda, C.C.A.Colo., 54 F.2d 31—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—In re Bills of Exceptions, C.C.A., 37 F.2d 849—Sanborn v. Bay, S. D., 194 F. 37, 114 C.C.A. 57, affirming, C.C., 189 F. 521.

"Settlement" as tantamount to "approving" or "allowing" the bill.—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—Great Northern Life Ins. Co. v. Dixon, C.C.A.S.D., 22 F.2d 655.

8. U.S.—Moynier v. Welch, C.C.A.Cal., 97 F.2d 471—Marion Steam Shovel Co. v. Reeves, C.C.A.Mo., 76 F.2d 462, granting mandamus, D.C., Bertino v. Marion Steam Shovel Co., 10 F.Supp. 354—In re Bills of Exceptions, C.C.A., 37 F.2d 849—In re Federal Life Ins. Co., Ind., 248 F. 908, 161 C.C.A. 26—Duluth St. R. Co. v. Speaks, Minn., 204 F. 573, 123 C.C.A. 99—Costello v. Ferrarini, C.C.Mass., 165 F. 379.

At chambers

U.S.—In re Federal Life Ins. Co., Ind., 248 F. 908, 161 C.C.A. 26.

Relief from default in failing to present the bill within the time required, due to mistake, inadvertence, surprise, or other excusable neglect.—Roberts v. Bennett, N.Y., 135 F. 748, 68 C.C.A. 386—Western Dredging & Improvement Co., Ill., 116 F. 179, 53 C.C.A. 625.

9. U.S.—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812, certiorari denied 57 S.Ct. 10, 299 U.S. 546, 81 L.Ed. 402—Johnson v. Titanium Pigment Co., C.C.A.Mo., 81 F.2d 529—U. S. v. Payne, C.C.A.Wash., 72 F.2d 593—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712—Farmers' Union Grain Co. v. Hallet & Carey Co., C.C.A.S.D., 22 F.2d 796, denying rehearing 21 F.2d 42, certiorari denied 48 S.Ct. 304, 276 U.S. 623, 72 L.Ed. 737—Norwood v. U. S., C.C.A.N.C., 18 F.2d 577—Bennett v. Riverland Co., C.C.A.Okl., 15 F.2d 491, affirming, D.C., 5 F.2d 676—Western Dredging & Improvement Co. v. Heldmaier, Ill., 116 F. 179, 53 C.C.A. 625.

4 C.J. p 248 note 30.

Delegation of authority

U.S.—Oxford & Coast Line R. Co. v. Union Bank of Richmond, N. C., 153 F. 723, 82 C.C.A. 609.

Effect of proceedings being before different judges

U.S.—Norwood v. U. S., C.C.A.N.C., 18 F.2d 577.

10. U.S.—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—Norwood v. U. S., C.C.A.N.C., 18 F.2d 577—American R. Co. of Porto Rico v. Lopez, C.C.A.Puerto Rico, 3 F.2d 876—Ulmer v. U. S., C.C.A.N.Y., 266 F. 176—Sanborn v. Bay, S.D., 194 F. 37, 114 C.C.A. 57, affirming, C.C., 189 F. 521.

4 C.J. p 251 note 53[c].

party,[11] and the availability of mandamus to compel the trial judge to settle and sign the bill.[12]

Time of settlement. In the appended notes are listed cases which applied the law, under the former practice, with regard to the time of settlement of a bill of exceptions,[13] as within the time prescribed by statute or rule of court,[14] during the term of court at which the judgment was rendered, or within an extension of such time by special order or rule of court,[15] within an extension

11. U.S.—City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567—Russo-Chinese Bank v. National Bank of Commerce, Wash., 187 F. 80, 109 C.C.A. 398.
4 C.J. p 258 note 13.

As not extension of time for presentation
U.S.—McDonald v. Harding, C.C.A. Alaska, 57 F.2d 119—In re Bills of Exceptions, C.C.A., 37 F.2d 849.

12. U.S.—Marion Steam Shovel Co. v. Reeves, C.C.A.Mo., 76 F.2d 462, granting mandamus, D.C., Bertino v. Marion Steam Shovel Co., 10 F. Supp. 354—In re King, C.C.A.Ala., 72 F.2d 925—In re Walsh, C.C.A., 69 F.2d 971—In re Richardson, C. C.A.S.C., 30 F.2d 687—Dunagan v. Appalachian Power Co., C.C.A.W. Va., 29 F.2d 58—U. S. v. Waddill, C.C.A.Va., 286 F. 908—In re Federal Life Ins. Co., Ind., 248 F. 908, 161 C.C.A. 26—Black v. Youmans, Ark., 245 F. 460, 157 C.C.A. 622—Scaife v. Western North Carolina Land Co., N.C., 87 F. 308, 30 C.C. A. 661.

13. U.S.—Rieke Metal Products Co. v. Finney, C.C.A.Ind., 70 F.2d 509—McDonald v. Harding, C.C.A. Alaska, 57 F.2d 119—Holmes v. Ginter Restaurant Co., C.C.A.Mass., 54 F.2d 876—U. S. v. Stephanidis, D.C.N.Y., 46 F.2d 691—In re Bills of Exceptions, C.C.A., 37 F.2d 849—Atchison, T. & S. F. Ry. Co. v. Nichols, C.C.A.Cal., 2 F.2d 12.
D.C.—Joerns v. Irvin, 114 F.2d 458, 72 App.D.C. 170.

14. U.S.—Willcox v. U. S., C.C.A. Fla., 100 F.2d 1002—U. S. v. 7,405.3 Acres of Land in Macon, Clay, and Swain Counties, C.C.A.N.C., 97 F.2d 417—Collins v. Streitz, C.C.A.Ariz., 95 F.2d 430, certiorari denied 59 S. Ct. 67, 305 U.S. 608, 83 L.Ed. 387—Meyer v. Kerrigan, C.C.A.Cal., 67 F.2d 599—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531.
4 C.J. p 269 note 13.

Statutory time mandatory
U.S.—Glick v. U. S., C.C.A.Ill., 93 F. 2d 953.

Disregarding time fixed by rule or order of court, if within statutory time.—U. S. v. 4,405.3 Acres of Land in Macon, Clay, and Swain Counties, C.C.A.N.C., 97 F.2d 417—Howard v. Louisiana & A. Ry. Co., C.C.A.La., 49 F.2d 571.

State statute not applicable
U.S.—Napier v. Northwestern Ohio Ry. & Power Co., C.C.A.Ohio, 2 F.2d 701.

Time fixed by rules of state courts not binding
U.S.—Russo-Chinese Bank v. National Bank of Commerce, Wash., 187 F. 80, 109 C.C.A. 398.
25 C.J. p 825 note 61.

15. U.S.—Saunders v. Commissioner of Internal Revenue, C.C.A., 101 F. 2d 407, affirming, D.C., Lewis v. U. S., 17 F.Supp. 543—Continental Petroleum Co. v. U. S., C.C.A.Okl., 87 F.2d 91, certiorari denied 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812—Young v. N. P. Severin Co., C.C.A.Alaska, 79 F.2d 884, certiorari denied N. P. Severin Co. v. Young, 56 S.Ct. 575, 297 U.S. 711, 80 L.Ed. 998—U. S. v. Jones, C.C.A. Okl., 78 F.2d 1005—Harris v. U. S., C.C.A.N.C., 72 F.2d 982, denying rehearing 70 F.2d 897—Rieke Metal Products Co. v. Finney, C.C. A.Ind., 70 F.2d 509—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A.Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601—U. S. v. Tucker, C.C.A.S.C., 65 F.2d 661—Gardner v. U. S. Fidelity & Guaranty Co., C.C.A.Okl., 60 F.2d 437—McDonald v. Harding, C.C.A.Alaska, 57 F.2d 119—Brady v. Baltimore & O. R. Co., D.C.W.Va., 56 F.2d 231—H. P. Cummings Const. Co. v. Marbleloid Co., C.C.A.N.J., 51 F.2d 906—In re Bills of Exceptions, C.C.A., 37 F.2d 849—Farmers' Union Grain Co. v. Hallet & Carey Co., C.C.A.S.D., 21 F.2d 42, rehearing denied 22 F.2d 796, and certiorari denied 48 S.Ct. 304, 276 U.S. 623, 72 L.Ed. 737—Cavana v. Addison Miller, Inc., C.C.A.Wash., 18 F.2d 278, certiorari denied 48 S.Ct. 28, 275 U.S. 531, 72 L.Ed. 410—Compania L'Union De Paris v. Goldsmith, C.C.A.Puerto Rico, 8 F. 2d 134—Napier v. Northwestern Ohio Ry. & Power Co., C.C.A.Ohio, 2 F.2d 701—Atchison, T. & S. F. Ry. Co. v. Nichols, C.C.A.Cal., 2 F. 2d 12—Ritz Carlton Restaurant & Hotel Co. v. Gillespie, C.C.A.N.J., 1 F.2d 921—Meurer Steel Barrel Co. v. Martin, C.C.A.Pa., 1 F.2d 687—Bertino v. Marion Steam Shovel Co., D.C.Mo., 10 F.Supp. 354, mandamus granted, C.C.A., Marion Steam Shovel Co. v. Reeves, 76 F. 2d 462—Midland Terminal Ry. Co. v. Warinner, C.C.A.Colo., 294 F. 185—Farm Mortgage & Loan Co. v. Willett, D.C.N.Y., 285 F. 42—Lyons v. U. S. Shipping Board Emergency Fleet Corporation, C.C. A.La., 278 F. 144—U. S. v. Thibodeaux, La., 232 F. 91, 146 C.C.A. 283—Minahan v. Grand Trunk Western R. Co., Mich., 138 F. 37, 70 C.C.A. 463—Western Dredging & Improvement Co. v. Heldmaier, Ill., 116 F. 179, 53 C.C.A. 625—Preble v. Bates, C.C.Mass., 40 F. 745.
4 C.J. p 273 notes 41, 43, 48, p 275 note 50.

Lack of authority to allow and sign bill after term or extension thereof
U.S.—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A. Neb., 74 F.2d 160—Harris v. U. S., C.C.A.N.C., 72 F.2d 982, denying rehearing 70 F.2d 897—Davis v. U. S., C.C.A.Colo., 67 F.2d 737—Ritter v. Gulf, C. & S. F. Ry. Co., C. C.A.Ark., 56 F.2d 369—Brady v. Baltimore & O. R. Co., D.C.W.Va., 56 F.2d 231—Imperial Beverage Corporation v. Charles E. Hires Co., D.C.N.Y., 55 F.2d 405—U. S. v. Seale, C.C.A.Tex., 45 F.2d 394—In re Bills of Exceptions, C.C.A., 37 F.2d 849—Great Northern Life Ins. Co. v. Dixon, C.C.A.S.D., 22 F. 2d 655—U. S. v. Konstovich, C.C.A. Va., 17 F.2d 84—Bennett v. Riverland Co., C.C.A.Okl., 15 F.2d 491, affirming, D.C., 5 F.2d 676—Ritz Carlton Restaurant & Hotel Co. of Atlantic City v. Gillespie, C.C.A.N. J., 1 F.2d 921—Greyerbiehl v. Hughes Electric Co., C.C.A.N.D., 294 F. 802, certiorari denied Hughes Electric Co. v. Greyerbiehl, 44 S.Ct. 402, 264 U.S. 589, 68 L.Ed. 864—Chapin v. Irwin, D.C.N.Y., 281 F. 831—Wyss-Thalman Co. v. Maryland Casualty Co., Pa., 193 F. 53, 113 C.C.A. 383—Western Dredging & Improvement Co. v. Heldmaier, Ill., 116 F. 179, 53 C.C.A. 625.

Bill allowed and signed after term or extension a nullity
U.S.—U. S. v. Rasmussen, C.C.A.Okl., 95 F.2d 842—Parker v. U. S., C.C. A.N.C., 62 F.2d 1055—Gardner v. U. S. Fidelity & Guaranty Co., C.C. A.Okl., 60 F.2d 437—Tramel v. U. S., C.C.A.Okl., 56 F.2d 142—Hammond Hotel & Improvement Co. v. Chicago Title & Trust Co., C.C.A. Ind., 55 F.2d 168—Denver Live Stock Commission Co. v. Lee, C.C. A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531—Maryland Casualty Co. v. Citizens' Nat. Bank of Los Angeles, C.C.A.Cal., 8 F.2d 216.
4 C.J. p 287 note 53.

of such time by consent of the parties,[16] or by unusual or extraordinary circumstances;[17] the effect of an intermediate motion as extending the time of settlement;[18] the authority for, and requisites of, granting an extension of time for settlement;[19] the time for applying for[20] and for making[21] the order of extension, the requisites of the order,[22] and the effect thereof;[23] the length of the period of exten-

Allowance or signing nunc pro tunc
U.S.—Imperial Beverage Corporation v. Charles E. Hires Co., D.C.N.Y., 55 F.2d 405—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—McIntyre v. Texas Co., C.C.A.N.Y., 48 F.2d 211—U. S. v. Seale, C.C.A. Tex., 45 F.2d 394—Twohy Bros. Co. v. Kennedy, C.C.A.Ariz., 295 F. 462, error dismissed 44 S.Ct. 636, 265 U.S. 575, 68 L.Ed. 1187—Farm Mortgage & Loan Co. v. Willett, D. C.N.Y., 285 F. 42.

Rule of continuance of matters pending at term's close inapplicable to bill of exceptions.—Baltimore & O. R. Co. v. Baker, C.C.A.W.Va., 58 F.2d 627, certiorari denied 53 S.Ct. 13, 287 U.S. 610, 77 L.Ed. 530—Brady v. Baltimore & O. R. Co., D.C.W. Va., 56 F.2d 231.

16. U.S.—McDonald v. Harding, C.C. A.Alaska, 57 F.2d 119—Exporters of Manufacturers' Products v. Butterworth-Judson Corporation, D.C. N.Y., 265 F. 907—E. I. Du Pont de Nemours & Co. v. Smith, C.C.A. Va., 249 F. 403, 161 C.C.A. 377—Susquehanna Coal Co. v. Casualty Co. of America, D.C.N.Y., 247 F. 137.
4 C.J. p 275 note 49 [b] (1).

Effect of stipulations extending time
U.S.—Dalton v. Bowers, C.C.A.N.Y., 53 F.2d 373—Rutherford v. U. S., D.C.Wash., 32 F.2d 387.

17. U.S.—Wright v. Farmers Nat. Grain Corporation, C.C.A.Ill., 83 F. 2d 666—Marion Steam Shovel Co. v. Reeves, C.C.A.Mo., 76 F.2d 462, granting mandamus, D.C., Bertino v. Marion Steam Shovel Co., 10 F. Supp. 354—Brady v. Baltimore & O. R. Co., D.C.W.Va., 56 F.2d 231—Farm Mortgage & Loan Co. v. Willett, D.C.N.Y., 285 F. 42—Susquehanna Coal Co. v. Casualty Co. of America, D.C.N.Y., 247 F. 137—Western Dredging & Improvement Co. v. Heldmaier, Ill., 116 F. 179, 53 C.C.A. 625.
4 C.J. p 250 notes 42, 44.

"Extraordinary circumstances"
U.S.—Brady v. Baltimore & O. R. Co., D.C.W.Va., 56 F.2d 231.

18. U.S.—Mahoning Valley R. Co. v. O'Hara, Ohio, 196 F. 945, 116 C.C. A. 495—Tullis v. Lake Erie & W. R. Co., Ind., 105 F. 554, 44 C.C.A. 597.
4 C.J. p 278 note 73, p 279 note 76.

Motion for new trial
U.S.—Marion Steam Shovel Co. v. Reeves, C.C.A.Mo., 76 F.2d 462, granting mandamus, D.C., Bertino v. Marion Steam Shovel Co., 10 F. Supp. 354—Cudahy Packing Co. v. City of Omaha, C.C.A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—U. S. Shipping Board Emergency Fleet Corporation v. Galveston Dry Dock & Construction Co., C.C.A.Tex., 13 F. 2d 607, certiorari denied Galveston Dry Dock & Construction Co. v. U. S. Shipping Board Emergency Fleet Corporation, 47 S.Ct. 237, 273 U.S. 725, 71 L.Ed. 860—O. J. Moore Grocer Co. v. Pacific Rice Mills, C. C.A.Iowa, 296 F. 828—Ford Motor Co. v. Hotel Woodward Co., C.C.A.N.Y., 271 F. 625, certiorari denied 41 S.Ct. 537, 256 U.S. 698, 65 L.Ed. 1177, and 42 S.Ct. 590, 259 U.S. 588, 66 L.Ed. 1078.

Motion to vacate judgment
U.S.—Dalton v. Hazelet, Alaska, 182 F. 561, 105 C.C.A. 99.

19. U.S.—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505—U. S. v. Tucker, C.C.A.S.C., 65 F.2d 661—McDonald v. Harding, C.C.A.Alaska, 57 F.2d 119—Dalton v. Bowers, C. C.A.N.Y., 53 F.2d 373—In re Bills of Exceptions, C.C.A., 37 F.2d 849—Cudahy Packing Co. v. City of Omaha, C.C.A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526—Spokane Interstate Fair Ass'n v. Fidelity & Deposit Co. of Maryland, C.C.A. Wash., 15 F.2d 48—U. S. v. Waddill, C.C.A.Va., 286 F. 908—Dalton v. Hazelet, Alaska, 182 F. 561, 105 C.C.A. 99.
4 C.J. p 280 note 96, p 281 note 3.

Further extensions
U.S.—Page v. M. Rich & Bros. Co., C.C.A.Ga., 99 F.2d 607, certiorari denied M. Rich & Bros. Co. v. First Nat. Bank, 59 S.Ct. 787, 306 U.S. 662, 83 L.Ed. 1059—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—E. K. Wood Lumber Co. v. Andersen, C.C.A. Wash., 81 F.2d 161, certiorari denied 56 S.Ct. 669, 297 U.S. 723, 80 L.Ed. 1007—Harris v. U. S., C.C.A. N.C., 70 F.2d 897, rehearing denied 72 F.2d 982—U. S. v. Tucker, C.C.A. S.C., 65 F.2d 661—Imperial Beverage Corporation v. Charles E. Hires Co., D.C.N.Y., 55 F.2d 405—In re Bills of Exceptions, C.C.A., 37 F. 2d 849—Rutherford v. U. S., D.C. Wash., 32 F.2d 387—Watjen v. Louisville Tobacco Warehouse Co., C. C.A.Ky., 29 F.2d 801—Cudahy Packing Co. v. City of Omaha, C.C. A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—Sunderland v. U. S., C.C.A. Neb., 294 F. 811—Stickel v. U. S., C.C.A.Neb., 294 F. 808.

Allowance of appeal as not extension
U.S.—Imperial Beverage Corporation v. Charles E. Hires Co., D.C.N.Y., 55 F.2d 405.

20. U.S.—Wright v. Farmers Nat. Grain Corporation, C.C.A.Ill., 83 F.2d 666.

Excuses for delay in applying
U.S.—Baltimore & O. R. Co. v. Baker, C.C.A.W.Va., 58 F.2d 627, certiorari denied 53 S.Ct. 13, 287 U.S. 610, 77 L.Ed. 530—Brady v. Baltimore & O. R. Co., D.C.W.Va., 56 F.2d 231—U. S. v. Stephanidis, D.C.N.Y., 46 F. 2d 691—Susquehanna Coal Co. v. Casualty Co. of America, D.C.N.Y., 247 F. 137.

21. U.S.—Saunders v. Commissioner of Internal Revenue, C.C.A., 101 F. 2d 407, affirming, D.C., Lewis v. U. S., 17 F.Supp. 543—U. S. v. 7,405.3 Acres of Land in Macon, Clay, and Swain Counties, C.C.A.N.C., 97 F.2d 417—U. S. v. Rasmussen, C.C.A. Okl., 95 F.2d 842—Meyer v. Kerrigan, C.C.A.Cal., 67 F.2d 599—Gardner v. U. S. Fidelity & Guaranty Co., C.C.A.Okl., 60 F.2d 437—Dalton v. Bowers, C.C.A.N.Y., 53 F.2d 373—Witte v. Franklin Fire Ins. Co. of Philadelphia, C.C.A.Mo., 46 F.2d 894, appeal dismissed 50 F.2d 1087—U. S. v. Stephanidis, D.C.N.Y., 46 F.2d 691—U. S. v. Todar, C.C.A. Ind., 41 F.2d 146—Goetzinger v. Woodley, C.C.A.N.C., 17 F.2d 83—Greyerbiehl v. Hughes Electric Co., C.C.A.N.D., 294 F. 802, certiorari denied Hughes Electric Co. v. Greyerbiehl, 44 S.Ct. 402, 264 U. 589, 68 L.Ed. 864—Susquehanna Coal Co. v. Casualty Co. of America, D.C.N.Y., 247 F. 137—Dalton v. Hazelet, Alaska, 182 F. 561, 108 C. C.A. 99—Oxford & Coast Line R. Co. v. Union Bank of Richmond, N. C., 153 F. 723, 82 C.C.A. 609—Koewing v. Wilder, N. Y., 126 F. 472, 61 C.C.A. 312.
4 C.J. p 284 note 23.

In vacation
U.S.—Missouri, K. & T. R. Co. v. Russell, Ind.T., 60 F. 501, 9 C.C.A. 108.

22. U.S.—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505—Koewing v. Wilder, N.Y., 126 F. 472, 61 C.C.A. 312, affirmed 128 F. 558, 63 F. 186.
4 C.J. p 285 notes 29–31.

23. U.S.—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505

sion;[24] and the matter of waiver of the objection that the bill was not presented, settled, and filed within the required time.[25]

Signing and filing. In the notes will be found decisions as to the law relating to the necessity and sufficiency of the signature of the trial judge to the bill of exceptions,[26] and as to the manner[27] and time[28] of filing the bill.

Amending and quashing or striking bill. Judicial decisions, listed below, relate to the power of the trial court[29] or of the appellate court[30] to permit the amendment or correction of a bill of exceptions; the extent and limits of the right to such amendments;[31] the time for the amendment or correction;[32] the incorporation of the amendments in the bill;[33] the remitting of the case to the lower court for correction;[34] and the review of the amendment proceedings or order;[35] and also as to the quashing or striking of a bill of exceptions,[36] and the ef-

—U. S. v. Tucker, C.C.A.S.C., 65 F. 2d 661.

Valid although contrary to court rule which was merely guide for exercise of discretion, not limitation on power.—U. S. v. Tucker, C.C.A.S. C., 65 F.2d 661.

24. U.S.—Wright v. Farmers Nat. Grain Corporation, C.C.A.Ill., 83 F.2d 666—In re Richardson, C.C.A. S.C., 30 F.2d 687—Farmers' Union Grain Co. v. Hallet & Carey Co., C. C.A.S.D., 22 F.2d 796, denying rehearing 21 F.2d 42, and certiorari denied 48 S.Ct. 304, 276 U.S. 623, 72 L.Ed. 737—Koewing v. Wilder, N. Y., 126 F. 472, 61 C.C.A. 312, affirmed 128 F. 558, 63 C.C.A. 186.
4 C.J. p 286 note 47 [a].

25. U.S.—Gardner v. U. S. Fidelity & Guaranty Co., C.C.A.Okl., 60 F. 2d 437—Greyerbiehl v. Hughes Electric Co., C.C.A.N.D., 294 F. 802, certiorari denied Hughes Electric Co. v. Greyerbiehl, 44 S.Ct. 402, 264 U.S. 589, 68 L.Ed. 864—Cirino v. American R. Co. of Porto Rico, C.C.A.Puerto Rico, 291 F. 569—E. I. Du Pont de Nemours & Co. v. Smith, C.C.A.Va., 249 F. 403, 161 C.C.A. 377.
4 C.J. p 293 note 16 [a].

Opposing party's consent ineffectual
U.S.—Gardner v. U. S. Fidelity & Guaranty Co., C.C.A.Okl., 60 F.2d 437.

26. U.S.—Harris v. U. S., C.C.A.N.C., 72 F.2d 982, denying rehearing 70 F.2d 897—Cavagnaro v. Latimer, C. C.A.N.J., 50 F.2d 898—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712—Goetzinger v. Woodley, C.C.A.N.C., 17 F.2d 83—Steen v. First Nat. Bank, C.C.A.Mo., 298 F. 36—Warren v. U. S., Kan., 183 F. 718, 106 C.C.A. 156, 33 L.R.A.,N.S., 800—Oxford & Coast Line R. Co. v. Union Bank of Richmond, N.C., 153 F. 723, 82 C.C.A. 609.
4 C.J. p 293 note 27.

Initialing held sufficient
U.S.—George A. Ohl & Co. v. A. L. Smith Iron Works, Mass., 53 S.Ct. 340, 288 U.S. 170, 77 L.Ed. 681, reversing, C.C.A., 57 F.2d 44, certiorari granted 53 S.Ct. 80, 287 U.S. 586, 77 L.Ed. 512.

Time of signing
U.S.—Cudahy Packing Co. v. City of Omaha, C.C.A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U. S. 601, 73 L.Ed. 530.

Signing order allowing and settling bill not sufficient
U.S.—Dalton v. Hazelet, Alaska, 182 F. 561, 105 C.C.A. 99.
4 C.J. p 295 note 33 [b].

Curing defect as to signature
U.S.—Oxford & Coast Line R. Co. v. Union Bank of Richmond, N.C., 153 F. 723, 82 C.C.A. 609.
4 C.J. p 294 note 31 [d] (2).

Seal unnecessary
U.S.—Copper River & N. W. R. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.

27. U.S.—Preble v. Bates, C.C.Mass., 40 F. 745.

28. U.S.—Sims v. Douglass, C.C.A. Ariz., 82 F.2d 812, certiorari denied 57 S.Ct. 10, 299 U.S. 546, 81 L.Ed. 402—U. S. Shipping Board Merchant Fleet Corporation v. Talmadge, C.C.A., 63 F.2d 886—Imperial Beverage Corporation v. Charles E. Hires Co., D.C.N.Y., 55 F.2d 405—Holmes v. Ginter Restaurant Co., C.C.A.Mass., 54 F.2d 876—Puget Sound Nav. Co. v. Nelson, C.C. A.Wash., 41 F.2d 356, certiorari denied Nelson v. Puget Sound Nav. Co., 51 S.Ct. 76, 282 U.S. 869, 75 L.Ed. 768—Moss v. Sherburne, C.C. A.Mass., 11 F.2d 579, certiorari denied 47 S.Ct. 100, 273 U.S. 710, 71 L.Ed. 852—Merchant v. Dairymen's League, C.C.A.N.J., 294 F. 281—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641—Dalton v. Hazelet, Alaska, 182 F. 561, 105 C. C.A. 99.
4 C.J. p 300 note 82.

Excuse for delay
U.S.—Harrison v. German-American F. Ins. Co., C.C.Iowa, 90 F. 758.
4 C.J. p 300 note 76 [a].

29. U.S.—Jones v. Gill, C.C.A.Mo., 67 F.2d 159, affirming, D.C., Gill v. Jones, 4 F.Supp. 769—Reader v. Haggin, N.Y., 160 F. 909, 88 C.C.A. 91—Rollins v. Board of Com'rs of Gunnison County, Colo., 78 F. 741, 24 C.C.A. 298.

30. U.S.—Johnson v. Titanium Pigment Co., C.C.A.Mo., 81 F.2d 529—Allen Gasoline Co. v. Franklin Fire Ins. Co. of Philadelphia, C.C.A.Or., 65 F.2d 609, certiorari denied 54 S.Ct. 208, 290 U.S. 698, 78 L.Ed. 600—Youngs Rubber Corporation v. C. I. Lee & Co., C.C.A.N.Y., 45 F. 2d 103—Rutherford v. U. S., D.C. Wash., 32 F.2d 387—U. S. v. McPhee, C.C.A.Wash., 31 F.2d 243.
4 C.J. p 315 note 17.

31. U.S.—Johnson v. Titanium Pigment Co., C.C.A.Mo., 81 F.2d 529—Proechel v. U. S., C.C.A.Minn., 59 F.2d 648, certiorari denied 53 S.Ct. 122, 287 U.S. 658, 77 L.Ed. 568—Lamborn v. Northern Jobbing Co., C.C.A.Ill., 15 F.2d 897—Case v. Hall, 94 F. 300, 36 C.C.A. 259, affirming 46 S.W. 180, 2 Ind.T. 8.

Amendment of judge's certificate to bill
U.S.—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812—Lamborn v. Northern Jobbing Co., C.C.A.Ill., 15 F.2d 897.

32. U.S.—Sims v. Douglass, C.C.A. Ariz., 82 F.2d 812—Johnson v. Titanium Pigment Co., C.C.A.Mo., 81 F.2d 529—Davis v. U. S., C.C.A. Colo., 67 F.2d 737—Jones v. Gill, C.C.A.Mo., 67 F.2d 159, affirming, D.C., Gill v. Jones, 4 F.Supp. 769—Bennett v. Riverland Co., C.C.A. Okl., 15 F.2d 491, affirming, D.C., 5 F.2d 676—Pittsburgh Gas & Coke Co. v. Goff-Kirby Coal Co., Pa., 151 F. 466, 81 C.C.A. 76.
4 C.J. p 318 note 43, p 319 note 59.

Nunc pro tunc entry
U.S.—Lamborn v. Northern Jobbing Co., C.C.A.Ill., 15 F.2d 897.

Correction of record as to time of filing bill
U.S.—Reader v. Hoggin, N.Y., 160 F. 909, 88 C.C.A. 91.

33. U.S.—Bronx Fire Ins. Co. v. Wasson, C.C.A.Kan., 62 F.2d 556.

34. U.S.—U. S. v. Howard, C.C.A. Fla., 64 F.2d 533, followed in U. S. v. Dunaway, 64 F.2d 535.

35. U.S.—Honey v. Chicago, B. & Q. R. Co., Iowa, 82 F. 773, 27 C.C. A. 262.

36. U.S.—Saunders v. Commissioner of Internal Revenue, C.C.A., 101 F. 2d 407, affirming, D.C., Lewis v. U. S., 17 F.Supp. 543—Collins v. Streitz, C.C.A.Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387—Continental Petroleum Co. v. U. S., C.C.A.Okl., 87 F.2d 91, certiorari denied 57 S.

fect thereof.[37]

e. Contents, Making, and Settlement of Statement of Case

Where the questions presented can be determined without an examination of the evidence and proceedings, the parties may prepare and sign an agreed statement of the case to be approved by the court; and, generally, a statement of the evidence, necessary to the decision of the particular errors relied on, should be prepared and settled.

Under the Federal Rules of Civil Procedure, rule 76, 28 U.S.C.A. following § 723c, which has adopted Equity Rules, rule 77, with appropriate modifications,[38] if the questions presented can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and setting forth as many of the facts as are essential to a decision of the questions by the appellate court.[39] The agreed statement must include a concise statement of the points to be relied on by appellant,[40] and, if it conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, must be approved by the district court,[41] but the filing and approval of the statement must take place while the court below retains jurisdiction of the case.[42]

Statement of evidence. In designating the evidence to be included in the transcript of the record, as explained infra subdivision f of this section, the testimony of witnesses may be designated, under Federal Rules of Civil Procedure, rule 75 (c), either in narrative form, or in question and answer form;[43] and a party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony;[44] if in narrative form, any other party to the appeal, if dissatisfied with the narrative statement, may require the testimony in question and answer form to be substituted for all or a part thereof.[45] If any part of the evi-

Ct. 670, 300 U.S. 679, 81 L.Ed. 883 —City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812, certiorari denied 57 S.Ct. 10, 299 U.S. 546, 81 L.Ed. 402—Buckley v. Verhonic, C.C.A.Alaska, 82 F.2d 730 —La Grotta v. U. S., C.C.A.Neb., 77 F.2d 673, 103 A.L.R. 527, certiorari denied Quigley v. U. S., 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447 —U. S. v. Payne, C.C.A.Wash., 72 F.2d 593—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467—Coberth v. Wilson, C. C.A.Or., 63 F.2d 156—Indemnity Ins. Co. of North America v. Levering, C.C.A.Cal., 59 F.2d 719—Union Indemnity Co. v. Vetter, C.C.A. Fla., 40 F.2d 606—U. S. v. Meadows, C.C.A.Colo., 29 F.2d 739—National Veneer Co. v. Langley, C.C.A.N.C., 29 F.2d 403—Windisch v. Western Casualty Co., C.C.A.Tex., 29 F.2d 201—Ætna Ins. Co. of Hartford, Conn., v. Licking Valley Milling Co., C.C.A.Ky., 19 F.2d 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415—U. S. Shipping Board Emergency Fleet Corporation v. Atlantic Corporation, C.C. A.Mass., 16 F.2d 27, dismissing error, D.C., 5 F.2d 529—Oregon-American Lumber Co. v. Simpson, C.C. A.Wash., 8 F.2d 946—Southwest Metals Co. v. Gomez, C.C.A.Ariz., 4 F.2d 215, 39 A.L.R. 1416—Czizek v. Western Union Telegraph Co., C.C. A.Idaho, 272 F. 223—St. Louis Southwestern R. Co. v. Purcell, La., 135 F. 499, 68 C.C.A. 211.

D.C.—Joerns v. Irvin, 114 F.2d 458, 72 App.D.C. 170.

By court ex mero motu

U.S.—Osborn v. U. S., C.C.A.N.C., 50 F.2d 712.

37. U.S.—U. S. v. Payne, C.C.A. Wash., 72 F.2d 593—U. S. v. Konstovich, C.C.A.Va., 17 F.2d 84—U. S. Shipping Board Emergency Fleet Corporation v. Atlantic Corporation, C.C.A.Mass., 16 F.2d 27, dismissing error, D.C., 5 F.2d 529—Atchison, T. & S. F. Ry. Co. v. Nichols, C.C. A.Cal., 2 F.2d 12.

Particular assignments not considered

U.S.—U. S. v. Jones, C.C.A.Okl., 78 F.2d 1005—U. S. v. Konstovich, C. C.A.Va., 17 F.2d 84.

Dismissal of appeal or affirmance

U.S.—Sims v. Douglass, C.C.A.Ariz., 82 F.2d 812, certiorari denied 57 S. Ct. 10, 299 U.S. 546, 81 L.Ed. 402 —Walton v. Southern Pac. Co., C.C. A.Cal., 53 F.2d 63—National Veneer Co. v. Langley, C.C.A.N.C., 29 F.2d 403—Windisch v. Western Casualty Co., C.C.A.Tex., 29 F.2d 201.

Review of questions raised by the record proper

U.S.—Moynier v. Welch, C.C.A.Cal., 97 F.2d 471.

38. **The purpose of** Equity Rules, rule 77 was "to permit a succinct statement of the record so as to show how the questions to be submitted to the appellate court arose and were decided in the District Court." —Barnett v. U. S., C.C.A.Cal., 82 F.2d 765, 767, certiorari denied 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402, rehearing denied 57 S.Ct. 113, 299 U.S. 620, 81 L.Ed. 457.

39. U.S.—Graham v. Carr, C.C.A. Cal., 112 F.2d 908—U. S. v. Gilbertson, C.C.A.Wis., 111 F.2d 978.

Practice commended

The practice of submitting case to circuit court of appeals on an agreed statement of the case filed pursuant to Fed Rules of Civ. Proc., rule 76, is to be commended.—In re Podolsky, C.C.A.Pa., 115 F.2d 965, reversing, D.C., 34 F.Supp. 803.

Under Equity Rules, rule 77, in so far as agreed statement purported to state propositions of law to be decided by circuit court of appeals on appeal, it was disregarded.—Barnett v. U. S., C.C.A.Cal., 82 F.2d 765, certiorari denied 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402, rehearing denied 57 S.Ct. 113, 299 U.S. 620, 81 L.Ed. 457.

40. U.S.—Graham v. Carr, C.C.A. Cal., 112 F.2d 908.

41. U.S.—Graham v. Carr, supra.

Recitals which are not approved by the district court and are expressly disapproved form no part of the "record."—Graham v. Carr, supra.

42. U.S.—Pierce Arrow Sales Corporation v. U. S., C.C.A.Mass., 32 F.2d 849.

43. U.S.—Sonken-Galamba v. Atchison T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909.

44. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

45. U.S.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909.

Duty on appellant

Appellant has the duty to comply with designation of appellee, since a thing cannot be "substituted" for something else unless that for which the substitution is made is taken out and that which is substituted is inserted in its place.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., supra.

dence has been omitted in the designation by appellant, it is the duty of appellee to prepare and file the omitted parts.[46]

Under Equity Rules, rule 75, 28 U.S.C.A. § 723, which has been substantially embraced in the Federal Rules of Civil Procedure, § 75, 28 U.S.C.A. following § 723c, a statement of the evidence to be included in the record, as essential to the matters to be decided on the appeal,[47] was required to be stated in simple and condensed form,[48] and the testimony of witnesses stated in narrative form except that, if either party desired it, and the court or judge so directed, any part of the testimony could be reproduced in the exact words of the witness.[49] The statement was not confined to the testimony of witnesses,[50] and was required to be lodged in the clerk's office for examination by the other parties who should be notified thereof,[51] and presented to the court or judge for allowance, approval, and certification.[52] In approving the statement of evidence, the court or judge was not limited to the term in which the judgment was entered or to an extension thereof,[53] but, where the appellate court enlarged the time for perfecting the appeal by the filing of a return, the district court retained jurisdiction to approve the statement only until the ex-

Manner of incorporating additional parts
The substituted parts of the evidence must be incorporated in the record at the point at which the substitution is to be made, and an additional part of testimony of a given witness, where a part has been narrated, should follow immediately the narration, and additional parts, where there has been no narration, should follow the record as designated by appellant.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., supra.

46. U.S.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., supra.

47. U.S.—Wright v. McLaury, C.C.A.Ill., 81 F.2d 96—Phillips v. Governor & Co. of Adventurers of England Trading into Hudson's Bay, C.C.A.Nev., 79 F.2d 971—Sommer v. Rotary Lift Co., C.C.A.Cal., 66 F.2d 809—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918—Kelly v. Central Hanover Bank & Trust Co., D.C.N.Y., 14 F.Supp. 346, case remanded, C.C.A., 85 F.2d 61.

Consolidation of statements
Where appellee's proposed statement of evidence was not indispensable to decision on appeal, appellee's motions to consolidate statements of appellee and appellant and to vacate trial court's order requiring appellee to defray expense of printing its proposed statement must be denied, although appellee's proposed statement may have materially aided appellate court in consideration of the case.—Phillips v. Governor & Co. of Adventurers of England Trading into Hudson's Bay, C.C.A.Nev., 79 F.2d 971.

48. U.S.—Ruth v. Climax Molybdenum Co., C.C.A.Colo., 93 F.2d 699—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133—U. S. v. Great Northern Ry. Co., C.C.A.Wash., 254 F. 522.

Circuit court of appeals could decline to consider evidence when not condensed as required by equity rule.—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133—Sommer v. Rotary Lift Co., C.C.A.Cal., 66 F.2d 809—Moss v. Gilchrist-Fordney Co., C.C.A.Miss., 24 F.2d 931.

Rules as law
Equity rules regarding condensation of testimony on appeal had force of law, and could not be overridden by order of district judge or by consent of parties.—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133.

49. U.S.—Ruth v. Climax Molybdenum Co., C.C.A.Colo., 93 F.2d 699—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., C.C.A.Ill., 16 F.2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316, and reversed on other grounds 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318—Buckeye Cotton Oil Co. v. Ragland, C.C.A.Miss., 11 F.2d 231.

This excepting clause was intended to have only a limited operation, and to be applied in the course of the required condensation and narration, as special occasion therefor arose. Its purpose was to provide for the exact reproduction of such parts of the testimony as need to be examined in that form to be rightly appreciated.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F.2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316.

Should be stated in first person
U.S.—Buckley v. U. S., C.C.A.Ohio, 33 F.2d 713.

50. U.S.—Royalty Service Corporation v. City of Los Angeles, C.C.A.Cal., 98 F.2d 551.

Applied to exhibits
U.S.—Ruth v. Climax Molybdenum Co., C.C.A.Colo., 93 F.2d 699—Hughes v. Reed, C.C.A.Okl., 46 F.2d 435.

Affidavits and depositions supporting order appealed from should be incorporated in statement of evidence on appeal duly allowed and authenticated by judge.—Title & Trust Co. v. Wernich, C.C.A.Or., 68 F.2d 811.

51. U.S.—In re Windsor Square Development Co., C.C.A.Ariz., 91 F.2d 493.

52. U.S.—Title & Trust Co. v. Wernich, C.C.A.Or., 68 F.2d 811.

Approval by other than trial judge
U.S.—In re Windsor Square Development, C.C.A.Ariz., 91 F.2d 493.

Necessity of judge's certificate
Portions of evidence, certified by district court clerk as addenda to record of evidence taken before special master, but not made part of record by judge's certificate, could not be considered by circuit court of appeals.—Aberly v. Craven County, N. C., C.C.A.N.C., 70 F.2d 52.

Method of adjusting differences
U.S.—Selway v. Fourth Nat. Bank, C.C.A.Ohio, 283 F. 783.

53. U.S.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F.2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316—Century Building & Loan Ass'n v. Wickersham, C.C.A.Tex., 75 F.2d 812—Alliance Securities Co. v. Killits, C.C.A.Ohio, 67 F.2d 480—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487—Sussex Land & Live Stock Co. v. Midwest Refining Co., C.C.A.Wyo., 294 F. 597, affirming, D.C., 276 F. 932—Struett v. Hill, C.C.A.Wash., 269 F. 247—In re General Equity Rule 75, 222 F. 884, 138 C.C.A. 574.

Previous approval of appeal bond and signing of citation did not affect the power of the district court to settle a statement of evidence on an appeal in equity, under Equity Rules, rule 75, not limiting time for settlement of statement of evidence.—Struett v. Hill, C.C.A.Wash., 269 F. 247—In re General Equity Rule 75, 222 F. 884, 138 C.C.A. 574.

piration of the extension period.[54]

f. Making, Form, and Requisites of Transcript

It is primarily the duty of the appellant to require a transcript of the record, in the court below, to be prepared for the appellate court, which transcript shall contain as much of the matter and proceedings as may be necessary to a review of the alleged errors.

The primary responsibility for preparation of a proper transcript rests on appellant, it being his duty to see that a proper and correct transcript of the record, sufficient to present the questions sought to be reviewed, is brought to the appellate court;[55] and a reasonable degree of care and efficiency should be employed in transcribing the record.[56] By the Federal Rules of Civil Procedure, rule 75 (a), 28 U.S.C.A. following § 723c, appellant is required to serve on the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal,[57] the designation to be served and filed promptly after the appeal is taken.[58] Under the Federal Rules of Civil Procedure, rule 75 (b), if the trial has been stenographically reported, appellant must file two copies of the reporter's transcript of the evidence or proceedings included in his designation,[59] unless such a transcript is unavailable, as where appellant sues in forma pauperis,[60] in which case a record of the evidence and proceedings may be created by the assent of the parties, or by the order of the judge in settling disputes.[61] If appellant's designation includes only certain portions of the record, proceedings, and evidence, appellee, within ten days thereafter, may properly designate additional portions thereof to be included,[62] and, if the evidence or proceedings have been stenographically reported, appellant must file two copies of such additional parts of the reporter's transcript as appellee may need to enable him to designate and file the parts he desires to have added to the record,[63] and, when so filed, they become a part of the records of the district court.[64] If there is a reporter's transcript, it may be re-

54. U.S.—Alliance Securities Co. v. Killits, C.C.A.Ohio, 67 F.2d 480.

55. U.S.—Drybrough v. Ware, C.C. A.Ky., 111 F.2d 548—Mason v. Citizens' Nat. Trust & Savings Bank of Los Angeles, C.C.A.Cal., 71 F.2d 246—Pulaski - Lonoke Drainage Dist. v. Missouri Pac. R. Co., C.C. A.Ark., 44 F.2d 899, reversed on other grounds 47 F.2d 1085—Milton v. H. C. Stone Lumber Co., C. C.A.Ill., 36 F.2d 589, affirming, D. C., 36 F.2d 583—Rodgers v. U. S., Pa., 152 F. 426, 81 C.C.A. 568—Teller v. U. S., Colo., 111 F. 119, 49 C.C.A. 263.

It is the duty of counsel for appellant to furnish the circuit court of appeals with a full and complete transcript of the record.—Dalton v. Moore, Alaska, 141 F. 311, 72 C.C.A. 459.

56. U.S.—Cosme v. Marquez, C.C.A. Puerto Rico, 94 F.2d 908.

Translating pleadings and records which are in foreign language.—Cosme v. Marquez, supra.

57. U.S.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F. 2d 44—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909.

Former practice, counsel informing clerk.—Cunningham v. German Ins. Bank, Ky., 103 F. 932, 43 C.C.A. 377.

"Record," within the meaning of these rules, means the writings filed with the district clerk as pleadings, process, formal orders of the judge, and such other writings as have always been considered parts of the record in a law or equity case in the district court.—Middleton v. Hartford Accident & Indemnity Co., C.C. A.Tex., 119 F.2d 721.

"Proceedings," include the oral motions and judgments during the trial, the rulings on evidence, the selection of the jury where there is one, the charges and refusals to charge, and the many occurrences of a trial which are not entered on the minutes of the court or otherwise reduced to record form.—Middleton v. Hartford Accident & Indemnity Co., supra.

58. U.S.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F. 2d 44.

Extension of time

Under former practice, where parties orally agreed to extend time for negotiations respecting contents of record on appeal, the court could thereafter grant extension of agreement.—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487.

59. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C. Mo., 36 F.Supp. 909.

"Stenographically reported"

A trial is not "stenographically reported" within the federal rule unless the stenographer was appointed under the rule governing appointment of stenographers, or unless he was agreed on by the parties.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

60. U.S.—Middleton v. Hartford Accident & Indemnity Co., supra.

Exception to general rule

The general rule that appellant must furnish and use a reporter's transcript is subject to a special statutory exception, in 28 U.S.C.A. § 832, of a poor person who cannot obtain such a transcript.—Middleton v. Hartford Accident & Indemnity Co., supra.

61. U.S.—Middleton v. Hartford Accident & Indemnity Co., supra.

62. U.S.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F. 2d 44—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909—In re Joshua Hendy Iron Works, D.C.Cal., 2 F.R.D. 244.

The purpose of Fed.Rules of Civ. Proc., rule 75, relating to the record on appeal, "is to insure that enough of the proceedings in the trial court be designated for inclusion, from the standpoint of appellant and appellee, to adequately present on appeal the points of error relied on by appellant."—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633.

63. U.S.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909—In re Joshua Hendy Iron Works, D.C.Cal., 2 F.R.D. 244.

64. U.S.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., D.C.Mo., 36 F.Supp. 909.

Purposes of two copies

One of the copies so filed is for the use of other parties and for use in the appellate court in printing the record. The second of the two copies becomes a permanent "record" in the district court.—Sonken-Galamba v. Atchison, T. & S. F. Ry. Co., supra.

quired to be used by either party, in whole or in part, subject to correction by the judge,[65] but this does not mean that always the entire transcript is or can be required to be used, but only the parts essential to the questions to be decided.[66]

Substantially the same practice obtained under Equity Rules, rule 75, 28 U.S.C.A. § 723, which required appellant to file with the clerk of the court from which the appeal was taken a præcipe indicating the portions of the record to be incorporated in the transcript on appeal,[67] and it was the duty of the clerk to follow the præcipe as to the portions of the papers and proceedings to be returned.[68] If a præcipe was not filed, it was the clerk's duty to make out and certify a complete transcript of everything necessary to the hearing in the appellate court,[69] and, if he was in doubt as to what papers were required, he could properly demand a præcipe from appellant.[70]

Statement of points relied on. Under the Federal Rules of Civil Procedure, rule 75 (d), if appellant does not designate the complete record and all the proceedings and evidence in the case, he must serve with his designation a concise statement of the points on which he intends to rely on the appeal;[71] otherwise no question is raised for review.[72]

Scope and sufficiency of transcript. The transcript must contain all the matters and proceedings necessary to a determination of the questions involved in the appeal,[73] and should not include matters which are not necessary to a clear understanding of the case[74] or be encumbered with useless repetitions and irrelevant matter.[75] Subject to these qualifications, if necessary for purposes of review, it is the duty of appellant to furnish the reviewing court with a full and complete transcript of the whole record of the court below,[76] including copies of the material pleadings,[77] and of the verdict and the judgment or final order appealed from.[78] The papers and documents incorporated in the transcript of the record on appeal should be arranged in chronological order.[79]

Original papers. Under the Federal Rules of Civil Procedure, rule 75 (i), whenever the district

65. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

66. U.S.—Middleton v. Hartford Accident & Indemnity Co., supra.

67. U.S.—Greene v. Hulse, C.C.A., 33 F.2d 121—Wade v. Leach, C.C. A.Ga., 2 F.2d 367—Teller v. U. S., Colo., 111 F. 119, 49 C.C.A. 263.

Equity Rules, rule 75, prescribed the procedure for drawing onto the record a condensed statement of the trial proceedings, and contemplated one statement only.—First Nat. Bank v. Bonner, C.C.A.Okl., 74 F.2d 139.

68. U.S.—Teller v. U. S., Colo., 111 F. 119, 49 C.C.A. 263.

69. U.S.—Teller v. U. S., supra.

70. U.S.—Burnham v. North Chicago St. R. Co., Ill., 87 F. 168, 30 C.C.A. 594.

71. U.S.—Kuper v. Betzer, C.C.A.S. D., 127 F.2d 84—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F.2d 44—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633.

72. U.S.—Kuper v. Betzer, C.C.A.S. D., 127 F.2d 84.

Questions presented for review generally see infra subdivision k of this section.

73. U.S.—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—Eteenpain Co-op. Soc. v. Lillback, C.C.A.Mass., 18 F.2d 912—In re Friedman, N.Y., 161 F. 260, 88 C.C.A. 306, affirming, D.C., 153 F. 939—Rodgers v. U. S., Pa., 152 F. 426, 81 C.C.A. 568—Cunningham v. German Ins. Bank, Ky., 103 F. 932, 43 C.C.A. 377.

A transcript is sufficient if its contents show jurisdiction and as much of the record as is necessary for the consideration of the questions presented for determination.—Kaw Valley Drainage Dist. of Wyandotte County v. Union Pac. R. Co., Kan., 163 F. 836, 90 C.C.A. 320—4 C.J. p 425 note 84[a].

"Short record"

Where a so-called short record presents all the facts on which the district court acted in granting a motion to dismiss a complaint, it is sufficient to permit of review of the judgment entered, even though it is a short record.—Karl Kiefer Mach. Co. v. U. S. Bottlers Machinery Co., C.C.A.Ill., 113 F.2d 356, reversing, D. C., 27 F.Supp. 300, motion overruled, C.C.A., 108 F.2d 469.

As determined by act of congress or rule of court

What shall constitute the transcript on which a case may be carried to the circuit court of appeals is a matter regulated by the acts of congress and the rules and regulations of that court, which the court below has no power to change, and it cannot overhaul the record, after final determination, without the consent of appellee for the convenience of appellant or to save him expense. —Smith v. McIntyre, C.C.Ohio, 84 F. 721.

74. U.S.—Cunningham v. German Ins. Bank, Ky., 103 F. 932, 43 C.C. A. 377—Tuttle v. Claflin, N.Y., 88 F. 122, 31 C.C.A. 419.

Parts of depositions not called for by either party.—Blanks v. Klein, Miss., 49 F. 1, 1 C.C.A. 254.

75. U.S.—Burnham v. North Chicago St. R. Co., Ill., 87 F. 168, 30 C. C.A. 594.

76. U.S.—Sublette v. Servel, C.C.A. Ark., 124 F.2d 516—Dalton v. Moore, Alaska, 141 F. 311, 72 C.C. A. 459, certiorari denied 26 S.Ct. 757, 200 U.S. 619, 50 L.Ed. 623—Teller v. U. S., Colo., 111 F. 119, 49 C.C.A. 263.

77. U.S.—U. S. v. Gilbertson, C.C.A. Wis., 111 F.2d 978—Gregory v. Pike, Mass., 64 F. 415, 12 C.C.A. 202.

In case of cross appeal, the transcript, for use of both appeals, should include the cross bill and the proceedings and proofs thereon, although the party filing the cross bill was dismissed as a defendant in the original bill and is not named as appellee in the appeal of the original complainant.—Gregory v. Pike, supra.

A rejected pleading in an equity case under former practice could not be made a part of the record by a bill of exceptions, but the clerk could be directed to certify a copy of the rejected pleading with the transcript. —Southern Bldg., & Loan Ass'n v. Carey, C.C.Tenn., 117 F. 325, affirmed 128 F. 1022, 62 C.C.A. 684.

78. U.S.—Mackay v. Fox, Alaska, 121 F. 487, 57 C.C.A. 439.
4 C.J. p 435 note 70[c] (1).

79. U.S.—Eteenpain Co-op. Soc. v. Lillback, C.C.A.Mass., 18 F.2d 912.

court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to such court in lieu of copies, it may make such order therefor as it may deem proper.[80]

Supplemental transcript. Under the Federal Rules of Civil Procedure, rule 75 (h), if any material matter is omitted from the record by error or mistake or is misstated therein, the circuit court of appeals, on a proper suggestion or of its own motion, may, if necessary, direct that a supplemental record be certified by the clerk of the district court.[81]

Transcripts on separate appeals and cross appeals. Under the Federal Rules of Civil Procedure, rule 75 (k), 28 U.S.C.A. following § 723c, where more than one appeal is taken to the same court from the same judgment, a single record on appeal should be prepared containing all the matter designated or agreed on by the parties, without duplication;[82] and, even under the former practice, the record settled on a former appeal could be made a part of the record and used on a second appeal in the same case, without a restatement of the case.[83] On a consolidated appeal from several judgments, a transcript containing only one of such judgments has been held erroneous where it violates a rule of court.[84] Where a cause has been remanded by the appellate court for a new trial, and an appeal is taken from the judgment or decree rendered at such new trial, the transcript of the record need contain only that part of the proceedings which has taken place subsequent to the remandment of the cause.[85]

g. Authentication and Certification

The transcript of the record must be authenticated or certified, usually by the judge of the trial court, in the manner and form required by statute or rule of court.

It is a general requirement that the transcript of the record on appeal, including matters contained therein, must be properly authenticated or certified; otherwise it cannot be considered by the ap-

80. **Practice under court rules**

(1) Appellate court rules, requiring the record to contain all necessary papers and exhibits, apply only to printed or written documents, and, where it is impossible to reproduce such papers without great inconvenience, they can by a proper order be sent up in the original.—Stephenson v. National Bank of Winter Haven, C.C.A.Fla., 39 F.2d 16—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, and reversed on other grounds 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, amended 48 S.Ct. 527, 72 L.Ed. 1018, conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008.

(2) Such an order does not dispense with requirement that the papers be copied in record, and a record merely referring to documents, filed in evidence or for identification, but not printed in record or ordered sent up in original, violates such rules.—Stephenson v. National Bank of Winter Haven, C.C.A.Fla., 39 F.2d 16.

(3) The judge is not authorized to make an order incorporating original papers introduced in evidence in the record, instead of copies, merely for the purpose of saving expense to the parties, nor unless in his opinion an inspection by the appellate court of the originals, as distinguished from authenticated copies, is either necessary or will be useful or aidful in the determination of the appeal.—Dowagiac Mfg. Co. v. Brennan & Co., C.C.Ky., 156 F. 213.

81. U.S.—McLean v. Federal Land Bank of Omaha, C.C.A.Iowa, 130 F.2d 123—Drybrough v. Ware, C.C.A.Ky., 111 F.2d 548.

Supplement to include omitted proceedings of state probate court

U.S.—McLean v. Federal Land Bank of Omaha, supra.

Motion for supplemental record denied

Appellants' motion for supplemental and corrected record, occasioned by a statement in appellees' brief to the effect that it was appellants' duty to support appellants' motion for a determination of appellants' rights under issues framed by the pleadings by evidence and to incorporate such evidence in the transcript, would be denied, where there was no contention by either side that such evidence had been introduced.—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F.2d 202.

Supplementary transcript of omitted evidence, under Equity Rules, rule 75.—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918, modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551.

Amending and correcting defects and omissions generally see infra subdivision i of this section.

82. U.S.—Miller v. U. S., C.C.A.Ill., 117 F.2d 256, adopting 114 F.2d 267, reversing, D.C., 24 F.Supp. 958, certiorari denied 61 S.Ct. 1114, 313 U.S. 591, 85 L.Ed. 1545.

Permitting record to stand after redesignation of contents

Where circuit court of appeals, on plaintiff's appeal reversed judgment dismissing the suit after vacation of judgment for plaintiff, and the government then continued with its appeal from original judgment for plaintiff, court permitted the printed record presented in plaintiff's appeal to stand as a record on government's appeal, after redesignation of its contents and certification by clerk of district court.—Miller v. U. S., supra.

83. U.S.—Stennick v. Jones, C.C.A.Or., 282 F. 161.

Record certified by trial judge in connection with appeal by defendants as against whom bill was dismissed could be considered on plaintiff's appeal.—Aberly v. Craven County, N. C., C.C.A.N.C., 70 F.2d 52.

A circuit court of appeals could not make its own record for the hearing of a case on appeal by authorizing the withdrawal from its files of the record on a former appeal, and permitting it to be refiled as a part of the record on a subsequent appeal in the same case.—Merriman v. Chicago, D. & V. R. Co., Ill., 120 F. 240, 56 C.C.A. 536.

84. U.S.—Gutierrez v. Longpre, C.C.A.Puerto Rico, 84 F.2d 43.

85. U.S.—Nashua & L. R. Corp. v. Boston & L. R. Corp., Mass., 61 F. 237, 9 C.C.A. 468.

pellate court,[86] or the judgment will be affirmed.[87] This authentication or certification applies to evidence made a part of the record,[88] and to papers included in, referred to, or annexed to the transcript.[89] The authentication or certification usually should be made by the trial judge,[90] and not by the stenographer who reported the case,[91] except that a stenographer, who has been properly appointed or agreed on, may certify to the correctness of his transcript.[92]

The authentication or certification must, in form and substance, be in conformity with the requirements of the applicable statute or rule of court,[93] such as that the certificate should affirm that the transcript contains a full, true, and complete copy of all of the proceedings,[94] although it is not necessary that the certificate should be framed in the exact language of the statute or rule.[95]

h. Printing, Transmission, and Filing of Record in Appellate Court

(1) Printing
(2) Transmission and filing

(1) Printing

The part of the record to be printed, the manner of printing, and the supervision thereof, are controlled by the rules of the court to which the appeal is taken; but the type, paper, and dimensions of the printed matter must conform to the rules of the supreme court relating to records on appeal.

Under the provisions of the Federal Rules of Civil Procedure, rule 75 (l), 28 U.S.C.A. following § 723c, the rules of the circuit court of appeals to

86. U.S.—Mayfield v. Ætna Life Ins. Co., C.C.A.Tex., 100 F.2d 199—Anderson v. Odisho, C.C.A. Cal., 90 F.2d 299, certiorari denied 58 S.Ct. 48, 302 U.S. 687, 82 L.Ed. 530, rehearing denied 58 S.Ct. 137, 302 U. S. 776, 82 L.Ed. 601—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1499—North River Ins. Co. of New York v. Guaranty State Bank of Farwell, C.C. A.Tex., 30 F.2d 881.

Equity Rules, rules 75(b), 77, requiring authentication of record were enforced with strictness necessary to effectuate their essential purpose.—Kelly v. U. S., Wash., 57 S.Ct. 335, 300 U.S. 50, 81 L.Ed. 507, reversing, C.C.A., 83 F.2d 783, rehearing denied 84 F.2d 541, affirming, D.C., In re Carlisle Packing Co., 12 F.Supp. 11, certiorari granted Kelly v. U. S., 57 S.Ct. 42, 299 U.S. 528, 81 L.Ed. 389, remanding cause, C.C.A., 90 F.2d 73, certiorari denied 58 S.Ct. 54, 302 U.S. 730, 82 L.Ed. 564—Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, Mo., D.C.Mo., 9 F.Supp. 988.

Authentication or certification of bill of exceptions, under former practice.

U.S.—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1499—McCuing v. Bovay, C.C.A.Ark., 60 F.2d 375—Osborn v. U. S., C.C.A.N.C., 50 F. 2d 712—Goetzinger v. Woodley, C. C.A.N.C., 17 F.2d 83—Chicago Great Western R. Co. v. Le Valley, Iowa, 233 F. 384, 147 C.C.A. 320, denying rehearing 227 F. 1016, 141 C.C.A. 664—Brown v. Cumberland Tel. & Tel. Co., La., 221 F. 261, 137 C.C.A. 206—Bunker Hill & S. Min. & C. Co. v. Oberder, Idaho, 79 F. 726, 25 C.C.A. 171.

4 C.J. p 441 note 34.

87. U.S.—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1499.

88. U.S.—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133—Brown v. Cumberland Telegraph & Telephone Co., La., 221 F. 261, 137 C.C.A. 206.

Testimony taken in open court, under Equity Rules, rules 46, 75, could not become certifiable part of record otherwise than by authentication and filing under order of judge who heard it, notwithstanding order allowing appeal provided that certified copy of record, testimony in hæc verba, and other matters should be transmitted to circuit court of appeals.—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133.

89. U.S.—Grand County v. King, Colo., 67 F. 945, 14 C.C.A. 421.

90. U.S.—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133—McCuing v. Bovay, C.C.A.Ark., 60 F.2d 375—North River Ins. Co. of New York v. Guaranty State Bank of Farwell, C.C.A.Tex., 30 F.2d 881.

Under Federal Rules of Civil Procedure, rule 75(g), 28 U.S.C.A. following § 723c, the transcript of the record, for the appellate court, is under the hand of the clerk of the district court and the seal of that court.—Sublette v. Servel, C.C.A.Ark., 124 F.2d 516.

Certification by clerk of court held proper

U.S.—U. S. v. Hayes, C.C.A.Okl., 20 F.2d 873, certiorari denied Riverside Oil & Refining Co. v. Cimarron River Oil Co., 48 S.Ct. 115, 275 U. S. 552, 72 L.Ed. 421, U. S. v. Cimarron River Oil Co., 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423, and U. S. v. Hayes, 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423.

91. U.S.—Trust Co. of Florida v. Gault, C.C.A.Fla., 69 F.2d 133—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C. C.A. 648.

92. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

93. U.S.—Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Jacksonville, T. & K. W. R. Co., Fla., 55 F. 131, 5 C.C.A. 53.

94. U.S.—Ruby v. Atkinson, Tex., 93 F. 577, 35 C.C.A. 458—Meyer v. Mansur & Tebbetts Impl. Co., Tex., 85 F. 874, 29 C.C.A. 465—Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Jacksonville, T. & K. W. R. Co., Fla., 55 F. 131, 5 C.C.A. 53.

If certificate fails to recite that transcript is complete or shows by its recitals that it is incomplete, the certificate is insufficient.—Meyer v. Mansur & Tebbetts Impl. Co., Tex., 85 F. 874, 29 C.C.A. 465.

Certificate to bill of exceptions under former practice.

U.S.—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—Baldwin v. Myers, C.C.A.Ark., 75 F. 2d 529—U. S. v. Densmore, C.C.A. Cal., 58 F.2d 748, certiorari denied Densmore v. U. S., 53 S.Ct. 24, 287 U.S. 598, 77 L.Ed. 521—First Nat. Bank of Council Bluffs, Iowa v. Moore, Wash., 148 F. 953, 78 C.C. A. 581—Gulf, C. & S. F. R. Co. v. Washington, Ind.T., 49 F. 347, 1 C.C.A. 286.

95. U.S.—Jacksonville, T. & K. W. R. Co. v. American Constr. Co., Fla., 57 F. 66, 6 C.C.A. 249—Pennsylvania Co. for Ins. on Lives and Granting Annuities v. Jacksonville, T. & K. W. R. Co., Fla., 55 F. 131, 5 C.C.A. 53—Maryland Casualty Co. v. Beebe, C.C.A.Utah, 54 F.2d 743.

which the appeal is taken govern as to what part of the record shall be printed[96] and the manner of the printing, and supervision thereof;[97] but the type, paper, and dimensions of the printed matter in the circuit court of appeals must conform to the rules of the supreme court relating to records on appeal to that court.[98] A question as to whether all matter transmitted to the appellate court is to be printed is for that court to decide;[99] and ordinarily a part of the record which has not been printed, as required by rule of court, should not be considered by the appellate court,[1] although the court may consider it, under special circumstances.[2] Accordingly, a failure to comply with the requirement as to the printing of the record will not necessarily entail the dismissal of the appeal without regard to the merits of the controversy.[3] Additional time will not be granted appellant to comply with the requirement, as to printing where it appears that nothing would be gained by him except delay.[4]

(2) Transmission and Filing

The record on appeal should be transmitted to, and filed in, the appellate court within the time prescribed therefor, or within a properly granted extension thereof. A failure to file the record within the proper time does not invalidate the record, but merely furnishes the basis for appropriate action by the appellate court.

Under the provisions of the Federal Rules of Civil Procedure, rule 73 (g), 28 U.S.C.A. following § 723c, the record on appeal must be filed with the appellate court within forty days from the date of the filing of notice of appeal,[5] and not from the final date on which appellant could have given notice of appeal.[6]

Extension of time for transmission and filing. The district court, under Federal Rules of Civil Procedure, rule 73 (g), may, in its discretion and with or without motion or notice, extend the time for filing the record on appeal,[7] provided its or-

96. U.S.—Westmoreland Asbestos Co. v. Johns-Manville Corporation, D.C.N.Y., 1 F.R.D. 249.

District court cannot intervene in dispute between parties as to matter to be printed.—Westmoreland Asbestos Co. v. Johns-Manville Corporation, supra.

Parties cannot abrogate rule of circuit court of appeals as to what shall be printed in record in that court.—Cherry-Burrell Corporation v. Dairy & Creamery Equipment Co., C.C.A.Mo., 75 F.2d 60.

97. **Former practice**

(1) Under Act Febr. 13, 1911 c 47 § 1, 28 U.S.C.A. § 865, which has been modified by Federal Rules of Civil Procedure, rule 75(1), appellant was entitled to have the record printed and was not obliged to let the clerk of court have it printed or supervise the printing of it; and a rule of court committing the supervision of the printing to the clerk of court could not be enforced where it ran counter to the statute.—In re King, C.C.A.Ala., 73 F.2d 175.

(2) This statute did not affect the power of the supreme court to regulate a district court as to the manner of making up and printing the record on an appeal to a circuit court of appeals.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F.2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316.

(3) Appellant's statement should be printed as supplemental transcript.—Sommer v. Rotary Lift Co., C.C.A.Cal., 66 F.2d 809.

98. **Act Febr. 13, 1911 c 47, § 1, 28 U.S.C.A. § 865,** requiring printed transcript on appeal to circuit court of appeals in conformity with supreme court rules applied to every kind of action or suit where such review was sought.—Hursh v. Killits, C.C.A.Cal., 58 F.2d 903, certiorari denied 53 S.Ct. 89, 287 U.S. 640, 77 L.Ed. 554.

99. U.S.—Treasure Imports v. Henry Amdur & Sons, C.C.A.N.Y., 127 F.2d 3, affirming, D.C., 40 F.Supp. 880.

1. U.S.—Sampsell v. Anches, C.C.A.Wash., 108 F.2d 945.

Exhibits, although a part of the record in the circuit court of appeals, should not be considered by that court where they were not printed in accordance with that court's rules providing that if not printed exhibits should not be considered.—Sampsell v. Anches, supra.

2. U.S.—Sampsell v. Anches, supra.

Matter of discretion

Where parties to appeal transmit as physical exhibits matters capable of reproduction in printed record, failure to include such in printed record or to obtain order suspending rule as to printing makes them no part of record which reviewing court is compelled to consider, but it is matter of pure discretion whether court will consider such unprinted, although transmitted, matters.—Cherry-Burrell Corporation v. Dairy & Creamery Equipment Co., C.C.A.Mo., 75 F.2d 60.

3. U.S.—Suzuki v. Higgins, Mont., 187 F. 603, 109 C.C.A. 433—Matsumura v. Higgins, Mont., 187 F. 601, 109 C.C.A. 431.

4 C.J. p 458 note 91 [c] (1).

Appellants' failure to print supplemental transcripts sent up by appellee does not entitle appellee to dismissal of appeal, where no question of sufficiency of evidence has been properly raised and proceedings as printed by appellants do not warrant a reversal.—Baten v. Kirby Lumber Corporation, C.C.A.Tex., 103 F.2d 272.

Where there is no apparent merit in appeal to warrant waiving the rule of court requiring printing of the record, appellee's motion to dismiss the appeal may be sustained.—Richardson v. Metropolitan Life Ins. Co., C.C.A.La., 109 F.2d 339, dismissing appeal, D.C., Metropolitan Life Ins. Co. v. Richardson, 27 F.Supp. 791.

4. U.S.—Suzuki v. Higgins, Mont., 187 F. 603, 109 C.C.A. 433—Matsumura v. Higgins, Mont., 187 F. 601, 109 C.C.A. 431.

5. U.S.—Bluford v. Canada, D.C.Mo., 1 F.R.D. 567.

"Date," in rule that record on appeal shall be filed with appellate court within forty days from date of notice of appeal, does not refer to date line in such notice, but to date or time when notice was filed.—In re Guanájuato Reduction & Mines Co., D.C.N.J., 29 F.Supp. 789.

Time under former rules

U.S.—Farmers' Sav. Bank of Grimes, Iowa, v. Allen, C.C.A.Iowa, 41 F.2d 208—Jackson v. Norris, C.C.A.Tex., 37 F.2d 511, certiorari denied 50 S.Ct. 462, 281 U.S. 763, 74 L.Ed. 1171.

6. U.S.—Bluford v. Canada, D.C.Mo., 1 F.R.D. 567.

7. U.S.—Ainsworth v. Gill Glass & Fixture Co., C.C.A.Pa., 104 F.2d 83.

Authority of another judge to extend time

(1) A judge of another district holding court for the resident judge may make an order in a case previ-

der for extension is made before the expiration of the period for filing as originally prescribed, or as extended by a previous order;[8] except that, by reason of the general authority conferred by Federal Rules of Civil Procedure, rule 6 (b), to enlarge the period of time fixed by the rules for doing acts required to be done by litigants, the court may, on motion after notice to appellee, permit the record to be filed after the prescribed or extended period, if the failure to file it within such period is shown to the satisfaction of the court to be the result of excusable neglect.[9] In no event, however, can the district court extend the time to a day more than ninety days from the date of the first notice of appeal.[10]

Extension beyond the ninety-day period is within the province of the circuit court of appeals where it is in the interest of justice to make such an extension,[11] the motion for the extension is made within a previous extension period,[12] and the reasons for the extension are manifestly meritorious.[13] Such an extension of the period of time for filing the record in the appellate court may be made by the circuit court of appeals as a whole,[14] and cannot be made by a single judge, except tentatively for the court and subject to its approval.[15] An irregularity in this respect may be overlooked by the court, in its discretion, if the reasons for a further extension are meritorious and such extension will not prejudice appellee.[16]

Effect of failure to file in time. By virtue of the provision of Federal Rules of Civil Procedure, rule 73 (a), to the effect that the failure of appellant to take any of the further steps, after the filing of a notice of appeal, does not affect the validity of the appeal, a failure of appellant, under rule 73 (g), to file his record in time does not invalidate his appeal, but merely furnishes the basis for such action as the appellate court may deem appropriate.[17] Ac-

ously tried by the resident judge extending the time for filing the record, the citation for which had been signed by the resident judge.—Hall v. McKinnon, Alaska, 193 F. 572, 113 C.C.A. 440.

(2) Judge of supreme court of Puerto Rico appointed by president and authorized to perform all duties of regular judge of United States district court for Puerto Rico was held authorized, in absence of judge of district court, to extend time of filing of transcript of record in circuit court of appeals, notwithstanding that he was not judge who signed citation as required by rule of circuit court of appeals, since such rule must yield to act of congress. —Despiau v. U. S. Casualty Co., C.C.A. Puerto Rico, 87 F.2d 270.

(3) Chief justice of supreme court of Puerto Rico having signed citation of appeal, another justice, even though acting chief justice, was unauthorized under court rule to extend time for filing transcript.—Gutierrez v. Longpre, C.C.A.Puerto Rico, 84 F. 2d 43.

8. U.S.—Mutual Benefit Health & Accident Ass'n v. Snyder, C.C.A. Cal., 109 F.2d 469—Ainsworth v. Gill Glass & Fixture Co., C.C.A. Pa., 104 F.2d 83—Bluford v. Canada, D.C.Mo., 1 F.R.D. 567.

Request for extension of time within which to file record on appeal must be made within forty days from date of filing notice of appeal, in absence of previous extension of time, and hence motion for extension forty-nine days after filing notice of appeal, although less than forty days after expiration of time originally available for filing notice of appeal, is too late.—Bluford v. Canada, supra.

Under former practice or rules

(1) Same rule as stated in text applied.—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co., C.C.A. La., 95 F.2d 289—Gutierrez v. Longpre, C.C.A.Puerto Rico, 84 F.2d 43—West v. Irwin, Ill., 54 F. 419, 4 C.C.A. 401.

(2) Extension held valid if applied for within the proper period, even though not granted until after the expiration of such period.—Candal De Lopez v. Sociedad Espanola de Auxillo Mutuo y Beneficencia, C.C.A. Puerto Rico, 45 F.2d 331.

9. U.S.—Ainsworth v. Gill Glass & Fixture Co., C.C.A.Pa., 104 F.2d 83.

10. U.S.—Ainsworth v. Gill Glass & Fixture Co., supra—U. S. ex rel. Sheehan v. Lawes, D.C.N.Y., 1 F. R.D. 731.

Former practice, under Cir.Ct.App. Rules, rules 14, 16 of fifth circuit, authorizing trial judge to extend time for filing an additional sixty days.—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co., C.C.A. La., 95 F.2d 289.

11. U.S.—Brennan v. United Fruit Co., C.C.A.La., 108 F.2d 710—Ainsworth v. Gill Glass & Fixture Co., C.C.A.Pa., 104 F.2d 83.

Under former rules

U.S.—Gutierrez v. Longpre, C.C.A. Puerto Rico, 84 F.2d 43—Gangler v. Rice, C.C.A., 33 F.2d 119—Selway v. Fourth Nat. Bank, C.C.A. Ohio, 283 F. 783.

12. U.S.—Brennan v. United Fruit Co., C.C.A.La., 108 F.2d 710.

Under former similar rules of court, subsequent extension after expiration of prior extension, was voidable.—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co., C.C.A. La., 95 F.2d 289.

13. U.S.—Brennan v. United Fruit Co., C.C.A.La., 108 F.2d 710.

14. U.S.—Cowden v. Addis, C.C.A. Tex., 55 F.2d 230.

15. U.S.—Brennan v. United Fruit Co., C.C.A.La., 108 F.2d 710.

Same rule applied under prior rule of court

U.S.—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co., C.C.A. La., 95 F.2d 289—Cowden v. Addis, C.C.A.Tex., 55 F.2d 230.

16. U.S.—Brennan v. United Fruit Co., C.C.A.La., 108 F.2d 710—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co., C.C.A.La., 95 F.2d 289.

17. U.S.—Miller v. U. S., C.C.A.Ill., 117 F.2d 256, adopting 114 F.2d 267, reversing, D.C., 24 F.Supp. 958, certiorari denied 61 S.Ct. 1114, 313 U.S. 591, 85 L.Ed. 1545—Ainsworth v. Gill Glass & Fixture Co., C.C.A. Pa., 104 F.2d 83.

Mandatory requirement of the rule concerning time within which record on appeal must be filed is alleviated by the provision of the same rule which renders failure to comply therewith nonjurisdictional.—Miller v. U. S., C.C.A.Ill., 117 F.2d 256, adopting 114 F.2d 267, reversing, D. C., 24 F.Supp. 958, certiorari denied 61 S.Ct. 1114, 313 U.S. 591, 85 L.Ed. 1545.

Same under former court rule

U.S.—U. S. v. Kieling, C.C.A.Or., 68 F.2d 163—Gangler v. Rice, C.C.A., 33 F.2d 119.

Granting leave to file nunc pro tunc

U.S.—Ainsworth v. Gill Glass & Fixture Co., C.C.A.Pa., 104 F.2d 83.

cordingly, notwithstanding the record has not been filed within the prescribed or extended time, under rule 73 (g) as well as under former similar rules of court, the circuit court of appeals, in its discretion, may consider the appeal,[18] and may refuse to dismiss the appeal on this ground,[19] particularly where the failure to file the record within the proper time is excusable,[20] or where, before the motion to dismiss is filed and notice thereof is given, the record has been actually filed.[21] On the other hand, if it appears that the failure to file the record within the proper time was not due to any fault on the part of appellee and appellee was without other excuse, the court may, and ordinarily should, dismiss the appeal.[22]

i. Defects, Objections, Amendments, and Corrections

(1) Effect of defects or omissions
(2) Amendment and correction
(3) Waiver and cure of defects or objections, and striking out
(4) Certiorari or other proceeding to bring up record

(1) Effect of Defects or Omissions

Defects or omissions in the record on appeal may constitute ground for dismissing the appeal, affirming the judgment, or the taking of other action by the appellate court. Immaterial defects or omissions are not fatal.

If the record on appeal is so imperfect, by reason of defects and omissions therein, that the questions involved and the rights of the parties cannot properly be determined, the appeal may be dismissed,[23] or, according to the decisions on the

18. U.S.—Johnson v. Wilson, C.C.A. Nev., 118 F.2d 557—Ainsworth v. Gill Glass & Fixture Co., C.C.A. Pa., 104 F.2d 83—Wharton v. Shenandoah Pub. House, C.C.A.Va., 101 F.2d 310—Witte v. Franklin Fire Ins. Co. of Philadelphia, C.C.A. Mo., 46 F.2d 894, appeal dismissed 50 F.2d 1087.

Where record presents strongly arguable claim of error, and delay beyond time allowable by district court is not shown to have prejudiced appellee, court will entertain appeal.—Johnson v. Wilson, C.C.A. Nev., 118 F.2d 557.

Expiration of term

Where the time for filing a return to an appeal has expired without valid extension, but the return is actually filed or tendered for filing shortly thereafter, the circuit court of appeals has power to make a retroactive extension of time for filing the return, and will do so unless there is reason to the contrary and the court is not deprived of jurisdiction to allow the return to be filed a few days after the expiration of the time therefor, and to entertain the appeal, because the term to which the appeal was returnable has expired.—Moran v. Peck, C.C.A.Ohio, 294 F. 80.

19. U.S.—National Surety Corporation v. Williams, C.C.A.Ark., 110 F. 2d 873, certiorari denied Williams v. National Surety Corporation, 61 S.Ct. 40, 311 U.S. 674, 85 L.Ed. 433—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A. Mo., 106 F.2d 793, reversed on other grounds 107 F.2d 1003—Century Building & Loan Ass'n v. Wickersham, C.C.A.Tex., 75 F.2d 812—Love v. Busch, Tex., 142 F. 429, 73 C.C.A. 545—Gilman v. Fernald, Iowa, 141 F. 940, 72 C.C.A. 666.

Refusal of motion to dismiss without prejudice to renewal

U.S.—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A. Mo., 106 F.2d 793, reversed on other grounds 107 F.2d 1003.

20. U.S.—Mutual Benefit Health & Accident Ass'n v. Snyder, C.C.A. Cal., 109 F.2d 469—Wharton v. Shenandoah Pub. House, C.C.A.Va., 101 F.2d 310—Grafton v. Meikleham, Ga., 246 F. 737, 159 C.C.A. 39, reversing, D.C., In re Meikleham, 236 F. 401, and certiorari denied Meikleham v. Grafton, 38 S. Ct. 334, 246 U.S. 665, 62 L.Ed. 929.

Excuses held sufficient

(1) Court's delay in approving record.—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487.

(2) Illness of attorney.—Smith v. Collins, C.C.A., 12 F.2d 267.

(3) Where appellant, following the established practice, permitted the clerk to assume responsibility for printing the record and procuring any necessary extensions of time for the return, and the clerk inadvertently failed to sign and send up a copy of the record within the time allowed for the return, a short delay was excusable.—Moran v. Peck, C.C. A.Ohio, 294 F. 80.

21. U.S.—Witte v. Franklin Fire Ins. Co. of Philadelphia, C.C.A.Mo., 46 F.2d 894, appeal dismissed 50 F.2d 1087.

4 C.J. p. 472 note 15 [a].

22. U.S.—Morrow v. Wood, C.C.A. Miss., 126 F.2d 1021—Lopata v. Handler, C.C.A.Okl., 121 F.2d 938, dismissing appeal, D.C., 37 F.Supp. 871—Ainsworth v. Gill Glass & Fixture Co., C.C.A.Pa., 104 F.2d 83—Wendel v. Hoffman, C.C.A.N.J., 104 F.2d 56, dismissing appeal, D. C., 24 F.Supp. 63—In re Norcor Mfg. Co., C.C.A.Wis., 97 F.2d 208—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co., C.C.A.La., 95 F.2d 289—Stebbins v. Frigidaire Corporation, C.C.A.Mich., 85 F.2d 915—McKee v. Great Lakes Pipe Line Co., C.C.A.Mo., 79 F.2d 384—U. S. v. Howard, C.C.A.Tex., 73 F.2d 980—U. S. v. Mosley, C.C.A.Miss., 68 F.2d 372—Cowden v. Addis, C.C.A. Tex., 55 F.2d 230—Lafayette Development Co. v. Biecker, C.C.A. Fla., 45 F.2d 165—U. S. v. Thacker, C.C.A.Tex., 44 F.2d 789—Jackson v. Norris, C.C.A.Tex., 37 F.2d 511, certiorari denied 50 S.Ct. 462, 281 U.S. 763, 74 L.Ed. 1171—Wong Sang v. U. S., Mass., 144 F. 968, 75 C.C.A. 383—Chamberlain Transp. Co. v. South Pier Coal Co., Ill., 126 F. 165, 61 C.C.A. 109.

4 C.J. p 470 note 7[b].

Excuses held insufficient

(1) Inability to procure funds earlier in order to print record.—Cowden v. Addis, C.C.A.Tex., 55 F. 2d 230.

(2) Extension of time for filing bill of exceptions, under former practice.—U. S. v. Mosley, C.C.A.Miss., 68 F.2d 372.

(3) Refusal of clerk of district court to deliver record, since steps could be taken to compel him to do so.—Mayer v. Hickey, C.C.A.Tex., 67 F.2d 489.

23. U.S.—Drybrough v. Ware, C.C.A. Ky., 111 F.2d 548—Massachusetts Bonding & Insurance Co. v. Preferred Automobile Ins. Co., C.C.A. Mich., 110 F.2d 764—Cavagnaro v. Latimer, C.C.A.N.J., 50 F.2d 898—Wade v. Leach, C.C.A.Ga., 2 F.2d 367—Kansas v. Merriwether, Kan., 171 F. 39, 96 C.C.A. 281.

question, the judgment below may be affirmed,[24] although in a proper case an opportunity may be afforded to correct the defects,[25] or the appellate court may remand the cause,[26] or reverse the judgment where the record fails to show facts essential to a proper decision of the case by the appellate court.[27] The power of dismissal of the appeal, however, generally should not be exercised unless the defect or omission arose from appellant's negligence or indifference,[28] and where, in case of an omission, good faith is shown, appellee may be directed to designate such additional papers, documents, and proof used on the hearing below as he deems necessary to a proper presentation of the case, and appellant may be ordered to file the same as a part of the record under penalty of a dismissal of the appeal.[29]

Immaterial defects or omissions. If the appeal record contains all that is necessary to present the questions to be reviewed and for their determination, immaterial defects or omissions are not fatal,[30] and do not require or warrant a dismissal of the appeal.[31] An appeal will not be dismissed for insufficiency of the transcript where the records

Dismissal held warranted

(1) For failure to include in printed appendix any of the evidence produced by appellee.—Hornin v. Montgomery Ward & Co., C.C.A.Pa., 120 F.2d 500.

(2) For failure to set forth evidence in condensed and narrative form.—U. S. v. Dunaway, C.C.A.Fla., 64 F.2d 535—U. S. v. Howard, C.C.A.Fla., 64 F.2d 533—Hughes v. Lodwick Lumber Co., C.C.A.Tex., 41 F.2d 225.

(3) For failure properly to authenticate or certify the transcript.—Meyer v. Mansur & Tebbetts Implement Co., Tex., 85 F. 874, 29 C.C.A. 465.

(4) Where record failed to show that appellant had ever served or filed a designation of the record, or proceedings and evidence in the court below to be contained in the record on appeal, and had not filed in the circuit court of appeals any statement of points to be relied on, and where record filed contained nothing to indicate that trial court had erred in any respect.—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A.Mo., 107 F.2d 1003, reversing 106 F.2d 793.

Failure to file proper bill of exceptions as ground for affirmance or dismissal under former practice see supra subdivision c of this section.

24. U.S.—Yim Kim Lau v. U. S., C.C.A.Hawaii, 53 F.2d 638, reversed on other grounds 52 S.Ct. 508, 286 U.S. 531, 76 L.Ed. 1272, conformed to, C.C.A., 63 F.2d 377—Chang Chow v. U. S., C.C.A.Hawaii, 53 F.2d 637, reversed on other grounds 52 S.Ct. 509, 286 U.S. 530, 76 L.Ed. 1272, conformed to, C.C.A., 63 F.2d 375—Hard & Rand v. Biston Coffee Co.; C.C.A.Mo., 41 F.2d 625—Griffin v. Allen, Mo., 207 F. 61, 124 C.C.A. 621—Lincoln Sav. Bank & Safe-Deposit Co. v. Allen, Neb., 82 F. 148, 27 C.C.A. 87.

Affirmance and not dismissal is proper where the record does not contain the evidence necessary to a determination of the questions raised.—Bank of Eureka v. Partington, C.C.A.Cal., 91 F.2d 587.

25. U.S.—Merriman v. Chicago, D. & V. R. Co., Ill., 120 F. 240, 53 C.C.A. 536.

Incorporation of evidence

Appellant, stating the evidence in the transcript in accordance with the prevailing practice of the circuit, is entitled to a further opportunity properly to incorporate the evidence into the record; but an order granting a rehearing and leave to withdraw the transcript for thirty days does not constitute such an opportunity.—Fairbanks Morse & Co. v. American Valve & Meter Co., Ill., 48 S.Ct. 317, 276 U.S. 305, 72 L.Ed. 584, reversing, C.C.A., 18 F.2d 716, certiorari granted 47 S.Ct. 770, 274 U.S. 735, 71 L.Ed. 1336.

Jurisdictional amount

Failure of the record to show that the jurisdictional amount is in controversy may be disregarded when first raised on appeal, if it appears probable that the defect could be remedied by amendment.—Fuller v. Montague, Tenn., 59 F. 214, 8 C.C.A. 100.

Amendment and correction generally see infra subdivision i (2) of this section.

26. U.S.—Drybrough v. Ware, C.C.A.Ky., 111 F.2d 548—Kelly v. Central Hanover Bank & Trust Co., C.C.A.N.Y., 85 F.2d 61, remanding case, D.C., 14 F.Supp. 346, and 11 F.Supp. 497.

27. U.S.—Kelly v. Central Hanover Bank & Trust Co., C.C.A.N.Y., 85 F.2d 61, remanding case D.C., 14 F.Supp. 346 and 11 F.Supp. 497—Pulaski-Lonoke Drainage Dist. v. Missouri Pac. R. Co., C.C.A.Ark., 47 F.2d 1085, reversing 44 F.2d 899—Hewitt v. Equitable Life Assur. Soc. of the U. S., C.C.A.Wash., 8 F.2d 706—Standard Computing Scale Co. v. Computing Scale Co., Mich., 145 F. 627, 76 C.C.A. 384—Barber v. Coit, Ohio, 118 F. 272, 55 C.C.A. 145.

28. U.S.—Drybrough v. Ware, C.C.A.Ky., 111 F.2d 548—Kansas v. Meriwether, Kan., 171 F. 39, 96 C.C.A. 281.

Dismissal not warranted

(1) For defect as to time of filing designation of contents of record.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F.2d 44.

(2) For failure to incorporate in record transcript of all of testimony.—Hormann v. Northern Trust Co., C.C.A.Ill., 114 F.2d 118, certiorari denied 61 S.Ct. 394, two cases, 311 U.S. 713, 85 L.Ed. 464.

Appeal in forma pauperis under statute is not dismissable for appellants' failure to furnish and use reporter's transcript under federal rule, where stenographer who reported trial would not, and could not be compelled to, make and furnish transcript free, and appellants were unable to pay for it.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

29. U.S.—Drybrough v. Ware, C.C.A.Ky., 111 F.2d 548—Kansas v. Meriwether, Kan., 171 F. 89, 96 C.C.A. 281.

30. U.S.—Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, C.C.A.Mo., 28 F.2d 177, modifying, D.C., Central Union Trust Co. of New York v. Missouri, K. & T. Ry. Co., 28 F.2d 176, and affirming North American Co. v. St. Louis & S. F. R. Co., 28 F.2d 174, certiorari denied Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564.

31. U.S.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F.2d 44—M. & M. Transp. Co. v. Cochran, C.C.A.R.I., 100 F.2d 207—In re Windsor Square Development, C.C.A.Ariz., 91 F.2d 493—Gaffney v. U. S., C.C.A.Pa., 89 F.2d 996—Robinson v. U. S., C.C.A.Tex., 84 F.2d 885—In re Wilson, C.C.A.Ill., 16 F.2d 177—Cunningham v. German Ins. Bank, Ky., 103 F. 932, 43 C.C.A. 377—Nashua & L. R. Corp. v. Boston & L. R. Corp., Mass., 61 F. 237, 9 C.C.A. 468.

were burned while the case was pending below, and the transcript contains all the subsequent proceedings and as much of the prior record as has been reëstablished, and no appellant is to blame for not fully reëstablishing the record.[32]

Inclusion of immaterial matter. The inclusion of immaterial matter in the record on appeal is not necessarily fatal, and ordinarily the appellate court may disregard it or strike it out,[33] although the costs incident to including such matter may be taxed against the party preparing and presenting the record.[34]

(2) Amendment and Correction

Defects or omissions, not of a jurisdictional character, in a record on appeal may be corrected by amendment by stipulation of the parties or by the lower court, or the amendment or correction may be ordered by the appellate court.

Defects or errors in the transcript of the record on appeal, unless they are of a jurisdictional character,[35] are as a rule amendable, in the discretion of the court;[36] but a motion for an amendment will be denied where movant shows no reason why the defect or omission could not have been presented to, and corrected in, the lower court.[37]

Under the Federal Rules of Civil Procedure, rule 75 (h), 28 U.S.C.A. following § 723c, the parties may by stipulation correct a material omission or misstatement in the record.[38]

Jurisdiction of lower court. Under the Federal Rules of Civil Procedure, rule 75 (h), 28 U.S.C.A. following § 723c, the district court has power only to correct and settle the record on appeal when a difference arises between the parties as to what occurred in the district court, so that the record may conform to the truth;[39] and, if anything material to either party is omitted from the record by error or accident or is misstated therein, the district court may direct that the omission or misstatement be corrected, either before or after the record is transmitted to the appellate court.[40] This power of the district court extends only to the correction of misstatements or actual omissions in the record;[41] it has no power to exclude from the record any matter occurring below which a party thinks should properly be in it,[42] or to add, or cause to be added, matter which did not occur in the lower court.[43]

Jurisdiction of appellate court. Under the Federal Rules of Civil Procedure, rule 75 (h), 28 U.S.C.A. following § 723c, the circuit court of appeals has power to correct the record only as to what occurred in the district court,[44] and not to add to the record matter which never occurred in the court

32. U.S.—Cutting v. Tavares, O. & A. R. Co., Fla., 61 F. 150, 9 C.C.A. 40.

33. U.S.—Tuttle v. Claflin, N.Y., 88 F. 122, 31 C.C.A. 419.

Not ground for reversal
U.S.—West v. East Coast Cedar Co., N.C., 113 F. 737, 51 C.C.A. 411.

34. U.S.—Treasure Imports v. Henry Amdur & Sons, C.C.A.N.Y., 127 F.2d 3, affirming, D.C., 40 F.Supp. 880—Missouri-Kansas Pipe Line Co. v. U. S., C.C.A.Del., 108 F.2d 614, dismissing appeals, D.C., U. S. v. Columbia Gas & Electric Corporation, 27 F.Supp. 116 and 28 F. Supp. 168, certiorari denied Missouri-Kansas Pipe Line Co. v. Columbia Gas & Electric Corporation, 60 S.Ct. 887, two cases, 309 U.S. 687, 84 L.Ed. 1030—U. S. v. Howard, C.C.A.Fla., 64 F.2d 533—Coxe v. Peck-Williamson Heating & Ventilating Co., C.C.A.Ala., 208 F. 409—In re Sullivan, D.C.N.Y., 2 F.R. D. 238.

35. U.S.—Copland v. Waldron, Wash., 133 F. 217, 66 C.C.A. 271.

36. U.S.—Huglin v. H. M. Byllesby & Co., C.C.A.Iowa, 72 F.2d 341—Kaw Valley Drainage Dist. v. Union R. Co., Kan., 163 F. 836, 90 C. C.A. 320—Brock v. Fuller Lumber Co., Mass., 153 F. 272, 82 C.C.A. 402.

Amendment not curing defect refused
U.S.—Snead v. Little Cahaba Coal Co., Ala., 53 F.2d 560, dismissing appeal, D.C., Little Cahaba Coal Co. v. Snead, 35 F.2d 31.

Denial of opportunity to amend as abuse of discretion
U.S.—Kelly v. U. S., Wash., 57 S.Ct. 335, 300 U.S. 50, 81 L.Ed. 507, reversing, C.C.A., 83 F.2d 783, rehearing denied 84 F.2d 541, affirming, D.C., In re Carlisle Packing Co., 12 F.Supp. 11, certiorari granted Kelly v. U. S., 57 S.Ct. 42, 299 U.S. 528, 81 L.Ed. 389, remanding cause, C.C.A., 90 F.2d 73, certiorari denied 58 S.Ct. 54, 302 U.S. 730, 82 L.Ed. 564.

37. U.S.—Hackner v. Morgan, C.C. A.N.Y., 130 F.2d 300, affirming, D. C., Eastman v. Morgan, 43 F.Supp. 637.

38. **Former practice**
Printed transcript on appeal after directed verdict could not be amended by stipulation showing grounds on which trial court directed verdict.—Falvey v. Coats, C.C.A.Ark., 47 F.2d 856.

39. U.S.—Treasure Imports v. Henry Amdur & Sons, C.C.A.N.Y., 127 F.2d 3, affirming, D.C., 40 F.Supp. 880—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721—Kennedy v. U. S., C. C.A., 115 F.2d 624—In re Sullivan, D.C.N.Y., 2 F.R.D. 238.

40. U.S.—Lewis Invisible Stitch Machine Co. v. Popper, D.C.N.Y., 35 F. Supp. 664.

Under former practice, power of lower court to amend record:

(1) Before record filed in appellate court.—Hays v. Wagner, Ohio, 150 F. 533, 80 C.C.A. 275.

(2) After record filed in appellate court.—McKay v. Neussler, Alaska, 148 F. 86, 78 C.C.A. 154—Gorham v. Broad River Tp., C.C.S.D., 113 F. 83—Lincoln Nat. Bank v. Perry, Ark., 66 F. 887, 14 C.C.A. 273—Whiting v. Equitable Life Assur. Soc., Fla., 60 F. 197, 8 C.C.A. 558.

41. U.S.—Treasure Imports v. Henry Amdur & Sons, C.C.A.N.Y., 127 F.2d 3, affirming, D.C., 40 F.Supp. 880.

42. U.S.—Treasure Imports v. Henry Amdur & Sons, supra—U. S. v. Forness, C.C.A.N.Y., 125 F.2d 928, certiorari denied 62 S.Ct. 1293, 316 U.S. 694, 86 L.Ed. 1764—In re Sullivan, D.C.N.Y., 2 F.R.D. 238.

43. U.S.—Kennedy v. U. S., C.C.A., 115 F.2d 624.

44. U.S.—U. S. v. Kennedy, supra.

All questions as to occurrences below which should be included in the record must be presented to the appellate court except where a dispute

below.[45] If anything material to either party is omitted from the record by accident or error, or is misstated therein, the appellate court, on a proper suggestion or on its own initiative, may direct that the omission or misstatement shall be corrected;[46] or it may, in its discretion, remit or remand the cause to the lower court for amendment or correction of the record.[47] However, while the appellate court may make orders for the correction of the record, it cannot itself make such correction or amendment,[48] except as to formal defects;[49] nor can it authorize or permit a change in the record so as to consider an appeal which in fact was not taken.[50]

Time of amendment. Except to the extent that a limitation may be imposed by rule of court,[51] amendments of the record must be applied for and made within a reasonable time, to be determined by the circumstances of the particular case.[52] It is too late to add to or alter the record after the appellate court has taken final action and ended the case in that court.[53]

(3) Waiver and Cure of Defects or Objections, and Striking Out

Defects in the appeal record may be waived, or they may be cured by reference to other papers on file, or the defective matter may be stricken out.

Defects or omissions, not of a jurisdictional character, in the record may be either expressly or im-

arises as to the accuracy of certain portions of the record.—Treasure Imports v. Henry Amdur & Sons, C.C.A. N.Y., 127 F.2d 3, affirming, D.C., 40 F. Supp. 880—Westmoreland Asbestos Co. v. Johns-Manville Corporation, D. C.N.Y., 1 F.R.D. 249.

45. U.S.—Kennedy v. U. S., C.C.A., 115 F.2d 624.

Supervisory jurisdiction
The circuit court of appeals has no general authority over the district court to require that a portion of the evidence alleged to have been received below be certified to the appellate court, and that on receipt thereof the district court be required to make specified finding favorable to appellee in absence of showing that appellee ever applied to district court for amendment of findings.—Kennedy v. U. S., supra.

46. U.S.—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F.2d 202—Puget Sound Nav. Co. v. Nelson, C.C.A.Wash., 41 F.2d 356, certiorari denied Nelson v. Puget Sound Nav. Co., 51 S.Ct. 76, 282 U.S. 869, 75 L.Ed. 768.

Prior to this rule, the practice was for the appellate court to allow or order such defects to be cured and omissions to be supplied as were not fatal to its own jurisdiction.—Kaw Valley Drainage Dist. of Wyandotte County v. Union Pac. R. Co., Kan., 163 F. 836, 90 C.C.A. 320—Hobbs v. National Bank of Commerce of Kansas City, N.Y., 93 F. 615, 35 C.C.A. 487—4 C.J. p 425 note 84 [a].

47. U.S.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F. 2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316—Roosevelt v. Missouri State Life Ins. Co., C.C.A.Ark., 70 F.2d 939—Yeandle v. Pennsylvania R. Co., N. J., 169 F. 938, 95 C.C.A. 232—Thomas v. Green County, Ky., 159 F. 339, 89 C.C.A. 405.

Absence of usual means of identifying evidence does not preclude remission of record for compliance with rule for including evidence.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F.2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316.

Court rule requiring statement of testimony in condensed narrative form may be enforced by remanding case for compliance therewith.—U. S. v. Howard, C.C.A.Fla., 64 F.2d 533, followed in U. S. v. Dunaway, C.C.A. Fla., 64 F.2d 535.

Remand and not affirmance
Where trial judge made no special findings of fact and separate conclusions of law on denial of claim informally submitted in receivership proceedings, and record on appeal was insufficient to enable court to determine merits of claim, decree should not be affirmed for insufficiency of record, but cause should be remanded for complete findings of fact and conclusions of law.—Edwards v. Holland Banking Co., C.C.A.Mo., 75 F.2d 713, setting aside, D.C., Holland Banking Co. v. Continental Nat. Bank of Jackson County at Kansas City, Mo., 9 F.Supp. 986.

Remand refused
U.S.—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C.A.China, 71 F.2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—Mound Coal Co. v. Jeffrey Mfg. Co., C.C.A.W. Va., 233 F. 913, 147 C.C.A. 587, affirming, D.C., Jeffrey Mfg. Co. v. Mound Coal Co., 215 F. 222, and rehearing granted Mound Coal Co. v. Jeffrey Mfg. Co., 240 F. 129, 153 C.C.A. 165, affirmed 240 F. 412, 153 C.C.A. 338.

48. U.S.—Yeandle v. Pennsylvania R. Co., N.J., 169 F. 938, 95 C.C.A. 232.
4 C.J. p 494 note 79.

49. U.S.—Burnham v. North Chicago St. Ry. Co., Ill., 87 F. 168, 30 C.C.A. 594.

50. U.S.—In re McIntosh, C.C.A.Cal., 95 F.2d 627, certiorari denied Fowler v. Seymour, 58 S.Ct. 1060, 304 U.S. 580, 82 L.Ed. 1542, rehearing denied 59 S.Ct. 60, 305 U. S. 670, 83 L.Ed. 434.

51. U.S.—Presidio Mining Co. v. Overton, C.C.A.Cal., 261 F. 1023.

52. U.S.—Kelly v. U. S., Wash., 57 S.Ct. 335, 300 U.S. 50, 81 L.Ed. 507, reversing, C.C.A., 84 F.2d 541, affirming, D.C., In re Carlisle Packing Co., 12 F.Supp. 11, certiorari granted Kelly v. U. S., 57 S.Ct. 42, 299 U.S. 528, 81 L.Ed. 389, remanding cause, C.C.A., 90 F.2d 73, certiorari denied 58 S.Ct. 54, 302 U.S. 730, 82 L.Ed. 564—Fairbanks, Morse & Co. v. American Valve & Meter Co., Ill., 48 S.Ct. 317, 276 U.S. 305, 72 L.Ed. 584, reversing, C.C.A., 18 F.2d 716, certiorari granted 47 S.Ct. 770, 274 U.S. 735, 71 L.Ed. 1336—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A.Mo., 107 F.2d 1003, reversing 106 F.2d 793.

Appellants, given further opportunity to have evidence properly included in record, must proceed with reasonable dispatch.—Fairbanks Morse & Co. v. American Valve & Meter Co., Ill., 48 S.Ct. 317, 276 U.S. 305, 72 L.Ed. 584, reversing, C.C.A., 18 F.2d 716, certiorari granted 47 S. Ct. 770, 274 U.S. 735, 71 L.Ed. 1336.

53. U.S.—Realty Acceptance Corporation v. Montgomery, Del., 52 S. Ct. 215, 284 U.S. 547, 76 L.Ed. 476, affirming, C.C.A., Montgomery v. Realty Acceptance Corporation, 51 F.2d 642, certiorari granted Realty Acceptance Corporation v. Montgomery, 52 S.Ct. 25, 284 U.S. 604, 76 L.Ed. 518.

pliedly waived,[54] or they may be cured by reference to other papers on file,[55] but a statement of an objection in the assignment of errors will not cure an omission thereof in the record.[56]

A transcript of the record may, on a proper application, be stricken in whole or in part where it is intrinsically defective,[57] or where it fails to comply with the statute or rule of court.[58] Matter improperly included in the transcript of the record on appeal may be stricken out on motion.[59] The appellate court may, in its discretion and in furtherance of justice, postpone the consideration of a motion to strike matter from the transcript until the final hearing of the cause on the merits.[60]

(4) Certiorari or Other Proceedings to Bring Up Record

The appellate court may, in its discretion, issue certiorari, or a similar order, to cause omitted or corrected portions of the record to be transmitted to the appellate court.

The appellate court may, in its discretion, issue a certiorari, or similar order, directing a full and complete record to be brought up, where there is shown to be a diminution in the record.[61] This writ is allowable only for surprise or excusable neglect,[62] and is employed generally to perfect a defective transcript or return, by bringing up matters of record omitted therefrom or defectively incorporated.[63] It will not be issued to bring up matters not of record or not considered in the court below.[64] An application or motion for a writ of certiorari, or similar order, must comply with the rule of court authorizing it,[65] and be within the time prescribed by order or rule of court.[66] A writ of certiorari to bring up a corrected record does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by evidence of the defects alleged to exist.[67] Under a

54. U.S.—Wertz v. National City Bank of Evansville, C.C.A.Ind., 115 F.2d 65, certiorari denied 61 S.Ct. 41, 311 U.S. 675, 84 L.Ed. 434—Wilson v. Chicago Lumber & Timber Co., Colo., 143 F. 705, 74 C.C.A. 529, reversing, C.C., 129 F. 636—Chapman v. Reynolds, R.I., 77 F. 274, 23 C.C.A. 166—Tefft v. Stern, Mich., 74 F. 755, 21 C.C.A. 73.

Waiver may be effected

(1) By joining in a stipulation as to the contents of the record.—American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., C.C.A., 52 F. 2d 145.

(2) By moving to dismiss the appeal on other grounds.—Harris v. Moreland Motor Truck Co., C.C.A. Cal., 279 F. 542—Elder v. McClaskey, Ohio, 70 F. 529, 17 C.C.A. 251.

55. U.S.—O'Boyle v. Northwestern Fire & Marine Ins. Co., C.C.A.N.Y., 49 F.2d 713—Wustum v. Kradwell, C.C.A.Wis., 270 F. 546.

Omission not cured

Where the character of evidence offered was not stated as required by rule of court, the omission was not cured by an affidavit filed about two months after the decree in support of a motion for rehearing or a new trial.—Wustum v. Kradwell, supra.

56. U.S.—North Chicago St. R. Co. v. St. John, Ill., 85 F. 806, 29 C.C. A. 634.

57. U.S.—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63.

58. U.S.—Snead v. Little Cahaba Coal Co., C.C.A.Ala., 53 F.2d 560, dismissing appeal, D.C., Little Cahaba Coal Co. v. Snead, 35 F.2d 31—Dickson v. Brown, C.C.A.Tex., 9 F.2d 63—U. S. v. Forness, D.C.N.Y., 2 F.R.D. 160.

Printed record, presented to appellee for approval, but not agreed to or approved by court is not properly for consideration of circuit court of appeals, and should be stricken.—Becker v. Thomas, C.C.A.Kan., 14 F. 2d 829.

It is no ground for striking out the transcript that it is merely incomplete.—Flickinger v. Vandalia First Nat. Bank, Ohio, 145 F. 162, 76 C.C. A. 132.

59. U.S.—Black & Yates v. Mahogany Ass'n., C.C.A.Del., 129 F.2d 227, reversing, D.C., 34 F.Supp. 450—Tuttle v. Claflin, N.Y., 88 F. 122, 31 C.C.A. 419, modifying, C.C., 86 F. 964.

Document and briefs

The circuit court of appeals will grant appellant's motion to strike from record a document not before district court, but will not strike out portions of appellees' brief dealing with such document, as briefs are not part of record.—Black & Yates v. Mahogany Ass'n, C.C.A.Del., 129 F.2d 227, reversing, D.C., 34 F.Supp. 450.

60. U.S.—Fleming v. Palmer, C.C.A. Puerto Rico, 123 F.2d 749—Edenborn v. Sim, N.Y., 204 F. 781, 123 C.C.A. 144.

61. U.S.—In re A. L. Robertshaw Mfg. Co., D.C.Pa., 135 F. 220.

Power to direct correction of omission or misstatement see supra subdivision i (2) of this section.

62. U.S.—Woods v. First Nat. Bank, C.C.A.Ariz., 16 F.2d 856.

63. U.S.—Flickinger v. First Nat. Bank of Vandalia, Ill., Ohio, 145 F. 162, 76 C.C.A. 132.

64. U.S.—Davidson v. Grady, C.C.A. Fla., 106 F.2d 272, denying rehearing 105 F.2d 405—U. S. v. Payne, C.C.A.Wash., 72 F.2d 593—U. S. v. McPhee, C.C.A.Wash., 31 F.2d 243.

Where jurisdiction was properly challenged in the trial court, and, notwithstanding the challenge, appellee permitted the case to be heard on appeal, without an attempt to supply defects in the record, certiorari for a diminution of the record will not be granted, particularly where a statement of the evidence was not prepared by the trial court as required by rule of court.—Woods v. First Nat. Bank, C.C.A.Ariz., 16 F.2d 856.

65. U.S.—Kennedy v. U. S., C.C.A., 115 F.2d 624.

Motion violating rule

A so-called petition by appellee for order requiring that a portion of the evidence alleged to have been received below be certified to circuit court of appeals, and that on receipt thereof district court be required to make a specific finding favorable to appellee, was in reality a "motion," and hence violated court rule by failing to state points and authorities.—Kennedy v. U. S., supra.

66. U.S.—Smith v. Hovland, C.C.A. Ariz., 11 F.2d 9, certiorari denied Hovland v. Smith, 46 S.Ct. 638, 271 U.S. 686, 70 L.Ed. 1151—Presidio Mining Co. v. Overton, C.C.A.Cal., 261 F. 1023—Sowles v. U. S., C.C. Vt., 21 F. 223.

Want of diligence in moving for writ of certiorari to compel certification of transcript of record of lower court may preclude relief.—Dickson v. Brown, C.C.A.Tex., 9 F.2d 63.

67. U.S.—Randolph v. Allen, Tex., 73 F. 23, 19 C.C.A. 353.

writ of certiorari from the appellate court directing the court below to correct and complete the record, that court has authority by a nunc pro tunc entry to make any changes in the record necessary to make it conform to the facts and recite accurately what was done.[68]

j. Conclusiveness and Effect of Record

The record on appeal is generally conclusive evidence of the proceedings in the lower court.

Generally speaking, the record filed for the purpose of appeal imports absolute verity, and is the sole, conclusive, and unimpeachable evidence of the proceedings in the lower court,[69] and accordingly the appellate court must be governed by the record in deciding questions presented for review;[70] and the record cannot be contradicted or explained by affidavits or other evidence or matters dehors the record.[71] These rules, as to conclusiveness, apply to recitals in the record,[72] a case made or statement of facts, as a part of the record,[73] a statement of the evidence approved by the trial court,[74] and to the certificate, authorized by law, of the judge or clerk to the record or some part thereof.[75] If, however, the record is intrinsically defective in failing to recite essential facts it falls of its own weight.[76]

Under the Federal Rules of Civil Procedure, rule 75, 28 U.S.C.A. following § 723c, as there is no provision for making an authentic statement of the proceedings not stenographically reported, or as to which no reporter's transcript is available, if appellant serves with his designation his account of the proceedings, such statement will be deemed correct unless his adversary serves a supplement, or takes its truth to the judge,[77] and if appellee files a supplemental statement of the evidence or proceedings, it too will be deemed agreed to unless taken to the

Presumptively the transcript filed is correct, and the court has no power, by certiorari, on ex parte affidavits, to cause the record to be amended by inserting a paper which appellant claims was introduced before a master, but of which neither the master nor counsel for appellee has any recollection.—Randolph v. Allen, supra.

68. U.S.—Hays v. Wagner, Ohio, 150 F. 533, 80 C.C.A. 275.

69. U.S.—Humphreys Gold Corporation v. Lewis, C.C.A.Mont., 90 F.2d 896—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—St. Louis & S. F. R. Co. v. Loughmiller, D.C.Okl., 193 F. 689—In re McCall, Tenn., 145 F. 898, 76 C.C.A. 430.

Particular proceedings held conclusive

(1) Decree based on master's report, where statement of evidence in record did not contain facts from which appellate court could by computation determine that the ultimate facts stated in master's report were not sustained by the detailed record which was available to him.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899.

(2) Findings of fact recited in, or based on, a master's report, where evidence before the master was not included in record on appeal.—Parker v. U. S., C.C.A.Mass., 126 F.2d 370—Chase v. African M. E. Church, C.C.A.Virgin Islands, 108 F.2d 977—U. S. v. Galveston-Houston Electric Co., C.C.A.Mass., 84 F.2d 516, affirming, D.C., In re Galveston-Houston Electric Co., 15 F.Supp. 126, certiorari denied U. S. v. Galveston-Houston Electric Co., 57 S.Ct. 117, 299 U.S. 590, 81 L.Ed. 435.

(3) Trial court's fact findings.—Southern Power & Light Co. v. U. S., C.C.A.Ark., 72 F.2d 368.

Conclusiveness of bill of exceptions, under former practice, before bill was abolished in circuit court of appeals.—E. K. Wood Lumber Co. v. Andersen, C.C.A.Wash., 81 F.2d 161, certiorari denied 56 S.Ct. 669, 297 U.S. 723, 80 L.Ed. 1007—U. S. v. Alcorn, C.C.A.Or., 80 F.2d 487—U. S. v. Paul, C.C.A.Idaho, 76 F.2d 132—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—Moss v. Gulf Compress Co., Miss., 202 F. 657, 121 C.C.A. 67—Purple v. Union Pac. R. Co., Kan., 114 F. 123, 51 C.C.A. 564, 57 L.R.A. 700.

70. U.S.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97.

Questions presented for review see infra subdivision k of this section.

71. U.S.—Wall v. U. S., C.C.A.Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63—In re McCall, Tenn., 145 F. 898, 76 C.C.A. 430—Columbus Chain Co. v. Standard Chain Co., Ohio, 145 F. 186, 76 C.C.A. 164.

72. U.S.—Mayfield v. Ætna Life Ins. Co., C.C.A.Tex., 100 F.2d 199—Wall v. U. S., C.C.A.Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Day-Gormley Co. v. National City Bank of New York, C.C.A.N.Y., 89 F.2d 703, certiorari denied Day-Gormley Leather Co. v. National City Bank of New York, 58 S.Ct. 39, 302 U.S. 719, 82 L.Ed. 555—Snider v. Sand Springs Ry. Co., C.C.A.Okl., 62 F.2d 635—Texas Co. v. American Trade Developing Co., C.C.A.Canal Zone, 272 F. 670.

73. U.S.—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918, modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551—St. Louis & S. F. R. Co. v. Loughmiller, D.C.Okl., 193 F. 689.

74. U.S.—In re Windsor Square Development, C.C.A.Ariz., 91 F.2d 493—Edwards v. Holland Banking Co., C.C.A.Mo., 75 F.2d 713, setting aside, D.C., Holland Banking Co. v. Continental Nat. Bank of Jackson County at Kansas City, Mo., 9 F.Supp. 986—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918, modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551.

Appellant cannot contradict statement approved by trial judge in equity case that no testimony had been offered in support of claim.—Edwards v. Holland Banking Co., C.C.A.Mo., 75 F.2d 713, setting aside, D.C., Holland Banking Co. v. Continental Nat. Bank of Jackson County at Kansas City, Mo., 9 F.Supp. 986.

75. U.S.—Collins v. Streitz, C.C.A.Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.

Recitals in certificate as true

U.S.—Collins v. Streitz, supra.

76. U.S.—Walton v. Southern Pac. Co., C.C.A.Cal., 53 F.2d 63.

77. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

judge;[78] and if the reporter's transcript of the proceedings and evidence is used it may be relied on as being correct, subject to correction by the judge.[79]

k. Questions Presented for Review

The appellate court is limited in its review to questions properly presented by the record, which also sets forth all related matters necessary to the determination of such questions.

As a rule of general application, the appellate court is limited in its review of a case to the consideration of such questions only as are properly presented by the record or the requisite part thereof,[80] and a question may be reviewed only where the record or the requisite part thereof contains or sets forth such matters relating thereto as will enable the appellate court to determine whether or not there is error in respect thereof.[81] If matters which are not a part of the record proper are not brought up in the manner required therefor, the review is limited to questions appearing on the record proper.[82]

Applications of rule. In accordance with the general rule, only where the record properly presents the question involved, and sets forth the evidence or other related matters necessary to its determination may the appellate court review questions relating to: the grounds and form of action,[83] and matters of defense;[84] the jurisdiction of the lower court;[85] a defect in process;[86] the pleadings,[87] including an amendment[88] or demurrer[89] thereto; the ruling on a motion for a continuance,[90] or on a

78. U.S.—Middleton v. Hartford Accident & Indemnity Co., supra.

79. U.S.—Middleton v. Hartford Accident & Indemnity Co., supra.

80. U.S.—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695—Traglio v. Harris, C.C.A.Or., 104 F. 2d 439, 127 A.L.R. 803, affirming, D.C., Harris v. Traglio, 24 F.Supp. 402, certiorari dismissed Traglio v. Harris, 60 S.Ct. 125, 308 U.S. 629, 84 L.Ed. 524—Garrow, MacClain & Garrow v. Bass, C.C.A.Tex., 88 F. 2d 574, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538—Close v. Brictson Mfg. Co., C.C.A. Neb., 49 F.2d 751—U. S. v. Commercial Credit Co., C.C.A.Md., 20 F.2d 519—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—Roberts Cone Mfg. Co. v. Bruckman, Mo., 255 F. 957, 167 C. C.A. 249—Good Pine Lumber Co. v. Duke, La., 229 F. 714, 144 C.C.A. 124.

4 C.J. p 521 note 76.

Review limited to questions presented by bill of exceptions, under former practice.—Taylor v. Merrill, C.C.A.Ariz., 104 F.2d 710, certiorari denied 60 S.Ct. 122, 308 U.S. 593, 84 L.Ed. 496—Griggs v. Nadeau, Minn., 250 F. 781, 163 C.C.A. 113—National Surety Co. v. Lincoln County, C.C.A. Mont., 238 F. 705, 151 C.C.A. 555, affirming, D.C., Lincoln County v. Coast Bridge Co., 231 F. 468—Dunsmuir v. Scott, Cal., 217 F. 200, 133 C.C.A. 194.

81. U.S.—Red Star Laboratories Co. v. Pabst, C.C.A.Ill., 100 F.2d 1—Close v. Brictson Mfg. Co., C.C.A. Neb., 49 F.2d 751—U. S. v. One Ford Sedan, C.C.A.Miss., 297 F. 830.

4 C.J. p 521 note 76.

82. U.S.—Bowers v. Henry Steers, Inc., N.Y., 241 F. 377, 154 C.C.A. 257.

Review limited to record proper in absence of bill of exceptions, under former practice, see supra subdivision c of this section.

83. U.S.—Rieker Brewing Co. v. U. S., C.C.A.Pa., 60 F.2d 88, certiorari denied 53 S.Ct. 90, 287 U.S. 641, 77 L.Ed. 555.

84. U.S.—Town of Hamden v. American Surety Co., C.C.A.Conn., 93 F. 2d 482, affirming, D.C., Town of Hamden v. American Surety Co. of New York, 9 F.Supp. 733, certiorari denied American Surety Co. v. Town of Hamden, 58 S.Ct. 647, 303 U.S. 648, 82 L.Ed. 1109—Vulcan Mfg. Co. v. Maytag Co., C.C.A.Mo., 73 F.2d 136, certiorari granted 55 S.Ct. 347, 293 U.S. 553, 79 L.Ed. 656, certiorari dismissed 55 S.Ct. 403, 294 U.S. 734, 79 L.Ed. 1263—U. S. Merchants' & Shippers' Ins. Co. v. Elder Dempster & Co., C.C.A. N.Y., 62 F.2d 59—Ralston Steel Car Co. v. Commissioner of Internal Revenue, C.C.A., 53 F.2d 948—Childs v. U. S., C.C.A.La., 5 F.2d 816—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A. Colo., 4 F. 2d 965—Wise v. Brotherhood of Locomotive Firemen and Enginemen, Iowa, 252 F. 961, 164 C.C.A. 469—Shawnee Nat. Bank v. U. S., Okl., 249 F. 583, 161 C.C.A. 509.

Res judicata

Where judgment in prior proceeding in same court between same parties is pleaded as res judicata or estoppel by judgment and plea is traversed, material parts of the record in prior proceeding must be offered in evidence to make a record on which review may be had.—Divide Creek Irr. Dist. v. Hollingsworth, C. C.A.Colo., 72 F.2d 859.

85. U.S.—Ferguson v. Wachs, C.C. A.Ill., 96 F.2d 910—Sturhahn v. General Household Utilities Co., C. C.A.Ga., 92 F.2d 415—Boston Acme Mines Corporation v. Salina Canyon Coal Co., C.C.A.Utah, 3 F.2d 729—Farmers' Oil & Guano Co. v. Duckworth Co., Ga., 217 F. 362, 133 C.C.A. 278—Eldorado Coal & Mining Co. v. Mariotti, Ill., 215 F. 51, 131 C.C.A. 359—Taylor v. Easton, S.D., 180 F. 363, 103 C.C.A. 509.

86. U.S.—Bankers' Surety Co. v. Town of Holly, Colo., 219 F. 96, 134 C.C.A. 536.

87. U.S.—Fred Harvey, Inc., v. Crooks, C.C.A.Mo., 54 F.2d 353, affirming, D.C., 39 F.2d 466—Akre v. Liberty State Bank of Minneapolis, C.C.A.S.D., 24 F.2d 816.

A ruling on a motion to require plaintiff to elect on which count he will rely is reviewable only where the record contains all the evidence.—Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 319.

88. U.S.—Suffel v. Bosworth, C.C.A. Cal., 95 F.2d 494—Electric Management & Engineering Corporation v. United Power & Light Corporation (of Kansas), C.C.A.Kan., 19 F.2d 311.

Refusal to permit amendment cannot be reviewed, where record does not disclose ground or amendment proposed.—Roach v. Stastny, C.C.A. Ill., 104 F.2d 559—Electric Management & Engineering Corporation v. United Power & Light Corporation (of Kansas), C.C.A.Kan., 19 F.2d 311—Bulte v. Iglehart, Ind., 137 F. 493, 70 C.C.A. 76.

89. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F.2d 925—Corona Coal Co. v. Robert P. Hyams Coal Co., C.C.A.Ala., 9 F. 2d 361.

90. U.S.—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97, certiorari denied 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 1258—Pat-

motion for a dismissal or nonsuit,[91] or for the direction of a verdict;[92] the qualifications and selection of jurors;[93] error in connection with a reference or submission to a master;[94] the conduct of the trial or hearing,[95] including the conduct and remarks of the court,[96] and the argument and conduct of counsel;[97] the amount of recovery or extent of the relief granted;[98] the ruling on a motion for a new trial;[99] and error in the allowance or disallowance of costs, and the manner of taxing them.[1]

Questions depending on evidence in general. Generally, questions which depend on the evidence are available on appeal only where such evidence or the relevant portion thereof appears of record,[2] in the manner and form prescribed by rule of court;[3] otherwise the review will be limited to a consideration of the record proper.[4]

terson Oil Co. v. Brodhead, C.C.A. Tex., 2 F.2d 598—Panama R. Co. v. Curran, Canal Zone, 256 F. 768, 168 C.C.A. 114.

Refusal of continuance to take deposition of a witness on a new issue introduced by amendment is not reviewable, where it does not appear what the testimony of the witness would have been.—Pauchet v. Bujac, C.C.A.N.M., 281 F. 962.

91. U.S.—Reynolds v. Dorrance, C.C.A.Va., 94 F.2d 184—Whelan v. Blankenbeckler, C.C.A.Tex., 87 F.2d 81—Ebner v. Zimmerly, Alaska, 118 F. 818, 55 C.C.A. 430.

Dismissal of defense
U.S.—Sinclair Refining Co. v. Refiners' Oil Co., C.C.A.Ohio, 75 F.2d 851.

92. U.S.—Pitcairn v. Perry, C.C.A. Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 U.S. 697, 86 L.Ed. 557—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383—Montgomery v. Sioux City Seed Co., C.C.A.Wyo., 71 F.2d 926—Vance v. Chapman, C.C.A.Okl., 23 F.2d 914—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C.C.A. 240.

93. U.S.—U. S. v. Meyer, C.C.A.Ill., 113 F.2d 387, certiorari denied Meyer v. U. S., 61 S.Ct. 174, two cases, 311 U.S. 706, 85 L.Ed. 459.

94. U.S.—Toledo, P. & W. R. R. v. Peoria & P. U. Ry. Co., C.C.A.Ill., 72 F.2d 745—Hunn v. Lewis, C.C.A. Iowa, 25 F.2d 271, certiorari denied 49 S.Ct. 30, 278 U.S. 631, 73 L.Ed. 549.

A master's finding of facts cannot be reviewed, in the absence from the record of a certificate or other proof that it contains all the evidence taken relating to such findings.—Prosser v. Chapman, C.C.A.S.C., 2 F.2d 134—Goldsmith Silver Co. v. Savage, Me., 229 F. 623, 144 C.C.A. 33, affirming, D.C., 211 F. 751—Clarkson v. Fisher, Mass., 228 F. 330, 142 C.C.A. 622—W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co., N.Y., 153 F. 575, 82 C.C.A. 529, affirming, C.C., 144 F. 568—McCourt v. Singers-Bigger, Colo., 145 F. 103, 76 C.C.A. 73, 7 Ann. Cas. 287—St. Louis Merchants' Bridge Terminal Ry. Co. v. Continental Trust Co., Ohio, 111 F. 669, 49 C.C.A. 529.

95. U.S.—Hazeltine v. Johnson, C.C. A.Mont., 92 F.2d 866.

Disqualification of jury
A judgment cannot be reviewed on the ground that the jury were not impartial, unless the record shows that they were improperly influenced or were governed by passion or prejudice.—Kansas City So. R. Co. v. Billingslea, Tex., 116 F. 335, 54 C.C.A. 109, certiorari dismissed 23 S.Ct. 850, 189 U.S. 515, 47 L.Ed. 925.

96. U.S.—Hazeltine v. Johnson, C.C. A.Mont., 92 F.2d 866—Fisher Mach. Works Co. v. Dougherty, Kan., 231 F. 910, 146 C.C.A. 106.

97. U.S.—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 106 F.2d 561, certiorari dismissed 60 S. Ct. 468, 309 U.S. 691, 84 L.Ed. 1033—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Minn., 74 F.2d 31—Rhodes v. U. S., Mo., 79 F. 740, 25 C.C.A. 186.

98. U.S.—Cameron County Water Imp. Dist. No. 8 v. De La Vergne Engine Co., C.C.A.Tex., 100 F.2d 523—Turner v. Standard Ice & Fuel Co., C.C.A.Kan., 292 F. 38—Guardian Savings & Trust Co. v. Road Improvement Dist. No. 2 of Benton County, C.C.A.Ark., 290 F. 152—Liggett v. Glenn, Mo., 51 F. 381, 2 C.C.A. 286.

Allowance of interest
U.S.—Greeley Nat. Bank v. Wolf, C. C.A.Colo., 4 F.2d 67.

Verdict cannot be reviewed as excessive in absence of instructions on measure of damages in the record, at least where verdict is within bounds of reason.—Spokane, P. & S. Ry. Co. v. Cole, C.C.A.Or., 54 F.2d 318.

99. U.S.—Gay v. U. S., C.C.A.Ill., 118 F.2d 160.

1. U.S.—Blackhurst v. Johnson, C.C. A.Mo., 72 F.2d 644—Pennsylvania R. Co. v. Minds, Pa., 244 F. 53, 156 C.C.A. 481, affirming, D.C., Minds v. Pennsylvania R. Co., 237 F. 267, and affirmed 39 S.Ct. 531, 250 U.S. 368, 63 L.Ed. 1039—Corn Products Refining Co. v. Chicago Real Estate Loan & Trust Co., Ill., 185 F. 63, 107 C.C.A. 283.

Necessity of setting out evidence
(1) The action of the trial court, on motions to tax or retax costs or to grant extra allowances, will not be reviewed on appeal unless the evidence before the trial court appears on the record.—Speh v. Bullard, C.C. A.Fla., 90 F.2d 227.

(2) Action of court in refusing to compel giving of security for costs will not be reversed, where record does not contain the evidence on the hearing of the motion.—Panama R. Co. v. Curran, Canal Zone, 256 F. 768, 168 C.C.A. 114.

2. U.S.—Lawrence v. Connecticut Mut. Life Ins. Co., C.C.A.Mich., 91 F.2d 381—Vulcan Mfg. Co. v. Maytag Co., C.C.A.Mo., 73 F.2d 136, certiorari granted 55 S.Ct. 347, 293 U.S. 553, 79 L.Ed. 656, certiorari dismissed 55 S.Ct. 403, 294 U.S. 734, 79 L.Ed. 1263—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Haubtman & Loeb Co. v. Hooven-Owens-Rentschler Co., C.C.A.La., 262 F. 408—Smith & Co. v. Kingfalfa Mills, Neb., 237 F. 82, 150 C.C.A. 284—Walker v. Giles, N.Y., 218 F. 637, 134 C.C.A. 395, affirming, D.C., 207 F. 825—Tiernan v. Chicago Life Ins. Co., Kan., 214 F. 238, 131 C.C. A. 284.

4 C.J. p 532 note 90.

Verdict
U.S.—Central Commercial Co. v. Jones-Dusenbury Co., Ill., 251 F. 13, 163 C.C.A. 263.

3. U.S.—Fairbanks, Morse & Co. v. American Valve & Meter Co., Ill., 48 S.Ct. 317, 276 U.S. 305, 72 L.Ed. 584, reversing, C.C.A., 18 F.2d 716, certiorari granted 47 S.Ct. 770, 274 U.S. 735, 71 L.Ed. 1336—Moss v. Gilchrist-Fordney Co., C.C.A.Miss., 24 F.2d 931.

That testimony is not filed within the time allowed by rule of court does not prevent its being considered.—Pinkston v. Brotherhood of Locomotive Firemen and Enginemen, C.C.A.Ohio, 69 F.2d 600, certiorari granted Brotherhood of Locomotive Firemen and Enginemen v. Pinkston, 54 S.Ct. 866, 292 U.S. 621, 78 L.Ed. 1477, affirmed 55 S.Ct. 1, 293 U.S. 96, 79 L.Ed. 219, rehearing denied 55 S. Ct. 211, 293 U.S. 632, 79 L.Ed. 717.

4. U.S.—In re Los Angeles Lumber Products Co., C.C.A.Cal., 100 F.2d 963, affirming, D.C., 24 F.Supp. 501—Huffman v. Baldwin, C.C.A.Ark.,

Admission or exclusion of evidence. Alleged error in the admission of evidence will be considered only where the record shows the evidence admitted,[5] and the fact that it was admitted,[6] and, when necessary to a review of a ruling on the admissibility of particular evidence, other evidence admitted should be included in the record.[7] Where evidence is admitted subject to objection to its competency and admissibility, the record must show whether the evidence was finally received or not, and whether or not the objection was overruled in order to obtain a review of the point.[8] The admission of expert testimony may be reviewed only where the record discloses a factual foundation for the expert witness' conclusion.[9] Rulings on the admissibility of evidence on cross-examination will be reviewed only where the record contains enough of the testimony in chief to enable the court to see whether the rulings were erroneous.[10]

Alleged error in the exclusion of evidence will be considered only where the record shows what such evidence would have been or otherwise preserves such evidence.[11] Error in excluding oral testimony will be reviewed only where the record shows what the testimony would have been, or what was proposed to be proved by the question asked,[12] unless the question itself indicates what the answer would be.[13] Alleged error in excluding documentary evidence will not be reviewed, where the record fails to preserve the document or the contents thereof.[14]

Sufficiency of evidence. The sufficiency of the evidence will be reviewed by the appellate court only where the record or the appropriate part thereof properly raises or presents such question, and properly sets forth and presents all or substantially all of the evidence adduced at the trial,[15] except where the omitted part has no bearing on the question pre-

82 F.2d 5—Rosborough v. Chelan County, C.C.A.Wash., 53 F.2d 198.

If the evidence heard by the lower court is not in the record, nothing can be considered on appeal except questions of law not depending on the evidence, such as the sufficiency of the common-law record, including the pleadings and findings, to authorize the verdict or the conclusions or judgment of the trial court.—American Employers Ins. Co. v. Franklin Savings & Loan Co. of Macon, C.C.A.Ga., 89 F.2d 224.

5. U.S.—Farmers' Life Ins. Co. of Denver, Colo., v. Barker, C.C.A.Tex., 2 F.2d 468.

4 C.J. p 533 note 91.

6. U.S.—Phillips v. Governor & Co. of Adventurers of England Trading into Hudson's Bay, C.C.A.Nev., 79 F.2d 971—Masonic Ben. Ass'n of Central Illinois v. Lyman, Ill., 60 F. 498, 9 C.C.A. 104.

7. U.S.—Sheehan v. Braddock Coal Co., C.C.A.Mass., 293 F. 573, certiorari denied 44 S.Ct. 334, 264 U.S. 585, 68 L.Ed. 862.

In rebuttal

An appellate court cannot determine admissibility of testimony in rebuttal, where the record contains but a small part of the prior evidence.—Sheehan v. Braddock Coal Co., supra.

8. U.S.—U. S. v. John II Estate, C.C.A.Hawaii, 91 F.2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577.

9. U.S.—U. S. v. Francis, C.C.A. Mont., 64 F.2d 865.

10. U.S.—Stolte v. Larkin, C.C.A. Minn., 110 F.2d 226—First Nat. Bank of Pittston v. Hoggson Bros., Pa., 242 F. 261, 155 C.C.A. 101.

Testimony in another suit

If testimony of a witness in another suit was different from his testimony in the present suit, such inconsistency should be brought into the record by cross-examination, and in the absence thereof the objection will be disregarded on appeal.—Troy Wagon Works Co. v. Ohio Trailer Co., C.C.A.Ohio, 274 F. 612.

11. U.S.—U. S. v. Marsh, C.C.A. Va., 108 F.2d 558, denying rehearing 107 F.2d 173—Andrews v. Drake, C.C.A.Mich., 83 F.2d 767, certiorari denied 57 S.Ct. 35, 299 U.S. 572, 81 L.Ed. 421—New York Life Ins. Co. v. Doerksen, C.C.A. Kan., 75 F.2d 96—Meador v. National Liberty Ins. Co. of America, C.C.A.Tex., 53 F.2d 731—Farley v. Norfolk & W. Ry. Co., C.C.A.W. Va., 14 F.2d 93—Camp Mfg. Co. v. Beck, C.C.A.S.C., 283 F. 705—Anderson Lumber Corporation v. Lehto, C.C.A.S.C., 282 F. 485—Postal Telegraph-Cable Co. v. Citizens' Nat. Bank, N.J., 228 F. 601, 143 C.C.A. 123.

4 C.J. p 71 note 97.

Rebuttal evidence

Error cannot be predicated on dismissal of bill, without permitting rebuttal evidence, where record does not show character of rebuttal to be offered.—Lowish v. First Nat. Bank, C.C.A.Ohio, 31 F.2d 408.

12. U.S.—Sacramento Suburban Fruit Lands Co. v. Soderman, C.C.A.Cal., 36 F.2d 934.

4 C.J. p 74 note 14.

Sufficiency of bill of exceptions, under former practice.—Sartor v. United Gas Public Service Co., C.C.A. La., 84 F.2d 436.

13. U.S.—Brett v. U. S., C.C.A. Wash., 86 F.2d 305, certiorari denied 57 S.Ct. 782, 301 U.S. 682, 81 L.Ed. 1340.

14. U.S.—Quapaw Land Co. v. Bolinger, C.C.A.La., 32 F.2d 627, certiorari granted 50 S.Ct. 34, 280 U.S. 542, 74 L.Ed. 602, and set aside, 50 S.Ct. 244, 281 U.S. 693, 74 L.Ed. 1122—First Nat. Bank of Pittston v. Hoggson Bros., Pa., 242 F. 261, 155 C.C.A. 101.

4 C.J. p 73 note 9.

State court records, excluded from evidence by federal district court, to which cause was removed, but ordered transmitted to, and duly lodged with, clerk of circuit court of appeals, which excused appellant from incorporating them in full, in record, were held properly before latter court for consideration.—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505, certiorari denied A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 57 S.Ct. 17, 299 U.S. 555, 81 L.Ed. 409.

15. U.S.—Kaschefsky v. Kaschefsky, C.C.A.Mich., 110 F.2d 836—Smith v. Boise City, C.C.A.Idaho, 104 F.2d 933—City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567—Baker Ice Mach. Co. v. Hebert, C.C.A. Neb., 76 F.2d 73—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C.C.A. 240—Pacific Mail S. S. Co. v. Balderach, Canal Zone, 229 F. 562, 144 C.C.A. 22—Meyer v. Everett Pulp & Paper Co., Wash., 193 F. 857, 113 C.C.A. 643, reversing, C.C., 184 F. 945—Christy v. Schwartzchild & Sulzberger Co., Ill., 160 F. 657, 88 C.C.A. 125.

4 C.J. p 535 note 8.

Omission of exhibits, maps, or documentary evidence

The sufficiency of the evidence will not be considered, on appeal, where

sented,[16] and except that, where there has been a view of the premises by the jury, it would seem impossible that the record be regarded as incorporating all of the evidence.[17] As a general rule alleged errors in the rulings of the court on an application for a dismissal or nonsuit,[18] or with regard to the direction of a verdict or an affirmative charge,[19] are reviewable only where the record contains all or substantially all the evidence on which the ruling is based.

It is a further essential to a review of the sufficiency of the evidence that the record or certificate affirmatively recite or show that it contains all the evidence, or, in other words, it must purport to contain all the evidence;[20] but this does not require a statement in express terms that all the evidence is set out; it is sufficient if it affirmatively appears from a reasonable construction of the language used that all, or substantially all, the material evidence is preserved.[21]

Instructions. Questions, involving instructions given or refused, will be considered on appeal only where the instructions involved are made a part of the record,[22] and, in case of a refusal of an instruction, where it affirmatively appears from the record that a proper request therefor was made.[23] It is further essential to a review of an assignment of error based on the giving or refusal of an instruction that all the instructions given be included in the record.[24]

If the instruction given or refused depends on the evidence adduced, and is proper or otherwise according to the proof, the appellate court will review the giving or the refusal of the instruction only where the record sets forth the evidence,[25] or at least as much thereof as bears on the instruction in question,[26] and affirmatively shows that it contains

exhibits, maps, or documentary evidence introduced in evidence are omitted from the record.—U. S. v. Patryas, C.C.A.Ill., 90 F.2d 715, certiorari granted 58 S.Ct. 142, 302 U.S. 676, 82 L.Ed. 522, and affirmed 58 S.Ct. 551, 303 U.S. 341, 82 L.Ed. 883—Wise v. Brotherhood of Locomotive Firemen and Enginemen, Iowa, 252 F. 961, 164 C.C.A. 469.

16. U.S.—Bolen-Darnall Coal Co. v. Hicks, Ark., 190 F. 717, 111 C.C.A. 445.

17. U.S.—Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co., N.D., 216 F. 503, 133 C.C.A. 9, L.R.A.1915B 953.

18. U.S.—Keith Lumber Co. v. Houston Oil Co. of Texas, Tex., 257 F. 1, 168 C.C.A. 213, certiorari denied 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648—Jefferson v. Burhans, Minn., 85 F. 924, 29 C.C.A. 487.

19. U.S.—Buffington v. Owosso Mfg. Co., C.C.A.Ark., 105 F.2d 692—E. K. Wood Lumber Co. v. Andersen, C. C.A.Wash., 81 F.2d 161, certiorari denied 56 S.Ct. 669, 297 U.S. 723, 80 L.Ed. 1007—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 18 F. 2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, and reversed on other grounds 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, amended 48 S.Ct. 527, 72 L.Ed. 1018, and mandate conformed to, C. C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008—U. S. v. Mobile & O. R. Co., C.C.A.Ala., 8 F.2d 613—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.
4 C.J. p. 539 note 15.

20. U.S.—U. S. v. John II Estate, C.C.A.Hawaii, 91 F.2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—U. S. v. Phillips, C.C.A.Ala., 70 F. 2d 722—McHale v. Hull, C.C.A.Ill., 16 F.2d 781—Oregon-American Lumber Co. v. Simpson, C.C.A. Wash., 8 F.2d 946.
4 C.J. p 539 note 19.

The usual formula is, "The foregoing was all the evidence given in the cause."—U. S. v. Yant, C.C.A.Ill., 88 F.2d 956.

21. U.S.—E. K. Wood Lumber Co. v. Andersen, C.C.A.Wash., 81 F.2d 161, certiorari denied 56 S.Ct. 669, 297 U.S. 723, 80 L.Ed. 1007—Equitable Life Assur. Soc. of U. S. v. Halliburton, C.C.A.Okl., 67 F.2d 854—U. S. v. Alvord, C.C.A.Mass., 66 F.2d 455, reversing, D.C., Alvord v. U. S., 4 F.Supp. 275, and certiorari denied 54 S.Ct. 376, 291 U.S. 661, 78 L.Ed. 1053—Page v. Lafayette Worsted Co., C.C.A.R.I., 66 F.2d 339, certiorari denied Lafayette Worsted Co. v. Page, 54 S. Ct. 127, 290 U.S. 692, 78 L.Ed. 596—Stinson v. Business Men's Accident Ass'n, C.C.A.Okl., 43 F.2d 312—Union Indemnity Co. v. Leidesdorf, C.C.A.N.Y., 37 F.2d 26, certiorari denied Leidesdorf v. Union Indemnity Co., 50 S.Ct. 246, 281 U.S. 730, 74 L.Ed. 1146—First Nat. Bank of Council Bluffs, Iowa v. Moore, Wash., 148 F. 953, 78 C.C.A. 581—Cincinnati, H. & D. R. Co. v. Thiebaud, Ohio, 114 F. 918, 52 C.C.A. 538.

22. U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Hartelt, C.C.A.Iowa, 119 F.2d 253—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A.Alaska, 76 F.2d 655—Emporia Loan & Investment Co. v. Rees, C. C.A.Kan., 66 F.2d 225, rehearing denied 66 F.2d 789—Compania L'Union De Paris v. Goldsmith, C.C.A. Puerto Rico, 8 F.2d 134—Standard Portland Cement Co. v. Foley, C.C. A.Ala., 270 F. 203, certiorari denied 41 S.Ct. 534, 256 U.S. 693, 65 L.Ed. 1174—Stewart v. Dallam, Fla., 219 F. 886, 135 C.C.A. 416—Johnson v. Willapa, Wash., 173 F. 488, 97 C.C. A. 494—Dubois v. Decker, Pa., 114 F. 267, 52 C.C.A. 153—Case v. Hall, 94 F. 300, 36 C.C.A. 259, affirming 2 Ind.T. 8, 46 S.W. 180.

Mere allegation of counsel that certain instructions were given is insufficient.—Compania L'Union De Paris v. Goldsmith, C.C.A.Puerto Rico, 8 F.2d 134.

23. U.S.—Dangelo v. McLean Fire Brick Co., C.C.A.Ohio, 287 F. 14—Jack v. Mutual Reserve Fund Life Ass'n, Miss., 113 F. 49, 51 C.C.A. 36—Fidelity & Casualty Co. of New York v. Freeman, Tenn., 109 F. 847, 48 C.C.A. 692, 54 L.R.A. 680.

24. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Spokane, P. & S. Ry. Co. v. Cole, C.C.A.Or., 54 F.2d 318—Stewart v. Dallam, Fla., 219 F. 886, 135 C.C.A. 416.
4 C.J. p 546 note 75.

25. U.S.—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648—Johnson v. Willapa Lumber Co., Wash., 173 F. 488, 97 C.C.A. 494—Milwaukee v. Shailer & Schinglau Co., Wis., 91 F. 726, 34 C.C.A. 66.
4 C.J. p 543 note 55.

26. U.S.—Robinson v. Stearns, Pa., 204 F. 772, 123 C.C.A. 222—Sternenberg v. Mailhos, Tex., 99 F. 43, 39 C.C.A. 408.

all the evidence on the subject matter of the instruction complained of.[27]

Findings and decisions. Errors in findings of fact or conclusions of law will be reviewed only where such errors are raised or shown by the record;[28] and, if the evidence, or at least the relevant part thereof, is not stated in the record, the correctness of the findings will not be reviewed except in so far as they are contradictory or conflicting or otherwise clearly erroneous,[29] or stated otherwise, if the evidence in the case is not properly brought up in the record, findings of the trial court will generally be accepted as correct.[30] The findings will not be reviewed where the record includes only as much of the evidence as was designated by appellant,[31] unless appellee does not call attention to any material evidence omitted from the record.[32]

Judgment. The validity or propriety of the judgment or order appealed from will be reviewed where the record sufficiently presents such question,[33] and, where the question is dependent on the evidence, it can be considered only where the record contains the evidence.[34]

1. Matters Not Apparent of Record

As a general rule, matters not properly included or shown in the record, notwithstanding they otherwise appear, will not be considered by the appellate court.

As a general rule, the appellate court can consider nothing that is not contained in the record, and will decide the case and the questions raised only on the basis of the record presented.[35] In accord-

27. U.S.—Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co., Ark., 114 F. 133, 52 C.C.A. 95—Yates v. U. S., Cal., 90 F. 57, 32 C.C.A. 507.

28. U.S.—Sims v. Douglass, C.C.A. Ariz., 82 F.2d 812—U. S. v. Derrick, C.C.A.Okl., 70 F.2d 162—Jones v. Gill, C.C.A.Mo., 67 F.2d 159, affirming, D.C., Gill v. Jones, 4 F.Supp. 769—Jensma v. Sun Life Assur. Co. of Canada, C.C.A.Idaho, 64 F. 2d 457, reversing, D.C., Jensma v. Benefit Ass'n of Ry. Employees, 1 F.Supp. 951, and certiorari denied Sun Life Assur. Co. of Canada v. Jensma, 53 S.Ct. 795, 289 U.S. 763, 77 L.Ed. 1505—Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co., C.C.A.Minn., 283 F. 915.

29. U.S.—Petition of Gogate, C.C.A. Pa., 126 F.2d 1020—Speh v. Bullard, C.C.A.Fla., 90 F.2d 227—Tricou v. Helvering, C.C.A., 68 F.2d 280, certiorari denied 54 S.Ct. 865, 292 U.S. 655, 78 L.Ed. 1503, rehearing denied 55 S.Ct. 67, 293 U.S. 629, 78 L.Ed. 715—U. S. v. Wooten, C.C.A.N.M., 40 F.2d 882—Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue, C.C.A., 29 F. 2d 559—Hunn v. Lewis, C.C.A.Iowa, 25 F.2d 271, certiorari denied 49 S. Ct. 30, 278 U.S. 631, 73 L.Ed. 549—Isaacs v. De Hon, C.C.A.Alaska, 11 F.2d 943.
4 C.J. p 548 note 91.

To obtain review of general finding, all evidence must be before the appellate court.—Stinson v. Business Men's Accident Ass'n, C.C.A.Okl., 43 F.2d 312.

Findings based on master's report
Where master was directed to report his findings of fact and conclusions of law, appeal from decree on court's own findings after all exceptions to master's report were sustained cannot be determined, where record does not show that it contains all the evidence that was before the master and that all of such evidence was before the trial court.—Roosevelt v. Missouri State Life Ins. Co., C.C.A.Ark., 70 F.2d 939.

30. U.S.—U. S. v. Flower, C.C.A. Neb., 108 F.2d 298—Bernards v. Johnson, C.C.A.Or., 103 F.2d 567—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864—Geiger v. First Troy Nat. Bank & Trust Co. of Troy, C.C.A.Ohio, 72 F.2d 877—Rickard v. Thompson, C.C.A.Alaska, 72 F.2d 807—Mayer v. White, C.C.A.Kan., 12 F.2d 710—Roxana Petroleum Co. of Oklahoma v. Rush, C.C.A.La., 295 F. 844.

Where evidence heard by auditor is not before court, his findings must stand, unless controlled by evidence in report or outside it.—Moore v. Foss & Co., D.C.Mass., 18 F.2d 635.

31. U.S.—Sublette v. Servel, Inc., C. C.A.Ark., 124 F.2d 516.

32. U.S.—Associated Indemnity Corporation v. Manning, C.C.A.Wash., 107 F.2d 362.

The district court's findings are subject to attack on appeal as against appellees' insistence that evidence is not all in record, where appellant complied with the Fed.Rules of Civ.Proc. rule 75, 28 U.S.C.A. following § 723c, in regard to designating the portion of the evidence to be contained in the record, when appeal was taken and appellees have not called attention to any material evidence omitted from record.—Associated Indemnity Corporation v. Manning, supra.

33. U.S.—Kelley-Koett Mfg. Co. v. McEuen, C.C.A.Ky., 130 F.2d 488, modifying, D.C., McEuen v. Kelley-Koett Mfg. Co., 34 F.Supp. 351—Ford v. Grimmett, C.C.A.La., 278 F. 140.

Suit in forma pauperis
Where record does not present definite findings of fact, and declarations of law in support of decree as contemplated by the Federal Rules of Civil Procedure, but appellant shows that lawsuit has been pending three and one-half years and is now being prosecuted in forma pauperis, and urges court to review the decree, circuit court of appeals will review the decree.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612.

34. U.S.—Page v. Lafayette Worsted Co., C.C.A.R.I., 66 F.2d 339, certiorari denied Lafayette Worsted Co. v. Page, 54 S.Ct. 127, 290 U.S. 692, 78 L.Ed. 596—Stradford v. Wagner, C.C.A.Okl., 64 F.2d 749—Frank v. Bernard, N.Y., 185 F. 810, 108 C.C.A. 42.

35. U.S.—McBee v. U. S., C.C.A.Okl., 126 F.2d 238—Drake v. General Finance Corporation of Louisiana, C.C.A.La., 119 F.2d 588—Century Indemnity Co. v. Nelson, C.C.A. Cal., 96 F.2d 679, conforming to mandate 55 S.Ct. 531, 303 U.S. 213, 82 L.Ed. 755, reversing, C.C.A., 90 F.2d 644, certiorari granted 58 S. Ct. 55, 302 U.S. 674, 82 L.Ed. 520, rehearing denied, C.C.A., 98 F.2d 903—American Trust Co. v. Harris, C.C.A.Cal., 88 F.2d 541—In re West Side-Atlas-National Bank of Chicago, C.C.A.Ill., 78 F.2d 395—U. S. v. Van Dusen, C.C.A.Minn., 78 F.2d 121—Ryals v. U. S., C.C.A. Fla., 69 F.2d 946—Chisholm-Ryder Co. v. Buck, C.C.A.Md., 65 F.2d 735, affirming, D.C., 1 F.Supp. 268—Becker v. Thomas, C.C.A.Kan., 14 F.2d 829—Oliver American Trading Co. v. Government of U. S. of Mexico, C.C.A.N.Y., 5 F.2d 659—Ford v. Grimmett, C.C.A.La., 278 F. 140—U. S. v. Bell, Pa., 135 F. 336, 68 C.C.A. 144.
4 C.J. p 553 note 35.

Particular matters not considered because not in record
(1) Card and contents used on cross-examination.—Smith v. S. S. Kresge Co., C.C.A.Mo., 79 F.2d 361.

ance with this rule the appellate court will not consider stipulations or agreed statements of fact which are not properly embodied or shown in the record;[36] nor will it consider statements and admissions of counsel which form no part of the record, and relate to matters not otherwise appearing therein,[37] and this is so whether the admissions or statements appear, or are made, in briefs,[38] or whether they appear in argument[39] or in informal colloquy between the court and counsel,[40] unless they are matters of which the court might properly take judicial notice.[41]

Evidence dehors the record, whether by affidavit[42] or otherwise,[43] ordinarily will not be considered by the appellate court. The appellate court, however, may avail itself of authentic evidence outside the record of matters occurring since the judgment or decree appealed from, where such course is necessary to prevent a miscarriage of justice, or a useless circuity of proceedings,[44] or to preserve a jurisdiction lawfully acquired,[45] or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled, or for other reasons has ceased to exist.[46] The appellate court may consider data not contained in the record with respect to the administrative construction of a statute.[47]

Opinion of trial court. The opinion of the lower court, or matters which appear only therein, will not as a rule be considered by the appellate court to ascertain facts which are required to be shown by the record,[48] or to control or modify the findings of

(2) Matters considered in other cases not before it.—Brown v. Norfolk & W. Ry. Co., C.C.A.Va., 20 F.2d 133, affirming, D.C., Brown's Adm'r v. Norfolk & W. Ry. Co., 12 F.2d 319, and certiorari denied Brown v. Norfolk & W. Ry. Co., 48 S.Ct. 36, 275 U.S. 540, 72 L.Ed. 414.

Matters not presented by bill of exceptions, under former practice.—Nielson v. Utah Const. Co., C.C.A. Idaho, 104 F.2d 887—Ocean Accident & Guarantee Corporation v. Olson, C.C.A.N.D., 87 F.2d 465—Kern v. U. S., C.C.A.N.M., 74 F.2d 450—Haubtman & Loeb Co. v. Hooven-Owens-Rentschler Co., C.C.A.La., 262 F. 408.

Matter not printed as not to be considered see supra subdivision h of this section.

Necessity for bill of exceptions generally see supra subdivision c of this section.

36. U.S.—Hayden v. Ogden Savings Bank, Utah, 158 F. 90, 85 C.C.A. 558—Stelk v. McNulta, Ill., 99 F. 138, 40 C.C.A. 357.

4 C.J. p 119 note 16.

37. U.S.—Compania L'Union De Paris v. Goldsmith, C.C.A.Puerto Rico, 8 F.2d 134.

Chronological statement of proceedings below, as appellant claims they transpired, presents no question of law to appellate court.—Barton v. Automobile Ins. Co. of Hartford, Conn., C.C.A.Mass., 63 F.2d 631, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1499.

38. U.S.—Bono v. U. S., C.C.A.N.Y., 113 F.2d 724—Montfort v. Korte, C.C.A.Ind., 100 F.2d 615—U. S. v. Van Dusen, C.C.A.Minn., 78 F.2d 121—Leonard v. Field, C.C.A.Wash., 71 F.2d 483—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14, reversing, D.C., 50 F.2d 219—Wabash Ry. Co. v. American Refrigerator Transit Co., C.C.A. Mo., 7 F.2d 335, certiorari denied American Refrigerator Transit Co. v. Wabash R. Co., 46 S.Ct. 208, 270 U.S. 643, 70 L.Ed. 776.

Particular matters insufficiently shown by statements or admissions in briefs only:

(1) Commercial reports.—Zell v. Bankers' Utilities Co., C.C.A.Cal., 77 F.2d 22.

(2) Explanation of discrepancy of expert witness.—Coca-Cola Co. v. Feulner, D.C.Tex., 7 F.Supp. 364.

(3) Matters shown by reporter's transcript not before court.—Globe & Rutgers Fire Ins. Co. v. Draper, C.C.A.Wash., 66 F.2d 985.

39. U.S.—U. S. v. Van Dusen, C.C.A. Minn., 78 F.2d 121—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14, reversing, D.C., 50 F.2d 219—Colorado Cent. Consol. Min. Co. v. Turck, Colo., 54 F. 262, 4 C.C.A. 313, error dismissed 14 S.Ct. 35, 150 U.S. 138, 37 L.Ed. 1030.

40. U.S.—Grossman v. Kridel, C.C.A. N.Y., 90 F.2d 624.

Validity of order

The circuit court of appeals cannot determine validity of district court's order from what was said by judge and counsel with reference thereto in latter court, but must determine such question from language of order itself, on appeal therefrom.—Red Star Laboratories Co. v. Pabst, C.C.A.Ill., 100 F.2d 1.

41. U.S.—U. S. v. Van Dusen, C.C.A.Minn., 78 F.2d 121.

42. U.S.—Hovland v. Smith, C.C.A. Ariz., 22 F.2d 769—Staples & Hanford Co. v. Lord, Mass., 148 F. 15, 78 C.C.A. 106.

43. U.S.—Globe & Rutgers Fire Ins. Co. v. Draper, C.C.A.Wash., 66 F.2d 985—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, reversed on other grounds 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, amended 48 S.Ct. 527, 72 L.Ed. 1013, conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.

4 C.J. p 133 note 45.

44. U.S.—Schevenell v. Blackwood, C.C.A.Ark., 35 F.2d 421—Ridge v. Manker, C.C.A.Iowa, 132 F. 599.

45. U.S.—Schevenell v. Blackwood, C.C.A.Ark., 35 F.2d 421—Ridge v. Manker, C.C.A.Iowa, 132 F. 599.

46. U.S.—Schevenell v. Blackwood, C.C.A.Ark., 35 F.2d 421—Ridge v. Manker, C.C.A.Iowa, 132 F. 599.

47. U.S.—U. S. v. Magnolia Petroleum Co., C.C.A.Okl., 110 F.2d 212.

48. U.S.—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—U. S. v. Van Dusen, C.C.A.Minn., 78 F.2d 121—Rickard v. Thompson, C.C.A.Alaska, 72 F.2d 807—Blumenfeld v. Union Nat. Bank of Beloit, Kan., C.C.A.Kan., 38 F.2d 455—Meyers v. Allen, C.C.A.Neb., 34 F.2d 883—Clark v. Milens, C.C.A.Or., 32 F.2d 1004—Kendrick Coal & Dock Co. v. Commissioner of Internal Revenue, C.C.A., 29 F.2d 559—J. W. McKim Corporation v. Whelan, C.C.A.Wyo., 8 F.2d 241—Texas Ranger Producing & Refining Co. v. Robinson, C.C.A. La., 272 F. 453, certiorari denied 42 S.Ct. 55, 257 U.S. 646, 66 L.Ed. 414—Northern Idaho & Montana Power Co. v. A. L. Jordan Lumber Co., C.C.A.Mont., 262 F. 765—Mason v. U. S., Iowa, 219 F. 547, 135 C.C.A. 315, affirming, D.C., U. S. v. Mason, 211 F. 233.

4 C.J. p 102 note 41.

Assignments of error complaining of findings of facts and of law can-

fact on which the judgment is based.[49] However, the lower court's opinion, may be considered for the limited purpose of enabling the appellate court better to understand and interpret the decision of the lower court, by having before it the grounds or basis for such decision, and the process of reasoning by which it was reached.[50]

§ 296. Assignment of Errors; Briefs; Docketing; Dismissal or Withdrawal; Matters Preliminary to Hearing

a. Assignment of errors or statement of points
b. Briefs
c. Dismissal, withdrawal, or abandonment

a. Assignment of Errors or Statement of Points

(1) In general
(2) Form, scope, and effect

(1) In General

At least where an appeal to the circuit court of appeals is based on a part of the record only, it is necessary that appellant file an assignment of errors or statement of points, and errors not assigned will not be considered except in the case of plain or fundamental errors apparent on the face of the record. On failure to file an assignment or statement of points as required, the court may dismiss the appeal or make such other disposition of the case as it sees fit.

Under the Federal Rules of Civil Procedure, rule 75 (d), 28 U.S.C.A. following § 723c, where an appeal to the circuit court of appeals is based on a part of the record only, it is necessary that appellant shall prepare and serve a concise statement of the points on which he intends to rely on the appeal.[51] According to some decisions, the effect of this rule is to abolish the necessity of filing assignments of errors, except under the conditions specified by the rule.[52] It has been held, on the other hand, that it is still the policy of the circuit courts of appeals to require a reasonably definite statement of points or errors to be relied on, regardless of the quantum of the appeal record,[53] in accordance with the rule which generally prevailed prior to the promulgation of the Federal Rules of Civil Procedure, to the effect that errors not properly assigned would not be considered on appeal[54] except in the case of

not be predicated on oral opinion stating court's reasons, where no findings either of fact or law are made.—Farmers' Life Ins. Co. of Denver, Colo., v. Barker, C.C.A.Tex., 2 F.2d 468.

Court's statement in denying motion for new trial not included in charge to jury will not be considered on appeal from judgment rendered on verdict.—Pullman Co. v. Culbreth, C.C.A.Ala., 2 F.2d 540, 42 A.L.R. 164, affirming, D.C., Culbreth v. Pullman Co., 293 F. 402.

Opinion of lower court as part of record see supra subdivision b of this section.

49. U.S.—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—Welch v. Hassett, C.C.A.Mass., 90 F.2d 833, reversing, D.C., 15 F.Supp. 692, certiorari granted Hassett v. Welch, 58 S.Ct. 56, 302 U.S. 674, 82 L.Ed. 521, affirmed 58 S.Ct. 559, 303 U.S. 303, 82 L.Ed. 858—Isaacs v. De Hon, C.C.A.Alaska, 11 F.2d 943.

Not finding or conclusion

Trial court's opinion or memorandum of opinion cannot on appeal be treated as finding of fact or conclusion of law.—Martin v. Drexel Ice Cream Co., C.C.A.Ill., 80 F.2d 768.

50. U.S.—Bankers Trust Co. v. Henwood, C.C.A.Mo., 88 F.2d 163, affirming, D.C., In re St. Louis Southwestern R. Co., 17 F.Supp. 68—Rademaker v. E. D. Flynn Export Co., C.C.A.Ala., 17 F.2d 15—Hall v. U. S., C.C.A.Tex., 267 F. 795—Carson v. Three States Lumber Co., C.C.Tenn., 142 F. 893, affirmed 149 F. 377, 79 C.C.A. 197.

Acceptance of findings in opinion

Appellate court may determine whether findings and conclusions set forth in opinion should be accepted in lieu of separate findings required by rule or whether case will be returned to trial court for appropriate findings.—National Reserve Ins. Co. of Illinois v. Scudder, C.C.A.Cal., 71 F.2d 884.

51. U.S.—Kuper v. Betzer, C.C.A.S.D., 127 F.2d 84—Mutual Benefit Health & Accident Ass'n v. Snyder, C.C.A.Mich., 109 F.2d 469.

"The purpose of [Fed. Rules of Civ. Proc.] rule 75(d) is to insure that the matter brought up in the record on appeal is adequate to protect the interests of the appellee. If the appeal record contains less than a complete transcript of all the proceedings, including the evidence in the trial court, it is important to the appellee that he be informed of the points to be relied upon in order to determine whether or not the matter designated for inclusion is sufficient to enable him to answer the contentions of appellant."—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633, 636.

Compliance held shown

U.S.—Ligare v. Harries, C.C.A.Ill., 128 F.2d 582.

52. U.S.—Mutual Benefit Health & Accident Ass'n v. Snyder, C.C.A. Mich., 109 F.2d 469.

53. U.S.—Kuper v. Betzer, C.C.A.S. D., 127 F.2d 84—Keeley v. Mutual Life Ins. Co. of New York, C.C.A. Ill., 113 F.2d 633.

The purpose of the rule of circuit court of appeals as to statement of points is definitely and separately to point out errors complained of in order clearly to define and confine issues on appeal.—New York Casualty Co. v. Young Men's Christian Ass'n, C.C.A.Iowa, 119 F.2d 387, certiorari denied Young Men's Christian Ass'n v. New York Casualty Co., 62 S.Ct. 91, 314 U.S. 648, 86 L.Ed. 519.

54. U.S.—Bekins v. Lindsay-Strathmore Irr. Dist., C.C.A.Cal., 114 F.2d 680, affirming, D.C., In re Lindsay-Strathmore Irr. Dist., 25 F.Supp. 988, certiorari denied Bekins v. Lindsay-Strathmore Irr. Dist., 61 S.Ct. 712, 312 U.S. 693, 85 L.Ed. 1128, rehearing denied 61 S.Ct. 805, 312 U.S. 716, 85 L.Ed. 1145—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633—Widetzky v. Pilgrim Trust Co., C.C.A.Mass., 108 F.2d 647—Jackson County v. Alton R. Co., C.C.A.Mo., 105 F.2d 633, certiorari denied Alton R. Co. v. Jackson County, Mo., 60 S.Ct. 175, 308 U.S. 610, 84 L.Ed. 510—Woods v. Rains, C.C.A.Mo., 104 F.2d 137, certiorari denied 60 S.Ct. 109, 308 U.S. 585, 84 L.Ed. 490—Montfort v. Korte, C.C.A.Ind., 100 F.2d 615—Rills' Heirs v. A. Wilbert's Sons Lumber & Shingle Co.,

plain[55] or fundamental[56] errors apparent on the | face of the record.

C.C.A.La., 95 F.2d 289—Hyland v. Millers Nat. Ins. Co., C.C.A.Cal., 92 F.2d 462, denying rehearing 91 F. 2d 735—Krause v. Snyder, C.C.A. Mo., 87 F.2d 723—New York Life Ins. Co. v. Wolf, C.C.A.S.D., 85 F.2d 162, certiorari denied 57 S.Ct. 316, 299 U.S. 614, 81 L.Ed. 453—New York Life Ins. Co. v. Roufos, C.C. A.Mich., 83 F.2d 620—Steinberger v. U. S., C.C.A.Cal., 81 F.2d 1008—U. S. v. Wilson, C.C.A.Kan., 78 F. 2d 465—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Cockrell v. U. S., C.C.A. Iowa, 74 F.2d 151—Columbia Pictures Corporation v. Lawton-Byrne-Bruner Ins. Agency Co., C. C.A.Mo., 73 F.2d 18—Sinclair Refining Co. v. Keister, C.C.A.Ohio, 64 F.2d 537—Pilson v. Rodeffer, C.C. A.Va., 61 F.2d 976—North River Coal & Wharf Co. v. McWilliams Bros., C.C.A.N.Y., 59 F.2d 979, certiorari granted People of State of New York v. Maclay, 53 S.Ct. 96, 287 U.S. 590, 77 L.Ed. 515, and affirmed 53 S.Ct. 323, 288 U.S. 290, 77 L.Ed. 754—U. S. v. Oliver, C.C. A.Cal., 59 F.2d 55—Victory Sparkler & Specialty Co. v. Latimer, C. C.A.Mo., 53 F.2d 3—Cabdal De Lopex v. Sociedad Espanola de Auxillo Mutuo y Beneficencia, C.C.A. Puerto Rico, 45 F.2d 331—Kaplan v. Swartz, C.C.A.Mass., 41 F.2d 177—Matheson v. National Surety Co., C.C.A.Alaska, 41 F.2d 155—Maytag Co. v. Meadows Mfg. Co., C.C.A. Ill., 35 F.2d 403, certiorari denied 50 S.Ct. 250, 281 U.S. 737, 74 L.Ed. 1151—Dickinson Tire & Machine Co. v. Dickinson, C.C.A.N.Y., 29 F. 2d 493—Smith v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 26 F.2d 337, modifying, D.C., 2 F.2d 390, and certiorari denied U. S. Shipping Board Emergency Fleet Corporation v. Smith, 49 S.Ct. 29, 278 U.S. 628, 73 L.Ed. 547—In re Morgan, C.C.A. Ohio, 26 F.2d 183—American Mfg. Co. v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N. Y., 7 F.2d 565—Christie-Myers Feed Co. v. Cleveland Grain & Milling Co., C.C.A.W.Va., 6 F.2d 797, certiorari denied 46 S.Ct. 348, 270 U.S. 647, 70 L.Ed. 779—Childs v. U. S., C.C.A.La., 5 F.2d 816—Damico v. Firemen's Fund Ins. Co., C.C.A.Mo., 5 F.2d 318—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A.Colo., 4 F.2d 965—Turner v. Standard Ice & Fuel Co., C.C.A. Kan., 292 F. 38—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641—Arkansas Short Leaf Lumber Co. v. Hemler, C.C.A.Ark., 281 F. 914—Louie Share Gan v. White, Cal., 258 F. 798, 170 C.C.A. 92—Wight v. Washoe County Bank, Nev., 251 F. 819, 163 C.C.A. 653—Feilbach Co. v. Russell, Mich., 233 F. 412, 147 C.C.A. 348—Hall v. Butler, Ohio, 224 F. 709, 140 C.C.A. 249—Wilson v. Calculograph Co., Mass., 153 F. 961, 83 C.C.A. 77.

3 C.J. p 1329 note 37, p 1330 note 44.

Requirement is a matter of substance, and not a mere matter of form which can be waived or dispensed with by agreement or conduct of the parties or their counsel.—U. S. v. Dieckmann, C.C.A.Ind., 101 F.2d 421.

Equity cases

(1) Rule requiring filing of assignment of errors applies to appeals in equity as well as to appeals in actions at law.—Wade v. Blieden, C.C.A. Ark., 86 F.2d 75.

(2) However, it was held that, where appeal in equity suit brings case up de novo, assignment of errors is unnecessary.—Aro Equipment Corporation v. Herring-Wissler Co., C. C.A.Iowa, 84 F.2d 619—Hopkins v. Texas Co., C.C.A.Okl., 62 F.2d 691, certiorari denied 54 S.Ct. 48, 290 U.S. 629, 78 L.Ed. 547.

Statute superseding rule of court

Rule of court relative to assignment of errors was inapplicable, where appeal was taken after statute, 28 U.S.C.A. § 861b note, providing that no petition for appeal should be required, was in force.—Chavez v. U. S., C.C.A.N.M., 29 F.2d 701.

55. U.S.—Fairmount Glass Works v. Cub Fork Coal Co., Ind., 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439, reversing, C.C.A., Cub Fork Coal Co. v. Fairmount Glass Works, 59 F.2d 539, certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S.Ct. 24, 287 U.S. 585, 77 L. Ed. 511—Lamb v. Cramer, Miss., 52 S.Ct. 315, 285 U.S. 217, 76 L.Ed. 715, affirming, C.C.A., Cramer v. Lamb, 48 F.2d 537, and certiorari granted Lamb v. Cramer, 52 S.Ct. 43, 284 U.S. 609, 76 L.Ed. 521—Old Monk Olive Oil Co. v. Southwestern Coca-Cola Bottling Co., Cust. & Pat.App., 118 F.2d 1015—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A. Or., 88 F.2d 536—Hickman County v. Nashville Bridge Co., C.C.A. Tenn., 66 F.2d 174.

3 C.J. p 1342 note 78.

Error held plain or fundamental so as to warrant review without assignment:

(1) Insufficiency of pleadings to state a cause of action or defense, or to support the judgment.—Reliable Incubator & Brooder Co. v. Stahl, Ill., 105 F. 663, 44 C.C.A. 657.

(2) Error as to evidence.—U. S. v. Eide, C.C.A.Cal., 88 F.2d 682, certiorari denied Eide v. U. S., 58 S.Ct. 9, 302 U.S. 689, 82 L.Ed. 533—U. S. v. Harris, C.C.A.Mont., 79 F.2d 341—U. S. v. White, C.C.A.Or., 77 F.2d 757—3 C.J. p 1344 note 8.

(3) Error as to instructions.—Swiss Bankverein v. Zimmermann, N. Y., 240 F. 87, 153 C.C.A. 123—Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 471—3 C.J. p 1345 note 11.

(4) Error in the judgment or decree, or in the rendition or entry thereof.—U. S. v. Bernays, Mo., 158 F. 792, 86 C.C.A. 52—3 C.J. p 1345 note 25.

(5) That the special findings of fact by the trial court are insufficient to support the judgment or conclusions of law.—Chicago, R. I. & P. R. Co. v. Barrett, Tenn., 190 F. 118, 111 C.C.A. 158.

(6) That the conclusion of a master and the decree rendered thereon are, as a matter of law, not justified by the facts found by him.—Central Impr. Co. v. Cambria Steel Co., Mo., 201 F. 811, 120 C.C.A. 121.

(7) Erroneous ruling on motion for new trial.—Hunt v. Standard Brands, C.C.A.Ohio, 72 F.2d 822.

(8) Laches.—Shea v. Nilima, Alaska, 133 F. 209, 66 C.C.A. 263.

Error held not plain so as to warrant review thereof in absence of assignment of error:

(1) Generally.—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S. Ct. 807, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Roberts v. Metropolitan Life Ins. Co., C.C.A.Ill., 94 F.2d 277, certiorari denied 58 S. Ct. 764, 303 U.S. 660, 82 L.Ed. 1119—Smith v. Metropolitan Life Ins. Co., C.C.A.Ill., 94 F.2d 277, certiorari denied 58 S.Ct. 1039, 304 U.S. 570, 82 L.Ed. 1535—Mutual Life Ins. Co. of New York v. Parkinson, C.C.A.Pa., 72 F.2d 759—Schmidt v. U. S., C.C.A. Neb., 63 F.2d 390—Sucesores de Perez Hermanos v. Costa, C.C.A.Puerto Rico, 281 F. 439.

(2) Want of process.—James-Dickinson Farm Mortgage Co. v. Seimer, C.C.A.Ill., 12 F.2d 772, affirming, D. C., Seimer v. James Dickinson Farm Mortgage Co., 299 F. 651, certiorari denied James-Dickinson Farm Mortgage Co. v. Seimer, 47 S.Ct. 95, 273 U.S. 700, 71 L.Ed. 847—Rogers v. Penobscot Min. Co., S.D., 154 F. 606, 83 C.C.A. 380.

(3) Particular errors with respect to evidence.—Baltimore & O. R. Co. v. McCune, Pa., 174 F. 991, 98 C.C.A. 561—3 C.J. p 1344 notes 5, 10.

(4) Error with regard to instructions.—New York Life Ins. Co. v. Roufos, C.C.A.Mich., 83 F.2d 620.

56. U.S.—Prudential Ins. Co. of

On failure to serve and file a statement of the points to be relied on on appeal as required, the circuit court of appeals may take such action as it deems appropriate, including dismissal of the appeal.[57] Ordinarily, however, a failure in this respect is not a jurisdictional defect in the appeal proceedings which necessitates a dismissal of the appeal,[58] and such action will not be taken in the absence of any claim of injury resulting from the failure to file the required statement.[59]

In accordance with the foregoing rules as to the necessity, at least under some circumstances, of an assignment of errors or statement of points on appeal, the circuit courts of appeals will not as a rule, except in the case of plain and fundamental errors apparent on the face of the record, consider errors which have not been properly assigned with respect to jurisdiction,[60] pleadings,[61] process,[62] evidence and rulings thereon,[63] instructions,[64] verdict and

America v. Morris, for Use of Yesko, C.C.A.Pa., 72 F.2d 824—In re Florsheim, D.C.Cal., 24 F.Supp. 991.
3 C.J. p 1343 notes 84, 85.

Jurisdiction

(1) As a general rule, a question of jurisdiction may be raised on appeal although no error has been assigned with respect thereto.—Flowers v. U. S., C.C.A.Neb., 86 F.2d 79—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 109 A.L.R. 1179—St. Louis Southwestern Ry. Co. v. Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark., C.C.A.Ark., 265 F. 524, certiorari granted Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co., 41 S.Ct. 15, 254 U.S. 626, 65 L.Ed. 445, affirmed Commissioners of Road Imp. Dist. No. 2 of Lafayette County, Ark., v. St. Louis Southwestern R. Co., 42 S.Ct. 250, 257 U.S. 547, 66 L.Ed. 364—Toledo Newspaper Co. v. U. S., 237 F. 986, 150 C.C.A. 636, affirming, D.C., U. S. v. Toledo Newspaper Co., 220 F. 458, affirmed Toledo Newspaper Co. v. U. S., 38 S.Ct. 560, 247 U.S. 402, 62 L.Ed. 1186—3 C.J. p 1343 notes 87, 88.

(2) It has been held, however, that mere errors in the method of exercising acknowledged jurisdiction are not fundamental within the text rule.—Morrison v. Burnette, Ind.T., 154 F. 617, 83 C.C.A. 391, appeal dismissed 29 S.Ct. 394, 212 U.S. 291, 53 L.Ed. 517—Rogers v. Penobscot Min. Co., S.D., 154 F. 606, 83 C.C.A. 380.

57. U.S.—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F. 2d 633.

Prior to Federal Rules of Civil Procedure

(1) Court could dismiss or quash the appeal or writ of error.—E. R. Squibb & Sons v. Mallinckrodt Chemical Works, Mo., 55 S.Ct. 135, 293 U.S. 190, 79 L.Ed. 279—Robertson v. Morganton Full Fashioned Hosiery Co., C.C.A.N.C., 95 F.2d 780—Ransome Concrete Machinery Co. v. Moody, C. C.A.N.Y., 282 F. 29—3 C.J. p 1348 note 55.

(2) On abandonment of duly filed assignments of error, the circuit court could affirm the decree from which the appeal was taken.—E. R. Squibb & Sons v. Mallinckrodt Chemical Works, supra.

(3) A judgment or decree could be affirmed as to matters not questioned by an assignment of error.—Walker v. First Trust & Savings Bank, C.C. A.Mo., 12 F.2d 896, 75 A.L.R. 757.

58. U.S.—Pence v. U. S., C.C.A.Wis., 121 F.2d 804—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Robertson v. Morganton Full Fashioned Hosiery Co., C.C.A.N.C., 95 F.2d 780—Benjamin v. Buell, C.C. A.Ill., 268 F. 792.

Condition precedent

However, under the rules prevailing in at least one circuit, it is a condition precedent to the consideration of an appeal by the circuit court of appeals that the prescribed statement of points be served and filed.—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633.

Irregularity cured

Motion to dismiss appeal on ground that appellant did not serve a statement of the points on which it would rely on appeal, while designating less than the complete record for inclusion in the transcript, would be denied, where appellees designated for inclusion all parts of the record not designated by appellant, since any irregularity in designation of the record by appellant was cured.—Grand Lodge Improved, B. P. O. E. of the World, v. Eureka Lodge No. 5, Independent Elks, C.C.A.Va., 114 F.2d 46, certiorari denied Eureka Lodge No. 5, Independent Elks v. Grand Lodge Improved, B. P. O. E. of the World, 61 S.Ct. 319, 311 U.S. 709, 85 L.Ed. 461.

59. U.S.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F.2d 44—Adams v. New York, C. & St. L. R. Co., C.C.A.Ind., 121 F.2d 808—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F.2d 633.

60. U.S.—U. S. v. Wilson, C.C.A. Kan., 78 F.2d 465—Healy v. Ratta, C.C.A.N.H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459, reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—O. L. Stanard Dry Goods Co. v. Tackett, C.C.A.Ky., 23 F.2d 919.

61. U.S.—Wilson v. Byron Jackson Co., C.C.A.Cal., 93 F.2d 572—Ricketts v. Waller, C.C.A.Neb., 81 F.2d 977—Schmidt v. U. S., C.C.A.Neb., 63 F.2d 390—Clinton E. Worden & Co. v. California Fig Syrup Co., Cal., 102 F. 334, 42 C.C.A. 383, reversed on other grounds 23 S.Ct. 161, 187 U.S. 516, 47 L.Ed. 282.
3 C.J. p 1335 note 73.

62. U.S.—Rogers v. Penobscot Min. Co., S.D., 154 F. 606, 83 C.C.A. 380.

63. U.S.—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—Eddy v. National Union Indemnity Co., C.C.A.Cal., 78 F.2d 545—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Lazelle v. Norfolk & W. Ry. Co., C.C.A.Ohio, 73 F.2d 459—U. S. v. Smith, C.C.A.Wash., 55 F.2d 141, 81 A.L.R. 926—Hookway v. First Nat. Bank, C.C.A.Iowa, 36 F.2d 166—Brown v. U. S., C.C.A.Wyo., 36 F.2d 161—Hill v. New York Cent. R. Co., C.C.A.Ohio, 35 F.2d 30—Elliott Addressing Mach. Co. v. Addressing Typewriter Stencil Corporation, C.C.A.N.Y., 31 F.2d 282—Meinrath Brokerage Co. v. Collins-Dietz-Morris Co., C.C.A.Okl., 298 F. 377—Gandia & Stubbe v. Cadierno, Puerto Rico, 233 F. 739, 147 C.C.A. 505—Connell Bros. Co. v. H. Diederichsen & Co., China, 213 F. 737, 130 C.C.A. 251.
3 C.J. p 1337 note 11.

64. U.S.—Radius v. Travelers Ins. Co., C.C.A.Cal., 87 F.2d 412—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Union Electric Light & Power Co. v. Snyder Estate Co., C.C.A.Mo., 65 F.2d 297—Payne v. Ostrus, C.C.A.Iowa, 50 F.2d 1039, 77 A.L.R. 531—Damico v. Firemen's Fund Ins. Co., C.C. A.Mo., 5 F.2d 318—Johnson v. Hislop, C.C.A.Mont., 272 F. 913—Co-operative Raw Fur Co. v. American Credit Indemnity Co., Mich., 240 F. 67, 153 C.C.A. 103—North British & Mercantile Ins. Co. v. Rose, N.J., 228 F. 290, 142 C.C.A. 582—Bassett v. Utah Copper Co., Utah, 219 F. 811, 135 C.C.A. 481—City of Detroit v. Grummond, Mich., 216 F. 273, 132 C.C.A. 417.
3 C.J. p 1338 note 16.

findings,[65] judgment, order, or decree,[66] and rulings on motions for new trial, and proceedings after judgment.[67]

Assignments of cross errors. In the absence of statute or rule of court giving such right, it is generally held that an appellee cannot make a cross assignment of errors unless he himself appeals.[68]

(2) Form, Scope, and Effect

Where assignments of errors or statements of points relied on for appeal are required, they must substantially comply as to form, contents, filing, and service with statutes or rules of courts; and, while noncompliance may be overlooked by the court, it may result in the refusing of the court to consider errors, dismissing the appeal, or affirming the judgment below.

Where assignments of error or statements of points relied on for appeal are required, see supra subdivision a (1) of this section, they must substantially comply as to form and contents, and in other particulars, with the applicable provisions of statutes and rules of court.[69] An assignment must

65. U.S.—Esso, Inc. v. Standard Oil Co., C.C.A.Mo., 98 F.2d 1—Reuter v. McCook, C.C.A.Or., 92 F.2d 267—Salt Bayou Drainage Dist. v. Futrall, C.C.A.Ark., 72 F.2d 940—National Surety Co. of New York v. Cobb, C.C.A.La., 66 F.2d 323, certiorari denied Cobb v. National Surety Co., 54 S.Ct. 127, 290 U.S. 692, 78 L.Ed. 595—Maryland Casualty Co. v. Klickalumber Co., C.C.A.Cal., 41 F.2d 222—Geo. A. Hormel & Co. v. Chicago, M. & St. P. Ry. Co., C.C.A. Minn., 283 F. 915—Davis v. Carnegie Steel Co., Ohio, 244 F. 931, 157 C.C.A. 281—In re Imperial Irr. Dist., D.C.Cal., 38 F.Supp. 770—Knaust Bros. v. Goldschlag, D.C.N.Y., 28 F.Supp. 188, affirmed, C.C.A., 119 F.2d 1022—Penmac Corporation v. Esterbrook Steel Pen Mfg. Co., D.C.N.Y., 27 F.Supp. 86.
3 C.J. p 1338 note 27, p 1339 note 31.

66. U.S.—Brennan v. Tillinghast, Mich., 201 F. 609, 120 C.C.A. 37.
3 C.J. p 1339 note 41, p 1340 note 43, p 1344 note 3.

Amount or extent of recovery or relief
U.S.—State of California v. Hisey, C.C.A.Cal., 84 F.2d 802—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 47 F.2d 166—Greeley Nat. Bank v. Wolf, C.C.A.Colo., 4 F.2d 67—Morgan's Louisiana & T. R. & S. S. Co. v. Isaac Joseph Iron Co., Ohio, 243 F. 149, 156 C.C.A. 15.
3 C.J. p 1340 note 42½.

67. U.S.—Hunt v. Standard Brands, C.C.A.Ohio, 72 F.2d 822—Baltimore S. S. Co. v. Phillips, C.C.A.N.Y., 9 F.2d 902, certiorari granted 46 S.Ct. 348, 270 U.S. 638, 70 L.Ed. 774 and reversed on other grounds 47 S.Ct. 600, 274 U.S. 316, 71 L.Ed. 1069—Williamson v. Electric Service Supplies Co., Pa., 242 F. 873, 155 C.C.A. 461, affirming, D.C., 236 F. 353—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C.C.A. 240.
3 C.J. p 1341 note 59.

68. U.S.—Cochran v. M & M Transp. Co., C.C.A.R.I., 110 F.2d 519—Harding v. Federal Nat. Bank, C.C.A. Mass., 31 F.2d 914—Millward v. Vulcan Furnace & Equipment Co., C.C.A.Pa., 26 F.2d 78—National Fire Ins. Co. of Hartford, Conn., v. Elliott, C.C.A.Mo., 7 F.2d 522, 42 A.L.R. 1121.
3 C.J. p 1403 note 57, p 352 note 41 [b].

However, where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, if the trial judge grants judgment notwithstanding the verdict and denies motion for new trial, the movant may cross assign error in the opposing party's appeal to the circuit court of appeals to rulings of law at the trial.—Montgomery Ward & Co. v. Duncan, Ark., 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147, modifying, C.C.A., Duncan v. Montgomery Ward & Co., 108 F.2d 848, reversing, D.C., 27 F.Supp. 4, certiorari granted Montgomery Ward & Co. v. Duncan, 60 S.Ct. 809, 309 U.S. 650, 84 L.Ed. 1001, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389.

69. U.S.—New York Casualty Co. v. Young Men's Christian Ass'n, C.C.A.Iowa, 119 F.2d 387, certiorari denied Young Men's Christian Ass'n v. New York Casualty Co., 62 S.Ct. 91, 314 U.S. 648, 86 L.Ed. 519—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A.Neb., 101 F.2d 987—U. S. v. Dickinson, C.C.A.Mass., 95 F.2d 65, affirming, D.C., Cushing v. U. S., 18 F.Supp. 83—Combs v. U. S., C.C.A.Mo., 65 F.2d 787—City Ice & Fuel Co. v. Dankmer, C.C.A.W.Va., 52 F.2d 929—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Villar & Co. v. Conde, C.C.A.Puerto Rico, 30 F.2d 588—Broatch v. Boysen, Wyo., 236 F. 516, 149 C.C.A. 568.
3 C.J. p 1333 note 54, p 1349 note 59.

A motion for a new trial cannot be used as a substitute for an assignment of errors if there is no express provision to that effect.—Booth v. Gilbert, C.C.A.Mo., 79 F.2d 790.

Reference to extrinsic matter
Generally an assignment of errors must be so complete in itself that no reference to extrinsic matter is necessary to determine what is intended to be presented thereby.—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—Delaware & H. R. Corporation v. Cottrell, C.C.A.Pa., 69 F.2d 195, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490—McClellan v. Pyeatt, Ind.T., 50 F. 686, 1 C.C.A. 613—3 C.J. p 1398 note 80.

Mere clerical errors and immaterial defects or irregularities will be disregarded.—McBride v. Neal, Ill., 214 F. 966, 131 C.C.A. 262—Church Cooperage Co. v. Pinkney, N.Y., 170 F. 266, 95 C.C.A. 462, reversing, D.C., 163 F. 653.

Joint and several assignments
(1) A joint assignment of error must be good as to all who join therein, or it will not be available as to any of them.—Wimberly v. Cowan Inv. Corporation, C.C.A.Ala., 80 F.2d 452, certiorari denied 56 S.Ct. 674, 298 U.S. 654, 80 L.Ed. 1381—Dolbear v. Gulf Production Co., C.C.A.Tex., 268 F. 737, certiorari denied Shannon v. Gulf Production Co., 41 S.Ct. 375, 255 U.S. 569, 65 L.Ed. 790.

(2) Where an appellant wishes to urge an identical question or error with respect to several different parties, one assignment is sufficient as to all.—Andrews v. National Foundry & Pipe Works, Wis., 76 F. 166, 22 C.C.A. 110, 36 L.R.A. 139, rehearing denied 77 F. 774, 23 C.C.A. 454, 36 L.R.A. 153, certiorari denied 17 S.Ct. 996, 166 U.S. 721, 41 L.Ed. 1188.

Filing of excessive and unnecessary number of assignments is improper, and court may in such case consider only such questions as seem to it to be material to the judgment.—Nev-Cal Electric Securities Co. v. Imperial Irr. Dist., C.C.A.Cal., 85 F.2d 886, certiorari denied 57 S.Ct. 493, 300 U.S. 662, 81 L.Ed. 871—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A.Cal., 73 F.2d 157—Albert Pick-Barth Co. v. Mitchell Woodbury Corporation, C.C.A.Mass., 57 F.2d 96, certiorari denied Albert Pick-Barth Co. v. Mitchell Woodbury Company, 52 S.Ct. 503, 286 U.S. 552, 76 L.Ed. 1288—Lawson v. U. S., C.C.A.Ark., 297 F. 418—Chicago Great Western R. Co. v. McDonough, Iowa, 161 F. 657, 88 C.C.A. 517—Shepard v. U. S., Utah, 160 F. 584, 87 C.C.A. 486, certiorari denied 29 S.Ct. 682, 212 U.S. 571, 53 L.Ed. 655—Farnsworth v. Nevada Co.,

be as to some reviewable judicial action occurring during the trial,[70] and it must have been preserved for review by timely and proper objections and exceptions.[71] The assignment or statement of points must set forth definitely and specifically the particular error or errors relied on,[72] and as a general rule an assignment defective in this respect will not be considered by the appellate court,[73] unless the error complained of is a plain or fundamental error apparent on the record, so that it may be considered on that ground.[74] Each error relied on must be separately and distinctly specified, no one assignment shall embrace more than one specification of error, and on a failure to comply with this requirement the court will either refuse to consider the assignment at all or will overrule it if any one of the assignments of error cannot be sustained.[75]

The foregoing rules as to the requisite specification of errors to warrant review thereof by the circuit court of appeals have been applied with respect

Utah, 102 F. 578, 42 C.C.A. 509—3 C. J. p 1356 note 41, p 1357 note 42.

Record

(1) No rulings or decisions of the court not shown by the record can be assigned as errors.—Woodbury v. Shawneetown, Ill., 74 F. 205, 20 C. C.A. 400—3 C.J. p 1365 note 85.

(2) Nothing can be assigned for error which is in contradiction of, or in conflict with, the record.—Cheney v. Bacon, Neb., 49 F. 305, 1 C. C.A. 244—3 C.J. p 1364 note 84.

70. U.S.—Century Indemnity Co. v. Nelsen, C.C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, and reversed on other grounds 58 S.Ct. 531, 302 U. S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903.
3 C.J. p 1356 notes 33, 34.

71. U.S.—Maryland Casualty Co. v. Elmira Coal Co., C.C.A.Mo., 69 F.2d 616—Elbukan Oil Co. v. Lamb, C.C. A.Kan., 12 F.2d 387.
3 C.J. p 1356 note 40.

72. U.S.—New York Casualty Co. v. Young Men's Christian Ass'n, C. C.A.Iowa, 119 F.2d 387, certiorari denied Young Men's Christian Ass'n v. New York Casualty Co., 62 S.Ct. 91, 314 U.S. 648, 86 L.Ed. 519—Reidy v. Myntti, C.C.A.Alaska, 116 F.2d 725—Denver-Greeley Valley Irr. Dist. v. McNeil, C.C.A. Colo., 106 F.2d 288—Pope v. Lincoln Nat. Life Ins. Co., C.C.A.Mo., 103 F.2d 265—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C.A.Ark., 84 F.2d 930, affirmed 87 F.2d 457—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—Virginian Ry. Co. v. Chambers, C.C.A. W.Va., 46 F.2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L. Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, C.C.A.W.Va., 36 F. 2d 224, denying rehearing 35 F.2d 433, certiorari denied 50 S.Ct. 158, 280 U.S. 609, 74 L.Ed. 652—Edwards v. Bodkin, Cal., 249 F. 562, 161 C.C.A. 488.
3 C.J. p 1357 note 48, p 1361 note 54, p 1362 note 70.

Rule unchanged

Rule of circuit court of appeals as to statement of points necessitates same separation and particularity of statement as did former assignment of errors.—New York Casualty Co. v. Young Men's Christian Ass'n, C.C. A.Iowa, 119 F.2d 387, certiorari denied Young Men's Christian Ass'n v. New York Casualty Co., 62 S.Ct. 91, 314 U.S. 648, 86 L.Ed. 519.

Objections and exceptions

The assignment of errors must set out specifically and fully the ruling or action of the court complained of and set out or show the necessary objections or exceptions thereto made in the lower court.—Lewis v. Standard Oil Co. of California, C.C.A.Cal., 88 F.2d 512—McCoy v. Universal Carloading & Distributing Co., C.C.A. Ohio, 82 F.2d 342—U. S. v. Alcorn, C.C.A.Or., 80 F.2d 487—Maryland Casualty Co. v. Elmira Coal Co., C.C. A.Mo., 69 F.2d 616.

Reference to record

It is sometimes required by rule of court that the assignment shall refer to the record by page or otherwise, so as to indicate where the alleged error may be found.—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C.A.Ark., 84 F.2d 930, affirmed 87 F.2d 457—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—Maryland Casualty Co. v. Elmira Coal Co., C.C. A.Mo., 69 F.2d 616—Anderson v. U. S., C.C.A.Mo., 65 F.2d 870—3 C.J. p 1364 notes 78, 83.

Scope and effect of assignment

Questions raised by an assignment or statement of errors are limited to those fairly presented by the particular assignment.—Davilla v. Brunswick-Balke Collender Co. of New York, C.C.A.N.Y., 94 F.2d 567, modifying, D.C., 19 F.Supp. 819, certiorari denied 58 S.Ct. 1040, 304 U.S. 572, 82 L.Ed. 1536—Guardian Trust Co. v. Keith, C.C.A.Ark., 69 F.2d 477, certiorari denied 54 S.Ct. 862, 292 U. S. 652, 78 L.Ed. 1501—Ed S. Michelson, Inc., v. Nebraska Tire & Rubber Co., C.C.A.Mo., 63 F.2d 597, certiorari denied 54 S.Ct. 52, 290 U.S. 634, 78 L.Ed. 551—Kennelly v. Frederick Starr Contracting Co., N.Y., 250 F. 229, 162 C.C.A. 365—Arnold v. Horrigan, Mich., 238 F. 39, 151 C.C.A. 115—3 C.J. p 1363 note 76.

73. U.S.—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C. A.Ark., 84 F.2d 930, affirmed 87 F. 2d 457—Northern Central Coal Co. v. Barrowman, Mo., 246 F. 906, 159 C.C.A. 178—Cooper v. Jewett, S. D., 233 F. 618, 147 C.C.A. 426.
3 C.J. p 1357 note 48.

74. U.S.—Hickman County v. Nashville Bridge Co., C.C.A.Tenn., 66 F. 2d 174.
3 C.J. p 1359 note 50.

75. U.S.—New York Casualty Co. v. Young Men's Christian Ass'n, C.C. A.Iowa, 119 F.2d 387, certiorari denied Young Men's Christian Ass'n v. New York Casualty Co., 62 S.Ct. 91, 314 U.S. 648, 86 L.Ed. 519—Gila Valley Irr. Dist. v. U. S., C.C. A.Ariz., 118 F.2d 507—Century Indemnity Co. v. Nelson, C.C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, reversed on other grounds 58 S. Ct. 531, 302 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F. 2d 679, rehearing denied 98 F.2d 903—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Currin v. Nourse, C.C.A.Mo., 74 F.2d 273, certiorari denied 55 S. Ct. 638, 294 U.S. 729, 79 L.Ed. 1259—E. R. Squibb & Sons v. Mallinckrodt Chemical Works, C.C.A.Mo., 69 F.2d 685, affirming, D.C., Mallinckrodt Chemical Works v. E. R. Squibb & Sons, 6 F.Supp. 173, and motion denied E. R. Squibb & Sons v. Mallinckrodt Chemical Works, 55 S.Ct. 121, certiorari denied 55 S.Ct. 916, 295 U.S. 759, 79 L.Ed. 1701—Hill v. New York Cent. R Co., C.C.A.Ohio, 35 F.2d 30.
3 C.J. p 1362 note 71.

Single proposition of law

However, where various errors are complained of, presenting a single proposition of law common to all of them, they need not be separately stated as so many distinct propositions.—Central Trust Co. v. Continental Trust Co., Colo., 86 F. 517, 30 C.C.A. 235, certiorari denied 171 U.S. 687, 18 S.Ct. 940.

to alleged errors as to pleadings,[76] interlocutory proceedings,[77] evidence,[78] and have been applied to submission of issues or questions to the jury,[79] in-

76. U.S.—Moore v. Tremelling, C.C.A.Idaho, 100 F.2d 39—Smith v. Royal Ins. Co., C.C.A.Cal., 93 F.2d 143, certiorari denied Royal Ins. Co. v. Smith, 58 S.Ct. 759, 303 U.S. 656, 82 L.Ed. 1115—Schmidt v. U. S., C.C.A.Neb., 63 F.2d 390—Blalock v. Georgia Ry. & Electric Co., Ga., 228 F. 296, 142 C.C.A. 588, Ann.Cas. 1917A 679.

3 C.J. p 1366 notes 96, 98, p 1368 note 16.

Necessity for assigning each error separately

U.S.—Manitoba Fish Co. v. Booth, Ill., 109 F. 594, 48 C.C.A. 564.

3 C.J. p 1367 note 1.

Assignments held sufficient

U.S.—Ramsay v. Crevlin, Colo., 254 F. 813, 166 C.C.A. 259—Klink v. Chicago, R. I. & P. Ry. Co., Colo., 219 F. 457, 135 C.C.A. 169.

77. U.S.—Burton v. Carey, C.C.A.Or., 82 F.2d 657—Trustees System Co. of Pennsylvania v. Payne, C.C.A. Pa., 65 F.2d 103.

78. U.S.—Baten v. Kirby Lumber Corporation, C.C.A.Tex., 103 F.2d 272—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—Greenway v. U. S., C.C.A. Colo., 67 F.2d 738—Schmidt v. U. S., C.C.A.Neb., 63 F.2d 390—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—Walton Trust Co. v. Taylor, C.C.A. Mo., 2 F.2d 342—Johnson Farm Loan Co. v. McManigal, C.C.A.Neb., 288 F. 185—Wustum v. Kradwell, C.C.A.Wis., 270 F. 546—Wm. Edwards Co. v. La Dow, 230 F. 378, 144 C.C.A. 520, modifying, D.C., In re Miller, 221 F. 471.

Admission or rejection of evidence

(1) The particular evidence or offer, the admission or exclusion of which is claimed to be erroneous, must be pointed out or identified.—Collins v. Finley, C.C.A.Ariz., 94 F. 2d 935, certiorari denied Collins, by Hughes v. Finley, 59 S.Ct. 76, 305 U. S. 618, 83 L.Ed. 394—Lewis v. Standard Oil Co. of California, C.C.A.Cal., 88 F.2d 512.

(2) The assignment should quote the full evidence admitted or rejected and the objections, exceptions, and rulings thereon.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—U. S. v. John Ii Estate, C.C.A. Hawaii, 91 F.2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—U. S. v. Shingle, C.C.A.Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Century Indemnity Co. v. Nelson, C. C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, reversed on other grounds 58 S. Ct. 531, 303 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F. 2d 679, rehearing denied 98 F.2d 903—Pacific Alaska Airways v. Mahan, C.C.A.Alaska, 89 F.2d 255, certiorari denied Pacific Alaska Airways v. Mahan, 58 S.Ct. 19, 302 U.S. 700, 82 L. Ed. 541—John Alt Furniture Co. v. Maryland Casualty Co., C.C.A.Mo., 88 F.2d 36—Krause v. Snyder, C.C.A.Mo., 87 F.2d 723—Wade v. Blieden, C.C.A. Ark., 86 F.2d 75—Northern Pac. Ry. Co. v. Wagner, C.C.A.Mont., 86 F.2d 63—The Golden Star, C.C.A.Cal., 82 F. 2d 687, affirming, D.C., 9 F.Supp. 172—Karlson v. U. S., C.C.A.Minn., 82 F.2d 330—Baker Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—U. S. v. National Bank of Commerce of Seattle, C.C.A.Wash., 73 F.2d 721—Ford Motor Co. v. Brady, C.C.A.Mo., 73 F. 2d 248—Washburn v. Douthit, C.C.A. Ark., 73 F.2d 23—Maryland Casualty Co. v. Elmira Coal Co., C.C.A.Mo., 69 F.2d 616—Mississippi Power & Light Co. v. Whitescarver, C.C.A.Miss., 68 F.2d 928, affirming, D.C., Whitescarver v. Mississippi Power & Light Co., 5 F.Supp. 948—Stoody Co. v. Mills Alloys, C.C.A.Cal., 67 F.2d 807, certiorari denied 54 S.Ct. 718, 292 U.S. 637, 78 L.Ed. 1489—Anderson v. U. S., C.C.A.Mo., 65 F.2d 870—Gerlach v. Chicago, R. I. & P. Ry. Co., C.C.A. Iowa, 65 F.2d 862—Combs v. U. S., C.C.A.Mo., 65 F.2d 787—Dayton Rubber Mfg. Co. of Delaware v. Sabra, C. C.A.Ariz., 63 F.2d 865—Shannon v. Shaffer Oil & Refining Co., C.C.A. Okl., 51 F.2d 878, 78 A.L.R. 851—Pacific Dock & Terminal Co. v. Los Angeles Dock & Terminal Co., C.C.A. Cal., 50 F.2d 557, reversing, D.C., 42 F.2d 496, and certiorari denied Los Angeles Dock & Terminal Co. v. Pacific Dock & Terminal Co., 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 570—Blackshear Mfg. Co. v. Umatilla Fruit Co., C.C.A.Fla., 48 F.2d 174—Langford v. Bond Realty Corporation, C.C.A.Fla., 47 F.2d 480—Wagner Electric Corporation v. Snowden, C.C.A. Mo., 38 F.2d 599—Federal Surety Co. v. Standard Oil Co., C.C.A.S.D., 32 F.2d 119—Fireman's Fund Ins. Co. v. Borschow, C.C.A.Tex., 30 F.2d 18—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897—Louisiana Ry. & Nav. Co. v. McGlory, C.C.A.La., 20 F.2d 545, certiorari denied 48 S.Ct. 157, 275 U.S. 570, 72 L.Ed. 432—Vandeventer v. Traders' Nat. Bank of Kansas City, Mo., Kan., 241 F. 584, 154 C.C.A. 360—3 C.J. p 1370 note 34.

(3) If the error assigned is refusal of the court to permit a witness to answer a question, the assignment must show what answer the witness was expected to make.—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279—3 C.J. p 1371 note 35.

(4) However, where an objection to a question was sustained, so that the witness made no answer, and where there was no offer of evidence made by the excepting party and rejected by the trial court, statements in assignments of error as to what it was expected the witness would have answered are unnecessary.—Victor Talking Mach. Co. v. Straus, C.C.A.N.Y., 280 F. 717.

(5) Different errors with regard to the admission or exclusion of evidence should not be joined in one assignment.—Century Indemnity Co. v. Nelson, C.C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, reversed on other grounds 58 S.Ct. 531, 303 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903—3 C.J. p 1372 note 40.

Weight and sufficiency

(1) An assignment of error in general terms that the evidence was insufficient or that the judgment, decision, or finding was not supported by, or was contrary to, the evidence ordinarily is regarded as presenting no question for review.—Inland Power & Light Co. v. Grieger, C.C.A. Wash., 91 F.2d 811—Humphreys Gold Corporation v. Lewis, C.C.A.Mont., 90 F.2d 896—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Rohrback v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 82 F.2d 291—Atlantic Brewing Co. v. William J. Brennan Grocery Co., C.C.A. Mo., 79 F.2d 45—Ford Motor Co. v. Brady, C.C.A.Mo., 73 F.2d 248—Washburn v. Douthit, C.C.A.Ark., 73 F.2d 23—Hunt v. Standard Brands, C.C. A.Ohio, 72 F.2d 822—Shell Petroleum Corporation v. Scully, C.C.A.La., 71 F. 2d 772—Hecht v. Alfaro, C.C.A.Cal., 10 F.2d 464, affirming, D.C., 4 F.2d 255.

(2) Assignment based on the insufficiency of evidence must ordinarily point out the particulars in which the evidence is insufficient.—Bank of Italy v. F. Romeo & Co., C.C.A. Cal., 287 F. 5.

79. U.S.—Pope v. Lincoln Nat. Life Ins. Co., C.C.A.Mo., 103 F.2d 265—Ojus Mining Co. v. Manufacturers Trust Co., C.C.A.Idaho, 82 F.2d 74—Mutual Life Ins. Co. of New York v. Parkinson, C.C.A.Pa., 72 F. 2d 759—Schmidt v. U. S., C.C.A. Neb., 63 F.2d 390—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F. 2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L.Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577,

structions,[80] verdict, findings of fact, and conclusions of law,[81] report of referee, master, or like officer,[82] decision, judgment, order, or decree,[83] and

76 L.Ed. 501—Radetsky v. Gramm-Bernstein Motor Truck Co., C.C.A. Colo., 4 F.2d 965.
3 C.J. p 1374 notes 57, 58.

Scope of assignment

Assignment of error for refusal to give binding instruction to jury raises question whether there was any substantial evidence under law for jury to consider.—New York Eskimo Pie Corporation v. Rataj, C.C.A. Pa., 73 F.2d 184—Redman v. Baltimore & Carolina Line, C.C.A.N.Y., 70 F.2d 635, certiorari granted Baltimore & Carolina Line v. Redman, 55 S.Ct. 89, 293 U.S. 541, 79 L.Ed. 646, certiorari denied Redman v. Baltimore & Carolina Line, 55 S.Ct. 98, 293 U.S. 577, 79 L.Ed. 674, modified on other grounds Baltimore & Carolina Line v. Redman, 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636.

Assignment held sufficient

U.S.—Jefferson Standard Life Ins. Co. v. Stevenson, C.C.A.La., 70 F. 2d 72, certiorari denied Stevenson v. Jefferson Standard Life Ins. Co., 55 S.Ct. 100, 293 U.S. 585, 79 L.Ed. 681—Schmidt v. U. S., C.C.A.Neb., 63 F.2d 390—Kennedy Lumber Co. v. Rickborn, C.C.A.S.C., 40 F.2d 228—Saunders System of Colorado Springs, Colo., v. Kelley, C.C.A. Colo., 30 F.2d 520—Arkansas Gravel Co. v. Williams Engineering Service, C.C.A.Miss., 5 F.2d 22—Casey-Hedges Co. v. Oliphant, Tenn., 228 F. 636, 143 C.C.A. 158.

80. U.S.—Moore v. Tremelling, C.C. A.Idaho, 100 F.2d 39—Liquid Veneer Corporation v. Smuckler, C.C. A.Cal., 90 F.2d 196—Pacific Alaska Airways v. Mahan, C.C.A.Alaska, 89 F.2d 255, certiorari denied Pacific Alaska Airways v. Mahan, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541—Southern Pac. Co. v. Schwartz, C.C.A.Ariz., 89 F.2d 192—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C. A.Cal., 86 F.2d 585—Arkansas Gravel Co. v. Williams Engineering Service, C.C.A.Miss., 5 F.2d 22—Fall v. Bennett, Neb., 248 F. 491, 160 C.C.A. 501.
3 C.J. p 1376 notes 60, 63, p 1379 note 71, p 1380 note 88.

Instruction or request must be set out or quoted

U.S.—Cudahy Packing Co. v. McBride, C.C.A.Neb., 92 F.2d 737, certiorari denied 58 S.Ct. 526, 303 U. S. 639, 82 L.Ed. 1099—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Ford Motor Co. v. Brady, C.C.A.Mo., 73 F. 2d 248—Washburn v. Douthit, C.C. A.Ark., 73 F.2d 23—Jones v. Fox Film Corporation, C.C.A.Tex., 68 F. 2d 116—Southwest Dairy Products Co. v. Coffee & Moore, C.C.A.Tex., 62 F.2d 174—Southwestern Gas & Electric Co. v. Rogers, C.C.A.Tex., 37 F.2d 708—Adkins-Polk & Co. v. G. Amsinck & Co., C.C.A.Tex., 10 F. 2d 361—Vandeventer v. Traders' Nat. Bank of Kansas City, Mo., Kan., 241 F. 584, 154 C.C.A. 360.
3 C.J. p 1378 note 68.

81. U.S.—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—Jones v. Futrall, C.C.A.Ark., 75 F.2d 418—McCaffrey v. Elliott, C.C.A.Fla., 65 F.2d 792—U. S. v. Rhodes, C. C.A.W.Va., 49 F.2d 228—Dreyer Commission Co. v. Hellmich, C.C.A. Mo., 25 F.2d 408—Ewert v. Thompson, C.C.A.Okl., 281 F. 449—Gartner v. Hays, C.C.A.Kan., 272 F. 896.
3 C.J. p 1381 note 15, p 1382 note 23.

Assignments held sufficient

U.S.—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 81 F.2d 385, vacating 77 F.2d 891—Barnett v. Kunkel, C.C.A.Okl., 283 F. 24, certiorari denied 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489, and appeal dismissed 44 S.Ct. 254, 264 U.S. 16, 68 L.Ed. 539.

Assignments held insufficient

(1) General assignment of error that the court below erred in its findings of fact or conclusions of law, without identifying, setting forth, or specifying the particular findings or exceptions thereto.—Hobbs-Western Co. v. Employers' Liability Assur. Corporation, Limited, of London, England, C.C.A.Ark., 102 F.2d 32—U. S. v. John Ii Estate, C.C. A.Hawaii, 91 F.2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Wade v. Blieden, C.C.A.Ark., 86 F.2d 75—Rohrback v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 82 F.2d 291—Gartner v. Hays, C.C.A.Kan., 272 F. 896.

(2) That the verdict is contrary to law, or contrary to law and evidence, without specifying or indicating in what way and for what reason it is so.—Humphreys Gold Corporation v. Lewis, C.C.A.Mont., 90 F.2d 896—Radius v. Travelers Ins. Co., C.C.A.Cal., 87 F.2d 412—Washburn v. Douthit, C.C.A.Ark., 73 F.2d 23—Solomon v. Newburger, C.C.A.Ark., 35 F.2d 328—Lawson v. U. S., C.C.A.Ark., 297 F. 418—Vandeventer v. Traders' Nat. Bank of Kansas City, Mo., Kan., 241 F. 584, 154 C.C.A. 360.
3 C.J. p 1384 notes 38, 40, 43.

82. U.S.—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—Oehring v. Fox Typewriter Co., N.Y., 251 F. 584, 163 C.C.A. 578, rehearing denied 254 F. 774, 166 C.C.A. 220, and certiorari denied Fox Typewriter Co. v. Oehring, 39 S.Ct. 257, 249 U. S. 598, 63 L.Ed. 795.
3 C.J. p 1383 notes 32, 33.

83. U.S.—Hobbs-Western Co. v. Employers' Liability Assur. Corporation, Limited, of London, England, C.C.A.Ark., 102 F.2d 32—Century Indemnity Co. v. Nelson, C.C.A. Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, and reversed on other grounds 58 S.Ct. 531, 302 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F. 2d 903—In re Trust No. 2988 of Foreman Trust & Savings Bank, C.C.A.Ill., 85 F.2d 942, certiorari denied Tetzke v. Trust No. 2988 of Foreman Trust & Savings Bank, 57 S.Ct. 235, 299 U.S. 609, 81 L. Ed. 450—Meyer v. Kansas City Southern Ry. Co., C.C.A.N.Y., 84 F.2d 411, affirming, D.C., 11 F.Supp. 937, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448—Hecht v. Alfaro, C.C.A.Cal., 10 F.2d 464, affirming, D.C., 4 F.2d 255.
3 C.J. p 1385 note 52, p 1387 note 75, p 1388 note 76.

Amount of recovery

U.S.—Smith v. Boise City, C.C.A.Idaho, 104 F.2d 933—Krause v. Snyder, C.C.A.Mo., 87 F.2d 723—Jones v. Futrall, C.C.A.Ark., 75 F.2d 418—Gartner v. Hays, C.C.A.Kan., 272 F. 896.

Assignments held insufficient

(1) That the court erred in the judgment or decree rendered.—U. S. v. Shingle, C.C.A.Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Humphreys Gold Corporation v. Lewis, C.C.A.Mont., 90 F.2d 896—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—Krause v. Snyder, C.C.A. Mo., 87 F.2d 723—Wade v. Blieden, C.C.A.Ark., 86 F.2d 75—Columbia Pictures Corporation v. Lawton-Byrne-Bruner Ins. Agency Co., C.C.A. Mo., 73 F.2d 18—McCarthy v. Ruddock, C.C.A.Wash., 43 F.2d 976—Flanagan v. Benson, C.C.A.Ark., 37 F.2d 69—Southern Surety Co. v. Lee County Bank, Title & Trust Co. of Ft. Myers, Fla., C.C.A.Mo., 36 F.2d 220—Geiger v. Tramp, C.C.A.Iowa, 291 F. 353—U. S. Shipping Board Emergency Fleet Corporation v. Drew, C.C.A. Pa., 288 F. 374—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 277 F. 625, certiorari denied 42 S.Ct. 589, 259 U.S. 584, 66 L.Ed. 1076—Stoffregen v. Moore, C.C.A.Mo., 271 F. 680, affirming, D.C., 264 F. 232—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.A.N.M., 270 F. 1—Vandeventer v. Traders' Nat. Bank of Kansas City,

motions for new trial.[84]

Filing, annexing to record, and service. Under Federal Rules of Civil Procedure, rule 75 (d), 28 U.S.C.A. following § 723c, appellant's statement of points for appeal is to be filed and served with his designation of the portions of the record to be brought up on appeal.[85]

Defects, objections, and amendment. An assignment of error, or statement of points for appeal, which is not in compliance with the applicable rules of court or statutes will, in general, be disregarded;[86] and such noncompliance may result in a dismissal of the appellate proceeding,[87] or an affirmance of the judgment.[88] However, failure to comply fully with the rules or statutes is not necessarily fatal to a consideration of the errors raised by the defective assignment,[89] at least where no prejudice results from the defect.[90] Leave to file amended or additional assignments of error will be granted only for good cause.[91]

Mo., Kan., 241 F. 584, 154 C.C.A. 360—Fisher Mach. Works Co. v. Dougherty, Kan., 231 F. 910, 146 C.C.A. 106—Philadelphia Casualty Co. v. Fechheimer, Ohio, 220 F. 401, 136 C.C.A. 25, Ann.Cas.1917D 64—3 C.J. p 1385 note 53.

(2) That the judgment is contrary to the law.—Century Indemnity Co. v. Nelson, C.C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, and reversed on other grounds 58 S.Ct. 531, 302 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903—Radius v. Travelers Ins. Co., C.C.A.Cal., 87 F.2d 412—Rohrback v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 82 F.2d 291—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897—U. S. v. Bowling, C.C.A.Okl., 261 F. 657, reversed on other grounds 41 S.Ct. 561, 256 U.S. 484, 65 L.Ed. 1054—3 C.J. p 1386 note 56.

(3) That the judgment is contrary to the law and the evidence.—Armstrong v. Metropolitan Life Ins. Co., C.C.A.Neb., 85 F.2d 185—Rohrback v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 82 F.2d 291—Allen v. Hudson, C.C.A.Ark., 35 F.2d 330—Coats v. Barton, C.C.A.Ark., 25 F.2d 813—Harris v. Newsom, C.C.A.Colo., 23 F.2d 652—3 C.J. p 1386 note 58, p 1387 note 59.

(4) Assignments of error predicated, not on the judgment or decree of the court, but on the opinion or reason given for the decree.—Clark v. Deere & Mansur Co., Ill., 80 F.2d 534, 25 C.C.A. 619—McFarlane v. Golling, Wis., 76 F. 23, 22 C.C.A. 23—Russell v. Kern, Wis., 67 F. 94, 16 C.C.A. 154—Caverly v. Deere, Ill., 66 F. 305, 13 C.C.A. 452, certiorari denied 16 S.Ct. 1199, 163 U.S. 679, 41 L.Ed. 317.

Scope of assignment

Rule that assigning error to one ruling or decision raises no question as to the correctness of another applies with respect to the assignments of error to judgments.—Northern Pac. Ry. Co. v. Twohy Bros. Co., C.C.A.Or., 95 F.2d 220, certiorari denied 58 S.Ct. 1049, 304 U.S. 575, 82 L.Ed. 1539—Century Indemnity Co. v. Nelson, C.C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, and reversed on other grounds 58 S.Ct. 531, 302 U.S. 213, 82 L.Ed. 755, conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903—3 C.J. p 1387 note 64.

84. U.S.—Niagara Fire Ins. Co. of New York, N. Y., v. Raleigh Hardware Co., C.C.A.W.Va., 62 F.2d 705—O'Brien v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, C.C.A.Neb., 42 F.2d 48—Eteenpain Co-op. Soc. v. Lillback, C.C.A.Mass., 18 F.2d 912. 3 C.J. p 1391 note 14.

85. U.S.—Fiske v. Wallace, C.C.A. Mo., 115 F.2d 1003, certiorari denied Wallace v. Fiske, 62 S.Ct. 123, two cases, 314 U.S. 663, 86 L.Ed. 531, rehearing denied 62 S.Ct. 174, two cases, 314 U.S. 710, 86 L.Ed. 566.

Under prior practice

(1) Assignment of errors had to be filed in the manner and within the time prescribed by statute and court rules.—Joplin Ice Co. v. U. S., C.C.A. Mo., 87 F.2d 174—U. S. v. Kieling, C.C.A.Or., 68 F.2d 163—Board of Com'rs of Osage County v. U. S., C.C.A.Okl., 64 F.2d 775—Raftery ex rel. Huie Fong v. Bligh, C.C.A.Mass., 55 F.2d 189—U. S. v. Thacker, C.C.A.Tex., 44 F.2d 789—Weinstein v. Black Diamond S. S. Corporation, C.C.A.N.Y., 31 F.2d 519—Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, Ohio, 219 F. 148, 135 C.C.A. 46—U. S. v. Goodrich, Ark., 54 F. 21, 4 C.C.A. 160—3 C.J. p 1394 note 24, p 1395 note 30, p 1396 notes 31, 33.

(2) Assignment held not too late.—Atchison, T. & S. F. Ry. Co. v. A. B. C. Fireproof Warehouse Co., C.C.A.Mo., 82 F.2d 505, certiorari denied A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., 57 S.Ct. 17, 299 U.S. 555, 81 L.Ed. 409.

86. U.S.—Century Indemnity Co. v. Nelson, C.C.A.Cal., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, and reversed on other grounds 58 S.Ct. 531, 302 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903—E. R. Squibb & Sons v. Mallinckrodt Chemical Works, C.C.A.Mo., 69 F.2d 685, affirming, D.C., Mallinckrodt Chemical Works v. E. R. Squibb & Sons, 6 F.Supp. 173, and motion denied E. R. Squibb & Sons v. Mallinckrodt Chemical Works, 55 S.Ct. 121, certiorari denied 55 S.Ct. 916, 295 U.S. 759, 79 L.Ed. 1701—Hodges v. Meriwether, C.C.A. Ark., 55 F.2d 29, 86 A.L.R. 52—Dennis v. Roberts, C.C.A.Cal., 19 F.2d 1—Bennett v. Riverland Co., C.C.A. Okl., 15 F.2d 491, affirming, D.C., 5 F.2d 676.

87. U.S.—U. S. v. Dieckmann, C.C.A. Ind., 101 F.2d 421.

88. U.S.—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A. Neb., 101 F.2d 987—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—Robinette v. Sidener, C.C.A. Kan., 33 F.2d 37.

89. U.S.—Yager v. Liberty Royalties Corporation, C.C.A.Okl., 123 F.2d 44—National Surety Corporation v. Williams, C.C.A.Ark., 110 F.2d 873, certiorari denied Williams v. National Surety Corporation, 61 S.Ct. 40, 311 U.S. 674, 83 L.Ed. 433—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Casualty Co. of New York, C.C.A. Mo., 107 F.2d 343—Denver-Greeley Valley Irr. Dist. v. McNeil, C.C.A. Colo., 106 F.2d 288—Roswell Drainage Dist. v. Dickey, C.C.A.N.M., 292 F. 29.

D.C.—Cochran v. Burdick, 89 F.2d 831, 67 App.D.C. 87.

90. U.S.—Fort Dodge Hotel Co. of Fort Dodge v. Bartelt, C.C.A.Iowa, 119 F.2d 253.

91. U.S.—Pacific Alaska Airways v. Mahan, C.C.A.Alaska, 89 F.2d 255, certiorari denied Pacific Alaska Airways v. Mahan, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541—American Surety Co. of New York v. Fischer Warehouse Co., C.C.A.Or., 88 F.2d 536—U. S. v. Sellers, C.C.A.Miss., 75 F.2d 623, certiorari denied 55 S.Ct. 923, 295 U.S. 763, 79 L.Ed. 1705—U. S. v. National Bank of Commerce of Seattle, C.C.A.Wash., 73 F.2d 721—Shreve v. U. S., C.C.A., 73 F.2d 542.

b. Briefs

It is generally required that parties to an appeal to the circuit court of appeals file briefs complying with court rules as to their form and contents, and on noncompliance with this requirement the court may dismiss the appeal or make such other disposition of the case as it deems fit.

It is generally required that parties to an appeal to the circuit court of appeals file briefs presenting their contentions,[92] and on failure to comply with this requirement the disposition of the case is ordinarily within the discretion of the court,[93] and it may in some circumstances dismiss the appeal.[94] The form and substance of briefs must conform to that prescribed by the court rules.[95] A brief should contain a brief, clear, and concise statement of the material facts, or an abstract of the case, presenting succinctly the questions involved,[96] and it should specifically and exactly point out the particular error or errors relied on for reversal.[97] The points

92. U.S.—American Car & Foundry Co. v. Matzok, Pa., 228 F. 179, 142 C.C.A. 535.

Supplemental, additional, or amended briefs setting up errors not specified in the original briefs cannot be filed without leave of court or consent of the opposite party.—Detroit United R. Co. v. Nichols, Mich., 165 F. 289, 91 C.C.A. 257.

93. U.S.—Plazuela Sugar Co. v. Alvarez, C.C.A.Puerto Rico, 295 F. 511.
3 C.J. p 1445 note 5.

94. U.S.—Dickson v. Maryland Casualty Co., C.C.A.La., 102 F.2d 299—Plazuela Sugar Co. v. Alvarez, C.C.A.Puerto Rico, 295 F. 511.

Where neither party submitted brief, appeal would be treated as dismissed or abandoned.—U. S. v. Mashunkashey, C.C.A.Okl., 72 F.2d 847, rehearing denied 73 F.2d 487, certiorari denied Mashunkashey v. U. S., 55 S.Ct. 551, 294 U.S. 724, 79 L.Ed. 1255—Zalduondo v. Civille, C.C.A.Puerto Rico, 295 F. 691.

Appeal in forma pauperis not dismissed for failure to file brief.—Edwards v. Bodkin, Cal., 249 F. 562, 161 C.C.A. 488.

95. U.S.—Credit Bureau of San Diego v. Petrasich, C.C.A.Cal., 97 F.2d 65.

96. U.S.—Credit Bureau of San Diego v. Petrasich, supra.
3 C.J. p 1408 note 18.

Particular matters

(1) To obtain consideration of an alleged error in the admission or rejection of evidence it is essential, according as the rules of the court may provide, to refer in the brief to the pages of the record where found, or to set forth in the brief itself, the evidence, objections, and rulings thereon.—Butler v. U. S., C.C.A.Ark., 108 F.2d 27—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—Welland v. Pioneer Irr. Co., Colo., 238 F. 519, 151 C.C.A. 455, affirmed 42 S.Ct. 568, 259 U.S. 498, 66 L.Ed. 1027—3 C.J. p. 1415 notes 72, 73, p 1416 note 76.

(2) Instructions with respect to which error was alleged should be set out in the brief.—National Cash Register Co. v. Leland, Mass., 94 F. 502, 37 C.C.A. 372, certiorari denied 20 S.Ct. 1021, 175 U.S. 724, 44 L.Ed. 337.

(3) Verdict or findings.—Diamond Alkali Co. v. Heiner, C.C.A.Pa., 60 F. 2d 505, modifying, D.C., 39 F.2d 645, and certiorari granted Heiner v. Diamond Alkali Co., 53 S.Ct. 221, 287 U. S. 593, 77 L.Ed. 517, reversed on other grounds 53 S.Ct. 413, 298 U.S. 502, 77 L.Ed. 921—Reid v. Baker, C.C.A. Or., 17 F.2d 770.

Record

(1) Under some court rules, it is required that the brief set out a concise statement of as much of the record as will enable the court to pass on all errors assigned so that no examination of the record itself need be made.—Pickett v. Aglinsky, C.C. A.W.Va., 110 F.2d 628.

(2) Under other rules, reference must be made to the record by page in verification of the statement of the case.—Wallace v. Hudson-Duncan & Co., C.C.A.Or., 98 F.2d 985, reversing, D.C., Hudson-Duncan & Co. v. Wallace, 21 F.Supp. 295.

(3) Reference to pages of the record may also be required to point out alleged errors complained of.—Fienup v. Kleinman, C.C.A.S.D., 5 F.2d 137—Varner v. Clark, C.C.A.Okl., 283 F. 17—Broatch v. Boysen, Wyo., 236 F. 516, 149 C.C.A. 568—Colorado Yule Marble Co. v. Collins, Neb., 230 F. 78, 144 C.C.A. 376—3 C.J. p 1409 note 37, p 1410 note 38, p 1415 note 72.

Improper matter will not be considered

U.S.—Malleable Iron Range Co. v. Lee, C.C.A.Wis., 263 F. 896, modifying, D.C., Lee v. Malleable Iron Range Co., 247 F. 795, and certiorari denied Malleable Iron Range Co. v. Lee, 40 S.Ct. 342, 251 U.S. 562, 64 L.Ed. 415.

97. U.S.—Simons v. Davidson Brick Co., C.C.A.Cal., 106 F.2d 518—Commissioner of Internal Revenue v. O'Donnell, C.C.A., 90 F.2d 907, certiorari granted Helvering v. O'Donnell, 58 S.Ct. 121, 302 U.S. 676, 82 L.Ed. 522, and reversed on other grounds 58 S.Ct. 619, 302 U.S. 370, 82 L.Ed. 903, rehearing denied 58 S.Ct. 762, 303 U.S. 669, 82 L.Ed. 1125—Ford Motor Co. v. Brady, C. C.A.Mo., 73 F.2d 248—Harrow-Taylor Butter Co. v. Crooks, C.C.A.Mo., 41 F.2d 627—Hard & Rand v. Biston Coffee Co., C.C.A.Mo., 41 F.2d 625—Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., Mo., 154 F. 545, 83 C.C.A. 431, certiorari denied 28 S.Ct. 256, 207 U.S. 589, 52 L.Ed. 354.
3 C.J. p. 1412 note 54, p 1414 note 64, p 1415 note 71.

Requisites of specification

(1) It is required under some rules that each specification of error in the brief shall state the particular ruling claimed to be erroneous and the assignment or assignments of error on which the specification is based.—Barnett v. U. S., C.C.A.Cal., 82 F.2d 765, certiorari denied 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402, rehearing denied 57 S.Ct. 113, 299 U.S. 620, 81 L. Ed. 457.

(2) Errors should be distinctly and separately alleged.—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Harrow-Taylor Butter Co. v. Crooks, C.C.A.Mo., 41 F.2d 627.

Effect of noncompliance

(1) Errors not included in the brief as points relied on will be considered to have been abandoned and will not be noticed.—Mason v. Anderson-Cottonwood Irr. Dist., C. C.A.Cal., 126 F.2d 921, certiorari denied 62 S.Ct. 1293, 316 U.S. 697, 86 L.Ed. 1767—Butler v. U. S., C.C.A. Ark., 108 F.2d 27—U. S. v. John II Estate, C.C.A. Hawaii, 91 F.2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—U. S. v. Shingle, C.C.A.Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A.Cal., 86 F.2d 585—Hultman v. Tevis, C.C.A.Cal., 82 F.2d 940—Berry v. Earling, C.C.A. Alaska, 82 F.2d 317—Gelberg v. Richardson, C.C.A.Cal., 82 F.2d 314—Gripton v. Richardson, C.C.A.Cal., 82 F.2d 313—Ford Motor Co. v. Brady, C.C.A. Mo., 73 F.2d 248—Wabash Ry. Co. v. Lindley, C.C.A.Neb., 29 F.2d 829—City of Goldfield, Colo., v. Roger, Colo., 249 F. 39, 161 C.C.A. 99—3 C.J. p 1410 note 42.

(2) In absence of specification of errors, the court may affirm the

or propositions of law raised in the brief should be applied to the facts and circumstances of the particular case,[98] and should be supported by argument[99] and proper citation of authorities.[1] Disrespectful or abusive language should not be inserted in the brief.[2]

While failure to comply with rules of court as to the form and contents of briefs may result in the affirmance of the judgment below,[3] dismissal of the appeal,[4] or striking of the brief,[5] technical defects will sometimes be overlooked in the absence of prejudice resulting therefrom,[6] at least where amendment by permission has cured the defects.[7]

Compliance must usually be had with rules as to the printing or typewriting,[8] and service,[9] of briefs; and a failure to file a brief within the time limited therefor may result in the court disregarding the brief,[10] and dismissing the appeal,[11] although it is within the discretion of the court to overlook the default where justified by the facts and circumstances.[12]

judgment or dismiss the appeal.—Mathewson v. First Trust Co. of St. Joseph, C.C.A.Mo., 100 F.2d 121, certiorari denied 59 S.Ct. 789, 306 U.S. 663, 83 L.Ed. 1060—Huffman v. Baldwin, C.C.A.Ark., 82 F.2d 5, certiorari denied Baldwin v. Huffman, 57 S.Ct. 12, 299 U.S. 550, 81 L.Ed. 405—Harrow-Taylor Butter Co. v. Crooks, C.C.A.Mo., 41 F.2d 627—Hard & Rand v. Biston Coffee Co., C.C.A.Mo., 41 F. 2d 625—3 C.J. p 1414 note 66, p 1415 note 67.

(3) However, the court may, if it sees fit, determine a case on the merits, even though there is no proper specification of errors.—McCullough v. Satterthwait, C.C.A.Okl., 11 F.2d 111—Klink v. Chicago, R. I. & P. Ry. Co., Colo., 219 F. 457, 135 C.C. A. 169—Western Assur. Co. v. Polk, Neb., 104 F. 649, 44 C.C.A. 104.

(4) So an error which involves a question of federal jurisdiction will be noticed.—Huffman v. Baldwin, C. C.A.Ark., 82 F.2d 5, certiorari denied Baldwin v. Huffman, 57 S.Ct. 12, 299 U.S. 550, 81 L.Ed. 405.

(5) But the court need not search the record for errors on which to reverse the judgment.—Coco-Cola Co. v. Moore, Ark., 256 F. 640, 168 C.C.A. 34—3 C.J. p 1413 note 56.

(6) Although errors should have been more specifically alleged, where the court is able to discover the errors relied on, and neither respondent nor the court has been misled, they will be considered.—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361.

98. U.S.—Ralston Purina Co. v. Novak, C.C.A.Neb., 111 F.2d 631.

A general or abstract statement of law or fact without specific application to some alleged error cannot be relied on as ground for reversal.—Butler v. U. S., C.C.A.Ark., 108 F. 2d 27—Harrow-Taylor Butter Co. v. Crooks, C.C.A.Mo., 41 F.2d 627.

99. U.S.—Wilder v. Century Carpet Co., C.C.A.Cal., 92 F.2d 175.

Excessive argument

Rules prohibiting argument in excess of a specified number of pages should not be violated by incorporating what is in fact argument under the heading "Statement of the Case."—Clark Blade & Razor Co. v. Gillette Safety Razor Co., C.C.A.N.J., 82 F. 2d 707.

1. U.S.—Northwestern Steam Boiler & Mfg. Co. v. Great Lakes Engineering Works, Minn., 181 F. 38, 104 C.C.A. 52.

Original report of case should be cited

U.S.—In re Kerner, N.Y., 250 F. 993, 163 C.C.A. 243, reversing, D.C., 245 F. 807.

2. U.S.—Flat Slab Patents Co. v. Turner, C.C.A.Minn., 285 F. 257, certiorari denied Turner v. Flat Slab Patents Co., 43 S.Ct. 700, 262 U.S. 752, 67 L.Ed. 1215—U. S. v. Peuschel, D.C.Cal., 116 F. 649.

3 C.J. p. 1432 notes 10, 12.

3. U.S.—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—Daly-West Mining Co. v. Savage, C.C.A.Utah, 253 F. 548, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C.C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539.

4. U.S.—Mathewson v. First Trust Co. of St. Joseph, C.C.A.Mo., 100 F. 2d 121, certiorari denied 59 S.Ct. 789, 306 U.S. 663, 83 L.Ed. 1060.

5. U.S.—Collins v. Streitz, C.C.A. Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.

6. U.S.—State of Missouri ex rel. and to Use of De Vault v. Fidelity & Casualty Co. of New York, C.C. A.Mo., 107 F.2d 343—Roswell Drainage Dist. v. Dickey, C.C.A.N. M., 292 F. 29—Ludwig v. Bressler, Neb., 253 F. 8, 165 C.C.A. 28, certiorari denied Bressler v. Ludwig, 39 S.Ct. 182, 248 U.S. 585, 63 L.Ed. 433.

7. U.S.—Collins v. Streitz, C.C.A. Ariz., 95 F.2d 430, certiorari denied 59 S.Ct. 67, 305 U.S. 608, 83 L.Ed. 387.

8. **Rule not suspended on appeal in forma pauperis**

U.S.—Reed v. Pennsylvania Co., 111 F. 714, 49 C.C.A. 572—3 C.J. p 1437 note 83.

9. U.S.—Russo-Chinese Bank v. National Bank of Commerce, Wash., 187 F. 80, 109 C.C.A. 398.

3 C.J. p 1436 note 62.

10. U.S.—Cardigan v. White, C.C.A. Kan., 18 F.2d 572, certiorari denied 47 S.Ct. 770, 274 U.S. 755, 71 L.Ed. 1334.

11. U.S.—Missouri, K. & T. R. Co. v. Kidd, 146 F. 499, 77 C.C.A. 13, affirming 88 S.W. 308, 6 Ind.T. 29.

12. U.S.—Wharton v. Shenandoah Pub. House, C.C.A.Va., 101 F.2d 310, certiorari denied 60 S.Ct. 128, 308 U.S. 595, 84 L.Ed. 498, rehearing denied 60 S.Ct. 259, 308 U.S. 637, 84 L.Ed. 529—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740, and certiorari denied Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Cramer v. Phoenix Mut. Life Ins. Co., 58 S. Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Coburn v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Cramer v. Aetna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, and certiorari denied Coburn v. Aetna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S. Ct. 263, 302 U.S. 778, 82 L.Ed. 602—Hupper v. Hyde, C.C.A.Fla., 296 F. 862, affirming, D.C., The Smith Terry No. 1, 34 F.2d 570.

3 C.J. p 1439 note 7.

Defect cured

The failure to file brief within time

Statements made in briefs may constitute binding admissions,[13] and may narrow the issues.[14]

c. Dismissal, Withdrawal, or Abandonment

Generally only the circuit court of appeals may dismiss an appeal to it, on proper and timely motion of a party, or in some instances on its own motion, and it may do so only in a clear case on some legal and substantial ground. On dismissal of an appeal or its abandonment, the cause stands as though no appeal had been taken, and the dismissal renders the decree or order below final, but the appellate court may in its discretion vacate its order of dismissal and reinstate the appeal.

After the jurisdiction of the circuit court of appeals over an appeal has attached, it may in a proper case dismiss the appeal,[15] but the trial court from which the appeal originated is without power to do so.[16] An appeal will be dismissed where all parties whose rights are affected so agree,[17] and appellant will, as a rule, be permitted to withdraw or to dismiss his appeal,[18] although not as to his coappellants.[19]

A motion to dismiss an appeal must be made on some legal ground recognized by statute or rules of court, or otherwise present substantial defects of such a nature as to preclude a fair determination of the cause on appeal, or else the motion will be denied.[20] While an omission or defect not going to the substance of an appeal is no ground for its dismissal,[21] generally an appeal may be dismissed where no actual controversy exists between the parties at the time of the hearing, and only a moot question exists for determination,[22] where the ap-

limited by court rule did not require dismissal of appeal where brief was filed before any motion was made to dismiss the appeal.—American Ins. Co. v. Scheufler, C.C.A. Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F. Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466.

Filing nunc pro tunc
An appeal will not be dismissed for failure to file copies of the brief as required but such filing will be permitted nunc pro tunc.—Delaware & H. Co. v. Stankus, C.C.A.Pa., 63 F. 2d 887.

13. U.S.—In re Wilkes, C.C.A.N.Y., 55 F.2d 224—Mandelbaum v. Goodyear Tire & Rubber Co., C.C.A. Iowa, 6 F.2d 818—Young & Vann Supply Co. v. Gulf, F. & A. Ry. Co., C.C.A.Fla., 5 F.2d 421.
D.C.—Sweeney v. District of Columbia, App.D.C., 113 F.2d 25, 72 App. D.C. 30, certiorari denied District of Columbia v. Sweeney, 60 S.Ct. 1082, 310 U.S. 631, 84 L.Ed. 1402.

14. U.S.—Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., C.C.A.Colo., 45 F.2d 715, modifying, D.C., Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., 35 F.2d 365, certiorari denied Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448.

15. U.S.—Martinez v. Sancho, C.C.A. Puerto Rico, 108 F.2d 960.

16. U.S.—Mayer v. Hickey, C.C.A. Tex., 67 F.2d 489.

17. U.S.—Harms, Inc. v. WJR, The Goodwill Station, C.C.A.Mich., 85 F.2d 866.

18. U.S.—U. S. v. Newbury Mfg. Co., C.C.A.Mass., 123 F.2d 453, denying motion, D.C., 36 F.Supp. 602.
4 C.J. p 563 note 12.

No request is necessary to enable appellant to move to dismiss.—Baltimore S. S. Co. v. Phillips, C.C.A.N.Y., 9 F.2d 902, certiorari granted 46 S. Ct. 348, 270 U.S. 638, 70 L.Ed. 774, and reversed on other grounds 47 S. Ct. 600, 274 U.S. 316, 71 L.Ed. 1069.

Leave of court
Appellant cannot dismiss the appeal as a matter of right but only on leave of court.—Greenville Banking & Trust Co. v. Selcow, C.C.A.N.J., 25 F.2d 78.

Costs
An appellant dismissing or withdrawing his appeal should be charged with the costs.—Tannage Patent Co. v. Donallan, C.C.Mass., 75 F. 287, appeal dismissed 79 F. 385, 24 C.C.A. 647.

19. U.S.—In re Volland, C.C.A.Ill., 83 F.2d 680.

20. U.S.—George v. Protective Life Ins. Co., C.C.A.Tenn., 113 F.2d 1021—De La Torre v. National City Bank of New York, C.C.A.Puerto Rico, 110 F.2d 381.

Jurisdiction to consider appeal
Appeals should be dismissed only when the appellate court has no jurisdiction to review any aspect of the action taken below, and when the order below is reëxamined, even to the limited extent of determining whether discretion of district court has been abused, appellate court exercises its appellate jurisdiction, and affirmance or reversal is required.—Federal Land Bank of Springfield v. Hansen, C.C.A.N.Y., 113 F.2d 82.

Error not shown
Ordinarily an appeal will not be dismissed on the ground that error is not shown, but the circuit court of appeals will consider the appeal on the merits.—Felker v. Southern Trust Co., C.C.A.Ark., 264 F. 798, certiorari denied 41 S.Ct. 8, 254 U.S. 633, 65 L.Ed. 449.

Allowance of appeal not shown
Circuit court of appeals cannot dismiss appeal or affirm judgment, where allowance of appeal is not shown, but can only strike cause from docket.—National Veneer Co. v. Langley, C.C.A.N.C., 29 F.2d 403.

21. U.S.—E. I. Du Pont de Nemours & Co. v. Smith, Va., 249 F. 403, 161 C.C.A. 377.

Alleged errors in the proceedings below generally afford no ground for dismissal of the appeal, but if properly presented will be considered by the appellate court at the hearing on the merits.—Operators' Oil Co. v. Barbre, C.C.A.Okl., 64 F.2d 857—Bradley v. Eccles, N.Y., 126 F. 945, 61 C.C.A. 669, affirming, C.C., 122 F. 867, and reversing 122 F. 871.

22. U.S.—International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, Local Union No. 523, of Tulsa, Okl. v. Keystone Freight Lines, C.C.A. Okl., 123 F.2d 326—Southard & Co. v. Salinger, C.C.A.Ill., 117 F.2d 194—The John Cadwalader, C.C.A. Pa., 99 F.2d 678—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740—San Joaquin County v. Harris, C.C.A.Cal., 88 F. 2d 541—Selected Products Corporation v. Humphreys, C.C.A.Ill., 86 F. 2d 821—Judith B. Nieva & Co., S.-C. v. Domenech, C.C.A.Puerto Rico, 83 F.2d 981—Burton v. Carey, C.C. A.Or., 82 F.2d 657—Missouri Public Service Co. v. City of Trenton, Mo., C.C.A.Mo., 80 F.2d 520, withdrawing in part and dismissing in part Arkansas-Missouri Power Co. v. City of Kennett, 78 F.2d 911—Western Electric Co. v. Cinema Supplies, C.C.A.Minn., 80 F.2d 111—California Canning Peach Growers v. Myers, C.C.A.Cal., 78 F.2d 194—Bender v. Donoghue, C.C.A.Tex., 70 F.2d 723—Harrison Beverage Co. v. Woodcock, C.C.A.N.J., 67 F.2d 441—Wynne v. Harrison Beverage Co., C.C.A.N.J., 59 F.2d 734—Wynne

peal is manifestly frivolous and without merit,[23] where there is a want of jurisdiction in the appellate court, and the defect is patent, or can be readily ascertained by an examination of the record,[24]

v. Union City Brewing Co., C.C.A. N.J., 59 F.2d 733—Rahayel v. McCampbell, C.C.A.N.Y., 55 F.2d 221, dismissing appeal, D.C., 46 F.2d 170—Wynne v. Pancheri, C.C.A.Pa., 54 F.2d 73—F. Burkart Mfg. Co. v. Case, C.C.A.Ark., 39 F.2d 5—Wingert v. Kieffer, C.C.A.Md., 29 F.2d 59—City of Boulder v. Lewis, C.C. A., 21 F.2d 910—O'Brien v. Fackenthal, C.C.A.Ohio, 284 F. 850, dismissing appeal, D.C., Central Metal Products Corporation v. O'Brien, 278 F. 827—First Nat. Bank v. Crissinger, C.C.A.Md., 279 F. 818—Dakota Coal Co. v. Fraser, C.C.A. N.D., 267 F. 130—City of Paducah v. Paducah Water Co., Ky., 258 F. 20, 169 C.C.A. 158—Pease v. Rathbun-Jones Engineering Co., Tex., 228 F. 273, 142 C.C.A. 565, affirmed 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715.

4 C.J. p 575 note 80, p 578 note 96.

Appeal dismissed

(1) Where the right in controversy has expired by lapse of the period of time fixed for its continuance.—Gelpi v. Tugwell, C.C.A.Puerto Rico, 123 F. 2d 377—Johnson-Kennedy Radio Corporation v. Chicago Bears Football Club, C.C.A.Ill., 97 F.2d 223—Rahayel v. McCampbell, C.C.A.N.Y., 55 F.2d 221, dismissing appeal, D.C., 46 F.2d 170—Camden County Beverage Co. v. Blair, C.C.A.N.J., 46 F.2d 655—4 C.J. p 578 note 3.

(2) When it appears that there has been a valid settlement or adjustment by the parties of all their rights and differences respecting the subject matter of the controversy.—Casey v. American Civil Liberties Union, C.C.A.N.J., 100 F.2d 354—Maryland Casualty Co. v. Dulaney Lumber Co., C.C.A.Miss., 23 F.2d 378, certiorari denied Bank of Ruleville v. Maryland Casualty Co., 48 S.Ct. 560, 277 U.S. 598, 72 L.Ed. 1007—Clark v. Fairbanks, La., 249 F. 431, 161 C.C.A. 405—3 C.J. p 688 note 28—4 C.J. p 579 note 12.

(3) Where appellant accepts the benefits of the judgment, order, or decree.—Selected Products Corporation v. Humphreys, C.C.A.Ill., 86 F.2d 821.

(4) Where the judgment or decree appealed from has been satisfied or complied with by appellant.—Selected Products Corporation v. Humphreys, supra—In re Smith, C.C.A. Cal., 71 F.2d 378—National-Ben Franklin Fire Ins. Co. of Pittsburgh, Pa., v. Haughton, C.C.A.Tex., 36 F. 2d 225.

Apparently contra—The Barge No. 25, C.C.A.Cal., 14 F.2d 107.

(5) However, payment by someone other than defendant will not necessitate dismissal of the appeal.—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740.

Costs

An appeal in a case which has become moot will not be retained merely for the purpose of determining the question of costs.—Gelpi v. Tugwell, C.C.A.Puerto Rico, 123 F.2d 377—Johnson-Kennedy Radio Corporation v. Chicago Bears Football Club, C.C. A.Ill., 97 F.2d 223.

Appeal not dismissed

(1) Where the controversy has not ceased to exist.—Oklahoma City v. Sanders, C.C.A.Okl., 94 F.2d 323, 115 A.L.R. 363, affirming, D.C., Sanders v. Oklahoma City, 19 F.Supp. 50—Berdie v. Kurtz, C.C.A.Cal., 75 F.2d 898—Pinkston v. Brotherhood of Locomotive Firemen and Enginemen, C.C.A. Ohio, 69 F.2d 600, certiorari granted Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 54 S.Ct. 866, 292 U.S. 621, 78 L.Ed. 1477—New York Dock Ry. v. Pennsylvania R. Co., C.C.A.Pa., 62 F.2d 1010, affirming, D.C., 1 F.Supp. 20, and certiorari denied 53 S.Ct. 694, 289 U.S. 750, 77 L.Ed. 1495—McCluer v. Super Maid Cook-Ware Corporation, C.C.A. Kan., 62 F.2d 426—Oklahoma Natural Gas Corporation v. Municipal Gas Co., C.C.A.Okl., 38 F.2d 444.

(2) Where merely a part of the controversy has ceased to exist, other questions remaining for decision.—Jackson v. Denver Producing & Refining Co., C.C.A.Okl., 96 F.2d 457—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F. 2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740—Burton v. Carey, C.C.A.Or., 82 F.2d 657—Lincoln Printing Co. v. Middle West Utilities Co., C.C.A.Ill., 74 F.2d 779, affirming, D.C., 6 F.Supp. 663, certiorari denied Pollak v. McCulloch, 55 S.Ct. 659, 295 U.S. 746, 79 L.Ed. 169—4 C.J. p 577 note 87.

23. U.S.—Dakin v. U. S., C.C.A.Va., 105 F.2d 150—Sancho v. Acevedo, C.C.A.Puerto Rico, 93 F.2d 331, certiorari denied 58 S.Ct. 829, 303 U. S. 662, 82 L.Ed. 1120, rehearing denied 58 S.Ct. 1036, 304 U.S. 588, 82 L.Ed. 1549—Robertson v. Wilkinson, C.C.A.Tex., 10 F.2d 311.

Shown on record

This ground of dismissal will not be considered in any event unless it is perfectly manifest from the record that such was the purpose of the appeal.—Texas Co. v. Roos, C.C.A. Tex., 93 F.2d 380, affirming, D.C., Burton v. Roos, 20 F.Supp. 75—U. S. v. Hayes, C.C.A.Okl., 20 F.2d 873, certiorari denied Riverside Oil & Refining Co. v. Cimarron River Oil Co., 48 S.Ct. 115, 275 U.S. 552, 72 L.Ed. 421 and U. S. v. Cimarron River Oil Co., 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423, and U. S. v. Hayes, 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423.

24. U.S.—In re Balfour Manor Apartments Co., C.C.A.Mich., 123 F. 2d 75—Martinez v. Sancho, C.C.A. Puerto Rico, 108 F.2d 960—Pueblo De Taos v. Archuleta, C.C.A.N.M., 64 F.2d 807.

4 C.J. p 580 note 28. p 581 note 38.

Nonappealable judgment

Appeal may be dismissed where an appeal is taken from a nonappealable judgment, order, or decree, or where a final judgment is lacking.—Hunter v. Federal Life Ins. Co., C.C.A.Ark., 103 F.2d 192—Lieberman v. Bancroft, C.C.A.Pa., 69 F.2d 202.

Amount in controversy

Where plaintiff saved question of whether items aggregating one thousand seven hundred dollars were properly stricken from bill by district court, fact that residue of claim amounted to only one thousand nine hundred dollars does not require dismissal by circuit court on ground that requisite amount is not in controversy.—Crawford County Trust & Savings Bank v. Crawford County, Iowa, C.C.A.Iowa, 63 F.2d 342.

Former statute construed

(1) Under Jud.Code § 238a which formerly prevailed, the circuit court of appeals could not dismiss an appeal improperly before it which should have been taken directly to the supreme court of the United States, but was required to transfer it to the supreme court.—W. T. Waggoner Estate v. Wichita County, Tex., 47 S.Ct. 271, 273 U.S. 113, 71 L. Ed. 566, affirming, C.C.A., 3 F.2d 962, affirming, D.C., Waggoner v. Wichita County, 298 F. 818—R. H. Hassler, Inc., v. Shaw, C.C.A.S.C., 3 F.2d 605—Reading Steel Casting Co. v. U. S., C. C.A.Pa., 293 F. 386, transferred, see 45 S.Ct. 469, 268 U.S. 186, 69 L.Ed. 907—McLean Oil Co. v. Ashworth Heirs, C.C.A.Tex., 289 F. 73—Bianchi v. Morales, C.C.A.Puerto Rico, 288 F. 194.

(2) This statute was held inapplicable to any case in which the appeal to the circuit court of appeals was taken after the period for appeals to the supreme court had expired.—U. S. & Cuban Allied Works Engineering Corporation v. Lloyds, N.Y., 44 S.Ct. 614, 265 U.S. 454, 68 L. Ed. 1103—McMillan Contracting Co. v. Abernathy, Mo., 44 S.Ct. 200, 263 U.S. 438, 68 L.Ed. 378, remanding appeals, C.C.A., 284 F. 354, appeal dismissed 2 F.2d 1018.

where there is an unexcused failure to prosecute the appeal within the time prescribed by statute or rule of court,[25] or where it appears that appellant has lost or disposed of his interest.[26] Also dismissal may be warranted by failure to perfect the appeal in the required manner,[27] unless the error in the proceedings for review is nonprejudicial;[28] and if, pending an appeal, an event occurs which makes a determination of it unnecessary or renders it clearly impossible for the appellate court to grant effectual relief, the appeal will be dismissed.[29]

Waiver or cure of defects. Treating an appeal as valid[30] and proceeding without preliminary objection to defects and irregularities[31] may under some circumstances be deemed a waiver of the right to have the appeal dismissed for such defects and irregularities. The circuit court of appeals may refuse to dismiss an appeal for defects and irregularities in the proceedings for review when such defects have been subsequently cured.[32]

Motion to dismiss. Generally a motion to dismiss is necessary to obtain a dismissal of an appeal to the circuit court of appeals,[33] but the court may or should dismiss an appeal of its own motion for want

25. U.S.—In re Prudence-Bonds Corporation, C.C.A.N.Y., 111 F.2d 37, certiorari granted Reconstruction Finance Corporation v. Prudence Securities Advisory Group, 60 S.Ct. 1101, 310 U.S. 622, 84 L.Ed. 1395, reversed on other grounds 61 S.Ct. 331, 311 U.S. 579, 85 L.Ed. 364, Manufacturers Trust Co. v. Prudence Securities Advisory Group, 61 S.Ct. 445, 312 U.S. 649, 85 L.Ed. 1101, Endelman v. Prudence-Bonds Corporation, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101, Kelby v. Prudence Securities Advisory Group, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101, Prudence Realization Corporation v. Prudence-Bonds Corporation, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101, and Davison v. Prudence Securities Advisory Group, 61 S.Ct. 446, 312 U.S. 649, 85 L.Ed. 1101—Caldwell v. Standard Accident Ins. Co., C.C.A.Tenn., 98 F.2d 364, certiorari denied 59 S.Ct. 106, 305 U.S. 640, 83 L.Ed. 412.
4 C.J. p 582 note 47.

26. U.S.—United Porto Rican Sugar Co. v. Saldana, C.C.A.Puerto Rico, 80 F.2d 13.

That corporate party was superseded or its stock acquired by another corporation without formal substitution as party does not necessitate dismissal of appeal.—Continental Oil Co. v. Osage Oil & Refining Co., C.C.A.Okl., 57 F.2d 527, certiorari denied 53 S.Ct. 17, 287 U.S. 616, 77 L.Ed. 535—Williamson v. Missouri-Kansas Pipe Line Co., C.C.A.Ill., 56 F.2d 503.

27. U.S.—McBee v. Palmer, C.C.A. Wash., 73 F.2d 342, dismissing appeal, D.C., In re Thompson, 4 F. Supp. 921.
Failure to file:
Assignment of errors or statement of points on appeal see supra subdivision a of this section.
Brief see supra subdivision b of this section.

28. U.S.—Keeley v. Mutual Life Ins. Co. of New York, C.C.A.Ill., 113 F. 2d 633—Wheeler v. Taft, C.C.A.La., 261 F. 978, certiorari denied 40 S. Ct. 584, 253 U.S. 490, 64 L.Ed. 1028—Sola v. Cintron & Aboy, Puerto Rico, 237 F. 61, 150 C.C.A. 263—Toyo Kisen Kaisha v. Hartman, Cal., 253 F. 422, 165 C.C.A. 164, reversing, D.C., Hartman v. Toyo Kisen Kaisha S. S. Co., 244 F. 567—Jumeau v. Brooks, Fla., 109 F. 353, 48 C.C.A. 397.
4 C.J. p 573 note 43.

29. U.S.—Rivers v. Miller, C.C.A.Ga., 112 F.2d 439, reversing, D.C., Miller v. Rivers, 31 F.Supp. 540—Connecticut General Life Ins. Co. v. Pierce, C.C.A.Pa., 110 F.2d 27—Selected Products Corporation v. Humphreys, C.C.A.Ill., 86 F.2d 821—Vidal v. South American Securities Co., C.C.A.N.Y., 276 F. 855.
4 C.J. p 584 note 62.

Moot question

(1) Appeal will be dismissed where by reason of a change of conditions or circumstances the question has become moot.—Alaska Packers Ass'n v. Marshall, C.C.A.Cal., 95 F.2d 279—Williams v. Durst, C.C.A.Cal., 93 F. 2d 807—City of Coeur d'Alene, Idaho, v. Washington Water Power Co., C. C.A.Idaho, 79 F.2d 461—Weldon v. U. S., C.C.A.Mass., 65 F.2d 748.

(2) Question held not moot.—F. Burkart Mfg. Co. v. Case, C.C.A.Ark., 39 F.2d 5.

Effect of other proceedings

(1) An appeal may be dismissed where the question in controversy has been settled by another order in the same action or in another action or proceeding.—Moore v. Linahan, C. C.A.N.Y., 117 F.2d 140, certiorari denied Sargent & Co. v. Moore, 62 S. Ct. 59, 314 U.S. 628, 86 L.Ed. 504—Suwannee River Bridge Co. v. Meredith, C.C.A.Fla., 112 F.2d 743—Moore Dry Dock Co. v. Pillsbury, C.C.A.Cal., 98 F.2d 115—Taylor v. Bancroft, C. C.A.Fla., 91 F.2d 582—Dietrich v. U. S. Shipping Board Merchant Fleet Corporation, C.C.A.N.Y., 80 F.2d 211—Amiesite Asphalt Co. of America v. Interstate Amiesite Co., C.C.A.Del., 72 F.2d 946, dismissing appeal, D.C., 4 F.Supp. 504—Fiske v. State of Missouri, C.C.A.Mo., 69 F.2d 683, certiorari denied 54 S.Ct. 716, 292 U.S. 636, 78 L.Ed. 1489—National Farmers' Bank of Owatonna, Minn., v. Moulton, C.C.A.Minn., 32 F.2d 78, dismissing appeal, D.C., Moulton v. Farmers' Bank of Owatonna, Minn., 27 F.2d 403—Farmers' State Bank of Texahoma v. Thompson, C.C.A.Tex., 261 F. 166—Keely v. Ophir Hill Consol. Min. Co., Utah, 169 F. 601, 95 C.C.A. 99.

(2) However, the fact that there is another suit pending involving the same question is no ground for dismissing an appeal.—Roach v. First Nat. Bank, C.C.A.Miss., 84 F.2d 969.

(3) In any case the decision or order must have determined the question raised on the appeal.—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 740—Shinholt v. Angle, C.C.A.Tex., 90 F.2d 297—Newton v. Laclede Steel Co., C.C.A.Ill., 80 F.2d 636, affirming, D.C., Laclede Steel Co. v. Newton, 6 F.Supp. 625—Sand Springs Home v. Title Guarantee & Trust Co., C.C.A.Okl., 16 F.2d 917.

30. U.S.—The Native, C.C.N.Y., 17 F.Cas.No.10,054, 14 Blatchf. 34.

31. U.S.—Wilson v. Chicago Lumber & Timber Co., Colo., 143 F. 705, 74 C.C.A. 529—Freeman v. Clay, Miss., 48 F. 849, 1 C.C.A. 115, affirmed 52 F. 1, 2 C.C.A. 587.

32. U.S.—Sargent v. State Banking & Trust Co., C.C.A.Iowa, 12 F.2d 758.
4 C.J. p 587 note 84.

Time of docketing appeal

The appellate court will not dismiss for a failure to docket the appeal in time, if, before the motion is made, the cause is actually placed on the docket.—American Gas Mach. Co. v. Willcuts, C.C.A.Minn., 87 F.2d 924—4 C.J. p 588 note 87.

33. U.S.—Hayes v. Tootle-Lacy Nat. Bank, C.C.A.Kan., 72 F.2d 429.

Alternative motion

While infrequent, motions to dismiss or, in the alternative, to affirm are well recognized in the circuit court of appeals.—National Surety Co. v. Universal Transp. Co., N.Y.,

of jurisdiction,[34] want of right to appeal generally,[35] defect or omission of essential parties,[36] defects in the proceedings for review,[37] or want of an actual controversy.[38] Such a motion must be made within the proper time,[39] and on proper notice.[40]

Motions to dismiss are not looked on with favor,[41] and in a doubtful case the appeal will be maintained.[42] On such a motion the circuit court of appeals will not ordinarily consider or determine the merits of the appeal, or questions involving its merits;[43] and where, in passing on a motion to dismiss, the court would be required to examine the entire record, the motion will ordinarily not be considered in advance of a hearing on the merits, or will be denied.[44] Ordinarily a motion to dismiss an appeal will not lie where it is necessary to examine evidence in order to pass on the motion;[45] but evidence dehors the record may in some circumstances be received and considered for the purpose of disposing of such a motion.[46]

Order of dismissal and dismissal without prejudice. While appellant, in the absence of special equitable considerations, is not entitled to a dismissal without prejudice,[47] the court may order such a dismissal in a proper case.[48] An appeal may be dis-

256 F. 450, 167 C.C.A. 578, affirming, D.C., Universal Transp. Co. v. National Surety Co., 252 F. 293.

Successive motions

(1) A second motion to dismiss an appeal, based on the same grounds as a former motion or on grounds existing at the time of such former motion, will, as a general rule, be denied.—Nashua & L. R. Corp. v. Boston & L. R. Corp., Mass., 51 F. 929, 2 C.C.A. 542.

(2) A motion to dismiss may be denied without prejudice to the moving party's right to renew the motion at a later stage of the proceedings.—Lynch v. Durfey, C.C.A.Cal., 108 F.2d 181.

(3) Where a motion to dismiss was denied as premature, and by inadvertence no leave was given to renew the motion, the circuit court of appeals may consider the questions raised by a second motion.—Bennell Realty Co. v. E. G. Shinner & Co., C.C.A.Wis., 87 F.2d 824, certiorari denied 58 S.Ct. 12, 302 U.S. 693, 82 L. Ed. 535.

34. U.S.—Benitez v. Bank of Nova Scotia, C.C.A.Puerto Rico, 109 F.2d 743, certiorari granted 61 S.Ct. 10, 311 U.S. 623, 85 L.Ed. 395, reversed on other grounds 61 S.Ct. 953, 313 U.S. 270, 85 L.Ed. 1324, rehearing denied 62 S.Ct. 51, 314 U.S. 706, 86 L.Ed. 564—Memphis Keeley Inst. v. Leslie E. Keeley Co., Tenn., 144 F. 628, 75 C.C.A. 430.

35. U.S.—In re Michigan-Ohio Bldg. Corporation, C.C.A.Ill., 117 F.2d 191.

However, it has been held that the fact that the appealing party's claim was not adjudicated below and that none of the other parties appealed does not preclude the court from considering the appeal on the merits in the absence of a motion to dismiss.—Hayes v. Tootle-Lacy Nat. Bank, C. C.A.Kan., 72 F.2d 429.

Nonappealability of the order or cause

U.S.—Dyar v. McCandless, C.C.A.S.D., 33 F.2d 578—U. S. ex rel. Patti v. Curran, C.C.A.N.Y., 18 F.2d 953—City and County of San Francisco v. McLaughlin, C.C.A.Cal., 9 F.2d 390.

36. U.S.—Wells v. Demeter, C.C.A. Okl., 84 F.2d 673—Higbee v. Chadwick, Tenn., 220 F. 873, 136 C.C. A. 317.

37. U.S.—Ayres v. Polsdorfer, Tenn., 105 F. 737, 45 C.C.A. 24, error dismissed 23 S.Ct. 196, 187 U.S. 585, 47 L.Ed. 314.

Appeal not taken in time

U.S.—Dealers Finance Co. v. Coulter, C.C.A.Ark., 64 F.2d 752, dismissing appeal, D.C., 3 F.Supp. 114—Youtsey v. Niswonger, Ohio, 258 F. 16, 169 C.C.A. 154.

38. U.S.—Maryland Casualty Co. v. Dulaney Lumber Co., C.C.A.Miss., 23 F.2d 378, certiorari denied Bank of Ruleville v. Maryland Casualty Co., 48 S.Ct. 560, 277 U.S. 598, 72 L.Ed. 1007.
4 C.J. p 591 note 20.

39. U.S.—Henderson County, N. C., v. Wilkins, C.C.A.N.C., 43 F.2d 670.
4 C.J. p 598 note 87.

Stage of proceeding

(1) A motion to dismiss appeal for defects or irregularities in the proceedings for review, not going to the jurisdiction, should be made at a preliminary stage or the defects or irregularities will be deemed waived. U.S.—Long v. Farmers' State Bank, Iowa, 147 F. 360, 77 C.C.A. 538. D.C.—Vogel v. Saunders, 92 F.2d 984, 68 App.D.C. 31.
4 C.J. p 596 notes 73, 74, 76.

(2) So appellee's motion to dismiss appeal not docketed within time allowed was denied, where made on day case was calendared for argument.—Henderson County, N. C. v. Wilkins, C.C.A.N.C., 43 F.2d 670.

(3) However, a motion to dismiss for jurisdictional defects may ordinarily be made at any stage of the proceedings before a final disposition of the case.—Hook v. Mercantile Trust Co. of New York, Ill., 95 F. 41, 36 C.C.A. 645.

40. U.S.—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 38 F. 2d 396.

41. U.S.—Bennell Realty Co. v. E. G. Shinner & Co., C.C.A.Wis., 87 F.2d 824, certiorari denied 58 S.Ct. 12, 302 U.S. 693, 82 L.Ed. 535—Davis v. F. W. Woolworth Co., C.C.A.Okl., 54 F.2d 366.

42. U.S.—Maryland Casualty Co. v. Kern County, C.C.A.Cal., 83 F.2d 774—Halfpenny v. Miller, W.Va., 232 F. 113, 146 C.C.A. 305.

43. U.S.—Hartmann v. Sloan, C.C.A. Pa., 99 F.2d 942, certiorari denied Hartman v. Sloan, 59 S.Ct. 487, 306 U.S. 638, 83 L.Ed. 1039—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, reversing, D.C., 14 F.Supp. 459, certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568—Atkinson v. U. S., C.C.A. Minn., 70 F.2d 515, denying motion, D.C., 4 F.Supp. 398, affirmed 73 F. 2d 214.
4 C.J. p 602 note 33.

44. U.S.—Graham v. O'Ferral, Puerto Rico, 236 F. 717, 150 C.C.A. 49—Merriman v. Chicago, D. & V. R. Co., Ill., 120 F. 240, 53 C.C.A. 536—Standard Oil Co. v. Bell, Fla., 82 F. 113, 27 C.C.A. 72.

45. U.S.—Davis v. F. W. Woolworth Co., C.C.A.Okl., 54 F.2d 366.

46. U.S.—Prince v. McLaughlin, C.C. A.Mass., 16 F.2d 886, certiorari denied McLaughlin v. Prince, 47 S. Ct. 658, 274 U.S. 746, 71 L.Ed. 1327, and 47 S.Ct. 763, 71 L.Ed. 1341.

Moot question

Evidence may be received to determine whether question on appeal is moot.—Vidal v. South American Securities Co., C.C.A.N.Y., 276 F. 855.

47. U.S.—Tannage Patent Co. v. Donallan, Mass., 79 F. 385, 24 C.C. A. 647, dismissing appeal, C.C., 75 F. 287.

48. U.S.—Chicago & N. W. Ry. Co. v. Eveland, C.C.A.S.D., 289 F. 783, vacating, D.C., 285 F. 425—Mossberg v. Nutter, Mass., 124 F. 966, 60 C.C.A. 98.

missed in part.[49]

Effect of dismissal. When an appeal is dismissed, whether on motion or otherwise, the whole case is out of court;[50] the cause stands in the trial court as though no appeal had ever been taken,[51] and the decree or order appealed from becomes final.[52]

Abandonment. The jurisdiction of the lower court is restored in case of abandonment of an appeal, and it may proceed in the cause as though no appeal had been taken.[53]

Vacating order and reinstatement. A motion to reinstate an appeal after dismissal thereof is addressed to the judicial discretion of the court,[54] and the court may grant such motion on good cause shown.[55]

§ 297. Review

a. In general
b. Interlocutory, collateral, and supplementary proceedings and questions
c. Persons entitled to allege error
d. Amendment, additional proofs, and trial of cause anew
e. Presumptions
f. Discretion of lower court
g. Questions of fact, verdicts, and findings
h. Harmless error
i. Error waived in appellate court
j. Decisions of intermediate courts
k. Subsequent appeals

a. In General

General principles of review are applied by the circuit court of appeals in the exercise of its appellate jurisdiction.

The circuit court of appeals is, as to law cases, a court of error;[56] it does not retry a jury case, but reviews the record for reversible error by the trial judge in failing to conduct the trial within proper bounds,[57] its function being limited to a review of specific rulings of the lower court alleged to be erroneous.[58] The circuit court of appeals will not decide a matter which was for the court below to determine;[59] but where the facts are not in dispute, the former court is in the same position as the trial court to pass on the question of law involved.[60] It has been broadly stated that, on appeal to the circuit court of appeals, all issues presented by the pleadings and the evidence are before the court for adjudication.[61]

Failure of a district judge to follow the prior rulings of another judge who sat in the same case does not affect the power of the circuit court of appeals to review the final judgment.[62]

49. U.S.—Westcot v. Bradford, C.C. N.J., 29 F.Cas.No.17,429, 4 Wash. C.C. 492.

50. U.S.—Maxwell v. Williams, Ark. Super., 16 F.Cas.No.9,324a, Hempst. 172.

Remand

The circuit court of appeals may not thereafter remand the record with leave to the court below to allow a new trial.—Realty Acceptance Corporation v. Montgomery, Del., 52 S.Ct. 215, 284 U.S. 547, 76 L.Ed. 476, affirming, C.C.A., Montgomery v. Realty Acceptance Corporation, 51 F. 2d 642, certiorari granted Realty Acceptance Corporation v. Montgomery, 52 S.Ct. 25, 284 U.S. 604, 76 L.Ed. 518.

51. U.S.—Wilson v. Aderhold, C.C.A. Ga., 89 F.2d 903.

52. U.S.—Wilson v. Aderhold, supra—Norton v. U. S., D.C.Fla., 38 F. Supp. 158, affirmed, C.C.A., 119 F.2d 173—Stewart v. Oneal, Ohio, 237 F. 897, 150 C.C.A. 547.

53. U.S.—Mauro v. Ritchie, D.C., 16 F.Cas.No.9,312, 3 Cranch C.C. 147, appeal dismissed Ritchie v. Mauro, 4 Pet. 243, 7 L.Ed. 411.

Abandonment not shown

Plaintiffs in federal court action did not, by filing counterclaim for same cause of action in subsequent suit in local territorial court, elect to abandon appeal from adverse judgment in federal court.—Franceschi v. De Tord, C.C.A.Puerto Rico, 71 F.2d 95.

54. U.S.—Rector v. Alcorn, Miss., 204 F. 748, 123 C.C.A. 125.

Time of making motion

Due diligence in moving to reinstate the appeal is required, or the delay will be fatal.—Arcoil Mfg. Co. v. American Equitable Assur. Co. of New York, C.C.A.N.J., 87 F.2d 206—Greene v. Hulse, C.C.A., 33 F.2d 121.

55. U.S.—Betts v. Gahagan, N.C., 205 F. 890, 124 C.C.A. 203.
4 C.J. p 609 note 11.

56. U.S.—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30.

57. U.S.—Maryland Casualty Co. v. Reid, supra.

58. U.S.—Ralston Purina Co. v. Novak, C.C.A.Neb., 111 F.2d 631.

59. U.S.—Levering & Garrigues Co. v. Morrin, C.C.A.N.Y., 61 F.2d 115, certiorari granted 53 S.Ct. 118, 287 U.S. 590, 77 L.Ed. 515, and affirmed 53 S.Ct. 549, 289 U.S. 103, 77 L.Ed. 1062.

Refusal of trial court to order an accounting under a supplemental bill presents nothing for consideration on appeal, where the trial court dismissed the supplemental bill.—Barton v. Rex-Oil Co., C.C.A.Pa., 29 F.2d 474.

Relief from judgment taken by mistake, etc.

The district court, and not the circuit court of appeals, is the place to make a record covering requirements of Federal Rules of Civil Procedure, rule 60(b), 28 U.S.C.A. following § 723c, authorizing one to seek relief from judgment or order taken against him by mistake, inadvertence, surprise, or excusable neglect.—Perlman v. 322 West Seventy-Second Street Co., C.C.A.N.Y., 127 F.2d 716.

Review of orders out of time

Where district court refused to review previous orders and decrees out of time, appellant could not attack them in circuit court of appeals.—Bernards v. Johnson, Or., 62 S.Ct. 30, 314 U.S. 19, 86 L.Ed. 11, affirming, C.C.A., 103 F.2d 567, certiorari denied 60 S.Ct. 127, 308 U.S. 595, 84 L.Ed. 498, certiorari granted 60 S.Ct. 899, 310 U.S. 616, 84 L.Ed. 1391.

60. U.S.—Flannery Bolt Co. v. Flannery, C.C.A.Pa., 86 F.2d 43, modifying, D.C., 16 F.Supp. 803.

61. U.S.—Lyon v. Union Gas & Oil Co., C.C.A.Ky., 281 F. 674.

62. U.S.—Friederichsen v. Renard, Neb., 231 F. 882, 146 C.C.A. 78, re-

Review dependent on whether questions are of law or fact. As appears infra subdivision g of this section, the general rule is that a circuit court of appeals cannot review findings of fact; but it reviews questions of law, without being bound by the conclusions of the court below.[63] A finding designated by the lower court as one of fact will be treated on review as one of law, if substantially of the latter character.[64]

In addition to other questions or findings,[65] the following have been held on review to be questions or findings of fact: What is the law of a foreign country;[66] intention to transfer title;[67] existence of negligence;[68] whether the minds of the parties met;[69] mitigation of damages;[70] and excessiveness of verdict.[71]

A reviewable question of law is presented where the evidence is, or the facts are, undisputed or without substantial conflict,[72] and where the answer admits the crucial averments of the petition by styling them as immaterial and as not requiring an answer.[73] A question or conclusion of law is also presented by the construction of pleadings,[74] of a decree,[75] a statute,[76] or of a contract or other document or instrument;[77] and it is a question of law whether there is any substantial evidence to

versed on other grounds 38 S.Ct. 450, 247 U.S. 207, 62 L.Ed. 1075.

63. U.S.—Exmoor Country Club v. U. S., C.C.A.Ill., 119 F.2d 961—Kuhn v. Princess Lida of Thurn & Taxis, C.C.A.Pa., 119 F.2d 704—U. S., for Use of Wadeford Electric Co. v. E. J. Biggs Const. Co., C.C.A.Ill., 116 F.2d 768—Wolfe v. Murphy, C.C.A.Iowa, 113 F.2d 775, certiorari denied 61 S.Ct. 138, 311 U.S. 700, 85 L.Ed. 454—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A.Cal., 73 F.2d 157—U. S. Fidelity & Guaranty Co. v. Wyler, C.C.A.Okl., 60 F.2d 856, certiorari denied Wyler v. U. S. Fidelity & Guaranty Co., 53 S.Ct. 93, 287 U.S. 647, 77 L.Ed. 560—Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 43 F.2d 355—Road Improvement Dist. No. 5 of Crittenden County, Ark. v. Roach, C.C.A.Ark., 18 F.2d 755—Société Anonyme des Sucreries de St. Jean v. Polanco, C.C.A.Puerto Rico, 6 F.2d 3.

64. U.S.—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S.Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527—H. B. Glover Co. v. Bladine, C.C.A.Iowa, 34 F.2d 605, affirming, D.C., 27 F.2d 347.

65. **Particular questions or findings** held questions or findings of fact:

(1) Whether an employee breached a contract for satisfactory service.—American Trading Co. v. Steele, C.C.A.China, 274 F. 774.

(2) Finding that plaintiff was not a bona fide purchaser of a note for value, but took it subject to any defense affecting the consideration.—American Nat. Bank v. Natkins, Wis., 119 F. 545, 56 C.C.A. 111, certiorari denied 23 S.Ct. 854, 190 U.S. 558, 47 L.Ed. 1183.

(3) Finding of a formula for an apportionment of investment and expense of telephone exchange as a whole between local and toll businesses or finding that none is practicable for determining proper rate.—Southwestern Bell Telephone Co. v. City of San Antonio, Tex., 75 F.2d 880, setting aside, D.C., 2 F.Supp. 611, affirmed 4 F.Supp. 570, certiorari denied City of San Antonio v. Southwestern Bell Telephone Co., 55 S.Ct. 835, 295 U.S. 754, 79 L.Ed. 1698.

(4) Ruling that contract condition that order for Canadian lumber would be void if there was a tariff tax was inserted for benefit of seller.—Fred W. Mears Heel Co. v. Walley, C.C.A.Me., 71 F.2d 876, affirming, D.C., Walley v. Fred W. Mears Heel Co., 4 F.Supp. 277, certiorari denied Fred W. Mears Heel Co. v. Walley, 55 S.Ct. 122, 293 U.S. 605, 79 L.Ed. 696.

(5) Other questions.—Southern Surety Co. of Des Moines, Iowa v. U. S., C.C.A.S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532.

66. U.S.—Compania Transcontinental de Petroleo, S. A., v. Mexican Gulf Oil Co., C.C.A.N.Y., 292 F. 846, affirming, D.C., Mexican Gulf Oil Co. v. Compania Transcontinental De Petroleo, 281 F. 148—Hudson River Pulp & Paper Co. v. Warner, N.Y., 99 F. 187, 39 C.C.A. 452.

67. U.S.—Barnard v. Standard Oil Co. of Indiana, C.C.A.Ind., 110 F.2d 417.

68. U.S.—Ahlhauser v. Butler, Wis., 63 F. 792, 11 C.C.A. 434.

4 C.J. p 646 note 68.

69. U.S.—Detroit Copper & Brass Rolling Mills v. Wise, C.C.A.N.Y., 297 F. 460.

70. U.S.—American Trading Co. v. Steele, C.C.A.China, 274 F. 774.

71. U.S.—Metropolitan St. R. Co. v. Jacobi, N.Y., 112 F. 924, 50 C.C.A. 619.

72. U.S.—Exmoor Country Club v. U. S., C.C.A.Ill., 119 F.2d 961—U. S. Fidelity & Guaranty Co. v. Wyer, C.C.A.Okl., 60 F.2d 856, certiorari denied Wyer v. U. S. Fidelity & Guaranty Co., 53 S.Ct. 93, 287 U.S. 647, 77 L.Ed. 560—Kaufmann v. Commissioner of Internal Revenue, C.C.A.Pa., 44 F.2d 144—Weicker v. Bromfield, C.C.A.Colo., 34 F.2d 377.

73. U.S.—Publicker v. Shallcross, C.C.A.Pa., 106 F.2d 949, 126 A.L.R. 386, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521.

74. U.S.—Edenborn v. Sim, N.Y., 206 F. 275, 124 C.C.A. 339, reversed on other grounds 37 S.Ct. 36, 242 U.S. 131, 61 L.Ed. 199, and 37 S.Ct. 38, 242 U.S. 137, 61 L.Ed. 204.

4 C.J. p 648 note 23.

Dismissal for want of jurisdiction

Whether a judgment of dismissal for want of jurisdiction is supported by the pleadings is a question of law.—Cushny v. Crowe, C.C.A.Mo., 36 F.2d 37.

75. U.S.—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S.Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527.

76. U.S.—Exmoor Country Club v. U. S., C.C.A.Ill., 119 F.2d 961—H. B. Glover Co. v. Bladine, C.C.A.Iowa, 34 F.2d 605, affirming, D.C., 27 F.2d 347.

77. U.S.—U. S., for Use of Wadeford Electric Co. v. E. J. Biggs Const. Co., C.C.A.Ill., 116 F.2d 768—Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A.Minn., 99 F.2d 902, certiorari denied Minneapolis, St. P. & S. S. M. R. Co. v. Pike Rapids Power Co., 59 S.Ct. 362, 305 U.S. 660, 83 L.Ed. 428, rehearing denied 59 S.Ct. 487, 306 U.S. 667, 83 L.Ed. 1062, certiorari denied Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co. 59 S.Ct. 488, 306 U.S. 640, 83 L.Ed. 1040—Erskine v. U. S., C.C.A.Cal., 84 F.2d 880, denying rehearing 84 F.2d 690—Road Improvement Dist. No. 5 of Crittenden County, Ark., v. Roach, C.C.A.Ark., 18 F.2d 755—Roessler & Hasslacher Chemical Co. v. Standard Silk Dyeing Co., N. Y., 254 F. 777, 166 C.C.A. 223, reversing, D.C., Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co., 244 F. 250, and certiorari denied Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co., 40 S.Ct. 11, 250 U.S. 663, 63 L.Ed. 1196.

support a verdict, finding, or judgment.[78] What is a reasonable time has been said to be usually, but not always, a question of law.[79] Other matters held to involve questions of law are set out in the note.[80]

The conclusion of the trial court as to fraud is a mixed one of law and fact.[81]

Matters not necessary to decision on review. Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by a circuit court of appeals;[82] thus abstract, moot, academic, or hypothetical questions

Trust deed
U.S.—Welch v. Hassett, C.C.A.Mass., 90 F.2d 833, reversing, D.C., 15 F.Supp. 692, and certiorari granted Hassett v. Welch, 58 S.Ct. 56, 302 U.S. 674, 82 L.Ed. 521, affirmed 58 S.Ct. 559, 303 U.S. 303, 82 L.Ed. 858.

Carrier's rate tariff
U.S.—Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., C.C. A.Mo., 66 F.2d 965, reversing, D. C., Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, 1 F. Supp. 399, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

78. U.S.—Dixon v. U. S., C.C.A.Ill., 113 F.2d 640—American Nat. Bank & Trust Co. v. U. S., C.C.A.Ill., 104 F.2d 783—Wessel v. U. S., C.C.A. Neb., 49 F.2d 137—Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 43 F.2d 355—Stinson v. Business Men's Accident Ass'n, C.C.A.Okl., 43 F.2d 312—Martin v. Richmond, F. & P. R. Co., C.C.A.Va., 3 F.2d 26—Corey v. Atlas Coal & Coke Co., C.C.A.Mich., 277 F. 138.
4 C.J. p 648 note 26.

Motion for judgment on the evidence, with refusal and reservation of exception, raises question of law for review, as to sufficiency of evidence to warrant judgment.—Builders & Manufacturers Mut. Casualty Co. v. Preferred Automobile Ins. Co., C.C.A. Ohio, 118 F.2d 118, affirming, D.C., Builders & Manufacturers Mut. Casualty Co. v. Hummon, 26 F.Supp. 929 —Page v. Lafayette Worsted Co., C. C.A.R.I., 66 F.2d 339, certiorari denied Lafayette Worsted Co. v. Page, 54 S.Ct. 127, 290 U.S. 692, 78 L.Ed. 596—U. S. v. Great Northern Ry. Co., C.C.A.Minn., 57 F.2d 385, certiorari granted 52 S.Ct. 648, 286 U.S. 540, 76 L.Ed. 1278, and affirmed 53 S.Ct. 28, 287 U.S. 144, 77 L.Ed. 223—Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 43 F.2d 355—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

Motion for nonsuit made by defendant at the close of the evidence and based on the asserted lack of evidence as to matters essential to recovery presents a reviewable question of law.—Maryland Casualty Co. v. Jones, Cal., 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960, reversing, C.C.A., 27 F.2d 521.

79. U.S.—American Concrete Steel Co. v. Hart, C.C.A.N.Y., 285 F. 322, affirming, D.C., Hart v. American Concrete Steel Co., 278 F. 541.

80. **Particular matters** held to involve questions of law.

(1) Application of proper rule of damages for breach of contract, except "where the application of the true rule of damages depends upon circumstances and facts which throw light upon the understanding of the parties and the character of the agreement."—Milton v. H. C. Stone Lumber Co., C.C.A.Ill., 36 F.2d 589, 590, affirming, D.C., 36 F.2d 583.

(2) In action for value of attorney's services, difficulty of the legal problem with respect to which the services were rendered.—Kuhn v. Princess Lida of Thurn & Taxis, C.C. A.Pa., 119 F.2d 704.

(3) Materiality of insured's statements in application for accident insurance policy sued on.—Ocean Accident & Guaranty Corporation v. Rubin, C.C.A.Cal., 73 F.2d 157.

(4) Where a bill to review a former decree for error appearing on the face of the record was dismissed on defendant's motion, the question whether there was any error apparent on the face of the record is one of law.—Rudolph v. Hunt, 286 F. 1007, 52 App.D.C. 343, certiorari denied 43 S.Ct. 521, 262 U.S. 744, 67 L.Ed. 1211.

(5) Where admissions in pleadings, together with stipulated ultimate facts, require judgment for plaintiff, it is error of law, reviewable on appeal, if court enter judgment for defendant; and, if plaintiff is entitled to judgment on stipulated ultimate facts, fact that parties introduced evidence on other theories does not deprive him of right to reversal.—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14, reversing, D.C., 50 F.2d 219.

81. U.S.—U. S. v. Mammoth Oil Co., C.C.A.Wyo., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed. 840, affirmed 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.

82. U.S.—Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America, N.J., 50 S.Ct. 356, 281 U.S. 462, 74 L.Ed. 967, affirming, C.C.A., 34 F.2d 3, affirming, D.C., 12 F.2d 945, certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608—Fanchon & Marco v. Hagenbeck-Wallace Shows Co., C.C.A.Cal., 125 F.2d 101—City of San Diego v. Perry, C.C.A.Cal., 124 F.2d 629—O'Brien v. Pabst Sales Co., C.C.A. Tex., 124 F.2d 167, certiorari denied 62 S.Ct. 917, 315 U.S. 823, 86 L.Ed. 1220—Simms v. Andrews, C. C.A.Okl., 118 F.2d 803—Northwestern Mut. Life Ins. Co. of Milwaukee, Wis. v. Fink, C.C.A.Mich., 118 F.2d 761—Hinton v. Columbia River Packers Ass'n, C.C.A.Or., 117 F.2d 310, reversing, D.C., Columbia River Packers Ass'n v. Hinton, 34 F.Supp. 970, certiorari granted 62 S.Ct. 123, 314 U.S. 600, 86 L.Ed. 483, and reversed on other grounds 62 S.Ct. 520, 315 U.S. 143, 86 L.Ed. 750—Rey v. Colonial Nav. Co., C. C.A.N.Y., 116 F.2d 580—Doyne v. Saettele, C.C.A.Mo., 112 F.2d 155—Galion Iron Works & Manufacturing Co. v. J. D. Adams Mfg. Co., C.C.A.Ind., 105 F.2d 943—Queen v. U. S., C.C.A.N.C., 105 F.2d 146, certiorari denied 60 S.Ct. 144, 308 U. S. 600, 84 L.Ed. 502—McLeod v. Majors, C.C.A.Fla., 102 F.2d 128, reversing, D.C., Majors v. McLeod, 26 F.Supp. 206—E. W. Bliss Co. v. Cold Metal Process Co., C.C.A.Ohio, 102 F.2d 105—M. & M. Transp. Co. v. Cochran, C.C.A.R.I., 100 F.2d 207 —Royal Oak Drain Dist., Oakland County v. Keefe, C.C.A.Mich., 87 F. 2d 786—Oxford Varnish Corporation v. Ault & Wiborg Corporation, C.C.A.Mich., 85 F.2d 390, denying rehearing 83 F.2d 764—Carson v. Long-Bell Lumber Corporation, C.C. A.Mo., 73 F.2d 397, certiorari denied 55 S.Ct. 352, 294 U.S. 707, 79 L.Ed. 1242, rehearing denied 55 S. Ct. 506, 294 U.S. 731, 79 L.Ed. 1261, and affirming, D.C., Hutson v. Long-Bell Lumber Co., 1 F.Supp. 468—Johnson v. Ingersoll, C.C.A. Ill., 63 F.2d 86—Superior Oil Corporation v. Matlock, C.C.A.Okl., 47 F.2d 993—Henderson v. Richardson Co., C.C.A.W.Va., 25 F.2d 225 —Steidle v. Reading Co., C.C.A.N. J., 24 F.2d 299, certiorari denied 49 S.Ct. 13, 278 U.S. 609, 73 L.Ed. 535—Cincinnati, N. O. & T. P. Ry. Co. v. Davis, C.C.A.Tenn., 293 F. 481—Severn v. Philadelphia & R. Ry. Co., C.C.A.N.J., 281 F. 784—Ward v. Foulkrod, C.C.A.Pa., 264

will not be considered or decided,[83] nor will questions the determination of which will not, in any event, affect the validity of the judgment appealed from,[84] or trivial or unimportant objections or questions, not affecting the parties' substantial rights.[85] These rules have been applied to objections to pleadings or assignments of error to the rulings of the trial court in respect of pleadings,[86]

F. 627, affirming, D.C., Wheeler v. Badenhausen Co., 260 F. 991—Edgar v. Ames, Okl., 255 F. 835, 167 C.C.A. 163—Baldwin Co. v. R. S. Howard Co., N.Y., 238 F. 154, 151 C.C.A. 230, affirming, D.C., 233 F. 439, and certiorari denied R. S. Howard Co. v. Baldwin Co., 37 S.Ct. 400, 243 U.S. 636, 61 L.Ed. 941—Odell v. H. Batterman Co., N.Y., 223 F. 292, 138 C.C.A. 534, reversing, D. C., 217 F. 305—Jackson v. Virginia Hot Springs Co., Va., 213 F. 969, 130 C.C.A. 375, followed in 213 F. 975, 130 C.C.A. 381.

4 C.J. p 649 note 36.

Decree will be disregarded on appeal in so far as it declares mortgage void, where in that respect it has no relation to, or bearing on, actual relief accorded, no relief having been sought as against mortgage.—Zaring v. Strauss & Co., C.C.A.Idaho, 30 F.2d 313.

One of defendant's pleas need not be considered if the uncontroverted evidence sustains its other plea.—Sponge Exch. Bank of Tarpon Springs v. Commercial Credit Co., C.C.A.Fla., 263 F. 20, certiorari denied Commercial Credit Co. v. Sponge Exch. Bank of Tarpon Springs, 40 S.Ct. 587, 253 U.S. 496, 64 L.Ed. 1030.

Assignments of error on cross writ, which are contingent and in the alternative, need not be reviewed where judgment for defendant, which sued out the cross writ, is affirmed.—Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., Ga., 236 F. 910, 150 C.C.A. 172.

Authority to amend findings

Where the parties agree that the trial court's original and so-called supplemental findings correctly reflect the facts, the reviewing court may consider the whole of the findings without passing on the trial court's authority to amend in the manner adopted.—Hayes v. Kelley, C.C.A.Or., 112 F.2d 897.

Expiration of injunction

That plaintiff's right to an injunction expired pendente lite does not relieve court from duty of determining substantial issues existing when case is argued on appeal.—Standard Fashion Co. v. Magrane Houston Co., Mass., 259 F. 793, 170 C.C.A. 593, affirming 251 F. 559, 163 C.C.A. 553, and certiorari granted 40 S.Ct. 54, 250 U.S. 658, 63 L.Ed. 1193, affirmed 42 S.Ct. 360, 258 U.S. 346, 66 L.Ed. 653.

Error of district court in treating evidence as conclusive

Where federal district court fell into error in treating survey and patent of federal government as conclusive on question whether land was upland or tideland, circuit court of appeals was not required to review evidence and determine whether land involved was tideland.—Borax Consolidated v. City of Los Angeles, Cal., 56 S.Ct. 23, 296 U.S. 10, 80 L.Ed. 9, affirming, C.C.A., City of Los Angeles v. Borax Consolidated, 74 F.2d 901, reversing, D.C., 5 F.Supp. 281, certiorari granted Borax Consolidated v. City of Los Angeles, 55 S.Ct. 921, 295 U.S. 729, 79 L.Ed. 1679, rehearing denied 56 S.Ct. 304, 296 U.S. 664, 80 L.Ed. 473.

83. U.S.—Powell v. Maryland Trust Co., C.C.A.Va., 125 F.2d 260, certiorari denied 62 S.Ct. 1041, 316 U.S. 671, 86 L.Ed. 1746, and 62 S.Ct. 1046, 316 U.S. 671, 86 L.Ed. 1746—City of High Point v. Duke Power Co., C.C.A.N.C., 120 F.2d 866, affirming, D.C., 34 F.Supp. 339—U. S. v. Meyer, C.C.A.Ill., 113 F.2d 387, certiorari denied Meyer v. U. S., 61 S.Ct. 174, two cases, 311 U.S. 706, 85 L. Ed. 459—Robinson v. Harris Trust & Savings Bank, C.C.A.Tex., 89 F.2d 929, certiorari denied 58 S.Ct. 37, 302 U.S. 716, 82 L.Ed. 553—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co., C.C.A.Mo., 88 F.2d 232—Oxford Varnish Corporation v. Ault & Wiborg Corporation, C.C.A.Mich., 83 F.2d 764, rehearing denied 85 F.2d 390—R. J. Reynolds Tobacco Co. v. Robertson, C.C.A.N.C., 80 F.2d 966, certiorari denied 56 S.Ct. 596, 297 U.S. 719, 80 L.Ed. 1004—Pauley v. State of California, C.C.A.Cal., 75 F.2d 120—Eureka Cereal Beverage Co. v. Pennington, C.C.A.N.J., 66 F.2d 1005—May Hosiery Mills v. U. S. Dist. Court in and for Dist. of Montana, C.C.A.Mont., 64 F.2d 450, reversing, D.C., May Hosiery Mills v. F. & W. Grand 5–10–25 Cent Stores, 59 F.2d 218—Wynne v. Kutz, C.C.A. Pa., 61 F.2d 870—Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., C.C.A.Colo., 45 F.2d 715, modifying, D.C., Denver & S. L. Ry. Co. v. Moffat Tunnel Improvement Dist., 35 F.2d 365, and certiorari denied Moffat Tunnel Improvement Dist. v. Denver & S. L. Ry. Co., 51 S.Ct. 485, 283 U.S. 837, 75 L.Ed. 1448—Lanahan v. Clark Car Co., C.C.A.Pa., 11 F.2d 820, modifying, D.C., Clark Car Co. of New Jersey v. Clark, 11 F.2d 814—Louisiana Agricultural Corporation v. Pelican Oil Refining Co., La., 256 F. 822, 168 C.C.A. 168, certiorari denied 39 S.Ct. 494, 250 U.S. 646, 63 L.Ed. 1187—Baldwin Co. v. R. S. Howard Co., N.Y., 238 F. 154, 151 C.C.A. 230, affirming, D.C., 233 F. 439, certiorari denied R. S. Howard Co. v. Baldwin Co., 37 S.Ct. 400, 234 U.S. 636, 61 L.Ed. 941.

4 C.J. p 649 note 35 [b].

Review of moot questions generally see Appeal and Error § 1455.

Questions which "have not yet arisen and probably never will arise" will not be discussed.—Murphy v. Kerr, C.C.A.N.M., 5 F.2d 908, 41 A. L.R. 1359, affirming, D.C., 296 F. 536.

Matters which may become moot as the proceedings go forward should not be determined.—Beaunit Mills v. Eday Fabric Sales Corporation, C.C. A.N.Y., 124 F.2d 563.

Questions held not moot

(1) That employer had paid compensation award did not render moot questions as to propriety of award, on appeal by employer's insurance carrier.—Baltimore & Philadelphia Steamboat Co. v. Norton, C.C.A.Pa., 48 F.2d 57, affirming, D.C., 40 F.2d 530, and certiorari granted 52 S.Ct. 18, 284 U.S. 602, 76 L.Ed. 516, modified on other grounds 52 S.Ct. 187, 284 U.S. 408, 76 L.Ed. 366.

(2) Where state railroad commission did not grant certificate to operator of interstate bus line, believing that federal statute had deprived commission of jurisdiction, matter involved in temporary injunction restraining interference with operator's business held not moot because interstate commerce commission had begun to function under federal statute, where intention to prevent operation because operator had no state certificate persisted.—Douglass v. Pan-American Bus Lines, C.C.A.Fla., 81 F.2d 222.

Transfer to equity side of court

Where district court did not have jurisdiction of suit, it is not material to determine on appeal whether it was properly transferred from law to equity side of court.—Davis v. McFarland, C.C.A.Tex., 15 F.2d 612, certiorari denied 47 S.Ct. 457, 273 U. S. 754, 71 L.Ed. 875.

84. U.S.—Love v. Chandler, C.C.A. Minn., 124 F.2d 785, followed in Blood v. Pearson, C.C.A.Minn., 124 F.2d 787.

85. U.S.—Atlas Beverage Co. v. Minneapolis Brewing Co., C.C.A. Mo., 113 F.2d 672.

86. U.S.—C. T. C. Inv. Co. v. U. S., C.C.A.Ill., 108 F.2d 383—New York Life Ins. Co. v. Bacalis, C.C.A.Fla., 94 F.2d 200—Setchell v. Moore, C. C.A.Kan., 89 F.2d 236—American Smelting & Refining Co. v. River-

and to assignments of error to rulings admitting or excluding evidence [87] or giving, granting, or refusing instructions.[88] So, when not essential to a decision of the case, the court will not consider constitutional questions,[89] or the question whether the action or claim was barred by the statute of limitations.[90] Where a judgment is reversed on one ground, other grounds of reversal assigned will not ordinarily be passed on, as the same questions may not arise on a subsequent appeal.[91] The court will avoid, except when clearly necessary, initial construction of local laws.[92]

Review dependent on mode of trial in lower court. It has been declared in the circuit court of appeals that at common law, and under the Seventh Amendment to the federal Constitution, questions of law only are reviewable on appeal in actions at law,[93] and that any question of law is reviewable in a trial before a court without a jury which is reviewable in a trial before a jury.[94] Where a plaintiff elected to prosecute his remedy at law, the circuit court of appeals cannot review the case as though brought in admiralty.[95]

Where a case was submitted on an agreed statement of facts, the appellate court must look to these facts, and not to the pleadings, in determining whether the judgment rendered may stand.[96] An agreed statement of facts on which an action at law is tried to the court is in the nature of a special verdict,[97] and on appeal the court will consider the sufficiency of the statement to support the judgment,[98] but only if the agreed facts contain all the facts essential to a judgment,[99] and not if the statement was of the evidentiary, as distinguished from the ultimate, facts.[1]

With respect to an appeal in an equity suit, it has been said that the circuit court of appeals acts as something more than a mere court of error.[2]

side Dairy & Stock Farm, Utah, 236 F. 510, 149 C.C.A. 562.

4 C.J. p 650 note 38.

87. U.S.—Brinkley v. Fishbein, C.C.A.Tex., 110 F.2d 62, certiorari denied 61 S.Ct. 34, 311 U.S. 672, 85 L.Ed. 432—Seber v. Thomas, C.C.A.Okl., 108 F.2d 856—Stuyvesant Ins. Co. v. Sussex Fire Ins. Co., C.C.A.N.J., 90 F.2d 281, certiorari denied 58 S.Ct. 144, 302 U.S. 742, 82 L.Ed. 573—Cooper v. Jewett, S.D., 233 F. 618, 147 C.C.A. 426.

88. U.S.—Brinkley v. Fishbein, C.C.A.Tex., 110 F.2d 62, certiorari denied 61 S.Ct. 34, 311 U.S. 672, 85 L.Ed. 432—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23—Vaughan v. News Leader Co., C.C.A.Va., 105 F.2d 360—Murray v. Third Nat. Bank of St. Louis, Ohio, 234 F. 481, 148 C.C.A. 247.

89. U.S.—Wilshire Oil Co. v. U. S., Cal., 55 S.Ct. 673, 295 U.S. 100, 79 L.Ed. 1329—McLeod v. Majors, C.C.A.Fla., 102 F.2d 128, reversing, D.C., Majors v. McLeod, 26 F.Supp. 206—Huston v. Iowa Soap Co., C.C.A.Iowa, 85 F.2d 649, 108 A.L.R. 173, reversing, D.C., Iowa Soap Co. v. Huston, 13 F.Supp. 517, and certiorari denied Iowa Soap Co. v. Huston, 57 S.Ct. 119, 299 U.S. 594, 81 L.Ed. 437—Interstate Transit v. City of Detroit, C.C.A.Mich., 46 F.2d 42.

"Only when it is absolutely necessary will . . . [courts] pass upon a constitutional question. . . . And this applies with greater force on appeals from an interlocutory injunction granted on the complaint, after a motion to dismiss has been denied and no answer tendered."—Allen v. Omaha Live Stock Commission Co., C.C.A.Neb., 275 F. 1, 3.

90. U.S.—Mitchell v. Greenough, C.C.A.Wash., 100 F.2d 1006, denying rehearing 100 F.2d 184, and certiorari denied 59 S.Ct. 788, 306 U.S. 659, 83 L.Ed. 1056—Sanderson v. Postal Life Ins. Co. of New York, C.C.A.Colo., 72 F.2d 894.

91. U.S.—Murray v. Third Nat. Bank of St. Louis, Ohio, 234 F. 481, 148 C.C.A. 247.

Validity of statute; equitable jurisdiction

In action to enjoin enforcement of National Labor Relations Act and for declaratory judgment declaring act invalid, where basis of petition was invalidity of act and act was held valid by supreme court, circuit court of appeals will not consider issue of whether equitable jurisdiction exists, since order for temporary injunction must be reversed on issue of validity.—Beman v. Iowa Mfg. Co., C.C.A.Iowa, 90 F.2d 249—General Motors Corporation v. Bajork, C.C.A.Mo., 90 F.2d 248—Wilson & Co. v. Gates, C.C.A.Minn., 90 F.2d 247—Pratt v. Oberman & Co., C.C.A.Mo., 89 F.2d 786, reversing, D.C., Oberman & Co. v. Pratt, 16 F.Supp. 887.

92. U.S.—Sucesores de Perez Hermanos v. Costa, C.C.A.Puerto Rico, 281 F. 439.

93. U.S.—New York Life Ins. Co. v. Doerksen, C.C.A.Kan., 75 F.2d 96.

94. U.S.—U. S. Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan., 145 F. 144, 76 C.C.A. 114.

95. U.S.—Puget Sound Nav. Co. v. Nelson, C.C.A.Wash., 41 F.2d 356, certiorari denied Nelson v. Puget Sound Nav. Co., 51 S.Ct. 76, 282 U.S. 869, 75 L.Ed. 768.

96. U.S.—City of South Jacksonville v. Jacksonville Traction Co., C.C.A.Fla., 50 F.2d 839.

Computation of rate of exchange

On appeal in admiralty from an allowance of damages for imported goods based on the invoice value stated in francs, appellant cannot complain of the computation of the rate of exchange, where the agreed statement of facts stated the invoice value in both francs and dollars.—U. S. Willow Furniture Co. v. La Compagnie Generale Transatlantique, C.C.A.N.Y., 271 F. 184.

97. U.S.—Greer-Robbins Co. v. U. S., C.C.A.Cal., 19 F.2d 841.

98. U.S.—Greer-Robbins Co. v. U. S., supra.

99. U.S.—U. S. v. Boston & M. R. R., C.C.A.Mass., 84 F.2d 365.

1. U.S.—Johnson v. First Nat. Bank & Trust Co. of Tulsa, Okl., C.C.A.Okl., 78 F.2d 535, affirming, D.C., 8 F.Supp. 788.

Particular objects considered

Pleadings, plats, photographs, correspondence, deeds, leases, and other exhibits in agreed statement of facts were "evidentiary facts" rather than "ultimate facts."—Ocean Accident & Guarantee Corporation v. J. L. Brandeis & Sons, C.C.A.Neb., 75 F.2d 605, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706.

2. U.S.—Roosevelt v. Missouri State Life Ins. Co., C.C.A.Ark., 70 F.2d 939.

"The absence of a legislative mandate [with respect to the priority of a claim for personal injuries or death of a railroad employee] must not be treated as an absolution of our judicial responsibility in the case. The very nature and purpose of chancery jurisdiction requires that we do not

An appeal in an equity case brings the entire case before the court for review,[3] and every issue not there urged is waived;[4] but the refusal of the trial court to pass on objections to evidence during the trial is not subject to review on appeal.[5] As far as an equitable plea interposed in a law action is concerned, the circuit court of appeals may review the case as an appeal in a case in equity;[6] and the same is true of an answer and cross petition in the nature of a bill of interpleader.[7]

While a referee's report dealing entirely with conclusions of law has been held reviewable by the circuit court of appeals,[8] that court, strictly speaking, can review only action of the court below, and not that of the referee.[9] Where a case was tried before a referee, the only questions open to the reviewing court are whether the conclusions of law are supported by the findings of fact[10] and whether the referee's findings support the judgment entered;[11] where the referee's findings were adopted by the trial court the sufficiency of the facts found to warrant the judgment will be reviewed as though the findings were wholly made by the trial court.[12]

Where the parties and the court agreed that the jury should bring in a special verdict on a fact issue, the reviewing court may not reëxamine the facts on that issue, but may consider the questions decided by the court without the intervention of the jury.[13]

Theory and grounds of decision of lower court. A circuit court of appeals is concerned, on review, with the correctness of the action of the court below, without regard to the reasons that moved the court,[14] except as those reasons may throw light on

close our eyes and conscience to those natural and compelling equities which are sufficiently broad to furnish the basis for a sound governing principle in the situation presented."—Reconstruction Finance Corporation v. Missouri-Kansas-Texas R. Co., C.C.A.Ark., 122 F.2d 326, 335.

3. U.S.—Baxter v. McGee, C.C.A. Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1401—Sun Co. v. Vinton Petroleum Co., Tex., 248 F. 623, 160 C.C.A. 523, certiorari denied 38 S.Ct. 580, 247 U.S. 514, 62 L.Ed. 1244—Blythe Co. v. Hinckley, Cal., 111 F. 827, 49 C.C.A. 647, certiorari denied 184 U.S. 701, 22 S.Ct. 941, 46 L.Ed. 766.

Transfer to equity side; consolidation

(1) Where suit was filed at law, but on filing of cross complaint general jurisdiction in equity was conferred and cause transferred to equity, general judgment in equity is reviewable as in a cause presenting only equitable issues.—Hollandsworth v. William Mead Tie Co., C.C.A.Ky., 26 F.2d 33.

(2) Where on defendants' motion cause was transferred to equity docket without objection, and plaintiff invoked power of equity to impress a trust, although primary redress sought was damage for fraud, merits of case will, on defendants' appeal, be reviewed as on an equity appeal.—Kershaw v. Julien, C.C.A. Kan., 72 F.2d 528.

(3) Appeal from decree in case transferred to equity side held to present questions of both law and equity for review, where jury was waived and case was consolidated for trial below.—Kelly-Dempsey & Co. v. Century Indemnity Co., C.C.A. Okl., 77 F.2d 85.

Legal question presented in injunction suit by undisputed evidence may be considered on appeal from order granting preliminary injunction.—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A.Ky., 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702.

Suit for accounting, discovery, and money judgment held properly considered on the merits as on equity appeal.—Quality Realty Co. v. Wabash Ry. Co., C.C.A.Mo., 50 F.2d 1051.

4. U.S.—Baxter v. McGee, C.C.A. Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1401.

5. U.S.—Unkle v. Wills, C.C.A.Okl., 281 F. 29.

6. U.S.—Donnelly v. Northwestern Life Ins. Co., C.C.A.Tex., 59 F.2d 46, certiorari denied 53 S.Ct. 87, 287 U.S. 638, 77 L.Ed. 553.

7. U.S.—Liberty Oil Co. v. Condon Nat. Bank, Kan., 43 S.Ct. 118, 260 U.S. 235, 67 L.Ed. 232, reversing, C.C.A., 271 F. 928, certiorari dismissed 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, rehearing granted 42 S. Ct. 92, 257 U.S. 628, 66 L.Ed. 405, and certiorari granted 42 S.Ct. 93, 257 U.S. 630, 66 L.Ed. 406.

8. U.S.—Atlantic Life Ins. Co. v. Rowland, C.C.A.S.C., 22 F.2d 126.

9. U.S.—Wichita Natural Gas Co. v. Vermilion, C.C.A.Kan., 297 F. 783.

Master disqualified

Circuit court of appeals will not pass on merits of controversy where district court decree was based on findings of special master and master was disqualified to act because of interest in outcome.—In re Volland, C.A.Ill., 69 F.2d 475, modified on other grounds 71 F.2d 1022.

10. U.S.—Delaware, L. & W. R. Co. v. Caboni, N.Y., 223 F. 631, 139 C.C.A. 177.

11. U.S.—Chicago, M. & St. P. R. Co. v. Clark, N.Y., 20 S.Ct. 924, 178 U.S. 353, 44 L.Ed. 1099—City of Parsons v. Fidelity & Deposit Co. of Maryland, C.C.A.Kan., 43 F.2d 315, reversing, D.C., City of Parsons v. Fidelity & Deposit Co., 29 F.2d 417—Wichita Natural Gas Co. v. Vermilion, C.C.A.Kan., 297 F. 783—Demotte v. Whybrow, C.C.A.N.Y., 263 F. 366—Grant v. National Bank of Auburn, D.C.N.Y., 221 F. 1007.

12. U.S.—Wichita Natural Gas Co. v. Vermilion, C.C.A.Kan., 297 F. 783—Philadelphia Casualty Co. v. Fechheimer, Ohio, 220 F. 401, 136 C.C.A. 25, Ann.Cas.1917D 64—Tiernan v. Chicago Life Ins. Co., Kan., 214 F. 238, 131 C.C.A. 284.

13. U.S.—Arkansas Natural Gas Corporation v. Sartor, C.C.A.La., 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437, mandate conformed to, D.C., Sartor v. Arkansas Natural Gas Co., 29 F.Supp. 956, reversed on other grounds, C.C.A., Sartor v. Arkansas Natural Gas Corporation, 111 F.2d 772.

14. U.S.—In re Eastern Palliament Corporation, C.C.A.N.Y., 67 F.2d 871—Massachusetts Bonding & Insurance Co. v. Holman, C.C.A.Or., 62 F.2d 902—Lewis v. Ingram, C.C.A.Okl., 57 F.2d 463, certiorari denied 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533—City of Newark v. Mills, C.C.A.N.J., 35 F.2d 110, affirming, D.C., Petition of Mills, 29 F.2d 207, and certiorari denied City of Newark v. Mills, 50 S.Ct. 237, 281 U.S. 722, 74 L.Ed. 1140—Abernathy v. State of Oklahoma ex rel. Goar, C.

the question to be decided.[15] So it will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record,[16] even though such ground or theory differs from that which was assigned by the trial court, or which prompted its ruling or action.[17] If the decision, conclusion, or result is correct, it is immaterial what grounds it was placed on or what reasons were assigned therefor,[18] or whether such grounds or reasons are sound, correct, erroneous, or insufficient,[19] or erroneously stated;[20] where a ruling, order, judgment, or decree is proper and cor-

C.A.Okl., 31 F.2d 547, certiorari denied 50 S.Ct. 81, 280 U.S. 599, 74 L.Ed. 645—U. S. v. Heinrich, C.C. A.Mont., 16 F.2d 112, affirming, D.C., 12 F.2d 938—Clinton Mining & Mineral Co. v. Cochran, Pa., 247 F. 449, 159 C.C.A. 503—Gideon v. Hinds, N.Y., 238 F. 140, 151 C.C. A. 216—Fourth Nat. Bank v. Willingham, Ga., 213 F. 219, 129 C.C.A. 563.

15. U.S.—U. S. v. Porter Fuel Co., Colo., 247 F. 769, 159 C.C.A. 627.

16. U.S.—Cold Metal Process Co. v. McLouth Steel Corporation, C.C. A.Mich., 126 F.2d 185—Reinstine v. Rosenfield, C.C.A.Ill., 111 F.2d 892 —Parrott Estate Co. v. McLaughlin, C.C.A.Cal., 89 F.2d 188, affirming, D.C., 12 F.Supp. 23—In re Schwartz, C.C.A.N.Y., 89 F.2d 172, affirming, D.C., 16 F.Supp. 993—Holyoke Water Power Co. v. American Writing Paper Co., C.C.A. Mass., 83 F.2d 398, affirming, D.C., In re American Writing Paper Co., 11 F.Supp. 518, and certiorari granted Holyoke Water Power Co. v. American Writing Paper Co., 57 S.Ct. 24, 299 U.S. 526, 81 L.Ed. 387, affirmed 57 S.Ct. 485, 300 U.S. 324, 81 L.Ed. 678—Massachusetts Bonding & Insurance Co. v. Holman, C.C.A.Or., 62 F.2d 902—Park Lane Dresses v. Houghton & Dutton Co., C.C.A.Mass., 54 F.2d 33—Corker v. Soper, C.C.A.Ga., 53 F.2d 190, certiorari denied Corker v. Howard, 52 S.Ct. 313, 285 U.S. 540, 76 L.Ed. 933—Mills Novelty Co. v. Monarch Tool & Mfg. Co., C.C.A. Ohio, 49 F.2d 28, certiorari denied Monarch Tool & Mfg. Co. v. Miller Novelty Co., 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561—In re Pacat Finance Corporation, C.C.A.N.Y., 27 F.2d 810, affirming, D.C., 295 F. 394—Higgins v. White, D.C.Mass., 31 F.Supp. 796, conforming to mandate, C.C.A., 93 F.2d 357, reversing, D.C., 18 F.Supp. 986.

Appeal for failure to dismiss on additional grounds

Defendants, as against whom bill was dismissed, cannot appeal from such decree on ground that it should have been based on additional grounds, as it will be affirmed if sustainable on any ground appearing in record.—Aberly v. Craven County, N. C., C.C.A.N.C., 70 F.2d 52.

Rejection of counterclaim

Where record fails to show that counterclaim asserted was established by evidence, decree should not be reversed because counterclaim was rejected on improper ground.—Brown v. Lane Cotton Mills Co., C.C.A.Ga., 28 F.2d 911, affirming, D.C., Lane Cotton Mills Co. v. Brown, 28 F.2d 910, and certiorari denied Brown v. Lane Cotton Mills Co., 49 S.Ct. 251, 279 U. S. 837, 73 L.Ed. 984.

Merely technical support

Where a technical basis, capable at worst of being easily obviated at trial and actually of no real substance, is brought forward as an afterthought to support a controlling ruling made on unsustainable grounds, the ruling need not be sustained.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 117 F.2d 222, denying rehearing 115 F.2d 492, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

17. U.S.—Pevely Dairy Co. v. Borden Printing Co., C.C.A.Cal., 123 F. 2d 17—L. McBrine Co. v. Silverman, C.C.A.Cal., 121 F.2d 181—Kishan Singh v. Carr, C.C.A.Cal., 88 F.2d 672—Knotts v. First Carolinas Joint Stock Land Bank of Columbia, C.C.A.S.C., 86 F.2d 551, certiorari denied 57 S.Ct. 436, 300 U.S. 600, 81 L.Ed. 869—Childers v. Commissioner of Internal Revenue, C.C.A.Cal., 80 F.2d 27—Commissioner of Internal Revenue v. Bryson, C.C.A., 79 F.2d 397—Yangtsze Rapid S. S. Co., Federal Inc., U. S. A., v. Deutsch-Asiatische Bank, C. C.A.China, 59 F.2d 8—Wineinger v. Union Pac. R. Co., C.C.A.Neb., 276 F. 65.

"The appellee may urge, or the appellate court sua sponte may consider any theory, argument or reason in support of a decision of a lower tribunal regardless of whether it applied that theory."—Cold Metal Process Co. v. McLouth Steel Corporation, C.C.A.Mich., 126 F.2d 185, 189.

To avoid an erroneous decision, the court will place its decision on a ground not urged in the court below.—Smith Engineering Co. v. Rice, C.C.A.Mont., 102 F.2d 492, certiorari denied Rice v. Smith Engineering Co., 59 S.Ct. 1034, two cases, 307 U.S. 637, 83 L.Ed. 1519, rehearing denied 60 S. Ct. 68, two cases, 308 U.S. 632, 84 L. Ed. 527.

Grounds rejected below

"The reasoning of the District Court is not binding upon us. We may support the decree upon grounds which the court below rejected."—Lanova Corporation v. National Supply Co., C.C.A.Pa., 116 F.2d 235, 239, affirming, D.C., 30 F.Supp. 742 and rehearing denied, C.C.A., 116 F.2d 934.

Jurisdiction or merits

"The court below dismissed the suit on the merits. While we are of the opinion that the dismissal should have been on jurisdictional grounds, it is well settled that an affirmance need not be based on the same grounds as those which influenced the trial court."—Montgomery v. Gilbert, C.C.A.Mont., 77 F.2d 39, 45.

18. U.S.—U. S. ex rel. Johnson v. Morley Const. Co., C.C.A.N.Y., 98 F.2d 781, modifying, D.C., 17 F. Supp. 378, and certiorari denied Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421—Crossett Lumber Co. v. U. S., C.C.A.Ark., 87 F.2d 930, 109 A.L.R. 1348—Blythe Co. v. Hinckley, Cal., 111 F. 827, 49 C.C.A. 647, certiorari denied 184 U.S. 701, 22 S.Ct. 941, 46 L.Ed. 766.

19. U.S.—American Eagle Fire Ins. Co. v. Gayle, C.C.A.Ky., 108 F.2d 116, certiorari denied 60 S.Ct. 809, 309 U.S. 686, 84 L.Ed. 1029—Century Distilling Co. v. Continental Distilling Co., C.C.A.Pa., 106 F.2d 486, certiorari denied Century Distilling Co. v. Continental Distilling Corporation, 60 S.Ct. 581, 309 U.S. 662, 84 L.Ed. 1010—Brace v. Gauger-Korsmo Const. Co., C.C.A.Ark., 36 F.2d 661, certiorari denied 50 S.Ct. 333, 281 U.S. 738, 74 L.Ed. 1153—Abernathy v. State of Oklahoma ex rel. Goar, C.C.A.Okl., 31 F. 2d 547, certiorari denied 50 S.Ct. 81, 280 U.S. 599, 74 L.Ed. 645—Norfolk & W. Ry. Co. v. Norton Iron Works, C.C.A.Ky., 279 F. 32—Blythe Co. v. Hinckley, Cal., 111 F. 827, 49 C.C.A. 647, certiorari denied 184 U.S. 701, 22 S.Ct. 941, 46 L. Ed. 766.

Reasoning embodied in findings

Where appeal brought up entire record and all evidence, incorrect reasoning of the lower court, although embodied in findings and conclusions, is of no controlling concern if judgment was correct and, under evidence, was justified by issues raised by pleadings.—McCluer v. Heim-Overly Realty Co., C.C.A.Mo., 71 F.2d 100.

20. U.S.—Gideon v. Hinds, N.Y., 238 F. 140, 151 C.C.A. 216.

rect on any ground or theory manifested by the record, it will not be disturbed, interfered with, or reversed because the trial court based its decision or conclusion on an insufficient, unfounded, unsound, or erroneous ground, reason, or theory.[21] The opinion of the trial court, or the reasoning therein, is not the subject of exception or assignment of error, since the opinion may be wrong and the ruling or judgment nevertheless right.[22]

However, a circuit court of appeals must adhere to the theory on which the case was tried in the lower court;[23] and it will not go beyond the record and consider questions, or affirm on grounds or theories, which are without the pleadings, evidence, findings, or issues which were tried and submitted to the jury or passed on by the court.[24]

In reviewing a ruling on a demurrer, a circuit court of appeals is not limited to the ground of the demurrer on which the lower court placed its decision, but may consider the other grounds of the demurrer;[25] an order or decree sustaining a demurrer will be affirmed if any one ground of demurrer is well taken.[26] A correct ruling on a demurrer will be upheld even though based on an erroneous reason;[27] and a final decree in favor of defendant is not to be reversed because based on a wrong ground, where his demurrer was improperly overruled.[28]

In reviewing a judgment of dismissal or nonsuit,

21. U.S.—In re Ko-Ed Tavern, C.C.A.N.J., 129 F.2d 806—Utah Copper Co. v. Railroad Retirement Board, C.C.A.Colo., 129 F.2d 358, affirming, D.C., 41 F.Supp. 763—Paine & Williams Co. v. Baldwin Rubber Co., C.C.A.Mich., 113 F.2d 840, affirming, D.C., Paine & Williams v. Baldwin Rubber Co., 23 F.Supp. 485—City of Vero Beach v. Rittenoure Inv. Co., C.C.A.Kan., 113 F.2d 269, certiorari denied 61 S.Ct. 316, 311 U.S. 710, 85 L.Ed. 461—North American Accident Ins. Co. v. Tebbs, C.C.A.Utah, 107 F.2d 853, certiorari denied 60 S.Ct. 717, 309 U.S. 678, 84 L.Ed. 1022—Ohio Casualty Ins. Co. v. Marr, C.C.A.Okl., 98 F.2d 973, affirming, D.C., 21 F. Supp. 217, and certiorari denied 59 S.Ct. 245, 305 U.S. 652, 83 L.Ed. 422, rehearing denied 59 S.Ct. 251, 305 U.S. 675, 83 L.Ed. 437—In re Jayrose Millinery Co., C.C.A. N.Y., 93 F.2d 471, modifying, D.C., 19 F.Supp. 1013—Spann v. Commercial Standard Ins. Co. of Dallas, Tex., C.C.A.Ark., 82 F.2d 593—Searfoss v. Lehigh Valley R. Co., C.C.A.N.Y., 76 F.2d 762—Park Lane Dresses v. Houghton & Dutton Co., C.C.A.Mass., 54 F.2d 33—City of St. Paul v. Certain Lands in City of St. Paul, Minn., C.C.A.Minn., 48 F.2d 805—R. K. Le Blond Mach. Tool Co. v. Wickes Bros., D.C. Mich., 23 F.Supp. 371—Ramsay v. Crevlin, Colo., 254 F. 813, 166 C.C.A. 259—Bush v. Branson, Ark., 248 F. 377, 160 C.C.A. 387, reversed on other grounds Branson v. Bush, 40 S.Ct. 113, 251 U.S. 182, 64 L.Ed. 215—Linde Air Products Co. v. Morse Dry Dock & Repair Co., N. Y., 246 F. 834, 159 C.C.A. 136, affirming, D.C., 239 F. 909—Bunday v. Huntington, S.D., 224 F. 847, 140 C.C.A. 415—Clark v. Belt, S.D., 223 F. 573, 138 C.C.A. 1—U. S. v. Norris, Okl., 222 F. 14, 137 C.C.A. 552—Von Baumbach v. Sargent Land Co., Minn., 219 F. 31, 134 C.C.A. 649, affirming, D.C., Sargent Land Co. v. Von Baumbach, 207 F. 423, and reversed on other grounds 37 S.Ct. 201, 242 U.S. 503, 61 L.Ed. 460—Fourth Nat. Bank v. Willingham, Ga., 213 F. 219, 129 C.C.A. 563.
4 C.J. p 663 note 92.

A ruling excluding evidence will be upheld where the evidence was properly excluded, although the reason assigned by the court was erroneous or incomplete.—Stolte v. Larkin, C.C.A.Minn., 110 F.2d 226—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C.C.A. 240.

22. U.S.—E. R. Squibb & Sons v. Mallinckrodt Chemical Works, C.C.A.Mo., 69 F.2d 685, affirming, D.C., Mallinckrodt Chemical Works v. E. R. Squibb & Sons, 6 F.Supp. 173, and motion denied E. R. Squibb & Sons v. Mallinckrodt Chemical Works, 55 S.Ct. 121, certiorari denied 55 S.Ct. 916, 295 U.S. 759, 79 L.Ed. 1701—U. S. v. Heinrich, C.C.A.Mont., 16 F.2d 112, affirming, D.C., 12 F.2d 938—U. S. Fidelity & Guaranty Co. v. Vicars, C.C.A.Hawaii, 10 F.2d 474—Stoffregen v. Moore, C.C.A.Mo., 271 F. 680, affirming, D.C., 264 F. 232—Nowata County Gas Co. v. Henry Oil Co., C.C.A.Okl., 269 F. 742—U. S. v. Porter Fuel Co., Colo., 247 F. 769, 159 C.C.A. 627—Smart v. Wright, Minn., 227 F. 84, 141 C.C.A. 632.

"It is what the trial court does, not its reasons therefor, which must form the basis of an assignment of error."—Mason v. U. S., Iowa, 219 F. 547, 548, 135 C.C.A. 315, affirming, D.C., U. S. v. Mason, 211 F. 233.

Rule applies to asserted errors of law, as well as to those of fact, appearing in an opinion of a court.—Stoody Co. v. Mills Alloys, C.C.A.Cal., 67 F.2d 807, certiorari denied 54 S.Ct. 718, 292 U.S. 637, 78 L.Ed. 1489.

Basis of dismissal

Where trial court found on issues joined that it had no jurisdiction, and ordered petition dismissed, decree should be dealt with as dismissing petition for want of jurisdiction, and not for want of equity, regardless of court's opinion.—Tripplehorn v. Cambron, Ohio, 250 F. 605, 162 C.C.A. 621.

23. U.S.—Valley Shoe Corporation v. Stout, C.C.A.Mo., 98 F.2d 514—Barnsdall Refining Corporation v. Cushman-Wilson Oil Co., C.C.A. Iowa, 97 F.2d 481—Dickinson v. Scruggs, Tenn., 242 F. 900, 155 C.C.A. 488.

24. U.S.—Arthur C. Harvey Co. v. Malley, Mass., 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, affirming, D.C., 52 F.2d 885, motion denied, C.C.A., 61 F.2d 365, and certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 461—Charles A. Hinsch & Co. v. Rowan County, C.C.A.Ky., 126 F.2d 189—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Rohrback v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 82 F.2d 291.

Where plaintiff obtained full relief in the trial court, he cannot, on appeal, insist that the relief should have been based on a different ground.—P. E. Sharpless Co. v. William A. Lawrence & Son, Pa., 208 F. 886, 126 C.C.A. 46, affirming, D.C., 203 F. 762.

25. U.S.—Johnson v. American-Hawaiian S. S. Co., C.C.A.Cal., 98 F.2d 847.

26. U.S.—Posey v. Tennessee Valley Authority, C.C.A.Ala., 93 F.2d 726.

27. U.S.—Chicago Title & Trust Co. v. Newman, Ill., 187 F. 573, 109 C.C.A. 263.

28. U.S.—U. S. v. Norris, Okl., 222 F. 14, 137 C.C.A. 552.

the court may affirm the judgment if it is correct on any legal ground, regardless of whether a correct reason was assigned in the court below.[29] To sustain a judgment of dismissal, appellee may rely on any of the grounds relied on by him below,[30] especially where the dismissal was general, without specification of reason;[31] and the reviewing court is not limited to a consideration of the specific reason given by the court below for its judgment.[32] A directed verdict or the judgment based thereon will be sustained where such direction was proper for any reason, regardless of the lower court's reason or the correctness thereof;[33] grounds in support of a motion for directed verdict may be properly urged in the appellate court even though not passed upon by the trial court.[34]

Until it is set aside in some lawful manner, a ruling which was not objected or excepted to, or appealed from, is binding and conclusive on a circuit court of appeals as the law of the case concerning the matter to which it is directed.[35] So, whether correct or erroneous, instructions which have not been properly challenged by objection, exception, assignment of error, or otherwise must be accepted by a circuit court of appeals as the law of the case concerning the matters with which they purport to deal; they are not open to review, and error therein is not ground for reversal.[36]

Review dependent on nature of decision appealed

29. U.S.—Rectangle Ranche Co. v. Board of Com'rs for Buras Levee Dist., C.C.A.La., 96 F.2d 825—Western Casualty & Surety Co. v. Beverforden, C.C.A.Mo., 93 F.2d 166, reversing, D.C., 17 F.Supp. 928—Sanderson v. Postal Life Ins. Co. of New York, C.C.A.Colo., 72 F.2d 894—Beers v. Equitable Trust Co. of New York, C.C.A.Colo., 286 F. 883—Clinton Mining & Mineral Co. v. Cochran, Pa., 247 F. 449, 159 C.C.A. 503—American Tube Works v. Bridgewater Iron Co., Mass., 132 F. 16, 65 C.C.A. 636.

Interlocutory orders granting plaintiff's motions to strike out defenses and impliedly recognizing the complaint as good on its face are not binding on the appellate court on appeal from a judgment dismissing the complaint.—Heydemann v. Westinghouse Electric Mfg. Co., C.C.A.N.Y., 80 F.2d 837.

30. U.S.—U. S. v. Board of Com'rs of Osage County, Okl., 254 F. 570, 166 C.C.A. 128, reversed on other grounds 40 S.Ct. 100, 251 U.S. 128, 64 L.Ed. 184.

31. U.S.—Brown v. Denver Omnibus & Cab Co., Colo., 254 F. 560, 166 C.C.A. 118.

32. U.S.—Dowd v. United Mine Workers of America, Ark., 235 F. 1, 148 C.C.A. 495, certiorari denied United Mine Workers of America v. Dowd, 37 S.Ct. 246, 242 U.S. 653, 61 L.Ed. 547.

33. U.S.—Brownell v. Tide Water Associated Oil Co., C.C.A.N.H., 121 F.2d 239—Automobile Underwriters of Des Moines, Iowa v. Bloemer, C.C.A.Neb., 94 F.2d 474—Smith v. S. S. Kresge Co., C.C.A.Mo., 79 F.2d 361—Wheeler v. Fidelity & Deposit Co. of Maryland, C.C.A.Iowa, 63 F.2d 562—Wise v. U. S., C.C.A.Tex., 63 F.2d 307.

4 C.J. p 662 note 88, p 665 note 4.

However, it has been held that "when a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party and he had been given an opportunity to meet them by evidence and argument."—Thorn v. Browne, Ark., 257 F. 519, 528, 168 C.C.A. 469, certiorari denied Browne v. Thorn, 39 S.Ct. 494, 250 U.S. 645, 63 L.Ed. 1187.

34. U.S.—Mosby v. Manhattan Oil Co., C.C.A.Mo., 52 F.2d 364, 77 A.L.R. 1099, certiorari denied Manhattan Oil Co. v. Mosby, 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572.

35. U.S.—Chlupsa v. Posvic, C.C.A.Ill., 113 F.2d 375—Nielson v. Utah Const. Co., C.C.A.Idaho, 104 F.2d 887—Golden West Brewing Co. v. Milonas & Sons, C.C.A.Cal., 104 F.2d 880.

Transfer of case to law side

Where no exception was taken to, or appeal taken from, order transferring case to law side of court on certain condition, the order was the law of the case.—Nielson v. Utah Const. Co., C.C.A.Idaho, 104 F.2d 887.

Cause of action not disclosed

Law of the case held established, as against defendant-appellant's contention, "unless it clearly appears that the record wholly fails to disclose a cause of action."—Yelloway, Inc., v. Hawkins, C.C.A.Mo., 38 F.2d 731, 738.

Judge's decision overruling exceptions to petition held law of the case.—Loma Fruit Co. v. International Nav. Co., C.C.A.N.Y., 11 F.2d 124, certiorari denied Atchison, T. & S. F. R. Co. v. Loma Fruit Co., 46 S.Ct. 471, 270 U.S. 662, 663, 70 L.Ed. 787.

36. U.S.—Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—Ætna Life Ins. Co. v. McAdoo, C.C.A.Ark., 115 F.2d 369—Guardian Life Ins. Co. of America v. Kissner, C.C.A.Mo., 111 F.2d 532—Kurn v. Stanfield, C.C.A.Mo., 111 F.2d 469—F. W. Woolworth Co. v. Carriker, C.C.A.Mo., 107 F.2d 689—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726—Ocean Accident & Guarantee Corporation v. Moore, C.C.A.Mo., 85 F.2d 369, certiorari denied Moore v. Ocean Accident & Guarantee Corporation, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449—U. S. v. Hossmann, C.C.A.Mo., 84 F.2d 808—New York Life Ins. Co. v. Stone, C.C.A.Mass., 80 F.2d 614—Garrett Const. Co. v. Aldridge, C.C.A.Ark., 73 F.2d 814—Paf Mfg. Co. v. R. L. Polk Co. of Missouri, C.C.A.Mo., 72 F.2d 33—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—Fricke v. General Accident, Fire & Life Assur. Corporation, C.C.A.Mo., 59 F.2d 563, certiorari denied 53 S.Ct. 221, 287 U.S. 662, 77 L.Ed. 571—Ætna Casualty & Surety Co. v. Reliable Auto Tire Co., C.C.A.Mo., 58 F.2d 100—Erlanger Tremont Theatre Corporation v. Ellsmore, C.C.A.Mass., 56 F.2d 809, certiorari denied 52 S.Ct. 646, 286 U.S. 564, 76 L.Ed. 1296—Skaggs Safeway Stores v. Dunkle, C.C.A.Neb., 49 F.2d 169, certiorari denied 52 S.Ct. 9, 284 U.S. 622, 76 L.Ed. 531—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—Hard & Rand v. Biston Coffee Co., C.C.A.Mo., 41 F.2d 625—Fuller v. Schuh-Mason Lumber Co., C.C.A.Mo., 6 F.2d 531—Silverman v. Bermuda & West Indies S. S. Co., D.C.N.Y., 12 F.Supp. 164—American Locomotive Co. v. Harris, R.I., 239 F. 234, 152 C.C.A. 222.

In considering the sufficiency of the evidence, the instructions as given will be accepted as the law governing the case.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwartzenbach, C.C.A.Mo., 123 F.2d 573—F. W. Woolworth Co. v. Carriker, C.C.A.Mo., 107 F.2d 689—Security Life Ins. Co. of America v. Brim-

from. On exception to each of the findings of fact, conclusions of law, and the judgment as a whole, the only review question open is whether the pleadings and the facts found support the judgment.[37] In case of appeal from part only of a judgment, order, or decree, the part not appealed from is not before the appellate court for review;[38] similarly, an appeal from one of several judgments, orders, or decrees does not authorize the review of any other judgment, order, or decree.[39]

On appeal from an order granting or refusing a preliminary or interlocutory injunction, the review is restricted to the propriety of the order and the existence of apparently reasonable grounds therefor; the circuit court of appeals will not ordinarily review or determine the merits of the case,[40] except as far as may be necessary in order to deter-

mer, C.C.A.Mo., 36 F.2d 176, certiorari denied 50 S.Ct. 350, 281 U.S. 744, 74 L.Ed. 1157.

Absence of challenge in circuit court of appeals

Where plaintiff made no exceptions to charge, and defendant made several exceptions to charge but did not challenge the charge before circuit court of appeals on his appeal from judgment on verdict for plaintiff, the effect was the same as though no exceptions had been taken to the charge, and hence the charge was the law of the case for purposes of appeal.—F. W. Woolworth Co. v. Carriker, C.C.A.Mo., 107 F.2d 689.

37. U.S.—State Bank of New York v. Henderson County, Ky., C.C.A. Ky., 35 F.2d 859, certiorari denied Henderson County, State of Kentucky, v. State Bank of New York, 50 S.Ct. 245, 281 U.S. 728, 74 L.Ed. 1144, 1145.

Absence of formal request for remand.

Where the exceptions and assignments of error duly raise the questions, not only whether the findings of fact support the judgment, but also whether the lower court erred in not making further findings of fact as requested, a failure formally to ask the appellate court to remand the case for such further findings, supported by the evidence, as are necessary to a proper disposition of the case does not restrict the appellate court to a review of the findings actually made.—Eldredge v. U. S., C.C.A.Mich., 31 F.2d 924.

Breach of contract

On an appeal from an adverse judgment in a suit for damages for breach of contract, matters that would be involved in a suit for an accounting between the parties are not before the court.—Schmitt v. Continental-Diamond Fibre Co., C.C. A.Ill., 116 F.2d 779.

38. U.S.—Steem-Electric Corporation v. Herzfeld-Phillipson Co., C.C.A. Wis., 118 F.2d 122, affirming, D.C., 29 F.Supp. 1011—Columbian Nat. Life Ins. Co. v. Foulke, C.C.A.Mo., 89 F.2d 261, reversing, D.C., 13 F. Supp. 350—Greif Bros. Cooperage Co. v. Mullinix, C.C.A.Ark., 264 F. 391—Nashua & L. R. Corp. v. Boston & L. R. Corp., Mass., 61 F. 237, 9 C.C.A. 468.

39. U.S.—Tennessee Valley Authority v. Tennessee Electric Power Co., C.C.A.Tenn., 90 F.2d 885, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, reversing, D.C., 14 F. Supp. 459, and certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S.Ct. 121, 302 U. S. 735, 82 L.Ed. 568.

Where two actions are consolidated for trial, but separate judgments are entered, a ruling applicable in one case only cannot be assigned as error in proceedings for review of the other judgment.—Public Service Ry. Co. v. McMahon, C.C.A.N.J., 273 F. 679.

40. U.S.—Weiner v. National Tinsel Mfg. Co., C.C.A.Wis., 123 F.2d 96, affirming, D.C., 35 F.Supp. 771—Cone v. Rorick, C.C.A.Fla., 112 F. 2d 894—City of Sumter v. Spur Distributing Co., C.C.A.S.C., 110 F. 2d 649—Spring v. Ohio Oil Co., C. C.A.Tex., 108 F.2d 560—Sheldon v. Moredall Realty Corporation, C.C.A. N.Y., 95 F.2d 48, modifying, D.C., 22 F.Supp. 91—Lea v. Vasco Products, C.C.A.Fla., 81 F.2d 1011—Douglass v. Pan-American Bus Lines, C.C.A.Fla., 81 F.2d 222—Edenborn v. Wigton, C.C.A.La., 74 F. 2d 374, certiorari denied Northwestern Trust Co. of Chicago, Ill. v. Edenborn, 55 S.Ct. 546, 294 U. S. 719, 79 L.Ed. 1252—Edenborn v. Mann, C.C.A.La., 74 F.2d 374, certiorari denied Mann v. Edenborn, 55 S.Ct. 546, 294 U.S. 719, 79 L.Ed. 1252—Butler v. D. A. Schulte, Inc., C.C.A.Ala., 67 F.2d 632—Fidler v. Roberts, C.C.A.Ill., 41 F.2d 305—Nashua Mfg. Co. v. Berenzweig, C. C.A.Ill., 39 F.2d 896—Equitable Trust Co. of New York v. Denney, C.C.A.Ind., 24 F.2d 169—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A.Iowa, 9 F.2d 246—Gasaway v. Borderland Coal Corporation, C.C.A.Ind., 278 F. 56, modifying, D.C., Borderland Coal Corporation v. International Organization of United Mine Workers of America, 275 F. 871.

25 C.J. p 969 note 9—4 C.J. p 687 note 54.

"The question is not . . . whether we [circuit court of appeals] should have made the order, but whether the trial court has departed from the rules and principles of equity in making the order."—Special School Dist. of Malvern, Hot Spring County, Ark., v. Speer, C.C.A.Ark., 75 F.2d 420, 421.

Reason for rule

"Ultimate rights should be decided only when the court is 'in possession of the materials necessary to enable it to do full and complete justice between the parties.' "—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42, 43.

Constitutionality of law

On appeal from judgment granting preliminary injunction, circuit court of appeals will not examine constitutionality of law before facts are fully ascertainable, where constitutionality of law is the meritorious question, and such question involves any possible questions of fact.—Cone v. Rorick, C.C.A.Fla., 112 F.2d 894.

The trial court's jurisdiction to entertain the application for an injunction will be considered.—Interstate Transit v. City of Detroit, Mich., C.C. A.Mich., 46 F.2d 42—Fidler v. Roberts, C.C.A.Ill., 41 F.2d 305.

Statement of cause of action; irreparable injury

Appellate court, on appeal from interlocutory order refusing temporary injunction, may determine whether bill states cause of action and whether plaintiff will sustain irreparable injury.—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42.

Relief clearly unwarranted

Where it clearly appears that relief by injunction is not warranted, the appellate court may consider the case on its merits, notwithstanding the appeal was from an interlocutory order granting injunction.—Alexander v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 51 F.2d 735, reversing, D.C., Mid-Continent Petroleum Corporation v. Alexander, 35 F. 2d 43—Consolidated Cement Corporation v. Pratt, C.C.A.Kan., 47 F.2d 90—Arizona Edison Co. v. Southern Sierras Power Co., C.C.A.Ariz., 17 F. 2d 739, certiorari denied Southern Sierras Power Co. v. Arizona Edison Co., 47 S.Ct. 768, 274 U.S. 757, 71 L. Ed. 1336.

mine whether the trial court exceeded a reasonable discretion,[41] and especially where the rights of the parties can be determined only on full proof of the facts;[42] but the court has the right, in its discretion, to pass on and determine the merits of the case, and will do so in proper circumstances.[43] An appeal to the circuit court of appeals from an interlocutory decree granting an injunction may be taken from the whole decree, and need not be restricted to the part granting the injunction.[44] On appeal from an order appointing a receiver, the circuit court of appeals may also consider motions to dismiss the bill.[45]

On appeal from a default decree, defendant can contest the decree on the ground that it was not warranted by the bill,[46] but cannot urge insufficiency of the evidence.[47]

The scope of the review on appeal from a judgment of dismissal may depend on the basis of the dismissal, as where the dismissal was on the pleadings[48] or for want of jurisdiction.[49] The circuit

41. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Kenan, C.C.A.Fla., 87 F.2d 651, certiorari denied Grand International Brotherhood of Locomotive Engineers v. Kenan, 57 S.Ct. 790, 301 U.S. 687, 81 L.Ed. 1344—Special School Dist. of Malvern, Hot Spring County, Ark., v. Speer, C.C.A.Ark., 75 F.2d 420—Boynton v. Ellis, C.C.A.Kan., 57 F.2d 665—Allen v. Omaha Live Stock Commission Co., C.C.A.Neb., 275 F. 1—City of Owensboro v. Cumberland Telephone & Telegraph Co., Ky., 174 F. 739, 99 C.C.A. 1.

Whether there was any insuperable obstacle to the relief asked may be considered by court, and, if there was, the court may direct dismissal as requested by defendants in the district court.—Cone v. Rorick, C.C.A. Fla., 112 F.2d 894.

Dissolution of injunction

The rule that an appellate court, on appeal from an order granting a preliminary injunction, will determine only whether an abuse of discretion appears does not apply to an appeal from an order dissolving a temporary injunction.—Bothwell v. Fitzgerald, 219 F. 408, 135 C.C.A. 212.

42. U.S.—Allen v. Omaha Live Stock Commission Co., C.C.A.Neb., 275 F. 1—Knoxville v. Africa, Tenn., 77 F. 501, 23 C.C.A. 252.

43. U.S.—Sheldon v. Moredall Realty Corporation, C.C.A.N.Y., 95 F.2d 48, modifying, D.C., 22 F.Supp. 91—T. J. Moss Tie Co. v. Wabash Ry. Co., C.C.A.Ill., 71 F.2d 107, certiorari denied American Surety Co. of New York v. Conroy, 55 S.Ct. 90, 293 U.S. 578, 79 L.Ed. 675—Boynton v. Fox West Coast Theatres Corporation, C.C.A.Kan., 60 F.2d 851—Denaro v. McLaren Products Co., C.C.A.Mass., 9 F.2d 328—Goldwyn Pictures Corporation v. Howells Sales Co., C.C.A.N.Y., 287 F. 100, reversing, D.C., 292 F. 458, and certiorari denied 43 S.Ct. 703, 262 U.S. 755, 67 L.Ed. 1217.

25 C.J. p 969 notes 7–8.

44. U.S.—Smith v. Vulcan Iron Works, Cal., 17 S.Ct. 407, 165 U.S. 518, 41 L.Ed. 810.

25 C.J. p 969 note 6.

45. **On appeal from order appointing general receivers without notice** and from subsequent order continuing hearing on motion to vacate former order, court had jurisdiction to review motions to dismiss bill.—Marion Mortg. Co. v. Edmunds, C.C.A. Fla., 64 F.2d 248.

On appeal from order denying intervention

Bondholder and judgment creditors who sought to intervene in receivership proceeding to question validity of pledge of corporation's bonds but who refused to participate in hearing on receiver's application for instructions as to whether he should proceed to have such pledge declared invalid was entitled, on appeal from orders denying intervention, to a determination of validity of pledge, since lower court's decision of that question was basis, not only for order disposing of receivership's application, but also for subsequent denial of intervention.—Slupsky v. Westinghouse Electric & Mfg. Co., C.C.A.Mo., 78 F.2d 13.

46. U.S.—Tallman v. Ladd, C.C.A.W. Va., 5 F.2d 582.

47. U.S.—Tallman v. Ladd, supra.

48. U.S.—Beechwood Securities Corporation v. Associated Oil Co., C.C.A.Cal., 104 F.2d 537—Jay Dreher Corporation v. Delco Appliance Corporation, C.C.A.N.Y., 93 F.2d 275—Hentschel v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 87 F.2d 833.

Dismissal on demurrer

On appeal from judgment of dismissal entered after sustaining of demurrer to plaintiff's petition, question is whether petition states facts sufficient to constitute a cause of action either at law or in equity.—State of Missouri ex rel. and to Use of Stormfeltz v. Title Guaranty & Surety Co., C.C.A.Mo., 72 F.2d 595, certiorari denied Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, 55 S.Ct. 404, 294 U.S. 708, 79 L.Ed. 1242.

Nature of defects in pleading

Where the trial court dismissed the bill as not stating a cause of action, the appellate court must decide whether the defects in the bill, if any, are fatal and extend to the pleading as a whole.—Martin v. Brown, C.C.A.Colo., 294 F. 436, reversing, D.C., 282 F. 717.

Contention not supported by pleading

Where nothing in petition by government against bank based on bank's transfer of bonds carrying forged indorsement indicated that government did not give bank timely notice of forgery, contention that it failed to do so cannot be considered on appeal from order dismissing petition without prejudice on ground that it failed to state cause of action.—U. S. v. City Sav. Bank & Trust Co. of Alliance, Ohio, C.C.A. Ohio, 73 F.2d 486.

Implication of allegation

On appeal from decree granting motion to dismiss bill in equity to recover amount of accounts payable, assigned by bankrupt corporation to banks of which appellees were directors and shareholders, circuit court of appeals may imply allegation, omitted from bill, that such assignments discharged appellees from liability for banks' statutory violations, where bill alleged that they procured assignments for such purpose.—Duell v. Brewer, C.C.A.N.Y., 92 F.2d 59, 112 A.L.R. 1246.

Libel per se

On appeal from dismissal of complaint for libel wherein no special damages were alleged, question before reviewing court was whether publication alleged, which was required, on appeal, to be taken for granted as having actually been made and, having been false, was libelous per se.—Sweeney v. Schenectady Union Pub. Co., C.C.A.N.Y., 122 F.2d 288, certiorari granted Schenectady Union Pub. Co. v. Sweeney, 62 S.Ct. 413, 314 U.S. 605, 86 L.Ed. 487, affirmed 62 S.Ct. 1031, 316 U.S. 642, 86 L.Ed. 1727, rehearing denied 62 S.Ct. 1266, 316 U.S. 710, 86 L.Ed. 1776.

49. U.S.—Mississippi Power & Light Co. v. City of Jackson, C.C.A.Miss.,

court of appeals, in remitting a case to the lower court, to be dismissed for want of federal jurisdiction on failure of plaintiff to amend his pleading, will not examine into the merits of the controversy.[50]

On appeal from a judgment for defendant on the pleadings, the main question is whether, on the facts well pleaded in the complaint, together with those alleged in the answer and not denied in the reply, the court erred in rendering judgment for defendant.[51] Where, after general demurrer to the answer, defendant stood on the answer, and judgment was rendered against him, the question on appeal is whether the averments of the answer presented a defense.[52]

Where the record shows substantial evidence to sustain a finding in favor of the party for whom the court directed a verdict, the only question reviewable is whether there was error in the declaration or application of the law by the court;[53] and, where both sides moved for a directed verdict, review is restricted to the questions of law presented, and the findings of fact may not be disturbed,[54] the only reviewable questions being whether there was any substantial evidence to support the verdict directed[55] and whether the unsuccessful movant was entitled to an instructed verdict in his favor to any extent and on any theory raised by the pleadings.[56] On assignment of error in denying a motion for a directed verdict, the only reviewable question has been said to be whether there was sufficient[57] or substantial[58] evidence to warrant a finding against appellant, or whether the evidence in support of the verdict requested was so conclusive that in the exercise of a sound judicial discretion the court should not have sustained a contrary verdict;[59] but it has been held that on such an assignment all questions fully disclosed at the trial by pleadings, evidence, and argument may be raised on appeal.[60] On assignment of error in refusing nonsuit and directed verdict, the appellate court must limit its review to the sufficiency of the evidence to submit the case and sustain the verdict, and to the correctness of the rulings on the evidence and instructions on the law.[61]

On appeal from a judgment entered after the sustaining of a demurrer to the evidence, the whole range of applicable law is open to appellant, as far, at least, as concerns any alleged error based on the court's failure to pass on declarations of law.[62]

Review of an order granting a new trial may be only for error of law and never for error of fact.[63]

Whether a court which sustained its jurisdiction of a cause by overruling a motion to remand acquired jurisdiction of the cause by removal cannot

116 F.2d 924, certiorari denied 61 S.Ct. 741, 312 U.S. 698, 85 L.Ed. 1133.

Limitation on motion for dismissal; merits

(1) Where district court entertaining motion to dismiss bill for lack of jurisdiction was bound by limitations confining motion to jurisdictional questions, circuit court of appeals could not disregard limitations and dismiss bill on merits.—May Coal & Grain Co. v. Kansas City, Mo., C.C.A.Mo., 73 F.2d 345.

(2) Where bill was dismissed for want of jurisdiction, without determination on the merits, only the jurisdiction of the trial court, and not the merits, will be considered on appeal.—Ironite Co. v. Guarantee Waterproofing Co., C.C.A.Mo., 64 F.2d 608, reversing, D.C., 52 F.2d 288.

50. U.S.—Dollar S. S. Lines v. Merz, C.C.A.Cal., 68 F.2d 594.

51. U.S.—McKenzie-Hague Co. v. Carbide & Carbon Chemicals Corporation, C.C.A.Minn., 73 F.2d 78.

52. U.S.—National Surety Co. v. U. S., C.C.A.Wash., 29 F.2d 92.

53. U.S.—Ramsay v. Crevlin, Colo., 254 F. 813, 166 C.C.A. 259.

54. U.S.—American Merchant Marine Ins. Co. v. Letton, C.C.A.N.Y., 9 F.2d 799, certiorari denied Letton v. American Merchant Marine Ins. Co., 46 S.Ct. 483, 271 U.S. 668, 70 L.Ed. 1142—Moore v. Fain, Tenn., 251 F. 573, 163 C.C.A. 567.

Question not considered

In action to recover for conversion of stock certificates, where at close of trial both parties moved for directed verdict and orally waived jury, the appellate court cannot, on writ of error without case made, pass on question of defendant's estoppel to deny validity of issue of stock certificates, such question not arising on case made, or on process, pleadings, or judgment, or on sufficiency of findings to support judgment.—National City Bank of Chicago v. Kimball Commercial & Savings Bank, C.C.A.S.D., 2 F.2d 461.

55. U.S.—La Crosse Plow Co. v. Pagenstecher, Neb., 253 F. 46, 165 C.C.A. 644, certiorari denied 39 S. Ct. 11, 248 U.S. 572, 63 L.Ed. 427—Moore v. Fain, Tenn., 251 F. 573, 163 C.C.A. 567—Dickinson v. Harris, Tenn., 242 F. 926, 155 C.C.A. 514.

56. U.S.—Letta v. Cincinnati Iron & Steel Co., C.C.A.Ohio, 285 F. 707.

57. U.S.—Hamilton Inv. Co. v. Bollman, C.C.A.Ill., 268 F. 788, certiorari denied 41 S.Ct. 376, 255 U.S. 571, 65 L.Ed. 791.

Reserved point for directed verdict

Under Pennsylvania law, question raised by defendant's appeal from denial of motion for judgment on reserved point for directed verdict was whether evidence in light most favorable to plaintiff supported verdict against defendant.—Great Atlantic & Pacific Tea Co. v. Boyles, C.C.A.Pa., 102 F.2d 343.

58. U.S.—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849—Missouri Pac. Ry. Co. v. Oleson, Neb., 213 F. 329, 130 C.C.A. 31.

59. U.S.—Missouri Pac. Ry. Co. v. Oleson, supra.

60. U.S.—Standard Oil Co. of Kentucky v. Noakes, C.C.A.Ky., 59 F.2d 897.

61. U.S.—Brumberger v. Burke, C.C.A.N.J., 56 F.2d 54.

62. U.S.—Smith v. Russell, C.C.A.Ark., 76 F.2d 91, certiorari denied 56 S.Ct. 135, 296 U.S. 614, 80 L.Ed. 436.

63. U.S.—Youdan v. Majestic Hotel Management Corporation, C.C.A.Ill., 125 F.2d 15.

be determined on appeal in an ancillary suit.[64]

Review dependent on mode of review. The act of January 31, 1928, c 14, § 1, 28 U.S.C.A. § 861a, abolishing the writ of error and providing that all relief previously obtainable by writ of error should thereafter be obtainable by appeal, does not enlarge appellant's rights so as to permit the circuit court of appeals to review findings of fact in law cases.[65] Prior to the enactment of the statute, a distinction was made between a writ of error, as bringing up matters of law only, and an appeal, as bringing up matters of both law and fact;[66] the review on a writ of error extended and was confined to errors of law apparent on the record, and did not extend to questions of fact.[67]

Stipulation as to matters reviewed. The parties cannot by their stipulation inject into an appeal matters not determined in the cause in which the decree appealed from was rendered, or for other reasons not properly before the court, or give the appellate court jurisdiction to consider such matters;[68] but it has been held that, where counsel stipulate that in case of reversal the appellate court should pass on the merits, the court may do so even though the lower court did not pass on the merits.[69]

Matters or evidence considered in determining question. Only matters to some degree involved in the issues closed by the determination appealed from will be considered by the circuit court of appeals.[70] In order to determine what the decision is from which an appeal is taken, the court will look to its substance and its necessary legal effect and operation, rather than to its mere form.[71] The court will not consider facts other than those which were before the lower court[72] and incorporated in the rec-

64. U.S.—Mestre v. Russell & Co., C.C.A.Puerto Rico, 279 F. 44.

65. U.S.—Bengoechea Macias v. De La Torre & Ramirez, C.C.A.Puerto Rico, 84 F.2d 894.

66. U.S.—Burns Bros. v. Cook Coal Co., C.C.A.N.J., 42 F.2d 109—Machcinski v. Lehigh Valley R. Co., C.C.A.N.Y., 272 F. 920.

67. U.S.—Burns Bros. v. Cook Coal Co., C.C.A.N.J., 42 F.2d 109—Armstrong v. U. S., C.C.A.Ind., 18 F. 2d 371, certiorari denied 48 S.Ct. 30, 275 U.S. 534, 72 L.Ed. 412—Sucesores de Perez Hermanos v. Costa, C.C.A.Puerto Rico, 281 F. 439—Machcinski v. Lehigh Valley R. Co., C.C.A.N.Y., 272 F. 920—Sampliner v. Motion Picture Patents Co., N.Y., 259 F. 152, 170 C.C.A. 220, denying rehearing 255 F. 242, 168 C.C.A. 202, which affirmed, D. C., 243 F. 277, and reversed on other grounds 41 S.Ct. 79, 254 U.S. 233, 65 L.Ed. 240—Buessel v. U. S., C.C.A.Conn., 258 F. 811—Buckeye Power Co. v. E. I. Du Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 219, affirmed 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123—Cloquet Lumber Co. v. Burns, Minn., 222 F. 857, 138 C.C.A. 283—Nashville Ry. & Light Co. v. Bunn, C.C.A.Tenn., 168 F. 862—Continental Gin Co. v. Murray Co., Del., 162 F. 873, 89 C.C.A. 563—American Sales Book Co. v. Bullivant, Or., 117 F. 255, 54 C.C.A. 287.

4 C.J. p 672 notes 3, 4.

Weight of evidence could not be reviewed on writ of error.—Lillie v. Dennert, Mich., 232 F. 104, 146 C.C.A. 296—J. W. Clement Co. v. Brown Folding Mach. Co., N.Y., 214 F. 78, 130 C.C.A. 518.

Assumption as to facts not in record

The reviewing court could not assume that facts appeared on the hearing below which were not disclosed by the record.—Helena v. U. S., Mont., 104 F. 113, 43 C.C.A. 429—3 C.J. p 308 note 91.

68. U.S.—Headrick v. Larson, Idaho, 152 F. 93, 81 C.C.A. 317.

69. U.S.—Hirsch v. Morton, C.C.A. Pa., 13 F.2d 701.

70. U.S.—Jenkins v. Dugger, C.C.A. Tenn., 96 F.2d 727, 119 A.L.R. 1484, certiorari denied Duggers v. Jenkins, 59 S.Ct. 84, 305 U.S. 623, 83 L.Ed. 398—Beaudry v. U. S., C.C.A. Ga., 92 F.2d 687—Pratt v. Stout, C. C.A.Mo., 85 F.2d 172, affirming, D. C., Stout v. Pratt, 12 F.Supp. 864—Wright v. Farmers Nat. Grain Corporation, C.C.A.Ill., 83 F.2d 666.

Amended pleadings

(1) Amended bill not considered.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, reversing, D.C., 14 F.Supp. 459, and certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568.

(2) No ruling of court on original petition, whether made before or after filing of amendment which was complete in itself and superseded the original petition, can be assigned as error.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.

On appeal from Puerto Rico supreme court, circuit court of appeals has jurisdiction to examine whole case and to reverse on nonfederal errors even where its jurisdiction rests solely on asserted federal question which was rightly decided below.—Municipality of Rio Piedras v. Serra, Garabis & Co., C.C.A.Puerto Rico, 65 F.2d 691.

71. U.S.—Public Service Commission of Pennsylvania v. Philadelphia Rapid Transit Co., C.C.A.Pa., 82 F. 2d 481, certiorari denied Citizens Passenger Ry. Co. of Philadelphia v. Public Service Commission of Commonwealth of Pennsylvania, 56 S.Ct. 938, 298 U.S. 673, 80 L.Ed. 1395.

Actual accomplishment

In reviewing orders, decrees, and judgments of trial courts, consideration must be given to what they actually accomplish.—Public Service Commission of Pennsylvania v. Philadelphia Rapid Transit Co., supra.

72. U.S.—Paddleford v. Fidelity & Casualty Co. of New York, C.C.A. Ill., 100 F.2d 606, certiorari denied Fidelity & Casualty Co. of New York v. Paddleford, 59 S.Ct. 789, 306 U.S. 664, 83 L.Ed. 1060—People of Porto Rico v. Livingston, C.C.A. Puerto Rico, 47 F.2d 712, certiorari denied 52 S.Ct. 23, 284 U.S. 642, 76 L.Ed. 546.

Evidence introduced at the trial and included in the bill of exceptions is open for consideration.—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A. Puerto Rico, 81 F.2d 385, vacating 77 F.2d 891, certiorari granted Jose Rivera Soler & Co. v. U. S. Firemen's Ins. Co. of Philadelphia, 56 S.Ct. 946, 298 U.S. 651, 80 L.Ed. 1379, and reversed on other grounds Jose Rivera Soler & Co. v. United Firemen's Ins. Co. of Philadelphia, 57 S.Ct. 54, 299 U.S. 45, 81 L.Ed. 30.

Evidence in separate suits

Where separate suits by the United States to abate a nuisance, one instituted by the United States district attorney and the other by the attorney general of the state, were tried at the same time, the testimony, whether presented in the one suit or in the other, should be viewed as an entirety by the circuit court of appeals in passing on the sufficiency of the evidence to sustain finding of dis-

ord;[73] and the general rule is that questions, including questions of law, not passed on by the trial court cannot be raised on appeal,[74] although the appellate court has the right to notice a plain error where that is essential to prevent a miscarriage of justice.[75]

Unproved averments in a pleading should be considered surplusage and disregarded on appeal.[76] The allegations of fact contained in a pleading which a party allowed to be taken as confessed must be taken at their face value on appeal.[77]

The record on a former appeal involving the same parties may be considered on appeal.[78]

In determining whether there was error in granting or refusing instructions, the instructions offered should be considered together with the oral charge;[79] and the fact that different verdicts were

trict court as to existence of nuisance, even though one of the suits was abated by the pendency of the prior suit.—Shore v. U. S., C.C.A.Ill., 282 F. 857.

Contract not mentioned in pleadings

An alleged contract between creditors of an insolvent corporation, giving certain creditors a right to preference, and produced by them when proving their claims before a master, but not put in issue or mentioned in any pleading, cannot be considered by the appellate court as determining rights between the creditors.—Mesker v. Ohio River Sand Co., C.C.A.Ky., 285 F. 379, appeal dismissed 44 S.Ct. 402, 264 U.S. 572, 68 L.Ed. 856.

Matters subsequent to trial or ruling

(1) Any declaration of public policy of the state in the interim between judgment of the lower court and appeal will be recognized by the circuit court of appeals.—Fieldcrest Dairies v. City of Chicago, C.C.A.Ill., 122 F.2d 132, reversing, D.C., 35 F. Supp. 451.

(2) A patent which was not set up in the answer, and was first introduced as evidence in the court below on a motion for rehearing and to reopen the case, which motion was denied, cannot be considered by an appellate court.—Andrews v. Thum, Mass., 67 F. 911, 15 C.C.A. 67, affirmed 70 F. 65, 16 C.C.A. 677, modified on other grounds 71 F. 763, 18 C.C.A. 308, motion denied 72 F. 290, 18 C.C.A. 566, certiorari denied 16 S.Ct. 1198, 163 U.S. 676, 41 L.Ed. 313.

73. U.S.—Montfort v. Korte, C.C.A. Ind., 100 F.2d 615—Krietmeyer v. Hemphill, C.C.A.Fla., 19 F.2d 513, reversing, D.C., Krietmeyer v. Baldwin Drainage Dist., 13 F.2d 903 and certiorari denied Brown v. Krietmeyer, 48 S.Ct. 117, 275 U.S. 496, 72 L.Ed. 392.

Recital in judgment but not in bill

Recital in judgment cannot be considered by reviewing court where it does not appear in bill.—Moline Pressed Steel Co. v. Dayton Toy & Specialty Co., C.C.A.Ohio, 30 F.2d 16.

Facts relating to pending action

(1) Facts outside record relating to another pending action in same court may be noticed on appeal, when necessary to determination, and when presented by concession of counsel or satisfactory evidence.—St. Louis Southwestern Ry. Co. v. Board of Directors of Red River Levee Dist. No. 1, C.C.A.Ark., 32 F. 2d 124.

(2) On appeal from decree directing certain interrogatories in bill of discovery to be answered, reviewing court will take notice of records of court in which action is pending, in aid of which bill of discovery has been brought, since discovery is merely ancillary to action.—Keith v. Endicott Johnson Corporation, C.C.A. N.Y., 75 F.2d 249.

Contention without basis in complaint held not before court on appeal.—Cohen v. U. S., C.C.A.Minn., 129 F.2d 733.

That court ruled on alternative motion for a new trial, as well as on motion for judgment notwithstanding the verdict, held shown by statement in opinion and recital in judgment.—Smails v. O'Malley, C.C.A. Neb., 127 F.2d 410.

74. U.S.—Lyons v. U. S., C.C.A. Ohio, 123 F.2d 507—Kleinschmit v. Farmers Mut. Hail Ins. Ass'n of Iowa, C.C.A.Neb., 101 F.2d 987—U. S. v. Bollman, C.C.A.Iowa, 81 F. 2d 1009—United Firemen's Ins. Co. of Philadelphia v. Jose Rivera Soler & Co., C.C.A.Puerto Rico, 77 F. 2d 891—Trapp v. Metropolitan Life Ins. Co., C.C.A.Mo., 70 F.2d 976, affirmed 72 F.2d 374, certiorari denied Metropolitan Life Ins. Co. v. Trapp, 55 S.Ct. 112, 293 U.S. 596, 79 L.Ed. 690—Monagas v. Central Eureka, C.C.A.Puerto Rico, 56 F.2d 318—American Surety Co. of New York v. Jackson, C.C.A.Idaho, 26 F.2d 248, denying rehearing 24 F.2d 768—Merritt v. American Steel-Barge Co., Minn., 79 F. 228, 24 C.C.A. 530.

"This court is not inclined to find that the lower court was guilty of error in a ruling it never made."—Commercial Nat. Bank of Philadelphia v. Reber, C.C.A.Pa., 74 F.2d 301, 302.

Only jurisdiction passed on

Where lower court passed on question of jurisdiction only, other questions are not reviewable.—Purcell v. Summers, C.C.A.S.C., 126 F.2d 390, reversing, D.C., 34 F.Supp. 421—Curtis v. Clarendon County, C.C.A.S.C., 31 F.2d 877.

Decision reserved

An issue on which the lower court reserved decision is not before the circuit court of appeals.—In re New York, S. & W. R. Co., C.C.A.N.J., 109 F.2d 988, modifying, D.C., 30 F.Supp. 257, certiorari denied New York Trust Co. of New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U.S. 633, 84 L. Ed. 1402 and Woodruff v. New York, S. & W. R. Co., 60 S.Ct. 1075, 310 U. S. 633, 84 L.Ed. 1403.

Grounds of demurrer

The reviewing court will not pass on grounds of a demurrer which have not been passed on by the lower court.—Seward v. South Florida Securities, C.C.A.Fla., 96 F.2d 964—4 C.J. p 688 note 65.

Statutes not considered below

In determining whether receiver of national bank could recover on accommodation note executed to bank by defendant at instance of president of bank to enable president to obtain funds without appearing to be a borrower from bank, circuit court of appeals must consider statutes making it an offense to aid bank officer in misapplication of money and defining a "principal," although statutes had not been presented to district court for consideration.—Federal Deposit Ins. Corporation v. Vest, C.C.A.Ky., 122 F.2d 765, reversing, D.C., 28 F.Supp. 507, and certiorari denied 62 S.Ct. 414, 314 U.S. 696, 86 L.Ed. 557.

75. U.S.—Trapp v. Metropolitan Life Ins. Co., C.C.A.Mo., 70 F.2d 976, affirmed 72 F.2d 374, certiorari denied Metropolitan Life Ins. Co. v. Trapp, 55 S.Ct. 112, 293 U.S. 596, 79 L.Ed. 690.

76. U.S.—Stewart v. Meadows, C.C. A.Mo., 282 F. 861.

77. U.S.—Quinlivan v. Dail-Overland Co., C.C.A.Ohio, 274 F. 56, affirming, D.C., Dail-Overland Co. v. Willys-Overland, 263 F. 171.

78. U.S.—Franz v. Buder, C.C.A.Mo., 34 F.2d 353.

79. U.S.—City of Wheeling v. John F. Casey Co., C.C.A.W.Va., 74 F.2d 794, certiorari denied 56 S.Ct. 106, 296 U.S. 593, 80 L.Ed. 420.

rendered by other juries on the same issues is not persuasive of error in the instructions given.[80] Where a charge is attacked as not supported by evidence, the record must be considered as it was at the time of the charge, without regard to evidence which had been received and later stricken out.[81]

According to some authorities, evidence erroneously admitted at the trial will not be considered on appeal;[82] but hearsay testimony not objected to has been held to be properly before the reviewing court,[83] and it has been held incumbent on the court to consider evidence informally taken, without exception or assignment of error, and incorporated in the record.[84] Evidence improperly excluded in an equity suit, but brought up in the record, may be considered on appeal.[85] In determining the propriety of rejecting an offer of proof, the entire offer, and not isolated portions, should be considered.[86]

Exhibits must be examined by the appellate court, and their effect determined, where the right to the relief sought depends on them;[87] but an exhibit improperly admitted in evidence over objection must be disregarded on appeal.[88]

b. Interlocutory, Collateral, and Supplementary Proceedings and Questions

(1) On appeal from final judgment
(2) On appeal from interlocutory order
(3) On appeal from subsequent order

(1) On Appeal from Final Judgment

(a) In general
(b) Previous orders or decrees reviewable
(c) Subsequent orders and proceedings reviewable

(a) In General

An appeal from the final judgment in one action does not bring up for review orders made in another independent action.

Where there are two separate and independent actions, the court of appeals, on appeal from the judgment in one action, will not review an order made in the other action.[89]

(b) Previous Orders or Decrees Reviewable

As a general rule on appeal from a final judgment or decree, prior interlocutory orders, decisions, or rulings made in the same proceeding may be reviewed.

As a general rule the court of appeals, on appeal from a final judgment, may consider and review a prior interlocutory order or decision which involves the merits or necessarily affects the judgment,[90] provided the order, decision, or ruling is properly presented for review.[91] Such review may be had not only where the interlocutory order, decision, or ruling was not itself appealable,[92] but also where a separate appeal from the interlocutory order or decision might have been, but was not, taken.[93] Intermediate orders on matters wholly unrelated to the final judgment from which the appeal

80. U.S.—Fidelity & Deposit Co. of Maryland v. Lehigh Valley R. Co., C.C.A.N.J., 275 F. 922.

81. U.S.—Mineral Development Co. v. Kentucky Coal Lands Co., Ky., 259 F. 118, 170 C.C.A. 186, certiorari denied 39 S.Ct. 492, 250 U.S. 641, 63 L.Ed. 1185.

82. U.S.—National - Ben Franklin Fire Ins. Co. v. Stuckey, C.C.A.Ga., 86 F.2d 175—U. S. v. Blumenthal, C.C.A.Okl., 77 F.2d 219—U. S. v. Steadman, C.C.A.Utah, 73 F.2d 706—Miller v. U. S., C.C.A.Ga., 71 F. 2d 361.

Exhibit
U.S.—U. S. v. Grabina, C.C.A.N.Y., 119 F.2d 863.

Findings based on incompetent testimony
Appellate court is not bound by findings of fact of referee or lower court where record indicates consideration of incompetent testimony.—Doyle Dry Goods Co. v. Lewis, C.C.A. Okl., 5 F.2d 918.

83. U.S.—Clark v. McNeill, C.C.A. Ky., 25 F.2d 247.

84. U.S.—Texas Co. v. Borne Scrymser Co., C.C.A.S.C., 68 F.2d 104, affirming, D.C., Borne Scrymser Co. v. Gaffney Mfg. Co., 5 F.Supp. 405.

85. U.S.—First Nat. Bank of Atlanta v. Southern Cotton Oil Co., C.C. A.Ga., 78 F.2d 339.

Offer of proof as testimony
Court on appeal in equity case may treat offer of proof of excluded testimony as testimony where exclusion thereof is relied on as error.—Buchhalter v. Rude, C.C.A.Colo., 54 F.2d 834, certiorari granted Rude v. Buchhalter, 52 S.Ct. 411, 285 U.S. 535, 76 L.Ed. 929, and modified on other grounds 52 S.Ct. 605, 286 U.S. 451, 76 L.Ed. 1221.

Opposition to application for injunction
Affidavits and admissions offered in opposition to an application for injunction may be considered on appeal, although disregarded by the trial court.—Shubert v. Woodward, Mo., 167 F. 47, 92 C.C.A. 509.

86. U.S.—Chambers v. Farnham, Ill., 236 F. 886, 150 C.C.A. 148.

87. U.S.—Nashua Mfg. Co. v. Berenzweig, C.C.A.Ill., 39 F.2d 896.

88. U.S.—U. S. v. Grabina, C.C.A.N. Y., 119 F.2d 863.

89. U.S.—U. S. v. Winkle Terra Cotta, C.C.A.Mo., 110 F.2d 919.

90. U.S.—Potts v. Village of Haverstraw, C.C.A.N.Y., 93 F.2d 506—Schaffran v. Mt. Vernon-Woodberry Mills, C.C.A.N.J., 70 F.2d 963, 94 A.L.R. 543—Satterlee v. Harris, C. C.A.Okl., 60 F.2d 490—Hodges v. Kimball, Va., 91 F. 845, 34 C.C.A. 103.

91. U.S.—Hawke v. Servicised Products Corporation, C.C.A.Ohio, 95 F. 2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049.

92. U.S.—Schaffran v. Mt. Vernon-Woodberry Mills, C.C.A.N.J., 70 F. 2d 963, 94 A.L.R. 543.

93. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703—Lawyers Trust Co. v. W. G. Maguire & Co., D.C.Del., 2 F.R.D. 310.

is taken, however, will not be considered or reviewed.[94]

On appeal from a final order or decree in equity every preceding interlocutory order or decree connected with the final decree and affecting the merits of the controversy is subject to review in the appellate court;[95] and this is so not only where the interlocutory order or decree was not itself appealable,[96] but also where a separate appeal from it might have been, but was not, taken.[97]

Particular matters which may be reviewed on appeal from the final judgment or decree include: An order appointing, or refusing to appoint, receivers;[98] an order making allowances to receivers and their attorneys;[99] an order or ruling on a demurrer;[1] an order granting or denying a new trial;[2] an order refusing to grant a temporary injunction;[3] and orders or rulings made in the trial of pleas in abatement.[4]

Effect of separate appeal taken from interlocutory order. The appellate court cannot be required to review the same order twice on the same grounds.[5] From this it follows that, if, on an appeal from an interlocutory order, the appellate court is required to pass on the merits of the case, a second appeal from the final decree, which challenges the same interlocutory order, can involve only matters affecting such order which have arisen subsequent to the entry thereof.[6] On the other hand, if the appellate court was not required to and did not pass on the merits of the controversy in deciding the appeal from the interlocutory order, a subsequent appeal from the final decree may properly challenge the validity of the interlocutory order and invoke a decision on the merits.[7]

(c) Subsequent Orders and Proceedings Reviewable

As a general rule, on appeal from a final judgment or decree subsequent orders and proceedings are not reviewable.

The general rule is that on appeal from a final judgment or decree subsequent orders or proceedings cannot be reviewed.[8] The principle has been applied to an order subsequently made denying a motion for a new trial,[9] a motion to reinstate the cause,[10] or an application to set aside[11] or modify[12] the judgment or decree appealed from.

(2) On Appeal from Interlocutory Order

Generally an appeal from an interlocutory order or decree does not bring up for review another order or decree, although on an appeal from an order granting or refusing a temporary injunction an order denying a motion to dismiss may be considered.

94. **Appeal from judgment of dismissal**
On appeal from order dismissing action without prejudice for failure of plaintiff to comply with a certain order, intermediate orders on matters wholly unrelated to order from which appeal was taken were not reviewable, since scope of review is limited by nature of decision from which appeal is taken.—Hawke v. Servicised Products Corporation, C.C.A.Ohio, 95 F.2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049.

95. U.S.—Western Union Telegraph Co. v. U. S. & Mexican Trust Co., Kan., 221 F. 545, 137 C.C.A. 113.
4 C.J. p 683 note 12.

96. U.S.—Cohan v. Richmond, C.C.A.N.Y., 86 F.2d 680—King v. Hiawatha Silk Mills, C.C.A.N.Y., 296 F. 907.

97. U.S.—Victor Talking Mach. Co. v. George, C.C.A.N.J., 105 F.2d 697, certiorari denied George v. Victor Talking Mach. Co., 60 S.Ct. 176, 308 U.S. 611, 84 L.Ed. 511, rehearing denied 60 S.Ct. 294, 308 U.S. 638, 84 L.Ed. 530, and 60 S.Ct. 466, 309 U.S. 693, 84 L.Ed. 1034—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703.

98. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703—Texas Co. v. Central Fuel Oil Co., Okl., 194 F. 1, 114 C.C.A. 21.

99. U.S.—King v. Hiawatha Silk Mills, C.C.A.N.Y., 296 F. 907.

1. U.S.—Snowden v. Ft. Lyon Canal Co., Colo., 238 F. 495, 151 C.C.A. 431—United Copper Securities Co. v. Amalgamated Copper Co., N.Y., 232 F. 574, 146 C.C.A. 532.
4 C.J. p 683 note 12 [c].

2. U.S.—Marshall's U. S. Auto Supply v. Cashman, C.C.A.Kan., 111 F.2d 140, certiorari denied Cashman v. Marshall's U. S. Auto Supply, 61 S.Ct. 26, 311 U.S. 667, 85 L.Ed. 428—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569.

On appeal from judgment rendered on second trial
On appeal from final judgment for plaintiff entered after second trial of case, the circuit court of appeals was authorized to review interlocutory order setting aside verdict for defendant rendered at first trial of case, and reverse the judgment for plaintiff and order the verdict for defendant reinstated.—Pettingill v. Fuller, C.C.A.Vt., 107 F.2d 933, certiorari denied 60 S.Ct. 609, 309 U.S. 669, 84 L.Ed. 1015.

3. U.S.—Texas Co. v. Central Fuel Oil Co., Okl., 194 F. 1, 114 C.C.A. 21.

4. U.S.—Merchants Ins. Co. v. Lilgeomont, Inc., C.C.A.Ga., 84 F.2d 685.

5. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., C.C.A.Mo., 95 F.2d 703.

6. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., supra.

7. U.S.—A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co., supra.

8. U.S.—U. S. v. Otley, C.C.A.Or., 116 F.2d 958—U. S. v. Asher, C.C.A.Cal., 111 F.2d 59—U. S. v. Winkle Terra Cotta, C.C.A.Mo., 110 F.2d 919—Nowell v. International Trust Co., Alaska, 169 F. 497, 94 C.C.A. 589—Wiegand v. Copeland, C.C.Cal., 14 F. 118, 7 Sawy. 442.

9. U.S.—Ford Motor Co. v. Farrington, Or., 245 F. 850, 158 C.C.A. 190.

10. U.S.—Ford v. Ford, C.C.A.Tex., 100 F.2d 227—Krause v. Mississippi Coal Corporation, C.C.A.Ill., 93 F.2d 515.

11. U.S.—Nowell v. International Trust Co., Alaska, 169 F. 497, 94 C.C.A. 589.

12. U.S.—Ford Motor Co. v. Farrington, Or., 245 F. 850, 158 C.C.A. 190.

As a general rule, on an appeal from an interlocutory order or decree, another and different order or decree is not reviewable;[13] and this is particularly true where such other order or decree is merged in the one from which the appeal is taken.[14] On an appeal from an order granting or refusing a temporary injunction, however, the court of appeals may consider and review an interlocutory order of the trial court denying a motion to dismiss the bill.[15]

(3) On Appeal from Subsequent Order

As a rule an appeal from a subsequent order or decree does not bring up for review a prior order, judgment, or decree which was final and might have been appealed from.

The general rule is that a previous order, judgment, or decree which is final in its nature and from which an appeal might have been taken is not brought up by, and cannot be considered or reviewed on, an appeal from a subsequent order or decree,[16] such as an appeal from an order or decree vacating or setting aside or refusing to vacate or set aside a judgment or decree,[17] or an appeal from an order or decree enforcing and carrying into effect another decree.[18]

c. Persons Entitled to Allege Error

(1) In general

(2) Waiver of, and estoppel to allege, error

(1) In General

(a) Appellant

(b) Appellee

(c) Persons not parties in appellate court

(a) Appellant

Appellant is not entitled to complain of errors of the trial court which may be prejudicial or injurious to others, but are not so as to him.

No party can take advantage of an error committed in the trial court except the one against whom it was committed.[19] Accordingly, appellant cannot take advantage on appeal of alleged errors in the rulings, orders, decisions, or proceedings in the trial court which do not affect his interests.[20] Thus he cannot complain of alleged errors which are not prejudicial to him and affect only his coparty,[21] an adverse party or parties,[22] an intervener,[23] or persons not parties to the suit [24] or to the appeal;[25] and he cannot predicate error on rulings or decisions favorable to his coparty unless he has been injured or prejudiced thereby.[26] A fortiori, appellant cannot complain of an alleged error which did not injure, but benefited, him.[27]

13. U.S.—Caterpillar Tractor Co. v. International Harvester Co., C.C.A. N.J., 120 F.2d 82, modifying, D.C., 32 F.Supp. 304—Weaver v. Atlas Oil Co., C.C.A.La., 39 F.2d 847.
4 C.J. p 687 note 54.

14. **Restraining order**
Alleged error in granting restraining order was not reviewable on appeal from order granting temporary injunction, former being merged in latter.—City of Reno v. Sierra Pac. Power Co., C.C.A.Nev., 44 F.2d 281.

15. U.S.—Deckert v. Independence Shares Corporation, Pa., 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing, C.C.A., Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F.Supp. 763, certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000—Holmes County, Miss., v. Burton Const. Co., C.C.A.Miss., 272 F. 565.

16. U.S.—Chase v. Driver, Ark., 92 F. 780, 34 C.C.A. 668.
It has been held, however, that on an appeal from an order confirming a sale of real estate and overruling a motion to vacate the order of sale, on the ground that it was not in compliance with statutory requirements, the confirmation should be set aside if it appears that there was not a legal sale, although the order of sale is not directly under review.—Westmoreland Brick Co. v. U. S. Malleable Iron Co., C.C.A.Ohio, 16 F. 2d 371.

17. U.S.—U. S. v. Van Blargen, C.C. A.N.J., 60 F.2d 874—Luhrig Collieries Co. v. Interstate Coal & Dock Co., C.C.A.N.Y., 287 F. 711, certiorari denied Thosmil Holding Corporation v. Interstate Coal & Dock Co., 43 S.Ct. 700, 262 U.S. 751, 67 L.Ed. 1215.

18. U.S.—Long v. Maxwell, N.C., 59 F. 948, 8 C.C.A. 410.

19. U.S.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292—Bremner v. Hendrickson, C. C.A.Minn., 31 F.2d 893.

20. U.S.—Southard & Co. v. Salinger, C.C.A.Ill., 117 F.2d 194—Royal Oak Drain Dist., Oakland County v. Keefe, C.C.A.Mich., 87 F.2d 786—Hayes v. Tootle-Lacy Nat. Bank, C.C.A.Kan., 72 F.2d 429—Grobel v. Miller, C.C.A.Pa., 71 F.2d 503—Evans v. Humphrey, C.C.A.Idaho, 38 F.2d 984—Missouri Broom Co. v. Guymon, Mo., 115 F. 112, 53 C. C.A. 16.

21. U.S.—Miller v. Wilkins, Wis., 209 F. 582, 126 C.C.A. 404.

22. U.S.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

Error in adjudicating respective rights of adversary coparties
Where error is committed in adjudicating the respective rights of adversary coparties, appellant cannot avail himself of such error.—Nolte v. Hudson Nav. Co., C.C.A.N. Y., 11 F.2d 680.

23. U.S.—Elmer Co. v. Kemp, C.C. A.Cal., 67 F.2d 948, modifying, D. C., Kemp v. Elmer Co., 56 F.2d 657.

24. U.S.—Fidler v. Roberts, C.C.A. Ill., 41 F.2d 305.
63 C.J. p 580 note 70.

25. U.S.—Elmer Co. v. Kemp, C.C.A. Cal., 67 F.2d 948, modifying, D.C., Kemp v. Elmer Co., 56 F.2d 657.

26. U.S.—Bremner v. Hendrickson, C.C.A.Minn., 31 F.2d 893—Illinois Cent. R. Co. v. Horace Turner Corporation, C.C.A.Ala., 9 F.2d 6—Denver City Tramway Co. v. Norton, Colo., 141 F. 599, 73 C.C.A. 1.

27. U.S.—Boswell v. U. S., C.C.A. Ga., 123 F.2d 213.

(b) Appellee

An appellee who has not taken a cross appeal cannot go beyond supporting the judgment or decree under review and opposing every assignment of error.

An appellee who has not taken a cross appeal may urge in support of the judgment or decree under review any matter appearing in the record,[28] even though his argument may involve an attack upon the reasoning of the lower court [29] or an insistence upon matters overlooked, ignored,[30] or rejected [31] by it; but he may not attack the judgment or decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary,[32] whether what he seeks is to correct an

28. U.S.—Anderson v. Atherton, Ky., 58 S.Ct. 53, 302 U.S. 643, 82 L.Ed. 500, reversing, C.C.A., Atherton v. Anderson, 86 F.2d 518, modifying, D.C., Anderson v. Akers, 7 F.Supp. 924, rehearing denied 9 F.Supp. 151, opinion supplemented 11 F. Supp. 9, certiorari granted Anderson v. Atherton, 57 S.Ct. 754, 300 U.S. 652, 81 L.Ed. 863—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087—Lanova Corporation v. National Supply Co., C.C.A.Pa., 116 F.2d 235, affirming, D.C., 30 F. Supp. 742, and rehearing denied, C.C.A., 116 F.2d 934—Cleveland Clinic Foundation v. Humphrys, C. C.A.Ohio, 97 F.2d 849, 121 A.L.R. 163, certiorari denied 59 S.Ct. 93, 305 U.S. 628, 83 L.Ed. 403—Cusack v. Longaker, C.C.A.N.Y., 95 F.2d 304—Blackhurst v. Johnson, C.C. A.Mo., 72 F.2d 644—Williams v. Bank of America Nat. Ass'n, C.C. A.N.Y., 55 F.2d 884—Higgins v. White, D.C.Mass., 31 F.Supp. 796, conforming to mandate, C.C.A., 93 F.2d 357, reversing D.C., 18 F. Supp. 986, and reversed on other grounds, C.C.A., 116 F.2d 312—R. K. Le Blond Mach. Tool Co. v. Wickes Bros., D.C.Mich., 23 F. Supp. 371.

4 C.J. p 696 note 6.

Decisive matter

(1) The matter asserted by appellee in support of the judgment must be decisive. The failure of appellant to prove its case would not be decisive on appeal where appellee secured an affirmative judgment quieting its title and the question on appeal was whether this judgment could be affirmed.—City of Los Angeles v. Borax Consolidated Limited, C.C.A.Cal., 74 F.2d 901, reversing, D. C., 5 F.Supp. 281, certiorari granted Borax Consolidated, Limited v. City of Los Angeles, 55 S.Ct. 921, 295 U. S. 729, 79 L.Ed. 1679, and affirmed 56 S.Ct. 23, 296 U.S. 10, 80 L.Ed. 9, rehearing denied 56 S.Ct. 304, 296 U. S. 664, 80 L.Ed. 473.

(2) Plaintiff could not justify verdict for compensation in excess of that provided in special contract on ground that other party had repudiated it where testimony concerning repudiation was denied and plaintiff did not accept alleged repudiation. —U. S. Potash Co. v. McNutt, C.C.A. N.M., 70 F.2d 126, costs taxed 70 F.2d 1003.

Particular matters which may be urged

(1) Where treasurer's demurrer to complaint seeking recovery of taxes allegedly paid under protest under alleged invalid law was sustained, question whether plaintiffs, who had not attached to complaint receipts which they were required to obtain on paying taxes under protest, could maintain their complaint was open to treasurer on plaintiffs' appeal, in support of judgment, even though treasurer did not take a cross-appeal. —Agudo v. Sancho, C.C.A.Puerto Rico, 89 F.2d 481.

(2) An appellee is not estopped from insisting that the trial court properly construed the contract sued on.—Ingram-Day Lumber Co. v. Schultz, C.C.A.Wis., 45 F.2d 359, certiorari denied 51 S.Ct. 366, 283 U. S. 833, 75 L.Ed. 1445.

29. U.S.—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087—Lanova Corporation v. National Supply Co., C.C.A.Pa., 116 F.2d 235, affirming, D.C., 30 F.Supp. 742, and rehearing denied, C.C.A., 116 F.2d 934—Cleveland Clinic Foundation v. Humphreys, C.C.A.Ohio, 97 F.2d 849, 121 A.L.R. 163, certiorari denied 59 S. Ct. 93, 305 U.S. 628, 83 L.Ed. 403— R. K. Le Blond Mach. Tool Co. v. Wickes Bros., D.C.Mich., 23 F.Supp. 371.

30. U.S.—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U. S. 425, 68 L.Ed. 1087—Lanova Corporation v. National Supply Co., C. C.A.Pa., 116 F.2d 235, affirming, D. C., 30 F.Supp. 742, and rehearing denied, C.C.A., 116 F.2d 934—R. K. Le Blond Mach. Tool Co. v. Wickes Bros., D.C.Mich., 23 F.Supp. 371.

31. U.S.—Cusack v. Longaker, C.C. A.N.Y., 95 F.2d 304.

Compromise and settlement

Issue raised by trial court's refusal to accept defendant's plea of accord and satisfaction was determinable on plaintiff's appeal from judgment for defendant, notwithstanding defendant did not appeal from order overruling plea and proceeded with trial on merits, since in pressing his view of legal effect of compromise settlement defendant was not attacking, but seeking to support, judgment.—Carpenter v. Durell, C.C.A.Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S. Ct. 42, 302 U.S. 721, 82 L.Ed. 557.

32. U.S.—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087—Boswell v. U. S., C.C.A.Ga., 123 F.2d 213—Jones v. Tower Production Co., C. C.A.Okl., 120 F.2d 779—American Agriculture Chemical Co. v. Jankowski, C.C.A.N.Y., 105 F.2d 953—Smith v. Boise City, C.C.A.Idaho, 104 F.2d 933—Reynolds Spring Co. v. L. A. Young Industries, C.C.A. Mich., 101 F.2d 257—Cleveland Clinic Foundation v. Humphreys, C.C.A.Ohio, 97 F.2d 849, 121 A.L.R. 163, certiorari denied 59 S.Ct. 93, 305 U.S. 628, 83 L.Ed. 403—U. S. Fidelity & Guaranty Co. v. Sweeney, C.C.A.Mo., 80 F.2d 235—Williams v. Bank of America Nat. Ass'n, C.C.A.N.Y., 55 F.2d 884—Pennsylvania Cement Co. v. Bradley Contracting Co., C.C.A.N.Y., 13 F.2d 532—R. K. Le Blond Mach. Tool Co. v. Wickes Bros., D.C. Mich., 23 F.Supp. 371—Gay v. Focke, C.C.A.Hawaii, 291 F. 721—Tjosevig v. Donohoe, C.C.A.Alaska, 262 F. 911, certiorari denied 40 S.Ct. 396, 252 U.S. 587, 64 L.Ed. 730—Rogers v. Marion County Lumber Corporation, S.C., 251 F. 876, 164 C.C.A. 92—Lasswell Land & Lumber Co. v. Lee Wilson & Co., Mo., 236 F. 322, 149 C.C.A. 454, certiorari denied 37 S.Ct. 245, 242 U.S. 652, 61 L.Ed. 546—U. S. v. Norris, Okl., 222 F. 14, 137 C.C.A. 552.

4 C.J. p 695 note 99.

Lessening claimant's rights

On appeal from order relegating claimant to status of general creditor, debtor's receiver who did not file a cross appeal could not contend that claimant should be relegated to status inferior to that of general creditor.—Stepp v. McAdams, C.C.A. Cal., 88 F.2d 925.

Amount of recovery

An appellee who has not appealed cannot complain that he was entitled to an increase or reduction, as the case may be, of the amount of the recovery.—U. S. v. Bentley, C.C.A.N.Y., 107 F.2d 382, affirming, D.C., 27 F. Supp. 420—Reynolds Spring Co. v. L. A. Young Industries, C.C.A.Mich., 101 F.2d 257—North German Lloyd v. Elting, C.C.A.N.Y., 96 F.2d 48—Likins v. Jefferson Standard Life Ins. Co., C.C.A.Tex., 69 F.2d 98—Orient Petroleum Co. v. Wichita State Bank & Trust Co., C.C.A.Tex., 17 F.2d 263, denying rehearing 16 F.2d 417—Coop-

error[33] or to supplement the judgment or decree with respect to a matter not dealt with below.[34] In other words, he cannot go beyond supporting the judgment and opposing every assignment of error.[35]

(c) Persons Not Parties in Appellate Court

One not a party to the appeal cannot ordinarily allege error in the proceedings.

One who has not appealed and who is not a party to the proceedings in the appellate court has no standing to allege error.[36] So, one who was not a party to the proceedings below will not be heard to complain of such proceedings in the appellate court,[37] even though he was named as a party in the original pleading but was never served with process.[38]

(2) Waiver of, and Estoppel to Allege, Error

(a) Error committed or invited by party complaining

(b) Assent to, or recognition of, validity of proceedings

(a) Error Committed or Invited by Party Complaining

aa. In general
bb. Jurisdiction
cc. Nature and theory of cause and grounds of action or defense
dd. Parties
ee. Pleadings
ff. Evidence and mode of proof
gg. Instructions and refusal thereof
hh. Submission of issue or question to jury
ii. Other matters

aa. In General

One may not complain on review of errors below for which he was responsible.

A party will not be permitted on appeal to take advantage of errors in the proceedings below which he himself committed,[39] or invited or induced the trial court to commit,[40] or which were the natural consequences of his own neglect or misconduct.[41] Especially is this true where the errors were not prejudicial.[42]

er v. Jewett, S.D., 233 F. 618, 147 C.C.A. 426—4 C.J. p 696 note 2.

33. U.S.—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087—U. S., to Use of Merchants & Manufacturers Securities Co. v. Johnson, C.C.A.Mo., 98 F.2d 462—Barnsdall Refining Corporation v. Cushman-Wilson Oil Co., C.C.A.Iowa, 97 F.2d 481—Mayo v. Dean, C.C.A.La., 82 F.2d 554, affirming, D.C., Dean v. Mayo, 9 F. Supp. 459—American Seating Co. v. Bullard, C.C.A.Mich., 290 F. 896—Moller v. Herring, Tex., 255 F. 670, 167 C.C.A. 46, 3 A.L.R. 624.

Questions determined adversely to appellee

Where appellee failed to appeal he is not entitled to present for review, in opposition to the judgment or decree, questions determined adversely to him in the court below.—Cervin v. W. T. Grant Co., C.C.A.Tex., 100 F.2d 153—Blackhurst v. Johnson, C.C.A.Mo., 72 F.2d 644—Merchants' & Manufacturers' Securities Co. v. Johnson, C.C.A.Mo., 69 F.2d 940, certiorari denied Johnson v. Merchants & Mfrs. Securities Co., 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87—Swig v. Tremont Trust Co., C.C.A. Mass., 8 F.2d 943—Henna v. Sauri & Subira, C.C.A.Puerto Rico, 237 F. 145, 150 C.C.A. 291—4 C.J. p 694 note 98.

Where appellee failed to appeal he cannot complain

(1) Of ruling on question of venue.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

(2) Of rulings admitting or excluding evidence.—Neece v. Durst, C.C.A.Cal., 61 F.2d 591.

(3) Of alleged errors in the submission of issues to the jury.—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003.

(4) Of findings.—Tillman & Bendel v. California Packing Corporation, C.C.A.Cal., 63 F.2d 498, certiorari denied 54 S.Ct. 55, 290 U.S. 638, 78 L.Ed. 554, and California Packing Corporation v. Tillman & Bendel, 54 S.Ct. 63, 290 U.S. 638, 78 L.Ed. 554—Jacobs v. Iodent Chemical Co., C.C.A. N.J., 41 F.2d 637—Guardian Savings & Trust Co. v. Dillard, C.C.A.Ark., 15 F.2d 996.

(5) Of a discrepancy between the verdict and the judgment as to the date at which interest should begin to run.—G. L. Webster Co. v. Trinidad Bean & Elevator Co., C.C.A.Va., 92 F.2d 177.

34. U.S.—U. S. v. American Ry. Express Co., Ga., 44 S.Ct. 560, 265 U.S. 425, 68 L.Ed. 1087.

35. U.S.—Philadelphia Casualty Co. v. Fechheimer, Ohio, 220 F. 401, 136 C.C.A. 25, Ann.Cas.1917D 64.
4 C.J. p 696 note 3.

36. U.S.—Osage Oil & Refining Co. v. Mulber Oil Co., C.C.A.Okl., 43 F.2d 306—Trinity Portland Cement Co. v. Bass Foundry & Machine Co., C.C.A.Ohio, 26 F.2d 348—Federal Coal Co. v. Royal Bank of Canada, C.C.A.N.Y., 10 F.2d 679.

37. U.S.—Cook v. Lasher, W.Va., 73 F. 701, 19 C.C.A. 654.

38. U.S.—Cook v. Lasher, supra.

39. U.S.—Rosaly v. Gonzalez, C.C.A. Puerto Rico, 106 F.2d 169—National Loan & Investment Co. v. Rockland Co., Minn., 94 F. 335, 36 C.C.A. 370.

40. U.S.—Smails v. O'Malley, C.C.A. Neb., 127 F.2d 410—Lake City, Nettleton & Bay Road Improvement Dist. No. 1 of Craighead County, Ark., v. Luehrmann, C.C.A.Ark., 113 F.2d 458—Hummel v. Wells Petroleum Co., C.C.A.Ill., 111 F.2d 883—Pitcairn v. Fisher, C.C.A.Iowa, 78 F.2d 649—Globe & Rutgers Fire Ins. Co. v. Winter Garden Co., C.C.A.N.Y., 9 F.2d 227, certiorari denied 46 S.Ct. 352, 270 U.S. 654, 70 L.Ed. 782—Boatmen's Bank of St. Louis, Mo., v. Fritzlen, Kan., 221 F. 145, 137 C.C.A. 45—Delta Lumber Co. v. Schwarz Wheel Co., D.C.Pa., 218 F. 85—National Loan & Investment Co. v. Rockland Co., Minn., 94 F. 335, 36 C.C.A. 370.
4 C.J. p 700 note 39.

41. U.S.—Rosaly v. Gonzalez, C.C.A. Puerto Rico, 106 F.2d 169—Southern Pac. Co. v. Hall, Cal., 100 F. 760, 41 C.C.A. 50.

42. U.S.—Rosaly v. Gonzalez, C.C.A. Puerto Rico, 106 F.2d 169—Schaffer v. Pennsylvania R. Co., C.C.A.Ill., 101 F.2d 369.

bb. Jurisdiction

Jurisdiction of the subject matter of a controversy may not be acquired by consent or estoppel.

Jurisdiction of the subject matter of a controversy must exist as a matter of law, and may not be conferred by consent of the parties or by estoppel.[43]

cc. Nature and Theory of Cause and Grounds of Action or Defense

In general, a party on review may not change the theory on which the case was tried below or take a position inconsistent with that which he maintained in the trial court.

Parties cannot elect to try their causes on one theory in the lower court, and, when defeated on that theory, assume a different position in the appellate court,[44] and hence a party may not urge a reversal because the case was tried below on an erroneous theory in which he acquiesced.[45] Accordingly, when a party relies, in the trial court, on a certain ground of action or defense, he is bound thereby and will not be allowed to assume, in the appellate court, any position which is inconsistent therewith.[46] So a party may not take, on appeal, a position inconsistent with that which he maintained in the trial court with respect to the validity of certain ordinances,[47] the right of his opponent to plead limitations,[48] or the nature of his cause of action.[49]

43. U.S.—Little Rock St. Grading Dist. v. Hagadorn, Ark., 186 F. 451, 108 C.C.A. 429, certiorari denied 32 S.Ct. 524, 223 U.S. 721, 56 L.Ed. 630.

Introducing evidence as not estoppel
Where plaintiff's evidence in suit on war risk policy showed that court was without jurisdiction, introduction of evidence to controvert evidence offered by plaintiff did not preclude government from relying on absence of jurisdiction on plaintiff's appeal.—Egan v. U. S., C.C.A.Ill., 80 F.2d 404.

44. U.S.—Parts Mfg. Corporation v. Lynch, C.C.A.N.Y., 129 F.2d 841, affirming, D.C., 45 F.Supp. 854—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892—Sierocinski v. E. I. Du Pont De Nemours & Co., C.C.A.Pa., 118 F.2d 531—Reidy v. Myntti, C.C.A.Alaska, 116 F.2d 725—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 114 F.2d 526, certiorari denied 61 S.Ct. 141, 311 U.S. 701, 85 L.Ed. 455—Associated Indemnity Corporation v. Scott, C.C.A.Tex., 103 F.2d 203—U. S. to Use of Merchants & Manufacturers Securities Co. v. Johnson, C.C.A.Mo., 98 F.2d 462—Henry H. Cross Co. v. Simmons, C.C.A.Ariz., 96 F.2d 482—Renwick v. U. S., C.C.A.Ill., 87 F.2d 123—Indemnity Ins. Co. of North America v. Atchison, T. & S. F. Ry. Co., C.C.A.Ariz., 85 F.2d 1006, denying rehearing 85 F.2d 438—Title Guarantee & Trust Co. v. McIlwain, C.C.A.Cal., 73 F.2d 754—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003—Bovay v. Fuller, C.C.A.Ark., 63 F.2d 280—Kimble v. Kiser, C.C.A.W.Va., 59 F.2d 626—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L.Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Sacramento Suburban Fruit Lands Co. v. Melin, C.C.A.Cal., 36 F.2d 907, followed in Sacramento Suburban Fruit Lands Co. v. Curtis, 36 F.2d 923—Alabama Chemical Co. v. International Agr. Corporation, C.C.A.Ala., 35 F.2d 907, certiorari denied 50 S.Ct. 240, 281 U.S. 727, 74 L.Ed. 1144—U. S. v. Peterson, C.C.A.Wyo., 34 F.2d 245—Rees v. Lombard, C.C.A.Cal., 21 F.2d 276—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 2 F.2d 511—Southern Cotton Oil Co. v. Shelton, S.C., 220 F. 247, 136 C.C.A. 509.
4 C.J. p 701 note 49.

45. U.S.—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 2 F.2d 511.

46. U.S.—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Dant & Russell v. J. D. Halstead Lumber Co., C.C.A.Cal., 103 F.2d 306—Fitzgerald v. McFadden, C.C.A.N.Y., 88 F.2d 639—Lord v. Territory of Hawaii, C.C.A.Hawaii, 79 F.2d 761.

Particular matters not available
(1) State suing insolvent bank's receiver on trust theory, cannot on appeal claim right of preference in distribution.—Fiman v. State of South Dakota, C.C.A.S.D., 29 F.2d 776, modifying, D.C., State of South Dakota v. Fiman, 29 F.2d 770, and certiorari denied Fiman v. State of South Dakota, 49 S.Ct. 254, 279 U.S. 841, 73 L.Ed. 987.

(2) Surety, suing individual claimants to have liability on highway contractor's bond prorated, could not assert on appeal that bond protected state only.—American Surety Co. of New York v. James A. Dick Co., C.C.A.N.M., 23 F.2d 464, certiorari denied 49 S.Ct. 26, 278 U.S. 624, 73 L.Ed. 545.

(3) On appeal from order relegating claimant to status of general creditor, debtor's receiver could not contend that claimant should be relegated to status inferior to that of general creditor, where receiver in lower court repeatedly prayed that claimant should be given status of general creditor.—Stepp v. McAdams, C.C.A.Cal., 88 F.2d 925.

(4) Stevedore, electing to try action under Oregon Employers' Liability Law, was not entitled to apply Merchant Marine Act abolishing fellow-servant rule.—Van Norden v. Chas. R. McCormick Lumber Co. of Delaware, C.C.A.Or., 17 F.2d 568, certiorari denied 47 S.Ct. 768, 274 U.S. 758, 71 L.Ed. 1337.

(5) In false imprisonment action, plaintiff, having claimed proceedings should have been instituted before United States commissioner, cannot claim he should have been taken before justice of peace.—Janus v. U. S. ex rel. Humphrey, C.C.A.Idaho, 38 F.2d 431, reversing, D.C., 30 F.2d 530.

Position on review not inconsistent
Rule that precludes change of theory on appeal did not preclude assignee of judgment who insisted on right to recover full amount of judgment in trial court from admitting that he was entitled only to contribution.—Nelson v. Century Indemnity Co., C.C.A.Cal., 65 F.2d 765, certiorari denied Century Indemnity Co. v. Nelson, 54 S.Ct. 120, 290 U.S. 683, 78 L.Ed. 588.

47. **Ordinances granting franchise**
City, having prior to and since commencement of litigation by street railway taken position that ordinances granting franchises were valid, cannot thereafter contend that ordinances were void ab initio.—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.

48. **Right recognized in trial court**
Inability of corporation to plead statute of limitations for failure to comply with law could not be raised for first time on appeal where case was tried on theory recognizing capacity of corporation to plead statute.—Sacramento Suburban Fruit Lands Co. v. Melin, C.C.A.Cal., 36 F.2d 907, followed in Sacramento Suburban Fruit Lands Co. v. Curtis, 36 F.2d 923.

49. **Express or implied contract**
Evidence and claim for legal services showed that attorney based

Rule qualified. The rule that the parties on appeal are bound by the theory on which the action was tried below is enforced only where injustice will not result.[50]

dd. Parties

One may not complain on appeal of errors in respect of parties for which he was responsible.

A party will not be heard to assert on appeal that the proceedings below were defective for want of proper parties when the defect was caused by his own neglect or misconduct.[51]

ee. Pleadings

One may not on review complain of errors with respect to pleadings where he invited such errors, or where his objection is inconsistent with the position taken below.

The rule that on review one may not take a position inconsistent with the theory, grounds of action, or defense followed and adopted below, see supra subdivision c (2) (a) cc of this section applies to errors in respect of pleadings [52] and in respect of matters involving issues, proof, and variance;[53] and the principle of estoppel to allege invited error considered supra subdivision c (2) (a) aa of this section prevents a party from asserting as error defects in his adversary's pleadings caused by the party complaining thereof.[54]

ff. Evidence and Mode of Proof

One may not complain on review of error which he has committed or invited in respect of rulings on evidence and the mode of proof in general, or urge in such connection an objection inconsistent with the position he took in the trial court.

The rule that one may not complain on review of errors committed or invited by himself, or raise objections inconsistent with his position below, as heretofore considered in subdivision c (2) (a) aa, cc of this section, applies to errors claimed in respect of rulings on evidence and mode of proof in general.[55]

Burden of proof. One who voluntarily assumes the burden of proof will not be heard on appeal to assert that the burden was on the other party.[56]

Admission of evidence. A party may not complain, on appeal, of the admission of certain evidence where its admission was due to his own fault [57] or where he objected to the withdrawal of the evidence.[58] So an appellant may not assert as error the admission of evidence which he himself has introduced [59] or which he has himself elicited or brought out, as by cross-examination of his adversary's witnesses in the trial of the cause below.[60] Moreover, a party who introduces improper evidence such as that which is incompetent, or evidence inadmissible under the pleadings, will not be

claim and tried case on quantum meruit, precluding reliance on appeal on theory of express contract.—Wickwire v. Martin, C.C.A.Okl., 63 F.2d 64.

50. U.S.—Associated Indemnity Corporation v. Scott, C.C.A.Tex., 103 F.2d 203.

51. U.S.—Home Ins. Co. of New York v. Scott, C.C.A.Ohio, 46 F.2d 10, certiorari granted Sun Insurance Office v. Scott, 51 S.Ct. 487, 283 U.S. 814, 75 L.Ed. 1431, and reversed on other grounds Sun Ins. Office v. Scott, 52 S.Ct. 72, 284 U. S. 177, 76 L.Ed. 229.

Party bound by election
Plaintiff electing to proceed on own account, after being apprised on former appeal and subsequent proceedings before master that third party should be additional plaintiff, was bound by election.—Lawrence-Williams Co. v. Societe Enfants Gombault Et Cie, C.C.A.Ohio, 52 F.2d 774, certiorari denied Societe Enfants Gombault Et Cie v. Lawrence-Williams Co., 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940.

52. U.S.—Harkin v. Brundage, C.C.A.Ill., 13 F.2d 617, 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838, and reversed on other grounds 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457.

53. **Case tried on theory issue was presented**
In action for commission for procuring reinsurance contract, where plaintiffs themselves brought out evidence showing that they represented adverse principals without knowledge of both, and defendant, at close of whole case, moved to dismiss complaint on such ground and plaintiffs did not suggest that issue was not in case but were content to meet it, plaintiffs could not, on defendant's appeal, rely on defendant's failure to plead such defense.—Wolfe v. International Reinsurance Corporation, C. C.A.N.Y., 73 F.2d 267, certiorari denied 55 S.Ct. 637, 294 U.S. 725, 79 L.Ed. 1256.

54. U.S.—Haley v. Kilpatrick, Colo., 104 F. 647, 44 C.C.A. 102.
4 C.J. p 703 note 69 [a].

55. U.S.—Baldrich v. Barbour, C.C. A.Puerto Rico, 90 F.2d 867, motion denied 91 F.2d 650—MacLaughlin v. Hull, C.C.A.Wash., 87 F.2d 641—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F. 2d 56, 89 A.L.R. 279—Chesapeake & O. R. Co. v. Lushbaugh, C.C.A. Ohio, 17 F.2d 986.

56. U.S.—U. S. v. Peterson, C.C.A. Wyo., 34 F.2d 245—Spokane Interstate Fair Ass'n v. Fidelity & Deposit Co. of Maryland, C.C.A.Wash., 15 F.2d 48.

57. U.S.—Stentor Electric Mfg. Co. v. Klaxon Co., C.C.A.Del., 115 F.2d 268, affirming, D.C., 30 F.Supp. 425, and reversed on other grounds 61 S.Ct. 1020, 313 U.S. 487, 85 L.Ed. 1477—Twachtman v. Connelly, C.C. A.Ohio, 106 F.2d 501—United Shoe Machinery Corporation v. Paine, C. C.A.N.H., 26 F.2d 594, 58 A.L.R. 1398.

58. U.S.—Chicago & E. R. Co. v. Ohio City Lumber Co., Ohio, 214 F. 751, 131 C.C.A. 57.

59. U.S.—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385—Ohio & Michigan Coal Co. v. Clarkson Coal & Dock Co., C.C.A.Mich., 266 F. 189.

Where defendant read in evidence depositions taken by plaintiff, defendant cannot complain on appeal that the depositions contained incompetent and hearsay evidence.—Chicago & E. I. R. Co. v. Collins Produce Co., Ill., 235 F. 857, 149 C.C.A. 169, affirmed 39 S.Ct. 189, 249 U.S. 186, 63 L.Ed. 552.

60. U.S.—Pabst Brewing Co. v. E. Clemens Horst Co., C.C.A.Cal., 264 F. 909.

permitted to assert as error the subsequent admission of same or similar evidence offered by his adversary.[61]

Exclusion of evidence. Where a litigant seeks a reversal on a ruling of the trial court rejecting evidence offered for a specific purpose, he cannot in the appellate court change the nature of the limitation of his offer, or the ground or theory upon which he asked the lower court to admit the testimony;[62] and a party on whose objection evidence was excluded in the trial court cannot avail himself of such evidence in support of his contentions on appeal.[63]

Weight and sufficiency. The general rule that on review one may not complain of error which he has committed or invited, or take a position on appeal inconsistent with that adopted below, as has been explained supra subdivision c (2) (a) aa, cc of this section, applies to errors alleged in respect of the weight and sufficiency of evidence.[64] Thus it is not competent for a party to assume, on appeal, an attitude different from that which he occupied at the trial, and to object to the judgment against him because of the want of evidence which was excluded at his instance.[65] In like manner a party is estopped to complain of the judgment for insufficiency of evidence to support it where he supplied the deficiency by his own admissions in the court below.[66]

The fact that certain documents were not produced at the trial cannot be taken advantage of, on appeal, by one having possession of the documents.[67]

gg. Instructions and Refusal Thereof

One may not complain on review of errors in respect of instructions which were committed or invited by himself, nor take a position inconsistent with that adopted below.

The general rules, stated supra subdivision c (2) (a) aa, cc of this section, which preclude appellant from raising errors committed or invited by himself, or taking on appeal a position inconsistent with that adopted on the trial, apply to errors in respect of instructions.[68] Thus, appellant will not be permitted, on appeal, to allege that an instruction is erroneous or improper where the instruction was given at his request by the trial court;[69] where it is substantially the same as one requested by him;[70] or where it is in accord with the theory advanced by him at the trial.[71] He will not be permitted to allege that an instruction is erroneous where the error arose from a consideration of improper evidence introduced by himself,[72] and he cannot assign as error an inconsistency in the charge which was produced by the giving of an erroneous instruction which he requested.[73]

Failure or refusal to instruct. Appellant may not complain on appeal of the trial court's failure to give a particular charge which would be inconsistent with one requested by himself;[74] nor can he complain of the court's refusal to direct the jury to disregard evidence which he himself has introduced.[75] So where appellant objected in the trial court to the giving of an instruction previously requested by him, he cannot complain, on appeal, of

61. U.S.—Hunter v. Derby Foods, C.C.A.N.Y., 110 F.2d 970—Bradley v. Adams Express Co., C.C.A.Tenn., 89 F.2d 641, certiorari denied 58 S.Ct. 17, 302 U.S. 698, 82 L.Ed. 539—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Mich., 84 F.2d 569—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Chesapeake & O. R. Co. v. Lushbaugh, C.C.A.Ohio, 17 F.2d 986.

62. U.S.—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892.

63. U.S.—U. S. v. White Oak Coal Co., C.C.A.W.Va., 5 F.2d 439.

64. U.S.—In re Schluter, Green & Co., C.C.A.N.C., 93 F.2d 810.

65. U.S.—Ætna Life Ins. Co. v. Moyer, C.C.A.Pa., 113 F.2d 974—McNeil & Higgins Co. v. Howell, C.C.A.Ill., 10 F.2d 969—Missouri, K. & T. Ry. Co. v. Elliott, Ind.T., 102 F. 96, 42 C.C.A. 188, affirmed 22 S.Ct. 937, 184 U.S. 695, 46 L.Ed. 763.

66. **Execution of mortgage**
Defendants, who admitted execution of mortgage in answer, could not contend on appeal there was no proof of its execution or existence.—Simmons v. Stern, C.C.A.N.M., 9 F.2d 256.

67. U.S.—Ætna Casualty & Surety Co. v. Reliable Auto Tire Co., C.C.A.Mo., 58 F.2d 100.

68. U.S.—Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410—B. F. Sturtevant Co. v. Champion Fibre Co., Ohio, 232 F. 1, 146 C.C.A. 193.

69. U.S.—American Ins. Co. of Newark, N. J., v. Vann, C.C.A.N.C., 118 F.2d 1004—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Security Life Ins. Co. v. Seeber, C.C.A.Ill., 41 F.2d 600—Bridgewater Gas Co. v. Home Gas Fuel Co., Ohio, 59 F. 40, 7 C.C.A. 652.

Error imputed to party
Errors, if any, in requested instructions given are to be imputed to the party making the request rather than to the court.—Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410.

70. U.S.—Badgett v. Johnson-Fife Hat Co., Ind.T., 85 F. 408, 29 C.C.A. 230.

71. U.S.—Griffin Grocery Co. v. Richardson, C.C.A.Okl., 10 F.2d 467—Bracken v. Union Pac. Ry. Co., Neb., 75 F. 347, 21 C.C.A. 387.

72. U.S.—Phenix Ins. Co. v. Wilcox & Gibbs Guano Co., S.C., 65 F. 724, 13 C.C.A. 88.

73. U.S.—Illinois Cent. R. Co. v. Griffin, Wis., 80 F. 278, 25 C.C.A. 413.

74. **As to burden of proof**
Plaintiff may not complain of the court's failure to charge that the burden of proving suicide was on defendant where plaintiff requested the court to charge that the burden was on him.—Mitchell v. New England Mut. Life Ins. Co., C.C.A.Va., 123 F.2d 246.

75. U.S.—Southern Pac. Co. v. Hall, Cal., 100 F. 760, 41 C.C.A. 59.

the court's failure to give the requested instruction.[76]

hh. Submission of Issue or Question to Jury

One may not complain on review of the submission of issues in accordance with his own requests, nor where he is otherwise estopped to raise an objection.

The general rules, stated supra subdivision c (2) (a) aa, cc of this section, that one may not complain on review of errors committed or invited by himself nor adopt a position inconsistent with that taken below, apply to errors in respect of the submission of issues or questions to the jury.[77] Thus a party is estopped to predicate error on the submission of an issue or question to the jury, where the submission was made in compliance with his request;[78] where the issue submitted was raised by his own pleadings and evidence;[79] where the submission of the issue was invited, or its propriety recognized by instructions requested by him;[80] or where the submission was in accordance with the theory on which the case was tried by him.[81] So where a party causes a question to be submitted to the jury as one of fact, he cannot thereafter take the position that the question was one of law and should not have been submitted.[82]

Conversely, a party may not assert error in the failure of the trial court to submit a particular issue or question to the jury where his own testimony, not claimed to have been mistaken, rendered such issue or question immaterial,[83] or where he requested that it should not be submitted to the jury;[84] and he cannot assert error in the submission of part of the fact issues to the court where he contended at the trial that all the issues should have been so submitted.[85]

Under the Federal Rules of Civil Procedure, rule 50 (a), 28 U.S.C.A. following § 723c, appellant is not precluded on appeal from claiming that the trial court erred in directing a verdict for appellee merely because both parties moved for a directed verdict.[86]

ii. Other Matters

One may be estopped on appeal to complain of errors with respect to the mode and conduct of the trial, rulings made on motions, findings, the judgment or decree entered, the amount of recovery, and the proceedings for review.

The general rules, stated supra subdivision c (2) (a) aa, cc of this section, which preclude appellant from raising errors committed or invited by himself, or taking on appeal a position inconsistent with that adopted below, apply to errors relating to the mode and conduct of the trial,[87] rulings made

76. U.S.—Delaware, L. & W. R. Co. v. Berry, C.C.A.N.J., 48 F.2d 1052, certiorari denied 52 S.Ct. 7, 284 U.S. 617, 76 L.Ed. 527.

77. **Failure to elect between special and general verdict**
Appellant cannot complain on appeal of the submission of the issues to the jury in the form of a special, rather than general verdict, where he was given the choice in the trial court of a general or special verdict and declined to make any election.—Cooley v. New York Cent. R. Co., C.C.A.N.Y., 80 F.2d 816, certiorari denied New York Cent. R. Co. v. Cooley, 56 S.Ct. 599, 297 U.S. 721, 80 L.Ed. 1005.

78. U.S.—Ætna Ins. Co. v. Murray, C.C.A.Okl., 66 F.2d 289—Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., Ind.T., 85 F. 417, 29 C.C.A. 239.

Issue not supported by evidence
Where defendant requested instructions submitting a particular issue, he cannot complain that those given on behalf of plaintiff, dealing with the same issue, were not supported by the evidence.—Stanton v. Hample, C.C.A.Wash., 272 F. 424.

79. U.S.—Kingrey v. New York, C. & St. L. R. Co., C.C.A.Ohio, 297 F. 376—Whiteside v. W. T. Bailey Lumber Co., C.C.A.Minn., 274 F. 96.

80. U.S.—Detroit, T. & I. R. Co. v. Hahn, C.C.A.Ohio, 47 F.2d 59, certiorari denied 51 S.Ct. 489, 283 U.S. 842, 75 L.Ed. 1452.

81. U.S.—Weinstein v. Studebaker Corp., D.C.Pa., 238 F. 963.

82. U.S.—Crowe v. Gary State Bank, C.C.A.Ind., 123 F.2d 513—Van De Water v. Order of United Commercial Travelers of America, C.C.A.N.Y., 77 F.2d 331, affirming, D.C., 7 F.Supp. 369—Sucesores de Bianchi v. Shope, C.C.A.Puerto Rico, 299 F. 44—Swofford Bros. Dry-Goods Co. v. Smith-McCord Dry-Goods Co., Ind.T., 85 F. 417, 29 C.C.A. 239.

83. U.S.—Aldrich v. Erie R. Co., C.C.A.Ohio, 2 F.2d 439.

84. U.S.—Norfolk & W. Ry. Co. v. Norton Iron Works, C.C.A.Ky., 279 F. 32.

85. U.S.—Pacific Indemnity Co. v. McDonald, C.C.A.Or., 107 F.2d 446.

86. U.S.—Vilter Mfg. Co. v. Rolaff, C.C.A.Mo., 110 F.2d 491.

Under former practice, where each party requested, without qualification, a peremptory instruction in his favor, and the court granted one of the requests, the parties were estopped from claiming on appeal that any question should have been submitted to the jury.—La Crosse Plow Co. v. Pagenstecher, Neb., 253 F. 46, 165 C.C.A. 644, certiorari denied 39 S.Ct. 11, 248 U.S. 572, 63 L.Ed. 427—U. S. v. Bishop, Minn., 125 F. 181, 60 C.C.A. 123.

87. U.S.—Smith v. Daniel, C.C.A.Tenn., 46 F.2d 740, certiorari denied 51 S.Ct. 651, 283 U.S. 852, 75 L.Ed. 1460.

Improper argument
Counsel for appellant who has been injured by improper argument to the jury should not ordinarily be permitted to take advantage of errors which he has invited or provoked or not complained of until after verdict, unless the objectionable remarks are so grossly prejudicial as to call for action by the appellate court in the public interest.—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325.

Transfer to equity docket
Appellant may not assert error in the trial court's refusal to transfer to the equity docket a particular issue where the error, if any, in the court's ruling resulted from incorrect statements of counsel for both sides which misled the court.—Mutual Ben. Health & Accident Ass'n v. Warrell, C.C.A.Ark., 96 F.2d 447, certiorari denied 59 S.Ct. 71, 305 U.S. 612, 83 L.Ed. 390, rehearing denied 59 S.Ct. 142, 305 U.S. 671, 83 L.Ed. 435.

on motions,[88] findings made by the trial court or a referee,[89] the judgment, order, or decree entered,[90] the amount of recovery or extent of relief,[91] and the proceedings for review.[92]

(b) Assent to, or Recognition of, Validity of Proceedings

aa. In general

bb. By pleading over or proceeding to trial

cc. By taking or failing to take an appeal

aa. In General

Assent to, or recognition of, the validity of matters not of a fundamental character precludes a litigant from objecting thereto on review.

Where one has assented to or recognized the validity of matters or proceedings not constituting fundamental error, he may not complain thereof on review.[93] Thus, where fundamental error is not involved, one may not question matters or proceedings to which he has consented[94] or to which he has acquiesced.[95] This principle has been applied so as to preclude a consenting or acquiescing litigant from raising objections on review with respect to pleadings;[96] evidence;[97] and from raising ob-

88. **Ruling procured or condoned by complainant**
The entry of an order granting or denying a motion cannot be assigned as error by one who procured, invited, or condoned the making and entry of the order.—Cybur Lumber Co. v. Erkhart, Miss., 247 F. 284, 159 C.C.A. 378—Walton v. Chicago, St. P., M. & O. Ry. Co., Minn., 56 F. 1006, 6 C.C.A. 223.

89. **Findings requested by complainant**
A party cannot assert as error a finding of a judge or referee made at his request.—National Loan & Investment Co. v. Rockland Co., Minn., 94 F. 335, 36 C.C.A. 370.

90. U.S.—Equitable Life Assur. Soc. of U. S. v. Tucker, C.C.A.Mo., 126 F.2d 396, affirming, D.C., Tucker v. Equitable Life Assur. Soc. of U. S., 36 F.Supp. 809, certiorari denied 62 S.Ct. 1298, 316 U.S. 699, 86 L.Ed. 1768.

Where party procures rendition or entry of a judgment, decree, or order, or is responsible for error therein, he is estopped to assert on appeal that it is erroneous.—Grubstake Inv. Ass'n v. Southern Natural Gas Co., C.C.A.Tex., 20 F.2d 1.

91. U.S.—Waggaman v. General Finance Co. of Philadelphia, C.C.A.Pa., 116 F.2d 254—Gravelle Const. Dist. No. 1, of Bassett-Wardell Road Improvement Dist. No. 3 of Mississippi County, C.C.A. Ark., 82 F.2d 391.

92. U.S.—Fraser v. Commissioner of Internal Revenue, C.C.A., 25 F.2d 653.

Party inviting ruling by appellate court on a particular point cannot, after such ruling, assert that the appellate court had no power so to rule.—Gratz v. McKee, C.C.A.Mo., 270 F. 713, reversing 258 F. 335, 169 C.C.A. 351, certiorari granted McKee v. Gratz, 41 S.Ct. 535, 256 U.S. 687, 65 L.Ed. 1172, and affirmed 43 S.Ct. 16, 260 U.S. 127, 67 L.Ed. 167.

Jurisdiction of appellate court
(1) Appellee held not estopped to assert that the court of appeals was without jurisdiction of the appeal.—George v. Victor Talking Mach. Co., N.J., 55 S.Ct. 229, 293 U.S. 377, 79 L.Ed. 439, reversing, C.C.A., Victor Talking Mach. Co. v. George, 69 F.2d 871, certiorari granted George v. Victor Talking Mach. Co., 55 S.Ct. 82, 293 U.S. 544, 79 L.Ed. 649.

(2) Prior to the abolition of the writ of error by statute, it was held that no action of defendant in error could estop him from raising the question whether the writ of error was taken within time provided by statute.—Vaughan v. American Ins. Co. of Newark, N. J., C.C.A.Ga., 15 F.2d 526.

Bill of exceptions
Party not obliged to serve amendments to bill of exceptions did not lose right to object to court's jurisdiction to sign bill by failure to serve amendments on time.—Farmers' Union Grain Co. v. Hallet & Carey Co., C.C.A.S.D., 22 F.2d 796, denying rehearing in 21 F.2d 42, certiorari denied 48 S.Ct. 304, 276 U.S. 623, 72 L.Ed. 737.

93. U.S.—Women's Catholic Order of Foresters v. City of Ennis, C.C.A.Tex., 116 F.2d 270, certiorari denied Women's Catholic Order of Foresters v. Ennis, Tex., 61 S.Ct. 1112, 313 U.S. 589, 85 L.Ed. 1544—Lansing B. Warner, Inc., v. Lehigh Valley R. Co., C.C.A.N.Y., 75 F.2d 483—Hayes v. Tootle-Lacy Nat. Bank, C.C.A.Kan., 72 F.2d 429—Hoosier Veneer Co. v. Trusts & Guarantee Co., C.C.A.Ill., 283 F. 1, certiorari denied Trusts & Guarantee Co. v. Hoosier Veneer Co., 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489—Pease v. Rathbun-Jones Engineering Co., Tex., 228 F. 273, 142 C.C.A. 565, affirmed 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715.

Where existence of certain fact is assumed in the trial court, and the trial proceeds on that assumption without objection, neither party may question the existence of such fact in the appellate court.—Southern Cotton Oil Co. v. Shelton, S.C., 220 F. 247, 136 C.C.A. 509.

94. U.S.—Securities and Exchange Commission v. Jones, C.C.A.N.Y., 85 F.2d 17, affirming, D.C., 15 F.Supp. 321, certiorari denied Jones v. Securities and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428—Baxter v. McGee, C.C.A.Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1401—S. A. Lynch Enterprise Finance Corporation v. Dulion, C.C.A.Ga., 45 F.2d 6—Olsness v. Home Ins. Co., C.C.A.N.D., 14 F.2d 907—Brown v. U. S., Ill., 196 F. 351, 116 C.C.A. 171.

95. U.S.—Lake City, Nettleton & Bay Road Improvement Dist. No. 1 of Craighead, Ark. v. Luehrmann, C.C.A.Ark., 113 F.2d 458—Street Grading Dist. No. 60 of Little Rock, Ark., v. Hagadorn, Ark., 186 F. 451, 108 C.C.A. 429, certiorari denied 32 S.Ct. 524, 223 U.S. 721, 56 L.Ed. 630.

96. U.S.—Frank v. Giesy, C.C.A.Ga., 117 F.2d 122.

Form and sufficiency of pleadings
(1) Defendant, having elected to proceed under short form of petition on account for work and labor without objection, cannot complain on appeal that, because of such pleading, it was precluded from asserting various elements of counterclaim.—Southwark Foundry & Machine Co. v. Franz Foundry & Machine Co., C.C.A.Ohio, 48 F.2d 714.

(2) Objection that excuse for delay in transporting goods was not pleaded is waived on appeal where case was tried and argued as though excuse were in issue.—Cohn v. U. S. Shipping Board, C.C.A.Tenn., 20 F. 2d 56.

97. **Admission of evidence**
One is precluded from objecting on appeal to the admission of evidence where he consented to, or acquiesced

jections on review with respect to instructions;[98] mode and conduct of trial;[99] submission of questions or issues to the jury[1] or court;[2] verdict;[3] findings;[4] judgments, decrees, or orders;[5] and the amount of recovery or extent of relief.[6]

bb. By Pleading Over or Proceeding to Trial

By pleading over or proceeding to trial a party waives errors in an adverse decision on demurrer or motion to dismiss.

One who pleads over or proceeds to trial on the merits, after an adverse decision on demurrer[7] or motion to dismiss,[8] will not be permitted to allege error in such decision, as he will be presumed to have acquiesced therein.

cc. By Taking or Failing to Take an Appeal

By failing to appeal a litigant acquiesces in the judgment or decree. By taking an appeal an appellant recognizes the validity of matters and proceedings inherent in the appeal.

One who fails to take an appeal from a judgment or decree,[9] and who voluntarily elects to pursue a course inconsistent with appeal,[10] waives or

in, its admission.—Deering Harvester Co. v. Kelly, Ohio, 103 F. 261, 43 C. C.A. 225.

98. U.S.—Meyer & Chapman State Bank v. First Nat. Bank, C.C.A. Wyo., 291 F. 42.

99. **Irregularity in trying case on affidavits** would not be considered on appeal where both parties consented to such trial.—U. S. v. C. I. T. Corporation, C.C.A.N.Y., 93 F.2d 469.

Defendant, consenting to trial at law, waived objection that remedy was in equity.—Mobile Shipbuilding Co. v. Federal Bridge & Structural Co., C.C.A.Ill., 280 F. 292, certiorari denied 43 S.Ct. 88, 260 U.S. 726, 67 L.Ed. 483.

Law action tried as suit in equity

(1) It was of no consequence that an action at law was tried as a suit in equity where facts were agreed to and the case was submitted to the court with the consent of both parties.—U. S. v. Havner, C.C.A.Iowa, 101 F.2d 161, reversing, D.C., 21 F. Supp. 985.

(2) One consenting to, or acquiescing in, the trial of a law issue on the equity side of the court could not be heard on appeal to contend that the cause or issue should have been transferred to the law side.—Penley Bros. Co. v. Hall, C.C.A.Me., 84 F.2d 371, vacating, D.C., Hall v. Penley Bros. Co., 9 F.Supp. 936—Williamson v. Chicago Mill & Lumber Corporation, C.C.A.Ark., 59 F.2d 918, modifying, D.C., Williamson v. Chicago Mill & Lumber Co., 51 F.2d 551.

1. **Issue of waiver**

Defendant, whose counsel withdrew objection to evidence tending to show that by its conduct it had waived its right to recover damages pleaded as a counterclaim, and expressed his willingness that the question be submitted to the jury, was estopped to complain of such submission.—Houck v. Seaboard Fuel Corporation, D.C.Pa., 278 F. 686.

2. **Objections to submission not available**

(1) Plaintiff's acquiescence and silence, when the court interpreted joint motions for directed verdict as a submission to the court of the law and the facts, and plaintiff's failure to indicate any desire to offer rebuttal proofs prevented plaintiff from complaining of acceptance by the court of such submission at a possibly premature stage of the case.—General Motors Corporation v. Bellevue Sav. Bank Co., C.C.A.Ohio, 300 F. 324.

(2) Although parties requested instructions other than peremptory instruction, where court stated that request for peremptory instruction by each party operated to submit the case to the court, and both parties assented, the other instructions were waived, and case submitted to the court for findings of fact and conclusions of law, and either party was estopped to insist that case should have been submitted on other instructions.—Meyer & Chapman State Bank v. First Nat. Bank, C.C.A.Wyo., 291 F. 42.

3. **Sufficiency of evidence to support verdict**

Where plaintiffs in error agreed at the trial that the jury should be directed to return a verdict for defendant in error for some amount under the pleadings and evidence, an objection on review that defendant in error had failed to introduce any evidence proving a joint liability was unavailable.—McBride v. Neal, Ill., 214 F. 966, 131 C.C.A. 262.

4. **Findings accepted as correct**

Appellees were not entitled to rely on argument in conflict with findings of the trial court which they had accepted as correct.—Thomas B. Bishop Co. v. Santa Barbara County, C.C.A.Cal., 96 F.2d 198, certiorari denied Santa Barbara County v. Thomas B. Bishop Co., 59 S.Ct. 84, 305 U. S. 623, 83 L.Ed. 398.

5. U.S.—Lake City, Nettleton & Bay Road Improvement Dist. No. 1 of Craighead County, Ark. v. Luehrmann, C.C.A.Ark., 113 F.2d 458—Mayer v. White, C.C.A.Kan., 12 F. 2d 710—Brown v. U. S., Ill., 196 F. 351, 116 C.C.A. 171.

Consent to entry of injunction waived any error of decision that might have been made.—Securities and Exchange Commission v. Jones, C.C.A.N.Y., 85 F.2d 17, affirming, D. C., 15 F.Supp. 321, certiorari denied Jones v. Securities and Exchange Commission, 57 S.Ct. 46, 299 U.S. 581, 81 L.Ed. 428.

Trial court without jurisdiction

The rule that no party can complain on appeal of an error acquiesced in by him cannot prevail where the trial court was without jurisdiction to enter the decree consented to.—Street Grading Dist. No. 60 of Little Rock, Ark. v. Hagadorn, Ark., 186 F. 451, 108 C.C.A. 429, certiorari denied 32 S.Ct. 524, 223 U.S. 721, 56 L.Ed. 630.

6. U.S.—S. A. Lynch Enterprise Finance Corporation v. Dulion, C. C.A.Ga., 45 F.2d 6—Colorado Cent. Consolidated Min. Co. v. Turck, Colo., 54 F. 262, 4 C.C.A. 313.

7. U.S.—Frishmuth v. Farmers' Loan & Trust Co., C.C.A.N.Y., 107 F. 169.

4 C.J. p 721 note 59.

8. U.S.—Sigafus v. Porter, N.Y., 21 S.Ct. 34, 179 U.S. 116, 45 L.Ed. 34, reversing 84 F. 430, 28 C.C.A. 443—Meeker v. Baxter, C.C.A.N.Y., 83 F.2d 183.

9. **Error in ruling as to venue** held waived by failure to appeal.—Jones Store Co. v. Dean, C.C.A.Mo., 56 F.2d 110, certiorari denied Dean v. Jones Store Co., 52 S.Ct. 641, 286 U.S. 559, 76 L.Ed. 1292.

Conclusion of court accepted as correct

Conclusion of district court that plaintiff was not entitled to recover a certain part of amount sued for was accepted as correct, where plaintiff had not appealed.—Fanchon & Marco v. Hagenbeck-Wallace Shows Co., C. C.A.Cal., 125 F.2d 101.

10. U.S.—Women's Catholic Order of Foresters v. City of Ennis, C.C.A. Tex., 116 F.2d 270, certiorari denied Women's Catholic Order of Foresters v. Ennis, Tex., 61 S.Ct. 1112, 313 U.S. 589, 85 L.Ed. 1544.

releases any errors which might be present in the suit or action in which the judgment or decree was rendered.

By taking an appeal appellant recognizes, and is estopped to challenge, the validity of matters and proceedings inherent in the appeal.[11]

d. Amendment, Additional Proofs, and Trial of Cause Anew

(1) Amendment of proceedings of lower court
(2) Additional proofs
(3) Trial de novo

(1) Amendment of Proceedings of Lower Court

(a) In general
(b) As to pleadings

(a) In General

Where practicable, amendments that may be made below may generally be made in the court of appeals.

Where practicable, amendments that may be made below may generally be made in the court of appeals.[12] Thus, where a case has been tried on the merits, and the allowance, on appeal, of an amendment as to parties will be a technical matter prejudicing the rights of no one, such amendment may be allowed;[13] and, of course, mere clerical errors may be amended or corrected by the appellate court.[14]

(b) As to Pleadings

In a proper case the court of appeals may, in the interest of justice, allow amendments to correct errors in the pleadings.

Under the provisions of 28 U.S.C.A. § 777, the circuit court of appeals may, in its discretion, allow an amendment of the pleadings on appeal;[15] and such an amendment has been allowed where the errors in the pleadings corrected thereby were merely formal errors which did not affect substantial rights or advance new issues.[16] An amendment of the pleadings, however, will not be allowed on appeal where there are no apparent equities sufficiently strong to justify it,[17] where it would change the whole cause of action,[18] or where the record is devoid of any proof to sustain an omitted allegation sought to be supplied by the amendment.[19]

To conform to evidence, verdict, or judgment. Where the record so warrants, the court of appeals, on a proper showing, may allow an amendment of the pleadings so as to make them conform to the proofs,[20] the verdict,[21] and the judgment.[22]

To show jurisdiction. Under the Act of March 3, 1915, 28 U.S.C.A. § 399, jurisdictional averments of diverse citizenship, actually existing but defectively alleged, are amendable "at any stage of the proceedings and in the appellate court upon such

11. **Existence of judicial decree**
Appellant held estopped to assert that decree appealed from was not a decree of the court.—The Rethalulew, Official No. 227860, C.C.A.Cal., 51 F.2d 646.
Sufficiency of findings
Plaintiff in error cannot challenge the sufficiency of the special findings, under Rev.St. § 649, Comp.St. § 1587, where, without such findings, no question would be presented within the authority of the court to review.—Mayes v. Paul Jones & Co., C.C.A. Ky., 270 F. 121, affirming, D.C., Paul Jones & Co. v. Mayes, 265 F. 365.

12. **Transferring cause to equity docket**
Where trial court should have sustained motion, at close of evidence, to transfer action to equity docket and case was fully tried, appellate court had power and duty to make transfer and, having done so, to consider proceeding as one in equity.—Jack v. Forrest, C.C.A.Utah, 71 F.2d 264, certiorari granted Forrest v. Jack, 55 S.Ct. 95, 293 U.S. 542, 79 L.Ed. 647, reversed on other grounds 55 S.Ct. 370, 294 U.S. 158, 79 L.Ed. 829, 96 A.L.R. 1457, rehearing denied 55 S.Ct. 543, 294 U.S. 733, 79 L.Ed. 1262.

13. U.S.—Elder v. Western Mining Co., C.C.A.Colo., 280 F. 569—U. S. v. Hopewell, Mass., 51 F. 798, 2 C.C.A. 510.
4 C.J. p 724 note 98.

14. U.S.—Seeley v. Hunt, C.C.A.Tex., 109 F.2d 595, certiorari denied Hunt v. Seeley, 60 S.Ct. 894, 309 U.S. 690, 84 L.Ed. 1033.

15. U.S.—Jeffreys v. O'Neal, C.C.A. N.C., 64 F.2d 284—Page v. Natural Gas & Fuel Co., C.C.A.Ark., 35 F. 2d 462—Keaton v. Little, C.C.A. Okl., 34 F.2d 396, reversing Dykes v. Little, 31 F.2d 742.
4 C.J. p 723 note 88.
Amendments regarded as made see infra subdivision e (4) (b) of this section.

16. **Discretion liberally exercised**
Discretion to amend complaint on appeal should be liberally exercised to meet technical objection.—Jeffreys v. O'Neal, C.C.A.N.C., 64 F.2d 284.

17. U.S.—Post v. Beacon Vacuum Pump & Electrical Co., Me., 89 F. 1, 32 C.C.A. 151.

18. U.S.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 282 F. 440, modified on other grounds 285 F. 381.

19. U.S.—Youngs Rubber Corporation v. C. I. Lee & Co., C.C.A.N.Y., 45 F.2d 103.

20. U.S.—Schmidt v. U. S., C.C.A. Neb., 63 F.2d 390—Youngs Rubber Corporation v. C. I. Lee & Co., C.C. A.N.Y., 45 F.2d 103.

21. **Amendment refused**
Where instructions allowed finding for plaintiff on count of indebitatus assumpsit, although such recovery was not warranted by evidence, it was held that plaintiff should not be allowed on appeal to file, as amendment, declaration in special assumpsit, and have affirmance of judgment on theory that verdict was based on count in quantum meruit.—American Locomotive Co. v. Harris, R.I., 239 F. 234, 152 C.C.A. 222.

22. **Amendment refused**
Where the complaint sought to recover judgment against defendant as surviving partner, but default judgment was rendered against him individually and as surviving partner, plaintiff cannot amend to conform to the judgment, on an appeal by defendant, following the court's refusal to open the default judgment.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 282 F. 440, modified on other grounds 285 F. 381.

terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction."[23] Amendments in the court of appeals to cure defects arising from the absence or insufficiency of jurisdictional averments as to the amount in controversy, however, have been denied in a number of cases,[24] particularly where the application for leave to amend was not made in good faith.[25]

(2) Additional Proofs

Generally additional proofs cannot be supplied in the court of appeals.

As a general rule defects in proofs cannot be supplied in the court of appeals and that court cannot hear additional proofs[26] or receive or accept affidavits;[27] and this is particularly true where the court below would itself be powerless to receive such additional proofs.[28] It has been held, however, that the court of appeals may avail itself of authentic evidence outside the record before it of matters occurring since the decree of the trial court, when such course is necessary to prevent a miscarriage of justice, to avoid a useless circuity of proceeding, to preserve a jurisdiction lawfully acquired, or to protect itself from imposition or further prosecution of litigation where the controversy between the parties has been settled or for other reasons has ceased to exist.[29]

(3) Trial de Novo
(a) In general
(b) Equitable proceedings

(a) In General

A trial de novo is a new trial in an appellate tribunal.

A trial de novo means a trial anew in an appellate tribunal, according to the usual or prescribed mode of procedure in other cases, involving similar questions, whether of law or of fact.[30]

(b) Equitable Proceedings

On appeal, chancery cases are tried de novo on the entire record.

On appeal to the circuit court of appeals, chancery cases are tried de novo on the entire record and the evidence.[31] They are tried in the appellate court on the same evidence that was before the

23. U.S.—Swayne v. Barsch, Or., 226 F. 581, 141 C.C.A. 337.
25 C.J. p 780 note 17 [a].

Construction and application of statute

(1) Omission from a complaint of allegation of plaintiff's citizenship was held cured for jurisdictional purposes by his testimony as to his citizenship, brought out on his cross-examination by defendant and uncontradicted, the complaint being amendable by adding such allegation, at any stage of the proceedings, and in the appellate court, under the statute.—Cunard S. S. Co. v. Sullivan, C.C.A.N.Y., 6 F.2d 383.

(2) An amendment of the pleadings on appeal to show diversity of citizenship will not be allowed where there is nothing in the record warranting such an amendment.—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F.2d 657—Utah Radio Products Co. v. Boudette, C.C.A.Mass., 78 F.2d 793.

(3) Where party who, respecting federal jurisdiction based on diverse citizenship, is improperly joined, is not indispensable, jurisdictional defect may not be cured by motion in appellate court to amend and dismiss as to him.—Levering & Garrigues Co. v. Morrin, C.C.A.N.Y., 61 F.2d 115, certiorari granted 53 S.Ct. 118, 287 U.S. 590, 77 L.Ed. 515, affirmed 53 S.Ct. 549, 289 U.S. 103, 77 L.Ed. 1062.

Practice prior to statute

Prior to the enactment of 28 U.S.C.A. § 399, amendments on appeal to show diversity of citizenship were denied in a number of cases.—St. Louis, I. M. & S. R. Co. v. Newcom, Ark., 56 F. 951, 6 C.C.A. 172—25 C.J. p. 780 notes 13, 15.

24. **Record not showing amount**

Where there was nothing in the record to show the amount involved, an application to amend on appeal was denied.—Utah Radio Products Co. v. Boudette, C.C.A.Mass., 78 F.2d 793.

Amendment refused on appeal to circuit court

U.S.—Agnew v. Dorman, C.C.Md., 1 F. Cas.No.100, Taney 386.

25. U.S.—Sharp v. Barnhart, C.C.A. Ind., 117 F.2d 604, certiorari denied Canterbury v. Barnhart, 61 S.Ct. 1099, 313 U.S. 576, 85 L.Ed. 1533—James v. Barnhart, C.C.A.Ind., 117 F.2d 604, certiorari denied 61 S.Ct. 1098, 313 U.S. 576, 85 L.Ed. 1534.

26. U.S.—Utah Radio Products Co. v. Boudette, C.C.A.Mass., 78 F.2d 793—Youngs Rubber Corporation v. C. I. Lee & Co., C.C.A.N.Y., 45 F.2d 103.

27. U.S.—Siano v. Helvering, C.C.A. N.J., 79 F.2d 444—Axelrod v. Osage Oil & Refining Co., C.C.A.Okl., 29 F.2d 712.

On appeal from interlocutory order

While, on an appeal from an order granting a preliminary injunction, in a suit for infringement of a patent and copyrights and for unfair competition, the cause might be dismissed, if it clearly appeared that no ground existed for equitable relief, the court of appeals could not render a final decree for complainant on ex parte affidavits and decrees of other courts in a suit by the same plaintiff against the party whose goods defendant was charged with selling.—Meccano, Limited, v. John Wanamaker, New York, N.Y., 40 S. Ct. 463, 253 U.S. 136, 64 L.Ed. 822, affirming 250 F. 450, 162 C.C.A. 520, reversing, D.C., 241 F. 133, and certiorari denied 39 S.Ct. 495, 250 U.S. 647, 63 L.Ed. 1188, granted 39 S.Ct. 10, 248 U.S. 554, 63 L.Ed. 419.

28. **After expiration of term**

No error appearing justifying modification or reversal, circuit court of appeals cannot take further proof which trial court would be powerless to receive because term has ended, and, on basis of such proof, reverse or modify.—Realty Acceptance Corporation v. Montgomery, Del., 52 S.Ct. 215, 284 U.S. 547, 76 L.Ed. 476, affirming, C.C.A., Montgomery v. Realty Acceptance Corporation, 51 F.2d 642, certiorari granted Realty Acceptance Corporation v. Montgomery, 52 S.Ct. 25, 284 U.S. 604, 76 L.Ed. 518.

29. U.S.—Ridge v. Manker, Iowa, 132 F. 599, 67 C.C.A. 596.

30. U.S.—Spano v. Western Fruit Growers, C.C.A.Colo., 83 F.2d 150.

31. U.S.—Craven v. Shoults, C.C.A. Neb., 97 F.2d 299—Aro Equipment Corporation v. Herring-Wissler Co., C.C.A.Iowa, 84 F.2d 619—Chickasaw Wood Products Co. v.

lower court,[32] since the court of appeals cannot take additional evidence,[33] and hence the trial on appeal is not de novo in the sense that new or additional evidence may be received on appeal.[34]

Scope of inquiry. An appeal in equity brings up for review the whole case [35] with certain inferences in favor of the decree below.[36] On such an appeal, the court of appeals, where the entire record including the evidence is before it, may review the evidence [37] and its sufficiency to support the findings and judgment of the court below,[38] draw inferences of fact,[39] and determine the cause on the merits even though the merits were not considered below.[40] While the appellate court is not bound by the findings of the court below,[41] usually such findings should be accepted by it unless they disclose a serious mistake in estimating the evidence,[42] as due weight should be given to the advantage of the trial judge in seeing the witnesses, hearing their testimony, and noting their demeanor on the stand and their candor or want of candor.[43]

Errors committed by the court below, which could have no effect on the court of appeals in determining the rights of the parties on a trial de novo, are immaterial and will not be considered.[44] Of this character are errors in the admission of evidence.[45]

From the record before it, the court of appeals will make such disposition of the cause as accords with equity and good conscience;[46] and accordingly the decree below will be sustained if it was right for any reason.[47]

Paysinger, C.C.A.Ark., 84 F.2d 476—Metropolitan Holding Co. v. Snyder, C.C.A.Mo., 79 F.2d 263—Waters v. Disbrow & Co., C.C.A. Neb., 70 F.2d 572—Smith v. Jackson State Bank, C.C.A.Wyo., 63 F. 2d 934—Hopkins v. Texas Co., C.C. A.Okl., 62 F.2d 691, certiorari denied 54 S.Ct. 48, 280 U.S. 629, 78 L.Ed. 547—Boynton v. Moffat Tunnel Improvement Dist., C.C.A.Colo., 57 F.2d 772, certiorari denied Moffat Tunnel Improvement Dist. v. Boynton, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538—Jonah v. Armstrong, C.C.A.Okl., 52 F.2d 343—Idawa Gold Mining Co. v. Cahill, C.C.A. Utah, 52 F.2d 70—Simmons v. Stern, C.C.A.N.M., 9 F.2d 256—Emerson-Brantingham Implement Co. v. Johnson, C.C.A.Neb., 1 F.2d 212—Unkle v. Wills, C.C.A.Okl., 281 F. 29—Presidio Mining Co. v. Overton, C.C.A.Cal., 270 F. 388, affirming 261 F. 933 and certiorari denied Martin v. Presidio Mining Co., 41 S.Ct. 535, 256 U.S. 694, 65 L.Ed. 1175—Anderson v. Hultberg, C.C.A. Kan., 247 F. 273—Central Improvement Co. v. Cambria Steel Co., C.C. A.Mo., 201 F. 811.

"An appeal in an equity suit invokes a new hearing and decision of the case upon its merits upon the lawful evidence."—Union Central Life Ins. Co. of Cincinnati, Ohio v. Imsland, C.C.A.S.D., 91 F.2d 365, 368—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316, 318.

32. U.S.—Chickasaw Wood Products Co. v. Paysinger, C.C.A.Ark., 84 F. 2d 476.

33. U.S.—Youngs Rubber Corporation v. C. I. Lee & Co., C.C.A.N.Y., 45 F.2d 103.

Taking of additional proofs on appeal generally see supra subdivision d (2) of this section.

34. U.S.—Youngs Rubber Corporation v. C. I. Lee & Co., supra.

35. U.S.—Edwards v. Lain, C.C.A. Ill., 112 F.2d 343—Aro Equipment Corporation v. Herring-Wissler Co., C.C.A.Iowa, 84 F.2d 619—A. O. Smith Corporation v. Petroleum Iron Works Co. of Ohio, C.C.A. Ohio, 73 F.2d 531, modified on other grounds and rehearing denied 74 F.2d 934—Title Guarantee & Trust Co. v. U. S., C.C.A.Cal., 50 F.2d 544—Mills Novelty Co. v. Monarch Tool & Mfg. Co., C.C.A.Ohio, 49 F. 2d 28, certiorari denied Monarch Tool & Mfg. Co. v. Mills Novelty Co., 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561—Swift v. Jackson, C.C.A. Okl., 37 F.2d 237, certiorari denied 50 S.Ct. 351, 281 U.S. 745, 74 L.Ed. 1158—R. K. Le Blond Mach. Tool Co. v. Wickes Bros., D.C.Mich., 23 F.Supp. 371—Linde Air Products Co. v. Morse Dry Dock & Repair Co., N.Y., 246 F. 834, 159 C.C.A. 136, affirming, D.C., 239 F. 909.

Law action heard in equity

Where legal action was heard in equity without objection, appeal was treated as equity appeal.—Fidelity & Deposit Co. of Maryland v. People's Bank of Sanford, C.C.A.N.C., 72 F.2d 932, certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714, affirming, D.C., People's Bank of Sanford, N. C. v. Fidelity & Deposit Co. of Maryland, 4 F.Supp. 379—Hess v. Couzinie, C.C.A.N.Y., 296 F. 358.

36. U.S.—A. O. Smith Corporation v. Petroleum Iron Works Co. of Ohio, C.C.A.Ohio, 73 F.2d 531, modified on other grounds and rehearing denied 74 F.2d 934—Mills Novelty Co. v. Monarch Tool & Mfg. Co., C. C.A.Ohio, 49 F.2d 28, certiorari denied Monarch Tool & Mfg. Co. v. Mills Novelty Co., 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561.

Inferences and presumptions in favor of decree below see infra subdivision e of this section.

37. U.S.—Edwards v. Lain, C.C.A. Ill., 112 F.2d 343.

38. U.S.—McDonnell v. Bank of China, C.C.A.China, 33 F.2d 816, certiorari denied Bank of China v. McDonnell, 50 S.Ct. 160, 280 U.S. 612, 74 L.Ed. 654.

39. **Power not restricted**

That proceeding to reclaim property from possession of trustee in bankruptcy was submitted on agreed statements of fact did not restrict power of court on appeal to draw inferences of fact, as the law and facts were reviewable as fully as in an ordinary equity appeal.—Flanders Motor Co. v. Reed, Mass., 220 F. 642, 136 C.C.A. 250, affirming, D.C., In re Harrington, 212 F. 542.

40. U.S.—Ferguson v. Omaha & S. W. R. Co., Neb., 227 F. 513, 142 C. C.A. 145.

41. U.S.—Waters v. Disbrow & Co., C.C.A.Neb., 70 F.2d 572.

42. U.S.—Smith v. Jackson State Bank, C.C.A.Wyo., 63 F.2d 934—Idawa Gold Mining Co. v. Cahill, C.C.A.Utah, 52 F.2d 70.

43. U.S.—Edwards v. Lain, C.C.A. Ill., 112 F.2d 343.

44. U.S.—Mound City Co. v. Castleman, Mo., 187 F. 921, 110 C.C.A. 55, affirming, C.C., 177 F. 510, and appeal dismissed 35 S.Ct. 204, 235 U.S. 689, 59 L.Ed. 427.

45. U.S.—Royal Baking Powder Co. v. Emerson, C.C.A.Ark., 270 F. 429, appeal dismissed 43 S.Ct. 166, 260 U. S. 752, 67 L.Ed. 496.

46. U.S.—Lewis v. Ingram, C.C.A. Okl., 57 F.2d 463, certiorari denied 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533.

47. U.S.—A. O. Smith Corporation v. Petroleum Iron Works Co. of Ohio, C.C.A.Ohio, 73 F.2d 531, modified on other grounds and rehearing denied 74 F.2d 934—Mills Novelty Co. v. Monarch Tool & Mfg. Co., C.C.A. Ohio, 49 F.2d 28, certiorari denied Monarch Tool & Mfg. Co. v. Mills Novelty Co., 52 S.Ct. 37, 284 U.S. 662, 76 L.Ed. 561.

e. **Presumptions**

(1) In general
(2) Organization and jurisdiction of lower court
(3) Parties and process
(4) Pleadings
(5) Interlocutory matters and provisional remedies
(6) Reference
(7) Conduct of trial in general
(8) Admissibility and reception of evidence
(9) Dismissal, nonsuit, and direction of verdict
(10) Instructions
(11) Custody and conduct of jury
(12) Verdict
(13) Findings of fact and conclusions of law
(14) Amount of recovery
(15) Judgment or decree
(16) Costs and allowances
(17) Taking and perfecting appeal

(1) In General

All reasonable presumptions are indulged in favor of the judgment below and against error; and the burden of affirmatively showing error is on appellant.

It is a general rule of wide application that the circuit court of appeals will indulge all reasonable presumptions in favor of the correctness of the judgment, order, or decree from which the appeal was taken.[48] Indeed error is never presumed on appeal,[49] and will not be inferred from a doubtful statement in the record,[50] but must be affirmatively shown by the record;[51] and the burden of so showing it is on appellant.[52]

Presumptions favorable to the judgment, order, or decree appealed from are properly indulged in a case where the record on appeal is abbreviated, defective, imperfect, or incomplete,[53] as where the appeal is on the judgment roll alone.[54] Thus, where the determination of a question presented for

48. U.S.—Wabash Ry. Co. v. Bridal, C.C.A.Mo., 94 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Hardt v. Kirkpatrick, C.C.A.Cal., 91 F.2d 875, reversing, D.C., In re Kirkpatrick, 17 F.Supp. 56, and certiorari denied Kirkpatrick v. Hardt, 58 S.Ct. 762, 303 U.S. 626, 82 L.Ed. 1088—U. S. v. Stephanidis, C.C.A.N.Y., 47 F.2d 554—Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, C.C.A.Mo., 28 F.2d 177, modifying, D.C., Central Union Trust Co. of New York v. Missouri K. & T. Ry. Co., 28 F.2d 176, and affirming North American Co. v. St. Louis & S. F. R. Co., 28 F.2d 174, certiorari denied Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564—Cordingly v. Kennedy, Colo., 239 F. 645, 152 C.C.A. 479—Manhattan Life Ins. Co. v. Wright, Colo., 126 F. 82, 61 C.C.A. 138.

"The legal presumption is that they [the orders of the court below] were just, lawful, and without prejudice to the appellant."—Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., Mo., 251 F. 789, 798, 164 C.C.A. 23.

49. U.S.—Hinshaw v. New England Mut. Life Ins. Co., C.C.A.Mo., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488—Hinshaw v. Massachusetts Mut. Life Ins. Co., C.C.A.Mo., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488—Hawke v. Servicised Products Corporation, C.C.A.Ohio, 95 F.2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—Wabash Ry. Co. v. Bridal, C.C.A.Mo., 94 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Baldwin v. Myers, C.C.A.Ark., 75 F.2d 529—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279—Williamson v. Richardson, Cal., 205 F. 245, 123 C.C.A. 427.

D.C.—Junghans v. Junghans, D.C., 112 F.2d 212, 72 App.D.C. 129.

50. U.S.—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279.

51. U.S.—Hawke v. Servicised Products Corporation, C.C.A.Ohio, 95 F. 2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—Wabash Ry. Co. v. Bridal, C.C.A. Mo., 94 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Southern Ry. Co. v. O'Dell, S. C., 252 F. 540, 164 C.C.A. 456, affirming, D.C., O'Dell v. Southern Ry. Co. 248 F. 345—Williamson v. Richardson, Cal., 205 F. 245, 123 C. C.A. 427.

52. U.S.—Eastern States Petroleum Co. v. Gilliland Refining Co., C.C.A. Tex., 103 F.2d 186—Hawke v. Servicised Products Corporation, C.C. A.Ohio, 95 F.2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—Louisiana & Arkansas Ry. Co. v. Jackson, C.C.A.La., 95 F.2d 369—Wabash Ry. Co. v. Bridal, C.C.A.Mo., 94 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Hardt v. Kirkpatrick, C.C.A.Cal., 91 F.2d 875, reversing, D.C., In re Kirkpatrick, 17 F.Supp. 56, and certiorari denied Kirkpatrick v. Hardt, 58 S.Ct. 762, 303 U.S. 626, 82 L.Ed. 1088—Capital Savings & Loan Ass'n v. Olympia Nat. Bank, C.C.A.Wash., 80 F.2d 561—Baldwin v. Myers, C.C.A.Ark., 75 F.2d 529—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A. Cal., 66 F.2d 56, 89 A.L.R. 279—In re Schulte-United, C.C.A.Mo., 59 F.2d 553—Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, C.C.A.Mo., 28 F.2d 177, modifying decree, D.C., Central Union Trust Co. of New York v. Missouri K. & T. Ry. Co., 28 F.2d 176, and affirming North American Co. v. St. Louis & S. F. R. Co., 28 F.2d 174, certiorari denied Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, 49 S.Ct. 179, 278 U.S. 655, 73 L.Ed. 564—Western Petroleum Co. v. Tidal Gasoline Co., C.C.A.Ill., 284 F. 82—Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., Mo., 251 F. 789, 164 C.C.A. 23.

D.C.—Junghans v. Junghans, 112 F. 2d 212, 72 App.D.C. 129.

53. U.S.—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A. Neb., 74 F.2d 160—U. S. v. Stephanidis, C.C.A.N.Y., 47 F.2d 554.

In such a case there is an unusually strong presumption in favor of the rulings below.—Lopez v. Gautier, C.C.A.Puerto Rico, 41 F.2d 914, certiorari granted Sanchez v. Borras, 51 S.Ct. 80, 282 U.S. 826, 75 L.Ed. 937, and certiorari dismissed Lopez v. Gautier, 51 S.Ct. 490, 283 U.S. 798, 75 L.Ed. 1421.

54. U.S.—Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., C.C.A.Minn., 68 F.2d 787.

review depends on evidence, and the record on appeal does not show or purport to show all the evidence pertaining to it in the manner required by the practice, it will be presumed that the evidence was sufficient to sustain the ruling or the action of the court.[55] Indeed, evidence omitted from the record will be presumed to be adverse to appellant.[56]

So also, on a partial or incomplete record, the court of appeals will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of;[57] but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.[58] Thus, in support of the ruling or decision complained of, it will be presumed on appeal, as to matters not fully disclosed by the record, that a private corporation acted regularly and within its corporate powers,[59] that parties acted in good faith,[60] that public officers performed their duties,[61] that administrative officers acted regularly and in an authorized manner,[62] that the lower court had power to sell particular assets,[63] that statutory requirements were complied with,[64] and that the court below had judicial knowledge of certain facts.[65] So presumptions will be indulged in an appropriate case as to the validity and effectiveness of legislative enactments;[66] the execution,[67] contents,[68] nature, and effect[69] of papers, documents, and written instruments; and other matters.[70]

55. U.S.—Cross v. Georgia Iron & Coal Co., Ga., 250 F. 438, 162 C.C.A. 508—First Nat. Bank of Ft. Wayne, Ind., v. Library Bureau, Ind., 211 F. 113, 128 C.C.A. 41.

56. U.S.—Stepp v. McAdams, C.C.A. Cal., 88 F.2d 925—Greco v. Haff, C.C.A.Cal., 63 F.2d 863.

57. U.S.—Albion-Idaho Land Co. v. Naf Irr. Co., C.C.A.Utah, 97 F.2d 439—Lambert v. Central Bank of Oakland, C.C.A.Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 436, 300 U.S. 658, 81 L.Ed. 867—Rieke Metal Products Co. v. Finney, C.C.A.Ind., 70 F.2d 509—Bartlett Trust Co. v. Elliott, C.C.A.Mo., 40 F.2d 351, affirming, D.C., 30 F.2d 700—Rose v. Haverty Furniture Co., C.C.A.Ga., 15 F.2d 345.

58. U.S.—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—Great American Ins. Co. v. Glenwood Irr. Co., C.C.A. Colo., 265 F. 594.

59. U.S.—Florida Blue Ridge Corporation v. Tennessee Electric Power Co., C.C.A.Ga., 106 F.2d 913, certiorari denied 60 S.Ct. 591, 309 U.S. 666, 84 L.Ed. 1013.

60. U.S.—Obartuch v. Security Mut. Life Ins. Co., C.C.A.Ill., 114 F.2d 873, certiorari denied 61 S.Ct. 730, 312 U.S. 696, 85 L.Ed. 1131, rehearing denied 61 S.Ct. 824, 312 U.S. 716, 85 L.Ed. 1146.

61. U.S.—Walton v. Wild Goose Mining & Trading Co., Alaska, 123 F. 209, 60 C.C.A. 155, certiorari denied 24 S.Ct. 856, 194 U.S. 631, 48 L.Ed. 1158.

62. U.S.—U. S. v. Johnson, C.C.A. Okl., 87 F.2d 155, affirming, D.C., 11 F.Supp. 897.

63. **Record silent as to nature of suit**

On appeal from decree directing property of defendants to be sold free of all liens including taxes, where nature of original suit does not appear, power of court to sell property was presumed.—Spreckels v. Spreckels Sugar Corporation, C.C.A.N.Y., 79 F.2d 332.

64. U.S.—Chandler v. Pennsylvania R. Co., C.C.A.Va., 11 F.2d 39, affirming, D.C., 9 F.2d 703.

65. U.S.—Nev-Cal Electric Securities Co. v. Imperial Irr. Dist., C.C.A.Cal., 85 F.2d 886, certiorari denied 57 S.Ct. 493, 300 U.S. 662, 81 L.Ed. 871.

66. U.S.—Inter-Island Steam Nav. Co. v. Territory of Hawaii, C.C.A. Hawaii, 96 F.2d 412, certiorari granted Inter-Island Steam Nav. Co. v. Territory of Hawaii by Public Utility Commission, 59 S.Ct. 68, 305 U.S. 580, 83 L.Ed. 366, affirmed Inter-Island Steam Nav. Co. v. Territory of Hawaii by Public Utility Commission, of Hawaii, 59 S.Ct. 202, 305 U.S. 306, 83 L.Ed. 189.

67. **Place of execution**

Where record was silent as to place of execution or performance of loan agreements between commodity credit corporation and cotton producers, circuit court of appeals could assume that agreements were executed where the producers resided.—Commodity Credit Corporation v. Henwood, C.C.A.Mo., 126 F.2d 145.

68. U.S.—Schmid v. Alice Bank & Trust Co., C.C.A.Tex., 86 F.2d 590—American Bureau of Shipping v. Allied Oil Co., C.C.A.Ohio, 64 F.2d 509.

Contents of summary of evidence

Where order of district judge recited his consideration of a summary of the evidence, but no summary was sent to appellate court, except so far as contained in referee's findings of fact and conclusions of law, and neither party referred to it or asked to have it sent up, it will be assumed that, if there was a separate summary, it contained substantially no more than as shown by referee's findings.—Titus v. Maxwell, C.C.A.Mich., 281 F. 433.

69. U.S.—Schmid v. Alice Bank & Trust Co., C.C.A.Tex., 86 F.2d 590. 4 C.J. p 737 note 54.

70. **Particular facts presumed on appeal**

(1) That courts will not violate established rules of comity.—McCrew v. Stanolind Oil & Gas Co., C.C.A. Tex., 80 F.2d 273.

(2) That fees involved in the litigation were not fees which had been abolished by statute.—Carriso, Inc. v. U. S., C.C.A.Cal., 106 F.2d 707.

(3) That one of the parties was not connected with the illegal transportation of liquor.—Shawnee Nat. Bank v. U. S., Okl., 249 F. 583, 161 C.C.A. 509.

(4) That a vendor was ready, willing, and able to perform his obligations under a contract for the sale of real estate.—Barrett v. Gay, C.C.A. Miss., 25 F.2d 565.

(5) That insurer, instituting interpleader proceedings, deposited in court all that was due on policy.—Cramer v. Phœnix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phœnix Mut. Life Ins. Co. of Hartford, Conn., v. Lafferty, 16 F.Supp. 740.

(6) That a tax commission correctly determined the value of property assessed.—Adams County v. Northern Pac. Ry. Co., C.C.A.Wash., 115 F.2d 768.

(7) That private property would not be unlawfully taken.—U. S. v. Winkle Terra Cotta, C.C.A.Mo., 110 F.2d 919.

(8) That a state court would not act without giving parties to proceedings therein an opportunity to be heard.—Axelrod v. Osage Oil & Refining Co., C.C.A.Okl., 29 F.2d 712.

(9) Other miscellaneous facts.—Kennedy v. U. S., C.C.A.Ariz., 119 F.2d 564—Jackson v. Quickslip Co., C.C.A.N.Y., 110 F.2d 731, affirming, D.C., 27 F.Supp. 338—Field v. Waterman S. S. Corporation, C.C.A.Ala., 104

Conversely, it will not be presumed on appeal that a personal representative will violate his duties,[71] or that a state court would place on a state statute a construction making it invalid where it was reasonably susceptible of a construction under which it would be valid.[72]

Exercise of discretion. Where the trial court made an order which was within its discretion to grant or refuse, there is a strong presumption that the power of discretion was exercised.[73] To overcome this presumption the record must affirmatively show that the order was granted because of an erroneous conclusion that the court was without discretionary power to refuse it.[74]

Presumptions unwarranted by the record will not be indulged.[75]

(2) Organization and Jurisdiction of Lower Court

If nothing to the contrary appears, the court of appeals, in support of the judgment, usually will make every reasonable presumption in favor of the jurisdiction and organization of the court below.

Where the lower court has assumed jurisdiction of the cause and there is nothing in the record to indicate lack of jurisdiction, the circuit court of appeals will, to avoid reversal, indulge in every reasonable presumption in favor of the jurisdiction of the lower court,[76] and of its having properly found and determined that it had jurisdiction.[77] Indeed jurisdictional allegations in a pleading will be accepted as true by the appellate court where they were not denied or disproved in the lower court and that court made no inquiry into their truth and no express finding with reference thereto.[78]

Conversely, where the court below dismissed the action for want of jurisdiction, every reasonable presumption will be indulged, on appeal, in favor of the trial court's ruling,[79] particularly where the record on appeal is incomplete.[80]

Organization. If nothing to the contrary appears in the record, it will be presumed that the case was tried to a judge duly qualified to hold the court[81] and that he held the court within the district thereof.[82] Likewise, it will be assumed, in the absence of a contrary showing, that a stenographer who reported the trial was duly appointed where no point as to his status was made in the argument on appeal.[83]

(3) Parties and Process

The court of appeals generally will indulge all reasonable presumptions with respect to parties and process necessary to sustain the judgment of the lower court.

The court of appeals will generally indulge all reasonable presumptions with respect to parties, or rulings thereon, necessary to sustain the judgment of the lower court.[84]

F.2d 849—McCampbell v. New York Life Ins. Co., C.C.A.Tex., 288 F. 465, certiorari denied 43 S.Ct. 705, 262 U. S. 759, 67 L.Ed. 1219.

71. U.S.—Gillespie v. Schram, C.C. A.Mich., 108 F.2d 39.

72. U.S.—Norton v. Cass County, C. C.A.Tex., 115 F.2d 884.

73. U.S.—Pilot Life Ins. Co. v. Habis, C.C.A.S.C., 90 F.2d 842.

74. U.S.—Pilot Life Ins. Co. v. Habis, supra.

75. **Meaning of foreign law**
Where translation of material foreign laws was either erroneous or incomplete, as introduced in evidence at trial, circuit court of appeals would not speculate concerning the correct meaning of the foreign laws. —Western Union Telegraph Co. v. Nester, C.C.A.Cal., 106 F.2d 587, affirming, D.C., Nester v. Western Union Telegraph Co., 25 F.Supp. 478, certiorari granted Western Union Telegraph Co. v. Nester, 60 S.Ct. 468, 309 U.S. 643, 84 L.Ed. 997, reversed on other grounds 60 S.Ct. 769, 309 U. S. 582, 84 L.Ed. 960, 128 A.L.R. 628.

76. U.S.—Chicago Bank of Commerce v. Carter, C.C.A.Ark., 61 F. 2d 986.

Jurisdictional amount
Where no objection is made that a bill does not show the requisite amount involved to give a federal court jurisdiction, and it contains allegations from which such amount may be inferred and could properly be alleged by amendment, the court of appeals may properly sustain the jurisdiction.—Williams v. Molther, N. Y., 198 F. 460, 117 C.C.A. 220, reversing, C.C., 189 F. 700.

77. **Incomplete record**
Where the evidence at the trial was not brought into the record, the court of appeals must assume that it was sufficient to support the trial court's decision that it had jurisdiction of defendant.—Bendix Home Appliances v. Radio Accessories Co., C.C.A.Neb., 129 F.2d 177.

78. U.S.—Roberts Min. & Mill. Co. v. Schrader, C.C.A.Nev., 95 F.2d 522.

79. U.S.—Mills v. Smith, C.C.A.Ind., 113 F.2d 404, certiorari denied Smith v. Mills, 61 S.Ct. 73, 311 U.S. 692, 85 L.Ed. 447.

80. **Facts assumed to show lack of jurisdiction**
Where, on an appeal from a judgment dismissing the action for want of jurisdiction, the record did not disclose whether the court reached its conclusion from the pleadings or evidence, and the record did not disclose the evidence on which the ruling might have been based, the circuit court of appeals must assume that facts were before the trial court which showed a lack of jurisdiction. —Sturhahn v. General Household Utilities Co., C.C.A.Ga., 92 F.2d 415.

81. U.S.—The Alaska, C.C.A.N.Y., 35 F. 555.

82. **Rule applied to judge holding court in district other than his own**
U.S.—The Alaska, supra.

83. U.S.—Middleton v. Hartford Accident & Indemnity Co., C.C.A.Tex., 119 F.2d 721.

84. **Dismissal of parties**
Where complainant by leave of court files an amended bill, from which he omits one of the parties made defendant in the original bill, it will be presumed on appeal, in the absence of an affirmative showing to the contrary, that leave was given to dismiss as to such party.—Hicklin v. Marco, Or., 56 F. 549, 6 C.C.A. 10.

Addition of parties
Circuit court of appeals was re-

Process: Where the record on appeal is incomplete on the question, it will be presumed that the trial court correctly ruled on the legality or sufficiency of process or service.[85]

(4) Pleadings
(a) In general
(b) Amendments regarded as made

(a) In General

In so far as necessary to sustain the judgment under review, the court of appeals will generally indulge all reasonable presumptions with reference to the pleadings, and in favor of the correctness of the trial court's rulings thereon.

If nothing to the contrary appears, the court of appeals will generally indulge all reasonable presumptions with respect to the pleadings,[86] and in favor of the correctness of rulings thereon,[87] which are necessary to sustain the judgment of the trial court. Thus, in the absence of a contrary showing, all reasonable presumptions will be made in support of the trial court's action in allowing an amendment to the pleadings;[88] and it will be assumed that, if objection had been made in the court below to the alleged insufficiency of a pleading, that court would have granted permission to amend.[89]

Where judgment has been rendered on the pleadings, the court of appeals will presume the facts to be as alleged by the unsuccessful party.[90]

Striking out or dismissal. In reviewing the ruling or decision of the trial court on a motion to strike[91] or on a motion to dismiss,[92] the circuit

quired to assume that no order allowing defendant's motion to join additional parties was entered by district court where record failed to show entry of such order.—United Porto Rican Sugar Co. v. Del Toro, C.C.A.Puerto Rico, 80 F.2d 14.

Unreasonable presumptions with respect to parties will not be indulged.—Granzow v. Village of Lyons, C.C.A.Ill., 89 F.2d 83.

85. U.S.—Bendix Home Appliances v. Radio Accessories Co. C.C.A.Neb., 129 F.2d 177.

86. U.S.—Southern Ry. Co. v. Rhodes, Tenn., 86 F. 422, 30 C.C.A. 157.

Defense presumed properly pleaded

Where the district court entered a judgment for defendants on the pleadings on the ground of res judicata, although that defense was not pleaded in the affidavit of defense, and no point was made on writ of error of the failure to specifically plead it, the appellate court would assume that the defense was properly presented below.—Graff Furnace Co. v. Scranton Coal Co., C.C.A.Pa., 266 F. 798.

Noncompliance with rules not assumed

Where the record was silent on the point, the court of appeals could not assume that a rule of the trial court requiring pleadings to be printed before the cause was heard was not observed.—Leitch v. City of Chicago, C.C.A.Ill., 41 F.2d 728, certiorari denied 51 S.Ct. 106, 282 U.S. 891, 75 L.Ed. 786.

87. U.S.—A. C. Motor Freight Lines v. Shingledecker, C.C.A.Ind., 70 F.2d 827.

88. **Where the evidence is not in the record,** it will be presumed that the allowance of an amendment was properly made to permit the pleadings to conform to the proof.—A. C. Motor Freight Lines v. Shingledecker, C.C.A.Ind., 70 F.2d 827.

89. U.S.—Continental Ins. Co. of City of New York v. Fortner, C.C.A.Ky., 25 F.2d 398.

90. **Probabilities not considered**

On plaintiff's appeal from judgment on pleadings, court of appeals cannot act on probabilities against allegations of bill.—Davis v. Hutchinson, C.C.A.Alaska, 22 F.2d 380.

91. U.S.—George v. Mutual Investment & Agency Co., C.C.A.N.M., 284 F. 681—O'Reilly v. City of Cambridge, C.C.A.Ohio, 279 F. 961—Kansas City Southern Ry. Co. v. Lusk, Mo., 224 F. 704, 140 C.C.A. 244.

92. U.S.—Delaware & Hudson R. Corporation v. Williams, C.C.A.Ill., 129 F.2d 11—Midwest Haulers v. Brady, C.C.A.Ohio, 128 F.2d 496—U. S. v. Research Laboratories, C.C.A.Wash., 126 F.2d 42—The Maccabees v. City of North Chicago, C.C.A.Ill., 125 F.2d 330—Wilcox v. City of Pittsburgh, C.C.A.Pa., 121 F.2d 835—Albrecht v. Kinsella, C.C.A.Ill., 119 F.2d 1003—Bono v. U. S., C.C.A.N.Y., 113 F.2d 724—Fleming v. Hawkeye Pearl Button Co., C.C.A.Iowa, 113 F.2d 52—U. S. Fidelity & Guaranty Co. v. Pierson, C.C.A.Ark., 97 F.2d 560, reversing, D.C., 21 F.Supp. 678—Allen v. Caterpillar Tractor Co., C.C.A.Ill., 96 F.2d 937—Cerritos Gun Club v. Hall, C.C.A.Cal., 96 F.2d 620, affirming, D.C., 21 F.Supp. 163—William B. Scaife & Sons Co. v. Driscoll, C.C.A.Pa., 94 F.2d 664, affirming, D.C., 18 F.Supp. 748, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383—Irvin v. Buick Motor Co., C.C.A.Mo., 88 F.2d 947, certiorari denied 57 S.Ct. 932, 301 U.S. 702, 81 L.Ed. 1357, rehearing denied 58 S.Ct. 6, 302 U.S. 773, 82 L.Ed. 599—Hentschel v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 87 F.2d 833—Simmons Co. v. Crew, C.C.A.N.C., 84 F.2d 82, certiorari denied Crew v. Simmons Co., 57 S.Ct. 32, 299 U.S. 569, 81 L.Ed. 419—Moore v. Garraguez, C.C.A.Cal., 83 F.2d 139—Arkansas-Missouri Power Co. v. City of Kennett, Mo., C.C.A.Mo., 78 F.2d 911—Camden Fire Ins. Ass'n v. Di Giovanni, C.C.A.Mo., 75 F.2d 808, certiorari granted Digiovanni v. Camden Fire Ins. Ass'n, 55 S.Ct. 834, 295 U.S. 728, 79 L.Ed. 1678, reversed on other grounds 56 S.Ct. 1—U. S. v. City Sav. Bank & Trust Co. of Alliance, Ohio, C.C.A.Ohio, 73 F.2d 486—Taylor v. Spurway, C.C.A.Fla., 72 F.2d 97—Tangipahoa Bank & Trust Co. v. Kent, C.C.A.La., 70 F.2d 139—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A.Ark., 63 F.2d 585, 90 A.L.R. 544—Jenkins Petroleum Process Co. v. Sinclair Refining Co., C.C.A.Me., 62 F.2d 663, reversing, D.C., 56 F.2d 272, certiorari granted Sinclair Refining Co. v. Jenkins Petroleum Process Co., 53 S.Ct. 595, 289 U.S. 717, 77 L.Ed. 1469, and affirmed 53 S.Ct. 736, 289 U.S. 689, 77 L.Ed. 1449, 88 A.L.R. 496—U. S. v. Central Stockholders' Corporation of Vallejo, C.C.A.Cal., 52 F.2d 322, modifying, D.C., 43 F.2d 977, and followed in U. S. v. Charles S. Howard Co., C.C.A.Cal., 52 F.2d 340—Warfield v. Bixby, C.C.A.Mo., 51 F.2d 210—U. S. v. Oscar Frommel & Bro., C.C.A.N.Y., 50 F.2d 73, certiorari denied Frommel Realty & Investment Co. v. U. S., 52 S.Ct. 25, 284 U.S. 647, 76 L.Ed. 549—Gilbert v. Fontaine, C.C.A.Kan., 22 F.2d 657—Wabash Ry. Co. v. American Refrigerator Transit Co., C.C.A.Mo., 7 F.2d 335, certiorari denied American Refrigerator Transit Co. v. Wabash R. Co., 46 S.Ct. 208, 270 U.S. 643, 70 L.Ed. 776—Thompson v. Emmett Irr. Dist., Idaho, 227 F. 560, 142 C.C.A. 192.

court of appeals will assume the truth of the well pleaded allegations in the pleading or portion of the pleading attacked, and that they could be established by proof;[93] and it will read such allegations in the light most favorable to the party pleading them[94] and will give him the benefit of all reasonable inferences arising therefrom.[95]

Demurrers. Prior to the abolition of demurrers, the general rule was that, in so far as necessary to sustain the judgment under review, the court of appeals would indulge all reasonable presumptions with reference to demurrers, and in favor of the correctness of the trial court's rulings thereon,[96] although the facts well pleaded in the pleading demurred to would be presumed on appeal to be true.[97]

(b) Amendments Regarded as Made

Necessary or desirable amendments to the pleadings not shown by the record to have been made will often be regarded by the circuit court of appeals as having been made.

For the purpose of sustaining the judgment under review, necessary or desirable amendments to the pleadings not shown by the record to have been made, and which should have been allowed if requested, will, in the furtherance of justice, often be regarded by the circuit court of appeals as having been made.[98] This is particularly true where the amendment relates to merely formal or technical matters[99] or where the case has been tried or treated in the lower court as though the pleading were sufficient or the amendment in fact made.[1] Thus, in the furtherance of justice, the appellate court may regard the pleadings as having been amended to conform to the proof[2] where no surprise or prejudice will result therefrom[3] and where the case was tried or treated in the lower court as though the is-

Exhibits
In determining whether motion to dismiss was properly sustained, the court of appeals accepted as true all the well-pleaded allegations of fact, but looked to the exhibits themselves for the contents thereof. —Simmons v. Peavy-Welsh Lumber Co., C.C.A.Ga., 113 F.2d 812, denying rehearing 112 F.2d 662, certiorari denied 61 S.Ct. 63, 311 U.S. 685, 85 L.Ed. 442.

93. U.S.—Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., N.Y., 166 F. 254, 92 C.C.A. 318, reversing, D.C., 160 F. 144—Thomsen v. Union Castle Mail Steamship Co., N.Y., 166 F. 251, 92 C.C.A. 315, reversing, D.C., 149 F. 933.

94. U.S.—Gaskill v. Thomson, C.C.A. Neb., 119 F.2d 105—Crossland v. Kentucky Blue Grass Seed Growers' Co-op. Ass'n, C.C.A.Ky., 103 F. 2d 565—Globe Steel Abrasive Co. v. National Metal Abrasive Co., C. C.A.Ohio, 101 F.2d 489.

95. U.S.—Baker & Taylor Co. v. U. S., C.C.A.N.Y., 26 F.2d 187, affirming, D.C., 21 F.2d 787, and certiorari denied 49 S.Ct. 19, 278 U.S. 615, 73 L.Ed. 538.

96. **Demurrer sustained after abolition thereof** by rule of court, but filed prior thereto, was assumed on appeal, in the absence of a contrary showing, to have been submitted before the effective date of the rule or treated as a motion to dismiss.—Weber v. Hertzell, Okl., 230 F. 965, 145 C.C.A. 159.

Demurrer presumed waived where the record on appeal did not show what action was taken thereon in the lower court, and the case was otherwise disposed of.—Southern Ry. Co. v. Rhodes, Tenn., 86 F. 422, 30 C.C.A. 157.

Harmless error not presumed
Where, after overruling of demurrer to a paragraph of the answer pleading a parol agreement varying the terms of the written contract of sale sued on, the case was tried and there was a general finding and judgment for defendant, the circuit court of appeals would not presume, in the absence of a bill of exceptions, that there was evidence on the trial to sustain any proper theory of defense admissible under any other part of the answer, so as to render the error in overruling the demurrer harmless. —Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co., C.C.A.Ind., 275 F. 794.
Pleadings in federal courts in general see supra § 128.

97. U.S.—Sabine Lumber Co. v. Broderick, C.C.A.La., 88 F.2d 586, certiorari denied Broderick v. Sabine Lumber Co., 58 S.Ct. 31, 302 U.S. 711, 82 L.Ed. 549—Merritt v. American Mut. Liability Ins. Co., C.C.A. Tex., 67 F.2d 777—American Mfg. Co. v. City of St. Louis, Mo., C.C.A. Mo., 296 F. 899.
4 C.J. p 747 note 32.

98. U.S.—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 114 F.2d 526, certiorari denied 61 S.Ct. 141, 311 U.S. 701, 85 L.Ed. 455—Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., C.C.A. Minn., 68 F.2d 787—Schmidt v. U. S., C.C.A.Neb., 63 F.2d 390—Chambers v. Anderson, C.C.A.Tenn., 58 F. 2d 151—Almo Water Co. v. Jones, C.C.A.Idaho, 39 F.2d 37, certiorari denied Pierce v. Albion Idaho Land Co., 51 S.Ct. 35, 282 U.S. 862, 75 L. Ed. 762.

99. U.S.—Jenkins v. Pullman Co., C. C.A.Cal., 96 F.2d 405, reversing, D. C., Jenkins v. Southern Pac. Co., 17 F.Supp. 820, certiorari granted Pullman Co. v. Jenkins, 59 S.Ct. 83, 305 U.S. 583, 83 L.Ed. 368, and affirmed 59 S.Ct. 347, 305 U.S. 534, 83 L.Ed. 334—Sacramento Suburban Fruit Lands Co. v. Lindquist, C.C.A.Cal., 39 F.2d 900, certiorari denied 51 S.Ct. 31, 282 U.S. 853, 75 L.Ed. 756, and followed in, C.C.A., 45 F.2d 163.

1. U.S.—Gray v. City of Santa Fe, C. C.A.N.M., 89 F.2d 406, modifying, D.C., 15 F.Supp. 1074—U. S. v. Suomy, C.C.A.Or., 70 F.2d 542.

2. U.S.—Balabanoff v. Kellogg, C.C. A.Alaska, 118 F.2d 597, certiorari denied 62 S.Ct. 69, 314 U.S. 635, 86 L.Ed. 510—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 114 F.2d 526, certiorari denied 61 S.Ct. 141, 311 U.S. 701, 85 L.Ed. 455—U. S. v. Winkle Terra Cotta, C.C.A.Mo., 110 F.2d 919—United Light & Power Co. v. Grand Rapids Trust Co., C.C. A.Mich., 85 F.2d 331, affirming, D. C., Guaranty Trust Co. of New York v. Grand Rapids, G. H. & M. Ry. Co., 7 F.Supp. 511, certiorari denied in part United Light & Power Co. v. Grand Rapids Trust Co., 57 S.Ct. 118, 299 U.S. 591, 81 L.Ed. 436, certiorari granted in part Grand Rapids Trust Co. v. United Light & Power Co., 57 S.Ct. 119, 299 U.S. 534, 81 L.Ed. 393, certiorari dismissed 57 S.Ct. 312, 299 U.S. 618, 81 L.Ed. 456—McAllister v. Sloan, C.C.A.Ark., 81 F.2d 707—Nash v. Pennsylvania R. Co., C.C.A. Ohio, 60 F.2d 26—Sacramento Suburban Fruit Lands Co. v. Lindquist, C.C.A.Cal., 39 F.2d 900, certiorari denied 51 S.Ct. 31, 282 U.S. 853, 75 L.Ed. 756, and followed in, C.C.A., 45 F.2d 163.

3. U.S.—Guerini Stone Co. v. P. J. Carlin Const. Co., Puerto Rico, 39 S.Ct. 102, 248 U.S. 334, 63 L.Ed. 275, reversing P. J. Carlin Const.

sues not made or tendered by the pleadings were in fact pleaded.[4] The circuit court of appeals, however, will not regard an amendment of the pleadings as having been made where to do so would result in injustice[5] or in the reversal of a judgment otherwise correct.[6]

(5) Interlocutory Matters and Provisional Remedies

In the absence of a contrary showing, the court of appeals will make all reasonable presumptions in favor of the correctness of the lower court's orders with respect to interlocutory matters or provisional remedies.

Unless there is something in the record to show the contrary, the circuit court of appeals, when necessary to sustain the judgment being reviewed, will make all reasonable presumptions in favor of the correctness of the lower court's orders or rulings with respect to interlocutory matters or provisional remedies[7] and the regularity of the proceedings in connection therewith.[8] Accordingly, in the absence of a record showing which prevents it, the court of appeals will make all reasonable presumptions in favor of the action of the lower court in granting,[9] modifying, or dissolving[10] a preliminary injunction. On an appeal from a decree appointing, on the bill, a receiver for a corporation, however, the allegations of the bill must be taken as true.[11]

Bonds. Where the statute requires the filing of a bond as a condition precedent to the maintenance of an action, it will be presumed on appeal, the record being silent on the matter, that the trial court, in the exercise of its sound discretion, deemed the bond filed sufficient.[12]

(6) Reference

Generally, reasonable presumptions will be indulged on appeal to support proceedings under an order of reference.

Where the case was referred by the lower court, and the record does not show the contrary, it will be presumed, on appeal, that the referee, or officer to whom the matter was referred, acted within the scope of his powers;[13] that he faithfully discharged his duty;[14] that he complied with the statutory requirements;[15] and that he weighed all the evidence

Co. v. Guerini Stone Co., 241 F. 545, 154 C.C.A. 321, certiorari granted Guerini Stone Co. v. P. J. Carlin Const. Co., 38 S.Ct. 9, 245 U.S. 643, 62 L.Ed. 528—Hertz Drivurself Stations v. Ritter, C.C.A.Cal., 91 F.2d 539—Schmidt v. U. S., C.C.A.Neb., 63 F.2d 390.

4. U.S.—Carbo-Frost v. Pure Carbonic, C.C.A.Mo., 103 F.2d 210, certiorari denied 60 S.Ct. 83, 308 U.S. 569, 84 L.Ed. 478—Midland Valley R. Co. v. Excelsior Coal Co., C.C.A. Ark., 86 F.2d 177—Drilling & Exploration Corporation v. Webster, C.C.A.Cal., 69 F.2d 416—American Sugar Refining Co. v. Nassif, C.C.A. Mass., 45 F.2d 321—Indemnity Ins. Co. of North America v. Forrest, C.C.A.Cal., 44 F.2d 465—Simmons v. Swan, C.C.A.Mass., 11 F.2d 267, certiorari granted 47 S.Ct. 91, 273 U.S. 675, 71 L.Ed. 834, and reversed on other grounds 48 S.Ct. 52, 275 U. S. 113, 72 L.Ed. 190—Crescent Milling Co. v. H. N. Strait Mfg. Co., Minn., 227 F. 804, 142 C.C.A. 328, certiorari denied 36 S.Ct. 724, 241 U.S. 673, 60 L.Ed. 1231—United Kansas Portland Cement Co. v. Harvey, Kan., 216 F. 316, 132 C.C. A. 460.

Failure to object to pleadings or evidence

(1) The circuit court of appeals may regard the pleadings as amended to conform to the proofs where the sufficiency of the pleadings was not attacked in the lower court by motion or otherwise.—Balabanoff v. Kellogg, C.C.A.Alaska, 118 F.2d 597, certiorari denied 62 S.Ct. 69, 314 U. S. 635, 86 L.Ed. 510.

(2) A like rule applies where no objection was made to the reception of the evidence.—Balabanoff v. Kellogg, supra—Schmidt v. U. S., C.C.A. Neb., 63 F.2d 390—American Sugar Refining Co. v. Nassif, C.C.A.Mass., 45 F.2d 321—A. Coolot Co. v. L. Kahner Co., Cal., 140 F. 836, 72 C.C.A. 248.

Under Fed.Rules of Civ.Proc., rule 15(b), 28 U.S.C.A. foll § 723c, when issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as though they had been raised in the pleadings.—Hubshman v. Louis Keer Shoe Co., C.C.A.Ill., 129 F.2d 137—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Ehrhart, C.C.A.Tenn., 127 F.2d 341—Hover v. Genesee Valley Trust Co., C.C. A.N.Y., 123 F.2d 813, affirming, D.C., In re Fee Bros., 36 F.Supp. 995.

5. U.S.—National Refining Co. v. Pennsylvania Petroleum Co., C.C.A. Mo., 66 F.2d 914, certiorari denied 54 S.Ct. 453, 291 U.S. 667, 78 L.Ed. 1058.

6. U.S.—U. S. v. Winkle Terra Cotta, C.C.A.Mo., 110 F.2d 919.

7. U.S.—King Lumber Co. v. Benton, Tex., 186 F. 458, 108 C.C.A. 436.

Inconsistent recitals in pretrial order

Where there was disagreement on appeal as to scope of admissions by appellants recited in pretrial order, and such recitals were in a measure inconsistent, reviewing court did not attempt to resolve dispute concerning effect of the order, but for the most part gave appellants the benefit of the doubt.—Frank v. Giesy, C.C.A. Or., 117 F.2d 122.

8. **Notice**

It may be presumed, in the absence of a contrary showing in the record, that due notice was given.—Rector v. U. S., C.C.A.Okl., 20 F.2d 845—City and County of Denver v. Stenger, C.C.A.Colo., 295 F. 809.

9. U.S.—King Lumber Co. v. Benton, Tex., 186 F. 458, 108 C.C.A. 436. 4 C.J. p 752 note 43.

10. **Time of modification or vacation**

On appeal from judgment granting preliminary injunction to protect jurisdiction of district court in action for distribution of trust fund, circuit court of appeals would assume that district court would modify the injunction or set it aside whenever it received sufficient assurance that trust fund would be kept intact and available.—Doyne v. Saettele, C.C.A. Mo., 112 F.2d 155.

11. U.S.—Trustees System Co. of Pennsylvania v. Payne, C.C.A.Pa., 65 F.2d 103.

12. U.S.—Cordingly v. Kennedy, Colo., 239 F. 645, 152 C.C.A. 479.

13. U.S.—Girard Life Insurance, Annuity & Trust Co. v. Cooper, Ind.T., 51 F. 332, 2 C.C.A. 245, affirmed 16 S.Ct. 879, 162 U.S. 529, 40 L. Ed. 1062.

14. U.S.—Goldsmith Silver Co. v. Savage, Me., 229 F. 623, 144 C.C.A. 33, affirming, D.C., 211 F. 751.

15. U.S.—Boatman's Bank v. Trow-

properly received in reaching his conclusion.[16] So it will be presumed, in the absence of a contrary showing, that his report contains all the evidence taken before him where he was directed by the court to report the evidence,[17] but there is no such presumption where he was directed to report only his findings.[18]

Assent to reference. Where an order of reference did not show the presence of, or assent by, defendants, and the record threw no light on the subject, it would be assumed that they were not present when the order was made or, if present, did not assent thereto.[19]

(7) Conduct of Trial in General

In the absence of a contrary showing in the record, it will be presumed on appeal that the rulings of the trial court during the course of the trial were correct and that the trial was properly conducted.

Under the general rules considered supra subdivision e (1) of this section, the rulings of the trial court during the course and conduct of the trial will, in the absence of anything in the record to the contrary, be presumed to be correct,[20] and it will be presumed that the trial was conducted in a proper, regular, and orderly manner.[21] Accordingly, in the absence of a contrary showing in the record, the presumption on appeal is in favor of the propriety, and against the impropriety, of counsel's conduct;[22] and where the record does not show that remarks of the court were objected to and does not contain the instructions, it will be assumed that error, if any, was cured by the instructions.[23]

(8) Admissibility and Reception of Evidence

In order to sustain the judgment or decree entered below, all reasonable presumptions are indulged with respect to the admissibility and reception of evidence.

When the record is silent on the point, it will be presumed that evidence was adduced to support the court's finding and judgment;[24] and it will not be assumed that the trial court followed any improper course of procedure in taking the evidence.[25] So where the record does not indicate that appellant objected to the trial court's action in treating a certain instrument as evidence, it is to be inferred that such treatment was acquiesced in by appellant.[26]

Admissibility and rulings thereon. In the absence of a contrary showing, the trial court is ordinarily presumed, on appeal, to have ruled correctly on the admissibility of evidence.[27] Thus, where evidence requiring a foundation was admitted, it will be presumed, in the absence of a showing to the contrary, that a proper foundation was laid;[28] and where ev-

er Bros. Co., Mo., 181 F. 804, 104 C.C.A. 314.

16. U.S.—Reynolds Spring Co. v. L. A. Young Industries, C.C.A.Mich., 101 F.2d 257.

17. U.S.—Goldsmith Silver Co. v. Savage, Me., 229 F. 623, 144 C.C.A. 33, affirming, D.C., 211 F. 751.

18. U.S.—Goldsmith Silver Co. v. Savage, supra.

19. U.S.—Wm. Edwards Co. v. La Dow, Ohio, 230 F. 378, 144 C.C.A. 520, modifying, D.C., In re Miller, 221 F. 471.

20. U.S.—Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., Mo., 251 F. 789, 164 C.C.A. 23.

21. U.S.—Colorado Cent. Cons. Min. Co. v. Turck, Colo., 50 F. 888, 2 C.C.A. 67.

Conversely, it will not be assumed that the trial was conducted in an improper manner.—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539, certiorari denied 56 S.Ct. 959, 298 U.S. 686, 80 L.Ed. 1405.

Remarks of court

Court of appeals, in absence of showing in bill of exceptions, could not assume that remark of judge respecting record was equivalent to certificate that plaintiff had made a certain admission.—Brown v. Carver, C.C.A.N.Y., 45 F.2d 673.

22. **Informing jury as to insurance or indemnity**

Where it is improper to adduce evidence on the trial or hearing of a tort action which informs the jury that the loss will fall on an insurance company, and plaintiff's counsel propounds a question which calls for proper evidence and the witness in his answer includes a reference to insurance, the good faith of counsel will be presumed; but if the record affirmatively shows that there was no excuse for injecting the suggestion that insurance coverage existed, bad faith will be presumed.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297.

23. U.S.—U. S. v. Bass, C.C.A.Ind., 64 F.2d 467.

24. U.S.—Pulaski-Lonoke Drainage Dist. v. Missouri Pac. R. Co., C.C.A. Ark., 44 F.2d 899, reversed on other grounds 47 F.2d 1085.

25. U.S.—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539, certiorari denied 56 S.Ct. 959, 298 U. S. 686, 80 L.Ed. 1405.

26. U.S.—Pensacola Shipping Co. v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.Fla., 277 F. 889.

27. **Absence of exceptions to rulings**

Prior to the adoption of Fed.Rules of Civ.Proc., rule 46, 28 U.S.C.A. foll § 723c, dispensing with the necessity for formal exceptions, see § 292b (3) supra, it was held that where no exception to any ruling of the trial court on admission or rejection of evidence was shown to have been taken, the appellate court would assume that all evidence offered was properly admitted and that no proper evidence was rejected.—McCampbell v. New York Life Ins. Co., C.C.A. Tex., 288 F. 465, certiorari denied 43 S.Ct. 705, 262 U.S. 759, 67 L.Ed. 1219.

Grounds of admissibility

Where defendant's counsel, in effort to have hospital records admitted in evidence in district court, referred to statutory authority concerning admission in evidence of public records of the United States, and a second statute was controlling as to admissibility of records, on defendant's appeal, circuit court of appeals would treat defendant's claims regarding admissibility of records as being made on basis of second statute.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

28. **Hearsay**

Presumption exists that trial court correctly decided whether circumstances under which statement, sought to be introduced as exception to hearsay rule, was made, were

idence was excluded on a general objection, if any ground in fact existed for its exclusion, it will be assumed, in the absence of any request for a more specific objection, that the ruling was placed on the right ground.[29]

Where evidence was excluded and the record contains the offer of proof, the court of appeals will assume that the proof could have been made,[30] and it will treat the assumed facts as established[31]

Competency and examination of witnesses. Where no objection was raised at the trial as to the competency of a witness offered as an expert, it will be assumed that he sufficiently qualified as an expert;[32] and, in the absence of a contrary showing, it will be presumed that questions asked him were proper in form and subject matter.[33]

(9) Dismissal, Nonsuit, and Direction of Verdict

(a) Dismissal
(b) Nonsuit
(c) Direction of verdict

(a) Dismissal

In the absence of a contrary showing, it will be presumed that the proceedings to obtain a dismissal, if granted, were regular, although on a dismissal for insufficiency of evidence, the evidence will be viewed in the light most favorable to the unsuccessful party.

It will be presumed in support of a judgment or decree of dismissal, in the absence of a contrary showing, that the proceedings to obtain it were regular[34] and that the court acted properly[35] and on lawful grounds.[36] In other words, the burden is on appellant to show that the judgment or decree of dismissal was erroneously entered,[37] and, where the record does not show the ground of a judgment of dismissal, there is no presumption against the correctness of the judgment.[38]

Dismissal on pleadings. As has been seen supra subdivision e (4) (a) of this section, where the judgment of dismissal is entered on the pleadings the circuit court of appeals, on appeal, must assume the truth of the allegations thereof.

Dismissal for want of prosecution. In a proper case it may be presumed that a dismissal for want of prosecution was on the merits.[39]

Where an order of dismissal is the equivalent of a directed verdict, the court of appeals, on reviewing such order, must view the evidence[40] and all inferences reasonably to be drawn therefrom[41] in the light most favorable to the party whose complaint or counterclaim, as the case may be, is dismissed by the order.

such as to exclude probability of statement being deliberately made.—Ætna Life Ins. Co. v. Kern-Bauer, C.C.A.Okl., 62 F.2d 477.

29. U.S.—Mine & Smelter Supply Co. v. Parke & Lacy Co., C.C.A.Colo., 107 F. 881.

30. U.S.—Dakota Life Ins. Co. v. Midland Nat. Bank of Minneapolis, C.C.A.Minn., 18 F.2d 903, certiorari granted Midland Nat. Bank of Minneapolis v. Dakota Life Ins. Co., 48 S.Ct. 85, 275 U.S. 515, 72 L.Ed. 402, and reversed on other grounds 48 S.Ct. 532, 277 U.S. 346, 72 L.Ed. 911, and vacated, C.C.A., Dakota Life Ins. Co. v. Midland Nat. Bank of Minneapolis, 28 F.2d 1009.

31. U.S.—Evans v. Van Dyke, C.C.A. Pa., 97 F.2d 18, affirming, D.C., Van Dyke v. Evans, 20 F.Supp. 640.

32. U.S.—Hardy-Burlingham Mining Co. v. Baker, C.C.A.Ky., 10 F.2d 277.

33. **Question assumed to include definition**

Where competency of testimony of physicians was not raised, and narrative record did not reflect whether questions to all physicians respecting total and permanent disability included definition of the term, but showed that such definition was included in question propounded to one physician, appellate court should assume that questions to the other physicians contained like definition.—U. S. v. Bowman, C.C.A.Utah, 73 F.2d 716.

34. U.S.—May Coal & Grain Co. v. Kansas City, C.C.A.Mo., 73 F.2d 345.

35. U.S.—Hawke v. Servicised Products Corporation, C.C.A.Ohio, 95 F. 2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049—May Coal & Grain Co. v. Kansas City, C.C.A.Mo., 73 F.2d 345—Drake v. Thompson, C.C.A.Neb., 14 F.2d 933, certiorari denied 47 S.Ct. 337, 273 U.S. 744, 71 L.Ed. 870.

Improper action not presumed

Circuit court of appeals would not assume that district court dismissed case on merits when question of jurisdiction was only one properly before it.—May Coal & Grain Co. v. Kansas City, Mo., C.C.A.Mo., 73 F.2d 345.

36. U.S.—Hawke v. Servicised Products Corporation, C.C.A.Ohio, 95 F. 2d 710, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049.

37. U.S.—Rinn v. Asbestos Mfg. Co., C.C.A.Ind., 101 F.2d 344, certiorari denied 60 S.Ct. 74, 308 U.S. 555, 84 L.Ed. 467.

38. **Waiver of available defense not presumed**

Defense of prematurity being available under motion to dismiss, appellate court will not presume it was waived where record did not show ground on which court sustained motion to dismiss.—Oregon-Washington Water Service Co. v. City of Hoquiam, C.C.A.Wash., 29 F. 2d 566, amending and denying rehearing 28 F.2d 576.

39. **Rules of Civil Procedure assumed applicable**

The district court's dismissal of equity suit for want of prosecution was on merits, in absence of contrary provision in order of dismissal, under Fed.Rules of Civ.Proc. rule 41(b), 28 U.S.C.A. foll. § 723c, which circuit court of appeals will assume to be applicable, where record shows no determination by judge who made order that application of such rules would not be feasible or would work injustice.—Carnegie Nat. Bank v. City of Wolf Point, C.C.A.Mont., 110 F.2d 569.

40. U.S.—Federal Deposit Ins. Corporation v. Mason, C.C.A.Pa., 115 F.2d 548—Oquendo v. Federal Reserve Bank of New York, C.C.A.N. Y., 98 F.2d 708, certiorari denied 59 S.Ct. 251, 305 U.S. 656, 83 L.Ed. 425—Champlin Refining Co. v. Gasoline Products Co., C.C.A.Me., 29 F. 2d 331—Ploxin v. Brooklyn Heights R. Co., C.C.A.N.Y., 261 F. 854.

41. U.S.—Federal Deposit Ins. Cor-

(b) Nonsuit

Generally on an appeal from a nonsuit, or refusal thereof, the evidence must be viewed in the light most favorable to plaintiff.

Generally on appeal from a judgment of nonsuit the evidence must be considered in the light most favorable to plaintiff.[42] Accordingly he is entitled to the most favorable inferences deducible from the evidence[43] and to the rejection of the unfavorable ones;[44] and the evidence in his favor is regarded as true.[45]

Likewise, in reviewing a refusal of the lower court to grant a nonsuit, the circuit court of appeals will view the evidence in the aspect most favorable to plaintiff.[46]

Where, however, the record is not complete, the presumption is in favor of the correctness of the lower court's ruling on a motion for a nonsuit.[47]

(c) Direction of Verdict

On appeal from a directed verdict, or a refusal to direct, the evidence, as a general rule, is considered in the aspect most favorable to the adverse party, although, where the record is incomplete, the trial court's decision is presumed correct.

As a general rule, in passing on the question whether the lower court should or should not have directed a verdict for one party, the circuit court of appeals must consider the evidence in the light most favorable to the adverse party.[48] Accordingly, where a verdict was directed, the appellate court must take that view of the evidence which is most favorable to the party against whom the verdict was directed,[49] applying all favorable inferences

poration v. Mason, C.C.A.Pa., 115 F.2d 548.

42. U.S.—Jones v. Travelers' Protective Ass'n of America, C.C.A.N.C., 70 F.2d 74.

43. U.S.—Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815—E. K. Wood Lumber Co. v. Moore Mill & Lumber Co., C.C.A.Cal., 97 F.2d 402—Hotel Woodward Co. v. Ford Motor Co., N.Y., 258 F. 322, 169 C.C.A. 338.

44. U.S.—Boal v. Electric Storage Battery Co., C.C.A.Pa., 98 F.2d 815.

45. U.S.—Whitehurst v. Standard Oil Co., C.C.A.Ga., 8 F.2d 728—Hotel Woodward Co. v. Ford Motor Co., N.Y., 258 F. 322, 169 C.C.A. 338.

46. U.S.—Reading Co. v. Layton, C. C.A.N.J., 92 F.2d 289.

47. **Grounds assumed sufficient**
In absence of proper record showing grounds of motion for nonsuit, the circuit court of appeals must assume that they were sufficient.—Spracklen v. Atchison, T. & S. F. Ry. Co., C.C.A.Cal., 7 F.2d 468—4 C.J. p 764 note 74.

Evidence presumed to warrant nonsuit
Where record does not disclose evidence before trial court at time nonsuit was granted, presumption exists that evidence warranted order of nonsuit.—Dulion v. S. A. Lynch Enterprise Finance Corporation, C.C. A.Ga., 53 F.2d 568, 82 A.L.R. 509, certiorari denied 52 S.Ct. 312, 285 U.S. 540, 76 L.Ed. 933.

48. U.S.—Smails v. O'Malley, C.C. A.Neb., 127 F.2d 410—New York, C. & St. L. R. Co. v. Slater, C.C. A.Ind., 23 F.2d 777, certiorari denied 48 S.Ct. 601, 277 U.S. 605, 72 L.Ed. 1011—Vascacillas v. Southern Pac. Co., Nev., 247 F. 8, 159 C.C.A. 226.

49. U.S.—Brownell v. Tide Water Associated Oil Co., C.C.A.N.H., 121 F.2d 239—Flynn v. Crume, C.C.A. Ind., 101 F.2d 661—Lucas v. Brown, C.C.A.Neb., 82 F.2d 361—Laughlin v. Chesapeake & O. Ry. Co., C.C.A. W.Va., 68 F.2d 242—Madray v. U. S., C.C.A.S.C., 55 F.2d 552—Pickens County v. National Surety Co., C.C.A.S.C., 13 F.2d 758.
4 C.J. p 765 note 86.

Where the verdict was directed for plaintiff, the circuit court of appeals must accept that view of the evidence which is most favorable to defendant.—Massachusetts Bonding & Insurance Co. v. Hudspeth, C.C.A. Ark., 94 F.2d 467—Virginian Ry. Co. v. Chambers, C.C.A.W.Va., 46 F.2d 20, certiorari granted 51 S.Ct. 352, 283 U.S. 813, 75 L.Ed. 1430, and affirmed 52 S.Ct. 27, 284 U.S. 577, 76 L.Ed. 501—Davenport Ladder Co. v. Edward Hines Lumber Co., C.C.A.Iowa, 43 F.2d 63—Hartman, Goldsmith & Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 33 F.2d 89.

Where the verdict was directed for defendant
(1) The circuit court of appeals will view the evidence in the light most favorable to plaintiff.—Johnson v. Dierks Lumber & Coal Co., C.C.A. Ark., 130 F.2d 115—Carter v. Kurn, C.C.A.Ark., 127 F.2d 415—Atkinson v. Dixie Greyhound Lines, C.C.A.Miss., 125 F.2d 237—Robins v. Pitcairn, C. C.A.Ill., 124 F.2d 734—Long v. London & Lancashire Indemnity Co. of America, C.C.A.Ohio, 119 F.2d 628—Myers v. American Well Works, C.C. A.Va., 114 F.2d 252, certiorari denied 61 S.Ct. 842, 313 U.S. 563, 85 L.Ed. 1522—Nelson v. Business Men's Assur. Co. of America, C.C.A.Ill., 108 F. 2d 363—Yukes v. Globe S. S. Corporation, C.C.A.Ohio, 107 F.2d 888—McGogney v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 103 F.2d 649—Thomson v. Pennsylvania R. Co., C.C.A.Ohio, 88 F.2d 148—Feak v. Marion Steam Shovel Co., C.C.A.Or., 84 F.2d 670, certiorari denied 57 S.Ct. 231, 299 U.S. 604, 81 L.Ed. 446—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106—Ove Tysko v. Royal Mail Steam Packet Co., C.C.A.Or., 81 F.2d 960—Lucas v. Great Atlantic & Pacific Tea Co., C.C.A.Ohio, 77 F.2d 1—Gamer v. New York Life Ins. Co., C.C.A.Mont., 76 F.2d 543—Tschudi v. Metropolitan Life Ins. Co., C.C.A.Iowa, 72 F.2d 306—Harris v. U. S., C.C.A.Va., 70 F.2d 889—Odom v. U. S., C.C.A.S.C., 70 F.2d 104—Limbeck v. Interstate Power Co., C.C.A.Iowa, 69 F.2d 249—Angco v. Standard Oil Co. of California, C.C.A.Hawaii, 66 F.2d 929—Hampton v. Des Moines & C. I. R. Co., C.C.A.Iowa, 65 F.2d 899—Andrews v. U. S., C.C.A.Ark., 63 F.2d 184—Nelson v. Chicago, M., St. P. & P. R. Co., C.C.A.Ill., 62 F.2d 1053—Calloway v. Pennsylvania R. Co., C. C.A.W.Va., 62 F.2d 27—Bartee v. U. S., C.C.A.Tenn., 60 F.2d 247—Britt v. U. S., C.C.A.Tenn., 59 F.2d 733—Engstrom v. De Witt, C.C.A.Minn., 58 F. 2d 137—Montgomery Ward & Co. v. Watson, C.C.A.W.Va., 55 F.2d 184—McNally v. U. S., C.C.A.Minn., 52 F. 2d 440—Philyaw v. Arundel Corporation, C.C.A.S.C., 51 F.2d 183—Keeler v. Fred T. Ley & Co., C.C.A.Mass., 49 F.2d 872—Slocum v. Erie R. Co., C. C.A.N.Y., 47 F.2d 216—Ford v. U. S., C.C.A.Mass., 44 F.2d 754—Summers v. Denver Tramway Corporation, C. C.A.Colo., 43 F.2d 286—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A.Ark., 41 F.2d 319—Ohio Galvanizing & Mfg. Co. v. Southern Pac. Co., C.C.A. Ky., 39 F.2d 840, certiorari denied 51 S.Ct. 83, 282 U.S. 879, 75 L.Ed. 776—Roberts v. White Star Bus Line, C. C.A.Puerto Rico, 38 F.2d 1, certiorari denied White Star Bus Line v. Roberts, 50 S.Ct. 463, 281 U.S. 764, 74 L. Ed. 1172—Booth v. Concordia Fire Ins. Co. of Milwaukee, C.C.A.S.C., 30

arising therefrom,[50] and disregarding evidence favorable to the successful party.[51] Moreover, the unsuccessful party's evidence will be accepted as true[52] and given its greatest force,[53] and all conflicts in the evidence will be resolved in his favor.[54] The court of appeals, however, may safely assume, where a verdict was directed for defendant, that plaintiff's case was not helped out by an impressive atmosphere in the trial court not shown in the record.[55]

Refusal of directed verdict. That view of the evidence most favorable to the party against whom a directed verdict was asked must be taken by the circuit court of appeals on review of the denial of a motion to direct a verdict,[56] whether for plaintiff[57] or for defendant.[58] Accordingly, on appeal

F.2d 20—Croty v. Pullman Co., C.C.A.Wis., 25 F.2d 563—Clark v. McNeill, C.C.A.Ky., 25 F.2d 247—Gajda v. Reick-McJunkin Dairy Co., C.C.A.Ohio, 18 F.2d 279—Farley v. Norfolk & W. Ry. Co., C.C.A.W.Va., 14 F.2d 93—Waid v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 14 F.2d 90—Gray v. Davis, C.C.A.N.H., 294 F. 57—Batson v. Rosofa, C.C.A.N.Y., 261 F. 874—Sowles v. Norcross Bros. Co., Vt., 195 F. 889, 115 C.C.A. 577—Wolf v. Lovering, N.Y., 159 F. 91, 86 C.C.A. 281.

(2) It must assume as established all the facts that the evidence supporting plaintiff's claim reasonably tends to prove.—Galloway v. U. S., C.C.A.Cal., 130 F.2d 467—White Bear Theatre Corporation v. State Theatre Corporation, C.C.A.Minn., 129 F.2d 600—Tyrakoski v. U. S., C.C.A.Ill., 119 F.2d 339—Johnson v. J. H. Yost Lumber Co., C.C.A.Neb., 117 F.2d 53—Nielsen v. Richman, C.C.A.S.D., 114 F.2d 343, certiorari denied 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 459—Clay County Cotton Co. v. Home Life Ins. Co. of New York, C.C.A.Ark., 113 F.2d 856—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441—Indemnity Ins. Co. of North America v. Atchison, T. & S. F. Ry. Co., C.C.A.Ariz., 85 F.2d 438, rehearing denied 85 F.2d 1006—Ojus Mining Co. v. Manufacturers Trust Co., C.C.A.Idaho, 82 F.2d 74.

Where both parties sought directed verdict

(1) Prior to the adoption of Fed. Rules of Civ. Proc., rule 50(a), 28 U.S.C.A. following § 723c, which changed the former federal rule with respect to the waiver of a trial by jury where both parties moved for a directed verdict, it was held that, where both parties moved unqualifiedly for a directed verdict, and the court directed a verdict or found for plaintiff, the circuit court of appeals, on review, would view the evidence in the light most favorable to plaintiff.—U. S. v. Brewer, C.C.A.Iowa, 87 F.2d 672—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C.A.Ark., 84 F.2d 930—Columbia Casualty Co. v. Lyle, C.C.A.Tex., 81 F.2d 281—Allegheny Valley Brick Co. v. C. W. Raymond Co., N.Y., 219 F. 477, 135 C.C.A. 189—Murch Bros. Constr. Co. v. Johnson, Tenn., 203 F. 1, 121 C.C.A. 353.

(2) In such a case the reviewing court would accept plaintiff's uncontradicted evidence as true.—Hansen & Rowland v. Fidelity & Deposit Co. of Maryland, C.C.A.Wash., 72 F.2d 151.

(3) Defendant had the burden, on appeal, of showing that there was no evidence to support the verdict directed for plaintiff.—Chicago & N. W. Ry. Co. v. Wilcox Co., C.C.A.Ill., 68 F.2d 883.

50. U.S.—Galloway v. U. S., C.C.A.Cal., 130 F.2d 467—White Bear Theatre Corporation v. State Theatre Corporation, C.C.A.Minn., 129 F.2d 600—Carter v. Kurn, C.C.A.Ark., 127 F.2d 415—Robins v. Pitcairn, C.C.A.Ill., 124 F.2d 734—Tyrakoski v. U. S., C.C.A.Ill., 119 F.2d 339—Johnson v. J. H. Yost Lumber Co., C.C.A.Neb., 117 F.2d 53—Nielsen v. Richman, C.C.A.S.D., 114 F.2d 343, certiorari denied 61 S.Ct. 172, 311 U.S. 705, 85 L.Ed. 459—Myers v. American Well Works, C.C.A.Va., 114 F.2d 252, certiorari denied 61 S.Ct. 842, 313 U.S. 563, 85 L.Ed. 1522—Clay County Cotton Co. v. Home Life Ins. Co. of New York, C.C.A.Ark., 113 F.2d 856—Nelson v. Business Men's Assur. Co. of America, C.C.A.Ill., 108 F.2d 363—Still v. Union Circulation Co., C.C.A.N.Y., 101 F.2d 11, certiorari denied 60 S.Ct. 78, 308 U.S. 565, 84 L.Ed. 474—Svenson v. Mutual Life Ins. Co. of New York, C.C.A.S.D., 87 F.2d 441—Indemnity Ins. Co. of North America v. Atchison, T. & S. F. Ry. Co., C.C.A.Ariz., 85 F.2d 438, rehearing denied 85 F.2d 1006—Lucas v. Brown, C.C.A.Neb., 82 F.2d 361—Ojus Mining Co. v. Manufacturers Trust Co., C.C.A.Idaho, 82 F.2d 74—Blue Valley Creamery Co. v. Consolidated Products Co., C.C.A.Mo., 81 F.2d 182—Andrews v. U. S., C.C.A.Ark., 63 F.2d 184—McNally v. U. S., C.C.A.Minn., 52 F.2d 440—Summers v. Denver Tramway Corporation, C.C.A.Colo., 43 F.2d 286—Buckeye Cotton Oil Co. v. Louisville & N. R. Co., C.C.A.Tenn., 24 F.2d 347—Waid v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 14 F.2d 90—Pickens County v. National Surety Co., C.C.A.S.C., 13 F.2d 758—Davis v. Carnegie Steel Co., Ohio, 244 F. 931, 157 C.C.A. 281—Sonnenberg v. Southern Pac. Co., Cal., 159 F. 884, 87 C.C.A. 64.

51. U.S.—Kuper v. Betzer, C.C.A.S.D., 115 F.2d 842—McGogney v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 103 F.2d 649.

52. U.S.—Robins v. Pitcairn, C.C.A.Ill., 124 F.2d 734—Shaw v. Great Atlantic & Pacific Tea Co., C.C.A.S.C., 115 F.2d 684—Blue Valley Creamery Co. v. Consolidated Products Co., C.C.A.Mo., 81 F.2d 182—Braman v. Mutual Life Ins. Co. of New York, C.C.A.Minn., 73 F.2d 391—Bugh v. Employers' Reinsurance Corporation, C.C.A.Tex., 63 F.2d 36—Detroit, G. H. & M. Ry. Co. v. Maldonado, C.C.A.Mich., 59 F.2d 911—Wharton v. Ætna Life Ins. Co., C.C.A.Ark., 48 F.2d 37, certiorari denied Ætna Life Ins. Co. v. Wharton, 52 S.Ct. 9, 284 U.S. 621, 76 L.Ed. 529—Davenport Ladder Co. v. Edward Hines Lumber Co., C.C.A.Iowa, 43 F.2d 63—Guffey v. Gulf Production Co., C.C.A.Pa., 17 F.2d 930—Mims v. Reid, C.C.A.Va., 286 F. 900—Davis v. Carnegie Steel Co., Ohio, 244 F. 931, 157 C.C.A. 281—Brothers v. Lidgerwood Mfg. Co., N.Y., 223 F. 359, 138 C.C.A. 460.

53. U.S.—Myers v. American Well Works, C.C.A.Va., 114 F.2d 252, certiorari denied 61 S.Ct. 842, 313 U.S. 563, 85 L.Ed. 1522.

54. U.S.—Carter v. Kurn, C.C.A.Ark., 127 F.2d 415—Kuper v. Betzer, C.C.A.S.D., 115 F.2d 842.

55. U.S.—Copeland v. Hines, C.C.A.Ohio, 269 F. 361.

56. U.S.—Lake Shore Electric Ry. Co. v. Kurtz, 218 F. 165, 133 C.C.A. 521—Illinois Cent. R. Co. v. Egan, Iowa, 203 F. 937, 122 C.C.A. 239.

57. U.S.—Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410—Commercial Trust Co. of New Jersey v. Kealey, C.C.A.Va., 92 F.2d 397.

58. U.S.—Kroger Grocery & Baking Co. v. Reddin, C.C.A.Mo., 128 F.2d 787—Lykes Bros. S. S. Co. v. Grubaugh, C.C.A.Tex., 128 F.2d 387, modified on other grounds 130 F.2d 25—Cram v. Eveloff, C.C.A.Minn., 127 F.2d 486—Cole v. U. S., C.C.A.Ind., 127 F.2d 470—Ferguson v. Union Nat. Bank of Clarksburg, C.C.A.W.Va., 126 F.2d 753—Canadian Pac. Ry. Co. v. Sullivan, C.C.A.Mass., 126 F.2d 433, certiorari de-

the evidence favorable to the party against whom the directed verdict was asked will be accepted as true;[59] evidence unfavorable to him will not be considered;[60] and all legitimate inferences will be indulged in his favor from the evidence supporting his side of the case.[61]

Where a verdict was directed on the opening statement of counsel of one of the parties, it will be presumed, on appeal, that all facts stated in the opening,[62] together with all the facts inferable therefrom,[63] would have been proved had the case been tried; and, in case the verdict was directed for defendant, all proper inferences will be drawn in support of the petition and plaintiff's statement.[64]

Verdict directed on particular issue. Where a verdict was directed because of insufficiency of evidence to support a finding on a particular issue, it may be assumed that a case was made for the jury

nied 62 S.Ct. 1291, 316 U.S. 696, 86 L.Ed. 1766—Altmayer v. Travelers Protective Ass'n of America, C.C.A.Wis., 119 F.2d 1005—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F.2d 562—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356—Southern S. S. Co. v. Meyners, C.C.A.Tex., 110 F.2d 376, certiorari denied 61 S.Ct. 40, 311 U.S. 674, 85 L.Ed. 433—U. S. v. Bemis, C.C.A.Or., 107 F.2d 894—White v. State of Maryland, to Use of Anderson, C.C.A.Md., 106 F.2d 392—American Nat. Bank & Trust Co. of Chicago v. U. S., C.C.A.Ill., 104 F.2d 783—Louisiana & Arkansas Ry. Co. v. Jackson, C.C.A.La., 95 F.2d 369—Ensign-Bickford Co. v. Reeves, C.C.A.Mo., 95 F.2d 190—L. E. Whitham Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Champlin Refining Co. v. Thomas, C.C.A.Okl., 93 F.2d 133—Reading Co. v. Layton, C.C.A.N.J., 92 F.2d 289—U. S. v. Thompson, C.C.A.Mont., 92 F.2d 135—Harlan v. Bryant, C.C.A.Ill., 87 F.2d 170—Northern Pac. Ry. Co. v. Wagner, C.C.A.Mont., 86 F.2d 63—Bonk v. Welch, C.C.A.Wis., 78 F.2d 478—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—P. F. Collier & Son Co. v. Hartfeil, C.C.A.Minn., 72 F.2d 625—Equitable Life Assur. Soc. of U. S. v. Singletary, C.C.A.S.C., 71 F.2d 409—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—U. S. v. Todd, C.C.A.Or., 70 F.2d 540—U. S. v. Anderson, C.C.A.Or., 70 F.2d 537—U. S. v. Hansen, C.C.A.Idaho, 70 F.2d 230, certiorari denied Hansen v. U. S., 55 S.Ct. 119, 293 U.S. 604, 79 L.Ed. 695—Atlantic Refining Co. v. Jones, C.C.A.W.Va., 70 F.2d 89—Chesapeake & O. Ry. Co. v. Ringstaff, C.C.A.Ohio, 67 F.2d 482—U. S. v. Albano, C.C.A.Idaho, 63 F.2d 677—U. S. v. Cornell, C.C.A.Neb., 63 F.2d 180—King Cotton Mills v. Wilson, C.C.A.N.C., 61 F.2d 1004—Standard Oil Co. of Kentucky v. Noakes, C.C.A.Ky., 59 F.2d 897—Erlanger Tremont Theatre Corporation v. Ellsmore, C.C.A.Mass., 56 F.2d 809, certiorari denied 52 S.Ct. 646, 286 U.S. 564, 76 L.Ed. 1296—Minneapolis, St. P. & S. S. M. Ry. Co. v. Galvin, C.C.A.Mich., 54 F.2d 202, certiorari denied 52 S.Ct. 407, 285 U.S. 551, 76 L.Ed. 941—Northwestern Nat. Ins. Co. v. McFarlane, C.C.A.Cal., 50 F.2d 539—Skaggs Safeway Stores v. Dunkle, C.C.A.Neb., 49 F.2d 169, certiorari denied 52 S.Ct. 9, 284 U.S. 622, 76 L.Ed. 531—Norfolk Southern Bus Corporation v. Lask, C.C.A.Va., 43 F.2d 45—Fidelity & Casualty Co. of New York v. Howe, C.C.A.Pa., 38 F.2d 741, certiorari denied 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173, and National Life Ass'n v. Howe, 50 S.Ct. 464, 281 U.S. 766, 74 L.Ed. 1174—Bangor & A. R. Co. v. Jones, C.C.A.Me., 36 F.2d 886—Texas Co. v. Brice, C.C.A.Tenn., 26 F.2d 164, certiorari denied Brice v. Texas Co., 49 S.Ct. 34, 278 U.S. 640, 73 L.Ed. 555—Chesapeake & O. Ry. Co. v. Waid, C.C.A.W.Va., 25 F.2d 366, certiorari denied 49 S.Ct. 29, 278 U.S. 629, 73 L.Ed. 547—Atlantic Coast Line R. Co. v. McLeod, C.C.A.S.C., 11 F.2d 22—Payne v. Colvin, C.C.A.Wis., 276 F. 15, certiorari denied Davis v. Colvin, 42 S.Ct. 92, 257 U.S. 652, 66 L.Ed. 417—Kenmont Coal Co. v. Patton, C.C.A.Ky., 268 F. 334—Bristol Gas & Electric Co. v. Boy, C.C.A.Tenn., 261 F. 297—Crane Co. v. Busdieker, Mo., 255 F. 664, 167 C.C.A. 40—Pennsylvania Co. v. Avran, Ohio, 249 F. 474, 161 C.C.A. 432—Flickwir & Bush v. Walkonen, N.J., 238 F. 307, 151 C.C.A. 323—Cincinnati, N. O. & T. P. Ry. Co. v. Tharp, 223 F. 615, 139 C.C.A. 161.

59. U.S.—Guardian Life Ins. Co. of America v. Kissner, C.C.A.Mo., 111 F.2d 532—Sprinkle v. Davis, C.C.A.Va., 104 F.2d 487—Schwarz v. Fast, C.C.A.Neb., 103 F.2d 865—Fort Smith Gas Co. v. Cloud, C.C.A.Ark., 75 F.2d 413—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—Pryor v. Strawn, C.C.A.Neb., 73 F.2d 595—Kroger Grocery & Baking Co. v. Yount, C.C.A.Mo., 66 F.2d 700—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541—Skaggs Safeway Stores v. Dunkle, C.C.A.Neb., 49 F.2d 169, certiorari denied 52 S.Ct. 9, 284 U.S. 622, 76 L.Ed. 531—Perkins v. Haskell, C.C.A.N.J., 31 F.2d 53, dismissing appeal, D.C., Haskell v. Perkins, 28 F.2d 222, and certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1007—International Agricultural Corporation v. Slappey, C.C.A.Ga., 261 F. 279.

60. U.S.—Empire Oil & Refining Co. v. Hoyt, C.C.A.Mich., 112 F.2d 356—Chesapeake & O. Ry. Co. v. Ringstaff, C.C.A.Ohio, 67 F.2d 482.

61. U.S.—Kroger Grocery & Baking Co. v. Reddin, C.C.A.Mo., 128 F.2d 787—Cram v. Eveloff, C.C.A.Minn., 127 F.2d 486—Cole v. U. S., C.C.A.Ind., 127 F.2d 470—Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410—Altmayer v. Travelers Protective Ass'n of America, C.C.A.Wis., 119 F.2d 1005—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F.2d 562—Guardian Life Ins. Co. of America v. Kissner, C.C.A.Mo., 111 F.2d 532—U. S. v. Bemis, C.C.A.Or., 107 F.2d 894—Amer. Nat. Bank & Trust Co. of Chicago v. U. S., C.C.A.Ill., 104 F.2d 783—Schwarz v. Fast, C.C.A.Neb., 103 F.2d 865—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—Pryor v. Strawn, C.C.A.Neb., 73 F.2d 595—Equitable Life Assur. Soc. of U. S. v. Singletary, C.C.A.S.C., 71 F.2d 409—U. S. v. Nickle, C.C.A.Mo., 70 F.2d 873—Kroger Grocery & Baking Co. v. Yount, C.C.A.Mo., 66 F.2d 700—Grand Trunk Western R. Co. v. Collins, C.C.A.Mich., 65 F.2d 875—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541—Cincinnati, N. O. & T. P. R. Co. v. Rimmer, C.C.A.Tenn., 37 F.2d 668.

Inferences contrary to established facts

The circuit court of appeals in considering the denial of a directed verdict cannot indulge in inferences and presumptions in the face of ascertained and established facts.—Chesapeake & O. Ry. Co. v. Thomason, C.C.A.Ky., 70 F.2d 860.

62. U.S.—Ratliff v. Chesapeake & O. Ry. Co., C.C.A.Ky., 116 F.2d 155.

63. U.S.—Ratliff v. Chesapeake & O. Ry. Co., supra.

64. U.S.—James B. Berry's Sons Co. of Illinois v. Monark Gasoline & Oil Co., C.C.A.Mo., 32 F.2d 74.

on the other issues.[65]

Incomplete record. In the absence of a showing to the contrary, where the record does not contain all the evidence, presumptions obtain favoring the sufficiency of the evidential support and the correctness of the lower court's decision on the question of directing a verdict.[66]

Inference on inference. While the party against whom a verdict was directed, or against whom a directed verdict was sought, is entitled to the benefit of all proper inferences that may be drawn from the evidentiary facts, as has been seen above, it is not legally correct on appeal to base one legal inference on another or one presumption on another.[67]

(10) Instructions

In the absence of a contrary showing, the circuit court of appeals will generally indulge all reasonable presumptions in favor of the propriety and sufficiency of instructions given and in favor of the correctness of rulings on requests for instructions.

For the purpose of sustaining the judgment under review, the circuit court of appeals, in the absence of a contrary showing, will generally indulge all reasonable presumptions and intendments in favor of the sufficiency and propriety of the instructions given to the jury by the lower court.[68] This is particularly true where no special instructions were requested,[69] no objections or exceptions were taken to the instructions given,[70] or where no specific error was assigned[71] or complaint otherwise made as to the charge or instructions.[72] Accordingly, error in the giving of instructions is never presumed on appeal[73] but must be affirmatively shown by the record.[74]

Requests and rulings thereon. As a general rule, if there is nothing shown to the contrary, the circuit court of appeals will make all reasonable presumptions in favor of the correctness of the trial court's rulings on requested instructions.[75] It is not to be assumed that the trial court will refuse to give proper charges;[76] and where a requested instruction was considered and refused by the trial court it will be presumed that the trial judge waived a rule of court, if violated, relating to the method of presenting requests for instructions.[77] So it will be presumed, in the absence of a showing to the contrary, that Federal Rules of Civil Procedure, rule 51, 28 U.S.C.A. following § 723c, requiring the trial court, prior to arguments to the jury, to inform counsel of its proposed action on written requests for charges were complied with.[78]

Where the record does not contain the evidence, it will be presumed that instructions given[79] and

65. **Failure to show character of employment**
Where verdict was directed in action under Federal Employers' Liability Act on ground that switchman was not employed in interstate commerce, court will, on appeal, assume that case was made for jury on issue of negligence.—Pope v. Utah-Idaho Cent. R. Co., C.C.A.Utah, 54 F.2d 575.

66. U.S.—General Finance Co. of Louisiana v. U. S., C.C.A.La., 45 F. 2d 380—Pinson v. Kansas City Southern Ry. Co., C.C.A.Tex., 37 F. 2d 652—Sternenberg v. Mailhos, Tex., 99 F. 43, 39 C.C.A. 408.
In absence of bill of exceptions, everything necessary to support direction of verdict in trial court was conclusively presumed, on appeal, to have been proved at the trial.—Reilly v. Beekman, C.C.A.N.Y., 24 F.2d 791.

67. U.S.—Altmayer v. Travelers Protective Ass'n of America, C.C. A.Wis., 119 F.2d 1005.

68. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—H. M. Byllesby & Co. v. Welch, C.C.A.Mo., 82 F.2d 539, certiorari denied 56 S.Ct. 959, 298 U. S. 686, 80 L.Ed. 1405—Fidelity & Casualty Co. of New York v. McKay, C.C.A.Tex., 73 F.2d 828—A. C. Motor Freight Lines v. Shingledecker, C.C.A.Ind., 70 F.2d 827—Coast S. S. Co. v. Brady, C.C.A. Ala., 8 F.2d 16, certiorari denied 46 S.Ct. 103, 269 U.S. 578, 70 L.Ed. 421—Steil v. Holland, C.C.A.Cal., 3 F.2d 776.
4 C.J. p 766 note 7.

69. U.S.—Najera v. Bombardieri, C. C.A.N.M., 46 F.2d 281.

70. U.S.—Gay, Sullivan & Co. v. Glaser, Crandell Co., C.C.A.Ill., 102 F.2d 149—Louisville & N. R. Co. v. Williamson, C.C.A.Ga., 87 F.2d 34—Najera v. Bombardieri, C.C.A.N.M., 46 F.2d 281—Julian Petroleum Corporation v. Courtney Petroleum Co., C.C.A.Cal., 22 F.2d 360—Cincinnati, N. O. & T. P. Ry. Co. v. Hall, C.C.A.Tenn., 243 F. 76, 155 C.C.A. 606—Ducktown Sulphur, Copper & Iron Co. v. Fortner, Tenn., 228 F. 191, 142 C.C.A. 547.
4 C.J. p 767 note 9.
Instructions deemed sufficiently favorable
Where appellant did not complain of the charge given there is a presumption that the instructions were as favorable to him as the case warranted.—Carolina C. & O. Ry. Co. v. Stroup, C.C.A.Tenn., 239 F. 75, 152 C.C.A. 125, error dismissed 37 S.Ct. 743, 244 U.S. 649, 61 L.Ed. 1371.

71. U.S.—W. G. Wetmore & Co. v. Reed, C.C.A.Miss., 98 F.2d 532—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557.

72. U.S.—Cole v. U. S., C.C.A.Ind., 127 F.2d 470—Swift & Co. v. Ellinor, C.C.A.Fla., 101 F.2d 131.

73. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.
Prejudicial error is not presumed on appeal.—Dallas Ry. & Terminal Co. v. Sullivan, C.C.A.Tex., 108 F.2d 581.

74. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187.

75. U.S.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

76. U.S.—Coast S. S. Co. v. Brady, C.C.A.Ala., 8 F.2d 16, certiorari denied 46 S.Ct. 103, 269 U.S. 578, 70 L.Ed. 421.

77. U.S.—Sun Oil Co. v. Gregory, C. C.A.Tex., 56 F.2d 108.

78. U.S.—Dallas Ry. & Terminal Co. v. Sullivan, C.C.A.Tex., 108 F.2d 581.

79. **Where "the record does not contain the evidence** . . . the presumption obtains that the charge of the court was correct and was responsive to the issue as developed by the evidence as well as by the

rulings on requested instructions[80] were correct and appropriate to the case as presented by the evidence.

If the instructions do not appear in the record, it will be presumed by the court of appeals that proper and full instructions[81] sufficiently favorable to appellant[82] were given; and this is particularly true where no exceptions were taken to the charge or instructions given.[83] So, in the absence of the entire charge, it may be presumed that the jury were properly and correctly instructed[84] and that error, if any, in the instructions before the appellate court was cured by other instructions not before the court.[85]

In support of the refusal of requested instructions which correctly stated the law and might properly have been given, it will be presumed by the appellate court that the substance of such requests was contained in other instructions that were given, where the record does not contain all the instructions given by the trial court,[86] or where it does not show that the instructions contained therein are all the instructions given by the court.[87]

(11) Custody and Conduct of Jury

In the absence of a contrary showing, it will be presumed on appeal that the officer in charge of the jury was properly instructed and performed his duties.

It will be presumed on appeal, in the absence of a contrary showing, that the officer in charge of the jury was instructed as to his duties in the manner prescribed by statute,[88] that he performed his duties,[89] and, as appears in the following subdivision of this section, that the jurors, in reaching their verdict, properly applied and followed the instructions of the court.

(12) Verdict

If there is nothing to show to the contrary, the court of appeals will generally indulge in all reasonable presumptions in favor of the correctness of the verdict.

In the absence of a contrary showing, the circuit court of appeals will usually indulge in all reasonable presumptions in favor of the correctness of the verdict.[90] Thus it will be presumed, in the absence of a contrary showing, that the verdict is in accord with the law,[91] that the jurors, in reaching the verdict, acted on evidence and not without it,[92] that they considered all of the duly admitted evidence,[93] and that they properly understood,[94] applied, and followed[95] the instructions and admonitions of the court.

pleadings."—Dangelo v. McLean Fire Brick Co., C.C.A.Ohio, 287 F. 14, 15.

80. U.S.—American Issue Pub. Co. v. Sloan, Ohio, 248 F. 251, 160 C.C.A. 329.

81. U.S.—Theurer v. Holland Furnace Co., C.C.A.Utah, 124 F.2d 494—Bankers Life Co. v. Bowie, C.C.A.Colo., 121 F.2d 779—Inland Power & Light Co. v. Grieger, C.C.A.Wash., 91 F.2d 811—Louisville & N. R. Co. v. Williamson, C.C.A.Ga., 87 F.2d 34—U. S. v. Newcomer, C.C.A.Iowa, 78 F.2d 50—S. S. Kresge Co. v. Dunne, C.C.A.Mass., 77 F.2d 755—National Surety Co. v. Earl Park State Bank, C.C.A.Ind., 63 F.2d 825—Inter-Island Steam Nav. Co. v. Ward, Hawaii, 232 F. 809, 147 C.C.A. 3, error dismissed 37 S.Ct. 1, 242 U.S. 1, 61 L.Ed. 113.

82. U.S.—Carolina C. & O. Ry. Co. v. Stroup, Tenn., 239 F. 75, 152 C.C.A. 125, error dismissed 37 S.Ct. 743, 244 U.S. 649, 61 L.Ed. 1371.

83. U.S.—T. Vidal & Co. v. Beatty Brokerage Co., C.C.A.Puerto Rico, 31 F.2d 98—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233.

84. U.S.—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Nev., 85 F.2d 187.

85. U.S.—Metropolitan Life Ins. Co. v. Armstrong, supra.

86. U.S.—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C.A. 233—Union Mut. Life Ins. Co. v. Payne, Tex., 105 F. 172, 45 C.C.A. 193.

87. U.S.—Columbia Mfg. Co. v. Hastings, Ill., 121 F. 328, 57 C.C.A. 504.

88. U.S.—Walton v. Wild Goose Mining & Trading Co., Alaska, 123 F. 209, 60 C.C.A. 155, certiorari denied 24 S.Ct. 856, 194 U.S. 631, 48 L.Ed. 1158.

89. U.S.—Walton v. Wild Goose Mining & Trading Co., supra.

90. U.S.—U. S. Fidelity & Guaranty Co. v. Leong Dung Dye, C.C.A.Hawaii, 52 F.2d 567, certiorari denied 52 S.Ct. 311, 285 U.S. 537, 76 L.Ed. 930—Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., Mo., 154 F. 545, 83 C.C.A. 431, certiorari denied 28 S.Ct. 256, 207 U.S. 589, 52 L.Ed. 354.

Finding as to negligence

Where sole question presented on appeal was whether verdict for plaintiff in death action was excessive, court of appeals presumed that finding by jury that defendant was negligent was correct.—Swift & Co. v. Ellinor, C.C.A.Fla., 101 F.2d 131.

91. U.S.—Harris v. Moreland Motor Truck Co., C.C.A.Cal., 279 F. 543, error dismissed Harris v. Moreland Truck Co., 43 S.Ct. 163, 260 U.S. 702, 67 L.Ed. 472.

92. U.S.—Betts v. Gahagan, N.C., 212 F. 120, 128 C.C.A. 636.

93. U.S.—Countee v. U. S., C.C.A.Ill., 127 F.2d 761.

Consideration limited to competent evidence

Where the only question raised on appeal was whether court erred in denying defendant's motion for directed verdict, reviewing court was required to assume that jury considered only competent evidence.—Cole v. U. S., C.C.A.Ind., 127 F.2d 470.

94. U.S.—Pennsylvania Co. v. Zahner Metal Sash & Door Co., C.C.A.Ohio, 273 F. 993.

95. U.S.—Husky Refining Co. v. Barnes, C.C.A.Idaho, 119 F.2d 715, 134 A.L.R. 1221—Maryland Casualty Co. v. Coker, C.C.A.Tex., 118 F.2d 43—Valley Shoe Corporation v. Stout, C.C.A.Mo., 98 F.2d 514—Southern Pac. Co. v. Smith, C.C.A.Ariz., 83 F.2d 451—Pennsylvania Co. v. Zahner Metal Sash & Door Co., C.C.A.Ohio, 273 F. 993—Harper & Reynolds Co. v. Wilgus, Cal., 56 F. 587, 6 C.C.A. 445—Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., Mo., 154 F. 545, 83 C.C.A. 431, certiorari denied 207 U.S. 589, 28 S.Ct. 256, 52 L.Ed. 354.

Particular instructions presumed followed

(1) Instruction to disregard improper remarks of counsel.—U. S. v. Nickerson, C.C.A.Mass., 2 F.2d 502.

Matters decided. If there is nothing to show to the contrary, the court of appeals will usually presume that every fact necessary to support the verdict has been found by the jury in favor of the prevailing party.[96]

Evidence in support of verdict. In the absence of a contrary showing, it will generally be presumed on appeal that the verdict is supported by sufficient evidence;[97] and this is particularly true where the evidence received on the trial has not been duly preserved and presented to the appellate court[98] in its entirety.[99]

Where the evidence has been duly preserved and presented to the appellate court, that court, on reviewing the sufficiency of the evidence to support the verdict, will view the evidence in the light most favorable to the party for whom the verdict was rendered,[1] accepting as true the evidence in his fa-

(2) Instruction to disregard certain improper evidence.—Graf v. Holcombe, C.C.A.Neb., 277 F. 687.

Conversely, it will not be assumed on appeal that the jury disregarded or disobeyed the instructions given.—Wock v. Wheeling & L. E. Ry. Co., C.C.A.Ohio, 61 F.2d 674—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio, 53 F.2d 318—American Ry. Express Co. v. Crabtree, C.C.A.Ky., 271 F. 287.

Action of trial judge

It will not be presumed that the trial judge permitted a verdict to stand which was in violation of the instructions given.—Gladden v. Gabbert, Miss., 219 F. 855, 135 C.C.A. 525.

96. U.S.—Theurer v. Holland Furnace Co., C.C.A.Utah, 124 F.2d 494—U. S. for Use of A. S. Schulman Electric Co. v. Standard Accident Ins. Co., C.C.A.Ill., 106 F.2d 200—Eldridge v. McGeorge, C.C.A.Ark., 99 F.2d 835—Joel v. Electrical Research Products, C.C.A.N.Y., 94 F. 2d 588—Grant Storage Battery Co. v. De Lay, C.C.A.Neb., 87 F.2d 726—United Const. Co. v. Town of Haverhill, N. H., C.C.A.Vt., 9 F.2d 538.

Particular facts

(1) The court of appeals must assume that jury found life insurance policy was delivered, where question of delivery was for jury, who found for beneficiary.—Inter-Southern Life Ins. Co. v. McElroy, C.C.A.Ark., 38 F.2d 557.

(2) Finding that actual cash value of property did not exceed insurance was implied, where jury returned verdict for full amount of policies making insured coinsurer if property was not insured to full value.—St. Paul Fire & Marine Ins. Co. v. Eldracher, C.C.A.Mo., 33 F.2d 675, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 649.

97. U.S.—Southern Pac. Co. v. Smith, C.C.A.Ariz., 83 F.2d 451—Harris v. Moreland Motor Truck Co., C.C.A.Cal., 279 F. 543, error dismissed Harris v. Moreland Truck Co., 43 S.Ct. 163, 260 U.S. 702, 67 L.Ed. 472.

Findings not challenged

It will be presumed that the evidence was sufficient to sustain a particular finding of the jury not challenged in the appellate court on this ground.—New York Life Ins. Co. v. Talley, C.C.A.Iowa, 72 F.2d 715.

98. U.S.—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A. Neb., 74 F.2d 160—Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., C.C.A.Minn., 68 F. 2d 787—Harris v. Moreland Motor Truck Co., C.C.A.Cal., 279 F. 543, error dismissed Harris v. Moreland Truck Co., 43 S.Ct. 163, 260 U.S. 702, 67 L.Ed. 472.

99. U.S.—Southern Pac. Co. v. Smith, C.C.A.Ariz., 83 F.2d 451—Pennsylvania R. Co. v. Glas, Pa., 239 F. 256, 152 C.C.A. 244.

Action by witness not reproduced

Jury's finding that gesture by defendant's driver toward plaintiff's child was so threatening as to amount to negligence will be presumed to be supported by evidence, witness having illustrated gesture, which could not be reproduced in the record.—Fell Brewing Co. v. Adamo, Pa., 245 F. 935, 158 C.C.A. 223.

1. U.S.—Lowden v. Burke, C.C.A. Minn., 129 F.2d 767—Independent Exploration Co. v. Campbell, C.C. A.Ill., 127 F.2d 899—Ætna Life Ins. Co. v. Newbern, C.C.A.Ark., 127 F. 2d 171—Shell Oil Co. v. State Tire & Oil Co., C.C.A.Tenn., 126 F.2d 971—Burdick v. Powell Bros. Truck Lines, C.C.A.Ill., 124 F.2d 694—Crowe v. Gary State Bank, C.C.A.Ind., 123 F.2d 513—Skinner v. Pennsylvania Greyhound Lines, C.C.A.Ind., 123 F.2d 497—Thomson v. Boles, C.C.A.Minn., 123 F.2d 487—Hadley v. Baltimore & O. R. Co., C.C.A.Pa., 120 F.2d 993—Vale v. Indiana County Theaters Co., C.C. A.Pa., 120 F.2d 495—Venuto v. Robinson, C.C.A.N.J., 118 F.2d 679, certiorari denied C. A. Ross, Agent, Inc. v. Venuto, 62 S.Ct. 58, 314 U.S. 627, 86 L.Ed. 504—Sierocinski v. E. I. Du Pont De Nemours & Co., C.C.A.Pa., 118 F.2d 531—Bomeisler v. M. Jacobson & Sons Trust, C.C. A.Mass., 118 F.2d 261, certiorari denied M. Jacobson & Sons Trust v. Bomeisler, 62 S.Ct. 61, 314 U.S. 630, 86 L.Ed. 505—U. S. v. Smith, C.C.A.Or., 117 F.2d 911—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Hopkins v. Pearce, C.C.A.Va., 115 F.2d 784—Lucas v. Interstate Motor Freight System, C.C.A.Wis., 115 F.2d 602—Pearl Assur. Co. v. Stacey Bros. Gas Const. Co., C.C.A. Ohio, 114 F.2d 702—Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., C.C.A.Ill., 112 F.2d 302, certiorari granted 61 S.Ct. 40, 311 U. S. 626, 85 L.Ed. 398, reversed on other grounds 61 S.Ct. 623, 312 U. S. 410, 668, 85 L.Ed. 920—Woodburn v. Standard Forgings Corporation, C.C.A.Ind., 112 F.2d 271, 129 A.L.R. 337—Hoskins Coal & Dock Corporation v. Great Lakes Dredge & Dock Co., C.C.A.Ill., 112 F.2d 263—Falstaff Brewing Corporation v. Iowa Fruit & Produce Co., C.C.A. Neb., 112 F.2d 101—Commercial Casualty Ins. Co. v. Stinson, C.C.A. Mich., 111 F.2d 63, certiorari denied 61 S.Ct. 25, 311 U.S. 667, 85 L.Ed. 428—Stephenson v. Grand Trunk Western R. Co., C.C.A.Ill., 110 F.2d 401, 132 A.L.R. 455, certiorari granted Grand Trunk Western R. Co. v. Stephenson, 60 S.Ct. 1101, 310 U.S. 623, 84 L.Ed. 1395, and 60 S.Ct. 1102, 310 U.S. 623, 84 L.Ed. 1395, certiorari dismissed 60 S.Ct. 1107, two cases, 311 U.S. 720, 85 L.Ed. 469—Stolte v. Larkin, C. C.A.Minn., 110 F.2d 226—Mutual Life Ins. Co. of New York v. Loeb, C.C.A.Ga., 107 F.2d 7—Century Ins. Co. v. First Nat. Bank, C.C.A.Tex., 102 F.2d 726, certiorari denied First Nat. Bank v. Century Ins. Co., 60 S.Ct. 84, 308 U.S. 570, 84 L.Ed. 478—Terre Haute Brewing Co. v. Dugan, C.C.A.Mo., 102 F.2d 425—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—Lewis-Kures v. Edward R. Walsh & Co., C.C.A.N.Y., 102 F.2d 42, certiorari denied 60 S.Ct. 132, 308 U.S. 596, 84 L.Ed. 499—Chicago G. W. R. Co. v. Robinson, C.C.A.Neb., 101 F.2d 994, certiorari denied 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1520—M. & M. Transp. Co. v. Cochran, C.C.A.R.I., 100 F.2d 207—U. S. ex rel. Johnson v. Morley Const. Co., C.C.A.N.Y., 98 F.2d 781, modifying, D.C., U. S. for the Use and Benefit of Johnson v. Morley Const. Co., 17 F.Supp. 378, certiorari denied

vor[2] and giving him the benefit of such favorable inferences as may reasonably be drawn from the evidence.[3] All conflicts in the evidence will be presumed to have been resolved by the jury in his favor,[4] and evidence which conflicts with that favor-

Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421—Tieben v. U. S., C.C.A.Ind., 96 F.2d 907—U. S. v. Aspinwall, C.C.A.Or., 96 F.2d 867—U. S. v. Meakins, C.C.A.Mont., 96 F.2d 751—New York Life Ins. Co. v. King, C.C.A.Mo., 93 F.2d 347—Metropolitan Life Ins. Co. v. Henderson, C. C.A.Wash., 92 F.2d 891—Megan v. Stevens, C.C.A.Iowa, 91 F.2d 419, 113 A.L.R. 992, certiorari denied Stevens v. Megan, 58 S.Ct. 267, 302 U.S. 746, 82 L.Ed. 576—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339—Ocean Accident & Guarantee Corporation v. Moore, C.C.A.Mo., 85 F. 2d 369, certiorari denied Moore v. Ocean Accident & Guarantee Corporation, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449—Phillips Petroleum Co. v. Manning, C.C.A.Ark., 81 F.2d 849—Booth v. Gilbert, C.C.A.Mo., 79 F.2d 790—Moore v. Tremelling, C.C.A.Idaho, 78 F.2d 821—Joy v. Winder, C.C.A.Okl., 78 F.2d 283—Thomas v. Slavens, C.C.A.Mo., 78 F.2d 144—U. S. v. Newcomer, C.C. A.Iowa, 78 F.2d 50—U. S. v. Anderson, C.C.A.S.C., 76 F.2d 337—Reed & Barton Corporation v. Maas, C.C.A.Mass., 73 F.2d 359—Hartford Fire Ins. Co. v. Kiser, C. C.A.S.C., 64 F.2d 288—Great Northern Ry. Co. v. Shellenbarger, C.C. A.Or., 54 F.2d 606, certiorari denied 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1290—Larabee Flour Mills Co. v. Carignano, C.C.A.Okl., 49 F. 2d 151—Kinghorn v. Pennsylvania R. Co., C.C.A.N.Y., 47 F.2d 588—Southern Ry. Co. v. Walters, C.C. A.Mo., 47 F.2d 3, certiorari granted 51 S.Ct. 495, 283 U.S. 815, 75 L.Ed. 1432, and reversed on other grounds and remanded 52 S.Ct. 58, 284 U.S. 190, 76 L.Ed. 239—Fidelity & Casualty Co. of New York v. Griner, C.C.A.Cal., 44 F.2d 706—U. S. v. Meserve, C.C.A.Or., 44 F.2d 549—U. S. Can Co. v. Ryan, C.C.A. Mo., 39 F.2d 445, certiorari denied 51 S.Ct. 23, 282 U.S. 842, 75 L.Ed. 748—Bank Sav. Life Ins. Co. v. Butler, C.C.A.Mo., 38 F.2d 972, certiorari denied 51 S.Ct. 28, 282 U.S. 850, 75 L.Ed. 753—U. S. v. Pentz, C.C.A.Or., 35 F.2d 350—Porto Rico Ry., Light & Power Co. v. Cognet, C.C.A.Puerto Rico, 3 F.2d 21, certiorari denied 45 S.Ct. 511, 268 U.S. 691, 69 L.Ed. 1159—City of East Liverpool, Ohio, v. Pitt Const. Co., C.C.A.Ohio, 285 F. 236—Delaware, L. & W. R. Co. v. Consalvo, N.J., 242 F. 264, 155 C.C.A. 104—Chicago, R. I. & P. Ry. Co. v. Sharp, Mo., 63 F. 532, 11 C.C.A. 337.

U.S.—American Steel & Wire Co. v. Sieraski, C.C.A.Ohio, 119 F.2d 709—Duluth, W. & P. Ry. Co. v. Zuck, C.C.A.Minn., 119 F.2d 74—Ætna Life Ins. Co. v. McAdoo, C. C.A.Ark., 115 F.2d 369—Hoskins Coal & Dock Corporation v. Great Lakes Dredge & Dock Co., C.C.A. Ill., 112 F.2d 263—Sears, Roebuck & Co. v. Copeland, C.C.A.N.C., 110 F.2d 947—U. S. v. Fields, C.C.A. Ark., 102 F.2d 535—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C.A.Iowa, 101 F.2d 493—Colorado Life Ins. Co. v. Steele, C.C.A.Ark., 101 F.2d 448—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Noble v. U. S., C.C. A.Iowa, 98 F.2d 441—U. S. v. Klever, C.C.A.Wash., 93 F.2d 15—Carter Coal Co. v. Nelson, C.C.A.Va., 91 F.2d 651—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339—Fidelity & Casualty Co. of New York v. Griner, C.C.A.Cal., 44 F.2d 706.

Facts assumed to have been established

All facts that the prevailing party's evidence reasonably tends to prove must be assumed to have been established.—U. S. v. Holland, C.C.A. Cal., 111 F.2d 949—Walkup v. Bardsley, C.C.A.Minn., 111 F.2d 789—Egan Chevrolet Co. v. Bruner, C.C.A.Minn., 102 F.2d 373, 122 A.L.R. 987—U. S. v. Dupire, C.C.A.Mo., 101 F.2d 945—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—U. S. v. Hossman, C.C.A. Mo., 84 F.2d 808—U. S. v. Harless, C. C.A.W.Va., 76 F.2d 317—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A. Ark., 52 F.2d 66—Kinghorn v. Pennsylvania R. Co., C.C.A.N.Y., 47 F.2d 588.

Jury's belief of evidence

(1) The court of appeals, in case of conflict in testimony, must assume that jury disbelieved witnesses whose testimony conflicted with verdict and believed those whose testimony supported verdict.—U. S. Fidelity & Guaranty Co. v. Wilson, C.C.A. Ark., 52 F.2d 66—Ford Motor Co. v. Pearson, C.C.A.Wash., 40 F.2d 858.

(2) Theory of facts, accepted as true by jury, must be accepted as true on appeal.—Cameron, Joyce & Co. v. McLouth, C.C.A.Ill., 70 F.2d 6—National City Bank v. Carter, C. C.A.Tenn., 14 F.2d 940.

Making of admission

On defendant's appeal after verdict for plaintiff, who introduced alleged admission denied by defendant, appellate court must regard admission as having been made.—Martin v. Burgess, C.C.A.Ala., 82 F.2d 321.

3. U.S.—Independent Exploration Co. v. Campbell, C.C.A.Ill., 127 F. 2d 899—Ætna Life Ins. Co. v. Newbern, C.C.A.Ark., 127 F.2d 171—Duluth, W. & P. Ry. Co. v. Zuck, C.C.A.Minn., 119 F.2d 74—Ætna Life Ins. Co. v. McAdoo, C.C.A. Ark., 115 F.2d 369—Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., C.C.A.Ill., 112 F.2d 302, certiorari granted 61 S.Ct. 40, 311 U. S. 626, 85 L.Ed. 398, reversed on other grounds 61 S.Ct. 623, 312 U.S. 410, 668, 85 L.Ed. 920—U. S. v. Holland, C.C.A.Cal., 111 F.2d 949—Walkup v. Bardsley, C.C.A.Minn., 111 F.2d 789—Commercial Casualty Ins. Co. v. Stinson, C.C.A.Mich., 111 F.2d 63, certiorari denied 61 S.Ct. 25, 311 U.S. 667, 85 L.Ed. 428—Montgomery Ward & Co. v. Snuggins, C.C.A.Minn., 103 F.2d 458—U. S. v. Fields, C.C.A.Ark., 102 F.2d 535—Terre Haute Brewing Co. v. Dugan, C.C.A.Mo., 102 F.2d 425—Egan Chevrolet Co. v. Bruner, C.C.A.Minn., 102 F.2d 373, 122 A.L. R. 987—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—U. S. v. Dupire, C.C.A.Mo., 101 F.2d 945—Ocean Accident & Guarantee Corporation v. Penick & Ford, C. C.A.Iowa, 101 F.2d 493—Colorado Life Ins. Co. v. Steele, C.C.A.Ark., 101 F.2d 448—Falstaff Brewing Corporation v. Thompson, C.C.A. Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Metropolitan Life Ins. Co. v. Gosney, C.C.A.Mo., 101 F.2d 167—Noble v. U. S., C.C.A.Iowa, 98 F.2d 441—U. S. v. Aspinwall, C.C. A.Or., 96 F.2d 867—U. S. v. Klever, C.C.A.Wash., 93 F.2d 15—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84—U. S. v. Hossman, C.C.A.Mo., 84 F. 2d 808—Thomas v. Slavens, C.C.A. Mo., 78 F.2d 144—U. S. v. Newcomer, C.C.A.Iowa, 78 F.2d 50—U. S. v. Harless, C.C.A.W.Va., 76 F.2d 317—Great Northern Ry. Co. v. Shellenbarger, C.C.A.Or., 54 F.2d 606, certiorari denied 52 S.Ct. 580, 286 U.S. 555, 76 L.Ed. 1290—U. S. v. Meserve, C.C.A.Or., 44 F.2d 549.

4. U.S.—Gary v. Consolidated Forwarding Co., C.C.A.Wis., 115 F.2d 632—Great Northern Ry. Co. v. Nelson, C.C.A.Minn., 90 F.2d 84—Ocean Accident & Guarantee Corporation v. Moore, C.C.A.Mo., 85 F. 2d 369, certiorari denied Moore v. Ocean Accident & Guarantee Cor-

able to him will generally be disregarded.[5]

Theory or grounds of verdict. If the contrary does not appear, it will be presumed that a general verdict was based on that theory or ground supported by the evidence which properly sustains the verdict;[6] and it will not be assumed that the verdict was based on a finding without evidence to support it.[7] Accordingly, where the pleadings raised two issues, and on the trial only one was supported by evidence, a favorable verdict will be sustained on appeal on the presumption that the jury based its verdict on the issue supported by the evidence.[8]

Refusal to submit particular issue. Where the evidence is before it, the court of appeals, in determining whether the lower court erred in refusing to submit an issue on the ground that it was not raised by the evidence, will consider the evidence in the light most favorable to the party requesting submission of the issue.[9]

(13) Findings of Fact and Conclusions of Law
(a) By court
(b) By master

(a) By Court

The general presumption is in favor of the correctness of the lower court's findings of fact and conclusions.

The findings of the trial court are regarded on appeal as presumptively correct[10] where the evi-

poration, 57 S.Ct. 235, 299 U.S. 609, 81 L.Ed. 449—Lowden v. McClung, C.C.A.Ark., 80 F.2d 694—Lehigh Valley Coal Co. v. Lukaszunas, N. Y., 230 F. 792, 145 C.C.A. 102.

5. U.S.—Bell v. Shoff, C.C.A.Pa., 89 F.2d 339—Employers' Indemnity Corporation v. Grant, C.C.A.Mich., 271 F. 136.

6. U.S.—Pennsylvania R. Co. v. Minds, Pa., 244 F. 53, 156 C.C.A. 481, affirming, D.C., Minds v. Pennsylvania R. Co., 237 F. 267, and affirmed 39 S.Ct. 531, 250 U.S. 368, 63 L.Ed. 1039—Betts v. Gahagan, N.C., 212 F. 120, 128 C.C.A. 636.

Charging two acts of negligence

Where, in an action to recover for loss of property by fire, defendant was charged with two acts of negligence, one of which would render it liable for the entire loss, and the other for only part of the loss, as the jury were instructed, and the verdict was for a sum much less than the entire loss, as shown by the evidence but approximately the amount claimed under the second cause of action, it must be presumed to have been based on that cause alone.—Pennsylvania Co. v. Zahner Metal Sash & Door Co., C.C.A.Ohio, 273 F. 993.

7. U.S.—Betts v. Gahagan, N.C., 212 F. 120, 128 C.C.A. 636.

8. U.S.—Betts v. Gahagan, N.C., supra.

9. U.S.—Liverpool & London & Globe Ins. Co. of Liverpool, England, v. Nebraska Storage Warehouses, C.C.A.Neb., 96 F.2d 30.

10. U.S.—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—Killoren v. First Nat. Bank in St. Louis, C.C.A.Mo., 127 F.2d 537—U. S. v. Foster, C.C.A.Cal., 123 F.2d 32—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A.Neb., 111 F.2d 412—U. S. v. Magnolia Petroleum Co., C.C.A. Okl., 110 F.2d 212—Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co., C.C.A.Mich., 110 F.2d 192—F. W. Fitch Co. v. Camille, Inc., C.C.A.Iowa, 106 F.2d 635, affirming, D.C., Camille, Inc. v. F. W. Fitch Co., 27 F.Supp. 752—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—Hedrick v. Perry, C.C.A.N.M., 102 F.2d 802—U. S. v. Proprietors of Social Law Library, C.C.A.Mass., 102 F.2d 481, affirming, D.C., Proprietors of Social Law Library v. U. S., 21 F.Supp. 462—Nance v. Hilliard, C.C.A.Mo., 101 F.2d 957—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C. C.A.Iowa, 101 F.2d 144—Esso, Inc. v. Standard Oil Co., C.C.A.Mo., 98 F.2d 1—New York Life Ins. Co. v. Calhoun, C.C.A.Mo., 97 F.2d 896—Nygard v. Dickinson, C.C.A.Alaska, 97 F.2d 53—U. S. v. Sands, C.C.A. Okl., 94 F.2d 156—Southwest Pump & Machinery Co. v. Jones, C. C.A.Mo., 87 F.2d 879—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F. Supp. 864—Arkansas Natural Gas Corporation v. Pierson, C.C.A.Ark., 84 F.2d 468—Gaskins v. Bonfils, C. C.A.Colo., 79 F.2d 352, modifying, D.C., 8 F.Supp. 832, and mandate construed, C.C.A., 85 F.2d 672—Humphrey v. Bankers Mortg. Co. of Topeka, Kan., C.C.A.Kan., 79 F.2d 345—Hays v. Harris, C.C.A.Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435—Ott v. Thurston, C.C.A.Cal., 76 F.2d 368—Gorman v. Shaffer Oil & Refining Co., C.C.A.Okl., 74 F.2d 610, certiorari denied 55 S.Ct. 654, 295 U.S. 739, 79 L.Ed. 1686—Howells State Bank v. Novotny, C.C.A.Neb., 69 F.2d 32—Jackson v. Jackson, C. C.A.Okl., 67 F.2d 719—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316—Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 63 F.2d 833—Woods-Faulkner & Co. v. Michelson, C.C.A.Mo., 63 F.2d 569—The Smyrna, C.C.A.Md., 62 F.2d 1048, affirming, D.C., 2 F.Supp. 351—Chicago Bank of Commerce v. Carter, C.C.A.Ark., 61 F.2d 986—Clements v. Coppin, C.C.A.Cal., 61 F.2d 552—Karn v. Andresen, C.C.A. Minn., 60 F.2d 427, affirming, D.C., 51 F.2d 521—Kingston v. American Car & Foundry Co., C.C.A.Mo., 55 F.2d 132, certiorari denied 52 S. Ct. 459, 285 U.S. 560, 76 L.Ed. 948—Hodges v. Meriwether, C.C.A. Ark., 55 F.2d 29, 86 A.L.R. 52—U. S. v. Board of National Missions of Presbyterian Church in U. S. of America, C.C.A.N.M., 37 F.2d 272—U. S. v. Hays, C.C.A.Wyo., 35 F.2d 948—New York Life Ins. Co. v. Griffith, C.C.A.Kan., 35 F.2d 945—Staley v. Dwyer, C.C.A.N.M., 29 F.2d 982—Harjo v. Empire Gas & Fuel Co., C.C.A.Okl., 28 F.2d 596—Lion Oil Refining Co. v. Albritton, C.C.A. Ark., 21 F.2d 280—Bailey v. Smith, C.C.A.Okl., 14 F.2d 519—Couch v. Central Bank & Trust Corporation, C.C.A.Ga., 297 F. 216—Smith v. McCullough, C.C.A.Okl., 285 F. 698, reversed on other grounds 46 S.Ct. 338, 270 U.S. 456, 70 L.Ed. 682—Stennick v. Jones, C.C.A.Or., 282 F. 161—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 277 F. 625, certiorari denied 42 S. Ct. 589, 259 U.S. 585, 66 L.Ed. 1076—Shearer v. Farmers' Life Ins. Co., C.C.A.Mo., 262 F. 861—Manhattan Life Ins. Co. v. Wright, Colo., 126 F. 82, 61 C.C.A. 138.

4 C.J. p 897 note 83.

Conversely, the court of appeals, in the absence of a contrary showing, cannot presume that the trial court's conclusion on a question of fact was wrong.—Cornelison v. Fitch, C.C.A.Iowa, 91 F.2d 5.

dence is conflicting[11] and consists of the testimony of witnesses taken in open court,[12] as distinguished from documentary evidence or depositions.[13] Indeed there is an unusually strong presumption in favor of the trial court's findings where the record on appeal is confusing and inadequate.[14] Thus where none[15] or only a part[16] of the pertinent evidence is brought up on appeal, it must be assumed that the facts as found were true and correct.

In the absence of any contrary showing in the record, the trial court's finding of facts carries the presumption that the trial court received evidence on which to base the finding,[17] without any objection as to form or substance of the complaint or as to variance between pleading and proof.[18]

Requests for findings. In the absence of a contrary showing, the court of appeals will assume that the trial judge's refusal to make certain requested findings of fact was based on the view which he took of the evidence.[19]

Evidence considered by trial court. It will be presumed, on appeal, in a case tried by the court without a jury that the court, in arriving at its findings, took into consideration all the evidence that was properly admitted.[20] So, also, in the ab-

11. U.S.—Wittmayer v. U. S., C.C.A. Mont., 118 F.2d 808—Rosen v. Furmbilt Stores, C.C.A.Utah, 103 F.2d 294—Peoples Trust & Savings Bank v. Hubbell, C.C.A.Kan., 102 F. 2d 754—Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., C.C. A.Okl., 100 F.2d 770, certiorari granted 59 S.Ct. 789, 306 U.S. 629, 83 L.Ed. 1032, reversed on other grounds 60 S.Ct. 215, 308 U.S. 530, 309 U.S. 4, 84 L.Ed. 447, 537, rehearing denied 60 S.Ct. 465, 309 U. S. 693, 84 L.Ed. 1034—Ohio Casualty Ins. Co. v. Gordon, C.C.A.Okl., 95 F.2d 605—Tyronza Special School Dist. of Poinsett County v. Speer, C.C.A.Ark., 94 F.2d 825—Ruth v. Climax Molybdenum Co., C.C.A.Colo., 93 F.2d 699—Stearns v. Central Petroleum Co., C.C.A.Kan., 93 F.2d 638—Whitchurch v. Crawford, C.C.A.Okl., 92 F.2d 249, affirming, D.C., Whitchurch v. Burge, 17 F.Supp. 234—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743—Hill v. Douglass, C.C.A.Nev., 78 F.2d 851—Standard Oil Co. of Colorado v. Standard Oil Co., C.C.A. Colo., 72 F.2d 524, certiorari denied 55 S.Ct. 216, 293 U.S. 620, 79 L.Ed. 708—National Reserve Ins. Co. of Illinois v. Scudder, C.C.A.Cal., 71 F. 2d 884—Norwich Union Indemnity Co. v. Simonds, C.C.A.Minn., 65 F.2d 134—Klaber v. Lakenan, C.C.A.Mo., 64 F.2d 86, 90 A.L.R. 783, affirming, D.C., Fechheimer v. Lakenan, 2 F. Supp. 785—Central Republic Bank & Trust Co. v. Caldwell, C.C.A.Mo., 58 F.2d 721—Clarke v. Hot Springs Electric Light & Power Co., C.C.A. Wyo., 55 F.2d 612, certiorari denied 53 S.Ct. 19, 287 U.S. 619, 77 L.Ed. 537—Quinn v. Union Nat. Bank of Rochester, Minn., C.C.A.S. D., 32 F.2d 762—Coats v. Barton, C.C.A.Ark., 25 F.2d 813—Bowmaster v. Carroll, C.C.A.Okl., 23 F.2d 825—Fienup v. Kleinman, C.C.A.S.D., 5 F. 2d 137—Drexler v. Commercial Sav. Bank, C.C.A.S.D., 5 F.2d 13—U. S. v. Rhodes, C.C.A.Ark., 3 F.2d 771—Public Ledger Co. v. Post Printing & Publishing Co., C.C.A.Mo., 294 F. 430—Savage v. Shields, C.C. A.Ark., 293 F. 863—Roswell Drainage Dist. v. Dickey, C.C.A.N.M., 292 F. 29—Conklin v. Tom C. Mining Co., C.C.A.Mo., 277 F. 807—Dunaway v. Puryear, C.C.A.Tenn., 276 F. 209—Porto Rico Mining Co. v. Conklin, C.C.A.Mo., 271 F. 570.

12. U.S.—Why Corporation v. Super Ironer Corporation, C.C.A.Mich., 128 F.2d 539, affirming, D.C., 37 F. Supp. 538—Dant & Russell v. J. D. Halstead Lumber Co., C.C.A.Cal., 103 F.2d 306—In re Great Lakes Transit Corporation, C.C.A.Ohio, 81 F.2d 441—Columbia Pictures Corporation v. Lawton-Byrne-Bruner Ins. Agency Co., C.C.A.Mo., 73 F.2d 18—Collins v. Finley, C.C.A.Ariz., 65 F.2d 625—Easton v. Brandt, C. C.A.Cal., 19 F.2d 857.

13. **Presumption inapplicable**

(1) Presumption in support of findings on conflicting testimony does not prevail in case testimony is taken by deposition.—Rown v. Brake Testing Equipment Corporation, C. C.A.Cal., 38 F.2d 220, rehearing denied 50 F.2d 380.

(2) The trial court's findings on documentary evidence or depositions are subject to free review unaffected by presumptions which ordinarily accompany findings on controverted issues.—Carter Oil Co. v. McQuigg, C. C.A.Ill., 112 F.2d 275.

14. U.S.—Lopez v. Gautier, C.C.A. Puerto Rico, 41 F.2d 914, certiorari granted Sanchez v. Borras, 51 S.Ct. 80, 282 U.S. 826, 75 L.Ed. 937, and certiorari dismissed Lopez v. Gautier, 51 S.Ct. 490, 283 U.S. 798, 75 L.Ed. 1421.

15. U.S.—Kattelman v. Madden, C.C. A.Mo., 88 F.2d 858—Rickard v. Thompson, C.C.A.Alaska, 72 F.2d 807—Pueblo De Taos v. Archuleta, C.C.A.N.M., 64 F.2d 807—Yangtsze Rapid S. S. Co., Federal Inc., U. S. A., v. Deutsch-Asiatische Bank, C.C.A.China, 59 F.2d 8—Walker Grain Co. v. Southwestern Telegraph & Telephone Co., C.C.A.Tex., 10 F.2d 272, affirming, D.C., Southwestern Telegraph & Telephone Co. v. Walker Grain Co., 3 F.2d 819—John A. Roebling's Sons Co. of California v. Idaho Ry., Light & Power Co., Idaho, 243 F. 527, 156 C.C.A. 225.

16. U.S.—Sublette v. Servel, Inc., C. C.A.Ark., 124 F.2d 516—Albion-Idaho Land Co. v. Naf Irr. Co., C.C.A. Utah, 97 F.2d 439.

17. U.S.—Lagerloef Trading Co. v. American Paper Products Co. of Indiana, C.C.A.Ind., 291 F. 947, certiorari denied American Paper Products Co. of Indiana v. Lagerloef Trading Co., 44 S.Ct. 34, 263 U.S. 706, 68 L.Ed. 516.

18. U.S.—Lagerloef Trading Co. v. American Paper Products Co. of Indiana, supra.

Matters presumed litigated by consent

Where there was no bill of exceptions, it was presumed that, if the facts found were not within the issues, they were litigated by consent. —Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., C.C.A. Minn., 99 F.2d 902, certiorari denied Minneapolis, St. P. & S. S. M. R. Co. v. Pike Rapids Power Co., 59 S. Ct. 362, 305 U.S. 660, 83 L.Ed. 428, rehearing denied 59 S.Ct. 487, 306 U. S. 667, 83 L.Ed. 1062, certiorari denied Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., 59 S. Ct. 488, 306 U.S. 640, 83 L.Ed. 1040.

19. U.S.—U. S. v. Rhodes, C.C.A.W. Va., 49 F.2d 228.

Where evidence did not compel finding not made by the trial court, the circuit court of appeals must assume in support of the judgment that the trial court considered the evidence insufficient to sustain such a finding.—Sonken-Galamba Corporation v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 124 F.2d 952, affirming, D.C., 33 F.Supp. 814, new trial denied 34 F.Supp. 15, certiorari denied 62 S. Ct. 917, 315 U.S. 822, 86 L.Ed. 1218.

20. **Exhibits** in evidence are presumed to have been considered by trial court.—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897.

sence of an affirmative showing to the contrary,[21] it will be presumed that the trial court considered only proper and competent evidence and disregarded that which was incompetent or erroneously admitted;[22] and it will not be presumed that the court gave weight to improper evidence[23] which it indicated ought not to be considered.[24]

It will be assumed that the trial court in making its findings did not believe the evidence offered by the unsuccessful party in so far as it conflicted with the findings made.[25]

Sufficiency of evidence to support findings. As a general rule, the findings of the trial court will be presumed, on appeal, to be sustained by the evidence.[26] This is particularly true where the evidence is not included in the record on appeal,[27] or is not properly presented to the appellate court,[28] or where the record does not show that all the material evidence adduced at the trial is before the appellate court.[29]

In reviewing the sufficiency of the evidence, where it is in the record, to sustain the findings, the court of appeals will view the evidence in the light most favorable to the prevailing party[30] and will draw every inference fairly deducible from the evidence in favor of the findings,[31] the burden being on the unsuccessful party to show that the evidence compelled a finding in his favor.[32]

Implied findings. Where the record does not contain express findings of all material facts involved in the case, it will be presumed, on appeal, that the lower court found, in favor of the prevailing party, all the facts necessary for the support of the judgment.[33] So where there is only a general finding,

Conversely, it will not be presumed that the court ignored any evidence properly before it.—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567.

21. U.S.—Hedrick v. Perry, C.C.A.N.M., 102 F.2d 802—Erceg v. Fairbanks Exploration Co., C.C.A.Alaska, 95 F.2d 850, certiorari denied 59 S.Ct. 74, 305 U.S. 615, 83 L.Ed. 392—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743—Missouri Pac. R. Co. v. Bartlett, C.C.A. Ark., 79 F.2d 275—Jonah v. Armstrong, C.C.A.Okl., 52 F.2d 343.

22. U.S.—MacDonnell v. Capital Co., C.C.A.Cal., 130 F.2d 311—Seber v. Thomas, C.C.A.Okl., 108 F.2d 856—Hedrick v. Perry, C.C.A.N.M., 102 F.2d 802—Wall v. U. S., C.C.A. Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Erceg v. Fairbanks Exploration Co., C.C.A.Alaska, 95 F. 2d 850, certiorari denied 59 S.Ct. 74, 305 U.S. 615, 83 L.Ed. 392—Grant v. Pilgrim, C.C.A.Alaska, 95 F.2d 562—U. S. v. Fairbanks, C. C.A.Mont., 89 F.2d 949, affirming, D.C., Fairbanks v. U. S., 17 F. Supp. 550—Travelers Ins. Co. v. Springfield Fire & Marine Ins. Co., C.C.A.Mo., 89 F.2d 757—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743—Wade v. Blieden, C.C. A.Ark., 86 F.2d 75—Missouri Pac. R. Co. v. Bartlett, C.C.A.Ark., 79 F. 2d 275—Hays v. Harris, C.C.A. Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435—Garden City Feeder Co. v. Commissioner of Internal Revenue, C.C.A., 75 F.2d 804—National Reserve Ins. Co. of Illinois v. Scudder, C.C.A.Cal., 71 F.2d 884—Elliott v. Gordon, C.C.A.Kan., 70 F.2d 9—Equitable Life Assur. Soc. of U. S. v. Thomas, C.C.A.Iowa, 69 F.2d 361—Howells State Bank v. Novotny, C.C.A.Neb., 69 F.2d 32—Anderson v. U. S., C.C.A.Mo., 65 F.2d 870—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694—Kaffanges v. New York Life Ins. Co., C.C.A.Mass., 59 F.2d 475—Jonah v. Armstrong, C. C.A.Okl., 52 F.2d 343—Alliance Ins. Co. of Philadelphia v. Brown, C. C.A.Cal., 36 F.2d 625—Unkle v. Wills, C.C.A.Okl., 281 F. 29—Keith Lumber Co. v. Houston Oil Co. of Texas, Tex., 257 F. 1, 168 C.C.A. 213, certiorari denied 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197.

Admissions

It will be presumed, when it does not otherwise appear, that admissions of one defendant were not used as evidence against other defendants.—Wilkinson v. Livingston, C.C.A. Mo., 45 F.2d 465.

23. U.S.—Thatenhorst v. U. S., C.C. A.Kan., 119 F.2d 567.

24. U.S.—U. S. v. Graham, C.C.A. Ark., 46 F.2d 639.

25. U.S.—Roxana Petroleum Co. of Oklahoma v. Rush, C.C.A.La., 295 F. 844.

26. U.S.—McCampbell v. New York Life Ins. Co., C.C.A.Tex., 288 F. 465, certiorari denied 43 S.Ct. 705, 262 U.S. 759, 67 L.Ed. 1219.

27. U.S.—Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation, C.C.A.Ind., 129 F.2d 17—Speh v. Bullard, C. C.A.Fla., 90 F.2d 227—Life & Casualty Ins. Co. v. City of Florala, C. C.A.Ala., 63 F.2d 195, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549—U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D.C., 48 F.2d 378—Hydraulic Press Brick Co. v. Stevens, C.C.A.Ga., 15 F.2d 312.

Conversely, the circuit court of appeals cannot infer that there is no evidentiary basis for the trial court's findings where there is no certificate of evidence.—Shipe v. Consumers' Service Co., C.C.A.Ind., 29 F.2d 321, certiorari denied Tudor v. Schindler, 49 S.Ct. 347, 279 U.S. 850, 73 L.Ed. 993.

28. U.S.—City of Woodward v. Caldwell, C.C.A.Okl., 86 F.2d 567.

In absence of approved statement of evidence, the trial court's findings, on appeal, are presumed to have been sustained by the evidence.—Chickasaw Wood Products Co. v. Paysinger, C.C.A.Ark., 84 F.2d 476—Oriole Phonograph Co. v. Kansas City Fabric Products Co., C.C.A.Mo., 34 F.2d 400, certiorari denied 50 S.Ct. 158, 280 U.S. 609, 74 L.Ed. 652.

29. U.S.—Tricou v. Helvering, C.C. A., 68 F.2d 280, certiorari denied 54 S.Ct. 865, 292 U.S. 655, 78 L. Ed. 1503, rehearing denied 55 S.Ct. 67, 293 U.S. 629, 79 L.Ed. 715—Carson v. Hurt, Tex., 250 F. 30, 162 C.C.A. 202.

"The findings of the court below raise the legal presumption that there was competent and relevant evidence in support of them, in the absence of a certificate of the trial judge that the bill of exceptions contains all the evidence, or all the evidence on the particular issues the findings concerning which are questioned."—Southern Surety Co. of Des Moines, Iowa v. U. S., C.C.A. S.D., 23 F.2d 55, 58, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532.

30. U.S.—U. S. v. Scarborough, C.C. A.Cal., 57 F.2d 137—U. S. v. Perry, C.C.A.Ark., 55 F.2d 819.

31. U.S.—U. S. v. Nelson, C.C.A.Ark., 102 F.2d 515, certiorari denied 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462.

32. U.S.—Jones v. U. S., C.C.A.Miss., 55 F.2d 574.

33. U.S.—Treat v. Farmers' L. & T. Co., N.Y., 185 F. 760, 108 C.C.A.

all questions of fact are presumed to have been resolved in favor of the prevailing party;[34] and where, from the facts found, other facts which will support the judgment may be inferred, such inference will be presumed, on appeal, to have been made by the trial court.[35]

In accordance with the provisions of the Federal Rules of Civil Procedure, rule 49 (a), 28 U.S.C.A. following § 723c, if the trial court, in submitting special questions to the jury in a case submitted for a special verdict, omits any issue of fact raised by the pleadings or evidence and as to such issue fails to make a finding when he is authorized to do so, it will be assumed on appeal that the court made a finding on such issue in accordance with the judgment entered on the special verdict.[36]

Interpretation of findings. The court on appeal will, if possible, in interpreting the findings of fact, indulge in such presumptions as will make them support the judgment.[37]

Conclusions of law. In the absence of a contrary showing, the circuit court of appeals will generally presume that the lower court's conclusions of law were right;[38] and, where the evidence is not brought up on appeal, it will be presumed that they were supported by the evidence.[39]

(b) By Master

The general presumption on appeal is in favor of the correctness of the findings and conclusions of a master concurred in by the trial court.

As a general rule, findings made by a master[40] on oral[41] and conflicting[42] evidence and concurred in by the trial court[43] are regarded on appeal as presumptively correct, unless the appellate court is fully satisfied that error has been committed.[44] Accordingly it will be presumed on appeal that a master's findings of fact approved by the trial court are sustained by the evidence where the record contains no statement of the evidence.[45] Indeed, the findings of a master on oral,[46] as distinguished from

98, affirming Central Trust Co. of N. Y. v. Treat, C.C., 171 F. 301.

34. U.S.—Seaboard Terminal & Refrigeration Co. v. Droste, C.C.A.N.Y., 80 F.2d 95—Banque de France v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 60 F.2d 703—South Sioux City v. Hanchett Bond Co., C.C.A.Neb., 19 F.2d 476—Hyman-Michaels Co. v. Fox, C.C.A.N.Y., 298 F. 440—National Surety Co. v. Lincoln County, Mont., Mont., 238 F. 705, 151 C.C.A. 555, affirming, D.C., Lincoln County v. Coast Bridge Co., 231 F. 468.

General judgment is conclusive finding of all necessary facts, where bill of exceptions shows no requests for findings or declarations of law, nor exceptions to court's declarations.—McFarland v. Central Nat. Bank of Topeka, Kan., C.C.A.Kan., 26 F.2d 890, affirming, D.C., Central Nat. Bank of Topeka, Kan. v. McFarland, 20 F.2d 416, and certiorari denied McFarland v. Central Nat. Bank of Topeka, Kan., 49 S.Ct. 12, 278 U.S. 606, 73 L.Ed. 533.

35. U.S.—Clyde Equipment Co. v. Fiorito, C.C.A.Wash., 16 F.2d 106.

36. U.S.—Hinshaw v. New England Mut. Life Ins. Co., C.C.A.Mo., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488—Hinshaw v. Massachusetts Mut. Life Ins. Co., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488.

37. U.S.—Maryland Casualty Co. v. Stark, C.C.A.Nev., 109 F.2d 212.

38. U.S.—Shearer v. Farmer Life Ins. Co., C.C.A.Mo., 262 F. 861.

39. U.S.—U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D.C., 48 F.2d 378.

40. U.S.—Carter Oil Co. v. Utilities Production Corporation, C.C.A.Okl., 100 F.2d 1006—Commissioners of Sewerage of City of Louisville v. Davis, C.C.A.Ky., 88 F.2d 797, modifying, D.C., Davis v. Commissioners of Sewerage of City of Louisville, 13 F.Supp. 672—Stromberg Motor Devices Co. v. Zenith-Detroit Corporation, C.C.A.N.Y., 73 F.2d 62—Pensacola Shipbuilding Co. v. Vincennes Bridge Co., C.C.A.N.C., 45 F.2d 165—Pensacola Shipbuilding Co. v. Southern Wood Preserving Co., C.C.A.N.C., 45 F.2d 164—American Securities Co. v. Wilkins, C.C.A.Ga., 32 F.2d 35—General Fire Extinguisher Co. v. Lamar, Ga., 141 F. 353, 72 C.C.A. 501.

Findings of fact by a master not excepted to below must be accepted as true on appeal.—Fleming v. Noble, Mass., 250 F. 733, 163 C.C.A. 65.

41. U.S.—General Kontrolar Co. v. Allen, C.C.A.Ohio, 124 F.2d 123.

42. U.S.—Cromwell v. Skinner, C.C.A.Okl., 62 F.2d 432, certiorari denied 53 S.Ct. 785, 289 U.S. 754, 77 L.Ed. 1498—Crawford v. Briant, C.C.A.Okl., 53 F.2d 754.

43. U.S.—First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 98 F.2d 416, affirming, D.C., Bechtel Trust Co. v. Iowa-Wisconsin Bridge Co., 19 F.Supp. 127, certiorari denied Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co., 59 S.Ct. 243, 305 U.S. 650, 83 L.Ed. 420, rehearing denied 59 S.Ct. 356, 305 U.S. 650, 83 L.Ed. 437—In re Waters, C.C.A.Ala., 93 F.2d 196, 114 A.L.R. 1368—Roosevelt v. Missouri State Life Ins. Co., C.C.A.Ark., 78 F.2d 752—Cromwell v. Skinner, C.C.A.Okl., 62 F.2d 432, certiorari denied 53 S.Ct. 785, 289 U.S. 754, 77 L.Ed. 1498—Miller v. U. S., C.C.A.Okl., 57 F.2d 987—Crawford v. Briant, C.C.A.Okl., 53 F.2d 754—Finefrock v. Kenova Mine Car Co., C.C.A.W.Va., 37 F.2d 310—American Securities Co. v. Wilkins, C.C.A.Ga., 32 F.2d 35—Commercial Nat. Bank v. Stockyards Loan Co., C.C.A.Kan., 16 F.2d 911—Smith v. Hovland, C.C.A.Ariz., 11 F.2d 9, certiorari denied Hovland v. Smith, 46 S.Ct. 638, 271 U.S. 686, 70 L.Ed. 1151—Road Improvement Dist. No. 4 v. Wilkerson, C.C.A.Ark., 5 F.2d 416—Charles Elmer & Sons v. Kelly, C.C.A.La., 263 F. 687—Tatum Bros. Real Estate & Investment Co. v. Shenk, Fla., 246 F. 684, 158 C.C.A. 640, certiorari denied 38 S.Ct. 334, 246 U.S. 664, 62 L.Ed. 928—Brown v. Lanyon Zinc Co., C.C.A.Kan., 179 F. 309—Houck v. Christy, C.C.A.Kan., 152 F. 612.

44. U.S.—Carter Oil Co. v. Utilities Production Corporation, C.C.A.Okl., 100 F.2d 1006.

45. U.S.—Federal Surety Co. v. A. Bentley & Sons Co., C.C.A.Ohio, 51 F.2d 24, 78 A.L.R. 1041.

46. U.S.—In re Turley, C.C.A.Ind., 92 F.2d 944.

Reason for rule

Where a special master appointed to determine the validity of an assignment of patents and the trial court disagreed, since the master had superior opportunity to appraise credibility of witnesses, his findings based on oral testimony were presumptively correct.—General Kon-

documentary,[47] evidence are regarded on appeal as presumptively correct even where the trial court's findings are in conflict with those of the master who saw and heard the witnesses; but the strength of this presumption is measurably weakened by the contrary finding of the trial court,[48] particularly where the master's findings are based wholly on inferences whose reasonableness could be as fairly determined by the court as by him.[49]

The burden of showing error with respect to findings of a master rests on the party attacking them.[50]

Conclusions. Where the conclusions of the master from the facts found are approved by the trial court, every reasonable presumption will be indulged in their favor on appeal.[51]

(14) Amount of Recovery

The general presumption on appeal is in favor of the correctness of the amount of recovery.

The general presumption, on appeal, is in favor of the correctness of the amount of the recovery.[52] Accordingly the presumption is that the amount awarded is in accord with the evidence;[53] and it will not be presumed that the jury, in making the award, applied an erroneous rule of damages.[54] Where, however, the verdict was general and no sufficient proof was made of some items of damages, the court of appeals could not assume that the jury excluded such items from its verdict.[55]

Where four verdicts, each for the same amount, were rendered in a case where only one verdict was proper, it may be presumed that they were all for the same damages, and thus quadruplicates.[56]

Interest. Ordinarily a general verdict for plaintiff will be presumed to include interest, especially where the jury were instructed to award plaintiff interest in case they found for him.[57]

Where interest was allowed, it will be presumed, in the absence of a contrary showing, that it was properly allowed.[58]

(15) Judgment or Decree

In the absence of a contrary showing, the general presumption, on appeal, is in favor of the regularity and correctness of the lower court's judgment or decree.

In the absence of a contrary showing, the judgment or decree of the trial court is entitled, on appeal, to a presumption of regularity and correctness.[59] Accordingly it will be assumed, in the ab-

trolar Co. v. Allen, C.C.A.Ohio, 124 F.2d 123.

"Where the question is one of veracity it is clear that the appellate court should give controlling weight to the trier of fact who saw and heard the witnesses."—Carter Oil Co. v. McQuigg, C.C.A.Ill., 112 F.2d 275, 279.

47. **Presumption inapplicable**

Where special master appointed to determine the validity of a corporation's assignment of patents and the district court disagreed, the circuit court of appeals was not bound, with respect to stipulated testimony and documentary evidence, by the presumption which attaches to the conclusions of the lower tribunals when they are in accord.—General Kontrolar Co. v. Allen, C.C.A.Ohio, 124 F.2d 123.

Reason for rule

"Where the testimony consists of documentary evidence and depositions, the master is in no better position to determine an issue of fact than a reviewing court."—Carter Oil Co. v. McQuigg, C.C.A.Ill., 112 F.2d 275, 279.

48. U.S.—In re Turley, C.C.A.Ind., 92 F.2d 944.

49. **Presumption of slight importance**

In such a case any presumption in favor of the master's conclusion can be of but slight importance.—Kycoga Land Co. v. Kentucky River Coal Corporation, C.C.A.Ky., 110 F.2d 894, certiorari denied 61 S.Ct. 615, 312 U.S. 688, 85 L.Ed. 1125.

50. U.S.—Curtice Bros. Co. v. Barnard, C.C.A.Ind., 209 F. 589.

A very heavy burden rests on such party where the master's findings are concurred in by the trial court.—First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., C.C.A. Iowa, 98 F.2d 416, affirming Bechtel Trust Co. v. Iowa-Wisconsin Bridge Co., 19 F.Supp. 127, certiorari denied Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co., 59 S.Ct. 243, 305 U.S. 650, 83 L.Ed. 420, rehearing denied 59 S.Ct. 356, 305 U.S. 650, 83 L.Ed. 437.

51. U.S.—Ladd & Tilton Bank v. Boyle, C.C.A.Or., 299 F. 56—Fleming v. Noble, Mass., 250 F. 733, 163 C.C.A. 65.

52. **Recovery for personal injuries**

(1) An award of damages for personal injuries enjoys a large presumption of correctness on appeal.—In re Central R. of New Jersey, C.C.A.N.Y., 52 F.2d 20.

(2) Where the master, who paid some of the hospital and medical expenses of an injured servant, made no request that the award of damages be diminished on that ground, the award will not be disturbed on appeal, for it will be presumed that it was so diminished.—Grand Trunk Ry. Co. of Canada v. Knapp, Mich., 233 F. 950, 147 C.C.A. 624.

53. **Evidence given proper effect**

Where testimony showing a pro tanto satisfaction of libelant's claim was received, it must be assumed on appeal that the lower court gave proper effect thereto in fixing amount of recovery.—The Emilia S. De Perez, Tex., 248 F. 480, 160 C.C.A. 490.

54. U.S.—Barrett v. Fournial, C.C.A. N.Y., 21 F.2d 298.

55. U.S.—Chas. Stolper Cooperage Co. v. Miller Hardwood Co., C.C.A. Wis., 90 F.2d 173.

56. **Action based on four counts**

Where each of four complaints was made basis of cause of action for malicious prosecution and damages under each count were identical, it must be conclusively presumed that verdict on first count included all recoverable damage, both actual and punitive.—Rouse v. Burnham, C.C.A.Kan., 51 F.2d 709.

57. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.

58. U.S.—National Lock Co. v. Hogland, C.C.A.Ill., 101 F.2d 576.

59. U.S.—Mitchell v. Joseph, C.C.A. Ill., 117 F.2d 253—McGee v. Nee, C.C.A.Mo., 113 F.2d 543—Wabash Ry. Co. v. Bridal, C.C.A.Mo., 94 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Becker v. Evens & Howard Sewer Pipe Co., C.C.A.Mo., 70 F.2d 596

sence of a showing to the contrary, that the trial court had before it facts which warranted its judgment or decree[60] and that it correctly decided all issues before it.[61] So, where a perpetual injunction was refused by the court below, it will be assumed, in the absence of a contrary showing, that it was denied as a matter of discretion.[62]

Conformity of judgment to evidence. In the absence of a contrary showing, the judgment or decree of the court below will be presumed, on appeal, to be sustained by the evidence.[63] This is particularly true where the evidence has not been properly brought up and presented to the appellate court.[64]

Where the evidence is properly in the record, the court of appeals, on reviewing the sufficiency of the evidence to support the judgment, will view the evidence in the light most favorable to the successful party[65] and will draw every inference fairly deducible from the evidence in favor of the judgment;[66] and where the evidence is conflicting the burden is on appellant to show that the judgment is against a decided preponderance of the evidence.[67]

Judgment by consent or stipulation. When a judgment recites that it is by consent, confession, agreement, or stipulation, the recital will be taken as presumptively true.[68]

Judgment notwithstanding verdict. Where the case was tried before a jury, the court of appeals, in reviewing the grant or refusal of a judgment notwithstanding the verdict, will consider the evidence in the light most favorable to the party in whose favor the verdict was rendered[69] and will draw in his favor all inferences fairly deducible from the evidence.[70] Moreover, in such a case, the appellate court will not concern itself with the truthfulness of such party's testimony or the weight of his evidence, but will assume as established all facts that the evidence supporting his claims reasonably tends to establish,[71] and it will disregard the controverting evidence offered by his opponent.[72]

Motion for judgment. Where there is something in the record on which to base it, it may be presumed that a motion for judgment was properly made in the court below.[73] On appeal from an or-

—Bain v. Indiana Nat. Bank, C.C.A. Ind., 64 F.2d 112—U. S. v. Fidelity & Guaranty Co. v. Leong Dung Dye, C.C.A.Hawaii, 52 F.2d 567, certiorari denied 52 S.Ct. 311, 285 U.S. 537, 76 L.Ed. 930—Heiner v. Crosby, C.C.A.Pa., 24 F.2d 191, affirming, D.C., Crosby v. Heiner, 12 F.2d 604—Smith v. McCullough, C. C.A.Okl., 285 F. 698, reversed on other grounds 46 S.Ct. 338, 270 U. S. 456, 70 L.Ed. 682—U. S. v. Porter Fuel Co., Colo., 247 F. 769, 159 C.C.A. 627.

60. U.S.—Mason v. Citizens' Nat. Trust & Savings Bank of Los Angeles, C.C.A.Cal., 71 F.2d 246.

61. U.S.—Heffron v. Western Loan & Building Co., C.C.A.Cal., 84 F.2d 301, 112 A.L.R. 501, certiorari denied 57 S.Ct. 189, 299 U.S. 597, 81 L.Ed. 440.

Issues not raised on appeal

Where defendant did not appeal, and complainant appealed only from the award of damages, claiming it inadequate, it will be presumed on appeal that the determination of the trial court that defendant was liable was correct.—L. A. Westermann Co. v. Dispatch Printing Co., Ohio, 233 F. 609, 147 C.C.A. 417, reversed on other grounds 39 S.Ct. 194, 249 U.S. 100, 63 L.Ed. 499.

Determination presumed limited to proper matters

Circuit court of appeals would assume that district court after joinder of issues and trial, would determine only such questions as properly might be adjudicated.—Maryland Casualty Co. v. Texas Co., C.C.A.Mo., 114 F.2d 952.

62. U.S.—Atwood v. Rhode Island Hospital Trust Co., C.C.A.R.I., 34 F.2d 18, affirming, D.C., 30 F.2d 707, and certiorari denied 50 S.Ct. 81, 280 U.S. 600, 74 L.Ed. 646.

63. U.S.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 36 F.2d 747, modifying, D.C., 33 F.2d 512, and certiorari denied 50 S.Ct. 407, 281 U.S. 756, 74 L.Ed. 1166.

4 C.J. p 786 note 29 [b].

64. U.S.—Baldwin v. Myers, C.C.A. Ark., 75 F.2d 529—American Nat. Red Cross v. Raven Honey Dew Mills, C.C.A.Neb., 74 F.2d 160—Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., C.C. A. Minn., 68 F.2d 787—U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D. C., 48 F.2d 378—Hoffer Oil Corporation v. Carpenter, C.C.A.Okl., 34 F.2d 589, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651—Morrison v. Regus, C.C.A.La., 22 F.2d 804, affirming, D.C., Walnut Creek Milling Co. v. Grain Products Co., 21 F.2d 380—King Lumber Co. v. Benton, Tex., 186 F. 458, 108 C.C.A. 436.

65. U.S.—Montgomery Ward & Co. v. Callahan, C.C.A.Kan., 127 F.2d 32—Inland Power & Light Co. v. Grieger, C.C.A.Wash., 91 F.2d 811—U. S. v. Linde, C.C.A.Kan., 71 F. 2d 925—Wilmington Transp. Co. v. Standard Oil Co., C.C.A.Cal., 53 F. 2d 787.

66. U.S.—Inland Power & Light Co. v. Grieger, C.C.A.Wash., 91 F.2d 811.

67. U.S.—Shepard v. Reed, C.C.A. Tenn., 26 F.2d 19.

68. U.S.—Loy v. Alston, Mo., 172 F. 90, 96 C.C.A. 578.

69. U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F.2d 762, reversing, D.C., 34 F. Supp. 667—Cline v. Southern Ry. Co., C.C.A.N.C., 115 F.2d 907, reversing, D.C., 31 F.Supp. 657—Cranston v. Baltimore & O. R. Co., C.C. A.Pa., 109 F.2d 630—Maty v. Grasselli Chemical Co., C.C.A.N.J., 98 F. 2d 877.

70. U.S.—Dierks Lumber & Coal Co. v. Mabry, C.C.A.Ark., 128 F.2d 1005—Kvart v. Swedish American Line, C.C.A.N.Y., 126 F.2d 279—Adams v. U. S., C.C.A.Ill., 116 F.2d 199—Cranston v. Baltimore & O. R. Co., C.C.A.Pa., 109 F.2d 630—Maty v. Grasselli Chemical Co., C.C.A.N.J., 98 F.2d 877.

71. U.S.—Dierks Lumber & Coal Co. v. Mabry, C.C.A.Ark., 128 F.2d 1005—Adams v. U. S., C.C.A.Ill., 116 F. 2d 199.

72. U.S.—Cranston v. Baltimore & O. R. Co., C.C.A.Pa., 109 F.2d 630.

73. **Renewal of motion presumed**

Statement in bill of exceptions that defendant moved for judgment at conclusion of testimony warrants presumption that motion filed at close of oral testimony was renewed

der granting defendant's motion for summary judgment, the court of appeals must give plaintiff the benefit of every doubt.[74]

(16) Costs and Allowances

Where no contrary showing exists, the presumption on appeal is generally in favor of the action of the lower court with reference to costs and allowances.

In the absence of a contrary showing, the presumption on appeal is in favor of the action of the lower court with respect to the award and taxation of costs[75] and the allowance of fees[76] and expenses.[77] Thus, in the absence of a contrary showing, it will be presumed that an order awarding costs was regularly and legally made,[78] and items found taxable as costs will be presumed to have been found reasonable by the lower court.[79]

(17) Taking and Perfecting Appeal

The general presumption on appeal is that all steps necessary to bring the case into the appellate court were regularly and properly taken.

The general presumption on appeal is that all steps necessary to bring the case into the court of appeals were regularly and properly taken[80] and that the printed transcript of the record filed therein contains the entire record of what occurred in the court below.[81] In the absence of an affirmative showing in the record to the contrary, a material defect in the joinder of parties on appeal will not be presumed for the purpose of defeating the appellate court's jurisdiction which otherwise appears to be complete.[82]

Parties not taking an appeal are presumed to be satisfied with the decree rendered.[83]

Exceptions and bill of exceptions. Under the former practice relating to exceptions and bills of exceptions, various presumptions were indulged on appeal with respect to the taking of exceptions[84] and the making[85] and contents[86] of bills of exceptions.

after introduction of additional evidence.—U. S. v. McGrory, C.C.A.R.I., 63 F.2d 697, certiorari denied McGrory v. U. S., 53 S.Ct. 692, 289 U.S. 742, 77 L.Ed. 1489.

74. U.S.—Weisser v. Mursam Shoe Corporation, C.C.A.N.Y., 127 F.2d 344, reversing, D.C., 40 F.Supp. 1007.

75. U.S.—Ladd v. Tallman, C.C.A. W.Va., 59 F.2d 732—Corn Products Refining Co. v. Chicago Real Estate Loan & Trust Co., Ill., 185 F. 63, 107 C.C.A. 283.

76. **Where all facts are in record**

(1) All reasonable presumptions should be indulged on appeal in favor of correctness of allowance fixed by district court for receiver's services, but reviewing court should not shirk responsibility of reviewing and revising awards, where entire facts are in record and undisputed.—Commodity Credit Corporation v. Bell, C. C.A.Tex., 107 F.2d 1001.

(2) It has been held that there is no presumption in favor of the reasonableness of an award of counsel fees for services rendered in a receivership proceeding had before a trial judge other than the one making the allowance where all the evidence on which the allowance was made is before the appellate court.—Federal Oil Marketing Corporation v. Cravens, C.C.A.Ark., 46 F.2d 938.

77. **Allowances to protective committee**

The action of the trial court in making allowances to a protective committee in an equity receivership proceeding is presumptively correct on appeal.—Palmer v. Watson, C.C.A. N.Y., 122 F.2d 598.

78. U.S.—Clarke v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 62 F.2d 440, certiorari denied 54 S.Ct. 49, 290 U.S. 629, 78 L.Ed. 548, three cases.

79. U.S.—Crowe v. Peaslee-Gaulbert Co., C.C.A.Mass., 37 F.2d 216.

80. **Irregularities disregarded**

Although petition for allowance of appeal and order allowing appeal referred to judgment and decree denying new trial or rehearing rather than to decree dismissing bill with prejudice, court would assume that appeal was from decree of dismissal. —Hale v. Hummel, C.C.A.Mo., 64 F.2d 210.

81. U.S.—Cavagnaro v. Latimer, C. C.A.N.J., 50 F.2d 898.

Certified statement of evidence held presumed to include all evidence essential to decision of questions presented by appeal.—Ralston Purina Co. v. Western Grain Co., C.C.A.Ala., 23 F.2d 253, certiorari denied Western Grain Co. v. Ralston Purina Co., 48 S.Ct. 529, 277 U.S. 593, 72 L.Ed. 1004.

82. U.S.—Higbee v. Chadwick, Tenn., 220 F. 873, 136 C.C.A. 317.

83. **Order fixing priority**

Where no appeal was taken from an order giving counsel fees priority as against certain certificates, it must be assumed that the certificate holders did not assert a priority over such fees.—Ball v. Improved Property Holding Co. of New York, N.Y., 247 F. 645, 159 C.C.A. 547.

84. **Exception presumed duly taken**

(1) Where the taking of a particular exception was noted or recited in the bill of exceptions it would be presumed on appeal that the exception was duly taken.—Great Northern Ry. Co. v. Taulbee, C.C.A.Mont., 92 F.2d 20, certiorari denied Taulbee v. Great Northern R. Co., 58 S.Ct. 476, 302 U.S. 766, 82 L.Ed. 595 —Cromwell v. Slaney, C.C.A.Mass., 65 F.2d 940.

(2) So a general exception taken to the judgment and appearing in the entry thereof would be presumed as intended to challenge the judgment on the statutory ground that the facts found were not sufficient to support it.—Mayes v. Paul Jones & Co., C.C.A.Ky., 270 F. 121, affirming, D.C., Paul Jones & Co. v. Mayes, 265 F. 365.

Elimination of necessity for formal exceptions see supra § 292 b (3).

85. **Settlement by judge not trial judge**

Where the record did not show why a bill of exceptions was settled by a judge other than the trial judge, it would be assumed on appeal that a sufficient reason existed.—Copper River & N. W. Ry. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648.

Unreasonable presumptions would not be indulged with respect to the settlement of a bill of exceptions.—Walton v. Southern Pac. Co., C.C.A. Cal., 53 F.2d 63.

86. **Evidence**

Where the bill of exceptions did not contain a statement that it contained all the evidence, the presumption was that it did not.—Atchison, T. & S. F. R. Co. v. Myers, Ill., 63 F. 793, 11 C.C.A. 439.

Elimination of necessity for bill of exception see supra § 295 c.

f. Discretion of Lower Court

The general rule is that, as to matters within the discretion of the trial court, review by the circuit court of appeals is limited to the question whether there has been an abuse of discretion, and that unless such abuse clearly appears the circuit court of appeals will not review or disturb the trial court's action or rulings with respect to such matters.

While a circuit court of appeals has declared it to be fundamental that the exercise of the trial court's discretion is not subject to review on appeal,[87] the general rule is that, as to matters within such discretion, review is limited to the question whether there has been an abuse of discretion, and that unless such abuse clearly appears the circuit court of appeals will not review or disturb the trial court's action or rulings with respect to such matters.[88] In this connection, the term "abuse" has

87. U.S.—First Nat. Bank v. Philippine Refining Corporation of New York, C.C.A.Cal., 51 F.2d 218.

88. U.S.—Weeks v. Bareco Oil Co., C.C.A.Ill., 125 F.2d 84—Delno v. Market St. Ry. Co., C.C.A.Cal., 124 F.2d 965, affirming, D.C., 38 F.Supp. 341—Reconstruction Finance Corporation v. Kentucky River Coal Corporation, C.C.A.Ky., 114 F.2d 942—Public Service Commission of State of Missouri v. Brashear Freight Lines, C.C.A.Mo., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, reversed on other grounds 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551—Borchard v. California Bank, C.C.A.Cal., 107 F.2d 96, certiorari granted 60 S.Ct. 721, 309 U.S. 648, 84 L.Ed. 1000, reversed on other grounds 60 S.Ct. 957, 310 U.S. 311, 84 L.Ed. 1222, rehearing denied 61 S.Ct. 54, 311 U.S. 724, 85 L.Ed. 472—Hartford-Empire Co. v. Obear-Nester Glass Co., C.C.A.Mo., 95 F.2d 414—Graves v. Mount Vernon Trust Co., C.C.A.N.Y., 69 F.2d 101—Fox v. Blair, D.C.Pa., 20 F.2d 235—City of Des Moines, Iowa, v. Des Moines Water Co., Iowa, 230 F. 570, 144 C.C.A. 624, affirming, D.C., 218 F. 939—Ah Tai v. U. S., Mass., 135 F. 513, 68 C.C.A. 225.

"Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate court's review does not include trial court's discretion. If, however, the facts are not in dispute and it is a question of sound judgment . . . we are in about as good a position as . . . [the trial judge] to say whether the discretion has been wisely exercised. In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment."—In re A. Roth Co., C.C.A.Ill., 125 F.2d 396, 398—Weeks v. Bareco Oil Co., C.C.A.Ill., 125 F.2d 84, 93.

"Discretionary orders are not appealable, unless abuse of discretion is shown as error of law."—Luhrig Collieries Co. v. Interstate Coal & Dock Co., C.C.A.N.Y., 287 F. 711, 713, certiorari denied Thosmil Holding Corporation v. Interstate Coal & Dock Co., 43 S.Ct. 700, 262 U.S. 751, 67 L. Ed. 1215.

The burden of showing abuse of discretion is on the complaining party.—Palmer v. Watson, C.C.A.N.Y., 122 F.2d 598—Murray Hill Restaurant v. Thirteen Twenty One Locust, C.C.A.Pa., 98 F.2d 578.

Construction of rule or decree

(1) Trial court's construction of its rule is not disturbed, in absence of abuse of discretion.—Republic Acceptance Corporation v. Massachusetts Bonding & Insurance Co., C.C. A.Pa., 34 F.2d 660.

(2) The circuit court of appeals is bound by receivership court's construction of its final decree in receivership proceedings, where receivership court had a right to construe the decree as it was construed.—Texas Co. v. Chicago & A. R. Co., C.C.A.Ill., 126 F.2d 83, reversing, D.C., 36 F.Supp. 62.

Amount of judgment

The rule that a reviewing court should not disturb a judgment unless there has been an abuse of discretion means merely that it will not intervene so long as it regards the amount as being within permissible limits.—Barnett v. Equitable Trust Co. of New York, C.C.A.N.Y., 34 F. 2d 916, certiorari granted U. S. v. Equitable Trust Co. of New York, 50 S.Ct. 160, 280 U.S. 550, 74 L.Ed. 609, and modified on other grounds 51 S.Ct. 639, 283 U.S. 738, 75 L.Ed. 1379.

Rulings as to particular matters held within rule:

(1) "Mere matters of procedure."—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A.Idaho, 8 F.2d 922, 925, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778.

(2) Competency or qualifications of jurors.—Press Pub. Co. v. McDonald, N.Y., 73 F. 440, 19 C.C.A. 516, affirming 63 F. 238, 11 C.C.A. 155, 26 L.R.A. 53, certiorari denied 16 S.Ct. 1205, 163 U.S. 700, 41 L.Ed. 320—Southern Pac. Co. v. Rauh, Or. 49 F. 696, 1 C.C.A. 416.

(3) Laches or the lapse of sufficient time to bar an action.—Laursen v. O'Brien, C.C.A.Wis., 90 F.2d 792—Gillons v. Shell Co. of California, C.C.A.Cal., 86 F.2d 600, certiorari denied 58 S.Ct. 9, 302 U.S. 689, 82 L.Ed. 532—Robert Hind, Limited, v. Silva, C.C.A.Hawaii, 75 F.2d 74—Koen v. Beardsley, C.C.A.Colo., 63 F.2d 595.

(4) Granting or refusing leave to a party to retire from a stipulation. —Davis-Bournonville Co. v. Alexander Milburn Co., C.C.A.N.Y., 1 F.2d 227, affirming, D.C., 297 F. 846, certiorari granted Alexander Milburn Co. v. Davis-Bournonville Co., 45 S.Ct. 93, 266 U.S. 596, 69 L.Ed. 459, and decree reversed on other grounds 46 S.Ct. 324, 270 U.S. 390, 70 L.Ed. 651.

(5) Extension of time to prepare bill of exceptions in accordance with trial court's rulings.—In re Richardson, C.C.A.S.C., 30 F.2d 687.

(6) Stay of proceedings in federal court action under Federal Employers' Liability Act pending appeal to state supreme court from order granting plaintiff new trial in state court action for same injury.—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F. 2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569.

(7) Excessiveness of verdict in personal injury action.—Teche Lines v. Boyette, C.C.A.Miss., 111 F.2d 579.

(8) Dismissal of action under statutory provision therefor when party entitled to judgment neglects to demand and procure entry thereof for over six months after verdict or final submission.—Carnegie Nat. Bank v. City of Wolf Point, C.C.A.Mont., 110 F.2d 569.

(9) Whether action is maintainable as a class action.—Weeks v. Bareco Oil Co., C.C.A.Ill., 125 F.2d 84—Pelelas v. Caterpillar Tractor Co., C.C.A. Ill., 113 F.2d 629, affirming, D.C., 30 F.Supp. 173, certiorari denied 61 S. Ct. 138, 311 U.S. 700, 85 L.Ed. 454.

(10) Whether the issuance of an order granting dedimus potestatem is necessary to prevent a failure or delay of justice is for the trial court to determine.—Tom Ung Chai v. Burnett, C.C.A.Hawaii, 25 F.2d 574, certiorari denied 49 S.Ct. 19, 278 U.S. 614, 73 L.Ed. 538.

(11) The reviewing court has the duty of correcting an abuse of the trial court's discretion in this respect.—Spellman v. Sullivan, C.C.A.

been said to be peculiarly of legal significance, wholely unrelated to its meaning in common parlance;[89] and "discretion" and "abuse of discretion" have been said to be relative, rather than absolute, terms.[90] It has been said that the question of discretion is the display of sound judgment,[91] that discretion means the equitable decision of what is just and proper under the circumstances,[92] and that abuse of discretion in law means that the court's action was in error as a matter of law,[93] or was arbitrary and not justifiable in view of the situation and circumstances affecting the exercise of discretion,[94] or was such that no reasonable man would take the view adopted by the trial judge.[95]

If the trial court has refused to exercise a discretion vested in it, on the supposed ground of want of power,[96] or on a ground not sanctioned by law,[97] the judgment will generally be reversed to the end that the discretion shall be exercised.

Parties; process. An order granting or denying intervention may be reviewed only if the trial court has abused its discretion.[98] A decree based on a failure to join persons as parties will be reviewed despite a court rule giving the court discretion with respect to joinder, in certain cases, where the effect of applying the rule would be to deprive a party of the right to invoke the jurisdiction of a federal court.[99]

The appellate court generally will not review or revise the trial court's exercise of its discretionary powers with respect to the amendment of process.[1]

Pleadings. The general rule is that, unless a gross abuse of discretion, or a detriment to justice, clearly appears, the circuit court of appeals will not review or disturb the trial court's exercise of its discretion with respect to amendments to pleadings,[2]

N.Y., 61 F.2d 787, affirming, D.C., 43 F.2d 762.

(12) Circuit court of appeals will not determine whether order of dismissal was in fact entered, by examination of record, and of practice of clerk in dealing with such orders since "all such questions must be decided by the District Court in the first instance."—Zadig v. Ætna Ins. Co., C.C.A.N.Y., 42 F.2d 142, 144.

89. U.S.—Beck v. Wings Field, Inc., C.C.A.Pa. 122 F.2d 114, reversing, D.C., 35 F.Supp. 953.

90. Weeks v. Barco Oil Co., C.C.A. Ill., 125 F.2d 84.

"The term 'discretion' implies the absence of a hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of discretion and yet discretion should not be a word for arbitrary will or inconsiderate action."—Cohen v. Young, C.C.A.Mich., 127 F.2d 721, 726.

91. U.S.—Weeks v. Bareco Oil Co., C.C.A.Ill., 125 F.2d 84—Delno v. Market St. Ry. Co., C.C.A.Cal., 124 F.2d 965, affirming, D.C., 38 F.Supp. 341.

92. U.S.—Cohen v. Young, C.C.A. Mich., 127 F.2d 721, 726.

Question of fact

"Whether action taken by the court lies within its sound discretion is ordinarily a question of fact whether under the rules of law and the established principles of practice, having regard to the rights and interests of all parties, justice and equity require the action in question."—Cohen v. Young, supra.

93. U.S.—Beck v. Wings Field, Inc., C.C.A.Pa., 122 F.2d 114, reversing, D.C., 35 F.Supp. 953—Rieder v. Rogan, D.C.Cal., 12 F.Supp. 307.

"The exercise of discretion does not permit the court to disregard the substantive principles of law established for the protection of litigants."—Cohen v. Young, C.C.A.Mich., 127 F.2d 721, 726.

94. U.S.—Delno v. Market St. Ry. Co., C.C.A.Cal., 124 F.2d 965, affirming, D.C., 38 F.Supp. 341—Hartford-Empire Co. v. Obear-Nester Glass Co., C.C.A.Mo., 95 F.2d 414.

95. U.S.—Delno v. Market St. Ry. Co., C.C.A.Cal., 124 F.2d 965, 967, affirming, D.C., 38 F.Supp. 341.

"If reasonable men could differ as to the propriety of the action taken by the trial judge, then it cannot be said that the trial court abused its discretion."—Delno v. Market St. Ry. Co., supra.

96. U.S.—Hernan v. American Bridge Co., Ohio, 167 F. 930, 93 C.C.A. 330—Felton v. Spiro, Tenn., 78 F. 576, 24 C.C.A. 321.

97. U.S.—Rieder v. Rogan, D.C. Cal., 12 F.Supp. 307.

98. U.S.—Whittaker v. Brictson Mfg. Co., C.C.A.S.D., 43 F.2d 485—Hartford-Connecticut Trust Co. v. Doherty, C.C.A.Ohio, 286 F. 926—Richfield Oil Co. v. Western Machinery Co., C.C.A.Ariz., 279 F. 852, certiorari denied Western Machinery Co. v. Richfield Oil Co., 43 S.Ct. 13, 260 U.S. 723, 67 L.Ed. 481.

Individual interest; custody of res

Permitting or denying interventions in proceeding which is not a class suit, and in which complainants are suing merely to establish individual interests, and there is no res in court's custody to be finally disposed of by decree, rests wholly in trial court's discretion, and such order is ordinarily not appealable.—Aiken v. Cornell, C.C.A.Tex., 90 F.2d 567.

Interest in res

(1) "There is a class of cases in which a party has the equitable right to intervene, and the right to review by appeal any order denying that right. . . . The class includes those cases in which one claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court."—Western Union Telegraph Co. v. United States & Mexican Trust Co., Kan., 221 F. 545, 552, 137 C.C.A. 113.

(2) "It is only when he who seeks to intervene has a direct and immediate interest in a res, the subject of the suit, and cannot otherwise protect his interest, that the right of intervention is absolute, and a denial is the subject of an appeal."—Radford Iron Co. v. Appalachian Electric Power Co., C.C.A.Va., 62 F. 2d 940, 943, certiorari denied 53 S.Ct. 691, 289 U.S. 748, 77 L.Ed. 1494.

Order made after final decree

In suit in nature of general creditors' and stockholders' bill by creditors and stockholders against insurance corporation, denial of petition of stockholder for leave to intervene was discretionary order, not reviewable on appeal, where not made until after final decree was entered.—Stallings v. Conn, C.C.A.Ala., 74 F.2d 189.

99. U.S.—Rose v. Saunders, C.C.A. Cal., 69 F.2d 339.

1. U.S.—Great Northern R. Co. v. Herron, N.D., 136 F. 49, 68 C.C.A. 599—Rucker v. Bolles, Colo., 133 F. 858, 67 C.C.A. 30.

2. U.S.—Aetna Casualty & Surety Co. v. Abbott, 130 F.2d 40, affirming Abbott v. Aetna Casualty & Surety Co., C.C.A.Md., 42 F.Supp.

bills of particulars,[3] the filing of additional or supplemental pleadings,[4] or the striking out of pleadings.[5]

Provisional remedies; interlocutory or other proceedings before trial. The trial court's exercise of its discretionary powers with reference to provisional remedies or interlocutory matters will not be reviewed by the circuit court of appeals except for clear abuse of discretion.[6] So, in the absence of manifest abuse of discretion, the court will generally not review, modify, or disturb discretionary rulings as to the grant, refusal, modification, continuance, or dissolution of an injunction or restraining order;[7] and this is particularly true where the facts

793—Wittmayer v. U. S., C.C.A. Mont., 118 F.2d 808—George v. Wiseman, C.C.A.Kan., 98 F.2d 923—Gallagher v. Pacific American Co., C.C.A.Cal., 97 F.2d 193—Liverpool & London & Globe Ins. Co. of Liverpool, England v. Nebraska Storage Warehouses, C.C.A.Neb., 96 F.2d 30—Suffel v. Bosworth, C.C.A. Cal., 95 F.2d 494—U. S. v. First Wisconsin Trust Co., C.C.A.Wis., 92 F.2d 840—McAllister v. Sloan, C.C.A.Ark., 81 F.2d 707—O'Quinn v. U. S., C.C.A.La., 70 F.2d 599—Howe v. Haterius, C.C.A.Mo., 66 F.2d 835, affirming, D.C., Haterius v. Howe, 4 F.Supp. 654—American Woolen Co. v. White, C.C.A.Mass., 56 F.2d 716, reversing, D.C., 52 F.2d 310—Broxham v. Borden's Farm Products Co. of Illinois, C.C.A.Ill., 53 F.2d 946—Schulenberg v. Norton, C.C.A.N.D., 49 F.2d 578—Wabash R. Co. v. Lewis, C.C.A.Mo., 48 F. 2d 519—Davis v. New York Life Ins. Co., C.C.A.Mo., 47 F.2d 1051—Johnston v. Ouachita Nat. Bank of Monroe, La., C.C.A.Ark., 40 F. 2d 604—Electric Management & Engineering Corporation v. United Power & Light Corporation (of Kansas), C.C.A.Kan., 19 F.2d 311—In re Boynton, D.C.Wash., 24 F. Supp. 267—Ozan Lumber Co. v. Davis Sewing Mach. Co., C.C.A.Del., 292 F. 135, affirming, D.C.1922, 284 F. 161, and 285 F. 395—Swiftwater Plantations Co. v. Davis, C.C.A. Miss., 287 F. 813—Beers v. Denver & R. G. W. R. Co., C.C.A.Colo., 286 F. 886—Beers v. Equitable Trust Co. of New York, C.C.A.Colo., 286 F. 883—Tway v. Seneca Motor Car Co., C.C.A.Ga., 284 F. 265—Pauchet v. Bujac, C.C.A.N.M., 281 F. 962—Gooch v. Presbyterian Home Hospital, Tenn., 239 F. 828, 152 C.C.A. 614, certiorari denied Presbyterian Home Hospital v. Gooch, 37 S.Ct. 480, 243 U.S. 655, 61 L.Ed. 949—In re Frank, Pa., 239 F. 709, 152 C.C. A. 543, affirming, D.C., 234 F. 665—Western Coal & Mining Co. v. McCallum, Ark., 237 F. 1003, 151 C.C. A. 65—El Dia Ins. Co. v. Sinclair, N.Y., 228 F. 833, 143 C.C.A. 231, certiorari denied 36 S.Ct. 449, 241 U.S. 661, 60 L.Ed. 1226—Chicago, St. P., M. & O. Ry. Co. v. Nelson, Minn., 226 F. 708, 141 C.C.A. 464—Coeur d'Alene Lumber Co. v. Thompson, Idaho, 215 F. 8, 131 C.C. A. 316, L.R.A.1915A 731—Great Northern R. Co. v. Herron, N.D., 136 F. 49, 68 C.C.A. 599—Rucker v. Bolles, Colo., 133 F. 858, 67 C.C. A. 30—Dietz v. Lymer, Neb., 61 F. 792, 10 C.C.A. 71, rehearing denied 63 F. 758, 11 C.C.A. 410—Brown v. The Cadmus, C.C.N.Y., 4 F.Cas. No.1,997, 2 Paine 564.

4 C.J. p 799 notes 34, 36.

"It is true that appellate courts are disinclined to interfere with a trial court's exercise of discretion in the matter of amendments; but there is no doubt that in proper cases the appellate power may, and should, be so used."—International Banding Mach. Co. v. Commissioner of Internal Revenue, C.C.A., 37 F.2d 660, 662.

Trial amendment to conform pleading to proof

U.S.—Gibson v. Southern Pac. Co., C. C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 291 U.S. 673, 78 L.Ed. 1062—Pulver v. Union Inv. Co., C. C.A.Minn., 279 F. 699.

Addition to prayer of bill

U.S.—Stewart v. Kelly Axe Mfg. Co., C.C.A.W.Va., 18 F.2d 567.

Addition of new defense

U.S.—Ames v. Sullivan, Alaska, 235 F. 880, 149 C.C.A. 192.

4 C.J. p 800 note 47.

Counterclaim

Whether counterclaim which might be subject of independent suit in equity against plaintiff may be filed under equity rules is within trial court's discretion, subject to review in case of abuse.—In-A-Floor Safe Co. v. Diebold Safe & Lock Co., C.C. A.Cal., 91 F.2d 341.

3. U.S.—Alaska S. S. Co. v. Katzeek, C.C.A.Alaska, 16 F.2d 210—Harper v. Harper, W.Va., 252 F. 39, 164 C. C.A. 151.

4. U.S.—Hartford-Empire Co. v. Obear-Nester Glass Co., C.C.A.Mo., 95 F.2d 414—Selden Co. v. General Chemical Co., C.C.A.Pa., 73 F.2d 195—Continental Oil Co. v. Osage Oil & Refining Co., C.C.A.Okl., 57 F.2d 527, certiorari denied 53 S.Ct. 17, 287 U.S. 616, 77 L.Ed. 535—Southern Surety Co. v. Slayton, C.C.A. Ohio, 41 F.2d 693—Chief Consol. Mining Co. v. Mammoth Mining Co. of Nevada, C.C.A.Utah, 29 F.2d 703, certiorari dismissed Mammoth Min. Co. v. Chief Consol. Mining Co., 50 S.Ct. 78, 74 L.Ed. 1178—Beers v. Denver & R. G. W. R. Co., C.C.A. Colo., 286 F. 886—Beers v. Equitable Trust Co., of New York, C.C.A. Colo., 286 F. 883—General Electric Co. v. Alexander, C.C.A.N.Y., 280 F. 852, affirming, D.C., 277 F. 290, and certiorari denied Alexander v. General Electric Co., 43 S.Ct. 89, 260 U.S. 727, 67 L.Ed. 484—General Inv. Co. v. Lake Shore & M. S. Ry. Co., Ohio, 250 F. 160, 162 C.C.A. 296, affirming, D.C., 226 F. 976.

4 C.J. p 802 note 66.

5. U.S.—Board of Drainage Com'rs of Pender County Drainage Dist. No. 4 v. Lafayette Southside Bank of St. Louis, C.C.A.N.C., 27 F.2d 286.

4 C.J. p 801 note 61.

An order striking out the intervening petition of a party who has an absolute right to intervene in a proceeding in which the court holds the exclusive custody and dominion of property in which he claims a lien or interest, or striking out the statement of his cause of action for such lien or interest, and the facts entitling him to its preservation or enforcement, is reviewable and reversible.—Western Union Telegraph Co. v. United States & Mexican Trust Co., Kan., 221 F. 545, 137 C.C.A. 113.

6. U.S.—Federal Trade Commission v. Thomsen-King & Co., C.C.A.Ill., 109 F.2d 516.

7. U.S.—Rice & Adams Corporation v. Lathrop, N.Y., 49 S.Ct. 220, 278 U.S. 509, 73 L.Ed. 480, affirming, C.C.A., 24 F.2d 1021, affirming, D. C., Lathrop v. Rice & Adams Corporation, 21 F.2d 124—Shannon v. Retail Clerks, International Protective Ass'n, C.C.A.Ill., 128 F.2d 553—Gaines Dry Cleaners v. City of Chicago, C.C.A.Ill., 123 F.2d 104—Sims v. Central Trust Co., C.C.A. W.Va., 123 F.2d 89—Hannan v. City of Haverhill, C.C.A.Mass., 120 F. 2d 87, certiorari denied 62 S.Ct. 81, 314 U.S. 641, 86 L.Ed. 514, affirming, D.C., 38 F.Supp. 234—International Agricultural Corporation v. Pearce, C.C.A.N.C., 113 F.2d 964—Doyne v. Saettele, C.C.A.Mo., 112 F. 2d 155—Federal Trade Commission v. Thomsen-King & Co., C.C.A.Ill., 109 F.2d 516—Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, C.C.A.Ark., 100 F.2d 202—Murray Hill Restaurant v. Thirteen Twenty One Locust, C. C.A.Pa., 98 F.2d 578—Wilson v. Byron Jackson Co., C.C.A.Cal., 93 F. 2d 572—Tennessee Valley Author-

are in dispute.[8] Such discretion is, however, a legal or judicial one which is subject to review for abuse or improper or improvident exercise;[9] and there may be review and reversal of such a ruling where there has been a misconception of the law governing the case, or a violation or misapplication of some established rule of law or principle of equity,[10] or an obvious misunderstanding or disre-

ity v. Tennessee Electric Power Co., C.C.A.Tenn., 90 F.2d 885, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Du Pont Rayon Co. v. Richmond Industries, C.C.A. Va., 85 F.2d 981—Pratt v. Stout, C. C.A.Mo., 85 F.2d 172, affirming, D. C., Stout v. Pratt, 12 F.Supp. 864—Bradford v. Hurt, C.C.A.Tex., 84 F. 2d 722, affirming, D.C., 15 F.2d 426 —Simmons Co. v. Crew, C.C.A.N. C., 84 F.2d 82, certiorari denied Crew v. Simmons Co., 57 S.Ct. 32, 299 U.S. 569, 81 L.Ed. 419—Butler v. D. A. Schulte, Inc., C.C.A.Ala., 67 F.2d 632—Independent Cheese Co. v. Kraft Phenix Cheese Corporation, C.C.A.Wis., 56 F.2d 575—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F.2d 42—Wheeling & L. E. Ry. Co. v. Pittsburgh & W. V. Ry. Co., C.C.A.Ohio, 33 F.2d 390, certiorari denied Pittsburgh & W. V. Ry. Co. v. Wheeling & L. E. Ry. Co., 50 S.Ct. 40, 280 U.S. 593, 74 L.Ed. 640—Æolian Co. v. Fischer, C.C.A.N.Y., 29 F.2d 679, affirming, D.C., 27 F.2d 560—Bittner v. West Virginia-Pittsburgh Coal Co., C.C.A.W.Va., 15 F. 2d 652—Security Metal Products Co. v. Kawneer Co., C.C.A.Mo., 14 F.2d 569—Decorative Stone Co. v. Building Trades Council of Westchester County, C.C.A.N.Y., 13 F.2d 123—El Dorado & W. Ry. Co. v. Chicago, R. I. & P. Ry. Co., C.C.A. Ark., 5 F.2d 777—Wilson & Co. of California v. The Best Foods, C. C.A.Nev., 300 F. 484—Field v. Kansas City Refining Co., C.C.A.Mo., 296 F. 800, certiorari denied 45 S. Ct. 98, 266 U.S. 618, 69 L.Ed. 471 —Goldwyn Pictures Corporation v. Goldwyn, C.C.A.N.Y., 296 F. 391 —Meade v. Van Toy Co., C.C.A. Ohio, 295 F. 139—American Code Co. v. Bensinger, C.C.A.N.Y., 282 F. 829—City of Winfield v. Wichita Natural Gas Co., C.C.A.Kan., 267 F. 47—City of Amarillo v. Southwestern Telegraph & Telephone Co., Tex., 253 F. 638, 165 C. C.A. 264—City of Chicago v. Fox Film Corporation, Ill., 251 F. 883, 164 C.C.A. 99, affirming, D.C., Fox Film Corporation v. City of Chicago, 247 F. 231—City Council of Augusta v. Postal Telegraph-Cable Co., Ga., 246 F. 440, 158 C.C.A. 504, affirming, D.C., Postal Telegraph Cable Co. v. City Council of Augusta, 242 F. 538—Kansas City, Mo., v. Sanitary Street Flushing Mach. Co., Mo., 224 F. 964, 140 C.C.A. 456—American Grain Separator Co. v. Twin City Separator Co., Minn., 202 F. 202, 120 C.C.A. 644—Cumberland Telephone & Telegraph Co. v. Memphis, Tenn., 200 F. 657, 119 C.C.A. 73—Love v. Atchison, T. & S. F. R. Co., Okl., 185 F. 321, 107 C.C.A. 403, certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612—Alaska Pacific R. & Terminal Co. v. Copper River & N. W. R. Co., Alaska, 160 F. 862, 87 C.C.A. 666—Railroad Comm'n of Louisiana v. Texas & P. Ry. Co., La., 144 F. 68, 75 C.C.A. 226—Rahley v. Columbia Phonograph Co., Md., 122 F. 623, 58 C.C. A. 639—Empire State-Idaho Mining & Developing Co. v. Bunker Hill Mining & Concentrating Co., Idaho, 121 F. 973, 58 C.C.A. 311—Chickering v. Chickering & Sons, Ill., 120 F. 69, 56 C.C.A. 475—U. S. Gramophone Co. v. Seaman, W.Va., 113 F. 745, 51 C.C.A. 419—Thompson v. Nelson, C.C.A.Ky., 71 F. 339.

4 C.J. p 803 note 87.

Question for review; test

(1) On appeal from an order granting a preliminary injunction, the only question is whether or not, under the circumstances, the trial court has exercised sound discretion in granting it.—Sommer v. Rotary Lift Co., C.C.A.Cal., 66 F.2d 809—Thompson v. Balke, Ky., 245 F. 841, 158 C.C.A. 181.

(2) "The test on appeal is not whether the appellate court would have granted or denied the injunction, but whether the record shows an abuse of authority by the trial judge."—Sinclair Refining Co. v. Midland Oil Co., C.C.A.N.C., 55 F.2d 42, 45.

(3) "The granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the trial court, and not in the discretion of the appellate court."—Special School Dist. of Malvern, Hot Spring County, Ark., v. Speer, C.C.A.Ark., 75 F.2d 420, 421.

(4) "Upon appeal from an order granting preliminary injunction, we will not examine the question of its issue, as if the original application had been to our own discretion, but will affirm the action of the trial court, if it seems to have been fairly within the range of the discretion which that court had a right to exercise."—City of Louisville v. Louisville Home Telephone Co., C.C.A. Ky., 279 F. 949, 956.

(5) "If . . . [a preliminary injunction] preserves the existing state of things until the rights of the parties can be safely and fully investigated and determined upon strictly legal proofs according to the course and principles of equity, such a determination should not be disturbed."—Maison Dorin Société Anonyme v. Arnold, C.C.A.N.Y., 296 F. 387, 390.

8. U.S.—Singer Mfg. Co. v. Seinfeld, C.C.A.N.Y., 89 F.2d 35—Nashua Mfg. Co. v. Berenzweig, C.C.A.Ill., 39 F.2d 896—National Picture Theatres v. Foundation Film Corporation, C.C.A.N.Y., 266 F. 208—Empire State-Idaho Mining & Developing Co. v. Bunker Hill Mining & Concentrating Co., Idaho, 121 F. 973, 58 C.C.A. 311.

4 C.J. p 804 note 88.

9. U.S.—Gaines Dry Cleaners v. City of Chicago, C.C.A.Ill., 123 F.2d 104 —Sims v. Central Trust Co., C.C. A.W.Va., 123 F.2d 89—Doyne v. Saettele, C.C.A.Mo., 112 F.2d 155—Tennessee Valley Authority v. Tennessee Electric Power Co., C.C.A. Tenn., 90 F.2d 885, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695—Allen W. Hinkel Dry Goods Co. v. Withison Industrial Gas Co., C.C. A.Kan., 64 F.2d 881—Boynton v. Ellis, C.C.A.Kan., 57 F.2d 665—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42—Security Metal Products Co. v. Kawneer Co., C.C.A.Mo., 14 F.2d 569—Flintkote Co. v. Philips Carey Co., C.C.A.Ill., 13 F.2d 850—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A.Iowa, 9 F.2d 246 —El Dorado & W. Ry. Co. v. Chicago, R. I. & P. Ry. Co., C.C.A.Ark., 5 F.2d 777—Mutual Oil Co. v. Empire Petroleum Co., C.C.A.Ohio, 5 F.2d 500—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370—Field v. Kansas City Refining Co., C.C.A.Mo., 296 F. 800, certiorari denied 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—Gasaway v. Borderland Coal Corporation, C.C.A. Ind., 278 F. 56, modifying, D.C., Borderland Coal Corporation v. International Organization of United Mine Workers of America, 275 F. 871—Louisville & N. R. Co. v. Western Union Telegraph Co., Ky., 252 F. 29, 164 C.C.A. 141—Empire State-Idaho Mining & Developing Co. v. Bunker Hill Mining & Concentrating Co., Idaho, 121 F. 973, 58 C.C.A. 311—Charles E. Hires Co. v. Consumers' Co., Ill., 100 F. 809, 41 C.C.A. 71.

4 C.J. p 804 note 89.

10. U.S.—Tennessee Valley Authority v. Tennessee Electric Power Co., C.C.A.Tenn., 90 F.2d 885, certiorari denied 57 S.Ct. 945, 301 U.S. 710, 81 L.Ed. 1363—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695—Al-

gard of the facts.[11] Moreover, the general rule forbidding the review of discretionary rulings on injunctions does not apply where the trial court does not base its decision on a discretionary matter, but rests it on a point of law,[12] or where undisputed facts entitle or disentitle the moving party, as a matter of law, to the injunction sought.[13]

It is only for manifest abuse that the court will review or interfere with the lower court's exercise of its discretionary powers with respect to the appointment of, or refusal to appoint, a receiver,[14] the control of a receiver's actions in the discharge of his duties,[15] or the approval of a receiver's account;[16] and the discretion of the trial court as to the mode of establishing lien claims, whether by suit or by presentation to the receiver, has been declared not subject to review.[17] However, an order of appointment may be reviewable on the ground of a departure from the principles of equity, without proof of abuse of discretion.[18]

The trial court's refusal to transfer the case to the equity side, and its hearing thereof on the law side before a jury, should not be disturbed on appeal unless plainly erroneous.[19]

The appellate court will not review or reverse a discretionary ruling of the trial court granting or denying a dismissal or nonsuit before trial,[20] or

len W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., C.C.A. Kan., 64 F.2d 881—Boynton v. Ellis, C.C.A.Kan., 57 F.2d 665—Interstate Transit v. City of Detroit, Mich., C.C.A.Mich., 46 F.2d 42—Wheeling & L. E. Ry. Co. v. Pittsburgh & W. V. Ry. Co., C.C.A.Ohio, 33 F.2d 390, certiorari denied Pittsburgh & W. V. Ry. Co. v. Wheeling & L. E. Ry. Co., 50 S.Ct. 40, 280 U.S. 593, 74 L.Ed. 640—Saunders v. Piggly-Wiggly Corporation, C.C.A. Tenn., 30 F.2d 385, modifying, D.C., Piggly-Wiggly Corporation v. Saunders, 1 F.2d 572—Flintkote Co. v. Philips Carey Co., C.C.A.Ill., 13 F.2d 850—City of Council Bluffs v. Omaha & C. B. St. Ry. Co., C.C.A. Iowa, 9 F.2d 246—Mutual Oil Co. v. Empire Petroleum Co., C.C.A.Ohio, 5 F.2d 500—Western Union Telegraph Co. v. Industrial Commission of Minnesota, D.C.Minn., 24 F.Supp. 370—Meade v. Van Toy Co., C.C.A. Ohio, 295 F. 139—Blackmore v. Collins, C.C.A.Mich., 290 F. 204, affirming, D.C., 286 F. 629—Rousso v. First Nat. Bank, C.C.A.Mich., 287 F. 273, certiorari denied, 43 S.Ct. 702, 262 U.S. 754, 67 L.Ed. 1216—City of Winfield v. Wichita Natural Gas Co., C.C.A.Kan., 267 F. 47—Louisville & N. R. Co. v. Western Union Telegraph Co., Ky., 252 F. 29, 164 C.C.A. 141—City of Chicago v. Fox Film Corporation, Ill., 251 F. 883, 164 C.C.A. 99, affirming, D. C., Fox Film Corporation v. City of Chicago, 247 F. 231—Folk v. U. S., Okl., 233 F. 177, 147 C.C.A. 183—Crescent Specialty Co. v. National Fireworks Distributing Co., Ohio, 219 F. 130, 135 C.C.A. 28—Magruder v. Belle Fourche Valley Water Users' Ass'n, S.D., 219 F. 72, 133 C.C.A. 524—Alaska Pacific R. & Terminal Co. v. Copper River & N. W. R. Co., Alaska, 160 F. 862, 87 C.C.A. 666—Vogel v. Warsing, Alaska, 146 F. 949, 77 C.C.A. 199.

25 C.J. p 970 note 11—4 C.J. p 804 notes 90, 92.

11. U.S.—Saunders v. Piggly-Wiggly Corporation, C.C.A.Tenn., 30 F.2d 385, modifying, D.C., Piggly-Wiggly Corporation v. Saunders, 1 F.2d 572—Mutual Oil Co. v. Empire Petroleum Co., C.C.A.Ohio, 5 F.2d 500—Meade v. Van Toy. C.C.A.Ohio, 295 F. 139—Blackmore v. Collins, C.C.A.Mich., 290 F. 204, affirming, D.C., 286 F. 629—Rousso v. First Nat. Bank, C.C.A.Mich., 287 F. 273, certiorari denied 43 S.Ct. 702, 262 U.S. 754, 67 L.Ed. 1216—American Code Co. v. Bensinger, C.C.A.N.Y., 282 F. 829—City of Chicago v. Fox Film Corporation, Ill., 251 F. 883, 164 C.C.A. 99, affirming, D.C., Fox Film Corporation v. City of Chicago, 247 F. 231—Crescent Specialty Co. v. National Fireworks Distributing Co., Ohio, 219 F. 130, 135 C.C.A. 28—Alaska Pacific R. & Terminal Co. v. Copper River & N. W. R. Co., Alaska, 160 F. 862, 87 C.C.A. 666—Vogel v. Warsing, Alaska, 146 F. 949, 77 C.C.A. 199.

12. U.S.—Securities and Exchange Commission v. Sunbeam Gold Mines Co., C.C.A.Wash., 95 F.2d 699—City of Covington, Ky., v. Cincinnati, N. & C. Ry. Co., C.C.A. Ky, 71 F.2d 117, certiorari denied Cincinnati, N. & C. Ry. Co. v. City of Covington, Ky., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702, and City of Covington v. Cincinnati, N. & C. Ry. Co., 55 S.Ct. 142, 293 U.S. 612, 79 L.Ed. 702—Cumberland Telephone & Telegraph Co. v. Memphis, Tenn., 200 F. 657, 119 C.C.A. 73.

Jurisdiction of equity
U.S.—Set-O-Type Co. v. American Multigraph Co., C.C.A.Ohio, 55 F.2d 800.

13. U.S.—Bankers' Utilities Co. v. National Bank Supply Co., C.C.A. Cal., 53 F.2d 432, certiorari denied 52 S.Ct. 313, 285 U.S. 541, 76 L.Ed. 933—National Picture Theatres v. Foundation Film Corporation, C.C. A.N.Y., 266 F. 208—Thompson v. Balke, Ky., 245 F. 841, 158 C.C.A. 181.

14. U.S.—U. S. v. Otley, C.C.A.Or., 116 F.2d 958—Kingsport Press v. Brief English Systems, C.C.A.N.Y., 54 F.2d 497, certiorari denied Owen v. Kingsport Press, 52 S.Ct. 497, 286 U.S. 545, 76 L.Ed. 1282—McLeod v. Hayward, C.C.A.Fla., 17 F.2d 900—Ward v. Central Trust Co. of Illinois, Ill., 252 F. 127, 164 C.C.A. 239—First Nat. Bank of San Francisco v. Detroit Trust Co., Wash., 248 F. 16, 160 C.C.A. 156, certiorari denied 38 S.Ct. 579, 247 U.S. 513, 62 L.Ed. 1243—United States Shipbuilding Co. v. Conklin, N.J., 126 F. 132, 60 C.C.A. 680—Heinze v. Butte & Boston Consolidated Min. Co., Mont., 126 F. 1, 61 C.C.A. 63, certiorari denied 25 S.Ct. 788, 195 U.S. 631, 49 L.Ed. 353—Briggs v. Neal, N.C., 120 F. 224, 56 C.C.A. 572.

4 C.J. p 804 note 96.

15. U.S.—Mercantile Trust Co. v. Farmers' L. & T. Co., Mo., 81 F. 254, 26 C.C.A. 383, certiorari denied 18 S.Ct. 944, 168 U.S. 710, 42 L.Ed. 1213.

16. U.S.—First Nat. Bank v. Waters, C.C.A.Pa., 82 F.2d 339.

17. U.S.—Haskell v. McClintic-Marshall Co., C.C.A.Wash., 289 F. 405, modifying, D.C., McClintic-Marshall Co. v. Scandinavian-American Bldg. Co., 281 F. 166.

18. U.S.—Folk v. U. S., Okl., 233 F. 177, 147 C.C.A. 183.

19. U.S.—Fidelity & Casualty Co. of New York v. Glenn, C.C.A.W.Va., 3 F.2d 913.

20. U.S.—Pen Phonograph Co. v. Columbia Phonograph Co., Pa., 132 F. 808, 66 C.C.A. 127.

Dismissal for lack of prosecution
The decision of a trial court in dismissing cause for lack of prosecution will not be disturbed on appeal unless it appears that there has been a gross abuse of discretion.—Sweeney v. Anderson, C.C.A.Kan., 129 F.2d 756.

granting or denying a reinstatement of the cause after a dismissal or nonsuit,[21] except so far as the jurisdiction of the trial court to make the order is concerned.[22]

Reference. The action of the lower court in overruling exceptions to a master's report, for the reason that the record was not printed as required by the rules, is a nonreviewable matter of discretion;[23] and the trial court's refusal to again refer a matter to referees is not reviewable in the absence of an abuse of discretion.[24]

Severance or consolidation of causes. The action of the trial court in allowing or not allowing separate trials between plaintiff and different defendants,[25] or the uniting of the causes of action of several plaintiffs against one defendant,[26] will be reviewed only if there has been an abuse of discretion.

Continuance. Where a motion or application for a continuance or postponement is addressed to the discretion of the trial court, its grant or refusal thereof will not be reviewed or reversed unless an abuse of discretion is shown.[27]

Proceedings at trial. The circuit court of appeals will not review or disturb rulings of the trial court on discretionary matters as to the course and conduct of the trial, unless an abuse of discretion clearly appears.[28] So a ruling of the trial court with respect to the reception or rejection of evidence, as to which it is vested with a sound discretion, will be reviewed only where such discretion has been plainly abused;[29] and the order in which evidence should

21. U.S.—Dexter v. Kellas, N.Y., 113 F. 48, 51 C.C.A. 35.

22. U.S.—S. M. Hamilton Coal Co. v. Watts, N.Y., 232 F. 832, 147 C.C.A. 26, reversing, D.C., Watts v. S. M. Hamilton Coal Co., 219 F. 1003.

23. U.S.—Du Bois v. New York, N. Y., 128 F. 418, 63 C.C.A. 160.

24. U.S.—McCarthy v. Ruddock, C. C.A.Wash., 43 F.2d 976.

25. U.S.—City of Denver v. Sherret, Colo., 88 F. 226, 31 C.C.A. 499.

26. U.S.—Radio Corporation of America v. Lehr Auto Supply Co., C.C.A.N.Y., 29 F.2d 162.

27. U.S.—Girard Trust Co. v. Amsterdam, C.C.A.Fla., 128 F.2d 376—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C.A.N.M., 122 F.2d 143—George v. Wiseman, C.C.A.Kan., 98 F.2d 923—Southern Kansas Stage Lines v. Gibson, C.C.A.Okl., 87 F.2d 23—Sanders v. Hall, C.C.A.Okl., 74 F.2d 399, certiorari denied 55 S.Ct. 653, 295 U.S. 739, 79 L.Ed. 1686—Virginia Beach Bus Line v. Campbell, C.C.A.N.C., 73 F.2d 97—Speers Sand & Clay Works v. American Trust Co., C.C.A.Md., 52 F.2d 831, certiorari denied Speers Sand & Clay Works v. American Trust Co. of New York, 52 S.Ct. 500, 286 U.S. 548, 76 L.Ed. 1284—U. S. v. De Armond, C.C.A.Mo., 48 F.2d 465—Smith v. Daniel, C.C.A.Tenn., 46 F. 2d 740, certiorari denied 51 S.Ct. 651, 283 U.S. 852, 75 L.Ed. 1460—Dietrich v. U. S. Shipping Board Emergency Fleet Corporation, C.C. A.N.Y., 9 F.2d 733, certiorari denied Dietrich v. U. S. Shipping Board Merchant Fleet Corporation, 49 S. Ct. 82, 278 U.S. 647, 73 L.Ed. 560—Dundee Petroleum Co. v. Clay, C. C.A.Okl., 267 F. 145, certiorari denied 41 S.Ct. 377, 255 U.S. 574, 65 L.Ed. 793—Goldfarb v. Keener, C. C.A.N.Y., 263 F. 357—Panama R. Co. v. Pigott, Canal Zone, 256 F. 837, 168 C.C.A. 183, affirmed 41 S. Ct. 199, 254 U.S. 552, 65 L.Ed. 400—Pennsylvania Co. v. Fanger, Ohio, 231 F. 851, 146 C.C.A. 47.
D.C.—Goodyear Service v. Pretzfelder, 84 F.2d 242, 65 App.D.C. 389.
4 C.J. p 809 notes 32, 33.

Illness of counsel

Denial of continuance for illness of one of defendant's counsel held not abuse of discretion.—Pocahontas Distilling Co. v. U. S., Va., 218 F. 782, 134 C.C.A. 566, certiorari denied 35 S.Ct. 602, 238 U.S. 620, 59 L.Ed. 1492.

28. U.S.—Jackson v. Mut. Life Ins. Co. of New York, Kan., 186 F. 447, 108 C.C.A. 369—May v. International Loan & Trust Co., Tex., 92 F. 445, 34 C.C.A. 448.

Matters to which rule has been applied

(1) Ruling on motion to reopen case for introduction of further evidence.—Anzano v. Metropolitan Life Ins. Co. of New York, C.C.A.N.J., 118 F.2d 430, affirming, D.C., 32 F.Supp. 417—Gardner v. U. S., C.C.A.Cal., 71 F.2d 63, certiorari denied 55 S.Ct. 213, 293 U.S. 619, 79 L.Ed. 707—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858, citing **Corpus Juris**—4 C.J. p 818 note 79, p 821 note 33.

(2) Reading of pleadings to jury by court or instructing jury to read them.—Illinois Cent. R. Co. v. Sigler, C.C.A.Tenn., 122 F.2d 279.

(3) Instruction authorizing unfavorable presumption against party failing to call witnesses controlled by or available to such party.—Nashville, C. & St. L. Ry. Co. v. York, C. C.A.Tenn., 127 F.2d 606.

(4) Submission of special questions or findings of fact to jury.—Fisher Mach. Works Co. v. Dougherty, Kan., 231 F. 910, 146 C.C.A. 106.

(5) Submission of issues to jury in advisory capacity.—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A.Idaho, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778.

(6) Determination by chancellor of question whether or not an issue in equity should be directed or framed to be tried by a jury.—Pacific Coal & Transportation Co. v. Pioneer Mining Co., Alaska, 205 F. 577, 123 C.C.A. 593.

(7) Trial court's exercise of its discretionary powers with reference to custody and conduct of jury, as in permitting separation of jury before verdict.—B. J. Wolf & Sons v. Royal Ins. Co., La., 194 F. 853, 114 C.C.A. 641—Guardian Fire Ins. Co. v. Central Glass Co., La., 194 F. 851, 114 C.C.A. 639.

Receiving suggestion of amicus curiæ

Whether the trial judge should or should not have received and considered a suggestion filed by the British ambassador as amicus curiæ is not reviewable.—The Claveresk, C.C.A.N. Y., 264 F. 276, affirming, D.C., Earn Line S. S. Co. v. Sutherland S. S. Co., 254 F. 126.

29. U.S.—Brigham Young University v. Lillywhite, C.C.A.Utah, 118 F. 2d 836, certiorari denied 62 S.Ct. 73, 314 U.S. 638, 86 L.Ed. 512—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Neb., 85 F.2d 187—Luke v. U. S., C.C.A.Ga., 84 F.2d 823—Maryland Casualty Co. v. Citizens State Bank of Tupelo, C.C.A. Miss., 84 F.2d 172—Gaillard v. Boynton, C.C.A.N.H., 70 F.2d 552—Gibson v. Southern Pac. Co., C.C.A. Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S. Ct. 458, 291 U.S. 673, 78 L.Ed. 1062—Lapp v. Pennsylvania R. Co., C.

be introduced or received,[30] and the determination of preliminary questions of fact on which the competency or relevancy of a witness or evidence depends,[31] are matters on which the ruling of the trial court will be reviewed or reversed only where there has been a clear error or abuse of discretion; and the same rule applies to the trial court's determination of the mental competency of a witness,[32] and to its exercise of discretion with reference to the examination[33] and cross-examination[34] of witnesses, including the allowance of leading questions,[35] and with reference to the arguments or statements of counsel.[36]

Where the trial court is vested with discretion in that connection, its action with reference to dismissal or nonsuit, as by granting or denying a motion therefor,[37] or its action on an application to reinstate a cause after dismissal,[38] or a motion to direct[39] or set aside[40] a verdict, will not be disturbed unless such discretion has been abused.

New trial or rehearing. When a motion or application for a new trial is addressed to the sound discretion of the lower court under the rules stated in the title New Trial § 201, also 46 C.J. p 406 note 16–p 416 note 80, its ruling thereon ordinarily will not be reviewed or reversed by the circuit court of appeals, at least in the absence of a clear abuse of discretion;[41] and the same rule prevails with

C.A.N.J., 51 F.2d 477—Central R. Co. of New Jersey v. Monahan, C.C.A.N.Y., 11 F.2d 212—U. S. ex rel. Marcus v. Hess, D.C.Pa., 41 F. Supp. 197—Overstreet v. Norfolk & W. Ry. Co., Va., 238 F. 565, 151 C.C.A. 501—American Agricultural Chemical Co. v. Hogan, Mass., 213 F. 416, 130 C.C.A. 52.

4 C.J. p 812 note 57.

Rulings relating to reception

(1) Of cumulative evidence.—Sommer v. Carbon Hill Coal Co., Wash., 107 F. 230, 46 C.C.A. 255.

(2) Of evidence on collateral issues.—Pacific S. S. Co. v. Holt, C.C.A. Or., 77 F.2d 192.

(3) Of expert testimony.—Gillespie v. Collier, Okl., 224 F. 298, 139 C.C.A. 534.

(4) Of photographs.—Chicago, G. W. R. Co. v. Robinson, C.C.A.Neb., 101 F.2d 994, certiorari denied 59 S. Ct. 1038, 307 U.S. 640, 83 L.Ed. 1520.

(5) Of testimony as res gestæ.—Flannagan v. Provident Life & Accident Ins. Co., C.C.A.Va., 22 F.2d 136.

Evidence controlling discretion

Refusal to receive and consider evidence by which the court's discretion should be guided or controlled is an abuse of discretion.—Cohen v. Young, C.C.A.Mich., 127 F.2d 721.

30. U.S.—Woodside v. U. S., C.C.A. Va., 60 F.2d 823.

4 C.J. p 815 note 67, p 817 note 73.

31. U.S.—White v. State of Maryland, to Use of Anderson, C.C.A. Md., 106 F.2d 392—American Glycerin Co. v. Eason Oil Co., C.C.A. Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435.

22 C.J. p 526 note 11.

Qualification or competency of expert or opinion witness

U.S.—Davidson v. Commissioner of Internal Revenue, C.C.A.Tex., 91 F.2d 516—Mutual Life Ins. Co. of New York v. Treadwell, C.C.A.La., 79 F.2d 487—Taylor v. U. S., C.C.A. Ala., 71 F.2d 76—General Paint Corporation v. Kramer, C.C.A.Okl., 68 F.2d 40, certiorari denied 54 S. Ct. 628, 292 U.S. 623, 78 L.Ed. 1478—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A. Iowa, 63 F.2d 602—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 55 F.2d 612, certiorari denied 53 S.Ct. 19, 287 U. S. 619, 77 L.Ed. 537—Henry H. Cross Co. v. Rice, C.C.A.Ind., 45 F.2d 940, certiorari denied 51 S.Ct. 657, 283 U.S. 865, 76 L.Ed. 1469—James Baird Co. v. Boyd, C.C.A. N.C., 41 F.2d 578—Hamilton v. Empire Gas & Fuel Co., C.C.A.Kan., 297 F. 422, certiorari denied 45 S. Ct. 92, 266 U.S. 607, 69 L.Ed. 465—Minnesota & Ontario Paper Co. v. Swenson Evaporator Co., C.C.A. Minn., 281 F. 622.

4 C.J. p 814 note 63 [g] (1)—22 C.J. p 526 note 11.

The admission of declarations of alleged conspirators before the conspiracy has been sufficiently proved being discretionary with the trial court, its rulings thereon will not ordinarily be disturbed.—Spencer v. Read, Iowa, 217 F. 508, 133 C.C.A. 360.

32. U.S.—New York Evening Post Co. v. Chaloner, C.C.A.N.Y., 265 F. 204, certiorari dismissed 40 S.Ct. 396, 252 U.S. 591, 64 L.Ed. 731.

33. U.S.—American Agricultural Chemical Co. v. Hogan, Mass., 213 F. 416, 130 C.C.A. 52—Sutherland v. Round, Ohio, 57 F. 467, 6 C.C.A. 428.

34. U.S.—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F. 2d 417.

4 C.J. p 823 note 63, p 824 note 64.

35. U.S.—Eli Mining & Land Co. v. Carleton, Colo., 108 F. 24, 47 C.C.A. 166—Ross v. Raphael Truck & Sons Co., N.Y., 91 F. 128, 33 C.C.A. 405.

36. U.S.—Braman v. Wiley, C.C.A. Ind., 119 F.2d 991—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C.A.Iowa, 101 F.2d 493—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30—Fidelity Phenix Fire Ins. Co. of New York v. Vallone, C.C.A.Tex., 74 F.2d 137, certiorari denied 55 S.Ct. 636, 294 U.S. 727, 79 L.Ed. 1257.

37. U.S.—Public Service Commission of State of Missouri v. Brashear Freight Lines, C.C.A.Mo., 114 F.2d 1, certiorari granted 61 S.Ct. 392, 311 U.S. 642, 85 L.Ed. 410, reversed on other grounds 61 S.Ct. 784, 312 U.S. 621, 85 L.Ed. 1083, rehearing denied 61 S.Ct. 938, 313 U.S. 598, 85 L.Ed. 1551—Iowa-Nebraska Light & Power Co. v. Daniels, C.C.A.Neb., 63 F.2d 322—Russell v. Texas Transport & Terminal Co., C.C.A.N.Y., 32 F.2d 689—Radio Corporation of America v. Emerson, C.C.A.N.Y., 296 F. 51, certiorari denied Emerson v. Radio Corporation of America, 44 S.Ct. 456, 265 U.S. 582, 68 L.Ed. 1190—Penn Phonograph Co. v. Columbia Phonograph Co., Pa., 132 F. 808, 66 C.C.A. 127.

"The question for . . . [the circuit] court [of appeals] is not whether discretion was wisely exercised, but whether it was abusively exercised."—United Motors Service v. Tropic-Aire, C.C.A.Minn., 57 F.2d 479, 488.

38. U.S.—Dexter v. Kellas, N.Y., 113 F. 48, 51 C.C.A. 35.

39. U.S.—Texas & P. R. Co. v. Eason, Tex., 92 F. 553, 34 C.C.A. 530.

40. U.S.—(American) Lumbermen's Mut. Casualty Co. of Illinois v. Timms & Howard, C.C.A.N.Y., 108 F.2d 497—Grissom v. Sternberger, C.C.A.N.C., 10 F.2d 764—Boston & M. R. R. v. Dutille, C.C.A.N.H., 289 F. 320.

41. U.S.—U. S. v. Socony-Vacuum Oil Co., Wis., 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, reversing C.C.A., 105 F.2d 809, reversing D.C., U.

S. v. Standard Oil Co. (Indiana), 23 F.Supp. 937, motion denied 24 F. Supp. 575, certiorari granted U. S. v. Socony-Vacuum Oil Co., 60 S.Ct. 124, 308 U.S. 540, 84 L.Ed. 455, and Socony-Vacuum Oil Co. v. U. S., 60 S.Ct. 124, 308 U.S. 540, 84 L.Ed. 455, rehearing denied 60 S. Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421, and U. S. v. Socony-Vacuum Oil Co., 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421—Emanuel v. Kansas City Title & Trust Co., C.C.A. Mo., 127 F.2d 175—Highway Const. Co. of Ohio v. City of Miami, C.C. A.Fla., 126 F.2d 777—Ætna Casualty & Surety Co. v. Yeatts, C.C.A. Va., 122 F.2d 350—Beck v. Wings Field, Inc., C.C.A.Pa., 122 F.2d 114, reversing, D.C., 35 F.Supp. 953—Barnes v. South Carolina Public Service Authority, C.C.A.S.C., 120 F.2d 439—Standard Oil Co. v. Burleson, C.C.A.Fla., 117 F.2d 412—Campbell v. American Foreign S. S. Corporation, C.C.A.N.Y., 116 F.2d 926, certiorari denied 61 S.Ct. 959, 313 U.S. 573, 85 L.Ed. 1530—Ecker v. Potts, C.C.A.D.C., 112 F.2d 581—Teche Lines v. Boyette, C.C.A. Miss., 111 F.2d 579—Marshall's U. S. Auto Supply v. Cashman, C.C. A.Kan., 111 F.2d 140, certiorari denied Cashman v. Marshall's U. S. Auto Supply, 61 S.Ct. 26, 311 U.S. 667, 85 L.Ed. 428—Pettingill v. Fuller, C.C.A.Vt., 107 F.2d 933, certiorari denied 60 S.Ct. 609, 309 U.S. 669, 84 L.Ed. 1015—Viles v. Prudential Ins. Co. of America, C.C.A. Colo., 107 F.2d 696, certiorari denied 60 S.Ct. 387, 308 U.S. 626, 84 L.Ed. 523, rehearing denied 60 S. Ct. 582, 309 U.S. 695, 84 L.Ed. 1035, petition denied 60 S.Ct. 709, 309 U. S. 695, 84 L.Ed. 991, and motion denied 61 S.Ct. 53, 311 U.S. 723, 85 L.Ed. 471—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 106 F.2d 561, certiorari dismissed 60 S.Ct. 468, 309 U.S. 691, 84 L.Ed. 1033—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A.N.C., 99 F.2d 218—U. S. v. Porter, C.C.A. Ill., 96 F.2d 773, 775, certiorari denied 59 S.Ct. 71, 305 U.S. 612, 83 L.Ed. 389—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 384—Carter Coal Co. v. Nelson, C. C.A.Va., 91 F.2d 651—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—U. S. v. Shingle, C.C.A.Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Nichols v. Republic Iron & Steel Co., C.C.A.Ala., 89 F.2d 927—McCoy v. Gaddes, C.C.A.Pa., 88 F.2d 480—Conley v. Hildebrant, C. C.A.Pa., 88 F.2d 300—Sulzbacher v. Continental Casualty Co., C.C.A. Mo., 88 F.2d 122—Roedegir v. Phillips, C.C.A.N.C., 85 F.2d 995—First Nat. Bank v. Deisher, C.C.A.Va., 80 F.2d 882—Prudential Ins. Co. of America v. Murphy, C.C.A.Wis., 74 F.2d 544—Century Indemnity Co. v. Shakespeare, C.C.A.Colo., 74 F.2d 392—Ralston Purina Co. v. Bansau, C.C.A.Ill., 73 F.2d 430—Lynch v. U. S., C.C.A.Ga., 73 F.2d 316—Hunt v. Standard Brands, C.C.A.Ohio, 72 F.2d 822—H. F. Wilcox Oil & Gas Co. v. Skidmore, C.C.A.Mo., 72 F. 2d 748—U. S. v. Flippence, C.C.A. Utah, 72 F.2d 611—Spokane International Ry. Co. v. U. S., C.C.A. Idaho, 72 F.2d 440—Warner Co. v. Orapello, C.C.A.Pa., 72 F.2d 373—Grobel v. Miller, C.C.A.Pa., 71 F.2d 503—Seals v. U. S., C.C.A.La., 70 F.2d 519—City of Amarillo, Tex., v. Emery, C.C.A.Tex., 69 F.2d 626—Delaware & H. R. Corporation v. Cottrell, C.C.A.Pa., 69 F.2d 195, certiorari denied 54 S.Ct. 719, 292 U. S. 638, 78 L.Ed. 1490—Gibson v. Southern Pac. Co., C.C.A.Tex., 67 F.2d 758, certiorari denied Southern Pac. Co. v. Gibson, 54 S.Ct. 458, 219 U.S. 673, 78 L.Ed. 1062—Jones v. Gill, C.C.A.Mo., 67 F.2d 159, affirming, D.C., Gill v. Jones, 4 F.Supp. 769—Emporia Loan & Investment Co. v. Rees, C.C.A.Kan., 66 F.2d 225, rehearing denied 66 F. 2d 789—National Box Co. v. Wroten, C.C.A.Miss., 66 F.2d 86—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569—Detroit Fire & Marine Ins. Co. v. Oklahoma Terminal Elevator Co., C.C.A. Okl., 64 F.2d 671—Weekley v. Thomas, C.C.A.Va., 63 F.2d 988—Dayton Rubber Mfg. Co. of Delaware v. Sabra, C.C.A.Ariz., 63 F.2d 865—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A. Iowa, 63 F.2d 602—Niagara Fire Ins. Co. of New York, N. Y., v. Raleigh Hardware Co., C.C.A.W. Va., 62 F.2d 705—National Surety Co. v. Jean, C.C.A.Tenn., 61 F.2d 197—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F.2d 889—Fricke v. General Accident, Fire & Life Assur. Corporation, C.C.A.Mo., 59 F.2d 563, certiorari denied 53 S. Ct. 221, 287 U.S. 262, 77 L.Ed. 571—W. T. Rawleigh Co. v. Shoultz, C.C.A.Pa., 56 F.2d 148—Chetkovich v. U. S., C.C.A.Mont., 53 F.2d 26, certiorari denied 52 S.Ct. 314, 285 U.S. 541, 76 L.Ed. 934—Shannon v. Shaffer Oil & Refining Co., C.C. A.Okl., 51 F.2d 878, 78 A.L.R. 851—Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 49 F.2d 146—Southern Transp. Co. v. Ashford, C.C.A.La., 48 F.2d 191—Erie R. Co. v. Irons, C.C.A.N.J., 48 F.2d 60, certiorari denied 51 S.Ct. 649, 283 U.S. 857, 75 L.Ed. 1463—Fidelity & Casualty Co. of New York v. Niemann, C.C. A.Mo., 47 F.2d 1056—New York Life Ins. Co. v. Seifris, C.C.A.Pa., 46 F.2d 391—Najera v. Bombardieri, C.C.A.N.M., 46 F.2d 281—General Motors Co. v. Swan Carburetor Co., C.C.A.Ohio, 44 F.2d 24, affirming, D.C., Swan Carburetor Co. v. General Motors Corporation, 42 F.2d 452, and certiorari denied General Motors Corporation v. Swan Carburetor Co., 51 S.Ct. 181, 282 U. S. 897, 75 L.Ed. 790—Norfolk Southern Bus Corporation v. Lask, C.C.A.Va., 43 F.2d 45—O'Brien v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, C.C.A.Neb., 42 F. 2d 48—Brown v. New York Indemnity Co., C.C.A.Mo., 39 F.2d 443—Western Union Telegraph Co. v. Kirby, C.C.A.Pa., 37 F.2d 480—Paine v. St. Paul Union Stockyards Co., C.C.A.Minn., 35 F.2d 624, modifying 28 F.2d 463—Chicago, B. & I. R. Co. v. Conway, C.C.A.Mo., 29 F.2d 551—Ellerd v. Griffith, C.C.A. Tex., 29 F.2d 402, certiorari denied 49 S.Ct. 480, 279 U.S. 864, 73 L.Ed. 1003—Cudahy Packing Co. v. City of Omaha, C.C.A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U. S. 601, 73 L.Ed. 530—Southern Surety Co. of Des Moines, Iowa, v. U. S., C.C.A.S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532—Beatty Brokerage Co. v. Gulf, C. & S. Ry. Co., C.C.A.La., 17 F.2d 480, affirming, D.C., Gulf & S. F. Ry. Co. v. Beatty Brokerage Co., 13 F.2d 950—Sun Oil Co. v. Rhodes, C.C.A.Ark., 15 F.2d 790—Detroit United Ry. v. Craven, C.C.A.Mich., 13 F.2d 352, certiorari denied 47 S.Ct. 107, 273 U.S. 713, 71 L.Ed. 854—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715—Davis v. Grantham, C.C.A.Tex., 11 F.2d 604, certiorari denied Mellon v. Grantham, 47 S. Ct. 99, 273 U.S. 707, 71 L.Ed. 851—Adkins-Polk & Co. v. G. Amsinck & Co., C.C.A.Tex., 10 F.2d 361—Cudahy Packing Co. v. Luyben, C.C.A. Neb., 9 F.2d 32—Illinois Cent. R. Co. v. Horace Turner, C.C.A.Ala., 9 F.2d 6—McLeod Lumber Co. v. Western Redwood Co., C.C.A.Cal., 8 F.2d 930—McParland-Scanlon Lumber Co. v. J. J. Newman Lumber Co., C.C.A.Miss., 5 F.2d 949—Parker v. Elgin, C.C.A.Tenn., 5 F.2d 562—U. S. v. Brookman, D.C.Minn., 1 F.2d 528—Bertino v. Marion Steam Shovel Co., D.C.Mo., 10 F. Supp. 354, mandamus granted, C. C.A., Marion Steam Shovel Co. v. Reeves, 76 F.2d 462—McClam v. New York Life Ins. Co., D.C.S.C., 9 F.Supp. 415—Davis v. Olson, C.C. A.Minn., 298 F. 921—Highway Trailer Co. v. City of Des Moines, Iowa, 298 F. 71—Prouty v. Grand Trunk Ry. Co. of Canada, C.C.A.Vt.,

297 F. 603—Hettrick Mfg. Co. v. J. A. Shepherd & Co., C.C.A.Ohio, 295 F. 10, certiorari denied 44 S.Ct. 456, 265 U.S. 581, 68 L.Ed. 1190—National Surety Co. v. First Nat. Bank, C.C.A.Ala., 293 F. 377—Johnson Farm Loan Co. v. McManigal, C.C.A.Neb., 288 F. 185—Adams Express Co. v. Darden, C.C.A. Tenn., 286 F. 61, affirmed 44 S.Ct. 502, 265 U.S. 265, 68 L.Ed. 1010—Payne v. Daugherty, C.C.A.Neb., 283 F. 353—Mendelson v. Davis, C.C.A.Neb., 281 F. 18—Simmons Hardware Co. v. Southern Ry. Co., C.C.A.Mo., 279 F. 929, certiorari denied 43 S.Ct. 96, 260 U.S. 739, 67 L.Ed. 490—Stetson v. Stindt, C.C.A.Pa., 279 F. 209, reversing, D.C., Stindt v. Stetson, 272 F. 770—McCarroll v. Newsham, C.C.A.La., 278 F. 4—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 277 F. 625, certiorari denied 42 S.Ct. 589, 259 U.S. 585, 66 L.Ed. 1076—Yellow Cab Co. v. Earle, C.C.A.Minn., 275 F. 928, certiorari denied 42 S.Ct. 317, 258 U.S. 624, 66 L.Ed. 797—Louisiana Ry. & Nav. Co. v. Williams, C.C.A. La., 272 F. 439, error dismissed 42 S.Ct. 48, 257 U.S. 610, 66 L.Ed. 396—R. E. Hamilton & Sons Co. v. Moss-Jellico Coal Co., C.C.A.Ky., 271 F. 237—Aronstam v. All-Russian Central Union of Consumers' Societies, C.C.A.N.Y., 270 F. 460—Ramsey v. U. S., C.C.A.Tenn., 268 F. 825—Hanson v. Cole, C.C.A.Mo., 266 F. 67—Bradley v. U. S., C.C.A.La., 264 F. 79—St. Tammany Bank & Trust Co. of Covington, La. v. Winfield, C.C.A.La., 263 F. 371—Dry Dock, E. B. & B. R. Co. v. Petkunas, C.C.A.N.Y., 261 F. 988—Bristol Gas & Electric Co. v. Boy, C.C.A.Tenn., 261 F. 297—Escanaba Traction Co. v. Burns, Mich., 257 F. 898, 169 C.C.A. 48—Panama R. Co. v. Pigott, Canal Zone, 256 F. 837, 168 C.C.A. 183, affirmed 41 S.Ct. 199, 254 U.S. 552, 65 L.Ed. 400—Royal Ins. Co. v. Taylor, W.Va., 254 F. 805, 166 C.C.A. 251—Farrell v. First Nat. Bank of Philadelphia, Pa., 254 F. 801, 166 C.C.A. 247—United Press Ass'ns v. National Newpaper Ass'n, Colo., 254 F. 284, 165 C.C.A. 572—Linn v. U. S., N.Y., 251 F. 476, 163 C.C.A. 470—American Trading Co. v. North Alaska Salmon Co., Cal., 248 F. 665, 160 C.C.A. 565, certiorari denied 38 S.Ct. 581, 247 U.S. 518, 62 L.Ed. 1245—Glenwood Irr. Co. v. Vallery, Colo., 248 F. 483, 160 C.C.A. 493—Mutual Coal Co. v. Angelo, Colo., 246 F. 124, 158 C.C.A. 350—Ford Motor Co. v. Farrington, Or., 245 F. 850, 158 C.C.A. 190—Lohman v. Stockyards Loan Co., Okl., 243 F. 517, 156 C.C.A. 215, certiorari denied 38 S.Ct. 134, 245 U.S. 668, 62 L.Ed. 539—Memphis St. Ry. Co. v. Illinois Cent. R. Co., Tenn., 242 F. 617, 155 C.C.A. 307—City of Grafton v. Gentry Bros.' Shows, W.Va., 240 F. 646, 153 C.C.A. 444—R. D. Cole Mfg. Co. v. Mendenhall, N.C., 240 F. 641, 153 C.C.A. 439—Maryland Casualty Co. v. Orchard Land & Timber Co., Or., 240 F. 364, 153 C.C.A. 290—Calaf v. Fernandez, Puerto Rico, 239 F. 795, 152 C.C.A. 581—Shepard v. U. S., Cal., 236 F. 73, 149 C.C.A. 283—Chautauqua Inst. v. Zimmerman, Ohio, 233 F. 371, 147 C.C.A. 307, certiorari denied 37 S.Ct. 114, 242 U.S. 642, 61 L.Ed. 542—Hamilton Coal Co. v. Watts, N.Y., 232 F. 832, 147 C.C.A. 26—Crescent Milling Co. v. H. N. Strait Mfg. Co., Minn., 227 F. 804, 142 C.C.A. 328, certiorari denied 36 S.Ct. 724, 241 U.S. 673, 60 L.Ed. 1231—National Bank of Commerce v. U. S., Wash., 224 F. 679, 140 C.C.A. 219, certiorari denied 36 S.Ct. 287, 241 U.S. 658, 60 L.Ed. 1225—Buckeye Powder Co. v. E. I. Du-Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 319, affirmed 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123—William Sebald Brewing Co. v. Tompkins, Ohio, 221 F. 895, 137 C.C.A. 465—Gladden v. Gabbert, Miss., 219 F. 855, 133 C.C.A. 525—Fruth v. Benassi, Colo., 219 F. 549, 135 C.C.A. 317—Northwestern Theatrical Ass'n v. Hannigan, N. Y., 218 F. 359, 134 C.C.A. 167—Spokane & I. E. R. Co. v. Campbell, Wash., 217 F. 518, 133 C.C.A. 370, affirmed 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125—Benedetto v. W. P. Rend Collieries Co., Ill., 216 F. 143, 132 C.C.A. 506—McBride v. Neal, Ill., 214 F. 966, 131 C.C.A. 262—Smith v. St. Louis, I. M. & S. R. Co., Tenn., 214 F. 737, 131 C.C.A. 43—Atlantic Coast Line R. Co. v. Thompson, S.C., 211 F. 889, 128 C.C.A. 267—Copper River & N. W. R. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648—Lueders v. U. S., Wash., 210 F. 419, 127 C.C.A. 151—Mason v. Smith, Ohio, 191 F. 502, 112 C.C.A. 146—Wells Fargo & Co. v. Zimmer, Minn., 186 F. 130, 108 C.C.A. 242—Big Brushy Coal & Coke Co. v. Williams, Tenn., 176 F. 529, 99 C.C.A. 102—American Bonding Co. of Baltimore v. Strasburger, N.Y., 176 F. 348, 99 C.C.A. 622—American Smelting & Refining Co. v. Karapa, Colo., 173 F. 607, 97 C.C.A. 517—Murhard Estate Co. v. Portland & Seattle R. Co., Wash., 163 F. 194, 90 C.C.A. 64—Alaska-Treadwell Gold Min. Co. v. Cheney, Alaska, 162 F. 593, 89 C.C.A. 351—Chicago, M. & St. P. R. Co. v. Heil, Minn., 154 F. 626, 83 C.C.A. 400—Fidelity & Casualty Co. of N. Y. v. Thompson, Colo., 154 F. 484, 83 C.C.A. 324, 11 L.R.A.,N.S., 1069, 12 Ann.Cas. 181—Miller v. Steele, Ohio, 153 F. 714, 82 C.C.A. 572—St. Louis Southwestern R. Co. v. Wainwright, Ark., 152 F. 624, 82 C.C.A. 16—James v. Evans, Pa., 149 F. 136, 80 C.C.A. 240—United Engineering & Contr. Co. v. Broadnax, N.Y., 136 F. 351, 69 C.C.A. 177, certiorari denied 25 S.Ct. 800, 197 U. S. 624, 49 L.Ed. 911—Southern Pac. Co. v. Maloney, Neb., 136 F. 171, 69 C.C.A. 83—Graves v. Sanders, Mont., 125 F. 690, 60 C.C.A. 422—Walker v. Moser, Neb., 117 F. 230, 54 C.C.A. 262—Manhattan Oil Co. v. Richardson Lubricating Co., N.Y., 113 F. 923, 51 C.C.A. 553—Bd. of Com'rs of Lake County v. Keene Five Cents Sav. Bank, Colo., 108 F. 505, 47 C.C.A. 464, rehearing denied 110 F. 79, 49 C.C.A. 31, certiorari dismissed 22 S.Ct. 936, 46 L.Ed. 1264—Manning v. German Ins. Co., Iowa, 107 F. 52, 46 C.C.A. 144—Louisville & N. R. Co. v. White, C.C.A.Ala., 100 F. 239—Willis v. Bd. of Com'rs of Wyandotte County, C.C.A.Kan., 86 F. 872—Atlas Distilling Co. v. Rheinstrom, C.C.A.Ill., 86 F. 244—Felton v. Spiro, Tenn., 78 F. 576, 24 C.C.A. 321—Alexander v. U. S., Idaho, 57 F. 828, 6 C.C.A. 602—Zimpelman v. Hipwell, Tex., 54 F. 848, 4 C.C.A. 609—Richmond R. & E. Co. v. Dick, Va., 52 F. 379, 3 C.C.A. 149—McClellan v. Pyeatt, Ind.T., 50 F. 686, 1 C.C.A. 613—Atchison T. & S. F. R. Co. v. Howard, Colo., 49 F. 206, 1 C.C.A. 229—Preble v. Bates, C.C.Mass., 37 F. 772—Breed v. Northern Pac. R. Co., C.C.Minn., 35 F. 642.

D.C.—Stewart v. Capital Transit Co., 108 F.2d 1, 70 App.D.C. 346, certiorari denied 60 S.Ct. 515, 309 U.S. 657, 84 L.Ed. 1006, rehearing denied 60 S.Ct. 607, 309 U.S. 696, 84 L.Ed. 1036.

4 C.J. p 830 note 45 [e].

Evidence to support verdict or judgment required for application of rule.—Allison v. Standard Air Lines, C.C.A.Cal., 65 F.2d 668—American Film Co. v. Moye, C.C.A.Cal., 267 F. 419—Chicago, M. & St. P. Ry. Co. v. Chamberlain, C.C.A.Idaho, 253 F. 429, 165 C.C.A. 171.

"Exceptional circumstances"

The action of the trial judge in granting or refusing a new trial "is not reviewable upon appeal, save in the most exceptional circumstances."—Ætna Casualty & Surety Co. v. Yeatts, C.C.A.Va., 122 F.2d 350, 354.

"Clearest case"

"Manifestly, it is only in the clearest case that such a ruling should be disturbed, as where the mistake is so obvious that no reasonable basis for the action of the court can be discerned."—Carter Coal Co. v. Nelson, C.C.A.Va., 91 F.2d 651, 654.

Motion to set aside verdict and judgment as contrary to law is nothing more than motion for new trial, and where it suggested no specific error, and was overruled, is not re-

respect to the review of discretionary rulings on motions for rehearing.[42] The grant of a new trial is more reluctantly interfered with than a denial thereof, and a much stronger showing is necessary to obtain a reversal where a new trial is granted than where it is denied.[43] When the trial court, in granting or refusing a new trial, rules on a question of law, such ruling is not a matter of discretion, and the ruling may and should be reviewed;[44] and the court's action with respect to an application for a new trial may be reviewed where it fails or refuses to exercise its discretion with respect thereto, as by refusing to entertain or determine the motion or to consider grounds urged,[45] such failure or refusal constituting an abuse of discretion;[46] but a refusal to entertain a motion or petition for a rehearing is not the subject of appeal.[47]

The rule that the action of the trial court in granting or denying a motion for new trial is not reviewable except for abuse of discretion applies where the motion is based on misconduct of counsel[48] or of jurors,[49] or bias of the jury,[50] although plain prejudicial error in the denial of a new trial on account of a juror's disqualification must be considered.[51] The rule also applies where the motion is based on insufficiency of the evidence to support the

viewable.—Proctor v. Preferred Accident Ins. Co. of New York, C.C.A. Ky., 51 F.2d 15.

Holding as to evidence in opinion

A holding, in the opinion denying a motion for a new trial, that there was evidence to submit to the jury is not reviewable on appeal.—Western Union Telegraph Co. v. Kirby, C.C.A. Pa., 37 F.2d 480.

Reduction of damages as condition of denial

The action of trial court sitting in New York, in requiring plaintiff to stipulate for a reduction of damages as condition of denial of motion for new trial, can be reviewed by circuit court of appeals, if at all, only when there has been a plain abuse of discretion.—Burris v. American Chicle Co., C.C.A.N.Y., 120 F.2d 218, affirming, D.C., 33 F.Supp. 104.

"**A motion to restrict the issues** [on a new trial] is addressed, in the first instance, to the sound discretion of the court, and a denial of the motion ought not lightly to be disturbed."—Schuerholz v. Roach, C.C.A. Va., 58 F.2d 32, 33, certiorari denied Scheurholz v. Roach, 53 S.Ct. 78, 287 U.S. 623, 77 L.Ed. 541.

Refusal to reconsider

Refusal, after denial of new trial, to reopen matter and reconsider ruling is not ground of exception.—Dunagan v. Appalachian Power Co., C. C.A.W.Va., 29 F.2d 58.

42. U.S.—Wayne United Gas Co. v. Owens-Illinois Glass Co., W.Va., 57 S.Ct. 382, 300 U.S. 131, 81 L.Ed. 557, reversing, C.C.A., 84 F.2d 965, certiorari granted 57 S.Ct. 41, 299 U.S. 528, 81 L.Ed. 389—Walgreen Drug Stores v. Scruggs Drug Store, C.C.A.N.C., 129 F.2d 789—Chapman v. Federal Land Bank of Louisville, Ky., C.C.A.Ohio, 117 F. 2d 321—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Zahn v. Hudspeth, C.C.A.Kan., 102 F.2d 759, certiorari denied 59 S.Ct. 1045, 307 U.S. 642, 83 L.Ed. 1522—First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 98 F.2d 416—Clarke v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 62 F.2d 440, certiorari denied 54 S.Ct. 49, 290 U.S. 629, 78 L.Ed. 548, three cases—Bailey v. Crump, C.C.A.W. Va., 41 F.2d 733—Magnetic Mfg. Co. v. Dings Magnetic Separator Co., C.C.A.Wis., 37 F.2d 709—Chicago, B. & Q. R. Co. v. Conway, C.C.A.Mo., 29 F.2d 551—In re Cury, D.C.Va., 34 F.Supp. 526—Escanaba Traction Co. v. Burns, Mich., 257 F. 898, 169 C.C.A. 48—Liebing v. Matthews, Mo., 216 F. 1, 132 C.C. A. 245.

43. U.S.—Hooper v. Shorr, C.C.A.Ill., 110 F.2d 446.

44. U.S.—Peterson v. John Hancock Mut. Life Ins. Co. of Boston, Mass., C.C.A.Iowa, 116 F.2d 148—Glenwood Irr. Co. v. Vallery, Colo., 248 F. 483, 160 C.C.A. 493.

Verdict against instructions and evidence

(1) Where verdict is directly contrary to the instructions of the court and without evidence to support it, a motion to set it aside and for a new trial is in effect an exception to the verdict, which does not call for an exercise of discretion, but for a ruling on a question of law, which is reviewable.—Stetson v. Stindt, C.C.A. Pa., 279 F. 209, reversing, D.C., Stindt v. Stetson, 272 F. 770.

(2) An exception to a denial of a motion for new trial, on the grounds that the jury misinterpreted and misapplied or disregarded the instructions, and that the verdict was against the evidence and the weight of evidence and the law, was held to raise no question of law for the consideration of the circuit court of appeals.—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641.

45. U.S.—Sulzbacher v. Continental Casualty Co., C.C.A.Mo., 88 F.2d 122—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569—O'Brien v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, C.C.A. Neb., 42 F.2d 48—Paine v. St. Paul Union Stockyards Co., C.C.A.Minn., 35 F.2d 624, modifying 28 F.2d 463—Dwyer v. U. S., Idaho, 170 F. 160, 95 C.C.A. 416—Ogden v. U. S., Pa., 112 F. 523, 50 C.C.A. 380, distinguished in Holmgren v. U. S., Cal., 217 U.S. 509, 30 S.Ct. 588, 54 L.Ed. 861, 19 Ann.Cas. 778—Felton v. Spiro, Tenn., 78 F. 576, 24 C.C.A. 321, following Mattox v. U. S., Kan., 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917.

46. U.S.—R. E. Hamilton & Sons Co. v. Moss-Jellico Coal Co., C.C.A.Ky., 271 F. 237.

47. U.S.—Wayne United Gas Co. v. Owens-Illinois Glass Co., W.Va., 57 S.Ct. 382, 300 U.S. 131, 81 L.Ed. 557, reversing, C.C.A., 84 F.2d 965, certiorari granted 57 S.Ct. 41, 299 U.S. 528, 81 L.Ed. 389—Walgreen Drug Stores v. Scruggs Drug Store, C.C.A.N.C., 129 F.2d 789—First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., C.C.A.Iowa, 98 F.2d 416.

48. U.S.—Alaska-Treadwell Gold Min. Co. v. Cheney, Alaska, 162 F. 593, 89 C.C.A. 351.

49. U.S.—Brown v. New York Indemnity Co., C.C.A.Mo., 39 F.2d 443—Chicago, B. & Q. R. Co. v. Conway, C.C.A.Mo., 29 F.2d 551—Pennsylvania R. Co. v. Thomas, C. C.A.Ohio, 2 F.2d 365—Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 319, affirmed 39 S. Ct. 38, 248 U.S. 55, 63 L.Ed. 123—Pocahontas Distilling Co. v. U. S., Va., 218 F. 782, 34 C.C.A. 566, certiorari denied 35 S.Ct. 602, 238 U. S. 620, 59 L.Ed. 1492.

50. U.S.—Thompkins v. Missouri, K. & T. R. Co., Mo., 211 F. 391, 128 C.C.A. 1, 52 L.R.A.,N.S., 791.

51. U.S.—Memphis St. Ry. Co. v. Illinois Cent. R. Co., Tenn., 242 F. 617, 155 C.C.A. 307.

verdict,[52] or is on the ground of newly discovered evidence;[53] and if no abuse of discretion is shown, the action of the trial court in granting or refusing a new trial, or in setting aside or refusing to set aside a verdict, on the ground that the damages are inadequate or excessive will not be reviewed.[54]

52. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A. N.C., 99 F.2d 218—Hunt v. Standard Brands, C.C.A.Ohio, 72 F.2d 822—Southern Ry. Co. v. Walters, C.C.A.Mo., 47 F.2d 3, certiorari granted 51 S.Ct. 495, 283 U.S. 815, 75 L.Ed. 1432, and reversed on other grounds and remanded to district court 52 S.Ct. 58, 284 U.S. 190, 76 L.Ed. 239—Cleveland & Western Coal Co. v. Main Island Creek Coal Co., C.C.A.Ohio, 297 F. 60, certiorari denied 44 S.Ct. 634, 265 U.S. 588, 68 L.Ed. 1194—Boston & M. R. R. Co. v. Dutille, C.C.A.N.H., 289 F. 320—Yellow Cab Co. v. Earle, Minn., 275 F. 928, certiorari denied 42 S.Ct. 317, 258 U. S. 624, 66 L.Ed. 797—Great Atlantic & Pac. Tea Co. v. Carey, N.Y., 220 F. 454, 136 C.C.A. 282—Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 319, affirmed 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123—McBride v. Neal, Ill., 214 F. 966, 131 C.C.A. 262—Copper River & N. W. R. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648—Latchtimacker v. Jacksonville Towing & Wrecking Co., C.C.Fla., 181 F. 276, affirmed 184 F. 987, 106 C.C.A. 665—Manhattan Oil Co. v. Richardson Lubricating Co., N.Y., 113 F. 923, 51 C.C.A. 553—McClain v. Provident Sav. & L. Assur. Soc. of N. Y., Pa., 110 F. 80, 49 C.C.A. 31, certiorari denied 22 S.Ct. 938, 184 U.S. 699, 46 L.Ed. 765—New York & T. S. S. Co. v. Anderson, N.Y., 50 F. 462, 1 C.C.A. 29.

"Mere error in the disposition of such a motion [for a new trial on the grounds both of insufficient evidence and weight of evidence] is not reviewable; only an abuse of the court's discretion."—Cleveland & Western Coal Co. v. Main Island Creek Coal Co., C.C.A.Ohio, 297 F. 60, 62, certiorari denied 44 S.Ct. 634, 265 U.S. 588, 68 L.Ed. 1194.

53. U.S.—Teche Lines v. Boyette, C. C.A.Miss., 111 F.2d 579—Great Atlantic & Pacific Tea Co. v. Chapman, C.C.A.Ohio, 72 F.2d 112—Royal Ins. Co. v. Eastham, C.C.A.Ala., 71 F.2d 385, certiorari denied 55 S.Ct. 110, 293 U.S. 557, 79 L.Ed. 658—McIntyre v. Texas Co., C.C.A.N.Y., 48 F.2d 211—State Bank of New York v. Henderson County, Ky., C.C.A.Ky., 35 F.2d 859, certiorari denied Henderson County, State of Kentucky v. State Bank of New York, 50 S.Ct. 245, 281 U.S. 728, 74 L.Ed. 1144, 1145—Ward v. Morrow, C.C.A.S.D., 15 F.2d 660—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715—Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., C.C.A.Ohio, 285 F. 214—Kaphan v. U. S., C.C.A.Cal., 264 F. 323—National Bank of Commerce v. U. S., Wash., 224 F. 679, 140 C.C.A. 219, certiorari denied 36 S.Ct. 287, 241 U.S. 658, 60 L.Ed. 1225—Andrews v. U. S., C.C.A.Cal., 224 F. 418—McIntyre v. Modern Woodmen of America, Mich., 200 F. 1, 121 C.C.A. 1.
D.C.—Mandes v. Midgett, 261 F. 1019, 49 App.D.C. 139.

54. U.S.—Sinclair Refining Co. v. Bennett, C.C.A.Tenn., 123 F.2d 884—Marshall's U. S. Auto Supply v. Cashman, C.C.A.Kan., 111 F.2d 140, certiorari denied Cashman v. Marshall's U. S. Auto Supply, 61 S.Ct. 26, 311 U.S. 667, 85 L.Ed. 428—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—Morton Butler Timber Co. v. U. S., C.C.A. Tenn., 91 F.2d 884—Chambers v. Skelly Oil Co., C.C.A.Kan., 87 F. 2d 853—Paf Mfg. Co. v. R. L. Polk Co. of Missouri, C.C.A.Mo., 72 F. 2d 33—W. T. Rawleigh Co. v. Shoultz, C.C.A.Pa., 56 F.2d 148—Jennings v. Chicago, R. I. & P. Ry. Co., D.C.Minn., 43 F.2d 397—Cain v. Alpha S. S. Corporation, C.C.A. N.Y., 35 F.2d 717, certiorari granted Alpha S. S. Corporation v. Cain, 50 S.Ct. 86, 280 U.S. 549, 74 L.Ed. 607, and affirmed 50 S.Ct. 443, 281 U.S. 642, 74 L.Ed. 1086—Kos v. Baltimore & O. R. Co., C.C.A.Ohio, 28 F.2d 872—Detroit Taxicab & Transfer Co. v. Pratt, C.C.A.Mich., 2 F.2d 193—Davis v. Olson, C.C.A. Minn., 298 F. 921—Arkansas Short Leaf Lumber Co., C.C.A.Ark., 281 F. 914—Yellow Cab Co. v. Earle, C.C.A.Minn., 275 F. 928, certiorari denied 42 S.Ct. 317, 258 U.S. 624, 66 L.Ed. 797—United Verde Extension Mining Co. v. Koso, C.C.A. Ariz., 273 F. 369—American R. Exp. Co. v. Crabtree, C.C.A.Ky., 271 F. 287—Hines v. Smith, C.C.A.Ohio, 270 F. 132, certiorari denied Payne v. Smith, 41 S.Ct. 448, 255 U.S. 576, 65 L.Ed. 794—American Film Co. v. Moye, C.C.A.Cal., 267 F. 419—Foundation Co. v. Henderson, C. C.A.La., 264 F. 483—Southern R. Co. v. White, Tenn., 232 F. 144, 146 C.C.A. 336—Black v. Canadian Pac. R. Co., D.C.N.Y., 218 F. 239, affirmed Canadian Pac. R. Co. v. Black, 230 F. 798, 145 C.C.A. 108—Chesapeake & O. R. Co. v. Proffitt, Va., 218 F. 23, 134 C.C.A. 37, error granted 221 F. 1020, 136 C.C. A. 662, and affirmed 36 S.Ct. 620, 241 U.S. 462, 60 L.Ed. 1102—Copper River & N. W. R. Co. v. Reeder, Alaska, 211 F. 280, 127 C.C.A. 648—Suravitz v. Pristasz, Pa., 201 F. 335, 119 C.C.A. 573—Illinois Cent. R. Co. v. Davies, Minn., 146 F. 247, 76 C.C.A. 613—Southern Pac. Co. v. Cavin, Cal., 144 F. 348, 75 C.C. A. 350—Cook v. Proskey, N.Y., 138 F. 273, 70 C.C.A. 563—Graves v. Sanders, Mont., 125 F. 690, 60 C.C. A. 422—Peirce v. Van Dusen, Ohio, 78 F. 693, 24 C.C.A. 280, 69 L.R.A. 705, error dismissed 19 S.Ct. 879, 43 L.Ed. 1184—St. Louis, I. M. & S. R. Co. v. Spencer, Ark., 71 F. 93, 18 C.C.A. 114—Northern Pac. R. Co. v. Charless, Wash., 51 F. 562, 2 C.C.A. 380, reversed on other grounds 16 S.Ct. 848, 162 U.S. 359, 40 L.Ed. 999—Morning Journal Ass'n v. Rutherford, N.Y., 51 F. 513, 2 C.C.A. 354, 16 L.R.A. 803—New York & Texas S. S. Co. v. Anderson, N.Y., 50 F. 462, 1 C.C. A. 529—Latchtimacker v. Jacksonville Towing & Wrecking Co., C.C. Fla., 181 F. 276, affirmed 184 F. 987, 106 C.C.A. 665.
4 C.J. p 836 note 74.

Rule limited

"At least when there is no limit fixed by law, or conceded, and when the jury has fixed more than nominal damages, we cannot review an order denying a new trial."—Miller v. Maryland Casualty Co., C.C.A.N. Y., 40 F.2d 463, 464, followed in Kopfinger v. Atlantic Transport Co. of West Virginia, C.C.A.N.Y., 44 F. 2d 1016, certiorari denied Atlantic Transport Co. of West Virginia v. Kapfinger, 51 S.Ct. 213, 282 U.S. 900, 75 L.Ed. 793.

"Damages must be outrageously excessive" to warrant interference by the reviewing court.—Thrush v. Fullhart, W.Va., 230 F. 24, 31, 144 C.C.A. 322.

Abuse of discretion held not shown on ground of excessiveness.—Detroit United Ry. v. Craven, C.C.A.Mich., 13 F.2d 352, certiorari denied 47 S. Ct. 107, 273 U.S. 713, 71 L.Ed. 854.

Amount uncontroverted

Where jury, in violation of instructions, found for amount less than that which uncontroverted evidence showed plaintiff was entitled to recover, if at all, refusal of motion for new trial was such abuse of discretion that reversal of judgment was proper.—Glenwood Irr. Co. v. Vallery, Colo., 248 F. 483, 160 C.C. A. 493.

Proceedings following judgment; judicial sale. The discretion of the court ordering a judicial sale as to whether it shall be confirmed or denied confirmation, as for inadequacy of price, will not be interfered with on appeal, in the absence of an abuse of discretion;[55] and the same is true of the court's exercise of discretion as to the time for selling under a foreclosure decree,[56] or as to the time within which money should be paid under a bid for property sold in a creditor's suit.[57]

The trial court's exercise of discretion with reference to an application to open, vacate, or set aside a judgment will not be disturbed on appeal except for a clear abuse of discretion;[58] and the same is true of the denial of a motion for a nunc pro tunc order to amend a judgment.[59]

Costs and fees. The trial court's exercise of the discretion with which it may be vested as to the awarding or taxation of costs,[60] or as to the allowance of interest[61] or of the fees of attorneys,[62] receivers,[63] or as to the allowance of the fees or

55. U.S.—Bovay v. Townsend, C.C.A. Ark., 78 F.2d 343—Bethlehem Steel Co. v. International Combustion Engineering Corp., C.C.A.N.Y., 66 F.2d 409—Currin v. Nourse, C.C.A. Mo., 66 F.2d 137—Speers Sand & Clay Works v. American Trust Co., C.C.A.Md., 52 F.2d 831, certiorari denied Speers Sand & Clay Works v. American Trust Co. of New York, 52 S.Ct. 500, 286 U.S. 548, 76 L.Ed. 1284—Century Motor Truck Co. v. Noyes, C.C.A.Mass., 18 F.2d 546—Raleigh & C. R. Co. v. Baltimore Nat. Bank, D.C.S.C., 41 F.Supp. 599—Baltimore Trust Co. v. Interocean Oil Co., D.C.Md., 29 F.Supp. 269—In re Wolke Lead Batteries Co., C.C.A.Ky., 294 F. 509—Jacobsohn v. Larkey, C.C.A.N.J., 245 F. 538, L.R.A.1918C 1176—In re Shea, Mass., 126 F. 153, 61 C.C.A. 219, affirming, D.C., 122 F. 742.

Rejection of bids

Where the court ordered property sold subject to confirmation, reserving the right to reject any and all bids for inadequacy of price, the court's exercise of discretion with respect to such reserved power will seldom be reviewed.—McClintic-Marshall Co. v. Scandinavian-American Bldg. Co., C.C.A.Wash., 296 F. 601.

56. U.S.—Daniel v. International Agr. Corporation, C.C.A.Ga., 293 F. 148.

57. U.S.—Luhrig Collieries Co. v. Interstate Coal & Dock Co., C.C.A.N.Y., 287 F. 711, certiorari denied Thosmil Holding Corporation v. Interstate Coal & Dock Co., 43 S.Ct. 700, 262 U.S. 751, 67 L.Ed. 1215.

58. U.S.—Western Union Telegraph Co. v. Dismang, C.C.A.Okl., 106 F.2d 362—In re Rochester Sanitarium & Baths Co., N.Y., 222 F. 22, 137 C.C.A. 560.

Different final result not likely

Trial court's refusal to vacate decree based on order pro confesso on defendant's cross bill would not be disturbed on appeal, where plaintiff failed to present meritorious defense to counterclaim, so that it could not be said that different final result would be reached.—Koen v. Beardsley, C.C.A.Colo., 63 F.2d 595.

59. U.S.—Mason v. Smith, Ohio, 191 F. 502, 112 C.C.A. 146.

60. U.S.—Lackner v. Illinois Bell Telephone Co., C.C.A.Ill., 111 F.2d 136, certiorari denied 61 S.Ct. 27, 311 U.S. 652, 85 L.Ed. 417—H. H. Robertson Co. v. Klauer Mfg. Co., C.C.A.Iowa, 98 F.2d 150, affirming, D.C., 21 F.Supp. 554—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665, affirming, D.C., 19 F.Supp. 932, and certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521, affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L.Ed. 381—Brislin v. Killanna Holding Corporation, C.C.A.N.Y., 85 F.2d 667—Duplate Corporation v. Triplex Safety Glass Co. of North America, C.C.A.Pa., 81 F.2d 352, modifying, D.C., Triplex Safety Glass Co. of North America v. Duplate Corporation, 10 F.Supp. 420, certiorari granted Duplate Corporation v. Triplex Safety Glass Co. of North America, 56 S.Ct. 668, two cases, 297 U.S. 702, 80 L.Ed. 990, and modified on other grounds 56 S.Ct. 792, 298 U.S. 448, 80 L.Ed. 1274—Associated Almond Growers of Paso Robles v. Wymond, C.C.A.Cal., 69 F.2d 912, 914, citing **Corpus Juris**—Freund v. Johnson, C.C.A.Ill., 46 F.2d 272, certiorari denied 51 S.Ct. 495, 283 U.S. 849, 75 L.Ed. 1457—Andersen, Meyer & Co. v. Fur & Wool Trading Co., C.C.A.China, 14 F.2d 586, certiorari denied 47 S.Ct. 337, 273 U.S. 740, 71 L.Ed. 868—Fidelity & Deposit Co. of Maryland v. City of Cleburne, C.C.A.Tex., 296 F. 643, certiorari denied 45 S.Ct. 122, 266 U.S. 622, 69 L.Ed. 573, and affirmed 46 S.Ct. 99, 269 U.S. 534, 70 L.Ed. 398—Weiland v. Pioneer Irr. Co., Colo., 238 F. 519, 151 C.C.A. 455, affirmed 42 S.Ct. 568, 259 U.S. 498, 66 L.Ed. 1027.

Finding of reasonableness without foundation

Costs cannot be attacked as excessive unless it is made to appear that lower court's finding that they were reasonable was without any foundation in fact.—Crowe v. Peaslee-Gaulbert Co., C.C.A.Mass., 37 F.2d 216.

61. U.S.—Seaboard Surety Co. v. Spear, C.C.A.Mich., 119 F.2d 849—Robertson v. Miller, C.C.A.N.Y., 286 F. 503, affirmed Miller v. Robertson, 45 S.Ct. 73, 266 U.S. 243, 69 L.Ed. 265—Pennsylvania Steel Co. v. New York City Ry. Co., 198 F. 778, 117 C.C.A. 560.

62. U.S.—Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist., C.C.A.Ark., 106 F.2d 966—Connecticut Importing Co. v. Frankfort Distilleries, C.C.A.Conn., 101 F.2d 79—Trustee's System Co. of Pennsylvania v. Simon, C.C.A.Pa., 85 F.2d 389—William H. Rankin Co. v. Associated Bill Posters of U. S. and Canada, C.C.A.N.Y., 42 F.2d 152, certiorari denied Associated Bill Posters of U. S. and Canada v. Wm. H. Rankin Co., 51 S.Ct. 37, 282 U.S. 864, 75 L.Ed. 765—S. E. Hendricks Co. v. Thomas Pub. Co., N.Y., 242 F. 37, 154 C.C.A. 629—Central Trust Co. of New York v. U. S. Light & Heating Co., N.Y., 233 F. 420, 147 C.C.A. 356—Central Trust Co. v. Ingersoll, Tenn., 87 F. 427, 31 C.C.A. 41.

Attorney for receiver

U.S.—Kaufman v. U. S., C.C.A.Del., 102 F.2d 368—Shotkin v. Beidler, C.C.A.Pa., 70 F.2d 398—Drilling & Exploration Corporation v. Webster, C.C.A.Cal., 69 F.2d 416—Smith v. Morris, C.C.A.Del., 69 F.2d 3.

Amount allowed guardian ad litem for legal services being largely discretionary, allowance is reversed only for abuse of discretion.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605.

Against whom fees charged

In suit to set aside corporation's deed of assignment to controlling stockholder, and to determine validity of bonds, discretion of trial court in allowing fees to plaintiff's solicitor against the company instead of such stockholder was held not reviewable.—Williamson v. Collins, Ohio, 243 F. 835, 156 C.C.A. 347.

63. U.S.—Kaufman v. U. S., C.C.A.Del., 102 F.2d 368—Shotkin v. Beidler, C.C.A.Pa., 70 F.2d 398—Drilling & Exploration Corporation v. Webster, C.C.A.Cal., 69 F.2d 416—Eames v. H. B. Claflin Co., N.Y., 231 F. 693, 145 C.C.A. 579—Braman

compensation of masters,[64] or auditors,[65] or of compensation or expenses to a protective committee of stockholders,[66] will not be interfered with on appeal unless an abuse of discretion is clearly shown; but the allowance of fees in a manifestly insufficient or excessive amount indicates, or constitutes, an abuse of discretion, and is reviewable.[67] Where the entire decree and the proceedings of the lower court are before the appellate court, the latter will consider whether the discretion as to costs was properly exercised;[68] and the appellate court will not apply the rule as to discretion, but will reverse, where its conclusions as to proper fees, based on substantially the same information as that of the trial court, are greatly at variance with the conclusions of that court.[69]

g. Questions of Fact, Verdicts, and Findings

(1) In general
(2) Verdicts
(3) Findings of court
(4) Findings of referee, master, or like officer
(5) Dismissal, nonsuit, or direction of verdict

(1) In General

As a general rule, the circuit court of appeals will not review questions of fact determined below except for the purpose of ascertaining the existence of any evidence to support the determination.

As a general rule, questions of fact are to be tried and determined in the court of original jurisdiction, and not in the circuit court of appeals which normally exercises strictly the functions of a court of review for the correction of errors of law.[70] However, as may be seen infra subdivision (3) of

v. Farmers' Loan & Trust Co., Kan., 114 F. 18, 51 C.C.A. 644—Northern Alabama R. Co. v. Hopkins, Ala., 87 F. 505, 31 C.C.A. 94.

64. U.S.—Shotkin v. Beidler, C.C.A. Pa., 70 F.2d 398—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Inquirer Co., C.C.A.Pa., 25 F.2d 701.

65. U.S.—Industrial Bankers Securities Corporation v. Higgins, C.C.A. N.Y., 104 F.2d 177.

66. U.S.—Palmer v. Watson, C.C.A. N.Y., 122 F.2d 598—Trustee's System Co. of Pennsylvania v. Simon, C.C.A.Pa., 85 F.2d 389.

67. U.S.—Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist., C.C.A.Ark., 106 F.2d 966—Universal Oil Products Co. v. Hall, C.C.A.Mo., 76 F.2d 258, certiorari denied Hall v. Universal Oil Products Co., 56 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441, rehearing denied 56 S.Ct. 169, 296 U.S. 663, 80 L.Ed. 472—Business Men's Assur. Co. of America v. Campbell, C.C.A.Neb., 18 F.2d 223—Tracy v. Spitzer-Rorick Trust & Savings Bank, C.C.A. Ark., 12 F.2d 755, followed in 12 F. 2d 758—City of New Orleans v. Malone, C.C.A.La., 12 F.2d 17.

"Vicarious generosity"
It is the duty of the appellate court to protect trust estates from "vicarious generosity" in the matter of attorney and receivership fees. —Blackhurst v. Johnson, C.C.A.Mo., 72 F.2d 644, 648—Federal Oil Marketing Corporation v. Cravens, C.C.A. Ark., 46 F.2d 938, 940.

68. U.S.—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665, affirming, D.C., 19 F.Supp. 932 and certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521; affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L. Ed. 381.

69. U.S.—Walton N. Moore Dry Goods Co. v. Lieurance, C.C.A.Cal., 38 F.2d 186.

70. U.S.—Ana Maria Sugar Co. v. Quinones, Puerto Rico, 41 S.Ct. 110, 254 U.S. 245, 65 L.Ed. 246, affirming 251 F. 499, 163 C.C.A. 493, certiorari granted 39 S.Ct. 11, 248 U.S. 555, 63 L.Ed. 419—Cox v. Pabst Brewing Co., C.C.A.Kan., 128 F.2d 468—U. S. v. Cherry River Boom & Lumber Co., C.C.A.W.Va., 118 F.2d 562, affirming, D.C., Cherry River Boom & Lumber Co. v. U. S., 37 F.Supp. 887—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A.Ind., 118 F.2d 163—Campana Corporation v. Harrison, C.C.A.Ill., 114 F.2d 400—Detroit City Gas Co. v. Syme, C.C.A.Mich., 109 F.2d 366—Katila v. Baltimore & O. R. Co., C.C.A.Ohio, 104 F.2d 842—Harris v. Biszkowicz, C.C.A. Mo., 100 F.2d 854—Mutual Benefit Health & Accident Ass'n v. Bowman, C.C.A.Neb., 99 F.2d 856, conforming to mandate 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, vacating, C.C.A., 96 F.2d 7, certiorari denied 59 S.Ct. 485, 306 U.S. 637, 83 L.Ed. 1038—Arkansas Fuel Oil Co. v. City of Blackwell, C.C.A.Okl., 87 F.2d 50—Bengoechea Macias v. De La Torre & Ramirez, C.C.A. Puerto Rico, 84 F.2d 894—U. S. v. Boston & M. R. R., C.C.A.Mass., 84 F.2d 365—Barbour v. George, C. C.A.Ill., 84 F.2d 281, certiorari denied 57 S.Ct. 43, 299 U.S. 579, 81 L. Ed. 426—Central Cambalache v. Martinez, C.C.A.Puerto Rico, 82 F. 2d 37—Union Bleachery v. U. S., C.C.A.S.C., 79 F.2d 549, 102 A.L.R. 204—Valiente & Co. v. Succession of Fuentes, C.C.A.Puerto Rico, 76 F.2d 78—Oliva v. Fernandez, C. C.A.Puerto Rico, 68 F.2d 338—Green Const. Co. v. Chicago, R. I. & P. Ry. Co., C.C.A.Okl., 65 F.2d 852—Porto Rico Ry., Light & Power Co. v. Miranda, C.C.A.Puerto Rico, 62 F.2d 479, certiorari denied Porto Rico Ry. Light & Power Co. v. Miranda, 53 S.Ct. 593, 289 U.S. 731, 77 L.Ed. 1480—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F. 2d 889—Perry v. Wiggins, C.C.A. Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529—Long v. Rike, C.C.A.Ill., 50 F. 2d 124, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557, 81 A.L.R. 521—White v. U. S., C.C.A. Okl., 48 F.2d 178—Ramu v. Succession of Verges, C.C.A.Puerto Rico, 42 F.2d 976—Gerardino v. People of Porto Rico, C.C.A. Puerto Rico, 29 F.2d 517—Nave-McCord Mercantile Co. v. Ranney, C.C.A.Mo., 29 F.2d 383—Grissom v. Sternberger, C.C. A.N.C., 10 F.2d 764.
4 C.J. p 843 note 65.

Concurring decisions below
Only plain error will warrant overturning concurring decisions of several lower courts on mere question of fact.—De Garcia v. Figueroa & Gautier, C.C.A.Puerto Rico, 102 F.2d 148—Boerman v. Marrero, C.C.A. Puerto Rico, 27 F.2d 321—Martinez v. Plumey, C.C.A.Puerto Rico, 20 F. 2d 826—Serralles v. Sucesion of Serralles, C.C.A.Puerto Rico, 16 F.2d 841 —A. Hartman & Co. v. Sanchez, C.C. A. Puerto Rico, 12 F.2d 649.

Amount of recovery rests largely in discretion of trier of facts and appellate court will not interfere therewith except in clear case of error or injustice.—Aladdin Mfg. Co. v. Mantle Lamp Co. of America, C. C.A.Ill., 116 F.2d 708.

this section, the appellate court may, in some cases, review the fact findings of the trial court in a case tried without a jury, although it will, as a rule, abide by such findings.

In accordance with the general rule just stated, the probative force of evidence is ordinarily for the consideration of the triers of fact in the court below, and the appellate court cannot or will not consider or pass on the credibility of witnesses,[71] or the weight of the evidence,[72] except to the extent of ascertaining the existence of any evidence to support the ultimate facts found.[73] So, where there is any admissible or competent substantial evidence on the whole record,[74] or reasonable inference

Action at law or in equity

(1) Generally, circuit court of appeals may determine an issue of fact in an equity case, but cannot do so in a law case tried by a jury where there is sufficient evidence to sustain verdict or judgment.—Kapiolani Maternity and Gynecological Hospital v. Wodehouse, C.C.A.Hawaii, 70 F.2d 793.

(2) Where the circuit court of appeals is given a reviewing jurisdiction, it extends to all fact questions such as exist in appeals from equity decrees except where that right is denied by statute.—National Labor Relations Board v. Acme-Evans Co., C.C.A., 130 F.2d 477.

Where new trial on fact issues was required, circuit court of appeals would not, under circumstances, pass on sufficiency of facts pleaded to sustain judgment.—Indemnity Ins. Co. of North America v. Levering, C.C.A. Cal., 59 F.2d 719.

71. U.S.—De Nicolo v. Palmer, C.C. A.N.Y., 125 F.2d 126, affirming, D. C., 38 F.Supp. 874—Copp v. Van Hise, C.C.A.Mont., 119 F.2d 691 —Anzano v. Metropolitan Life Ins. Co. of New York, C.C.A.N.J., 118 F. 2d 430, affirming, D.C., 32 F.Supp. 417—Kuper v. Betzer, C.C.A.S.D., 115 F.2d 842—Aetna Life Ins. Co. v. McAdoo, C.C.A.Ark., 115 F.2d 369 —Storley v. Armour & Co., C.C.A. N.D., 107 F.2d 499—Egan Chevrolet Co. v. Bruner, C.C.A.Minn., 102 F.2d 373, 122 A.L.R. 987—American Optometric Ass'n v. Ritholz, C.C.A. Ill., 101 F.2d 883, certiorari denied Ritholz v. American Optometric Ass'n, 59 S.Ct. 1047, 307 U.S. 647, 83 L.Ed. 1527, rehearing denied 60 S.Ct. 70, 308 U.S. 634, 84 L.Ed. 527 —Bonk v. Welch, C.C.A.Wis., 78 F. 2d 478—Larsen v. Portland California S. S. Co., C.C.A.Cal., 66 F.2d 326—Harold Lloyd Corporation v. Witwer, C.C.A.Cal., 65 F.2d 1, reversing, D.C., Witwer v. Harold Lloyd Corporation, 46 F.2d 792, certiorari dismissed 54 S.Ct. 94, 78 L.Ed. 1507—U. S. v. Scott, C.C.A. Tenn., 50 F.2d 773—Moore v. Ford Motor Co., C.C.A.N.Y., 43 F.2d 685, affirming, D.C., 28 F.2d 529—R. E. Hamilton & Sons Co. v. Moss-Jellico Coal Co., C.C.A.Ky., 271 F. 237—Carolina C. & O. Ry. Co. v. Stroup, Tenn., 239 F. 75, 152 C.C.A. 125, error dismissed 37 S.Ct. 743, 244 U. S. 649, 61 L.Ed. 1371.

4 C.J. p 848 note 35.

Rule applied

(1) Where the testimony of the witnesses was conflicting.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

(2) Where the testimony of a witness contains contradictory or inconsistent statements, or differs from statements made by him prior to the trial.—Bowen v. Cote, C.C.A.N.H., 69 F.2d 136, affirming, D.C., Bowen v. Soucy, 2 F.Supp. 481—U. S. v. Tyrakowski, C.C.A.Ill., 50 F.2d 766.

Opinion testimony

(1) The credibility of expert and nonexpert witnesses giving opinion testimony is generally considered to be for the fact-finding body and not for the reviewing court.—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—U. S. v. Todd, C.C.A.Or., 70 F.2d 540.

(2) However, the appellate court is not bound by the expert evidence in a case below as to the reasonableness of attorney's fees.—Federal Oil Marketing Corporation v. Cravens, C. C.A.Ark., 46 F.2d 938.

Silence or evasiveness

It has been held that the appellate court has the same right to draw conclusions from the silence or evasiveness of witness as has the trial court.—U. S. v. Mammoth Oil Co., C.C.A.Wyo., 14 F.2d 705, reversing, D.C., 5 F.2d 330, and certiorari granted Mammoth Oil Co. v. U. S., 47 S.Ct. 332, 273 U.S. 686, 71 L.Ed. 840, affirmed 48 S.Ct. 1, 275 U.S. 13, 72 L.Ed. 137.

72. U.S.—Springmann v. Gary State Bank, C.C.A.Ind., 124 F.2d 678—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F. 2d 823, rehearing denied 118 F.2d 252—Obartuch v. Security Mut. Life Ins. Co., C.C.A.Ill., 114 F.2d 873, certiorari denied 61 S.Ct. 730, 312 U.S. 696, 85 L.Ed. 1131, rehearing denied 61 S.Ct. 824, 312 U. S. 716, 85 L.Ed. 1146—Lang v. U. S. Reduction Co., C.C.A.Ind., 110 F. 2d 441—McCann v. New york Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 807, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 83 L.Ed. 521—De Garcia v. Figueroa & Gautier, C.C.A.Puerto Rico, 102 F.2d 148—Interstate Transit Lines v. Crane, C.C.A.Colo., 100 F.2d 857—Hartford Fire Ins. Co. v. Wolf Bldg. Co., C.C.A.Ind., 92 F.2d 776—Elzig v. Gudwangen, C. C.A.Minn., 91 F.2d 434—U. S. v. Union Trust Co. of Indianapolis, C. C.A.Ind., 90 F.2d 702—McCoy v. Universal Carloading & Distributing Co., C.C.A.Ohio, 82 F.2d 342—Bonk v. Welch, C.C.A.Wis., 78 F.2d 478—U. S. v. Scott, C.C.A.Tenn., 50 F.2d 773—Simpson-Fell Oil Co. v. Pierce Petroleum Corporation, C. C.A.Okl., 32 F.2d 576—Gajda v. Reick-McJunkin Dairy Co., C.C.A. Ohio, 18 F.2d 279—Federal Life Ins. Co. v. Rascoe, C.C.A.Tenn., 12 F.2d 693, certiorari denied 47 S.Ct. 112, 273 U.S. 722, 71 L.Ed. 859—Buffalo Union Furnace Co. v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 291 F. 23, error dismissed 45 S.Ct. 510, 268 U.S. 707, 69 L.Ed. 1168, and affirming, D.C., 280 F. 751, rehearing denied 283 F. 673—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641—Payne v. Haubert, C.C.A.Ohio, 277 F. 646.

4 C.J. p 844 note 66.

Inferences

It is the province of trial court to determine the weight of the evidence and to draw such inferences as the direct evidence and the circumstances reasonably warrant.—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeal dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—Gary Theatre Co. v. Columbia Pictures Corporation, C.C. A.Ill., 120 F.2d 891.

73. U.S.—McVeigh v. McGurren, C. C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Foote Bros. Gear & Machine Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—U. S. v. Union Trust Co. of Indianapolis, C.C.A.Ind., 90 F.2d 702—Valiente & Co. v. Succession of Fuentes, C.C.A.Puerto Rico, 76 F.2d 78.

74. U.S.—Hanover Fire Ins. Co. v. Isabel, C.C.A.Okl., 129 F.2d 111 —Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410—Grand Trunk West-

therefrom,[75] to support the fact determined in the lower court, the fact so determined will not be disturbed on appeal.[76] Also questions of fact determined below will not be disturbed on appeal where the evidence is conflicting,[77] or where different minds might arrive at opposite conclusions on a consideration of the evidence.[78]

On the other hand, the facts disclosed by the record may be considered and reviewed by the appellate court when the action of the lower court based thereon appears to be clearly erroneous,[79] as where it is not sustained by sufficient evidence.[80] It has also been held that the reviewing court is not bound by facts determined in the lower court based on uncontradicted evidence.[81]

The trial court's determination of preliminary fact questions on which the competency of witnesses or admissibility of evidence depends is generally final,[82] unless there is no evidence to support it.[83]

Questions of fact on motions or other special proceedings. When the determination of questions as to motions or other special proceedings depends on facts laid before the trial court, its decision is ordinarily governed by the same rules relating to findings of fact generally as are discussed above, and the appellate court will not ordinarily interfere with such determination.[84] So the circuit court of appeals will not as a rule review the action of the trial court in granting or denying a motion for a new trial for error of fact.[85]

ern R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Reyes v. La Capital De Puerto Rico, C.C.A. Puerto Rico, 106 F.2d 199—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—Gould Securities Co. v. U. S., C.C.A.N.Y., 96 F.2d 780—Missouri Pac. Transp. Co. v. Bennett, C.C.A.Neb., 95 F.2d 177—Goble v. U. S., C.C.A.Ind., 94 F.2d 275—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672—U. S. Fidelity & Guaranty Co. v. Vicars, C.C.A.Hawaii, 10 F.2d 474.

75. U.S.—Lincoln Petroleum Co. v. New York Life Ins. Co., C.C.A.Ill., 115 F.2d 73—Continental Petroleum Co. v. U. S., C.C.A.Okl., 87 F.2d 91, certiorari denied 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883—U. S. v. O'Brien, C.C.A.Va., 51 F.2d 37—Limbach v. Yellow Cab Co., C.C.A.Ill., 45 F.2d 386—Mutual Life Ins. Co. of New York v. Gregg, C.C.A.Ohio, 32 F.2d 567—Andujar v. Hani, C.C.A.N.Y., 277 F. 62—Hines v. Smith, C.C.A.Ill., 275 F. 766—King v. Weiss & Lesh Mfg. Co., C.C.A.Tenn., 266 F. 257.

2 C.J. p 971 note 78.

76. U.S.—Sabine Towing Co. v. Brennan, C.C.A.Tex., 85 F.2d 478, certiorari denied in part Brennan v. Sabine Towing Co., 57 S.Ct. 191, 299 U.S. 599, 81 L.Ed. 441, rehearing denied 57 S.Ct. 234, 299 U.S. 624, 81 L.Ed. 459—Van Beeck v. Sabine Towing Co., C.C.A.Tex., 85 F.2d 478, certiorari granted in part 57 S.Ct. 191, 299 U.S. 535, 81 L.Ed. 394, reversed on other grounds 57 S.Ct. 452, 300 U.S. 342, 81 L.Ed. 685—Thomas E. Basham Co. v. Lucas, C.C.A.Ky., 30 F.2d 97, affirming, D.C., 21 F.2d 550—McHale v. Hull, C.C.A.Ill., 16 F.2d 781—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672.

77. U.S.—Seber v. Thomas, C.C.A.Okl., 108 F.2d 856—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 83 L.Ed. 521—De Garcia v. Figueroa & Gautier, C.C.A. Puerto Rico, 102 F.2d 148—The Black Gull, C.C.A.N.Y., 82 F.2d 758, modifying, D.C., Peterson v. United New York Sandy Hook Pilots Ass'n, 11 F.Supp. 411, certiorari denied American Diamond Lines v. Peterson, 56 S.Ct. 954, 298 U.S. 684, 80 L.Ed. 1404 and Black Gull American Diamond Lines v. Peterson, 56 S.Ct. 954, 298 U.S. 684, 80 L.Ed. 1404—Waid v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 14 F.2d 90—Pacific American Fisheries v. Hoof, C.C.A.Wash., 291 F. 306, affirming, D.C., Hoof v. Pacific American Fisheries, 284 F. 174, and certiorari denied Pacific American Fisheries v. Hoof, 44 S.Ct. 38, 263 U.S. 712, 68 L.Ed. 520.

"Contradictions and conflicts of evidence are for trier of facts, whether it be court or jury, and where the evidence and inferences fairly deducible from it are such that reasonable minds may honestly draw different conclusions from them . . . the question is not one of law but of fact to be determined by the trier of the facts."—National Mut. Casualty Co. of Tulsa, Okl., v. Eisenhower, C.C.A.Kan., 116 F.2d 891.

78. U.S.—Helvering v. Johnson, C.C.A., 104 F.2d 140, certiorari granted 60 S.Ct. 114, 308 U.S. 536, 84 L.Ed. 452, affirmed 60 S.Ct. 293, 308 U.S. 523, 84 L.Ed. 443, motion granted 60 S.Ct. 584—U. S. v. Gamble-Skogmo, C.C.A.Minn., 91 F.2d 372.

79. U.S.—Kishan Singh v. Carr, C.C.A.Cal., 88 F.2d 672.

80. U.S.—Ætna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1—Lapp v. Pennsylvania R. Co., C.C.A.N.J., 51 F.2d 477.

81. U.S.—In re Danville Hotel Co., C.C.A.Ill., 38 F.2d 10, affirming in part and reversing in part, D.C., 33 F.2d 162.

Finding based on inferences from uncontroverted facts has not the weight in an appellate court of a finding of fact.—Bianchi v. Vere, C.C.A.Puerto Rico, 17 F.2d 22, certiorari denied Vere v. Bianchi, 47 S.Ct. 765, 274 U.S. 752, 71 L.Ed. 1333.

82. U.S.—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892—Meaney v. U. S., C.C.A.N.Y., 112 F.2d 538, 130 A.L.R. 973—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—Lang Co. v. Fort, C.C.A.N.J., 76 F.2d 27—Citizens Bank & Trust Co. of Middlesboro, Ky., v. Allen, C.C.A.Va., 43 F.2d 549.

83. U.S.—Ætna Life Ins. Co. v. Kern-Bauer, C.C.A.Okl., 62 F.2d 477.

84. U.S.—Federal Trade Commission v. Thomsen-King & Co., C.C.A.Ill., 109 F.2d 516—Dant & Russell v. J. D. Halstead Lumber Co., C.C.A.Cal., 103 F.2d 306—Coates v. Dresner, C.C.A.Pa., 34 F.2d 264—Frances Inv. Co. v. Thomason, C.C.A.Cal., 11 F.2d 229.

4 C.J. p 846 notes 95, 4.

85. U.S.—U. S. v. Socony-Vacuum Oil Co., Wis., 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, reversing, C.C.A., 105 F.2d 809, reversing, D.C., U. S. v. Standard Oil Co. (Indiana), 23 F.Supp. 937, motion denied 24 F.Supp. 575, certiorari granted U. S. v. Socony-Vacuum Oil Co., 60 S.Ct. 124, 308 U.S. 540, 84 L.Ed. 455, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421, and U. S. v. Socony-Vacuum Oil Co., 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421—State of Minnesota v. U. S., C.C.A.Minn., 125 F.2d 636, affirming, D.C., U. S. v. 4,450.72 Acres of Land, Clearwater County, State of Minnesota, 27 F.Supp. 167—Oklahoma Natural Gas Co. v. McKee, C.C.A.Okl., 121 F.2d 583—

(2) Verdicts

Ordinarily the verdict or findings of a jury will be taken as conclusive and will not be reviewed in the circuit court of appeals unless it is clearly erroneous or without evidential support.

Ordinarily the verdict or findings of a jury will be taken as conclusive and will not be reviewed in the circuit court of appeals,[86] where the case was properly submitted to the jury without error as to rulings or instructions,[87] where there is sufficient[88]

Barnes v. South Carolina Public Service Authority, C.C.A.S.C., 120 F.2d 439—Silver v. New York Life Ins. Co., C.C.A.Ill., 116 F.2d 59—Marshall's U. S. Auto Supply v. Cashman, C.C.A.Kan., 111 F.2d 140, certiorari denied Cashman v. Marshall's U. S. Auto Supply, 61 S.Ct. 26, 311 U.S. 667, 85 L.Ed. 428—Ætna Ins. Co. v. Norris Bros., C.C.A.S.C., 109 F.2d 172—Carter Coal Co. v. Nelson, C.C.A.Va., 91 F.2d 651—Kimball Ice Co. v. Hartford Fire Ins. Co., C.C.A.W.Va., 18 F.2d 563, 52 A.L.R. 799.

Grounds of motion not reviewed

(1) Excessive or inadequate verdict.—Fairmount Glass Works v. Cub Fork Coal Co., Ind., 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439, reversing, C.C.A., Cub Fork Coal Co. v. Fairmount Glass Works, 59 F.2d 539, and certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S.Ct. 24, 287 U.S. 585, 77 L.Ed. 511—Powers v. Wilson, C.C.A.Vt., 110 F.2d 960—Chicago & N. W. R. Co. v. Kelly, C.C.A.Minn., 74 F.2d 31.

(2) Verdict against weight of evidence.—Dairymen's Milk Co. of Pittsburgh v. McCormick Co., C.C.A.Pa., 114 F.2d 736—Booth v. Gilbert, C.C.A.Mo., 79 F.2d 790—O'Donnell v. New York Transp. Co., N.Y., 187 F. 109, 109 C.C.A. 29.

86. U.S.—Independent Exploration Co. v. Campbell, C.C.A.Ill., 127 F.2d 899—Ætna Life Ins. Co. v. Newbern, C.C.A.Ark., 127 F.2d 171—Samuelson v. Central Nebraska Public Power & Irrigation Dist., C.C.A.Neb., 125 F.2d 838—Sundquist v. Camden Fire Ins. Ass'n, C.C.A.Ill., 119 F.2d 955, certiorari denied 62 S.Ct. 110, 314 U.S. 658, 86 L.Ed. 527—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Norfolk & W. Ry. Co. v. McKenzie, C.C.A.Ky., 116 F. 2d 632—Camara v. American R. Co. of Puerto Rico, C.C.A.Puerto Rico, 111 F.2d 960—Baten v. Kirby Lumber Corporation, C.C.A.Tex., 103 F. 2d 272—Gay, Sullivan & Co. v. Glaser, Crandell Co., C.C.A.Ill., 102 F.2d 149—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C.A.Iowa, 101 F.2d 493—U. S. v. About 151.682 Acres of Land in McHenry County, C.C.A.Ill., 99 F.2d 716—Palace Cafe v. Hartford Fire Ins. Co., C.C.A.Ind., 97 F.2d 766, certiorari denied Hartford Fire Ins. Co. v. Palace Cafe, 59 S.Ct. 102, 305 U.S. 634, 83 L.Ed. 407—Palace Cafe v. National Security Fire Ins. Co., C.C.A.Ind., 97 F.2d 766, certiorari denied National Security Fire Ins. Co. v. Palace Cafe, 59 S.Ct. 102, 305 U.S. 634, 83 L.Ed. 407—John Irving Shoe Co. v. Dugan, C.C.A.Mass., 93 F.2d 711—Yellow Cab Co. v. Keane, C.C.A.Ill., 93 F.2d 290—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—Continental Casualty Co. v. Shankel, C.C.A.Okl., 88 F.2d 819—Pacific Fire Ins. Co. v. Pennsylvania Sugar Co., C.C.A.Pa., 72 F.2d 958, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710, rehearing denied 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 718—Erie R. Co. v. Fritsch, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—Erie R. Co. v. Landau, 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—New York, O. & W. Ry. Co. v. Jones, C.C.A.Pa., 66 F.2d 556, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592—Combs v. U. S., C.C.A.Mo., 65 F.2d 787—New York, C. & St. L. R. Co. v. Boulden, C.C.A.Ind., 63 F.2d 917, certiorari denied 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1498—American Surety Co. of New York v. Greek Catholic Union, C.C.A.Pa., 51 F.2d 1050, certiorari granted 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 520, and reversed on other grounds 52 S.Ct. 235, 284 U.S. 563, 76 L.Ed. 490, amending 52 S.Ct. 392, 285 U.S. 526, 76 L.Ed. 923—National Surety Co. v. Sheridan County, C.C.A.Mont., 33 F.2d 473—Fordson Coal Co. v. Jackson, C.C.A.Ky., 32 F.2d 1000—Mutual Inv. Co. v. Shull, C.C.A.N.C., 28 F.2d 830—Williams v. Stone, C.C.A.N.C., 25 F.2d 588—Clark v. McNeill, C.C.A.Ky., 25 F.2d 247—National Fire Ins. Co. of Hartford, Conn., v. Renier, C.C.A.Wis., 22 F. 2d 671—Lamborn & Co. v. Palmetto Grocery Co., C.C.A.S.C., 5 F.2d 502—Elias v. Wright, C.C.A.N.Y., 276 F. 908—Champion Spark Plug Co. v. Automobile Sundries Co., C.C.A.N.Y., 273 F. 74—Batson v. Rosofa, C.C.A.N.Y., 271 F. 309—U. S. Steel Products Co. v. Poole-Dean Co., Or., 245 F. 533, 157 C.C.A. 645—Bluefields S. S. Co. to Use of Wood v. United Fruit Co., Pa., 243 F. 1, 155 C.C.A. 531, error dismissed 39 S.Ct. 136, 248 U.S. 595, 63 L.Ed. 438—Thomas A. Edison, Inc. v. Kidd, C.C.A.N.Y., 242 F. 923, 155 C.C.A. 511, affirming, D.C., Kidd v. Thomas A. Edison, Inc., 239 F. 405—Crescent Milling Co. v. H. N. Strait Mfg. Co., Minn., 227 F. 804, 142 C.C.A. 328, certiorari denied 36 S.Ct. 724, 241 U.S. 673, 60 L.Ed. 1231.

4 C.J. p 850 note 51, p 866 note 55 [b].

On questions of fraud or negligence

U.S.—Kellerman v. Bullock, C.C.A.Cal., 295 F. 21—Director General of Railroads v. Reynolds, C.C.A.Ky., 268 F. 948—Cincinnati, N. O. & T. P. Ry. Co. v. Hall, Tenn., 243 F. 76, 155 C.C.A. 606—New York & Porto Rico S. S. Co. v. Guanica Centrale, N.Y., 231 F. 820, 145 C.C.A. 640—Madison Coal Corporation v. Stullken, Ill., 228 F. 307, 142 C.C.A. 599.

87. U.S.—Fidelity & Casualty Co. of New York v. Genova, C.C.A.Ohio, 90 F.2d 874—Illinois Surety Co. v. Standard Underground Cable Co., Pa., 238 F. 546, 151 C.C.A. 482, certiorari denied 37 S.Ct. 478, 243 U.S. 651, 61 L.Ed. 947.

88. U.S.—Nailling v. U. S., C.C.A.Tenn., 124 F.2d 431, certiorari denied 62 S.Ct. 1043, 316 U.S. 676, 86 L.Ed. 1749—Anzano v. Metropolitan Life Ins. Co. of New York, C.C.A.N.J., 118 F.2d 430, affirming, D.C., 32 F.Supp. 417—Woodburn v Standard Forgings Corporation, C.C.A.Ind., 112 F.2d 271, 129 A.L.R. 337—Seaboard Refractories Co. v. Lehigh Valley R. Co., C.C.A.N.J., 51 F.2d 918—U. S. v. Pentz, C.C.A.Or., 35 F.2d 350—Allgood v. Hines, C.C.A.Ala., 287 F. 772—International Glass Co. v. Krouse, C.C.A.Pa., 282 F. 206.

4 C.J. p 852 note 56.

Similar statements of rule

(1) Where there is evidence to support the verdict.—Great Atlantic & Pacific Tea Co. v. Boyles, C.C.A.Pa., 102 F.2d 343—Sears, Roebuck & Co. v. Peterson, C.C.A.Minn., 76 F.2d 243—Terminal R. Ass'n of St. Louis v. Farris, C.C.A.Mo., 69 F.2d 779—Employers' Liability Assur. Corporation v. Bell, C.C.A.N.J., 63 F.2d 953—Schnerb v. Caterpillar Tractor Co., C.C.A.N.Y., 43 F.2d 920, certiorari denied 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—National Biscuit Co. v. Litzky, C.C.A.Mich., 22 F.2d 939, 56 A.L.R. 853—Goldwyn Distributing Corporation v. Brenneman, C.C.A.Pa., 13 F.2d 105—Mercantile Trust Co. v. Olsan, C.C.A.Okl., 292 F. 49—Columbia Agricultural Co. v. Seid Pak Sing, C.C.A.Or., 267 F. 1.

4 C.J. p 853 note 58.

(2) Where the evidence was sufficient to warrant its submission to the jury.—Warbende v. Prudential Ins. Co. of America, C.C.A.Ill., 97 F.

or substantial[89] evidence to support the verdict, and where the verdict or finding is not clearly or manifestly wrong.[90]

As it is not, ordinarily, the province of the appellate court to weigh the evidence or consider its weight,[91] it will not interfere with a verdict mere-

2d 749, 117 A.L.R. 760—Tieben v. U. S., C.C.A.Ind., 96 F.2d 907—Chase Nat. Bank of City of New York v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 79 F.2d 84—U. S. v. American Surety Co. of New York, C.C.A.N.Y., 56 F.2d 734—Wagner Electric Corporation v. Snowden, C. C.A.Mo., 38 F.2d 599—Inter-Southern Life Ins. Co. v. McElroy, C.C.A.Ark., 38 F.2d 557.

(3) Where the verdict or findings are supported by the inferences reasonably deducible from the facts proved.—Crowe v. Gary State Bank, C.C.A.Ind., 123 F.2d 513—Reskin v. Minnesota-Atlantic Transit Co., C.C. A.N.Y., 107 F.2d 743—Columbian Nat. Life Ins. Co. v. Comfort, C.C.A.Mo., 84 F.2d 291, certiorari denied 57 S.Ct. 34, 299 U.S. 571, 81 L.Ed. 420.

(4) Other statements of rule.—Moore v. American Scantic Line, C.C. A.N.Y., 121 F.2d 767, affirming, D.C., 30 F.Supp. 843—Phillips Petroleum Co. v. Taylor, C.C.A.Tex., 115 F.2d 726, rehearing denied 116 F.2d 994, certiorari denied 61 S.Ct. 941, 313 U.S. 565, 85 L.Ed. 1524—Aetna Life Ins. Co. v. McAdoo, C.C.A.Ark., 115 F. 2d 369—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196 —Southern Pac. Co. v. Schwartz, C. C.A.Ariz., 89 F.2d 192—New York Telephone Co. v. Beckers, C.C.A.N.Y., 30 F.2d 578—Anderson Lumber Corporation v. Lehto, C.C.A.S.C., 282 F. 485—Hallenback-Hungerford Realty Corp. v. John I. Devin Co., N.Y., 228 F. 661, 143 C.C.A. 183.

4 C.J. p 855 note 80.

89. U.S.—Sears, Roebuck & Co. v. Leviski, C.C.A.Ohio, 128 F.2d 923—Sears, Roebuck & Co. v. Leviski, C. C.A.Ohio, 128 F.2d 924—Thomson v. Boles, C.C.A.Minn., 123 F.2d 487 —Rich v. Warren, C.C.A.Ky., 123 F.2d 198—Altmayer v. Travelers Protective Ass'n of America, C.C.A. Wis., 119 F.2d 1005—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Chapman v. Alton R. Co., C.C.A.Ill., 117 F.2d 669—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F.2d 562—Cabel v. U. S., C.C.A.Mass., 113 F.2d 998—Splint Coal Corporation v. Anderson, C.C.A.Ky., 109 F. 2d 896, certiorari denied 61 S.Ct. 18, 311 U.S. 661, 85 L.Ed. 424—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—Chicago G. W. R. Co. v. Robinson, C.C.A. Neb., 101 F.2d 994, certiorari denied 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1520—Colorado Life Co. v. Steele, C.C.A.Ark., 101 F.2d 448—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Gaughan v. Michigan Interstate Motor Freight, C.C.A.Ill., 94 F.2d 266—Yellow Cab Co. v. Keane, C.C.A.Ill., 93 F.2d 290—Penn Mut. Life Ins. Co. v. Tilton, C.C.A.N.M., 84 F.2d 10—Hammond v. Tate, C.C.A.Kan., 83 F.2d 69, 105 A.L.R. 433—Massachusetts Protective Ass'n v. Lewis, C.C.A.Pa., 72 F.2d 952—U. S. v. Monger, C.C.A.Wyo., 70 F.2d 361—Maryland Casualty Co. v. Elmira Coal Co., C.C.A.Mo., 69 F.2d 616—Strouse v. Union Indemnity Co., C.C.A.N.Y., 67 F.2d 528—U. S. v. Crume, C.C.A.Tex., 54 F.2d 556 —U. S. v. Martin, C.C.A.Tex., 54 F.2d 554, certiorari denied Martin v. U. S., 52 S.Ct. 497, 286 U.S. 546, 76 L.Ed. 1282—Larabee Flour Mills Co. v. Carignano, C.C.A.Okl., 49 F. 2d 151—Smith v. Daniel, C.C.A. Tenn., 46 F.2d 740, certiorari denied 51 S.Ct. 651, 283 U.S. 852, 75 L.Ed. 1460—Bank Sav. Life Ins. Co. v. Butler, C.C.A.Mo., 38 F.2d 972, certiorari denied 51 S.Ct. 28, 282 U.S. 850, 75 L.Ed. 753—General Accident Fire & Life Assur. Corporation v. Savage, C.C.A.Utah, 35 F.2d 587—Lord Const. Co. v. U. S. to Use of W. E. Sexton Co., C.C. A.N.J., 28 F.2d 340—Dodge v. Allison, C.C.A.N.J., 13 F.2d 588, certiorari dismissed 47 S.Ct. 239, 273 U.S. 774, 71 L.Ed. 885—Goodwin v. U. S., C.C.A.Ohio, 2 F.2d 200—C. A. Smith Timber Co. v. Auld, Minn., 218 F. 824, 134 C.C.A. 512.

4 C.J. p 853 note 59.

90. U.S.—Miller v. Advance Transp. Co., C.C.A.Ill., 126 F.2d 442—Samuelson v. Central Nebraska Public Power & Irrigation Dist., C.C.A. Neb., 125 F.2d 838—Noller v. London & Lancashire Indemnity Co. of America, C.C.A.Ind., 103 F.2d 622—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Wald v. Longacre, C.C.A.Pa., 34 F.2d 25 —U. S. v. 323 Packages of "Kil-Tone," C.C.A.Pa., 279 F. 398.

91. U.S.—White Bear Theatre Corporation v. State Theatre Corporation, C.C.A.Minn., 129 F.2d 600—Cram v. Eveloff, C.C.A.Minn., 127 F.2d 486—Smails v. O'Malley, C.C. A.Neb., 127 F.2d 410—Galeota v. U. S. Gypsum Co., C.C.A.N.Y., 123 F.2d 947—Aetna Life Ins. Co. v. McAdoo, C.C.A.Ark., 115 F.2d 369—Egan Chevrolet Co. v. Bruner, C.C. A.Minn., 102 F.2d 373, 122 A.L.R. 987—Foster v. Denny Motor Transfer Co., C.C.A.Ill., 100 F.2d 658—Long Transp. Co. v. Domurat, C.C. A.Ill., 93 F.2d 23—U. S. v. Thompson, C.C.A.Mont., 92 F.2d 135—In re Country Club Bldg. Corporation, C. C.A.Ill., 91 F.2d 713, certiorari denied Murphy v. Bloom, 58 S.Ct. 284, 302 U.S. 757, 82 L.Ed. 585—U. S. v. Todd, C.C.A.Or., 70 F.2d 540—U. S. v. Alger, C.C.A.Idaho, 68 F. 2d 592—Stanolind Oil & Gas Co. v. Kimmel, C.C.A.Okl., 68 F.2d 520—U. S. v. Francis, C.C.A.Mont., 64 F.2d 865—American Bureau of Shipping v. Allied Oil Co., C.C.A. Ohio, 64 F.2d 509—U. S. v. Lesher, C.C.A.Or., 59 F.2d 53—Cleveland Nehi Bottling Co. v. Schenk, C.C.A. Ohio, 56 F.2d 941—Illinois Power & Light Corporation v. Hurley, C.C. A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L. Ed. 541—Chesapeake & O. Ry. Co. v. Wells, C.C.A.Ohio, 49 F.2d 251, certiorari denied Wells v. Chesapeake & O. Ry. Co., 52 S.Ct. 22, 284 U.S. 641, 76 L.Ed. 545—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—Wagner Electric Corporation v. Snowden, C.C.A.Mo., 38 F.2d 599—Mason & Hanger Co. v. Burnam, C.C.A.Ky., 36 F.2d 330—Security Life Ins. Co. of America v. Brimmer, C.C.A.Mo., 36 F.2d 176, certiorari denied 50 S.Ct. 350, 281 U. S. 744, 74 L.Ed. 1157—Lehigh Valley R. Co. v. State of Russia, C. C.A.N.Y., 21 F.2d 406, certiorari denied 48 S.Ct. 159, 275 U.S. 571, 72 L.Ed. 432—Steil v. Holland, C. C.A.Cal., 3 F.2d 776—Phœnix Ins. Co. v. Bakovic, C.C.A.Wash., 2 F. 2d 857—Lake Erie & W. R. Co. v. Schneider, Ohio, 257 F. 675, 168 C.C.A. 625—American Trading Co. v. North Alaska Salmon Co., Cal., 248 F. 665, 160 C.C.A. 565, certiorari denied 38 S.Ct. 581, 247 U.S. 518, 62 L.Ed. 1245—Brazil Block Coal Co. v. Hotel, Ill., 192 F. 108, 112 C.C.A. 448.

Fact that verdict is opposed to opinion of reviewing court, which if it had sat as a jury in the case would have come to the opposite conclusion, furnished no ground for setting aside a verdict otherwise sustainable.—Skinner v. Pennsylvania Greyhound Lines, C.C.A.Ind., 123 F. 2d 497—Adams v. U. S., C.C.A.Ill., 116 F.2d 199—Dryfoos v. Scavenger Service Corporation, C.C.A.Ill., 115 F.2d 637—Hunter v. Derby Foods, C. C.A.N.Y., 110 F.2d 970, 133 A.L.R. 255 —Hughes v. Lawyers Trust Co., C.C. A.N.Y., 108 F.2d 792, certiorari denied 60 S.Ct. 1097, 310 U.S. 647, 84 L.Ed. 1413—O'Connor v. Ludlam, C. C.A.N.Y., 92 F.2d 50, certiorari de-

ly because it appears to be against the weight or preponderance of the evidence;[92] nor will it disturb the determination of the jury where the evidence is conflicting.[93]

nied 58 S.Ct. 364, 302 U.S. 758, 82 L. Ed. 586—Delaware, L. & W. Ry. Co. v. Tuovinen, N.Y., 240 F. 678, 153 C.C.A. 476.
4 C.J. p 855 note 82.

92. U.S.—Ramming Real Estate Co. v. U. S., C.C.A.Mo., 122 F.2d 892—U. S. v. Holland, C.C.A.Cal., 111 F. 2d 949—Duncan v. Montgomery Ward & Co., C.C.A.Ark., 108 F.2d 848, reversing, D.C., 27 F.Supp. 4, and certiorari granted Montgomery Ward & Co. v. Duncan, 60 S. Ct. 809, 309 U.S. 650, 84 L.Ed. 1001, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389—Cleveland & Western Coal Co. v. Main Island Creek Coal Co., C.C.A.Ohio, 297 F. 60, certiorari denied 44 S.Ct. 634, 265 U.S. 588, 68 L.Ed. 1194—Atlantic Ice & Coal Corporation v. Van, C.C.A.Tenn., 276 F. 646—John A. Crowley Co. v. Clark Equipment Co., C.C.A.N.Y., 263 F. 58—Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co., N.J., 223 F. 881, 139 C.C.A. 319, affirmed 39 S.Ct. 38, 248 U.S. 55, 63 L.Ed. 123.
4 C.J. p 861 note 24.

Verdict will not be set aside as against weight of evidence

(1) Where there is some competent evidence to support it.—Louisiana & Arkansas Ry. Co. v. Jackson, C.C.A. La., 95 F.2d 369—Owl Creek Coal Co. v. Goleb, Wyo., 232 F. 445, 146 C. C.A. 439—Kirkpatrick v. Adams, C.C. Tenn., 20 F. 287.

(2) Where it is supported by sufficient or substantial evidence.—U. S. v. Dupire, C.C.A.Mo., 101 F.2d 945—Grand Trunk Western R. Co. v. Collins, C.C.A.Mich., 65 F.2d 875—U. S. v. Burke, C.C.A.Wash., 50 F.2d 653—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U. S. 637, 76 L.Ed. 541.

(3) Unless the verdict is clearly and palpably against the great weight of the evidence.—Flewellen v. Logan, C.C.A.Tex., 106 F.2d 151, denying rehearing 105 F.2d 268—El Dia Ins. Co. v. Sinclair, N.Y., 228 F. 833, 143 C.C.A. 231, certiorari denied 36 S.Ct. 449, 241 U.S. 661, 60 L.Ed. 1226.

93. U.S.—Tri-State Transit Co. of Louisiana v. Grier, C.C.A.La., 127 F.2d 719—American Employers' Ins. Co. v. McLean, C.C.A.La., 127 F.2d 275—Cross v. Ryan, C.C.A.Ill., 124 F.2d 883, certiorari denied 62 S.Ct. 1269, 316 U.S. 682, 86 L.Ed. 1755—American Steel & Wire Co. v. Sieraski, C.C.A.Ohio, 119 F.2d 709—Ferguson v. U. S., C.C.A.Tex., 119 F.2d 582, certiorari denied 62 S.Ct. 78, 314 U.S. 623, 86 L.Ed. 501, order withheld 62 S.Ct. 118, 314 U.S. 576, 86 L.Ed. —, rehearing denied 62 S.Ct. 176, 314 U.S. 709, 86 L.Ed. 566—Standard Oil Co. of New Jersey v. Midgett, C.C.A.N.C., 116 F.2d 562—Teche Lines v. Boyette, C.C.A.Miss., 111 F.2d 579—Atlantic Greyhound Corporation v. Lyon, C.C.A.Va., 107 F.2d 157, certiorari denied 60 S.Ct. 592, 309 U.S. 667, 84 L.Ed. 1014—Alexander, Ramsay & Kerr, v. National Union Fire Ins. Co., C.C.A.N.Y., 104 F.2d 1006—Hinshaw v. New England Mut. Life Ins. Co., C.C.A.Mo., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488—Hinshaw v. Massachusetts Mut. Life Ins. Co., C.C.A.Mo., 104 F.2d 45, certiorari denied 60 S.Ct. 106, 308 U.S. 583, 84 L.Ed. 488—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528—Woodmen of the World v. Sugar, C.C.A.Utah, 102 F.2d 695—Spotts v. Baltimore & O. R. Co., C.C.A.Ind., 102 F.2d 160, certiorari denied Baltimore & O. R. Co. v. Spotts, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522—U. S. ex rel. Johnson v. Morley Const. Co., C.C.A.N.Y., 98 F.2d 781, modifying, D.C., 17 F.Supp. 378, certiorari denied Maryland Casualty Co. v. U. S. for Use and Benefit of Harrington, 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421—Swinger v. Firman Equipment Corporation, C.C.A.Ill., 94 F.2d 269—Gaughan v. Michigan Interstate Motor Freight, C.C.A.Ill., 94 F.2d 266—Laursen v. O'Brien, C. C.A.Wis., 90 F.2d 792—Cuneo Press v. Claybourn Corporation, C.C.A.Ill., 90 F.2d 233—New York Life Ins. Co. v. Kassly, C.C.A.Ill., 87 F.2d 236, certiorari denied 57 S.Ct. 672, 300 U.S. 680, 81 L.Ed. 884—Booth v. Gilbert, C.C.A.Mo., 79 F.2d 790—Mutual Life Ins. Co. of New York v. Still, C.C.A.Neb., 78 F.2d 748—City Ice & Fuel Co. v. Bright, C.C. A.Mich., 73 F.2d 461—Royal Ins. Co. v. Eastham, C.C.A.Ala., 71 F.2d 385, certiorari denied 55 S.Ct. 110, 293 U.S. 557, 79 L.Ed. 658—Stanolind Oil & Gas Co. v. Kimmel, C.C. A.Okl., 68 F.2d 520—Columbia Casualty Co. v. Tibma, C.C.A.Ind., 63 F.2d 538, certiorari denied 54 S. Ct. 51, 290 U.S. 633, 78 L.Ed. 551—Frates v. Thomas, C.C.A.Okl., 57 F. 2d 535—Third Nat. Bank & Trust Co. v. U. S., C.C.A.Ohio, 53 F.2d 599—F. W. Woolworth Co. v. Davis, C.C.A.Okl., 41 F.2d 342, certiorari denied 51 S.Ct. 33, 282 U.S. 859, 75 L.Ed. 760—Mountain States Telephone & Telegraph Co. v. Walker, C.C.A.Ariz., 35 F.2d 465—Central Supply Co. v. Carter Clothing Corporation, C.C.A.N.J., 35 F.2d 172—G. L. Webster Canning Co. v. Hogue-Kellogg Co., C.C.A.Va., 34 F.2d 10—Atchison, T. & S. F. Ry. Co. v. Condos, C.C.A.Colo., 30 F.2d 669—Flannery v. Willcuts, C.C.A.Minn., 25 F.2d 951—Morris & Co. v. Power Mfg. Co., C.C.A. Ohio, 17 F.2d 689—Higgins v. California Prune & Apricot Growers, C.C.A.N.Y., 16 F.2d 190, certiorari dismissed 47 S.Ct. 460, 273 U.S. 781, 71 L.Ed. 889—Fleischmann Malting Co. v. Mrkacek, C.C.A.Ill., 14 F.2d 602—Christie-Myers Feed Co. v. Cleveland Grain & Milling Co., C.C.A.W.Va., 6 F.2d 797, certiorari denied 46 S.Ct. 348, 270 U.S. 647, 70 L.Ed. 779—Fidelity & Casualty Co. of New York v. Glenn, C.C.A. W.Va., 3 F.2d 913—Steil v. Holland, C.C.A.Cal., 3 F.2d 776—Woodside Cotton Mills Co. v. Kaustine Co., C.C.A.S.C., 3 F.2d 523—Hettrick Mfg. Co. v. James A. Shepherd & Co., C.C.A.Ohio, 295 F. 10, certiorari denied 44 S.Ct. 456, 265 U.S. 581, 68 L.Ed. 1190—Canal Const. Co. v. Henson, C.C.A.Ark., 280 F. 98—Glynn v. May, C.C.A.Wis., 271 F. 464—Puget Sound Electric Ry. Co. v. Matson, Wash., 253 F. 33, 165 C.C.A. 53—Lehigh Valley R. Co. v. Pidcock, N.Y., 252 F. 475, 164 C.C.A. 659—National Enameling & Stamping Co. v. Zirkovics, Mo., 251 F. 184, 163 C.C.A. 340—Metropolitan Casualty Ins. Co. of New York v. Johnston, N.J., 247 F. 65, 159 C.C.A. 283—Fell Brewing Co. v. Adams, Pa., 245 F. 935, 158 C.C.A. 223—Chicago, B. & Q. R. Co. v. Dawson, Mo., 245 F. 338, 157 C.C.A. 530—Williams v. Vreeland, N.J., 244 F. 346, 156 C.C.A. 632, affirmed 39 S.Ct. 438, 250 U.S. 295, 63 L.Ed. 989, 3 A.L.R. 1038—Pennsylvania R. Co. v. Minds, Pa., 244 F. 53, 156 C.C.A. 481, affirming, D. C., Minds v. Pennsylvania R. Co., 237 F. 267, and affirmed 39 S.Ct. 531, 250 U.S. 368, 63 L.Ed. 1039—Blake v. Perrin, N.Y., 242 F. 54, 154 C.C.A. 646—Valentine v. Quackenbush, Alaska, 239 F. 832, 152 C.C.A. 618—Coal & Coke Ry. Co. v. Deal, W.Va., 231 F. 604, 145 C.C.A. 490, affirming, D.C., Deal v. Coal & Coke Ry. Co., 215 F. 285, and error granted Coal & Coke Ry. Co. v. Deal, 232 F. 1020, 146 C.C.A. 665, error dismissed 38 S.Ct. 345, 245 U.S. 681, 62 L.Ed. 544—Thrush v. Fullhart, W.Va., 230 F. 24, 144 C.C.A. 322—Erie R. Co. v. Schmidt, 225 F. 513, 140 C.C.A. 655—Indian Refining Co. v. Buhrman, 220 F. 426, 135 C.C.A. 231.
4 C.J. p 858 note 3.

Other statements of rule

(1) Generally.—Noller v. London & Lancashire Indemnity Co. of Amer-

However, it is for the circuit court of appeals to decide whether there is any evidence in support of the verdict,[94] and where there is no legal or competent supporting evidence the court will set the verdict aside.[95] Where the evidence in a case is undisputed, its legal effect presents a question of law and not of fact, and the verdict is subject to review.[96] A verdict rendered on submission of issues in an equity case to a jury is generally held to be merely advisory, and not binding either on the court below or on the appellate court.[97]

Amount of recovery. A finding of value or the amount of damages is so much a matter within the exclusive province of the jury that it will ordinarily not be disturbed by the reviewing court.[98] So the circuit court of appeals will refuse to set aside a judgment on the ground that the award of damages is excessive,[99] or that the award of damages is

ica, C.C.A.Ind., 103 F.2d 622—Napier v. Greenzweig, N.Y., 256 F. 196, 167 C.C.A. 412—4 C.J. p 860 notes 10, 11.

(2) Where there is ample or substantial evidence supporting a verdict based on conflicting evidence, it is conclusive on the appellate court.—Schwarz v. Fast, C.C.A.Neb., 103 F.2d 865—Mutual Life Ins. Co. of New York v. Frey, C.C.A.Cal., 71 F.2d 259—Grand Trunk Western Ry. Co. v. Heatlie, C.C.A.Mich., 48 F.2d 759, certiorari denied 52 S.Ct. 10, 284 U.S. 625, 76 L.Ed. 533.

(3) Unless clearly wrong, or flagrantly against the weight of the evidence, a verdict based on conflicting evidence will not be disturbed on appeal.—Farmers' Mfg. Co. v. Burton, C.C.A.N.C., 20 F.2d 339—Bleznak v. Springfield Fire & Marine Ins. Co., N.J., 237 F. 589, 150 C.C.A. 471.

4 C.J. p 860 note 14.

94. U.S.—Pickering v. Corson, C.C.A. Ill., 108 F.2d 546.

95. U.S.—Waggaman v. General Finance Co. of Philadelphia, C.C.A.Pa., 116 F.2d 254—Uihlein v. General Electric Co., C.C.A.Wis., 47 F.2d 997.

4 C.J. p 856 note 88.

Verdict set aside

(1) Where it rests only on speculation and conjecture.—U. S. v. Fain, C.C.A.Ark., 103 F.2d 161—Lapp v. Pennsylvania R. Co., C.C.A.N.J., 51 F.2d 477.

(2) Where it is based on evidence in flat contradiction of recognized physical laws.—U. S. v. Thornburgh, C.C.A.Mo., 111 F.2d 278, certiorari denied Thornburgh v. U. S., 61 S.Ct. 21, 311 U.S. 664, 85 L.Ed. 426.

96. U.S.—Flad v. Murphysboro & S. I. Ry. Co., C.C.A.Ill., 283 F. 386.

97. U.S.—(American) Lumbermens Mut. Casualty Co. of Illinois v. Timms & Howard, C.C.A.N.Y., 108 F.2d 497.

4 C.J. p 875 note 69.

98. U.S.—Oklahoma Natural Gas Co. v. McKee, C.C.A.Okl., 121 F.2d 583—Scalise v. National Utility Service, C.C.A.Fla., 120 F.2d 938—McCoy v. Cate, C.C.A.R.I., 117 F.2d 194—Voelkel v. Bennett, C.C.A.Pa., 115 F.2d 102, affirming, D.C., 31 F. Supp. 506—Kurn v. Stanfield, C.C.A.Mo., 111 F.2d 469—Arkansas Fuel Oil Co. v. City of Blackwell, C.C.A. Okl., 87 F.2d 50—Kroger Grocery & Baking Co. v. Yount, C.C.A.Mo., 66 F.2d 700, 92 A.L.R. 1166—Southern Ry. Co. v. Walters, C.C.A.Mo., 47 F.2d 3, certiorari granted 51 S.Ct. 495, 283 U.S. 815, 75 L.Ed. 1432, and reversed on other grounds 52 S.Ct. 58, 284 U.S. 190, 76 L.Ed. 239—Maryland Casualty Co. v. Palmetto Coal Co., C.C.A.S.C., 40 F.2d 374—U. S. Can Co. v. Ryan, C.C.A.Mo., 39 F.2d 445, certiorari denied 51 S.Ct. 23, 282 U.S. 842, 75 L.Ed. 748—Chesapeake & O. Ry. Co. v. Winder, C.C.A.Va., 23 F.2d 794—Sun Oil Co. v. Rhodes, C.C.A.Ark., 15 F.2d 790—Alaska Packers' Ass'n v. Gover, C.C.A.Alaska, 278 F. 927—Ford Motor Co. v. Hotel Woodward Co., C.C.A.N.Y., 271 F. 625, certiorari denied 41 S. Ct. 537, 256 U.S. 698, 65 L.Ed. 1177, and 42 S.Ct. 590, 259 U.S. 588, 66 L.Ed. 1078—American Film Co. v. Moye, C.C.A.Cal., 267 F. 419—National Enameling & Stamping Co. v. Zirkovics, Mo., 251 F. 184, 163 C.C.A. 340—Worden v. Kenny, N. Y., 239 F. 131, 152 C.C.A. 173—Press Pub. Co. v. Gillette, N.Y., 229 F. 108, 143 C.C.A. 384—St. Louis, I. M. & S. Ry. Co. v. Reed, Okl., 216 F. 741, 132 C.C.A. 651.

4 C.J. p 869 note 96.

99. U.S.—Armit v. Loveland, C.C.A. Pa., 115 F.2d 308—Southern Fruit Distributors v. Fulmer, C.C.A.Va., 107 F.2d 456—Swift & Co. v. Ellinor, C.C.A.Fla., 101 F.2d 131—Bissonette v. National Biscuit Co., C. C.A.Vt., 100 F.2d 1003—Atlantic Greyhound Corporation v. Crenshaw, C.C.A.Ga., 99 F.2d 449—Yellow Cab Co. v. Keane, C.C.A.Ill., 93 F.2d 290—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Blaydes v. Barnes, C.C. A.Va., 81 F.2d 198—Grand Trunk Western R. Co. v. Boylen, C.C.A. Ind., 81 F.2d 91—Booth v. Gilbert, C.C.A.Mo., 79 F.2d 790—Missouri Pac. R. Co. v. Siratt, C.C.A.Ark., 78 F.2d 253—Searfoss v. Lehigh Valley R. Co., C.C.A.N.Y., 76 F.2d 762—Jacque v. Locke Insulator Corporation, C.C.A.N.Y., 70 F.2d 680, certiorari denied Locke Insulator Corporation v. Jacque, 55 S.Ct. 99, 293 U.S. 585, 79 L.Ed. 681—Terminal R. Ass'n of St. Louis v. Farris, C.C.A.Mo., 69 F.2d 779—Moran v. City of Beckley, for Use of Bowen, C.C.A.W.Va., 67 F.2d 161—Kansas City Southern Ry. Co. v. Pinson, C.C.A.Tex., 61 F.2d 1001—Cleveland Nehi Bottling Co. v. Schenk, C.C.A.Ohio, 56 F.2d 941—Spokane, P. & S. Ry. Co. v. Cole, C.C.A.Or., 54 F.2d 318—Grand Trunk Western Ry. Co. v. Heatlie, C.C.A.Mich., 48 F.2d 759, certiorari denied 52 S.Ct. 10, 284 U.S. 625, 76 L.Ed. 733—Southern Transp. Co. v. Ashford, C.C.A.La., 48 F.2d 191—Southern Ry. Co. v. Montgomery, C.C.A.Miss., 46 F.2d 990—Interstate Stage Lines Co. v. Ayers, C.C.A. Mo., 42 F.2d 611—Chicago & E. I. Ry. Co. v. Divine, C.C.A.Ind., 39 F. 2d 537, certiorari denied 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173—Public Utilities Corporation of Arkansas v. McNaughton, C.C.A.Ark., 39 F.2d 7—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 38 F.2d 159, certiorari denied 50 S.Ct. 355, 281 U.S. 751, 74 L.Ed. 1162—St. Louis-San Francisco Ry. Co. v. Ewan, C.C.A.Mo., 26 F.2d 619—Chesapeake & O. Ry. Co. v. Winder, C.C.A.Va., 23 F.2d 794—Bowman-Hicks Lumber Co. v. Robinson, C.C.A.Or., 16 F.2d 240, certiorari denied 47 S.Ct. 574, 274 U.S. 736, 71 L.Ed. 1316—Detroit Taxicab & Transfer Co. v. Pratt, C.C.A. Mich., 2 F.2d 193—Davis v. Olson, C.C.A.Minn., 298 F. 921—Boston & M. R. R. v. Dutille, C.C.A. N.H., 289 F. 320—Payne v. Daugherty, C.C.A.Neb., 283 F. 353—Panama R. Co. v. Strobel, C.C.A.Canal Zone, 282 F. 52—Erie R. Co. v. Connors, C.C.A.Ohio, 261 F. 303, certiorari denied 40 S.Ct. 179, 251 U.S. 557, 64 L.Ed. 413—Stultz v. Cousins, Tenn., 242 F. 794, 155 C. C.A. 382—Central Vermont Ry. Co. v. Cauble, N.Y., 228 F. 876, 143 C.C. A. 274—Ramsdell v. Goumis, N.Y., 228 F. 864, 143 C.C.A. 262—Kansas City Southern Ry. Co. v. Willsie, Ark., 224 F. 908, 140 C.C.A. 352—Baltimore & O. R. Co. v. Smith, W.Va., 222 F. 667, 138 C.C.A. 215—Williamson v. Osenton, W.Va., 220 F. 653, 136 C.C.A. 261.

Ill.—See also Stott v. Thompson, 14 N.E.2d 246, 294 Ill.App. 450.

4 C.J. p 871 notes 6, 8, 10, p 873 note 21.

inadequate,[1] unless it is so palpably erroneous as to indicate bias, passion, prejudice, corruption, outside influence, or mistake.[2]

Approval of trial court; successive verdicts. The fact that the trial court considered the evidence and approved the verdict is always a circumstance of great weight in determining whether a verdict shall be set aside on appeal for insufficiency of the evidence.[3] Also, the fact that several successive juries have reached the same verdict will usually deter the appellate court from disturbing the last;[4] but such fact will not preclude the appellate court from setting aside a verdict not supported by substantial evidence.[5] A verdict in a case in which there has been several trials should be allowed to stand unless clearly erroneous.[6]

(3) Findings of Court
(a) In general
(b) When reviewable

(a) In General

Generally, the circuit court of appeals may review the trial court's findings to the extent permitted in equity appeals, and it must accept such findings, especially on conflicting evidence, unless they are clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of the witnesses.

It was formerly the rule that the fact findings of the trial court in a case tried without a jury were to be given the same effect or weight as jury verdicts,[7] and were to be regarded as conclusive and binding on the appellate court if sustained by substantial evidence.[8] It is now generally held, under

Effect of remittitur
Where there is a remittitur for part of the verdict, reviewing court will uphold a judgment for the balance if it is not clearly excessive.—Dallas Ry. & Terminal Co. v. Sullivan, C.C.A.Tex., 108 F.2d 581—Maryland Casualty Co. v. Citizens State Bank of Tupelo, C.C.A.Miss., 84 F.2d 172—4 C.J. p 874 note 45.

1. U.S.—Yazoo Spoke Co. v. Moore Dry Kiln Co., C.C.A.Miss., 3 F.2d 937.

2. U.S.—Sinclair Refining Co. v. Tompkins, C.C.A.Miss., 117 F.2d 596—Kurn v. Stanfield, C.C.A.Mo., 111 F.2d 469—L. E. Whitham Const. Co. v. Rener, C.C.A.Okl., 105 F.2d 371—Gay, Sullivan & Co. v. Glaser, Crandell Co., C.C.A.Ill., 102 F.2d 149.

3. U.S.—Phœnix Blue Diamond Express v. Mendez, C.C.A.Ariz., 103 F.2d 66, certiorari denied 60 S.Ct. 79, 308 U.S. 566, 84 L.Ed. 475—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—U. S. v. Huddleston, C.C.A.Ill., 81 F.2d 593—Globe & Rutgers Fire Ins. Co. v. Gulf Coast Erection Co., C.C.A.Tex., 68 F.2d 309—Delaware, L. & W. R. Co. v. Rebmann, C.C.A.N.Y., 285 F. 317, affirming, D.C., Rebmann v. Delaware, L. & W. R. Co., 275 F. 1009—Southern Power Co. v. McClure, N.C., 239 F. 495, 152 C.C.A. 373.
4 C.J. p 866 note 55 [b].

Where evidence is conflicting
U.S.—Rich v. Warren, C.C.A.Ky., 123 F.2d 198—Baker, Fentress & Co. v. Young, C.C.A.Wis., 55 F.2d 53—Bristol Gas & Electric Co. v. Boy, C.C.A.Tenn., 261 F. 297.

4. U.S.—Sprinkle v. Davis, C.C.A.Va., 115 F.2d 625, 128 A.L.R. 1101, rehearing denied 117 F.2d 938, certiorari denied 62 S.Ct. 90, 314 U.S. 647, 86 L.Ed. 519.

5. U.S.—U. S. v. Marsh, C.C.A.Va., 108 F.2d 558, denying rehearing 107 F.2d 173.

6. U.S.—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—Chesapeake & O. Ry. Co. v. McKell, Ohio, 221 F. 934, 137 C.C.A. 504.

7. U.S.—Oliver v. Bell, C.C.A.Pa., 103 F.2d 760, affirming, D.C., 23 F.Supp. 30—A. E. Barker & Co. of California v. Gilinsky Fruit Co., C.C.A.Neb., 100 F.2d 863—U. S. v. Nugent, C.C.A.Ky., 100 F.2d 215—Wall v. U. S., C.C.A.Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Cain v. Southern Alkali Corporation, C.C.A.Tex., 95 F.2d 188—Mermis v. Waldo, C.C.A.Kan., 91 F.2d 391—U. S. v. Washington Dehydrated Food Co., C.C.A.Mo., 89 F.2d 606—Wellston Trust Co. of St. Louis v. Snyder, C.C.A.Mo., 87 F.2d 44—City of Philadelphia v. Standard Oil Co. of Pennsylvania, C.C.A.Pa., 79 F.2d 764, affirming, D.C., 12 F.Supp. 647, certiorari denied 56 S.Ct. 443, 297 U.S. 705, 80 L.Ed. 992—Willcuts v. Stoltze, C.C.A.Minn., 73 F.2d 868, affirming, D.C., Stoltze v. Willcuts, 4 F.Supp. 486—Motter v. Wallace, C.C.A.Kan., 72 F.2d 678—School Dist. of Lepanto of Poinsett County, Ark., v. First Detroit Co., C.C.A.Ark., 72 F.2d 654—Anderson v. U. S., C.C.A.Mo., 65 F.2d 870—Perry v. Wiggins, C.C.A.Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529—U. S. v. Perry, C.C.A.Ark., 55 F.2d 819—White v. U. S., C.C.A.Okl., 48 F.2d 178—Fidelity & Deposit Co. of Maryland v. Hay, C.C.A.Pa., 9 F.2d 749, certiorari denied 46 S.Ct. 474, 271 U.S. 663, 70 L.Ed. 1139—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 47.
4 C.J. p 876 note 78.
Scope of review in jury-waived cases generally see infra § 298.

8. U.S.—In re Duvall, C.C.A.Ill., 103 F.2d 653—U. S. v. Nelson, C.C.A.Ark., 102 F.2d 515, certiorari denied 60 S.Ct. 81, 308 U.S. 550, 84 L.Ed. 462—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A.Ill., 102 F.2d 164—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S.Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527—Nance v. Hilliard, C.C.A.Mo., 101 F.2d 957—Burkhard Inv. Co. v. U. S., C.C.A.Cal., 100 F.2d 642, affirming, D.C., 22 F.Supp. 23—North American Accident Ins. Co. v. Anderson, C.C.A.Colo., 100 F.2d 452—Guiles v. U. S., C.C.A.Idaho, 100 F.2d 47—Indianapolis Glove Co. v. U. S., C.C.A.Ind., 96 F.2d 816—Glens Falls Ins. Co. of Glens Falls, N. Y. v. Sherritt, C.C.A.Va., 95 F.2d 823—Atlanta & St. A. B. Ry. Co. v. Barnes, C.C.A.Fla., 95 F.2d 273, rehearing denied 96 F.2d 18—Vitagraph, Inc. v. Perelman, C.C.A.Pa., 95 F.2d 142, affirming, D.C., Perelman v. Warner Bros. Pictures, 9 F.Supp. 729, certiorari denied Vitagraph Inc. v. Perelman, 59 S.Ct. 68, 305 U.S. 610, 83 L.Ed. 388—U. S. v. Dickinson, C.C.A.Mass., 95 F.2d 65, affirming D.C., Cushing v. U. S., 18 F.Supp. 83—Oil Shares v. Kahn, C.C.A.N.J., 94 F.2d 751, reversed on other grounds Oil Shares v. Commercial Trust Co. of New Jersey, 58 S.Ct. 1059, 304 U.S. 551, 82 L.Ed. 1522—State Farm Mut. Automobile Ins. Co. v. Coughran, C.C.A.Cal., 92 F.2d 239, certiorari granted 58 S.Ct. 281, 302 U.S. 679, 82 L.Ed. 524, reversed on other grounds 58 S.Ct. 670, 303 U.S. 485, 82 L.Ed. 970—U. S. v. Gamble-Skogmo, C.C.A.Minn., 91 F.2d 372—Stuyvesant Ins. Co. v. Sussex

Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. following § 723c, and under decisions apart therefrom, that the trial court's findings are of less binding effect, and that the circuit court of appeals may review such findings to the extent permissible under the practice which formerly prevailed in equity appeals,[9] discussed infra subdivision g (3) (b) of this section.

As a rule, the appellate court must give due regard to the opportunity of the trial court to judge of the credibility of the witnesses,[10] and it is obliged

Fire Ins. Co., C.C.A.N.J., 90 F.2d 281, certiorari denied 58 S.Ct. 144, 302 U.S. 742, 82 L.Ed. 573—Plumer v. Hewitt, C.C.A.Ill., 88 F.2d 977—Arkansas Fuel Oil Co. v. City of Blackwell, C.C.A.Okl., 87 F.2d 50—Murphy v. Sun Oil Co., C.C.A.Tex., 86 F.2d 895, certiorari denied 57 S. Ct. 754, 300 U.S. 683, 81 L.Ed. 886—Kansas City Marble & Tile Co. v. Penker Const. Co., C.C.A.Va., 86 F.2d 287—Martin v. Luster, C.C.A. Wis., 85 F.2d 833, certiorari denied Luster v. Martin, 57 S.Ct. 510, 300 U.S. 667, 81 L.Ed. 874—Enterprise Coal Co. v. Phillips, C.C.A.Pa., 84 F.2d 565, affirming, D.C., 12 F. Supp. 49—Crown Willamette Paper Co. v. McLaughlin, C.C.A.Cal., 81 F.2d 365, certiorari denied 56 S.Ct. 939, 298 U.S. 674, 80 L.Ed. 1396—Mutual Life Ins. Co. of New York v. Treadwell, C.C.A.La., 79 F.2d 487—Joyce v. Humbird, C.C.A.Ill., 78 F.2d 386, certiorari denied 56 S.Ct. 175, 296 U.S. 641, 80 L.Ed. 456—William T. Joyce Co. v. Humbird, C.C.A.Ill., 78 F.2d 386, certiorari denied 56 S.Ct. 175, 296 U. S. 641, 80 L.Ed. 456, and 56 S.Ct. 176, 296 U.S. 641, 80 L.Ed. 456—Sternberg Co. v. State Nat. Bank of Texarkana, Ark., C.C.A.La., 69 F.2d 759—Constitution Indemnity Co. v. Lane, C.C.A.Tenn., 67 F.2d 433—Taylor v. Scarborough, C.C. A.N.Y., 66 F.2d 589—Twyman v. Radiant Glass Co., C.C.A.Ark., 56 F.2d 119—U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D.C., 48 F.2d 378—Gawf v. U. S., C.C.A.Okl., 48 F.2d 182—White v. U. S., C.C.A.Okl., 48 F.2d 178—Chesapeake Lighterage & Towing Co. v. Baltimore Copper Smelting & Rolling Co., C.C.A.Md., 40 F.2d 394—Grouf v. State Nat. Bank of St. Louis, C.C.A.Mo., 40 F.2d 2—Nye v. Chase Nat. Bank, C.C.A.Minn., 34 F.2d 435—Abernathy v. State of Oklahoma ex rel. Goar, C.C.A.Okl., 31 F.2d 547, certiorari denied 50 S.Ct. 81, 280 U.S. 599, 74 L.Ed. 645—Cino Theatre Co. v. B/G Sandwich Shops, C.C.A. Ohio, 24 F.2d 31—Dunbar Bros. Co. v. Consolidated Iron-Steel Mfg. Co., C.C.A.Conn., 23 F.2d 416, certiorari denied Consolidated Iron-Steel Mfg. Co. v. Dunbar Bros. Co., 48 S.Ct. 560, 277 U.S. 599, 72 L.Ed. 1007—Wabash Ry. Co. v. South Daviess County Drainage Dist., C. C.A.Mo., 12 F.2d 909, certiorari denied 47 S.Ct. 455, 273 U.S. 751, 71 L.Ed. 873, error dismissed 47 S.Ct. 658, 274 U.S. 764, 71 L.Ed. 1328—American Concrete Steel Co. v. Hart, C.C.A.N.Y., 285 F. 322, affirming, D.C., Hart v. American Concrete Steel Co., 278 F. 541—American Trading Co. v. Steele, C.C.A. China, 274 F. 774.

D.C.—Shell Eastern Petroleum Products v. White, 68 F.2d 379, 62 App. D.C. 332.

4 C.J. p 876 note 78—52 C.J. p 756 note 96.

Error as a matter of law

(1) The only question or inquiry before the appellate court for review was whether or not the findings were for some reason erroneous or wrong as a matter of law.—Southwest Pump & Machinery Co. v. Jones, C.C.A.Mo., 87 F.2d 879.

(2) On such inquiry, the trial court's findings were to be given great weight and would not be lightly disturbed by the appellate court. —Southwest Pump & Machinery Co. v. Jones, supra—Scavenger Service Corporation v. Courtney, C.C.A.Ill., 85 F.2d 825—U. S. v. Algodones Land Co., C.C.A.N.M., 52 F.2d 359—Goode v. Oceanic Steam Nav. Co., N.Y., 251 F. 556, 163 C.C.A. 550.

Law or equity

Power of court to review facts depended on whether appeal was from judgment at law or decree in equity. —Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14, reversing, D.C., 50 F.2d 219.

9. U.S.—Katz Underwear Co. v. U. S., C.C.A.Pa., 127 F.2d 965, affirming, D.C., 39 F.Supp. 976—Equitable Life Assur. Soc. of U. S. v. Irelan, C.C.A.Mont., 123 F.2d 462 —U. S. v. Still, C.C.A.S.C., 120 F.2d 876, certiorari denied Still v. U. S., 62 S.Ct. 135, 314 U.S. 671, 86 L.Ed. 537—Wittmayer v. U. S., C.C.A. Mont., 118 F.2d 808—Guilford Const. Co. v. Biggs, C.C.A.N.C., 102 F.2d 46.

"Prior to the effective date . . . of the Rules of Civil Procedure, the findings of fact of a trial court in an action at law tried without a jury, were as conclusive, upon review, as a verdict of a jury, and could not be set aside by the reviewing court if there was any substantial evidence to support them. A different rule prevailed in equity cases. The findings of fact of the trial court in such cases were presumptively correct, and unless clearly against the weight of the evidence or induced by an erroneous view of the law would not be disturbed by a reviewing court. . . . The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity. This court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals."—Ætna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1, 4.

10. U.S.—Stubnitz-Greene Spring Corporation v. Fort Pitt Bedding Co., C.C.A.Mich., 110 F.2d 192—Maryland Casualty Co. v. Stark, C.C.A.Nev., 109 F.2d 212—Chinn v. Llangollen Stable, C.C.A.Ky., 109 F.2d 66, affirming, D.C., 25 F.Supp. 389—Snapp Hotel & Realty Co. v. Elbert, C.C.A.Mo., 108 F.2d 661—U. S. v. Appalachian Electric Power Co., C.C.A.Va., 107 F.2d 769, affirming, D.C., 23 F.Supp. 83, certiorari granted 60 S.Ct. 608, 309 U.S. 646, 84 L.Ed. 999, and reversed on other grounds 61 S.Ct. 291, 311 U.S. 377, 85 L.Ed. 243, rehearing denied 61 S.Ct. 548, 312 U.S. 712, 85 L.Ed. 1143—In re Duvall, C.C.A.Ill., 103 F.2d 653—Wire Tie Mach. Co. v. Pacific Box Corporation, C.C.A.Cal., 102 F.2d 543, affirmed 107 F.2d 54—U. S. v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, C.C.A.Utah, 101 F.2d 156—Smith v. Minor, C.C.A.Tex., 83 F.2d 970.

Witnesses not heard

(1) The fact that the trial judge did not see the witnesses on whose testimony his finding is based greatly lessens the conclusiveness of such finding.—Banister v. Solomon, C.C.A. N.Y., 126 F.2d 740.

(2) So where the testimony is by deposition, a finding based thereon is not entitled to the weight which would otherwise be conceded to it.—Equitable Life Assur. Soc. of U. S. v. Irelan, C.C.A.Mont., 123 F.2d 462—Himmel Bros. Co. v. Serrick Corporation, C.C.A.Ind., 122 F.2d 740—Globe-Union v. Chicago Telephone Supply Co., C.C.A.Ind., 103 F.2d 722, followed in Cutler-Hammer, Inc., v. Chicago Telephone Supply Co., C.C.A.Ind., 103 F.2d 732.

to regard the findings as presumptively correct and may not disturb them or set them aside unless they are clearly erroneous,[11] especially where the evi-

11. U.S.—Deep Rock Oil Corporation v. Salisbury, C.C.A.Mo., 130 F.2d 387—MacDonnell v. Capital Co., C.C.A.Cal., 130 F.2d 311—Judson v. Buckley, C.C.A.N.Y., 130 F.2d 174—Bethlehem Baking Co. v. U. S., C.C.A.Pa., 129 F.2d 490, affirming, D.C., 40 F.Supp. 936—American Ins. Co. v. Scheufler, C.C.A.Mo., 129 F.2d 143, affirming, D.C., American Ins. Co. v. Lucas, 38 F.Supp. 896, motion denied 38 F.Supp. 926, appeals dismissed 62 S.Ct. 107, 314 U.S. 575, 86 L.Ed. 466—Sullivan, Long & Haggerty v. Washington, C.C.A.La., 128 F.2d 466—Eppenauer v. Ohio Oil Co., C.C.A.Tex., 128 F.2d 363—Hickok Producing & Development Co. v. Texas Co., C.C.A.Tex., 128 F.2d 183—Killoren v. First Nat. Bank in St. Louis, C.C.A.Mo., 127 F.2d 537—Columbus Outdoor Advertising Co. v. Harris, C.C.A.Ohio, 127 F.2d 38—McCarthy v. Wynne, C.C.A.Okl., 126 F.2d 620—Art Metal Const. Co., for Use of McCloskey & Co., v. Lehigh Structural Steel Co., C.C.A.Pa., 126 F.2d 134, affirming, D.C., 38 F.Supp. 530, and certiorari denied 62 S.Ct. 1296, 316 U.S. 694, 86 L.Ed. 1764—Rowe v. Gatke Corporation, C.C.A.Ind., 126 F.2d 61—U. S. v. Forness, C.C.A.N.Y., 125 F.2d 928, reversing, D.C., 37 F.Supp. 337, certiorari denied 62 S.Ct. 1293, 316 U.S. 694, 86 L.Ed. 1764—Adair v. Reorganization Inv. Co., C.C.A.Mo., 125 F.2d 901, affirming, D.C., Fischer v. Reorganization Inv. Co., 31 F.Supp. 553—Biggs v. Mays, C.C.A.Ark., 125 F.2d 693, affirming, D.C., In re Mays, 38 F.Supp. 958—Andrew Jergens Co. v. Conner, C.C.A.Ohio, 125 F.2d 686, affirming, D.C., 31 F.Supp. 61—Hargrove v. American Cent. Ins. Co., C.C.A.Okl., 125 F.2d 225—Fidelity & Deposit Co. of Maryland v. Aberdeen Nat. Bank & Trust Co., C.C.A.S.D., 124 F.2d 973—U. S. v. State Street Trust Co., C.C.A.Mass., 124 F.2d 948, affirming, D.C., State Street Trust Co. v. U. S., 37 F.Supp. 846—Paul v. Girard Trust Co., C.C.A.Ill., 124 F.2d 809—Arcadia Knitting Mills v. Princeton Knitting Mills, C.C.A.N.Y., 124 F.2d 330, affirming, D.C., 39 F.Supp. 153, and certiorari denied 62 S.Ct. 908, 315 U.S. 819, 86 L.Ed. 1216—Jones v. Haller, C.C.A.N.Y., 123 F.2d 845—Shapiro, Bernstein & Co. v. Bryan, C.C.A.N.Y., 123 F.2d 697, affirming, D.C., 36 F.Supp. 544—Hartford Accident & Indemnity Co. v. City of Sulphur, C.C.A.Okl., 123 F.2d 566—Corbett v. Halliwell, C.C.A.Conn., 123 F.2d 331—McIntosh v. Wiggins, C.C.A.Mo., 123 F.2d 316—American Employers' Ins. Co. v. Raton Wholesale Liquor Co., C.C.A.N.M., 123 F.2d 283—U. S. v. Foster, C.C.A.Cal., 123 F.2d 32—Scott v. Beams, C.C.A.Okl., 122 F.2d 777—Anthony P. Miller, Inc., v. Needham, C.C.A.Pa., 122 F.2d 710—The Quarrington Court, C.C.A.N.Y., 122 F.2d 266, affirming, D.C., Mente & Co. v. Isthmian S. S. Co., 36 F.Supp. 278—Smith v. U. S., C.C.A.Del., 121 F.2d 692, affirming, D.C., 34 F.Supp. 947—Plack v. Baumer, C.C.A.Pa., 121 F.2d 676—Weber v. Alabama-California Gold Mines Co., C.C.A.Cal., 121 F.2d 663—Crancer v. Lowden, C.C.A.Mo., 121 F.2d 645, certiorari granted 62 S.Ct. 108, 314 U.S. 595, 86 L.Ed. 479, and affirmed 62 S.Ct. 763, 315 U.S. 631, 86 L.Ed. 1077, rehearing denied 62 S.Ct. 1030, 316 U.S. 708, 86 L.Ed. 1775—Hecht, Levis & Kahn v. New Zealand Ins. Co., C.C.A.N.Y., 121 F.2d 442—Buckley v. Christmas, C.C.A.Md., 121 F.2d 323, certiorari denied 62 S.Ct. 180, 314 U.S. 679, 86 L.Ed. 543—Gates v. General Casualty Co. of America, C.C.A.Cal., 120 F.2d 925—Gary Theatre Co. v. Columbia Pictures Corporation, C.C.A.Ill., 120 F.2d 891—Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corporation, C.C.A.Pa., 120 F.2d 254—Kuhn v. Princess Lida of Thurn & Taxis, C.C.A.Pa., 119 F.2d 704—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567—Thermopolis Northwest Electric Co. v. Ireland, C.C.A.Wyo., 119 F.2d 409—Sauder v. Dittmar, C.C.A.Kan., 118 F.2d 524—U. S. v. McCain, C.C.A.Kan., 118 F.2d 479—City of Wewoka, Okl., v. Banker, C.C.A.Okl., 117 F.2d 839—Foote Bros. Gear & Machine Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—Brooks v. Driscoll, C.C.A.Pa., 114 F.2d 426—Chalk v. U. S., C.C.A.N.C., 114 F.2d 207, certiorari denied 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—Continental Oil Co. v. Jones, C.C.A.Okl., 113 F.2d 557, affirming, D.C., 26 F.Supp. 694, certiorari denied 61 S.Ct. 64, 311 U.S. 687, 85 L.Ed. 443—McGee v. Nee, C.C.A.Mo., 113 F.2d 543—Borserine v. Maryland Casualty Co., C.C.A.Mo., 112 F.2d 409—Strong-Scott Mfg. Co. v. Weller, C.C.A.Minn., 112 F.2d 389—Andruss v. Nieto, C.C.A.Cal., 112 F.2d 250—Young v. U. S., C.C.A.Cal., 111 F.2d 823—Lumbermens Mut. Casualty Co. v. McIver, C.C.A.Cal., 110 F.2d 323, affirming, D.C., 27 F.Supp. 702, and certiorari denied 61 S.Ct. 8, 311 U.S. 655, 85 L.Ed. 419—Lowden v. Shoffner Mercantile Co., C.C.A.Ark., 109 F.2d 956—Gray v. U. S., C.C.A.Ark., 109 F.2d 728—Kurn v. Beasley, C.C.A.Ark., 109 F.2d 687—Cray, McFawn & Co. v. Hegarty, Conroy & Co., C.C.A.N.Y., 109 F.2d 443, affirming, D.C., 27 F.Supp. 93—Schofield v. John R. Thompson Co., C.C.A.Ohio, 109 F.2d 432—Maryland Casualty Co. v. Stark, C.C.A.Nev., 109 F.2d 212—Manning v. Gagne, C.C.A.N.H., 108 F.2d 718, affirming, D.C., Carpenter v. Gagne, 27 F.Supp. 286—U. S. v. Borg-Warner Corporation, C.C.A.Ill., 108 F.2d 424—Rutland Sav. Bank of Rutland, Vt. v. Wilson, C.C.A.Tex., 108 F.2d 92—Occidental Life Ins. Co. v. Thomas, C.C.A.Idaho, 107 F.2d 876—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65—F. W. Fitch Co. v. Camille, Inc., C.C.A.Iowa, 106 F.2d 635, affirming, D.C., Camille, Inc. v. F. W. Fitch Co., 27 F.Supp. 752—Porto Rico Ry., Light & Power Co. v. Colom, C.C.A.Puerto Rico, 106 F.2d 345, certiorari denied 60 S.Ct. 263, 308 U.S. 617, 84 L.Ed. 516—Collier v. Union Central Life Ins. Co., C.C.A.Tex., 100 F.2d 411—Fox v. Capital Co., C.C.A.N.J., 96 F.2d 684—Heywood-Wakefield Co. v. Small, C.C.A.Mass., 87 F.2d 716, affirming, D.C., Small v. Heywood-Wakefield Co., 13 F.Supp. 825, and certiorari denied Heywood-Wakefield Co. v. Small, 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353—The Haven Belle, C.C.A.Va., 85 F.2d 939—Deutser v. Marlboro Shirt Co., C.C.A.Md., 81 F.2d 139, affirming, D.C., Union Central Life Insurance Co. v. Deutser, 13 F.Supp. 313—Jackson v. Jackson, C.C.A.Okl., 67 F.2d 719—The Smyrna, C.C.A.Md., 62 F.2d 1048, affirming, D.C., 2 F.Supp. 351—Luttrell v. U. S., C.C.A.Tenn., 41 F.2d 517, affirming, D.C., Petree v. U. S., 34 F.2d 563, and certiorari denied 51 S.Ct. 82, 282 U.S. 877, 75 L.Ed. 775—Stennick v. Jones, C.C.A.Or., 282 F. 161.

D.C.—Consolidated Realty Corporation v. Dunlop, 114 F.2d 16, 72 App.D.C. 273—Societe Suisse Pour Valeurs De Metaux v. Cummings, 99 F.2d 387, 69 App.D.C. 154, certiorari denied Societe Suisse Pour Valeurs De Metaux v. Murphy, 59 S.Ct. 463, 306 U.S. 631, 83 L.Ed. 1033.

4 C.J. p 880 note 94—63 C.J. p 580 notes 66, 69.

Rule applies to findings prepared by counsel for the prevailing party.—Simons v. Davidson Brick Co., C.C.A.Cal., 106 F.2d 518.

Mixed questions of law and fact

(1) Findings on mixed questions of law and fact have been held within the text rule.—Rutan v. Johnson & Johnson, N.J., 231 F. 369, 145 C.C.A. 363.

(2) There is authority to the contrary as to mixed questions of law

dence is conflicting.[12] So, in the absence of clear error, the appellate court will not review or retry the facts,[13] or weigh the evidence or pass on the credibility of witnesses to determine whether the

and fact which are so interwoven that it is impossible to review the trial court's legal conclusions without reviewing its fact findings.—Connor v. Excess Ins. Co. of America, C.C.A.N.J., 67 F.2d 901.

Finding as to amount of recovery

U.S.—Sammons v. Colonial Press, C.C.A.Mass., 126 F.2d 341, vacating, D.C., Sammons v. Larkin, 38 F.Supp. 649—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Arkansas Natural Gas Corporation v. Sartor, C.C.A.La., 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437, mandate conformed to, D.C., Sartor v. Arkansas Natural Gas Co., 29 F.Supp. 956, reversed on other grounds, C.C.A., Sartor v. Arkansas Natural Gas Corporation, 111 F.2d 772—Oliver v. Yellow Cab Co., C.C.A.Ill., 98 F.2d 192—Oregon Mortg. Co. v. Renner, C.C.A.Idaho, 96 F.2d 429, affirming, D.C., 17 F.Supp. 727—Maytag Co. v. Meadows Mfg. Co., C.C.A.Ill., 45 F.2d 299, certiorari denied 51 S.Ct. 489, 283 U.S. 843, 75 L.Ed. 1452—Andersen, Meyer & Co. v. Fur & Wool Trading Co., C.C.A.China, 14 F.2d 586, certiorari denied 47 S.Ct. 337, 273 U.S. 740, 71 L.Ed. 868.

Local conditions

Appellate court, in passing on validity of zoning ordinance, should give great weight to determination of local authorities and local courts especially familiar with local conditions.—Marblehead Land Co. v. City of Los Angeles, C.C.A.Cal., 47 F.2d 528, affirming, D.C., 36 F.2d 242, and certiorari denied 52 S.Ct. 18, 284 U.S. 634, 76 L.Ed. 540.

12. U.S.—MacDonnell v. Capital Co., C.C.A.Cal., 130 F.2d 311—Why Corporation v. Super Ironer Corporation, C.C.A.Mich., 128 F.2d 539, affirming, D.C., 37 F.Supp. 538—Anheuser-Busch, Inc., v. Grovier-Starr Produce Co., C.C.A.Kan., 128 F.2d 116—Ryan v. Denver Union Terminal Ry. Co., C.C.A.Colo., 126 F.2d 782—De Nicolo v. Palmer, C.C.A.N.Y., 125 F.2d 126, affirming, D.C., 38 F.Supp. 874—Scott v. Beams, C.C.A.Okl., 122 F.2d 777—Gates v. General Casualty Co. of America, C.C.A.Cal., 120 F.2d 925—The Josephine & Mary, C.C.A.Mass., 120 F.2d 459—Drake v. General Finance Corporation of Louisiana, C.C.A.La., 119 F.2d 588—U. S. v. Lux Laundry Co., C.C.A.Ind., 118 F.2d 848—Wittmayer v. U. S., C.C.A.Mont., 118 F.2d 808—Mid-Continent Pipe Line Co. v. Whiteley, C.C.A.Okl., 116 F.2d 871—Bolander v. Godsil, C.C.A.Alaska, 116 F.2d 437—Atlas Beverage Co. v. Minneapolis Brewing Co., C.C.A.Mo., 113 F.2d 672—The Friendship II, C.C.A.Fla., 113 F.2d 105, certiorari granted Just v. Chambers, 61 S.Ct. 63, 311 U.S. 634, 84 L.Ed. 403, reversed on other grounds 61 S.Ct. 687, 312 U.S. 383, 668, 86 L.Ed. 903—Mississippi Valley Timber Co. v. Mengel Co., C.C.A.Miss., 112 F.2d 947—Mutual Life Ins. Co. of New York v. Drummond, C.C.A.Mo., 111 F.2d 282, affirming, D.C., Drummond v. Mutual Life Ins. Co. of New York, 28 F.Supp. 294—Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, C.C.A.Ark., 110 F.2d 902—Lowden v. Shoffner Mercantile Co., C.C.A.Ark., 109 F.2d 956—Columbia Ins. Co. of New Jersey v. Peoples Exchange Bank of Russellville, C.C.A.Ark., 109 F.2d 530—Linea Sud-Americana v. 7,295.40 Tons of Linseed, C.C.A.N.Y., 108 F.2d 755, affirming, D.C., 29 F.Supp. 210, and certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1018—McDaniel v. U. S., C.C.A.Ill., 108 F.2d 450—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Farm Bureau Mut. Automobile Ins. Co. v. Daniel, C.C.A.Va., 104 F.2d 477—Madden v. Mac Sim Bar Paper Co., C.C.A.Mich., 103 F.2d 974, certiorari denied 60 S.Ct. 102, 308 U.S. 556, 54 L.Ed. 468, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528—Globe-Union v. Chicago Telephone Supply Co., C.C.A.Ind., 103 F.2d 722, followed in Cutler-Hammer, Inc., v. Chicago Telephone Supply Co., C.C.A.Ind., 103 F.2d 732—Eastern States Petroleum Co. v. Gilliland Refining Co., C.C.A.Tex., 103 F.2d 186—Clark & Wilson Lumber Co. of Delaware v. McAllister, C.C.A.Or., 101 F.2d 709—A. E. Barker & Co. of California v. Gilinsky Fruit Co., C.C.A.Neb., 100 F.2d 863—Wilson v. U. S., C.C.A.Cal., 100 F.2d 552—Shambegian v. U. S., C.C.A.R.I., 100 F.2d 414—Northern Trust Co. of Chicago v. Edenborn, C.C.A.La., 98 F.2d 657, certiorari denied 59 S.Ct. 583, 306 U.S. 643, 83 L.Ed. 1043—Ferguson v. Wachs, C.C.A.Ill., 96 F.2d 910—Oregon Mortg. Co. v. Renner, C.C.A.Idaho, 96 F.2d 429, affirming, D.C., 17 F.Supp. 727—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—Hertz Drivurself Stations v. Ritter, C.C.A.Cal., 91 F.2d 539—Singer Mfg. Co. v. Seinfeld, C.C.A.N.Y., 89 F.2d 35—Ott v. Long Beach Co., C.C.A.Ind., 70 F.2d 1, certiorari denied 55 S.Ct. 103, 293 U.S. 588, 79 L.Ed. 683—Crown Central Petroleum Corporation v. Bates, C.C.A.Tex., 37 F.2d 508, certiorari denied 50 S.Ct. 348, 281 U.S. 743, 74 L.Ed. 1156—Waterbury Co. v. Sunset Lighterage Corporation, C.C.A.N.Y., 25 F.2d 621—St. Petersburg Advertising Co. v. American Motorsign Co., C.C.A.Fla., 25 F.2d 397—U. S. Industrial Chemical Co. v. Theroz Co., C.C.A.Md., 25 F.2d 387, affirming, D.C., Theroz Co. v. U. S. Industrial Chemical Co., 14 F.2d 629, and certiorari denied U. S. Industrial Chemical Co. v. Theroz Co., 49 S.Ct. 12, 278 U.S. 608, 73 L.Ed. 534—Elkhorn-Hazard Coal Co., v. Kentucky River Coal Corporation, C.C.A.Ky., 20 F.2d 67—Dempsey v. Merritt, Chapman & Scott Corporation, C.C.A.N.Y., 10 F.2d 687—Muentzer v. Los Angeles Trust & Savings Bank, C.C.A.Ind., 3 F.2d 222.

4 C.J. p 883 note 33, p 885 notes 41, 42, p 886 note 44.

Sufficiency of conflict

The conflict does not have to be between different witnesses but may be found in different parts of the testimony of the same witness.—Johnson v. Ellmers, C.C.A.Ky., 295 F. 685.

13. U.S.—McCaughn v. Real Estate Land Title & Trust Co., Pa., 56 S.Ct. 604, 297 U.S. 606, 80 L.Ed. 879, reversing, C.C.A., Real Estate Land Title & Trust Co. v. McCaughn, 79 F.2d 602, certiorari granted McCaughn v. Real Estate Land Title & Trust Co., 56 S.Ct. 442, 297 U.S. 699, 80 L.Ed. 988—Prudential Ins. Co. of America v. Carlson, C.C.A.Kan., 126 F.2d 607—Rowe v. Gatke Corporation, C.C.A.Ind., 126 F.2d 61—City of San Diego v. Perry, C.C.A.Cal., 124 F.2d 629—Edwin L. Wiegand Co. v. Harold E. Trent Co., C.C.A.Pa., 122 F.2d 920—Plack v. Baumer, C.C.A.Pa., 121 F.2d 676—Gary Theatre Co. v. Columbia Pictures Corporation, C.C.A.Ill., 120 F.2d 891—Deward & Rich v. Bristol Savings & Loan Corporation, C.C.A.Va., 120 F.2d 537, affirming, D.C., 34 F.Supp. 345—Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corporation, C.C.A.Pa., 120 F.2d 254—Pressed Metals of America v. Woodworth, C.C.A.Mich., 119 F.2d 210—U. S. v. De Back, C.C.A.Cal., 118 F.2d 208, modifying, D.C., 29 F.Supp. 141—Webb v. Frisch, C.C.A.Ill., 111 F.2d 887—Township of South Hackensack v. Federal Deposit Ins. Corporation, C.C.A.N.J., 109 F.2d 327, certiorari denied 60 S.Ct. 896, 310 U.S. 624, 84 L.Ed. 1396—U. S. v. Flower, C.C.A.Neb., 108 F.2d 298—Storley v. Armour & Co., C.C.A.N.D., 107 F.2d 499—Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns, C.C.A.Pa., 106 F.2d 204, reversing, D.C., New

facts were correctly found.[14]

(b) When Reviewable

The trial court's findings of fact are not conclusive, either at law or in equity, and they may be reviewed and set aside if they lack evidential support, are clearly erroneous, or are against the clear weight of the evidence. The appellate court is not obliged to accept findings representing conclusions of law rather than of fact or findings based on documentary evidence.

Notwithstanding the general rule that questions of fact ordinarily will not be reviewed by the circuit court of appeals, the trial court's findings of fact are not conclusive, and they may be considered and set aside by the appellate court if they are clearly erroneous,[15] or if they are against the clear weight of the evidence.[16] So the question of whether or not the fact findings below are sufficiently sustained

Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns v. Hoffman, 26 F.Supp. 556—Ungerleider v. Citizens Commercial & Savings Bank of Flint, C.C.A.Mich., 104 F.2d 718—Southern Extract Co. v. Green, C.C.A.Tenn., 103 F.2d 232, certiorari denied 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 476—Guilford Const. Co. v. Biggs, C.C.A.N.C., 102 F.2d 46—Franklin Savings & Loan Co. of Macon v. American Employers Ins. Co., C.C.A.Ga., 99 F.2d 494.

D.C.—Prevost v. Morgenthau, 106 F.2d 330, 70 App.D.C. 306, affirming, D.C., 22 F.Supp. 43.

14. U.S.—MacDonnell v. Capital Co., C.C.A.Cal., 130 F.2d 311—U. S. v. Still, C.C.A.S.C., 120 F.2d 876, certiorari denied Still v. U. S., 62 S.Ct. 135, 314 U.S. 671, 86 L.Ed. 537—Adair v. Shallenberger, C.C.A.Ill., 119 F.2d 1017—Venuto v. Robinson, C.C.A.N.J., 118 F.2d 679, certiorari denied 62 S.Ct. 58, 314 U.S. 627, 86 L.Ed. 504—National Mut. Casualty Co. of Tulsa, Okl. v. Eisenhower, C.C.A.Kan., 116 F.2d 891—Lewis v. U. S., C.C.A., 113 F.2d 489—Stevens v. Edwards, C.C.A.Fla., 112 F.2d 534, certiorari denied 61 S.Ct. 45, 311 U.S. 378, 85 L.Ed. 437—Snapp Hotel & Realty Co. v. Elbert, C.C.A.Mo., 108 F.2d 661—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—Metro-Goldwyn-Mayer Corporation v. Fear, C.C.A.Cal., 104 F.2d 892—Helvering v. Johnson, C.C.A., 104 F.2d 140, certiorari granted 60 S.Ct. 114, 308 U.S. 536, 84 L.Ed. 452, affirmed 60 S.Ct. 293, 308 U.S. 523, 84 L.Ed. 443, motion granted 60 S.Ct. 584—Oliver v. Bell, C.C.A.Pa., 103 F.2d 760, affirming, D.C., 23 F.Supp. 30—Kennedy v. Anderson-Tully Co., C.C.A.Tenn., 102 F.2d 340—Ferguson v. Wachs, C.C.A.Ill., 96 F.2d 910—Oregon Mortg. Co. v. Renner, C.C.A.Idaho, 96 F.2d 429, affirming, D.C., 17 F.Supp. 727—Flack v. Holtegel, C.C.A.Ind., 93 F.2d 512—U. S. v. Gamble-Skogmo, C.C.A.Minn., 91 F.2d 372—U. S. v. Washington Dehydrated Food Co., C.C.A.Mo., 89 F.2d 606—Fitzgerald v. McFadden, C.C.A.N.Y., 88 F.2d 639—Davies v. Home Trust Co., C.C.A.Mo., 83 F.2d 124—Mutual Life Ins. Co. of New York v. Still, C.C.A.Neb., 78 F.2d 748—Brooks v. Willcuts, C.C.A.Minn., 78 F.2d 270, affirming, D.C., 9 F.Supp. 19—Salt Bayou Drainage Dist. v. Futrall, C.C.A.Ark., 72 F.2d 940—Jensma v. Sun Life Assur. Co. of Canada, C.C.A.Idaho, 64 F.2d 457, reversing, D.C., Jensma v. Benefit Ass'n of Ry. Employees, 1 F.Supp. 951, certiorari denied Sun Life Assur. Co. of Canada v. Jensma, 53 S.Ct. 795, 289 U.S. 763, 77 L.Ed. 1505—F. T. Dooley Lumber Co. v. U. S., C.C.A.Ark., 63 F.2d 384, certiorari denied 54 S.Ct. 58, 290 U.S. 640, 78 L.Ed. 556—Calhoun v. Stratton, C.C.A.Tenn., 61 F.2d 302—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841—People's Bank of Keyser, W. Va. v. International Finance Corporation, C.C.A.W.Va., 30 F.2d 46, affirming, D.C., International Finance Corporation v. People's Bank of Keyser, 27 F.2d 523, certiorari denied Peoples' Bank of Keyser, W. Va. v. International Finance Corporation, 49 S.Ct. 352, 279 U.S. 858, 73 L.Ed. 999—Ætna Ins. Co. of Hartford, Conn. v. Licking Valley Milling Co., C.C.A.Ky., 19 F.2d 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415—Shaw v. Owens, C.C.A.La., 18 F.2d 954, certiorari denied 48 S.Ct. 31, 275 U.S. 536, 72 L.Ed. 413—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330—Camden Woolen Co. v. Eastern S. S. Lines, C.C.A.Me., 12 F.2d 917, vacating, D.C., 8 F.2d 162—Miami Paper Co. v. American Woodpulp Corporation, C.C.A.Ohio, 5 F.2d 408—Hirning v. Live Stock Nat. Bank, C.C.A.Iowa, 1 F.2d 307—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—Kentucky Coal Lands Co. v. Mineral Development Co., C.C.A.Ky., 295 F. 255—Pneumatic Scale Corporation v. Mainwaring, C.C.A.N.Y., 286 F. 378—U. S. v. Pennsylvania & Lake Erie Dock Co., C.C.A.Ohio, 272 F. 839—Garwood v. Scheiber, Cal., 246 F. 74, 158 C.C.A. 300, certiorari denied 38 S.Ct. 427, 247 U.S. 506, 62 L.Ed. 1240—Wear v. Imperial Window Glass Co., Mo., 224 F. 60, 139 C.C.A. 622.

4 C.J. p 654 note 99, p 887 note 62.

Refusal to find facts

(1) Where a refusal to find facts involves the weighing of evidence, it is as conclusive on appeal as affirmative findings.—Pennok Oil Co. v. Roxaba Petroleum Co. of Oklahoma, C.C.A.Okl., 289 F. 416—Schoenwald v. Bishop, Alaska, 244 F. 715, 157 C.C.A. 163—Nashville Interurban Ry. v. Barnum, N.Y., 212 F. 634, 129 C.C.A. 170.

(2) However, where special findings have been requested and refused, the appellate court may review the evidence to see if it is such as imposed on the trial court the duty to grant the request for special findings.—Bunday v. Huntington, S.D., 224 F. 847, 140 C.C.A. 415.

15. U.S.—Jax Beer Co. v. Redfern, C.C.A.Tex., 124 F.2d 172—Fleming v. Palmer, C.C.A.Puerto Rico, 123 F.2d 749—Kuhn v. Princess Lida of Thurn & Taxis, C.C.A.Pa., 119 F.2d 704—Ætna Life Ins. Co. v. Kepler, C.C.A.Neb., 116 F.2d 1—U. S. v. Perry, C.C.A.Ark., 55 F.2d 819—U. S. v. Worley, C.C.A.Neb., 42 F.2d 197.

4 C.J. p 880 note 94.

Findings set aside

(1) Contrary to the evidence.—Hooper v. First Exchange Nat. Bank of Coeur D'Alene, C.C.A.Idaho, 53 F.2d 593—Paine v. St. Paul Union Stockyards Co., C.C.A.Minn., 28 F.2d 463, modified on other grounds 35 F.2d 624—4 C.J. p 880 note 96.

(2) Without support in the evidence.—Mermis v. Waldo, C.C.A.Kan., 91 F.2d 391—Stuyvesant Ins. Co. v. Sussex Fire Ins. Co., C.C.A.N.J., 90 F.2d 281, certiorari denied 58 S.Ct. 144, 302 U.S. 742, 82 L.Ed. 573.

(3) Due to, or colored by, an error or misconception of law.—Chicago & A. Ry. Co. v. Pressed Steel Car Co., Ill., 243 F. 883, 156 C.C.A. 395, certiorari denied 38 S.Ct. 11, 245 U.S. 652, 62 L.Ed. 532.

16. U.S.—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A.Neb., 111 F.2d 412—Williams v. Williams, C.C.A.Ill., 61 F.2d 257, certiorari denied 53 S.Ct. 404, 288 U.S. 612, 77 L.Ed. 986.

or supported by the record evidence is one which will be passed on by the appellate court.[17] In this respect the findings, unless clearly erroneous, are to be regarded as adequately supported and left undisturbed if they are sustained by sufficient evidence,[18] or by substantial evidence.[19]

Insufficient supporting evidence

Under rule that fact findings shall not be set aside unless clearly erroneous, a finding of fact is "clearly erroneous" if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence.—Fleming v. Palmer, C.C.A. Puerto Rico, 123 F.2d 749.

17. U.S.—Kuhn v. Princess Lida of Thurn & Taxis, C.C.A.Pa., 119 F.2d 704—Campana Corporation v. Harrison, C.C.A.Ill., 114 F.2d 400—Massachusetts Protective Ass'n v. U. S., C.C.A.Mass., 114 F.2d 304, reversing, D.C., 22 F.Supp. 755—State Farm Mut. Automobile Ins. Co. v. Bonacci, C.C.A.Neb., 111 F.2d 412—Universal Gas Co. v. Central Illinois Public Service Co., C.C.A. Ill., 102 F.2d 164—Baldwin Rubber Co. v. Paine & Williams Co., C.C.A. Mich., 99 F.2d 1—Aycock v. Bradbury, C.C.A.Okl., 77 F.2d 14, certiorari denied Bradbury v. Aycock, 56 S.Ct. 101, 296 U.S. 589, 80 L.Ed. 416—C. C. Mengel & Bro. Co. v. Handy Chocolate Co., C.C.A.Mass., 10 F.2d 293, certiorari denied Handy Chocolate Co. v. C. C. Mengel & Bro. Co., 46 S.Ct. 483, 271 U.S. 668, 70 L.Ed. 1141.

Improper evidence not considered

When considering whether the findings have proper evidentiary support, the appellate court will eliminate from consideration all incompetent and immaterial evidence.—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694.

18. U.S.—Wittmayer v. U. S., C.C.A. Mont, 118 F.2d 808—Sauder v. Dittmar, C.C.A.Kan., 118 F.2d 524—Van Auken v. Second Nat. Bank & Trust Co. of Saginaw, C.C.A.Mich., 117 F.2d 938, certiorari denied 61 S.Ct. 1118, 313 U.S. 593, 85 L.Ed. 1547—U. S. v. Fleming, C.C.A.Ga., 115 F.2d 314—Reinstine v. Rosenfield, C.C.A.Ill., 111 F.2d 892—U. S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987—Sundt v. Turman Oil Co., C.C.A.Tex., 107 F.2d 762—Oliver v. Yellow Cab Co., C.C.A.Ill., 98 F.2d 192—Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 63 F.2d 833—Wessel v. U. S., C.C.A.Neb., 49 F.2d 137—United Shoe Machinery Corporation v. Muther, C.C.A.Mass., 288 F. 283, certiorari denied 44 S.Ct. 33, 263 U.S. 703, 68 L.Ed. 515—National Surety Co. v. Globe Grain & Milling Co., Cal., 256 F. 601, 167 C.C.A. 631, 4 A.L.R. 552.

Findings sustained where supported by:

(1) Material and competent evidence.—Eppenauer v. Ohio Oil Co., C.C.A.Tex., 128 F.2d 363—Wenzel & Henoch Const. Co. v. Metropolitan Water Dist. of Southern California, C.C.A.Cal., 115 F.2d 25, certiorari denied Wenzel & Honock Const. Co. v. Metropolitan Water Dist. of Southern California, 61 S.Ct. 834, 313 U.S. 560, 85 L.Ed. 1520—Edwards v. Lain, C.C.A.Ill., 112 F.2d 343—Fox v. Lofland, C.C.A.Pa., 98 F.2d 589, certiorari denied 59 S.Ct. 359, two cases, 305 U.S. 658, 83 L.Ed. 427—Turnbow v. Lamb, C.C.A.Tex., 95 F.2d 29—Greene v. O'Connor, C.C.A.N.Y., 93 F.2d 309—James v. Nelson, C.C.A.Alaska, 90 F.2d 910, certiorari denied 58 S.Ct. 41, 302 U.S. 721, 82 L.Ed. 556—4 C.J. p 877 note 80.

(2) Some or any competent or admissible evidence.—Fort Atkinson Loan & Investment Co. v. Merchandise Bank & Trust Co. of Chicago, Ill., C.C.A.Wis., 89 F.2d 942—U. S. v. Washington Dehydrated Food Co., C. C.A.Mo., 89 F.2d 606—Cudahy Packing Co. v. City of Omaha, C.C.A.Neb., 24 F.2d 3, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—American Sales Book Co. v. Bullivant, Or., 117 F. 255, 54 C.C.A. 287, certiorari denied 23 S.Ct. 855, 190 U.S. 560, 47 L.Ed. 1184.

(3) Ample or abundant evidence.—Rowe v. Gatke Corporation, C.C.A. Ind., 126 F.2d 61—Bell v. Saxon, C.C. A.Fla., 296 F. 690—Roswell Drainage Dist. v. Dickey, C.C.A.N.M., 292 F. 29—Great Northern Ry. Co. v. Philadelphia & Reading Coal & Iron Co., Minn., 242 F. 799, 155 C.C.A. 387—Luten v. Sharp, Kan., 234 F. 880, 148 C.C.A. 478, affirming, D.C., 217 F. 76.

(4) Legitimate or reasonable inferences deduced from the evidence.—Gross v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 72 F.2d 223.

(5) If findings which will uphold the judgment are adequately sustained by the evidence, there will be no reversal because of the insufficiency of the evidence as to other or immaterial findings.—Oregon Mortg. Co. v. Renner, C.C.A.Idaho, 96 F.2d 429, affirming, D.C., 17 F.Supp. 727.

(6) If there is evidence which supports the findings, they will not be disturbed for lack of support simply because there is other evidence which, if believed and accepted, warrants findings the other way.—Lowenstein v. I. N. Platt & Co., C.C.A.N. Y., 58 F.2d 173—4 C.J. p 884 note 37.

19. U.S.—Ford v. Caspers, C.C.A. Ill., 128 F.2d 884, affirming, D.C., 42 F.Supp. 994—Galion Iron Works & Mfg. Co. v. J. D. Adams Mfg. Co., C.C.A.Ind., 128 F.2d 411—City of Baton Rouge, La., v. Robinson, C.C.A.La., 127 F.2d 693—Ryan v. Denver Union Terminal Ry. Co., C.C.A.Colo., 126 F.2d 782—Floridin v. Attapulgus Clay Co., C.C.A.Del., 125 F.2d 669, affirming, D.C., 35 F. Supp. 810—Dye v. U. S., C.C.A.Okl., 123 F.2d 385—Apex Electrical Mfg. Co. v. Maytag Co., C.C.A.Ind., 122 F.2d 182, certiorari denied Maytag Co. v. Apex Electrical Mfg. Co., 62 S.Ct. 297, 314 U.S. 687, 86 L.Ed. 549—Gary Theatre Co. v. Columbia Pictures Corporation, C. C.A.Ill., 120 F.2d 891—Maier v. Continental Oil Co., C.C.A.Ind., 120 F.2d 237, certiorari denied 62 S.Ct. 101, 314 U.S. 652, 86 L.Ed. 523—Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co., C.C. A.Tex., 115 F.2d 736—Wertz v. National City Bank of Evansville, Ind., C.C.A.Ind., 115 F.2d 65, certiorari denied 61 S.Ct. 41, 311 U.S. 675, 85 L.Ed. 434—Foote Bros. Gear & Machine Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—E. Albrecht & Son v. Landy, C.C.A.Minn., 114 F.2d 202, reversing, D.C., 27 F.Supp. 65—Cater Const. Co. v. Nischwitz, C.C. A.Ill., 111 F.2d 971—Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, C.C.A.Ark., 110 F. 2d 902—In re Chicago & N. W. R. Co., C.C.A.Ill., 110 F.2d 425—Barnard v. Standard Oil Co. of Indiana, C.C.A.Ind., 110 F.2d 417—American Home Fire Assur. Co. v. Hargrove, C.C.A.Okl., 109 F.2d 86—Federal Deposit Ins. Corporation v. Barton, C.C.A.Okl., 106 F.2d 737—Smoley v. New Jersey Zinc Co., C. C.A.N.J., 106 F.2d 314, affirming, D.C., 24 F.Supp. 494—Luzier's v. Nee, C.C.A.Mo., 106 F.2d 130, affirming, D.C., 24 F.Supp. 608, and certiorari denied 60 S.Ct. 514, 309 U.S. 660, 84 L.Ed. 1008—Federal Deposit Ins. Corporation v. Deaton, C.C.A.Okl., 105 F.2d 677, affirming, D.C., Deaton v. Federal Deposit Ins. Corporation, 24 F.Supp. 984—American Nat. Bank & Trust Co. of Chicago v. U. S., C.C.A.Ill., 104 F.2d 783—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C.C.A.Iowa, 101 F.2d 144—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435—Pure Oil Co. v. Hyman, C.C.A. Ill., 95 F.2d 22—Pulitzer Pub. Co. v. Current News Features, C.C.A. Mo., 94 F.2d 682, certiorari denied 58 S.Ct. 1040, 304 U.S. 570, 82 L.Ed. 1535—Paridy v. Caterpillar Tractor Co., C.C.A.Ill., 94 F.2d 292, certio-

Findings representing conclusions of law. The circuit court of appeals is, of course, not bound by findings which are conclusions of law rather than of fact,[20] and accordingly findings based on facts which are not in dispute, or which are agreed to by the parties, present questions of law proper for the determination of the appellate court unhampered by the trial court's conclusions.[21] So also the appellate court will always review to determine whether the findings made support the judgment rendered, or the ultimate conclusion drawn;[22] and it may also pass on the propriety of conclusions or ultimate find-

rari denied 58 S.Ct. 758, 303 U.S. 657, 82 L.Ed. 1116—Arn v. Dunnett, C.C.A.Okl., 93 F.2d 634, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540—Mermis v. Waldo, C.C.A.Kan., 91 F.2d 391—The Dalzelline, C.C.A.N.Y., 89 F.2d 160, modifying, D.C., 15 F.Supp. 122—Nielsen v. General American Life Ins. Co., C.C.A.N.M., 89 F.2d 90, 110 A.L.R. 1133—Gideon-Anderson Lumber Co. v. St. Louis Southwestern Ry. Co., C.C.A.Mo., 88 F.2d 232—Clark v. Mutual Loan & Investment Co., C.C.A.Ark., 88 F.2d 202—Conyers v. Cleveland, C.C.A.S.C., 87 F.2d 195—Board of Com'rs of Caddo County v. U. S., C.C.A.Okl., 87 F.2d 55—Wellston Trust Co. of St. Louis v. Snyder, C.C.A.Mo., 87 F.2d 44—Davies v. Home Trust Co., C.C.A.Mo., 83 F.2d 124—Union Bleachery v. U. S., C.C.A.S.C., 79 F.2d 549—Brooks v. Willcuts, C.C.A.Mich., 78 F.2d 270, affirming, D.C., 9 F.Supp. 19—Grauf v. State Nat. Bank of St. Louis, C.C.A.Mo., 76 F.2d 726—Public Opinion Pub. Co. v. Jensen, C.C.A.S.D., 76 F.2d 494—El Paso & S. W. R. Co. v. Phelps-Dodge Mercantile Co., C.C.A.Ariz., 75 F.2d 873—U. S. v. Jones, C.C.A.Tex., 74 F.2d 986—Kretni Development Co. v. Consolidated Oil Corporation, C.C.A.Wyo., 74 F.2d 497, certiorari denied 55 S.Ct. 829, 295 U.S. 750, 79 L.Ed. 1694—Willcuts v. Stoltze, C.C.A.Minn., 73 F.2d 868, affirming, D.C., Stoltze v. Willcuts, 4 F.Supp. 486—Robinson v. Bowe, C.C.A.S.D., 73 F.2d 238—U. S. v. Linde, C.C.A.Kan., 71 F.2d 925—Kurecki v. Buck, C.C.A.Ill., 71 F.2d 227—U. S. v. Beller, C.C.A.Ind., 70 F.2d 463—Hussey-Hobbs Tie Co. v. Louisville & N. R. Co., C.C.A.Mo., 69 F.2d 92—Motter v. Patterson, C.C.A.Kan., 68 F.2d 252, affirming, D.C., Patterson v. Motter, 55 F.2d 692—Coleman Furniture Corporation v. Home Ins. Co. of New York, C.C.A.Va., 67 F.2d 347, affirming, D.C., 4 F.Supp. 794, and certiorari denied 54 S.Ct. 453, 291 U.S. 669, 78 L.Ed. 1059—National Bank of South Carolina of Sunter v. American Surety Co. of New York, C.C.A.S.C., 67 F.2d 131—College Inn Food Products Co. v. Loudon Packing Co., C.C.A.Ind., 65 F.2d 883—Brown Shoe Co. v. Carns, C.C.A.Mo., 65 F.2d 294, certiorari denied 54 S.Ct. 130, 290 U.S. 695, 78 L.Ed. 598—McCaughn v. Electric Storage Battery Co., C.C.A.Pa., 63 F.2d 715, affirming, D.C., Electric Storage Battery Co. v. McCaughn, 52 F.2d 205, affirmed 54 F.2d 814—U. S. v. Fitzpatrick, C.C.A.Okl., 62 F.2d 562—Taber v. U. S., C.C.A.Iowa, 59 F.2d 568, certiorari denied 53 S.Ct. 86, 287 U.S. 636, 77 L.Ed. 551—Lehman v. Tait, C.C.A.Md., 58 F.2d 20, certiorari denied 53 S.Ct. 79, 287 U.S. 626, 77 L.Ed. 543—Hanagan v. U. S., C.C.A.Ill., 57 F.2d 860—Independence Indemnity Co. v. Sanderson, C.C.A.Cal., 57 F.2d 125—First Nat. Bank v. Andresen, C.C.A.Minn., 57 F.2d 17—Kingston v. American Car & Foundry Co., C.C.A.Mo., 55 F.2d 132, certiorari denied 52 S.Ct. 459, 285 U.S. 560, 76 L.Ed. 948—Rector v. Suncrest Lumber Co., C.C.A.N.C., 52 F.2d 946—Bereth v. Sparks, C.C.A.Wis., 51 F.2d 441, 80 A.L.R. 909—U. S. v. Tyrakowski, C.C.A.Ill., 50 F.2d 766—U. S. v. Rhodes, C.C.A.W.Va., 49 F.2d 228—Exchange Trust Co. v. Capitol Life Ins. Co., C.C.A.Okl., 49 F.2d 133, affirming, D.C., 40 F.2d 687—Blair v. U. S., C.C.A.Ark., 47 F.2d 109—Kline v. H. Poleskin & Son, C.C.A.Md., 46 F.2d 998—Gill v. Benjamin Franklin Realty & Holding Co., C.C.A.Pa., 43 F.2d 337, certiorari denied 51 S.Ct. 106, 282 U.S. 892, 75 L.Ed. 786—Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., C.C.A.W.Va., 40 F.2d 323, certiorari denied 51 S.Ct. 35, 282 U.S. 861, 75 L.Ed. 762—Ladd v. Perry, C.C.A.Ill., 40 F.2d 265—Wald v. Longacre, C.C.A.Pa., 34 F.2d 25—General Motors Acceptance Corporation v. U. S., C.C.A.Okl., 32 F.2d 121—Maryland Casualty Co. v. Miles, C.C.A.Cal., 31 F.2d 751—Del Valle v. Rossy, C.C.A.Puerto Rico, 29 F.2d 353—Paine v. St. Paul Union Stockyards Co., C.C.A.Minn., 28 F.2d 463, modified on other grounds 35 F.2d 624—Canadian Nat. Ry. Co. v. George M. Jones Co., C.C.A.Mich., 27 F.2d 240, affirming, D.C., George M. Jones Co. v. Canadian Nat. Ry. Co., 14 F.2d 852—New York Underwriters' Fire Ins. Co. v. Malham & Co., C.C.A.Ark., 25 F.2d 415—U. S. Pennsylvania & Lake Erie Dock Co., C.C.A.Ohio, 272 F. 839.

4 C.J. p 878 note 82.

20. U.S.—Himmel Bros. Co. v. Serrick Corporation, C.C.A.Ind., 122 F.2d 740—Campana Corporation v. Harrison, C.C.A.Ill., 114 F.2d 400.

Jurisdiction

Where the review is of the decision of the trial court on the question of jurisdiction, the reviewing court will examine the evidence of the facts bearing on that question.—Mas v. Owens-Illinois Glass Co., D.C.Va., 34 F.Supp. 415.

Denomination of finding

That district court denominated its holding a "finding of fact" was not binding upon circuit court of appeals.—Bendix Home Appliances v. Radio Accessories Co., C.C.A.Neb., 129 F.2d 177.

21. U.S.—Palmer v. Connecticut Railway & Lighting Co., Conn., 61 S.Ct. 379, 311 U.S. 544, 85 L.Ed. 336, affirming, C.C.A., Connecticut Railway & Lighting Co. v. Palmer, 109 F.2d 568, certiorari granted Palmer v. Connecticut Railway & Lighting Co., 60 S.Ct. 894, 309 U.S. 653, 84 L.Ed. 1003, rehearing denied 61 S.Ct. 609, 312 U.S. 713, 85 L.Ed. 1143—Wigginton v. Order of United Commercial Travelers of America, C.C.A.Ind., 126 F.2d 659—Butex Gas Co. v. Southern Steel Co., C.C.A.Tex., 123 F.2d 954—Kuhn v. Princess Lida of Thurn & Taxis, C.C.A.Pa., 119 F.2d 704—In re Chicago & N. W. R. Co., C.C.A.Ill., 110 F.2d 425—U. S. v. South Georgia Ry. Co., C.C.A.Ga., 107 F.2d 3—Western Battery & Supply Co. v. Hazelett Storage Battery Co., C.C.A.Mo., 61 F.2d 220, reversing, D.C., Hazelett Storage Battery Co. v. Western Battery & Supply Co., 52 F.2d 659, and certiorari denied 53 S.Ct. 399, 288 U.S. 608, 77 L.Ed. 982—Uihlein v. General Electric Co., C.C.A.Wis., 47 F.2d 997—U. S. v. Kern River Co., C.C.A.Cal., 264 F. 412, modified on other grounds Kern River Co. v. U. S., 42 S.Ct. 60, 257 U.S. 147, 66 L.Ed. 175—Dunn v. Trefry, Mass., 260 F. 147, 171 C.C.A. 183—Panama R. Co. v. Beckford, Canal Zone, 231 F. 436, 145 C.C.A. 430.

22. U.S.—Kuhn v. Princess Lida of Thurn & Taxis, C.C.A.Pa., 119 F.2d 704—Campana Corporation v. Harrison, C.C.A.Ill., 114 F.2d 400—Huglin v. H. M. Byllesby & Co., C.C.A.Iowa, 72 F.2d 341—Becker v. Evens & Howard Sewer Pipe Co., C.C.A.Mo., 70 F.2d 596—Perry v. Wiggins, C.C.A.Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529—Border Gas Co. v. Windrow, C.C.A.Tex., 3 F.2d 974.

Failure to make finding

Where trial court made no ade-

ings of fact which have been reached by way of deduction or inference from probative or subordinate facts.[23]

Findings based on documentary evidence. As a rule, the limitation on the reviewing court's authority to review and set aside the trial court's findings of fact is inapplicable where the findings are based on evidence which is entirely or largely documentary,[24] for under such circumstances the appellate court is in just as good a position as the trial court to form a just estimate of the credence to be given to the testimony.[25]

In equity. As a general rule, an appeal in an equity case involves examination of both the law and the facts, so that the circuit court of appeals is in no way concluded by the fact findings of the trial court and may review and weigh all the evidence in the case and make its own findings.[26] However, the findings of the trial court are entitled to considerable weight and deference,[27] depending on the extent to which the trial judge was in a favorable position to determine the facts accurately,[28]

quate finding of fact on which to base determination of estoppel, circuit court of appeals could look to evidence to determine whether such fact existed.—Meeker v. Halsey, C.C.A.N.Y., 87 F.2d 299.

23. U.S.—U. S. v. Armature Rewinding Co., C.C.A.Mo., 124 F.2d 589—Brown v. U. S., C.C.A.Pa., 95 F.2d 487, reversing, D.C., 19 F.Supp. 825.

24. U.S.—Smith v. Royal Ins. Co., C.C.A.Cal., 125 F.2d 222, reversing, D.C., 37 F.Supp. 841—Fleming v. Palmer, C.C.A.Puerto Rico, 123 F.2d 749—U. S. v. Anderson Co., C.C.A.Ind., 119 F.2d 343—Chain O'Mines v. United Gilpin Corporation, C.C.A.Ill., 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422—U. S. v. Mitchell, C.C.A.Mo., 104 F.2d 343—Grove Laboratories v. Brewer Co., C.C.A.Mass., 103 F.2d 175—U. S. v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, C.C.A.Utah, 101 F.2d 156—The Marsodak, C.C.A.Va., 94 F.2d 339—Kaeser & Blair v. Merchants' Ass'n, C.C.A.Ohio, 64 F.2d 575—Nashua Mfg. Co. v. Berenzweig, C.C.A.Ill., 39 F.2d 896.

Where evidence is conflicting, however, trial court's finding will not be disturbed unless plainly wrong, even though evidence is largely documentary.—Olympic Salt Water Co. v. Shipowners' & Merchants' Tugboat Co., C.C.A.Cal., 48 F.2d 49, certiorari denied 52 S.Ct. 8, 284 U.S. 619, 76 L.Ed. 528—Bell v. Saxon, C.C.A.Fla., 296 F. 690.

Oral and documentary evidence

When in addition to the documentary or written evidence there is also some oral evidence which enters into the trial court's consideration or affords a partial basis for the findings, it is usually held that the findings are to be accorded their usual binding effect.—Patton-Tully Transp. Co. v. Barrett, C.C.A.Ohio, 37 F.2d 516.

If the document or instrument is uncertain or ambiguous, the trial court's construction made in the light of the surrounding circumstances will be given deference.—Frank v. Atwood, C.C.A.Pa., 75 F.2d 918.

25. U.S.—Nashua Mfg. Co. v. Berebzweig, C.C.A.Ill., 39 F.2d 896—Munro v. Smith, R.I., 259 F. 1, 170 C.C.A. 1, reversing, D.C., 243 F. 654.

26. U.S.—MacGowan v. Barber, C.C.A.Vt., 127 F.2d 458—Texas Agr. Ass'n of Edinburg v. Hidalgo County Water Control & Improvement Dist. No. 1, C.C.A.Tex., 125 F.2d 829, reversing, D.C., 36 F.Supp. 314—Mullins Mfg. Co. v. Booth, C.C.A.Mich., 125 F.2d 660—Home Life Ins. Co. v. Madere, C.C.A.Miss., 101 F.2d 292—Oxley v. Sweetland, C.C.A.W.Va., 94 F.2d 33—National Manufacture & Stores Corporation v. Whitman, C.C.A.S.C., 93 F.2d 829—Aro Equipment Corporation v. Herring-Wissler Co., C.C.A.Iowa, 84 F.2d 619—Equitable Life Assur. Soc. of U. S. v. Vaughn, C.C.A.Tenn., 82 F.2d 978—Victor Talking Mach. Co. v. George, C.C.A.N.J., 69 F.2d 871, certiorari granted George v. Victor Talking Mach. Co., 55 S.Ct. 82, 293 U.S. 544, 79 L.Ed. 649, reversed on other grounds 55 S.Ct. 229, 293 U.S. 377, 79 L.Ed. 439—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316—Equitable Life Assur. Soc. of U. S. v. Schwartz, C.C.A.Fla., 42 F.2d 646—Durham Loan & Trust Co. v. Chambers, C.C.A.N.C., 14 F.2d 53.

4 C.J. p 897 note 81.

Case improperly tried at law

Where case seeking relief cognizable in equity had been improperly tried before a jury and trial judge withdrew case from jury and ordered suit dismissed as of nonsuit, appellate court would examine evidence as upon an appeal in equity in order to determine correctness of district judge's conclusion.—Vann v. Bankers Life Co., C.C.A.N.C., 107 F.2d 136.

27. U.S.—Wertz v. National City Bank of Evansville, Ind., C.C.A.Ind., 115 F.2d 65, certiorari denied 61 S.Ct. 41, 311 U.S. 675, 85 L.Ed. 434—American Optometric Ass'n v. Ritholz, C.C.A.Ill., 101 F.2d 883, certiorari denied Ritholz v. American Optometric Ass'n, 59 S.Ct. 1047, 307 U.S. 647, 83 L.Ed. 1527, rehearing denied 60 S.Ct. 70, 308 U.S. 634, 84 L.Ed. 527—Horvath v. McCord Radiator & Mfg. Co., C.C.A.Mich., 100 F.2d 326, certiorari denied Carrier Engineering Corporation v. Horvath, 60 S.Ct. 101, 308 U.S. 581, 84 L.Ed. 486, rehearing denied 60 S.Ct. 171, 308 U.S. 636, 84 L.Ed. 529—Fidelity-Bankers' Trust Co. v. Little, C.C.A.S.C., 99 F.2d 950—Aro Equipment Corporation v. Herring-Wissler Co., C.C.A.Iowa, 84 F.2d 619—Koenig v. Oswald, C.C.A.Mo., 82 F.2d 85—Illinois Watch Case Co. v. Hingeco Mfg. Co., C.C.A.R.I., 81 F.2d 41—Johnson v. U. S., C.C.A.Utah, 51 F.2d 54—Youngblood v. Magnolia Petroleum Co., C.C.A.Okl., 35 F.2d 578—Pennsylvania R. Co. v. Shannon, C.C.A.Ohio, 32 F.2d 559—L. A. Westermann Co. v. Dispatch Printing Co., Ohio, 233 F. 609, 147 C.C.A. 417, reversed on other grounds 39 S.Ct. 194, 249 U.S. 100, 63 L.Ed. 499.

4 C.J. p 897 note 84, p 898 note 86.

28. U.S.—Backer v. Hook, C.C.A.Ky., 295 F. 261—Semidey v. Central Aguirre Co., Puerto Rico, 239 F. 610, 152 C.C.A. 444, certiorari denied 37 S.Ct. 479, 243 U.S. 652, 61 L.Ed. 947.

4 C.J. p 898 note 90.

Findings entitled to particular weight

(1) Where the evidence was oral and trial court saw and heard the witnesses.—Malloy v. New York Life Ins. Co., C.C.A.N.H., 103 F.2d 439, reversing, D.C., New York Life Ins. Co. v. Malloy, 21 F.Supp. 1001, certiorari denied 60 S.Ct. 86, 308 U.S. 572, 84 L.Ed. 480—Neil v. Gross, C.C.A.Cal., 101 F.2d 153—Ditto v. Dufur, C.C.A.Iowa, 88 F.2d 266—Arkansas Natural Gas Corporation v. Pierson, C.C.A.Ark., 84 F.2d 468—Sherman v. Bramham, C.C.A.N.C., 78 F.2d 443, affirming, D.C., Bramham v. First Nat. Bank, 9 F.Supp. 979—Columbia Pictures Corporation v. Lawton-Byrne Bruner Ins. Agency Co., C.C.A.Mo., 73 F.2d 18—Miller v. Pyrites Co., C.C.A.Md., 71 F.2d 804, certiorari denied 55 S.Ct. 121, 293 U.S. 604, 79 L.Ed. 696, rehearing denied 55 S.Ct. 208, 293 U.S. 632, 79 L.Ed. 717, certiorari denied Merrell

and under Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. following § 723c, and under decisions apart therefrom, such findings will not, as a rule, be disturbed by the appellate court if they appear to have sufficient evidentiary support,[29] and are not manifestly or clearly erroneous or wrong.[30] Of course, if the appellate court, after reviewing the evidence, agrees with the conclusions of the trial court they will not be disturbed.[31] The trial court's findings may, however, be set aside and new

v. Pyrites Co., 55 S.Ct. 121, 293 U.S. 604, 79 L.Ed. 696—Holmes v. Cummings, C.C.A.Tex., 71 F.2d 364, affirming, D.C., 7 F.Supp. 382—Collins v. Finley, C.C.A.Ariz., 65 F.2d 625—Exchange Nat. Bank of Spokane v. Meikle, C.C.A.Wash., 61 F.2d 176—Gila Water Co. v. International Finance Corporation, C.C.A.Ariz., 13 F. 2d 1—Hamlin v. Grogan, Mo., 257 F. 59, 168 C.C.A. 271—Fay v. Hill, Mo., 249 F. 415, 161 C.C.A. 389—Fuller v. Reed, Mass., 249 F. 158, 161 C.C. A. 210, affirming, D.C., Thurston v. Reed, 229 F. 737.

(2) Where evidence is oral and conflicting.—Viles v. Prudential Ins. Co. of America, C.C.A.Colo., 107 F.2d 696, certiorari denied 60 S.Ct. 387, 308 U.S. 626, 84 L.Ed. 523, rehearing denied 60 S.Ct. 582, 309 U.S. 695, 84 L.Ed. 1035, and motion denied 61 S. Ct. 53—Hedrick v. Perry, C.C.A.N. M., 102 F.2d 802—Tyronza Special School Dist. of Poinsett County v. Speer, C.C.A.Ark., 94 F.2d 825—Stearns v. Central Petroleum Co., C. C.A.Kan., 93 F.2d 638—Neukrom v. North Butte Mining Co., C.C.A.Mont., 84 F.2d 101—4 C.J. p 900 note 98.

Findings entitled to little weight

(1) Where the hearing was entirely on bill and answer.—U. S. v. Cantini, Pa., 212 F. 925, 129 C.C.A. 445, reversing, D.C., 199 F. 857.

(2) Where the evidence is written or documentary in form.—Photoplay Pub. Co. v. La Verne Pub. Co., C.C.A. Pa., 269 F. 730, reversing, D.C., 261 F. 428.

(3) Where the trial judge's conclusions have been reached by way of reasoning or inference from undisputed or established facts.—Irving Bank-Columbia Trust Co. v. Stoddard, C.C.A.Mass., 292 F. 815.

29. U.S.—Timetrust, Inc. v. Securities and Exchange Commission, C. C.A.Cal., 130 F.2d 214, remanding, D.C., Securities and Exchange Commission v. Timetrust, Inc., 39 F. Supp. 145—Rytex Co. v. Ryan, C.C. A.Ill., 126 F.2d 952—Chain O'Mines v. United Gilpin Corporation, C.C. A.Ill., 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422—Barbour v. George, C.C. A.Ill., 84 F.2d 281, certiorari denied 57 S.Ct. 43, 299 U.S. 579, 81 L.Ed. 426—The Bellhaven, C.C.A.N.Y., 72 F.2d 206—Hathaway v. Ford Motor Co., C.C.A.Or., 264 F. 952, certiorari denied 41 S.Ct. 15, 254 U.S. 644, 65 L.Ed. 454—Weld v. McKay, Ill., 218 F. 807, 134 C.C.A. 495.

4 C.J. p 900 note 99.

30. U.S.—Cox v. Pabst Brewing Co., C.C.A.Kan., 128 F.2d 468—Katz Underwear Co. v. U. S., C.C.A.Pa., 127 F.2d 965, affirming, D.C., 39 F.Supp. 976—Rothman v. Wilson, C.C.A. Or., 121 F.2d 1000—Wertz v. National City Bank of Evansville, Ind., C.C.A.Ind., 115 F.2d 65, certiorari denied 61 S.Ct. 41, 311 U.S. 675, 85 L.Ed. 434—Missouri Pac. Transp. Co. v. George, C.C.A.Ark., 114 F.2d 757, certiorari denied 61 S.Ct. 549, 312 U.S. 681, 85 L.Ed. 1120—Darrell v. Joe Morris Music Co., C.C.A.N.Y., 113 F.2d 80—Malloy v. New York Life Ins. Co., C. C.A.N.H., 103 F.2d 439, reversing, D.C., New York Life Ins. Co. v. Malloy, 21 F.Supp. 1001, certiorari denied 60 S.Ct. 86, 308 U.S. 572, 84 L.Ed. 480—Texas Co. v. City of Tampa, C.C.A.Fla., 100 F.2d 347—Esso, Inc. v. Standard Oil Co., C.C. A.Mo., 98 F.2d 1—U. S. v. Sands, C.C.A.Okl., 94 F.2d 156—Ruth v. Climax Molybdenum Co., C.C.A. Colo., 93 F.2d 699—Mershon v. Sprague Specialties Co., C.C.A. Mass., 92 F.2d 313, affirming, D.C., 14 F.Supp. 361, certiorari denied 58 S.Ct. 943, 304 U.S. 361, 82 L. Ed. 1528—Whitchurch v. Crawford, C.C.A.Okl., 92 F.2d 249, affirming, D.C., Whitchurch v. Burge, 17 F. Supp. 234—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743—Ditto v. Dufur, C.C.A.Iowa, 88 F.2d 266—Counce v. Yount-Lee Oil Co., C.C.A.Tex., 87 F.2d 572, certiorari denied Wilkinson v. Yount-Lee Oil Co., 58 S.Ct. 12, 302 U.S. 693, 82 L.Ed. 536—Freiberg v. Pierce, C.C.A.Okl., 83 F.2d 961—Wright v. McLaury, C.C.A.Ill., 81 F.2d 96—Ott v. Thurston, C.C.A. Cal., 76 F.2d 368—Caigan v. Plibrico Jointless Firebrick Co., C.C.A. Mass., 74 F.2d 316, certiorari denied 55 S.Ct. 645, 295 U.S. 733, 79 L.Ed. 1682, first case, and 55 S. Ct. 645, 295 U.S. 734, 79 L.Ed. 1682, second case—Conqueror Trust Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 63 F.2d 833—Woods-Faulkner & Co. v. Michelson, C.C.A.Mo., 63 F.2d 569—Boyle v. Gray, C.C.A.Me., 28 F.2d 7, certiorari denied 49 S.Ct. 178, 278 U.S. 653, 73 L.Ed. 563—Public Ledger Co. v. Post Printing & Publishing Co., C.C.A.Mo., 294 F. 430—Smith v. McCullough, C.C.A.Okl., 285 F. 698, reversed on other grounds 46 S.Ct. 338, 270 U.S. 456, 70 L.Ed. 682—Shearer v. Farmers' Life Ins. Co., C.C.A.Mo., 262 F. 861.

4 C.J. p 899 note 95.

Findings sustained

(1) Where not the result of a misconception of the law.—Rosenthal v. New York Life Ins. Co., C.C.A.Mo., 99 F.2d 578—Bailey v. Smith, C.C. A.Okl., 14 F.2d 519—Fay v. Hill, Mo., 249 F. 415, 161 C.C.A. 389.

(2) Where not against the clear preponderance or weight of the evidence.—Hyland v. Millers Nat. Ins. Co., C.C.A.Cal., 91 F.2d 735, affirming, D.C., 58 F.2d 1003, and rehearing denied 92 F.2d 462, certiorari denied 58 S.Ct. 644, 303 U.S. 645, 82 L.Ed. 1107—Seeley v. Cornell, C. C.A.Tex., 90 F.2d 562—Flynn v. Smith, C.C.A.Ind., 90 F.2d 305—Arkansas Natural Gas Corporation v. Pierson, C.C.A.Ark., 84 F.2d 468—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316—Monroe v. Prophet, C.C.A. Tex., 49 F.2d 1021—Nave-McCord Mercantile Co. v. Banney, C.C.A.Mo., 29 F.2d 383—International Organization, United Mine Workers of America v. Red Jacket Consol. Coal & Coke Co., C.C.A.W.Va., 18 F.2d 839, certiorari denied International Organization, United Mine Workers of America v. Carbon Fuel Co., 48 S.Ct. 31, 275 U.S. 536, 72 L.Ed. 413—Wolf Mineral Process Corporation v. Minerals Separation North American Corporation, C.C.A.Md., 18 F.2d 483, affirming, D.C., 7 F.2d 903, certiorari denied 48 S.Ct. 118, 275 U.S. 558, 72 L.Ed. 425—Kansas City Southern Ry. Co. v. May, C.C.A.Ark., 2 F.2d 680—Estep v. Kentland Coal & Coke Co., Ky., 239 F. 617, 152 C.C.A. 451—U. S. v. Grass Creek Oil & Gas Co., Wyo., 236 F. 481, 149 C.C.A. 533—Columbia Graphophone Co. v. Searchlight Horn Co., Cal., 236 F. 135, 149 C.C.A. 345.

4 C.J. p 901 note 2.

31. U.S.—Lehigh Valley R. Co. of New Jersey v. Martin, C.C.A.N.J., 100 F.2d 139, certiorari denied 59 S.Ct. 592, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 784, 306 U.S. 669, 83 L.Ed. 1063, certiorari denied Central R. Co. of New Jersey v. Martin, 59 S.Ct. 592, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 784, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied 59 S.Ct. 592, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied Delaware, L. & W. R. Co. v. Martin, 59 S.Ct. 593, 306 U. S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied New York Cent. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.

findings made, if the appellate court is convinced that the findings or decree of the trial court is clearly wrong,[32] or against the clear weight or preponderence of the evidence.[33]

(4) Findings of Referee, Master, or Like Officer

Findings of a master or referee, having support in the evidence, ordinarily will not be disturbed on appeal, especially where they have been approved by the trial court; but such findings are not of determinative weight under all circumstances, and may be set aside where clearly erroneous. The appellate court must itself determine the facts where the master's findings have been disapproved by the trial court.

On appeal to the circuit court of appeals, the findings or report of a referee, master, commissioner, auditor, or register are ordinarily regarded as presumptively correct, and will not be disturbed by the appellate court,[34] at least where supported by substantial evidence.[35] However, such findings are not

Ct. 785, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied New Jersey & N. Y. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied New York, S. & W. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied Erie R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1063, certiorari denied Lehigh Valley R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1063—Earnest v. Mogollen Consol. Mines Co., C.C.A. Tex., 93 F.2d 315.

32. U.S.—MacGowan v. Barber, C.C.A.Vt., 127 F.2d 458—McIntosh v. Leisk, C.C.A.Tex., 95 F.2d 164.
4 C.J. p 902 note 3.

33. U.S.—Horvath v. McCord Radiator & Mfg. Co., C.C.A.Mich., 100 F.2d 326, certiorari denied Carrier Engineering Corporation v. Horvath, 60 S.Ct. 101, 308 U.S. 581, 84 L.Ed. 486, rehearing denied 60 S.Ct. 171, 308 U.S. 636, 84 L.Ed. 529—New York Life Ins. Co. v. Simons, C.C.A.Mass., 60 F.2d 30, reversing, D.C., New York Life Ins. Co. v. Drooker, 53 F.2d 859, certiorari denied Simons v. New York Life Ins. Co., 53 S.Ct. 93, 287 U.S. 648, 77 L.Ed. 560.

34. U.S.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612—In re Plenz, C.C.A.Ill., 111 F.2d 860—Horvath v. McCord Radiator & Mfg. Co., C.C.A.Mich., 100 F.2d 326, certiorari denied Carrier Engineering Corporation v. Horvath, 60 S.Ct. 101, 308 U.S. 581, 84 L.Ed. 486, rehearing denied 60 S.Ct. 171, 308 U.S. 636, 84 L.Ed. 529—Vann v. Almours Securities, C.C.A.Fla., 96 F.2d 214—Mills Alloys v. Stoody Co., C.C.A.Cal., 94 F.2d 413, certiorari denied Stoody Co. v. Miller-Alloys, Inc., 58 S.Ct. 1042, 304 U.S. 573, 82 L.Ed. 1537—Automobile Ins. Co. of Hartford, Conn. v. St. Paul Fire & Marine Ins. Co., C.C.A.N.Y., 89 F.2d 163—Irving Trust Co. v. Compania Mexicana De Petroleo, La Libertad, S. A., C.C.A.N.Y., 66 F.2d 390, certiorari denied 54 S.Ct. 377, 291 U.S. 661, 78 L.Ed. 1052—In re Central R. of New Jersey, C.C.A.N.Y., 52 F.2d 20—Pensacola Shipbuilding Co. v. Vincennes Bridge Co., C.C.A.N.C., 45 F.2d 165—Pensacola Shipbuilding Co. v. Southern Wood Preserving Co., C.C.A.N.C., 45 F.2d 164—Roberts v. Southern Surety Co., C.C.A.N.C., 33 F.2d 501—McCallum v. Bray-Robinson Clothing Co., C.C.A. Tenn., 24 F.2d 35—Dexter & Carpenter v. Houston, C.C.A.Va., 20 F.2d 647, modifying, D.C., Houston v. Dexter & Carpenter, Inc., 300 F. 354—Ladd & Tilton Bank v. Boyle, C.C.A.Or., 299 F. 56—Armstrong v. Belding Bros. & Co., C.C.A.Conn., 297 F. 728, affirming, D.C., 280 F. 895, and certiorari denied Belding Bros. & Co. v. Armstrong, 44 S.Ct. 459, 265 U.S. 585, 68 L.Ed. 1192—I. T. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A.Ohio, 295 F. 479—Union Trust & Savings Bank v. Southern Traction Co., C.C.A.Ill., 283 F. 50, certiorari denied 43 S.Ct. 166, 260 U.S. 744, 67 L.Ed. 492—Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co., C.C.A.Mo., 281 F. 453, reversing, D.C., 248 F. 508, certiorari denied Wagner Electric Mfg. Co. v. Westinghouse Electric & Mfg. Co., 43 S.Ct. 165, 260 U.S. 744, 67 L.Ed. 492—Fifth Nat. Bank of City of New York v. Lyttle, 250 F. 361, 62 C.C.A. 431, certiorari denied 38 S.Ct. 427, 247 U.S. 506, 62 L.Ed. 1240—In re Victor, D.C.Ga., 246 F. 727—Fernald Woodward Co. v. Conway Co., D.C.N.H., 229 F. 819—In re Anderson, D.C.Ga., 224 F. 790—J. G. White & Co. v. Ball Engineering Co., Conn., 223 F. 618, 139 C.C.A. 164, reversing, D.C., Ball Engineering Co. v. J. G. White & Co., 212 F. 1009—Sicard v. Buffalo, N. Y. & P. R. Co., C.C.N.Y., 22 F.Cas. No.12,831, 15 Blatchf. 525.
4 C.J. p 890 notes 92, 94, p 892 note 8, p 894 note 48—63 C.J. p 580 note 68.

Against weight of evidence

(1) Findings merely against weight of evidence need not be disturbed on appeal.—American Pipe & Construction Co. v. Westchester County, C.C.A.N.Y., 292 F. 941—4 C.J. p 893 note 41.

(2) However, findings clearly and manifestly against weight of evidence may be set aside.—Horvath v. McCord Radiator & Mfg. Co., C.C.A. Mich., 100 F.2d 326, certiorari denied Carrier Engineering Corporation v. Horvath, 60 S.Ct. 101, 308 U.S. 581, 84 L.Ed. 486, rehearing denied 60 S.Ct. 171, 308 U.S. 636, 84 L.Ed. 529—Fifth Nat. Bank of City of New York v. Lyttle, N.Y., 250 F. 361, 162 C.C.A. 431, certiorari denied 38 S.Ct. 427, 247 U.S. 506, 62 L.Ed. 1240.

Administrative determination

Although the trial court hears a case de novo on review of a determination of an administrative body. the findings of such administrative body will not be disregarded by the appellate court but will be given some weight.—New Hampshire Fire Ins. Co. v. Murray, C.C.A.Wis., 105 F.2d 212.

35. U.S.—Foote Bros. Gear & Machine Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—In re Rubins, C.C.A.Ill., 74 F.2d 432, certiorari denied International Shoe Co. v. Rubins, 55 S.Ct. 915, 295 U.S. 758, 79 L.Ed. 1700—Wald v. Longacre, C.C.A.Pa., 34 F.2d 25—U. S. Fidelity & Guaranty Co. v. McNulty Bros., C.C.A. Mass., 13 F.2d 78, affirming, D.C., U. S. v. Noel Const. Co., 1 F.2d 446—U. S. v. Apple, C.C.A.Kan., 292 F. 935.

Findings on conflicting evidence

U.S.—Foote Bros. Gear & Machine Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 611, reversed on other grounds 61 S.Ct. 318, 311 U.S. 620, 85 L.Ed. 394—In re Eastern Oil Co., C.C.A.Cal., 100 F.2d 341—Brislin v. Killanna Holding Corporation, C.C.A.N.Y., 85 F.2d 667—Atchison, T. & S. F. Ry. Co. v. California Sea Products Co., C.C.A.Cal., 51 F.2d 466—Packard v. Southern States Power Co., C.C.A.Fla., 46 F.2d 789—Vance v. Chicago Portrait Co., C.C.A.Ill., 19 F.2d 981, certiorari denied 48 S.Ct. 141, 275 U.S. 567, 72 L.Ed. 430, motion denied 48 S.Ct. 303, 72 L.Ed.

of determinative weight under all circumstances or in all kinds of proceedings,[36] and they may be set aside where clearly erroneous.[37]

The fact that the findings of the referee, master, or like officer have been approved by the trial court entitles such findings to greater weight;[38] and, while they are not conclusive in such case and may under some circumstances be set aside,[39] they will not as a rule be disturbed by the reviewing court[40]

1017, motion denied 48 S.Ct. 527, 72 L.Ed. 1018—Fienup v. Kleinman, C.C.A.S.D., 5 F.2d 137—Westinghouse Electric & Mfg. Co. v. Wagner Electric Mfg. Co., C.C.A. Mo., 281 F. 453, reversing, D.C., 248 F. 508, and certiorari denied Wagner Electric Mfg. Co. v. Westinghouse Electric & Mfg. Co., 43 S. Ct. 165, 260 U.S. 744, 67 L.Ed. 492—In re S. & S. Mfg. & Sales Co., D.C.Ohio, 246 F. 1005—In re Crocker, D.C.Iowa, 217 F. 167.

4 C.J. p 892 note 26, p 893 notes 27, 29, 33, 34.

36. U.S.—In re Plenz, C.C.A.Ill., 111 F.2d 860—Atherton v. Anderson, C.C.A.Ky., 99 F.2d 883.

Particular circumstances

(1) Findings of a referee are not conclusive where no question of credibility of witnesses appearing before referee is involved.—Carr v. Southern Pac. Co., C.C.A.Cal., 128 F.2d 764—Lone Star Gas Co. v. City of Fort Worth, C.C.A.Tex., 93 F.2d 584, reversing, D.C., 15 F.Supp. 171, certiorari denied City of Fort Worth v. Lone Star Gas Co., 58 S.Ct. 943, 304 U.S. 562, 82 L.Ed. 1529, rehearing denied 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549—W. H. Anderson Co. v. Baldwin Law Pub. Co., C.C.A.Ohio, 27 F.2d 82.

(2) Findings representing ultimate conclusions derived from admitted facts need not be accepted by the appellate court.—Adams County v. Northern Pac. Ry. Co., C.C.A.Wash., 115 F.2d 768—4 C.J. p 892 note 16.

(3) Findings based on documentary evidence and depositions are likewise subject to review unaffected by presumptions which ordinarily accompany findings on controverted issues.—Carter Oil Co. v. McQuigg, C. C.A.Ill., 112 F.2d 275, affirming, D.C., 27 F.Supp. 182—4 C.J. p 892 note 15.

37. U.S.—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612—Adams County v. Northern Pac. Ry. Co., C.C.A.Wash., 115 F.2d 768—Vann v. Almours Securities, C.C.A.Fla., 96 F.2d 214—In re Turley, C.C.A.Ind., 92 F.2d 944—American Asiatic Co. v. Robert Dollar Co., C.C.A.Cal., 282 F. 743, certiorari denied Robert Dollar Co. v. American Asiatic Co., 43 S.Ct. 361, 261 U.S. 615, 67 L.Ed. 828.

38. U.S.—Stonega Coke & Coal Co. v. Price, C.C.A.W.Va., 106 F.2d 411, modifying, D.C., Price v. Stonega Coke & Coal Co., 26 F.Supp. 172, certiorari denied Stonega Coke & Coal Co. v. Price, 60 S.Ct. 263, 308 U.S. 618, 84 L.Ed. 516—P. Sanford Ross, Inc., v. Public Service Corporation of New Jersey, C.C.A.N.J., 42 F.2d 79—Dunkley Co. v. Central California Canneries, C.C.A.Cal., 7 F.2d 972, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778—In re Ackerman, C.C.A.N.Y., 297 F. 224—Meyer v. Ritter, C.C.A.Mo., 268 F. 937.

39. U.S.—Beckley Nat. Bank v. Boone, C.C.A.W.Va., 115 F.2d 513, reversing, D.C., Boone v. Equitable Holding Co., 32 F.Supp. 896, certiorari denied 61 S.Ct. 835, 313 U.S. 558, 85 L.Ed. 1519—National Manufacture & Stores Corporation v. Whitman, C.C.A.S.C., 93 F.2d 829—In re Central R. of New Jersey, C. C.A.N.Y., 52 F.2d 20—City of Marysville v. Standard Oil Co., C. C.A.Kan., 27 F.2d 478, certiorari granted Standard Oil Co. v. City of Marysville, 49 S.Ct. 177, 278 U.S. 596, 73 L.Ed. 527, and affirmed 49 S.Ct. 430, 279 U.S. 582, 73 L.Ed. 856, rehearing denied 50 S.Ct. 79, and interpretation of decision denied 51 S.Ct. 38, 282 U.S. 797, 75 L.Ed. 718—Leathe v. Title Guaranty Trust Co., C.C.A.Mo., 18 F.2d 41, certiorari denied 48 S.Ct. 30, 275 U.S. 535, 72 L.Ed. 412—Hand & Johnson Tug Line v. Canada S. S. Lines, C.C.A.Ohio, 281 F. 779—Chicago Life Ins. Co. v. Tiernan, C.C.A. Kan., 263 F. 325.

4 C.J. p 896 notes 68, 69.

40. U.S.—Municipality of Guayanilla v. Public Service Commission of Puerto Rico, C.C.A.Puerto Rico, 116 F.2d 15, certiorari denied 61 S.Ct. 1108, 313 U.S. 587, 85 L.Ed. 1543—Seeley v. Hunt, C.C.A.Tex., 109 F. 2d 595, certiorari denied Hunt v. Seeley, 60 S.Ct. 894, 309 U.S. 690, 84 L.Ed. 1033—Lawrence v. Commodore Navigation Corporation, C. C.A.N.Y., 108 F.2d 563—Morrison v. Federal Land Bank of Louisville, C.C.A.Ohio, 105 F.2d 279, reversed on other grounds 60 S.Ct. 292, 308 U.S. 524, 84 L.Ed. 443, and 60 S.Ct. 293, 308 U.S. 524, 84 L.Ed. 443—Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, C.C. A.Mass., 90 F.2d 556—Atherton v. Anderson, C.C.A.Ky., 86 F.2d 518, modifying, D.C., Anderson v. Akers, 7 F.Supp. 924, rehearing denied 9 F.Supp. 151, opinion supplemented 11 F.Supp. 9, certiorari granted Anderson v. Atherton, 57 S.Ct. 754, 300 U.S. 652, 81 L.Ed. 863, reversed on other grounds 58 S.Ct. 53, 302 U. S. 643, 82 L.Ed. 500—Continental Corporation v. National Union Radio Corporation, C.C.A.Ill., 67 F. 2d 938—Wickwire v. Martin, C.C.A. Okl., 63 F.2d 64—Rudin v. King-Richardson Co., C.C.A.Ill., 37 F.2d 637—Barger v. National Discount Corporation, C.C.A.Ind., 33 F.2d 511—Armstrong v. Lone Star Refining Co., C.C.A.Kan., 20 F.2d 625—Stockley v. U. S., C.C.A.La., 271 F. 632, reversed on other grounds 43 S.Ct. 186, 260 U.S. 532, 67 L.Ed. 390—Aronstam v. All-Russian Central Union of Consumers' Societies, C.C.A.N.Y., 270 F. 460—In re Fred D. Jones Co., C.C.A.Ill., 268 F. 818, certiorari dismissed Heldman v. Central Trust Co. of Illinois, 42 S. Ct. 45, 257 U.S. 664, 66 L.Ed. 424—Osley v. Adams, C.C.A.Ga., 268 F. 114, affirming, D.C., Adams v. Osley, 255 F. 117—Barber v. Columbia Chemical Co., Ohio, 228 F. 476, 143 C.C.A. 58, certiorari denied 37 S.Ct. 650, 244 U.S. 652, 61 L.Ed. 1372—Brooks v. Kerr, 223 F. 1016, 139 C. C.A. 612—Abbott v. Underwood, Kan., 216 F. 335, 132 C.C.A. 479—Emerson & Norris Co., v. Simpson Bros. Corporation, Mass., 214 F. 572, 131 C.C.A.121, certiorari denied 35 S.Ct. 283, 235 U.S. 707, 59 L. Ed. 435.

4 C.J. p 894 note 56.

Where findings supported by evidence

U.S.—Equitable Casualty & Surety Co. v. Helena Wholesale Grocery Co., C.C.A.Ark., 60 F.2d 380—Colquitt v. Roxana Petroleum Corporation, C.C.A.Tex., 49 F.2d 1025, affirming, D.C., Roxana Petroleum Corporation v. Colquitt, 34 F.2d 470, and certiorari denied Colquitt v. Roxana Petroleum Corporation, 52 S.Ct. 43, 284 U.S. 669, 76 L.Ed. 566—Commercial Casualty Ins. Co. v. Williams, C.C.A.N.C., 49 F.2d 472—White River Levee Dist. v. McWilliams Dredging Co., C.C.A. Ark., 40 F.2d 873, certiorari denied 51 S.Ct. 35, 282 U.S. 862, 75 L.Ed. 762—Pierce v. National Bank of Commerce in St. Louis, C.C.A.Mo., 13 F.2d 40, certiorari denied National Bank of Commerce in St. Louis v. Pierce, 47 S.Ct. 240, 273 U.S. 730, 71 L.Ed. 863—Midland Bridge Co. v. Houston & B. V. Ry. Co., C.C.A.Tex., 268 F. 931, affirming, D.C., Freeport Texas Co. v. Houston & B. V. Ry. Co., 257 F. 213—Robinson v. U. S., N.Y., 251 F. 461, 163 C.C.A. 637, error dismissed Robinson v. U. S. ex rel. Brown-Ketcham Iron Works, 42 S. Ct. 45, 257 U.S. 664, 66 L.Ed. 424.

4 C.J. p 895 note 57 [a].

unless manifestly erroneous.[41]

Where the trial court disapproves the findings of the master or referee and makes his own findings, the circuit court of appeals must itself examine the evidence and determine the facts,[42] giving due weight to the findings of the master who saw and

Where evidence conflicting

U.S.—Cooper v. Brown, C.C.A.Pa., 126 F.2d 874—Westchester Fire Ins. Co. v. Bringle, C.C.A.Tenn., 86 F.2d 262—Fruehauf Trailer Co. v. Bridge, C.C.A.Mich., 84 F.2d 660—The Hindanger, C.C.A.Cal., 76 F.2d 13—U. S. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 67 F. 2d 37, certiorari denied Hosey v. Mid-Continent Petroleum Corporation, 54 S.Ct. 346, 290 U.S. 702, 78 L. Ed. 603—Pleasant v. Missouri-Kansas-Texas R. Co., C.C.A.Kan., 66 F. 2d 842, certiorari denied Missouri-Kansas-Texas R. Co. v. Pleasant, 54 S.Ct. 376, 291 U.S. 659, 78 L.Ed. 1051—In re Nathanson Bros. Co., C. C.A.Ohio, 64 F.2d 912—Southern Pac. Co. v. Western Pac. California R. Co., C.C.A.Cal., 61 F.2d 732, conforming to Western Pac. California R. Co. v. Southern Pac. Co., 52 S. Ct. 56, 284 U.S. 47, 76 L.Ed. 160, reversing, C.C.A., Southern Pac. Co. v. Western Pac. California R. Co., 46 F.2d 729, certiorari granted Western Pac. California R. Co. v. Southern Pac. Co., 51 S.Ct. 649, 283 U.S. 816, 75 L.Ed. 1423—In re Trimble, C.C.A.Iowa, 55 F.2d 165—Crawford v. Briant, C.C.A.Okl., 53 F.2d 754—P. Sanford Ross, Inc., v. Public Service Corporation of New Jersey, C.C.A.N.J., 42 F.2d 79—Munn v. Des Moines Nat. Bank, C. C.A.Iowa, 18 F.2d 269—Commercial Nat. Bank of Independence, Kan., v. Stockyards Loan Co., C.C. A.Kan., 16 F.2d 911, certiorari denied Stock Yards Loan Co. v. Commercial Nat. Bank of Independence, Kan., 48 S.Ct. 84, 275 U.S. 547, 72 L.Ed. 418—Skelton v. Federal Surety Co., C.C.A.Kan., 15 F.2d 756—Susquehanna Trust & Safe Deposit Co. v. United Telephone & Telegraph Co., C.C.A.Pa., 6 F.2d 179—Emerson v. Fisher, Mass., 246 F. 642, 158 C.C.A. 598—Wootton Land & Fuel Co. v. Ownbey, C.C.A.Colo., 265 F. 91—Parker v. Ross, Ill., 234 F. 289, 148 C.C.A. 191, certiorari denied 37 S.Ct. 18, 242 U.S. 634, 61 L.Ed. 538.

4 C.J. p 895 note 60.

41. U.S.—Bagley v. Rowley, C.C.A. Mich., 127 F.2d 139—Beckley Nat. Bank v. Boone, C.C.A.W.Va., 115 F.2d 513, reversing, D.C., Boone v. Equitable Holding Co., 32 F.Supp. 896, certiorari denied 61 S.Ct. 835, 313 U.S. 558, 85 L.Ed. 1519—In re Avery, C.C.A.Ohio, 114 F.2d 768—Robbins v. Winters Creek Canal Co., C.C.A.Neb., 109 F.2d 849—Coyner v. U. S., C.C.A.Ill., 103 F.2d 629—Reynolds Spring Co. v. L. A. Young Industries, C.C.A.Mich., 101 F.2d 257—Paradise v. Vogtlandische Maschinen-Fabrik, C.C.A.N. J., 99 F.2d 53—Cleveland Trust Co. v. Aberdeen Motor Supply Co., C. C.A.Ohio, 92 F.2d 330, certiorari denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., 58 S.Ct. 609, 303 U.S. 639, 82 L.Ed. 1100, rehearing denied Aberdeen Motor Supply Co. v. Cleveland Trust Co., Chrysler Corporation, 58 S.Ct. 749, 303 U.S. 667, 82 L.Ed. 1124, certiorari granted 58 S.Ct. 1053, 304 U.S. 587, 82 L.Ed. 1548, reversed on other grounds 59 S.Ct. 8, 305 U.S. 47, 83 L.Ed. 34, mandate conformed to, C.C.A., Cleveland Trust Co. v. Schriber-Schroth Co., 108 F.2d 109—Stewart v. Wall, C.C.A.N.C., 87 F.2d 598, certiorari denied 58 S.Ct. 26, 302 U.S. 684, 82 L.Ed. 528, rehearing denied 58 S.Ct. 135, 302 U. S. 775, 82 L.Ed. 600—Fruehauf Trailer Co. v. Bridge, C.C.A.Mich., 84 F.2d 660—Duplate Corporation v. Triplex Safety Glass Co. of North America, C.C.A.Pa., 81 F.2d 352, modifying, D.C., Triplex Safety Glass Co. of North America v. Duplate Corporation, 10 F.Supp. 420, certiorari granted Duplate Corporation v. Triplex Safety Glass Co. of North America, 56 S.Ct. 668, two cases, 297 U.S. 702, 80 L.Ed. 990, modified on other grounds 56 S.Ct. 792, 298 U.S. 448, 80 L.Ed. 1274—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—Ott v. Thurston, C. C.A.Cal., 76 F.2d 368—Clements v. Coppin, C.C.A.Cal., 72 F.2d 796—Swift v. Higgins, C.C.A.Cal., 72 F. 2d 791—Levin Bros. v. Davis Mfg. Co., C.C.A.Minn., 72 F.2d 163—Henson v. Fidelity & Columbia Trust Co., C.C.A.Ky., 68 F.2d 144, affirming, D.C., 3 F.Supp. 950, rehearing denied, C.C.A., 69 F.2d 778—The Tourist, No. 2, C.C.A.Or., 64 F.2d 669—Buckman v. Jefferson Standard Life Ins. Co., C.C.A.Fla., 63 F. 2d 805—Cross v. Globe-Boss-World Furniture Co., C.C.A.Cal., 63 F.2d 421—Zimmerman v. Daley, C.C.A. Mass., 61 F.2d 518—Miller v. U. S., 57 F.2d 987, certiorari denied 53 S.Ct. 79, three cases, 287 U.S. 625, 77 L.Ed. 542—Crawford v. Briant, C.C.A.Okl., 53 F.2d 754—In re Central R. of New Jersey, C.C.A.N.Y., 52 F.2d 20—General Finance Corporation v. Keystone Credit Corporation, C.C.A.Va., 50 F.2d 872, certiorari denied Adams v. Keystone Credit Corporation, 52 S.Ct. 201, 284 U.S. 684, 76 L.Ed. 578—Home Mortg. Co. v. Ramsey, C.C.A.N.C., 49 F.2d 738, reversing, D.C., Ramsey v. Home Mortg. Co., 47 F.2d 621—In re Bernard & Katz, C.C.A.N.Y., 38 F.2d 40—Schock v. Malloy, C.C. A.Okl., 26 F.2d 621—Hill v. Gerber, C.C.A.Me., 24 F.2d 514, certiorari denied 48 S.Ct. 563, 277 U.S. 603, 72 L.Ed. 1010—Cory Mann George Corporation v. Old, C.C.A.Va., 23 F.2d 803—In re M. J. Hoey & Co., C.C.A. N.Y., 19 F.2d 764, certiorari denied Norwegian American Securities Corporation v. Kaufman, 48 S.Ct. 86, 275 U.S. 550, 72 L.Ed. 420—S. L. Collins Oil Co. v. Central Trust Co. of Illinois, C.C.A.Okl., 18 F.2d 474—Smith v. Hovland, C.C.A. Ariz., 11 F.2d 9, certiorari denied Hovland v. Smith, 46 S.Ct. 638, 271 U.S. 686, 70 L.Ed. 1151—Dickinson v. O. & W. Thum Co., C.C.A.Mich., 8 F.2d 570—Road Improvement Dist. No. 4 of Conway County, Ark., v. Wilkerson, C.C.A.Ark., 5 F.2d 416—Bailey v. Blackmon, C.C.A.S.C., 3 F.2d 252, affirmed 14 F.2d 16—Lerner v. Gladstone, C.C.A.N.J.; 1 F.2d 89—John A. Schmitt's Sons v. Shadrach, Pa., 251 F. 874, 164 C.C.A. 90, error dismissed Schmitt v. Shadrach, 39 S.Ct. 67, 248 U.S. 538, 63 L. Ed. 410—Fleming v. Noble, Mass., 250 F. 733, 163 C.C.A. 65—Brown v. Pennsylvania R. Co., Pa., 250 F. 513, 162 C.C.A. 529, modifying, D.C., Brown v. Pennsylvania Canal Co., 244 F. 980, and certiorari denied Pennsylvania R. Co. v. Brown, 39 S. Ct. 6, 248 U.S. 558, 63 L.Ed. 420—Firestone Tire & Rubber Co. v. Riverside Bridge Co., Ohio, 247 F. 625, 160 C.C.A. 35—Lasswell Land & Lumber Co. v. Lee Wilson & Co., Mo., 236 F. 332, 149 C.C.A. 454, certiorari denied 37 S.Ct. 245, 242 U. S. 652, 61 L.Ed. 546—Poff v. Adams, Payne & Gleaves, Va., 226 F. 187, 141 C.C.A. 185.

4 C.J. p 895 notes 61, 62.

Findings of court

The rule of civil procedure that fact findings shall not be set aside unless clearly erroneous, and that master's findings shall be considered as findings of the court to the extent that the court adopts them, is but the formulation of practice long prevailing in equity courts.—Stonega Coke & Coal Co. v. Price, C.C.A.W.Va., 106 F.2d 411, modifying, D.C., Price v. Stonega Coke & Coal Co., 26 F.Supp. 172, certiorari denied Stonega Coke & Coal Co. v. Price, 60 S.Ct. 263, 308 U.S. 618, 84 L.Ed. 516.

42. U.S.—Roosevelt v. Missouri State Life Ins. Co., C.C.A.Ark., 78 F.2d 752—Roberts v. Southern Surety Co., C.C.A.N.C., 33 F.2d 501—Quinn v. Union Nat. Bank of Rochester, Minn., C.C.A.S.D., 32 F.

heard the witnesses[43] and to the conclusion of the trial court that the master's findings were erroneous.[44]

(5) Dismissal, Nonsuit, or Direction of Verdict

As a general rule, the grant or refusal of a motion for a directed verdict or nonsuit raises only the question of the existence of legally sufficient evidence to sustain the determination below.

While the grant or refusal of a motion for a directed verdict or nonsuit is reviewable, the circuit court of appeals will not weigh the evidence but will consider only the question of the existence of legally sufficient evidence to sustain the trial court's determination.[45] On such review, the appellate court must view the evidence in the light least favorable to the moving party and most favorable to the adverse party, see supra subdivision e (9) of this section. Unless manifestly wrong,[46] the action of the trial court will be upheld.[47]

Where both parties moved for a directed verdict, the trial court's decision is not conclusive on the appellate court and it may reverse such decision where the evidence warrants submission of the case to the jury, for the reason that under Federal Rules of Civil Procedure, rule 50, 28 U.S.C.A. following § 723c, such action by the parties is no longer a waiver of jury trial.[48] Formerly the trial court's

2d 762—Armstrong v. Lone Star Refining Co., C.C.A.Kan., 20 F.2d 625.

Limited order of reference
Where order of reference reserved full power of review and specifically denied any presumption to be attached to the master's findings, the master's findings were not to any extent binding on the court of appeals.—Kycoga Land Co. v. Kentucky River Coal Corporation, C.C.A.Ky., 110 F.2d 894, certiorari denied 61 S.Ct. 615, 312 U.S. 688, 85 L.Ed. 1125.

43. U.S.—Roberts v. Southern Surety Co., C.C.A.N.C., 33 F.2d 501—Dorrance v. Dorrance, C.C.A.Mo., 264 F. 53, certiorari denied 41 S.Ct. 216, 254 U.S. 654, 65 L.Ed. 459.

Practice unchanged
In weighing conflicting findings by master and district court, practice is the same under rules of civil procedure as under the prior equity rules, and hence appellate court is not required to give more weight to master's finding than under equity rule.—Carter Oil Co. v. McQuigg, C.C.A.Ill., 112 F.2d 275, affirming, D.C., 27 F.Supp. 182.

44. U.S.—Scavenger Service Corporation v. Courtney, C.C.A.Ill., 85 F.2d 825.

45. U.S.—Galloway v. U. S., C.C.A.Cal., 130 F.2d 467—Cole v. U. S., C.C.A.Ind., 127 F.2d 470—Prudential Ins. Co. of America v. Carlson, C.C.A.Kan., 126 F.2d 607—Rutherford Freight Lines v. Huff, C.C.A.Tenn., 126 F.2d 216—Robins v. Pitcairn, C.C.A.Ill., 124 F.2d 734—Allen v. Pennsylvania R. Co., C.C.A.Ill., 120 F.2d 63—Champlin Refining Co. v. Walker, C.C.A.Minn., 113 F.2d 844—Nelson v. Business Men's Assur. Co. of America, C.C.A.Ill., 108 F.2d 363—Channell v. Sampson, C.C.A.Mass., 108 F.2d 315, affirming, D.C., Sampson v. Channell, 27 F.Supp. 213, second case, new trial denied 27 F.Supp. 213, first case, vacated on other grounds 110 F.2d 754, 128 A.L.R. 394, certiorari denied Channell v. Sampson, 60 S.Ct. 1099, 310 U.S. 650, 84 L.Ed. 1415—Heatherly v. Southern Ry. Co., C.C.A.Ga., 106 F.2d 894—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—American Nat. Bank & Trust Co. of Chicago v. U. S., C.C.A.Ill., 104 F.2d 783—Schwarz v. Fast, C.C.A.Neb., 103 F.2d 865—McGogney v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 103 F.2d 649—Southern Extract Co. v. Green, C.C.A.Tenn., 103 F.2d 232, certiorari denied 60 S.Ct. 81, 308 U.S. 568, 84 L.Ed. 476—Dolblestis v. U. S., C.C.A.Ill., 101 F.2d 900—U. S. v. Hartley, C.C.A.Mont., 99 F.2d 923—Sprow v. U. S., C.C.A.Ill., 99 F.2d 38—Noble v. U. S., C.C.A.Iowa, 98 F.2d 441—Maryland Casualty Co. v. Hosmer, C.C.A.Mass., 93 F.2d 365—Elzig v. Gudwangen, C.C.A.Minn., 91 F.2d 434—Equitable Life Assur. Soc. of U. S. v. Guiou, C.C.A.Neb., 86 F.2d 865—Provident Life & Accident Ins. Co. v. Eaton, C.C.A.Va., 84 F.2d 528—U. S. v. Fancher, C.C.A.Miss., 84 F.2d 306—Columbian Nat. Life Ins. Co. v. Comfort, C.C.A.Mo., 84 F.2d 291, certiorari denied 57 S.Ct. 34, 299 U.S. 571, 81 L.Ed. 420—Pryor v. Strawn, C.C.A.Neb., 73 F.2d 595—Terminal R. Ass'n of St. Louis v. Farris, C.C.A.Mo., 69 F.2d 779—Halsband v. Columbian Nat. Life Ins. Co., C.C.A.N.Y., 67 F.2d 863, certiorari denied Columbian Nat. Life Ins. Co. v. Halsband, 54 S.Ct. 531, 291 U.S. 681, 78 L.Ed. 1068—Wise v. U. S., C.C.A.Tex., 63 F.2d 307—U. S. Fidelity & Guaranty Co. v. Leong Dung Dye, C.C.A.Hawaii, 52 F.2d 567, certiorari denied 52 S.Ct. 311, 285 U.S. 537, 76 L.Ed. 930—O'Boyle v. Northwestern Fire & Marine Ins. Co., C.C.A.N.Y., 49 F.2d 713—Orvis v. George, C.C.A.Tex., 47 F.2d 1045—J. B. McCrary Engineering Co. v. White Coal Power Co., C.C.A.N.C., 35 F.2d 142—Clapper v. Gamble, C.C.A.Mo., 28 F.2d 755—George A. Fuller Co. v. Brown, C.C.A.N.C., 15 F.2d 672—Kean v. National City Bank, C.C.A.Tenn., 12 F.2d 203—W. J. Foye Lumber Co. v. Pennsylvania R. Co., C.C.A.Neb., 10 F.2d 437, certiorari denied 46 S.Ct. 632, 271 U.S. 681, 70 L.Ed. 1149—United S. S. Co. v. Barber, C.C.A.Ohio, 4 F.2d 625—U. S. Fidelity & Guaranty Co. v. Blake, C.C.A., 285 F. 449, certiorari denied 43 S.Ct. 523, 262 U.S. 748, 67 L.Ed. 1213—Interstate Compress Co. v. Agnew, C.C.A.Okl., 276 F. 882—Buckbee v. P. Hohenadel, Jr., Co., Ill., 224 F. 14, 139 C.C.A. 478, L.R.A.1916C 1001, Ann.Cas.1918B 88.
4 C.J. p 902 note 12, p 903 note 13.

Right to appellate review
Defendant by moving to dismiss complaint at close of case was not deprived of right to appellate review of question whether directed verdict for plaintiff was justified.—Hartman Goldsmith & Co. v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 33 F.2d 89.

Physical facts
In determining whether defendant's motion for directed verdict should have been granted because of the physical facts, the test was not whether circuit court of appeals might have been convinced that defendants' theory of occurrence of accident was actually true, but whether physical facts made the theory of plaintiffs so physically impossible that verdict for plaintiffs could not be sustained.—Stolte v. Larkin, C.C.A.Minn., 110 F.2d 226.

46. U.S.—Sulzbacher v. Continental Casualty Co., C.C.A.Mo., 88 F.2d 122.

47. U.S.—U. S. v. Barnette, C.C.A.La., 91 F.2d 10—Fricke v. International Harvester Co., Neb., 247 F. 869, 160 C.C.A. 91.

48. U.S.—U. S. v. Brown, C.C.A.S.C., 107 F.2d 401.

decision stood on the same footing as a jury verdict and was in general conclusive on both parties where supported by, and not clearly against, the weight of the evidence;[49] and the reviewing court was limited to a consideration of the law and would accept, without review, the determination of the trial court as to the facts, unless it was without any substantial support.[50]

49. U.S.—Federal Life Ins. Co. v. Rumpel, C.C.A.Mich., 102 F.2d 120—Kelble Operating Corporation v. Jarka Corporation, C.C.A.N.Y., 96 F.2d 601, affirming, D.C., 20 F.Supp. 647—St. Paul Mercury Indemnity Co. of St. Paul v. Long, C.C.A.N.J., 85 F.2d 848—Bricknell v. St. Joseph Stock-Yards Bank, C.C.A.Neb., 81 F.2d 471—Tidwell v. Anderson, C.C.A.N.Y., 72 F.2d 684, affirming, D.C., 4 F.Supp. 789—Fidelity-Phenix Fire Ins. Co. v. Haywood, C.C.A.Ky., 71 F.2d 834—Equitable Life Assur. Soc. of U. S. v. Larocco, C.C.A.Pa., 68 F.2d 451—Ittleson v. Anderson, C.C.A.N.Y., 67 F.2d 323, affirming, D.C., 2 F.Supp. 716—Fidelity & Casualty Co. of New York v. Martin, C.C.A.Mont., 66 F.2d 438—Ramsey v. Deepwater Oil Refineries, C.C.A.Okl., 65 F.2d 931, affirming, D.C., Deepwater Oil Refineries v. Ramsey, 59 F.2d 346—Laredo Nat. Bank v. Gordon, C.C.A.Tex., 61 F.2d 906, certiorari denied 53 S.Ct. 524, 289 U.S. 726, 77 L.Ed. 1476—Barringer v. Dinkler Hotels Co., C.C.A.S.C., 61 F.2d 82—Detroit Fidelity & Surety Co. v. U. S., C.C.A.Minn., 59 F.2d 565, certiorari denied 53 S.Ct. 84, 287 U.S. 633, 77 L.Ed. 549—Chicago, M., St. P. & P. R. Co. v. Flanders, C.C.A.Iowa, 56 F.2d 114—Southern Surety Co. v. Fidelity & Casualty Co., C.C.A.Iowa, 50 F.2d 16—Queensboro Nat. Bank of City of New York v. Kelly, C.C.A.N.Y., 48 F.2d 574, 87 A.L.R. 1172, certiorari denied Kelly v. Queensboro Nat. Bank of City of New York, 52 S.Ct. 9, 284 U.S. 620, 76 L.Ed. 529—U. S. v. De Armond, C.C.A.Mo., 48 F.2d 465—Blackburn Const. Co. v. Cedar Rapids Nat. Bank, C.C.A.Okl., 37 F.2d 865, certiorari denied 50 S.Ct. 409, 281 U.S. 755, 74 L.Ed. 1165—Russell Wheel & Foundry Co. v. U. S., C.C.A.Mich., 31 F.2d 826, affirming, D.C., U. S. v. Russell Wheel & Foundry Co., 11 F.2d 531—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 30 F.2d 901, conforming to mandate 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, reversing, C.C.A., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, judgment as to costs amended 48 S.Ct. 527, 72 L.Ed. 1018, and certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008—C. F. Childs & Co. v. Harris Trust & Savings Bank, for Use of American Surety Co., C.C.A.Ill., 27 F.2d 633, certiorari denied 49 S.Ct. 179, 278 U.S. 653, 73 L.Ed. 563—Continental Ins. Co. of City of New York v. Fortner, C.C.A.Ky., 25 F.2d 398—Reynolds v. Zarlengo, C.C.A.Colo., 22 F.2d 626—American Smelting & Refining Co. v. Hyman, C.C.A.Ky., 16 F.2d 39—Speelman v. Iowa State Traveling Men's Ass'n, C.C.A.Iowa, 4 F.2d 501—U. S. v. One Chevrolet 1935 Sedan, Engine No. 4980926, Serial No. 12 EAO 35274, D.C.N.Y., 12 F.Supp. 793—Louisville & N. R. Co. v. Central Iron & Coal Co., C.C.A.Ala., 284 F. 250, affirmed 44 S.Ct. 441, 265 U.S. 59, 68 L.Ed. 900—Tanner v. Ballard & Ballard Co., C.C.A.N.Y., 273 F. 671—Kansas City Soap Co. v. Illinois Cudahy Packing Co., C.C.A.Kan., 265 F. 108, affirming, D.C., Illinois Cudahy Packing Co. v. Kansas City Soap Co., 247 F. 556—American Mercantile Corporation v. Spielberg, C.C.A.N.Y., 262 F. 492—Cuyamel Fruit Co. v. Johnson Iron Works, C.C.A.La., 262 F. 387, certiorari denied 40 S.Ct. 481, 253 U.S. 485, 64 L.Ed. 1025.

4 C.J. p 902 note 12 [b].

Finding conclusive on conflicting evidence

U.S.—Fidelity-Phenix Fire Ins. Co. of New York v. Glasow, C.C.A.Wis., 18 F.2d 957—Business Men's Assur. Co. of America v. Campbell, C.C.A.Neb., 18 F.2d 223.

50. U.S.—Ungerleider v. Citizens Commercial & Savings Bank of Flint, C.C.A.Mich., 104 F.2d 718—U. S., for Use and Benefit of P. A. Bourquin & Co. v. Chester Const. Co., C.C.A.N.Y., 104 F.2d 648—Federal Life Ins. Co. v. Rumpel, C.C.A.Mich., 102 F.2d 120—Webb v. Consolidated Oil Co., C.C.A.Tex., 100 F.2d 865—North American Accident Ins. Co. v. Anderson, C.C.A.Colo., 100 F.2d 452—First Nat. Bank v. Continental Casualty Co., C.C.A.Tex., 100 F.2d 308, certiorari denied Continental Casualty Co. v. First Nat. Bank, 59 S.Ct. 833, 307 U.S. 630, 83 L.Ed. 1513—Morgan v. Penn Mut. Life Ins. Co., C.C.A.Mo., 94 F.2d 129—Continental Casualty Co. v. Shankel, C.C.A.Okl., 88 F.2d 819—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C.A.Ark., 84 F.2d 930—Indiana Macaroni Co. v. Moscahlades Bros., C.C.A.Pa., 83 F.2d 891—Chisholm v. Gilmer, C.C.A.Va., 81 F.2d 120, certiorari granted 56 S.Ct. 682, 298 U.S. 648, 80 L.Ed. 1377, affirmed 57 S.Ct. 65, 299 U.S. 99, 81 L.Ed. 63, rehearing denied 57 S.Ct. 229, 299 U.S. 623, 81 L.Ed. 458—Perkins v. Prudential Ins. Co. of America, C.C.A.Ill., 69 F.2d 218—Frick Co. v. Rubel Corporation, C.C.A.N.Y., 62 F.2d 765—New York Life Ins. Co. v. Ollich, C.C.A.Ohio, 42 F.2d 399—Clapper v. Gamble, C.C.A.Mo., 28 F.2d 755—Ætna Ins. Co. of Hartford, Conn., v. Licking Valley Milling Co., C.C.A.Ky., 19 F.2d 177, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415—Krauss Bros. Lumber Co. v. Mellon, C.C.A.Ala., 18 F.2d 369, certiorari granted 48 S.Ct. 35, 275 U.S. 513, 72 L.Ed. 400, reversed on other grounds 48 S.Ct. 358, 276 U.S. 386, 72 L.Ed. 620, amended 48 S.Ct. 527, 72 L.Ed. 1018, and mandate conformed to, C.C.A., 30 F.2d 901, certiorari denied 49 S.Ct. 513, 279 U.S. 872, 73 L.Ed. 1008—Andrus v. Hutchinson, C.C.A.Tex., 17 F.2d 472, certiorari denied 47 S.Ct. 770, 274 U.S. 761, 71 L.Ed. 1339—Swift & Co. v. Columbia Ry., Gas & Electric Co., C.C.A.S.C., 17 F.2d 46, 51 A.L.R. 983—First Nat. Bank v. First Utah Nat. Bank of Ogden, Utah, C.C.A.Utah, 15 F.2d 913, certiorari denied First Nat. Bank of Ogden, Utah, v. First Nat. Bank of Rigby, Idaho, 47 S.Ct. 473, 273 U.S. 760, 71 L.Ed. 878—Jackson v. Bell, C.C.A.Neb., 14 F.2d 61—New England Mut. Life Ins. Co. of Boston, Mass., v. Clinchfield Coal Corporation, C.C.A.W.Va., 9 F.2d 46—Larabee Flour Mills Corporation v. City Flour & Grain Co., C.C.A.S.C., 9 F.2d 44—Linsky v. U. S., C.C.A.Mass., 6 F.2d 869—Coal & Iron Nat. Bank of City of New York v. Suzuki, C.C.A.N.Y., 3 F.2d 764—Hettrick Mfg. Co. v. Waxahachie Cotton Mills, C.C.A.Ohio, 1 F.2d 913—Keyes v. Security State Bank of Strasburg, N. D., C.C.A.N.D., 300 F. 897—Vogt Bros. Mfg. Co. v. Sloss-Sheffield Steel & Iron Co., C.C.A.Ky., 297 F. 54—Meyer & Chapman State Bank v. First Nat. Bank, C.C.A.Wyo., 291 F. 42—Knoblock v. Gilchrist-Fordney Co., C.C.A.Miss., 286 F. 679—N. K. Fairbank Co. v. Canal-Commercial Trust & Savings Bank, C.C.A.La., 286 F. 648—Letta v. Cincinnati Iron & Steel Co., C.C.A.Ohio, 285 F. 707—Gosho Co. v. Southern Pac. Co., C.C.A.Tex., 285 F. 227, certiorari denied 43 S.Ct. 520, 262 U.S. 742, 67 L.Ed. 1210—Mohawk Oil Corporation v. Simpson, C.C.A.Tex., 285 F. 149—Thomas-Bonner Co. v. Hooven, Owens & Rentschler Co., C.C.A.Ohio, 284 F. 386—Mayes v. U. S. Trust Co., C.C.A.Ky., 280 F. 25—Inmon v. State of Mississippi, C.C.A.Miss., 278 F. 23—South Atlantic Packing & Provision Co. v. York Mfg. Co., C.C.A.Ga., 276 F. 509—Moore v. Lee Tire & Rubber Co. of New York, C.C.A.Utah, 273 F. 465—Lockhart

h. Harmless Error

(1) In general
(2) Evidence and witnesses

(1) In General

Generally no cognizance will be taken of error which is nonprejudicial to the rights of the party complaining; whether error is harmless is dependent on the circumstances of the case as ascertained from the record, and the burden of proof with respect to the existence of prejudice is dependent on the intrinsic character of the error.

Under various federal statutes, 28 U.S.C.A. § 391, and Federal Rules of Civil Procedure, rule 61, 28 U.S.C.A. following § 723c, the circuit court of appeals must disregard error which could not have affected the substantial rights of the parties,[51] and even apart from statute it is generally recognized that error as such, unaccompanied by prejudice, is not ground for reversal.[52] Whether, in any given instance, an error is harmless depends largely on the circumstances of the particular case,[53] and is to be determined solely from the record.[54]

Error will be considered harmless and not to operate to reverse the judgment appealed from where such judgment is clearly correct on the merits,[55] or where the error could not have affected the final result;[56] and it is a rule of universal application that appellant cannot complain of errors which were favorable to himself.[57] Technical or formal errors

v. Tri-State Loan & Trust Co., C.C.A.Tex., 268 F. 523—Harriman Nat. Bank v. Seldomridge, N.Y., 240 F. 111, 153 C.C.A. 147, reversed on other grounds 39 S.Ct. 244, 249 U.S. 1, 63 L.Ed. 443—Wilson v. Knowles, N.Y., 213 F. 782, 130 C.C.A. 440.
4 C.J. p 902 note 12 [b] (5).

51. U.S.—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—Dallas Ry. & Terminal Co. v. Sullivan, C.C.A.Tex., 108 F.2d 581—Woods v. Gettelfinger, C.C.A.Ga., 108 F.2d 549—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383.

52. U.S.—Gulf Refining Co. v. Fetschan, C.C.A.Ohio, 130 F.2d 129—New York Life Ins. Co. v. Rogers, C.C.A.Ariz., 126 F.2d 784—Hargrove v. American Cent. Ins. Co., C.C.A.Okl., 125 F.2d 225—Pitcairn v. Perry, C.C.A.Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 U.S. 697, 86 L.Ed. 557—Tillman v. National City Bank of New York, C.C.A.N.Y., 118 F.2d 631, certiorari denied 62 S.Ct. 96, 314 U.S. 650, 86 L.Ed. 521—U. S. v. Barton, C.C.A.Fla., 117 F.2d 540—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 807, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Eastern States Petroleum Co. v. Gilliland Refining Co., C.C.A.Tex., 103 F.2d 186—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884—Milleson v. U. S., C.C.A.Mo., 78 F.2d 60—Ingram v. Jones, C.C.A.Okl., 47 F.2d 135—Wolfberg v. State Mut. Life Assur. Co. of Worcester, Mass., C.C.A.Mo., 36 F.2d 171—Hutton v. Norfolk & W. Ry. Co., C.C.A.Ohio, 28 F.2d 874—F. C. Ayres Mercantile Co. v. Union Pac. R. Co., C.C.A.Colo., 16 F.2d 395—Chicago Ry. Equipment Co. v. Superior Charcoal Iron Co., C.C.A.Mich., 12 F.2d 235—Central R. Co. of New Jersey v. Monahan, C.C.A.N.Y., 11 F.2d 212—Erie R. Co. v. Murphy, C.C.A.N.Y., 9 F.2d 525—Passaic Valley Sewerage Com'rs v. Holbrook, Cabot & Rollins Corporation, C.C.A.N.J., 6 F.2d 721, certiorari denied 46 S.Ct. 107, 269 U.S. 582, 70 L.Ed. 423—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—Morris Land & Cattle Co. v. Kilpatrick, Tex., 256 F. 788, 168 C.C.A. 134—Compagnié Générale Transatlantique v. Bump, N.Y., 234 F. 52, 148 C.C.A. 68, certiorari denied 37 S.Ct. 114, 242 U.S. 642, 61 L.Ed. 542.

53. U.S.—Worcester v. Pure Torpedo Co., C.C.A.Ill., 127 F.2d 945—Morton Butler Timber Co. v. U. S., C.C.A.Tenn., 91 F.2d 884.

54. U.S.—Gila Valley Irr. Dist. v. U. S., C.C.A.Ariz., 118 F.2d 507—Pappas v. Baltimore & O. R. Co., C.C.A.Ohio, 37 F.2d 271—Great American Ins. Co. v. Johnson, C.C.A.W.Va., 27 F.2d 71, denying rehearing 25 F.2d 847, certiorari denied 49 S.Ct. 29, 278 U.S. 629, 73 L.Ed. 548.

55. U.S.—Witmer v. U. S., C.C.A.Pa., 96 F.2d 745—Moon Motor Car Co. v. Moon, C.C.A.Mo., 58 F.2d 90.

56. U.S.—Atlantic Greyhound Corporation v. McDonald, C.C.A.N.C., 125 F.2d 849—Wenzel & Henoch Const. Co. v. Metropolitan Water Dist. of Southern California, C.C.A.Cal., 115 F.2d 25, certiorari denied Wenzel & Honock Const. Co. v. Metropolitan Water Dist. of Southern California, 61 S.Ct. 834, 313 U.S. 560, 85 L.Ed. 1520—Maynard v. Finney, C.C.A.Ga., 92 F.2d 454, certiorari denied 58 S.Ct. 647, 303 U.S. 648, 82 L.Ed. 1109—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Geo. A. Moore & Co. v. Mathieu, C.C.A.Cal., 13 F.2d 747, affirming, D.C., Mathieu v. George A. Moore & Co., 4 F.2d 251, and certiorari denied Moore & Co. v. Mathieu, 47 S.Ct. 242, 273 U.S. 733, 71 L.Ed. 864—Wiener v. Union Trust Co., D.C. Mich., 261 F. 709—Austro-American S. S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D 873.

Party not entitled to succeed

The unsuccessful party cannot complain of any error committed at the trial where not entitled to succeed in any event.—Kustoff v. Chaplin, C.C.A.Cal., 120 F.2d 551, affirming, D.C., 32 F.Supp. 772—Hornblower v. City of Pierre, S.D., 241 F. 450, 154 C.C.A. 282, affirming, D.C., 231 F. 496—Howland v. Corn, N.Y., 232 F. 35, 146 C.C.A. 227—Vagaszki v. Consolidation Coal Co., N.Y., 225 F. 913, 141 C.C.A. 37—4 C.J. p 909 note 67.

57. U.S.—Countee v. U. S., C.C.A.Ill., 127 F.2d 761—Meissner v. Papas, C.C.A.Wis., 124 F.2d 720—Columbia Casualty Co. v. Thomas, C.C.A.Fla., 101 F.2d 151—U. S. to Use of Stallings v. Starr, C.C.A.N.C., 20 F.2d 803—A. Hartman & Co. v. Sanchez, C.C.A.Puerto Rico, 12 F.2d 649—Von Crome v. Travelers' Ins. Co. of Hartford, Conn., C.C.A.Mo., 11 F.2d 350, certiorari denied 46 S.Ct. 482, 271 U.S. 665, 70 L.Ed. 1140—Mann v. Dempster, N.Y., 181 F. 76, 104 C.C.A. 110.

Particular favorable errors

(1) Admission or exclusion of evidence.—Highway Const. Co. of Ohio v. City of Miami, Fla., C.C.A.Fla., 126 F.2d 777—Maryland Casualty Co. v. Kern County, C.C.A.Cal., 83 F.2d 774—U. S. v. Roberts, C.C.A.Colo., 62 F.2d 594—Norfolk & W. Ry. Co. v. Collingsworth, C.C.A.Ohio, 32 F.2d 561—Payne v. Connor, C.C.A.Me., 274 F. 497—Port Wells Mill & Lumber Co. v. Crawford, C.C.A.Alaska, 264 F. 935—Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., S.C., 255 F. 645, 167 C.C.A. 21—Co-operative Raw Fur Co. v. American Credit Indemnity Co., Mich., 240 F. 67, 153 C.C.A. 103—Frederick Mfg. Co. v. Devlin, N.J., 127 F. 71, 62 C.C.A. 53.

(2) Submission of case or question to jury.—Christenson v. Gorton-Pew

will be deemed harmless on appeal.[58]

Presumptions and burden of proof as to effect of error. In the case of errors which are intrinsically collateral and without influence on the final result, it is generally held that the record must not only establish error, but also that the party complaining was prejudiced thereby.[59] However, the opposite is true as to those errors which, by fair and legitimate inference, have a potential connection with the final verdict or judgment, and if there is such error apparent on the face of the record a presumption of prejudice arises which cannot be disregarded, unless the record affirmatively discloses that the error was not prejudicial.[60]

Fisheries Co., C.C.A.N.Y., 8 F.2d 689—Delaware, L. & W. R. Co. v. Pittinger, C.C.A.N.J., 293 F. 853—Central R. Co. of New Jersey v. De Busley, C.C.A.Pa., 261 F. 561—4 C.J. p 921 note 66.

(3) Instructions. — Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485—Trinidad Asphalt Mfg. Co. v. McIntosh, C.C.A.Miss., 100 F. 2d 310—American Credit-Indemnity Co. of New York v. E. R. Apt Shoe Co., C.C.A.N.H., 74 F.2d 345—Merchants' Bank v. Hanna, C.C.A.Mo., 73 F.2d 818—Shell Petroleum Corporation v. Scully, C.C.A.La., 71 F.2d 772—Cameron, Joyce & Co. v. McLouth, C.C.A.Ill., 70 F.2d 6—S. H. Kress Co. v. Bullock Shoe Co., C.C. A.Ala., 56 F.2d 713—Ætna Life Ins. Co. v. Windham, C.C.A.Tex., 53 F.2d 984—American Ry. Express Co. v. McDermott, C.C.A.Pa., 44 F.2d 955—Security Life Ins. Co. of America v. Brimmer, C.C.A.Mo., 36 F.2d 176, certiorari denied 50 S.Ct. 350, 281 U. S. 744, 74 L.Ed. 1157—Emlenton Refining Co. v. Chambers, C.C.A.Pa., 35 F.2d 273, certiorari denied 50 S.Ct. 160, 280 U.S. 612, 74 L.Ed. 654—Blakely v. Greene, C.C.A.W.Va., 24 F.2d 676—Land Co. of Florida v. Fetty, C.C.A.Ga., 15 F.2d 942, certiorari denied 47 S.Ct. 477, 273 U.S. 764, 71 L.Ed. 880—Deal v. U. S., C.C.A. Alaska, 11 F.2d 3, certiorari granted 46 S.Ct. 630, 271 U.S. 656, 70 L.Ed. 1135, and reversed on other grounds 47 S.Ct. 613, 274 U.S. 277, 71 L.Ed. 1045—Coast S. S. Co. v. Brady, C.C.A. Ala., 8 F.2d 16, certiorari denied 46 S.Ct. 103, 269 U.S. 578, 70 L.Ed. 421—Gerseta Corporation v. Wessex-Campbell Silk Co., C.C.A.N.Y., 3 F. 2d 236—M. W. Savage Factories v. Parker, C.C.A.Minn., 294 F. 455—Richmond Guano Co. v. E. I. Du Pont de Nemours & Co., C.C.A.Va., 284 F. 803—Hughes v. Chesapeake & Ohio Coal & Coke Co., C.C.A.N.J., 269 F. 589—Dundee Petroleum Co. v. Clay, C.C.A.Okl., 267 F. 145, certiorari denied 41 S.Ct. 377, 255 U. S. 574, 65 L.Ed. 793—Manchester St. Ry. v. Barrett, C.C.A.N.H., 265 F. 557—Stultz v. Cousins, Tenn., 242 F. 794, 155 C.C.A. 382—Clark v. Erie R. Co., D.C.N.Y., 230 F. 478—Lauderdale County v. Kittel, Miss., 229 F. 593, 143 C.C.A. 615—4 C.J. p 918 note 42, p 920 note 53.

(4) Findings.—Walz v. Fidelity-Phœnix Fire Ins. Co. of New York, C.C.A.Mich., 10 F.2d 22, certiorari denied Fidelity-Phœnix Fire Ins. Co. of New York v. Walz, 46 S.Ct. 481, 271 U.S. 665, 70 L.Ed. 1140.

(5) That a judgment, decree, or verdict against appellant awards less relief than the prevailing party claims or is entitled to.—Langroise v. Cummings, C.C.A.Idaho, 123 F.2d 969, affirming, D.C., Cummings v. Langroise, 36 F.Supp. 174—Arkansas Fuel Oil Co. v. City of Blackwell, C. C.A.Okl., 87 F.2d 50—Ohio Boulevard Land Corporation v. Greggory, C.C. A.Mich., 46 F.2d 263—Miami Valley Fruit Co. v. U. S., C.C.A.Ga., 45 F.2d 303, certiorari denied 51 S.Ct. 488, 283 U.S. 841, 75 L.Ed. 1451—Weinstein v. Laughlin, C.C.A.Mo., 21 F.2d 740—Denton v. Brocksmith, C.C.A. Miss., 299 F. 559—American Lumber & Mfg. Co. v. Atlantic Mill & Lumber Co., C.C.A.Pa., 290 F. 632—Kawfield Oil Co. v. Braymer Drilling Co., C.C.A.Kan., 287 F. 713—Chicago, B. & Q. R. Co. v. Gelvin, C.C.A.Mo., 238 F. 14, 151 C.C.A. 90, L.R.A.1917C, 983—Venner v. Pennsylvania Steel Co. of New Jersey, N.J., 233 F. 407, 147 C.C.A. 343—Pease v. Rathbun-Jones Engineering Co., Tex., 228 F. 273, 142 C.C.A. 565, affirmed 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715.

(6) That the verdict, judgment, or decree awards appellant relief or damages in excess of that to which he is entitled.—Clement v. Wilson, C.C.A.Okl., 11 F.2d 355—Cronkhite v. Chaplin, C.C.A.Okl., 282 F. 579—Santa Marina Co. v. Canadian Bank of Commerce, Cal., 254 F. 391, 165 C.C. A. 611, affirming, D.C., 242 F. 142, certiorari denied 39 S.Ct. 493, 250 U. S. 643, 63 L.Ed. 1186.

(7) Taxation of only part of the costs against appellant.—Kohler v. Kohler, C.C.A.Mont., 104 F.2d 38.

(8) Remittitur of part of judgment against appellant.—Streckfus Steamers v. Shuttleworth, C.C.A.W. Va., 86 F.2d 327, rehearing denied 86 F.2d 1013, certiorari denied 57 S. Ct. 922, 301 U.S. 694, 81 L.Ed. 1350.

58. U.S.—Scritchfield v. Kennedy, C. C.A.Okl., 103 F.2d 467—General Motors Acceptance Corporation v. American Ins. Co., C.C.A.Fla., 50 F.2d 803, certiorari denied American Ins. Co. v. General Motors Acceptance Corporation, 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571—Garfield Aniline Works v. Zendle, C.C.A.N. J., 43 F.2d 537—Illinois Surety Co. v. U. S., 215 F. 334, 131 C.C.A. 476, error granted 215 F. 1007, 131 C. C.A. 666, and modified on other grounds 36 S.Ct. 321, 240 U.S. 214, 60 L.Ed. 609.
4 C.J. p 1167 notes 94–96.

59. U.S.—Eastern States Petroleum Co. v. Gilliland Refining Co., C.C.A. Tex., 103 F.2d 186—Automobile Underwriters of Des Moines, Iowa v. Bloemer, C.C.A.Neb., 94 F.2d 474—Chase Nat. Bank of City of New York v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 79 F.2d 84—McCandless v. U. S., C.C.A.Hawaii, 74 F.2d 596, certiorari granted 56 S.Ct. 308, 296 U.S. 570, 80 L.Ed. 403, reversed on other grounds 56 S.Ct. 764, 298 U.S. 342, 80 L.Ed. 1205—Smith v. U. S., C.C.A.Ind., 63 F.2d 252—In re Schulte-United, C.C.A.Mo., 59 F.2d 553—Rector v. U. S., C.C.A.Okl., 20 F.2d 845—Parker v. Elgin, C.C.A.Tenn., 5 F. 2d 562—Sebastian Bridge Dist. v. Missouri Pac. R. Co., C.C.A.Ark., 292 F. 345, certiorari denied 44 S. Ct. 37, 263 U.S. 711, 68 L.Ed. 519—Dimmitt v. Breakey, C.C.A.Tex., 267 F. 792, certiorari denied 41 S. Ct. 13, 254 U.S. 641, 65 L.Ed. 453—Miller v. Continental Shipbuilding Corporation, C.C.A.N.Y., 265 F. 158.
4 C.J. p 912 note 77.

Nominal errors in rulings on evidence
U.S.—Jennings v. U. S., C.C.A.Ga., 73 F.2d 470.

Trivial or formal error in instructions
U.S.—Scritchfield v. Kennedy, C.C.A. Okl., 103 F.2d 467.

60. U.S.—Worcester v. Pure Torpedo Co., C.C.A.Ill., 127 F.2d 945—Lynch v. Oregon Lumber Co., C. C.A.Or., 108 F.2d 283—Gaillard v. Boynton, C.C.A.N.H., 70 F.2d 552—American Mills Co. v. Hoffman, C. C.A.N.Y., 275 F. 285—Austro-American S. S. Co. v. Thomas, N. Y., 248 F. 231, 160 C.C.A. 309, L.R. A.1918D 873—Chicago, St. P., M. & O. Ry. Co. v. Kroloff, Iowa, 217 F. 525, 133 C.C.A. 377—Coble v. Phillips Petroleum Co., D.C.Tex., 30 F. Supp. 39.
4 C.J. p 911 note 74.

Evidence
(1) Where the record shows that evidence which may, not improbably, have had a part in the final outcome

Application of rules to particular errors. The general rule stated above that nonprejudicial errors do not constitute ground for reversal has been applied to error asserted on appeal as to the remedy or procedure used or followed,[61] parties,[62] defective or insufficient pleadings,[63] rulings on pleadings[64] or motions directed to the pleadings,[65] variance be-

of the case has been erroneously admitted for the jury's consideration, prejudice will be presumed, and the burden will rest on appellee to show affirmatively that no prejudice resulted.—Worcester v. Pure Torpedo Co., C.C.A.Ill., 127 F.2d 945—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409—Antietam Paper Co. v. Womble. C.C.A.Fla., 294 F. 795—National Biscuit Co. v. Nolan, Minn., 138 F. 6, 70 C.C.A. 436—4 C.J. p 913 note 85.

(2) Like principles apply to the exclusion of evidence.—Westall v. Osborne, N.Y., 115 F. 282, 53 C.C.A. 74.

61. U.S.—Sofarelli Bros. v. Elgin, C.C.A.Md., 129 F.2d 785—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C.C.A.Iowa, 101 F.2d 144—Irons v. Smith, C.C.A.S.C., 62 F.2d 644—Milwaukee Mechanics' Ins. Co. v. Ciaccio, C.C.A.Ill., 38 F.2d 153—Great American Ins. Co. v. Johnson, C.C.A.W.Va., 27 F.2d 71, denying rehearing 25 F.2d 847, certiorari denied 49 S.Ct. 29, 278 U.S. 629, 73 L.Ed. 548—Fidelity & Casualty Co. of New York v. Glenn, C.C.A.W.Va., 3 F.2d 913.
4 C.J. p 927 note 40.

Error held prejudicial

U.S.—Burke Grain Co. v. St. Paul-Mercury Indemnity Co., C.C.A.S.D., 94 F.2d 458, certiorari denied 58 S.Ct. 765, 303 U.S. 661, 82 L.Ed. 1120—Wood v. Phillips, C.C.A.N.C., 50 F.2d 714.

62. U.S.—Grant v. Pilgrim, C.C.A. Alaska, 95 F.2d 562—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—Long v. Stites, C.C.A.Ky., 63 F.2d 855, certiorari denied 54 S.Ct. 59, 290 U.S. 640, 78 L.Ed. 556—Garretson v. National Surety Co., C.C.A.Fla., 63 F.2d 847, certiorari denied National Surety Co. v. Garretson, 54 S.Ct. 55, 290 U.S. 638, 78 L.Ed. 555—Bromfield v. Trinidad Nat. Inv. Co., C.C.A.Colo., 36 F.2d 646, 71 A.L.R. 542.

63. U.S.—Securities and Exchange Commission v. Universal Service Ass'n, C.C.A.Ill., 106 F.2d 232, certiorari denied Universal Service Ass'n v. Securities and Exchange Commission, 60 S.Ct. 378, 308 U.S. 622, 84 L.Ed. 519—Cuneo Press v. Claybourn Corporation, C.C.A.Ill., 90 F.2d 233—U. S. v. Anderson, C.C.A.Or., 70 F.2d 537—Winn v. Consolidated Coach Corporation, C.C.A. Tenn., 65 F.2d 256, certiorari denied 54 S.Ct. 453, 291 U.S. 668, 78 L.Ed. 1059, rehearing denied 54 S.Ct. 557, 291 U.S. 651—Remington Rand Business Service v. Walter J. Peterson Co., C.C.A.Mich., 58 F.2d 11—Lion Oil Refining Co. v. Albritton, C.C.A.Ariz., 21 F.2d 280—Pennsylvania R. Co. v. Wm. H. Muller & Co., C.C.A.Md., 15 F.2d 535, certiorari denied 47 S.Ct. 449, 273 U.S. 748, 71 L.Ed. 872—Keystone Coal & Coke Co. v. Petrovich, Pa., 227 F. 43, 141 C.C.A. 591.

64. U.S.—Towle v. Donnell, C.C.A. Tenn., 49 F.2d 49—Lauderdale County v. Kittel, Miss., 229 F. 593, 143 C.C.A. 615—Yates v. Whyel Coke Co., Ohio, 221 F. 603, 137 C.C.A. 327—Cummins Grocer Co. v. Talley, Tenn., 187 F. 507, 109 C.C.A. 273.

Particular rulings

(1) As to demurrers.—Tippens v. Metropolitan Life Ins. Co., C.C.A.Ga., 99 F.2d 671—Town of Hamden v. American Surety Co., C.C.A.Conn., 93 F.2d 482, affirming, D.C., Town of Hamden v. American Surety Co. of New York, 9 F.Supp. 733, and certiorari denied American Surety Co. v. Town of Hamden, 58 S.Ct. 647, 303 U.S. 648, 82 L.Ed. 1109—Missouri State Life Ins. Co. v. Langreder, C.C.A.Ill., 87 F.2d 586—Donald v. J. J. White Lumber Co., C.C.A.Miss., 68 F.2d 441—Quinn v. Smith Co., C.C.A. Fla., 57 F.2d 784—U. S. Fidelity & Guaranty Co. v. Union Indemnity Co., C.C.A.Ala., 56 F.2d 147—Sacramento Suburban Fruit Lands Co. v. Lindquist, C.C.A.Cal., 39 F.2d 900, certiorari denied 51 S.Ct. 31, 282 U.S. 853, 75 L.Ed. 756, and followed in, C.C.A., 45 F.2d 163—U. S. v. Fifteen Cases of Bred Spred, Raspberry Flavor, C.C.A.Ind., 35 F.2d 183—American Surety Co. of New York v. Blount County Bank, C.C.A.Ala., 30 F.2d 882, certiorari denied 50 S.Ct. 19, 280 U.S. 561, 74 L.Ed. 616—Louisville & N. R. Co. v. Chatters, C.C.A. La., 26 F.2d 403, affirming, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, certiorari granted Louisville & N. R. Co. v. Chatters, 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523, and reversed on other grounds 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711—U. S. Casualty Co. v. Drew, C.C.A.Cal., 5 F.2d 498—U. S. v. Northern Pac. Ry. Co., C.C.A.Wash., 293 F. 657—National Surety Co. v. First Nat. Bank, C.C.A. Ala., 293 F. 377—Ætna Life Ins. Co. v. Caffee, C.C.A.Fla., 286 F. 657—United Verde Extension Mining Co. v. Koso, C.C.A.Ariz., 273 F. 369—U. S. v. Illinois Surety Co., Ill., 226 F. 653, 141 C.C.A. 409, affirmed Illinois Surety Co. v. John Davis Co., 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206—4 C.J. p 931 note 10, p 932 note 32, p 935 note 66.

(2) As to amendments or supplemental pleadings.—Conyers v. Cleveland, C.C.A.S.C., 87 F.2d 195—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F. Supp. 864—U. S. for Use of Mengel Body Co. v. Metropolitan Body Co., C.C.A.Conn., 79 F.2d 177, 101 A.L.R. 562—H. F. Wilcox Oil & Gas Co. v. Skidmore, C.C.A.Mo., 72 F.2d 748—Union Indemnity Co. v. Vetter, C.C.A.Fla., 40 F.2d 606—Ellerd v. Griffith, C.C.A.Tex., 29 F.2d 402, certiorari denied 49 S.Ct. 480, 279 U.S. 864, 73 L.Ed. 1003—Norrie v. Lohman, C.C.A. N.Y., 16 F.2d 355—Federal Bridge Co. v. Hanson County, C.C.A.S.D., 298 F. 924—Westwater v. Murray, Ohio, 245 F. 427, 157 C.C.A. 589—Erie R. Co. v. Schmidt, N.J., 225 F. 513, 140 C.C.A. 655—4 C.J. p 944 notes 82, 84.

(3) Compelling or refusing to compel an election.—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A.Idaho, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778—Robbins v. Pennsylvania Co., Ohio, 245 F. 435, 157 C.C.A. 597.

Error held prejudicial

U.S.—Standard Lumber Co. v. Interstate Trust Co., C.C.A.Fla., 82 F.2d 346, certiorari denied Interstate Trust & Banking Co. v. Standard Lumber Co., 57 S.Ct. 8, 299 U.S. 545, 81 L.Ed. 401.

65. U.S.—Time, Inc., v. Viobin Corporation, C.C.A.Ill., 128 F.2d 860—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486.

Particular motions

(1) Motion to strike.—Davis v. Jefferson Standard Life Ins. Co., C.C.A.Ga., 73 F.2d 330, 96 A.L.R. 599, certiorari denied 55 S.Ct. 352, 294 U.S. 706, 79 L.Ed. 1241, rehearing denied 55 S.Ct. 511, 294 U.S. 732, 79 L.Ed. 1261—Richard v. Thompson, C.C.A.Alaska, 72 F.2d 807—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486—Skolar v. Lehigh Valley R. Co., C.C.A.N.Y., 60 F.2d 893—Dickason Goodman Lumber Co. v. Penn Mut. Life Ins. Co., C.C.A.Okl., 60 F.2d 225—Pacific Mut. Life Ins. Co. of California v. Barton, C.C.A. Fla., 50 F.2d 362, certiorari denied 52 S.Ct. 29, 284 U.S. 647, 76 L.Ed. 550—Fort Worth Independent School Dist. v. Ætna Casualty & Surety Co., C.C.A.Tex., 48 F.2d 1, 77 A.L.R. 223,

tween pleading and proof,[66] interlocutory orders,[67] and extraordinary or provisional remedies.[68] Also a reversal is not warranted in the case of harmless error with respect to references,[69] the selection and impaneling of jurors,[70] and the conduct of the trial or hearing in general,[71] as with respect to remarks and conduct of the judge[72] or with respect

certiorari denied 52 S.Ct. 24, 284 U.S. 645, 76 L.Ed. 548—U. S. v. Golden, C.C.A.N.M., 34 F.2d 367—Graff v. Town of Seward, Alaska, C.C.A.Alaska, 20 F.2d 816—Sunlight Carbon Co. v. St. Louis & S. F. R. Co., C.C.A. Okl., 15 F.2d 802—Martin v. Brown, C.C.A.Colo., 294 F. 436, reversing, D. C., 282 F. 717—Minnesota Mut. Inv. Co. v. McGirr, C.C.A.Colo., 263 F. 847—4 C.J. p 939 note 22.

(2) To make more definite and certain.—West Helena Consol. Co. v. McCray, Ark., 256 F. 753, 168 C.C.A. 99, certiorari denied McCray v. West Helena Consolidated Co., 39 S.Ct. 494, 250 U.S. 644, 63 L.Ed. 1186.

Error held prejudicial

U.S.—Kneberg v. H. L. Green Co., C.C.A.Ill., 89 F.2d 100.

66. U.S.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Ehrhart, C.C.A.Tenn., 127 F.2d 341—Farris v. Meyer Schuman Co., C. C.A.Ill., 115 F.2d 577—Metropolitan Life Ins. Co. v. Banion, C.C.A.Wyo., 106 F.2d 561, certiorari dismissed 60 S.Ct. 468, 309 U.S. 691, 84 L.Ed. 1033—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—Midland Valley R. Co. v. Excelsior Coal Co., C.C.A.Ark., 86 F.2d 177—El Dorado Refining Co. v. Lientz, C.C.A.Kan., 7 F.2d 814—Meade Fibre Co. v. Varn, C.C.A.S. C., 3 F.2d 520, certiorari denied 46 S.Ct. 23, 269 U.S. 564, 70 L.Ed. 414—American Ry. Express Co. v. Ewing Thomas Coverting Co., C.C. A.Pa., 292 F. 335—Druid S. S. Co. v. Allaun, N.Y., 255 F. 20, 166 C.C. A. 348.

4 C.J. p 946 note 14.

67. U.S.—State of Kansas ex rel. Beck v. Occidental Life Ins. Co., C.C.A.Kan., 95 F.2d 935, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44.

68. **Appointment of receiver**

U.S.—Robbins v. Newberg, C.C.A. Alaska, 85 F.2d 754.

Attachment or garnishment

U.S.—Lafkowitz v. Jackson, C.C.A. Mo., 13 F.2d 370.

Injunction

(1) Error held harmless.—Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., C.C.A.Okl., 100 F.2d 770, certiorari granted 59 S.Ct. 789, 306 U.S. 629, 83 L.Ed. 1032, reversed on other grounds 60 S.Ct. 215, 308 U.S. 530, 309 U.S. 4, 84 L.Ed. 447, 537, rehearing denied 60 S.Ct. 465, 309 U.S. 693, 84 L.Ed. 1034—City of Louisville v. Louisville Home Telephone Co., C. C.A.Ky., 279 F. 949—King v. Weiss & Lesh Mfg. Co., C.C.A.Tenn., 266 F. 257.

(2) Error held prejudicial.—Western Fruit Growers v. U. S., C.C.A. Cal., 124 F.2d 381, modifying, D.C., U. S. v. Western Fruit Growers, 34 F.Supp. 794.

Summary judgment

U.S.—Person v. U. S., C.C.A.Ark., 112 F.2d 1, certiorari denied 61 S.Ct. 35, 311 U.S. 672, 85 L.Ed. 432.

69. U.S.—Towle v. Donnell, C.C.A. Tenn., 49 F.2d 49—Adams v. Osley, D.C.Ga., 255 F. 117, affirmed, C.C.A., Osley v. Adams, 268 F. 114.

70. U.S.—U. S. v. Meyer, C.C.A.Ill., 113 F.2d 387, certiorari denied Meyer v. U. S., 61 S.Ct. 174, two cases, 311 U.S. 706, 85 L.Ed. 459—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—Lowenstein v. Federal Rubber Co., C.C.A.Mo., 85 F.2d 129—Kreger v. Baltimore & O. R. Co., D.C.Pa., 25 F.2d 726, affirmed, C. C.A., 25 F.2d 728—Southern Pac. Co. v. Rauh, Or., 49 F. 696, 1 C.C. A. 416.

4 C.J. p 953 note 91.

71. U.S.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297—Twachtman v. Connelly, C.C.A. Ohio, 106 F.2d 501—Hindel v State Farm Mut. Auto Ins. Co. of Bloomington, Ill., C.C.A.Ind., 97 F.2d 777, certiorari denied State Farm Mut. Auto Ins. Co. of Bloomington, Ill. v. Hindel, 59 S.Ct. 153, 305 U.S. 647, 83 L.Ed. 418—Liverpool & London & Globe Ins. Co. of Liverpool, England, v. Nebraska Storage Warehouses, C.C.A.Neb., 96 F.2d 30—Atlantic Greyhound Lines of West Virginia v. Metz, C.C.A.Va., 70 F.2d 166, certiorari denied 55 S.Ct. 73, 293 U.S. 562, 79 L.Ed. 662—Nelson v. Jadrijevics, C.C.A.Canal Zone, 68 F.2d 631, certiorari denied 54 S.Ct. 862, 292 U.S. 652, 78 L.Ed. 1501—American Trust Co. v. Butler, C.C. A.Fla., 47 F.2d 482—Crocker First Federal Trust Co. v. U. S., C.C.A. Cal., 38 F.2d 545—Federal Reserve Bank of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n, C.C.A.Idaho, 8 F.2d 922, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778—Denman v. Richardson, C.C.A.Wash., 292 F. 19—Swiftwater Plantations Co. v. Davis, C.C.A.Miss., 287 F. 813—Arnold v. U. S., for Use of W. B. Guimarin & Co., C.C.A.S.C., 280 F. 338, error dismissed 44 S.Ct. 144, 263 U.S. 427, 68 L.Ed. 371—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 277 F. 625, certiorari denied 42 S.Ct. 589, 259 U.S. 584, 66 L.Ed. 1076—Alley v. Bessemer Gas Engine Co., C.C.Tex., 262 F. 94—Fay v. Hill, Mo., 249 F. 415, 161 C.C.A. 389—Southern Ry. Co. v. Board of Com'rs of Public Works of City of Union, S.C., 246 F. 383, 158 C.C.A. 447.

Refusal to hear argument

U.S.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Polak, C.C. A.Idaho, 7 F.2d 583, certiorari denied 46 S.Ct. 106, 269 U.S. 581, 70 L.Ed. 423.

Error held prejudicial

U.S.—F. W. Woolworth Co. v. Davis, C.C.A.Okl., 41 F.2d 342, certiorari denied 51 S.Ct. 33, 282 U.S. 859, 75 L.Ed. 760—Union Pac. R. Co. v. Syas, Colo., 246 F. 561, 158 C.C.A. 531.

72. U.S.—Scott v. Beams, C.C.A.Okl., 122 F.2d 777—Chapman v. Alton R. Co., C.C.A.Ill., 117 F.2d 669—National Labor Relations Board v. Ford Motor Co., C.C.A., 114 F.2d 905, certiorari denied 61 S.Ct. 621, 312 U.S. 689, 85 L.Ed. 1126—Paul v. Elliott, C.C.A.Mont., 107 F.2d 872—Nelson v. Devney, C.C.A.Wis., 102 F.2d 487—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Streckfus Steamers v. Shuttleworth, C.C.A.W.Va., 86 F. 2d 327, rehearing denied 86 F.2d 1013, certiorari denied 57 S.Ct. 922, 301 U.S. 694, 81 L.Ed. 1350—Andrews v. Drake, C.C.A.Mich., 83 F. 2d 767, certiorari denied 57 S.Ct. 35, 299 U.S. 572, 81 L.Ed. 421—U. S. v. Harless, C.C.A.W.Va., 76 F.2d 317—Brumberger v. Burke, C. C.A.N.J., 56 F.2d 54—Mason & Hanger Co. v. Burnam, C.C.A.Ky., 36 F.2d 330—Whiteside v. U. S., C.C.A.Or., 35 F.2d 452—Payne v. Daugherty, C.C.A.Neb., 283 F. 353—Lyons v. U. S. Shipping Board Emergency Fleet Corporation, C.C. A.La., 278 F. 144—New York, N. H. & H. R. Co. v. Fruchter, C.C.A.N.Y., 271 F. 419, certiorari granted 41 S.Ct. 449, 256 U.S. 686, 65 L.Ed. 1171, reversed on other grounds 43 S.Ct. 38, 260 U.S. 141, 67 L.Ed. 173—Arkansas Grand Prairie Oil & Gas Co. v. Davidson, Pa., 233 F. 641, 147 C.C.A. 449—Pennsylvania Co. v. Ganger, Ohio, 231 F. 851, 146 C.C.A. 47—Pennsylvania Co. v. Whitney, Ohio, 169 F. 572, 95 C.C. A. 70—Johnson v. Roy, N.Y., 112 F. 256, 50 C.C.A. 237.

D.C.—Gutshall v. Wood, 123 F.2d 174, 74 App.D.C. 379.

to remarks and conduct of counsel.[73]

The rule that error is not ground for reversal, if not prejudicial, also applies in the case of errors with respect to dismissal,[74] nonsuit,[75] or direction of verdict,[76] and the submission of issues or questions to the jury.[77]

Error held prejudicial
U.S.—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101—New York Life Ins. Co. v. Sparkman, C.C.A.Fla., 101 F.2d 484—Williams v. U. S., C.C.A., 93 F.2d 685—McCoy v. Universal Carloading & Distributing Co., C.C.A.Ohio, 82 F.2d 342—Atlantic Refining Co. v. Jones, C.C.A.W.Va., 70 F.2d 89.

73. U.S.—Heald v. Milburn, C.C.A. Ill., 125 F.2d 8—Thomson v. Boles, C.C.A.Minn., 123 F.2d 487—Dromey v. Inter State Motor Freight Service, C.C.A.Ill., 121 F.2d 361—Braman v. Wiley, C.C.A.Ind., 119 F.2d 991—Phœnix Mut. Life Ins. Co. of Hartford, Conn. v. Harmegnies, C. C.A.Mo., 110 F.2d 20—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Morrow v. U. S., C.C.A.Ill., 101 F.2d 654, certiorari denied 59 S.Ct. 836, 307 U.S. 628, 83 L.Ed. 1511—Mutual Life Ins. Co. of New York v. City Nat. Bank & Trust Co. of Chicago, C.C.A.Ill., 86 F.2d 660—Kierce v. Central Vermont Ry., C.C.A.Vt., 79 F.2d 198, certiorari denied Central Vermont Ry. v. Kierce, 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447—Currier v. Ingram, C.C.A.N.H., 75 F.2d 783—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Minn., 74 F.2d 31—Town of Bolivar, Tenn., v. Kelly, C.C.A. Tenn., 69 F.2d 68—Prevette v. U. S., C.C.A.N.C., 68 F.2d 112, certiorari denied 54 S.Ct. 633, 292 U.S. 622, 78 L.Ed. 1478—Mason v. U. S., C.C.A.Vt., 63 F.2d 791—Fidelity & Casualty Co. of New York v. Niemann, C.C.A.Mo., 47 F.2d 1056—Lord & Spencer v. M. N. Stout Co., C.C.A.Mass., 33 F.2d 60—Jacoby v. Kelley, C.C.A.N.J., 296 F. 590—Michigan Mut. Life Ins. Co. v. Oliver, Ala., 256 F. 212, 167 C.C.A. 428, certiorari denied 39 S.Ct. 494, 250 U.S. 646, 63 L.Ed. 1187—Puget Sound Electric Ry. v. Matson, Wash., 253 F. 33, 165 C.C.A. 53.

Error held prejudicial
U.S.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297—Twachtman v. Connelly, C.C.A. Ohio, 106 F.2d 501—Mutual Life Ins. Co. of New York v. City Nat. Bank & Trust Co. of Chicago, C. C.A.Ill., 86 F.2d 660—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Minn., 84 F.2d 569—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80—Ætna Life Ins. Co. of Hartford, Conn. v. Kelley, C.C.A.Mo., 70 F.2d 589, 93 A.L.R. 471—Panama Electric Co. v. Moyers, Canal Zone, 259 F. 219, 170 C.C.A. 287—Quinette v. Pullman Co., Okl., 229 F. 333, 143 C.C.A. 453, rehearing denied 233 F. 890, 147 C.C.A. 654.

74. U.S.—Pickett v. Trixler, C.C.A. Ind., 93 F.2d 178, certiorari denied 58 S.Ct. 751, 303 U.S. 652, 82 L. Ed. 1113—Butler v. U. S., C.C.A. Neb., 261 F. 841—Porter v. Coble, Neb., 246 F. 244, 158 C.C.A. 404.

75. U.S.—Aiken Mills v. Boss Mfg. Co., C.C.A.N.Y., 65 F.2d 344.

76. U.S.—Omaha Packing Co. v. Pittsburgh, F. W. & C. Ry. Co., C. C.A.Ill., 120 F.2d 594, certiorari denied 62 S.Ct. 85, 314 U.S. 645, 86 L. Ed. 517—Cochran v. M & M Transp. Co., C.C.A.R.I., 110 F.2d 519—Zaks v. Elliott, C.C.A.S.C., 106 F.2d 425, reversing, D.C., Krupnick v. Peoples State Bank of South Carolina, 25 F.Supp. 857—Southern Tallow Co. v. David J. Joseph & Co., C.C.A.Fla., 101 F.2d 862—Witmer v. U. S., C.C.A.Pa., 96 F.2d 745—National Liberty Ins. Co. of America v. Police Jury of Natchitoches Parish, C.C.A.La., 96 F.2d 261—Ralston Purina Co. v. Bansau, C.C.A.Ill., 73 F.2d 430—Chickasha Cotton Oil Co. v. Roden, C.C. A.Okl., 66 F.2d 127—General Tire Co. of Minneapolis v. Standard Accident Ins. Co., C.C.A.Minn., 65 F. 2d 237—Union Trust Co. of Cleveland, Ohio v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602—Wickwire v. Reinecke, C.C.A.Ill., 14 F.2d 956, certiorari granted 47 S.Ct. 336, 273 U.S. 687, 71 L.Ed. 840, and reversed on other grounds 48 S.Ct. 43, 275 U.S. 101, 72 L.Ed. 184—Breakwater Co. v. Donovan, Ohio, 218 F. 340, 134 C.C.A. 148—Lamar v. Spalding, N.J., 154 F. 27, 83 C. C.A. 111.
4 C.J. p 1021 note 9, p 1022 notes 18, 32, p 1023 note 39.

77. U.S.—Reading Co. v. Larkin, C.C.A.Pa., 114 F.2d 416, affirming, D.C., Larkin v. Reading Co., 28 F. Supp. 292, and certiorari denied 61 S.Ct. 175, 311 U.S. 707, 85 L.Ed. 459—Dallas Ry. & Terminal Co. v. Sullivan, C.C.A.Tex., 108 F.2d 581—North American Accident Ins. Co. v. Tebbs, C.C.A.Utah, 107 F.2d 853, certiorari denied 60 S.Ct. 717, 309 U.S. 678, 84 L.Ed. 1022—City of Reading v. Rae, C.C.A.Pa., 106 F.2d 458, affirming, D.C., Rae v. City of Reading, 24 F.Supp. 566, and certiorari denied City of Reading v. Roe, 60 S.Ct. 145, 308 U.S. 607, 84 L.Ed. 508—Alabama Title & Trust Co. v. Millsap, C.C.A.Ala., 71 F.2d 518—Wabash Ry. Co. v. Beez, C.C.A.Ohio, 36 F.2d 480—Brill v. Reading Co., C.C.A.Pa., 16 F.2d 461—Erie Food Products Co. v. Interocean Mercantile Corporation, C.C. A.Ohio, 299 F. 71—Lehigh Valley R. Co. v. Normile, N.Y., 254 F. 680, 166 C.C.A. 178—United Press Ass'ns, v. National Newspapers Ass'n, Colo., 254 F. 284, 165 C.C.A. 572—Chicago Rys. Co. v. Kramer, Ill., 234 F. 245, 148 C.C.A. 147—Canadian Pac. Ry. Co. v. Black, N.Y., 230 F. 798, 145 C.C.A. 108, affirming, D.C., Black v. Canadian Pac. Ry., 218 F. 239—Coopersville Co-Operative Creamery Co. v. Lemon, Mich., 163 F. 145, 89 C.C.A. 595.
4 C.J. p 1023 notes 49, 54, p 1027 note 91.

Submission of issues of law
U.S.—Gildner v. Baltimore & O. R. Co., C.C.A.N.Y., 90 F.2d 635—Pipe & Tube Bending Corporation of America v. Cornine-Hakanson Die-Casting Co., C.C.A.N.J., 27 F.2d 32—Mills Woven Cartridge Belt Co. v. Malley, C.C.A.Mass., 286 F. 841—Morris & Co. v. Fels & Co., C.C.A. Pa., 278 F. 172—Missouri Dist. Telegraph Co. v. Morris & Co., Mo., 243 F. 481, 156 C.C.A. 179, certiorari denied 38 S.Ct. 11, 245 U.S. 651, 62 L.Ed. 531—Philadelphia Casualty Co. v. Thacher, Mass., 236 F. 869, 150 C.C.A. 131—Continental Public Works Co. v. Stein, N.Y., 232 F. 559, 146 C.C.A. 517—Wilmoth v. Hamilton, Pa., 127 F. 48, 61 C.C.A. 584.

Error held prejudicial
(1) Generally.—McCrate v. Morgan Packing Co., C.C.A.Ohio, 117 F.2d 702—Geraghty v. Lehigh Valley R. Co., C.C.A.N.Y., 70 F.2d 300—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—Murray v. Third Nat. Bank of St. Louis, Ohio, 234 F. 481, 148 C.C.A. 247.

(2) Failure or refusal to submit material issues to the jury, or the withdrawal of material issues submitted.—Katila v. Baltimore & O. R. Co., C.C.A.Ohio, 104 F.2d 842—Darling Shops of Tennessee v. Brack, C. C.A.Ark., 95 F.2d 135—Erie R. Co. v. Gallagher, N.Y., 255 F. 814, 167 C.C. A. 142—U. S. Cast Iron Pipe & Foundry Co. v. Eastham, Ala., 237 F. 185, 150 C.C.A. 331—Chicago, St. P., M. & O. Ry. Co. v. Kroloff, Iowa, 217 F. 525, 133 C.C.A. 377.

(3) Error affecting only one of two counts of declaration is sufficient to require reversal of judgment for plaintiff on general verdict fitting either count.—Travelers' Ins. Co. v. Wilkes, C.C.A.Fla., 76 F.2d 701, certiorari denied Hirsig v. Travelers Ins. Co., 56 S.Ct. 120, 296 U.S. 604, 80 L.Ed. 428.

If no prejudice results therefrom, a cause will not be reversed because of erroneous declarations of law by the court,[78] or because of error in the conduct and deliberations of the jury,[79] the verdict,[80] findings of fact and conclusions of law,[81] judgment, decree, or order,[82] or in the proceedings after judg-

78. U.S.—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A.Ind., 118 F.2d 163—Noguera v. Fuertes, C.C.A.Puerto Rico, 8 F.2d 115—St. Bernard Cypress Co. v. Johnson, La., 222 F. 246, 137 C.C.A. 662.

79. U.S.—Breslin v. National Surety Co., C.C.A.Pa., 114 F.2d 65—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—Montgomery Ward & Co. v. Medline, C.C.A.N.C., 104 F.2d 485—Fillipon v. Albion Vein Slate Co., Pa., 242 F. 258, 155 C.C.A. 98, certiorari granted Fillippon v. Albion Vein Slate Co., 38 S.Ct. 12, 245 U.S. 648, 62 L.Ed. 530, and reversed on other grounds Fillippon v. Albion Vein Slate Co., 39 S.Ct. 435, 250 U. S. 76, 63 L.Ed. 853.
4 C.J. p 954 note 15.

Error held prejudicial
U.S.—Parfet v. Kansas City Life Ins. Co., C.C.A.Colo., 128 F.2d 361—Arrington v. Robertson, C.C.A.Pa., 114 F.2d 821—Gasoline Products Co. v. Champlin Refining Co., C.C.A.Me., 39 F.2d 521, certiorari granted 51 S. Ct. 76, 282 U.S. 824, 75 L.Ed. 735, and reversed on other grounds 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188.
4 C.J. p 954 note 21.

80. U.S.—Gulf Refining Co. v. Fetschan, C.C.A.Ohio, 130 F.2d 129—Barnsdall Refining Corporation v. Cushman-Wilson Oil Co., C.C.A. Iowa, 97 F.2d 481—Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co., C.C.A.W.Va., 11 F.2d 87—Sheehan v. Braddock Coal Co., C.C. A.Mass., 293 F. 573, certiorari denied 44 S.Ct. 334, 264 U.S. 585, 68 L.Ed. 862—Bank of Palmetto v. Hyman, C.C.A.Ga., 290 F. 353—United Mine Workers of America v. Coronado Coal Co., Ark., 258 F. 829, 169 C.C.A. 549; reversed on other grounds 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition for rehearing granted 42 S.Ct. 587—Bryan v. Louisville & N. R. Co., Mo., 244 F. 650, 157 C.C. A. 98, error dismissed and certiorari denied 38 S.Ct. 334, 246 U.S. 651, 664, 62 L.Ed. 921.

Error held prejudicial
U.S.—McCoy v. Gaddes, C.C.A.Pa., 88 F.2d 480.

81. U.S.—Fanchon & Marco v. Hagenbeck-Wallace Shows Co., C.C.A. Cal., 125 F.2d 101—Walker v. Lightfoot, C.C.A.Idaho, 124 F.2d 3—Kustoff v. Chaplin, C.C.A.Cal., 120 F.2d 551, affirming, D.C., 32 F. Supp. 772—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A. Mo., 105 F.2d 496—Midland Valley R. Co. v. Railroad Express Agency, C.C.A.Okl., 105 F.2d 201—Model Dairy Co. v. Foltis-Fischer, Inc., C. C.A.N.Y., 91 F.2d 971—Theatre Realty Co. v. Aronberg-Fried Co., C.C.A.Mo., 85 F.2d 383—Consolidated Indemnity & Insurance Co. v. W. A. Smoot & Co., 57 F.2d 995, certiorari denied 53 S.Ct. 16, 287 U. S. 613, 77 L.Ed. 533—U. S. v. Rhodes, C.C.A.W.Va., 49 F.2d 228—U. S. v. Salmon, C.C.A.Miss., 42 F.2d 353—Mayes v. Paul Jones & Co., C.C.A.Ky., 270 F. 121, affirming D.C., Paul Jones & Co. v. Mayes, 265 F. 365—Bluefields S. S. Co. to Use of Elmer E. Wood v. United Fruit Co., Pa., 243 F. 1, 155 C.C.A. 531, error dismissed 39 S.Ct. 136, 248 U.S. 595, 63 L.Ed. 438—Panama R. Co. v. Beckford, Canal Zone, 231 F. 436, 145 C.C.A. 430.

Error held prejudicial
U.S.—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 49 F.2d 692.

Rulings on questions of law
U.S.—Fred W. Mears Heel Co. v. Walley, C.C.A.Me., 71 F.2d 876, affirming, D.C., Walley v. Fred W. Mears Heel Co., 4 F.Supp. 277, certiorari denied Fred W. Mears Heel Co. v. Walley, 55 S.Ct. 122, 293 U.S. 605, 79 L.Ed. 696—Exner v. Sherman Power Const. Co., C.C.A.Vt., 54 F.2d 510, 80 A.L.R. 686—Southern New England R. Corporation v. Marsch, C.C.A.Mass., 45 F.2d 766—Bluefields S. S. Co. to Use of Elmer E. Wood v. United Fruit Co., Pa., 243 F. 1, 155 C.C.A. 531, error dismissed 39 S.Ct. 136, 248 U.S. 595, 63 L.Ed. 438.

Failure or refusal to state findings or conclusions
(1) Error held harmless.—Kustoff v. Chaplin, C.C.A.Cal., 120 F.2d 551, affirming, D.C., 32 F.Supp. 772—Fox v. Mutual Ben. Life Ins. Co., C.C.A. Mo., 107 F.2d 715—Ralston Purina Co. v. Bansau, C.C.A.Ill., 73 F.2d 430—Toledo, P. & W. R. R. v. Peoria & P. U. Ry. Co., C.C.A.Ill., 72 F.2d 745—Woo King-Hsun v. Pemberton & Penn, C.C.A.China, 66 F.2d 811—Bryant Paper Co. v. Holden, C.C.A. Mich., 63 F.2d 370, rehearing denied 65 F.2d 1012, and certiorari denied 54 S.Ct. 49, 290 U.S. 631, 78 L.Ed. 549—U. S. v. New York, C. & St. L. R. Co., C.C.A.Ohio, 32 F.2d 887—U. S. v. Sligh, C.C.A.Ariz., 31 F.2d 735, certiorari denied 50 S.Ct. 18, 280 U.S. 559, 74 L.Ed. 614—Sun Co. v. Vinton Petroleum Co., Tex., 248 F. 623, 160 C.C.A. 523, certiorari denied 38 S.Ct. 580, 247 U.S. 514, 62 L.Ed. 1244.

(2) Error held prejudicial.—Horwitz v. New York Life Ins. Co., C.C. A.Or., 80 F.2d 295—May v. Marbury, C.C.A.Tenn., 39 F.2d 438, certiorari denied 51 S.Ct. 32, 282 U.S. 857, 75 L. Ed. 758.

82. U.S.—Dellefield v. Blockdel Realty Co., C.C.A.N.Y., 128 F.2d 85—Sonken-Galamba Corporation v. Butler Iron & Steel Co., C.C.A.Mo., 119 F.2d 283, certiorari denied 62 S.Ct. 73, 314 U.S. 638, 86 L.Ed. 512—Scott v. Jones, C.C.A.Kan., 118 F. 2d 30—Sun-Maid Raisin Growers Ass'n v. Neustadter Bros., C.C.A. Cal., 115 F.2d 126—Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, C. C.A.Ind., 113 F.2d 217, reversed on other grounds 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47—Muckenfuss v. Marchant, C.C.A.S.C., 105 F.2d 469—International Co. of St. Louis v. Occidental Life Ins. Co. of California, C.C.A.Mo., 98 F.2d 138, certiorari denied International Co. of St. Louis v. Accidental Life Ins. Co., 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 412—Tilton v. Ætna Life Ins. Co. of Hartford, Conn., C.C.A. Tex., 67 F.2d 898—U. S. v. Wooten, C.C.A.N.M., 40 F.2d 882—U. S. v. George A. Fuller Co., C.C.A.Kan., 14 F.2d 813, affirming, D.C., 6 F.2d 879—Nolte v. Hudson Nav. Co., C.C. A.N.Y., 11 F.2d 680—Harvey Hubbell, Inc., v. General Electric Co., C.C.A.N.Y., 267 F. 564—Finley v. Halliburton, Okl., 251 F. 860, 164 C.C.A. 76, certiorari denied 39 S.Ct. 12, 248 U.S. 575, 63 L.Ed. 428—Bankers' Trust Co. v. Missouri, K. & T. Ry. Co., Mo., 251 F. 789, 164 C.C.A. 23—Carson v. Hurt, Tex., 250 F. 30, 162 C.C.A. 202—Cooper v. Jewett, S.D., 233 F. 618, 147 C.C.A. 426—U. S. v. Institute of Carpet Manufacturers of America, D.C.N. Y., 1 F.R.D. 636.

Amount
U.S.—Dellefield v. Blockdel Realty Co., C.C.A.N.Y., 128 F.2d 85—U. S. v. Rodiek, C.C.A.N.Y., 120 F.2d 760, denying rehearing 117 F.2d 588, certiorari granted Rodiek v. U. S., 62 S.Ct. 101, 314 U.S. 597, 86 L.Ed. 481—Orient Petroleum Co. v. Wichita State Bank & Trust Co., C.C.A.Tex., 16 F.2d 417, rehearing denied 17 F.2d 263—United Transp. Co. v. Berwind-White Coal-Mining Co., C.C.A.N.Y., 13 F.2d 282, affirming, D.C., 13 F.2d 281—Lee Blakemore, Inc., v. Lewelling, C.C.A. Ark., 281 F. 952—Standard Chemical & Oil Co. v. N. P. Sloan Co., C. C.A.Ala., 268 F. 225—Hughitt v. Wayne County Securities Co., Ill., 251 F. 57, 163 C.C.A. 307—Cooper v. Jewett, S.D., 233 F. 618, 147 C.

ment.[83]

Instructions. The giving of an erroneous instruction will not constitute a ground for reversal where the complaining party has not been injured thereby.[84] On the other hand, when the case has been submitted on erroneous instructions which operate to the prejudice of the complaining party, the judgment will be reversed.[85] The giving of in-

C.A. 426—Princess Furnace Co. v. Virginia-Carolina Chemical Co., Va., 218 F. 68, 134 C.C.A. 20, denying rehearing 215 F. 329, 131 C.C.A. 471.

Error held prejudicial

U.S.—Asher v. Bone, C.C.A.Idaho, 100 F.2d 315.

83. U.S.—Blumenfeld v. Union Nat. Bank of Beloit, Kan., C.C.A.Kan., 38 F.2d 455—Baltimore S. S. Co. v. Phillips, C.C.A.N.Y., 9 F.2d 902, certiorari granted 46 S.Ct. 348, 270 U.S. 638, 70 L.Ed. 774, and reversed on other grounds 47 S.Ct. 600, 274 U.S. 316, 71 L.Ed. 1069—Mound Coal Co. v. Jeffrey Mfg. Co., W.Va., 240 F. 129, 153 C.C.A. 165.

4 C.J. p 1066 notes 89, 91.

84. U.S.—Gulf Refining Co. v. Fetschan, C.C.A.Ohio, 130 F.2d 129—Hoffman v. Palmer, C.C.A.N.Y., 129 F.2d 976—Smails v. O'Malley, C.C.A.Neb., 127 F.2d 410—Blair v. National Security Ins. Co., C.C.A.N.J., 126 F.2d 955—New York Life Ins. Co. v. Rogers, C.C.A.Ariz., 126 F.2d 784—Boyle v. Ward, C.C.A.Pa., 125 F.2d 672, affirming, D.C., 39 F.Supp. 545—American Ins. Co. of Newark, N. J. v. Vann, C.C.A.N.C., 118 F.2d 1004—Chesapeake & O. Ry. Co. v. Richardson, C.C.A.Ohio, 116 F.2d 860, certiorari denied 61 S.Ct. 961, 313 U.S. 574, 85 L.Ed. 1531—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, 311 U.S. 699, 85 L.Ed. 453, rehearing denied 61 S.Ct. 391, 311 U.S. 730, 85 L.Ed. 475—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101—Shell Oil Co. v. Kamper, C.C.A.Miss., 111 F.2d 569—Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Harmegnies, C.C.A.Mo., 110 F.2d 20—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 87, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Klas v. Yellow Cab Co., C.C.A.Ill., 106 F.2d 935—Virginia-Carolina Tie & Wood Co. v. Dunbar, C.C.A.N.C., 106 F.2d 383—Scritchfield v. Kennedy, C.C.A.Okl., 103 F.2d 467—Hazeltine v. Johnson, C.C.A.Mont., 92 F.2d 866—Kansas City Southern Ry. Co. v. Quin, C.C.A.La., 85 F.2d 485, certiorari denied 57 S.Ct. 116, 299 U.S. 590, 81 L.Ed. 434—Maryland Casualty Co. v. Wyoming Valley Paper Co., C.C.A.N.H., 84 F.2d 633—Penn Mut. Life Ins. Co. v. Tilton, C.C.A.N.M., 84 F.2d 10—Blaydes v. Barnes, C.C.A.Va., 81 F.2d 198—Tyson-Long Co. v. Wolfe, C.C.A.Ill., 81 F.2d 82—Miller v. Hockley, C.C.A.Md., 80 F.2d 980, certiorari denied 56 S.Ct. 677, 298 U.S. 657, 80 L.Ed. 1383—Forno v. Coyle, C.C.A.Alaska, 75 F.2d 692—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio, 74 F.2d 606—Century Indemnity Co. v. Shakespeare, C.C.A.Colo., 74 F.2d 392—Atlantic Greyhound Lines of West Virginia v. Metz, C.C.A.Va., 70 F.2d 166, certiorari denied 55 S.Ct. 73, 293 U.S. 562, 79 L.Ed. 662—Tennessee R. Co. v. Thompson, C.C.A.Tenn., 50 F.2d 892, certiorari denied 52 S.Ct. 23, 284 U.S. 643, 76 L.Ed. 547—London Guarantee & Accident Co. v. Leefson, C.C.A.Pa., 37 F.2d 488—Dunnagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649—Board of Drainage Com'rs of Pender County Drainage Dist. No. 4 v. Lafayette Southside Bank of St. Louis, C.C.A.N.C., 27 F.2d 286—Gotham Nat. Bank of New York v. Sharood Co., C.C.A.N.Y., 23 F.2d 567—Lamborn v. Northern Jobbing Co., C.C.A.Ill., 15 F.2d 897—McNeil & Higgins Co. v. Howell, C.C.A.Ill., 10 F.2d 969—Kutztown Foundry & Machine Co. v. Sloss-Sheffield Steel & Iron Co., C.C.A.Pa., 279 F. 627—U. S. Fidelity & Guaranty Co. v. Sutherlin Const. Co., C.C.A.La., 263 F. 360—Donovan v. Universal Motor Truck Co., C.C.A.Mass., 262 F. 322—Lake Erie & W. R. Co. v. Schneider, Ohio, 257 F. 675, 168 C.C.A. 625—Memphis St. Ry. Co. v. Pierce, Tenn., 257 F. 659, 168 C.C.A. 609—American Temperance Life Ins. Ass'n of City of New York v. Solomon, Pa., 233 F. 213, 147 C.C.A. 219—Denison v. McNorton, Ohio, 228 F. 401, 142 C.C.A. 631—Cloquet Lumber Co. v. Burns, Minn., 222 F. 857, 138 C.C.A. 283—Otis v. Pittsburgh-Westmoreland Coal Co., Pa., 220 F. 595, 136 C.C.A. 53, certiorari denied 35 S.Ct. 941, 238 U.S. 639, 59 L.Ed. 1501—City of Philadelphia v. Welsbach Street Lighting Co. of America, 218 F. 721, 134 C.C.A. 399, certiorari denied 35 S.Ct. 418, 238 U.S. 618, 59 L.Ed. 1492—Eastern Oil & Rendering Co. v. Thompson, N.H., 217 F. 204, 133 C.C.A. 198—Memphis St. Ry. Co. v. Huggins, Tenn., 215 F. 37, 131 C.C.A. 345.

4 C.J. p 1029 note 30, p 1039 note 16.

Particular errors

(1) Instruction which is informal, inaccurate, incomplete, or lacking in clearness or certainty.—Shell Oil Co. v. State Tire & Oil Co., C.C.A.Tenn., 126 F.2d 971—Dryfoos v. Scavenger Service Corporation, C.C.A.Ill., 115 F.2d 637—Trucking, Inc., v. Krotzer, C.C.A.Ohio, 106 F.2d 447—Lindback v. Milter, C.C.A.Pa., 70 F.2d 454—Atlanta & St. A. B. Ry. Co. v. Register, C.C.A.Fla., 69 F.2d 323—Sunny Point Packing Co. v. Faigh, C.C.A.Alaska, 53 F.2d 921—Cudahy Packing Co. v. Luyben, C.C.A.Neb., 9 F.2d 32—Ohlen-Bishop Co. v. Schwartz-Hermann Steel Works, C.C.A.Ohio, 287 F. 539—Alamo Cattle Co. v. Hall, Ariz., 220 F. 832, 136 C.C.A. 578.

(2) Instruction which is immaterial, or on an immaterial issue or question.—Equitable Life Assur. Soc. of U. S. v. Bomar, C.C.A.Ky., 106 F.2d 640—4 C.J. p 1037 note 76.

(3) Conflicting instructions.—McKee v. Producers' & Refiners' Corporation, C.C.A.Okl., 46 F.2d 36—Lord & Spencer v. M. N. Stout Co., C.C.A.Mass., 33 F.2d 60.

Instructions as to particular matters

(1) As to damages.—Payne v. Colvin, C.C.A.Wis., 276 F. 15, certiorari denied Davis v. Colvin, 42 S.Ct. 92, 257 U.S. 652, 66 L.Ed. 417—Pennsylvania Co. v. Cole, Ohio, 214 F. 948, 131 C.C.A. 244.

(2) As to degree of care or negligence.—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649—Panama R. Co. v. Johnson, C.C.A.N.Y., 289 F. 964, affirmed 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748—Denison v. McNorton, Ohio, 228 F. 401, 142 C.C.A. 631—Puget Sound Traction Light & Power Co. v. Hunt, Wash., 223 F. 952, 139 C.C.A. 432.

(3) As to burden of proof and preponderance of evidence.—Meissner v. Papas, C.C.A.Wis., 124 F.2d 720—American Ins. Co. of Newark, N. J., v. Vann, C.C.A.N.C., 118 F.2d 1004—Wilks v. U. S., C.C.A.N.Y., 65 F.2d 775—Motor Requirements Corporation v. Keystone Watch Case Corporation, C.C.A.N.J., 64 F.2d 274—Johnson v. Hislop, C.C.A.Mont., 272 F. 913.

(4) As to expert testimony.—Aetna Life Ins. Co. of Hartford, Conn. v. Kelley, C.C.A.Mo., 70 F.2d 589, 93 A.L.R. 471—Travelers' Ins. Co. v. Schenkel, C.C.A.Mo., 35 F.2d 611, rehearing denied 37 F.2d 254.

85. U.S.—Bedser v. Horton Motor Lines, C.C.A.Va., 122 F.2d 406—Wood v. Morrow, C.C.A.Miss., 119 F.2d 776—Fort Dodge Hotel Co. of Fort Dodge, Iowa v. Bartelt, C.C.A.Iowa, 119 F.2d 253—L. E. Whitham

structions which are abstract or not authorized by, or applicable to, the pleadings and evidence is ordinarily harmless error,[86] except where prejudice is shown;[87] but instructions which improperly assume the existence of a material fact are ordinarily prejudicial.[88] Error may be regarded as cured and not to warrant a reversal where it is clear that the verdict or judgment is correct, and that no prejudice resulted from the erroneous instructions,[89] as in the case of erroneous instructions with respect to the

Const. Co. v. Remer, C.C.A.Okl., 93 F.2d 736—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 89 F.2d 557, certiorari denied Thompson v. Falstaff Brewing Corporation, 58 S.Ct. 28, 302 U.S. 709, 82 L.Ed. 547—Western Union Telegraph Co. v. Hudson, C.C.A.Cal., 82 F.2d 992—Linde Air Products Co. v. Cameron, C.C.A.W.Va., 82 F.2d 22—American Steel Foundries v. Hunt, C.C.A.Ohio, 79 F.2d 558, certiorari denied Hunt v. American Steel Foundries, 56 S.Ct. 499, 297 U.S. 707, 80 L.Ed. 995—New York Life Ins. Co. v. Anderson, C.C.A. Minn., 66 F.2d 705—Puget Sound Nav. Co. v. Nelson, C.C.A.Wash., 59 F.2d 697—Pullman Co. v. Hall, C. C.A.W.Va., 55 F.2d 139—College Silk Throwing Co. v. American Credit Indemnity Co. of New York, C.C.A.N.J., 43 F.2d 668, certiorari denied 51 S.Ct. 105, 282 U.S. 891, 75 L.Ed. 786—Rode v. Gonterman, C. C.A.Ill., 41 F.2d 1—Automobile Ins. Co. of Hartford, Conn. v. Central Nat. Bank, Savings & Trust Co., C.C.A.Ohio, 20 F.2d 619—Baltimore & O. R. Co. v. U. S., Ohio, 242 F. 1, 154 C.C.A. 593—American Locomotive Co. v. Harris, R.I., 239 F. 234, 152 C.C.A. 222.

Particular errors

(1) Instructions expressing court's opinion on a material fact.—Pullman Co. v. Hall, C.C.A.W.Va., 46 F.2d 399.

(2) Instructions singling out and giving undue prominence to particular issues, theories, or portions of the evidence.—Delaware & H. Co. v. Stankus, C.C.A.Pa., 66 F.2d 186.

86. U.S.—Detroit Edison Co. v. Ewing, C.C.A.Mich., 122 F.2d 852—Hupp Motor Car Corporation v. Wadsworth, C.C.A.Mich., 113 F.2d 827—Rackoff v. U. S., C.C.A.N.Y., 78 F.2d 671—Delaware & H. R. Corporation v. Cottrell, C.C.A.Pa., 69 F.2d 195, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490—Chesapeake & O. Ry. Co. v. Coffey, C.C.A.Va., 37 F.2d 320, certiorari denied 50 S.Ct. 353, 281 U.S. 749, 74 L.Ed. 1160—Lord & Spencer v. M. N. Stout Co., C.C.A. Mass., 33 F.2d 60—Pennsylvania R. Co. v. Lutton, C.C.A.Ohio, 29 F.2d 689, certiorari denied 50 S.Ct. 29, 280 U.S. 574, 74 L.Ed. 626—Sun Oil Co. v. Rhodes, C.C.A.Ark., 15 F.2d 790—Passaic Valley Sewerage Com'rs v. Holbrook, Cabot & Rollins Corporation, C.C.A.N.Y., 6 F. 2d 721, certiorari denied 46 S.Ct. 107, 269 U.S. 582, 70 L.Ed. 423—Boston & M. R. R. v. Daniel, C.C.A. Vt., 298 F. 84—Oregon-Washington R. & Nav. Co. v. Roman, C.C.A. Wash., 293 F. 666—Whitehurst v. U. S., C.C.A.Va., 272 F. 46—Erie R. Co. v. Connors, C.C.A.Ohio, 261 F. 303, certiorari denied 40 S.Ct. 179, 251 U.S. 557, 64 L.Ed. 413—Royal Ins. Co. v. Taylor, W.Va., 254 F. 805, 166 C.C.A. 251—Long Island R. Co. v. Darnell, N.Y., 221 F. 191, 136 C.C.A. 1.

4 C.J. p 1033 note 37, p 1034 note 39.

87. U.S.—Christian v. Boston & M. R. R., C.C.A.N.Y., 109 F.2d 103—Skelley v. New York, N. H. & H. R. Co., C.C.A.N.Y., 93 F.2d 479—Budd v. John B. Southee, Inc., C. C.A.N.Y., 85 F.2d 513—Moser v. Hand, C.C.A.Miss., 81 F.2d 522—Thompson v. Missouri Pac. R. Co., C.C.A.Mo., 15 F.2d 28—J. C. Shaffer & Co. v. West Tennessee Grain Co., C.C.A.Tenn., 271 F. 320—New York Cent. R. Co. v. Lloyd, N.Y., 258 F. 111, 169 C.C.A. 197—Richards v. American Bank of Alaska, Alaska, 234 F. 300, 148 C.C.A. 202, certiorari denied American Bank of Alaska v. Richards, 37 S.Ct. 242, 242 U.S. 649, 61 L.Ed. 545.

D.C.—Dick v. Davis, 53 App.D.C. 91, 288 F. 445.

88. U.S.—Sprinkle v. Davis, C.C.A. Va., 104 F.2d 487—J. E. Riley Inv. Co. v. Sakow, C.C.A.Alaska, 98 F.2d 8—Blodgett v. Pinkerton Tobacco Co., C.C.A.Mich., 79 F.2d 945—Hanging Rock Iron Co. v. P. H. & F. M. Roots Co., C.C.A.Ind., 10 F.2d 154—Grand Union Tea Co. v. Lord, Va., 231 F. 390, 145 C.C.A. 384.

Error held harmless

U.S.—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 90 F.2d 817, certiorari granted 58 S.Ct. 46, 302 U.S. 670, 82 L.Ed. 517, and reversed on other grounds 58 S.Ct. 500, 303 U.S. 161, 82 L.Ed. 726, 114 A.L.R. 1218—Boston & M. R. R. v. Daniel, C.C.A.Vt., 298 F. 84—Cross v. Ramdullah, C.C.A.Cal., 274 F. 762, certiorari denied 42 S.Ct. 96, 257 U.S. 655, 66 L.Ed. 419.

89. U.S.—Crowe v. Gary State Bank, C.C.A.Ind., 123 F.2d 513—McCrate v. Morgan Packing Co., C.C.A.Ohio, 117 F.2d 702—Bass v. Dehner, C.C. A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528—Ford Motor Co. v. Cullum, C.C.A. Tex., 96 F.2d 1, certiorari denied 59 S.Ct. 89, 305 U.S. 627, 83 L.Ed. 401—Cusack v. Longaker, C.C.A.N. Y., 95 F.2d 304—Ohmer v. Allen, C. C.A.Ohio, 79 F.2d 942—Etna Ins. Co. v. C. I. T. Corporation, C.C.A. Tex., 74 F.2d 516—Clark v. Remington, C.C.A.N.H., 55 F.2d 48—Norfolk & W. Ry. Co. v. Hall, C.C.A. W.Va., 49 F.2d 692—National Union Fire Ins. Co. v. Kaplan, C.C.A. Ill., 41 F.2d 569, certiorari denied 51 S.Ct. 90, 282 U.S. 887, 75 L.Ed. 782—Petersen v. Wellsville City, C. C.A.Utah, 14 F.2d 38—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—U. S. v. Northern Pac. Ry. Co., C.C.A. Wash., 293 F. 657—General Cigar Co. v. First Nat. Bank, C.C.A.Or., 290 F. 143—Rels v. East St. Louis & S. Ry. Co., C.C.A.Mo., 275 F. 881—American Ry. Express Co. v. Crabtree, C.C.A.Ky., 271 F. 287—Jacob v. Ivins, Pa., 250 F. 431, 162 C.C.A. 501, affirming, D.C., Ivins v. Jacob, 245 F. 892—Stark Electric R. Co. v. McGinty Contracting Co., Ohio, 238 F. 657, 151 C.C.A. 507—Hamilton Iron & Steel Co. v. Groveland Mining Co., Ohio, 233 F. 388, 147 C.C.A. 324—Chicago, St. P. M. & O. Ry. Co. v. Nelson, Minn., 226 F. 708, 141 C.C.A. 464.

4 C.J. p 1041 note 32, p 1042 notes 34, 37, p 1047 note 63.

Case justifying directed verdict

Error will be considered cured where the court would have been justified in directing a verdict against appellant.—Jones v. Mutual Life Ins. Co. of New York, C.C.A.Mo., 113 F.2d 873—Sanders v. Schenley Products Co., C.C.A.N.Y., 108 F.2d 23—General Securities Corporation v. City of Homewood, Ala., C.C.A.Ala., 67 F.2d 513, certiorari denied General Securities Corporation v. City of Homewood, 54 S.Ct. 562, 291 U.S. 685, 78 L.Ed. 1072—Alpine Forwarding Co. v. Pennsylvania R. Co., C.C.A.N.Y., 60 F.2d 734, certiorari denied Pennsylvania R. Co. v. Alpine Forwarding Co., 53 S.Ct. 93, 287 U.S. 647, 77 L. Ed. 559—Nalbantian v. U. S., C.C.A. Ill., 54 F.2d 63, certiorari denied 52 S.Ct. 313, 285 U.S. 536, 76 L.Ed. 930—Weidenfeld v. Pacific Imp. Co., C.C. A.N.Y., 43 F.2d 817, certiorari denied 51 S.Ct. 102, 282 U.S. 890, 75 L.Ed. 784—Flannery v. New York, O. & W. R. Co., C.C.A.N.Y., 29 F.2d 18—Christenson v. Gorton-Pew Fisheries Co., C.C.A.N.Y., 8 F.2d 689.

Error held not cured where it is impossible to tell whether the verdict was based on erroneous instruction.—Christian v. Boston & M. R. R., C.C.A.N.Y., 109 F.2d 103—Wisconsin & Arkansas Lumber Co. v. Ward, C. C.A.Ark., 32 F.2d 974—Pennsylvania

amount of recovery or damages.[90]

A failure or refusal to give proper instructions to the jury will necessitate a reversal where it cannot be said that appellant was not prejudiced.[91] However, appellant cannot complain of the refusal of instructions where no prejudice resulted from such refusal.[92]

(2) Evidence and Witnesses

In the absence of prejudice, error in respect of evidence or witnesses will be considered harmless and will not necessitate a reversal.

If prejudice does not result, a cause will not be reversed on appeal for erroneous rulings in respect of evidence generally,[93] or in respect of the exam-

R. Co. v. Stegaman, C.C.A.Ohio, 22 F. 2d 69—American Sugar Refining Co. v. J. E. Jones & Co., C.C.A.Ala., 293 F. 560.

90. U.S.—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Overland Const. Co. v. Sydner, C.C.A.Ohio, 70 F.2d 338—Bryne v. Greene, C.C.A.Me., 70 F.2d 137—Blanton v. Great Atlantic & Pacific Tea Co., C.C.A.Ga., 61 F.2d 427, certiorari denied 53 S.Ct. 405, 288 U.S. 609, 77 L.Ed. 984—C. W. Denning & Co. v. Suncrest Lumber Co., C.C.A.N.C., 51 F.2d 945—Ingram v. Fidelity-Phoenix Fire Ins. Co. of New York, C.C.A.Okl., 16 F. 2d 251—United Verde Copper Co. v. Jordan, C.C.A.Ariz., 14 F.2d 299, affirming, C.C., Jordon v. United Verde Copper Co., 9 F.2d 144, affirmed United Verde Extension Mining Co. v. Jordan, C.C.A., 14 F. 2d 304, certiorari denied 47 S.Ct. 243, 273 U.S. 734, 71 L.Ed. 865—Coast S. S. Co. v. Brady, C.C.A.Ala., 8 F.2d 16, certiorari denied 46 S.Ct. 103, 269 U.S. 578, 70 L.Ed. 421—Memphis Furniture Mfg. Co. v. Wemyss Furniture Co., C.C.A.Tenn., 2 F.2d 428—Dangelo v. McLean Fire Brick Co., C.C.A.Ohio, 287 F. 14—George P. Clark Co. v. Kuebler Foundries, C.C.A.Pa., 285 F. 568, certiorari denied 43 S.Ct. 434, 261 U.S. 622, 67 L.Ed. 831—Pulver v. Union Inv. Co., C.C.A.Minn., 279 F. 699.

4 C.J. p 1045 notes 49, 51.

Error held not cured

U.S.—Foster & Kleiser Co. v. Special Site Sign Co., C.C.A.Cal., 85 F.2d 742, certiorari denied Special Site Sign Co. v. Foster & Kleiser Co., 57 S.Ct. 315, 299 U.S. 613, 81 L.Ed. 452—Detroit Graphite Co. v. Hoover, C.C.A.Mass., 41 F.2d 490—Arnold v. Horrigan, Mich., 238 F. 39, 151 C.C.A. 115.

91. U.S.—Copp v. Van Hise, C.C.A. Mont., 119 F.2d 691—Peterson v. Sheridan, C.C.A.Iowa, 115 F.2d 121—Sprinkle v. Davis, C.C.A.Va., 104 F.2d 487—Montgomery Ward & Co. v. Snuggins, C.C.A.Minn., 103 F.2d 458—Gold v. U. S., C.C.A.N.J., 102 F.2d 350—H. W. Bass Drilling Co. v. Ray, C.C.A.N.M., 101 F.2d 316—Skelley v. New York, N. H. & H. R. Co., C.C.A.N.Y., 93 F.2d 479—Budd v. John B. Southee, Inc., C.C. A.N.Y., 85 F.2d 513—Fair v. Floyd, C.C.A.N.J., 75 F.2d 920—Metropolitan Casualty Ins. Co. of New York v. Stahl, C.C.A.Pa., 72 F.2d 881, reversing, D.C., Stahl v. Metropolitan Life Ins. Co. of New York, 4 F.Supp. 777—Hayat Carpet Cleaning Co. v. Northern Assur. Co., Limited, of London, C.C.A.N.Y., 69 F.2d 805—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 57 F.2d 1004—Wisconsin & Arkansas Lumber Co. v. Day, C.C.A.Ark., 35 F.2d 563—Texas Co. v. Pensacola Maritime Corporation, C.C.A.Fla., 300 F. 51—American Car & Foundry Co. v. Allen, C.C.A.Mo., 264 F. 647—New York & Philadelphia Coal & Coke Co. v. Meyersdale Coal Co., Pa., 236 F. 536, 149 C.C.A. 588—American Smelting & Refining Co. v. Riverside Dairy & Stock Farm, Utah, 236 F. 510, 149 C.C.A. 562.

92. U.S.—Jones v. Weaver, C.C.A. Ariz., 123 F.2d 403—Illinois Cent. R. Co. v. Sigler, C.C.A.Tenn., 122 F.2d 279—Grand River Dam Authority v. Thompson, C.C.A.Okl., 118 F.2d 242—Hartford Fire Ins. Co., Hartford, Conn. v. Logan Grain Co., C.C.A.N.D., 105 F.2d 699—Hall v. Aetna Life Ins. Co., C.C. A.Ark., 85 F.2d 447—Chesapeake & O. Ry. Co. v. Rich, C.C.A.Ohio, 81 F.2d 584—National Live Stock Credit Corporation of St. Louis v. Thompson, C.C.A.N.M., 76 F.2d 696—Currier v. Ingram, C.C.A.N.H., 75 F.2d 783—U. S. Fidelity & Guaranty Co. v. McCarthy, C.C.A.Iowa, 50 F.2d 2, certiorari denied 52 S. Ct. 32, 284 U.S. 652, 76 L.Ed. 553—Great American Ins. Co. of New York v. Roney & Berger Co., C.C. A.Pa., 42 F.2d 816—Alksne v. U. S., C.C.A.Mass., 39 F.2d 62, certiorari denied 50 S.Ct. 467, 281 U.S. 768, 74 L.Ed. 1175—Consolidated Lead & Zinc Co. v. Corcoran, C.C. A.Okl., 37 F.2d 296—Idaho Copper Corporation v. Campbell, C.C.A.Idaho, 27 F.2d 833—Petersen v. Wellsville City, C.C.A.Utah, 14 F.2d 38—Fidelity & Casualty Co. of New York v. Glenn, C.C.A.W.Va., 3 F. 2d 913—Pennsylvania R. Co. v. Jones, C.C.A.Ohio, 300 F. 525—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—Kingrey v. New York, & St. L. R. Co., C.C.A.Ohio, 297 F. 376—Sebastian Bridge Dist. v. Missouri Pac. R. Co., C.C.A.Ark., 292 F. 345, certiorari denied 44 S.Ct. 37, 263 U.S. 711, 68 L.Ed. 519—St. Louis Smelting & Refining Co. v. Henke, C.C.A.Ill., 277 F. 665—Bristol Gas & Electric Co. v. Boy, C.C.A.Tenn., 261 F. 297—Memphis St. Ry. Co. v. Pierce, Tenn., 257 F. 659, 168 C. C.A. 609—Iowa Cent. Ry. Co. v. Walker, Iowa, 255 F. 648, 167 C.C. A. 24—Pocahontas Consol. Collieries Co. v. Johnson, Va., 244 F. 368, 156 C.C.A. 654, certiorari denied 38 S.Ct. 14, 245 U.S. 658, 62 L.Ed. 535—Smith v. Robins, Kan., 236 F. 114, 149 C.C.A. 324—Atlas Portland Cement Co. v. Hagen, Mo., 233 F. 24, 147 C.C.A. 94, certiorari denied 37 S.Ct. 15, 242 U.S. 631, 61 L.Ed. 537—Parrish v. Order of United Commercial Travelers of America, Va., 232 F. 425, 146 C.C. A. 419—Williamson v. Osenton, W. Va., 220 F. 653, 136 C.C.A. 261.

4 C.J. p 1048 note 76.

Error held harmless

(1) Where the verdict shows that no injury resulted therefrom.—Venuto v. Robinson, C.C.A.N.J., 118 F.2d 679, certiorari denied Ross Agent, Inc., v. Venuto, 62 S.Ct. 58, 314 U.S. 627, 86 L.Ed. 504—States Marine Corporation v. John B. Honor & Co., C.C.A.La., 80 F.2d 277—Century Indemnity Co. v. Shakespeare, C.C.A. Colo., 74 F.2d 392—Erie R. Co. v. Fritsch, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—Erie R. Co. v. Landau, C.C.A.N.J., 72 F.2d 766, certiorari denied 55 S.Ct. 213, 293 U.S. 620, 79 L.Ed. 708—Taylor v. Continental Supply Co., C.C.A.Colo., 16 F. 2d 578—Nemaha County, Neb., v. Harmon, C.C.A.Neb., 289 F. 795—Northern Pac. Ry. Co. v. Mentzer, Wash., 214 F. 10, 130 C.C.A. 404—4 C.J. p 1051 notes 99, 2.

(2) Where appellee was entitled to a directed verdict.—Mitchell v. New England Mut. Life Ins. Co., C.C.A. Va., 123 F.2d 246—McLean v. Donoghue Transp. Co., C.C.A.Me., 97 F. 2d 356—Zeller v. American International Corporation, C.C.A.Pa., 292 F. 822.

93. U.S.—Hoffman v. Palmer, C.C.A. N.Y., 129 F.2d 976—Sinclair Refining Co. v. Bennett, C.C.A.Tenn., 123 F.2d 884—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297—Atlantic Greyhound Corporation v. Crenshaw, C.C.A.Ga., 99 F.2d 449—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S.

ination of witnesses and their competency.[94] | Accordingly, error as to the admission of evi-

672, 83 L.Ed. 435—Maryland Casualty Co. v. Kern County, C.C.A. Cal., 83 F.2d 774—Jennings v. U. S., C.C.A.Ga., 73 F.2d 470—Strangio v. Consolidated Indemnity & Insurance Co., C.C.A.Cal., 66 F.2d 330—Union Trust Co. of Cleveland, Ohio v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602—American Sugar Refining Co. v. Nassif, C.C.A.Mass., 45 F.2d 321—Nalbantian v. U. S., C.C.A.Ill., 54 F.2d 63, certiorari denied 52 S.Ct. 313, 285 U.S. 536, 76 L.Ed. 930—Piel Const. Co. v. Commonwealth of Pennsylvania, to Use of Hendricks, C.C.A.Pa., 35 F.2d 265—New York Life Ins. Co. v. Rees, C.C.A.Mo., 19 F.2d 781—Stegeman v. Pennsylvania R. Co., C.C.A.Ohio, 6 F.2d 873—Craig-Giles Iron Co. v. Brownlee, C.C.A.Va., 272 F. 74—Rose Lumber Co. v. Hughes Lumber Co., C.C.A.Ala., 264 F. 757, certiorari denied 41 S.Ct. 8, 254 U. S. 635, 65 L.Ed. 450—Copper Process Co. v. Chicago Bonding & Ins. Co., C.C.A.Pa., 262 F. 66, 8 A.L.R. 1477—Cascaden v. O'Connor, Alaska, 257 F. 930, 169 C.C.A. 80—Birge-Forbes Co. v. Heye, Tex., 248 F. 636, 160 C.C.A. 536, certiorari granted 38 S.Ct. 426, 246 U.S. 676, 62 L.Ed. 933, and affirmed 40 S.Ct. 160, 251 U.S. 317, 64 L.Ed. 286—Watson v. Adams, Ohio, 242 F. 441, 155 C.C.A. 217—Daigle v. U. S., Me., 237 F. 159, 150 C.C.A. 305—Norfolk & W. Ry. Co. v. Gillespie, Va., 224 F. 316, 139 C.C.A. 552.

D.C.—Smith v. Doyle, 98 F.2d 341, 69 App.D.C. 60.

4 C.J. p 963 note 68, p 964 note 76.

Particular matters within rule

(1) Rulings on objections to questions.—Southern Package Corporation v. Mitchell, C.C.A.Miss., 109 F. 2d 609—Twachtman v. Connelly, C. C.A.Ohio, 106 F.2d 501—Schermann v. Yellow Cab Co., C.C.A.Ill., 101 F. 2d 363, certiorari denied 59 S.Ct. 1045, 307 U.S. 647, 83 L.Ed. 1527—Campbell v. Preferred Accident Ins. Co. of New York, C.C.A.N.Y., 98 F.2d 53—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486—Sacramento Suburban Fruit Lands Co. v. Soderman, C.C.A.Cal., 36 F.2d 934—Outlook Hotel Co. v. St. John, C.C.A. N.J., 297 F. 184—4 C.J. p 965 note 92, p 966 notes 2, 6, p 967 notes 12, 13, 17, p 968 notes 36, 38, p 969 note 50.

(2) Rulings relating to production and inspection of books and documents.—Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, C.C.A.Ind., 113 F.2d 217, reversed on other grounds 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 807, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S. Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co., C.C.A.Ohio, 285 F. 214.

(3) Order of proof, rebuttal, and reopening of case.—Paine v. St. Paul Union Stockyards Co., C.C.A.Minn., 28 F.2d 463, modified on other grounds 35 F.2d 624—Dietrich v. U. S. Shipping Board Emergency Fleet Corporation, C.C.A.N.Y., 9 F.2d 733, certiorari denied Dietrich v. U. S. Shipping Board Merchant Fleet Corporation, 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560—Berio v. Gay, C.C.A. Puerto Rico, 272 F. 404—Harper v. Harper, W.Va., 252 F. 39, 164 C.C.A. 151—4 C.J. p 962 notes 43, 45.

(4) Striking out or withdrawing evidence.—Glens Falls Ins. Co. of Glens Falls, N. Y. v. Sherritt, C.C.A. Va., 25 F.2d 823—Fidelity & Deposit Co. of Maryland v. People's Bank of Sanford, C.C.A.N.C., 72 F.2d 932, affirming, D.C., People's Bank of Sanford, N. C., v. Fidelity & Deposit Co. of Maryland, 4 F.Supp. 379, and certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714—United Verde Extension Mining Co. v. Littlejohn, C. C.A.Ariz., 279 F. 223—Great Northern Ry. Co. v. Ennis, Mont., 236 F. 17, 149 C.C.A. 227—Chicago Rys. Co. v. Kramer, Ill., 234 F. 245, 148 C.C.A. 147—Norfolk & W. Ry. Co. v. Gillespie, Va., 224 F. 316, 139 C.C.A. 552.

(5) Failure to rule on objections to evidence.—Solomon v. Benjamin, C. C.A.Ill., 75 F.2d 564, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694—American Trading Co. v. Steele, C.C.A.China, 274 F. 774.

Error held prejudicial

(1) Generally.—Powhatan Mining Co. v. Ickes, C.C.A., 118 F.2d 105—Ulm v. Moore-McCormack Lines, C.C. A.N.Y., 115 F.2d 492, rehearing denied 117 F.2d 222, certiorari denied 61 S. Ct. 941, 313 U.S. 567, 85 L.Ed. 1525—Cervin v. W. T. Grant Co., C.C.A. Tex., 100 F.2d 153.

(2) Permitting answers to leading questions where the answers elicited are the only basis in the evidence for an instruction given on a material issue.—Baldi v. Cedar Hill Coal & Coke Co., Colo., 173 F. 781, 97 C.C. A. 505.

94. U.S.—Hoffman v. Palmer, C.C.A. N.Y., 129 F.2d 976—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U. S. 633, 78 L.Ed. 1486—U. S. Fidelity & Guaranty Co. v. McCarthy, C.C. A.Iowa, 50 F.2d 2, certiorari denied 52 S.Ct. 32, 284 U.S. 652, 76 L.Ed. 553—Citizens' Nat. Bank of Los Angeles v. Santa Rita Hotel Co., C.C.A.Ariz., 22 F.2d 524—Julian Petroleum Corporation v. Courtney Petroleum Co., C.C.A.Cal., 22 F.2d 360—Ætna Life Ins. Co. v. Caffee, C.C.A.Fla., 286 F. 657—New York Evening Post Co. v. Chaloner, C.C. A.N.Y., 265 F. 204, certiorari dismissed 40 S.Ct. 396, 252 U.S. 591, 64 L.Ed. 731—Waters v. Guile, Mich., 234 F. 532, 148 C.C.A. 298.

Errors within rule

(1) As to the form of the question directed to witness.—Chesapeake & O. Ry. Co. v. Smith, C.C.A.Ohio, 42 F.2d 111, certiorari denied 51 S. Ct. 32, 282 U.S. 856, 75 L.Ed. 758—Travelers' Ins. Co. v. Schenkel, C. C.A.Mo., 35 F.2d 611, rehearing denied 37 F.2d 254—Dunagan v. Appalachian Power Co., C.C.A.W.Va., 33 F.2d 876, certiorari denied 50 S.Ct. 152, 280 U.S. 606, 74 L.Ed. 649—First Nat. Bank v. Sleeper, C.C.A.N.D., 12 F.2d 228—Erie R. Co. v. Linnekogel, N.Y., 248 F. 389, 160 C.C.A. 399.

(2) As to the form and scope of cross-examination.—Moyer v. Ætna Life Ins. Co., C.C.A.Pa., 126 F.2d 141, affirming, D.C., 39 F.Supp. 725—Weekley v. Thomas, C.C.A.Va., 63 F. 2d 988—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C. A.Iowa, 63 F.2d 602—Walters v. U. S., C.C.A.Tex., 63 F.2d 299—Community Natural Gas Co. v. Henley, C.C.A. Tex., 54 F.2d 59—Stone v. Chicago, M., St. P. & P. R. Co., C.C.A.Iowa, 53 F.2d 813—Puget Sound Power & Light Co. v. City of Puyallup, C.C.A. Wash., 51 F.2d 688—Sacramento Suburban Fruit Lands Co. v. Schreindl, C.C.A.Cal., 36 F.2d 932—Southern Ry. Co. v. Pettit, Tenn., 257 F. 663, 168 C.C.A. 613, certiorari denied 39 S.Ct. 290, 249 U.S. 607, 63 L.Ed. 799—E. I. Du Pont de Nemours & Co. v. Smith, C.C.A.Va., 252 F. 491, 164 C.C.A. 407—N. P. Sloan Co. v. Uncasville Mfg. Co., Pa., 240 F. 680, 153 C.C.A. 478—Owl Creek Coal Co. v. Goleb, Wyo., 232 F. 445, 146 C.C.A. 439—McArthur v. Citizens' Bank of Norfolk, Va., N.C., 223 F. 1004, 139 C.C.A. 380—Alamo Cattle Co. v. Hall, Ariz., 220 F. 832, 136 C.C.A. 578.

(3) As to the credibility, impeachment, contradiction, and corroboration of witnesses.—American Smelting & Refining Co. v. Hyman, Ky., 16 F.2d 39—Chicago, M. & St. P. Ry. Co. v. Harrelson, C.C.A.Mo., 14 F.2d 893—American Agricultural Chemical Co. v. Hogan, Mass., 213 F. 416, 130 C.C.A. 52—Houston First Nat. Bank v. Wells, Tex., 127 F. 818, 62 C.C.A. 134.

4 C.J. p 961 note 10.

Error cured by answer

Error in question is harmless where cured by answer or failure to answer.—Payne v. Connor, C.C.A.Me.,

dence does not warrant disturbance of the judgment below unless it appears that appellant has been prejudiced thereby;[95] and whether prejudice resulted is to be determined from the practical effect

274 F. 497—Sharples Separator Co. v. Skinner, Cal., 251 F. 25, 163 C.C.A. 275—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—Central Vermont Ry. Co. v. Cauble, N.Y., 228 F. 876, 143 C.C.A. 274.

Errors held prejudicial

(1) Generally.—Nashville, C. & St. L. Ry. Co. v. York, C.C.A.Tenn., 127 F.2d 606—U. S. v. Kaminsky, C.C.A. Ga., 64 F.2d 735—De Soto Motor Corporation v. Stewart, C.C.A.N.M., 62 F. 2d 914—Patriotic Ins. Co. of America v. Franciscus, C.C.A.Mo., 55 F.2d 844—Pure Oil Pipe Line Co. v. Ross, C.C.A.Okl., 51 F.2d 925—American Mills Co. v. Hoffman, C.C.A.N.Y., 275 F. 285.

(2) Exclusion of competent impeaching testimony.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 115 F. 2d 492, rehearing denied 117 F.2d 222, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525—Pure Oil Pipe Line Co. v. Ross, C.C.A.Okl., 51 F.2d 925—Stegeman v. Pennsylvania R. Co., C.C.A.Ohio, 6 F.2d 873.

95. U.S.—Sofarelli Bros. v. Elgin, C.C.A.Md., 129 F.2d 785—Ferguson v. Union Nat. Bank of Clarksburg, C.C.A.W.Va., 126 F.2d 753—Franhan Distributors v. New York World's Fair 1939, C.C.A.N.Y., 124 F.2d 82, certiorari denied 62 S.Ct. 1277, 316 U.S. 687, 86 L.Ed. 1759—Thomson v. Boles, C.C.A.Minn., 123 F.2d 487—U. S. v. 52 Drums Maple Syrup, C.C.A.Vt., 110 F.2d 914—Equitable Life Assur. Soc. of U. S. v. Bomar, C.C.A.Ky., 106 F. 2d 640—Twachtman v. Connelly, C. C.A.Ohio, 106 F.2d 501—L. E. Whitham Const. Co. v. Remer, C.C.A. Okl., 105 F.2d 371—Paramount Productions v. Smith, C.C.A.Cal., 91 F. 2d 863, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579—Smith v. Pacific Alaska Airways, Inc., C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541—William C. Barry, Inc. v. Baker, C.C.A.Me., 82 F.2d 79—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Equitable Life Assur. Soc. of U. S. v. Sief, C.C.A.Ohio, 74 F.2d 606—Merchants' Bank v. Hanna, C.C.A.Mo., 73 F.2d 818—Roelker v. Bromley-Shepard Co., C. C.A.Mass., 73 F.2d 618, certiorari denied 55 S.Ct. 509, 294 U.S. 713, 79 L.Ed. 1246—Manhattan Oil Co. v. Mosby, C.C.A.Mo., 72 F.2d 840, certiorari denied 55 S.Ct. 237, 293 U.S. 623, 79 L.Ed. 710—Firemen's Ins. Co. v. Follett, C.C.A.Ill., 72 F. 2d 49, certiorari denied 55 S.Ct. 209, 293 U.S. 618, 79 L.Ed. 706—Royal Ins. Co. v. Eastham, C.C.A. Ala., 71 F.2d 385, certiorari denied 55 S.Ct. 110, 293 U.S. 557, 79 L.Ed. 658—Prevette v. U. S., C.C.A.N.C., 68 F.2d 112, certiorari denied 54 S. Ct. 633, 292 U.S. 622, 78 L.Ed. 1478—Krumm v. Southwest Finance Co. of California, C.C.A.Cal., 67 F.2d 1—U. S. v. Sauls, C.C.A.N.C., 65 F. 2d 886—Wilks v. U. S., C.C.A.N.Y., 65 F.2d 775—U. S. v. Dudley, C.C. A.Idaho, 64 F.2d 743—Public Utilities Corporation of Arkansas v. Oliver, C.C.A.Ark., 64 F.2d 60—Sunny Point Packing Co. v. Faigh, C.C.A.Alaska, 63 F.2d 921—Neece v. Durst, C.C.A.Cal., 61 F.2d 591—S. S. Kresge Co. v. McCallion, C.C. A.Mo., 58 F.2d 931—Heinz v. Leeds & Lippincott Co., C.C.A.N.J., 55 F.2d 829—Wabash Ry. Co. v. City of St. Louis, C.C.A.Mo., 54 F.2d 921, affirming, D.C., City of St. Louis v. Senter Commission Co., 3 F.Supp. 308, and certiorari denied Wabash Ry. Co. v. City of St. Louis, Mo., 54 S.Ct. 88, 290 U.S. 668, 78 L.Ed. 577—Community Natural Gas Co. v. Henley, C.C.A.Tex., 54 F.2d 59—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Frankel v. New York Life Ins. Co., C.C.A.Okl., 51 F.2d 933—U. S. v. Lawson, C.C.A.Idaho, 50 F.2d 646—People of Porto Rico v. Livingston, C.C.A.Puerto Rico, 47 F. 2d 712, certiorari denied 52 S.Ct. 23, 284 U.S. 642, 76 L.Ed. 546—U. S. v. Phillips, C.C.A.Mo., 44 F.2d 689—O'Brien v. General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, C.C.A. Neb., 42 F.2d 48—James Baird Co. v. Broyd, C.C.A.N.C., 41 F.2d 578—Sacramento Suburban Fruit Lands Co. v. La Gue, C.C.A.Cal., 40 F.2d 897—Alliance Ins. Co. of Philadelphia v. Brown, C.C.A.Cal., 36 F. 2d 625—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 35 F.2d 667—Lord & Spencer v. M. N. Stout Co., C.C.A.Mass., 33 F.2d 60—American Coal Co. of Allegany County v. De Wese, C.C.A.W.Va., 30 F.2d 349—Newlands Calaveras Min. & Mill Co., C.C.A.Cal., 28 F.2d 89—International Indemnity Co. v. Lehman, C.C.A.Wis., 28 F.2d 1, certiorari denied 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed. 561—Louisville & N. R. Co. v. Chatters, C.C.A.La., 26 F.2d 403, affirming, D.C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, certiorari granted Louisville & N. R. Co. v. Chatters, 49 S.Ct. 26, 278 U. S. 590, 73 L.Ed. 523, and reversed on other grounds 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711—Lehigh & N. E. R. Co. v. Smale, C.C.A.N.J., 19 F.2d 67—New York & Porto Rico S. S. Co. v. Garcia, C.C.A.Puerto Rico, 16 F.2d 734—Air Refuction Co. v. Philadelphia Storage Battery Co., C.C.A.Pa., 14 F.2d 734—Moss v. Sherburne, C.C.A.Mass., 11 F.2d 579, certiorari denied 47 S. Ct. 100, 273 U.S. 710, 71 L.Ed. 352—Griffin v. Thompson, C.C.A.Tex., 10 F.2d 127—Keeton v. Jefferson Standard Life Ins. Co., C.C.A.Va., 5 F.2d 183—Gettys v. Newburger, C.C.A.Okl., 272 F. 209, certiorari denied 42 S.Ct. 56, 257 U.S. 649, 66 L.Ed. 416, and error dismissed 43 S.Ct. 11, 260 U.S. 693, 69 L.Ed. 467—People of Porto Rico v. Russell & Co., C.C.A.Puerto Rico, 268 F. 723—Tate v. Baugh, C.C.A.Tenn., 264 F. 892—Garwood v. Scheiber, Cal., 246 F. 74, 158 C.C.A. 300, certiorari denied 38 S.Ct. 427, 247 U. S. 506, 62 L.Ed. 1240—Société Nouvelle d'Armement v. Barnaby, Wash., 246 F. 68, 158 C.C.A. 294—Akalitis v. Philadelphia & Reading Coal & Iron Co., N.Y., 239 F. 299, 152 C.C.A. 287, certiorari denied 38 S.Ct. 581, 247 S.W. 517, 62 L.Ed. 1245—Tacoma Ry. & Power Co. v. Cothary, Wash., 235 F. 872, 149 C. C.A. 184.

4 C.J. p 970 note 57—37 C.J. p 113 note 4 [a] (2)—43 C.J. p 1325 note 55.

Evidence incompetent for want of preliminary proof

(1) Harmless.—Klas v. Yellow Cab Co., C.C.A.Ill., 106 F.2d 935—Grant v. Pilgrim, C.C.A.Alaska, 95 F.2d 562—McLeod Lumber Co. v. Western Redwood Co., C.C.A.Cal., 8 F.2d 930—4 C.J. p 996 note 71.

(2) Prejudicial.—John Irving Shoe Co. v. Dugan, C.C.A.Mass., 92 F.2d 711.

Opinion evidence

(1) Harmless.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F. 2d 297—Sears, Roebuck & Co. v. Copeland, C.C.A.N.C., 110 F.2d 947—Stephenson v. Grand Trunk Western R. Co., C.C.A.Ill., 110 F.2d 401, 132 A.L.R. 455, certiorari granted Grand Trunk Western R. Co. v. Stephenson, 60 S.Ct. 1101, 310 U.S. 623, 84 L.Ed. 1395, and 60 S.Ct. 1102, 310 U.S. 623, 84 L.Ed. 1395, certiorari dismissed 60 S.Ct. 1107, two cases, 311 U.S. 720, 85 L.Ed. 469—American Glycerin Co. v. Eason Oil Co., C.C.A. Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U. S. 672, 83 L.Ed. 435—Metropolitan Life Ins. Co. v. Armstrong, C.C.A. Neb., 85 F.2d 187—Maryland Casualty Co. v. Wyoming Valley Paper Co., C. C.A.N.H., 84 F.2d 633—Fidelity & Deposit Co. of Maryland v. People's Bank of Sanford, C.C.A.N.C., 72 F. 2d 932, certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714, and affirming, D.C., People's Bank of Sanford, N. C. v. Fidelity & Deposit Co.

of the erroneous evidence, viewed in the light of the trial as a whole, with all its attending circumstances.[96] As a rule, such an error will be considered harmless where the evidence in question is utterly irrelevant or immaterial or unimportant,[97] where the case is tried by the court without a ju-

of Maryland, 4 F.Supp. 379—Niagara Fire Ins. Co. of New York, N. Y. v. Raleigh Hardware Co., C.C.A.W. Va., 62 F.2d 705—U. S. v. Roberts, C.C.A.Colo., 62 F.2d 594—Sun Oil Co. v. Rhodes, C.C.A.Ark., 14 F.2d 790—Western Union Telegraph Co. v. Ammann, C.C.A.N.J., 296 F. 453—Alaska Treadwell Gold Mining Co. v. Crinis, Alaska, 255 F. 810, 167 C.C.A. 138—Missouri Valley Bridge & Iron Co. v. Blake, Va.. 231 F. 217, 145 C.C.A. 411—Norfolk & W. Ry. Co. v. Gillespie, Va., 224 F. 316, 139 C.C.A. 552—4 C.J. p 997 notes 85, 86.

(2) Prejudicial.—Farris v. Interstate Circuit, C.C.A.Tex., 116 F.2d 409—Eldridge v. McGeorge, C.C.A. Ark., 99 F.2d 835—Patrick v. Rice, C.C.A.Pa., 98 F.2d 550—Harrison v. New York Life Ins. Co., C.C.A.Ohio, 78 F.2d 421.

Hearsay evidence

(1) Harmless.

U.S.—Valley Shoe Corporation v. Stout, C.C.A.Mo., 98 F.2d 514—Schnerb v. Caterpillar Tractor Co., C.C.A.N.Y., 43 F.2d 920, certiorari denied 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—James Baird Co. v. Boyd, C.C.A.N.C., 41 F.2d 578—Louisville & N. R. Co. v. Chatters, C. C.A.La., 26 F.2d 403, affirming, D. C., Chatters v. Louisville & N. R. Co., 17 F.2d 305, certiorari granted Louisville & N. R. Co. v. Chatters, 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523, and reversed on other grounds 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711—Cross v. Ramdullah, C.C.A.Cal., 274 F. 762, certiorari denied 42 S.Ct. 96, 257 U.S. 655, 66 L.Ed. 419.

D.C.—Western Union Telegraph Co. v. Scrivener, 57 App.D.C. 120, 18 F.2d 162.

(2) Prejudicial.—Reliance Life Ins. Co. v. Burgess, C.C.A.Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, 311 U.S. 699, 85 L.Ed. 453, rehearing denied 61 S.Ct. 391, 311 U.S. 730, 85 L.Ed. 475—U. S. v. Nickle, C.C.A. Mo., 60 F.2d 372—Interstate Compress Co. v. Agnew, C.C.A.Okl., 276 F. 882—Klein v. Darnell, Tex., 239 F. 844, 152 C.C.A. 630.

96. U.S.—U. S. v. Becktold Co., C.C. A.Mo., 129 F.2d 473.

Nature or purpose of evidence

Error may be harmless by reason of the nature of the evidence complained of, or the purpose for which such evidence is offered.—Wabash Ry. Co. v. Bridal, C.C.A.Mo., 94 F.2d 117, certiorari denied 59 S.Ct. 63, 305 U.S. 602, 83 L.Ed. 382—Western Produce Co. v. Folliard, C.C.A.Tex., 93 F. 2d 588—Ocean Accident & Guarantee Corporation v. Schachner, C.C.A.Ill., 70 F.2d 28—Klauder-Weldon Dyeing Mach. Co. v. Gagnon, N.Y., 166 F. 286, 92 C.C.A. 204—4 C.J. p 971 note 61.

Prejudice not shown

(1) Where the legal evidence abundantly established the case.—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196.

(2) Where the incompetent evidence is in no way inconsistent with the complaining party's contentions.—Egan Chevrolet Co. v. Bruner, C. C.A.Minn., 102 F.2d 373, 122 A.L.R. 987.

(3) Where the same or similar evidence has been admitted without objection.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417—Travelers Ins. Co. v. Drake, C.C.A.Cal., 89 F.2d 47—Metropolitan Life Ins. Co. v. Armstrong, C.C.A.Mo., 85 F.2d 187—Shell Petroleum Corporation v. Scully, C.C.A.La., 71 F.2d 772—Community Natural Gas Co., v. Henley, C.C. A.Tex., 54 F.2d 59—Henry W. Putnam Memorial Hospital v. Allen, C.C. A.Vt., 34 F.2d 927—American Glycerin Co. v. Burleson, C.C.A.Tex., 30 F.2d 811, certiorari denied 49 S.Ct. 481, 279 U.S. 866, 73 L.Ed. 1004—Eteenpain Co-op. Soc. v. Lillbak, C.C.A.Mass., 18 F.2d 912—Clover Valley Lumber Co. v. Sierra Valley Creamery, C.C. A.Cal., 18 F.2d 858—Hill v. Wabash Ry. Co., C.C.A.Mo., 1 F.2d 626—Mitchell v. Toole, C.C.A.Miss., 287 F. 25—Western Coal & Mining Co. v. Greeson, C.C.A.Ark., 284 F. 510—Waters v. Guile, Mich., 234 F. 532, 148 C.C.A. 298.

Error held prejudicial

U.S.—Union Oil Co. of California v. Hunt, C.C.A.Or., 111 F.2d 269—Smith v. Pacific Alaska Airways, Inc., C.C.A.Alaska, 89 F.2d 253, certiorari denied Pacific Alaska Airways v. Smith, 58 S.Ct. 20, 302 U.S. 700, 82 L.Ed. 541—Hawthorne v. Eckerson Co., C.C.A.Vt., 77 F.2d 844—Union Electric Light & Power Co. v. Snyder Estate Co., C.C.A. Mo., 65 F.2d 297—Southern Pac. Co. v. Ralston, C.C.A.Utah, 67 F.2d 958, adhering to 62 F.2d 1026—Schroble v. Lehigh Valley R. Co., C.C.A.N. Y., 62 F.2d 993—U. S. v. Blackburn, C.C.A.Wash., 33 F.2d 564—Orient Ins. Co. v. Ariasi, C.C.A. Cal., 28 F.2d 579, certiorari denied Ariasi v. Orient Ins. Co., 49 S.Ct. 251, 279 U.S. 837, 73 L.Ed. 984—Manjon v. Lebron, C.C.A.Puerto Rico, 23 F.2d 266—Baltimore & O. R. Co. v. Moore, C.C.A.Del., 13 F.2d 364, certiorari denied Moore v. Baltimore & O. R. Co., 47 S.Ct. 238, 273 U.S. 727, 71 L.Ed. 861—Northern Assur. Co. v. Del Moral, C.C.A. Puerto Rico, 300 F. 513—Western Union Telegraph Co. v. Hall, C.C.A. Md., 287 F. 297—New York Life Ins. Co. v. Neasham, Nev., 250 F. 787, 163 C.C.A. 119, reversing, D.C., Neasham v. New York Life Ins. Co., 244 F. 556—Frey & Son v. Welch Grape Juice Co., Md., 240 F. 114, 153 C.C.A. 150—Quinette v. Pullman Co., Okl., 229 F. 333, 143 C.C.A. 453, rehearing denied 233 F. 980, 147 C.C.A. 654—Brabham v. Baltimore & O. R. Co., W.Va., 220 F. 35, 136 C.C.A. 117, L.R.A.1915E, 1201.

D.C.—Filloramo v. Giunta, 89 F.2d 500, 67 App.D.C. 28—District of Columbia v. Chessin, 64 App.D.C. 23, 73 F.2d 663.

4 C.J. p 972 note 70.

97. U.S.—Southern Ry. Co. v. Wood, C.C.A.Ga., 116 F.2d 274—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514—Wolf v. Citizens Bank & Trust Co. of Southern Pines, C.C.A.N.C., 92 F.2d 233—Stewart v. American Life Ins. Co., C.C.A.Kan., 89 F.2d 743—Bankers Indemnity Ins. Co. v. Pinkerton, C.C.A.Cal., 89 F.2d 194, followed in Bankers Indemnity Ins. Co. v. Lundgren, C.C.A.Cal., 89 F. 2d 200, certiorari denied 58 S.Ct. 23, 302 U.S. 703, 82 L.Ed. 543, and certiorari denied Bankers Indemnity Ins. Co. v. Pinkerton, 58 S.Ct. 23, 302 U.S. 704, 82 L.Ed. 543—MacLaughlin v. Hull, C.C.A.Wash., 87 F.2d 641—Ocean Accident & Guarantee Corporation v. Schachner, C.C.A.Ill., 70 F.2d 28—Union Electric Light & Power Co. v. Snyder Estate Co., C.C.A.Mo., 65 F.2d 297—Fidelity & Casualty Co. of New York v. Brightman, C.C.A. Mo., 53 F.2d 161—Chevrolet Motor Co. v. Gladding, C.C.A.Md., 42 F.2d 440, certiorari denied 51 S.Ct. 78, 282 U.S. 872, 75 L.Ed. 770—Piel Const. Co. v. Commonwealth of Pennsylvania, to Use of Hendricks, C.C.A.Pa., 35 F.2d 265—Bickley v. U. S., C.C.A.La., 24 F.2d 481—Bowmaster v. Carroll, C.C.A.Okl., 23 F.2d 825—F. W. Woolworth Co. v. Federal Inv. Co., C.C.A.Minn., 5 F. 2d 787—Lehigh Valley R. Co. v. Passinier, C.C.A.N.J., 4 F.2d 46—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—U. S. Fidelity & Guaranty Co. v. U. S., C.C.A.Md., 295 F. 598—Oregon-Washington R. & Nav. Co. v. Roman, C.C.A.Wash., 293 F 666—Hays v. Stine, C.C.A.W.Va.

ry,[98] where the fact sought to be proved by the evidence in question is otherwise fully and clearly established,[99] or where the error is cured by subsequent acts or proceedings in the case rendering the error immaterial or nugatory,[1] as by the withdrawal

289 F. 224—Mims v. Reid, C.C.A. Va., 286 F. 900—Chesapeake & O. Ry. Co. v. Hare, C.C.A.W.Va., 283 F. 944—East Harlan Coal Co. v. R. E. Hamilton & Sons Co., C.C.A. Ky., 277 F. 337—Pabst Brewing Co. v. E. Clemens Horst Co., C.C.A.Cal., 264 F. 909—Freeman-Sweet Co. v. Luminous Unit Co., C.C.A.Ill., 264 F. 107, modifying, D.C., Luminous Unit Co. v. Freeman-Sweet Co., 249 F. 876, certiorari denied 40 S.Ct. 482, 253 U.S. 486, 64 L.Ed. 1025—Bristol Gas & Electric Co. v. Boy, C.C.A.Tenn., 261 F. 297—Detroit United Ry. v. Weintrobe, Mich., 259 F. 64, 170 C.C.A. 132—Iowa Cent. Ry. Co. v. Walker, Iowa, 255 F. 648, 167 C.C.A. 24—Harper v. Harper, W.Va., 252 F. 39, 164 C.C.A. 151—Fronsoe v. Bushnell, Ohio, 251 F. 850, 164 C.C.A. 66—Western Union Telegraph Co. v. Thomasson, Va., 251 F. 833, 164 C.C.A. 49—Bluefields S. S. Co., to Use of Elmer E. Wood v. United Fruit Co., Pa., 243 F. 1, 155 C.C.A. 531, error dismissed 39 S.Ct. 136, 248 U.S. 595, 63 L.Ed. 428—O'Brien v. Las Vegas & T. R. Co., Nev., 242 F. 850, 155 C.C.A. 438—Woo Vey v. U. S., Ohio, 242 F. 838, 155 C.C.A. 426, certiorari denied 38 S.Ct. 60, 245 U.S. 660, 62 L.Ed. 535—Vandeventer v. Traders' Nat. Bank of Kansas City, Mo., Kan., 241 F. 584, 154 C.C.A. 360—Arnold v. Horrigan, Mich., 238 F. 39, 151 C.C.A. 115—Ames v. Sullivan, Alaska, 235 F. 880, 149 C.C.A. 192—Tacoma Ry. & Power Co. v. Cothary, Wash., 235 F. 872, 149 C.C.A. 184—Texas & P. Ry. Co. v. Hartford Fire Ins. Co., Tex., 230 F. 801, 145 C.C.A. 111, reversing 218 F. 990, 133 C.C.A. 673—Central Vermont Ry. Co. v. Cauble, N.Y., 228 F. 876, 143 C.C.A. 274—Vagaski v. Consolidation Coal Co., N.Y., 225 F. 913, 141 C.C.A. 37—Rubinsky v. Banner Rubber Co., N.Y., 224 F. 449, 140 C.C.A. 547—Richmond Light & R. Co. v. Blau, N.Y., 210 F. 887, 127 C.C.A. 497.

4 C.J. p 969 note 56.

Technical and theoretical errors and errors not involving injustice should ordinarily be disregarded.—Missouri Valley Bridge & Iron Co. v. Blake, Va., 231 F. 417, 145 C.C.A. 411.

98. U.S.—Donnelly Garment Co. v. National Labor Relations Board, C.C.A., 123 F.2d 215—Crancer v. Lowden, C.C.A.Mo., 121 F.2d 645, certiorari granted 62 S.Ct. 108, 314 U.S. 595, 86 L.Ed. 479, and affirmed 62 S.Ct. 763, 315 U.S. 631, 86 L.Ed. 1077, rehearing denied 62 S.Ct. 1030, 316 U.S. 708, 86 L.Ed. 1775—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567—Mutual Life Ins. Co. of New York v. Tormohlen, C.C.A. Ind., 118 F.2d 163—Baily v. Sears, Roebuck & Co., C.C.A.Or., 115 F.2d 904, certiorari denied 62 S.Ct. 82, 314 U.S. 616, 86 L.Ed. 495—Anglo California Nat. Bank of San Francisco v. Lazard, C.C.A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521—Hedrick v. Perry, C.C.A.N.M., 102 F.2d 802—Wall v. U. S., C.C.A.Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Jackson Furniture Co. v. McLaughlin, C.C.A.Cal., 85 F.2d 606—U. S. v. Rucker, C.C.A.Ill., 80 F.2d 369—Hays v. Harris, C.C.A.Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435—U. S. v. Northern Pac. Ry. Co., C.C.A.Mont., 77 F.2d 587, affirming, D.C., 6 F.Supp. 278—El Paso & S. W. R. Co. v. Phelps-Dodge Mercantile Co., C.C.A.Ariz., 75 F.2d 873—Gardner v. U. S., C.C.A.Cal., 71 F.2d 63, certiorari denied 55 S.Ct. 213, 293 U.S. 619, 79 L.Ed. 707—Elliott v. Gordon, C.C.A.Kan., 70 F.2d 9—Alksne v. U. S., C.C.A.Mass., 39 F.2d 62, certiorari denied 50 S.Ct. 467, 281 U.S. 768, 74 L.Ed. 1175—U. S. v. Garbutt, C.C.A.Wyo., 35 F.2d 924, modifying, D.C., 27 F.2d 1000—City Bond & Finance Co. v. Grant, C.C.A.Colo., 30 F.2d 671—English v. Gamble, C.C.A.Okl., 26 F.2d 28—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A. Neb., 20 F.2d 897—Southern Pac. Co. v. Kalbaugh, C.C.A.Cal., 18 F.2d 837, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416—Jennings v. Canady, C.C.A.Okl., 13 F.2d 356, certiorari denied 47 S.Ct. 239, 273 U.S. 728, 71 L.Ed. 862—Edwards v. Robinson, C.C.A.Idaho, 8 F.2d 726—Drexler v. Commercial Sav. Bank, C.C.A.S.D., 5 F.2d 13—Lackner v. McKechney, C.C.A.Ill., 2 F.2d 516, certiorari denied Lackner v. Starr, 45 S.Ct. 462, 267 U.S. 601, 69 L.Ed. 808—South Fork Brewing Co. v. U. S., C.C.A.Pa., 1 F.2d 167 certiorari denied 45 S.Ct. 125, 266 U.S. 626, 69 L.Ed. 475, and affirmed 46 S.Ct. 349, 270 U.S. 631, 70 L.Ed. 770—Unkle v. Wills, C.C.A.Okl., 281 F. 29—Granite Falls Bank v. Keyes, C.C.A.Minn., 277 F. 796—Chicago Bonding & Ins. Co. v. City of Pittsburg, C.C.A.Kan., 271 F. 678—Coles v. Denslow, C.C.A.Colo., 270 F. 22—Hall v. U. S., C.C.A.Tex., 267 F. 795—Bodkin v. Edwards, C.C.A.Cal., 265 F. 621, affirming, D.C., Edwards v. Bodkin, 267 F. 1004, and affirmed 41 S.Ct. 268, 255 U.S. 221, 65 L.Ed. 595—Cascaden v. Bell, Alaska, 257 F. 926, 169 C.C.A. 76.

4 C.J. p 999 note 22, p 1000 note 24, p 1001 note 28.

99. **By other evidence**

U.S.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297—Ralston Purina Co. v. Novak, C.C.A.Neb., 111 F.2d 631—William C. Barry, Inc., v. Baker, C.C.A.Me., 82 F.2d 79—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602—Standard Oil Co. of New Jersey v. Neville, C.C.A.W.Va., 48 F.2d 580—U. S. v. Cole, C.C.A.Ohio, 45 F.2d 339—Arcade & A. R. Corporation v. Kann, C.C.A.N.Y., 286 F. 809—Keith Lumber Co. v. Houston Oil Co., of Texas, Tex., 257 F. 1, 168 C.C.A. 213, certiorari denied 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197—Sharples Separator Co. v. Skinner, Cal., 251 F. 25, 163 C.C.A. 275—Good Pine Lumber Co. v. Duke, Ala., 229 F. 714, 144 C.C.A. 124—Gillespie v. Collier, Okl., 224 F. 298, 139 C.C.A. 534—McArthur v. Citizens' Bank of Norfolk, Va., N.C., 223 F. 1004, 139 C.C.A. 380.

4 C.J. p 976 note 92.

Fact admitted or undisputed

U.S.—Braman v. Wiley, C.C.A.Ind., 119 F.2d 991—Divide Creek Irr. Dist. v. Hollingsworth, C.C.A.Colo., 72 F.2d 859—Royal Finance Co. of California v. Miller, C.C.A.Cal., 47 F.2d 24—Pennsylvania R. Co. v. Schafer, C.C.A.Ohio, 290 F. 140—Arnold v. U. S., for Use of W. B. Guimarin & Co., C.C.A.S.C., 280 F. 338, error dismissed 44 S.Ct. 144, 263 U.S. 427, 68 L.Ed. 371—Simmons Hardware Co. v. Southern Ry. Co., C.C.A.Mo., 279 F. 929, certiorari denied 43 S.Ct. 96, 260 U.S. 739, 67 L.Ed. 490—Washington & C. Ry. Co. v. Mobile & O. R. Co., Ala., 255 F. 12, 166 C.C.A. 340, reversing, D.C., Mobile & O. R. Co. v. Washington & C. Ry. Co., 242 F. 531—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—Kalloch v. Hoagland, Tenn., 239 F. 252, 152 C.C.A. 240.

4 C.J. p 978 note 4, p 979 note 13.

1. U.S.—Thomson v. Boles, C.C.A. Minn., 123 F.2d 487—Garfield Aniline Works v. Zendle, C.C.A.N.J., 43 F.2d 537—Tampa Shipbuilding & Engineering Co. v. General Const. Co., C.C.A.Fla., 43 F.2d 309, 85 A.L.R. 1178—New York Life Ins. Co. v. Brown, C.C.A.Ga., 39 F.2d 376—Walter v. Rowlands, C.C.A.Cal., 28 F.2d 687—Weed v. Lyons Petroleum Co., D.C.Del., 294 F. 725, affirmed, C.C.A., Lyons Petroleum Co. v. Weed, 300 F. 1005—Central

or striking out of the evidence,[2] or by instructions to the jury.[3]

Exclusion of evidence. Generally the exclusion of competent material evidence on a question in issue is reversible error;[4] but error will be held harmless if the exclusion did not prejudice the com-

Iron & Coal Co. v. Massey, C.C.A. Ala., 268 F. 300—Lauderdale County v. Kittel, Miss., 229 F. 593, 143 C.C.A. 615—Dinet v. Rapid City, S. D., 222 F. 497, 138 C.C.A. 93—Courtnay v. King, Alaska, 220 F. 112, 136 C.C.A. 204.

4 C.J. p 982 note 44, p 983 note 57, p 984 note 68–69, p 985 note 73.

Error held cured

(1) Where appellant is not entitled to a favorable decision in any event.—First Trust Co. of St. Paul v. Kansas City Life Ins. Co., Minn., 79 F.2d 48—Hays v. Harris, C.C.A.Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435—Stelwagon Mfg. Co. v. Elvidge, C.C. A.N.Y., 30 F.2d 285, certiorari denied Elvidge v. Stelwagon Mfg. Co., 49 S. Ct. 265, 279 U.S. 344, 73 L.Ed. 989—Casey v. U. S., C.C.A.N.J., 8 F.2d 709—N. K. Fairbank Co. v. Canal-Commercial Trust & Savings Bank, C.C. A.La., 286 F. 648—Robbins v. Pennsylvania Co., Ohio, 245 F. 435, 157 C. C.A. 597.

4 C.J. p 977 note 94, p 987 notes 98, 99, 3.

(2) Where the determination of the action shows that the improper evidence had no prejudicial effect on the verdict or judgment.—City Ice & Fuel Co. v. Dankmer, C.C.A.W.Va., 52 F.2d 929—Morris & Co. v. Kerr S. S. Co., C.C.A.N.Y., 21 F.2d 292—Illinois Cent. R. Co. v. Horace Turner Corporation, C.C.A.Ala., 9 F.2d 6—Hirning v. Live Stock Nat. Bank, C.C.A. Iowa, 1 F.2d 307—Passaic Valley Sewerage Com'rs v. Tierney, C.C.A.N. J., 1 F.2d 304—American Express Co. v. Farmington Shoe Mfg. Co., C.C.A. Mass., 299 F. 86, error dismissed 45 S.Ct. 512, 268 U.S. 707, 69 L.Ed. 1168—U. S. v. Northern Pac. Ry. Co., C.C. A.Wash., 293 F. 657—Pennok Oil Co. v. Roxana Petroleum Co. of Oklahoma, C.C.A.Okl., 289 F. 416—George P. Clark Co. v. Kuebler Foundries, C.C. A.Pa., 285 F. 568, certiorari denied 43 S.Ct. 434, 261 U.S. 622, 67 L.Ed. 831—Victory Bottle Capping Mach. Co. v. O. & J. Mach. Co., C.C.A.Mass., 280 F. 753—McCarroll v. Newsham, C.C.A.La., 278 F. 4—Austro-American S. S. Co. v. Thomas, N.Y., 248 F. 231, 160 C.C.A. 309, L.R.A.1918D, 873—B. F. Sturtevant Co. v. Champion Fibre Co., Ohio, 232 F. 1, 146 C.C.A. 193.

4 C.J. p 985 notes 83, 87, p 986 note 88, p 988 note 11.

Error held not cured

U.S.—Southern Pac. Co. v. Ralston, C.C.A.Utah, 67 F.2d 958, adhering to 62 F.2d 1026.

2. U.S.—Worcester v. Pure Torpedo Co., C.C.A.Ill., 127 F.2d 945—Baltimore American Ins. Co. of New York v. Pecos Mercantile Co., C.C. A.N.M., 122 F.2d 143—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Hazeltine v. Johnson, C.C.A.Mont., 92 F.2d 866—Chicago, St. P., M. & O. Ry. Co. v. Henkel, C.C.A.Minn., 52 F.2d 313, certiorari denied 52 S.Ct. 200, 284 U.S. 683, 76 L.Ed. 576, and certified questions answered Henkel v. Chicago, St. P. M. & O. Ry. Co., 52 S.Ct. 223, 284 U.S. 444, 76 L.Ed. 386—Fidelity & Casualty Co. of New York v. Griner, C.C.A.Cal., 44 F.2d 706—Sacramento Suburban Fruit Lands Co. v. Zdarsky, C.C.A. Cal., 36 F.2d 939—Monongahela West Penn Public Service Co. v. Albey, C.C.A.Ohio, 31 F.2d 85, certiorari denied Monongahela West Penn Public Service Corporation v. Albey, 50 S.Ct. 27, 280 U.S. 568, 74 L.Ed. 621—Meinrath Brokerage Co. v. Collins-Dietz-Morris Co., C. C.A.Okl., 298 F. 377—International Cotton Mills v. Burnham, C.C.A. Ga., 284 F. 351—Richmond Cedar Works v. Foreman Blades Lumber Co., C.C.A.N.C., 267 F. 363—Maytag v. Cummins, C.C.A.S.D., 260 F. 74, 171 C.C.A. 110—Buckeye Cotton Oil Co. v. Sloan, Tenn., 250 F. 712, 163 C.C.A. 44—Central Iron & Coal Co. v. Hamacher, Ala., 248 F. 50, 160 C.C.A. 190—Delaware, L. & W. R. Co. v. Lanterman, N.J., 245 F. 548, 157 C.C.A. 660—Oates v. U. S., W.Va., 233 F. 201, 147 C.C.A. 207, certiorari denied 37 S.Ct. 16, 242 U.S. 633, 61 L.Ed. 538—Canadian Pac. Ry. Co. v. Black, N.Y., 230 F. 798, 145 C.C.A. 108, affirming, D.C., Black v. Canadian Pac. Ry., 218 F. 239.

4 C.J. p 989 note 16, p 990 note 25.

Error will not be considered corrected when it appears that the impression made by incompetent evidence was prejudicial and too deep to be removed by withdrawal and an instruction to disregard it.—Outlook Hotel Co. v. St. John, C.C.A.N.J., 287 F. 115—Chesapeake & O. Ry. Co. v. Hare, C.C.A.W.Va., 283 F. 944—James Stewart & Co. v. Newby, C.C. A.Va., 266 F. 287—4 C.J. p 990 note 26.

3. U.S.—Ferguson v. Union Nat. Bank of Clarksburg, C.C.A.W.Va., 126 F.2d 753—Chicago G. W. R. Co. v. Robinson, C.C.A.Neb., 101 F. 2d 994, certiorari denied 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1520—Paramount Productions v. Smith, C.C.A.Cal., 91 F.2d 863, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L.Ed. 579—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Pacific S. S. Co. v. Holt, C.C.A.Or., 77 F.2d 192—Independence Indemnity Co. v. Grants Pass & Josephine Bank, C.C.A.Or., 29 F. 2d 83—Hill v. Wabash Ry. Co., C. C.A.Mo., 1 F.2d 626—American Finance & Commerce Co. v. Wilcox, C.C.A.La., 297 F. 174—Eastman Kodak Co. v. Southern Photo Material Co., C.C.A.Ga., 295 F. 98, certiorari denied Eastman Kodak Co. of New York v. Southern Photo Materials Co., 44 S.Ct. 453, 264 U. S. 597, 68 L.Ed. 868, and affirmed 47 S.Ct. 400, 273 U.S. 359, 71 L.Ed. 684—Curcuru v. Peninsular Electric Light Co., Mich., 258 F. 785, 170 C.C.A. 79—Southern Pac. Co. v. Stevens, Ariz., 258 F. 165, 169 C.C. A. 233—Co-operative Raw Fur Co. v. American Credit Indemnity Co., Mich., 240 F. 67, 153 C.C.A. 103—Examiner Printing Co. v. Aston, Cal., 238 F. 459, 151 C.C.A. 395—St. Louis Merchants' Bridge Terminal Ry. Co. v. Schuerman, Mo., 237 F. 1, 150 C.C.A. 203, certiorari denied 37 S.Ct. 246, 242 U.S. 652, 61 L.Ed. 546—City of Charlotte v. Atlantic Bitulithic Co., N.C., 228 F. 456, 143 C.C.A. 38.

4 C.J. p 991 note 33, p 992 note 39, p 994 note 55, p 995 notes 58, 59.

Error held not cured

U.S.—London Guarantee & Accident Co. v. Woelfle, C.C.A.Mo., 83 F.2d 325—Chicago, B. & Q. R. Co. v. Gelvin, Mo., 238 F. 14, 151 C.C.A. 90, L.R.A.1917C, 983.

4 C.J. p 993 note 45.

4. U.S.—Dellefield v. Blockdel Realty Co., C.C.A.N.Y., 128 F.2d 85—Commercial Banking Corporation v. Martel, C.C.A.N.Y., 123 F.2d 846—Southern Pac. Co. v. Humphrey, C.C.A.Cal., 97 F.2d 29, certiorari denied Humphrey v. Southern Pac. Co., 59 S.Ct. 251, 305 U.S. 656, 83 L.Ed. 425—U. S. ex rel. Willoughby v. Howard, C.C.A.Ill., 96 F.2d 893, conforming to 58 S.Ct. 309, 302 U.S. 445, 82 L.Ed. 352, reversing C.C.A., Howard v. U. S., 87 F.2d 243, certiorari granted U. S. ex rel. Willoughby v. Howard, 57 S.Ct. 930, 301 U.S. 677, 81 L.Ed. 1337, rehearing denied 58 S.Ct. 524, 303 U.S. 666, 82 L.Ed. 1123—Corral, Wodiska Y Ca v. Anderson, Thorson & Co., C.C.A.Ill., 95 F.2d 11, certiorari denied 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 390—Zalatuka v. Metropolitan Life Ins. Co., C.C.A. Wis., 90 F.2d 230, reversing, D.C., 14 F.Supp. 440—Ætna Life Ins. Co. of Hartford, Conn. v. Maxwell, C. C.A.W.Va., 89 F.2d 988—La Fon v.

plaining party,[5] as where the excluded evidence | could not have affected the result,[6] where the facts

Grimes, C.C.A.Tex., 86 F.2d 809, 109 A.L.R. 156—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A.Alaska, 76 F.2d 655—Raker v. Clark Dredging Co., C.C.A.Fla., 75 F.2d 146—Prudential Ins. Co. of America v. Morris, for Use of Yesko, C.C.A.Pa., 72 F.2d 824—Chicago & N. W. Ry. Co. v. Booten, C.C.A.Neb., 57 F.2d 786—Atlantic Coast Line R. Co. v. Woods, S.C., 238 F. 917, 151 C.C.A. 651, certiorari denied 37 S.Ct. 406, 243 U.S. 645, 61 L.Ed. 944—City Bank of Wheeling v. Rhodehamel, W.Va., 223 F. 979, 139 C.C.A. 355—Owl Creek Coal Co. v. Goleb, Wyo., 210 F. 209, 127 C.C.A. 271.

4 C.J. p 1007 note 82.

5. U.S.—Pitcairn v. Perry, C.C.A.Mo., 122 F.2d 881, certiorari denied 62 S.Ct. 414, 314 U.S. 697, 86 L.Ed. 557—Omaha Packing Co. v. Pittsburgh, F. W. & C. Ry. Co., C.C.A.Ill., 120 F.2d 594—Krug v. Mutual Ben. Health & Accident Ass'n, C.C.A.Mo., 120 F.2d 296—Metropolitan Life Ins. Co. v. Madden, C.C.A.Fla., 117 F.2d 446—Murray v. Williams, C.C.A.S.C., 114 F.2d 282—Sickelco v. Union Pac. R. Co., C.C.A.Cal., 111 F.2d 746—Morgan v. Sun Oil Co., C.C.A.Tex., 109 F.2d 178, certiorari denied 60 S.Ct. 1086, 310 U.S. 640, 84 L.Ed. 1408—U. S. v. Marsh, C.C.A.Va., 108 F.2d 558, denying rehearing 107 F.2d 173—(American) Lumbermens Mut. Casualty Co. of Illinois v. Timms & Howard, C.C.A.N.Y., 108 F.2d 497—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 87, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65—Aetna Life Ins. Co. v. McAdoo, C.C.A.Ark., 106 F.2d 618—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Chapman & Dewey Lumber Co. v. Hanks, C.C.A.Tenn., 106 F.2d 482—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496—State Automobile Mut. Ins. Co. of Columbus, Ohio v. York, C.C.A.N.C., 104 F.2d 730, certiorari denied 60 S.Ct. 120, 308 U.S. 591, 84 L.Ed. 495—Goess v. Lucinda Shops, Inc., C.C.A.N.Y., 93 F.2d 449, 115 A.L.R. 264—Greenwood County v. Duke Power Co., C.C.A.S.C., 81 F.2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, 12 F.Supp. 70, cause remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S.C., 10 F.Supp. 854, and certiorari granted 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379, reversed on other grounds 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178—Parker v. Gulf Refining Co., C.C.A.Ohio, 80 F.2d 795—Vulcan Mfg. Co. v. Maytag Co., C.C.A.Mo., 73 F.2d 136, certiorari granted 55 S.Ct. 347, 293 U.S. 553, 79 L.Ed. 656, certiorari dismissed 55 S.Ct. 403, 294 U.S. 734, 79 L.Ed. 1263—Woo King-Hsun v. Pemberton & Penn, C.C.A.China, 66 F.2d 811—Bromfield v. Trinidad Nat. Inv. Co., C.C.A.Colo., 36 F.2d 646, 71 A.L.R. 542—Pryotely v. New York, C. & St. L. R. Co., C.C.A.Ohio, 28 F.2d 868—Federal Surety Co. v. Millspaugh & Irish Corporation, C.C.A.Ind., 14 F.2d 937—United Shoe Machinery Corporation v. Muther, C.C.A.Mass., 288 F. 283, certiorari denied 44 S.Ct. 33, 263 U.S. 703, 68 L.Ed. 515—Davis v. Reynolds, C.C.A.Va., 280 F. 363, certiorari denied 42 S.Ct. 383, 258 U.S. 627, 66 L.Ed. 798—Cohansey Glass Mfg. Co. v. First Nat. Bank of Philadelphia, Pa., 251 F. 177, 163 C.C.A. 333—Sharples Separator Co. v. Skinner, Cal., 251 F. 25, 163 C.C.A. 275—Cache Creek Mining Co. v. Brahenberg, Alaska, 217 F. 240, 133 C.C.A. 234.

4 C.J. p 1004 note 63, p 1006 note 70.

Error held not prejudicial

(1) Evidence immaterial to issue.—Ralston Purina Co. v. Novak, C.C.A.Neb., 111 F.2d 631—Coleman Furniture Corporation v. Home Ins. Co. of New York, C.C.A.Va., 67 F.2d 347, affirming, D.C., 4 F.Supp. 794, and certiorari denied 54 S.Ct. 453, 291 U.S. 669, 78 L.Ed. 1059—Davis v. Jessup, C.C.A.Ohio, 2 F.2d 433—Chiarello Bros. Co. v. Pedersen, N.Y., 242 F. 482, 155 C.C.A. 258—Daigle v. U. S., Me., 237 F. 159, 150 C.C.A. 305—4 C.J. p 1005 note 68.

(2) Evidence insufficient or improper for purpose offered.—Galeota v. U. S. Gypsum Co., C.C.A.N.Y., 123 F.2d 947—Hanover Fire Ins. Co. of New York v. Merchants' Transp. Co., C.C.A.Wash., 15 F.2d 946, certiorari denied 47 S.Ct. 472, 273 U.S. 758, 71 L.Ed. 877—Pocahontas Consol. Collieries Co. v. Johnson, Va., 244 F. 368, 156 C.C.A. 654, certiorari denied 38 S.Ct. 14, 245 U.S. 658, 62 L.Ed. 535.

(3) Where the determination of the action shows that the exclusion of the evidence could not have prejudiced appellant.—McCann v. New York Stock Exchange, C.C.A.N.Y., 107 F.2d 908, certiorari denied 60 S.Ct. 87, 309 U.S. 684, 84 L.Ed. 1027, rehearing denied 60 S.Ct. 974, 310 U.S. 656, 84 L.Ed. 1420—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Detroit Edison Co. v. Stricker, C.C.A.Mich., 65 F.2d 126—U. S. v. Asbestos Corporation, D.C.N.Y., 34 F.2d 182—Mitchell v. Pittsburgh, C., C. & St. L. R. Co., C.C.A.Ohio, 13 F.2d 704—West Tennessee Grain Co. v. J. C. Shaffer & Co., C.C.A.Tenn., 299 F. 197—Denman v. Richardson, C.C.A.Wash., 292 F. 19—City of Charlotte v. Atlantic Bitulithic Co., N.C., 228 F. 456, 143 C.C.A. 38—4 C.J. p 1007 note 73, p 1008 note 95.

(4) Error cured by instructions to the jury.—Osland v. Star Fish & Oyster Co., C.C.A.Ala., 118 F.2d 772, certiorari denied 62 S.Ct. 86, 314 U.S. 615, 86 L.Ed. 495—Lazelle v. Norfolk & W. Ry. Co., C.C.A.Ohio, 73 F.2d 459—Gratz v. McKee, C.C.A.Mo., 9 F.2d 593, certiorari denied 46 S.Ct. 472, 270 U.S. 664, 70 L.Ed. 788—Robbins v. Pennsylvania Co., Ohio, 245 F. 435, 157 C.C.A. 597—Co-operative Raw Fur Co. v. American Credit Indemnity Co., Mich., 240 F. 67, 153 C.C.A. 103—4 C.J. p 1018 note 66.

On trial without jury

U.S.—Thatenhorst v. U. S., C.C.A.Kan., 119 F.2d 567—Joyce v. Humbird, C.C.A.Ill., 78 F.2d 386, certiorari denied 56 S.Ct. 175, 296 U.S. 641, 80 L.Ed. 456—William T. Joyce Co. v. Humbird, C.C.A.Ill., 78 F.2d 386, certiorari denied 56 S.Ct. 175, 296 U.S. 641, 80 L.Ed. 456, and 56 S.Ct. 176, 296 U.S. 641, 80 L.Ed. 456—Hays v. Harris, C.C.A.Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435—American Central Life Ins. Co. v. American Trust Co., C.C.A.Tenn., 5 F.2d 71, affirming, D.C., American Trust Co. v. American Central Life Ins. Co., 5 F.2d 69—Grand Valley Water Users' Ass'n v. Zumbrunn, C.C.A.Colo., 272 F. 943.

4 C.J. p 1020 note 77.

6. U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417—Continental Casualty Co. v. U. S., for Use of Ainsworth, C.C.A.Ill., 68 F.2d 577, certiorari denied 54 S.Ct. 774, 292 U.S. 641, 78 L.Ed. 1493, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1474—Tracy v. Commissioner of Internal Revenue, C.C.A., 53 F.2d 575, certiorari denied 53 S.Ct. 83, 287 U.S. 632, 77 L.Ed. 548—Yates v. Whyel Coke Co., Ohio, 221 F. 603, 137 C.C.A. 327.

4 C.J. p 1004 note 64.

Appellant not entitled to favorable decision in any event

U.S.—Ferguson v. Wachs, C.C.A.Ill., 96 F.2d 910—Corrigan v. U. S., C.C.A.Idaho, 82 F.2d 106—Parker v. Gulf Refining Co., C.C.A.Ohio, 80 F.2d 795—Hays v. Harris, C.C.A.Ark., 78 F.2d 66, certiorari denied 56 S.Ct. 134, 296 U.S. 613, 80 L.Ed. 435—Long v. U. S., C.C.A.S.C., 59 F.2d 602—Planters' Oil Mill & Gin Co. v. A. K. Burrow Co., C.C.A.Miss., 10 F.2d 312—Edwards v. Robinson, C.C.A.Idaho, 8 F.2d 726.

4 C.J. p 1010 note 4.

attempted to be proved by the excluded evidence have been otherwise established,[7] or where the same or similar evidence has been otherwise admitted.[8]

i. Error Waived in Appellate Court

(1) Express waiver
(2) Implied waiver

(1) Express Waiver

An assignment of error may be waived by an entry on the record or by express waiver in the brief or argument; and no further consideration will be given it.

An assignment of error may be waived by an entry on the record or by express waiver in the brief or oral argument, and such matter will not be further considered,[9] unless it is necessary to secure justice.[10]

(2) Implied Waiver

A waiver of an assignment of error will generally be implied where the appellant has failed to discuss it or urge it in some necessary manner, or where he has taken proceedings inconsistent with his objection.

Questions assigned as error by an appellant are generally deemed to have been abandoned or waived where they are not urged or discussed on appeal.[11]

7. U.S.—Pillsbury Flour Mills Co. v. Miller, C.C.A.Mo., 121 F.2d 297—McVeigh v. McGurren, C.C.A.Ill., 117 F.2d 672, certiorari denied 61 S.Ct. 960, 313 U.S. 573, 85 L.Ed. 1531—Sprinkle v. Davis, C.C.A.Va., 111 F.2d 925, 128 A.L.R. 1101—Vilter Mfg. Co. v. Rolaff, C.C.A.Mo., 110 F.2d 491—Cherry-Burrell Co. v. Thatcher, C.C.A.Mont., 107 F.2d 65—Palace Cafe v. National Security Fire Ins. Co., C.C.A.Ind., 97 F.2d 766, certiorari denied National Security Fire Ins. Co. v. Palace Cafe, 59 S.Ct. 102, 305 U.S. 634, 83 L.Ed. 407—Prentiss v. Chandler, C.C.A.Cal., 85 F.2d 733, certiorari denied 57 S.Ct. 431, 300 U.S. 654, 81 L.Ed. 864—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Divide Creek Irr. Dist. v. Hollingsworth, C.C.A.Colo., 72 F.2d 859—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003—Proechel v. U. S., C.C.A.Minn., 59 F.2d 648, certiorari denied 53 S.Ct. 122, 287 U.S. 658, 77 L.Ed. 568—Davis v. New York Life Ins. Co., C.C.A.Mo., 47 F.2d 1051—Mitchell v. Pittsburgh, C., C. & St. L. R. Co., C.C.A.Ohio, 13 F.2d 704—Wheeler & Motter Mercantile Co. v. Lamerton, C.C.A.Ohio, 8 F.2d 957, 44 A.L.R. 769—Texas Co. v. Brilliant Mfg. Co., C.C.A.Pa., 2 F.2d 1—Nemaha County, Neb., v. Harmon, C.C.A.Neb., 289 F. 795—Virginia & West Virginia Coal Co. v. Charles, D.C.Va., 251 F. 83, affirmed 254 F. 379, 165 C.C.A. 599, error allowed 255 F. 992, 167 C.C.A. 671, and dismissed 40 S.Ct. 345, 252 U.S. 569, 64 L.Ed. 720—Spring Garden Ins. Co. of Philadelphia, Pa., v. Wood, Va., 233 F. 223, 147 C.C.A. 229, certiorari denied 37 S.Ct. 15, 242 U.S. 631, 61 L.Ed. 537.

4 C.J. p 1010 notes 7, 8, p 1012 note 16, p 1013 note 26, p 1014 note 27.

8. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Ballard v. Ocean Accident & Guarantee Co., C.C.A.Wis., 86 F.2d 449—Smyth, Sanford & Gerard v. Missouri-Kansas-Texas R. Co., C.C.A.N.Y., 72 F.2d 216—Jones v. Foster, C.C.A.Va., 70 F.2d 200, certiorari denied 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659—Travelers' Ins. Co. of Hartford, Conn., v. Person, C.C.A.Neb., 58 F.2d 210—Ingram-Day Lumber Co. v. Schultz, C.C.A.Wis., 45 F.2d 359, certiorari denied 51 S.Ct. 366, 283 U.S. 833, 75 L.Ed. 1445—James Baird Co. v. Boyd, C.C.A.N.C., 41 F.2d 578—Mountain States Telephone & Telegraph Co. v. Walker, C.C.A.Ariz., 35 F.2d 465—New York Underwriters' Fire Ins. Co. v. Malham & Co., C.C.A.Ark., 25 F.2d 415—New York Life Ins. Co. v. Pater, C.C.A.Ind., 17 F.2d 963—Fuller Process Co. v. Texas Co., C.C.A.Mo., 16 F.2d 108—Central R. Co. of New Jersey v. Monahan, C.C.A.N.Y., 11 F.2d 212—Fidelity & Casualty Co. of New York v. Glenn, C.C.A.W.Va., 3 F.2d 913—St. Louis Car Co. v. Glover Equipment Co., C.C.A.Mo., 298 F. 404—Berio v. Gay, C.C.A.Puerto Rico, 272 F. 404—Houston Oil Co. of Texas v. Goodrich, Tex., 226 F. 434, 141 C.C.A. 264, certiorari dismissed 38 S.Ct. 140, 245 U.S. 440, 62 L.Ed. 385.

4 C.J. p 1014 note 34, p 1018 notes 58, 59.

Other testimony of same witness
U.S.—Woelfle v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417—Grant v. Pilgrim, C.C.A.Alaska, 95 F.2d 562—Ballard v. Ocean Accident & Guarantee Co., C.C.A.Wis., 86 F.2d 449—U. S. v. Bryan, C.C.A.La., 82 F.2d 784—Fidelity & Deposit Co. of Maryland v. Lindholm, C.C.A.Cal., 66 F.2d 56, 89 A.L.R. 279—Travelers' Ins. Co. of Hartford Conn., v. Person, C.C.A.Neb., 58 F.2d 210—Eppinger & Russell Co. v. Sheely, C.C.A.Fla., 24 F.2d 153—Citizens' Nat. Bank of Los Angeles v. Santa Rita Hotel Co., C.C.A.Ariz., 22 F.2d 524—Delaware, L. & W. R. Co. v. Lanterman, N.J., 245 F. 548, 157 C.C.A. 660—Lauderdale County v. Kittel, Miss., 229 F. 593, 143 C.C.A. 615—Benedetto v. W. P. Rend Collieries Co., Ill., 216 F. 143, 132 C.C.A. 506.

D.C.—McCurley v. National Savings & Trust Co., 258 F. 154, 49 App.D.C. 10.

4 C.J. p 1016 note 47.

9. U.S.—Rosenthal v. New York Life Ins. Co., C.C.A.Mo., 94 F.2d 675, vacated 58 S.Ct. 874, 304 U.S. 263, 82 L.Ed. 1330.

10. U.S.—Woods v. Rains, C.C.A.Mo., 104 F.2d 137, certiorari denied 60 S.Ct. 109, 308 U.S. 585, 84 L.Ed. 490.

11. U.S.—Moore v. American Scantic Line, C.C.A.N.Y., 121 F.2d 767—U. S. v. Flower, C.C.A.Neb., 108 F.2d 298—Twachtman v. Connelly, C.C.A.Ohio, 106 F.2d 501—Commissioner of Internal Revenue v. Purdy, C.C.A., 102 F.2d 331—Barringer v. Lilley, C.C.A.Ariz., 96 F.2d 607—Suffel v. Bosworth, C.C.A.Cal., 95 F.2d 494—U. S. v. First Wisconsin Trust Co., C.C.A.Wis., 92 F.2d 840—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160—Forno v. Coyle, C.C.A.Alaska, 75 F.2d 692—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A.Idaho, 75 F.2d 79, affirming in part, D.C., U. S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., 4 F.Supp. 216—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003—E. R. Squibb & Sons v. Mallinckrodt Chemical Works, C.C.A.Mo., 69 F.2d 685, motion denied 55 S.Ct. 121, certiorari denied 55 S.Ct. 916, 295 U.S. 759, 79 L.Ed. 1701, affirming, D.C., Mallinckrodt Chemical Works v. E. R. Squibb & Sons, 6 F.Supp. 173—Franklin Sav. Bank of Franklin, N. H. v. Garot, C.C.A.Ark., 69 F.2d 487—Brown Sheet Iron & Steel Co. v. Maple Leaf Oil & Refining Co., C.C.A.Minn., 68 F.2d 787—Carpenter v. Connecticut General Life Ins. Co., C.C.A.Colo., 68 F.2d 69—Harold Lloyd Corporation v. Witwer, C.C.A.Cal., 65 F.2d 1, reversing, D.C., Witwer v. Harold Lloyd Corporation, 46 F.2d 792, certiorari dismissed 54 S.Ct. 94, 78 L.Ed. 1507—Payne v. Ostrus, C.C.A.Iowa, 50 F.2d 1039, 77 A.L.R. 531—McCarthy

So an assignment of error will ordinarily be regarded as waived and no consideration will be given it, unless it is properly presented by brief[12] or argument;[13] and, ordinarily where the point is not presented in the argument in chief or in the opening brief, it will be disregarded if referred to for the first time in the closing or reply brief.[14] The mere mention of an assignment of error in a brief, without sufficient argument or citation of authorities in support thereof, must be treated as a waiver of the error claimed.[15] Although not argued on appeal, the question of the trial court's jurisdiction is, however, necessarily before the circuit court of appeals.[16]

A waiver of error will also be implied where a party to an appeal takes proceedings inconsistent with the particular error assigned.[17]

Particular applications of rules. Under the rules above set out, the following matters, among others, have been deemed waived when not properly presented in the brief or argument in the circuit court of appeals: objections to rulings on the admission

v. Ruddock, C.C.A.Wash., 43 F.2d 976—Hard & Rand v. Biston Coffee Co., C.C.A.Mo., 41 F.2d 625—Porto Rico Coal Co. v. Domenech, C.C.A. Puerto Rico, 41 F.2d 183—John Murtland, Inc. v. Empire Trust Co., C.C.A.N.J., 39 F.2d 341—Central R. Co. of New Jersey v. Schick, C. C.A.Pa., 38 F.2d 968—Schevenell v. Blackwood, C.C.A.Ark., 35 F.2d 421—Allen v. Hudson, C.C.A.Ark., 35 F.2d 330—Leggett & Platt Spring Bed Co. v. Crooks, D.C.Mo., 34 F.2d 492—Lord & Spencer v. M. N. Stout Co., C.C.A.Mass., 33 F. 2d 60—Harris v. Newsom, C.C.A. Colo., 23 F.2d 652—U. S. v. Hayes, C.C.A.Okl., 20 F.2d 873, certiorari denied Riverside Oil & Refining Co. v. Cimarron River Oil Co., 48 S. Ct. 115, 275 U.S. 552, 72 L.Ed. 421, and certiorari denied U. S. v. Cimarron River Oil Co., 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423, and U. S. v. Hayes, 48 S.Ct. 116, 275 U.S. 555, 72 L.Ed. 423—Denver Live Stock Commission Co. v. Lee, C.C. A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531—Walker v. First Trust & Savings Bank, C.C.A.Mo., 12 F.2d 896, 75 A.L.R. 757—S. A. Gerrard Co. of New York Inc. v. Prince Line, D.C.N.Y., 1 F.Supp. 123—Arkansas Short Leaf Lumber Co. v. Hemler, C.C.A.Ark., 281 F. 914—Merten v. Fertig, C.C.A.Iowa, 281 F. 908—Consolidated Interstate-Callahan Mining Co. v. Witkouski, Idaho, 249 F. 833, 162 C.C. A. 67—Sun Co. v. Vinton Petroleum Co., Tex., 248 F. 623, 160 C.C. A. 523, certiorari denied 38 S.Ct. 580, 247 U.S. 514, 62 L.Ed. 1244—Pond Creek Coal Co. v. Hatfield, Ky., 239 F. 622, 152 C.C.A. 456—Town of Newbern v. National Bank of Barnesville, Ohio, Tenn., 234 F. 209, 148 C.C.A. 111, L.R.A.1917B 1019, certiorari denied 37 S.Ct. 48, 242 U.S. 634, 61 L.Ed. 538—Gibson v. Chesapeake & O. Ry. Co., Ky., 215 F. 24, 131 C.C.A. 332.

4 C.J. p 1068 note 16.

12. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252—Woods v. Rains, C.C.A.Mo., 104 F.2d 137, certiorari denied 60 S.Ct. 109, 308 U.S. 585, 84 L.Ed. 490—Mathewson v. First Trust Co. of St. Joseph, C.C.A.Mo., 100 F.2d 121, certiorari denied 59 S.Ct. 789, 306 U.S. 663, 83 L.Ed. 1060—Smith v. Royal Ins. Co., C. C.A.Cal., 93 F.2d 143, certiorari denied Royal Ins. Co. v. Smith, 58 S. Ct. 759, 303 U.S. 656, 82 L.Ed. 1115—Humphreys Gold Corporation v. Lewis, C.C.A.Mont., 90 F.2d 896—Lewis v. Standard Oil Co. of California, C.C.A.Cal., 88 F.2d 512—Coopman v. Citizens State Bank of Omak, C.C.A.Wash., 85 F.2d 799, denying rehearing and supplementing opinion, C.C.A., 83 F.2d 815, certiorari denied 57 S.Ct. 431, 300 U.S. 655, 81 L.Ed. 865—U. S. v. Los Angeles Soap Co., C.C.A.Cal., 83 F.2d 875—Andrews v. Drake, C. C.A.Mich., 83 F.2d 767, certiorari denied 57 S.Ct. 35, 299 U.S. 572, 81 L.Ed. 421—Schwartzman v. Lloyd, App.D.C., 82 F.2d 822—U. S. v. Chicago, B. & Q. R. Co., C.C. A.Minn., 82 F.2d 131—Doherty v. Bartlett, C.C.A.N.H., 81 F.2d 920, modifying, D.C., Bartlett v. Doherty, 10 F.Supp. 465—Missouri Pac. R. Co. v. Siratt, C.C.A.Ark., 78 F. 2d 253—Wynne v. Fries, C.C.A.Ohio, 50 F.2d 761—Ruedy v. Town of White Salmon, D.C.Wash., 35 F. Supp. 130.

4 C.J. p 1068 note 22, p 1070 note 27.

13. U.S.—Abrams v. American Security & Trust Co., App.D.C., 111 F.2d 520, 129 A.L.R. 368—Paramount Productions v. Smith, C.C.A. Cal., 91 F.2d 863, certiorari denied 58 S.Ct. 266, 302 U.S. 749, 82 L. Ed. 579—Edwards v. U. S., C.C.A. Cal., 91 F.2d 767, affirming, D.C., U. S. v. Edwards, 16 F.Supp. 53—Bank of Eureka v. Partington, C. C.A.Cal., 91 F.2d 587—Queenan v. Mays, C.C.A.Okl., 90 F.2d 525, certiorari denied Board of Com'rs of Creek County, Okl. v. Mays, 58 S. Ct. 45, 302 U.S. 724, 82 L.Ed. 559—Liquid Veneer Corporation v. Smuckler, C.C.A.Cal., 90 F.2d 196—Colorado Central Power Co. v. City of Englewood, C.C.A.Colo., 89 F. 2d 233—Katteiman v. Madden, C.C. A.Mo., 88 F.2d 858—Otoe County Nat. Bank v. Delany, C.C.A.Neb., 88 F.2d 238—Radius v. Travelers Ins. Co., C.C.A.Cal., 87 F.2d 412—McNamara v. Hart, C.C.A.Mo., 83 F. 2d 649—Travelers' Ins. Co. v. Bancroft, C.C.A.Okl., 65 F.2d 963, certiorari denied 54 S.Ct. 103, 290 U. S. 680, 78 L.Ed. 587—U. S. ex rel. Mastoras v. McCandless, C.C.A.N. J., 61 F.2d 366—Mas v. Root, Cust. & Pat.App., 54 F.2d 435—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 38 F.2d 159, certiorari denied 50 S.Ct. 855, 281 U.S. 751, 74 L.Ed. 1162—A. Schrader's Sons v. Wein Sales Corporation, C.C.A. N.Y., 9 F.2d 306, affirming, D.C., 3 F.2d 999—Chesapeake & O. R. Co. v. Dandridge, 171 F. 74, 96 C.C.A. 178.

Waiver overlooked

The waiver of assignments of error, for failure to argue the same on appeal, will, where appellant proceeds on the theory that the action was one of trover, when it was also one on the case, be overlooked, and the assignment will be considered. —Arnold v. Horrigan, Mich., 238 F. 39, 151 C.C.A. 115.

14. U.S.—Nash v. Rehmann Bros., C.C.A.Iowa, 53 F.2d 624.

15. U.S.—Hubshman v. Louis Keer Shoe Co., C.C.A.Ill., 129 F.2d 137.

4 C.J. p 1071 note 31.

Mere repetition of assignment of error

Where nothing more than a repetition of the assignments of error on appeal is set forth in the brief, the error must be deemed to be waived. —Wege v. Safe Cabinet Co., Mich., 249 F. 696, 161 C.C.A. 606.

16. U.S.—Prince Line v. American Paper Exports, C.C.A.N.Y., 55 F. 2d 1053, affirming, D.C., 45 F.2d 242—Stiefel v. 14th St. & Broadway Realty Corporation, C.C.A.N. Y., 48 F.2d 1041—Delaware, L. & W. R. Co. v. Scales, C.C.A.N.Y., 18 F.2d 73.

17. U.S.—Taylor v. Easton, S.D., 180 F. 363, 103 C.C.A. 509—Red Jacket Mfg. Co. v. Davis, Wis., 82 F. 432, 27 C.C.A. 204.

or exclusion of evidence;[18] objections to the giving or refusing of instructions;[19] objections to verdicts;[20] and objections to findings.[21] Where the objection is not properly urged in counsel's brief or argument, errors will also be regarded as waived, in respect of the pleadings.[22]

j. Decisions of Intermediate Courts

Ordinarily in appeals from an intermediate appellate court questions must be raised and passed on in such intermediate court before they may be reviewed by the circuit court of appeals; and, where two independent tribunals have examined the facts and reached a like result, their conclusion will not lightly be disturbed.

Ordinarily where a case has been brought up for review from an intermediate court of appellate jurisdiction to the circuit court of appeals, questions will not be considered which were neither raised in the court of first instance nor assigned for error in the intermediate court,[23] or which could have been, but were not, properly raised and passed on in the intermediate court.[24] When two independent and distinct tribunals have examined the facts and reached a like result, the conclusion so reached should not be lightly disturbed by a higher court,[25] but, where two fact-finding tribunals have reached different conclusions, the circuit court of appeals will not give the same weight to a finding which would be given otherwise.[26] An assignment that the intermediate appellate court erred in giving undue weight to evidence adduced at the trial and in altering the conclusions of the trial court raises questions of fact which cannot be considered by the circuit court of appeals.[27]

k. Subsequent Appeals

Generally an adjudication on the first appeal to a circuit court of appeals having jurisdiction of the cause is the law of the case on all subsequent appeals in which the facts are substantially the same, and will be reconsidered only under exceptional circumstances and when cogent reasons therefor exist.

It may be stated as a rule of general application that, where the evidence on a second or succeeding appeal is substantially the same as that on the first or preceding appeal, all matters, questions, points, or issues adjudicated on the prior appeal are the law of the case on all subsequent appeals and will not be reconsidered or readjudicated therein.[28] If,

18. U.S.—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695—E. K. Wood Lumber Co. v. Moore, Mill & Lumber Co., C.C.A.Cal., 97 F.2d 402—Farmers' Life Ins. Co. of Denver, Colo. v. Barker, C.C.A. Tex., 2 F.2d 468—Erie R. Co. v. Schleenbaker, Ohio, 257 F. 667, 168 C.C.A. 617, certiorari denied 40 S.Ct. 13, 250 U.S. 666, 63 L. Ed. 1197.

19. U.S.—Moore v. Tremelling, C.C. A.Idaho, 100 F.2d 39—U. S. v. Sanford, C.C.A.Ga., 73 F.2d 233—Washburn v. Douthit, C.C.A.Ark., 73 F. 2d 23—Boston & M. R. R. v. Baker, Mass., 236 F. 896, 150 C.C.A. 158.

20. U.S.—Washburn v. Douthit, C.C. A.Ark., 73 F.2d 23.

Allowance of interest
U.S.—Loomis v. Wattles, C.C.A.Neb., 266 F. 876.

21. U.S.—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.

22. U.S.—Travelers' Ins. Co. v. Bancroft, C.C.A.Okl., 65 F.2d 963, certiorari denied 54 S.Ct. 103, 290 U.S. 680, 78 L.Ed. 587—Petroleum Iron Works Co. v. Wright, C.C.A.Ark., 5 F.2d 935, certiorari denied 46 S. Ct. 25, 269 U.S. 567, 70 L.Ed. 415—Stave & Timber Corp. in Norfolk, Va. v. A. H. Andrews Co., N. Y., 242 F. 230, 155 C.C.A. 70.

23. U.S.—Sancho v. Valiente & Co., C.C.A.Puerto Rico, 93 F.2d 327, certiorari denied 58 S.Ct. 829, 303 U.S. 662, 82 L.Ed. 1120, rehearing denied 58 S.Ct. 1037, 304 U.S. 588, 82 L.Ed. 1549.

24. **Objection made too late**
Administrator sued in probate court for recovery of stock, who made no objection on jurisdictional grounds until close of trial de novo in district court, waived jurisdictional question so that the question cannot be considered by the circuit court of appeals.—Stone v. Howell, C.C.A. Alaska, 33 F.2d 701.

25. U.S.—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, and reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U. S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F. 2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, and reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—De Leon v. Cortes, C.C.A.Puerto Rico, 23 F.2d 636—Morales v. Velez, C.C.A.Puerto Rico, 18 F.2d 519—U. S. v. Boston Sand & Gravel Co., C.C.A.Mass., 23 F.2d 839, affirming, D.C., Boston Sand & Gravel Co. v. U. S., 16 F.2d 643—Roig v. Central Pasto Viejo, Inc., C.C.A.Puerto Rico, 6 F.2d 106—Gandia v. Porto Rico Fertilizer Co., C.C.A.Puerto Rico, 291 F. 18, certiorari denied Porto Rico Fertilizer Co. v. Gandia, 44 S.Ct. 37, 263 U.S. 711, 68 L.Ed. 519.

26. U.S.—Uihlein v. General Electric Co., C.C.A.Wis., 47 F.2d 997.

27. U.S.—Valiente & Co. v. Succession of Fuentes, C.C.A.Puerto Rico, 76 F.2d 78.

28. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 120 F. 2d 301—Russell & Co. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 225, certiorari granted 62 S.Ct. 61, 314 U. 589, 86 L.Ed. 475, and affirmed 62 S.Ct. 784, 315 U.S. 610, 86 L.Ed. 1062, rehearing denied 62 S.Ct. 1030, 316 U.S. 708, 86 L.Ed. 1775—A. S. Kreider Co. v. U. S., C.C.A.Pa., 117 F.2d 133, affirming, D.C., 30 F.Supp. 724, certiorari granted U. S. v. A. S. Kreider Co., 61 S.Ct. 843, 313 U.S. 552, 85 L.Ed. 1516, and reversed on other grounds 61 S.Ct. 1007, 313 U.S. 443, 85 L.Ed. 1447—Wyant v. U. S. Fidelity & Guaranty Co., C.C.A.W. Va., 116 F.2d 83, certiorari denied 62 S.Ct. 57, 314 U.S. 610, 86 L. Ed. 490—Midland Valley R. Co. v. Jones, C.C.A.Okl., 115 F.2d 508—Toucey v. New York Life Ins. Co., C.C.A.Mo., 112 F.2d 927, certiorari granted 61 S.Ct. 440, 311 U.S. 643, 85 L.Ed. 410, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1549, reversed on other grounds 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967, motion denied 62 S.Ct. 294, 314 U. S. 682, 86 L.Ed. 473—Atchison, T. & S. F. Ry. Co. v. Ballard,

however, the court on the first appeal did not have | jurisdiction or authority to adjudicate the question,

C.C.A.Tex., 108 F.2d 768, rehearing denied 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S.Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413—Pike Rapids Power Co. v. Minneapolis St. P. & S. S. M. Ry. Co., C.C.A.Minn., 106 F.2d 891—Louisville Trust Co. v. National Bank of Kentucky, C.C.A.Ky., 102 F.2d 137, certiorari denied 60 S.Ct. 76, 308 U.S. 564, 84 L.Ed. 474—State of Kansas ex rel. Beck v. Occidental Life Ins. Co., C.C.A.Kan., 95 F.2d 935, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383—New York Life Ins. Co. v. Golightly, C.C.A.Ark., 94 F.2d 316, certiorari denied 58 S.Ct. 949, 304 U.S. 566, 82 L.Ed. 1532—Carpenter v. Durell, C.C.A.Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S.Ct. 42, 302 U.S. 721, 82 L.Ed. 557—Chicago & N. W. Ry. Co. v. Kelly, C.C.A.Minn., 84 F.2d 569—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—U. S. v. Bollman, C.C.A.Iowa, 81 F.2d 1009—De Parcq v. Liggett & Myers Tobacco Co., C.C.A.Minn., 81 F.2d 777—U. S. Paper Exports Ass'n v. Bowers, C.C.A.N.Y., 80 F.2d 82, modifying, D.C., 6 F.Supp. 735—Claiborne-Reno Co. v. E. I. Du Pont de Nemours & Co., C.C.A.Iowa, 77 F.2d 565—General Motors Acceptance Corporation v. Mid-West Chevrolet Co., C.C.A.Okl., 74 F.2d 386—Chesapeake & O. Ry. Co. v. Mears, C.C.A.Va., 70 F.2d 490, certiorari denied 55 S.Ct. 69, 293 U.S. 557, 79 L.Ed. 659—Jones v. Box Elder County, Utah, C.C.A.Utah, 67 F.2d 900—Keeler v. Fred T. Ley & Co., C.C.A.Mass., 65 F.2d 499—Zurich General Accident & Liability Ins. Co. v. O'Keefe, C.C.A.N.D., 64 F.2d 768, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 548—Armour Fertilizer Works v. Sanders, C.C.A.Tex., 63 F.2d 902, certiorari granted Sanders v. Armour Fertilizer Works, 54 S.Ct. 345, 290 U.S. 623, 78 L.Ed. 543, and affirmed 54 S.Ct. 677, 292 U.S. 190, 78 L.Ed. 1206, 91 A.L.R. 950, rehearing denied 54 S.Ct. 855, 292 U.S. 612, 78 L.Ed. 1472—Ætna Life Ins. Co. v. Wharton, C.C.A.Ark., 63 F.2d 378, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1500—Utah Power & Light Co. v. Woody, C.C.A.Utah, 62 F.2d 613—Freeman v. Smith, C.C.A.Alaska, 62 F.2d 291—Northern Pac. Ry. Co. v. Van Dusen Harrington Co., C.C.A.Minn., 60 F.2d 394—International Brotherhood of Electrical Workers, Local No. 134 v. Western Union Telegraph Co., C.C.A.Ill., 46 F.2d 736, certiorari denied 52 S.Ct. 13, 284 U.S. 630, 76 L.Ed. 536—Federal Reserve Bank of Kansas City, Mo., v. Omaha Nat. Bank of Omaha, Neb., C.C.A.Neb., 45 F.2d 511, 514, citing **Corpus Juris**, and certiorari denied Wyoming Nat. Bank of Casper, Wyo. v. Omaha Nat. Bank of Omaha, 51 S.Ct. 215, 282 U.S. 902, 75 L.Ed. 794—National Brake & Electric Co. v. Christensen, C.C.A.Wis., 38 F.2d 721, certiorari denied 51 S.Ct. 36, 282 U.S. 86, 75 L.Ed. 764—Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, affirming, D.C., 22 F.2d 712—Dodd v. Union Indemnity Co., C.C.A.Va., 32 F.2d 512, certiorari denied 50 S.Ct. 33, 280 U.S. 581, 74 L.Ed. 631—Illinois Cent. R. Co. v. Crail, C.C.A.Minn., 31 F.2d 111, affirming, D.C., Crail v. Illinois Cent. R. Co., 21 F.2d 836, certiorari granted Illinois Cent. R. Co. v. Crail, 49 S.Ct. 483, 279 U.S. 833, 73 L.Ed. 982, and reversed on other grounds 50 S.Ct. 180, 281 U.S. 57, 74 L.Ed. 699, 67 A.L.R. 1423—Pennsylvania Mining Co. v. United Mine Workers of America, C.C.A.Ark., 28 F.2d 851, certiorari denied 49 S.Ct. 263, 279 U.S. 841, 73 L.Ed. 987—Hatch v. Morosco Holding Co., C.C.A.N.Y., 26 F.2d 247, certiorari granted Riehle v. Margolies, 49 S.Ct. 29, 278 U.S. 591, 73 L.Ed. 523, and affirmed 49 S.Ct. 310, 279 U.S. 218, 73 L.Ed. 669—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—L. P. Larson, Jr., Co. v. William Wrigley, Jr., Co., C.C.A.Ill., 20 F.2d 830, modifying, D.C., William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., 5 F.2d 731, and certiorari denied 48 S.Ct. 157, 275 U.S. 521, 72 L.Ed. 404, motion denied 48 S.Ct. 435, 72 L.Ed. 1018, and reversed in part on other grounds 48 S.Ct. 449, 277 U.S. 97, 72 L.Ed. 800—Liberty Nat. Bank of Roanoke, Va., v. Bear, C.C.A.Va., 18 F.2d 281, certiorari granted 47 S.Ct. 659, 274 U.S. 731, 71 L.Ed. 1327, and reversed on other grounds 48 S.Ct. 252, 276 U.S. 215, 72 L.Ed. 536—City of Seattle v. Puget Sound Power & Light Co., C.C.A.Wash., 15 F.2d 794, certiorari denied 47 S.Ct. 456, 273 U.S. 752, 71 L.Ed. 874, and Puget Sound Power & Light Co. v. City of Seattle, 47 S.Ct. 458, 273 U.S. 753, 71 L.Ed. 874—Dickinson v. O. & W. Thum Co., C.C.A.Mich., 8 F.2d 570—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577—Chouteau Trust Co. v. Massachusetts Bonding & Ins. Co., C.C.A.Mo., 1 F.2d 136—In re Paramount-Publix Corporation, D.C.N.Y., 10 F.Supp. 504—Finley v. United Mine Workers of America, C.C.A.Ark., 300 F. 972, modified on other grounds Coronado Coal Co. v. United Mine Workers of America, 45 S.Ct. 551, 268 U.S. 295, 69 L.Ed. 963—Texas Co. v. Pensacola Maritime Corporation, C.C.A.Fla., 292 F. 61—Meyer & Chapman State Bank v. First Nat. Bank, C.C.A.Wyo., 291 F. 42—First Nat. Bank v. Old Dominion Trust Co., C.C.A.N.C., 284 F. 128—Canal-Commercial Trust & Savings Bank v. Bank of Plant City, C.C.A.La., 278 F. 178—Philadelphia Rubber Works Co. v. U. S. Rubber Reclaiming Works, C.C.A.N.Y., 277 F. 171, affirming, D.C., 276 F. 600, 613, and certiorari denied U. S. Rubber Reclaiming Works v. Philadelphia Rubber Works Co., 42 S.Ct. 187, 257 U.S. 660, 66 L.Ed. 422—Browne v. Thorn, C.C.A.Ark., 272 F. 950, certiorari granted 41 S.Ct. 625, 256 U.S. 689, 65 L.Ed. 1172, and affirmed 43 S.Ct. 36, 260 U.S. 137, 67 L.Ed. 171—Keith v. Kilmer, C.C.A.Mass., 272 F. 643, certiorari denied Kilmer v. Keither, 42 S.Ct. 51, 257 U.S. 639, 66 L.Ed. 410—Cogswell v. Drennen, C.C.A.Ala., 271 F. 289, petition dismissed Tilton v. Drennen, 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, rehearing granted 42 S.Ct. 168, 257 U.S. 631, 66 L.Ed. 406, certiorari denied 42 S.Ct. 169, 257 U.S. 657, 66 L.Ed. 420, and appeal dismissed 43 S.Ct. 358, 261 U.S. 624, 67 L.Ed. 823, and reversed on other grounds 43 S.Ct. 704, 262 U.S. 635, 67 L.Ed. 1206—Rainier Brewing Co. v. Great Northern Pac. S. S. Co., C.C.A.Wash., 270 F. 94, affirmed 42 S.Ct. 436, 259 U.S. 150, 66 L.Ed. 868—Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., C.C.A.Md., 267 F. 180, certiorari denied 41 S.Ct. 62, 254 U.S. 648, 65 L.Ed. 456—Whitfield v. Hanges, C.C.A.Iowa, 266 F. 69—F. H. Orcutt & Son Co. v. National Trust & Credit Co., C.C.A.Ill., 265 F. 267, certiorari denied 40 S.Ct. 584, 253 U.S. 491, 64 L.Ed. 1028—United Mine Workers of America v. Coronado Coal Co., Ark., 258 F. 829, 169 C.C.A. 549, reversed on other grounds 42 S.Ct. 570, 259 U.S. 344, 66 L.Ed. 975, 27 A.L.R. 762, certiorari denied and leave to present petition for rehearing granted 42 S.Ct. 587—Tillar v. Cole Motor Car Co., Tex., 246 F. 831, 159 C.C.A. 133, certiorari denied 38 S.Ct. 579, 247 U.S. 511, 62 L.Ed. 1242—U. S. Fidelity & Guaranty Co. v. Eichel, Pa., 241 F. 357, 153 C.C.A. 237, affirmed Eichel v. U. S. Fidelity & Guaranty Co., 38 S.Ct. 47, 245 U.S. 102, 62 L.Ed. 177—Ferrell v. Prame, Ohio, 236 F. 727, 150 C.C.A. 59—National Bank of Commerce v. U. S., Wash., 224 F. 679, 140 C.C.A. 219, certiorari de-

its judgment is not the law of the case on a subsequent appeal.[29] Generally, a party on a second appeal involving the same subject matter and between the same parties is estopped to assert a position or theory inconsistent with that relied on upon the first appeal to the prejudice of his adversary.[30]

While the adjudication on a former appeal has been declared to be res judicata on subsequent appeals in the case involving substantially the same facts,[31] the doctrine of the law of the case does not carry the same consequences as the rule of res judicata, since the law of the case directs discretion whereas res judicata supersedes it and compels judgment.[32]

In accordance with the general rule stated, where, after a definite determination, the court has remanded the cause for further action below, it will refuse to examine questions other than those arising subsequently to such determination and remand, or other than the propriety of the compliance with its mandate;[33] and, if the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal.[34] A new appeal is an appropriate remedy, however, if the mandate does not cover the entire case, but leaves something undetermined to be inquired into and adjudicated,[35] or if the lower court misconstrues the decree of the appellate court and does not give full effect to its mandate;[36] and, where the last decree of the lower court does not touch any matter adjudged on the former appeal or covered by the mandate, it may be reviewed.[37]

Former decision erroneous. While the remedy of the party deeming himself aggrieved by an erroneous decision on appeal is ordinarily held to be to seek a rehearing,[38] the doctrine of the law of the case is qualified in a number of decisions which hold that, although the court will not review or reconsider questions decided on a former appeal except in most unusual circumstances or in a very clear case of error,[39] the court is not precluded from doing so, and the former decision may be reconsidered and reversed under exceptional circumstances and when cogent reasons therefor exist.[40]

nied 36 S.Ct. 287, 241 U.S. 658, 60 L.Ed. 1225—McClelland v. Rose, Tex., 222 F. 67, 137 C.C.A. 519, certiorari denied Rose v. McClelland, 36 S.Ct. 552, 241 U.S. 668, 60 L.Ed. 1229—Bell v. Arledge, Tex., 219 F. 675, 135 C.C.A. 347.

4 C.J. p 1093 note 77, p 1096 note 91, p 1104 note 38 [a].

29. U.S.—Russell & Co. v. People of Puerto Rico, C.C.A.Puerto Rico, 118 F.2d 225, certiorari granted 62 S.Ct. 61, 314 U.S. 589, 86 L.Ed. 475, and affirmed 62 S.Ct. 784, 315 U.S. 610, 86 L.Ed. 1062, rehearing denied 62 S.Ct. 1030, 316 U.S. 708, 86 L.Ed. 1775.

30. **Treating suit as one in equity**

Where a city for more than five years and on a former appeal treated the suit as one in equity between it and the receiver, it cannot on a later appeal contend otherwise.—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.

31. U.S.—Burns v. Cooper, Neb., 153 F. 148, 82 C.C.A. 300.

4 C.J. p 1097 note 94.

32. U.S.—Connett v. City of Jerseyville, C.C.A.Ill., 110 F.2d 1015.

33. U.S.—Flannery Bolt Co. v. Flannery, C.C.A.Pa., 119 F.2d 601—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—Jones v. Box Elder County, C.C.A.Utah, 67 F.2d 900—American Surety Co. of New York v. Greek Catholic Union, C.C.A.Pa., 51 F.2d 1050, certiorari granted 52 S.Ct. 41, 284 U.S. 608, 76 L.Ed. 520, and reversed on other grounds 52 S.Ct. 235, 284 U.S. 563, 76 L.Ed. 490, amended 52 S.Ct. 392, 285 U.S. 526, 76 L.Ed. 923—Lederer v. Real Estate Title Insurance & Trust Co. of Philadelphia, C.C.A.Pa., 273 F. 933.

4 C.J. p 1097 note 1.

34. U.S.—Whitfield v. Hanges, C.C.A.Iowa, 266 F. 69.

4 C.J. p 1098 note 2.

35. U.S.—American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., C.C.A.Fla., 51 F.2d 665—Great Northern R. Co. v. Western Union Tel. Co., Minn., 174 F. 321, 98 C.C.A. 193.

36. U.S.—Continental & Commercial Trust & Savings Bank v. North Platte Valley Irr. Co., Wyo., 237 F. 188, 150 C.C.A. 334—Great Northern R. Co. v. Western Union Tel. Co., Minn., 174 F. 321, 98 C.C.A. 193.

37. U.S.—Nashua & L. R. Corp. v. Boston & L. R. Corp., Mass., 51 F. 929, 2 C.C.A. 542.

38. U.S.—Maryland Casualty Co. v. City of South Norfolk, C.C.A.Va., 54 F.2d 1032, rehearing denied and modified on other grounds 56 F.2d 822, certiorari denied City of South Norfolk v. Maryland Casualty Co., 52 S.Ct. 644, 286 U.S. 562, 76 L.Ed. 1295.

39. U.S.—White v. Higgins, C.C.A.Mass., 116 F.2d 312, reversing, D.C., Higgins v. White, 31 F.Supp. 796, conforming to mandate C.C.A., 93 F.2d 357, reversing, D.C., 18 F.Supp. 986—Louisville Trust Co. v. National Bank of Kentucky, C.C.A.Ky., 102 F.2d 137, certiorari denied 60 S.Ct. 76, 308 U.S. 564, 84 L.Ed. 474—Lauf v. E. G. Shinner & Co., C.C.A.Wis., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U.S. 669, 82 L.Ed. 516, and reversed on other grounds 58 S.Ct. 579, 303 U.S. 323, 82 L.Ed. 872—U. S. v. Bollman, C.C.A.Iowa, 81 F.2d 1009—Zurich General Accident & Liability Ins. Co. v. O'Keefe, C.C.A.N.D., 64 F.2d 768, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 548—Maryland Casualty Co. v. City of South Norfolk, C.C.A.Va., 54 F.2d 1032, rehearing denied and modified on other grounds 56 F.2d 822, certiorari denied City of South Norfolk v. Maryland Casualty Co., 52 S.Ct. 644, 286 U.S. 562, 76 L.Ed. 1295—Williams v. Order of Commercial Travelers of America, C.C.A.Ky., 41 F.2d 745, certiorari denied Williams v. Order of United Commercial Travelers of America, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 774—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577—Lackner v. McKechney, C.C.A.Ill., 2 F.2d 516, certiorari denied Lackner v. Starr, 45 S.Ct. 462, 267 U.S. 601, 69 L.Ed. 808.

4 C.J. p 1100 note 14.

Mere doubt on the part of the circuit court of appeals is not enough to open up a point decided on a previous appeal for full reconsideration.—White v. Higgins, C.C.A.Mass., 116 F. 2d 312, reversing, D.C., Higgins v. White, 31 F.Supp. 796, conforming to mandate, C.C.A., 93 F.2d 367, reversing, D.C., 18 F.Supp. 986.

40. U.S.—White v. Higgins, supra—Connett v. City of Jerseyville, C.C.A.Ill., 110 F.2d 1015—Kelly-Spring-

For example, the court will overrule or modify its former decision where the decision is palpably erroneous or grossly and manifestly unjust, or where the mischief to be cured far outweighs any injury that may be done in the particular case.[41] So the circuit court of appeals will change a ruling made on a prior appeal in the same case to conform to a subsequent decision of the supreme court in another case.[42] Where the circuit court of appeals on the prior appeal erred in remanding the case to the trial court for further evidence instead of deciding the case on the record, the court of appeals will not, on the subsequent appeal, consider a contention that the findings made after remand were not supported by substantial evidence.[43]

Errors existing on former review. It is generally held, on a second or subsequent appeal, that the court will not consider matters assigned as error, which arose prior to the first appeal or writ of error, and which might have been raised thereon, but were not, or matters appearing in the original record which might have been corrected on the first hearing, but were not urged.[44] This rule, however, is one of practice, rather than one of jurisdiction;[45] and, according to some authority, an appellate tribunal is bound by its prior decision only on the points distinctly made and determined, and not on points which might have been raised, but were not.[46] A judgment of reversal is not necessarily an adjudication of any other questions than those in terms discussed and decided.[47] A decision on which a judgment is not rendered is not binding on a subsequent appeal, as where an appeal is abandoned or dismissed.[48]

Cross appeals. Where, on an appeal or review, a party fails to prosecute a cross appeal or to urge assignments of error which might have been effectively presented, he may be precluded from such prosecution or presentation on a subsequent appeal.[49]

New questions on second appeal. While, as already discussed, generally all questions reserved for review by an appellate court must be presented on

field Tire Co. v. U. S., C.C.A.N.J., 110 F.2d 823—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—State of Kansas ex rel. Beck v. Occidental Life Ins. Co., C.C.A.Kan., 95 F.2d 935, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383—Mantle Lamp Co. of America v. Knapp-Monarch Co., C.C.A.Ill., 81 F.2d 428—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 153, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—Williams v. Order of Commercial Travelers of America, C.C.A.Ky., 41 F.2d 745, certiorari denied Williams v. Order of United Commercial Travelers of America, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 774—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577—Texas Co. v. Pensacola Maritime Corporation, C.C.A. Fla., 292 F. 61—Ford Motor Co. v. Hotel Woodward Co., C.C.A.N.Y., 271 F. 625, certiorari denied 41 S.Ct. 537, 256 U.S. 698, 65 L.Ed. 1177, and 42 S.Ct. 590, 259 U.S. 588, 66 L.Ed. 1078—Chase v. U. S., C.C.A.Neb., 261 F. 833, affirmed 41 S.Ct. 417, 256 U.S. 1, 65 L.Ed. 801.

Good practice only, and not jurisdiction, is involved.—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 163, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716.

41. U.S.—Hammond-Knowlton v. U. S., C.C.A.Conn., 121 F.2d 192—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—American Surety Co. of New York v. Bankers' Savings & Loan Ass'n of Omaha, C.C.A.Neb., 67 F.2d 803, certiorari denied 54 S.Ct. 529, 291 U.S. 678, 78 L.Ed. 1066—Northern Pac. Ry. Co. v. Van Dusen Harrington Co., C.C.A.Minn., 60 F.2d 394—Rogers v. Chicago, R. I. & P. Ry. Co., C.C.A.Neb., 39 F.2d 601—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577.

42. U.S.—White v. Higgins, C.C.A. Mass., 116 F.2d 312, reversing, D.C., Higgins v. White, 31 F.Supp. 796, conforming to mandate, C.C.A., 93 F.2d 357, reversing, D.C., 18 F. Supp. 986—Higgins v. California Prune & Apricot Grower, C.C.A.N.Y., 3 F.2d 896.

43. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 125 F.2d 446.

44. U.S—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—U. S. v. Gutzler, C.C.A.Cal., 105 F.2d 188—Western Union Telegraph Co. v. Czizek, C.C.A.Idaho, 286 F. 478, certiorari granted 43 S.Ct. 700, 262 U.S. 739, 67 L.Ed. 1208, and reversed on other grounds 44 S.Ct. 328, 264 U.S. 281, 68 L.Ed. 682—Raydure v. Lindley, C.C.A.Ky., 268 F. 338—Guaranty Trust Co. of New York v. International Steam Pump Co., N.Y., 242 F. 920, 155 C.C.A. 508.

4 C.J. p 1101 note 18.

45. U.S.—Connett v. City of Jerseyville, C.C.A.Ill., 110 F.2d 1015—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 163, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716.

46. U.S.—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 106 F.2d 375, certiorari denied 60 S.Ct. 294, 308 U.S. 621, 84 L.Ed. 518.

4 C.J. p 1100 note 17.

Unnecessary decision

A party is not estopped from raising a question of law on a second appeal, because it might have been, but was not, raised on the former appeal where the decision would have been unnecessary on the former appeal.—Chase v. U. S., C.C.A.Neb., 261 F. 833, affirmed 41 S.Ct. 417, 256 U.S. 1, 65 L.Ed. 801.

47. U.S.—Des Moines Terminal Co. v. Des Moines Union Ry. Co., C.C.A.Iowa, 52 F.2d 616, affirming, C.C., 52 F.2d 605, and certiorari denied 52 S.Ct. 311, 285 U.S. 537, 76 L.Ed. 930.

48. **Dismissal for want of equity** is not an adjudication that the court does not have jurisdiction.—Burnrite Coal Briquette Co. v. Riggs, N. J., 47 S.Ct. 578, 274 U.S. 208, 71 L. Ed. 1002, affirming, C.C.A., 6 F.2d 226, certiorari granted 46 S.Ct. 106, 269 U.S. 546, 70 L.Ed. 405.

49. U.S.—Sun Co. v. Vinton Petroleum Co., Tex., 248 F. 623, 160 C.C.A. 523, certiorari denied 38 S. Ct. 580, 247 U.S. 514, 62 L.Ed. 1244.

the first appeal therefrom after the final judgment or not at all, as thereafter all questions presented by the record will be considered as finally determined by the judgment, and all such questions not expressly affirmed or reversed will, by implication, be deemed affirmed, yet, where new questions arise, such as were not and could not have been fully determined on the former appeal, such rule is without force.[50] Accordingly, where different questions arise on the second appeal, and the record presents a different state of facts, the former determination is not controlling.[51] In like manner, if the essential facts and evidence or the issues and pleadings on the subsequent appeal are substantially different and the record presents a materially different situation, the doctrine of the law of the case has no application to the former decision or parts thereof affected by the altered circumstances,[52] but to have this effect the new evidence must be more than merely cumulative or immaterial.[53]

Appeals to supreme court. The determination of the supreme court, on the review of a decision of the circuit court of appeals, cannot be questioned on a second appeal in the latter court[54] unless a different question is presented.[55] Thus the circuit court of appeals may examine the opinion and mandate of the supreme court to determine whether the decision of the district court on remand from the supreme court is on a question left open, on a new issue, or on some matter properly appealable to the circuit court of appeals,[56] but has no power to review the decision of the supreme court or to construe and enforce its mandate in respect of matters found to be within the compass of its decision.[57] The decision of the circuit court of appeals on the first appeal of a cause is not res judicata or conclusive on the supreme court where, after a subsequent appeal to the circuit court of appeals, a further appeal is taken to the supreme court.[58]

Decision on interlocutory appeal. Questions decided on appeal from an interlocutory decree will not be reconsidered on appeal from the final decree.[59]

50. U.S.—General Inv. Co. v. Lake Shore & M. S. Ry. Co., Ohio, 43 S.Ct. 106, 260 U.S. 261, 67 L.Ed. 244, modifying, C.C.A., 269 F. 235—Zolintakis v. Orfanos, C.C.A.Utah, 119 F.2d 571, certiorari denied Orfanos v. Zolintakis, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506—Fidelity & Guaranty Fire Corporation of Baltimore, Md., v. Bilquist, C.C.A.Wash., 108 F.2d 713—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 106 F.2d 375, certiorari denied 60 S.Ct. 294, 308 U.S. 621, 84 L.Ed. 518—Carpenter v. Durell, C.C.A.Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S.Ct. 42, 302 U.S. 721, 82 L.Ed. 557.

51. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 120 F.2d 301—Reynolds Spring Co. v. L. A. Young Industries, C.C.A.Mich., 101 F.2d 257—Lawrence-Williams Co. v. Societe Enfants Gombault Et Cie, C.C.A.Ohio, 52 F.2d 774, certiorari denied Societe Enfants Gombault Et Cie v. Lawrence-Williams Co., 52 S.Ct. 406, 285 U.S. 549, 76 L.Ed. 940—McCormick v. Puritan Coal Mining Co., C.C.A.Pa., 41 F.2d 213—Fairbanks, Morse & Co. v. American Valve & Meter Co., C.C.A.Ill., 34 F.2d 869, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 649—Stroud v. Sautbine, C.C.A.Okl., 18 F.2d 883—Wong Wong v. Honolulu Skating Rink, C.C.A.Hawaii, 283 F. 731—Chicago Life Ins. Co. v. Tiernan, C.C.A.Kan., 263 F. 325—Saalfield Pub. Co. v. G. & C. Merriam Co., Ohio, 238 F. 1, 151 C.C.A. 77, certiorari denied 37 S.Ct. 478, 243 U.S. 651, 61 L.Ed. 947—In re Jamison Bros. & Co., Pa., 227 F. 30, 142 C.C.A. 3.
4 C.J. p 1101 note 21.

52. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—General Motors Acceptance Corporation v. Mid-West Chevrolet Co., C.C.A.Okl., 74 F.2d 386—Ætna Life Ins. Co. v. Wharton, C.C.A.Ark., 63 F.2d 378, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1500—Page v. Arkansas Natural Gas Corporation, C.C.A.Ark., 53 F.2d 27, certiorari granted 52 S.Ct. 407, 285 U.S. 532, 76 L.Ed. 927, and affirmed 52 S.Ct. 507, 286 U.S. 260, 76 L.Ed. 1096—Meyer & Chapman State Bank v. First Nat. Bank, C.C.A.Wyo., 291 F. 42—Eikland v. Casey, C.C.A.Alaska, 290 F. 880—Patterson v. Stroecker, Alaska, 245 F. 732, 158 C.C.A. 134, certiorari denied Stroecker v. Patterson, 38 S.Ct. 222, 245 U.S. 673, 62 L.Ed. 541.
4 C.J. p 1095 note 78.

Evidence held substantially similar rendering decision on first appeal conclusive.—Carpenter v. Durell, C.C.A.Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S.Ct. 42, 302 U.S. 721, 82 L.Ed. 557.

53. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 308 U.S. 636, 83 L.Ed. 1518—Zurich General Accident & Liability Ins. Co. v. O'Keefe, C.C.A.N.D., 64 F.2d 768, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 548—Ætna Life Ins. Co. v. Wharton, C.C.A.Ark., 63 F.2d 378, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1500.

54. U.S.—Bogart v. Southern Pac. Co., C.C.A.N.Y., 292 F. 586, amending mandate 290 F. 727, modifying, D.C., 285 F. 46, and certiorari denied 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517—Gratz v. McKee, C.C.A.Mo., 9 F.2d 593, certiorari denied 46 S.Ct. 472, 270 U.S. 664, 70 L.Ed. 788.

55. U.S.—Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co., Ind., 57 S.Ct. 135, 299 U.S. 156, 81 L.Ed. 93, reversing, C.C.A., 82 F.2d 704, certiorari granted 57 S.Ct. 14, 299 U.S. 524, 81 L.Ed. 386, and remanding cause for further consideration, C.C.A., 88 F.2d 979, certiorari denied Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 57 S.Ct. 925, 301 U.S. 696, 81 L.Ed. 1351, rehearing denied 58 S.Ct. 5, 302 U.S. 773, 82 L.Ed. 599.

56. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528.

57. U.S.—Ohio Oil Co. v. Thompson, supra.

58. U.S.—Diaz A. v. Patterson, Canal Zone, 44 S.Ct. 151, 263 U.S. 399, 68 L.Ed. 356, affirming, C.C.A., 281 F. 394—White v. Higgins, C.C.A.Mass., 116 F.2d 312, reversing, D.C., Higgins v. White, 31 F.Supp. 796, conforming to mandate, C.C.A., 93 F.2d 357, reversing, D.C., 18 F.Supp. 986.

59. U.S.—Radio Corporation of America v. De Forest Radio Co.,

Dicta. Mere expressions of opinion, or illustrations respecting matters not actually involved in the decision, have no binding force.[60]

Persons concluded. All parties and privies are bound by the decision on the former appeal.[61]

Particular questions concluded. As a general rule, the doctrine of the law of the case has no application to questions of fact,[62] but applies to all questions of law identical with those on the prior appeal, and on the same facts.[63] Among the questions which have been held to be concluded by the decision on the former appeal are such as relate to the grounds and right of action[64] or of defense;[65] the validity and interpretation of written instruments or contracts;[66] the proper parties;[67] the sufficiency or effect of the verdict;[68] the validity, sufficiency, or effect of the judgment;[69] negligence or contributory negligence;[70] and the amount of recovery or extent of relief.[71]

Where the court, on a prior appeal, has expressly or impliedly decided that it had jurisdiction at that time, it will not reconsider that question on a subsequent appeal.[72] Generally, the court will not pass on the jurisdiction of the lower court where that question was decided either expressly or by implication on a formal appeal.[73] Where the question of jurisdiction was not raised by any of the parties or decided by the court, however, its consideration is not foreclosed by the decision on the former appeal.[74]

Where the sufficiency or insufficiency of a pleading is determined on one appeal, the determination is conclusive when the same question is presented on a subsequent appeal.[75] In passing on the suffi-

C.C.A.Del., 47 F.2d 606, affirming, D.C., Lord v. Radio Corporation of America, 35 F.2d 962, and certiorari denied Radio Corporation of America v. Deforest Radio Co., 51 S.Ct. 493, 283 U.S. 847, 75 L.Ed. 1456—Walbridge-Aldinger Co. v. Rudd, C.C.A.Okl., 26 F.2d 636—Field v. Kansas City Refining Co., C.C.A.Mo., 9 F.2d 313, certiorari denied 46 S.Ct. 489, 271 U.S. 676, 70 L.Ed. 1146—Brown v. Lanyon Zinc Co., Kan., 179 F. 309, 102 C.C.A. 497.

60. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 120 F. 2d 301—U. S. Fidelity & Guaranty Co. v. Commercial Nat. Bank of Brady, C.C.A.Tex., 62 F.2d 718, certiorari denied 53 S.Ct. 595, 289 U.S. 734, 77 L.Ed. 1483.

4 C.J. p 1104 note 41.

61. U.S.—Morrison v. Kuhn, Ga., 80 F. 740, 26 C.C.A. 130.

62. U.S.—Carpenter v. Durell, C.C. A.Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S.Ct. 42, 302 U.S. 721, 82 L.Ed. 557.

63. U.S.—American Surety Co. of New York v. Bankers' Savings & Loan Ass'n of Omaha, C.C.A.Neb., 67 F.2d 803, certiorari denied 54 S.Ct. 529, 291 U.S. 678, 78 L.Ed. 1066.

64. U.S.—Citizens Nat. Bank of Waco, Tex. v. Fidelity & Deposit Co. of Maryland, C.C.A.Tex., 117 F. 2d 852, certiorari denied 61 S.Ct. 947, 313 U.S. 570, 85 L.Ed. 1528—Page v. Regents of University System of Georgia, C.C.A.Ga., 93 F.2d 887, affirming, D.C., Regents of University System of Georgia v. Page, 18 F.Supp. 62, conforming to, C.C.A., 81 F.2d 577, reversing, D.C., 10 F.Supp. 901, certiorari granted Allen v. Regents of University System of Georgia, 58 S.Ct. 831, reversed on other grounds 58 S.Ct. 980, 304 U.S. 439, 82 L.Ed. 1448, rehearing denied 58 S.Ct. 1053, 304 U.S. 590, 82 L.Ed. 1550—Speh v. Bullard, C.C.A.Fla., 90 F. 2d 227—Bodkin v. Edwards, C.C.A. Cal., 265 F. 621, affirming, D.C., Edwards v. Bodkin, 267 F. 1004, and affirmed 41 S.Ct. 268, 255 U.S. 221, 65 L.Ed. 595—Caledonian Ins. Co. v. Levy, Cal., 233 F. 92, 147 C.C.A. 162, certiorari denied Lewis v. Caledonian Ins. Co., 37 S.Ct. 19, 242 U.S. 635, 61 L.Ed. 539.

4 C.J. p 1107 note 61.

Nature of action as one in equity
U.S.—McCarthy v. Wynne, C.C.A.Okl., 126 F.2d 620.

65. U.S.—U. S. v. Bollman, C.C.A. Iowa, 81 F.2d 1009.

66. U.S.—Panama City v. Federal Reserve Bank of Atlanta, C.C.A. Fla., 97 F.2d 499—Barnett v. Kunkel, C.C.A.Okl., 283 F. 24, certiorari denied 43 S.Ct. 97, 260 U.S. 738, 67 L.Ed. 489, appeal dismissed 44 S.Ct. 254, 264 U.S. 16, 68 L.Ed. 539—Chesapeake & O. Ry. Co. v. McKell, Ohio, 221 F. 934, 137 C.C.A. 504.

4 C.J. p 1107 note 63.

67. U.S.—Brach v. Moen, C.C.A. Iowa, 35 F.2d 475, certiorari denied 50 S.Ct. 162, 280 U.S. 613, 74 L.Ed. 655.

68. U.S.—Gooch v. Buford, C.C.A. Tenn., 262 F. 894.

69. U.S.—Gooch v. Buford, supra.

70. U.S.—Davis v. Crane, C.C.A. Mo., 12 F.2d 355—Western Union Telegraph Co. v. Czizek, C.C.A. Idaho, 286 F. 478, certiorari granted 43 S.Ct. 700, 262 U.S. 739, 67 L. Ed. 1208, and reversed on other grounds 44 S.Ct. 328, 264 U.S. 281, 68 L.Ed. 682.

71. U.S.—Davis v. Dexter & Carpenter, C.C.A.Md., 2 F.2d 59, affirmed 45 S.Ct. 514, 268 U.S. 679, 69 L.Ed. 1153.

72. U.S.—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Granite Brick Co. v. Titus, S.C., 226 F. 557, 141 C.C.A. 313.

73. U.S.—Speh v. Bullard, C.C.A. Fla., 90 F.2d 227—Federal Reserve Bank of Kansas City, Mo., v. Omaha Nat. Bank of Omaha, Neb., C. C.A.Neb., 45 F.2d 511, certiorari denied Wyoming Nat. Bank of Casper, Wyo., v. Omaha Nat. Bank of Omaha, 51 S.Ct. 215, 282 U.S. 902, 75 L.Ed. 794—City and County of Denver v. Denver Tramway Corporation, C.C.A.Colo., 23 F.2d 287, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539—Cable v. U. S. Life Ins. Co., Ill., 111 F. 19, 49 C.C. A. 216, reversed on other grounds 191 U.S. 288, 24 S.Ct. 74, 48 L.Ed. 188.

74. U.S.—City of Stuart v. Green, C.C.A.Fla., 91 F.2d 603, 113 A.L.R. 560, certiorari denied Green v. City of Stuart, 58 S.Ct. 146, 302 U.S. 744, 82 L.Ed. 575, rehearing denied 58 S.Ct. 280, 302 U.S. 779, 82 L.Ed. 602, and motion denied, C.C.A., 94 F.2d 942.

Liberal practice
Regardless of the effect of the previous decision, when the trial court's jurisdiction as a federal court is questioned, liberality in practice should be indulged to the end that the question may be determined on subsequent appeal.—Connett v. City of Jerseyville, C.C.A.Ill., 110 F.2d 1015.

75. U.S.—Aaron v. Hopkins, C.C.A. Tex., 63 F.2d 804—Walker v. Traylor Engineering & Mfg. Co., C.C.A. Okl., 34 F.2d 748, certiorari denied

ciency of a pleading the appellate court assumes the truth of the allegations and does not pass on the truth of the matters alleged, so that the ruling is not conclusive as to the facts stated therein.[76]

The decision of the court on appeal as to the admissibility of certain evidence in the case is conclusive on a subsequent appeal.[77] On a second appeal the court will not reëxamine evidence, the weight and sufficiency of which, or substantially the same, were passed on on a former appeal, but will adhere to its former ruling.[78] However, the decision on the prior appeal is not conclusive on the second appeal, where the evidence on the second trial was materially different,[79] or where the questions presented on the second appeal were not adjudicated in the prior decision.[80] Similarly, a decision on appeal as to the sufficiency or insufficiency of the evidence to warrant submission to the jury is conclusive on a second appeal, where substantially the same evidence was introduced at the second trial,[81] but that rule is inapplicable where the evidence on the second trial was materially different.[82]

§ 298. —— Where Jury Waived

a. In general
b. Trial on agreed statement of facts

a. In General

On appeal to the circuit court of appeals where there has been a waiver of a jury, the questions which are open for review are limited by the statute authorizing a review of the rulings of the court in the progress of the trial and, when the finding is special, of the sufficiency of the facts found to support the judgment.

In an action at law where the parties waive a jury, the power of the circuit court of appeals to review or consider the facts on appeal is extremely limited,[83] and the questions which are open for review are determined by statute.[84] Although this statute has been superseded in so far as it provides for formal exceptions and a bill of exceptions by Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, which provides that for all purposes for which an exception has heretofore been necessary an objection will suffice, a federal statute, 28 U.S.C.A. § 875, provides that when an issue of fact in any civil cause is tried and determined by the court without the intervention of a jury in accordance with 28 U.S.C.A. § 773 the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed on appeal, and when the finding is special the review may ex-

50 S.Ct. 160, 280 U.S. 611, 74 L. Ed. 654.

76. U.S.—Gleason v. Thaw, N.Y., 234 F. 570, 148 C.C.A. 336, certiorari denied 37 S.Ct. 481, 243 U.S. 656, 61 L.Ed. 949.

77. U.S.—Brent v. Chas. H. Lilly Co., D.C.Wash., 202 F. 335—Standard Sewing Mach. Co. v. Leslie, Ill., 118 F. 557, 55 C.C.A. 323.

78. U.S.—Carpenter v. Durell, C.C.A. Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S.Ct. 42, 302 U.S. 721, 82 L.Ed. 557—Standard Accident Ins. Co. v. Rossi, C.C.A. Ark., 52 F.2d 547—Casals v. Fernaandex, C.C.A.Puerto Rico, 40 F. 2d 831, certiorari denied 51 S.Ct. 36, 282 U.S. 863, 75 L.Ed. 763—Cogswell v. Drennen, C.C.A.Ala., 271 F. 289, petition dismissed Tilton v. Drennen, 42 S.Ct. 53, 257 U.S. 651, 66 L.Ed. 417, rehearing granted 42 S.Ct. 168, 257 U.S. 631, 66 L.Ed. 406, certiorari denied 42 S.Ct. 169, 257 U.S. 657, 66 L.Ed. 420, and appeal dismissed 43 S.Ct. 358, 261 U.S. 624, 67 L.Ed. 833, and reversed on other grounds 43 S.Ct. 704, 262 U.S. 735, 67 L.Ed. 1206.
4 C.J. p. 1110 note 80.

79. U.S.—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541—Patton v. Texas & P. R. Co., Tex., 95 F. 244, 37 C.C.A. 56, appeal dismissed 17 S.Ct. 997, 166 U.S. 717, 41 L.Ed. 1196, and affirmed 21 S.Ct. 275, 179 U.S. 658, 45 L.Ed. 361.

80. U.S.—Board of Com'rs of Muddy Bottom Swamp Land Dist., No. 1, Tippah County, Miss. v. Equitable Surety Co., Miss., 246 F. 633, 158 C.C.A. 589.

81. U.S.—Chicago, St. P., M. & O. Ry. Co. v. Kulp, C.C.A.Minn., 102 F.2d 352, certiorari denied 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—New York Life Ins. Co. v. Golightly, C.C.A.Ark., 94 F.2d 316, certiorari denied 58 S.Ct. 949, 304 U.S. 566, 82 L.Ed. 1532—Equitable Life Assur. Soc. of U. S. v. Sieg, C.C.A.Ohio, 74 F.2d 606—Gratz v. McKee, C.C.A.Mo., 9 F.2d 593, certiorari denied 46 S.Ct. 472, 270 U. S. 664, 70 L.Ed. 788—Cromwell v. Simons, C.C.A.N.Y., 280 F. 663, certiorari denied 42 S.Ct. 463, 258 U. S. 530, 66 L.Ed. 800—Linkous v. Virginian Ry. Co., Va., 242 F. 916, 155 C.C.A. 504, certiorari denied 38 S.Ct. 10, 245 U.S. 649, 62 L.Ed. 530—Woodruff v. Yazoo & M. V. R. Co., Miss., 222 F. 29, 137 C.C.A. 567—Chesapeake & O. Ry. Co. v. McKell, Ohio, 221 F. 934, 137 C.C.A. 504.

82. U.S.—Rogers v. Chicago, R. I. & P. Ry. Co., C.C.A.Neb., 39 F.2d 601.

83. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14, reversing, D.C., 50 F.2d 219—Domenech v. Porto Rican Leaf Tobacco Co., C.C.A.Puerto Rico, 50 F.2d 579, certiorari denied 52 S.Ct. 33, 284 U.S. 654, 76 L.Ed. 555—Combs v. Eubank, C.C.A.Ark., 28 F.2d 459—Respass v. Oden, C. C.A. Ohio, 294 F. 285.

84. U.S.—Hirning v. Live Stock Nat. Bank, C.C.A.Iowa, 1 F.2d 307.

In absence of statute there was no question of fact subject to review by the circuit court of appeals, and the only questions of law reviewable were those which related to the record proper, such as whether the pleadings were sufficient to support the judgment.—Campbell v. U. S., Colo., 32 S.Ct. 398, 224 U.S. 99, 56 L. Ed. 684—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

Improperly treating action as one at law

Where action for trespass and for equitable relief was tried in equity, circuit court of appeals improperly treated action as necessarily tried at law after jury waiver, and refused to consider errors assigned.—Twist v. Prairie Oil & Gas Co., Okl., 47 S.Ct. 755, 274 U.S. 684, 71 L.Ed. 1297, reversing, C.C.A., 6 F.2d 347, certiorari granted 46 S.Ct. 355, 270 U.S. 639, 70 L.Ed. 775.

tend to the determination of the sufficiency of the facts found to support the judgment. Under this statute if there was a proper statutory waiver of a jury a review may be had of all questions inherent in the primary record[85] and of all rulings on the trial which were imported into that record by the bill of exceptions, and which were properly challenged;[86] and where the facts are found specially the court may and should determine whether under the pleadings they are sufficient to support the judgment.[87] Review on appeal is confined to the rulings of the court in the progress of the trial if properly presented, and to the question whether the facts specially found support the judgment where there are no rulings on demurrers,[88] or where it is not claimed that any of the findings made by the court are wholly without evidential support, or that the court failed to make a material finding indispensable to the determination of liability under the issues;[89] and where no complaint is made on appeal of rulings during the progress of the trial the review is limited to whether the facts found support the judgment.[90] The sufficiency of the special findings to sustain the judgment is reviewable

85. U.S.—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701.

Whether pleadings support judgment is reviewable.—U. S. v. Wyoming Central Ass'n, C.C.A.Wyo., 70 F.2d 869, reversing, D.C., 2 F.Supp. 86.

Matters apparent of record

(1) A judgment which shows on its face that the only question decided was the construction of a certain statute, on which the judgment was based, is reviewable by the appellate court without exceptions during the trial, a finding other than a general one, or a bill of exceptions.—Maxwell v. Ricks, C.C.A. Wash., 294 F. 255, reversing, D.C., 285 F. 656.

(2) Material facts not specifically embraced in findings of fact may be called to appellate court's attention so far as they appear in record.—U. S. v. McIntosh, D.C.Va., 3 F.Supp. 715, denying rehearing 2 F.Supp. 244, and appeal dismissed, C.C.A., McIntosh v. U. S., 70 F.2d 507, certiorari denied 55 S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682.

Where case was tried on equitable defenses alone, and heard by court without a jury pursuant to a stipulation, court should hear equitable branch of case on merits, even though it was not before it on appeal.—Roark v. Fordson Coal Co., C.C.A.Ky., 10 F.2d 70.

86. U.S.—Builders & Manufacturers Mut. Casualty Co. v. Preferred Automobile Ins. Co., C.C.A.Ohio, 118 F.2d 118, affirming, D.C., Builders & Manufacturers Mut. Casualty Co. v. Hummon, 26 F.Supp. 929—Oyler v. Cleveland, C., C. & St. L. Ry. Co., C.C.A.Ohio, 16 F.2d 455—Quarles v. City of Appleton, C.C.A. Wis., 299 F. 508—Blumenfeld v. Mogi & Co., C.C.A.Ga., 295 F. 123—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701.

Rulings as to offer of testimony of witness

U.S.—Palmer v. Aeolian Co., C.C.A. Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458.

87. U.S.—Welch v. Hassett, C.C.A. Mass., 90 F.2d 833, reversing, D.C., 15 F.Supp. 692, certiorari granted Hassett v. Welch, 58 S.Ct. 56, 302 U.S. 674, 82 L.Ed. 521, affirmed 58 S.Ct. 559, 303 U.S. 303, 82 L.Ed. 858—U. S. v. Blumenthal, C.C.A. Okl., 77 F.2d 219—Valenti v. Prudential Ins. Co. of America, C.C.A. Mo., 71 F.2d 229, affirming, D.C., 1 F.Supp. 993—Cronkleton v. Hall, C.C.A.Neb., 66 F.2d 384, certiorari denied Hall v. Cronkleton, 54 S.Ct. 121, 290 U.S. 685, 78 L.Ed. 590—Perry v. Wiggins, C.C.A.Mo., 57 F. 2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529—Bass v. Sugarland Industries, C.C.A.Tex., 50 F.2d 65, reversing, D.C., Sugarland Industries v. Bass, 36 F.2d 375—White v. U. S., C.C.A.Okl., 48 F.2d 178—U. S. v. Smith, C.C.A. Mass., 39 F.2d 851, affirming, D.C., 32 F.2d 901—Henry H. Cross Co. v. Texhoma Oil & Refining Co., C.C.A. Okl., 32 F.2d 442—Abernathy v. State of Oklahoma ex rel. Goar, C.C.A.Okl., 31 F.2d 547, certiorari denied 50 S.Ct. 81, 280 U.S. 599, 74 L.Ed. 645—People's Bank of Keyser, W. Va., v. International Finance Corporation, C.C.A.W.Va., 30 F.2d 46, affirming, D.C., International Finance Corporation v. People's Bank of Keyser, 27 F.2d 523, and certiorari denied People's Bank of Keyser, W. Va., v. International Finance Corporation, 49 S.Ct. 352, 279 U.S. 858, 73 L.Ed. 999—Newlands v. Calaveras Min. & Mill Co., C.C.A.Cal., 28 F.2d 89—Quarles v. City of Appleton, C.C.A.Wis., 299 F. 508—Dexter & Carpenter v. Davis, C.C.A.Md., 281 F. 385—Turner v. Schaeffer, Ohio, 249 F. 654, 161 C.C.A. 564—Société Nouvelle d'Armement v. Barnaby, Wash., 246 F. 68, 158 C.C.A. 294.

4 C.J. p 654 note 99.

Additional facts not found by trial court cannot be considered.—U. S. v. Pennsylvania & Lake Erie Dock Co., C.C.A.Ohio, 272 F. 839.

In determining sufficiency of facts found to support judgment, appellate court will decide for itself nature of so-called ultimate facts or conclusions of law in trial court's findings, and may reject trial court's conclusion that defendant waived certain defenses, unless such conclusion is necessary deduction from facts found by trial court. In action for dishonor of draft drawn under letter of credit, trial court's mixed finding of law and fact that issuing bank's refusal to pay draft on sole ground that goods were below standard waived all other defenses was held binding finding of ultimate facts, where other findings showed that defects in documents might have been remedied and that failure to mention them may have induced holder not to proceed against drawer.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F. 2d 312.

88. U.S.—Shapleigh v. Mier, C.C.A. Tex., 83 F.2d 673, certiorari granted 57 S.Ct. 17, 299 U.S. 524, 81 L. Ed. 386, and affirmed 57 S.Ct. 261, 299 U.S. 468, 81 L.Ed. 355, 113 A. L.R. 253—Sloss-Sheffield Steel & Iron Co. v. Stover Mfg. & Engine Co., C.C.A.Ill., 37 F.2d 876.

89. **In absence of claim** that a finding is wholly without evidential support, or that the court failed to make a material finding indispensable to the determination of liability under the issues, the circuit court of appeals can go no further than to inquire whether the facts found support the judgment, and whether during the progress of the trial there was error prejudicial to the appellant to which it saved exceptions.—Scandinavian-American Bank of Fargo, N. D., v. U. S. Nat. Bank of Portland, Or., C.C.A.N.D., 271 F. 805.

90. U.S.—State Farm Mut. Automobile Ins. Co. v. Coughran, Cal., 58 S. Ct. 670, 303 U.S. 485, 82 L.Ed. 970, reversing, C.C.A., 92 F.2d 239, certiorari granted 58 S.Ct. 281, 302 U. S. 679, 82 L.Ed. 524—U. S. v. John II Estate, C.C.A.Hawaii, 91 F.2d 93, certiorari denied John II Estate v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—U. S. v. Shingle, C.C.A. Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264,

without an exception whether they were made before or after judgment.[91] The statute relates only to those rulings of law which are made in the course of the trial, and has no application to the preliminary rulings of the district judge made in the exercise of his general authority before the issues are submitted to him for hearing under the statutory stipulation. Such rulings on the pleadings and the sufficiency of the complaint are therefore subject to review as in any other case, independently of the statute.[92] The rulings of the court in the progress of the trial do not include the general findings of the court or the conclusions embodied therein.[93] Nothing is presented for review where the judgment was entered without opinion and without reciting any findings, either general or special, or conclusions of law, and where the record discloses no ruling outside the judgment.[94] Where a jury is waived and a special finding of fact is made by the trial judge, the circuit court of appeals cannot examine the evidence and supply a necessary finding of fact to support the judgment[95] and cannot accept as true facts, relied on by a party, which the trial court did not find and was not requested to find.[96] That special findings do not contain sufficient evidentiary facts to enable the circuit court of appeals to ascertain whether the trial court correctly found the evidentiary facts presents nothing for review.[97] Where a case was transferred to the equity side of the court under stipulation that the jury be waived, the circuit court of appeals considered the case on the record without regard to harmless technical errors.[98]

The circuit court of appeals may review conclusions of law;[99] but under the statute as originally enacted, in order to obtain a review of the

302 U.S. 746, 82 L.Ed. 577—Ocean Accident & Guarantee Corporation v. Olson, C.C.A.N.D., 87 F.2d 465—Ocean Accident & Guarantee Corporation v. J. L. Brandeis & Sons, C.C.A.Neb., 75 F.2d 605, certiorari denied 55 S.Ct. 923, 295 U.S. 764, 79 L.Ed. 1706—Dakota Corporation v. Slope County, N. D., C.C.A.N.D., 75 F.2d 587, certiorari denied 56 S.Ct. 106, 296 U.S. 593, 80 L.Ed. 420—Blythe v. Doheny, C.C.A.Cal., 73 F.2d 799—Routzahn v. Willard Storage Battery Co., C.C.A.Ohio, 65 F.2d 89, certiorari granted 54 S.Ct. 77, 290 U.S. 612, 78 L.Ed. 535, and reversed on other grounds 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—Van Meter v. U. S., C.C.A.N.Y., 47 F.2d 192, modifying, D.C., 37 F.2d 111—Crooks v. Kansas City Title & Trust Co., C.C.A.Mo., 46 F.2d 928, affirming D.C., Kansas City Title & Trust Co. v. Crooks, 35 F.2d 351—Palmer v. Aeolian Co., C.C.A. Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458—Tatum v. Davis, C.C.A.Mo., 283 F. 948—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—McCampbell v. New York Life Ins. Co., C.C.A.Tex., 288 F. 465, certiorari denied 43 S.Ct. 705, 262 U.S. 759, 67 L.Ed. 1219—Globe Indemnity Co. v. Sulpho-Saline Bath Co., C.C.A.Neb., 299 F. 219, certiorari denied 45 S.Ct. 92, 266 U.S. 606, 69 L.Ed. 464—Roessler & Hasslacher Chemical Co. v. Standard Silk Dyeing Co., N.Y., 254 F. 777, 166 C.C.A. 223, reversing, D.C., Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co., 244 F. 250, and certiorari denied 40 S.Ct. 11, 250 U.S. 663, 63 L.Ed. 1196.

91. U.S.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312—Palmer v. Aeolian Co., C.C.A.Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458.

92. U.S.—Arthur C. Harvey Co. v. Malley, Mass., 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, motion denied 61 F.2d 365, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461.

93. U.S.—National Surety Co. v. Cincinnati, N. O. & T. P. R. Co., Ohio, 145 F. 34, 76 C.C.A. 19.
4 C.J. p 654 note 96.

94. U.S.—Dorris Bros. v. U. S., C.C.A.Cal., 37 F.2d 346—Globe & Rutgers Fire Ins. Co. v. Storer, C.C.A. Ohio, 23 F.2d 921.

No findings or requests therefor

Law side of case was held not reviewable for want of findings of fact or request therefor.—Roark v. Fordson Coal Co., C.C.A.Ky., 10 F.2d 70.

95. U.S.—Border Gas Co. v. Windrow, C.C.A.Tex., 3 F.2d 974—New York Life Ins. Co. v. Dunlevy, Cal., 214 F. 1, 130 C.C.A. 473, affirming, D.C., Dunlevy v. New York Life Ins. Co., 204 F. 670, and affirmed 36 S.Ct. 613, 241 U.S. 518, 60 L.Ed. 1140.

No issue of law raised on finding

Where trial court's special finding in jury-waived case leaves any fact, which is necessary to establish rights of parties, to be determined by court from conflicting evidence or even from inferences to be drawn from admitted facts or undisputed testimony, unless inference is inevitable conclusion from undisputed testimony or facts found, no issue of law is raised on such imperfect special finding.—Inland Irving Nat. Bank of Chicago v. American Flange & Mfg. Co., C.C.A.Ill., 75 F.2d 533—U. S. v. Smith, C.C.A.Mass., 39 F.2d 851, affirming, D.C., 32 F.2d 901.

96. U.S.—Pearl Assur. Co. v. Stacey Bros. Gas Const. Co., C.C.A.Ohio, 114 F.2d 702.

97. U.S.—Becker v. Evens & Howard Sewer Pipe Co., C.C.A.Mo., 70 F.2d 596.

98. U.S.—Abraham v. Wichita Petroleum Co., C.C.A.Tex., 50 F.2d 771.

99. U.S.—La Grotta v. U. S., C.C.A.Neb., 77 F.2d 673, 103 A.L.R. 527, certiorari denied Quigley v. U. S., 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447—Robinson v. Bowe, C.C.A.S.D., 73 F.2d 238—Alexander v. Continental Petroleum Co., C.C.A.Okl., 63 F.2d 927.

Statute giving finding effect of jury verdict

(1) Under a statute which provided that the findings of the trial court have the same effect as the verdict of a jury any question might be reviewed on appeal which might be reviewed if the trial were by jury.—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

(2) Such statute did not prevent review of questions of law.—Order of United Commercial Travelers of America v. Shane, C.C.A.S.D., 64 F.2d 55.

conclusions of law, special findings raising legal propositions were required to be obtained, or propositions of law presented and rulings obtained thereon.[1] However, by virtue of Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. following § 723c, which rule requires the trial court to find the facts specially, and state separately its conclusions of law, requests for findings are not necessary for purposes of review; and this rule supersedes the statutes in so far as they provide for a different method of appellate review.

As shown supra § 297 g (3), under Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. following § 723c, it seems that findings of fact may be set aside if clearly erroneous. Cases decided prior to the effective date of the rules held that, since the statute limits the review to the inquiry whether the special findings support the judgment and whether there were erroneous rulings in the course of the trial, the testimony could not be regarded for any purpose other than as it is involved in such rulings.[2] A finding could be reviewed only in so far as it was unsupported by evidence, or based on erroneous legal theories,[3] but the question whether there was substantial evidence to support the finding and judgment was considered a question of law which could be reviewed if presented to the court during the progress of the trial and a ruling secured or obtained to which there was an exception,[4] and,

1. U.S.—Arthur C. Harvey Co. v. Malley, Mass., 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, motion denied 61 F.2d 365, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461—Pippin v. U. S., C.C.A.Tenn., 109 F.2d 960—Nevins v. U. S., C.C.A.Ind., 95 F.2d 553—Roach v. Minshall, C.C.A.Ohio, 85 F.2d 614—Provident Life & Accident Ins. Co. of Chattanooga, Tenn. v. Crady, C.C.A.Ohio, 82 F.2d 900, certiorari denied 56 S.Ct. 949, 298 U.S. 681, 80 L.Ed. 1401—Baker Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—Roberts v. National Sav. Life Ins. Co., C.C.A.Ark., 75 F.2d 530—Chesapeake & O. Ry. Co. v. Indiana Fibre Products Co., C.C.A.Ind., 75 F.2d 193, affirming, D.C., 5 F.Supp. 339—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C.A.China, 71 F.2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—Fred W. Mears Heel Co. v. Walley, C.C.A.Me., 71 F.2d 876, affirming. D.C., Walley v. Fred W. Mears Heel Co., 4 F.Supp. 277, certiorari denied Fred W. Mears Heel Co. v. Walley, 55 S.Ct. 122, 293 U.S. 605, 79 L.Ed. 696—English v. Hetherington & Berner, C.C.A.Ill., 71 F.2d 613—Anderson v. U. S., C.C.A.Mo., 65 F.2d 870—Hawthorne v. Bankers' Life Co., C.C.A.Mo., 63 F.2d 971, affirming, D.C., 52 F.2d 309—Kentz v. Mosher, C.C.A.Wyo., 62 F.2d 827—Wilmington Steamboat Co. v. Sturgess, C.C.A.N.J., 55 F.2d 831, affirming, D.C., 52 F.2d 210—Central Surety & Ins. Co. v. Davidson, C.C.A.N.M., 46 F.2d 774—Brown Sheet Iron & Steel Co. v. Willcuts, C.C.A.Minn., 45 F.2d 390, affirming, D.C., 34 F.2d 969—May v. Marbury, C.C.A.Tenn., 39 F.2d 438, certiorari denied 51 S.Ct. 32, 282 U.S. 857, 75 L.Ed. 758—U. S. v. New York, C. & St. L. R. Co., C.C.A.Ohio, 32 F.2d 887—Akre v. Liberty State Bank of Minneapolis, C.C.A.S.D., 24 F.2d 816—Mission Marble Works v. Robinson Tile & Marble Co., C.C.A.Wash., 20 F.2d 14—Elkhart Carriage & Motor Car Co. v. Partin, C.C.A.Tenn., 9 F.2d 393—Geiger v. Tramp, C.C.A.Iowa, 291 F. 353—Northrup Nat. Bank v. Title Guaranty & Surety Co., C.C.A.Kan., 271 F. 952—McClay v. Fleming, C.C.A.Kan., 271 F. 472.

4 C.J. p 657 note 37 [d].

Motion held sufficient

In law action to enforce national bank's stockholder's liability, plaintiff's motion, at close of all evidence, for declaration of law and judgment in plaintiff's favor was held sufficient to present questions raised on appeal as to plaintiff's right to recover, although plaintiff did not request special findings of fact. Trial court need not make special findings of fact as basis for appeal, and general finding is equivalent to verdict of jury.—Jack v. Forrest, C.C.A.Utah, 71 F.2d 264, certiorari granted Forrest v. Jack, 55 S.Ct. 95, 293 U.S. 542, 79 L.Ed. 647, reversed on other grounds 55 S.Ct. 370, 294 U.S. 158, 79 L.Ed. 829, 96 A.L.R. 1457, rehearing denied 55 S.Ct. 543, 294 U.S. 733, 79 L.Ed. 1262.

2. U.S.—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330.

3. U.S.—Globe Indemnity Co. v. Southern Pac. Co., C.C.A.N.Y., 30 F.2d 580, certiorari denied 49 S.Ct. 418, 279 U.S. 860, 73 L.Ed. 1000.

4. U.S.—U. S. v. Blumenthal, C.C.A.Okl., 77 F.2d 219—Motter v. Wallace, C.C.A.Kan., 72 F.2d 678—F. Carrera & Hermano v. Font, Gamundi & Co., C.C.A.Puerto Rico, 70 F.2d 999—Associated Mfrs. Corporation of America v. De Jong, C.C.A.Iowa, 64 F.2d 64—Hawthorne v. Bankers' Life Co., C.C.A.Mo., 63 F.2d 971, affirming, D.C., 52 F.2d 309—U. S. v. Great Northern Ry. Co., C.C.A.Minn., 57 F.2d 385, certiorari granted 52 S.Ct. 648, 286 U.S. 540, 76 L.Ed. 1278, and affirmed 53 S.Ct. 28, 287 U.S. 144, 77 L.Ed. 223—U. S. v. Perry, C.C.A.Ark., 55 F.2d 819—Quality Realty Co. v. Wabash Ry. Co., C.C.A.Mo., 50 F.2d 1051—Wessel v. U. S., C.C.A.Neb., 49 F.2d 137—Blair v. U. S., C.C.A.Ark., 47 F.2d 109—Crooks v. Kansas City Title & Trust Co., C.C.A.Mo., 46 F.2d 928, affirming, D.C., Kansas City Title & Trust Co. v. Crooks, 35 F.2d 351—U. S. v. Phillips, C.C.A.Mo., 44 F.2d 689—Zurich General Accident & Liability Ins. Co. v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 43 F.2d 355—U. S. v. Edwards, C.C.A.Neb., 23 F.2d 477—Sartoris v. Utah Const. Co., C.C.A.Cal., 21 F.2d 1—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330—Wabash Ry. Co. v. South Daviess County Drainage Dist., C.C.A.Mo., 12 F.2d 909, certiorari denied 47 S.Ct. 455, 273 U.S. 751, 71 L.Ed. 873, error dismissed 47 S.Ct. 658, 274 U.S. 764, 71 L.Ed. 1328—Nashville, C. & St. L. Ry. v. Tennessee-Oklahoma Grain Co., C.C.A.Tenn., 4 F.2d 756—Keystone Steel & Wire Co. v. Kokomo Steel & Wire Co., C.C.A.Ind., 1 F.2d 790—Compania Transcontinental de Petroleo, S. A. v. Mexican Gulf Oil Co., C.C.A.N.Y., 292 F. 846, affirming, D.C., Mexican Gulf Oil Co. v. Compania Transcontinental De Petroleo, 281 F. 148—Turner v. Schaeffer, Ohio, 249 F. 654, 161 C.C.A. 564—Garwood v. Scheiber, Cal., 246 F. 74, 158 C.C.A. 300, certiorari denied 38 S.Ct. 427, 247 U.S. 506, 62 L.Ed. 1240—Wm. Edwards Co. v. La Dow, Ohio, 230 F. 378, 144 C.C.A. 520, modifying, D.C., In re Miller, 221 F. 471—Illinois Surety Co. v. U. S., N.Y., 229 F. 533, 143 C.C.A. 601—Illinois Surety Co. v. U. S., N.Y., 229 F. 527, 143 C.C.A. 595.

according to the decisions, not otherwise.[5] Either party could by motion present the question of his right to a judgment as a matter of law on the whole evidence, and an adverse ruling on such motion could be reviewed and the entire evidence presented by a bill of exceptions considered by the circuit court of appeals for that purpose.[6] Where the primary facts are either stipulated or established by uncontradicted evidence, and the court, solely from these primary facts, finds an ultimate fact on which the judgment rests, such finding is in the nature of a conclusion of law, and as such is reviewable on appeal to determine whether the primary facts support it.[7] Where the judgment of the trial court was on the merits, the question whether or not there was sufficient evidence to require the submission of

Prerequisites to review

Question of law whether finding is sustained by substantial evidence is reviewable only when request for findings of fact and declarations of law, or motion for judgment, is made, denied, and excepted to, or other like action taken to present question to trial court and secure its ruling thereon during trial.—Pippin v. U. S., C.C.A.Tenn., 109 F.2d 960—Hobbs-Western Co. v. Employers' Liability Assur. Corporation, Limited, of London, England, C.C.A.Ark., 102 F.2d 32—Wall v. U. S., C.C.A.Kan., 97 F.2d 672, certiorari denied 59 S.Ct. 104, 305 U.S. 632, 83 L.Ed. 405—Nevins v. U. S., C.C.A.Ind., 95 F.2d 553—Funk v. Ætna Life Ins. Co. of Hartford, Conn., C.C.A.Cal., 95 F.2d 38, affirming D.C., 20 F.Supp. 90—Shira v. New York Life Ins. Co., C.C.A.Okl., 90 F.2d 953, affirming, D.C., 15 F.Supp. 259—Becher-Barrett-Lockerby Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 89 F.2d 752—Alliance Life Ins. Co. v. Saliba, C.C.A.Ark., 87 F.2d 937—Becher v. Sidner, C.C.A. Neb., 87 F.2d 899—Armstrong v. Metropolitan Life Ins. Co., C.C.A. Neb., 85 F.2d 185—Fierce v. Wyatt, C.C.A.Iowa, 83 F.2d 892—Woods Bros. Realty Co. v. Mutual Ben. Life Ins. Co., C.C.A.Neb., 81 F.2d 461—Martin v. Drexel Ice Cream Co., C.C.A.Ill., 80 F.2d 768—Baker Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—Chicago, R. I. & P. Ry. Co. v. Maryland Casualty Co., C.C.A.Mo., 75 F.2d 596—Dakota Corporation v. Slope County, N. D., C.C.A.N.D., 75 F.2d 587, certiorari denied 56 S.Ct. 106, 296 U. S. 593, 80 L.Ed. 420—People's Loan & Investment Co. v. Universal Credit Co., C.C.A.Ark., 75 F.2d 545—Chesapeake & O. Ry. Co. v. Indiana Fibre Products Co., C.C.A.Ind., 75 F. 2d 193, affirming, D.C., 6 F.Supp. 339—Pocahontas Coal & Coke Co. v. Cook, C.C.A.W.Va., 74 F.2d 878—Salt Bayou Drainage Dist. v. Futrall, C. C.A.Ark., 72 F.2d 940—Fidelity & Deposit Co. of Maryland v. U. S. ex rel. Woods, C.C.A.Wash., 72 F.2d 828, affirming, D.C., U. S. ex rel. Woods v. Mayer, 4 F.Supp. 653—School Dist. of Lepanto of Poinsett County, Ark., v. First Detroit Co., C.C.A.Ark., 72 F.2d 654—Lyle v. Phillips Petroleum Co., C.C.A.Ark., 72 F.2d 347—Mandel Bros. v. Henry A. O'Neil, Inc., C.C. A.S.D., 69 F.2d 452—Hussey-Hobbs Tie Co. v. Louisville & N. R. Co., C.C. A.Mo., 69 F.2d 92—Cronkleton v. Hall, C.C.A.Neb., 66 F.2d 384, certiorari denied Hall v. Cronkleton, 54 S. Ct. 121, 290 U.S. 685, 78 L.Ed. 590—Unger v. U. S., C.C.A.Okl., 65 F. 2d 946—U. S. v. Douglas, Buchanan & Crow, C.C.A.Iowa, 61 F.2d 821—Clauson v. U. S., C.C.A.S.D., 60 F.2d 694—American Surety Co. of New York v. Cotton Belt Levee Dist. No. 1 of Phillips County, Ark., C.C.A.Ark., 58 F.2d 234—Wourdack v. Becker, C.C. A.Mo., 55 F.2d 840, certiorari denied 52 S.Ct. 501, 286 U.S. 548, 76 L.Ed. 1285—Buechle v. Montgomery, C.C.A. Mo., 45 F.2d 987—White Co. v. Wells, C.C.A.Ohio, 42 F.2d 460—Federal Intermediate Credit Bank of Omaha v. L'Herisson, C.C.A.S.D., 33 F.2d 841—Simpson-Fell Oil Co. v. Pierce Petroleum Corporation, C.C.A.Okl., 32 F. 2d 576—Jenkins v. Boyd, C.C.A.Cal., 6 F.2d 844—Navajo County v. Mesmer, C.C.A.Ariz., 4 F.2d 821.

Matters which may be reviewed

(1) In the absence of requests for findings of facts or conclusions of law, the review was limited to questions arising on the pleadings.—Inter-Southern Life Ins. Co. v. Klaber, C.C.A.Mo., 50 F.2d 154—Palmer v. Aeolian Co., C.C.A.Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458—Akre v. Liberty State Bank of Minneapolis, C.C.A.S.D., 24 F.2d 816.

(2) Where appellant in law case tried by court made no request for special findings of fact or conclusions of law, and did not challenge sufficiency or lack of evidence by demurrer, only question open to review was whether judgment was sustained by pleadings, findings, and conclusions.—Gerlach v. Chicago, R. I. & P. Ry. Co., C.C.A.Iowa, 65 F.2d 862.

(3) But where questions of fact were undisputed and court was fully apprised of litigant's position and that counsel vigorously opposed adverse ruling, court was authorized to review evidence, notwithstanding neither findings nor requests for findings were made.—Muentzer v. Los Angeles Trust & Savings Bank, C.C. A.Ind., 3 F.2d 222, 224, overruling Raymer v. Netherwood, Wis., 257 F. 284, 168 C.C.A. 368.

(4) Request for findings of fact setting out fully proposed findings claimed to have been proved and conclusions of law logically following therefrom, when read together sufficiently raise question.—People's Loan & Investment Co. v. Universal Credit Co., C.C.A.Ark., 75 F.2d 545.

Question held not presented by mere assertion that judgment was erroneous as contrary to facts or as not supported by competent evidence, or that court erred in entering findings.—Anderson v. U. S., C. C.A.Mo., 65 F.2d 870.

Case submitted on stipulation and testimony

Where an action at law was submitted to the district judge on a stipulation as to certain facts and the testimony of one witness, and a general judgment was entered without special findings of fact, the circuit court of appeals was limited to an inquiry as to whether there was any evidence in the record that would support the judgment and an examination of such errors of law as were properly presented or apparent on the record.—St. Louis Southwestern Ry. Co. v. S. H. Bolinger & Co., C.C.A.La., 17 F.2d 924.

5. U.S.—Home Bldg. & Sav. Ass'n v. New Amsterdam Casualty Co., C.C.A.Ark., 45 F.2d 989—Brown Sheet Iron & Steel Co. v. Willcuts, C.C.A.Minn., 45 F.2d 390, affirming, D.C., 34 F.2d 969—Combs v. Eubank, C.C.A.Ark., 28 F.2d 459—Hirning v. Live Stock Nat. Bank, C.C.A.Iowa, 1 F.2d 307.

6. U.S.—Motter v. Wallace, C.C.A. Kan., 72 F.2d 678—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F. 2d 889—White v. U. S., C.C.A.Okl., 48 F.2d 178—Ozark Pipe Line Corporation v. Decker, C.C.A.Mo., 32 F.2d 66—Griffin v. Thompson, C.C. A.Tex., 10 F.2d 127—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471—World's Columbian Exposition v. Republic of France, Ill., 96 F. 687, 38 C.C.A. 483.

4 C.J. p 654 note 94.

7. U.S.—Order of United Commercial Travelers of America v. Shane, C.C.A.S.D., 64 F.2d 55.

the case to a jury, had there been a jury, is not reviewable.[8]

By the express terms of Federal Rules of Civil Procedure, rule 52 (a), 28 U.S.C.A. following § 723c, which supersedes statutes providing a different method of finding facts, in all actions tried on the facts without a jury the court is required to find the facts specially. Under the statute, 28 U.S.C.A. § 875, set out above, if the finding is general, the only matters reviewable are the sufficiency of the complaint and the rulings made during the progress of the trial properly presented by exceptions;[9] and, where there are no exceptions to rulings of the court in the progress of the trial, only rulings on the pleadings and their sufficiency are open to review.[10] Where the assignments of error present no point based on the pleadings and the bills of exceptions disclose no special findings of fact or propositions of law duly presented, there is nothing to review, and the judgment will be affirmed.[11] The circuit court of appeals cannot inquire into the facts or conclusions of law if the finding is general[12] or if there is not a special finding of facts,[13] and, although it seems that the rule has been modified somewhat by the provisions of Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, under which formal exceptions and a bill of exceptions are no longer required, it was formerly held in such case that the general finding of the trial court was conclusive on all matters of fact and prevented any inquiry into the conclusions of law embodied therein except in so far as the rulings were excepted to and duly preserved by bill of exception.[14] The foregoing principles apply notwith-

8. U.S.—Young v. U. S., C.C.A.Cal., 111 F.2d 823.

9. U.S.—Feather River Lumber Co. v. U. S., C.C.A.Cal., 30 F.2d 642, affirming, D.C., U. S. v. Feather River Lumber Co., 23 F.2d 936.
4 C.J. p 654 note 95.

Questions of law
Where a jury was waived, and the court made no special findings, only questions of law were presented on writ of error.—Operators' Piano Co. v. First Wisconsin Trust Co., C.C.A. Ill., 283 F. 904.

Refusing new trial
In nonjury case, resulting in general finding without special findings of fact, refusing motion for new trial presented nothing for review. —Wynne v. Fries, C.C.A.Ohio, 50 F.2d 761.

10. U.S.—Real Estate-Land Title & Trust Co. v. Town of Fairfax, C.C. A.Okl., 84 F.2d 675, affirming, D.C., 11 F.Supp. 459.

11. U.S.—Nevins v. U. S., C.C.A.Ind., 95 F.2d 553.

12. U.S.—Arthur C. Harvey Co. v. Malley, 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, motion denied 61 F.2d 365, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461—Law v. U. S., Mont., 45 S. Ct. 175, 266 U.S. 494, 69 L.Ed. 401, reversing, C.C.A., U. S. v. Law, 299 F. 61, reversing, D.C., Law v. U. S., 290 F. 972—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C.A.China, 71 F. 2d 895, certiorari denied 55 S.Ct 122, 293 U.S. 606, 79 L.Ed. 697—English v. Hetherington & Berner, C.C.A.Ill., 71 F.2d 613—U. S. v. Federal Commerce Trust Co., C.C.A. Mo., 64 F.2d 679—Banque de France v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 60 F.2d 703—American Surety Co. of New York v. Savannah Creosoting Co., C.C.A. Ga., 35 F.2d 272—Federal Surety Co. v. Standard Oil Co., C.C.A.S. D., 32 F.2d 119—Callan v. U. S. Spruce Production Corporation, C. C.A.Or., 28 F.2d 770—Newlands v. Calaveras Min. & Mill Co., C.C.A. Cal., 28 F.2d 89—Harris v. Newsom, C.C.A.Colo., 23 F.2d 652—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897—Stone v. Bank of Whitecastle, C.C.A.La., 18 F.2d 97—U. S. v. Gordin, C.C. A.Ohio, 9 F.2d 394—Blumenfeld v. Mogi & Co., C.C.A.Ga., 295 F. 123 —Beam v. Hamilton, C.C.A.Ky., 289 F. 9—Warren v. Bromley, C. C.A.Cal., 288 F. 563—Firestone Tire & Rubber Co. v. McCutcheon, C.C.A. Colo., 284 F. 220—U. S. v. Columbia & N. R. R. Co., C.C.A.Or., 274 F. 625—City of Goldfield, Colo., v. Roger, Colo., 249 F. 39, 161 C.C.A. 99—Good Pine Lumber Co. v. Duke, La., 240 F. 695, 153 C.C.A. 493—West v. Houston Oil Co. of Texas, Tex., 136 F. 343, 69 C.C.A. 169.

Effect of constitutional provision
The statutory provision that the finding of the court shall have the same effect as the verdict of a jury brings such findings within the constitutional rule that "no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law," and thus cuts off the right to review such findings on the facts.
U.S.—Martinton v. Fairbanks, Ill., 5 S.Ct. 321, 112 U.S. 670, 28 L.Ed. 862.
25 C.J. p 972 note 49.

13. U.S.—U. S. v. Shingle, C.C.A. Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C. A.China, 71 F.2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—Arthur C. Harvey Co. v. Malley, C.C.A.Mass., 60 F.2d 97, affirming, D.C., 52 F.2d 885, motion denied, C.C.A., 61 F.2d 365, certiorari granted 53 S.Ct. 314, 287 U. S. 596, 77 L.Ed. 519, affirmed 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed 866, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461—Wynne v. Fries, C.C.A.Ohio, 50 F. 2d 781—Cushny v. Crowe, C.C.A. Mo., 36 F.2d 37—Federal Life Ins. Co. v. Rascoe, C.C.A.Tenn., 12 F. 2d 693, certiorari denied 47 S.Ct. 112, 273 U.S. 722, 71 L.Ed. 859—Swanson v. Continental Casualty Co., C.C.A.Cal., 12 F.2d 410.
What constitutes special finding for purpose of review see infra § 299.

14. U.S.—Arthur C. Harvey Co. v. Malley, Mass., 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, affirming, D. C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, motion denied 61 F.2d 365, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461—Baldwin v. Higgins, C.C.A.N.Y., 100 F.2d 405 —Nevins v. U. S., C.C.A.Ind., 95 F.2d 553—Ocean Accident & Guarantee Corporation v. Olson, C.C.A. N.D., 87 F.2d 465—City of Woodward v. Caldwell, C.C.A.Okl., 86 F. 2d 567—Mittry Bros. Const. Co. v. U. S., for Use of Belmont, C.C.A. Idaho, 75 F.2d 79, affirming in part, D.C., U. S. for Use and Benefit of Belmont v. Mittry Bros. Const. Co., 4 F.Supp. 216—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C.A.China, 71 F. 2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—Gerlach v. Chicago, R. I. & P. Ry. Co., C.C.A.Iowa, 65 F. 862—Aiken Mills v. Boss Mfg. Co., C.C.A.N.Y.,

standing defendant's application for special findings of fact, which application is denied.[15]

Rulings or exceptions "in the progress of the trial." By the terms of the statute the reviewing court will not consider an alleged error in the rulings of the court unless the request was made therefor and its refusal excepted to "in the progress of the trial."[16] A trial is still in progress within the meaning of the statute until the case is submitted to the trial judge for final determination;[17] and a ruling or an exception is "in the progress of the trial" within the statute when made before announcement of the opinion or entry of the judgment of the court[18] but is too late if made after judgment,[19] even though the trial judge after judgment granted leave to make the request.[20] Rulings made and exceptions thereto taken after submission of the case and after announcement by the court of its opinion and intended judgment, but before rendition of the final judgment are generally held not made "in the progress of the trial."[21] However, the progress of the trial is not ended by such an announcement where the parties evidently understood that the cause was still in progress of trial,[22] particularly where there is a rule of court that the rendition of the decision or opinion should be deemed and entered as merely a preliminary order for judgment,[23] the statute and rule being intended to insure orderly and timely presentation to the judge of matters deemed important in advance of any definite action by him with respect to them and subject to construction accordingly;[24] and a like rule applies where the trial court agreed to hold final disposition of the case open after announcing its decision

65 F.2d 344—Brown v. Harvey Coal Corporation, C.C.A.Ky., 61 F.2d 624, affirming, D.C., 49 F.2d 434—McPherson v. Cement Gun Co., C.C.A. Okl., 59 F.2d 889—Wilmington Steamboat Co. v. Sturgess, C.C.A. N.J., 55 F.2d 831, affirming, D.C., 52 F.2d 210—U. S. v. Pacific Market Co., C.C.A.Wyo., 51 F.2d 350, affirming, D.C., 51 F.2d 348—Hendrie v. Turpen, C.C.A.Wyo., 50 F.2d 1049—Wynne v. Fries, C.C.A.Ohio, 50 F.2d 761—White v. U. S., C.C.A. Okl., 48 F.2d 178—U. S. v. Smith, C.C.A.Mass., 39 F.2d 851, affirming, D.C., 32 F.2d 901—May v. Marbury, C.C.A.Tenn., 39 F.2d 438, certiorari denied 51 S.Ct. 32, 282 U. S. 857, 75 L.Ed. 758—Fordson Coal Co. v. Wilson, C.C.A.Ky., 39 F.2d 55—Milton v. H. C. Stone Lumber Co., C.C.A.Ill., 36 F.2d 589, affirming, D.C., 36 F.2d 583—Meyers v. Allen, C.C.A.Neb., 34 F.2d 883—Newlands v. Calaveras Min. & Mill. Co., C.C.A.Cal., 28 F.2d 89—Northern Pac. Ry. Co. v. Standard Coal Co., C.C.A.Utah, 23 F.2d 656—Southern Pac. Co. v. Kalbaugh, C. C.A.Cal., 18 F.2d 837, certiorari denied 48 S.Ct. 38, 275 U.S. 543, 72 L.Ed. 416—Beatty Brokerage Co. v. Gulf, C. & S. F. Ry. Co., C.C.A. La., 17 F.2d 480, affirming, D.C., Gulf, C. & S. F. Ry. Co. v. Beatty Brokerage Co., 13 F.2d 950—Fuller Process Co. v. Texas Co., C.C.A. Mo., 16 F.2d 108—Jonesboro-Nettleton Road Improvement Dist. v. Klyce, C.C.A.Ark., 15 F.2d 918—Morris v. Texas Working Barrel Mfg. Co., C.C.A.Tex., 13 F.2d 977—U. S. Fidelity & Guaranty Co. v. Garner, C.C.A.Ill., 13 F.2d 125—Ætna Life Ins. Co. v. Bundscho, C. C.A.Ill., 12 F.2d 522, certiorari denied 47 S.Ct. 108, 273 U.S. 716, 71 L.Ed. 855—Rajotte-Winters v. Whitney Co., C.C.A.Or., 2 F.2d 801—Oakland Water Front Co. v. Le Roy, C.C.A.Cal., 282 F. 385—Dayton Bronze Bearing Co. v. Gilligan, C. C.A.Ohio, 281 F. 709—Dendy v. Southern Pine Lumber Co., C.C.A. Tex., 269 F. 13—Northern Idaho & Montana Power Co. v. A. L. Jordan Lumber Co., C.C.A.Mont., 262 F. 765—Kindred v. Black, Mo., 257 F. 302, 168 C.C.A. 386—Société Nouvelle d'Armement v. Barnaby, C.C. A.Wash., 246 F. 68, 158 C.C.A. 294.

Error held properly presented

In law action tried without jury, where trial court admitted certain evidence offered by defendant, reserving ruling on plaintiff's objection thereto, and in subsequent written opinion ruled in effect that evidence was inadmissible and had not been considered in making of general finding, and defendant promptly filed new trial motion presenting alleged erroneous ruling of law respecting admissibility of evidence and motion was overruled, to which ruling defendant properly saved exception, error in such ruling was held properly presented by defendant, although neither party requested special findings of fact.—English v. Hetherington & Berner, C.C.A.Ill., 71 F.2d 613.

15. U.S.—Berwind-White Coal Min. Co. v. Martin, Pa., 124 F. 313, 314, 60 C.C.A. 27, certiorari denied 24 S.Ct. 841, 191 U.S. 569, 48 L.Ed. 306.
4 C.J. p 654 note 98.

16. U.S.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312.

17. U.S.—U. S. v. Smith, C.C.A.Mass., 39 F.2d 851, affirming, D.C., 32 F. 2d 901.

18. U.S.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312.

Refusal of proposition held reviewable as ruling in progress of trial

U.S.—Smith v. New York Life Ins. Co. of New York, C.C.A.La., 31 F. 2d 281—Smith v. Mutual Life Ins. Co. of New York, C.C.A.La., 31 F. 2d 280, certiorari denied Smith v. Mutual Life Ins. Co., 49 S.Ct. 482, 279 U.S. 868, 73 L.Ed. 1005, rehearing denied 50 S.Ct. 79.

19. U.S.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312—U. S. v. Smith, C.C.A.Mass., 39 F.2d 851, affirming, D.C., 32 F.2d 901.

20. U.S.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312.

21. U.S.—Blythe v. Doheny, C.C.A. Cal., 73 F.2d 799—Mandel Bros. v. Henry A. O'Neil, Inc., C.C.A.S.D., 69 F.2d 452—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312—Arthur C. Harvey Co. v. Malley, C.C. A.Mass., 60 F.2d 97, affirming, D.C., 52 F.2d 885, motion denied, C.C.A., 61 F.2d 365, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, affirmed 53 S.Ct. 426, 288 U. S. 415, 77 L.Ed. 866, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L. Ed. 1461—Merriam v. Huselton, C. C.A.Mo., 45 F.2d 983—Ewert v. Thompson, C.C.A.Okl., 281 F. 449—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.A.N.M., 270 F. 1.

22. U.S.—Anglo California Nat. Bank of San Francisco v. Lazard, C.C. A.Cal., 106 F.2d 693, certiorari denied 60 S.Ct. 379, 308 U.S. 624, 84 L.Ed. 521.

23. U.S.—Century Indemnity Co. v. Nelson, Cal., 58 S.Ct. 531, 303 U.S. 213, 82 L.Ed. 755, reversing, C.C. A., 90 F.2d 644, certiorari granted 58 S.Ct. 55, 302 U.S. 674, 82 L.Ed. 520, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903.

24. U.S.—Century Indemnity Co. v. Nelson, supra.

so as to permit a party to take additional steps.[25] An exception that special findings are not supported by any evidence, taken before final action by the trial court, is an exception to rulings made "in the progress of the trial."[26] The right granted by the statute to a review of the rulings made during the progress of the trial is not lost because of the fact that a general finding or special findings sufficient apparently to support the judgment are thereafter made by the court.[27]

Waiver not conforming to statute. It is provided by Federal Rules of Civil Procedure, rule 38 (d), 28 U.S.C.A. following § 723c, that the failure of a party to serve and file a written demand for a jury trial constitutes a waiver of such trial. As affects review, it was formerly required by statute that the waiver be by written stipulation or by oral agreement of which record was made.[28] Where a jury was not duly waived in accordance with the requirement of the statute, and evidence was introduced and submitted to the court, there was no matter of fact which the circuit court of appeals could review[29] and no question of law could be reviewed except those arising on the process, pleadings, or judgment.[30] None of the questions decid-

25. U.S.—Columbian Nat. Life Ins. Co. v. Griffith, C.C.A.Mo., 73 F.2d 244—Mandel Bros. v. Henry A. O'Neil, Inc., C.C.A.S.D., 69 F.2d 452.

26. U.S.—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S. Ct. 763, 274 U.S. 748, 71 L.Ed. 1330.

27. U.S.—Maryland Casualty Co. v. Jones, Cal., 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960, reversing, C.C.A., 27 F.2d 521.

28. **Requirements under various statutes**

(1) By act of May 29, 1930, 46 U.S. St. at L. p 486, written waiver was unnecessary and the recitation in the judgment that a jury was waived was sufficient.—Baker Ice Mach. Co. v. Hebert, C.C.A.Neb., 76 F.2d 73—Jack v. Forrest, C.C.A.Utah, 71 F.2d 264, certiorari granted Forrest v. Jack, 55 S.Ct. 95, 293 U.S. 542, 79 L. Ed. 647, reversed on other grounds 55 S.Ct. 370, 294 U.S. 158, 79 L.Ed. 829, 96 A.L.R. 1457, rehearing denied 55 S.Ct. 543, 294 U.S. 733, 79 L.Ed. 1262.

(2) Prior to that time, in an action at law, the full review authorized by the statute was permissible only when it affirmatively appeared by the record that the waiver of the right to jury trial was in writing.—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701—35 C.J. p 203 note 22 [a] (2).

(3) A case was tried by the court without a jury under written stipulation waiving the jury within the statute where the cause was on written stipulation referred to a referee to hear and report and the judge on the coming in of the report adopted the findings of the referee as his own after an examination of the evidence.—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330.

(4) But this rule did not apply where the consent to the reference was not by written stipulation.—Thompson-Starrett Co. v. La Belle Iron Works, supra.

(5) Where the right to jury trial was waived in writing and the case submitted to a referee, the rulings or legal conclusions of the referee could not be directly reviewed on writ of error to the judgment; but if the trial judge proceeded under an applicable state, or stipulated practice, his rulings reviewing those of the referee became subject to review; and where the referee's findings were final, as under the common-law practice, or if the judge by adoption or otherwise made his own findings, the findings were part of the primary record opening for review the question whether they supported the judgment. Where the written stipulation could be construed as providing for complete arbitration before the referee, the referee's findings, whether construed as final or not, after their confirmation by the court could be reviewed to the extent of determining whether they support the judgment.—City of Cleveland v. Walsh Const. Co., supra.

(6) A statement in the trial court's opinion that the jury was waived was not a sufficient compliance with the statute.—Municipal Excavator Co. v. Siedhoff, C.C.A.Kan., 15 F.2d 10.

(7) Where action was legal and not equitable and defendant, after joining in request for equity trial, proceeded without objection and after decree requested trial court to treat agreement for equity trial as one waiving trial by jury, appellate court would treat trial as trial at law without jury.—Atlantic Tank & Barrel Corporation v. McClendon, C. C.A.Ky., 81 F.2d 797.

Mode of waiver of jury trial generally see the C.J.S. title Juries § 90, also 35 C.J. p 201 note 5–p 204 note 24.

29. U.S.—St. Paul Mercury Indemnity Co. of St. Paul v. Long, C.C. A.N.J., 85 F.2d 848—Cleveland, C., C. & St. L. Ry. Co. v. Blair, C.C.A. Ill., 59 F.2d 478, affirming, D.C., Blair v. Cleveland, C., C. & St. L. Ry. Co., 45 F.2d 792—Davis v. Knox County, C.C.A.Neb., 31 F.2d 757—Weil v. Neary, C.C.A.N.Y., 22 F. 2d 893, certiorari granted 48 S.Ct. 338, 276 U.S. 613, 72 L.Ed. 732, and reversed on other grounds 49 S.Ct. 144, 278 U.S. 160, 73 L.Ed. 243—Harrison Engineering & Construction Corporation v. Vincennes Bridge Co., C.C.A.Ind., 22 F.2d 802—Virginia Iron, Coal & Coke Co. v. Woodside Cotton Mills Co., C.C. A.S.C., 6 F.2d 442—Hadfield-Penfield Steel Co. v. Eastern Production Co., C.C.A.Ohio, 281 F. 382—Ford v. Grimmett, C.C.A.La., 278 F. 140.

Record held to show statutory waiver

U.S.—T. H. Flood & Co. v. Bates, C. C.A.Ill., 283 F. 364.

30. U.S.—Desha County, Ark., v. Crocker First Nat. Bank, C.C.A. Ark., 72 F.2d 359—Fred W. Mears Heel Co. v. Walley, C.C.A.Me., 71 F.2d 876, affirming, D.C., Walley v. Fred W. Mears Heel Co., 4 F.Supp. 277, certiorari denied Fred W. Mears Heel Co. v. Walley, 55 S.Ct. 122, 293 U.S. 605, 79 L.Ed. 696—Perry v. Wiggins, C.C.A.Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529—U. S. v. Yamoto, C.C.A.Hawaii, 50 F.2d 599—White v. U. S., C.C.A.Okl., 48 F. 2d 178—Kennedy v. U. S., C.C.A. Cal., 44 F.2d 57—Pierce Arrow Sales Corporation v. U. S., C.C.A. Mass., 32 F.2d 849—Talent v. U. S., C.C.A.Mass., 32 F.2d 630—North River Ins. Co. of New York v. Guaranty State Bank of Farwell, C.C.A.Tex., 30 F.2d 881—Noone v. Sinner, C.C.A.Kan., 24 F.2d 960—Graver Corporation v. Hercules Gasoline Co., C.C.A.Cal., 16 F.2d 459—Kunihiro v. Lyons Bros. Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Kunihiro v. M. O. Coggins Co., C.C.A.Cal., 12 F.2d 894, certiorari denied 47 S.Ct. 112, 273 U.S. 723, 71 L.Ed. 859—Virginia Iron, Coal & Coke Co. v. Woodside Cotton Mills Co., C.C.A.S.C., 6 F.

ed at the trial could be reviewed in such case.[31] Hence the court would not review the testimony[32] or alleged error in admitting or excluding testimony,[33] or the denial of a motion for a directed verdict.[34] An appeal would not be dismissed on the ground that a written waiver of jury was not filed before trial of the case where after the trial such a waiver was signed with a stipulation that it should be filed and effective as of the date of the trial.[35]

b. Trial on Agreed Statement of Facts

Where a case is submitted on an agreed statement of the ultimate facts, the question whether the facts are sufficient to support the judgment is open to review.

If the parties stipulate as to the ultimate facts, it in effect amounts to a special finding of facts by the court or a jury,[36] and the question whether the facts are sufficient to support the judgment is open to review[37] although neither a finding nor declaration of law is requested.[38] An agreed statement of fact or special findings, the sufficiency of which to support the judgment presents a reviewable question of law, must, however, be of the ultimate, as distinguished from the evidentiary, facts;[39] and

2d 442—Emerzian v. S. J. Kornblum & William Kornblum, C.C.A. Cal., 3 F.2d 995—Bouldin v. Alto Mines Co., C.C.A.Ariz., 299 F. 301—U. S. v. National City Bank of New York, C.C.A.N.Y., 281 F. 754, affirming, D.C., National City Bank of New York v. U. S., 275 F. 855, and error dismissed 44 S.Ct. 32, 263 U.S. 726, 68 L.Ed. 527—St. Louis Southwestern Ry. Co. v. Commissioners of Road Improvement Dist. No. 2 of Lafayette County, Ark., C.C.A.Ark., 265 F. 524, certiorari granted Commissioners of Road Improvement Dist. No. 2 v. St. Louis Southwestern R. Co., 41 S.Ct. 15, 254 U.S. 626, 65 L.Ed. 445, and affirmed 42 S.Ct. 250, 257 U.S. 547, 66 L.Ed. 364—Bowers v. Henry Steers, Inc., N.Y., 241 F. 377, 154 C.C.A. 257.

Where action is tried without jury and without statutory waiver, or special findings, or bill of exception, appellate court can consider only questions arising on process, pleadings, or judgment.—Twist v. Prairie Oil & Gas Co., Okl., 47 S.Ct. 755, 274 U.S. 684, 71 L.Ed. 1297, reversing, C.C.A., 6 F.2d 347, certiorari granted 46 S.Ct. 355, 270 U.S. 639, 70 L.Ed. 775.

Primary record

If the statute is not complied with in waiving jury trial, there can be no review of any question not arising on primary record.—Hartford Accident & Indemnity Co. v. Board of Education of District of Beaver Pond, in Mercer County, W.Va., C.C.A.W. Va., 15 F.2d 317—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701.

Statute held applicable to district courts

U.S.—St. Louis Southwestern R. Co. v. Road Impr. Dist. No. 2 of Lafayette County, C.C.A.Ark., 265 F. 524.
25 C.J. p 971 note 42 [b].

31. U.S.—F. Carrera & Hermano v. Font, Gamundi & Co., C.C.A.Puerto Rico, 70 F.2d 999—James-Dickinson Farm Mortgage Co. v. Seimer, C.C. A.Ill., 12 F.2d 772, affirming, D.C., Seimer v. James Dickinson Farm Mortgage Co., 299 F. 651, and certiorari denied James-Dickinson Farm Mortgage Co. v. Seimer, 47 S.Ct. 95, 273 U.S. 700, 71 L.Ed. 847—Crouch v. U. S., C.C.A.Va., 8 F. 2d 435—U. S. v. McGovern, C.C.A. Mont., 299 F. 302, affirming, D.C., McGovern v. U. S., 294 F. 108, and error dismissed 45 S.Ct. 515, 268 U.S. 708, 69 L.Ed. 1169, and 45 S.Ct. 351, 267 U.S. 608, 69 L.Ed. 1169—Cross State Land Co. v. Pruett, C.C.A.Tex., 278 F. 143—Illinois Surety Co. v. U. S., N.Y., 229 F. 533, 143 C.C.A. 601—Illinois Surety Co. v. U. S., N.Y., 229 F. 527, 143 C.C.A. 595.

Trial before referee

Where the waiver of a jury trial is not in writing, cases tried before referee cannot be reviewed and bill of exceptions and recitals of evidence are ineffective; but the findings of the referee or judge have the same character and effect as in the case of written waiver.—City of Cleveland v. Walsh Const. Co., C.C.A.Ohio, 279 F. 57, affirming, D.C., Walsh Const. Co. v. City of Cleveland, 271 F. 701.

32. U.S.—National Surety Co. v. U. S., C.C.A.Wash., 17 F.2d 372—Municipal Excavator Co. v. Siedhoff, C.C.A.Kan., 15 F.2d 10—Ford v. U. S., Okl., 260 F. 657, 171 C.C.A. 421.

33. U.S.—Harris v. Newsom, C.C.A. Colo., 23 F.2d 652—Hartford Accident & Indemnity Co. v. Board of Education of Dist. of Beaver Pond, in Mercer County, W. Va., C. C.A.W.Va., 15 F.2d 317—U. S. v. C. G. Blake Co., C.C.A.Ohio, 279 F. 71, affirming, D.C., C. G. Blake Co. v. U. S., 275 F. 861.

34. U.S.—Hartford Accident & Indemnity Co. v. Board of Education of District of Beaver Pond, in Mercer County, W. Va., C.C.A.W.Va., 15 F.2d 317.

35. U.S.—Central Surety & Ins. Co. v. Davidson, C.C.A.N.M., 46 F.2d 774.

36. U.S.—U. S. v. Smith, C.C.A. Mass., 39 F.2d 851, affirming, D.C., 32 F.2d 901—Hipple v. Bates County, Mo., 223 F. 22, 138 C.C.A. 436, certiorari denied Bates County v. Hipple, 36 S.Ct. 723, 241 U.S. 672, 60 L.Ed. 1231—New York Life Ins. Co. v. Dunlevy, Cal., 214 F. 1, 130 C.C.A. 473, affirming, D.C., Dunlevy v. New York Life Ins. Co., 204 F. 670, and affirmed 36 S.Ct. 613, 241 U.S. 518, 60 L.Ed. 1140.
4 C.J. p 656 note 26.

37. U.S.—Chicago, R. I. & P. Ry. Co. v. Maryland Casualty Co., C.C. A.Mo., 75 F.2d 596—Valenti v. Prudential Ins. Co. of America, C.C.A. Mo., 71 F.2d 229, affirming, D.C., 1 F.Supp. 993—Perry v. Wiggins, C.C.A.Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529—White v. U. S., C.C. A.Okl., 48 F.2d 178—U. S. v. Smith, C.C.A.Mass., 39 F.2d 851, affirming, D.C., 32 F.2d 901—Wastun v. Lincoln Nat. Life Ins. Co. of Ft. Wayne, Ind., C.C.A.S.D., 12 F.2d 422—Hipple v. Bates County, Mo., 223 F. 22, 138 C.C.A. 436, certiorari denied Bates County v. Hipple, 36 S.Ct. 723, 241 U.S. 672, 60 L.Ed. 1231.

Findings equivalent to agreed statement of facts

Where counsel for appellant or plaintiff in error in the appellate court admit that the findings of fact made by the trial court are sustained by the evidence, such findings will be treated as in effect an agreed statement of facts.—Philadelphia Casualty Co. v. Fechheimer, Ohio, 220 F. 401, 136 C.C.A. 25, Ann.Cas.1917D 64.

38. U.S.—Kirkman v. Farmers' Sav. Bank of Boyden, Iowa, C.C.A.Iowa, 28 F.2d 857—Hipple v. Bates County, Mo., 223 F. 22, 138 C.C.A. 436, certiorari denied Bates County v. Hipple, 36 S.Ct. 723, 241 U.S. 672, 60 L.Ed. 1231.

39. U.S.—Chicago, R. I. & P. Ry. Co. v. Maryland Casualty Co., C. C.A.Mo., 75 F.2d 596—White v. U. S., C.C.A.Okl., 48 F.2d 178.

"Ultimate facts" include all facts necessary in order that determination of rights of parties shall become question of law.—U. S. v. Smith, C.C. A.Mass., 39 F.2d 851, affirming, D. C., 32 F.2d 901.

where the agreed statement was of the evidentiary, and not the ultimate, facts, the sufficiency of the statement to support the judgment cannot be reviewed.[40]

§ 299. —— General and Special Findings

The opinion of the trial judge is generally not a special finding for purposes of review, although special findings may be embodied in the opinion; but refusals of findings may constitute special findings. The exercise of the lower court's discretion with respect to the making or refusal of findings is not reviewable.

Whether the finding of the court was general or special in an action in which there has been a waiver of a jury is a circumstance which, as shown supra § 298, may affect the scope of the review on appeal to the circuit court of appeals. The opinion of the trial judge dealing generally with issues of law and fact and giving the reasons for his conclusions is not a special finding of fact for the purposes of review,[41] although special findings may be made part of the opinion[42] or set forth at the end of the opinion.[43] Refusals of findings requested on undisputed evidence constitute special findings within the rule authorizing the appellate court to determine the sufficiency of facts specially found to support the judgment.[44] It is immaterial, on appeal, whether the finding of the ultimate fact is in the "findings of fact" or in the so-called "conclusions of law;"[45] and the concluding statement in special findings that plaintiff was entitled to damages in a specified amount does not constitute a general finding that will nullify the special findings.[46] The making of special findings being discretionary with the trial court, its action in making such findings,[47] in refusing to make requested findings,[48] or its action in refusing to amend findings

Evidentiary facts

Stipulation of facts and specific findings was held to disclose evidentiary, rather than ultimate, facts, precluding review, in absence of exceptions.—Perry v. Wiggins, C.C.A. Mo., 57 F.2d 622, certiorari denied 53 S.Ct. 12, 287 U.S. 609, 77 L.Ed. 529.

40. U.S.—Armstrong v. Metropolitan Life Ins. Co., C.C.A.Neb., 85 F.2d 185—Chicago, R. I. & P. Ry. Co. v. Maryland Casualty Co., C.C.A. Mo., 75 F.2d 596.

41. U.S.—Arthur C. Harvey Co. v. Malley, Mass., 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, affirming, C.C.A., 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, motion denied 61 F.2d 365, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461—Hill v. Ohio Casualty Ins. Co., C.C.A.Tenn., 104 F.2d 695—U. S. v. Shingle, C.C.A. Hawaii, 91 F.2d 85, certiorari denied Shingle v. U. S., 58 S.Ct. 264, 302 U.S. 746, 82 L.Ed. 577—Welch v. Hassett, C.C.A.Mass., 90 F.2d 833, reversing, D.C., 15 F.Supp. 692, certiorari granted Hassett v. Welch, 58 S.Ct. 56, 302 U.S. 674, 82 L.Ed. 521, affirmed 58 S.Ct. 559, 303 U.S. 303, 82 L.Ed. 858—Real Estate-Land Title & Trust Co. v. Town of Fairfax, C.C.A.Okl., 84 F. 2d 675, affirming, D.C., 11 F.Supp. 459—Martin v. Drexel Ice Cream Co., C.C.A.Ill., 80 F.2d 768—Alexander Pickering & Co. v. Chinese American Cold Storage Ass'n, C.C. A.China, 71 F.2d 895, certiorari denied 55 S.Ct. 122, 293 U.S. 606, 79 L.Ed. 697—Rasmusson v. Eddy's Steam Bakery, C.C.A.Mont., 57 F. 2d 27, reversing, D.C., Eddy's Steam Bakery v. Rasmussen, 47 F.2d 247, and certiorari denied 53 S.Ct. 7, 287 U.S. 601, 77 L.Ed. 523—Wynne v. Fries, C.C.A.Ohio, 50 F.2d 761—Buechle v. Montgomery, C.C.A.Mo., 45 F.2d 987—Merriam v. Huselton, C.C.A.Mo., 45 F.2d 983—Cushny v. Crowe, C.C.A.Mo., 36 F.2d 37—People's Bank of Keyser, W.Va. v. International Finance Corporation, C.C.A.W.Va., 30 F.2d 46, affirming, D.C., International Finance Corporation v. People's Bank of Keyser, 27 F.2d 523, certiorari denied People's Bank of Keyser, W.Va. v. International Finance Corporation, 49 S.Ct. 352, 279 U.S. 858, 73 L.Ed. 999—Macomber v. Goldthwaite, C. C.A.Or., 22 F.2d 638—Lahman v. Burnes Nat. Bank of St. Joseph, Mo., C.C.A.Neb., 20 F.2d 897—Thompson-Starrett Co. v. La Belle Iron Works, C.C.A.N.Y., 17 F.2d 536, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330—Hartford Accident & Indemnity Co. v. Board of Education of Dist. of Beaver Pond, in Mercer County, W. Va., C.C.A.W.Va., 15 F.2d 317—Federal Life Ins. Co. v. Rascoe, C.C.A. Tenn., 12 F.2d 693, certiorari denied 47 S.Ct. 112, 273 U.S. 722, 71 L.Ed. 859—China Press v. Webb, C.C.A.China, 7 F.2d 581—Java Cocoanut Oil Co. v. Pajaro Valley Nat. Bank, C.C.A.Cal., 300 F. 305—Highway Trailer Co. v. City of Des Moines, Iowa, C.C.A.Iowa, 298 F. 71—Central Trust Co. of Des Moines, Iowa, v. Fidelity Trust Co., C.C.A. Mo., 282 F. 233—First Nat. Bank v. Weitzel, Ky., 239 F. 497, 152 C. C.A. 375—Mason v. Smith, Ohio, 191 F. 502, 112 C.C.A. 146—Adkins v. Sloane, Mo., 60 F. 344, 8 C.C. A. 656.

4 C.J. p 656 note 25.

Findings of fact generally see supra § 140.

42. U.S.—Welch v. Hassett, C.C.A. Mass., 90 F.2d 833, reversing, D. C., 15 F.Supp. 692, certiorari granted Hassett v. Welch, 58 S.Ct. 56, 302 U.S. 674, 82 L.Ed. 521, affirmed 58 S.Ct. 559, 303 U.S. 303, 82 L.Ed. 858.

43. U.S.—People's Bank of Keyser, W. Va. v. International Finance Corporation, C.C.A.W.Va., 30 F.2d 46, affirming, D.C., International Finance Corporation v. People's Bank of Keyser, 27 F.2d 523, certiorari denied People's Bank of Keyser, W. Va. v. International Finance Corporation, 49 S.Ct. 352, 279 U.S. 858, 73 L.Ed. 999.

44. U.S.—Dexter & Carpenter v. Davis, C.C.A.Md., 281 F. 385.

45. U.S.—Bogan v. Hynes, C.C.A. Cal., 65 F.2d 524, certiorari denied 54 S.Ct. 126, 290 U.S. 690, 78 L.Ed. 594.

46. U.S.—Continental Nat. Bank v. National City Bank of New York, C.C.A.Cal., 69 F.2d 312.

47. U.S.—Southern Surety Co. of Des Moines, Iowa v. U. S., C.C.A. S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F. 2d 11, rehearing denied 20 F.2d 531—Ewert v. Thompson, C.C.A.Okl., 281 F. 449—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.A.N.M., 270 F. 1.

48. U.S.—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F.2d 889—Hendrie v. Turpen, C.C.A.Wyo., 50 F. 2d 1049—White v. U. S., C.C.A.Okl., 48 F.2d 178—Henry H. Cross Co. v. Texhoma Oil & Refining Co., C.C. A.Okl., 32 F.2d 442—Southern Surety Co. of Des Moines, Iowa, v. U. S., C.C.A.S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F.2d 11, rehearing denied 20 F.2d 531—Modoc County Bank v. Ringling, C.C.A.Cal., 7 F.2d 535—Compania Transcontinental de Petroleo.

made[49] is not reviewable on appeal. No findings are necessary for the purpose of appeal where the case was submitted to the trial court on motions for judgment on the pleadings.[50]

§ 300. Hearing and Rehearing

a. Hearing
b. Rehearing

a. Hearing

Several cases growing out of the same transaction may be heard together on appeal. The court may for good cause continue the hearing or excuse failure of counsel to appear for argument, and will in other respects conduct the appeal in accordance with the requirements of good practice.

Several cases which have been brought to the circuit court of appeals for review may be consolidated and heard together, where they all grow out of the same transaction and depend on the same facts or principles, and the consolidation appears to be the course most convenient, expeditious, or inexpensive to the parties.[51] The court may continue or postpone the hearing of the appeal for good cause shown,[52] such as illness of counsel,[53] and may impose terms as a condition of such postponement.[54] The court will not appoint counsel to represent a party who was allowed to prosecute the appeal as a pauper where examination of the record convinces the court that such action would be futile.[55] The court may for good reason at the hearing excuse failure of counsel to appear for argument of the appeal, although it is better practice for counsel to secure by formal petition prior leave of the court to submit the case on briefs without oral argument.[56] Appellant's brief in the district court not in record on appeal should not be referred to in the argument of appellee's counsel.[57] An appeal from an interlocutory decision is entitled to precedence as provided for by statute.[58]

b. Rehearing

(1) Power to grant and nature of right
(2) Grounds for rehearing
(3) Application for rehearing
(4) Scope and conduct of hearing and relief granted

(1) Power to Grant and Nature of Right

A rehearing in the circuit court of appeals is not a matter of right, applications therefor being addressed to the discretion of the court.

A rehearing in the circuit court of appeals is not a matter of right, but a privilege given by the court, and governed and limited by its rules;[59] and applications for rehearing are addressed solely to the discretion of the court.[60]

(2) Grounds for Rehearing

Generally a party is entitled to a rehearing only because of some manifest error or omission which is so material that, if corrected, it should result in a substantial change in the original opinion; and a mere failure sufficiently to present the cause on the original hearing affords no ground for a rehearing, nor can a

S. A., v. Mexican Gulf Oil Co., C. C.A.N.Y., 292 F. 846, affirming, D. C., Mexican Gulf Oil Co. v. Compania Transcontinental de Petroleo, 281 F. 148—Ewert v. Thompson, C. C.A.Okl., 281 F. 449—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.A.N. M., 270 F. 1.

49. U.S.—Southern Surety Co. of Des Moines, Iowa v. U. S., C.C.A. S.D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532—Denver Live Stock Commission Co. v. Lee, C.C.A.Colo., 18 F. 2d 11, rehearing denied 20 F.2d 531—Ewert v. Thompson, C.C.A. Okl., 281 F. 449—U. S. v. Atchison, T. & S. F. Ry. Co., C.C.A.N.M., 270 F. 1.

Motion to vacate findings

(1) Judge's discretion not being abused, denial of motion to set aside finding in jury waived case is not reviewable.—Pocahontas Coal & Coke Co. v. Cook, C.C.A.W.Va., 74 F.2d 878.

(2) Motions for order to vacate findings, for judgment, and for new trial, and requests and rulings thereon which are filed after trial court, has filed findings and conclusions that judgment must be entered for one of the parties, are discretionary with trial court, and are not subject to review in federal appellate courts. —Becher-Barrett-Lockerby Co. v. Northern Pac. Ry. Co., C.C.A.Minn., 89 F.2d 752.

50. U.S.—Chalaire v. Franklin, C.C. A.China, 81 F.2d 105.

51. U.S.—Board of Drainage Com'rs of Pender County Drainage Dist. No. 4 v. Lafayette Southside Bank of St. Louis, C.C.A.N.C., 27 F.2d 286.

4 C.J. p 619 note 48.

52. U.S.—Rasmusson v. National Popsicle Corporation, C.C.A., 105 F.2d 759.

53. U.S.—Rasmusson v. National Popsicle Corporation, supra.

54. U.S.—Rasmusson v. National Popsicle Corporation, supra.

55. U.S.—Ligare v. Harries, C.C.A. Ill., 128 F.2d 582.

56. U.S.—Chase v. African M. E. Church, C.C.A.Virgin Islands, 108 F.2d 977.

57. U.S.—Adams v. Champion, C.C.A. Ill., 70 F.2d 956, certiorari granted 55 S.Ct. 122, 293 U.S. 547, 79 L.Ed. 651, reversed on other grounds 55 S.Ct. 399, 294 U.S. 231, 79 L.Ed. 880.

58. U.S.—Star Brass Works v. General Electric Co., Mich., 129 F. 102, 63 C.C.A. 604.

59. U.S.—Gregory v. Pike, Mass., 67 F.2d 837, 15 C.C.A. 33, appeals dismissed Gregory v. Van Ee, 16 S. Ct. 431, 160 U.S. 643, 40 L.Ed. 566, Gregory v. Pike, 16 S.Ct. 1202, 163 U.S. 688, 41 L.Ed. 311, and Gregory v. Van Ee, 17 S.Ct. 994, 164 U.S. 703, 41 L.Ed. 1183.

60. U.S.—General Excavator Co. v. Keystone Driller Co., C.C.A.Ohio, 64 F.2d 39, denying rehearing 62 F.2d 48, certiorari granted Keystone Driller Co. v. General Excavator Co., 53 S.Ct. 791, 289 U.S. 721, 77 L.Ed. 1472, and affirmed 54 S.Ct. 146, 290 U.S. 240, 78 L. Ed. 293. Motion to recall mandate denied 54 S.Ct. 556, two cases, Keystone Driller Co. v. Osgood, 54 S. Ct. 556, 291 U.S. 651, 78 L.Ed. 1045, and 54 S.Ct. 557, 291 U.S. 651, 78 L.Ed. 1045.

rehearing be had on account of matters different from those urged on the original hearing.

Generally a party will be entitled to a rehearing only because of some manifest error or omission which is so material that, if it is corrected, it should result in a substantial alteration or change in the original opinion.[61] This means that a rehearing will usually be refused if no material fact or principle of law has been overlooked or disregarded,[62] or if it is not made to appear that a rehearing could change the result.[63] If no omissions or new authorities or points of law or fact are shown, the appellate court will seldom permit a rehearing simply for the purpose of obtaining a reargument on, and a reconsideration of, points, authorities, and matters which have already been fully considered by the court, on the assertion of counsel that, notwithstanding the court fully considered everything wished to be urged on the rehearing, it reached the wrong conclusion.[64] A rehearing may be granted because of the disqualification of one member of the original court not known at the time of the first hearing of the appeal.[65] A rehearing will be granted by the circuit court of appeals where its decision is in conflict with a case previously decided by the highest court of the state, the law of which controls, or where the latter court renders such an adverse decision pending the determination of the case at bar or immediately after it has been decided;[66] and, on the subsequent discovery of a decision of the state court in point, a rehearing will be granted where the decision of the circuit court of appeals was made under the belief that there was no relevant state statute or decision.[67] A rehearing will not be granted solely because questions of great importance are involved.[68] Moreover, if a judgment is not final, a rehearing will be refused, although it was rendered by a divided court.[69]

Generally the failure of counsel sufficiently to present the cause for the determination of the appellate court furnishes no ground for a rehearing,[70] and the mere fact that the court has overlooked a certain point presented by the record is not sufficient to authorize a rehearing, unless it further appears that its attention was called to the point in question by the briefs or arguments of counsel.[71] A rehearing, however, will be granted if the court has overlooked material points or decisive authorities duly submitted by counsel.[72]

Where an appeal has been heard and determined on a certain theory, a rehearing cannot be had on grounds inconsistent with that theory.[73]

As a general rule, points which have been waived on the hearing, either expressly or by implication, will not be considered on a petition for a rehearing,[74] and a rehearing cannot ordinarily be had on

61. U.S.—Schneider v. Kessler, C.C.A.N.J., 97 F.2d 542, dismissing reargument 89 F.2d 1001—Texas Consol. Theatres v. Pittman, C.C.A.Tex., 94 F.2d 203, denying rehearing 93 F.2d 21, certiorari granted 58 S.Ct. 1046, 304 U.S. 556, 82 L.Ed. 1524, certiorari dismissed 59 S.Ct. 40, 305 U.S. 3, 83 L.Ed. 5.

62. U.S.—United Production Corporation v. Chesser, C.C.A.Tex., 95 F.2d 521, denying rehearing 94 F.2d 790, certiorari denied Chesser v. United States Production Corporation, 59 S.Ct. 75, 305 U.S. 616, 83 L.Ed. 393—Torrent v. Duluth Lumber Co., C.C.Minn., 32 F. 229.

63. U.S.—Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, C.C.A.Tex., 97 F.2d 249, denying rehearing 95 F.2d 671, remanding, D.C., City Nat. Bank of Wichita Falls, Tex. v. Witchita Royalty Co., 18 F.Supp. 795, certiorari granted Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 59 S.Ct. 101, 305 U.S. 587, 83 L.Ed. 371, affirmed 59 S.Ct. 420, 306 U.S. 103, 83 L.Ed. 515.

64. U.S.—Burget v. Robinson, Mass., 123 F. 262, 59 C.C.A. 260.

65. U.S.—General Motors Corporation v. Preferred Electric & Wire Corporation, C.C.A.N.Y., 109 F.2d 615, affirming 79 F.2d 621, certiorari denied 56 S.Ct. 381, 296 U.S. 655, 80 L.Ed. 466—Electric Auto-Lite Co. v. P. & D. Mfg. Co., C.C.A.N.Y., 109 F.2d 566, affirming 78 F.2d 700, modifying, D.C., 8 F.Supp. 314, certiorari denied 56 S.Ct. 310, 296 U.S. 648, 80 L.Ed. 461, rehearing denied 56 S.Ct. 380, 296 U.S. 665, 80 L.Ed. 474.

66. U.S.—Unitype Co. v. Long, Ohio, 149 F. 196, 79 C.C.A. 154—Burget v. Robinson, Mass., 123 F. 262, 59 C.C.A. 260.

67. U.S.—American Nat. Ins. Co. of Galveston, Tex., v. Belch, C.C.A.Va., 100 F.2d 48.

68. U.S.—Camfield v. U. S., Colo., 67 F. 17, 14 C.C.A. 228, denying rehearing 66 F. 101, 13 C.C.A. 359, and affirmed 17 S.Ct. 864, 167 U.S. 518, 42 L.Ed. 260.

4 C.J. p 629 note 81.

69. U.S.—Texas & P. R. Co. v. Gentry, Tex., 57 F. 422, 6 C.C.A. 413, affirmed 16 S.Ct. 1104, 163 U.S. 353, 41 L.Ed. 186.

70. U.S.—Hull v. Burr, Mass., 207 F. 543, 125 C.C.A. 221, denying rehearing 206 F. 1, 124 C.C.A. 135, and affirmed 34 S.Ct. 892, 234 U.S. 712, 58 L.Ed. 1557.

71. U.S.—Reece Folding Mach. Co. v. Fenwick, Mass., 140 F. 287, 72 C.C.A. 39, 2 L.R.A.,N.S., 1094.

72. U.S.—Railway Register Mfg. Co. v. North Hudson County R. Co., C.C.N.J., 26 F. 411.

73. U.S.—Mitchell v. Greenough, C.C.A.Wash., 100 F.2d 1006, denying rehearing 100 F.2d 184, certiorari denied 59 S.Ct. 788, 306 U.S. 659, 83 L.Ed. 1056—Merriman v. Chicago & E. I. R. Co., Ill., 66 F. 663, 14 C.C.A. 36, denying petition 64 F. 535, 12 C.C.A. 275.

Controlling law

Where case had been tried and heard on appeal on erroneous assumption that it was controlled by general law, instead of by state law, rehearing would not be granted, but reversal and remandment were permitted to stand in order that case might be tried anew under state law, especially where case presented special difficulties.—Brabham v. State of Mississippi, for Use of Smith, C.C.A.Miss., 97 F.2d 251, denying rehearing 96 F.2d 210, certiorari denied State of Mississippi for Use of Smith v. Brabham, 59 S.Ct. 103, 305 U.S. 636, 83 L.Ed. 409.

74. U.S.—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 945, denying rehearing 82 F.2d 541, cer-

account of matters or questions different from those urged at the original hearing by the party seeking the rehearing.[75] The reasons against granting a rehearing in such cases apply with particular force where the matters suggested ought to have been urged in the trial court before the appeal was taken.[76] Nevertheless the court may consider such matters in view of the interesting character of the problems presented and the petitioner's insistence that the judgment rendered was unconscionable.[77]

The death of a party pending appeal is not usually a ground for a rehearing.[78]

(3) Application for Rehearing

A petition for rehearing can be maintained only by one whose interests are affected by the judgment. It should set out the grounds on which it is based and specify in what respect the original decision was erroneous. It must be made and filed within the time prescribed by statute and rules of court.

Generally a petition or application for rehearing cannot be maintained by one whose interests are not affected or prejudiced by the judgment,[79] but a rehearing will be granted to avoid possible injustice to a petitioner who would be affected by the decree appealed from even though he was not named therein, where, had he then asked, he would have been heard when the appeals were originally argued, it appearing that he had no record notice of the appeals.[80] Where one not previously a party to the action takes steps in reliance on the decision of the circuit court of appeals before expiration of the term of court or of the time allowed for granting certiorari, such party's interest is subject to the outcome of the action, and his motion for leave to file a petition in intervention in the nature of a petition for rehearing after the judgment of the appellate court is set aside on petition for rehearing will be overruled.[81]

The application should set forth fully and concisely the grounds on which it is based, and point out specifically in what respect the original decision is erroneous.[82] In stating the facts, however, the petition should not proceed to give further reasons in support of the case made in the original brief, and an application which is in form a mere argument or brief cannot be considered by the court.[83] The petition may be accompanied by a certificate of counsel,[84] but affidavits and drawings not presented in the district court are incompetent to support the petition.[85] A petition for a rehearing and affidavits in answer and reply are entirely irregular as documents for submission in connection with a motion for rehearing where there is nothing properly before the circuit court of appeals except the record on appeal, although such documents may be considered as upon an application for leave to file a petition in the district court to reopen the case and to remand the cause to that court for further proceedings.[86] A petition not made in accord with the recognized code of professional manners cannot be filed.[87]

tiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409.

75. U.S.—Jones v. Zurich General Accident & Liability Ins. Co., C.C. A.N.Y., 121 F.2d 761—Mitchell v. Greenough, C.C.A.Wash., 100 F.2d 1006, denying rehearing 100 F.2d 184, certiorari denied 59 S.Ct. 788, 306 U.S. 659, 83 L.Ed. 1056—Otoe County Nat. Bank v. Delany, C.C.A. Neb., 88 F.2d 238—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 945, denying rehearing 82 F.2d 541, certiorari denied 57 S. Ct. 17, 299 U.S. 556, 81 L.Ed. 409 —Niagara Fire Ins. Co. v. Pospisil, C.C.A.S.D., 54 F.2d 71, 79 A.L.R. 4, denying rehearing and supplementing, C.C.A., 52 F.2d 709, reversing, D.C., Pospisil v. National Fire Ins. Co. of Hartford, Conn., 35 F.2d 213 —Moss v. Sherburne, C.C.A.Mass., 11 F.2d 579, certiorari denied 47 S.Ct. 100, 273 U.S. 710, 71 L.Ed. 852.

4 C.J. p 629 note 88.

76. U.S.—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 945, denying rehearing 82 F.2d 541, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—Bassick Mfg. Co. v. Adams Grease Gun Corporation, C.C.A.N.Y., 54 F.2d 285, affirming 52 F.2d 36, modifying, D.C., 39 F. 2d 904, and certiorari granted Adams Grease Gun Corporation v. Bassick Mfg. Co., 52 S.Ct. 312, 285 U.S. 531, 76 L.Ed. 926, certiorari dismissed 52 S.Ct. 495, 286 U.S. 567, 76 L.Ed. 1298.

77. U.S.—U. S. v. Rodiek, C.C.A.N. Y., 120 F.2d 760, denying rehearing 117 F.2d 588, certiorari granted Rodiek v. U. S., 62 S.Ct. 101, 314 U.S. 597, 86 L.Ed. 481, affirmed 62 S.Ct. 793, 315 U.S. 783, 86 L.Ed. 1190, rehearing denied 62 S.Ct. 940, 316 U.S. 707, 86 L.Ed. 1774.

78. **Death of Indian ward**

That Indian ward died pending appeal in action involving his property, and that all property involved in order of appellate court descended to persons under no governmental restrictions, was held not cause for modification of order, since matters involved should be presented to trial court.—U. S. v. Mashunkashey, C.C.A. Okl., 73 F.2d 487, denying rehearing 72 F.2d 847, certiorari denied Mashunkashey v. U. S., 55 S.Ct. 551.

79. U.S.—Magnolia Petroleum Co. v. Blankenship, C.C.A.Tex., 85 F.2d 553, certiorari denied 57 S.Ct. 234, 299 U.S. 608, 81 L.Ed. 449, rehearing denied 57 S.Ct. 319, 299 U.S. 624, 81 L.Ed. 459.

80. U.S.—Alexander v. Fidelity Trust Co., Pa., 249 F. 1, 161 C.C. A. 61.

81. U.S.—Sun Oil Co. v. Burford, C. C.A.Tex., 130 F.2d 10, vacating 124 F.2d 467.

82. U.S.—The Dago, Md., 63 F. 182, 11 C.C.A. 117.

83. U.S.—The Dago, supra.

84. U.S.—Hinds v. Keith, Ala., 57 F. 10, 6 C.C.A. 231.

85. U.S.—Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co., C. C.A.Mich., 48 F.2d 73, affirming, D.C., Eclipse Interchangeable Counterbore Co. v. Gairing Tool Co., 33 F.2d 942.

86. U.S.—Boro Hall Corporation v. General Motors Corporation, C.C. A.N.Y., 130 F.2d 196, denying rehearing 124 F.2d 822, affirming, D. C., 37 F.Supp. 999.

87. U.S.—Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., C.C.A. N.Y., 292 F. 861, denying petitions

Where, after a dismissal for want of jurisdiction in the circuit court of appeals, the jurisdictional defect was apparently remedied and the parties expressed a desire that the case be disposed of on the merits, the appellate court may consider the legal questions presented on the merits but need not allow the petition for rehearing.[88]

Time for filing application or granting rehearing. An application for rehearing ordinarily may and must be made and filed within the time prescribed by statutes or court rules.[89] As a general rule the petition must be filed before the end of the term at which the case is decided, and a failure to make the application within this period is fatal,[90] but the court may grant leave to file a petition after expiration of the term where the rules of the court do not expressly forbid it from entertaining petitions after the term.[91] The time for applying for a rehearing may be extended by the court for good cause.[92] The circuit court of appeals may not grant a rehearing after mandate has issued[93] or after the expiration of the term at which judgment was rendered,[94] unless jurisdiction be retained over the cause in some appropriate manner for the purpose,[95] even though with respect to proceedings brought to enforce or set aside its order the court occupies the position of a court of original jurisdiction rather than of an appellate court.[96]

Second petition. Although the rules of the court do not contemplate a second petition for rehearing, one may be granted because of an alleged conflict within the circuit of decisions rendered by the court.[97]

(4) Scope and Conduct of Hearing and Relief Granted

Except where the application was based on particular errors, a petitioner may urge any point which was in the case at all times; and if the court concludes that its original decision was erroneous such decision may be modified or reversed.

A petitioner will not ordinarily be denied the right to urge on rehearing a point which was in the case at all times,[98] but if the application was based on particular errors in the original judgment, or if the court in granting the rehearing has limited it to a certain portion of the case, other points cannot be considered and should not be raised on the reargument.[99] Under a rule of the circuit court of

for rehearing and petition for intervention 290 F. 625, reversing 285 F. 73, and certiorari denied Wenbourne-Karpen Dryer Co. v. Cutler Dry Kiln Co., 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.

88. U.S.—Florian v. U. S., C.C.A.Ill., 114 F.2d 990, reversed on other grounds U. S. v. Florian, 61 S.Ct. 713, 312 U.S. 656, 85 L.Ed. 1105, rehearing denied 61 S.Ct. 738, 312 U.S. 715, 85 L.Ed. 1145.

89. U.S.—City of Stuart v. Green, C.C.A.Fla., 91 F.2d 603, 113 A.L.R. 560, certiorari denied Green v. City of Stuart, 58 S.Ct. 146, 302 U.S. 744, 82 L.Ed. 575, rehearing denied 58 S.Ct. 280, 302 U.S. 779, 82 L.Ed. 602, and motion denied, C.C.A., 94 F.2d 942.
4 C.J. p 637 note 55.

Petition held timely
U.S.—Oehring v. Fox Typewriter Co., C.C.A.N.Y., 254 F. 774, 166 C.C.A. 220, denying rehearing 251 F. 584, 163 C.C.A. 578, and certiorari denied Fox Typewriter Co. v. Oehring, 39 S.Ct. 257, 249 U.S. 598, 63 L.Ed. 795.

So-called "motion for reconsideration," filed after denial of petition for rehearing and lapse of time allowed for such petition, was held petition for rehearing and unauthorized.—Arthur C. Harvey Co. v. Malley, C.C.A.Mass., 61 F.2d 365, denying motion 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S. Ct. 314, 287 U.S. 596, 77 L.Ed. 519, affirmed 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461.

90. U.S.—Kirchberger v. American Acetylene Burner Co., N.Y., 142 F. 169, 73 C.C.A. 387, denying rehearing 128 F. 599, 64 C.C.A. 107.
4 C.J. p 638 note 62.

91. U.S.—U. S. v. Harris, C.C.A. Okl., 286 F. 910, granting rehearing 265 F. 261, in which judgment is reversed 293 F. 389, and appeal dismissed 42 S.Ct. 269, 257 U.S. 623, 66 L.Ed. 402.

92. **Ruling case in supreme court for review**
Where an appeal is decided on the authority of another decision of the circuit court of appeals which is to be reviewed by the supreme court, the circuit court of appeals may extend the time for applying for rehearing until a certain time after the decision of the supreme court in the ruling case.—U. S. v. Reed, C.C.A.N.Y., 280 F. 721, affirming, D. C., 274 F. 724.

93. U.S.—Foster Bros. Mfg. Co. v. National Labor Relations Board, C.C.A., 90 F.2d 948, denying rehearing 85 F.2d 984.
Jurisdiction and proceedings of circuit court of appeals after remand generally see infra § 301.

94. U.S.—Foster Bros. Mfg. Co. v. National Labor Relations Board, supra.

Court held without jurisdiction to entertain appellee's petition for rehearing where it had not been presented and permission had not been given to present it within term when original order of reversal had been made, and it had not been presented within term when supreme court denied petitions for certiorari and for rehearing, or within term when circuit court of appeals' mandate, which appellant sought to have clarified, was issued.—National Biscuit Co. v. Kellogg Co., C.C.A.Del., 96 F. 2d 873, clarifying mandate 91 F.2d 150, certiorari denied Kellogg Co. v. National Biscuit Co., 58 S.Ct. 120, 302 U.S. 733, 82 L.Ed. 567, rehearing denied 58 S.Ct. 139, 302 U.S. 777, 82 L. Ed. 601, petition denied 58 S.Ct. 280, 302 U.S. 654, 82 L.Ed. 506, certiorari granted 58 S.Ct. 1052, 304 U.S. 586, 82 L.Ed. 1547, reversed on other grounds 59 S.Ct. 109, 305 U.S. 111, 83 L.Ed. 73, rehearing denied 59 S. Ct. 246, 305 U.S. 674, 83 L.Ed. 437, and 59 S.Ct. 247, 305 U.S. 674, 83 L. Ed. 437.

95. U.S.—Foster Bros. Mfg. Co. v. National Labor Relations Board, C.C.A., 90 F.2d 948, denying rehearing 85 F.2d 984.

96. U.S.—Foster Bros. Mfg. Co. v. National Labor Relations Board, supra.

97. U.S.—Sun Oil Co. v. Burford, C.C.A.Tex., 130 F.2d 10, vacating 124 F.2d 467.

98. U.S.—Robertson v. Nee, C.C.A. Mo., 105 F.2d 651.

99. U.S.—U. S. v. Bertelsen & Petersen Engineering Co., C.C.A. Mass., 98 F.2d 132, affirming, 95 F. 2d 867, affirming, D.C., Bertelsen &

appeals authorizing it to notice plain errors not assigned, the court on a petition for rehearing should notice an error in allowing interest on a judgment for a penalty recovered in a criminal prosecution from the date of the indictment.[1] If the court on rehearing concludes that its original decision was erroneous, the original decision may be modified[2] or reversed.[3]

§ 301. Determination; Liability on Bonds

a. Determination and disposition of cause
b. Liabilities on bonds and undertakings

a. Determination and Disposition of Cause

(1) In general
(2) Remand without decision
(3) Effect of changes pending appeal
(4) Findings of fact and conclusions of law
(5) Affirmance
(6) Modification
(7) Reversal
(8) Amendment, modification, and setting aside of its judgment by circuit court of appeals
(9) Mandate and proceedings in lower court
(10) Jurisdiction and proceedings of appellate court after remand

(1) In General

The circuit court of appeals has broad power to affirm, modify, or reverse any judgment brought before it for review, or to direct such judgment to be entered or such further proceedings to be had as justice may require, but the court should not grant relief beyond its jurisdiction.

By virtue of the act establishing the circuit court of appeals, the court is vested with power to affirm, modify, or reverse any judgment, decree, or order lawfully brought before it for review, or to direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.[4] Criminal cases are included within the power granted by the statute.[5] The duty of the court extends no further than to determine the issues raised by the appeal and to direct the entry of the judgment; it cannot anticipate what action a party may take or refuse to take in view of the judicial determination of the issue presented.[6] Moreover, the circuit court of appeals may not retry an action at law and render such judgment as it thinks should be rendered,[7] although on an equity appeal the court may enter such decree as the proof warrants.[8] Where the record does not show jurisdiction in the federal court, the submission of the case will be set aside, and the case replaced on the calendar, with permission to counsel to suggest a diminution of the record and bring up the necessary parts of the record that may show jurisdiction.[9] Where the question has become moot, the court may refuse to render a decision.[10] It is the practice of the circuit court of appeals to base its decision on more than one ground where the record shows there are more existing in favor of the litigant who prevails on appeal.[11] The court has jurisdiction to effectuate its own decree.[12]

Petersen Engineering Co. v. U. S., 14 F.Supp. 868, certiorari granted U. S. v. Bartelson & Petersen Engineering Co., 59 S.Ct. 229, 305 U. S. 590, 83 L.Ed. 373, affirmed U. S. v. Bertelsen & Petersen Engineering Co., 59 S.Ct. 541, 306 U.S. 276, 83 L.Ed. 647.

1. U.S.—Pierce v. U. S., Mo., 41 S. Ct. 365, 255 U.S. 398, 65 L.Ed. 697, modifying 257 F. 514, 171 C.C.A. 1, rehearing denied 260 F. 158, 171 C. C.A. 194, and certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L.Ed. 1199.

2. U.S.—Lykes Bros. S. S. Co. v. Grubaugh, C.C.A.Tex., 130 F.2d 25, modifying 128 F.2d 387—Fleming v. U. S., C.C.A.Tenn., 107 F.2d 952, reversing 106 F.2d 452.

3. U.S.—Art Metal Works v. Abraham & Straus, C.C.A.N.Y., 107 F.2d 944, affirming, D.C., 4 F.Supp. 298, certiorari denied Abraham & Straus v. Art Metal Works, 60 S.Ct. 293, 308 U.S. 621, 84 L.Ed. 518, rehearing denied 60 S.Ct. 611, 309 U.S. 696, 84 L.Ed. 1036.

4. U.S.—U. S. v. Illinois Surety Co., Ill., 226 F. 653, 141 C.C.A. 409, affirmed 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206.
25 C.J. p 972 note 55.

5. U.S.—Whitworth v. U. S., Mo., 114 F. 302, 52 C.C.A. 214.
25 C.J. p 972 note 56.

6. U.S.—Gillespie v. Yell County, Ark., C.C.A.Ark., 124 F.2d 632.

7. U.S.—Emanuel v. Kansas City Title & Trust Co., C.C.A.Mo., 127 F.2d 175—Elzig v. Gudwangen, C. C.A.Minn., 91 F.2d 434—U. S. v. Washington Dehydrated Food Co., C.C.A.Mo., 89 F.2d 606—Geiger v. Tramp, C.C.A.Iowa, 291 F. 353.

8. U.S.—Stearns-Roger Mfg. Co. v. Ruth, C.C.A.Colo., 87 F.2d 35, reversing, D.C., Ruth v. Stearns-Roger Mfg. Co., 13 F.Supp. 697.

Right to partial relief
Failure of appellee's counsel, in attempting to sustain entire decree, to point out right to partial relief, does not prevent reviewing court's granting appropriate relief within pleadings and evidence.—Turner v. Kirkwood, C.C.A.Okl., 62 F.2d 256, certiorari denied 53 S.Ct. 522, 289 U. S. 724, 77 L.Ed. 1474.

9. U.S.—Downer v. Goodwin, C.C.A. Kan., 9 F.2d 918.

10. U.S.—Northwestern Light & Power Co. v. Town of Milford, Iowa, C.C.A.Iowa, 82 F.2d 45—Ser-Att B. Field v. Wynne, C.C.A. Pa., 62 F.2d 1052.

11. U.S.—National Labor Relations Board v. Sterling Electric Motors, C.C.A., 109 F.2d 194, affirmed 112 F.2d 63, set aside on other grounds 114 F.2d 738, motion denied Ex parte National Labor Relations Board, 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391, certiorari dismissed National Labor Relations Board v. Sterling Electric Motors, 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471.

12. U.S.—National Labor Relations Board v. Stackpole Carbon Co., C. C.A., 128 F.2d 188, supplementing opinion 105 F.2d 167, certiorari de-

Leaving out of consideration the ordinary case of a new trial awarded after a judgment has been reversed, the circuit court of appeals is without power to confer original jurisdiction on, or restore lost jurisdiction to, the district court with respect to a new trial after the term.[13] There is no fixed rule governing the granting of leave to apply to the lower court for further relief,[14] and the court will refuse to grant it where a proper case therefor is not presented.[15]

It is a general rule that the court will not grant relief to a party who has not appealed or complained in the mode provided by law of the judgment or decree;[16] but the court may act sua sponte on behalf of a person who is deprived of a right and is not served with process and does not appear.[17] An appeal will not be dismissed, however, on the ground that it was not taken by anyone authorized to appear for appellant.[18] Where defendant has once been dismissed from a cause of action in the district court, the circuit court of appeals has no power to set aside the dismissal and render judgment against him.[19]

Preparatory to its decisions a circuit court of appeals may ask instructions from the supreme court.[20] When a question of jurisdiction is certified by the circuit court of appeals to the supreme court, it is proper to reserve decision meanwhile on the other questions,[21] but a circuit court of appeals is not bound to withhold a decision of other questions presented, because on one out of many it desires the opinion of the supreme court.[22]

The rule, discussed supra §§ 170–187, as to following decisions of the highest court of a state in matters of local law applies in cases of the review of decisions of the supreme court of Puerto Rico[23] and of the review of decisions of the supreme

nied Stackpole Carbon Co. v. National Labor Relations Board, 60 S.Ct. 142, 308 U.S. 605, 84 L.Ed. 506.

13. U.S.—Jensen v. New York Life Ins. Co., C.C.A.Neb., 59 F.2d 957, reversing 50 F.2d 512, and certiorari denied 53 S.Ct. 80, 287 U.S. 626, 77 L.Ed. 543—Montgomery v. Realty Acceptance Corporation, C.C.A.Del., 51 F.2d 642, certiorari granted Realty Acceptance Corporation v. Montgomery, 52 S.Ct. 25, 284 U.S. 604, 76 L.Ed. 518, affirmed 52 S.Ct. 215, 284 U.S. 547, 76 L.Ed. 476.

14. U.S.—Post v. Beacon Vacuum Pump & Electric Co., Me., 89 F. 1, 32 C.C.A. 151, reversing 84 F. 371, 28 C.C.A. 431.

15. U.S.—Boro Hall Corporation v. General Motors Corporation, C.C.A. N.Y., 130 F.2d 196, denying rehearing 124 F.2d 822, affirming, D.C., 37 F.Supp. 999—Post v. Beacon Vacuum Pump & E. Co., Me., 89 F. 1, 32 C.C.A. 151, reversing 84 F. 371, 28 C.C.A. 431.

16. U.S.—Dakota Bldg. & Loan Assoc. v. Logan, Tex., 66 F. 827, 14 C.C.A. 133.

Appointment of counsel

Where petitioner in habeas corpus proceeding, claiming he was allowed to appeal in forma pauperis, and moving for appointment of counsel to represent him on appeal without having obtained certificate of probable cause for appeal, was held under process of state court and question raised involved interpretation of state law, and his remedy lay in appeal to supreme court from state court decision, circuit court of appeals would not appoint counsel even if such certificate was no longer required under Federal Rules of Civil Procedure, 28 U.S.C.A., following § 723c.—Schenk v. Plummer, C.C.A. Cal., 113 F.2d 726, first case.

Necessity of cross appeal

(1) In a suit by a contractor's surety for exoneration and specific performance of an agreement as to the use of payments under the contract, where the district court, finding that the surety had broken the contract and impliedly finding that the breach was substantial, denied specific performance but granted exoneration by requiring a payment to be deposited as a special trust fund for the payment of bills for labor and materials. the circuit court of appeals, on an appeal by the contractor with no cross appeal by the surety, could not set aside the decree and direct the entry of a decree for specific performance on a finding that the surety's breach was unsubstantial. Morley Const. Co. v. Maryland Casualty Co., Mo., 57 S.Ct. 325, 300 U.S. 185, 81 L.Ed. 593, reversing, C.C.A., 84 F.2d 522, certiorari granted 57 S.Ct. 43, 299 U.S. 529, 81 L.Ed. 389, rehearing denied 57 S.Ct. 505, 300 U.S. 687, 81 L.Ed. 888, conformed to, C.C.A., 90 F.2d 976, certiorari denied 58 S.Ct. 266, 302 U.S. 748, 82 L.Ed. 578, rehearing denied 58 S.Ct. 362, 302 U.S. 779, 82 L.Ed. 602.

(2) Where plaintiff took voluntary nonsuit without prejudice, and subsequently appealed from judgment for defendant on cross action of defendant and defendant did not bring a cross appeal, circuit court of appeals could do nothing which would affect a subsequent suit by plaintiff in its original demand.—Eastern States Petroleum Co. v. Gilliland Refining Co., C.C.A.Tex., 103 F.2d 186.

17. U.S.—National Labor Relations Board v. Sterling Electric Motors, C.C.A., 114 F.2d 738, setting aside 112 F.2d 63, affirming 109 F.2d 194, certiorari dismissed 61 S.Ct. 69, 311 U.S. 722, 85 L.Ed. 471, motion denied Ex parte National Labor Relations Board, 61 S.Ct. 67, 311 U.S. 617, 85 L.Ed. 391.

18. U.S.—Sutherland v. American Equitable Assur. Co. of New York, C.C.A.N.Y., 43 F.2d 973.

19. U.S.—Griggs v. Nadeau, Minn., 221 F. 381, 137 C.C.A. 189.

20. U.S.—In re Judith Gap Commercial Co., D.C.Mont., 1 F.2d 508, reversed on other grounds, C.C.A., 5 F.2d 307.

21. U.S.—Sun Printing & Publishing Assoc. v. Edwards, N.Y., 121 F. 826, 58 C.C.A. 162—Pullman's Palace-Car Co. v. Central Transp. Co., Pa., 83 F. 1, 27 C.C.A. 389, overruling 76 F. 401, 22 C.C.A. 246.

22. U.S.—Sigafus v. Porter, N.Y., 84 F. 430, 28 C.C.A. 443, reversed on other grounds 21 S.Ct. 34, 179 U.S. 116, 45 L.Ed. 113.

23. U.S.—Sancho v. Texas Co., Puerto Rico, 60 S.Ct. 349, 308 U.S. 463, 84 L.Ed. 401, reversing, C.C.A., Texas Co. v. Sancho, 102 F.2d 710, certiorari granted Sancho v. Texas Co., P.R., 60 S.Ct. 85, 308 U.S. 538, 84 L.Ed. 453—Cami v. Central Victoria, Puerto Rico, 45 S.Ct. 570, 268 U.S. 469, 69 L.Ed. 1056, affirming, C.C.A., Central Victoria v. Cami, 295 F. 809—Trigo v. People of Puerto Rico, C.C.A.Puerto Rico, 112 F.2d 493—De La Torre v. National City Bank of New York, C.C.A.Puerto Rico, 110 F.2d 381—Reyes v. La Capital De Puerto Rico, C.C.A.Puerto Rico, 106 F.2d 199—Sancho v. Serralles, C.C.A. Puerto Rico, 106 F.2d 125—Miranda v. People of Puerto Rico, C.C.A.

court of Hawaii,[24] and so far as local law is involved the decision of the supreme court appealed from must be upheld unless plainly erroneous.[25] However, with respect to a review of decisions of the district court of the Territory of Alaska the circuit court of appeals may exercise its independent judgment on all questions, whether federal, general, or local.[26]

Puerto Rico, 101 F.2d 26—MacLeod v. Fernandez, C.C.A.Puerto Rico, 101 F.2d 20, certiorari denied Taste v. Macleod, 60 S.Ct. 72, 308 U.S. 561, 84 L.Ed. 471—Yabucoa Sugar Co. v. Sancho, C.C.A.Puerto Rico, 95 F.2d 481—Bengoechea Macias v. De La Torre & Ramirez, C.C.A.Puerto Rico, 84 F.2d 894—National City Bank of New York v. Garzot, C.C.A.Puerto Rico, 83 F.2d 476, certiorari denied 57 S.Ct. 110, 299 U.S. 586, 81 L.Ed. 431—Central Cambalache v. Martinez, C.C.A.Puerto Rico, 82 F.2d 37—Domenech v. Verges, C.C.A. Puerto Rico, 69 F.2d 714—Oliva v. Fernandez, C.C.A.Puerto Rico, 68 F.2d 338—Heirs of Franceschi v. Gonzalez, C.C.A.Puerto Rico, 62 F.2d 748—Sauri v. Sauri, C.C.A.Puerto Rico, 45 F.2d 90—Villar & Co. v. Conde, C.C.A.Puerto Rico, 30 F.2d 588—Armstrong v. Goyco, C.C.A.Puerto Rico, 29 F.2d 900—Stubbe v. Cordova, C.C.A.Puerto Rico, 23 F.2d 257—Arocho v. People of Puerto Rico, C.C.A.Puerto Rico, 16 F.2d 90, certiorari denied 47 S.Ct. 477, 273 U.S. 760, 71 L.Ed. 878—A. Hartman & Co. v. Sanchez, C.C.A.Puerto Rico, 12 F.2d 649.

25 C.J. p 973 note 69.

Apparently erroneous holding

Circuit courts of appeal will follow insular courts when construing local statutes, especially where statute involves property rights, unless clearly wrong; but where insular statute involves personal rights and liberty, circuit courts of appeal will not adopt construction by local courts if apparently erroneous.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F.2d 427.

24. U.S.—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Walker v. O'Brien, C.C.A.Hawaii, 115 F.2d 956, certiorari denied 61 S.Ct. 829, 312 U.S. 707, 85 L.Ed. 1139—Hawaii Consol. Ry. v. Borthwick, C.C.A.Hawaii, 105 F.2d 286—Lord v. Territory of Hawaii, C.C.A.Hawaii, 79 F.2d 761—Yoshizawa v. Hewitt, C.C.A.Hawaii, 52 F.2d 411, 79 A.L.R. 317—Hill v. Carter, C.C.A.Hawaii, 47 F.2d 869, certiorari denied 52 S.Ct. 10, 284 U.S. 625, 76 L.Ed. 532—Honolulu Rapid Transit Co. v. Wilder, C.C.A.Hawaii, 36 F.2d 159—Notley v. McMillan, C.C.A.Hawaii, 16 F.2d 273—U. S. Fidelity & Guaranty Co. v. Vicars, C.C.A.Hawaii, 10 F.2d 474—Halsey, v. Ho Ah Keau, C.C.A.Hawaii, 295 F. 636—Ewa Plantation Co. v. Wilder, C.C.A.Hawaii, 289 F. 664—Territory of Hawaii v. Hutchinson Sugar Plantation Co., C.C.A.Hawaii, 272 F. 856.

Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

25 C.J. p 973 note 70.

25. U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., Puerto Rico, 62 S.Ct. 771, 315 U.S. 637, 86 L.Ed. 1081, reversing, C.C.A., Hermanos, Inc. v. People of Puerto Rico, 118 F.2d 752—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1123, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., Hawaii, 58 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1123, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Board of Com'rs of San Juan v. De Castro, C.C.A.Puerto Rico, 116 F.2d 806, certiorari denied 62 S.Ct. 61, 314 U.S. 614, 86 L.Ed. 495—Municipality of Guayanilla v. Public Service Commission of Puerto Rico, C.C.A.Puerto Rico, 116 F.2d 15, certiorari denied 61 S.Ct. 1108, 313 U.S. 587, 85 L.Ed. 1543—Trigo v. People of Puerto Rico, C.C.A.Puerto Rico, 112 F.2d 493—De La Torre v. National City Bank of New York, C.C.A.Puerto Rico, 110 F.2d 976, certiorari denied De La Torre v. First Nat. Bank, 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 428—Yabucoa Sugar Co. v. United Porto Rican Bank, C.C.A.Puerto Rico, 59 F.2d 492—Cabo Rodriquez v. Anaud, C.C.A.Puerto Rico, 54 F.2d 585—Yoshizawa v. Hewitt, C.C.A.Hawaii, 52 F.2d 411, 79 A.L.R. 317—Territory of Hawaii v. Gay, C.C.A.Hawaii, 52 F.2d 356, certiorari denied 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572—Ramu v. Succession of Verges, C.C.A.Puerto Rico, 42 F.2d 976—Gerardino v. People of Porto Rico, C.C.A.Puerto Rico, 29 F.2d 517—Noguera v. Fuertes, C.C.A.Puerto Rico, 8 F.2d 115—Polanco v. Goffinet, C.C.A.Puerto Rico, 4 F.2d 74—Plazuela Sugar Co. v. Alvarez, C.C.A.Puerto Rico, 295 F. 511—Quinones v. Borras, Munoz & Co., C.C.A.Puerto Rico, 293 F. 390—Ewa Plantation Co. v. Wilder, C.C.A.Hawaii, 289 F. 664—Goffinet v. Polanco, C.C.A.Puerto Rico, 287 F. 29—Castle v. Castle, C.C.A.Hawaii, 281 F. 609—Fordham v. Marrero, C.C.A.Puerto Rico, 273 F. 61—Territory of Hawaii v. Hutchinson Sugar Plantation Co., C.C.A.Hawaii, 272 F. 856—Succession of Garcia v. Hernandez, C.C.A.Puerto Rico, 270 F. 455.

Hawaii.—Hakalau v. De La Nux, 35 Hawaii 59.

25 C.J. p 973 notes 69, 70.

Mere disagreement with Puerto Rican tribunal's interpretation of act of local legislature is not sufficient to justify reversal of judgment of the Puerto Rican tribunal on such a local matter, even though such tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations.—Sancho v. Texas Co., Puerto Rico, 60 S.Ct. 349, 308 U.S. 463, 84 L.Ed. 401, reversing, C.C.A., Texas Co. v. Sancho, 102 F.2d 710, certiorari granted Sancho v. Texas Co., P.R., 60 S.Ct. 85, 308 U.S. 538, 84 L.Ed. 453.

Decision held not plainly erroneous

U.S.—Sancho v. Texas Co., supra—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Walker v. O'Brien, C.C.A.Hawaii, 115 F.2d 956, certiorari denied 61 S.Ct. 829, 312 U.S. 707, 85 L.Ed. 1139—Hawaii Consol. Ry. v. Borthwick, C.C.A.Hawaii, 105 F.2d 286—Lord v. Territory of Hawaii, C.C.A.Hawaii, 79 F.2d 761—Honolulu Rapid Transit Co. v. Wilder, C.C.A.Hawaii, 36 F.2d 159.

26. U.S.—Carscadden v. Territory of Alaska, C.C.A.Alaska, 105 F.2d 377.

Status of district court of Alaska see infra § 314.

Decision on consent or stipulation. It is generally permissible for the court to render its decision on the consent or stipulation of the parties to the cause that the judgment be reversed.[27]

Double appeals. Where, pending an appeal from an interlocutory order, a final order in the same case is affirmed, the only order that need be made on the appeal from the interlocutory decree is that the order has been superseded by the final decree.[28]

Decision by divided court. Where a majority, or other required number, of the judges agree to affirm the judgment of the lower court, it is not material that their conclusions are based on different reasons.[29]

(2) Remand without Decision

The circuit court of appeals has power to remand a case without decision, and will do so in a proper case to enable the court below to determine certain issues or make specific findings, or to enable a party to move for a new trial or amend his pleadings.

The circuit court of appeals has power without determining and disposing of the cause to remand it to the lower court for further proceedings, where the record is not in condition for the appellate court properly to decide the questions presented with justice to all parties concerned,[30] or where the case has been tried on a wrong theory.[31] Thus in a proper case the appellate court may remand for the purpose of determining certain issues or questions,[32] such as the jurisdiction of the court,[33] or to enable appellant to move for a new trial on the ground of new evidence discovered after the taking of the appeal.[34] Where the district court has failed to comply with the rule requiring that court to make specific findings of fact, the circuit court of appeals may remand the case in order that such findings may be made,[35] but it need not do so, and can consider the merits where general findings of

The "manifest error" rule which has been applied in the case of reviews of decisions of the territorial courts of Puerto Rico and Hawaii is not applicable on review of a decision of the district court of the Territory of Alaska.—Carscadden v. Territory of Alaska, C.C.A.Alaska, 105 F.2d 377.

27. U.S.—U. S. v. Pope, C.C.A.Tex., 94 F.2d 557—Texas Consol. Theatres, Inc., v. Pittman, C.C.A.Tex., 94 F.2d 203, denying rehearing 93 F.2d 21, certiorari granted 58 S.Ct. 1046, 304 U.S. 556, 82 L.Ed. 1524, certiorari dismissed 59 S.Ct. 40, 305 U.S. 3, 83 L.Ed. 5.

28. U.S.—Howard Bros. Mfg. Co. v. Gibbs Loom Harness & Reed Co., Mass., 157 F. 676, 85 C.C.A. 348.

29. U.S.—Burak v. U. S., C.C.A. Wash., 101 F.2d 137, certiorari denied 60 S.Ct. 126, 308 U.S. 595, 84 L.Ed. 498.

30. U.S.—Humble Oil & Refining Co. v. State Tax Commission of New Mexico, C.C.A.N.M., 78 F.2d 108—Underwood v. Commissioner of Internal Revenue, C.C.A., 56 F.2d 67—Columbus Gas & Fuel Co. v. City of Columbus, C.C.A.Ohio, 55 F.2d 56, dismissing appeal, D.C., 17 F.2d 630—Finefrock v. Kenova Mine Car Co., C.C.A.W.Va., 22 F.2d 627—Freedom Oil Works Co. v. Pittsburgh, C., C. & St. L. Ry. Co., Pa., 254 F. 800, 166 C.C.A. 246, reversing, D.C., Pittsburgh, C., C. & St. L. Ry. Co. v. Freedom Oil Works, 247 F. 573—Pfeil v. Jamison, Pa., 245 F. 119, 157 C.C.A. 415.

4 C.J. p 1115 note 39.

Decree based on findings of disqualified master

Circuit court of appeals will not pass on merits of controversy where district court decree was based on findings of special master and master was disqualified to act because of interest in outcome.—In re Volland, C.C.A.Ill., 69 F.2d 475.

Remand to dismiss motion for want of jurisdiction

Plaintiff's motion to set aside an order dismissing action on ground that plaintiff's then attorney had no authority to dismiss the action on merits, and that plaintiff had just learned that without such authority his attorney's action was improper, was properly denied, where record showed that order dismissing action on merits was made, not on consent of plaintiff's attorney, but over his protest, and case will be remanded with directions to dismiss the motion for want of jurisdiction.—De Filippis v. Chrysler Sales Corporation, C.C.A.N.Y., 127 F.2d 530.

31. U.S.—Underwood v. Commissioner of Internal Revenue, C.C.A., 56 F.2d 67—Finefrock v. Kenova Mine Car Co., C.C.A.W.Va., 22 F.2d 627.

32. U.S.—Pennsylvania v. Maryland Fidelity & Deposit Co., C.C.Pa., 180 F. 292.

4 C.J. p 1117 note 66.

33. U.S.—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 109 A.L.R. 1179—St. Louis Smelting & Refining Co. v. Nix, C.C.A.Okl., 272 F. 977.

34. U.S.—Isgrig v. U. S., C.C.A.Md., 109 F.2d 131.

Jurisdiction after expiration of term

After dismissal and remand on appeal, on discovery of new evidence, the decree being interlocutory, the district court is not deprived of power to set aside its decree and reopen the case because a term expired while the appeal was pending.—Wagner v. Meccano, Limited, Ohio, 235 F. 890, 149 C.C.A. 202, authorizing reopenment, D.C., Meccano, Limited v. Wagner, 234 F. 912.

Imposition of terms

Where application to reopen patent case, based on alleged newly discovered evidence, came after trial and hearing and decision on appeal, it is discretionary with court to impose terms.—Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co., C.C.A.Mich., 48 F.2d 73, affirming, D.C., Eclipse Interchangeable Counterbore Co. v. Gairing Tool Co., 33 F.2d 942.

Laches

On application for leave to file petition in district court to reopen patent case, based on alleged newly discovered evidence, showing of laches was insufficient to defeat application.—Gairing Tool Co. v. Eclipse Interchangeable Counterbore Co., supra.

35. U.S.—Timetrust, Inc. v. Securities and Exchange Commission, C.C.A.Cal., 130 F.2d 214, remanding case, D.C., Securities and Exchange Commission v. Timetrust, Inc., 39 F.Supp. 145—Knapp v. Imperial Oil & Gas Products Co., C.C.A.W.Va., 130 F.2d 1—Hubshman v. Louis Keer Shoe Co., C.C.A.Ill., 129 F.2d 137—Helfer v. Corona Products, C.C.A.Ark., 127 F.2d 612—Fitzhugh v. Smith, C.C.A.Ark., 97 F.2d 893—Clarke v. Gold Dust Corporation, C.C.A.N.J., 91 F.2d 12—Horwitz v. New York Life Ins. Co., C.C.A.Or., 80 F.2d 295—Siano v. Helvering, C.C.A.N.J., 79 F.2d 444—Humphrey v. Helgerson, C.C.A.Iowa, 78 F.2d 484—Wyant v. Caldwell, C.C.A.W.Va., 67 F.2d 374—Meadows v. Cheshire, C.C.A.N.C., 58 F.2d 628—Parker v. St. Sure, C.C.A.Cal., 53 F.2d 706.

the trial court clearly indicate the basis for its decision.[36] However, the failure of the district court to find a fact essential to a party's recovery cannot be supplied by the appellate court even if the latter thinks the evidence in the record warrants it.[37] Where, except for the pendency of an appeal from a judgment of dismissal, the district court has power to allow an amendment to the complaint, plaintiff may move in the circuit court of appeals to dismiss the appeals and thereby reinstate the district court's jurisdiction, or, in the alternative, the appellate court may, on request from the trial court, remand the case,[38] but in the absence of such motion or request, the circuit court of appeals has no power to vacate the judgment and remand the case so that plaintiff can present a motion for leave to file an amended complaint.[39]

(3) Effect of Changes pending Appeal

Generally the circuit court of appeals will decide the case in accordance with the law existing at the time of its own decision, but with respect to the facts will confine itself to the state of the case at the time the judgment of the lower court was rendered. The rule is not without exceptions, however.

The appellate court must generally decide and dispose of the case in accordance with the law existing at the time of its own decision.[40] Thus, although the decision of the district court was correct in view of the law as announced by other decisions at the time it was entered, it must be reversed if incorrect under later decisions when reached on appeal.[41] As respects the standing of parties as appellants from an order of the district court pursuant to mandate from the circuit court of appeals, the circuit court of appeals is required to take note of and give effect to the changed situation brought about by the supreme court's reversal of the decision of the circuit court of appeals, notwithstanding the order was appealed from before the decision was reversed.[42]

Generally the appellate court, in considering the correctness of the judgment below, will confine itself to the state of the case at the time such judgment was rendered and will not consider any facts arising subsequently,[43] but a change of conditions by reason of which the case has become moot may be properly considered although not appearing on the record;[44] and where the ends of justice may be best subserved thereby, the case may be remanded to permit the parties to file amended or supplementary pleadings alleging matters occurring pending the appeal,[45] although this relief will be denied where the facts sought to be set forth in the proposed new pleading would authorize no different relief from that sought in the original pleading.[46] Where, pending review of a judgment which correctly sustained a plea of res judicata, the judgment which was the basis of such plea was reversed by the court in which the appeal was pending, that court will take cognizance of its own action, and, considering the changes in fact and in law which have supervened, will reverse the judgment, al-

36. U.S.—Knapp v. Imperial Oil & Gas Products Co., C.C.A.W.Va., 130 F.2d 1—Girard Trust Co. v. Amsterdam, C.C.A.Fla., 128 F.2d 376—Baldwin Rubber Co. v. Paine & Williams Co., C.C.A.Mich., 99 F. 2d 1.

37. U.S.—Hubshman v. Louis Keer Shoe Co., C.C.A.Ill., 129 F.2d 137.

38. U.S.—U. S. v. Newbury Mfg. Co., C.C.A.Mass., 123 F.2d 453, denying motion, D.C., 36 F.Supp. 602.

39. U.S.—U. S. v. Newbury Mfg. Co., supra.

40. U.S.—Hines v. Davidowitz, Pa., 61 S.Ct. 399, 312 U.S. 52, 85 L.Ed. 581, affirming, D.C., 30 F.Supp. 470—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189, 27 A.L.R. 360, reversing decree in part and affirming decree in part Tri-City Central Trades Council v. American Steel Foundries, 238 F. 728, 151 C.C.A. 578, motion granted American Steel Foundries v. Tri-City Central Trades Council, 42 S. Ct. 271—Home Savings & Loan Ass'n v. Plass, C.C.A.Wash., 57 F. 2d 117.

41. U.S.—Sprague Specialties Co. v. Mershon, C.C.A.Mass., 73 F.2d 379—Groner v. U. S. ex rel. Snower, C.C.A.Mo., 73 F.2d 126, reversing, D.C., Snower v. Hope Drainage Dist., 2 F.Supp. 931—Mutual Life Ins. Co. of New York v. Lipp, C. C.A.Or., 28 F.2d 863.

Dismissal without prejudice

Where denial of defendants' motion to restrain plaintiff from further prosecution of cause was based on decision of another district court in a proceeding between the same parties, and that decision was reversed after denial of motion, dismissal of appeal from nonappealable order of denial would be without prejudice to entertaining of renewed motions for stay of proceedings based on changes of the law with respect to the other litigation.—Triangle Conduit & Cable Co. v. National Electric Products Corporation, C. C.A.Mich., 127 F.2d 524.

42. U.S.—In re Morris White Handbags Corporation, C.C.A.N.Y., 77 F. 2d 827.

43. U.S.—Klaber v. Maryland Casualty Co., C.C.A.Neb., 69 F.2d 934—Nottebaum v. Leckie, C.C.A.N.J., 31 F.2d 556, certiorari denied Guaranty Trust Co. of New York v. Noxon Chemical Products Co., 50 S.Ct. 17, 280 U.S. 558, 74 L.Ed. 613. 4 C.J. p 1120 note 15.

Jurisdiction of appellate court

Where prior to assignment of judgment for defendant to plaintiff's nominee circuit court of appeals had obtained jurisdiction of appeal and of parties, the court had jurisdiction to reverse judgment and remand cause for new trial since it did not lose jurisdiction because of the assignment.—Keller v. Hall, C.C.A. Ariz., 111 F.2d 129.

44. U.S.—Northwestern Light & Power Co. v. Town of Milford, Iowa, C.C.A.Iowa, 82 F.2d 45.

45. U.S.—Southern Pac. Co. v. Conway, C.C.A.Ariz., 115 F.2d 746—City of Centralia v. Illinois Power & Light Corporation, C.C.A.Ill., 89 F.2d 985, vacating and remanding cause, D.C., Illinois Power & Light Corporation v. City of Centralia, Ill., 11 F.Supp. 874.

46. U.S.—Southern Pac. Co. v. Conway, C.C.A.Ariz., 115 P.2d 746.

though finding no error therein.[47]

(4) Findings of Fact and Conclusions of Law

The circuit court of appeals does not make findings of fact in an action at law, but may do so on an equity appeal.

In an action at law, the circuit court of appeals does not make findings of fact.[48] On an equity appeal where no findings of fact or insufficient findings are made in the court of first instance, the circuit court of appeals has power either to send the case back for further disposition, in accordance with the rule stated supra § 301 a (2), or to make findings itself and decree accordingly,[49] and will pursue the latter course where both parties had full opportunity to present all their material evidence and did present proof sufficient for a finding.[50] On appeal from an order granting a temporary injunction to preserve the status quo pending final hearing, the appellate court will not find facts or lay down rulings of law.[51]

(5) Affirmance
(a) On motion
(b) On hearing

(a) On Motion

A motion to affirm the judgment may be granted on a showing of proper grounds therefor.

The appellate court may affirm, on motion, the judgment of the lower court for want of prosecution of the appeal,[52] or, on appeal from the overruling of defenses propounded by traverse to scire facias, on the ground that the defenses were wholly without merit and that the appeal was taken for purposes only of delay.[53] A decree may be affirmed for want of a statement of evidence prepared and certified as required by rule of court,[54] but a court which has been uniformly indulgent with respect to transgressions of such a rule abuses its discretion in affirming a decree for failure to observe it.[55]

(b) On Hearing
aa. Grounds and effect of affirmance
bb. Conditional affirmance
cc. Rendering final judgment or directing further proceedings

aa. Grounds and Effect of Affirmance

The judgment of the lower court will be affirmed where there are no reversible errors, but an affirmance is not necessarily an adoption of the reasoning of the court below, and an affirmance based on the absence of certain necessary conditions is not conclusive on the parties' rights when such conditions afterward come into existence.

The judgment of the lower court will be affirmed where there is no error,[56] where on the whole record it appears that the merits of the cause have been fairly tried and determined, and that substantial justice has been done by the judgment of the trial court,[57] where the error is not prejudicial,[58] where a reversal would be ineffectual or would not be beneficial,[59] as where the questions involved have

47. U.S.—Whitaker v. Coleman, C.C.A.Ala., 115 F.2d 305—E. I. Du Pont de Nemours & Co. v. Richmond Guano Co., C.C.A.Va., 297 F. 580.

48. U.S.—Flewellen v. Logan, C.C.A. Tex., 106 F.2d 151, denying rehearing 105 F.2d 268—Palmer v. Aeolian Co., C.C.A.Iowa, 46 F.2d 746, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1458—Slip Scarf Co. v. Wm. Filene's Sons Co., C.C.A.Mass., 289 F. 641.

49. U.S.—Horwitz v. New York Life Ins. Co., C.C.A.Or., 80 F.2d 295—Shore v. U. S., C.C.A.Ill., 282 F. 857.

50. U.S.—Horwitz v. New York Life Ins. Co., C.C.A.Or., 80 F.2d 295—Shore v. U. S., C.C.A.Ill., 282 F. 857.

51. U.S.—Munoz v. Porto Rico Ry. Light & Power Co., C.C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L. Ed. 1408.

52. U.S.—The Montgomery v. The Betsey, C.C.Mass., 17 F.Cas.No. 9,734, 1 Gall. 416.

53. U.S.—National Surety Co. v. Universal Transp. Co., N.Y., 256 F. 450, 167 C.C.A. 578, affirming, D.C., Universal Transp. Co. v. National Surety Co., 252 F. 293.

54. U.S.—Interstate Folding Box Co. v. Empire Box Corporation, C.C.A. Ind., 68 F.2d 500, affirming, D.C., 2 F.Supp. 531, certiorari denied 54 S. Ct. 870, 292 U.S. 657, 78 L.Ed. 1505.

55. U.S.—Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co., Ill., 48 S.Ct. 183, 275 U.S. 372, 72 L.Ed. 318, reversing, C.C.A., 16 F. 2d 751, certiorari granted 47 S.Ct. 576, 274 U.S. 728, 71 L.Ed. 1316.

56. U.S.—Pettiford v. George, C.C.A. Ohio, 125 F.2d 144—Fissel v. Transamerican Freight Lines, C.C. A.Ohio, 124 F.2d 431—Dunn v. Jefferson Standard Life Ins. Co., C.C. A.Tex., 123 F.2d 815, motion denied 125 F.2d 98—Guthard v. Sanitary District of Chicago, C.C.A.Ill., 118 F.2d 899, affirming, D.C., Activated Sludge v. Sanitary Dist. of Chicago, 33 F.Supp. 692, and certiorari denied Sanitary Dist. of Chicago v. Guthard, 61 S.Ct. 1102, 313 U.S. 583, 85 L.Ed. 1539—Gliwa v. U. S. Steel Corporation, C.C.A.Pa., 111 F. 2d 281, followed in 111 F.2d 646—Chicago, S. S. & S. B. R. R. v. Fleming, C.C.A.Ind., 109 F.2d 419—Retail Food Clerks & Managers Union, Local No. 1357 v. Union Premier Food Stores, C.C.A.Pa., 101 F.2d 475, certiorari granted 59 S.Ct. 1032, 307 U.S. 619, 83 L. Ed. 1498—Rood v. Goodman, C.C. A.Tex., 83 F.2d 28, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 405.

57. U.S.—L. McBrine Co. v. Silverman, C.C.A.Cal., 121 F.2d 181—In re Colwell, C.C.A.Ill., 93 F.2d 946—White Packing Co. v. Robertson, C. C.A.N.C., 89 F.2d 775, affirming, D. C., 17 F.Supp. 120—Pratt v. Stout, C.C.A.Mo., 85 F.2d 172, affirming, D.C., Stout v. Pratt, 12 F.Supp. 864—Baltimore & O. R. Co. v. Kast, C.C.A.Ohio, 299 F. 419, certiorari denied 45 S.Ct. 95, 266 U.S. 613, 69 L.Ed. 468.

58. U.S.—City of Tacoma, Wash., v. Hoffman, C.C.A.Wash., 72 F.2d 721.

59. U.S.—Utilities Production Corporation v. Carter Oil Co., C.C.A.

become moot,[60] where the errors are not sufficiently reserved or presented,[61] or where the assignments of error are not substantial.[62] However, before the rule will be applied that the judgment of the lower court will be affirmed despite errors occurring at the trial, where a reversal would be fruitless, it must be clearly apparent that no other result could be reached on a second trial; if there is any doubt about the matter, the rule is not applicable.[63] A judgment of dismissal for want of jurisdiction must be affirmed where the record fails to show jurisdiction.[64]

Effect of affirmance. By its affirmance, a judgment of the district court becomes, in effect, a judgment of the circuit court of appeals,[65] but an affirmance is not necessarily an adoption of the reasoning of the lower court,[66] unless the appellate court expressly affirms "on the opinion below."[67] An affirmance of a judgment based on the ground that certain necessary conditions did not exist is not conclusive of the rights of the parties where such conditions afterward come into existence.[68] The affirmance on appeal of a preliminary injunction issued to restrain the enforcement of a rate ordinance does not deprive the trial court of liberty to revise its conclusion on a proper showing.[69] Affirmance of a decree requiring defendant to perform a contract, on appeal without supersedeas, reaches back to the inception of the agreement and finally adjudicates defendant's obligation to perform.[70]

bb. Conditional Affirmance

Where there has been an excessive recovery in the court below, and the circuit court of appeals can determine the amount of the excess, it may affirm on condition that the party recovering consent to a remittitur.

In a proper case the circuit court of appeals will affirm a judgment which is excessive on condition that the party in whose favor the judgment was rendered shall remit a specified sum,[71] as where

Okl., 72 F.2d 655, affirming, D.C., 2 F.Supp. 81—Kelly v. Illinois State Trust Co., Ill., 215 F. 567, 131 C.C.A. 635, certiorari denied 35 S.Ct. 203, 235 U.S. 701, 59 L.Ed. 432.

60. U.S.—Contract Cartage Co. v. Sawyer, C.C.A.Ohio, 54 F.2d 632—Bullard v. City of Cisco, C.C.A.Tex., 48 F.2d 212—Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America, C.C.A.N.J., 34 F.2d 3, affirming, D.C., 12 F.2d 945, and certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 356, 281 U.S. 462, 74 L.Ed. 967—Texas & N. O. R. Co. v. North Side Belt Ry. Co., C.C.A.Tex., 16 F.2d 782, affirming, D.C., 8 F.2d 153, certiorari granted 47 S.Ct. 768, 274 U.S. 734, 71 L.Ed. 1335, and affirmed 48 S.Ct. 361, 276 U.S. 475, 72 L.Ed. 661—U. S. v. Dunn, Okl., 288 F. 158, modified on other grounds 45 S.Ct. 451, 268 U.S. 121, 69 L.Ed. 876.

61. U.S.—Homestake Oil Co. v. Rigler, C.C.A.Mont., 39 F.2d 40.

62. U.S.—Thornberg v. Jorgensen, C.C.A.Virgin Islands, 65 F.2d 794, certiorari denied Jorgensen v. Thornberg, 54 S.Ct. 129, 290 U.S. 694, 78 L.Ed. 597.

63. U.S.—U. S. v. Price Trading Co., Utah, 109 F. 239, 48 C.C.A. 331.

64. U.S.—J. J. McCaskill Co. v. Dickson, Fla., 159 F. 704, 86 C.C.A. 572.

Dismissal on mistaken ground of want of jurisdiction

In declaratory judgment action, judgment dismissing complaint on mistaken ground of lack of jurisdiction should not be affirmed on appeal, even if there existed adequate grounds for dismissal thereof as matter of discretion.—Maryland Casualty Co. v. United Corporation of Massachusetts, C.C.A.Mass., 111 F.2d 443, reversing, D.C., 29 F.Supp. 986.

65. U.S.—Inghram v. Union Stock Yards Co. of Omaha, D.C.Neb., 5 F. Supp. 486.

66. U.S.—Victor Talking Mach. Co. v. Hoschke, N.Y., 188 F. 326, 110 C.C.A. 304, reversed on other grounds Victor Talking Mach. Co. v. Sonora Phonograph Co., C.C., 188 F. 330.

4 C.J. p 1149 note 90.

67. U.S.—Victor Talking Mach. Co. v. Hoschke, supra.

68. U.S.—Watson v. U. S., C.C.A. Ala., 107 F.2d 1.

69. U.S.—City of Louisville v. Louisville Home Telephone Co., C. C.A.Ky., 279 F. 949.

70. U.S.—Continental Oil Co. v. Osage Oil & Refining Co., C.C.A. Okl., 57 F.2d 527, certiorari denied 53 S.Ct. 17, 287 U.S. 616, 77 L.Ed. 535.

71. U.S.—U. S. v. Brookridge Farm, C.C.A.Colo., 111 F.2d 461, affirming, D.C., Brookridge Farm v. U. S., 27 F.Supp. 909—American Surety Co. of New York v. Standard Asphalt Co. of Florida, C.C.A.Fla., 75 F.2d 1, certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687, affirming, D.C., Standard Asphalt Co. of Florida v. American Surety Co. of New York, 5 F.Supp. 430—Consolidated Indemnity & Insurance Co. v. Salmon & Cowin, Mining Engineers and Contractors, C.C.A.Ala., 64 F.2d 756—Companhia De Navegacao Lloyd Brasileiro v. C. G. Blake Co., C.C. A.N.Y., 34 F.2d 616—Moss v. Sherburne, C.C.A.Mass., 11 F.2d 579, certiorari denied 47 S.Ct. 100, 273 U.S. 710, 71 L.Ed. 852—Becker Bros. v. U. S., C.C.A.N.Y., 7 F.2d 3—Straus v. Victor Talking Mach. Co., C.C.A.N.Y., 297 F. 791—U. S. v. Benedict, C.C.A.N.Y., 280 F. 76, affirming judgment conditionally, D.C., Benedict v. U. S., 270 F. 267, and affirmed 43 S.Ct. 357, 261 U.S. 294, 67 L.Ed. 662—Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., S.C., 255 F. 645, 167 C.C.A. 21—Rederiaktiebolaget Amie v. Universal Transp. Co., N.Y., 250 F. 400, 162 C.C.A. 470, certiorari denied 38 S.Ct. 425, 246 U.S. 675, 62 L.Ed. 933—Breakwater Co. v. Donovan, Ohio, 218 F. 340, 134 C. C.A. 148—Cunningham v. Underwood, Tenn., 116 F. 803, 53 C.C.A. 99.

4 C.J. p 1138 note 63.

Unliquidated damages

In personal injury or other actions for unliquidated damages where the verdict is excessive and there is no other error requiring reversal, the court will affirm the judgment on the entry by plaintiff of a remittitur of that part of his recovery which the court deems excessive.—Hazard Powder Co. v. Volger, Wyo., 58 F. 152, 7 C.C.A. 130.

Interest

Where a judgment is excessive in the matter of interest but is proper in every other respect and the amount of the excess can be ascertained by calculation, it may be remitted and the judgment be allowed to stand for the residue.—B. F. Sturtevant Co. v. Champion Fibre Co., Ohio, 232 F. 1, 146 C.C.A. 193—4 C.J. p 1141 note 89.

the excess of the judgment appealed from is merely a matter of computation and does not involve a determination of a disputed question of fact;[72] and the practice is commended by the courts on the ground that it saves the time and expense attendant on a new trial.[73] In the absence of a clear showing that the verdict is excessive, the reviewing court is hesitant to order a remittitur,[74] and will not ordinarily do so where it is not apparent from the record what the amount of the excess is and for what amount the correct judgment should be,[75] or where there is no mathematical basis by which that portion of the verdict which was due to the erroneous element can be computed, or at least closely approximated.[76] A remittitur will not be allowed where the verdict and judgment based thereon are wholly outside the issues in that they award damages on a theory wholly at variance with the allegations of the complaint.[77] The court cannot take the place of the jury, and if the condition fixed by the court seems unjust, the party can protect himself by declining to accept it.[78] A remittitur cannot be entered after the expiration of the time allowed therefor.[79] On affirmance after remittitur, the circuit court of appeals cannot add interest from the date of the rendition of the services forming the subject matter of the action to the date of the entry of judgment, when plaintiff did not ask for such interest in his complaint.[80]

cc. Rendering Final Judgment or Directing Further Proceedings

In a proper case the circuit court of appeal in affirming may render final judgment or remand the case for further proceedings.

Where the cause is not ripe for final disposition, on affirmance the reviewing court may remand the cause for final disposition thereof or further proceedings therein.[81] Where plaintiff does not have a cause of action, on affirmance of an order sustaining a demurrer to the petition, the case should not be remanded with leave to amend.[82] In an action to recover excessive payments, where defendant had offered no proof of the amount of an alleged set-off, the circuit court of appeals affirming the judgment for plaintiff would not remand the cause in order that the district court might determine the amount of credits to be deducted.[83] On affirmance of an order discharging an order to show cause why a judgment should not be opened, the time for execution of a writ of execution, levy under which was stayed pending the appeal, should be extended for a sufficient time to allow the marshal to execute it.[84] The circuit court of appeals has power, either as a matter of substantive right under the state law or as a matter of procedure under federal statute and court rule, to add damages for delay to a judgment which it affirms on being satisfied that the appeal was without merit and ap-

Judgment exceeding damages proved
Where the judgment, or the verdict on which the judgment is based, is in excess of the damages proved and the evidence clearly shows the amount for which judgment should have been rendered, the judgment may be affirmed on condition that plaintiff remit the excessive part of his recovery.—Gulf States Creosoting Co. v. Loving, C.C.A.N.C., 120 F.2d 195.

Errors cured by remittitur
(1) Admission or rejection of evidence.—Loewer v. Harris, N.Y., 57 F. 368, 6 C.C.A. 394.

(2) Instructions.—Hazard Powder Co. v. Volger, Wyo., 58 F. 158, 7 C.C.A. 136—Hazard Powder Co. v. Volger, Wyo., 58 F. 152, 7 C.C.A. 130.

72. U.S.—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003.

73. U.S.—American Surety Co. of New York v. Standard Asphalt Co. of Florida, C.C.A.Fla., 75 F.2d 1, certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687, affirming, D.C., Standard Asphalt Co. of Florida v. American Surety Co. of New York, 5 F.Supp. 430—Chesbrough v. Woodworth, 195 F. 875, 116 C.C.A. 465.

74. U.S.—Smith v. Socony Vacuum Oil Co., C.C.A.N.Y., 96 F.2d 98, certiorari granted Socony Vacuum Oil Co. v. Smith, 59 S.Ct. 81, 305 U.S. 586, 83 L.Ed. 370, and affirmed 59 S.Ct. 262, 305 U.S. 424, 83 L.Ed. 265.

75. U.S.—Chesbrough v. Woodworth, Mich., 195 F. 875, 116 C.C.A. 465.

76. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 118 F.2d 252, denying rehearing 116 F.2d 823—New York, C. & St. L. R. Co. v. Niebel, Ohio, 214 F. 952, 131 C.C.A. 248.
4 C.J. p 1145 note 24.

77. U.S.—Phœnix Assur. Co. v. Maryland Gold Min. & Dev. Co., Idaho, 146 F. 501, 77 C.C.A. 15.
4 C.J. p 1142 note 99.

78. U.S.—Pennsylvania Co. v. Sheeley, Ohio, 221 F. 901, 137 C.C.A. 471.

79. U.S.—Standard Asphalt Co. of Florida v. American Surety Co. of New York, D.C.Fla., 5 F.Supp. 430, 432, citing **Corpus Juris**, and affirmed, C.C.A., American Surety Co. of New York v. Standard Asphalt Co. of Florida, 75 F.2d 1, certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687.

80. U.S.—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 1003, taxing costs 70 F.2d 126.

81. U.S.—Florida Power & Light Co. v. City of Miami, C.C.A.Fla., 98 F.2d 180, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 415.

Petition for rehearing in trial court
Leave granted to appellants, after affirmance of interlocutory decree, to file petitions for rehearing in the trial court.—Central California Canneries Co. v. Dunkley Co., C.C.A.Cal., 282 F. 406, dismissing appeal, D.C., Dunkley Co. v. Central California Canneries Co., 277 F. 1001.

82. U.S.—Northwestern Light & Power Co. v. Town of Milford, Iowa, C.C.A.Iowa, 82 F.2d 1023, modifying 82 F.2d 45.

83. U.S.—U. S. v. Rodiek, C.C.A.N.Y., 120 F.2d 760, denying rehearing 117 F.2d 588, certiorari granted Rodiek v. U. S., 62 S.Ct. 101, 314 U.S. 597, 86 L.Ed. 481, affirmed 62 S.Ct. 793, 315 U.S. 783, 86 L.Ed. 1190, rehearing denied 62 S.Ct. 940, 316 U.S. 707, 86 L.Ed. 1774.

84. U.S.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 285 F. 381, modifying opinion 282 F. 440.

parently taken merely for delay.[85] The court cannot add to a judgment affirming a judgment enjoining the seizure of property under state law a provision that defendants may apply to the lower court for a further order or decree if the state supreme court holds the statute valid and applicable to the conditions shown, where no case involving such issue is pending in such court.[86] On appeal from an order granting a preliminary injunction, the court cannot enter a decree for complainant on the merits unless it can see that the whole issues can be disposed of at once without injustice to the parties.[87]

(6) Modification

The circuit court of appeals has power, in a proper case, to modify or correct the judgment or order appealed from, or remand the case to the lower court for correction.

The circuit court of appeals has power to modify or correct the judgment, order, or decree appealed from,[88] or remand the case to the lower court for correction.[89] The power to modify is generally the power to render such judgment as the lower court should have rendered, where the appellate court is in possession of all the facts and evidence or otherwise occupies the same position as the trial court.[90] On appeals in equity cases, the higher court has somewhat broader powers of review than on appeals in actions at law tried before a jury, and further it generally has the benefit of findings of fact made by the trial court. Accordingly, on such an appeal, where the court can see from the record what the rights of the parties are, it not only has the power to render such a decree as ought to have been rendered below, without remanding the case,[91] but it is also held to be its duty to do so.[92] The court cannot reform a judgment where the right to appeal has been forfeited,[93] or where the record is insufficient to show clearly what judgment should have been rendered by the lower court.[94] A defendant against whom a preliminary injunction was ordered will be presumed to agree

85. U.S.—Occidental Life Ins. Co. v. Eiler, C.C.A.Mo., 126 F.2d 429, denying rehearing 125 F.2d 229, certiorari denied 62 S.Ct. 1278, 316 U.S. 688, 86 L.Ed. 1760.

86. U.S.—Davies v. Mills Novelty Co., C.C.A.Neb., 70 F.2d 424.

87. U.S.—Meccano, Limited, v. John Wanamaker, New York, N.Y., 250 F. 250, 162 C.C.A. 386.

88. U.S.—Fidelity & Deposit Co. of Maryland v. Davis, C.C.A.Va., 127 F.2d 780—Hunt v. Seeley, C.C.A.Tex., 115 F.2d 205—London & Lancashire Indemnity Co. of America v. Courtney, C.C.A.Okl., 106 F.2d 277—Ætna Casualty & Surety Co. v. Catskill Nat. Bank & Trust Co., C.C.A.N.Y., 102 F.2d 527—Drainage Dist. No. 7 of Poinsett County, Ark. v. Sternberg, C.C.A.Ark., 16 F.2d 598, modifying 15 F.2d 41—Wadden v. Crow, C.C.A.S.D., 1 F.2d 300—Journal of Commerce Pub. Co. v. Tribune Co., C.C.A.Ill., 286 F. 111—Dalton-Kelly Coal Corporation v. Taplin, C.C.A.W.Va., 275 F. 191—Equitable Trust Co. of New York v. Denver & R. G. R. Co., N.Y., 250 F. 327, 162 C.C.A. 397, affirming, D.C., Equitable Trust Co. of New York v. Western Pac. Ry. Co., 244 F. 485, and certiorari denied Denver & R. G. R. Co. v. Equitable Trust Co. of New York, 38 S.Ct. 423, 246 U.S. 672, 62 L.Ed. 932.

Judgments at law entered by court without intervention of jury may be modified on appeal.—U. S. v. Salmon, C.C.A.Miss., 42 F.2d 353—Morris v. Texas Working Barrel Mfg. Co., C.C.A.Tex., 13 F.2d 977.

Change of conditions pending appeal

Where conditions have changed pending an appeal from an order of the federal district court, the circuit court of appeals, with the consent of the parties, has the authority to modify the order.—In re Miller, C.C.A.N.Y., 281 F. 764, appeal dismissed Schaefer v. Miller, 43 S.Ct. 519, 262 U.S. 760, 67 L.Ed. 1220.

Stipulation of parties

Where both parties to appeal, in effect, agreed that trial court's decree providing that depositions taken and filed in case and exhibits identified in depositions and filed could be used in any action in district court wherein defendant and plaintiff or their customers or privies were parties should be construed as meaning that depositions and exhibits could be used only in suits relating to same subject matter as instant case, circuit court of appeals would consider that parties had stipulated that decree be modified to limit use of depositions in question in suits relating to same subject matter as instant case.—Caterpillar Tractor Co. v. International Harvester Co., C.C.A.Cal., 106 F.2d 769.

89. U.S.—Close v. Brictson Mfg. Co., C.C.A.Neb., 49 F.2d 751.

90. U.S.—Richmond v. Atwood, Mass., 52 F. 10, 2 C.C.A. 596, 17 L.R.A. 615.

4 C.J. p 1150 note 4.

91. U.S.—Richmond v. Atwood, supra.

92. U.S.—National Pigments & Chemical Co. v. C. K. Williams & Co., C.C.A.Mo., 94 F.2d 792.

93. U.S.—Lafontan v. Elting, N.Y., 58 F.2d 180, reversing, D.C., 54 F.2d 664, and rehearing denied, C.C.A., 59 F.2d 204, certiorari denied Lafontan v. American Import & Export Co., 53 S.Ct. 221, 287 U.S. 664, 77 L.Ed. 573.

94. **Amendment to accord with parties' views**

Circuit court of appeals is not at liberty to amend judgment to accord with respective views of parties to suit on construction contract involving questions of fact.—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A.Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601.

Issue not tried

Where United States sought recovery of excessive payments made by Alien Property Custodian on ground that they had been induced by fraudulent misrepresentations and also that they resulted from a mistake of law, and verdict had been directed on theory of mistake of law, circuit court of appeals, on affirming judgment, would not direct district court to disallow interest allowed, since amount of interest depended on whether there had been fraud and that issue had not been tried.—U. S. v. Rodiek, C.C.A.N.Y., 120 F.2d 760, denying rehearing 117 F.2d 588, certiorari granted Rodiek v. U. S., 62 S.Ct. 101, 314 U.S. 597, 86 L.Ed. 481, affirmed 62 S.Ct. 793, 315 U.S. 783, 86 L.Ed. 1190, rehearing denied 62 S.Ct. 940, 316 U.S. 707, 86 L.Ed. 1774.

Discretion of court

If amount of interest recoverable by United States in action to recover excessive payments made by Alien Property Custodian was a matter of discretion based on considerations of fairness, the circuit court of appeals, on affirming judgment, could not di-

to a modification of the order where such modification is in his favor.[95]

Correction of formal or clerical errors. Mere clerical errors in the form of a judgment, as shown in the C.J.S. title Judgments § 237, also 34 C.J. p 229 note 83, may, and should, be corrected in the court below. If, however, there has been a failure of the lower court in this respect, such errors will usually be remedied in the appellate court by that court either directly modifying the judgment or decree or remanding the case to the lower court with directions to make the modification.[96]

Changing relief or recovery or denial thereof. In a proper case an appellate court may modify the judgment of the lower court by altering the relief granted, as by striking out and eliminating improper provisions in the judgment or decree,[97] striking out part of the relief and substituting other relief,[98] changing an absolute dismissal to a dismissal without prejudice[99] or a dismissal at the cost of defendant,[1] amending a judgment for defendant on the pleadings to be without prejudice to another action,[2] or substituting other parties for those for, or against whom, the judgment was rendered.[3]

Although it has been denied that the circuit court of appeals has power to increase the award made by the verdict of a jury,[4] at least where it does not appear from the record that defendant's liability for the amount was conceded or that there was no room for contesting it,[5] generally the court has power, in a proper case, to modify, or to order the lower court to modify, the judgment appealed from by reducing the amount thereof,[6] as where there were errors of computation.[7] With respect to interest, judgments have been modified and reduced in amount where they have erroneously allowed and included interest,[8] or allowed interest at too high a rate,[9] or for too long a period of time.[10]

The general rules hereinbefore discussed have been applied by the appellate courts in modifying or refusing to modify judgment or decrees in actions or proceedings for an injunction.[11]

Effect of modification. Modification of a decree in some particulars without modifying other provisions leaves it effective and conclusive of the rights of the parties as to such other provisions.[12]

(7) Reversal
- (a) Grounds
- (b) Scope and extent of relief in general
- (c) Rendering or ordering final judgment
- (d) Ordering new trial or other proceeding in lower court
- (e) Compelling or directing restitution
- (f) Effect of reversal

(a) Grounds

aa. In general

rect district court to disallow interest allowed unless convinced that district court had abused its discretion.—U. S. v. Rodiek, supra.

95. U.S.—Fransioli v. Prest-O-Lite Co., Tenn., 234 F. 63, 148 C.C.A. 79.
63 C.J. p 580 note 75.

96. U.S.—Stanolind Oil & Gas Co. v. Guertzgen, C.C.A.Mont., 100 F.2d 299—Dextone Co. v. Building Trades Council of Westchester County, C.C.A.N.Y., 60 F.2d 47.

97. U.S.—Tyler County, Tex. v. Town, C.C.A.Tex., 23 F.2d 371, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—Mason City, & Ft. D. R. Co. v. Boynton, Iowa, 158 F. 599, 85 C.C.A. 421.

98. U.S.—U. S. v. Robins, C.C.A. Miss., 117 F.2d 145—Juneau Ferry & Nav. Co. v. Alaska SS. Co., Alaska, 121 F. 356, 58 C.C.A. 34.

99. U.S.—Edwards v. Glasscock, C.C. A.Tex., 91 F.2d 625—Cage v. Cage, C.C.A.Tex., 74 F.2d 377—Smyth v. Asphalt Belt Ry. Co., C.C.A.Tex., 12 F.2d 14, amending, D.C., 292 F. 876, and transferred, see 45 S.Ct. 242, 267 U.S. 326, 69 L.Ed. 629—Harrison v. Farmers' L. & T. Co., Tex., 94 F. 728, 36 C.C.A. 443.

1. U.S.—New York Life Ins. Co. v. McCarthy, C.C.A.Ala., 22 F.2d 241.

2. U.S.—Johnson v. Riverland Levee Dist., C.C.A.Mo., 117 F.2d 711, 134 A.L.R. 326.

3. U.S.—Wilhite v. Skelton, 149 F. 67, 78 C.C.A. 635, reversing 5 Ind. T. 621, 82 S.W. 932.
4 C.J. p 1156 note 86.

4. U.S.—Dock Contractor Co. v. City of New York, C.C.A.N.Y., 296 F. 377.

5. U.S.—Empire Fuel Co. v. Lyons, Ohio, 257 F. 890, 169 C.C.A. 40, certiorari denied 40 S.Ct. 393, 252 U. S. 582, 64 L.Ed. 727.

Error of law

Case should be remanded for entry of proper judgment without new trial, where only error committed was error of law in limiting amount of damage which plaintiff was entitled to recover under undisputed evidence.—Barnebey v. Barron G. Collier, Inc., C.C.A.Neb., 65 F.2d 864.

6. U.S.—Gary v. Consolidated Forwarding Co., C.C.A.Wis., 115 F.2d 632—Western Union Telegraph Co. v. Aldridge, C.C.A.Cal., 66 F.2d 26, 89 A.L.R. 352—In re Central R. of New Jersey, C.C.A.N.Y., 52 F.2d 20—U. S. v. Salmon, C.C.A.Miss., 42 F.2d 353—Southern Ry. Co. v. McKinney, C.C.A.Ala., 276 F. 772—Walker v. Gulf & I. Ry. Co. of Texas, C.C.A.Tex., 269 F. 885—Pacific Postal Tel. Cable Co. v. Fleischner, Or., 66 F. 899, 14 C.C.A. 166.

7. U.S.—St. Paul Fire & Marine Ins. Co. v. Garza County Warehouse & Marketing Ass'n, C.C.A.Tex., 93 F. 2d 590.

8. U.S.—U. S. v. Salmon, C.C.A. Miss., 42 F.2d 353—Pacific Postal Tel. Cable Co. v. Fleischner, Or., 66 F. 899, 14 C.C.A. 166.

9. U.S.—Otoe County Nat. Bank v. Delany, C.C.A.Neb., 88 F.2d 238.

10. U.S.—American Nat. Bank v. Williams, Kan., 101 F. 943, 42 C.C. A. 101.

11. U.S.—Ada County v. Oregon Short Line R. Co., C.C.A.Idaho, 97 F.2d 666, affirming, D.C., Oregon Short Line R. Co. v. Ada County, 18 F.Supp. 842.

12. U.S.—Trappey v. McIlhenny Co., C.C.A.La., 12 F.2d 19, certiorari denied 47 S.Ct. 94, 273 U.S. 698, 71 L. Ed. 846.

bb. Technical, formal, or trivial defects or errors
cc. Amount or extent of recovery

aa. In General

Any material and harmful error of law entering into, or forming the basis of, some legal action, ruling, or decision of the lower court affords ground for reversal; and a judgment may be reversed on confession of error, or for want of jurisdiction.

While an appellate court will usually reverse only for a clear and material error of law,[13] as a general rule practically any material and harmful error of law entering into, or forming the basis of, some legal action, ruling, or decision of the lower court will afford grounds for reversal.[14] Thus a judgment will be reversed for material error of the trial court in its rulings on the sufficiency of the pleadings,[15] as where the court erroneously sustained a demurrer,[16] or where the pleadings are insufficient to support the judgment rendered;[17] in declining, on the ground of lack of power, to allow an amendment to be made which it was within its discretion to grant;[18] in applying the rules of evidence;[19] in giving improper, or in refusing to give proper, instructions to the jury;[20] or in dismissing the action[21] or directing a verdict,[22] as where the evidence did not warrant a directed verdict, notwithstanding both parties moved for a directed verdict.[23] It is ground for reversal that the district court granting a temporary injunction did not state reasons therefor and did not make findings of fact and conclusions of law as required by the Federal Rules of Civil Procedure,[24] yet where the judgment is supported by the findings of fact and is apparently correct, it will not be reversed for error in one particular conclusion of law.[25] A judgment may be reversed where the jury's verdict was general and it was impossible to tell whether the jury found for the prevailing party on an issue unsupported by the evidence which, with others, was erroneously submitted to the jury,[26] or when it was made to appear that there was a want of substantial evidence to support the judgment.[27] The circuit court of appeals cannot set aside a decree on newly discovered evidence, but may grant permission to the district court to hear and determine such application for a rehearing, exercising a sound discretion, by reservation of such right to the district court in its mandate.[28] A trial court should not be reversed for declining to amend a decree which the circuit court of appeals has affirmed.[29] Where an action at law is tried without a jury and the court makes a general or special finding of fact, the appellate court cannot reverse that finding, or the judgment based thereon, for any error in fact.[30]

Confession of error. A judgment will ordinarily be reversed on a confession of error by appellee, respondent, or defendant in error.[31]

Want of jurisdiction. A judgment or order rendered without jurisdiction or authority must ordinarily be reversed,[32] and an appellate court may of

13. U.S.—Potts v. Village of Haverstraw, C.C.A.N.Y., 93 F.2d 506—Binney v. Chesapeake & Ohio Canal Co., D.C., 8 Pet. 214, 8 L.Ed. 921.

14. U.S.—Collins v. Metro-Goldwyn Pictures Corporation, C.C.A.N.Y., 106 F.2d 83, reversing, D.C., 25 F. Supp. 781.

Application of wrong law
Where federal district court applied the law determined by federal courts rather than law determined by Pennsylvania court in quashing writs of scire facias, issued under Pennsylvania statute, to bring in additional defendant, the order of district court quashing the writs was required to be reversed.—Deslauriers Steel Mould Co. v. Gangaway, C.C.A. Pa., 97 F.2d 78.

15. U.S.—Van Doren v. Pennsylvania R. Co., N.J., 93 F. 260, 35 C.C.A. 282.
4 C.J. p 1165 note 45.

16. U.S.—Van Doren v. Pennsylvania R. Co., supra.

17. U.S.—Texas Tract Co. v. Collier, Tex., 195 F. 65, 115 C.C.A. 82.

18. U.S.—In re Bieler, C.C.A.N.Y., 295 F. 78.

19. U.S.—Rettig Beverage Co. v. U. S., C.C.A.Pa., 13 F.2d 740.

20. U.S.—Deal v. U. S., Alaska, 47 S. Ct. 613, 274 U.S. 277, 71 L.Ed. 1045, reversing, C.C.A., 11 F.2d 3, certiorari granted 46 S.Ct. 630, 271 U.S. 656, 70 L.Ed. 1135—Shell Oil Co. v. Kamper, C.C.A.Miss., 111 F.2d 569—Pappas v. Baltimore & O. R. Co., C.C.A.Ohio, 37 F.2d 271—Chesapeake & O. Ry. Co. v. Cochran, C. C.A.W.Va., 22 F.2d 22—Consolidation Coal Co. v. Peninsular Portland Cement Co., C.C.A.Mich., 272 F. 625, certiorari denied Peninsular Portland Cement Co. v. Consolidation Coal Co., 42 S.Ct. 52, 257 U.S. 641, 66 L.Ed. 411.

21. U.S.—Ruby v. Atkinson, Tex., 71 F. 567, 18 C.C.A. 249.

22. U.S.—U. S. v. Brown, C.C.A.S.C., 107 F.2d 401.

23. U.S.—U. S. v. Brown, supra.

24. U.S.—Shannon v. Retail Clerks, International Protective Ass'n, C.C. A.Ill., 128 F.2d 553.

25. U.S.—Gray v. Smith, Cal., 83 F. 824, 28 C.C.A. 168, affirming, C.C., 76 F. 525.

26. U.S.—Schilling v. Delaware & H. R. Corporation, C.C.A.N.Y., 114 F.2d 69.

27. U.S.—U. S. v. McAlister, C.C.A. Mont., 88 F.2d 379.

28. U.S.—Hazeltine Corporation v. Wildermuth, C.C.A.N.Y., 35 F.2d 733.

29. U.S.—Clarke v. Hot Springs Electric Light & Power Co., C.C.A. Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443.

30. U.S.—Southern Surety Co. of Des Moines, Iowa v. U. S., C.C.A.S. D., 23 F.2d 55, certiorari denied 49 S.Ct. 11, 278 U.S. 604, 73 L.Ed. 532.

31. U.S.—Thomas v. U. S., C.C.A. Miss., 96 F.2d 767.

32. U.S.—Myers v. Bethlehem Shipbuilding Corporation, Mass., 58 S. Ct. 459, 303 U.S. 41, 82 L.Ed. 638, reversing 88 F.2d 154, affirming, D. C., Bethlehem Shipbuilding Corporation v. Myers, 15 F.Supp. 915, rehearing denied, C.C.A., Myers v. Bethlehem Shipbuilding Corporation, 89 F.2d 1000, certiorari grant-

its own motion reverse such a judgment or order.[33] This rule applies where the record does not affirmatively show jurisdiction;[34] and it has been applied to lack of jurisdiction of the subject matter.[35]

bb. Technical, Formal, or Trivial Defects or Errors

The circuit court of appeals will not reverse a judgment on account of immaterial, technical, formal, or trivial defects or errors.

Immaterial, technical, formal, or trivial defects or errors do not afford grounds for reversal under the statute requiring the appellate court to give judgment after examination of the entire record without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.[36] So, Federal Rules of Civil Procedure, rule 61, providing that no error is ground for disturbing a judgment or order unless inconsistent with substantial justice, while intended for the guidance of the district court, should be heeded by the appellate court to make it effective.[37] However, neither this rule nor the statute was intended to deprive a litigant of a substantial right,[38] and where error is shown, and it does not clearly appear that the correct result was reached and that the error was not injurious, the court will reverse the judgment.[39] The statute, which embodies a sound principle of practice,[40] governs the disposition of cases on appeal, whether civil or criminal, legal or equitable, and applies to all actions at law, including those wherein a jury is waived.[41] It does not authorize setting aside a former judgment which has become final by the lapse of the term.[42]

Applying the general rule, it has been held that the circuit court of appeals will not reverse for immaterial, technical, formal, or trivial irregularities of procedure;[43] errors or defects in process;[44] defects or errors with respect to the pleadings;[45] errors in the joinder of two or more causes of action;[46] errors or irregularities in connection with the trial of the case,[47] such as improper argument

ed 58 S.Ct. 26, 302 U.S. 667, 82 L.Ed. 515, and Myers v. Mackenzie, 58 S.Ct. 27, 302 U.S. 667, 82 L.Ed. 515—Nashua & L. R. Corp. v. Boston & L. R. Corp., Mass., 51 F. 929, 2 C.C.A. 542.

33. U.S.—Newcomb v. Burbank, N. Y., 181 F. 334, 104 C.C.A. 164.

34. U.S.—Newcomb v. Burbank, supra.
4 C.J. p 1162 note 6.

35. U.S.—Cochran v. Childs, Ill., 111 F. 433, 49 C.C.A. 421.

36. U.S.—Keller v. Brooklyn Bus Corporation, C.C.A.N.Y., 128 F.2d 510—Pittman v. Schultz, C.C.A. Miss., 125 F.2d 82—Valley Shoe Corporation v. Stout, C.C.A.Mo., 98 F.2d 514—Model Dairy Co. v. Foltis-Fischer, Inc., C.C.A.N.Y., 91 F.2d 971—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30—Aiken Mills v. Boss Mfg. Co., C.C.A.N.Y., 65 F.2d 344—Kline v. Blackwell, C.C.A.Fla., 63 F.2d 897, certiorari denied 54 S.Ct. 54, 290 U.S. 636, 78 L.Ed. 553—Norrell v. Maryland Casualty Co., C.C.A.Tex., 62 F.2d 352—S. A. Lynch Enterprise Finance Corporation v. Dulion, C.C.A. Ga., 45 F.2d 6—National Surety Co. v. Sheridan County, Mont., C.C.A. Mont., 33 F.2d 473—Murphy v. India Tire & Rubber Co., C.C.A.Tex., 29 F.2d 228, certiorari denied 49 S.Ct. 252, 279 U.S. 838, 73 L.Ed. 985—Monument Pottery Co. v. Imperial Coal Corporation, C.C.A.N.J., 21 F.2d 683, certiorari denied 48 S.Ct. 213, 276 U.S. 618, 72 L.Ed. 734—Pierce Petroleum Corporation v. Empire Gas & Fuel Co. of Maine, C.C.A.Tex., 17 F.2d 758—Mitchell v. Pittsburgh, C., C. & St. L. R. Co., C.C.A.Ohio, 13 F.2d 704—Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co., C.C.A.W.Va., 11 F.2d 87—Fidelity & Casualty Co. of New York v. Glenn, C.C.A. W.Va., 3 F.2d 913—Hunt v. Pearce, C.C.A.Okl., 284 F. 321, affirming, D.C., 271 F. 498—In re Griggs, Minn., 233 F. 243, 147 C.C.A. 249, denying rehearing 227 F. 795, 142 C.C.A. 319.
4 C.J. p 924 note 98.
Review of harmless error generally see supra § 297 h.

37. U.S.—University City v. Home Fire & Marine Ins. Co., C.C.A. Mo., 114 F.2d 288.

38. U.S.—University City v. Home Fire & Marine Ins. Co., supra.

39. U.S.—Consolidated Grocery Co. v. Hammond, Fla., 177 F. 641, 99 C.C.A. 195.

40. U.S.—Choctaw, O. & G. R. Co. v. Jackson, C.C.Okl., 182 F. 342, affirmed 192 F. 792, 114 C.C.A. 12.

41. U.S.—Muentzer v. Los Angeles Trust & Savings Bank, C.C.A.Ind., 3 F.2d 222.

Purpose of statute is to prevent reversal of judgments because of technical errors which, although properly presented, do not affect substantial rights, and it does not require the court to decide on the whole record whether exceptions were taken or not, or to overlook defects due to negligence, ignorance, or inadvertence.—Storgard v. France & Canada S. S. Corporation, C.C.A. N.Y., 263 F. 545, certiorari denied France & Canada S. S. Corporation v. Storgard, 40 S.Ct. 394, 252 U.S. 585, 64 L.Ed. 729.

Construction of statute not controlled by state practice
U.S.—Title Guaranty & Surety Co. v. State of Missouri ex rel. and to Use of Stormfeltz, C.C.A.Mo., 105 F.2d 496.

42. U.S.—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A.Iowa, 76 F. 2d 240, certiorari denied 56 S.Ct. 120, 291 U.S. 605, 80 L.Ed. 428.

43. U.S.—Fiorito v. Clyde Equipment Co., C.C.A.Wash., 2 F.2d 807.

44. U.S.—Southern Oil Corporation v. Waggoner, C.C.A.Tex., 276 F. 487, certiorari denied 42 S.Ct. 382, 258 U.S. 626, 66 L.Ed. 798.

45. U.S.—Sarasota County, Fla., v. American Surety Co. of New York, C.C.A.Fla., 68 F.2d 543—United S. S. Co. v. Barber, C.C.A.Ohio, 4 F. 2d 625—Davis v. Shirer, C.C.A.S.C., 288 F. 293.
4 C.J. p 1170 note 33.

Treating motion to dismiss complaint as answer
Where district court treated motion to dismiss complaint in the nature of an answer and decided case on merits, and neither party would benefit by reversal which would require district court to decide questions which it had apparently decided, circuit court of appeals would consider case on merits.—A. L. Mechling Barge Line v. Bassett, C.C.A.Ill., 119 F.2d 995.

46. U.S.—Hosmer v. Wyoming R. & Iron Co., Wyo., 129 F. 883, 65 C.C.A. 81.

47. **Failure to admonish jury,** on their separation at one particular time, against conversing about the case or forming an opinion thereon

of counsel,[48] or the giving of supplementary instructions to the jury in the absence of counsel for the parties;[49] errors with respect to the dismissal of a case;[50] errors in the giving,[51] failure to give,[52] or refusal,[53] of instructions; errors with respect to conclusions of law[54] or failure to make findings in accordance with the procedural rule;[55] or errors in the judgment, order, or decree,[56] or with respect to costs.[57] An insufficient bill of exceptions on appeal is not a mere technical error which may be disregarded under the statute.[58]

Reception of evidence. The circuit court of appeals will not reverse for erroneous rulings on the reception of evidence which do not affect the result or are not materially injurious to the rights of the complaining party.[59] In accordance with this, it has been held that judgment will not be reversed because of error in admission[60] or exclusion[61] of evidence; but the statute does not preclude a reversal for errors in the admission of evidence which was given undue emphasis before the jury.[62] Whether or not a substantial right was invaded by the admission of irrelevant and incompetent evidence must depend on the circumstances of each case.[63]

cc. Amount or Extent of Recovery

A judgment will not be reversed because of a technical error in permitting recovery on a wrong theory, or because of a trifling error in the amount awarded, but it will not be affirmed on the ground that plaintiff could recover no more than nominal damages where the trial was terminated before proof of damages was made; and where the decree was erroneous in respect of costs, it may also be reversed with respect thereto.

The circuit court of appeals will not reverse a judgment because of a technical error in permitting recovery on a wrong theory, where defendant was not injured thereby.[64] Accordingly, a judgment will not be reversed because of the allowance of a claim as special damages rather than as an element of general damages.[65] Where the judgment is clearly excessive and the exact amount of the excess is not ascertainable from the record, the judgment will be reversed.[66] The court will refuse to reverse a judgment on account of a trivial error in the amount awarded as damages where the cost of a retrial would be as much as, or more than, the

held not ground for reversal.—McKnight v. U. S., Mont., 130 F. 659, 65 C.C.A. 37.

48. U.S.—Maryland Casualty Co. v. Reid, C.C.A.Tex., 76 F.2d 30.

Sustaining objections to arguments to result in reversal must be so prejudicial as presumably to have conditioned verdict and judgment.—Silent Automatic Sales Corporation v. Stayton, C.C.A.Mo., 45 F.2d 471.

49. U.S.—Sandusky Cement Co. v. A. R. Hamilton & Co., C.C.A.Ohio, 287 F. 609, certiorari denied 43 S.Ct. 705, 262 U.S. 759, 67 L.Ed. 1219.

50. **Want of notice to defendant**

Irregularity in dismissing a suit on plaintiff's motion without notice to defendants does not require reversal of a subsequent decree of dismissal made after notice, even though the record does not show a motion to vacate the former orders, where no reason appeared why the suit should not be dismissed.—Hines v. Martin, C.C.A.Miss., 286 F. 653.

51. U.S.—Crumlish v. Mutual Life Ins. Co. of New York, C.C.A.Pa., 69 F.2d 310—Seaboard Oil Co. v. Cunningham, C.C.A.Fla., 51 F.2d 321, certiorari denied 52 S.Ct. 35, 284 U.S. 657, 76 L.Ed. 557—Pullman Co. v. Bullard, C.C.A.Ga., 44 F.2d 347—St. Paul Fire & Marine Ins. Co. v. Eldracher, C.C.A.Mo., 33 F.2d 675, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 649—Business Men's Assur. Co. of America v. Campbell, C.C.A.Mo., 32 F.2d 995, affirming, D.C., Campbell v. Business Men's Assur. Co., 31 F. 2d 571, and certiorari denied Business Men's Assur. Co. v. Campbell, 50 S.Ct. 40, 280 U.S. 594, 74 L.Ed. 642.

52. **Failure to charge on burden** is not reversible error where the omission was not called to the attention of the trial court.—Stewart v. Morris, Ill., 96 F. 703, 37 C.C.A. 562.

53. U.S.—Bank of Grottoes v. Brown, C.C.A.Va., 8 F.2d 321.

54. U.S.—Green Valley Creamery v. U. S., C.C.A.Mass., 108 F.2d 342, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F.Supp. 672.

55. U.S.—Green Valley Creamery v. U. S., supra—National Reserve Ins. Co. of Illinois v. Scudder, C.C.A. Cal., 71 F.2d 884.

56. U.S.—National Biscuit Co. v. Litzky, C.C.A.Mich., 22 F.2d 939, 56 A.L.R. 853.

57. U.S.—Conrad Inv. Co. v. U. S., Mont., 161 F. 829, 88 C.C.A. 647, affirming, C.C., 156 F. 123—Sproull v. Pratt & Whitney Co., N.Y., 108 F. 963, 48 C.C.A. 167.

58. U.S.—Rouhib v. Zurbrick, C.C.A. Mich., 67 F.2d 570.

59. U.S.—Lopez v. Gautier, C.C.A. Puerto Rico, 41 F.2d 914, certiorari granted Sanchez v. Borras, 51 S. Ct. 80, 282 U.S. 826, 75 L.Ed. 737, and certiorari dismissed Lopez v. Gautier, 51 S.Ct. 490, 283 U.S. 798, 75 L.Ed. 1421.

60. U.S.—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718—Public Utilities Corporation of Arkansas v. Oliver, C.C.A.Ark., 64 F.2d 60—Lord Const. Co. v. U. S. to Use of W. E. Sexton Co., C.C.A. N.J., 28 F.2d 340—Belisle v. Lisk, C.C.A.Mass., 16 F.2d 261—Boston & M. R. R. v. Card, C.C.A.Mass., 7 F.2d 428—Southern Ry. Co. v. Douglas, C.C.A.Tenn., 289 F. 325—Reid v. Baker, C.C.A.Or., 288 F. 969—American Agricultural Chemical Co. v. Hogan, Mass., 213 F. 416, 130 C.C.A. 52.

61. U.S.—Fidelity & Deposit Co. of Maryland v. People's Bank of Sanford, C.C.A.N.C., 72 F.2d 932, affirming, D.C., People's Bank of Sanford, N. C., v. Fidelity & Deposit Co. of Maryland, 4 F.Supp. 379, and certiorari denied 55 S.Ct. 348, 293 U.S. 627, 79 L.Ed. 714.

62. U.S.—University City v. Home Fire & Marine Ins. Co., C.C.A.Mo., 114 F.2d 288.

63. U.S.—University City v. Home Fire & Marine Ins. Co., supra.

64. U.S.—W. H. Goff Co. v. Lamborn & Co., C.C.A.Ga., 281 F. 613, certiorari denied 43 S.Ct. 95, 260 U.S. 734, 67 L.Ed. 487.

65. U.S.—United Verde Extension Mining Co. v. Littlejohn, C.C.A. Ariz., 279 F. 223.

66. U.S.—Washington & C. Ry. Co. v. Mobile & O. R. Co., Ala., 255 F. 12, 166 C.C.A. 340, reversing, D.C., Mobile & O. R. Co. v. Washington & C. Ry. Co., 242 F. 531.

amount indicated as error.[67] Likewise a judgment or decree will not ordinarily be reversed for an inconsiderable mistake in the matter of interest,[68] or merely because nominal damages were not awarded plaintiff.[69] A judgment for defendant will not be affirmed, however, on the ground that plaintiff could recover no more than nominal damages where the trial was terminated before proof of damages was made.[70] While a reversal of a judgment or decree will not be granted in a case where the only error relates to the allowance or taxation of costs, where the decree is found to be erroneous in other respects, the circuit court of appeals may reverse or modify the decree of the district court with respect to costs in accordance with its own conclusions as to the equities of the case.[71]

(b) Scope and Extent of Relief in General

The circuit court of appeals may affirm in part and reverse in part where the judgment consists of distinct and independent matters, where plaintiff sets up several counts or causes of action capable of separation, where several distinct judgments are grouped in one entry, or where there are several coparties.

Where a judgment appealed from consists of distinct and independent matters, so that an erroneous portion thereof can be segregated from the parts that are correct, the court will not set aside the entire judgment, but only so much as is erroneous, leaving the residue undisturbed.[72] Where the judgment is entire and indivisible, however, it cannot be reversed in part and affirmed in part, and if there is reversible error therein, it must be set aside in toto.[73] Where plaintiff in his pleading sets up several counts or several causes of action and error is committed as to only part of them, the judgment, if capable of separation, should be affirmed in part and reversed in part.[74] On the other hand, where the issue or count infected by error cannot be segregated, the judgment will be reversed in toto.[75] So where cases separately commenced have been consolidated for trial, or where several distinct judgments in favor of separate plaintiffs are for convenience grouped in one entry, the reviewing court can properly effect a severance, and affirm some and reverse others.[76] A judgment or decree relating to several lots or parcels of land may be reversed as to those concerning which error has been committed, and affirmed as to the remainder.[77] A reversal as to one or more of several coparties may be had whenever the circumstances of the case render such action proper.[78] On affirmance of the decree between the original parties, the court has no power to reverse it as to an intervener who did not join the appeal.[79]

(c) Rendering or Ordering Final Judgment

On reversing a case, the circuit court of appeals may render or direct entry of the proper final judgment where the ends of justice would not be promoted by a new trial, but will not ordinarily do so where the facts have not been fully developed, or where the evidence is conflicting, or where to do so would contravene the provisions of the Seventh Amendment to the federal Constitution.

As a general rule, the circuit court of appeals reversing a judgment in an action at law will not render or order final judgment where the facts have not been fully developed and the case for the unsuccessful party may be strengthened on another trial,[80] or where the evidence is conflicting,[81] or an

67. U.S.—Peters v. Mallin, C.C.Iowa, 111 F. 244.

68. U.S.—Gulf, C. & S. F. R. Co. v. Johnson, Ind.T., 54 F. 474, 4 C.C.A. 447.
4 C.J. p 1179 note 97.

69. U.S.—U. S. v. Withers, N.Y., 130 F. 696, 65 C.C.A. 16—Kelly v. Fahrney, Ark., 97 F. 176, 38 C.C.A. 103.

70. U.S.—Lord v. Pathe News, C.C. A.N.Y., 97 F.2d 508.

71. U.S.—Chapin-Sacks Mfg. Co. v. Hendler Creamery Co., C.C.A.Md., 254 F. 553, 166 C.C.A. 111, modifying, D.C., 231 F. 550.

72. U.S.—City of Hialeah v. Groves, C.C.A.Fla., 101 F.2d 951—Board of Public Instruction for Brevard County v. Osburn, C.C.A.Fla., 101 F.2d 919—Thorpe v. National City Bank of Tampa, C.C.A.Fla., 274 F. 200—National Surety Co. v. U. S., Mich., 228 F. 577, 143 C.C.A. 99, L.R.A.1917A 336, certiorari denied Brogan v. National Surety Co., 36 S.Ct. 721, 241 U.S. 670, 60 L.Ed. 1230, reversed on other grounds 38 S.Ct. 250, 246 U.S. 257, 62 L.Ed. 703, L.R.A.1918D 776—Great Western Coal Co. v. Chicago Great Western R. Co., Mo., 98 F. 274, 39 C.C.A. 79.

73. U.S.—San Antonio Utilities League v. Southwestern Bell Telephone Co., C.C.A.Tex., 86 F.2d 584, certiorari denied 57 S.Ct. 783, 301 U.S. 682, 81 L.Ed. 1340—Kean v. National City Bank, Tenn., 294 F. 214, certiorari dismissed 44 S.Ct. 179, 263 U.S. 729, 68 L.Ed. 528.

Where, on cross writs of error from the same judgment, a portion of such judgment is affirmed and a portion reversed, the result is to reverse the entire judgment and to remand the cause for a new trial.—Montana Min. Co. v. St. Louis Min. & M. Co., Mont., 22 S.Ct. 744, 186 U.S. 24, 46 L.Ed. 1039—Empire State-Idaho Min. & Dev. Co. v. Bunker Hill & S. Min. & C. Co., Idaho, 121 F. 973, 58 C.C.A. 311.

74. U.S.—Great Western Coal Co. v. Chicago Great Western R. Co., Mo., 98 F. 274, 39 C.C.A. 79.

75. U.S.—State Automobile Mut. Ins. Co. of Columbus, Ohio v. York, C.C.A.N.C., 104 F.2d 730, certiorari denied 60 S.Ct. 120, 308 U.S. 591, 84 L.Ed. 495—Gentry v. Billing, C.C.A.Cal., 73 F.2d 925.

76. U.S.—Kean v. National City Bank, C.C.A.Tenn., 294 F. 214, certiorari dismissed 44 S.Ct. 179, 263 U.S. 729, 68 L.Ed. 528.

77. U.S.—G. F. Stearns Land & Lumber Co. v. Asher, C.C.A.Ky., 295 F. 268.

78. U.S.—Dollar S. S. Lines v. Merz, C.C.A.Cal., 68 F.2d 594—Chiarello Bros. Co. v. Pedersen, N.Y., 242 F. 482, 155 C.C.A. 258.

79. U.S.—Muskogee Nat. Tel. Co. v. Hall, Ind.T., 118 F. 382, 55 C.C.A. 208.

80. U.S.—Olivier v. Mt. Union Tanning & Extract Co., C.C.A.Pa., 264 F. 601, reversing, D.C., 253 F. 593.

81. U.S.—Mason v. U. S., C.C.A.Mo., 75 F.2d 54.

issue of fact for the trial court is undetermined,[82] or the circumstances are not such as to permit a decision as a matter of law.[83] Thus where the district court in an action at law dismissed the complaint at the close of the evidence on the ground of res judicata, the circuit court of appeals on holding such dismissal erroneous cannot direct final judgment for plaintiff on the ground that the district court should have granted a directed verdict for plaintiff.[84] In a proper case, however, final judgment may be rendered or directed,[85] as where the facts of the case are undisputed by reason of the evidence being without material conflict or otherwise,[86] and only a question of law is involved,[87] for example, where the facts are admitted or agreed to by the parties.[88] Thus the circuit court of appeals may render, or direct the lower court to render,[89] the proper judgment in a case tried without a jury where the facts were fully developed,[90] where there were no controverted questions of fact[91] or the facts were agreed on by the parties,[92] or where the findings of the court are undisputed,[93] or where the reversal is for error of law arising on the pleadings or record proper;[94] but it has been held that in such a case where the circuit court of appeals reverses because the finding of fact was not justified by the evidence, it cannot direct the entry of a judgment, but can only order a new trial.[95]

Generally, however, subject to qualifications here-

82. U.S.—American Distilling Co. v. Wisconsin Liquor Co., C.C.A.Wis., 104 F.2d 582, 123 A.L.R. 739—U. S. v. Board of Com'rs of Grady County, C.C.A.Okl., 54 F.2d 593.

83. U.S.—Ferro Concrete Const. Co. v. U. S., for Use and Benefit of Luchini, C.C.A.R.I., 112 F.2d 488, certiorari denied U. S. for Use and Benefit of Luchini v. Ferro Concrete Const. Co., 61 S.Ct. 136, 311 U.S. 697, 85 L.Ed. 452.

84. U.S.—Bisbee Linseed Co. v. Paragon Paint & Varnish Corporation, C.C.A.N.Y., 89 F.2d 18.

85. U.S.—Delaware, L. & W. R. Co. v. Rellstab, C.C.A.N.J., 15 F.2d 137, certiorari granted 47 S.Ct. 247, 273 U.S. 685, 71 L.Ed. 840, reversed on other grounds 48 S.Ct. 203, 276 U.S. 1, 72 L.Ed. 439.

Arrest of judgment

Appellate court may order arrest of judgment, although no motion in arrest thereof was made in trial court.—Grobel v. Miller, C.C.A.Pa., 71 F.2d 503.

86. U.S.—U. S. v. Ryerson, C.C.A. Ill., 114 F.2d 150, reversing, D.C., Ryerson v. U. S., 28 F.Supp. 265, and certiorari granted U. S. v. Ryerson, 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408, and Ryerson v. U. S., 61 S.Ct. 142, 311 U.S. 640, 85 L.Ed. 408, reversed on other grounds U. S. v. Ryerson, 61 S.Ct. 479, 312 U.S. 260, 85 L.Ed. 819, affirmed Ryerson v. U. S., 61 S.Ct. 656, 312 U.S. 405, 85 L.Ed. 917.

4 C.J. p 1187 note 89.

Where both parties moved for directed verdict and jury were discharged, appellate court could take the facts as undisputed and apply law to such facts and render final judgment without sending case back for retrial, especially where appellant's counsel, in motion for directed verdict, had categorically stated there was no disputed fact.—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A.Iowa, 76 F.2d 240, certiorari denied 56 S.Ct. 120, 296 U.S. 605, 80 L.Ed. 428.

87. U.S.—Bayne v. U. S., Minn., 195 F. 236, 115 C.C.A. 188.

4 C.J. p 1188 note 90.

88. U.S.—Fidelity & Deposit Co. of Maryland v. Port of Seattle, C.C.A. Wash., 106 F.2d 777, reversing, D. C., Port of Seattle v. Fidelity & Deposit Co. of Maryland, 24 F. Supp. 434, certiorari denied 60 S.Ct. 515, 309 U.S. 661, 84 L.Ed. 1009—Lydon v. New York Life Ins. Co., C.C.A.Mo., 89 F.2d 78, certiorari denied New York Life Ins. Co. v. Lydon, 58 S.Ct. 23, 302 U.S. 703, 82 L.Ed. 543—Sanderson v. Postal Life Ins. Co. of New York, C.C.A. Colo., 87 F.2d 58—Minnesota Mut. Life Ins. Co. v. Cost, C.C.A.Kan., 72 F.2d 519—Maryland Casualty Co. v. Beebe, C.C.A.Utah, 54 F.2d 743—Graham v. Business Men's Assur. Co. of America, C.C.A.Okl., 43 F. 2d 673.

4 C.J. p 1188 note 92.

Facts stipulated in trial court

U.S.—U. S. v. Utah-Idaho Sugar Co., C.C.A.Utah, 96 F.2d 756, certiorari denied 59 S.Ct. 95, 305 U.S. 631, 83 L.Ed. 404.

89. **Better practice,** it has been held, is for the circuit court of appeals to remand the case to the lower court with instructions to render a specific judgment if the circumstances justify it, rather than for the appellate court itself to enter the proper judgment.—Jensma v. Sun Life Assur. Co. of Canada, C.C.A.Idaho, 64 F.2d 457, reversing, D.C., Jensma v. Benefit Ass'n of Ry. Employees, 1 F. Supp. 951, certiorari denied Sun Life Assur. Co. of Canada v. Jensma, 53 S. Ct. 795, 289 U.S. 763, 77 L.Ed. 1505.

90. U.S.—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—U. S. v. Bornn, C.C.A.N.Y., 104 F.2d 641, modifying, D.C., 20 F.Supp. 336, certiorari denied Royal Indemnity Co. v. U. S., 60 S.Ct. 143, 308 U.S. 606, 84 L.Ed. 506, and Bornn v. U. S., 60 S.Ct. 143, 308 U.S. 606, 84 L.Ed. 507—Monroe Sand & Gravel Co. v. Sanders, C.C.A.La., 79 F.2d 292, affirming, D.C., Sanders v. Monroe Sand & Glass Co., 11 F.Supp. 941—Cocke v. Vacuum Oil Co., C.C.A.Tex., 63 F.2d 406—Wallace v. Seagraves, D. C.Tex., 51 F.2d 143—Border Gas Co. v. Windrow, C.C.A.Tex., 3 F.2d 974—Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, C.C.A.La., 299 F. 478, denying rehearing 297 F. 217, certiorari denied Fidelity & Deposit Co. of Maryland v. Bank of Waterproof, 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

91. U.S.—Maryland Casualty Co. v. U. S., to Use of Heyward, C.C.A. S.C., 108 F.2d 784—Massachusetts Bonding & Insurance Co. v. Santee, C.C.A.Wash., 62 F.2d 724.

92. U.S.—Marshall v. Equitable Life Assur. Soc., C.C.A.Mich., 116 F.2d 901, certiorari denied Equitable Life Assur. Soc. of U. S. v. Marshall, 61 S.Ct. 1088, 313 U.S. 575, 85 L.Ed. 1533—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—Routzahn v. Mason, C.C.A.Ohio, 13 F.2d 702, reversing, D.C., Mason v. Routzahn, 8 F.2d 56, and certiorari granted Mason v. Routzahn, 47 S.Ct. 344, 273 U.S. 687, 71 L.Ed. 840, reversed on other grounds 48 S.Ct. 50, 275 U.S. 175, 72 L.Ed. 223.

25 C.J. p 972 note 63.

93. U.S.—Howbert v. Penrose, C.C. A.Colo., 38 F.2d 577, 68 A.L.R. 820—U. S. v. Illinois Surety Co., Ill., 226 F. 653, 141 C.C.A. 409, affirmed 37 S.Ct. 614, 244 U.S. 376, 61 L.Ed. 1206.

94. U.S.—Slocum v. New York L. Ins. Co., Pa., 33 S.Ct. 523, 228 U.S. 364, 382, 57 L.Ed. 879, Ann.Cas. 1914D 1029.

25 C.J. p 972 note 64.

95. U.S.—Northern Pac. Ry. Co. v. Van Dusen Harrington Co., D.C. Minn., 34 F.2d 786.

in stated, on an appeal from a judgment in an action at law, tried by a jury, the circuit court of appeals can correct the error complained of only by directing a new trial, and cannot itself render or direct such judgment as should have been rendered below,[96] being precluded from doing so by the Seventh Amendment to the Constitution which requires adherence to the rule of the common law that a verdict cannot be disturbed for an error of law occurring on the trial without awarding a new trial;[97] and this has been held to be the case even where the error consisted of a refusal to grant a nonsuit or to direct a verdict.[98] Nevertheless, the circuit court of appeals, on reversing a judgment on a verdict for plaintiff for error in denying defendant's motions for dismissal of the complaint and a directed verdict on the ground of insufficiency of the evidence to support a verdict for plaintiff after reserving decision on such motions and submitting the case to the jury subject to the court's rulings thereon, can and should direct a judgment of dismissal on the merits rather than a new trial;[99] and under the Federal Rules of Civil Procedure, rule 50 (b), 28 U.S.C.A. following § 723c, providing that when a motion for a directed verdict is denied at the close of the evidence, the judge is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion, the appellate court, on reversal, may dismiss the action even though the trial court did not specifically reserve decision,[1] although formerly a new trial could be avoided, and judgment rendered non obstante veredicto only where a motion to direct a verdict was reserved and the verdict taken subject to the reservation.[2] Where a party moves for judgment notwithstanding the verdict and for a new

96. U.S.—City of El Paso v. West, C.C.A.Tex., 102 F.2d 927, rehearing denied 104 F.2d 96, certiorari denied 60 S.Ct. 111, 308 U.S. 587, 84 L.Ed. 492, and West v. City of El Paso, 60 S.Ct. 111, 308 U.S. 587, 84 L.Ed. 492—Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A. Minn., 99 F.2d 289—Millers' Mut. Fire Ins. Ass'n of Illinois v. Warroad Potato Growers Ass'n, C.C.A. Minn., 94 F.2d 741—Rentfrow v. U. S., C.C.A.Okl., 67 F.2d 747—Bassett v. Delaware & H. Co., C.C.A. Vt., 62 F.2d 74—Midland Savings & Loan Co. v. Tradesmen's Nat. Bank of Oklahoma City, C.C.A.Okl., 57 F.2d 686, certiorari denied Trademen's Nat. Bank v. Midland Savings & Loan Co., 53 S.Ct. 17, 287 U.S. 615, 77 L.Ed. 534—Clemence v. Hudson & M. Ry. Co., C.C. A.N.Y., 11 F.2d 913, reversing. D.C., 8 F.2d 317—Royal Bank of Canada v. Universal Export Corporation, C.C.A.N.Y., 10 F.2d 669—Jaslow v. Waterbury Co., C.C.A.N.Y., 296 F. 363—Eastman Kodak Co. v. Blackmore, C.C.A.N.Y., 277 F. 694.
25 C.J. p 972 notes 58 [a], 59.

97. U.S.—Slocum v. New York L. Ins. Co., Pa., 33 S.Ct. 523, 228 U.S. 364, 57 L.Ed. 879, Ann.Cas.1914D 1029, modifying 177 F. 842, 101 C. C.A. 56.
25 C.J. p 972 note 60.

98. U.S.—Order of United Commercial Travelers of America v. Tripp, C.C.A.Colo., 63 F.2d 37—Williams v. Thrasher, C.C.A.Tex., 62 F.2d 944, certiorari denied Thrasher v. Williams, 53 S.Ct. 691, 289 U.S. 748, 77 L.Ed. 1493—Travelers' Ins. Co. of Hartford, Conn., v. Miller, C.C. A.Ill., 62 F.2d 910—F. W. Woolworth Co. v. Davis, C.C.A.Okl., 41 F.2d 342, certiorari denied 51 S. Ct. 33, 282 U.S. 859, 75 L.Ed. 760.
25 C.J. p 972 note 61.

99. U.S.—Baltimore & Carolina Line v. Redman, C.C.A.N.Y., 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636, modifying, D.C., Redman v. Baltimore & Carolina Line, 70 F.2d 635, certiorari granted Baltimore & Carolina Line v. Redman, 55 S.Ct. 89, 293 U.S. 541, 79 L.Ed. 646, certiorari denied Redman v. Baltimore & Carolina Line, 55 S.Ct. 98, 293 U. S. 577, 79 L.Ed. 674, and qualifying Slocum v. New York Life Ins. Co., 33 S.Ct. 523, 228 U.S. 364, 57 L.Ed. 879, Ann.Cas.1914D 1029—Brennan v. Baltimore & O. R. Co., C.C.A.N.Y., 115 F.2d 555, reversing, D.C., 33 F.Supp. 158, certiorari denied 61 S.Ct. 614, 312 U.S. 685, 85 L.Ed. 1123—Limbershaft Sales Corporation v. A. G. Spalding & Bros., C.C.A.N.Y., 111 F.2d 675—Conway v. O'Brien, C.C.A.Vt., 111 F.2d 611, certiorari granted 61 S.Ct. 61, 311 U.S. 634, 85 L.Ed. 403, motion denied 61 S.Ct. 610, reversed on other grounds 61 S.Ct. 634, 312 U.S. 492, 85 L.Ed. 969—Eastern Livestock Co-op. Marketing Ass'n v. Dickenson, C.C.A.Va., 107 F.2d 116—Lewis-Kures v. Edward R. Walsh & Co., C.C.A.N.Y., 102 F.2d 42, certiorari denied 60 S.Ct. 132, 308 U.S. 596, 84 L.Ed. 499—New York Life Ins. Co. v. Brown, C.C.A.S.C., 99 F.2d 199, reversing, D.C., Brown v. New York Life Ins. Co., 22 F. Supp. 82, certiorari denied 59 S. Ct. 487, 306 U.S. 638, 83 L.Ed. 1039—New England Mut. Life Ins. Co. of Boston, Mass. v. Cohen, C.C.A. N.Y., 83 F.2d 163, rehearing denied 83 F.2d 1014.

1. U.S.—U. S. v. Halliday, C.C.A.S. C., 116 F.2d 812, certiorari granted Halliday v. U. S., 62 S.Ct. 62, 314 U.S. 588, 86 L.Ed. 474, and reversed on other grounds 62 S.Ct. 438, 315 U.S. 94, 86 L.Ed. 711—Waggaman v. General Finance Co. of Philadelphia, C.C.A.Pa., 116 F.2d 254—Southern Ry. Co. v. Bell, C.C.A.Va., 114 F.2d 341—Williams v. New Jersey-New York Transit Co., C.C.A. N.Y., 113 F.2d 649, certiorari denied 61 S.Ct. 393, 311 U.S. 712, 85 L.Ed. 463—Ferro Concrete Const. Co. v. U. S., for Use and Benefit of Luchini, C.C.A.R.I., 112 F.2d 488, certiorari denied U. S. for Use and Benefit of Luchini v. Ferro Concrete Const. Co., 61 S.Ct. 136, 311 U.S. 697, 85 L.Ed. 452—Reliance Life Ins. Co. v. Burgess, C.C.A. Mo., 112 F.2d 234, certiorari denied Burgess v. Reliance Life Ins. Co., 61 S.Ct. 137, 311 U.S. 699, 85 L.Ed. 453, rehearing denied 61 S.Ct. 391, 311 U.S. 730, 85 L.Ed. 475—Limbershaft Sales Corporation v. A. G. Spalding & Bros., C.C.A.N.Y., 11 F. 2d 675—Lowden v. Denton, C.C.A. Mo., 110 F.2d 274, certiorari denied Denton v. Lowden, 60 S.Ct. 1100, 310 U.S. 652, 84 L.Ed. 1417—Massachusetts Protective Ass'n v. Mouber, C. C.A.Mo., 110 F.2d 203—Home Life Ins. Co. of New York v. Moon, C.C.A. W.Va., 110 F.2d 184, certiorari denied Moon v. Home Life Ins. Co. of New York, 61 S.Ct. 15, 311 U.S. 659, 85 L.Ed. 422, rehearing denied 61 S.Ct. 129, 311 U.S. 726, 85 L.Ed. 473, and 61 S.Ct. 173, 311 U.S. 728, 85 L.Ed. 473—Mutual Ben. Health & Accident Ass'n v. Moon, C.C.A.W. Va., 110 F.2d 184, certiorari denied Moon v. Mutual Ben. Health & Accident Ass'n, 61 S.Ct. 15, 311 U.S. 659, 85 L.Ed. 422, rehearing denied 61 S.Ct. 129, 311 U.S. 726, 85 L.Ed. 473, and 61 S.Ct. 173, 311 U.S. 728, 85 L.Ed. 473—Leader v. Apex Hosiery Co., C.C.A.Pa., 108 F.2d 71, certiorari granted Apex Hosiery Co. v. Leader, 60 S.Ct. 589, 309 U. S. 644, 84 L.Ed. 997, affirmed 60 S. Ct. 982, 310 U.S. 469, 84 L.Ed. 1311, 128 A.L.R. 1044.

2. U.S.—Ætna Ins. Co. v. Kennedy,

trial in the alternative, if the trial judge denies judgment notwithstanding the verdict and also denies a new trial, on appeal the circuit court of appeals may reverse the judgment and itself enter judgment notwithstanding the verdict[3] or may reverse and remand for a new trial for errors of law.[4] On the other hand, if, in such case, the trial judge enters judgment notwithstanding the verdict and in the alternative grants a new trial, only the action in entering the judgment would be a ground of appeal, and if the judgment is reversed, the case, on remand, would be governed by the trial judge's award of a new trial;[5] and if the motion for judgment notwithstanding the verdict was granted without a ruling in the alternative, and the judgment is reversed by the circuit court of appeals, the cause must be remanded to the district court to hear and rule on the motion for new trial.[6] Where the court erroneously sustained a motion for a directed verdict, or, in the alternative, for a new trial, and set aside a verdict and judgment, however, the circuit court of appeals was not required to remand the case with directions to pass on the motion for new trial where the only question involved on the appeal was whether the case was one to be submitted to a jury, it being proper for the appellate court to reverse with directions to reinstate the verdict of the jury.[7] Where plaintiff moved for a new trial after an unconditional verdict for defendant, but not for judgment notwithstanding the verdict, and the district court denied the motion and entered judgment for defendant, the circuit court of appeals has jurisdiction to reverse and remand for a new trial but is without power, consistently with the Seventh Amendment, to direct the district court to give judgment for plaintiff.[8] Where the verdict of the jury is a special one covering every controverted issue in the case, it is the duty of the circuit court of appeals on reversal to direct the entry of the proper judgment.[9]

In an equity suit it is the duty of the circuit court of appeals to enter, or direct the lower court to enter, the decree which should have been entered,[10]

to Use of Bogash, Pa., 57 S.Ct. 809, 301 U.S. 389, 81 L.Ed. 1177, modifying, C.C.A., Kennedy to Use of Bogash v. Ætna Ins. Co., 87 F.2d 683, certiorari granted Ætna Ins. Co. v. Kennedy, to Use of Bogash, 57 S.Ct. 670, 300 U.S. 651, 81 L. Ed. 862—Springfield Fire & Marine Ins. Co. v. Kennedy, to Use of Bogash, Pa., 57 S.Ct. 809, 301 U. S. 389, 81 L.Ed. 1177, modifying, C.C.A., Kennedy, to Use of Bogash v. Springfield Fire & Marine Ins. Co., 87 F.2d 683, certiorari granted Springfield Fire & Marine Ins. Co. v. Kennedy, to Use of Bogash, 57 S.Ct. 670, 300 U.S. 651, 81 L.Ed. 862—Liverpool & London & Globe Ins. Co., Limited v. Kennedy, to Use of Bogash, Pa., 57 S.Ct. 809, 301 U.S. 389, 81 L.Ed. 1177, modifying, C.C.A., Kennedy, to Use of Bogash v. Liverpool & London & Globe Ins. Co., Limited, 87 F.2d 683, certiorari granted Liverpool & London & Globe Ins. Co., Limited v. Kennedy, to Use of Bogash, 57 S.Ct. 670, 300 U.S. 651, 81 L.Ed. 862—Wolfe v. Pennsylvania R. Co., C.C.A.N.Y., 82 F.2d 164—Heffner v. Pennsylvania R. Co., C.C.A.N.Y., 81 F.2d 28.

3. U.S.—Montgomery Ward & Co. v. Duncan, Ark., 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147, modifying, C.C. A., Duncan v. Montgomery Ward & Co., 108 F.2d 848, reversing, D.C., 27 F.Supp. 4, certiorari granted Montgomery Ward & Co. v. Duncan, 60 S.Ct. 809, 309 U.S. 650, 84 L.Ed. 1001, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389—Great Northern Life Ins. Co. v. Vince, C.C.A.Mich., 118 F.2d 232, certiorari denied 62 S.Ct. 71, 314 U.S. 637, 86 L.Ed. 511—Brunet v. S. S. Kresge Co., C.C.A.Ill., 115 F. 2d 713, certiorari denied 61 S.Ct. 1102, 313 U.S. 577, 85 L.Ed. 1535.

When rule inapplicable

An appellate court reviewing action of district court on motion under federal rule for new trial or for entry of judgment notwithstanding verdict may direct the action to be taken with respect to such motion by district court on remand, but such rule is not applicable where overruling of motion for judgment non obstante veredicto is neither assigned as error nor considered by appellate court.—Madden Furniture v. Metropolitan Life Ins. Co., C.C.A.Fla., 127 F.2d 837.

4. U.S.—Montgomery Ward & Co. v. Duncan, Ark., 61 S.Ct. 189, 311 U.S. 243, 85 L.Ed. 147, modifying, C.C. A., Duncan v. Montgomery Ward & Co., 108 F.2d 848, reversing, D.C., 27 F.Supp. 4, certiorari granted Montgomery Ward & Co. v. Duncan, 60 S.Ct. 809, 309 U.S. 650, 84 L.Ed. 1001, motion denied 60 S.Ct. 1073, 310 U.S. 612, 84 L.Ed. 1389.

Ordering new trial or other proceedings in lower court see infra § 301 a (7) (d).

5. U.S.—Montgomery Ward & Co. v. Duncan, supra.

6. U.S.—Montgomery Ward & Co. v. Duncan, supra—Vearn v. Crane, C. C.A.Ind., 114 F.2d 896—Pruitt v. Hardware Dealers Mut. Fire Ins. Co., C.C.A.Ga., 112 F.2d 140, followed in Pruitt v. Caledonian Ins. Co., 112 F.2d 574 and Pruitt v. Hardware Mut. Fire Ins. Co. of Minnesota, Minneapolis, Minn., 112 F.2d 574.

7. U.S.—Jaggers v. Southeastern Greyhound Lines, C.C.A.Tenn., 126 F.2d 762, reversing, D.C., 34 F. Supp. 667.

8. U.S.—Ætna Ins. Co. v. Kennedy, to Use of Bogash, Pa., 57 S.Ct. 809, 301 U.S. 389, 81 L.Ed. 1177, modifying, C.C.A., Kennedy, to Use of Bogash v. Ætna Ins. Co., 87 F.2d 683, certiorari granted Ætna Ins. Co. v. Kennedy, to Use of Bogash, 57 S.Ct. 670, 300 U.S. 651, 81 L.Ed. 862—Springfield Fire & Marine Ins. Co. v. Kennedy, to Use of Bogash, Pa., 57 S.Ct. 809, 301 U.S. 389, 81 L.Ed. 1177, modifying, C.C. A., Kennedy, to Use of Bogash v. Springfield Fire & Marine Ins. Co., 87 F.2d 683, certiorari granted Springfield Fire & Marine Ins. Co. v. Kennedy, to Use of Bogash, 57 S.Ct. 670, 300 U.S. 651, 81 L.Ed. 862—Liverpool & London & Globe Ins. Co., Limited v. Kennedy, to Use of Bogash, Pa., 57 S.Ct. 809, 301 U.S. 389, 81 L.Ed. 1177, modifying, C.C. A., Kennedy, to Use of Bogash v. Liverpool & London & Globe Ins. Co., Limited, 87 F.2d 683, certiorari granted Liverpool & London & Globe Ins. Co., Limited v. Kennedy, to Use of Bogash, 57 S.Ct. 670, 300 U.S. 651, 81 L.Ed. 862.

9. U.S.—U. S. v. Stamey, C.C.A. Wash., 48 F.2d 150, reversing, D.C., Stamey v. U. S., 42 F.2d 879.

10. U.S.—Edwards v. Lain, C.C.A. Ill., 112 F.2d 343—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—In re Gustav Schaefer Co., C.C.A.Ohio, 103 F.2d 237, certiorari denied

but final judgment will not be given where it is more equitable or justice requires that the case be remanded for a new trial or other proceedings.[11] On appeal from a decree granting an interlocutory injunction, where the question is raised whether the cause is one of equitable cognizance and the circuit court of appeals is of the opinion that equity has no jurisdiction, it may dissolve the injunction and dismiss the bill.[12] It is also proper to direct the dismissal of the bill, where the court determines that complainant is not entitled to sue,[13] or where requisite jurisdictional findings were not made.[14] On appeal from a decree denying an interlocutory injunction, it was improper for the circuit court of appeals to treat the case as ripe for final disposition by remanding it with directions to enter a decree granting an injunction without specifying its scope.[15]

Want of jurisdiction of lower court. The appellate court will not, on reversing a judgment, remand the cause for further proceedings, but will itself render final judgment, or direct or render a judgment of dismissal or nonsuit, where the court below had no jurisdiction of the subject matter.[16] Where it appears that a necessary defendant was not joined, a decree of dismissal on the merits should not be affirmed, but the circuit court of appeals should reverse with directions to dismiss the bill for want of a necessary party.[17] Similarly, on appeal from a decree of the circuit court sustaining a demurrer to the bill and dismissing the suit on the merits, where the bill contained no averment of the amount or value in controversy, which was essential to give a federal court jurisdiction, the decree was reversed, with directions to enter a dismissal for want of jurisdiction and without prejudice.[18] Where the district court did not pass on the merits of the case, but dismissed it for lack of ju-

Wells v. Boyle, 60 S.Ct. 96, 308 U.S. 579, 84 L.Ed. 485—Millers' Mut. Fire Ins. Ass'n of Illinois v. Warroad Potato Growers Ass'n, C.C.A. Minn., 94 F.2d 741—Union Central Life Ins. Co. of Cincinnati, Ohio v. Imsland, C.C.A.S.D., 91 F.2d 365—Baxter v. McGee, C.C.A.Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1401—Johnson v. Umsted, C.C.A.Ark., 64 F.2d 316—Weeks v. Pratt, C.C.A.Fla., 43 F.2d 53, certiorari denied Pratt v. Weeks, 51 S.Ct. 106, 282 U.S. 892, 75 L.Ed. 756—Equitable Life Assur. Soc. of U. S. v. Schwartz, C.C.A.Fla., 42 F.2d 646—Emerson-Brantingham Implement Co. v. Johnson, C.C.A.Neb., 1 F.2d 212—Unkle v. Wills, C.C.A. Okl., 281 F. 29—Alwood v. Lewis, Ga., 254 F. 810, 166 C.C.A. 256.
4 C.J. p 1192 notes 58, 59.

Denial of relief
In ordinary equity case, relief would be denied on appeal, if record disclosed no liability.—Hughes v. Reed, C.C.A.Okl., 46 F.2d 435.

Suspension of suit
Beneficiaries of life policy would be entitled to have insurer's equity suit for cancellation of policy remanded to district court with instruction for proper order of suspension until determination of beneficiaries' action at law in state court on policy if any prejudice could be shown if this were not done, notwithstanding beneficiaries' failure to appeal from that portion of decree sustaining jurisdiction of district court as court of equity.—Mutual Life Ins. Co. of New York v. Cunningham, C.C.A.Iowa, 87 F.2d 842.

Temporary injunction
Where interlocutory injunction against enforcement of Agricultural Adjustment Act was improvidently issued because no finding that prosecutions were threatened was made, and government's attorneys stated that no prosecutions would be instituted, circuit court of appeals in vacating injunction and remanding cause would not continue temporary injunction pending further hearing by district court.—Sparks v. Mellwood Dairy, C.C.A.Ky., 74 F.2d 695.

Time governing
On a writ of error, an appellate court would direct the entry of the order which should have been made by the trial court on the day when it entered the judgment under review, but on appeal in equity there was no such rigid rule.—Lindley v. Denver, Ohio, 259 F. 83, 170 C.C.A. 151.

11. U.S.—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 104 F.2d 863—Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co., Pa., 185 F. 487, 107 C.C.A. 587, denying motion Exchange Mut. Fire Ins. Co. v. Warsaw-Wilkinson Co., 181 F. 330, 104 C.C.A. 518.

Absence of proof of critical facts
Appellate court will not pass final decree on appeal for defendants in equity suit, in absence of proof of critical facts, susceptible of ready determination from records of plaintiff, its agent or both or inquiry from officers of either, but will vacate decree appealed from and remand cause for findings on supplemental proofs as to such facts.—Kansas Educational Ass'n of M. E. Church for State of Kansas v. McMahan, C.C.A.Okl., 76 F.2d 957.

12. U.S.—Green v. Mills, S.C., 69 F. 852, 16 C.C.A. 516, 30 L.R.A. 90, appeal dismissed 16 S.Ct. 132, 159 U.S. 651, 40 L.Ed. 293.

13. U.S.—Metropolitan Water Co. v. Kaw Valley Drain. Dist., Kan., 32 S.Ct. 246, 223 U.S. 519, 56 L.Ed. 533.

14. U.S.—Sparks v. Hart Coal Corporation, C.C.A.Ky., 74 F.2d 697, vacating, D.C., Hart Coal Corporation v. Sparks, 7 F.Supp. 16.

15. U.S.—City of Hammond v. Schappi Bus Line, Ind., 48 S.Ct. 66, 275 U.S. 164, 72 L.Ed. 218, modifying, C.C.A., Schappi Bus Line v. City of Hammond, 11 F.2d 940, certiorari granted City of Hammond v. Schappi Bus Line, 47 S.Ct. 92, 273 U.S. 675, 71 L.Ed. 834, and which is followed in, C.C.A., Farina Bus Line & Transportation Co. v. City of Hammond, 11 F.2d 943, certiorari granted City of Hammond v. Farina Bus Line & Transportation Co., 47 S.Ct. 92, 273 U.S. 675, 71 L.Ed. 834, and in which is modified 48 S.Ct. 70, 275 U.S. 173, 72 L.Ed. 222.

16. U.S.—Cohn v. Dowling, C.C.A. Mich., 123 F.2d 408—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 685—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 684—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 109 A.L.R. 1179—Norge Corporation v. Long Island R. Co., C.C.A.N.Y., 77 F.2d 312, certiorari denied 56 S.Ct. 137, 296 U.S. 616, 80 L.Ed. 437—Ashley v. Board of Sup'rs of Presque Isle County, Mich., 60 F. 55, 8 C.C.A. 455.

17. U.S.—Gnerich v. Rutter, Cal., 44 S.Ct. 532, 265 U.S. 388, 68 L.Ed. 1068, reversing, C.C.A., Gnerich v. Yellowley, 277 F. 632.

18. U.S.—Cochrane v. Childs, Ill., 111 F. 433, 49 C.C.A. 421.

risdiction, and there was no assignment of error relating to the merits, the circuit court of appeals cannot pass on the merits, and in reversing the dismissal on the jurisdictional point can only remand the cause for further proceedings.[19]

Insufficient cause of action or sufficient defense. Where the complaint sets forth no cause of action and no amendment to correct its deficiency can properly be granted, the circuit court of appeals may direct that judgment be entered for defendant.[20] In a case tried without a jury, where there was a full finding of facts and the facts as found affirmatively establish a complete defense, the circuit court of appeals will, on reversing a judgment for plaintiff, direct the entry of that judgment which should have been entered.[21] Frequently in equitable actions, but also sometimes in actions at law, an appellate court, on reversing a judgment or decree for plaintiff and deciding that plaintiff has not the capacity to maintain the suit or cannot recover in any event in that particular suit, will dismiss the bill or complaint or nonsuit plaintiff,[22] or direct the lower court to dismiss the bill or complaint.[23] Dismissal of the bill has been directed on reversal of an order or decree granting a temporary injunction.[24]

Controversy becoming moot. Where the controversy has become moot, the cause on reversal will be dismissed.[25]

Sufficient cause of action and insufficient defense. Where the facts are practically undisputed, the amount of recovery certain, plaintiff has made out a prima facie case, and defendant, although having full opportunity to do so, has established no defense sufficient to prevent or bar the right of recovery, the appellate court, on reversing a judgment in defendant's favor, will sometimes render the proper judgment for plaintiff, or direct the court below to do so.[26] The court in reversing a final judgment sustaining a demurrer to the petition is not authorized to direct judgment for plaintiff in the nature of a judgment non obstante,[27] especially where plaintiff omitted an essential averment, even though the absence thereof was waived by not demurring on such ground.[28]

Conformity of judgment to verdict. Provided the case is not one requiring further proceedings,[29] where a wrong judgment is rendered on a proper verdict or findings of fact, the appellate court may reverse and render, or direct, the judgment which should have been given below.[30] The rule applies

19. U.S.—Stephenson v. Equitable Life Assur. Soc. of U. S., C.C.A.Va., 92 F.2d 406.

20. U.S.—Tompkins v. Erie R. Co., C.C.A.N.Y., 98 F.2d 49, conforming to mandate Erie R. Co. v. Tompkins, 58 S.Ct. 817, 304 U.S. 64, 82 L.Ed. 1188, 114 A.L.R. 1487, reversing, C.C.A., 90 F.2d 603, certiorari granted Erie R. Co. v. Tompkins, 58 S.Ct. 50, 302 U.S. 671, 82 L.Ed. 518, certiorari denied Tompkins v. Erie R. Co., 59 S.Ct. 108, 305 U.S. 637, 83 L.Ed. 410, rehearing denied 59 S.Ct. 229, 305 U.S. 673, 83 L.Ed. 436.

4 C.J. p 1189 note 4.

21. U.S.—U. S. v. Stark, C.C.A.Ohio, 32 F.2d 453, reversing, D.C., Stark v. U. S., 24 F.2d 237.

22. U.S.—McDonald v. Robertson, C.C.A.Mich., 104 F.2d 945—Ely v. Greenbaum, C.C.A.N.Y., 85 F.2d 501—Arizona Edison Co. v. Southern Sierras Power Co., C.C.A.Ariz., 17 F.2d 739, certiorari denied Southern Sierras Power Co. v. Arizona Edison Co., 47 S.Ct. 768, 274 U.S. 757, 71 L.Ed. 1336.

4 C.J. p 1190 note 12.

23. U.S.—Limbershaft Sales Corporation v. A. G. Spalding & Bros., C.C.A.N.Y., 111 F.2d 675—Moody v. Johnston, C.C.A., 70 F.2d 835.

4 C.J. p 1190 note 13.

24. U.S.—Deckert v. Independence Shares Corporation, Pa., 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189, reversing, C.C.A., Independence Shares Corporation v. Deckert, 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F.Supp. 763, certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000 and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000—Lyons v. Eagle-Picher Lead Co., C.C.A. Okl., 90 F.2d 321, remanding cause, D.C., Eagle-Picher Lead Co. v. Madden, 15 F.Supp. 407—Schell v. Food Machinery Corporation, C.C.A.Fla., 87 F.2d 385, certiorari denied Food Machinery Corporation v. Schell, 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 883—Sapulpa Petroleum Co. v. McCray, C.C.A.Okl., 4 F.2d 645, certiorari denied McCray v. Sapulpa Petroleum Co., 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412—Susquehanna Coal Co. v. Pratt & Young, C.C.A.Mass., 276 F. 919, reversing, D.C., Pratt & Young v. Susquehanna Coal Co., 269 F. 667, petition dismissed 42 S.Ct. 313, 258 U.S. 632, 66 L.Ed. 801—U. S. v. Western Union Telegraph Co., C.C.A.N.Y., 272 F. 893, affirming D.C., 272 F. 311, and reversed on other grounds 43 S.Ct. 91, 260 U.S. 754, 67 L.Ed. 497—Bell & Howell Co. v. Bliss, C.C.A.Ill., 262 F. 131.

4 C.J. p 1190 note 18.

25. U.S.—Rivers v. Miller, C.C.A. Ga., 112 F.2d 439, reversing, D.C., Miller v. Rivers, 31 F.Supp. 540—Kishi v. Humble Oil & Refining Co., C.C.A.Tex., 62 F.2d 984—Kunze v. Auditorium Co., C.C.A.Minn., 52 F.2d 444.

Controversy in litigation in state court

Temporary restraining order was reversed, with directions to vacate order and retain cause, where matter had become moot but merits of controversy were still in litigation in state court.—Santa Anna Gas Co. v. Coleman Gas & Oil Co., C.C.A.Tex., 61 F.2d 975.

26. U.S.—American Lumber & Mfg. Co. v. Equitable Life Assur. Soc. of U. S., C.C.A.Wis., 45 F.2d 504.

27. U.S.—Wm. J. Friday & Co. v. U. S., C.C.A.Pa., 61 F.2d 370, reversing, D.C., 48 F.2d 225.

28. U.S.—Wm. J. Friday & Co. v. U. S., supra.

29. U.S.—Mayfield v. Ætna Life Ins. Co., C.C.A.Tex., 100 F.2d 199.

30. U.S.—Skelley v. New York, N. H. & H. R. Co., C.C.A.N.Y., 93 F.2d 479—Sheehan v. New York, N. H. & H. R. Co., C.C.A.N.Y., 93 F.2d 442, reversing, D.C., 18 F.Supp. 635, certiorari denied 58 S.Ct. 942, 304 U.S. 560, 82 L.Ed. 1527.

Reinstatement of original judgment

Where federal district court followed procedure substantially the

and the appellate court will, on reversal, order judgment on the verdict where the trial court erroneously dismissed the complaint[31] or rendered judgment contrary to the verdict on a point of law reserved.[32]

Trial before master. Where the circuit court of appeals determines that the district court erred in disapproving findings and conclusions of a master to whom the case had been referred, the appellate court, to avoid unnecessary prolongation of the litigation, may direct that the master's report allowing damages be approved in an amount determined by the circuit court of appeals to be reasonable.[33]

After several trials. Where a motion to set aside a verdict in favor of one party and to allow a new trial is granted through abuse of discretion, and on the second trial a verdict is returned and judgment rendered for the opposite party, on appeal the second judgment will be reversed and the cause remanded with direction to enter judgment on the first verdict.[34]

(d) Ordering New Trial or Other Proceeding in Lower Court

The circuit court of appeals has power, under proper circumstances, to order a cause remanded for a new trial or other appropriate proceedings, and will exercise its discretion by ordering such proceedings whenever it appears that the ends of justice will best be served thereby.

Although final judgment may often be rendered in accordance with the rules stated supra § 301 a (7) (c), the circuit court of appeals is usually held to have the power, under proper circumstances, to order the case remanded to the lower court for a new trial or other appropriate proceedings.[35] This power is largely, although not entirely, discretionary,[36] but the court, on reversal, will usually exercise its discretion by ordering a new trial or further proceedings whenever it appears that the ends of justice will best be served by such course,[37] and will refuse to make such an order where it appears that it is unnecessary and would serve no useful purpose.[38] The circuit court of appeals should not leave in effective operation the final decree of the district court and at the same time revest that court with jurisdiction to retry the cause.[39] While the awarding of a new trial on reversal was much more common in actions at law than in actions in equity,[40] an equity court had pow-

same as if it had received original verdict for plaintiff conditionally on points of law reserved and entered judgment for defendant, circuit court of appeals had power to order the district court to reinstate the original verdict and judgment for plaintiff.—Maty v. Grasselli Chemical Co., C.C.A.N.J., 98 F.2d 877.

31. U.S.—Hoffman v. American Mills Co., C.C.A.N.Y., 288 F. 768, certiorari denied American Mills Co. v. Hoffmann, 44 S.Ct. 6, 263 U.S. 701, 68 L.Ed. 514.

32. U.S.—Hunt v. Fidelity & Deposit Co. of Maryland, C.C.A.Pa., 95 F.2d 491, supplementing 92 F.2d 75.

33. U.S.—Aladdin Mfg. Co. v. Mantle Lamp Co. of America, C.C.A. Ill., 116 F.2d 708.

34. U.S.—Marshall's U. S. Auto Supply v. Cashman, C.C.A.Kan., 111 F. 2d 140, certiorari denied Cashman v. Marshall's U. S. Auto Supply, 61 S.Ct. 26, 311 U.S. 667, 85 L.Ed. 428 —Pettingill v. Fuller, C.C.A.Vt., 107 F.2d 933.

35. U.S.—Realty Acceptance Corporation v. Montgomery, Del., 52 S. Ct. 215, 284 U.S. 547, 76 L.Ed. 476, affirming, C.C.A., Montgomery v. Realty Acceptance Corporation, 51 F.2d 642, certiorari granted Realty Acceptance Corporation v. Montgomery, 52 S.Ct. 25, 284 U.S. 604, 76 L.Ed. 518—Thompson v. Murphy, C.C.A.Mo., 93 F.2d 38.

36. U.S.—Thompson v. Murphy, supra.

37. U.S.—Knapp v. Imperial Oil & Gas Products Co., C.C.A.W.Va., 130 F.2d 1—White Bear Theatre Corporation v. State Theatre Corporation, C.C.A.Minn., 129 F.2d 600—White v. Federal Deposit Ins. Corporation, C.C.A.Va., 124 F.2d 429, denying rehearing 122 F.2d 770—Adams v. Pennsylvania R. Co., C. C.A.Ind., 117 F.2d 649—Missouri Pac. R. Co. v. Baldwin, C.C.A.Ark., 117 F.2d 510—Samuel Goldwyn, Inc., v. United Artists Corporation, C.C.A.Del., 113 F.2d 703—Reisberg v. Walters, C.C.A.Mich., 111 F.2d 595—American Dirigold Corporation v. Dirigold Metals Corporation, C.C.A.Mich., 104 F.2d 863—Ayer-Kempton Corporation v. Ayer-O'Donnell Mfg. Co., C.C.A. Conn., 298 F. 748—U. S. v. Fernandez, Tex., 254 F. 302, 166 C.C.A. 42 —Mundy v. Stevens, Pa., 61 F. 77, 9 C.C.A. 366.

4 C.J. p 1193 note 65.

Transfer to law side of court

(1) Under former Equity Rules, rule 22, appellate court, on reversal of decree in equity, directed transfer to law side of court, where plaintiff was entitled to damages.—Diamond Alkali Co. v. P. C. Tomson & Co., C. C.A.Pa., 35 F.2d 117, reversing, D.C., Diamond Alkali Co. v. P. C. Thomson & Co., 23 F.2d 515.

(2) Appellate court would transfer cause from law to equity or vice versa on its own motion, regardless of failure properly to raise question in lower court when otherwise failure of justice might result.—Clarksburg Trust Co. v. Commercial Casualty Ins. Co., C.C.A.W.Va., 40 F.2d 626.

38. U.S.—Goldstein v. Franklin Square Nat. Bank, C.C.A.N.Y., 107 F.2d 393, reversing, D.C., 26 F. Supp. 890, mandate conformed to 31 F.Supp. 66—Baxter v. McGee, C.C.A.Ark., 82 F.2d 695, certiorari denied McGee v. Baxter, 56 S.Ct. 948, 298 U.S. 680, 80 L.Ed. 1401—Western Union Telegraph Co. v. Aldridge, C.C.A.Cal., 66 F.2d 26, 89 A.L.R. 352—Barnebey v. Barron G. Collier, Inc., C.C.A.Neb., 65 F.2d 864—Delaware & H. Co. v. Stankus, C.C.A.Pa., 63 F.2d 887—Border Gas Co. v. Windrow, C.C.A.Tex., 3 F.2d 974—Olivier v. Mt. Union Tanning & Extract Co., C.C.A.Pa., 264 F. 601, reversing, D.C., 253 F. 593.

4 C.J. p 1189 note 4.

39. U.S.—Duke Power Co. v. Greenwood County, S.C., 57 S.Ct. 202, 299 U.S. 259, 81 L.Ed. 178, reversing, C.C.A., Greenwood County, S. C., v. Duke Power Co., 81 F.2d 986, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 12 F. Supp. 70, remanded, C.C.A., Greenwood County v. Duke Power Co., 79 F.2d 995, reversing, D.C., Duke Power Co. v. Greenwood County, S. C., 10 F.Supp. 854, certiorari granted Duke Power Co. v. Greenwood County, 56 S.Ct. 941, 298 U.S. 651, 80 L.Ed. 1379.

40. U.S.—Mutual Reserve Life Ins.

er to remand for a new trial or other proceedings on reversal in an action in equity,[41] as where a motion to dismiss on the merits at the close of plaintiff's case was granted.[42]

Nature and extent of proceedings ordered. The circuit court of appeals, on remanding a cause, may in its discretion, either grant a complete new trial or restrict or limit the purpose of the proceedings or the issues to be tried in the lower court,[43] according to which course is demanded by the circumstances or the ends of justice.[44] Indeed, the directions, instructions, and limitations, imposed or given may be such that the subsequent proceedings in the lower court, whether or not denominated a new trial, fall short of being a full and unrestricted new trial of the original issues.[45] Where the error in the trial relates only to a certain issue which is in no way dependent for its proper trial on certain other issues already satisfactorily tried and a partial new trial will not work injustice to any of the parties concerned, the cause may be remanded, on reversal, for the trial of the issue erroneously tried, and for that alone.[46] Thus it has been held that a cause may be remanded for a trial of questions not passed on or submitted below;[47] and, if the only exceptions sustained relate to the question of damages or amount of recovery, the new trial may be ordered on the question alone.[48] To justify the court in limiting the issues on a new trial to the question of damages, however, it should

Co. v. Heidel, Mo., 161 F. 535, 88 C.C.A. 477.

41. U.S.—Lee v. State Bank & Trust Co., C.C.A.N.Y., 38 F.2d 45.

42. U.S.—Lee v. State Bank & Trust Co., supra.

43. U.S.—McCarthy v. Wynne, C.C.A.Okl., 126 F.2d 620.

Ruling on motion and exception

Jury-waived case in which defendant's motion for judgment was denied after case was taken under advisement without resuming trial would be reversed to enable ruling on motion to be made and exception to be taken in progress of trial which could be incorporated in bill of exceptions, where defendant had done all it could to save its rights and record showed that court after trial allowed exception.—U. S. v. Martin, C.C.A.Kan., 80 F.2d 460.

44. U.S.—Yellow Cab Co. v. Keane, C.C.A.Ill., 93 F.2d 290.

Error requiring complete new trial

Where evidence erroneously rejected was offered by vessel owner not merely to show extent of seaman's injuries, but to show nonexistence of any injury, judgment in favor of seaman would be reversed in its entirety and would not be upheld as to recovery on count for maintenance and cure while permitting retrial only on issue of damages.—Ulm v. Moore-McCormack Lines, C.C.A.N.Y., 117 F.2d 222, denying rehearing 115 F.2d 492, certiorari denied 61 S.Ct. 941, 313 U.S. 567, 85 L.Ed. 1525.

Constitutional questions

On retrial of action to enjoin the drilling of an oil well under an order of the Texas railroad commission on ground that order violated local law and due process clause of Fourteenth Amendment, district court should first determine whether order was in conformity with laws and constitution of Texas, and, if not, any determination under the federal Constitution is rendered unnecessary, but if order is held valid under local law, the court is then bound to pass on any federal constitutional question presented.—Sun Oil Co. v. Burford, C.C.A.Tex., 130 F.2d 10, vacating 124 F.2d 467.

45. U.S.—Robinson v. Hays, Wash., 186 F. 295, 108 C.C.A. 373—Knight v. Illinois Cent. R. Co., Ky., 180 F. 368, 103 C.C.A. 514.
4 C.J. p 1194 note 85.

Remand for further proceedings

U.S.—National Popsicle Corporation v. Icyclair, Inc., C.C.A.Cal., 119 F. 2d 799—City of Sumter v. Spur Distributing Co., C.C.A.S.C., 110 F. 2d 649.

46. U.S.—Walling v. Goldblatt Bros., C.C.A.Ill., 128 F.2d 778, modifying, D.C., Fleming v. Goldblatt Bros., 39 F.Supp. 701—McCarthy v. Wynne, C.C.A.Okl., 126 F.2d 620—Ocean Accident & Guarantee Corporation v. Penick & Ford, C.C.A. Iowa, 101 F.2d 493—American Alliance Ins. Co. v. Brady Transfer & Storage Co., C.C.A.Iowa, 101 F. 2d 144—Yellow Cab Co. v. Keane, C.C.A.Ill., 93 F.2d 290—De La Torre v. National City Bank of New York, C.C.A.Puerto Rico, 91 F.2d 399, certiorari denied 58 S.Ct. 272, 302 U.S. 752, 82 L.Ed. 581—U. S. v. Phillips, C.C.A.Pa., 24 F.2d 195, reversing, D.C., Phillips v. U. S., 12 F.2d 598—Empire Fuel Co. v. Lyons, C.C.A.Ohio, 257 F. 890, 169 C.C.A. 40, certiorari denied 40 S.Ct. 393, 252 U.S. 582, 64 L.Ed. 727—Jenkins Bros. v. Kelly & Jones Co., Pa., 227 F. 211, 142 C.C.A. 11, modifying, D.C., 212 F. 328.

Issue as to jurisdiction of court

U.S.—Ward v. Morrow, C.C.A.S.D., 15 F.2d 660—Chicago & A. R. Co. v. Allen, C.C.A.Ill., 249 F. 280, 161 C. C.A. 288, certiorari denied Allen v. Chicago & A. R. Co., 38 S.Ct. 335, 246 U.S. 666, 62 L.Ed. 929—Chicago, R. I. & P. Ry. Co. v. Stephens, Tenn., 218 F. 535, 134 C.C.A. 263.

47. U.S.—In re Consolidated Rock Products Co., C.C.A.Cal., 114 F.2d 102, certiorari granted Consolidated Rock Products Co. v. Du Bois, 61 S.Ct. 71, 311 U.S. 636, 85 L.Ed. 405, and Badgley v. Du Bois, 61 S. Ct. 76, 311 U.S. 636, 85 L.Ed. 405, affirmed Consolidated Rock Products Co. v. Du Bois, 61 S.Ct. 675, 312 U.S. 510, 85 L.Ed. 982—Lea v. Vasco Products, C.C.A.Fla., 95 F.2d 59—Brogdex Co. v. Food Machinery Co., C.C.A.Del., 92 F.2d 787, reversing, D.C., 16 F.Supp. 228.

48. U.S.—McCarthy v. Wynne, C.C.A.Okl., 126 F.2d 620—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571, modifying, D.C., 22 F.Supp. 311—Fidelity & Deposit Co. of Maryland v. Port of Seattle, C.C.A.Wash., 106 F.2d 777, reversing, D.C., Port of Seattle v. Fidelity & Deposit Co. of Maryland, 24 F.Supp. 434, certiorari denied 60 S. Ct. 515, 309 U.S. 661, 84 L.Ed. 1009—Massachusetts Bonding & Insurance Co. v. John R. Thompson Co., C.C.A.Mo., 88 F.2d 825, certiorari denied 57 S.Ct. 941, 301 U.S. 707, 81 L.Ed. 1361—Mutual Life Ins. Co. of New York v. Sayre, C.C.A.Pa., 81 F.2d 752, modifying, D.C., Mutual Life Ins. Co. of New York v. Sayre, 79 F.2d 937—New England Newspaper Pub. Co. v. Bonner, C.C.A. Mass., 68 F.2d 880, certiorari denied 54 S.Ct. 630 and Bonner v. New England Newspaper Pub. Co., 54 S.Ct. 631, 292 U.S. 625, 78 L.Ed. 1480—May Department Stores Co. v. Bell, C.C.A.Mo., 61 F.2d 830—Cub Fork Coal Co. v. Fairmount Glass Works, C.C.A.Ind., 59 F.2d 539, certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S.Ct. 24, 287 U.S. 585, 77 L.Ed. 511, and reversed on other grounds 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439—Bird v. U. S., C.C.A.Cal., 24 F.2d 933—Farrar v. Wheeler, N.H., 145 F. 482, 75 C.C.A. 386.

clearly appear that all questions in respect to liability have been considered and passed on.[49] Where the amount of damages recovered was not plainly insufficient, and plaintiff apparently seeks to retain his present recovery, and, without jeopardizing that, to try to increase it, the circuit court of appeals will not remand the case with an order to assess additional damages.[50] The circuit court of appeals in setting aside an equity decree and remanding the cause on the assumption that the cause would be transferred to the law side of the court could not deprive the parties of their statutory right to waive a jury nor relieve the district judge of his primary responsibility to pass on the substantial character of plaintiff's evidence,[51] nor should the appellate court deprive itself, in the event of a second appeal, of the judgment of the district court on such evidence.[52] In an action tried by a district judge without a jury, where an order granting defendant's motion for dismissal was reversed, the district judge who heard plaintiff's evidence on the original trial may be directed to proceed with the case as though defendant's motion for dismissal had not been granted by him, without requiring plaintiff to offer his evidence a second time.[53]

It is quite generally held that on reversal and remand for new trial or other appropriate proceedings, an appellate court may and will, in furtherance of justice, direct that the parties, or either of them, amend or be given leave to amend their pleadings, where the pleadings are defective but not fatally so.[54] Accordingly, on reversal of cause and remand to trial court, it is sometimes ordered that plaintiff[55] or defendant[56] be given an opportunity to change, amend, or supplement his pleadings. Particularly is the appellate court inclined to do this on the reversal of an order sustaining a demurrer to the pleadings.[57] So on reversal of the judgment or decree for want of jurisdiction, the court below may be directed or authorized to allow an amendment,[58] or will be left to exercise its discretion in the matter,[59] unless the record shows that an amendment would not accord with the facts.[60] Although the answer admitted diversity of citizenship and existence of the requisite jurisdictional amount, the circuit court of appeals may permit the pleadings to be amended in the court below so as to present a jurisdictional issue.[61] Where judgment was reversed for want of jurisdiction in a case arising under the laws of the United States, the circuit court of appeals cannot allow an amendment to show jurisdiction based on diversity of citizenship,[62] nor can that court direct or instruct the

49. U.S.—American Locomotive Co. v. Harris, R.I., 239 F. 234, 152 C.C.A. 222.

50. U.S.—Empire Fuel Co. v. Lyons, Ohio, 257 F. 890, 169 C.C.A. 40, certiorari denied 40 S.Ct. 393, 252 U.S. 582, 64 L.Ed. 727.

51. U.S.—Louisville Trust Co. v. National Bank of Kentucky, C.C.A. Ky., 102 F.2d 137, certiorari denied 60 S.Ct. 76, 308 U.S. 564, 84 L.Ed. 474.

52. U.S.—Louisville Trust Co. v. National Bank of Kentucky, supra.

53. U.S.—Federal Deposit Ins. Corporation v. Mason, C.C.A.Pa., 115 F.2d 548.

54. U.S.—Fidelity & Guaranty Fire Corporation of Baltimore v. Bilquist, C.C.A.Wash., 99 F.2d 333—Fitzhugh v. Smith, C.C.A.Ark., 97 F.2d 893—Connecticut General Life Ins. Co. of Hartford, Conn. v. McClellan, C.C.A.Ohio, 94 F.2d 445—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—The Ada M., D.C.N.Y., 20 F.Supp. 331.

4 C.J. p 1195 note 96.

55. U.S.—Tahir Erk v. Glenn L. Martin Co., C.C.A.Md., 116 F.2d 865, reversing, D.C., 32 F.Supp. 722—Atwood v. National Bank of Lima, C.C.A.Ohio, 115 F.2d 861—Yarnell v. Hillsborough Packing Co., C.C.A. Fla., 70 F.2d 435, 92 A.L.R. 1475.

4 C.J. p 1196 note 97.

Changed conditions

Where an appeal from an order denying a temporary injunction has become moot by changed conditions, but the main case is pending on a motion to dismiss the complaint, the order will not be permitted to stand, but will be reversed, with direction to permit plaintiffs to amend their complaint if they so desire.—Dakota Coal Co. v. Fraser, C.C.A.N.D., 267 F. 130.

When relief denied

After trial and determination on appeal on the theory that defendants' dictionary was a revision of one, the copyright to which plaintiff had owned before its expiration, plaintiff cannot change his theory by alleging that it was a revision of a different dictionary.—Saalfield Pub. Co. v. G. & C. Merriam Co., Ohio, 238 F. 1, 151 C.C.A. 77, certiorari denied 37 S.Ct. 478, 243 U.S. 651, 61 L.Ed. 947.

Further pleadings held unnecessary

U.S.—Magnolia Petroleum Co. v. Suits, C.C.A.Okl., 43 F.2d 280, certiorari denied Suits v. Magnolia Petroleum Co., 51 S.Ct. 35, 282 U.S. 861, 75 L.Ed. 762.

56. U.S.—Publicker v. Shallcross, C.C.A.Pa., 103 F.2d 596.

57. U.S.—Hubbard v. Manhattan Trust Co., N.Y., 87 F. 51, 30 C.C.A. 520.

58. U.S.—Alderman v. Elgin, J. & E. Ry. Co., C.C.A.Ill., 125 F.2d 971.

25 C.J. p 780 note 18.

59. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., C.C.A.Mo., 121 F.2d 561, modifying 119 F.2d 892—Levering & Garrigues Co. v. Morrin, C.C.A.N.Y., 61 F.2d 115.

25 C.J. p 780 note 19.

60. U.S.—Fred Macey Co. v. Macey, Mich., 135 F. 725, 68 C.C.A. 363—Less v. English, Ark., 85 F. 471, 29 C.C.A. 275.

25 C.J. p 781 note 20.

61. U.S.—Harllee v. City of Gulfport, C.C.A.Miss., 120 F.2d 41.

62. U.S.—International Ladies' Garment Workers' Union v. Donnelly

court below with respect to the exercise of its discretion in granting or denying leave to make such an amendment;[63] and a statute permitting an appellate court to allow an amendment when diversity of citizenship has been defectively alleged is not applicable in such case.[64]

A cause may be remanded in order that a defect of parties may be cured by amendment,[65] but the circuit court of appeals views with disfavor a motion to remand for additional parties interposed after adverse decision on appeal,[66] and will deny the motion where the parties are not indispensable.[67]

A cause may be remanded to the district court with directions to exercise its discretion with regard to retention of jurisdiction, and if it should determine to retain jurisdiction, to decide the cause on the merits.[68] Where jurisdictional facts do not appear in the appellate record, the court may direct them to be made to appear properly to the court below, in default of which the case, after remand, should be dismissed for that reason.[69]

Errors and defects in trial or proceedings. On reversal of a judgment, order, or decree for errors, defects, or irregularities committed or occurring during the course of the trial or proceedings in the court below, and which can be satisfactorily corrected in no other way, an appellate court will usually order a new trial or other appropriate proceedings.[70] Under this rule new trials or other proceedings have been ordered because of the trial of the case on the wrong theory;[71] because the case was tried without a jury under the mistaken impression that it could not be tried any other way;[72] because it plainly appears that the case was not heard on the merits below;[73] because of errors in the instructions to the jury;[74] and for numerous other errors, defects, or mistakes by counsel or the trial court or both, which have prevented such a full and proper trial or proceeding as the law contemplates in order to do justice to all parties concerned.[75] On the other hand, a new trial will not be ordered on account of errors, defects, or irregularities which can be satisfactorily corrected without such proceedings.[76] An appellate court reversing a cause because of insufficiency of the evidence to sustain the judgment may or should grant a new trial.[77]

On reversal of a judgment or decree, an appellate court will usually remand for a new trial or for other appropriate proceedings, where one or more material issues or matters in the case were not fully litigated or passed on and determined at the trial either by the court or by the jury.[78] How-

Garment Co., C.C.A.Mo., 121 F.2d 561, modifying 119 F.2d 892.

63. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., supra.

64. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., supra.

65. U.S.—Franz v. Buder, C.C.A.Mo., 11 F.2d 854, certiorari denied Buder v. Franz, 47 S.Ct. 459, 273 U.S. 756, 71 L.Ed. 876.

After erroneous ruling on demurrer
Where a district court erroneously held on demurrer to a bill that a certain person was not a necessary party, on reversal of the final decree in the case complainant is entitled to amend the bill by making such person a party.—Brown v. Fletcher, N. Y., 231 F. 92, 145 C.C.A. 280.

66. U.S.—Isenberg v. Trent Trust Co., C.C.A.Hawaii, 31 F.2d 553, affirming 26 F.2d 609, certiorari denied Trent Trust Co. v. Isenberg, 49 S.Ct. 479, 279 U.S. 862, 73 L. Ed. 1001.

67. U.S.—Isenberg v. Trent Trust Co., supra.

68. U.S.—The Wilja, C.C.A.N.Y., 113 F.2d 646, reversing, D.C., 32 F. Supp. 247, certiorari denied O/Y Wipu v. Dreyfus, 61 S.Ct. 64, 311 U.S. 687, 85 L.Ed. 444.

69. U.S.—Columbian Nat. Life Ins. Co. v. Harrison, C.C.A.Tenn., 12 F. 2d 986.

70. U.S.—Mutual Reserve Life Ins. Co. v. Heidel, Mo., 161 F. 535, 88 C.C.A. 477.

71. U.S.—Hamilton Gas Co. v. Watters, C.C.A.W.Va., 75 F.2d 176.

72. U.S.—Crouch v. U. S., C.C.A.Va., 8 F.2d 435.

73. U.S.—Republic of China v. Merchants' Fire Assur. Corporation of New York, C.C.A.China, 30 F.2d 278—U. S. v. Metro-Goldwyn-Mayer Corporation, 19 C.C.P.A.,Customs, 119.

74. U.S.—Shell Oil Co. v. Kamper, C. C.A.Miss., 111 F.2d 569.

75. U.S.—Union Castle Mail S.S.Co. v. Thomsen, N.Y., 190 F. 536, 111 C.C.A. 368.
4 C.J. p 1198 note 21.

76. U.S.—Carpenter v. Durell, C.C.A. Tenn., 90 F.2d 57, certiorari denied Durell v. Carpenter, 58 S.Ct. 42, 302 U.S. 721, 82 L.Ed. 557.

77. U.S.—Sammons v. Colonial Press, C.C.A.Mass., 126 F.2d 341, vacating, D.C., Sammons v. Larkin, 38 F.Supp. 649—U. S. v. Hall, C.C. A.Mass., 86 F.2d 537, reversing 83 F.2d 94—Northern Pac. Ry. Co. v. Van Dusen Harrington Co., D.C. Minn., 34 F.2d 786.

78. U.S.—Hunter v. Scruggs Drug Store, C.C.A.N.C., 113 F.2d 971—City of New Port Richey v. Fidelity & Deposit Co. of Maryland, C.C. A.Fla., 105 F.2d 348, 123 A.L.R. 1352—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U. S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U. S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—U. S. v. Lewis County, C.C.A.Idaho, 95 F.2d 236, remanding cause, D.C., U. S. v. Nez Perce County, 16 F.Supp. 967, rehearing denied, C.C.A., 95 F.2d 238—U. S. v. Nez Perce County, C.C.A.Idaho, 95 F.2d 232, remanding cause, D.C., 16 F.Supp. 267, rehearing denied, C.C.A., 95 F.2d 238—Edward Hines Yellow Pine Trustees v. Stewart, C.C.A.Miss., 46 F.2d 910, certiorari denied Stewart v. Edward Hines Yellow Pine Trustees, 51 S.Ct. 654, 283 U.S. 861, 75 L.Ed. 1466—Youngs Rubber Corporation v. C. I. Lee & Co., C.C.A.N.Y., 45 F.2d 103—Venice Hunting & Trapping Co. v. Salinovich, C.C.A.La., 16 F.2d

ever, this rule does not allow the parties to delay raising issues until the case is heard on appeal and then to have the case remanded for the determination of such issues.[79]

In many cases the court has, on reversal, remanded the cause for a new trial or other proceedings, where the findings of fact were so imperfect that an appellate court could not base a judgment thereon.[80]

On reversal of an order erroneously denying a new trial, the case will be remanded with directions that the court pass on or decide the motion, where it has not fully and properly considered it on its merits.[81]

Imperfect record. If the record is so imperfect or confused that the appellate court cannot render judgment with safety to the rights of the parties, a new trial or other proceedings will often be ordered.[82]

(e) Compelling or Directing Restitution

Where several parties claim an interest in impounded tax funds, on determination of an appeal involving the validity of the tax statute in favor of the taxpayer, determination of the right to the impounded funds will be left to the district court.

Where the amount of a tax alleged due was impounded pending an appeal involving the validity of the taxing statute, on determination of the appeal in the taxpayer's favor, the circuit court of appeals will not direct payment of the impounded funds, but will leave the matter to the determination of the district court, where interventions had been filed by parties claiming an interest in the impounded funds.[83]

(f) Effect of Reversal

An unqualified reversal leaves the case standing as if the reversed judgment or order had never been rendered; and where the appellate court directs final judgment, the action is finally terminated. Dependent orders, judgments, or proceedings fall with the reversed judgment, but distinct and independent judgments or proceedings do not.

The effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered.[84] Where, on reversal, the appellate court renders or directs final judgment, the action is final-

121, reversing, D.C., 10 F.2d 222—Wilson v. Spencer, C.C.A.Tex., 261 F. 357—Hawkins v. Dannenberg Co., Ga., 253 F. 529, 165 C.C.A. 199—Fifth Third Nat. Bank v. Johnson, Ohio, 219 F. 89, 134 C.C.A. 529.

4 C.J. p 1201 note 42.

79. U.S.—Victory v. Manning, C.C.A.N.J., 128 F.2d 415—U. S. v. Rodiek, C.C.A.N.Y., 120 F.2d 760, denying rehearing 117 F.2d 588, certiorari granted Rodiek v. U. S., 62 S.Ct. 101, 314 U.S. 597, 86 L.Ed. 481, affirmed 62 S.Ct. 793, 315 U.S. 783, 86 L.Ed. 1190, rehearing denied 62 S.Ct. 940, 316 U.S. 707, 86 L. Ed. 1774.

80. U.S.—Selby Oil & Gas Co. v. Railroad Commission of Texas, C.C.A.Tex., 128 F.2d 334—U. S. v. Otley, C.C.A.Or., 127 F.2d 988, modifying, D.C., 34 F.Supp. 182—Wyant v. Caldwell, C.C.A.W.Va., 86 F.2d 357, certiorari denied 57 S.Ct. 673, 300 U.S. 675, 81 L.Ed. 880—Wessel v. Seminole Phosphate Co., C.C.A.N.C., 13 F.2d 999—Border Gas Co. v. Windrow, C.C.A.Tex., 3 F.2d 974.

4 C.J. p 1201 note 44.

81. U.S.—Felton v. Spiro, Tenn., 78 F. 576, 24 C.C.A. 321.

4 C.J. p 1202 note 52.

82. U.S.—Willing v. Eveloff, C.C.A.Pa., 94 F.2d 344, certiorari denied Eveloff v. Willing, 59 S.Ct. 70, 305 U.S. 611, 83 L.Ed. 389—Hamilton Gas Co. v. Watters, C.C.A.W.Va., 75 F.2d 176—Hughes v. Reed, C.C.A.Okl., 46 F.2d 435—Doak v. Hamilton, C.C.A.N.C., 15 F.2d 774—Rialto Irr. Dist. v. Chellis, Cal., 246 F. 308, 159 C.C.A. 38—Rialto Irr. Dist. v. Stowell, Cal., 246 F. 294, 159 C.C.A. 24.

4 C.J. p 1202 note 62.

83. U.S.—Larabee Flour Mills Co. v. Nee, C.C.A.Mo., 81 F.2d 623, remanding cause, D.C., 12 F.Supp. 395.

84. U.S.—Keller v. Hall, C.C.A.Ariz., 111 F.2d 129—Seeley v. Cornell, C.C.A.Tex., 90 F.2d 562—First Nat. Bank v. Southern Cotton Oil Co., C.C.A.Ga., 86 F.2d 33—Allen v. Belford, D.C.Okl., 35 F.Supp. 111—Mutual Orange Distributors v. Agriculture Prorate Commission of California, D.C.Cal., 30 F.Supp. 937—French v. Edwards, C.C.Cal., 9 F. Cas.No.5,097, 4 Sawy. 125.

Cause remanded without specific directions standing in the lower court as if no judgment or decree had been rendered see infra § 301 a (9) (c) aa.

Rates assailed as confiscatory

Where district court, in dismissing bill assailing water rates as confiscatory, determined that a prior valuation of water company's property remained applicable, although thirty-two months had intervened and commodity values had risen, such determination was erroneous and required a reversal by circuit court of appeals to permit district court to hear anew all questions pertinent to issue of confiscation, but such reversal did not necessarily require a finding of confiscation.—McCart v. Indianapolis Water Co., Ind., 58 S.Ct. 324, 302 U.S. 419, 82 L.Ed. 336, modifying, C.C.A., Indianapolis Water Co. v. McCart, 89 F.2d 522, reversing, D.C., 13 F.Supp. 110, and certiorari granted McCart v. Indianapolis Water Co., 58 S.Ct. 14, 302 U.S. 665, 82 L.Ed. 513.

Entire decree reversed

(1) Where decree awarding plaintiff property interest and allowing defendant lien thereon for purchase price was reversed on defendant's appeal, that part of decree awarding defendant lien was necessarily reversed, although plaintiff failed to take cross appeal.—Turner v. Kirkwood, C.C.A.Okl., 62 F.2d 256, certiorari denied 53 S.Ct. 522, 289 U. S. 724, 77 L.Ed. 1474.

(2) Where an interlocutory injunction restrained defendant from infringing plaintiff's patents and also from engaging in unfair competition, a decree of the circuit court of appeals, reversing the order of the district court granting the interlocutory injunction, vacated the injunction in so far as it restrained defendant from unfair competition, as well as that portion enjoining the infringement of plaintiff's patents, although the question of the propriety of restraining unfair competition was not raised nor considered nor decided by the court.—I. T. S. Rubber Co. v. Tee Pee Rubber Co., C.C.A.Ohio, 295 F. 479.

ly terminated;[85] and generally, when the court, finding under the law that no recovery can be had, uses the word "reversed" without more, the term means that the case is at an end.[86] If on plaintiff's appeal a judgment on demurrer is reversed, the case stands as though the demurrer had been overruled.[87]

Where the rights of parties who did not join, or were not made parties to, the appeal were so interwoven and dependent as to be inseparable from the rights of those who were parties to the appeal, a reversal as to one operates as a reversal as to all.[88]

Dependent or independent judgments or proceedings. On the reversal of a judgment, order, or decree, a dependent order, judgment, or proceeding, ancillary and accessory thereto, shares its fate and falls with it.[89] This rule, however, will not operate, by implication, to set aside a distinct and independent judgment or proceeding, although it forms a part of the same litigation.[90]

(8) Amendment, Modification, and Setting Aside of Its Judgment by Circuit Court of Appeals

The circuit court of appeals has inherent power to amend or set aside its judgment while it still has jurisdiction over it.

Ordinarily the circuit court of appeals has inherent power to amend or vacate its judgment while it still has jurisdiction over it.[91] Thus the court has authority to modify its decree on petition filed during the same term at which the decree was entered,[92] and it may do so without granting a rehearing,[93] even though the change was prompted by an application for a rehearing accompanied by a supplemental transcript containing a petition for an injunction not included in the original transcript.[94] An order of reversal entered after the death of appellee which occurred after argument on appeal may be vacated and entered nunc pro tunc as of the date of argument on appeal.[95] An appellate court, after determining a cause on appeal and affirming the judgment will not direct it to be reopened by the lower court to admit new evidence unless such evidence is of a character clearly to show that the decision was erroneous;[96] and the mandate will not be modified so as to remand for further proofs where it is not shown that the real facts were not correctly assumed in the opinion.[97] A modification of the ruling of the circuit court of appeals may be sought only by a petition for a rehearing or for a writ of certiorari to the supreme court seasonably made.[98]

(9) Mandate and Proceedings in Lower Court

(a) Mandate or other order of remand
(b) Effect in lower court of decision of appellate court

85. U.S.—Bastian v. Erickson, C.C.A. Utah, 114 F.2d 338.

Final adjudication exists where, on reversal, mandate requires entry of specific judgment.—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 163, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716.

86. U.S.—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A.Iowa, 76 F. 2d 240, certiorari denied 56 S.Ct. 120, 296 U.S. 605, 80 L.Ed. 428.

87. U.S.—Wm. J. Friday & Co. v. U. S., C.C.A.Pa., 61 F.2d 370, reversing, D.C., 48 F.2d 225.

88. U.S.—Maryland Casualty Co. v. City of South Norfolk, C.C.A.Va., 54 F.2d 1032, rehearing denied and modified on other grounds 56 F.2d 822, certiorari denied City of South Norfolk v. Maryland Casualty Co., 52 S.Ct. 644, 286 U.S. 562, 76 L.Ed. 1295.

89. U.S.—Johnson v. Dierks Lumber & Coal Co., C.C.A.Ark., 130 F.2d 115—Williams Holding Co. v. Pennell, C.C.A.Fla., 86 F.2d 230—Speers Sand & Clay Works v. American Trust Co., C.C.A.Md., 20 F.2d 336.
4 C.J. p 1205 note 11.

90. U.S.—U. S., for Use of A. S. Schulman Electric Co. v. Standard Accident Ins. Co., C.C.A.Ill., 106 F.2d 200.

91. U.S.—Twin Falls Salmon River Land & Water Co. v. Caldwell, Idaho, 45 S.Ct. 22, 266 U.S. 85, 69 L. Ed. 178, affirming, C.C.A., 272 F. 356—Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, C.C.A. Tex., 97 F.2d 249, denying rehearing 95 F.2d 671, remanding cause, D.C., City Nat. Bank of Wichita Falls, Tex. v. Wichita Royalty Co., 18 F.Supp. 795, certiorari granted Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 59 S.Ct. 101, 305 U.S. 587, 83 L. Ed. 371, and affirmed 59 S.Ct. 420, 306 U.S. 103, 83 L.Ed. 515—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F.2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246.
Jurisdiction of circuit court of appeals to vacate, modify, or correct judgment or mandate after remand see infra § 301 a (10).

92. U.S.—Twin Falls Salmon River Land & Water Co. v. Caldwell, Idaho, 45 S.Ct. 22, 266 U.S. 85, 69 L.Ed. 178, affirming, C.C.A., 272 F. 356—J. Greenebaum Tanning Co. v. National Labor Relations Board, C.C.A., 129 F.2d 487.

93. U.S.—Twin Falls Salmon River Land & Water Co. v. Caldwell, Idaho, 45 S.Ct. 22, 266 U.S. 85, 69 L.Ed. 178, affirming, C.C.A., 272 F. 356.

94. U.S.—Twin Falls Salmon River Land & Water Co. v. Caldwell, supra.

95. U.S.—Madden v. La Cofske, C.C. A.Ariz., 72 F.2d 602.

96. U.S.—City of Akron v. Bone, Ohio, 221 F. 944, 137 C.C.A. 514.

97. U.S.—Brocalsa Chemical Co. v. Langsenkamp, C.C.A.Ohio, 32 F.2d 725, reversing, D.C., Langsenkamp v. Broscalsa Chemical Co., 21 F. 2d 207.

98. U.S.—Western Maryland R. Co. v. Tait, D.C.Md., 53 F.2d 211, affirming, C.C.A., Tait v. Western Maryland Ry. Co., 62 F.2d 933, certiorari granted 53 S.Ct. 660, 289 U. S. 718, 77 L.Ed. 1470, and affirmed 53 S.Ct. 706, 289 U.S. 620, 77 L.Ed. 1405.

(c) Powers and duties of lower court generally
(d) Amendments
(e) Proceedings after remand
(f) Enforcement of judgment
(g) Rendition and entry of judgment as directed
(h) Restitution
(i) New trial
(j) Failure to follow decision or comply with mandate

(a) Mandate or Other Order of Remand

The mandate is the order issued by the circuit court of appeals on the decision of an appealed cause directing the action to be taken by the lower court, and should conform to what the court decided, although no particular form is necessary. The opinion of the court constitutes part of the mandate.

The words "mandate" and "procedendo" as used in this title and section denote the order issued by the circuit court of appeals on the decision of a cause on appeal directing the action to be taken or the disposition to be made of the cause by the lower court,[99] and a rule of court requiring the clerk of the circuit court of appeal, after final determination, to issue a mandate or other proper process in the nature of a procedendo to the court below merely requires that the case be handed back to the trial court, so that that court may have jurisdiction, which it lost on appeal, to record and carry out the judgment of the appellate court.[1] The mandate should conform and be restricted to what the court decided as between the parties before it.[2] No particular form is necessary, and the mandate is to be drawn to suit the requirements of the particular case.[3] It is not necessary to recite therein every step in the various stages of the cause.[4] The opinion of the court constitutes a part of its mandate,[5] particularly where the mandate contains a direction to proceed in accordance with the opinion,[6] and counsel are charged with knowledge of that fact, so that if the opinion makes any misstatement or does not sufficiently cover the issues tried it is incumbent on counsel to bring such matters to the attention of the court by proper motion to correct it.[7] By virtue of some court rules the bill of costs is annexed to the mandate to be collected by execution, if necessary, in the lower court.[8] The mandate may be withheld for a stated time to permit the losing party to petition the supreme court for certiorari, and until final determination if certiorari should be granted;[9] and where there has been an extraordinary delay affecting the rights of a party the mandate may go down in less time than that provided by court rule.[10] After affirmance of a decree dismissing a bill in equity because of the existence of an adequate remedy at law, the order of remand may permit the transfer of the cause to the law docket and the recasting of the pleadings and may be so amended.[11]

(b) Effect in Lower Court of Decision of Appellate Court

aa. Construction and operation in gengeneral
bb. Law of the case

aa. Construction and Operation in General

The mandate of the circuit court of appeals has the same finality as that of the supreme court, and is to be interpreted reasonably and in the light of the opinion.

The decree and mandate of the circuit court of appeals have the same finality as those of the supreme court.[12] The mandate is to be interpreted reasonably,[13] and not in a manner to do injus-

99. U.S.—Exchange Mut. Life Ins. Co. v. Warsaw-Wilkinson Co., Pa., 185 F. 487, 107 C.C.A. 587.

1. U.S.—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A.Iowa, 76 F. 2d 240, certiorari denied 56 S.Ct. 120, 296 U.S. 605, 80 L.Ed. 428.

2. U.S.—Sutherland v. Norris, C.C.A. Pa., 33 F.2d 899, amending mandate 24 F.2d 414, reversing, D.C., Norris v. Bergdoll, 19 F.2d 232, and certiorari denied Norris v. Sutherland, 48 S.Ct. 562, 277 U.S. 602, 72 L.Ed. 1009.

3. U.S.—Goshen Sweeper Co. of Grand Rapids, Mich. v. Bissell Carpet-Sweeper Co., Mich., 72 F. 67, 19 C.C.A. 13, reversed on other grounds 72 F. 545, 19 C.C.A. 25.

4. U.S.—Andrews v. Thum, Mass., 72 F. 290, 18 C.C.A. 566.

5. U.S.—American Surety Co. of New York v. Bankers' Savings & Loan Ass'n of Omaha, Neb., C.C.A. Neb., 67 F.2d 803, certiorari denied 54 S.Ct. 529, 291 U.S. 678, 78 L. Ed. 1066—Mortgage Loan Co. v. Livingston, C.C.A.Mo., 66 F.2d 636, certiorari denied Livingston v. Mortgage Loan Co., 54 S.Ct. 121, 290 U.S. 685, 78 L.Ed. 590—H. P. Coffee Co. v. Reid, Murdoch & Co., C.C.A.Mo., 60 F.2d 387—Great Northern Ry. Co. v. General Ry. Signal Co., C.C.A.Minn., 57 F.2d 457.

6. U.S.—U. S. v. Pan-American Petroleum Co., D.C.Cal., 24 F.2d 206.

7. U.S.—Simonds v. Norwich Union Indemnity Co., C.C.A.Minn., 73 F. 2d 412, certiorari denied Norwich Union Indemnity Co. v. Simonds, 55 S.Ct. 507, 294 U.S. 711, 79 L.Ed. 1246—Mortgage Loan Co. v. Livingston, C.C.A.Mo., 66 F.2d 636, certiorari denied Livingston v. Mortgage Loan Co., 54 S.Ct. 121, 290 U. S. 685, 78 L.Ed. 590.

8. U.S.—Corn Products Refining Co. v. Chicago Real Est. L. & T. Co., Ill., 185 F. 63, 107 C.C.A. 283.

9. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., C.C.A.Mo., 119 F.2d 892, modified on other grounds 121 F.2d 561.

10. U.S.—Boerman v. Marrero, C.C. A.Puerto Rico, 27 F.2d 321.

11. U.S.—Sanderson v. Postal Life Ins. Co. of New York, C.C.A.Colo., 72 F.2d 894.

12. U.S.—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.

13. U.S.—Wilkinson v. Massachusetts Bonding & Insurance Co., C. C.A.Tex., 16 F.2d 66.

tice,[14] and, in construing the mandate or in otherwise determining what was decided by the appellate court and what was ordered done, the opinion of the appellate court may be examined and consulted,[15] especially where the remand is stated to be for further proceedings in accordance with, in conformity to, or not inconsistent with, the opinion.[16] The determination on appeal of an interlocutory order or decree does not operate as a decision of the matters involved in the main suit.[17]

bb. Law of the Case

The decision of the circuit court of appeals becomes the law of the case as to all matters properly within the scope thereof, and controls in all subsequent trials or proceedings; but the doctrine applies only where the facts are the same on the retrial, and not where they are essentially different.

The decision of the circuit court of appeals is the law of the case in further proceedings in the cause in the trial court[18] and in all subsequent stag-

Particular decisions construed
U.S.—Fiske v. Wallace, C.C.A.Mo., 117 F.2d 149, certiorari denied 61 S.Ct. 1112, 313 U.S. 589, 85 L.Ed. 1544—Louisville Trust Co. v. National Bank of Kentucky, C.C.A. Ky., 102 F.2d 137, certiorari denied 60 S.Ct. 76, 308 U.S. 564, 84 L.Ed. 474—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S. Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527—Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A.Minn., 99 F.2d 289—Albert Pick-Barth Co. v. Mitchell Woodbury Corporation, C. C.A.Mass., 57 F.2d 96, certiorari denied Albert Pick-Barth Co. v. Mitchell Woodbury, 52 S.Ct. 503, 286 U.S. 552, 76 L.Ed. 1288—Evans v. Fidelity & Deposit Co. of Maryland, C.C.A.Pa., 49 F.2d 86—Texas Electric Service Co. v. Fairbanks, Morse & Co., D.C.Tex., 36 F.2d 831—U. S. v. Pan-American Petroleum Co., D.C.Cal., 24 F.2d 206—Pacific Gas & Electric Co. v. Railroad Commission of California, D.C.Cal., 26 F.Supp. 507, conforming to mandate Railroad Commission of California v. Pacific Gas & Electric Co., 58 S.Ct. 334, 302 U.S. 388, 82 L.Ed. 319, reversing Railroad Commission of State of California v. Pacific Gas & Electric Co., 57 S.Ct. 935, 301 U.S. 669, 81 L.Ed. 1333, affirming, D.C., Pacific Gas & Electric Co. v. Railroad Commission of California, 13 F.Supp. 931, rehearing denied 16 F.Supp. 884, rehearing denied Railroad Commission of State of California v. Pacific Gas & Electric Co., 58 S.Ct. 3, 302 U. S. 771, 82 L.Ed. 598—Plimpton v. Mattakeunk Cabin Colony, D.C. Conn., 9 F.Supp. 288—American Surety Co. of New York v. Riner, C.C.A.Wyo., 269 F. 137—F. M. Davies & Co. v. Porter, S.D., 248 F. 397, 160 C.C.A. 407.
4 C.J. p 1212 note 55.

14. U.S.—Wilkinson v. Massachusetts Bonding & Insurance Co., C.C. A.Tex., 16 F.2d 66.

15. U.S.—Great Northern Ry. Co. v. General Ry. Signal Co., C.C.A.Minn., 57 F.2d 457—Wilkinson v. Massachusetts Bonding & Insurance Co., C.C.A.Tex., 16 F.2d 66—William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., D.C.Ill., 5 F.2d 731, modified on other grounds, C.C.A., 20 F. 2d 830.
4 C.J. p 1212 note 47.

Construed in entirety
The mandate of appellate court and its opinion must be construed in their entirety and particularly with reference to the issues which were before the court.—Gonzalez v. Bowie, C.C.A.Puerto Rico, 123 F.2d 387.

16. U.S.—Graff v. Boesch, C.C.Cal., 50 F. 660.

17. U.S.—Canadian Club Corporation v. Canada Dry Ginger Ale, C.C.A. Pa., 60 F.2d 785, certiorari denied 53 S.Ct. 319, 288 U.S. 599, 77 L.Ed. 976—A. D. Howe Mach. Co. v. Dayton, W.Va., 210 F. 801, 127 C.C.A. 351.

18. U.S.—Moyer v. Ætna Life Ins. Co., C.C.A.Pa., 126 F.2d 141, affirming, D.C., 39 F.Supp. 725—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F. 2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528—Stonega Coke & Coal Co. v. Price, C.C.A.W.Va., 116 F.2d 618—Midland Valley R. Co. v. Jones, C.C.A.Okl., 115 F.2d 508—Bastian v. Erickson, C.C.A.Utah, 114 F.2d 338—Dravo Contracting Co. v. James, C.C.A.W. Va., 114 F.2d 242, certiorari denied 61 S.Ct. 450, 312 U.S. 678, 85 L.Ed. 1117, rehearing denied 61 S.Ct. 620, 312 U.S. 714, 85 L.Ed. 1144—Toucey v. New York Life Ins. Co., C.C. A.Mo., 112 F.2d 927, certiorari denied 61 S.Ct. 440, 311 U.S. 643, 85 L.Ed. 410, affirmed 61 S.Ct. 833, 313 U.S. 538, 85 L.Ed. 1507, vacated 61 S.Ct. 938, 313 U.S. 596, 85 L.Ed. 1549, reversed on other grounds 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—Atchison, T. & S. F. R. Co. v. Ballard, C.C.A.Tex., 108 F. 2d 768, rehearing denied 109 F.2d 1012, certiorari denied Ballard v. Atchison, T. & S. F. R. Co., 60 S. Ct. 1096, 310 U.S. 646, 84 L.Ed. 1413—South Florida Securities v. Seward, C.C.A.Fla., 103 F.2d 872—Clarke v. Order of United Commercial Travelers of America, C.C. A.Ga., 99 F.2d 457—State of Kansas ex rel. Beck v. Occidental Life Ins. Co., C.C.A.Kan., 95 F.2d 935, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383—City of Orlando v. Murphy, C.C.A.Fla., 94 F. 2d 426—Federal Reserve Bank of Philadelphia v. Ocean City, C.C.A. N.J., 91 F.2d 635, certiorari denied Ocean City v. Federal Reserve Bank of Philadelphia, 58 S.Ct. 281, 302 U.S. 752, 82 L.Ed. 581, rehearing denied 58 S.Ct. 475, 302 U.S. 781, 82 L.Ed. 603, and opinion supplemented Federal Reserve Bank of Philadelphia v. Ocean City, N.J., 93 F.2d 519—Lauf v. E. G. Shinner & Co., C.C.A.Wis., 90 F.2d 250, certiorari granted 58 S.Ct. 41, 302 U. S. 669, 82 L.Ed. 516, reversed on other grounds 58 S.Ct. 578, 303 U. S. 323, 82 L.Ed. 872—Hunt v. Commissioner of Internal Revenue, C.C. A., 82 F.2d 668—Marion Steam Shovel Co. v. Bertino, C.C.A.Mo., 82 F.2d 541, rehearing denied 82 F.2d 945, certiorari denied 57 S.Ct. 17, 299 U.S. 556, 81 L.Ed. 409—U. S. v. Bollman, C.C.A.Iowa, 81 F.2d 1009—De Parcq v. Liggett & Myers Tobacco Co., C.C.A.Minn., 81 F.2d 777—Mantle Lamp Co. of America v. Knapp-Monarch Co., C. C.A.Ill., 81 F.2d 428—Claiborne-Reno Co. v. E. I. Du Pont de Nemours & Co., C.C.A.Iowa, 77 F.2d 565—General Motors Acceptance Corporation v. Mid-West Chevrolet Co., C.C.A.Okl., 74 F.2d 386—Fisher v. Bank of America Nat. Trust & Savings Ass'n, C.C.A.Cal., 72 F. 2d 635—Seagraves v. Wallace, C.C. A.Tex., 69 F.2d 163—American Surety Co. of New York v. Bankers' Savings & Loan Ass'n of Omaha, Neb., C.C.A.Neb., 67 F.2d 803, certiorari denied 54 S.Ct. 529, 291 U.S. 678, 78 L.Ed. 1066—In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, C.C.A. Fla., 64 F.2d 915—American Cyanamid Co. v. Wilson & Toomer Fertilizer Co., C.C.A.Fla., 62 F.2d 1018, certiorari denied 53 S.Ct. 595, 289 U.S. 735, 77 L.Ed. 1483—Northern Pac. Ry. Co. v. Van Dusen Harrington Co., C.C.A.Minn., 60 F.2d 394—H. P. Coffee Co. v. Reid, Murdoch & Co., C.C.A.Mo., 60 F.2d 387—Norfolk & W. Ry. Co. v. Hall, C.C.A.W.Va., 57 F.2d 1004—Smyth v. Klauder, C.C.A.Pa., 52 F.2d 109,

es of the action or proceeding,[19] nor is the finality of the decision of the reviewing court affected, so far as it did decide any question, by the fact that it was a judgment reversing the lower court.[20]

The lower court cannot rehear or reconsider the matters decided by the circuit court of appeals,[21] and it is the duty of the lower court to follow the decision of the appellate court,[22] its action being deemed erroneous when at variance with the decision[23] and not erroneous in this respect when in ac-

certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575—International Brotherhood of Electrical Workers, Local No. 134 v. Western Union Telegraph Co., C.C.A.Ill., 46 F.2d 736, certiorari denied 52 S.Ct. 13, 284 U.S. 630, 76 L.Ed. 536—Clark v. Pond Creek Mill & Elevator Co., C.C.A.Ill., 35 F.2d 865—Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, C.C.A. N.Y., 32 F.2d 195, certiorari denied 50 S.Ct. 32, 280 U.S. 579, 74 L.Ed. 629—Pennsylvania Mining Co. v. United Mine Workers of America, C.C.A.Ark., 28 F.2d 851, certiorari denied 49 S.Ct. 263, 279 U.S. 841, 73 L.Ed. 987—City of Seattle v. Puget Sound Power & Light Co., C.C.A. Wash., 15 F.2d 794, certiorari denied 47 S.Ct. 456, 273 U.S. 752, 71 L.Ed. 874, and Puget Sound Power & Light Co. v. City of Seattle, 47 S.Ct. 458, 273 U.S. 753, 71 L.Ed. 874—Dunkley Co. v. Central California Canneries, C.C.A.Cal., 7 F.2d 972, certiorari denied 46 S.Ct. 347, 270 U.S. 646, 70 L.Ed. 778—William Wrigley, Jr. Co. v. L. P. Larson, Jr., Co., D.C.Ill., 5 F.2d 731, modified on other grounds, C.C.A., 20 F.2d 830—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577—Higgins v. White, D.C. Mass., 31 F.Supp. 796, conforming to mandate, C.C.A., 93 F.2d 357, reversing, D.C., 18 F.Supp. 986, reversed on other grounds White v. Higgins, 116 F.2d 312—Frigorifico Wilson De La Argentina v. Weirton Steel Co., D.C.W.Va., 31 F.Supp. 214—Eisman v. Samuel Goldwyn, Inc., D.C.N.Y., 30 F.Supp. 436—Wells v. Equitable Life Assur. Soc. of U. S., D.C.Ky., 29 F.Supp. 144—McCreary v. U. S., D.C.Or., 23 F.Supp. 385, reversed on other grounds, C.C.A., U. S. v. McCreary, 105 F.2d 297—Securities and Exchange Commission v. Torr, D.C.N.Y., 22 F.Supp. 602—Duke Power Co. v. Greenwood County, D.C.S.C., 19 F.Supp. 932, affirmed, C.C.A., 91 F.2d 665, certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521, affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L.Ed. 381—Milwaukee County v. M. E. White Co., D.C. Ill., 17 F.Supp. 759—Finley v. United Mine Workers of America, C.C.A.Ark., 300 F. 972, modified on other grounds Coronado Coal Co. v. United Mine Workers of America, 45 S.Ct. 551, 268 U.S. 295, 69 L.Ed. 963—Bowling v. U. S., C.C.A. Okl., 299 F. 438—Wing v. Sedgwick, D.C.Mass., 299 F. 311, reversed on other grounds, C.C.A., 4 F.2d 177—Western Union Telegraph Co. v. Czizek, C.C.A.Idaho, 286 F. 478, certiorari granted 43 S.Ct. 700, 262 U.S. 739, 67 L.Ed. 1208, and reversed on other grounds 44 S.Ct. 328, 264 U.S. 281, 68 L.Ed. 682—Bowling Green Trust Co. v. Virginia Passenger & Power Co., D.C.Va., 276 F. 965, affirmed, C.C.A., Virginia Ry. & Power Co. v. Davis, 284 F. 479, certiorari denied 43 S.Ct. 247, 260 U.S. 746, 67 L.Ed. 473—Browne v. Thorn, C.C.A. Ark., 272 F. 950, certiorari granted 41 S.Ct. 625, 256 U.S. 689, 65 L.Ed. 1172, and affirmed 43 S.Ct. 36, 260 U.S. 137, 67 L.Ed. 171—Edwards v. Bodkin, D.C.Cal., 267 F. 1004, affirmed Bodkin v. Edwards, C.C.A., 265 F. 621, affirmed 41 S.Ct. 268, 255 U.S. 221, 65 L.Ed. 595—United Press Ass'ns v. National Newspapers Ass'n, Colo., 254 F. 284, 165 C.C.A. 572—Coal & Iron Ry. Co. v. Reherd, W.Va., 226 F. 441, 141 C.C.A. 271—National Bank of Commerce v. U. S., Wash., 224 F. 679, 140 C.C.A. 219, certiorari denied 36 S.Ct. 287, 241 U.S. 658, 60 L.Ed. 1225—D'Arcy v. Jackson Cushion Spring Co., Mich., 212 F. 889, 129 C.C.A. 409.

Rule of practice

(1) The doctrine of the law of the case is a rule of practice or procedure.—Western Fire Ins. Co. v. University City, C.C.A.Mo., 124 F.2d 698—City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corporation, C.C.A.Mo., 81 F.2d 193.

(2) It is not an absolute rule of law.—City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corporation, supra.

(3) Nor is it a limitation of power, although it will not be departed from except for very cogent reasons.—Western Fire Ins. Co. v. University City, supra—Connett v. City of Jerseyville, C.C.A.Ill., 110 F.2d 1015.

Failure to enter decree conforming to mandate

Decision of the circuit court of appeals, and its decree and mandate, reversing a decree of the district court, constituted the law of the case, notwithstanding the district court's failure to enter a decree in conformity with the mandate.—Deppe v. General Motors Corporation, C.C.A.N.J., 98 F.2d 813, certiorari denied 59 S.Ct. 462, 306 U.S. 633, 83 L.Ed. 1035, rehearing denied 59 S.Ct. 581, 306 U.S. 668, 83 L.Ed. 1063, petition denied 59 S.Ct. 821, 307 U.S. 611, 83 L.Ed. 1494.

Distinguishing feature of new trial

The sole difference between the effect of a new trial granted by the trial court after setting aside a verdict, and a new trial ordered by the circuit court of appeals on reversal of judgment, is that the legal propositions which the circuit court of appeals settles and determines on appeal cannot ordinarily be again questioned.—Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A.Minn., 99 F.2d 289.

19. U.S.—Stonega Coke & Coal Co. v. Price, C.C.A.Va., 116 F.2d 618—Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A.Minn., 99 F.2d 289—State of Kansas ex rel. Beck v. Occidental Life Ins. Co., C.C.A.Kan., 95 F.2d 935, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383—City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corporation, C.C.A.Mo., 81 F.2d 193—Ætna Life Ins. Co. v. Wharton, C.C.A.Ark., 63 F.2d 378, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1500—H. P. Coffee Co. v. Reid, Murdoch & Co., C.C.A.Mo., 60 F.2d 387—Amicon Fruit Co. v. Norfolk & W. Ry. Co., C.C.A.W.Va., 299 F. 120—St. Louis & S. F. R. Co. v. Barker, D.C.Mo., 210 F. 902.

25 C.J. p 970 note 16.

20. U.S.—William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., D.C.Ill., 5 F.2d 731, modified on other grounds, C.C.A., 20 F.2d 830.

21. U.S.—Stonega Coke & Coal Co. v. Price, C.C.A.Va., 116 F.2d 618—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577—D'Arcy v. Jackson Cushion Spring Co., Mich., 212 F. 889, 129 C.C.A. 409.

4 C.J. p 1215 note 88—25 C.J. p 970 note 16.

22. U.S.—U. S. Rubber Co. v. General Tire & Rubber Co., C.C.A.Ohio, 128 F.2d 104, affirming, D.C., 40 F.Supp. 247—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—William Wrigley, Jr., Co. v. L. P. Larson, Jr., Co., D.C.Ill., 5 F.2d 731, modified on other grounds, C.C.A., 20 F.2d 830.

23. U.S.—Smith v. Kent, C.C.A.La., 79 F.2d 129—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316.

cord therewith.[24]

While the rule that the decision of the circuit court of appeals is the law of the case in subsequent proceedings in the same cause does not extend to matters not decided,[25] even though the appellate court may have made some statements or remarks with respect thereto,[26] it does apply to and comprehend all points presented and decided[27] and necessarily involved,[28] regardless of whether or not such points are specially noted in the mandate.[29] Furthermore, the decision of the appellate court is the law of the case as to all questions that might have been raised;[30] and, although a matter is not essential to the decision of the case on appeal, if it is important for the purposes of a new trial, and in that view passed on, it becomes the law of the case.[31] A decision of the circuit court of appeals on the legal merits of the case, which was reversed on a question of practice only by the supreme court, is, on the second trial, the law of the case on the merits.[32]

Particular applications of the doctrine. The doctrine of the law of the case has been applied to decisions of the circuit court of appeals with respect to matters of jurisdiction,[33] limitations of actions,[34] evidence,[35] findings,[36] costs,[37] and damages;[38] also

24. U.S.—Western Fire Ins. Co. v. University City, C.C.A.Mo., 124 F. 2d 698.

25. U.S.—General Inv. Co. v. Lake Shore & M. S. Ry. Co., Ohio, 43 S.Ct. 106, 260 U.S. 261, 67 L.Ed. 244, modifying, C.C.A., 269 F. 235—International Ladies' Garment Workers' Union v. Donnelly Garment Co., C.C.A.Mo., 121 F.2d 561, modifying 119 F.2d 892—Dezendorf v. Twentieth Century-Fox Film Corporation, C.C.A.Cal., 118 F.2d 561, affirming, D.C., 32 F.Supp. 359—Connett v. City of Jerseyville, C. C.A.Ill., 110 F.2d 1015—National Bondholders Corporation v. Seaboard Citizens Nat. Bank of Norfolk, C.C.A.Va., 110 F.2d 138—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—Munro v. Post, C.C.A.N. Y., 102 F.2d 686, affirming, D.C., 23 F.Supp. 308—Hayat Carpet Cleaning Co. v. Northern Assur. Co., Limited, of London, C.C.A.N.Y., 69 F.2d 805—William Wrigley, Jr. Co. v. L. P. Larson, Jr., Co., D.C.Ill., 5 F.2d 731, modified on other grounds, C.C.A., 20 F.2d 830—Art Metal Const. Co., for Use of McCloskey & Co. v. Lehigh Structural Steel Co., D.C.Pa., 38 F.Supp. 530—Mutual Orange Distributors v. Agricultural Prorate Commission of California, D.C.Cal., 30 F.Supp. 937—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406—Atchison, T. & S. F. Ry. Co. v. Merchants' Live Stock Co., C.C.A.N.M., 293 F. 987—General Inv. Co. v. Lake Shore & M. S. Ry. Co., C.C.A.Ohio, 269 F. 235, modified on other grounds 43 S.Ct. 106, 260 U.S. 261, 67 L.Ed. 244—Chase v. U. S., C.C.A.Neb., 261 F. 833, affirmed 41 S.Ct. 417, 256 U. S. 1, 65 L.Ed. 801—Iowa Cent. Ry. Co. v. Walker, Iowa, 255 F. 648, 167 C.C.A. 24.
4 C.J. p 1216 note 99.

26. U.S.—Patillo v. Allen-West Commission Co., Ark., 108 F. 723, 47 C.C.A. 637.

27. U.S.—Western Fire Ins. Co. v. University City, C.C.A.Mo., 124 F. 2d 698—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—H. P. Coffee Co. v. Reid, Murdoch & Co., C.C.A. Mo., 60 F.2d 387—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.

28. U.S.—D'Arcy v. Jackson Cushion Spring Co., Mich., 212 F. 889, 129 C.C.A. 409.

29. U.S.—Empire State-Idaho Mining & Development Co. v. Hanley, Idaho, 136 F. 99, 69 C.C.A. 87, appeal dismissed 25 S.Ct. 691, 198 U. S. 292, 49 L.Ed. 1056.

30. U.S.—Thornton v. Carter, C.C. A.Ark., 109 F.2d 316—Sorensen v. Pyrate Corporation, C.C.A.Cal., 65 F.2d 982, certiorari denied 54 S. Ct. 124, 290 U.S. 689, 78 L.Ed. 593—Herzbergs, Inc., v. Ocean Accident & Guarantee Corporation, D.C. Neb., 42 F.Supp. 52.

Overlooked matters

Failure to stress contention on first appeal sufficiently to attract attention of reviewing court and demand specific treatment did not preclude contention from being controlled by "law of case" on second trial, although it was then more vehemently urged, since, if opinion on first appeal overlooked potency of contention, matter should have been called to reviewing court's attention by motion for rehearing.—Claiborne-Reno Co. v. E. I. Du Pont de Nemours & Co., C.C.A.Iowa, 77 F.2d 565.

Proceedings contemplated at time of appeal

Where, on former appeal, the denial of an injunction to restrain further proceedings in the state court for dissolution of a corporation was affirmed, the court below properly refused thereafter to enjoin further proceedings in the state court, which had been contemplated at the time of the former appeal, although the particular steps sought to be restrained were not then before the court.—Window Glass Mach. Co. v. New Bethlehem Window Glass Co., C. C.A.Pa., 269 F. 979.

31. U.S.—F. W. Woolworth Co. v. Carriker, C.C.A.Mo., 107 F.2d 689—Poag v. The McDonald, D.C.N.Y., 19 F.Cas.No.11,238.

32. U.S.—Connelley v. Pennsylvania R. Co., D.C.Pa., 221 F. 508, affirmed 228 F. 322, 142 C.C.A. 614.

33. U.S.—International Ladies' Garment Workers' Union v. Donnelly Garment Co., C.C.A.Mo., 121 F.2d 561, modifying 119 F.2d 892—In re Silverman, C.C.A.N.Y., 11 F.2d 970—McKesson & Robbins v. Edwards, D.C.N.Y., 14 F.Supp. 109.

34. U.S.—Sartor v. Arkansas Natural Gas Corporation, C.C.A.La., 111 F.2d 772, reversing, D.C., Sartor v. Arkansas Natural Gas Co., 29 F. Supp. 956, conforming to mandate, C.C.A., Arkansas Natural Gas Corporation v. Sartor, 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437.

35. U.S.—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602.

Weight and sufficiency

Where the facts shown on the second trial are substantially the same as on the first trial, the decision of the appellate court as to weight and sufficiency of the evidence is binding on the lower court.—Kershaw Oil Mill v. National Bank of Savannah, S.C., 209 F. 835, 126 C.C.A. 559.

36. U.S.—Stonega Coke & Coal Co. v. Price, C.C.A.W.Va., 116 F.2d 618.

37. U.S.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605—Steiner, Lobman & Frank v. T. S. Faulk & Co., Ala., 222 F. 61, 137 C.C.A. 599, certiorari denied Steiner v. T. S. Faulk & Co., 36 S.Ct. 160, 239 U.S. 638, 60 L.Ed. 481.

38. U.S.—Anchor Stove & Range Co. v. Rymer, C.C.A.Tenn., 97 F.2d 689, certiorari denied 59 S.Ct. 246, 305 U.S. 653, 83 L.Ed. 422, rehearing denied 59 S.Ct. 357, 305 U.S. 676, 83 L.Ed. 438.

to decisions with respect to construction of contracts,[39] negligence,[40] and matters relating to receivers.[41]

Same or different facts on trial. The rule that the decision of a circuit court of appeals is the law of the case on a retrial or further proceedings in the cause is applicable and controlling when, and only when, the facts appearing on the second trial are substantially the same as those shown on the first trial; in other words, the facts on the second trial must be such as to make applicable the points of law decided on appeal before such points of law can be considered the law of the case.[42] Where the circuit court of appeals has decided that the facts proved raise a question for the jury, it is error for the lower court on a second trial in which the same, or practically the same, facts are developed to enter a judgment notwithstanding the verdict.[43] On the other hand, its decision of a question involving, turning on, or dependent on a matter of fact is not the law of the case on a subsequent trial of the same cause where materially different facts have been pleaded[44] or are shown in evidence.[45]

State law. Where a circuit court of appeals in a given case has ascertained and applied what it apprehends to be the pertinent state law, such ascertainment of the local law is binding on the trial court at the retrial of the case unless it is clearly made to appear by subsequent statute, no more than declaratory, or by binding state court decision that the law of the state was other than what the federal appellate court had understood it to be.[46]

(c) Powers and Duties of Lower Court Generally

aa. Jurisdiction of lower court after remand
bb. Compliance with mandate or directions
cc. Modification or avoidance of judgment or order
dd. Granting new trial or rehearing

aa. Jurisdiction of Lower Court after Remand

On remand the lower court has jurisdiction to take any action that is not inconsistent with the decision and mandate of the circuit court of appeals.

Generally, on the remand of a cause, the trial court may make any order or direction in its further progress that is not inconsistent with the decision and directions of the circuit court of appeals,[47] and may consider and decide any matters

39. U.S.—In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, C.C.A.Fla., 64 F.2d 915—Smith v. Kent, C.C.A.La., 79 F.2d 129.

40. U.S.—Gosney v. Metropolitan Life Ins. Co., C.C.A.Mo., 114 F.2d 649.

41. U.S.—State of Kansas ex rel. Beck v. Occidental Life Ins. Co., C.C.A.Kan., 95 F.2d 935, certiorari denied 59 S.Ct. 63, 305 U.S. 603, 83 L.Ed. 383.

42. U.S.—Cole v. U. S., C.C.A.Ind., 127 F.2d 470—Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A. Minn., 99 F.2d 289.
4 C.J. p 1217 note 10.

Identity of pleading not controlling
Substantial identity of facts on first and second trials, not identity of pleading, is test of whether law determined on first appeal is "law of case" as to second trial.—Claiborne-Reno Co. v. E. I. Du Pont de Nemours & Co., C.C.A.Iowa, 77 F.2d 565.

Facts tending to strengthen inferences
Additional facts at a trial, after reversal because no negligence was shown, which only tend to strengthen the inferences from the facts presented at the first trial, do not relieve the trial court from following the decision of the circuit court of appeals.—Connelley v. Pennsylvania R. Co., D.C.Pa., 221 F. 508, affirmed 228 F. 322, 142 C.C.A. 614.

43. U.S.—Collins v. Edward B. Smith & Co., C.C.Pa., 170 F. 367.

44. U.S.—Thane Lumber Co. v. J. L. Metz Furniture Co., C.C.A.Ark., 12 F.2d 701.

45. U.S.—De Parcq v. Liggett & Myers Tobacco Co., C.C.A.Minn., 81 F.2d 777—City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corporation, C.C.A.Mo., 81 F.2d 193—General Motors Acceptance Corporation v. Mid-West Chevrolet Co., C.C.A.Okl., 74 F.2d 386—Union Trust Co. of Cleveland, Ohio, v. Woodrow Mfg. Co., C.C.A.Iowa, 63 F.2d 602.
4 C.J. p 1219 note 27.

46. U.S.—Lennig v. New York Life Ins. Co., C.C.A.Pa., 130 F.2d 580.

47. U.S.—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 98 F.2d 930—Mendez v. Eastern Sugar Associates, C.C.A.Puerto Rico, 89 F.2d 399—Pacific Gas & Electric Co. v. Railroad Commission of California, D.C.Cal., 26 F.Supp. 507, conforming to mandate Railroad Commission of California v. Pacific Gas & Electric Co., 58 S.Ct. 334, 302 U.S. 388, 82 L.Ed. 319, reversing Railroad Commission of State of California v. Pacific Gas & Electric Co., 57 S.Ct. 935, 301 U.S. 669, 81 L.Ed. 1333, affirming, D.C., Pacific Gas & Electric Co. v. Railroad Commission of California, 13 F. Supp. 931, rehearing denied 16 F. Supp. 884, rehearing denied Railroad Commission of State of California v. Pacific Gas & Electric Co., 58 S.Ct. 3, 302 U.S. 771, 82 L.Ed. 598—U. S. v. Marshall, Utah, 122 F. 428, 58 C.C.A. 410—Baltimore Building & Loan Ass'n v. Alderson, W.Va., 99 F. 489, 39 C.C. A. 609.

Enjoining exhibits
Where mandate ordered reinstatement of bill, trial court, having jurisdiction thereof could properly determine in first instance whether exhibits, inadvertently overlooked by appellate court, should be enjoined.—American Safety Razor Corporation v. International Safety Razor Corporation, C.C.A.N.J., 61 F.2d 479.

Summary judgment
Where district court's judgment in favor of plaintiff was reversed by circuit court of appeals on the ground of error in refusing to find that claim sued on by plaintiff had been fully adjudicated against it in prior state court litigation, and case remanded and where no new legal situation or issue of fact was shown to exist on remand, district court properly entered summary judgment for defendant.—A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 122 F.2d 657.

left open by the mandate of the appellate court,[48] but the power of the trial court cannot under any circumstances rise above the mandate.[49] Where a cause is reversed and remanded to the district court with directions for further proceedings in conformity with the opinion of the circuit court of appeals, the only command which is carried to the district court is to apply the principle of law established by the appellate court, in its final disposition.[50] A cause remanded without specific directions stands in the lower court as though no judgment or decree had been rendered.[51] Where, however, the appellate court by its decision and directions puts an end to the litigation, the lower court is without jurisdiction except to comply with whatever directions are made.[52] On reversal and remand by the circuit court of appeals, the record in the previous trial is properly before the district court in considering the right of a party to a summary judgment.[53]

bb. Compliance with Mandate or Directions

On remand of the cause it is the duty of the lower court to comply substantially with the mandate of the circuit court of appeals and to obey the directions therein.

It is the duty of the lower court, on the remand of the cause, to comply with the mandate of the circuit court of appeals and to obey the directions therein[54] without variation,[55] even though the mandate may be or is supposed to be erroneous.[56] Accordingly, if the trial court fails to follow the directions of the appellate court the judgment should be reversed if the errors are prejudicial to appellant.[57] The rule as to obedience to the mandate,

Intermediate court

On mandate of circuit court of appeals, remanding case to supreme court of Puerto Rico "for further proceedings not inconsistent with this opinion," supreme court properly reviewed case on its merits, the opinion not disposing of, although incidentally referring to, facts and merits.—Gandia v. Porto Rico Fertilizer Co., C.C.A.Puerto Rico, 2 F.2d 641.

48. U.S.—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.
4 C.J. p 1220 note 48.

49. U.S.—In re Squire, D.C.N.J., 24 F.Supp. 763, application to revise denied, C.C.A., 100 F.2d 1021.

50. U.S.—McNee v. Williams, C.C.A. Okl., 280 F. 95.

51. U.S.—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.
4 C.J. p 1220 note 50.
That unqualified reversal leaves case standing as though judgment had never been rendered see supra subdivision a (7) (f) of this section.

52. U.S.—Hubbard v. Worcester Art Museum, Mass., 196 F. 871, 116 C.C.A. 433, dismissing error, C.C., 179 F. 406—Harrison v. Clarke, Iowa, 182 F. 765, 105 C.C.A. 197.

53. U.S.—A. B. C. Fireproof Warehouse Co. v. Atchison, T. & S. F. Ry. Co., C.C.A.Mo., 122 F.2d 657.

54. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528—Rogers v. Consolidated Rock Products Co., C.C.A.Cal., 114 F.2d 108—Sartor v. Arkansas Natural Gas Corporation, C.C.A.La., 111 F.2d 772, reversing, D.C., Sartor v. Arkansas Natural Gas Co., 29 F.Supp. 956, conforming to mandate, C.C.A., Arkansas Natural Gas Corporation v. Sartor, 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—Thornton v. Carter, C.C.A.Ark., 109 F.2d 316—Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., C.C.A.Minn., 106 F.2d 891—Illinois Bell Telephone Co. v. Slattery, C.C.A.Ill., 102 F.2d 58, certiorari denied Slattery v. Illinois Bell Telephone Co., 59 S.Ct. 1045, 307 U.S. 648, 83 L.Ed. 1527—Root v. U. S., C.C.A.Tex., 85 F.2d 612—American Surety Co. of New York v. Bankers' Savings & Loan Ass'n of Omaha, Neb., C.C.A.Neb., 67 F.2d 803, certiorari denied 54 S.Ct. 529, 291 U.S. 678, 78 L.Ed. 1066—H. P. Coffee Co. v. Reid, Murdoch & Co., C.C.A.Mo., 60 F.2d 387—Great Northern Ry. Co. v. General Ry. Signal Co., C.C.A.Minn., 57 F.2d 457—Smyth v. Klauder, C.C.A.Pa., 52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575—Rothschild & Co. v. Marshall, C.C.A.Wash., 51 F.2d 897, reversing, D.C., 47 F.2d 919—Swartz v. Kaplan, D.C.Mass., 50 F.2d 947—Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid Transit Co., D.C.N.Y., 20 F.2d 932, affirmed, C.C.A., 20 F.2d 934—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406—Standard Asphalt Co. of Florida v. American Surety Co. of New York, D.C.Fla., 5 F.Supp. 430, affirmed, C.C.A., American Surety Co. of New York v. Standard Asphalt Co. of Florida, 75 F.2d 1, certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687—In re Bensel, D.C.N.Y., 230 F. 932—D'Arcy v. Jackson Cushion Spring Co., Mich., 212 F. 889, 129 C.C.A. 409.
4 C.J. p 1221 note 58.
Rendition of judgment as directed see infra subdivision a (9) (g) of this section.

55. U.S.—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—Federal Trade Commission v. Standard Education Soc., C.C.A.N.Y., 97 F.2d 513, conforming to mandate 58 S.Ct. 113, 302 U.S. 112, 82 L.Ed. 141, modifying, C.C.A., 86 F.2d 692, certiorari granted 57 S.Ct. 790, 301 U.S. 674, 81 L.Ed. 1335, rehearing denied 58 S.Ct. 365, 302 U.S. 779, 82 L.Ed. 602, motion denied 58 S.Ct. 474, 302 U.S. 661, 82 L.Ed. 511, certiorari denied Standard Education Soc. v. Federal Trade Commission, 59 S.Ct. 145, 305 U.S. 642, 83 L.Ed. 414—Magnolia Petroleum Co. v. Suits, C.C.A.Okl., 43 F.2d 280, certiorari denied Suits v. Magnolia Petroleum Co., 51 S.Ct. 35, 282 U.S. 861, 75 L.Ed. 762—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F.2d 577—Cold Metal Process Co. v. United Engineering & Foundry Co., D.C.Pa., 43 F.Supp. 375—Goldwyn Pictures Corporation v. Howells Sales Co., C.C.A.N.Y., 287 F. 100, reversing, D.C., 292 F. 458, and certiorari denied 43 S.Ct. 703, 262 U.S. 755, 67 L.Ed. 1217—Brictson Mfg. Co. v. Woodrough, C.C.A., 284 F. 484—D'Arcy v. Jackson Cushion Spring Co., Mich., 212 F. 889, 129 C.C.A. 409—Keasbey & Mattison Co. v. American Magnesia & Covering Co., C.C.Pa., 148 F. 91.

56. U.S.—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—Kennicott v. Wayne County, C.C.Ill., 14 F.Cas. No.7,710, 6 Biss. 138, affirmed 94 U.S. 498, 24 L.Ed. 260.

Validity of order of circuit court of appeals reversing judgment and remanding cause for new trial was not a question for consideration of trial court.—Keller v. Hall, C.C.A. Ariz., 111 F.2d 129.

57. U.S.—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—Pocono Rubber Cloth Co. v. J. A. Livingston, Inc., C.C.A.N.J., 92 F.2d 290, certiorari denied J. A. Livingston, Inc. v. Pocono Rubber Co., 58 S.Ct. 522,

however, requires only an intelligent and reasonable compliance therewith,[58] and it has been held that a substantial, rather than a literal, compliance is sufficient.[59] In order fully to effectuate the mandate, action taken inconsistent therewith pending the appeal may and should be corrected, even though no specific directions to that effect are given.[60]

cc. Modification or Avoidance of Judgment or Order

Generally the lower court has no power, after a cause has been determined by the circuit court of appeals, to vacate or modify the judgment of the appellate court, or its own judgment after affirmance.

Generally, after a cause has been determined by the circuit court of appeals and remanded, the lower court is without power to open[61] or vacate or modify[62] the judgment of the appellate court, or to alter, extend, or relieve from the precise fulfillment of a specified condition on which the effect of the appellate judgment is made to depend.[63] Likewise, after affirmance on appeal, except as directed by the appellate court,[64] the lower court is generally without power to vacate, alter, or modify the judgment originally entered by it;[65] and the trial court properly declines to modify a part of a decree which the circuit court of appeals refused to modify on appeal.[66] Nevertheless, where after mandate of the circuit court of appeals affirming a decree in favor of plaintiff, an opinion of the supreme court in another case announced a decision at variance with the opinion of the circuit court of appeals, it is proper for the district court to vacate its decree and dismiss the suit notwithstanding the mandate.[67]

The trial court generally does not have the power to open a judgment or decree entered by it in strict conformity with the mandate of the appellate court,[68] although it may amend a judgment entered by it but which falls short of a compliance with the mandate,[69] and may correct clerical errors in the judgment rendered by it in pursuance

303 U.S. 637, 82 L.Ed. 1097—Northern Mining & Trading Co. v. Alaska Gold Recovery Co., C.C.A.Alaska, 25 F.2d 106—Old Colony Trust Co. v. Union Land & Cattle Co., C.C.A. Nev., 4 F.2d 451.

58. U.S.—Baltimore Building & Loan Ass'n v. Alderson, W.Va., 99 F. 489, 39 C.C.A. 609—The Sabine, C.C.La., 50 F. 215.

Authority under mandate held not exceeded

U.S.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859—Turner v. Kirkwood, C.C.A.Okl., 62 F.2d 256, certiorari denied 53 S.Ct. 522, 289 U.S. 724, 77 L.Ed. 474—H. P. Coffee Co. v. Reid, Murdoch & Co., C.C.A. Mo., 60 F.2d 387—In re Old Colony Trust Co., C.C.A.Nev., 2 F.2d 407—Indian Territory Illuminating Oil Co. v. Bartlesville Zinc Co., C.C.A. N.J., 299 F. 375.

59. U.S.—South Fork Canal Co. v. Gordon, C.C.Cal., 22 F.Cas.No.13,-189, 2 Abb. 479.

60. U.S.—South Fork Canal Co. v. Gordon, supra.

61. U.S.—American Engineering Co. v. Metropolitan By-Products Co., C.C.A.N.Y., 280 F. 677.

62. U.S.—Smyth v. Klauder, C.C.A. Pa., 52 F.2d 109, certiorari denied Klauder v. Smyth, 52 S.Ct. 199, 284 U.S. 681, 76 L.Ed. 575.
4 C.J. p 1223 note 73.

63. U.S.—The Holladay Case, C.C. Or., 29 F. 226.

64. U.S.—The Pocahontas, C.C.A.N. Y., 111 F.2d 451, denying motion 109 F.2d 929, modifying, D.C., 28 F.Supp. 955, certiorari denied Eagle Transport Co. v. U. S., 60 S.Ct. 1088, 310 U.S. 641, 84 L.Ed. 1409—Raydure v. Lindley, C.C.A.Ky., 268 F. 338.

Power reserved in decree

(1) Where railroad mortgage foreclosure decree which was affirmed as modified by circuit court of appeals expressly extended term at which decree was entered until after complete execution of provisions of decree, party seeking modification of decree was not required to apply to circuit court of appeals for leave to make application where provision of decree extending term of trial court was not matter of controversy in reviewing court, and was in no way modified by reviewing court, since such provision stood in no different situation after affirmance of decree by reviewing court than before appeal.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 98 F.2d 345.

(2) Where district court's decree in receivership proceeding adjudicated specific amounts of mortgage debts due to mortgagee bank, and adjudicated tax priorities asserted by government of Puerto Rico, and provided that matters not disposed of were reserved for further adjudication, that a party might subsequently apply for further relief in such matters, and that for purpose of any further order the term of court should be continued, the district court's interpretation of the decree as not extending the term of court for purpose of retaining jurisdiction to modify the decree with respect to matters finally determined therein, was accepted by the circuit court of appeals.—People of Puerto Rico v. Bank of Nova Scotia, C.C.A. Puerto Rico, 116 F.2d 379, certiorari denied 62 S.Ct. 56, 314 U.S. 615, 86 L.Ed. 495.

Opinion held to authorize modification

U.S.—City of Louisville v. Louisville Ry. Co., C.C.A.Ky., 281 F. 353.

65. U.S.—City of Orlando v. Murphy, C.C.A.Fla., 94 F.2d 426—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443—Inghram v. Union Stock Yards Co. of Omaha, D.C.Neb., 5 F.Supp. 486.
4 C.J. p 1223 note 77.

Federal Rules of Civ.Proc., rule 60, 28 U.S.C.A. foll. § 723c, authorizing court to relieve from a judgment, order or proceeding taken through mistake, inadvertence, surprise, or excusable neglect, although enlarging power of court over judgments without respect to running of term of court, does not give court power to alter or amend a judgment affirmed by circuit court of appeals.—Home Indemnity Co. of New York v. O'Brien, C.C.A.Mich., 112 F.2d 387.

66. U.S.—Turner v. Kirkwood, C.C. A.Okl., 62 F.2d 256, certiorari denied 53 S.Ct. 522, 289 U.S. 724, 77 L.Ed. 1474.

67. U.S.—Luminous Unit Co. v. Freeman-Sweet Co., C.C.A.Ill., 3 F. 2d 577.

68. U.S.—Rogers v. Consolidated Rock Products Co., C.C.A.Cal., 114 F.2d 108.

69. U.S.—Moran v. Hagerman, Nev., 64 F. 499, 12 C.C.A. 239, certiorari

of the mandate.[70]

On remand after appeal by some of the defendants, taken while the court still had jurisdiction, the trial court can vacate or revise its decree as to the defendants not appealing.[71]

dd. Granting New Trial or Rehearing

Generally after remand the lower court cannot grant a new trial on matters which were or could have been raised on appeal, although such relief may be granted where the opinion and mandate of the appellate court expressly or impliedly commit this matter to the discretion of the lower court.

Generally, after a review on the merits and a remand to the lower court, the lower court cannot grant a new trial on grounds which could have, and should have, been raised on the appeal,[72] especially where the matters desired to be reheard or retried have already been disposed of on appeal;[73] and, after a decree of a district court has been affirmed or reversed by the circuit court of appeals, the question whether a party should be allowed to file a bill of review in the district court must be passed on by the appellate court.[74] A new trial or rehearing may be granted where the opinion and mandate of the appellate court expressly or impliedly commit this matter to the discretion of the lower court.[75]

(d) Amendments
aa. Pleadings
bb. Parties

aa. Pleadings

Amendment of the pleadings after remand may ordinarily, in the discretion of the trial court, be allowed where expressly authorized by the appellate court or where the latter did not determine the case on the merits or direct final judgment.

Amendment of the pleadings after remand is authorized where leave or direction to that effect has been given by the circuit court of appeals, but the amendment must conform strictly to the terms of the mandate.[76] Cases bearing on the amendment of pleadings after remand, where no leave or direction has been granted by the appellate court, generally turn on the question of the power of the lower court, rather than on an absolute right of the party asking the amendment, it being held that, even where an amendment is authorized, the question whether it shall be allowed in a particular case is committed primarily to the discretion of the lower court.[77] Where an amendment after remand is permissible, and no specific direction as to amendment has been made by the appellate court, the power to allow it is to be exercised under the same rules as govern the allowance of amendments at any other time.[78]

In some cases the power to allow amendments of pleadings, after remand, is made to depend on whether the appellate court determined the case on the merits, amendments not being permissible when it did so determine the case,[79] and being permissible when the case was not so determined.[80]

denied 15 S.Ct. 1041, 159 U.S. 261, 40 L.Ed. 145.

70. U.S.—Ex parte Marks, Alaska, 136 F. 168, 69 C.C.A. 80.

71. U.S.—Fifth Third Nat. Bank v. Johnson, Ohio, 219 F. 89, 134 C.C.A. 529.

72. U.S.—City of Orlando v. Murphy, C.C.A.Fla., 94 F.2d 426—Wenborne-Karpen Dryer Co. v. Cutler Dry Kiln Co., D.C.N.Y., 21 F.2d 692, denying rehearing 285 F. 73, reversed, C.C.A., 290 F. 625, petitions for rehearing and intervention denied 292 F. 861, and certiorari denied 44 S.Ct. 36, 263 U.S. 708, 68 L.Ed. 517.

Effect of prior stipulation
District court is unauthorized to grant defendant new trial after receiving appellate court's mandate affirming judgment for plaintiff, notwithstanding plaintiffs' prior stipulation that court might entertain new trial motion.—Swartz v. Kaplan, D.C. Mass., 50 F.2d 947.

73. U.S.—D'Arcy v. Jackson Cushion Spring Co., Mich., 212 F. 889, 129 C.C.A. 409.

74. U.S.—Suhor v. Gooch, Va., 248 F. 870, 160 C.C.A. 628, denying petition for leave to file bill of review 244 F. 361, 156 C.C.A. 647, certiorari denied Gooch v. Suhor, 38 S.Ct. 581, 247 U.S. 517, 62 L.Ed. 1245.

75. U.S.—Alderman v. Elgin, J. & E. Ry. Co., C.C.A.Ill., 125 F.2d 971—Arkansas Natural Gas Corporation v. Sartor, C.C.A.La., 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437, mandate conformed to, D.C., Sartor v. Arkansas Natural Gas Co., 29 F.Supp. 956, reversed on other grounds, C.C.A., Sartor v. Arkansas Natural Gas Corporation, 111 F.2d 772—McCreary v. U. S., D.C.Or., 23 F.Supp. 385, reversed on other grounds, C.C.A., U. S. v. McCreary, 105 F.2d 297.

76. U.S.—Moody v. Johnston, C.C.A., 70 F.2d 835.

Amendment held in conformity with suggestion on appeal
One rendering services to village under contract fulfilled statutory condition precedent to action to recover therefor on quantum meruit by presenting bill or account over thirty days before moving for leave to amend complaint in his original action for breach of contract so as to state cause of action on quantum meruit, pursuant to suggestion in decision of circuit court of appeals on reversal of judgment for him in such action, and was not bound to submit to nonsuit after such decision and begin new action thirty days after presenting such bill or account.—Potts v. Village of Haverstraw, C.C.A.N.Y., 110 F.2d 58, certiorari denied Village of Haverstraw v. Potts, 61 S.Ct. 17, 311 U.S. 660, 85 L.Ed. 423.

77. U.S.—Southern Ry. Co. v. Colonna, C.C.A.Va., 64 F.2d 237, certiorari denied 53 S.Ct. 795, 289 U.S. 762, 77 L.Ed. 1505.
4 C.J. p 1224 note 9.

78. U.S.—Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, C.C.A. Minn., 99 F.2d 289—U. S. v. Revere Copper & Brass Co., D.C.N.Y., 28 F.Supp. 277.

79. U.S.—City of Orlando v. Murphy, C.C.A.Fla., 94 F.2d 426.

80. U.S.—Sheehy v. Mandeville, C.C.D.C., 21 F.Cas.No.12,740, 2 Cranch C.C. 15.

Defendant is entitled to serve an answer and have the case tried on the merits where the circuit court of appeals, on the ground that the complaint was sufficient to enable plaintiff to recover, reversed a judgment granting defendant's motion to dismiss the complaint for insufficiency, and remanded the cause for further proceedings.[81]

The lower court is without power to allow a new or amended pleading to be filed after the cause has been remanded with specific directions, as to the judgment or decree to be rendered,[82] but it is proper for the trial court within its discretion to allow amendments to the pleadings where, without any specific directions, the case has been remanded for further proceedings[83] or for new trial,[84] and the fact that, on reversal, the appellate court has directed the lower court generally to proceed in accordance with the opinion does not preclude an amendment of the pleadings.[85] Defendant is entitled to preserve in his answer his demurrer to the petition notwithstanding a ruling of the circuit court of appeals that the petition did state a cause of action.[86]

The lower court cannot, after remand, allow an amendment to the pleadings which states a new and different cause of action[87] or changes the character of the controversy.[88]

After determination on appeal and remand to the lower court, a party will not be allowed so to plead as to open up matters already adjudicated by the appellate court.[89]

bb. Parties

After remand new parties may sometimes be brought in.

The lower court, after the remand of a cause to it, may, in a proper case, allow new parties to be brought in.[90]

(e) Proceedings after Remand

Further proceedings after remand must be in substantial compliance with the specific directions of the appellate court, and in the absence of specific directions the further proceedings must be consistent with the opinion of the appellate court as determined from the nature of the particular case.

In accordance with the rule heretofore stated,

81. U.S.—U. S. v. Revere Copper & Brass Co., D.C.N.Y., 28 F.Supp. 277.

82. U.S.—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A. Iowa, 76 F.2d 240, certiorari denied 56 S.Ct. 120, 296 U.S. 605, 80 L. Ed. 428—Hickey v. Johnson, C.C.A. Okl., 9 F.2d 498—Cold Metal Process Co. v. United Engineering & Foundry Co., D.C.Pa., 43 F.Supp. 375.

83. U.S.—Jones v. St. Paul Fire & Marine Ins. Co., C.C.A.Tex., 108 F. 2d 123—Southern Ry. Co. v. Colonna, C.C.A.Va., 64 F.2d 237, certiorari denied 53 S.Ct. 795, 289 U.S. 762, 77 L.Ed. 1505—Edwards v. Bates County, C.C.Mo., 79 F. 56—Potts & Co. v. Creager, C.C.Ohio, 71 F. 574—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., D.C.Mo., 1 F.R.D. 386.

Refusal held not abuse of discretion
U.S.—Montgomery v. Pacific Electric Ry. Co., C.C.A.Cal., 293 F. 680, certiorari denied 44 S.Ct. 334, 264 U.S. 586, 68 L.Ed. 862.

84. U.S.—Midland Valley R. Co. v. Jones, C.C.A.Okl., 115 F.2d 508—In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, C.C.A.Fla., 64 F.2d 915.

Refusal held not abuse of discretion
U.S.—Standard Accident Ins. Co. v. Rossi, C.C.A.Ark., 52 F.2d 547—Lamborn v. National Bank of Commerce of Norfolk, Va., C.C.A.Va., 15 F.2d 473, certiorari granted 47 S.Ct. 457, 273 U.S. 688, 71 L.Ed. 841, and reversed on other grounds 48 S.Ct. 378, 276 U.S. 469, 72 L.Ed. 657.

85. U.S.—Rogers v. Hill, N.Y., 53 S. Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, 88 A.L.R. 744, reversing, C.C.A., 62 F.2d 1079, certiorari granted 53 S. Ct. 593, 289 U.S. 716, 77 L.Ed. 1469, following 60 F.2d 109—Jones v. St. Paul Fire & Marine Ins. Co., C.C.A. Tex., 108 F.2d 123—Hawkins v. Cleveland, C. C. & St. L. R. Co., Ind., 99 F. 322, 39 C.C.A. 538.

86. U.S.—Leimer v. State Mut. Life Assur. Co. of Worcester, Mass., D. C.Mo., 1 F.R.D. 386.

87. U.S.—Barnes-King Dev. Co. v. Assets Collecting Co., N.Y., 205 F. 362, 123 C.C.A. 490, certiorari denied 34 S.Ct. 315, 231 U.S. 734, 58 L.Ed. 459.

88. U.S.—Routzahn v. Brown, C.C.A. Ohio, 95 F.2d 766.

89. U.S.—Long Beach Dock & Terminal Co. v. Pacific Dock & Terminal Co., C.C.A.Cal., 98 F.2d 833, certiorari denied 59 S.Ct. 361, 305 U.S. 659, 83 L.Ed. 427—City of Orlando v. Murphy, C.C.A.Fla., 94 F. 2d 426—In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, C.C.A.Fla., 64 F. 2d 915—Walker v. Brown, C.C. Iowa, 86 F. 364.

Matters which might have been urged
In a suit to establish a trust in land, in which a corporation created by the trustee was held entitled to reimbursement for expenditures for prospecting, where an accounting was had, and the decree thereon affirmed, leave to file a supplementary petition thereafter presented, seeking an accounting by the trustee for damages for deprivation of the use and occupation of the premises pending suit, was properly denied, as such claims should have been pressed on the accounting.—Clarke v. Boysen, C.C.A.Wyo., 264 F. 492, modified on other grounds Clarke v. Asmus Boysen Mining Co., 268 F. 535, and mandate recalled and opinion and decree amended on other grounds 273 F. 923.

90. U.S.—Reed v. Atchison, C.C.A. Okl., 276 F. 888—Baltimore Building & Loan Ass'n v. Alderson, W. Va., 99 F. 489, 39 C.C.A. 609.
4 C.J. p 1229 note 1.

Amendment held improper
Where an injunction against infringement of a copyright had been reversed on the ground that plaintiff was not the owner of the copyright, and the cause remanded, with leave to the plaintiff to procure title to the copyright, if it could do so, the mandate did not permit plaintiff, instead of procuring the title to the copyright, to have the owner thereof joined as a coplaintiff under an agreement which amounted substantially to paying him for permission to use his name in the suit.—Goldwyn Pictures Corporation v. Howells Sales Co., C.C.A.N.Y., 287 F. 100, reversing, D.C., 282 F. 458, and certiorari denied 43 S.Ct. 703, 262 U.S. 755, 67 L.Ed. 1217.

requiring the lower court to comply with the mandate or directions of the appellate court, see supra subdivision a (9) (c) bb of this section, if a cause is remanded with specific directions further proceedings in the trial court must be in substantial compliance with such directions.[91] If however, no specific directions are given on the remand, the question as to what further proceedings can be had consistent with the opinion of the appellate court must be determined from the nature of the particular case.[92] In a proper case the district court may permit defendant relying on a particular statute as a defense to abandon such defense and set up a later statute as a defense.[93] On a remand by the appellate court directing the assessment of damages, both parties are entitled to be heard and adduce evidence;[94] and where a judgment of dismissal was reversed with instructions to enter judgment for plaintiff for the reasonable cost of construction work it was error to enter judgment without notice to defendant.[95] On failure of plaintiff to sustain the burden of proof with respect to jurisdiction, and reversal of the cause for error in not dismissing on that ground, such reversal will not prevent plaintiff on a new trial from proving the allegations of his pleadings concerning jurisdiction.[96] Where the circuit court of appeals directed a modification of the judgment on the record already made, the trial court was without jurisdiction to reopen the case for the taking of additional testimony.[97] Reversal of an interlocutory decree appointing a master did not deprive the trial court of power to award compensation for services rendered by such master under order of the trial court pending appeal where there was no indication that the circuit court of appeals intended that the district court should be deprived of such power.[98] Although the decree was entered before the rule took effect, and the circuit court of appeals decided the case without reference to the rule, on remand of an interpleader proceeding, Federal Rules of Civil Procedure, rule 22, 28 U.S.C.A. following § 723c, relating to interpleader, was applicable in the district court.[99] Inclusion in an answer of a contention subject to being stricken out as having been passed on adversely by the circuit court of appeals precludes any inference of waiver depriving defendants of the point if the case should be taken to the supreme court.[1]

Dismissal or nonsuit. The lower court generally may and should, either of its own motion or on motion of a party, dismiss the action after it has been remanded only where in so doing it acts in obedience to the mandate or in conformity to the judgment and opinion of the appellate court.[2] Ordi-

91. U.S.—Casebeer v. Hudspeth, C.C. A.Kan., 121 F.2d 914, conforming to mandate 61 S.Ct. 804, 312 U.S. 662, 85 L.Ed. 1109, reversing, C.C.A., 114 F.2d 789.

Entry of judgment on record

Mandate reversing judgment of dismissal, with instructions to enter judgment "on the record as it stands," required consideration of entire record in court below.—Southern Pac. Co. v. Sartoris, C.C.A.Cal., 27 F.2d 852, certiorari denied Sartoris v. Utah Const. Co., 49 S.Ct. 176, 278 U.S. 651, 73 L.Ed. 562.

92. U.S.—Morgan v. U. S., D.C.Mo., 23 F.Supp. 380, reversed on other grounds 58 S.Ct. 773, 304 U.S. 1, 82 L.Ed. 1129, rehearing denied 58 S. Ct. 999, 304 U.S. 1, 82 L.Ed. 1129, mandate conformed to, D.C., 24 F. Supp. 214, reversed on other grounds 59 S.Ct. 795, 307 U.S. 183, 83 L.Ed. 1211, mandate conformed to, D.C., Morgan v. U. S., 32 F. Supp. 546.

Moot case

Where, in suit to enjoin claimant to land underlying bay from prosecuting in state court proceeding on order against contractor to show cause why contractor should not be restrained from dredging land under contract with United States, final decree in favor of the United States was required to be reversed because case had become moot prior to final hearing, claimant was not entitled to reversal of decree on merits so that on remand she could claim and recover damages for dredging of her land, where claimant had not theretofore claimed damages, since, not having claimed damages before case became moot, claimant could not subsequently assert claim for damages in same case.—Newcomb v. U. S., C. C.A.Cal., 98 F.2d 25, certiorari denied 59 S.Ct. 243, 305 U.S. 651, 83 L. Ed. 421.

93. U.S.—Chase v. U. S., Neb., 41 S. Ct. 417, 256 U.S. 1, 65 L.Ed. 801, affirming, C.C.A., 261 F. 833.

94. U.S.—Magnolia Petroleum Co. v. Suits, C.C.A.Okl., 43 F.2d 280, certiorari denied Suits v. Magnolia Petroleum Co., 51 S.Ct. 35, 282 U.S. 861, 75 L.Ed. 762—Southern Pac. Co. v. Sartoris, C.C.A.Cal., 27 F.2d 852, certiorari denied Sartoris v. Utah Const. Co., 49 S.Ct. 176, 278 U.S. 651, 73 L.Ed. 562.

95. U.S.—Southern Pac. Co. v. Sartoris, supra.

96. U.S.—Town of Lantana v. Hopper, C.C.A.Fla., 102 F.2d 118.

97. U.S.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 52 F.2d 418.

98. U.S.—Associated Almond Growers of Paso Robles v. Wymond, C. C.A.Cal., 69 F.2d 912.

99. U.S.—Century Ins. Co. v. First Nat. Bank, C.C.A.Tex., 102 F.2d 726, certiorari denied First Nat. Bank v. Century Ins. Co., 60 S.Ct. 84, 308 U.S. 570, 84 L.Ed. 478.

1. U.S.—Western Electric Co. v. Pacent Reproducer Corporation, D. C.N.Y., 53 F.2d 639.

2. U.S.—Campbell v. James, C.C.N. Y., 31 F. 525.

Motion held proper

Where all questions involved were decided by circuit court of appeals in reversing decree and remanding, complaint would be dismissed by district court on merits on motion, notwithstanding better practice required to move for dismissal when cause was reached on calendar, where no objection was made to bringing matter before court by way of motion. Such motion to dismiss complaint would be granted as against contention that motion was premature in being made before time expired within which plaintiff might apply for writ of certiorari to supreme court, where no stay in proceeding was applied for or granted, no application for writ of certiorari was made, and issuance of mandate of circuit court of appeals was not stayed and was

narily after a judgment has been reversed on appeal and the cause remanded the case stands, with respect to plaintiff's right to take a voluntary nonsuit, in the same relative position which it occupied before the trial in the first instance,[3] and where the reversal was with instructions to proceed in accordance with the opinion, permitting plaintiff to dismiss the action without prejudice, under a statute authorizing such procedure before the final submission of the case, was held not error.[4] A decree directing an accounting, entered pursuant to the mandate of the circuit court of appeals, is in effect the decree of that court, and while it remains in effect the trial court can give the master no different authority.[5]

Costs of reference after remand may be taxed in accordance with a stipulation entered into between the parties.[6]

(f) Enforcement of Judgment

The lower court has the power and duty to enforce a judgment in that court after decision of an appeal to the circuit court of appeals; and, where the mandate of the appellate court fully shows the decree, a new judgment in the district court is not prerequisite to issuance of execution.

Where the judgment is in the lower court, either by reason of its original judgment having been simply affirmed or a judgment having been entered by it in pursuance of the mandate of the appellate court or the judgment of the appellate court having been sent back to it for execution, the lower court has the power and duty to enforce it, by execution or otherwise.[7] Where the circuit court of appeals modifies a decree of the district court and affirms it, and the mandate to the district court fully shows the modified decree which provides for enforcement by execution, a new judgment in the district court is not required to be entered before execution can issue.[8]

(g) Rendition and Entry of Judgment as Directed

aa. In general

bb. Inclusion of interest and costs

aa. In General

Where the mandate of the circuit court of appeals directs a certain judgment, the district court should, on the day when the mandate is received, enter a judgment conforming to such directions; and if the directions are general or implied it should render a judgment that will give effect to, and be within the scope of, the decision and directions of the appellate court.

While the party prevailing on the appeal is not entitled to judgment on the mandate without retrial where a judgment was reversed by the circuit court of appeals without entry of judgment or direction thereof,[9] on the filing of a mandate or remittitur of the appellate court directing a certain judgment the lower court has no discretion but must comply therewith by entering a judgment conforming to such directions.[10] In such case the mandate requires of the district court the doing of a purely ministerial or clerical act, and appellant is entitled, on the day the mandate is received, to have the decree entered without any application on his part; and if through no fault of appellant the decree is not entered on the day the mandate is received, the adverse party would nevertheless be obligated as of that date to fulfill the terms and conditions of the decree which should have been entered.[11] The entry, however, of a judgment or decree in substantial compliance with the directions contained in the mandate is proper and sufficient,[12] and it is proper for the district court to make additional orders not directed by the appellate court but which are a necessary consequence of the

filed with clerk of district court.—Nelson v. Lewis, D.C.N.Y., 9 F.Supp. 406.

3. U.S.—Shell Petroleum Corporation v. Shore, C.C.A.Kan., 80 F.2d 785—Cybur Lumber Co. v. Erkhart, Miss., 247 F. 284, 159 C.C.A. 378.

4. U.S.—Shell Petroleum Corporation v. Shore, C.C.A.Kan., 80 F.2d 785.

5. U.S.—In re L. P. Larson, Jr., Co., C.C.A.Ill., 275 F. 535.

6. U.S.—Clark v. Chicago, M. & St. P. R. Co., C.C.A.N.Y., 105 F. 552.

7. U.S.—Home Indemnity Co. of New York v. O'Brien, C.C.A.Mich., 112 F.2d 387—In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, C.C.A.Fla., 64 F.2d 915—Osage Oil & Refining Co. v. Continental Oil Co., C.C.A. Cal., 34 F.2d 585—In re Walker Grain Co., C.C.A.Tex., 3 F.2d 872, certiorari denied Walker v. Wilkinson, 45 S.Ct. 637, 268 U.S. 701, 69 L.Ed. 1165—Inghram v. Union Stock Yards Co. of Omaha, D.C. Neb., 5 F.Supp. 486—Hanan v. Threadgill, D.C.Fla., 296 F. 569.

8. U.S.—Hunt v. Seeley, C.C.A.Tex., 115 F.2d 205.

9. U.S.—Wallace v. Seagraves, D.C. Tex., 51 F.2d 143.

10. U.S.—Bastian v. Erickson, C.C.A. Utah, 114 F.2d 338—Pocono Rubber Cloth Co. v. J. A. Livingston, Inc., C.C.A.N.J., 92 F.2d 290, certiorari denied J. A. Livingston, Inc. v. Pocono Rubber Cloth Co., 58 S. Ct. 522, 303 U.S. 637, 82 L.Ed. 1097—National Labor Relations Board v. Jones & Laughlin Steel Corporation, C.C.A., 90 F.2d 678—American Engineering Co. v. Metropolitan By-Products Co., C.C.A.N.Y., 280 F. 677—Williams v. Ansehl, C. C.A.Mo., 279 F. 550—U. S. v. Ash Sheep Co., D.C.Mont., 229 F. 479, affirmed 250 F. 591, 162 C.C.A. 607, affirmed 40 S.Ct. 241, 252 U.S. 159, 64 L.Ed. 507—Harrison v. McPherson, Iowa, 226 F. 138, 141 C.C.A. 196—Groves v. Sentell, La., 66 F. 179, 13 C.C.A. 386, affirmed 69 F. 223, 16 C.C.A. 217.

11. U.S.—Thornton v. Carter, C.C.A. Ark., 109 F.2d 316.

12. U.S.—Pittsburgh Mfg Co. v. Ludlow Valve Mfg. Co., Pa., 177 F. 691, 101 C.C.A. 608, certiorari denied 30 S.Ct. 697, 217 U.S. 608, 54 L.Ed. 901—Rowley v. J. F. Rowley Co., Pa., 171 F. 415, 96 C.C.A. 371.

judgment directed.[13] So, where the directions are general or implied, the lower court should render a judgment or decree that will give effect to the decision and directions of the appellate court and yet be within the scope thereof and not inconsistent therewith.[14] Frequently it is contemplated that an entirely new or a modified judgment or decree shall be entered.[15] A judgment in the district court in accordance with the mandate of the circuit court of appeals presents no possible error.[16]

bb. Inclusion of Interest and Costs

The district court must comply with the directions of the mandate with respect to the awarding of interest and costs, and is without power to allow interest after affirmance of a judgment not allowing interest, although interest may be awarded where it is authorized by statute, by the judgment as affirmed, or by the mandate and opinion of the appellate court.

The district court is without power to allow interest after affirmance of a judgment not allowing interest,[17] but where a judgment allowing interest is affirmed in part the lower court may compute interest on the part affirmed,[18] and, of course, interest may be allowed where so authorized by statute.[19] So where the circuit court of appeals did not discuss interest in its opinion, but the legal result of its decision was that interest, as an incident of the debt, followed it, the district court in determining the amount due plaintiff rightfully must consider interest.[20] A rule of the circuit court of appeals that interest may be allowed if specifically directed by the court, adopted at a time when no appeal could be taken from an interlocutory decree, and consequently when every appeal involved damages and interest, does not cover appeals from interlocutory decrees so far as interest is concerned, and does not preclude an allowance of interest by the district court after affirmance of judgment on such appeal.[21]

After remand the lower court must comply with whatever directions are contained in the mandate as to costs.[22] After reversal or modification in equity and admiralty the district court has discretion as to the award of costs in that court, unless the opinion or the mandate of the appellate court gives instructions with respect to such costs;[23] and where the opinion and mandate are silent on costs in the trial court the district court has discretion to cut down the cost theretofore allowed.[24] A motion to apportion costs already taxed among various defendants in an action still pending in the district court after affirmance of an interlocutory decree thereof by the circuit court of appeals is not beyond the power of the district court to grant.[25] Where the mandate of the circuit court of appeals was filed and judgment pursuant thereto was entered after the effective date of the Federal Rules

13. U.S.—White v. Dawson, C.C.A. Ky., 18 F.2d 471.

Setting aside judgment

Where judgment of district court was reversed with directions to dismiss for lack of jurisdiction, order of district court setting aside judgment entered after reversal of original judgment was not error, although not directed by circuit court of appeals, since district court could not have rendered binding judgment, being without jurisdiction.—Green v. City of Stuart, C.C.A.Fla., 101 F.2d 309, certiorari denied 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1510.

14. U.S.—Fitch v. Stanton Tp., Kan., 190 F. 310, 111 C.C.A. 210.

15. U.S.—Ingersoll v. Coram, C.C. Mass., 174 F. 662.

16. U.S.—Green v. City of Stuart, C.C.A.Fla., 101 F.2d 309, certiorari denied 59 S.Ct. 827, 307 U.S. 626, 83 L.Ed. 1510—Clarke v. Hot Springs Electric Light & Power Co., C.C.A.Wyo., 76 F.2d 918, certiorari denied 56 S.Ct. 147, 296 U.S. 624, 80 L.Ed. 443.

Entry in precise words of mandate

A district court decree, entered pursuant to, and for all practical purposes in precise words of, apparently complete and explicit mandate of circuit court of appeals, to which party complaining of mandate as not giving all relief sought by such party did not seasonably apply for modification thereof, was not erroneous.—Grove Laboratories v. Brewer & Co., C.C.A.Mass., 111 F.2d 124.

17. U.S.—De Witt v. U. S., D.C.Colo., 298 F. 182—U. S. v. U. S. Dist. Court for Dist. of Montana, C.C.A. Mont., 272 F. 611.

18. U.S.—Bradford v. Commonwealth Trust Co. of Pittsburgh, C. C.A.Pa., 98 F.2d 655.

19. U.S.—Metcalf v. Watertown, Wis., 68 F. 859, 16 C.C.A. 37.
4 C.J. p 1235 note 13.

20. U.S.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859.

21. U.S.—The Manhattan, D.C.Pa., 10 F.Supp. 45, affirmed, C.C.A., 85 F.2d 427, certiorari denied U. S. v. The Bessemer, 57 S.Ct. 432, 300 U.S. 654, 81 L.Ed. 864.

22. U.S.—Tompkins v. St. Regis Paper Co., D.C.N.Y., 240 F. 838—Clark v. Chicago, M. & St. P. R. Co., C.C. N.Y., 105 F. 552.

Fees of guardian ad litem

U.S.—Franz v. Buder, C.C.A.Mo., 38 F.2d 605.

23. U.S.—The Pocahontas, C.C.A.N. Y., 111 F.2d 451, denying motion 109 F.2d 929, modifying, D.C., 28 F. Supp. 955, certiorari denied Eagle Transport Co. v. U. S., 60 S.Ct. 1088, 310 U.S. 641, 84 L.Ed. 1409—Romeike v. Romeike, N.Y., 251 F. 273, 163 C.C.A. 429.

24. U.S.—The Pocahontas, C.C.A.N. Y., 111 F.2d 451, denying motion 109 F.2d 929, modifying, D.C., 28 F. Supp. 955, certiorari denied Eagle Transport Co. v. U. S., 60 S.Ct. 1088, 310 U.S. 641, 84 L.Ed. 1409.

25. **Decree held interlocutory within rule**

In action for infringement of patents and unfair competition, district court decree referring costs to master, to determine amount of gains and profits realized by defendant and damages sustained by plaintiff and retaining cause in such court for disposition of master's report and such relief thereon as the court may determine was only interlocutory decree by which court retained jurisdiction to hear one defendant's motion to apportion costs taxed, although another defendant appealed to circuit court of appeals which affirmed it as to such appellant's personal liability for gains and profits only without referring to costs in its opinion.—General Motors Corporation v. Franklin Die Casting Co., D.C.Ill., 41 F.Supp. 340.

of Civil Procedure, those rules were controlling on the subject of retaxing costs as far as applicable.[26]

(h) Restitution

The reversal of a judgment gives rise to a right of restitution of money or property taken in the enforcement thereof, which restitution may be enforced by the lower court by summary proceedings as part of the original action or by a distinct independent action.

The reversal of a judgment or decree gives rise to a right in favor of the party who has lost money or property by reason of the judgment or decree to have restitution made thereof,[27] and power to enforce the right of restitution is usually possessed by the lower court as a matter of inherent right.[28] This rule entitles a successful appellant to recover from a party who has received and retained money which has been paid under the judgment.[29] The condition of the restoration, however, is always that the party against whom restitution is sought shall have received, by virtue of the decree, what he is asked to restore,[30] and reversal of a decree granting an injunction does not entitle defendant to recover damages alleged to have resulted incidentally from the injunction.[31] If property has passed into the hands of a bona fide purchaser for value there can be no recovery in specie.[32]

Remedies and proceedings. The right of restitution may be enforced by summary proceedings in the trial court as a part of the original action,[33] or by a distinct independent action,[34] which must usually be in the nature of an action for money or property had and received where the recovery of personal property or money is all that is sought.[35] Proceedings for restitution, whether by motion or independent action, are governed by broad equitable considerations and their maintainability is a question ex æquo et bono, as in the case of suits for money or property had and received.[36] Where no specific property is sought to be recovered, a right of restitution, enforceable by an action for money had and received, does not entitle the person who has paid the money under a reversed judgment to a preferential claim or lien against the property of the person receiving the money.[37] As in other actions or proceedings, the evidence must be sufficient to establish the matters to be proved.[38]

(i) New Trial

Even without a specific order a new trial is ordinarily necessary where the case has been reversed and remanded generally without directions to the contrary, although under the terms of a particular mandate a new trial may be unnecessary. Where a new trial is had, it should be confined to the issues designated in the mandate, but if there is no such designation all pertinent issues left undetermined by the appellate court may be retried.

26. U.S.—Solomon v. Welch, D.C. Cal., 28 F.Supp. 823.

27. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014—Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Texas & P. Ry. Co., C.C.A.La., 12 F.2d 245, 45 A.L.R. 1513—In re Lilyknit Silk Underwear Co., D.C. N.Y., 5 F.Supp. 896, affirmed, C.C. A., 73 F.2d 52—Kansas City Southern Ry. Co. v. Southern Trust Co., C.C.A.Ark., 279 F. 801.

28. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L. Ed. 1014—St. Louis Southwestern Ry. Co. v. Consolidated Fuel Co., Okl., 260 F. 638, 171 C.C.A. 402.

29. U.S.—Hinchman v. Ripinsky, Alaska, 202 F. 625, 121 C.C.A. 35, certiorari denied 34 S.Ct. 676, 234 U.S. 759, 58 L.Ed. 1580.

4 C.J. p 1237 note 50.

Apportionment

Where, in a suit for foreclosure of railroad mortgages, one mortgagee was adjudged to have the prior lien on all the property, which decision was reversed on appeal, and appellant held to have the first lien on a part of the road, but pending the appeal the property had been sold as an entirety and the road junked as permitted by the decree of confirmation which was not objected to or appealed from, so that the property on which appellant had the first lien could not be returned, the only way of restitution was by apportioning the purchase money according to the interests of the parties.—Kansas City Southern Ry. Co. v. Southern Trust Co., C.C.A.Ark., 279 F. 801.

30. U.S.—Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Texas & P. Ry. Co., C.C.A.La., 12 F.2d 245, 45 A.L.R. 1513.

31. U.S.—Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Texas & P. Ry. Co., supra.

32. U.S.—South Fork Canal Co. v. Gordon, C.C.Cal., 22 F.Cas.No.13,-189, 2 Abb. 479.

33. U.S.—Sanger Lumber Co. v. Western Lumber Exchange, 11 F. 2d 489, 491, citing **Corpus Juris**.

34. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—Tenth Ward Road Dist. No. 11 of Avoyelles Parish v. Texas & P. Ry. Co., C.C. A.La., 12 F.2d 245, 45 A.L.R. 1513—Sanger Lumber Co. v. Western Lumber Exchange, C.C.A.Wash., 11 F.2d 489, 491, citing **Corpus Juris**—Crane v. Runey, C.C.Or., 26 F. 15.

35. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001—Crane v. Runey, C. C.Or., 26 F. 15.

36. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F. 2d 484, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F. Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014.

37. U.S.—Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co., C.C.A.Mo., 80 F.2d 32, certiorari denied 56 S.Ct. 591, 297 U.S. 715, 80 L.Ed. 1001.

38. U.S.—Greenwood County v. Duke Power Co., C.C.A.S.C., 107 F.2d 484, affirming, D.C., Duke Power Co. v. Greenwood County, 25 F.Supp. 963, certiorari denied Greenwood County v. Duke Power Co., 60 S.Ct. 608, 309 U.S. 667, 84 L.Ed. 1014.

General rules as to the conduct of the trial, evidence, and instructions control.

Even without a specific order to that effect, it is usually held that a new trial is intended by the circuit court of appeals and necessary where the case has been reversed and remanded generally without directions to the contrary,[39] particularly where the facts are disputed.[40] If the appellate court has unconditionally ordered a new trial, the lower court cannot make the payment of costs of the former trial a condition precedent to the new trial.[41] Where the mandate on reversal of a judgment for plaintiff contained a direction to grant a new trial, sustain the plea of the statute of limitations, and enter a judgment for defendant, the mandate does not make a new trial compulsory, but merely allows plaintiff one if he desires it, the further directions to govern if he elects to take a new trial; hence, after the trial court has entered an order granting a new trial, plaintiff may take a voluntary nonsuit.[42] After the appellate court, on defendant's appeal, has decided the law in defendant's favor, plaintiff is in no position to urge a new trial on grounds set forth by defendant before the appeal.[43]

A mandate expressly or in effect ordering a new trial is sufficiently complied with if there is a judicial examination of the issues between the parties, whether they are of law or of fact.[44] Where the view taken by the circuit court of appeals directing a new trial makes another trial a useless proceeding, a new trial will be ordered by the district court to the extent that the case be again listed on the trial calendar, and the district court will then grant motions for dismissal.[45]

Scope of issues. Where on remanding a cause the circuit court of appeals has expressly or in effect given directions as to the issues to be tried, the new trial may and should be confined to the issues designated.[46] If the appeal is taken generally from the entire judgment of the lower court, a reversal and remand for a new trial, without any limitations or issues being specified, is usually held to vacate completely the judgment of the lower court and open the whole case up for a new trial as to all issues.[47] As noted supra subdivision a (9) (b) bb of this section, issues which have been decided by the appellate court, whose decision thereon has become the law of the case, cannot be relitigated. Conversely, where the case has been opened for retrial practically all pertinent issues left undetermined by the appellate court may be retried;[48] but there can be no trial of issues not made by the pleadings.[49]

Conduct of new trial. If the evidence or facts produced on the second trial are substantially the same as on the first trial, the trial court may and should follow the appellate court's decision as to whether or not the case[50] or certain issues[51] should be submitted to the jury, or a verdict instructed or

39. U.S.—Fisher v. Lord, C.C.A.Ill., 125 F.2d 117—Federal Reserve Bank of Philadelphia v. Ocean City, C.C.A.N.J., 93 F.2d 519, supplementing 91 F.2d 635, certiorari denied Ocean City v. Federal Reserve Bank of Philadelphia, 58 S.Ct. 281, 302 U.S. 752, 82 L.Ed. 581, rehearing denied 58 S.Ct. 475, 302 U.S. 781, 82 L.Ed. 603—Shell Petroleum Corporation v. Shore, C.C.A.Kan., 80 F.2d 785—Illinois Power & Light Corporation v. Hurley, C.C.A.Mo., 49 F.2d 681, certiorari denied 52 S.Ct. 19, 284 U.S. 637, 76 L.Ed. 541.

40. U.S.—Hawkins v. Cleveland, C. C. & St. L. R. Co., Ind., 99 F. 322, 39 C.C.A. 538, refusing to modify 89 F. 266, 32 C.C.A. 198.

41. U.S.—Chapman v. Yellow Poplar Lumber Co., Va., 89 F. 903, 32 C.C.A. 402, certiorari denied 19 S.Ct. 883, 173 U.S. 705, 43 L.Ed. 1186.

42. U.S.—Atlanta, K. & N. Ry. Co. v. Hooper, Tenn., 105 F. 550, 44 C.C.A. 586.

43. U.S.—Sykes v. Bensinger Recreation Corporation, D.C.Wis., 39 F. Supp. 952.

44. U.S.—Dodge v. U. S., N.Y., 131 F. 849, 65 C.C.A. 603, certiorari denied 25 S.Ct. 790, 195 U.S. 632, 49 L.Ed. 353.
4 C.J. p 1240 note 15.

45. U.S.—Sykes v. Bensinger Recreation Corporation, D.C.Wis., 39 F. Supp. 952.

46. Alaska.—Reed v. Thompson, 6 Alaska 215.

47. U.S.—Ohio Oil Co. v. Thompson, C.C.A.Mo., 120 F.2d 831, certiorari denied 62 S.Ct. 112, 314 U.S. 658, 86 L.Ed. 528—Glades County, Fla., v. Detroit Fidelity & Surety Co., C.C.A. Fla., 65 F.2d 252—Cub Fork Coal Co. v. Fairmount Glass Works, C.C.A.Ind., 59 F.2d 539, certiorari granted Fairmount Glass Works v. Cub Fork Coal Co., 53 S. Ct. 24, 287 U.S. 585, 77 L.Ed. 511, and reversed on other grounds 53 S.Ct. 252, 287 U.S. 474, 77 L.Ed. 439.

Facts well pleaded

On reversal of order sustaining demurrer to secretary of interior's answer that he had made finding that departmental oil lease from Osage Nation expired because of lessee's failure to produce oil, facts well pleaded in answer were open for determination.—Continental Oil Co. v. Osage Oil & Refining Co., C.C.A.Okl., 69 F.2d 19.

48. U.S.—Duke Power Co. v. Greenwood County, C.C.A.S.C., 91 F.2d 665, affirming, D.C., 19 F.Supp. 932, and certiorari granted 58 S.Ct. 120, 302 U.S. 675, 82 L.Ed. 521, and affirmed 58 S.Ct. 306, 302 U.S. 485, 82 L.Ed. 381—American Surety Co. of New York v. Jackson, C.C.A.Idaho. 26 F.2d 248, denying rehearing 24 F.2d 768.

49. U.S.—Brent v. Chas. H. Lilly Co., D.C.Wash., 202 F. 335.

50. U.S.—Ætna Life Ins. Co. v. Wharton, C.C.A.Ark., 63 F.2d 378, certiorari denied 53 S.Ct. 786, 289 U.S. 755, 77 L.Ed. 1500.
4 C.J. p 1218 note 14.

51. U.S.—Hanging Rock Iron Co. v. P. H. & F. M. Roots Co., C.C.A. Ind., 51 F.2d 720—Cortes v. Baltimore Insular Line, D.C.N.Y., 6 F. Supp. 604—St. Louis & S. F. R. Co. v. Herr, Miss., 193 F. 950, 113 C.C.A. 578, certiorari denied 225 U.S. 705, 32 S.Ct. 837, 56 L.Ed. 1265.

directed for plaintiff[52] or defendant.[53] On a trial had before a jury, a direction of a verdict for plaintiff is not a violation of the decision of the circuit court of appeals on a prior appeal that the trial court committed error in refusing defendant's demand for a jury trial.[54] Where on the former trial, as well as on appeal, the parties treated a defense as in issue and argued thereon, it cannot be successfully urged on the second trial that such defense was waived as not within the objections raised.[55] On retrial where the parties waived a jury trial, the district court will find the facts specially, state separately its conclusions of law thereon and its order for the entry of the appropriate judgment in accordance with the federal practice.[56]

Evidence. If it is material to the issues properly triable practically any competent evidence is admissible.[57] The evidence received on the first trial is admissible,[58] but the parties are not confined to this and are entitled to introduce additional evidence.[59] Counsel can waive objections to the competency of evidence notwithstanding the prior judgment was reversed because of the admission of similar evidence in the earlier trial.[60] The lower court should direct a verdict against a party whose testimony is wholly inconsistent with that given by him on the first trial.[61]

Instructions conforming to the law of the case as settled on the former appeal are proper.[62]

(j) Failure to Follow Decision or Comply with Mandate

Enforcement of the mandate of the circuit court of appeals may be by mandatory order of the court, application to the trial or appellate court for correction of the judgment, or appeal and reversal.

Error of the trial court in failing to follow the law of the case as laid down by the decision of the circuit court of appeals may be remedied or corrected by another appellate proceeding and reversal.[63] Under proper circumstances the procedure or remedy to obtain enforcement of the appellate court's mandate may be by mandatory order of the appellate court requiring the lower court to comply with the former's mandate,[64] application to the lower court by motion, petition, or bill of review for correction or amendment of the judgment or decree,[65] or a similar application to the appellate court,[66] or another appeal and reversal.[67]

52. U.S.—National Can Co. v. Fellows, C.C.A.Mich., 290 F. 201—Good v. Central Coal & Coke Co., 170 F. 416, 95 C.C.A. 586, affirming 7 Ind. T. 268, 104 S.W. 613.

53. U.S.—Nugent v. Proel, C.C.A.N.H., 108 F.2d 718—Priester v. Southern Ry. Co., C.C.A.S.C., 6 F.2d 878—Toledo, St. L. & W. R. Co. v. Sellers, Ill., 184 F. 885, 107 C.C.A. 114.

Evidence stronger for plaintiff
Defendants' motion for directed verdict was properly denied, where appellate court on former appeal held that evidence made jury case and evidence on retrial materially strengthened plaintiff's case.—Kaplan v. Swartz, C.C.A.Mass., 41 F.2d 177.

54. U.S.—Peterson v. Sucro, C.C.A.N.C., 101 F.2d 282.

55. U.S.—Lamborn v. National Bank of Commerce of Norfolk, Va., C.C.A.Va., 15 F.2d 473, certiorari granted 47 S.Ct. 457, 273 U.S. 688, 71 L.Ed. 841, and reversed on other grounds 48 S.Ct. 378, 276 U.S. 469, 72 L.Ed. 657.

56. U.S.—Olds v. Town of Belleair, D.C.Fla., 41 F.Supp. 453, conforming to mandate, C.C.A., 120 F.2d 492.

57. U.S.—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436.

58. U.S.—New York Alaska Gold Dredging Co. v. Walbridge, C.C.A. Alaska, 76 F.2d 655.

59. U.S.—Christian v. Waialua Agr. Co., C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Waialua Agr. Co. v. Christian, C.C.A.Hawaii, 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436.

60. U.S.—Pabst Brewing Co. v. E. Clemens Horst Co., C.C.A.Cal., 264 F. 909.

61. U.S.—Smith v. Boston El. R. Co., Mass., 184 F. 387, 106 C.C.A. 497, 37 L.R.A.,N.S., 429.
4 C.J. p 1242 note 57.

62. U.S.—Falstaff Brewing Corporation v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

63. U.S.—Sartor v. Arkansas Natural Gas Corporation, C.C.A.La., 111 F.2d 772, reversing, D.C., Sartor v. Arkansas Natural Gas Co., 29 F. Supp. 956, conforming to mandate, C.C.A., Arkansas Natural Gas Corporation v. Sartor, 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437.

64. U.S.—Sartor v. Arkansas Natural Gas Corporation, supra.

65. U.S.—Moran v. Hagerman, Nev., 64 F. 499, 12 C.C.A. 239, certiorari denied 15 S.Ct. 1041, 159 U.S. 261, 40 L.Ed. 145.

66. U.S.—Individual Drinking Cup Co. v. Public Service Cup Co., C.C.A.N.Y., 262 F. 410, modifying, D.C., 261 F. 555, and rehearing denied, C.C.A., Individual Drinking Cup Co. v. Public Service Corporation, 263 F. 98.

67. U.S.—Sartor v. Arkansas Natural Gas Corporation, C.C.A.La., 111 F.2d 772, reversing, D.C., Sartor v. Arkansas Natural Gas Co., 29 F.Supp. 956, conforming to mandate, C.C.A., Arkansas Natural Gas Corporation v. Sartor, 98 F.2d 527, certiorari denied 59 S.Ct. 243, 305 U.S. 649, 83 L.Ed. 420, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—Individual Drinking Cup Co. v. Public Service Cup Co., C.C.A.N.Y., 262 F. 410, modifying,

(10) Jurisdiction and Proceedings of Appellate Court after Remand

While the jurisdiction of the circuit court of appeals over a cause generally ceases on the opening of another term after the mandates have issued, in a proper case the court, after remand, has jurisdiction of proceedings for construction or clarification of the mandate, for rehearing, for recall, amendment, or correction of the mandate, and for vacation or modification of its judgment.

As a general rule jurisdiction of the circuit court of appeals over a cause ceases on the opening of another term after the mandates have issued.[68] However, although the mandate has gone down, the circuit court of appeals has jurisdiction at a subsequent term to order the judge to determine in the first instance whether the use of certain exhibits, inadvertently overlooked, should be enjoined.[69] Where a suit to enjoin enforcement of a decree was instituted while the decree was still before the circuit court of appeals for enforcement by its mandate, and on rule to show cause why prosecution of the injunction suit should not be restrained, the character of such suit was disclosed on a full hearing, the circuit court of appeals had jurisdiction to determine whether the filing and maintenance thereof was in contempt of its jurisdiction, and if so to punish it by a compensatory imposition, or to remand the case to the district court for that purpose.[70]

Construction or clarification of mandate. The circuit court of appeals has power to construe its mandate whenever it becomes advisable to do so,[71] at least where the relief was requested before expiration of the term at which the mandate was issued,[72] the matter being entirely discretionary with the court,[73] which will exercise its discretion to construe the mandate when it expressed what the court intended, but it was possible that the trial court may have misconceived its purport when entering the decrees directed.[74] If clarification of the mandate is necessary, a motion of the parties asking the circuit court of appeals to state what the mandate means is a proper method of obtaining clarification.[75] Since a mandate directing the district judge to modify the judgment in accordance with the opinion of the appellate court deals with the substance, not the form, of the judgment to be entered, it is not the function of the circuit court of appeals on motion for clarification of the mandate to give an advisory opinion regarding the form of the judgment, such as whether the judgment should embody the facts as found in the opinion of the appellate court, nor will the court on such a motion determine questions which were not decided by the trial judge nor argued on appeal.[76]

Rehearing. Only the circuit court of appeals in which review was had has jurisdiction to entertain a petition for a rehearing.[77]

Recall, amendment, or correction of mandate. The circuit court of appeals has power to recall the mandate and rehear a case at the term at which its judgment therein was rendered,[78] but has no power to recall its mandate where the term has expired since the mandate went down;[79] the Federal Rules of Civil Procedure, rule 6 (c), which provides that

D.C., 261 F. 555, and rehearing denied, C.C.A., Individual Drinking Cup Co. v. Public Service Corporation, 263 F. 98.

68. U.S.—Dobson v. U. S., C.C.A.N. Y., 31 F.2d 288, denying motion Dobson v. U. S., 27 F.2d 807, certiorari denied 49 S.Ct. 179, 278 U. S. 653, 73 L.Ed. 563, and affirming, D.C., Haselden v. U. S., 24 F.2d 529.

69. U.S.—American Safety Razor Corporation v. International Safety Razor Corporation, C.C.A.N.J., 61 F.2d 479.

70. U.S.—Toledo Scale Co. v. Computing Scale Co., Ill., 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719, affirming, C.C.A., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L.Ed. 1072, and 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073.

71. U.S.—S. S. Kresge Co. v. Winget Kickernick Co., C.C.A.Minn., 102 F. 2d 740, certiorari denied Winget Kickernick Co. v. S. S. Kresge Co., 60 S.Ct. 79, 308 U.S. 557, 84 L.Ed. 468.

72. U.S.—National Biscuit Co. v. Kellogg Co., C.C.A.Del., 96 F.2d 873, clarifying mandate, 91 F.2d 150, certiorari denied Kellogg Co. v. National Biscuit Co., 58 S.Ct. 120, 302 U.S. 733, 82 L.Ed. 567, rehearing denied 58 S.Ct. 139, 302 U.S. 777, 82 L.Ed. 601, petition denied 58 S.Ct. 280, 302 U.S. 654, 82 L.Ed. 506, certiorari granted 58 S.Ct. 1052, 304 U.S. 586, 82 L.Ed. 1547, reversed on other grounds 59 S.Ct. 109, 305 U.S. 111, 83 L.Ed. 73, rehearing denied 59 S.Ct. 246, 305 U. S. 674, 83 L.Ed. 437 and 59 S.Ct. 247, 305 U.S. 674, 83 L.Ed. 437.

73. U.S.—S. S. Kresge Co. v. Winget Kickernick Co., C.C.A.Minn., 102 F. 2d 740, certiorari denied Winget Kickernick Co. v. S. S. Kresge Co., 60 S.Ct. 79, 308 U.S. 557, 84 L.Ed. 468.

74. U.S.—S. S. Kresge Co. v. Winget Kickernick Co., supra.

75. U.S.—Epstein v. Goldstein, C.C. A., 110 F.2d 747, denying motion 107 F.2d 755.

76. U.S.—Epstein v. Goldstein, supra.

77. U.S.—Toledo Scale Co. v. Computing Scale Co., C.C.A.Ill., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L.Ed. 1072, and Fidelity Deposit Co. v. Computing Scale Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073, and affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719.

78. U.S.—Sun Oil Co. v. Burford, C. C.A.Tex., 130 F.2d 10, vacating 124 F.2d 467—Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, C.C.A.Tex., 97 F.2d 249, denying rehearing 95 F.2d 671, remanding, D. C., City Nat. Bank of Wichita Falls, Tex. v. Witchita Royalty Co., 18 F.Supp. 795, certiorari granted Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 59 S.Ct. 101, 305 U.S. 587, 83 L.Ed. 371, affirmed 59 S.Ct. 420, 306 U.S. 103, 83 L.Ed. 515.

79. U.S.—Nachod v. Engineering & Research Corporation, C.C.A.Conn., 108 F.2d 594—Deppe v. General Motors Corporation, C.C.A.N.J., 98 F.2d 813, certiorari denied 59 S.Ct. 462, 306 U.S. 633, 83 L.Ed. 1035, rehearing denied 59 S.Ct. 581, 306

the expiration of a term of court in no way affects the power of a court to do any act in any civil action which has been pending before it, does not apply to the circuit court of appeals.[80] It is not necessary that a mandate already issued be recalled before an appeal can be taken to the supreme court.[81] Generally the court will not recall its mandate for correction in the absence of inadvertence, accident, or mistake,[82] and will not recall the mandate for the purpose of reëxamining the cause on the merits[83] or hearing an application to intervene,[84] nor will a motion to recall a mandate be granted where the alleged error therein resulted from petitioner's delay in bringing matters to the attention of the appellate court.[85] Where the mandate is adequate without amendment, the circuit court of appeals will deny a motion to amend, with an expression of its views for the guidance of the district court;[86] and a motion to amend will be denied where there has been no mistake, fraud, or imposition.[87] Where the mandate has gone down, it cannot be amended or corrected in matters of substance after the expiration of the term.[88] An alleged right to modification of the mandate may be lost by laches.[89]

A mandate may be recalled and modified on motion to provide specifically for interest on the judgment affirmed to the date of the entry of the judgment on the mandate,[90] or to provide that the district court might permit the intervention of a trustee in bankruptcy;[91] and, where plaintiff objects to a summary conclusion by the circuit court of appeals on appeal from a judgment denying defendant's motion to modify a default judgment, he is entitled to a modification of the mandate modifying the judgment so as to reverse the judgment and direct defendant to answer.[92] A simple entry of "judgment reversed" without a direction for a new trial occurring in the mandate is not a mistake warranting the recall and amendment of the mandate.[93] Where the mandate provided that merchandise seized be returned unless a libel for forfeiture thereof be filed within a stated time, and it subsequently appeared that such a libel was pending when the mandate was issued, the mandate need not be amended, since the pendency of the libel would be considered equivalent to the required filing within the stated period.[94] Where a party was adjudicated a bankrupt before issuance of a mandate directing modification of an order denying a motion to compel return of books seized under a search warrant, whether the party's attorneys had a charging lien on such books under state law could be determined by the bankruptcy court, and not by the circuit court of appeals on motion to amend its mandate.[95] Inasmuch as costs of appeal automat-

U.S. 668, 83 L.Ed. 1063, petition denied 59 S.Ct. 821, 307 U.S. 611, 83 L.Ed. 1494—Foster Bros. Mfg. Co. v. National Labor Relations Board, C.C.A., 90 F.2d 948, denying rehearing 85 F.2d 984.
4 C.J. p 1246 note 7.

80. U.S.—Nachod v. Engineering & Research Corporation, C.C.A.Conn., 108 F.2d 594.

81. U.S.—Merrill v. National Bank of Jacksonville, Fla., 19 S.Ct. 360, 173 U.S. 131, 43 L.Ed. 640, affirming 78 F. 208, 24 C.C.A. 63, and affirming 75 F. 148, 21 C.C.A. 282—Ritter v. Mutual L. Ins. Co., Pa., 72 F. 567, 19 C.C.A. 41.

82. U.S.—Kosak v. U. S., C.C.A., 54 F.2d 72, denying motion 46 F.2d 906.

83. U.S.—Hawkins v. Cleveland, C. C. & St. L. R. Co., Ind., 99 F. 322, 39 C.C.A. 538, denying motion 89 F. 266, 32 C.C.A. 198.

84. U.S.—In re Nevada-Utah Mines & Smelters Corporation, N.Y., 204 F. 982, 123 C.C.A. 304, denying rehearing 202 F. 126, 120 C.C.A. 440.

85. U.S.—Commissioner of Internal Revenue v. Adolph Hirsch & Co., C.C.A., 37 F.2d 98, denying recall of mandate 30 F.2d 645.

86. U.S.—Mulhens & Kropff v. Ferd. Muelhens, Inc., C.C.A.N.Y., 48 F.2d 206, denying motion 43 F.2d 937, reversing, D.C., 38 F.2d 287 and certiorari denied 51 S.Ct. 84, 282 U. S. 881, 75 L.Ed. 777.

87. U.S.—S. S. Kresge Co. v. Winget Kickernick Co., C.C.A.Minn., 102 F. 2d 740, certiorari denied Winget Kickernick Co. v. S. S. Kresge Co., 60 S.Ct. 79, 308 U.S. 557, 84 L.Ed. 468.

88. U.S.—American Safety Razor Corporation v. International Safety Razor Corporation, C.C.A.N.J., 61 F.2d 479—Hawkins v. Cleveland, C. C. & St. L. R. Co., Ind., 99 F. 322, 39 C.C.A. 538, denying motion 89 F. 266, 32 C.C.A. 198.

Addition of interest

Modification of order affirming judgment, so as to include interest, involves matter of substance, within rule of text, and not mere form.—Casey v. Sterling Cider Co., C.C.A. Mass., 15 F.2d 52, denying motion 294 F. 426, affirming, D.C., Sterling Cider Co. v. Casey, 285 F. 885.

Adding to costs taxed

After expiration of term at which decree was reversed, appellant's petition to recall mandate for correction, by adding to costs taxed, must be denied, where item sought to be added was contested, and no voucher was before clerk when he prepared mandate.—E. G. Staude Mfg. Co. v. Labombarde, N.H., 247 F. 879, 160 C.C.A. 101.

89. U.S.—Deppe v. General Motors Corporation, C.C.A.N.J., 98 F.2d 813, certiorari denied 59 S.Ct. 462, 306 U.S. 633, 83 L.Ed. 1035, rehearing denied 59 S.Ct. 581, 306 U.S. 668, 83 L.Ed. 1063, petition denied 59 S.Ct. 821, 307 U.S. 611, 83 L.Ed. 1494.

90. U.S.—Huntley v. Southern Oregon Sales, C.C.A.Or., 104 F.2d 153, modifying 102 F.2d 538.

91. U.S.—In re No. 32 East 67th Street, Borough of Manhattan, City of New York, C.C.A.N.Y., 96 F.2d 795, amending mandate 96 F. 2d 153.

92. U.S.—U. S. v. Steinberg, C.C.A. N.Y., 100 F.2d 405, modifying 100 F.2d 124.

93. U.S.—Kosak v. U. S., C.C.A., 54 F.2d 72, denying motion 46 F.2d 906.

94. U.S.—In re No. 32 East 67th Street, Borough of Manhattan, City of New York, C.C.A.N.Y., 96 F.2d 795, amending mandate 96 F.2d 153.

95. U.S.—In re No. 32 East 67th Street, Borough of Manhattan, City of New York, supra.

ically follow the judgment when the mandate is silent as to costs, a motion to correct the mandate for clerical error in that the mandate was silent as to costs will be denied.[96]

Vacation or modification of judgment. The circuit court of appeals has power to enter a decree supplemental to another decree entered at the same term of court;[97] but it has no power to alter its decision after the term at which it was rendered,[98] although it may thereafter correct clerical errors or mere matters of form.[99]

b. Liabilities on Bonds and Undertakings

(1) In general
(2) Performance or breach of conditions
(3) Extent of liability
(4) Actions
(5) Summary remedies

(1) In General

The rights, liabilities, and obligations of a surety on a bond given on appeal are fixed by its conditions read in the light of the statute and the order under which it is given; a bond is valid as a statutory obligation if it complies substantially with statutory requirements and is supported by a consideration.

In general the rights, liabilities, and obligations of a surety on a bond given on appeal are fixed by its conditions read in the light of the statute and order under which it is given and cannot be changed or enlarged by the principal or court beyond the terms of the obligation.[1] In order for the bond to be valid as a statutory obligation the exact form or language of the statute need not be followed if the condition expressed is of substantially the same import,[2] or if it is made substantially as is required by the statute.[3] Failure to recite the nature of the action or the court to which the appeal is prayed does not render the bond invalid where there is sufficient certainty to prevent a second recovery.[4]

An appeal bond without consideration is void and cannot be enforced.[5] Except where the bond is regarded as binding on the theory of estoppel or,

96. U.S.—City of Stuart v. Green, C.C.A.Fla., 94 F.2d 942, denying motion 91 F.2d 603, 113 A.L.R. 560, certiorari denied Green v. City of Stuart, 58 S.Ct. 146, 302 U.S. 744, 82 L.Ed. 575, rehearing denied 58 S.Ct. 280, 302 U.S. 779, 82 L.Ed. 602.

97. U.S.—Republic Steel Corporation v. National Labor Relations Board, C.C.A., 114 F.2d 820, supplementing 107 F.2d 472, certiorari denied 60 S.Ct. 806, 309 U.S. 684, 84 L.Ed. 1027, vacated 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari granted 60 S.Ct. 1072, 310 U.S. 655, 84 L.Ed. 1419, certiorari denied Central Council of Steel Plants, Northern District, Republic Steel Corporation v. National Labor Relations Board, 60 S.Ct. 808, 309 U.S. 684, 84 L.Ed. 1028, modified on other grounds Republic Steel Corporation v. National Labor Relations Board, 61 S.Ct. 77, 311 U.S. 7, 85 L.Ed. 6.

98. U.S.—Guaranty Trust Co. of New York v. Minneapolis & St. L. R. Co., C.C.A.Minn., 98 F.2d 345—Walsh Const. Co. v. U. S. Guarantee Co., C.C.A.Iowa, 76 F.2d 240, certiorari denied 56 S.Ct. 120, 296 U.S. 605, 80 L.Ed. 428—Seagraves v. Wallace, C.C.A.Tex., 69 F.2d 163, certiorari denied Wallace v. Seagraves, 55 S.Ct. 80, 293 U.S. 569, 79 L.Ed. 668, rehearing denied 55 S. Ct. 138, 293 U.S. 630, 79 L.Ed. 716—E. G. Staude Mfg. Co. v. Labombarde, C.C.A.N.H., 247 F. 879, 160 C.C.A. 101.

Amendment, modification, and setting aside of judgment of circuit court of appeals generally see supra subdivision a (8) of this section.

99. U.S.—Hart v. Wiltsee, C.C.A. Mass., 25 F.2d 863—E. G. Staude Mfg. Co. v. Labombarde, C.C.A.N.H., 247 F. 879, 160 C.C.A. 101.

After term and before execution of mandate

The power of the court, in the interest of justice, after the term and before execution of the mandate, to recall the mandate and to amend the opinion and the orders thereunder to make them conform to the issues involved and to the determination clearly expressed on the face of the record has been asserted.—Clarke v. Boysen, C.C.A.Wyo., 273 F. 923, amending 264 F. 492 and recalling mandate Clarke v. Asmus Boysen Mining Co., 268 F. 535.

1. U.S.—U. S. v. Fidelity & Deposit Co. of Baltimore, Md., C.C.A.Idaho, 88 F.2d 793.

2. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F. Supp. 476, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

Particular bonds construed

(1) Bond given by administrator to have reviewed judgment against deceased was supersedeas bond requiring surety to answer all damages and costs where judgment was sustained.—U. S. Fidelity & Guaranty Co. v. Jones, C.C.A.Ill., 49 F.2d 559.

(2) Bonds given by lessee of oil and gas lease in suit involving determination of lessor's title to realty, given to protect adverse claimants in event of judgment in their favor, were held not intended to protect lessor and legatee claiming under her.—Folk v. Monsell, C.C.A.Okl., 71 F.2d 816.

(3) An appeal bond requiring appellant to "answer all damages and costs that may be awarded against him" was not merely a "bond for costs and special damages" but was a "bond for amount of judgment appealed from" with interest and costs, where judgment was for recovery of money and order granting appeal provided that bond should operate as a supersedeas.—Martin v. Clarke, C.C.A.Ill., 105 F.2d 685, 124 A.L.R. 497.

(4) Where condition of bond was that an appeal should be prosecuted to effect and all damages and costs paid if appeal was not made good, bond was a "cost bond" and not a "supersedeas bond."—The Astoria, D.C.N.Y., 1 F.R.D. 742.

3. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F. Supp. 476, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S. Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

4. U.S.—Smith v. Walker, Ark., 21 F.Cas.No.13,123a, Hempst. 289.
4 C.J. p 1254 note 48.

5. U.S.—U. S. v. Morris' Heirs, C.C. La., 153 F. 240.

under the particular circumstances, the bond may be given effect as a common-law or voluntary obligation, where no appeal can lawfully be taken in a given case, a bond given for no other purpose than the taking of such an appeal is wholly without consideration and therefore void,[6] but where an appeal is taken, even though improperly taken and improperly allowed, and the court takes jurisdiction, the bond on appeal is valid, and action thereupon will lie for the reason that there is a consideration for the bond and an estoppel arises against those who obtained the contemplated advantages pending the disposition of the appeal.[7]

(2) Performance or Breach of Conditions
- (a) Condition to prosecute with effect
- (b) Condition to pay or satisfy judgment
- (c) Nonperformance excused and sureties discharged
- (d) Effect of other bond in same proceeding

(a) Condition to Prosecute with Effect

A condition to prosecute an appeal with effect is breached unless appellant secures a reversal of the judgment appealed from or is partially successful in the prosecution of the appeal.

A condition to prosecute an appeal with effect, as usually construed, means to prosecute it successfully,[8] or to secure a reversal of the judgment appealed from.[9] So failure to perfect an appeal has been regarded as a breach of the condition, fixing the sureties with liability.[10] A mere interlocutory order, remitting the record for a finding by a referee, is not a final judgment either of affirmance or of reversal and does not show that appellant has prosecuted his appeal with effect.[11] An appeal is not prosecuted to effect if the judgment is affirmed;[12] but partial success in the prosecution of an appeal is a compliance with a condition to prosecute with effect,[13] and there is no breach where the judgment is reduced and affirmance is entered only on condition of filing a remittitur for the amount of the reduction.[14] A voluntary dismissal by appellant is a breach of the condition to prosecute with effect.[15] On termination of the appeal in his favor, appellant is entitled to the discharge of the bond.[16]

(b) Condition to Pay or Satisfy Judgment

There is not a breach of a condition to pay or satisfy the judgment appealed from if affirmed in case of affirmance in part. Payment of a judgment which is affirmed releases both the principal and sureties from liability on a bond conditioned on such payment.

A condition to pay the judgment has been implied from a condition to prosecute with effect.[17] Under a condition to pay the judgment if affirmed, it has been held that there is not such an affirmance as will impose liability on the bond where the final judgment based on the claim against appellant as defendant below and the denial of his claim of set-off is reversed because of errors affecting the set-off with directions to permit the verdict upholding appellee's cause of action to stand.[18] Whatever operates as a legal satisfaction of the judgment op-

6. U.S.—National Surety Co. v. U. S., C.C.A.Wash., 29 F.2d 92, 97, citing **Corpus Juris.**
4 C.J. p 1267 note 10.

7. U.S.—National Surety Co. v. U. S., supra, citing **Corpus Juris.**

8. U.S.—Crane v. Buckley, Cal., 27 S.Ct. 56, 203 U.S. 441, 51 L.Ed. 260, affirming 138 F. 22, 70 C.C.A. 452.

9. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F.Supp. 476, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S. Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

10. U.S.—Dexter v. Sayward, C.C. Wash., 84 F. 296.

11. U.S.—Commonwealth of Pennsylvania, to Use of Huidekoper v. Fidelity & Deposit Co. of Maryland, C.C.Pa., 180 F. 292.

12. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F. Supp. 476, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S. Ct. 833, 307 U.S. 629, 83 L.Ed. 1512—Davis v. Patrick, Neb., 57 F. 909, 6 C.C.A. 632, appeal dismissed 16 S.Ct. 1200, 163 U.S. 683, 41 L.Ed. 316.

13. **Substantial modification of judgment**
Where defendant, in a suit to foreclose a contract for the purchase of real estate, by an appeal secured a modification of the decree below, allowing him a substantial extension of time within which to make the deferred payments and protect his rights under the contract, his appeal was "prosecuted to effect," within the meaning of the condition of his supersedeas bond.—Crane v. Buckley, Cal., 138 F. 22, 70 C.C.A. 452, affirmed 27 S.Ct. 56, 203 U.S. 441, 51 L.Ed. 260.

14. U.S.—Seymour v. Gregory, C.C. Ill., 21 F.Cas.No.12,686, 10 Biss. 13.

15. U.S.—Sutton v. Hay, C.C.A.Ill., 9 F.2d 795.

16. **Effect of intervention**
Where taxpayer filed bond instead of making deposit of amount of processing tax required to be impounded in registry of court pending determination of appeal involving validity of Agricultural Adjustment Act, taxpayer on termination of appeal in its favor was entitled to discharge of bond, notwithstanding intervention of parties claiming ownership or interest in tax funds.—Larabee Flour Mills Co. v. Nee, C.C.A.Mo., 81 F.2d 623, remanding, D.C., 12 F.Supp. 395.

17. U.S.—Rosenstein v. Tarr, C.C. Mass., 51 F. 368, affirmed 53 F. 112, 3 C.C.A. 466.

18. U.S.—Fitchner v. American Surety Co. of New York, D.C.Fla., 2 F.Supp. 321.

Remittitur
Where an action on a supersedeas bond has been removed to a federal court, a surety has been held liable notwithstanding the Florida supreme court ordered a remittitur and affirmed the judgment on condition of remittitur, where the remittitur was filed.—American Surety Co. of New York v. Standard Asphalt Co. of Florida, C.C.A.Fla., 75 F.2d 1, affirming, D.

erates to discharge the bond as to both principal and sureties.[19]

(c) Nonperformance Excused and Sureties Discharged

Mere delay in prosecuting the appeal does not discharge the sureties, but they may be discharged by dismissal by agreement between appellant and appellee without their consent, or fraud.

Mere delay on the part of appellant in prosecuting or perfecting the appeal does not discharge the sureties on the appeal bond or undertaking;[20] but it has been held that dismissal, pursuant to an agreement between appellant and appellee, entered into for a consideration moving to appellant, without the knowledge or consent of the surety, discharges the surety.[21] An appeal bond cannot be enforced against the obligors, where the judgment was procured by false and fraudulent statements to the court preventing a rehearing and a modification of the original decree.[22]

(d) Effect of Other Bond in Same Proceeding

Successive appeal bonds given in the same case are cumulative, and the final judgment fixes the liability.

Successive appeal bonds given in the same proceeding on further appeal have been regarded as cumulative, and liability on the first bond is fixed by the intermediate judgment of affirmance, which in turn is superseded by the second bond, and the final judgment of affirmance fixes the liability on both.[23]

(3) Extent of Liability

The obligation of a surety on an appeal bond is strictissimi juris, and must be determined in accordance with the provisions of the applicable rule of the circuit court of appeals as interpreted and applied by the supreme court.

The general rule that the obligation of a surety is strictissimi juris, that is, that he has the right to stand on the precise terms of his contract, and his liability cannot be extended by construction or implication, which is noted in the C.J.S. title Principal and Surety § 101, also 50 C.J. p 78 note 71–p 79 note 73, has been applied or recognized in respect of sureties on appeal bonds.[24]

The scope of liability under a supersedeas bond must be determined in accordance with the provisions of the applicable rule of the circuit court of appeals as interpreted and applied by the supreme court.[25] Under a rule generally prevalent in the various circuits, and which has been embodied in the Federal Rules of Civil Procedure, rule 73 (d), 28 U.S.C.A. following § 723c, supersedeas bonds are classified as: (1) Those in which the judgment or decree is for the recovery of money not otherwise secured. (2) Those in which the property in controversy necessarily follows the suit, as in real actions, suits on mortgages, etc., or where the property or the proceeds thereof is in the custody of the court. Different liabilities are provided for each class. Thus, under a rule providing that indemnity in cases of the second class will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the cost of the suit and just damages for delay, and costs and interest on the appeal, the only basis of recovery on a bond given on appeal from a decree foreclosing a mortgage is the costs of the appeal which accrued in the appellate court, depreciation of the property in market value pending the appeal, deterioration by waste or want of repair or accumulation of taxes or other burdens, and the use and detention of the property pending the appeal.[26] Applying this principle, it has been held that a bond given in such a case does not cover interest accumulating on the mortgage debt during the appeal, but only interest included in damages due to delay;[27] that it does not include compensation to the trustee or receiver, or fees of

C., Standard Asphalt Co. of Florida v. American Surety Co. of New York, 5 F.Supp. 430, certiorari denied American Surety Co. of New York v. Standard Asphalt Co. of Florida, 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687.

19. U.S.—Dugas v. American Surety Co. of New York, C.C.A.La., 82 F.2d 953, certiorari granted 57 S.Ct. 47, 299 U.S. 532, 81 L.Ed. 391, affirmed 57 S.Ct. 515, 300 U.S. 414, 81 L.Ed. 720, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—In re Levinson, D.C.Wash., 19 F.2d 253.

Acceptance of bonds on condition that their market value should advance to par within a certain time, and failure of such advance, whereupon they are tendered back, is not a satisfaction.—Jacksonville, M. & P. Ry. & Nav. Co. v. Hooper, Fla., 85 F. 630, 29 C.C.A. 382.

20. U.S.—Smith v. Pendergast, D.C.N.Y., 82 F. 504.
4 C.J. p 1288 note 76.

21. U.S.—Sutton v. Hay, C.C.A.Ill., 9 F.2d 795.

22. U.S.—Harrison v. Richards, Iowa, 226 F. 196, 141 C.C.A. 194.

23. U.S.—Babbitt v. Finn, Mo., 101 U.S. 7, 25 L.Ed. 820—Howard Ins. Co. of New York v. Silverberg, C.C. Cal., 89 F. 168, affirmed 94 F. 921, 36 C.C.A. 549.

24. U.S.—Crane v. Buckley, Cal., 27 S.Ct. 56, 203 U.S. 441, 51 L.Ed. 260, affirming 138 F. 22, 70 L.Ed. 452.

Penalty

Recovery may be for the amount of the penalty of the bond with interest thereon.—Richards v. Harrison, D.C.Iowa, 218 F. 134.

25. U.S.—American Trust Co. v. Speers Sand & Clay Works, D.C. Md., 60 F.2d 994.

26. U.S.—American Trust Co. v. Speers Sand & Clay Works, supra.
4 C.J. p 1292 note 26.

27. U.S.—American Trust Co. v. Speers Sand & Clay Works, supra.

the trustee's counsel;[28] that it covers only the ordinary taxable costs allowed the successful party by the appellate court, and does not include lower court costs or costs on appellee's motion to dismiss the appeal;[29] that it does not cover an accumulation of interest on a sum paid to the receiver by a purchaser at a foreclosure sale subsequently held unauthorized on appeal;[30] that interest is allowable on the purchase price of the mortgaged property for the period of delay occasioned in the sale of the property by the unsuccessful appeal[31] from which interest earned on money paid the receiver by the purchaser at the unauthorized foreclosure sale is not deductible;[32] that the cost of readvertising the property, made necessary by the stay, may be recovered;[33] and that it does not cover the premium on a receiver's bond pending the appeal.[34] Damages on a bond issued for supersedeas which prevented and delayed payment, as ordered, of funds in the hands of a receiver include such items for expenses as premiums on the receiver's bond, taxes, office expenses, and premiums on depository bonds, every item of which was necessitated by the granting of the appeal; and such damages are recoverable although the decree appealed from provided that payments could be made to those entitled thereto on giving refunding bonds. Furthermore, in such case the difference between the legal rate of interest and the interest earned on the funds while in the hands of the receiver is recoverable.[35] It has been held, however, that an appeal bond given on appeal from a decree awarding to one of the parties a fund which has been paid into the registry of the court in interpleader proceedings and deposited at interest does not bind appellant, on an affirmance, to pay interest on such fund not awarded by the appellate court, in the absence of proof of misconduct on his part, where appellee has received the fund, with its accumulations.[36]

Where the judgment or decree is for the recovery of money not otherwise secured, the indemnity of the supersedeas bond, by the terms of the rule of procedure referred to in the preceding paragraph must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; hence the surety is liable for the amount of the judgment[37] with interest and costs,[38] including costs in the lower court.[39]

It has been held that an appeal bond conditioned to pay all costs, which is not a supersedeas, covers only the costs in the appellate court, and not those in the trial court,[40] and that a bond obligating the surety to pay all damages and costs merely means damages for delay in proceeding with the appeal, and is intended to cover costs in the appellate court only, so that the surety cannot be held liable for the amount awarded by the final decree.[41] On the other hand, however, it has been held that the surety is liable for costs in both courts where the obligation of the bond is to pay all cost,[42] or all costs that may be adjudged or awarded,[43] or to answer all damages and costs.[44]

28. U.S.—American Trust Co. v. Speers Sand & Clay Works, supra.

Effect of decree

Mortgage foreclosure decree, requiring payment of costs, including compensation and expenses of mortgagee trustee, its counsel and receiver, from proceeds of sale, did not make special taxation thereof effective in appellate court as respects supersedeas bond to stay sale pending appeal.—American Trust Co. v. Speers Sand & Clay Works, supra.

29. U.S.—American Trust Co. v. Speers Sand & Clay Works, supra.

30. U.S.—American Trust Co. v. Speers Sand & Clay Works, supra.

31. U.S.—American Trust Co. v. Speers Sand & Clay Works, supra —Graysonia-Nashville Lumber Co. v. Goldman, Ark., 260 F. 600, 171 C.C.A. 364.

32. U.S.—American Trust Co. v. Speers Sand & Clay Works, D.C. Md., 60 F.2d 994.

33. U.S.—Graysonia-Nashville Lumber Co. v. Goldman, Ark., 260 F. 600, 171 C.C.A. 364.

34. U.S.—American Trust Co. v. Speers Sand & Clay Works, D.C. Md., 60 F.2d 994.

35. U.S.—Brame v. Keystone Credit Corporation, C.C.A.Va., 76 F.2d 328, certiorari denied 56 S.Ct. 104, 296 U.S. 591, 80 L.Ed. 418.

36. U.S.—Pike v. Gregory, Mass., 118 F. 128, 55 C.C.A. 78.

37. U.S.—Martin v. Clarke, C.C.A. Ill., 105 F.2d 685, 124 A.L.R. 497—U. S. Fidelity & Guaranty Co. v. Jones, C.C.A.Ill., 49 F.2d 559—Louisville Trust Co. v. National Bank of Kentucky, D.C.Ky., 3 F. Supp. 925—Pease v. Rathbun-Jones Engineering Co., Tex., 228 F. 273, 142 C.C.A. 565, affirmed 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715.

4 C.J. p 1291 note 14.

Revival of money judgment

Where the judgment in the court below revived a money judgment against defendants, who were husband and wife, and also subjected certain real estate belonging to the wife to the payment of the judgment, and both appealed, joining in a supersedeas bond with a surety, on reversal of as much of the decree as affected the real estate and affirmance of the rest of the decree the signers of the bond were liable thereon for the payment of the money judgment and costs up to the amount of the penalty named therein.—Richards v. Harrison, D.C.Iowa, 218 F. 134.

38. U.S.—Martin v. Clarke, C.C.A. Ill., 105 F.2d 685, 124 A.L.R. 497.

39. U.S.—Pacific Coast Casualty Co. v. Harvey, Cal., 250 F. 952, 163 C.C.A. 202.

Dictum to effect that costs in lower court are recoverable as "damages," and not as "costs."—Massachusetts Bonding & Ins. Co. v. Clymer Mfg. Co., C.C.A.Colo., 48 F.2d 513.

40. U.S.—Leviton v. Pugsley, D.C. Minn., 55 F.2d 417—Massachusetts Bonding & Ins. Co. v. Clymer Mfg. Co., C.C.A.Colo., 48 F.2d 513.

41. U.S.—The Astoria, D.C.N.Y., 1 F.R.D. 742.

42. U.S.—American Surety Co. v. U. S., C.C.A.La., 239 F. 680.

43. U.S.—Young v. Daley, C.C.N.Y., 185 F. 209.

44. U.S.—Oehring v. Fox Typewriter Co., C.C.A.N.Y., 266 F. 682, 12

(4) Actions

The liability of the principal and sureties on appeal and supersedeas bonds may be enforced by an action on the bond in which general principles relating to procedural matters are applicable.

On a breach of the conditions of a valid and sufficient bond or undertaking given on appeal, the liability of the principal and sureties may be enforced by an action on the bond.[45] Action against the surety may be started by filing in the district court a præcipe for a writ of scire facias,[46] and it is no ground of objection to such a writ that the surety was not a party to the original action.[47] The writ in such a case is original only in the sense that, once obtained, the resultant procedure is the same as in any action at law entitling defendant to answer and to a jury trial.[48]

Where, by virtue of an attachment, there is a lien on the lands of the judgment debtor, it is not a condition precedent to the maintenance of an action on the appeal bond that the obligee first enforce and exhaust his remedy of enforcing the lien by having the land sold;[49] nor is the issuance, and return unsatisfied, of an execution against the principal a condition precedent to such an action.[50]

As a general rule, the only defense which a surety on an appeal bond can interpose after affirmance of the judgment is one which discharges him from his obligation in whole or in part.[51]

The court in which the original action was tried has jurisdiction of an action on the appeal bond.[52]

Where the bond as regards the obligees is joint, all obligees should be joined as parties plaintiff,[53] except where the bond, although joint in form, expresses distinct obligations to the different obligees.[54] The general rule, stated in the C.J.S. title Parties §§ 43, 46, also 47 C.J. p 85 note 31, p 89 note 93, that, where several parties are jointly liable on a contract, they must all be made parties defendant applies to actions on appeal bonds.[55] A coappellant appealing from a part of the decree which did not delay distribution of funds in the hands of the court, as did the supersedeas granted appellant, and who did not apply for supersedeas, is not a necessary party to an action on the supersedeas bond.[56] A judgment defendant is not a necessary party to a suit by the surety on his supersedeas bond brought after affirmance of the judgment to enjoin prosecution of an action on the bond by the judgment plaintiff.[57]

General rules of pleading usually apply.[58] Where, in an action on an appeal bond, a special breach of condition is assigned, a general plea of non damnificatus is not good.[59]

General rules of evidence are applicable.[60]

(5) Summary Remedies

By virtue of the Federal Rules of Civil Procedure, the liability of a surety may be enforced on motion without the necessity of an independent action, although the en-

A.L.R. 718—Expanded Metal Co. v. Bradford, C.C.Pa., 177 F. 604, affirmed 183 F. 568, 106 C.C.A. 114, and following The Joseph B. Thomas, D.C., 158 F. 559.

45. U.S.—Davis v. Patrick, Neb., 57 F. 909, 6 C.C.A. 632, appeal dismissed 16 S.Ct. 1200, 163 U.S. 683, 41 L.Ed. 316.

46. U.S.—Montgomery v. Realty Acceptance Corporation, D.C.Del., 15 F.Supp. 665, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S. Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

47. U.S.—Universal Transp. Co. v. National Surety Co., D.C.N.Y., 252 F. 293, affirmed National Surety Co. v. Universal Transp. Co., 256 F. 450, 167 C.C.A. 578.

48. U.S.—Universal Transp. Co. v. National Surety Co., supra.

49. U.S.—Davis v. Patrick, Neb., 57 F. 909, 6 C.C.A. 632, appeal dismissed 16 S.Ct. 1200, 163 U.S. 683, 41 L.Ed. 316.

50. U.S.—Fuller v. Aylesworth, Mich., 75 F. 694, 21 C.C.A. 505.
4 C.J. p 1298 note 37.

51. U.S.—Montgomery v. American Employers' Ins. Co., D.C.Del., 22 F. Supp. 476, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S. Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

52. U.S.—Arnold v. Frost, D.C.N.Y., 1 F.Cas.No.558, 9 Ben. 267.

53. U.S.—Dashley v. Daniel, Alaska, 202 F. 426, 120 C.C.A. 532.

54. U.S.—Dashley v. Daniel, supra.

55. U.S.—Montgomery v. Realty Acceptance Corporation, D.C.Del., 15 F.Supp. 665, affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512, two cases, and U. S. Casualty Co. v. Montgomery, 59 S. Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

56. U.S.—Brame v. Keystone Credit Corporation, C.C.A.Va., 76 F.2d 328, certiorari denied 56 S.Ct. 104, 296 U.S. 591, 80 L.Ed. 418.

57. U.S.—Maryland Casualty Co. v. Repass, Va., 253 F. 328, 165 C.C.A. 110.

58. **Plea in bar**
Where declaration, in action on supersedeas bond, alleged that state supreme court affirmed judgment on condition that plaintiff enter remittitur and pay costs, which remittitur plaintiff duly entered and which costs plaintiff paid, pleas alleging that remittitur was not filed within time allowed and that costs were not paid were pleas in bar and were good against demurrer.—Standard Asphalt Co. of Florida v. American Surety Co. of New York, D.C.Fla., 5 F.Supp. 430, affirmed, C.C.A., American Surety Co. of New York v. Standard Asphalt Co. of Florida, 75 F.2d 1, certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687.

59. U.S.—Tucker v. Lee, D.C., 24 F. Cas.No.14,221, 3 Cranch.C.C. 684.

60. **In suit for cancellation of bond** on which complainant's name appeared as surety, and to set aside a sale of his property made thereon, evidence considered, and held to sustain his contention that his signature to the bond and also to the justification were forgeries.—Emerson-Brantingham Implement Co. v. Johnson, C. C.A.Neb., 1 F.2d 212.

forcement of this remedy may be affected by the pendency of attachment proceedings in another court.

It is expressly provided by the Federal Rules of Civil Procedure, rule 73 (f), 28 U.S.C.A. following § 723c, that by entering into an appeal or supersedeas bond the surety submits himself to the jurisdiction of the court[61] and that his liability may be enforced on motion without the necessity of an independent action; and accordingly a motion for judgment against the surety is the appropriate manner in which to seek that judgment.[62] A judgment against the surety cannot stand, however, where the notice required by the rule was not given,[63] and in such case the judgment should be vacated either on motion of a party affected thereby[64] or by the court on its own motion.[65]

Where, pending appeal from a judgment of the federal district court, attachment proceedings are instituted in a state court by a creditor of the judgment creditor against the judgment defendant and his surety, if the attachment suit has been prosecuted to a successful conclusion and the judgment debtor has been compelled to pay to the attaching creditor, on affirmance of the judgment by the circuit court of appeals the district court must refuse to enter judgment on the supersedeas bond,[66] and if the attachment proceedings are still pending at the time of the affirmance of the judgment in the federal court, according to the decisions of the various courts on the subject, the judgment cred-

61. **Prior to adoption of Fed.Rules of Civ.Proc., rule 73(f),** the federal courts had announced the principle therein stated with respect to the jurisdiction of the court over sureties on a bond.—Brame v. Keystone Credit Corporation, C.C.A.Va., 76 F.2d 328, certiorari denied 56 S.Ct. 104, 296 U.S. 591, 80 L.Ed. 418—Toledo Scale Co. v. Computing Scale Co., C.C.A. Ill., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L.Ed. 1072, and Fidelity & Deposit Co. v. Computing Scale Co., 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073, and affirmed 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719—Richards v. Harrison, D.C.Iowa, 218 F. 134.

62. U.S.—Christmas v. Buckley, D.C. Md., 43 F.Supp. 673.

Under former practice

(1) In the absence of express statutory authority covering the case in question, a summary judgment on an appeal bond could not be rendered by either the trial or the appellate court, and where the court lacked statutory authority to render such a judgment in a given case, even a stipulation in the bond that summary judgment could be rendered against the sureties was ineffectual.—Montgomery v. Realty Acceptance Corporation, D.C.Del., 15 F.Supp. 665, 667, quoting **Corpus Juris,** and affirmed, C.C.A., American Employers' Ins. Co. v. Montgomery, 101 F.2d 1005, certiorari denied 59 S.Ct. 833, two cases, 307 U.S. 629, 83 L.Ed. 1512 and U. S. Casualty Co. v. Montgomery, 59 S.Ct. 833, 307 U.S. 629, 83 L.Ed. 1512.

(2) State statutes authorizing the court to render summary judgment against the sureties in certain cases were followed in actions at law in the federal courts by virtue of the statute providing for conformity to state practice.—Montgomery v. Realty Acceptance Corporation, supra, quoting **Corpus Juris**—Empire State-Idaho Mining & Developing Co. v. Hanley, Idaho, 136 F. 99, 69 C.C.A. 87, appeal dismissed 25 S.Ct. 691, 198 U.S. 292, 49 L.Ed. 1056—25 C.J. p 825 note 75.

(3) But where no statute of this nature existed in a state where a particular federal court was held, a summary judgment on the bond in such an action could not be rendered by that federal court, there being no federal statute expressly authorizing it.—Lamon v. Speer Hardware Co., Okl., 198 F. 453, 119 C.C.A. 1—Montgomery v. Realty Acceptance Corporation, supra, quoting **Corpus Juris.**

(4) In suits in equity, however, the federal courts had inherent power, irrespective of the state practice, to render summary judgment against sureties on appeal bonds.—Pease v. Rathbun-Jones Engineering Co., Tex., 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715, Ann.Cas.1918C 1147, affirming 228 F. 273, 142 C.C.A. 565—Brame v. Keystone Credit Corporation, C.C.A.Va., 76 F.2d 328, certiorari denied 56 S.Ct. 104, 296 U.S. 591, 80 L.Ed. 418—American Trust Co. v. Speers Sand & Clay Works, D.C.Md., 60 F.2d 994—Robertson v. Wilkinson, C.C.A.Tex., 10 F.2d 311—Medusa Concrete Waterproofing Co. v. McCormick Waterproof Portland Cement Co., C.C.A. Ill., 266 F. 981—Richards v. Harrison, D.C.Iowa, 218 F. 134—Perry v. Tacoma Mill Co., Wash., 152 F. 115, 81 C.C.A. 333.

(5) In issuing its mandate after affirmance of a final decree in a patent infringement suit, the circuit court of appeals had jurisdiction to direct, and did not err in directing, entry of a summary decree against the sureties on supersedeas bonds for the amount due, although the sureties had been enjoined by another court from complying with the decree, or from using money deposited by their principal for that purpose, and the banks in which it was deposited had been enjoined from paying it out.—Toledo Scale Co. v. Computing Scale Co., Ill., 43 S.Ct. 458, 261 U.S. 399, 67 L.Ed. 719, affirming, C.C.A., 281 F. 488, certiorari granted 42 S.Ct. 585, 259 U.S. 579, 66 L.Ed. 1072 and 42 S.Ct. 587, 259 U.S. 579, 66 L.Ed. 1073.

(6) It was not a good defense that the judgment debtor was solvent.—Egan v. Chicago Great Western R. Co., C.C.Iowa, 163 F. 344.

(7) Nor was it a valid objection that the court had no jurisdiction because there was an adequate remedy at law on the bond.—Pease v. Rathbun-Jones Engineering Co., 37 S.Ct. 283, 243 U.S. 273, 61 L.Ed. 715, Ann. Cas.1918C, 1147, affirming 228 F. 273, 142 C.C.A. 565.

(8) Even if notice to the sureties was essential, want of notice was waived where the sureties subsequently asked a decision on the question of their liability under the evidence.—Pease v. Rathbun-Jones Engineering Co., supra.

(9) The judgment was required to be rendered and entered at the time contemplated by statute.—Fuller v. Aylesworth, Mich., 75 F. 694, 21 C.C. A. 505—4 C.J. p 1308 note 54.

(10) Judgment in district court on supersedeas bond against appellant and surety was improper, where made possible by plaintiff's false statements to the circuit court of appeals, procuring it to reverse a decree in part.—Harrison v. Richards, Iowa, 226 F. 196, 141 C.C.A. 194.

63. U.S.—The Astoria, D.C.N.Y., 1 F. R.D. 742.

64. U.S.—The Astoria, supra.

65. U.S.—The Astoria, supra.

66. U.S.—Huron Holding Corporation v. Lincoln Mine Operating Co., Idaho, 61 S.Ct. 513, 312 U.S. 183, 85 L.Ed. 725, rehearing denied 61 S.Ct. 840, 313 U.S. 598, 85 L.Ed. 1550.

itor is entitled to have judgment entered in his favor against the surety, but execution on the judgment must be withheld pending determination of the attachment suit.[67]

XI. DISTRICT COURTS

§ 302. Creation and Constitution

The district courts are created and established by congress pursuant to the authority vested in it by the constitution.

The federal district courts are created and established by congress pursuant to the authority vested in it by the Constitution.[68]

Circuit courts, as appears infra § 308, were, until the district courts replaced them, federal courts of general original jurisdiction, except as to a limited number of matters, jurisdiction of which was specifically vested in the district court.

Three-judge court. The provision for a three-judge court to hear an application for an injunction to restrain enforcement of a state statute on the ground of its unconstitutionality is considered in the C.J.S. title Injunctions § 169, also 32 C.J. p 290 notes 30–39, and appeals directly from such a court to the United States supreme court are treated supra § 211. The three-judge court provided for to hear applications to enjoin, annul, or set aside orders of the interstate commerce commission is considered in Commerce § 148 [d] (3).

Expedition court. Under express statutory provision, in any suit in equity brought in a district court by the United States under the anti-trust laws, if the attorney general files a certificate that the case is of public importance, the case must be expedited in every way, and be assigned for hearing at the earliest practicable day before a court, commonly referred to as an "Expedition Court," consisting of not less than three of the circuit judges of the circuit, or designated substitutes for them.[69]

§ 303. —— Judicial Districts

As a rule a district court has jurisdiction throughout and territorially coextensive with its district, such jurisdiction being unaffected by a mere multiplication of places of holding court or the creation of divisions within the district. The transfer of territory from one district to another does not abolish the original district.

The United States is, by statute, divided into judicial districts, in each of which a district court is held.[70] As a rule, a district court has jurisdiction throughout and territorially coextensive with its district,[71] and a mere multiplication of places of holding court, or the creation of divisions, does not affect this jurisdiction, the court being regarded as one and the same tribunal regardless of whether it sits in one or a number of places or divisions.[72] The rule is otherwise, however, where the act creating a new division of a district manifests an intention that the court established therein shall be a distinct entity,[73] in which case such court has no jurisdiction outside of the division for which it is

67. U.S.—Christmas v. Buckley, D.C.Md., 43 F.Supp. 673.

68. U.S.—Seligman's Inc. v. U. S., D.C.La., 30 F.Supp. 895.

Power of congress to create district courts see supra § 2.

Creation and constitution of district courts of territories and outlying possessions see infra §§ 312–318.

69. U.S.—U. S. v. Aluminum Co. of America, D.C.Pa., 20 F.Supp. 608, affirmed Aluminum Co. of America v. U. S., 58 S.Ct. 178, 302 U.S. 230, 82 L.Ed. 219.

Abolition of circuit court did not repeal by implication the provisions for the organization of an expedition court.—Ex parte U. S., Mo., 33 S.Ct. 170, 226 U.S. 420, 57 L.Ed. 281—25 C.J. p 973 note 75 [c].

70. U.S.—Standish v. Gold Creek Mining Co., C.C.A.Mont., 92 F.2d 662, certiorari denied Gold Creek Mining Co. v. Standish, 58 S.Ct. 476, 302 U.S. 765, 82 L.Ed. 594—In re Associated Gas & Electric Co., C.C.A.N.Y., 83 F.2d 734.

25 C.J. p 973 note 76.

71. U.S.—Anderson v. Standard Accident Ins. Co., D.C.La., 36 F.Supp. 7—U. S. v. Southern Ry. Co., D.C.Tenn., 285 F. 766—Gopcevic v. California Packing Corporation, D.C.Cal., 272 F. 994.

Congress might validly extend the jurisdiction of any district court to the entire United States.—In re Chicago, R. I. & P. R. Co., C.C.A.Ill., 72 F.2d 443, certiorari granted Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 55 S.Ct. 213, two cases, 293 U.S. 550, 79 L.Ed. 653, Chase Nat. Bank of City of New York v. Chicago, R. I. & P. R. Co., 55 S.Ct. 213, 214, 293 U.S. 550, 79 L.Ed. 653, Mississippi Valley Trust Co. v. Chicago, R. I. & P. R. Co., 55 S.Ct. 214, two cases, 293 U.S. 550, 79 L.Ed. 653, Harris Trust & Savings Bank v. Chicago, R. I. & P. R. Co., 55 S.Ct. 214, two cases, 293 U.S. 550, 79 L.Ed. 653, New York Trust Co. v. Chicago, R. I. & P. R. Co., 55 S.Ct. 214, 215, 293 U.S. 550, 79 L.Ed. 653, and Reconstruction Finance Corporation v. Chicago, R. I. & P. R. Co., 55 S.Ct. 215, two cases, 293 U.S. 550, 79 L.Ed. 653, affirmed Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R. I. & P. R. Co., 55 S.Ct. 595, 294 U.S. 648, 79 L.Ed. 1110.

Trial within district

The statutory division of United States into judicial districts implies that cases pending in certain district shall be tried there.—In re Associated Gas & Electric Co., C.C.A.N.Y., 83 F.2d 734.

72. U.S.—Rosecrans v. U. S., Mont., 17 S.Ct. 302, 165 U.S. 257, 41 L.Ed. 708—Mizell v. Vickrey, C.C.A.Okl., 36 F.2d 327—Anderson v. Standard Accident Ins. Co., D.C.La., 36 F.Supp. 7—U. S. v. Southern Ry. Co., D.C.Tenn., 285 F. 766—Gopcevic v. California Packing Corporation, D.C.Cal., 272 F. 994.

73. U.S.—Steers v. U. S., C.C.A.Mo., 297 F. 116—U. S. v. Southern Ry. Co., D.C.Tenn., 285 F. 766.

Division because of disagreement among judges

(1) Where the two judges of a district could not agree on the distribution of work, an order of a circuit court and a statute confirming it, which divided the district into two

established.[74] Such intent, however, must be clearly apparent; it cannot be inferred.[75]

The transfer of territory from one district to another, as where a new district is created, does not operate to abolish the original district, but merely affects its territorial jurisdiction and in some cases its name, the organization of the original district not being changed, and its officers continuing in office charged with the same duties.[76]

§ 304. —— Judges

Any duly acting district court judge constitutes a district court. If the public interest requires, the senior judge of a circuit may assign any circuit judge, including himself, to hold a district court therein, either generally, or in a particular division or term, or for a particular proceeding.

Any duly acting district court judge constitutes a district court.[77]

Circuit judges sitting as district judges. Under a federal statute, the senior circuit judge of a circuit may, if the public interest requires, designate and assign any circuit judge of the circuit to hold a district court therein.[78] The senior circuit judge may assign himself,[79] and it has even been said that in a proper case it is his duty to do so.[80] The circuit judge may be assigned generally to hold a district court in a named district,[81] or to hold a particular division of a district court, or a term of such court at one of several places fixed by law,[82] or even to hear a particular case[83] or sit in a par-

divisions and distributed the work, were held to limit the jurisdiction of the respective judges accordingly.—Case v. U. S., C.C.A.Kan., 14 F.2d 510.

(2) But either of the judges could, by agreement with the other, assume jurisdiction of matters not allocated to him by the order and statute.—Ex parte Briggs, D.C., 15 F.2d 84.

74. U.S.—Kibbler v. St. Louis & S. F. R. Co., C.C.Ala., 147 F. 879.

75. U.S.—Rosecrans v. U. S., Mont., 17 S.Ct. 302, 165 U.S. 257, 41 L.Ed. 708.

76. U.S.—In re Mason, C.C.Iowa, 85 F. 145.
25 C.J. p 973 note 78.

Pending actions and existing causes

(1) Under express statutory provision that, whenever a new district is established or any territory transferred from one district to another, prosecutions for crimes committed within the transferred territory prior to the transfer shall be commenced and proceeded with as if such transfer had not taken place, the original district court has jurisdiction to commence the prosecution of a crime so committed.—Lewis v. U. S., Okl., 49 S.Ct. 257, 279 U.S. 63, 73 L.Ed. 615, affirming, C.C.A., 22 F.2d 760, rehearing denied 26 F.2d 465, and certiorari granted 49 S.Ct. 11, 278 U.S. 587, 73 L.Ed. 521—Mizell v. Vickrey, C.C.A.Okl., 36 F.2d 327—Briggs v. White, C.C.A.Kan., 32 F.2d 108—Lewis v. U. S., C.C.A.Okl., 14 F.2d 369.

(2) The court of the new district does not have jurisdiction thereof unless the case is transferred.—Mizell v. Vickrey, supra—Mizell v. Beard, D.C.Okl., 25 F.2d 324.

(3) However, it has been held that the provision referred to in (1) applies only to criminal cases begun before, and pending at the time of, the creation of the new district, and that, where no prosecution had been commenced at the time of its creation, the new district has jurisdiction.—Quinlan v. U. S., C.C.A.Ga., 22 F.2d 95.

(4) Under express provisions of the act creating a new district, the new court may acquire jurisdiction of all causes pending in the original court, which arose in the transferred territory, with the exception of causes in which evidence had already been taken.
U.S.—O'Conner v. O'Conner, C.C.Tex., 146 F. 994—Stillman v. Hart, Tex., 126 F. 359, 61 C.C.A. 309.
N.Y.—Baldwin v. Rice, 89 N.Y.S. 738, 44 Misc. 64, modified on other grounds 89 N.Y.S. 738, 91 N.Y.S. 1086, 100 App.Div. 241, and 75 N.E. 1096, 183 N.Y. 55, modified on other grounds 76 N.E. 1088, 184 N.Y. 523.

77. U.S.—Ackerson v. U. S., C.C.A. N.Y., 15 F.2d 268.

78. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331, affirming in part, C.C.A., 61 F.2d 934, which reversed, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467.
Competency of district judge to sit as a judge of circuit court of appeals see supra § 283.

Duty to consider application

Senior circuit judge could not properly decline to consider application to designate circuit judge to hold district court on theory that public interest so requires.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y., 4 F. Supp. 68.

Circumstances warranting designation

Senior circuit judge has judicial duty to designate circuit judge to hold district court whenever, in his judgment, any case is presented of sufficient public importance and likely to present difficult and complicated questions of law and judicial administration, if public interest so requires.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., supra.

79. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331, affirming in part, C.C.A., 61 F.2d 934, which reversed, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467.

It is a common practice for the senior circuit judge to designate himself.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y., 4 F.Supp. 68.

80. U.S.—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y., 1 F.Supp. 820.

81. U.S.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331, affirming in part, C.C.A., 61 F.2d 934, which reversed, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467.

82. U.S.—Johnson v. Manhattan Ry. Co., supra.

83. U.S.—Johnson v. Manhattan Ry. Co., supra.

Contrary district court rules

While a designated circuit judge is sitting as a district judge, he must obey all valid rules of the district court applicable to the proceedings, but, if he has been assigned by the senior circuit judge to hear a particular case, he is not obliged to comply with a district court rule which would prevent him from performing his statutory duty of carrying out the assignment.—Johnson v. Manhattan Ry. Co., supra.

Senior circuit judge assigning himself

Power of senior circuit judge to assign himself to sit in particular case in district court should be exercised only in special exigencies, and then

ticular part.[84] The circuit judge's determination that public interest requires such an assignment is not open to collateral attack.[85] A circuit court judge assigned to hold a district court is, while sitting as such, a district court judge for all purposes.[86]

Under a statute providing that, where the district judges do not agree on the division of business and assignment of cases for trial, the senior circuit judge shall make all necessary orders relating thereto, the senior circuit judge cannot, by first assigning himself as a district judge and in that capacity disagreeing with all the district judges, create such a disagreement as the statute contemplates so as to authorize him as senior circuit justice to assign to himself as district judge a particular case.[87]

§ 305. Character of Courts

The district court is a court of record. It is not an inferior court in the technical sense of the term.

The federal district courts are courts of record.[88] They are not inferior courts in the technical sense of the term,[89] although they have been said to be inferior in the sense that their jurisdiction is limited to that conferred by congress.[90]

§ 306. Terms and Sessions

Proceedings conducted by a district court at a term or session held without authority of law are inoperative and void; a district court may extend its terms for specified periods. A special term may be held at such place in the district as the nature of the business requires.

Proceedings conducted by a district court at a term or session held without authority of law are inoperative and void.[91] A district court is open in its entirety from the beginning of each session to its end, and may make writs returnable on the criminal side at a time when it shall have adjourned as a criminal court.[92] District courts may extend their terms for specified periods,[93] and this may be accomplished either by order in a particular case or by a general order in the form of a rule.[94]

Special terms. In view of a statute providing that a special term of any district court may be held at the same place where any regular term is held or at such other place in the district as the nature of the business may require, the fact that the place for the holding of the regular term of a district is fixed by statute does not prevent a special term thereof from being held elsewhere.[95] Under the statute providing that special terms of any district court may be ordered by the district judge, and that "any business may be transacted at such special term which might be transacted at a regular term," a district court has jurisdiction at a special term to try a defendant on an indictment returned at a previous regular term, and it is not necessary that the order for the special term be incorporated in the record of the case to show such jurisdiction.[96]

§ 307. Rules of Procedure

District courts have power to make rules not inconsistent with any law of the United States, or with

with commensurate care and discretion, and a mere difference of opinion between him and district judges respecting relative fitness of individuals and trust companies as equity receivers is not proper ground for taking public carrier receivership case from district judge and bringing it before senior circuit judge under latter's order assigning case to himself.—Johnson v. Manhattan Ry. Co., supra.

84. U.S.—Johnson v. Manhattan Ry. Co., supra.

85. U.S.—Johnson v. Manhattan Ry. Co., supra.

Collateral attack is not justified on grounds that public interest did not require designation or that designation was conditioned on public interest rather than on judgment of senior circuit judge that public interest required designation, as in original statute.—Johnson v. Manhattan Ry. Co., C.C.A.N.Y., 61 F.2d 934, reversing, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

86. U.S.—Johnson v. Manhattan Ry. Co., C.C.A.N.Y., 61 F.2d 934, reversing, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

87. U.S.—Johnson v. Manhattan Ry. Co., D.C.N.Y., 1 F.Supp. 809, reversed on other grounds, C.C.A., 61 F.2d 934, certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

88. U.S.—In re Columbia Real-Estate Co., D.C.Ind., 101 F. 965, appeal dismissed 112 F. 643, 50 C.C.A. 406.
Mass.—Brown v. Bridge, 106 Mass. 563.

89. U.S.—M'Cormick v. Sullivant, Ohio, 10 Wheat. 192, 6 L.Ed. 300.
15 C.J. p 722 note 72 [a].

90. U.S.—Cole v. Blankenship, C.C.A.W.Va., 30 F.2d 211.
Jurisdiction of district courts see infra § 308.

91. U.S.—McGlashan v. U. S., Wis., 71 F. 434, 18 C.C.A. 172, appeal dismissed 18 S.Ct. 948, 170 U.S. 703, 42 L.Ed. 1218.

92. U.S.—U. S. v. Philadelphia & R. R. Co., D.C.Pa., 237 F. 292, error dismissed 37 S.Ct. 651, 244 U.S. 644, 61 L.Ed. 1368.

93. U.S.—Maison Dorin Société Anonyme v. Arnold, C.C.A.N.Y., 16 F.2d 977, certiorari denied 47 S.Ct. 571, 273 U.S. 766, 767, 71 L.Ed. 881.

94. U.S.—Maison Dorin Société Anonyme v. Arnold, supra.

95. U.S.—Hill v. U. S., C.C.A.Md., 42 F.2d 812, certiorari denied 51 S.Ct. 87, 282 U.S. 884, 75 L.Ed. 780.

96. U.S.—Goll v. U. S., Wis., 151 F. 412, 80 C.C.A. 642.

Under a former statute, defendant could not be tried at a special term under an indictment returned at a regular term.—U. S. v. Cornell, C.C. R.I., 25 F.Cas.No.14,868, 2 Mason 91.

any rules prescribed by the supreme court, or with the Federal Rules of Civil Procedure; but no rules may be adopted which alter the court's jurisdiction, change statutory or substantive law, or are unreasonable.

Although, as appears supra § 96, the Federal Rules of Civil Procedure regulate many matters of practice arising in the district courts, under rule 83 thereof district courts have power to make additional rules not inconsistent with the rules provided.[97] The rules may be adopted by a majority of the district judges,[98] and they may be repealed[99] by the same authority[1] Since district courts are empowered to make such additional rules, any local district rules adopted before the effective date of the Federal Rules of Civil Procedure and not inconsistent with them remain in force.[2] The adoption of the Federal Rules of Civil Procedure did not enlarge the jurisdiction of the district courts.[3]

Under a power to make rules of practice, a district court cannot adopt rules which alter the court's jurisdiction,[4] or change statutory or substantive law,[5] or are unreasonable.[6] Rules adopted by a district court have the force and effect of laws until set aside.[7]

97. U.S.—Hicks v. Bekins Moving & Storage Co., C.C.A.Wash., 115 F.2d 406—Gillson v. Vendome Petroleum Corporation, D.C.La., 35 F.Supp. 815—Green v. Me-Tex Supply Co., D.C.Tex., 29 F.Supp. 851—Clair v. Philadelphia Storage Battery Co., D.C.Pa., 29 F.Supp. 299—Stockton v. Consolidated Feldspar Corporation, D.C.Tenn., 1 F.R.D. 411.

Rules construed or applied

(1) Rule providing that only an attorney or proctor of the court may enter appearances for parties, sign stipulations or receive payment on judgments, decrees, or orders.—Schifrin v. Chenille Mfg. Co., C.C.A.N.Y., 117 F.2d 92, reversing, D.C., 34 F.Supp. 400, certiorari denied Chenille Mfg. Co. v. Schifrin, 61 S.Ct. 1114, 313 U.S. 590, 85 L.Ed. 1545.

(2) Rule providing that, where there is a procedural question which is not expressly covered by federal statutes or by Fed.Rules of Civ.Proc. or otherwise covered by rules of the local federal courts, the question shall be determined, if possible, by parallels or analogies furnished by such statutes and rules, but that, if no such analogies or parallels exist, then procedure prevailing in courts of equity of United States or, in default thereof, the procedure which shall then prevail in state court should be applied.—U. S. v. Certain Lands in Borough of Brooklyn, Kings County, State of New York, for the Establishment of Receiving Barracks, D.C.N.Y., 39 F.Supp. 91.

98. U.S.—Superior Fire Ins. Co. v. Martin, C.C.A.Ill., 80 F.2d 275, certiorari denied Camden Fire Ins. Ass'n v. Martin, 56 S.Ct. 938, 298 U.S. 672, 80 L.Ed. 1394—Stockton v. Consolidated Feldspar Corporation, D.C.Tenn., 1 F.R.D. 411.

99. U.S.—U. S. v. Aluminum Co. of America, D.C.N.Y., 2 F.R.D. 224.

1. U.S.—Superior Fire Ins. Co. v. Martin, C.C.A.Ill., 80 F.2d 275, certiorari denied Camden Fire Ins. Ass'n v. Martin, 56 S.Ct. 938, 298 U.S. 672, 80 L.Ed. 1394.

2. U.S.—Clair v. Philadelphia Storage Battery Co., D.C.Pa., 29 F.Supp. 299—Stockton v. Consolidated Feldspar Corporation, D.C.Tenn., 1 F.R.D. 411.

3. U.S.—Lowe v. U. S., D.C.N.J., 37 F.Supp. 817.

Where the procedure is jurisdictional

The special statute conferring on the district court jurisdiction of claims against the United States in certain cases also lays down the procedural requirements for invoking that jurisdiction, and Fed.Rules of Civ.Proc. cannot be applied so as to change those requirements, since so doing would in effect change the jurisdiction of the court.—Mount Tivy Winery v. Lewis, D.C.Cal., 42 F.Supp. 636—Lowe v. U. S., D.C.N.J., 37 F. Supp. 817.

4. U.S.—Concord Casualty & Surety Co. v. U. S., C.C.A.N.Y., 69 F.2d 78, 91 A.L.R. 885—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487—Clymer v. U. S., C.C.A.Colo., 38 F.2d 581.

"An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not authority to enlarge that jurisdiction."—Lowe v. U. S., D.C.N.J., 37 F.Supp. 817, 819.

Time for perfecting appeal

District court rule attempting to require filing of narrative form of testimony within forty days after entry of decree appealed from, and construed as prohibiting extension of time where application is not made within such period, was held invalid as depriving court of jurisdiction conferred by congress.—Alliance Securities Co. v. Killits, C.C.A.Ohio, 67 F.2d 480.

5. U.S.—Concord Casualty & Surety Co. v. U. S., C.C.A.N.Y., 69 F. 2d 78, 91 A.L.R. 885—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487—Clymer v. U. S., C.C.A.Colo., 38 F.2d 581. 25 C.J. p 827 note 16 [a].

Requiring attorney to secure costs

Rule providing that, where a suit is instituted in forma pauperis and fee of plaintiff's counsel depends on the result, the suit cannot be prosecuted alone on plaintiff's oath of his poverty, but his counsel must likewise file such an oath, or give security for costs was not invalid as requiring the violation of any state law.—U. S. v. Ross, C.C.A.Tenn., 298 F. 64.

6. U.S.—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487.

7. U.S.—Hicks v. Bekins Moving & Storage Co., C.C.A.Wash., 115 F.2d 406—Galveston Dry Dock & Construction Co. v. Standard Dredging Co., C.C.A.N.Y., 40 F.2d 442—Gillson v. Vendome Petroleum Corporation, D.C.La., 35 F.Supp. 815—In re Wilkin, D.C.Iowa, 8 F.Supp. 222—Johnson v. Manhattan Ry. Co., D. C.N.Y., 1 F.Supp. 809, reversed on other grounds, C.C.A., 61 F.2d 934, certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

Enforcement

(1) It has been held that a rule governing preparation of trial calendars must be applied to all cases coming within its provisions until repealed by action of majority of judges of district.—Superior Fire Ins. Co. v. Martin, C.C.A.Ill., 80 F.2d 275, certiorari denied Camden Fire Ins. Ass'n v. Martin, 56 S.Ct. 938, 298 U.S. 672, 80 L.Ed. 1394.

(2) It has also been held that rules of court should be strictly enforced against unreasonable delays in prosecuting causes.—U. S. Fidelity & Guaranty Co. v. Helm, C.C.A.Cal., 84 F.2d 546, reversing, D.C., Helm v. U. S. Fidelity & Guaranty Co., 12 F. Supp. 185, reversed on other grounds, C.C.A., U. S. Fidelity Guaranty Co. v. Shepherd, 86 F.2d 1021, rehearing denied U. S. Fidelity & Guaranty Co. v. Helm, 85 F.2d 865.

(3) On the other hand it has been held that the presiding judge may

Rules of federal courts generally are considered supra § 96.

Before the adoption of the Federal Rules of Civil Procedure, district courts likewise had power to adopt rules for the regulation of their practice to the extent that it might be necessary for the advancement of justice and the prevention of delay in proceedings, provided such rules were not in any manner inconsistent with any law of the United States or any rule prescribed by the supreme court.[8] The provisions of the Conformity Act, considered generally supra §§ 99–108, attached to any rules so made, the rules being required to conform as near as might be to state practice,[9] and, indeed, the adoption of the practice of state courts was proper;[10] accordingly a rule effecting an unreasonable departure from state practice was void.[11]

exercise discretion in enforcement of court rule.—Holmes v. Ginter Restaurant Co., C.C.A.Mass., 54 F.2d 876.

8. U.S.—Hicks v. Bekins Moving & Storage Co., C.C.A.Wash., 115 F.2d 406—Superior Fire Ins. Co. v. Martin, C.C.A.Ill., 80 F.2d 275, certiorari denied Camden Fire Ins. Ass'n v. Martin, 56 S.Ct. 938, 298 U.S. 672, 80 L.Ed. 1394—Concord Casualty & Surety Co. v. U. S., C.C.A. N.Y., 69 F.2d 78, 91 A.L.R. 885—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied Berenson v. Woodbury, 53 S.Ct. 659, 289 U.S. 740, 77 L.Ed. 1487—Galveston Dry Dock & Construction Co. v. Standard Dredging Co., C.C.A.N.Y., 40 F.2d 442—Clymer v. U. S., C.C.A.Colo., 38 F.2d 581—In re Wilkin, D.C.Iowa, 8 F. Supp. 222—King v. Weiss & Lesh Mfg. Co., C.C.A.Tenn., 266 F. 257.
15 C.J. p 904 note 33—25 C.J. p 827 note 18, p 974 note 92.

Construction

The rule of the district court authorizing an offer to permit entry of decree, and providing that after such offer is made no costs shall be taxed against respondent, unless a decree for a larger amount than was included in the offer is rendered, must be construed in the light of the federal statute fixing the costs. —The Bluefields, D.C.Ala., 273 F. 268.

Limitation on statutory power of circuit judge

(1) Judges of federal district court cannot, by adoption of rules, extend and enlarge their powers so as to limit or exclude statutory powers and duties of senior circuit judge duly designated to hold district court.—Johnson v. Manhattan Ry. Co., C.C.A. N.Y., 61 F.2d 934, reversing, D.C., 1 F.Supp. 809, and certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331—American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., D.C.N.Y., 1 F. Supp. 820.

(2) So, a rule of district court purporting to limit judges to work designated by senior district judge, and a rule requiring application for appointment of equity receivers to be made to judge holding motion part of court, and "to no other judge," were invalid as applied to circuit judges assigned to district court pursuant to statute.—Johnson v. Manhattan Ry. Co., N.Y., 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331, affirming, in part, C.C.A., 61 F.2d 934, which reversed, D.C., 1 F.Supp. 809, certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L. Ed. 1467.

Prior district court rule must give way to a subsequent equity rule with which it is at variance.—Buck v. Case, D.C.Wash., 24 F.Supp. 541, appeal dismissed in part Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358, reversed on other grounds 59 S.Ct. 740, 307 U.S. 95, 83 L.Ed. 1128.

Concurrence of a majority of the circuit judges, required by the equity rule permitting district courts to adopt further rules, is not necessary for the validity of a rule other than an equity rule.—Johnson v. Manhattan Ry. Co., D.C.N.Y., 1 F.Supp. 809, reversed on other grounds, C.C.A., 61 F.2d 934, certiorari granted 53 S. Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U. S. 479, 77 L.Ed. 1331.

Rules upheld

(1) Rule declaring what disbursements shall be taxed as costs.—Williams v. Sawyer Bros., C.C.A.N.Y., 51 F.2d 1004, 81 A.L.R. 1527.

(2) Rule depriving plaintiff of absolute right to discontinue equity suit after issue joined, even though defendant could not have affirmative relief under pleadings.—Bronx Brass Foundry v. Irving Trust Co., N.Y., 56 S.Ct. 451, 297 U.S. 230, 80 L.Ed. 657, affirming, C.C.A., In re J. R. Palmenberg Sons, 76 F.2d 935, certiorari granted Bronx Brass Foundry v. Irving Trust Co., 56 S.Ct. 117, 296 U.S. 565, 80 L.Ed. 399.

(3) Rule relating to depositions de bene esse, and providing that "upon the return of a commission the clerk shall open and file it forthwith in his office and give notice thereof by mail to the counsel for the respective parties, and any motion to suppress such commission must be made within 10 days after the mailing of said notice."—Louis Werner Stave Co. v. Marden, Orth & Hastings Co., C.C.A.N.Y., 280 F. 601.

(4) Rule requiring any amended pleading to be filed within ten days thereafter, unless for good cause further time should be given.—McMullin v. Sheehan, C.C.A.Mo., 95 F.2d 129, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

9. U.S.—Janoske v. Porter, C.C.A. Ill., 64 F.2d 958.

Where the state practice is uncertain, the adoption of a rule more effectually securing the purpose of the state laws on the subject is valid.—Lowry v. Story, C.C.N.C., 31 F. 769.

10. U.S.—Steam Stone-Cutter Co. v. Jones, C.C.Vt., 13 F. 567, 21 Blatchf. 138—Teese v. Phelps. C.C. Cal., 23 F.Cas.No.13,818, McAll. 17.
25 C.J. p 827 note 19.

Equity and admiralty practice were excluded from the operation of the Conformity Act, but were subject to the rule that the practice in such suits, except as otherwise provided by statute, or by rule of court, must be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively. —Gaines v. Relf, La., 15 Pet. 9, 10 L.Ed. 642—21 C.J. p 356 note 46.

Subsequent changes in state practice

(1) The mere adoption of the state practice with respect to any matter does not require that subsequent changes in the state practice be followed.—Boston & M. R. R. Co. v. Gokey, Vt., 28 S.Ct. 657, 210 U.S. 155, 52 L.Ed. 1002, affirming 149 F. 42, 79 C.C.A. 64—In re Craig, C.C.N.J., 6 F. Cas.No.3,325, Pet.C.C. 1.

(2) But, although a statute allowing district courts to adopt by general rules such state laws as may be in force in relation to remedies on judgments presupposes some action by court, the use of the phrase "by general rules" indicates that court may incorporate whole procedure in bulk; hence a rule adopting such proceedings supplementary to execution "as are now or may be hereafter provided" by the state laws was valid and warrants resort to subsequent provisions of the state law relating to supplementary proceedings.—Capital Co. v. Fox, C.C.A. N.Y., 85 F.2d 97, 106 A.L.R. 376, affirming, D.C., 15 F.Supp. 677.

11. U.S.—Eley v. Gamble, C.C.A.Va., 75 F.2d 171.

On the abolition of the circuit courts and the transfer of their jurisdiction to the district courts, see infra § 308, all rules previously in force in the circuit courts were necessarily abrogated.[12]

§ 308. Jurisdiction

District courts have only such jurisdiction as congress confers; and congress may change or take away any jurisdiction it has conferred, making such change operative even as to pending cases. The district court has general equity jurisdiction.

The district courts are the creatures of statutes enacted in pursuance of the constitution, and, apart from the powers inherent in a lawfully constituted judicial tribunal, such courts have no jurisdiction other than that conferred on them by acts of congress within the limits defined by the Constitution.[13]

12. U.S.—Ross v. Grafton Power Co., D.C.Vt., 60 F.2d 663.

13. U.S.—Noland v. Noland, C.C.A. Cal., 111 F.2d 322, certiorari denied 61 S.Ct. 30, 311 U.S. 670, 85 L.Ed. 430, rehearing denied 61 S.Ct. 130, 311 U.S. 726, 85 L.Ed. 473—Heine v. New York Life Ins. Co., C.C.A.Or., 50 F.2d 382, affirming, D.C., 45 F.2d 426, and followed in, C.C.A., Herrmann v. New York Life Ins. Co., 50 F.2d 387—The Gerald A. Fagan, C. C.A.N.Y., 49 F.2d 215, certiorari granted Marine Transit Corporation v. Dreyfus, 52 S.Ct. 14, 284 U.S. 601, 76 L.Ed. 516, affirmed 52 S.Ct. 166, 284 U.S. 263, 76 L.Ed. 282—Teeters v. Henton, D.C.Wyo., 43 F.2d 175—Cole v. Blankenship, C.C.A.W.Va., 30 F.2d 211—Colgate & Co. v. Procter & Gamble Mfg. Co., D.C.N.Y., 25 F.2d 160—Taylor v. De Hart, D.C.Mo., 22 F.2d 206, dismissed 47 S.Ct. 767, 274 U.S. 726, 71 L.Ed. 1335—Emerson v. Baker, D.C.Ga., 3 F.2d 830—Kelley v. Queeney, D.C.N.Y., 41 F.Supp. 1015 —Westor Theatres v. Warner Bros. Pictures, D.C.N.J., 41 F.Supp. 757 —Moses Taylor Lodge No. 95 of Brotherhood of Railroad Trainmen v. Delaware, L. & W. R. Co., D.C. Pa., 39 F.Supp. 456—Seligman's, Inc. v. U. S., D.C.La., 30 F.Supp. 895—Richard H. Oswald Co. v. Leader, D.C.Pa., 20 F.Supp. 876—Sheridan Flouring Mills v. Cassidy, D.C.Wyo., 17 F.Supp. 598—Keogh v. Horner, D.C.Ill., 8 F.Supp. 933—National Lock Co. v. Chicago Regional Labor Board, D.C.Ill., 8 F. Supp. 820—Snyder v. Fancher, D. C.N.Y., 7 F.Supp. 597—United Mine Workers of America, Dist. No. 17 v. Chafin, D.C.W.Va., 286 F. 959—Orange Theatre Corporation v. Rayherstz Amusement Corporation, D.C.N.J., 2 F.R.D. 278, reversed on other grounds, C.C.A., 130 F.2d 185.
25 C.J. p 975 note 5.

No prescriptive or common law powers are inherent in the district court.—Concord Casualty & Surety Co. v. U. S., C.C.A.N.Y., 69 F.2d 78, 91 A.L.R. 885.

Manner of exercise

Where statutes, in conferring jurisdiction, point out the manner in which it shall be exercised, only that method expressly or impliedly conferred may be followed.—Metropolitan Life Ins. Co. v. U. S., C.C.A.Mich., 107 F.2d 311, certiorari denied 60 S. Ct. 978, 310 U.S. 630, 84 L.Ed. 1400.

Effect of power to issue writs

The statute making available to district courts all writs not specifically provided for by statute, which may be necessary for exercise of jurisdiction of such courts, does not confer or expand jurisdiction.—Shimola v. Local Board No. 42 for Cuyahoga County, D.C.Ohio, 40 F.Supp. 808.

Power to make rates

The Federal district courts are without jurisdiction to exercise the ordinary rate-making power which the legislatures of various states have conferred on rate-making bodies, because power to prescribe rates is a function reserved to the states and because it is not within the judicial power conferred on district courts by the Constitution; hence, while the district court had jurisdiction to determine amount due on certificates of indebtedness issued by municipally owned water system and to compel adoption of schedule of rates sufficient to enable discharge of certificates within a reasonable time, it had no power itself to increase the rates to be charged by its receiver in operation of such water system.—Connett v. City of Jerseyville, C.C.A.Ill., 110 F.2d 1015.

Jurisdiction or power as to particular matters

(1) The federal district court has no power to reserve or report questions to the higher court for decision, but must pass on all issues involved, so that an appeal may be taken to the higher court.—Colyer v. Skeffington, D.C.Mass., 265 F. 17, reversed on other grounds, C.C.A., Skeffington v. Katzeff, 277 F. 129.

(2) The district court has no power to appoint an ancillary guardian of an incompetent's property.—Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co. of New York, D.C.N.Y., 27 F.Supp. 485.

(3) In a suit by a trustee in bankruptcy to set aside an alleged preferential mortgage and remove clouds from the bankrupts' title created by a will containing interlineations and erasures, the United States district court has no probate jurisdiction and may construe the will, but cannot determine its contents.—City Nat. Bank v. Slocum, C.C.A.Ohio, 272 F. 11, certiorari denied Slocum v. Halliday, 42 S.Ct. 49, 257 U.S. 637, 66 L.Ed. 409.

(4) The federal district court has no power to validate bridge bonds issued under state laws.—Farmers' State Bank of New Washington, Ohio v. Board of Com'rs of Jensen Bridge Dist., D.C.Fla., 295 F. 755.

(5) United States district court cannot acquire and own property in its own right.—In re King, D.C.Tenn., 11 F.Supp. 351.

(6) District court has jurisdiction of subject matter of action by United States against motor bus operators to restrain defendants from carrying on their business until compliance with motor bus industry code promulgated under National Industrial Recovery Act.—U. S. v. Scott, D.C. Wash., 10 F.Supp. 453.

(7) A district court will not grant an injunction restraining the federal trade commission from examining the books and records of a person charged with using unfair methods of competition in commerce, as authorized by Federal Trade Commission Act Sept. 26, 1914 § 9, Comp.St. § 8836i, in view of the fact that by § 5, section 8836e, of the act the circuit court of appeals is given exclusive jurisdiction to review proceedings of the commission. —T. C. Hurst & Son v. Federal Trade Commission, D.C.Va., 268 F. 874.

(8) The district court has jurisdiction of an action to enjoin interference with fishing rights under a treaty with Indians.—McCauley v. Makah Indian Tribe, C.C.A.Wash., 128 F.2d 867, reversing, D.C., Makah Indian Tribe v. McCauley, 39 F.Supp. 75.

(9) District courts of the United States have jurisdiction of many cases of libel which are not cases cognizable in admiralty.—The Dixie, D. C.Tex., 30 F.Supp. 215.

(10) The district court, sitting at common law, had no jurisdiction of administratrix' action at law for United States customs inspector's death resulting from injuries received in boarding a vessel owned by the United States maritime commission and operated for the commission by private corporation, none of whose stock was owned directly or indirectly by the United States,

A fortiori, they do not have any jurisdiction which congress has specifically denied them.[14] The general rule, stated supra § 4 that the jurisdiction of federal courts other than the supreme court may be changed or taken away at the pleasure of congress, applies to district courts,[15] and, if jurisdiction as to any matter is withdrawn without a saving clause, all pending cases, although cognizable under the withdrawn jurisdiction when commenced, must fall.[16] In the sense that its jurisdiction is dependent on the will of congress, the district court is a court of limited, rather than general, jurisdiction,[17] but within the bounds of the jurisdiction conferred it exercises general,[18] exclusive, and concurrent[19] jurisdiction.

The jurisdiction of the district court is, except as statutes may otherwise provide, strictly original;[20] the court has no power to review the decision of a state court.[21]

In appropriate places elsewhere in this title will be found discussions of the jurisdiction of district courts as respects particular actions, as, for example, cases affecting ambassadors, ministers, and consuls, see supra § 44, suits by the United States, see supra § 45, actions by states, see supra § 48, and suits between citizens of a state and foreign states, see supra § 54. In other titles will be found discussions of the jurisdiction of the district court of actions as to war risk insurance, see Army and Navy § 91, as to matters relating to the interstate commerce commission, see Commerce §§ 146–148, as a court of bankruptcy, see Bankruptcy § 19, of

since administratrix' remedy was exclusively under the Suits in Admiralty Act.—Brady v. Roosevelt S. S. Co., C.C.A.N.Y., 128 F.2d 169.

14. U.S.—Seligman's Inc., v. U. S., D.C.La., 30 F.Supp. 895.

Patent infringement

District court has no jurisdiction over patent infringement suit involving articles manufactured for United States.—Pierce v. Submarine Signal Co., D.C.Mass., 25 F.Supp. 862.

Controversies respecting public utility rates

Under the provision denying the district court jurisdiction of certain intra-state public utility rate cases where federal jurisdiction is based solely on diversity of citizenship or repugnance of an order to the Constitution, the court lacks jurisdiction not only where either of two grounds is present but even where both are present; the only situation in which the district court has jurisdiction of such cases is where the rate has been fixed without "reasonable notice and hearing" in the sense of denial of due process, and, if the court determines that there was such notice and hearing, it cannot proceed further to review errors of fact or law by the rate-making body.—Mississippi Power & Light Co. v. City of Jackson, Miss., D.C.Miss., 9 F.Supp. 564.

Customs duties

(1) The district court ordinarily has no jurisdiction of a bill to enjoin the liquidation of entry of customs duties.—Cottman Co. v. Dailey, D.C. Md., 20 F.Supp. 142, affirmed, C.C.A., 94 F.2d 85.

(2) Review of custom duty proceedings see Customs Duties §§ 176–198.

15. U.S.—Kuligowski v. Hart, D.C. Ohio, 43 F.Supp. 207—Louisville Provision Co. v. Glenn, D.C.Ky., 12 F.Supp. 545—Mississippi Power & Light Co. v. City of Jackson, Miss., D.C.Miss., 9 F.Supp. 564.

Conferring jurisdiction on other court

Statute restricting patent infringement suits involving apparatus manufactured for or sold to United States to court of claims is not unconstitutional as taking property either without due process of law or without adequate compensation.—Pierce v. Submarine Signal Co., D. C.Mass., 25 F.Supp. 862.

16. U.S.—Louisville Provision Co. v. Glenn, D.C.Ky., 12 F.Supp. 545.

17. U.S.—Metropolitan Life Ins. Co. v. U. S., C.C.A.Mich., 107 F.2d 311, certiorari denied 60 S.Ct. 978, 310 U.S. 630, 84 L.Ed. 1400—U. S., for Use of Mutual Metal Mfg. Co. v. Biggs, D.C.Ill., 46 F.Supp. 8—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Shimola v. Local Board No. 42 for Cuyahoga County, D.C.Ohio, 40 F.Supp. 808—Newcastle Products v. School Dist. of Blair Tp., D.C.Pa., 18 F.Supp. 335—Sheridan Flouring Mills v. Cassidy, D.C.Wyo., 17 F.Supp. 598—Keogh v. Horner, D.C.Ill., 8 F.Supp. 933—National Lock Co. v. Chicago Regional Labor Board, D.C.Ill., 8 F. Supp. 820—United Mine Workers of America, Dist. No. 17 v. Chafin, D.C.W.Va., 286 F. 959.
15 C.J. p 722 note 72 [a].

Circuit courts

(1) Before the abolition of the circuit courts by the judicial code of 1911, the jurisdiction of the district courts was much more limited than it is at present, and it was the circuit court that had jurisdiction of the great mass of litigation in cases of a civil nature between private parties.—Day v. Walls, D.C.Pa., 7 F.Cas.No.3,692, 35 Leg.Int. 468—25 C. J. p 974 note 99 [a].

(2) Effect of abolition of circuit courts.—Nashville Interurban R. Co. v. Barnum, N.Y., 212 F. 634, 129 C.C. A. 170.
25 C.J. p 973 note 75.

18. U.S.—McGarry v. Lentz, D.C. Ohio, 9 F.2d 680, affirmed, C.C.A., 13 F.2d 51, certiorari denied 47 S. Ct. 108, 273 U.S. 716, 71 L.Ed. 855.
15 C.J. p 722 note 72 [a].

19. U.S.—McGarry v. Lentz, D.C. Ohio, 9 F.2d 680, affirmed, C.C.A., 13 F.2d 51, certiorari denied 47 S. Ct. 108, 273 U.S. 716, 71 L.Ed. 855.
Exclusive jurisdiction of federal courts as contrasted to jurisdiction of state courts see Courts § 525.
Concurrent jurisdiction:
Between federal and state courts generally see Courts §§ 526–528.
Between district courts and other federal courts see infra §§ 355–359.

20. U.S.—Rooker v. Fidelity Trust Co., Ind., 44 S.Ct. 149, 263 U.S. 413, 68 L.Ed. 362—Williams v. Tooke, C. C.A.Tex., 108 F.2d 758, certiorari denied 61 S.Ct. 8, 311 U.S. 655, 85 L.Ed. 419—Phœnix Oil Co. v. Mackenzie Oil Co., D.C.Del., 56 F.2d 1070.

Review of administrative boards

As affects review, all judgments may be classified as either judicial fact findings or as rulings based on judicial discretion.—Fox v. Blair, D. C.Pa., 20 F.2d 235.

21. U.S.—Phœnix Oil Co. v. Mackenzie Oil Co., D.C.Del., 56 F.2d 1070.

Even if the decision violates the constitution of the United States, the district court cannot reverse or modify it.—Rooker v. Fidelity Trust Co., Ind., 44 S.Ct. 149, 263 U.S. 413, 68 L.Ed. 362—Williams v. Tooke, C.C.A. Tex., 108 F.2d 758, certiorari denied 61 S.Ct. 8, 311 U.S. 655, 85 L.Ed. 419—Daniel B. Frazier Co. v. Long Beach Tp., Ocean County, N. J., C.C. A.N.J., 77 F.2d 764.

actions for denial of right to allotment to Indians, see the C.J.S. title Indians § 52, also 31 C.J. p 512 note 64, and 25 C.J. p 726 note 85 [d], of condemnation proceedings, see Eminent Domain § 232, of proceedings under the Trading with the Enemy Act to enforce a seizure or to recover property seized by the alien property custodian, see the C.J. S. title War § 26, also 67 C.J. p 392 note 14, p 397 note 6.

The amount in controversy, as affecting the jurisdiction of the district court, is considered generally infra § 310.

Equity jurisdiction. The district court has, in all cases otherwise within the jurisdiction of the federal courts, general equity jurisdiction[22] as broad as the equity jurisdiction of the state courts.[23]

Actions to which state is a party. Although, as appears supra § 194, the supreme court has exclusive jurisdiction of all civil controversies wherein a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, nevertheless, in a suit to enforce alleged treaty rights against a state's tenants, the district court has jurisdiction, even though the state is a party, where no affirmative relief against the state is sought.[24]

§ 309. —— Claims against United States

By express statutory provision, the district court has jurisdiction of claims against the United States not exceeding ten thousand dollars founded on the Constitution of the United States or any law of congress, or on any regulation of an executive department, or on any contract with the United States government, or for damages in cases not sounding in tort, subject to certain specified exceptions. Jurisdiction as to other classes of claims against the United States is in some instances conferred on the district court by special statute, and as to particular claims by private statute.

Under the express provisions of a federal statute, commonly called the Tucker Act,[25] the district court has jurisdiction concurrent with the court of claims, see infra § 355, of claims against the United States[26] for money only[27] not exceeding ten thousand dollars[28] where such claim is founded on the

22. U.S.—Briggs v. United Shoe Mach. Co., N.Y., 36 S.Ct. 6, 239 U. S. 48, 60 L.Ed. 138—Anderson v. Peck, D.C.Okl., 53 F.2d 257.
Equity jurisdiction of federal courts generally see supra § 4.

Equity jurisdiction prior to Judicial Code abolishing circuit court
U.S.—Bardes v. Hawarden First Nat. Bank, Iowa, 20 S.Ct. 1000, 178 U. S. 524, 44 L.Ed. 1175—25 C.J. p 976 note 23.

Distribution of a fund governed by foreign law
The district court has power to distribute funds in its custody, although in doing so it becomes necessary to construe the laws of a foreign country.—Roos v. Roos, C.C.A. Tex., 2 F.2d 588.

23. U.S.—Supreme Tribe of Ben-Hur v. Cauble, Ind., 41 S.Ct. 338, 255 U.S. 356, 65 L.Ed. 673, reversing, D.C., 264 F. 247—Hall v. Cottingham, D.C.S.C., 55 F.2d 659, affirmed, C.C.A., Cottingham v. Hall, 55 F.2d 664—Acken v. New York Title & Mortgage Co., D.C.N.Y., 9 F.Supp. 521.

24. U.S.—U. S. ex rel. Charley v. McGowan, D.C.Wash., 2 F.Supp. 426, affirmed, C.C.A., 62 F.2d 955, certiorari granted U. S. v. McGowan, 53 S.Ct. 790, 289 U.S. 721, 77 L.Ed. 1472, affirmed 54 S.Ct. 95, 290 U.S. 592, 78 L.Ed. 522 and U. S. v. Baker's Bay Fish Co., 54 S.Ct. 95, 290 U.S. 592, 78 L.Ed. 522.

The rights of the state may be considered in such a suit, but they cannot be determined and enforced against the state itself or its officers. —U. S. ex rel. Charley v. McGowan, supra.

25. U.S.—Cornell Steamboat Co. v. U. S., D.C.N.Y., 130 F. 480, affirmed 137 F. 455, 69 C.C.A. 603, affirmed 26 S.Ct. 648, 202 U.S. 184, 50 L.Ed. 987.
25 C.J. p 975 note 7.

Construction of statute
While the statute is remedial and should not be looked on adversely, nevertheless the question of the court's jurisdiction must always be viewed in light of premise that suit will not lie against United States unless clearly authorized by statute. —Baltimore Mail S. S. Co. v. U. S., C.C.A.Md., 76 F.2d 582, reversing, D. C., 7 F.Supp. 651, certiorari denied 56 S.Ct. 111, 296 U.S. 595, 80 L.Ed. 421.

Ultimate source of authority
The concurrent authority to entertain suits against the United States, which the Tucker Act vests in district courts, does not derive from the judicial article of the constitution.—Byron Jackson Co. v. U. S., D.C.Cal., 35 F.Supp. 665.

26. U.S.—Dismuke v. U. S., Ga., 56 S.Ct. 400, 297 U.S. 167, 80 L.Ed. 561, affirming, C.C.A., U. S. v. Dismuke, 76 F.2d 715, rehearing denied 77 F.2d 1017, certiorari granted Dismuke v. U. S., 56 S.Ct. 111, 296 U.S. 554, 80 L.Ed. 391, rehearing denied 56 S.Ct. 594, 297 U.S. 728, 80 L.Ed. 1011—Sochis v. U. S., D.C.Pa., 266 F. 446.

Refund of excess postage
The district court had jurisdiction of action against the United States to recover a refund for excess postage which plaintiffs were required to pay for mailing of certain items as first-class mail, instead of at third-class rate which plaintiffs were thereafter permitted to use.—Schreiber v. U. S., C.C.A.Ill., 129 F.2d 836, 141 A.L.R. 1394.

27. U.S.—Admiral Oriental Line v. U. S., C.C.A.N.Y., 86 F.2d 201—U. S. v. Dismuke, C.C.A.Ga., 76 F.2d 715, rehearing denied 77 F.2d 1017, and certiorari granted Dismuke v. U. S., 56 S.Ct. 111, 296 U.S. 554, 80 L.Ed. 391, affirmed 56 S.Ct. 400, 297 U.S. 167, 80 L.Ed. 561, rehearing denied, 56 S.Ct. 594, 297 U.S. 728, 80 L.Ed. 1011—Yeskel v. U. S., D.C.N.J., 31 F.Supp. 956—Ford Bros. & Co. v. Eddington Distilling Co., D.C.Pa., 30 F.Supp. 213.

Quieting of title
Under Tucker Act, district court was without jurisdiction to enter decree quieting title to land against United States or grant injunction restraining government from trespass thereon.—U. S. v. Turner, C.C.A.N.D., 47 F.2d 86.

28. U.S.—Dismuke v. U. S., Ga., 56 S.Ct. 400, 297 U.S. 167, 80 L.Ed. 561, affirming, C.C.A., U. S. v. Dismuke, 76 F.2d 715, rehearing denied 77 F.2d 1017, certiorari granted Dismuke v. U. S., 56 S.Ct. 111, 296 U.S. 554, 80 L.Ed. 391, rehearing denied 56 S.Ct. 594, 297 U.S. 728, 80 L.Ed. 1011—North Dakota-Montana Wheat Growers' Ass'n, v. U. S., C.C.A.Minn., 66 F.2d 573, 92 A.L.R. 1484, certiorari denied 54 S.Ct. 457, 291 U.S. 672, 78 L.Ed. 1061—Sloan Shipyards Corporation v. U. S. Shipping Board Emer-

Constitution of the United States or any law of congress,[29] or on any regulation of an executive department,[30] or on any contract, express or implied, with the government of the United States,[31] or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable,[32] and subject to certain exceptions and limitations specified

gency Fleet Corporation, D.C. Wash., 272 F. 132, affirming 268 F. 624, reversed on other grounds 42 S.Ct. 386, 258 U.S. 549, 66 L.Ed. 762, leave to present petition for rehearing granted 42 S.Ct. 588—Astoria Marine Iron Works v. U. S. Shipping Board Emergency Fleet Corporation, D.C.Or., 270 F. 635, reversed on other grounds Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 386, 258 U.S. 549, 66 L.Ed. 762.

25 C.J. p 975 note 10.

Strict compliance

The limitation of jurisdictional amount in the Tucker Act is a condition with which a complaining citizen must rigidly comply, and one on which the courts, of their own motion, must insist.—Hammond-Knowlton v. U. S., C.C.A.Conn., 121 F.2d 192.

Interest demanded in suit against United States must be considered as part of claim in determining whether suit was within district court's jurisdiction as involving claim "not exceeding" $10,000.—Otis Elevator Co. v. U. S., D.C.N.Y., 18 F.Supp. 87.

Although the actual value is greater than ten thousand dollars, where plaintiff prays only for that amount and thereby waives his right to recover more, the court has jurisdiction.—W. E. Hedger Co. v. U. S., D. C.N.Y., 42 F.2d 553, reversed on other grounds, C.C.A., 52 F.2d 31, certiorari denied 52 S.Ct. 130, 284 U.S. 676, 76 L.Ed. 571.

29. U.S.—Carriso, Inc. v. U. S., C.C. A.Cal., 106 F.2d 707—Ross Packing Co. v. U. S., D.C.Wash., 42 F.Supp. 932—Lancashire Shipping Co. v. U. S., D.C.N.Y., 4 F.Supp. 544

25 C.J. p 975 note 13, p 979 note 92.

"Founded upon" and "arising under" are not distinguishable.—U. S. v. Emery, Bird, Thayer Realty Co., Mo., 35 S.Ct. 499, 237 U.S. 28, 59 L.Ed. 825—25 C.J. p 975 note 11.

Private act

Where comptroller general, when acting with respect to a claim for loss sustained in fire originating from operation of railroads by United States in Minnesota on Oct. 12, 1918, relied solely on his own construction of Private Act respecting payment by government of claims for losses sustained in fire, review of comptroller general's construction of act was not confined to mandamus proceedings.—U. S. v. Bang, C.C.A. Minn., 117 F.2d 515, affirming, D.C., Bang v. U. S., 31 F.Supp. 535.

Recovery of immigration fine

An action for the return of a fine or a deposit for a fine improperly imposed under the immigration laws is within the jurisdiction of the district court as an action founded on a law of congress.—U. S. v. Compagnie Générale Transatlantique, C.C.A.N.Y., 26 F.2d 195, affirming, D.C., Compagnie General Transatlantique v. U. S., 21 F.2d 465—Clyde S. S. Co. v. U. S., D.C.N.Y., 33 F.2d 343.

Annuities

Provision of Retirement Act that employee shall be entitled to annuity payable from civil service retirement and disability fund is mandatory and is inseparable from correlative obligation of United States, and hence suit to recover annuity is on a claim "founded upon a law of Congress" and is within jurisdiction conferred on district courts, as are suits to recover sums of money which administrative officers are directed by act of congress to "pay" or "repay."—Dismuke v. U. S., Ga., 56 S.Ct. 400, 297 U.S. 167, 80 L.Ed. 561, affirming, C.C.A., U. S. v. Dismuke, 76 F.2d 715, rehearing denied 77 F.2d 1017, certiorari granted Dismuke v. U. S., 56 S. Ct. 111, 296 U.S. 554, 80 L.Ed. 391, rehearing denied 56 S.Ct. 594, 297 U. S. 728, 80 L.Ed. 1011.

30. U.S.—Dismuke v. U. S., supra.

25 C.J. p 979 note 94.

31. U.S.—Dismuke v. U. S., supra—U. S. v. Georgia Marble Co., C.C.A. Ga., 106 F.2d 955—Cory Bros. & Co. v. U. S., C.C.A.N.Y., 51 F.2d 1010—Barr v. Spalding, D.C.Ky., 46 F.2d 798—Sinclair Nav. Co. v. U. S., C. C.A.La., 32 F.2d 90—Sultzbach Clothing Co. v. U. S., D.C.N.Y., 10 F.2d 363—Sponenbarger v. U. S., D. C.Ark., 21 F.Supp. 28, motion denied 21 F.Supp. 895, reversed on other grounds, C.C.A., 101 F.2d 506, certiorari granted U. S. v. Sponenbarger, 59 S.Ct. 1047, 307 U.S. 621, 83 L.Ed. 1500, reversed on other grounds 60 S.Ct. 225, 308 U.S. 256, 84 L.Ed. 230.

25 C.J. p 975 note 15, p 980 note 95.

Contractual obligation breached by tort

"Where the wrong [on which the claim is based] really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement" and the court has jurisdiction.—Keifer & Keifer v. Reconstruction Finance Corporation, Neb., 59 S.Ct. 516, 521, 306 U.S. 381, 83 L.Ed. 784, reversing, C.C.A., 97 F.2d 812, affirming, D.C., 22 F.Supp. 918, certiorari granted 59 S.Ct. 106, 305 U.S. 588, 83 L.Ed. 372.

Contract must be implied in fact to give the court jurisdiction, a contract implied only in law or based merely on equitable considerations being insufficient.—U. S. v. Minnesota Mut. Inv. Co., Colo., 46 S.Ct. 501, 271 U.S. 212, 70 L.Ed. 911—Baltimore Mail S. S. Co. v. U. S., C.C.A.Md., 76 F.2d 582, reversing, D.C., 7 F.Supp. 651, certiorari denied 56 S.Ct. 111, 296 U.S. 595, 80 L.Ed. 421—Bielecky v. U. S., D.C.N.Y., 26 F.2d 746.

Suit in equity by surety

Agent of United States, being sued by subagent for expenses incurred by subagent in successfully defending suit by cargo owners for loss, could, before agent's liability to subagent was adjudicated, maintain suit in equity under Tucker Act against United States, under a bill sounding in contract and calling only for the payment of money.—Admiral Oriental Line v. U. S., C.C.A.N.Y., 86 F.2d 201.

Appropriation of property

Where the United States in taking possession of land in invitum for a public use, under authority of an act of congress, takes or destroys an easement over such land, appurtenant to lands not taken, there is an implied contract to pay for it, which will support an action in the district court.—Tucker v. U. S., D.C.R.I., 283 F. 428.

Fine in criminal case

There is no implied contract to repay a fine imposed in a criminal case under an unconstitutional statute and paid voluntarily, which gives the court jurisdiction of an action for its recovery.—Blumenthal v. U. S., D.C. Cal., 4 F.2d 808.

32. U.S.—Tempel v. U. S., Ill., 39 S. Ct. 56, 248 U.S. 121, 63 L.Ed. 162.

25 C.J. p 975 note 17, p 980 note 96.

"The words 'not sounding in tort' are in terms referable only to the fourth class of cases," that is, actions for damages, liquidated or unliquidated.—Ross Packing Co. v. U. S., D.C.Wash., 42 F.Supp. 932, 935.

Waiving tort and suing in assumpsit

The common-law fiction of waiving the tort and suing in assumpsit cannot be used as an evasion of the limited liability created by court of claims acts.—Keifer & Keifer v.

in the statute,[33] as, for example, the exception of cases brought to recover fees, salary, or compensation for official services of officers of the United States.[34] As will appear in the C.J.S. title Internal Revenue, the district court also has jurisdiction of any suit or proceeding to recover any sum, even if it exceeds ten thousand dollars, alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws, if the collector who collected such sum is dead or out of office when the suit is begun.

The jurisdiction so conferred on the district court is restricted to the determination of issues between claimant and the government.[35] The statute refers only to original suits and does not permit the recovery of a demand against the United States by way of counterclaim,[36] but it permits the adjudication of a counterclaim against the government in a suit brought by it, for the purpose of setting off such claim against the government's claim.[37] The Tucker Act does not limit the jurisdiction of the district court to entertain a suit against governmental agencies and corporations;[38] and the fact that in such cases the claim involved exceeds that amount does not oust the district court's jurisdiction or require the claim to be prosecuted in the court of claims,[39]

Reconstruction Finance Corporation, Neb., 59 S.Ct. 516, 306 U.S. 381, 83 L.Ed. 784, reversing, C.C.A., 97 F.2d 812, affirming, D.C., 22 F.Supp. 918, certiorari granted 59 S.Ct. 106, 305 U.S. 588, 83 L.Ed. 372—Hill v. U. S., Md., 13 S.Ct. 1011, 149 U.S. 593, 37 L.Ed. 862—Blumenthal v. U. S., D.C. Cal., 4 F.2d 808.

Changing implied contract to tort

Where an implied promise on the part of the United States had arisen to pay a marble company for marble seized by United States, United States could not by a later claim convert the act of seizing the marble into a tort and thereby deprive marble company of a right to maintain an action against United States under the Tucker Act.—U. S. v. Georgia Marble Co., C.C.A.Ga., 106 F.2d 955.

Right determined under Private Act

Where Private Act respecting payment by government of claims for losses sustained in fire originating from operation of railroads by United States, and action of director general of railroads pursuant thereto had perfected plaintiff's right to receive money from United States for loss by personal injury in fire, and plaintiff had not received money, plaintiff could sue the United States by virtue of Tucker Act.—U. S. v. Bang, C.C.A.Minn., 117 F.2d 515, affirming, D.C., Bang v. U. S., 31 F. Supp. 535.

33. U.S.—U. S. v. McCrory, Ala., 119 F. 861, 56 C.C.A. 373.

Annuities or pensions

Annuities payable under Retirement Act are not "pensions" within the exceptions of the Tucker Act, and hence suits against government to recover annuities are within jurisdiction of district courts, if not precluded by administrative provisions of Retirement Act.—Dismuke v. U. S., Ga., 56 S.Ct. 400, 297 U.S. 167, 80 L.Ed. 561, affirming, C.C.A., U. S. v. Dismuke, 76 F.2d 715, rehearing denied 77 F.2d 1017, certiorari granted 56 S.Ct. 111, 296 U. S. 554, 80 L.Ed. 391, rehearing denied 56 S.Ct. 594, 297 U.S. 728, 80 L.Ed. 1011.

Claims dependent on treaty

Inasmuch as an action growing out of a treaty of the United States is excluded from the jurisdiction of the court of claims, it is by reference likewise excluded from the jurisdiction of the district, the latter's jurisdiction being only concurrent with that of the former.—George E. Warren Corporation v. U. S., C.C.A.N.Y., 94 F.2d 597, certiorari denied 58 S.Ct. 1041, 30 U.S. 572, 82 L.Ed. 1537.

34. U.S.—Oswald v. U. S., C.C.A.Hawaii, 96 F.2d 10—Brooks v. U. S., D.C.N.Y., 33 F.Supp. 68.

D.C.—Callahan v. U. S., 122 F.2d 216, 74 App.D.C. 281.

25 C.J. p 976 note 21 [b].

Definition of officers

(1) "Officers," as used in this sense, includes officers named in the Constitution, those whose appointments are established by law, and those whose appointments have been vested by congress in the president, the courts of law, or in the heads of departments.—Brooks v. U. S., D. C.N.Y., 33 F.Supp. 68.

(2) The term "office" means a public station or employment conferred by the appointment of government, and embraces the ideas of tenure, duration, emolument, and duties.—Baskins v. U. S., D.C.S.C., 32 F.Supp. 518.

Persons held to be officers

(1) A court reporter appointed by the court.—Oswald v. U. S., C.C.A. Hawaii, 96 F.2d 10.

(2) A penal and correction guard appointed by the attorney general.—Baskins v. U. S., D.C.S.C., 32 F.Supp. 518.

(3) A postal clerk appointed by the postmaster general.—Foshay v. U. S., D.C.N.Y., 54 F.2d 668.

(4) A customs service employee appointed by the secretary of the treasury.—Callahan v. U. S., 122 F.2d 216, 74 App.D.C. 281.

35. U.S.—U. S. v. Sherwood, N.Y., 61 S.Ct. 767, 312 U.S. 584, 85 L.Ed. 1058, reversing, C.C.A., Sherwood v. U. S., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S.Ct. 171, 311 U.S. 640, 85 L.Ed. 408—Lowe v. U. S., D.C.N.J., 37 F.Supp. 817.

36. U.S.—U. S. v. Stephanidis, D.C. N.Y., 41 F.2d 958—U. S. v. Nipissing Mines Co., N.Y., 206 F. 431, 124 C.C.A. 313, certiorari dismissed 34 S.Ct. 673, 234 U.S. 765. 58 L.Ed. 1582.

Effect of Federal Rules of Civil Procedure

In action by the United States under the Miller Act, 40 U.S.C.A. § 270a et seq, for the use of subcontractor to recover on bond given by contractor to assure payment for labor and materials furnished to contractor while doing work under contract with the United States, district court's refusal to take jurisdiction of contractor's counterclaim against the United States for the balance allegedly due under the contract was not in violation of Federal Rules of Civil Procedure regarding the filing of counterclaims arising out of the same transaction as that on which complaint is based.—U. S., for Use of Mutual Metal Mfg. Co. v. Biggs, D. C.Ill., 46 F.Supp. 8.

37. U.S.—U. S. v. Stephanidis, D.C. N.Y., 41 F.2d 958.

38. U.S.—Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 386, 258 U.S. 549, 66 L.Ed. 762, reversing, D.C.Wash., 272 F. 132, reversing, D.C.Or., Astoria Marine Iron Works v. U. S. Shipping Board Emergency Fleet Corporation, 270 F. 635, affirming, C.C.A.N.Y., In re Eastern Shore Shipbuilding Corporation, 274 F. 893, leave to present petition for rehearing granted Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 588—Ferguson v. Union Nat. Bank of Clarksburg, W. Va., C.C.A.W.Va., 126 F.2d 753.

39. U.S.—Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 386, 258 U.S. 549, 66 L.Ed. 762, reversing, D.C.Wash., 272 F. 132,

particularly where the legislation creating the agency expressly provides that it may sue and be sued in any court of competent jurisdiction.[40] The limitations of the Tucker Act do not apply to a claim against the United States where the government has otherwise impliedly consented to be bound by an adverse decision by placing itself in the position of a private suitor.[41]

Apart from the provisions of the Tucker Act, jurisdiction of the district court as to particular classes of claims against the United States is in some cases governed by special statutes,[42] and, where this is so, the limitations of the Tucker Act do not apply.[43] Jurisdiction as to particular claims may also be conferred and regulated by private statute.[44]

The jurisdiction of the court of claims generally is considered infra §§ 328–340.

§ 310. —— Amount in Controversy

a. Requirement of jurisdictional amount
b. Amount required
c. What constitutes amount or value involved
d. How determined

a. Requirement of Jurisdictional Amount

By express statute, the jurisdiction of the district court in certain cases depends on there being involved in the controversy a stated minimum amount.

By express statute, the jurisdiction of the federal district court in certain cases is dependent on the

reversing, D.C.Or., Astoria Marine Iron Works v. U. S. Shipping Board Emergency Fleet Corporation, 270 F. 635, affirming, C.C.A. N.Y., In re Eastern Shore Shipbuilding Corporation, 274 F. 893, leave to present petition for rehearing granted Sloan Shipyards Corporation v. U. S. Shipping Board Emergency Fleet Corporation, 42 S.Ct. 588—Ferguson v. Union Nat. Bank of Clarksburg, C.C. A.W.Va., 126 F.2d 753.

40. U.S.—Ferguson v. Union Nat. Bank of Clarksburg, supra—Union Nat. Bank of Clarksburg v. McDonald, D.C.W.Va., 36 F.Supp. 46.

41. U.S.—Danforth v. U. S., C.C.A. Mo., 102 F.2d 5, modified on other grounds on rehearing 105 F.2d 318, certiorari granted 60 S.Ct. 113, 308 U.S. 538, 84 L.Ed. 454, modified on other grounds 60 S.Ct. 231, 308 U.S. 271, 84 L.Ed. 240.

Eminent domain

Where government repudiated valid contract to purchase flowage easement and instituted proceeding to condemn easement in federal district court, the court did not have jurisdiction to entertain easement owner's demand that damages in condemnation proceeding be determined according to his contract with the government rather than by statutory mode, on ground that in instituting the proceedings the government entered court as a "private suitor."—Danforth v. U. S., supra.

42. U.S.—U. S. v. Seaboard Air Line Ry. Co., C.C.A.S.C., 280 F. 349, reversed on other grounds Seaboard Air Line R. Co. v. U. S., 43 S.Ct. 354, 261 U.S. 299, 67 L.Ed. 664.

Admiralty suits

Statute requiring certain suits against government to be brought in district court embraces suits on maritime causes of action by owners as well as by third persons injured by operation of merchant vessels for government.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L. Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515.

Statute held not repealed

A statute giving the district courts jurisdiction over claims by owners of property requisitioned for war supplies or storehouses for the same was not impliedly repealed by another statute authorizing payment on approval by the secretary of war for property taken under agreements made before the Armistice, § 2 of which gave the court of claims jurisdiction to determine controversies regarding those claims.—Benedict v. U. S., D.C.N.Y., 271 F. 714.

43. U.S.—Cook v. U. S., C.C.A.Ala., 115 F.2d 463—Westbrook v. Director General of Railroads, D.C. Ga., 263 F. 211.

Patent infringement

Under special act permitting employee to sue United States for patent infringement, recovery was held not limited to ten thousand dollars prescribed by statute relating to suits against United States.—Van Meter v. U. S., C.C.A.N.Y., 47 F.2d 192, modifying, D.C., 37 F.2d 111.

Compensation for property requisitioned for war

(1) In a suit in a district court under a special statute to recover additional compensation for property requisitioned for war purposes, the court has jurisdiction, regardless of the amount involved, and plaintiff in such suit is entitled to trial by jury as in ordinary actions at law.—U. S. v. McGrane, C.C.A.N.J., 270 F. 761.

(2) But since the jurisdiction of the court under such statute is limited to controversies in which the compensation fixed is not satisfactory, recovery of a balance of nine thousand eight hundred fifty dollars and ninety-eight cents, owing for coal requisitioned under the act, must be had pursuant to the Tucker Act, the amount sued for in such case being liquidated.—Dexter & Carpenter v. U. S., D.C.Del., 275 F. 566.

Similar limitation in statute

District court, in suit to recover excess payments made by Fleet Corporation under canceled contract, was held without jurisdiction to determine claim of defendant by way of set-off to compensation in excess of amount allowed by shipping board, in view of special statute giving exclusive jurisdiction of such claims in excess of ten thousand dollars to the court of claims.—U. S. v. Skinner & Eddy Corporation, C.C.A.Wash., 35 F. 2d 889, modifying, D.C., 28 F.2d 373, and certiorari dismissed Skinner & Eddy Corporation v. U. S., 50 S.Ct. 248, 281 U.S. 770, 74 L.Ed. 1176.

44. U.S.—U. S. v. De Back, C.C.A. Cal., 118 F.2d 208, modifying, D.C., De Back v. U. S., 29 F.Supp. 141.

Permitting action for tort

A private act conferring jurisdiction on federal district court to hear, determine, and render judgment on claim for wrongful death as if United States were suable in tort was ineffective unless statutory right to recover existed.—U. S. v. Durrance, C.C.A.Fla., 101 F.2d 109.

Act construed

A private act, conferring jurisdiction on district court to render judgment "with costs under and in accordance with the same provisions of law as if the United States were a private party" on claims of named persons for damages to land resulting from construction of dikes and revetments, intended only to put United States in position of private party with respect to jurisdiction or costs, and did not intend that United States was to be treated as a private individual in regard to its liability for damages.—Kuhnert v. U. S., C.C.A.Mo., 127 F.2d 824, affirming, D.C., 36 F.Supp. 798.

presence of a minimum amount in controversy, unless the case falls within certain specified exceptions,[45] and in the discussions supra §§ 27–72 of jurisdiction as to particular types and classes of cases, there is a consideration of the necessity that a minimum amount in connection with the particular ground of jurisdiction be involved. The required jurisdictional amount must be present in suits in equity as well as in actions at law.[46] Under express provision of the statute, the jurisdictional limitation as to the amount in controversy does not apply to matters and proceedings in bankruptcy.[47]

Where a specific right of action is given by a statute which does not designate the particular court in which it may be brought and the action is actually brought in the district court, the general limitation as to amount or value applies.[48] Similarly, where a statute provides that an action thereunder may be brought in a court "of competent jurisdiction," the question of competency is determinable by reference to the general statutes concerning jurisdiction, so that the general limitation as to amount or value applies.[49]

The minimum amount regulating the jurisdiction of the district court with respect to claims against the United States is considered supra § 309, and the minimum amount regulating the jurisdiction of the Canal Zone district court, infra § 315.

b. Amount Required

In cases where the jurisdictional amount is required, the district court has jurisdiction only if the amount involved exceeds that amount, exclusive of interest and costs.

Under the current provisions of the judicial code, in cases where the jurisdictional amount is required, the district court has jurisdiction only if the amount involved exceeds three thousand dollars, exclusive of interest and costs.[50] If the amount involved is less than that[51] or only equal to it[52] the court lacks jurisdiction.

c. What Constitutes Amount or Value Involved

(1) In general

(2) Interest, costs, and attorney's fees

45. U.S.—Pinel v. Pinel, Mich., 36 S. Ct. 416, 240 U.S. 594, 60 L.Ed. 817.
15 C.J. p 747 note 97—25 C.J. p 977 notes 36, 37.
Amount in controversy as affecting removal of causes see the C.J.S. title Removal of Causes §§ 28–44, also 54 C.J. p 224 note 45–p 230 note 31.
Constitutionality of provision see supra § 5.
Dismissal for insufficiency of amount see supra § 93.
Waiver of requirement see supra §§ 83, 84.

The purpose of statute making amount in controversy determinative of federal district court's jurisdiction was to prevent dockets of federal courts from being overcrowded with small cases that should be brought in state courts, which are fully equipped to handle such cases.—Tlusty v. Gillespie-Rogers-Pyatt Co., D.C.N.Y., 35 F.Supp. 910.

Construction

The statute conferring jurisdiction on district courts where matter in controversy exceeds three thousand dollars must be strictly construed.—Scarborough v. Mountain States Telephone & Telegraph Co., D.C.Tex., 45 F.Supp. 176.

46. U.S.—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A.Ark., 63 F.2d 585, 90 A.L.R. 544—Adam Schumann Associates v. City of New York, C.C.A.N.Y., 40 F.2d 216, certiorari denied 51 S.Ct. 20, 282 U.S. 838, 75 L.Ed. 745—Delaware Consol. Oil Co. v. Randall, D.C.Okl., 34 F.2d 666—New York Life Ins. Co. v. Jones, D.C.N.C., 2 F.Supp. 600—O'Brien v. Lashar, C.C.A. Conn., 274 F. 326, certiorari denied 42 S.Ct. 51, 257 U.S. 640, 66 L.Ed. 411—O'Brien v. Anderson, C.C.A. Conn., 274 F. 326, certiorari denied 42 S.Ct. 51, 257 U.S. 640, 66 L.Ed. 411—Farmers' & Merchants' Bank of Monroe, N. C. v. Federal Reserve Bank of Richmond, Va., D.C.N.C., 274 F. 235.

47. U.S.—Milkman v. Arthe, D.C.N.Y., 213 F. 642.
25 C.J. p 979 note 91.

48. U.S.—Smeltzer v. St. Louis & S. F. R. Co., C.C.Ark., 168 F. 420.

49. U.S.—Stewart v. Hickman, D.C. Mo., 36 F.Supp. 861—Delaware, L. & W. R. Co. v. Lyne, N.J., 193 F. 984, 113 C.C.A. 604.

50. U.S.—Schindler v. Spackman, C. C.A.S.D., 16 F.2d 45—Dallasega v. Victoria Amusement Enterprises, D.C.Pa., 43 F.Supp. 697—Peavey v. Reed Co., D.C.N.Y., 41 F.Supp. 351—Pink v. Georgia Stages, D.C. Ga., 35 F.Supp. 437—Parsons v. Detroit & Canada Tunnel Co., D.C. Mich., 15 F.Supp. 986—Aero-Mayflower Transit Co. v. Grosjean, D.C. La., 3 F.Supp. 527, appeal dismissed Aero Mayflower Transit Co. v. Conway, 53 S.Ct. 4, 287 U.S. 671, 77 L.Ed. 579—Oklahoma Utilities Co. v. City of Hominy, D.C.Okl., 2 F.Supp. 849—Dillon v. Lineker, C.C. A.Cal., 266 F. 688—Nueces Valley Town-Site Co. v. McAdoo, D.C.Tex., 257 F. 143.
"It is the policy of the law that controversies involving less than $3,000 should be determined by the state courts."—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 92 F.2d 845, 849.

Strict construction

Policy of statute fixing amount necessary to give federal court jurisdiction calls for its strict construction.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F. Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459.

Effect of successive statutes on prior ones

U.S.—McKernan v. North River Ins. Co., D.C.Wash., 206 F. 984.
25 C.J. p 977 note 54.

51. U.S.—Corcoran v. Royal Development Co., C.C.A.N.Y., 121 F. 2d 957, affirming, D.C., 35 F.Supp. 400—City of Dothan, Ala. v. First Nat. Bank, C.C.A.Ala., 61 F.2d 685, followed in City of Dothan, Ala., v. Dothan Nat. Bank, 61 F.2d 687—Stone v. Christensen, D.C.Or., 36 F.Supp. 739—Johnson v. Beneficial Loan Soc., D.C.Del., 34 F.Supp. 392.

52. U.S.—Alderman v. Elgin, J. & E. Ry. Co., C.C.A.Ill., 125 F.2d 971—Small v. Frick, D.C.S.C., 40 F.Supp. 778—Standard Accident Ins. Co. v. Alexander, Inc., D.C.Tex., 23 F. Supp. 807—Travelers' Ins. Co. of Hartford, Conn., v. Rabinowitz, D. C.Md., 9 F.Supp. 353—Voorhees v. Ætna Life Ins. Co., D.C.N.J., 250 F. 484.
25 C.J. p 978 note 56.

(3) Aggregation of amounts
(4) Particular proceedings

(1) In General

The amount or value in controversy is measured by the pecuniary consequence to either party which the judgment will directly produce either at once or in the future; collateral or speculative results of the judgment cannot be considered. Where the action involves something other or more than a mere sum of money, such other matter must be capable of pecuniary evaluation in order to be considered, although precise evaluation is not required.

The matter in controversy, the amount or value of which determines the jurisdiction of the district court, is the subject matter of the litigation,[53] as presented by the record for determination by the court;[54] it is the object sought to be gained in the litigation.[55] It is to be distinguished from the principle involved[56] and from matters out of which it arose.[57] The authorities have frequently asserted the rule that the amount or value involved in the controversy is measured by the pecuniary consequence to either party which the judgment will produce,[58] according to the judicial decisions on the

53. U.S.—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Dewar v. Brooks, D.C.Nev., 16 F. Supp. 636—Brandenburg v. Doyle, D.C.Ill., 12 F.Supp. 342.
25 C.J. p 977 note 41.

The matter may consist of property, real or personal, or damages for injury to either or to the person.—Miller v. Wattier, C.C.Or., 24 F. 49.

54. U.S.—Kanouse v. Martin, N.Y., 15 How. 198, 14 L.Ed. 660.
25 C.J. p 977 note 42.

55. U.S.—Boesenberg v. Chicago Title & Trust Co., C.C.A.Ill., 128 F.2d 245, 141 A.L.R. 565—Ronzio v. Denver & R. G. W. R. Co., C.C.A.Utah, 116 F.2d 604—Nord v. Griffin, C.C. A.Ill., 86 F.2d 481, certiorari denied 57 S.Ct. 612, 300 U.S. 673, 81 L.Ed. 879—Healy v. Ratta, C.C.A. N.H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459, reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—Johnson v. Ingersoll, C.C.A. Ill., 63 F.2d 86—Nutt v. Ellerbe, D.C.S.C., 56 F.2d 1058—Swan Island Club v. Ansell, C.C.A.N.C., 51 F.2d 337—New York Life Ins. Co. v. Swift, C.C.A.Miss., 38 F.2d 175—Adam v. New York Trust Co., C.C. A.La., 37 F.2d 826, certiorari granted 50 S.Ct. 460, 281 U.S. 715, 74 L. Ed. 1135, certiorari dismissed 51 S. Ct. 214, 282 U.S. 814, 75 L.Ed. 728—Mutual Life Ins. Co. v. Thompson, D.C.Va., 27 F.2d 753—Wright v. Mutual Life Ins. Co. of New York, D.C.Ala., 3 F.2d 501, reversed on other grounds, C.C.A., 19 F.2d 117, certiorari granted Mutual Life Ins. Co. of New York v. Wright, 48 S. Ct. 30, 275 U.S. 513, 72 L.Ed. 400, and affirmed 48 S.Ct. 323, 276 U.S. 602, 72 L.Ed. 726—Mountain States Power Co. v. City of Forsyth, D.C. Mont., 41 F.Supp. 389—Peavey v. Reed Co., D.C.N.Y., 41 F.Supp. 351—Pure Oil Co. v. Puritan Oil Co., D.C.Conn., 39 F.Supp. 68—New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns v. Hoffman, D.C.Pa., 25 F.Supp. 687—Enzor v. Jefferson Standard Life Ins. Co., D.C.S.C., 14 F.Supp. 677—Cook's Estate, Trustees v. Sheppard, D.C.Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S. Ct. 145, 293 U.S. 527, 79 L.Ed. 637—Penn Mut. Life Ins. Co. of Philadelphia v. Joseph, D.C.Minn., 5 F. Supp. 1003.

56. U.S.—Wheless v. St. Louis, Mo., 21 S.Ct. 402, 180 U.S. 379, 45 L.Ed. 583—Dewar v. Brooks, D.C.Nev., 16 F.Supp. 636.
"The value of the 'matter in controversy' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation."—Thomson v. Gaskill, Neb., 62 S.Ct. 673, 675, 315 U.S. 442, 86 L.Ed. 951, reversing, C.C.A., Gaskill v. Thomson, 119 F.2d 105.

57. U.S.—McNeill v. Southern R. Co., N.C., 26 S.Ct. 722, 202 U.S. 543, 50 L.Ed. 1142, modifying, C.C., 134 F. 82.
25 C.J. p 977 note 52.

Arbitrator's award
Amount in controversy, not amount of arbitrators' award, determines federal court's jurisdiction to vacate award.—American Guaranty Co. v. Caldwell, C.C.A.Cal., 72 F.2d 209.

In a suit on a judgment the amount involved is the amount of the judgment rather than the amount of the original debt which is merged in it.—Preston v. Durham, D.C.Ga., 262 F. 843.

58. U.S.—Thompson v. Gaskill, Neb., 62 S.Ct. 673, 315 U.S. 442, 86 L.Ed. 951—Kroger Grocer & Baking Co. v. Lutz, Ind., 57 S.Ct. 215, 299 U.S. 300, 81 L.Ed. 251—Wheless v. St. Louis, Mo., 21 S.Ct. 402, 180 U. S. 379, 45 L.Ed. 583—Ronzio v. Denver & R. G. W. R. Co., C.C.A. Utah, 116 F.2d 604—Celite Corporation v. Dicalite Co., C.C.A.Cal., 96 F.2d 242, certiorari denied Celite Corporation v. Decalite Co., 59 S.Ct. 101, 305 U.S. 633, 83 L.Ed. 407—Brusselback v. Chicago Joint Stock Land Bank, C.C.A.Ill., 85 F.2d 617, certiorari denied Gage v. Brusselback, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454—Jensen v. New York Life Ins. Co., C.C.A.Neb., 50 F.2d 512, order remanding case revoked and appeal from decree on remand dismissed 59 F.2d 957, certiorari denied 53 S.Ct. 80, 287 U.S. 626, 77 L.Ed. 543—New York Life Ins. Co. v. Swift, C.C.A.Miss., 38 F.2d 175—Delaware Consol. Oil Co. v. Randall, D.C.Okl., 34 F.2d 666—Elliott v. Empire Natural Gas Co., C.C.A. Okl., 4 F.2d 493—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Griffiths v. Enochs, D.C.La., 43 F.Supp. 352—Lambrou v. Miner, D.C.Ill., 36 F.Supp. 451—New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns v. Hoffman, D.C.Pa., 25 F.Supp. 687—Morrow v. Mutual Casualty Co. of Chicago, D.C.Ky., 20 F.Supp. 193—Dewar v. Brooks, D.C.Nev., 16 F. Supp. 636—Enzor v. Jefferson Standard Life Ins. Co., D.C.S.C., 14 F.Supp. 677—Armstrong v. Townsend, D.C.Ind., 8 F.Supp. 953—Hannan v. First Nat. Bank, C.C.A. Iowa, 269 F. 527, appeal dismissed First Nat. Bank v. Hannan, 45 S. Ct. 9, 266 U.S. 638, 69 L.Ed. 482—Oregon R. & Nav. Co. v. Shell, C.C. Wash., 125 F. 979, affirmed on rehearing, C.C., 143 F. 1004—Sharon v. Terry, C.C.Cal., 36 F. 337, 1 L.R. A. 572, affirmed Terry v. Sharon, 9 S.Ct. 705, 131 U.S. 40, 33 L.Ed. 94.
"It is the amount or value of that which the complainant claims to recover, or the sum or value of that which defendant will lose if the complainant succeeds in his suit, that constitutes the jurisdictional sum or value of the matter in dispute which tests the jurisdiction."—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 681, 109 A.L.R. 1179.

Intervener's demand
In determining whether sufficient amount is involved to entitle federal court to take jurisdiction, intervener must be considered the same as an original plaintiff.—Reppel v. Board of Liquidation, D.C.La., 11 F.Supp. 799.

In suit by obligor to cancel contract the sum contracted to be paid determines jurisdiction.—Massachu-

subject, either at once or in the future.[59] Where the action is for a sum of money only, it is the sum involved in the controversy,[60] that is, the greatest sum for which judgment may be obtained[61] that determines jurisdiction. Where, however, the action involves something other or more than a mere sum of money, jurisdiction depends, as the case may be, on the value of the property in controversy,[62] or, more precisely, on the increase or diminution in the value of the property directly affected by the relief prayed,[63] or on the value of the right sought to be enforced or preserved, or the value of preventing the threatened wrong.[64]

The pecuniary result which measures the pres-

setts Protective Ass'n v. Stephenson, D.C.Ky., 5 F.Supp. 586.

Cancellation of fraudulent mortgage on estate property

In suit to compel accounting by guardian and to cancel mortgages, amount by which estate was depleted determines jurisdictional amount.—Schindler v. Spackman, C.C.A.S.D., 16 F.2d 45.

Value of release

In action for specific performance of contract to deliver general release to plaintiff against whom defendant had brought action for malicious prosecution and had demanded three hundred thirty thousand dollars in damages, the "amount in controversy" was three hundred thirty thousand dollars and hence the action involved the federal court jurisdictional sum.—Peavey v. Reed Co., D.C. N.Y., 41 F.Supp. 351.

59. U.S.—Elliott v. Empire Natural Gas Co., C.C.A.Okl., 4 F.2d 493—Griffith v. Enochs, D.C.La., 43 F. Supp. 352—Lester v. Prudential Ins. Co. of America, D.C.Mass., 24 F.Supp. 54—Enzor v. Jefferson Standard Life Ins. Co., D.C.S.C., 14 F.Supp. 677—Armstrong v. Townsend, D.C.Ind., 8 F.Supp. 953.

Where the object is to prevent a future loss which will exceed the jurisdictional amount, the court has jurisdiction regardless of the amount of damage that has presently accrued.—Davis v. American Foundry Equipment Co., C.C.A.Ind., 94 F.2d 441, 115 A.L.R. 1486—New York Life Ins. Co. v. Swift, C.C.A.Miss., 38 F.2d 175—Adam v. New York Trust Co., C.C.A.La., 37 F.2d 826, certiorari granted 50 S.Ct. 460, 281 U.S. 715, 74 L.Ed. 1135, certiorari dismissed 51 S.Ct. 214, 282 U.S. 814, 75 L.Ed. 728—Essenkay Corporation v. Mangel Stores Corporation, D.C.N.Y., 10 F. Supp. 50—Penn Mut. Life Ins. Co. of Philadelphia v. Joseph, D.C.Minn., 5 F.Supp. 1003.

60. U.S.—Massachusetts Protective Ass'n v. Stephenson, D.C.Ky., 5 F. Supp. 586.

Liquidated damages, like any other damages, may form basis of jurisdiction of federal district court.—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907.

61. U.S.—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F. 2d 657—Wilderman v. Roth, C.C.A. Pa., 17 F.2d 486, affirming, D.C., 9 F.2d 637—Mayers v. Associated Indemnity Corporation, D.C.Tex., 22 F.Supp. 956—Massachusetts Protective Ass'n v. Stephenson, D.C. Ky., 5 F.Supp. 586—Davies v. Sun Life Assur. Co. of Canada, D.C. Wash., 2 F.Supp. 955.

Where exemplary damages are recoverable, the amount of such damages which may be recovered constitutes part of the amount in controversy.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Greene v. Keithley, C. C.A.Neb., 86 F.2d 238—Young v. Main, C.C.A.Iowa, 72 F.2d 640—Ragsdale v. Rudich, C.C.A.Ga., 293 F. 182.

62. U.S.—Massachusetts Protective Ass'n v. Stephenson, D.C.Ky., 5 F. Supp. 586—Ryan v. Seaboard & R. R. Co., C.C.Va., 89 F. 397.

63. U.S.—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Griffith v. Enochs, D.C.La., 43 F. Supp. 352—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F.Supp. 76—Dewar v. Brooks, D.C. Nev., 16 F.Supp. 636.

"To measure the amount in controversy by reference to the value of certain property, irrespective of the extent of injury to it, would be entirely arbitrary and inconsistent with the general principle by which the amount in controversy is defined as the 'value of the object to be gained' by the action."—Pure Oil Co. v. Puritan Oil Co., D.C.Conn., 39 F. Supp. 68, 71.

64. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Pinkston, Ohio, 55 S.Ct. 1, 293 U.S. 96, 79 L.Ed. 219, affirming, C.C.A., Pinkston v. Brotherhood of Locomotive Firemen and Enginemen, 69 F.2d 600, and certiorari granted Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 54 S.Ct. 866, 292 U.S. 621, 78 L.Ed. 1477, rehearing denied 55 S.Ct. 311, 293 U.S. 632, 79 L.Ed. 717—Western & A. R. R. v. Railroad Commission of Georgia, Ga., 43 S.Ct. 252, 261 U.S. 264, 67 L.Ed. 645, reversing, D.C., 275 F. 128—United Enterprises v. Dubey, C.C.A.Fla., 128 F.2d 843, affirming, D.C., 42 F. Supp. 60—Purcell v. Summers, C. C.A.S.C., 126 F.2d 390, reversing, D.C., 34 F.Supp. 421—Celite Corporation v. Dicalite Co., C.C.A.Cal., 96 F.2d 642, certiorari denied Celite Corporation v. Decalite Co., 59 S.Ct. 101, 305 U.S. 633, 83 L.Ed. 407—Gavica v. Donaugh, C.C.A.Or., 93 F.2d 173—Electro Therapy Products Corporation v. Strong, C.C.A. Cal., 84 F.2d 766—Healy v. Ratta, C.C.A.N.H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459, reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—Swan Island Club v. Ansell, C.C.A.N.C., 51 F.2d 337—General Petroleum Corporation of California v. Beanblossom, C.C.A.Wash., 47 F.2d 826—Cohn v. Cities Service Co., C.C.A.N.Y., 45 F.2d 687—New York Life Ins. Co. v. Swift, C.C.A. Miss., 38 F.2d 175—Wisconsin Electric Co. v. Dumore Co., C.C.A.Ohio, 35 F.2d 555, certiorari granted 50 S.Ct. 333, 281 U.S. 710, 74 L.Ed. 1132, certiorari dismissed 51 S.Ct. 214, 282 U.S. 813, 75 L.Ed. 728—Campbell Baking Co. v. City of Maryville, Mo., D.C.Mo., 31 F.2d 466—Pacific Telephone & Telegraph Co. v. Agnew, C.C.A.Wash., 5 F.2d 221, reversing, D.C., 2 F.2d 155—Lambert v. Yellowley, C.C.A.N.Y., 4 F.2d 915, reversing, D.C., 291 F. 640, and affirmed 47 S.Ct. 210, 272 U.S. 581, 71 L.Ed. 422, 49 A.L.R. 575—Wright v. Mutual Life Ins. Co. of New York, D.C.Ala., 3 F.2d 501, reversed on other grounds, C.C.A., 19 F.2d 117, certiorari granted Mutual Life Ins. Co. of New York v. Wright, 48 S.Ct. 30, 275 U.S. 513, 72 L.Ed. 400, and affirmed 48 S.Ct. 323, 276 U.S. 602, 72 L.Ed. 726—Associated Press v. Emmett, D.C. Cal., 45 F.Supp. 907—Mutual Life Ins. Co. of New York v. Moyle, D. C.S.C., 34 F.Supp. 127—Bley v. Travelers Ins. Co., D.C.Ala., 27 F. Supp. 351—Gobitis v. Minersville School Dist., D.C.Pa., 24 F.Supp. 271, affirmed, C.C.A., Minersville School Dist. v. Gobitis, 108 F.2d 683, certiorari granted 60 S.Ct. 609, 309 U.S. 645, 84 L.Ed. 998, reversed on other grounds 60 S.Ct. 1010, 310 U.S. 586, 84 L.Ed. 1375, 127 A.L.R. 1493—Dewar v. Brooks, D.C.Nev.,

ence or absence of the jurisdictional amount must be such as will be directly produced by the litigation.[65] It does not include results merely collateral or incidental to the determination of the issue raised by the pleadings,[66] such as the probative effect of the judgment in a subsequent litigation in which the jurisdictional amount will be present.[67] Only the amount or value actually involved in the controversy may be considered;[68] and, where pecuniary results claimed to bring the case within the jurisdiction are so contingent, speculative, or uncertain that they cannot be deemed part of the matter in controversy, they cannot be considered in determining whether the jurisdictional amount is involved.[69]

Pecuniary valuation. In all cases where a juris-

16 F.Supp. 636—Massachusetts Protective Ass'n v. Stephenson, D.C.Ky., 5 F.Supp. 586—Hutchinson Box Board & Paper Co. v. Van Horn, C.C.A.Kan., 299 F. 424.

15 C.J. p 753 note 40—25 C.J. p 977 note 49.

A suit for a declaratory judgment finding valid a contract having an admitted value, if valid, of at least nine thousand five hundred dollars but under which only two thousand dollars is presently recoverable, is within the jurisdiction of the federal court, as the value in controversy is the value of that which it is sought to have declared free from doubt.—Davis v. American Foundry Equipment Co., C.C.A.Ind., 94 F.2d 441, 115 A.L.R. 1486.

65. U.S.—Ronzio v. Denver & R. G. W. R. Co., C.C.A.Utah, 116 F.2d 604—Elliott v. Empire Natural Gas Co., C.C.A.Kan., 4 F.2d 493—Griffith v. Enochs, D.C.La., 43 F.Supp. 352—Shabotzky v. Massachusetts Mut. Life Ins. Co., D.C.N.Y., 21 F.Supp. 166—Enzor v. Jefferson Standard Life Ins. Co., D.C.S.C., 14 F.Supp. 677—Brandenburg v. Doyle, D.C. Ill., 12 F.Supp. 342.

66. U.S.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F.2d 657—City of Pawhuska, Okl., ex rel. Graham v. Midland Valley R. Co., C.C.A.Okl., 33 F.2d 487—Wichita County Improvement Dist. v. Western Union Telegraph Co., D.C.Tex., 22 F.2d 997—Wright v. Mutual Life Ins. Co. of New York, C.C.A.Ala., 19 F.2d 117, reversing, D.C., 3 F.2d 501, certiorari granted Mutual Life Ins. Co. of New York v. Wright, 48 S.Ct. 30, 275 U.S. 513, 72 L.Ed. 400, and affirmed 48 S.Ct. 323, 276 U.S. 602, 72 L.Ed. 726—Elliott v. Empire Natural Gas Co., C.C.A.Kan., 4 F.2d 493—Scarborough v. Mountain States Telephone & Telegraph Co., D.C.Tex., 45 F.Supp. 176—Calhoun v. Lange, D.C.Md., 40 F.Supp. 264—Mutual Life Ins. Co. of New York v. Moyle, D.C.S.C., 34 F.Supp. 127—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441—Stockman v. Reliance Life Ins. Co. of Pittsburgh, Pa., D.C.S.C., 28 F.Supp. 446—Struble v. Connecticut Mut. Life Ins. Co. of Hartford, D.C.Fla., 20 F.Supp. 779—State Life Ins. Co. of Indianapolis, Ind. v. Wichita County Water Improvement Dist. No. 2, D.C.Tex., 18 F.Supp. 834—Brandenburg v. Doyle, D.C.Ill., 12 F.Supp. 342—Cook's Estate, Trustees v. Sheppard, D.C., Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S.Ct. 145, 293 U.S. 527, 79 L.Ed. 637—Ginsburg v. Pacific Mut. Life Ins. Co. of California, D.C.N.Y., 5 F.Supp. 296, reversed on other grounds, C.C.A., 69 F.2d 97—Atlantic Coast Line Ry. Co. v. Railroad Commission of Georgia, D.C.Ga., 281 F. 321.

67. U.S.—New England Mortgage Co. v. Gay, Ga., 12 S.Ct. 815, 145 U.S. 123, 36 L.Ed. 646—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F.2d 657—Bell v. Philadelphia Life Ins. Co., C.C.A.N.C., 78 F.2d 322—Wichita County Improvement Dist. v. Western Union Telegraph Co., D.C.Tex., 22 F.2d 997—Elliott v. Empire Natural Gas Co., C.C.A.Kan., 4 F.2d 493—Stockman v. Reliance Life Ins. Co. of Pittsburgh, Pa., D.C.S.C., 28 F.Supp. 446—Duke v. State Life Ins. Co., D.C.Tex., 4 F.Supp. 138—Atlantic Coast Line Ry. Co. v. Railroad Commission of Georgia, D.C.Ga., 281 F. 321.

That judgment will constitute an estoppel in a subsequent action cannot be availed of to add to the sum or value of the matter in controversy.—Wright v. Mutual Life Ins. Co. of New York, C.C.A.Ala., 19 F.2d 117, reversing, D.C., 3 F.2d 501, certiorari granted Mutual Life Ins. Co. of New York v. Wright, 48 S.Ct. 30, 275 U.S. 513, 72 L.Ed. 400, and affirmed 48 S.Ct. 323, 276 U.S. 602, 72 L.Ed. 726—Shabotzky v. Massachusetts Mut. Life Ins. Co., D.C.N.Y., 21 F.Supp. 166.

68. U.S.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F.2d 657—Bell v. Philadelphia Life Ins. Co., C.C.A.N.C., 78 F.2d 322—City of Belton v. Omaha Trust Co., C.C.A.Tex., 17 F.2d 90—Mutual Life Ins. Co. of New York v. Moyle, D.C.S.C., 34 F.Supp. 127—Stockman v. Reliance Life Ins. Co. of Pittsburgh, Pa., D.C.S.C., 28 F.Supp. 446—Enzor v. Jefferson Standard Life Ins. Co., D.C.S.C., 14 F.Supp. 677—John Deere Plow Co. v. Ortner, D.C.Mich., 11 F.Supp. 375—Atlantic Coast Line Ry. v. Railroad Commission of Georgia, D.C.Ga., 281 F. 321.

Penalty not yet incurred

Where suit to enjoin enforcement of state copyright act was brought in federal court before act went into effect, no penalties could have been incurred under the act at the time of the institution of the suit, and hence penalties could not be included in determining whether jurisdictional amount of more than three thousand dollars, exclusive of interest and costs, was involved.—Buck v. Case, D.C.Wash., 24 F.Supp. 541, appeal dismissed in part Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358, reversed on other grounds 59 S.Ct. 740, 307 U.S. 95, 83 L.Ed. 1128.

69. U.S.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Carroll v. Somervell, C.C.A.N.Y., 116 F.2d 918—Pure Oil Co. v. Puritan Oil Co., D.C.Conn., 39 F.Supp. 68—Cooney v. Legg, D.C.Cal., 34 F.Supp. 531—Paul v. Craemer, D.C.Cal., 24 F.Supp. 353—Travelers' Ins. Co. of Hartford, Conn., v. Rabinowitz, D.C.Md., 9 F.Supp. 353—Cook's Estate, Trustees v. Sheppard, D.C. Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S.Ct. 145, 293 U.S. 527, 79 L.Ed. 637—Duke v. State Life Ins. Co., D.C.Tex., 4 F.Supp. 138.

"Jurisdiction is based on actuality, not prophecy, the pressure of a grievance immediately felt and presently measurable in money of the jurisdictional amount. Speculative anticipation that conditions, from which present ills, not now sufficient in amount to give jurisdiction, flow, may in time aggregate the necessary amount, will not support

dictional amount is required, the matter in controversy, if it is not solely a sum of money, must be such that it is capable of being valued in money, in order to come within the grant of jurisdiction.[70] However, the fact that the value of the matter in controversy cannot be measured with exactness does not defeat the court's jurisdiction.[71] In the application of this rule it has been held that value may be predicated of political or social rights,[72] civil rights,[73] and of the right of a foreign corporation to engage in interstate commerce within a certain state,[74] but not of the matter in controversy in habeas corpus,[75] or in a suit by a stockholder to compel a corporation to permit an inspection of its books and records,[76] or in a suit for divorce,[77] even though alimony is claimed,[78] or in a suit to annul a divorce decree.[79]

(2) Interest, Costs, and Attorney's Fees

Interest and costs cannot be considered part of the amount in controversy, except where they are demanded as part and parcel of the original demand, and not merely as ancillary or incidental thereto. Attorney's fees may be included where they are claimed as part of the damages recoverable, but not where they are allowable as costs.

Under the express terms of the statute requiring the amount in controversy, exclusive of interest and costs, to exceed the stated amount, interest as such cannot be added to the principal sum demanded to make up the jurisdictional amount.[80] However, where an amount representing interest is not merely accessory or incidental to the principal demand, but is part and parcel of the obligation sought to be enforced in the federal court, or is claimed to be an element of the damages sought to be recovered, such amount may be considered as part of the amount in controversy.[81] Since costs are ordinarily merely incidental to a judicial proceeding and not

jurisdiction."—Vicksburg, S. & P. Ry. Co. v. Nattin, C.C.A.La., 58 F.2d 979, 980, affirming, D.C., 51 F.2d 1061, motion denied 54 F.2d 712—Schlosser v. Welsh, D.C.S.D., 5 F.Supp. 993, 996.

70. U.S.—Neustein v. Mitchell, C.C.A.N.Y., 130 F.2d 197, modifying, D.C., 42 F.Supp. 839—Carroll v. Somervell, C.C.A.N.Y., 116 F.2d 918—Greenough v. Independence Lead Mines Co., D.C.Idaho, 45 F.2d 659—Asbury v. New York Life Ins. Co., D.C.Ky., 45 F.Supp. 513—Purcell v. Summers, D.C.S.C., 34 F.Supp. 421—Farmers' & Merchants' Bank of Monroe, N.C., v. Federal Reserve Bank of Richmond, Va., D.C.N.C., 274 F. 235.
25 C.J. p 978 note 58.

71. U.S.—Mutual Life Ins. Co. v. Thompson, D.C.Va., 27 F.2d 753—Lester v. Prudential Ins. Co. of America, D.C.Mass., 24 F.Supp. 54—Penn Mut. Life Ins. Co. of Philadelphia v. Joseph, D.C.Minn., 5 F. Supp. 1003.

Value of mining claims
Speculative value and fact that ore veins extend through premises may be considered in determining value of mining claims for jurisdictional purposes.—Kline v. Wright, D.C. Idaho, 42 F.2d 927.

Anticipated gains from fur trapping
In an action for breach of a contract employing plaintiff as agent on commission to engage trappers to trap furs on commission basis, plaintiff might well have established that his commissions on the furs that would have been obtained by the trapping operations had there been no breach would have exceeded the jurisdictional amount.—Prejean v. Delaware-Louisiana Fur-Trapping Co., C.C.A.La., 13 F.2d 71, reversing, D.C., 8 F.2d 357.

Future participation in pension fund
District court had jurisdiction of widow's suit in equity to preserve and protect right of future participation in widows' pension fund under certificate calling for monthly installments for life provided widow does not remarry, where, by actuarial determination of her life expectancy and likelihood of remarrying, value of widow's right to receive monthly payments as long as she remained unmarried exceeded the jurisdictional amount.—Brotherhood of Locomotive Firemen and Enginemen v. Pinkston, Ohio, 55 S.Ct. 1, 293 U.S. 96, 79 L.Ed. 219, affirming, C.C.A., Pinkston v. Brotherhood of Locomotive Firemen and Enginemen, 69 F.2d 600, certiorari granted Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 54 S.Ct. 866, 292 U.S. 621, 78 L. Ed. 1477, and rehearing denied 55 S. Ct. 211, 293 U.S. 632, 79 L.Ed. 717.

72. U.S.—Carroll v. Somervell, C.C. A.N.Y., 116 F.2d 918.
25 C.J. p 978 note 59.

73. U.S.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S. Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, and modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

74. U.S.—McNeill v. Southern R. Co., N.C., 26 S.Ct. 722, 202 U.S. 543, 50 L.Ed. 1142, modifying, C.C., 134 F. 82.

75. U.S.—Mutual Life Ins. Co. v. Thompson, D.C.Va., 27 F.2d 753.
25 C.J. p 978 note 61.

76. U.S.—Whitney v. American Shipbuilding Co., D.C.Ohio, 197 F. 777.

77. U.S.—Mutual Life Ins. Co. v. Thompson, D.C.Va., 27 F.2d 753.
25 C.J. p 978 note 63.

78. U.S.—De la Rama v. De la Rama, Philippine, 26 S.Ct. 485, 201 U.S. 303, 50 L.Ed. 765.

79. Ill.—Caswell v. Caswell, 11 N.E. 342, 120 Ill. 377.

80. U.S.—City of Pawhuska, Okl., ex rel. Graham v. Midland Valley R. Co., C.C.A.Okl., 33 F.2d 487—Security Mut. Life Ins. Co. v. Harwood, C.C.A.Mass., 16 F.2d 250—Home Life Ins. Co. v. Sipp, C.C.A. N.J., 11 F.2d 474—Hovenden v. City of Bristow, D.C.Okl., 34 F.Supp. 674—Gilliland v. Colorado Life Co., D.C.Mo., 15 F.Supp. 367—A. H. Marshal Co. v. Buick Motor Co., D. C.N.Y., 251 F. 685—Central Commercial Co. v. Jones-Dusenbury Co., Ill., 251 F. 13, 163 C.C.A. 263—Voorhees v. Ætna Life Ins. Co., D.C.N.J., 250 F. 484.
15 C.J. p 764 note 41.

Interest accruing before suit brought
The phrase, "exclusive of interest and costs," in the statute, refers to interest accrued before filing of complaint, not that accruing after suit was brought.—Athan v. Hartford Fire Ins. Co., C.C.A.N.Y., 73 F.2d 66.

81. U.S.—Brown v. Webster, Neb., 15 S.Ct. 377, 156 U.S. 328, 39 L.Ed. 440—Brusselback v. Chicago Joint Stock Land Bank, C.C.A.Ill., 85 F. 2d 617, certiorari denied Gage v. Brusselback, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454—Brush v. World Fire & Marine Ins. Co., D.C.Fla., 33 F.2d 1007—Schlorer v. Mangin, D. C.N.Y., 39 F.Supp. 64—Ray v. New York Life Ins. Co., D.C.La., 20

part of the recovery, they cannot be considered in determining the amount in controversy.[82] Where attorney's fees are claimed as part of the damages recoverable, such fees are properly considered in making up the jurisdictional amount;[83] but attorney's fees which are allowable only as costs are not to be taken into consideration.[84]

(3) Aggregation of Amounts

Interests of parties joined solely for convenience cannot be aggregated so as to confer jurisdiction, and ordinarily the court will have jurisdiction only as to those plaintiffs or defendants whose separate claims or the separate claims against whom are in themselves sufficient to confer jurisdiction; but where persons are united by a sufficient community of interest in the subject matter of the litigation, as in the case of a genuine representative or class action, the aggregate of their interests determines the court's jurisdiction. Assigned claims may be aggregated to confer jurisdiction, unless the assignments are only colorable and made solely for the purpose of collection.

It is well settled that the interests of parties joined solely for the purpose of convenience in a proceeding in the district court cannot be aggregated to confer jurisdiction.[85] Thus, where several plaintiffs assert distinct and separate demands in a single suit, the amounts thereof cannot be aggregated to make up the jurisdictional amount, and jurisdiction can be sustained only as to those claims which exceed such amount.[86] So too, where sep-

F.Supp. 497—Gilliland v. Colorado Life Co., D.C.Mo., 15 F.Supp. 367—Central Commercial Co. v. Jones-Dusenbury Co., Ill., 251 F. 13, 163 C.C.A. 263—Continental Casualty Co. v. Spradlin, Va., 170 F. 322, 95 C.C.A. 112.

However, it has been held that interest, even if looked on as the measure of damages suffered by reason of nonpayment of money when due and, therefore, a penalty, is still "interest" in its very nature, and it cannot be included in the "matter in controversy," even though it is denominated a penalty and is imposed by statute.—Merrigan v. Metropolitan Life Ins. Co., D.C.La., 43 F.Supp. 209.

Interest coupons, matured when the suit was begun, are separate enforceable obligations and may be included in the amount in controversy.—Brown-Crummer Inv. Co. of Wichita, Kan., v. City of Florala, Ala., D.C. Ala., 55 F.2d 238—Tyler County, Tex., v. Town, C.C.A.Tex., 23 F.2d 371, certiorari denied 49 S.Ct. 9, 278 U.S. 601, 73 L.Ed. 530—Hovenden v. City of Bristow, D.C.Okl., 34 F.Supp. 674—15 C.J. p 764 note 41 [f].

Penalty

A charge of twelve per cent on unpaid installments of special improvement bonds of a street improvement district constituted a "penalty" or a charge distinct from the obligation of the bonds, and could be considered in determining the jurisdictional amount.—Hovenden v. City of Bristow, supra.

Action on supersedeas bond

Where plaintiff had judgment in a state court action, and plaintiff appealed filing a supersedeas bond conditioned to pay the judgment with interest if affirmed, in an action on the bond after affirmance, interest was properly considered part of the amount in controversy.—Fitchner v. American Surety Co. of New York, D. C.Fla., 2 F.Supp. 321.

In an action sounding in tort, where part of the damages demanded is measured by the rate of interest on a sum of money, that part of the claim may be considered in making up the jurisdictional amount.—Chesbrough v. Northern Trust Co., Mich., 40 S.Ct. 237, 252 U.S. 83, 64 L.Ed. 470—Simecek v. U. S. National Bank of Omaha, C.C.A.Neb., 91 F.2d 214.

82. U.S.—Merrigan v. Metropolitan Life Ins. Co., D.C.La., 43 F.Supp. 209—Washington County v. Williams, Neb., 111 F. 801, 49 C.C.A. 621.

Protest fees, being taxable costs, cannot be considered part of the amount in controversy in an action on a promissory note.—Baker v. Howell, C.C.Neb., 44 F. 113.

Where costs in another action or proceeding are part of the principal demand involved in the action in the federal court, they are included.—Employers Mut. Liability Ins. Co. of Wisconsin v. Andrus, D.C.Ala., 39 F. Supp. 605—Fitchner v. American Surety Co. of New York, D.C.Fla., 2 F.Supp. 321—Glen Inv. Co. v. Romero, N.M., 254 F. 239, 165 C.C.A. 527.

Disbursements may be included if they are part of the matter put in controversy by the complaint, but not if they are to be recovered as part of statutory costs.—Cogswell v. Tribune Co., D.C.N.Y., 16 F.Supp. 631.

83. U.S.—Wilson v. Alliance Life Ins. Co., C.C.A.Tex., 108 F.2d 150—Nathan v. Rock Springs Distilling Co., C.C.A.Ky., 10 F.2d 268—Curtis v. Harris, Davis & Co., C.C.A. Ala., 272 F. 265.
15 C.J. p 767 note 47.

Limitations on amount

(1) The amount of attorney's fees that may be included cannot exceed the amount demanded therefor.—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441.

(2) Only reasonable fees may be included.—Colorado Life Co. v. Steele, C.C.A.Ark., 95 F.2d 535—Merrigan v. Metropolitan Life Ins. Co., D.C.La., 43 F.Supp. 209.

84. U.S.—Swofford v. Oregon Cornucopia Mines, C.C.Or., 140 F. 957.

85. U.S.—First Nat. Bank v. Harrison County, C.C.A.Iowa, 57 F.2d 56, certiorari denied 53 S.Ct. 13, 287 U.S. 611, 77 L.Ed. 531—Gramling v. Maxwell, D.C.N.C., 52 F.2d 256—Griffith v. Enochs, D.C.La., 43 F.Supp. 352—Small v. Frick, D.C.S. C., 40 F.Supp. 778—Pioneer Coal Co. v. Bush, D.C.Ky., 16 F.Supp. 117, appeal dismissed, C.C.A., Kentucky-Jellico Coal Co. of Delaware v. Chitwood, 99 F.2d 1008.
15 C.J. p 768 note 73.

The rules of joinder do not govern jurisdiction; hence, where no demand equals or exceeds the jurisdictional amount, the court acquires no jurisdiction by virtue of the fact that plaintiffs allege a community of interest as justification for joining in same complaint.—Dewar v. Brooks, D.C.Nev., 16 F.Supp. 636.

86. U.S.—Thomson v. Gaskill, Neb., 62 S.Ct. 673, 315 U.S. 442, 86 L.Ed. 951—Hague v. Committee for Industrial Organization, N.J., 59 S. Ct. 954, 307 U.S. 496, 83 L.Ed. 1423, modifying, C.C.A., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U. S. 624, 83 L.Ed. 1028—Clark v. Paul Gray, Inc., 59 S.Ct. 744, 306 U.S. 583, 83 L.Ed. 1001, reversing, D.C., Paul Gray, Inc. v. Ingels, 23 F. Supp. 946—Lion Bonding & Surety Co. v. Karatz, 43 S.Ct. 480, 262 U.S. 77, 67 L.Ed. 871, reversing, C.C.A.Minn., 280 F. 532, 281 F. 1021 and, C.C.A.Neb., Hertz v. Lion Bonding & Surety Co., 280 F. 540, certiorari granted Department of Trade and Commerce of State of Nebraska v. Hertz, 43 S.Ct. 89, 260 U.S. 713, 67 L.Ed. 477, appeal dismissed 43 S.Ct. 90, 260 U.S. 696, 67 L.Ed. 468, and motion denied 43 S.Ct. 641, 262 U.S. 640, 67 L.Ed. 1151, and 43 S.Ct. 701, 262 U.S. 733, 67 L.Ed. 1206—Scott v. Frazier,

arate causes of action against two or more defendants are joined in one action,[87] as where a single suit is brought against defendants who are severally liable,[88] or where a suit is brought to enjoin or otherwise prevent several defendants from enforcing against plaintiff claims which are separate and distinct, although depending for their validity on a common origin,[89] the test of jurisdiction is

N.D., 40 S.Ct. 503, 253 U.S. 243, 64 L.Ed. 883, reversing, D.C., 258 F. 669—Black & Yates v. Mahogany Ass'n, C.C.A.Del., 129 F.2d 227, reversing, D.C., 34 F.Supp. 450—Boesenberg v. Chicago Title & Trust Co., C.C.A.Ill., 128 F.2d 245, 141 A. L.R. 565—Woerter v. Orr, C.C.A. Okl., 127 F.2d 969—Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., C.C.A.Ill., 127 F.2d 245—Andrews v. Equitable Life Assur. Soc. of U. S., C.C.A.Ill., 124 F.2d 788, certiorari denied 62 S.Ct. 1270, 316 U.S. 682, 86 L.Ed. 1755—City of Manchester v. Leiby, C.C. A.N.H., 117 F.2d 661, reversing, D. C., Leiby v. City of Manchester, 33 F.Supp. 842, certiorari denied 61 S.Ct. 838, 313 U.S. 562, 85 L.Ed. 1522—Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y., 117 F. 2d 95, certiorari denied 61 S.Ct. 835, 313 U.S. 559, 85 L.Ed. 1520—Atwood v. National Bank of Lima, C.C.A.Ohio, 115 F.2d 861—Takashi Kataoka v. May Department Stores Co., C.C.A.Cal., 115 F.2d 521, reversing, D.C., Kataoka v. May Department Stores Co., 28 F.Supp. 3, and certiorari denied May Department Stores Co. v. Takashi Kataoka, 61 S.Ct. 739, 312 U.S. 700, 85 L. Ed. 1134—Hilliker v. Grand Lodge, K. P., C.C.A.Ohio, 112 F.2d 382—Independence Shares Corporation v. Deckert, C.C.A.Pa., 108 F.2d 51, reversing, D.C., Deckert v. Independence Shares Corporation, 27 F. Supp. 763, and certiorari granted 60 S.Ct. 715, 309 U.S. 648, 84 L.Ed. 1000, and Deckert v. Pennsylvania Co. for Insurance on Lives and Granting Annuities, 60 S.Ct. 716, 309 U.S. 648, 84 L.Ed. 1000, reversed on other grounds 61 S.Ct. 229, 311 U.S. 282, 85 L.Ed. 189—Frank & Lambert v. Rosengren, C. C.A.Minn., 97 F.2d 460—Marion Mortg. Co. v. Edmunds, C.C.A.Fla., 64 F.2d 248—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A. Ark., 63 F.2d 585, 90 A.L.R. 544—First Nat. Bank v. Harrison County, C.C.A.Iowa, 57 F.2d 56, certiorari denied 53 S.Ct. 13, 287 U.S. 611, 77 L.Ed. 531—Elliott v. Board of Trustees of Ovalo Rural High School Dist. No. 19, C.C.A.Tex., 53 F.2d 845—Cohn v. Cities Service Co., C.C.A.N.Y., 45 F.2d 687—Weems v. Carter, C.C.A.Va., 30 F.2d 202—Woods v. Thompson, C.C.A. Ill., 14 F.2d 951, followed in Illinois Banker's Life Ass'n v. Farris, C.C. A.Ill., 21 F.2d 1014, certiorari denied Farris v. Illinois Banker's Life Ass'n, 48 S.Ct. 301, 276 U.S. 621, 72 L.Ed. 735—Elliott v. Empire Natural Gas Co., C.C.A.Kan., 4 F. 2d 493—Scarborough v. Mountain States Telephone & Telegraph Co., D.C.Tex., 45 F.Supp. 176—Griffith v. Enochs, D.C.La., 43 F.Supp. 352—Edelhertz v. Matlack, D.C.Pa., 42 F.Supp. 309—Small v. Frick, D.C. S.C., 40 F.Supp. 778—Shapiro Bros. Factors Corporation v. Automobile Ins. Co. of Hartford, Conn., D.C.N. J., 40 F.Supp. 1—Stevenson v. City of Bluefield, D.C.W.Va., 39 F.Supp. 462—Stucker v. Roselle, D.C.Ky., 37 F.Supp. 864—Barr v. Rhodes, D. C.Ky., 35 F.Supp. 223—Johnson v. Beneficial Loan Soc., D.C.Del., 34 F.Supp. 392—Cashmere Valley Bank v. Pacific Fruit & Produce Co., D.C.Wash., 33 F.Supp. 946—Neale v. Railroad Commission of State of California, D.C.Cal., 32 F. Supp. 407—Robertson v. Argus Hosiery Mills, D.C.Tenn., 32 F.Supp. 19, reversed on other grounds, C. C.A., 121 F.2d 285, certiorari denied Argus Hosiery Mills v. Robertson, 62 S.Ct. 181, 314 U.S. 681, 86 L.Ed. 544—Guerra v. City of Philadelphia, D.C.Pa., 30 F.Supp. 791—Bender v. Connor, D.C.Conn., 28 F.Supp. 903—Paul v. Craemer, D.C.Cal., 24 F.Supp. 353—Dugan v. Bridges, D.C.N.H., 16 F.Supp. 694, appeal dismissed 57 S.Ct. 668, 300 U.S. 684, 81 L.Ed. 887—Dewar v. Brooks, D.C.Nev., 16 F.Supp. 636—Hammer v. British Type Investors, D.C.N.Y., 15 F.Supp. 497—Alliance Ins. Co. of Philadelphia v. Jamerson, D.C.Ill., 12 F.Supp. 957, affirmed, C.C.A., Jamerson v. Alliance Ins. Co. of Philadelphia, 87 F.2d 253, certiorari denied 57 S.Ct. 753, 300 U.S. 683, 81 L.Ed. 886—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825—Schlosser v. Welsh, D.C.S.D., 5 F.Supp. 993—Local Union No. 497 of Amalgamated Ass'n of Street & Electric Ry. Employees of America v. Joplin & P. Ry. Co., C.C.A.Kan., 287 F. 473—State of Ohio ex rel. Erkenbrecher v. Cox, D.C.Ohio, 257 F. 334—Eaton v. Hoge, Colo., 141 F. 64, 72 C.C.A. 74, 5 Ann.Cas. 487—Hagge v. Kansas City Southern R. Co., C.C.Mo., 104 F. 391—Putney v. Whitmire, C.C.S.C., 66 F. 385—John N. Price & Sons v. Maryland Casualty Co., D.C.N.J., 2 F.R.D. 408.

N.Y.—Plunkett v. Bain, 259 N.Y.S. 918, 144 Misc. 928.

15 C.J. p 772 note 92.

87. U.S.—Central Mexico Light & Power Co. v. Munch, C.C.A.N.Y., 116 F.2d 85—Peterson v. Sucro, C.C.A.N.C., 93 F.2d 878, 114 A.L.R. 890—Camden Fire Ins. Ass'n v. Di Giovanni, C.C.A.Mo., 75 F.2d 808, certiorari granted Digiovanni v. Camden Fire Ins. Ass'n, 55 S.Ct. 834, 295 U.S. 728, 79 L.Ed. 1678, reversed on other grounds, 56 S. Ct. 1, 296 U.S. 64, 80 L.Ed. 47—Marion Mortg Co. v. Edmunds, C.C. A.Fla., 64 F.2d 248—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A.Ark., 63 F.2d 585, 90 A.L.R. 544—Scarborough v. Mountain States Telephone & Telegraph Co., D.C.Tex., 45 F.Supp. 176—Griffith v. Enochs, D.C.La., 43 F.Supp. 352—Cashmere Valley Bank v. Pacific Fruit & Produce Co., D.C. Wash., 33 F.Supp. 946—Pioneer Coal Co. v. Bush, D.C.Ky., 16 F. Supp. 117, appeal dismissed, C.C.A., Kentucky-Jellico Coal Co. of Delaware v. Chitwood, 99 F.2d 1008—Cooper v. Preston, C.C.Cal., 105 F. 403—Stemmler v. McNeill, C.C.N.C., 102 F. 660.

88. U.S.—Application of Hardware Mut. Fire Ins. Co. of Minnesota, C.C.A.Cal., 91 F.2d 13—Busey v. Smith, C.C.Ind., 67 F. 13.

15 C.J. p 772 note 94.

"The rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different defendants to the same plaintiff."—Walter v. Northeastern R. Co., S.C., 13 S.Ct. 348, 350, 147 U.S. 370, 37 L.Ed. 206—Broderick v. American General Corporation, C. C.A.Md., 71 F.2d 864, 866, 94 A.L.R. 1359.

89. U.S.—Sovereign Camp, W. O. W., v. O'Neill, Tex., 45 S.Ct. 49, 266 U.S. 292, 69 L.Ed. 293, reversing, D.C., 286 F. 734—Citizens' Bank of Louisiana v. Cannon, La., 17 S. Ct. 89, 164 U.S. 319, 41 L.Ed. 451—Fishback v. Western Union Tel. Co., Ark., 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630—Northern Pac. R. Co. v. Walker, N.D., 13 S.Ct. 650, 148 U.S. 391, 37 L.Ed. 494—Keels v. Central R. Co., S.C., 13 S.Ct. 350, 147 U.S. 374, 37 L.Ed. 206—Walter v. Northeastern R. Co., S.C., 13 S. Ct. 348, 147 U.S. 370, 37 L.Ed. 206—Indemnity Ins. Co. of North America v. School Dist. No. 1, Stockbridge Tp., Ingham County, C.C.A.Mich., 63 F.2d 878—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A.Ark., 63 F.2d 585, 90 A.L.R. 544—Georgia Power Co. v. Hudson, C.C.A.S.C., 49 F.2d 66, 75 A.L.R. 1439—Essman v. Hood, D.C.Tex., 45 F.2d 881—Robinson v. Wemmer, D.C.Ohio, 253 F. 790.

the amount of each separate claim, and not their aggregate amount.

On the other hand, where two or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, the court has jurisdiction if their interests collectively equal the jurisdictional amount.[90] Similarly, where a single action is brought against several defendants who are jointly liable, the total liability is the amount in controversy.[91] So too, where the causes of action asserted against several defendants, which would otherwise be deemed distinct and separate, are tied together by allegations of conspiracy or fraudulent coöperation among the defendants, they may be aggregated for the purposes of jurisdiction,[92] and the same rule applies where the suit against the conspirators is brought by several rather than by only one of the alleged victims of the conspiracy or fraud.[93] Where a suit against several defendants involves a matter in which they all have a common interest, and the amount or value of the matter in controversy exceeds the jurisdictional amount, the jurisdiction of the court extends to defendants the value of whose separate interests is less than the jurisdictional amount.[94]

Where plaintiff has several demands against the same defendant which he may join in one action, the aggregate of such demands is the amount in controversy, regardless of the nature of the demands.[95]

Demands by separate taxing bodies
National bank seeking, in federal court, to enjoin collection of state, county, and municipal taxes could not join with county, as party defendant, municipality whose claim for taxes amounted to less than three thousand dollars to make up jurisdictional amount.—Albertville Nat. Bank v. Marshall County, Ala., C.C.A.Ala., 71 F.2d 848.

90. U.S.—Thomson v. Gaskill, Neb., 62 S.Ct. 673, 315 U.S. 442, 86 L.Ed. 951—Andrews v. Equitable Life Assur. Soc. of U. S., C.C.A.Ill., 124 F.2d 788, certiorari denied 62 S.Ct. 1270, 316 U.S. 682, 86 L.Ed. 1755—Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y., 117 F.2d 95, certiorari denied 61 S.Ct. 835, 313 U.S. 559, 85 L.Ed. 1520—Phillips Petroleum Co. v. Taylor, C.C.A.Tex., 115 F.2d 726, rehearing denied 116 F.2d 994, certiorari denied 61 S.Ct. 941, 313 U.S. 565, 85 L.Ed. 1524—General Finance Corporation v. Keystone Credit Corporation, C.C.A.Va., 50 F.2d 872, certiorari denied Adams v. Keystone Credit Corporation, 52 S.Ct. 201, 284 U.S. 684, 76 L.Ed. 578—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Small v. Frick, D.C.S.C., 40 F.Supp. 778—Dewar v. Brooks, D.C.Nev., 16 F.Supp. 636—Alliance Ins. Co. of Philadelphia v. Jamerson, D.C.Ill., 12 F.Supp. 957, affirmed, C.C.A., Jamerson v. Alliance Ins. Co. of Philadelphia, 87 F.2d 253, certiorari denied 57 S.Ct. 753, 300 U.S. 683, 81 L.Ed. 886—Local Union No. 497 of Amalgamated Ass'n of Street & Electric Ry. Employees of America v. Joplin & P. Ry. Co., C.C.A.Kan., 287 F. 473—Mullen v. Alaska Packers' Ass'n, D.C.Wash., 277 F. 967—Hagge v. Kansas City Southern R. Co., C.C.Mo., 104 F. 391.

15 C.J. p 771 note 91.

Claims of plaintiffs and interveners may be considered together in determining whether amount in controversy is sufficient to give federal court jurisdiction.—Kline v. Wright, D.C.Idaho, 42 F.2d 927.

Coinsurers liable pro rata
Where several insurance companies issued identical policies insuring insured's merchandise against direct loss by fire, each policy containing a provision that it covered liability only in the proportion the amount insured should bear to whole insurance, the language of the policies established a community interest among the companies, which gave them a right to aggregate claims against them on policies for purpose of making the jurisdictional amount.—Jamerson v. Alliance Ins. Co. of Philadelphia, C.C.A.Ill., 87 F.2d 253, affirming, D.C., Alliance Ins. Co. of Philadelphia v. Jamerson, 12 F.Supp. 957, and certiorari denied Jamerson v. Alliance Ins. Co. of Philadelphia, 57 S.Ct. 753, 300 U.S. 683, 81 L.Ed. 886—Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa, D.C.Idaho, 42 F.Supp. 917.

91. U.S.—St. Louis Union Trust Co. v. Stephens, C.C.A.Tex., 116 F.2d 574, reversing, D.C., 30 F.Supp. 563, certiorari denied Stephens v. St. Louis Union Trust Co., 62 S.Ct. 66, 314 U.S. 633, 86 L.Ed. 508.

15 C.J. p 772 note 93.

92. U.S.—Sovereign Camp, W. O. W., v. O'Neill, Tex., 45 S.Ct. 49, 266 U.S. 292, 69 L.Ed. 293, reversing, D.C., 286 F. 734—McDaniel v. Traylor, Ark., 25 S.Ct. 369, 196 U.S. 415, 49 L.Ed. 533—American Optometric Ass'n v. Ritholz, C.C.A.Ill., 101 F.2d 883, certiorari denied Rithholz v. American Optometric Ass'n, 59 S.Ct. 1047, 307 U.S. 647, 83 L.Ed. 1527, rehearing denied 60 S.Ct. 70, 308 U.S. 634, 84 L.Ed. 527—Camden Fire Ins. Ass'n v. Di Giovanni, C.C.A.Mo., 75 F.2d 808, certiorari granted Di Giovanni v. Camden Fire Ins. Ass'n, 55 S.Ct. 834, 295 U.S. 728, 79 L.Ed. 1678, reversed on other grounds 56 S.Ct. 1, 296 U.S. 64, 80 L.Ed. 47—Marion Mortg. Co. v. Edmunds, C.C.A.Fla., 64 F.2d 248—St. Louis Union Trust Co. v. Stephens, D.C., 30 F.Supp. 563, reversed on other grounds, C.C.A., 116 F.2d 574, certiorari denied Stephens v. St. Louis Union Trust Co., 62 S.Ct. 66, 314 U.S. 633, 86 L.Ed. 508.

"Fraud in the original establishment of the claims sought to be enjoined, and a joint participation in this fraud by pretending claimants" must be shown.—Central Mexico Light & Power Co. v. Munch, C.C.A.N.Y., 116 F.2d 85, 89.

93. U.S.—Jamerson v. Alliance Ins. Co. of Philadelphia, C.C.A.Ill., 87 F.2d 253, affirming, D.C., Alliance Ins. Co. of Philadelphia v. Jamerson, 12 F.Supp. 957, and certiorari denied Jamerson v. Alliance Ins. Co. of Philadelphia, 57 S.Ct. 753, 300 U.S. 683, 81 L.Ed. 886.

94. U.S.—Dern v. Tanner, D.C.Mont., 60 F.2d 626—Hartford Fire Ins. Co. v. Bonner Mercantile Co., Mont., 56 F. 378, 5 C.C.A. 524, affirming, C.C., 44 F. 151, 11 L.R.A. 623, and petition denied 14 S.Ct. 1146, 154 U.S. 504, 38 L.Ed. 1077.

15 C.J. p 773 note 99.

95. U.S.—Gray v. Blight, C.C.A.Colo., 112 F.2d 696, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Equitable Life Assur. Soc. of U. S. v. Wert, C.C.A.Neb., 102 F.2d 10—Kimel v. Missouri State Life Ins. Co., C.C.A.Kan., 71 F.2d 921—Provident Mut. Life Ins. Co. of Philadelphia v. Parsons, C.C.A.N.C., 70 F.2d 863, certiorari denied Parsons v. Provident Mut. Life Ins. Co., 55 S.Ct. 95, 293 U.S. 582, 79 L.Ed. 678—First State Bank v. Chicago, R. I. & P. R. Co., C.C.A.Ark., 63 F.2d 585, 90 A.L.R. 544—Commercial Nat. Bank of Los Angeles v. Catron, C.C.A.N.M., 50 F.2d 1023—New York Life Ins. Co. v. Marshall, D.C.La., 21 F.2d 172,

Representative or class actions. Where a suit is brought by one or more for themselves and all others of a class jointly interested for the relief of the whole class, jurisdiction is sustained if the aggregate interest of the whole class or the fund to be recovered exceeds the jurisdictional minimum;[96] but where the action, although purportedly brought in behalf of others similarly situated, is basically an action for the enforcement of individual claims or rights,[97] or where the class can be

affirmed, C.C.A., 23 F.2d 225, certiorari denied 48 S.Ct. 434, 277 U.S. 587, 72 L.Ed. 1001—Mutual Life Ins. Co. of New York v. Moyle, D.C. S.C., 34 F.Supp. 127—Oshry v. Mutual Life Ins. Co. of New York, D.C.Mass., 27 F.Supp. 237—Gobitis v. Minersville School Dist., D.C.Pa., 24 F.Supp. 271, affirmed, C.C.A., Minersville School Dist. v. Gobitis, 108 F.2d 683, certiorari granted 60 S.Ct. 609, 309 U.S. 645, 84 L.Ed. 998, reversed on other grounds 60 S.Ct. 1010, 310 U.S. 586, 84 L.Ed. 1375, 127 A.L.R. 1493—Union Central Life Ins. Co. v. McAden, D.C. Tex., 21 F.Supp. 110—Rainier Nat. Park Co. v. Martin, 18 F.Supp. 481, affirmed 58 S.Ct. 478, 302 U.S. 661, 82 L.Ed. 511, and rehearing denied, D.C., 23 F.Supp. 60—New York Life Ins. Co. v. Jones, D.C.N.C., 2 F.Supp. 600—Mutual Life Ins. Co. of New York v. Rose, D.C.Ky., 294 F. 122, reversed on other grounds, C.C.A., Rose v. Mutual Life Ins. Co. of New York, 19 F.2d 280.

15 C.J. p 770 note 81 p 771 note 89.

"The reasoning applicable to 'separable' controversies is, of course, not available where there is a single plaintiff and a single defendant."—Cashmere Valley Bank v. Pacific Fruit & Produce Co., D.C.Wash., 33 F.Supp. 946, 949.

Where two petitions making the same claim are consolidated for trial, there can be no aggregation for jurisdictional purposes.—Simecek v. U. S. Nat. Bank of Omaha, C.C.A.Neb., 91 F.2d 214.

Suits consolidated in state court at defendant's instance cannot be considered in the aggregate for the purpose of giving the district court jurisdiction on removal.—Fried v. State Life Ins. Co. of Indianapolis, Ind., D.C.La., 10 F.Supp. 369.

Bank's liability for tax on stockholders

(1) Where bank was liable for and paid taxes imposed on bank stockholders, court had jurisdiction of tax refund suit involving jurisdictional amount, notwithstanding amount paid for no one stockholder would give court jurisdiction.—Crawford County Trust & Savings Bank v. Crawford County, Iowa, C.C.A.Iowa, 66 F.2d 971, certiorari denied 54 S. Ct. 439, 291 U.S. 664, 78 L.Ed. 1055, Crawford County Trust & Savings Bank of Dennison, Iowa v. Crawford County, Iowa, 54 S.Ct. 439, 291 U.S. 664, 78 L.Ed. 1055, and Farmer's State Bank of Dow City, Iowa v. Crawford County, Iowa, 54 S.Ct. 439, 291 U.S. 664, 78 L.Ed. 1055—Crawford County Trust & Savings Bank v. Crawford County, C.C.A., Iowa, 63 F.2d 342—First Nat. Bank v. Harrison County, C.C.A.Iowa, 57 F.2d 56, certiorari denied 53 S.Ct. 13, 287 U.S. 611, 77 L.Ed. 531.

(2) The same rule has been applied in a suit by the bank to enjoin the collection of such taxes.—Hannan v. First Nat. Bank, C.C.A. Iowa, 269 F. 527, appeal dismissed First Nat. Bank v. Hannan, 45 S. Ct. 9, 266 U.S. 638, 69 L.Ed. 482.

96. U.S.—Buck v. Gallagher, Wash., 59 S.Ct. 740, 307 U.S. 95, 83 L.Ed. 1128, reversing, D.C., Buck v. Case, 24 F.Supp. 541, and appeal dismissed Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Boesenberg v. Chicago Title & Trust Co., C.C.A.Ill., 128 F.2d 245, 141 A. L.R. 565—Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., C.C.A.Ill., 127 F.2d 245—Andrews v. Equitable Life Assur. Soc. of U. S., C.C.A.Ill., 124 F.2d 788, certiorari denied 62 S.Ct. 1270, 316 U.S. 682, 86 L.Ed. 1755—Marion Mortg. Co. v. Edmunds, C.C.A.Fla., 64 F.2d 248—King v. Kansas City Police Relief Ass'n, D.C.Mo., 60 F.2d 547—Town of Fairfax. ex rel. Barringer v. Hubler, D.C.Okl., 23 F.Supp. 66—Local No. 7 of Bricklayers', Masons' and Plasterers' International Union of America v. Bowen, D.C.Tex., 278 F. 271—Carpenter v. Knollwood Cemetery, D.C.Mass., 198 F. 297—Jones v. Mutual Fidelity Co., C.C.Del., 123 F. 506.

Bank stockholders' liability

(1) Where the statutory liability of stockholders runs directly to the creditors as a body, and there is no duly constituted representative to act for them, in a suit brought by one creditor in behalf of himself and all others, to enforce such liability and distribute the fund to be thus created, if such fund equals or exceeds the jurisdictional minimum the court has jurisdiction thereof and of all the component parts thereof, and, hence, of all the stockholders regardless of the amount of their individual liability.—Brusselback v. Arnovitz, C.C.A.Ohio, 87 F.2d 761, certiorari granted Christopher v. Brusselback, 58 S.Ct. 16, 302 U.S. 672, 82 L.Ed. 518, reversed on other grounds 58 S.Ct. 350, 302 U.S. 500, 82 L.Ed. 388—Brusselback v. Chicago Joint Stock Land Bank, C.C.A.Ill., 85 F.2d 617—Brusselback v. Cago Corporation, C.C.A.N.Y., 85 F.2d 20, reversing, D.C., 14 F.Supp. 993, and certiorari denied Cago Corporation v. Brusselback, 57 S.Ct. 111, 299 U.S. 586, 81 L.Ed. 432—Holmberg v. Hanaford, D.C.Ohio, 28 F.Supp. 216—Partridge v. Ainley, D.C.N.Y., 24 F. Supp. 43—Robertson v. Conway, Ky., 188 F. 579, 110 C.C.A. 377—Alsop v. Conway, C.C.A.Ky., 188 F. 568.

(2) But in a suit by the superintendent of banks against numerous bank stockholders to enforce statutory liability, the test of federal jurisdiction as to each stockholder severally liable is the amount of the separate claim against him, not the aggregate amount.—Broderick v. American General Corporation, C.C.A. Md., 71 F.2d 864, 94 A.L.R. 1359.

(3) And the latter rule has been applied likewise in a suit brought by one creditor for himself and all others where the liability of the stockholders was several and each creditor had a direct remedy against each stockholder for its recovery.—Auer v. Lombard, Mass., 72 F. 209, 19 C.C.A. 72.

(4) However, on the latter point there is authority to the contrary, at least where the suit is brought in equity to avoid multiplicity of actions.—U. S. v. Freeman, D.C.Mass., 21 F.Supp. 593—Reconstruction Finance Corporation v. Central Republic Trust Co., D.C.Ill., 11 F.Supp. 976.

(5) But where an action in assumpsit is brought, the several liabilities of different stockholders cannot be aggregated.—Burnett v. Bush, D.C.N.J., 44 F.Supp. 390.

Foreclosure of assessments

Action by holders of six paving assessment bonds of five hundred dollars each issued by municipality to foreclose delinquent assessments presented "amount in controversy" sufficient to give federal district court jurisdiction, in view of state statute which compels all assessments to be foreclosed in one "class action."—City of Hollis, Okl., ex rel. Kearn v. Carrell, D.C.Okl., 42 F.Supp. 893.

97. U.S.—Lion Bonding & Surety Co. v. Karatz, 43 S.Ct. 480, 262 U.S. 77, 67 L.Ed. 871, reversing, C.C.A. Minn., 281 F. 1021, and C.C.A.Neb., Hertz v. Lion Bonding & Surety Co., 280 F. 540, certiorari granted Department of Trade and Commerce of the State of Nebraska v. Hertz, 43 S.Ct. 89, 260 U.S. 713, 67 L.Ed. 477, and appeal dismissed 43 S.Ct. 90, 260 U.S. 696, 67 L.Ed. 468 and motion denied 43 S.Ct. 641,

found only in the spurious sense that a common question of fact and law are involved,[98] the suit can be maintained only by one whose individual interest exceeds the jurisdictional amount, and neither the aggregate of the several claims nor the size of the fund out of which payment is sought controls. Where, in a suit on behalf of claimants and all others similarly situated, the interest of any one complainant is sufficient to confer jurisdiction, other persons whose interests are insufficient may join, and the relief granted will inure to the benefit of all.[99]

An assignee or transferee of several claims, each of which is less than the required jurisdictional amount, may aggregate the several claims to make up the amount necessary for jurisdiction,[1] since the prohibition in the Judiciary Act against the bringing of actions by assignees does not refer to jurisdictional amount but rather to diversity of citizenship,[2] provided the assignments or transfers are not colorable and made solely for the purpose of collection;[3] but this proviso does not prevent an

262 U.S. 640, 67 L.Ed. 1151, and 43 S.Ct. 701, 262 U.S. 733, 67 L.Ed. 1266—Woerter v. Orr, C.C.A.Okl., 127 F.2d 969—Andrews v. Equitable Life Assur. Soc. of U. S., C.C. A.Ill., 124 F.2d 788, certiorari denied 62 S.Ct. 1270, 316 U.S. 682, 86 L.Ed. 1755—Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y., 117 F.2d 95, certiorari denied 61 S.Ct. 835, 313 U.S. 559, 85 L.Ed. 1520—Hilliker v. Grand Lodge, K. P., C.C.A.Ohio, 112 F.2d 382—Wales v. Jacobs, C.C.A.Ohio, 104 F.2d 264, certiorari denied 60 S.Ct. 130, 308 U.S. 599, 84 L.Ed. 501—Frank & Lambert v. Rosengren, C.C.A. Minn., 97 F.2d 460—Ayer v. Kemper, C.C.A.N.Y., 48 F.2d 11, certiorari denied Union Trust Co. of Rochester v. Ayer, 52 S.Ct. 20, 284 U.S. 639, 76 L.Ed. 543—Woods v. Thompson, C.C.A.Ill., 14 F.2d 951, followed in Illinois Banker's Life Ass'n v. Farris, C.C.A.Ill., 21 F.2d 1014, certiorari denied Farris v. Illinois Banker's Life Ass'n, 48 S. Ct. 301, 276 U.S. 621, 72 L.Ed. 735—First Nat. Bank of Roselle v. Lafayette Nat. Bank of Brooklyn, D. C.N.Y., 40 F.Supp. 480—Stevenson v. City of Bluefield, D.C.W.Va., 39 F.Supp. 462—Corcoran v. Royal Development Co., D.C.N.Y., 35 F.Supp. 400, affirmed, C.C.A., 121 F.2d 957—Terrio v. S. N. Nielsen Const. Co., D.C.La., 30 F.Supp. 77—Town of Fairfax, ex rel. Barringer v. Hubler, D.C.Okl., 23 F.Supp. 66—Auer v. Lombard, Mass., 72 F. 209, 19 C. C.A. 72.

A statute authorizing suit in behalf of others similarly situated does not authorize the addition of all sums due the similarly situated persons to arrive at the jurisdictional amount.—Robertson v. Argus Hosiery Mills, D.C.Tenn., 32 F.Supp. 19, reversed on other grounds, C.C.A., 121 F.2d 285, certiorari denied Argus Hosiery Mills v. Robertson, 62 S.Ct. 181, 314 U.S. 681, 86 L.Ed. 544.

No others joined

Where the suit is primarily for the enforcement of personal rights, the value of which is insufficient, and no other persons similarly situated join, the court lacks jurisdiction.—Kimmich v. Potter, C.C.A.N.Y., 112 F.2d 135, certiorari denied Kimmich v. New York Clearing House Ass'n, 61 S.Ct. 47, 311 U.S. 653, 85 L.Ed. 418, rehearing denied 61 S.Ct. 832, 313 U. S. 597, 85 L.Ed. 1550—Southern Pac. Co. v. McAdoo, C.C.A.Cal., 82 F.2d 121, reversing, D.C., McAdoo v. Southern Pac. Co., 10 F.Supp. 953—Davis v. McFarland, C.C.A.Tex., 15 F.2d 612, certiorari denied 47 S.Ct. 457, 273 U.S. 754, 71 L.Ed. 875.

98. U.S.—Ayer v. Kemper, C.C.A.N. Y., 48 F.2d 11, certiorari denied Union Trust Co. of Rochester v. Ayer, 52 S.Ct. 20, 284 U.S. 639, 76 L.Ed. 543—Stevenson v. City of Bluefield, D.C.W.Va., 39 F.Supp. 462—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825.

"Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument . . . or because the plaintiffs have a community of interest."—Thomson v. Gaskill, Neb., 62 S.Ct. 673, 675, 315 U.S. 442, 86 L. Ed. 751.

Actual joinder or intervention of others of class does not affect the rule so as to permit the aggregation of their several interests.—Hackner v. Guaranty Trust Co. of New York, C.C.A.N.Y., 117 F.2d 95, certiorari denied 61 S.Ct. 835, 313 U.S. 559, 85 L.Ed. 1520.

99. U.S.—Handley v. Stutz, Tenn., 11 S.Ct. 117, 137 U.S. 366, 34 L.Ed. 706—General Finance Corporation v. Keystone Credit Corporation, C. C.A.Va., 50 F.2d 872, certiorari denied Adams v. Keystone Credit Corporation, 52 S.Ct. 201, 284 U.S. 684, 76 L.Ed. 578—Reagan v. Midland Packing Co., D.C.Iowa, 298 F. 500, affirmed, C.C.A., 8 F.2d 954—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825—Bidwell v. Huff, C.C.S.D., 103 F. 362.

Derivative cause of action

The fact that bondholder with bonds in excess of three thousand dollars was joined as plaintiff in suit by corporation and associated companies against other bondholders to enjoin actions on matured bonds would not support federal court's jurisdiction in view of purpose of suit to avoid disturbance of pending reorganization plan, since primary right threatened was that of corporation, and the derivative right is worth no more than the primary one.—Central Mexico Light & Power Co. v. Munch, C.C.A.N.Y., 116 F.2d 85.

1. U.S.—Central Paper Co. v. Southwick, C.C.A.Mich., 56 F.2d 593—Allen v. Clark, D.C.Cal., 22 F.Supp. 898—Seelig v. First Nat. Bank, D. C.Ill., 20 F.Supp. 61—Brauns v. Ailshie, D.C.Idaho, 5 F.Supp. 388.

15 C.J. p 770 note 85—25 C.J. p 980 note 6.

Transfer in trust

Agreement for transfer of bonds to bondholders' committee under which title was to pass to committee in trust to conserve, salvage, and adjust investment gave federal court jurisdiction of action by committee, notwithstanding some of transferors could not have sued in federal court because of insufficiency of amount of their claims.—Bullard v. City of Cisco, Tex., 54 S.Ct. 177, 290 U.S. 179, 78 L.Ed. 254, 93 A.L.R. 141, reversing, C.C.A., 62 F.2d 313, certiorari granted 53 S.Ct. 657, 289 U.S. 718, 77 L.Ed. 1470.

2. U.S.—Central Paper Co. v. Southwick, C.C.A.Mich., 56 F.2d 593.

25 C.J. p 980 note 6.

3. U.S.—Bullard v. City of Cisco, Tex., 54 S.Ct. 177, 290 U.S. 179, 78 L.Ed. 254, 93 A.L.R. 141, reversing, C.C.A., 62 F.2d 313, certiorari granted 53 S.Ct. 657, 289 U.S. 718, 77 L.Ed. 1470—Central Paper Co. v. Southwick, C.C.A.Mich., 56 F.2d 593—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Allen v. Clark, D.C.Cal., 22 F.Supp. 898—Mullen v. Alaska Packers' Ass'n, D.C.Wash., 277 F. 967.

15 C.J. p 769 note 75—25 C.J. p 980 note 7.

Assignment to one having sufficient claim

A claimant owning separate claim of less than three thousand dollars cannot circumvent the jurisdictional limitation of federal district court by a colorable and fictitious instrument of assignment to a plaintiff

assignee from suing on claims assigned to him for collection only where the amounts of the individual claims are such as would have enabled the real owners to sue thereon.[4]

(4) Particular Proceedings

(a) Injunction suits generally
(b) Injunctions against taxes
(c) Insurance, pensions, workmen's compensation, etc.
(d) Actions involving title and possession; liens
(e) Other proceedings

(a) Injunction Suits Generally

In injunction suits the amount in controversy is the value to plaintiff of the right or interest he seeks to protect, or, as some cases have held, the value to defendant of the acts sought to be restrained. It is not the mere pecuniary loss or damage resulting from the acts complained of.

In a suit for an injunction, the value of the matter in dispute is that of the object of the bill,[5] that is, the value to plaintiff of the right or interest for which he prays protection,[6] or the amount by which the value of such right or of plaintiff's property will be diminished as a result of the acts sought to be enjoined;[7] and in some cases the test applied has

owning a claim in excess of three thousand dollars, for purpose of joining in suit, even though the claims arise out of the same alleged tort.—Grosvenor v. Guenther, D.C.Mich., 42 F.Supp. 249.

4. U.S.—Bullard v. City of Cisco, C. C.A.Tex., 62 F.2d 313, certiorari granted 53 S.Ct. 657, 289 U.S. 718, 77 L.Ed. 1470, and reversed on other grounds 54 S.Ct. 177, 290 U.S. 179, 78 L.Ed. 254, 93 A.L.R. 141.

5. U.S.—Healy v. Ratta, C.C.A.N.H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, and appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459. Reversed on other grounds 54 S. Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—State of Ohio ex rel. Erkenbrecher v. Cox, D.C.Ohio, 257 F. 334—Griggs, Cooper & Co. v. Erie Preserving Co., C.C.N.Y., 131 F. 359—Western Union Tel. Co. v. City Council of Charleston, C.C.S.C., 56 F. 419, affirmed 14 S.Ct. 1094, 153 U.S. 692, 38 L.Ed. 781, appeal dismissed 16 S.Ct. 1208, 163 U.S. 711, 41 L.Ed. 309.

6. U.S.—McNeill v. Southern R. Co., N.C., 26 S.Ct. 722, 202 U.S. 543, 50 L.Ed. 1142—Scalise v. National Utility Service, C.C.A.Fla., 120 F.2d 938—Central Mexico Light & Power Co. v. Munch, C.C.A.N.Y., 116 F. 2d 85—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Zicos v. Dickmann, C.C.A.Mo., 98 F.2d 347—Nord v. Griffin, C.C.A. Ill., 86 F.2d 481, certiorari denied 57 S.Ct. 612, 300 U.S. 673, 81 L.Ed. 879—Pinkston v. Brotherhood of Locomotive Firemen and Enginemen, C.C.A.Ohio, 69 F.2d 600, certiorari granted Brotherhood of Locomotive Firemen and Enginemen v. Pinkston, 54 S.Ct. 866, 292 U.S. 621, 78 L.Ed. 1477, affirmed 55 S.Ct. 1, 293 U.S. 96, 79 L.Ed. 219, rehearing denied 55 S.Ct. 211, 293 U.S. 632, 79 L.Ed. 717—King v. Kansas City Police Relief Ass'n, D.C.Mo., 60 F.2d 547—Nutt v. Ellerbee, D.C.S.C., 56 F.2d 1058—Durant v. Bennett, D.C.S.C., 54 F.2d 634—General Petroleum Corporation of California v. Beanblossom, C.C.A.Wash., 47 F.2d 826—Station WBT v. Poulnot, D.C.S.C., 46 F.2d 671—Wisconsin Electric Co. v. Dumore Co., C.C.A.Ohio, 35 F.2d 555, certiorari granted 50 S.Ct. 333, 281 U.S. 710, 74 L.Ed. 1132, certiorari dismissed 51 S.Ct. 214, 282 U.S. 813, 75 L.Ed. 728—St. Louis Southwestern Ry. Co. v. Emmerson, C. C.A.Ill., 36 F.2d 322, reversing, D. C., 27 F.2d 1005, and reversed on other grounds Stratton v. St. Louis Southwestern Ry. Co., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135—Sun-Maid Raisin Growers of California v. Avis, D.C.Ill., 25 F.2d 303—Fajardo Sugar Co. of Porto Rico v. Holcomb, C.C.A.Puerto Rico, 16 F.2d 92—Mutual Oil Co. v. Zehrung, D.C.Neb., 11 F.2d 887—Harris v. Brown, D.C.Ky., 6 F.2d 922—Lambert v. Yellowley, C.C.A.N.Y., 4 F.2d 915, reversing, D.C., 291 F. 640, and affirmed 47 S.Ct. 210, 272 U.S. 581, 71 L.Ed. 422, 49 A.L.R. 575—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D. C.Ky., 1 F.2d 805—Lamp v. Irvine, D.C.Md., 41 F.Supp. 684—Caron Corporation v. Wolf Drug Co., D. C.N.Y., 40 F.Supp. 103—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F.Supp. 607—Miles Laboratories v. Seignious, D. C.S.C., 30 F.Supp. 549—Terrio v. S. N. Nielsen Const. Co., D.C.La., 30 F.Supp. 77—James Heddon's Sons v. Callender, D.C.Minn., 28 F.Supp. 643—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F.Supp. 76—Calvert Distilling Co. v. Brandon, D.C.S.C., 24 F.Supp. 857—Gobitis v. Minersville School Dist., D.C.Pa., 24 F.Supp. 271, affirmed, C.C.A., Minersville School Dist. v. Gobitis, 108 F.2d 683, certiorari granted 60 S.Ct. 609, 309 U.S. 645, 84 L.Ed. 998, reversed on other grounds 60 S.Ct. 1010, 310 U.S. 586, 84 L.Ed. 1375, 127 A.L.R. 1493—Dewar v. Brooks, D.C.Nev., 16 F. Supp. 636—Winola Lake & Land Co. v. Gorham, D.C.Pa., 13 F.Supp. 721—Boggus Motor Co. v. Onderdunk, D.C.Tex., 9 F.Supp. 950—National Lock Co. v. Chicago Regional Labor Board, D.C.Ill., 8 F.Supp. 820—Oklahoma Utilities Co. v. City of Hominy, D.C.Okl., 2 F.Supp. 849—Local No. 7 of Bricklayers', Masons' and Plasterers' International Union of America v. Bowen, D.C. Tex., 278 F. 271—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546—Lowe v. Pure Oil Co., W.Va., 260 F. 704, 171 C.C.A. 442—Prest-O-Lite Co. v. Bournonville, D.C.N. J., 260 F. 440.

15 C.J. p 753 note 40.

7. U.S.—Healy v. Ratta, C.C.A.N.H., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459 and reversed on other grounds 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248—Durant v. Bennett, D.C.S.C., 54 F. 2d 634—Lambert v. Yellowley, C.C. A.N.Y., 4 F.2d 915, reversing, D.C., 291 F. 640, and affirmed 47 S.Ct. 210, 272 U.S. 581, 71 L.Ed. 422, 49 A.L.R. 575—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Brown v. Parker, D.C.Cal., 39 F. Supp. 895—Birch v. McGolgan, D.C. Cal., 39 F.Supp. 358—Briggs v. Boston, D.C.Iowa, 15 F.Supp. 763—Mountain States Telephone & Telegraph Co. v. Public Utilities Commission of Utah, D.C.Utah, 8 F. Supp. 307—Kercheval v. Ross, D.C. Mo., 7 F.Supp. 355—Harr v. Pioneer Mechanical Corporation, D.C. N.Y., 1 F.Supp. 294—Atlantic Coast Line Ry. Co. v. Railroad Commission of Georgia, D.C.Ga., 251 F. 321—Tri-City Central Trades Council v. American Steel Foundries, Ill., 238 F. 728, 151 C.C.A. 578, certiorari granted American Steel Foundries v. Tri-City Central Trades Council, 38 S.Ct. 190, 245 U.S. 670,

been the value to defendant of the acts which plaintiff seeks to restrain or prevent.[8] The pecuniary loss or damage resulting from the acts complained of is not the amount in controversy.[9] Indeed it has even been held that past losses from the acts sought to be enjoined cannot be added to the value of the right invaded in order to bring the amount in controversy up to the jurisdictional amount,[10] although such losses may sometimes be used as a measure of the value of the right involved;[11] but where the action is for damages and for injunction the amount of damages claimed in good faith may be added to the value of the right involved in determining the amount or value in controversy.[12]

In accordance with the foregoing rules, in a suit to enjoin the enforcement of a statute or regulation which, without reference to a tax, destroys or restricts the right to do business, the right of plaintiff to do business, or to do business free from the threatened interference is the matter in controversy.[13] The right to do business free from the interference of the challenged statute or regulation is not measured by the investment in or the net worth of the business or by the volume of business transacted within a given period,[14] but it may be measured by the loss that would follow enforcement of the statute or regulation, as, for example, by the diminution of net profits or the cost of compliance.[15] In a suit to enjoin a continuing wrong to

62 L.Ed. 539, and modified on other grounds 42 S.Ct. 72, 257 U.S. 184, 66 L.Ed. 189, 27 A.L.R. 360.
15 C.J. p 753 note 40.

Decrease in sales

The amount in controversy in suit to restrain defendants from picketing plaintiff's stores could not be determined merely by value of decrease in volume of merchandise sold by it, since loss would depend on profit it might reasonably have anticipated from sale of merchandise represented by decrease in volume.—S. S. Kresge Co. v. Amsler, C.C.A.Mo., 99 F.2d 503, certiorari denied 59 S.Ct. 582, 306 U.S. 641, 83 L.Ed. 1041.

Impaired use and enjoyment

As respects jurisdiction of federal court in action to enjoin trespass, the result of which would be to destroy or impair the use and enjoyment of plaintiff's land as a whole, the "amount in controversy" is determined by the value of the land.—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F.Supp. 76.

8. U.S.—Mississippi & M. R. Co. v. Ward, Iowa, 2 Black 485, 17 L.Ed. 311—Roland v. Jumper Creek Drainage Dist., D.C.Fla., 4 F.2d 719—Ross v. Southern Ry. Co., D.C.S.C., 20 F.Supp. 556—National Lock Co. v. Chicago Regional Labor Board, D.C.Ill., 8 F.Supp. 820—American Fisheries Co. v. Lennen, C.C.Conn., 118 F. 869—Johnston v. Pittsburg, C.C.Pa., 106 F. 753—Rainey v. Herbert, Pa., 55 F. 443, 5 C.C.A. 183.

Loss of prospective compensation

In taxpayer's suit against lieutenant governor and state auditor to enjoin auditor from drawing further warrants payable to lieutenant governor for services allegedly being performed without right, where latter would be deprived of compensation at rate of six thousand dollars per year for over two years if plaintiff should be successful and had already received over three thousand dollars, suit held to involve necessary amount in controversy as to each party, regardless of amount of taxes paid by plaintiff.—Armstrong v. Townsend, D.C.Ind., 8 F.Supp. 953.

9. U.S.—Scott v. Donald, S.C., 17 S.Ct. 262, 41 L.Ed. 648—King v. Kansas City Police Relief Ass'n, D.C.Mo., 60 F.2d 547—Nutt v. Ellerbe, D.C.S.C., 56 F.2d 1058—General Petroleum Corporation of California v. Beanblossom, C.C.A.Wash., 47 F.2d 826—Station WBT v. Poulnot, D.C.S.C., 46 F.2d 671—Wisconsin Electric Co. v. Dumore Co., C.C.A. Ohio, 35 F.2d 555, certiorari granted 50 S.Ct. 333, 281 U.S. 710, 74 L.Ed. 1132, certiorari dismissed 51 S.Ct. 214, 282 U.S. 813, 75 L.Ed. 728—Harris v. Brown, D.C.Ky., 6 F.2d 922—Lambert v. Yellowley, C.C.A. N.Y., 4 F.2d 915, reversing, D.C., 291 F. 640, and affirmed 47 S.Ct. 210, 272 U.S. 581, 71 L.Ed. 422, 49 A.L.R. 575—Illinois Cent. R. Co. v. Railroad Commission of Kentucky, D.C.Ky., 1 F.2d 805—Lamp v. Irvine, D.C.Md., 41 F.Supp. 684—Caron Corporation v. Wolf Drug Co., D.C. N.J., 40 F.Supp. 103—Miles Laboratories v. Seignious, D.C.S.C., 30 F.Supp. 549—James Heddon's Sons v. Callender, D.C.Minn., 28 F.Supp. 643—Winola Lake & Land Co. v. Gorham, D.C.Pa., 13 F.Supp. 721—Boggus Motor Co. v. Onderdonk, D.C.Tex., 9 F.Supp. 950—Local No. 7 of Bricklayers', Masons' and Plasterers' International Union of America v. Bowen, D.C.Tex., 278 F. 271—Norfolk Southern R. Co. v. Stricklin, D.C.N.C., 264 F. 546—Prest-O-Lite Co. v. Bournonville, D.C.N.J., 260 F. 440—Ury v. Mazer Cigar Mfg. Co., Mo., 253 F. 551, 165 C.C.A. 221—Rainey v. Herbert, Pa., 55 F. 443, 5 C.C.A. 183.

10. U.S.—Dunning v. Agricultural Prorate Advisory Commission of California, D.C.Cal., 38 F.Supp. 393.

11. U.S.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, and modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

12. U.S.—Scott v. Donald, S.C., 17 S.Ct. 262, 165 U.S. 107, 41 L.Ed. 648—Reed, Fears & Miller v. Miller, D.C. Pa., 2 F.2d 280, affirmed, C.C.A., Miller v. Reed, Fears & Miller, 5 F.2d 1018.

13. U.S.—Buck v. Gallagher, Wash., 59 S.Ct. 740, 307 U.S. 95, 83 L.Ed. 1128, reversing, D.C., Buck v. Case, 24 F.Supp. 541, appeal dismissed Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Reese v. Holm, D.C.Minn., 31 F.Supp. 435—Snively Groves v. Florida Citrus Commission, D.C.Fla., 23 F.Supp. 600—Dugan v. Bridges, D.C.N.H., 16 F.Supp. 694, appeal dismissed 57 S.Ct. 668, 300 U.S. 684, 81 L.Ed. 887—Hale v. Mann, D.C.Tex., 15 F.Supp. 1051—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825—Grandin Farmers' Co-op. Elevator Co. of Grandin, N. D., v. Langer, D.C.N.D., 5 F.Supp. 425, affirmed Langer v. Grandin Farmers' Co-op. Elevator Co. of Grandin, N.D., 54 S.Ct. 772, 292 U.S. 605, 78 L.Ed. 1467.

14. U.S.—Kroger Grocery & Baking Co. v. Lutz, Ind., 57 S.Ct. 215, 299 U.S. 300, 81 L.Ed. 251—Equality Cleaners & Laundry v. Florida Dry Cleaning & Laundry Board, D.C. Fla., 26 F.Supp. 705.

15. U.S.—Buck v. Gallagher, Wash., 59 S.Ct. 740, 307 U.S. 95, 83 L.Ed. 1128, reversing, D.C., Buck v. Case, 24 F.Supp. 541, appeal dismissed

an established business growing out of infringement of a trade-mark or other unfair trade practices or competition affecting the good will of plaintiff's business, the amount in controversy is the value of the good will or reputation of the business or the value of the trade-mark, and not the mere amount of damages or of lost profits.[16]

(b) Injunctions against Taxes

In a suit to enjoin the collection of a tax or license fee, the amount in controversy is generally held to be the amount of the tax demanded or which might be demanded within any time reasonably required to conclude the litigation.

In a suit to enjoin the collection of a tax or license fee, the amount in controversy is generally held to be the amount of the tax demanded or which might be demanded within any time reasonably required to conclude the litigation.[17] The fact that

Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358—Gibbs v. Buck, Fla., 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111—Kroger Grocery & Baking Co. v. Lutz, Ind., 57 S.Ct. 215, 299 U.S. 300, 81 L.Ed. 251—Missouri-Kansas-Texas R. Co. v. Williamson, D.C.Okl., 36 F.Supp. 607—Reese v. Holm, D.C.Minn., 31 F.Supp. 435—Equality Cleaners & Laundry v. Florida Dry Cleaning & Laundry Board, D.C.Fla., 26 F. Supp. 705—Hart Coal Corporation v. Sparks, D.C.Ky., 9 F.Supp. 825.

Capitalization of cost of compliance

(1) Where compliance involves a permanent annual outlay, such annual outlay may be capitalized for the purpose of determining the amount in controversy.—Western & A. R. R. v. Railroad Commission of Georgia, Ga., 43 S.Ct. 252, 261 U.S. 264, 67 L. Ed. 645, reversing, D.C., 275 F. 128.

(2) On the other hand, where the cost of compliance involves no permanency of annual outlay, but merely the expenses for a specific period, as, for example, one year, such expenses cannot be capitalized.—Kroger Grocery & Baking Co. v. Lutz, Ind., 57 S.Ct. 215, 299 U.S. 300, 81 L.Ed. 251—Dunning v. Agricultural Prorate Advisory Commission of California, D.C.Cal., 38 F.Supp. 393.

16. U.S.—Celite Corporation v. Dicalite Co., C.C.A.Cal., 96 F.2d 242, certiorari denied Celite Corporation v. Decalite Co., 59 S.Ct. 101, 305 U.S. 633, 83 L.Ed. 407—Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., C. C.A.Okl., 95 F.2d 711, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—Harvey v. American Coal Co., C.C.A.Ind., 50 F.2d 832, certiorari denied 52 S.Ct. 43, 284 U.S. 669, 76 L.Ed. 566—Del Monte Special Food Co. v. California Packing Corporation, C.C.A.Cal., 34 F.2d 774—Eternit, Inc., v. J. J. Clarke Co., D.C.La., 18 F.2d 607—Adam Hat Stores v. Scherper, D.C. Wis., 45 F.Supp. 804—Baker v. Master Printers Union of New Jersey, D.C.N.J., 34 F.Supp. 808—Miles Laboratories v. Seignious, D. C.S.C., 30 F.Supp. 549—General Shoe Corporation v. Rosen, D.C.W. Va., 29 F.Supp. 102, reversed on other grounds, C.C.A., 111 F.2d 95, rehearing denied 112 F.2d 561—American Viscose Corporation v. Crown Craft, D.C.N.Y., 28 F.Supp. 884—Great Atlantic & Pacific Tea Co. v. A. & P. Radio Stores, D.C. Pa., 20 F.Supp. 703—Household Finance Corporation of Delaware v. Household Finance Corporation of West Virginia, D.C.W.Va., 11 F. Supp. 3—Great Atlantic & Pacific Tea Co. v. A. & P. Cleaners & Dyers of Washington, D.C.Pa., 10 F.Supp. 450—Coca-Cola Co. v. Brown & Allen, D.C.Ga., 274 F. 481 —Ury v. Mazer Cigar Mfg. Co., Mo., 253 F. 551, 165 C.C.A. 221—Draper v. Skerrett, C.C.Pa., 116 F. 206.

Portion of good will threatened

Where Ohio oil company making no sales in Connecticut except oil to industrial concerns sought relief from alleged unfair competition by Connecticut corporation making gasoline sales from single filling station to residents of Hartford, Conn., "amount in controversy" for purposes of federal jurisdiction was not to be measured by total value wherever found of right for which protection was sought by oil company but by value of portion thereof that was threatened by Connecticut corporation's act.—Pure Oil Co. v. Puritan Oil Co., D.C.Conn., 39 F.Supp. 68.

Where destruction of trade-name is not threatened, the value of the trade-name is not the amount in controversy.—Winchester Repeating Arms Co. v. Butler, D.C.Ill., 128 F. 976.

17. U.S.—Clark v. Paul Gray, Inc., Cal., 59 S.Ct. 744, 306 U.S. 583, 83 L.Ed. 1001, reversing, D.C., Paul Gray, Inc. v. Ingels, 23 F.Supp. 946—Henneford v. Northern Pac. Ry. Co., Wash., 58 S.Ct. 415, 303 U. S. 17, 82 L.Ed. 619, reversing, D.C., Northern Pac. Ry. Co. v. Henneford, 15 F.Supp. 302—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Risty v. Chicago, R. I. & P. Ry. Co., S. D., 46 S.Ct. 236, 270 U.S. 378, 70 L.Ed. 641, affirming in part and reversing in part, C.C.A., 297 F. 710, affirming, D.C., Chicago, R. I. & P. Ry. Co. v. Risty, 282 F. 364—Martin v. Producers Pipe Line Co., C.C.A.Ky., 113 F.2d 817, certiorari denied Producers Pipe Line Co. v. Martin, 61 S.Ct. 397, 311 U.S. 715, 85 L.Ed. 465—Royalty Service Corporation v. City of Los Angeles, C. C.A.Cal., 98 F.2d 551—Lucas v. City of Charlotte, C.C.A.N.C., 86 F.2d 394, 109 A.L.R. 297, affirming, D.C., 14 F.Supp. 163—Grosjean v. Musser, C.C.A.La., 74 F.2d 741, reversing, D.C., Musser v. Grosjean, 7 F.Supp. 1010—Albertville Nat. Bank v. Marshall County, C.C.A. Ala., 71 F.2d 848—Neale v. Railroad Commission of State of California, D.C.Cal., 32 F.Supp. 407—Brown Motor Freight Lines v. O'Hara, D.C.Mich., 32 F.Supp. 173 —Guerra v. City of Philadelphia, D.C.Pa., 30 F.Supp. 791—Crater Lake Nat. Park Co. v. Oregon Liquor Control Commission, D.C.Or., 23 F.Supp. 316—Southern Fruit Co. v. Porter, D.C.S.C., 21 F.Supp. 1011 —Dewar v. Brooks, D.C.Nev., 16 F. Supp. 636—Cook's Estate, Trustees, v. Sheppard, D.C.Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S.Ct. 145, 293 U.S. 527, 79 L.Ed. 637—Schlosser v. Welsh, D.C.S.D., 5 F.Supp. 993—Bank of Arizona v. Howe, D.C.Ariz., 293 F. 600—Hannan v. First Nat. Bank, C.C.A.Iowa, 269 F. 527, appeal dismissed First Nat. Bank v. Hannan, 45 S.Ct. 9, 266 U.S. 638, 69 L.Ed. 482—King v. Wilson, C.C.Iowa, 14 F.Cas.7,810, 1 Dill. 555.

15 C.J. p 754 note 48.

Tax to pay bonds

(1) In suits to enjoin the collection of taxes levied to pay bonds, the amount in controversy is not the amount of the bonds but the amount of taxes levied.—Vicksburg, S. & P. Ry. Co. v. Nattin, C.C.A.La., 58 F.2d 979, affirming, D.C., 51 F.2d 1061, motion denied 54 F.2d 712.

(2) The same is true in a suit to enjoin the sale of bonds or incurring of other obligations for which taxes are to be levied.—Colvin v. City of Jacksonville, Fla., 15 S.Ct. 866, 158 U.S. 456, 39 L.Ed. 1053—Elliott v. Board of Trustees of Ovalo Rural High School Dist. No. 19, C.C. A.Tex., 53 F.2d 845—Pine v. East

failure to pay will subject plaintiff to a penalty,[18] or will result in the suppression, restriction, or impairment of his business,[19] or that property of a greater value than the jurisdictional amount will be subjected to a lien and a cloud cast on the title,[20] cannot be considered before such consequences have been incurred, since in either case the penalty or loss may be avoided by payment of the tax; but where the penalty has already been incurred and its enforcement is threatened,[21] or where plaintiff's failure to pay has already subjected his business to the suppression, restriction, or impairment consequent on nonpayment,[22] such penalties or threatened losses may be considered. Except in so far as they are likely to be demanded within the time reasonably required to conclude the litigation, taxes which may be demanded in the future, or are undetermined, unaccrued, or unspecified, cannot be taken into consideration.[23] Accordingly the fact that the tax is payable annually does not permit its value to be capitalized where no tax for future years is as yet payable, and its imposition in future years is conjectural.[24] While the taxpayer's inability to litigate the validity of the tax without risk of irreparable injury to his business is a ground for invoking the equity powers of a federal court, it affords

Bay Municipal Utility Dist., C.C.A. Cal., 16 F.2d 274—Scott v. Frazier, D.C.N.D., 258 F. 669, reversed on other grounds 40 S.Ct. 503, 253 U.S. 243, 64 L.Ed. 883—Murphy v. East Portland, C.C.Or., 42 F. 308.

(3) However, there are cases holding otherwise.—City of Ottumwa v. City Water Supply Co., Iowa, 119 F. 315, 56 C.C.A. 219, 59 L.R.A. 604—15 C.J. p 753 note 40 [b].

18. U.S.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F. Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Royalty Service Corporation v. City of Los Angeles, C.C.A.Cal., 98 F.2d 551—Grosjean v. Musser, C.C.A.La., 74 F.2d 741, reversing, D.C., Musser v. Grosjean, 7 F.Supp. 1010—Brown Motor Freight Lines v. O'Hara, D.C.Mich., 32 F.Supp. 173—Dewar v. Brooks, D.C.Nev., 16 F.Supp. 636—Cook's Estate, Trustees, v. Sheppard, D.C. Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S.Ct. 145, 293 U.S. 527, 79 L.Ed. 637.

Contra Nutt v. Ellerbee, D.C.S.C., 56 F.2d 1058—St. Louis Southwestern Ry. Co. v. Emmerson, C.C.A.Ill., 30 F.2d 322, reversing, D.C., 27 F.2d 1005, and reversed on other grounds Stratton v. St. Louis Southwestern Ry. Co., 51 S.Ct. 8, 282 U.S. 10, 75 L. Ed. 135.

19. U.S.—Henneford v. Northern Pac. Ry. Co., Wash., 58 S.Ct. 415, 303 U.S. 17, 82 L.Ed. 619, reversing, D.C., Northern Pac. Ry. Co. v. Henneford, 15 F.Supp. 302—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U. S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Royalty Service Corporation v. City of Los Angeles, C.C.A. Cal., 98 F.2d 551—Grosjean v. Musser, C.C.A.La., 74 F.2d 741, reversing, D.C., Musser v. Grosjean, 7 F.Supp. 1010—Brown Motor Freight Lines v. O'Hara, D.C.Mich., 32 F.Supp. 173.

Contra McCormick & Co. v. Brown, D.C.W.Va., 58 F.2d 994—St. Louis Southwestern Ry. Co. v. Emmerson, C.C.A.Ill., 30 F.2d 322, reversing, D. C., 27 F.2d 1005, and reversed on other grounds Stratton v. St. Louis Southwestern Ry. Co., 51 S.Ct. 8, 282 U.S. 10, 75 L.Ed. 135—White Cleaners & Dyers v. Hughes, D.C.La., 7 F. Supp. 1017—Hutchinson v. Beckham, Kan., 118 F. 399, 35 C.C.A. 333—Humes v. City of Ft. Smith, C.C.Ark., 93 F. 857, appeal dismissed 21 S.Ct. 917, 45 L.Ed. 1257.

Tax imposed on third person

(1) Where the tax is imposed on third persons with whom plaintiff has contractual relations, and whose failure to pay the tax will result in their being prohibited from continuing such relations, the impairment of plaintiff's business measures the amount in controversy.—Pavel v. Richard, D.C.La., 28 F.Supp. 992.

(2) Similarly, where the consequence of a third person's failure to pay a license fee imposed upon him is to prohibit plaintiff from dealing with him, the amount in controversy is the value of plaintiff's right to do business free from such restraint, and not merely the amount of the tax imposed.—Dugan v. Bridges, D. C.N.H., 16 F.Supp. 694, appeal dismissed 57 S.Ct. 668, 300 U.S. 684, 81 L.Ed. 887.

(3) So the amount in controversy in suit by radio broadcasting station to enjoin collection of tax on receiving sets was held to be the amount of the threatened wrong to plaintiff's business.—Station WBT v. Poulnot, D.C.S.C., 46 F.2d 671.

20. U.S.—Douglas County v. Stone, Va., 24 S.Ct. 843, 191 U.S. 558, 48 L.Ed. 801, affirming, C.C., 110 F. 812—Delaware Consol. Oil Co. v. Randall, D.C.Okl., 34 F.2d 666—Cook's Estate, Trustees, v. Sheppard, D.C.Tex., 8 F.Supp. 21, affirmed Barwise v. Sheppard, 55 S. Ct. 145, 293 U.S. 527, 79 L.Ed. 637—Purnell v. Page, C.C.N.C., 128 F. 496.

21. U.S.—Healy v. Ratta, N.H., 54 S. Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Kansas City Southern Ry. Co. v. Ogden Levee Dist., C.C.A.Ark., 15 F.2d 637—Southern Express Co. v. Mayor, etc., of Ensley, C.C.Ala., 116 F. 756.

22. U.S.—Nutt v. Ellerbe, D.C.S.C., 56 F.2d 1058—Birch v. McColgan, D.C.Cal., 39 F.Supp. 358—American Fertilizing Co. v. Board of Agriculture of North Carolina, C.C.N. C., 43 F. 609, 11 L.R.A. 179.

23. U.S.—Healy v. Ratta, N.H., 54 S. Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459—Washington & G. R. Co. v. District of Columbia, D.C., 13 S.Ct. 64, 146 U.S. 227, 36 L.Ed. 951—Royalty Service Corporation v. City of Los Angeles, C.C.A.Cal., 98 F.2d 551—Risty v. Chicago, R. I. & P. Ry. Co., C.C.A. S.D., 297 F. 710, affirming, D.C., Chicago, R. I. & P. Ry. Co. v. Risty, 282 F. 364, and certiorari denied Risty v. Chicago, M. & St. P. R. Co., 45 S.Ct. 122, 266 U.S. 622, 69 L.Ed. 473, dismissal of appeal denied Risty v. Northern States Power Co., 45 S.Ct. 229, 266 U.S. 622, 69 L. Ed. 473, affirmed in part and reversed in part on other grounds 46 S.Ct. 236, 270 U.S. 378, 70 L.Ed. 641.

24. U.S.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U. S. 701, 77 L.Ed. 1459—Southern Fruit Co. v. Porter, D.C.S.C., 21 F. Supp. 1011—Cook's Estate, Trustees, v. Sheppard, D.C.Tex., 8 F. Supp. 21, affirmed Barwise v. Sheppard, 55 S.Ct. 145, 293 U.S. 527, 79 L.Ed. 637.

no measure of the amount in controversy.[25] An exception to the rule that the amount of the disputed tax is the amount in controversy has been recognized in cases where the threatened tax would constitute an impairment of the obligation of a contract exempting plaintiff from taxation, in which case the test is the value of such contract right.[26]

(c) Insurance, Pensions, Workmen's Compensation, Etc.

Where a suit involving an insurance policy raises an issue as to its validity, the amount in controversy is the value of the policy, which may be the face amount as in the case of a life policy with a fixed liability, or the estimated value where the amount of liability varies with certain contingencies; but, where a suit is brought merely to recover accrued liability and no justiciable issue is raised as to the future liability of the insured, only the amount claimed is in controversy. Similar principles apply in cases involving pensions, workmen's compensation, etc.

In any suit involving the validity of an insurance policy, as, for example, in a suit by an insurer to cancel a life, health, or accident policy or to declare its invalidity, or in a suit by insured to enjoin its cancellation or to reinstate one that has been canceled or for a judgment declaring its validity, the amount in controversy is the value of the policy, measured by the amount of the probable obligations of insurer thereunder, even though the exact amount of such obligations may vary with certain contingencies.[27] So, the amount payable in case of death of insured,[28] as well as disability benefits for which insurer may become liable,[29] and the future premiums, payment of which is required to be waived during periods of disability,[30] are part thereof. Where the suit involves a life policy which definitely fixes the amount of liability, the face amount of the policy is involved in the controversy.[31] It has even been held that the face amount of the policy is in controversy where the amount which insurer may become obligated to pay varies with certain contingencies, as in the case of a policy containing special provisions relating to double indemnity, accidental death, or disability payments;[32] but the greater weight of authority holds that in the latter situation the test is not the maximum contingent liability,[33] although that, as well as the min-

25. U.S.—Gypsy Oil Co. v. Oklahoma Tax Commission, Okl., 54 S.Ct. 779, 292 U.S. 611, 78 L.Ed. 1471, amending 54 S.Ct. 772, 292 U.S. 605, 78 L.Ed. 1467, and modifying, D.C., 6 F.Supp. 6—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459.

26. U.S.—Schlosser v. Welsh, D.C.S.D., 5 F.Supp. 993.
15 C.J. p 754 note 49.

27. U.S.—Ballard v. Mutual Life Ins. Co. of New York, C.C.A.Fla., 109 F.2d 388—Mutual Ben. Health & Accident Ass'n v. Fortenberry, C.C.A.Miss., 98 F.2d 570—Stephenson v. Equitable Life Assur. Soc. of U. S., C.C.A.Va., 92 F.2d 406—Bell v. Philadelphia Life Ins. Co., C.C.A.N.C., 78 F.2d 322—Mutual Life Ins. Co. of New York v. Moyle, D.C.S.C., 34 F.Supp. 127—Oshry v. Mutual Life Ins. Co. of New York, D.C.Mass., 27 F.Supp. 237—Lester v. Prudential Ins. Co. of America, D.C.Mass., 24 F.Supp. 54—Shabotzky v. Massachusetts Mut. Life Ins. Co., D.C.N.Y., 21 F.Supp. 166—Davies v. Sun Life Assur. Co. of Canada, D.C.Wash., 2 F.Supp. 955.

Death of insured pending suit

An action to cancel a life and health policy was not dismissible after insured's death pending suit on ground that total amount recoverable under policy was less than three thousand dollars where the validity of a contract for five thousand dollars of accident insurance as well as health and disability benefits was involved, since the value of an insurance policy which itself is in controversy determines the question of jurisdictional amount.—Mutual Ben. Health & Accident Ass'n v. Teal, D.C.S.C., 34 F.Supp. 714.

28. U.S.—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872—Jensen v. New York Life Ins. Co., C.C.A.Neb., 50 F.2d 512, adhered to 59 F.2d 957, revoking previous order of remand and dismissing appeal from decree on remand, certiorari denied 53 S.Ct. 80, 287 U.S. 626, 77 L.Ed. 543—New York Life Ins. Co. v. Swift, C.C.A.Miss., 38 F.2d 175—Rydstrom v. Massachusetts Accident Co. D.C.Md., 25 F.Supp. 359—Ray v. New York Life Ins. Co., D.C.La., 20 F.Supp. 497.

29. U.S.—Ballard v. Mutual Life Ins. Co. of New York, C.C.A.Fla., 109 F.2d 388—Mutual Ben. Health & Accident Ass'n v. Fortenberry, C.C.A.Miss., 98 F.2d 570—Pacific Mut. Life Ins. Co. of California v. Parker, C.C.A.S.C., 71 F.2d 872—Provident Mut. Life Ins. Co. of Philadelphia v. Parsons, C.C.A.N.C., 70 F.2d 863, certiorari denied Parsons v. Provident Mut. Life Ins. Co., 55 S.Ct. 95, 293 U.S. 582, 79 L.Ed. 678—Massachusetts Protective Ass'n v. Kittles, C.C.A.Ga., 2 F.2d 211, reversing, D.C., 295 F. 572—Mutual Life Ins. Co. of New York v. Harris, D.C.La., 32 F.Supp. 90—Connecticut Gen. Life Ins. Co. v. Cohen, D.C.N.Y., 27 F.Supp. 735—Lester v. Prudential Ins. Co. of America, D.C.Mass., 24 F.Supp. 54.

Nonliability in certain contingencies does not necessarily show absence of jurisdictional amount, and basically this rule is no different from the rule in cases of life insurance policies where the amount is fixed, for even in the latter type of cases, although death is inevitable, there are still contingencies which would absolve insurer from liability, as for example, failure to pay premiums.—Penn Mut. Life Ins. Co. of Philadelphia v. Joseph, D.C.Minn., 5 F.Supp. 1003.

30. U.S.—Stoner v. New York Life Ins. Co., Mo., 61 S.Ct. 336, 311 U.S. 464, 85 L.Ed. 284, reversing, C.C.A., New York Life Ins. Co. v. Stoner, 109 F.2d 874, certiorari granted Stoner v. New York Life Ins. Co., 61 S.Ct. 8, 311 U.S. 628, 85 L.Ed. 399, rehearing denied 61 S.Ct. 609, 312 U.S. 713, 85 L.Ed. 1144.

31. U.S.—New York Life Ins. Co. v. Guyes, D.C.N.C., 22 F.Supp. 454, affirmed, C.C.A., Guyes v. New York Life Ins. Co., 99 F.2d 393—Equitable Life Assur. Soc. of U. S. v. Templeton, D.C.S.C., 19 F.Supp. 485—Massachusetts Protective Ass'n v. Stephenson, D.C.Ky., 5 F.Supp. 586—New York Life Ins. Co. v. Jones, D.C.N.C., 2 F.Supp. 600.

32. U.S.—Massachusetts Protective Ass'n v. Stephenson, D.C.Ky., 5 F.Supp. 586.

33. U.S.—Mutual Life Ins. Co. v. Thompson, D.C.Va., 27 F.2d 753.

imum amount, is a factor to be considered in determining the probable amount of liability,[34] as is the life expectancy of insured.[35] It has also been held that the reserve which insurer must set up to cover the contingent liabilities may be considered as part of the amount in controversy,[36] although this has been held not to be the proper test.[37] Of course, amounts claimed to have accrued by reason of past disabilities may be added in determining the amount in controversy[38] as well as the amount of premiums paid to insurer,[39] and the amount of benefits already paid to insured and sought to be recovered.[40]

On the same principles as those involved in insurance cases it has been held that in a suit directly involving the future rights of a widow under a pension certificate[41] or under a workmen's compensation statute,[42] the maximum, or at least probable, amount of future payments is part of the amount in controversy, despite the fact that marriage or death would end the right to payments thereafter.

Where a suit is brought to recover benefits claimed already to have accrued,[43] plus the statutory penalty for insurer's refusal to pay on demand,[44] or, whether separately or in connection with a demand for payment of benefits by insurer, for the amount of premiums paid after the alleged disability,[45] but presents no justiciable claim directly affecting the future rights of insured or obligations of insurer under the policy, the total of the amounts so claimed is the amount in controversy and the amount for which insurer may become liable cannot be included, even though the judgment sought would operate as an estoppel or be res judicata against insurer in a subsequent action,[46] and, a fortiori, where it would not op-

Unexercised option to increase

In a suit to cancel a life insurance policy, the face amount of which was less than the jurisdictional amount, the amount in controversy was not increased by the fact that the policy gave insured an option to increase the amount of the policy.—Travelers' Ins. Co. of Hartford, Conn., v. Rabinowitz, D.C.Md., 9 F.Supp. 353.

34. U.S.—Mutual Life Ins. Co. v. Thompson, D.C.Va., 27 F.2d 753.

35. U.S.—Ballard v. Mutual Life Ins. Co. of New York, C.C.A.Fla., 109 F.2d 388—Mutual Ben. Health & Accident Ass'n v. Fortenberry, C.C.A.Miss., 98 F.2d 570—Mutual Life Ins. Co. of New York v. Harris, D.C.La., 32 F.Supp. 90—Connecticut General Life Ins. Co. v. Cohen, D.C.N.Y., 27 F.Supp. 735—Penn Mut. Life Ins. Co. of Philadelphia v. Joseph, D.C.Minn., 5 F.Supp. 1003.

36. U.S.—Connecticut General Life Ins. Co. v. Cohen, D.C.N.Y., 27 F.Supp. 735—Struble v. Connecticut Mut. Life Ins. Co. of Hartford, D.C.Fla., 20 F.Supp. 779—Penn Mut. Life Ins. Co. of Philadelphia v. Joseph, D.C.Minn., 5 F.Supp. 1003.

37. U.S.—Oshry v. Mutual Life Ins. Co. of New York, D.C. Mass., 27 F.Supp. 237—Lester v. Prudential Ins. Co. of America, D.C.Mass., 24 F.Supp. 54.

38. U.S.—Massachusetts Protective Ass'n v. Kittles, C.C.A.Ga., 2 F.2d 311, reversing, D.C., 295 F. 572—Connecticut General Life Ins. Co. v. Cohen, D.C.N.Y., 27 F.Supp. 735—Ray v. New York Life Ins. Co., D.C.La., 20 F.Supp. 497.

39. U.S.—Connecticut General Life Ins. Co. v. Cohen, D.C.N.Y., 27 F.Supp. 735.

40. U.S.—Massachusetts Protective Ass'n v. Kittles, C.C.A.Ga., 2 F.2d 311 reversing, D.C., 295 F. 572—Connecticut General Life Ins. Co. v. Cohen, D.C.N.Y., 27 F.Supp. 735—Rydstrom v. Massachusetts Accident Co., D.C.Md., 25 F.Supp. 359.

41. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Pinkston, Ohio, 55 S.Ct. 1, 293 U.S. 96, 79 L.Ed. 219, affirming, C.C.A., Pinkston v. Brotherhood of Locomotive Firemen and Enginemen, 69 F.2d 600, certiorari granted Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 54 S.Ct. 866, 292 U.S. 621, 78 L.Ed. 1477, and rehearing denied 55 S.Ct. 211, 293 U.S. 632, 79 L.Ed. 717.

42. U.S.—Franzen v. E. I. Du Pont De Nemours & Co., D.C.N.J., 36 F. Supp. 375.

43. U.S.—Wright v. Mutual Life Ins. Co. of New York, C.C.A.Ala., 19 F.2d 117, reversing, D.C., 3 F.2d 501, certiorari granted Mutual Life Ins. Co. of New York v. Wright, 48 S.Ct. 30, 275 U.S. 513, 72 L.Ed. 400, and affirmed 48 S.Ct. 323, 276 U.S. 602, 72 L.Ed. 726—Asbury v. New York Life Ins. Co., D.C.Ky., 45 F.Supp. 513—Light v. Connecticut Gen. Life Ins. Co., D.C.La., 35 F.Supp. 691—Shabotzky v. Massachusetts Mut. Life Ins. Co., D.C.N.Y., 21 F.Supp. 166—Duke v. State Life Ins. Co., D.C.Tex., 4 F.Supp. 138—La Vecchia v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., D.C.N.Y., 1 F.Supp. 588.

Effect of answer alleging lapse of policy

In action solely to recover seven hundred fifty dollars as monthly disability payments allegedly due under two thousand five hundred dollars life policy covering permanent total disability, jurisdictional amount could not be attained by adding face of policy to such payments, even though answer alleged lapse of policy for nonpayment of premiums prior to disability.—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F.2d 657.

Admission of partial liability

The claim of one suing for five thousand dollars payable under life insurance policy issued by foreign corporation was for amount within federal court's jurisdiction, even if defendant's offer to pay three thousand dollars in full settlement of claim was equivalent to acknowledgment of unconditional liability to such extent.—Morrow v. Mutual Casualty Co. of Chicago, D.C.Ky., 20 F. Supp. 193.

Action to reform and enforce

In an action to reform a fire policy, and to enforce it as reformed, where the policy was for ten thousand dollars and twenty thousand dollars and the alleged fire loss of insured's customers was over six thousand dollars, the entire amount of the loss was involved.—Morris v. Franklin Fire Ins. Co. of Philadelphia, Pa., C.C.A.Cal., 130 F.2d 553.

44. U.S.—Columbian Nat. Life Ins. Co. v. Harrison, C.C.A.Tenn., 12 F.2d 986.

Contra, Merrigan v. Metropolitan Life Ins. Co., D.C.La., 43 F.Supp. 209.

45. U.S.—Asbury v. New York Life Ins. Co., D.C.Ky., 45 F.Supp. 513—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441—Small v. New York Life Ins. Co., D.C.Ala., 18 F.Supp. 820.

46. U.S.—Wright v. Mutual Life Ins. Co. of New York, C.C.A.Ala., 19 F.2d 117, reversing, D.C., 3 F.2d 501, certiorari granted Mutual Life Ins. Co. of New York v. Wright, 48 S.Ct. 30, 275 U.S. 513, 72 L.Ed. 400, and affirmed 48 S.Ct. 323, 276 U.S. 602, 72 L.Ed. 726—La Vecchia v. Connecticut Mut. Life Ins. Co. of

erate as an estoppel or be res judicata.[47] In such case the amount in controversy is not increased by the amount of reserve required to be maintained against the policy,[48] although there is authority to the contrary,[49] by that portion of the annual premium covering the period between the death of insured and the end of the premium year,[50] or by a prayer for a declaration that penalties shall attach to future delays in payment[51] or that annual premiums in the future need not be paid as long as total and permanent disability continues.[52] The same rules have been applied in a suit brought by insurer for a declaratory judgment as to its liability for past disability benefits, where there is no justiciable issue as to the validity of the policy or as to insurer's liability for future payments.[53] In such case, the life expectancy of insured is no factor.[54]

Indemnity insurance. In a suit by an indemnity insurer against insured for a declaratory judgment as to insurer's duty and obligations with respect to an alleged cause of action by a third person against insured, the full amount of possible liability under the policy,[55] plus the expense of defending the third person's action,[56] comprises the amount in controversy.

Interpleader. Under the statutory provision giving district courts jurisdiction of bills of interpleader or suits in the nature of interpleader where two or more adverse claimants, citizens of different states, are claiming to be entitled to an insurance policy of the value or amount of five hundred dollars or more, or to the benefits arising by virtue of such policy, or to property or money of the value of five hundred dollars in the custody or possession of the company, the court has jurisdiction of such a suit where the amount for which insurer is liable equals or exceeds five hundred dollars,[57] even though the face amount of the policy is less,[58] or where several policies, each for less than five hundred dollars, have an aggregate face value exceeding that sum.[59]

(d) Actions Involving Title and Possession; Liens

In ejectment the amount in controversy is the value of the interest in the land to recover which the suit was brought, and in an action to quiet title or to remove a cloud, it is the value of as much of plaintiffs' property as is affected by the adverse claim. In a suit to foreclose a lien the amount in controversy is the amount sought to be recovered through the lien.

In ejectment the value of the matter in dispute is that of the interest in the land, to recover which the suit was brought, although defendant claims a lesser interest therein,[60] together with any special dam-

Hartford, Conn., D.C.N.Y., 1 F. Supp. 588.

47. U.S.—Asbury v. New York Life Ins. Co., D.C.Ky., 45 F.Supp. 513—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441.

48. U.S.—Asbury v. New York Life Ins. Co., D.C.Ky., 45 F.Supp. 513—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441—Shabotzky v. Massachusetts Mut. Life Ins. Co., D.C.N.Y., 21 F.Supp. 166—Small v. New York Life Ins. Co., D.C.Ala., 18 F.Supp. 820.

49. U.S.—Enzor v. Jefferson Standard Life Ins. Co., D.C.S.C., 14 F. Supp. 677.

50. U.S.—Home Life Ins. Co. v. Sipp, C.C.A.N.J., 11 F.2d 474.

51. U.S.—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441.

52. U.S.—Asbury v. New York Life Ins. Co., D.C.Ky., 45 F. 513—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441.

53. U.S.—Mutual Life Ins. Co. of New York v. Moyle, C.C.A.S.C., 116 F.2d 434, affirming, D.C., 34 F. Supp. 127—Travelers Ins. Co. v. Wechsler, D.C.Fla., 34 F.Supp. 721—Travelers Ins. Co. v. Wechsler, D.C.Fla., 34 F.Supp. 717.

54. U.S.—Travelers Ins. Co. v. Wechsler, D.C.Fla., 34 F.Supp. 721—Travelers Ins. Co. v. Wechsler, D.C.Fla., 34 F.Supp. 717—Mutual Life Ins. Co. of New York v. Moyle, D.C.S.C., 34 F.Supp. 127, affirmed, C.C.A., 116 F.2d 434.

55. U.S.—Ætna Casualty & Surety Co. v. Yeatts, C.C.A.Va., 99 F.2d 665—U. S. Fidelity & Guaranty Co. v. Pierson, C.C.A.8, 97 F.2d 560, reversing, D.C., 21 F.Supp. 678.

The amount claimed by the injured person or the amount which he may claim does not control, the test being the maximum possible liability under the policy.—C. E. Carnes & Co. v. Employers' Liability Assur. Corporation, Limited, of London, England, C. C.A.La., 101 F.2d 739, affirming, D.C., Employers' Liability Assur. Corporation, Limited, of London, England, v. C. E. Carnes & Co., 24 F.Supp. 128—New Century Casualty Co. v. Chase, D.C.W.Va., 39 F.Supp. 768—Builders & Manufacturers Mut. Casualty Co. v. Paquette, D.C.Me., 21 F.Supp. 858—Travelers Ins. Co. v. Young, D.C. N.J., 18 F.Supp. 450—Commercial Casualty Ins. Co. v. Humphrey, D.C.Tex., 13 F.Supp. 174.

Claim that fire policy covers third persons' losses
U.S.—Pacific Fire Ins. Co. v. Reiner, D.C.La., 45 F.Supp. 703.

56. U.S.—U. S. Fidelity & Guaranty Co. v. Pierson, C.C.A.Ark., 97 F.2d 560, reversing, D.C., 21 F.Supp. 678—New Century Casualty Co. v. Chase, D.C.W.Va., 39 F.Supp. 768.

57. U.S.—Metropolitan Life Ins. Co. v. Skov, D.C.Or., 45 F.Supp. 140.

58. U.S.—Metropolitan Life Ins. Co. v. Segaritis, D.C.Pa., 20 F.Supp. 739.

"Value" and "amount"
Within the meaning of the statute the word "value" means the present or cash surrender value, and the word "amount" the face amount or amount payable in case of death.—Metropolitan Life Ins. Co. v. Mason, D.C.Pa., 21 F.Supp. 704, vacated on other grounds, C.C.A., 98 F.2d 668.

59. U.S.—Metropolitan Life Ins. Co. v. Dunne, D.C.N.Y., 2 F.Supp. 165.

The fact that one party claims only the cash surrender value of several policies, the sum of such values being less than five hundred dollars, does not defeat jurisdiction where the other party disputes such claim and himself claims ownership of the policies.—Metropolitan Life Ins. Co. v. Mason, C.C.A.Pa., 98 F.2d 668, vacating, D.C., 21 F.Supp. 704.

60. U.S.—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 109 A.L.R. 1179.
15 C.J. p 761 note 2.

ages that are alleged and can be recovered in the suit.[61]

In a suit to quiet title or to remove a cloud therefrom, the value of the matter in controversy is that of as much of plaintiff's property as is affected by the adverse claim,[62] or, as otherwise stated, the difference between the value of the property without the cloud and the value with the cloud on it.[63] Where the alleged cloud on the title consists of tax liens, the amount in controversy has been held to be the amount of the tax and not the value of the property subject to the lien,[64] but it has also been held that the value of the property governs.[65]

In a suit to foreclose a mortgage or other lien, the amount in dispute, for the purpose of determining the jurisdiction, is the amount sought to be recovered through the lien,[66] together with any damages not covered by the lien, for which judgment is prayed;[67] but it has also been held that in such an action the amount demanded and the value of the property on which the lien is asserted must each exceed the jurisdictional amount.[68]

Actions for the mere possession of realty involve only the value of the possession.[69]

Possession of personal property. In an action or proceeding to recover the possession of personal property, it seems that the value of the property sought by plaintiff or by claimant of the same, is that of the matter in dispute.[70]

(e) Other Proceedings

In a creditor's or stockholder's suit for the adminis-

Amount of mortgage

Jurisdiction of federal court in action in ejectment to try title to realty was unaffected by amount of outstanding mortgage or deed of trust. —Peterson v. Sucro, C.C.A.N.C., 93 F.2d 878, 114 A.L.R. 890.

Suit to establish trust

In action against surviving widow of deceased guardian to establish trust in favor of infants in realty purchased by the guardian with infants' money, the "matter in controversy" for purpose of establishing federal court jurisdiction was the realty purchased by guardian and not amount of infants' money received by him.—Catanzaritti v. Bianco, D.C. Pa., 30 F.Supp. 873.

Several defendants

Where several defendants in action in ejectment to try title to realty were in privity, claiming under a common source of title, and making a common defense, with result that plaintiff's claim was disputed by all defendants as to entire property in controversy, value of entire property, and not value of respective defendants' interests, constituted "amount in controversy."—Peterson v. Sucro, C.C.A.N.C., 93 F.2d 878, 114 A.L.R. 890.

61. U.S.—Way v. Clay, C.C.W.Va., 140 F. 352.

62. U.S.—Peterson v. Sucro, C.C.A.N. C., 93 F.2d 878, 882, 114 A.L.R. 890, citing **Corpus Juris**—State Life Ins. Co. of Indianapolis, Ind., v. Wichita County Water Improvement Dist. No. 2, D.C.Tex., 18 F.Supp. 834 —Frontera Transportation Co. v. Abaunza, C.C.A.La., 271 F. 199—Connecticut General Life Ins. Co. v. Welden, D.C.Ala., 246 F. 265.

15 C.J. p 762 note 5.

Quieting of title as collateral effect

A suit under Kentucky statute for injunction to prevent trespass on and to restrain assertion of claim against land, the nature and extent of which claim was undisclosed, was not a "suit to quiet title," except in a collateral or incidental aspect; hence the value of the land did not determine jurisdiction.—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F.Supp. 76.

How value determined

(1) In determining the value of land, the value in its actual situation and use is controlling, and not its simple value as land.—Griffith v. Enochs, D.C.La., 43 F.Supp. 352—New Jersey Federation of Young Men's and Young Women's Hebrew Ass'ns v. Hoffman, D.C.Pa., 25 F. Supp. 687.

(2) Thus, in an action involving title to land held under an oil lease and producing oil, the amount involved was not merely the superficial value of the land, but the court was required to consider the mineral value thereof, and could also capitalize the annual rental, in determining the amount involved.—Griffith v. Enochs, supra.

Adjudication of water priorities

In suits to quiet title and adjudicate water priorities, jurisdictional "matter in controversy" is not any separate, unidentified, undivided claim of one owner to segregate and use portion of waters, but is aggregate of uses.—Dern v. Tanner, D.C. Mont., 60 F.2d 626.

63. U.S.—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F. Supp. 76.

64. U.S.—State Life Ins. Co. of Indianapolis, Ind., v. Wichita County Water Improvement Dist. No. 2, D.C.Tex., 18 F.Supp. 834—Shewalter v. Lexington, C.C.Mo., 143 F. 161—Purnell v. Page, C.C.N.C., 128 F. 496—Douglas County v. Stone, C.C.Va., 110 F. 812, affirmed 24 S.Ct. 843, 191 U.S. 557, 48 L. Ed. 301.

65. U.S.—Jones v. Box Elder County, C.C.A.Utah, 52 F.2d 340, certiorari denied 52 S.Ct. 456, 285 U.S. 555, 76 L.Ed. 944.

66. U.S.—Lowenthal v. Georgia Coast & P. R. Co., D.C.Ga., 233 F. 1010, affirmed 238 F. 795, 151 C.C. A. 645—Less v. English, Ark., 85 F. 471, 29 C.C.A. 275.

15 C.J. p 762 note 13.

In a suit to foreclose a tax lien, the value of the land is immaterial. —City of Pawhuska, Okl., ex rel. Graham v. Midland Valley R. Co., C.C.A. Okl., 33 F.2d 487.

67. U.S.—Lilienthal v. McCormick, Or., 117 F. 89, 54 C.C.A. 475

68. U.S.—Miller v. First Service Corporation, C.C.A.N.D., 84 F.2d 680, 109 A.L.R. 1179.

69. U.S.—Pioneer Coal Co. v. Bush, D.C.Ky., 16 F.Supp. 117, appeal dismissed, C.C.A., Kentucky-Jellico Coal Co. of Delaware v. Chitwood, 99 F.2d 1008—Battle v. Atkinson, C.C.Ark., 115 F. 384, affirmed 24 S.Ct. 845, 191 U.S. 559, 48 L.Ed. 302.

15 C.J. p 762 note 9.

70. U.S.—Peyton v. Robertson, Va., 9 Wheat. 527, 6 L.Ed. 151.

"In replevin . . . if the action is brought as a means of trying the title to property, the value of the property replevied is the matter in dispute; but if the replevin is of property distrained for rent, the amount for which avowry is made is the real matter in dispute, and the limit of jurisdiction."—Gibson v. Shufeldt, Va., 7 S.Ct. 1066, 1067, 122 U.S. 27, 30 L.Ed. 1083.

Special damages

The amount involved is not enlarged by a claim of special damages for injury to plaintiff's business, when the state practice would not allow the recovery of the same.—Vance v. W. A. Vandercook Co., S.C., 18 S.Ct. 645, 170 U.S. 468, 42 L.Ed. 1111, reversing, C.C., 80 F. 786.

tration of assets, if the real purpose of the suit is the enforcement of plaintiff's individual claim or interest, the amount thereof governs, but, if the suit is brought in the right of the corporation or all creditors and the real matter in controversy is the administration of assets, the amount of the assets controls.

Creditor's action. In a suit in the nature of a creditor's action asking for the distribution of assets or for the appointment of a receiver to conserve or distribute the assets, the amount in controversy is generally held to be the amount of plaintiff's claim, and not the amount of the assets.[71] However, in a number of cases, especially earlier ones, it has been held that, where the creditor sues on behalf of himself and the other creditors for the administration of the fund, the amount of the fund governs,[72] and a number of more recent cases have held that, where the real matter in controversy is the administration of defendant's assets and not merely the enforcement of a creditor's claim as a lien against the assets, the amount of the assets controls.[73] In a suit by a creditor to restrain a receiver of the debtor from paying out dividends on an alleged false claim, the amount in controversy is the amount of complainant's own claim, and not the amount of the dividends, payment of which is sought to be enjoined.[74]

Stockholder's action. Where a stockholder sues in the right of the corporation, the amount in controversy is the value of the right of the corporation which it is sought to protect and not the value of complainant's interest therein.[75] Thus it has been held that in a stockholder's suit for the appointment of a receiver for the purpose of winding up the affairs of the corporation, or of conserving or distributing its assets, the amount in controversy is the value of the entire corporate assets,[76] although in some cases jurisdiction has been determined by the value of complainant's stock.[77] On the other hand, where a stockholder's suit is in reality nothing more than an attempt to enforce or protect his own rights, the value of his stock, and not the value of the corporate assets, governs.[78]

In a suit to set aside a fraudulent conveyance, the value of the property transferred has been held to be the amount in controversy;[79] but it has also been held that in a creditor's suit jurisdiction is determined by the amount claimed by the creditor rather than by the value of the property held by the debtor's alleged fraudulent assignee.[80]

d. How Determined

(1) In general
(2) Effect of pleadings
(3) Evidence

(1) In General

The amount involved must be determined with reference to the situation existing at the time of the com-

71. U.S.—Lion Bonding & Surety Co. v. Karatz, 43 S.Ct. 480, 262 U.S. 77, 67 L.Ed. 871, reversing, C.C.A. Minn., 280 F. 532, 281 F. 1021, and, C.C.A.Neb., Hertz v. Lion Bonding & Surety Co., 280 F. 540, certiorari granted Department of Trade and Commerce of State of Nebraska v. Hertz, 43 S.Ct. 89, 260 U.S. 713, 67 L.Ed. 477, and appeal dismissed 43 S.Ct. 90, 260 U.S. 696, 67 L.Ed. 468, and motion denied 43 S.Ct. 641, 262 U.S. 640, 67 L.Ed. 1151, and 43 S.Ct. 701, 262 U.S. 733, 67 L. Ed. 1206—Handley v. Stutz, Tenn., 11 S.Ct. 117, 137 U.S. 366, 34 L. Ed. 706—Bruce v. Manchester & K. R. R., N.H., 6 S.Ct. 849, 117 U.S. 514, 29 L.Ed. 990—Corcoran v. Royal Development Co., C.C.A.N.Y., 121 F.2d 957, affirming, D.C., 35 F. Supp. 400—Pianta v. H. M. Reich Co., C.C.A.N.Y., 77 F.2d 888—First Nat. Bank of Roselle v. Lafayette Nat. Bank of Brooklyn, D.C.N.Y., 40 F.Supp. 480—Paul v. Craemer, D.C.Cal., 24 F.Supp. 353—Parsons v. Detroit & Canada Tunnel Co., D.C.Mich., 15 F.Supp. 986.

72. U.S.—Atwater v. Community Fuel Corporation, D.C.N.Y., 291 F. 686—Jones v. Mutual Fidelity Co., C.C.Del., 123 F. 506—Putnam v. Timothy Dry-Goods & Carpet Co., C.C.Tenn., 79 F. 454.

Representative or class actions generally see supra § 310 c (3).

73. U.S.—Boesenberg v. Chicago Title & Trust Co., C.C.A.Ill., 128 F. 2d 245, 141 A.L.R. 565—King v. Kansas City Police Relief Ass'n, D.C.Mo., 60 F.2d 547—U. S. Radiator Corporation v. Doody, D.C.Pa., 5 F.Supp. 471—McAtamney v. Commonwealth Hotel Const. Corporation, D.C.N.Y., 296 F. 500.

74. U.S.—Smithson v. Hubbell, C.C. Wash., 81 F. 593.

75. U.S.—Johnson v. Ingersoll, C.C. A.Ill., 63 F.2d 86—Haynes v. Fraternal Aid Union, D.C.Kan., 34 F. 2d 305—Hutchinson Box Board & Paper Co. v. Van Horn, C.C.A.Kan., 299 F. 424—Larabee v. Dolley, C.C. Kan., 175 F. 365, reversed on other grounds Dolley v. Abilene Nat. Bank, 179 F. 461, 102 C.C.A. 607, 32 L.R.A.,N.S., 1065, affirmed Assaria State Bank v. Dolley, 31 S.Ct. 189, 219 U.S. 121, 55 L.Ed. 123.

15 C.J. p 763 note 20.

Nonstock corporation

The rule stated in the text applies to a suit brought by a member of a nonstock corporation to enjoin ultra vires acts.—McKee v. Chautauqua Assembly, C.C.N.Y., 124 F. 808, affirmed 130 F. 536, 65 C.C.A. 8.

76. U.S.—Kelly v. Alabama-Quenelda Graphite Co., D.C.Ala., 34 F.2d 790—Klein v. Wilson & Co., D.C. N.J., 7 F.2d 772, affirmed, C.C.A., 7 F.2d 777—Kent v. Honsinger, C. C.N.Y., 167 F. 619.

15 C.J. p 763 note 26.

77. U.S.—Robinson v. West Virginia Loan Co., C.C.W.Va., 90 F. 770.

15 C.J. p 763 note 25.

78. U.S.—Haas v. Burton, C.C.A.La., 25 F.2d 938, certiorari denied Burton v. Haas, 49 S.Ct. 18, 278 U.S. 612, 73 L.Ed. 537—Davis v. McFarland, C.C.A.Tex., 15 F.2d 612, certiorari denied 47 S.Ct. 457, 273 U.S. 754, 71 L.Ed. 875—Woods v. Thompson, C.C.A.Ill., 14 F.2d 951, followed in Illinois Banker's Life Ass'n v. Farris, C.C.A.Ill., 21 F. 2d 1014, certiorari denied Farris v. Illinois Banker's Life Ass'n, 48 S. Ct. 301, 276 U.S. 621, 72 L.Ed. 735—Ryan v. Seaboard & R. R. Co., C. C.Va., 89 F. 397.

15 C.J. p 763 note 24.

79. U.S.—Simon v. House, C.C.Tex., 46 F. 317.

80. U.S.—Alkire Grocery Co. v. Richesin, C.C.Ark., 91 F. 79—Werner v. Murphy, C.C.N.J., 60 F. 769.

mencement of the suit, and subsequent events changing the amount can neither confer nor divest jurisdiction.

The amount involved must be determined with reference to the situation existing at the time of the commencement of the suit,[81] and subsequent events changing the amount can neither confer nor divest jurisdiction.[82] Thus it is usually held that, where an action is originally brought for an amount which is within the jurisdiction of the court, jurisdiction is not defeated by the fact that through subsequent events the amount involved is reduced to an extent which makes it less than the jurisdictional amount.[83]

(2) Effect of Pleadings

The amount demanded in good faith, or the alleged value of the property or right, is, in the first instance, regarded as the amount or value in controversy, even though there appears to be a valid defense to the action; but, if it appears that such demand was colorable, fictitious, or made in bad faith, the real amount involved governs. Subsequent pleadings cannot ordinarily divest the court's jurisdiction, although they may in some cases supply the jurisdictional amount otherwise lacking.

Primarily the amount in controversy must be determined from the initial pleading.[84] Unless the law gives a different rule[85] the specific amount demanded or claimed in good faith by plaintiff in an action on a money demand or sounding in damages,[86] or the alleged value of the property or right

81. U.S.—Royalty Service Corporation v. City of Los Angeles, C.C.A. Cal., 98 F.2d 551—Ford, Bacon & Davis v. Volentine, C.C.A.Miss., 64 F.2d 800—Cohn v. Cities Service Co., C.C.A.N.Y., 45 F.2d 687—Mitchell v. Mutual Life Ins. Co. of New York, D.C.La., 31 F.Supp. 441—Lester v. Prudential Ins. Co. of America, D.C.Mass., 24 F.Supp. 54—Hart Coal Corporation v. Sparks, D.C. Ky., 9 F.Supp. 825—Mutual Life Ins. Co. v. Rose, D.C.Ky., 294 F. 122.

Effect of past situation

Where plaintiff's property was assessed for six thousand fifty-two dollars and five cents, but at time of suit there was lien for only three hundred twenty dollars and eighty cents, federal court had no jurisdiction of suit to restrain collection of assessment.—Adam Schumann Associates v. City of New York, C.C.A.N.Y., 40 F.2d 216, certiorari denied 51 S.Ct. 20, 282 U.S. 838, 75 L.Ed. 745.

82. U.S.—Royalty Service Corporation v. City of Los Angeles, C.C.A. Cal., 98 F.2d 551—Ford, Bacon & Davis v. Volentine, C.C.A.Miss., 64 F.2d 800—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953 —Mutual Life Ins. Co. v. Rose, D. C.Ky., 294 F. 122.

Intervention of another party

Right to intervene presupposes an action duly brought, so that, if jurisdiction is lacking at commencement of suit, because amount involved is insufficient, it cannot be aided by intervention of a creditor with a sufficient claim; hence the court is without power at a later time to cure such lack of jurisdiction by nunc pro tunc order directing intervention of creditor with claim exceeding jurisdictional amount, and such intervention cannot be regarded as an original proceeding for the purpose of sustaining jurisdiction from the date petition to intervene was granted.—Pianta v. H. M. Reich Co., C.C. A.N.Y., 77 F.2d 888.

83. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S. Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing 90 F.2d 229, certiorari granted 58 S.Ct. 38, 302 U.S. 669, 82 L.Ed. 516—New Century Casualty Co. v. Chase, D.C.W.Va., 39 F. Supp. 768—Mutual Ben. Health & Accident Ass'n v. Teal, D.C.S.C., 34 F.Supp. 714—Mutual Life Ins. Co. v. Rose, D.C.Ky., 294 F. 122.
15 C.J. p 775 note 23.

Death of joint claimant

Where husband and wife having joint claim for more than three thousand dollars properly joined in suing for son's death, amendment after wife's death, whereby husband sought only his half of compensation, less than three thousand dollars, did not deprive federal court of jurisdiction.—Ford, Bacon & Davis v. Volentine, C.C.A.Miss., 64 F.2d 800.

Before and after removal

Where jurisdictional requirements were satisfied when action on contract for purchase of standing timber was originally brought in state court, jurisdiction was not lost by the fact that after removal the amount sued for under liquidated damage clause of contract was less than the jurisdictional requirement.—Foster v. Hudson Valley Lumber Co., D.C.Md., 37 F.Supp. 381.

84. U.S.—Atchison, T. & S. F. Ry. Co. v. Phillips, D.C.Mo., 13 F.2d 254—James Heddon's Sons v. Callender, D.C.Minn., 28 F.Supp. 643.

85. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S. Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing, C.C.A., 90 F.2d 229, certiorari granted 58 S.Ct. 38, 302 U.S. 669, 82 L.Ed. 516—National Surety Co. v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—Sparks v. England, C.C.A. Mo., 113 F.2d 579—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Mutual Ben. Health & Accident Ass'n v. Teal, D.C.S.C., 34 F.Supp. 714—Federal Wall Paper Co. v. Kempner, D.C.N.Y., 244 F. 240—Hayward v. Nordberg Mfg. Co., Mich., 85 F. 4, 29 C.C.A. 438.

Limited liability provision

Where damages in common-law action, against express company for failure to deliver manuscript shipped by express, were limited by the receipt for shipment to fifty dollars, federal court could not entertain jurisdiction, although seven hundred fifty thousand dollars damages were sought.—Peyton v. Railway Express Agency, C.C.A.Tex., 124 F.2d 430, reversed on other grounds 62 S.Ct. 1171, 316 U.S. 350, 86 L.Ed. 1525.

Where the law liquidates the damages, the amount so liquidated, and not the amount claimed in the complaint, constitutes the matter in dispute.—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Bergman v. Inman, Poulsen & Co., C.C.Or., 91 F. 293.

Mere claim for exemplary damages in action where exemplary damages are not recoverable cannot affect jurisdictional amount of federal court. —Greene v. Keithley, C.C.A.Neb., 86 F.2d 238—Newcastle Products v. School Dist. of Blair Tp., D.C.Pa., 18 F.Supp. 335.

86. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S. Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing, C.C.A., 90 F.2d 229, certiorari granted 58 S.Ct. 38, 302 U. S. 669, 82 L.Ed. 516—Alderman v. Elgin, J. & E. Ry. Co., C.C.A.Ill., 125 F.2d 971—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F. 2d 573—Sparks v. England, C.C.A. Mo., 113 F.2d 579—Gray v. Blight, C.C.A.Colo., 112 F.2d 696, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modifying, D.C., Committee for Industrial Organization v. Hague, 25 F.Supp. 127, certiorari granted Hague v. Committee for Industrial Organization, 59 S. Ct. 486, 306 U.S. 624, 83 L.Ed. 1028,

involved,[87] is, in the first instance, regarded as the amount in dispute for jurisdictional purposes, even though the existence of a valid defense is apparent[88] from the complaint itself,[89] or is pleaded by defendant;[90] but, if it appears[91] from the nature of the case,[92] or from the facts alleged or shown

modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Brown v. United Gas Public Service Co., C.C.A.La., 96 F.2d 264—Mutual Ben. Health & Accident Ass'n v. Bowman, C.C.A.Neb., 96 F.2d 7, certiorari granted 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, mandate conformed to, C.C.A., Mutual Ben. Health & Accident Ass'n v. Bowman, 99 F.2d 856, certiorari denied 59 S.Ct. 485, 306 U.S. 637, 83 L.Ed. 1038—Colorado Life Co. v. Steele, C.C.A.Ark., 95 F.2d 535—Simecek v. U. S. National Bank of Omaha, C.C.A.Neb., 91 F.2d 214—Miller-Crenshaw Co. v. Colorado Mill & Elevator Co., C.C.A.Ark., 84 F.2d 930, affirmed 87 F.2d 457—Kimel v. Missouri State Life Ins. Co., C.C.A.Kan., 71 F.2d 921—Barnebey v. Barron G. Collier, Inc., C.C.A.Neb., 65 F.2d 864—Turmine v. West Jersey & S. R. Co., D.C.Pa., 44 F.2d 614—Randall v. Becton-Dickinson Co., D.C.Mass., 18 F.2d 631—Eternit, Inc. v. J. J. Clarke Co., D.C.La., 18 F.2d 607—Home Life Ins. Co. v. Sipp, C.C.A.N.J., 11 F.2d 474—Nathan v. Rock Springs Distilling Co., C.C.A.Ky., 10 F.2d 268—Paramore v. Mack Sennett, Inc., D.C.Cal., 9 F.2d 66—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Associated Press v. Emmett, D.C.Cal., 45 F.Supp. 907—Palmer v. Moren, D.C.Pa., 44 F.Supp. 704—King Features Syndicate v. Valley Broadcasting Co., D.C.Tex., 42 F.Supp. 107—Humphrey v. U. S. Fidelity & Guaranty Co., D.C.Or., 38 F.Supp. 224—Mutual Ben. Health & Accident Ass'n v. Teal, D.C.S.C., 34 F.Supp. 714—Morrow v. Mutual Casualty Co. of Chicago, D.C.Ky., 20 F.Supp. 193—Small v. New York Life Ins. Co., D.C.Ala., 18 F.Supp. 820—Schlosser v. Welsh, D.C.S.D., 5 F.Supp. 993—Davies v. Sun Life Assur. Co. of Canada, D.C.Wash., 2 F.Supp. 955—La Vecchia v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., D.C.N.Y., 1 F.Supp. 588—American R. Co. of Porto Rico v. South Porto Rico Sugar Co., C.C.A.Puerto Rico, 293 F. 670—Ragsdale v. Rudich, C.C.A.Ga., 293 F. 182—Owen M. Bruner Co. v. O. R. Manefee Lumber Co., C.C.A.Or., 292 F. 985—Operators' Piano Co. v. First Wisconsin Trust Co., C.C.A.Ill., 283 F. 904—Fernandina Shipbuilding & Dry Dock Co. v. Peters, D.C.Fla., 283 F. 621—St. Tammany Bank & Trust Co. v. Winfield, C.C.A.La., 263 F. 371—Central Commercial Co. v. Jones-Dusenberry Co., Ill., 251 F. 13, 163 C.C.A. 263—Federal Wall Paper Co. v. Kempner, D.C.N.Y., 244 F. 240—Brent v. Chas. H. Lilly Co., D.C.Wash., 202 F. 335—Eisele v. Oddie, C.C.Nev., 128 F. 941—Kunkel v. Brown, Md., 99 F. 593, 39 C.C.A. 665.

15 C.J. p 755 note 59, p 757 note 65.

Ad damnum clause

Ordinarily, in determining the amount in controversy, the ad damnum stated in the petition governs.—Peyton v. Railway Express Agency, C.C.A.Tex., 124 F.2d 430, reversed on other grounds 62 S.Ct. 1171, 316 U.S. 350, 86 L.Ed. 1525—Merrigan v. Metropolitan Life Ins. Co., D.C.La., 43 F.Supp. 209.

87. U.S.—United Enterprises v. Dubey, C.C.A.Fla., 128 F.2d 843, affirming, D.C., 42 F.Supp. 60—Purcell v. Summers, C.C.A.S.C., 126 F.2d 390, reversing, D.C., 34 F.Supp. 421.

88. U.S.—Commercial Nat. Bank of Los Angeles v. Catron, C.C.A.N.M., 50 F.2d 1023—King Features Syndicate v. Valley Broadcasting Co., D.C.Tex., 42 F.Supp. 107—American R. Co. of Porto Rico v. South Porto Rico Sugar Co., C.C.A.Puerto Rico, 293 F. 670.

Payment

(1) Where it appears, after the filing of a complaint demanding an amount sufficient to confer jurisdiction, that plaintiff had, in excusable ignorance and without bad faith, failed to credit defendant with payments reducing the claim below the jurisdictional amount, the court retains jurisdiction.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573.

(2) Where defendant sets up payments reducing the amount claimed below the jurisdictional amount, the court retains jurisdiction if, in order to determine the amount in controversy, it must consider conflicting testimony or disputed questions of law.—Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co., C.C.S.C., 80 F. 68—Fuller v. Metropolitan Life Ins. Co., C.C.N.Y., 37 F. 163.

89. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S.Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing C.C.A., 90 F.2d 229, certiorari granted 58 S.Ct. 38, 302 U.S. 669, 82 L.Ed. 516—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—Sparks v. England, C.C.A.Mo., 113 F.2d 579—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Jones v. Rowley, C.C.Cal., 73 F. 286.

90. U.S.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573.

91. U.S.—Sharp v. Barnhart, C.C.A.Ind., 117 F.2d 604, certiorari denied Canterbury v. Barnhart, 61 S.Ct. 1099, 313 U.S. 576, 85 L.Ed. 1533—James v. Barnhart, C.C.A.Ind., 117 F.2d 604, certiorari denied 61 S.Ct. 1098, 313 U.S. 576, 85 L.Ed. 1534—Paramore v. Mack Sennet, Inc., D.C.Cal., 9 F.2d 66—Palmer v. Moren, D.C.Pa., 44 F.Supp. 704—Brown v. United Gas Public Service Co., D.C.La., 28 F.Supp. 704—Small v. New York Life Ins. Co., D.C.Ala., 18 F.Supp. 820—Davies v. Sun Life Assur. Co. of Canada, D.C.Wash., 2 F.Supp. 955—Operators' Piano Co. v. First Wisconsin Trust Co., C.C.A.Ill., 283 F. 904—St. Tammany Bank & Trust Co. v. Winfield, C.C.A.La., 263 F. 371—Washington County v. Williams, Nev., 111 F. 801, 49 C.C.A. 621—Hayward v. Nordberg Mfg. Co., Mich., 85 F. 4, 29 C.C.A. 438—Arapahoe Bank v. David Bradley & Co., Neb., 72 F. 867, 19 C.C.A. 206.

15 C.J. p 758 note 70.

Claims not shown to be excessive

(1) In general.—Kriesak v. Crowe, D.C.Pa., 36 F.Supp. 127—Operators' Piano Co. v. First Wisconsin Trust Co., C.C.A.Ill., 283 F. 904.

(2) Where suits on two concurrent insurance policies were begun, and a compromise was agreed on but repudiated by insurer under one of the policies, the face amount of which was half of the face amount of the other, plaintiff's claim on the policy not compromised was not confined to half the amount for which the other policy was compromised.—Coffin v. London & Edinburgh Ins. Co., D.C.Ga., 27 F.2d 616.

92. U.S.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—Morrow v. Mutual Casualty Co. of Chicago, D.C.Ky., 20 F.Supp. 193—Pioneer Coal Co. v. Bush, D.C.Ky., 16 F.Supp. 117, appeal dismissed C.C.A., Kentucky-Jellico Coal Co. of Delaware v. Chitwood, 99 F.2d 1008—Battle v. Atkinson, C.C.Ark., 115 F. 384, affirmed 24 S.Ct. 845, 191 U.S. 559, 48 L.Ed. 302—Simon v. House, C.C.Tex., 46 F. 317.

The mere ad damnum clause will not confer jurisdiction where the claim is one which plaintiff cannot be legally permitted to sustain by evidence to the extent of the juris-

in the record,[93] or from the failure to allege certain facts,[94] or from the proofs,[95] that there can be or could not have been a reasonable expectation of recovering a sufficient sum, and that the claim was, therefore, fictitious, colorable, made in bad faith, or excessive, the real amount involved governs and the court has no further jurisdiction. However, where the cause of action as stated involves an amount within the jurisdiction of the court, the fact that plaintiff is subsequently unable to recover an amount sufficient for jurisdiction, does not of itself show bad faith or oust jurisdiction.[96]

dictional amount.—North America Transportation & Trading Co. v. Morrison, Wash., 20 S.Ct. 869, 178 U.S. 262, 44 L.Ed. 1061, reversing, C.C., 85 F. 802.

93. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S. Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing, C.C.A., 90 F.2d 229, certiorari granted 58 S.Ct. 38, 302 U. S. 669, 82 L.Ed. 516—Sparks v. England, C.C.A.Mo., 113 F.2d 579—Colorado Life Co. v. Steele, C.C.A. Ark., 95 F.2d 535—Nixon v. Town Taxi, D.C.Mass., 39 F.2d 618—Home Life Ins. Co. v. Sipp, C.C.A. N.J., 11 F.2d 474—Nathan v. Rock Springs Distilling Co., C.C.A.Ky., 10 F.2d 268—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Morrow v. Mutual Casualty Co. of Chicago, D.C.Ky., 20 F.Supp. 193—Small v. New York Life Ins. Co., D.C.Ala., 18 F.Supp. 820—Travelers' Ins. Co. of Hartford, Conn., v. Rabinowitz, D.C.Md., 9 F.Supp. 353—Hines v. Fidelity Mut. Life Ins. Co., D.C.N.Y., 6 F.Supp. 692—Menssen v. Travelers' Ins. Co., D.C.N.Y., 5 F.Supp. 114—La Vecchia v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., D.C.N.Y., 1 F.Supp. 588—American R. Co. of Porto Rico v. South Porto Rico Sugar Co., C. C.A.Puerto Rico, 293 F. 670—New York Life Ins. Co. v. Johnson, Iowa, 255 F. 958, 167 C.C.A. 250—Howard v. Carroll, D.C.Md., 195 F. 646—Clement v. Louisville & N. R. Co., C.C.A.La., 153 F. 979.

Credit ignored

(1) Where the answer discloses that plaintiff in demanding an amount in excess of the jurisdictional minimum has ignored an undisputed credit to which defendant is entitled, and which, if allowed, reduces the amount in controversy below the jurisdictional minimum, the court has no jurisdiction.—Bedford Quarries Co. v. Welch, C.C.Iowa, 100 F. 513.

(2) There is, however, authority to the contrary.—West v. Woods, C.C. La., 18 F. 665.

94. U.S.—Ohman v. City of New York, C.C.N.Y., 168 F. 953.

95. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S.Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing, C.C.A., 90 F.2d 229, certiorari granted 58 S.Ct. 38, 302 U.S. 669, 82 L.Ed. 516—Sparks v. England, C.C.A.Mo., 113 F.2d 579—Home Life Ins. Co. v. Sipp, C.C.A. N.J., 11 F.2d 474—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F. Supp. 953—Nixon v. Town Taxi, D. C.Mass., 39 F.2d 618—Mutual Ben. Health & Accident Ass'n v. Teal, D.C.S.C., 34 F.Supp. 714—Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co., S.C., 246 F. 232, 158 C.C.A. 392.

15 C.J. p 759 note 73.

Question of fact

Whether the claim is based on reasonable expectation of recovering the jurisdictional amount or is fraudulent, fictitious, colorable, or excessive is a question of fact.—Nixon v. Town Taxi, D.C.Mass., 39 F.2d 618.

Effect of conclusions of court respecting amount

Judgment could not rest on conclusion that action involved jurisdictional amount, where conclusion rested on findings affirmatively showing that judgment granting full relief prayed for amounted to less than jurisdictional amount, even when augmented by surplusage awarding relief not pleaded or prayed for.—Equitable Life Assur. Soc. of U. S. v. Wilson, C.C.A.Cal., 81 F.2d 657.

Proofs on former trial

Court is not without jurisdiction as matter of law where item of damage necessary to make jurisdictional amount was withdrawn from jury on former trial for want of evidence to sustain it.—St. Tammany Bank & Trust Co. v. Winfield, C.C.A. La., 263 F. 371.

96. U.S.—St. Paul Mercury Indemnity Co. v. Red Cab Co., Ind., 58 S. Ct. 586, 303 U.S. 283, 82 L.Ed. 845, reversing, C.C.A., 90 F.2d 229, certiorari granted 58 S.Ct 38, 302 U.S. 669, 82 L.Ed. 516—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—Sparks v. England, C.C.A.Mo., 113 F.2d 579—Gray v. Blight, C.C. A.Colo., 112 F.2d 696, certiorari denied 61 S.Ct. 170, 311 U.S. 704, 85 L.Ed. 457—Brown v. United Gas Public Service Co., C.C.A.La., 96 F.2d 264—Mutual Ben. Health & Accident Ass'n v. Bowman, C.C.A. Neb., 96 F.2d 7, certiorari granted 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, mandate conformed to Mutual Ben. Health & Accident Ass'n v. Bowman, 99 F.2d 856, certiorari denied 59 S.Ct. 485, 306 U.S. 637, 83 L.Ed. 1038—Simecek v. U. S. Nat. Bank of Omaha, C.C.A.Neb., 91 F.2d 214—Kimel v. Missouri State Life Ins. Co., C.C.A.Kan., 71 F.2d 921—Commercial Nat. Bank of Los Angeles v. Catron, C.C.A. N.M., 50 F.2d 1023—Home Life Ins. Co. v. Sipp, C.C.A.N.J., 11 F.2d 474—Nathan v. Rock Springs Distilling Co., C.C.A.Ky., 10 F.2d 268—Southwestern Telegraph & Telephone Co. v. Walker Grain Co., D.C. Tex., 3 F.2d 819, affirmed, C.C.A., Walker Grain Co. v. Southwestern Telegraph & Telephone Co., 10 F.2d 272—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Associated Press v. Emmett, D.C. Cal., 45 F.Supp. 907—Federman v. Verni, D.C.N.Y., 42 F.Supp. 113—King Features Syndicate v. Valley Broadcasting Co., D.C.Tex., 42 F. Supp., 107—Federal Deposit Ins. Corporation v. Citizens State Bank of Niangua, Niangua, Mo., D.C.Mo., 40 F.Supp. 805—Humphrey v. U. S. Fidelity & Guaranty Co., D.C.Or., 38 F.Supp. 224—Schneider v. Rockwell-Powers Lumber Co., D.C.La., 35 F.Supp. 695—Mutual Ben. Health & Accident Ass'n v. Teal, D.C.S.C., 34 F.Supp. 714—Morrow v. Mutual Casualty Co. of Chicago, D.C.Ky., 20 F.Supp. 193—Stuckert v. Alexander, D.C.Okl., 4 F.Supp. 172—Davies v. Sun Life Assur. Co. of Canada, D.C.Wash., 2 F.Supp. 955—Ragsdale v. Rudich, C.C.A.Ga., 293 F. 182—Owen M. Bruner Co. v. O. R. Manefee Lumber Co., C.C.A. Or., 292 F. 985.

Puerto Rico.—Dorvalle v. Mancini, 9 Puerto Rico Fed. 3—Goenaga v. Quiros, 5 Puerto Rico Fed. 554.

15 C.J. p 756 note 61, p 758 note 72.

Proof showing defendant corporations to be separate entities

Where a creditor's bill, filed by a creditor of two corporations, joined such corporations and an individual, alleging that he created the corporations as dummies for the conduct of his own business and invested their earnings in property, title to which was taken in his own name, and the aggregate of its claims against the two corporations was sufficient to give the court jurisdiction, but the claims singly were not, a finding that the corporations were not so organized, but were separate entities, does not deprive the court of jurisdiction to grant complainant any relief to which the proofs show it to be entitled under the pleadings.—Southwestern Telegraph & Telephone Co. v. Walker Grain Co., D.C.Tex., 3 F.2d

Effect of subsequent pleadings. Where plaintiff's demand is sufficient to give the court jurisdiction, its jurisdiction is not ousted by an answer disclaiming a portion of plaintiff's demand, or contesting only a portion of it;[97] nor is jurisdiction ousted by the assertion or establishment of a set-off or counterclaim, even though such set-off or counterclaim, when deducted from the amount involved under the complaint, reduces such amount below the jurisdictional minimum.[98] An answer denying plaintiff's allegation of damages does not affect the court's jurisdiction.[99] When the jurisdictional amount is in question, the tendering of a counterclaim or a cross bill in an amount which in itself, or added to the amount claimed in the petition, makes up a sum equal to the amount necessary to the jurisdiction of the court establishes jurisdiction, whatever may be the state of plaintiff's complaint,[1] and it has been held that the amount of a set-off asserted by defendant may be added to the amount involved under the complaint to make up the jurisdictional amount;[2] but it has also been held that a counterclaim asserted by defendant, not as a basis for affirmative relief, but only for the purpose of having the amount thereof deducted from plaintiff's recovery, if any, cannot supply a deficiency in the jurisdictional amount.[3] If the amount involved under the complaint is sufficient to confer jurisdiction, the court has jurisdiction of counterclaims involving matters directly connected with matters set up in the bill, even though the amounts involved under the counterclaims are less than the jurisdictional amount.[4] The court has jurisdiction where a cross complaint impleading a third party shows that the controversy involves more than the jurisdictional amount;[5] but, where the claims against the impleaded parties are separate and distinct from the controversy involved in the main action, if they are not sufficient to satisfy the jurisdictional requirements as to amount, the court acquires no jurisdiction as to them by virtue of its jurisdiction over the main action.[6] An amendment reducing the amount claimed below the jurisdictional minimum ordinarily relates back to the commencement of the action and deprives the court of jurisdiction;[7] but this does not apply where the amendment is based on events occurring after the filing of the bill.[8] Where a bill showed two separate causes of action and the court ordered the filing of separate bills, the inclusion in one of the amended bills of the amount which accrued since the filing of the original bill was held proper.[9]

(3) Evidence

The sufficiency of the amount in controversy may be shown by evidence, the admissibility, weight, and sufficiency of which are governed by general rules.

That the necessary amount in controversy is involved may be shown by the evidence.[10] General rules of evidence are applicable to the question of the admissibility of evidence relating to the value or amount in controversy,[11] and weight and suffi-

819, affirmed, C.C.A., Walker Grain Co. v. Southwestern Telegraph & Telephone Co., 10 F.2d 272.

97. U.S.—Colony Coal & Coke Corporation v. Napier, D.C.Ky., 28 F. Supp. 76.

98. U.S.—Pickham v. Wheeler-Bliss Mfg. Co., Ill., 77 F. 663, 23 C.C.A. 391, certiorari denied 18 S.Ct. 945, 168 U.S. 708, 42 L.Ed. 1211—Hellrigle v. Dulany, 11 F.Cas.No.6,343, 4 Cranch C.C. 473, 4 D.C. 473.
15 C.J. p 774 note 11.

99. U.S.—Pine v. New York City, C. C.N.Y., 103 F. 337, affirmed 112 F. 98, 50 C.C.A. 145, reversed on other grounds 22 S.Ct. 592, 185 U.S. 93, 46 L.Ed. 820—Butchers & Drovers Stock-Yards Co. v. Louisville & N. R. Co., Tenn., 67 F. 35, 14 C.C. A. 290.

1. U.S.—Kendrick v. Ownby, C.C.A. Tex., 123 F.2d 689—Ginsburg v. Pacific Mut. Life Ins. Co. of California, C.C.A.N.Y., 69 F.2d 97, reversing, D.C., 5 F.Supp. 296—Home Life Ins. Co. v. Sipp, C.C.A.N.J., 11 F.2d 474.
15 C.J. p 774 note 12.

A counterclaim against a bill collusively brought so as to provide diversity of citizenship so as to enable defendant to bring his action against coresidents of the state in the federal court cannot supply the deficiency, and falls with the original bill.—Industrial & Mining Guaranty Co. v. Electrical Supply Co., Ohio, 58 F. 732, 7 C.C.A. 471.

2. U.S.—Central Commercial Co. v. Jones-Dusenbury Co., Ill., 251 F. 13, 163 C.C.A. 263.

3. U.S.—Home Life Ins. Co. v. Sipp, C.C.A.N.J., 11 F.2d 474.

4. U.S.—Kirby v. American Soda Fountain Co., Tex., 24 S.Ct. 619, 194 U.S. 141, 48 L.Ed. 911—Norton v. Agricultural Bond & Credit Corporation, C.C.A.Kan., 92 F.2d 348, certiorari denied Agricultural Bond & Credit Corporation v. Norton, 58 S.Ct. 409, 302 U.S. 763, 82 L.Ed. 592.

5. U.S.—Michigan Alkali Co. v. Bankers Indemnity Ins. Co., D.C.N. Y., 20 F.Supp. 424.

6. U.S.—John N. Price & Sons v. Maryland Casualty Co., D.C.N.J., 2 F.R.D. 408.

7. U.S.—Ford, Bacon & Davis v. Volentine, C.C.A.Miss., 64 F.2d 800.

8. U.S.—Ford, Bacon & Davis v. Volentine, supra.

9. U.S.—Brusselback v. Chicago Joint Stock Land Bank, C.C.A.Ill., 85 F.2d 617, certiorari denied Gage v. Brusselback, 57 S.Ct. 320, 299 U. S. 615, 81 L.Ed. 454.

10. U.S.—Leitch v. City of Chicago. C.C.A.Ill., 41 F.2d 728, certiorari denied 51 S.Ct. 106, 282 U.S. 891, 75 L.Ed. 786.
Necessity and sufficiency of averments as to amount in dispute see supra § 81.
Evidence of jurisdictional requirements generally see supra § 91.

11. U.S.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573.
Evidence held admissible
U.S.—Buck v. Gallagher, Wash., 59 S. Ct. 740, 307 U.S. 95, 83 L.Ed. 1128, reversing, D.C., Buck v. Case, 24 F.Supp. 541, appeal dismissed Buck v. Gallagher, 59 S.Ct. 145, 305 U.S. 569, 83 L.Ed. 358.

ciency[12] of evidence relating to the value or amount in controversy.

§ 311. —— Issuance of Writs

Writs of scire facias and mandamus are abolished in so far as district courts are concerned, but before their abolition, the district courts had authority to issue writs of scire facias, and could issue writs of mandamus and prohibition, although only in aid of a jurisdiction previously acquired and never as an original proceeding. District courts may issue writs of injunction, but not where their issuance would have the effect of a writ of mandamus which the court is not authorized to issue; they may also issue writs of ne exeat, and any other writs not specifically provided for which are necessary for the exercise of their jurisdiction.

In addition to certain enumerated writs discussed hereinafter in this section, district courts have general power to issue all writs not specifically provided for by statute which may be necessary for the exercise of their jurisdiction and agreeable to the usages and principles of law.[13]

Scire facias and mandamus. The writs of scire facias and mandamus are abolished by the Federal Rules of Civil Procedure,[14] but similar relief is made available under the practice prescribed by the rules,[15] and the substantive rights of the parties are governed by the principles formerly applied in cases involving those writs.[16]

Before their abolition, writs of scire facias were among those which district courts were expressly authorized to issue.[17] The power to issue writs of mandamus was not expressly granted, and in view of the fact that general power to issue writs was limited to such as might be necessary for the exercise of the court's jurisdiction, the rule became well established that, unless specially authorized by statute,[18] the district court, like its predecessor, the circuit court, had no original jurisdiction in man-

12. U.S.—Murphy v. Sun Oil Co., C.C.A.Tex., 86 F.2d 895, certiorari denied 57 S.Ct. 754, 300 U.S. 683, 81 L.Ed. 886.

Evidence held sufficient

(1) To show presence of jurisdictional amount.—Clark v. Paul Gray, Inc., Cal., 59 S.Ct. 744, 306 U.S. 583, 83 L.Ed. 1001, reversing, D.C., Paul Gray, Inc. v. Ingels, 23 F.Supp. 946—Armstrong v. New La Paz Gold Mining Co., C.C.A.Cal., 107 F.2d 453—Indian Territory Oil & Gas Co. v. Indian Territory Illuminating Oil Co., C.C.A.Okl., 95 F.2d 711, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386—Murphy v. Sun Oil Co., C.C.A.Tex., 86 F.2d 895, certiorari denied 57 S.Ct. 754, 300 U.S. 683, 81 L.Ed. 886—New York Life Ins. Co. v. Kaufman, C.C.A.Cal., 78 F.2d 398, certiorari denied 56 S.Ct. 149, 296 U.S. 626, 80 L.Ed. 445—Forno v. Coyle, C.C.A.Alaska, 75 F.2d 692—Kline v. Wright, D.C.Idaho, 42 F.2d 927—McNichols v. International Typographical Union, C.C.A.Ind., 21 F.2d 497—Gallardo v. Porto Rico Ry., Light & Power Co., C.C.A.Puerto Rico, 18 F.2d 918—Caldwell v. Travelers Ins. Co., D.C.Ark., 45 F.Supp. 573—Ohio Casualty Ins. Co. v. Callaway, D.C.Okl., 45 F.Supp. 586—American Type Founders v. Lanston Monotype Mach. Co., D.C.Pa., 45 F.Supp. 531—Caron Corporation v. Wolf Drug Co., D.C.N.J., 40 F.Supp. 103—Mitchell Metal Products v. Berkeley Equipment Co., D.C.Pa., 36 F.Supp. 1010—Leighton v. City of Minneapolis, D.C.Minn., 16 F.Supp. 101—Briggs v. Boston, D.C.Iowa, 15 F.Supp. 763—Merriam v. Texas Siftings Pub. Co., C.C.N.Y., 49 F. 944.

(2) To show absence of jurisdictional amount.—Novitzky v. Rozner, D.C.Pa., 259 F. 913.

(3) To show good faith in the making of a claim.—National Surety Corporation v. City of Excelsior Springs, Mo., ex rel. and to Use of Schwarzenbach, C.C.A.Mo., 123 F.2d 573—Schneider v. Rockwell-Powers Lumber Co., D.C.La., 35 F.Supp. 695.

Evidence held insufficient

(1) To show presence of jurisdictional amount.—Thomson v. Gaskill, Neb., 62 S.Ct. 673, 315 U.S. 442, 86 L.Ed. 951 reversing, C.C.A., Gaskill v. Thomson, 119 F.2d 105—Louis D. Rubin Electrical Co. v. Poulnot, D.C.S.C., 46 F.2d 676—Dixie Greyhound Lines v. Elliott, D.C.Ky., 45 F.Supp. 953—Pure Oil Co. v. Puritan Oil Co., D.C.Conn., 39 F.Supp. 68—Dunning v. Agricultural Prorate Advisory Commission of California, D.C.Cal., 38 F.Supp. 393—Terrio v. S. N. Nielsen Const. Co., D.C.La., 30 F.Supp. 77—Carl Fischer, Inc. v. Shannon, D.C.Mont., 26 F.Supp. 727—Hale v. Mann, D.C.Tex., 15 F.Supp. 1051.

(2) To show absence of jurisdictional amount.—Simecek v. U. S. Nat. Bank of Omaha, C.C.A.Neb., 91 F.2d 214—Williams v. James, D.C.La., 34 F.Supp. 61.

(3) To show bad faith in making claim.—Welsh v. Erie R. Co., C.C.A.Ohio, 39 F.2d 869—Palmer v. Moren, D.C.Pa., 44 F.Supp. 704.

13. U.S.—Bronson v. La Crosse & M. R. Co., Wis., 1 Wall. 405, 17 L.Ed. 616.

25 C.J. p 980 note 9.

Jurisdiction respecting issuance of writs:

Of supreme court see supra § 196.

Of circuit court of appeals see supra § 286.

To expedite cases

Federal district court has power to issue all writs necessary or proper to speed administration of justice and bring case to final conclusion.—E. W. Montgomery Co. v. Gwin, D.C.Miss., 58 F.2d 779.

14. U.S.—In re Stewart, D.C.Cal., 1 F.R.D. 105.

D.C.—Morgenthau v. Barrett, 108 F.2d 481, 71 D.C. 148, reversing D.C., Barrett v. Morgenthau, 25 F.Supp. 709, certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1017—Levine v. Farley, 107 F.2d 186, 70 App.D.C. 381, certiorari denied 60 S.Ct. 377, 308 U.S. 622, 84 L.Ed. 519.

15. D.C.—Morgenthau v. Barrett, 108 F.2d 481, 71 D.C. 148, reversing, D.C., Barrett v. Morgenthau, 25 F.Supp. 709, certiorari denied 60 S.Ct. 615, 309 U.S. 672, 84 L.Ed. 1017—Levine v. Farley, 107 F.2d 186, 70 App.D.C. 381, certiorari denied 60 S.Ct. 377, 308 U.S. 622, 84 L.Ed. 519.

16. U.S.—Levine v. Farley, supra.

17. U.S.—Universal Transp. Co. v. National Surety Co., D.C.N.Y., 252 F. 293, affirmed 256 F. 450, 167 C.C.A. 578.

25 C.J. p 980 note 8 [a].

18. U.S.—Platek v. Aderhold, C.C.A.Ga., 73 F.2d 173—Cudahy Packing Co. v. U. S., C.C.A.Ill., 15 F.2d 133—Wilson v. Bowers, D.C.N.Y., 14 F.2d 976—U. S. v. Rollnick, D.C.Pa., 33 F.Supp. 863—Crites v. Hill, D.C.Pa., 9 F.Supp. 975—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

General grant of jurisdiction; revenue laws

(1) An action for a writ of mandamus is not an "action at law" or a "suit in equity" under the code provisions respecting original jurisdiction of district courts.—Dick v. Tevlin, D.C.N.Y., 37 F.Supp. 836.

(2) So, the general jurisdiction conferred on district courts over all suits of a civil nature at law or in

damus,[19] but could issue a writ of mandamus only in aid of a jurisdiction previously acquired.[20]

Prohibition. A district court has no power to issue a writ of prohibition except when necessary in aid of a jurisdiction previously acquired.[21]

Injunctions. The district court has power to issue writs of injunction.[22] However, under the rule that it had no original jurisdiction in mandamus, it was held that the court had no jurisdiction of a suit for an injunction, where the issuance thereof would have the same effect as the issuance of a writ of mandamus,[23] and this practice rule applied to a preventive injunction[24] as well as to a mandatory

equity arising under the Constitution and laws of the United States does not confer on those courts jurisdiction over applications for mandamus, where that relief is the object of the suit.—In re Higdon, D.C.Mo., 269 F. 150.

(3) However, it has been held that, under the jurisdiction thus granted, a district court may grant mandamus to compel officer to perform legal duty under revenue **law.**—Bruner v. Woodworth, D.C.Mich., 22 F.2d 577—Waldo v. Poe, D.C.Wash., 14 F.2d 749.

19. U.S.—Rosenbaum v. Bauer, Cal., 7 S.Ct. 633, 120 U.S. 450, 30 L.Ed. 743—Ballf v. Kranz, C.C.A.Cal., 82 F.2d 315, certiorari denied 57 S.Ct. 12, 299 U.S. 549, 81 L.Ed. 404, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457—Platek v. Aderhold, C.C.A.Ga., 73 F.2d 173—Amchanitzky v. Sinnott, C.C.A.N.Y., 69 F.2d 97, reversing, D.C., Amchanitzky v. Carrougher, 3 F.Supp. 953, and certiorari denied Amchanitzky v. Sinnott, 54 S.Ct. 715, 292 U.S. 638, 78 L.Ed. 1489—Appalachian Electric Power Co. v. Smith, C.C.A.Va., 67 F.2d 451, reversing, D.C., 4 F.Supp. 6, and certiorari denied 54 S.Ct. 458, 291 U.S. 674, 78 L.Ed. 1063—White v. County Democratic Executive Committee of Harris County, D.C.Tex., 60 F.2d 973—Wilson v. Bowers, D.C.N.Y., 14 F.2d 976—Waldo v. Poe, D.C.Wash., 14 F.2d 749—Barber v. Hetfield, C.C.A.Cal., 4 F.2d 245, reversing, D.C., Hetfield v. Barber, 2 F.2d 723—Fineran v. Bailey, C.C.A.La., 2 F.2d 363—Dick v. Tevlin, D.C.N.Y., 37 F.Supp. 836—U. S. v. Rollnick, D.C.Pa., 33 F.Supp. 863—Mills v. Lowndes, D.C.Md., 26 F.Supp. 792—Hellawell v. Grafeld, D.C.N.Y., 22 F.Supp. 765—State ex rel. Glassell v. Shell Petroleum Corporation, D.C.La., 20 F.Supp. 795—Curran v. Higgiston, D.C.Mass., 18 F.Supp. 969—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993—Johnson v. Thomas, D.C.Tex., 16 F.Supp. 1013—Crites v. Hill, D.C.Pa., 9 F.Supp. 975—Hogan v. Hill, D.C.Pa., 9 F.Supp. 975, affirmed, C.C.A., 78 F.2d 1017—Consumers' Lignite Co. v. Lumberman's Mut. Casualty Co., D.C.Tex., 5 F.Supp. 794—Stevens v. Brookhaven Municipal Separate School Dist., D.C.Miss., 5 F.Supp. 629—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499—Hume v. Mahan, D.C.Ky., 1 F.Supp. 142, reversed on other grounds Mahan v. Hume, 53 S.Ct. 223, 287 U.S. 575, 77 L.Ed. 505—U. S. v. Clausen, D.C.Wash., 291 F. 231, transferred, see, C.C.A., U. S. v. Babcock, 293 F. 195, error dismissed 45 S.Ct. 126, 266 U.S. 641, 69 L.Ed. 484—North Carolina Public Service Co. v. Southern Power Co., C.C.A.N.C., 282 F. 837, certiorari granted Southern Power Co. v. North Carolina Public Service Co., 43 S.Ct. 94, 260 U.S. 716, 67 L.Ed. 478, and certiorari dismissed Southern Power Co. v. North Carolina Public Service Co., 44 S.Ct. 164, 263 U.S. 508, 68 L.Ed. 413—In re Higdon, D.C.Mo., 269 F. 150—U. S. v. Pearson, C.C.N.Y., 32 F. 309, 24 Blatchf. 453.

25 C.J. p 697 note 20.

If the action is in effect one for mandamus, although not so denominated, the district court has no jurisdiction.—Fox v. City of Pasadena, C.C.A.Cal., 78 F.2d 948—John C. Winston Co. v. Vaughan, D.C.Okl., 11 F.Supp. 954, affirmed C.C.A., Vaughan v. John C. Winston, 83 F.2d 370.

20. U.S.—Ballf v. Kranz, C.C.A.Cal., 82 F.2d 315, certiorari denied 57 S.Ct. 12, 299 U.S. 549, 81 L.Ed. 404, rehearing denied 57 S.Ct. 113, 299 U.S. 621, 81 L.Ed. 457—Barber v. Hetfield, C.C.A.Cal., 4 F.2d 245, reversing, D.C., Hetfield v. Barber, 2 F.2d 723—Fineran v. Bailey, C.C.A.La., 2 F.2d 363—State ex rel. Glassell v. Shell Petroleum Corporation, D.C.La., 20 F.Supp. 795—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993—Johnson v. Thomas, D.C.Tex., 16 F.Supp. 1013—Crites v. Hill, D.C.Pa., 9 F.Supp. 975—Consumers' Lignite Co. v. Lumberman's Mut. Casualty Co., D.C.Tex., 5 F.Supp. 794—Stevens v. Brookhaven Municipal Separate School Dist., D.C.Miss., 5 F.Supp. 629—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499—In re Higdon, D.C.Mo., 269 F. 150.

25 C.J. p 697 note 21, p 700 note 51 [a].

Proceedings held not ancillary

Petition for writ of mandamus to compel penitentiary warden to produce petitioner for hearing before United States commissioner under Indigent Convict Act after court had discharged writ of habeas corpus because of nonpayment of fines imposed on petitioner, and warden had refused to produce petitioner as directed by commissioner's mandate, was held not in aid of court's jurisdiction, but original proceeding in mandamus, over which district court has no jurisdiction.—Hogan v. Hill, D.C.Pa., 9 F.Supp. 975, affirmed, C.C.A., 78 F.2d 1017.

Persons not parties

The fact that such jurisdiction is merely ancillary does not preclude its exercise over persons not parties to the judgment sought to be enforced.—Labette County Com'rs v. U. S., Kan., 5 S.Ct. 108, 112 U.S. 217, 28 L.Ed. 698—25 C.J. p 697 note 22.

21. U.S.—Keogh v. Horner, D.C.Ill., 8 F.Supp. 933—In re Binninger, C.C.N.Y., 3 F.Cas.No.1,417, 7 Blatchf. 159.

22. U.S.—Curran v. Higgiston, D.C.Mass., 18 F.Supp. 969.

Injunction against discrimination in state tax assessments see the C.J.S. title Taxation § 582, also 61 C.J. p 894 notes 63–66.

Mandatory injunction may be issued.—John C. Winston Co. v. Vaughan, D.C.Okl., 11 F.Supp. 954, affirmed, C.C.A., Vaughan v. John C. Winston Co., 83 F.2d 370.

Power to modify

U.S.—In re Arkansas Railroad Rates, C.C.Ark., 168 F. 720.

23. U.S.—Fineran v. Bailey, C.C.A.La., 2 F.2d 363—Stevens v. Brookhaven Municipal Separate School Dist., D.C.Miss., 5 F.Supp. 629.

24. U.S.—Creager v. Bryan, D.C.Tex., 287 F. 362.

Enjoining refusal to act

(1) A suit to enjoin an officer from refusing to perform an act, although expressed in the form of a double negative, is equivalent to a prayer for a direct command to perform it, and hence is without the jurisdiction of the district court.—Knickerbocker Ice Co. v. Sprague, D.C.N.Y., 4 F.Supp. 499.

(2) However, a distinction has been drawn between such a case and the case of an injunction restraining an official from refusing to perform an act on some particular ground which he sets up as a consideration legally controlling.—Wilson v. Bowers, D.C.N.Y., 14 F.2d 976.

injunction.[25]

Ne exeat. A district court has authority to issue writs of ne exeat.[26]

Attachment. A district court has no inherent power to proceed in attachment, and may not do so unless given such power by statute.[27]

XII. COURTS OF TERRITORIES AND OUTLYING POSSESSIONS, AND PROVISIONAL COURTS

§ 312. In General

Although a territorial court is a legislative, rather than a constitutional, court, it is its province to declare the law of the territory and, within its sphere of action, it possesses the independence of the judiciary generally.

In the exercise of the power, granted to it by the constitution, to make all needful rules and regulations respecting the territory or other property belonging to the United States, congress may, as shown supra § 2, create territorial courts and confer on them judicial power. The courts so created are legislative courts[28] and not district courts of the United States in the sense that the latter are constitutional courts created under the judiciary article of the Constitution,[29] even though they are vested with jurisdiction identical with, or similar to, that vested in district courts of the United States.[30] A territorial legislature in conferring or limiting the appellate jurisdiction of the territorial courts is controlled by the organic act of the territory and other acts of congress with relation thereto, and legislation in conflict therewith is invalid;[31] but the territorial legislature may prescribe reasonable conditions not in conflict with such acts of congress.[32]

The principle of an independent judiciary is recognized in the territories.[33] The judiciary may and should, whenever necessary, protect itself against legislative inroads on the judiciary's sphere of action;[34] and it may, in general, do what is necessary to maintain its independence and effectiveness.[35] The courts may declare the invalidity of an act of the territorial legislative body,[36] even though the statute in question has been given effect by the court in previous cases in which the validity of the statute was not in issue.[37] The arguments of policy in favor of having the state courts declare the law of the state are applicable to the question whether territorial courts should declare the law of the territories with the least possible interference.[38]

Virgin Islands. The judicial power of the Virgin Islands is, by 48 U.S.C.A. § 1405x, vested in a court designated "the District Court of the Virgin Islands" and in courts of inferior jurisdiction es-

25. U.S.—Curran v. Higgiston, D.C. Mass., 18 F.Supp. 969.

26. U.S.—Lewis v. Shainwald, C.C. Cal., 48 F. 492.
25 C.J. p 701 note 65.
Power of federal district judge to issue writ of ne exeat see the C.J.S. title Ne Exeat § 7, also 45 C.J. p 594 note 87 [b] (1)–(3).

27. U.S.—U. S. v. Pacific Forwarding Co., D.C.Wash., 8 F.Supp. 647.

28. U.S.—Mookini v. U. S., Hawaii, 58 S.Ct. 543, 303 U.S. 201, 82 L.Ed. 748, reversing, C.C.A., 92 F.2d 126, certiorari granted 58 S.Ct. 53, 302 U.S. 674, 82 L.Ed. 520, conformed to C.C.A., 95 F.2d 960—Williams v. U. S., Ct.Cl., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372—O'Donoghue v. U. S., Ct.Cl., 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356.
Neb.—State ex rel. Ralston v. Turner, 4 N.W.2d 302.
25 C.J. p 689 note 28.

29. U.S.—Mookini v. U. S., Hawaii, 58 S.Ct. 543, 303 U.S. 201, 82 L.Ed. 748, reversing, C.C.A., 92 F.2d 126, certiorari granted 58 S.Ct. 53, 302 U.S. 674, 82 L.Ed. 520, conformed to, C.C.A., 95 F.2d 960—Sand Springs Home v. Title Guarantee & Trust Co., C.C.A.Okl., 16 F.2d 917.
25 C.J. p 689 note 28.

Word "states" in statutes relating to original jurisdiction of federal district court is used in its ordinary meaning and does not include territory, district or possession.—Munoz v. Porto Rico Ry. Light & Power Co., C.C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L.Ed. 1408.

30. U.S.—Mookini v. U. S., Hawaii, 58 S.Ct. 543, 303 U.S. 201, 82 L.Ed. 748, reversing, C.C.A., 92 F.2d 126, certiorari granted 58 S.Ct. 53, 302 U.S. 674, 82 L.Ed. 520, conformed to, C.C.A., 95 F.2d 960—Summers v. U. S., Alaska, 34 S.Ct. 38, 231 U.S. 92, 58 L.Ed. 137, reversing 204 F. 976, 123 C.C.A. 298, denying rehearing 202 F. 457, 120 C.C.A. 563.

31. N.M.—Jung v. Meyer, 68 P. 933, 11 N.M. 378, 382.
3 C.J. p 299 note 3.

32. U.S.—Janes v. Buzzard, Ark., 13 F.Cas.No.7,206b, 1 Hempst. 259.
Fla.—Gordon v. Camp, 2 Fla. 23.

33. Philippine.—Borromeo v. Mariano, 41 Philippine 322.

34. Hawaii.—In re Cummins, 20 Hawaii 518.
Philippine.—Borromeo v. Mariano, 41 Philippine 322.

35. Philippine.—Province of Tarlac v. Gale, 26 Philippine 338.
62 C.J. p 812 note 69.

36. Hawaii.—In re Mott-Smith, 29 Hawaii 343.
N.M.—Baca v. Perez, 42 P. 162, 8 N.M. 187.
Philippine.—U. S. v. Ang Tang Ho, 43 Philippine 1.
62 C.J. p 812 note 70.

37. Philippine.—Government of the Philippine Islands v. Springer, 50 Philippine 259, affirmed 48 S.Ct. 480, 277 U.S. 189, 72 L.Ed. 845—McGirr v. Hamilton, 30 Philippine 563.

38. U.S.—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436.

tablished by local law. The district court consists of two divisions, 48 U.S.C.A. § 1405z, and its jurisdiction is conferred and defined by statute, 48 U.S.C.A. §§ 1406, 1406a, as is also the jurisdiction of the inferior courts, 48 U.S.C.A. § 1406d. Appeals lie from the judgments and rulings of the inferior courts to the district court, 48 U.S.C.A. § 140[illegible]. Under the local law, the allowance of costs in an action of an equitable nature is within the discretion of the district court.[39]

§ 313. Former Territories Now Admitted as States

Judgments and orders of courts of former territories were upheld where they were within the jurisdiction of such courts to render or make and errors, if any, therein were not prejudicial. An appeal to another territorial court was governed by statutory provisions.

A judgment of a court of a former territory was rendered with full jurisdiction where the court had jurisdiction of the subject matter of, and of the persons of the parties to, the action and the judgment was of a nature not only permitted, but required, by the pleadings and stipulations of the parties.[40] The appellee or defendant in error was not entitled to a notice of the application for the allowance of an appeal or writ of error, unless notice was required by statute.[41] It was essential that an appeal bond be conditioned according to law[42] and be for the amount fixed by the clerk, where he was empowered to fix the amount.[43] Error in dismissing an appeal was not prejudicial where appellant could take a second appeal at any time within the period prescribed by law.[44]

Full jurisdiction in probate proceedings was properly conferred on probate courts by a territorial legislature.[45]

§ 314. Alaska

In the territory of Alaska the district court has both general jurisdiction and the jurisdiction of district courts of the United States.

The district court of the territory of Alaska has a dual jurisdiction and acts in a dual capacity,[46] it being invested with the jurisdiction of district courts of the United States and with general jurisdiction in civil, equity,[47] criminal, see Criminal Law § 124, and admiralty, see Admiralty § 3 a, cases. It has been considered that the district court of Alaska is not, strictly speaking, a court of the United States, and does not come within the purview of the acts of congress which speak of "courts of the United States" only.[48] While it has been subsequently provided by statute that the court shall be deemed a court of the United States, such statute does not make the court a constitutional court.[49] However, Alaska is one of the territories of the United States, and its district court is the supreme court of the territory.[50] It must follow the decisions of the federal supreme court in preference to those of state courts.[51] Federal courts of district of Alaska as bankruptcy court are considered in Bankruptcy § 19. The status, powers, func-

39. U.S.—Chase v. African M. E. Church, C.C.A.Virgin Islands, 108 F.2d 377.

40. Ariz.—Wall v. Superior Court of Yavapai County, 89 P.2d 624, 53 Ariz. 344.

41. U.S.—Ex parte Parker, Wash., 9 S.Ct. 708, 131 U.S. 221, 33 L.Ed. 123.

42. U.S.—Swan v. Hill, Ariz., 15 S. Ct. 178, 155 U.S. 394, 39 L.Ed. 197.

43. U.S.—Swan v. Hill, supra.

44. Ind.T.—Swift v. Guy, 49 S.W. 46, 2 Ind.T. 736.

45. U.S.—Christianson v. King County, Wash., [illegible] F. [illegible], 122 C.C.A. [illegible] affirming D.C. 196 F. 791, affirmed [illegible] S.Ct. 114, 239 U.S. 356, 60 L.Ed. 327.

46. U.S.—Carscadden v. Territory of Alaska, C.C.A.Alaska, 105 F.2d 377.
25 C.J. p 951 note 19 [b].

47. U.S.—Electrical Research Products v. Gross, C.C.A.Alaska, 86 F.2d 925.
25 C.J. p 951 note 19.

District court is court of general jurisdiction
U.S.—Stone v. Howell, C.C.A.Alaska, 33 F.2d 701.

The common-law and equity practice of the district court for the district of Alaska is governed by the code of Alaska.—The Nugget, 1 Alaska 202.

The distinction between actions at law and suits in equity having been abolished by statute, the rule of the federal courts in equity, requiring both a legal and an equitable title to support a suit to quiet title, is not applicable.—Fulkerson v. Chisna Mining & Imp. Co., Alaska, 122 F. 782, 58 C.C.A. 582.

Place of trial may be changed from one division to another in accordance with a court rule construed in the light of pertinent statutes.—Paulson v. Shearer, 8 Alaska 465.

Former district court
The district court for the District of Alaska created by the Organic Act of 1884, 23 U.S.St. at L. p 24 c 53, if not abolished, was supplanted by the courts created by the Alaska Code, Act June 6, 1900, 31 U.S.St. at L. p 321 c 786, and their jurisdiction is limited by the provisions of such Code.—U. S. v. Newth, D.C.Wash., 149 F. 302.

48. Alaska.—Allen v. Myers, 1 Alaska 114.

49. U.S.—Carscadden v. Territory of Alaska, C.C.A.Alaska, 105 F.2d 377.

50. U.S.—The Coquitlam, Alaska, 16 S.Ct. 1117, 163 U.S. 346, 41 L.Ed. 184—Lindeberg v. Howard, Alaska, 146 F. 467, 77 C.C.A. 23, 8 Ann.Cas. 709.

Appeal from probate court
(1) An appeal may be taken from the probate court to the district court.—Matheson v. National Surety Co., C.C.A.Alaska, 41 F.2d 155—Stone v. Howell, C.C.A.Alaska, 33 F.2d 701.
(2) On such appeal, the case is heard in the appellate court in the nature of a suit in equity, and should be decided on equitable principles.—In re Underwood's Estate, 6 Alaska 673.

51. U.S.—Lindeberg v. Howard, Alaska, 146 F. 467, 77 C.C.A. 23, 8 Ann.Cas. 709.
Alaska.—U. S. v. Frank, 8 Alaska 436.

tions, and jurisdiction of United States commissioners in Alaska are considered in the C.J.S. title United States Commissioners §§ 1, 3, also 25 C.J. p 981 note 20, 66 C.J. p 2 note 23, p 5 notes 1–3.

There is no authority in incorporated towns in Alaska to create municipal courts independent of those created by congress, and from which there is neither appeal nor other supervision.[52]

§ 315. Canal Zone

There are in the Canal Zone magistrate's courts having jurisdiction of minor causes and one district court having general jurisdiction.

In 1904, under the authority of an act of congress, a complete system of courts was created for the Canal Zone;[53] in 1912 an act of congress provided for magistrate's courts, created a district court with two divisions, and divided civil jurisdiction between the magistrate's courts and the district court; in 1922 a federal statute enlarged the jurisdiction of the district court; and in 1933 some amendments were made to the statutes relating to the civil jurisdiction of the district court, see 48 U.S.C.A. § 1345, and of the magistrate's courts, see 48 U.S.C.A. § 1342. There is but one district court in the Canal Zone.[54] In addition to general jurisdiction given district courts of the United States, it has practically the same jurisdiction as a state court of unlimited civil jurisdiction.[55] Congress can, and at one time did, delegate to the president authority to make rules of practice in the district court;[56] but its present provision is that the rules of the district court shall be prescribed by the district judge, see 48 U.S.C.A. § 1344.

Formerly there were circuit courts[57] and a supreme court.[58] There are, of course, no state courts in the Canal Zone.[59]

§ 316. Hawaii

In Hawaii there are superior and inferior local courts with jurisdiction prescribed by local laws; and there is also a district court with the jurisdiction of a district court of the United States.

Effect is accorded a federal statute vesting the judicial power of the territory of Hawaii in one supreme court, circuit courts, and such inferior courts as the legislature may from time to time establish,[60] and declaring, 48 U.S.C.A. § 631, that, except as otherwise provided in the federal statutes and until the legislature shall otherwise provide, the laws of Hawaii in force prior to April 30, 1900, concerning the several courts and their jurisdiction and procedure, shall continue in force. There is also established in Hawaii a district court which has all the jurisdiction of a district court of the United States.[61] The latter court bears the same relation to the territorial courts as other federal

52. Alaska.—In re Munro, 1 Alaska 279.

53. U.S.—McConaughey v. Morrow, Canal Zone, 44 S.Ct. 78, 263 U.S. 39, 68 L.Ed. 153, affirming, C.C.A., 279 F. 617—Fullerton v. Government of Canal Zone, C.C.A.Canal Zone, 8 F.2d 968.

54. U.S.—Fullerton v. Government of Canal Zone, supra.

55. U.S.—Arthur v. Compagnie Generale Transatlantique, C.C.A.Canal Zone, 72 F.2d 662.

As a court of general jurisdiction, the district court of the Canal Zone has jurisdiction to hear a suit brought by one resident of the zone against another on whom personal service can be had, in respect of any property or personal right of the plaintiff.—McConaughey v. Morrow, Canal Zone, 44 S.Ct. 78, 263 U.S. 39, 68 L.Ed. 153, affirming, C.C.A., 279 F. 617.

Court has jurisdiction to issue writ of mandamus

U.S.—Smith v. Jackson, Canal Zone, 241 F. 747, 154 C.C.A. 449, affirmed 38 S.Ct. 353, 246 U.S. 388, 62 L.Ed. 788.

Court has jurisdiction of particular case where it has jurisdiction of the subject matter and defendant is not a transient, but is residing within the Canal Zone for the purpose of carrying on business.—De Jan v. De Jan, C.C.A.Canal Zone, 18 F.2d 690.

56. U.S.—Fullerton v. Government of Canal Zone, C.C.A.Canal Zone, 8 F.2d 968.

57. U.S.—Smith v. Jackson, Canal Zone, 241 F. 747, 154 C.C.A. 449, affirmed 38 S.Ct. 353, 246 U.S. 388, 62 L.Ed. 788.

Jurisdiction

(1) A circuit court had plenary jurisdiction.—Kung Ching Chong v. Wing Chong, 2 Canal Zone 25.

(2) However, it did not have jurisdiction of a case pending in a Panama court on Febr. 26, 1904, unless the Panama court surrendered jurisdiction.—Montilla v. Herbruger, 2 Canal Zone 154.

58. U.S.—Smith v. Jackson, Canal Zone, 241 F. 747, 154 C.C.A. 449, affirmed 38 S.Ct. 353, 246 U.S. 388, 62 L.Ed. 788.

In the exercise of its original jurisdiction, the supreme court could issue writs of mandamus, but its only authority in this respect was such as was specifically conferred by law.—Canal Zone v. Gudger, 2 Canal Zone 69.

Appellate matters

(1) The writ of certiorari could not be made to serve the purposes of an appeal to the supreme court.—Calderon v. Coquard, 1 Canal Zone 32.

(2) The court would not disturb a finding fully sustained by evidence.—Lam Hing v. Lynch, 2 Canal Zone 271.

(3) It would not reverse a judgment because of the exercise of the trial court's discretion as to the manner of allowing a witness to testify from a memorandum, unless a party had been clearly prejudiced thereby.—Panama R. Co. v. Ogilvie, 2 Canal Zone 150.

59. U.S.—Arthur v. Compagnie Generale Transatlantique, C.C.A.Canal Zone, 72 F.2d 662.

60. Hawaii.—Prudy v. Janion, 2 Hawaii 453.

61. Hawaii.—U. S. v. Burrell Construction Co., 3 Hawaii Fed. 316—Young v. Chong, 24 Hawaii 95—Roy v. Scott, 17 Hawaii 598—Paris v. Scott, 17 Hawaii 426.

25 C.J. p 983 note 42.

The rules of evidence in criminal cases are those in force in Hawaii at the time of the organization as a territory, except as subsequently

courts bear to the state courts in their respective districts.[62] It is the province of Hawaiian courts to construe and apply Hawaiian laws in accordance with their understanding thereof;[63] their decisions based on local law must be accorded deference,[64] and, unless manifestly erroneous, must be accepted as correct and followed[65] by federal courts where no federal question is involved; and the preference of a federal court as to the correct rule of general or local law applicable in a particular case should not be imposed on Hawaii unless there is a clear departure from ordinary legal principles in the decision of an Hawaiian court.[66] However, where no decree is entered, a decision of the highest court of the territory is not binding on a federal court.[67]

Review generally. Under the statutes, review may be had upon a bill of exceptions;[68] but such a bill, unlike a writ of error or an appeal, does not bring the entire case or its record to the appellate court, the only thing which the court passes on being whether the exceptions are good or bad.[69] Also a review may be had on a writ of error,[70] even in an equitable suit;[71] but, as shown infra this section, in respect of appeals from certain courts to other courts there are limitations on the scope of appeals and the actions in which they lie. A judgment or decree will be affirmed on appeal or writ of error if the record shows it to be correct, although the trial court may have assigned erroneous reasons for making it.[72]

Courts of equity generally. Pertinent statutes are construed not to limit courts of equity to the usage and practice of English courts of equity, but rather to permit them to follow the usage and practice of American courts whenever that usage and practice shall seem to them for any reason to be preferable.[73]

The supreme court is not a court of general original common-law jurisdiction, but primarily is an appellate court, with only such original jurisdiction as has been conferred on it.[74] It may, on appeal, review the judgment of a circuit judge at chambers;[75] and it may reject findings on conflict-

changed by congress.—U. S. v. Moore, 3 Hawaii Fed. 66—U. S. v. Morimoto, 3 Hawaii Fed. 395.

62. Hawaii.—Soga v. Jarrett, 3 Hawaii Fed. 502—Matter of Atcherley, 3 Hawaii Fed. 404.

63. U.S.—Walker v. O'Brien, C.C.A. Hawaii, 115 F.2d 956, certiorari denied 61 S.Ct. 829, 312 U.S. 707, 85 L.Ed. 1139—Hawaii Consol. Ry. v. Borthwick, C.C.A.Hawaii, 105 F.2d 286.

64. U.S.—Walker v. O'Brien, C.C.A. Hawaii, 115 F.2d 956, certiorari denied 61 S.Ct. 829, 312 U.S. 707, 85 L.Ed. 1139.

65. U.S.—Walker v. O'Brien, supra.
Hawaii.—U. S. v. John Ii, Ltd., 3 Hawaii Fed. 575.

66. U.S.—Waialua Agr. Co. v. Christian, Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., Christian v. Waialua Agr. Co., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436—Christian v. Waialua Agr. Co., Hawaii, 59 S.Ct. 21, 305 U.S. 91, 83 L.Ed. 60, reversing, C.C.A., 93 F.2d 603, rehearing denied 94 F.2d 806, certiorari granted 58 S.Ct. 949, 304 U.S. 553, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 240, 305 U.S. 673, 83 L.Ed. 436.

67. Hawaii.—U. S. v. John Ii, Ltd., 3 Hawaii Fed. 575.

68. U.S.—Goto v. Lane, Hawaii, 44 S.Ct. 525, 265 U.S. 393, 68 L.Ed. 1070.
Hawaii.—Meheula v. Pioneer Mill Co., 17 Hawaii 91.

69. Hawaii.—Meheula v. Pioneer Mill Co., supra.

Exceptions and writs of error distinguished

"Exceptions and error are inherent proceedings of different character. On exceptions, various specific rulings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review; only so much of the record is brought up as is necessary for passing upon the specific exceptions; the decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant, as shown by the entire case."—Territory of Hawaii v. Cotton Bros., 17 Hawaii 374, 379.

Exceptions dismissed

Where, in a jury-waived trial, the parties by stipulation limited the issue to one question of fact on which the evidence was conflicting but admittedly sufficient to support the court's decision determining that issue, exceptions, which raise only the questions of the sufficiency of the evidence and the findings of fact, will be dismissed.—Ilaga v. Yuen Lin Ho, 35 Hawaii 497.

70. U.S.—Goto v. Lane, Hawaii, 44 S.Ct. 525, 265 U.S. 393, 68 L.Ed. 1070.

Prescribed bond must be filed before writ of error may properly be issued.—Lord v. Lord, 35 Hawaii 843.

71. Hawaii.—Bierce v. McChesney, 16 Hawaii 258.

72. Hawaii.—In re Kaimuki Land Co., 35 Hawaii 254.

73. Hawaii.—Lee Chew v. Lee Wong Shee, 29 Hawaii 571.

74. Hawaii.—Matter of Pringle, 22 Hawaii 589.
Criminal jurisdiction of Hawaii supreme court see Criminal Law § 124.

Supreme court is an intermediate court of appeal in a case where the appellant has the right of appeal from an adverse decision by this court to the United States circuit court of appeals for the ninth circuit and a decision by this court on a former appeal of the cause does not become the law of the case.—Goo v. Hee Fat, 35 Hawaii 827.

75. U.S.—Matter of Goo Wan Hoy, 24 Hawaii 71.

Notice of appeal

(1) A severance is effected, under a statute, by service of the notice of appeal on all the nonappealing parties against whom the decision, judgment, order, or decree was rendered.—Lord v. Lord, 35 Hawaii 10.

(2) However, service on appellees or on nonjoining parties of a copy of

ing evidence and make findings according to its own views of the testimony;[76] but on appeal from a judgment at chambers in a contempt case the facts are not to be reviewed and new evidence is not admissible;[77] and no appeal lies from an order of a circuit court in a law case to the supreme court.[78] An appeal from a district court to the supreme court on points of law is limited to the single point or points of law certified by the district magistrate.[79] Where an exception is sustained and the cause remanded, the new decision in the lower court will bear the date of its rendition and the supreme court will not amend its decision so as to direct the lower court to amend the latter's decision as of the date of its original decision.[80] After remand, following a decision that the trial court erred in not granting defendant's motion for nonsuit, plaintiff is not entitled to introduce further evidence without a showing which would warrant reopening of the case.[81]

Where, under statutory authority, an agreed case is submitted to the supreme court, the formal submission takes the place of pleadings and the issues for determination are controlled and limited thereby.[82]

A circuit court has superior and general jurisdiction.[83] It has concurrent jurisdiction with the supreme court of an appeal on points of law from a district magistrate;[84] and the hearing of such an appeal is not a trial within the meaning of a statute prohibiting trials within certain months;[85] but a general appeal, requiring a trial de novo, as distinguished from an appeal on points of law, does not lie to it from a district magistrate's judgment of nonsuit for failure of proof.[86] Its jurisdiction on appeal from the land court is limited to issues framed by that court.[87]

The statutory jurisdiction of a circuit judge at chambers to decree the distribution of intestate estates does not extend to a case where decedent left a will, even though there is a partial intestacy.[88]

A district magistrate is without jurisdiction, under the statute relating thereto, where the

the notice of appeal is not essential to the jurisdiction of the supreme court to review the decree appealed from.—Lalakea v. Laupahoehoe Sugar Co., 35 Hawaii 262.

(3) While the statutes do not require that a notice of appeal be signed by or on behalf of the appellant, a notice of appeal should indicate from whom it emanates in order that the appellee or nonjoining parties may be advised that the notice of appeal comes from a proper source. Where it is recited in the body of a joint notice of appeal that the notice is given by and on behalf of an adult respondent personally and by and on behalf of a minor respondent by the adult respondent as his next friend and the name of adult respondent is alone subscribed to the notice of appeal, the signature of the adult respondent is sufficient to indicate from whom the notice of appeal emanates and that it comes from a proper source and it is immaterial that there was not repeated in connection with the name subscribed to the joint notice of appeal the language embodied in the notice of appeal indicating on whose behalf the joint notice of appeal was given. —Lalakea v. Laupahoehoe Sugar Co., supra.

(4) Where the caption of a notice of appeal and appeal contains the names of all of the parties to the cause, both petitioners and respondents, or the caption of an appeal and notice of appeal contains the names of the petitioners but the name of only one respondent, the other respondents being referred to by the abbreviation "et al.," to the extent that the respective captions include the names of the parties, the respective appellants use the names of the parties respectively appearing therein within the meaning of a statute permitting, as a substitute for summons and severance, the use, on an appeal by some of the parties against whom a decree was rendered, of the names of all such persons; and where the appellants use the names of all of the parties complainant and respondents affected by the decree, the notice necessarily includes all of the persons against whom the decree to be reviewed was rendered within the meaning of the statute.—Lalakea v. Laupahoehoe Sugar Co., supra.

Discretion of circuit judge held not abused

Hawaii.—Hansen v. Ah Bun Lau, 35 Hawaii 907.

Harmless error

Where plaintiff showed no right to relief, appellate court will not reverse decree dismissing bill, although all parties directly interested were not before court.—Kaohelelani v. Bishop Trust Co., 31 Hawaii 357.

76. Hawaii.—Valdez v. Valdez, 30 Hawaii 240.

Effect

Trial judge's error in considering evidence does not warrant new trial where appellate court makes its own findings on the evidence which was properly adduced.—Bradbury v. Bradbury, 29 Hawaii 638.

77. Hawaii.—Matter of Goo Wan Hoy, 24 Hawaii 71.

78. Hawaii.—Harumi v. Bonnell, 29 Hawaii 545.

79. Hawaii.—Dung v. Ah New Chun, 35 Hawaii 579.

80. Hawaii.—Woods v. Rapozo, 27 Hawaii 219.

81. U.S.—Wong Wong v. Honolulu Skating Rink, C.C.A.Hawaii, 283 F. 731.

82. U.S.—Hawaii Consol. Ry. v. Borthwick, C.C.A.Hawaii, 105 F. 2d 286.

Stipulation must agree to all essential ultimate facts involved in an issue framed, otherwise the court will not pass an opinion on that issue.—Kapiolani Maternity and Gynecological Hospital v. Wodehouse, 33 Hawaii 846.

83. Hawaii.—Gomez v. Whitney, 21 Hawaii 539.

Circuit court does not lose jurisdiction of case by reserving questions for the consideration of the supreme court.—Choy Look Lum Too v. Kaiwiki Sugar Co., 32 Hawaii 611.

84. Hawaii.—Hamamo v. Miyake, 24 Hawaii 12.

85. Hawaii.—Hamano v. Miyake, supra.

86. Hawaii.—Matsumoto v. Toraichi, 30 Hawaii 468.

87. Hawaii.—Kahue v. Kahale, 30 Hawaii 846.

88. Hawaii.—Matter of Kaiena, 24 Hawaii 148.

amount claimed exceeds a prescribed amount[89] or where the title to real estate is involved,[90] provided, in the latter case, an affidavit in support of a plea to the jurisdiction complies with a rule of court by showing the source, nature, and extent of the title claimed by defendant.[91] While strict rules of pleading do not apply in a court of a district magistrate, and the complaint need not contain a prayer for process,[92] nevertheless, it is necessary to state all essential facts required to entitle one to a special order in a statutory proceeding.[93]

§ 317. Philippine Islands

In the Philippine Islands the various courts are substantially the same as those which existed at the time of the acquisition of the islands from Spain.

The judicial system prevailing in the Philippine Islands at the time of their acquisition from Spain has been continued substantially, first by executive order, and then by legislation.[94] The judicial power is vested in a supreme court, courts of first instance, courts of justices of the peace, municipal courts, and other special tribunals.[95] As judicially noted,[96] the jurisdiction of these courts respectively was fixed originally by act of the Philippine commission passed June 11, 1901. Subsequent acts of congress provide that the supreme court and the courts of first instance shall possess and exercise jurisdiction as theretofore provided, and such additional jurisdiction as may thereafter be provided by law, see 48 U.S.C.A. § 1071,[97] and that the municipal courts shall have the jurisdiction then provided by law subject in all matters to such alteration and amendment as may be provided by law, see 48 U.S.C.A. § 1078. The admiralty jurisdiction of the supreme court and the courts of first instance cannot be changed except by act of congress, see 48 U.S.C.A. § 1072. The supreme court and the courts of first instance are courts of record.

The supreme court has original jurisdiction in, and only in, the cases provided by law.[98] It has appellate jurisdiction of all actions and special proceedings properly brought to it from the courts of first instance, and from other tribunals when specially provided by law;[99] but an appeal lies to the supreme court only when permitted by law;[1] and if the case has been once appealed from a justice of the peace or municipal court it cannot be appealed from the court of the first instance unless it involves the validity of a statute or municipal ordinance.[2] An act of the Philippine legislature authorizing the supreme court to sit either in banc or in divisions is valid.[3]

Courts of first instance. Courts, known and designated as courts of first instance, are a part of the judicial system of the Philippine Islands.[4] They are the courts of general original jurisdiction, both civil and criminal,[5] and also have appellate jurisdiction over all causes arising in justices' and oth-

89. Hawaii.—Sanada v. Kuwase, 23 Hawaii 480.

90. [illegible]—[illegible] v. [illegible], 24 Hawaii [illegible]—[illegible] Co. v. Jones, 24 Hawaii 74.

91. [illegible]—K[illegible] v. K[illegible], 29 Hawaii 336.

Affidavit is defective where it asserts a claim under an executory sale contract, but does not allege affirmatively that the contract is still in force and effect.—Jellings v. Kaihe, 30 Hawaii 160.

92. Hawaii.—Young v. Chong, 24 Hawaii [illegible].

93. Hawaii.—Thompson v. Gill, 24 Hawaii 16.

94. U.S.—Kepner v. U. S., Philippine, 24 S.Ct. 797, 195 U.S. 100, 49 L.Ed. 114, 1 Ann.Cas. 655.

95. **Township courts**

Under the Township Government Act, Act No. [illegible], which creates the township courts, [illegible] residents are authorized to submit their contentions in civil matters to the township court, and, on application to the court and the submission of an agreement in writing to abide by the decision, the court acquires jurisdiction to hear and determine the case, provided the value of the property involved does not exceed two hundred pesos and the judgment is final.—Abac v. Acedera, 21 Philippine 195.

96. U.S.—Kepner v. U. S., Philippine, 24 S.Ct. 797, 195 U.S. 100, 49 L.Ed. 114, 1 Ann.Cas. 655.

97. **Local legislature may increase, but not decrease, jurisdiction of such courts.**—[illegible] v. [illegible], 37 Philippine [illegible]—25 C.J. p [illegible] note 48 [a].

98. Philippine.—Madarang v. Santamaria, 37 Philippine 304.

25 C.J. p 981 [illegible].

Jurisdiction to issue writs of habeas corpus see [illegible] C.J.S. title Habeas Corpus § 6 [illegible] C.J. p 134 note 57.

99. Philippine.—[illegible] Pias v. Regidor, 2 Philippine 151.

25 C.J. p 982 note 53.

The filing of a bill of exceptions does not revive **a preliminary injunction which was dissolved by the final judgment.**—Teco v. Ventura, 1 Philippine 497—Watson v. Enriquez, 1 Philippine 480.

Trial de novo

On appeal the cause is tried de novo on the record on both the law and the facts.—Serra v. Mortiga, Philippine, 27 S.Ct. 343, 204 U.S. 470, 51 L.Ed. 571—25 C.J. p 982 note 54.

Cause may be remanded for an amendment of the complaint to include a necessary party.—Sanidad v. Cabotaje, 5 Philippine 204.

1. Philippine.—Aragon v. Araullo, 11 Philippine 7.

2. U.S.—U. S. v. Que Bing, 6 Philippine 513—Legaspi v. Sweeney, 5 Philippine 157—Trinidad v. Sweeney, 4 Philippine 531—U. S. v. Jeng, 2 Philippine 179.

3. Philippine.—U. S. v. Limsionges, 41 Philippine 94.

4. Philippine.—U. S. v. Mallari, 24 Philippine 366, 367.

15 C.J. p 688 note 93.

5. Philippine.—U. S. v. Jenkins, 5 Philippine 278.

25 C.J. p 983 note 58.

Election contests

Under statute, the judge of the court of first instance having jurisdiction in the judicial district in which an election was held, has exclusive jurisdiction to try and decide election protests and to issue a writ of mandamus to the board of canvassers to correct its certificate in conformity with the decision of

er inferior courts in their respective provinces.[6] While they are given jurisdiction in all cases in which the subject of litigation is not capable of pecuniary estimation, where the subject is so capable, the jurisdictional amount which must be in controversy is one hundred dollars exclusive of interest.[7]

Justices of the peace are given jurisdiction of specified minor causes, see the C.J.S. title Justices of the Peace § 26, also 35 C.J. p 487 note 26–p 492 note 62.

§ 318. Puerto Rico

There are in Puerto Rico certain insular courts, as well as the district court of the United States for Puerto Rico. The latter court, although only a territorial court, has jurisdiction somewhat broader than that of federal district courts in the states.

The judicial power of Puerto Rico is vested in the established courts and tribunals of Puerto Rico, see 48 U.S.C.A. § 861, including the supreme court,[8] insular district courts,[9] municipal courts,[10] and courts of justices of the peace.[11] A Puerto Rican statute conferring on the supreme court exclusive original jurisdiction of quo warranto proceedings for violation of a congressional enactment prohibiting agricultural corporations from owning more than five hundred acres of land has been upheld.[12] Both the supreme court[13] and the district courts[14] have original jurisdiction to issue writs of mandamus; but ordinarily, and except in certain cases, an application for a writ of mandamus may and should be presented in the first instance to a district court.[15]

The right of appeal is a statutory privilege;[16] and an appeal will lie in cases or proceedings where it is authorized by statute.[17] The supreme court may, notwithstanding the absence of a bill of exceptions, review matters constituting parts of the record proper;[18] but it will not take judicial notice of the judgment of another appellate court where such judgment is not part of the record and the court has no knowledge that the judgment was directly submitted to the trial court.[19]

The district court of the United States for Puerto Rico has a unique status.[20] It derives its authority wholly from congress.[21] Although it is a

the court.—Biegten v. Esteyo, 41 Philippine 318.

6. Philippine.—U. S. v. Jenkins, 5 Philippine 278—Eleizegui v. Manila Lawn Tennis Club, 1 Philippine 303.

7. Philippine.—Oehlers v. Hartwig, 5 Philippine 487.

8. Puerto Rico.—Delgado v. Executive Council of Puerto Rico, 7 Puerto Rico 401.
25 C.J. p 983 note 64.

Supreme court is statutory court
U.S.—Rubert Hermanos, Inc., v. People of Puerto Rico, C.C.A.Puerto Rico, 106 F.2d 754, certiorari granted People of Puerto Rico v. Rubert Hermanos, Inc., 60 S.Ct. 467, 309 U.S. 642, 84 L.Ed. 996, reversed on other grounds 60 S.Ct. 699, 309 U.S. 543, 84 L.Ed. 916.

9. Puerto Rico.—Ex parte Bird, 5 Puerto Rico 241.
25 C.J. p 983 note 65.

10. Puerto Rico.—Abella v. Humacao Dist. Ct., 10 Puerto Rico 215.
25 C.J. p 983 note 66.

11. Puerto Rico.—Ex parte Pesquera, 17 Puerto Rico 706.

12. U.S.—People of Puerto Rico v. Rubert Hermanos, Inc., Puerto Rico, 60 S.Ct. 699, 309 U.S. 543, 84 L.Ed. 916, reversing, C.C.A., Rubert Hermanos, Inc., v. People of Puerto Rico, 106 F.2d 754, certiorari granted People of Puerto Rico v. Rubert Hermanos, Inc., 60 S.Ct. 467, 309 U.S. 642, 84 L.Ed. 996.

13. Puerto Rico.—Quebradillas v. Executive Secretary, 27 Puerto Rico 138—Delgado v. Executive Council of Puerto Rico, 7 Puerto Rico 401—Delgado v. Council, 7 Puerto Rico 401.

14. Puerto Rico.—De la Pila v. Siaca, 25 Puerto Rico 558.

15. Puerto Rico.—De la Pila v. Siaca, supra—Palmer v. Guerra, 9 Puerto Rico 499.

16. Puerto Rico.—Rodriguez v. Workmen's Relief Commn., 28 Puerto Rico 596—Carrero v. Diez & Pérez, 27 Puerto Rico 433.

17. Puerto Rico.—Santiago v. Feuille, 10 Puerto Rico 408.

Dismissal for failure to file transcript within time
Supreme Court of Puerto Rico may properly dismiss an appeal where the transcript is not filed within thirty days from the approval of the stenographer's notes by the trial judge.—Great American Ins. Co. v. Campos, C.C.A.Puerto Rico, 24 F.2d 198.

Review of questions not raised in district court
The fact that plaintiff, after recovering judgment from defendant, subsequently brought an action for the same cause against another and recovered judgment therein, cannot be considered in Puerto Rico supreme court where it was first raised in the supreme court of Puerto Rico on appeal from the district court by motion for rehearing.—Gandia v. Porto Rico Fertilizer Co., C.C.A.Puerto Rico, 291 F. 18, certiorari denied Porto Rico Fertilizer Co. v. Gandia, 44 S.Ct. 37, 263 U.S. 711, 68 L.Ed. 519.

18. U.S.—De La Torre v. National City Bank of New York, C.C.A. Puerto Rico, 91 F.2d 399, certiorari denied 58 S.Ct. 272, 302 U.S. 752, 82 L.Ed. 581.

19. Puerto Rico.—Igaravidez v. Rubert, 23 Puerto Rico 272.

20. Puerto Rico.—Ortiz v. Alcalá del Olmo, 2 Puerto Rico Fed. 95, affirmed 29 S.Ct. 552, 214 U.S. 173, 53 L.Ed. 955.

21. U.S.—Romeu v. Todd, Puerto Rico, 27 S.Ct. 724, 206 U.S. 358, 51 L.Ed. 1093.

Acts expressly applicable to court
Congress has always defined the jurisdiction of the district court of the United States for Puerto Rico by acts expressly applicable to that court. In defining jurisdiction of United States district courts, congress did not intend to define jurisdiction of United States district court for Puerto Rico.—Munoz v. Porto Rico Ry. Light & Power Co., C.C.A. Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L.Ed. 1408.

Statute relating to terms construed
A statute requiring regular terms of court to be held at two designated places at prescribed times, and authorizing special terms to be held at a designated third place at such stated times as the judge may deem expedient, is construed to mean that a regular term may be held at the third place at a time to be specially designated by the judge, and not that the term held there is to have the

mere territorial or congressional court, and is not a constitutional court or a true United States court established under Article III of the Constitution to administer the judicial power of the United States,[22] nevertheless Puerto Rico constitutes a federal judicial district, 48 U.S.C.A. § 863; the court is called the district court of the United States for Puerto Rico;[23] it has, in some respects, broader jurisdiction than that of United States district courts in the states,[24] it having, under the statute, 48 U.S.C.A. § 863, jurisdiction of all cases cognizable in district courts of the United States,[25] and in addition, jurisdiction of all controversies where all the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States,[26] not domiciled in Puerto Rico,[27] where the matter in dispute exceeds three thousand dollars, exclusive of interest or costs,[28] and of all controversies in which there is a separable controversy involving the jurisdictional amount and in which all the parties on either side of such separable controversy are citizens or subjects of the character mentioned above,[29] and it not being within the application of that provision of 28 U.S.C.A. § 41(1) which is known as the Johnson Act and which deprives federal district courts of jurisdiction to enjoin enforcement of orders of state rate-making bodies.[30]

The court is required to proceed in the same manner as district courts of the United States.[31] It conforms to the local law and formerly to the local procedure,[32] except in matters in admiralty and equity,[33] to the same extent, and only to the same extent, as other district courts;[34] but at the present time a statute, 48 U.S.C.A. § 873a, brings actions of a civil nature in such court within the application of the Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723c. District court rules have been held valid.[35]

Formerly, when a judgment of the district court was reviewable by writ of error, the writ was a matter of right;[36] but, to give it operation as a

character of a special, as contradistinguished from a regular, term.—American R. Co. of Porto Rico v. Castro, Puerto Rico 27 S.Ct. 466, 204 U.S. 453, 51 L.Ed. 564.

22. U.S.—Balzac v. People of Porto Rico, Puerto Rico, 42 S.Ct. 343, 258 U.S. 298, 66 L.Ed. 627—Porto Rico Ry., Light & Power Co. v. Colom, C.C.A.Puerto Rico, 106 F.2d 345, certiorari denied 60 S.Ct. 262, 308 U.S. 617, 84 L.Ed. 516—Munoz v. Porto Rico Ry. Light & Power Co., C.C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L.Ed. 1408.

Puerto Rico.—Ortiz v. Alcalá del Olmo, 2 Puerto Rico Fed. 95, affirmed 29 S.Ct. 552, 214 U.S. 173, 53 L.Ed. 955.

Other federal district courts distinguished

There is a distinction, preserved in congressional legislation, between the territorial district court for Puerto Rico and the district courts of the United States in the strict sense of those words.—Munoz v. Porto Rico Ry. Light and Power Co., C.C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L.Ed. 1408.

23. Puerto Rico.—Ortiz v. Alcalá del Olmo, 2 Puerto Rico Fed. 95, affirmed 29 S.Ct. 552, 214 U.S. 173, 53 L.Ed. 955.

24. Puerto Rico.—Fuentes v. Suarez, 8 Puerto Rico Fed. [illegible]—Bigelow v. Porto Rico Planters Co. 7 Puerto Rico Fed. 349—Ortiz v. Alcalá del Olmo, 2 Puerto Rico Fed. 95 affirmed 29 S.Ct. 552, 214 U.S. 173, 53 L.Ed. 955.

25. U.S.—Fraenkl v. Cerecedo, Puerto Rico, 30 S.Ct. 322, 216 U.S. 295, 54 L.Ed. 486.

25 C.J. p 983 note 69.

Court has equitable jurisdiction

U.S.—People of Porto Rico v. American R. Co. of Porto Rico, Puerto Rico, 254 F. 369, 165 C.C.A. 589, certiorari denied American R. Co. of Porto Rico v. People of Porto Rico, 39 S.Ct. 259, 249 U.S. 600, 63 L.Ed. 796.

Offenses arising out of violations of National Prohibition Act were, at one time, within the jurisdiction of the court.—Ramos v. U. S., C.C.A.Puerto Rico, 12 F.2d 761.

26. U.S.—People of Puerto Rico v. National City Bank of New York, C.C.A.Puerto Rico, 128 F.2d 493—Munoz v. Porto Rico Ry. Light & Power Co., C.C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L.Ed. 1408—Domenech v. Verges, C.C.A.Puerto Rico, 69 F.2d 714.

25 C.J. p 984 note 70.

27. U.S.—Benitez Sampayo v. Bank of Nova Scotia, C.C.A.Puerto Rico, 125 F.2d 519, certiorari denied 62 S.Ct. 1308, 316 U.S. 702, 86 L.Ed. 1770—Sanfeliz v. Bank of Nova Scotia, C.C.A.Puerto Rico, 74 F.2d 338.

25 C.J. p 984 note 71.

28. U.S.—People of Puerto Rico v. National City Bank of New York, C.C.A.Puerto Rico, 128 F.2d 493—Sanfeliz v. Bank of Nova Scotia, C.C.A.Puerto Rico, 74 F.2d 338—Domenech v. Verges, C.C.A.Puerto Rico, 69 F.2d 714.

29. U.S.—San Juan Fruit Co. v. Carrillo, C.C.A.Puerto Rico, 7 F.2d 106.

30. U.S.—Munoz v. Porto Rico Ry. Light & Power Co., C.C.A.Puerto Rico, 83 F.2d 262, certiorari denied 56 S.Ct. 955, 298 U.S. 689, 80 L.Ed. 1408.

31. U.S.—Benedicto v. West India & Panama Tel. Co., Puerto Rico, 256 F. 417, 167 C.C.A. 545.

Attachment of property of nonresident cannot be issued.—Ortiz v. Alcalá del Olmo, 2 Puerto Rico Fed. 95, affirmed 29 S.Ct. 552, 214 U.S. 173, 53 L.Ed. 955—Re Rule Ten, 1 Puerto Rico Fed. 450.

32. U.S.—Fernandez y Perez v. Perez y Fernandez, Puerto Rico, 26 S.Ct. 561, 202 U.S. 80, 50 L.Ed. 942.

25 C.J. p 984 note 77—38 C.J. p 35 note 85 [a].

33. Puerto Rico.—Fernandez v. Perez, 6 Puerto Rico Fed. 342—Desola & Ramirez v. Willoughby, 1 Puerto Rico Fed. 344.

34. Puerto Rico.—Delgado v. Bernal, 7 Puerto Rico Fed. 666.

25 C.J. p 984 note 79.

35. U.S.—T. Vidal & Co. v. Beatty Brokerage Co., C.C.A.Puerto Rico, 31 F.2d 98.

District court rule held not contrary to Federal Rules of Civil Procedure

U.S.—Casalduc v. Diaz, C.C.A.Puerto Rico, 117 F.2d 915, certiorari denied Casalduc v. Diaz Gonzalez, 62 S.Ct. 74, 314 U.S. 639, 86 L.Ed. 512.

36. Puerto Rico.—Zurrinach v. Aran, 5 Puerto Rico Fed. 33—Zurrinach v. Aran, 5 Puerto Rico Fed. 33—Munich v. Valdes, 4 Puerto Rico Fed. 98.

supersedeas, service thereof within the period of time prescribed by statute was necessary.[37]

§ 319. Effect of Admission of Territory as State

On the admission of a territory as a state, the territorial courts are extinguished and cases pending therein are to be transferred to other courts in accordance with provisions for such transfer.

The general rule, stated in the C.J.S. title States § 22, also 59 C.J. p 70 note 93, that, on the admission of a territory as a state, the territorial government is extinguished and superseded applies to territorial courts,[38] notwithstanding any provision impliedly to the contrary in the state constitution, and even though there is no appointment of a district judge to the United States district court established therein.[39]

Transfer of causes. On the admission of a territory as a state, provision is ordinarily made for a transfer of cases pending in the territorial courts to other courts, and such provision, as properly construed, is given effect.[40] The character of a case is ordinarily made the determining factor in ascertaining the court to which it should be transferred,[41] the general rule being that cases which are of such character as to fall within the jurisdiction of the federal court should be transferred to the United States court established in the new state,[42] while cases which are not of this character are properly transferred to the state court within whose jurisdiction they fall.[43] If the federal and state courts have concurrent jurisdiction of pending causes, they may be transferred to either the state or federal courts by either party possessing that option under existing laws,[44] unless specific provision is made for such cases, in which event they must, of course, be transferred to the court designated.[45] It has been asserted, however, that the transfer of causes depends on the judicial status of states, when the law was passed, with reference to judicial circuits and whether or not they were then attached to any circuit.[46]

While a state statute authorizing a further transfer of a pending probate case, from the court of the county to which it was transferred on admission of the territory to statehood, to the court of another county where venue would lie if the matter had arisen since admission to statehood is valid,[47] it merely authorizes the second transfer and does not of itself oust the jurisdiction of the court to which the original transfer was made.[48]

§ 320. Provisional Courts

A provisional court is a federal court with jurisdiction and powers governed by the order from which it derives its authority.

A provisional court established in conquered or occupied territory by the military authorities, or the provisional government, is a federal court deriving its existence and all its powers from the federal government.[49] The jurisdiction and powers of such a court are governed by the order from which it derives its authority.[50]

37. Puerto Rico.—Perez y Fernandez v. Fernandez y Perez, 1 Puerto Rico Fed. 148.

38. U.S.—Koenigsberger v. Richmond Silver Min. Co., S.D., 15 S. Ct. 751, 158 U.S. 41, 39 L.Ed. 889.
25 C.J. p 984 note 82.

39. U.S.—Benner v. Porter, Fla., 9 How. 235, 13 L.Ed. 119.

40. U.S.—Joines v. Patterson, 47 S.Ct. 706, 274 U.S. 544, 71 L.Ed. 1194, reversing Patterson v. Joines, 244 P. 585, 114 Okl. 9.
Okl.—Eli v. Carter Oil Co., 257 P. 761, 126 Okl. 12, certiorari granted Carter Oil Co. v. Eli, 48 S.Ct. 117, 275 U.S. 517, 72 L.Ed. 403, and certiorari dismissed 48 S.Ct. 435, 277 U.S. 573, 72 L.Ed. 994—State v. Carr, 244 P. 436, 114 Okl. 121—Burton v. Colley, 242 P. 185, 113 Okl. 265—Bailey v. Jones, 220 P. 345, 96 Okl. 56, certiorari denied 44 S.Ct. 460, 265 U.S. 586, 68 L.Ed. 492.
25 C.J. p 984 note 84, p 985 note 91.

41. U.S.—Koenigsberger v. Richmond Silver Min. Co., S.D., 15 S. Ct. 751, 158 U.S. 41, 39 L.Ed. 889.

42. Okl.—Choctaw, O. & G. R. Co. v. Hamilton, 95 P. 972, 21 Okl. 126.
Wash.—Kenyon v. Squire, 24 P. 28, 1 Wash. 9.
25 C.J. p 985 note 86.

43. U.S.—Williams v. First Nat. Bank of Pauls Valley, 30 S.Ct. 441, 216 U.S. 582, 54 L.Ed. 625, affirming 95 P. 457, 20 Okl. 274.
25 C.J. p 985 note 87.

44. U.S.—Baker v. Morton, Neb., 12 Wall. 150, 20 L.Ed. 262.

45. U.S.—U. S. v. Alamogordo Lumber Co., N.M., 202 F. 700, 121 C.C.A. 162.

46. U.S.—U. S. Express Co. v. Kountze Bros., Neb., 8 Wall. 342, 19 L.Ed. 457.

47. Okl.—In re Smith's Estate, 269 P. 259, 132 Okl. 33.

48. Okl.—Eli v. Carter Oil Co., 257 P. 761, 126 Okl. 12, certiorari granted Carter Oil Co. v. Eli, 48 S.Ct. 117, 275 U.S. 517, 72 L.Ed. 403, and certiorari dismissed 48 S.Ct. 435, 277 U.S. 573, 72 L.Ed. 994—State v. Carr, 244 P. 436, 114 Okl. 121—Bailey v. Jones, 220 P. 345, 96 Okl. 56, certiorari denied 44 S.Ct. 460, 265 U.S. 586, 68 L.Ed. 492.

49. Miss.—Scott v. Billgerry, 40 Miss. 119.
"Provisional courts" defined see Courts § 10.
Power to establish provisional courts see the C.J.S. title War § 39, also 67 C.J. p 423 note 15 and 25 C.J. p 986 note 96 [a].

50. U.S.—Santiago v. Nogueras, Puerto Rico, 29 S.Ct. 608, 214 U.S. 260, 53 L.Ed. 989.
25 C.J. p 986 note 97.

Service of process of the provisional court for Puerto Rico by delivering the summons at usual place of defendant's abode, into hands of his wife, was sufficient, such service being in strict accordance with procedure established by that court.—Santiago v. Nogueras, supra.

XIII. UNITED STATES COURT FOR CHINA

§ 321. Establishment and Organization

The United States court for China was established by statute in 1906 and opened for business in 1907. In addition to a judge, there were a clerk, marshal, and district attorney.

During its exercise of extraterritorial rights in China, relinquished by treaty of January 11, 1943, the United States court for China was established by the United States by Act June 30, 1906, c 3934 § 1, 22 U.S.C.A. § 191. The court was presided over by one judge with a staff consisting of a district attorney, marshal, and clerk, all of whom were appointed by the president, 22 U.S.C.A. § 197. It was exclusively a court of the United States, and belonged in the same class with the district courts.[51] It was, however, a legislative court.[52]

§ 322. Jurisdiction and Procedure

With the exception of minor civil and criminal cases, the United States court for China succeeded to the jurisdiction previously exercised by consular courts in China: it had jurisdiction of appeals from the consular courts: and it had supervisory control of the administration of decedents' estates, by consuls or vice consuls. Any alien might resort to the court; but defendant was required to be an American citizen or an American corporation doing business in China.

With the exception of civil cases wherein the amount involved did not exceed five hundred dollars and criminal cases wherein the penalty prescribed did not exceed a fine of one hundred dollars or imprisonment for sixty days, or both, the United States court for China had exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction might have been exercised, prior to statutory establishment of the court, by United States consuls and ministers by law and by virtue of treaties between the United States and China, see 22 U.S.C.A. § 191; it had jurisdiction of appeals from final judgments of consular courts in China, see 22 U.S.C.A. § 192; and it had supervisory control over the discharge by consuls and vice consuls of the duties prescribed by the laws of the United States relating to the estates of decedents in China, see 22 U.S.C.A. § 193. The territorial jurisdiction of the court extended to, and its process ran throughout, all Chinese territory. In so far as personal jurisdiction was concerned, it was necessary and sufficient that defendant be a citizen of the United States[53] and, in a criminal case, it was assumed that he was a citizen at the time the offense was committed.[54] In the absence of a provision in a treaty with a particular country taking away jurisdiction over citizens or subjects of that country, every alien had access to the court where defendant was an American citizen.[55] Where defendant was a citizen of the United States and the controversy had its origin in China, it was not necessary that the residence of the parties be in China;[56] but where defendant was a corporation incorporated in a particular state, it must have been doing business in China in such manner and to such extent as to warrant the inference that it was present there and subject to the jurisdiction of the court.[57]

The United States court for China derived its entire authority from the federal government;[58] and it had no jurisdiction except that conferred by the laws of the United States.[59] Its jurisdiction was not dependent on treaties between the United States and nations other than China;[60] but in ascertaining the extent of its jurisdiction it was necessary to look to treaty provisions with China and acts of congress passed to give effect thereto.[61] The court having only limited jurisdiction,[62] it was necessary that its jurisdiction of a particular cause affirmatively appear;[63] and unless it did so appear

51. U.S.—In re Corrigan, 4 Mill.Rev. 298.

52. U.S.—Ex parte Bakelite Corporation, Cust.App., 49 S.Ct. 411, 279 U.S. 438, 73 L.Ed. 789—Casement v. Squier, D.C.Wash., 46 F.Supp. 296.

53. U.S.—Husar v. U. S., C.C.A. China, 26 F.2d 847, certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715, 717, quoting **Corpus Juris.**

54. U.S.—Husar v. U. S., C.C.A. China, 26 F.2d 847, certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545.

Object of statute, so far as criminal jurisdiction was concerned, was to secure to American citizens, residing or sojourning in China and there charged with crime the benefit of the privileges of the laws of the United States relating to the trial of persons accused of crime.—Biddle v. U. S., China [illegible] F. 759, 84 C.C.A. 415.

55. U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.

56. U.S.—Swayne & Hoyt v. Everett, China, 255 F. 71, 166 C.C.A. 399.

57. U.S.—Neuss, Hesslein & Co. v. Van der Stegen, C.C.A.China, 10 F. 2d 772, certiorari denied Van der Stegen v. Neuss, Hesslein & Co., 46 S.Ct. 632, 271 U.S. 681, 70 L.Ed. 1149.

58. U.S.—In re Corrigan, 4 Mill.Rev. 298.

59. U.S.—Neuss, Hesslein & Co. v. Van der Stegen, C.C.A.China, 10 F. 2d 772, certiorari denied Van der Stegen v. Neuss, Hesslein & Co., 46 S.Ct. 632, 271 U.S. 681, 70 L.Ed. 1149.

60. U.S.—Wulfsohn v. Russo-Asiatic Bank, C.C.A.China, 11 F.2d 715.

61. U.S.—Husar v. U. S., C.C.A. China, 26 F.2d 847, certiorari denied 49 S.Ct. 27, 278 U.S. 625, 73 L.Ed. 545.

62. U.S.—Husar v. U. S., supra.

63. U.S.—Husar v. U. S., supra.

Burden of proving foreign corporation was doing business in China, and subject to jurisdiction of United States Court for China, was on **plaintiff.**—Neuss, Hesslein & Co. v.

the cause was presumed to be without the jurisdiction of the court.[64]

Concurrent jurisdiction of consular courts and United States Court for China see infra § 355.

Rules of court. The act establishing the United States court for China confirmed and continued in force the old consular court rules, see 22 U.S.C.A. § 196, with all their defects, and it was even held that they prevailed over acts of congress relating to the same subject;[65] but that provision likewise offered a remedy for such defects (which, as suggested,[66] congress thus appeared to recognize) by authorizing the judge of the United States court "to modify and supplement said rules," see 22 U.S.C.A. § 196. A statement of the judge in a particular case as to a matter of fact, which had no support in the evidence, could not establish a court rule operating retroactively.[67]

XIV. COURTS OF THE DISTRICT OF COLUMBIA

§ 323. In General

There are both inferior and superior courts in the District of Columbia. The supreme court, now called the district court, and the United States court of appeals for the District are superior courts with jurisdiction, in respect of general federal matters, corresponding to that of the federal district courts and circuit courts of appeals located elsewhere, and with further jurisdiction and powers conferred by congress in the exercise of its constitutional power to legislate for the District.

Congress is the only body which may establish the courts of the District of Columbia.[68] The judicial power in the District of Columbia is, by D.C. Code § 11-101, vested in inferior courts, namely, the municipal court, the juvenile court, and the police court; and superior courts, namely, the district court of the United States for the District of Columbia, the United States court of appeals for the District of Columbia, and the supreme court of the United States. The appellate jurisdiction of the United States supreme court in respect of the judgments and decrees of the court of appeals and the supreme court of the District of Columbia is considered supra §§ 231–234; and detailed consideration is given hereinafter to the other courts, inferior courts being dealt with infra § 326, the supreme court, now known as the "District Court of the United States for the District of Columbia," infra § 325, and the United States court of appeals for the District of Columbia, formerly called the court of appeals of the District of Columbia, infra § 324.

Courts of the District of Columbia are parts of the federal judicial system.[69] They are federal courts or "courts of the United States" in certain senses,[70] for example, they are "federal courts" for the purpose of enforcing general federal laws[71] and "federal courts" in the sense that they are created by acts of congress in pursuance of provisions of the Constitution of the United States;[72] but whether the phrase "courts of the United States," as used in legislation, will include any or all of the courts of the District is a matter of statutory construction.[73] Subject to the guaranties of personal liberty contained in the amendments and in the original Constitution,[74] congress, in the exercise of its plenary power as the local legislature of the District of Columbia, has as much authority to vest courts of the District with a variety of jurisdiction and powers as a state legislature has to confer jurisdiction on its courts;[75] and it may, if it sees fit, unite legislative and judicial powers in a single hand.[76] Indeed, the courts of the District are vested not only with jurisdiction and power analagous to those of the federal courts within the several states, but also with powers analogous to those which states have vested in their own courts in order to perform the necessary judicial and administrative functions

in the permanent federal territory which surrounds the seat of the government at Washington.[77]

The supreme court and the court of appeals of the District have jurisdiction, for the enforcement of general federal statutes within the District, corresponding to that of the federal district courts in the several districts and the several circuit courts of appeal,[78] and there is a complete parallel between such courts in the consideration and disposition of cases involving what, among the states, would be regarded as within federal jurisdiction.[79] These superior courts of the District are permanent federal courts, constituting parts of the federal judicial system, and vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in the judiciary article of the federal Constitution;[80] they are courts of the United States within the meaning of various statutes;[81] and they are constitutional courts of the United States, or inferior courts in the constitutional sense, having been ordained and established under the Constitution, article 3,[82] even though congress, under the constitutional grant of power to it to exercise exclusive legislation over the District, has conferred on them quasi-judicial or administrative functions, powers, or duties or jurisdiction over nonfederal causes of action.[83] As shown supra § 2, the grant of these additional powers is permissible, under the dual authority of congress over the district, as an exception to the general rule relating to inferior courts established under the judiciary article of the Constitution.

Trespass to personalty. The courts in the District of Columbia have a like jurisdiction in trespass to personalty with the English and state courts;[84] and at one time they were required, in the absence of statutory provisions, to apply the same common-law principles which regulate the mode of bringing such actions, the pleadings, and the proof;[85] but at the present time, as explained infra § 325, the procedure in civil actions in the district court is governed by Federal Rules of Civil Procedure, 28 U.S.C.A., following § 723c.

§ 324. Court of Appeals

a. In general

b. Review of decisions of other tribunals

a. In General

The United States court of appeals for the District of Columbia is a circuit court of appeals within the meaning of some statutes and rules of procedure. It lacks the original jurisdiction of a district court, but has statutory power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction.

The court of appeals of the District of Columbia was created by an act of congress, approved February 9, 1893, 27 St. at L. p 434, and its name was changed to the United States court of appeals for the District of Columbia by Act of June 7, 1934, 48 St. at L. p 926. Although it has been held not to be a circuit court of appeals,[86] its jurisdiction, in respect of general federal matters, corresponds, as noted supra § 323, to that of the several circuit courts of appeals, it is held to be a circuit court of appeals within the meaning of a particular statute,[87] and, by virtue of an express provision in Federal Rules of Civil Procedure, rule 81 (d), 28 U.S.C.A. following § 723c, it or a justice thereof is included in any reference made in such rules to a circuit court of appeals or to a judge thereof. It is without jurisdiction over original suits conferred on district courts by 28 U.S.C.A. § 41;[88] it cannot entertain an original suit to annul a judgment or decree of a lower court;[89] and it cannot

77. Va.—Rinker v. Trout, 198 S.E. 913, 171 Va. 327.

78. U.S.—U. S. v. California Co-op. Canneries, D.C., 49 S.Ct. 423, 279 U.S. 553, 73 L.Ed. 838.

79. U.S.—Federal Trade Commission v. Klesner, 47 S.Ct. 557, 274 U.S. 145, 71 L.Ed. 972, reversing 6 F. 2d 701, 56 App.D.C. 3, certiorari granted 46 S.Ct. 102, 269 U.S. 545, 70 L.Ed. 404.

80. U.S.—O'Donoghue v. U. S., Ct.Cl., 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356.

81. U.S.—James v. U. S., 26 S.Ct. 685, 202 U.S. 401, 50 L.Ed. 1079, reversing 38 Ct.Cl. 615.

D.C.—In re Mattulath, 37 App.D.C. 410—U. S. v. Sampson, 19 App.D.C. 419—Noerr v. Brewer, 8 D.C. 507.

25 C.J. p 986 note 6.

82. U.S.—Williams v. U. S., Ct.Cl., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372—O'Donoghue v. U. S., Ct.Cl., 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356—James v. U. S., 38 Ct.Cl. 615, reversed on other grounds 26 S.Ct. 685, 202 U.S. 401, 50 L.Ed. 1079.

Contrary view is said to have been recognized in prior cases.—Federal Radio Commission v. General Electric Co., App.D.C., 50 S.Ct. 389, 281 U.S. 464, 74 L.Ed. 969.

Question was left open and undecided in some cases.

U.S.—James v. U. S., Ct.Cl., 26 S. Ct. 685, 202 U.S. 401, 50 L.Ed. 1079.

D.C.—U. S. v. Sampson, 19 App.D.C. 419.

83. U.S.—O'Donoghue v. U. S., Ct.Cl., 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356.

D.C.—Pitts v. Peak, 50 F.2d 485, 60 App.D.C. 195, certiorari denied 52 S.Ct. 21, 284 U.S. 640, 76 L.Ed. 544.

84. U.S.—McKenna v. Fisk, D.C., 1 How. 241, 11 L.Ed. 117.

85. U.S.—McKenna v. Fisk, supra.

86. D.C.—In re Mattulath, 37 App. D.C. 410.

87. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

88. U.S.—American Federation of Labor v. National Labor Relations Board, 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347, affirming 103 F.2d 933, 70 App.D.C. 62, certiorari granted 60 S.Ct. 76, 308 U.S. 531, 84 L.Ed. 448.

89. D.C.—Hartman v. Masters, 19 F. 2d 670, 57 App.D.C. 196, certiorari denied Modern Workmen of the

issue writs as a court of original jurisdiction.[90] While it has power, conferred by statute, to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction,[91] this statutory power does not authorize it to stay an order of a commission, pending an appeal therefrom, without requiring a bond,[92] and it has no inherent superintending or supervisory power over the inferior courts of the District that will warrant the issue of the writ of prohibition.[93]

As jurisdiction cannot be conferred on it by consent of the parties, want of jurisdiction cannot be waived by them, but may be taken advantage of at any time.[94]

b. Review of Decisions of Other Tribunals

(1) In general
(2) Persons entitled and parties
(3) Presentation and reservation in lower court of grounds of review
(4) Proceedings for, and effect of transfer of cause; supersedeas
(5) Record and proceedings not of record
(6) Assignment of errors or equivalent thereof
(7) Briefs
(8) Dismissal, advancement, or rehearing
(9) Scope and extent of review
(10) Determination and disposition of cause

(1) In General

In addition to such jurisdiction as is conferred on it by statutes, in force at the time, to review orders or decisions of commissions or administrative agencies, the United States court of appeals for the District of Columbia has statutory jurisdiction to review, by writ of error, a final judgment of the municipal court of the District and, by appeal, not only a final judgment, order, or decree of the supreme or district court of the District, but also an interlocutory order of such court which changes or affects the possession of property or from which the appellate court, in its discretion, allows an appeal on a showing that the allowance will be in the interest of justice.

In civil actions or proceedings, the United States court of appeals for the District of Columbia has jurisdiction, under the statutes, to review the judgments, orders, or decrees of the district court, formerly called the supreme court,[95] and the judgments of the municipal court;[96] and it has, or at times has had, under the statutes, jurisdiction to review the orders or decisions of various commissions or administrative agencies, such as the federal trade commission,[97] the federal communications commission,[98] and the patent office, see the C.J.S. title Patents § 136, also 48 C.J. p 161 note 59. Generally speaking, such jurisdiction as it has to review directly the action of administrative agencies is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review;[99] but in one instance the conclusion that the court had jurisdiction to review orders of a particular commission affecting persons within the district was arrived at by construction.[1] Under some former statutes relating to appeals from certain commissions or other administrative agencies, the court was deemed to act as a superior and revising agency in the administrative field and to exercise administrative, rather than judicial, jurisdiction.[2] It may have exclusive jurisdiction of appeals in a certain class of cases;[3] and in another class of cases it may be without jurisdiction of an appeal by reason of another court's having exclusive jurisdiction thereof under the pertinent statute.[4] It is invested with no power to supervise the proceedings, or review the judgments, of the court

World v. Hartmann, 48 S.Ct. 84, 275 U.S. 547, 72 L.Ed. 418.

90. D.C.—Universal Motor Truck Co. v. Universal Motor Co., 41 App. D.C. 261.

91. D.C.—Nuckols v. Nuckols, 38 App.D.C. 441.
25 C.J. p 987 note 33.

92. U.S.—General Broadcasting System v. Bridgeport Broadcasting Station, D.C.Conn., 53 F.2d 664.

93. D.C.—In re MacFarland, 30 App. D.C. 365, appeal dismissed Washington Gaslight Co. v. Macfarland, 30 S.Ct. 402, 215 U.S. 614, 54 L. Ed. 349.

94. D.C.—Utah Fuel Co. v. National Bituminous Coal Commission, 101 F.2d 426, 69 App.D.C. 333, certiorari granted 59 S.Ct. 253, 305 U.S. 575, 83 L.Ed. 362, affirmed 59 S.Ct. 409, 306 U.S. 56, 83 L.Ed. 483.

95. D.C.—Serkowich v. Wardell, 102 F.2d 253, 69 App.D.C. 389.

96. D.C.—Serkowich v. Wardell, supra—U. S. ex rel. Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.

97. U.S.—Federal Trade Commission v. Klesner, 47 S.Ct. 557, 274 U.S. 145, 71 L.Ed. 972, reversing 6 F.2d 701, 56 App.D.C. 3, certiorari granted 46 S.Ct. 102, 269 U.S. 545, 70 L.Ed. 404.

98. D.C.—Monocacy Broadcasting Co. v. Prall, 90 F.2d 421, 67 App. D.C. 176.

99. U.S.—American Federation of Labor v. National Labor Relations Board, 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347, affirming 103 F.2d 933, 70 App.D.C. 62, certiorari granted 60 S.Ct. 76, 308 U.S. 531, 84 L.Ed. 448.

1. U.S.—Federal Trade Commission v. Klesner, 47 S.Ct. 557, 274 U.S. 145, 71 L.Ed. 972, reversing 6 F.2d 701, 56 App.D.C. 3, certiorari granted 46 S.Ct. 102, 269 U.S. 545, 70 L. Ed. 404.

2. U.S.—Federal Radio Commission v. General Electric Co., App.D.C., 50 S.Ct. 389, 281 U.S. 464, 74 L.Ed. 969.

3. D.C.—Monocacy Broadcasting Co. v. Prall, 90 F.2d 421, 67 App.D.C. 176.

4. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

of claims.[5] The Trading with the Enemy Act, 50 U.S.C.A. appendix, did not change or modify in any respect the appellate jurisdiction of the court.[6] Review of intermediate appellate decisions in cases originating in former justice court is considered in the C.J.S. title Justices of the Peace § 234, also 35 C.J. p 855 note 52 [d].

The remedy by appeal is purely of statutory origin, and exists only when given by some statutory provision.[7] The right of appeal is subject to the control of congress, which may, in its discretion, grant or take away the remedy, and prescribe in what cases, under what circumstances, in what manner, and to or from what courts, appeals may be taken.[8] An appeal will not lie in those cases or proceedings to which the statutory provision cannot, under the liberal rules of construction applicable, reasonably be extended.[9]

The mode of obtaining review is by appeal where a review of a judgment, order, or decree of the supreme or district court is sought,[10] and by writ of error, where a review of a judgment of the municipal court is sought.[11] A writ of certiorari cannot ordinarily be made to serve the purposes of a writ of error or an appeal.[12]

Jurisdiction of lower court. The supreme court being without power, on motion, to vacate a judgment of the municipal court which has become final and been docketed in the office of the clerk of the supreme court, no appeal lies to the court of appeals from its refusal to grant such motion.[13] On the other hand, where the district court had jurisdiction in disbarment proceedings the court of appeals has jurisdiction of the subject matter on appeal;[14] and alleged irregularities, constituting error merely and not defeating jurisdiction in the fundamental sense, have no effect on the jurisdiction of either court.[15]

Nature and form of decision. Subject to the statutory exceptions hereinafter mentioned, an appeal or writ of error can be taken to the court of appeals only from a final judgment, order, or decree.[16] Review may be had, under the statutes, of the final judgments of the municipal court,[17] and of the final orders, judgments, and decrees of the supreme or district court,[18] as well as, in some cases, of the interlocutory orders of the supreme or district court,[19] but not of the municipal court,[20] in civil suits or proceedings. By virtue of express statutory provisions governing civil cases, review may be had of all interlocutory orders of the supreme or district court or any justice thereof whereby the possession of property is changed or affected, such as orders for the appointment of receivers, granting injunctions, dissolving writs of attachment, and the like,[21] and also of any other interlocutory order, in the discretion of the court of appeals, whenever it is made to appear to that court on petition that it will be in the interest of justice to allow such appeal.[22] However, the mere fact that an interlocutory order is made in an injunction or receivership proceeding does not make it appealable as a matter of right; to be so appealable, it must affirmatively change or affect the actual possession of property as it existed immediately before the order, it not being within the statute where it only preserves the status quo ante the order or reiterates a direction contained in a prior order.[23] Particular orders or decrees held final or otherwise appealable to, and reviewable by, the court of appeals include the district court's final approval of a sale under a deed of trust;[24] an order quashing an attachment of the property of a

5. D.C.—Butler v. Indian Protective Assoc., 34 App.D.C. 284.

6. D.C.—Trans-Atlantic Trust Co. v. Pagenstecher, 287 F. 1019, 53 App. D.C. 43.

7. D.C.—Bankers Surety Co. v. Security Trust Co., 39 App.D.C. 354—U. S. v. O'Neal, 10 App.D.C. 205.

8. D.C.—U. S. v. O'Neal, supra.

9. D.C.—In re Standard Oil Co., 39 App.D.C. 491.

10. D.C.—Serkowich v. Wardell, 102 F.2d 253, 69 App.D.C. 389.

11. D.C.—Serkowich v. Wardell, supra—U. S. ex rel. Eure v. Borden, 36 F.2d 527, 65 App.D.C. 84.

12. D.C.—Bradshaw v. Earnshaw, 11 App.D.C. 495.

13. D.C.—Restifo v. Hartig, 61 F.2d 404, 61 App.D.C. 252—Hopper v. Supplee Hardware Co., 39 App.D.C. 596.

14. D.C.—Fletcher v. Evening Star Newspaper Co., 114 F.2d 582, 72 App.D.C. 303.

15. D.C.—Fletcher v. Evening Star Newspaper Co., supra.

16. D.C.—American Federation of Labor v. National Labor Relations Board, 103 F.2d 933, 70 App.D.C. 62, certiorari granted 60 S.Ct. 76, 308 U.S. 531, 84 L.Ed. 448, affirmed 60 S.Ct. 300, 308 U.S. 401, 84 L.Ed. 347—Southland Industries v. Federal Communications Commission, 99 F.2d 117, 69 App.D.C. 82—Roth v. Mercantile Bank of Washington, 41 App.D.C. 293.
3 C.J. p 433 note 7.

17. D.C.—Serkowich v. Wardell, 102 F.2d 253, 69 App.D.C. 389.

18. U.S.—Jacobsen v. Jacobsen, App. D.C., 126 F.2d 13.
25 C.J. p 986 notes 9 [a], 10.

19. D.C.—Serkowich v. Wardell, 102 F.2d 253, 69 App.D.C. 389.

20. D.C.—Serkowich v. Wardell, supra.

21. D.C.—Mearns v. Sullivan, 49 App.D.C. 179, 262 F. 633.

22. D.C.—Hutchins v. Dante, 47 App.D.C. 99—Parish v. Hedges, 34 App.D.C. 21.
3 C.J. p 440 note 36—25 C.J. p 987 note 22.

23. U.S.—Laughlin v. Berens, App. D.C., 128 F.2d 23.
D.C.—Chas. McCaul Co. v. Harr, 51 App.D.C. 111, 276 F. 633—Mearns v. Sullivan, 49 App.D.C. 179, 262 F. 633.

24. U.S.—Ex parte Thomas, 114 F. 2d 847, 73 App.D.C. 50.

nonresident;[25] an order refusing to quash a writ of ne exeat and directing that the writ continue in force;[26] a decree denying recovery on an injunction bond for attorney fees incurred in obtaining dissolution of an injunction pendente lite;[27] discretionary orders and decisions in probate proceedings;[28] a dismissal of a bill of partition on the ground that a disputed question of title is involved and plaintiffs have an adequate remedy at law, where the record shows that no disputed question of fact is involved;[29] an order dismissing the petition in habeas corpus proceedings;[30] and an order awarding the custody of a child.[31] Other particular orders, judgments, or decrees which have been held not directly reviewable on appeal or writ of error, or at least not appealable as a matter of right, include an order or decree overruling a motion to quash or set aside the writ or summons in an action or the service thereof;[32] a judgment, on demurrer to the declaration, dismissing the action as to part of the defendants, but leaving it standing as to the other defendants;[33] an order framing issues on the caveat of a will;[34] an order directing plaintiff, in an action by an attorney against his client, to deliver certain papers to defendant without prejudice to plaintiff's lien;[35] an order overruling a motion to vacate an order approving an executor's account;[36] a judgment or order opening, vacating, or setting aside a judgment, order, or decree previously rendered in the cause;[37] an order striking from the files a suggestion of rights by an entity which is not a party and has not filed a petition to intervene;[38] and a judgment, order, or decree, in so far merely as it awards or denies costs.[39] Also, no appeal lies from the action of the trial court on a motion for a new trial[40] or from the denial of a motion for rehearing;[41] and there is no final judgment or decree for the purpose of an appeal as long as the cause is still under the control of the trial court by reason of the pendency of a motion for a new trial, for rehearing, to set the judgment aside, or otherwise.[42] An appeal from the direction of a verdict cannot be maintained where no judgment was entered on the directed verdict and none was intended.[43] An order of punishment in contempt proceedings is appealable where the contempt consists of attempting corruptly to influence a grand juror,[44] but not where it consists of refusal to comply with other orders of the court in a receivership proceeding.[45]

The appellate court may entertain an appeal from a decree entered pursuant to its mandate;[46] and although a judgment, order, or decree is void, and not merely erroneous, it is so far to be considered in existence by the appellate court that it may be reviewed and reversed on writ of error or appeal, and the parties restored to the position they originally occupied.[47]

(2) Persons Entitled and Parties

Any aggrieved party may maintain the proper appeal or error proceeding. Where the judgment is several, the parties may appeal severally without affecting the interests of nonappealing parties.

To be entitled to maintain an appeal or writ of error as a party aggrieved, within the meaning of the statutes, it is necessary and sufficient that a person be a party,[48] that he be interested in the subject matter of the suit, and that he be injuriously affected or aggrieved by the judgment, order, or decree complained of.[49] One who has been allowed by order of the court to intervene in a cause, or who has been treated as a party thereto, may appeal from a judgment, order, or decree therein affecting his interests.[50] Also, an executor or administrator may appeal from a judgment, order, or decree revoking his letters or removing him.[51] On the other hand, a party is not aggrieved by a judgment, order, decree, or ruling regularly rendered or made, on agreement or otherwise, with his express or implied consent, and therefore he cannot appeal or sue out a writ of error to review the same.[52]

Federal Rules of Civil Procedure, rule 74, 28 U.S.C.A. following § 723c, deals with joint and several appeals. In a case not governed by the rules, it was said that the common-law rule enforced in the federal courts is that where the judgment is joint, all parties must join in the appeal, but that where the judgment is several, the parties may appeal severally without affecting the interests of non-appealing parties.[53]

(3) Presentation and Reservation in Lower Court of Grounds of Review

Proper and timely objections in the lower court are necessary to obtain a review of most questions, and exceptions are necessary in respect of rulings which must be brought into the record by a bill of exceptions. Both objections and exceptions must be specific.

Ordinarily, the trial court cannot properly be said to have erred in respect of a matter not brought to its attention;[54] and errors which it was given no opportunity to correct will not be considered on appeal.[55] Objections cannot be made, for the first time on appeal, to the validity of the contract or instrument in suit;[56] to the propriety of the form of the action or the nature of the proceeding;[57] that a bill is bad for multifariousness;[58] that a plea, answer, or subsequent pleading is defective or insufficient;[59] to rulings on motions relating to pleadings;[60] to the improper admission of letters in evidence;[61] to the competency of a witness to testify;[62] to remarks of counsel;[63] or to the submission of an issue or question of fact to the jury.[64] So, also, the question of the identity of a witness cannot be raised for the first time on appeal;[65] and a statute will not be treated as controlling on appeal where its applicability was not raised in the trial court.[66] However, an objection to the complete want of a necessary party may be taken for the first time in the reviewing court;[67] and sometimes the court considers a question not raised, or a defense not interposed, below.[68]

To be available, an objection must be a timely one.[69] Furthermore, it must be specific,[70] especially when it pertains to instructions,[71] no ground or

48. D.C.—U. S. v. Securities Corporation General, 4 F.2d 619, 55 App. D.C. 258, affirmed White v. Mechanics' Securities Corporation, 46 S.Ct. 116, 269 U.S. 283, 70 L.Ed. 275.

49. D.C.—Hawley v. Hawley, 114 F.2d 505, 72 App.D.C. 357.

3 C.J. p 629 note 3.

50. U.S.—Automobile Brokerage Corporation v. U. S., App.D.C., 39 F.2d 288.

51. D.C.—Webb v. Lohnes, 96 F.2d 582, 68 App.D.C. 310.

52. U.S.—Curry v. Curry, App.D.C., 79 F.2d 172.

D.C.—Gauss v. Goldenberg, 39 App. D.C. 597.

53. D.C.—Swofford v. International Mercantile Marine Co., 113 F.2d 179, 72 App.D.C. 225.

54. D.C.—Columbia Aid Ass'n v. Sprague, 271 F. 381, 50 App.D.C. 307.

55. U.S.—Donovan v. Brown, App.D.C., 124 F.2d 295.

56. D.C.—United Clay Products Co. v. Linder, 119 F.2d 456, 73 App.D.C. 389.

57. D.C.—Supreme Lodge, K. P. v. Woods, 52 App.D.C. 334, 286 F. 998.

58. D.C.—Street v. Stubblefield, 57 App.D.C. 276, 20 F.2d 1017, certiorari denied 48 S.Ct. 121, 275 U.S. 564, 72 L.Ed. 428—Knight v. Herriman, 37 App.D.C. 236.

59. D.C.—Peyser v. Owen, 116 F.2d 298, 73 App.D.C. 64.

60. D.C.—Daly v. Sacks, 59 App.D.C. 216, 38 F.2d 388.

61. D.C.—Washington Times Co. v. Bonner, 66 App.D.C. 280, 86 F.2d 836, 110 A.L.R. 393.

62. U.S.—New Arcade Co. v. Owens, App.D.C., 258 F. 965.

63. U.S.—McWilliams v. Lewis, App. D.C., 125 F.2d 200.

64. D.C.—Martin v. Washington Times Co., 89 F.2d 230, 67 App.D.C. 11.

65. D.C.—Bailey v. Smith, 57 App. D.C. 369, 23 F.2d 977.

66. D.C.—Lehker v. Joyce, 51 App. D.C. 35, 273 F. 763.

67. D.C.—Flynn v. Brooks, 105 F.2d 766, 70 App.D.C. 243—Balter v. Ickes, 89 F.2d 856, 67 App.D.C. 112, certiorari denied 57 S.Ct. 941, 301 U.S. 709, 81 L.Ed. 1363.

68. D.C.—Kaplan v. Manhattan Life Ins. Co. of New York, 109 F.2d 463, 71 App.D.C. 250—Saks v. B. H. Stinemetz & Son Co., 293 F. 1005, 54 App.D.C. 38.

69. D.C.—Baltimore & O. R. R. v. Corbin, 118 F.2d 9, 73 App.D.C. 124.

70. D.C.—Carson v. Jackson, 281 F. 411, 52 App.D.C. 51.

71. D.C.—Martin v. Washington Times Co., 89 F.2d 230, 67 App.D.C. 11—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.

grounds of complaint against instructions other than those specified being considered by the appellate court.[72]

Tender of the expected answer to a question which is in proper form and clearly admits of a favorable and relevant answer is not necessary as a condition precedent to review of its exclusion.[73]

Motions. Where defendant, at the close of plaintiff's evidence and again at the close of all the evidence, moved for a directed verdict on the ground of the statute of limitations, and after verdict moved for a new trial, his failure to move to have the verdict set aside and judgment entered in accordance with his motion for a directed verdict does not prevent him from urging the statute of limitations on appeal.[74] Excessiveness of the verdict is not reviewable where the contention is raised for the first time on a motion for a new trial.[75]

Exceptions are necessary only to save those rulings which must be brought into the record by a bill of exceptions.[76] However, a statute which requires that technical errors, defects, or exceptions, not affecting the substantial rights of the parties, should be disregarded on appeal does not do away with the necessity of taking proper exceptions in order to save questions for review.[77] Exceptions must go further than merely to show that a particular ruling was objected and excepted to, and must show the grounds of objection, or the reasons why the ruling was erroneous.[78] A failure or refusal to charge as to certain matters is not available on appeal in the absence of an exception to the charge as given;[79] and, except where the charge in effect asserts but a single proposition,[80] an exception to the charge given must point out specifically the propositions of law objected to.[81] The question of the sufficiency of the evidence is raised by exceptions to the making of a finding of fact in favor of defendant and to the refusal to grant a new trial.[82] The foregoing rules must, in so far as appeals from the district court to the court of appeals are concerned, be viewed in the light of Federal Rules of Civil Procedure, rule 46, 28 U.S.C.A. following § 723c, dispensing with the necessity of formal exceptions.

(4) Proceedings for, and Effect of Transfer of Cause; Supersedeas

An appeal should be taken and perfected in accordance with applicable provisions in force at the time; and where it is so taken and perfected, general rules are applied in determining the effect of the appeal and the supersedeas, if any, accompanying it as excluding or curtailing further action in the lower court. Where a motion for new trial, vacation of the judgment, or the like, is filed, the period for taking the appeal is computed from the determination of the motion.

The filing of a motion or petition for new trial, rehearing, or vacation or modification of the judgment suspends the running of the period within which an appeal may be taken, and such period begins to run anew from the date on which final action is taken on the petition or motion, whether it be denied or granted.[83] On the other hand, the death of either party after rendition or entry of the judgment, order, or decree does not suspend the running of the time within which an appeal must be brought, even though no personal representative has been appointed.[84]

Federal Rules of Civil Procedure, rule 73, 28 U.S.C.A. following § 723c, contains provisions dealing with appeal and supersedeas bonds which are applicable to appeals from the district court to the United States court of appeals for the District of

72. D.C.—Walsh v. Rosenberg, 81 F.2d 559, 65 App.D.C. 157, certiorari denied 56 S.Ct. 747, 298 U.S. 663, 80 L.Ed. 1388.
3 C.J. p 845 note 75.

73. D.C.—Stafford v. American Security & Trust Co., 55 F.2d 542, 60 App.D.C. 380.

74. U.S.—Howard University v. Cassell, App.D.C., 126 F.2d 6, certiorari denied Cassell v. Howard University, 62 S.Ct. 1046, 316 U.S. 675, 86 L.Ed. 1749.

75. D.C.—Jarvis v. Bostic, 79 F.2d 831, 65 App.D.C. 78.

76. D.C.—National Savings & Trust Co. v. Ryan, 49 App.D.C. 159, 262 F. 613.

Ruling on demurrer may be reviewed notwithstanding the absence of exception thereto.
U.S.—Nalle v. Oyster, 33 S.Ct. 1043, 230 U.S. 165, 57 L.Ed. 1439, modifying 36 App.D.C. 36.
D.C.—National Savings & Trust Co. v. Ryan, 49 App.D.C. 159, 262 F. 613.

Refusal to adjourn trial
Assignment based on the trial court's refusal to adjourn a trial until a time specified when additional witnesses would be present to testify was held to be without merit where the trial court was not advised as to diligence exercised or testimony expected from additional witnesses, and no exception was noted.—Frazier v. Frazier, 61 App.D.C. 279, 61 F.2d 920.

77. D.C.—Carson v. Jackson, 52 App.D.C. 51, 281 F. 411.

78. D.C.—District of Columbia v. Wood, 41 App.D.C. 101.

79. D.C.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260—Economon v. Barry-Pate Motor Co., 3 F.2d 84, 55 App.D.C. 143.

80. D.C.—Bernhardt v. City & S. Ry. Co., 49 App.D.C. 265, 263 F. 1009.

81. D.C.—Weigle v. Roller, 54 App.D.C. 164, 295 F. 985.

82. D.C.—George v. Capital Traction Co., 54 App.D.C. 144, 295 F. 965.

83. D.C.—Hawley v. Hawley, 114 F.2d 745, 72 App.D.C. 376—Burke v. Canfield, 111 F.2d 526, 72 App.D.C. 127—Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554, 68 App.D.C. 282, certiorari denied Gross v. Saginaw Broadcasting Co., 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 391.
3 C.J. p 1051 note 10, p 1054 note 19.

84. U.S.—Ex parte Dante, App.D.C., 33 S.Ct. 579, 228 U.S. 429, 57 L.Ed. 905.

Columbia: but while these provisions supersede some of the previously existing provisions in statutes, and court rules, they only modify other provisions, and still other provisions are left unaffected. Prior to the taking effect of the rules, it was held that the federal statutes requiring the taking of security are applicable to the courts of the District;[85] a decree cannot be superseded and the status quo of the subject matter of the suit maintained pending appeal except by an order of court in accordance with Equity Rules, rule 74, which is binding on the courts of the District;[86] a rule of court requiring a cost bond on appeal from the supreme court is not applicable to a review by means of a writ of error to the municipal court;[87] after the jurisdiction of the appellate court over an appeal has attached, power to permit or require new or additional security to be filed exists only in the appellate court;[88] the legality of an appeal cannot be made to depend on the validity of the title of the signer of the appeal bond to a corporate office;[89] and that a supersedeas will be accorded its proper effect.[90]

Although, if no supersedeas bond has been filed, the trial court may properly permit a special master to proceed with a hearing, over the objection that it is without jurisdiction because of an appeal from a prior order,[91] it cannot, after an appeal or writ of error has been taken or sued out and perfected, vacate or open the judgment or order which is the subject of the appellate proceeding,[92] nor can it take such action as will be, in effect, an execution of its judgment, or will destroy the subject of the appeal, or place the funds involved where they will be beyond the control of the ultimate judgment or decree.[93]

(5) Record and Proceedings Not of Record

The record on appeal must comply with applicable requirements in force at the time; it must, to permit a review of a particular question, contain such matters pertaining thereto as will enable the reviewing court to determine whether there is error in respect thereof; and, to be of aid to appellant, it must support and bear out his contentions.

Federal Rules of Civil Procedure, rules 73 (g), 75, 76, 28 U.S.C.A. following § 723c, relating to the record on appeal, including such matters as a designation by appellant, and a counter-designation by appellee, of the matters to be contained in the record, the right of appellee to require the substitution of question and answer form for narrative form of the testimony of witnesses, the time, and extension thereof, for filing the record, and the connection of the record, are given effect when applicable, that is, on appeals from the district court to the court of appeals in actions commenced after the effective date of the rules, or in actions then pending and not excluded by the court from the application of the rules.[94] Prior to the effective date of the Federal Rules of Civil Procedure, it was

85. U.S.—General Broadcasting System v. Bridgeport Broadcasting Station, D.C.Conn., 53 F.2d 664.

86. D.C.—Shaw v. Lane, 47 App.D.C. 170, appeal dismissed Shaw v. Payne, 41 S.Ct. 60, 254 U.S. 609, 65 L.Ed. 436.

87. D.C.—George v. Capital Traction Co., 295 F. 965, 54 App.D.C. 144.

88. D.C.—Jackson v. Finance Corporation of Washington, 59 App.D.C. 309, 41 F.2d 103, certiorari denied Pickford v. Jackson, 51 S.Ct. 29, 282 U.S. 851, 75 L.Ed. 754—Jackson v. Kaufman, 41 F.2d 103, 59 App.D.C. 309, certiorari denied Kaufman v. Jackson, 51 S.Ct. 29, 282 U.S. 851, 75 L.Ed. 754.

89. D.C.—Vernon v. Provident Relief Ass'n, 19 F.2d 710, 57 App.D.C. 238.

90. **Performance of conditions of judgment or decree**

A judgment or decree which requires a party to perform specified conditions is stayed or suspended pending an appeal from the judgment or decree with a supersedeas.—Gates v. Pickett, 56 App.D.C. 306, 12 F.2d 841.

Amendment of judgment

Where defendant in open court noted an appeal and secured approval of a supersedeas bond, the lower court was without jurisdiction thereafter to amend the judgment appealed from.—Purman v. Marsh, 261 F. 1005, 49 App.D.C. 125.

91. D.C.—Avery v. Vernon, 40 F.2d 796, 59 App.D.C. 284, certiorari denied 51 S.Ct. 32, 282 U.S. 857, 75 L.Ed. 75.

92. D.C.—Ballard v. Spruill, 64 App.D.C. 60, 74 F.2d 464, certiorari denied Spruill v. Ballard, 55 S.Ct. 349, 293 U.S. 625, 79 L.Ed. 712, rehearing denied 55 S.Ct. 507, 294 U.S. 732, 79 L.Ed. 1261, certiorari denied 56 S.Ct. 130, 296 U.S. 575, 80 L.Ed. 406, rehearing denied 56 S.Ct. 158, 296 U.S. 662, 80 L.Ed. 472—Spruill v. Supreme Court of District of Columbia, 64 App.D.C. 60, 74 F.2d 464, certiorari denied 55 S.Ct. 350, 293 U.S. 625, 79 L.Ed. 712, rehearing denied 55 S.Ct. 507, 294 U.S. 732, 79 L.Ed. 1261.

93. D.C.—Jackson v. Finance Corporation of Washington, 41 F.2d 103, 59 App.D.C. 309, certiorari denied Pickford v. Jackson, 51 S.Ct. 29, 282 U.S. 851, 75 L.Ed. 754—Jackson v. Kaufman, 41 F.2d 103, 59 App.D.C. 309, certiorari denied Kaufman v. Jackson, 51 S.Ct. 29, 282 U.S. 851, 75 L.Ed. 754.

94. U.S.—Boucher Inventions v. Sola Electric Co., D.C.D.C., 1 F.R.D. 631—In re Taltavull's Estate, D.C.D.C., 1 F.R.D. 128.

D.C.—Laughlin v. Berens, 118 F.2d 193, 73 App.D.C. 136—Hannan v. U. S., 118 F.2d 52, 73 App.D.C. 166—Clawans v. White, 112 F.2d 189, 71 App.D.C. 362, certiorari denied 61 S.Ct. 16, 311 U.S. 646, 85 L.Ed. 412—Reynolds v. Imlay, 118 F.2d 53, 73 App.D.C. 173, denying motion D.C., 33 F.Supp. 564.

Liberal construction to relieve against undue hardship

The Federal Rules of Civil Procedure governing preparation of the record on appeal should be liberally construed so as to promote justice and relieve against undue hardship. The letter of the rules should be followed, except where undue hardship would result, and in such cases the rules should be flexible rather than rigid.—Hall v. Gordon, 119 F.2d 453, 74 App.D.C. 24.

decided that affidavits, being in the nature of evidence, are not part of the record proper;[95] the opinion of the court is not a part of the record proper;[96] a bill of exceptions preserving the evidence is necessary to review the disallowance of items in an administrator's final account;[97] where appellant or plaintiff in error fails to make a bill of exceptions, case, or statement of facts, prepared and settled as required by law, the order, judgment, or decree appealed from should be affirmed, or his appeal or writ of error dismissed;[98] the failure of the trial judge to certify that the bill of exceptions contains all the evidence in the case may not, under the circumstances, render the bill insufficient;[99] if the statute or rule of court limits the extension of time which may be granted for the settlement and filing of a bill of exceptions, an order ordinarily cannot be granted giving a longer time;[1] after the expiration of the first extension, the court has no power again to extend the time for filing, settling, and signing the bill;[2] the court cannot, after the expiration of the term, correct the record nunc pro tunc as to the time of filing of the bill of exceptions, unless there is some written memorial to which the record will be made to conform by such correction;[3] the reviewing court will rely on the record, or on the bill of exceptions as settled by the trial court, and not disturb or correct it on affidavits;[4] a district court rule, relating to the time for submission of a statement of evidence in equity for settlement and striking a statement not timely submitted for settlement, must, to be effective, be consistent with, and not contrary to, a controlling equity rule;[5] and that the court is constrained to sustain a motion to dismiss the appeal where a requirement as to the time of filing the transcript is not complied with.[6] On appeal from the municipal court, the court of appeals must accept the transcript of record as it comes to the court where there are no inconsistencies within the transcript, no apparent inadequacy of the transcript, no clerical or ministerial mistakes, and no charge of deliberate falsification.[7]

The court of appeals confines itself to the facts disclosed by the record on appeal and the inferences legitimately deducible therefrom; it does not consider matters outside the record[8] or questions dependent on matters not shown by the record;[9] and it does not uphold contentions not sustained or supported by the record.[10] Questions relating to, or dependent on, evidence offered or introduced can-

Where record was not filed in time, because order extending time for filing was not itself made before expiration of period originally prescribed, the error was not necessarily fatal, and court in its discretion would not dismiss appeal, the rules involved being new and there being a difference in opinion on the point. Nevertheless, the court deemed it timely to advise the bar of its intent to exercise sparingly its discretion to save an appeal prosecuted in disregard of rules of procedure.—Burke v. Canfield, 111 F.2d 526, 72 App.D.C. 127.

95. D.C.—Fishel v. Kite, 101 F.2d 685, 69 App.D.C. 360, certiorari denied Kite v. Fishel, 59 S.Ct. 645, 306 U.S. 656, 83 L.Ed. 1054.

96. D.C.—Atlantic Greyhound Lines v. Keesee, 111 F.2d 657, 72 App.D.C. 45.

97. D.C.—Perry v. Wilson, 60 App.D.C. 109, 48 F.2d 1021.

98. D.C.—Union Co-operative Ins. Ass'n v. Bannerman, 78 F.2d 1007, 65 App.D.C. 3.

4 C.J. p 212 note 43.

99. D.C.—Taylor v. Maddux, Marshall & Co., 4 F.2d 447, 55 App.D.C. 254.

1. D.C.—Nunan v. Timberlake, 66 App.D.C. 150, 85 F.2d 407.

2. D.C.—Cannon v. Tinkham, 99 F.2d 133, 69 App.D.C. 98, certiorari denied 59 S.Ct. 244, 305 U.S. 651, 83 L.Ed. 421.

3. D.C.—Cannon v. Tinkham, supra.

4. D.C.—Graziani v. Arundell, 299 F. 886, 55 App.D.C. 21—Dreslin v. Phillips, 279 F. 303, 51 App.D.C. 324.

5. D.C.—Saul v. Saul, 104 F.2d 245, 70 App.D.C. 112.

6. D.C.—Clawans v. Carnduff, 61 App.D.C. 185, 59 F.2d 472, certiorari denied 53 S.Ct. 319, 288 U.S. 601, 77 L.Ed. 977.

7. U.S.—Marvin's Credit v. Hall, App.D.C., 129 F.2d 57.

8. D.C.—White v. Central Dispensary and Emergency Hospital, 99 F.2d 355, 69 App.D.C. 122, 119 A.L.R. 1002—Cave v. District of Columbia, 90 F.2d 383, 67 App.D.C. 138—Moses v. Hazen, 69 F.2d 842, 63 App.D.C. 104—Pilger v. Sutherland, 57 F.2d 604, 61 App.D.C. 84—Washington Ry. & Electric Co. v. Stuart, 267 F. 632, 50 App.D.C. 74, certiorari denied 41 S.Ct. 63, 254 U.S. 649, 65 L.Ed. 456.

Lease not incorporated, or referred to, in bill of exceptions
D.C.—Beyer v. Smith, 32 F.2d 423, 59 App.D.C. 32, certiorari denied 50 S.Ct. 17, 280 U.S. 557, 74 L.Ed. 613.

Addition to record on appeal
In suit to enjoin assessment and collection of taxes on processing of palm oil refuse, where it appeared that, when bill was filed, no oil had been processed and no taxes were due, plaintiff was not entitled to add to record on appeal in order to show that, after hearing below, plaintiff had distilled oil on which no tax had been paid and was then engaged in distilling refuse oil, since case must be decided on pleadings and proofs below.—Gardner v. Helvering, 88 F.2d 746, 66 App.D.C. 364, certiorari denied 57 S.Ct. 784, 301 U.S. 684, 81 L.Ed. 1342.

9. D.C.—Simpson v. Stein, 284 F. 731, 52 App.D.C. 137.

Sufficiency or insufficiency of defense set up in the court below cannot be considered, on appeal, where the record does not show all the matters properly bearing on such defense.—Cave v. District of Columbia, 90 F.2d 383, 67 App.D.C. 138.

10. U.S.—Marvin's Credit v. Hall, App.D.C., 129 F.2d 57.
D.C.—Janes v. Janes, 278 F. 576, 51 App.D.C. 267—New Arcade Co. v. Owens, 258 F. 965, 49 App.D.C. 65—McCurley v. National Savings & Trust Co., 258 F. 154, 49 App.D.C. 10.

Objection to latitude of cross-examination will not be considered on appeal unless it is sustained by the record.—Nunan v. Timberlake, 85 F.2d 407, 66 App.D.C. 150.

not be considered or reviewed where such evidence is not shown by the record or bill of exceptions;[11] and an assignment of error challenging the charge cannot be considered in the absence from the record of the charge[12] or exceptions thereto.[13] Indeed, where the omissions in the record are such that nothing is presented for appellate review, as is sometimes the case,[14] the appeal will be dismissed[15] or the judgment will be affirmed.[16] On the other hand, failure to incorporate the testimony in the record on appeal may not warrant affirmance in view of the pleadings and findings in the particular case;[17] and matters which are not necessary to a clear understanding of the case should not be included in the record.[18] A statement in the appeal record that a party has consented to the decree is equivalent to an admission that facts exist on which the decree rests, and the only question open is whether the decree could be entered on any state of facts.[19]

(6) Assignment of Errors or Equivalent Thereof

While rules relating to a presentation of errors by assignment or otherwise should be complied with, they are not so rigid as to make a full and perfect compliance therewith an absolute condition precedent to consideration of questions otherwise reviewable.

In accordance with its rule, the court of appeals ordinarily will disregard points not presented for its consideration in appellant's brief, argument, statement of points to be relied on on the appeal, or otherwise.[20] A rule of court in force at the time relating to assignments of error should be complied with,[21] and the reviewing court need not consider questions not raised by any of the assignments of error,[22] but it may, at its option, consider plain errors not assigned or not properly or fully assigned.[23] While an assignment of errors may and should be filed within the time prescribed by a rule of court in force at the time,[24] the fact that it is not filed within such time does not render it subject to a motion to strike from the record.[25] Federal Rules of Civil Procedure, rule 75, 28 U.S.C.A. following § 723c, relating to the record on appeal to a circuit court of appeals, does not contain any general provision corresponding to the court rule requiring the filing of an assignment of errors in the lower court and the inclusion thereof in the transcript of the record; but it does provide that

In view of ambiguity in record, the court of appeals may be unable to say that a tender by appellant at the trial was sufficient.—Dante v. Miniggio, 293 F. 345, 54 App.D.C. 386.

11. D.C.—Steger v. Cameron, 103 F.2d 347, 71 App.D.C. 252—Pinn v. Lawson, 72 F.2d 742, 63 App.D.C. 370—Fletcher v. Laws, 64 F.2d 163, 62 App.D.C. 49—Ricketts v. U. S., 32 F.2d 943, 59 App.D.C. 47—Stockmann v. Allen, 4 F.2d 299, 55 App.D.C. 223—Gladman v. Stoddart, 42 App.D.C. 346.

12. D.C.—Ricketts v. U. S., 32 F.2d 943, 59 App.D.C. 47.

13. D.C.—Ricketts v. U. S., supra.

14. D.C.—Spruill v. Crawford, 75 F.2d 522, 64 App.D.C. 118.

No exception properly appearing in record

D.C.—Vincent v. U. S., 37 F.2d 824, 59 App.D.C. 194, certiorari denied 50 S.Ct. 237, 281 U.S. 720, 74 L.Ed. 1139.

15. D.C.—Barker v. Albright, 86 F.2d 852, 66 App.D.C. 296.

16. D.C.—Spruill v. Crawford, 75 F.2d 522, 64 App.D.C. 118—Darby v. Montgomery County Nat. Bank of Rockville, Md., 72 F.2d 181, 63 App.D.C. 213, certiorari denied 55 S.Ct. 92, 293 U.S. 579, 79 L.Ed. 676, rehearing denied Darby v. Montgomery County Nat. Bank, 55 S.Ct. 146, 293 U.S. 631, 79 L.Ed. 717.

17. D.C.—Allen v. Jones, 12 F.2d 185, 56 App.D.C. 245.

18. D.C.—American Electrotype Co. v. Kerschbaum, 105 F.2d 764, 70 App.D.C. 241.

19. D.C.—Curry v. Curry, 79 F.2d 172, 65 App.D.C. 47.

20. D.C.—Minnesota Min. & Mfg. Co. v. Coe, 118 F.2d 593, 73 App.D.C. 146, affirming, D.C., 28 F.Supp. 430 and 28 F.Supp. 433, and certiorari denied 62 S.Ct. 89, two cases, 314 U.S. 624, 86 L.Ed. 501, and 62 S.Ct. 90, 314 U.S. 624, 86 L.Ed. 501, rehearing denied 62 S.Ct. 486, three cases, 315 U.S. 826, 86 L.Ed. 1221—Cooper v. O'Connor, 107 F.2d 207, 71 App.D.C. 6, certiorari denied 60 S.Ct. 263, 308 U.S. 615, 84 L.Ed. 514.

21. **Where there is utter failure to comply with rule** and there is no plain error in the case, the judgment must be affirmed.—Bailey v. Block, 89 F.2d 801, 67 App.D.C. 57.

Definiteness

(1) The assignments of error should be definite.—Bernhardt v. City & S. Ry. Co., 263 F. 1009, 49 App.D.C. 265.

(2) An assignment of error to a refusal of the court to strike out testimony need not be considered where the ground of objection is not stated.—District of Columbia v. White, 48 App.D.C. 44.

(3) An assignment of error to the giving or refusing of instructions should definitely point out the error complained of, making clear in what it is contended to consist, in order that the court may be required to consider the assignment.—Nunan v. Timberlake, 85 F.2d 407, 66 App.D.C. 150.

Separate specification of each error is essential.—Shellman v. Shellman, 95 F.2d 108, 68 App.D.C. 197—Nicolopole v. Love, 39 App.D.C., 343, 47 L.R.A.,N.S., 949.

Assignment held sufficient

D.C.—Saks v. B. H. Stinemetz & Son Co., 293 F. 1005, 54 App.D.C. 38.

22. D.C.—Helvering v. Helmholz, 75 F.2d 245, 64 App.D.C. 114, certiorari granted 55 S.Ct. 657, 295 U.S. 724, 79 L.Ed. 1677, affirmed 56 S.Ct. 68, 296 U.S. 93, 80 L.Ed. 76—McReynolds v. W. F. Roberts Co., 281 F. 286, 52 App.D.C. 48.

23. D.C.—Shellman v. Shellman, 95 F.2d 108, 68 App.D.C. 197—Gordon v. Thomas, 70 F.2d 752, 63 App.D.C. 148—McReynolds v. W. F. Roberts Co., 281 F. 286, 52 App.D.C. 48.

Matter otherwise appearing

Although an assignment of error is not so specific as it might be, or as the rule contemplates, the appeal may be considered on its merits where the view of the trial judge sufficiently appears from his memorandum opinion and his order, as brought up by the record.—Cattell v. Jefferson, 51 F.2d 317, 60 App.D.C. 261.

24. D.C.—Nunan v. Timberlake, 85 F.2d 407, 66 App.D.C. 150.

25. D.C.—O'Connor v. Shapiro, 13 F.2d 957, 56 App.D.C. 351.

if appellant does not designate for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.[26]

(7) Briefs

A brief should be filed within the required time or an extension of time should be applied for. It should not contain abusive or other improper language or charges of misconduct unsupported by the record.

An appeal may, under a rule of court, be dismissed for failure to file a brief within the time specified;[27] and where counsel finds that he is prevented from having his brief printed or properly prepared for timely filing, he should apply at once to the court for an extension of time.[28]

Where a brief contains scandalous, libelous, abusive, or disrespectful language, or charges of misconduct unsupported by the record, it,[29] or the objectionable matter therein,[30] may be stricken on motion; but the granting of the motion is not intended to approve or excuse the alleged conduct referred to in the brief.[31] Citations of applicable law in the briefs are helpful, but may be omitted with less danger to a correct determination of the case than absence from the record of material facts on which the case must turn.[32]

(8) Dismissal, Advancement, or Rehearing

The practice and principles which govern the making and disposition of an application for dismissal of the appeal, or for advancement of the cause, or for a rehearing are substantially the same as those which obtain and are applied in appellate courts generally.

An appeal cannot be dismissed except on leave of court;[33] and in a doubtful case the appeal will be maintained.[34] It may be dismissed on a proper ground,[35] as where the appeal is taken from a nonappealable judgment, order, or decree, or a final judgment is lacking,[36] or where the appeal presents only a moot question.[37]

Advancement of cause. The court may, on a showing that public policy requires the advancement of the cause, grant a request for an immediate disposition of the appeal in order that the question involved therein, which is of great public interest, may be presented to the United States supreme court in time to be heard with another case involving the same question.[38]

26. **Sufficient designation**

Where five actions arising out of same accident were consolidated for trial, designation comprising complete record of all proceedings and evidence in portion of action from which appeal was taken was a sufficient designation for purposes of rule requiring a statement of points to be served only if appellant does not designate for inclusion the complete record and all proceedings and evidence in the action.—Atlantic Greyhound Lines v. Keesee, 111 F.2d 657, 72 App.D.C. 45.

Dismissal for failure to file statement of points

Failure to file a statement of points to be relied on, if appellant does not designate for inclusion the complete record of all proceedings and evidence in the action, is not mandatory ground for dismissing appeal.—Atlantic Greyhound Lines v. Keesee, supra.

27. D.C.—Wegner v. Bobbitt, 263 F. 480, 49 App.D.C. 228.

28. D.C.—Doyne v. Werner, 48 App. D.C. 254.

Extension of time was refused where, on account of the lack of filing of any statement of the evidence, the only grounds on which the appeal could be heard were purely technical.—Gladman v. Stoddart, 42 App.D.C. 346.

29. D.C.—Davidge v. Simmons, 266 F. 1018, 49 App.D.C. 398, certiorari and error dismissed 42 S.Ct. 184, 257 U.S. 667, 66 L.Ed. 426—U. S. v. Lane, 48 App.D.C. 279, affirmed U. S. v. Payne, 41 S.Ct. 131, 254 U. S. 343, 65 L.Ed. 295.

30. D.C.—Radtke Patents Corporation v. Coe, 121 F.2d 103, 74 App. D.C. 183—Jordon v. Bondy, 114 F. 2d 599, 72 App.D.C. 360.

31. D.C.—Radtke Patents Corporation v. Coe, 121 F.2d 103, 74 App. D.C. 183.

32. D.C.—Burgoyne v. U. S., 57 F.2d 764, 61 App.D.C. 97.

33. D.C.—U. S. ex rel. White v. Coe, 95 F.2d 347, 68 App.D.C. 218.

34. D.C.—Clawans v. White, 112 F. 2d 189, 71 App.D.C. 362, certiorari denied 61 S.Ct. 16, 311 U.S. 646, 85 L.Ed. 412.

35. D.C.—Clawans v. White, supra—Taylor v. Wharton, 43 App.D.C. 104, certiorari denied 35 S.Ct. 793, 238 U.S. 631, 59 L.Ed. 1498.

36. D.C.—Southland Industries v. Federal Communications Commission, 99 F.2d 117, 69 App.D.C. 82.

37. D.C.—International Bank v. Securities Corporation of District of Columbia, 32 F.2d 968, 59 App.D.C. 72—Chesapeake Western Ry. v. Jardine, 8 F.2d 794, 56 App.D.C. 33, certiorari denied Town of Bridgewater, Va., v. Jardine, 46 S. Ct. 352, 270 U.S. 653, 70 L.Ed. 782—Shaw v. Lane, 47 App.D.C. 170, appeal dismissed Shaw v. Payne, 41 S.Ct. 60, 254 U.S. 609, 65 L.Ed. 436.

Questions held moot

(1) The propriety of the granting of a temporary injunction or restraining order becomes moot after the expiration of the time for the stay.—Glass v. Ickes, 107 F.2d 259, 71 App.D.C. 60.

(2) Where, pending appeal from decree enjoining rent commission from interfering with proceedings instituted by landlord in municipal court, the life of the commission expired, the commission was without power to prosecute or defend appeal, and only moot case was presented.—Whaley v. Norment, 6 F.2d 716, 56 App.D.C. 18.

(3) Question with respect to validity of sale under deed of trust became moot, where purchaser because of delay rescinded sale without objection.—McKinley Memorial Baptist Church v. The American Workmen, 59 F.2d 303, 61 App.D.C. 179.

Question held not moot

That radio broadcasting license would have long since expired if it had been granted does not render moot appeal from denial of application where the relief sought by applicant includes a continuing right to apply for successive renewals.—Technical Radio Laboratory v. Federal Radio Commission, 36 F.2d 111, 59 App.D.C. 125, 66 A.L.R. 1355.

38. D.C.—Frothingham v. Mellon,

Rehearing. An application for a rehearing should set forth fully and concisely the grounds on which it is based, and point out specifically in what respect the original decision is erroneous.[39] The court may amend its opinion on a motion for a rehearing.[40]

(9) Scope and Extent of Review

- (a) In general
- (b) Parties entitled to allege error; waiver or estoppel
- (c) Presumptions
- (d) Discretion of lower court
- (e) Questions of fact; verdicts and findings
- (f) Harmless or prejudicial error

(a) In General

General principles are applied by the court of appeals in determining the scope and extent of appellate review.

The scope of inquiry on appeal is not broader than that permissible in the lower court.[41] Ordinarily questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by the court of appeals.[42] However, where a judgment granting an injunction in a case involving a labor dispute is required to be reversed because of lack of jurisdiction, but the case was fully tried on other issues which will necessarily arise again in the event of a new trial, the court may decline to limit its opinion to the jurisdictional question.[43]

A correct judgment or order will not be reversed or set aside because the trial court based it on insufficient or erroneous grounds or assigned incorrect or erroneous reasons therefor;[44] if the decision, conclusion, or result is correct it is immaterial what grounds it was placed on or what reasons were assigned therefor;[45] and where the trial court stated no reason for its decision the judgment will be affirmed if the record reveals any ground therefor.[46] However, where appellee submitted his case and obtained a verdict on one theory, he will not be permitted, for the purpose of sustaining the judgment, to adopt on appeal a different theory which appellant was not required to meet in the lower court.[47] Where no reasons were assigned for the dismissal of a bill on motion, the reviewing court must consider the bill and motion as filed.[48] An order or decree sustaining a demurrer will be affirmed if any one ground of demurrer is well taken;[49] and a correct ruling on the demurrer will be upheld, although it is based on an erroneous reason.[50]

283 F. 252, 53 App.D.C. 47, affirmed Commonwealth of Massachusetts v. Mellon, 43 S.Ct. 597, 262 U.S. 447, 67 L.Ed. 1078.

39. D.C.—Washington Ry. & Electric Co. v. Stuart, 50 App.D.C. 74, 267 F. 632, certiorari denied 41 S.Ct. 63, 254 U.S. 649, 65 L.Ed. 456.

40. D.C.—Vermillion v. Philadelphia, B. & W. R. Co., 42 App.D.C. 579, L.R.A.1916A 1145.

41. D.C.—Parks v. Parks, 98 F.2d 235, 68 App.D.C. 363.

42. D.C.—Stitzel-Weller Distillery v. Wickard, 118 F.2d 19, 73 App.D.C. 220, affirming, D.C., Stitzell Weller Distillery v. Wallace, 30 F.Supp. 1010—White v. Central Dispensary and Emergency Hospital, 99 F.2d 355, 69 App.D.C. 122, 119 A.L.R. 1002—Farley v. U. S. ex rel. Welch, 92 F.2d 533, 67 App.D.C. 382, affirming, D.C., U. S. ex rel. Welch v. Farley, 18 F.Supp. 75—Hazen v. American Security & Trust Co., 265 F. 447, 49 App.D.C. 297—Moses v. Hayes, 36 App.D.C. 194.

Another statement is that questions or objections need not be considered where the result would be the same however they were decided, or where the decision on a different matter is decisive of the case.—Acker v. H. Herfurth, Jr., Inc., 110 F.2d 241, 71 App.D.C. 241.

Where appellant has received benefit of jurisdiction, his contention that a statute is unconstitutional because denying him jurisdiction to which he is entitled need not be considered.—Lowry v. McCarl, 79 F.2d 144, 65 App.D.C. 19, certiorari denied 56 S.Ct. 170, 296 U.S. 637, 80 L.Ed. 453.

Particular issues

Where defendants' motions for a directed verdict and to set aside judgment for plaintiff in malicious prosecution action were founded on view that evidence was insufficient to sustain action for want of showing that judicial proceedings had been instituted, and that was the principal ground urged for reversal of judgment, the issues of malice and want of probable cause were not properly before the reviewing court.—Melvin v. Pence, App.D.C., 130 F.2d 423, affirming, D.C., Pence v. Melvin, 38 F.Supp. 759.

43. D.C.—Green v. Obergfell, 121 F.2d 46, 73 App.D.C. 298, reversing, D.C., Obergfell v. Green, 29 F.Supp. 589, certiorari denied 62 S.Ct. 72, 314 U.S. 637, 86 L.Ed. 511.

44. D.C.—Lewis-Hall Iron Works v. Blair, 23 F.2d 972, 57 App.D.C. 364, certiorari denied 48 S.Ct. 529, 277 U.S. 592, 72 L.Ed. 1004—Union Realty Corporation v. Wills, 286 F. 1016, 52 App.D.C. 352—Maxwell v. Brayshaw, 258 F. 957, 49 App.D.C. 57.

General order denying motion to vacate judgment, not being appealable, can be sustained if there was any jurisdiction to make it, regardless of the correctness or incorrectness of the reason for the order stated in a memorandum opinion of the trial court.—International Bank v. Securities Corporation of District of Columbia, 32 F.2d 968, 59 App.D.C. 72.

45. D.C.—Fay v. Doyle, 95 F.2d 110, 68 App.D.C. 199—McMahon v. Matthews, 48 App.D.C. 303.

46. D.C.—Capital Apartment Corporation v. Vassos, 65 F.2d 482, 62 App.D.C. 136.

47. D.C.—Carr v. Shifflette, 82 F.2d 874, 65 App.D.C. 268.

48. D.C.—Lowry v. McCarl, 65 App.D.C. 19, 79 F.2d 144, certiorari denied 56 S.Ct. 170, 296 U.S. 637, 80 L.Ed. 453.

49. D.C.—White v. Central Dispensary and Emergency Hospital, 99 F.2d 355, 69 App.D.C. 122, 119 A.L.R. 1002.

50. D.C.—Wilkins v. McGuire, 2 App.D.C. 448.

Questions of law are reviewable on appeal;[51] and in an equitable suit or proceeding questions of fact are also subject to review.[52] However, the questions raised and determinable on a special appeal may be limited.[53] Also, where the case was tried to the court without a jury, issues or assignments of error as to which no findings of fact or conclusions of law were requested or made will not be considered on review.[54] A special finding within this rule is not a mere report of the evidence, but is a finding of those ultimate facts on which the law must determine the rights of the parties.[55] However, the purpose of the findings contemplated under Equity Rules, rule 70½, 28 U.S.C.A. following § 723, is to enable the court of appeals to ascertain the basis of the determinations below and, when the questions presented may be readily understood, precise findings are not absolutely essential.[56] A case submitted on an agreed statement of facts must be determined in the light of such statement.[57]

Matters or evidence considered. The reviewing court will consider matters not offered or introduced in evidence in the lower court where the lower court was bound to take judicial notice of such matters;[58] and, on appeal from a judgment entered on demurrer in an action based on false certification of notes, it must look to the notes rather than the pleading where the terms and conditions of the notes are misstated in the declaration.[59] Matters which could not properly be considered by the trial court will not be considered by the court of appeals.[60]

Review of prior interlocutory order. On a writ of error from the final judgment of the municipal court, the court of appeals may consider a prior interlocutory order which could not be reviewed on a direct writ of error therefrom, such as an order vacating a judgment or order of dismissal and reinstating the case on the docket.[61]

Amendment of pleading on appeal. The insufficiency of a declaration can be cured by an amendment on appeal where the statement of a new cause of action is not involved.[62]

On a second or subsequent appeal or writ of error, the court will not consider matters assigned as error which arose prior to the first appeal or writ of error, and which might have been raised thereon, but were not, nor matters appearing in the original record which might have been corrected on the first hearing, but were not urged.[63]

51. D.C.—Sun Indemnity Co. of New York v. American University, Washington, D.C., 26 F.2d 556, 58 App.D.C. 184.

Contribution between tort-feasors

There is not, and since the decision in Erie R. Co. v. Tompkins, N.Y., 58 S.Ct. 817, 304 U.S. 64, 82 L.Ed. 1188, 114 A.L.R. 1487, conformed to, C.C.A., Tompkins v. Erie R. Co., 98 F.2d 49, certiorari denied 59 S.Ct. 118, 305 U.S. 637, 83 L.Ed. 410, rehearing denied 59 S.Ct. 229, 305 U.S. 673, 83 L.Ed. 436, discussed supra § 185, there cannot be, any fixed and binding federal rule of general application concerning contribution between two persons liable for a tort in the absence, on the part of either, of any personal participation, personal culpability, fraud, or moral wrong; and this imposes on the court of appeals the duty of exercising its own judgment in deciding the question.—George's Radio v. Capital Transit Co., App.D.C., 126 F.2d 219.

52. D.C.—Hammett v. Ruby Lee Minar, Inc., 53 F.2d 144, 60 App.D.C. 286, certiorari denied Minar v. Hammett, 52 S.Ct. 200, 284 U.S. 682, 76 L.Ed. 576—Faunce v. Woods, 5 F.2d 753, 55 App.D.C. 330, 40 A.L.R. 208.

53. **On special appeal from temporary injunction,** only question of jurisdiction will be determined.—Federal Trade Commission v. Millers' Nat. Federation, 23 F.2d 968, 57 App.D.C. 360.

On special appeal from order allowing additional exceptions to auditor's report, the question whether those exceptions were responsive to the pleadings was a matter not passed on in the court below, and therefore not raised by the special appeal.—Eichberg v. U. S. Shipping Board Emergency Fleet Corporation, 285 F. 928, 52 App.D.C. 194.

On appeal from order refusing to dismiss complaint in libel and slander suit against United States marshal on ground that any statements made by him were privileged, questions as to whether statements complained of were made concerning complainants or whether they were defamatory would not be considered, since motion to dismiss raised only the question of privileged statements.—Colpoys v. Gates, 118 F.2d 16, 73 App.D.C. 193.

54. D.C.—Fogle v. General Credit, 110 F.2d 128, 71 App.D.C. 338—Sanders Bros. Radio Station v. Federal Communications Commission, 106 F.2d 321, 70 App.D.C. 297, certiorari granted Federal Communications Commission v. Sanders Bros. Radio Station, 60 S.Ct. 294, 308 U.S. 546, 84 L.Ed. 460, and reversed on other grounds 60 S.Ct. 693, 309 U.S. 470, 642, 84 L.Ed. 869, 1037.

Exception to entry of judgment presents nothing for review where no request for special findings or motion for judgment was made.—Central of Georgia Ry. Co. v. West Virginia Pulp & Paper Co., 92 F.2d 292, 67 App.D.C. 309.

55. D.C.—Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554, 68 App.D.C. 282, certiorari denied Gross v. Saginaw Broadcasting Co., 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 391.

56. D.C.—Brown v. Metropolitan Life Ins. Co., 100 F.2d 98, 69 App.D.C. 233—Shellman v. Shellman, 95 F.2d 108, 68 App.D.C. 197.

57. D.C.—Borden's Condensed Milk Co. v. Eagle Mfg. Co., 47 App.D.C. 191.

58. D.C.—Fletcher v. Jones, 105 F.2d 58, 70 App.D.C. 179, certiorari denied 60 S.Ct. 116, 308 U.S. 555, 84 L.Ed. 467.

59. D.C.—French v. District Title Ins. Co., 75 F.2d 650, 64 App.D.C. 131.

60. D.C.—Cooper v. O'Connor, 107 F.2d 207, 71 App.D.C. 6, certiorari denied 60 S.Ct. 263, 308 U.S. 615, 84 L.Ed. 514.

61. D.C.—Serkowich v. Wardell, 102 F.2d 253, 69 App.D.C. 389.

62. D.C.—Fetherstonhaugh v. Moore, 48 App.D.C. 35.

63. D.C.—Moran v. Washington Ry. & Electric Co., 73 F.2d 384, 64 App.D.C. 3.

(b) Parties Entitled to Allege Error; Waiver or Estoppel

To be entitled to assert error in respect of a particular matter, a party must be aggrieved thereby and must not have waived, or become estopped to assert, it.

An appeal from an order will not be heard by the court of appeals as a special appeal on the request of appellee, who is not aggrieved by the order, where appellant does not join in the request.[64]

Appellant is estopped on appeal to make a claim inconsistent with the claim made or position taken by him on the trial[65] or with the theory on which the case was tried.[66] He may not complain of action taken with his consent[67] or on his request,[68] as where he requested that a certain question be submitted to the jury or that a charge thereon be given, he being precluded, in such case, from claiming on appeal that, on account of the insufficiency of the evidence or otherwise, the question should not have been submitted or the charge should not have been given.[69] Also, where he went to trial on the issues raised by the pleadings, he may not on appeal challenge the form or sufficiency of his adversary's pleading,[70] especially where the case was submitted entirely on his own theory.[71]

An assignment of error will ordinarily be regarded as waived or abandoned and no consideration will be given it, where it is not properly presented by brief.[72]

(c) Presumptions

The presumptions usually indulged on appellate review are, when appropriate, given effect by the court of appeals.

In the absence of anything in the record to the contrary, regularity of procedure in the lower court is presumed or implied in the appellate court.[73] It will be presumed that the trial was conducted in a proper, regular, and orderly manner,[74] and that the jury followed the instructions of the trial judge and were governed thereby in formulating the verdict.[75] On appeal the presumption is in favor of an order of confirmation of a judicial sale.[76]

Presumptions favorable to the judgment, order, or decree appealed from are properly indulged in a case where the record on appeal is abbreviated, defective, imperfect, or incomplete.[77] Such presumptions do not arise, however, from omission of

64. D.C.—Dieterich v. Dieterich, 45 App.D.C. 356.

65. **Disclaimer on trial**

Where one of the parties disclaimed at the trial any intention of attacking the good faith of the other party, claiming that the question of good faith was immaterial to the issue, he is estopped on an appeal to claim that such other party acted in bad faith and conspired with others to deprive him of his property.—Staples v. Port Graham Coal Co., 46 App.D.C. 542.

Objection withdrawn in trial court may not be urged on appeal.—Pillow v. Shields, 46 App.D.C. 487.

Introduction of other evidence pertaining to same matter

In an action by a servant for injuries received when she fell down a dumb-waiter shaft, defendant cannot complain of introduction in evidence of photographs of the opening into the dumb-waiter on the third floor, where both parties introduced evidence concerning the opening.—Gibson v. Gernat, 267 F. 305, 50 App.D.C. 3, certiorari denied 40 S.Ct. 463, 253 U.S. 487, 64 L.Ed. 1026.

66. D.C.—Baldi v. Ambrogi, 89 F.2d 845, 67 App.D.C. 101—Penn Oil Co. v. Vacuum Oil Co., 45 F.2d [illegible], [illegible] App.D.C. [illegible].

67. D.C.—Hoagland v. Chestnut Farms Dairy, 72 F.2d 729, 63 App.D.C. 357.

68. D.C.—Lemon v. Martin, 2 F.2d 710, 55 App.D.C. 186—Washington Ry. & Electric Co. v. Upperman, 47 App.D.C. 219.

Granting one, and refusing other, inconsistent motions

Where defendant filed four alternative and inconsistent motions and the first motion was rightly overruled, defendant could not complain that its second motion was granted and the others refused.—Eichberg v. U. S. Shipping Board Emergency Fleet Corporation, 285 F. 928, 52 App.D.C. 194.

69. D.C.—Perry v. District Amusement Corporation, 114 F.2d 484, 72 App.D.C. 323—Indiana Flooring Co. v. District Nat. Bank of Washington, 289 F. 522, 51 App.D.C. 391—Whelan v. Welch, 269 F. 689, 50 App.D.C. 173.

Related instruction

Defendant, requesting an instruction that if decedent when killed was crossing the tracks at a point other than the cinder walk he was not a passenger, is estopped to claim that the court erred in charging that if he was on the walk he was a passenger.—Washington Ry. & Electric Co. v. Clark, 48 App.D.C. 55.

70. D.C.—Avery v. Vernon, 40 F.2d 796, 59 App.D.C. 284, certiorari denied 51 S.Ct. 32, 282 U.S. 857, 75 L.Ed. 759—Vincent v. U. S., 37 F.2d 824, 59 App.D.C. 194, certiorari denied 50 S.Ct. 237, 281 U.S. 72[illegible], 74 L.Ed. 1139.

71. D.C.—Martin v. Washington Times Co., 89 F.2d 230, 67 App.D.C. 11.

72. D.C.—S. S. Kresge Co. v. Kenney, 86 F.2d 651, 66 App.D.C. 274—Jackson v. Fuller, 85 F.2d 816, 66 App.D.C. 239, certiorari denied 57 S.Ct. 236, 299 U.S. 608, 81 L.Ed. 448—Smith v. Pickford, 85 F.2d 705, 66 App.D.C. 206.

73. D.C.—Rhodes v. Bowling Green White Stone Co. of Kentucky, 43 App.D.C. 298.

74. D.C.—McLean v. Burkinshaw, 107 F.2d 665, 71 App.D.C. 107, certiorari denied 60 S.Ct. 616, 309 U.S. 670, 84 L.Ed. 1016.

75. D.C.—Hammond v. Sully, 48 App.D.C. 320.

Contrary not assumed

Where counsel withdrew a remark and the court instructed the jury to disregard the statement, it cannot be assumed that the jury took no heed of the withdrawal and disobeyed the positive mandate of the court.—Washington & O. D. Ry. Co. v. Dulany, 288 F. 421, 53 App.D.C. 67.

76. D.C.—Parsons v. Little, 28 App.D.C. 218.

77. U.S.—Weiss v. District Title Ins. Co., App.D.C., 121 F.2d 900.

Presumption of supporting facts

On a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained

parts of the record which were not considered by the trial court, could not have influenced its decision, and which, if present, would not have been necessary to be considered to determine the correctness of the decision; and, where the record fails to show that anything omitted from the transcript or bill of exceptions was considered by the trial court, or was before it to be considered, the appellate court will not presume the judgment to be correct, because certain orders in the case, or the records of prior suits pleaded, but not introduced in evidence, are omitted from the transcript.[78] Where the instructions given by the court are not properly presented to the appellate court, it must be presumed that proper and full instructions were given.[79]

Truth of allegations. In reviewing the ruling or decision of the trial court on a demurrer[80] or on a motion to dismiss,[81] the appellate court will assume the truth of the well pleaded allegations in the pleading attacked, and that they could be established by proof. Also, in order to sustain a judgment for defendant, the court of appeals may presume the truth of defendant's allegations.[82]

Evidence and findings or other determination of facts. The reviewing court may, under some circumstances, indulge a presumption that questions of fact were passed on by the trial court.[83] In an equitable proceeding, it will be presumed that the trial justice considered only competent evidence.[84]

The general presumption, on appeal, is in favor of the findings made by the lower court,[85] especially where the trial judge heard the witnesses testify;[86] and, where the record does not contain express findings of all material facts involved in the case, it will be presumed, on appeal, that the lower court found, in favor of the prevailing party, all the facts necessary for the support of the judgment.[87] The evidence adduced must be considered in the light most favorable to the prevailing party,[88] except where a verdict was directed for defendant, in which case the appellate court will view the evidence in the light most favorable to plaintiff and give him the benefit of all favorable inferences arising therefrom.[89] Ordinarily, where the evidence is not before the appellate court, it will be assumed to support and justify the findings[90] and decree;[91] but this presumption as to the suf-

of.—Carle v. Rainey, 83 F.2d 600, 65 App.D.C. 343.

78. D.C.—Klingstein v. Thomas Circle Cafe, 92 F.2d 554, 68 App.D.C. 5.

Validity of will

In determining right of testatrix' heirs and next of kin, instead of executor, to maintain suit to avoid deed on ground of undue influence, court of appeals could not presume that unproved will, whereby testatrix directed executor to sell real property and distribute proceeds, was invalid.—Kashouty v. Deep, App.D.C., 126 F.2d 233.

79. D.C.—Washington Loan & Trust Co. v. Cowgill, 85 F.2d 255, 66 App. D.C. 89.

In absence of bill of exceptions, appellate court must assume that, if issue of limitations became inapplicable, court so charged.—Vincent v. U. S., 37 F.2d 824, 59 App.D.C. 194, certiorari denied 50 S.Ct. 237, 281 U. S. 720, 74 L.Ed. 1139.

80. D.C.—U. S. ex rel. McCullough v. Lane, 269 F. 202, 50 App.D.C. 123, error dismissed U. S. ex rel. McCullough v. Lane, 42 S.Ct. 314, 258 U.S. 632, 66 L.Ed. 801—National Savings & Trust Co. v. Ryan, 262 F. 613, 49 App.D.C. 159.

81. D.C.—Realty Investment & Securities Corporation v. H. L. Rust Co., 109 F.2d 456, 71 App.D.C. 213 —Barnett v. Hines, 105 F.2d 96, 70 App.D.C. 217, certiorari denied 60 S.Ct. 88, 308 U.S. 573, 84 L. Ed. 480—Leventhal v. District of Columbia, 100 F.2d 94, 69 App.D.C. 229—Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 69 App.D.C. 27 —Jackson v. Finance Corporation of Washington, 41 F.2d 103, 59 App.D.C. 309, certiorari denied Pickford v. Jackson, 51 S.Ct. 29, 282 U.S. 851, 75 L.Ed. 754—Jackson v. Kaufman, 59 App.D.C. 309, 41 F.2d 103, certiorari denied Kaufman v. Jackson, 51 S.Ct. 29, 282 U.S. 851, 75 L.Ed. 754.

On appeal from decree of dismissal after cause was submitted on bill alone, the case must be disposed of on the assumption that all the allegations of the bill are true.—Commercial Solvents Corporation v. Mellon, 277 F. 548, 51 App.D.C. 146.

82. D.C.—Royal Indemnity Co. v. Woodbury Granite Co., 101 F.2d 689, 69 App.D.C. 364, certiorari granted 59 S.Ct. 645, 306 U.S. 627, 83 L.Ed. 1030, certiorari dismissed 60 S.Ct. 63, 308 U.S. 628, 84 L.Ed. 524.

83. D.C.—Township of Franklin, Somerset County, N. J. v. Tugwell, 85 F.2d 208, 66 App.D.C. 42.

84. D.C.—Faunce v. Woods, 5 F.2d 753, 55 App.D.C. 330, 40 A.L.R. 208.

85. D.C.—Colby v. Riggs Nat. Bank, 92 F.2d 183, 67 App.D.C. 259, 114 A.L.R. 1065.

Findings of fact by auditor to whom case was referred by trial court are presumptively correct.—Graves v. Construction Engineers, 70 F.2d 754, 63 App.D.C. 150.

86. D.C.—Metropolitan Casualty Ins. Co. of New York v. Hoage, 72 F.2d 175, 63 App.D.C. 307.

87. D.C.—Shellman v. Shellman, 95 F.2d 108, 68 App.D.C. 197.

88. D.C.—Washington Ry. & Electric Co. v. Chapman, 65 F.2d 486, 62 App.D.C. 140, certiorari denied Chapman v. Washington Ry. & Electric Co., 54 S.Ct. 75, 290 U.S. 661, 78 L.Ed. 572—Key v. Polk, 63 F.2d 358, 61 App.D.C. 382—Baltimore & O. R. Co. v. Fidelity Storage Co., 2 F.2d 310, 55 App.D.C. 92.

Whether there was substantial evidence to support findings in plaintiff's favor, court of appeals was bound to take as true all facts which plaintiff's evidence tended to establish and to draw in plaintiff's favor all inferences fairly deducible from such facts.—U. S. v. Ingalls, 114 F.2d 839, 72 App.D.C. 383.

89. D.C.—Hohenthal v. Smith, 114 F.2d 494, 72 App.D.C. 343—Boaze v. Windridge & Handy, 102 F.2d 628, 70 App.D.C. 24—Hansen v. Nicoll, 40 App.D.C. 228, Ann.Cas.1914C 759.

90. D.C.—Pike v. Walker, 121 F.2d 37, 73 App.D.C. 289, certiorari denied 62 S.Ct. 94, 314 U.S. 625, 86 L.Ed. 502, rehearing denied 62 S. Ct. 177, 314 U.S. 710, 86 L.Ed. 566 —Snider v. Lyons, 285 F. 932, 52 App.D.C. 198.

91. D.C.—Avery v. Vernon, 40 F.2d 796, 59 App.D.C. 284, certiorari denied 51 S.Ct. 32, 282 U.S. 857, 75 L.Ed. 759—Wedderburn v. Wedder-

ficiency of the evidence to support a finding is not available to prop up the contentions of the appealing party where, although one of the findings was in his favor, the decree was against him.[92]

(d) Discretion of Lower Court

Usually the determination or ruling of the trial court in respect of a matter within its discretion will not be reviewed or disturbed by the court of appeals except for a clear abuse of discretion.

As a general rule, if there has not been a clear abuse of discretion resulting to the complaining party's prejudice, the appellate court will not review or revise the trial court's action or rulings with reference to matters resting in the latter's judicial discretion.[93] The rule is applicable to the trial court's determination of discretionary matters in garnishment proceedings,[94] as well as to its discretionary action or rulings in respect of amendments,[95] leave to file a supplemental bill[96] or bill of review,[97] continuances,[98] injunctions,[99] the right to open and close,[1] the exclusion of evidence offered by plaintiff after he has closed his case in chief and defendant has moved for a directed verdict,[2] cross-examination beyond the scope of the direct examination,[3] or setting aside a decree pro confesso.[4] Also, in a number of cases, the rule is deemed to be applicable to the grant or refusal of a new trial generally[5] or to the ruling on a motion for a new trial on the ground of newly discovered evidence.[6] In some cases, however, the ruling is considered reviewable for, and only for, error of law[7] and not at all where it is discretionary.[8] It is even stated that the action of the trial court in refusing to grant a new trial is not assignable as error.[9] The ruling is not reviewable in so far as it relates to a ground of the motion that the damages awarded by the verdict are inadequate or excessive.[10]

A determination by the trial court as to the qualification of a witness to testify as an expert or to express an opinion as a nonexpert ordinarily will not be disturbed by the court of appeals[11] unless manifest error has been committed.[12] Discretionary orders in respect of costs usually are not re-

burn, 46 App.D.C. 149—Fletcher v. Fletcher, 43 App.D.C. 18.

92. D.C.—Hight v. Richmond Park Imp. Co., 47 App.D.C. 518.

93. D.C.—National Ben. Life Ins. Co. v. Shaw-Walker Co., 111 F.2d 497, 71 App.D.C. 276, certiorari denied Shaw-Walker Co. v. National Ben. Life Ins. Co., 61 S.Ct. 35, 311 U.S. 673, 85 L.Ed. 432—Heller v. Lamar, 77 F.2d 389, 64 App.D.C. 266—Lincoln v. Virginia Portland Cement Co., 258 F. 505, 49 App.D.C. 33.

4 C.J. p 796 note 15.

Departure from established rules

The court of appeals has jurisdiction to inquire on appeal whether the lower court exercised its discretion in accordance with established rules and precedents; and, when it appears that there has been a departure from such rules and precedents, the appellate court will not hesitate to act.—American E. E. Co. v. Normandy, 46 App.D.C. 329—Billings v. Field, 36 App.D.C. 16.

94. U.S.—Security Savings & Commercial Bank v. Aukam, App.D.C., 120 F.2d 722.

95. D.C.—Stokes v. Hinden, 85 F.2d 256, 66 App.D.C. 34—McDonald v. Co-operative Restaurant, 64 F.2d 333, 62 App.D.C. 48—Clawans v. Carrick, 55 F.2d 1028, 60 App.D.C. 413, certiorari denied 53 S.Ct. 10, 287 U.S. 605, 77 L.Ed. 526—Clawans v. Whiteford, 55 F.2d 1037, 60 App.D.C. 412, certiorari denied 53 S.Ct. 10, 287 U.S. 605, 77 L.Ed. 526—McReynolds v. Mortgage & Acceptance Corporation, 13 F.2d 310, 56 App.D.C. 342—Lincoln v. Virginia Portland Cement Co., 258 F. 505, 49 App.D.C. 33—Morris v. West, 11 App.D.C. 201.

4 C.J. p 799 note 34.

96. D.C.—Walters v. Baer, 50 F.2d 995, 60 App.D.C. 230.

97. D.C.—Bayer v. Rice, 75 F.2d 238, 64 App.D.C. 107.

98. U.S.—Thomas v. U. S., App.D.C., 121 F.2d 905.

D.C.—Harrah v. Morgenthau, 89 F.2d 863, 67 App.D.C. 119—Washington Ry. & Electric Co. v. Scala, 45 App. D.C. 484, affirmed 37 S.Ct. 654, 244 U.S. 630, 61 L.Ed. 1360.

99. D.C.—Phillips v. Sager, 276 F. 625, 51 App.D.C. 103—Standard Oil Co. v. Oeser, 11 App.D.C. 80—Electric Lighting Co. v. Metropolitan Club, 6 App.D.C. 536.

1. D.C.—Snow v. Snow, 270 F. 364, 50 App.D.C. 242.

2. D.C.—King v. Rhodes, 47 App.D.C. 316.

3. D.C.—Washington Ry. & Electric Co. v. Dittman, 44 App.D.C. 89.

4. D.C.—Bush v. Bush, 63 F.2d 134, 61 App.D.C. 337.

5. D.C.—Atlantic Greyhound Lines v. Keesee, 111 F.2d 757, 72 App. D.C. 41—Washington Times Co. v. Bonner, 86 F.2d 836, 66 App.D.C. 280, 110 A.L.R. 393—Concrete Oil Tank Co. v. Menefee, 57 F.2d 429, 61 App.D.C. 63—Gas Consumers' Ass'n v. Lely, 57 F.2d 395, 61 App. D.C. 29—Kenyon v. Youngman, 40 F.2d 512, 59 App.D.C. 270—Capital Traction Co. v. Sneed, 26 F.2d 306, 58 App.D.C. 141, certiorari denied Capital Traction Co. v. Newmyer, 49 S.Ct. 10, 278 U.S. 604, 73 L.Ed. 531.

6. D.C.—District Nat. Bank v. Malatico, 60 F.2d 1078, 61 App.D.C. 242—Fitzgerald v. Dodson, 26 F.2d 522, 58 App.D.C. 150—Mandes v. Midgett, 261 F. 1019, 49 App.D.C. 139.

7. D.C.—Ricketts v. U. S., 32 F.2d 943, 59 App.D.C. 47—Frye v. Lyon, 299 F. 926, 55 App.D.C. 48.

8. D.C.—Frye v. Lyon, supra—Raub v. Carpenter, 17 App.D.C. 505, affirmed 23 S.Ct. 72, 187 U.S. 159, 47 L.Ed. 119.

9. D.C.—Phillips v. Moore & Hill, 279 F. 927, 51 App.D.C. 349.

10. D.C.—Washington Times Co. v. Bonner, 86 F.2d 836, 66 App.D.C. 280, 110 A.L.R. 393—Ramsey v. Ross, 85 F.2d 685, 66 App.D.C. 186.

Absence of gross abuse of discretion

In a case where the verdict was not such as to present the question of a gross abuse of discretion, the court said that refusal to set aside a verdict as excessive on motion for a new trial will not be reviewed on appeal, but deemed it unnecessary to decide what it might do in case of a gross abuse of discretion.—Washington Ry. & Electric Co. v. Upperman, 47 App.D.C. 219.

11. D.C.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260.

12. D.C.—Washington Ry. & Electric Co. v. Clark, 46 App.D.C. 58.

4 C.J. p 814 note 63 [h]—22 C.J. p 527 note 15 [c].

viewable.[13]

(e) Questions of Fact; Verdicts and Findings

A verdict, finding, or other determination of fact will not be disturbed or set aside on appeal where it is supported by substantial evidence and is not clearly erroneous.

In an action at law a determination of a question of fact in the lower court will not be disturbed on appeal where it is supported by the evidence.[14] Where both parties move for a directed verdict, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn therefrom, and on review his finding, decision, or determination must stand if the record discloses any substantial evidence to support it.[15] The overruling of a motion for a new trial on the ground that the finding or verdict is contrary to the evidence, or is not sustained by sufficient evidence, is not assignable as error.[16]

Verdict or findings of jury. The verdict or findings of the jury will not be disturbed, or will be taken as conclusive, where there is ample evidence to support the verdict or findings[17] or where no verdict could have been rendered which would not have ignored important, convincing, and crucial evidence given by honest and honorable witnesses.[18] In determining whether the evidence is sufficient to support the verdict, the function of the court of appeals is not to weigh the evidence factually as the jury does, but to decide whether plaintiff's case, as made, was strong enough for the court to allow the jury to consider it.[19] The verdict or finding is conclusive as to a particular issue or question of fact which was properly submitted to the jury.[20] The question whether there was evidence for the jury on any particular issue must be determined by the reviewing tribunal according to its best judgment on the particular record involved;[21] and each case must rest largely on its own facts.[22]

A verdict approved by the trial court will not be disturbed;[23] and a judgment based on a corrected verdict will not be reversed on the ground that the defect in the verdict, which included a few extra days' interest, was corrected by remittitur to conform to the evidence.[24]

Findings of court generally. The trial court's fact findings will never be lightly disturbed by the appellate court;[25] and they will not be disturbed at all where the reviewing court finds no reason to do so.[26] If they have proper evidentiary support and are free from legal error, the trial court's fact findings will be regarded by the appellate court as conclusive and binding, and as establishing with finality that the facts are in truth as found.[27] Ordinarily the findings will not be disturbed if they are not clearly, plainly, palpably, or manifestly wrong or erroneous;[28] and, a fortiori, they will not be disturbed where the court of appeals is not only unable to say that they are clearly erroneous, but is of the opinion that they are amply supported by the evidence.[29] The findings of fact are to be regarded as adequately supported and left undisturbed if they are sustained by substantial evidence,[30] the

13. D.C.—Ruby Lee Minar, Inc., v. Hammett, 53 F.2d 149, 60 App.D.C. 291, certiorari denied Minar v. Hammett, 52 S.Ct. 200, 284 U.S. 682, 76 L.Ed. 576—Burlingame v. Manchester, 44 App.D.C. 335.

14. D.C.—U. S. v. Ingalls, 114 F.2d 839, 72 App.D.C. 383.

15. D.C.—Counselman v. Pitzer, 79 F.2d 707, 65 App.D.C. 71, certiorari denied 56 S.Ct. 310, 296 U.S. 650, 80 L.Ed. 463—Wardman Const. Co. v. Flynn, 54 F.2d 831, 60 App.D.C. 357—Lemon v. Martin, 3 F.2d 710, 55 App.D.C. 186—Splain v. B. F. Goodrich Rubber Co., 290 F. 275, 53 App.D.C. 300—Campbell v. Willis, 290 F. 271, 53 App.D.C. 296—Freeman v. W. B. Moses & Sons, 285 F. 898, 52 App.D.C. 164.

16. D.C.—Leapley v. Matthews, 50 F.2d 1016, 60 App.D.C. 251—Whelan v. Welch, 269 F. 689, 50 App. D.C. 173.

17. D.C.—Kintz v. Lenkin, 89 F.2d 860, 67 App.D.C. 116—Chambers v. District of Columbia, 44 App.D.C. 331.

Excessive verdict

It is not within the province of the court of appeals to reverse a judgment for the reason that the verdict is excessive.—American Security & Trust Co. v. Kaveney, 39 App.D.C. 223.

18. U.S.—Christie v. Callahan, App. D.C., 124 F.2d 825.

19. U.S.—Christie v. Callahan, supra.

20. D.C.—MacDonald v. Schenkel, 125 F.2d 737, 74 App.D.C. 346.

Negligence

D.C.—Robertson v. Washington Ry. & Electric Co., 279 F. 180, 51 App. D.C. 311.

Finding of fact under last clear chance doctrine

D.C.—Amdur v. Jacobsen, 57 App. D.C. 181, 18 F.2d 831.

21. D.C.—Service Parking Corporation v. Washington Times Co., 92 F. 2d 502, 67 App.D.C. 351—Fleming v. Fisk, 87 F.2d 747, 66 App.D.C. 350—S. S. Kresge Co. v. Kenney, 86 F.2d 651, 66 App.D.C. 274.

22. D.C.—Service Parking Corporation v. Washington Times Co., 92 F.2d 502, 67 App.D.C. 351.

23. D.C.—Economon v. Barry-Pate Motor Co., 3 F.2d 84, 55 App.D.C. 143.

24. D.C.—Snider v. Lyons, 285 F. 932, 52 App.D.C. 198.

25. D.C.—Penn Oil Co. v. Vacuum Oil Co., 48 F.2d 1008, 60 App.D.C. 96.

26. U.S.—Jackson v. Young, App.D. C., 120 F.2d 732.

27. D.C.—Consolidated Realty Corporation v. Dunlop, 114 F.2d 16, 72 App.D.C. 273—Neely Electric Construction & Supply Co. v. Browning, 25 App.D.C. 84.

28. D.C.—Colby v. Riggs Nat. Bank, 92 F.2d 183, 67 App.D.C. 259, 114 A.L.R. 1065.

29. D.C.—Nichols v. Gaston, 112 F. 2d 220, 72 App.D.C. 186.

30. D.C.—Alabama Power Co. v. McNinch, 94 F.2d 601, 68 App.D.C. 132.

the inquiry whether, without considering and weighing conflicting testimony, there is some substantial evidence to support the findings.[31] Findings of fact based on conflicting evidence are regarded as binding and conclusive on the appellate court and not to be disturbed,[32] at least where they have sufficient support in competent believable evidence,[33] and are not clearly or plainly wrong or erroneous.[34] While error, which will result in reversal, exists if the fact findings or conclusions are contrary to the evidence which is all one way and is not immaterial, irrelevant, improbable, inconsistent, contradicted, or discredited,[35] the mere fact that the findings may appear to the appellate court to be against the weight or preponderance of the evidence will not cause them to be disturbed if they are not clearly, manifestly, or palpably against the great weight of the evidence.[36]

A judgment attacked on the ground that the findings of fact do not comply with Federal Rules of Civil Procedure, rule 52, 28 U.S.C.A. following § 723c, may stand if the appellate court is afforded a clear understanding of the basis of the decision.[37] Prior to the effective date of such rule, it was held that, in the absence of special findings, a general finding was conclusive on all matters of fact.[38]

Findings in equitable suit. While the court of findings of fact,[39] it will not disturb them on appeal unless, on examination of the evidence, it deems them clearly wrong.[40] It accords particular deference and weight to, and seldom interferes with, the lower court's findings in an equitable suit where the evidence is oral and conflicting;[41] and it may uphold a finding even though there is conflicting evidence which would have justified a finding the other way.[42]

Findings of auditor or special master. While it is true that the court of appeals will sustain the findings of an auditor or special master unless it is shown that there has been an error in law or a conclusion of fact unwarranted by the evidence,[43] it will not hesitate to set aside such findings if they are clearly in conflict with the evidence.[44] When approved or concurred in by the trial court, the findings of the auditor or special master will not be disturbed or set aside except for an obvious and important error or mistake[45] in the application of the law or the consideration of the evidence.[46]

(f) Harmless or Prejudicial Error

The usual rules as to harmless and prejudicial error have been applied many times in cases coming before the court of appeals for review.

Appellant cannot complain of error which operated in his favor;[47] and a judgment will not be

31. D.C.—Operative Plasterers' and Cement Finishers' International Ass'n of U. S. and Canada v. Case, 93 F.2d 56, 68 App.D.C. 43.

32. D.C.—Crow v. Gore, 85 F.2d 291, 66 App.D.C. 125.
4 C.J. p 883 note 33—25 C.J. p 987 note 24.

33. U.S.—Saul v. Saul, App.D.C., 122 F.2d 64.

34. D.C.—Hearst Radio v. Good, 91 F.2d 555, 67 App.D.C. 250.

35. D.C.—George v. Capital Traction Co., 54 App.D.C. 144, 295 F. 965.

36. D.C.—Sears v. Sears, 92 F.2d 530, 67 App.D.C. 379.

37. D.C.—Klimkiewicz v. Westminster Deposit & Trust Co., 122 F.2d 957, 74 App.D.C. 333—Goodacre v. Panagopoulos, 110 F.2d 716, 72 App. D.C. 25.

In probate proceeding
The failure of the district court to separate findings of fact and conclusions of law in a probate proceeding in accordance with Fed.Rules of Civ.Proc. rule 52(a) did not require reversal of orders appealed from, especially in view of rule 81(a) (1) providing that the rules do not apply to probate proceedings in the district court of the United States for the District of Columbia except to appeals therein.—Burke v. Canfield, 121 F.2d 877, 74 App.D.C. 6.

38. D.C.—Central of Georgia Ry. Co. v. West Virginia Pulp & Paper Co., 92 F.2d 292, 67 App.D.C. 309.

39. D.C.—Abbott v. Coe, 109 F.2d 449, 71 App.D.C. 195—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256.

40. D.C.—Abbott v. Coe, 109 F.2d 449, 71 App.D.C. 195—Hazen v. Hawley, 86 F.2d 217, 66 App.D.C. 266, certiorari denied 57 S.Ct. 315, 299 U.S. 613, 81 L.Ed. 452—Garrity v. District of Columbia, 86 F.2d 207, 66 App.D.C. 256—Hotel Lafayette v. Pickford, 85 F.2d 710, 66 App.D.C. 211—Russell v. Wallace, 30 F.2d 981, 58 App.D.C. 357, certiorari denied 49 S.Ct. 512, 279 U. S. 871, 73 L.Ed. 1007.

41. D.C.—Jameson v. Brown, 109 F. 2d 830, 71 App.D.C. 254—Hearst Radio v. Good, 91 F.2d 555, 67 App. D.C. 250.

42. D.C.—Hotel Lafayette v. Pickford, 85 F.2d 710, 66 App.D.C. 211.

43. D.C.—Falcone v. Paradiso, 54 F. 2d 715, 60 App.D.C. 348—Weller v. Wolf, 50 F.2d 1014, 60 App.D.C. 249.

44. D.C.—Falcone v. Paradiso, 54 F. 2d 715, 60 App.D.C. 348.

45. D.C.—Washington Loan & Trust Co. v. Colby, 108 F.2d 743, 71 App. D.C. 236—McGrath v. McGrath, 4 F.2d 297, 55 App.D.C. 221.
4 C.J. p 895 note 61.

Appellate court will not substitute its views for those of master and trial court on matters of fact.—Tutson v. Holland, 50 F.2d 338, 60 App. D.C. 188, certiorari denied 52 S.Ct. 21, 284 U.S. 632, 76 L.Ed. 538.

46. D.C.—Fidelity Storage Co. v. Jaques, 76 F.2d 427, 64 App.D.C. 177—Graves v. Construction Engineers, 70 F.2d 754, 63 App.D.C. 150.

47. **Requiring bond**
Where plaintiff brought an action on an account for which defendant had given a note which had been lost by plaintiff, defendant cannot complain that the court, by analogy to the proceeding permitted by statute, in an action on a lost instrument, required a bond to indemnify defendant against liability on the lost note, even if that requirement was not authorized, since it was favorable to defendant.—Freeman v. W. B. Moses & Sons, 285 F. 898, 52 App.D. C. 164.

Favorable evidence
In an action for false arrest and

reversed for errors occurring on the trial where it is apparent that substantial justice has been done between the parties.[48] Various errors, defects, or irregularities, or matters claimed to be such, have been held, under the circumstances, harmless or not prejudicial to the party complaining thereof and therefore not grounds for reversal. These include defects or insufficiencies in respect of the pleadings;[49] misconduct of the court while conducting the trial;[50] improper remarks of counsel;[51] the fact that no verdict was returned by the jury;[52] and error or alleged error in granting or denying a motion for a bill of particulars,[53] permitting a supplemental pleading to be filed,[54] hearing evidence on a motion to dismiss a petition,[55] striking out affidavits supporting a motion for summary judgment,[56] refusing to sustain a challenge to a juror,[57] admitting[58] or excluding[59] or striking out[60] or refusing to strike out[61] evidence, giving[62]

imprisonment, recitals in a judgment on habeas corpus proceedings, introduced to prove plaintiff's release from arrest, that the warrant on which plaintiff was arrested was void and affidavit of lunacy insufficient, because not accompanied by a physician's certificate, tended to show that plaintiff was released because of defects in the proceedings, not for want of probable cause, and were therefore favorable, and not prejudicial, to defendant.—Arnaud v. Langellotti, 269 F. 857, 50 App.D.C. 205.

Error in instructions
D.C.—Steger v. Cameron, 109 F.2d 347, 71 App.D.C. 202.

48. D.C.—Coxe v. Ballard, 41 F.2d 426, 59 App.D.C. 337.

49. D.C.—Fitzhugh v. District of Columbia, 109 F.2d 837, 71 App.D.C. 290.

50. U.S.—Bethlehem Steel Co. v. National Labor Relations Board, App.D.C., 120 F.2d 641.

51. U.S.—Bethlehem Steel Co. v. National Labor Relations Board, supra.

Erroneous argument is rendered harmless by instruction to the jury to disregard it.—Washington Times Co. v. Bonner, 86 F.2d 836, 66 App.D.C. 280, 110 A.L.R. 393.

52. **Where both parties moved for directed verdict**
D.C.—Lemon v. Martin, 3 F.2d 710, 55 App.D.C. 186.

53. U.S.—Brady v. Games, App.D.C., 128 F.2d 754.
D.C.—Vansant v. Lindsley, 2 App. D.C. 421.

54. **Where supplemental pleading was subsequently superseded by another pleading**
D.C.—Daly v. Sacks, 59 App.D.C. 216, 38 F.2d 388.

55. D.C.—Zibell v. Meacham & Babcock Shipbuilding Co., 16 F.2d 330, 56 App.D.C. 385.

56. U.S.—Fox v. Johnson & Wimsatt, App.D.C., 127 F.2d 729, affirming, D.C., 31 F.Supp. 64.

57. D.C.—Lewis v. Washington Ry. & Electric Co., 285 F. 977, 52 App. D.C. 243.

58. U.S.—McWilliams v. Lewis, App. D.C., 125 F.2d 200.
D.C.—Washington & O. D. Ry. Co. v. Smith, 289 F. 582, 53 App.D.C. 184—Burnstine v. Drew, 269 F. 677, 50 App.D.C. 161.

Opinion evidence
D.C.—Hazen v. Hawley, 86 F.2d 217, 66 App.D.C. 266, certiorari denied 57 S.Ct. 315, 299 U.S. 613, 81 L. Ed. 452.

Evidence obviously harmless
Error in the admission of evidence is not ground for a reversal where such evidence was so utterly irrelevant or immaterial or unimportant that it was obviously harmless.—Hazen v. Hawley, 86 F.2d 217, 66 App.D.C. 266, certiorari denied 57 S. Ct. 315, 299 U.S. 613, 81 L.Ed. 452—4 C.J. p 969 note 56.

In action for alienation of affections, the admission of certain testimony was not reversible error where no substantial injustice was done to appellant by reason of the testimony.—Richards v. Lorleberg, 79 F.2d 413, 65 App.D.C. 57, certiorari denied 56 S.Ct. 178, 296 U.S. 642, 80 L.Ed. 456.

Error cured or rendered harmless by other matters
(1) The admission of improper and objectionable evidence consisting of letters is harmless where the fact thereby sought to be shown is fully and clearly established by other evidence which is competent.—McReynolds v. W. F. Roberts Co., 52 App. D.C. 48, 281 F. 286.

(2) Also error, if any, in admitting extrajudicial statement was not prejudicial, where fact stated was conclusively established by evidence.—Wagar v. Stalcup, 73 F.2d 986, 64 App.D.C. 50.

(3) Any error in permitting one party to introduce only a portion of a deposition taken by his opponent becomes immaterial where the party taking the deposition subsequently introduces all of it.—New Arcade Co. v. Owens, 258 F. 965, 49 App.D.C. 65.

(4) The defect in a question is cured where it is supplied by the answer of the witness.—U. S. v. Woltman, 57 F.2d 418, 61 App.D.C. 52.

(5) Any error in admission of testimony on cross-examination of defendant called as plaintiff's witness, because directed to material matters not brought out on direct examination, was cured by action of defendant's counsel in accepting her as his own witness.—Lemon v. Martin, 3 F.2d 710, 55 App.D.C. 186.

(6) Error in the admission of evidence is harmless where the court, in accordance with the competent evidence in the case, directs a verdict on the count or issue on which the improper evidence is admitted.—Washington & O. D. Ry. Co. v. Dulany, 53 App.D.C. 67, 288 F. 421.

59. D.C.—Wardman v. Washington Loan & Trust Co., 90 F.2d 429, 67 App.D.C. 184—Wilson v. Borden, 62 F.2d 866, 61 App.D.C. 327, certiorari denied 53 S.Ct. 506, 288 U. S. 615, 77 L.Ed. 988—Sands v. McNeill, 281 F. 589, 52 App.D.C. 85—Janes v. Janes, 278 F. 576, 51 App. D.C. 267—Crook v. Maryland International Trust Co., 32 App.D.C. 490.

Where same evidence was subsequently admitted, the exclusion was not prejudicial error.—Economon v. Barry-Pate Motor Co., 3 F.2d 84, 55 App.D.C. 143—Rogers v. Rawlings, 298 F. 683, 54 App.D.C. 361.

Where other evidence establishes fact sought to be shown by the excluded evidence, the error is cured.—Pollock v. Jameson, 70 F.2d 756, 63 App.D.C. 152.

Finding of fact
The exclusion of evidence is harmless error where the court or jury find as a fact the matter which such evidence would have tended to show.—Steger v. Cameron, 109 F.2d 347, 71 App.D.C. 202—Janes v. Janes, 278 F. 576, 51 App.D.C. 267.

60. **Where error cured by findings**
D.C.—Baber v. Baessell, 85 F.2d 725, 66 App.D.C. 226.

61. D.C.—Globe Furniture Co. v. Gately, 279 F. 1005, 51 App.D.C. 367.

62. D.C.—Regal Cleaners & Dyers v. Pessagno, 109 F.2d 453, 71 App.D.C. 199.
4 C.J. p 1029 note 30.

or refusing to give[63] instructions, directing[64] or refusing to direct[65] a verdict on one of two counts or pleas, refusing to cite for contempt,[66] or in denying a right to supersedeas on appeal from an order.[67] Statements made in the presence of the jury were not prejudicial to plaintiff where a verdict was directed for defendant;[68] and a reference in the opinion of the court to the answer of a defendant who did not appeal is not ground for reversal where the answer of the defendant who did appeal justifies the decree.[69]

However, the court will refuse to reverse for error only when it is certain that the error could not have prejudiced the complaining party;[70] the error will be presumed to be injurious where it is not shown that it did not or could not prejudice the party against whom it was committed.[71] The court of appeals will reverse for errors in respect of parties which materially affected the rights of appellant;[72] error in the admission of evidence which apparently affected the jury in their verdict;[73] the improper exclusion of material testimony offered in explanation or rebuttal;[74] error in not allowing defendant to lay an adequate foundation for admission of secondary evidence of a signed statement constituting an admission;[75] submission of the case on erroneous instructions which operated to the prejudice of the complaining party;[76] and failure of the trial court to comply with a rule of court requiring it to disregard, at every stage of the proceeding, any error or defect in the proceeding which does not affect the substantial rights of a party.[77] Error in admitting incompetent evidence is not cured by giving an instruction which is not responsive to the evidence.[78]

(10) Determination and Disposition of Cause

Such general principles as are applicable to the particular case are controlling in determining whether the judgment is to be affirmed, modified, or reversed and what, if any, further proceedings in the cause are to be ordered or permitted.

While the court of appeals has jurisdiction, as shown infra this section and as expressly provided by statute, to affirm, reverse, or modify a judgment of the municipal court or of the district, formerly supreme, court properly brought before it for review, its jurisdiction to review one judgment does not give it power to reverse or modify another and independent judgment.[79] Its duty is to give judgment after an examination of the entire record,[80] without regard to technical errors or defects not affecting the substantial rights of the parties.[81]

Affirmance. The judgment appealed from will be affirmed in a proper case,[82] as where appellant has failed to demonstrate error or to overcome a presumption of correctness[83] or the questions in-

63. D.C.—New Arcade Co. v. Owens, 258 F. 965, 49 App.D.C. 65.

Explanation to jury by counsel

Where defendant's requested instruction on burden of proof was properly refused because it did not correctly state the law, but defendant's counsel was permitted to, and did, explain to the jury what the plaintiffs' burden was, verdict for plaintiffs would not be disturbed.—McWilliams v. Lewis, App.D.C., 125 F.2d 200.

64. U.S.—Weiss v. District Title Ins. Co., App.D.C., 121 F.2d 900.

65. D.C.—Lake v. Parker, 2 F.2d 127, 55 App.D.C. 78.

66. D.C.—Lipschutz v. Phillips, 273 F. 748, 51 App.D.C. 20.

67. **Where order is affirmed on appeal**

D.C.—Reed v. Reed, 280 F. 1009, 52 App.D.C. 35.

68. D.C.—Leonard v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 290 F. 318, 53 App.D.C. 343.

69. D.C.—Kellogg v. Mutual L. Ins. Co., 25 App.D.C. 36.

70. D.C.—Chichester Chemical Co. v. U. S., 49 F.2d 516, 60 App.D.C. 134.

71. D.C.—Traver v. Smolik, 43 App. D.C. 150.

72. D.C.—Flynn v. Brooks, 105 F.2d 766, 70 App.D.C. 243.

73. D.C.—Carle v. Rainey, 83 F.2d 600, 65 App.D.C. 343.

4 C.J. p 972 note 70.

74. D.C.—Berry v. Littlefield, Alvord & Co., 296 F. 285, 54 App.D.C. 195—Lisner v. Hughes, 258 F. 512, 49 App.D.C. 40.

75. U.S.—Nu Car Carriers v. Traynor, App.D.C., 125 F.2d 47.

76. D.C.—Old Dominion Stages v. Connor, 90 F.2d 403, 67 App.D.C. 158.

77. D.C.—District of Columbia, to Use of Hydroseal Waterproofing Co., v. Sun Indemnity Co. of New York, 82 F.2d 454, 65 App.D.C. 198—District of Columbia, to Use of Cambridge Wheatley Co., v. U. S. Casualty Co., 82 F.2d 453, 65 App. D.C. 197—District of Columbia, to Use of Philip Carey Co., v. U. S. Casualty Co., 82 F.2d 451, 65 App. D.C. 195.

78. D.C.—Karrick v. Holloway, 54 App.D.C. 252, 296 F. 999.

General instruction

Error in the admission of evidence calculated to create sympathy for plaintiff is not cured by a general instruction as to the measure of damages.—Zinkhan v. District of Columbia, 50 App.D.C. 312, 271 F. 542.

79. U.S.—Reed v. Allen, App.D.C., 52 S.Ct. 532, 286 U.S. 191, 76 L.Ed. 1054, 81 A.L.R. 703, reversing, C. C.A., Allen v. Reed, 54 F.2d 713, certiorari granted Reed v. Allen, 52 S.Ct. 210, 284 U.S. 615, 76 L.Ed. 525.

80. D.C.—District of Columbia v. Chessin, 61 F.2d 523, 61 App.D.C. 260.

81. D.C.—District of Columbia v. Chessin, supra—Carson v. Jackson, 281 F. 411, 52 App.D.C. 51.

Improper question

In a personal injury action, a question concerning a person's drinking habits over a twelve months' period should not have been asked, but it would be going too far to say that it constituted reversible error, especially when it was coupled with an inquiry regarding drinking at the time of the injury.—Radio Cab v. Houser, App.D.C., 128 F.2d 604.

82. D.C.—Goss v. Verzi, 289 F. 1019, 53 App.D.C. 288—Poling v. Washington Loan & Trust Co., 289 F. 610, 53 App.D.C. 212.

83. U.S.—Akron Standard Mold Co. v. Coe, App.D.C., 125 F.2d 203.

volved have become moot and no controversy remains.[84]

Modification. A judgment which is too broad may be modified by the reviewing court.[85]

Reversal generally. A reversal may be proper and necessary in the particular case.[86] A judgment will be reversed for failure to award nominal damages where it appears from the record that, on another trial, actual and substantial damages may be recovered.[87] A reversal does not control the interests of parties who did not join, or were not made parties to, the appeal.[88]

Remand for further proceedings. Where the condition of the cause or the record is such that the court of appeals cannot make a final disposition of the case or render judgment with safety to the rights of the parties, it will order, or grant permission for, a new trial or other proceedings in the lower court.[89] The nature and extent of the proceedings which will be ordered on a reversal and remand is a matter largely within the discretion of the appellate court.[90] Various steps and proceedings which, in particular cases, the court of appeals has deemed it proper to order, or grant permission for, include the entry of a particular judgment or decree,[91] the vacation of a decree,[92] dismissal of the proceeding,[93] quashing a writ of replevin and ordering a return of the property,[94] transfer to the probate court,[95] a new trial of one issue alone,[96] amendment of pleadings,[97] the taking of further evidence,[98] the making of findings

84. D.C.—W. Ames & Co. v. Wallace, 81 F.2d 414, 65 App.D.C. 150—Engle v. McNeill, 48 App.D.C. 358.

Dismissal of appeal where questions are moot see supra § 324 b (8).

85. U.S.—Brady v. Games, App.D.C., 128 F.2d 754.

86. D.C.—Flynn v. Potomac Electric Power Co., 47 F.2d 978, 60 App.D.C. 82—Payne v. Hearst, 269 F. 678, 50 App.D.C. 162—District of Columbia v. Caton, 48 App.D.C. 96—John Gill & Sons v. Kahl-Holt Co., 47 App.D.C. 53.

On consent and confession of error by appellee

D.C.—American Security & Trust Co. v. Thompson, 42 App.D.C. 382.

Conditional reversal

Where the jury returned a verdict for plaintiff for six thousand dollars assessing five thousand dollars as compensatory and one thousand dollars as punitive damages, and the court of appeals found that the lower court erred in permitting the jury to award punitive damages, the judgment was reversed, unless plaintiff should remit one thousand dollars.—A. S. Abell Co. v. Ingham, 43 App.D.C. 582.

87. D.C.—Smith v. Doyle, 98 F.2d 341, 69 App.D.C. 60.

88. D.C.—Swofford v. International Mercantile Marine Co., 113 F.2d 179, 72 App.D.C. 225.

89. D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F.2d 785, 70 App.D.C. 262—Maier v. Independent Taxi Owner's Ass'n, 96 F.2d 579, 68 App.D.C. 307—Fields v. Central Nat. Bank, 10 App.D.C. 1.

Where joint verdict and judgment against two appellants is erroneous as to one of them, the judgment will be reversed and the case remanded, with directions to set aside such judgment and permit the appellee to elect to become nonsuit against the successful appellant, and take judgment on the verdict against the other appellant, and if appellee does not so elect, then to set aside the verdict and order a new trial generally.—J. E. Taylor & Co. v. Empire Lighting Fixture Co., 273 F. 739, 51 App.D.C. 11.

90. D.C.—Davis v. Davis, 96 F.2d 512, 68 App.D.C. 240, certiorari granted 58 S.Ct. 944, 304 U.S. 552, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26, 118 A.L.R. 1518, motion denied 59 S.Ct. 773.

Correction of statement of evidence

If statement of evidence which was not submitted to, or approved by, trial court, judicial approval being unnecessary under district court rule, did not reflect accurately evidence which was received, the matter was for attention, correction, and disposition of trial court in further proceedings.—Miller v. Miller, 114 F.2d 596, 72 App.D.C. 348.

91. D.C.—McDonald v. Maxwell, 12 F.2d 822, 56 App.D.C. 287—Bergland v. Owen, 48 App.D.C. 26—Lasier v. Lasier, 47 App.D.C. 80.

Where trial court erroneously denies motion for directed verdict, presumably it is duty of United States court of appeals to reverse and remand with instructions to enter judgment for the moving party.—Pessagno v. Euclid Inv. Co., 112 F.2d 577, 72 App.D.C. 141, reversing, D.C., 25 F.Supp. 896.

New trial not desired by appellee

After a case has been reversed and remanded for new trial, a petition by appellee, plaintiff in the suit, stating it does not desire a new trial or to present new testimony, but is willing to stand on the record made, and prefers a decision directing the lower court to enter judgment against it, so that it may appeal to the supreme court without further delay, should be granted.—National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 F. 681, 50 App.D.C. 165, affirmed Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs, 42 S.Ct. 465, 259 U.S. 200, 66 L.Ed. 898, 26 A.L.R. 357, leave to present petition for rehearing granted 42 S.Ct. 587, 66 L.Ed. 898.

92. D.C.—Addison v. Barnes, 45 App.D.C. 284.

93. D.C.—Seymour v. Nelson, 11 App.D.C. 58.

94. D.C.—Wallace v. Degree, 38 App.D.C. 145, Ann.Cas.1913C 118.

95. D.C.—Gracie v. American Security & Trust Co., 277 F. 543, 51 App. D.C. 141.

96. D.C.—Faulks v. Schrider, 99 F.2d 370, 69 App.D.C. 137.

97. U.S.—Brown v. Christman, App. D.C., 126 F.2d 625.

D.C.—Boss v. Hardee, 93 F.2d 234, 68 App.D.C. 75—Lewis v. Lilliston, 89 F.2d 847, 67 App.D.C. 103—Addison v. Barnes, 45 App.D.C. 284.

Determination without prejudice

In suit by members of unincorporated association composed of men who owned and operated taxicabs to prevent suspension of their licenses because of nonpayment of judgment for injuries inflicted by one member, determination that theory that plaintiffs were not bound by the judgment because not properly before court rendering judgment could not be considered because not raised in district court was made without prejudice to right of district court, if it deemed that justice so required, to permit plaintiffs to amend their complaint.—Champ v. Atkins, App.D.C., 128 F.2d 601.

98. D.C.—Boss v. Hardee, 93 F.2d 234, 68 App.D.C. 75.

of fact,[99] and reinstatement of a verdict and passing on an alternative motion for a new trial.[1] However, the court, on reversing a decree dismissing a bill on a motion in the nature of a demurrer to the pleading, should not direct a final decree;[2] and the equitable power of remanding with instructions to grant leave to amend the bill by adding a necessary party defendant will not be exercised in a case involving a public contract, work under which has, before the decision on appeal, progressed to the extent that large public interests are involved, where complainant's attention was previously called to the defect of parties and he made no offer to amend.[3] A reversal and remand are not made necessary by a change of law which preserves pending appeals and decision thereof in accordance with previous law.[4]

Mandate and subsequent proceedings. A mandate granting restitution of property obtained under an erroneous judgment should not dispose of deposits in court.[5] While a mandate may be recalled and amended,[6] a particular amendment may be unwarranted,[7] and, where it is obvious that only one act remains to be done, a motion to recall the mandate for amendment on the ground that there exists misapprehension as to its scope will be denied.[8]

In subsequent proceedings in the lower court, the mandate, as properly interpreted,[9] should be complied with,[10] and the decision on appeal should be followed, it being the law of the case.[11] While, on the vacation of a judgment and the granting of a new trial under the mandate, the case stands as originally, the former trial and all that occurred in connection therewith being a nullity,[12] nevertheless, where the court of appeals held on appeal that the evidence made a question for the jury, the lower court, on a new trial, is required, on substantially the same evidence, to submit the case to the jury.[13]

Where a motion for judgment on the mandate was overruled on submission to a district judge while presiding in the motions division, a motion for rehearing on the motion for judgment is properly before the same judge, notwithstanding the termination of his assignment to the motions division.[14]

§ 325. District Court of United States

The district court, formerly the supreme court, possesses both local and federal jurisdiction. Its local jurisdiction is original and general.

The supreme court of the District of Columbia was established in 1863 by 12 St. at L. p 762 c 91. It superseded, and succeeded to the jurisdiction of the circuit court of the District which was established in 1801 by 2 St. at L. pp 103,

99. D.C.—Boss v. Hardee, supra.

1. D.C.—Pessagno v. Euclid Inv. Co., 112 F.2d 577, 72 App.D.C. 141, reversing, D.C., 25 F.Supp. 896.

2. U.S.—Lane v. Pueblo of Santa Rosa, 39 S.Ct. 185, 249 U.S. 110, 63 L.Ed. 504, reversing Pueblo of Santa Rosa v. Lane, 46 App.D.C. 411.

3. D.C.—Hyman v. Rudolph, 281 F. 1017, 52 App.D.C. 105.

4. D.C.—Barbagollo v. Fishbien, 286 F. 780, 52 App.D.C. 318.

5. D.C.—Wilson v. Newburgh, 43 App.D.C. 202.

6. D.C.—Prall v. Prall, 15 F.2d 735, 56 App.D.C. 336, granting in part motion to amend mandate 13 F.2d 305, 56 App.D.C. 333.

7. D.C.—Prall v. Prall, supra.

8. D.C.—Snyder v. Hunter, 11 F.2d 336, 56 App.D.C. 164, denying motion to recall mandate 8 F.2d 902, 56 App.D.C. 41.

9. D.C.—Eichberg v. U. S. Shipping Board Emergency Fleet Corporation, 285 F. 928, 52 App.D.C. 194—Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia v. Grand Lodge of Knights of Pythias of North America, South America, Europe, Asia, and Africa, 265 F. 453, 49 App.D.C. 303—District of Columbia v. Washington Terminal Co., 47 App.D.C. 570.

10. D.C.—Hartman v. Masters, 46 App.D.C. 271.

Decree, entered on mandate after affirmance without modification, cannot enlarge scope of former decree; but it is in substantial conformity with original decree, where both require same acts from defendants.—Work v. Read, 23 F.2d 139, 57 App.D.C. 312.

11. D.C.—Walker v. Gish, 273 F. 366, 51 App.D.C. 4, affirmed 43 S.Ct. 174, 260 U.S. 447, 67 L.Ed. 344.

Decision in respect of persons liable

D.C.—Thompson v. Park Sav. Bank, 96 F.2d 544, 68 App.D.C. 272, certiorari denied 59 S.Ct. 82, 305 U.S. 606, 83 L.Ed. 385, and Cox v. Thompson, 59 S.Ct. 66, 305 U.S. 606, 83 L.Ed. 385.

Rule without application

Where husband obtained a divorce a vinculo matrimonii in Virginia after having been granted a divorce a mensa et thoro by the district court of the United States for the District of Columbia which also awarded alimony to wife, district court was sustained on appeal in denying husband's petition to set aside or modify its order, new petition for reduction of alimony was denied under the law of the case rule, the court of appeals on appeal held that the Virginia decree was not entitled to full faith and credit in the District of Columbia because of lack of jurisdiction of Virginia court, and the supreme court on certiorari held that Virginia court had jurisdiction and that its decree was enforceable in the District of Columbia, the law of the case rule had no application, and the district court was required on remand to vacate its original order and to relieve husband from making further alimony payments.—Davis v. Davis, 114 F.2d 492, 72 App.D.C. 341.

To prevent application of rule there must be a clear case showing that earlier adjudication was plainly wrong and that manifest injustice would be worked.—Brown v. Gesellschaft Fur Drahtlose Telegraphie, M. B. H., 104 F.2d 227, 70 App.D.C. 94, certiorari denied Brown v. Gesellschaft Fur Drahtlose Telegraphie, M. B. H., 59 S.Ct. 1038, 307 U.S. 640, 83 L.Ed. 1521.

12. D.C.—Wilson v. Newburgh, 42 App.D.C. 407.

13. D.C.—U. S. ex rel. Smith v. Stewart, 2 F.2d 936, 55 App.D.C. 134.

14. U.S.—In re Dunlap's Guardianship, D.C.D.C., 36 F.Supp. 545.

105 c 15 § 3. Its name was changed to the district court of the United States for the District of Columbia by a statute, Act of June 25, 1936, 49 St. at L. p 1921 c 804, which provided, however, that nothing contained therein should affect the jurisdiction or functions of the court. It is a single court of general jurisdiction[15] and the court of general original jurisdiction within the District,[16] occupying the same relation to the District of Columbia that a state court of similar jurisdiction does to a state.[17] In addition to such general original jurisdiction within the District, it possesses the same powers and jurisdiction as the district courts of the United States and such further special jurisdiction as is conferred on it by congress.[18] It is a district court of the United States within the meaning of some,[19] but not other,[20] federal statutes. As required by statute, it holds a general[21] and special[22] terms; but in so far as it embraced matters of appellate jurisdiction, the general term was superseded by the statutes substituting the court of appeals therefor.[23] The special terms are known respectively as the circuit court,[24] the equity court,[25] and the criminal court,[26] and, likewise, a special term known as the

15. D.C.—Re Gompers, 40 App.D.C. 293.

16. D.C.—U. S. v. West, 34 App.D.C. 12.
25 C.J. p 987 note 36.

17. D.C.—Lyttle v. National Surety Co., 43 App.D.C. 136.

18. U.S.—Hine v. Morse, D.C., 31 S. Ct. 37, 218 U.S. 493, 54 L.Ed. 1123, 21 Ann.Cas. 782.
25 C.J. p 987 note 38.

Formerly the powers of the supreme court of the District of Columbia in patent cases were the same as those of circuit courts of the United States.—Cochrane v. Deener, D.C., 94 U.S. 780, 24 L.Ed. 139.

Exclusive jurisdiction

The district court for District of Columbia has exclusive jurisdiction of suits against an executor on claims against the estate, but an attachment or garnishment directed to an executor, in connection with an action against a third party who claims an interest in the estate, is not such a suit.—Frank v. Malone, App.D.C., 126 F.2d 651.

Concurrent jurisdiction

Under 38 U.S.C.A. § 445, the district court of the United States for the District of Columbia has original jurisdiction to hear and determine action by national bank as conservator of incompetent to recover monthly and total disability benefits under converted war risk policy; and it is unimportant that such jurisdiction is concurrent with that conferred on district court of United States in district where veteran resides.—First Nat. Bank v. U. S., D.C. D.C., 30 F.Supp. 730.

Statutory jurisdiction of suits authorized by Trading with the Enemy Act see the C.J.S. title War § 26, also 67 C.J. p 397 note 4, p 398 note 18.

Supreme court of District of Columbia as bankruptcy court see Bankruptcy § 19.

19. U.S.—Swift & Co. v. U. S., App. D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

Status as constitutional court see supra § 323.

20. U.S.—U. S. v. Burroughs, App. D.C., 53 S.Ct. 574, 289 U.S. 159, 77 L.Ed. 1096.

21. U.S.—Spalding v. Mason, App. D.C., 16 S.Ct. 592, 161 U.S. 375, 40 L.Ed. 738.
D.C.—U. S. v. Wood, 8 D.C. 241.

22. D.C.—Cook v. Speare, 13 App.D. C. 446.
25 C.J. p 988 note 40.

23. U.S.—Federal Trade Commission v. Klesner, 47 S.Ct. 557, 274 U.S. 145, 71 L.Ed. 972, reversing 6 F.2d 701, 56 App.D.C. 3, certiorari granted 46 S.Ct. 102, 269 U.S. 545, 70 L. Ed. 404.
D.C.—U. S. ex rel. Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.

Decisions under former appellate jurisdiction

(1) From the final decision of one of the justices of the supreme court at chambers, on the hearing and determination of habeas corpus discharging the prisoner, an appeal might be taken to the general term at the instance of the attorney general of the United States.—Matter of Taylor, 10 D.C. 426.

(2) On appeal from a judgment of the municipal court, it was necessary to comply with requirements relating to an appeal bond and approval thereof.—Monahan v. Murray, 269 F. 476, 50 App.D.C. 134.

(3) A notice stating that one of two persons whose names and addresses were given would be offered as surety, sufficiently complied with the rule of practice requiring such notice to contain "the name and address of the proposed surety."—Liebman v. Fromm, 47 App.D.C. 540.

(4) A landlord could not in the supreme court on appeal from the municipal court in a proceeding to dispossess a tenant rely on a breach of the lease not alleged by him in his complaint in the municipal court. —Davis v. Taylor, 276 F. 619, 51 App. D.C. 97.

(5) If the municipal court had no jurisdiction in a case, the supreme court acquired none by an appeal. —Gray v. Ward, 45 App.D.C. 498.

(6) Where a case over which the municipal court and the supreme court had concurrent jurisdiction was brought from the former court into the latter by certiorari, it became a case pending in the latter court the same as though it had been originally instituted therein.—New Arcade Co. v. Owens, 258 F. 965, 49 App. D.C. 65—Bradford v. Brown, 22 App. D.C. 455.

(7) In such case a set-off might be asserted for the first time in the supreme court.—New Arcade Co. v. Owens, supra.

(8) Also, the supreme court might render judgment thereon for an amount in excess of the judisdiction of the municipal court.—New Arcade Co. v. Owens, supra.

(9) An appeal did not lie to the supreme court sitting in general term from an order of the circuit court vacating a judgment by default.—Meloy v. Grant, 15 D.C. 486.

(10) Findings of an auditor, concurred in by the lower court, were permitted to stand unless some obvious error had intervened in the application of the law or some serious or important mistake had been made in the consideration of the evidence.—York v. Tyler, 21 D.C. 265.

24. U.S.—Gordon v. Randle, App. D.C., 23 S.Ct. 635, 189 U.S. 417, 47 L.Ed. 875.
25 C.J. p 988 note 41.

25. U.S.—Cochrane v. Deener, D.C., 94 U.S. 780, 24 L.Ed. 139.
25 C.J. p 988 note 42.

Suit which could only have been brought in court of equity was properly brought in the supreme court of the District, sitting in equity.—Swift & Co. v. U. S., App.D.C., 48 S.Ct. 311, 276 U.S. 311, 72 L.Ed. 587.

26. U.S.—Hyde v. Shine, Cal., 25 S. Ct. 760, 199 U.S. 62, 50 L.Ed. 90.
25 C.J. p 988 note 43.

Criminal jurisdiction of supreme court see Criminal Law § 124.

probate court,[27] and it also sat as the district court of the United States.[28]

In an equity case, the court has continuing jurisdiction to grant full and complete relief;[29] but the equity court is without jurisdiction of matters over which exclusive jurisdiction is conferred on the probate court;[30] and where the supreme or district court is exercising jurisdiction which is expressly limited by statute and is identical with that conferred on district courts of the United States, such as jurisdiction with reference to the action of a particular commission, its authority is not enlarged by its general equity jurisdiction.[31]

The probate court, or district court sitting in probate, although possessing exclusive jurisdiction over probate matters,[32] is a tribunal of limited powers and jurisdiction.[33] Generally speaking, it exercises the same powers as were conferred on the orphans' court of Maryland by the Act of 1798, together with such additional powers as have been conferred by congress since that time.[34] Although, in determining the jurisdiction and powers of the probate court, Maryland statutes and decisions of later date than 1801 are not to be regarded as constituting the law of the District,[35] such decisions are customarily looked to for assistance, not merely in interpreting the law which was inherited from that state, but also in interpreting later statutes of the District which are the same as, or closely similar to, those of Maryland.[36] The court is without jurisdiction to settle the ownership of property[37] as between the personal representative and a stranger who claims adversely to the estate;[38] but it does have jurisdiction to try the question of title presented where an executor asserts title to assets adversely to the estate.[39] It has statutory power to enforce its decrees in like manner as decrees may be enforced in the equity court;[40] and where it has personal jurisdiction over an individual in the main cause, its jurisdiction continues in that cause, and in a civil contempt proceeding, for the purpose of enforcing, and making effective, its original decree.[41]

Personal or territorial jurisdiction. A voluntary submission to the jurisdiction of the court by a person or corporation will be accorded effect;[42] and a fund is personal property within the meaning of a statute authorizing service by publication or personal service outside the District where defendant is a nonresident and the suit involves a claim or demand to or against real or personal property within the District;[43] but, except as otherwise provided by statute, and in the absence of personal service within the District or a voluntary submission to jurisdiction, the court is without jurisdiction where defendant is a nonresident and the action is in personam or the property, if any, involved is situated outside the District.[44] The Fifth Amendment to the federal Constitution does not, of itself, confer jurisdiction on the court to entertain an action against the sovereign.[45] The court has no jurisdiction over the custody and control of prisoners in the penitentiary at Atlanta, Georgia,[46] or over the action of the warden of such penitentiary in his conduct with counsel representing inmates.[47] Also, the court is without jurisdiction to investigate

27. D.C.—Gracie v. American Security & Trust Co., 277 F. 543, 51 App. D.C. 141.
25 C.J. p 988 note 44.

28. D.C.—Garfield Memorial Hospital v. Macfarland, 31 App.D.C. 447—U. S. v. Sampson, 19 App.D.C. 419.

29. U.S.—Emrich v. McNeil, App.D. C., 126 F.2d 841.

30. D.C.—Gracie v. American Security & Trust Co., 277 F. 543, 51 App.D.C. 141.

31. D.C.—Southern Transp. Co. v. Interstate Commerce Commission, 47 F.2d 411, 60 App.D.C. 49, certiorari denied 51 S.Ct. 559, 283 U. S. 850, 75 L.Ed. 1458.

32. D.C.—Gracie v. American Security & Trust Co., 277 F. 543, 51 App.D.C. 141.

33. U.S.—Watkins v. Rives, App.D. C., 125 F.2d 33.
D.C.—Fidelity & Deposit Co. of Maryland v. McQuade, 123 F.2d 337, 74 App.D.C. 383—Holzbeierlein v. Grant, 117 F.2d 26, 73 App.D.C. 154.

34. U.S.—Watkins v. Rives, App.D. C., 125 F.2d 33.

35. U.S.—Watkins v. Rives, supra.

36. U.S.—Watkins v. Rives, supra.

37. D.C.—Holzbeierlein v. Grant, 117 F.2d 26, 73 App.D.C. 154.

38. U.S.—Watkins v. Rives, App.D. C., 125 F.2d 33.
D.C.—Holzbeierlein v. Grant, 117 F.2d 26, 73 App.D.C. 154.

39. U.S.—Watkins v. Rives, App.D. C., 125 F.2d 33.

40. U.S.—Watkins v. Rives, supra.

41. U.S.—Watkins v. Rives, supra.

42. U.S.—Watkins v. Rives, supra.
D.C.—Doerschuck v. Mellon, 55 F.2d 741, 60 App.D.C. 383, followed in Mellon v. U. S. ex rel. Z. & F. Assets Realization Corporation, 55 F. 2d 745, 60 App.D.C. 387.

43. U.S.—American-Mexican Claims Bureau v. Morgenthau, D.C.D.C., 26 F.Supp. 904.
D.C.—Doerschuck v. Mellon, 55 F.2d 741, 60 App.D.C. 383, followed in Mellon v. U. S. ex rel. Z. & F. Assets Realization Corporation, 55 F. 2d 745, 60 App.D.C. 387.

44. D.C.—Putnam v. Ickes, 78 F.2d 223, 64 App.D.C. 339, certiorari denied 56 S.Ct. 132, 296 U.S. 612, 80 L.Ed. 434, Lassig v. Ickes, 56 S.Ct. 132, 296 U.S. 612, 80 L.Ed. 434, Dunn v. Ickes, 56 S.Ct. 132, 296 U.S. 612, 80 L.Ed. 434, Abbot v. Ickes, 56 S.Ct. 132, 296 U.S. 612, 80 L.Ed. 434, Hill v. Ickes, 56 S.Ct. 132, 296 U.S. 612, 80 L.Ed. 434, Thompson v. Ickes, 56 S.Ct. 133, 296 U.S. 612, 80 L.Ed. 434, Hull v. Ickes, 56 S.Ct. 133, 296 U.S. 612, 80 L.Ed. 434, and Fordham v. Ickes, 56 S.Ct. 133, 296 U.S. 612, 80 L.Ed. 434.

45. D.C.—Pflueger v. U. S., 121 F. 2d 732, 73 App.D.C. 364, certiorari denied 62 S.Ct. 98, 314 U.S. 617, 86 L.Ed. 497.

46. D.C.—Laughlin v. Cummings, 105 F.2d 71, 70 App.D.C. 192.

47. D.C.—Laughlin v. Cummings, supra.

an illegal search and seizure outside the District and unconnected with any case pending in the court.[48] In a divorce proceeding, the court exercises local and not federal jurisdiction.[49]

Writs and procedure. The practice and procedure in the district court, formerly the supreme court, is prescribed in part by statutes, in part by the Federal Rules of Civil Procedure, 28 U.S.C.A. following § 723c, and in part by rules of such court.[50] The court has statutory power to issue certain named writs and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction.[51] Also, it has authority to make rules of court,[52] provided they are not inconsistent with the Federal Rules of Civil Procedure, or, formerly, the Equity Rules,[53] which were binding on it.[54] Federal Rules of Civil Procedure, rule 81 (d), 28 U.S. C.A. following § 723c, makes the rules applicable generally to the district court of the United States for the District of Columbia; but rule 81 a provides that they shall not apply to probate, adoption, or lunacy proceedings in such court; and while the district court, in the exercise of its own rule-making power, has, in respect of some matters, adopted the Federal Rules of Civil Procedure for the probate court,[55] it has not done so to the extent of modifying a statute providing for certain procedure.[56] Federal Rules of Civil Procedure, rules 17 (b), 81 (e), 28 U.S.C.A. following § 723c, are construed together as not intended to change the preëxisting law of the District in reference to the capacity of partnerships and unincorporated associations to sue and be sued in the district court for the District of Columbia on local causes of action arising at common law.[57] Prior to the adoption of the Federal Rules of Civil Procedure, a motion to set aside a default judgment for lack of service of process could be heard and determined on affidavits and counter-affidavits or on oral testimony.[58] There is early authority to the effect that a motion for a new trial, based on a bill of exceptions, is to be regarded as equivalent to a writ of error and the court will look only at the matter of law it contains.[59]

§ 326. Inferior Courts

The municipal court is the inferior court possessing civil jurisdiction in the District of Columbia. It was established, and its jurisdiction was defined, for the purpose of providing a tribunal for the speedy disposition of numerous cases in which title to realty is not involved and the amount claimed does not exceed one thousand dollars. The proceedings therein are simple and the pleadings need not be formal; but the judgments of the court are as immune from collateral impeachment and vacation after the term as are judgments of other courts.

The inferior courts of the District of Columbia are the municipal court,[60] which is the successor of the justices of the peace,[61] a police court,[62] and a juvenile court.[63]

Generally speaking, the municipal court has jurisdiction of civil cases wherein the debt or damages or the value of the personal property claimed does not exceed one thousand dollars;[64] but it is without jurisdiction of cases involving title to realty[65] and of cases within the exclusive jurisdiction of the supreme or district court.[66] While it is with-

48. D.C.—Impiriale v. Perkins, 66 F. 2d 805, 62 App.D.C. 279, certiorari denied 54 S.Ct. 126, 290 U.S. 690, 78 L.Ed. 594.

49. D.C.—Murphy v. Paris, 16 F.2d 515, 57 App.D.C. 19.

50. **On motion for correction of record** under Fed.Rules of Civ.Proc. rule 75(h), 28 U.S.C.A. following section 723c, evidence showed that transcript of testimony made by the reporter was in accordance with recollection of trial judge and was correct.—Boucher Inventions v. Sola Electric Co., D.C.D.C., 1 F.R.D. 631.

51. D.C.—Murphy v. Paris, supra.
25 C.J. p 988 note 49.

52. D.C.—Doherty v. Kalmbach, 87 F.2d 539, 66 App.D.C. 322.

53. D.C.—California Co-op. Canneries v. U. S., 299 F. 908, 55 App.D.C. 36.

54. D.C.—Saul v. Saul, 104 F.2d 245, 70 App.D.C. 112—Maryland & Virginia Milk Products Ass'n v. Hazen, 85 F.2d 302, 66 App.D.C. 136, certiorari denied 57 S.Ct. 29, 299 U. S. 566, 81 L.Ed. 417.

55. U.S.—Watkins v. Rives, App.D. C., 125 F.2d 33—In re Cottrill's Estate, D.C.D.C., 39 F.Supp. 689.
D.C.—Ecker v. Potts, 112 F.2d 581, 72 App.D.C. 174.

56. U.S.—In re Cottrill's Estate, D. C.D.C., 39 F.Supp. 689.

57. D.C.—Fennell v. Bache, 123 F.2d 905, 74 App.D.C. 247, certiorari denied 62 S.Ct. 359, 314 U.S. 689, 86 L.Ed. 551.

58. D.C.—Consolidated Radio Artists v. Washington Section, National Council of Jewish Juniors, 105 F. 2d 785, 70 App.D.C. 262.

59. D.C.—McPherson v. Cox, 11 D.C. 23.

60. D.C.—Bliss v. Duncan, 44 App. D.C. 93—Callan v. District of Columbia, 43 App.D.C. 338—Moses v. Hayes, 36 App.D.C. 194.
15 C.J. p 986 note 49—25 C.J. p 988 note 52.

61. D.C.—U. S. ex rel. Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.
25 C.J. p 988 note 53.

62. D.C.—Mullen v. Canfield, 105 F. 2d 47, 70 App.D.C. 168.
25 C.J. p 988 note 54.
Status and jurisdiction of court see Criminal Law § 124.

63. D.C.—Callan v. District of Columbia, 43 App.D.C. 338—Zinkham v. Linaweaver, 34 App.D.C. 19—U. S. v. West, 34 App.D.C. 12.
25 C.J. p 988 note 55.

64. U.S.—Frank v. Malone, App.D.C., 126 F.2d 651.
D.C.—U. S. ex rel. Eure v. Borden, 80 F.2d 527, 65 App.D.C. 84.

65. D.C.—Johnson v. Simmons, 290 F. 331, 53 App.D.C. 356—Gray v. Ward, 45 App.D.C. 498.
Title to realty must be necessarily and directly in issue between the parties in order to exclude the case from the jurisdiction of the municipal court.—Schwartz v. Murphy, 112 F.2d 24, 72 App.D.C. 103.

66. D.C.—Sanford v. Sanford, 286 F. 777, 52 App.D.C. 315.

out jurisdiction of a direct action against an executor or administrator on a claim against the estate,[67] it has jurisdiction of attachment or garnishment proceedings involving one thousand dollars or less,[68] including an attachment or garnishment directed to an executor in connection with an action against a third party who claims an interest in the estate.[69] The purpose of the statute setting up the court and defining its jurisdiction is to provide a tribunal for the speedy disposition of a large number of small causes.[70] The proceedings in the court are intended to be simple and as free as possible from legal technicalities.[71] Under the municipal court rules, informality in pleading is permissible;[72] and after an action has been initiated, no further pleadings of any kind are required;[73] but where, in a certain kind of proceeding, a complaint is required by statute, there must be a written statement, however informal, of the grounds on which relief is asked.[74] The municipal court is without power to vacate its judgment after the expiration of the term in the absence of fraud or other recognized ground for vacation.[75] A judgment of such court is not subject to collateral impeachment where the court had jurisdiction of the cause of action and over the person of defendant and no fraud in the procurement of the judgment is alleged.[76] So, also, where the court had jurisdiction of the parties and the subject matter, a judgment of a corporation court of a city in a state on a judgment of the municipal court of the District is not open to collateral attack in a subsequent suit thereon in the municipal court of the District.[77] Former statutory provisions, since changed by amendment, relating to actions in the municipal court were construed in some cases.[78]

XV. COURT OF CLAIMS

A. HISTORY AND PURPOSE

§ 327. General Statement

The court of claims, originally only an administrative or advisory body, has, by statute, been converted into a court, and has been given jurisdiction over controversies which are susceptible of judicial cognizance; but it derives none of its powers from the judiciary article of the Constitution.

The court of claims was established in 1855 "for the triple purpose of relieving Congress and of protecting the government by regular investigation and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims."[79] Until the organization of the court the only recourse was in an appeal to congress.[80] The court of claims was originally nothing more than

Custody and maintenance of child

Where stipulation for support of infant child was made part of record in divorce proceeding in district court of United States for District of Columbia, the district court had continuing and exclusive jurisdiction over custody and maintenance of child and the municipal court did not have jurisdiction of action to recover amount alleged to be due under the stipulation.—Emrich v. McNeil, App.D.C., 126 F.2d 841.

67. D.C.—Sanford v. Sanford, 286 F. 777, 52 App.D.C. 315.

68. U.S.—Frank v. Malone, App.D.C., 126 F.2d 651.

69. U.S.—Frank v. Malone, supra.

70. D.C.—Schwartz v. Murphy, 112 F.2d 24, 72 App.D.C. 103.

71. D.C.—Bliss v. Duncan, 44 App. D.C. 93.

72. D.C.—Schwartz v. Murphy, 112 F.2d 24, 72 App.D.C. 103—Davis v. Taylor, 276 F. 619, 51 App.D.C. 97.

Primary purpose of rule of municipal court providing that no formal pleadings shall be required, even for initiation of Class B cases, is to assure people of small means, ignorant of complexities of pleading and practice and often unrepresented by counsel, their day in court and that fair hearing on merits which in our system of jurisprudence is regarded as fundamental.—Shields v. Hawkins, App.D.C., 125 F.2d 204.

73. U.S.—Shields v. Hawkins, supra.

74. D.C.—Davis v. Taylor, 276 F. 619, 51 App.D.C. 97.

75. D.C.—Taliaferro v. Carter, 72 F. 2d 172, 63 App.D.C. 304.

76. D.C.—Reynolds v. Decker, 18 F. 2d 183, 57 App.D.C. 141.

77. D.C.—Edward Thompson Co. v. Thomas, 49 F.2d 500, 60 App.D.C. 118.

78. **Security for costs**

A former statutory provision that nonresidents should not commence a suit in the municipal court without first giving security for costs went to the jurisdiction of the court over the person of defendant, and he had a right to insist on it; but the right was a personal privilege which might be waived by him and was waived by pleading to the merits.—Boss v. Hagan, 261 F. 254, 49 App.D.C. 106, 8 A.L.R. 1508.

Pleading equitable defenses

Prior to an amendment making it expressly applicable to actions in the municipal court, a statute providing that in all actions at law equitable defenses may be interposed by plea or replication, was construed to apply only to actions in courts which already possessed jurisdiction over equitable causes, and did not enlarge the jurisdiction of the municipal court by giving it general equitable jurisdiction when dealing with defenses to actions.—International Exch. Bank v. Pullo, 285 F. 933, 52 App.D.C. 199.

79. U.S.—U. S. v. Klein, 13 Wall. 128, 20 L.Ed. 519, affirming 7 Ct. Cl. 240—Brandon v. U. S., 46 Ct. Cl. 559.

History of court of claims reviewed and explained

U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

The principal purpose of the court of claims is to examine and determine money claims against the United States.—U. S., for Use of Mutual Metal Mfg. Co. v. Biggs, D.C.Ill., 46 F.Supp. 8.

80. U.S.—Schillinger v. U. S., 15 S. Ct. 85, 155 U.S. 166, 39 L.Ed. 108, affirming 24 Ct.Cl. 278—U. S. v. Lee, Va., 1 S.Ct. 240, 106 U.S. 196, 27 L.Ed. 171.

25 C.J. p 988 note 58.

an administrative or advisory body, but by statute it has been converted into a court, in fact as well as name, and given jurisdiction over controversies which are susceptible of judicial cognizance.[81] The court of claims receives no authority and its judges no rights from the judicial article of the Constitution, but the court derives its being and its powers and the judges their rights from the acts of congress passed in pursuance of other and distinct constitutional provisions.[82]

B. JURISDICTION

§ 328. In General

The jurisdiction of the court of claims, which is purely statutory, extends throughout the United States.

The jurisdiction of the court of claims extends throughout the United States. The court issues writs to every portion of the United States, and is specially authorized to enforce them.[83] The jurisdiction of the court is purely statutory and cannot be extended to cases not provided for by statute,[84] and special jurisdictional acts are to be strictly construed and implications as to jurisdiction under their terms are forbidden.[85] Congress may with-

81. U.S.—Williams v. U. S., Ct.Cl., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372.
25 C.J. p 988 notes 59–61.

Function of court judicial, not administrative.—Hart v. U. S., 91 Ct.Cl. 308.

82. U.S.—Williams v. U. S., Ct.Cl., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372.

Power to pay debts

The court of claims is legislative, not constitutional, in character and function and its jurisdiction arises from the congressional power to pay the debts of the United States, which it is free to exercise through judicial agencies.—U. S., for Use of Mutual Metal Mfg. Co. v. Biggs, D.C.Ill., 46 F.Supp. 8.

Requirements not vesting judicial power

Requirement that court of claims in cases involving expropriation of property must award just compensation as provided by Fifth Amendment and decide set-offs and other claims made by government against petitioners does not vest in court of claims "judicial power" as defined in judicial article of Constitution.—Williams v. U. S., Ct.Cl., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372.

83. U.S.—U. S. v. Borcherling, 22 S.Ct. 607, 185 U.S. 223, 46 L.Ed. 884, affirming 35 Ct.Cl. 311.
25 C.J. p 988 note 62.

84. U.S.—U. S. v. Sherwood, N.Y., 61 S.Ct. 767, 312 U.S. 584, 85 L.Ed. 1058, reversing, C.C.A., Sherwood v. U. S., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S.Ct. 171, 311 U.S. 640, 85 L.Ed. 408—Randall v. U. S., 90 Ct.Cl. 325—Chippewa Indians of Minnesota v. U. S., 87 Ct.Cl. 1, affirmed 59 S.Ct. 313, 305 U.S. 479, 83 L.Ed. 300—Choctaw & Chickasaw Nations v. U. S., 75 Ct.Cl. 494—Hord v. U. S., 67 Ct.Cl. 582—Molchanoff v. U. S., 67 Ct.Cl. 288—Deutsch-Australische Dampfschiffs Gesellschaft v. U. S., 59 Ct.Cl. 450.
25 C.J. p 989 note 63.

Court of claims has no jurisdiction

(1) Of an action for the value of property taken by our military forces in California during the war with Mexico.—Garcia v. U. S., 14 Ct.Cl. 121.

(2) To classify railroads or to fix compensation for carrying mails.—New Jersey & N. Y. R. Co. v. U. S., 80 Ct.Cl. 243.

(3) To enforce award of interstate commerce commission.—World Pub. Co. v. U. S., 57 Ct.Cl. 1.

(4) To try title to office.—Curran v. U. S., 92 Ct.Cl. 66—Hart v. U. S., 91 Ct.Cl. 308—Barry v. U. S., 83 Ct.Cl. 413—Krueger v. U. S., 83 Ct.Cl. 412, certiorari denied 57 S.Ct. 34, 299 U.S. 541, 81 L.Ed. 395—Golding v. U. S., 78 Ct.Cl. 682, certiorari denied 54 S.Ct. 776, 292 U.S. 643, 78 L.Ed. 1494—Goodwin v. U. S., 76 Ct.Cl. 218, certiorari denied 53 S.Ct. 784, 289 U.S. 753, 77 L.Ed. 1497—O'Neil v. U. S., 56 Ct.Cl. 89.

(5) To try suit for restoration of a discharged government employee to his former position, for the clearing of such an employee's record of false charges or stigma, or for loss of property by such an employee due to his inability to secure employment after dismissal from the government service.—Barry v. U. S., 83 Ct.Cl. 413.

Declaratory judgment act

Court of claims is not within declaratory judgment act of June 14, 1934.—Twin Cities Properties, Inc., Clayton, Mo., v. U. S., 81 Ct.Cl. 655.

Duties of military officers

Under a statute which provides "that during the continuance of the present war, warrant officers, petty officers and enlisted men of the United States coast guard shall receive the same rates of pay as are or may hereafter be prescribed for corresponding grades or ratings and length of service in the navy," the court has jurisdiction to determine to the duties of what warrant or petty officers in the navy the duties of warrant or petty officers in the coast guard correspond.—Allen v. U. S., 56 Ct.Cl. 265, affirmed U. S. v. Allen, 43 S.Ct. 369, 261 U.S. 317, 67 L.Ed. 675.

Gratuities cannot be recovered in court of claims, in absence of enabling act.—Osage Tribe of Indians v. U. S., 66 Ct.Cl. 64, appeal dismissed and certiorari denied Osage Nation of Indians v. U. S., 49 S.Ct. 251, 279 U.S. 811, 73 L.Ed. 971.

Indian cases brought before the court of claims do not rest on the theory that the government's responsibility is that of a guardian toward its ward.—Choctaw & Chickasaw Nations v. U. S., 75 Ct.Cl. 494.

Legislative purpose as expressed in a statute cannot be questioned.—Buchanan v. U. S., 78 Ct.Cl. 791.

Moral obligations

The court may not consider moral obligations or look beyond the terms of the act for seeming injustices.—Shearer v. U. S., 87 Ct.Cl. 40.

Necessity of providing remedy

Congress does not have to provide a remedy through its courts where it creates rights in individuals against itself; where a special remedy is provided in a statute creating a right, that special remedy is exclusive.—John B. Kelly, Inc., v. U. S., 87 Ct.Cl. 271.

85. U.S.—Klamath and Moadoc Tribes v. U. S., Ct.Cl., 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202—Barlow v. U. S., 87 Ct.Cl. 281—Choctaw & Chickasaw Nations, v. U. S., 75 Ct.Cl. 494.

Existence of remedy for injury occasioned by failure of the government to recognize a governmental duty is exclusively dependent on legislative discretion, and the courts may not intervene save by authority from congress.—McCalib v. U. S., 83 Ct.Cl. 79.

draw cases from the jurisdiction of the court of claims, but it cannot interfere with the proper exercise of its judicial functions.[86] The court can act only on vested rights,[87] and, generally, only on money demands.[88] It cannot take jurisdiction by consent of the parties where it is without jurisdiction of the subject matter.[89] Since all matters made cognizable by the court of claims are equally susceptible of legislative or executive determination, they are matters in respect of which there is no constitutional right to a judicial remedy.[90] While the court of claims has certain equity powers, its jurisdiction in that regard is limited.[91] The court of claims has no jurisdiction to interpret or construe the rules of the house of representatives of the United States.[92]

Amounts due United States. The Judicial Code § 180, 28 U.S.C.A. § 287, permits the adjudication, on petition of the debtor, of certain monetary claims of the United States against the suitor.[93]

§ 329. Claims against United States

The court of claims has jurisdiction of two distinct classes of cases; those in which the claimant sues in his own behalf as a matter of right, and those in which a claim is referred to the court by either house of congress or by the head of one of the executive departments.

The court of claims has jurisdiction of two distinct classes of cases: First, those arising under Judicial Code §§ 145, 180, 28 U.S.C.A. §§ 250, 287, and special jurisdictional acts, wherein plaintiff sues in his own behalf as a matter of right and in which the court awards final judgments, with the right of either party to apply to the supreme court for a writ of certiorari for a review; second, jurisdiction under Judicial Code, §§ 148, 151, 28 U.S.C.A. §§ 254, 257, where a case may be referred which may involve the findings of facts and report to congress without the right of appeal.[94] As a general rule, where a statute creates a right against the United States, but does not furnish the remedy, it may be found in the court of claims.[95] Conversely, where specific jurisdiction has been otherwise provided, the court of claims usually does not have jurisdiction,[96] but the right of a claimant to sue in the court of claims cannot be taken away except in express terms or by an unavoidable implication.[97]

Under the Judicial Code § 155, 28 U.S.C.A. § 261, the court of claims has no jurisdiction of a claim prosecuted against the United States by a citizen or subject of a foreign government which does not accord to citizens of the United States the right to prosecute claims against such government

86. U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

87. U.S.—Daily v. U. S., 17 Ct.Cl. 144.

88. U.S.—Hart v. U. S., 91 Ct.Cl. 308. 25 C.J. p 989 note 65.

89. U.S.—Berger v. U. S., 36 Ct.Cl. 243.

90. U.S.—Williams v. U. S., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372.

91. **Reformation of contract**
A petition for the reformation of a contract with the federal government, and for damages for breach of such contract as reformed, is within the jurisdiction of the court of claims.—U. S. v. Milliken Imprinting Co., 26 S.Ct. 572, 202 U.S. 168, 50 L.Ed. 980, reversing 40 Ct.Cl. 81.

Stockholder's suit
The court of claims has no jurisdiction to adjudicate the rights of stockholders in a suit by minority stockholders alleging fraudulent practices by the majority stockholders or corporate officers to the injury of the minority and seeking for that cause to impeach or defeat a conveyance to the United States.—Leather v. U. S., 61 Ct.Cl. 388, certiorari denied 46 S.Ct. 473, 271 U.S. 660, 70 L.Ed. 1137.

92. U.S.—Price v. U. S., 65 Ct.Cl. 91, certiorari denied 48 S.Ct. 434, 277 U.S. 587, 72 L.Ed. 1001.

93. **The intention** of this statute was to provide for the speedy disposition of claims by the United States against its officers and agents, and against those having contracts with it, by giving to such persons the right to come into the court and compel the United States to answer and have its claim determined. This relieves the suitor of the embarrassment entailed in the lack of a limitation statute against the United States.—Standard Dredging Co. v. U. S., 71 Ct.Cl. 218.

94. U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

95. U.S.—New York Cent. R. Co. v. U. S., 65 Ct.Cl. 115, certiorari granted U. S. v. New York Cent. R. Co., 49 S.Ct. 18, 278 U.S. 588, 73 L.Ed. 522, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619, followed in Nevada County Narrow Gauge R. Co. v. U. S., 65 Ct.Cl. 327, certiorari granted U. S. v. Nevada County Narrow Gauge R. Co., 49 S.Ct. 18, 278 U.S. 588, 73 L.Ed. 522, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619.

96. U.S.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515—Nichols v. U. S., Ct.Cl., 7 Wall. 122, 19 L.Ed. 125—Venezuelan Meat Export Co. v. U. S., 58 Ct.Cl. 76—U. S. Bedding Co. v. U. S., 55 Ct.Cl. 459—Foster v. U. S., 32 Ct.Cl. 170.
Review of decisions of executive departments see infra § 339.

Lever Act
(1) The district courts have exclusive jurisdiction over claims arising under the Lever Act, and the court of claims has no jurisdiction over such claims.—U. S. v. Pfitsch, N.Y., 41 S.Ct. 569, 256 U.S. 547, 65 L.Ed. 1084—General Chemical Co. v. U. S., 57 Ct.Cl. 94—Corona Coal Co. v. U. S., 56 Ct.Cl. 390, appeal dismissed 44 S.Ct. 156, 263 U.S. 537, 68 L.Ed. 431.

(2) Where fuel oil and gasoline are taken through procurement orders issued under authority of Act of March 4, 1917 c 180, and Act June 15, 1917 c 29, U.S.Comp.St. 1918 §§ 3115$\frac{1}{16}$a–3115$\frac{1}{16}$d, the court of claims is not deprived of jurisdiction because deliveries are made after the passage of the Lever Act.—Atlantic Refining Co. v. U. S., 59 Ct.Cl. 108.

97. U.S.—Sams v. U. S., 35 Ct.Cl. 151.
Jurisdiction held not limited
U.S.—Cox v. U. S., 41 Ct.Cl. 86.

Statute held not to furnish remedy, and the court of claims was held to have jurisdiction as a claim founded on a law of congress.—Medbury v. U. S., Ct.Cl., 19 S.Ct. 503, 173 U.S. 492, 43 L.Ed. 779.

in its courts.[98]

The admiralty jurisdiction of the United States Court of Claims is discussed in Admiralty § 3 a, and claims against the United States generally, and actions and proceedings by and against the United States generally, in the C.J.S. title United States §§ 136–210, also 65 C.J. p 1372 note 89–p 1431 note 9.

Other suits pending. Under the express provisions of the Judicial Code § 154, 28 U.S.C.A. § 260, no person shall file or prosecute in the court of claims any claim for or in respect of which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereof, acting or professing to act under the authority of the United States.[99] The object and intent of this statute is to prevent the government from being sued in separate jurisdictions on the same cause of action and to require plaintiff to elect in which court to sue.[1] The act prohibits not only the filing but also the prosecution of any claim in the court of claims when another suit is pending in another court.[2]

§ 330. —— In General

The court of claims has jurisdiction to hear and determine all claims against the United States, except for pensions, founded on the Constitution of the United States or any law of congress or any regulation of an executive department, on any contract with the government of the United States, or for damages in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States if the United States were suable.

The Judicial Code § 145, 28 U.S.C.A. § 250, is the general jurisdictional statute granting the court of claims jurisdiction over particular claims against the United States. Under this statute, the court of claims has jurisdiction only in cases where the United States is defendant,[3] in actions on money demands,[4] in cases not sounding in tort,[5] in respect of which claims the party would be entitled to redress against the United States either in a court of

98. U.S.—Rossia Ins. Co. v. U. S., 58 Ct.Cl. 180.

99. **Suits against United States Shipping Board Fleet Corporation**

(1) Where plaintiffs have pending in the district court a suit against the United States Shipping Board Fleet Corporation, and the petition in the district court does not allege that the cause of action arose against a person acting or professing to act under the authority of the United States, and it does not appear that such defendant could act only under the authority of the United States, it is held that the court of claims has jurisdiction in the instant case, under Judicial Code § 154, 28 U.S.C.A. § 260.—First Nat. S. S. Co. v. U. S., 90 Ct.Cl. 632.

(2) In the case pending in the court of claims there can be no recovery unless agency of the United States on the part of the Fleet Corporation is established, while in the case pending in the district court if such agency is established plaintiffs' action must fail.—First Nat. S. S. Co. v. U. S., supra.

1. U.S.—Matson Nav. Co. v. U. S., 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515, affirmed 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336.

2. U.S.—Matson Nav. Co. v. U. S., 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515, affirmed 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336.

3. U.S.—Pacific Mut. Life Ins. Co. of California v. U. S., Ct.Cl., 44 F.2d 887.

25 C.J. p 989 note 67.

Action against state

The court of claims has no jurisdiction of an action against a state, or in which a state is impleaded as party defendant, and is a necessary party.—Milwaukee & Rock River Canal Co. v. U. S., 1 Ct.Cl. 187.

Interest on judgments

The court of claims has jurisdiction of a suit to recover interest on an unpaid balance of judgments against the United States, whether rendered by the court of claims or by some other court.—Standard Dredging Co. v. U. S., 71 Ct.Cl. 218.

Relief against private parties

The jurisdiction of the court of claims is confined to the rendition of money judgments in actions brought for that relief against the United States, and, if the relief sought is against others than the United States, the action as to them must be ignored as beyond the jurisdiction of the court, or if its maintenance against private parties is prerequisite to prosecution of the action against the United States, the action must be dismissed.—U. S. v. Sherwood, 61 S.Ct. 767, 312 U.S. 584, 85 L.Ed. 1058, reversing, C.C.A., Sherwood v. U. S., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S.Ct. 171, 311 U.S. 640, 85 L.Ed. 408—U. S., for Use of Mutual Metal Mfg. Co. v. Biggs, D.C.Ill., 46 F.Supp. 8.

4. U.S.—Hart v. U. S., 91 Ct.Cl. 308.

25 C.J. p 991 note 73.

5. U.S.—U. S. v. Nederlandsch-Amerikaansche Stoomvart Maatschappij, 41 S.Ct. 72, 254 U.S. 148, 65 L.Ed. 193, reversing Nederlansch-Amerikaansche, Stoomvart Maatschappij v. U. S., 53 Ct.Cl. 522—Bussey v. U. S., Ct.Cl., 41 F.2d 415—Isthmian Airways v. U. S., 94 Ct.Cl. 598—Excavating Equipment Dealers v. U. S., 93 Ct.Cl. 82—Campbell v. U. S., 89 Ct.Cl. 529—Andrew Radel Oyster Co. v. U. S., 78 Ct.Cl. 816—Flynn v. U. S., 65 Ct.Cl. 33—Wood v. U. S., 61 Ct.Cl. 192, certiorari denied 46 S.Ct. 350, 270 U.S. 650, 70 L.Ed. 780—William C. Atwater & Co. v. U. S., 60 Ct.Cl. 323, affirmed 48 S.Ct. 90, 275 U.S. 188, 72 L.Ed. 229—Calwalader v. U. S., 59 Ct.Cl. 533—Klebe v. U. S., 57 Ct.Cl. 160, affirmed 44 S.Ct. 58, 263 U.S. 188, 68 L.Ed. 244—Pendleton v. U. S., 56 Ct.Cl. 222—Pawnee Tribe of Indians v. U. S., 56 Ct.Cl. 1—Keokuk & Hamilton Bridge Co. v. U. S., 55 Ct.Cl. 480, affirmed 43 S.Ct. 37, 260 U.S. 125, 67 L.Ed. 165.

25 C.J. p 991 note 74.

Failure to deliver letter

A claim for damage resulting from a mail carrier's failure to deliver a letter to plaintiff's address is based on a tort, and is not a cause of action within the jurisdiction of the court.—Threatt v. U. S., 77 Ct.Cl. 645, certiorari denied 54 S.Ct. 74, 290 U. S. 626, 78 L.Ed. 545.

False imprisonment

Where the gravamen of plaintiff's complaint in essence is false imprisonment, the court of claims is without jurisdiction.—Paden v. U. S., 90 Ct.Cl. 531.

Suit held not to sound in tort

U.S.—Weissbaum v. U. S., 72 Ct.Cl. 423.

law, equity, or admiralty, if the United States were suable.[6] It is expressly provided by this general jurisdictional statute that the jurisdiction of the court shall not extend to hearing and determining claims growing out of the late Civil War and commonly known as "war claims,"[7] or other claims, which, prior to March 3, 1887, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine them.[8] Under the Judicial Code § 162, 28 U.S.C.A. § 268, the court of claims also has jurisdiction to hear and determine claims of those whose property was taken and sold subsequent to June 1, 1865, under the provisions of the Abandoned Property Act.[9]

Constitution, laws, or regulation of executive department. The court of claims, under the jurisdictional act, Judicial Code § 145, 28 U.S.C.A. § 250, has jurisdiction to hear and determine all claims, except for pensions, founded on the Constitution of the United States or any law of congress or on any regulation of an executive department.[10] A claim for private property taken for

6. U.S.—U. S. v. Cornell Steamboat Co., N.Y., 26 S.Ct. 648, 202 U.S. 184, 50 L.Ed. 987.
D.C.—Wells v. Roper, 44 App.D.C. 276.

Broad equity

Under the general statute conferring on the court of claims jurisdiction over claims founded on any law of congress and also for "damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, or equity, or admiralty if the United States were suable," there is nothing which authorizes a suit to be brought merely on the ground that as a matter of broad equity and justice plaintiff is entitled to relief.—Montgomery Ward & Co., for Use of Pettibone v. U. S., 94 Ct.Cl. 309.

7. **For decisions with reference to war claims**
U.S.—U. S. v. Winchester & P. R. Co., Ct.Cl., 16 S.Ct. 993, 163 U.S. 244, 41 L.Ed. 145.
25 C.J. p 991 note 76 [a].

8. U.S.—Emmons v. U. S., C.C.Or., 42 F. 26.
25 C.J. p 991 note 78.

9. U.S.—Thompson v. U. S., Ct.Cl., 38 S.Ct. 349, 246 U.S. 547, 62 L.Ed. 876.
25 C.J. p 991 note 77.

Ownership

In determining the jurisdictional question of ownership, in cases brought under the provisions of Judicial Code § 162, 28 U.S.C.A. § 268, the validity of a sale of cotton to the Confederate States by the tutor of infant owners residing in Louisiana may be inquired into by this court, even though the property at time of seizure by the federal government was in the possession of the purchaser.—Walker v. U. S., 54 Ct.Cl. 48.

Statute construed

U.S.—O'Pry v. U. S., 39 S.Ct. 305, 249 U.S. 323, 63 L.Ed. 626, affirming 51 Ct.Cl. 111.

10. **Action by state**

The court of claims has jurisdiction of an action by a state against the United States for a demand arising on an act of congress.—U. S. v. Louisiana, Ct.Cl., 8 S.Ct. 17, 123 U.S. 32, 31 L.Ed. 69, followed in U. S. v. Alabama, Ct.Cl., 8 S.Ct. 21, 123 U.S. 39, 31 L.Ed. 73.

Appropriation

Where congress makes appropriation to pay interest specified in judgment of court, claim for such interest is cognizable by court of claims, and the court cannot review decision of another court awarding interest on hearing claim for such interest.—Benedict v. U. S., 66 Ct.Cl. 437.

Claims held founded on law of congress

(1) Generally.—Reynolds v. U. S., 54 S.Ct. 800, 292 U.S. 443, 78 L.Ed. 1353, reversing 78 Ct.Cl. 401, certiorari granted 54 S.Ct. 628, 292 U.S. 616, 78 L.Ed. 1474—Medbury v. U. S., Ct.Cl., 19 S.Ct. 503, 173 U.S. 492, 43 L.Ed. 779—U. S. v. Weld, Ct.Cl., 8 S. Ct. 1000, 127 U.S. 51, 32 L.Ed. 62—Campbell v. U. S., Ct.Cl., 2 S.Ct. 759, 107 U.S. 407, 27 L.Ed. 592—New York Cent. R. Co. v. U. S., 65 Ct.Cl. 115, certiorari granted U. S. v. New York Cent. R. Co., 49 S.Ct. 18, 278 U.S. 588, 73 L.Ed. 522, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619, and followed in Nevada County Narrow Gauge R. Co. v. U. S., 65 Ct.Cl. 327, certiorari granted U. S. v. Nevada County Narrow Gauge R. Co., 49 S.Ct. 18, 278 U.S. 588, 73 L.Ed. 522, affirmed 49 S.Ct. 260, 279 U.S. 73, 73 L.Ed. 619—T. A. Gillespie Co. v. U. S., 60 Ct.Cl. 923—Laughlin v. U. S., 52 Ct.Cl. 292—Maginnis v. U. S., 52 Ct.Cl. 271—Newcomber v. U. S., 51 Ct.Cl. 408—Sowle v. U. S., 38 Ct.Cl. 525—Blount v. U. S., 21 Ct.Cl. 274—Jordan v. U. S., 19 Ct.Cl. 108—Huffman v. U. S., 17 Ct.Cl. 55—Hukill v. U. S., 16 Ct.Cl. 562—Thomas v. U. S., 16 Ct.Cl. 522—Bradley v. U. S., 12 Ct.Cl. 578, affirmed, 104 U.S. 442, 26 L.Ed. 824.

(2) Claim by informer for his portion of a forfeiture or fine.—Moore v. U. S., 4 Ct.Cl. 139—25 C.J. p 989 note 70 [a].

(3) Railroad's claim for compensation for government's taking.—Perry v. U. S., 55 S.Ct. 432, 294 U.S. 330, 79 L.Ed. 912, 95 A.L.R. 1335—Marion & R. V. Ry. Co. v. U. S., 46 S.Ct. 253, 270 U.S. 280, 70 L.Ed. 585, affirming 60 Ct.Cl. 230.

Dent Act

If the claim, pursuant to an award by the secretary of war, is founded on the Dent Act, the court has jurisdiction as of a claim founded on a law of congress.—T. A. Gillespie Co. v. U. S., 60 Ct.Cl. 923.

Increased costs under National Industrial Recovery Act

(1) Under the special jurisdictional act of June 25, 1938, 52 U.S.St. at L. p 1197, which was remedial legislation, the prime contractor may sue for the recovery of National Industrial Recovery Act wages actually paid directly by himself, or indirectly by payments to subcontractors, and not otherwise; and subcontractors may sue for and recover wages actually paid directly by themselves, or indirectly by payments to subsubcontractors, and not otherwise; the final subcontractor may sue for and recover only those wages which he has paid and for which he has not been reimbursed by his principal.—McShain v. U. S., 87 Ct.Cl. 581.

(2) No right of action is given in the act to the contractor to sue for losses which have not been incurred by him or incurred by his subcontractors and paid by him.—McShain v. U. S., supra.

(3) Contract with the navy department for the purchase by plaintiffs of certain structures and materials, and the demolition of such buildings and removal thereof by plaintiffs, where the contract did not call for payment by the United States to plaintiffs of any sum of money whatever for any service to be performed or materials to be furnished by plaintiffs, was not a contract coming within the statute.—Pollock v. U. S., 91 Ct.Cl. 257.

Interest

The Act of March 3, 1933, 47 U.S. St. at L. p 1489 § 13, 31 USCA § 227, did not repeal, but merely amended,

takes jurisdiction must be one implied in fact, not merely implied by law.[17] The common-law fiction of waiving the tort and suing in assumpsit cannot be used as an evasion of the limits on the jurisdiction of the court of claims;[18] but, where the wrong really derives from an undertaking, to stand on the undertaking and to disregard the tort is not to invoke a fictive agreement.[19] The court of claims has no jurisdiction to award damages for a mere consequence of lawful governmental action which does not constitute a contractual breach or a taking of private property for public use.[20] Under this provision of the jurisdictional act the court of claims has jurisdiction of a claim for private property appropriated to public use,[21] but, since no contract can be in fact implied therefrom, the court has no jurisdiction of a claim for private property taken for public use under a claim of right by the government.[22] Such a liability can be created only by some officer of the government lawfully invested

17. U.S.—State of Alabama v. U. S., 51 S.Ct. 225, 282 U.S. 502, 75 L.Ed. 492, reversing, Ct.Cl., 38 F.2d 897, certiorari granted 50 S.Ct. 463, 281 U.S. 718, 74 L.Ed. 1138—U. S. v. Minnesota Mut. Inv. Co., Colo., 46 S.Ct. 501, 271 U.S. 212, 70 L.Ed. 911—Enid Milling Co. v. U. S., 64 Ct.Cl. 396.

Facts which negative the making of a contract cannot be a basis for a claim within the court's jurisdiction of claims founded on contracts.—E. W. Bliss Co. v. U. S., 40 S.Ct. 455, 253 U.S. 187, 64 L.Ed. 852, affirming 53 Ct.Cl. 47.

Military action taken in foreign country does not give rise to any contract, express or implied, within the jurisdiction of the court of claims.—Ingenio Porvenir C. Por A. v. U. S., 70 Ct.Cl. 735.

Particular contracts implied in fact

(1) Generally.—Gulf Transit Co. v. U. S., 43 Ct.Cl. 183.

(2) Where the government has illegally received money which is the property of an innocent citizen and the money has gone into the treasury, there arises an "implied contract" on the part of the government to make restitution to the rightful owner under the statute and court of claims has jurisdiction to entertain suit therefor.—Kirkendall v. U. S., Ct.Cl., 31 F.Supp. 766.

(3) Suits to recover penalties illegally exacted are maintainable in the court of claims, and such claims are not based on contracts implied in law.—Rio Cape Line v. U. S., 89 Ct. Cl. 307.

(4) If the building of dikes by a contractor acting under a contract with the federal government and erosion of riparian owners' land because of consequent diversion of current constituted a taking of property for which there must be just compensation under the Fifth Amendment, the government, under statute giving the court of claims jurisdiction of claims against the United States, has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the court of claims.—Yearsley v. W. A. Ross Const. Co., Neb., 60 S.Ct. 413, 309 U.S. 18, 84 L.Ed. 554, affirming, C.C.A., W. A. Ross Const. Co. v. Yearsley, 103 F. 2d 589, certiorari granted Yearsley v. W. A. Ross Const. Co., 60 S.Ct. 89, 308 U.S. 538, 84 L.Ed. 454.

Prior adjudication held not a determination on the merits so as to preclude jurisdiction of subsequent suit on contract.—Northern Pac. Ry. Co. v. U. S., Ct.Cl., 18 F.Supp. 543, certiorari denied U. S. v. Northern Pac. R. Co., 58 S.Ct. 270, 302 U.S. 750, 82 L.Ed. 580.

Quasi contract

The court may have jurisdiction of suits based on quasi contracts.—Ingram v. U. S., 32 Ct.Cl. 147, reversed on other grounds, 19 S.Ct. 177, 172 U. S. 327, 43 L.Ed. 465.

Claims held not based on implied contracts

U.S.—U. S. v. Algoma Lumber Co., 59 S.Ct. 267, 305 U.S. 415, 83 L.Ed. 260, reversing Algoma Lumber Co. v. U. S., 86 Ct.Cl. 226, certiorari granted U. S. v. Algoma Lumber Co., 59 S.Ct. 88, 305 U.S. 583, 83 L.Ed. 368—U. S. v. Forrest Lumber Co., 59 S.Ct. 267, 305 U.S. 415, 83 L.Ed. 260, reversing Forest Lumber Co. v. U. S., 86 Ct.Cl. 188, certiorari granted U. S. v. Forest Lumber Co., 59 S.Ct. 88, 305 U.S. 583, 83 L.Ed. 368—U. S. v. Lamm Lumber Co., 59 S.Ct. 267, 305 U.S. 415, 83 L.Ed. 260, reversing Lamm Lumber Co. v. U. S., 86 Ct.Cl. 171, certiorari granted U. S. v. Lamm Lumber Co., 59 S.Ct. 88, 305 U.S. 583, 83 L.Ed. 368—Eastern Extension, Australasia & China Tel. Co. v. U. S., Ct.Cl., 40 S.Ct. 168, 251 U. S. 355, 64 L.Ed. 305—Bonner v. U. S., Ct.Cl., 9 Wall. 156, 19 L.Ed. 666.

"To constitute such a contract, there must have been some consideration moving to the United States; or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake."—Knote v. U. S., Ct.Cl., 95 U.S. 149, 156, 24 L.Ed. 442.

Voluntary payments

(1) The jurisdiction of the court of claims does not extend to a claim for money voluntarily paid to the government.—U. S. v. Edmonston, Ct.Cl., 21 S.Ct. 718, 181 U.S. 500, 45 L.Ed. 971—Machinery & Metals Sales Co. v. U. S., 57 Ct.Cl. 197—25 C.J. p 990 note 72 [d] (11).

(2) Payment held not voluntary so as to preclude suit.—Northern Pac. Ry. Co. v. U. S., Ct.Cl., 18 F.Supp. 543, certiorari denied 58 S.Ct. 270, 302 U.S. 750, 82 L.Ed. 580.

18. U.S.—Keifer & Keifer v. Reconstruction Finance Corporation, Neb., 59 S.Ct. 516, 306 U.S. 381, 83 L.Ed. 784, reversing, C.C.A., 97 F.2d 812, affirming, D.C., 22 F.Supp. 918, certiorari granted 59 S.Ct. 106, 305 U.S. 588, 83 L.Ed. 372—Flynn v. U. S., 65 Ct.Cl. 33—Keokuk & Hamilton Bridge Co. v. U. S., 55 Ct.Cl. 480, affirmed 43 S.Ct. 37, 260 U.S. 125, 67 L.Ed. 165.

19. U.S.—Keifer & Keifer v. Reconstruction Finance Corporation, Neb., 59 S.Ct. 516, 306 U.S. 381, 83 L.Ed. 784, reversing, C.C.A., 97 F. 2d 812, affirming, D.C., 22 F.Supp. 918, certiorari granted 59 S.Ct. 106, 305 U.S. 588, 83 L.Ed. 372.

Tenant holding over

If the government occupies the property of plaintiff for a period under an express agreement as to the terms of its occupancy, and, after the end of the period, it continues to occupy without any indication that it contemplates a change in terms, and if plaintiff accepts the rent, thus consenting to continued occupancy, their relation is consensual.—Raymond Commerce Corporation v. U. S., 93 Ct.Cl. 698.

20. U.S.—Acme Die-Casting Corporation v. U. S., 81 Ct.Cl. 415.

21. U.S.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L. Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U. S. 600, 76 L.Ed. 515.

25 C.J. p 990 note 72 [c] (21).

Jurisdiction of federal courts generally in condemnation proceedings by United States see Eminent Domain § 232.

22. U.S.—McLennan County, Tex., v. U. S., 60 Ct.Cl. 496—Andrus v. U. S., 59 Ct.Cl. 851—Calwalader v. U. S., 59 Ct.Cl. 533—Pearson v. U. S., 58 Ct.Cl. 485, affirmed 45 S.Ct. 240, 267 U.S. 423, 69 L.Ed. 694—

with power to make such contracts or to perform acts from which they may lawfully be implied.[23]

Nominal damages. The court of claims has no jurisdiction to entertain an action for nominal damages.[24]

Pensions. The subject of pensions is specially excepted from the general jurisdiction of the court of claims.[25]

Patent cases. Under the express provisions of the federal statute, 35 U.S.C.A. § 68, whenever a patented invention is used or manufactured by or for the United States without license of the owner thereof or lawful right, the owner's remedy is by suit against the United States in the court of claims.[26] The benefits of this act do not inure to any patentee, who, when he makes such claim, is in the employment or service of the government, or the assignee of such a patentee, nor does the act apply to any device discovered or invented by such employee during the time of his employment or service.[27] The jurisdiction of the court of claims ceases when plaintiff becomes an employee of the government, irrespective of the method by which the employment was brought about, or the serv to be rendered.[28] A special jurisdictional act p mitting an employee of the government to sue the court of claims for an alleged patent infrin ment does not deprive the government of defen available in ordinary infringement cases.[29]

§ 331. —— Claims Referred by Congress

Whenever any bill, except for a pension, is pend in either house of congress providing for the payment a claim against the United States, legal or equitable, for a grant, gift, or bounty to any person, the house which such bill is pending may, for the investigation determination of facts, refer the same to the court claims.

Where congress merely desires to ascertain fa regarding any bill pending in either house of c gress providing for the payment of a claim agai the United States, either house may, under Judicial Code § 151, 28 U.S.C.A. § 257, refer claim to the court of claims for an investigat and determination of facts and a report thereof, gether with conclusions sufficient to inform c gress of the nature and character of the dem and the amount thereof.[30] The intent of congr

Klebe v. U. S., 57 Ct.Cl. 160, affirmed 44 S.Ct. 58, 263 U.S. 188, 68 L.Ed. 244.

23. U.S.—Hooe v. U. S., Ct.Cl. 31 S.Ct. 85, 218 U.S. 322, 54 L.Ed. 1055.

25 C.J. p 990 note 72 [a].

24. U.S.—Marion & R. V. Ry. Co. v. U. S., 270 U.S. 280, 46 S.Ct. 253, 70 L.Ed. 585, affirming 60 Ct.Cl. 230 —Sioux Tribe of Indians v. U. S., 84 Ct.Cl. 16, certiorari denied 58 S.Ct. 139, 302 U.S. 740, 82 L.Ed. 572.

Holder of liberty loan bond, called for redemption April 15, 1934, and presented May 24, to which holder government refused payment in gold and tendered payment in legal tender currency, was held not to have suffered actual loss, and was, therefore, not entitled to recover in court of claims legal tender currency in excess of face amount of bonds, notwithstanding devaluation of gold dollar, in view of restrictive use of gold in domestic transactions, and restraints on transactions in foreign exchange or export of gold.—Perry v. U. S., Ct.Cl., 55 S.Ct. 432, 294 U.S. 330, 79 L.Ed. 912, 95 A.L.R. 1335.

Holder of gold certificates

In determining whether plaintiff, required by order of secretary of treasury to deliver gold certificates to treasury in exchange for currency not redeemable in gold, had claim for actual damages authorizing him to sue in court of claims, plaintiff could not claim better position than in case gold coin had then been paid to him, which coin, under applicable legislation and orders, he would have been required forthwith to deliver to treasury. Accordingly, plaintiff who, in obedience to order of secretary of treasury, delivered his gold certificates to treasury, under protest on Jan. 17, 1934, in exchange for currency not redeemable in gold, was held not to have sustained actual loss which would entitle him to sue in court of claims to recover just compensation which was allegedly unconstitutionally withheld, especially where, at time of such exchange, gold dollar had not yet been devalued.—Nortz v. U. S., Ct.Cl., 55 S.Ct. 428, 294 U.S. 317, 79 L.Ed. 907, 95 A.L.R. 1346.

25. U.S.—Cole v. U. S., 29 Ct.Cl. 47 —Gordon v. U. S., 26 Ct.Cl. 307—Daily v. U. S., 17 Ct.Cl. 144.

However, under the act of March 3, 1863, apparently the court could, under some circumstances, entertain a suit involving a bounty.—U. S. v. Alire, 6 Wall. 573, 18 L.Ed. 947, 3 Ct.Cl. 447, reversing 1 Ct.Cl. 233.

26. U.S.—Luellen v. Baldwin Locomotive Works, D.C.Pa., 11 F.2d 390, affirmed, C.C.A., Luellen Ry. Artillery v. Baldwin Locomotive Works, 20 F.2d 449—Allgrunn v. U. S., 67 Ct.Cl. 1, certiorari denied 58 S.Ct. 46, 302 U.S. 725, 82 L.Ed. 560—Farnham v. U. S., 56 Ct.Cl. 290.

25 C.J. p 990 note 72 [e] (3).

Cases prior to statute

U.S.—Harley v. U. S., Ct.Cl., 25 S. Ct. 634, 198 U.S. 229, 49 L.Ed. 1(

25 C.J. p 990 note 72 [e].

Sole remedy

A patentee's sole remedy for infringement of his patent by sale of infringing apparatus to coast guard for use by it is by a s against the United States in the cc of claims.—Hazeltine Corporation General Electric Co., D.C.Md., 19 Supp. 898.

27. U.S.—National Electric Sig ing Co. v. U. S., 60 Ct.Cl. 338.

28. U.S.—National Electric Signal Co. v. U. S., supra.

29. U.S.—Gates v. U. S., 87 Ct 358.

30. U.S.—Stanton v. U. S., 68 Cl. 379.

A war claim cannot be refer To this extent the statute provid for reference was repealed by Omnibus Claims Bill of March 1915, § 5.—Chase v. U. S., 50 Ct 293.

Bowman Act

(1) Under the Bowman Act, 22 St. at L. p 485 c 116 § 3, U.S.Co St. 1901 p. 748, embodied in in this section of the Judicial C the court had no jurisdiction of claim which was barred by virtu the provisions of any law.—Nea U. S., 36 Ct.Cl. 49—Allen v. U. 27 Ct.Cl. 89—Bernard v. U. S., Ct.Cl. 312—Dockery v. U. S., 26 Cl. 148—Nutt v. U. S., 26 Ct.Cl. —Perry v. U. S., 25 Ct.Cl. 27 Fowler v. U. S., 25 Ct.Cl. 122—K brough v. U. S., 25 Ct.Cl. 21—F

was to grant to either house the power to refer to the court of claims for investigation any claim which congress might constitutionally pay,[31] and the object was to relieve congress and its committees from the inconvenience and labor incident to the investigation of claims, and to secure to the government the protection of judicial investigation.[32] The court is limited in its action to the items and amount stated in the bill.[33] A claim transmitted by congress will not be defined arbitrarily by the phraseology of the letter transmitting it. The court will look into the accompanying papers and determine what claim congress intended to have investigated.[34]

It is the bill referred which gives character to the matter before the court.[35] Under this grant of jurisdiction a bill referring a claim must be one involving payment,[36] but the court can take jurisdiction, although the bill does not in express terms provide for the payment of the claim.[37] A bill which, if enacted, would be simply a general law providing for the payment of a class of claims,[38] or which merely directs an administrative officer to investigate,[39] or which involves merely a matter of accounting,[40] is not a bill which may be referred. Under the statute, the court has no jurisdiction of a claim referred unless it is a claim against the United States,[41] of a legal or equitable nature;[42] but, if the claim is one of a legal or equitable nature against the United States, the court has jurisdiction.[43]

The court has no jurisdiction to determine questions of law in referred cases except such as are incident to the ascertainment and settlement of facts.[44] The court of claims has jurisdiction to make findings of fact concerning claims growing

long v. U. S., 23 Ct.Cl. 32—Dennis v. U. S., 23 Ct.Cl. 324—Belt v. U. S., 23 Ct.Cl. 317—Payne v. U. S., 22 Ct. Cl. 144—Burwell v. U. S., 22 Ct.Cl. 92—Marshall v. U. S., 21 Ct.Cl. 307—Blair v. U. S., 21 Ct.Cl. 253—Battelle v. U. S., 21 Ct.Cl. 250—Dunbar v. U. S., 19 Ct.Cl. 489.

(2) The restriction did not extend to cases where the bar was subsequent to the Bowman Act.—Nutt v. U. S., 26 Ct.Cl. 15.

(3) Claims held not barred.—Terrill v. U. S., 28 Ct.Cl. 465.

Loyalty

(1) The fact of loyalty is not jurisdictional under the Tucker Act, and, notwithstanding the disloyalty of claimant, the court may find the facts relating to the merits, leaving it to congress to determine whether claimant shall be paid.—Daigle v. U. S., 42 Ct.Cl. 124.

(2) The court may find the fact of loyalty or disloyalty at the request of either party for the consideration of congress.—Hunt v. U. S., 45 Ct.Cl. 566.

Successive references

(1) Notwithstanding the court of claims has once found the facts in a case under the Bowman Act, yet if it is again referred by one of the houses of congress under the Tucker Act, the court will reëxamine the case and again report the facts.—Hartiens v. U. S., 42 Ct.Cl. 42—White v. U. S., 33 Ct.Cl. 368.

(2) But, where a claim investigated by the court of claims under the Bowman Act is paid by congress on the statutory condition that the receipt of the amount awarded by the court shall be a full and final discharge of the claim, it is absolutely extinguished and barred, and cannot be reëxamined by the court by virtue of a second reference by the committee.—Pilkington v. U. S., 36 Ct.Cl. 357.

31. U.S.—Chieves v. U. S., 42 Ct.Cl. 21.

32. U.S.—Widmayer v. U. S., 42 Ct. Cl. 519.

33. U.S.—Hart v. U. S., 58 Ct.Cl. 518—Sampson v. U. S., 42 Ct.Cl. 378.

Court will not confine hearing to questions raised by special plea or "cross-bill," but will proceed to hear the issues raised in the record.—Atlantic Works v. U. S., 50 Ct.Cl. 16.

Where a committee transmits a pending bill, the court is restricted to the relief claimed therein.—Choteau v. U. S., 20 Ct.Cl. 250.

34. U.S.—Cofer v. U. S., 30 Ct.Cl. 131.

35. U.S.—Atlantic Works v. U. S., 46 Ct.Cl. 57.

A "claim," in a just juridical sense, is a demand of some matter as of right made by one person on another, to do or to forbear to do some act or thing as a matter of duty.—Creek Nation v. U. S., 74 Ct.Cl. 663.

Use of word "claim" will not divest the court of jurisdiction if it appears that the reference was under the act and that a bill was pending in the house referring it.—Dowdy v. U. S., 26 Ct.Cl. 220.

36. **Bill directing court to make findings and report** to congress is not a bill for the payment of a claim or for a grant, gift, or bounty.—Missouri v. U. S., 43 Ct.Cl. 327.

Special jurisdictional act

Where the bill referred merely provides that claimant may bring suit in the court of claims, it is not a bill for the payment of a claim or for a grant, gift, or bounty pending in congress, but, on the contrary, it is a bill to take the claim out of the domain of congress. The court cannot be called on to exercise in advance the lesser judicial function of finding the facts in a case which, if the bill becomes a law, it will later be called on to "hear and determine."—Cahalan v. U. S., 42 Ct.Cl. 280.

Jurisdiction under Bowman Act was not limited to cases in which the legislative relief would be by the payment of money.—Taylor v. U. S., 25 Ct.Cl. 75.

37. U.S.—Leahy v. U. S., 41 Ct.Cl. 265.

25 C.J. p 992 note 84 [a].

38. U.S.—Shawnee & Delaware Indians v. U. S., 47 Ct.Cl. 321.

39. U.S.—White River Utes v. U. S., 43 Ct.Cl. 260—Bellah v. U. S., 39 Ct.Cl. 396.

25 C.J. p 992 note 84 [b], [e].

40. U.S.—Creek Nation v. U. S., 74 Ct.Cl. 663—Meeha v. U. S., 48 Ct. Cl. 258—Missouri v. U. S., 43 Ct. Cl. 327.

41. U.S.—Vincent v. U. S., 39 Ct.Cl. 456.

42. **An agreement to protect Indians** in the possession of their homes is not a promise to pay the tribe for loss of lives or property of individual Indians, and a claim for losses for failure to protect is neither legal nor equitable within the purview of this section.—Pawnee Tribe of Indians v. U. S., 56 Ct.Cl. 1.

43. U.S.—Duncan v. U. S., 48 Ct.Cl. 488.

44. U.S.—Griffin v. U. S., 33 Ct.Cl. 228—Webb v. U. S., 20 Ct.Cl. 487.

25 C.J. p 992 note 93 [c].

Gratuity

Where a claim is neither a legal nor equitable demand in its character, the court will find the facts, but cannot assess the damages. The

out of treaties with Indians under a proper reference by congress,[45] notwithstanding it has no general jurisdiction over such claims, see infra § 334.

Under the first part of the statute the government does not consent to be sued in a court, but expressly makes such claims subject to its final legislative action;[46] in the class of cases under the proviso that, if it shall appear to the satisfaction of the court on the facts established, under existing laws, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, the government expressly consents to be sued,[47] and the provision for the rendition and entry of judgment by the court is mandatory.[48] Under this statute either house of congress may refer a case to the court of claims, but neither the senate nor the house acting separately can authorize the court to adjudicate such a claim and render a final judgment.[49] A resolution of one house of congress transmitting a bill for the payment of a claim against the government is merely the vehicle by which the bill comes to the court, and its provisions in no way define or fix the jurisdiction of the court.[50] Under the statute, either of the houses of congress may refer a claim for the ascertainment of facts including those which may excuse claimant for not having resorted to his remedy in due time, to the end that congress may remove the bar of any statute of limitation by legislating for his relief.[51]

Special jurisdictional statutes. Congress has also passed from time to time various special acts authorizing the court of claims to adjudicate on particular claims.[52] Although the court has jurisdiction of all claims and questions fairly within the terms of a special jurisdictional act,[53] such acts are

relief to be given, if any, will be a gratuity; and the amount of a gratuity must be a matter of legislative discretion.—Widmayer v. U. S., 42 Ct.Cl. 519.

Securing clear understanding

The findings of fact in congressional cases are to inform the legislative authority of those things which are necessary for the exercise of the legislative intelligence. They are not intended to present to congress legal questions for judicial determination. The court will, however, advert to the law applicable to the facts to the end that a clear and unmistakable understanding of the facts shall be secured.—Wilkes v. U. S., 43 Ct. Cl. 152.

45. U.S.—Pawnee Tribe of Indians v. U. S., 56 Ct.Cl. 1.

46. U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

Final judgment

(1) The proceeding is not to obtain a final judgment, but to give congress authenticated information necessary for legislative action.—Murfreesboro Presb. Church v. U. S., 33 Ct.Cl. 339.

(2) The jurisdiction of the court of claims to proceed with congressional references, investigate the facts, and report the same is not controlled by its jurisdiction to proceed to judgment in cases wherein the United States is defendant. The two jurisdictions are not interdependent, but distinct.—Montgomery v. U. S., 49 Ct.Cl. 574.

47. U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

Taking of private property

The court has jurisdiction to render a final judgment in a congressional case where the cause of action is the taking of private property for public use.—Chrystal v. U. S., 81 Ct.Cl. 461—Drapery Hardware Mfg. Co. v. U. S., 81 Ct.Cl. 455—Thermal Syndicate v. U. S., 81 Ct.Cl. 446—Fairbanks, Morse & Co. v. U. S., 81 Ct.Cl. 439—Sirio Match Co. v. U. S., 81 Ct.Cl. 427—Acme Die-Casting Corporation v. U. S., 81 Ct. Cl. 415—Barnes v. U. S., 46 Ct.Cl. 7.

48. U.S.—Post v. U. S., 49 Ct.Cl. 105—Stovall v. U. S., 26 Ct.Cl. 226.

Report to congress

The rendition of such judgment does not preclude the court from making a report to congress according to law.—Hood v. U. S., 49 Ct. Cl. 669.

49. U.S.—Farmers Cotton Oil Co. to the Use of Choctaw Cotton Oil Co. v. U. S., 84 Ct.Cl. 468—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

50. U.S.—Hartsville Oil Mill v. U. S., 46 S.Ct. 389, 271 U.S. 43, 70 L.Ed. 822, affirming 60 Ct.Cl. 712—Richardson v. U. S., 81 Ct.Cl. 948.
25 C.J. p 992 note 94 [a].

Exclusive jurisdiction elsewhere

Referring a claim does not confer jurisdiction on the court, where jurisdiction is exclusive in another tribunal or officer.—Boehm v. U. S., 21 Ct.Cl. 290.

51. U.S.—Balmer v. U. S., 26 Ct.Cl. 82.

52. U.S.—Mille Lac Band of Chippewas v. U. S., 46 Ct.Cl. 424.
25 C.J. p 993 note 8.

Forum

Jurisdictional acts merely provide a forum for the presentation and adjudication of Indian cases.—Coos Bay, Lower Umpqua and Siuslaw Indian Tribes v. U. S., 87 Ct.Cl. 143, certiorari denied 59 S.Ct. 642, 306 U.S. 653, 83 L.Ed. 1052.

Suit held within special jurisdictional act

U.S.—Seminole Nation v. U. S., Ct. Cl., 62 S.Ct. 1049, 316 U.S. 286, 651, 86 L.Ed. 1480—U. S. v. Creek Nation, Ct.Cl., 55 S.Ct. 681, 295 U. S. 103, 79 L.Ed. 1331, rehearing denied 55 S.Ct. 911, 295 U.S. 769, 79 L.Ed. 1709—Butler Lumber Co. v. U.S., 73 Ct.Cl. 270.

Practical construction

Failure of Indians to seek further payment on large claim against United States between settlement of claim in 1909 and suit thereon in 1925, and their omission to mention claim of such size when seeking congressional action for passage of statute permitting them to adjudicate their claims against United States were practical construction that statute enacted did not provide for adjudication of such claim.—Klamath and Moadoc Tribes v. U. S., 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202, affirming 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679.

53. U.S.—Cross v. U. S., Ct.Cl., 14 Wall. 479, 20 L.Ed. 721—Mansfield v. U. S., 89 Ct.Cl. 12—Stubbs v. U. S., 86 Ct.Cl. 152—A. S. Rosenthal Co. v. U. S., 64 Ct.Cl. 643—Goodrich v. U. S., 47 Ct.Cl. 200—U. S. v. La Abra Silver Min. Co., 32 Ct.Cl. 462, affirmed 20 S.Ct. 168, 175 U.S. 423, 44 L.Ed. 223.
25 C.J. p 993 note 4 [c], note 97 [b].

Individual Indians

A jurisdictional act can give individual Indians a forum in which to assert such rights as they may possess.—Sac and Fox Indians of Iowa v. Sac and Fox Indians of Oklahoma, 45 Ct.Cl. 287, affirmed 31 S.Ct. 473, 220 U.S. 481, 55 L.Ed. 552.

to be strictly construed,[54] and the court, in adjudicating such claims, may not go beyond the terms of the act.[55] The terms of the reference may be such as to authorize the entry of judgment,[56] or they may be so qualified that the court may omit the entry of judgment and report the facts to congress with its opinion.[57] Jurisdiction to render judgment "in any and all legal and equitable claims" cannot be construed to embrace a claim founded on an allegation that a former act of congress was fraudulent.[58] A special act conferring on the court of claims jurisdiction to determine the merits of a particular claim does not concede liability thereon.[59] A special jurisdictional act, however, may waive a special and conclusive defense to a claim,[60] and the court is to ascertain from all the facts and circumstances whether the act was intended to do so.[61] Accordingly, a special jurisdictional act may

Misappropriation of funds

Under a statute conferring jurisdiction to hear and determine all claims of an Indian tribe for the misappropriation of any funds of the tribe for purposes not for its material benefit, the construction by the government of a building as an infirmary for certain tribes of Indians, which was not used and was not suitable for the use of the Indians, was a "misappropriation" of the funds of the tribe within the statute.—U. S. v. Omaha Tribe, Ct.Cl., 40 S.Ct. 522, 253 U.S. 275, 64 L.Ed. 901.

Questions of law

(1) Questions of law and fact may be determined where the jurisdictional act so provides.—Oakes v. U. S., 19 S.Ct. 864, 174 U.S. 778, 43 L.Ed. 1169, affirming 30 Ct.Cl. 378—25 C.J. p 992 note 93 [g].

(2) Where the jurisdictional act so provides, title to real estate may be determined.—Hussey v. U. S., 32 S.Ct. 33, 222 U.S. 88, 56 L.Ed. 106, affirming 44 Ct.Cl. 324.

25 C.J. p 989 note 67 [e].

54. U.S.—U. S. v. Goltra, 61 S.Ct. 487, 312 U.S. 203, 85 L.Ed. 776, modifying Goltra v. U. S., 91 Ct.Cl. 42, motion denied 61 S.Ct. 25—Gates v. U. S., 87 Ct.Cl. 358.

55. U.S.—Cherokee Nation v. U. S., 92 Ct.Cl. 262—Seminole Nation v. U. S., 92 Ct.Cl. 210, certiorari denied 61 S.Ct. 841, 313 U.S. 563, 85 L.Ed. 1523—Wichita and Affiliated Bands of Indians in Oklahoma v. U. S., 89 Ct.Cl. 378—Alcock v. U. S., 74 Ct.Cl. 308—Village of Harbor Springs, Mich., v. U. S., 72 Ct.Cl. 32—Colgate v. U. S., 66 Ct.Cl. 667, certiorari denied 50 S.Ct. 15, 280 U.S. 553, 74 L.Ed. 610, appeal dismissed 50 S.Ct. 22, 280 U.S. 43, 74 L.Ed. 757—Winton v. Amos, 51 Ct.Cl. 284, affirmed in part and reversed in part on other grounds 41 S.Ct. 342, 255 U.S. 373, 65 L.Ed. 684.

25 C.J. p 992 note 93 [f], p 993 note 97 [a].

Claims held not within special acts

U.S.—Chippewa Indians of Minnesota v. U. S., 59 S.Ct. 313, 305 U.S. 479, 83 L.Ed. 300, affirming 87 Ct.Cl. 1—Klamath and Moadoc Tribes v. U. S., 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202, affirming 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679—Choctaw Nation v. U. S., 91 Ct.Cl. 320—Randall v. U. S., 90 Ct.Cl. 325—Blenkner v. U. S., 65 Ct.Cl. 18.

Law applicable

Special jurisdictional act was held to require application of statutory law in force at time controversy arose and continued.—Colgate v. U. S., 66 Ct.Cl. 667, certiorari denied 50 S.Ct. 15, 280 U.S. 553, 74 L.Ed. 610, appeal dismissed 50 S.Ct. 22, 280 U.S. 43, 74 L.Ed. 757.

Relief intended

Where a matter is referred by act of congress, statements of a committee will not be considered. The court will not go behind the act to ascertain what was the relief intended by it.—U. S. v. Weil, 35 Ct.Cl. 42.

56. U.S.—Norris v. U. S., 2 Ct.Cl. 155.

57. **Judgment or report**

(1) Where the words "when completed the court shall make a full report to congress" are used in the jurisdictional act, the court may omit the entry of judgment and report the facts to congress with its opinion.—Fond Du Lac Band of Chippewa Indians v. U. S., 34 Ct.Cl. 426.

(2) Although the reference is by a special statute to hear, determine, and report to the house, yet, the case being a congressional one, the court can find the facts only and report them.—Griffin v. U. S., 33 Ct.Cl. 228.

(3) Where the act directs both an "adjudication according to law" and that the court "report the same to Congress," a final judgment will be rendered and, in due course, reported to congress.—Irwin v. U. S., 23 Ct.Cl. 149, reversed on other grounds 8 S.Ct. 1033, 127 U.S. 125, 32 L.Ed. 99.

58. U.S.—Seminole Nation v. U. S., 92 Ct.Cl. 210, certiorari denied 61 S.Ct. 841, 313 U.S. 563, 85 L.Ed. 1523—Klamath and Moadoc Tribes v. U. S., (No. E-346), 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679 and affirmed 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202.

59. U.S.—Shoshone Tribe of Indians of Wind River Reservation in Wyoming v. U. S., 82 Ct.Cl. 23, certiorari granted Shoshone Tribe of Indians v. U. S., 57 S.Ct. 45, 299 U.S. 530, 81 L.Ed. 390, and U. S. v. Shoshone Tribe of Indians, 57 S.Ct. 46, 299 U.S. 530, 81 L.Ed. 390, and reversed on other grounds River Reservation in Wyoming v. U. S., 57 S.Ct. 244, 299 U.S. 476, 81 L.Ed. 360—Klamath and Moadoc Tribes v. U. S., 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679, and affirmed 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202—Randall v. U. S., 71 Ct.Cl. 152—Stanton v. U. S., 68 Ct.Cl. 379—Bishop v. U. S., 38 Ct.Cl. 473, affirmed 25 S.Ct. 440, 197 U.S. 334, 49 L.Ed. 780.

25 C.J. p 992 note 94 [d], [f].

Recitals of ownership in statute conferring jurisdiction to determine a certain claim for rentals do not require the court of claims to accept such ownership as a fact, nor operate as an estoppel, but such court may consider the question of title.—Kinkead v. U. S., Ct.Cl., 14 S.Ct. 172, 150 U.S. 483, 37 L.Ed. 1152—U. S. v. Jordan, Ct.Cl., 5 S.Ct. 585, 113 U.S. 418, 28 L.Ed. 1013.

60. U.S.—Cherokee Nation v. U. S., 46 S.Ct. 428, 270 U.S. 476, 70 L.Ed. 694, affirming 59 Ct.Cl. 862—Alcock v. U. S., 74 Ct.Cl. 308—Butler Lumber Co. v. U. S., 73 Ct.Cl. 270.

Act held not to waive defense

U.S.—Eastern or Emigrant Cherokees v. U. S., 82 Ct.Cl. 180, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 406.

Correctness of judgment

The sole question submitted to the court by jurisdictional act was the determination of the correctness of judgment awarded to the government in the district court of the United States and it must be assumed from the language used in the act that congress intended the court to decide and determine this question on the merits and to waive any and all defenses which would prevent the court from doing this.—Hampton & B. R. Co. v. U. S., 89 Ct.Cl. 117.

61. U.S.—Butler Lumber Co. v. U. S., 73 Ct.Cl. 270.

Release

Appropriation and payment by the government for the lands and the ac-

refer to an action ex delicto and waive the defense of lack of privity of contract.[62] There must be a compliance with all conditions precedent contained in the jurisdictional act.[63] Where an act of congress provides for the acquisition of land by the United States by purchase or requisition, giving the president authority to determine just compensation to the owners thereof, who, if dissatisfied with his award, might receive seventy-five per cent thereof and sue in the court of claims for such amount as, added to the seventy-five per cent, would make just compensation, if the owner receives the full amount of the award without protest, objection, or reservation, the court has no jurisdiction to consider a claim for any further amount.[64]

§ 332. —— Claims Referred by Executive Departments

The court of claims has jurisdiction of claims involving controverted questions of fact or law referred to it by the heads of the executive departments.

Under the Judicial Code § 148, 28 U.S.C.A. § 254, when any claim or matter is pending in any of the executive departments which involves controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, documents, and proofs pertaining thereto, to the court of claims, and the same shall be there proceeded in under such rules as the court may adopt.[65] In such a proceeding the court acquires jurisdiction, if at all, by virtue of the reference and not by reason of any subsequent filing in the court of a petition by claimant.[66]

The claim must be pending in the executive department in order to warrant transmission thereof.[67] Where an executive department itself has no jurisdiction of a claim, it is not pending therein within the meaning of this provision of the Judicial Code,[68] and its transmission to the court of claims by the head of such department does not confer jurisdiction to hear and determine questions involved.[69] A claim which has been reopened and reconsidered by the executive department is pend-

ceptance of payment and execution of the release by the Indians was intended as a final settlement for the lands; and to revive by legislative enactment a liability once satisfied and expressly released exacts language in the statute which leaves no room for doubt of such intent.—Klamath and Moadoc Tribes v. U. S., 81 Ct.Cl. 79, certiorari granted 55 S. Ct. 920, 295 U.S. 729, 79 L.Ed. 1679, and affirmed 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202.

62. U.S.—Andrew Radel Oyster Co. v. U. S., 78 Ct.Cl. 816—Butler Lumber Co. v. U. S., 73 Ct.Cl. 270.

63. U.S.—Duffy Bros. v. U. S., 89 Ct. Cl. 528—St. Louis & Mississippi Valley Transp. Co. v. U. S., 33 Ct. Cl. 251, affirmed 22 S.Ct. 350, 184 U.S. 247, 46 L.Ed. 520.

Report of referees

Where an act provides that unsettled claims of railroad companies for just compensation shall be submitted to a board of three referees, who shall consider all the facts presented and report in convenient form its findings as to just compensation to the president, who is thereupon authorized to agree with such railroad companies for just compensation, not in excess of the amount reported by such board, and, failing such agreement, either party may file a petition in the court of claims for just compensation, the report of such board to be prima facie evidence of the amount of just compensation and the facts stated therein, the court, on failure of such board to report such just compensation, has no jurisdiction to consider the claims.—Cairo, T. & S. R. Co. v. U. S., 58 Ct.Cl. 336, affirmed 45 S.Ct. 247, 267 U.S. 350, 69 L.Ed. 651.

64. U.S.—Mitchell v. U. S., 58 Ct.Cl. 443, affirmed 45 S.Ct. 293, 267 U. S. 341, 69 L.Ed. 644.

65. **Barred claims**

(1) Under the Bowman Act, 22 U. S.St. at L. p 485 c 116 § 3, the court had no jurisdiction of any claim which was barred by virtue of the provisions of any law.—Chesapeake & Ohio R. Co. v. U. S., 20 Ct.Cl. 49—25 C.J. p 993 note 9 [c] (1).

(2) A claim transmitted by the head of an executive department was not barred, within the meaning of the statute, unless it was barred within such department.—McClure v. U. S., 19 Ct.Cl. 18.

(3) Thus limitation was not pleadable against a claim referred by the head of an executive department which was presented at the proper department within the period limited.—U. S. v. New York, Ct.Cl., 16 S.Ct. 402, 160 U.S. 598, 40 L.Ed. 551—U. S. v. Lippitt, Ct.Cl., 100 U.S. 663, 25 L.Ed. 747—Green v. U. S., 18 Ct.Cl. 93—25 C.J. p 993 note 9 [e].

(4) A claim which was barred before presentation to the department could not be referred.—Alexandria, Loudoun & Hampshire R. Co. v. U. S., 26 Ct.Cl. 327—Wadell v. U. S., 25 Ct.Cl. 323, 7 L.R.A. 861—Savage v. U. S. 23 Ct.Cl. 255.

(5) Particular claim held barred. —Savage v. U. S., supra.

66. U.S.—Secor v. U. S., 54 Ct.Cl. 92.

67. U.S.—Matter of Wright, 50 Ct. Cl. 19.

25 C.J. p 994 note 10.

Department in which claim pending

Where the claim of an Indian for property taken away by Indians of another tribe in violation of treaty obligations is transmitted by the interior department to the proper auditor of the treasury, the claim must be deemed to be pending in the treasury department, and may be transmitted by the secretary to the court of claims.—Byrd v. U. S., 44 Ct. Cl. 498.

Settlement and certification

(1) A head of a department may transmit a claim after the auditor and comptroller have settled it and certified a balance due to claimant. —Winnisimmet Co. v. U. S., 12 Ct. Cl. 319—Delaware River Steamboat Co. v. U. S., 5 Ct.Cl. 55.

(2) Where a claim allowed by the accounting officers of the treasury, and approved by the secretary, is subsequently referred to the court by the secretary, under Rev.St. § 1063, the award is suspended and subordinated to the jurisdiction of the court.—Glynn v. U. S., 32 Ct.Cl. 82.

68. U.S.—In re Departmental Reference, 59 Ct.Cl. 813—Matter of Wright, 50 Ct.Cl. 19.

69. U.S.—In re Departmental Reference, 59 Ct.Cl. 813—Secor v. U. S., 54 Ct.Cl. 92.

25 C.J. p 994 note 11 [a].

Particular claims held within jurisdiction of transmitting department. —Campbell v. U. S., 44 Ct.Cl. 488.

ing, and may be transmitted.[70]

The claim or matter which may be transmitted under this statute is one involving a money demand in one of the general classes of claims of which the court has jurisdiction.[71] Claims which must be finally decided by the head of one of the executive departments cannot be referred.[72] This statute does not authorize a reference by the head of a department for a mere advisory opinion,[73] and an executive department cannot relieve itself from the investigation of claims except where they involve controverted questions of law or fact.[74]

The head of an executive department may transmit a matter to the court of claims without the consent of claimant.[75] A statute giving the secretary of the treasury authority, on the certificate of the auditor or comptroller, to refer any account, matter, or claim to the court for trial and adjudication does not apply to any other department.[76]

The head of an executive department, in referring a claim to the court of claims, may transmit whatever papers, vouchers, and documents relating to the case are in his department. The fact that some of the papers relating to the case are on file in another executive department will not prevent a reference of the claim.[77]

When the facts and conclusions of law have been found, the court must report its findings to the department by which the matter was transmitted for its guidance and action,[78] and the department is bound by the findings of fact and conclusions of law reported by the court.[79] The head of the executive department is entitled to have the facts found by the court and its conclusions of law and opinion thereon for the guidance and action of the department, even though claimant does not appear in the court of claims to prosecute the case.[80]

Under this statute, if the claim has been transmitted with the consent of claimant,[81] or if it appears to the satisfaction of the court on the facts established that under the existing laws it has jurisdiction to render judgment or decree thereon,[82] it shall proceed to do so.[83]

§ 333. —— Assigned Claims

The court of claims ordinarily cannot entertain jurisdiction of a suit on an assigned claim against the United States brought by an assignee thereof.

In view of the general prohibition of the assignment of claims against the United States, see the C.J.S. title United States §§ 157–159, also 65 C.J. p 1388 note 95–p 1391 note 45, the court of claims ordinarily cannot entertain jurisdiction of a suit on an assigned claim against the United States brought by an assignee thereof.[84]

70. U.S.—Blazek v. U. S., 44 Ct.Cl. 188.

71. U.S.—In re Departmental Reference, 59 Ct.Cl. 813.
25 C.J. p 993 note 9 [a], [c].

Amount
Under the acts of 1887 and of 1883 and the present statute the amount is immaterial, while the act of 1868 specified the amount of three thousand dollars as one of the factors.—U. S. v. New York, Ct.Cl., 16 S.Ct. 402, 160 U.S. 598, 40 L.Ed. 551—Glynn v. U. S., 32 Ct.Cl. 82—Bright v. U. S., 6 Ct.Cl. 118—Amoskeag Mfg. Co. v. U. S., 6 Ct.Cl. 99.

Claims growing out of treaties
The jurisdictional restrictions relating to claims growing out of treaties do not extend to claims referred by an executive department.—Hayes v. U. S., 44 Ct.Cl. 493.

Matters which may be referred
(1) An application to the interior department, asking the government to retain, out of moneys due an Indian tribe, a certain amount alleged to be due claimant under a contract with the Indians.—In re Sanborn, Ct. Cl., 13 S.Ct. 577, 148 U.S. 222, 37 L. Ed. 429.
(2) Other matters see 25 C.J. p 993 note 9 [b].

72. U.S.—U. S. Bedding Co. v. U. S., 55 Ct.Cl. 459.

73. U.S.—In re Departmental Reference, 59 Ct.Cl. 813—U. S. Bedding Co. v. U. S., 55 Ct.Cl. 459.
25 C.J. p 994 note 18 [c].

74. **Reasons for reference** should be stated in letter of reference.—Hayes v. U. S., 44 Ct.Cl. 493.

75. **Bowman Act**
When a claim is transmitted without the consent of a claimant, without specifying the statute under which it is so transmitted, jurisdiction may be taken under the Bowman Act of 1883 which did not require consent.—Matter of Billings, 23 Ct.Cl. 166.

76. U.S.—Baltimore & O. R. Co. v. U. S., 34 Ct.Cl. 484.

77. U.S.—Delaware River Steamboat Co. v. U. S., 5 Ct.Cl. 55.

78. U.S.—U. S. v. New York, Ct.Cl., 16 S.Ct. 402, 160 U.S. 598, 40 L.Ed. 551.
25 C.J. p 994 note 18.

79. U.S.—Matter of Wright, 50 Ct.Cl. 19.
25 C.J. p 994 note 18 [b].

80. U.S.—Pennsylvania R. Co. v. U. S., 35 Ct.Cl. 584.

81. U.S.—In re Hodges, 84 Ct.Cl. 380.
25 C.J. p 994 note 19 [a].

82. U.S.—U. S. v. New York, Ct.Cl., 16 S.Ct. 402, 160 U.S. 598, 40 L.Ed. 551—In re Hodges, 84 Ct.Cl. 380—Bright v. U. S., 6 Ct.Cl. 118.
25 C.J. p 994 note 19.

83. **Taking evidence**
"If it becomes necessary, in the judgment of the court, in order to find the facts, to take additional testimony, the court has the right to do so under its rules."—Matter of Wright, 50 Ct.Cl. 19, 29.

Provision by congress for reëxamination by department
If, while a departmental case is pending in the court, congress enacts that the accounting officers shall reëxamine and allow such claims, further action by the court will be unnecessary, and the papers in the case will be returned to the secretary who transmitted them.—Massachusetts v. U. S., 37 Ct.Cl. 524.

84. U.S.—U. S. v. Gillis, Ct.Cl., 95 U.S. 407, 24 L.Ed. 503—Sines v. U. S., 1 Ct.Cl. 12.
25 C.J. p 994 note 22.

§ 334. —— Claims Growing Out of Treaties

The court of claims has no jurisdiction of claims growing out of treaties, unless jurisdiction is acquired by virtue of a special act of congress.

The ordinary jurisdiction of the court of claims, under the Judicial Code § 153, 28 U.S.C.A. § 259, does not extend to any claim against the government not pending therein on December 1, 1862, growing out of, or dependent on, any treaty stipulation entered into with foreign nations or with Indian tribes,[85] but special statutes have from time to time conferred on the court jurisdiction to adjudicate on claims arising out of particular designated treaties.[86] While the court may exercise jurisdiction over such claims as come fairly within the terms of such a special statute,[87] jurisdiction is not conferred to hear and determine claims or matters arising from treaties which are not within its terms.[88]

§ 335. —— Indian Depredation Claims

The general jurisdiction of the court of claims does not extend to claims for Indian depredations.

The general jurisdiction of the court of claims does not extend to Indian depredations, which are, primarily, liabilities of the Indian tribes rather than of the United States.[89] The Indian Depredation Claims Act of March 3, 1891, 26 U.S.St. at L. c 538, provided for the adjudication by the court of claims for property "taken" or "destroyed" by Indians,[90] but as this act contained provisos barring all claims not presented within three years after its passage, and prohibiting any proceedings thereunder for depredations committed after its passage, a reference to decisions thereunder is deemed sufficient.[91]

§ 336. Set-Offs and Counterclaims

The court of claims has general jurisdiction to hear and determine all set-offs, counterclaims, claims for

85. U.S.—George E. Warren Corporation v. U. S., C.C.A.N.Y., 94 F. 2d 597, certiorari denied 58 S.Ct. 1041, 304 U.S. 572, 82 L.Ed. 1537 —Spears v. U. S., 64 Ct.Cl. 684—Pawnee Tribe of Indians v. U. S., 56 Ct.Cl. 1.
25 C.J. p 995 note 23.

Invalidity
Where an Indian treaty was executed and ratified by the government and plaintiff Indians, and the obligations of the government thereunder were discharged, and the benefits therefrom received by the Indians, there can be no recovery by the Indians on a claim based on invalidity of the treaty because of the fact that its ratification by them was overlooked and not promulgated by the officials of the government.—Crow Nation v. U. S., 81 Ct.Cl. 238.

The Tucker Act, redefining and broadening jurisdiction of the court of claims and repealing all inconsistent enactments, did not repeal statute providing that jurisdiction of the court of claims should not extend to claim against the United States growing out of, or dependent on, a treaty.—George E. Warren Corporation v. U. S., C.C.A.N.Y., 94 F.2d 597, certiorari denied 58 S.Ct. 1041, 304 U.S. 572, 82 L.Ed. 1537.

86. U.S.—Iowa Tribe of Indians v. U. S., 68 Ct.Cl. 585.
25 C.J. p 995 note 24.

87. U.S.—Seminole Nation v. U. S., 93 Ct.Cl. 500, certiorari granted 62 S.Ct. 105—Klamath and Moadoc Tribes v. U. S., 86 Ct.Cl. 614—Iowa Tribe of Indians v. U. S., 68 Ct.Cl. 585.

Particular jurisdictional acts construed and applied
U.S.—Duwamish v. U. S., 79 Ct.Cl. 530, certiorari denied 55 S.Ct. 913, 295 U.S. 755, 79 L.Ed. 1698.

88. U.S.—Klamath and Moadoc Tribes v. U. S., 86 Ct.Cl. 614—Duwamish v. U. S., 79 Ct.Cl. 530, certiorari denied 55 S.Ct. 913, 295 U.S. 755, 79 L.Ed. 1698—Osage Tribe of Indians v. U. S., 66 Ct.Cl. 64, appeal dismissed and certiorari denied Osage Nation of Indians v. U. S., 49 S.Ct. 251, 279 U.S. 84, 73 L.Ed. 971.

Adjudicated claims
(1) Under some special acts the court is given jurisdiction only of claims not theretofore adjudicated on their merits.—Western or Old Settler Cherokees v. U. S., 82 Ct.Cl. 566—Cherokee Nation v. U. S., 82 Ct. Cl. 456—Eastern or Emigrant Cherokees v. U. S., 82 Ct.Cl. 180, certiorari denied 57 S.Ct. 13, 299 U.S. 551, 81 L.Ed. 406.
(2) The provision of a jurisdictional act for readjustment by the court of the account between plaintiffs and the government as adjusted in a prior adjudication is purely procedural, and in no way changes or enlarges the jurisdiction of the court, which is limited to claims not theretofore adjudicated and paid.—Western or Old Settler Cherokees v. U. S., supra—Eastern or Emigrant Cherokees v. U. S., supra.

Prior adjudication
Where claims of which the court of claims is given jurisdiction by a special statute are limited to legal or equitable claims and the subject matter and respective rights of the parties have been adjudicated in another court of competent jurisdiction, the court is bound by such adjudication and cannot redetermine the controversy under the jurisdictional act.—Duwamish v. U. S., 79 Ct. Cl. 530, certiorari denied 55 S.Ct. 913, 295 U.S. 755, 79 L.Ed. 1698.

Setting aside treaty
A special statute granting jurisdiction to hear and render judgment on claims arising under, or growing out of, a treaty does not confer jurisdiction over a claim which involves setting aside the treaty.—Klamath and Moadoc Tribes v. U. S., 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679, affirmed 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202—Creek Nation v. U. S., 63 Ct.Cl. 270, certiorari denied 47 S.Ct. 765, 274 U. S. 751, 71 L.Ed. 1332.

Time limited
Jurisdiction of court of claims in action against United States on claims of Seminole Nation was held limited to claims sued on before expiration of period within which United States consented to be sued and did not extend to cause of action not alleged in original petition which was filed within such period, where amended petition was not filed until after expiration of such period; since United States could not be sued without its consent.—U. S. v. Seminole Nation, 57 S.Ct. 283, 299 U.S. 417, 81 L.Ed. 316, reversing Seminole Nation v. U. S., 82 Ct.Cl. 135, certiorari granted U. S. v. Seminole Nation, 57 S.Ct. 23, 299 U.S. 526, 81 L. Ed. 387.

89. U.S.—Church v. U. S., 48 Ct.Cl. 262.

90. **Cases involving jurisdiction under statute**
U.S.—Davidson v. U. S., 34 Ct.Cl. 169.
25 C.J. p 995 note 26 [a].

91. U.S.—Rex v. U. S., 40 S.Ct. 181, 251 U.S. 382, 64 L.Ed. 318, affirming 53 Ct.Cl. 320.
25 C.J. p 995 note 27.

damages, or other demands on the part of the United States against any claimant against the government in that court.

Under the Judicial Code § 145, 28 U.S.C.A. § 250 (2), the court of claims has jurisdiction to hear and determine all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in that court.[92] Where there is evidence accompanying the motion of the government for leave to file a counterclaim which tends to establish fraud and the right to have judgment for a larger amount than claimant could recover, a discontinuance asked for should not be allowed.[93] If the court is without jurisdiction of the claim asserted against the United States it cannot retain jurisdiction of a counterclaim which has been pleaded.[94] In proceedings under special jurisdictional acts, items within the terms of the act may be charged as set-offs against plaintiffs,[95] but, where the jurisdictional act contemplates the consideration of counterclaims only as set-offs against whatever amount may be due plaintiff, and where nothing is found to be due plaintiff, there is no need for the consideration of counterclaims against plaintiff.[96]

§ 337. Claims against District of Columbia

The ordinary jurisdiction of the court of claims does not extend to claims against the District of Columbia.

The ordinary jurisdiction of the court of claims does not extend to claims against the District of Columbia,[97] but an act of congress passed in 1880, 21 U.S.St. at L. p 284 c 243, conferred on the court of claims jurisdiction with respect to certain contracts made by the district. As this act is no longer in force, it is sufficient to refer to cases decided thereunder.[98]

Reference of claims by congress. Congress has complete legislative control of the District of Columbia, and either house or a committee thereof may refer to the court of claims a claim against the district.[99]

§ 338. Claims of Disbursing Officers for Relief from Responsibility

The court of claims has jurisdiction to entertain suits by disbursing officers for relief from responsibility for losses incurred, without their fault, by reason of capture or otherwise.

Under the Judicial Code § 145, 28 U.S.C.A. § 250 (3), the court of claims is granted jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.[1] To be entitled to invoke the jurisdiction of the court of

92. U.S.—Allen v. U. S., Ct.Cl., 27 S.Ct. 324, 204 U.S. 581, 51 L.Ed. 634.
25 C.J. p 996 note 28.
Set-offs and counterclaims in actions against the United States generally see the C.J.S. title United States § 187, also 65 C.J. p 1415 note 25—p 1416 note 32.

93. U.S.—Huske v. U. S., 46 Ct.Cl. 35.

94. U.S.—Yale & Towne Mfg. Co. v. U. S., 67 Ct.Cl. 618—Baltimore & O. R. Co. v. U. S., 34 Ct.Cl. 484.

95. **Court cannot go beyond terms of private act** allowing a deduction and allow another set-off.—Ely v. U. S., 19 Ct.Cl. 658.

Gratuities

(1) Under some jurisdictional acts gratuities from the United States to plaintiffs are chargeable as set-offs. —Blackfeet et al. Nations v. U. S., 81 Ct.Cl. 101.

(2) Where it was contended that certain expenditures, made not pursuant to any specific obligation under treaty or agreements, were not solely for the benefit of the Indians but were made pursuant to the established Indian policy of the government and therefore should not be allowed as offsets for gratuitous expenditures under the provisions of the act giving court of claims jurisdiction of certain Indian claims, it was held that under the decisions in the Blackfeet case and other cases cited any amounts expended from public funds for the benefit of the Indians in maintaining and carrying out the government's Indian policy, as determined by congress, without obligation for such expenditures under any treaty or agreement, are gratuities which must be allowed as offsets under the provisions of such jurisdictional act.—Chippewa Indians of Minnesota v. U. S., 91 Ct.Cl. 97.

(3) Payment made to plaintiffs as compensation after the enactment of the jurisdictional act held not a gratuity chargeable as a set-off.—Chippewa Indians of Minnesota v. U. S., supra.

Treaty obligations

Where a payment made to Indians was clearly a payment pursuant to an obligation assumed by United States under the provisions of a treaty, such payment cannot be allowed as an offset.—Chippewa Indians of Minnesota v. U. S., supra.

96. U.S.—Blackfeet et al. Nations v. U. S., 81 Ct.Cl. 101.

97. U.S.—Strachan v. District of Columbia, 20 Ct.Cl. 484.
Claims against the District of Columbia generally see District of Columbia § 20.

98. U.S.—District of Columbia v. Barnes, 25 S.Ct. 401, 197 U.S. 146, 40 L.Ed. 699, affirming 37 Ct.Cl. 342.
25 C.J. p 996 note 33.

99. U.S.—Widmayer v. U. S., 42 Ct. Cl. 519.

1. **Statute held prospective in operation**
U.S.—Glenn v. U. S., 4 Ct.Cl. 501.
The intent of the law is that the legal liability of disbursing officers remains unchanged, but that the court of claims sitting as a court of equity can award specific redress in exceptional cases, that is, where the officer can establish the fact that his official conduct was faultless.—Boggs v. U. S., 44 Ct.Cl. 367.

claims under this statute, the officer must be within one of the named classes;[2] and the term "other disbursing officer" must be confined to the class of disbursing officers previously described in the statute,[3] under the rule that, when general words follow particular and specific words, they must be confined to things of the same kind or class.[4] Under this provision one can petition the court of claims for relief as long as the government, while holding him liable on account of a loss, neglects to sue him in a court where his defense can be heard,[5] and the jurisdiction of the court is acquired by claimant appearing and filing his petition for relief.[6] The mere fact that the disbursing officer has not given bond does not deprive the court of jurisdiction to extend relief to him.[7]

The loss must have been incurred in the line of duty,[8] but jurisdiction under this statute is not confined to losses incurred in time of war.[9] Under the statute, a disbursing officer is entitled to relief for losses occasioned, without his fault, by capture by enemy forces during time of war.[10] Loss by "capture or otherwise" has been construed to mean, not only loss by capture and kindred ways under the rule of ejusdem generis interpretation, but the words "or otherwise" have been construed to apply to losses occurring in any way while the officer was in the line of duty and free from fault.[11] This statute does not extend relief for errors in the settlement of accounts.[12]

§ 339. Review of Decisions of Executive Departments

Where an executive department is vested with exclusive jurisdiction of a claim, the court of claims ordinarily has no jurisdiction to review its decision thereon.

Where an executive department or an administrative body is clearly vested with exclusive jurisdiction of a claim, and its decision is made final, the court of claims has no power to review such decision.[13] Where, however, the department is given exclusive jurisdiction only with respect to disputed questions of fact, an allowance or disallowance of a claim, based on a determination of questions of law, is reviewable by the court of claims.[14] The court of claims has jurisdiction where a private act directed the accounting officers of the treasury "to settle and adjust" an army officer's right to back pay and emoluments, for in such case, the duties of the accounting officers being simply administrative, they are not constituted a special tribunal to pass on the matter, and their adjustment is not final.[15]

§ 340. Review of Decisions of Prize Courts

The court of claims has been held not to have jurisdiction to review a decision of a prize court.

A decision of a prize court allowing a claim for weighing and gauging the cargo of a condemned prize is a judicial determination which is not subject to review by the court of claims.[16]

2. **Acting commissaries** held entitled to benefit of statute.—Wood v. U. S., 25 Ct.Cl. 98—Hoyle v. U. S., 21 Ct.Cl. 300—Scott v. U. S., 18 Ct.Cl. 1.

Officer of executive department

The act is not limited to officers of the army or navy. It also extends to disbursing officers of the executive departments.—Hobb v. U. S., 17 Ct. Cl. 189.

Losses in commissary and general sales store

The court of claims has jurisdiction of a suit by a major, quartermaster corps, United States army, to recover deductions from his pay made to recoup the government for losses sustained by a commissary and general sales store of which he was in charge through a regular detail, and for a decree relieving him from responsibility for such losses.—White v. U. S., 72 Ct.Cl. 375.

Officer in charge of post exchange in a military or naval establishment is a disbursing officer within the jurisdictional statute.—Woog v. U. S., 48 Ct.Cl. 80.

3. **Court has no jurisdiction to extend relief to**

(1) Collector of internal revenue.—Stapp v. U. S., 4 Ct.Cl. 219.

(2) Postmasters.—Henderson v. U. S., 42 Ct.Cl. 449.

(3) Superintendent of a money order division in a post office.—Henderson v. U. S., 42 Ct.Cl. 449.

4. U.S.—Henderson v. U. S., supra.

5. U.S.—Hobbs v. U. S., 17 Ct.Cl. 189.

6. U.S.—Boggs v. U. S., 44 Ct.Cl. 367.

7. U.S.—Wood v. U. S., 25 Ct.Cl. 98.

8. U.S.—Stevens v. U. S., 41 Ct.Cl. 344.

9. U.S.—Penrose v. U. S., 42 Ct.Cl. 29, appeal dismissed 28 S.Ct. 759, 209 U.S. 554, 52 L.Ed. 923.

10. U.S.—Murphy v. U. S., 3 Ct.Cl. 212—Prime v. U. S., 3 Ct.Cl. 209.

11. U.S.—Stevens v. U. S., 41 Ct.Cl. 344.

25 C.J. p 996 note 40 [a].

Broader private statute

A broader discretion was conferred for relief under 20 U.S.St. at L. p 617, authorizing such court to relieve a certain army officer and his sureties from the consequences of a robbery of public funds in his custody.—Reynolds v. U. S., 15 Ct.Cl. 314.

12. U.S.—Hall v. U. S., 9 Ct.Cl. 270.

13. U.S.—John B. Kelly, Inc. v. U. S., 87 Ct.Cl. 271.

25 C.J. p 996 note 47.

If proceedings were regular and administrative officer did not act arbitrarily or capriciously, the court of claims has no jurisdiction.—Tyson v. U. S., Ct.Cl., 32 F.Supp. 135.

Payment for lost money orders is with postmaster general on proof satisfactory to him.—Former Corporation v. U. S., 66 Ct.Cl. 83, certiorari denied 49 S.Ct. 352, 279 U.S. 857, 73 L.Ed. 998.

Where contract provided that bureau of yards and docks should be final arbiter, court of claims cannot review its action.—Howard v. U. S., 60 Ct.Cl. 583.

14. U.S.—Utah Power & Light Co. v. U. S., 67 Ct.Cl. 602—Curran v. U. S., 65 Ct.Cl. 26.

25 C.J. p 997 note 48, p 989 note 70 [c].

15. U.S.—McLean v. U. S., 45 Ct.Cl. 95.

16. U.S.—Root v. U. S., 5 Ct.Cl. 408.

C. PROCEDURE

§ 341. In General

The practice and procedure prevailing in the court of claims is substantially similar to that in other courts.

The rules of procedure and practice in the court of claims are not materially different from the general rules which obtain in other courts.[17] It is not unreasonable to require claimants to come within the jurisdiction of the court and comply with whatever orders may be made relative to the litigation which they have instituted.[18]

Rules. The court of claims may make rules governing its own procedure, but cannot enforce a rule violating or changing the effect of a federal statute.[19]

The purpose of provisions of the rules permitting either party in a patent case to file motions for interrogatories or bills of particular within a specified number of days from the filing of a general traverse is to expedite the proceedings and to bring the procedure more into conformity with patent litigation in the district courts.[20]

Consolidation of cases. Two or more actions involving the same contract may be consolidated.[21]

What law governs. Cases brought under special jurisdiction acts of congress confiding to the court of claims determination of particular matters involving the rights of corporations of foreign nations should be decided under principles of international law, and neither principles nor precedents of municipal law contrary thereto are controlling.[22]

Construction of statutes. In construing statutes affecting procedure in the court of claims, the courts may correct by construction obvious clerical errors in such statutes.[23]

§ 342. Conditions Precedent to Suit

A demand on a department is a condition precedent to suit in the court of claims only when made so by statute. Ordinarily an account for fees should be rendered by a United States officer before suing the government in the court of claims.

In the absence of any statutory requirement, a demand on a department is not a condition precedent to a suit in the court of claims,[24] but it is a very usual requirement of legislation with respect to claims against the United States that such claim be presented to the proper accounting officers, and in such case presentation within the time allowed therefor is necessary as a basis for a suit in the court of claims.[25]

Claims for fees for services. An officer of the United States cannot sue the government in the court of claims for fees for services alleged to have been performed for the United States until an account for such fees has been rendered and finally acted on as required by law,[26] unless the proper accounting officer of the treasury fails to act on the account within the period fixed by statute after it is received in his office.[27]

Protest as to insufficient payment. It is not a condition precedent to suit for a fixed sum claimed to be due that plaintiff should protest against prior payment of a smaller sum.[28]

17. U.S.—Murray v. U. S., 46 Ct.Cl. 94.
25 C.J. p 997 note 51.

18. U.S.—Atlantic Contracting Co. v. U. S., 40 Ct.Cl. 244.

19. U.S.—Graf v. U. S., Ct.Cl., 24 F. Supp. 54.

20. U.S.—Pratt v. U. S., 87 Ct.Cl. 586.
Bills of particulars generally see infra § 347 e.
Interrogatories generally see infra § 349.

21. U.S.—McShain v. U. S., 87 Ct.Cl. 531.

Claims by contractors and subcontractors
Where it appears that the prime contractor, the subcontractors or the sub-subcontractors have commenced separate actions, an order to consolidate the cases will be made on application of either party.—McShain v. U. S., supra.

22. U.S.—Royal Holland Lloyd v. U. S., 73 Ct.Cl. 722.

23. U.S.—Allen v. U. S., D.C.Tex., 10 F.2d 807.

Construing "6" to mean "7"
Where, in a statute affecting procedure in the court of claims, § 10 of such statute referred to the "findings of fact and the law applicable thereto . . . as provided in section 6," and § 6 contained no provisions as to findings of fact, but § 7 did contain provisions of the character referred to, in construing such statute the court construed the reference to "6" as erroneous and read the said section 10 as though by "6" it had meant "7."—Allen v. U. S., supra.

24. U.S.—U. S. v. Knox, 9 S.Ct. 63, 128 U.S. 230, 32 L.Ed. 465.
25 C.J. p 997 note 53.

25. U.S.—Rosenfield v. U. S., 70 Ct. Cl. 639—Utah Power & Light Co. v. U. S., 67 Ct.Cl. 602.
25 C.J. p 997 note 54.

Submission to secretary of war under Dent Act
Court of claims is without jurisdiction of contractor's claim under Dent Act, 50 U.S.C.A. § 80 note, where no appeal was taken to secretary of war from board of contract adjustment's rejection of claim, the decision of the board rejecting the claim not being equivalent to a failure or refusal of the secretary to act. —Purity Cross v. U. S., 73 Ct.Cl. 632.

26. U.S.—Summey v. U. S., 39 Ct.Cl. 199—Collins v. U. S., 35 Ct.Cl. 146.
25 C.J. p 997 note 55.

27. U.S.—Summey v. U. S., 39 Ct. Cl. 199—Collins v. U. S., 35 Ct.Cl. 146.

28. U.S.—St. Louis, B. & M. Ry. Co. v. U. S., 45 S.Ct. 472, 268 U.S. 169, 69 L.Ed. 472, affirming in part and reversing in part 59 Ct.Cl. 82.

§ 343. Limitations

a. In general
b. Computation of statutory period
c. Suspension of statute

a. In General

The statutory limitations barring recovery in the court of claims are jurisdictional and subject to waiver only by specific act of congress.

Act March 3, 1911, c. 231 § 156, Judicial Code § 156, 28 U.S.C.A. § 262, expressly provides that, with certain exceptions based on disability, every claim against the United States cognizable by the court of claims shall be forever barred unless a petition setting forth a statement thereof is filed in the court or transmitted to it by the secretary of the senate or the clerk of the house of representatives, as provided by law, within six years after the claim first accrues.[29] This provision is not only a statute of limitations but is jurisdictional in character[30] and the court of claims is without power to act on a claim which is barred under its provisions,[31] which cannot be ignored by the court[32] and which apply to special jurisdictional acts in the same way as to other grants of jurisdiction to the court of claims[33] unless some express words in the act negative their application.[34] However, they do not apply where, pursuant to the statute, a claim is referred to the court of claims by the house or senate for the purpose of obtaining information with relation thereto and the court is not considering it for the purpose of rendering judgment or of adjudicating the matter involved in any way.[35]

A rule of court cannot change the effect of a federal statute as to limitations by prescribing a rule as to the computation of time.[36]

Particular limitations as to particular classes of

29. U.S.—Western Pac. R. Co. v. U. S., 45 S.Ct. 503, 268 U.S. 271, 69 L.Ed. 951, reversing 59 Ct.Cl. 67—Clark v. U. S., 99 U.S. 493, 25 L.Ed. 481, 15 Ct.Cl. 617—Tserioni v. U. S., 94 Ct.Cl. 142, certiorari denied 62 S.Ct. 129, 314 U.S. 668, 86 L.Ed. 535—Brownstein-Louis Co. v. U. S., 90 Ct.Cl. 1, certiorari denied 60 S.Ct. 1074, 310 U.S. 632, 84 L.Ed. 1402—Johnson v. U. S., 87 Ct.Cl. 270—Union Iron Works v. U. S., 77 Ct.Cl. 467—Mangelsdorf v. U. S., 69 Ct.Cl. 600—Johnson v. U. S., 68 Ct. Cl. 222—Williams v. U. S., 63 Ct. Cl. 668, certiorari denied 48 S.Ct. 36, 275 U.S. 539, 72 L.Ed. 414—Anderson v. U. S., 57 Ct.Cl. 242—O'Neil v. U. S., 56 Ct.Cl. 89—Hartman v. U. S., 35 Ct.Cl. 106—Cotton v. U. S., 29 Ct.Cl. 207—State of Indiana v. U. S., 26 Ct.Cl. 583, affirmed, 13 S.Ct. 564, 148 U.S. 148, 37 L.Ed. 401—Alexandria, L. & H. R. Co. v. U. S., 26 Ct.Cl. 327—Bernard v. U. S., 26 Ct.Cl. 312—Berdan Fire-Arms Mfg. Co. v. U. S., 25 Ct. Cl. 355, affirmed 15 S.Ct. 420, 156 U.S. 552, 39 L.Ed. 530, 30 Ct.Cl. 491—Waddell v. U. S., 25 Ct.Cl. 323, 7 L.R.A. 861.
25 C.J. p 997 note 57.

Causes of action subsequently created are subject to the limitation.—Rice v. U. S., Ct.Cl., 7 S.Ct. 1377, 122 U.S. 611, 30 L.Ed. 793—Kinney v. U. S., C.C.Conn., 60 F. 883.

Claims accrued prior to statute
Under Act March 3, 1863, § 10, claims which had accrued six years before that date were barred in three years thereafter.—Carlin v. U. S., 6 Ct.Cl. 81.

Claims held not barred
U.S.—Central R. Co. of New Jersey v. U. S., 60 Ct.Cl. 578, appeal dismissed U. S. v. Central R. Co. of New Jersey, 46 S.Ct. 336, 270 U.S. 668, 70 L.Ed. 790.
25 C.J. p 997 note 57 [b].

Claims within statute
(1) A demand against the United States for services rendered under a contract is a "claim" within the meaning of the statute.—Carlisle v. U. S., 29 Ct.Cl. 414.
(2) The fact that action is begun under the provisions of the act of June 15, 1917, 40 U.S.St. at L. pp 182, 183, as modified by the Merchant Marine Act of June 5, 1920, U.S. 41 St. at L. pp 988, 989, does not prevent the application of the general statute of limitations applicable to all cases commenced in the court of claims.—Dawnic S. S. Corporation v. U. S., 90 Ct.Cl. 537.

30. U.S.—U. S. v. Wardwell, 19 S.Ct. 86, 172 U.S. 48, 43 L.Ed. 360, 34 Ct.Cl. 535, affirming Wardwell v. U. S., 32 Ct.Cl. 30—B. Altman & Co. v. U. S., Ct.Cl., 40 F.2d 781, certiorari denied 51 S.Ct. 36, 282 U.S. 863, 75 L.Ed. 763—Delaware Tribe of Indians v. U. S., 84 Ct.Cl. 535—Hendricks v. U. S., 81 Ct.Cl. 609—Jones v. U. S., 80 Ct.Cl. 386—Bond v. U. S., 68 Ct.Cl. 369—Maguire Petroleum Co. v. U. S., 68 Ct.Cl. 198—Williams v. U. S., 63 Ct.Cl. 668, certiorari denied 48 S.Ct. 36, 275 U.S. 539, 72 L.Ed. 414—Fehl v. U. S., 59 Ct.Cl. 682—Anderson v. U. S., 57 Ct.Cl. 242.

31. U.S.—Wadell v. U. S., 25 Ct.Cl. 323, 7 L.R.A. 861.

Reference for findings of fact
Where a claim against the government of a subject matter which the court of claims had jurisdiction to adjudicate was referred to the court by one of the houses of congress for findings of fact before the statute of limitations had run against it, and the claimant voluntarily came into the court but did not present the claim to the court by filing a petition until after the statute had run against it, the court is without jurisdiction to adjudicate the claim and render final judgment thereon under the provisions of 28 U.S.C.A. § 257, Jud.Code § 151.—Farmers Cotton Oil Co. to Use of Choctaw Cotton Oil Co. v. U. S., 84 Ct.Cl. 468.

Certification to congress only power of court
It is held, following the decision in the case of Farmers Cotton Oil Co. v. United States, 84 Ct.Cl. 468, 472, that the instant case is barred by the statute of limitations and the court is without jurisdiction to take any action except to certify to congress the facts in the case.—Wailes v. U. S., 91 Ct.Cl. 317.

32. U.S.—Delaware Tribe of Indians v. U. S., 84 Ct.Cl. 535—Farmers Cotton Oil Co. to Use of Choctaw Cotton Oil Co. v. U. S., 84 Ct.Cl. 468.
25 C.J. p 998 note 62.

It is the duty of the court to enforce the statute whether or not defendant raises the issue of limitations.—Delaware Tribe of Indians v. U. S., 84 Ct.Cl. 535.

33. U.S.—Delaware Tribe of Indians v. U. S., supra.

34. U.S.—Delaware Tribe of Indians v. U. S., supra.

35. **The Crawford Amendment,** Act March 4, 1915, c. 140, 28 U.S.C.A. § 251, does not prevent the consideration by the court of claims of cases coming under its advisory jurisdiction.—Wales Island Packing Co. v. U. S., 73 Ct.Cl. 615.

36. U.S.—Graf v. U. S., Ct.Cl., 24 F.Supp. 54.

cases. The general statute of limitations, Judicial Code § 156, 28 U.S.C.A. § 262, hereinbefore considered, is not necessarily inconsistent with a statute which fixes a different limitation for a particular class of cases and may yield to such a statute,[37] but a claim which does not fall within the meaning of the particular statute will be governed by the general statute.[38]

Waiver and revival. In the absence of authority conferred either expressly or by implication, no officer of the United States may waive the limitation imposed by statute against suits against the United States in the court of claims;[39] hence the general rule that a failure to plead the statute of limitations operates as a waiver does not apply.[40] While congress has power to provide that claims referred to the court of claims by the senate or by the house of representatives may be determined on their merits without reference to any previous bar by limitations,[41] the mere reference of a claim to the court of claims under the provisions of a general statute does not confer on that court the jurisdiction to hear and determine the claim, relieved from any bar arising from the limitations prescribed by either a general or special statute.[42] The United States may in effect waive the bar of limitations by a congressional or other acknowledgment of the debt, as by an appropriation to pay the same, provided the acknowledgment goes to the specific debt or claim, and not otherwise.[43] A statute removing disability to sue does not create a cause of action in the court of claims as to actions respecting which the bar of the statute has intervened.[44] A statute limiting the time for the consideration of claims will not be construed to revive claims already barred.[45] So a provision by a statute for a rule which shall be followed by the courts and auditing officials in determining the law as applicable to a certain class of cases does not remove the bar of limitations from such cases.[46]

Claim for tax refund

That last day of two-year period for filing petition in suit for refund of taxes fell on Sunday did not entitle plaintiff to file petition on following day, notwithstanding court rule under which time would have been extended.—Graf v. U. S., supra.

37. U.S.—Fort Pitt Gas Co. v. U. S., 49 Ct.Cl. 224.

Retroactive effect

(1) A particular statute prescribing a three-year period of limitation will not be applied to causes of action existing at the date of its enactment in the absence of explicit language or necessary implication requiring such a construction.—U. S. v. St. Louis, I. M. & S. R. Co., 46 S. Ct. 182, 270 U.S. 1, 70 L.Ed. 435, affirming St. Louis, S. F. & T. R. Co., 59 Ct.Cl. 975 and Wabash R. Co. v. U. S., 59 Ct.Cl. 322.

(2) Prior to the supreme court decision supra, there were some apparently contrary holdings with regard to the Transportation Act, 49 U.S.C.A. § 16 (3), in the court of claims.—Central R. Co. of New Jersey v. U. S., 60 Ct.Cl. 578, appeal dismissed U. S. v. Central R. Co. of New Jersey, 46 S.Ct. 336, 270 U.S. 668, 70 L.Ed. 790—Lancaster v. U. S., 60 Ct.Cl. 80—Schaff v. U. S., 59 Ct.Cl. 318.

(3) Prospective or retroactive operation of statutes of limitation generally see Limitations of Actions § 4, also 37 C.J. p 691 note 98—p 698 note 68.

38. **General statute held applicable**

(1) Six years' statute, and not two years' limitations, prescribed by Rev. St. § 3227 applies to suit for erroneously collected tax under Act July 27, 1912.—Fidelity & Deposit Co. of Maryland v. U. S., Ct.Cl., 42 S.Ct. 511, 259 U.S. 296, 66 L.Ed. 948—Sage v. U. S., Ct.Cl., 39 S.Ct. 415, 250 U.S. 33, 63 L.Ed. 828.

(2) Statute limiting time for interstate carrier's action to recover charges is inapplicable to suits against government.—Southern Pac. Co. v. U. S., 62 Ct.Cl. 391.

39. U.S.—Finn v. U. S., Ct.Cl., 8 S. Ct. 82, 123 U.S. 227, 31 L.Ed. 128—Delaware Tribe of Indians v. U. S., 84 Ct.Cl. 535—Baltimore & O. R. Co. v. U. S., 34 Ct.Cl. 484.

25 C.J. p 998 note 62.

40. U.S.—Finn v. U. S., Ct.Cl., 8 S. Ct. 82, 123 U.S. 227, 31 L.Ed. 128—Quinn v. U. S., 52 Ct.Cl. 496—Cotton v. U. S., 29 Ct.Cl. 207.

41. U.S.—Ford v. U. S., Ct.Cl., 6 S. Ct. 360, 116 U.S. 213, 29 L.Ed. 608—Fauber v. U. S., 37 F.Supp. 415—Board of Field Officers v. U. S., 22 Ct.Cl. 58.

Intent indicated

U.S.—Fauber v. U. S., 37 F.Supp. 415.

42. U.S.—Ford v. U. S., Ct.Cl., 6 S. Ct. 360, 116 U.S. 213, 29 L.Ed. 608—Dunbar v. U. S., 19 Ct.Cl. 489.

43. U.S.—Grant v. U. S., Ct.Cl., 41 F.2d 863—Latham v. U. S., 47 Ct. Cl. 533—Miller v. U. S., 34 Ct.Cl. 335—Valdez v. U. S., 16 Ct.Cl. 550—Cross v. U. S., 4 Ct.Cl. 271.

Payment from permanent fund

The rule that, where congress appropriates money for the payment of a designated claim or class of claims barred by the statute of limitations, the legislative intent is to give a new promise on the old consideration, cannot be extended to a case where the claim in suit is payable out of a permanent fund, provided by statute and not out of a fund provided by a subsequent appropriation act for the payment of a distinct class of claims.—Latham v. U. S., 47 Ct.Cl. 533.

Payment of admitted part of claim by the government does not constitute an acknowledgment of another part for which liability was denied so as to remove the bar of limitations as to the latter when prosecuted in the court of claims.—U. S. v. Wilder, 13 Wall. 254, 20 L.Ed. 681, 7 Ct.Cl. 286.

Statute applicable only to remedy

The statute of limitations applies only to the remedy and not to the rights of the parties so that a voluntary payment may be made even where the claim is barred.—Tserioni v. U. S., 94 Ct.Cl. 142, certiorari denied 62 S.Ct. 129, 314 U.S. 668, 86 L. Ed. 535.

44. U.S.—Anderson v. U. S., 57 Ct. Cl. 242.

Repeal of statute barring claims of disloyal persons

Where suit could have been brought at any time, under the acts conferring longevity pay, prior to the approval of the Act of March 2, 1867, Rev.St. § 3480, barring claims of disloyal persons, the Act of July 6, 1914, repealing Rev.St. § 3480, while it opens up for settlement such claims by the accounting officers, who are not bound by the statute of limitations, it cannot be considered as creating a cause of action in the court of claims, where the bar of the statute of limitations has intervened.—Anderson v. U. S., supra.

45. U.S.—Latham v. U. S., 47 Ct.Cl. 533.

46. U.S.—Grant v. U. S., Ct.Cl., 41 F.2d 863.

Laches. Inexcusable delay in prosecuting a case against the government which involves an interest allowance is a matter for serious consideration,[47] and, irrespective of limitations, delay amounting to laches may bar recovery on any suit in the court of claims.[48]

Consolidated claims. A barred claim is not removed from the operation of the statute by the fact that it is consolidated with claims which are not barred.[49]

Rights of interveners. Where suit is begun within the statutory period, one who becomes the owner of the claim pending suit may intervene after expiration of the statutory period.[50] So, where a suit is begun by one who cannot maintain an action thereon, it has been held that it will not be dismissed where the claims of those entitled are properly presented by intervening petitions filed either before or after the jurisdictional period.[51]

b. Computation of Statutory Period

Ordinarily the period of limitations runs from the time when suit could first be brought on the claim.

The claim accrues, within the meaning of Judicial Code § 156, 28 U.S.C.A. § 262, and other specific statutory limitations, at the time when an enforceable legal right arises so that a suit may be brought thereon,[52] and until that time the statute does not begin to run.[53] Ordinarily on a claim for services the limitations run from the time of the rendition of the services[54] or on the termination of the services.[55] On a breach of a contract by the government, ordinarily the statute runs from the time of the breach.[56] Under a contract for the performance of work, ordinarily the claim accrues and the statute begins to run when payment becomes due under the terms of the contract,[57] which may be on the completion and acceptance of the work[58] or at some time dependent on determina-

47. U.S.—Barlow v. U. S., 87 Ct.Cl. 287.

48. U.S.—Ryan v. U. S., 56 Ct.Cl. 103, affirmed 43 S.Ct. 34, 260 U.S. 90, 67 L.Ed. 147—O'Neil v. U. S., 56 Ct.Cl. 89.

Almost six years' delay

Delay of five years and more than eleven months by federal employee in filing suit for restoration to former position constitutes laches.—U. S. ex rel. Arant v. Lane, 39 S.Ct. 293, 249 U.S. 367, 372, 63 L.Ed. 650, affirming 47 App.D.C. 336—Hart v. U. S., 91 Ct.Cl. 308.

Unexplained delay of over three years from the time plaintiff was retired in filing petition for additional compensation constitutes laches.—Bennett v. U. S., 89 Ct.Cl. 322.

49. U.S.—Central Pacific R. Co. v. U. S., 24 Ct.Cl. 145, modified on other grounds 11 S.Ct. 285, 138 U. S. 84, 34 L.Ed. 895.

50. U.S.—Export Oil Corporation v. U. S., 64 Ct.Cl. 342.

51. U.S.—The Brig Hiram, 23 Ct.Cl. 431—The Betsey, 23 Ct.Cl. 277.

52. U.S.—Rice v. U. S., Ct.Cl., 7 S. Ct. 1377, 122 U.S. 611, 30 L.Ed. 793—Tserioni v. U. S., 94 Ct.Cl. 142, certiorari denied 62 S.Ct. 129, 314 U.S. 668, 86 L.Ed. 535—Delaware Tribe of Indians v. U. S., 84 Ct.Cl. 535—Cross v. U. S., 4 Ct.Cl. 271.

25 C.J. p 997 note 57 [a].

Particular claims considered

(1) Claim for compensation before shipping board.—Smith v. U. S., 67 Ct.Cl. 182.

(2) Claim for duties overpaid.—Tserioni v. U. S., 94 Ct.Cl. 142, certiorari denied 62 S.Ct. 129, 314 U.S. 668, 86 L.Ed. 535.

(3) Claim for extra work on government contract.—Myerle v. U. S., 31 Ct.Cl. 105.

(4) Claims for fees or disbursements by marshal.—U. S. v. Walker, Ala., 148 F. 1022, 79 C.C.A. 392, affirming, C.C., 139 F. 409.

(5) Claim for general average under maritime law.—U. S. v. Atlantic Mut. Ins. Co., Ct.Cl., 56 S.Ct. 889, 298 U.S. 483, 80 L.Ed. 1296.

(6) Claim for goods furnished the United States.—Battelle & Evans v. U. S., 7 Ct.Cl. 297.

(7) Claim for money granted by statute.—Mumford v. U. S., 31 Ct.Cl. 210.

(8) Claim for rent under lease, with option of renewal.—Brownstein-Louis Co. v. U. S., 90 Ct.Cl. 1, certiorari denied 60 S.Ct. 1074, 310 U.S. 632, 84 L.Ed. 1402.

(9) Claim for retained percentages and extra work.—Pink v. U. S., 85 Ct.Cl. 121, certiorari denied 58 S.Ct. 641, 303 U.S. 642, 82 L.Ed. 1102.

(10) Claim for trust fund.—Ray v. U. S., D.C.Ind., 50 F. 166—Tserioni v. U. S., 94 Ct.Cl. 142, certiorari denied 62 S.Ct. 129, 314 U.S. 668, 86 L.Ed. 535—Miller v. U. S., 34 Ct.Cl. 335—Wayne v. U. S., 26 Ct.Cl. 274.

(11) Claim for unlawful seizure and sale of goods.—Pacifico v. U. S., 80 Ct.Cl. 391.

(12) Claim rejected by department.—U. S. v. Connor, Ct.Cl., 11 S. Ct. 229, 138 U.S. 61, 34 L.Ed. 860.

(13) Expenses prior to rescission of government contract for which another is substituted.—Chandler v. U. S., 17 Ct.Cl. 1.

(14) Refund allowed to purchaser of surplus property.—Silverman v. U. S., 69 Ct.Cl. 588.

53. U.S.—Austin Engineering Co. v. U. S., 88 Ct.Cl. 559.

Open running account

There was a mutual open running account between the parties, where the United States elected so to treat an account by withholding the earnings of claimant's road with the intent of applying them to claimant's indebtedness, whereby claimant was lulled into nonaction and the running of the statute of limitations suspended.—Louisville & N. R. Co. v. U. S., 47 Ct.Cl. 129.

54. U.S.—Southern Pac. Co. v. U. S., 67 Ct.Cl. 414, certiorari denied 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 620—Titus v. U. S., 16 Ct.Cl. 276.

65 C.J. p 1284 note 17.

Date of service rather than date of request

Statute of limitations runs from time carriers complete passenger service and not from date of request therefor.—Cleveland, C., C. & St. L. Ry. Co. v. U. S., 64 Ct.Cl. 534.

55. U.S.—Mullett v. U. S., 25 Ct.Cl. 409, affirmed 14 S.Ct. 190, 150 U.S. 566, 37 L.Ed. 1184, 29 Ct.Cl. 558.

56. U.S.—People's Oil & Fertilizer Co. v. U. S., 60 Ct.Cl. 765.

Notice of termination

The time allowed for bringing a suit in the court of claims on a government contract begins to run when the government gave a notice to the contractor terminating the contract.—Shimmins v. U. S., 10 Ct.Cl. 465.

57. U.S.—Austin Engineering Co. v. U. S., 88 Ct.Cl. 559.

58. U.S.—Jonlin v. U. S., 89 Ct.Cl. 345—Pink v. U. S., 85 Ct.Cl. 121, certiorari denied 58 S.Ct. 641, 303 U.S. 642, 82 L.Ed. 1102.

tions, decisions, or actions thereafter.[59] Where damages occur during the performance of the contract, the full claim does not accrue until the completion of the contract, if it is completed.[60] Where a right is created by statute conditioned on presentation of a claim within a specified time, until that time no statute of limitation can begin to run.[61] Where the governing statute sets no definite period within which a governmental board shall act on claims, and where the board delays in acting on a claim, claimant may invoke the jurisdiction of the court of claims following final judgment of the board at any time within the period of limitations,[62] but this rule does not apply where the delay of the board in action is entirely due to the conduct of the claimant.[63]

c. Suspension of Statute

The running of the statute may be suspended pending disabilities prescribed therein or pending decision of an executive officer or department where such decision is a condition precedent to the existence of a right of action.

Judicial Code § 156, 28 U.S.C.A. § 262, expressly provides that claims of married women first accrued during their marriage, and of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, and persons beyond the high seas at the time of the claim shall not be barred if the petition is filed in the court or transmitted within three years after the disability has ceased,[64] but provides that no other disability shall prevent any claim from being barred.[65]

Since, as has been noted supra subdivision b of this section, the statute of limitations begins to run from the date when suit may first be brought on a claim, the running of the statute is not suspended by the time in which it is held in a government department or office for auditing or allowance where it is not necessary for the claimant to present the claim to an executive department or officer before suing;[66] but where the right of action is dependent on the decision of a department or duly authorized officer of the government the statute does not run until such decision[67] although it is not suspended thereafter pending settlement or audit by the accounting department of the government.[68] Further, the fact that a claim must be presented to a

After alleged breach

Where alleged breach of contract occurred more than six years prior to the time when the suit was commenced, but less than six years elapsed between the time when the contract was completed and the suit begun, it is held that the suit was timely.—Joplin v. U. S., 89 Ct.Cl. 345.

59. U.S.—Austin Engineering Co. v. U. S., 88 Ct.Cl. 559.

60. U.S.—Joplin v. U. S., 89 Ct.Cl. 345—Myerle v. U. S., 31 Ct.Cl. 105.

No "piecemeal" accrual

A cause of action or a claim under a contract does not accrue piecemeal, and where a contract contains a provision with reference to the time when the contract shall be regarded as finally concluded, the statute of limitation with reference to bringing suit does not begin to run until that date.—Austin Engineering Co. v. U. S., 88 Ct.Cl. 559.

61. U.S.—Sage v. U. S., Ct.Cl., 39 S. Ct. 415, 250 U.S. 33, 63 L.Ed. 828.

62. U.S.—Smith v. U. S., 67 Ct.Cl. 182.

63. U.S.—Dawnic S. S. Corporation v. U. S., 90 Ct.Cl. 537.

Withdrawal of claim

Where claim presented to the United States Shipping Board within the statutory period was withdrawn and no further action was taken until more than six years after the claim was withdrawn and more than twelve years after the claim originated, at which time a petition was filed with the board requesting it to resume consideration of the claim under controversy, the statute of limitations was held to apply.—Dawnic S. S. Corporation v. U. S., supra.

64. **Insanity**

The limitations of Jud.Code § 156, 28 U.S.C.A. § 262, run against all claims of an insane claimant accruing prior to his insanity, but not against those accruing subsequently, as the express terms of the statute render insanity an exception.—Leonard v. U. S., 18 Ct.Cl. 382.

Repeal by Tucker Act

Passage of the Tucker Act in 1887, which provided a six-year period of limitations for claims against the government without enumerating any disabilities tolling the statute, did not repeal by implication Act of March 3, 1863, c 92 § 10, 12 U.S.St. at L. p 767, now Jud.Code § 156, 28 U. S.C.A. § 262.—U. S. v. Greathouse, D.C., 17 S.Ct. 701, 166 U.S. 601, 41 L.Ed. 1130.

65. U.S.—Kendall v. U. S., Ct.Cl., 2 S.Ct. 277, 107 U.S. 123, 27 L.Ed. 437.

Alien

The compulsory absence of an alien denied admission to the country does not toll the statute.—Pacifico v. U. S., 80 Ct.Cl. 391.

Disability arising from service with Confederacy

Where a claim accrued while plaintiff was in the military service of the Confederacy and therefore unable to take the oath of loyalty to the United States prerequisite to maintenance of an action in the court of claims, the limitations nevertheless began to run from the date of accrual and his claim was barred where he brought suit more than six years from such date even though within six years from the general amnesty extended to former rebels. Plaintiff's disability to sue was not one of those enumerated in the statute and therefore afforded no ground for tolling limitations.—Kendall v. U. S., Ct.Cl., 2 S.Ct. 277, 107 U.S. 123, 27 L.Ed. 437.

66. U.S.—U. S. v. Utz, N.J., 80 F. 848, 26 C.C.A. 184, reversing 75 F. 648—Pink v. U. S., 85 Ct.Cl. 121, certiorari denied 58 S.Ct. 641, 303 U. S. 642, 82 L.Ed. 1102—Hendricks v. U. S., 81 Ct.Cl. 609—Cohen, Goldman & Co. v. U. S., 77 Ct.Cl. 713—Southern Pac. Co. v. U. S., 67 Ct. Cl. 414, certiorari denied 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 620—Curtis v. U. S., 34 Ct.Cl. 1—Carlisle v. U. S., 29 Ct.Cl. 414—Lisle v. U. S., 23 Ct.Cl. 270—Shimmins v. U. S., 10 Ct.Cl. 465.

67. U.S.—Maneely v. U. S., 68 Ct. Cl. 623—Utah Power & Light Co. v. U. S., 67 Ct.Cl. 602—Scott v. U. S., 18 Ct.Cl. 1.

Claim under Dent Act accrued on the date of an award by the secretary of war, and not on the date of demand for payment and refusal, as under such act neither a formal acceptance of the award by plaintiff nor his demand on the secretary for payment was a condition precedent to the right to bring suit for the award.—Nitro Chemical Corporation v. U. S., 71 Ct.Cl. 458.

68. U.S.—Cunningham v. U. S., 83

board or department for consideration and determination does not authorize the claimant to postpone the presentation of the claim until such a time as it shall see fit to proceed.[69] The rule that the running of the statute is not suspended pending the period during which a claim is being considered and passed on by government officials does not, however, apply to a claim referred to the court of claims for determination by the head of an executive department under statutory authority if the claim was presented for settlement at the proper department within the statutory period after it accrued.[70]

Congressional reference. The reference of a claim against the government to the court of claims by either of the branches of congress for findings of fact does not stop the running of the statute of limitations.[71]

The Soldiers and Sailors Civil Relief Act of 1918 suspended the running of limitations against claims of men in military service against the government until formal termination of the First World War by presidential proclamation.[72]

§ 344. Defenses

The government may urge such matters as constitute a legal bar or an estoppel against the enforcement of the claim. The mere lack or lapse of an appropriation is not a defense.

A private act which confers "jurisdiction and authority" on the court of claims "to adjudicate, on terms of equity and justice," is not equivalent to a grant of authority to adjudicate the case on its merits, irrespective of any legal bar or estoppel. Therefore the government may still insist on a defense, which has been held in similar cases to bar the claim, irrespective of the merits.[73]

Lapse of an appropriation for payment of a claim affords no defense to suit for its recovery in the court of claims,[74] but a claim based solely on a judgment against the United States without either statutory appropriation or implied contract to sustain it is not within the jurisdiction of the court.[75]

§ 345. Parties

General rules as to parties and as to the right to intervene are applicable in proceedings before the court of claims.

The question of who are proper or necessary parties to an action in the court of claims is governed largely by the character of the claim and the statutes concerning jurisdiction.[76] Where a number of claimants allege an undivided interest in a common fund, they may unite in one petition,[77] the court may bring in parties not before the court who are alleged to have an interest in the cause of action brought before it,[78] and where ownership of a fund within its jurisdiction is in question the court has power to bring in all interested parties.[79] Where no one of several claimants has any right, title, or interest in the causes of action of the others, there is a misjoinder of parties,[80] although if the cases are of a class, arising out of the same transaction, the several cases may be heard together.[81] Under a statute permitting suit on a claim to be brought by the legal representative of a decedent, the heir may not sue while there is an administrator de bonis non acting for the estate.[82]

A petition brought against governmental bureaus

Ct.Cl. 696, certiorari denied 57 S.Ct. 789, 301 U.S. 686, 81 L.Ed. 1344—Electric Boat Co. v. U. S., 81 Ct.Cl. 361, certiorari denied 56 S.Ct. 573, 297 U.S. 710, 80 L.Ed. 997—Nitro Chemical Corporation v. U. S., 71 Ct.Cl. 453—C. L. Maguire Petroleum Co. v. U. S., 68 Ct.Cl. 198—Utah Power & Light Co. v. U. S., 67 Ct.Cl. 602.

69. U.S.—Dawnic S. S. Corporation v. U. S., 90 Ct.Cl. 537.

70. U.S.—U. S. v. State of New York, Ct.Cl., 16 S.Ct. 402, 160 U.S. 598, 40 L.Ed. 551—U. S. v. Lippitt, Ct.Cl., 100 U.S. 663, 25 L.Ed. 747.

71. U.S.—Wailes v. U. S., 91 Ct.Cl. 317—Farmers Cotton Oil Co. to Use of Choctaw Cotton Oil Co. v. U. S., 84 Ct.Cl. 468.

72. U.S.—Bohannon v. U. S., 83 Ct. Cl. 423.

73. U.S.—Haskell v. U. S., 9 Ct.Cl. 410.

74. U.S.—Whitlock Coil Pipe Co. v. U.S., 71 Ct.Cl. 759.

75. U.S.—Helfield v. U. S., 78 Ct.Cl. 419.

76. U.S.—New River Collieries Co. v. U. S., 65 Ct.Cl. 205, certiorari denied 49 S.Ct. 18, 278 U.S. 613, 73 L.Ed. 537, motion denied 49 S.Ct. 18, 73 L.Ed. 1011—Davenport v. U.S., 31 Ct.Cl. 430—Brown v. District of Columbia, 17 Ct.Cl. 303—Burdette v. U. S., 15 Ct.Cl. 465.
25 C.J. p 998 note 64.

Prime contractor and subcontractors
While the courts endeavor to lay down rules to avoid a multiplicity of suits, in this act congress has granted the right to sue which continues to the subcontractors of the prime contractor, and whether it incurs numerous suits or great expense, the courts must bow to the wisdom of congress in enacting legislation; but the payment by the prime contractor to the subcontractor is not an assignment of the claim under the National Industrial Recovery Act, 48 U.S.St. at L. p 195, and, having paid the subcontractor, the prime contractor becomes the proper party plaintiff.—McShain v. U. S., 87 Ct.Cl. 581.

77. U.S.—Jones v. U. S., 42 Ct.Cl. 178.

78. U.S.—Globe Works v. U. S., 45 Ct.Cl. 497.
25 C.J. p 998 note 66.

79. U.S.—Brewer & Jones v. U. S., 56 Ct.Cl. 81.

80. U.S.—Jones v. U. S., 42 Ct.Cl. 178.

Striking names
Names of parties plaintiff having no interest in subject matter may be stricken.—Havens v. U. S., 60 Ct.Cl. 30.

81. U.S.—Jones v. U. S., 42 Ct.Cl. 178.

82. U.S.—Lockwood v. U. S., 56 Ct. Cl. 243.

or departments may be sustained as one in effect making the United States the party defendant.[83]

Aliens may prosecute claims against the United States in the court of claims.[84]

Change by amendment. An amendment radically changing the party plaintiff by substituting another person is not allowable,[85] and where, in a claim for Indian depredations, it appears that two separate depredations were committed by two distinct tribes, it is not allowable to make a change of parties by amending the petition so as to make both tribes joint defendants.[86]

Revival in name of administrator. A claim presented to the court by petition within the jurisdictional period by the attorney in ignorance of the death of the party is not a cause pending, and cannot be used as a basis for reviving the case in the name of the administrator after the expiration of the jurisdictional period.[87]

Intervention as party plaintiff. Where during pendency of a suit the ownership passes by operation of law to another than the original plaintiff, the new owner may properly intervene as party plaintiff.[88]

Intervention as party defendant. Under the statute limiting jurisdiction of the court of claims to suits against the United States, no person may be allowed to intervene as a party defendant.[89]

§ 346. Process and Appearance

In a suit against the United States, a copy of the process should be served on the attorney general, and where a claim is referred by congress claimant should appear or be cited to confer jurisdiction.

In suits against the United States, a copy of the petition is required to be served upon the attorney general.[90] Where a claim is referred by congress, the claimant must appear or be cited in order to confer jurisdiction.[91] Where an act of congress authorizes suit against an Indian nation and fails to prescribe the method of service of process, it is doubtful whether the court of claims can direct the necessary or proper service to bring defendants before the court.[92]

83. U.S.—O'Leary v. U. S., 77 Ct. Cl. 635.

84. U.S.—Hartmann v. U. S., 86 Ct. Cl. 579.
25 C.J. p 998 note 69.

Suit in representative rather than individual capacity

(1) Nothing in the statutes limits suits by aliens to suits by individuals in their individual capacity, and a duly authorized alien executor of the estate of a deceased alien may sue in the same way as a citizen executor.—Hartmann v. U. S., supra.

(2) Since any citizen may prosecute a suit in the court of claims, in his representative capacity, without obtaining ancillary letters of administration, the same right must be accorded to a citizen of Switzerland, under the treaty between the United States of America and the Swiss Confederation of November 25, 1850, 11 U.S.St. at L. p 587.—Hartmann v. U. S., supra.

Russian corporation

A Russian corporation could maintain suit in court of claims for compensation for requisition by government of the United States of contracts for constructing ships, irrespective of question of recognition of present Russian government or right of American citizens to prosecute claims against Russian government.—Russian Volunteer Fleet v. U. S., 51 S.Ct. 229, 282 U.S. 481, 75 L.Ed. 473, reversing 68 Ct.Cl. 32, certiorari granted 50 S.Ct. 346, 281 U.S. 711, 74 L.Ed. 1133.

Reciprocity

(1) A citizen of a foreign country which gives American citizens the same right of suit against it as its own citizens have, may maintain the same kind of action in the court of claims as is permitted to an American citizen, notwithstanding neither the American citizen nor the alien may maintain that sort of suit against the foreign government.—Pollen v. U. S., 85 Ct.Cl. 673—Brodie v. U. S., 62 Ct.Cl. 29.

(2) Under the laws of the Kingdom of Italy a citizen of the United States is permitted to maintain a suit on a claim against that nation, and a citizen of Italy has therefore the reciprocal right to maintain a suit in the court of claims on a claim against the United States.—Sanguineti v. U. S., 83 Ct.Cl. 1.

85. U.S.—Askins v. U. S., 50 Ct.Cl. 361.

86. U.S.—Coffield v. U. S., 52 Ct.Cl. 17.

87. U.S.—Gallegos v. U. S., 39 Ct.Cl. 86.

88. U.S.—Export Oil Corporation v. U. S., 64 Ct.Cl. 342.

Receivers of original plaintiff having claim against government could not sue United States on such claim, ownership having passed by operation of law to another.—Export Oil Corporation v. U. S., supra.

When surety denied right to intervene

Under the statute, Jud.Code § 172, 28 U.S.C.A. § 279, a charge of fraud on the part of plaintiff in the proof or establishment of his claim in a suit against the government goes to the whole of the claim, and plaintiff's sureties for his performance of the contract involved in the claim are not entitled to intervene. The court's finding that the acts of plaintiff brought about a forfeiture of the entire claim leaves in the case no subject matter with respect to which the surety might intervene.—Blume v. U. S., 81 Ct.Cl. 210, certiorari denied 56 S.Ct. 667, 297 U.S. 722, 80 L.Ed. 1006, rehearing denied 56 S.Ct. 746, 298 U.S. 691, 80 L.Ed. 1409.

89. U.S.—Waite v. U. S., 57 Ct.Cl. 546.

Patent infringement suit

A suit for infringement by the government of a patent must be brought against the United States, and a contractor who agrees to save the United States harmless from suits for infringement will not be allowed to intervene as a party defendant in a suit brought in the court of claims by the owner of a patent against the United States for infringement.—Waite v. U. S., supra.

90. U.S.—Turner v. U. S., 51 Ct.Cl. 125, 144.
25 C.J. p 998 note 73.

91. U.S.—Burdette v. U. S., 15 Ct.Cl. 465—Bright v. U. S., 6 Ct.Cl. 118.

92. U.S.—Turner v. U. S., 51 Ct.Cl. 125.

Indians as in court through service of process on attorney general

U.S.—Jaeger v. U. S., 27 Ct.Cl. 278.

§ 347. Pleading

a. In general
b. Petition
c. Demurrer or plea
d. Counterclaims and cross bills
e. Bills of particulars
f. Amendments
g. Issues, proof, and variance

a. In General

While the court of claims will enforce the rules essential to the due administration of justice, it is not bound by special rules of pleading nor are its own rules as strict as those of some other courts. The general principles governing construction of pleadings apply.

The court of claims is not bound by special rules of pleading,[93] and its own rules are not so strict as those in some jurisdictions,[94] but it will nevertheless enforce those rules deemed necessary by all courts for the orderly administration of justice and to secure to defendants the benefit of the principle of res judicata.[95]

Construction of pleadings. The usual rules with respect to the construction of pleadings discussed in Pleading §§ 53–58, also 49 C.J. p 105 note 11–p 122 note 52, are applied in the court of claims.[96]

b. Petition

The petition must set forth a cause of action and one within the jurisdiction of the court of claims, stating the claim fully, but a plain statement of facts is sufficient. Verification is usually requisite. Allegations of fraud or coercion should be specific.

Claimant's petition must state a cause of action[97] within the jurisdiction of the court.[98] The petition must set forth the full particulars of the

93. U.S.—Bull v. U. S., Ct.Cl., 55 S.Ct. 695, 295 U.S. 247, 79 L.Ed. 1421, reversing 6 F.Supp. 141, and certiorari granted 55 S.Ct. 544, 294 U.S. 704, 79 L.Ed. 1239—Hammond v. U. S., 42 F.Supp. 284—Pratt v. U. S., 87 Ct.Cl. 586.
25 C.J. p 998 note 76.

Time for pleading in Indian depredation cases
U.S.—Labadie v. U. S., 31 Ct.Cl. 436—Giddings v. U. S., 29 Ct.Cl. 12.
65 C.J. p 1383 note 42 [c].

94. U.S.—Wisconsin Cent. R. Co. v. U. S., Ct.Cl., 17 S.Ct. 45, 164 U.S. 190, 41 L.Ed. 399—Murray v. U. S., 46 Ct.Cl. 94—Molina v. U. S., 6 Ct.Cl. 269.
25 C.J. p 998 note 77.

Liberal forms
"The forms of pleading in the Court of Claims are not strict, but liberal."—Chicago, M. & St. P. Ry. Co. v. U. S., 63 Ct.Cl. 485, 490, certiorari denied 48 S.Ct. 303, 276 U.S. 622, 72 L.Ed. 736.

Failure to plead the facts precisely will not preclude claimant from receiving what is justly due him in the court of claims since the forms of pleading in such court are not of so strict a character as to have that effect.—American Sanitary Rag Co. v. U. S., 84 Ct.Cl. 417.

Award of recovery despite faulty pleading
(1) The forms of pleading are such that judgment may properly be awarded in the amounts justly due the plaintiff on the facts, although due in a different aspect from that in which the demand is stated in the petition.—M. A. Long Co. v. U. S., 79 Ct.Cl. 656.

(2) The forms of pleadings are not of so strict a character as to prevent the allowance of a debt justly due defendant from plaintiff as against any sum found due from defendant to plaintiff even though there is no plea thereof.—Vulcanite Portland Cement Co. v. U. S., 74 Ct.Cl. 692.

(3) The rules of pleading exact the court's consideration of the facts in a case, as alleged in the petition or established by the evidence, irrespective of plaintiff's application of them with respect to a right of recovery.—Hampton v. U. S., 82 Ct.Cl. 162.

Recovery under statute not sued on
Plaintiff bringing action under one section of Judicial Code is not thereby prevented from recovery in same suit under another section.—Standard Dredging Co. v. U. S., 71 Ct.Cl. 218.

Right to simplified procedure
In the patent jurisdictional Act of 1910, as amended by the Act of July 1, 1918, 35 U.S.C.A. § 68, congress has prescribed the forms of pleadings and the rules of procedure to be observed in such suits, but has not specifically defined the form of pleadings and practice to be observed, and the court of claims is not to be denied the privilege of § 4920, in its amended form, 35 U.S.C.A. § 69.—Pratt v. U. S., 87 Ct.Cl. 586.

95. U.S.—Jones v. U. S., 42 Ct.Cl. 178.

96. U.S.—E. W. Bliss Co. v. U. S., Ct.Cl., 40 S.Ct. 455, 253 U.S. 187, 64 L.Ed. 852—Waite v. U. S., 69 Ct.Cl. 153, certiorari granted 51 S.Ct. 21, 283 U.S. 817, 75 L.Ed. 731.
25 C.J. p 999 note 80.

97. U.S.—Interocean Oil Co. v. U. S., 46 S.Ct. 219, 270 U.S. 65, 70 L.Ed. 473, affirming 59 Ct.Cl. 980.

Allegations held insufficient
(1) Generally.—Kunhardt & Co. v. U. S., 45 S.Ct. 158, 266 U.S. 537, 69 L.Ed. 428, affirming 58 Ct.Cl. 718—L. Richardson & Co. v. U. S., 45 S.Ct. 155, 266 U.S. 541, 69 L.Ed. 430, affirming 58 Ct.Cl. 717—Prisament v. U. S., 92 Ct.Cl. 434—Fehl v. U. S., 59 Ct.Cl. 682.

(2) To state cause of action in contract.—Interocean Oil Co. v. U. S., 46 S.Ct. 219, 270 U.S. 65, 70 L.Ed. 473, affirming 59 Ct.Cl. 980—Barry v. U. S., 83 Ct.Cl. 413—U. S. Bedding Co. v. U. S., 58 Ct.Cl. 341, affirmed 45 S.Ct. 182, 266 U.S. 491, 69 L.Ed. 399.

(3) To show ground of recovery on implied agreement to pay for property taken for public use.—Pearson v. U. S., 45 S.Ct. 240, 267 U.S. 423, 69 L.Ed. 694, affirming 58 Ct.Cl. 485.

(4) To show exhaustion of other remedies before suing.—Silas Mason Co. v. U. S., 90 Ct.Cl. 266.

(5) To state grounds for reformation of an award under the Dent Act.—Perkins-Campbell Co. v. U. S., 44 S.Ct. 237, 264 U.S. 213, 68 L.Ed. 643, affirming 57 Ct.Cl. 623.

98. U.S.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515.

Allegations held insufficient
(1) Generally.—O'Leary v. U. S., 77 Ct.Cl. 635—Baum v. U. S., 64 Ct.Cl. 323.

(2) Petition held to state cause of action in tort beyond jurisdiction of court of claims.—U. S. v. Nederlandsch-Amerikaansche Stoomvart Maatschappij, 41 S.Ct. 72, 254 U.S. 148, 65 L.Ed. 193, reversing Nederlansch-Amerikaansche Stoomvart Maatschappij v. U. S., 53 Ct.Cl. 522.

(3) Petition alleging that plaintiff had no information on which to base allegation as to government contracts involving use of his patents held in effect to seek right of discovery, which court of claims has no power to grant.—Blenkner v. U. S., 65 Ct.Cl. 18.

claim,[99] and of the action taken thereon by any of the departments,[1] and where the claim is such as is ordinarily settled in an executive department the petition must show that application was made to that department and its decision thereon.[2] The petition should contain a plain, concise statement of the facts,[3] but such a statement is all that is required,[4] and a petition which shows that claimant has a claim may be allowed whether or not it is artificially drawn.[5] Allegations to sustain the equitable jurisdiction of the court should not be too general and indefinite,[6] and compliance with a condition precedent should be alleged and proved.[7] Claims set forth in the petition should be consistent,[8] and distinct causes of action cannot be brought together by proceedings subsequent to the bringing of the original action without the consent of both parties.[9]

Showing of representative capacity. The rule requiring the representative character of a trustee plaintiff to be filed with the petition in the form of a duly authenticated copy of the record of his appointment does not mean that proof of the appointment is necessary as an integral part of the original petition, or that failure to make such proof at the time of filing the petition is fatal, but proof may be furnished subsequent to the filing of the petition.[10]

Recovery on implied contract. The forms of pleading in the court of claims do not preclude a claimant from recovering, as on an implied contract, what is justly due him on the facts stated in the petition and proved, although there is no count in the petition on the implied contract;[11] but where a petition is based on an alleged infringement of a patent, and no infringement has been shown, there can be no recovery as on an implied contract.[12]

Verification of the petition is usually required,[13] although it has been held that verification is not jurisdictional.[14]

Fraud and coercion. To show a cause of action for fraud and coercion it is necessary for the pleader to state distinctly the particular acts relied on, and general allegations of "fraud" and "coercion" are mere conclusions which are insufficient.[15]

(4) A recital of the operative facts relied on by a claimant does not state two separate and distinct causes of action merely because such facts may set up a liability in both tort and contract so as to adapt a single claim to two different suits in district court and court of claims, and latter court lacked jurisdiction where suit was pending in district court.—British American Tobacco Co. v. U. S., 89 Ct.Cl. 438, certiorari denied 60 S.Ct. 974, 310 U.S. 627, 84 L. Ed. 1398.

Allegations held sufficient

U.S.—John Horstmann Co. v. U. S., 42 S.Ct. 58, 257 U.S. 138, 66 L.Ed. 171, affirming 54 Ct.Cl 214 and Natron Soda Co. v. U. S., 54 Ct.Cl. 169 and 55 Ct.Cl. 66—O'Leary v. U. S., 77 Ct.Cl. 635—National Electric Signaling Co. v. U. S., 77 Ct.Cl. 87.

99. U.S.—Clyde v. U. S., 5 Ct.Cl. 134, reversed on other grounds 13 Wall. 35, 20 L.Ed. 479.

Where plaintiff's petition contains common counts, it must comply as to them with the provisions of Jud.Code § 159, relating to setting forth the particulars of the claim.—Corona Coal Co. v. U. S., 56 Ct.Cl. 390, appeal dismissed 44 S.Ct. 156, 263 U. S. 537, 68 L.Ed. 431.

1. U.S.—Clyde v. U. S., 5 Ct.Cl. 134, reversed on other grounds 13 Wall. 35, 20 L.Ed. 479.

2. U.S.—Clyde v. U. S., supra.

3. U.S.—Merritt v. U. S., 45 S.Ct. 278, 267 U.S. 338, 69 L.Ed. 643, affirming 58 Ct.Cl. 371—Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S.Ct. 135, 260 U.S. 327, 67 L.Ed. 287, reversing 56 Ct.Cl. 494.

General statement insufficient

Under rule 15, practice of court of claims, although liberal, does not allow general statement of claim in analogy to common counts, but requires plain, concise statement of facts relied on.—Merritt v. U. S., 45 S.Ct. 278, 267 U.S. 338, 69 L.Ed. 643, affirming 58 Ct.Cl. 371.

4. U.S.—Bull v. U. S., Ct.Cl., 55 S.Ct. 695, 295 U.S. 247, 79 L.Ed. 1421, reversing 6 F.Supp. 141, and certiorari granted 55 S.Ct. 544, 294 U.S. 704, 79 L.Ed. 1239.
25 C.J. p 999 note 84.

5. U.S.—New Jersey Foundry & Machine Co. v. U. S., 49 Ct.Cl. 235.
25 C.J. p 999 note 85.

Reference to exhibits not attached by plaintiff

Where a plaintiff does not attach to his petition, as required by the rules of the court, the government advertisement or available specifications essential to the acceptance of a proposal, reference to them in the petition entitles the court to have recourse to them if produced by defendant, or by call of the court for them on its own motion, and to make them a part of the petition.—Jones v. U. S., 80 Ct.Cl. 386.

6. U.S.—Schierling v. U. S., 23 Ct. Cl. 361.
N.Y.—Cunningham v. New York, 141 N.Y.S. 1000, modified on other grounds 162 App.Div. 851, 148 N. Y.S. 170.
25 C.J. p 999 note 86.

7. U.S.—Henry v. U. S., 38 Ct.Cl. 635 —Hoffeld v. U. S., 36 Ct.Cl. 230.
25 C.J. p 999 note 87.

8. U.S.—Hammond v. U. S., Ct.Cl., 42 F.Supp. 284.

Inconsistency not shown

U.S.—Hammond v. U. S., supra.

9. U.S.—Eager v. U. S., 33 Ct.Cl. 336.

10. U.S.—Crocker v. U. S., 48 Ct.Cl. 383.

11. U.S.—Wood v. U. S., 49 Ct.Cl. 119.

12. U.S.—Brothers v. U. S., 52 Ct. Cl. 462.

13. U.S.—Gray v. U. S., 23 Ct.Cl. 277—Woody v. U. S., 23 Ct.Cl. 160 —Eastern Band Cherokee Indians v. Cherokee Nation West, 19 Ct.Cl. 35.

14. U.S.—Eastern Band Cherokee Indians v. Cherokee Nation West, supra.

15. U.S.—Chamberlain Mach. Works v. U. S., 46 S.Ct. 225, 270 U.S. 347, 70 L.Ed. 619, affirming 59 Ct.Cl. 972 —Silas Mason Co. v. U. S., 90 Ct.Cl. 266—De Luca v. U. S., 69 Ct.Cl. 262, certiorari denied 51 S.Ct. 36, 283 U.S. 862, 75 L.Ed. 763.

Specification of participants

Acts constituting and persons participating in alleged fraud and coercion, vitiating claim settlement, should be specifically alleged.—Chamberlain Mach. Works v. U. S.,

c. Demurrer or Plea

The sufficiency of a petition to state a cause of action may be raised by demurrer, but an objection to the jurisdiction should be taken by plea.

The question of the sufficiency of the petition to show a right of recovery against the government may be raised by demurrer,[16] and on demurrer the case will be decided on the basis of the allegations irrespective of inferences which might be drawn from facts that might be proved.[17] Matters left in doubt by the allegations of the petition will not be decided on demurrer but decision of such matters will be made when the court of claims hears the evidence relative thereto.[18] An objection to the jurisdiction should be raised by plea,[19] but a plea by defendant that the cause of action declared on in a second suit against the government had accrued when the first suit was filed and might have been united in it is bad.[20] Limitations, as stated supra § 343 a, need not be pleaded.

d. Counterclaims and Cross Bills

Where all the facts and questions are before the court, recovery may be allowed the government as on a counterclaim without the filing of formal pleadings by it, although it is proper practice to file a counterclaim where it arises from transactions different from those on which plaintiff's claim is predicated. Forfeiture for fraud should be set up by pleading in the nature of a cross bill and not sought by mere motion.

The forms of pleading in the court of claims do not require that the right to recover on a counterclaim shall be restricted by the pleading. Omissions to plead counterclaims are not necessarily fatal to the rendition of such judgments as the facts demand.[21] While the filing of a counterclaim is proper practice for recoupment by the government against plaintiff's claim where the claims of the parties arose from different transactions,[22] nevertheless, where the government's claim against plaintiff is fully disclosed by the latter's petition, the court will take cognizance thereof without the filing of a counterclaim.[23]

Formal requisites of counterclaim. Where a counterclaim is filed it should state definitely the claim which the government makes against plaintiff.[24] If a report from the accounting office is pertinent, it should go into the file separately and not be attached to the counterclaim as a part thereof.[25] The counterclaim should be signed by the

46 S.Ct. 225, 270 U.S. 347, 70 L.Ed. 619, affirming 59 Ct.Cl. 972.

Allegations that conduct was "willful," on the part of a government contracting officer alleged to have fraudulently and coercively delayed performance by plaintiff, were insufficient to show fraud and coercion where it was nowhere specifically alleged that the action of such officer was the result of mistake or fraud so gross as to imply bad faith.—Silas Mason Co. v. U. S., 90 Ct.Cl. 266.

16. U.S.—Price v. U. S., 33 Ct.Cl. 106, affirmed 19 S.Ct. 765, 174 U.S. 373, 43 L.Ed. 1011.
25 C.J. p 999 note 94.

Dismissal
Where petition showed no contract breach of which might constitute cause of action, court sustained demurrer and dismissed petition.—Randall v. U. S., 71 Ct.Cl. 152.

17. U.S.—Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S.Ct. 135, 260 U.S. 327, 67 L.Ed. 287, reversing 56 Ct.Cl. 494.

Allegations must warrant finding for claimant
On demurrer to petition in court of claims setting up claim against the United States, the question is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require, or at least warrant, a finding for the claimant.—Portsmouth Harbor Land & Hotel Co. v. U. S., supra.

Averment of government authorization
Where petition alleges that acts of setting up heavy coast defense guns with intention of firing them over claimant's land, and without intent or ability to fire them except over his land, and establishing a fire control station and service on the land, and discharging the guns thereover, were the acts of the government, it cannot be declared on demurrer that they were the acts of unauthorized persons.—Portsmouth Harbor Land & Hotel Co. v. U. S., supra.

"Servitude" shown
Petition alleging that the government set up heavy coast defense guns with intention of firing them over claimant's land, and without intent or ability to fire them except over such land, and established on claimant's land a fire control station and service, and discharged all of such guns over the land, as it had done some years before, and that it had thereby taken the land, set forth sufficient specific facts to warrant a finding that a servitude had been imposed, and was not demurrable, the allegation that the United States had taken the land being a conclusion of fact rather than law.—Portsmouth Harbor Land & Hotel Co. v. U. S., supra.

18. U.S.—Portsmouth Harbor Land & Hotel Co. v. U. S., supra.

Purpose of government in using land for artillery practice
Whether the repetition through many years of the acts of firing coast defense guns across claimant's land and the establishment of a fire control thereon show an abiding purpose to fire the guns whenever the United States sees fit, or constitute only occasional torts, is for the court of claims to determine on evidence, and not on demurrer.—Portsmouth Harbor Land & Hotel Co. v. U. S., supra.

19. U.S.—Pennsylvania Co. v. U. S., 7 Ct.Cl. 401.
25 C.J. p 999 note 95.

20. U.S.—Shrewsbury v. U. S., 9 Ct. Cl. 263.

21. U.S.—Huske v. U. S., 46 Ct.Cl. 35.

Where all the facts and questions are before the court, a set-off or counterclaim may be allowed by way of recoupment without any formal pleading thereof against a plaintiff who establishes his right to recover on his claim against the government. —American Sanitary Rag Co. v. U. S., 84 Ct.Cl. 417.

22. U.S.—American Sanitary Rag Co. v. U. S., supra.

23. U.S.—American Sanitary Rag Co. v. U. S., supra.

24. U.S.—Hurley-Mason Co. v. U. S., 60 Ct.Cl. 764.

25. U.S.—Hurley-Mason Co. v. U. S., supra.

assistant attorney general or some one under his authority, and it cannot be recognized that an attorney's name be signed as of counsel for the government unless he is so designated or is authorized by the attorney general to appear in his behalf.[26]

Cross bill. The court cannot declare a forfeiture for fraud in connection with the prosecution of a claim on a mere motion, but defendants must file a plea in the nature of a cross bill, setting up the matters constituting the fraud.[27]

e. Bills of Particulars

The court of claims will grant a motion for a bill of particulars in a proper case where requisite in amplification of the pleadings of either party, but not for the purpose of securing admissions or of disclosing evidentiary matters. Plaintiff may not secure a bill of particulars from defendant concerning matters peculiarly within the knowledge of the former.

The function of a bill of particulars, as shown in the C.J.S. title Pleading § 376, also 49 C.J. p 622 note 17–p 624 note 32, is to amplify the pleadings where justice so requires, and the court of claims has sufficient flexibility of procedure to grant a motion for a bill of particulars if a particular set of circumstances arises in a case which requires amplification of the pleadings of either party in order to expedite justice;[28] but such a motion will be denied where its essential purpose is the securing of an admission rather than the amplification of pleadings.[29] It is not the office of a bill of particulars to require a party to disclose arguments or evidence, or to disclose the names of witnesses,[30] and where a party is entitled to information of this character he should seek it by an interrogatory or call for information rather than by motion for a bill of particulars.[31] Plaintiff may not secure from defendant a bill of particulars as to matters lying peculiarly within the knowledge of plaintiff.[32]

f. Amendments

Defects of form should be amended by the court if not the subject of demurrer, but other amendments are committed to its discretion. As a rule amendments designed to present the cause as the parties may be presumed to have understood it will be allowed, but amendments introducing new matters may be denied.

The court should amend defects and wants of form other than those which are demurred to,[33] but other amendments rest in the discretion of the court.[34] The general rule is that amendments designed to present a cause as the parties may be supposed to have understood it will be allowed,[35] but amendments to introduce new parties not in privity, to introduce a new cause of action, to enforce a penalty, or where the opposite party has been misled, or where an unfair advantage would result, will not be allowed.[36] An amended petition

26. U.S.—Hurley-Mason Co. v. U. S., supra.

27. U.S.—Globe Works v. U. S., 45 Ct.Cl. 497.

28. U.S.—Pratt v. U. S., 87 Ct.Cl. 586.

Duty of court

It is not only proper for, but it is the duty of, the court of claims to allow a motion for a bill of particulars when it will expedite and simplify the trial of the case.—Pratt v. U. S., supra.

29. U.S.—Martin v. U. S., 88 Ct.Cl. 249.

30. U.S.—Martin v. U. S., supra.

Details of time and place unnecessary

Where it is proper for defendant to indicate whether it will plead certain grounds specified in the motion for a bill of particulars, it has been held to be unnecessary to specify any detail as to time, place, or character of events relating to such contentions other than within certain limitations.—Pratt v. U. S., 87 Ct.Cl. 586.

Statement of ultimate facts sufficient

Where a more complete answer by defendant with respect to the validity of the patent in suit would save considerable time and effort, a motion for a bill of particulars will be granted; however, it is not necessary in response thereto for defendant to set forth any specific evidence but merely to state ultimate facts.—Pratt v. U. S., supra.

Complete and detailed history of claims not essential

Where, in order to answer certain paragraphs of the motion, it would be necessary for defendant to construe the invention as covered by the claims set forth therein and apply such construed claims to each and every structure of this character made or used by the government within the six-year period, and then to express an opinion on these matters, this is clearly beyond the scope of any pleading, and does not form any basis for a bill of particulars. Pratt v. U. S., supra.

31. U.S.—Pratt v. U. S., supra.

32. U.S.—Martin v. U. S., 88 Ct.Cl. 249.

Conception of invention and ownership of patent

U.S.—Martin v. U. S., supra.

Employment

Information as to employment of plaintiff at a particular time is within the knowledge of plaintiff, and not properly included in a motion for a bill of particulars.—Martin v. U. S., supra.

Definiteness required of plaintiff

(1) Time and expense would be saved if plaintiff would give notice to defendant, either in response to a motion for a bill of particulars, or in some other form binding on plaintiff, setting forth the dates of conception and reduction to practice it intends to rely on, and the application of the claims in issue as applied to the alleged infringing structures. —Martin v. U. S., supra.

(2) Before a defendant can be called on to furnish a bill of particulars, the essential facts relied on by plaintiff to establish his cause of action must be pleaded; in the instant case it is held that plaintiff is in error in seeking a bill of particulars asking the defendant to divulge the prior art relied on in order to facilitate disposition of the case, without setting forth in plaintiff's petition the dates of conception and reduction to practice.—Martin v. U. S., supra.

33. U.S.—Thomas v. U. S., 15 Ct.Cl. 335.

25 C.J. p 999 note 2.

34. U.S.—Thomas v. U. S., supra.

35. U.S.—Thomas v. U. S., supra.

25 C.J. p 1000 note 4.

36. U.S.—Jones v. U. S., 42 Ct.Cl. 178—Thomas v. U. S., 15 Ct.Cl. 335.

cannot be filed, where a claim has been referred by a committee of Congress and dismissed for want of jurisdiction,[37] nor can an amended petition be filed, without submission to and specific leave from the court, where a case is remanded to the general docket with merely a general leave to amend.[38] Where an amended petition is filed, the recitals of the original are considered abandoned, except so far as they are incorporated in the amended petition, which must be complete in itself.[39]

Necessity for amendment. A petition seeking to have a suspension by the secretary of the interior of a contract for the construction of a dam held fraudulent need not be amended to enable plaintiff contractor to question the propriety of charges against his account for work and materials used by defendants in completing the contract.[40]

g. Issues, Proof, and Variance

The proof in support of a claim should correspond with the allegations in all material respects. In the absence of a plea nul tiel corporation it is unnecessary to prove incorporation of a claimant corporation.

Claimant must plead and prove the essential elements of a cause of action within the jurisdiction of the court.[41] Proof of the incorporation of plaintiff corporation, in a suit for the proceeds of captured or abandoned property, is unnecessary in the absence of a plea of nul tiel corporation.[42]

The proof in support of a claim should so far correspond with the allegations of the petition as not to introduce demands of which defendant had no notice,[43] and there is a fatal variance where the allegation and proof as to a material fact differ substantially;[44] but if a variance is merely as to a matter of form not going to the merits, judgment may be rendered in accordance with the proved facts.[45]

§ 348. Evidence and Taking of Proof

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency
d. Affidavits and depositions
e. Examination of claimant
f. Calling on government departments for information

a. Presumptions and Burden of Proof

In accordance with the general rules governing presumptions and burden of proof, claimant has the burden of proving the facts necessary to establish his claim, and the court will indulge presumptions warranted by the facts and the law but decline to draw inferences which are unwarranted. The burden rests on the party seeking to show fraud or duress.

As a rule, the burden rests on claimant to establish every fact necessary to support his claim,[46] and to show that his claim is within the jurisdiction of the court,[47] but if the petition sets forth a good cause of action and defendants have records in their possession which will defeat the claim they should produce them,[48] and the burden of prov-

37. U.S.—Dunbar v. U. S., 19 Ct.Cl. 674.

38. U.S.—Shaw v. U. S., 9 Ct.Cl. 301.

39. U.S.—Jones v. U. S., 42 Ct.Cl. 178.

40. U.S.—S. R. H. Robinson & Son Contracting Co. v. U. S., 53 Ct.Cl. 536.

41. U.S.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515.

Proof of ownership
Under Jud. Code § 162, 28 U.S.C.A. § 268, giving the court of claims jurisdiction of claims for property taken under Act March 12, 1863, providing for the collection of abandoned property, a claimant cannot recover for cotton seized as abandoned property without proving ownership of the cotton.—Mangan v. U. S., 41 S.Ct. 157, 254 U.S. 494, 65 L.Ed. 370, affirming 54 Ct.Cl. 207.

Issues, proof, and variance in Indian depredation claims
U.S.—Thompson v. U. S., 44 Ct.Cl. 359—Gamel v. U. S., 31 Ct.Cl. 321. 65 C.J. p 1383 notes 42 [a], [b].

42. U.S.—Basch v. U. S., 52 Ct.Cl. 134.

43. U.S.—Chicago, M. & St. P. Ry. Co. v. U. S., 63 Ct.Cl. 485, certiorari denied 48 S.Ct. 303, 276 U.S. 622, 72 L.Ed. 736.

44. U.S.—Salois v. U. S., 32 Ct.Cl. 68.

45. U.S.—Molina v. U. S., 6 Ct.Cl. 269.

46. U.S.—Creek Nation v. U. S., 77 Ct.Cl. 226—American Dredging Co. v. U. S., 68 Ct.Cl. 565—Chesapeake & Potomac Telephone Co. v. U. S., 68 Ct.Cl. 273, certiorari granted 50 S.Ct. 81, 280 U.S. 548, 74 L.Ed. 607, affirmed 50 S.Ct. 343, 281 U.S. 385, 74 L.Ed. 921—Illinois Cent. R. Co. v. U. S., 58 Ct.Cl. 182—J. J. Preis & Co. v. U. S., 58 Ct.Cl. 81. 25 C.J. p 1000 note 17.

Burden of proof in Indian depredation cases
U.S.—Hernandez v. U. S., 34 Ct.Cl. 455—King v. U. S., 31 Ct.Cl. 304—65 C.J. p 1383 note 44.

Officer's burden to sustain claim for reimbursement
Officer sustaining loss of funds and seeking reimbursement has burden of proof, in case brought under Rev.St. § 1062, to show that such loss occurred without his negligence or other fault.—O'Neal v. U. S., 60 Ct.Cl. 413.

47. U.S.—Klamath and Moadoc Tribes v. U. S., 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202, affirming 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679.

Absence of release
In suit by Indians on claim against United States under statute which did not permit adjudication of released claims, burden was on Indians in court of claims court to prove absence of valid release of claim and in supreme court to show that, as matter of law, facts found compelled conclusion that release given was not valid, since absence of a valid release was essential to jurisdiction.—Klamath and Moadoc Tribes v. U. S., supra.

48. U.S.—Smith v. U. S., 36 Ct.Cl. 304.

ing fraud and duress rests on the party alleging it.[49]

Under the general rules regulating presumptions discussed in Evidence §§ 114–157, the court of claims may indulge presumptions warranted by the facts,[50] or refuse to draw inferences which the facts do not support.[51] If the secretary of the interior has found facts from which the court may infer its own jurisdiction, the burden of proof is on defendants to show want of jurisdiction.[52] In proceedings under the disbursing officers' act before the court of claims by a disbursing officer to secure relief from liability for funds embezzled by his clerk, there exists a presumption of liability, and the burden of proof rests on the officer.[53] Where the decree of a prize court is silent as to the appearance of the master or owners, and there is neither protest nor proof to show that they were denied a hearing, the presumption is that they were given an opportunity to defend.[54] It must be presumed that a roll of Cherokee freedmen made under a decree of the court of claims was made in compliance with the decree because it was accepted by all parties and distribution was made under it without objection by any person.[55]

As to citizenship. Where citizenship of claimant goes to the jurisdiction, is preliminary, and is questioned, the burden of proof is on claimant.[56]

Counterclaim. The government has the burden of establishing by proper and sufficient evidence its right of recovery on a counterclaim.[57]

b. Admissibility

While the general rules ordinarily govern admissibility of evidence in cases coming before the court of claims, special provision may and has been made in certain cases as to evidence, witnesses, and taking of proof, and where applicable such special provisions control.

Where congress has not provided, and no special reason demands, a different rule, the rules of evidence as found in the common law govern the action of the court of claims.[58] Under the statutes, however, special provisions have been made in certain cases as to evidence, witnesses, and taking proof,[59] and the provisions of an act of congress prevail over local rules in the state where the cause of action arose.[60] So, also, under the terms of a reference by congress, letters and papers presented before congress, although not admissible under the ordinary rules of evidence, may be considered.[61] The evidence, of course, must be competent and

49. U.S.—Klamath and Moadoc Tribes v. U. S., 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679, affirmed 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202—Globe Works v. U. S., 45 Ct.Cl. 497.

50. U.S.—Atchison, T. & S. F. Ry. Co. v. U. S., 81 Ct.Cl. 346.

Freight rates

Where a government shipping officer orders railway cars of certain size for transportation of government property in mixed carloads, it is to be assumed that he considered cars of the size ordered to be necessary, and the freight rates chargeable for the transportation are those applicable to cars of the size ordered and used for the shipments.—Atchison, T. & S. F. Ry. Co. v. U. S., supra.

Validity of release and regularity of proceedings

Where release of Indians' claims against United States was given and accepted as sufficient to comply with statute providing that appropriation by United States for Indians should not be effective until Indians should execute release of their claims against United States, it would be presumed in suit by Indians on claim against United States that all things necessary to make appropriation effective and release valid were done regularly and in accordance with expressed will of congress.—Klamath and Moadoc Tribes v. U. S., 56 S.Ct. 212, 296 U.S. 244, 80 L.Ed. 202, affirming 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679.

51. U.S.—Edward E. Gillen Co. v. U. S., 88 Ct.Cl. 347.

Duress

In suit by Indians on claim against United States in which Indians contended that release executed by them was invalid because obtained by duress, duress would not be presumed and would not be inferred from incomplete, doubtful, or ambiguous findings.—Klamath and Moadoc Tribes v. U. S., 56 S.Ct. 212, 80 L.Ed. 202, 296 U.S. 244, affirming 81 Ct.Cl. 79, certiorari granted 55 S.Ct. 920, 295 U.S. 729, 79 L.Ed. 1679.

52. U.S.—Montoya v. U. S., 32 Ct.Cl. 71.

53. U.S.—Boggs v. U. S., 44 Ct.Cl. 367.

54. U.S.—The Snow Thetis, 37 Ct.Cl. 470.

55. U.S.—Whitmire v. U. S., 44 Ct. Cl. 453.

56. U.S.—Hernandez v. U. S., 34 Ct. Cl. 455.

57. U.S.—Heid Bros. v. U. S., 65 Ct. Cl. 87.

Consideration of matters occurring after filing of petition

The discharge of coast defense guns across claimant's land, although occurring after petition was filed in the court of claims, may be considered as bearing on the intent of the government in establishing a fire control station on claimant's land before the filing of the petition.—Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S.Ct. 135, 260 U.S. 327, 67 L.Ed. 287, reversing 56 Ct.Cl. 494.

58. U.S.—Moore v. U. S., Ct.Cl., 91 U.S. 270, 23 L.Ed. 346.

25 C.J. p 1000 note 21.

59. U.S.—The Ship Parkman, 35 Ct. Cl. 406—In re Calls for Evidence, 33 Ct.Cl. 354—Woolverton v. U. S., 26 Ct.Cl. 215—Atchison, T. & S. F. R. Co. v. U. S., 15 Ct.Cl. 1.

Admissibility of evidence and taking of proof in Indian depredation cases

U.S.—Collier v. U. S., Ct.Cl., 19 S.Ct. 330, 173 U.S. 79, 43 L.Ed. 621, 34 Ct.Cl. 543—Jones v. U. S., 35 Ct.Cl. 36—Stevens v. U. S., 34 Ct.Cl. 244—Truitt v. U. S., 30 Ct.Cl. 19.

65 C.J. p 1383 note 45.

60. U.S.—Hobbs v. McLean, Iowa, 6 S.Ct. 870, 117 U.S. 567, 29 L.Ed. 940—Christie v. U. S., 48 Ct.Cl. 293.

25 C.J. p 1001 note 23.

61. U.S.—Irwin v. U. S., 23 Ct.Cl. 149, reversed on other grounds 8 S.Ct. 1033, 127 U.S. 125, 32 L.Ed. 99.

relevant,[62] and waivers as to incompetent evidence cannot be countenanced.[63] The certificate of a referee in bankruptcy is competent evidence to show that a party plaintiff has been appointed trustee in bankruptcy.[64]

c. Weight and Sufficiency

General rules control matters respecting the weight and sufficiency of evidence in cases before the court of claims.

The general rules as to the weight and sufficiency of evidence, discussed in Evidence §§ 1016–1050, apply in the court of claims,[65] and plaintiff's petition will be dismissed where the evidence is insufficient to support his claim.[66] Similarly the government's counterclaim will be denied where the evidence adduced in support thereof is insufficient to establish it.[67] Competent and persuasive evidence introduced by plaintiff in support of his claim may control over the government's reliance on the findings of a board to whom the claim was orig-
findings of a board to whom the claim was orig-
inally submitted.[68] It has been held that, where a subordinate engineer officer without explanation refuses to be governed by the construction given to the contract by the principal engineer, the final action taken by the local subordinate last in charge in conformity with the interpretation put on the specifications by the chief engineer officer will be taken as the best basis for a just settlement.[69] The determination of the court of claims, acting as a jury, relative to the weight, if any, to be accorded evidence of a remote character has been held conclusive.[70]

The evidence in particular cases has been held sufficient or insufficient to show damage generally,[71] appropriation of property,[72] boundaries,[73] fraud,[74] the existence of a legal or moral obligation on the part of the government to reimburse

62. U.S.—Birdsong v. U. S., 34 Ct.Cl. 437.
25 C.J. p 1001 note 25.

63. U.S.—West Virginia v. U. S., 45 Ct.Cl. 576.

64. U.S.—Crocker v. U. S., 48 Ct.Cl. 383.

65. U.S.—Hirsch v. U. S., 94 Ct.Cl. 602—Steel Products Engineering Co. v. U. S., 90 Ct.Cl. 513—Martin v. U. S., 88 Ct.Cl. 179—Maryland Casualty Co. v. U. S., 53 Ct.Cl. 81—Salois v. U. S., 32 Ct.Cl. 68.
25 C.J. p 1002 note 44.

Indian depredation cases
U.S.—French v. U. S., 49 Ct.Cl. 337—King v. U. S., 31 Ct.Cl. 304—Stone v. U. S., 29 Ct.Cl. 111, affirmed 17 S.Ct. 71, 164 U.S. 380, 41 L.Ed. 477.
65 C.J. p 1383 note 46.

Leased district cases
U.S.—Wichita and Affiliated Bands of Indians in Oklahoma v. U. S., 89 Ct.Cl. 378.

66. U.S.—Air-Track Mfg. Corporation v. U. S., Ct.Cl., 40 F.Supp. 988—Eastern or Emigrant Cherokees and Western or Old Settler Cherokees v. U. S., 88 Ct.Cl. 452—Choctaw & Chickasaw Nations v. U. S., 88 Ct.Cl. 271, certiorari denied Chickasaw Nation v. U. S., 59 S.Ct. 1041, 307 U.S. 646, 83 L.Ed. 1526—Lamm Lumber Co. v. U. S., 86 Ct. Cl. 171, certiorari granted U. S. v. Lamm Lumber Co., 59 S.Ct. 88, 305 U.S. 583, 83 L.Ed. 368, reversed on other grounds 59 S.Ct. 267, 305 U.S. 415, 83 L.Ed. 260—Knight v. U. S., 67 Ct.Cl. 267.

Claim for extra work denied
U.S.—James McHugh Sons v. U. S., 89 Ct.Cl. 94.

67. U.S.—Dawnic S. S. Corporation v. U. S., 90 Ct.Cl. 537—Kling Bros. & Co. v. U. S., 89 Ct.Cl. 329—International Arms & Fuze Co. v. U. S., 70 Ct.Cl. 471—Heid Bros. v. U. S., 65 Ct.Cl. 87.

Government books
The government is not exempt from rules of evidence applying to other litigants, and government counterclaim could not be shown by statement of accounts in government's books, such documents being alone and by themselves inadequate for the purpose.—W. L. Fain Grain Co. v. U. S., 68 Ct.Cl. 441.

68. U.S.—Wright v. U. S., 60 Ct.Cl. 546.

69. U.S.—Shippey v. U. S., 49 Ct.Cl. 151.

70. U.S.—U. S. v. Goltra, 61 S.Ct. 487, 312 U.S. 203, 85 L.Ed. 776, modifying 91 Ct.Cl. 42, motion denied 61 S.Ct. 25, 311 U.S. 613, 85 L.Ed. 389.

Evidence respectiing damages
In action under private act conferring jurisdiction on court of claims to consider claim against the United States for just compensation for certain vessels taken by the United States from lessee holding vessels under lease from the United States and for certain unloading apparatus, determination of court of claims that offer to rent fleet, made years after fleet had been seized, and rental value of similar vessels was not entitled to weight in arriving at just compensation was not erroneous.—U. S. v. Goltra, supra.

71. U.S.—B. F. Sturtevant Co. v. U. S., 90 Ct.Cl. 93.

Recovery without proof of "damages"
Although evidence was held insufficient to show damages which plaintiff suffered by reason of defendant's breach of its contract, where the claims board of the U. S. Shipping Board awarded plaintiff a certain sum for breach of its contract, and plaintiff accepted seventy-five per cent of the award and brought suit in the court of claims, where no proof was submitted as to the amount of the damages suffered by reason of such breach of contract, the court rendered judgment for the balance of such award.—Freygang v. U. S., 57 Ct.Cl. 244, affirmed, Russell Motor Car Co. v. U. S., 43 S.Ct. 428, 261 U.S. 514, 67 L.Ed. 778.

72. **Discharge of guns over plaintiff's land**
A continuance of the discharge of coast defense guns across land in sufficient number and for a sufficient time may prove an intent on the part of the government to fire across the land at will, or in effect to appropriate the property, and every successive trespass adds to the force of the evidence.—Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S.Ct. 135, 260 U.S. 327, 67 L.Ed. 287, reversing 56 Ct.Cl. 494.

73. **Recollection of aged Indians as insufficient**
Testimony of aged Indians as to their recollections concerning the boundaries, based on what they remember to have heard in their childhood, is held to be without probative value.—Klamath and Moadoc Tribes v. U. S., 86 Ct.Cl. 614.

74. U.S.—Dawnic S. S. Corporation v. U. S., 90 Ct.Cl. 537.

plaintiff,[75] the making[76] or termination[77] of a contract, title,[78] unreasonable or arbitrary action on the part of the government,[79] or other particular matters.[80]

d. Affidavits and Depositions

Depositions may be submitted to the court of claims under the general rules but ex parte affidavits are not regarded as evidence.

Ex parte affidavits are not evidence in the court of claims;[81] and a stipulation between claimant's attorney and the attorney general that ex parte affidavits may be taken instead of depositions cannot be upheld by the courts so as to dispense with competent evidence which the court deems material.[82]

In taking testimony to be used in support of or against any claim, the adverse party is entitled to an opportunity to file interrogatories, or to examine the witnesses by attorney, under such regulations as the court may prescribe.[83] If by a rule of court certain requirements exist as to reading and signing of depositions, they must be complied with, or the court may suppress them on its own motion;[84] and where a deposition fixes a jurisdictional fact, a second deposition inconsistent therewith on such point may be disregarded.[85] Where a party has taken testimony without leave of court, and under objection of the other party, the deposition so taken will be suppressed on motion.[86]

e. Examination of Claimant

In a proper case before the court of claims there may be an examination of claimant before trial, and in the case of a corporate claimant the officers are ordinarily the proper persons to be examined, although where all the stock is owned by two individuals it may be permissible to examine them as the real parties concerned.

An order of the court of claims for examination of an interested party should be in compliance with the provisions of the governing statute.[87] In the case of a corporation the officers thereof are ordinarily the proper persons to be examined;[88] but where all of the stock of the company is owned by two persons, they are in fact and in legal effect the parties claimant, and are proper persons to be examined under the statute.[89]

Fraud. The government's rescission of a contract for alleged failure of performance does not estop it from setting up fraud nor from examining claimants in an action on such contract.[90]

75. U.S.—North Pacific Grain Growers v. U. S., 90 Ct.Cl. 189.

76. U.S.—Sobel v. U. S., 88 Ct.Cl. 149.

77. U.S.—Cherokee Fuel Co. v. U. S., 89 Ct.Cl. 279, certiorari denied 60 S.Ct. 466, 309 U.S. 655, 84 L.Ed. 1004.

78. **Immemorial possession**
A claim to title to lands based on immemorial possession cannot be sustained where the evidence shows that other tribes similarly occupied and possessed such territory.—Wichita and Affiliated Bands of Indians in Oklahoma v. U. S., 89 Ct.Cl. 378.

Record as controlling over oral testimony
Oral testimony as to facts and traditions, by witnesses many of whom have a direct interest in the outcome of the case, is insufficient to establish Indian title to a vast acreage of lands; it does not afford a degree of proof sufficient to overcome contemporaneous documentary and historical evidence to the contrary.—Coos Bay, Lower Umpqua and Siuslaw Indian Tribes v. U. S., 87 Ct.Cl. 143, certiorari denied 59 S.Ct. 642, 306 U.S. 653, 83 L.Ed. 1052.

79. U.S.—Orleans Dredging Co. v. U. S., 90 Ct.Cl. 360.

80. U.S.—South Dakota Wheat Growers Ass'n v. U. S., 90 Ct.Cl. 222—Identification Devices v. U. S., 89 Ct.Cl. 141, certiorari denied 60 S.Ct. 84, 308 U.S. 507, 84 L.Ed. 478.

Cause of landslides occurring in river levee work
U.S.—Orleans Dredging Co. v. U. S., 90 Ct.Cl. 360.

Falsity to trust of council of Indian tribe
U.S.—Seminole Nation v. U. S., 62 S.Ct. 1049, 316 U.S. 286, 651, 86 L.Ed. 1480.

Increased labor costs
U.S.—Consumers Paper Co. v. U. S., 94 Ct.Cl. 713, certiorari granted U. S. v. Consumers Paper Co., 62 S.Ct. 795, 315 U.S. 792, 86 L.Ed. 1195, affirmed 63 S.Ct. 76.

Plaintiff's employment of qualified laborers and mechanics
U.S.—Hirsch v. U. S., 94 Ct.Cl. 602.

Reason for delay in completion of work
U.S.—Hirsch v. U. S., supra.

Relationship of landlord and tenant from which contract could be implied not shown.—Pearson v. U. S., 45 S.Ct. 240, 267 U.S. 423, 69 L.Ed. 694, affirming 58 Ct.Cl. 485.

Insufficient evidence as to "margin of safety" in levee work
U.S.—Orleans Dredging Co. v. U. S., 90 Ct.Cl. 360.

Population of Indian tribes
U.S.—Sioux Tribe of Indians v. U. S., 85 Ct.Cl. 181, certiorari denied 58 S.Ct. 37, 302 U.S. 717, 82 L.Ed. 554.

Superior knowledge of government engineers
U.S.—C. W. Blakeslee & Sons v. U. S., 89 Ct.Cl. 226, certiorari denied 60 S.Ct. 512, 309 U.S. 659, 84 L.Ed. 1007.

81. U.S.—Main v. U. S., 21 Ct.Cl. 54—Smith v. U. S., 19 Ct.Cl. 690—Wiggins v. U. S., 2 Ct.Cl. 345.
25 C.J. p 1001 note 33.

82. U.S.—Jones v. U. S., 42 Ct.Cl. 178.

83. U.S.—Smith v. U. S., 19 Ct.Cl. 690.
25 C.J. p 1001 note 29.

84. U.S.—Martin v. U. S., 3 Ct.Cl. 384.

85. U.S.—Johnson v. U. S., 35 Ct.Cl. 552.

86. U.S.—Curved Electrotype Plate Co. v. U. S., 42 Ct.Cl. 268.

87. U.S.—Globe Works v. U. S., 45 Ct.Cl. 497.
25 C.J. p 1001 note 35 [a].

88. U.S.—Atlantic Contracting Co. v. U. S., 40 Ct.Cl. 244.

89. U.S.—Atlantic Contracting Co. v. U. S., supra.

90. U.S.—Atlantic Contracting Co. v. U. S., supra.

Where plea of fraud is interposed by defendants, they may examine claimants under the statute; and the examination cannot be evaded by claimants alleging that all the facts are within the knowledge of defendants.—Atlantic Contracting Co. v. U. S., supra.

f. Calling on Government Departments for Information

The court of claims may, in its discretion, issue a call on an executive department of the government in the nature of a subpœna duces tecum requiring production of information and documents, or of a "discovery", or may in a proper case refuse to make such a call, as where claimant has been guilty of laches.

The court has power to call on any of the departments for any information or papers which it may deem necessary.[91] Such a call has been described as in the nature of a subpœna duces tecum,[92] although other courts regard it as more analogous to a bill for discovery;[93] but the power granted the court to make calls on executive departments of the government does not confer absolute rights on a litigant,[94] the matter being committed to judicial discretion,[95] and claimant's application for a call may properly be denied for delay amounting to laches.[96]

Objection for lack of certification. When it was agreed by the respective attorneys that certain papers selected by them from a departmental file should be filed in court, the objection that the papers so filed and printed were not certified under the seal of the interior department comes too late after such action in the absence of any question as to their genuineness or any showing that they were filed through improvidence, mistake, or fraud.[97]

In case of a refusal, after notice and without just reason, to furnish original and competent evidence in the possession of the government, secondary evidence of the matters in question may be received.[98]

§ 349. Trial

On the trial the court determines both questions of law and questions of fact, and, where the loyalty of claimant is in issue, should determine that matter preliminarily to trying the case on its merits. Interrogatories may be allowed. There can be no demurrer to the evidence.

The court determines the facts as well as the law.[99] Where essential allegations are not established by claimant's evidence, the court will not determine what the rights and liabilities of the parties would be if the allegations were proved.[1]

The rules pertaining to the introduction of evidence are the same in the court of claims as in other nisi prius courts in the United States.[2] The established rule of practice is that, when parties have closed their proofs and noted that fact on the notice book, new testimony cannot be taken by either without an order of the court, and the application for leave to take further testimony must show the grounds on which the application rests, the issue on which it will be used, etc.[3] The court cannot make an order compelling claimant to take more testimony than he has taken. If defendants have evidence of their own to present, it is their privilege to take it. If they fail to do so, claimant is entitled to have the issues tried in the regular way.[4]

While a demurrer to the evidence is proper under common-law practice and in some of the states with statutory modifications, no such doctrine obtains in the court of claims, but on the contrary the practice in the latter court, as regulated by applicable rules of the United States supreme court, forbids a demurrer to the evidence,[5] and a motion to dismiss the petition on the ground that the evidence produced by claimant shows no liability is, in effect, a demurrer to the evidence and improper under this doctrine.[6]

Loyalty of claimant. Under the provisions of Judicial Code §§ 159, 160, plaintiff should show his loyalty to the United States in order to be permit-

91. U.S.—Robinson v. U. S., 50 Ct.Cl. 159.
25 C.J. p 1001 note 38.

92. U.S.—In re Calls for Evidence, 33 Ct.Cl. 354.

93. U.S.—Pratt v. U. S., 87 Ct.Cl. 586—Robinson v. U. S., 50 Ct.Cl. 159.

94. U.S.—Collins v. U. S., 56 Ct.Cl. 41.

95. U.S.—Collins v. U. S., supra.

96. U.S.—Collins v. U. S., supra.

97. U.S.—U. S. Fidelity & Guaranty Co. v. U. S., 50 Ct.Cl. 316.

98. U.S.—Robinson v. U. S., 50 Ct. Cl. 159.

99. U.S.—Moore v. U. S., Ct.Cl., 91 U.S. 270, 23 L.Ed. 346.
25 C.J. p 1002 note 50.

Finding of ultimate facts as not including evidence
In its findings of fact the court is required by supreme court rules regulating appeals from this court to find the ultimate facts established by the evidence, and not the evidence establishing them. This rule will not be construed as requiring the court to include in its findings any evidence which the parties may ask to have included on the ground that such evidence is a proved fact; the court itself must determine what are the ultimate facts which the evidence establishes, leaving none of the functions of a jury to be discharged by the appellate court.—Natron Soda Co. v. U. S., 55 Ct.Cl. 66, affirmed 42 S.Ct. 58, 257 U.S. 138, 66 L.Ed. 171.
Findings or report generally see infra § 352.

Trial in Indian depredation cases
U.S.—Gamel v. U. S., 31 Ct.Cl. 321—Giddings v. U. S., 29 Ct.Cl. 12.
65 C.J. p 1383 note 47.

1. U.S.—Peay v. U. S., 19 Ct.Cl. 77.

2. U.S.—Oxford Paper Co. v. U. S., Ct.Cl., 56 F.2d 895, supplementing 52 F.2d 1008.

3. U.S.—Curved Electrotype Plate Co. v. U. S., 42 Ct.Cl. 268.

4. U.S.—Smitheman v. U. S., 48 Ct. Cl. 449.

5. U.S.—L. Vogelstein & Co. v. U. S., 55 Ct.Cl. 490—Smitheman v. U. S., 48 Ct.Cl. 449.

6. U.S.—Creek Nation v. U. S., 93 Ct.Cl. 559.

Doctrine applicable to Indian cases
U.S.—Creek Nation v. U. S., supra.

ted to file claims against the government, and where such loyalty is in issue the question of loyalty should be determined before the case proceeds to trial on the merits.[7]

Interrogatories. The term "interrogatories," as used in the court of claims, has been defined as a question or series of questions in writing for the purpose of eliciting information to aid a party in making out his case when ascertainment of the facts either in support or defense is difficult, thereby limiting testimony necessary at the trial and simplifying the issues.[8] A motion for an interrogatory under Judicial Code § 164, is substantially the same thing as a motion for a call under the same section, as discussed supra § 348 f, and in either case the request is for information from the government to avoid examination of witnesses and to simplify procedure.[9] Under the procedure in the court of claims, where defendant is always the government, interrogatories should be addressed to the heads of various departments,[10] and the head of the department should pass on the question of whether the questions propounded might disclose military secrets.[11] The interrogatories should be so framed as to avoid the necessity for construction or interpretation of facts complicating the issues,[12] and should not be so drawn as to require defendant in effect to admit or deny legal conclusions.[13] In patent cases the interrogatories may properly ask defendant to admit or deny the correctness of certain drawings submitted by plaintiff as true representations of machines made or used by defendant, but should not require defendant itself to make drawings nor to compose descriptions not already in existence.[14] The answers given to interrogatories by a head of department are binding on the government if certified by his signature and the oath may be waived.[15]

In congressional cases the court must inquire into every material fact necessary to enable congress to act intelligently when disposing of the claims;[16] and the court will consider and determine every issue necessary to the proper disposition of the matter,[17] and transmit its special findings of fact and conclusions of law in accordance with applicable resolutions and statutes.[18]

§ 350. References

The report of a commissioner to whom a case has been referred becomes the judgment of the court on approval and adoption, but until approval the findings of the commissioner are in no sense final. General rules governing references in the federal courts control references in the court of claims in the absence of any rule of such court on the matter.

The court may in proper cases refer a cause to a special commissioner, and after due deliberation approve his report, and the judgment rendered will be that of the court and not that of the commissioner alone,[19] but until officially made by the court itself the findings of fact by a commissioner to whom the case has been referred are not final and conclusive.[20] In the absence of any rule of the court of claims on the subject, such references are to be governed by rules in similar cases, governing references to referees and masters, adopted by other federal courts.[21] Where a delay in discovering

7. U.S.—L. Vogelstein & Co. v. U. S., 55 Ct.Cl. 490.

8. U.S.—Pratt v. U. S., 87 Ct.Cl. 586.

9. U.S.—Pratt v. U. S., supra.

10. U.S.—Pratt v. U. S., supra.

11. U.S.—Pratt v. U. S., supra.

12. U.S.—Pratt v. U. S., supra.

Similarities of mechanisms

Where plaintiff calls for an interpretation by defendant of what structures are the "same in all essential respects as the mechanism" shown and described in a submitted drawing, it is held that defendant should not be required to construe what is or is not "essential;" to do so might precipitate a discussion on this issue and complicate, rather than expedite, procedure.—Pratt v. U. S., supra.

13. U.S.—Pratt v. U. S., supra.

Infringement of patent

Where certain paragraphs in plaintiff's motion paraphrase the claims of the patent in suit, it is held that to require defendant to furnish plaintiff's counsel with a drawing and a description of the matter called for as requested would be to require defendant to admit or to deny infringement as a legal conclusion.—Pratt v. U. S., supra.

14. U.S.—Pratt v. U. S., supra.

15. U.S.—Pratt v. U. S., supra.

16. U.S.—West Virginia v. U. S., 37 Ct.Cl. 201.

17. U.S.—Pennsylvania v. U. S., 37 Ct.Cl. 514.

18. U.S.—Trent Trust Co. v. U. S., 92 Ct.Cl. 501—Wales Island Packing Co. v. U. S., 73 Ct.Cl. 615.

Claims construed as for gratuity without legal or equitable grounds for relief, and so reported with special findings of fact and conclusions of law.—George Lawley & Son v. U. S., 78 Ct.Cl. 685—John N. Knauff Co. v. U. S., 78 Ct.Cl. 423.

19. U.S.—In re Intermingled Cotton Cases, Ct.Cl., 92 U.S. 651, 23 L.Ed. 756.

25 C.J. p 1002 note 53.

20. U.S.—Pratt v. U. S., 85 Ct.Cl. 1, certiorari denied U. S. v. Pratt, 58 S.Ct. 270, 302 U.S. 750, 82 L.Ed. 580.

Failure to except not fatal

The report of a commissioner of the court of claims is not final as to the facts in a case, the findings of fact not being final and conclusive until officially made by the court itself; and a patent is not invalidated by failure of the patentee to disclaim certain claims of the patent found and reported by the commissioner as anticipated by the prior art, or to except to such finding of the commissioner.—Pratt v. U. S., supra.

21. U.S.—Johnson v. District of Columbia, 49 Ct.Cl. 8.

25 C.J. p 1002 note 54.

Controlling sequence of evidence under alternative counts

Where petitions in actions against the United States for judgment for compensation with respect to alleged unauthorized use of patented inventions contained alternative claims or counts, the commissioner to whom cases were referred to take evidence

additional evidence and a failure to produce it are inexcusable, a request to introduce additional evidence and again refer the case will not be granted.[22]

§ 351. Rules of Decision

The court of claims may determine cases coming before it according to their own facts, under controlling decisions of the supreme court.

Decisions of the supreme court are, of course, controlling on the court of claims.[23] The liability of the government should be determined by the settled principles of law;[24] and the court will construe an act of congress on which a claim is alleged to be founded, according to the rules of construction which long and continued experience has determined to be best adapted for the purpose.[25] Beyond this, no general rules of decision can be laid down, but each case coming before the court of claims is necessarily to be determined according to its own peculiar facts.[26] Where a former ruling would result in inequality to the officers and men who served in the late Spanish War, and where the comptroller of the treasury has construed certain statutes favorably to claimants, and congress has subsequently legislated on the same subject with apparent approval, and certainly no disapproval, of the comptroller's ruling, the court will resolve all doubts in favor of claimants, who have no right of appeal.[27] Where the jurisdiction conferred on the court of claims is to hear and determine a case according to principles of equity and justice, the case will be heard on the merits, and not decided on an estoppel arising from the negligence of parties.[28]

§ 352. Findings or Report

It is the duty of the court of claims in a case before it to make findings of fact and conclusions of law. The court should find the ultimate fact, but failure to do so is not fatal where the findings of subsidiary facts are such that the ultimate fact appears by essential inference. The court has power to make amended, substitutional, or additional findings but may in its discretion refuse a tardy request to do so.

With the trial in the court of claims the rights of counsel over the findings of fact cease and those of the court begin.[29] It is the duty of the court to make findings as to essential matters,[30] to find the facts established by the evidence,[31] and to make a separate statement of the conclusions of law on the facts so found,[32] but it is not obliged to rule specifically on separate requests of counsel.[33] The duty of the court is to find the ultimate facts,[34] and its failure to do so is fatal where the findings as to subsidiary facts do not raise a necessary inference of the ultimate fact on which judgment

and make a report of the facts would be directed to control manner and sequence in which evidence was presented, so that facts relating specifically to one count would not be confused with facts relating solely to the other count, and the parties, commissioner, and the court would know to what count certain evidence pertained.—Hammond v. U. S., Ct.Cl., 42 F.Supp. 284.

22. U.S.—Johnson v. District of Columbia, 49 Ct.Cl. 8.

23. U.S.—Chicago, M. & St. P. R. Co. v. U. S., 18 Ct.Cl. 359—Illinois Cent. R. Co. v. U. S., 18 Ct.Cl. 118.

Constitutionality of statute
The court of claims has considered itself bound by a holding of the supreme court of the United States that a certain statute was not in conflict with the Constitution, although the particular ground of unconstitutionality assigned in the court of claims was not raised in the supreme court.—Pacific Coast SS. Co. v. U. S., 42 Ct.Cl. 228.

24. U.S.—Thierman v. U. S., 51 Ct.Cl. 35.

25. U.S.—Todd v. U. S., Dev.Ct.Cl. § 118.
25 C.J. p 1003 note 58.

26. U.S.—De Groot v. U. S., Ct.Cl., 5 Wall. 419, 18 L.Ed. 700.
25 C.J. p 1003 note 59.

27. U.S.—Hovey v. U. S., 40 Ct.Cl. 390.

28. U.S.—U. S. v. Weil, 35 Ct.Cl. 42.

29. U.S.—Neal v. U. S., 14 Ct.Cl. 477.

30. U.S.—Seminole Nation v. U. S., 62 S.Ct. 1061.

Gratuity offsets against Indian claim
U.S.—Seminole Nation v. U. S., 62 S.Ct. 1049.

31. U.S.—Beach v. U. S., 33 S.Ct. 20, 226 U.S. 243, 57 L.Ed. 205, affirming 41 Ct.Cl. 110—Smitheman v. U. S., 48 Ct.Cl. 449—Gallagher v. District of Columbia, 18 Ct.Cl. 705.
25 C.J. p 1003 note 65.

32. U.S.—Gallagher v. District of Columbia, supra.
25 C.J. p 1003 note 66.

33. U.S.—Union Pac. R. Co. v. U. S., 20 Ct.Cl. 508.

Practice outlined
Under Supreme Court Rules, rule 5, concerning appeals from and governing findings of fact in this court, and rules 73 and 74 promulgated by this court, "the requests required to be submitted by the parties are for the assistance of the court in making up its finding and not for the purpose of obtaining specific rulings on each one separately in the form by them presented. The practice of the court is to give to the requests of the parties the fullest consideration and the most careful scrutiny, and, without finding or ruling upon each one separately, to make up an accurate and connected finding, in its own language, in such way as to cover each material fact asked for on either side, and to present to the Supreme Court on appeal a clear and concise statement of the case upon which questions of law may be there reviewed."—Delaware L. & W. R. Co. v. U. S., 54 Ct.Cl. 35.

34. U.S.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted 58 S.Ct. 33, 302 U.S. 668, 82 L. Ed. 516—Moran Towing & Transportation Co. v. U. S., 78 Ct.Cl. 526.

Resolving conflicting inferences
The requirement, by supreme court rule, that court of claims shall find ultimate facts which are controlling, places on court of claims duty of resolving conflicting inferences and drawing from evidence necessary conclusions of fact.—U. S. v. Esnault-Pelterie, 58 S.Ct. 412, 303 U.S. 26, 82 L.Ed. 625, affirming Esnault-Pelterie v. U. S., 84 Ct.Cl. 625, certiorari granted U. S. v. Esnault-Pelterie, 58 S.Ct. 33, 302 U.S. 668, 82 L.Ed. 516.

Finding construed as showing exercise of "due diligence"
U.S.—U. S. v. Swift & Co., 46 S.Ct. 308, 270 U.S. 124, 70 L.Ed. 497, modifying Swift & Co. v. U. S., 59 Ct.Cl. 364.

may be based.[35] However, the absence of a finding of ultimate facts is not fatal if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference,[36] and such inference may be drawn although the findings are to be treated like the verdict of a jury in the sense that an appellate court may not add to or modify them.[37] A negative finding to the effect that there is nothing in the evidence to show a certain fact is proper where the state of the evidence warrants it.[38] A finding made in an action at law disposes of all matters of fact[39] and is final where there is any evidence of the fact,[40] and no exception is taken.[41] In cases coming to a hearing on the report of a commissioner, parties dissatisfied with the facts found in the report must present their requests for additional findings at the hearing, and not afterward as in ordinary cases.[42] In a proceeding in equity, a finding of the ultimate facts for the consideration of the supreme court is not required, as the whole record goes up.[43] Recitals in a finding, that the claim in suit was supported by the testimony of but two witnesses, and that "the court is not satisfied by this evidence," followed by the statement, in the opinion, that the court "has no reason, other than the lapse of time and the inaction of the claimant, to discredit the witnesses or suspect the claim," do not justify a reversal, on the ground that the court attempted to create a rule of evidence as to the number of witnesses necessary to prove such a claim.[44]

Amended or additional findings. The court retains jurisdiction over its findings and can entertain motions from either side to amend them until the granting of an appeal,[45] and on a motion to amend its findings, the court may withdraw its findings and set aside its judgment and file new findings and enter a second judgment.[46] A requested amendment of findings will be denied where the amendment sought would be in effect a finding of evidence contrary to the rules,[47] or where the request for further or amended findings is an unwarranted effort to change negative to positive findings.[48] Requests for additional findings may be rejected by the court in its discretion if filed after the period prescribed by applicable rules.[49]

In a congressional case the findings by the court should show everything necessary for an understanding of the case in congress;[50] but where the findings are sufficient to govern intelligent action by congress, the court will not make new or additional findings on a motion for a new trial.[51] Where a suit is brought by virtue of a reference by congress, and the court refuses to enter judgment as requested, it will find the facts and report them to congress, as in other congressional cases.[52] Where a bill referred by congress is for the payment of a specific amount "in full payment and discharge of the claim," the findings of the court must be limited to that amount;[53] and where such a bill fixes the value of the property at an amount named, the court is without authority to exceed the amount when finding the value of the property.[54] The report in a case referred by congress is neither a judgment, an award, nor a recommendation, but merely a recital of proved facts;[55] and it follows that such reports create no vested rights.[56]

The reply of the court to a request from the commissioner of Indian affairs for an opinion on a

35. U.S.—Botany Worsted Mills v. U. S., 49 S.Ct. 129, 278 U.S. 282, 73 L.Ed. 379, affirming 63 Ct.Cl. 405, certiorari granted 48 S.Ct. 303, 276 U.S. 611, 72 L.Ed. 730.

36. U.S.—U. S. v. Wells, Ct.Cl., 51 S.Ct. 446, 283 U.S. 102, 75 L.Ed. 867, affirming Wells v. U. S., 39 F. 2d 998, certiorari granted U. S. v. Wells, 51 S.Ct. 32, 282 U.S. 822, 75 L.Ed. 734.

37. U.S.—U. S. v. Wells, supra.
Review of court of claims decisions by supreme court see supra § 235.

38. U.S.—Leisenring v. U. S., Ct.Cl., 4 F.Supp. 993, supplementing 3 F. Supp. 853, and certiorari denied 54 S.Ct. 558, 291 U.S. 682, 78 L.Ed. 1069.

39. U.S.—Crocker v. U. S., Ct.Cl., 36 S.Ct. 245, 240 U.S. 74, 60 L.Ed. 533.
25 C.J. p 1003 note 67.

40. U.S.—U. S. v. Omaha Tribe, Ct. Cl., 40 S.Ct. 522, 253 U.S. 275, 64 L.Ed. 901.
25 C.J. p 1003 note 68.

41. U.S.—U. S. v. New York Indians, Ct.Cl., 19 S.Ct. 487, 173 U.S. 464, 43 L.Ed. 769.

42. U.S.—Bright v. U. S., 12 Ct.Cl. 646.

43. U.S.—U. S. v. La Abra Silver Min. Co., 32 Ct.Cl. 462, affirmed 20 S.Ct. 168, 175 U.S. 423, 44 L.Ed. 223—Eastern Band of Cherokees v. U. S., 20 Ct.Cl. 449, affirmed 6 S.Ct. 718, 117 U.S. 288, 29 L.Ed. 880.

44. U.S.—Stone v. U. S., Ct.Cl., 17 S. Ct. 71, 164 U.S. 380, 41 L.Ed. 477.

45. U.S.—Plumley v. U. S., 45 Ct. Cl. 185.

46. U.S.—Plumley v. U. S., supra.

47. U.S.—Oregon-Washington R. & Nav. Co. v. U. S., 41 S.Ct. 329, 255 U.S. 339, 65 L.Ed. 667, affirming 54 Ct.Cl. 131.

48. U.S.—Oregon-Washington R. & Nav. Co. v. U. S., supra.

49. U.S.—Winton v. Amos, 41 S.Ct. 342, 255 U.S. 373, 65 L.Ed. 684, affirming in part and reversing in part 51 Ct.Cl. 284, and reversing 52 Ct.Cl. 90.

50. U.S.—The Friendship, 49 Ct.Cl. 204.
25 C.J. p 1004 note 75.

51. U.S.—Glasgow Presb. Church v. U. S., 44 Ct.Cl. 408.
25 C.J. p 1004 note 76.

52. U.S.—Post v. U. S., 49 Ct.Cl. 105.

53. U.S.—Sampson v. U. S., 42 Ct.Cl. 378.

54. U.S.—Love v. U. S., 48 Ct.Cl. 74.

55. U.S.—Guttormsen v. U. S., 43 Ct. Cl. 299—Widmayer v. U. S., 42 Ct. Cl. 519.
25 C.J. p 1004 note 80.

56. U.S.—Alleman v. U. S., 43 Ct.Cl. 144.

question not passed on in its original opinion, but of which it was given jurisdiction by statute, has been held a part of the decision of the case.[57]

§ 353. Judgment and Relief

a. In general
b. Nature and extent of relief
c. Conformity to pleadings, proof, and findings
d. Judgment by consent or on default
e. Amendment or correction of judgment
f. Payment and enforcement of judgment
g. Res judicata

a. In General

The court of claims has power to render judgment against the United States where so authorized by statute and in this connection may adjudicate all matters essential to the establishment of a claim within its jurisdiction.

The court of claims has power to render a judgment against the United States,[58] and, where the claim is within its jurisdiction, to adjudicate all matters necessary to the establishment of its validity;[59] but where a judgment of the court of claims was absolutely reversed for an error as to interest, and the cause remanded for further proceedings, and after the filing of mandate and motion for judgment for the principal without interest, but before the entry of judgment, the statute on which the proceeding was based, which conferred a mere gratuity, was repealed, the court of claims had no jurisdiction to enter judgment.[60]

Postponing entry of judgment. Where the several claims of a large number of Indians are united in a single suit, the entry of judgment will be suspended until it appears which of the claimants are still living, who are the administrators of deceased claimants, etc.[61]

"Congressional cases". Where the statute under which a case is referred to the court of claims contemplates merely a report to the congress or one of its branches, there is no power in the court of claims to go further and render a judgment.[62]

b. Nature and Extent of Relief

(1) In general
(2) Dismissal or discontinuance

(1) In General

The court of claims may within statutory restrictions award judgment in favor of plaintiff or defendant for pecuniary damages shown to be justly due, but may not give a judgment to claimant for nominal damages, and it ordinarily lacks power to award equitable relief except in cases where equitable powers are expressly conferred on it. The award of interest is generally beyond the power and purview of the court of claims, although exceptions to the rule may occur.

Where claimant has suffered pecuniary loss under circumstances rendering the government liable therefor, the court of claims may, within statutory restrictions,[63] award him such damages as justice requires;[64] but where claimant has suffered no pe-

57. U.S.—U. S. v. Fisher, 32 S.Ct. 196, 223 U.S. 95, 56 L.Ed. 364, affirming 35 App.D.C. 524.

58. U.S.—U. S. v. Gorham, Ct.Cl., 17 S.Ct. 382, 165 U.S. 316, 41 L.Ed. 729—Ayres v. U. S., 44 Ct.Cl. 110. 25 C.J. p 1004 note 84.

Suit against funds of private corporation held by government

Congress has power to authorize a suit in the court of claims to be brought by a creditor, such as a seaman, against the government to collect his claim from funds of a private corporation, such as a shipping company, out of the funds of the latter which have been covered into the United States treasury, and under applicable statute it has been held that the court of claims has power to render judgment in such a case.—Garrett v. U. S., 70 Ct.Cl. 304.

Judgment in Indian depredation cases

U.S.—Labadie v. U. S., 33 Ct.Cl. 476—Price v. U. S., 33 Ct.Cl. 106, affirmed 19 S.Ct. 765, 174 U.S. 373, 43 L.Ed. 1011—Valencia v. U. S., 31 Ct.Cl. 388.
65 C.J. p 1383 note 48.

59. U.S.—Magee v. U. S., Ct.Cl., 37 F.2d 763, certiorari granted 50 S.Ct. 407, 281 U.S. 713, 74 L.Ed. 1134, affirmed 51 S.Ct. 195, 282 U.S. 432, 75 L.Ed. 142.

Determining overpayment on claim for refund

Where plaintiff contended that, while the court had authority to determine a refund and to enter judgment for its payment, it had no authority to determine an overpayment, in denying such contention the court held that a finding of an overpayment was necessary in order to establish the right to a refund and that, having jurisdiction of the claim, it had authority to determine all matters, including overpayment, essential to determination of the validity of the claim.—Magee v. U. S., supra.

60. U.S.—In re Hall, 17 S.Ct. 723, 167 U.S. 38, 42 L.Ed. 69.

61. U.S.—Navarre v. U. S., 33 Ct. Cl. 235, affirmed 19 S.Ct. 326, 173 U.S. 77, 43 L.Ed. 620.

62. U.S.—Barlow v. U. S., 87 Ct.Cl. 281, 282.

Right of "adjudicating"

"Congress having by amendment eliminated from the jurisdictional act authority of the court to render judgment, and having inserted other language requiring that the court report to congress the law and the facts, it is held that the court has no power to render a judgment although the jurisdictional act contains the language 'the Court of Claims in considering and *adjudicating* the above described claim, etc.' (Italics ours.)"—Barlow v. U. S., supra.

63. U.S.—Cherokee Nation v. U. S., 92 Ct.Cl. 262.

Indian claims

Under the terms of the applicable statute, it has been held that, while the court of claims may render a judgment in favor of the whole tribe, it lacks power to adjudicate the claims of individuals within such tribe.—Cherokee Nation v. U. S., supra.

64. U.S.—Steel Products Engineering Co. v. U. S., 90 Ct.Cl. 513—Meuer Steel Barrel Co. v. U. S., 85 Ct.Cl. 554, certiorari denied 58 S.Ct. 280, 302 U.S. 754, 82 L.Ed.

cuniary loss, there can be no recovery even if his legal rights may have been infringed, as nominal damages are not recoverable in the court of claims.[65]

Where a settlement of the account between plaintiff and defendants, taking into consideration defendants' valid counterclaim, shows a balance in favor of the government, a judgment may be entered in favor of defendants for such balance.[66]

The court of claims has no general equity powers;[67] but equity powers have from time to time been especially conferred on it by particular statutes;[68] and where such powers are conferred, the court may reform a contract and adjust the accounts of the parties thereunder.[69]

Appropriation of land. Where the government enters on a tract of land without designating the portion to be taken for public use, and the owner brings an action for the value of the whole tract, the court will institute proceedings to ascertain how much is absolutely required by the government, and will designate the portion so taken by metes and bounds, and render judgment for the value thereof.[70]

Impressment or capture of property. If property is captured, intermingled, sold, and the proceeds paid into the treasury in a common fund, judgment may be rendered in each case for a sum which bore the same proportion to the whole fund still on hand that the quantity of claimant's property did to the whole number represented by the fund.[71] If a claim is referred for adjudication as to property taken and impressed into the service of the United States, it is erroneous for the court to render judgment based on damages arising from mere detention and delay of the property.[72] In the case of French spoliation claims, the court found only as to the validity and amount of the claim, and the legal representations of the parties entitled thereto.[73]

On division of court. If the court is equally divided as to claimant's right to recover, the petition will be dismissed in order that he may take his appeal.[74] Where the court is equally divided as to the right of claimant to recover for the whole claim, but a majority of the judges are of the opinion that he should recover a part, a judgment will be ordered for the part, with leave to claimant to move to vacate it and have the case reheard before a full bench.[75]

Interest. Ordinarily the court of claims cannot allow interest on any claim up to the time of the rendition of judgment,[76] unless on a contract expressly stipulating for the payment of interest.[77] In the case of unpaid royalties interest has been allowed,[78] and where the claim is based on the judgment of another federal court allowing a certain sum and interest, it is permissible for the judgment of the court of claims to award interest.[79]

(2) Dismissal or Discontinuance

A claim may be dismissed where there is a suit pending on it in a federal district court or in other cases where it appears that no recovery can be had, and a tardy motion for reinstatement may be denied.

583—Peaslee-Gaulbert Co. v. U. S., 60 Ct.Cl. 631.

Cost to railroad of controlling flood
U.S.—Southern Pac. Co. v. U. S., 68 Ct.Cl. 223.

Determining by court as jury
U.S.—Andrew Radel Oyster Co. v. U. S., 78 Ct.Cl. 816.

Distribution under direction of state court
In receiver's suit against government for taking land, judgment may order distribution under direction of state chancery court to holders of enumerated encumbrances according to priority.—Schroth v. U. S., 67 Ct. Cl. 382.

Remission of liquidated damages
U.S.—Peaslee-Gaulbert Co. v. U. S., 60 Ct.Cl. 631.

65. U.S.—Marion & R. V. Ry. Co. v. U. S., 46 S.Ct. 253, 270 U.S. 280, 70 L.Ed. 585, affirming 60 Ct.Cl. 230—Martin v. U. S., 86 Ct.Cl. 311.

66. U.S.—Johnson v. District of Columbia, 49 Ct.Cl. 8.

67. U.S.—Bonner v. U. S., Ct.Cl., 9 Wall. 156, 19 L.Ed. 666—Jackson v. U. S., 27 Ct.Cl. 74—Fawcett v. U. S., 25 Ct.Cl. 178.
25 C.J. p 1005 note 93.

68. U.S.—U. S. v. Old Settlers, Ct. Cl., 13 S.Ct. 650, 148 U.S. 427, 37 L.Ed. 509—Pam-to-pee v. U. S., 36 Ct.Cl. 427, affirmed 23 S.Ct. 142, 187 U.S. 371, 47 L.Ed. 221.
25 C.J. p 1005 note 94.

69. U.S.—Cramp & Sons Ship & Eng. Bldg. Co. v. U. S., Ct.Cl., 36 S.Ct. 70, 239 U.S. 221, 60 L.Ed. 238.
25 C.J. p 1005 note 95.

70. U.S.—Clark v. U. S., 37 Ct.Cl. 503.

71. U.S.—In re Intermingled Cotton Cases, Ct.Cl., 92 U.S. 651, 23 L.Ed. 756—Minor v. U. S., 6 Ct.Cl. 393.
25 C.J. p 1004 note 88.

72. U.S.—U. S. v. Irwin, Ct.Cl., 8 S. Ct. 1033, 127 U.S. 125, 32 L.Ed. 99.

73. U.S.—The Ship Juliana, 35 Ct. Cl. 400.
25 C.J. p 1004 note 90.

74. U.S.—Reeside v. U. S., 2 Ct.Cl. 481, reversed on other grounds 8 Wall. 38, 19 L.Ed. 318.
25 C.J. p 1004 note 91.

75. U.S.—Fennerty v. U. S., 3 Ct.Cl. 437.

76. U.S.—U. S. v. North American Transp. & T. Co., 40 S.Ct. 518, 253 U.S. 330, 64 L.Ed. 935, affirming 53 Ct.Cl. 424—Olympia Shipping Corporation v. U. S., 71 Ct.Cl. 251, certiorari denied U. S. v. Olympia Shipping Corporation, 52 S.Ct. 196, 284 U.S. 680, 76 L.Ed. 574.
D.C.—Gray v. District of Columbia, 1 App.D.C. 20.
25 C.J. p 1005 note 97.

77. U.S.—Tillou v. U. S., 1 Ct.Cl. 220, reversed on other grounds 6 Wall. 484, 18 L.Ed. 920.
25 C.J. p 1005 note 98.

78. U.S.—Meuer Steel Barrel Co. v. U. S., 85 Ct.Cl. 554, certiorari denied 58 S.Ct. 280, 302 U.S. 754, 82 L.Ed. 583.

79. U.S.—Benedict v. U. S., 66 Ct.Cl. 437.

It is proper to dismiss a claim where it is shown that plaintiff could not recover thereon,[80] as where there was an action pending in the district court based on the claim at the time when it was filed,[81] and it is proper to dismiss a claim which was disallowed by the southern claims commission and resubmitted to the court on the same evidence.[82] Where, under applicable statute, the court is in doubt as to whether to dismiss a case or to report the facts to congress without rendering judgment, it will pursue the latter course.[83]

Reinstatement. The court has announced that it will not indulge in the practice of allowing a discontinuance or dismissal coupled with any right of restoration to the docket.[84] Where a case has been dismissed for want of prosecution, it passes out of the jurisdiction of the court at the end of the term during which the dismissal is made, unless a motion for reinstatement is made during that term,[85] and after dismissal of a claim transmitted by congress and notice of its dismissal, the court loses control thereof[86] and a tardy motion for reinstatement will be denied.[87]

Where an Indian depredation case was dismissed for want of prosecution, a motion to reinstate under the statute requiring reinstatement of such cases which had been dismissed for want of proof of citizenship should show, from the evidence taken and filed or the court records, that the case would have failed on the jurisdictional issue of citizenship, and that this was the reason of claimant's failure to resist the motion to dismiss for want of prosecution.[88]

Following dismissal of a claim on plaintiff's motion after defendant's failure to file any pleadings, the order of dismissal will not be vacated on defendant's motion to permit it to file a counterclaim, especially not where plaintiff on the day following dismissal entered suit in a state court on the same cause of action.[89]

c. Conformity to Pleadings, Proof, and Findings

The judgment should be in substantial conformity to the pleadings and evidence and find support in the findings made.

While the relief granted must conform to the pleadings,[90] a substantial conformity is sufficient.[91] The judgment must accord with, and be supported by, the findings[92] and the evidence,[93] and the facts found must be sufficient to support the judgment.[94]

80. U.S.—Lamar v. U. S., 92 Ct.Cl. 249.

Hopeless confusion of record

Where stipulation in cotton linters contract case recites that the defendant is indebted to the Macon County Oil Company, a corporation, which is the owner of the claim in suit, but where it is also conceded in said stipulation that there never was any such corporation, and motion to substitute a trustee as plaintiff is based on the fact that no such corporation ever existed although it is also set forth that said corporation entered into the contract in suit, it is held that the record is in such hopeless confusion as to the rights of the parties plaintiff that to render judgment in favor of said trustee would conflict with the terms of the stipulation, and the petition is accordingly dismissed.—Lamar v. U. S., supra.

Dismissal on equal division of court see supra subdivision b (1) of this section.

81. U.S.—New Jersey Worsted Mills v. U. S., Ct.Cl., 9 F.Supp. 605.

82. U.S.—Stern v. U. S., 32 Ct.Cl. 533.

83. U.S.—Bodkin v. U. S., 67 Ct.Cl. 281, certiorari denied 50 S.Ct. 29, 280 U.S. 572, 74 L.Ed. 624.

84. U.S.—McMullin v. U. S., 49 Ct. Cl. 379.

85. U.S.—In re Indian Depredation Cases, 50 Ct.Cl. 395.
25 C.J. p 1005 note 3.

86. U.S.—Stanton v. U. S., 57 Ct.Cl. 120.

87. U.S.—Stanton v. U. S., supra.

Six years' delay

Where a claim referred by congress to the court of claims under the Bowman Act, U.S.Comp.St. §§ 1139, 1175–1178, remains on the docket for an unreasonable length of time without preparation for trial, and after dismissal for nonprosecution no steps for its reinstatement are taken for six years, a motion for reinstatement will not be allowed.—Stanton v. U. S., supra.

88. U.S.—In re Indian Depredation Cases, 50 Ct.Cl. 395.

89. U.S.—In re Skinner & Eddy Corporation, Ct.Cl., 44 S.Ct. 446, 265 U. S. 86, 68 L.Ed. 912.

90. U.S.—Gerding v. U. S., 28 Ct.Cl. 531.

Failure to ask affirmative relief against government

Where the petition is for an ascertainment of the amount, if any, due to the United States, the court cannot go further than to adjudge that petitioner owes the government nothing, and cannot render a money judgment in his favor.—Gerding v. U. S., supra.

91. U.S.—Electric Boat Co. v. U. S., 66 Ct.Cl. 333.

Absence of count for particular relief not fatal

The court of claims is authorized to award judgment in accordance with the facts stated and proved, notwithstanding absence of a count in the pleadings praying for the particular recovery given.—Electric Boat Co. v. U. S., supra.

92. U.S.—Cape Romain Land & Improvement Co. v. U. S., 89 Ct.Cl. 1.

Accord shown

Special finding that releases executed on completion of fixed price contracts with government were not intended to release government from liability for wage increases in contractor's plant warranted judgment for contractor.—E. W. Bliss Co. v. U. S., 70 Ct.Cl. 176.

93. U.S.—Steel Products Engineering Co. v. U. S., 90 Ct.Cl. 513.

94. U.S.—U. S. v. Stratton, Ala., 88 F. 54, 31 C.C.A. 384—Gallagher v. District of Columbia, 18 Ct.Cl. 705.

Facts held insufficient to support judgment

(1) Under statute, providing that every claim against the United States cognizable by the court of claims shall be barred unless the petition is filed within six years after the claim first accrued, where, in an action for a royalty under an implied contract for the use of an alleged improve-

d. Judgment by Consent or on Default

The court of claims may enter judgment on consent or by default where, and only where, the evidence so warrants.

The court of claims may enter judgment on stipulation of the parties if, after examination of the record, it believes that the evidence adequately supports the judgment.[95]

Where the attorney general fails to file a plea, claimant cannot have judgment by default, but must establish his claim by evidence.[96]

e. Amendment or Correction of Judgment

The judgment is open to amendment or correction on proper grounds, but may not be changed by the court of claims after affirmance by the United States supreme court. The judgment of the court of claims is final as against an application for rehearing unless one of the judges participating in the judgment rendered subsequently desires a reargument.

Where it clearly appears that competent evidence was overlooked by the court, or that its judgment or findings were based on fraudulent testimony or procured through the misconduct of either party, the court can correct the judgment or the findings as it would have done at the time if the real facts had been known;[97] but the court cannot change a decree after it has been affirmed by the supreme court.[98] Where by statute congress directed the court to reopen a claim and correct an error in rendering judgment on its being so found, it being apparent that congress supposed that an error had been made and the evidence not being inconsistent therewith, the judgment was corrected.[99]

Rehearing. In the absence of oversight or misapprehension, in the nature of a mistake of fact, a decision of the court of claims on a point must be regarded as final unless one of the judges joining in rendering the judgment complained of should subsequently desire a reargument after examination of the grounds on which it is sought; in the latter case the motion presented at chambers will be referred to the law docket; otherwise it will be denied at chambers.[1]

f. Payment and Enforcement of Judgment

Payment of a judgment should be effected in accordance with requirements of statute and may be suspended pending performance of essential conditions. While there is no provision generally for enforcement of a judgment against the United States, the government is in duty bound to make an appropriation to satisfy it.

Where the statute provides that payment shall be a full discharge of claims against the government, the court of claims cannot afterward correct the amount of the judgment;[2] nor can a claim be reexamined by the court by virtue of a second reference where the claim is paid, since by such payment it becomes absolutely extinguished.[3] Acceptance of payment of a judgment, rendered on report of a commissioner, waives an error of computation by the latter.[4] Payment of a judgment should be effected in compliance with its provisions.[5]

ment in projectiles, the facts found do not show what number, if any, of such projectiles was manufactured within six years from the filing of the petition, or what number, if any, of such projectiles was purchased or used during that period, claimant cannot recover.—Henry v. U. S., 38 Ct.Cl. 635.

(2) Judgment in action on claim by Seminole Nation against United States was held not sustainable as to items not supported by definite fact findings extending to all issues and which, unaided by statements in court's conclusions of law or its opinion, were clearly sufficient to entitle plaintiff to recover.—U. S. v. Seminole Nation, 57 S.Ct. 283, 299 U. S. 417, 81 L.Ed. 316, reversing Seminole Nation v. U. S., 82 Ct.Cl. 135, certiorari granted U. S. v. Seminole Nation, 57 S.Ct. 23, 299 U.S. 526, 81 L.Ed. 387.

95. U.S.—Old Colony R. Co. v. U. S., 56 Ct.Cl. 326.

96. U.S.—King v. U. S., 31 Ct.Cl. 304.

97. U.S.—Rymarkiewicz v. U. S., 42 Ct.Cl. 1.
25 C.J. p 1006 note 11.

98. U.S.—Eastern Cherokees v. U. S., 45 Ct.Cl. 104, affirmed 32 S.Ct. 707, 225 U.S. 572, 56 L.Ed. 1212.

99. U.S.—Grant v. U. S., 18 Ct.Cl. 732, appeal dismissed 3 S.Ct. 585, 110 U.S. 225, 28 L.Ed. 127.

1. U.S.—Fendall v. U. S., 12 Ct.Cl. 305.

2. U.S.—Russell v. U. S., 15 Ct.Cl. 168.
25 C.J. p 1006 note 16.

Payment as full discharge

Under Judicial Code § 178, 28 U.S.C.A. § 285, payment of the amount awarded by judgment of the court in any case decided by the court is "a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy."—Ruf v. U. S., 87 Ct.Cl. 248.

Release of errors in judgment

Acceptance by plaintiff of the amount awarded under judgment in a prior case operated not only as a full discharge by the United States of all claim and demand touching any of the matters involved, but it was also a release of all errors in the judgment.—Ruf v. U. S., supra.

3. U.S.—Pilkington v. U. S., 36 Ct. Cl. 357.
25 C.J. p 1006 note 17.

4. U.S.—Michot v. U. S., 31 Ct.Cl. 299.

5. U.S.—Cherokee Nation v. U. S., 85 Ct.Cl. 76.

Distribution of funds to individual Indians

(1) Where congress by special statute authorized suit in the court of claims in behalf of the Cherokee freedmen against the Cherokee Nation to determine whether the freedmen were entitled to share in certain Cherokee funds, and provided that the judgment of the court for any sum of money found due the freedmen should be enforced by the court against the Cherokee Nation by execution, mandamus, or in any other way the court might see fit, the statute contemplated the determination, and distribution by the court to the individual freedmen, of their several shares in such judgment.—Cherokee Nation v. U. S., 85 Ct.Cl. 76.

(2) Under the jurisdictional act in the case of Whitmire, Trustee v. Cherokee Nation, 30 Ct.Cl. 138, 180,

Suspension of payment. The court may suspend payment of a judgment pending performance of such conditions as may be just under the circumstances.[6]

Enforcement. While the court of claims has no power to enforce a judgment against the United States, the government is in duty bound to respond to such a judgment by way of appropriation.[7]

g. Res Judicata

The doctrine of res judicata applies in the court of claims.

The doctrine of res judicata is applicable in the court of claims;[8] but the United States is not bound by judgments against a state in state courts for moneys expended by the state for the benefit of the United States.[9] A judgment rendered by the court of claims under its general jurisdiction, which stands unvacated and unreversed, is a final judgment[10] and within the rule of res judicata,[11] even though it is founded on an erroneous ruling of law,[12] and a fact or question in issue in a former suit and there judicially determined is conclusively settled as far as concerns the same parties, so that it may not again be litigated in the court of claims.[13] Where a case has been decided by the court of claims and affirmed by the supreme court, it becomes res judicata of the questions involved and will not be reopened, even though a subsequent act of congress purportedly gives the court jurisdiction to do so.[14] Dismissal of a claim for insufficiency of evidence does not preclude filing of a similar claim at a later period when the evidence may be sufficient to support it,[15] and a judgment

for the determination and enforcement of the rights of the Cherokee freedmen in certain funds of the Nation, the method of ascertaining who were the proper parties to receive the money found due the freedmen was left entirely to the discretion of the court; and the Kern-Clifton roll of the freedmen made under the decree of the court for the distribution of the judgment was a valid roll for that purpose, and was in nowise affected by the subsequent Dawes commission roll made for a different purpose, as of a much later date, and in a different manner. —Cherokee Nation v. U. S., supra.

6. U.S.—Morrell v. U. S., 57 Ct.Cl. 379.

Filing of survey and execution of deed

Where damages are awarded for overflowing and permanently rendering worthless plaintiff's lands by government work, in improvement of navigation, payment of the judgment will be suspended until plaintiff files a survey of such lands and executes a good and sufficient deed therefor to the United States.—Morrell v. U. S., supra.

Release of encumbrances

Where just compensation for taking property is determined and allowed, judgment may be suspended until plaintiff files releases of encumbrances.—Shields v. U. S., 65 Ct.Cl. 712.

7. U.S.—Ayres v. U. S., 44 Ct.Cl. 110—U. S. v. Moore, 10 D.C. 226.

8. U.S.—Le More v. U. S., 35 Ct. Cl. 9.

25 C.J. p 1003 note 62.

9. U.S.—Pennsylvania v. U. S., 36 Ct.Cl. 131.

10. U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447—Adams v. U. S., 36 Ct.Cl. 104.

25 C.J. p 1005 note 8.

Review of decisions of court of claims see supra § 235.

11. U.S.—Du Bose v. U. S., 65 Ct. Cl. 142.

25 C.J. p 1005 note 9—34 C.J. p 876 note 84 [a].

Res judicata generally see the C.J. S. title Judgments §§ 592–848, also 34 C.J. p 743 note 70–p 1080 note 97.

12. U.S.—Adams v. U. S., 36 Ct.Cl. 104.

25 C.J. p 1005 note 10.

13. U.S.—Ruf v. U. S., 87 Ct.Cl. 248.

Computation of rental allowance concluded

(1) Where computation by comptroller general, submitted pursuant to a call by plaintiff under Judicial Code § 164, 28 U.S.C.A. § 272, was accepted by plaintiff and he files a motion for judgment conforming with such computation, the correctness of which was not questioned, and judgment in accordance therewith was entered, plaintiff is precluded from maintaining a new suit, notwithstanding his evidence in the prior case failed to show the correct amount.—Ruf v. U. S., supra.

(2) Where the comptroller general was in error in not including an increased rental allowance for a particular period, this does not give rise to a new question which will sustain a new suit, where the comptroller general was plaintiff's witness in the prior suit and plaintiff was bound by his evidence.—Ruf v. U. S., supra.

Particular items

(1) Items of a claim that were included in a prior suit in court of claims, in which judgment was rendered, are res judicata, and there can be recovery thereon.—Southern Pac. Co. v. U. S., 59 Ct.Cl. 97—St. Louis, B. & M. Ry. Co. v. U. S., 59 Ct.Cl. 82, affirmed in part and reversed in part on other grounds 45 S.Ct. 472, 268 U. S. 169, 69 L.Ed. 472.

(2) Items formerly sued on, but abandoned, could not be again declared on in a subsequent action, and items accruing before the commencement of the former action were within the allegations of the petition in that case, were properly to be declared on therein, and, in absence of a proper showing, could not be declared on subsequently.—Louisville & N. R. Co. v. U. S., 54 Ct.Cl. 161.

Setting up two causes of action and proving one

Where plaintiff filed a petition alleging two causes of action, one of which is established by proof and as to the other of which no proof is offered, and judgment is rendered thereon, and same is paid by appropriation of congress, and received without protest, other cause of action is res judicata, and cannot be made subject matter of a subsequent suit it being assumed that the same subject matter is involved.—Seaboard Air Line Ry. v. U. S., 59 Ct.Cl. 250, affirmed 47 S.Ct. 474, 273 U.S. 672, 71 L.Ed. 833.

14. U.S.—Cherokee Nation v. U. S., 59 Ct.Cl. 862, affirmed 46 S.Ct. 428, 270 U.S. 476, 70 L.Ed. 694.

15. U.S.—Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S.Ct. 135, 260 U.S. 327, 67 L.Ed. 287, reversing 56 Ct.Cl. 494.

Renewal of claim after lapse of years

Fact that the evidence was insufficient in 1905, at a prior suit by claimant, to show an abiding purpose on the part of the government to discharge coast defense guns across claimant's land at will, does not show that it may not be sufficient in 1922.—Portsmouth Harbor Land & Hotel Co. v. U. S., 43 S.Ct. 135, 260 U.S. 327, 67 L.Ed. 287, reversing 56 Ct.Cl. 494.

based on false and fraudulent testimony is not conclusive on a rereference.[16]

§ 354. New Trial

a. On motion of claimant
b. On motion of United States

a. On Motion of Claimant

The court of claims may grant plaintiff's motion for new trial where timely made and supported by a proper showing of the existence of sufficient grounds, and may in its discretion entertain subsequent motions, although a rule permitting subsequent motions is not to be construed as allowing an unlimited number of such motions, and a subsequent motion made on grounds already found insufficient on a prior motion may be denied.

When judgment is rendered against a claimant, the court may grant a new trial on timely motion[17] and a proper showing[18] for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.[19]

Amended and subsequent motions. An amendment striking nonessential matter does not impair the motion.[20] The court of claims may in its discretion permit the filing of a second motion for a new trial on a showing that the court has inadvertently committed some error or on other adequate ground, although the motion is tardily made under the rules,[21] but, in the absence of such a showing, the motion will be overruled.[22] Where a subsequent motion for new trial is made under the same circumstances and based on the same grounds as one previously denied, denial of the prior motion renders the matter res judicata,[23] and the court lacks jurisdiction to consider the subsequent motion repeated on the same grounds.[24] A rule limiting the number of motions for new trial except by leave of court will not be construed as permissive of innumerable motions with such permission.[25]

b. On Motion of United States

On motion of the United States a new trial may be granted under the rules of the court or on grounds specified in the Judicial Code, as for fraud, wrong, or injustice done the United States.

The United States may as of right and without prior leave of court move for a new trial under the provisions of Judicial Code § 175, 28 U.S.C.A. § 282,[26] which permits the granting of a new trial on due showing of fraud, wrong, or injustice done the United States. On such a motion the court may in its discretion[27] stay judgment and grant a new trial at any time within the period prescribed by the statute,[28] even though an appeal is then pending in the supreme court,[29] and on due showing of the statutory grounds of fraud, wrong, or injustice

16. U.S.—Hartiens v. U. S., 42 Ct.Cl. 42.
34 C.J. p 876 note 84 [a] (2).

17. U.S.—First Nat. Bank v. U. S., Ct.Cl., 9 F.Supp. 424, denying motion 8 F.Supp. 484, certiorari denied 55 S.Ct. 544, 294 U.S. 717, 79 L. Ed. 1250.
25 C.J. p 1006 note 20 [a].

Motion after expiration of term
A motion for new trial after expiration of the term when the judgment became final may not be allowed unless it appears that the judgment resulted from imposition and fraud on the court.—Pope v. U. S., 81 Ct.Cl. 658.

18. U.S.—Murphy v. U. S., 15 Ct.Cl. 217.
25 C.J. p 1006 note 20 [b].

Affidavits held insufficient for failure to show why testimony of witness urged as ground for new trial was not produced on original trial. —Glasgow Presbyterian Church v. U. S., 44 Ct.Cl. 408.
25 C.J. p 1006 note 20 [e].

19. U.S.—Montoya v. U. S., 32 Ct. Cl. 71—Nance v. U. S., 23 Ct.Cl. 463—Deeson v. U. S., 6 Ct.Cl. 227.
25 C.J. p 1006 note 21.

20. U.S.—McCollum v. U. S., 33 Ct. Cl. 469.

Striking reference to statute
An amendment to a motion for a new trial, striking out the words "in accordance with the provisions of section 1088 of the Revised Statutes," does not impair the motion, if it is authorized by other sections of the revised statutes.—McCollum v. U. S., 33 Ct.Cl. 469.

21. U.S.—First Nat. Bank v. U. S., Ct.Cl., 9 F.Supp. 424, denying motion 8 F.Supp. 484, certiorari denied 55 S.Ct. 544, 294 U.S. 717, 79 L.Ed. 1250.

22. U.S.—First Nat. Bank v. U. S., Ct.Cl., 9 F.Supp. 424, denying motion 8 F.Supp. 484, certiorari denied 55 S.Ct. 544, 294 U.S. 717, 79 L.Ed. 1250.

23. U.S.—Child v. U. S., 6 Ct.Cl. 44.

24. U.S.—Pope v. U. S., 86 Ct.Cl. 18, certiorari denied 58 S.Ct. 761, 303 U.S. 654, 82 L.Ed. 1114—Pope v. U. S., 81 Ct.Cl. 658.

25. U.S.—Winton v. Amos, 52 Ct. Cl. 90, 98.

26. U.S.—U. S. v. Seminole Nation, 57 S.Ct. 283, 299 U.S. 417, 81 L.Ed. 316, reversing Seminole Nation v. U. S., 82 Ct.Cl. 135, certiorari granted U. S. v. Seminole Nation, 57 S. Ct. 23, 299 U.S. 526, 81 L.Ed. 387.

27. U.S.—Bush v. U. S., 55 Ct.Cl. 485.

"The word 'may,' as used in the statute, means 'shall' under the principle that where a statute directs the doing of a thing for the sake of justice or the public good the word may is the same as the word shall. . . . The statute does not so much give the court discretion as it does confer a power, and this power must be exercised whenever a prima facie case is shown."—Purcell Envelope Co. v. U. S., 48 Ct.Cl. 66, 70.

28. U.S.—Sanderson v. U. S., Ct.Cl., 28 S.Ct. 661, 210 U.S. 168, 52 L.Ed. 1007.
25 C.J. p 1006 note 22, p 1007 note 28.

New trial in Indian depredation cases
U.S.—Sanderson v. U. S., Ct.Cl., 28 S. Ct. 661, 210 U.S. 168, 52 L.Ed. 1007 —McCollum v. U. S., 33 Ct.Cl. 469.
65 C.J. p 1384 note 49.

29. U.S.—Volk v. U. S., 56 Ct.Cl. 395.
25 C.J. p 1006 note 23.

Provision peculiar to court of claims
The provision of Judicial Code § 175, permitting the grant of a new trial while appeal is pending in the supreme court, is a provision peculiar to the court of claims.—Belknap v. U. S., Ct.Cl., 14 S.Ct. 183, 150 U.S. 588, 37 L.Ed. 1191—Volk v. U. S., 56 Ct.Cl. 395.

done the United States.[30] The injustice warranting a new trial under this section must be a legal injustice, and the word "injustice" will not be so construed as to permit grant of a new trial where a carefully prepared and considered judgment has been rendered against the United States which the government law officers deem to be unsound, as such a judgment, if erroneous, may be corrected on appeal.[31] The motion will be denied where the proof fails to show the existence of the statutory grounds.[32]

Under rules. In a proper case a motion for new trial may be granted on application of the United States under the rules of court.[33]

XVI. CONCURRENT AND CONFLICTING JURISDICTION

§ 355. In General

a. Jurisdiction of particular courts
b. Priority of jurisdiction
c. Property in custodia legis

a. Jurisdiction of Particular Courts

Questions as to concurrent and conflicting jurisdiction between the various inferior federal courts and between such courts and the supreme court are governed by the provisions of the federal Constitution and the acts of congress.

The jurisdiction of particular federal courts, such as the district courts[34] or the customs court,[35] as to cases of a particular character is exclusive where made so by act of congress. However, the mere grant of jurisdiction to a particular court does not alone imply that its jurisdiction shall be exclusive.[36] Where a court has exclusive jurisdiction, the fact that relief is denied in the proper forum will not confer jurisdiction on another court.[37] The federal district court in one state exercises jurisdiction independent of, and under sovereignty different from, sovereignty of another state.[38]

Actions to which state is a party. The original jurisdiction conferred on the supreme court by the constitution in an action to which the state is a party is not exclusive where congress has indicated an intention to confer jurisdiction on other courts,[39] as by statutes conferring a concurrent ju-

30. U.S.—Electric Boat Co. v. U. S., 55 Ct.Cl. 497.
25 C.J. p 1007 notes 29–31.

Nature of evidence required to show injustice, wrong, or fraud done the United States.—Goodrich v. U. S., 48 Ct.Cl. 65.
25 C.J. p 1007 note 30 [a].

31. U.S.—Pocono Pines Assembly Hotels Co. v. U. S., 73 Ct.Cl. 447.

32. U.S.—Volk v. U. S., 56 Ct.Cl. 395—Bush v. U. S., 55 Ct.Cl. 485.
25 C.J. p 1007 note 31 [b]–[d].

33. U.S.—Electric Boat Co. v. U. S., 55 Ct.Cl. 497.

Newly discovered evidence
Where facts materially affecting the issues in a case were unknown to the attorney general or his assistant in charge at the trial thereof, it is good ground for the allowance of a motion to take testimony as to such facts under the rules of the court allowing new trials for after-discovered evidence.—Electric Boat Co. v. U. S., supra.

34. U.S.—U. S. Bedding Co. v. U. S., 45 S.Ct. 182, 266 U.S. 491, 69 L.Ed. 399, affirming 58 Ct.Cl. 341—Law v. U. S., 45 S.Ct. 175, 266 U.S. 494, 69 L.Ed. 401, affirming, C.C.A., U. S. v. Law, 299 F. 61, reversing, D. C., Law v. U. S., 290 F. 972—Salzer v. U. S., D.C.N.Y., 300 F. 764, affirmed, C.C.A., 300 F. 767, error and petition dismissed 47 S.Ct. 90, 273 U.S. 702, 771, 71 L.Ed. 884—U. S. v. McGovern, C.C.A.Mont., 299 F. 302, affirming, D.C., McGovern v. U. S., 294 F. 108, and error dismissed 45 S.Ct. 351, 267 U.S. 608, 69 L.Ed. 812, and 45 S.Ct. 515, 268 U.S. 708, 69 L.Ed. 1169.
Exclusive jurisdiction of civil causes in admiralty see Admiralty § 3 a.
Jurisdiction of district courts generally see supra §§ 308–311.

Matters antedating bankruptcy
District court and not bankruptcy court was held proper forum for judgment debtor to test right of equitable set-off as against assignee of judgment before judgment creditor's bankruptcy.—Turner v. Dickey, D.C.Tenn., 3 F.Supp. 360, affirmed, C.C.A., Dickey v. Turner, 64 F.2d 1012.

35. U.S.—David L. Moss Co. v. U. S., Cust. & Pat.App., 103 F.2d 395—Cottman Co. v. Dailey, D.C.Md., 20 F.Supp. 142, affirmed, C.C.A., 94 F. 2d 85.
Exclusive jurisdiction of customs court of actions to recover customs duties improperly exacted see Customs Duties § 236.

36. U.S.—U. S. v. U. S. Fidelity & Guaranty Co., C.C.A.Okl., 106 F.2d 804, modifying, D.C., 24 F.Supp. 961, certiorari granted 60 S.Ct. 383, 308 U.S. 548, 84 L.Ed. 461, reversed on other grounds 60 S.Ct. 653, 309 U.S. 506, 84 L.Ed. 894.
Concurrent and conflicting jurisdiction generally see Courts §§ 486–556.

Jurisdiction of action for penalties for violation of Contract Labor Law, conferred on federal district courts, is not exclusive.—Oehlers v. Hartwig, 5 Philippine 487—2 C.J. p 1090 note 30.

37. U.S.—Identification Devices v. U. S., App.D.C., 121 F.2d 895, certiorari denied 62 S.Ct. 63, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 174, 314 U.S. 710, 86 L.Ed. 566—British American Tobacco Co. v. U. S., 89 Ct.Cl. 438, certiorari denied 60 S.Ct. 974, 310 U.S. 627, 84 L.Ed. 1398.

38. U.S.—Moore v. Mitchell, 50 S.Ct. 175, 281 U.S. 18, 74 L.Ed. 673, affirming, C.C.A., 30 F.2d 600, 65 A.L.R. 1354, affirming, D.C., 28 F. 2d 997, and certiorari granted 49 S. Ct. 513, 279 U.S. 834, 73 L.Ed. 982.

Judgment on writ of scire facias
A California federal district court could not grant judgment on writ of scire facias, on a forfeited bail bond given in prosecution in New York federal district court, where California court had never had possession of the record.—Western Surety Co. v. U. S., C.C.A.Cal., 100 F.2d 88.

39. U.S.—U. S. v. Ladley, D.C.Idaho, 51 F.2d 756—U. S. v. 4,450.72 Acres of Land, Clearwater County, State of Minnesota, D.C.Minn., 27 F. Supp. 167—U. S. v. Forty Acres, More or Less, of Land, Described as NE¼ NW¼, Sec. 16, Township 7 North, Range 36 East of Boise Meridian, in Jefferson County, D.C. Idaho, 24 F.Supp. 390.
Original jurisdiction of supreme court generally see supra §§ 193–198.

risdiction with respect to such an action on the district courts.[40]

Claims against the United States. Most cases against the United States are settled in the court of claims[41] and, under statutes giving the consent of the United States to be sued on certain claims only in the court of claims, the jurisdiction of such court is exclusive;[42] but the fact that the court of claims is given jurisdiction over certain claims against the United States does not prevent concurrent jurisdiction over such claims being granted to the district courts,[43] and statutes conferring concurrent jurisdiction of such claims on the district courts and the court of claims have been applied in a number of cases.[44]

Crimes and offenses against the United States. The statutory grant of original jurisdiction to district courts of all crimes and offenses cognizable under the authority of the United States is not an unconstitutional intrusion on the original jurisdiction of the supreme court under the constitution, but is merely a valid grant of concurrent jurisdiction.[45]

40. U.S.—State of Georgia v. Evans, 62 S.Ct. 972, 316 U.S. 159, 86 L.Ed. 1346, reversing, C.C.A., 123 F.2d 57, certiorari granted 62 S.Ct. 796, 315 U.S. 792, 86 L.Ed. 1195—U. S. v. State of California, 56 S.Ct. 421, 297 U.S. 175, 80 L.Ed. 567, reversing, C.C.A., State of California v. U. S., 75 F.2d 41, certiorari granted U. S. v State of California, 56 S.Ct. 87, 296 U.S. 554, 80 L.Ed. 391—U. S. v. Carbon County Land Co., C.C.A.Utah, 46 F.2d 980, certiorari granted State of Utah v. U. S., 51 S.Ct. 658, 283 U.S. 816, 75 L.Ed. 1432, affirmed 52 S.Ct. 232, 284 U.S. 534, 76 L.Ed. 469.

41. Puerto Rico.—Correa v. Bruner, 12 Puerto Rico Fed. 223.

65 C.J. p 1417 note 60½.

42. U.S.—Nassau Smelting & Refining Works v. U. S., N.Y., 45 S. Ct. 25, 266 U.S. 101, 69 L.Ed. 190—Identification Devices v. U. S., App. D.C., 121 F.2d 895, certiorari denied 62 S.Ct. 63, 314 U.S. 615, 86 L.Ed. 495, rehearing denied 62 S.Ct. 174, 314 U.S. 710, 86 L.Ed. 566—U. S. Shipping Board Merchant Fleet Corporation v. First Nat. S. S. Co., 119 F.2d 6, 73 App.D.C. 237, certiorari denied First Nat. S. S. Co. v. U. S. Shipping Board Merchant Fleet Corporation, 62 S.Ct. 60, 314 U.S. 619, 86 L.Ed. 498—Yuhasz v. U. S., C.C.A.Ind., 109 F.2d 467—Broome v. Hardie-Tynes Mfg. Co., C.C.A.Ala., 92 F.2d 886—U. S. v. Tacoma Oriental S. S. Co., C.C.A.Wash., 86 F.2d 363—Hammond v. U. S., Ct.Cl. 42 F. Supp. 284.

Jurisdiction of court of claims generally see supra §§ 328–340.

Patented invention unlawfully used by United States and others

Under federal statute providing that, where a patented invention shall be used by or manufactured by or for the United States without lawful right, the remedy of the patentee shall be by suit in the court of claims, a district court is without jurisdiction to award damages for infringement by articles made for the United States under a contract by which it agreed to protect the manufacturer against damages for infringement, but it may award an injunction and damages where defendant has also sold such infringing articles to individuals.—Floyd Smith Aerial Equipment Co. v. Irving Air Chute Co., D.C.N.Y., 276 F. 834.

43. U.S.—Benedict v. U. S., D.C.N.Y., 271 F. 714.

44. U.S.—Ross Packing Co. v. U. S., D.C.Wash., 42 F.Supp. 932—Byron Jackson Co. v. U. S., D.C.Cal., 35 F.Supp. 665—Sochis v. U. S., D.C. Pa., 266 F. 446.

25 C.J. p 975 notes 8, 18.

Concurrent:

Admiralty jurisdiction of United States court of claims and federal district courts see Admiralty § 3 a.

Jurisdiction of federal district courts and court of claims of suits against United States to recover drawback see Customs Duties § 227 f.

Statute strictly construed

U.S.—U. S. v. Sherwood, N.Y., 61 S. Ct. 767, 312 U.S. 584, 85 L.Ed. 1058, reversing, C.C.A., Sherwood v. U. S., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S.Ct. 171, 311 U.S. 640, 85 L.Ed. 408.

The purpose of statute giving district courts concurrent jurisdiction with court of claims over claims against the United States is to provide additional opportunity for determination of claims and to permit suit to be brought in district where parties reside, and statute manifests intent to provide adequate opportunity for expeditious and orderly determination of such claims, expanding jurisdiction of court of claims and giving district courts general authority to hear and determine such claims. It creates an integrated jurisdictional plan, whose essential features are uniformity and equality in substantial rights and privileges.—Bates Mfg. Co. v. U. S., Mass., 58 S.Ct. 694, 303 U.S. 567, 82 L.Ed. 1020, reversing, C.C.A., 93 F.2d 721, affirming 19 F.Supp. 526, certiorari granted 58 S.Ct. 521, 303 U.S. 628, 82 L.Ed. 1089.

Jurisdiction of district court limited by that of court of claims

The provisions of the Tucker Act conferring jurisdiction on the district courts concurrent with the court of claims of claims on any contract with the United States or for damages in cases not sounding in tort does no more than authorize a district court to sit as a court of claims, and the authority thus given to adjudicate claims against the United States does not extend to any action which could not be maintained in the court of claims.—U. S. v. Sherwood, N.Y., 61 S.Ct. 767, 312 U.S. 584, 85 L.Ed. 1058, reversing, C.C.A., Sherwood v. U. S., 112 F.2d 587, certiorari granted U. S. v. Sherwood, 61 S.Ct. 171, 311 U.S. 640, 85 L.Ed. 408—Lowe v. U. S., D.C.N.J., 37 F.Supp. 817.

Suits against government and agent of government

(1) Jud.Code § 154, 28 U.S.C.A. § 260, forbidding prosecution in court of claims of any claim for which suit is pending in any other court against an agent of the government, was held not to forbid suit in court of claims where another suit against government itself was pending in another court on same cause of action.—Matson Nav. Co. v. U. S., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515.

(2) But where the only distinction between two suits, one instituted in the United States district court against an agent of the United States and the other instituted in the court of claims against the United States, was that the action in the district court was made to sound in tort and the action in the court of claims was alleged on contract, the facts existing and operating in both cases being the same, it was held that under such statute and the decision in Corona Coal Co. v. U. S., 44 S.Ct. 156, 263 U.S. 537, 68 L.Ed. 431, the court of claims was without jurisdiction, the case in the district court having been prosecuted to a conclusion.—British American Tobacco Co. v. U. S., 89 Ct.Cl. 438, certiorari denied 60 S.Ct. 974, 310 U.S. 627, 84 L.Ed. 1398.

45. U.S.—Farnsworth v. Sanford, C. C.A.Ga., 115 F.2d 375, affirming, D. C., 33 F.Supp. 400, certiorari de-

Review of administrative boards and commissions. The exclusive statutory jurisdiction of the circuit court of appeals to review orders of various administrative boards and commissions has been upheld in a number of cases.[46] The original jurisdiction acquired by the circuit court of appeals in actions involving the National Labor Relations Act, 29 U.S.C.A. § 151 et seq, is exclusively with respect to provisions authorizing such court to enforce, modify, or set aside orders of the board,[47] and an action against the government to recover moneys paid to the federal treasury pursuant to an order of the board directing payment was properly brought in the district court, and not in the circuit court of appeals.[48]

District court and island territorial courts. With respect to matters which may be within the jurisdiction of either court, the United States district court and the island territorial courts stand on an equality, there being no question of relative dignity between them, and the court which first acquires jurisdiction will retain it.[49]

United States court for China. The United States court for China had jurisdiction concurrent with that of the consular courts within their limits.[50]

b. Priority of Jurisdiction

Where actions between the same parties relating to the same subject matter are instituted in different federal courts of concurrent jurisdiction, the court which first acquired jurisdiction will ordinarily retain it and dispose of the entire controversy.

Where actions between the same parties or their privies, relating to the same subject matter, are instituted in different United States courts of concurrent jurisdiction, the court which first acquired jurisdiction of the parties and the cause of action is entitled to retain such jurisdiction and dispose of the entire controversy.[51] In applying this rule, however, the courts are not at liberty to disregard

nied 61 S.Ct. 1109, 313 U.S. 586, 85 L.Ed. 1541, rehearing denied 62 S. Ct. 54, 314 U.S. 708, 86 L.Ed. 565.

Criminal jurisdiction of United States courts generally see Criminal Law § 124.

Impairing or enlarging criminal jurisdiction conferred by constitution generally see Criminal Law § 117.

Statutes conferring concurrent jurisdiction of crimes generally see Criminal Law § 119.

46. **Orders issued by Securities and Exchange Commission**
U.S.—Okin v. Securities and Exchange Commission, D.C.N.Y., 46 F.Supp. 481.

Orders in gas rate cases
U.S.—Natural Gas Pipeline Co of America v. Federal Power Commission, C.C.A., 128 F.2d 481.

47. U.S.—Ross Packing Co. v. U. S., D.C.Wash., 42 F.Supp. 932.

48. U.S.—Ross Packing Co. v. U. S., supra.

49. Puerto Rico.—Grosch v. Central Vannina, 7 Puerto Rico Fed. 55.
25 C.J. p 984 note 81.
Jurisdiction of courts of territories and outlying possessions generally see supra §§ 312–319.

50. U.S.—In re Fitch, (U. S. Ct. for China March 8, 1919) No. 736—Yao Sui-Dong v. American Food Mfg. Co., (U. S. Ct. for China March 8, 1919) No. 740.
25 C.J. p 324 note 27—16 C.J. p 153 note 75 [g] (1).
Jurisdiction of United States court for China generally see supra § 322.

51. U.S.—Standard Oil Co. v. National Labor Relations Board, C.C. A., 114 F.2d 743—Hicks v. National Labor Relations Board, C.C.A., 100 F.2d 804, certiorari denied 60 S.Ct. 115, 308 U.S. 554, 84 L.Ed. 466—International Co. of St. Louis v. Occidental Life Ins. Co. of California, C.C.A.Mo., 98 F.2d 138, certiorari denied International Co. of St. Louis v. Accidental Life Ins. Co., 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 412—Alabama Power Co. v. Tennessee Valley Authority, C.C.A. Ala., 92 F.2d 412, reversing, D.C., Ashwander v. Tennessee Valley Authority, 19 F.Supp. 190—In re Georgia Power Co., C.C.A.Ga., 89 F.2d 218, affirming, D.C., Georgia Power Co. v. Tennessee Valley Authority, 17 F.Supp. 769, certiorari denied 58 S.Ct. 11, 302 U.S. 692, 82 L.Ed. 535, and Georgia Power Co. v. Underwood, 58 S.Ct. 11, 302 U.S. 693, 82 L.Ed. 535—Stark v. Texas Co., C.C.A.Fla., 88 F.2d 182—National Labor Relations Board v. Friedman-Harry Marks Clothing Co., C.C.A., 83 F.2d 731—Gold Seal Electrical Co. v. Radio Corporation of America, C.C.A.Del., 52 F.2d 849—Ohio Steel Foundry Co. v. U. S., Ct.Cl., 38 F.2d 144—Godfrey L. Cabot, Inc., v. Binney & Smith Co., D.C.N.J., 46 F.Supp. 346—Crosley Corporation v. Westinghouse Electric & Mfg. Co., D.C.Pa., 43 F.Supp. 690, reversed on other grounds, C. C.A., 130 F.2d 474—Silvray Lighting v. Versen, D.C.N.Y., 25 F.Supp. 223—The Mandu, D.C.N.Y., 20 F. Supp. 820—Hurd v. Moiles, C.C. Mich., 28 F. 897.
D.C.—U. S. ex rel. Skinner & Eddy Corporation v. McCarl, 8 F.2d 1011, 56 App.D.C. 52, certiorari granted 46 S.Ct. 205, 270 U.S. 636, 70 L.Ed. 773, affirmed 48 S.Ct. 12, 275 U.S. 1, 72 L.Ed. 131—Detroit & T. S. L. R. Co. v. Interstate Commerce Commission, 277 F. 535, 51 App.D.C. 133.
Fla.—Ex parte Sirmans, 116 So. 282, 94 Fla. 832.
25 C.J. p 1007 note 33.
Stay of action by federal court pending determination in another federal court see Actions § 133 c (8).

Commencement of suit as controlling
Priority between courts in point of jurisdiction depends not on day when property comes into their possession, but on day of commencement of first suit in which possession can be taken.—Emil v. Hanley, C.C.A.N.Y., 130 F.2d 369, affirming, D.C., In re John M. Russell, Inc., 43 F.Supp. 128.

Suits for declaratory judgment and patent infringement
(1) Where a federal district court had acquired jurisdiction of plaintiff's action for declaratory judgment as to validity and infringement of defendant's patents before defendant filed an infringement suit involving same patents in another federal district court against plaintiff and plaintiff's customer, which allegedly sold infringing articles, the former court was bound to adjudicate the controversy and to restrain defendant from prosecuting infringement suit until after action for declaratory judgment had been decided.—Triangle Conduit & Cable Co. v. National Electric Products Corporation, C.C.A.Del., 125 F.2d 1008, reversing, D.C., 38 F.Supp. 533, certiorari denied 62 S.Ct. 1046, 316 U.S. 676, 86 L.Ed. 1750—Crosley Corporation v. Hazeltine Corporation, C.C.A.Del., 122 F.2d 925, reversing, D.C., 38 F.Supp. 38.

(2) Where suit for declaratory judgment was filed on June 13, 1938, and patent infringement suit was filed June 29, 1938, jurisdiction of

rights which the law assures to litigants,[52] and comity between courts should always yield to justice.[53] To prevent a conflict between two courts of equal dignity, it is within the discretion of one of them to dismiss the proceeding before it.[54] Where, in proceedings in a federal court of one state, a decree of foreclosure rendered in a federal court of another state is ratified, with a reservation by the former court of certain rights as to the distribution of funds and the priority of liens, such court may determine the priority of claims filed therein on a judgment recovered in such state over the lien of the mortgage,[55] and, where a prisoner is under arrest under the process of a federal court, the jurisdiction of such court must be respected by other federal courts.[56]

The general rule does not extend so far as to preclude actions in different courts, between different parties, even though the same subject matter may be involved, where the court in which the first action was brought could not determine the matters involved in the second action.[57] A fortiori, where the jurisdiction of one federal court has terminated, a subsequent suit relating to the same subject matter may be brought in another federal court.[58]

c. Property in Custodia Legis

Property in the possession of a federal court cannot, without the consent of such court, be interfered with by another federal court of concurrent jurisdiction.

A federal court which has in its possession, control, or equivalent dominion property or funds involved in litigation may exercise exclusive jurisdiction over such property or funds to determine the rights therein, and another federal court of concurrent or coördinate jurisdiction cannot interfere with such possession or control.[59] Accordingly in

the infringement suit could not be retained because answer and counterclaim in declaratory judgment suit were not filed until Aug. 5, 1938, whereas answer in patent infringement suit was filed July 28, 1938, since jurisdiction becomes effective from filing of complaint.—Milwaukee Gas Specialty Co. v. Mercoid Corporation, C.C.A.Ill., 104 F.2d 589.

(3) So, where action for declaratory judgment was filed one day before actions for infringement first court erred in refusing to enjoin prosecution of infringement actions and in ordering declaratory action's removal from trial list pending disposition of infringement actions.—Crosley Corporation v. Westinghouse Electric & Manufacturing Co., C.C.A. Pa., 130 F.2d 474, reversing, D.C., 43 F.Supp. 690.

(4) However, the fact that appeal was pending from decree of court of one district dismissing alleged infringer's declaratory judgment suit against patentee was held not to deprive patentee of its statutory right to sue alleged infringer in another district for patent infringement, and whether patentee should be permitted to pursue that remedy after suit brought rested in court's sound discretion.—Cold Metal Process Co. v. E. W. Bliss Co., D.C.Del., 21 F.Supp. 509.

Nature of rule

The general rule that court first acquiring jurisdiction maintains jurisdiction until its duty is fully performed and jurisdiction is exhausted is not only rule of comity to prevent unseemly conflicts between courts, but is principle of law and of necessity leaving nothing to discretion or mere convenience.—Milwaukee Gas Specialty Co. v. Mercoid Corporation, C.C.A.Ill., 104 F.2d 589.

Consideration of impleaded records

In mortgagees' suit in federal equity court to impose trust on proceeds of sale of vessel received by nonmaritime mortgage claimant in admiralty proceeding pending in same district court, such court could consider records, papers, and pleadings in admiralty cause, expressly impleaded by such claimant's answer, in determining whether jurisdiction in rem was acquired in admiralty proceeding.—Criscuolo v. Atlas Imperial Diesel Engine Co., C.C.A.Cal., 84 F.2d 273.

52. U.S.—Nelson v. Berry, Cust. & Pat.App., 59 F.2d 351.

53. U.S.—May Hosiery Mills v. F. & W. Grand 5-10-25 Cent Stores, D.C.Mont., 59 F.2d 218, reversed on other grounds, C.C.A., May Hosiery Mills v. U. S. District Court in and for Dist. of Montana, 64 F.2d 450—Central Union Trust Co. of New York v. North Butte Mining Co., D.C.Mont., 26 F.2d 675—Hardy v. North Butte Mining Co., D.C. Mont., 20 F.2d 967, reversed on other grounds, C.C.A., 22 F.2d 62.

Comity held not to obtain in federal courts

U.S.—Morlan v. Lucey Mfg. Corporation, C.C.A.Cal., 7 F.2d 494, affirmed 14 F.2d 920, certiorari denied 47 S. Ct. 344, 273 U.S. 744, 71 L.Ed. 870.

54. U.S.—Stanolind Oil & Gas Co. v. National Labor Relations Board, C.C.A., 116 F.2d 274.

55. U.S.—Central Trust Co. of New York v. East Tennessee, V. & G. R. Co., C.C.Ga., 69 F. 658.

56. U.S.—Peckham v. Henkel, N.Y., 30 S.Ct. 255, 216 U.S. 483, 54 L.Ed. 579, affirming, C.C., 166 F. 627.

57. U.S.—Patent Tube Corporation v. Bristol-Myers Co., D.C.N.Y., 25 F.Supp. 776—Chicago, R. I. & P. Ry. Co. v. Union Pac. R. Co., Neb., 254 F. 235, 165 C.C.A. 523—Ex parte Equitable Trust Co. of New York, Cal., 231 F. 571, 145 C.C.A. 157, reversing, D.C., 231 F. 478.
25 C.J. p 1008 note 27.

58. U.S.—Chicago Great Western R. Co. v. Hulbert, Iowa, 205 F. 248, 125 C.C.A. 98.
25 C.J. p 1008 note 38.

59. **Possession of property**

When court of competent jurisdiction takes possession, property is withdrawn from control of others.—In re Hein, D.C.N.Y., 60 F.2d 966—In re Williams, D.C.Minn., 53 F.2d 486—American Locomotive Co. v. Histed, D.C.Mo., 18 F.2d 652—The Don, D.C.N.J., 1 F.Supp. 353.
As between state courts and United States courts see Courts §§ 533-535.
Possession by receiver see infra § 356.

"Custodia legis," whether in the bankruptcy or any other court, means that the jurisdiction of the court having custody of the res is exclusive in so far as restrictions may be necessarily imposed on other courts for the proper control and disposition of the res by the court having custody and control of it.—National Automatic Tool Co. v. Goldie, D.C.Minn., 27 F.Supp. 399.

Custody of customs collector

District court was held without jurisdiction to adjudicate claim for repairs to vessel in custody of customs collector after seizure for violating Tariff Act.—The Motor Boat No. L-7869, C.C.A.N.J., 21 F.2d 594—The Don, D.C.Del., 4 F.Supp. 809.

the absence of statute, money or property in custody of the law is not subject to attachment or garnishment issuing from another court.[60] The court having custody of a res may, however, authorize the commencement of suit in another court as well as limit the extent to which another court's jurisdiction may go,[61] and property in its possession may, with the consent of the court, be subject to attachment or garnishment issuing from another court after the purpose for which it was taken into custody has ceased.[62]

§ 356. Appointment of Receiver

Although it may appoint an ancillary receiver, a federal court cannot interfere with the possession of property by a receiver appointed by another federal court of coördinate jurisdiction.

The possession by a receiver of the property involved in a suit, where he has been appointed by a federal court, cannot be interfered with by another federal court of coördinate jurisdiction.[63] Ancillary receivers may, however, be appointed in another district;[64] and where a claim is made by a citizen of a state in the federal court for such state against an insolvent corporation, which is in the hands of a receiver appointed by a federal court for another state, the former court may assume jurisdiction to the extent of determining the existence and amount of such claim.[65] Whether the receivership is original or ancillary, the court of the locality of the property has exclusive jurisdiction over its administration,[66] and, where an ancillary receiver has been appointed, any order made by any other court to its own receiver or to the ancillary receiver to sell property located in the jurisdiction of the ancillary receivership is void on its face[67] and incapable of confirmation in the jurisdiction where the property is located.[68] So, where the court appointing ancillary receivers has no assets in the hands of its receivers, it has no power or duty to order its receivers to join in a sale.[69] The court appointing the receivers has jurisdiction of a suit by receivers of a railway company to enjoin the enforcement of unreasonable rates even though there is pending in another court of coördinate jurisdiction a suit by various railway companies, including plaintiff, involving some of the same issues.[70] Where a receiver of a bank was appointed after institution of proceedings by the trustee of a bankrupt against the bank to recover preferences, the fact that the receiver did not know of the proceeding until the comptroller of currency received a mailed copy of a decree ordering him to deliver collateral deposited with the bank by the bankrupt did not affect the binding force of the decree on the receiver.[71]

§ 357. Proceedings in Aid of Action of Another Court

Proceedings which are properly ancillary to an action

60. U.S.—Clarke v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 91 F.2d 561, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096, rehearing denied 58 S.Ct. 755, 303 U.S. 668, 82 L.Ed. 1124.

61. U.S.—National Automatic Tool Co. v. Goldie, D.C.Minn., 27 F.Supp. 399.

62. U.S.—Clarke v. Chicago, B. & Q. R. Co., C.C.A.Wyo., 91 F.2d 561, certiorari denied 58 S.Ct. 521, 303 U.S. 635, 82 L.Ed. 1096, rehearing denied 58 S.Ct. 755, 303 U.S. 668, 82 L.Ed. 1124.

63. U.S.—Carter v. Powell, C.C.A. Fla., 104 F.2d 428, rehearing denied 104 F.2d 1012, certiorari denied 60 S.Ct. 173, 308 U.S. 611, 84 L.Ed. 511—First Union Trust & Savings Bank v. Consumers' Co., C.C.A.Ill., 63 F.2d 273, certiorari granted 54 S.Ct. 61, 290 U.S. 585, 78 L.Ed. 517—O. M. Spratt Corporation v. Public Utilities Consol. Corporation, D.C.Mont., 57 F.2d 908—Link v. Powell, D.C.S.C., 57 F. 2d 591—Barons v. First Nat. Bank of Plainville, Kan., D.C.Kan., 28 F. 2d 615—American Locomotive Co. v. Histed, D.C.Mo., 18 F.2d 652.
25 C.J. p 1008 note 39.

Property held not to have passed into custody of court

U.S.—Barnette v. Wells Fargo Nevada Nat. Bank of San Francisco, D. C.Cal., 277 F. 110, reversed on other grounds, C.C.A., Wells Fargo Nevada Nat. Bank of San Francisco v. Barnette, 298 F. 689, 43 A.L.R. 916, affirmed Barnette v. Wells Fargo Nevada Nat. Bank of San Francisco, 46 S.Ct. 326, 270 U.S. 438, 70 L.Ed. 669.
D.C.—Railroad Credit Corporation v. Fruit Growers' Express Co., 71 F. 2d 218, 63 App.D.C. 208.

Operating agreement affecting separate receiverships

A Florida district court was not without jurisdiction to adjudge in contempt owners of easement which, without court's consent, constructed a pipe line under tracks and across right of way of railroad operated by and in possession of receivers, on ground that railroad involved was in receivership in another court, where that railroad was under lease at time of receivership of lessee railroad and passed into possession of lessee's receivers, and the courts entered into an operating agreement whereby possession was retained by lessee's receivers for operating purposes.—Southeastern Pipe Line Co. v. Powell, C.C.A.Fla., 113 F.2d 434.

64. U.S.—Haydock v. Fisheries Co., C.C.Me., 156 F. 988.
Ancillary proceedings generally see infra § 357.

65. U.S.—New York Security & Trust Co. v. Equitable Mortg. Co., C.C.Mo., 71 F. 556.

66. U.S.—O. M. Spratt Corporation v. Public Utilities Consol. Corporation, D.C.Mont., 57 F.2d 908.

67. U.S.—O. M. Spratt Corporation v. Public Utilities Consol. Corporation, supra.

68. U.S.—O. M. Spratt Corporation v. Public Utilities Consol. Corporation, supra.

69. U.S.—Harding v. American Sumatra Tobacco Co., D.C.Ga., 14 F.2d 168.

70. U.S.—Bush v. Texas & P. Ry. Co., D.C.La., 290 F. 1008.

71. U.S.—Adams v. Champion, C.C. A. Ill., 70 F.2d 956, certiorari granted 55 S.Ct. 122, 293 U.S. 547, 79 L.Ed. 651, reversed on other grounds 55 S.Ct. 399, 294 U.S. 231, 79 L.Ed. 880.

or proceeding in one federal court may be entertained by another federal court.

One federal court may entertain proceedings which are properly ancillary to an action or proceeding in another federal court, as this is not an interference with, but an aid to, the jurisdiction of the court in which the main action is pending;[72] but, where a judgment has been rendered in a court of claims, interest thereon cannot be recovered in the United States circuit court, the question being incidental to the original suit and one for the former court to determine.[73]

§ 358. Injunction against Proceedings

A federal court first acquiring jurisdiction may enjoin a second suit in another federal court involving the identical subject matter, wherein it is sought to defeat the first court's jurisdiction; and an order restraining prosecution of the second suit may be granted by the court in which it is pending.

A party seeking, in one federal court, to enjoin a suit in another federal court of concurrent jurisdiction must show a clear and indubitable right on his part.[74] A federal court first acquiring jurisdiction over the subject matter may enjoin a second suit in another federal court involving the identical subject matter, wherein it is sought to defeat the first court's jurisdiction;[75] and refusal to exercise this power in a proper case constitutes an abuse of discretion.[76] Where the petition for injunction was not an independent action but was merely ancillary to the original action, and plaintiff in the original action and its legal representatives were already in court, due notice of the supplementary proceeding could be given without reference to their citizenship or residence, regardless of the fact that the original counsel had been succeeded by others.[77] An injunction will not be granted, however, unless the suits are substantially identical in subject matter and issues,[78] and it will be denied where the suits were dissimilar with respect to parties defendant, subject matter, issues, and relief sought,[79] nor is it a sufficient ground for

72. U.S.—Mercantile Trust Co. v. Kanawha & O. R. Co., C.C.Ohio, 50 F. 874, reversed on other grounds 58 F. 6, 7 C.C.A. 3.
25 C.J. p 1008 note 42.
Appointment of ancillary receiver see supra § 356.

73. U.S.—Bunton v. U. S., C.C.Pa., 62 F. 171.

74. U.S.—Gold Seal Electrical Co. v. Radio Corporation of America, C.C.A.Del., 52 F.2d 849—Frink Co. v. Erikson, C.C.A.Mass., 20 F.2d 707, vacating, D.C., Erikson v. Frink Co., 16 F.2d 498.

75. U.S.—Steelman v. All Continent Corporation, N.J., 57 S.Ct. 705, 301 U.S. 278, 81 L.Ed. 1085, reversing, C.C.A., All Continent Corporation v. Steelman, 86 F.2d 913, reversing, D.C., In re Fox, 16 F.Supp. 949, motion granted Steelman v. All Continent Corporation, 57 S.Ct. 323, 299 U.S. 522, 81 L.Ed. 385, certiorari granted 57 S.Ct. 492, 300 U.S. 648, 81 L.Ed. 860—Crosley Corporation v. Westinghouse Electric & Manufacturing Co., C.C.A.Pa., 130 F.2d 474, reversing, D.C., 43 F.Supp. 690—Crosley Corporation v. Hazeltine Corporation, C.C.A.Del., 122 F.2d 925, reversing, D.C., 38 F.Supp. 38—In re Georgia Power Co., C.C.A.Ga., 89 F.2d 218, affirming, D.C., Georgia Power Co. v. Tennessee Valley Authority, 17 F.Supp. 769, certiorari denied 58 S.Ct. 11, 302 U.S. 692, 82 L.Ed. 535, and Georgia Power Co. v. Underwood, 58 S.Ct. 11, 302 U.S. 693, 82 L.Ed. 535—Godfrey L. Cabot, Inc., v. Binney & Smith Co., D.C.N.J., 46 F.Supp. 346—U. S. v. Aluminum Co. of America, D.C.Pa., 20 F.Supp. 608, affirmed Aluminum Co. of America v. U. S., 58 S.Ct. 178, 302 U.S. 230, 82 L.Ed. 219—U. S. v. Aluminum Co. of America, D.C.Pa., 19 F.Supp. 374—Commercial Acetylene Co. v. Avery Portable Lighting Co., C.C. Wis., 152 F. 642, affirmed 159 F. 935, 87 C.C.A. 206.

Administrative tribunal
The rule that court of equity which has first taken jurisdiction of the case may, in order to prevent vexatious litigation, enjoin parties from further proceeding in another forum, applies between two federal courts, or between a federal court and an administrative tribunal of the United States.—National Fruit Product Co. v. Dwinell-Wright Co., D.C.Mass., 42 F.Supp. 1016, affirmed, C.C.A., 129 F.2d 848.

Tax sale
Where federal court in Florida in receivership of lessor railroad directed its receiver to disaffirm lease and permit the comptroller of the state of Florida to proceed with enforcement of tax liens against the leased property in Florida, federal court in Georgia was held not without jurisdiction to enjoin tax sale of leased property located in Florida belonging to lessee railroad in receivership in Georgia court, on ground that decree appointing receivers and authorizing them to take possession of property directed them not to take possession of leased premises until further order of court, where decree indicated court's purpose to take as full control of leased property as was possessed by lessor and restriction merely withheld power to terminate lease or take possession of leased property.—Lee v. Freeman, C.C.A.Ga., 79 F.2d 868, certiorari denied 56 S. Ct. 667, 297 U.S. 722, 80 L.Ed. 1006.

Relief held not barred by laches, waiver, or estoppel
U.S.—Georgia Power Co. v. Tennessee Valley Authority, D.C.Ga., 17 F. Supp. 769, affirmed, C.C.A., In re Georgia Power Co., 89 F.2d 218, certiorari denied Georgia Power Co. v. Tennessee Valley Authority, 58 S.Ct. 11, 302 U.S. 692, 82 L.Ed. 535, and Georgia Power Co. v. Underwood, 58 S.Ct. 11, 302 U.S. 693, 82 L.Ed. 535.

76. U.S.—Triangle Conduit & Cable Co. v. National Electric Products Corporation, C.C.A.Del., 125 F.2d 1008, reversing, D.C., 38 F.Supp. 533, certiorari denied 62 S.Ct. 1046, 316 U.S. 676, 86 L.Ed. 1750—Crosley Corporation v. Hazeltine Corporation C.C.A.Del., 122 F.2d 925, reversing, D.C., 38 F.Supp. 38—Crosley Corporation v. Westinghouse Electric & Mfg. Co., C.C.A.Pa., 130 F.2d 474, reversing, D.C., 43 F. Supp. 690.

77. U.S.—U. S. v. Aluminum Co. of America, D.C.Pa., 19 F.Supp. 374.

78. U.S.—Aluminum Co. of America v. U. S., Pa., 58 S.Ct. 178, 302 U.S. 230, 82 L.Ed. 219, affirming, D.C., U. S. v. Aluminum Co. of America, 20 F.Supp. 608.

79. U.S.—Aluminum Co. of America v. U. S., supra—Alabama Power Co. v. Tennessee Valley Authority, C.C.A.Ala., 92 F.2d 412, reversing, D.C., Ashwander v. Tennessee Valley Authority, 19 F.Supp. 190—Dorr Co. v. Poplar Grove Planting & Refining Co., D.C.La., 32 F.Supp. 193.

an injunction that it would be inconvenient for defendant in the first suit to defend the second.[80] Where proceedings in one district, on which an execution was founded, were void, the court of another district had jurisdiction to restrain the marshal of its own district from enforcing and collecting such execution from property owned by the resident debtor located therein.[81]

Where two suits in different federal courts of concurrent jurisdiction involve the same subject matter and parties, defendant's petition in the second suit for a temporary injunction restraining prosecution of that suit pending final determination of the first suit shouid be granted.[82]

§ 359. Vacating or Annulling Decisions of Another Court

One judge may not overrule the decision of another judge of coördinate jurisdiction in the same case or decide an issue already submitted to such other judge except for cogent reasons; and a judgment entered by a court of competent jurisdiction respecting a matter in controversy before it may not be reviewed by another court of coordinate jurisdiction.

It is highly indiscreet and injudicious for one judge of equal rank and power to review identical matters passed on by his colleague,[83] and one judge may not overrule the decision of another judge of coördinate jurisdiction in the same case,[84] or decide an issue already submitted to such other judge,[85] except for cogent reasons.[86] The "law of the case" when referring to a judge's duty to adhere to rulings previously made in the case by another judge of the same court merely requires that the order of the first judge, unless merely a formal or an ex parte order, shall not be vacated or nullified by a later judge of the same court.[87] The rule applies to orders and rulings of the court which are purely

80. U.S.—U. S. v. Aluminum Co. of America, D.C.Pa., 20 F.Supp. 608, affirmed Aluminum Co. of America v. U. S., 58 S.Ct. 178, 302 U.S. 230, 82 L.Ed. 219.

81. U.S.—Kirk v. U. S., C.C.N.Y., 124 F. 324, affirmed 130 F. 112, 64 C. C.A. 446.

82. U.S.—Milwaukee Gas Specialty Co. v. Mercoid Corporation, C.C.A. Ill., 104 F.2d 589.

83. U.S.—De Maurez v. Swope, C.C. A.Wash., 110 F.2d 564.

Powers and duties of coördinate judges generally see the C.J.S. title Judges § 54, also 33 C.J. p 970 note 33—p 971 note 41.

Review in bankruptcy of matters determined at law

District judge's rulings in law action between same parties for rentals under same indentures as those involved in subsequent bankruptcy proceeding are binding, as far as applicable, on another judge of same district court sitting in bankruptcy.—In re American Writing Paper Co., D.C.Mass., 11 F.Supp. 518, affirmed, C.C.A., Holyoke Water Power Co. v. American Writing Paper Co., 83 F.2d 398, certiorari granted 57 S.Ct. 24, 299 U.S. 526, 81 L.Ed. 387, affirmed 57 S.Ct. 485, 300 U.S. 324, 81 L.Ed. 678.

Legality of proceedings

District court has no power to consider legality of proceedings in another district court of coördinate jurisdiction.—In re Sierra Salt Corporation, D.C.Nev., 8 F.Supp. 922.

84. U.S.—Banke v. Novadél-Agene Corporation, C.C.A.Mich., 130 F.2d 99—In re India Wharf Brewery, C. C.A.N.Y., 96 F.2d 710—In re Hines, C.C.A.N.Y., 88 F.2d 423—Humphrey v. Bankers Mortg. Co. of Topeka, Kan., C.C.A.Kan., 79 F.2d 345—U. S. v. B. Goedde & Co., D.C.Ill., 40 F.Supp. 523—Basevi v. Edward O'Toole Co., D.C.N.Y., 26 F.Supp. 41—Baltimore Trust Co. v. Norton Coal Mining Co., D.C.Ky., 25 F. Supp. 968—Bradford v. Chase Nat. Bank of City of New York, D.C.N. Y., 24 F.Supp. 28, affirmed, C.C.A., Berger v. Chase Nat. Bank of City of New York, 105 F.2d 1001, affirmed 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Schram v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U. S. 698, 84 L.Ed. 1037, affirmed Wardell v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Young v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Feucht v. Chase Nat. Bank of City of New York, 60 S. Ct. 708, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 886, 309 U.S. 698, 84 L.Ed. 1037—U. S. v. Parker, D.C.N.J., 23 F.Supp. 880—U. S. v. Davis, D.C.N.Y., 3 F.Supp. 97—Metro-Goldwyn-Mayer Distributing Corporation v. Bijou Theatre Co. of Holyoke, D.C.Mass., 3 F.Supp. 66—American Fomon Co. v. United Dyewood Corporation, D. C.N.Y., 1 F.R.D. 171.

Stipulation in state court order

Federal court, in accounting suit, properly refused to reopen case to permit complainant to dispute stipulation in order of state court in receivership proceeding.—Williams v. New York Zinc Co., C.C.A.N.Y., 29 F.2d 167.

Decision on similar issue

Where arguments in support of unfair competition by plaintiff were originally advanced before another judge on defendants' claim of infringement by plaintiff, which arguments were rejected by such other judge and same arguments were urged in support of claim for unfair competition, court would not grant relief for unfair competition, notwithstanding adjudication of noninfringement by such other judge was not decisive on issue of unfair competition.—Millburn Bills v. Meister, D.C.N.Y., 37 F.Supp. 231.

Order of de facto judge

Judge should not vacate order of another judge of same rank, whether that other judge, in making order, was de jure judge or was acting as judge de facto.—Johnson v. Manhattan Ry. Co., D.C.N.Y., 1 F.Supp. 809, reversed on other grounds, C.C.A., 61 F.2d 934, certiorari granted 53 S.Ct. 524, 289 U.S. 714, 77 L.Ed. 1467, affirmed in part 53 S.Ct. 721, 289 U.S. 479, 77 L.Ed. 1331.

Order of United States commissioner

A district court cannot set aside an order of the United States commissioner with power equal to that of district court judges directing a return of property seized under his search warrant any more than one district judge can set aside an order entered by another.—U. S. v. Maresca, D.C.N.Y., 266 F. 713.

85. U.S.—In re Hines, C.C.A.N.Y., 88 F.2d 423.

86. U.S.—Universal Oil Products Co. v. Standard Oil Co. of Indiana, D.C. Mo., 6 F.Supp. 37, affirmed, C.C.A., German v. Universal Oil Products Co., 77 F.2d 70.

87. U.S.—Munro v. Post, C.C.A.N.Y., 102 F.2d 686, affirming, D.C., 23 F. Supp. 308.

judicial in their character, such as rulings on questions of law, or law and fact,[88] and not to purely administrative orders of the court,[89] such as allowances of compensation.[90] It does not bind a judge to follow the reasons given by the earlier judge.[91] Furthermore, a ruling on a preliminary motion to the jurisdiction[92] or denying a motion to dismiss the complaint[93] does not prevent another judge from announcing a contrary conclusion required by the fully developed evidence; and a ruling on a motion attacking an original pleading does not preclude another judge from ruling otherwise on a motion attacking the pleading after it is amended.[94] A cogent reason justifying a decision different from that made by another judge in the case is a certainty that the earlier ruling was erroneous;[95] and another cogent reason justifying a departure from the general rule is a conclusion reached by the second judge that the court has no jurisdiction either of the parties or of the subject matter.[96] In an equity suit, where the judge who heard the case on the merits died without handing down any decision, and the parties agreed to resubmit the case on the transcript of testimony, exhibits, and briefs, the judge considering the case on resubmission was authorized to disregard rulings of the deceased judge as to competency of the evidence, and could consider evidence rejected by him.[97] Failure of the trial judge to require proof of matters alleged in an amendment to the pleadings does not operate to vacate an order of a previous judge requiring the amendment.[98]

Where a judgment is entered by a court of competent jurisdiction, with respect to a matter in controversy before it, such judgment is binding on the parties and may not be reviewed by another court of coördinate jurisdiction.[99] Accordingly, neither the district court nor the circuit court of appeals may, in effect, by enjoining the collector of customs from assessing a special duty, reverse a decision of the court of customs and patent appeals.[1]

§ 360. Transfer of Causes

The right or duty to transfer a particular cause from one district court to another, or from one division or place of holding court within a district to another division or place within the district, depends on the controlling statute; and the right to transfer may be waived.

In the absence of statute or authority, the federal district court of one state cannot transfer an action to the federal district court of another state in order to save dismissal of the action.[2] A statute requiring that where a district judge is disqualified the case must be transferred to another district requires such transfer where the judge of the district wherein the case was pending was disqualified because of family and friendly relations with a par-

Previous decision in same case as law of case generally see Courts § 195.

88. U.S.—In re Insull Utility Investments, C.C.A.Ill., 74 F.2d 510, affirming, D.C., 6 F.Supp. 653.

Ruling on motions to dismiss that bills stated cause of action constituted "law of case," binding other judges of the same court.—Commercial Union of America v. Anglo-South American Bank, C.C.A.N.Y., 10 F.2d 937—Pathé Exchange v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. 306, D.C.N.Y., 3 F. Supp. 63.

89. U.S.—In re Insull Utility Investments, C.C.A.Ill., 74 F.2d 510, affirming, D.C., 6 F.Supp. 653.

Reference to other judge

Where file showed that judge who directed the issuance of a subpoena reserved decision on motion to set aside order directing issuance and subpoena issued pursuant thereto, stating that he could not determine the matter on affidavits and that depositions should be taken, that thereafter he indorsed on moving papers statement that motion was referred to another judge with his consent, and that other judge thereafter indorsed on papers statement that motion was referred to third judge, and motion was argued before third judge on the merits and denied by him, decision denying motion would not be recalled on motion based on ground that original motion to set aside order and subpoena had been decided by judge who directed its issuance.—U. S. v. Schenck, D.C.N.Y., 40 F.Supp. 56, second case, denying motion 40 F.Supp. 56, first case.

90. U.S.—In re Insull Utility Investments, C.C.A.Ill., 74 F.2d 510, affirming, D.C., 6 F.Supp. 653.

91. U.S.—Munro v. Post, C.C.A.N.Y., 102 F.2d 686, affirming, D.C., 23 F. Supp. 308.

92. U.S.—Root v. Samuel Cupples Envelope Co., D.C.N.Y., 36 F.2d 405.

93. U.S.—Basevi v. Edward O'Toole Co., D.C.N.Y., 26 F.Supp. 41.

94. U.S.—Universal Oil Products Co. v. Standard Oil Co. of Indiana, D.C.Mo., 6 F.Supp. 37, affirmed, C. C.A., German v. Universal Oil Products Co., 77 F.2d 70.

95. U.S.—Universal Oil Products Co. v. Standard Oil Co. of Indiana, supra.

96. U.S.—Universal Oil Products Co. v. Standard Oil Co. of Indiana, supra.

97. U.S.—Salem Trust Co. v. Federal Nat. Bank, C.C.A.Mass., 78 F.2d 407, affirming, D.C., 11 F.Supp. 105.

98. U.S.—Munro v. Post, C.C.A.N.Y., 102 F.2d 686, affirming, D.C., 23 F. Supp. 308.

99. U.S.—Cottman Co. v. Dailey, C. C.A.Md., 94 F.2d 85, affirming, D. C., 20 F.Supp. 142—Gardner v. U. S., C.C.A.Cal., 13 F.2d 851—Torquay Corporation v. Radio Corporation of America, D.C.N.Y., 2 F.Supp. 841—The Don, D.C.N.J., 1 F.Supp. 353—Loud v. U. S., C.C.A.Mich., 286 F. 56—Louisville & N. R. Co. v. Western Union Telegraph Co., C.C. A.Miss., 233 F. 82, 147 C.C.A. 152, affirmed 39 S.Ct. 513, 250 U.S. 363, 63 L.Ed. 1032.

1. U.S.—Cottman Co. v. Dailey, C.C. A.Md., 94 F.2d 85, affirming, D.C., 20 F.Supp. 142.

2. U.S.—Billings Utility Co. v. Federal Reserve Bank of Minneapolis, D.C.Mont., 40 F.Supp. 309.

Transfer of:

Causes when territory admitted as state see supra § 319.

Criminal prosecutions between federal courts see Criminal Law § 149.

ty.[3] Under a statute providing that a proceeding shall on application of the claimant be removed to any district agreed on by stipulation between the parties, the consent of a party's attorney is in effect a stipulation; and, in the absence of any statutory provision to the contrary, the proceeding may be transferred by stipulation more than once.[4] In the absence of statute, a district court sitting as a court of admiralty is without power to transfer a case to a district court sitting as a court of law or equity;[5] but in a proper case a district court which, sitting as a court of law, has no jurisdiction of a cause may transfer it to the admiralty docket.[6] It sometimes happens, especially in administration matters, that a cause is commenced in a consular court under the belief that it involves less than five hundred dollars, and is afterward found to involve more; in that event it is transferred and the prior proceedings are treated as having been conducted under its authority.[7]

In view of the rule stated supra § 303 that a district court has jurisdiction throughout, and territorially coextensive with its district, and may competently do in one division or at one seat things pertaining to the business in another, the court may, for proper reasons, transfer cases for trial and disposition from one division of the district to another,[8] as where the case is by inadvertence made returnable in a division other than that in which defendant resides;[9] but there is authority holding that the court is without power to grant a motion based on improper venue of the action to transfer the case from one division of the court to another.[10] Judicial Code §§ 53, 58, 28 U.S.C.A. §§ 114, 119, relative to transfer of causes to another division within the district, is not applicable in the case of a transfer within a district wherein divisions were created by rule of court, but a civil transitory action removed by a nonresident may be transferred to another division created by rule of court within the district.[11] Under the statutory provision authorizing a transfer from one division of the district to another on written stipulation of the parties, consent of both parties is necessary, and where a motion to transfer is opposed by the other party the motion must be denied.[12]

Under a statute providing that causes may be transferred by the court from any of the places in which court shall be held in a certain district to any of the places mentioned in the statute when the convenience of the parties or the ends of justice would be promoted by the transfer, whether the cause shall be transferred rests in the discretion of the trial court, which may transfer a cause on its own motion; and when it does the presumption is in favor of the validity of the order of transfer, and the burden is on the complaining party to establish that there has been an abuse of discretion and that he was prejudiced thereby.[13]

The right to transfer a cause may be waived,[14] and is waived by permitting the cause to remain on submission in the district wherein it was pending when the right accrued.[15]

FEDERALIST, THE. A series of eighty-five essays by Alexander Hamilton, James Madison, and John Jay, expounding and advocating the adoption of the constitution of the United States.[1]

FEDERATED STATE. An independent, central organism having its own machinery (rouages) which absorbs, in the view of international law, all the individual states which are associated together.[2]

3. U.S.—Annoni v. Blas Nadal's Heirs, C.C.A.Puerto Rico, 94 F.2d 513.

4. U.S.—U. S. v. 45⅚ Dozen Packages, More or Less, of U-X Improved Shaving Medium, D.C.N.Y., 46 F.Supp. 112.

5. U.S.—The Dixie, D.C.Tex., 30 F. Supp. 215.

6. U.S.—Modin v. Matson Nav. Co., C.C.A.Cal., 128 F.2d 194.

7. U.S.—In re Jaeger, (April 26, 1918, No. 613) 4 Mill.Rev. 374.
25 C.J. p 324 note 29.

8. U.S.—Gopcevic v. California Packing Corporation, D.C.Cal., 272 F. 994.

9. U.S.—Anderson v. Standard Accident Ins. Co., D.C.La., 36 F.Supp. 7.

10. U.S.—Duval v. Bathrick, D.C. Minn., 31 F.Supp. 510—Lavietes v. Ferro Stamping & Manufacturing Co., D.C.Mich., 19 F.Supp. 561, affirmed, C.C.A., 121 F.2d 455.

11. U.S.—Patrick Jobbing Co. v. Globe & Rutgers Fire Ins. Co., D. C.Va., 21 F.2d 106.

12. U.S.—Walsh & Wells v. City of Memphis, D.C.Tenn., 32 F.Supp. 448.

13. U.S.—Gee Lung v. U. S., C.C.A. Ariz., 111 F.2d 640.

14. U.S.—Hampton v. Williams, C. C.A., 33 F.2d 46.

15. U.S.—Hampton v. Williams, supra.

1. Webster New Int.D.

History and influence

(1) These essays were first published, signed "A Citizen of New York" and later "Publius", in the "Independent Journal" of New York City between Oct 27, 1787, and April 2, 1788, with the exception of six, which were added when they were published in book form.—Webster New Int.D.

(2) "The opinion of the Federalist has always [been] considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties, in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank."—Cohens v. Virginia, Va., 6 Wheat. 264, 418, 5 L.Ed. 257.

2. **Relation with associated states**

"The federal power has alone and exclusively the enjoyment and exer-

FEDERATION. An unincorporated union or association of persons for a common purpose.[3] The term has been held synonymous with "league" and "union."[4]

FEE.

Estate in Land

As an estate of inheritance see generally Estates §§ 7–11; and specifically the references in the accompanying foot note.[5]

Compensation or Emolument

In a generic sense, the word implies compensation or salary; but if used in its narrow, distinctive sense it signifies the compensation for particular acts or services rendered in the line of official duties;[6] and it has been defined as a charge fixed by law for the service of a public officer, or for the use of a privilege under the control of the government;[7] a charge for services;[8] a charge or emolument;[9] a fixed charge;[10] compensation;[11] compensation for particular acts or services;[12] compensation for particular services rendered at irregular and uncertain periods;[13] compensation to professional men, a remuneration for services rendered in the line of their professions;[14] every kind of compensation allowed by law;[15] pay or perquisite;[16] a recompense for official or professional services;[17] payment in money for official or professional services, whether the amount be optional or fixed by custom or law;[18] reward, compensation, or wage given to one for the performance of professional services;[19] reward or compensation allowed by law to an officer for specific services performed by him in the discharge of his official duties;[20] reward or compensation for services ren-

cise of external severeignty. It alone has the direction of external relations. The independence of each associated state in this respect is sunk in the sovereignty of the federal state."—Molina v. Comision Reguladora del Mercado de Henequen, 103 A. 397, 400, 91 N.J.Law 382, quoting Bonfils Droit International Publique § 172.

3. Ark.—Hughes v. State, 160 S.W. 209, 109 Ark. 403, 404.

4. Ark.—Hughes v. State, supra.

5. **Phrases relating to land**

(1) "Base, determinable, or qualified fees" see the C.J.S. titles Deeds § 110; Estates § 10; and Wills §§ 850, 858; also 69 C.J. p 475 note 74 and p 489 notes 7–9.

(2) "Conditional fee," "fee conditional" and "fee simple conditional" see the C.J.S. titles Deeds § 110, Estates §§ 9, 11, and Wills §§ 859, 860, also 69 C.J. p 475 note 75 and p 489 note 10–p 491 note 54.

(3) "Defeasible fee" see the C.J.S. title Wills §§ 850–856, also 69 C.J. p 474 note 70–p 487 note 85.

(4) "Fee damages" see Eminent Domain § 133 c note 54.

(5) "Fee farm" and "fee farm rent" see the C.J.S. title Ground Rents § 1, also 25 C.J. p 1009 notes 7 and 8.

(6) "Fee in soil," as meaning a complete fee and not a fee subject to easements.—Paris Mountain Water Co. v. Woodside, 131 S.E. 37, 40, 133 S.C. 383.

(7) "Fee simple" or "fee simple absolute" see the C.J.S. titles Deeds § 109, Estates § 8, and Wills §§ 809–821, also 69 C.J. p 432 note 88–p 455 note 36.

(8) "Fee tail" see the C.J.S. titles Deeds § 111, Estates §§ 21–29, 131, and Wills §§ 861–869, also 69 C.J. p 492 note 55–p 505 note 87.

(9) "Lay fee" see Estates § 8 a note 81.

(10) Limited fee see Estates § 9.

(11) "Quasi fee" see Estates § 8 a note 82.

6. Mo.—Ward v. Christian County, 111 S.W.2d 182, 183, 184, 341 Mo. 1115.

7. Ariz.—Stewart v. Verde River Irrigation & Power Dist., 68 P.2d 329, 334, 49 Ariz. 531.
Ark.—Fort Smith Gas Co. v. Wiseman, 74 S.W.2d 789, 790, 189 Ark. 675.
Fla.—Flood v. State, 117 So. 385, 386, 95 Fla. 1003.

8. Idaho.—Hudson v. Bertsch, 220 P. 109, 38 Idaho 52.

9. Ky.—Craig v. Shelton, 258 S.W. 694, 695, 201 Ky. 790, quoting **Corpus Juris.**
25 C.J. p 1009 note 10.

10. Mich.—People v. Goulding, 266 N.W. 378, 379, 275 Mich. 353.

11. Cal.—Reynolds v. Reynolds, 58 P.2d 660, 661, 14 Cal.App.2d 481.

12. Ky.—Craig v. Shelton, 258 S.W. 694, 695, 201 Ky. 790, quoting **Corpus Juris.**
25 C.J. p 1009 note 11.

Similarly expressed

(1) A compensation for service rendered.—Williams v. Jacksonville Terminal Co., C.C.A.Fla., 118 F.2d 324, 325.

(2) A fixed compensation required to be paid by individuals for official services rendered.—Starr v. Board of Com'rs of Delaware County, 76 N.E. 1025, 1027, 79 N.E. 390, 40 Ind.App. 7.

(3) A recompense to an officer for his services.—Harlan County v. Blair, 49 S.W.2d 1028, 1029, 243 Ky. 777.

(4) A payment for something done or to be done.—People v. Goulding, 266 N.W. 378, 379, 275 Mich. 353.

(5) Payment for particular services performed.—McNair v. Allegheny County, 195 A. 118, 121, 328 Pa. 3.

(6) A sum certain given for a particular service.—Pittsburgh v. Grenet, 86 A. 462, 465, 238 Pa. 567.

(7) Other similar definitions see 25 C.J. p 1009 note 11 [a].

13. Ariz.—State ex rel. Colorado River Commission v. Frohmiller, 52 P.2d 483, 488, 46 Ariz. 413.

14. Cal.—Reynolds v. Reynolds, 58 P.2d 660, 661, 14 Cal.App.2d 481.

15. Ky.—Craig v. Shelton, 258 S.W. 694, 695, 201 Ky. 790, quoting **Corpus Juris.**
Tex.—Ellis County v. Thompson, 64 S.W. 927, 95 Tex. 22, 66 S.W. 48, 51.

16. Okl.—Finley v. Territory, 73 P. 273, 278, 12 Okl. 621.

Similarly expressed

(1) Pay, wages, or salary.—Flood v. State, 117 So. 385, 386, 95 Fla. 1003.

(2) A perquisite charged as a recompense for labor and trouble.—People v. Goulding, 266 N.W. 378, 379, 275 Mich. 353.

17. Ky.—Craig v. Shelton, 258 S.W. 694, 695, 201 Ky. 790.

18. Cal.—Reynolds v. Reynolds, 58 P.2d 660, 661, 14 Cal.App.2d 481.

19. Mich.—People v. Goulding, 266 N.W. 378, 379, 275 Mich. 353.

20. Ala.—Autauga Banking & Trust Co. v. Allen, 125 So. 805, 806, 220 Ala. 478.
Utah.—Smith v. Carbon County, 63 P.2d 259, 260, 90 Utah, 560, 108 A.L.R. 513, quoting **Corpus Juris.**
25 C.J. p 1009 note 16.

dered or to be rendered.[21] Also, with a slightly different connotation, the amount paid for a privilege,[22] voluntary payment for a particular privilege,[23] or tribute to a superior.[24]

The fee may be for acts or services done or performed, partially done or rendered, or to be done or rendered, or for services rendered at regular periods,[25] especially for personal, professional, or special services;[26] and usually the particular acts or services should be done or rendered in the line of some duty,[27] although in a particular connection, the term has been held broad enough to include ex officio compensation without specific regard to the performance of any particular service;[28] and, as used in some statutes, the word "fees" is not restricted to charges which may be collected by a public official for services rendered by him to the public,[29] while under other statutes it has been held to be so limited.[30] The general rule is that fees should be paid by the persons obtaining the benefit of the acts, or receiving the services, or at whose instance they were done or performed, whether persons or municipalities;[31] the payments should be in money,[32] and are to be made to the person doing or performing the act or services, as the fees of clerks, sheriffs, lawyers, doctors, etc.[33] Specifically, in the case of an official, payment may be made to him for his own use, or for the use of the public.[34] The amount of a fee may be optional, or may be fixed by law, as in the case of official fees, or by custom,[35] especially payment for professional services. Frequently the services rendered are in the progress of a cause.[36]

Depending on the circumstances, the term has been held equivalent to, or synonymous with, "commission" see 15 C.J.S. p 582 note 15, "costs" see Costs § 1 b note 28, and "percentage."[37] It has been compared or contrasted with, and distinguished from, "allowance" see 3 C.J.S. p 891 note 74, "assessment" see 6 C.J.S. p 1025 note 42, "commission" see 15 C.J.S. p 582 note 20, "compensation" see 15 C.J.S. p 655 notes 52, 58, "costs" see Costs § 1 b notes 29, 30, "disbursement" see 26 C.J.S. p 1329 note 22, "dues" see 28 C.J.S. p 574 note 76, "emolument" see Emolument 30 C.J.S. p 221 note 10, "expenses" see Expense or Expenses 35 C.J.S. p 208 note 29, "gain,"[38] "per diem allowances,"[39] "profit,"[40] "salary,"[41] "tax" see the C.J.S. title Taxation § 1, also

Similarly expressed

(1) Reward or compensation or wages allowed by law in return for services of public officials.—Veltman v. Slater, 217 S.W. 378, 380, 110 Tex. 198.

(2) Reward or wages given to one as a compensation, or recompense, for his labor and trouble for the execution of his office or profession.

Fla.—Flood v. State, 117 So. 385, 386, 95 Fla. 1003.

Mo.—State v. Dishman, 68 S.W.2d 797, 798, 334 Mo. 874.

Okl.—Finley v. Territory, 73 P. 273, 278, 12 Okl. 621, 639.

(3) Reward or wages given to one for the execution of his office.

Ill.—People ex rel. City of Peoria v. Weston, 193 N.E. 487, 489, 358 Ill. 610.

Pa.—Pittsburgh v. Grenet, 86 A. 462, 465, 238 Pa. 567.

(4) The sums prescribed by law as charges for services rendered by public officers.—Collman v. Wanamaker, 149 P. 292, 293, 27 Idaho 342—25 C.J. p 1009 note 18.

21. Cal.—Reynolds v. Reynolds, 58 P.2d 660, 661, 14 Cal.App.2d 481.

Fla.—Flood v. State, 117 So. 385, 386, 95 Fla. 1003.

Tenn.—State, for Use of Sullivan County v. O'Dell, 84 S.W.2d 577, 579, 169 Tenn. 248.

22. N.Y.—Thompson v. Wyandanch Club, 127 N.Y.S. 195, 200, 70 Misc. 299.

23. N.Y.—Rainbow Falls Fish & Game Club v. Clute, 29 N.Y.S.2d 948, 950, 177 Misc. 71.

24. Fla.—Flood v. State, 117 So. 385, 386, 95 Fla. 1003.

25. Ariz.—Cochise County v. Wilcox, 127 P. 758, 760, 14 Ariz. 234.

25 C.J. p 1010 notes 28, 30.

26. Okl.—Finley v. Territory, 73 P. 273, 278, 12 Okl. 621.

25 C.J. p 1010 note 32.

27. Ala.—Autauga Banking & Trust Co. v. Allen, 125 So. 805, 806, 220 Ala. 478.

25 C.J. p 1010 note 33.

28. Tex.—Witherspoon v. Sheppard, 67 S.W.2d 1037, 1038, 123 Tex. 93—Veltman v. Slater, 217 S.W. 378, 380, 110 Tex. 198.

29. Cal.—Rose v. Superior Court in and for Imperial County, 252 P. 765, 768, 80 Cal.App. 739.

30. Utah.—Atwood v. Cox, 55 P.2d 377, 390, 88 Utah 437.

31. Ariz.—Cochise County v. Wilcox, 127 P. 758, 760, 14 Ariz. 234.

25 C.J. p 1010 notes 34, 36.

As voluntary or compulsory

(1) "A fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society."—Stewart v. Verde River Irrigation & Power Dist., 68 P.2d 329, 335, 49 Ariz. 531.

(2) Webster defines a fee as: "A charge for special services which people are compelled to accept;" and also as "a charge for special services which people are not compelled to accept, unless they choose."—Flood v. State, 117 So. 385, 386, 95 Fla. 1003.

32. Fla.—Crawford v. Bradford, 2 So. 782, 783, 23 Fla. 404.

25 C.J. p 1010 note 40.

33. Ind.—Seiler v. State, 65 N.E. 922, 927, 160 Ind. 605, 619.

25 C.J. p 1009 note 15.

34. Ky.—Commonwealth v. Bailey, 3 Ky.L. 110, 114.

35. Ariz.—Cochise County v. Wilcox, 127 P. 758, 760, 14 Ariz. 234.

25 C.J. p 1010 notes 41–43.

36. Ga.—Alexander v. Walton, 107 S.E. 862, 863, 151 Ga. 645.

25 C.J. p 1010 note 44.

37. Ill.—People ex rel. City of Peoria v. Weston, 193 N.E. 487, 489, 358 Ill. 610.

Pa.—Pittsburgh v. Grenet, 86 A. 462, 465, 238 Pa. 567.

38. Mich.—People v. Goulding, 266 N.W. 378, 380, 275 Mich. 353.

39. Ind.—Seiler v. State, 65 N.E. 922, 927, 160 Ind. 605.

40. Mich.—People v. Goulding, 266 N.W. 378, 380, 275 Mich. 353.

41. Ala.—Autauga Banking & Trust Co. v. Allen, 125 So. 805, 806, 220 Ala. 478.

Ariz.—State ex rel. Colorado River Commission v. Frohmiller, 52 P.2d 483, 488, 46 Ariz. 413.

61 C.J. p 73 notes 53–56, and "wages."[42]

Fees in connection with corporations see Corporations § 67, for incorporation; § 79 note 11, on extension of charter; § 437 notes 94, 95, for registering stock transfers; § 895 e (4) (a) notes 18, 19, on filing reports; § 1620, on consolidation; and with reference to imports or exports see Customs Duties § 214. Fees of particular persons see such C.J.S. titles as Attorney and Client §§ 61, 162; Judges §§ 34, 38, 39, also 33 C.J. p 951 note 28–p 952 note 35, p 958 note 39–p 959 note 64; Sheriffs and Constables § 217, also 57 C.J. p 1104 note 96–p 1105 note 6; and Witnesses §§ 35–48, also 70 C.J. p 67 notes 72–p 82 note 91.

Phrases employing the word are set out in the foot note.[43] Other phrases as to which more recent adjudications have not been found see 25 C.J. p 1010 notes 46–55.

FEEBLE. Lacking strength, or capacity for forcible action or resistance; weak; specifically, reduced to a state of weakness, as by sickness or age.[44] The term as applied to corporations means financially weak, denoting inability to sustain themselves financially.[45]

Phrases employing the word are set out in the note.[46]

FEED.

As a Noun

As referring to articles to be fed to animals,

Cal.—Reynolds v. Reynolds, 58 P.2d 660, 661, 14 Cal.App.2d 481.
La.—Lobrano v. Plaquemines Parish Police Jury, 90 So. 423, 425, 150 La. 14.
Pa.—McNair v. Allegheny County, 195 A. 118, 121, 328 Pa. 3.
25 C.J. p 1010 note 26—54 C.J. p 1124 note 73.

42. Ariz.—State v. Ash, 87 P.2d 270, 273, 53 Ariz. 197.
Cal.—Reynolds v. Reynolds, 58 P.2d 660, 661, 14 Cal.App.2d 481.
Colo.—Wilson v. City and County of Denver, 178 P. 17, 19, 65 Colo. 484.
25 C.J. p 1010 notes 26, 27—67 C.J. p 286 note 86.

Gist of distinction

(1) The term is distinguished from "wages" or "salary" in that it refers to compensation for particular acts, whereas "wages" or "salary" refers rather to compensation for work during a definite period of time. —Seiler v. State, 65 N.E. 922, 927, 160 Ind. 605, 619.

(2) "Fees" also are distinguishable from "wages" in being compensation paid to professional men, while the term "wages" is applied to the payment for manual labor or other labor of manual or mechanical kind.—In re Stryker, 53 N.E. 525, 158 N.Y. 526, 70 Am.S.R. 489.

43. "Fees of office"

(1) As the property of the state.—Collins v. Tarrant County, Tex.Civ.App., 242 S.W. 1103, 1105.

(2) Distinguished from "perquisite."—McKinney v. Collingsworth County, Tex.Civ.App., 159 S.W.2d 234, 237—Hood v. State, Tex.Civ.App., 73 S.W.2d 611, 613—Harris County v. Hammond, Tex.Civ.App., 203 S.W. 445, 448.

(3) As including profits made by sheriff under statute relating to allowance to sheriff for support and maintenance of prisoners.—McKinney v. Collingsworth County, supra.

Other phrases

(1) "Attorney fees allowed in criminal cases."—Gabrielson v. Webster County, 210 N.W. 912, 913, 202 Iowa 673.

(2) "Extra compensation, fee, or allowance" see 15 C.J.S. p 657 note 2.

(3) "Fee bill" see Costs § 423.

(4) "Fee, commission, bonus, gift or other consideration."—Federal Land Bank of Berkeley v. Warner, Ariz., 54 S.Ct. 571, 292 U.S. 53, 78 L. Ed. 1120, 91 A.L.R. 380.

(5) "Fee, fine, or other charge."—Commonwealth v. Pennsylvania Loan Corporation, 193 A. 141, 143, 127 Pa. Super. 253.

(6) "Fees and emoluments."
U.S.—U. S. v. Hill, Mass., 7 S.Ct. 510, 513, 120 U.S. 169, 30 L.Ed. 627.
Mo.—State v. Dishman, 68 S.W.2d 797, 798, 334 Mo. 874.

(7) "Fees and expenses."—In re Nolan's Estate, 108 P.2d 385, 388, 56 Ariz. 353.

(8) "Fees, commissions, and perquisites."—Witherspoon v. Sheppard, 67 S.W.2d 1037, 1038, 123 Tex. 93—Veltman v. Slater, 217 S.W. 378, 380, 110 Tex. 198.

(9) "Fees of all kinds."—Eastland County v. Hazel, Tex.Civ.App., 288 S.W. 518, 521—25 C.J. p 1010 note 51.

(10) "Fees or costs," as not including charges of a court reporter. —Estabrook v. King, C.C.A.Mo., 119 F.2d 607, 610.

(11) "Fees, salary, or compensation for official services of officers of the United States" see Compensation 15 C.J.S. p 657 note 4.

(12) "Membership fee," as not including an involuntary payment of moneys attempted to be enforced by depriving members of certain privileges.—Kiowa Council, No. 147, Degree of Pocahontas of New York State of I. O. R. M. v. Great Council of New York, Degree of Pocahontas of I. O. R. M., 228 N.Y.S. 256, 259, 132 Misc. 106.

(13) "Qualifying fee" or a "fee for an annual permit," paid as a condition to the right of a corporation to do business in the state.—Consolidated Coal Co. v. State, 183 So. 650, 651, 236 Ala. 489.

(14) "Regulatory or enforcement fees," such as license fees, inspection fees, or examination fees, distinguished from "taxes."—State ex rel. Attorney General v. Wisconsin Constructors, 268 N.W. 238, 243, 222 Wis. 279.

(15) "Retaining fee" see Attorney and Client § 61 notes 8, 9, and § 162.

(16) "Taxes or fees," as including contributions required under Unemployment Compensation Act.—Lucas v. Murphy, Mo., 156 S.W.2d 686, 688.

(17) "Withdrawal fee."—E. A. Strout Farm Agency v. McTeer, 88 A. 411, 111 Me. 169, 170.

44. Century D.

45. N.H.—French v. Lawrence, 81 A. 705, 706, 76 N.H. 234.
What constitutes corporate insolvency see Corporations § 1372.

46. "Feeble health"

The words import that the person in such health is weak, sickly, debilitated by disease or by age or decline of life, but they do not mean that the person is incapable of travel.—Lund v. Dawes, 41 Vt. 370, 372.

Other phrases

(1) "Feeble Congregational churches," as designating churches of that denomination which are not self-supporting.—French v. Lawrence, 81 A. 705, 706, 76 N.H. 234.

(2) "Feeble-minded," "feeble-mindedness," or "feeble minded person" see the C.J.S. title Insane Persons § 1, also 32 C.J. p 622 notes 61–68, p 626 note 62.

particularly domestic animals, see the C.J.S. title Food § 1, also 26 C.J. p 751 note 8.

In a mechanical sense, the motion or advance of any material which is being fed to a machine, as of cloth to the needle of a sewing machine; also the material upon which a machine operates, as the grain running into a grinding-mill.[47] The word admits of some ambiguity. The "feed" mechanism is a part of the machine, which clamps and controls the material, and the material, when so clamped, partakes of the movements of the feed mechanism, so that the material may thus be considered a part of the feed.[48]

Phrases employing the word, both as a noun and as an adjective, are set out in the note.[49]

As a Verb

To lend additional support, to strengthen ex post facto.[50]

Phrases employing the verb are set out in the note.[51]

FEEDER. Primarily, one who or that which gives or provides food or supplies nourishment; and specifically one who fattens cattle, especially for slaughter.[52] Applied to the animals themselves, "feeders" are such as are not ready for slaughter but require fattening to place them in condition for consumption.[53]

In a different, but still analogous, sense, a fountain, stream, or channel that supplies a main canal with water.[54]

FEEL. As a noun, a sensation of any kind, or a vague mental impression or feeling,[55] as in the expression, the "feel" of a case.[56]

As a verb, to be conscious of;[57] to have experience of; also, to try by touch; examine by touching with the hands or otherwise.[58] In the latter sense, the term may indicate deliberation.[59]

In a derived sense, the word has been said to be equivalent to "believe" see Believe 10 C.J.S. p 239 in Pocket Parts.

Feeling. A verbal noun, defined as meaning the immediate quality of what is present to consciousness in sensation, desire, or emotion, considered apart from all complication by thought; in a loose use, any content of consciousness, not recognizable as thought or volition.[60] As a mental process, it has been described as a fact, an ultimate fact, and distinguished from "judgment."[61] In the plural, the term is broad enough properly to include both mental and bodily feelings.[62]

Phrases employing the word are set out in the note.[63] Other phrases as to which more recent ad-

47. Century D.

48. U.S.—Jones Special Mach. Co. v. Pentucket Variable Stitch Sewing-Mach. Co., Me., 104 F. 556, 560, 44 C.C.A. 33.

49. **Phrases construed**

(1) "Feed mechanism."—Jones Special Mach. Co. v. Pentucket Variable Stitch Sewing-Mach. Co., supra.

(2) "Feed, provisions, and fuel."—Aetna Casualty & Surety Co. of Hartford, Conn. v. Kimball, 222 N.W. 31, 33, 206 Iowa 1251.

(3) "Feed roll," or automatic feeder, used in connection with a ripsaw, described as a toothed appliance, something like a saw, but working in front of the saw proper, and feeding the board to it automatically, and tending to prevent the board from being thrown against the sawyer by the hold its teeth take.—Dean v. St. Louis Woodenware Works, 80 S.W. 292, 294, 106 Mo.App. 167.

(4) "Feed stable" see the C.J.S. title Livery Stable Keepers § 1, also 25 C.J. p 1011 note 69.

(5) "Feed wire" see Electricity § 1 p 476 note 49.

(6) "Furnishing of shelter and feed."—El Paso Cattle Loan Co. of El Paso, Tex. v. Hunt, 228 P. 888, 889, 30 N.M. 157.

50. Eng.—Christmas v. Oliver, 5 M. & R. 202, 207, cited in Black L.D.

51. **Phrases construed**

(1) "'Feeding and watering' live stock," as not including showering to protect them from the heat, see Carriers § 63 b.

(2) "Feeds the estoppel."—Christmas v. Oliver, 5 M. & R. 202, 207, cited in Black L.D.

(3) "Feed the mortgage," as referring to a subsequent title acquired by the mortgagor.—Black L.D.

52. Webster New Int.D.

Phrase construed

"Stock feeder," as distinguished from "stock merchant or buyer."—Jewell v. Sumner Tp., 84 N.W. 973, 113 Iowa 47.

53. Mo.—McGraw v. O'Neil, 101 S. W. 132, 135, 123 Mo.App. 691.

54. Pa.—Graff v. Evergreen R. Co., 2 Pa.Co. 502, 504.

55. Century D.

56. **As a factor in aiding a trier's conclusion**

"There are many factors aiding in a reasonable conclusion which are presented to the trier of facts in the first instance and not available to one going over the cold record. There is what might be called the 'feel' of the case. This embraces a consideration of the witnesses, the manner in which they testify and their general attitude in the courtroom. It embraces likewise the conduct of counsel."—Cummings v. Kendall, Cal.App., 107 P.2d 282, 285.

57. Webster New Int.D.

58. Century D.

59. Md.—Thillman v. Neal, 42 A. 242, 245, 88 Md. 525.

60. Century D.

61. Conn.—Vivian's Appeal, 50 A. 797, 798, 74 Conn. 257.

62. Tex.—Western Union Tel. Co. v. Sweetman, 47 S.W. 676, 677, 19 Civ.App. 435.

63. **Phrases construed**

(1) "Feel doubtful," as distinguished from "deem."—Smith v. Missouri Pac. R. Co., 44 S.W. 718, 719, 143 Mo. 33.

(2) "Feeling aggrieved."—Brown v. Chase, 217 P. 23, 125 Wash. 542.

(3) "Felt in through a window and struck her," as indicating deliberation, and an intent to deliver the blow which followed.—Thillman v. Neal, 42 A. 242, 245, 88 Md. 525.

FELON. A person who commits a felony;[79] one who has committed felony; one convicted of felony.[80] As used in a particular state statute, the term has been defined as a person who has been convicted by a court "of this state" of a crime which is or may be punishable by death or imprisonment in a state prison.[81] In the subjoined note, examples are given of what, in particular connections, the term has been held to include and not to include.[82]

FELONIA. Latin and Spanish, felony.[83] In Spanish feudal law, "felonía" designated an act of disloyalty or treason committed by a vassal against his lord, or of oppression by the latter against the former. The first was punished by forfeiture of the fief, and the second by loss of dominion.[84]

FELONIA, EX VI TERMINI SIGNIFICAT QUODLIBET CAPITALE CRIMEN FELLEO ANIMO PERPETRATUM.[85]

FELONIA IMPLICATUR IN QUALIBET PRODITIONE.[86]

FELONICE. Latin, literally "feloniously."[87]

FELONIOUS. Of, or pertaining to, or having the quality of felony;[88] proceeding from an evil heart or purpose; done with a deliberate purpose to commit a crime;[89] with intent to commit a crime;[90] wrongful;[91] malicious, malignant, perfidious, traitorous, villainous.[92] The term connotes a deliberate and well-formed intent to do an act known to be wrong,[93] or evil intent;[94] describes a willful act;[95] and means and includes all that the word willfully imports, and in addition other elements of crime which constitute felony.[96]

When used in a statute, it may be synonymous with "criminal," see Criminal 21 C.J.S. p 1153 note 82 in Pocket Parts, and "fraudulent."[97]

Phrases employing the word are set out in the note.[98]

FELONIOUSLY. A term which has been defined generally as meaning having the quality of a felony;[99] proceeding from an evil heart or purpose, done with a deliberate intention of committing a crime;[1] wickedly and against the admonition of the

79. N.Y.—In re La Grange, 274 N.Y.S. 702, 706, 153 Misc. 236—In re Canter's Will, 261 N.Y.S. 872, 880, 146 Misc. 123.

80. Black L.D.

Phrases

(1) "Convicted felon."—Perry v. Man, 1 R.I. 263, 265.

Use of the word "convict" as signifying a condemned felon see Convicts § 1 note 3.

(2) "Felon editor."—Leyman v. Latimer, 3 Exch.D. 352.

81. N.Y.—In re Cohen's Will, 298 N.Y.S. 368, 373, 164 Misc. 98.

82. **Held to include**

One convicted of attempt to commit second-degree grand larceny.—In re La Grange, 274 N.Y.S. 702, 705, 153 Misc. 236.

Held not to include

(1) A person convicted in one jurisdiction of a crime which is there a felony is not necessarily a "felon" within a particular statute of another jurisdiction.—In re Cohen's Will, 2 N.Y.S.2d 764, 765, 254 App.Div. 571.

(2) One less than seventeen years old at the time of the offense charged.—State v. Connally, 182 So. 318, 319, 190 La. 175.

Specific applications of the term see 25 C.J. p 1012 note 96.

83. Black L.D.

"Per feloniam"—with a criminal intention.—Black L.D.

84. Escriche Diccionario.

85. A maxim meaning "Felony, by force of the term, signifies any capital crime perpetrated with a malignant mind."—Black L.D.

86. A maxim meaning "Felony is implied in every treason."—Black L.D.

87. Black L.D.

"Anciently an indispensable word in indictments for felony, and classed by Lord Coke among those *voces artis* (words of art) which cannot be expressed by any periphrasis or circumlocution."—Black L.D., citing 4 Blackstone Comm. p 307.

88. Cal.—People v. Thomas, 208 P. 343, 344, 58 Cal.App. 308.

Similarly expressed

Of the grade or quality of a felony.—Martin v. State, 142 So. 15, 163 Miss. 454.

89. Ky.—Wood v. Commonwealth, 56 S.W.2d 556, 560, 246 Ky. 829—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

90. Fla.—Grooms v. State, 96 So. 296, 85 Fla. 4.

Miss.—Martin v. State, 142 So. 15, 163 Miss. 454.

91. **As meaning wrongful** "in that there was no color of right or excuse for the act."

Conn.—State v. Enanno, 114 A. 386, 388, 96 Conn. 420.

Del.—State v. Savage, 186 A. 738, 739, 7 W.W.Harr. 509.

92. La.—State v. Dickerson, 71 So. 347, 349, 139 La. 147.

N.Y.—People v. Knapp, 274 N.Y.S. 85, 90, 152 Misc. 368.

Utah.—State v. Horne, 220 P. 378, 381, 62 Utah 376.

93. Ky.—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

"An act could not be felonious without being both malicious and unlawful."—State v. Horne, 220 P. 378, 381, 62 Utah 376.

94. Ky.—Lanham v. Commonwealth, 63 S.W.2d 585, 586, 250 Ky. 500.

95. Ky.—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

96. Ky.—Gatewood v. Commonwealth, supra.

97. Or.—State v. Albert, 242 P. 1116, 1117, 117 Or. 179.

Pa.—Commonwealth v. Hartland, 24 A.2d 160, 161, 147 Pa.Super. 263.

98. **Phrases construed**

(1) "Felonious assault" see generally Assault and Battery §§ 73–84, 110, 125.

(2) "Felonious homicide" see the C.J.S. title Homicide § 1, also 29 C.J. p 1049 notes 11–16.

(3) "Felonious intent," generally see Criminal Law § 1 e notes 74, 75, and specifically see the particular criminal law titles.

(4) "Felonious purpose."—Traders & General Ins. Co. v. Grant, Tex.Civ. App., 137 S.W.2d 213, 214.

(5) "Overt felonious act committed in the presence of a custodian.—Van Keuren v. Travelers' Indemnity Co., 108 S.E. 310, 27 Ga.App. 367.

99. Ind.—Mann v. State, 186 N.E. 283, 284, 205 Ind. 491, 187 N.E. 343.

1. Ky.—Wood v. Commonwealth, 56

law, that is, wickedly and unlawfully;[2] with criminal intent;[3] wrongfully and with the intent of committing a felony or crime.[4] Used in connection with an unlawful and forbidden act, the term signifies that the act was done knowingly and purposely, not accidentally or by mistake.[5] The term imports intent,[6] and a willful act;[7] and has been held to include "maliciously"[8] and "unlawfully."[9]

It may be synonymous with "criminally" see Criminally 24 C.J.S. p 1262 note 1 in Pocket Parts; and has been held equivalent to "fraudulently,"[10] "maliciously,"[11] "purposely," and "unlawfully."[12] It has been compared with, and distinguished from, "unlawfully,"[13] "willfully,"[14] and "wrongfully."[15]

As a technical term in accusations of crime see the C.J.S. title Indictments and Informations § 135, also 31 C.J. p 699 note 7–p 701 note 42.

FELONY. See generally Criminal Law § 6. Necessity of characterizing an offense as a felony, or as committed feloniously, see the C.J.S. title Indictments and Informations §§ 109, 135, also 31 C.J. p 670 notes 27–34, p 699 note 7–p 701 note 42. Particular offenses as felonies see the specific C.J.S. titles discussing such offenses.

FELT. An unwoven fabric of short hair or wool, or of wool and fur, agglutinated or matted together, with the aid usually of moisture and heat, by rolling, beating, and pressure;[16] rabbit fur, the separate hairs of which, when agitated in hot water, congeal as it were into a seamless fabric.[17]

FELTING. That action, or quality, of wool which distinguishes it from hair and which is caused by the tiny hooks or scales on wool, which grip and mat on pressure and contact with other strands;[18] hence the process in making felt by which the fur fibers become interlocked with the wool fibers or with other fibers of fur for their whole length.[19] In this sense, the term has been compared with "sticking."[20]

FEMALE. Comprehensively considered, a generic term, including a variety of species,[21] and defined as meaning the sex which conceives and gives birth to young; also a member of such sex.[22] Applied to the human race, a woman.[23] It is not a word of technical character, and may be substituted by the use of synonymous words, or words which plainly indicate a female, such as "her" or "she" and proper names applied to females only.[24] The term has been compared with "woman."[25]

Phrases employing the word are set out in the note.[26]

S.W.2d 556, 560, 246 Ky. 829—Golden v. Commonwealth, 53 S.W.2d 185, 186, 245 Ky. 19—Garrett v. Commonwealth, 285 S.W. 203, 204, 215 Ky. 484—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

Embraces evil intent
Utah.—State v. Horne, 220 P. 378, 381, 62 Utah 376.

2. Mo.—State v. Allister, 295 S.W. 754, 757, 317 Mo. 348—State v. Young, 286 S.W. 29, 34, 314 Mo. 612—State v. Newland, 285 S.W. 400, 402—State v. Mathes, 281 S.W. 437, 439—State v. Smith, 281 S.W. 35, 39, 313 Mo. 71.

3. Me.—State v. Castner, 119 A. 112, 122 Me. 106.
Va.—Butts v. Commonwealth, 133 S.E. 764, 768, 145 Va. 800.

4. R.I.—State v. Smith, 184 A. 494, 499, 56 R.I. 168.

5. Mo.—Mansur v. Lentz, 211 S.W. 97, 99, 201 Mo.App. 256.

6. Mich.—People v. Locke, 266 N.W. 370, 372, 275 Mich. 333.
Wash.—State v. McGuff, 177 P. 316, 317, 104 Wash. 501.

7. U.S.—U. S. v. Altman, D.C.N.Y., 8 F.Supp. 880, 884—Howenstine v. U. S., C.C.A.Cal., 263 F. 1, 4.
Ky.—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

8. Ky.—Aikman v. Commonwealth, 18 S.W. 937, 938, 13 Ky.L. 894.
38 C.J. p 355 note 44 [b].

9. Colo.—Bridge v. People, 165 P. 778, 779, 63 Colo. 319.
Miss.—Winston v. State, 90 So. 177, 178, 127 Miss. 477.
Utah.—State v. Lund, 286 P. 960, 961, 75 Utah 559.
66 C.J. p 45 note 28 [a].

10. Tex.—Jorasco v. State, 6 Tex. App. 238, 240.

11. N.Y.—People v. Knapp, 274 N.Y.S. 85, 90, 152 Misc. 368.

12. Ind.—Mann v. State, 186 N.E. 283, 284, 205 Ind. 491, 187 N.E. 343.
Ky.—Gatewood v. Commonwealth, 285 S.W. 193, 194, 215 Ky. 360.

"Purposely" held identical in effect
Ind.—Carder v. State, 17 Ind. 307, 308.

13. Cal.—People v. Ranney, 1 P.2d 423, 426, 213 Cal. 70.
Ind.—Weinzorpflin v. State, 7 Blackf. 186, 195.

14. Me.—State v. Hyman, 102 A. 231, 232, 116 Me. 419.
68 C.J. p 294 note 11.

15. La.—State v. Pellerin, 43 So. 159, 161, 118 La. 547.

16. Century D.

17. **Manufacturing process**
"At first this is very flimsy and must be handled with great care, but, as the barbs on the hairs interlock more and more completely, it becomes more closely knit and stouter. This process is called the 'hardening' stage; it always was, and still is, done by hand."—United States Hat Machinery Corporation v. Boesch Mfg. Co., C.C.A.Conn., 108 F.2d 417.

18. U.S.—Werk v. Parker, Pa., 231 F. 121, 123, 145 C.C.A. 309.

19. U.S.—Matteawan Mfg. Co. v. Emmons Bros. Co., C.C.A.Mass., 253 F. 372, 376.

"Felting, shrinking, and crozing"
U.S.—United States Hat Machinery Corporation v. Boesch Mfg. Co., C.C.A.Conn., 108 F.2d 417, 418.

20. U.S.—Matteawan Mfg. Co. v. Emmons Bros. Co., C.C.A.Mass., 253 F. 372, 376.

21. Iowa.—State v. Hemm, 48 N.W. 971, 972, 82 Iowa 609.

22. Black L.D.

23. Ala.—Myers v. State, 4 So. 291, 84 Ala. 11, 12.
25 C.J. p 1012 note 8.

24. Va.—Taylor v. Commonwealth, 20 Gratt. 825, 827, 61 Va. 825, 827.

25. Iowa.—State v. Hemm, 48 N.W. 971, 972, 82 Iowa 609.

26. **Phrases construed**
(1) "Female abortionist."—State v. Guaraneri, R.I., 194 A. 589, 592, 593.

FEME or **FEMME.** A woman;[27] also, a wife, as in the phrase "baron et feme."[28] It was used in the feudal legal nomenclature and in the earlier text-books as properly expressing the feudal theory that the wife was subject to the husband.[29]

Phrases employing the word are set out in the note.[30]

FEMICIDE. The killing of a woman; also one who kills a woman.[31]

FEMININE. Of or belonging to females.[32]

FENATIO or **FEONATIC.** In forest law, the fawning of deer; the fawning season.[33]

FENCE. As a noun or as a verb, in its literal or primary sense of a barrier, see the C.J.S. title Fences § 1. As a noun, in a derived sense, applied to those who make a business of receiving stolen property see the C.J.S. title Receiving Stolen Goods §§ 1, 14, also 25 C.J. p 1012 note 16.

As a verb, in old Scotch law, to defend or protect by formalities.[34]

Phrases employing the word are set out in the note.[35]

FENCE-MONTH or **DEFENSE-MONTH.** In old English law, a period of time, occurring in the middle of summer, during which it was unlawful to hunt deer in the forest, that being their fawning season. Probably so called because the deer were then defended from pursuit or hunting.[36]

(2) "Female breeding stock," as meaning only those sufficiently matured, or one year old.—Rodgers v. Perez, C.C.A.Nev., 12 F.2d 923, 924.

(3) "Female child" as equivalent to "woman child" see Child or Children 14 C.J.S. p 1110 in Pocket Parts.

(4) "Female child under 14" see 14 C.J.S. p 1110 note 4.

(5) "Female heirs."—Beall v. Harwood, 2 Harr. & J., Md., 167, 171, 3 Am.D. 532.

(6) "Unmarried female," as descriptive not only of those who have never married, but also of widows and divorced women.—People v. Weinstock, 140 N.Y.S. 453, 458, 27 N.Y.Cr. 53.

(7) "Unmarried female of previous chaste character."—State v. Hemm, 48 N.W. 971, 972, 82 Iowa 609.

27. La.—Ducre v. Milner, App., 146 So. 734, 736.

28. Black L.D.
See also Baron 9 C.J.S. p 1545 notes 47, 48.

29. Me.—Cummings v. Everett, 19 A. 456, 82 Me. 260, 262.

Historical note
"In the feudal theory of the common law, the wife was subject to the husband. They were styled in the earlier law books, baron and feme, or lord and woman. . . . Blackstone . . . says that the disabilities of the wife are intended for the most part for her protection and benefit, 'so great a favorite is the female sex of the law of England.'" —Cummings v. Everett, supra.

30. "Feme sole"
(1) Defined as meaning a woman, single, unmarried, not having a spouse.
Del.—Kirkley v. Lacey, 30 A. 994, 995, 12 Del. 213.
La.—Ducre v. Milner, App., 146 So. 734, 736.

(2) The term may be applied to a married woman acting or contracting with reference to her separate estate. —Chew v. Henrietta Mining & Smelting Co., C.C.Mo., 2 F. 5, 8, 1 McCrary 222.
See also the C.J.S. title Husband and wife § 233, and 30 C.J. p 801 note 70–p 802 note 82.

Other phrases construed
(1) "Femme couleur libre," as meaning a free woman of color, sometimes abbreviated "F. C. L."—Sunseri v. Cassagne, 185 So. 1, 4, 191 La. 209.

(2) "Feme covert" see 21 C.J.S. p 1033 note 31.

(3) Feme covert's jus disponendi, as meaning "A married woman's right of disposing" [of her estate].—Smith v. Morgan, 8 Gill, Md., 133, 139.

(4) "Feme sole trader" and "feme sole trading acts" see the C.J.S. title Husband and Wife § 129, also 30 C.J. p 681 note 72-74, as to partnership with husband; §§ 204–208, also 30 C. J. p 762 note 82–p 769 note 63, as to carrying on business as sole trader.

31. Black L.D.

32. Black L.D.

33. Black L.D.

34. Black L.D.
"To 'fence a court' was to open it in due form, and interdict all manner of persons from disturbing their proceedings. This was called 'fencing,' that is to say defending or protecting the court."—Black L.D.

35. Phrases construed
(1) "Fenced in common," as indicating that two or more farms are inclosed by uniting the outside line fences.—Markin v. Priddy, 20 P. 474, 40 Kan. 684.

(2) "Fenced off," as meaning properly protected, and not necessarily referring to a fence in its literal sense.—Honor v. Albrighton, 93 Pa. 475, 478.

(3) "Fence pole," may include a heavy club.—Baker v. Hope, 49 Cal. 598, 599.

36. Black L.D.

FENCES

This Title includes structures for inclosing lands in general; statutory provisions relating thereto; rights, duties, and liabilities of proprietors or occupants of lands in respect of such structures; and legal proceedings relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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§ 1. Definition and Nature

A fence is an inclosing structure about a field or other space intended to prevent intrusion from without or straying from within.

A fence is an inclosing structure about a field or other space, or about any object, composed of wood, iron, or other material, and intended to prevent intrusion from without or straying from within.[1]

It is nothing more than a line of obstacle, and may be composed of any material which will present a sufficient obstruction.[2] Thus a fence may be constructed of barbed wire,[3] meshed wire,[4] or

1. Okl.—Midland Valley R. Co. v. Bryant, 131 P. 678, 37 Okl. 206.
25 C.J. p 1014 note 1.
Protection as object of fence
Cal.—Meade v. Watson, 8 P. 311, 67 Cal. 591.
25 C.J. p 1014 note 1 [c].

2. Ill.—Allen v. Tobias, 77 Ill. 169.
25 C.J. p 1014 note 2.
Structure built and used like fence is a fence within a restrictive covenant, even though climbing rose bushes planted alongside conceal some part of the structure.—Molony v. Belzer, 14 Pa.Dist. & Co. 781, 46 Montg.Co. 262.

3. Mass.—Quigley v. Clough, 53 N. E. 884, 173 Mass. 429, 430, 73 Am. S.R. 303, 45 L.R.A. 500.
25 C.J. p 1014 note 3.
Sufficiency of barbed wire fence under statute see infra § 4.

4. **Supported by iron posts**
Pa.—Molony v. Belzer, 14 Pa.Dist. & Co. 781, 46 Montg.Co. 262.

of wood,[5] boards,[6] rails,[7] or stumps.[8] It may be a hedge,[9] a wall,[10] a trestle,[11] or a ditch[12] or trench[13] of sufficient dimensions.[14]

A navigable or deep watercourse is sometimes deemed to be a fence, or equivalent to or a substitute for a fence;[15] but the rule is otherwise as to a shallow stream that will not, under ordinary circumstances, prevent domestic animals from crossing.[16]

A gate erected in a line of fence is a part of the fence.[17]

Although different in construction,[18] a railroad cattle guard, gap, or pit is in a sense a fence[19] and is deemed a fence within the meaning of some statutes.[20]

Posts merely set around a piece of land cannot be termed a fence;[21] neither can the term "fence" be construed to include a line of posts on which slats are nailed, where they are intended not to inclose or surround a field, but to prevent travelers from turning out of the road and trespassing thereon.[22]

A "division fence" is one dividing contiguous property.[23]

A "partition fence" is a fence on the land between two proprietors, where there is no road, alley, or something else which would prevent erection of such fence.[24]

A "possession fence" is an inclosure made by the lapping of fallen trees, and apparently constructed only for the purpose of indicating a claim to the ownership of the land surrounded thereby.[25]

"To fence" means to inclose with a fence or other protection.[26] To "fence in" a place, as against live stock, means to surround it by a fence, so as to prevent the intrusion of such animals upon the inclosed premises.[27]

Terms distinguished. A "lawful fence" means a fence as defined by statute,[28] while an "ordinary fence" is a common or usual fence.[29] The term "lawful fences" is not necessarily synonymous with the term "ordinary fences,"[30] or "sufficient fences."[31] However, as discussed infra § 14, in applying a statute defining a sufficient fence the terms "lawful" and "sufficient" are necessarily synonymous.

5. Ill.—Wolf v. Schwill, 124 N.E. 389, 289 Ill. 190.
25 C.J. p 1014 note 4.

6. Mich.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann.Cas. 198.
25 C.J. p 1015 note 5.

7. Mich.—Rose v. Linderman, supra.
25 C.J. p 1015 note 6.

Worm fence
(1) The term "fence" includes an ordinary worm or Virginia rail fence.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann.Cas. 198.
(2) Location of rail or worm fences see infra § 15.

8. Mich.—Rose v. Linderman, supra.

9. Iowa.—Kinney v. Kinney, 74 N.W. 688, 104 Iowa 703, 40 L.R.A. 626.
25 C.J. p 1015 note 8.

10. Va.—Kimball v. Carter, 27 S.E. 823, 95 Va. 77, 38 L.R.A. 570.
25 C.J. p 1015 note 9.

11. Iowa.—Hilliard v. Chicago & N. W. R. Co., 37 Iowa 442.

12. Mich.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann. Cas. 198.
25 C.J. p 1015 note 11.

13. Iowa.—Hilliard v. Chicago & N. W. R. Co., 37 Iowa 442.

14. Conn.—Fox v. Beebe, 24 Conn. 271.
25 C.J. p 1015 note 13.

15. Mich.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann. Cas. 198.
25 C.J. p 1015 note 14.
Location of fence across stream see infra § 15.

16. N.C.—Jones v. Witherspoon, 52 N.C. 555, 78 Am.D. 263—State v. Lamb, 30 N.C. 229.

17. Mont.—Scheffer v. Chicago, M. & P. S. R. Co., 163 P. 565, 53 Mont. 302.
25 C.J. p 1015 note 16.

18. Ala.—Carrollton Short Line R. Co. v. Lipsey, 43 So. 836, 150 Ala. 570.

19. Ala.—Carrollton Short Line R. Co. v. Lipsey, supra.

20. Ind.—Louisville, New Albany & C. R. Co. v. Porter, 97 Ind. 267.
25 C.J. p 1015 note 19.
Fences and cattle guards along or on railroad right of way see the C.J.S. title Railroads §§ 176–181, also 51 C.J. p 707 note 47–p 714 note 80.

21. Tex.—Burch v. State, Cr., 67 S. W. 500.

22. N.C.—State v. Roberts, 7 S.E. 714, 101 N.C. 744.

23. Mont.—Hoar v. Hennessey, 74 P. 452, 29 Mont. 253, 260.

24. Iowa.—Osgood v. Names, 184 N. W. 331, 191 Iowa 1227—Hewitt v. Jewell, 12 N.W. 738, 739, 59 Iowa 37, 38.

Other definitions
Any structure, hedge, or ditch in the nature of a fence, used for the purpose of inclosure, such as good husbandmen generally keep, and such as shall on the testimony of skillful men appear to be sufficient, is a partition fence.—Endere v. McDonald, 31 N.E. 1056, 1057, 5 Ind.App. 297.
"Gate" in partition fence comes within the phrase "partition fence."—Robinson v. Schlitz, 115 S.W. 472, 473, 135 Mo.App. 32.

25. Tex.—Freedman v. Bonner, Civ. App., 40 S.W. 47.

26. Iowa.—Mackie v. Iowa Cent. R. Co., 6 N.W. 723, 54 Iowa 540.

27. Tex.—Ft. Worth & R. G. R. Co. v. Swan, 78 S.W. 920, 97 Tex. 338.
25 C.J. p 1015 note 24.

28. Mo.—Russell v. Hannibal & St. J. R. Co., 83 Mo. 507—Smith v. Chicago & A. R. Co., 105 S.W. 10, 127 Mo.App. 160—Ayres v. St. Louis, M. & S. E. R. Co., 101 S.W. 689, 690, 124 Mo.App. 422.
Mont.—Smith v. Williams, 2 Mont. 195, 201.

29. Conn.—Hine v. Wooding, 37 Conn. 123.

30. Conn.—Hine v. Wooding, supra.

31. Pa.—Robison v. Fetterman, 9 Pa. Cas. 604, 14 A. 245.

Defined
"Sufficient fences" mean fences such as farmers of practical knowledge and experience would consider as sufficient to protect the crop from injury by usually orderly cattle.—Robison v. Fetterman, supra.
Sufficiency of fences generally see infra § 14.

While, as stated supra this section, a hedge is ordinarily considered a fence, and is so recognized by the statutes of some jurisdictions,[32] it is not a fence within the meaning of some of the statutes relating to fences.[33]

§ 2. Right and Duty to Erect and Maintain in General

As a general rule a landowner may build a fence along the boundary of his property.

It has been held that a landowner has an inherent right to erect a boundary fence along the division line of his property.[34]

§ 3. Statutory Provisions

Statutes exist, in many jurisdictions, dealing with and regulating the erection and maintenance of fences. Fence district laws are considered infra § 4, and statutes dealing with partition or division fences are considered infra § 8. Fencing requirements under the so-called Stock Laws are considered in Animals § 110 b.

Examine Pocket Parts for later cases.

§ 4. —— Fence District Laws

a. In general
b. Taxation

a. In General

Statutes exist providing for the establishment of fence districts, on petition or election by their residents, for the purpose of erecting and maintaining fences.

The statutes of some states provide for the establishment of fencing districts in accordance with the wishes of the residents of such districts, as ascertained by an election or by petition.[35] These statutes generally specify the qualifications of the persons who may vote or sign the petition,[36] the number or proportion of owners who must sign the petition,[37] and the official or officials under whose direction such elections are to be held and by whom the result is to be ascertained and declared.[38]

An election held pursuant to such a statute is not void for mere irregularities,[39] but it has been held that an election held on any other date,[40] or at any other place,[41] than that provided by statute is necessarily void.

The action of the officials in such proceedings is ministerial and not judicial,[42] and consequently they have no power to entertain a counterpetition, or pass on a contest over the result of an election.[43] However, where no review is provided by statute the action of such officials within their jurisdiction is final and conclusive,[44] and the courts have no power to interfere therewith.[45]

It is the province and duty of these officials to declare the result,[46] and if they refuse to declare the result, they may be compelled to do so by mandamus.[47] Where so required by statute, an application to an ordinary or other official acting in a fence district election to examine and count certain returns should be made in writing, distinctly setting forth the grounds of the proceedings desired,[48] and such application should be made before the official declares the result.[49]

Fencing board. Some statutes require members of a fencing board to take an oath of office, to adopt written plans for the construction of a fence, and to file a written report of the cost with a designated county officer. However, failure to take these steps is not a jurisdictional defect, it being waived by a failure to object thereto within the time limited by statute.[50]

Lands included. Under some statutes, land may be annexed to an existing fence district in a manner therein provided,[51] as, for example, by order

32. Mich.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann. Cas. 198.
25 C.J. p 1016 note 31.

33. Kan.—Griffith v. Carrothers, 119 P. 548, 86 Kan. 93.
25 C.J. p 1016 notes 32, 33.

34. Pa.—Dyba v. Borowitz, 7 A.2d 500, 136 Pa.Super. 532.
Easements as affecting right to build fences see Easements § 98.

35. Ark.—Hill v. Gibson, 154 S.W. 203, 107 Ark. 130.
25 C.J. p 1044 note 10.
Constitutionality of statutes see Constitutional Law § 142.
Stock law districts see Animals § 110 a.

36. Ala.—Flowers v. Grant, 30 So. 94, 129 Ala. 275.
25 C.J. p 1044 note 11.

37. Ark.—Stiewel v. Fencing Dist. No. 6, 70 S.W. 308, 71 S.W. 247, 71 Ark. 17.
25 C.J. p 1044 note 12.

38. Ga.—Harris v. Perryman, 30 S.E. 663, 103 Ga. 816.
25 C.J. p 1044 note 13.

39. Ga.—Mize v. Speight, 9 S.E. 1080, 82 Ga. 397.
25 C.J. p 1044 note 22.

40. Ga.—Reeves v. Gay, 18 S.E. 61, 92 Ga. 309.

41. Ga.—Dyson v. Pope, 71 Ga. 205.

42. Ga.—Meadows v. Taylor, 10 S.E. 204, 82 Ga. 738.
25 C.J. p 1044 note 14.

43. Ga.—Harris v. Perryman, 30 S.E. 663, 103 Ga. 816—Meadows v. Taylor, 10 S.E. 204, 82 Ga. 738.

44. Ga.—Skrine v. Jackson, 73 Ga. 377.
25 C.J. p 1044 note 16.

45. Ga.—Seymour v. Almond, 75 Ga. 112—Skrine v. Jackson, 73 Ga. 377.

46. Ga.—Steward v. Peyton, 77 Ga. 668.

47. Ga.—Steward v. Peyton, supra.

48. Ga.—Dyson v. Pope, 71 Ga. 205.

49. Ga.—Dyson v. Pope, supra.

50. Ark.—Stiewel v. Fencing Dist. No. 6, 70 S.W. 308, 71 S.W. 247, 71 Ark. 17.

51. **Validity of statute**
Pope's Digest § 5786, authorizing

of the county court on compliance with conditions specified in the applicable statute.[52] On compliance with the statutory requirements, the court is under a duty to grant the order of annexation.[53]

After land has been properly added to an existing fence district by annexation, all funds on hand may and should be expended on behalf of the whole district as enlarged.[54]

Where the intent of the statute providing for the creation of fence districts is to benefit persons engaged in agricultural pursuits, or at least a rural population, land in an incorporated town cannot be annexed to a fence district.[55]

Contracts. Although work done in the building of a fence was under a void contract made with the fence district, payments made for such work, in an amount not excessive or fraudulent, could not be recovered.[56]

b. Taxation

Fence districts may be empowered to levy taxes to defray the cost of fences erected by such districts.

The legislature may provide for levying a tax to defray the cost of the fence erected around a fencing district.[57] An assessment under such a statute must conform to the requirements of the act, or it is altogether unauthorized.[58] However, it has been held that a tax will not be defeated for mere irregularities which can be corrected[59] or for failure to follow provisions which are merely directory.[60]

An objection that the assessment does not comply with the petition is not well taken where the change or deviation in the original plans did not increase the length or cost of the fence.[61]

The fact that the money used in construction of the fence is borrowed by the county commissioners on their individual account will not invalidate an assessment.[62]

Amount. In the absence of fraud, an assessment approximately equal to the actual cost is not excessive or illegal.[63]

Apportionment. The tax must be uniformly apportioned on all the assessable realty in the fencing district, irrespective of the amount of fencing required in each county included in the district.[64]

Land taxable. The assessment must be for the benefit of the land taxed,[65] although a presumption exists that the property owners within the fence district will be benefited.[66] Hence, where fencing districts are created exclusively for the benefit of agricultural lands, land located in an incorporated

the annexation of "lands near or adjacent to any fencing district organized pursuant to the law," is valid as a general statute, even though authorizing the annexation of lands to a fence district created by special act, such statute not constituting a prohibited amendment of a special or local law.—Barber v. Edwards, 141 S.W.2d 831, 200 Ark. 940.

52. **Petition**

After denial of petition for annexation of lands to fencing district, on ground that majority in value or acreage of the lands was not represented, second petition could be filed at any time thereafter, involving different lands representing a majority in value of the lands or acreage sought to be annexed, and three of the parties to the first petition could join other parties in the second petition.—Armstrong v. Bull, 144 S.W.2d 707, 201 Ark. 377.

Consolidation of separate petitions

Separate petitions for annexation of territory to fence district were held properly consolidated for hearing.—Norton v. No Fence Dist. No. 2, 26 S.W.2d 878, 181 Ark. 560.

Notice

Lands embraced in separate petitions for annexation of territory to fence district were held properly included in same notice, such notice being substantial compliance with statute.—Norton v. No Fence Dist. No. 2, supra.

Collateral attack

Order of county court is valid against collateral attack.—Barber v. Edwards, 141 S.W.2d 831, 200 Ark. 940.

53. Ark.—Armstrong v. Bull, 144 S.W.2d 707, 201 Ark. 377.

54. Ark.—Barber v. Edwards, 141 S.W.2d 831, 200 Ark. 940.

55. Ark.—Johnson v. Owen, 152 S.W.2d 311, 202 Ark. 761.

56. Ark.—Barber v. Edwards, 141 S.W.2d 831, 200 Ark. 940.

Reason for rule

District could not accept such work without paying its reasonable value. —Barber v. Edwards, supra.

57. Miss.—Browning v. Mathews, 18 So. 658, 73 Miss. 343.
25 C.J. p 1044 note 30.

Annexed territory

Act authorizing annexation of territory to fence district providing no means for assessing annexed lands must be read with statute under which original district was established.—Norton v. No Fence Dist. No. 2, 26 S.W.2d 878, 181 Ark. 560.

58. N.C.—Bradshaw v. Guilford County, 92 N.C. 278.

59. N.C.—Simpson v. Mecklenburg, 84 N.C. 158.

Presumption of regularity

Ark.—Eagle v. Fencing Dist. No. 2, 121 S.W. 340, 91 Ark. 378.
25 C.J. p 1044 note 31[a].

60. Ark.—Stiewel v. Fencing Dist. No. 6, 70 S.W. 308, 71 S.W. 247, 71 Ark. 17.

Advertising for proposals for contract work

Ark.—Stiewel v. Fencing Dist. No. 6, supra.

61. Ark.—Stiewel v. Fencing Dist. No. 6, supra.

62. Ark.—Eagle v. Fencing Dist. No. 2, 121 S.W. 340, 91 Ark. 378.

63. Ark.—Stiewel v. Fencing Dist. No. 6, 70 S.W. 308, 71 S.W. 247, 71 Ark. 17.

64. N.C.—Greene County Comrs. v. Lenoir County Comrs., 92 N.C. 180.
25 C.J. p 1045 note 41.

Reapportionment on changing boundaries

Where the boundaries of a district are changed, reapportionment of the fencing must be made, although no allowance is made for any further survey.—Henderson v. Dearing, 117 S.W. 1066, 89 Ark. 598.

65. N.C.—Harper v. New Hanover County, 45 S.E. 526, 133 N.C. 106.
25 C.J. p 1045 note 37.

66. Ark.—Henderson v. Dearing, 117 S.W. 1066, 89 Ark. 598.
25 C.J. p 1045 note 37 [b].

town cannot be included in a fence district for purpose of assessment,[67] nor is the roadbed or right of way of a railroad to be included for such purpose.[68] Likewise coal mines are not subject to assessment for construction of fences, unless the coal bearing land is also useful for agricultural purposes.[69]

Collection and enforcement. In a suit to enforce a fencing assessment as a lien against the property assessed, the description of the land in the complaint, or exhibits attached thereto, must be definite and certain.[70]

Where a statute provides that suits to enforce collection of fencing assessments shall follow the procedure in suits for collection of assessments for local improvements, such provision has reference only to the mode of procedure and does not give the right to tax an attorney's fee.[71] The fees of officers for services in connection with the collection of taxes are governed by the applicable statutory provisions.[72]

§ 5. Right and Duty to Erect and Maintain Partition Fences

A landowner has a right, as a general rule, to build a partition fence on the common boundary of adjoining lands. However, apart from rights and duties which may arise from prescription, agreement, or statute, a landowner is under no obligation to build, maintain, or contribute toward a partition fence.

Ownership of land carries with it the right to erect a division fence on common boundaries of adjoining lands.[73] On the other hand, apart from an obligation to build, maintain, or contribute to a partition fence which may arise by prescription, agreement, or statute, no duty so to do is incumbent on the landowner.[74]

Although a fence actually exists between adjacent lands, it will become a partition fence, and the obligations and rights of the adjacent owners, under the partition fence statutes, will arise only on its being made a partition fence by agreement, or by proceeding in the manner prescribed by statute,[75] unless the jurisdiction is one in which it is provided by statute that all fences constructed or used by adjoining owners as partition fences, unless otherwise specially agreed, shall be deemed partition fences, and shall be built, maintained, and paid for as in the statute provided.[76]

§ 6. —— Prescription or Custom

A duty to maintain a partition fence may arise from prescription or local custom.

The obligation to maintain a partition fence may arise by prescription,[77] or even by local custom.[78] Where, however, a fence is maintained only at intervals, and not continuously during the period of prescription, no prescriptive obligation can arise.[79]

67. Ark.—Johnson v. Owen, 152 S.W.2d 311, 202 Ark. 761.

68. Ark.—Stiewel v. Fencing Dist. No. 6, 70 S.W. 308, 71 S.W. 247, 71 Ark. 17—Little Rock & F. S. R. Co. v. Huggins, 43 S.W. 145, 64 Ark. 432.
25 C.J. p 1045 note 39.

69. Ark.—Stiewel v. Fencing Dist. No. 6, 70 S.W. 308, 71 S.W. 247, 71 Ark. 17.

70. Ark.—Little Rock & F. S. R. Co. v. Huggins, 43 S.W. 145, 64 Ark. 432.

71. Ark.—Eagle v. Fencing Dist. No. 2, 121 S.W. 340, 91 Ark. 378.

72. **Fees for filing delinquent tax list**
Chancery court clerk was held entitled to fees for recording delinquent tax list in fence district, although no redemption certificates were issued, and district bid in property.—No Fence Dist. No. 1 v. Grumbles, 7 S.W.2d 977, 177 Ark. 784.

73. Va.—Good v. Petticrew, 183 S.E. 217, 165 Va. 526—Willing v. Booker, 168 S.E. 417, 160 Va. 461.
Nature and effect of right
"The right and the burden in this respect of owners of adjoining land are in common and equal. That different estates or interests may exist in one parcel of such lands does not destroy or affect the common right and burden. Each estate and interest in each parcel of the land may enjoy the right, and from its inception is subject to the possible burden of the exercise of the right, unless it has been freed expressly or impliedly by the parties (or their predecessors in title) who own each of the adjoining parcels . . . and those creating the estate or interest."—Willing v. Booker, 168 S.E. 417, 419, 160 Va. 461.
Effect on adjoining owner
One owning less estate than owner in fee cannot object to building of line fence.—Willing v. Booker, 168 S.E. 417, 160 Va. 461.
Along roadway
Where lot held by one owner in fee ran with roadway to which another had like title, division fence was lawful structure.—Willing v. Booker, supra.
Easements as affecting right to build fences see Easements § 98.

74. Del.—Carey v. Schweitzer, Super., 134 A. 52, 54, 3 W.W.Harr. 21, citing **Corpus Juris.**
Mass.—Deane v. Garniss, 200 N.E. 923, 924, 294 Mass. 221.
Pa.—Hoehn v. Miller, 7 Pa.Dist. & Co. 516, 39 Lanc.L.Rev. 429, 74 Pittsb.Leg.J. 455.
25 C.J. p 1018 note 53.
"At common law, no landowner was required to fence against a neighbor's land. Each owner was bound to keep his cattle from passing from his own to his neighbor's land, and was liable for their trespasses."—Deane v. Garniss, supra.
Duty to inclose or restrain animals see Animals § 106.

75. Mo.—Jones v. Derosset, App., 185 S.W. 239.
25 C.J. p 1018 note 54.
Duty to maintain before division see infra § 10.

76. Ind.—Burck v. Davis, 73 N.E. 192, 35 Ind.App. 648.
25 C.J. p 1018 note 55.

77. Del.—Carey v. Schweitzer, 134 A. 52, 54, 3 W.W.Harr. 211, citing **Corpus Juris.**
25 C.J. p 1018 note 56.

78. S.C.—Knox v. Artman, 37 S.C.L. 283.
25 C.J. p 1018 note 57.

79. Vt.—Carpenter v. Cook, 41 A. 1038, 71 Vt. 110.

A statute as to partition fences will not interfere with an obligation as to the maintenance of such a fence existing by prescription.[80] However, the rule of prescription does not apply in a proceeding by an adjoining owner to recover the cost of erecting a fence under the statute.[81]

Particular portion of fence. It has also been held that the respective owners may become bound by prescription to maintain a specific portion of a partition fence,[82] but there is authority to the contrary where statutory procedure has been set up holding that such obligation can arise only by virtue of the statute or by express or implied agreement.[83] However, from a joint maintenance of a fence by adjoining owners, however long continued, no prescriptive obligation on either of them to maintain a separate and distinct part of the fence can arise.[84]

§ 7. —— Agreement

Valid agreements between adjoining landowners will govern the rights and liabilities of the parties with respect to the erection, maintenance, and repair of partition fences.

The owners of adjacent lands may make valid agreements as to the construction and maintenance of partition fences,[85] even where the subject is regulated by statute,[86] and, as stated in Covenants § 69, the agreement may be in form of a covenant running with the land. In such case, the rights and liabilities of the parties will be measured by the terms of the agreement.[87]

The agreement carries with it, by implication, the right to do such things as are necessary in order to build the fence,[88] and where the agreement mentions no time within which the fence is to be erected, the law implies a reasonable time.[89] So where the width of a partition fence is not stipulated, a reasonable width is implied.[90]

Implied agreement. An agreement to maintain a portion of a partition fence may arise by implication,[91] but an agreement will not be implied against an adjoining owner from mere silence during the erection of a partition fence with his knowledge,[92] nor will any agreement be implied, after his decease, against his son, who is not the owner of the property benefited.[93]

Even if a reference in a deed, in its description of a division line, to a conditional fence may be taken as conclusive proof of an agreement by the parties to erect and maintain a division fence, the ruling will not be extended so as to apply to parts of the division line to which the deed does not so refer.[94]

80. Ga.—Collins v. Cochran, 49 S.E. 771, 121 Ga. 785.
25 C.J. p 1018 note 62.
"Adjoining owners may acquire a prescriptive right to the maintenance of a partition fence notwithstanding a statute relating to such fences."—Carey v. Schweitzer, 134 A. 52, 56, 3 W.W.Harr., Del., 211.

81. Del.—Carey v. Schweitzer, supra.

82. N.H.—Gibson v. Heyward, 30 A. 407, 67 N.H. 265.
25 C.J. p 1018 note 58.

83. N.J.—Castner v. Riegel, 24 A. 484, 54 N.J.Law 498.
25 C.J. p 1018 note 59.

84. Me.—Webber v. Closson, 35 Me. 26.

85. Del.—Carey v. Schweitzer, 134 A. 52, 54, 3 W.W.Harr. 211, citing **Corpus Juris.**
Iowa.—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.
25 C.J. p 1018 note 64.

Consideration
The mutual promises to build and maintain a partition fence constitute a sufficient consideration to support such an agreement.—Baynes v. Chastain, 68 Ind. 376.

Construction of contract
The agreement will be construed in accord with the construction placed thereon by the parties over a period of years.—Wilklow v. Bennett, 237 N.Y.S. 665, 227 App.Div. 273.
Agreements concerning location see infra § 15.
Parol agreements see the C.J.S. title Frauds, Statute of, § 84, also 27 C.J. p 204 notes 81–86.

86. Ind.—Retter v. Retter, App., 40 N.E.2d 385.
Iowa.—Nichols v. Fierce, 212 N.W. 151, 202 Iowa 1358—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.
W.Va.—Cutright v. Sexton, 127 S.E. 728, 729, 99 W.Va. 69, citing **Corpus Juris.**
25 C.J. p 1019 note 65.
"While the statute provides a procedure for ascertaining and fixing the rights and duties of coterminous proprietors with respect to a division fence, it is not exclusive, but they may by contract adjust their respective rights and obligations."
Neb.—Meyer v. Perkins, 130 N.W. 986, 89 Neb. 59, 62, Ann.Cas.1912C 468.
W.Va.—Cutright v. Sexton, 127 S.E. 728, 729, 99 W.Va. 69.

Statutory provision for arbitration
Agreement is not affected by statute providing for arbitration of disputes between such landowners, and may be enforced in court as any other contract.—Cutright v. Sexton, 127 S.E. 728, 99 W.Va. 69.
Waiver of statutory provisions:
Generally see infra § 8.
Relating to sufficiency of fence see infra § 14.

87. Ind.—Retter v. Retter, App., 40 N.E.2d 385.
Iowa.—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.
N.Y.—Wilklow v. Bennett, 237 N.Y.S. 665, 227 App.Div. 273.

88. Mich.—Newberry v. Bunda, 100 N.W. 277, 137 Mich. 69.

89. Mass.—Lawton v. Fitchburg R. Co., 8 Cush. 230, 54 Am.D. 753.

90. N.J.—Morton v. Reynolds, 45 N.J.Law 326, 46 Am.R. 776.
Application of statutory standard where agreement silent see infra § 14.

91. Ind.—Retter v. Retter, App., 40 N.E.2d 385.
Iowa.—Schnare v. Gehman, 9 Iowa 283.
25 C.J. p 1019 note 70.

92. Conn.—Chesebro v. Lockwood, 91 A. 188, 88 Conn. 219.

93. Conn.—Chesebro v. Lockwood, supra.

94. Ky.—Sturgill v. Sturgill, 202 S.W. 311, 180 Ky. 170.

Persons bound or protected. An agreement between adjoining landowners with respect to a partition fence not constituting a covenant running with the land does not bind a successor in title[95] without notice of the agreement,[96] unless such successor in interest acquiesces therein, either expressly or by implication,[97] nor does it, without an assignment, inure to the benefit of a successor in title not a party to the agreement.[98]

It has been held that the representative of a deceased owner who was a party to a partition fence agreement is not bound for any future repairs under such agreement.[99]

Landlord and tenant. Where a landlord contracts with his adjoining owner to build, maintain, and repair part of a partition fence, his tenant, by virtue of his occupancy of the landlord's land, is bound to the same extent as his landlord.[1] However, a tenant who has agreed to erect a partition fence cannot be compelled to build, and the injured party has no remedy but an action on the agreement.[2]

Where the controlling feature of a contract was the making of fences on specified lines, so that each of the parties should be restored to the possession of pasture held by him under his lease, such provision must prevail over any other general purpose stated by the contract.[3]

Assignability. An agreement to fence is assignable,[4] and the obligation to fence will pass under the assignment of an instrument to which it is incident.[5]

Recording. Notwithstanding a statutory requirement that a partition fence agreement be recorded, an unrecorded agreement is as effectual between the parties thereto as if recorded.[6]

§ 8. —— Statutes

a. In general
b. Persons affected
c. Lands affected

a. In General

Rights and duties with respect to partition fences are usually regulated by statute. The statute ordinarily may be superseded by agreement of the parties.

The duty to erect and maintain partition fences, and all matters connected with their erection and maintenance, are usually regulated by statute.[7] Before a duty to build, maintain, or repair a partition fence can arise under such a statute, the conditions imposed thereby must be complied with.[8]

These statutes do not impose an absolute requirement to build and maintain such fences and the parties may dispense with them if they so agree.[9]

The statutory remedies for violation of the duties imposed are not exclusive of relief at law or in equity,[10] and may be waived by agreement of the parties.[11] When the statutory provisions have been waived the parties are left to their common-law rights and remedies,[12] and the statutes have no application.[13] However, an agreement, in effect modifying the statutory duties, between predecessors in title, not constituting a covenant running with the land and hence not binding on subsequent purchasers without notice, does not prevent application of the statute and enforcement of rights thereunder.[14]

Constitutionality. Laws regulating the building and maintenance of partition fences are enacted in the exercise of the police power and are sustained as constitutional.[15]

95. Conn.—Millner v. Elias, 125 A. 470, 101 Conn. 280.

96. Ind.—Hull v. Breedlove, 165 N.E. 328, 89 Ind.App. 460.

97. Conn.—Millner v. Elias, 125 A. 470, 101 Conn. 280.
Ind.—Retter v. Retter, App., 40 N.E.2d 385.

Evidence sufficient
Ind.—Retter v. Retter, supra.

98. N.Y.—Wilklow v. Bennett, 237 N.Y.S. 665, 227 App.Div. 273.

99. Pa.—Bland v. Umstead, 23 Pa. 316.

1. Ind.—Baynes v. Chastain, 68 Ind. 376.

2. Mass.—Minor v. Deland, 18 Pick. 266.

3. Colo.—Tomkins v. Smith, 193 P. 558, 69 Colo. 271.

4. N.Y.—Parmelee v. Dann, 23 Barb. 461.

5. N.Y.—Parmelee v. Dann, supra.

6. Iowa.—Little v. Laubach, 168 N.W. 155, 183 Iowa 1370.

Reason for rule
Purpose of recording requirement is to give notice of the making of the agreement and the parties already have notice.—Little v. Laubach, supra.

7. Iowa.—Sinnott v. District Court in and for Clarke County, 207 N.W. 129, 201 Iowa 292.
25 C.J. p 1019 note 82.

8. **Written request** by adjoining landowner is essential under some statutes.—Sinnott v. District Court in and for Clarke County, 207 N.W. 129, 201 Iowa 292.
Conditions precedent to right to contribution see infra § 12.

9. Ill.—McGill v. Compton, 66 Ill. 327.
25 C.J. p 1020 note 83.
Agreement to fence as superseding statute see supra § 7.
Waiver of statutory requirements as to sufficiency of fence see infra § 14.

10. Ind.—State v. Burkit, 108 N.E. 113, 182 Ind. 665.
25 C.J. p 1020 note 84.

11. Iowa.—Names v. Osgood, 184 N.W. 331, 191 Iowa 1227.

12. Ind.—Tomlinson v. Bainaka, 70 N.E. 155, 163 Ind. 112.
Kan.—Baker v. Robbins, 9 Kan. 303.
25 C.J. p 1020 note 85.

13. Pa.—Milligan v. Wehinger, 68 Pa. 235.

14. Ind.—Hull v. Breedlove, 165 N.E. 328, 89 Ind.App. 460.

15. Kan.—Chaput v. Demars, 243 P. 311, 312, 120 Kan. 273, quoting Corpus Juris.

Construction. Partition fence statutes have been accorded both a strict construction, as in derogation of the common law,[16] and a liberal construction.[17] However, substantial compliance with their requirements has been held both necessary and sufficient.[18]

These statutes must be construed with reference to the conditions which existed at the time of their adoption and which called them into existence.[19]

b. Persons Affected

Partition fence statutes confer no rights or duties except between owners or occupiers of adjoining land or those holding under them.

Partition fence statutes confer no rights or duties, except between the owners or occupiers of adjoining lands and those who hold under them.[20] The statutes vary in the different jurisdictions, some conferring rights[21] and imposing duties[22] only on the occupiers of adjoining lands, while others are construed to render the remedies provided available either to the owner or occupier of one tract of land[23] against either the owner or occupier of an adjoining tract.[24] To be an occupant in the sense of these statutes, a person must be in possession and have the use and control of the land, with the right to make erections, merely living and boarding on the premises being insufficient.[25]

Although an owner is not liable under statute to an adjoining owner for erection or repairs of a partition fence, yet if he consents, as owner, to the erection of the fence by the adjoining owner, he is estopped from denying his liability.[26]

The grantee of one who has built a partition fence succeeds to the right of his grantor to enforce contribution from the adjoining owner or occupier;[27] but there is contrary authority to the effect that the statutory right of contribution is a chose in action which is not assignable.[28] An administrator is not personally liable in an action under a statute which provides that when one of the owners of adjoining lands neglects to build his proportion of a partition fence the person injured thereby may build it and recover therefor.[29]

c. Lands Affected

The statutes vary with respect to the lands coming within their scope.

The partition fence statutes differ with respect to the kind of lands coming within their scope. Some apply only to agricultural lands and do not require fences between urban lots,[30] while others apply to all fences, those in towns and cities as well as those in the country.[31] Generally, statutes on the subject apply only to lands that are inclosed,[32] or to lands that are occupied,[33] or apply only to lands that

Ohio.—McDorman v. Ballard, 113 N.E. 836, 94 Ohio St. 183.
25 C.J. p 1020 note 87.
Particular statutes or ordinances:
Providing for lien see infra § 11.
Relating to sufficiency of fence see infra § 14.

16. Wis.—Voelz v. Breitenfield, 32 N.W. 757, 68 Wis. 491.
25 C.J. p 1020 note 90.
Strict construction of statutes allowing recovery of double value see infra § 11.

17. Ind.—Rhodes v. Dunn, 19 N.E. 2d 876, 106 Ind.App. 367.
Iowa.—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.
25 C.J. p 1020 note 92.

18. Ind.—Rhodes v. Dunn, 19 N.E.2d 876, 106 Ind.App. 367.
Mo.—Sharp v. Quincy, O. & K. C. R. Co., 123 S.W. 507, 139 Mo.App. 525.

19. Wash.—Kobayashi v. Strangeway, 116 P. 461, 64 Wash. 36.
25 C.J. p 1020 note 93.

20. N.Y.—Crandall v. Eldridge, 46 Hun 411—Ryan v. Rochester & S. R. Co., 9 How.Pr. 453.

21. Mass.—Deane v. Garniss, 260 N.E. 923, 249 Mass. 221.
25 C.J. p 1020 note 95.

22. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
25 C.J. p 1020 note 96.

23. N.Y.—Bronk v. Becker, 17 Wend. 320.
25 C.J. p 1021 note 97.

24. Minn.—McClay v. Clarke, 44 N.W. 255, 42 Minn. 363.

25. Mich.—Carpenter v. Vail, 36 Mich. 226.
Construction of statutes limited to occupied lands see infra subdivision c of this section.

26. Ala.—Moore v. Levert, 24 Ala. 310.

27. Kan.—Gray v. Edrington, 29 Kan. 208.
Mo.—Brawner v. Langton, 57 Mo. 516.
25 C.J. p 1021 note 3.

28. Ill.—Hale v. Andrews, 75 Ill. 252.

29. Vt.—Cummings v. Brock, 56 Vt. 308.

30. Ohio.—Zarbaugh v. Ellinger, 124 N.E. 68, 99 Ohio St. 133.
Pa.—Hoehn v. Miller, 7 Pa.Dist. & Co. 516, 39 Lanc.L.Rev. 429, 74 Pittsb.Leg.J. 455.
25 C.J. p 1021 note 6.

31. Ky.—Grief v. Kahn, 7 S.W. 159, 87 Ky. 17, 10 Ky.L. 87.

32. Del.—Carey v. Schweitzer, 134 A. 52, 54, 3 W.W.Harr. 211, citing **Corpus Juris.**
25 C.J. p 1021 note 8.

"Inclosed by fences" construed
The term, "inclosed by fences," in statute requiring occupants of adjoining lands so inclosed to maintain partition fences, while both continue to improve lands, does not mean improved lands only, nor uninclosed lands once inclosed.—Carey v. Schweitzer, 134 A. 52, 3 W.W.Harr., Del., 211.

Full or partial inclosure
(1) Under some statutes fence viewers can order partition fence even though neither parcel is fully inclosed with fences.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

(2) Under others if only part of adjoining premises is inclosed or improved partition fences can be compelled only as to such part.
Iowa.—Farmer v. Young, 53 N.W. 279, 86 Iowa 382.
Me.—James v. Tibbetts, 60 Me. 557.

33. Colo.—Maudlin v. Hanscombe, 20 P. 619, 12 Colo. 204.
25 C.J. p 1021 note 9.

Several lands occupied in common
Under statute authorizing fence viewers to require partition fence where land belonging to two persons in severalty has been "occupied in common" without partition fence, parcels of land owned in severalty are "occupied in common" if no partition fence exists that would prevent

are improved,[34] but some are construed to apply only to lands which will be benefited by the fence.[35] Where particular statutes of a jurisdiction are limited to improved or inclosed lands, other statutes of the same jurisdiction dealing with the same subject may be construed to apply only to wild or unimproved lands.[36] Some of the statutes apply to all lands whether inclosed or uninclosed, cultivated or uncultivated, or wild or wood lot.[37]

Occupation within the meaning of such statutes, means use such as to make it advantageous, for the purpose of such use, to fence; actual residence on the land is not required.[38]

Land is under improvement when used to good purpose or turned to profitable account.[39] Thus land which is used or occupied for pasturage[40] or buildings,[41] is considered improved, but land occupied by public buildings and open to public use is not within the requirement of such statutes.[42]

Lands separated by lane. Where a public lane separates the lands of two owners, one cannot be compelled to fence under a statute requiring owners who improve adjacent lands to fence,[43] and substantially the same rule has been applied to lands separated by a private lane or a pent road on the land of both owners.[44] However, the duty of adjoining owners to fence is not altered where such a pent road is wholly on the land of one and contiguous to the other.[45]

Under the express terms of some statutes requiring the building of partition fences, an owner of a right of way used as a farm outlet is included.[46]

§ 9. —— Termination of Duty

A statute or agreement covering the matter will determine when and how the duty to erect or maintain a partition fence will terminate. Unity of ownership of adjoining lands in one person will terminate such duty.

When a statutory method of terminating the obligation as to partition fences is prescribed, the obligation continues until such method has been complied with,[47] and if the duties with respect to the erection and maintenance of such a fence are covered by an agreement of the parties, it will control their duration and termination.[48]

One at whose solicitation a division fence was apportioned after the adoption of a herd law, and who with the adjoining owner acquiesced in the apportionment and erected a fence accordingly, cannot afterward of his own motion relieve himself of the obligation to keep his portion of the fence in repair.[49]

Permitting land to lie in common. Where one of the adjoining owners chooses to let his land, or a part of it, lie in common, he may do so, and be relieved of his corresponding obligation to contribute to the maintenance of a partition fence.[50] This may be done even though the land has been inclosed and improved, and an assignment made,[51] provided he gives the adjoining owner due notice of his intention.[52]

Unity of ownership. Unity of ownership of adjoining lands acquired by one of the owners, on whom the duty to repair a partition fence rested, destroys such obligation.[53] It is otherwise with respect to a prescriptive obligation on the owner of land to maintain a partition fence who becomes a tenant in common of the adjoining land.[54]

trespasses by animals.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

34. Mass.—Deane v. Garniss, supra. 25 C.J. p 1021 note 10.

"Improved" used in contrast to "wild"

Mass.—Deane v. Garniss, supra.

35. Ohio.—Zarbaugh v. Ellinger, 124 N.E. 68, 99 Ohio St. 133—Jennings v. Nelson, 15 Ohio App. 395.

36. Ky.—Sturgill v. Sturgill, 202 S. W. 311, 180 Ky. 170.

37. Ind.—Ashley v. Kelley, 149 N.E. 377, 84 Ind.App. 303, rehearing denied 150 N.E. 417.

38. Colo.—Maudlin v. Hanscombe, 20 P. 619, 12 Colo. 204.

39. Ala.—Johnson v. Frederick, 50 So. 910, 163 Ala. 455.
25 C.J. p 1021 note 13.

40. Mass.—Deane v. Garniss, 200 N. E. 923, 294 Mass. 221.
25 C.J. p 1022 note 14.

41. N.H.—Wiggin v. Baptist Soc., 43 N.H. 260.

42. N.H.—Wiggin v. Baptist Soc., supra.
Pa.—Whyte v. East Whiteland Tp., 2 Chest.Co. 219.
25 C.J. p 1022 note 16.

43. Pa.—Rohrer v. Rohrer, 18 Pa. 367.

44. Vt.—Carpenter v. Cook, 30 A. 998, 67 Vt. 102, 41 A. 1038, 71 Vt. 110.
25 C.J. p 1022 note 18.

45. Vt.—Carpenter v. Cook, supra.

46. Ohio.—Zarbaugh v. Ellinger, 124 N.E. 68, 99 Ohio St. 133, 6 L.R.A. 208, 120 N.E. 879, 97 Ohio St. 340.
Lack of obligation of owner of servient estate to fence way generally see Easements § 94 b.

47. Ill.—Hoag v. Switzer, 61 Ill. 294—Brown v. Brown, 23 Ill.App. 90.

48. Colo.—Tomkins v. Smith, 193 P. 558, 69 Colo. 271.
25 C.J. p 1023 note 29.

49. Iowa.—Barrett v. Dolan, 32 N. W. 189, 71 Iowa 94.

50. Iowa.—Farmer v. Young, 53 N. W. 279, 86 Iowa 382.
25 C.J. p 1022 note 26.

51. Pa.—Smith v. Johnson, 76 Pa. 191.
25 C.J. p 1023 note 27.
Redivision of remainder of fence after laying in common of part of land see infra § 10.
Removal of fence after laying in common see infra § 16.

52. Minn.—Boenig v. Hornberg, 24 Minn. 307.

53. Ill.—Conklin v. Newman, 115 N. E. 849, 278 Ill. 30.

54. Mass.—Binney v. Hull, 5 Pick. 503.

§ 10. Division of Partition Fences between Landowners

The duty of maintaining the entire fence rests on each of the adjoining owners unless there has been a division by agreement or under statutory provisions.

Until there has been a division of a particular fence and assignment of a distinct portion to each party to build and maintain, the duty of maintaining the entire fence rests equally on both of the parties, and neither can allege neglect on the part of the other.[55] In such case each party has a right to build and maintain such portions of a fence, or all, as he sees fit,[56] although until a legal division is made no right to any particular portion of a fence can be asserted.[57]

Statutes as to partition fences generally provide that the portions which adjoining landowners shall construct and maintain shall be assigned to them by officials sometimes known as fence viewers, on application made by one of such owners when they cannot agree.[58] The statutes have reference only to cases where the parties cannot or do not agree on a division,[59] but a positive disagreement is not necessary to give the fence viewers jurisdiction, the absence of a binding agreement being sufficient,[60] except perhaps in cases of prescription,[61] Where there has never been a legal division of a partition fence either by agreement or under the statute, the fact that the fence in controversy has been maintained by the respective owners for many years, does not bar adjoining owners from having a legal division under the statute at any time they desire.[62]

A division of the fence by agreement is of the same force and effect as a division by the fence viewers under the statute,[63] and where adjoining owners divide a partition fence for maintenance under the statute, the agreement inures to their grantees.[64]

Whole or partial division. In some jurisdictions it is not necessary to assign the whole of a fence between adjoining owners, a division of a part being legal.[65] In other jurisdictions, however, the statutes contemplate a division of the whole fence and not merely a part thereof.[66]

Equality of burden. The statutes generally contain provisions designed to secure equality of burden, such as provisions that each adjoining owner shall make and maintain one half or a just proportion of the fence, or that the fence shall be divided into equal shares.[67] Some statutes are construed to require each owner to build and maintain a portion that is equal, with reference to the cost and expense of construction and maintenance,[68] or with regard to the conveniences of fencing.[69] To secure equality of shares it is not necessary that the whole portion of the fence assigned to each owner should be contiguous.[70]

Redivision. If the land of one adjoining owner is sold in different parcels after a division of a partition fence, either by agreement or under the statute, so that new coterminous proprietors are introduced, each one extending over a part only of the line so divided, a new adjustment and division becomes necessary.[71]

Where, after a fence between adjoining landowners has been divided throughout the whole length,

N.H.—Gibson v. Heyward, 30 A. 407, 67 N.H. 265.
25 C.J. p 1022 note 23.

55. Iowa.—De Mers v. Rohan, 102 N.W. 413, 126 Iowa 488.
25 C.J. p 1023 note 30.

56. Iowa.—Sinnott v. District Court in and for Clarke County, 207 N.W. 129, 201 Iowa 292.

57. Iowa.—Sinnott v. District Court in and for Clarke County, supra.

Restraint by injunction
Injunction permanently restraining landowner from constructing or assuming control of his part of partition fence, because fence viewers acted illegally, was held improper, plaintiff being entitled to injunction only until legal division was made.—Sinnott v. District Court in and for Clarke County, supra.

58. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
25 C.J. p 1023 note 31.
Fence viewers generally see infra § 12.

59. Iowa.—Nichols v. Fierce, 212 N.W. 151, 202 Iowa 1358.
25 C.J. p 1023 note 32.

60. N.H.—Glidden v. Towle, 31 N.H. 147—York v. Davis, 11 N.H. 241.

61. N.H.—York v. Davis, supra.
N.Y.—Adams v. Van Alstyne, 25 N.Y. 232.

62. Iowa.—Morrison v. Kipping, 290 N.W. 59, 227 Iowa 1146.

Finding of no legal division sustained
Iowa.—Morrison v. Kipping, supra.

63. Tex.—Adair v. Stallings, Civ. App., 165 S.W. 140.
25 C.J. p 1023 note 33.

64. Mo.—Yoakum v. Davis, 144 S.W. 877, 162 Mo.App. 253.

65. Me.—Prescott v. Mudgett, 13 Me. 423.
Mass.—Alger v. Pool, 11 Cush. 450.
25 C.J. p 1023 note 37.

66. N.J.—Castner v. Riegel, 24 A. 484, 54 N.J.Law 498.
25 C.J. p 1023 note 38.

67. Colo.—Maudlin v. Hanscombe, 20 P. 619, 12 Colo. 204.
25 C.J. p 1023 note 39.

Extent of duty
Provision that coterminous owners are mutually bound equally to maintain a division fence requires each to contribute his share of land, material, and labor for its erection and maintenance.—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.

68. Mass.—Newell v. Hill, 2 Metc. 180.
25 C.J. p 1024 note 40.

69. N.J.—Titman v. Smith, 38 A. 810, 61 N.J.Law 191—Castner v. Riegel, 24 A. 484, 54 N.J.Law 498.

70. Me.—Prescott v. Mudgett, 13 Me. 423.
25 C.J. p 1024 note 42.

71. N.H.—Walker v. Wetherbee, 23 A. 621, 65 N.H. 656, 660.
25 C.J. p 1024 note 43.

one of the owners lays a part of the land on the line in common or takes such other steps as relieve him from further contribution to maintain the fence there, see supra § 9, the other owner will be entitled to a new division of the rest of the fence.[72]

§ 11. Contribution to Cost of Partition Fences

a. In general
b. Amount or measure of recovery
c. Lien

a. In General

Fence statutes generally permit a landowner to build or repair the entire partition fence on failure of the adjacent owner to build or repair his share, and to enforce contribution.

The statutes generally provide that, where one adjacent owner does not construct or maintain his portion of a partition fence, the other adjacent owner may construct all of it or make all necessary repairs and may recover from the defaulting owner the value of his proper share of such construction or maintenance,[73] after compliance with conditions precedent, as discussed infra § 12. In some states the statutes provide for the construction or repair of partition fences by township trustees at the expense of a defaulting landowner,[74] and some of such statutes provide for assessment and collection of the cost from the affected landowners as taxes.[75]

To authorize recovery under a statute the case must be brought within its terms.[76] Generally, an action to recover contribution cannot be maintained unless the fence is built on the line which divides the premises of the parties, if this is known and undisputed.[77] If, however, parties use a fence as a partition between their lands it is wholly immaterial whether it is on the exact boundary line, so far as the obligation to maintain the fence or contribute to its construction is concerned,[78] and if there is in reality a partition fence, the fact that the line is in dispute does not relieve the adjoining owners from the duty of contributing to its maintenance,[79] nor oust the proper tribunal of jurisdiction to enforce the duty.[80]

Where the owner of land which has been uninclosed incloses it, he is required to pay one half or a just proportion of the value of a partition fence already standing to the owner who erected it.[81] However, the owner of lands which remain uninclosed cannot be charged with the expense of, or be compelled to contribute to, the cost of a partition fence for the sole benefit of his adjoining owner.[82]

b. Amount or Measure of Recovery

Generally half the value of the fence is the limit of recovery. Some statutes, however, permit recovery of double the expense or value of the defaulting owner's portion of the fence or repairs.

Under some statutes the amount recoverable extends to, and is limited by, one half of the value of the fence,[83] the value of the fence in the condition in which it is found, rather than the cost or worth of the materials and labor entering into its construction or repair, being controlling.[84] Other statutes, however, allow the party building the en-

72. N.H.—Jones v. Perry, 50 N.H. 134.
N.Y.—Chamberlain v. Reed, 14 Hun 403.
25 C.J. p 1024 note 45.

73. Wis.—Voelz v. Breitenfield, 32 N.W. 757, 68 Wis. 491.
25 C.J. p 1024 note 46.
New fence on line
Where one of two adjoining owners has erected, when the two properties were both his, a fence which was not on the division line between the two lots, he may be made to contribute toward building a fence on the division line, it not appearing that the existing fence had been maintained as a substitute for a division fence or to avoid contribution thereto.—Odenwelder v. Frankenfield, 26 A. 97, 153 Pa. 526.

74. Ind.—Rhodes v. Dunn, 19 N.E. 2d 876, 106 Ind.App. 367—Ashley v. Kelley, 149 N.E. 377, 84 Ind.App. 303, rehearing denied 150 N.E. 417.
25 C.J. p 1024 note 48.

75. **Only parties directly interested** are assessed.—Trustees of Prairie Tp., Holmes County, v. Garver, 180 N.E. 747, 41 Ohio App. 232.
Particular tax considered void
Mich.—Brown v. Warner, 123 N.W. 1113, 159 Mich. 274.

76. Ill.—Robillard v. Beaupre, 68 Ill.App. 103.
Iowa.—Kinney v. Kinney, 74 N.W. 688, 104 Iowa 703, 40 L.R.A. 626.
Erection by trustees
While statute conferring power on board of trustees to erect partition fence, on failure of landowner to do so after proper notice, and to assess cost against landowner must be liberally construed, there must be substantial compliance with statute before any authority exists in trustees to construct fence and create lien against land.—Rhodes v. Dunn, 19 N.E.2d 876, 106 Ind.App. 367.

77. Mass.—Kennedy v. Owen, 131 Mass. 431.
25 C.J. p 1024 note 50.
Necessity of location on line generally see infra § 15.

78. Iowa.—McAvoy v. Saunders, 143 N.W. 548, 161 Iowa 651—Card v. Dale, 25 N.W. 774, 67 Iowa 552.

79. Pa.—Trego v. Pierce, 12 A. 864, 119 Pa. 139.
25 C.J. p 1024 note 52.

80. Pa.—Stephens v. Shriver, 25 Pa. 78.

81. Colo.—Maudlin v. Hanscombe, 20 P. 619, 12 Colo. 204.
25 C.J. p 1024 note 54.

82. La.—Boucherau v. Guilne, 40 So. 863, 116 La. 534.
25 C.J. p 1025 note 55.
Limitation of statute to inclosed property generally see supra § 8.

83. Iowa.—Miles v. Tomlinson, 81 N.W. 587, 110 Iowa 322.
Kan.—Griffith v. Carrothers, 119 P 548, 86 Kan. 93.

84. Ohio.—Robb v. Brachmann, 24 Ohio St. 3.
25 C.J. p 1025 note 57.

tire fence to recover all the damages arising from the neglect of the other.[85]

Where the value of the fence determines the amount of contribution, some courts hold that half thereof may be recovered, although it is a better or more expensive fence than would have satisfied the requirements of the statute,[86] while others hold that contribution can be enforced only for a legally sufficient fence.[87] At any rate one who builds or repairs a fence must act reasonably, and has no right to be extravagant either in materials or work.[88]

Rebuilding. No recovery can be had for the cost of unnecessary rebuilding.[89]

Double value. In some jurisdictions, by statute, a landowner who builds such part of a fence or makes such repairs as the adjoining owner should have built or made may recover from the owner who is in default double the expense or value of his portion of the fence or repairs.[90] Such statutes being penal as well as remedial are strictly construed, and will not be extended to cases not clearly within their provisions;[91] and all proceedings prescribed by such statutes must be strictly followed.[92]

c. Lien

The amount recoverable from a defaulting landowner under the fence statutes is sometimes made a lien on his land.

Some of the fence statutes provide that the expenses of building or repairing a fence shall be a lien on the land of the owner who is in default.[93] Such a statute is a proper exercise of the police power inherent in the state.[94] Some of these statutes have been construed as not applying to division fences existing under agreement or by prescription,[95] and as not conferring a lien for repairs.[96]

§ 12. —— Actions to Enforce

a. Nature and form
b. Conditions precedent
c. Procedure

a. Nature and Form

Ordinarily contribution with respect to a partition fence may be enforced in a law action.

Contribution between adjoining landowners with respect to a partition fence may ordinarily be enforced in a civil action,[97] legal in nature. An action brought under a statute to enforce contribution for building or repairing a partition fence is legal in its nature,[98] except where the action or proceeding is one to enforce a statutory lien, in which case it is one in rem,[99] calling for the exercise of the equity powers of the court.[1]

b. Conditions Precedent

All preliminary steps prescribed by the statute must ordinarily be taken before an action to recover contribution will lie.

Unless the obligation sought to be enforced rests on a deed,[2] or on agreement,[3] all preliminary steps prescribed by the statute,[4] as, for example, proceed-

85. Neb.—Burr v. Hamer, 11 N.W. 741, 12 Neb. 483.
25 C.J. p 1025 note 62.

86. Ohio.—Robb v. Brachmann, 24 Ohio St. 3.

87. Kan.—Griffith v. Carrothers, 119 P. 548, 86 Kan. 93.

88. Conn.—Guyer v. Stratton, 29 Conn. 421.
Kan.—Griffith v. Carrothers, 119 P. 548, 86 Kan. 93.
25 C.J. p 1025 note 60.

89. Pa.—Trego v. Pierce, 12 A. 864, 119 Pa. 139.
25 C.J. p 1025 note 61.

90. Mass.—Deane v. Garniss, 200 N. E. 923, 294 Mass. 221.
25 C.J. p 1025 note 63.

91. Me.—Cobb v. Corbitt, 3 A. 732, 78 Me. 242.
25 C.J. p 1025 note 64.
Construction of fence statutes generally see supra § 8.

92. Wis.—Voelz v. Breitenfield, 32 N.W. 757, 68 Wis. 491.
25 C.J. p 1025 note 65.

93. Ind.—Collins v. Wilber, 89 N.E. 372, 173 Ind. 361.
25 C.J. p 1025 note 66.

94. Mich.—Gilson v. Munson, 72 N. W. 994, 14 Mich. 671, followed in Vincent v. Ackerman, 119 N.W. 1085, 155 Mich. 614.

95. Ky.—Muntz v. Mastin, 47 S.W. 2d 515, 242 Ky. 694.

96. Ky.—Muntz v. Mastin, supra.

97. Mass.—Deane v. Garniss, 200 N. E. 923, 294 Mass. 221.
Or.—Ready v. Schmith, 95 P. 817, 52 Or. 196.

98. Wis.—Farr v. Spain, 31 N.W. 21, 67 Wis. 631.

Case or assumpsit

(1) An action on the case is the proper one for this purpose.—Sanford v. Haskell, 50 Me. 86—25 C.J. p 1025 note 73.

(2) Usually assumpsit will not lie.—Howland v. Howland, 14 R.I. 560.

(3) Assumpsit does lie where there is an agreement to pay half the expense.—Strong v. Slicer, 33 Vt. 466.

(4) This is so, also, where there is a custom to such effect.—Walker v. Chichester, 4 S.C.L. 67.

99. Ind.—Collins v. Wilber, 89 N.E. 372, 173 Ind. 361.

1. Ind.—Tomlinson v. Bainaka, 70 N.E. 155, 163 Ind. 112.

2. Mass.—Kennedy v. Owen, 134 Mass. 227.

3. Mass.—Rust v. Low, 6 Mass. 90.
Mo.—Mackler v. Cramer, 32 Mo.App. 542.
25 C.J. p 1025 note 78.

4. **Notice to build**

Costs of erecting partition fence by township trustees could not be assessed against landowner, where notice of request to landowner and trustees to build fence was not made by adjoining owner but by adjoining owner's son, and there was no showing that son was authorized so to act.—Rhodes v. Dunn, 19 N.E.2d 876, 106 Ind.App. 367.

Estimate of probable cost

Where township trustees failed to furnish landowner estimate of probable cost of construction of partition fence requested by adjoining owner, and failed after construction of fence to furnish him statement of actual cost incurred, cost of erecting fence

ings prescribed for the determination of the value of the fence or of other matters by the fence viewers, discussed supra § 10 and infra § 13, must be taken before an action will lie to recover contribution.[5]

These rules, however are not universally adopted. Thus the appointment of viewers, although provided for by statute, has been held not a condition precedent to recovery.[6] It has also been held that, although the parties have by agreement fixed the part of a division fence each is to keep in repair, a finding by the fence viewers, as provided by statute, of the necessity of repairs or rebuilding is a condition precedent to recovery from the defaulting owner.[7]

Where the statute makes no provision for fence viewers, an appraisal by them is not necessary to entitle an adjoining owner to maintain an action for the recovery of the expense of building or repairing a partition fence.[8]

Demand. Under some statutes before bringing an action against the defaulting owner a demand for the amount claimed to be owing by him, as shown by the award of the fence viewers if such an award is necessary, must be made.[9] The demand need not include a detailed statement or itemized account of costs and expenses.[10] The exhibition to the delinquent of the proper certificate, accompanied by a request of payment of the amount, is a sufficient demand.[11]

Consultation with adjoining owner. Where a statute provides for proceedings to enforce contribution in case the adjoining owners cannot agree, and to determine the amount to be paid by each, there is no implied condition precedent that the moving party must consult the other concerning the kind of fence to be built and probable cost, before building, in order to recover therefor.[12]

Time of suit. Under a statute providing for recovery unless the cost is paid within "one month after demand," an action commenced before the expiration of a month after demand for payment is prematurely brought.[13]

c. Procedure

In actions to enforce contribution with respect to a partition fence, plaintiff must allege and prove such facts as entitle him to recover. An action to recover double the expense of the fence is triable by a jury, but not an action to foreclose a statutory lien.

Plaintiff's pleading must contain sufficient allegations of compliance with conditions precedent[14] and of defendant's duty to build or repair.[15]

Where the action is brought under a statute which fixes the rights and duties of the parties, general allegations bringing the case within the statute are sufficient.[16] However, provisos not contained in the enacting clause of the statute need not be negatived.[17]

An action to enforce a statutory lien being one in rem, see supra subdivision a of this section, the complaint therein need not contain the allegations necessary in an action on contract.[18] However, in

could not be assessed against landowner.—Rhodes v. Dunn, supra.

Waiting period after notice

Landowner who begins construction of fence without waiting the required time after notice to the adjoining owner so to do cannot recover contribution, even though the fence was not completed until after such time.—Briggeman v. Corrigan, 198 P. 443, 60 Mont. 205.

5. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
Pa.—Hoehn v. Miller, 7 Pa.Dist. & Co. 516, 39 Lanc.L.Rev. 429, 74 Pittsb.Leg.J. 455.
25 C.J. p 1026 note 80.

Hearing by selectmen unnecessary

Where the statute does not provide for a hearing by the selectmen viewing the fence and ordering its repair, defendant is not required to assert a claim that the fence was not on the boundary line, but may assert such claim when sued for double the cost of the repair because of failure to make such repair.—Millner v. Elias, 125 A. 470, 101 Conn. 280.

Irregularity in proceedings is no defense to action.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

Notice of view

(1) Although not expressly required by statute.—Carpenter v. Wolf, 76 Pa.Super. 363.

(2) Notice of proceedings before fence viewers see infra § 13.

6. Ala.—Walker v. Watrous, 8 Ala. 493, 42 Am.D. 646.

7. Ill.—Bigelow v. Burnside, 109 N.E. 1045, 269 Ill. 324, affirming 193 Ill.App. 302.

8. N.Y.—Perkins v. Perkins, 44 Barb. 134.
25 C.J. p 1026 note 83.

9. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 923.
25 C.J. p 1026 note 84.

10. Conn.—Hollister v. Hollister, 35 Conn. 241.

11. Minn.—Oxborough v. Boesser, 13 N.W. 906, 30 Minn. 1.

12. Ala.—Johnson v. Frederick, 50 So. 910, 163 Ala. 455.

13. Me.—Sanford v. Haskell, 50 Me. 86.

14. Cal.—Meade v. Watson, 8 P. 311, 67 Cal. 591.
25 C.J. p 1026 note 90.

15. Conn.—Sharp v. Curtis, 15 Conn. 526.

Divisional nature of fence

Under statutes which limit the jurisdiction of the fence viewers to matters relating to repair of a division fence, in an action based on an order for repair of a fence it must be alleged that the fence involved was a division fence.—Millner v. Elias, 125 A. 470, 101 Conn. 280.

16. Ind.—Burck v. Davis, 73 N.E. 192, 35 Ind.App. 648.
Mass.—Rust v. Low, 6 Mass. 90.

17. Ind.—Tomlinson v. Bainaka, 70 N.E. 155, 163 Ind. 112—Deemer v. Knight, 103 N.E. 868, 55 Ind.App. 397.

18. Ind.—Collins v. Wilber, 89 N.E. 372, 173 Ind. 361.

an action based on an implied promise to pay, allegations of fact showing such a promise must be made to entitle plaintiff to recover.[19]

Issues, proof, and variance. In an action under a statute, to which defendant pleads a general denial, plaintiff must prove all the facts necessary to recovery under the statute.[20] The proof must establish compliance with the requirements of the statute with respect to proceedings before fence viewers, where such a proceeding is a condition precedent to the action.[21]

The actual interest which the parties have in a fence is a question which cannot arise in an action for contribution brought under some statutes.[22]

Burden of proof. The burden is on defendant to show that his lands are not inclosed and are therefore within a statutory exception.[23]

Admissibility and sufficiency of evidence. Competent evidence on the issues in the case is admissible in an action to enforce contribution with respect to a partition fence. Thus, where an issue in the case is whether the alleged division fence was on the boundary line, evidence on such issue is admissible,[24] it being proper, however, for the court to limit such evidence to proving or disproving that the fence was a divisional fence.[25] In such an action the decision or certificate of the fence viewers is admissible,[26] and, in the absence of evidence to the contrary, is sufficient evidence of the facts recited therein.[27] Properly proved county records in which the certificates are recorded are also admissible.[28]

In jurisdictions where the determination of these matters by fence viewers is not a condition precedent to the action, see subdivision b supra this section, the insufficiency of a fence[29] and the expense of building or repairing it[30] may be established by witnesses who know or can judge what it was.

Trial. An action under statute to recover double the expense of building or repairing a partition fence is triable by jury,[31] but a jury trial is properly denied in an action to foreclose a statutory lien.[32]

Where the action is tried before a jury, questions of fact are to be determined by the jury.[33]

An affirmative finding of fact that defendant's land is not within a statutory exception need not be made,[34] a failure to make any finding being equivalent to a finding that the land is not within the excepted class.[35]

Joinder of municipality. A statute providing that a statutory lien for the expense of building or repairing a partition fence may be collected in the same manner as municipal claims are by law collected does not have the effect of requiring that a municipal corporation shall be made a party to the action or proceeding to enforce the lien.[36]

§ 13. Fence Viewers

a. In general

19. Pa.—Hoehn v. Miller, 7 Pa.Dist. & Co. 516, 39 Lanc.L.Rev. 429, 74 Pittsb.Leg.J. 455.

20. Ind.—Tomlinson v. Bainaka, 70 N.E. 155, 163 Ind. 112.

21. **Proof of notice to select viewer**
Ill.—Kibbat v. Clokey, 263 Ill.App. 410.

Sufficiency of proof of service of notice
Where statute does not provide any particular mode for serving notice of the proceeding nor how service shall be proved, affidavit of one that on a certain day he, personally, served said notice by delivering true copy thereof to defendants in person, is sufficient evidence of such service.—Merritt v. Summers, 215 Ill.App. 613.

22. Ala.—Moore v. Levert, 24 Ala. 310.

23. Ind.—Deemer v. Knight, 103 N.E. 868, 55 Ind.App. 397.

Land uninclosed
Del.—Carey v. Schweitzer, 134 A. 52, 3 W.W.Harr. 211.

24. Conn.—Millner v. Elias, 125 A. 470, 101 Conn. 280.

25. Conn.—Millner v. Elias, supra.

26. Ill.—Merritt v. Summers, 215 Ill.App. 613.
Mass.—Day v. Dolan, 55 N.E. 384, 174 Mass. 524.
25 C.J. p 1026 note 96.

27. Mass.—Day v. Dolan, supra.

Prima facie evidence
(1) Award of fence viewers is only prima facie evidence as to the amount of contribution to be made by one adjoining owner to another who has erected the whole fence.—Snyder v. Bell, 4 P. 71, 32 Kan. 230—Grey v. Edrington, 29 Kan. 208.

(2) Decision setting out notice of petition for view and affidavit of service of such notice is prima facie evidence of the service of the notice.—Merritt v. Summers, 215 Ill.App. 613.

(3) In such case burden of proving absence of service is on defendant denying the same.—Merritt v. Summers, supra.

28. Md.—Burck v. Davis, 73 N.E. 192, 35 Ind.App. 648.

Uncertified copy of findings inadmissible
Ill.—Kibbat v. Clokey, 263 Ill.App. 410.

29. Ala.—Walker v. Watrous, 8 Ala. 493, 42 Am.D. 646.

30. N.Y.—Perkins v. Perkins, 44 Barb. 134.
25 C.J. p 1026 note 2.

31. Wis.—Farr v. Spain, 31 N.W. 21, 67 Wis. 631.

32. Ind.—Tomlinson v. Bainaka, 70 N.E. 155, 163 Ind. 112.

33. Ill.—Buckman v. Watts, 162 Ill.App. 167.
25 C.J. p 1026 note 8.

Existence of agreement
Where there was contradictory evidence as to whether fence had been divided by plaintiff and defendant's predecessor in title for purpose of repairs, question whether agreement was made was properly left to jury.—Millner v. Elias, 125 A. 470, 101 Conn. 280.

34. Ind.—Collins v. Wilber, 89 N.E. 372, 173 Ind. 361.

35. Ind.—Collins v. Wilber, supra.

36. Pa.—Foulkrod v. Ankenbrandt, 28 Pa.Co. 493.

b. Appointment or election and qualification
c. Powers and duties
d. Proceedings

a. In General

Fence viewers provided for by many statutes to determine questions involving partition fence constitute a tribunal of limited jurisdiction.

The statutes dealing with partition fences frequently provide for determination of questions arising thereunder by officials known as fence viewers. Fence viewers constitute a tribunal of limited jurisdiction,[37] but while their duties and functions are judicial in their nature,[38] they do not constitute a court.[39] Some courts deem their functions to be more analogous to those of appraisers and inspectors, and other boards of that character, than of judges or of courts.[40]

b. Appointment or Election and Qualification

The statutes determine who shall be, and the mode and manner of selecting, fence viewers.

The particular statute involved determines who shall be the fence viewers and the mode and manner of their selection. Some of these statutes provide that certain named local officers, such as township assessors, township trustees, commissioners of highways, or county commissioners, shall be ex officio fence viewers in their respective jurisdictions,[41] and they may also provide for the determination of a particular controversy by a less number than all the viewers in the town or precinct, the selection of the particulars viewers being made by the complaining party on proper notice to the adverse party.[42] Under other statutes, fence viewers are elected as special officers.[43]

As fence viewers are quasi-public officers, proof of their having acted officially is prima facie evidence of their appointment or election and qualification,[44] and the party proceeded against is bound to take notice that they are fence viewers,[45] except in cases where they have been appointed or qualified a short time previous to their action.[46] It is not necessary that their office should be proved by record.[47]

Qualification. At common law, and under statutes not expressly providing what shall constitute disqualification, a fence viewer who is related to one of the parties within the fourth degree, by consanguinity or affinity, is disqualified to act.[48] The parties, however, may waive such disqualification,[49] or the objection that the board of viewers is defectively constituted.[50]

It is essential to the qualification of fence viewers that they take an oath of office,[51] although this requirement may also be waived by failure to object at the time of the hearing.[52] It is not necessary that there should be any record of their taking the oath.[53]

c. Powers and Duties

The particular statute involved determines the powers of fence viewers.

The powers of the fence viewers are determined by the statutes under which they act, there being no uniformity in the statutes in this respect. Dependent on the particular statute involved, fence viewers have been held to have power to assign to adjoining owners their due portions of a fence for erection or maintenance, as discussed supra § 10, to pass on the necessity of a fence,[54] to prescribe

37. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

38. Iowa.—Scott v. Nesper, 188 N.W. 889, 194 Iowa 538.
25 C.J. p 1027 note 25.

39. N.H.—Sanborn v. Fellows, 22 N.H. 473.
Pa.—Turner v. Richards, 34 Pa.Super. 624.

40. Conn.—Edgerton v. Moore, 28 Conn. 600.

41. Ill.—Bigelow v. Burnside, 109 N.E. 1045, 269 Ill. 324.
25 C.J. p 1027 note 11.

42. Ill.—Thompson v. Bulson, 78 Ill. 277—Hale v. Andrews, 75 Ill. 252—Scott v. Jackson, 93 Ill.App. 529.
Mode of selection
Under the Illinois statute each party selects one fence viewer, but if either fails so to do after eight days notice in writing, the other may select both.—Kibbat v. Clokey, 263 Ill.App. 410.

43. Me.—Bradford v. Hawkins, 52 A. 1019, 96 Me. 484.
25 C.J. p 1027 note 13.

44. Conn.—Hollister v. Hollister, 35 Conn. 241.
25 C.J. p 1027 note 14.

45. Mass.—Rowe v. Beale, 15 Pick. 123.

46. Mass.—Rowe v. Beale, supra.
25 C.J. p 1027 note 16.

47. Mass.—Day v. Dolan, 55 N.E. 384, 174 Mass. 524.

48. Me.—Conant v. Norris, 58 Me. 451.
N.H.—Sanborn v. Fellows, 22 N.H. 473.
25 C.J. p 1027 note 18.

49. Ohio.—Robb v. Brachman, 38 Ohio St. 423.
25 C.J. p 1027 note 19.

50. Conn.—Kellogg v. Brown, 32 Conn. 108.
25 C.J. p 1027 note 20.

51. N.H.—Hartshorn v. Schoff, 51 N.H. 316, 58 N.H. 197.
25 C.J. p 1027 note 21.
Additional oath by auditors
It has been held not essential that township auditors, in addition to their oath as auditors, take an official oath as fence viewers, such oath not being absolutely essential to the validity of their proceedings or actions based thereon.—Shriver v. Stevens, 20 Pa. 138.

52. N.H.—Hartshorn v. Schoff, 51 N.H. 316, 58 N.H. 197.
25 C.J. p 1027 note 22.

53. Mass.—Day v. Dolan, 55 N.E. 384, 174 Mass. 524.

54. Mass.—O'Malley v. Meyer, 108 N.E. 1066, 221 Mass. 198.

the time within which a fence shall be built,[55] to inspect an existing fence,[56] to pass on the sufficiency of a fence,[57] to determine the need for repairs or rebuilding,[58] to determine the value of a fence built wholly by one adjoining landowner,[59] to fix the amount which shall be paid to the owner erecting or repairing the fence by the other owner,[60] and to determine all controversies arising under the statutes relating to partition fences.[61]

Since the powers of viewers are limited strictly to those given by statute, when they exceed those limits their determinations are void.[62] They have no power to require one owner to build a part of the portion of the fence assigned to the other;[63] to apportion fences which are not for any reason subject to apportionment or to conclude the parties by determining a fence to be a partition fence when in fact it is not;[64] or to make an assignment when a previous assignment has been made,[65] or when an obligation to maintain has arisen through prescription or by agreement, as discussed supra § 10. Also, they have not the power to determine the existence of an agreement to maintain a fence or a portion thereof.[66] However, under some statutes they have power to determine disputes arising under an agreement.[67]

Under a power to assign portions of a hedge for maintenance they cannot require each party to trim his own side for the whole distance,[68] and, under a power to direct the repair or rebuilding of a partition fence, they cannot determine an invasion of property rights, by the negligent maintenance of an untrimmed hedge which shades the adjoining owner.[69] Where they have power to fix the value of a fence, they have no power to determine whether such fence has been paid for, in whole or in part, and have no control over the sum to be paid,[70] and where they have power to adjudicate an equal division, they cannot award damages or money values to either owner in order to equalize the division.[71]

They have no authority to settle the rights of title of different claimants of land,[72] nor to establish boundary lines.[73] They are, however, sometimes authorized by statute to designate the line on which a partition fence is to be built, where the boundary line is in dispute or is unknown.[74]

d. Proceedings

(1) In general
(2) Conditions on exercise of power or jurisdiction
(3) Limits on exercise of jurisdiction
(4) Notice of proceedings
(5) View or hearing
(6) Decision or order
(7) Fees and costs
(8) Appeal

(1) In General

The proceedings of the fence viewers must be in accordance with the law.

Being a tribunal of limited jurisdiction, as stated in subdivision a of this section, the fence viewers must proceed in accordance with the law or their doings will be void.[75]

(2) Conditions on Exercise of Power or Jurisdiction

All essential conditions or steps provided by the statute must be observed before fence viewers may take jurisdiction.

Before fence viewers may take jurisdiction of a matter with respect to which they have power to act, all essential conditions or steps provided for by

55. Iowa.—Peschongs v. Mueller, 50 Iowa 237.

56. Ala.—Johnson v. Frederick, 50 So. 910, 163 Ala. 455.
Ill.—Bigelow v. Burnside, 109 N.E. 1045, 269 Ill. 324, affirming 193 Ill.App. 302.

57. Mass.—O'Malley v. Meyer, 108 N.E. 1066, 221 Mass. 198.

62. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
25 C.J. p 1027 note 41.

63. Me.—Longley v. Hilton, 34 Me. 332.

64. Iowa.—Farmer v. Young, 53 N.W. 279, 86 Iowa 382.
25 C.J. p 1028 note 43.

65. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

69. Iowa.—Kinney v. Kinney, 74 N.W. 688, 104 Iowa 703, 40 L.R.A. 626.

70. Wis.—Butler v. Barlow, 2 Wis. 10.

71. N.J.—Titman v. Smith, 38 A. 810, 61 N.J.Law 191.

72. N.J.—State v. Ford, 1 N.J.Law 64.

the statute must be observed.[76] Under some statutes, they may act only when the adjoining landowners cannot or do not agree,[77] or when a controversy between them exists.[78] In such case they cannot take jurisdiction if an agreement covering the matter exists between the parties.[79]

Where required by the statute a written request for a partition fence or division thereof must be made by one landowner of the other,[80] and, as discussed infra subdivision d (4) of this section, due notice of the proceedings must usually be given.

Provision is sometimes made for a notice, complaint, or application to the trustees or fence viewers, which constitutes the basis of the proceedings.[81]

(3) Limits on Exercise of Jurisdiction

Fence viewers are ordinarily limited by the purposes stated in the notice or application served on them, or in the notice of the proceedings served on interested parties.

Unless there has been a valid waiver,[82] the powers of fence viewers in a particular controversy are limited by the notice, complaint, or application under which they proceed,[83] and by purposes stated in the notice of the proceedings.[84]

(4) Notice of Proceedings

A proper notice of the time and place of the proceedings by the fence viewers must ordinarily be given to persons whose rights will be affected by such proceedings.

Persons whose rights will be affected by the proceedings of fence viewers must have notice of the time and place of such proceedings,[85] and this is true, although notice is not expressly provided for by statute.[86] However, where the statute does not expressly require notice of the meeting of viewers, it has been held that notice of the insufficiency of the fence is all that is required.[87] So, where a statute expressly requires notice of a meeting to assign shares of a fence to be built, but omits any requirement of notice of a meeting to ascertain the value of the fence, the latter notice is considered unnecessary in some jurisdictions,[88] although required in others.[89]

If a party appears without objecting to want of notice he thereby waives it.[90]

76. **Notice to select viewer**
Under statute providing that, when a matter is submitted to fence viewers, each party shall choose one, and, if either neglect, after eight days' notice in writing, to make such choice, then the other party may select both, the giving of such notice is a condition precedent to the jurisdiction of the viewers to act.—Kibbat v. Clokey, 263 Ill.App. 410.

77. Kan.—Robertson v. Bell, 14 P. 160, 36 Kan. 748.
25 C.J. p 1027 note 29.

78. **What constitutes controversy**
Where applicant was claiming that plaintiff should build or rebuild a portion of his fence, and this was being resisted, or disputed, this made a "controversy" sufficient to give the fence viewers jurisdiction, under the statute, for the word "controversy" does not necessarily mean an action in court, and because the petition alleges the conclusion that there is no controversy, and this is admitted, such petition does not change the fact that there was a controversy as shown by the record.—Scott v. Nesper, 188 N.W. 889, 194 Iowa 538.

79. Iowa.—Nichols v. Fierce, 212 N. W. 151, 202 Iowa 1358.

act has been imposed on him by the request of the adjoining owner. Until then there can exist, in such case, no such controversy as the statute contemplates. The written request is an essential prerequisite to the creation of the duty the fence viewers may enforce, it is essential to their jurisdiction to act at all. Without it there is nothing of which they could take jurisdiction."—Sinnott v. District Court in and for Clarke County, supra.

Waiver
(1) The absence of the required demand may be expressly waived.—Gavin v. Linnane, 221 N.W. 462, 206 Iowa 917.

(2) Appearance by both parties and presentation of their respective claims constitute a waiver of the requirement.—Morrison v. Kipping, 290 N.W. 59, 227 Iowa 1146.

(3) However, landowners appearing with attorney to object to jurisdiction on ground of no request do not thereby waive the requirement.—Sinnott v. District Court in and for Clarke County, 207 N.W. 129, 201 Iowa 292.

Objection by party instituting proceedings
The party invoking action by the Scott v. Nesper, 188 N.W. 889, 194 Iowa 538.

82. **Urging other matters at hearing**
Fence viewers have jurisdiction to order a legal division of a fence on a notice served on them by a landowner complaining of the refusal of an adjoining owner to maintain his part of an alleged division fence, where latter denies the existence of a legal division and requests that such division be made, and both parties appear at the hearing and urge their respective contentions on such issue.—Morrison v. Kipping, 290 N. W. 59, 227 Iowa 1146.

83. Mass.—Sears v. Charlemont, 6 Allen 437.
25 C.J. p 1028 note 56.

84. Iowa.—Pickerell v. Davis, 146 N.W. 34, 164 Iowa 576.
25 C.J. p 1029 note 79.

85. Mass.—Deane v. Garniss, 200 N. E. 923, 294 Mass. 221.
25 C.J. p 1029 note 68.

86. Mass.—Deane v. Garniss, supra.
Pa.—Carpenter v. Wolf, 76 Pa.Super. 363.
25 C.J. p 1029 note 69.

87. Conn.—Edgerton v. Moore, 28 Conn. 600.

Form and contents. The notice must be sufficiently definite to inform the party as to the time and place of meeting and the fences to be passed on.[91] However, proceedings of fence viewers should not be measured with technical nicety as to matters of form, but should be treated with at least the indulgence extended to proceedings before justices of the peace.[92]

Although several matters are to be passed on by fence viewers, one notice is sufficient,[93] but it must embrace all the matters to be considered, or it will be insufficient as to those omitted.[94]

The fact that the notice was prepared by the attorney of one of the parties is immaterial.[95]

Unless the notice is required by the statute to be in writing,[96] an oral notice is sufficient.[97]

Service. Statutory requirements as to the service of the notice must be complied with, service in any other manner being insufficient.[98] If no period is designated, the time of notice must be "reasonable," and merely time enough to enable one to get to the meeting is not sufficient, although a short time would ordinarily suffice.[99]

The service of notice after viewers have met and made their finding and order cannot relate back to give them jurisdiction.[1]

A recital of notice in the return or certificate of fence viewers is prima facie evidence that such notice was given.[2]

(5) View or Hearing

Fence viewers must ordinarily act on a personal inspection.

As stated supra subdivision d (1) of this section, the fence viewers must proceed in accordance with the applicable law. The statutes expressly or impliedly require their determination to be based on personal inspection,[3] but the inspection need not be made by all the members at the same time.[4]

Place of hearing. Under some statutes, when a fence is situated on the line between two towns, the fence viewers of one have jurisdiction to hear a controversy in the other, where the party proceeded against resides.[5] Where fence viewers perform their official acts within their territorial jurisdiction, it is immaterial that the clerical or ministerial work is done elsewhere.[6]

Acting separately or as unit. A determination by fence viewers must be made by them sitting in consultation as a board,[7] at least as to those matters with respect to which there may be an exercise of judgment and a difference of opinion as to the propriety of the course of action about to be adopted.[8]

It is generally held that the action of a majority

N.Y.—Willoughby v. Carleton, 9 Johns. 136.
Pa.—Shriver v. Stephens, 20 Pa. 138.

91. Ind.—Bruner v. Palmer, 9 N.E. 354, 108 Ind. 397.
Me.—Emery v. Maguire, 32 A. 781, 87 Me. 116.

Unconditional day certain
It should be unqualified and unconditional of a meeting on a certain day.—Emery v. Maguire, 32 A. 781, 87 Me. 116—25 C.J. p 1029 note 75.

92. Iowa.—Talbot v. Blacklege, 22 Iowa 572.

93. Iowa.—Scott v. Nesper, 188 N.W. 889, 194 Iowa 538.
25 C.J. p 1029 note 77.

94. Iowa.—Scott v. Nesper, supra.
N.H.—Fairbanks v. Childs, 44 N.H. 458.
Limitation of jurisdiction to purposes stated in notice see supra subdivision d (3) of this section.

95. Mass.—Day v. Dolan, 55 N.E. 384, 174 Mass. 524.

96. Me.—Goodwin v. Hodgkins, 77 A. 711, 107 Me. 170.
25 C.J. p 1029 note 82.

97. Iowa.—Gantz v. Clark, 31 Iowa 254—Talbot v. Blacklege, 22 Iowa 572.

98. **Service as in civil action**
If service is required to be made as a summons in a civil action before a justice of the peace, service in any other manner is insufficient.—Voelz v. Breitenfield, 32 N.W. 757, 68 Wis. 491.

Service by fence viewers
(1) The statute permitting, it is no objection to the validity of the notice that it was served by one of the fence viewers who described himself as a deputy sheriff.—Day v. Dolan, 55 N.E. 384, 174 Mass. 524.
(2) On the other hand, if the applicable statute requires service to be made by a sheriff or constable, service by a fence viewer is insufficient.—Voelz v. Brittenfield, 32 N.W. 757, 68 Wis. 491.

Service by publication
Under some statutes service on nonresidents may be made by publication.—Scott v. Nesper, 188 N.W. 889, 194 Iowa 538.

Leaving at residence
Under some statutes, written notice of the meeting of fence viewers addressed to the party in default, and left at his residence with his wife, is duly served.—Brown v. Petrie, 53 N.W. 321, 86 Iowa 581.

99. Iowa.—Tubbs v. Ogden, 46 Iowa 134.

1. Iowa.—Pickerell v. Davis, 146 N.W. 34, 164 Iowa 576.
25 C.J. p 1029 note 88.

2. Me.—Achorn v. Andrews, 12 A. 793.
25 C.J. p 1029 note 86.

3. Ohio.—Robb v. Brachmann, 24 Ohio St. 3.
25 C.J. p 1028 note 62.

Use of witnesses
"They are authorized to act upon their own knowledge or view, and not otherwise; they may issue subpœnas, swear and examine witnesses for the purpose of enabling themselves to overcome any inability to acquire on view a perfect knowledge of the subject, upon which they are to act; but for no other purpose."—Clark v. Brown, 18 Wend., N.Y., 213, 233.

4. Iowa.—Tubbs v. Ogden, 46 Iowa 134.

5. N.H.—Jaques v. Benton, 63 N.H. 232.

6. Iowa.—Miles v. Tomlinson, 81 N.W. 587, 110 Iowa 322.
25 C.J. p 1028 note 59.

7. Iowa.—Tubbs v. Ogden, 46 Iowa 134.

8. Pa.—Turner v. Richards, 34 Pa. Super. 624.

of the fence viewers is valid[9] where all have been duly notified to act.[10] Some courts hold, however, that the whole number of fence viewers contemplated by statute must act in the absence of evidence of a refusal of one viewer to act or the consent of the parties to the remaining viewers proceeding in the absence of one.[11]

(6) Decision or Order
(a) In general
(b) Order or notice to build or repair
(c) Conclusiveness

(a) In General

The fence viewers are often required to reduce their decision to writing, to record the same, and serve a copy thereof on the parties. Statutory requirements as to the form and contents of the award have been considered directory rather than mandatory, and mere irregularities therein do not invalidate the proceedings.

As a general rule, statutory requirements as to the decision or order of the fence viewers should ordinarily be complied with.[12] However, the courts are inclined to construe the provisions concerning the form and contents of the award as merely directory rather than mandatory,[13] and technical objections to the form of an award are not favored.[14] Mere irregularities in the order do not invalidate the proceedings,[15] and an order is not vitiated because of mere surplusage in its contents;[16] it has even been held that omissions in an award may be supplied by oral testimony.[17]

It is sometimes required that the decision of the fence viewers be reduced to writing,[18] and a copy thereof given to each party,[19] and that it shall be sworn to,[20] unless the oath be waived,[21] and recorded.[22] Since the object of recording is to give notice of the action of the fence viewers, if the party has actual notice of their determination recording is unnecessary.[23] It is not necessary that the report should be prepared and filed at the time of the view.[24]

Some courts hold that, where the decision is recorded it becomes binding on the parties, without delivery of copies thereof to them,[25] but other courts hold that recording is not equivalent to delivery of a copy.[26]

The report need not be signed by all the fence viewers at one time,[27] and even the fact that it is not signed has been held not to invalidate it.[28]

Under some statutes an award is void which does not declare the fence built by the complaining party to be sufficient,[29] but under other statutes the rule is otherwise where the fence has never been divided and the proportion which each party should maintain is in dispute.[30]

When the dispute is as to the value of the fence and the proportion thereof which one party should pay to the other, the award should specify such sum,[31] or, at least, data from which the sum is ascertainable.[32] An award is not void for failing to specify whether the value fixed is the actual or double value, if it appears from the whole award which is meant.[33] However, an award is void which, under a statute requiring an assessment of the "expense" of building a fence, finds its value.[34]

9. N.H.—Hartshorn v. Schoff, 58 N.H. 197—Glidden v. Towle, 31 N.H. 147.
Vt.—Miller v. Sanborn, 54 Vt. 522.

10. Conn.—Guyer v. Stratton, 29 Conn. 421.

11. Ont.—Miller v. McKenzie, 14 Ont.W.R. 542.

12. Ind.—Tomlinson v. Bainaka, 70 N.E. 155, 163 Ind. 112.

13. Mich.—Vincent v. Ackerman, 119 N.W. 1085, 155 Mich. 614.
25 C.J. p 1030 note 96.

14. Ind.—Bruner v. Palmer, 9 N.E. 354, 108 Ind. 397.
25 C.J. p 1030 note 97.

15. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

16. N.H.—Gallup v. Mulvah, 26 N.H. 132.
Nugatory provision as to kind of fence
Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

17. Pa.—Shriver v. Stephens, 20 Pa. 138.

18. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
25 C.J. p 1029 note 89.

19. Me.—Goodwin v. Hodgkins, 77 A. 711, 107 Me. 170.
25 C.J. p 1029 note 89.

20. N.H.—Perkins v. Boody, 62 N.H. 452.

21. N.H.—Perkins v. Boody, 62 N.H. 452—Hartshorn v. Schoff, 51 N.H. 316, 58 N.H. 197.

22. Mich.—Vincent v. Ackerman, 119 N.W. 1085, 155 Mich. 614.
25 C.J. p 1030 note 91.

23. Iowa.—Gantz v. Clark, 31 Iowa 254.
Mich.—Vincent v. Ackerman, 119 N.W. 1085, 155 Mich. 614.

24. Pa.—Turner v. Richards, 34 Pa. Super. 624.
25 C.J. p 1030 note 92.

25. N.H.—Gallup v. Mulvah, 26 N.H. 132.
25 C.J. p 1030 note 94.

26. Me.—Briggs v. Haynes, 68 Me. 535.

27. Pa.—Turner v. Richards, 34 Pa. Super. 624.
25 C.J. p 1030 note 1.
Necessity of viewers acting as board generally see supra subdivision d (5) of this section.

28. Ind.—Bruner v. Palmer, 9 N.E. 354, 108 Ind. 397.
25 C.J. p 1030 note 2.

29. Me.—Emery v. McGuire, 32 A. 781, 87 Me. 116.

30. Mass.—Leonard v. Lyon, 96 N.E. 670, 210 Mass. 248.

31. N.Y.—Hewitt v. Watkins, 11 Barb. 409.

32. Pa.—Roberts v. Sarchet, 14 Pa. Co. 372.

33. Conn.—Guyer v. Stratton, 29 Conn. 421.

34. Wis.—Voelz v. Breitenfeld, 32 N.W. 757, 68 Wis. 491.

(b) Order or Notice to Build or Repair

The order to build or repair a fence should ordinarily state the need therefor, assign respective shares, and fix a time for compliance.

If the fence viewers find that a partition fence or repair thereof is necessary, the order should state the need[35] and assign to each of the parties his respective share,[36] and fix the time for compliance[37] definitely.[38] It has been held, however, that omission to designate the time for compliance is not a fatal objection, a reasonable time being implied.[39] The mailing of notice which is not received until after the time fixed therein for repair or rebuilding is insufficient, where no evasion or attempt to prevent receipt of the notice is shown.[40]

A notice to repair need not specify the particulars in which the fence is deficient;[41] but it should specify the portion of the fence to be repaired, where the notice would otherwise be ambiguous.[42] An order requiring a delinquent owner to repair his part of a division fence is not void because it makes no reference to the condition of the other part, for which the adjoining owner is responsible.[43] Reasonable certainty is all that is required in the description of a fence in such notice.[44]

In some jurisdictions, where a written notice requiring the building of a fence has been served on a delinquent, parol evidence of its contents cannot be given without notice to him to produce it;[45] but in other jurisdictions the contrary rule prevails.[46]

(c) Conclusiveness

Unless impeached for fraud or mistake, or set aside on appeal, the order of the fence viewers is usually conclusive as to matters within their jurisdiction.

The decision of fence viewers on questions within their jurisdiction is conclusive,[47] unless impeached for fraud or mistake,[48] or set aside on appeal, as discussed infra subdivision d (7) of this section. Thus the determination of the viewers as to the amount of fence to be built and maintained,[49] or as to the sufficiency of a fence already built,[50] is conclusive. So a decision against the establishment of a fence on the ground that the land is uninclosed is binding on the parties until it is otherwise determined on a new application.[51]

Where one party is bound by a covenant in a deed to maintain the whole of a fence, an apportionment by viewers does not conclude the other party[52] who will not be estopped from asserting such obligation, although he assented to the apportionment.[53]

Effect on grantees. Under some statutes the order properly recorded binds subsequent grantees of the land, unless the land ceases to be used for revenue or benefit.[54]

(7) Fees and Costs

Costs and fees in proceedings before fence viewers are usually regulated by statute.

The amount of the fees of fence viewers, liability therefor, and collection thereof are matters regulated by statute.[55] Where the costs are fixed by statute, and the viewers have no discretion with reference thereto, the imposition of costs on defendant cannot affect the validity of the report.[56] Fence viewers have no right to include the fees of the township clerk in their assessment.[57]

After appeal. Where plaintiff, on appeal from the order of viewers, is successful in having the order set aside and in having an additional portion of the fence assigned to defendant, half of the costs

35. Mass.—Deane v. Garniss, 200 N. E. 923, 294 Mass. 221.

36. Mass.—Deane v. Garniss, supra.

37. Mass.—Deane v. Garniss, supra.
25 C.J. p 1030 note 10.

38. Me.—James v. Tibbetts, 60 Me. 557.

39. Mich.—Vincent v. Ackerman, 119 N.W. 1085, 155 Mich. 614.
25 C.J. p 1030 note 12.

40. Me.—Goodwin v. Hodgkins, 77 A. 711, 107 Me. 170.
25 C.J. p 1030 note 13.

41. Conn.—Fox v. Beebe, 24 Conn. 271.

42. Mass.—Rowe v. Beale, 15 Pick. 123.
25 C.J. p 1030 note 15.

43. Iowa.—Rainsberger v. Leverton, 135 N.W. 56, 155 Iowa 92.

44. Conn.—Guyer v. Stratton, 29 Conn. 421.

45. Me.—Abbott v. Wood, 22 Me. 541.

46. N.Y.—Willoughby v. Carleton, 9 Johns. 136.
25 C.J. p 1030 note 19.

47. Iowa.—Scott v. Nesper, 188 N. W. 889, 194 Iowa 538.
25 C.J. p 1030 note 20.

Modification in new proceedings improper
Once the duties of the parties are established, they are not subject to modification on new proceedings.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.

48. Minn.—Oxborough v. Boesser, 13 N.W. 906, 30 Minn. 1.
Ohio—Robb v. Barchmann, 24 Ohio St. 3.
25 C.J. p 1031 note 21.

49. Kan.—Grey v. Edrington, 29 Kan. 209.
N.Y.—People v. Dewey, 1 Hun 529.

50. Mass.—Baker v. Lakeman, 12 Metc. 195.

51. Vt.—Miller v. Sanborn, 54 Vt. 522.

52. N.Y.—Dey v. Prentice, 35 N.Y. S. 563, 90 Hun 27.

53. N.Y.—Dey v. Prentice, supra.

54. Iowa.—Trustees of Van Meter Tp., Dallas County v. Harkrader, 293 N.W. 455, 228 Iowa 1229.

55. Minn.—Oxborough v. Boesser, 13 N.W. 906, 30 Minn. 1.
25 C.J. p 1031 note 37.

56. Pa.—Turner v. Richards, 34 Pa. Super. 624.

57. Iowa.—Miles v. Tomlinson, 81 N. W. 587, 110 Iowa 322.

before the viewers and all of the costs on appeal should be taxed against defendant.[58]

(8) Appeal

Under some statutes an appeal may be taken from a decision of the fence viewers, the appeal sometimes being tried as an action at law.

The right to appeal from the decision of fence viewers is sometimes expressly provided by statute. Under a statute authorizing appeals in "qui tam and other actions for forfeitures and penalties," appeal lies from the action of justices of the peace acting as fence viewers;[59] and, where a statute provides for the entry of judgment by a justice of the peace ex parte on a fence viewers' award if it is not paid within a certain time, an appeal lies from such judgment as from other judgments of such courts, the proceedings being an "action" within the code and a judicial rather than a ministerial act.[60] Whether a landowner was assessed by fence viewers with the cost of a more expensive fence than the law required must be decided on appeal and not on certiorari to review their proceedings.[61]

The appeal must be taken within the time prescribed by statute,[62] and, where a bond is required, it must be duly furnished or the appeal will be dismissed.[63] An appeal will not be dismissed because witness' fees were paid by the party appealing.[64]

Trial de novo. Under some statutes the appeal is triable as an action at law.[65] Unless waived,[66] a jury may be demanded therein,[67] and the question submitted to it for its determination.[68] In such a trial it is not error for the court in its instructions to the jury to recite the proceedings before the fence viewers, provided it does not refer to the findings of the viewers otherwise than by an instruction that the findings are not to be considered as evidence by the jury.[69]

§ 14. Sufficiency of Fences

What constitutes a sufficient fence is often specified by the statutes. Apart therefrom, a sufficient fence is one which will turn ordinary stock.

In the absence of an applicable statute defining what constitutes a sufficient fence, the rule is that a fence which will turn ordinary stock is a good and sufficient fence;[70] it is not necessary that it turn stock which is breachy or peculiarly vicious and prone to break fences.[71]

Where a division line fence is not required to be built of any particular height or size, or of any particular materials or particular style, it must be so built as to size, height, character, and kind of materials that it will be proper and suitable for all the purposes of such fence, and will be reasonably safe, and not necessarily cause injury to the adjoining owner or his property or animals.[72]

The law does not require that fences shall be constructed of fine materials,[73] or that they shall be attractive in appearance.[74]

Statutory provisions. What constitutes a sufficient or lawful fence is sometimes prescribed by statute.[75] Statutes of this character are not necessarily applicable to all fences or in determining all classes of liability claimed to arise from failure to construct or maintain a proper fence.[76] In a case where the statute is applicable land must be

58. Iowa.—Smith v. Ellyson, 115 N.W. 40, 137 Iowa 391.

59. Ill.—Holliday v. Swailes, 2 Ill. 515.

60. Tenn.—Lightfoot v. Grove, 5 Heisk. 473.

61. Iowa.—Miles v. Tomlinson, 81 N.W. 587, 110 Iowa 322.

62. Iowa.—Miles v. Tomlinson, supra.

63. Iowa.—Hahn v. Lumpa, 109 N.W. 310, 131 Iowa 722.

64. Iowa.—Smith v. Ellyson, 115 N.W. 40, 137 Iowa 391.
25 C.J. p 1031 note 35.

65. Iowa.—Moore v. Short, 288 N.W. 407, 227 Iowa 380—In re Swisher, 216 N.W. 673, 204 Iowa 1072.

Tried as appeal from justice of peace
Iowa.—Trustees of Van Meter Tp., Dallas County v. Harkrader, 293 N.W. 455, 228 Iowa 1229.

Findings as to nature of fence
In action arising over dispute as to maintenance of partition fence, evidence warranted judgment requiring defendants to maintain that portion of fence which town trustees as fence viewers had ordered defendants' predecessor in title to maintain, in view of finding supported by evidence that fence was a line fence running parallel to private driveway on defendants' property and not a fence on a public highway.—Trustees of Van Meter Tp., Dallas County v. Harkrader, supra.

66. Iowa.—Moore v. Short, 288 N.W. 407, 227 Iowa 380.

67. Iowa.—Moore v. Short, supra.

68. Iowa.—Moore v. Short, supra.

69. Iowa.—Smith v. Ellyson, 115 N.W. 40, 137 Iowa 391.

70. Nev.—Chase v. Chase, 15 Nev. 259, 264.
Wyo.—Anthony Wilkinson Live Stock Co. v. McIlquam, 83 P. 364, 14 Wyo. 209, 3 L.R.A.,N.S., 733.
25 C.J. p 1016 note 34.

71. Iowa.—Shellabarger v. Chicago, R. I. & P. R. Co., 23 N.W. 158, 66 Iowa 18.
25 C.J. p 1016 note 35.

72. N.Y.—Rowland v. Baird, 18 Abb. N.Cas. 256.
Fence as obstruction of light, air, and view see Adjoining Landowners §§ 50, 51.

73. Ind.—Giller v. West, 69 N.E. 548, 162 Ind. 17.

74. Ind.—Giller v. West, supra.

75. Cal.—Meade v. Watson, 8 P. 311, 67 Cal. 591.
Tex.—Posey v. Coleman, Civ.App., 133 S.W. 937, 939.
25 C.J. p 1016 note 39.

76. Tex.—Posey v. Coleman, supra.
25 C.J. p 1017 note 40.
"We do not think these statutory regulations were intended to entirely supersede the common-law standard of what should constitute a sufficient fence in determining the question of liability based upon negligence on the part of the owner of trespassing stock, but were designed

inclosed by a fence of the character described,[77] or at least by an inclosure equivalent, in its capacity to turn stock, to the statutory fence,[78] substantial compliance with the statute, however, being sufficient.[79] Thus, where the statute prescribes the manner of constructing barbed wire fences, one constructed otherwise is not a lawful or sufficient fence.[80]

A statutory prohibition of the use of barbed wire in certain cases must be obeyed in such cases, and such only, as come within its terms.[81]

The height of a lawful fence being prescribed, the average height cannot be considered in determining its sufficiency; it is immaterial that it is higher in some places if it is lower in others.[82] An immaterial variation from the statutory height will be disregarded; substantial compliance with the statute is all that is required.[83]

Delegation of regulation to towns. The legislature may delegate to towns the power to make their own regulations as to the sufficiency of fences.[84] However, an unreasonable ordinance enacted by a city or village in the exercise of legislative power to regulate fences delegated to it will be declared void.[85]

Effect of agreement. An agreement for a partition fence which requires a "sufficient fence," without a more particular description, will be held to refer to and adopt the standard prescribed by statute.[86] On the other hand, statutory requirements as to the sufficiency of partition fences may be waived or modified by agreement,[87] or acquiescence in the existence of a fence which does not come up to the statutory requirements.[88]

§ 15. Location and Ownership

a. Location
b. Ownership

a. Location

In the absence of agreement or binding acquiescence to the contrary, a partition fence should in theory be located along the boundary line between adjacent lands. Substantial compliance with this requirement is sufficient, however, and an equal and reasonable amount of each party's land may be used for the erection of the fence.

The statutes providing for and relating to partition fences contemplate fences on the boundary line between the lands of adjoining owners.[89] Hence a fence built by a person on his own land and claimed by him and his grantees as theirs exclusively is not a division or partition fence recognized by statute.[90] However, to constitute a partition fence it is not necessary that it be located precisely on the true line,[91] although substantial compliance with the rule that a partition fence must be located on the line between adjoining landowners is necessary in the absence of an express or implied agreement to locate it elsewhere.[92]

to furnish to landowners who complied with the prescribed requirements in constructing their fences a special remedy for such damages."—Posey v. Coleman, supra.

77. Mo.—Ayres v. St. Louis, M. & S. E. R. Co., 101 S.W. 689, 124 Mo. App. 422.
N.D.—Johnson v. Rickford, 122 N.W. 386, 18 N.D. 268.
Okl.—Bottoms v. Clark, 132 P. 903, 38 Okl. 243.
25 C.J. p 1017 note 41.

78. Mo.—Cook v. Cooksey, App., 300 S.W. 1034.
25 C.J. p 1017 note 42.
Fence of equal security or effectiveness as the defined lawful fence is sometimes, by the express provisions of the statute, a lawful fence.—Johnson v. Rickford, 122 N.W. 386, 18 N.D. 268—25 C.J. p 1017 note 42 [b].

79. Mo.—Cook v. Cooksey, App., 300 S.W. 1034.

80. N.Y.—Barr v. Green, 104 N.E. 619, 210 N.Y. 252, Ann.Cas.1915B 855, reversing 132 N.Y.S. 739, 148 App.Div. 897.
25 C.J. p 1017 note 43.

81. Ky.—McKinney v. Thompson, 86 S.W. 543, 27 Ky.L. 733.
25 C.J. p 1017 note 44.
Such a statute is valid
N.Y.—Buckley v. Clark, 47 N.Y.S. 42, 21 Misc. 138.

82. Kan.—Prather v. Reeve, 23 Kan. 627.
25 C.J. p 1017 note 46.

83. Mont.—Smith v. Williams, 2 Mont. 195.
25 C.J. p 1017 note 47.

84. N.Y.—Griffin v. Martin, 7 Barb. 297.
25 C.J. p 1017 note 51.

85. Ill.—Dixon v. Messer, 136 Ill. App. 488—Mason City v. Barngrover, 26 Ill.App. 296.

86. Ill.—Albright v. Bruner, 14 Ill. App. 319.
Iowa.—Panther v. Trauman, 56 N.W. 289, 89 Iowa 101.

87. Ala.—Avary v. Searcy, 50 Ala. 54.
25 C.J. p 1017 note 49.
Use of barbed wire under agreement
Ky.—Stewart v. Foltz, 276 S.W. 833, 210 Ky. 805.

88. Ill.—Scott v. Jackson, 93 Ill. App. 529.

89. Iowa.—Foster v. Bussey, 109 N. W. 1105, 132 Iowa 640.
25 C.J. p 1031 note 44.
Dispute as to boundary line as:
Authorizing viewers to designate line for fencing purposes see supra § 13 c.
Defense to action for contribution see supra § 11 a.
Justification for removal see infra § 16.
Fence as boundary see Boundaries §§ 77, 79.

90. Mo.—Huntley v. Osborn, App., 198 S.W. 1115.

91. Minn.—Oxborough v. Boesser, 13 N.W. 906, 30 Minn. 1.
25 C.J. p 1031 note 45.

92. Ky.—Sturgill v. Sturgill, 202 S. W. 311, 180 Ky. 170.
25 C.J. p 1032 note 46.
Erection by tenant
Fence, not on true line, erected by tenant for his convenience between tracts of different landlords is not a partition fence.—Shaheen v. Dorsey, 270 S.W. 452, 208 Ky. 89.
Fence several feet from line
Fences located several feet or more from the line have been held

Where landowners expressly agree as to the location of a partition fence,[93] or acquiesce in its location for a long period,[94] or treat it as being a partition fence or on the line,[95] such agreement or acquiescence controls, the fact that the fence is not on the line being immaterial.

Location on lands of both parties. As the line between adjacent landowners is imaginary, existing only in theory,[96] and as every species of fence must take some land and cannot stand on a mathematical line,[97] a reasonable amount of land may be used for the erection of a partition fence, one half of such fence being placed on the land of each of the adjacent owners.[98] Thus crooked or zigzag fences, usually known as Virginia or worm fences, may be built with one half resting on the land of each adjoining owner,[99] unless they infringe the rights of the parties under licenses or agreements.[1]

The occupation by a landowner of the requisite land of his neighbor for the erection of a partition fence is not adverse, but permissive.[2] If more than half of such a fence is built on the land of one of the adjacent owners, without his consent, he is entitled to relief.[3]

The rule which permits partition fences to be placed equally on the land of each adjoining owner does not apply to fences meeting on the front of adjoining premises. Such fences are required to terminate at the division line.[4]

Fence on uneven ground. Since fences must be located along the surface of the ground, whether even or uneven, an order to build a certain number of rods of partition fence is complied with by measurement along the undulating surface, instead of on the level, as in surveying.[5]

Effect of watercourses or ditches. The existence of watercourses or ditches sometimes makes the erection of a partition fence on the boundary between adjoining owners impossible or so expensive as to be practically impossible.[6] Some statutes authorize trustees or fence viewers in such a case to construct or direct the location of a suitable fence elsewhere than on the true line.[7] Where such case is not provided for by statute it must be governed by principles of reason and justice.[8]

In complying with an order of viewers, an owner may extend a partition fence to the terminus of the adjoining owner's, although the fence must be located across a stream, and the water is thereby obstructed to some extent.[9]

not to be partition fences.—Sturgill v. Sturgill, 202 S.W. 311, 180 Ky. 170—25 C.J. p 1032 note 47.

93. Minn.—Oxborough v. Boesser, 13 N.W. 906, 30 Minn. 1.
25 C.J. p 1032 note 49.

Construction of agreement
Where the controlling feature of a contract was the making of fences on specified lines, so that each of the parties should be restored to the possession of pasture held by him under his lease, such provision must prevail over any other general purpose stated by the contract.—Tomkins v. Smith, 193 P. 558, 69 Colo. 271.

Duration of agreement by tenants
Where lessees of adjoining lands stipulated each to build a certain amount of fence, it must be presumed that they intended that such fences would stand during the term of their leases, or at least for a reasonable time, and one of them could be enjoined by the other from changing the fence lines as established by the contract, the fences having been built.—Tomkins v. Smith, supra.

94. Ky.—Grief v. Kahn, 7 S.W. 159, 87 Ky. 17, 10 Ky.L. 87.
25 C.J. p 1032 note 50.

95. Ala.—Garrett v. Sewell, 10 So. 226, 95 Ala. 456.
25 C.J. p 1032 note 51.

Dispute as to line
Fence erected as a partition fence where the boundary was disputed and the fence was not in fact on the boundary line is a partition fence regardless of the location.—Porter v. Poole, 8 Tenn.App. 453.

Waiver by failure to object
If objection to the location of a partition fence is not duly taken in proceedings before fence viewers, it is waived.—Piper v. Piper, 60 N.H. 98.

96. Tex.—Slaughter v. Cullup, 55 S.W. 182, 22 Tex.Civ.App. 578.

97. Va.—Willing v. Booker, 168 S.E. 417, 160 Va. 461.
25 C.J. p 1032 note 55.

98. Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
Va.—Willing v. Booker, 168 S.E. 417, 160 Va. 461.
25 C.J. p 1032 note 56.

Posts on adjoining land
La.—Alba v. Zeller, 7 La.A., Orleans, 47.

99. Mich.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann. Cas. 198.
25 C.J. p 1032 note 57.

No trespass
No trespass is committed by either owner in building a crooked or zigzag fence, one half resting on the land of each adjoining owner.—Carpenter v. Halsey, 60 Barb., N.Y., 45—Ferris v. Van Buskirk, 18 Barb., N.Y., 397.

1. Va.—Willing v. Booker, 168 S.E. 417, 418, 160 Va. 461, citing **Corpus Juris.**
25 C.J. p 1032 note 58.
Rights of owners of servient and dominant estates see Easements § 98.

2. N.Y.—Higgins v. Kingsley, 31 N.Y.S. 100, 82 Hun 150, affirmed 49 N.E. 1098, 155 N.Y. 634.
Pa.—Dysart v. Leeds, 2 Pa. 488.

3. Mich.—Rose v. Linderman, 110 N.W. 939, 147 Mich. 372, 11 Ann. Cas. 198.
25 C.J. p 1033 note 60.
Injunction against erection of fence see the C.J.S. title Injunctions § 61, also 32 C.J. p 135 note 84 [c].
Right to remove see infra § 16.

4. Conn.—Hubbell v. Peck, 15 Conn. 133.
N.Y.—Warren v. Sabin, 1 Lans. 79.

5. Iowa.—Myers v. Tallman, 149 N.W. 259, 169 Iowa 104.

6. Ind.—Smith v. Timmons, 132 N.E. 319, 77 Ind.App. 448.
Iowa.—Foster v. Bussey, 109 N.W. 1105, 132 Iowa 640.

7. Ind.—Smith v. Timmons, 132 N.E. 319, 77 Ind.App. 448.
Mass.—Lamb v. Hicks, 11 Metc. 496.

8. Conn.—Bissel v. Southworth, 1 Root 269.

9. Iowa.—Myers v. Tallman, 149 N.W. 259, 169 Iowa 104.
25 C.J. p 1033 note 66.

The general statutory duty of trustees, in certain cases, to construct partition fences does not require them to erect a floodgate across a creek, over which the line of fence is located,[10] although the right and duty of the trustees to erect a floodgate exist under statutes expressly dealing with a situation where a creek or ditch makes impossible the erection of a partition fence along the dividing line.[11]

Rebuilding. Where a partition fence which was not on the true line is rebuilt, it may be correctly located.[12]

b. Ownership

A partition fence is generally the joint property of the adjoining owners.

A fence which is entirely on the land of one person and which is not a partition fence by virtue of agreement, prescription, or statute belongs to the owner of the land on which it rests.[13] This is true even where the fence was erected by another person,[14] unless the latter acted in good faith under a misapprehension as to the location of the boundary line and with the consent, express or implied, of the owner of the land on which the fence is built,[15] or unless the case comes within a statute protecting a person who builds a fence on the land of another before the establishment of a boundary line by the county surveyor.[16]

Although a division fence may belong entirely to one owner,[17] as where it was built by him and he has not been reimbursed for one half the value thereof by the adjoining owner, either voluntarily or under statutory compulsion,[18] a fence erected on the line between the lands of adjoining owners,[19] or recognized by them as being on the line, although not so in fact,[20] generally belongs to them as tenants in common, the statutes of some states making partition fences joint property, belonging equally to the adjoining proprietors.[21] At any rate, since a partition fence is required to be, and generally is, built equally on both sides of the line, see supra subdivision a of this section, it is presumed to be the common property of both owners, until the contrary is shown.[22]

§ 16. Removal or Destruction of Fences

The liability or culpability of one arising from the removal or destruction of a fence depends on the nature of the fence and the rights of the parties involved. Civil rights and liabilities arising from such removal or destruction are considered infra § 17, and criminal responsibility arising therefrom is considered infra § 18.

Examine Pocket Parts for later cases.

§ 17. —— Civil Liability

a. In general
b. As between adjacent owners
c. Actions
d. Damages

a. In General

One removing a fence built on his land by another without authority is not liable therefor. An action in damages lies, however, against one removing or destroying a fence on the land of another.

An owner of land is not liable for removing a fence built thereon without his permission[23] nor is a drainage district liable for removal of a boundary fence built over a drainage ditch in violation of a statute prohibiting the building of a fence over such a ditch.[24] On the other hand, a person who

10. Ind.—State v. Burkit, 108 N.E. 113, 182 Ind. 665.

11. **Statute construed**
Statute providing that, where a ditch or creek marks the dividing line between land of different owners, so as to preclude construction of partition fence on dividing line, "such partition fences shall be built and maintained under the provisions of this act as near to such boundary line as may be, and each landowner shall be required on his own land to build a separate partition fence and to maintain the same at his own cost," requires each owner to construct, not a separate fence along entire distance, but to construct and maintain at his own expense a partition fence for one half the distance, which, when connected by floodgate with fence along other half of distance of other owner, will constitute a continuous partition fence.—Smith v. Timmons, 132 N.E. 319, 77 Ind.App. 448.

12. Ill.—Scott v. Jackson, 93 Ill. App. 529.
La.—Alba v. Zeller, 7 La.App., Orleans, 47.
Notice unnecessary
La.—Alba v. Zeller, supra.

13. Del.—Quillen v. Betts, 39 A. 595, 17 Del. 53.
Ownership as affecting removal see infra § 16.

14. Mo.—Ousley v. Lambeth, App., 199 S.W. 594.
25 C.J. p 1033 note 70.

15. Mo.—Ousley v. Lambeth, App., 199 S.W. 594.

16. Wis.—Scholl v. Kinitzer, 53 N.W. 451, 83 Wis. 307.

17. Wis.—Murray v. Van Derlyn, 24 Wis. 67.

18. Mo.—Jones v. Derosset, App., 185 S.W. 239.
25 C.J. p 1033 note 79.

19. Ala.—Garrett v. Sewell, 10 So. 226, 95 Ala. 456.
25 C.J. p 1033 note 73.
No trespass is committed by one adjoining owner hanging property on partition fence.—Hannabalson v. Sessions, 90 N.W. 93, 116 Iowa 457, 93 Am.S.R. 250.

20. Ala.—Garrett v. Sewell, 10 So. 226, 95 Ala. 456.
25 C.J. p 1033 note 74.

21. Ala.—Walker v. Watrous, 8 Ala. 493, 42 Am.D. 646.

22. Del.—Quillen v. Betts, 39 A. 595, 17 Del. 53.
25 C.J. p 1033 note 76.

23. N.Y.—Thayer v. Wright, 4 Den. 180.

24. Mo.—Carroll v. Little River

commits a trespass by removing or destroying a fence on another's land becomes liable to an action for damages.[25]

The fact that a fence was not of the kind or dimensions prescribed by statute will not defeat an action for its willful destruction,[26] although it may defeat an action for partial cutting and removal, under a bona fide claim of right to repair,[27] and the fact that the entry and temporary removal of the fence was legal and necessary in constructing a road is no defense to an action for trespass, where the removal or rebuilding was negligent and resulted in damage.[28]

Trover lies against a person who removes a quantity of fence from the land of its owner, although such person was acting at the time under the direction of town officers and mistakenly supposed the fence to be on the land of the town.[29]

Statutory penalty. Persons who throw down or leave open fences are sometimes, by statute, made liable to a penalty recoverable in a civil action.[30] Such statutes, being penal, must be strictly construed,[31] and the object of such statutes being to preserve the integrity of the owner's inclosure, the penalty may be recovered only for leaving open or throwing down part of a complete inclosure.[32]

b. As between Adjacent Owners

(1) In general
(2) Removal on notice

(1) In General

The owner of land may ordinarily remove a fence built entirely on his own land. It is otherwise, generally, as to a partition fence considered the joint property of the adjoining owners, except in the case of consent, or the giving of a prescribed notice.

If a fence separating the lands of adjoining owners is entirely on the land of one and is not a partition fence by virtue of agreement, prescription, or statute, he has a right to remove it.[33]

On the other hand, a partition fence considered the joint property of the adjoining landowners, as discussed supra § 15 b, cannot be arbitrarily removed or destroyed by either of the owners,[34] even if the boundary is in dispute,[35] without the consent of the other,[36] or without complying with the conditions of statutes authorizing removal, as discussed infra subdivision b (2) of this section, or unless it is for the purpose of replacing the fence with another on the same site.[37] If one owner improperly removes or destroys a partition fence, he is liable to the other[38] in an appropriate action, as discussed infra subdivision c of this section. Either, however, may repair such fence and lawfully enter on the land of the other for that purpose,[39] and either may replace it after its removal or destruction.[40] When a partition fence is rebuilt beyond the boundary line, it may properly be removed and replaced on the correct line of the original fence.[41]

Although, as discussed supra § 15 a, no trespass

Drainage Dist., 237 S.W. 207, 208 Mo.App. 537.

25. Tex.—Jameson v. Board, Civ. App., 171 S.W. 1037.
25 C.J. p 1033 note 80.

In whom right to sue lies

Grantees occupying lot, described in deed by reference to plan showing inclusion of disputed strip, had sufficient title and possession to sue for destruction of fence, there being a presumption that grantees were in possession of whole lot.—D'Orazio v. Pashby, 150 A. 70, 102 Vt. 480.

Enjoining removal or destruction of fence see the C.J.S. title Injunctions § 68, also 32 C.J. p 148 note 8 –p 149 note 17.

26. Colo.—Norton v. Young, 40 P. 156, 6 Colo.App. 187—Fugate v. Smith, 35 P. 283, 4 Colo.App. 201.

27. Mo.—Johnson v. Fiala, 143 S.W. 537, 161 Mo.App. 359.
25 C.J. p 1034 note 82.

28. Tenn.—Crawford v. Maxwell, 3 Humphr. 476.

Joint or several liability

If road contractors engaged in the construction of the same road each made gaps in the fence around plaintiff's premises, which were not replaced for a considerable length of time, and used the gaps without restoring the fence or protecting the field from the depredation of cattle, they were jointly liable under the rule as to concert of action, and the rule as to negligence concurring in setting in operation the force causing the injury.—Troop v. Dew, 234 S.W. 992, 150 Ark. 560.

29. Me.—Smith v. Colby, 67 Me. 169.

30. Mo.—Wright v. Brown, 145 S.W. 518, 163 Mo.App. 117.
25 C.J. p 1034 note 86.

31. Mo.—Wright v. Brown, supra—Robinson v. Schiltz, 115 S.W. 472, 135 Mo.App. 32.

32. Mo.—Sperry v. Hurd, 109 S.W. 76, 130 Mo.App. 495—Wilson v. Burton, 70 S.W. 916, 96 Mo.App. 686.
25 C.J. p 1034 note 88.

33. Ky.—White v. Thompson, 219 S.W. 434, 187 Ky. 481.
25 C.J. p 1034 note 89.

Fence built under revocable license

A person removing a fence on his own land, constructed by his adjoining owner under a revocable license, is not liable for a statutory penalty, where he has given due notice of revocation of the license.—Wright v. Brown, 145 S.W. 518, 163 Mo.App. 117.

34. Va.—Willing v. Booker, 168 S. E. 417, 160 Va. 461.

35. Ky.—Jones v. Motley, 13 S.W. 432, 11 Ky.L. 921.
Tenn.—Porter v. Poole, 8 Tenn.App. 453.

36. Tex.—Gulf, C. & S. F. Ry. Co. v. Stephenson, Civ.App., 273 S.W. 294.
25 C.J. p 1035 note 9.

37. Ill.—Hill v. Tohill, 80 N.E. 253, 225 Ill. 384, 8 Ann.Cas. 423.
25 C.J. p 1034 note 95.

38. Tenn.—Porter v. Poole, 8 Tenn. App. 453.
25 C.J. p 1034 note 92.

39. Mo.—Johnson v. Fiala, 143 S.W. 537, 161 Mo.App. 359.
25 C.J. p 1034 note 91.

40. Va.—Willing v. Booker, 168 S. E. 417, 160 Va. 461.

41. N.Y.—Thayer v. Wright, 4 Den. 180.

is committed by either owner in building a crooked or zigzag fence, one half resting on the land of each adjoining owner, where more than one half of a division fence is built on the land of one owner, without his consent, he may remove the excess,[42] and, if in order to effect such removal it becomes necessary to destroy the whole fence, he may rightfully do so.[43]

Statutory penalties for removal of a partition fence do not of course apply to removal of a fence which is not a division fence.[44] A hedge of growing trees is not removable as a fence under the statutes of some states authorizing one who constructs or owns a division fence or a part thereof to remove it on certain conditions;[45] but a division hedge fence is within the rules and statutes of other jurisdictions relating to removal of division fences.[46]

The owner of inclosed land which he ceases to improve or lays in common has no right to remove any portion of a partition fence standing,[47] although, as discussed supra § 9, he is relieved from the further duty of contributing to its maintenance. Statutes sometimes provide that a landowner who desires to let his land lie open shall not remove his part of a partition fence if the adjoining owner pays him for it.[48]

Right to remove fences placed by mistake. If one of two adjoining landowners, with the knowledge of the other, erects a division or a partition fence which is by mistake placed on the land of the latter, and the former on discovering his mistake removes the fence, the latter cannot recover its value,[49] nor is the former liable to an action of trespass for such removal.[50]

A statute giving the right to remove fences placed by mistake on the lands of other persons has been held to apply only to natural persons, and to give no right to remove fences erected by mistake on lands of the state or of the United States.[51]

(2) Removal on Notice

Statutes sometimes make removal of a partition fence by one of the adjoining owners contingent on the giving of notice to the other.

In some jurisdictions there are statutes which authorize the removal of partition fences, where notice of intention to remove has been given by one adjacent owner to the other, at a prescribed time in advance of the removal, and prohibit their removal where the prescribed notice has been given.[52] Similar statutes in other jurisdictions prohibit the removal of a partition fence without consent except during certain months of the year and then only after giving notice for a prescribed time.[53]

Unless a written notice is called for by the statute,[54] a notice by parol is sufficient.[55]

The fact that one adjacent owner has notified the other that he intends to remove will not justify the other in removing his part without notice, it being only where the party making the removal has given the notice that the statute affords any protection to him.[56]

Application of statutes. The statutes are given a broad application and are not limited to a particular kind of partition fence.[57] According to some authorities the prescribed notice must be given, although the fence is partly or entirely on the land of the party desiring its removal, if it is used as

42. Mass.—Kennedy v. Owen, 131 Mass. 431—Sparhawk v. Twichell, 1 Allen 450.

43. Mass.—Sparhawk v. Twichell, supra.
25 C.J. p 1034 note 99.

44. Mo.—Jones v. Derosset, App., 185 S.W. 239.
25 C.J. p 1035 note 2.

45. Kan.—Griffith v. Carrothers, 119 P. 548, 86 Kan. 93.
25 C.J. p 1035 note 3.

46. Ill.—Conklin v. Newman, 115 N.E. 849, 278 Ill. 30—Hill v. Tohill, 80 N.E. 253, 225 Ill. 384, 8 Ann. Cas. 423.

47. N.H.—Perkins v. Boody, 62 N.H. 452—Jones v. Perry, 50 N.H. 134.
Pa.—Smith v. Johnson, 76 Pa. 191.

48. Ind.—Haines v. Kent, 11 Ind. 126.

49. Mont.—Schmuck v. Beck, 234 P. 477, 42 Mont. 606.
25 C.J. p 1035 note 23.

50. Mont.—Schmuck v. Beck, 234 P. 477, 481, 72 Mont. 606, citing **Corpus Juris.**
25 C.J. p 1035 note 24.

51. Ill.—Blair v. Worley, 2 Ill. 178.

52. Tenn.—Porter v. Poole, 8 Tenn. App. 453.
25 C.J. p 1035 note 13.

Act of contractor

Railroad is liable, although its contractor may not have been acting under specific instructions in removing fences, and although he also removed fences not on the right of way.—Gulf, C. & S. F. Ry. Co. v. Stephenson, Tex.Civ.App., 273 S.W. 294.

53. Ky.—Clemmons v. Grow, 43 S. W. 728, 102 Ky. 499, 19 Ky.L. 1544.
25 C.J. p 1035 note 14.

Statute inapplicable to nonpartition fence

Fence, admittedly not on true line, constructed by tenant for his own convenience between tracts owned by his two landlords, was held not a partition fence, removable, under statute, by subsequent grantee of one of such parcels.—Shaheen v. Dorsey, 270 S.W. 452, 208 Ky. 89.

54. Tenn.—Porter v. Poole, 8 Tenn. App. 453.
25 C.J. p 1035 note 15.

55. N.Y.—Holladay v. Marsh, 3 Wend. 142, 20 Am.D. 678.

56. Mo.—Knott v. Glaze, 22 Mo.App. 352.

57. Ky.—Clemmons v. Grow, 43 S. W. 728, 102 Ky. 499, 19 Ky.L. 1544 —Grief v. Kahn, 7 S.W. 159, 87 Ky. 17, 10 Ky.L. 87.

a partition fence by consent of the parties;[58] but in other jurisdictions the rule is otherwise, except where the person desiring removal has consented to the connection of his fence with that of an adjoining owner, in which case reasonable notice, rather than notice for the time prescribed by statute, is necessary.[59]

Effect of removal on notice. The effect of removing a partition fence on notice is to remit the parties to their common-law rights and duties.[60]

Disuniting fences. Where, by agreement or long acquiescence, the fences of adjoining owners are united, one owner cannot disunite the fences or remove his own fence, or a portion thereof, without giving reasonable notice of his intention to the other party.[61]

c. Actions

For a wrongful removal or destruction of a fence an action lies.

For the improper removal or destruction of a fence an appropriate action may be brought.[62]

Pleading. In an action to recover a statutory penalty it is necessary and sufficient to allege facts bringing the case within the statute.[63]

Where, in an action of trespass, notice of intention to remove a partition fence is alleged, the pleading should show that the notice was given in due time and to a proper person.[64]

An allegation that the fence was removed and converted by defendant to his own use does not require a complaint otherwise stating a cause of action for damage to realty to be treated purely as an action in conversion.[65]

Issues, proof, and variance. The essential elements of the action which are in issue and only matters that are such elements must be proved to justify a recovery in an action based on the removal or destruction of a fence. Thus, in an action for damage to a fence, based on negligence, the evidence must establish such negligence.[66]

Under a statute imposing a penalty against one who shall voluntarily throw down or open any fence or gate and leave it open, it is not sufficient to prove merely that defendant threw down a fence, but evidence must be introduced to show that he left it down.[67] It is not necessary to prove that the fence injured or removed inclosed a cultivated field,[68] nor is it necessary to prove notice of removal of a fence built entirely on the land of one owner where the provision for notice relates exclusively to partition fences.[69]

In an action growing out of the removal of a fence, when the ownership of the land on which the fence was situated is not in issue, evidence offered to show title to the land is properly rejectd,[70] and, where such ownership is in issue, evidence of ownership of other tracts of land in the vicinity, by one of the adjoining owners, is incompetent.[71]

Evidence. Direct and affirmative evidence is not necessary to establish the removal of a partition fence; it may be shown by any facts and circumstances sufficient to convince the jury.[72] However, where the evidence is of such nature as to compel

58. Tenn.—Porter v. Poole, 8 Tenn. App. 453.
25 C.J. p 1035 note 18.

59. Mo.—Sims v. Field, 74 Mo. 139—Jeffries v. Burgin, 57 Mo. 327.

60. N.Y.—Holladay v. Marsh, 3 Wend. 142, 20 Am.D. 678.

61. Ky.—Shean v. Withers, 12 B. Mon. 441—Burries v. Agnew, 6 Ky. Op. 10.
Mo.—Sims v. Field, 74 Mo. 139.

62. **Action for statutory penalty**
Mo.—Frederick v. Bruckner, 101 S. W. 619, 124 Mo.App. 31.
Trover or conversion
Ala.—Garrett v. Sewell, 11 So. 226, 95 Ala. 456.
Me.—Smith v. Colby, 67 Me. 169.
Tenn.—Porter v. Poole, 8 Tenn.App. 453.
Trespass
(1) Whether trespass will lie for removal or destruction of a partition fence owned by the adjoining owners in common seems to depend on whether the case arises in a jurisdiction where trespass lies or does not lie between tenants in common.—Conklin v. Newman, 115 N.E. 849, 278 Ill. 30—25 C.J. p 1034 note 93 [a].
(2) Trespass between tenants in common is considered in the C.J.S. title Tenancy in Common § 100, also 62 C.J. p 521 note 10–p 526 note 14.

63. Mo.—Robinson v. Schiltz, 115 S. W. 472, 135 Mo.App. 32—Frederick v. Bruckner, 101 S.W. 619, 124 Mo. App. 31.

64. Ill.—McCormick v. Tate, 20 Ill. 334.
Objection too late
Ky.—Schieble v. Hart, 12 S.W. 628, 11 Ky.L. 607.

65. S.D.—Metropolitan Life Ins. Co. v. Farmers Co-op. Co., 2 N.W.2d 665.

66. Mass.—Lanoue v. Buscicchia, 158 N.E. 666, 261 Mass. 236.
Finding of no negligence improper
Where it was alleged that defendant drove his teams and automobile trucks into and injured plaintiff's fence, evidence that defendant owned roadway on his land in close proximity to fence and was responsible for uneven places therein, which caused vehicles to lurch or swerve sufficiently to cause injury to plaintiff's fence, held not to support finding that injury was not caused by defendant's negligence.—Lanoue v. Buscicchia, supra.

67. Mo.—Donovan v. Sallee, 19 Mo. App. 593.

68. Mo.—Frederick v. Bruckner, 101 S.W. 619, 124 Mo.App. 31.

69. Mo.—Frederick v. Bruckner, supra.

70. Ky.—Fitts v. Howard, 13 Ky.L. 302.

71. Kan.—Shanks v. Williams, 144 P. 1007, 93 Kan. 573.

72. Mo.—Robinson v. Schiltz, 115 S. W. 472, 135 Mo.App. 32.
25 C.J. p 1036 note 28.

the jury to make an inference on an inference in order to find that the loss or damage suffered was caused solely by the removal or destruction of the fence, it is insufficient to justify submission of the case to the jury.[73]

In a civil action for a penalty the jury need not be convinced beyond a reasonable doubt, but only by a preponderance of evidence.[74]

In an action for damages for the removal of a fence without notice, judgment for half the value of the fence is not supported by evidence of statements of defendant that he owned only one half of it, when the otherwise uncontradicted evidence shows that it was built wholly by defendant and that plaintiff's grantor was merely permitted to connect with it.[75]

A witness may testify that a fence for the removal of which an action is brought was a partition fence, although the evidence does not show that it was a statutory partition fence, if he knows the fact that it was erected by agreement between the parties who owned the land, and the statement is not objectionable as a conclusion of law.[76]

Trial. Questions of fact should in actions tried to a jury be submitted to the jury for determination[77] after instructions by the court stating the applicable law.[78] Requested instructions which are not applicable to the evidence or incorrectly state the law thereunder are properly refused,[79] or given after modification to make them correctly state the applicable law.[80]

Where the evidence is sufficient to sustain the verdict of the jury, the verdict should not be set aside.[81]

d. Damages

The measure of damage for the removal or destruction of a fence is its value at the time determined by the cost of replacement less depreciation for age and use.

One who removes or destroys the fence of another is liable to respond in damages for any loss which is the natural or proximate consequence of his act;[82] and, where an adjacent owner removes a partition fence without notice to,[83] or the consent of,[84] the other adjacent owner, when such notice or consent is required by statute, the measure of damages is the same.

The measure of damage for the removal or destruction of a fence is its value as it stood on the realty at the time of its destruction,[85] determined by the cost of building a similar fence,[86] less depreciation from age and use.[87]

Value of land as element. It has been held that, since the fence is a part of the realty, the difference in the value of the land caused by its destruction should be considered in measuring the damages.[88] Where, however, the injury to the realty is temporary only and readily repairable, as where fencing is partially impaired, the measure of dam-

73. Tex.—Helmerich-Payne, Inc. v. Debus, Civ.App., 148 S.W.2d 243.

74. Mo.—Robinson v. Schiltz, 115 S. W. 472, 135 Mo.App. 32.

75. Tex.—Long v. Cude, Civ.App., 26 S.W. 1000.

76. Ala.—Avary v. Searcy, 50 Ala. 54.

77. Mo.—Ousley v. Lambeth, App., 199 S.W. 594.

Negligence
Tex.—Gross v. Shell Pipe Line Corporation, Civ.App., 48 S.W.2d 377.

78. Ark.—Troop v. Dew, 234 S.W. 992, 150 Ark. 560.

Instruction on joint or several liability
In an action against several road contractors for making gaps in plaintiff's fences, and permitting cattle to enter and injure their crops, instructions were held not to exclude the idea of a separate liability or assume that the liability, if any, was joint, where they merely told the jury that each defendant whose negligent act caused injury was liable.—Troop v. Dew, supra.

79. Mo.—Bast v. Mason, App., 184 S.W. 398.

80. Ark.—Troop v. Dew, 234 S.W. 992, 150 Ark. 560.

Cause of damage
In an action against road contractors, an instruction that one defendant was not liable for any damage except such as might have been suffered from depredations of stock entering plaintiff's premises through a particular fence was properly modified by adding "and other gates or gaps left negligently open, if any," where there was evidence that such defendant's teams used a gate through which cattle entered.—Troop v. Dew, supra.

81. Vt.—D'Orazio v. Pashby, 150 A. 70, 102 Vt. 480.

82. Ill.—Conklin v. Newman, 115 N. E. 849, 278 Ill. 30.
25 C.J. p 1036 note 39.

83. Tenn.—Stallcup v. Bradly, 3 Coldw. 406.
Tex.—St. Louis Cattle Co. v. Gholson, Civ.App., 30 S.W. 269.
25 C.J. p 1036 note 40.

84. Ky.—Mene v. Horner, 7 Ky.L. 293.
25 C.J. p 1036 note 41.

85. S.D.—Metropolitan Life Ins. Co. v. Farmers Co-op. Co., 2 N.W.2d 665.
25 C.J. p 1036 note 43.

86. Mo.—Wiggins v. St. Louis, M. & S. E. R. Co., 95 S.W. 311, 119 Mo.App. 492.
S.D.—Metropolitan Life Ins. Co. v. Farmers Co-op. Co., 2 N.W.2d 665.

87. S.D.—Metropolitan Life Ins. Co. v. Farmers Co-Op. Co., supra.

Restoration of fence to former condition
Mo.—Wiggins v. St. Louis, M. & S. E. R. Co., 95 S.W. 311, 119 Mo. App. 492.

88. Tex.—International & G. N. R. Co. v. McIver, Civ.App., 40 S.W. 438.

Evidence of the difference in value of the land was held properly received where such evidence disclosed the same amount of damage as the evidence relating to the reasonable value of the fence, but it was not decided whether such evidence would be proper in another case.—Metropolitan Life Ins. Co. v. Farmers Co-op. Co., S.D., 2 N.W.2d 665.

ages is the cost of material and labor reasonably necessary to restore the damaged property approximately to its condition when injured.[89]

Nominal damages. Where one who has given the proper notice commences the removal of a partition fence one day prior to the time authorized by statute, he is liable for nominal damages only, unless it is shown that actual loss has been sustained.[90]

Punitive damages. Punitive damages may be awarded against one landowner for wrongfully and forcibly removing a partition fence against the protest of the adjacent owner.[91] Where, however, one's good faith in believing his land invaded by a fence is not impugned, he should not suffer punitive damages for tearing it down.[92]

§ 18. —— Criminal Responsibility

a. In general
b. Affidavit, indictment, or information
c. Evidence
d. Trial

a. In General

Criminal responsibility is often imposed by the statutes for the injury to, or removal or destruction of, a fence.

The statutes often impose criminal responsibility for the injury to, or removal or destruction of, a fence, and whether or not a prosecution can be sustained depends on the terms of the particular statute under which it is brought.[93]

As a general rule to be criminally liable for removing or destroying a fence one must have acted unlawfully and willfully and committed some trespass,[94] malice sometimes being an essential element of the offense.[95] If the purpose is legitimate and no harm is done, the offense is not committed.[96] However, if the statute prohibits voluntarily throwing down a fence, malice or even willfulness is not essential,[97] and in some jurisdictions a mere general intent to do the act prohibited is sufficient, although "wilfully" is used in the statute.[98] If the prohibition is against "unlawfully, maliciously or negligently" destroying a fence, proof that it was "unlawfully" destroyed will authorize a conviction.[99]

Under most,[1] but not all,[2] of the criminal statutes relating to fences, there can be no conviction of a person who, under a bona fide claim of right, removes a fence or performs some other prohibited act relative thereto. However, a mere claim of ownership is not conclusive evidence of good faith[3] and, where one's belief in his right is due to negligence in not ascertaining the fact of ownership of the land on which a fence is located, he is held guilty.[4]

Preventing removal. One cannot be convicted for preventing the removal and relocation of a fence, where the right of removal is doubtful and the line uncertain.[5]

Nature of fence and lands inclosed thereby. Under some statutes, in order to establish criminal liability, it must be shown that the fence constituted an inclosure;[6] but, under a statute merely against

89. W.Va.—Moore v. Hope Natural Gas Co., 86 S.E. 564, 76 W.Va. 649.

90. Ky.—Clemmons v. Grow, 43 S.W. 728, 102 Ky. 499, 19 Ky.L. 1544.

91. Ky.—Fitts v. Howard, 13 Ky.L. 302.

92. Wis.—Scheer v. Kriesel, 85 N.W. 138, 109 Wis. 125.

93. Miss.—Card v. State, 86 So. 460, 123 Miss. 702.
25 C.J. p 1037 note 49.

94. Tenn.—Goforth v. State, 8 Humphr. 37.
25 C.J. p 1037 note 50.

95. **Malicious mischief**
(1) Malice is essential element of crime of malicious mischief.
Ark.—Fleming v. State, 279 S.W. 778, 170 Ark. 344.
Colo.—Koch v. People, 204 P. 332, 71 Colo. 119.
Okl.—Ratabaugh v. State, 209 P. 230, 21 Okl.Cr. 465.
(2) In prosecution for malicious mischief, where defendant tore down a fence built on land in dispute which was claimed by another for whom defendant was acting, there was no malice such as is contemplated by the statute.—Koch v. People, 204 P. 332, 71 Colo. 119.
(3) A member of the Choctaw or of the Chickasaw tribe, who, at the time of the allotment, had more lands inclosed than he was entitled to take, and who removed fencing therefrom, not knowing that the land had been allotted, is not guilty of malicious mischief under the statute. —McGlassen v. State, 130 P. 1174, 9 Okl.Cr. 135.

96. Tenn.—Goforth v. State, 8 Humphr. 37.
Tex.—McNeely v. State, 96 S.W. 1083, 50 Tex.Cr. 279.
25 C.J. p 1037 note 51.
Recovery of unlawfully impounded animals
Owner of wrongfully impounded animals is not guilty in pulling down fence to release them.—Holland v. State, 239 S.W. 984, 91 Tex.Cr. 478 —25 C.J. p 1037 note 51 [b].

97. Kan.—State v. Adams, 138 P. 580, 91 Kan. 642.

98. Idaho.—State v. Jacobson, 47 P. 2d 228, 55 Idaho 711.

99. Ala.—Edwards v. State, 22 So. 564, 115 Ala. 52.
25 C.J. p 1037 note 53.

1. Okl.—McGlassen v. State, 130 P. 1174, 9 Okl.Cr. 135.
Pa.—Commonwealth v. Givens, 49 Dauph.Co., 233.
25 C.J. p 1037 note 54.

2. Ala.—Wallace v. State, 26 So. 932, 124 Ala. 87.

3. Ga.—Woods v. State, 73 S.E. 608, 10 Ga.App. 476.

4. Ark.—Clark v. State, 9 S.W. 431, 50 Ark. 570.
25 C.J. p 1037 note 57.

5. Tex.—Boyd v. State, 13 S.W. 864, 28 Tex.App. 524.

6. Mo.—Wilson v. Burton, 70 S.W. 916, 96 Mo.App. 686.
25 C.J. p 1037 note 59.
Opening gate in inclosure
In some states it is an offense to open and leave open a gate leading into the inclosure of another.—Jolly v. State, 19 Tex.App. 76.

maliciously or negligently throwing down a fence, it is not necessary that the fence form a part of an inclosure.[7]

The statutes in some states protect all fences inclosing lands, whether crops are grown thereon or not,[8] while in other states the statutes apply only to fences inclosing cultivated fields or cleared ground under cultivation.[9]

In criminal prosecutions for injuries to, or acts done in connection with, fences, it is immaterial whether or not the fence is a lawful one, that is, of such dimensions as would entitle the owner to bring a civil action for a trespass by the cattle of another.[10] However, one cannot be convicted of tearing down a fence when his act is the pulling up of the posts on which no wire is strung, these not constituting a fence.[11]

Ownership or possession. Generally a person is not criminally liable for removing, destroying, or doing other acts to fences which are on his own land,[12] even if built by another,[13] or to fences on lands of which he is in actual possession,[14] or to a partition fence or a fence of which he is joint owner,[15] or to fences of which he is the owner,[16] or of which he is in actual possession.[17] It is not so much the title to land that controls in cases of this character as it is the quiet and peaceable possession of the property on which the fence is situate.[18]

The inquiry as to the possession of the fence should ordinarily be limited to the actual peaceable possession, and not extended to the right of possession.[19] Where the actual possession is in the prosecutor, defendant cannot exculpate himself by showing title to the land on which the fence was situated.[20]

Where the ownership of the fence is determined by agreement, it is immaterial on whose land it is located.[21]

Under a statute prohibiting anyone from injuring a fence belonging to and inclosing land not his own, the fence must both belong to and inclose land not belonging to the party charged with the offense.[22]

Defenses. Where a trespass is a necessary element of such offenses, any fact may be shown in defense, in general, which might be shown by defendant in an action of trespass.[23] Thus consent of one of the cotenants in possession of the adjoining tract is a sufficient defense in a prosecution for removal of a partition fence.[24]

7. Ala.—Shaw v. State, 28 So. 390, 125 Ala. 80.

8. Ark.—Fleming v. State, 279 S.W. 778, 170 Ark. 344.
Tex.—Dennis v. State, 66 S.W. 838, 43 Tex.Cr. 464.
25 C.J. p 1037 note 61.

9. N.C.—State v. Taylor, 69 N.C. 543—State v. Lamb, 30 N.C. 229—State v. Bell, 25 N.C. 506.

What constitutes cultivated field

(1) Land cleared, fenced, and cultivated, or kept for cultivation, although nothing is growing within inclosure, is "cultivated field" within statute making it misdemeanor to injure fence.—State v. Cornett, 155 S.E. 451, 199 N.C. 634—25 C.J. p 1037 note 62 [a] (1).

(2) "Pasture," within statute making it offense to destroy fence, is not cleared ground under cultivation. —State v. Cornett, supra—State v. Perry, 64 N.C. 305.

(3) The smallness of the tract is immaterial.—State v. Campbell, 45 S. E. 344, 133 N.C. 640.

(4) A town lot if inclosed and cultivated is within this statute.—State v. McMinn, 81 N.C. 585.

10. Ala.—Hill v. State, 16 So. 114, 104 Ala. 64.

11. Tex.—Burch v. State, Cr., 67 S. W. 500.

12. Miss.—Evans v. State, 132 So. 455, 159 Miss. 870.
25 C.J. p 1038 note 65.

13. Ala.—Edgar v. State, 47 So. 295, 156 Ala. 147.

14. N.C.—State v. Williams, 44 N.C. 197.
25 C.J. p 1038 note 66.

15. Ala.—Boyett v. State, 31 So. 551, 132 Ala. 23.
25 C.J. p 1038 note 67.

16. Miss.—Evans v. State, 132 So. 455, 159 Miss. 870.
25 C.J. p 1038 note 68.

Gratuitous licensor

A gratuitous licensor, who permits another to repair a fence on land rented by the licensor, is not guilty of a willful or malicous trespass for tearing the fence down, where before doing so he notifies the licensee to remove it, and he declines.—Card v. State, 86 So. 460, 123 Miss. 702.

Party fence

(1) Making of slight repairs on fence by adjoining landowner and giving of notice not to interfere would not constitute such fence a "party fence," so as to render the owner liable for its removal.—Evans v. State, 132 So. 455, 159 Miss. 870.

(2) Line fence does not become "party fence" unless provisions of statute are complied with so that each party owns interest in adjoining land and fence.—Evans v. State, supra.

(3) That adjoining landowners may have owned land by adverse possession up to fence would not of itself constitute such fence a "party fence."—Evans v. State, supra.

17. Tex.—Bray v. State, Civ.App., 219 S.W. 1102—Morgan v. State, 271 S.W. 608, 99 Tex.Cr. 661.

18. Tex.—Morgan v. State, supra.
25 C.J. p 1038 note 70.

19. N.C.—State v. Beacham, 34 S.E. 447, 125 N.C. 652.
25 C.J. p 1038 note 71.

Holdover tenant

No offense is shown where accused is lessee of premises holding over and in actual possession, and prosecuting witness is not in possession but merely seeking to obtain it. —Morgan v. State, 271 S.W. 608, 99 Tex.Cr. 661.

20. N.C.—State v. Taylor, 90 S.E. 294, 172 N.C. 892.
25 C.J. p 1038 note 72.

21. Vt.—State v. Buck, 51 A. 1087, 74 Vt. 29.

22. Mo.—State v. Coy, 47 Mo.App. 187.

23. N.C.—State v. McCracken, 24 S. E. 530, 118 N.C. 1240.
25 C.J. p 1038 note 76.

24. Tex.—Bailey v. State, 87 S.W.

It is no defense that defendant removed the fence in order to induce a civil suit to try title,[25] or that the fence was not on a line fixed by agreement or arbitration,[26] or that defendant was acting as agent of another and by his direction.[27] If, however, defendant ordered his servants to pull down one party's fence, and by mistake they pulled down another's, defendant cannot be convicted.[28]

Where a mere general intent to commit the prohibited act is sufficient, good faith based on a belief that the fence was on defendant's land is no defense.[29]

Officials in charge of public roads or employees lawfully working thereon are not criminally liable for removing a fence which constitutes an obstruction of the highway.[30] On the other hand the removal of a fence obstructing a road which is not a public highway is not justified.[31]

b. Affidavit, Indictment, or Information

The indictment or information must charge all the elements of the offense, but a charge in the language of the statute is generally sufficient.

The indictment or information in a prosecution for removing, destroying, or injuring a fence must charge all the elements of the offense[32] and connect defendant therewith.[33] In accordance with general rules, however, an indictment or information is generally sufficient which charges the offense in the language of the statute.[34]

Affidavit or complaint. Although the same particularity is not necessary in complaints or affidavits before inferior tribunals as would be required in an indictment,[35] yet the affidavit or complaint must state the essential elements of the offense charged.[36]

Unnecessary allegations. It is not generally necessary to allege the value of the fence,[37] or the value or amount of material destroyed,[38] or that damage was done by the removal;[39] neither is it necessary to allege express malice if not mentioned in the statute,[40] or to conclude "contrary to the form of the statute."[41] A particular description of the land on which the offense was committed is unnecessary,[42] and, having alleged that the fence was pulled down, it is not necessary further to charge that it was left down and open.[43]

Joinder of civil and criminal action. A criminal prosecution and a civil action to recover a penalty cannot be joined where one statute imposes treble damages for the benefit of the injured party for throwing down a fence and another makes such act a misdemeanor.[44]

Variance. Under a statute against injuring or pulling down the fence of another without his consent, an allegation of ownership of the fence by one party is sufficient, although the evidence shows

700, 48 Tex.Cr. 262, 122 Am.S.R. 740.

25. N.C.—State v. Graham, 53 N.C. 397.

26. Ala.—Shaw v. State, 28 So. 390, 125 Ala. 80.

27. N.C.—State v. Campbell, 45 S.E. 344, 133 N.C. 640.

28. Tex.—Gordon v. State, 111 S.W. 146, 53 Tex.Cr. 624.

29. Idaho.—State v. Jacobson, 47 P. 2d 228, 55 Idaho 711.

30. Tex.—Gowhenouer v. State, 28 S. W. 201, 33 Tex.Cr. 538—Schott v. State, 7 Tex.App. 616.

31. Colo.—Olson v. People, 138 P. 21, 56 Colo. 199.

32. Cal.—Messick v. Superior Court of California in and for San Joaquin County, 207 P. 58, 57 Cal. App. 340.
Tex.—Meissner v. State, 188 S.W. 977, 80 Tex.Cr. 92.

Ownership

(1) The ownership of the property must be accurately alleged in the indictment.—Pate v. State, 113 S.W. 757, 54 Tex.Cr. 491.

(2) Ownership may properly be alleged in a tenant who at the time of the injury was in legal possession and control, and entitled to the use of the fence.—Hill v. State, 16 So. 114, 104 Ala. 64.

Want of consent

Under some statutes the consent of all the owners must be negatived, or their want of consent alleged.—Anderson v. State, Tex.Cr., 29 S.W. 786—25 C.J. p 1039 note 99.

Single offense charged

Under a statute making it an offense to destroy or injure any fence or to injure any growing crops, an indictment alleging that defendant removed a fence and injured the growing crops it inclosed charges but a single offense.—Ratcliffe v. Commonwealth, 5 Gratt. 657, 46 Va. 657.

33. Tex.—Carney v. State, Cr., 39 S. W. 661.

34. Ala.—Ridings v. State, 79 So. 141, 16 Ala.App. 467.
Fla.—Studstall v. State, 92 So. 151, 83 Fla. 623.
25 C.J. p 1038 note 87—31 C.J. p 720 note 55 [a] (23)-(25).

35. Ala.—Brazleton v. State, 66 Ala. 96.

36. Ala.—Ridings v. State, 79 So. 141, 16 Ala.App. 467.
Mo.—State v. Grubb, 71 Mo.App. 214.

37. Ind.—Dorrell v. State, 80 Ind. 566.

38. Ind.—Dorrell v. State, supra.
25 C.J. p 1039 note 89.

39. Ark.—State v. Culbreath, 71 S. W. 254, 71 Ark. 80.

40. Mo.—State v. Schaefer, 56 Mo. App. 496.
25 C.J. p 1039 note 91.

41. Ark.—State v. Culbreath, 71 S. W. 254, 71 Ark. 80.

42. Mo.—State v. Maclay, 163 S.W. 544, 180 Mo.App. 727.
25 C.J. p 1039 note 97.

Description in bill of particulars

Indictment was held not fatally defective for failure to allege location of lands on which fence was situated, where bill of particulars described lands referred to in each count of the indictment and no motion was made for further or better bill of particulars.—Padgett v. State, 170 So. 175, 126 Fla. 57.

43. Mo.—State v. Maclay, 163 S.W. 544, 180 Mo.App. 727.
Contra State v. Grubb, 71 Mo. App. 214.

44. Kan.—Manville v. Felter, 19 Kan. 253.

a joint ownership.[45] However, under an indictment charging removal of a fence around a cultivated field, a conviction cannot be had on proof that the fence involved surrounded a pasture field, even though the statute on which the indictment is based prohibits removal of a fence surrounding a pasture as well as a cultivated field.[46]

A discrepancy of one month between the date of the offense charged in the information and that stated in the affidavit on which the information was founded is not cause for quashing the information after verdict.[47]

c. Evidence

The essential elements of the offense charged in a prosecution for removing, destroying, or injuring a fence must be proved beyond a reasonable doubt.

In some jurisdictions the destruction or injury of a fence is presumed to have been done willfully and maliciously,[48] and proof that defendant destroyed or injured the fence in the manner alleged throws on him the burden of proving that he honestly believed he had a right to do so.[49]

Admissibility. General rules governing the admissibility of evidence in criminal cases govern the admissibility of evidence in prosecutions for removing, destroying, or injuring a fence.[50]

Weight and sufficiency. In a prosecution for re-

45. Tex.—Pate v. State, 113 S.W. 757, 54 Tex.Cr. 491—Hurlbut v. State, 12 Tex.App. 252.
25 C.J. p 1039 note 1.

46. N.C.—State v. Cornett, 155 S.E. 451, 199 N.C. 451.

47. Mo.—State v. Gift, 86 S.W. 593, 112 Mo.App. 200.
25 C.J. p 1039 note 93.

48. Ga.—Woods v. State, 73 S.W. 608, 10 Ga.App. 476.

49. Ga.—Woods v. State, supra.

50. **Consent or want thereof**

(1) The custom of various parties to pass over the prosecutor's fence with his knowledge and without his objection is admissible.—Caudle v. State, Tex.Cr., 74 S.W. 545.

(2) It seems that declarations of the parties or their agents are admissible to show want of consent to the breaking or removal of a fence.—Pate v. State, 113 S.W. 757, 54 Tex. Cr. 491.

(3) In a prosecution for breaking down a fence, when the owner cannot be had before the court, it is competent to prove his want of consent by circumstances.—Caudle v. State, supra—25 C.J. p 1040 note 26.

(4) Notices published in a newspaper purporting to be signed by the owners of the land prohibiting trespassing thereon are inadmissible to show want of consent of one of the owners in the absence of evidence that he published them or authorized their publication.—Caudle v. State, supra.

(5) Likewise the posting of notices about an inclosure by the foreman or servant of the owners is inadmissible to show want of consent of the owners.—Caudle v. State, supra. 25 C.J. p 1040 note 28.

Malice

In a prosecution for malicious injury to a fence belonging to a church, evidence of expressions by defendant showing enmity toward the officers and members while engaged in the business of the church is admissible as far as showing malice toward the society.—People v. Ferguson, 78 N.W. 334, 119 Mich. 373.

Motive

In a prosecution for destroying a fence, it is competent to prove declarations going to show motive, where accused made such declarations, or where they were made in his presence and hearing and received either his active or tacit consent.—Smith v. State, Tex.Cr., 70 S. W. 84.

Ownership or possession

(1) Evidence tending to show possession, and the character thereof, is admissible.—Hughitt v. State, 179 S.W. 703, 77 Tex.Cr. 573.

(2) At least under some statutes, evidence along this line should be confined to possession and not extended to title or ownership separate and apart from possession.—Bray v. State, 219 S.W. 1102, 87 Tex.Cr. 146.

(3) Defendant may introduce a deed to the property on which the fence was located as tending to show rightful possession.—McCuen v. State, Tex.Cr., 68 S.W. 180—25 C.J. p 1039 note 12.

(4) Defendant may introduce a deed to show that the prosecutor was not in quiet and peaceful possession.—Pate v. State, Tex.Cr., 81 S.W. 737.

(5) Accused cannot introduce conveyances showing ownership in a third party.—Wallace v. State, 26 So. 932, 124 Ala. 87.

(6) Accused cannot introduce evidence of his rights in a tract of land not in controversy.
Ark.—Fleming v. State, 279 S.W. 778, 170 Ark. 344.
Kan.—State v. Adams, 138 P. 580, 91 Kan. 642.

(7) In prosecution for the willful and malicious cutting of a fence inclosing land not belonging to defendants, a quitclaim deed was admissible to prove the allegation of the indictment that the land did not belong to defendants.—Studstill v. State, 92 So. 151, 83 Fla. 623.

(8) Although a fence is realty, its ownership, as far as is necessary to be proved, may be proved by parol.—Fitzsimon v. State, 128 S.W. 903, 59 Tex.Cr. 540—Joy v. State, 51 S.W. 933, 41 Tex.Cr. 46—25 C.J. p 1039 note 17.

(9) On the question of ownership defendant cannot put in evidence a survey not made in conformity to statutory provisions and not shown to have been by the consent of the adjacent owner.—Boett v. State, 31 So. 551, 132 Ala. 23.

(10) Evidence of a survey made under agreement is admissible.—State v. Buck, 51 A. 1087, 74 Vt. 29.

(11) Evidence that the party claiming the land on which the fence was built had built it, and that parties holding under him had cultivated it without interference from accused, is admissible to show possession and ownership of the fence.—Kalklosch v. State, 80 S.W. 85, 46 Tex.Cr. 94.

(12) In order to prove his possession defendant may introduce the pleadings in a pending action between the same parties to try title, including the prosecutor's petition alleging possession of the property in defendant.—McCuen v. State, 68 S.W. 180, 43 Tex.Cr. 612.

Proper location of division fence

(1) It may be shown in a prosecution for moving a division fence that in a prior civil suit between defendant and the prosecuting witness a judgment was rendered establishing the boundary where the fence was located.—Dorrell v. State, 83 Ind. 357.

(2) Defendant may introduce deed to show the proper location of a division fence.—Fitzsimon v. State, 128 S.W. 903, 59 Tex.Cr. 540.

Removal under claim of right

In order to show removal under

moving, destroying, or injuring a fence, the evidence must be sufficient to establish all the elements of the offense charged[51] beyond a reasonable doubt.[52]

Circumstantial evidence may be sufficient to connect defendant with the offence charged,[53] and, where malice is an essential ingredient of the crime charged, it need not be proved expressly, but may be inferred from the surrounding circumstances,[54] if sufficient to justify such an inference.[55]

Some statutes require the conviction to be based on the testimony of a certain number of witnesses.[56]

d. Trial

In a prosecution for removing, destroying, or injuring a fence, questions of fact are ordinarily for the jury, while questions of law are for the court. The instructions should correctly state the law applicable to the facts.

In accordance with general rules ordinarily questions of fact in a prosecution for removing, destroying, or injuring a fence are for determination by the jury, while questions of law are for the court,[57] and neither may properly invade the province of the other.[58]

Instructions. The instructions to the jury should contain correct statements of the law applicable to the evidence.[59]

Requested instructions which are misleading[60] or are not called for by the evidence[61] may and should be refused.

Where the party accused of destroying the fence introduces no evidence of his title, an instruction that the title to the land will not be affected by the verdict, and that titles to land cannot be determined, is not prejudicial.[62]

An instruction that it is a question for the jury

a claim of right, evidence of a pending injunction against maintenance of the fence is admissible.—State v. Jablowsky, 152 S.W. 390, 169 Mo. App. 238.

Res gestæ

(1) Acts and circumstances in relation to the breaking or pulling down of the fence are admissible as part of the transaction.—Caudle v. State, Tex.Cr., 74 S.W. 545.

(2) This rule does not render admissible acts done so long after the transaction as not to be a part of the res gestæ.—Caudle v. State, supra.

Fence inclosing land in sections

Under a charge of cutting a fence inclosing land in two designated sections separated by a public road evidence of cutting the fence on either or both of the sections is admissible.—State v. Morse, 66 Mo.App. 303.

51. Tex.—Morgan v. State, 271 S.W. 608, 99 Tex.Cr. 661—McCullers v. State, 216 S.W. 182, 86 Tex.Cr. 247.
25 C.J. p 1040 note 33.

Evidence of substantial nature is sufficient.—Fleming v. State, 279 S. W. 778, 170 Ark. 344.

Malicious mischief

(1) Charge of malicious mischief in breaking, injuring, and pulling down a fence is not proved by evidence of assistance in carrying away a gate and hiding it after it had been removed by another.—Meador v. State, 162 S.W. 1155, 72 Tex.Cr. 527.

(2) But a charge of malicious mischief in pulling down and destroying a fence is sufficiently proved by showing the pulling out of a post or posts of a fence in process of erection.—Olson v. People, 138 P. 21, 56 Colo. 199.

Malice

(1) Evidence sufficient.—Commonwealth v. Lick, 22 A.2d 616, 146 Pa. Super. 435.

(2) Evidence insufficient.—Ratabaugh v. State, 209 P. 230, 21 Okl.Cr. 465.

Proof of ownership

(1) Although a deed to the prosecutor misdescribed the land, ownership may be sufficiently shown by occupancy for the prescriptive period. —People v. Ferguson, 78 N.W. 334, 119 Mich. 373.

(2) Ownership in another than defendant is not sustained by testimony of the prosecuting witness that the fence was his and on his land, but that he knew nothing about the line between him and defendant, when defendant and others testified that the fence was on defendant's land and that they knew the line.—Oliver v. State, Tex.Cr., 37 S.W. 427.

(3) Evidence sufficient to show ownership by prosecutor.—Lunsford v. State, 94 S.E. 80, 21 Ga.App. 78.

Throwing and leaving fence down

A prosecution for throwing down and leaving open a fence is not supported by evidence of throwing down and going across the adjacent premises; it must affirmatively appear that the fence was left down.—State v. Howell, 34 Mo.App. 86.

52. N.C.—State v. Cornett, 155 S.E. 451, 199 N.C. 634.

Guesswork and speculation

Evidence which is so unsatisfactory and unsubstantial as to leave the jury to grope in guesswork and speculation is insufficient to support a conviction.—Padgett v. State, 170 So. 175, 126 Fla. 57.

53. Ark.—Scott v. State, 21 S.W.2d 186, 180 Ark. 408.

54. Ark.—Fleming v. State, 279 S. W. 778, 170 Ark. 344.

55. Colo.—Koch v. People, 204 P. 332, 71 Colo. 119.

56. N.C.—State v. Sawyer, 13 N.C. 213.
25 C.J. p 1040 note 39.

57. **Defendant's connection with offense charged** is for jury.—Scott v. State, 21 S.W.2d 186, 180 Ark. 408.

Fence as within statute is for jury. —State v. Godwin, 59 S.E. 132, 145 N. C. 461, 122 Am.S.R. 467.

Dedication of inclosed land as street is for jury.—State v. Godwin, supra.

Sufficiency of watercourse as fence

The sufficiency of a watercourse to serve as a fence was held to be a question of law for the court, the jury deciding the facts.—State v. Lamb, 30 N.C. 229.

Conflict in the evidence is for the jury to resolve.—State v. Jacobson, 47 P.2d 228, 55 Idaho 711.

58. **Peremptory charge improper**

The credibility of witnesses and the ultimate fact of guilt being questions for the jury, a peremptory charge by the court to find defendant guilty is erroneous.—State v. Godwin, 59 S.E. 132, 145 N.C. 461, 122 Am.S.R. 467.

59. Tex.—Becker v. State, 119 S.W. 95, 56 Tex.Cr. 92.
25 C.J. p 1040 note 40.

60. Ala.—Wallace v. State, 26 So. 932, 124 Ala. 87.

61. Tex.—Kalklosch v. State, 80 S. W. 85, 46 Tex.Cr. 94—Jessel v. State, 57 S.W. 826, 42 Tex.Cr. 72.

62. Ga.—Woods v. State, 73 S.E. 608, 10 Ga.App. 476.

to determine the weight and credit "if any" to be given to defendant's statement is not objectionable as minimizing the importance of the statement.[63]

Insufficiency of proof. Where proof of an essential element is lacking, a verdict for defendant should be directed[64] or a verdict of guilty set aside.[65]

§ 19. Fencing Lands of Another

For unlawfully fencing the lands of another one may be held civilly or criminally liable.

As discussed in the C.J.S. title Property § 13, also 50 C.J. p 780 note 11, private ownership of realty carries with it the exclusive right to its use and occupancy. The willful violation of the prerogatives of such ownership by one's erection of a fence on the land of another exposes the trespasser to an action for damages,[66] although the property itself is not in fact injured.[67]

Criminal responsibility. Under some statutes one may be held criminally responsible for unlawfully fencing the lands of another,[68] or for failing to remove or disconnect such a fence on receipt of a specified notice.[69]

An action for unlawfully making or permitting a fence to remain about the lands of another must be prosecuted in the name of the state, although half the fine goes to the informer.[70]

§ 20. Injuries Caused by Failure to Erect or Maintain Fences

One under a duty to build or maintain a fence is generally liable for injuries resulting from his neglect properly to build or maintain a fence.

One whose duty it is to build or maintain a fence is as a general rule liable for all injuries which may be fairly said to be the legal and natural consequence of his neglect to do so,[71] including injuries to live stock[72] or crops,[73] common-law remedies being available to the injured party where no remedy is specified by the statute imposing the duty to erect or maintain the fence.[74] To recover plaintiff must prove that defendant was under a duty to maintain a part of the division fence, that he neglected so to do, and that the injury sustained was proximately caused by such neglect,[75] there being no liability where there is no duty to fence,[76] or where there is no neglect,[77] or where the neglect is not the proximate cause of the injury.[78]

63. Ga.—Woods v. State, supra.
25 C.J. p 1040 note 44.

64. Colo.—Koch v. People, 204 P. 332, 71 Colo. 119.

65. Pa.—Commonwealth v. Givens, 49 Dauph.Co. 233.

66. La.—Hoyt v. Smith, App., 187 So. 87.

Evidence admissible under pleadings

In action for trespass to land, wherein defendant's sworn answer admitted participation in erection of fence on plaintiff's land, testimony of defendant and his son that son erected the fence was properly rejected.—Hoyt v. Smith, supra.

67. La.—Hoyt v. Smith, supra.

Erecting fence on unimproved land

La.—Hoyt v. Smith, supra.

Elements of damage

(1) Only element of damage where land is not injured is that arising from the trespass and violation of the owner's rights.—Hoyt v. Smith, supra.

(2) Attorney's fees, expenses incurred before filing suit, and expenses incurred as incident to attending court were not recoverable as damage.—Hoyt v. Smith, supra.

(3) Seventy-five dollars was held proper for mere act of trespass, causing no injury to land, whereby considerable part of plaintiff's woodland was enclosed with fence for three months.—Hoyt v. Smith, supra.

68. **Effect of continued claim to lands**

A conviction for unlawfully, willfully, and knowingly fencing the land of another will not be sustained, where it appears that defendant has all along made claim to that portion of the land on which the fence was erected, and it also appears that his vendors made a similar claim.—Clark v. State, 5 S.W. 163, 23 Tex.App. 618.

69. **Indictment or information**

(1) An information for failing to disconnect and remove a fence as prescribed by statute must allege that the fence was not removed within the time allowed after the requisite notice was given.—Elkins v. State, 51 S.W. 372, 40 Tex.Cr. 589.

(2) It must also allege that such notice was given by the proper person.—Meissner v. State, 188 S.W. 977, 80 Tex.Cr. 92.

70. Tex.—Gibbs v. State, 46 S.W. 645, 39 Tex.Cr. 476.

71. Ark.—Primrose v. Brown, 292 S.W. 1003, 173 Ark. 632.
Mass.—Deane v. Garniss, 200 N.E. 923, 294 Mass. 221.
25 C.J. p 1043 note 92.

Gist of action

The obligation and neglect to keep up the fence are the gist of the action for damages.—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.

72. Ark.—Primrose v. Brown, 292 S.W. 1003, 173 Ark. 632.
Iowa.—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.
25 C.J. p 1043 note 93.
Injuries to animals generally see Animals § 213.

73. Tex.—Adair v. Stallings, Civ. App. 165 S.W. 140.
25 C.J. p 1043 note 94.

74. Iowa.—Osgood v. Names, 184 N.W. 331, 191 Iowa 1227.

75. Iowa.—Osgood v. Names, supra.

Sufficiency of proof of agreement

In action against adjoining owner for damage to cattle caused by defendant's breach of agreement to keep his portion of division fence in repair, involving a question as to existence of agreement, defendant's action in repairing a part of his portion of fence, on plaintiff's notice to him that plaintiff's cattle were going through fence, and in repairing the other part of such portion after plaintiff's cattle had been injured, was held to warrant jury finding that repairs were made pursuant to such an agreement.—Osgood v. Names, supra.

76. Wyo.—Garretson v. Avery, 176 P. 433, 26 Wyo. 53.

77. Tex.—Fennell v. Seguin St. R. Co., 8 S.W. 486, 70 Tex. 670.

78. Conn.—Kelsey v. Rebuzzini, 89 A. 170, 87 Conn. 556, 52 L.R.A.,N.S., 103.
Mass.—Fales v. Cole, 26 N.E. 872, 153 Mass. 322.

An agreement between adjoining owners to dispense with a partition fence exempts each from liability to the other for injuries resulting from failure to fence,[79] and, where adjoining owners enter into an agreement that each will maintain half of a partition fence, neither can maintain trespass against the other for injuries resulting from an insufficient fence, the proper remedy being for breach of contract.[80]

Some courts hold that, where the obligation to maintain a partition fence does not arise by virtue of agreement or prescription, but only by virtue of statute, and the statute does not impose liability for injury to animals, a person who has been diligent in keeping up his part of the fence as required by statute cannot recover damages, against the adjoining owner who is delinquent in his duty, by reason of the former's cattle going through the defective fence on the land of the adjoining owner and there suffering injury.[81]

Where the injury is caused by defect in a partition fence, it must be shown that the injury resulted from a defect in that portion of the fence which it is the duty of defendant to maintain;[82] but the fact that the portion of the fence which it is the duty of the adjoining landowner to maintain is defective also does not relieve from liability.[83]

As discussed in Animals § 186 b, one who fails to maintain his portion of a partition fence properly is without redress for injuries occasioned by his neighbor's stock breaking through such portion, as the loss is occasioned by his own negligence. So, in case of a party line fence removed by one of the adjoining owners after it had fallen into disuse, the other adjoining owner cannot recover for personal injuries suffered because of the absence of the fence where he was aware of the danger and could have restored the fence himself.[84]

Double damages. Some statutes render a person liable in double damages for killing or injuring a domestic animal which has entered his field for want of a lawful fence. In an action under the statute it is not essential to recovery that plaintiff prove the precise spot at which his animal entered defendant's field. He may undertake to show that the entire fence around the field was an unlawful fence and in bad condition, and, for this purpose, may introduce evidence of its condition at places other than the one at which the animal entered.[85]

§ 21. Injuries Caused by Fences

As discussed infra §§ 22, 23, liability for injuries resulting from the erection and maintenance of a fence is determined by general rules of negligence and the applicable statutes.

Examine Pocket Parts for later cases.

§ 22. —— To Persons

Liability for personal injuries caused by a fence generally depends on ordinary rules of negligence. There is no liability, as a general rule, to a trespasser.

The question whether a person is liable for personal injuries arising from the erection of a fence depends on the ordinary principles or rules as to what constitutes negligence.[86] The owner of the land on which a fence is maintained, or other person who is responsible for its maintenance, is not an insurer against injury,[87] or bound to provide against extraordinary conditions.[88] He is not liable for a personal injury caused by its fall if he uses the care of a prudent man in maintaining it;[89] but, where he negligently fails to maintain his fence in a condition reasonably safe, or if he keeps it in an unreasonably dangerous condition, he is responsible for the natural and probable consequences of his neglect.[90]

If, as between two adjoining owners, the duty of maintaining a partition fence rests exclusively on one of them, the other owner is not liable to a third person for a personal injury caused by its fall.[91] However, the owner himself being responsible for maintenance of a defective or dilapidated fence, he

79. Ill.—Walters v. Stacey, 134 Ill. App. 336.

80. Ala.—Walker v. Watrous, 8 Ala. 493, 42 Am.D. 646.

81. N.J.—Van Nest v. Dealman, 90 A. 308, 85 N.J.Law 650, 52 L.R.A., N.S., 99, reversing 87 A. 329, 84 N.J.Law 564.

82. Ill.—D'Arcy v. Miller, 86 Ill. 102, 29 Am.R. 11.
Vt.—Saxton v. Bacon, 31 Vt. 540.

83. Ill.—Ozburn v. Adams, 70 Ill. 291.
Vt.—Saxton v. Bacon, 31 Vt. 540.

84. Pa.—Senica v. Schriber, 131 A. 366, 284 Pa. 377.

85. Mo.—Ward v. Proffer, supra.

86. N.Y.—Barr v. Green, 104 N.E. 619, 210 N.Y. 252, Ann.Cas.1915B 855, reversing 132 N.Y.S. 739, 148 App.Div. 897.

87. Pa.—Henry v. Wanamaker, 45 Pa.Super. 346.
S.D.—McLinn v. Noll, 274 N.W. 833, 835, 65 S.D. 440, citing **Corpus Juris.**

88. Mass.—Quinn v. Crimmings, 50 N.E. 624, 171 Mass. 255, 68 Am.S.R. 420, 42 L.R.A. 101.
N.J.—Sutphen v. Hedden, 51 A. 721, 67 N.J.Law 324.
25 C.J. p 1041 note 51.

89. Mass.—Quinn v. Crimmings, 50 N.E. 624, 171 Mass. 255, 68 Am.S.R. 420, 42 L.R.A. 101.
25 C.J. p 1041 note 53.

90. N.H.—Durgin v. Kennett, 29 A. 414, 67 N.H. 329.

91. Mass.—Quinn v. Crimmings, 50 N.E. 624, 171 Mass. 255, 68 Am.S.R. 420, 42 L.R.A. 101.
25 C.J. p 1041 note 55.

cannot relieve himself of that obligation by an agreement with another in the nature of a lease, the lessee agreeing to repair and assuming liability for injuries.[92]

Fence along or across road. The owner of land on which a fence is built, or another who is responsible for the maintenance thereof, must, as far as the exercise of ordinary care will enable him to do so, keep it in such condition that it will not fall and injure persons passing along the highway.[93]

Where a landowner builds a barbed wire or other dangerous fence across a traveled road, without maintaining proper warning, and a traveler is thereby injured, a charge permitting the jury to find such owner negligent is within the issues, and a finding of negligence is justified.[94] Where, however, the road, although traveled and used by the public for some time, is entirely on defendant's land and is not a public highway, his actionable negligence, if any, consists only in not giving such notice of the obstruction across the way as would be reasonable under the circumstances.[95]

Injury to trespassers. A landowner owes no duty to persons trespassing on his lands, in the construction of fencing not along public highways, and there can be no negligence in the construction of such fencing.[96] The rule is applicable even where the fence is of barbed wire[97] and the intrusion is accidental.[98]

Effect of statute on common-law action. In a common law negligence action for injuries caused by a barbed wire fence statutes forbidding use of barbed wire in fences erected in specified areas are not admissible in evidence.[99]

Proximate, concurring, and intervening causes. The fact that there was an intervening contributory cause does not preclude recovery where the circumstances are such that the owner of the fence should have anticipated the occurrence.[1]

Contributory negligence. Since ordinarily prudent persons lean on fences, rails, and banisters without thought of injury, reasonable care requires maintenance thereof with reference to such usual and ordinary user.[2]

A person is not guilty of contributory negligence for such user when the fence appears to be reasonably safe for the purpose.[3] However, the party so injured may be declared negligent as a matter of law, when the fence was known to him to be defective and unsafe.[4]

When the party injured has no knowledge of the defective fence, the question of contributory negligence should be left to the jury.[5] The jury should also determine the question of negligence in the erection of an unprotected barbed wire fence along a schoolhouse lot where children were accustomed to play, and of contributory negligence of a child in running into the fence while looking backward.[6]

Where the uncontradicted evidence shows that the fall of a fence was caused by a large number of trespassers climbing on it, and that it did not give way under the pressure for several minutes, although it was many years old and somewhat rotten, it is the duty of the court to withdraw the case from the jury and direct a verdict for defendant, the

92. Pa.—Henry v. Wanamaker, 45 Pa.Super. 346.
25 C.J. p 1041 note 56.

93. Pa.—Henry v. Wanamaker, supra.

94. Tex.—Abilene Cotton Oil Co. v. Briscoe, 66 S.W. 315, 27 Tex.Civ. App. 157.

95. Colo.—Rosenburg v. Tennant, 189 P. 25, 68 Colo. 80.
25 C.J. p 1041 note 62.

96. Mass.—Noyes v. Carr, 117 N.E. 350, 228 Mass. 339, L.R.A.1918A 954.
25 C.J. p 1041 note 57.

97. Mass.—Quigley v. Clough, 53 N. E. 884, 173 Mass. 429, 73 Am.S.R. 303, 45 L.R.A. 500.
25 C.J. p 1041 note 58.

Barbed wire not in itself dangerous
Barbed wire is not in itself a dangerous thing.—Skaling v. Sheedy, 126 A. 721, 101 Conn. 545, 36 A.L.R. 540.

Attractive nuisance doctrine inapplicable
In action for injuries to child from contact with barbed wire, sustained while coasting on land adjoining that of defendant, when sled struck rock and was deflected toward defendants' land, instruction on doctrine of attractive nuisance was held improper.—Skaling v. Sheedy, supra.

98. Mass.—Quigley v. Clough, 53 N. E. 884, 173 Mass. 429, 73 Am.S.R. 303, 45 L.R.A. 500.
Tex.—Bishop v. Gulf, C. & S. F. R. Co., Civ.App., 75 S.W. 1086.
25 C.J. p 1041 note 59.

99. Conn.—Skaling v. Sheedy, 126 A. 721, 101 Conn. 545, 36 A.L.R. 540.

1. Cal.—Marton v. Jones, 186 P. 410, 44 Cal.App. 299.
25 C.J. p 1041 note 63.

High wind as concurring cause
Where a fence is insecurely built, and it blows down and injures a person passing, the fence is none the less the proximate cause of the injury because the high wind was a concurring cause.—Sutphen v. Hedden, 51 A. 721, 67 N.J.Law 324—25 C.J. p 1041 note 64.

Fence on precipice
A defective fence maintained on the brink of a quarry or precipice, which gives way to a person rightfully leaning over it, is the proximate cause of injury, the maintenance of the quarry itself being remote in the chain of causation.—Herdt v. Koenig, 119 S.W. 56, 137 Mo. App. 589.

2. Mo.—Herdt v. Koenig, supra.

3. Mo.—Herdt v. Koenig, supra.

4. Mo.—Herdt v. Koenig, supra.
N.Y.—Knox v. Hall Steam Power Co., 23 N.Y.S. 490, 69 Hun 231.

5. Ind.—Cincinnati & Hammond Spring Co. v. Brown, 69 N.E. 197, 32 Ind.App. 58.

6. N.Y.—Barr v. Green, 104 N.E. 619, 210 N.Y. 252, Ann.Cas.1915B 855.

proximate cause being the trespass, and not the condition of the fence.[7]

§ 23. —— To Animals

One negligently building or maintaining a fence so as to cause injury to live stock rightfully coming in contact therewith is, in the absence of contributory negligence, liable therefor in damages.

One who builds or maintains a fence must see that it is in a reasonably safe condition and unlikely to injure live stock rightfully coming in contact with it, and for all injuries caused by a failure in this respect he is liable to respond in damages.[8]

Acts of agents. A landowner is liable for injuries to stock resulting from the negligent construction of his fence by his agent or servant.[9] The owner's agent, however, is not responsible for the negligence or want of care of a subagent employed by him, where he has been reasonably careful in the selection of a subagent.[10]

By barbed wire fences. The act of a landowner in erecting a barbed wire fence does not in itself render him liable to one whose live stock sustains injuries therefrom.[11] However, one negligently constructing or maintaining such a fence and thereby causing injury to stock lawfully at large or on the adjacent lands is liable therefor,[12] and, if there is gross negligence, or entire want of care in its construction, punitory damages are recoverable.[13]

When the defective barbed wire fence causing the injury is entirely on defendant's land, and not near a highway, ordinarily defendant is not liable.[14] On the other hand, when a barbed wire fence is so negligently constructed as to constitute a trap for passing live stock, liability exists for injuries sustained by them, even though it is constructed entirely on defendant's land and the stock are trespassing when injured.[15]

Where a landowner, having allowed the public to travel a well defined road across his land for a considerable time, although not for the prescriptive period, stretches a barbed wire across the road without proper warning, he is liable for injuries caused thereby to horses or other animals driven over the road after dark.[16]

Contributory negligence. One whose negligence contributed to the injury of his live stock cannot recover therefor.[17] Thus an owner who permits his live stock to stray on the common, and trespass on others' lands, cannot recover for injuries to such stock by fences placed on others' lands, and not located unreasonably close to a highway.[18] It is not contributory negligence, however, for one to turn his stock loose in his own field, or in a public highway, with knowledge that a fence constructed by another partly around such field or along such highway is improperly and negligently constructed, as he cannot be deprived of the use of his own premises or the public highway by another's violation of duty;[19] nor is one guilty of contributory negligence in failing to maintain his portion of a partition fence over which live stock escapes, where the injury is immediately caused by defendant in driving the animal against a barbed wire fence, while attempting to catch and return it.[20]

Actions. A petition or complaint is sufficient

7. Pa.—Bannon v. Pennsylvania R. Co., 29 Pa.Super. 231.

8. Ala.—Louisville, & N. R. Co. v. Harrison, 80 So. 683, 16 Ala.App. 609.
25 C.J. p 1042 note 72.

Fence not complying with statute
Where a fence is not constructed in the manner required by statute, its construction is a trespass on the rights of others, and those constructing it are liable for resulting injuries.
Or.—Siglin v. Coos Bay, R. & E. R. & Nav. Co., 56 P. 1011, 35 Or. 79, 76 Am.S.R. 463.
Tex.—Cook v. Horstman, 2 Tex.A.Civ. Cas. § 770—Woodward v. Griffith, 2 Tex.A.Civ.Cas. § 360.
Injury to escaping or trespassing animals from absence of, or defect in, fence see Animals § 213 a and the C.J.S. title Negligence § 31, also 45 C.J. p 787 note 52—p 788 note 71.

9. N.Y.—Roney v. Aldrich, 44 Hun 320.

10. N.D.—Kuhnert v. Angell, 77 N. W. 1015, 8 N.D. 198.

11. Iowa.—Golden v. Coonan, 77 N. W. 852, 107 Iowa 209.
25 C.J. p 1042 note 75.

12. Cal.—Loveland v. Gardner, 21 P. 766, 79 Cal. 317, 4 L.R.A. 395.
25 C.J. p 1042 note 76.

Loose wire in division fence
One who in constructing a division fence of barbed wire leaves the wire on the ground without protection is liable to respond in damages to the adjoining owner whose stock is injured by it.—Lowe v. Guard, 39 N.E. 428, 11 Ind.App. 472, 54 Am.S.R. 511.

Incomplete fence
One who erects only part of a barbed wire fence to inclose a pasture is not liable for injury to another's horses while in the pasture, especially where the latter owned the surrounding land and wrongfully restrained him from completing the fence.—Godden v. Coonan, 77 N.W. 852, 107 Iowa 209.

13. Tex.—Cook v. Horstman, 2 Tex. A.Civ.Cas. § 770.

14. Mo.—Teague v. Clemons, 166 S. W. 641, 180 Mo.App. 462.

15. Cal.—Loveland v. Gardner, 21 P. 766, 79 Cal. 317, 4 L.R.A. 395.
25 C.J. p 1042 note 79.

16. Ind.—Morrow v. Sweeney, 38 N. E. 187, 10 Ind.App. 626.
25 C.J. p 1042 note 80.

17. Wis.—Ray v. Stuckey, 88 N.W. 900, 113 Wis. 77, 90 Am.S.R. 844.
25 C.J. p 1043 note 83.

18. Mo.—Teague v. Clemons, 166 S. W. 641, 180 Mo.App. 462.

19. Or.—Siglin v. Coos Bay, R. & E. R. & Nav. Co., 56 P. 1011, 35 Or. 79, 76 Am.S.R. 463.
25 C.J. p 1043 note 85.

20. Iowa.—Bullard v. Mulligan, 29 N.W. 404, 69 Iowa 416.

where it specifies matters constituting negligence on defendant's part in constructing the fence and alleges injury to plaintiff's animal by coming in contact therewith.[21]

In an action against a tenant his landlord is not a necessary party.[22]

When the ownership of a fence is in issue, it may be proved by parol.[23]

The question of negligence in constructing the fence is for the jury[24] where there is evidence of improper construction.[25]

FENDER. A well defined and readily understood term, defined generally as a guard and protection against danger;[1] and more specifically referred to as a contrivance sometimes called a "life guard."[2]

In sawmills, a guard to protect employees from flying pieces of wood driven by the saws.[3]

As applied to street railway cars see the C.J.S. title Street Railroads § 1, also 25 C.J. p 1045 notes 3, 4.

FENERATION. Usury, the gain of interest, the practice of increasing money by lending; sometimes applied to interest on money lent.[4]

FENGELD. In Saxon law, a tax or imposition, exacted for the repelling of enemies.[5]

FENIAN. Originally, a champion, hero, or giant. In the plural, generally used to signify invaders or foreign spoilers.[6]

FEOD and **FEODAL.** See the definitions Feud and Feudal post.

FEODALITY. Fidelity or fealty.[7]

FEODARY. An officer of the court of wards, appointed by the master of that court, under the statute 32 Henry VIII chapter 26.[8]

FEODATORY. See the Feudary post.

FEODUM EST QUOD QUIS TENET EX QUACUNQUE CAUSA SIVE SIT TENEMENTUM SIVE REDITUS.[9]

FEODUM, FEODI. See Feudum post.

FEODUM SIMPLEX EX FEODO SIMPLICI PENDERE NON POTEST.[10]

FEODUM SIMPLEX QUIA FEODUM IDEM EST QUOD HÆREDITAS, ET SIMPLEX IDEM EST QUOD LEGITIMUM VEL PURUM; ET SIC FEODUM SIMPLEX IDEM EST QUOD HÆREDITAS LEGITIMA VEL HÆREDITAS PURA.[11]

FEODUM TALLIATUM, ID EST, HÆREDITAS IN QUANDAM CERTITUDINEM LIMITATA.[12]

FEOFFAMENTUM. A feoffment.[13]

FEOFFARE. To enfeoff, to bestow a fee.[14]

21. Ind.—McFarland v. Swihart, 38 N.E. 483, 11 Ind.App. 175, 54 Am.S.R. 499.

22. N.Y.—Buckley v. Clark, 47 N.Y.S. 42, 21 Misc. 138.

23. Or.—Siglin v. Coos Bay, R. & E. R. & Nav. Co., 56 P. 1011, 35 Or. 79, 76 Am.S.R. 463.
25 C.J. p 1043 note 89.

24. Okl.—Mullen v. Renzleman, 119 P. 641, 31 Okl. 53, Ann.Cas.1913D 778.
Tex.—Hester v. Windham, Civ.App. 27 S.W. 1078.

25. Okl.—Mullen v. Renzleman, 119 P. 641, 31 Okl. 53, Ann.Cas.1913D 778.

1. N.J.—Cape May, D. B. & S. P. R. Co. v. City of Cape May, 36 A. 696, 699, 59 N.J.Law 396, 36 L.R.A. 653.
Utah.—Spiking v. Consolidated Ry. & P. Co., 93 P. 838, 845, 33 Utah 313.

2. Fla.—Tampa Electric Co. v. Bazemore, 96 So. 297, 298, 85 Fla. 164.
Tex.—Galveston Electric Co. v. Swank, Civ.App., 188 S.W. 704, 706.

3. La.—Burns v. Ruddock-Orleans Cypress Co., 38 So. 157, 158, 114 La. 247.

4. Black L.D.

5. Black L.D.

6. Black L.D.

Modern meaning

A member of an organization of persons of Irish birth, resident in the United States, Canada, and elsewhere, having for its aim the overthrow of English rule in Ireland.—Black L.D.

7. Black L.D.

8. Black L.D.

Duties

"To be present with the escheator in every county at the finding of offices of lands, and to give evidence for the king, as well concerning the value as the tenure . . . also to survey the land of the ward, after the office found, and to rate it. He also assigned the king's widows their dower; and received all the rents, etc."—Black L.D.

Abolished by statute 12 Car. II c 24.—Black L.D.

9. A maxim meaning "A fee is that which any one holds from whatever cause, whether tenement or rent."—Black L.D.

10. A maxim meaning "A simple fee cannot depend upon a simple fee."—Morgan Leg.Max.

11. A maxim meaning "A fee-simple, so called because fee is the same as inheritance, and simple is the same as lawful or pure; and thus fee-simple is the same as a lawful inheritance, or pure inheritance."—Black L.D.

12. A maxim meaning "Fee-tail, that is, an inheritance limited in a definite descent."—Black L.D.

13. Black L.D.

14. Black L.D.

FEOFFEE or **FEOFFATUS.** He to whom a fee is conveyed, one to whom a fee is given, or a feoffment made.[15]

FEOFFMENT. The term is derived from the word "feoffare" or "infeudare," to give one a feud, and is properly "donatio feudi."[16]

As a common-law conveyance, or the mode of transferring a freehold estate in lands see Deeds § 5.

FEOFFOR, FEOFFATOR, or **FEOFFER.** The person making a feoffment, or enfeoffing another in fee,[17] one who gives or bestows a fee, one who makes a feoffment.[18]

FEOH. A Saxon word meaning originally cattle, and thence property or money, and, by a second transition, wages, reward, or fee.[19]

FEONATIO. In forest law, the fawning season of deer.[20]

FEORME. A certain portion of the produce of the land due by the grantee to the lord according to the terms of the charter.[21]

FERÆ BESTIÆ. Wild beasts.[22]

FERÆ NATURÆ. As a classification of animals, see Animals § 2.

FERCOSTA. In Italian, a kind of small vessel or boat. It is mentioned in old Scotch law, where it is called "fercost."[23]

FERDELLA TERRÆ. A fardel-land, ten acres; or perhaps a yard-land.[24]

FERDFARE. Saxon, a summons to serve in the army; also an acquittance from going into the army.[25]

FERDINGUS. A term denoting apparently a freeman of the lowest class, being named after the cotseti.[26]

FERDWITE. In Saxon law, an acquittance of manslaughter committed in the army; also a fine imposed on persons for not going forth on a military expedition.[27]

FERE IN OMNIBUS PŒNALIBUS JUDICIIS, ET ÆTATI ET IMPRUDENTIÆ SUCCURITUR.[28]

FERIA. In Spanish law, a fair, that is, a concourse of merchants at a fixed time and place for the exchange of commodities. The courts were closed and other business suspended on the day of fair; hence the phrase "dia feriado," for a holiday.[29]

FERIÆ. In Roman law, holidays; generally speaking, days or seasons during which the free-born Romans suspended their political transactions and their lawsuits, and during which slaves enjoyed a cessation from labor. All feriæ were thus "dies nefasti."[30]

FERIAL DAYS. Originally and properly, days free from labor and pleading, holidays. In statute 27 Henry VI chapter 5, working-days; weekdays as

15. Black L.D.

"Feoffatus" in old English law

Black L.D.

"Feoffee to uses"

A person to whom land was conveyed for the use of a third party. The latter was called "cestui que use." One holding the same position with reference to a use that a trustee does to a trust. He answers to the "hæres fiduciarius" of the Roman law.—Black L.D.

16. Mass.—Thatcher v. Omans, 3 Pick. 521, 532, citing 2 Blackstone Comm. p 310.

"Feoffment to uses"

A feoffment of lands to one person to the use of another. In such case the feoffee was bound in conscience to hold the lands according to the use, and could himself derive no benefit. Sometimes such feoffments were made to the use of the feoffer. The effect of such conveyance was entirely changed by the statute of uses.—Black L.D.

17. Black L.D.

18. Black L.D.

In old English law, "feoffator"

Black L.D.

19. Black L.D.

Derived words

"Feoh" was probably the original form from which the words "feod," "feudum," "fief," "feu," and "fee," all meaning a feudal grant of lands, have been derived.—Black L.D.

20. Black L.D.

21. Black L.D.

22. Black L.D.

23. Black L.D.

24. Black L.D.

25. Black L.D.

26. Black L.D.

27. Black L.D.

28. A maxim meaning "In almost all criminal trials, let allowance be made for age [youth] and imprudence."—Morgan Leg.Max.

29. Escriche Diccionario.

"Mercado (market) distinguished

It differed from a market [mercado] in its intermittent character and briefer duration, but fairs and markets were the subjects of extensive regulation in the Spanish laws commencing with the Partidas.—Escriche Diccionario.

30. Black L.D.

Classes

All feriæ were divided into two classes,—"feriæ publicæ" and "feriæ privatæ." The latter were only observed by single families or individuals in commemoration of some particular event which had been of importance to them or their ancestors. —Black L.D.

Roman festivals

Numerous festivals were called by this name in the early Roman empire. In the later Roman empire the single days occurring at intervals of a week apart, commencing with the seventh day of the ecclesiastical year, were so called.—Black L.D.

distinguished from Sunday.[31]

FERITA. In old European law, a wound, a stroke.[32]

FERLING. In old records, the fourth part of a penny, also the quarter of a ward in a borough.[33]

FERLINGATA. A fourth part of a yard-land.[34]

FERLINGUS or **FERLINGUM.** A furlong.[35]

FERM, FEARM, or **FERME.** A farm, a rent, a lease; a house or land, or both, let or taken by indenture or lease.[36]

FERMENT. To cause fermentation in; also to undergo fermentation.[37]

FERMENTATION. A decomposition produced in an organic substance by the physiological action of a living organism, or by certain unorganized agents;[38] the chemical change, or the decomposition into new chemical compounds, of a substratum, by living organisms, such, for example, as yeast or bacteria.[39]

FERMER or **FERMOR.** A lessee, a farmer, also, one who holds a term, whether of lands or an incorporeal right, such as customs or revenue.[40]

FERMIER. In French law, one who farms any public revenue.[41]

FERMISONA. In old English law, the winter season for killing deer.[42]

FERMORY. In old records, a place in monasteries, where the monks received the poor, "hospicio excipiebant," and gave them provisions, "ferm," or "firma," hence, the modern infirmary, used in the sense of a hospital.[43]

FERNIGO. In old English law, a waste ground, or a place where fern grew.[44]

FERRATOR. A farrier.[45]

FERRI. In the civil law, to be borne; that is, on or about the person. This was distinguished from "portari," to be carried, which signified to be carried on an animal.[46]

FERRIAGE. See Ferries § 1.

31. Black L.D.

32. Black L.D.

33. Black L.D.

34. Black L.D.

35. Black L.D.

36. Black L.D.

37. Century D.

"Fermented liquors" see the C.J.S. title Intoxicating Liquors § 6, also 33 C.J. p 494 note 48–p 495 note 52.

38. U.S.—U. S. v. Dodson, D.C.Cal., 268 F. 397, 403.

39. U.S.—Guaranty Trust Co. of New York v. Union Solvents Corporation, D.C.Del., 54 F.2d 400, 403.

40. Black L.D.

The statute of 52 Hen. III, commonly called the statute of Marlbridge, passed in the year 1267, provided that "fermors, during their terms, shall not make waste."—Sackett v. Sackett, 8 Pick., Mass., 309, 313.

"The term 'fermors' . . . [in the statute of Marlbridge (c 24)], comprehended all who held by lease for life or lives, or for years by deed or without deed."—Woodhouse v. Walker, 5 Q.B.D. 404, 406.

41. Black L.D.

42. Black L.D.

43. Black L.D.

44. Black L.D.

45. Black L.D.

46. Black L.D.

FERRIES.

This Title includes the establishment, maintenance, regulation, and use of ferries for the passage of the public over inland waters subject to payment of tolls; organization, franchises, and powers of ferry companies; and rights, duties, and liabilities of individuals or corporations exercising ferry franchises, in their capacities as carriers as well as otherwise.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. DEFINITION AND NATURE

§ 1. In General

A ferry may be defined as a right or liberty to have a vessel upon a stream or other body of water for the transportation of persons and their teams and vehicles with their contents across it for a reasonable toll. The term also is used to refer to the place where the right is exercised or to the landing places.

In a strict technical sense a ferry is a continuation of a highway from one side of the water over which it passes to the other and is for the transportation of passengers or travelers with their teams or vehicles and such other property as they may carry or have with them.[1] More broadly it may be defined as a liberty to have a boat on a stream, river, arm of the sea, lake, or other body of water for the transportation of men, horses, and vehicles and their contents for a reasonable toll.[2] As is shown infra § 2, ferries may be either public or private, and as is shown infra § 3 b the existence of a franchise is essential to the lawful establishment of a public ferry, the general definitions of a ferry sometimes given incorporating the idea of public right or franchise.[3] A more restricted definition of a ferry is that it is a necessary service by a specially constructed boat to carry passengers and property across rivers or bodies of water from a place on one shore to a point conveniently opposite on the other shore and in continuation of a highway, making connections with a thoroughfare at each terminus.[4] The term is also used to

1. U.S.—St. Clair County v. Interstate Sand & Car Transfer Co., Ill., 24 S.Ct. 300, 192 U.S. 454, 48 L.Ed. 518, affirming, C.C., 109 F. 741.
N.Y.—City of New York v. Starin, 12 N.E. 631, 106 N.Y. 11.
N.C.—Broadnax v. Baker, 94 N.C. 675, 15 Am.R. 633.
25 C.J. p 1049 note 8.

2. Ark.—St. Paul Fire & Marine Ins. Co. v. Harrison, 215 S.W. 698, 140 Ark. 158.
Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 1045, 250 Ky. 269, quoting **Corpus Juris.**
25 C.J. p 1048 note 1.

Carriers of goods and passengers distinguished

(1) "In a strictly ferry business, property is always transported only with the owner or custodian thereof; and ferry-men who do nothing but a ferry business, and have nothing but a ferry franchise, are bound to transport no other property. . . . But they may combine, and usually do combine, with the ferry business the business of a common carrier, carrying freight and merchandise without the presence of the owner or custodian."—City of New York v. Starin, 12 N.E. 631, 632, 106 N.Y. 11.

(2) So persons carrying freight by boats propelled by poles up and down a river from a railroad landing, who carry no persons for toll and charge only for freight, are not operating a ferry.—Broadnax v. Baker, 94 N.C. 675, 55 Am.R. 633.

(3) A steamer operating under a passenger and freight certificate, transporting passengers and freight, is not a ferry in a legal sense.—Puget Sound Nav. Co. v. Department of Public Works of Washington, 287 P. 52, 54, 156 Wash. 377.

(4) A steamship company operating passenger vessels with provisions for the accommodation of automobiles thereon along a coast line, giving a scenic service rather than a service of necessity for the crossing of a body of water, is not operating a ferry.—U. S. v. Canadian Pac. Ry. Co., D.C.Wash., 4 F.Supp. 851, affirmed, C.C.A., Canadian Pac. R. Co. v. U. S., 73 F.2d 831.

(5) A car ferry is not within a statute regulating ferries generally. —St. Clair County v. Interstate Sand & Car Transfer Co., Ill., 24 S.Ct. 300, 192 U.S. 454, 48 L.Ed. 518, affirming, C.C., 109 F. 741—25 C.J. p 1048 note 1 [b].

(6) An excursion boat is not a ferry.—Commonwealth v. Rees, 10 Pa. Co. 545.

(7) A steamer operated by a railroad company on Lake Tahoe, which carries goods and passengers between California points, Nevada points, and interstate points, is not a ferry boat within a statutory definition.—Lake Tahoe R. & Transp. Co. v. Roberts, 143 P. 786, 168 Cal. 551, Ann.Cas.1916E 1196.

3. U.S.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, affirming, D.C., 4 F.Supp. 851.
Okl.—Hale v. Record, 176 P. 756, 757, 74 Okl. 77.
Va.—Patrick v. Riffner, 2 Rob. 209, 214, 41 Va. 209, 214, 40 Am.D. 740.

4. U.S.—U. S. v. Canadian Pac. Ry. Co., D.C.Wash., 4 F.Supp. 851, affirmed, C.C.A., Canadian Pac. R. Co. v. U. S., 73 F.2d 831.

Necessity to afford crossing

"Ferry" is service of necessity for common good to reach point across stream, lagoon, lake, or bay.—U. S. v. Canadian Pac. Ry. Co., supra.

designate the place where the right is exercised,[5] and sometimes as limited to the landing place.[6] There is nothing in the nature of a ferry which requires that it should be operated from but one place on one shore to a single point on the opposite shore;[7] nor is there any particular limit to the distance over which it may be operated, provided only the intervening waters are not wide and can be traversed at regular and brief intervals by boats adapted to a ferry business.[8] In determining whether a service is a ferry service, the character of the service rendered, the type of the vessels employed, the length of the trip, the places or localities served, and the manner in which the trips of the vessels are made must all be taken into consideration.[9] A ferry may consist of the right to transport from one shore only, or from one shore to the middle of the stream.[10] It is immaterial by what means the ferryboat is propelled.[11]

A ferry may be intra-state, interstate, or international,[12] and the difference between a "ferry" and an "international ferry" is of degree and not of kind, since a ferry is the same whether connecting villages, states, or nations.[13]

Ferry as highway. Ferries are frequently referred to or regarded as public highways, being continuations of the highways with which they connect,[14] and serving the purpose of a bridge where a bridge is impracticable;[15] but the terms "ferry" and "bridge" are not ordinarily capable of use as synonymous terms,[16] and it has been denied that ferries are highways in a strict sense.[17] The limits of the ferry proper are the high-water mark at either terminus,[18] and, strictly speaking, a highway connects with a ferry only at the water's edge.[19]

A ferry franchise, emanating from the state or its mandatories, may be defined as a grant to a named person empowering him to continue an interrupted land highway over the interrupting waters.[20]

The term "ferriage" has been defined as the price or fare fixed by law for transportation of the traveling public, with such goods and chattels as they

5. Ark.—St. Paul Fire & Marine Ins. Co. v. Harrison, 215 S.W. 698, 140 Ark. 158.
Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 1045, 250 Ky. 269, quoting **Corpus Juris.**
25 C.J. p 1049 note 2.

6. Ky.—State Highway Commission v. Smith, supra, quoting **Corpus Juris.**
25 C.J. p 1049 note 3.

7. Mo.—Capital City Ferry Co. v. Cole & Callaway Transportation Co., 51 Mo.App. 228.
N.Y.—New York v. New Jersey Steam-Boat Nav. Co., 12 N.E. 435, 106 N.Y. 28.
25 C.J. p 1050 note 10.

8. U.S.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, affirming, D.C., U. S. v. Canadian Pac. R. Co., 4 F.Supp. 851.
25 C.J. p 1050 notes 11, 12.

9. U.S.—Canadian Pac. Ry. Co. v. U. S., supra—U. S. v. Puget Sound Nav. Co., D.C.Wash., 24 F.Supp. 431, affirmed, C.C.A., Puget Sound Nav. Co. v. U. S., 107 F.2d 73, certiorari denied 60 S.Ct. 608, 309 U. S. 668, 84 L.Ed. 1015.

10. U.S.—Conway v. Taylor's Ex'r, Ky., 1 Black 603, 17 L.Ed. 191.
25 C.J. p 1050 note 13.

11. U.S.—Parrott v. Lawrence, C.C. Kan., 18 F.Cas.No.10,772, 2 Dill. 332.
25 C.J. p 1050 note 14.

12. U.S.—U. S. v. Canadian Pac. Ry. Co., D.C.Wash., 4 F.Supp. 851, affirmed, C.C.A., Canadian Pac. R. Co. v. U. S., 73 F.2d 831.

13. U.S.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, affirming, D.C., U. S. v. Canadian Pac. Ry. Co., 4 F.Supp. 851.

14. U.S.—U. S. v. Puget Sound Nav. Co., D.C.Wash., 24 F.Supp. 431, affirmed, C.C.A., Puget Sound Nav. Co. v. U. S., 107 F.2d 73, certiorari denied 60 S.Ct. 608, 309 U.S. 668, 84 L.Ed. 1015.
Ariz.—Deans v. Coconino County, 17 P.2d 801, 41 Ariz. 253, quoting **Corpus Juris.**
Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 1045, 250 Ky. 269, quoting **Corpus Juris.**
N.Y.—Fairchild v. Union Ferry Co. of New York & Brooklyn, 201 N.Y.S. 295, 121 Misc. 513, affirmed 207 N.Y.S. 835, 212 App.Div. 823, affirmed 148 N.E. 750, 240 N.Y. 666.
Va.—State Highway Com'r v. Yorktown Ice & Storage Corporation, 147 S.E. 239, 242, 152 Va. 559, quoting **Corpus Juris.**
25 C.J. p 1049 note 4.

Ferries as highways
Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 1045, 250 Ky. 269, quoting **Corpus Juris.**
25 C.J. p 1049 note 4 [a].

Moving public highway on water
Pa.—Greensboro Ferry Co. v. New Geneva Ferry Co., 34 Pa.Co. 33, 43.

15. U.S.—Jamestown & Newport Ferry Co. v. Commissioner of Internal Revenue, C.C.A., 41 F.2d 920.
Ariz.—Deans v. Coconino County, 17 P.2d 801, 41 Ariz. 253, quoting **Corpus Juris.**
Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 1045, 250 Ky. 269, quoting **Corpus Juris.**
Va.—State Highway Com'r v. Yorktown Ice & Storage Corporation, 147 S.E. 239, 242, 152 Va. 559, quoting **Corpus Juris.**
25 C.J. p 1049 note 5.

Substitute for bridge
"A ferry, in its ordinary sense, is but a substitute for a bridge where a bridge is impracticable, and its end and use are the same."
U.S.—Puget Sound Nav. Co. v. U. S., C.C.A.Wash., 107 F.2d 73, 74, affirming, D.C., U. S. v. Puget Sound Nav. Co., 24 F.Supp. 431, certiorari denied Puget Sound Nav. Co. v. U. S., 60 S.Ct. 608, 309 U.S. 668, 84 L.Ed. 1015.
Cal.—People v. San Francisco & A. R. Co., 35 Cal. 606, 619.

16. Pa.—Schuylkill Bridge Co. v. Frailey, 13 Serg. & R. 422.
25 C.J. p 1049 note 6.

17. Cal.—Menzel Est. Co. v. Redding, 174 P. 48, 178 Cal. 475.
25 C.J. p 1049 note 7.

18. Me.—State v. Wilson, 42 Me. 9.
25 C.J. p 1050 note 9.

19. R.I.—State v. Peckam, 9 R.I. 1.

20. U.S.—U. S. v. Puget Sound Nav. Co., D.C.Wash., 24 F.Supp. 431, 432, affirmed, C.C.A., Puget Sound Nav. Co. v. U. S., 107 F.2d 73, certiorari denied 60 S.Ct. 608, 309 U.S. 668, 84 L.Ed. 1015.
Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 871, 165 Cal. 255, Ann.Cas.1914C 1197.

may have with them, across a river, bay, or lake.[21]

Railroad ferry is part of a railroad route, serving as a substitute for a railroad bridge, and is a means of connecting different railroad tracks or different railroads, and it differs widely, except in name, from a general or unlimited ferry.[22]

"Facilities," as applied to a ferry, means everything incident to the general, prompt, and safe carriage of passengers, boats in good repair, appliances answering the purpose, and readiness and willingness to perform the services incident to the grant.[23]

§ 2. Private and Public Ferries Distinguished

A public ferry is one open to the general public, whereas a private ferry is one operated primarily for the benefit of the proprietor.

While in a general sense all ferries are regarded as publici juris,[24] a distinction is made between private ferries, which riparian owners may under certain restrictions establish for their own convenience, and public ferries which are franchises that cannot be exercised without the consent of the state and must be based on grant, license, or prescription.[25] It has been said that a public ferry is one to which all the public have the right to resort, the ferryman being bound to take all who apply on payment of the regular fare, whereas a private ferry is one operated mainly for the use of the owner and which is not open to the public at its demand, even though he may occasionally take pay for ferriage.[26] A public ferry is a part of a highway and necessarily subserves public interest and convenience;[27] but it is more than a mere continuation of the highway and includes in the idea of public service the necessary incidents of toll and probable monopoly.[28]

II. ESTABLISHMENT, MAINTENANCE, AND FRANCHISES

§ 3. Right to Establish and Maintain in General

a. Private ferries
b. Public ferries

a. Private Ferries

A riparian owner may establish operation of boats across a body of water for his own private business without legislative or similar authorization, but he may not directly or indirectly do so for the accommodation of any substantial portion of the public.

A riparian owner may, without legislative authority, establish a ferry for his own use, and may occasionally carry others and receive compensation therefor, provided it is not done as a regular business;[29] but he has no right to receive regular compensation either directly or indirectly, or to operate the ferry for the accommodation of any considerable portion of the general public.[30] A riparian proprietor operating a private ferry from his own land has no right to land upon the property of the opposite owner without the latter's permission;[31] nor can he, for a private ferry, use land condemned for a public highway without the consent of the owner of the land so condemned, in states where such owner is given a preferable right to call for a public ferry franchise, when a ferry becomes necessary.[32]

b. Public Ferries

A franchise is prerequisite to lawful establishment of a public ferry, and the absolute right to establish and maintain one is not appurtenant to riparian ownership. Unauthorized establishment of a public ferry may be remedied by quo warranto or an equivalent proceeding.

21. Cal.—People v. San Francisco & A. R. Co., 35 Cal. 606, 619.
Rates of ferriage see infra § 25.

22. U.S.—New York v. New England Transfer Co., C.C.N.Y., 18 F.Cas. No.10,197, 14 Blatchf. 159, 168.
51 C.J. p 369 note 9.

23. Pa.—Commonwealth v. Sturtevant, 37 A. 916, 182 Pa. 323, 333.

24. U.S.—Jamestown & Newport Ferry Co. v. Commissioner of Internal Revenue, C.C.A., 41 F.2d 920.

25. Iowa.—Prosser v. Wapello County, 18 Iowa 327.
25 C.J. p 1050 note 15.

A public ferry is a franchise, and consists not merely in the building of the ferry and the furnishing of boats, but in the running of them.—McGregor v. Erie Ry. Co., 35 N.J. Law 89, 98.

26. Ark.—St. Paul Fire & Marine Ins. Co. v. Harrison, 215 S.W. 698, 140 Ark. 158.
Ga.—Hudspeth v. Hall, 36 S.E. 770, 773, 111 Ga. 510.
25 C.J. p 1050 note 15 [a].

27. Wash.—State ex rel. King County v. Murrow, 93 P.2d 304, 199 Wash. 685—State ex rel. Washington Nav. Co. v. Pierce County, 51 P.2d 407, 184 Wash. 414, modified on other grounds 60 P.2d 16, 187 Wash. 695.

28. Pa.—Greensboro Ferry Co. v. New Geneva Ferry Co., 34 Pa.Co. 33, 43.

29. Ga.—Futch v. Bohannon, 67 S.E. 814, 134 Ga. 313, 30 L.R.A.,N.S., 462, 19 Ann.Cas. 1032.
Me.—Peru v. Barrett, 60 A. 968, 108 Me. 213, 109 Am.S.R. 494, 70 L.R.A. 567.
25 C.J. p 1051 note 16.

No franchise is prerequisite to the lawful establishment and maintenance of a private ferry.—Hudspeth v. Hall, 36 S.E. 770, 111 Ga. 510.

Without compensation

It has been said that, strictly speaking, operation of a boat across a stream or other body of water for the primary benefit of the proprietor is not a "ferry," either public or private, since the term "ferry" imports receipt of compensation from those carried.—Futch v. Bohannon, 67 S.E. 814, 134 Ga. 313.

30. Ga.—Hudspeth v. Hall, 36 S.E. 770, 111 Ga. 510.
25 C.J. p 1051 note 17.

31. Pa.—Chess v. Manown, 3 Watts 219.

32. Tex.—Buford v. Smith, 21 S.W. 168, 2 Tex.Civ.App. 178.

The right to ferry across a river or other body of water is primarily in the interest of the public and not of the ferry owner,[33] and a franchise is prerequisite to the lawful establishment of a public ferry.[34] In other words, the right to establish and operate a public ferry, which was under the English common law a franchise of the crown, is in this country a right of the state, and may be conferred on individuals by county authorities acting as an agency of the state.[35] The right is a franchise which cannot be exercised without the consent of the state, and no person, although he may own the land on both sides of a stream, may establish such a ferry unless authorized to do so by the proper public authority;[36] nor can the grant to the proprietor be altered or enlarged except by a supplemental grant or the consent of the proper public authorities.[37] Unless otherwise provided by statute, the grant of authority to conduct a ferry must be express,[38] except where it may be held to be necessarily incidental to other powers granted.[39] An express power to establish a ferry to effectuate other powers granted does not confer a right to establish a ferry independent of the exercise of such powers.[40] The right to operate a public ferry is not appurtenant to riparian ownership,[41] and will not be inferred, by implication, from a mere grant of land,[42] or of articles of incorporation,[43] or of a municipal charter,[44] or of privileges other than that of maintaining a public ferry, to the exercise of which the ferry right is not a necessary incident.[45]

In some states the legislative authority conferred by general statutes obviates the necessity of an express grant or license in certain specified instances, as, for example, toll ferries maintained by riparian

33. Wash.—State v. Superior Court in and for Douglas County, 252 P. 906, 142 Wash. 284, error dismissed 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335 and followed in State v. Superior Court in and for Okanogan County, 252 P. 910, 142 Wash. 696, error dismissed State of Washington ex rel. McPherson Bros. Co. v. Superior Court of State of Washington in and for Douglas County, 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335.

34. U.S.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, affirming, D.C., U. S. v. Canadian Pac. R. Co., 4 F.Supp. 851.

At common law franchise was necessary to creation of ferry.—Canadian Pac. Ry. Co. v. U. S., supra.

Ferry line

A ferry line is a creation of local franchise.—U. S. v. Canadian Pac. Ry. Co., D.C.Wash., 4 F.Supp. 851, affirmed, C.C.A., Canadian Pac. R. Co. v. U. S., 73 F.2d 831.

International ferry cannot lawfully be established without a franchise, as the general requirement of a franchise applies to it as much as to any other ferry.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, affirming, D.C., U. S. v. Canadian Pac. Ry. Co., 4 F.Supp. 851.

35. Tenn.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.

36. Ga.—State Highway Board v. Willcox, 149 S.E. 182, 168 Ga. 883, reversing Willcox v. State Highway Board, 144 S.E. 214, 38 Ga. App. 373, and conformed to 149 S. E. 432, 40 Ga.App. 241.

Wash.—Nearhoff v. Department of Public Works of Washington, 236 P. 288, 289, 134 Wash. 677, citing **Corpus Juris.**

25 C.J. p 1051 note 20—26 C.J. p 1011 note 47.

Private person's establishment of ferry across county boundary, consisting of a river, was not within the authorization of statutes providing for establishment of ferries across county boundaries by the counties for operation of ferries across streams forming the boundaries of states or other specific instances of ferry operation not meeting the factual situation involved.—State v. Superior Court in and for Douglas County, 252 P. 906, 142 Wash. 284, error dismissed 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335 and followed in State v. Superior Court in and for Okanogan County, 252 P. 910, 142 Wash. 696, error dismissed State of Washington ex rel. McPherson Bros. Co. v. Superior Court of State of Washington in and for Douglas County, 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335.

37. Or.—Price v. Knott, 8 Or. 438.

25 C.J. p 1051 note 21.

38. Or.—State v. Portland Gen. Electric Co., 95 P. 722, 98 P. 160, 52 Or. 502.

39. Mont.—Reid v. Lincoln County, 125 P. 429, 46 Mont. 31.

25 C.J. p 1052 note 24.

40. Va.—Chesapeake Ferry Co. v. Hampton Roads Transp. Co., 133 S. E. 561, 564, 145 Va. 28, quoting **Corpus Juris.**

25 C.J. p 1052 note 25.

41. Ga.—State Highway Board v. Willcox, 149 S.E. 182, 168 Ga. 883, reversing Willcox v. State Highway Board, 144 S.E. 214, 38 Ga.App. 373, and conformed to 149 S.E. 432, 40 Ga.App. 241.

Preferential privilege without absolute right

The owner of land on both banks of a navigable stream does not have an absolute right to operate a public ferry as appurtenant to his riparian ownership, but at most is accorded a preferential privilege, as against strangers to the title, to be exercised only in event that the public authorities deem it in the public interest, and if the owner does not demand the privilege or right to operate a ferry it may be granted by the public to a stranger.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.

42. Ga.—Harrison v. Young, 9 Ga. 359.

25 C.J. p 1052 note 26.

43. Or.—State v. Portland Gen. Electric Co., 95 P. 722, 98 P. 160, 52 Or. 502.

25 C.J. p 1052 note 27.

Railroad charter

Under a statute which was in effect a charter of incorporation of a railroad, and which granted the railroad certain ferry privileges, it was held that on a properly strict construction of the statute the railroad's franchise to establish and maintain a ferry was limited to one used in connection with its railroad business and did not include an exclusive franchise to establish a general ferry.—Chesapeake Ferry Co. v. Hampton Roads Transp. Co., 133 S.E. 561, 145 Va. 28.

44. La.—Hoggard v. Monroe, 25 So. 349, 51 La.Ann. 683, 44 L.R.A.,N.S., 477.

25 C.J. p 1052 note 27 [a].

45. U.S.—Harding v. The Maverick, D.C.Mass., 16 F.Cas.No.9,316, 1 Sprague 23.

25 C.J. p 1052 note 28.

proprietors at points other than at a public road crossing.[46]

Remedies for unlawful establishment. If a public ferry is established without authority, the state has a remedy by quo warranto or other equivalent proceeding,[47] and any prior grantee, whose rights are infringed, by action, as discussed infra § 16. A defendant charged with unlawfully usurping the franchise for a public ferry must show that he has a valid title, or that he is not using the franchise.[48]

§ 4. Constitutional and Statutory Provisions

The courts have upheld the validity of statutes regulating the grant and revocation of ferry franchises.

In some jurisdictions it has been broadly declared that all ferries are governed by general or special statute, and not by common law.[49]

The courts have upheld the validity of statutes regulating the establishment of ferries,[50] and the alteration[51] and revocation[52] of ferry franchises.

The operation and effect of constitutional and statutory provisions are discussed in appropriate sections infra this title, as in §§ 7 and 8 dealing with powers to grant ferry franchises and § 22 dealing with general regulation and control of ferries.

§ 5. Establishment by Public Authorities

The establishment of ferries by the public authorities is discussed in connection with the power to grant the franchise infra § 7 et seq.

Examine Pocket Parts for later cases.

§ 6. Ferry Companies

Incorporation of a ferry company does not relieve the operator of the duty of obtaining a license to maintain and operate the ferry. Ferry companies may ordinarily own boats in excess of those immediately and constantly employed in their ferry business and charter such boats to third persons without exceeding their charter powers.

Statutes providing for the incorporation of ferry companies are designed to furnish a mode by which a corporation may be created for the purpose of maintaining a public ferry, and the incorporation of a ferry company under general laws does not confer on it the right to operate a ferry without obtaining a license on due application to the proper authorities.[53]

Under a charter incorporating a ferry company to establish and maintain a ferry between designated points and to own, hold, and possess such vessels and other personalty not exceeding a specified amount in value as might be necessary and convenient for management of its ferry and affairs, the main purpose for which the ferry company is incorporated is transportation of persons and property between the designated points; but the ferry company does not exceed its corporate powers by owning steamboats within the limitation of value although not required for immediate or constant use in the daily prosecution of its regular business and held merely by way of reserve for emergencies or the like, and, where it owns such a boat, the ferry company may contract with others wishing to use it without exceeding its charter powers.[54]

Under a statute creating a named individual and his associates a ferry corporation, he is invested with the powers conferred even though he takes no associates and acts alone, since if possessed of adequate funds he may serve the public as effectually by himself and agents as though other persons shared in the profits and duties of the ferry company.[55]

The acquisition of ferry franchises by corporations is discussed infra § 10.

§ 7. Power to Grant Franchise

a. In general

46. Ala.—Tuscaloosa County v. Foster, 31 So. 587, 132 Ala. 392.
25 C.J. p 1052 note 30.

47. N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1.
25 C.J. p 1052 note 31.

48. Ill.—Gunterman v. People, 28 N.E. 1067, 138 Ill. 518.

49. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108—People's Ferry Co. v. Casco Bay Lines, 115 A. 815, 121 Me. 108.

50. Fla.—Masters v. Duval County, 154 So. 172, 114 Fla. 205, certiorari denied 55 S.Ct. 70, 293 U.S. 559, 79 L.Ed. 660.
S.C.—Poulnot v. Cantwell, 123 S.E. 651, 129 S.C. 171.
Wash.—Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n, 30 P.2d 233, 176 Wash. 486.

51. Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 250 Ky. 269.

Alteration of prohibition of other ferries

Statute prohibiting operation of ferry within one mile of existing ferry is in nature of police regulation, and is subject to alteration so as to permit establishment of a new ferry altering the existing ferry franchise. —State Highway Commission v. Smith, supra.

Constitutional provision for alteration

Ferry franchise taken in 1930 held governed by constitutional provision making every franchise subject to alteration.—State Highway Commission v. Smith, supra.

52. Ky.—Muscovalley v. Horn, 56 S.W.2d 354, 246 Ky. 778—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.

53. Tex.—Tugwell v. Eagle Pass Ferry Co., 9 S.W. 120, 74 Tex. 480.
Necessity for ferry license see supra § 3.

54. Mass.—Brown v. Winnisimmet Co., 11 Allen 326.

55. Me.—Day v. Stetson, 8 Me. 365.

b. Imposition of conditions
c. Power to establish ferries on boundary waters

a. In General

In the United States the power to establish ferries and to grant franchises for such purpose inheres in the states, which may delegate it to agencies or political subdivisions, and is not exercised by the federal government as it lies within the undelegated powers reserved to the states. This doctrine applies to navigable as well as to other waters.

In England the power of granting ferry franchises emanates from the crown. In Canada the right is vested in the provinces, except as to ferries between a province and any British or foreign country or between two provinces, which are subjects of Dominion legislation.[56]

In the United States ferries are established by the legislative authority of the states, which is exercised either directly by a special act of the legislature, or through some inferior body to which power has been delegated under the provisions of a general law.[57] In the making of such general laws territorial legislatures have the same power as those of the states.[58] In this connection it has been said that the inherent right to grant a franchise to operate a ferry inheres in the sovereignty within which it is proposed to use such franchise, but that it is competent for such sovereignty to delegate the right to grant the franchise to agencies or political subdivisions.[59]

The power of establishing ferries is never exercised by the federal government, but lies within the scope of those undelegated powers which are reserved to the states respectively.[60]

Establishment by special act. There are constitutional provisions in some states prohibiting the grant of franchises by special acts in enumerated cases, extending in some instances to the chartering or licensing of ferries. Such provisions are prospective and do not operate to destroy existing ferry franchises.[61] A similar prohibition prevailed in the territories.[62]

Ferries over navigable waters. The state has the same right to grant ferry franchises over navigable waters that it has to grant such franchises over nonnavigable waters.[63]

Presumption of authority. A grant of a ferry franchise by the proper granting agency, but by an officer or board having only a de facto existence, will be presumed, in the absence of proof to the contrary, to have been made with authority.[64]

b. Imposition of Conditions

The state may impose conditions on the right to enjoy a ferry franchise, which apply only within its own jurisdiction.

The state in granting a ferry franchise may impose such terms and conditions on the right to enjoy it as may be necessary to its proper regulation.[65] The conditions imposed are operative only within the jurisdiction of the state granting the franchise.[66]

c. Power to Establish Ferries on Boundary Waters

The states, and not the federal government, have authority to establish ferries and to grant ferry franchises for waters forming the boundary between states, or between a state and a foreign nation. The state may confer franchise good only within its own jurisdiction. The power of an inferior body to grant a ferry franchise as to boundary waters depends on the statute granting it.

56. U.S.—Canadian Pac. Ry. Co. v. U.S., C.C.A.Wash., 73 F.2d 831, 833, quoting **Corpus Juris**, and affirming, D.C., U. S. v. Canadian Pac. R. Co., 4 F.Supp. 851.
25 C.J. p 1052 notes 37, 38.

57. U.S.—Canadian Pacific Ry. Co. v. U. S., supra, quoting **Corpus Juris.**
25 C.J. p 1052 note 39.

Establishment by state highway commission

The Arkansas state highway commission has general authority to establish and operate ferries on state highways.—Arkansas State Highway Commission v. Butler, C.C.A.Ark., 105 F.2d 732.

Establishment in connection with railroad

Legislature has power to establish public ferry in connection with railroad business, the legislature never having surrendered its power over the subject of ferries.—Chesapeake Ferry Co. v. Hampton Roads Transp. Co., 133 S.E. 561, 145 Va. 28.

Irrevocable grants

"The sovereign power is . . . able to make an irrevocable grant of it [franchises] . . . by so doing it does not part with any political or governmental function. It still may regulate the conduct of the ferry for the public good."—New York v. Starin, 12 N.E. 631, 106 N.Y. 1, 15.

58. S.D.—Nixon v. Reid, 67 N.W. 57, 8 S.D. 507, 32 L.R.A. 315.

59. Ky.—Tri-State Ferry Co. v. Birney, 31 S.W.2d 932, 235 Ky. 540, appeal dismissed 51 S.Ct. 349, 283 U.S. 868, 75 L.Ed. 1471.

60. U.S.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, 833, quoting **Corpus Juris**, and affirming, D.C., U. S. v. Canadian Pac. R. Co., 4 F.Supp. 851.
25 C.J. p 1052 note 41.

61. Cal.—Vallejo Ferry Co. v. Lang, 120 P. 421, 161 Cal. 672.

62. S.D.—Nixon v. Reid, 67 N.W. 57, 8 S.D. 507, 32 L.R.A. 315.
25 C.J. p 1053 note 45.

63. Cal.—Vallejo Ferry Co. v. Lang, 120 P. 421, 161 Cal. 672.
La.—Chiapella v. Brown, 14 La.Ann. 189.
25 C.J. p 1053 note 46.

64. U.S.—Davis v. Concordia Police Jury, 1 La.Ann. 288.
25 C.J. p 1053 note 47.

65. N.Y.—Power v. Athens, 2 N.E. 609, 99 N.Y. 592, 598, affirming 26 Hun 282.
25 C.J. p 1053 note 48.
Regulation generally see infra §§ 22–25.

66. Mo.—State v. Sickmann, 65 Mo. App. 499.
25 C.J. p 1053 note 49.

In the case of counties within the same state, neither has complete jurisdiction of establishment of ferries on its boundary waters.

The states, and not the federal government, have the authority to establish ferries upon waters forming a boundary between the states,[67] or between a state and a foreign country.[68] The franchise of one state can confer no rights as to landing upon or ferrying from the other state,[69] but is valid as far as the jurisdiction of the state which grants the franchise extends, without any concurrent action on the part of the other state.[70] The franchise of either state may be made exclusive as to ferrying from its own shore,[71] but it cannot be made to exclude ferries operating under franchises granted by the state on the opposite shore.[72] The jurisdiction of a state over a ferry is determined by its point of departure, and the fact that the landing place is in another jurisdiction does not take it out of the jurisdiction of the authority which granted the franchise.[73]

Powers of inferior bodies. The power of an inferior body to establish ferries on boundary waters depends on the terms of the statute conferring authority on it. Where the statute is construed to give the inferior body jurisdiction as ample as the legislature possesses, its authority to establish ferries upon boundary waters cannot be impeached;[74] but statutes enumerating the instances in which the inferior body is given authority to establish ferries, and not specifically referring to the establishment of ferries upon boundary waters, have been construed not to give authority to the inferior body to establish ferries upon waters forming a boundary between states.[75]

Where a stream or other body of water forms the boundary between two counties within the same state, the granting of ferry privileges is not wholly within the jurisdiction of either county,[76] and the counties on each side may have concurrent jurisdiction,[77] or each may have exclusive jurisdiction on its own side to the center of the stream.[78] Statutes authorizing county commissioners to construct, maintain, and operate ferries under their own direction over streams forming the boundaries between two counties will not be extended by implication to authorize the county authorities to grant a franchise to others to establish ferries over boundary waters.[79]

§ 8. —— Delegation of Power to Inferior Bodies

a. In general
b. Limitations on power of inferior body

a. In General

Inferior bodies, such as counties and municipalities, may establish ferries and grant ferry franchises under power delegated to them by the state, but in the absence of such a delegation of power they ordinarily lack authority to do so. The power delegated is subject to recall by the state which granted it.

Under general laws prevailing in many jurisdictions, the power to establish ferries and grant ferry franchises lies in sundry inferior bodies exercising a delegated authority in such respect, as in the case of county or session courts,[80] county commission-

67. U.S.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, 833, quoting **Corpus Juris**, and affirming, D.C., U. S. v. Canadian Pac. R. Co., 4 F.Supp. 851.
25 C.J. p 1055 note 70.

68. U.S.—Canadian Pac. Ry. Co. v. U. S., supra, quoting **Corpus Juris**.
25 C.J. p 1055 note 71.

69. U.S.—Canadian Pac. Ry. Co. v. U. S., supra, quoting **Corpus Juris**.
25 C.J. p 1055 note 72.

70. U.S.—Canadian Pac. Ry. Co. v. U. S., supra, quoting **Corpus Juris**.
25 C.J. p 1055 note 73.

71. U.S.—Canadian Pac. Ry. Co. v. U. S., supra, quoting **Corpus Juris**.
25 C.J. p 1055 note 74.

72. U.S.—Canadian Pac. Ry. Co. v. U. S., supra, quoting **Corpus Juris**.
25 C.J. p 1055 note 75.

73. U.S.—Canadian Pac. Ry. Co. v. U. S., supra, quoting **Corpus Juris**.
25 C.J. p 1055 note 76.

74. Tenn.—Memphis Corp. v. Overton, 3 Yerg. 387.

75. Va.—Zane v. Zane, 2 Va.Cas. 63, 4 Va. 63.

76. Ark.—Caldwell v. Fitzhugh, 300 S.W. 395, 175 Ark. 801.
Power to grant exclusive franchise over boundary waters see infra § 13 b.
Proceedings to obtain license to establish county boundary ferry see infra § 11 a.

77. Ala.—Jones v. Johnson, 2 Ala. 746.

78. N.D.—State ex rel. Leach v. Olson, 176 N.W. 833, 44 N.D. 367.

79. Wash.—Nearhoff v. Department of Public Works of Washington, 236 P. 288, 134 Wash. 677.

80. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.
25 C.J. p 1053 note 51.

Destruction of jurisdiction by implication not favored
The long established jurisdiction of county courts to grant ferry franchises may not be destroyed by implication arising merely from establishment of a state highway system under other authorities which makes no mention of the matter of ferries.—McCrary v. Harrell, 62 S.W. 2d 566, 166 Tenn. 431.

Judicial control
(1) Quarterly county court's reasonable exercise of its jurisdiction to establish, continue, or discontinue ferries may not be judicially controlled.—McCrary v. Harrell, supra.

(2) County court, in exercising statutory jurisdiction to grant ferry franchise, does not act in legislative or executive capacity for county, but in judicial capacity for commonwealth.—Tri-State Ferry Co. v. Birney, 31 S.W.2d 932, 235 Ky. 540, appeal dismissed 51 S.Ct. 349, 283 U.S. 868, 75 L.Ed. 1471.

ers,[81] boards of county supervisors,[82] police juries,[83] and municipalities.[84] The first county court rightfully to assume jurisdiction of the granting of a ferry franchise continues to retain such jurisdiction exclusive of any other county court of a county contiguous to the body of water until in some legal manner it relinquishes its jurisdiction.[85] Where the power to establish ferries is conferred on inferior bodies by general statutes, their power in such respect is in no wise dependent on other and particular statutory provisions,[86] but in the absence of some legislative delegation the inferior body ordinarily lacks power to authorize the establishment of a ferry.[87] The inferior body, to whom power is delegated, is the agent of the state, and the license to establish the ferry, when granted by the inferior body, is still one emanating from the state.[88] The delegation of this authority to an inferior body does not prevent the legislature from exercising the same right,[89] and, when a ferry is established by a direct legislative grant, no further license from the inferior body is necessary.[90] The legislature has the same right in cases where the authority of the inferior body is conferred by a state constitution,[91] unless its power in this regard is expressly denied.[92] It has been held that delegation of power to grant a ferry franchise will not be inferred from statute giving an inferior body control over county highways.[93]

Recall of power. The power delegated to one inferior body may be recalled, expressly or by implication, and delegated to another.[94]

b. Limitations on Power of Inferior Body

The scope and extent of the power of an inferior body to establish ferries and grant ferry privileges should be sought in the statutes conferring the power and must be exercised in conformity therewith.

The extent of the authority to establish ferries delegated to the inferior body depends on the construction of the statute delegating the power;[95] but a general authority granted to an inferior body to establish ferries may be limited by implication by the terms of a subsequent legislative grant of a ferry franchise.[96] The inferior body must act in strict conformity with the law by which its powers are conferred, and when its authority is limited any act done in excess of such authority is void.[97] Where the act done is separable into authorized

81. Ala.—Thompson v. Chilton County, 181 So. 701, 236 Ala. 142.
S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.
25 C.J. p 1053 note 52.

Legislative, judicial and executive powers
Under some statutory provisions, courts of county commissioners are given broad legislative, judicial, and executive power with reference to establishment of ferries within their jurisdiction and possess an unlimited jurisdiction over such matters except as they may be restricted by local or special statutes of the state.—Thompson v. Chilton County, 181 So. 701, 236 Ala. 142.

82. Iowa.—Prosser v. Wapello County, 18 Iowa 327.
25 C.J. p 1053 note 53.

83. La.—Lafourche v. Robichaux, 40 So. 705, 116 La. 286.
25 C.J. p 1053 note 54.

84. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C 1197.
25 C.J. p 1053 note 55.

Duty under charter
The Montgomerie Charter, granted in 1730, not only gives the city of New York the right to establish ferries, but it is under the duty of so doing.—New York v. New York & Staten Island Ferry Co., 40 N.Y. Super. 232—Fairchild v. Union Ferry Co. of New York & Brooklyn, 201 N.Y.S. 295, 121 Misc. 513, affirmed 207 N.Y.S. 835, 212 App.Div. 823, affirming 148 N.E. 750, 240 N.Y. 666.

Effect of creation of Port Authority
The power conferred on New York City by Greater New York Charter with respect to development or improvement of port and terminal facilities, including ferries, is unimpaired by express terms of treaty which created Port of New York Authority, in absence of conflict by a specific project with the Comprehensive Plan.—Murray v. City of New York, 300 N.Y.S. 425, 165 Misc. 125, affirmed 300 N.Y.S. 431, 252 App.Div. 853, appeal dismissed 300 N.Y.S. 430, 252 App.Div. 854, motion denied 1 N.Y.S.2d 862, 253 App.Div. 798, motion denied 13 N.E.2d 470, 277 N.Y. 554, and 14 N.E.2d 183, 277 N.Y. 601, affirmed 15 N.E.2d 69, 278 N.Y. 475, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1544.
Power of inferior bodies with reference to establishment of ferries over boundary waters see supra § 7.

85. Ky.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.

86. S.C.—Tallevast v. Kaminski, 143 S.E. 796, 146 S.C. 225.

87. N.Y.—New York v. New York & S. I. Ferry Co., 40 N.Y.Super. 232.
Wash.—Nearhoff v. Department of Public Works of Washington, 236 P. 288, 134 Wash. 677.
25 C.J. p 1053 note 57.

88. Cal.—Fall v. Sutter County, 21 Cal. 237, 252.
25 C.J. p 1053 note 58.

89. U.S.—Wright v. Nagle, Ga., 101 U.S. 791, 25 L.Ed. 921.
25 C.J. p 1054 note 59.

90. Ala.—Roy v. Henderson, 31 So. 457, 132 Ala. 175.
Kan.—Territory v. Reyburn, McC. p 134.
Or.—Multnomah County v. Knott, 6 Or. 279.

91. Miss.—Blake v. McCarthy, 56 Miss. 654.
N.C.—In re Spease Ferry, 50 S.E. 625, 138 N.C. 219—Barrington v. Neuse River Ferry Co., 69 N.C. 165.

92. Wis.—Chapin v. Crusen, 31 Wis. 209.
25 C.J. p 1054 note 62.

93. Ky.—Tri-State Ferry Co. v. Birney, 31 S.W.2d 932, 235 Ky. 540, appeal dismissed 51 S.Ct. 349, 283 U.S. 868, 75 L.Ed. 1471.

94. Mass.—In re Fay, 15 Pick. 243.
N.Y.—New York City v. New Jersey & S. I. Ferry Co., 155 N.Y.S. 937, 92 Misc. 40, affirmed 159 N.Y.S. 434, 173 App.Div. 496.

95. Or.—Cason v. Stone, 1 Or. 39.
25 C.J. p 1054 note 64.

96. N.C.—In re Spease Ferry, 50 S.E. 625, 138 N.C. 219.
25 C.J. p 1054 note 65.

97. Wash.—Nearhoff v. Department of Public Works of Washington, 236 P. 288, 289, 134 Wash. 677, citing Corpus Juris.
25 C.J. p 1054 note 66.

Police jury of parish held without authority to grant franchise for ferry extending into limits of Mor-

and unauthorized parts, the grant is void only as to the unauthorized part,[98] and where the act is separable into parts, any one of which, by itself, would be in excess of the granting power's authority, but which are within that authority when taken in the aggregate, it is valid.[99]

Exclusive franchises. The inferior body, by a grant of an exclusive ferry privilege, cannot divest itself of power to perform its full duty, under the statute, to the public.[1] On the other hand, where a county court has exhausted its powers by granting an exclusive privilege to establish a toll bridge, it may not thereafter grant a franchise to establish a competing ferry,[2] and, despite the fact that the county court has been annually granting a franchise to run a ferry, where it thereafter grants a necessarily exclusive franchise to establish a toll bridge it cannot, after consummation of the latter franchise by the putting of such bridge into operation, grant any further license for the competing ferry.[3]

§ 9. Prescription

It is more generally held that a ferry franchise may be acquired by prescription.

By the weight of authority a ferry franchise may be acquired by prescription,[4] the prescriptive right resting on the presumption of an original grant raised by continuous enjoyment of the ferry privilege for the requisite number of years.[5] This presumption may be rebutted by evidence showing that no grant ever was made.[6] The length of possession necessary to raise the presumption of a lost grant varies in the different states, in some states following the English term of twenty years,[7] and in others following the term fixed in the state limitation acts.[8]

It is held, however, in a few jurisdictions, that a ferry franchise cannot be acquired by prescription,[9] although the right to land upon the property of another may be.[10]

§ 10. Who May Acquire Franchise

a. In general
b. Preferential rights of riparian owners

a. In General

Within statutory limitations natural persons, private corporations, and municipalities may be the recipients of ferry franchises, and riparian ownership is prerequisite to acquisition of such a franchise only where made so by statute.

It is not necessary that a ferry franchise should be granted to a single individual; it may be granted to several persons together,[11] or to a corporation,[12] except where the language of the act shows that only natural persons were intended as grantees;[13] but a corporation may be restricted in its right to acquire a ferry franchise by the provisions of its charter,[14] and may not be granted a ferry franchise in violation of statutory inhibitions.[15] The legislature may authorize a municipal corporation to ac-

gan City.—Bisso v. Morgan City, 124 So. 308, 169 La. 122.

98. Ill.—La Salle County v. Simmons, 10 Ill. 513.
Mo.—Carroll v. Campbell, 17 S.W. 884, 108 Mo. 550.
25 C.J. p 1054 note 67.

99. S.D.—Nixon v. Reid, 67 N.W. 57, 8 S.D. 507, 32 L.R.A. 315.
25 C.J. p 1054 note 68.

1. Ill.—Gales v. Anderson, 13 Ill. 413.
Mass.—In re Fay, 15 Pick. 243.
25 C.J. p 1055 note 69.

2. Ark.—White River Bridge Co. v. Hurd, 252 S.W. 917, 159 Ark. 652.

3. Ark.—McClintock v. Bovay, 262 S.W. 669, 164 Ark. 482.

Granting ferry privilege pending construction of bridge
Fact that one has obtained ferry license from year to year does not deprive county court of power, under Crawford & M.Dig. § 10258, to grant exclusive privilege in territory affected to construct and operate toll bridge, but court may, until exercise of franchise to construct bridge is consummated, continue ferry privilege.—McClintock v. Bovay, supra.

4. N.C.—Smith v. Harkins, 38 N.C. 613, 44 Am.D. 83.
Tex.—Laredo v. Martin, 52 Tex. 548.
25 C.J. p 1055 note 81.

5. S.C.—Stark v. McGowen, 10 S.C.L. 387.
25 C.J. p 1055 note 81.

6. Puerto Rico.—Valdes v. Grahame, 3 Puerto Rico Fed. 417.
25 C.J. p 1056 notes 84, 85.

7. Ill.—Mills v. St. Clair County, 4 Ill. 53.

8. Ga.—Williams v. Turner, 7 Ga. 348.
25 C.J. p 1056 note 87.

9. Miss.—Sullivan v. Lafayette County, 58 Miss. 790, overruling Leake County v. McFadden, 57 Miss. 618.
Pa.—Bird v. Smith, 8 Watts 434, 34 Am.D. 483.
25 C.J. p 1055 note 82.

In Kentucky, under a statute providing that no franchise to operate a ferry shall be granted for a longer period than twenty years, where appellant based its right to a franchise on a grant made in 1890, and a renewal in 1902, admitting that its last grant expired in 1922, only a short time before appellees made their application for the franchise, sufficient time had not elapsed for appellant to acquire a prescriptive right to the franchise.—Burnside Land Co. v. Connelly & Lee, 291 S.W. 409, 218 Ky. 346.

10. Pa.—Bird v. Smith, 8 Watts 434, 34 Am.D. 483.

11. Ill.—Haven v. Mehlgarten, 19 Ill. 91.
25 C.J. p 1056 note 89.

12. Ky.—Maysville v. Boon, 2 J.J. Marsh. 224.

13. Ill.—Betts v. Menard, 1 Ill. 395.

14. U.S.—Starin v. New York, 42 Hun 549, reversed on other grounds 19 N.E. 670, 112 N.Y. 206.
25 C.J. p 1056 note 92.

15. Md.—Weller v. Maryland Bay Co., 3 A.2d 736, 176 Md. 59.

Ferry company denied right to operate within bridge area
Where proposed ferry was within inhibition of statute creating Chesapeake Bay Bridge Authority and prohibiting operation of ferry within twenty miles of proposed bridge,

quire and operate a public ferry,[16] and a ferry franchise may be granted to a municipal corporation,[17] except where the act of incorporation does not authorize it to exercise ferry rights.[18] It is not necessary, except where the law expressly requires ownership, that the grantee should own the land where the ferry is located.[19] Mere priority in filing a petition for a ferry license by one of several competing claimants whose petitions are considered together does not confer a right to the license on the prior claimant in preference to the others.[20]

b. Preferential Rights of Riparian Owners

Under statutes prevailing in many jurisdictions a riparian owner is accorded a preferential, but not an absolute, right to a ferry franchise to be used at the place where his land is located, in some jurisdictions defeated if a public highway exists at the ferry landing but in others recognized even though such highway exists at such place. The preference of the riparian owner is exclusive if he owns both banks but not otherwise, although either of two riparian owners will be preferred to a stranger.

Under statutory rules prevailing in many jurisdictions a preference is accorded the owner of land where the ferry is to be located,[21] which preferential right is exclusive if the proprietor owns or controls the land on both banks.[22] Where the opposite banks are owned by different persons, one is not entitled to a preference over the other,[23] but either will be preferred to one not a landowner.[24] Under some statutes the preferential right of the riparian owner is not defeated by existence of an easement for a public highway or wharf at the ferry landing,[25] but other statutes have been construed not to give the riparian owner a preference at points where public roads have been established across streams.[26]

These statutes do not give to the owner an absolute right to have a ferry established upon his land, but only make him a preferred claimant for the right whenever the proper authorities have decided that the establishment of a ferry is necessary.[27] If the landowner fails or refuses to avail himself of his right or is adjudged not to be a proper person to exercise the franchise, it may be granted to another.[28] In such cases, before making the grant, the owner of the land must be given notice of the application for the establishment of the proposed ferry.[29] One tenant in common of riparian land may acquire a ferry franchise,[30] but it is improper to grant such a right to one tenant without notice to or default in the others.[31]

Possessory title. Under the statutes in some states mere possession is not sufficient title to entitle

ferry company was not entitled to receive from public service commission permission to operate.—Weller v. Maryland Bay Co., supra.

16. Mass.—Attorney General v. Boston, 123 Mass. 460.

17. Ill.—Helm v. Grayville, 79 N.E. 689, 224 Ill. 274.
25 C.J. p 1056 note 93.

18. Ill.—Betts v. Menard, 1 Ill. 395.

19. Or.—Dean v. Washington Nav. Co., 115 P. 284, 59 Or. 91.
25 C.J. p 1056 notes 95, 96.

In Kentucky

(1) In a decision which decided merely that the owner of land on the Ohio River was entitled to a ferry franchise as against one not a landowner, and where the court expressly declined to decide whether or not a ferry franchise could be granted an applicant not an owner, to operate from a point in the highway, the court went on to add: "The right to a ferry on the Ohio river being a franchise incident to a freehold in the land, the owner of the land where it is proposed to establish a ferry, or the person to whom he has transferred the ferry rights, is the only person entitled to a grant of ferry privileges."—Walker v. Trail, 74 S.W.2d 345, 346, 255 Ky. 336.

(2) Despite differences under earlier statutes, the rule under Ky.St. § 1803, providing that a ferry shall be established for the benefit of the owner of the land on which it is located, or of some one who has obtained the ferry privilege from the owner, is the same as to the Ohio River and other waters, and either the owner or one to whom he has transferred the ferry privilege may receive the grant of a ferry franchise.—Burke v. Layoff, 199 S.W. 775, 178 Ky. 588—25 C.J. p 1056 note 95 [a] (3).

(3) Earlier Kentucky cases discussing ownership as a prerequisite to acquisition of a ferry privilege see 25 C.J. p 1056 note 95 [a].

In West Virginia, under a statute providing that any person "who owns or has contracted for the use of land at the point at which he wishes to establish the same, may present his application" for a ferry, a person who owns land on the West Virginia side of the Ohio river may make application for a ferry.—Sistersville Ferry Co. v. Russell, 43 S.E. 107, 52 W.Va. 356, 359, 59 L.R.A. 513.

20. Kan.—Oxford Ferry Co. v. Sumner County, 19 Kan. 293.

21. Ky.—Walker v. Trail, 74 S.W.2d 345, 255 Ky. 336.
25 C.J. p 1057 note 98.

Owner

Under statutes according preferential ferriage rights to the riparian "owner," the latter word will not receive a technical definition, but will be construed to include a tenant for years, in lawful possession; and to meet the spirit of the statute a ferry operator's possession of his incompetent wife's lands by virtue of marriage relation has been held to make him "owner," within statute authorizing county court to authorize "owner" of river bank to erect ferry thereat.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.

22. Ark.—Ex parte Grayson, 277 S.W. 538, 169 Ark. 984.

23. Tenn.—Guinn v. Eaves, 101 S.W. 1154, 117 Tenn. 524.
25 C.J. p 1057 note 99.

24. Ala.—Collins v. Ewing, 51 Ala. 101.

25. Tenn.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.

26. Tex.—Tugwell v. Eagle Pass Ferry Co., 9 S.W. 120, 13 S.W. 654, 74 Tex. 480.

27. Ky.—Kennedy v. Covington, 4 J.J.Marsh. 538.
25 C.J. p 1057 note 3.

28. Tenn.—Sparks v. White, 7 Humphr. 86.
25 C.J. p 1057 note 4.

29. Ky.—Lawless v. Reeves, 4 Bibb 309.
Or.—Dean v. Washington Nav. Co., 115 P. 284, 59 Or. 91.

30. Tenn.—Guinn v. Eaves, 101 S.W. 1154, 117 Tenn. 524.

31. N.C.—Pipkin v. Wynns, 13 N.C. 402.

the person in possession to a ferry franchise as riparian owner,[32] while under the statutes in other states actual possession of lands, in the absence of other proof, places the one in possession on the same footing as the owner.[33] A preëmption right to land on both banks of a river unaccompanied by possession will not, however, entitle the owner to exclusive ferry privileges under a statute giving a right to an exclusive ferry franchise only to those who own the land, or have possession of it by preemption right, or settlement, on both opposite banks of a river.[34]

Evidence of title. A certificate of the register of the land office is sufficient evidence of the ownership of the land to give the owner preferential rights to a ferry franchise, and the applicant's title cannot be further inquired into in the hearing on his petition.[35]

Recovery of land by rightful owner does not operate to revoke the franchise of the person in possession,[36] nor to vest title to the franchise in the owner of the land.[37]

§ 11. Proceedings to Acquire Franchise

a. In general
b. Hearing and contest
c. Record
d. Acceptance of grant and fixing of rates
e. Bond and costs
f. Review
g. Acquisition by lease or purchase

a. In General

Ordinarily application for a ferry franchise should be made formally in compliance with statutory regulations and on notice to those entitled to contest the grant.

In the execution of the power to establish ferries conferred on an inferior body there must be a compliance with the statutory requirements.[38] In general, a formal application should be made[39] by one entitled to acquire the franchise,[40] stating the location of the proposed ferry[41] and the applicant's ownership of the land or other facts essential to his right to receive the franchise.[42]

Notice. The giving of notice of application in compliance with statutory requirements is a condition precedent to issuance of a ferry franchise, and the requirement of notice has been held jurisdictional, so that an order for issuance of a ferry franchise or license issued on proceedings as to which the required notice was not given is void.[43] The notice is usually required to be given, either publicly by posting notices[44] or personally on certain persons,[45] so that anyone entitled to contest the granting of the application may have an opportunity to do so.[46] Although the statute may fail expressly to prescribe the contents of the notice, it has been held that notice of a ferry application should set forth the point at which it is to be established and that such point should be one within the jurisdiction of the court to which the application is to be made.[47] Where the applicant proposes to supplant an existing ferry by establishing another in lieu of it, the notice should contain a claim that the existing ferry cannot properly do all of the business, or that the public convenience requires another ferry.[48] Statutory requirements as to affidavit of publication of notice must be complied with.[49]

In the cases of ferries over boundary waters, the power to establish which is discussed supra § 7 c, the applicant for a license to operate a ferry over waters forming the boundary between two counties should secure permission from the proper authorities in each of such counties, and where either coun-

32. Ind.—Mullis v. Cavins, 5 Blackf. 77.

33. Cal.—Henshaw v. Butte County, 19 Cal. 150.
Ky.—Givens v. Pollard, 3 A.K.Marsh. 320.

34. Ark.—Cloyes v. Keatts, 18 Ark. 19.

35. Ala.—Cox v. Easter, 1 Port. 130.

36. Miss.—McCearly v. Swayze, 3 So. 657, 65 Miss. 351.

37. Ky.—Fisher v. Higgins, 5 T. B. Mon. 140.

38. Conn.—Wethersfield v. Humphrey, 20 Conn. 218.
Va.—Muire v. Smith, 2 Rob. 458, 41 Va. 458.

39. Ky.—Givens v. Pollard, 3 A.K. Marsh. 320.
25 C.J. p 1057 note 15.

40. Ky.—Ryan v. Hobson, 206 S.W. 785, 182 Ky. 573.
25 C.J. p 1057 note 16.
Who may acquire ferry franchise see supra § 10.

41. W.Va.—Sistersville Ferry Co. v. Russell, 43 S.E. 107, 52 W.Va. 356, 59 L.R.A. 513.
25 C.J. p 1057 note 17.

42. Ind.—Hazleton v. De Priest, 42 N.E. 751, 143 Ind. 368.
Va.—Zane v. Zane, 2 Va.Cas. 63, 4 Va. 63.

43. Ala.—Pitts v. Boggs, 93 So. 906, 208 Ala. 194.

44. Ky.—Clark County Ct. v. Warner, 76 S.W. 828, 116 Ky. 801, 25 Ky.L. 857.
25 C.J. p 1057 note 19.

45. N.Y.—In re Talcott, 31 Hun 464.
25 C.J. p 1057 note 20.

46. W.Va.—Williamson v. Hays, 12 S.E. 1092, 35 W.Va. 52.

47. Ala.—Pitts v. Boggs, 93 So. 906, 208 Ala. 194.

Particular statutory requirements
Code 1907 § 3029, providing for publication of notices before issuance of ferry license, contemplates the notice shall state place of operation, one point of which shall be within jurisdiction of the issuing commissioners' court, and at a public river crossing where intersected by a public road on each side.—Pitts v. Boggs, supra.

48. Ky.—Willis v. Calhoun, 140 S. W. 199, 145 Ky. 95.

49. Cal.—Pool v. Simmons, 66 P. 872, 134 Cal. 621.

ty has denied the application the judgment operates as a bar in respect of both counties.[50]

Application by railroad. Where a railroad has discontinued a formerly operated general ferry service it may not claim the benefit of a statutory exception permitting operation of an existing ferry without first obtaining a certificate of public convenience and necessity,[51] and the fact that on the effective date of the statute the railroad was operating a passenger ferry in connection with its railroad business does not bring it within the exception in favor of ferries existing on such date, as respects the necessity of obtaining the certificate in order to operate a general ferry.[52] Since operation of a vehicular ferry is in no proper sense an adjunct to a railroad passenger ferry service, the railroad may not avoid the necessity for a ferry certificate for the vehicular ferry by merely filing a tariff for the latter on the assumption that it constitutes a mere addition of a commodity for the railroad ferry service it already operates.[53]

b. Hearing and Contest

Only persons whose rights may be affected may contest the application for a ferry franchise or privilege, and on the hearing controverted questions of fact may be passed on. On an application for establishment of an additional ferry the question of public need is in issue, and under some statutes there is no authority to issue a certificate where service already exists for the territory to which the application relates. The question of what territory is served by another ferry is one of fact to be determined by the department asked to issue the new ferry certificate.

Anyone whose rights may be interfered with may appear and contest the granting of the application;[54] but not one with no rights which can be affected.[55] The owner of a prior established ferry is under no obligation to appear and contest the application,[56] but if he does so, and the proceedings are erroneous, his remedy is by appeal, and not by injunction to restrain the other ferry.[57] Controverted questions of fact may be passed on at the hearing.[58] On hearing of the application, the finding of the jury on the issue whether public convenience will result from the establishment of a proposed ferry, for which proceedings statutory provision is made in some states, is merely evidence, and the weight of it under all the circumstances is a matter for the discretion of the court.[59] The ownership of an existing ferry, in controversy between different claimants, cannot be settled in a proceeding to establish a new ferry.[60]

Additional ferry service. On an application for establishment of a ferry to perform substantially the same service as that of one already established, the first question for determination is the public need for such additional service,[61] and where adequate ferry service already exists the application may be denied.[62] The burden of showing the public need is on the applicant for an additional ferry.[63] Under some statutes the department is unauthorized to issue a ferry certificate to a competing line where the territory is already served by another,[64] and determination of this issue must be made by the department before it can issue a ferry certificate.[65] If the service of the existing ferry line is inadequate it should on due notice be ordered

50. Ark.—Caldwell v. Fitzhugh, 300 S.W. 395, 175 Ark. 801.

51. Cal.—Golden Gate Ferry Co. v. Railroad Commission of California, 268 P. 355, 204 Cal. 305.

Abandonment of service for over thirty-two years

Cal.—Golden Gate Ferry Co. v. Railroad Commission of California, supra.

52. Cal.—Golden Gate Ferry Co. v. Railroad Commission of California, supra.

53. Cal.—Golden Gate Ferry Co. v. Railroad Commission of California, supra.

54. Va.—Williamson v. Hays, 25 W. Va. 609.

25 C.J. p 1058 note 24.

55. Or.—Knott v. Jefferson St. Ferry Co., 9 Or. 530.

25 C.J. p 1058 note 25.

56. Ark.—Lindsay v. Lindley, 20 Ark. 573—Murray v. Menefee, 20 Ark. 561.

57. Ark.—Lindsay v. Lindley, 20 Ark. 573.

58. N.Y.—Matter of Pierce, 172 N.Y.S. 852, 185 App.Div. 212.

59. Va.—Muire v. Smith, 2 Rob. 458, 41 Va. 458.

60. Ky.—Gresham v. Gresham, 5 Ky. Op. 665.

61. W.Va.—Greene v. Lane, 130 S.E. 522, 100 W.Va. 399.

Consistency of findings as to public need

A statement in the opinion of a commission, if construed as a finding, that operation of a new boat by an existing ferry company resulted in the furnishing of adequate service was not necessarily inconsistent with its grant of a franchise to a new ferry company on the implied finding that public convenience required establishment of an additional ferry, where under the facts the first statement could well have referred to "off times" of travel during which existing service was adequate and the second finding to times of greater travel when additional facilities were requisite.—San Diego & Coronado Ferry Co. v. Railroad Commission of California, 292 P. 640, 210 Cal. 504.

62. W.Va.—Greene v. Lane, 130 S.E. 522, 100 W.Va. 399.

Adequate service rendered at a loss

Where adequate service is performed by established ferry at financial loss, and it does not appear that additional ferry will be of material benefit, or that travel will support reasonably well two adequately equipped and properly attended ferries, county court should refuse franchise for additional ferry.—Greene v. Lane, supra.

63. W.Va.—Egerton v. Flesher, 86 S.E. 34, 76 W.Va. 519, L.R.A.1916D 828.

64. Wash.—Kitsap County Transp. Co. v. Department of Public Works, 16 P.2d 828, 170 Wash. 396.

65. Wash.—State v. Department of Public Works of Washington, 2 P.2d 686, 164 Wash. 237.

Omission of finding fatal

Statement of opinion by department of public works indicating lack

to supplement its service as necessary, and in the absence of a finding and order as to supplemental service an application by a new and competing ferry line should be denied.[66] The question of what territory is already served by an existing ferry, when arising on application for a license to establish a new ferry, is a question of fact,[67] to be determined in the light of existing economic conditions and a consideration of the kinds, means, and methods of travel and the size of the population to be served,[68] and under the practice in some jurisdictions such question will be decided by the department of public works in the first instance.[69] It has been held that no holder of a certificate of public necessity and convenience for operation of a ferry may be compelled as a condition precedent to holding his route free from competition to establish and maintain a new ferry route when it is admitted that such new service can be installed and maintained only at a loss.[70]

"Good faith" certificate. Under statutes providing for issuance of a ferry certificate to one who on a specified date was operating a ferry over the route for which the certificate is sought, an applicant who on such date was operating a boat service not falling within the definition of "ferry" is not entitled to such certificate,[71] and, not being so entitled, could not secure a ferry certificate under general provisions of the statutes until the department had tried and determined the question of whether his operation would invade territory already served.[72]

c. Record

It has been held that to support a grant of a ferry license the record must show the existence of all jurisdictional facts, but other authority is to the effect that this may be shown by evidence dehors the record. If the record affirmatively shows the absence of jurisdictional facts the purported grant of a ferry license is void.

In accordance with the general rule with respect to the proceedings of inferior courts and tribunals, as discussed in Courts §§ 104–106, it has been held that in order to support the grant of a ferry license or franchise the record of the proceedings must show the existence of all jurisdictional facts,[73] such as the giving of the prescribed notice,[74] and that an insufficient record in this respect cannot be aided by oral evidence.[75] On the other hand, it has been held that if the jurisdictional facts exist, and a license or franchise is issued by the proper board or other body, it is valid, although such facts are not made a matter of record;[76] that in the absence of evidence to the contrary the license is prima facie sufficient to show the right of the licensee to establish and operate the ferry, the presumption being in favor of the regularity of the proceedings;[77] and that evidence, other than the record, is competent to show the facts.[78] Where the record af-

of necessity for finding that territory for which certificate was sought was not already served held insufficient and fatal to validity of order granting certificate.—State v. Department of Public Works of Washington, supra.

66. Wash.—Kitsap County Transp. Co. v. Department of Public Works, 16 P.2d 828, 170 Wash. 396.

67. Wash.—State v. Department of Public Works, 6 P.2d 55, 165 Wash. 444—State v. Department of Public Works of Washington, 2 P.2d 686, 164 Wash. 237—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works of Washington, 278 P. 189, 152 Wash. 417.

68. Wash.—State v. Department of Public Works, 6 P.2d 55, 165 Wash. 444—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works of Washington, 278 P. 189, 152 Wash. 417.

69. Wash.—State v. Department of Public Works of Washington, 2 P. 2d 686, 164 Wash. 237—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works of Washington, 278 P. 189, 152 Wash. 417.

Findings of department sustained

Finding of public works department issuing certificate of public convenience and necessity that applicants' operation of ferry service between Seattle and Port Ludlow would not invade territory already served by protestants operating ferry service between Edmonds and Port Ludlow held supported.—State v. Department of Public Works, 6 P.2d 55, 165 Wash. 444.

70. Wash.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works of Washington, 278 P. 189, 152 Wash. 417.

71. Wash.—Puget Sound Nav. Co. v. Department of Public Works of Washington, 287 P. 52, 156 Wash. 377.

72. Wash.—Puget Sound Nav. Co. v. Department of Public Works of Washington, 287 P. 52, 156 Wash. 377.

73. Or.—Dean v. Washington Nav. Co., 115 P. 284, 59 Or. 91.
25 C.J. p 1058 note 24.

Public interest

Record held to sustain conclusion that granting of certificate of public convenience for operation of ferry was in public interest, and that existing and new companies could operate at profit.—San Diego & Coronado Ferry Co. v. Railroad Commission of California, 292 P. 640, 210 Cal. 504.

Whether territory is already served

(1) To affirm grant of certificate, determination of jurisdictional fact whether territory is already served must appear in record.—State v. Department of Public Works of Washington, 2 P.2d 686, 164 Wash. 237.

(2) Department of public works by granting certificate cannot thereby be considered as having found that territory was not already served.—State v. Department of Public Works of Washington, supra.

74. Or.—Dean v. Washington Nav. Co., 115 P. 284, 59 Or. 91.
25 C.J. p 1058 note 35.

75. Or.—Dean v. Washington Nav. Co., supra.

76. Idaho.—Sims v. Milwaukee Land Co., 119 P. 37, 20 Idaho 513, 524.
Ky.—Hatten v. Turman, 97 S.W. 770, 98 S.W. 1000, 123 Ky. 844, 30 Ky. L. 194, 382.
25 C.J. p 1058 note 37.

77. Idaho.—Sims v. Milwaukee Land Co., 119 P. 37, 20 Idaho 513.

78. Idaho.—Sims v. Milwaukee Land Co., supra.

firmatively shows the absence of a jurisdictional fact, such as legal notice of the proceedings pursuant to which a ferry franchise or license was issued, the purported grant is void.[79]

d. Acceptance of Grant and Fixing of Rates

A grant of a ferry license must be accepted by the grantee to become effective, and it has been held that the ferry is not established until the accepting grantee has furnished essential facilities and begun operation. The order establishing a ferry need not fix rates, which may be fixed by later order.

A legislative grant of a ferry franchise must be accepted by the grantee, or by all the grantees, if more than one, before it will become operative.[80] The grant of a license by an inferior body to establish a ferry is complete when a definite order that the ferry be settled, laid out, and established has been made and the required bond has been executed,[81] and such order operates as a valid establishment of the ferry,[82] although according to some authorities the ferry is not established until the grantee has provided the necessary facilities and has begun to operate the ferry for the public.[83]

Fixing rates. Unless otherwise provided by statute, an order establishing a ferry need not fix the rates of toll; this may be done by a separate and independent order.[84]

e. Bond and Costs

An applicant for a ferry license may be obligated to give a bond where statute so requires. The applicant is not liable for costs of the proceeding in the absence of statute making him so.

The grantee of the franchise is in some cases required to give bond,[85] and to renew his bond at fixed periods;[86] but statutes requiring the applicant for a ferry license to give covenant to pay damages for negligence do not apply to the agent through whom the owner or lessee operates the ferry.[87]

Costs. A contestant is not liable for costs in the absence of statute providing therefor.[88]

f. Review

The order of a court or other body granting or denying a ferry franchise is ordinarily open to review, although it will be sustained as to discretionary matters in the absence of abuse of discretion. It has been held that anyone interested may appeal such an order whether or not a formal party to the proceedings below. The judgment of a court establishing a ferry is not open to collateral attack except on jurisdictional grounds, and the regularity of the proceedings will be presumed on such an attack.

Under statutes regulating procedure in the granting of ferry franchises, a review may generally be had by appeal,[89] error,[90] or certiorari.[91] Noncompliance with statutory requirements is reversible error.[92] The exercise of discretion in determining whether the public convenience requires the establishment of a ferry is not unlimited and may be reviewed,[93] but will not be interfered with where it does not clearly appear to have been abused.[94] Amendments in the interest of justice have been permitted on appeal, where no one was prejudiced thereby.[95] Where the statute gives a state depart-

Ky.—Hatten v. Turman, 97 S.W. 770, 123 Ky. 844, 98 S.W. 1000, 30 Ky. L. 194, 382.
25 C.J. p 1058 note 39.

79. Ala.—Pitts v. Boggs, 93 So. 906, 208 Ala. 194.

License issued by commissioners' court of general jurisdiction

That the commissioners' court issued a ferry license subsequent to acquiring general jurisdiction of ferries, under Code 1907 § 3312, does not dispense with, but merely raises presumption of, jurisdictional fact of thirty-day prior notice necessary under § 3029 (which previously dealt with that court as of limited jurisdiction) to validity of licenses; and affirmative showing that the ferry connecting road was established only four days prior to license rendered the order of the court void on its face and subject to collateral attack.—Pitts v. Boggs, supra.

80. Wis.—Chapin v. Crusen, 31 Wis. 209—Ferrell v. Woodward, 20 Wis. 458.
25 C.J. p 1058 note 40.

81. Ala.—Collins v. Ewing, 51 Ala. 101.
N.C.—Robinson v. Lamb, 39 S.E. 579, 129 N.C. 16.

82. N.C.—Robinson v. Lamb, supra.

83. Ark.—Munn v. Shults, 197 S.W. 570, 130 Ark. 291.

84. Ky.—Pentecost v. Miller, 7 T.B. Mon. 312.
25 C.J. p 1059 note 46.

85. Kan.—Walker v. Armstrong, 2 Kan. 198.
Ky.—Sanders v. Craig, 1 A.K.Marsh. 196.
25 C.J. p 1058 note 44.

86. Ala.—Garrett v. Ricketts, 9 Ala. 529.

87. Ky.—Commonwealth for Use and Benefit of Lindsey's Adm'r v. Deweese, 62 S.W.2d 1042, 250 Ky. 283.

88. Ky.—Ackler v. Oldham, 1 A.K. Marsh. 471.

89. Ky.—Stahl v. Brown, 1 S.W. 540, 84 Ky. 325, 8 Ky.L. 279.
25 C.J. p 1059 note 53.

Bill of exceptions as not requisite

Under Ky.St. § 1801, providing that an appeal from an order of the court concerning a ferry shall be to the circuit court and thence to the court of appeals, both of which shall have jurisdiction of law and fact, but the court of appeals only of such facts as shall be certified from the circuit court, it is not necessary to file a bill of exceptions on appeal to the circuit court, since such court has jurisdiction over all facts developed on the hearing in the county court.—Adkins v. Ashland & Ironton Transfer & Ferry Co., 276 S.W. 131, 210 Ky. 532.

90. Ky.—Casey v. Jones, 2 Litt. 301—Lawless v. Reese, 4 Bibb 309.

91. Mass.—In re Fay, 15 Pick. 243.

92. Ky.—Lawless v. Reese, 4 Bibb 309.
25 C.J. p 1059 note 56.

93. Ky.—Harvie v. Cammack, 6 Dana 242.
W.Va.—Sistersville Ferry Co. v. Russell, 43 S.E. 107, 52 W.Va. 356, 59 L.R.A. 513.
25 C.J. p 1059 note 57.

94. Ga.—Hudspeth v. Hall, 38 S.E. 358, 113 Ga. 4, 84 Am.S.R. 200.
25 C.J. p 1059 note 58.

95. Ky.—Ryan v. Hobson, 206 S.W. 785, 182 Ky. 573.
25 C.J. p 1059 note 59.

ment original jurisdiction of applications for ferry licenses and on review by the court the latter decides that there should be a finding on a question left unanswered by the department, it is not the function of the court itself to pass on such question but it should remit the case to the department with instructions to make a finding as to such omitted matter.[96]

Who may appeal. Under statutes giving the right to appeal to anyone interested, an appeal by interested parties to the circuit court from an order of the county court granting a ferry franchise will not be dismissed because appellants filed no pleadings and were not parties in the proceedings below.[97]

Collateral attack. The establishment of a ferry is a judicial act, and the judgment of a court establishing a ferry, like any other judgment, cannot be attacked in a collateral proceeding,[98] except in respect of lack of a jurisdictional fact rendering the judgment void.[99] On a collateral attack the only point in issue is whether the judgment respecting the grant of a ferry franchise was void,[1] and the regularity of the prior proceedings before a court of original and exclusive jurisdiction will ordinarily be presumed;[2] but a judgment as to a ferry franchise is open to collateral attack where it is void for uncertainty.[3]

g. Acquisition by Lease or Purchase

Under the statutory practice in some jurisdictions the highest bidder at public auction may acquire ferry privileges by lease or purchase, but is not entitled to exercise his franchise until he has complied with all conditions imposed.

Under statutes in some jurisdictions the right to establish a ferry may be sold or leased at public auction to the highest bidder;[4] but a statute relating to franchises generally and providing for their sale to the highest bidder will not apply where the statute relating specifically to ferry franchises contains different requirements.[5] The terms of sale

96. Wash.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works of Washington, 278 P. 189, 152 Wash. 417.

Decision by court on unconsidered point erroneous

Superior court erred in deciding case on point not considered by public works department amending good-faith steamboat certificate to include ferry service.—Puget Sound Nav. Co. v. Department of Public Works of Washington, 287 P. 52, 156 Wash. 377.

97. Ky.—Adkins v. Ashland & Ironton Transfer & Ferry Co., 276 S.W. 131, 210 Ky. 532.

98. Ky.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.
25 C.J. p 1059 note 60.

Second application

An application in one county court for a ferry franchise at a certain point was a collateral attack on judgment and proceedings of another county court granting a franchise to other persons, it being claimed that the first judgment was void as ground for granting of the second application.—Decker v. Tyree, supra.

99. Ala.—Pitts v. Boggs, 93 So. 906, 208 Ala. 194.

1. Ky.—Adkins v. Ashland & Ironton Transfer & Ferry Co., 276 S.W. 131, 210 Ky. 532.

Failure to execute bond as not jurisdictional

Failure to execute bond at the time of granting ferry franchise, and failure of the court to make an order concerning the rate of tolls, did not render the judgment void, such omissions being errors only that did not affect the jurisdiction of the court.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.

Matter of abandonment or forfeiture not in issue

In view of Ky.St. § 1820, prohibiting establishment of ferry within four hundred yards of another, an application for franchise within prohibited distance, on sole ground that existing ferry was without right, is a collateral attack on the existing franchise, and only matter for inquiry is whether it is void, question of abandonment or forfeiture not being at issue.—Adkins v. Ashland & Ironton Transfer & Ferry Co., 276 S.W. 131, 210 Ky. 532.

2. Ky.—Adkins v. Ashland & Ironton Transfer & Ferry Co., supra.

After lapse of great time

In a collateral attack on a franchise granted by county court having original and exclusive jurisdiction, it is presumed that all statutory and jurisdictional requirements were complied with, especially where there is a great lapse of time since granting of franchise, so that absence of an order showing required notice will not render franchise void.—Adkins v. Ashland & Ironton Transfer & Ferry Co., supra.

Lack of jurisdiction not appearing affirmatively

On collateral attack where lack of jurisdiction does not appear affirmatively, it will be presumed, particularly after lapse of eighty years, that statutory and jurisdictional requirements were complied with in granting a ferry franchise and that county court had jurisdiction to grant the franchise, although order does not show that party to whom it was granted was citizen or resident of the county or owned land in the county or abutting on the river, or that the ferry was established from his land, or that he gave notice to the owner of land on the opposite side of the river.—Smith v. Graves, 103 S.W.2d 673, 268 Ky. 116.

3. Ky.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.

Failure to designate stream or roads leading thereto

Ky.—Decker v. Tyree, supra.

4. N.Y.—Starin v. Edson, 19 N.E. 670, 112 N.Y. 206.
25 C.J. p 1059 note 47.

Accompanying use of public landing

La.—Bisso v. City of New Orleans, 98 So. 737, 155 La. 5.

Effect of creation of Port Authority

The power of New York City to lease a ferry franchise between New York and New Jersey under Greater New York Charter has not been taken away by legislation creating Port of New York Authority.—Murray v. City of New York, 300 N.Y.S. 425, 165 Misc. 125, affirmed 300 N.Y.S. 431, 252 App.Div. 853, appeal dismissed 300 N.Y.S. 439, 252 App.Div. 854, motion denied 1 N.Y.S.2d 862, 253 App.Div. 798, motion denied 13 N.E.2d 470, 277 N.Y. 554, and 14 N.E. 2d 183, 277 N.Y. 601, affirmed 15 N.E. 2d 69, 278 N.Y. 475, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1544.

5. Cal.—Pool v. Simmons, 66 P. 872, 134 Cal. 621.

imposed by the statute control,[6] and the highest bidder is not entitled to exercise the franchise until he has complied with all its conditions.[7] Irregularities in the manner of exercising the right to sell a ferry franchise at public auction may be ratified or cured by estoppel.[8]

Disputes respecting rental. Bona fide disputes respecting the computation of rental due the public from ferry lessees may be settled by appropriate agreement of the parties.[9]

Valuation of property at termination of lease. Where the United States takes over operation of a leased ferry line under agreement during time of war, and where the original lease provides for payment of increased value at the termination of the lease, in determining what price the United States is to pay the lessee for increased value it has been held that the properties should be valued by prewar prices rather than by wartime prices.[10]

Renewal or extension of lease contract. A new contract for the lease of ferry privileges to an operator cannot be construed as a renewal or extension of an existing lease in contradiction of express recitals to the contrary in such new contract.[11]

§ 12. Nature, Requisites, Construction, and Extent of Franchise

a. In general
b. Requisites and construction of grant
c. Duration and extent of grant

a. In General

A ferry franchise is "property" and is ordinarily regarded as a contract between the grantee and the state. The franchise comprises not only the right to establish the ferry, with landings and boats, but also the right to operate it, subject to the general public right to use navigable waters and the right of the federal government to improve the waterway for purposes of navigation.

A ferry franchise consists not merely in the establishment of a ferry with its landing and boats, but in its operation as a ferry,[12] and a grant of authority to maintain a ferry carries with it, by necessary implication, the right to acquire what is essential to its operation.[13] A ferry right, when exercised over navigable waters, is subject to the right of the public to use the waters as a highway,[14] and to the right of the federal government to improve the waterway for purposes of navigation;[15] but, where the landing place is owned by the owner of the ferry franchise, steamboats navigating the river as common carriers have no right, without the ferry owner's consent, to receive and discharge passengers or freight at the ferry landing.[16]

Ferry franchise as property. A ferry franchise is property and is entitled as such to the same protection as any other property.[17] Although there is

6. N.Y.—Phillips v. New York City, 108 N.Y.S. 1059, 124 App.Div. 307.

7. N.D.—Patterson v. Wollmann, 67 N.W. 1040, 5 N.D. 608, 33 L.R.A. 536.

8. La.—Prince v. Concordia Parish Police Jury, 36 So. 342, 112 La. 257.

9. Wash.—Pierce County v. Washington Nav. Co., 27 P.2d 569, 175 Wash. 344.

Resolution by commissioners

(1) County commissioners' resolution, reciting controversy with ferry company as to meaning of term "gross earnings," therein defined, and board's understanding at time of contracting for operation of ferries that certain expenses should be deducted from income before computing percentage of such earnings payable to county was not unauthorized as mere attempt to construe unambiguous phrase in contract.—Pierce County v. Washington Nav. Co., supra.

(2) County commissioners' resolution, defining term "gross earnings" in contract with ferry operator, may be valid, whether merely reducing doubtful term to certainty or declaring parties' mutual intention.—Pierce County v. Washington Nav. Co., supra.

10. U.S.—Ferries Co. v. U. S., 45 S. Ct. 36, 266 U.S. 260, 69 L.Ed. 276, affirming 57 Ct.Cl. 616.

Termination of lease before expiration of term

Where ferries were leased in 1909 for ten years, and lessor agreed to pay lessee difference between value of equipment at beginning and at termination of lease, if value was greater at termination, and in 1918 government took over operation of ferries, and it was provided that former lease should terminate, and that United States should pay lessee whatever he was entitled to, it was held that equipment was to be valued according to prewar prices in determining amount to which lessee was entitled.—Ferries Co. v. U. S., supra.

11. Wash.—State ex rel. Kitsap County Transp. Co. v. King County, 101 P.2d 327, 3 Wash.2d 392.

Express stipulation respecting termination of prior lease

A contract entered into in 1927 between a county and a transportation company covering ferry service on two routes was not a renewal or extension of a contract entered into in 1921, where 1927 contract provided that it was understood and agreed that contract of 1921 was terminated and at an end as of close of business in 1927.—State ex rel. Kitsap County Transp. Co. v. King County, supra.

12. N.J.—McGregor v. Erie R. Co., 35 N.J.Law 89.
Va.—Patrick v. Ruffner, 2 Rob. 209, 41 Va. 209, 40 Am.D. 740.
25 C.J. p 1060 note 80.

13. N.Y.—People v. Brooklyn Assessors, 19 N.E. 90, 111 N.Y. 505, 2 L.R.A. 148, affirming 47 Hun 383, 14 N.Y.St. 623, 19 Abb.N.Cas. 158.

14. U.S.—Conway v. Taylor's Ex'r, Ky., 1 Black 603, 17 L.Ed. 191.
25 C.J. p 1060 note 81.

15. U.S.—Lonergan v. Mississippi River Bridge Co., C.C.Mo., 5 F. 777, 2 McCrary 451.
Ill.—Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508.

16. Ky.—Shearer v. Prewitt, 189 S.W. 233, 172 Ky. 357.

17. Ky.—McConnell v. Crittenden County, 63 S.W.2d 329, 250 Ky. 359.
Mo.—Carroll v. Campbell, 17 S.W. 884, 108 Mo. 550, affirmed 19 S.W. 809, 110 Mo. 557.
25 C.J. p 1059 note 62.

authority to the contrary,[18] it is generally classed as real property,[19] and should, as shown infra § 17, be conveyed in the manner provided for conveyances of realty. It is an incorporeal hereditament.[20]

The grantee may acquire no property rights under a void ferry franchise.[21]

Contractual character. Broadly speaking a ferry franchise constitutes a contract between the owner and the state.[22] A legislative act in derogation of a former grant by the state is void,[23] but, where the legislature has reserved the right to amend or repeal a ferry franchise or charter, subsequent legislation effecting such change is valid and enforceable.[24] Where the right of repeal is reserved on failure of the grantee to perform certain duties imposed on him, the legislature may repeal the grant without a judicial ascertainment of nonperformance by the grantee, the question whether he has in fact failed, so as to make the repeal effectual, being for the courts.[25]

Where the ferry privilege is a mere license to operate acquired under a general law, no contractual relationship arises,[26] and a license so given will be subject to rights under a franchise where the two are conflicting,[27] even where the license is given by the federal government, and the franchise rights are granted by the state from a point in the state to property belonging to the federal government, provided the ferry licensed by the federal government is not a necessary incident to the execution of government work;[28] but a license, renewed annually, will be as effective to confer exclusive privileges, as long as it is not revoked, as a franchise.[29]

b. Requisites and Construction of Grant

Any language sufficiently evincing the legislative intent may be adequate to confer a ferry franchise irrespective of form. Ambiguities in ferry grants may be construed to effectuate rather than to defeat the grant, but in respect of the privileges given they are ordinarily subject to a strict construction in favor of the government.

Any words which clearly show the intention of the legislature to grant a ferry franchise are sufficient, no set form being necessary.[30] In construing such grants, in cases of ambiguity, a construction will be given which will make the grant effective rather than one which will entirely defeat it, if such a construction is within the reasonable meaning of the terms employed;[31] but as to the privileges conferred, ferry franchises have generally been held to fall within the rule of strict construction against the grantee and in favor of the

As much "property" as chattels or realty

"A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property."
U.S.—Conway v. Taylor's Ex'r, Ky., 1 Black 603, 632, 17 L.Ed. 191.
Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 629, 237 Ky. 806.
Franchise generally as property or contract see the C.J.S. title Franchises § 8, also 26 C.J. p 1019 note 86–p 1023 note 24.
Franchise as property within due process clause see Constitutional Law § 599.
Vested rights of municipalities under constitutional rules see Constitutional Law § 244.

18. S.C.—Morse v. Garner, 32 S.C.L. 514, 47 Am.D. 565.

19. U.S.—Bowman v. Wathen, D.C. Ind., 3 F.Cas.No.1,740, 2 McLean 376.
25 C.J. p 1059 note 66.

20. N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1.

21. La.—Bisso v. Morgan City, 124 So. 308, 169 La. 122.

Arrest for illegal operation not deprivation of "property rights"

Lessee of ferry landing arrested for attempting to operate ferry into city under void franchise was not deprived of property rights since he could acquire none under a void franchise.—Bisso v. Morgan City, supra.

22. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.
25 C.J. p 1059 note 69.

Not a contract with county or municipality

A ferry franchise obtained by entry of a county court's judgment establishing the ferry flows, not from any action on the part of any local governing body, but from the action of the legislature as expressed in the ferry statute; hence, the franchise is not a contract between the owner and the county or municipality, but is one between him and the state.—Tri-State Ferry Co. v. Birney, 31 S.W.2d 932, 235 Ky. 540, appeal dismissed 51 S.Ct. 349, 283 U.S. 868, 75 L.Ed. 1471.

23. Conn.—Hartford Bridge Co. v. East Hartford, 16 Conn. 149.
Contracts to which state is party as within constitutional prohibition against impairment of obligation of contracts see Constitutional Law § 285 et seq.
Revocability of ferry franchise granted municipality as not entitled to protection under contract clause of constitution see Constitutional Law § 303 text and note 99.

24. Minn.—Perrin v. Oliver, 1 Minn. 202.
Or.—Stephens v. Powell, 1 Or. 283.

25. Minn.—Myrick v. Brawley, 23 N.W. 549, 33 Minn. 377.
Conditional reservation of legislative power to amend charters see Constitutional Law § 320 b (3).
Exercise of police power as impairment of franchise see Constitutional Law § 605.

26. Miss.—Sullivan v. Lafayette County, 58 Miss. 790.
License as protected by constitutional provisions prohibiting impairment of contract rights see Constitutional Law § 287.

27. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C 1197.
25 C.J. p 1060 note 76.

28. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, supra.

29. Ark.—Crane v. Jackson, 172 S.W. 890, 116 Ark. 106.

30. S.C.—Stark v. McGowen, 10 S.C.L. 397, 9 Am.D. 712.
25 C.J. p 1062 note 22.

31. Mass.—Proprietors Charles River Bridge v. Proprietors Warren Bridge, 7 Pick. 344, affirmed 11 Pet. 420, 9 L.Ed. 773, 938.
25 C.J. p 1062 note 23.

government,[32] although there is authority holding that the rule of strict construction against the grantee is not applicable to the grant of a ferry franchise, which is never without a consideration.[33]

c. Duration and Extent of Grant

In the absence of limitation by statute, constitution, or the terms of the grant, a grant of a ferry franchise will be construed as in perpetuity; but the right to a ferry franchise arising from riparian ownership is not perpetual but subject to defeat if the public interest subsequently so demands. The grant of a ferry franchise ordinarily extends to two or more termini and includes a two-way operation.

It has been broadly held that in the absence of constitutional or statutory restriction, or a limitation in the grant, a ferry franchise is perpetual,[34] and that under such conditions the franchise will not be void because unlimited as to time.[35] On the other hand, the right to a ferry franchise arising from riparian ownership, which right is rendered effectual by a series of grants for limited periods, is not a right in perpetuity, and despite long continued exercise of such right it may subsequently be defeated by refusal of the public authorities to renew the ferry franchise where it is not in the public interest to do so.[36]

Termini. A grant of a ferry franchise usually describes the ferry to be established as lying between two or more designated points,[37] but this is not essential where it is impracticable to do so.[38] Generality in the description of the termini will not affect the validity of the grant on a petition for certiorari to quash the proceedings of the inferior body making it, while it may be taken advantage of in an action brought for alleged infringement of the franchise.[39]

One-way or both-way ferry. A legislative grant of a ferry franchise across a river from a place on one side to a place on the other side, standing alone and unexplained, will ordinarily be construed to give the right of ferriage across the river between the two places in both directions; but other portions of the grant, and other acts in pari materia, and the actual user under them in connection with the surrounding circumstances may limit the grant to a ferry in one direction only, by showing that such was the legislative intent.[40]

§ 13. —— Exclusiveness of Franchise

a. In general
b. Power to make franchise exclusive

a. In General

The ancient common-law doctrine that a ferry franchise was inherently exclusive does not apply in the United States, where such franchises are deemed exclusive only if made so by express language or necessary implication. In the absence of an exclusive grant, the proper authorities may permit establishment of such additional ferries as public convenience and necessity may require.

At common law a ferry franchise was in its nature exclusive of contiguous competition;[41] but this ancient doctrine of the common law is inapplicable to the local and political institutions of the United States.[42]

Although a licensed ferryman may be protected against competition of a completely unauthorized and unlicensed character,[43] the rule generally prevailing in this country is that a prior ferry franchise will not be considered exclusive of other and authorized competition unless made so by express language or by necessary implication,[44] and that, in the absence of statute, there is no particular limit within which the keeper of a public ferry is secure against the establishment of another public ferry.[45] Where, however, the governing statutes or

32. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108.
25 C.J. p 1062 note 24.

33. N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1.

34. Ky.—Adkins v. Ashland & Ironton Transfer & Ferry Co., 276 S.W. 131, 210 Ky. 532—Willis v. Calhoun, 140 S.W. 199, 145 Ky. 95.

35. Ky.—Adkins v. Ashland & Ironton Transfer & Ferry Co., 276 S.W. 131, 210 Ky. 532.

36. Ark.—Desha v. Independence County Bridge Dist. No. 1, 18 S.W. 2d 337, 179 Ark. 561.

37. Mass.—In re Fay, 15 Pick. 243.

38. Mo.—Capital City Ferry Co. v. Cole, etc., Transp. Co., 51 Mo.App. 228.
25 C.J. p 1062 note 27.

39. Mass.—In re Fay, 15 Pick. 243.

40. N.Y.—Power v. Athens, 2 N.E. 609, 99 N.Y. 592, affirming 26 Hun 282.

41. Fla.—Green v. Ivey, 33 So. 711, 45 Fla. 338.
Ga.—Shorter v. Smith, 9 Ga. 517.
N.C.—Anonymous, 2 N.C. 457.

42. Ga.—State Highway Board v. Willcox, 149 S.E. 182, 168 Ga. 883, reversing Willcox v. State Highway Board, 144 S.E. 214, 38 Ga. App. 373, and conformed to 149 S.E. 432, 40 Ga.App. 241—Hudspeth v. Hall, 36 S.E. 770, 111 Ga. 510—Shorter v. Smith, 9 Ga. 517.

43. La.—Blanchard v. Abraham, 40 So. 379, 115 La. 989.
25 C.J. p 1062 note 35.

44. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108—People's Ferry Co. v. Casco Bay Lines, 115 A. 815, 121 Me. 108.
25 C.J. p 1062 note 36.

In Georgia, under code provisions that no franchise granted by the state shall be held to be exclusive unless plainly and expressly so declared to be in the grant, a ferry franchise granted riparian owners has been held not exclusive in the absence of language plainly and distinctly declaring that it should be exclusive.—State Highway Board v. Willcox, 149 S.E. 182, 168 Ga. 883, reversing Willcox v. State Highway Board, 144 S.E. 214, 38 Ga.App. 373, and conformed to 149 S.E. 432, 40 Ga.App. 241.

45. La.—O'Neill v. Caddo Parish Police Jury, 21 La.Ann. 586.
Tenn.—Guinn v. Eaves, 101 S.W. 1154, 117 Tenn. 524.

the terms of the grant by express language or by necessary implication show such intent, the grant of ferry privileges will be deemed exclusive, as in the case of an exclusive ferry franchise or license for a specified period,[46] and other ferries may not be established within prescribed limits of existing ferries in violation of special acts or general laws protecting the existing ferry against such competition.[47] Such prohibiting acts have no retroactive effect on ferries already established within the prohibited limits,[48] and an exclusive ferry franchise is limited as to time in that it does not survive repeal of the act on which it is founded in the absence of a saving clause.[49] Under laws prohibiting establishment of other ferries within a limited distance, an exception may be made where the public necessities demand other ferries, or in regard to certain localities or conditions, as in the case of ferries located on certain rivers or at or near cities or towns or rendered necessary by the establishment of public highways.[50] Where it is shown that a public highway is established on one shore, but not on the other, the case is brought within the statutory exception.[51]

It has been said that the grant of a ferry franchise by the legislature of a state for a specified period is, unless limited by general law or the terms of the grant, by necessary implication exclusive to the extent of the privileges thus conferred,[52] and that the purpose of statutes forbidding establishment of another ferry within a designated distance of one established by the legislature is to prevent county authorities from establishing another ferry within such proscribed area.[53] Where a granting statute authorizes a given person or his assigns to establish and maintain a ferry for a specified period after a certain date and between specified towns over specified waters, and further provides that no other ferry shall be operated within a given distance of the ferry thus established, the statute will be construed as granting a ferry franchise exclusive in character, but, under a reserved power of revocation in such statutory grant, it will be deemed that the franchise is at the outset an exclusive, vested right to operate a ferry subject to subsequent revocation for adequate cause.[54]

In the absence of an exclusive grant, the legislature or other proper authority may establish as many additional ferries at or near the same place as public convenience and necessity may require.[55] It is for the legislature, or other body vested with jurisdiction to establish the second ferry, to determine whether the public convenience requires a second ferry,[56] and such decision cannot be questioned in a collateral action.[57] The right to operate a ferry over the same route as another ferry depends on express grant and will not be implied.[58] Exclusive ferry privileges, founded on a general legislative act prohibiting the licensing of other ferries within a specified distance of an established ferry, have been held not to invade private rights, or to bestow special privileges, or to interfere with the free right of navigation.[59]

Existing but unauthorized ferry. Despite the protection against competition furnished to legally established ferries, where a ferry is maintained without authority, the mere fact that the operator furnishes ferry service at a given point will not preclude the grant of the application of another to establish a ferry at the same point.[60]

b. Power to Make Franchise Exclusive

The legislature has power to confer an exclusive ferry franchise and under proper legislative sanction an inferior body may grant such a franchise in the exercise of its delegated power. The exercise of the power to grant exclusive ferry franchises is, however, subject to limitations affecting navigable waters and to limitations inherent in the sovereignty of the granting body.

The legislature may, subject to the restrictions mentioned, make the grant of a ferry franchise ex-

46. Ark.—McClintock v. White River Bridge Co., 287 S.W. 163, 171 Ark. 943.

Riparian owner may become entitled to exclusive ferry privileges under license.—McClintock v. White River Bridge Co., supra.

47. Ark.—Finley v. Shemwell, 126 S. W. 717, 94 Ark. 190.
Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C 1197.
25 C.J. p 1063 note 58.

48. N.C.—Robinson v. Lamb, 3 S.E. 579, 129 N.C. 16.

49. U.S.—Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 11 S.Ct. 301, 138 U.S. 287, 34 L.Ed. 967, affirming 11 S.E. 1009, 34 W.Va. 155.

50. Cal.—In re Hanson, 2 Cal. 262.
Tex.—Alabama Ferry Co. v. Leathers, 69 S.W. 117, 30 Tex.Civ.App. 16.
25 C.J. p 1064 note 62.

51. Tex.—Alabama Ferry Co. v. Leathers, supra.

52. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108.

53. Me.—People's Ferry Co. v. Casco Bay Lines, 115 A. 815, 121 Me. 108.

54. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108.

55. Ga.—Hudspeth v. Hall, 36 S.E. 770, 111 Ga. 510—Williams v. Turner, 7 Ga. 348.
25 C.J. p 1062 note 37.

56. Cal.—Fall v. Sutter County, 21 Cal. 237.
25 C.J. p 1063 note 38.

57. Cal.—Fall v. Paine, 23 Cal. 302.

58. Wash.—Anderson Steamboat Co. v. King County, 146 P. 855, 84 Wash. 375.

59. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C 1197.
25 C.J. p 1063 note 41.

60. Ky.—Burnside Land Co. v. Connelly & Lee, 291 S.W. 409, 218 Ky. 346.

clusive.[61] The delegation of authority to an inferior body merely to grant licenses does not carry with it, by implication, a right to confer exclusive privileges;[62] nor is the power to be implied where the delegation of authority is in terms giving the inferior body full jurisdiction over ferries,[63] or where it is empowered to lay out ferries and authorize the construction of them,[64] or to authorize the establishment of such ferries as it may think necessary,[65] or to appoint and settle ferries.[66] The delegation of authority, however, may be construed to give the right to grant exclusive privileges, where the authority delegated is expressed to be the same as that which before belonged to the delegating body,[67] and a power to grant or refuse licenses has been construed to give that right.[68]

Limitations on exercise of power. The grant of an exclusive privilege is always taken subject to the rights of the public on navigable waters,[69] and subject to the right of the federal government to make such improvements in these waters as may be necessary in its regulation of interstate commerce.[70] Statutes granting exclusive ferry franchises have been held inapplicable to preclude the subsequent establishment of free ferries within the competing area by a state agency.[71]

Statutory restrictions as to establishment of a new ferry within a designated distance of one already existing refer only to grants by the same sovereignty,[72] and, as shown supra § 7 c, they cannot prevent the establishment of a ferry by an adjoining state over a boundary river. Ordinarily the authorities of one county may not confer a ferry franchise over boundary waters exclusive of the rights of riparian owners in a different county.[73]

Unauthorized grant of exclusive ferry privileges. A contract purportedly granting one an exclusive ferry franchise is ineffective where governing statutes fail to give the grantor official power to make such a grant.[74]

Where a grant from an inferior body purports to convey an exclusive ferry privilege, and the body may not grant such exclusive privilege, the grant is good to the extent of the right of the inferior body.[75]

§ 14. —— Right to Collect Tolls

Ordinarily the grant of a ferry franchise implies power to collect tolls, but no such implication will be indulged where conditions attached to the grant preclude collection of tolls. The right to collect tolls generally extends to collection from all users other than those expressly agreed to be carried free of charge.

In the absence of contrary conditions attached to the grant of a ferry privilege,[76] the grant of a ferry franchise implies in its very nature the taking of tolls by the grantee,[77] and the right to collect tolls exists as long as the right or duty of operating the ferry continues.[78] The right to col-

61. N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1.

62. Ill.—Gales v. Anderson, 13 Ill. 413.
Mo.—Carroll v. Campbell, 17 S.W. 884, 108 Mo. 550.

63. Miss.—Montjoy v. Pillow, 2 So. 108, 64 Miss. 705—Seal v. Donnelly, 60 Miss. 658—Sullivan v. Lafayette County, 58 Miss. 790.

64. U.S.—Minturn v. Larue, Cal., 23 How. 435, 16 L.Ed. 574.

65. U.S.—Wright v. Nagle, Ga., 101 U.S. 791, 25 L.Ed. 921.

66. N.C.—Barrington v. Neuse River Ferry Co., 69 N.C. 165.

67. N.Y.—Costar v. Brush, 25 Wend. 628.
25 C.J. p 1063 note 54.

68. Iowa.—Burlington & Henderson County Ferry Co. v. Davis, 48 Iowa 133, 30 Am.R. 390.
25 C.J. p 1063 note 55.

69. N.C.—Broadnax v. Baker, 94 N.C. 675, 55 Am.R. 633.
25 C.J. p 1063 note 43.

70. Ill.—Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508, followed in Lonergan v. Mississippi River Bridge Co., C.C.Mo., 5 F. 777, 2 McCrary 45.

71. Ky.—State Highway Commission v. Smith, 62 S.W.2d 1044, 250 Ky. 269.

State highway commission
Statutes prohibiting operation of other ferries within a given distance of an existing ferry do not preclude a state highway commission from establishing a free ferry, as part of a highway, within the prohibited distance of an established ferry, where the statutes authorize such state agency to invade the competitive limits and where its contract with the federal government makes a ferry or bridge at such point prerequisite to receipt of federal aid.—State Highway Commission v. Smith, supra.

72. Iowa.—Weld v. Chapman, 2 Iowa 524.
25 C.J. p 1064 note 59.

73. Tenn.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.
Ferries over boundary waters generally see supra § 7 c.

74. Tenn.—McCrary v. Harrell, supra.

Contract with highway commissioner; power resting in county
Ferry operator's contract with highway commissioner, purportedly granting him exclusive right of operating ferry as link in state highway, is ineffective, since statutes defining commissioner's powers do not divest county courts of their jurisdiction of ferries.—McCrary v. Harrell, supra.

75. N.Y.—Hall v. Minturn, 55 N.Y. 676.

76. Ariz.—Deans v. Coconino County, 17 P.2d 801, 802, 41 Ariz. 253.

Ferry maintained by taxation
Where the power granted a county to establish and maintain a ferry was coupled with the requirement that it be done by taxation, and the ferry was thus made a public charge, the money for its establishment and maintenance coming from the taxpayers, it had no power to collect tolls and, if it did so, was acting ultra vires.—Deans v. Coconino County, supra.

77. Ariz.—Deans v. Coconino County, supra, citing **Corpus Juris.**
25 C.J. p 1060 note 85.

78. Ky.—McCauly v. Givens, 1 Dana 261.

lect toll is a right to collect from all persons using the ferry in crossing,[79] but not from persons crossing in other boats and using the ferry merely in landing,[80] or entitled to free passage because of a reservation in the sale or lease of a ferry franchise,[81] or because of an agreement for free passage entered into between the person claiming the privilege and the ferry owner,[82] with the reservation, however, that a ferryman cannot bind his successors to the performance of such agreement.[83] A ferryman can collect no greater toll than is allowed by statute.[84] Where a statute fixes rates for wagons, a ferryman cannot charge for the contents of a wagon separately from the wagon, although the wagon and contents belong to different persons.[85] Under a statute fixing the rate for vehicles according to size or capacity, and not according to the number of passengers therein, no charge may be made for bona fide passengers crossing in vehicles.[86] Where a passenger is obliged to pay a greater rate than that allowed by law, the excess, if not voluntarily paid, may be recovered.[87]

Collection of tolls by distress. In some states a power of distress to enforce the right to tolls is given to a ferry company, and such a provision has been held to be valid.[88]

§ 15. —— Right to Land and Embark

A ferry franchise ordinarily does not carry with it the right to use landings at places other than public highways, but, in the case of public ferries whose termini are public highways, the franchise usually includes the right to use landings at such points.

As to public ferries at places other than public highways, the legislative grant of the franchise does not of itself confer on the grantee the right of landing and embarking on private property on the shores of the water over which the ferry is operated,[89] nor is such right conferred by a statutory provision that a person operating a public ferry and owning land on one side of a stream shall have the privilege of landing his ferryboat on the opposite shore and of making the landing and road up the bank.[90] In order to render his franchise effective, the grantee of the franchise must acquire the right to use the landing on both sides of the water for the purpose of landing and embarking,[91] but it is not necessary that the ferry owner should secure a title in fee to the land at the landing place, and a statute authorizing the acquirement of landing rights does not impliedly require the ferry owner to acquire the fee thereto.[92] A grant of the right of landing and embarking may be presumed from usage,[93] which may be rebutted by evidence tending to show a permissive use.[94] It has been held that, where a riparian owner who would be a preferred claimant for the franchise fails to apply for it, he waives the right to object to this use of his land by the person to whom the franchise is granted.[95] Under a statute providing that no other ferry line shall make or maintain a landing place at a certain place used by plaintiff without written consent of the utilities commission, but that "nothing herein shall be construed to . . . impair the existing vested rights of any other transportation company," the assignee of the existing, vested rights of another transportation company is protected in its use of such place as much as if it had been directly named as excepted in such statute.[96]

Designation of landing place. The designation of places for ferry landings along river banks within the limits of a town is a function primarily belonging to the town. Ordinarily the town's designation is not subject to judicial control, but, where the town proceeds on an erroneous theory and plainly deviates from its duty in the premises, eq-

79. S.C.—Addison v. Hard, 17 S.C.L. 431.

80. Ala.—Henry v. Turner, 2 Port. 23.
25 C.J. p 1060 note 88.

81. Or.—Stephens v. Knott, 2 Or. 304.

82. Ky.—Potts v. Park, 49 S.W. 1058, 106 Ky. 202, 20 Ky.L. 1774.

83. Ky.—Potts v. Park, supra.
25 C.J. p 1060 note 92.

84. Ark.—Newport Ferry Co. v. Stephens, 209 S.W. 726, 137 Ark. 544—Kelly v. Altemus, 34 Ark. 184, 36 Am.R. 6.
N.Y.—Edmonds v. Abeel, 20 Hun 441.
Ferriage rates see infra § 25.

85. Ark.—Kelly v. Altemus, 34 Ark. 184, 36 Am.R. 6.

86. Ark.—Newport Ferry Co. v. Stephens, 209 S.W. 726, 137 Ark. 544.
25 C.J. p 1060 note 95.

87. N.Y.—Edmonds v. Abeel, 20 Hun 441.
Overcharge as criminal offense see infra § 33.

88. N.C.—State v. Patrick, 14 N.C. 478.

89. Or.—Chapman v. Hood River County, 178 P. 379, 91 Or. 92.
W.Va.—State v. Faudre, 46 S.E. 269, 54 W.Va. 122, 102 Am.S.R. 927, 63 L.R.A. 877, 1 Ann.Cas. 104.

90. Ark.—Lake v. Combs, 104 S.W. 544, 84 Ark. 21, rehearing denied 104 S.W. 1094, 84 Ark. 21.

91. Me.—State v. Wilson, 42 Me. 9.
Pa.—Chess v. Manown, 3 Watts 219—Chambers v. Furry, 1 Yeates 167.
Establishment of public ferry under power of eminent domain see Eminent Domain § 52.

92. Pa.—Douglass' Appeal, 12 A. 834, 118 Pa. 65.
25 C.J. p 1061 notes 7, 8.

93. Ky.—Clark v. White, 5 Bush 353.
Pa.—Bird v. Smith, 8 Watts 434, 34 Am.D. 483.

94. Or.—Chapman v. Dean, 115 P. 154, 58 Or. 475.
25 C.J. p 1061 note 18.

95. Or.—Mills v. Learn, 2 Or. 215.
25 C.J. p 1061 note 19.

96. Me.—People's Ferry Co. v. Casco Bay Lines, 115 A. 815, 121 Me. 108.

uity may grant relief.[97] On a judicial designation of landing places for both ferries, the owner of the previously established ferry is entitled to no further relief, and he may not exclude an additional and competing ferry on the ground of his prior use of the bank as a landing place, or on the ground that he owns the adjacent lots where, under the law of the state, his ownership is subject to a servitude for public use because the lots owned are on the banks of a navigable stream.[98]

Rights of ferry operator as against owner or lessee of uplands and shore lands. The operator of a ferry using certain landings for many years, and eventually granted a license, acquires an interest in the shore land which the law will protect as against a trespasser or wrongdoer, and a private person, charged with notice of such use and of the public's long continued use of the ferry and the highways crossing the shore lands and uplands to the ferry landings when purchasing uplands and later leasing such shore lands as an upland proprietor, cannot interfere with the public use or operation of the ferry. In such a case whatever rights the purchaser may have acquired in the shore land by virtue of his purchase of the upland are subject to the dominant servitude of the easement of the ferry operator which may be extended over the uplands to abutting shore lands leased by such purchaser.[99]

Under deed or lease. The scope of the right to land or embark under a deed or lease depends on the terms of the instrument as construed by the court.[1]

A mere personal license to use a landing place terminates on a transfer by the licensee.[2]

Termini in public highways. As to public ferries whose termini are public highways, the grant of the franchise carries with it whatever rights the public then has or may afterward acquire to the use of the highway for this purpose.[3] Where the public, by dedication or condemnation, has title to the roadbed, the grantee of the ferry franchise has a right to use the highway for landing and embarking,[4] but not to make such a use of the right as to obstruct access to navigable water.[5] Where the landowner retains the fee and the public has only an easement for passage, the decisions are conflicting, some holding that this right of way includes the right to use the highway for landing and embarking,[6] while others hold that this is not so much a public use as a use by the holder of the ferry franchise for his own gain, and that it is an additional burden on the land for which compensation must be made to the owner.[7]

A public wharf may be used as a landing place on payment of lawful wharfage charges,[8] and the right to use a public wharf may be given and limited by statute.[9]

§ 16. Infringement of Franchise

a. In general
b. Character and extent of interference
c. Remedies generally
d. Injunction
e. Damages
f. Penalties and forfeitures

a. In General

Unauthorized establishment of another ferry within competing distance of an existing ferry constitutes an infringement of the franchise of the latter, even though there is no physical interference.

The unauthorized operation of another ferry at the same point as a lawfully established ferry or so near at hand as to divert traffic from the previously established ferry constitutes an infringement of the franchise of the latter,[10] even though there is no physical interference of one ferry with the other,[11] as where the infringement consists in operation of

97. U.S.—Town of Vidalia v. McNeely, La., 47 S.Ct. 758, 274 U.S. 676, 71 L.Ed. 1292, affirming, D.C., McNeely v. Town of Vidalia, 6 F.2d 21, modifying injunction and making permanent 6 F.2d 19.

Failure to accord any landing to established ferry

Where a town assigns a landing place in actual use by an established ferry to a new and competing ferry without assigning any new landing place to the previously established ferry, and is under the same legal obligation to accord a landing place to one ferry as to the other, it violates its duty and equity may afford relief.—Town of Vidalia v. McNeely, supra.

98. U.S.—Town of Vidalia v. McNeely, supra.

99. Wash.—McPherson Bros. Co. v. Buell, 9 P.2d 348, 167 Wash. 391.

1. U.S.—The Harry v. Hollins, D.C. N.Y., 125 F. 430.
Va.—Bonos v. Ferries Co., 75 S.E. 126, 113 Va. 495.
25 C.J. p 1061 note 21.

2. Mo.—Bryant v. West, 219 S.W. 355.

3. Va.—Somerville v. Wimbish, 7 Gratt. 205, 48 Va. 205.

4. Ky.—Clark v. White, 5 Bush 353.
25 C.J. p 1061 note 11.

5. R.I.—Horgan v. Jamestown, 80 A. 271, 32 R.I. 528.
25 C.J. p 1061 note 12.

6. Okl.—Hale v. Record, 176 P. 756.
Or.—Gant v. Drew, 1 Or. 35.
Va.—Patrick v. Ruffner, 2 Rob. 209, 41 Va. 209, 40 Am.D. 740.

7. Iowa.—Prosser v. Wapello County, 18 Iowa 327.

8. W.Va.—State v. Faudre, 46 S.E. 269, 54 W.Va. 122, 102 Am.S.R. 927, 63 L.R.A. 877, 1 Ann.Cas. 104.

9. Cal.—People v. San Francisco & Alameda R. Co., 35 Cal. 606.

10. Fla.—Green v. Ivey, 33 So. 711, 45 Fla. 338.
N.Y.—New York v. New Jersey Steam Boat Nav. Co., 12 N.E. 435, 106 N.Y. 28.
25 C.J. p 1064 notes 64, 66.

11. Wash.—Anderson v. Glenn, 191 P. 792, 112 Wash. 31.

a competing ferry within a distance expressly prohibited by statute.[12] In this class of cases, the remedy may be afforded on the ground that the competing ferry is a private nuisance,[13] and damages are the gist of the action and must be proved.[14]

b. Character and Extent of Interference

Unauthorized establishment of another ferry or bridge within a proscribed or competing distance of an established ferry constitutes an infringement of the latter's franchise; but infringement of a ferry franchise ordinarily may not be shown by use of boats other than ferries, or by use of a ford, and operation of a strictly private ferry is not generally regarded as infringing the franchise of an established public ferry.

A mere casual or slight interference with an existing ferry is not necessarily actionable.[15] Where the statute or grant expressly makes the franchise exclusive within specified territorial limits, any unauthorized operation of a ferry within such limits is an infringement;[16] but, in the absence of any such express provision, there is no fixed rule as to the distance within which a ferry will be protected against unauthorized competition, further than that a rival ferry will not be permitted so near as to result in damage by diversion of traffic.[17]

Within constitutional limitations, the state may authorize establishment of a competitive ferry,[18] or it may make an irrevocable grant of an exclusive ferry franchise which will be protected by the constitution from impairment by subsequent legislation,[19] other than an exercise of the power of eminent domain involving payment of compensation,[20] and establishment of a competing ferry may, under applicable statutes and grants, constitute an infringement of an existing ferry franchise.[21]

Toll and free ferries; private ferries. Where the operation of a ferry would otherwise constitute an infringement of an existing ferry, it is none the less so because it is operated free, since the evil is the same whether tolls are charged or not;[22] but the taking of tolls or compensation may be necessary to constitute a violation of particular statutes, prohibiting only the operation of a ferry for hire,[23] or, as shown infra § 16 f, to warrant the recovery of a statutory penalty for such operation, and the taking of compensation for carriage may be decisive of the question whether defendant is operating a public ferry, and therefore guilty of infringement.[24] In all such cases where the taking of tolls is material, it is sufficient if compensation for carriage is taken either directly or indirectly.[25] As respects private ferries, it is not an infringement for persons to use their own boats within the limits of a ferry franchise in crossing themselves, their families, employees, guests, and occasionally others, where no tolls are charged;[26] but any at-

12. Ky.—Blackwood v. Tanner, 66 S.W. 500, 112 Ky. 672, 23 Ky.L. 1919.
25 C.J. p 1064 note 66.

13. Ill.—Golconda v. Field, 108 Ill. 419.
25 C.J. p 1064 note 67.
Remedies for infringement generally see infra subdivisions c and d of this section.

14. Mass.—Proprietors Charles River Bridge v. Proprietors Warren Bridge, 7 Pick. 344, affirmed 11 Pet. 420, 9 L.Ed. 773, 938.

15. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C 1197.

16. Ark.—Shinn v. Cotton, 12 S.W. 157, 52 Ark. 90—In re Howell, 36 Ark. 466.
Ky.—Burke v. Layoff, 199 S.W. 775, 178 Ky. 588.
La.—Chapelle v. Wells, 4 Mart.,N.S., 426.
25 C.J. p 1064 note 71.

17. Mass.—Proprietors Charles River Bridge v. Proprietors Warren Bridge, 7 Pick. 344, affirmed 11 Pet. 420, 9 L.Ed. 773.
25 C.J. p 1064 note 72.

18. Ala.—Dyer v. Tuskaloosa Bridge Co., 2 Port. 296, 27 Am.D. 655.
Va.—Snidow v. Giles County, 96 S.E. 810, 123 Va. 578.

19. U.S.—Proprietors Charles River Bridge v. Proprietors Warren Bridge, Mass., 11 Pet. 420, 9 L.Ed. 773, affirming 7 Pick. 344.

20. La.—Blanchard v. Abraham, 40 So. 379, 115 La. 989.

21. Ill.—Golconda v. Field, 108 Ill. 419.
N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1—New York v. New York & Staten Island Ferry Co., 40 N.Y.Super. 232.

22. Cal.—Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. D. 535.
25 C.J. p 1065 note 91.

23. Ark.—Shinn v. Cotton, 12 S.W. 157, 52 Ark. 90.

24. La.—Blanchard v. Abraham, 40 So. 379, 115 La. 989—Chiapella v. Brown, 14 La.Ann. 189—Chapelle v. Wells, 4 Mart.,N.S., 426.

Directing payment to plaintiff
Where partners, dealing in livestock as their regular business, in sporadic instances when plaintiff ferry operator's services were not available, transported persons not within the category of those whom the partners had a right to transport and directed them to pay ferriage fee to plaintiff, across a river within one mile of plaintiff's ferry by a boat acquired for the partners' own necessities, plaintiff was not entitled to an injunction restraining partners from operating their boat on ground that such operation constituted an "infringement of plaintiff's exclusive public ferry franchise."—Dunbar v. Johnson, 162 S.W.2d 25, 290 Ky. 581.

25. Ark.—Shemwell v. Finley, 114 S.W. 705, 88 Ark. 330.
Ga.—Hudspeth v. Hall, 36 S.E. 770, 111 Ga. 510.
La.—Fenner v. Watkins, 16 La. 204—Chiapella v. Brown, 14 La.Ann. 189.
25 C.J. p 1066 note 95.

26. Ky.—Dunbar v. Johnson, 162 S.W.2d 25, 26, 290 Ky. 581, quoting **Corpus Juris.**
25 C.J. p 1066 note 96.

Private ferry for family and friends
While a number of persons may not combine and hire a common ferryman, share the expense, and thus establish for themselves a ferry, nevertheless a private individual may, at any place along the river, keep his private boat and ferry his family, servants, and goods, and occasionally lend his boat to another or ferry with himself a friend, in both cases without compensation.—Dunbar v. Johnson, 162 S.W.2d 25, 290 Ky. 581.

tempt to operate a private ferry within such limits for the accommodation of any considerable portion of the general public is an infringement.[27] Where a competing ferry is ostensibly private but in reality public, the courts will look through the subterfuge and enjoin unauthorized competition.[28]

Boats other than ferries. The use of vessels on navigable waters for purposes of commerce is not an infringement of a ferry franchise,[29] but such vessels have no right to use the ferry landing for the purpose of receiving and discharging freight and passengers,[30] or to use their boats to make regular ferry trips in competition with the lawfully established ferry.[31]

Bridges. Within constitutional limitations, the legislature may authorize construction of a bridge competing with an established ferry,[32] and any damage thereby caused to the ferry is damnum absque injuria.[33] In this connection it has been said that ferry rights are exclusive only as against competing ferries and not as against bridges unless expressly made so,[34] and held that, where there is a duly licensed and authorized ferry, the public authorities may also authorize a bridge in the same locality where the public welfare so demands, notwithstanding such bridge will interfere with the business and traffic of the ferry;[35] but, where the state has granted an irrevocable and exclusive franchise to a ferry, the ferry franchise may not be infringed by a bridge attempted to be authorized or operated in violation of the prior grant of exclusive ferry privileges,[36] and a competitive bridge constitutes an infringement of a ferry franchise where prohibited by statute.[37] Apart from any express statutory prohibition, however, an unauthorized competitive bridge has been held to infringe a ferry franchise,[38] and damages may be recovered for a physical interference with a ferry by building a bridge structure on the landing place and across the line of the ferry, thereby destroying the business of the ferry.[39] Where operation of a bridge would otherwise constitute an infringement of a previously established ferry, it is none the less so because it is operated without charging tolls.[40]

27. Ky.—Dunbar v. Johnson, 162 S.W.2d 25, 26, 290 Ky. 581, quoting **Corpus Juris.**
25 C.J. p 1066 note 97.

28. Wash.—Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n, 30 P.2d 233, 176 Wash. 486.

29. U.S.—Conway v. Taylor, Ky., 1 Black 603, 17 L.Ed. 191.
N.C.—Broadnax v. Baker, 94 N.C. 675, 55 Am.R. 633.
25 C.J. p 1066 note 98.

30. Ky.—Shearer v. Prewitt, 189 S.W. 233, 172 Ky. 357.

31. N.J.—Midland Terminal & Ferry Co. v. Wilson, 28 N.J.Eq. 537.
N.Y.—New York v. Starin, 12 N.E. 631, 106 N.Y. 1—New York v. Longstreet, 64 How.Pr. 30.

32. U.S.—Larson v. State of South Dakota, 49 S.Ct. 196, 278 U.S. 429, 73 L.Ed. 441, affirming Larson v. State, 215 N.W. 880, 51 S.D. 561.
N.H.—Proprietors Piscataqua Bridge v. New Hampshire Bridge, 7 N.H. 35.
25 C.J. p 1065 note 80.

Protection only against competing ferries

Under a statute providing that, when any ferry lease has been granted, no other lease shall be granted within a specified distance from the place described, in the application for a ferry lease, as the ferry landing, the intent is to prohibit establishment of competing ferries within such distance and the state's erection of a bridge within the prohibited distance is not a violation of the statute or otherwise unlawful.—Larson v. State, 215 N.W. 880, 51 S.D. 561, affirmed Larson v. State of South Dakota, 49 S.Ct. 196, 278 U.S. 429, 73 L.Ed. 441.

33. Ala.—Dyer v. Tuskaloosa Bridge Co., 2 Port. 296, 27 Am.D. 655.
W.Va.—Mason v. Harper's Ferry Bridge Co., 17 W.Va. 396.

34. Wash.—State v. Superior Court in and for Douglas County, 252 P. 906, 142 Wash. 284, error dismissed 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335, and followed in State v. Superior Court in and for Okanogan County, 252 P. 910, 142 Wash. 696, error dismissed State of Washington ex rel. McPherson Bros. Co. v. Superior Court of State of Washington in and for Douglas County, 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335.

35. Wash.—State v. Superior Court in and for Douglas County, 252 P. 906, 142 Wash. 284, error dismissed 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335, and followed in State v. Superior Court in and for Okanogan County, 252 P. 910, 142 Wash. 696, error dismissed State of Washington ex rel. McPherson Bros. Co. v. Superior Court of State of Washing in and for Douglas County, 47 S.Ct. 769, 274 U.S. 726, 71 L.Ed. 1335.

36. Mass.—Proprietors Charles River Bridge v. Proprietors Warren Bridge, 7 Pick. 344, affirmed 11 Pet. 420, 9 L.Ed. 773.
W.Va.—Mason v. Harper's Ferry Bridge Co., 17 W.Va. 396.

37. Cal.—Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am.D. 535.
La.—Blanchard v. Abraham, 40 So. 379, 115 La. 989.
25 C.J. p 1065 note 87.

38. Ala.—Gates v. McDaniel, 2 Stew. 211, 19 Am.D. 49.
Cal.—Menzel Estate Co. v. Redding, 174 P. 48, 178 Cal. 475.
W.Va.—Mason v. Harper's Ferry Bridge Co., 17 W.Va. 396.

39. Pa.—Riverton Ferry Co. v. McKeesport & D. Bridge Co., 36 A. 186, 179 Pa. 466—Bridgewater Ferry Co. v. Sharon Bridge Co., 22 A. 1039, 145 Pa. 404.

40. La.—Blanchard v. Abraham, 40 So. 379, 115 La. 989.
25 C.J. p 1065 note 91.

Free municipal bridge

A public corporation, as a city, exercises discretionary power in deciding to erect a bridge, which discretion may not be imposed on an adjoining county or municipality to which the bridge is to run, and it follows that, where a city has built a free bridge extending outside its own limits and into an adjoining county or municipality, and where construction of such bridge destroys the value of a ferry franchise granted by the county, in a suit by the ferry owner for damages, the city may not escape liability on the plea that it had made a finding of public necessity of the bridge where the county did not join in such finding.—Menzel Estate Co. v. City of Redding, 174 P. 48, 178 Cal. 475.

Whether or not a ferry constitutes a violation of an existing exclusive bridge franchise has been considered in Bridges §§ 29, 30.

Fords. Fording, or showing others a ford, is not an infringement, although it impairs the income of the ferry.[41]

Railroads. A railroad authorized to operate a ferry as a connecting link in its road may use it to transport its own freight and passengers without infringing the franchise of a regular ferry at the same place,[42] but it cannot use its boats to carry on a regular ferry business.[43]

Federal government. The United States may, in the exercise of its inherent powers of sovereignty, transport its employees, notwithstanding the existence of any exclusive ferry franchise, but its employees may not combine to maintain a ferry which interferes with an existing ferry franchise.[44]

c. Remedies Generally

On infringement of his rights a ferry operator may have relief by appropriate remedy, as by injunction or suit for damages.

A ferry operator whose rights have been infringed is entitled to relief even if he has theretofore exacted unreasonable charges from the public,[45] and, as shown in following subdivisions of this section, his remedy may be by injunction or by suit for damages.

d. Injunction

(1) In general
(2) Pleading and evidence
(3) Decree

(1) In General

Injunction is a proper remedy to protect one in the enjoyment of his ferry franchise where the legal remedy is inadequate, but plaintiff must have right or title to the ferry before he may enjoin interference therewith. A defendant may successfully interpose the defense that plaintiff has grossly neglected his duties under the franchise or been guilty of inequitable conduct precluding relief.

Injunction is a proper remedy to protect a party in the enjoyment of a ferry franchise, the equity jurisdiction resting on the ground of its necessity to avoid a multiplicity of suits and to afford adequate protection to plaintiff's property in his franchise.[46] An injunction may be denied where, under the circumstances of the particular case, the legal remedy is adequate,[47] or where the granting of an injunction would be futile.[48]

Right to maintain suit. Plaintiff must have a right or title to his ferry before he can maintain a bill to enjoin an interference with it;[49] but long actual use and enjoyment of ferry privileges has been held a sufficient title to support an injunction against one operating without authority.[50] By the weight of authority it is not necessary that the franchise be exclusive to entitle the owner to enjoin an infringement,[51] although in some courts an injunction has been refused because the franchise of complainant was not exclusive.[52]

The owner of a competing ferry is a party in interest within the meaning of statutory provisions limiting the right to seek an injunction of establishment of a ferry to a "party in interest."[53]

Defenses. A franchise, having been granted by

41. Ark.—Hunter v. Moore, 44 Ark. 184, 51 Am.R. 589.
25 C.J. p 1065 note 90.

42. U.S.—New York v. New England Transfer Co., C.C.N.Y., 18 F.Cas. No.10,197, 14 Blatchf. 159.
25 C.J. p 1067 note 2.

43. Conn.—Fitch v. New Haven, N. L. & S. R. Co., 30 Conn. 38.
N.Y.—Aikin v. Western R. Corp., 20 N.Y. 370, reversing 30 Barb. 305.

44. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C 1197.

45. U.S.—McNeely v. Town of Vidalia, D.C.La., 6 F.2d 21, modifying and making injunction permanent 6 F.2d 19, affirmed, C.C.A., Town of Vidalia v. McNeely, 47 S. Ct. 758.

Remedy accorded only to certain cases under statute
It is only to a ferry established and licensed by county commissioners that Rev.St. c 27 § 4 gives remedy against unauthorized competition.—People's Ferry Co. v. Casco Bay Lines, 115 A. 815, 121 Me. 108.
Plaintiff as denied relief by injunction where guilty of gross neglect of duty or other inequitable conduct see infra subdivision d (1) of this section.

46. Ill.—Golconda v. Field, 108 Ill. 419.
Kan.—Walker v. Armstrong, 2 Kan. 198.
N.D.—Patterson v. Wollman, 67 N.W. 1040, 5 N.D. 608, 33 L.R.A. 536.
25 C.J. p 1067 note 7.

47. Miss.—Blewitt v. Vaughn, 6 Miss. 418.
25 C.J. p 1067 note 8.

48. Tenn.—Levisay v. Delp, 9 Baxt. 415.
25 C.J. p 1067 note 9.
Previous practice of making exorbitant charges see supra subdivision c of this section.

49. Cal.—Norris v. Lapsley, 5 Cal. 47.
25 C.J. p 1067 note 11.

Where right of plaintiff is doubtful, injunction may be denied.—Minturn v. Larue, C.C.Cal., 17 F.Cas.No. 9,646, McAll. 370, affirmed 23 How. 435, 16 L.Ed. 574.

50. Ky.—Davis v. Connolly, 46 S.W. 679, 104 Ky. 87, 20 Ky.L. 411.

51. Tex.—Tugwell v. Eagle Pass Ferry Co., 9 S.W. 120, 13 S.W. 654, 74 Tex. 480.
25 C.J. p 1067 note 13.

52. Iowa.—McEwen v. Taylor, 4 Greene 532.
Tex.—Butt v. Colbert, 24 Tex. 355.

53. U.S.—Claiborne-Annapolis Ferry Co. v. U. S., App.D.C., 52 S.Ct. 440, 285 U.S. 382, 76 L.Ed. 808.

Ferry twenty miles distant
Operator of competing ferry some twenty miles distant is "party in interest," entitled to bring suit to enjoin construction and operation of ferry by interstate railroad pursuant to certificate of public convenience and necessity from interstate com-

competent authority, is not subject to collateral attack, by way of defense, in a suit for its infringement.[54] Defendant has no standing to assert a forfeiture of plaintiff's franchise.[55] Plaintiff may be denied relief where he has so grossly neglected his duty as to make the establishment of another ferry a public necessity,[56] or where he has been guilty of using unfair means to divert traffic from defendant's licensed ferry,[57] or where he has been guilty of laches.[58] The right to an injunction is not defeated by the expiration of a ferry owner's license pendente lite where his failure to get a renewal is due to the incompetency or refusal of the authorities to act in the premises.[59] A license improperly granted to defendant to operate a ferry within a prohibited distance of plaintiff's previously licensed ferry is no bar to an injunction; the order granting such license is not binding on plaintiff and may be collaterally impeached;[60] but a valid and subsisting ferry franchise issued to defendant may afford valid ground of defense to plaintiff's suit for injunction, even though such franchise has been granted after the suit was brought.[61]

(2) Pleading and Evidence

Under the general rules of pleading and proof applicable to injunction suits, which control in suits for injunction sought to protect a ferry franchise, plaintiff should allege and prove all facts essential to his cause of action, such as establishment of his own ferry and compliance with conditions precedent to its operation.

The bill must allege a compliance with the conditions authorizing plaintiff to operate his ferry,[62] and that he has established his ferry and is offering his services to the public,[63] and all the facts necessary to show that defendant has violated or threatens to violate plaintiff's rights.[64] The bill must also allege facts showing that plaintiff's remedy at law is inadequate.[65] Where the right to an injunction depends on plaintiff's franchise being exclusive, the bill must allege that such franchise is exclusive,[66] but, where the act complained of is a trespass on plaintiff's lands, such allegation is not necessary.[67]

Evidence. Proof of the repeated issuance of annual licenses by the clerk of the county court is sufficient to make out a prima facie case of the court's establishment of a ferry.[68]

(3) Decree

A decree of injunction may be construed as inoperative after abandonment of the ferry which it protected against interference. Only the federal government may complain that such a decree invades federal rights in being directed against a competing ferry operating to a point within a federal reservation.

An injunction in broad general terms will be construed as not operative after plaintiff's ferry, which it protects, has been abandoned by the owner or discontinued by order of court.[69] Where a state court injunction forbids operation of a competing ferry between a point within a state and a point within a federal government reservation, no one but the federal government may complain that such injunction constitutes an invasion of federal rights.[70]

e. Damages

(1) In general
(2) Parties
(3) Pleading and proof
(4) Amount of recovery

(1) In General

A ferry operator may recover damages for impairment of his franchise in an appropriate action, and ordinarily misconduct of plaintiff warranting forfeiture of his franchise affords no defense for damages already accrued.

An invasion of a ferry right is a nuisance, and the party aggrieved has a remedy at law in an action on the case for the disturbance,[71] except in jurisdictions where both the right and the remedy are purely statutory, in which case, in accordance with the general rule, as explained in Actions § 6, the statutory remedy is exclusive, and a common-

merce commission.—Claiborne-Annapolis Ferry Co. v. U. S., supra.

54. Ky.—Owens v. Roberts, 6 Bush 608.
25 C.J. p 1067 note 15.

55. Ind.—New Albany & S. R. Co. v. Huff, 19 Ind. 315.
25 C.J. p 1067 note 16.

56. Ark.—Crane v. Jackson, 172 S.W. 890, 116 Ark. 100.
25 C.J. p 1068 note 21.

57. Ala.—Hill v. Averett, 27 Ala. 484.

58. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C, 1197.
25 C.J. p 1068 note 28.

59. Cal.—Chard v. Stone, 7 Cal. 117.

60. Ark.—Finley v. Shemwell, 126 S.W. 717, 94 Ark. 190.
25 C.J. p 1068 note 25.

61. Tenn.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.
Defendant's franchise held not suspended by writs of certiorari and supersedeas under prevailing facts.—McCrary v. Harrell, supra.

62. Mich.—Willard v. Forsythe, 2 Mich.N.P. 190.
25 C.J. p 1068 note 26.

63. Kan.—Walker v. Armstrong, 2 Kan. 198.

64. Iowa.—McEwen v. Taylor, 4 Greene 532.

65. N.C.—Long v. Merrill, 4 N.C. 549, 7 Am.D. 700.

66. Tex.—Butt v. Colbert, 24 Tex. 355.

67. Ky.—Wilson v. Sullivan, 77 S.W. 193, 25 Ky.L. 1110, distinguishing Owens v. Lockwood, 83 Ky. 266.

68. Ark.—Finley v. Shemwell, 126 S.W. 717, 94 Ark. 190.

69. Ark.—Finley v. Shemwell, supra.

70. Cal.—Vallejo Ferry Co. v. Solano Aquatic Club, 131 P. 864, 165 Cal. 255, Ann.Cas.1914C, 1197.

71. Ill.—Golconda v. Field, 108 Ill. 419.

law action for damages will not lie,[72] unless the statute expressly authorizes such an action.[73] In other jurisdictions the statutory remedy is cumulative and not exclusive of a common-law action for damages,[74] and counts on both the common-law and statutory liabilities may be joined in the same declaration.[75] The mere possession of an established ferry has been held sufficient to sustain an action for infringement of it.[76]

Impairment by bridge. Although a ferry company may not secure damages for impairment of its franchise by a bridge in condemnation proceedings by the bridge company, it might recover such damages in an independent action.[77]

Defenses. It is no defense to an action for damages that plaintiff has been guilty of conduct authorizing the forfeiture of his franchise.[78] The judgment establishing the ferry cannot be attacked by way of defense;[79] but it is a good defense that defendant's ferry is duly authorized by a competent tribunal.[80]

(2) Parties

The proprietor of a ferry is the proper party plaintiff in a suit for damages for infringement of the franchise, and joint proprietors may maintain a joint action.

The proprietor of the ferry who is entitled to the tolls is the proper party plaintiff.[81] Where a license for operating a ferry is issued to two persons jointly, they may maintain a joint action for damages for infringement.[82]

(3) Pleading and Proof

Under the general rules governing pleading and proof, which apply in actions for damages for infringement of a ferry franchise, complainant should allege the facts showing his cause of action, such as his authority to operate the ferry and receipt of tolls, and should prove essential matters of which the court cannot take judicial notice, such as a private act establishing the ferry.

The complaint must allege facts, not conclusions of law,[83] showing plaintiff's authority to operate his ferry,[84] and to collect tolls.[85] In an action by a lessee it must be alleged that the lessor was owner of the franchise and had the right to lease it to plaintiff.[86] It is not necessary to allege ownership of the soil,[87] or to refer to the statute under which the action is brought.[88] The complaint must allege facts to show that defendant collected tolls without lawful authority, where the collection of tolls is necessary or material to the cause of action,[89] or that defendant operated the ferry other than for his personal use.[90]

Evidence. Private acts creating or establishing ferries must be proved, as the courts cannot take judicial notice of such acts.[91] Where plaintiff's ownership has been settled by a former appeal, he is not bound to show ownership at the time of the trial.[92] It is sufficient for plaintiff to show diminution in the receipts of his ferry, and the use of the prohibited ferry by the public, for the law will presume then that damage has resulted.[93]

(4) Amount of Recovery

Damages for infringement of a ferry franchise may be measured by the amount of tolls lost as a result of the infringement and any physical injury which may have been done. Where plaintiff's landings are unsafe, the damages may, it has been held, be reduced by the amount required to make them safe, in an action for infringement caused by construction of a competing bridge.

The measure of damages for the infringement of a ferry franchise is ordinarily the amount of

72. N.Y.—Almy v. Harris, 5 Johns. 175.
25 C.J. p 1068 note 39.

73. Me.—Peru v. Barrett, 60 A. 968, 100 Me. 213, 109 Am.S.R. 494, 70 L.R.A. 567.
Mo.—Carroll v. Campbell, 19 S.W. 809, 110 Mo. 557.

74. Ark.—Shinn v. Cotton, 12 S.W. 157, 52 Ark. 90.
25 C.J. p 1068 note 41.

75. Ark.—Crane v. Jackson, 188 S.W. 1188, 125 Ark. 396.
25 C.J. p 1068 note 42.

76. Ill.—Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508.
25 C.J. p 1068 note 43.

77. Wash.—Okanogan-Douglas Inter-County Bridge Co. v. State, 266 P. 724, 147 Wash. 454, certiorari denied McPherson Bros. Co. v. Okanogan-Douglas Inter-County Bridge Co., 49 S.Ct. 93, 278 U.S. 571, 73 L.Ed. 512.

78. Mo.—Capital City Ferry Co. v. Cole & Callaway Transp. Co., 51 Mo.App. 228.
25 C.J. p 1069 note 44.

79. Ky.—Hatten v. Turman, 97 S.W. 770, 98 S.W. 1000, 123 Ky. 844, 30 Ky.L. 194, 382.

80. Ind.—Conner v. Paxson, 1 Blackf. 168.

81. Me.—Peru v. Barrett, 60 A. 968, 100 Me. 213, 109 Am.S.R. 494, 70 L.R.A. 567.
25 C.J. p 1069 note 50.

82. Ky.—Blackwood v. Tanner, 66 S.W. 500, 112 Ky. 672, 23 Ky.L. 1919.

83. Ky.—Owens v. Lockwood, 83 Ky. 266.

84. Ark.—Hanger v. Little River Junction R. Co., 11 S.W. 965, 52 Ark. 61.
Cal.—Hanson v. Webb, 3 Cal. 236.
25 C.J. p 1069 note 54.

85. Ky.—Owens v. Lockwood, 83 Ky. 266, 7 Ky.L. 193.

86. Ky.—Wilson v. Sullivan, 77 S.W. 193, 25 Ky.L. 1110—Owens v. Lockwood, 83 Ky. 266, 7 Ky.L. 193.

87. Va.—Patrick v. Ruffner, 2 Rob. 209, 41 Va. 209, 40 Am.D. 740.

88. Me.—Peru v. Barrett, 60 A. 968, 100 Me. 213, 109 Am.S.R. 494, 70 L.R.A. 567.

89. Ark.—Hanger v. Little Rock Junction R. Co., 11 S.W. 965, 52 Ark. 61.
Cal.—Hanson v. Webb, 3 Cal. 236.

90. Cal.—Hanson v. Webb, 3 Cal. 236.

91. N.C.—Carrow v. Washington Toll-Bridge Co., 61 N.C. 118.

92. W.Va.—Mason v. Harper's Ferry Bridge Co., 20 W.Va. 223.

93. Ky.—Hatten v. Turman, 97 S.W. 770, 98 S.W. 1000, 123 Ky. 844, 30 Ky.L. 194, 382.

tolls lost to the owners by diminution in the number of customers using the ferry,[94] and evidence of the income derived in former years is competent to show the extent of the losses;[95] but, where it is shown that defendant also used unwarrantable means to divert the travel from plaintiff's ferry, defendant's clear gains can be made the measure of damages.[96] To the amount of tolls lost by diminution in number of customers may also be added damages for obstruction to the landing where this occurs, the measure being the diminution in value of the landing place property caused by the obstruction.[97] In estimating damages for infringement of a ferry franchise the franchise should ordinarily be considered as permanent,[98] it not being permissible to take into consideration the possibility that the legislature may repeal the law under which plaintiff is enjoying his ferry privileges,[99] but no recovery can be had for any time during which it is not shown that plaintiff had a license.[1] A ferry franchise, made valueless by a free bridge constructed by a city across the river without participation of the county authorities on the other side, was not a divisible entity, and the owners could recover their entire damages from the city.[2] Where plaintiff's landings are not safe and convenient, his damages for injuries to his ferry franchise caused by construction and operation of a bridge may be reduced by such an amount as would be necessary to put them in such condition,[3] but they cannot be reduced on the ground that plaintiff was not the owner of the land at the landing place, but a trespasser there, defendant not being entitled to benefit from this fact.[4]

f. Penalties and Forfeitures

Under statutes the owner of a duly established ferry may become entitled to recover a penalty or to take the boat of his unauthorized competitor for infringement of his franchise, although under other statutes the penalty is not available as a remedy to the injured proprietor.

Under applicable statutory provisions the owner of an authorized and established ferry may become entitled to recovery of a penalty for infringement of his franchise,[5] and statutory remedies, as explained supra subdivision e (1) of this section, may be exclusive in character. Under other statutes the penalty is not available as a remedy for the private wrong to an established ferry.[6]

Free and toll ferries. Under some statutes the penalty may be recovered only where defendant's ferry was operated for pay; not where it was free.[7]

Forfeiture of the boat used in operating an unlicensed ferry within a prohibited distance of an authorized ferry to the proprietor of such authorized ferry has been provided for as a statutory remedy.[8] A judicial proceeding to declare the forfeiture is necessary.[9]

§ 17. Transfer or Lease of Franchise or Ferry

a. In general
b. Mode and sufficiency of transfer
c. Transfer of ferry rights appurtenant to land

a. In General

A ferry franchise is ordinarily regarded as transferable unless made a personal trust or otherwise restricted as to transfer by provisions of statute or grant.

Subject to such regulations as may be imposed by statute or the terms of the grant, a ferry franchise is ordinarily regarded as transferable,[10] as in the case of a transfer made with consent of the proper authorities,[11] or under express statutory authori-

94. Ky.—Hatten v. Turman, 97 S.W. 770, 98 S.W. 1000, 123 Ky. 844, 30 Ky.L. 194, 382—Blackwood v. Tanner, 66 S.W. 500, 111 Ky. 672, 23 Ky.L. 1919.

95. Ky.—Blackwood v. Tanner, supra.
N.J.—Columbia Delaware Bridge Co. v. Geisse, 38 N.J.Law 39, affirmed 38 N.J.Law 580.

96. S.C.—Stark v. McGowen, 10 S.C.L. 397 note.
25 C.J. p 1069 note 74.

97. Pa.—Pittsburgh & L. E. R. Co. v. Jones, 2 A. 410, 111 Pa. 204, 56 Am.R. 260.

98. N.J.—Columbia Delaware Bridge Co. v. Geisse, 38 N.J.Law 39, affirmed 38 N.J.Law 580.
W.Va.—Mason v. Harper's Ferry Bridge Co., 20 W.Va. 223.

99. W.Va.—Mason v. Harper's Ferry Bridge Co., supra.

1. Mo.—Carroll v. Campbell, 19 S.W. 809, 110 Mo. 557.

2. Cal.—Menzel Estate Co. v. Redding, 174 P. 48, 178 Cal. 475.

3. W.Va.—Mason v. Harper's Ferry Bridge Co., 20 W.Va. 223.
25 C.J. p 1070 note 80.

4. W.Va.—Mason v. Harper's Ferry Bridge Co., supra.

5. Ark.—Munn v. Shults, 197 S.W. 570, 130 Ark. 291.
25 C.J. p 1070 note 83.
Penalties for violation of regulations see infra § 32.

6. La.—Miles v. Craig, 3 La.Ann. 635.
25 C.J. p 1070 note 85.

7. Ark.—Crane v. Jackson, 188 S.W. 1188, 125 Ark. 396—Shinn v. Cotton, 12 S.W. 157, 52 Ark. 90.
25 C.J. p 1066 note 93.

8. Ill.—Gear v. Bullerdick, 34 Ill. 74—Lombard v. Cheever, 8 Ill. 469.

9. Ill.—Gear v. Bullerdick, 34 Ill. 74.

10. Cal.—Menzel Estate Co. v. Redding, 174 P. 48, 178 Cal. 475, overruling earlier California decisions.
Wash.—State v. King County, 69 P. 78, 29 Wash. 239.
25 C.J. p 1070 note 91.

11. Or.—Hackett v. Multnomah R. Co., 6 P. 659, 12 Or. 124, 53 Am.R. 327.
S.D.—Nixon v. Reid, 67 N.W. 57, 8 S.D. 507, 32 L.R.A. 315.
25 C.J. p 1070 note 93.

ty,[12] which latter transfers should be effected in compliance with statutory regulations governing the same.[13] A ferry franchise or license, however, may not be transferred by operation of law or by voluntary act in violation of statutory provisions in effect making such franchise or license a trust personal to the recipient.[14] In any case the right of the transferee to exercise the right and privileges of the franchise can be questioned only by the state, and cannot be collaterally attacked.[15]

Municipal lease. It has been held that a municipal corporation authorized to maintain a ferry, or charged with the duty of doing so, may lease it to a private individual;[16] but there is authority to the contrary.[17] Such a lessee is an independent contractor and not a public officer.[18]

b. Mode and Sufficiency of Transfer

A ferry franchise should be conveyed by deed, but a sale without a deed may pass an equitable title.

Ferry franchises can be conveyed only by deed,[19] but, where the franchise, including boat and appurtenances, is sold without a conveyance, the price paid and possession taken, an equitable title passes.[20]

c. Transfer of Ferry Rights Appurtenant to Land

Ferry rights may be so far appurtenant to riparian ownership of land as to descend with it. Where the right to a public ferry is appurtenant, a conveyance of the land, with its appurtenances, passes the ferry rights, but it is otherwise where ferry rights are independent of the land. The authorities disagree respecting the right to convey land or ferry rights separately where the latter are appurtenant to the former.

A ferry franchise may be appurtenant to the freehold so as to descend with it.[21] Where the right to a public ferry is annexed to a tract of land as appurtenant thereto, a conveyance of the land, with its appurtenances, passes the ferry;[22] but the rule is otherwise where the ferry rights are independent of the land.[23] A lease of ferries and all other property of the lessors now used "or subject to be used," for the uses and purposes of such ferries, includes land liable to be used for ferry purposes, although not already actually so used.[24] A lease of ferries to a railroad, reserving to the lessor a percentage of the gross receipts, gives to the lessor out of the receipts for through tickets including ferry and railroad transportation charges a percentage only on the gross receipts after making a reasonable allowance to the railroad for its railroad transportation charges.[25]

Separate conveyance of land and appurtenant ferry rights. Where ferry rights are appurtenant to the soil of riparian owners, a reservation of the ferry right in a grant of the fee, or a grant of the ferry right without also granting the fee, has been held valid,[26] although there is authority to the contrary.[27]

§ 18. Termination and Renewal of Franchise

a. Termination of franchise in general
b. Abandonment or forfeiture of franchise
c. Proceedings for forfeiture or discontinuance
d. Renewal of franchise

12. Wash.—State v. King County, 69 P. 1106, 29 Wash. 359.
25 C.J. p 1070 note 90 [a], [d].

13. Ky.—Brooker v. Maysville & B. S. R. Co., 83 S.W. 117, 119 Ky. 137, 26 Ky.L. 1022.
25 C.J. p 1070 note 90 [b], [c].

14. Or.—Knott v. Frush, 2 Or. 237.
Va.—Roper v. McWhorter, 77 Va. 214.
25 C.J. p 1070 note 92.

15. Idaho.—Evans v. Kroutinger, 72 P. 882, 9 Idaho 153, 2 Ann.Cas. 691.
25 C.J. p 1071 note 94.

16. Conn.—Rocky Hill v. Hollister, 22 A. 290, 59 Conn. 434.
Wash.—State v. King County, 69 P. 1106, 29 Wash. 359.

17. Va.—Roper v. McWhorter, 77 Va. 214.

18. Conn.—Rocky Hill v. Hollister, 22 A. 290, 59 Conn. 434.
25 C.J. p 1071 note 97.

19. Ill.—Gunterman v. Peo., 28 N.E. 1067, 138 Ill. 518—Dundy v. Chambers, 23 Ill. 369.
25 C.J. p 1071 note 98.

20. Ill.—Mississippi River Bridge Co. v. Lonergan, 91 Ill. 508, followed in Lonergan v. Mississippi River Bridge Co., C.C.Mo., 5 F. 777, 2 McCrary 45.

21. U.S.—Stoops' Estate, 14 Pittsb. Leg.J.,N.S., 34.

In Kentucky the right to operate a ferry on the Ohio River is a franchise incident to the riparian freehold and passes with the title to the latter.—Walker v. Trail, 74 S.W.2d 345, 255 Ky. 336—McConnell v. Crittenden County, 63 S.W.2d 329, 250 Ky. 359—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806—Lytle v. Breckenridge, 3 J.J.Marsh. 663.

22. N.C.—State v. Willis, 44 N.C. 223—Biggs v. Ferrell, 34 N.C. 1.

23. N.C.—Haithcock v. Swift Island Mfg. Co., 72 N.C. 410.
S.C.—Gourdine v. Davis, 17 S.C.L. 469.
25 C.J. p 1071 note 5.

Claim of ferry rights by proprietors of bridge

Under applicable statutes it has been held that the rights of a college in an old ferry between two towns did not pass to the proprietors of a subsequently constructed bridge, authorized by statute, although by acquiescence of the former ferry owner its ferry rights may have been extinguished.—Charles River Bridge v. Warren Bridge, 7 Pick., Mass., 344, affirmed 11 Pet. 420, 9 L.Ed. 773.

24. Va.—Bonos v. Ferries Co., 75 S.E. 126, 113 Va. 495.

25. N.Y.—Staten Island Rapid Transit Co. v. New York, 23 N.E. 175, 119 N.Y. 96.

26. U.S.—Bowman v. Wathen, D.C. Ind., 3 F.Cas.No.1,740, 2 McLean 376, affirmed 1 How. 189, 11 L.Ed. 97.
25 C.J. p 1071 note 1.

27. Ark.—Haynes v. Wells, 26 Ark. 464.
25 C.J. p 1071 note 2.

a. Termination of Franchise in General

A ferry franchise may terminate by expiration of the term for which it was granted, or by abandonment or forfeiture, or it may be revocable at the pleasure of the licensing authorities.

A ferry franchise terminates on the expiration of the term for which it is granted,[28] or may be revocable at the pleasure of designated authorities,[29] or may terminate through abandonment or forfeiture, as discussed in the following subdivisions of this section. As shown supra § 12, a franchise may be perpetual unless limited by the grant, and it may be terminated under reserved legislative power. A ferry license is not vacated, or the franchise lost, by the death of the grantee,[30] except in jurisdictions where the franchise is held to be a personal trust imposed on the grantee alone.[31]

Substitution of other facilities. Under the practice prevailing in some jurisdictions public authorities may, on a showing that the public welfare will thereby be promoted, grant permission to substitute busses for ferries on part of a route,[32] and it has been held an order permitting such a substitution should not be construed as a permission to abandon the remainder of the ferry route.[33]

b. Abandonment or Forfeiture of Franchise

A ferry franchise may be lost by abandonment or forfeiture, as in the case of prolonged nonuser or a failure to comply with conditions attached to the grant; but temporary interruptions of service or the proprietor's absence from the state are not necessarily conclusive of abandonment or forfeiture.

A ferry franchise may be lost by abandonment or surrender,[34] as by nonuser,[35] such as unreasonable delay after grant of franchise in putting the ferry into operation.[36] Failure to exercise a ferry franchise is evidence tending to show abandonment, whether such failure begins immediately after grant of the franchise[37] or during the term of the franchise;[38] but evidence of nonuser may be rebutted by showing that the ferry owners used other effective methods to serve the public during the time the ferry was not in operation,[39] or that the boat, although it was seized and sold under judicial process and temporarily discontinued during the proceedings, was put into service again by the purchaser immediately after the sale,[40] or that the operation of the boat was temporarily interrupted in consequence of the river being frozen.[41] Poor or interrupted ferry service is not necessarily proof of abandonment.[42] A grant of a franchise by two counties on opposite sides of a river is not abandoned by having the ferry rights recorded in the county court of a new county, formed by a merger of the counties originally granting the franchise.[43] Accepting a subsequent limited grant is not a waiver or surrender of a prior grant in fee,[44] and the fact that a ferry proprietor seeks a new or renewed ferry franchise does not necessarily show that he has abandoned a prior franchise.[45]

A refusal to transport may be ground for forfeiture of a ferry franchise,[46] as may circumstances

28. Ark.—Bell v. Clegg, 25 Ark. 26.
25 C.J. p 1071 note 14.

29. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108.

30. Iowa.—Lippencott v. Allander, 27 Iowa 460, 1 Am.R. 299.

31. Or.—Knott v. Frush, 2 Or. 237.

32. Wash.—State ex rel. City of Port Orchard v. Department of Public Service, 58 P.2d 352, 186 Wash. 424.

Substitution held not arbitrary

Department of public service's grant of navigation company's application for permission to substitute bus for ferry service for that part of through ferry trip between Port Orchard and Seattle which lay between Port Orchard and Bremerton held sustained by great weight of evidence and not arbitrary, precluding substitution of court's judgment for that of commission.—State ex rel. City of Port Orchard v. Department of Public Service, supra.

33. Wash.—State ex rel. City of Port Orchard v. Department of Public Service, supra.

34. N.C.—Smith v. Harkins, 38 N.C. 613, 44 Am.D. 83.
25 C.J. p 1072 note 25.

Failure to establish ferry or to procure license prescribed by statute may constitute an abandonment of the ferry franchise.—Munn v. Shults, 197 S.W. 570, 130 Ark. 291.

35. Ark.—Munn v. Shults, supra.
25 C.J. p 1071 note 18.

36. Iowa.—Phillips v. Bloomington, 1 Greene 498.
Ky.—Clarke v. Calloway, Ky.Dec. 46, 2 Am.D. 706.

37. N.C.—Smith v. Harkins, 38 N.C. 613, 44 Am.D. 83.
25 C.J. p 1072 note 26.

38. Ark.—Munn v. Shults, 197 S.W. 570, 130 Ark. 291.

39. La.—Davis v. Concordia Police Jury, 1 La.Ann. 288.
Pa.—Commonwealth v. Hulings, 18 A. 138, 129 Pa. 317.
25 C.J. p 1072 note 22.

40. Cal.—Heywood v. Berkeley Loan & Trust Impr. Ass'n, 12 P. 232, 71 Cal. 349.

41. Pa.—Bridgewater Ferry Co. v. Sharon Bridge Co., 22 A. 1039, 145 Pa. 404.

42. Ky.—McConnell v. Crittenden County, 63 S.W.2d 329, 250 Ky. 359.

Inferior service as not an abandonment

Inferior service and lack of any service for few short intervals was insufficient to show "abandonment" of ferry franchise, especially where county court, only body authorized to act, never attempted to revoke franchise.—McConnell v. Crittenden County, supra.

43. Ky.—Willis v. Calhoun, 140 S.W. 199, 145 Ky. 95.

44. Ill.—Golconda v. Field, 108 Ill. 419.

45. Ky.—McConnell v. Crittenden County, 63 S.W.2d 329, 330, 250 Ky. 359.

Precautionary measure

That a ferry proprietor sought a new franchise or renewal of an old franchise to operate a ferry on the Ohio River did not show abandonment of the existing franchise, but merely a desire to "make assurance doubly sure."—McConnell v. Crittenden County, supra.

46. Iowa.—Phillips v. Bloomington, 1 Greene 498.
Va.—Carter v. Commonwealth, 2 Va. Cas. 354, 4 Va. 354.

showing bad faith and a purpose to deprive the public of the benefits of the ferry.[47]

Where the owner of a ferry franchise abandons it on condition of being permitted to incorporate as a bridge company, he may not claim any additional rights under the bridge company incorporation by virtue of his former ownership of the ferry privilege.[48]

Noncompliance with conditions of grant. The franchise may be forfeited by failure to comply with the conditions on which it was granted,[49] but a subsequent recognition of the existence of the franchise by the granting authority may operate to exempt the owner from forfeiture of his franchise on that particular ground.[50]

Failure to renew the bond as required by statute is evidence of abandonment.[51]

Absence or nonresidence. Absence of a ferry licensee from the state is not per se an abandonment of the ferry rights,[52] nor, under statutes requiring residence of ferry proprietors, does his nonresidence ipso facto forfeit his franchise,[53] but due proceedings must be had to accomplish a forfeiture for nonresidence.[54] On the other hand, it has been held that a ferry franchise holder who disregards an order requiring him to sell the franchise or else to become a resident and file a bond may not thereafter complain because his franchise was forfeited.[55]

c. Proceedings for Forfeiture or Discontinuance

Proceedings for forfeiture or discontinuance of ferry franchises vary with the law of the jurisdiction and may consist in a formal proceeding for revocation or in a refusal to renew a necessary ferry license on a due showing that the public welfare so demands, or quo warranto may lie. There should be a due compliance with all procedural requirements of the governing statute, including requirements as to notice.

In states requiring a renewal of licenses at regular intervals, the licensing authority has power to discontinue a ferry franchise, by refusing a renewal of the license, when the public welfare requires it.[56] When a ferry franchise is once granted and a ferry is established thereunder, the ferry privilege continues subject to the power of the proper authorities to discontinue it when the public interest and convenience so require,[57] and if for any cause the owner of the franchise subjects his right to forfeiture the fact must be ascertained by an appropriate judicial proceeding instituted for that purpose;[58] it cannot be determined in a collateral proceeding.[59] While a county court may have power to discontinue a ferry franchise by refusing the annual license for its further exercise when the public welfare demands, there must be some foundation in fact for such discontinuance and it may not arbitrarily refuse an annual license.[60]

Jurisdiction to forfeit a ferry franchise is special, and it may be forfeited only on the grounds specified in the statute under which the proceedings are brought.[61] Acts providing for revocation of a ferry franchise when the public welfare demands it merely empower county authorities charged with such matters to revoke after petition and hearing,[62] and where no proceedings for revocation are instituted the franchise continues until the end of its term.[63] Ordinarily the state alone can insist upon the forfeiture of a ferry franchise.[64] The forfeiture dates only from the date of the judgment of

47. W.Va.—Polley v. Gilleland, 78 S.E. 96, 72 W.Va. 301.
25 C.J. p 1072 note 21.

48. Wis.—Janesville Bridge Co. v. Stoughton, 1 Pinn. 667.

49. Ill.—School Trustees v. Tatman, 13 Ill. 27.
Iowa.—Phillips v. Bloomington, 1 Greene 498.

50. Ky.—Willis v. Calhoun, 140 S.W. 199, 145 Ky. 95.
25 C.J. p 1072 note 34 [a].

51. Ark.—Finley v. Shemwell, 126 S.W. 717, 94 Ark. 190.

52. Ala.—Garrett v. Ricketts, 9 Ala. 529.

53. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.

54. Ky.—Crittenden County v. McConnell, supra.

55. Ky.—Muscovalley v. Horn, 56 S.W.2d 354, 246 Ky. 778.

But ferry rights on Ohio river granted before 1851 could not be revoked by county court for proprietor's nonresidence.—McConnell v. Crittenden County, 63 S.W.2d 329, 250 Ky. 359.

56. Ark.—Shemwell v. Finley, 129 S.W. 792, 95 Ark. 342.

57. Ark.—Ex parte Grayson, 277 S.W. 538, 169 Ark. 984.

58. Ky.—Brown v. Given, 4 J.J. Marsh. 28.

59. Ky.—Willis v. Calhoun, 140 S.W. 199, 145 Ky. 95.
25 C.J. p 1072 note 37.

60. Ark.—Ex parte Grayson, 277 S.W. 538, 169 Ark. 984.

61. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806—Hammond v. Commonwealth, 265 S.W. 297, 204 Ky. 729.

Complaint insufficient to show statutory grounds
Complaint alleging that one granted franchise operated ferry in negligent and careless manner, and not in reasonable and convenient manner for use of general traveling public, so that persons using ferry were greatly inconvenienced, and that ferry was not operated for several hours at a time, did not warrant revocation of franchise under Ky.St. § 1810, providing for revocation for failure to put and keep boats in use by six months after grant of franchise, although it might warrant fine under § 1815.—Hammond v. Commonwealth, supra.

62. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108.

63. Me.—Waukeag Ferry Ass'n v. Arey, supra.

64. Ala.—Harrell v. Ellsworth, 17 Ala. 576.
25 C.J. p 1072 note 35.

ouster;[65] but proceedings for forfeiture are not necessary where the ferry franchise has been lost or discontinued by nonuser under the statute, the discontinuance being complete without judgment of ouster,[66] or where the ferry is maintained as an incident to a chartered turnpike and the turnpike franchise has been forfeited.[67]

A proceeding in the nature of quo warranto is the appropriate judicial proceeding for trying the question of forfeiture.[68] Equity has jurisdiction to cancel a lease of a municipal ferry to a private operator for nonperformance of its terms.[69] All statutory requirements as to conditions precedent to the commencement of proceedings must be observed,[70] as giving statutory notice to execute a new bond, or a sufficient bond, before instituting proceedings for forfeiture for failure to give the bond as required.[71] A private relator in proceedings for forfeiture must show some interest in himself authorizing him to prosecute the proceedings, in the absence of an order of court authorizing him to do so.[72] It is no defense to quo warranto proceedings that the owner of the franchise had given bond for the faithful performance of his duties.[73]

Notice of proceedings. Statutory provisions as to notice of proceedings to revoke a ferry franchise must be complied with.[74] Such notice is jurisdictional,[75] and the mere fact that the owner is in court on his own motion to renew his covenant is not sufficient to give the court jurisdiction.[76] It is not only indispensable that the notice be given the owner, but that the jurisdictional facts be stated in the notice.[77] The notice should inform the owner of the nature of the complaint,[78] and, where the statute under which a proceeding is brought to revoke a ferry franchise does not confer on a person uninterested in the franchise the right to institute such a proceeding, notice of the proceeding should show the movant's interest.[79] The posting and publication of notice in a statutory proceeding of this description may be equivalent to service of summons.[80] Where the county court is by statute given exclusive jurisdiction of such a proceeding, it is immaterial whether the procedure of the court or the giving of notice by the judge is sua sponte or at the suggestion of another.[81]

Remedy for "usurpation." Under statutes providing for actions to prevent usurpation of a franchise, the owner of a ferry franchise cannot become a usurper thereof until he has been deprived of his franchise in the statutory manner, and to be a usurper his claim to the franchise must be unfounded and without pretense of a franchise granted under the statute.[82] Statutes providing a remedy by action for usurpation of a franchise are not, however, exclusive of special statutory remedies and do not furnish the only method of revoking a ferry franchise.[83]

d. Renewal of Franchise

A ferry franchise is ordinarily subject to renewal, and under local regulations the original ferry operator may have an option or preference of renewal. Application for a renewal should show validity of the original franchise and the question of renewal is generally addressed to the discretion of the granting authorities.

In some states the statutes give the former owner a right to have his license renewed if he has kept the ferry according to law.[84] In other states the statutes make the former keeper of a ferry a preferred claimant for the right to a renewal when the original franchise has expired.[85] In jurisdictions where riparian owners are preferred claimants for the franchise in the first instance, they are entitled to the same preference as to a renewal.[86] The application must show validity of the original license as a foundation for its renewal.[87]

65. Ga.—Greer v. Haugabook, 47 Ga. 282.

66. W.Va.—Polley v. Gilleland, 78 S.E. 96, 72 W.Va. 301.

67. Ark.—Darnell v. State, 3 S.W. 365, 48 Ark. 321.

68. Kan.—Territory v. Reyburn, 1 Kan. 551.

69. Iowa.—Phillips v. Bloomington, 1 Greene 498.

70. Ala.—Lamar v. Marshall County, 21 Ala. 772—Garrett v. Ricketts, 9 Ala. 529.

71. Ala.—Lamar v. Marshall County, 21 Ala. 772—Garrett v. Ricketts, 9 Ala. 529.

72. Ky.—Commonwealth v. Little, 6 Ky.Op. 440.
25 C.J. p 1073 note 50.

73. N.Y.—People v. Thompson, 21 Wend. 235, reversed on other grounds 23 Wend. 537.

74. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.
25 C.J. p 1073 note 46.
Sufficient compliance shown
U.S.—Crittenden County v. McConnell, supra.

75. Ky.—Crittenden County v. McConnell, supra.
25 C.J. p 1073 note 48.

76. Ky.—Combs v. Sewell, 59 S.W. 526, 22 Ky.L. 1026.

77. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.

78. Ky.—Brown v. Givens, 1 Dana 259.

79. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.

80. Ky.—Crittenden County v. McConnell, supra.

81. Ky.—Crittenden County v. McConnell, supra.

82. Ky.—Crittenden County v. McConnell, supra.

83. Ky.—Crittenden County v. McConnell, supra.

84. Cal.—Finch v. Tehama County, 29 Cal. 453.
25 C.J. p 1071 note 8.

85. Iowa.—Lippencott v. Allander, 23 Iowa 536.
25 C.J. p 1071 note 9.

86. Or.—Beckley v. Learn, 3 Or. 544.

87. Or.—Dean v. Washington Nav. Co., 115 P. 284, 59 Or. 91.

The granting of a renewal is discretionary with the authorities having power to make the grant, and if they deem it for the public good they may refuse a renewal and discontinue the ferry.[88] A county court having before it two applications for the same ferry franchise may in its discretion grant the one first filed even though the other was submitted by a prior franchise holder seeking to renew, where the latter failed to make application until long after expiration of its original franchise.[89]

Validity of judgment. Where a county court is invested by statute with jurisdiction to grant a ferry franchise, but not to extend or renew one, the fact that its judgment employs inapt terms by stating that it renews a given ferry franchise will not render the judgment void, as it will be construed as a grant from the date of the expiration of the original franchise;[90] such a judgment is not open to collateral attack.[91]

Unlicensed operation not serving as renewal. Subsequent operation of the ferry without a license will not serve to restore the ferryman to his rights under a franchise which he had allowed to lapse.[92]

Renewal under lease. The assignee of a lease of a ferry franchise expending substantial sums for repairs and equipment does not acquire an equity such as to prevent expiration of the lease by neglect of the lessee to make a timely exercise of a renewal option, and the fact that one of the lessors was an employee of such assignee and failed to remind him of the necessity of a timely notice to prevent lapse of the option does not estop the lessors from insisting on such lapse; nor will the silence of such employee lessor constitute a ratification of a delayed notice given by the assignee. In this connection it has been held that the time of exercising the renewal option constitutes the essence of the contract, that, on a failure of the lease assignee to make a timely exercise of such option, forfeiture of the lease should be adjudged, especially as to a coöwner of the franchise not signing the lease, and that, as the contract of lease referred to the parties as lessee and lessor and was otherwise couched in language appropriate to a lease, it should be construed as creating a landlord and tenant relationship and not one of partnership or of joint adventure in operation of the ferry, so that the failure to exercise the option of renewal was fatal and its effect could not be avoided by arguing that the parties were partners in operation of the ferry.[93]

§ 19. Construction and Maintenance of Boats, Buildings, and Works

The rights and duties of ferry proprietors in respect of construction and maintenance of boats, buildings, and works are governed by the applicable provisions of statutes, franchises, and contracts. Under a statute permitting levy of taxes to maintain a ferry, none may be levied to build or repair one.

Under statute it has been held that a ferry operator has the duty of maintaining a roadway on the bank from high-water mark on the state highway to low-water mark.[94]

Rights of upland and shore land owners. An upland owner has a statutory right to lease abutting shore land, but such right is subservient to a ferry owner's dominant easement, and the upland owner may exercise his right and use his land only in a manner not interfering with the dominant easement of the ferry owner, and since the latter has only an easement in the upland, he is not negligent in his failure to secure a lease of abutting shore land, across which it is sought to extend the easement, before the leasing thereof by the upland owner.[95] A ferry rack constructed at the side of a pier belonging to the upland owner, pursuant to a franchise from municipal authorities, does not give rise to an action for damages resulting from interference with the pier of the upland owner, as it is neither a nuisance nor unlawful.[96]

Construction of termini and application of deposit to damages. Where a city and a ferry company enter into a contract whereby the city grants the ferry company a franchise to operate between a terminal to be constructed by the city and a place in another state, even in the absence of a specific provision to such effect, there is a clear implication that the ferry company is to construct a terminal on the other side of the water, and that both termini should be completed at substantially the same time, inability of the ferry company to carry out

88. Ark.—Shemwell v. Finley, 129 S.W. 792, 95 Ark. 342—Bell v. Clegg, 25 Ark. 26.

89. Ky.—Burnside Land Co. v. Connelly & Lee, 291 S.W. 409, 218 Ky. 346.

90. Ky.—Decker v. Tyree, 264 S.W. 726, 204 Ky. 302.

91. Ky.—Decker v. Tyree, supra.

92. Ark.—Munn v. Shults, 197 S.W. 570, 130 Ark. 291.

93. Ky.—Rounds v. Owensboro Ferry Co., 69 S.W.2d 350, 253 Ky. 301.

94. Tenn.—McCrary v. Harrell, 62 S.W.2d 566, 166 Tenn. 431.

95. Wash.—McPherson Bros. Co. v. Buell, 9 P.2d 348, 167 Wash. 391.

96. N.Y.—Fairchild v. Union Ferry Co. of New York & Brooklyn, 201 N.Y.S. 295, 121 Misc. 513, affirmed 207 N.Y.S. 835, 212 App.Div. 823, affirmed 148 N.E. 750, 240 N.Y. 666.

its part of the contract excuses the city, where it has performed substantially, from proceeding further with construction of its terminal, and under such circumstances the city may, without completing its own terminal construction, apply a deposit made by the ferry company to compensate it for damages.[97]

Taxes. Statutes authorizing the levy of taxes for "operation" of ferries cannot be upheld as levies for the building or repairing of ferries.[98]

§ 20. Injuries to Ferry Property

Actions for damages for injury to, or interference with, a ferry franchise are considered supra § 16.

Examine Pocket Parts for later cases.

§ 21. Offenses

Unlawful establishment of a ferry may constitute an offense.

Under statutes in some jurisdictions, the unlawful establishment of a ferry is made an offense.[99]

III. REGULATION AND CONTROL

§ 22. Power to Regulate and Control in General

Within limitations as to interference with interstate commerce and obstruction of navigable waters elsewhere discussed, the state has inherent power to regulate and control ferries operating within its borders, which may be exercised through the legislature or through inferior bodies, such as cities or counties. Regulation may be by law or contract.

The state has power to control travel over its navigable waters and in the exercise of such power may regulate ferries;[1] and within limitations affecting interstate or foreign commerce and the obstruction of navigable waters, as discussed in Commerce § 42 and in the C.J.S. title Navigable Waters § 44, also 45 C.J. p 471 notes 24, 25, the police power of the state extends to the regulation of ferries operating in or into the state,[2] and in the exercise thereof each state's power is confined to its own jurisdiction.[3] In other words, the right or liberty to operate a public ferry cannot be exercised without the consent of the state and is subject to the supervision and control of the state or its mandatories.[4] The power to regulate and control ferries rests primarily in the legislatures of the different states,[5] or in other bodies to whom it may be intrusted by constitutional provisions,[6] and under inherent or delegated authority may be exercised by inferior bodies,[7] such as cities,[8] counties,[9] or state

97. N.Y.—Murray v. City of New York, 300 N.Y.S. 425, 165 Misc. 125, affirmed 300 N.Y.S. 431, 252 App. Div. 853, appeal dismissed 300 N.Y.S. 430, 252 App.Div. 854, motion denied 1 N.Y.S.2d 862, 253 App. Div. 798, motion denied 13 N.E.2d 470, 277 N.Y. 554, and 14 N.E.2d 183, 277 N.Y. 601, affirmed 15 N.E. 2d 69, 278 N.Y. 475, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1544.

98. Ga.—Montgomery County v. Seaboard Air Line Ry. Co., 152 S.E. 261, 41 Ga.App. 130.

Effect of amendment

Amendment providing part of tax levy shall be for bridges and part for ferries was held mere explanation of original levy incorporated therein in determining its validity.—Montgomery County v. Seaboard Air Line Ry. Co., supra.

99. Ala.—Milton v. Haden, 32 Ala. 30, 70 Am.D. 523.
25 C.J. p 1052 note 35.

1. Wash.—Kitsap County Transp. Co. v. Manitou Beach-Afate Pass Ferry Ass'n, 30 P.2d 233, 176 Wash. 486.

2. U.S.—U. S. v. Canadian Pac. Ry. Co., D.C.Wash., 4 F.Supp. 851, affirmed, C.C.A., Canadian Pac. R. Co. v. U. S., 73 F.2d 831.
25 C.J. p 1073 note 54.

International ferries

Regulation of operation of international ferries is feasible without violation of international custom or law.—U. S. v. Canadian Pac. Ry. Co., supra.

3. W.Va.—State v. Faudre, 46 S.E. 269, 54 W.Va. 122, 102 Am.S.R. 927, 63 L.R.A. 877, 1 Ann.Cas. 104.
25 C.J. p 1073 note 55.

Point of departure as controlling

Jurisdiction of a government over a ferry is determined by point of departure.—Canadian Pac. Ry. Co. v. U. S., C.C.A.Wash., 73 F.2d 831, affirming, D.C., U. S. v. Canadian Pac. Ry. Co., 4 F.Supp. 851.

4. Ariz.—Deans v. Coconino County, 17 P.2d 801, 41 Ariz. 253.

5. Ill.—Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560.
25 C.J. p 1073 note 58.
Validity of statutes as to establishment of ferries see supra § 4.

6. Miss.—Board of Sup'rs of Quitman County v. Self, 125 So. 828, 156 Miss. 273.

Board of county supervisors, although subject to legislative regulation, cannot be deprived entirely of constitutional power and discretion over ferries.—Board of Sup'rs of Quitman County v. Self, supra.

7. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.
Mich.—Chilvers v. People, 11 Mich. 43.
Wash.—State ex rel. Kitsap County Transp. Co. v. King County, 101 P. 2d 327, 3 Wash.2d 392.
25 C.J. p 1073 note 57.

8. U.S.—McNeely v. City of Natchez, C.C.A.Miss., 12 F.2d 3, certiorari denied 47 S.Ct. 767, 274 U.S. 762, 71 L.Ed. 1339, and City of Natchez v. McNeely, 47 S.Ct. 767, 274 U.S. 762, 71 L.Ed. 1339, affirmed 48 S.Ct. 156, 275 U.S. 502, 72 L.Ed. 394.
Mich.—Chilvers v. People, 11 Mich. 43.

9. Ky.—Crittenden County v. McConnell, 36 S.W.2d 627, 237 Ky. 806.
Miss.—Board of Sup'rs of Quitman County v. Self, 125 So. 828, 156 Miss. 273.

Creation of office of road supervisor

A local act creating the office of road supervisor for Chilton County and making supervisor's authority and duties subject to control of commissioners' court, did not, as respects Chilton County, repeal statute

commissions or departments.[10] Public service commission laws bringing utilities within the regulatory power of a state commission or department may operate to repeal earlier laws under which such regulation was vested in other bodies, such as counties, although other features of such earlier laws not inconsistent with the public service commission statute may remain in full force and effect.[11] The courts have upheld the validity of the exercise of delegated powers to regulate ferries;[12] and when the power is delegated in terms authorizing an inferior body to regulate ferries within its jurisdiction, it is sufficient if one terminus only is within its jurisdiction.[13] Regulation need not necessarily be by ordinance or by-law; it may take the form of an agreement with the licensee.[14]

Federal statutes regulating navigation apply to ferries.[15]

§ 23. Extent of Power

The state in the exercise of its police power may make such regulations affecting ferry operation as will subserve public convenience, and in this connection may directly or through its proper agencies regulate the carrying of dangerous things, the character and frequency of service, and the moving of terminals.

The state, in the exercise of its police power, may make such rules and regulations as may be necessary to insure that a ferry franchise shall not be abused to the serious detriment or inconvenience of the public;[16] but governmental regulations of this character are subject to judicial review, as for unfair discrimination.[17] Regulations prohibiting the carrying of certain dangerous articles,[18] or the continuance of unsanitary conditions on the boats,[19] or fixing the hours during which the ferry shall be operated, and the number and frequency of trips,[20] are a valid exercise of the power. Ferries and ferrymen may be required under bond to do specific things requisite or proper in operating a ferry,[21] as, for example, to keep safe and convenient boats, with a sufficient number of ferrymen, and to pay a statutory penalty to one unreasonably detained.[22] A departmental order requiring a ferry company to move its terminal and to make other changes has been upheld as against the objection that a public

giving courts of county commissioners general superintendence of roads, bridges, and ferries, or deprive the Chilton County commissioners' court of any power conferred by such statute.—Thompson v. Chilton County, 181 So. 701, 236 Ala. 142.

10. Wash.—State ex rel. Kitsap County Transp. Co. v. King County, 101 P.2d 327, 3 Wash.2d 392—State ex rel. Scofield v. Schaaf, 54 P.2d 1014, 185 Wash. 354.

11. Md.—Bay Bridge Ferry Corporation v. Commissioners of Queen Anne's County, 153 A. 441, 160 Md. 398.

In Washington

(1) Statute requiring company operating any ferry for public use for hire between fixed termini on waters within state to obtain certificate of public convenience and necessity from department of public works gave such commission regulatory power over operations of navigation company over ferry routes, each of which was altogether or partly within Pierce County.—State ex rel. Scofield v. Schaaf, 54 P.2d 1014, 185 Wash. 354.

(2) The Public Service Commission Law did not repeal, by implication, the Ferry Law, and therefore the public service commission had no jurisdiction over ferries, such jurisdiction being vested in the county commissioners.—State v. Public Service Commission, 190 P. 1012, 111 Wash. 294.

(3) Department of public works had jurisdiction, under Public Service Commission Law, to regulate service and rates of a ferry operating over a body of water forming boundary line between two counties, Remington Comp.St. §§ 5462, 5470, 5477, 5479–5483, not authorizing one of such counties to grant a license for that purpose.—Nearhoff v. Department of Public Works of Washington, 236 P. 288, 134 Wash. 677.

12. Mo.—City of St. Louis v. Waterloo-Carondelet Turnp. & Ferry Co., 14 Mo.App. 216.

13. Ark.—Arkadelphia Lumber Co. v. Arkadelphia, 19 S.W. 1053, 56 Ark. 370.

Tex.—Parsons v. Hunt, 84 S.W. 644, 98 Tex. 420, reversing, Civ.App., 81 S.W. 120.

14. N.W.Terr.—Humberstone v. Dinner, 2 Terr.L. 106, appeal dismissed 26 Can.S.C. 252.

15. Or.—Kaminsky v. Good, 265 P. 786, 124 Or. 618.

16. N.Y.—People v. New York, 32 Barb. 102—Benson v. New York, 10 Barb. 223.

25 C.J. p 1073 note 61.

17. U.S.—McNeely v. Town of Vidalia, D.C.La., 6 F.2d 21, modifying and making injunction permanent 6 F.2d 19, affirmed Town of Vidalia v. McNeely, 47 S.Ct. 758, 274 U.S. 676, 71 L.Ed. 1292.

Discretion upheld in absence of abuse

So long as the manner of operation of a ferry acquired by a port under a comprehensive plan for port improvements does not substantially vary from the plan as submitted to the voters, the discretion of the officers will not be controlled by the courts.—Raine v. Port of Seattle, 203 P. 61, 118 Wash. 168.

Putting operator out of business

While a town has the right ordinarily to police its river front and to adopt such regulations as are in accord with safety in assigning landing places for those engaged in operation of interstate ferries, it has not the right to discriminate and put a ferry operator out of business.—McNeely v. Town of Vidalia, D.C.La., 6 F.2d 21, modifying and making injunction permanent 6 F.2d 19, affirmed Town of Vidalia v. McNeely, 47 S.Ct. 758, 274 U.S. 676, 71 L.Ed. 1292.

18. U.S.—The Nassau, N.Y., 188 F. 46, 110 C.C.A. 184, certiorari denied 32 S.Ct. 524, 223 U.S. 722, 56 L.Ed. 630.

19. Puerto Rico.—Valdès v. Grahame, 3 Puerto Rico Fed. 417.

20. Ind.—Madison v. Abbott, 21 N.E. 28, 118 Ind. 337.

Variation of schedule as permissible

The officers of a port which had acquired a ferry had discretion, either directly or through the agency of others, to vary the schedules or hours of service from those originally installed.—Raine v. Port of Seattle, 203 P. 61, 118 Wash. 168.

21. Ala.—Botts v. Bridges, 4 Port. 274.

Tex.—Johnson v. Erskine, 9 Tex. 1.

22. Ala.—Koretke v. Irwin, 13 So. 943, 100 Ala. 323, 21 L.R.A. 787.

utility may not be permitted to abandon part of its service without surrendering its entire franchise, where the statute empowered the department to determine what service was necessary and whether or not any was necessary, and where, in effect, the order was not for an abandonment but rather for a substitution of a different kind of service.[23] In determining whether revenues accruing are sufficient to maintain the ferry service formerly ordered or to warrant operation of more than a certain number of boats, the department properly rejects the contention that it should consider an anticipated subsequent increase of business, and it is within the discretion of the department to decide whether or not it should consider the company's operations as a whole in determining what service the company is financially able to render over a particular route. The decision of the department as to the kind of service to be rendered is not necessarily res judicata so as to preclude relief in subsequent proceedings before the department, where this is preferable to reopening prior proceedings with a voluminous record.[24]

§ 24. —— License Fees

The state may impose a license fee or tax on the operation of ferries within its borders.

The state may, through the proper authorities, require the payment of a license fee from ferries operating within its jurisdiction.[25] A license fee or tax is payable only on the issuing of the license, and is not taxable on a riparian owner's right to a ferry franchise in advance of his acting on it.[26] An annual license fee, required by statute, becomes payable at yearly intervals, without giving notice to the licensee, in the absence of express requirement of notice.[27]

Under statutes imposing a license tax on the owner or lessee of a toll ferry, a contractor operating a ferry free to the public under agreement with the state to pay him a certain sum monthly to cover operating expenses and his own salary is not the owner or lessee of a toll ferry so as to be subject to tax.[28]

Validity of taxing acts. A statute levying a tax on the operation of a ferry within a specified distance of a state-owned toll bridge and creating a presumption that such a ferry competes with the bridge has been upheld as against a charge of arbitrary discrimination, and it has also been held that such an act is not objectionable as foreclosing the issue of competition, since the presumption created is not conclusive in character and must still be judicially determined.[29]

§ 25. —— Ferriage Rates

a. In general
b. Discrimination and reasonableness of rates
c. Compliance with established ferry tariff

a. In General

In the exercise of its police power the state, or its political subdivisions, may fix ferry rates. Such rates may be fixed either by legislation or by contract, and rates once fixed are subject to change by the public authorities.

Within limitations affecting interstate and internation ferriage, as discussed in Commerce § 95, the state, either directly or through an inferior body to which the power has been delegated, may fix the rates of ferriage,[30] even though there is no express reservation of such power in the legislative grant of the franchise.[31] Under constitutional provisions conferring exclusive original jurisdiction on county courts in matters relating to ferries, the county courts have power to fix ferriage rates, and subsequently enacted statutes purporting to confer jurisdiction on a railroad commission in all matters pertaining to regulation and operation of ferries are ineffectual to transfer jurisdiction over ferry rates from the county court to the commission;

23. Wash.—State ex rel. Country Club of Seattle v. Department of Public Service, 86 P.2d 1104, 198 Wash. 37.

24. Wash.—State ex rel. Country Club of Seattle v. Department of Public Service, supra.

Order held to be based on hearing and not on subsequent events

A statement in a Department of Public Service order issued to ferry company relating to expenses "prior" to strike and an estimate of revenues based on pre-strike traffic, rates, and labor conditions showed that order was not issued as a result of occurrences and information acquired after close of hearing, notwithstanding order cited later occurrences in an attempt to show that conclusion reached was correct.—State ex rel. Country Club of Seattle v. Department of Public Service, supra.

25. Ill.—Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560.

25 C.J. p 1073 note 67.

26. Ky.—Gates v. Commonwealth, 105 S.W. 432, 127 Ky. 395, 32 Ky.L. 301.

27. Ark.—Independence County v. Duffey, 129 S.W. 794, 95 Ark. 352.

28. La.—State ex rel. Galatas v. Shaffer, 127 So. 472, 13 La.App. 249.

29. Tenn.—Marion County River Transp. Co. v. Stokes, 117 S.W.2d 740, 173 Tenn. 347.

30. W.Va.—Huntington Chamber of Commerce v. Public Service Commission, 99 S.E. 285, 84 W.Va. 81.

25 C.J. p 1073 note 71.

31. Mass.—Proprietors Charles River Bridge v. Proprietors Warren Bridge, 7 Pick. 344, affirmed 11 Pet. 420, 9 L.Ed. 773.

nor does a constitutional amendment authorizing creation of a commission to correct abuses and excessive charges by railroads, canals, and turnpike companies apply to ferries so as to deprive the county court of its exclusive original jurisdiction over ferriage rates.[32] Statutes empowering police juries of parishes to establish ferries and to fix rates except as to ferries within the control of municipal corporations, contemplate that the latter ferries shall be subject to municipal control of rates not established by the ferry franchise, and the right of a municipality to fix ferry rates arises from the police power and may be exercised either by contract with the grantee or by appropriate legislation.[33] The power to regulate fares charged at a terminus within the state exists over corporations, even though incorporated under, and claiming the protection of, the laws of the state on the opposite side of the river;[34] but a statute authorizing a municipality to fix rates on a ferry operating between it and a point within another state has been construed as empowering the municipality to fix rates only from its landing to that in the other state and not to fix the return rate from the point of departure in such other state.[35]

Fixing rates on establishment of ferry. Under the statutes in some states, rates must be fixed at the same time the ferry is established,[36] but, under statutes so providing without further restrictions on the power, it is not necessary that the rates be fixed in the same order as that establishing the ferry.[37]

Subsidies. Where a county contracts to pay a ferry proprietor subsidies for operating the ferry, and subsequently it is determined that such contract is invalid and the county is permitted to recover the sums paid as subsidies, the ferry company should be allowed to recover the reasonable value of services rendered, as measured by the invalid contract and not by maximum ferry license fees.[38]

Hearing. No notice or hearing is necessary to the exercise of the legislative power to fix ferry rates, and it is sufficient if persons affected are afforded a hearing when it is attempted to execute the provisions adopted by legislation.[39]

Posting rates. Some statutes require the ferryman to post the rates for transportation on the boat or in some conspicuous place in the approaches or entrance to the ferry, and impose a penalty for failure so to do.[40] Under other statutes the failure to post the rates results in a forfeiture of the right to collect tolls,[41] but under a statute so providing, failure to post rates of toll does not deprive the ferryman of his right to collect tolls where the passenger knows the rates, does not object to them, and accepts the service under these circumstances.[42] Such statutes have no application to ferries operating under a foreign charter in the absence of a definite and plainly expressed statutory provision requiring it.[43]

Change of rates. Rates, once established, may be reduced on giving notice, as required by statute, to the owner of the ferry, which notice must comply with a statutory requirement that it contain a statement of the proposed reduction. The judgment of the court cannot go beyond the reduction proposed in the notice.[44] Rates once fixed in a judicial proceeding cannot be relitigated in another similar proceeding without showing a substantial change in conditions.[45]

Contracts between a ferry company and a municipality as to rates are subject to the reserved or police power of the state and it may give juris-

32. Ark.—Gray v. Duffey, 238 S.W. 60, 152 Ark. 291.

Unlimited character of jurisdictional grant

A constitutional provision granting county courts jurisdiction "in all matters relating to . . . ferries" does not refer only to establishment of ferries, but on the contrary includes regulation of rates as a part of the control of ferries committed to such agencies.—Gray v. Duffey, supra.

33. La.—McNeely v. Town of Vidalia, 102 So. 422, 157 La. 338.

Control of town

Relative to fixing rates of a ferry not fixed by its franchise, the town within which it has its landing, and which was incorporated under Act of 1898, No. 136, has, under § 15 par 32, control of it.—McNeely v. Town of Vidalia, supra.

34. N.J.—Port Richmond & Bergen Point Ferry Co. v. Freeholders of Hudson County, 82 A. 729, 82 N.J. Law 536, affirming 77 A. 1046, 80 N.J.Law 614, and affirmed 34 S.Ct. 821, 224 U.S. 317, 58 L.Ed. 330.

35. Ohio.—City of Bellaire v. Bellaire, Benwood & Wheeling Ferry Co., 136 N.E. 899, 105 Ohio St. 247.

36. Ky.—Lawless v. Reese, 4 Bibb. 309.

37. Ky.—Pentecost v. Miller, 7 T.B. Mon. 312—Ackler v. Oldham, 1 A. K.Marsh. 471.

38. Wash.—State ex rel. Washington Nav. Co. v. Pierce County, 51 P.2d 407, 184 Wash. 414, modified on other grounds 60 P.2d 16, 187 Wash. 695.

39. La.—McNeely v. Town of Vidalia, 102 So. 422, 157 La. 338.

40. Ark.—State v. Arkadelphia Lumber Co., 67 S.W. 1011, 70 Ark. 329.

25 C.J. p 1074 note 89.

41. S.C.—Addison v. Hard, 17 S.C.L. 431—Frazier v. Drayton, 11 S.C.L. 471.

42. S.C.—Addison v. Hard, 17 S.C. L. 431.

43. N.Y.—Blanchard v. Hoboken Land & Imp. Co., 6 N.Y.S. 279, 3 Silv.Sup. 22.

44. Ky.—Troutman v. Smith, 48 S. W. 1084, 105 Ky. 231, 20 Ky.L. 1134.

45. Ky.—Calhoun v. Alexander, 161 S.W. 980, 156 Ky. 597.

diction to a state department to change rates in alteration of the provisions of such contracts.[46]

b. Discrimination and Reasonableness of Rates

Ferry rates fixed should be reasonable and nondiscriminatory, and the issue of reasonableness is addressed in the first instance to the commission or other rate-making body although subject to judicial review.

Ferry rates fixed by public authorities must be fair and reasonable,[47] and to be so must allow a fair return on the value of the property employed in the public service,[48] valued as of the time of the inquiry,[49] after setting aside a proper sum for depreciation and replacement,[50] and after consideration of such factors as the state of the evidence may warrant under the law as applied to the circumstances disclosed.[51] The fact that a ferry was entirely paid for out of excessive profits realized from high rates in the past is immaterial in fixing rates for the future.[52] The reasonableness of the rate is ultimately a question for the court,[53] and the order of the inferior body is, therefore, always subject to review by the court.[54] However, a court ordinarily has no jurisdiction over the fixing of rates in the first instance, even though the case is before it on another point,[55] and if the rate fixed is not unreasonable, the court cannot interfere,[56] and judicial interference is permissible only where the rate fixing body acted arbitrarily or on a fundamentally erroneous basis.[57] There is a presumption that the rate fixed by the ferry authorities is reasonable, and the burden is on complainant to show the contrary.[58]

c. Compliance with Established Ferry Tariff

Rates charged by a ferry proprietor should comply with established tariffs, and contracts varying rates from such tariffs are invalid.

A tariff for ferriage duly established is valid and effective unless and until modified, and may not be

46. Wash.—State ex rel. Kitsap County Transp. Co. v. King County, 101 P.2d 327, 3 Wash.2d 392.

47. Ark.—Fulton Ferry & Bridge Co. v. Huckins, 292 S.W. 353, 173 Ark. 301.
25 C.J. p 1074 note 73.

48. U.S.—Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County, D. C.N.J., 264 F. 998.

49. U.S.—Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County, supra
Ark.—Fulton Ferry & Bridge Co. v. Huckins, 292 S.W. 353, 173 Ark. 301.

Past losses and profits not controlling
Past losses cannot be used to show that future ferry rates are confiscatory nor past profits to sustain confiscatory rates.—Fulton Ferry & Bridge Co. v. Huckins, supra.

50. U.S.—Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County, D. C.N.J., 264 F. 998.

Amortization allowance
Ferry company should have been allowed amount claimed for amortization of plant until displacement by bridge in fixing rates.—Fulton Ferry & Bridge Co. v. Huckins, 292 S.W. 353, 173 Ark. 301.

51. Ark.—Fulton Ferry & Bridge Co. v. Huckins, supra.

Additional rental value of ferry site since corporation took over ferry as entire capital at stated valuation was properly excluded from consideration in fixing rates.—Fulton Ferry & Bridge Co. v. Huckins, supra.

Cost of liability insurance was properly excluded from consideration as operating expense in fixing ferry rates.—Fulton Ferry & Bridge Co. v. Huckins, supra.

Cost of reconditioning bank
Reasonable amount for reconditioning river bank after overflows should have been allowed as necessary operating expense in fixing ferry rates.—Fulton Ferry & Bridge Co. v. Huckins, supra.

Increased value as going concern
Consideration of increased value of ferry as going concern since organization of corporation taking it over for capitalization at certain figure was not warranted, under evidence in fixing rates.—Fulton Ferry & Bridge v. Huckins, supra.

Suspension of travel
Suspension of travel over ferry approach because of overflows was held not so probable, since raising of road, as to warrant allowance for loss of tolls or decreased income in fixing toll rates.—Fulton Ferry & Bridge Co. v. Huckins, supra.

52. Ark.—Fulton Ferry & Bridge Co. v. Huckins, supra.

53. Ark.—Fulton Ferry & Bridge Co. v. Huckins, supra.
25 C.J. p 1074 note 77.

54. N.C.—Robinson v. Lamb, 36 S.E. 29, 126 N.C. 492.

55. N.C.—Robinson v. Lamb, supra.

56. U.S.—Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders of Hudson County, D. C.N.J., 264 F. 998.
Ark.—Fulton Ferry & Bridge Co. v. Huckins, 292 S.W. 353, 173 Ark. 301.

57. Wash.—State ex rel. Kitsap County Transp. Co. v. King County, 101 P.2d 327, 3 Wash.2d 392.

Basing rate on whole system not improper
The department of public service in fixing rates for ferry service on the Fauntleroy-Vashon Heights-Harper route did not act arbitrarily or on a fundamentally wrong basis in regarding the ferry system, which operated ferries on many routes, as an integrated system, instead of basing rates on the experience of each individual route.—State ex rel. Kitsap County Transp. Co. v. King County, supra.

Rates held not discriminatory as fixed by ordinance, in view of company's practical construction of same to apply equally to all persons of same class.—City of Bellaire v. Bellaire, Benwood & Wheeling Ferry Co., 13 Ohio App. 356, affirmed 136 N. E. 899, 105 Ohio St. 247.

58. Ark.—Fulton Ferry & Bridge Co. v. Huckins, 292 S.W. 353, 173 Ark. 301.

Burden to show by preponderance of evidence
Owner of ferry has burden of showing by fairly reasonable preponderance of evidence that the rate for service fixed by town council was not fair.—McNeely v. Town of Vidalia, 102 So. 422, 157 La. 338.

Burden sustained
Ark.—Fulton Ferry & Bridge Co. v. Huckins, 292 S.W. 353, 173 Ark. 301.

Burden not sustained
La.—McNeely v. Town of Vidalia, 102 So. 422, 157 La. 338.

evaded by agreement between the ferry carrier and its patrons, as by a contract discriminating in favor of a particular shipper, such a contract not being sustainable on the plea that it benefits both ferry company and shipper.[59] Where a ferry tariff filed with the proper authorities in compliance with governing provisions of law is in terms applicable to "touring autobusses or stages," it will be construed as applying to stages having a regular schedule as well as to those of irregular or no schedule, and since the tariff conveys such meaning, the fact that the ferry company may have had an intent to limit the tariff to irregular or occasional busses is not controlling.[60] The fact that a contracting bus company is also a connecting carrier with the ferry company does not change the shipper-carrier relationship of the ferry company and bus company, so as to take their contract out of the rule against discrimination under established tariffs and permit application of contract rates instead of tariff rates.[61] However, a judgment reversing a departmental order enforcing special contract rates and requiring compliance with the established tariff in such a case does not preclude subsequent establishment of a new tariff which would apply generally and without discrimination.[62] Where governing law expressly permits issuance of commutation tickets at special rates, such exception has been construed as permitting a ferry to issue commutation tickets for vehicles and freight as well as passengers.[63] Jurisdiction over a proceeding to recover the difference between ferry rates paid and rates established by tariff is not, it has been held, vested exclusively in a department of public works.[64]

IV. OPERATION

§ 26. Duties and Liabilities of Ferrymen

In fulfillment of his primary duty to operate and transport, a ferryman should provide adequate boats and means of ingress and egress to and from the same.

In connection with his primary duty to operate and transport, as discussed infra § 27, and in fulfillment of his general obligations, a ferry proprietor is under a duty to provide adequate and suitable boats,[65] and to use due care to keep the boats in good repair and running order,[66] and is bound to furnish adequate means of ingress and egress to and from the ferryboat.[67] From the latter duty springs the right of ferry patrons to travel safely, by all appropriate means of travel, to and from the ferry over a terminal tract provided by the proprietor.[68] Where the ferry proprietor does not assume to furnish adequate means of conveyance to and from the ferry, it may not exclude local carriers from entering its terminal grounds to discharge passengers at the ferry.[69] A ferry company may not,

59. Wash.—Wolverton Auto Bus Co. v. Robinson, 274 P. 1056, 151 Wash. 67.

60. Wash.—Wolverton Auto Bus Co. v. Robinson, supra.

61. Wash.—Wolverton Auto Bus Co. v. Robinson, supra.

62. Wash.—Wolverton Auto Bus Co. v. Robinson, supra.

New general tariff approved as nondiscriminatory

(1) Ferry rates established for auto stages operated in regular schedule through service were held in effect commutation rates for all such shippers and not private and special rates for benefit of particular shippers, even though established on application of such particular shippers.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works, 289 P. 1006, 157 Wash. 557, affirmed Puget Sound Nav. Co. v. Department of Public Works, 295 P. 949, 160 Wash. 703.

(2) In this connection, question of what was granted by departmental order is governed, not by relief complaint asked for, but by what order provides regarding allegedly discriminatory ferry rates.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works, supra.

(3) Order that old ferry rate schedules are "inapplicable" to auto stages, was held not to intend unjust discrimination.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works, supra.

63. Wash.—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works, 287 P. 672, 156 Wash. 489.

"Trucks loaded or unloaded"

Tariff of ferry company authorizing commutation rates for trucks loaded or unloaded was held not "unjust discrimination."—Puget Sound Nav. Co. v. Director and Supervisors of Department of Public Works, 287 P. 672, 156 Wash. 489.

64. Wash.—Robinson v. Wolverton Auto Bus Co., 300 P. 533, 163 Wash. 160.

65. Mont.—State v. Martin, 219 P. 632, 68 Mont. 392.

25 C.J. p 1077 note 39.

Safety of boats and equipment see infra § 28.

66. Iowa.—Slimmer v. Merry, 23 Iowa 90.

Mont.—State v. Martin, 219 P. 632, 635, 68 Mont. 392, quoting **Corpus Juris.**

67. Ark.—Importers' & Exporters' Ins. Co. v. Jones, 266 S.W. 286, 166 Ark. 370.

N.J.—Yellow Cab Co. of Camden v. Risley, 141 A. 161, 102 N.J.Eq. 450—Public Service Ry. Co. v. Weehawken Tp., 119 A. 90, 94 N.J.Eq. 88.

Regulation by public authorities

Where a public service railway company, having been granted a right of way across the property of a railroad company to a ferry, attempted to fence off such right of way, thereby excluding jitney competition, the township could resist erection of a fence as a police measure, the plaza through which the right of way extended, although not dedicated, being nevertheless affected with a public interest.—Public Service Ry. Co. v. Weehawken Tp., 119 A. 90, 94 N.J.Eq. 88.

68. N.J.—Yellow Cab Co. of Camden v. Risley, supra.

Safety of means of ingress and egress generally see infra § 28.

69. N.J.—Philadelphia & Camden Ferry Co. v. Johnson, 121 A. 900, 94 N.J.Eq. 296.

consistently with its public duty, exclude all busses from the ferry grounds while admitting all other public and private conveyances, even though use of the busses unduly congests the ferry terminal grounds and the bus operators are unprotected by contractual rights.[70] The duty referred to does not, however, include a requirement that the ferry proprietor furnish taxicab owners a place on the terminal tract on which to solicit business,[71] and so long as adequate facilities, such as means of ingress and egress, are furnished to ferry patrons, the proprietor may use, or permit others to use, the terminal tract for any lawful purpose,[72] and in this connection may grant one taxicab company an exclusive right to solicit business on ferry grounds which the courts will protect by restraining a rival taxicab company from interfering therewith.[73]

Operation in compliance with statutory provisions. Where a municipality is authorized by the state to acquire and operate a ferry, it must regulate and operate it in compliance with the governing statutory or charter provisions.[74]

§ 27. —— Duty to Operate and Transport

a. Duty to operate
b. Duty to transport

a. Duty to Operate

The holder of a ferry franchise is ordinarily under a duty to operate the ferry, but in the absence of statutory prohibition may delegate such duty to another or may in a proper case discontinue operation.

The acceptance of a ferry franchise imposes on the grantee the duty of operating the ferry,[75] which duty is, of course, limited to the extent to which the grantee has lawful right and power to operate.[76] A railroad receiving legislative authority to operate a ferry as an extension and part of its rail line is under a duty to do so.[77]

Delegation of duty. Within limitations imposed by governing statutes, it is permissible to delegate the duty of operating a ferry.[78]

Waiver of, or relief from, duty of operation. The duty of operation is an obligation to the state which can be waived only by the state, and such waiver will not be presumed without the use of language in some statute clearly expressing or implying it. It will not be inferred from the omission of officers of the state to take steps for enforcing the duty.[79]

In the absence of mandatory requirement of statute, a public corporation may discontinue operation of a ferry where, in the sound discretion of its officials, such discontinuance is advisable.[80]

b. Duty to Transport

The operator of a public ferry is under a duty to transport passengers at reasonable hours, and failure to fulfill his duty in such respect may subject him to damages or penalty. A private ferryman ordinarily has no duty of transportation.

70. N.J.—Philadelphia & Camden Ferry Co. v. Johnson, supra.

Public duty paramount

A ferry company's duty to the public is first and paramount, and qualifies the right to control its own property and adopt and execute regulative measures, such as exclusion of all motor busses from its terminal grounds.—Philadelphia & Camden Ferry Co. v. Johnson, supra.

Occasional abuse of bus privileges

That, in individual cases, inconsiderate bus drivers have caused more or less delay at ferry terminal by failing to move on after discharging passengers, and by waiting for outgoing passengers, does not entitle ferry company to injunction wholly excluding all busses from the terminal grounds.—Philadelphia & Camden Ferry Co. v. Johnson, supra.

Exclusion by grantee of right of way

Where a railroad company granted a right of way to a public service railway company to operate street cars across a plaza giving access to the railroad company's ferries, the public service company could not fence its right of way as a regulation of the plaza in the right of the railroad company, which, while having a right reasonably to regulate the plaza, could not exclude local carriers awaiting passengers from the ferry, it appearing that the fence would have such effect.—Public Service Ry. Co. v. Weehawken Tp., 119 A. 90, 94 N.J.Eq. 88.

71. N.J.—Yellow Cab Co. of Camden v. Risley, 141 A. 161, 102 N.J.Eq. 450.

72. N.J.—Yellow Cab Co. of Camden v. Risley, supra.

73. N.J.—Yellow Cab Co. of Camden v. Risley, supra.

74. Mass.—Attorney-General v. Boston, 123 Mass. 460.

75. U.S.—Charles River Bridge v. Warren Bridge, Mass., 11 Pet. 420, 9 L.Ed. 773.
25 C.J. p 1075 note 10.
Facilities defined see supra § 1.

76. N.Y.—Matter of Wheeler, 115 N.Y.S. 605, 62 Misc. 37, affirmed 121 N.Y.S. 1143, 137 App.Div. 894.
25 C.J. p 1076 note 11.

77. Mass.—Brownell v. Old Colony R. Co., 41 N.E. 107, 164 Mass. 29, 49 Am.S.R. 442, 29 L.R.A. 169.

78. Wash.—Raine v. Port of Seattle, 203 P. 61, 118 Wash. 168.

Delegation under power to lease

The patrons of a ferry which had been acquired by a port as part of a comprehensive plan of port improvement adopted by the voters of the port cannot complain that the port, which was expressly given power to lease the ferry, had delegated its power to operate the ferry to a county which was authorized by law to operate and control it, even though the sale of the ferry by the port to the county was forbidden by statute.—Raine v. Port of Seattle, supra.

79. Mass.—Brownell v. Old Colony R. Co., 41 N.E. 107, 164 Mass. 29, 49 Am.S.R. 442, 29 L.R.A. 169.

80. Wash.—Woody v. Port of Seattle, 203 P. 59, 118 Wash. 163.

Other means of transportation becoming available

A port which, in accordance with the vote of the people adopting a comprehensive plan of improvement, had acquired a ferry previously operated by a private corporation, is not required to continue its operation at a constant loss, which could only be made good by taxation, where since the acquisition of the ferry street car lines and paved roads had been constructed which furnished necessary transportation to the community served by the ferry.—Woody v. Port of Seattle, supra.

It is the duty of a public ferryman to transport passengers at all reasonable hours and without unnecessary delay,[81] and any person who is refused transportation or unreasonably delayed may maintain an action for the damages sustained.[82] Under the statutes in some states a penalty may be recovered in such cases by the injured party, as shown infra § 32, which remedy has been held to be cumulative, and no bar to an action on the case for damages.[83] In cases of refusal to transport across boundary waters between states, the statutory remedy can be invoked only where the refusal was to transport from the state where the statute is operative.[84] No duty of transportation rests on a private ferry.[85]

§ 28. —— Liability for Injuries Generally

a. In general
b. Ferryman as common carrier
c. Care as to passengers and goods generally
d. Safe and seaworthy vessel
e. Equipment and appliances
f. Landings and approaches
g. Contributory negligence
h. Property in owner's custody
i. Liability of private and unlicensed ferrymen
j. Liability of lessor and lessee
k. Liability of municipal corporation

a. In General

A ferryman owes the general public a duty to exercise reasonable diligence to prevent casualties reasonably to be anticipated, but does not owe either a trespasser or a member of the general public the same degree of care that he owes passengers.

A licensed ferryman owes the general public a duty to take all reasonable precautions to prevent casualties which may reasonably be anticipated and which the exercise of ordinary prudence and foresight on his part would prevent.[86] A public ferryman is ordinarily regarded as a common carrier of passengers and property intrusted to his care and held accountable for the exercise of due diligence in respect of their safety, as shown in following subdivisions of this section; but neither under common-law principles nor under statutes merely declaratory of the common law does he owe the carrier's duty of care to one not sustaining toward him the relationship of passenger, and a ferryman may not be held accountable for the injury or death of one not a passenger which occurs without breach of the ferryman's duty toward the general public.[87]

A trespasser is not entitled to the same degree of care on the part of the ferryman as is due to passengers, and those rightfully on the premises.[88]

Gratuitous service. Where a ferryman carries property gratuitously, he has been held liable for gross negligence only.[89]

Operation in fog. The mere act of operating a

81. Ala.—Koretke v. Irwin, 13 So. 943, 100 Ala. 323, 21 L.R.A. 787.
Iowa.—Slimmer v. Merry, 23 Iowa 90.
25 C.J. p 1076 note 18.

82. Ark.—Jabine v. Midgett, 25 Ark. 474.
25 C.J. p 1076 note 19.

83. Tenn.—Wallen v. McHenry, 3 Humphr. 245.

84. Ky.—Reeves v. Little, 7 Bush 469.

85. Mich.—Meisner v. Detroit, Belle Isle & Windsor Ferry Co., 118 N.W. 14, 154 Mich. 545, 129 Am.S.R. 493, 19 L.R.A.,N.S., 872.
25 C.J. p 1076 note 24.

86. Ark.—Harris v. McClintock, 261 S.W. 29, 164 Ark. 145.

87. Ark.—Harris v. McClintock, supra.

Motorist mistaking moored ferryboat for bridge

Where plaintiff's decedent was drowned by driving off end of ferryboat, which was moored to shore at night, in belief that it was a bridge, the failure of owner to guard against such casualty was not negligence, it not being a contingency which could have been reasonably anticipated.—Harris v. McClintock, supra.

Persons not invitees

Where highway approaching river afforded extensive view of stream in daytime, and private road leading from highway to river had never been and could not be used except to reach ferry, automobile driver and occupants of car who lost their way and, without any purpose of using ferry, drove along private road to ferry landing and into river, were not invitees for whose death owner of private road and ferry was liable, since his only acquiescence in use of road by public was for access to ferry. In this connection the court stated that it had been ruled that the motorist was not a trespasser, and remarked that its decision was limited to ruling that it was error to submit the law as to invitees, and that the question whether defendant might be liable for some breach of duty to the general public was left undecided.—Printy v. Reimbold, 205 N.W. 211, 200 Iowa 541, 41 A.L.R. 1423, overruling 202 N.W. 122, 200 Iowa 541, 41 A.L.R. 1423.

Runaway horse

The failure to keep up the barriers on the boat while the boat is moored to the bank does not render the ferry owner liable for the loss of a runaway horse, passing over the boat into the water.—Evans v. Goodrich, 49 N.W. 188, 46 Minn. 388.

Statutes relating to ferryman's duty to his passengers are inapplicable to his duties to the general public, and recovery may not be had for the death or injury of one not a passenger under such statute, recovery, if any, being imposed on common-law grounds.—Harris v. McClintock, 261 S.W. 29, 164 Ark. 145.

88. N.Y.—Malloy v. Staten Island Rapid Transit R. Co., 28 N.Y.S. 979, 78 Hun 166.
25 C.J. p 1077 note 35.

89. Ga.—Self v. Dunn, 42 Ga. 528, 5 Am.R. 544.
N.J.—Dudley v. Camden & Philadelphia Ferry Co., 42 N.J.Law 25, 36 Am.R. 501.

Services compensated for by county

Where the consideration for the operation of a public ferry was paid by the county for the benefit of the citizens, the services of the ferryman were not gratuitous, so as to make him liable only for the consequences of gross negligence.—Hil-

ferryboat in a fog is not negligence per se as regards the liability of the ferryman for injury to persons and property generally,[90] and, as shown in Collision § 114, ferryboats are exempt from the usual duty to discontinue navigation during fogs.

b. Ferryman as Common Carrier

A public ferryman is ordinarily regarded as a common carrier of passengers and property committed to his care. A private ferryman is not a common carrier.

A public ferryman is a common carrier of passengers.[91] As soon as a ferryman signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery.[92] The duty to protect the passenger as a passenger continues until he has been landed.[93]

Of property. A public ferryman is generally regarded as a common carrier of property,[94] although some decisions limit the application of this doctrine and hold that while a ferryman is a common carrier in the sense that he cannot refuse transportation of goods to any person applying therefor, he does not assume the obligation of a common carrier with reference to the transportation of goods, but is liable only in case of neglect or fault on his part.[95] As in the case of transportation of passengers, liability attaches as soon as there is assent to receive the goods for transportation.[96]

A private ferryman is not a common carrier.[97]

c. Care as to Passengers and Goods Generally

A public ferryman must exercise the care required of a common carrier as to passengers and according to the generally accepted rule as to property which he transports.

The status of a public ferryman as a common carrier, as discussed in the preceding subdivision of this section, has led the courts to impose on him an insurer's liability for property committed to his care, making him responsible for all damage except that resulting from an act of God or the public enemy,[98] although, as therein shown some authorities refuse to hold him to so great a degree of liability. In accordance with principles discussed in Carriers §§ 676–712, a ferryman, although a common carrier of passengers, is not an insurer of their safety,[99] but is held to exercise of the highest degree of care and foresight in the protection of their lives and persons.[1] A ferryman who fails in his duty to exercise due care in respect of either passengers or property will be held responsible for resultant damage,[2] although he will be relieved of responsibility where he has not failed in such duty.[3] Negligence

burn v. McKinney, 96 So. 61, 209 Ala. 229.

90. Md.—Adams v. Carey, 190 A. 815, 172 Md. 173.

91. N.J.—Williams v. Pennsylvania R. Co., 115 A. 447, 96 N.J.Law 350, affirmed 117 A. 927, 97 N.J.Law 585.
Va.—City of Portsmouth v. Madrey, 191 S.E. 595, 168 Va. 517—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.
Wash.—McLain v. Easley, 262 P. 975, 146 Wash. 377, modified in other respects 264 P. 714, 146 Wash. 377.
25 C.J. p 1074 note 94.

92. U.S.—Riley v. Vallejo Ferry Co., D.C.Cal., 173 F. 331.
25 C.J. p 1074 note 96.

93. Mass.—Dodge v. Boston & B. SS. Co., 19 N.E. 373, 148 Mass. 207, 12 Am.S.R. 541, 2 L.R.A. 83.
25 C.J. p 1075 note 98.

94. Ark.—Importers' & Exporters' Ins. Co. v. Jones, 266 S.W. 286, 166 Ark. 370.
Tex.—Bean v. Hinson, Civ.App., 235 S.W. 327.
Wash.—McLain v. Easley, 262 P. 975, 146 Wash. 377, modified in other respects 264 P. 714, 146 Wash. 377.
25 C.J. p 1075 note 2.

95. U.S.—The Nassau, D.C.N.Y., 182 F. 696, reversed on other grounds 188 F. 46, 110 C.C.A. 184, error denied 32 S.Ct. 524, 223 U.S. 722, 56 L.Ed. 630.
25 C.J. p 1075 note 5.

96. S.C.—Cohen v. Hume, 12 S.C.L. 439.
Tenn.—Wilson v. Alexander, 88 S.W. 935, 115 Tenn. 125.
25 C.J. p 1075 note 7.

97. Ark.—St. Paul F. & M. Ins. Co. v. Harrison, 215 S.W. 698, 140 Ark. 158.
Ga.—Self v. Dunn, 42 Ga. 528, 5 Am. R. 544.
25 C.J. p 1075 note 4.

98. Tex.—Bean v. Hinson, Civ.App., 235 S.W. 327.
25 C.J. p 1075 note 3.

99. La.—Johnson v. Bisso Ferry Co., 127 So. 661, 13 La.App. 159.
Pa.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.
Va.—City of Portsmouth v. Madrey, 191 S.E. 595, 168 Va. 517.

Need only exonerate itself from negligence
Ferryboat is not insurer of passenger's safety, and has burden only to exonerate itself from negligence and not to demonstrate reason why accident happened.—Gates v. Bisso Ferry Co., La.App., 172 So. 829.

1. N.J.—Williams v. Pennsylvania R. Co., 115 A. 447, 96 N.J.Law 350, affirmed 117 A. 927, 97 N.J.Law 585.
Va.—City of Portsmouth v. Madrey, 191 S.E. 595, 168 Va. 517—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.

Duty of strict diligence
Ferry company is bound to use strictest diligence that means of conveyance employed and circumstances will permit in receiving a passenger, conveying him to his destination, and setting him down safely.—Alford v. Bisso Ferry Co., La. App., 161 So. 368.

2. Mass.—Townsend v. Boston, 72 N.E. 991, 187 Mass. 283.
N.J.—Williams v. Pennsylvania R. Co., 115 A. 447, 96 N.J.Law 350, affirmed 117 A. 927, 97 N.J.Law 585—Peters v. Philadelphia & C. Ferry Co., 72 A. 106, 77 N.J.Law 540.
N.Y.—Cash v. New York Cent. & H. R. R. Co., 67 N.Y.S. 823, 56 App.Div. 473.
25 C.J. p 1076 note 26.

Common-law duty of reasonable care
Irrespective of whether or not statutes defining a ferryman's duty apply, ferryman operating intercounty ferry has common-law duty of at least using reasonable care to safeguard patrons.—McLain v. Easley, 272 P. 66, 150 Wash. 148.

3. La.—Johnson v. Bisso Ferry Co., 127 So. 661, 13 La.App. 159.

Injury to passenger by automobile
La.—Johnson v. Bisso Ferry Co., supra.

Last clear chance doctrine
Where there was no proof that any one connected with train movements saw passenger on rails of fer-

in operation may consist of a number of concurring elements, no one of which in itself is sufficient to establish actionable negligence.[4] It is not necessary that the ferryman should have had notice that a failure to take certain precautions would result in accident, if the possibility of its happening was clear to the ordinarily prudent mind,[5] and he is chargeable with knowledge that automobiles may not be, at all times, under adequate control,[6] although the ferryman is under no duty to inspect each car or as it comes aboard to ascertain whether its brakes and other machinery are in good working order.[7] Where the accident is an extraordinary one that could not reasonably have been anticipated as resulting from the ferryman's alleged negligent act, the ferryman is not liable.[8] Where it is sought to hold a ferryman for negligence of his employees, there must be proof that the negligent act was the act of an employee,[9] and that the employee's act was within the course and scope of his employment.[10]

Animals. A ferryman may, as in the case of damage to other property, be held responsible for damage to animals resulting from his negligence[11] and is chargeable with knowledge that animals are easily frightened;[12] but he is not chargeable for loss or injury due to the animal's own restive or vicious character.[13] The act of swimming cattle across a river is no part of a ferryman's legal duty and he cannot be held liable for its nonperformance.[14]

Expulsion of passenger. A ferryman has no right to expel a passenger from a ferryboat for violating a rule of the company without first informing the passenger of the existence of the rule, nor has he any right to touch the person of the passenger without first notifying him that unless he leaves the boat such extreme measures will be resorted to.[15] However, the use of only sufficient force to compel a passenger to alight at destination as required by the rules of the ferry is not actionable.[16]

d. Safe and Seaworthy Vessel

The ferryman should furnish a seaworthy boat, properly manned and equipped, and maintain it in a safe condition; but he is not obligated to guard against extraordinary accidents not reasonably to be anticipated and fulfills his duty by adopting methods of construction followed by others and found by experience to be efficient and safe.

As a common carrier of passengers, under the rule discussed supra subdivision b of this section, a ferryman owes his passengers a duty to exercise due care to provide a reasonably safe vessel,[17] and

ryboat used to transport trains across river when train could or should have been stopped in time to avoid killing him, last clear chance doctrine did not apply.—Dowling v. Texas Pacific-Missouri Pac. Terminal R. Co., La.App., 154 So. 65.

4. La.—Aiken v. Southern Pac. Co., 29 So. 1, 104 La. 157.
25 C.J. p 1077 note 27.

5. N.Y.—Meisle v. New York Cent. & H. R. Co., 114 N.E. 347, 219 N.Y. 317, Ann.Cas.1918E 1081.

Duty to anticipate unruly conduct of crowd

Where ferry company knew that a large, rough, and boisterous crowd left dock for a particular trip, but placed no warning signs or guards in the waiting room, company was under a duty to take reasonable precaution to prevent injury to passengers by rushing and crowding of persons assembled.—Rambo v. Puget Sound Nav. Co., Wash., 123 P.2d 355.

6. U.S.—Shepard v. Reed, C.C.A. Tenn., 26 F.2d 19.
25 C.J. p 1077 note 30.

In supervising parking of automobiles on ferry, operator was charged with knowledge, and duty to anticipate, that automobiles are not always under adequate control.—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.

7. Pa.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.

8. N.Y.—Cleveland v. New Jersey Steam-Boat Co., 26 N.E. 327, 125 N.Y. 299.
25 C.J. p 1077 note 31.

Unexpected cranking of truck in gear

Where, when ferryboat was about fifty feet from landing place, driver of large and heavy tractor truck, inadequately equipped with working brakes, cranked motor while it was in gear, in violation of federal statute, when there was no one in cab of truck, causing truck to move forward before driver could get control of it and pushed against two cars ahead, causing car first in line to plunge through closed barrier gate and steel cable into water, causing death of driver, legal liability for death of driver was solely on owner of tractor truck, and there was no liability on ferry company, notwithstanding steel cable barring passage was not properly fastened and that second car in line was not properly blocked, since conduct of driver of tractor truck in cranking truck was so extraordinary as not to have been foreseeable.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.

9. Mass.—Joy v. Winnisimmet Co., 114 Mass. 63.
N.Y.—Cleveland v. New Jersey Steam-Boat Co., 68 N.Y. 306.
25 C.J. p 1077 note 33.

10. Pa.—Scanlon v. Suter, 27 A. 963, 158 Pa. 275.
25 C.J. p 1077 note 34.

11. Ohio.—Wilson v. Hamilton, 4 Ohio St. 722.
Pa.—Bauer v. Verona Ferry Co., 33 Pa.Super. 607.

12. Miss.—Sparkman v. Graham, 30 So. 713, 79 Miss. 376.
Tenn.—Wilson v. Alexander, 88 S.W. 935, 115 Tenn. 125.
25 C.J. p 1077 note 29.

13. Ky.—Hall v. Renfro, 3 Metc. 51.

14. Ill.—Einstman v. Black, 14 Ill. App. 381.

15. N.J.—Compton v. Van Valkenburgh & N. J. R. & T. Co., 34 N.J. Law 134.

16. La.—Young v. Southern Impr., etc., Co., 84 So. 168, 146 La. 882.

17. U.S.—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F. Supp. 950, affirmed, C.C.A., 68 F.2d 144, rehearing denied 69 F.2d 778.

Duty to use highest degree of care in furnishing vessel

A common carrier, such as a ferryboat, is bound to use the highest degree of care in furnishing a safe con-

his duty in such respect is absolute[18] and nondelegable.[19] The ferryman must furnish a seaworthy ferryboat,[20] manned and equipped for all normal purposes,[21] and keep it in a safe condition, free from anything likely to cause injury to passengers or their property.[22] However, the ferryman fulfills his duty in construction of ferryboats by adopting methods in general use which have been found efficient and safe,[23] and mere failure to provide sufficient seats for all passengers that a boat can safely carry is not of itself proof of negligence.[24] He is not required to put himself to unreasonable expense and trouble to guard against all possible accident,[25] nor, on the other hand, is it necessary that he should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye.[26] The application of these rules is limited to cases where the loss or injury arises in the operation of the ferry and to one entitled to its service.[27]

e. Equipment and Appliances

A ferryman is under a duty to provide his boat with such equipment as is necessary for the safe transportation of passengers and property, but need not furnish appliances of a character to safeguard against casualties not reasonably to be anticipated.

A ferryman must equip his boat with such appliances as are necessary to secure the safety of passengers and property in transportation,[28] such as barriers[29] and mooring appliances,[30] and the sufficiency of the equipment and its installation will be measured by the high standard of care imposed on a common carrier.[31] It is not necessary that the ferryman should have had notice that his failure to provide safeguards would result in accident, if the possibility of accident should have been foreseen.[32] However, the ferryman need not equip his boat so as to prevent abnormal casualties of a character not reasonably to be anticipated,[33] and negligence cannot be predicated, on the use of the means afforded passengers to land, where such means have been in common use for many years, and have nev-

veyance.—Wood v. Washington Nav. Co., 95 P.2d 1019, 1 Wash.2d 324.

18. U.S.—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F. Supp. 950, affirmed, C.C.A., 68 F. 2d 144, rehearing denied 69 F.2d 778.

19. U.S.—Henson v. Fidelity & Columbia Trust Co., supra.

20. U.S.—Henson v. Fidelity & Columbia Trust Co., supra.

21. Pa.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.
Tex.—Bean v. Hinson, Civ.App., 235 S.W. 327.

Competent attendants and necessary equipment
Ferrymen are bound to provide proper boats, with competent attendants, and to equip them with all other things necessary and proper for the maintenance of the ferry in an efficient state and safe condition.—Bean v. Hinson, supra.

22. Mont.—State v. Martin, 219 P. 632, 635, 68 Mont. 392, quoting **Corpus Juris.**
25 C.J. p 1077 note 41.

23. La.—Johnson v. Bisso Ferry Co., 127 So. 661, 13 La.App. 159.

24. U.S.—Burton v. West Jersey Ferry Co., Pa., 5 S.Ct. 960, 114 U. S. 474, 29 L.Ed. 215.

25. N.Y.—Meisle v. New York Cent. & H. R. Co., 114 N.E. 347, 219 N. Y. 317, Ann.Cas.1918E 1081.

26. N.Y.—Meisle v. New York Cent. & H. R. Co., supra.

27. Minn.—Evans v. Goodrich, 49 N. W. 188, 46 Minn. 388.
25 C.J. p 1078 note 45.

28. U.S.—Shepard v. Reed, C.C.A. Tenn., 26 F.2d 19.
Pa.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.
25 C.J. p 1078 note 47.

29. Va.—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.
25 C.J. p 1078 note 47 [a]–[c].

Concrete duty
Ferry operator owes abstract duty to provide proper safeguards to prevent automobiles from going overboard, which becomes concrete duty on emergency arising.—Chesapeake Ferry Co. v. Cummings, supra.

Contrary custom
A ferryman is not excused for failure to provide adequate barriers by the fact that it was customary to operate boats on that river without gates or chains, it not being enough that his and other ferries may have carried animals safely without these protective measures.—Bean v. Hinson, Tex.Civ.App., 235 S.W. 327.

Mere conjecture that barriers would not have prevented the accident cannot excuse the ferryman for failure to provide such barriers.—Shepard v. Reed, C.C.A.Tenn., 26 F. 2d 19.

30. Miss.—Richards v. Fuqua, 28 Miss. 792, 64 Am.D. 121.
25 C.J. p 1079 note 59.

Duty of inspection
(1) Owner of ferry could not merely rely on previous safe use of ferry chain when disembarking occupants of truck.—Henson v. Fidelity & Columbia Trust Co., C.C.A.Ky., 69 F.2d 778, denying rehearing 68 F.2d 144, which affirmed, D.C., 3 F.Supp. 950.

(2) Visual inspection of chain made by blacksmith which broke when truck was being driven off ferry was held not exercise of reasonable care.—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F. Supp. 950, affirmed, C.C.A., 68 F.2d 144, rehearing denied 69 F.2d 778.

Manufacture of chain
Where ferry chain used to moor boat to dock broke when heavy truck was being driven off ferry, resulting in death of occupants, owner was held negligent in equipping ferry with a chain defectively welded by local blacksmith instead of with a factory-made chain.—Henson v. Fidelity & Columbia Trust Co., C.C.A. Ky., 68 F.2d 144, affirming, D.C., 3 F. Supp. 950, and rehearing denied, C.C. A., 69 F.2d 778.

Number of chains
Ferry owner was held negligent in not having two chains, where chain broke while truck was being driven off ferry, and occupants were drowned.—Henson v. Fidelity & Columbia Trust Co., D.C.Ky., 3 F.Supp. 950, affirmed, C.C.A., 68 F.2d 144, rehearing denied 69 F.2d 778.

31. U.S.—Henson v. Fidelity & Columbia Trust Co., C.C.A.Ky., 68 F. 2d 144, affirming, D.C., 3 F.Supp. 950, and rehearing denied, C.C.A., 69 F.2d 778.

32. N.Y.—Meisle v. New York Cent. & H. R. Co., 114 N.E. 347, 219 N.Y. 317, Ann.Cas.1918E 1081.

33. Pa.—Hendricks v. Pyramid Motor Freight Corporation, 195 A. 907, 328 Pa. 570.

er been found to be dangerous or ineffective.[34] Statutory requirements in some states as to the equipment of boats, and regulations passed by properly authorized boards or commissions, will affect the issue whether or not sufficient care in this respect has been used in a particular case,[35] but it has been held that an order of court pursuant to such statutes, excusing the keeper of a ferry from having certain appliances on his boat, does not release him from any part of his liability at common law.[36] Where the duly authorized board makes no requirement as to particular appliances, that fact gives rise to a presumption which is entitled to some weight in determining the question of legal duty.[37]

f. Landings and Approaches

A ferryman should provide safe landing places and approaches to the ferryboat, but need not guard against accidents not reasonably foreseeable, and may not be made to respond in damages for casualties occurring off his premises and in the public highway.

In compliance with his duty to maintain adequate means of ingress and egress from and to the ferryboat, discussed supra § 26, a ferryman should maintain safe and suitable landings and approaches,[38] and his liability for maintenance of an unsafe landing place attaches, even though the ownership of the landing is in another.[39] The duty to remedy obvious dangers is not less stringent because of the fact that a large number of persons pass over the ferry without injury.[40] The duty as to the safety of landings applies not only to the immediate means of getting on and off the boat, but also requires the ferryman to furnish safe passageways between the ferryhouses and the streets,[41] and the common carrier's duty to provide safe means of passage between the streets and the carrier's means of transportation applies to the ferryman.[42] Passageways habitually used by foot passengers, although designed for vehicles, must be kept in reasonably safe condition for foot passengers.[43] The ferryman's liability will not, however, be so far extended as to make him responsible for injuries occurring off his premises and on the public highway.[44]

There is no duty to guard against all possible accidents which could not reasonably have been foreseen;[45] but the ferryman is under a duty to anticipate and guard against reasonably foreseeable accidents,[46] and the extraordinary character of the accident does not relieve him from liability, if it was in fact caused by his negligent act.[47] He is not bound to adopt new and improved methods, where those already in use are reasonably safe.[48] Where he does adopt the best appliances known, he will not be responsible for an injury resulting from a condition impossible to remedy,[49] but the evidence must affirmatively show that the condition is such as to be impossible to remedy.[50]

g. Contributory Negligence

Contributory negligence of a ferry user may bar his recovery. The ferryman's rules and existing customs are

34. N.Y.—Scribner v. Long Island R. Co., 88 N.Y. 351—Loftus v. Union Ferry Co., 84 N.Y. 455, 38 Am. R. 533.
25 C.J. p 1078 note 50.

35. Conn.—Gillette v. Goodspeed, 37 A. 973, 69 Conn. 363.

36. Tenn.—Sanders v. Young, 1 Head 219, 73 Am.D. 175.

37. Conn.—Gillette v. Goodspeed, 37 A. 973, 69 Conn. 363.
25 C.J. p 1078 note 53.

38. La.—Alford v. Bisso Ferry Co., App., 161 So. 368.
Mo.—Burke v. St. Louis Southwestern R. Co., 97 S.W. 683, 120 Mo. App. 683.
Wash.—Simmons v. Anderson, 13 P. 2d 73, 169 Wash. 165.
W.Va.—Quinn v. Flesher, 102 S.E. 300, 85 W.Va. 451.
25 C.J. p 1078 note 54.

Dock and appurtenances

Ferryman is under duty to passengers to keep dock and appurtenances in reasonably safe condition.—Simmons v. Anderson, 32 P.2d 1005, 177 Wash. 591.

Rising apron

In suit by ferry passenger who fell when apron, hinged to gangway and with its free end resting on floating pontoon, rose and tripped her, ferry company was held negligent.—Alford v. Bisso Ferry Co., La.App., 161 So. 368.

39. N.J.—Fortein v. Delaware, L. & W. R. Co., 100 A. 194, 90 N.J.Law 137—Yetter v. Gloucester Ferry Co., 69 A. 1079, 76 N.J.Law 249.

40. La.—Alford v. Bisso Ferry Co., App., 161 So. 368.
N.Y.—Bartholomew v. Poughkeepsie & H. Ferry Co., 7 N.Y.S. 785, 55 Hun 605.

41. U.S.—Magoric v. Little, C.C.N.Y., 25 F. 627, 23 Blatchf. 399.
Pa.—Bauer v. Verona Ferry Co., 33 Pa.Super. 607.
25 C.J. p 1079 note 57.

42. Pa.—Calhoon v. Pittsburgh Coal Co., 194 A. 768, 128 Pa.Super. 582—Allen v. Delaware River Ferry Co. of New Jersey, 177 A. 201, 117 Pa. Super. 142.

Negligence not shown

Pa.—Allen v. Delaware River Ferry Co. of New Jersey, supra.

43. N.Y.—Wolf v. Brooklyn Ferry Co., 66 N.Y.S. 298, 54 App.Div. 67.

44. Pa.—Calhoon v. Pittsburgh Coal Co., 194 A. 768, 128 Pa.Super. 582.

Ice on roadway leading to ferry

Pa.—Calhoon v. Pittsburgh Coal Co., supra.

45. Ky.—Tolin v. Terrell, 117 S.W. 290, 133 Ky. 210.
25 C.J. p 1079 note 60.

46. La.—Alford v. Bisso Ferry Co., App., 161 So. 368.

47. N.Y.—Cash v. New York Cent. & H. R. R. Co., 67 N.Y.S. 823, 56 App. Div. 473.

48. Mass.—Le Barron v. East Boston Ferry Co., 11 Allen 312, 87 Am. D. 717.
N.Y.—Scribner v. Long Island R. Co., 88 N.Y.S. 351.
Pa.—Bauer v. Verona Ferry Co., 33 Pa.Super. 607.

49. N.Y.—Race v. Union Ferry Co., 34 N.E. 280, 138 N.Y. 644—Duke v. Tenth St. & Twenty-Third St. Ferry Co., 29 N.Y.S. 739, 9 Misc. 268, affirmed 41 N.E. 88, 145 N.Y. 640.
25 C.J. p 1079 note 63.

50. N.Y.—Spero v. Long Island R. Co., 47 N.Y.S. 1093, 21 Misc. 683.
25 C.J. p 1079 note 64.

relevant to the issue of contributory negligence although not necessarily controlling.

A passenger may assume that the ferryman has performed his full duty toward him in the maintenance and operation of the boat, in the absence of circumstances putting him on guard,[51] and if he conducts himself as a reasonably prudent man would under the circumstances, he will not be held guilty of contributory negligence.[52] However, if, acting on the assumption of the ferryman's full performance of his obligations, the passenger still conducts himself without a reasonable degree of care under the circumstances, and if his negligence contributes to his injury, he cannot recover against the ferryman.[53] Nonperformance of a ferryman's obligation to the passenger does not relieve the passenger from the duty of exercising proper care, under circumstances showing the passenger's knowledge of existing conditions.[54]

Boarding or leaving boat. A passenger may be denied recovery for injuries sustained while boarding or leaving a ferryboat where they were caused by his contributory negligence,[55] as where he attempted to board a ferryboat after it left its moorings,[56] or failed, without excuse for doing so, to look where he was walking in passing between the dock and ferryboat.[57] Where a landing place is sufficiently safe for persons of ordinary prudence, and the passenger is injured by failure to exercise such prudence, he cannot recover.[58]

On the other hand, a passenger injured while boarding or leaving a ferryboat may recover for negligence of the ferry proprietor where the plea of contributory negligence is not sustained under the facts.[59] A passenger is justified in assuming that when the guard chains are taken down, or the gates opened for passengers to leave, the boat will remain securely fastened.[60] He may also assume that the landing place is in a safe condition,[61] and when following immediately behind other passengers need not examine particularly to see if there is a vacant place between the bridge and the boat.[62] A driver of a wagon may rely on the skill of a ferryman who directs his movements, even though he knows that the ferry is not fastened.[63] It is not negligent for the owner of a young horse to take it on a ferryboat, even though it is timid and easily frightened,[64] nor for a truck driver to stand upright on his truck while it is being driven onto a ferryboat,[65] nor for a driver to start his horse and wagon up a steep drop following a heavy team when he sees a deck hand standing there whose duty it is to block teams going up the drop.[66] The existence of customary methods in boarding or leaving a ferryboat at a particular place has a bearing on the legal character of the act, whether negligent or otherwise.[67] It has been held not negligent for a passenger to step over the guard chain and pass to the wharf before the boat is secured, even though contrary to the rules of the ferry company, it being in evidence that it was customary for passengers to leave the boat in that way,[68] or for a pas-

51. Mich.—Flanagan v. Arnold, 210 N.W. 256, 236 Mich. 180.
Wash.—Wood v. Washington Nav. Co., 95 P.2d 1019, 1 Wash.2d 324.
25 C.J. p 1079 note 66.

Operation under dangerous conditions

Where plaintiff's decedent was inexperienced in the matter of boats and was assured by the operator of a small launch used as a ferry that it was safe to undertake the trip despite adverse weather conditions, and where the boat sank owing to rough water and plaintiff's decedent was drowned, recovery could be had as against the defense of contributory negligence, since plaintiff's decedent was justified in relying on the assurances of the ferry operator that it was safe to undertake the trip under prevailing conditions.—Flanagan v. Arnold, 210 N.W. 256, 236 Mich. 180.

52. N.J.—Peters v. Philadelphia & C. Ferry Co., 72 A. 106, 77 N.J. Law 540.
N.Y.—Bartlett v. New York & S. B. F. & S. Transp. Co., 8 N.Y.S. 309, 57 N.Y.Super. 348.
Pa.—Amos v. Delaware River Ferry Co., 77 A. 12, 228 Pa. 362.
25 C.J. p 1079 note 67.

53. La.—Williams v. Union Ferry Co., 52 So. 678, 126 La. 502, 139 Am.S.R. 542.
25 C.J. p 1079 note 68.

54. Ill.—Keokuk Packet Co. v. Henry, 50 Ill. 264.
25 C.J. p 1079 note 69.

55. Ky.—Neal v. Ashland-Ironton Transfer & Ferry Co., 256 S.W. 721, 201 Ky. 332.

Boat not yet fastened to dock

A woman ferry passenger, negligently invited to land, and who attempted to step from the boat when she knew there was a space between it and the float and that the boat had not been fastened, and while it was still in motion, was guilty of contributory negligence as a matter of law.—Neal v. Ashland-Ironton Transfer & Ferry Co., supra.

56. La.—Williams v. Union Ferry Co., 52 So. 678, 126 La. 502, 139 Am.S.R. 542.

57. La.—Williams v. Union Ferry Co., 52 So. 678, 126 La. 502, 139 Am. S.R. 542.
25 C.J. p 1080 note 75.

58. N.Y.—Race v. Union Ferry Co., 34 N.E. 280, 138 N.Y. 644, reversing 19 N.Y.S. 675—Fogassi v. New York Cent. & H. R. R. Co., 45 N.Y.S. 175, 17 App.Div. 286, affirming 43 N.Y.S. 268, 19 Misc. 108.

59. La.—Alford v. Bisso Ferry Co., App., 161 So. 368.

60. N.Y.—Spero v. Long Island R. Co., 47 N.Y.S. 1093, 21 Misc. 683.

61. Mo.—Burke v. St. Louis Southwestern R. Co., 97 S.W. 981, 120 Mo.App. 683.
25 C.J. p 1080 note 90.

62. N.J.—Palmer v. New Jersey R. Co., 33 N.J.Law 90.

63. Tenn.—Wilson v. Alexander, 88 S.W. 935, 115 Tenn. 125.

64. N.Y.—Clark v. Union Ferry Co., 35 N.Y. 485, 91 Am.D. 66.

65. N.J.—Bunce v. Pennsylvania R. Co., 88 A. 1078, 85 N.J.Law 367.

66. Mass.—Townsend v. Boston, 72 N.E. 991, 187 Mass. 283.

67. U.S.—The Manhasset, D.C.Va., 19 F. 430.
N.Y.—Hazman v. Hoboken Land & Impr. Co., 2 Daly 130.

68. U.S.—The Manhasset, D.C.Va., 19 F. 430.

senger to leave by the carriageway, when it is in evidence that it was customary for pedestrians to use the carriageway.[69] It has been said, however, that a person who is in a place not intended for passengers is under the duty of exercising a greater degree of care than would be required if occupying a place intended for passengers,[70] and it has been held that one using the vehicular gangway in boarding or leaving the ferry assumes the risk of resultant injury[71] and is guilty of contributory negligence.[72]

Conduct in transit. A plaintiff sustaining damage on a ferryboat during the course of transit may not recover where the injury resulted from his own contributory negligence.[73] It is negligent for a driver of a team not to remain in a position where he can control his horses,[74] or to refuse to unhitch horses from his wagon when requested to do so by the ferryman.[75]

On the other hand, plaintiff is not precluded from recovery sustained as a result of defendant ferryman's breach of duty where the plea of contributory negligence is not sustained by the facts adduced in evidence.[76] It is not, as a matter of law, contributory negligence for a passenger to leave the cabin and stand on the deck between the cabin and the end of the boat,[77] or to stand near a stairway, or go down a stairway without taking hold of the railing,[78] or to rise from his seat before the boat is safely moored,[79] nor can the movements of a person in an endeavor to regain his feet be held an act of negligence on his part.[80]

Where plaintiff's violation of a criminal statute does not contribute to his injury sustained while in transit on a ferryboat, such violation does not preclude his recovery of damages from the ferryman.[81]

Effect of rules and regulations. Reasonable rules and orders of the ferryman,[82] when brought to the notice of the passenger,[83] should be considered when determining the issue of contributory negligence. The ferryman's acquiescence in customs violating his rules is evidence of their abrogation.[84]

Proximate cause. To constitute a defense available to the ferry operator the negligence of the ferry user must have contributed proximately to the damage sustained, and the defense is unavailable where the negligence of defendant was the sole proximate cause of the damage.[85]

69. N.Y.—Hazman v. Hoboken Land & Impr. Co., 2 Daly 130.

70. N.Y.—Weill v. New York City, 132 N.Y.S. 609, 147 App.Div. 634.

71. U.S.—Bohem v. Atlantic City R. Co., C.C.Pa., 174 F. 302.
Pa.—Henderson v. Philadelphia & Camden Ferry Co., 170 A. 425, 112 Pa.Super. 42.

Fall into coal hole
Pa.—Hopkins v. West Jersey & S. R. Co., 73 A. 1104, 225 Pa. 193, 17 Ann.Cas. 370.

Injury by truck
Pa.—Henderson v. Philadelphia & Camden Ferry Co., 170 A. 425, 112 Pa.Super. 42.

72. U.S.—Graham v. Pennsylvania R. Co., C.C.N.J., 39 F. 596.

73. Pa.—Freihofer Baking Co. v. Payne, 77 Pa.Super. 570.

Leaving motor truck unguarded constitutes contributory negligence barring recovery for damage to truck sustained when it was jarred partially off the ferryboat as the latter struck the pilings on entering its slip.—Freihofer Baking Co. v. Payne, supra.

74. N.J.—Dudley v. Camden & Philadelphia Ferry Co., 45 N.J.Law 368, 46 Am.R. 781.

75. Ala.—Frierson v. Frazier, 37 So. 825, 142 Ala. 232.

76. Wash.—Wood v. Washington Nav. Co., 95 P.2d 1019, 1 Wash.2d 324.

Failure to keep eyes on deck while walking
A passenger on defendant's ferryboat was not guilty of contributory negligence by failing to keep her gaze fixed on the deck during every step of her progress from an automobile, which was on the boat, to a door at foot of gangway preparatory to going to upper deck, but could assume that deck was in a safe condition to walk on, as respects liability of defendant for personal injuries sustained by passenger in fall on ice near door, especially when icy spot was comparatively small and not easy to see and accident occurred at twilight.—Wood v. Washington Nav. Co., supra.

77. Mass.—Peverly v. Boston, 136 Mass. 366, 49 Am.R. 37.

78. N.Y.—Bartlett v. New York & S. B. F. & S. Transp. Co., 8 N.Y.S. 309, 57 N.Y.Super. 348.

79. N.Y.—Snelling v. Brooklyn & N. Y. Ferry Co., 13 N.Y.S. 398, affirming 28 N.E. 250, 128 N.Y. 579.

80. N.Y.—Cash v. New York Cent. & H. R. R. Co., 67 N.Y.S. 823, 56 App.Div. 473.

81. N.Y.—Ashendorf v. Delaware, L. & W. R. Co., 167 A. 27, 11 N.J. Misc. 487.

Driver leaving car unattended
Motorist was held not precluded from recovery against ferryboat operator for injuries sustained in falling down open coal hole, regardless of whether New York statute making it misdemeanor for motorist to leave automobile on ferryboat unattended applied, where motorist's violation of statute did not contribute to accident.—Ashendorf v. Delaware, L. & W. R. Co., supra.

82. Ill.—McFadden v. Fortier, 20 Ill. 509.
25 C.J. p 1080 note 70.

83. Mass.—Dodge v. Boston & B. SS. Co., 19 N.E. 373, 148 Mass. 207, 12 Am.S.R. 541, 2 L.R.A. 83.

84. U.S.—The Manhasset, D.C.Va., 19 F. 430.

85. Tex.—Bean v. Hinson, Civ.App., 235 S.W. 327.
Va.—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.
25 C.J. p 1079 note 68 [a].

Operation without barriers
(1) In a case where, but for the owner's effort to make his mules pull the hind wheels of his wagon back on the ferryboat without the ferryboat being fastened to the bank, the wagon would not have dragged the mules into the water and drowned them, but the accident could also have been avoided had the ferryman equipped his boat with end gates, stay chains, bumpers, or other means of preventing animals being transported from backing off the boat, it was held that defendant's negligence in operating his boat without such means for preventing accidents was

h. Property in Owner's Custody

Some authorities hold a ferryman to an insurer's liability for property remaining in the custody and control of the ferry user, while other authorities limit his liability to liability for negligence.

There is a diversity of opinion as to the liability of a ferryman for property which a passenger takes with him on a ferryboat for transportation and does not deliver into the custody of the ferryman, but retains under his own control and management.[86] It has been held that in such a case the owner acts, in the control of his property, solely as the agent of the ferryman, whose responsibility is that of a common carrier insuring the safety of the property against all loss, except such as may result from the act of God or the public enemy,[87] and, with the further exception, not occurring generally in transportation by a common carrier, that the ferryman will not be liable for loss resulting from negligence on the part of the owner in control of the property.[88] On the other hand, it has been held that, where the passenger retains the custody of his property, the ferryman is not liable as a common carrier, but only for loss or injury resulting directly from his failure to provide safe and suitable boats and appliances, or his failure to exercise proper care and skill in managing them.[89] The passenger who retains control of his property must use due care to protect it from injury, and if his own negligence in this regard contributes to the injury, he cannot recover;[90] but in such cases the ferryman will still be liable if it is shown that the loss or injury is the direct result of his omission to use due care to avoid it after becoming aware of the owner's negligence.[91] In order to exempt the ferryman from liability as a common carrier, it must appear affirmatively that the passenger retained the custody and control of his property;[92] but where the facts show simply that a passenger purchased a ferry ticket and drove his car onto the ferry, there is neither actual nor constructive delivery of the car to the ferryman so as to charge him with an insurer's liability.[93]

i. Liability of Private and Unlicensed Ferrymen

A private ferryman cannot be held to the standard of responsibility imposed on a public ferryman as a common carrier, but may be liable for negligence. One in effect holding himself out as a public ferryman may be held responsible as though he were a common carrier and cannot evade liability on the plea that he was unlicensed.

One who keeps a private ferry for his own use is not liable as a common carrier, although others are carried,[94] but is liable only for negligence,[95] and, in accordance with the general rule stated supra § 28, only for gross negligence where no toll is taken.[96] However, where the owner of a private ferry undertakes for hire to convey all persons indifferently with their carriages and goods, he subjects himself thereby to the liability of a common carrier.[97]

Liability of unlicensed ferryman. One who without authority operates a public ferry and holds himself out as a public ferryman is liable as such, and cannot take advantage of his own wrong to avoid the responsibilities of his calling.[98]

j. Liability of Lessor and Lessee

Where a ferry is leased to another, lessee or lessor may be liable for damages sustained by ferry users during operation, the liability of the lessor being dependent

the direct cause of the accident, for which he was liable.—Bean v. Hinson, Tex.Civ.App., 235 S.W. 327.

(2) Ferry operator's negligence in failing to provide or use proper barriers and appliances was held sole proximate cause of death of plaintiff's intestate when automobile was driven overboard, as against contention that plaintiff's intestate was contributorily negligent in not timely stopping car.—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.

86. Del.—Mercer v. Christiana Ferry Co., 155 A. 596, 4 W.W.Harr. 490.

87. Ill.—Fisher v. Clisbee, 12 Ill. 344.
25 C.J. p 1080 note 85.

88. Miss.—Powell v. Mills, 37 Miss. 691.
Ohio.—Wilson v. Hamilton, 4 Ohio St. 722.

89. Del.—Mercer v. Christiana Ferry Co., 155 A. 596, 4 W.W.Harr. 490.
25 C.J. p 1080 note 97.

Application of ordinary rules as to negligence
Where the owner of property being transported on a ferry retains control thereof, the ferryman does not assume toward the property the strict responsibility of a common carrier, but his liability therefor in case of loss is governed by the ordinary rules in actions for negligence.—Bean v. Hinson, Tex.Civ. App., 235 S.W. 327.

90. Ala.—Frierson v. Frazier, 37 So. 825, 142 Ala. 232.
Mass.—White v. Winnisimmet Co., 7 Cush. 155.
Pa.—Freihofer Baking Co. v. Payne, 77 Pa.Super. 570.

91. Ark.—Evans v. Rudy, 34 Ark. 383—Harvey v. Rose, 26 Ark. 3, 7 Am.R. 595.

92. Ark.—Harvey v. Rose, supra.

93. Del.—Mercer v. Christiana Ferry Co., 155 A. 596, 4 W.W.Harr. 490.

Directing location of car
Mere direction by employees of ferry indicating location for automobile on ferry was not exercise of possessory authority necessary to charge ferry as insurer.—Mercer v. Christiana Ferry Co., supra.

94. Ark.—St. Paul F. & M. Ins. Co. v. Harrison, 215 S.W. 698, 140 Ark. 158.
Ga.—Self v. Dunn, 42 Ga. 528, 5 Am. R. 544.

95. Ala.—Frierson v. Frazier, 37 So. 825, 142 Ala. 232.
Ga.—Self v. Dunn, 42 Ga. 528, 5 Am. R. 544.

96. Ala.—Frierson v. Frazier, 37 So. 825, 142 Ala. 232.

97. Ky.—Hall v. Renfro, 3 Metc. 51.
S.C.—Littlejohn v. Jones, 27 S.C.L. 365, 39 Am.D. 132.

98. Cal.—Polk v. Coffin, 9 Cal. 56.

on his power to lease and the extent to which he has retained control.

Where the owner of a ferry franchise,[99] or of a ferryboat,[1] under a power to lease and in valid exercise of that power, leases it to another who has the control and management of it, it has been held that the lessee and not the owner is liable for any loss or injury caused by the defective condition of the ferry, or negligence in its management, except as to matters as to which the lessor has retained control.[2] The lessee of a common carrier ferryman himself acquires the status of a common carrier,[3] and even though the terms of the lease oblige the lessor to maintain the approaches to the ferry, this does not relieve the lessee of its obligation to provide safe means of access to its invitees, and it may be held liable as between it and a prospective passenger for injuries sustained as a result of defects in the approaches.[4] If the lease of the ferry privilege is unauthorized, the lessor is not relieved from liability for injuries occurring while the ferry is being operated by the lessee.[5] Where the lessor is primarily liable to the injured party, a lessee operating the ferry is bound to indemnify the lessor against damages caused by the lessee's negligence.[6] A person employed to operate a ferry on shares, although in exclusive control, is a servant for hire and not a lessee, and in such case the owner is liable for injuries due to negligence in its operation.[7] Under statutes in some states a landowner who leases his land on which a public ferry is situated will be held liable for its negligent use by his tenant, unless he is able to show that he has done all in his power to prevent the ferry from being used as a public ferry.[8]

k. Liability of Municipal Corporation

The general rule, subject to statutory modifications, is that a municipality is liable for damages to a ferry user caused by negligent operation or maintenance where it operates a toll ferry in its proprietary capacity, but not where it operates a free ferry in its governmental capacity.

Except as the rule may be varied by statute, a municipality operating a free ferry is deemed to be exercising a governmental function and cannot be held to respond in damages for an injury occasioned by its servants or agents;[9] but a municipality proceeding under due legal authorization and carrying for hire may be held liable for damage or injury caused a ferry user just as any other common carrier,[10] even though the business as managed was not profitable to the municipality.[11] In other words, where the municipality operates a ferry in its proprietary capacity, it is liable for damages the same as any individual or corporation.[12] Where the agents of a municipality operate a ferry without

99. N.C.—Biggs v. Ferrell, 34 N.C. 1.
Vt.—Felton v. Deall, 22 Vt. 170, 54 Am.D. 61.
25 C.J. p 1081 note 13.

1. Ala.—Ladd v. Chotard, Minor 366.
Ill.—Claypool v. McAllister, 20 Ill. 504.
25 C.J. p 1081 note 13.

2. **Lease by county**
Where under statute a county empowered to operate a public ferry is also empowered to lease such ferry, it may properly retain some measure of control under the lease so as to be liable to one injured as a result of its fault with respect to matters as to which control was retained.—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.

Approaches
Under a lease providing that the lessee should maintain the ferry slips, aprons of the ferry docks, ticket offices, waiting rooms, and other structures thereon used by the lessee in its operations, and that the lessor county should maintain the remaining portions of the docks, the latter was under a duty to maintain the approaches to the ferry and liable to a prospective passenger injured by a defective plank in such an approach.—Norton v. Anderson, supra.

3. Wash.—Norton v. Anderson, supra.

4. Wash.—Norton v. Anderson, supra.

5. Ky.—Brooker v. Maysville & B. S. R. Co., 83 S.W. 117, 119 Ky. 137, 26 Ky.L. 1022.

6. Ala.—Harris v. Plant, 31 Ala. 639.
25 C.J. p 1081 note 15.

7. Ala.—Taylor v. Rushing, 2 Stew. 160.

8. Ga.—Printup v. Patton, 18 S.E. 311, 91 Ga. 422.

9. Ariz.—Deans v. Coconino County, 17 P.2d 801, 41 Ariz. 253.
Ga.—Arline v. Laurens County, 2 S.E. 833, 77 Ga. 249.
Ohio.—Morgan County Bd. of Com'rs v. Marietta Transf. & Storage Co., 79 N.E. 237, 75 Ohio St. 244.
S.C.—Chick v. Newberry County, 3 S.E. 787, 27 S.C. 419.

Statute as inapplicable
That statute concerning liability of ferry franchise grantee for negligence applies to county obtaining such franchise would not make county liable for its agent's negligence, where it did not appear county acquired franchise under such statute.—Deans v. Coconino County, 17 P.2d 801, 41 Ariz. 253.

10. Mass.—Davies v. Boston, 76 N.E. 663, 190 Mass. 194—Townsend v. Boston, 72 N.E. 991, 187 Mass. 283.

11. Mass.—Davies v. Boston, 76 N.E. 663, 190 Mass. 194.

12. Va.—City of Portsmouth v. Madrey, 191 S.E. 595, 598, 168 Va. 517, citing **Corpus Juris.**
Wash.—Hart v. King County, 177 P. 344, 104 Wash. 485.

Aerial ferry
A county which maintained a ferry for use of general public in crossing river and in winter season provided a basket or aerial carrier operated on a cable was engaged in a "proprietary" function and was liable for injuries sustained by prospective passenger as result of collapse of tower which sustained the cable.—Jacoby v. Chouteau County, 112 P.2d 1068, 112 Mont. 70.

Ferry approaches
(1) County's ferry landing approach forming continuous way from street to county's ferry was held not part of highway or street which county would have been maintaining as a part of its governmental functions, but a ferry approach as to which the county occupied a proprietary status rendering it liable for

authority to do so, the municipality may not be held liable for damage occurring in the course of such unauthorized operation.[13] Where a city operates a ferry, its duty as a common carrier of passengers with reference to the care required to keep boats in a safe condition is greater than the duty of care required of it to keep its highways free from defects.[14] Statutes providing for the recovery from municipal corporations of damages caused by defects in a highway, causeway, or bridge do not authorize the recovery of damages for injuries resulting from the negligent operation of ferries.[15]

§ 29. —— Liability on Statutory Bond

A ferry user may recover against the sureties on a ferryman's bond in an otherwise proper case where the nature of the bond and governing statute is such that the bond was designed for protection of ferry users, but not where the terms of the bond limit it to other purposes, such as that of indemnity of a county against loss arising from operation of its ferry by another.

Where a ferryman's statutory bond for the faithful performance of his duties is designed for their protection, ferry users may sue thereon for damages sustained as a result of the ferryman's breach.[16] Where, however, the bond is executed merely to indemnify a county against loss, it will not be construed as an obligation of the surety to pay damages directly to ferry users for injury sustained as a result of the fault of the ferry operator acting under authority from the county.[17]

The liability of the sureties is ordinarily measured by the bond given,[18] and statutory requirements regarding a covenant to be given by a ferry owner or lessee cannot be read into a bond from which they have been omitted.[19] If the conditions of the bond enlarge the liability beyond the statutory limit, it will be void to that extent.[20] Liability beyond the statutory limit can only be enforced against the ferryman as a common carrier.[21]

§ 30. Actions to Enforce Liability

a. In general
b. Pleading
c. Evidence
d. Trial
e. Damages

a. In General

Concurrent jurisdiction of suits involving ferries plying between two different political subdivisions may be granted the courts of such subdivisions. Suits against a ferryman for damage to, or loss of, property may be brought in contract on tort.

Under a statute providing that, on streams that divide parishes, the parishes between which ferryboats ply shall have concurrent jurisdiction and that complaints for neglect or infraction of the charter shall be cognizable by the court of either parish, a suit to set aside a franchise granted by the court of one parish may be brought in the court of another parish where the ferry plies between points within the two parishes.[22]

Where property is lost or damaged by the negligence of the ferryman, the owner may sue either on the ferryman's contract as a carrier or in tort.[23]

b. Pleading

In a suit against a ferryman for injury or damage to person or property, the plaintiff's initial pleading should allege facts sufficient to show a cause of action, as by showing that the damage arose from breach of a duty imposed on the ferryman, and the defendant's plea or answer should sufficiently aver matters constituting a valid defense. An amendment may not introduce a new cause of action.

Plaintiff's initial pleading in a suit against a fer-

damages sustained through defects.—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.

(2) County, empowered to conduct a ferry and collect tolls, under Remington Code 1915 § 5013, has implied authority to provide approach from terminus of street railroad to landing place, and may be held liable for an injury occurring thereon through its fault.—Hart v. King County, 177 P. 344, 104 Wash. 485.

13. La.—Hoggard v. Monroe, 25 So. 349, 51 La.Ann. 683, 44 L.R.A. 477.

14. Mass.—Rosen v. Boston, 72 N.E. 992, 187 Mass. 245, 68 L.R.A. 153.
25 C.J. p 1078 note 46.

15. Ohio.—Morgan County Bd. of Com'rs v. Marietta Transf. & Storage Co., 79 N.E. 237, 75 Ohio St. 244.
S.C.—Chick v. Newberry County, 3 S.E. 787, 27 S.C. 419.

16. Mo.—State ex rel. Hines v. Randles, 247 S.W. 808, 212 Mo.App. 413.
25 C.J. p 1081 note 2.

Ferryman's bond is for the protection of the public as well as for the security of penalties which might be imposed on the ferryman for breach of its conditions.—State ex rel. Hines v. Randles, 247 S.W. 808, 212 Mo.App. 413.

Lack of guard or gate on boat
The bond required of ferryman by Rev.St.1919 § 5536, is given for the faithful performance of the duties required by law, and where a team of mules backed off a ferry into water ten feet deep and were drowned because there was no end guard or gate, the ferryman breached his bond in failing to keep a good boat in good repair and suitable to the water, as required by § 5540.—State ex rel. Hines v. Randles, supra.

17. Ky.—Commonwealth for Use and Benefit of Lindsey's Adm'r v. Deweese, 62 S.W.2d 1042, 250 Ky. 283.

18. Ky.—Commonwealth for Use and Benefit of Lindsey's Adm'r v. Deweese, supra.

19. Ky.—Commonwealth for Use and Benefit of Lindsey's Adm'r v. Deweese, supra.

20. Ala.—Botts v. Bridges, 4 Port. 274.

21. Ala.—Botts v. Bridges, supra.

22. La.—Police Jury of Parish of Jefferson v. Westwego & Walnut St. Ferry Co., 59 So. 862, 131 La. 430.

23. Pa.—Smith v. Seward, 3 Pa. 342.

ryman for personal injury or property damage must state facts constituting a cause of action,[24] and show a breach of duty by defendant ferryman.[25] Although allegations of defendant's negligence are usual, they may be unnecessary where defendant is liable as a common carrier,[26] but where negligence is necessary to fix defendant with liability, it must be alleged.[27] The complaint in an action for property damage must specify the articles lost or damaged so as to inform defendant of the extent of the action.[28] In states where the action for damages for injuries resulting from negligence in operation of a ferry is a statutory remedy, the declaration may charge negligence in the language of the statute.[29] Where the authority of a town to operate ferries rests entirely on a special grant, the complaint in an action against the town must allege the existence of the grant.[30]

Amendment. An amendment introducing an entirely different negligent act than that originally charged, making substantially a new cause of action, will not be allowed.[31] Where allegations of defendant ferryman's negligence are unnecessary, an amendment setting up additional acts of negligence is surplusage and nonprejudicial.[32]

Plea or answer. The plea or answer of defendant ferryman should contain averments constituting a valid defense.[33]

Admissibility of evidence under pleadings. Evidence is not admissible of any losses or injuries other than those alleged in the complaint.[34]

c. Evidence

(1) Burden of proof and presumptions
(2) Admissibility
(3) Weight and sufficiency

(1) Burden of Proof and Presumptions

The burden rests on a plaintiff ferry user to prove his case, but with certain qualifications and exceptions a presumption of negligence may arise against a ferryman by proof of a passenger's rightful presence on the ferryboat and of his injury; and as a common carrier the ferryman has the burden of proving his freedom from negligence, although he need not go further and show how the accident occurred. In a suit against a ferryman common carrier of property with an insurer's liability, the burden rests on the ferryman to show facts relieving him of liability for loss of property committed to his care.

The burden of proof is on the injured passenger to show the ferryman's negligence, resulting in his injuries.[35] There is a class of cases where the na-

24. Ala.—Hilburn v. McKinney, 85 So. 496, 204 Ala. 158.

Allegations held sufficient

Complaint in action against ferry company and its insurer for negligent killing of passenger, which alleged that passenger, to knowledge of ferry company's employees, was unattended in his drunken stupor, was situated in position of danger on ferry boat, and that employees' failure to provide for his safety proximately caused his death, was held to state cause of action.—Gates v. Bisso Ferry Co., La.App., 172 So. 829.

Sufficiency of notice in summary action

In action against city which operated ferry for injuries passenger sustained, allegedly as result of improper docking of ferryboat, when she fell while boarding boat, notice of motion for judgment alleging that boat was improperly docked stated cause of action and was good as against demurrer.—City of Portsmouth v. Madrey, 191 S.E. 595, 168 Va. 517.

25. Ala.—Hilburn v. McKinney, 85 So. 496, 204 Ala. 158.

Sufficiency of allegations

(1) Count of complaint against operator of ferry for drowning of mules and loss of harness and part of wagon, complaint being open to construction that ferry was a public one operated for county, under Code 1907 § 3023 et seq., was demurrable as omitting to aver duty rested on defendant operator, rather than county, to provide barrier for the boat.—Hilburn v. McKinney, supra.

(2) Complaint, specifically averring that defendant was operating the ferry under a contract with the county whereby he agreed to provide a ferryboat and keep it in good repair and condition to transport persons and property without charge, was not demurrable as failing to aver that defendant did not furnish a safe boat.—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229.

26. Ga.—Deen v. Wheeler, 67 S.E. 212, 7 Ga.App. 507.

27. Ala.—Hilburn v. McKinney, 85 So. 496, 204 Ala. 158.
25 C.J. p 1083 note 45.

28. Iowa.—Whitmore v. Bowman, 4 Greene 148.

29. Ga.—Deen v. Wheeler, 67 S.E. 212, 7 Ga.App. 507.
25 C.J. p 1082 note 26.

30. La.—Hoggard v. Monroe, 25 So. 349, 51 La.Ann. 683, 44 L.R.A. 477.

31. N.Y.—Scribner v. Long Island R. Co., 88 N.Y.S. 351.
25 C.J. p 1082 note 28.

32. Ga.—Deen v. Wheeler, 67 S.E. 212, 7 Ga.App. 507.

33. Ala.—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229.

Contributory negligence

A plea that plaintiff contributed to the loss, in that he negligently hitched the mules to the wagon after the ferryboat had landed, without calling on defendant to help or aid in controlling them, well knowing they were easily frightened and unmanageable, did not allege sufficient facts to show a duty of plaintiff to call on defendant for assistance.—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229.

Plaintiff's retention of control of property

Where defendant denied the right of recovery on the ground that plaintiff was alleged to have retained control of his mules and wagon, and was in control at the time of the accident, such defense might lessen the degree of care of defendant, but was not a complete defense.—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229.

34. Iowa.—Whitmore v. Bowman, 4 Greene 148.

35. Mass.—Le Barron v. East Boston Ferry Co., 11 Allen 312, 87 Am.D. 717.
25 C.J. p 1082 note 30.

Duty to maintain road

Where accident occurred as result of defective condition of public road leading to ferry, burden rests on plaintiff to prove that it was the ferryman's duty to maintain such road in good condition.—Calhoon v. Pittsburgh Coal Co., 194 A. 768, 128 Pa. Super. 582.

ture of the accident itself affords proof of defendant's negligence, and where it is held that a presumption of defendant's negligence arises from evidence that plaintiff was a passenger rightfully on the ferry, that he was in the exercise of due care, and that he was injured in transportation, and from facts showing how the accident happened. In these cases the burden shifts to defendant to rebut the presumption of his negligence from the facts shown.[36] The ferryman has the burden of proving his own freedom from negligence causing the accident,[37] or to show affirmatively that plaintiff was contributorily negligent,[38] but he need not go further and explain how the accident occurred.[39] The presumption of defendant's negligence does not arise, however, where the injury is of such a character that it might reasonably have happened without any negligence on the part of the ferryman,[40] or is caused by something not connected with the machinery of transportation,[41] and there is no burden on the ferryman to explain the accident and exculpate himself where the means of knowledge as to what caused the accident are equally within the reach of both parties.[42] The rule as to the burden of proof to show the passenger's due care or contributory negligence varies in the different jurisdictions, it being incumbent on the passenger, in some states, to prove the exercise by him of ordinary care to avoid the injury,[43] while in other states the burden is on the ferryman to prove the passenger's contributory negligence.[44]

Suit on contract for property damage. In an action of contract against a ferryman for loss of, or damage to property, it is sufficient for plaintiff to show the receipt of the property by the ferryman and the loss or damage; the burden is on defendant to show that his failure to perform his agreement was due to a cause which would relieve him from liability.[45]

(2) Admissibility

General rules control admissibility of evidence in proceedings against ferrymen for injury or damage to persons or property committed to their care.

In accordance with the general rules governing admissibility of evidence, evidence in proceedings against ferrymen for injury or damage to persons or property has been held admissible or inadmissible.[46]

(3) Weight and Sufficiency

The general rules apply to weight and sufficiency of evidence in suits against ferrymen for damage or injury, and circumstantial evidence is of probative force in determining the cause of a passenger's death.

Under the general rules governing weight and sufficiency of evidence, in particular cases involving proceedings against ferrymen for injury or damage

Place of accident
In action by intending passenger of ferry for injuries caused by slipping on ice on roadway leading to ferry landing, burden of showing duty if any on owner of ferry landing to maintain roadway in good repair, despite fact that it was public road, was on plaintiff; and inference from language of witnesses that accident happened along roadway or along left side of road would not warrant inference that accident occurred on private right of way so as to impose liability on owner of ferry landing.—Calhoon v. Pittsburgh Coal Co., supra.

Prima facie case shown
Proof that ferryboat passenger was drenched from boat's hose and ill for two weeks was held to make prima facie case of negligence.—Hand v. New York Cent. R. Co., 221 N.Y.S. 3, 129 Misc. 301.

36. Mass.—Rosen v. Boston, 72 N.E. 992, 187 Mass. 245, 68 L.R.A. 153.
25 C.J. p 1082 note 31.
Res ipsa loquitur in respect of carriers of passengers generally see Carriers § 764 d.

37. La.—Alford v. Bisso Ferry Co., App., 161 So. 368.

38. La.—Alford v. Bisso Ferry Co., supra.

39. La.—Gates v. Bisso Ferry Co., App., 172 So. 829—Alford v. Bisso Ferry Co., App., 161 So. 368.

40. Mass.—Le Barron v. East Boston Ferry Co., 11 Allen 312, 87 Am. D. 717.
25 C.J. p 1082 note 32.

41. Pa.—Hayman v. Pennsylvania R. Co., 11 A. 815, 118 Pa. 508.
25 C.J. p 1082 note 33.

42. Mass.—Le Barron v. East Boston Ferry Co., 11 Allen 312, 87 Am.D. 717.
25 C.J. p 1082 note 34.

43. N.Y.—Weill v. New York City, 132 N.Y.S. 609, 147 App.Div. 634.

44. Cal.—May v. Hanson, 5 Cal. 360, 63 Am.D. 135.

Driving off boat
Defendant sued for death of intestate driving automobile off ferry into deep water had burden of proving intestate's contributory negligence.—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.

45. Mass.—Lewis v. Smith, 107 Mass. 334.

46. N.Y.—Renoud v. City of New York, 296 N.Y.S. 702, 251 App.Div. 851, 868.

Evidence of surrounding circumstances admissible
Where the principal issues related to the question as to whether defendant was negligent in operating the boat without gates or barrier for the protection of stock or vehicles, and whether plaintiff was negligent in handling the mules, it was proper to show that the road on both sides of the river was public and was frequently traveled, and that all kinds of vehicles crossed on the ferry, and automobiles frequently made much noise when moving off the boat, and such facts were properly submitted to the jury on the question of what is due care, and what precautions are necessary for the protection of property ferried.—Hilburn v. McKinney, 96 So. 61, 209 Ala. 229.

Evidence of departmental rule inadmissible
In action against the city of New York for injuries sustained by passenger on ferryboat as result of her slipping and falling on a wet deck, evidence of departmental rule as to the sprinkling of sand on wet decks was inadmissible.—Renoud v. City of New York, 296 N.Y.S. 702, 251 App.Div. 851, 868.

to persons or property committed to their care, evidence has been held sufficient or insufficient to support the judgment rendered,[47] or to show particular facts,[48] such as the proximate cause of the death of a ferry passenger [49] or the presence or absence of contributory negligence.[50] In determining whether circumstantial evidence establishes the liability of a ferryman each case must stand on its own facts,[51] but such evidence may in any event be accorded consideration.[52]

d. Trial

Under general rules governing trial of civil actions, which apply to actions against a ferryman for damage to ferry users, questions of fact as to the ferryman's negligence or the plaintiff's contributory negligence are for the jury or trial court on conflicting evidence, and on such evidence it is improper to direct a verdict or to grant a nonsuit. Instructions should conform to the general rules governing instructions in civil causes.

On conflicting evidence questions of fact are for the trial court or jury,[53] such as the public or private character of a ferry,[54] the negligence of defendant ferryman,[55] or the contributory negligence of plaintiff ferry passenger,[56] the accidental or suicidal character of a ferry passenger's death,[57] or

47. U.S.—Shepard v. Reed, C.C.A. Tenn., 26 F.2d 19.

Evidence held sufficient to sustain recovery

In action against city for injuries passenger sustained when she fell while boarding city's ferryboat, testimony that ferryboat was improperly docked, in that deck of boat was four inches below bridge when passenger stepped on it, and at that moment sank still further, was sufficient to sustain recovery.—City of Portsmouth v. Madrey, 191 S.E. 595, 168 Va. 517.

48. Wash.—Wood v. Washington Nav. Co., 95 P.2d 1019, 1 Wash.2d 324.

Presence of ice on deck

Wash.—Wood v. Washington Nav. Co., supra.

Ferryman's knowledge of passenger's helpless condition

La.—Gates v. Bisso Ferry Co., App., 172 So. 829.

Knowledge of general use of aerial carrier

Mont.—Jacoby v. Chouteau County, 112 P.2d 1068, 112 Mont. 70.

49. La.—Dowling v. Texas-Pacific-Missouri Pacific Terminal R. Co., App., 154 So. 65.

Suicide

La.—Gates v. Bisso Ferry Co., App., 172 So. 829.

50. N.Y.—Raleigh v. Hines, 186 N.Y.S. 120, 194 App.Div. 592, affirmed 134 N.E. 595, 232 N.Y. 617.

Evidence held sufficient to show absence

In action for death of teamster, thrown from truck to floor of ferryboat gangway, on theory that horses stumbled because of defective condition of planking, the evidence was held sufficient to warrant the jury in finding that decedent was free from contributory negligence.—Raleigh v. Hines, supra.

51. La.—Gates v. Bisso Ferry Co., App., 172 So. 829.

52. **Sufficiency of circumstances to show cause of death**

In action against ferry company for passenger's death by drowning, circumstantial evidence could be considered in determining whether death by drowning resulted from passenger's falling off ferry, and if such evidence would exclude any reasonable hypothesis other than that contended for by plaintiff, it would be adequate.—Gates v. Bisso Ferry Co., supra.

53. Wash.—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688.

Evidence held sufficient to go to jury

Tex.—Southern States Transp. Co. v. Ford, Civ.App., 102 S.W.2d 281, error dismissed.

Wash.—Rambo v. Puget Sound Nav. Co., 123 P.2d 355, 12 Wash.2d 637.

Evidence held insufficient to go to jury

N.Y.—Raleigh v. Hines, 186 N.Y.S. 120, 194 App.Div. 592, affirmed 134 N.E. 595, 232 N.Y. 617.

54. S.C.—Littlejohn v. Jones, 27 S.C. L. 365, 39 Am.D. 132.

55. Cal.—Rea v. Southern Pac. Co., 288 P. 151, 105 Cal.App. 559.

Wash.—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688—Simmons v. Anderson, 32 P.2d 1005, 177 Wash. 591—McLain v. Easley, 262 P. 975, 146 Wash. 377, modified in other respects 264 P. 714, 146 Wash. 377.

25 C.J. p 1083 note 39.

Leaving gates open

Wash.—Simmons v. Anderson, 13 P. 2d 73, 169 Wash. 165.

Open coal hole

U.S.—Erie R. Co. v. Kelly, C.C.A.N.J., 4 F.2d 5.

Steering course too close to another vessel

N.J.—Beck v. Hines, 112 A. 332, 95 N.J.Law 158.

Evidence held sufficient to go to jury

N.Y.—Raleigh v. Hines, 186 N.Y.S. 120, 194 App.Div. 592, affirmed 134 N.E. 595, 232 N.Y. 617.

Wash.—Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.

Evidence held insufficient to go to jury

Ark.—Thomas v. Arkansas Lime Co., 243 S.W. 828, 154 Ark. 355.

56. U.S.—Erie R. Co. v. Kelly, C.C.A.N.J., 4 F.2d 5.

Cal.—Rea v. Southern Pac. Co., 288 P. 151, 105 Cal.App. 559.

Wash.—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688—Simmons v. Anderson, 13 P.2d 73, 169 Wash. 165.

25 C.J. p 1083 note 40.

Leaving space reserved for passengers

It was erroneous to withdraw from the jury the issue of possible contributory negligence raised by evidence to the effect that a ferryboat passenger, struck by truck dislodged by bump against slip pilings, had theretofore voluntarily left space reserved for foot passengers and was leaning against gate of vehicular gangway at the time of injury.—Henderson v. Philadelphia & Camden Ferry Co., 170 A. 425, 112 Pa. Super. 42.

Riding in aërial ferry

In action against county, which maintained an aërial carrier operating on a cable for transporting persons across river, by prospective passenger for injuries sustained on collapse of tower which sustained cable and on which passenger was waiting, whether he was guilty of contributory negligence or was a trespasser were questions for jury.—Jacoby v. Chouteau County, 112 P.2d 1068, 112 Mont. 70.

57. Wash.—Corbaley v. Pierce County, 74 P.2d 993, 192 Wash. 688.

Credibility of witnesses as to suicide threats

In administrator's action against county and ferry companies for wrongful death and damages to an automobile occurring when deceased drove into a ferry slip and drowned, conflicting testimony as to deceased's statements in respect to committing suicide presented a question for jury as to witnesses' credibility.—Corbaley v. Pierce County, supra.

the unauthorized opening of ferry gates by third persons.[58]

Instructions. The general rules, discussed in the C.J.S. title Trial §§ 266–448, also 64 C.J. p 510 note 3-p 1008 notes 15–99, govern in respect of instructions asked or given in suits against a ferryman for injury or damage to person or property committed to his care.[59]

Direction of verdict or grant of nonsuit is improper where the evidence is conflicting as to material facts.[60]

e. Damages

The measure of recovery in a suit against a ferryman for loss or injury is the natural and proximate damage suffered.

The recovery in a suit against a ferryman should be for whatever damage was the natural and proximate consequence of the injury complained of.[61] When property is lost the measure of damages is the value of the property, together with compensation for the actual expenses, and loss of time, caused by the detention on account of the accident.[62]

§ 31. —— On Statutory Bond

The remedy given on a statutory bond of a ferryman has been likened to a common-law action on the case and may be cumulative and not exclusive of a common-law right of action. Such a bond has been held not within a statute providing that an action on an official bond may be brought in the name of the party injured. The complaint should allege facts showing a breach of the bond.

The remedy given on the bond of a public ferryman is in the nature of a common-law action on the case for damages caused by the ferryman's negligence. It may be a cumulative remedy and not exclusive of the common-law right of action.[63] It has been held that a ferry bond is not the bond of an officer, or a bond given in an official capacity, within the meaning of a statute providing that an action on an official bond may be brought in the name of the party injured, but that a complaint improperly brought in the name of the party injured may be amended.[64] The complaint must allege facts showing clearly a breach of the conditions of the bond.[65]

§ 32. Penalties for Violations of Regulations

Unlicensed operation of a ferry may subject the operator to statutory penalties, and a lessee rather than the lessor of a ferry has been held liable to penalties for improper operation.

Under statutes in some states, a ferry owner who

58. Wash.—Simmons v. Anderson, 32 P.2d 1005, 177 Wash. 591.

59. Wash.—McLain v. Easley, 272 P. 66, 150 Wash. 148.

Instructions approved

(1) Degree of care required of ferryman of passengers.
N.J.—Condra v. New Jersey & S. I. Ferry Co., 154 A. 748, 9 N.J.Misc. 529.
Va.—Chesapeake Ferry Co. v. Cummings, 164 S.E. 281, 158 Va. 33, 82 A.L.R. 790.

(2) Duties of ferrymen.—McLain v. Easley, 272 P. 66, 150 Wash. 148.

(3) Interpretation of ferry lease. —Norton v. Anderson, 2 P.2d 266, 164 Wash. 55.

Instructions disapproved

Instruction requiring ferrymen to use highest degree of care as to elements other than operations was erroneous, and not cured by subsequent instruction.—McLain v. Easley, 272 P. 66, 150 Wash. 148.

Requested instruction properly refused

If danger was obvious, decedent could not excuse himself from taking passage in ferryboat in reliance on assurance that it was safe, and instruction eliminating question of fact as to how danger appeared to decedent, and whether assurances were given, was properly refused.—Flanagan v. Arnold, 210 N.W. 256, 236 Mich. 180.

Requested instruction improperly refused

Where question whether defendant's servant was subsequently negligent in operation of ferryboat was for jury, refusal of charge that plaintiff was not prevented from recovering because of decedent's negligence in getting into boat was error.—Flanagan v. Arnold, supra.

Conformity of instructions to pleadings

Declaration alleging that plaintiff's decedent tried to persuade operator of ferryboat to return to shore, but he refused was held to charge defendant's subsequent negligence, so as to warrant instruction.—Flanagan v. Arnold, supra.

60. S.C.—Dawkins v. Chester County, 115 S.E. 62, 122 S.C. 8.

Question of proximate cause of ferry passenger's injury or death

(1) Where, in an action by a passenger injured on a ferry against the ferry owners and the owners of a truck which ran into plaintiff, defendant's contention that their negligence in failing to take proper precaution for the safety of deceased was not the proximate cause of decedent's injury was based on facts in dispute, a verdict could not have been directed for defendant nor a nonsuit granted.—Schreiner v. Delaware, L. & W. R. Co., 121 A. 84, 98 N.J.Law 899.

(2) Where plaintiff, after paying defendant ferry company a fare, drove a government mail motor truck to the usual place in defendant's ferryhouse to wait for the boat and dismounted to ascertain if his truck had been injured by a collision, and while mounting the truck was struck by the flying "hook end" of a rope through the negligence of defendant's servants, it was held that plaintiff's dismounting did not justify a nonsuit or the direction of a verdict against him, since such act was not negligence as a matter of law, but presented a condition with no causal connection with defendant's negligence.—Williams v. Pennsylvania R. Co., 115 A. 447, 96 N.J.Law 350, affirmed 117 A. 927, 97 N.J.Law 585.

61. Ark.—Evans v. Rudy, 34 Ark. 383.

62. Ark.—Evans v. Rudy, supra.

63. Ark.—Wells v. Steele, 31 Ark. 219.
Mass.—Miller v. Pendleton, 8 Gray 547.
Miss.—Sparkman v. Graham, 30 So. 713, 79 Miss. 376.

64. Ala.—Harris v. Plant, 31 Ala. 639.

65. Ala.—Judge Wilcox County Ct. v. Pharr, 4 Stew. & P. 332.

operates his ferry without license subjects himself to liability for statutory penalties,[66] and he may also become subject to a penalty for breach of his duty to transport, recoverable by the party injured.[67] The lessee of a ferry rather than the lessor is liable for penalties imposed for improper operation of the ferry, but where a person is employed on shares to run a ferry the owner remains liable for such penalty, even though his servant, the share operator, has exclusive control of the management of the ferry.[68]

§ 33. Offenses Incident to Operation

Unauthorized or improper operation of a ferry, charging excessive ferriage, or failure to operate or transport in compliance with the duties of a ferryman, may constitute a criminal offense.

Under statute or otherwise, a ferryman may be guilty of a criminal offense for the unauthorized operation of a ferry,[69] or for a breach of his duty to transport,[70] and it has been said that failure on the part of the owner of the franchise to operate the ferry is an indictable offense.[71]

The indictment should specify the water on which an allegedly unlawful operation occurred,[72] and the burden rests on the prosecution to prove that defendant ferryman lacked a license.[73]

Excess charges. In some jurisdictions, the ferryman is liable to prosecution and fine for charging more than a statutory rate,[74] but this liability attaches only for acts done within the jurisdiction of the state fixing the rate.[75]

FERRIFODINA. In old pleading, an iron mine.[1]

FERROCARRILES. In Spanish, railroads or railways. They have been a subject of legislation in Spain beginning with 1855. The general railway law now in force is that of 1877 which covers such subjects as concessions, eminent domain, operation, etc.[2]

FERROCHROME. A substance produced by reducing chrome iron ore with carbon in an electrical furnace, and containing iron, chromium, and carbon.[3]

FERROMANGANESE. A substance produced by smelting the ore containing iron and manganese.[4]

FERROTUNGSTEN. Tungsten iron or "ferrotungsten" is made from tungsten or wolframite by roasting it, freeing it from sulphur and arsenic by treatment with muriatic acid, and strongly igniting it with charcoal in a closed crucible, giving a sintered or scaly mass which is fusible with iron ore.[5]

FERROUS. Pertaining to, or obtained from, iron.[6]

Phrases employing the word are set out in the note.[7]

FERRUERE or **FERRURA.** The shoeing of horses.[8]

FERRULE. A metallic ring or sleeve on the handle

66. Ark.—Shults v. Munn, 187 S.W. 316, 124 Ark. 415.
25 C.J. p 1081 note 12.

67. Ala.—Koretke v. Irwin, 13 So. 943, 100 Ala. 323, 21 L.R.A. 787—Pate v. Henry, 5 Stew. & P. 101.
Duty to transport see supra § 27 b.

68. Ala.—Taylor v. Rushing, 2 Stew. 160.

69. N.D.—State v. Olson, 176 N.W. 833, 44 N.D. 367.
25 C.J. p 1052 note 35.

70. Ark.—State v. Sewell, 45 Ark. 387.
Duty to transport see supra § 27 b.

71. U.S.—Charles River Bridge v. Warren Bridge, Mass., 11 Pet. 420, 9 L.Ed. 773, 938.

72. Mo.—Wheat v. State, 6 Mo. 455.

73. Kan.—Territory v. Reyburn, McC. 134.

74. Mo.—State v. Sickmann, 65 Mo. App. 499.

75. W.Va.—State v. Faudre, 46 S.E. 269, 54 W.Va. 122, 102 Am.S.R. 927, 63 L.R.A. 877, 1 Ann.Cas. 104.
25 C.J. p 1061 note 98.
Ferriage rates generally see supra § 25.

1. Black L.D.

2. Escriche Diccionario and Suplemento.

3. **Uses**
"One of its principal uses is in the manufacture of armor-piercing projectiles and armor plates. It is also generally used to impart hardness and toughness to steel structures and implements where these qualities are particularly needed, such as burglar-proof safes, crushers, cutting tools, and the like."—U. S. v. Roesseler & Hasslacher Chemical Co., N. Y., 137 F. 770, 771, 70 C.C.A. 346.

4. **Uses**
"It is added to steel in the process of manufacture. It is used in making steel for the cheaper class of projectiles and for other purposes where hardness, strength, and ductility are necessary."—U. S. v. Roesseler & Hasslacher Chemical Co., supra.

5. U.S.—Hempstead v. Thomas, Pa., 122 F. 538, 539, 59 C.C.A. 342.

6. Century D.

7. **Phrases construed**
(1) "Ferrous ammonium sulphate" and "ferrous sulphate," described as ferrous salts which can be used as reducing agents.—Steinfur Patents Corporation v. J. Meyerson, Inc., D.C. N.Y., 56 F.2d 372, 382.
(2) "Ferrous pyrolignite," commonly called "iron liquor," and also usable as a reducing agent.—Steinfur Patents Corporation v. J. Meyerson, Inc., supra.
(3) "Ferrous salt," defined as a salt of iron with any acid in which the iron is in a diavalent condition.—Steinfur Patents Corporation v. J. Meyerson, Inc., supra.
(4) "Ferrous sulphide," usable as a reducing agent if an iron sulphate is first put on the pelt or skin to be bleached or dyed.—Steinfur Patents Corporation v. J. Meyerson, Inc., supra.

8. Black L.D.

of a tool or the end of a stick to keep the wood from splitting; a ring or short tube of metal fitted on or inclosing the lower end of a cane or umbrella stick.[9]

FERRUM. Latin, literally, "Iron." In old English law, a horse-shoe.[10]

FERRY. See Ferries § 1.

Phrases employing the word are set out in the note.[11]

FERRYBOAT. See generally Ferries § 1, and, as a "vessel" subject to admiralty jurisdiction, see Admiralty § 18 b note 67.

FERTILIZER. Sometimes a mere synonym for "manure."[12]

As employed in connection with various agricultural regulations see Agriculture §§ 16–23; and as exempt from customs duties see Customs Duties § 73 note 87.

FESTA IN CAPPIS. In old English law, grand holidays, on which the choirs wore caps.[13]

FESTINATIO JUSTITIÆ EST NOVERCA INFORTUNII.[14]

FESTING-MAN. In old English law, a bondsman, a surety, a frank-pledge, or one who was surety for the good behavior of another.[15]

FESTING-PENNY. Earnest given to servants when hired or retained; the same as "arles-penny."[16]

FESTINUM REMEDIUM. Literally "A speedy remedy." The writ of assise was thus characterized, in comparison with the less expeditious remedies previously available, by the Statute of Westminster II (13 Edw. I c 24).[17]

FESTOON. In general a string or chain of any material suspended between two points.[18] In advertising, a lithographic display designed to be hung above the mirror on the back bar of a soda fountain.[19]

FESTUCA. In Frankish law, a rod, staff, or stick, on which imprecatory runs were cut; it was used as a gage or pledge of good faith by a party to a contract, or for symbolic delivery in the conveyance or quitclaim of land, before a court of law, prior to the introduction of written documents by the Romans.[20]

FESTUM. A feast, holiday, or festival.[21]

FETICIDE. In medical jurisprudence, destruction of the fetus, the act by which criminal abortion is produced.[22]

FETTERS. Chains or shackles for the ankles or feet, irons used to secure the legs of convicts, unruly prisoners, etc. Similar chains securing the wrists are called "handcuffs."[23]

FEU. In Scotch law, a holding or tenure where the vassal, in place of military service, makes his return in grain or money; distinguished from "wardholding," which is the military tenure of the country.[24]

9. U.S.—Evans v. Newark Rivet Works, N.J., 126 F. 492, 494, 61 C.C.A. 474.

Similarly expressed

(1) "A hollow metallic tube adapted to fit over and be attached to the end of an umbrella or cane, together with the metallic or steel point or tip which is inverted in one end."—Evans v. Newark Rivet Works, C.C.A.N.J., 121 F. 133, 134.

(2) For other definitions see 25 C. J. p 1083 note 6 [a].

10. Black L.D.

11. **Phrases construed**

(1) "Ferry bridge," described generally as a floating structure hinged or chained to a wharf.—Cope v. Vallette Dry Dock Co., La., 7 S.Ct. 336, 337, 119 U.S. 625, 630, 30 L.Ed. 501.

(2) "Ferry franchise," and "railroad ferry" see Ferries § 1.

(3) "Private ferry," and "public ferry" and the distinction between them see Ferries § 2.

12. U.S.—Heller v. Magone, C.C.N.Y., 38 F. 908, 912.

13. Black L.D.

14. A maxim meaning "Hasty justice is the step-mother of misfortune."—Black L.D.

15. Black L.D.

Monasteries exempt

Monasteries enjoyed the privilege of being "free from festing-men," which means that they were not bound for the forthcoming of any man who should transgress the law.—Black L.D.

16. Black L.D.

17. Black L.D.

A term applied to those cases in which the remedy for the redress of an injury was given without any unnecessary delay; the term was applied to an action of dower.—Black L.D.

18. Century D.

19. N.Y.—Thieler v. Trinity Advertising Corporation, 270 N.Y.S. 717, 718, 241 App.Div. 34.

20. Black L.D.

21. Black L.D.

"Festum stultorum"

"The feast of fools."—Black L.D.

22. Black L.D.

See also Abortion §§ 1–3.

23. Black L.D.

Shackling of accused during trial see Criminal Law § 977 notes 73–81.

24. Black L.D.

"Feu annuals"

In Scotch law, the reddendo, or annual return from the vassal to a superior in a feu holding.—Black L.D.

"Feu et lieu"

In old French and Canadian law, hearth and home; a term importing actual settlement upon land by a tenant.—Black L.D.

"Feu holding"

A holding by tenure of rendering grain or money in place of military service.—Black L.D.

FEUAR. In Scotch law, the tenant or vassal of a feu; a feu-vassal.[25]

FEUD. In feudal law, an estate in land held of a superior on condition of rendering him services; also an inheritable right to the use and occupation of lands, held on condition of rendering services to the lord or proprietor, who himself retained the property in the lands.[26]

Military feuds, the genuine or original feuds which were in the hands of military men, who performed military duty for their tenures.[27]

In Saxon and old German law, an enmity, or species of private war, existing between the family of a murdered man and the family of his slayer.[28]

FEUDA. See Feudum post.

FEUDA AD INSTAR PATRIMONIORUM SUNT REDACTA.[29]

FEUDAL. More commonly spelled "feodal" by the old writers, and defined to mean belonging to a fee or feud, pertaining to feuds or fees, relating to or growing out of the feudal system or feudal law; also having the quality of a feud as distinguished from "allodial."[30]

FEUDALISM. The feudal system, the aggregate of feudal principles and usages.[31] It has been characterized as a vague term used to describe a congeries of customs and legal relations by no means uniform throughout Europe and never static, although feudalism had one basic characteristic traceable through all its variations in that it rested on relations to land, the primary factor in a relatively primitive agrarian civilization.[32]

FEUDALISMO. In Spanish feudal law, "feudalism," the body of rights enjoyed by a lord; also the abuse of such rights.[33]

25. Black L.D.

26. Black L.D.

Synonymous terms

"In this sense, the word is the same as 'feod,' 'feodum,' 'feudum,' 'fief,' or 'fee.' "—Black L.D.

27. Black L.D.

28. Black L.D.

In Scotland and the north of England

A combination of all the kin to revenge the death of any of the blood upon the slayer and all his race.—Black L.D.

29. A maxim meaning "Lands held feu are reduced to the character of patrimony or succession."—Trayner Leg.Max.

This is said to mean that lands held feu have now lost their strictly feudal character and are become like any other succession which may devolve upon the heir.—Trayner Leg. Max.

30. Black L.D.

See also Allodial 3 C.J.S. p 887 note 32.

"Feudal action"

An ancient name for real actions, or such as concern real property only.—Black L.D.

"Feudal courts"

"In the 12th century, a lord *qua* lord, had the right to hold a court for his tenants; in the 13th century, they became of less importance and for three reasons: The feudal principle would have led to a series of courts one above the other, and the dominions of the large landowners were usually scattered, so that great feudal courts became impossible. The growth of the jurisdiction of the king's court removed the necessity for feudal courts. All the incidents of the feudal system came to be regarded in a commercial spirit—as property. Its jurisdiction became merely appendant to landowning."—Black L.D.

"Feudal law"

The law anciently regulating the property relations of lord and vassal, and the creation, incidents, and transmission of feudal estates. The laws and usages constituting the "feudal law" were originally customary and unwritten, but a compilation was made in the twelfth century, called "Foedarum Consuetudines," which has formed the basis of later digests. The feudal law prevailed over Europe from the twelfth to the fourteenth century, and was introduced into England at the Norman Conquest, where it formed the entire basis of the law of real property until comparatively modern times. Survivals of the feudal law, to the present day, so affect and color that branch of jurisprudence as to require a certain knowledge of the feudal law for the perfect comprehension of modern tenures and rules of real property law.—Black L.D.

"Feudal possession"

The equivalent of "seizin" under the feudal system.—Black L.D.

"Feudal system"

"The system of feuds. A political and social system which prevailed throughout Europe during the eleventh, twelfth, and thirteenth centuries, and is supposed to have grown out of the peculiar usages and policy of the Teutonic nations who overran the continent after the fall of the Western Roman Empire, as developed by the exigencies of their military domination, and possibly furthered by notions taken from the Roman jurisprudence. It was introduced into England, in its completeness, by William I., A.D. 1085, though it may have existed in a rudimentary form among the Saxons before the Conquest. It formed the entire basis of the real-property law of England in medieval times; and survivals of the system, in modern days, so modify and color that branch of jurisprudence, both in England and America, that many of its principles require for their complete understanding a knowledge of the feudal system. The feudal system originated in the relations of a military chieftain and his followers, or king and nobles, or lord and vassals, and especially their relations as determined by the bond established by a grant of *land* from the former to the latter. From this it grew into a complete and intricate complex of rules for the tenure and transmission of real estate, and of correlated duties and services; while, by tying men to the land and to those holding above and below them, it created a close-knit hierarchy of persons, and developed an aggregate of social and political institutions."—Black L.D., citing 2 Blackstone Comm. p 44.

"Feudal tenures"

The tenures of real estate under the feudal system, such as knight service, socage, villenage, etc.—Black L.D.

31. Black L.D.

32. U.S.—U. S. v. Forness, C.C.A. N.Y., 125 F.2d 928, 933, note.

33. Escriche Diccionario.

See also Feudal supra note 30, and Feudalism supra notes 31, 32.

FEUDALIZE. To reduce to a feudal tenure, or to conform to feudalism.[34]

FEUDARY. Held by feudal service, or relating to feuds or feudal tenures; hence a tenant who holds by feudal tenure, also spelled "feodatory" and "feudatory."[35]

FEUDATARIO. In Spanish feudal law, a vassal with a fief; also a fund subject to the payment of feudal dues.[36]

FEUDATORY. See Feudary ante.

FEUDBOTE. A recompense for engaging in a feud, and the damages consequent, it having been the custom in ancient times for all the kindred to engage in their kinsman's quarrel.[37]

FEUDE. An occasional early form of "feud" as defined above, in the sense of private war or vengeance.[38]

FEUDIST. A writer on feuds, as Cujacius, Spelman, etc.[39]

FEUDISTA. In Spanish law, a feudist, an author who writes about feuds, or fiefs.[40]

FEUDO. In Spanish law, a feud, or fief; a species of benefice which one gives to another so that the latter may become the former's vassal.[41]

FEUDUM. Law Latin, a feud, fief, or fee; a right of using and enjoying forever the lands of another, which the lord grants on condition that the tenant shall render fealty, military duty, and other services. It is not properly the land, but a right in the land.[42]

Feuda. The plural of "feudum," meaning feuds or fees.[43]

Latin phrases, employing various forms of the word, are listed in the note.[44]

34. Black L.D.
35. Black L.D.
36. Escriche Diccionario.
37. Black L.D.
38. Black L.D.
39. Black L.D.
40. Escriche Diccionario.
41. Escriche Diccionario, citing Partidas IV tit XXVI ley I.

See Fued supra notes 26–28, and Feudum infra notes 42–44.

Nature

(1) Escriche, who is disposed to ascribe the origin of the system to the Lombards, says that a "feudo" may be considered as a contract or as a right in a thing similar to a pledge, mortgage, or emphyteusis.—Escriche Diccionario. See also Emphyteusis 30 C.J.S. p 222 notes 24–26.

(2) As a contract the "feudo," or fief, is a reciprocal agreement between lord and vassal, the former conceding the useful ownership (dominio útil) and the latter recognizing the former as the ultimate owner and promising him fidelity, military and other service, and perhaps payment of dues.—Escriche Diccionario.

(3) As a right in a thing a fief, or "feudo," is the title, shared by the lord and vassal, which arises from investiture, and which precludes alienation or encumbrance of the fief without the lord's consent, is forfeited for felonias or feudal crimes, involves certain services, and escheats to the lord on the vassal's death without male heirs.—Escriche Diccionario.

Classification

A fief may be proper or improper. It is the former when it is conceded or granted purely and simply, without determination as to time or service. When conditions as to such matters are added, the fief becomes improper, but in case of doubt the fief is presumed to be a proper one. A fief is "real," that is, royal, when granted by a king or emperor with some dignity or royal privilege, as kingdom, principality, dukedom, etc. A simple fief usually has no such appurtenance. A "ligio," or liege fief, is one by which the vassal bound himself to serve the lord in war against anyone, and is therefore exclusive. The ordinary fief, however, does not preclude the vassal from agreeing to serve another lord in war. Fiefs were also ecclesiastical when the subject was church property, and lay when it was not; they were termed "new" when received by the vassal directly from the lord, and "old" when acquired by inheritance; "hereditary" when transmissible by inheritance or will, and "familiar" when succession is confined to male heirs of the first vassal; "masculine" when succession was so confined, and "feminine" when female heirs were admitted in default of male; "franco" when free from the obligation of personal service; and "personal" when limited to the vassal who received it.—Escriche Diccionario.

42. Black L.D.

Historical

This form of the word was used by the feudal writers; the earlier English writers generally preferred the form "feodum;" and there was a still older word "feum." Usually it denoted a stretch of land, rarely a tenure or mass of rights. It came to be applied to every person who had heritable rights in land. The use of the word by the Normans is exceedingly obscure; "feudal" was not in their vocabulary.—Black L.D.

43. Black L.D.

44. **Feudorum libri**

The Books of Feuds published during the reign of Henry III, about the year 1152.—Black L.D.

"Feudum antiquum"

(1) In feudal law, a term used to designate an interest in land to which the possessor succeeds as heir to his ancestor.—Priest v. Cummings, 20 Wend., N.Y., 338, 349.

(2) Defined as an ancient feud or fief, a fief descended to the vassal from his ancestors, or a fief which ancestors had possessed for more than four generations.—Black L.D.

(3) A feud which descended to a vassal from an ancestor; one which had been in the family for generations.—English L.D.

(4) In holding that "estate" as generally understood connotes "an immediate descent from A. to B." the court used the phrase "ut feudum antiquum" and said: "In a sense, an estate may be said to come by descent from a remote ancestor, to a person upon whom it has devolved through many intermediate descents."—Gardner v. Collins, R.I., 2 Pet. 58, 92, 7 L.Ed. 347.

Feudum novum or Feuda nova

(1) A new feud or fief, a fief which began in the person of the feudatory, and did not come to him by succession.—Black L.D.

(2) In feudal law, a term used to designate an interest in land which was acquired by the possessor in

FEUDUM SINE INVESTITURA NULLO MODO CONSTITUI POTUIT.[45]

FEUM. An older form of "feudum," defined above.[46]

FEVER. A temperature of the body higher than the normal temperature, appearing as a symptom of disease.[47]

Rocky Mountain spotted fever. A disease of man said to be directly traceable to a deadly virus carried by infected wood ticks, or "hard-shelled ticks," Dermaceutor Andersoni, found throughout the intermountain region.[48]

Typhoid fever. An infectious febrile disease caused by a micro-organism called "bacillus typhosus," introduced into the system by the fingers, or with the food or drinking water. It is contagious, infectious, and communicable.[49]

Yellow fever. An acute, infectious, malignant, paroxysmal disease, characterized by violent fever, jaundice, bloody vomit, hemorrhage, and abdominal pains.[50]

FEW. An indefinite expression for a small or limited number;[51] not many; of small number, indicating a small number of units or individuals which constitute a whole.[52] It is a relative term and of great elasticity of meaning,[53] and has been contrasted with "many."[54]

Phrases employing the word are set out in the note.[55]

any other way than by succession as heir to his ancestor.—Priest v. Cummings, 20 Wend., N.Y., 338, 349.

Other phrases

(1) "Feodi firma," in old English law, fee-farm.—Black L.D.

(2) "Feodi firmarius," the lessee of a fee-farm.—Black L.D.

(3) "Feudorum consuetudines" see Consuetudo 16 C.J.S. p 1517 note 18.

(4) "Feudum apertum," an open feud or fief, a fief resulting back to the lord, where the blood of the person last seised was utterly extinct and gone or where the tenant committed a crime, or gave other legal cause.—Black L.D.

(5) "Feudum francum," a free feud, one which was noble and free from talliage and other subsidies to which the plebeia feuda, vulgar feuds, were subject.—Black L.D.

(6) "Feudum hauberticum," a fee held on the military service of appearing fully armed at the "ban" and "arriere ban."—Black L.D.

(7) "Feudum [or feodum] improprium," an improper or derivative feud or fief.—Black L.D.

(8) "Feudum individuum," an indivisible or impartible feud or fief; descendible to the eldest son alone. —Black L.D.

(9) "Feudum [or feodum] laicum," a lay fee.—Black L.D.

(10) "Feudum ligium," a liege feud or fief, a fief held immediately of the sovereign, or one for which the vassal owed fealty to his lord against all persons.—Black L.D.

(11) "Feudum maternum," a maternal fief, a fief descended to the feudatory from his mother.—Black L.D.

(12) "Feudum [or feodum] militare," a knight's fee, held by knight service and esteemed the most honorable species of tenure.—Black L.D.

(13) "Feudum nobile," a fee for which the tenant did guard and owed fealty and homage.—Black L.D.

(14) "Feudum novum ut antiquum," a new fee held with the qualities and incidents of an ancient one. —Black L.D.

(15) "Feudum paternum," a fee which the paternal ancestors had held for four generations, one descendible to heirs on the paternal side only, or one which might be held by males only.—Black L.D.

(16) "Feudum [or feodum] proprium," a proper, genuine, and original feud or fief, being of a purely military character, and held by military service.—Black L.D.

(17) "Feudum [or feodum] simplex," a simple or pure fee; fee-simple.—Black L.D.

(18) "Feudum [or feodum] talliatum," a restricted fee, one limited to descend to certain classes of heirs, a fee tail.—Black L.D.

(19) "Quasi feudum," a kind of fee or heritable right; and, generally, that kind of heritable right which arose in money when heritably secured.—Trayner Leg.Max.

45. A maxim meaning "A freehold estate cannot be created except by investiture or some mode of constituting."—Thatcher v. Omans, 3 Pick., Mass., 521, 525.

46. Black L.D.

47. Century D.

48. Onset and progress of the disease

These infected transmitting agents attach themselves to man by biting. The virus becomes reactivated within several hours after ingestion of blood in the tick has begun and it is then passed into the body of man. There are two types of infection in man, "ambulatory" and "fulminating." The latter is more often a fatal infection. The period of incubation within man covers a period of from two to fifteen days depending upon the severity of the infection, the resistance of the man and the locality of the bite. In the cases of fulminating infections, the period of incubation is determined as from two to five days, the prodromal period is from two to three days in duration during which time the characteristic chilly sensations, backache, etc., appear. Death occurs between the ninth and the fifteenth day following infection. It is not infrequent that the site of the tick attachment cannot be found. Medical science has some basis for the belief that the virus of an activated tick may enter through the pores of the skin.—Salt Lake County v. Industrial Commission, Utah, 120 P.2d 321, 324.

49. Ark.—Davis v. Rodman, 227 S. W. 612, 613, 147 Ark. 385, 13 A.L.R. 1459.

50. Tenn.—Blackman v. U. S. Casualty Co., 103 S.W. 784, 788, 117 Tenn. 578.

51. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Broderick, 102 N.E. 887, 893, 56 Ind.App. 58.

52. Tenn.—Provident Loan Bank & Parham, 194 S.W. 570, 571, 137 Tenn. 483.

53. Pa.—Anderson v. Williams, 44 Wkly.N.C. 418, 420.

Wis.—Klann v. Minn, 154 N.W. 996, 161 Wis. 517.

54. Ala.—Louisville & N. R. Co. v. Hall, 6 So. 277, 282, 87 Ala. 708, 13 Am.S.R. 84, 4 L.R.A. 710.

55. Phrases construed

(1) "Few copies."—Myers v. Gross, 59 Ill. 436, 438.

(2) "Few gross."—Allen v. Kirwan, 28 A. 495, 496, 159 Pa. 612.

(3) "Few minutes."—Klann v. Minn, 154 N.W. 996, 161 Wis. 517.

(4) "Few people."—Indianapolis St. R. Co. v. Robinson, 61 N.E. 936, 937, 157 Ind. 414.

Ff. and F.G.A. See Abbreviations 1 C.J.S. p 276 note 5.

FIADO. In Spanish law, one for whom another is obligated or accepted as surety, or "fiador."[56]

Al fiado. A phrase indicating that one buys, contracts for, or takes something without presently paying for it, hence equivalent to the English phrase "on credit."[57]

En fiado. Applied to an accused released from custody, the phrase means "under bond." It is also used in the same sense as "al fiado," above defined to express the idea of "on credit."[58]

FIADOR. In Spanish law, surety.[59]

"Fiador lego, llano y abonado," a solvent surety subject to no exemptions or privileges.[60]

FIANCE and FIANCEE. The words are borrowed from the French verb "fiancer," meaning to promise to marry in the presence of a priest; but in English they have a broader significance, referring to all under engagement to marry, whether the declaration has been made in the presence of a priest or not. The English synonym of "fiance" is "affianced husband" and that of "fiancee" is "affianced wife."[61]

FIANCER. French, generally, to pledge one's faith;[62] and, more specifically, to promise to marry in the presence of a priest.[63]

FIANZA. A Spanish word of generic meaning sufficiently broad to designate general obligation, as well as restricted liability under a single instrument,[64] and defined generally in Spanish law as security, bond, or undertaking.[65]

(5) "Few rods."—Butts v. Stowe, 53 Vt. 600, 603.

(6) "Few stones."—Wheelock v. Noonan, 15 N.E. 67, 68, 108 N.Y. 179, 2 Am.S.R. 405.

56. Escriche Diccionario.

57. Escriche Diccionario.

58. Escriche Diccionario.

59. Escriche Diccionario.

60. Escriche Diccionario.

61. Pa.—Jacobs v. Most Excellent Assembly Artisans' Order of Mutual Protection, 9 Pa.Dist. 54, 55.

62. Black L.D.

63. Pa.—Jacobs v. Most Excellent Assembly Artisans' Order of Mutual Protection, supra.

64. N.J.—Martinez v. Runkle, 30 A. 593, 57 N.J.Law 111, 125.

65. Escriche Diccionario.

Classification

(1) Fianza carcelara (de carcel segura)—an undertaking to return accused to custody on demand.—Escriche Diccionario.

(2) Fianza con información de abono—an undertaking secured by specific property shown to belong to the obligor and to be free and sufficient to meet the purpose of the instrument. It is especially employed in cases where a defendant, civil or criminal, is without surety or property at the locus fori but has property elsewhere, which is thus accepted upon due proof of ownership.—Escriche Diccionario.

(3) Fianza de accredor de mejor derecho—a form of the proceeding given by a creditor upon being awarded property of the debtor and by which he undertakes to restore it if another creditor is found entitled thereto, or if the judgment awarding it is reversed.—Escriche Diccionario.

(4) Fianza de arraigo—an undertaking secured by pledge, mortgage, or personal surety, to carry out the results of an action, and which might be enforced upon the debtor's alienation of his property with intent to change his domicile, provided the debt had been previously proved by authenticated document, witnesses, or the debtor's admission.—Escriche Diccionario, citing Novisima Recopilación lib X tit XI ley V.

(5) Fianza de calumnia—an undertaking required of an accuser in a criminal proceeding, as a precaution against malicious prosecution, to indemnify accused in case the charge is not proved, being imperatively required in accusations by private individuals before the audiencias (higher tribunals) against judges of inferior courts.—Escriche Diccionario.

(6) Fianza de estar á derecho—an undertaking on the part of defendant in a cause, criminal or civil, to appear at the trial.—Escriche Diccionario.

(7) Fianza de estar á las resultas del juicio—a bond to abide the event of a suit; an undertaking to pay a money judgment against defendant in a cause criminal or civil.—Escriche Diccionario.

(8) Fianza de indemnidad—an obligation of guaranty as distinguished from "ordinary suretyship," the fiador agreeing to pay only after exhaustion of the principal debtor's assets.—Escriche Diccionario.

(9) Fianza de la haz—a phrase which includes any of the three last previous forms of undertaking.—Escriche Diccionario.

(10) Fianza de ley de Madrid—an undertaking (authorized by Royal Ordinance of Madrid in 1502) by the prevailing party in an arbitral proceeding or compromise, to restore with rents and profits property received under the award in case it should be set aside at the instance of the prevailing party.—Escriche Diccionario, citing Novisima Recopilación lib XI tit XVII leyes IV, V.

(11) Fianza de ley de Toledo—an undertaking (authorized at Toledo in 1840) in an executive proceeding to restore in double amount, as penalty and interest, in case the judgment is set aside, whatever is collected thereunder.—Escriche Diccionario.

(12) Fianza de mancomunidad—the joint obligation of two or more "fiadores" which may be either simple, when the liability of each is limited to an aliquot part of the debt, or solidary when all are liable, jointly and severally, for the whole.—Escriche Diccionario.

(13) Fianza depositaria—an undertaking to hold certain property subject to the order of the court, to secure a debt of the obligor or another, or to deliver them, in case the debt is paid, to some other creditor. —Escriche Diccionario.

(14) Fianza de saneamiento—an undertaking with surety, by an execution debtor, to avoid imprisonment, that he will satisfy the judgment. It should appear that property offered as security is the debtor's, or, should it prove otherwise, other sufficient property will be substituted.—Escriche Diccionario.

(15) Fianza de seguridad de la vida—an undertaking, similar to the "bond to keep the peace" in Anglo-American law, based upon investigation of a complaint that another threatens bodily harm to complain-

FIAR (English). In Scotch law, he who has the fee or feu; also one whose property is charged with a life-rent. The proprietor is termed "fiar," in contradistinction to the life renter.[66]

Fiar prices. The value of grain in the different counties of Scotland, fixed yearly by the respective sheriffs, in the month of February, with the assistance of juries.[67]

FIAR (Spanish). In Spanish law, to guarantee performance or payment by another. In a different sense, to sell on credit.[68]

FIAT. Latin, "Let it be done." In English practice, a short order or warrant of a judge or magistrate directing some act to be done; an authority issuing from some competent source for the doing of some legal act.[69]

In Spanish law, the act of favor extended to one who is empowered to act as clerk of a court; also the name of a notarial fee, now abolished.[70]

FIAT JUS, RUAT JUSTITIA.[71]

FIAT JUSTITIA, RUAT CŒLUM.[72]

FIAT PROUT FIERI CONSUEVIT, NIL TEMERE NOVANDUM.[73]

FIAUNT. An order, or command; probably a plural form of "fiat" above defined.[74]

FIBROID. Resembling, containing, or taking the form of fiber, fibrous, as a fibroid tumor;[75] a fibroma or a fibrous structure.[76]

FIBROMA. A tumor composed mainly of fibrous or fully developed connective tissue.[77]

FIBROUS. Containing or consisting of fibers; having the character of fibers.[78]

As used in the steel making art, it is a generic term to denote a condition in contrast to the crystalline state. The "fibrous" state is obtained by annealing.[79]

FICCION. An assumption which conceals, or assumes to conceal, that the law has changed.[80]

FICTIO. In Roman law, a fiction, an assumption or supposition of the law.[81]

FICTIO CEDIT VERITATI, FICTIO JURIS NON EST UBI VERITAS.[82]

FICTIO EST CONTRA VERITATEM, SED PRO VERITATE HABETUR.[83]

FICTIO JURIS NON EST UBI VERITAS.[84]

ant, and requiring the former to observe good conduct.—Escriche Diccionario.

(16) Fianza subsidiaria—an undertaking to carry out some other undertaking.—Escriche Diccionario.

66. Black L.D.

67. Black L.D.

68. Escriche Diccionario.

69. Black L.D.

In English bankruptcy practice

"One of the proceedings in the English bankruptcy practice, being a power, signed by the lord chancellor, addressed to the court of bankruptcy, authorizing the petitioning creditor to prosecute his complaint before it. By the statute 12 & 13 Vict. c. 116. fiats were abolished."—Black L.D.

"Joint fiat"

In English law, a fiat in bankruptcy issued against two or more trading partners.—Black L.D.

Latin phrases

(1) "Fiat justitia," literally "Let justice be done." On a petition to the king for his warrant to bring a writ of error in parliament, he writes on the top of the petition, "Fiat justitia," and then the writ of error is made out, etc.—Black L.D.

(2) "Fiat ut petitur," literally "Let it be done as it is asked;" a form of granting a petition.—Black L.D.

70. Escriche Diccionario.

71. A maxim meaning "Let law prevail, though justice fail."—Wharton L.Lex.

72. A maxim meaning "Let right be done, though the heaven should fall." —Black L.D.

Applied or explained in

Ind.—Sopher v. State, 81 N.E. 913, 922, 169 Ind. 177, 14 L.R.A.,N.S., 172, 14 Ann.Cas. 27.

Pa.—Commonwealth v. Gushinski, 10 Pa.Dist. & Co. 202, 24 Luz.Leg.Reg. 373.

25 C.J. p 1086 note 63 [a].

Meaning legal justice

"The justitia of that maxim means, legal justice—justice evolved and made operative by the administration of the law."—Vermont & Canada R. Co. v. Vermont Cent. R. Co., 50 Vt. 500, 595.

73. A maxim meaning "Let it be done as formerly, let no innovation be made rashly."—Bouvier L.D.

Similarly rendered

"Let it be done as it hath used to be done, nothing must be rashly innovated."—Black L.D.

74. Black L.D.

75. Century D.

76. Idaho.—Brown v. St. Joseph Lead Co., 87 P.2d 1000, 1004, 60 Idaho 49.

77. Idaho.—Brown v. St. Joseph Lead Co., supra.

78. Century D.

79. U.S.—Fried Krupp Aktien Gesellschaft v. Midvale Steel Co., Pa., 191 F. 588, 607, 112 C.C.A. 194.

80. Escriche Diccionario.
See also Fictio and Fiction post.

81. Black L.D.

In old Roman law

"'Fictio' in the old Roman law was properly a term of pleading, and signified a false averment on the part of the plaintiff which the defendant was not allowed to traverse; as that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of the fiction was to give the court jurisdiction."—Black L.D.

82. A maxim meaning "Fiction yields to truth. Where there is truth, fiction of law exists not."—Black L.D.

83. A maxim meaning "Fiction is against the truth, but it is to be esteemed truth."—Black L.D.

84. A maxim meaning "Where truth is, fiction of law does not exist."—Black L.D.

FICTIO LEGIS INIQUE OPERATUR ALICUI DAMNUM VEL INJURIAM.[85]

FICTIO LEGIS NEMINEM LÆDIT.[86]

FICTION. Generally, that which is feigned, assumed, pretended;[87] a subterfuge.[88] More specifically, a false averment on the part of plaintiff which defendant is not allowed to traverse, the object being to give the court jurisdiction, an example being the common-law action of a father for his daughter's seduction which was grounded on the fiction of his loss of her services.[89]

Fiction of law. A legal assumption that a thing is true which is either not true or which is as probably false as true;[90] an assumption or supposition of law that something which is or may be false is true, or that a state of facts exists which has never really taken place;[91] the assumption as true of something known to be false;[92] the assumption, for the purposes of justice, of a fact that does not or may not exist;[93] the legal assumption or invention that something is true, which is, or may be, false; an assumption of an innocent and beneficial character, made to advance the ends of justice,[94] but not allowed to work injustice, or to defeat the policy of the state.[95]

It has been distinguished from "estoppel,"[96] "intendment of law,"[97] and "presumption of law" see Evidence § 117 note 24.

FICTIONE JURIS SEMPER SUBSISTIT ÆQUITAS.[98]

FICTITIOUS. Feigned, imaginary, not real, counterfeit, false, not genuine;[99] nonexistent.[1]

Phrases employing the word are set out in the note.[2] Other phrases as to which more recent ad-

85. A maxim meaning "A legal fiction does not properly work loss or injury."—Wharton L.Lex.

Also translated "Fiction of law is wrongful if it works loss or injury to anyone."—Black L.D.

86. A maxim meaning "A fiction of law injures no one."—Black L.D.

87. Iowa.—Murphy v. Murphy, 179 N.W. 530, 533, 190 Iowa 874.

88. N.C.—Snider v. Newell, 44 S.E. 354, 357, 358, 132 N.C. 614.

89. N.C.—Snider v. Newell, supra.

90. Cal.—Hibberd v. Smith, 4 P. 473, 482, 8 P. 46, 67 Cal. 547, 56 Am.R. 726.

Land as money and vice versa

"The law often regards money as land and land as money, and, through the forms in which property may be put, will, if possible. trace and establish the original ownership."—McIntosh v. Aubrey, Pa., 22 S.Ct. 561, 563, 185 U.S. 122, 46 L.Ed. 834.

91. Mo.—Leavell v. Blades, 141 S.W. 893, 895, 237 Mo. 695.

92. N.J.—Ryan v. Motor Credit Co., 23 A.2d 607, 622, 130 N.J.Eq. 531, citing **Corpus Juris.**

93. Colo.—Dodo v. Stocker, 219 P. 222, 224, 74 Colo. 95.

Similarly expressed

An allegation in legal proceedings that does not accord with the actual facts of the case, and which may be contradicted for every purpose, except to defeat the beneficial end for which the fiction is invented and allowed.—New Hampshire Strafford Bank v. Cornell, 2 N.H. 324, 327.

94. Iowa.—Murphy v. Murphy, 179 N.W. 530, 533, 190 Iowa 874.

95. U.S.—Sheldon Bldg. Corporation v. Commissioner of Internal Revenue, C.C.A., 118 F.2d 835, 836.

Rule variously stated

(1) The court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work wrong, contrary to the real truth and substance of the thing.

Cal.—Hibberd v. Smith, 4 P. 473, 482, 8 P. 46, 67 Cal. 547, 56 Am.R. 726.

N.J.—Ryan v. Motor Credit Co., 23 A.2d 607, 622, 130 N.J.Eq. 531, quoting **Corpus Juris.**

(2) "It seems to be a rule founded in common sense, as well as strict justice, that 'fictions of law' shall not be permitted to work any wrong, but shall be used ut res magis valeat quam pereat."—U. S. v. 1,960 Bags of Coffee, Md., 8 Cranch 398, 415, 3 L.Ed. 602.

(3) "That legal fictions must always be confined to their purpose and intent is not only common sense, but common law."—Gliewe v. Mulberry Metal Stamping Works, 14 A. 2d 58, 59, 18 N.J.Misc. 461, citing **Corpus Juris.**

(4) "When logic and the policy of a state conflict with a fiction due to historical tradition, the 'fiction' must give way."—Blackstone v. Miller, N. Y., 23 S.Ct. 277, 278, 188 U.S. 189, 47 L.Ed. 439.

(5) Although a judgment upon an entry nunc pro tunc, in taking effect by a legal relation at a time before it was actually entered or existed, is based on a "fiction of law," it cannot be contradicted.—Mahaska County v. Bennett, 129 N.W. 838, 839, 150 Iowa 216.

96. Black L.D.

97. N.H.—New Hampshire Strafford Bank v. Cornell, 2 N.H. 324, 326.

98. A maxim meaning "In a fiction of law equity must always exist."—Low v. Little, 17 Johns., N.Y., 346, 348.

99. Ala.—Kinney v. Kinney, 161 So. 798, 800, 230 Ala. 558, quoting **Corpus Juris.**

Cal.—Stein v. Howard, 4 P. 662, 663, 65 Cal. 616—People v. Carmona, 251 P. 315, 317, 79 Cal.App. 159.

Utah.—State v. Tinnin, 232 P. 543, 545, 64 Utah 587, 43 A.L.R. 46.

1. Ala.—Kinney v. Kinney, 161 So. 798, 800, 230 Ala. 558, quoting **Corpus Juris.**

2. **Phrases construed**

(1) "Fictitious debt" is a feigned debt, not real or genuine, but arbitrarily invented and set up to accomplish an ulterior object.—West Virginia Mortgage & Discount Corporation v. Newcomer, 132 S.E. 748, 749, 101 W.Va. 292.

(2) "Fictitious increase of . . . indebtedness."—Houghten v. Restland Memorial Park, 23 A.2d 497, 501, 343 Pa. 625.

(3) "Fictitious or nonexisting person."

Cal.—Goodyear Tire & Rubber Co. of California v. Wells Fargo Bank & Union Trust Co., 37 P.2d 483, 485, 1 Cal.App.2d 694.

S.C.—Bourne v. Maryland Casualty Co., 192 S.E. 605, 611, 185 S.C. 1, 118 A.L.R. 1.

(4) "Fictitious person."

La.—Allan Ware Pontiac, Inc., v. First Nat. Bank of Shreveport, App., 2 So.2d 76, 79.

Mo.—Little v. Remley, App., 101 S. W.2d 505, 507.

N.J.—Ocean Accident & Guarantee Corporation v. Lincoln Nat. Bank, N.J., 172 A. 45, 48, 112 N.J.Law 550.

N.Y.—Jacoby v. Kline Bros. Co., 272 N.Y.S. 871, 873, 241 App.Div. 470—

judications have not been found are listed in 25 C.J. p 1086 note 82–p 1087 note 96.

FIDE-COMMISSARY or **FIDEI-COMMISSARY** and **FIDEI-COMMISSARIUS.** See the C.J.S. title Trusts § 5, also 25 C.J. p 1087 notes 1–3.

FIDEI-COMISARIO. See the C.J.S. title Trusts §§ 3, 5 also 25 C.J. p 1087 notes 99–3.

FIDEI-COMISO and **FIDEI-COMMISSUM.** See the C.J.S. title Trusts § 2, also 25 C.J. p 1087 notes 98, 4.

FIDE-JUBERE. In the civil law, to order a thing upon one's faith, to pledge one's self, hence to become surety for another.[3]

FIDE-JUSSIO. An act by which any one binds himself as an additional security for another.[4]

FIDE-JUSSOR or **FIDE-PROMISSOR.** In Roman law, a guarantor, one who became responsible for the payment of another's debt, by a stipulation which bound him to discharge it if the principal debtor failed to do so.[5]

FIDELITAS. Fealty, fidelity.[6]

FIDELITY. Good faith, the term importing, in a particular relationship, a sincere and single intention to administer property for the best interests of the parties beneficially interested, and according to the duty imposed.[7]

The word is not synonymous with "federal," nor may the two words be taken for each other see Federal 35 C.J.S. p 759 note 73.

FIDELITY INSURANCE. See the title Insurance in Corpus Juris Secundum, also 25 C.J. p 1088 et seq.

FIDEM MENTIRI. Latin, to betray faith or fealty. A term used in feudal and old English law of a feudatory or feudal tenant who did not keep that fealty which he had sworn to the lord.[8]

FIDE-PROMISSOR. See Fide-Jussor ante.

FIDES. Latin, faith; honesty, confidence, trust, veracity, honor.[9]

In re Hammer's Estate, 261 N.Y.S. 478, 488, 237 App.Div. 497.
See also Bills and Notes § 129.

Phrases discussed elsewhere

(1) "Fictitious action or suit" see Actions § 19 a, Appeal and Error § 40 c, Contracts § 232 note 41; and consult Descriptive-Word Index.

(2) "Fictitious bail or security" see Contempt § 20.

(3) "Fictitious bill of lading" and rights arising thereunder see Carriers § 128 f (2) (a) notes 47–49.

(4) "Fictitious bonded indebtedness" see Corporations § 1149 notes 49–54.

(5) "Fictitious census returns" see Census § 7.

(6) "Fictitious claim" see Appeal and Error § 73 b, Assignments for Benefit of Creditors § 79, and Courts § 56.

(7) "Fictitious consideration" see the C.J.S. titles Frauds, Statute of § 200, also 27 C.J. p 285 note 90, and Fraudulent Conveyances §§ 81, 143, 169, 251, also 27 C.J. p 484 note 37, p 527 notes 49, 50, p 568 note 51–p 569 note 54, p 642 notes 61–68.

(8) "Fictitious issue of stock" see Corporations § 245 a (3) (a) notes 93–98.

(9) "Fictitious name," in general see the C.J.S. title Names § 9, also 45 C.J. p 376 note 3–p 380 note 71; as equivalent to "assumed name" see 7 C.J.S. p 106 note 60; and as compared with, or distinguished from, "designation not showing the names of the partners" see 26 C.J.S. p 1241 note 69.

(10) "Fictitious or colorable claim" see Appeal and Error § 73 b.

(11) "Fictitious or fraudulent claims" see Courts § 56.

(12) "Fictitious payee" see Bills and Notes § 129.

(13) "Fictitious proceedings" see Appeal and Error § 40 c.

(14) "Fictitious transaction" as fraud by broker see Brokers § 41 notes 69, 70.

(15) "Fictitious venue," as sometimes justified in transitory actions, see the C.J.S. title Venue § 3, also 67 C.J. p 18 note 5–p 19 note 20.

(16) "Nonexisting or fictitious plaintiff" see Abatement and Revival § 91.

3. Black L.D.

Form of stipulation

"Fide-jubes? Fide-jubeo:" Do you pledge yourself? I do pledge myself. —Black L.D.

4. Black L.D.

Effect

"This giving security does not destroy the liability of the principal, but adds to the security of the surety."—Black L.D.

5. Black L.D.

Former use in admiralty

The sureties taken on the arrest of a defendant, in the court of admiralty, were formerly denominated "fidejussors."—Black L.D.

6. Black L.D.

7. N.Y.—King v. Talbot, 40 N.Y. 76, 85—Matter of Burr, 96 N.Y.S. 225, 230, 48 Misc. 56.

"Fidelity bond"

(1) As meaning a contract of fidelity insurance.—Runcie v. Corn Exchange Bank Trust Co., 6 N.Y.S.2d 616, 620. See also the C.J.S. title Insurance § 13, and 25 C.J. p 1089 note 3.

(2) Distinguished from "performance bond."—United States Shipping Board Merchant Fleet Corporation, to Use of United States, v. Ætna Casualty & Surety Co., 98 F.2d 238, 241, 68 App.D.C. 366.

Other phrases

(1) "Fidelity guaranty" see the C.J.S. title Insurance § 16, also 25 C.J. p 1087 note 6.

(2) "Perform their duties with fidelity," as not interchangeable with "perform the duties of their appointment impartially."—In re Jefferson Tp. Road, 2 Lack.Leg.N., Pa., 328, 329.

8. Black L.D.

9. Black L.D.

"Uberrima fides"

(1) In Latin, the most perfect good faith.—Bouvier L.D.

(2) The most abundant good faith, absolute and perfect candor or openness and honesty, the absence of any concealment or deception, however slight; a phrase used to express the perfect good faith, concealing noth-

FIDES EST OBLIGATIO CONSCIENTIÆ ALICUJUS AD INTENTIONEM ALTERIUS.[10]

FIDES SERVANDA.[11]

FIDES SERVANDA EST; SIMPLICITAS JURIS GENTIUM PRÆVALEAT.[12]

FIDUCIA. Faith reposed, as where one man, confiding in another, intrusts his property to him for a particular purpose, and in the belief that he will in good faith use it for no other purpose.[13]

FIDUCIAL. Having the nature of a trust.[14] An adjective having the same meaning as "fiduciary."[15]

FIDUCIARIO and **FIDUCIARIUS.** As a noun, see the C.J.S. title Trusts § 3, also 25 C.J. p 1087 note 3 [b] and p 1118 note 6.

Phrases in which the Latin word is used adjectively are set out in the note.[16]

FIDUCIARY.

In General

A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given.[17] The term is derived from the civil, or Roman, law.[18] It connotes the idea of trust or confidence,[19] contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability,[20] and has been

ing, with which a contract must be made.—Black L.D.

(3) A rule applied to agents, partners, and trustees.—Wiggins v. Markham, 108 N.W. 113, 115, 131 Iowa 102.

(4) A contract of insurance is said to be a contract uberrimæ fidei.—Equitable Life Ass. Soc. v. McElroy, Mo., 83 F. 631, 636, 28 C.C.A. 365.

Other phrases

(1) "Bonae fidei," "bona fide," "bona fides" and other phrases employing the two words see 11 C.J.S. p 386 note 27–p 391 note 22.

(2) "Fides facta," meaning making one's faith; by which undertakings were guaranteed among the Franks and Lombards, and symbolized by such formal acts as the giving of a rod; in suretyship giving the "festuca" or "vadium."—Black L.D.

(3) "Mala fide," applied as meaning "in bad faith."—Lenhardt v. Ponder, 42 S.E. 169, 172, 64 S.C. 354—Magovern v. Richard, 3 S.E. 340, 342, 27 S.C. 272.

(4) "Mala fide possessor," defined as one who is in possession of land, knowing that the title is contested by a third person claiming a better right to it.—Canal Bank v. Hudson, Miss., 4 S.Ct. 303, 311, 111 U.S. 66, 28 L.Ed. 354—Green v. Biddle, Ky., 8 Wheat. 1, 79, 5 L.Ed. 547.

(5) "Mala fide purchaser," as a purchaser in bad faith, the determining factor being notice of another's prior right rather than absence of valuable consideration.

Ky.—Kellar v. Stanley, 5 S.W. 477, 480, 86 Ky. 240, 9 Ky.L. 388, 391.

Tex.—Mansfield v. Wardlow, Civ. App., 91 S.W. 859, 863.

(6) "Mala fides"—bad faith.—Black L.D. As the antithesis of "fairness and good faith" see Fairness 35 C.J.S. p 487 note 58(1).

10. A maxim meaning "A trust is an obligation of conscience of one to the will of another."—Black L.D.

11. A maxim meaning "Good faith must be observed."—Bouvier L.D.

Applied in Paul v. Hadley, 23 Barb., N.Y., 521, 524—McCoy v. Artcher, 3 Barb., N.Y., 323, 330.

Another form of the maxim

"Fides servanda est," translated as meaning "Faith must be observed; an agent must not violate the confidence reposed in him."—Black L.D.

12. A maxim meaning "Good faith is to be preserved; the simplicity of the law of nations should prevail."—Bouvier L.D.

Applied in Pillans v. Van Mierop, 3 Burr. 1663, 1672, 97 Reprint 1035.

Similarly rendered

"Faith must be kept; the simplicity of the law of nations must prevail."—Black L.D.

13. N.Y.—Moffatt v. Fulton, 30 N.E. 992, 994, 132 N.Y. 507.

As mortgage or pledge

"In Roman law, an early form of mortgage or pledge, in which both the title and possession of the property were passed to the creditor by a formal act of sale, properly with the solemnities of the transaction known as "mancipatio," there being at the same time an express or implied agreement on the part of the creditor to reconvey the property by a similar act of sale provided the debt was duly paid; but on default of payment, the property became absolutely vested in the creditor without foreclosure and without any right of redemption. In course of time, this form of security gave place to that known as hypotheca, while the contemporary contract of pignus or pawn underwent a corresponding development."—Black L.D.

14. Webster New Int. D.

15. Black L.D.

Phrases construed

(1) "Fiducial office."—Moss v. Rowlett, 65 S.W. 153, 154, 112 Ky. 121.

(2) "Fiducial relation," as more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and so technically distinguished from the broader expression, "confidential relation."—Roberts v. Parsons, 242 S.W. 594, 596, 195 Ky. 274. See also Confidential Relation 15 C.J.S. p 823 note 94.

16. **Phrases construed**

(1) "Fiduciarius hæres," used by the Romans to signify a fiduciary heir, that is, a person to whom a testator has sold the inheritance under the condition that he should sell it to another. Black L.D. See also Fiduciary post.

(2) "Fiduciarius tutor," in Roman law, the elder brother of an emancipated pupillus, whose father had died leaving him still under fourteen years of age.—Black L.D.

17. N.Y.—Smith v. Ogilvie, 27 N.E. 807, 808, 127 N.Y. 143.

Tex.—Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, 160 S. W.2d 509, 512, citing **Corpus Juris.**

18. U.S.—Commissioner of Internal Revenue v. Owens, C.C.A., 78 F.2d 768, 773.

N.Y.—Smith v. Ogilvie, 27 N.E. 807, 808, 127 N.Y. 143.

Tex.—Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, 160 S. W.2d 509, 512, citing **Corpus Juris.**

19. U.S.—Commissioner of Internal Revenue v. Owens, C.C.A., 78 F.2d 768, 773.

25 C.J. p 1118 note 10.

20. La.—Succession of Meunier, 26 So. 776, 779, 52 La.Ann. 79, 48 L.R.A. 77—Ducloslange v. Ross, 3 La. Ann. 432, 433.

N.Y.—Smith v. Ogilvie, 27 N.E. 807, 808, 127 N.Y. 143—Stoll v. King, 8 How.Pr. 298, 299.

held to apply to all persons who occupy a position of peculiar confidence toward others,[21] and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.[22]

As a Noun

One who holds a thing in trust for another, a trustee;[23] a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith, and candor which it requires;[24] a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking;[25] also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person, trust, or estate.[26] Some examples of what, in particular connections, the term has been held to include and not to include are set out in the note.[27]

While agency is often described as a fiduciary relation, see Agency § 1, "fiduciaries" may be distinguished from "agents."[28]

As an Adjective

——In General. Of the nature of a trust; having the characteristics of a trust; relating to or founded upon a trust or confidence;[29] holding, or held, or founded in trust.[30]

The term has been held equivalent to, or synonymous with, "confidential" see 15 C.J.S. p 821 note 58.

——Fiduciary Relation.

In general. It is difficult to define the term "fiduciary relation."[31] Under the decisions dealing

Tex.—Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, 160 S.W. 2d 509, 512, citing **Corpus Juris**—Gortario v. Cantu, 7 Tex. 35, 44.

21. N.Y.—Glover v. National Bank of Commerce, 141 N.Y.S. 409, 415, 156 App.Div. 247.
Tex.—Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, 160 S.W. 2d 509, 512, 513, citing **Corpus Juris.**

22. Tex.—Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, supra, citing **Corpus Juris.**

23. Ill.—Svanoe v. Jurgens, 33 N.E. 955, 957, 144 Ill. 507.
Pa.—In re Suretyship of Banks and Trust Companies, 14 Pa.Dist. & Co. 268, 269.

24. Black L.D.

25. Ohio.—Haluka v. Baker, 34 N.E. 2d 68, 70, 66 Ohio App. 308.

26. U.S.—Seymour v. National Biscuit Co., C.C.A.N.J., 107 F.2d 58, 63—Commissioner of Internal Revenue v. Owens, C.C.A., 78 F.2d 768, 773.

27. Held to include

(1) A corporation which retained dividends in its treasury until final determination of ownership of stock in litigation.—Ferguson v. Forstmann, C.C.A.N.J., 25 F.2d 47, 48.

(2) A mortgage trustee holding in trust for mortgage bondholders see the C.J.S. title Mortgages § 299, also 41 C.J. p 605 note 32–p 607 note 52.

(3) An executor or administrator see Executors and Administrators § 142.

(4) A person who agreed to invest and reinvest cash and proceeds of securities for another's account to increase income and make capital gains.—Irving Trust Co. v. McKeever, D.C.N.Y., 44 F.Supp. 842, 846.

(5) A buyer's trusted employee who, without the buyer's knowledge, acted secretly as agent for the seller.—Kinzbach Tool Co., Inc. v. Corbett-Wallace Corporation, Tex., 160 S.W.2d 509, 513.

(6) Corporate directors or officers see Corporations § 761 a, b.

(7) Indenture trustees representing all bondholders in corporate reorganization proceedings.—Woods v. City National Bank & Trust Co. of Chicago, Ill., 61 S.Ct. 493, 497, 312 U.S. 262, 85 L.Ed. 820.

(8) Majority or dominant stockholder or group of stockholders in a corporation see Corporations §§ 490, 514.

(9) Members of a bondholders' protective committee.—Woods v. City Nat. Bank & Trust Co. of Chicago, supra—U. S. v. Buckner, C.C.A.N.Y., 108 F.2d 921, 926—Mann v. Commonwealth Bond Corporation, D.C.N.Y., 27 F.Supp. 315, 317.

(10) Within constitutional provision relating to jurisdiction of suits on "bonds of fiduciaries," the word "fiduciaries" embraces those and those only who are bound for the discharge of express trusts—technical trusts, where bond is required to be given by law—and it does not include those engaged in the execution of trusts springing from contract.—Geo. D. Barnard & Co. v. Sykes, 18 So. 450, 451, 72 Miss. 297.

Held not to include

(1) A bank receiving money from a subscribers' committee for distribution among the subscribers and acting therein as a mere agent for the committee, or as passive trustee.—Meeker v. Durey, C.C.A.N.Y., 92 F.2d 607, 609.

(2) A sequestrator in a suit to determine ownership of shares of stock who took possession of the stock and held it subject to further order of the court, and who had no active duty to perform with reference thereto.—Loft, Inc., v. Guth, Del., 19 A.2d 721, 723.

(3) A stockholder in a corporate mortgagor with respect to dealings with a second mortgagee to keep the first mortgagee satisfied.—In re Campbell's Estate, 1 N.Y.S.2d 726, 728, 165 Misc. 808.

(4) A tax collector.—In re Suretyship of Banks & Trust Cos., 14 Pa. Dist. & Co. 268, 269.

28. U.S.—U. S. v. Griswold, C.C.A. Mass., 124 F.2d 599, 601.

29. Black L.D.

30. Ill.—Svanoe v. Jurgens, 33 N.E. 955, 957, 144 Ill. 507.

31. Mo.—Patton v. Shelton, 40 S.W. 2d 706, 712, 328 Mo. 631, quoting **Corpus Juris.**
N.M.—Van Sickle v. Keck, 81 P.2d 707, 717, 42 N.M. 450, quoting **Corpus Juris.**
W.Va.—McKinley v. Lynch, 51 S.E. 4, 9, 58 W.Va. 44.

"Not susceptible of exact definition"
Mont.—Roecher v. Story, 5 P.2d 205, 210, 91 Mont. 28, citing **Corpus Juris.**

"No invariable rule can be laid down by which to determine the existence of a fiduciary relationship."—Koehler v. Haller, 112 N.E. 527, 528, 62 Ind.App. 8.

"The law is as cautious in defining a fiduciary relation in the sense in which we are now using that term as it is in limiting by definition the boundaries within which fraud may be pursued."—Studybaker v. Cofield, 61 S.W. 246, 250, 159 Mo. 596—Sewell v. Ladd, Mo.App., 158 S.W.2d 752, 756—Selle v. Wrigley, 116 S.W.2d 217, 221, 233 Mo.App. 43.

with meaning of the term it is a very broad one;[32] but it may be defined generally as a relation in which, if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust.[33] Also referred to as a definition of the term is the statement that a person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation.[34] The term connotes a relation of trust as the basis of obligation of one and of security for the other,[35] embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies on another,[36] has reference to any relationship of blood, business, friendship, or association in which the parties repose special trust and confidence in each other and are in a position to have and exercise, or do have and exercise, influence over each other,[37] and implies a condition of superiority of one of the parties over the other;[38] but, in relation with undue influence, it does not necessarily imply acts which the law deems fraudulent.[39]

The term has been held synonymous with, and also distinguished from, "confidential relation" see 15 C.J.S. p 823 notes 93, 94. It has been distinguished from "agency,"[40] and "fiducial relation" see Fiducial supra note 15.

32. Ill.—Bennett v. Hodge, 29 N.E.2d 524, 527, 374 Ill. 326—Negley v. Ingleman, 166 N.E. 477, 479, 335 Ill. 52—Stahl v. Stahl, 73 N.E. 319, 321, 214 Ill. 131, 105 Am.S.R. 101, 68 L.R.A. 617, 2 Ann.Cas. 774—O'Donnell v. Snowden & McSweeney Co., 237 Ill.App. 156, 162.
Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514.
Mo.—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631, quoting **Corpus Juris.**
Mont.—Roecher v. Story, 5 P.2d 205, 210, 91 Mont. 28, citing **Corpus Juris.**
N.M.—Van Sickle v. Keck, 81 P.2d 707, 717, 42 N.M. 450, quoting **Corpus Juris.**
Okl.—Hayes v. Thornsbrough, 69 P.2d 664, 666, 180 Okl. 357, citing **Corpus Juris**—Micco v. Replogle, 53 P.2d 1093, 1095, 175 Okl. 61.—Lewis v. Schafer, 120 P.2d 1048, 1050, 163 Okl. 94—Reeves v. Crum, 225 P. 177, 179, 97 Okl. 293.
Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.
25 C.J. p 1119 note 38.

Using the same terms to define or describe "fiduciary or confidential relation."
Fla.—State v. Gautier, 147 So. 240, 242, 108 Fla. 390—Quinn v. Phipps, 113 So. 419, 420, 93 Fla. 805, 54 A.L.R. 1173—Dale v. Jennings, 107 So. 175, 178, 90 Fla. 234.
Okl.—Rollison v. Muir, 21 P.2d 1062, 1065, 163 Okl. 266—McDaniel v. Schroeder, 261 P. 224, 226, 128 Okl. 91.

33. U.S.—Central National Bank v. Connecticut Mutual Life Ins. Co., Md., 104 U.S. 54, 68, 26 L.Ed. 603.
Fla.—Metcalf v. Leedy, Wheeler & Co., 191 So. 690, 691.
Ill.—Niland v. Kennedy, 147 N.E. 117, 119, 316 Ill. 253—Dick v. Albers, 90 N.E. 683, 685, 243 Ill. 231, 134 Am.S.R. 369.
Mass.—City of Boston v. Santosuosso, 30 N.E.2d 278, 288, 307 Mass. 302—City of Boston v. Santosuosso, 10 N.E.2d 271, 275, 298 Mass. 175—Millett v. Temple, 188 N.E. 382, 383, 285 Mass. 87—Carr v. Streeter, 160 N.E. 405, 407, 262 Mass. 595—Smith v. Smith, 109 N.E. 830, 832, 222 Mass. 102.
Miss.—Wall v. Wall, 171 So. 675, 677, 177 Miss. 743—Cresswell v. Cresswell, 144 So. 41, 44, 164 Miss. 871.
Mo.—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631, quoting **Corpus Juris**—Klika v. Albert Wenzlick Real Estate Co., App., 150 S.W.2d 18, 24, quoting **Corpus Juris.**
N.M.—Van Sickle v. Keck, 81 P.2d 707, 717, 42 N.M. 450, quoting **Corpus Juris.**
Okl.—Hivick v. Urschel, 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**

34. Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514, quoting Am.L.Inst.Restatement of The Law of Trusts, § 2b.

35. U.S.—Railway & Express Co. v. U. S., Ct.Cl., 56 F.2d 687, 703.
Iowa.—Vertman v. Drayton, 272 N.W. 438, 439, 223 Iowa 380, citing **Corpus Juris.**

36. Ga.—Trustees' of Jesse Parker Williams Hospital v. Nisbet, Ga., 14 S.E.2d 64, 76, 191 Ga. 821.
Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514.
Md.—Anderson v. Watson, 118 A. 569, 575, 141 Md. 217.
Okl.—Hayes v. Thornsbrough, 69 P.2d 664, 666, 180 Okl. 357, citing **Corpus Juris**—Micco v. Replogle, 53 P.2d 1093, 1095, 175 Okl. 617—Lewis v. Schafer, 120 P.2d 1048, 1050, 163 Okl. 94—Reeves v. Crum, 225 P. 177, 179, 97 Okl. 293.
Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.

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Me.—Gerrish v. Chambers, 189 A. 187, 189, 135 Me. 70—Eldridge v. May, 150 A. 378, 379, 129 Me. 112.
Okl.—Rollison v. Muir, 21 P.2d 1062, 1065, 163 Okl. 266—Posey v. Brixey, 271 P. 230, 232, 133 Okl. 98—McDaniel v. Schroeder, 261 P. 224, 226, 128 Okl. 91.

Not necessarily a technical relation
"Fiduciary relation" does not depend on technical relation created or defined by law.—Lindholm v. Nelson, 264 P. 50, 54, 125 Kan. 223, quoting **Corpus Juris.**

37. Ill.—Steinmetz v. Kern, 32 N.E.2d 151, 154, 375 Ill. 616—Bennett v. Hodge, 29 N.E.2d 524, 527, 374 Ill. 326.
Iowa.—O'Brien v. Stoneman, 288 N.W. 447, 448, 227 Iowa 389.
Md.—Gerson v. Gerson, 20 A.2d 567, 570, 179 Md. 171.
Or.—Patterson v. Getz, 111 P.2d 842, 858, 166 Or. 245.

38. Del.—Peyton v. William C. Peyton Corporation, 7 A.2d 737, 747, 123 A.L.R. 1482.
Iowa.—O'Brien v. Stoneman, 288 N.W. 447, 448, 227 Iowa 389.
Md.—Gerson v. Gerson, 20 A.2d 567, 570, 179 Md. 171.
Mont.—Roecher v. Story, 5 P.2d 205, 210, 91 Mont. 28.

39. Del.—Peyton v. William C. Peyton Corporation, 7 A.2d 737, 747, 123 A.L.R. 1482.

Distinction clear
There is a well defined distinction between undue influence arising from acts which the law deems fraudulent, and undue influence resulting from fiduciary relations existing between the parties.
Ill.—Stahl v. Stahl, 73 N.E. 319, 321, 214 Ill. 131, 105 Am.S.R. 101, 68 L.R.A. 617, 2 Ann.Cas. 774.
Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514.
25 C.J. p 1119 note 41 [a].

40. U.S.—U. S. v. Griswold, C.C.A. Mass., 124 F.2d 599, 601.

Disclosures on trial of cause of communications between persons occupying fiduciary relations toward each other see the C.J.S. title Witnesses §§ 252–301, also 70 C.J. p 376 note 38–p 456 note 81.

When it exists. What constitutes a fiduciary relation is often a subject of controversy.[41] The relation may exist under a great variety of circumstances;[42] it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith, and with due regard to the interests of the one reposing the confidence,[43] in cases when confidence is reposed on one side and there is resulting superiority and influence on the other,[44] in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed.[45] It has been said, however, that mere re-

41. Okl.—Wells v. Shriver, 197 P. 460, 484, 81 Okl. 108.

42. Iowa.—O'Brien v. Stoneman, 288 N.W. 447, 448, 227 Iowa 389—Curtis v. Armagast, 138 N.W. 873, 878, 158 Iowa 507.
Kan.—Miller v. Henderson, 33 P.2d 1098, 1102, 140 Kan. 46—Lindholm v. Nelson, 264 P. 50, 54, 125 Kan. 223, citing **Corpus Juris.**
Mo.—Klika v. Albert Wenzlick Real Estate Co., App., 150 S.W.2d 18, 24, quoting **Corpus Juris**—Dimity v. Dimity, 62 S.W.2d 859, 861, 862, quoting **Corpus Juris**—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631, quoting **Corpus Juris.**
Mont.—Roecher v. Story, 5 P.2d 205, 210, 91 Mont. 28, citing **Corpus Juris.**
N.M.—Van Sickle v. Keck, 81 P.2d 707, 717, 42 N.M. 450, quoting **Corpus Juris.**
N.C.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708, citing **Corpus Juris**—Puckett v. Dyer, 167 S.E. 43, 46, 203 N.C. 684—Abbitt v. Gregory, 160 S.E. 896, 906, 201 N.C. 577, citing **Corpus Juris.**
Okl.—Hivick v. Urschel, 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**

Test
"Appellant relies on 25 C.J. 1118–1120, inclusive, sections 8 and 9 . . . [being] the general rules by which it is determined whether or not a fiduciary relationship existed."—Ward Stores Inc. v. Jaco, Mo.App., 157 S.W.2d 790, 791, citing **Corpus Juris.**

43. Ill.—Wharton v. Meyers, 21 N.E. 2d 772, 775, 371 Ill. 546—Johnson v. Lane, 15 N.E.2d 710, 716, 369 Ill. 135—Neagle v. McMullen, 165 N.E. 605, 608, 334 Ill. 168—O'Donnell v. Snowden & McSweeny Co., 149 N.E. 253, 255, 318 Ill. 374—Niland v. Kennedy, 147 N.E. 117, 119, 316 Ill. 253—Higgins v. Chicago Title & Trust Co., 143 N.E. 482, 484, 312 Ill. 11.
Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514.
Kan.—Miller v. Henderson, 33 P.2d 1098, 1102, 140 Kan. 46—Lindholm v. Nelson, 264 P. 50, 54, 125 Kan. 223, quoting **Corpus Juris.**
Md.—Gerson v. Gerson, 20 A.2d 567, 570, 179 Md. 171—Anderson v. Watson, 118 A. 569, 575, 141 Md. 217.
Mo.—Liddell v. Lee, 159 S.W.2d 769, 772, quoting **Corpus Juris**—Klaber v. Unity School of Christianity, 51 S.W.2d 30, 31, quoting **Corpus Juris**—Klika v. Albert Wenzlick Real Estate Co., App., 150 S.W.2d 18, 24, quoting **Corpus Juris.**
Mont.—Roecher v. Story, 5 P.2d 205, 210, 91 Mont. 28, quoting **Corpus Juris.**
N.C.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708, citing **Corpus Juris**—Puckett v. Dyer, 167 S.E. 43, 46, 203 N.C. 684—Abbitt v. Gregory, 160 S.E. 896, 906, 201 N.C. 577, citing **Corpus Juris.**
Okl.—Hivick v. Urschel, 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**
25 C.J. p 1119 note 41.

44. Fla.—Metcalf v. Leedy, Wheeler & Co., 191 So. 690, 691.
Ill.—Johnson v. Lane, 15 N.E.2d 710, 716, 369 Ill. 135—Suchy v. Hajicek, 4 N.E.2d 836, 840, 364 Ill. 502—Commercial Merchants' Nat. Bank & Trust Co. v. Kloth, 196 N.E. 214, 218, 360 Ill. 294—Warren v. Pfeil, 178 N.E. 894, 900, 346 Ill. 344—McCord v. Roberts, 165 N.E. 624, 626, 334 Ill. 233—Neagle v. McMullen, 165 N.E. 605, 608, 334 Ill. 168—Kochorimbus v. Maggos, 154 N.E. 235, 238, 323 Ill. 510—Rubin v. Midlinsky, 152 N.E. 217, 218, 321 Ill. 436—Feeney v. Runyan, 147 N.E. 114, 115, 316 Ill. 246—Allen v. McGill, 142 N.E. 470, 472, 311 Ill. 170—Herczeg v. Weiss, 136 N.E. 714, 716, 304 Ill. 543—People ex rel. Barrett v. Central Republic Trust Co., 20 N.E.2d 999, 1002, 1003, 300 Ill.App. 297—O'Donnell v. Snowden & McSweeney Co., 237 Ill. App. 156, 162.
Md.—Gaggers v. Gibson, 26 A.2d 395, 397—Gerson v. Gerson, 20 A.2d 567, 570, 179 Md. 171.
Okl.—Renegar v. Bruning, 123 P.2d 686, 688, 190 Okl. 340.
Wash.—Tucker v. Brown, 92 P.2d 221, 226, 199 Wash. 320.

Similarly expressed
(1) Fiduciary relations exist when parties to a transaction do not meet on equality, one party having a full knowledge and the other not, and the latter places confidence in the former.—Dean v. Cole, 204 P. 952, 955, 103 Or. 570.
(2) A fiduciary relation exists wherever there exists such a confidence, of whatever character that confidence may be as enables the person in whom the confidence or trust is reposed to exert influence over the person trusting him; that is to say, whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of the confidence is possessed by the other. —Dean v. Cole, supra.
(3) "The fiduciary relation may exist wherever special confidence is reposed, whether the relationship be that of blood, business, friendship, or association, by one person in another who are in a position to have and exercise or do have and exercise influence over each other."—Dawson v. National L. Ins. Co., 157 N.W. 929, 933, 176 Iowa 362—Curtis v. Armagast, 138 N.W. 873, 878, 158 Iowa 507.
(4) It has been held to apply to all persons who occupy a position of peculiar confidence toward others, such as a trustee, executor, or administrator, director of a corporation or society.—Wells v. Shriver, 197 P. 460, 484, 81 Okl. 108.
(5) It is found with its accompanying burdens and disqualifications wherever there is confidence reposed on one side and resulting superiority and influence on the other.—Bliss v. Bahr, 87 P.2d 219, 223, 161 Or. 79.
Similar statement made in discussing "fiduciary or confidential relations."—Small v. Nelson, Me., 16 A. 2d 473, 475.

45. Ill.—Swiney v. Womack, 175 N.E. 419, 423, 343 Ill. 278—Negley v. Ingleman, 166 N.E. 477, 479, 335 Ill. 52—O'Donnell v. Snowden & McSweeney Co., 237 Ill.App. 156, 162.
Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514.
Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.
Same terms used in discussing "fiduciary or confidential relations."
Fla.—Quinn v. Phipps, 113 So. 419, 421, 93 Fla. 805, 54 A.L.R. 1173—Dale v. Jennings, 107 So. 175, 178, 90 Fla. 234.
Okl.—Rollison v. Muir, 21 P.2d 1062, 1065, 163 Okl. 266—Posey v. Brix-

spect for the judgment of another or trust in his character is not enough to constitute such a relation,[46] but there must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party.[47] The relation arises wherever a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property, or pecuniary interest, in the whole or in a part, or the bodily custody of one person is placed in the charge of another;[48] and it may exist in the absence of a specific or technical trust or agency.[49] Courts of equity have refused to set any bounds to the circumstances out of which a fiduciary relation may spring.[50] It includes not only all the usual legal relations,[51] such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, husband and wife, partners, principal and agent, trustee and cestui que trust,[52] and other specific relations as indicated in the footnote,[53] but

ey, 271 P. 230, 232, 133 Okl. 98—McDaniel v. Schroeder, 261 P. 224, 226, 128 Okl. 91.

46. Mass.—Snow v. Merchants Nat. Bank of New Bedford, 35 N.E.2d 213, 217, 309 Mass. 354—Cranwell v. Oglesby, 12 N.E.2d 81, 83, 299 Mass. 148.
Wis.—Van Dale v. Prudential Ins. Co. of America, 274 N.W. 153, 159, 225 Wis. 281.

"If the relation is a business one, the existence of the mutual respect and confidence does not make it fiduciary."—Snow v. Merchants National Bank of New Bedford, 35 N.E.2d 213, 217, 309 Mass. 354—Cranwell v. Oglesby, 12 N.E.2d 81, 83, 299 Mass. 148.

47. Mass.—Cranwell v. Oglesby, supra.

48. U.S.—Commissioner of Internal Revenue v. Owens, C.C.A., 78 F.2d 768, 773.
Mass.—Cranwell v. Oglesby, 12 N.E. 2d 81, 83, 299 Mass. 148.
Mo.—Klika v. Albert Wenzlick Real Estate Co., App., 150 S.W.2d 18, 24, quoting **Corpus Juris.**
Okl.—Hivick v. Urschel, 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**
W.Va.—McKinley v. Lynch, 51 S.E. 4, 9, 58 W.Va. 44.

Similarly expressed

Fiduciary relation exists "whenever trust and confidence . . . [are] reposed by one person in the integrity and fidelity of another."
Cal.—In re Cover's Estate, 204 P. 583, 588, 188 Cal. 133.
Okl.—Fipps v. Stidham, 50 P.2d 680, 683, 174 Okl. 473.

Using similar terms to define or describe "fiduciary or confidential relation."—Kerrigan v. O'Meara, 227 P. 819, 821, 71 Mont. 1.

49. Or.—Bliss v. Bahr, 87 P.2d 219, 223, 161 Or. 79—Rowe v. Freeman, 172 P. 508, 511, 174 P. 727, 89 Or. 428.

50. Ill.—Seely v. Rowe, 18 N.E.2d 874, 877, 370 Ill. 336.
Mo.—Liddell v. Lee, 159 S.W.2d 769, 772, quoting **Corpus Juris.**
Okl.—Hivick v. Urschel, 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**
25 C.J. p 1119 note 48.

Existence of relationship as basis for equity jurisdiction.
Ala.—Ingram v. People's Finance & Thrift Co., 146 So. 822, 823, 226 Ala. 317, citing **Corpus Juris.**

Similarly expressed

(1) The courts generally have declined to define the term "fiduciary relation," and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either.—Puckett v. Dyer, 167 S.E. 43, 46, 203 N.C. 684.

(2) The courts have consistently refused to give an exact definition to, or to fix definite boundaries of, those human relations which, by principles of common honesty, require fair dealing between the parties, and which are commonly known as fiduciary relations.—Miller v. Henderson, 33 P.2d 1098, 1102, 140 Kan. 46.

(3) Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708—Abbitt v. Gregory, 160 S.E. 896, 906, 201 N.C. 577.

51. Ill.—Catherwood v. Morris, 178 N.E. 487, 493, 345 Ill. 617—Schweickhardt v. Chessen, 161 N.E. 118, 123, 329 Ill. 637—Mors v. Peterson, 104 N.E. 216, 261 Ill. 532, 536.
Mo.—Liddell v. Lee, 159 S.W.2d 769, 772, quoting **Corpus Juris**—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631, quoting **Corpus Juris**—Selle v. Wrigley, 116 S.W.2d 217, 221, 233 Mo.App. 43.
N.C.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708, quoting **Corpus Juris**—Abbitt v. Gregory, 160 S.E. 896, 906, 201 N.C. 577, quoting **Corpus Juris.**
Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.
Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 473, 56 Wyo. 314.

52. U.S.—In re Consolidated Rock Products Co., D.C.Cal., 36 F.Supp. 912, 914.
Ill.—Ex parte Goodman, 37 N.E.2d 345, 349, 377 Ill. 578—Seely v. Rowe, 18 N.E.2d 874, 877, 370 Ill. 336—Mors v. Peterson, 104 N.E. 216, 218, 261 Ill. 532.
Iowa.—O'Brien v. Stoneman, Iowa, 288 N.W. 447, 448, 227 Iowa 389.
Mo.—Liddell v. Lee, 159 S.W.2d 769, 772, quoting **Corpus Juris**—Klaber v. Unity School of Christianity, 51 S.W.2d 30, 31, citing **Corpus Juris.**
N.C.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708, quoting **Corpus Juris**—Abbit v. Gregory, 160 S.E. 896, 906, 201 N.C. 577, quoting **Corpus Juris.**
Okl.—Hayes v. Thornsbrough, 69 P. 2d 664, 666, 180 Okl. 357.
Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.
25 C.J. p 1120 notes 66–70.
See generally the C.J.S. titles Attorney and Client § 125 et seq.; Brokers §§ 6, 11, 69–74; Executors and Administrators § 142; Factors § 1; Guardian and Ward §§ 68–76, also 28 C.J. p 1123 note 44–p 1130 note 28; Partnership § 76, also 47 C.J. p 771 note 60–p 773 note 74; and Trusts §§ 9, and 246 et seq., also 65 C.J. p 218 note 94–p 219 note 12, and p 644 note 41 et seq.

53. **Particular relations held "fiduciary"**

(1) Corporate directors or officers and the corporation or its stockholders.
U.S.—In re Norcor Mfg. Co., C.C.A. Wis., 109 F.2d 407, 411—In re Fergus Falls Woolen Mills Co., D.C. Minn., 41 F.Supp. 355, 364.
Mass.—Lincoln Stores, Inc., v. Grant, 34 N.E.2d 704, 707, 309 Mass. 417.
N.J.—Masholie v. River Edge Estates, Ch., 19 A.2d 27, 29, 129 N.J. Eq. 228.
N.Y.—Levy v. Feinberg, 29 N.Y.S.2d 550, 555.
See Corporations § 761.

(2) A corporation in control and its subsidiaries.—Espach v. Nassau & Suffolk Lighting Co., 31 N.Y.S.2d

it extends to every possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side and resulting domination and influence on the other.[54] However, it is not every guardian, attorney, or priest, quia eo nomine, who is to be adjudged to hold a fiduciary relation with the person with regard to a particular subject; it is in each case a question of fact, for the law regards the real, rather than the nominal, condition,[55] and in some relations there must exist confidence of the one in the other,[56] together with conditions extending to the one an advantage over the other, and this may be by reason of the superior intelligence of the one over the other or a superior knowledge of the facts involved in a business transaction.[57] It is not necessary that the relation and duties involved be legal; they may be either moral, social, domestic or merely personal.[58] The origin of the confidence and the source of the influence are immaterial.[59] The phrase has been said not to include the relations of a bank and a general depositor see Banks and Banking §§ 273, 276, a bank cashier and a customer of the bank,[60] a husband and wife living apart,[61] a parent and child or chil-

259, 264, 177 Misc. 521. See Corporations § 492.

(3) Life tenant and remainderman. —Bienvenu v. First Nat. Bank of Atlanta, Ga., 17 S.E.2d 257, 260. See Estates §§ 34, 35.

(4) Majority or dominating stockholders and the minority.

U.S.—Overfield v. Pennroad Corporation, D.C.Pa., 42 F.Supp. 586, 606 —In re Fergus Falls Woolen Mills Co., D.C.Minn., 41 F.Supp. 355, 364.

Del.—Hartford Accident & Indemnity Co. v. W. S. Dickey Clay Mfg. Co., Ch., 21 A.2d 178, 184.

See Corporations §§ 490, 496, 514.

(5) Mortgagee and the mortgagor.

N.C.—Hinton v. West, 178 S.E. 356, 360. 207 N.C. 708.

Or.—Harper v. Interstate Brewery Co., 120 P.2d 757, 766.

(6) Parent and child.

Cal.—In re Eakie's Estate, 91 P.2d 954, 959, 33 Cal.App.2d 379.

Iowa.—O'Brien v. Stoneman, 288 N. W. 447, 448, 227 Iowa 389.

See generally the C.J.S. title Parent and Child §§ 59, 60, also 46 C. J. p 1318 note 21–p 1319 note 41.

(7) The promoter of a corporation and subscribers to its stock.—Austin v. Hallmark Oil Co., Cal.App., 125 P.2d 935, 942. See Corporations § 120.

(8) Receivers generally see the C. J.S. title Receivers § 142 et seq, also 53 C.J. p 135 note 60 et seq.

54. Ill.—Steinmetz v. Kern, 32 N.E. 2d 151, 154, 375 Ill. 616—Seely v. Rowe, 18 N.E.2d 874, 877, 370 Ill. 336—Mors v. Peterson, 104 N.E. 216, 218, 261 Ill. 532.

Md.—Gerson v. Gerson, 20 A.2d 567, 570, 179 Md. 171.

Mo.—Liddell v. Lee, 159 S.W.2d 769, 772, quoting **Corpus Juris**—Klika v. Albert Wenzlick Real Estate Co., App., 150 S.W.2d 18, 24, quoting **Corpus Juris**—Selle v. Wrigley, 116 S.W.2d 217, 221, 233 Mo.App. 43.

N.C.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708, quoting **Corpus Juris**—Abbitt v. Gregory, 160 S.E. 896, 906, 201 N.C. 577, quoting **Corpus Juris.**

Okl.—Hivick v. Urschel, 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**

25 C.J. p 1119 note 60, p 1120 note 66.

55. Mass.—Cranwell v. Oglesby, 12 N.E.2d 81, 83, 299 Mass. 148.

Mo.—Klaber v. Unity School of Christianity, 51 S.W.2d 30, 31, citing **Corpus Juris**—Studybaker v. Cofield, 61 S.W. 246, 250, 159 Mo. 596, 612—Selle v. Wrigley, 116 S. W.2d 217, 221, 233 Mo.App. 43.

Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.

56. Ill.—McDonnell v. Holden, 185 N.E. 572, 575, 352 Ill. 362.

Ind.—Koehler v. Haller, 112 N.E. 527, 528, 62 Ind.App. 8.

57. Ind.—Koehler v. Haller, supra—Yuster v. Keefe, 90 N.E. 920, 922, 46 Ind.App. 460.

Similarly expressed

(1) "There must be not only confidence of the one in the other, but there must exist a certain inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of the facts involved, or other conditions giving to one advantages over the other."—Yuster v. Keefe, 90 N.E. 920, 922, 46 Ind.App. 460.

(2) "It must appear as a fact that there was confidence reposed on the one side and accepted on the other, with a resulting dependence by the one party and influence by the other."—Hoge v. George, 200 P. 96, 102, 27 Wyo. 423, 18 A.L.R. 469.

58. Fla.—Metcalf v. Leedy, Wheeler & Co., 191 So. 690, 691.

Ill.—Seely v. Rowe, 18 N.E.2d 874, 877, 370 Ill. 336—Commercial Merchants' Nat. Bank & Trust Co. v. Kloth, 196 N.E. 214, 218, 360 Ill. 294—Swiney v. Womack, 175 N.E. 419, 423, 343 Ill. 278—Schweickhardt v. Chessen, 161 N.E. 118, 123, 329 Ill. 637—Higgins v. Chicago Title & Trust Co., 143 N.E. 482, 484, 312 Ill. 11.

Mo.—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631.

N.C.—Hinton v. West, 178 S.E. 356, 360, 207 N.C. 708 citing **Corpus Juris**—Abbitt v. Gregory, 160 S.E. 896, 906, 201 N.C. 577, citing **Corpus Juris.**

Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.

25 C.J. p 1120 notes 66–70.

Friendship

Fiduciary relations are not found solely in legal relationships, but are found where relation of trust and confidence exists between friends.—Thompson v. Thompson, 267 P. 375, 380, 91 Cal.App. 554.

59. Ill.—Commercial Merchants' Nat. Bank & Trust Co. v. Kloth, 196 N.E. 214, 218, 360 Ill. 294—Swiney v. Womack, 175 N.E. 419, 423, 343 Ill. 278—Negley v. Ingleman, 166 N.E. 477, 479, 335 Ill. 52—Higgins v. Chicago Title & Trust Co., 143 N.E. 482, 484, 312 Ill. 11.

Iowa.—Merritt v. Easterly, 284 N.W. 397, 399, 226 Iowa 514.

Md.—Anderson v. Watson, 118 A. 569, 575, 141 Md. 217.

Mo.—Liddell v. Lee, 159 S.W.2d 769, 772, quoting **Corpus Juris**—Klaber v. Unity School of Christianity, 51 S.W.2d 30, 31, citing **Corpus Juris** —Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631.

Okl.—Hivick v. Urschel. 40 P.2d 1077, 1080, 171 Okl. 17, citing **Corpus Juris.**

Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.

25 C.J. p 1120 note 71.

Using the same terms to define or describe "fiduciary or confidential relation."

Fla.—Quinn v. Phipps, 113 So. 419, 421, 93 Fla. 805, 54 A.L.R. 1173—Dale v. Jennings, 107 So. 175, 178, 90 Fla. 234.

Okl.—Rollison v. Muir, 21 P.2d 1062, 1065, 163 Okl. 266—Posey v. Brixey, 271 P. 230, 232, 133 Okl. 98—McDaniel v. Schroeder, 261 P. 224, 226, 128 Okl. 91.

60. Mo.—Rardon v. Davis, App., 52 S.W.2d 193, 197.

61. Ill.—Shlensky v. Shlensky, 15 N. E.2d 694, 698, 369 Ill. 179.

dren;[62] nor does the relation necessarily arise between one stockholder and another out of the mere ownership of corporate stock.[63]

Effect of relation. It is against public policy to allow persons occupying fiduciary relations to be placed in positions in which there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives.[64] It is a well-settled equitable rule that anyone acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest,[65] except with the full knowledge and consent of the other person, and such other person must be in possession of all his powers before he can be bound by that knowledge or consent.[66] When a fiduciary relation is established between parties, courts of equity scrutinize very closely any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.[67] All transactions between parties in this relation are presumptively fraudulent and void,[68] and the burden of proof is on the party asserting validity with respect thereto.[69]

——**Other Phrases.** The word occurs in other phrases as indicated in the note.[70]

FIEF. A term used in the Norman law to designate real estate.[71] Also called a fee, feod, or feud.[72]

FIEL. In Spanish, literally, "Faithful," hence in Spanish law, a depositary or custodian; also the public weighmaster.[73]

62. Ill.—Neagle v. McMullen, 165 N. E. 605, 608, 334 Ill. 168.
Iowa.—Jensen v. Phippen, 280 N.W. 528, 529, 225 Iowa 302.

63. Mass.—Mairs v. Madden, 30 N. E.2d 242, 244, 307 Mass. 378.

64. N.Y.—Barnes v. Brown, 80 N. Y. 527, 535.
25 C.J. p 1120 note 72.

65. Cal.—In re Cover's Estate, 204 P. 583, 588, 188 Cal. 133.
Ill.—Commercial Merchants' Nat. Bank & Trust Co. v. Kloth, 196 N. E. 214, 218, 360 Ill. 294.
25 C.J. p 1120 note 73.

Similarly expressed

(1) The law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith, uberrima fides, in all transactions between the parties.—In re Eakle's Estate, 91 P.2d 954, 959, 33 Cal.App.2d 379.

(2) "The underlying thought is that an agent or other fiduciary should not unite his personal and his representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or be brought into a situation where his own personal interests conflict with the interests of his principal and with the duties he owes to his principal."—Mallory v. Mallory Wheeler Co., 23 A. 708, 710, 61 Conn. 131.

66. Kan.—Meyer v. Reimer, 70 P. 869, 870, 65 Kan. 822.

Using the same terms to define or describe "fiduciary or confidential relation."—Kerrigan v. O'Meara, 227 P. 819, 821, 71 Mont. 1.

67. Ill.—Negley v. Ingleman, 166 N. E. 477, 479, 335 Ill. 52—Mors v. Peterson, 104 N.E. 216, 218, 261 Ill. 532.
25 C.J. p 1120 note 73.

As an element of, or as associated with, undue influence in affecting the validity of various transactions see such C.J.S. titles as Contracts §§ 182–184; Deeds §§ 62–64; Exchange of Property § 4 d; Gifts § 34, also 28 C.J. p 653 note 13–p 654 note 31; Husband and Wife § 114, also 30 C.J. p 660 note 16–p 662 note 35, marriage settlement; Landlord and Tenant § 225, also 35 C.J. p 1164 notes 77–85, lease; Mortgages § 143, also 41 C.J. p 439 notes 7–14; Trusts § 76, also 65 C. J. p 332 notes 21–32; and Wills § 230, also 68 C.J. p 751 note 95–p 753 note 15.

68. Del.—Peyton v. William C. Peyton Corporation, 7 A.2d 737, 747, 123 A.L.R. 1482.
Ill.—Seely v. Rowe, 18 N.E.2d 874, 877, 370 Ill. 336—Commercial Merchants' Nat. Bank & Trust Co. v. Kloth, 196 N.E. 214, 218, 360 Ill. 294.
Iowa.—O'Brien v. Stoneman, 288 N. W. 447, 448, 227 Iowa 389.
Mo.—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631.
25 C.J. p 1120 note 77.

69. Iowa.—Dawson v. National L. Ins. Co., 157 N.W. 929, 934, 176 Iowa 362, L.R.A.1916E 878, Ann. Cas.1918B 230.
Mo.—Patton v. Shelton, 40 S.W.2d 706, 712, 328 Mo. 631.
25 C.J. p 1120 note 77 [a].

70. **Phrases construed**

(1) "Any fiduciary character," compared with "any other fiduciary capacity."—Woolsey v. Cade, 54 Ala. 378, 381, 25 Am.R. 711.

(2) "Fiducial or fiduciary relation."
Cal.—Wilson v. Cooper, 15 P.2d 174, 177, 126 Cal.App. 607.
Ky.—Roberts v. Parsons, 242 S.W. 594, 596, 195 Ky. 274.
Tex.—Peckham v. Johnson, Civ.App., 98 S.W.2d 408, 416.
"Confidential relation" distinguished see Confidential 15 C.J.S. p 823 note 94.

(3) "Fiduciary bequest" see the C. J.S. title Wills § 1125, also 25 C.J. p 1118 notes 19–21.

(4) "Fiduciary capacity" see 12 C. J.S. p 1117 notes 57–61.

(5) "Fiduciary contract" see Contracts § 10 note 59.

(6) "Fiduciary debt" see 26 C.J.S. p 11 note 25.

(7) "Fiduciary or confidential relation," defined in the same terms as "fiduciary relation" see supra notes 32, 36, 44, 45, 48, 59, 66.

(8) "Fiduciary relationship."
Cal.—Flaherty v. State Bar, Cal., 106 P.2d 617, 620, 16 Cal.2d 483.
Colo.—Midwest Mut. v. Heald, 108 P. 2d 535, 536, 106 Colo. 552—Santa Anita Corporation v. Walker, 106 P.2d 459, 461, 106 Colo. 465.

(9) "While acting as an officer or in any fiduciary capacity."—In re Hammond, C.C.A.N.Y., 98 F.2d 703, 705—In re Herbst, D.C.N.Y., 22 F. Supp. 353, 354—Bloemecke v. Applegate, C.C.A.N.J., 271 F. 595, 598.

71. Pa.—Dowdel v. Hamm, 2 Watts 61, 65.

72. Black L.D.

"Fief d'haubert" or "fief d'hauberk"

French, in Norman feudal law, a fief or fee held by the tenure of knight-service; a knight's fee; a fee held on the military tenure of appearing fully armed on the ban and arriere-ban.—Black L.D.

"Fief-tenant"

In old English law, the holder of a fief or fee; a feeholder or freeholder. —Black L.D.

73. Escriche Diccionario.

"Fiel cogidor"

Public revenue collector.—Escriche Diccionario.

"Fiel de fechos"

A substitute court clerk in places where there was no actual one.—Escriche Diccionario.

FIELD. The term has no technical signification in law, but has been frequently employed, in its primary sense, to describe or designate cleared land as distinguished from woodland;[74] cleared land for cultivation or other purposes, whether inclosed or not;[75] cultivated land;[76] a cultivated tract of land; a lot, inclosed and cultivated;[77] a garden;[78] a wide extent of land, suitable for tillage or pasture.[79]

In this sense "field" has sometimes been used interchangeably with,[80] and at others distinguished from,[81] "inclosure;" and has been compared with, and distinguished from, "garden."[82]

In a derived or secondary sense, the word has been defined as meaning the sphere of practical operation, as of an organization or enterprise; also the place or territory where direct contacts, as with a clientele, may be made or first-hand knowledge may be gained; sphere of action or place of contest, either literally or figuratively; hence, any scene of operations or opportunity for activity.[83]

As used in horse racing see the C.J.S. title Gaming § 1, also 27 C.J. p 975 note 46; and in statutes relating to the duty of railroads to fence their tracks see the C.J.S. title Railroads § 572, also 52 C.J. p 43 note 23–p 44 note 53.

Field work. Work in the field, using "field" in the derived sense above defined; specifically the task of gathering scientific data from the field;[84] more particularly in political activities, it is not an uncommon expression, has no mysterious connotation, but is readily understandable by laymen and has been held to include such activities as the circulating of petitions, collecting signatures thereon, and seeing to it that the petitions are properly notarized.[85]

Other phrases employing the word are set out in the note.[86] Other phrases as to which more recent

"Fiel ejecutor"
A food inspector with power to impose fines.—Escriche Diccionario.

74. N.C.—State v. Staton, 66 N.C. 640, 643.

75. Va.—Commonwealth v. Wilson, 9 Leigh 648, 649, 36 Va. 648, 649.

76. Vt.—State v. Mack, 102 A. 58, 59, 92 Vt. 103.

77. N.C.—State v. McMinn, 81 N.C. 585, 587.

78. Mass.—Commonwealth v. Josselyn, 97 Mass. 411, 412.

79. Tex.—Southern Kansas R. Co. v. Isaacs, 49 S.W. 690, 20 Tex.Civ. App. 466, 467.

80. Tex.—Southern Kansas R. Co. of Texas v. Isaacs, supra.

81. N.C.—State v. Staton, 66 N.C. 640, 643.

82. **Whether a garden is always a field** or not, it may be in a field.—Commonwealth v. Josselyn, 97 Mass. 411, 412.

83. Or.—State ex rel. McPherson v. Snell, 121 P.2d 930, 937, quoting Funk & Wagnalls D. and Webster New Int.D.

84. Or.—State ex rel. McPherson v. Snell, 121 P.2d 930, 937.

85. Or.—State ex rel. McPherson v. Snell, supra.

86. **"Field man"**
(1) An employee of a bank whose duties consist in looking after the bank's farm lands and in taking care of its live stock.—Red River Nat. Bank v. Latimer, Tex.Civ.App., 110 S.W.2d 232, 238, 239.

(2) An employee of a city health department whose duties include making inspections and daily reports to the health commissioner, collecting of samples of milk and food products, executing quarantine regulations, fumigating, and performing other services required by health commissioner in interest of the public health.—Jagger v. Green, 133 P. 174, 175, 90 Kan. 153.

"Field storage warehousing"
(1) Defined as warehousing the owner's goods on the premises of the owner or of the former owner.—American Can Co. v. Erie Preserving Co., N.Y., 183 F. 96, 97, 105 C.C.A. 388.

(2) System commended.—Philadelphia Warehouse Co. v. Winchester, C. C.Del., 156 F. 600, 610.

Other phrases construed
(1) "Field ale" or "filkdale" described as an ancient custom in England, by which officers of the forest and bailiffs of hundreds had the right to compel the hundred to furnish them with ale.—Black L.D.

(2) "Field audit," as contemplating a verification of the facts reported in the return of a taxpayer, and constituting a complete review of the taxpayer's books for the purpose of establishing accurately and finally the facts with respect to the taxpayer's income.—Bechaud v. Wisconsin Tax Commission, 290 N.W. 632, 635, 235 Wis. 23—Newport Co. v. Wisconsin Tax Commission, 261 N.W. 884, 886, 219 Wis. 293, 100 A.L.R. 1204.

(3) "Field book."—Neill v. Ward, 153 A. 219, 225, 103 Vt. 117.

(4) "Field instruction" see the C. J.S. titles Army and Navy § 8 notes 90–92, and Militia § 19, also 40 C.J. p 689 notes 15–22.

(5) "Field meeting," as equivalent to "camp meeting" see 12 C.J.S. p 889 note 34.

(6) "Field notes" see Boundaries § 24.

(7) "Field reeve," in England, an officer elected by the owners of a regulated pasture to keep in order the fences, ditches, etc., on the land, to regulate the times during which animals are to be admitted to the pasture, and generally to maintain and manage the pasture subject to the instructions of the owners.—Black L.D.

(8) "Field service" or "service in the field," as meaning or including service in mobilization, concentration, instruction, or maneuver camps, as well as service in campaign, simulated campaign, or on the march.—Ex parte Jochen, D.C.Tex., 257 F. 200, 201.

(9) "Field spliced," as designating steel girders manufactured in two pieces to be put together in the field, that is, at the place where they are to be used, and thus distinguished from "shop spliced."—Green-Beekman Const. Co. v. McClintic-Marshall Co., 272 P. 420, 422, 134 Okl. 60.

(10) "Field vision," defined as the general vision used in catching in sight, following and locating objects.—Turpin v. St. Regis Paper Co., 192 N.Y.S. 85, 87, 199 App.Div. 64. Distinguished from "binocular vision" see 11 C.J.S. p 349 note 7.

(11) "Field workers" as meaning those who attend to the details of doing "field work" as above defined. —State ex rel. McPherson v. Snell, Or., 121 P.2d 930, 937.

(12) "Inclosed field or parcel of land."—Riegel v. Commissioners of Bankston Special Drainage Dist., 211 Ill.App. 170, 172.

adjudications have not been found see 25 C.J. p 1121 notes 89–3.

FIELDAD. In Spanish law, custody, possession in trust; also an order dispatched by the treasury board regarding the collection of revenues.[87]

FIERI FACIAS. Literally, "That you cause to be done or made."[88] A judicial writ,[89] included within the generic word "process" see the C.J.S. title Process § 1, also 50 C.J. p 444 note 85 [c], and specifically defined in Executions § 12 notes 45–47.

The writ of "fieri facias" and "warrant of execution" have been described as convertible terms.[90]

Fieri facias de bonis ecclesiasticis. When a sheriff to a common fieri facias returns nulla bona, and that defendant is a beneficed clerk, not having any lay fee, a plaintiff may issue a fieri facias de bonis ecclesiasticis, addressed to the bishop of the diocese or to the archbishop, during the vacancy of the bishop's see, commanding him to make of the ecclesiastical goods and chattels belonging to defendant within his diocese the sum therein mentioned.[91]

Fieri facias de bonis propriis. A writ for the seizure of the goods of an executor, where devastavit has prevented satisfaction of a judgment from goods of the testator.[92]

Fieri facias de bonis testatoris. The writ issued on an ordinary judgment against an executor when sued for a debt due by his testator.[93]

FIERI FECI. Literally "I have caused to be made." The name given to the return made by a sheriff or other officer to a writ of fieri facias, where he has collected the whole or a part of the sum directed to be levied.[94]

FIERI NON DEBET, SED FACTUM VALET.[95]

FIESTA. In Spanish law, festival or holiday, particularly one set aside by the church for celebrating mass and abstaining from labor.[96]

FI. FA. See Abbreviations 1 C.J.S. p 276 note 5.

FIFTEENTH AMENDMENT. See Constitutional Law § 69 b note 80.

FIFTEEN. A cardinal numeral; five more than ten, or one more than fourteen.[97]

FIFTEENTHS. In English law, originally a tax or tribute, levied at intervals by act of parliament, consisting of one-fifteenth of all the movable property of the subject or personalty in every city, township, and borough.[98]

FIFTH QUARTER. A term understood among butchers to embrace the head, heart, hide, hoofs, horns, liver, tail, tallow, tongue, and tripe of animals slaughtered.[99]

FIFTY. Five times ten; ten more than forty, or one more than forty-nine.[1] A name given in early colonial New York to a proprietor's allotment of lands purchased and held for the use of the community.[2]

(13) "Old-field pine."—Hearin v. Union Sawmill Co., 151 S.W. 1007, 1008, 105 Ark. 455.

(14) "Race field" see the C.J.S. title Gaming § 1, also 27 C.J. p 987 notes 96, 97.

87. Escriche Diccionario.

"Meter en fieldad"

To deposit by way of security.—Escriche Diccionario.

88. Okl.—State ex rel. First Nat. Bank v. Ogden, 49 P.2d 565, 567, 173 Okl. 285, quoting **Corpus Juris.**

89. U.S.—Loague v. Brownsville Taxing Dist., C.C.Tenn., 36 F. 149, 151.

Vt.—Mack v. Nichols, 5 Vt. 200, 201.

90. Ont.—Macfie v. Hunter, 9 Ont.Pr. 149, 155.

91. Black L.D.

92. English L.D.

See generally Executors and Administrators § 806 c.

93. Black L.D.

See generally Executors and Administrators § 806.

94. Black L.D.

95. A maxim meaning "It ought not to be done, but having been done it is valid."—Bouvier L.D.

Applied or explained in Threadgill v. Colcord, 85 P. 703, 706, 16 Okl. 447—25 C.J. p 1122 note 17 [a].

Another form of the maxim

"Fieri non oportuit sed factum valet" applied in Green v. Thompson, Johns. 418, 423, 70 Reprint 485.

96. Escriche Diccionario.

Fiesta de consejo

A day when the courts suspend sessions.—Escriche Diccionario.

97. Century D.

Phrases construed

(1) "Fifteen continuous miles" under full crew law construed as meaning that a railroad operation outside of state would not be added to one within state in order to subject freight operations of a railroad to the "fifteen continuous miles" provision.—Union Pac. R. Co. v. Anderson, 120 P.2d 578, 581, 167 Or. 687. Full crew statutes generally see the C.J.S. title Railroads § 401, also 51 C.J. p 982 note 31–p 985 note 85.

(2) "Fifteen members shall constitute quorum for business" construed as meaning fifteen in person and not satisfied by proxies of absent members.—Morton v. Talmadge, 144 S.E. 111, 114, 166 Ga. 620.

98. Black L.D.

Later significance

"Under Edward III., the taxable property was assessed, and the value of its fifteenth part (then about twenty-nine thousand pounds) was recorded in the exchequer, whence the tax, levied on that valuation, continued to be called a 'fifteenth,' although, as the wealth of the kingdom increased, the name ceased to be an accurate designation of the proportion of the tax to the value taxed."—Black L.D.

99. U.S.—Gibbons' Case, 5 Ct.Cl. 416, 422.

1. Century D.

2. **"As early as 1647,** inhabitants of Southampton had been contributors to a fund of six thousand pounds,

"Fifty-fifty." The expression has a well-defined meaning, conveying to the mind the division of the subject under discussion into halves.[3] Used as descriptive of an agreement, it has been said that the term does not warrant the conclusion that the parties thereto were joint adventurers.[4]

Other phrases employing the word are set out in the note.[5]

FIG. The common name for species of the genus Ficus, and for their fruit.[6] When used without qualifying descriptive terms, with commercial significance, it refers to the dried figs commonly imported and sold in baskets or boxes, and not the preserved fruits.[7]

FIGHT. As a noun, a combat or battle, a hostile encounter or engagement between opposing forces; a combat between two persons or animals, implying force, and suggesting primarily the notion of a brawl or unpremeditated encounter, or that of a pugilistic combat.[8]

As a verb, used intransitively, the term has been defined as meaning primarily to contend in battle or single combat;[9] to strike or contend for victory, in battle or in single combat.[10] Used transitively, it means primarily to combat or to engage or to oppose in battle; to war against;[11] to attempt to defeat, subdue, or destroy an enemy, either by blows or weapons.[12]

"Fighting," in a particular connection, has been said not to apply to actions and movements of a person attacked designed either to disarm the attacker or to get him in a position where he could not use his gun.[13] For specific uses of the word see the C.J.S. titles Affray §§ 2, 3, Homicide § 43, also 29 C.J. p 1128 notes 8–10, and Prize-Fighting §§ 1, 2, also 50 C.J. p 411 note 1–p 413 note 34.

FIGHTWITE. Saxon, a mulct or fine for making a quarrel to the disturbance of the peace;[14] also a payment to a lord possessing soc, or jurisdiction, over a place where a wrong was done.[15]

FIGURE. The numerical character by which a number is expressed or written;[16] either Roman, made with letters of the alphabet, for example, MDCCLXXVI, or Arabic, as follows, 1776.[17] In particular contexts, the term may express measurement of length or extension[18] sections, in a description of land,[19] value in dollars,[20] and other ideas of quantity.[21] The term has been held not to

which was expended in the purchase of lands for the use of the new community. The contributors were known as the 'proprietors,' and were deemed to have at least an equitable interest in the lands so purchased. The inhabitants resolved in town meeting . . . that the town be divided 'into fortie house lots, some biger, some less, as men have put in a share, six thousand pounds to be divided in to fortie parts.' By force of this division of six thousand pounds by forty, each lot had a value of one hundred and fifty pounds, and the lots thus divided were subdivided into three fifty-pound parts, with the result that an allotment became known as a 'fifty' or a 'fifty right.' When new purchases were made afterwards with new allotments following, the 'fifties' were still the units." —Beers v. Hotchkiss, 175 N.E. 506, 507, 256 N.Y. 41.

3. W.Va.—Chafin v. Main Island Creek Coal Co., 102 S.E. 291, 293, 85 W.Va. 459, 11 A.L.R. 657.

4. Wyo.—Dunn v. Gilbert, 254 P. 121, 122, 36 Wyo. 249.

5. **Phrases construed**

(1) "Fifty decisions," defined as ordinances of Justinian (529–532) upon the authority of which all moot points were settled in the preparation of the second edition of the Code.—Black L.D.

(2) "Fifty trip ticket," as commutation ticket see Carriers § 603 a.

6. Century D.

7. U.S.—U. S. v. Reiss, N.Y., 136 F. 741, 743, 69 C.C.A. 393.

8. U.S.—Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, 232.

"Fight by consent," as a fight had on a mutual agreement to fight together.

Colo.—Carpenter v. People, 72 P. 1072, 1074, 31 Colo. 284.

N.C.—State v. Gladden, 73 N.C. 150, 155.

9. U.S.—Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, 232.

10. Miss.—Sullivan v. State, 7 So. 275, 276, 67 Miss. 346, 351.

11. U.S.—Gitlow v. Kiely, D.C.N.Y., 44 F.2d 227, 232.

12. Miss.—Sullivan v. State, 7 So. 275, 276, 67 Miss. 346, 351.

13. Ill.—Cory v. Woodmen Acc. Co., 253 Ill.App. 20, 27.

Phrases construed

(1) "Fighting ships," as ships competing in trade rivalry.—U. S. v. Hamburgh-American SS. Line, D.C. N.Y., 216 F. 971, 973.

(2) "Fighting, wrestling, scuffling," as referring to altercations for which the person referred to is in some degree to blame, and in which he is a voluntary participant, and not those which are unavoidable and beyond his control, or which have not been occasioned by any improper conduct on his part.—Coles v. New York Casualty Co., 83 N.Y.S. 1063, 1064, 87 App.Div. 41.

14. Black L.D.

"Called also by Cowell 'forisfactura pugnae.' The amount was one hundred and twenty shillings."—Black L.D.

15. Black L.D.

16. Wharton L.Lex.

17. Black L.D.

18. **In measuring shingles,** and the like, "5x16" means five inches wide and sixteen inches long.—Birmingham & A. R. Co. v. Maddox, 46 So. 780, 781, 155 Ala. 292.

19. **"The figure '4' after 'N.E.'** evidently means 'quarter,' and should be read so."—Diamond Plate-Glass Co. v. Tennell, 52 N.E. 168, 169, 22 Ind.App. 132.

20. **"Whenever figures are used intending to represent money,** such figures must, of course, be understood to represent 'dollars,' unless a different intention is clearly expressed."—Hunt v. Smith, 9 Kan. 137, 152.

21. U.S.—Burrow-Giles Lith. Co. v. Sarony, N.Y., 4 S.Ct. 279, 111 U.S. 53, 55, 28 L.Ed. 349.

S.C.—State v. Chicco, 63 S.E. 306, 307, 82 S.C. 122.

25 C.J. p 1122 note 31 [d].

include the ordinary punctuation marks,[22] or a dash or hyphen.[23]

In art. The artificial representation of a form, as in drawing, embroidery, painting, or sculpture; especially the human body represented by art of any kind.[24] It has been held synonymous with "design" see Design 26 C.J.S. p 1238 in Pocket Parts.

FILACER. An officer of the superior courts at Westminster, whose duty it was to file the writs on which he made process.[25]

FILAMENT. A long, thread-like process, a substance like a thread, a slender fiber, indicating that a thread is produced by some process or other which gives to its constituent parts a twist;[26] a separate fiber or fibril of any vegetable or animal tissue or product, natural or artificial, or of a fibrous mineral; as a filament of silk, wool, cobweb, or asbestos; a cortical or muscular filament.[27]

The term has been compared with "strand" and "thread,"[28] and has been compared and contrasted with "yarn."[29]

FILARE. In old English practice, to file.[30]

FILCH. As a noun, a hooked staff used by thieves to snatch articles; also a person who filches or pilfers; and also the thing filched.[31]

As a verb, in its primary and ordinary meaning, to steal, to pilfer; to steal, especially in a small, sly way, to steal privily, to take from another in an underhand way, as by violation of trust or good faith; to take wrongfully from another.[32] The word is ordinarily applied to things of little value, but may apply to the most precious.[33] It carries with it the idea of secrecy.[34] The synonyms usually given are "pilfer," "purloin," "rob," "steal," and "thieve."[35]

FILE.

In General

A word of well defined meaning,[36] which may, however, be used in several senses.[37] It is derived from the Latin word "filum," signifying a thread, string, or wire, and its present application is drawn from the ancient practice of placing papers upon a thread or wire for the more safe keeping and ready turning to them,[38] although the original and technical application of the word "file" has long gone out of use.[39]

As a Noun

Originally, a thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe keeping and ready turning to them;[40] and hence a paper placed with the clerk, or officer, and assigned by the law to his official custody or keeping;[41] papers put together and tied in bundles[42] as distinguished from papers merely preserved;[43] also, although more loosely, the official custody of the court or the place in the offices of a court where the records and pa-

22. N.Y.—Matter of Murtaugh, 128 N.Y.S. 850, 851, 71 Misc. 513.

23. Utah.—Burton v. Hoover, 74 P. 2d 652, 654, 93 Utah 498.

24. N.Y.—People v. Eastman, 152 N. Y.S. 314, 317, 89 Misc. 596.

25. Black L.D.

Number and duties
There were fourteen filacers, and it was their duty to make out all original process. The office was abolished in 1837.—Black L.D.

26. U.S.—Luckemeyer v. Magone, C. C.N.Y., 38 F. 30, 33.

27. U.S.—Haskell Golf Ball Co. v. Perfect Golf Ball Co., C.C.N.Y., 143 F. 128, 130, 131.

28. U.S.—Haskell Golf Ball Co. v. Perfect Golf Ball Co., supra.

29. U.S.—U. S. v. Veit, Son & Co., 8 Cust.App. 290, 293, 294.

30. Black L.D.

31. Webster Int.D.

32. Ill.—People v. Fuller, 87 N.E. 336, 338, 238 Ill. 116.

33. Ill.—People v. Fuller, 141 Ill. App. 374, 378.

34. Ill.—People v. Fuller, 87 N.E. 336, 338, 238 Ill. 116.

35. Ill.—People v. Fuller, 87 N.E. 336, 338, 238 Ill. 116.

36. Tex.—Dallas v. Beeman, 45 S. W. 626, 628, 18 Tex.Civ.App. 335.

37. Mass.—Chapin v. Kingsbury, 138 Mass. 194, 196.
N.Y.—Sweeney v. New York, 123 N. E. 243, 244, 225 N.Y. 271.

Ordinary and technical senses
The term is used in the ordinary sense of delivery to and leaving with the proper officer, as used in a statute, and in a technical sense of "marked 'filed,'" as used in courts of record.—Hartley v. Lee County Suprs., 162 N.W. 48, 51, 179 Iowa 814.

38. Wash.—U. S. v. Lombardo, Wash., 36 S.Ct. 508, 509, 241 U.S. 73, 60 L.Ed. 897—Milton v. U. S., C. C.A.La., 105 F.2d 253, 255.
Ala.—Ex parte State ex rel. Breitling, 128 So. 788, 221 Ala. 398.
N.M.—Gallagher v. Linwood, 231 P. 627, 629, 30 N.M. 211, 37 A.L.R. 664.
25 C.J. p 1123 notes 58, 60.

"In modern practice, the file is the manner adopted for preserving papers. The mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle—a file."—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 13, 74 Miss. 221, 226, 60 Am.S.R. 504, 36 L.R.A. 796.

39. Ala.—Ex parte State, 51 Ala. 69, 74.

40. Kan.—Wilkinson v. Elliott, 23 P. 614, 616, 43 Kan. 590, 19 Am.S.R. 158.
Miss.—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 13, 74 Miss. 221, 226, 60 Am.S.R. 504, 36 L. R.A. 796.
25 C.J. p 1123 note 63.

41. U.S.—Milton v. U. S., C.C.A.La., 105 F.2d 253, 255.
25 C.J. p 1123 note 61.

42. Tenn.—Fanning v. Fly, 2 Coldw. 486, 488.

43. Ohio.—Stokes v. Logan County, 2 Ohio Dec., Reprint, 688, 691, 4 West.L.Month. 590.

pers are kept.[44]

As a record of the court see Courts § 225 note 63.

On file. Deposited,[45] as distinguished from a technical filing.[46]

Other phrases are set out in the note.[47]

As a Verb

——**Present Tense.** Primarily, from its derivation, to fix upon a string or wire;[48] to string, to fasten, as papers, on a line or wire for preservation;[49] hence, derivatively, to arrange or insert in a bundle, as papers, indorsing the title on each paper;[50] to lay away papers for presentation or reference;[51] to place papers upon a file;[52] to preserve.[53]

More specifically, in connection with the filing of papers, the word may refer to either the act of an individual, or party in bringing the paper and depositing it with the officer, for keeping, or the act of the officer in folding, indorsing, and putting up the paper.[54] In the first sense it has been defined as meaning to bring before a court or legislative body by presenting proper papers in a regular way, as to file a petition or bill;[55] to deliver a paper or instrument to the proper officer so that it is received by him to be kept on file, or among the records of his office;[56] to deposit;[57] to deposit in a court or public office a paper or document;[58] to deposit papers in official custody;[59] to deposit with;[60] to deposit with the proper custodian for keeping;[61] to leave a paper with an officer for action or preservation;[62] to place in the official custody of the clerk.[63] In the second sense, referring to the act of the clerk or other official, it has been defined as to put upon the files or among the records of a court;[64] to re-

44. Black L.D.

45. Minn.—Slosson v. Hall, 17 Minn. 95.
25 C.J. p 1123 note 66.

What constitutes

(1) "A paper is said to be on file when delivered to the proper officer to be kept on file."—In re Von Borcke, D.C.N.J., 94 F. 352.

(2) "A document may be on file in legal contemplation although it is not physically in the clerk's possession or in his office."—Poole v. Poindexter, 83 P. 126, 127, 72 Kan. 654.

46. Minn.—Slosson v. Hall, 17 Minn. 95.

47. **Phrases construed**

(1) "All the files," as including all the pleadings, and process and such other documents as may be filed in the case.—State Bank v. Plummer, 102 P. 1082, 1083, 46 Colo. 71.

(2) "Among the files" see 3 C.J.S. p 1054 note 35.

(3) "File mark" described as the indorsement of the clerk on papers filed in a cause, evidencing the act of filing.—Grogan v. Robinson, Tex. Civ.App., 8 S.W.2d 571, 573.

(4) "File paper," as not including a written agreement, entered into by the parties, and spread on court's trial docket, stating reasons for selection of special judge, selection of judge, and that oath of office was duly administered.—Grogan v. Robinson, supra.

(5) "In the files."—Moores v. State, 96 N.W. 225, 226, 4 Neb., Unoff., 781.

(6) "On file or on deposit," as equivalent to "filed or deposited," see 26 C.J.S. p 723 note 16.

(7) "Record and files of his office."—Jacksonville St. R. Co. v. Walton, 28 So. 59, 61, 42 Fla. 54.

48. Ala.—Ex parte State, 51 Ala. 69, 74.

49. Cal.—Cox v. Tyrone Power Enterprises, App., 121 P.2d 829, 836.
N.Y.—Bishop v. Cook, 13 Barb. 326, 329.
Ohio.—Stokes v. Logan County, 2 Ohio Dec., Reprint, 688, 691, 4 West. L.Month. 590.

50. N.Y.—Bishop v. Cook, 13 Barb. 326, 329.
Ohio.—Stokes v. Logan County, 2 Ohio Dec., Reprint. 688, 691, 4 West.L.Month. 590, 594.

51. Ky.—Campbell v. Mason, 106 S.W.2d 100, 103, 269 Ky. 128.
Mo.—Murphy v. Burlington Overall Co., 34 S.W.2d 1035, 1037, 225 Mo. App. 866.

52. La.—State v. Lewis, 22 So. 327, 328, 49 La.Ann. 1207.
25 C.J. p 1124 note 86.

53. Ohio.—Stokes v. Logan County, 2 Ohio Dec., Reprint, 688, 691, 4 West.L.Month. 590.

54. Mo.—State v. Clardy, 185 S.W. 184, 187, 267 Mo. 371.

55. Tex.—Dallas v. Beeman, 45 S.W. 626, 628, 18 Tex.Civ.App. 335, 339.

Similarly expressed

(1) To present in the regular way, as to a judicial or legislative body, so that it shall go upon the records or into the order of business.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494.

(2) To present or exhibit officially, or for trial, as, to file a bill in chancery.—Bishop v. Cook, 13 Barb., N.Y., 326, 329.

56. N.Y.—Cheesman v. Cheesman, 196 N.Y.S. 820, 822, 203 App.Div. 533.
Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494.

Similarly expressed

To present to the proper officer to be kept as an archive of his office.—Nations v. Lowenstern, 204 P. 60, 61, 27 N.M. 613.

57. Iowa.—Harrison v. Clifton, 38 N.W. 406, 408, 75 Iowa 736.

58. N.Y.—In re Yakel, 195 N.Y.S. 355, 357, 118 Misc. 641.
Okl.—Willard v. State, 92 P.2d 600, 601, 66 Okl.Cr. 344.

"And pay the fees prescribed therefor"

Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494.

59. La.—State v. Lewis, 22 So. 327, 328, 49 La.Ann. 1207.
25 C.J. p 1123 note 77.

"The word now imports that the document shall be placed in the official custody of a proper person."—Cox v. Tyrone Power Enterprises, Cal.App., 121 P.2d 829, 836.

60. Ill.—People v. Glassberg, 158 N.E. 103, 110, 326 Ill. 379.

61. Mont.—Pierce v. Pierce, 89 P.2d 269, 270, 108 Mont. 42.
25 C.J. p 1123 note 78.

62. Miss.—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 13, 74 Miss. 221, 60 Am.S.R. 504, 36 L.R.A. 796.
25 C.J. p 1123 note 83.

63. Miss.—Meridian Nat. Bank v. Hoyt & Bros. Co., supra.
W.Va.—Dawson v. Phillips, 88 S.E. 456, 457, 78 W.Va. 14.
25 C.J. p 1124 note 85.

64. Tex.—Dallas v. Beeman, 45 S.W. 626, 628, 18 Tex.Civ.App. 335.

ceive a paper into custody;[65] to receive papers officially for orderly, systematic safe keeping;[66] also to indorse a paper, as received into custody, and give it its place among other papers—to file away;[67] to indorse on a paper the date of its reception, and retain it in the office, subject to inspection by whomsoever it may concern.[68]

In particular connections, the term has been held equivalent to, or synonymous with, "give notice to [or serve notice upon] the officers,"[69] "lodge,"[70] and "present."[71] It has been distinguished from "deposit" see 26 C.J.S. p 724 note 27, "preserve,"[72] and "serve."[73]

Phrases employing the word are set out in the note.[74] Other phrases as to which more recent adjudications have not been found see 25 C.J. p 1124 notes 97–1.

——**Filed.** Primarily, strung upon a thread, string, or wire.[75] In practice, the word has a well defined meaning,[76] signifying delivered to the proper officer and by him received to be kept on file, or in his official custody;[77] delivered into the actual custody of the officer designated by the statute, to be kept

65. N.C.—Thompson v. Southern Express Co., 61 S.E. 182, 183, 147 N.C. 343.
25 C.J. p 1124 note 91.

66. U.S.—U. S. v. Davidson, D.C. Pa., 285 F. 661, 662.
25 C.J. p 1124 note 92.

67. Neb.—Medland v. Linton, 82 N.W. 866, 868, 60 Neb. 249.

Similarly expressed
"To note on a paper the fact and date of its reception in court."—Dallas v. Beeman, 45 S.W. 626, 628, 18 Tex.Civ.App. 335.

68. U.S.—Mutual L. Ins. Co. v. Phinney, Wash., 76 F. 617, 621, 22 C.C.A. 425.
25 C.J. p 1123 note 82.

69. Mass.—Bianchi Bros. v. Gendron, 198 N.E. 767, 771, 292 Mass. 438, 107 A.L.R. 953—Powers Regulator Co. v. Taylor, 114 N.E. 356, 358, 225 Mass. 292.

70. Ky.—Wilson v. Lawrence, 103 S.W.2d 955, 957, 268 Ky. 179.

71. Ark.—Olcott v. Salt Bayou Drainage Dist., 223 S.W. 353, 354, 145 Ark. 101.

72. Ohio.—Stokes v. Logan County, 2 Ohio Dec., Reprint, 688, 691, 4 West.L.Month. 590.

73. N.Y.—Albany Builders' Supply Co. v. Eastern Bridge & Structural Steel Co., 139 N.E. 565, 566, 235 N.Y. 432.

74. Phrases construed
(1) "Carefully file," as distinguished from "carefully preserve." —Stokes v. Logan County, 2 Ohio Dec., Reprint, 688, 691, 4 West.L. Month. 590.

(2) "File a paper" means to deliver it at the place where it is to be lodged or kept.—Wampler v. Snyder, 66 F.2d 195, 196, 62 App.D.C. 215.

(3) "File a petition," as distinguished from "bring a petition" see 11 C.J.S. p 1140 note 64.

(4) "File for probate," as synonymous with "present for probate."—Ross' Estate v. Abrams, Tex.Civ.App., 239 S.W. 705, 707.

(5) "File the list with the clerk," as complied with by a handing of the list to the clerk, or a laying it upon his desk accompanied by the request that he file it.—Andrews v. Butts County, 114 S.E. 912, 913, 29 Ga.App. 302.

(6) "File with his petition," as not requiring attachment thereto.—North American Accident Ins. Co. v. Scarborough, 176 S.E. 671, 49 Ga.App. 833—Powell v. Fidelity & Deposit Co. of Maryland, 173 S.E. 196, 197, 48 Ga. App. 529.

(7) "Take and file . . . the constitutional oath of office."—In re Yakel, 195 N.Y.S. 355, 356, 118 Misc. 641.

75. Minn.—Gorham v. Summers, 25 Minn. 81, 87.

76. U.S.—In re Gubelman, C.C.A.N.Y., 10 F.2d 926, 929.
Mich.—People v. Madigan, 193 N.W. 806, 807, 223 Mich. 86, quoting **Corpus Juris.**
Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494, quoting **Corpus Juris.**
Tex.—Dallas v. Beeman, 45 S.W. 626, 628, 18 Tex.Civ.App. 335.

In construing statutes
"The present ordinary sense of the word 'filed,' would be presumed to be the legislative sense, unless the contrary is made to appear."—Gorham v. Summers, 25 Minn. 81, 87.

77. U.S.—Edwards Sales Co. v. Harris Structural Steel Co., D.C.Me., 17 F.2d 155, 158—In re Labb, D.C.N.Y., 42 F.Supp. 542, 544.
Ala.—Covington Bros. Motor Co. v. Robinson, 194 So. 663, 666, 239 Ala. 226.
Ark.—Buchanan v. Commercial Inv. Trust, 7 S.W.2d 318, 319, 177 Ark. 579—C. A. Blanton Co. v. First National Bank of Marked Tree, 1 S.W.2d 558, 559, 175 Ark. 1107—Horton v. Gillespie, 279 S.W. 1020, 1025, 170 Ark. 107—Hogue v. Hogue, 208 S.W. 579, 582, 137 Ark 485.
Colo.—Crowley v. Farmers State Bank of Yuma, 123 P.2d 407, 409, citing **Corpus Juris.**
Fla.—Coult v. McIntosh Inv. Co., 182 So. 594, 600, 133 Fla. 141—Vickers v. Glenn, 136 So. 326, 327, 102 Fla. 535—Waring v. O'Doniel, 135 So. 850, 852, 102 Fla. 354.
Ga.—Stubbs v. Mendel, 98 S.E. 476, 148 Ga. 802.
Ill.—Edwin Pratt's Sons' Co. v. Schafer, 7 N.E.2d 901, 903, 290 Ill. App. 80.
Mich.—People v. Madigan, 193 N.W. 806, 807, 223 Mich. 86, quoting **Corpus Juris.**
Mo.—Murphy v. Burlington Overall Co., 34 S.W.2d 1035, 1037, 225 Mo. App. 866.
N.M.—Gallagher v. Linwood, 231 P. 627, 629, 30 N.M. 211, 37 A.L.R. 664.
Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494, quoting **Corpus Juris**—Muskingum Watershed Conservancy Dist. v. Steinmetz, 15 N.E.2d 164, 166, 57 Ohio App. 502.
Okl.—Armstrong v. State, 95 P.2d 919, 922, 68 Okl.Cr. 105—Willard v. State, 92 P.2d 600, 601, 66 Okl.Cr. 344—McIntosh v. Palmer, 48 P.2d 815, 816, 173 Okl. 367—Pardoe v. Dean, 44 P.2d 84, 86, 172 Okl. 101.
Tex.—Helge v. Wood, Civ.App., 65 S.W.2d 352, 353, citing **Corpus Juris**—Bailey v. Woodrum Truck Lines, Civ.App., 36 S.W.2d 1090, 1092.
25 C.J. p 1124 note 3.

Similarly expressed
(1) A document may properly be said to be filed with a clerk when it is placed in his official custody, and is deposited in the place where his official records and papers are usually kept.
Mass.—Reed v. Acton, 120 Mass. 130, 131.
N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797, citing **Corpus Juris.**

(2) "In modern days it is usually held that a paper is filed on the part of the party who is required to file it when he has presented it at the proper office and left it with the person in charge thereof."

by him as a permanent record of his office.[78] The word carries with it the idea of permanent preservation of the thing so delivered and received that it may become a part of the public record,[79] and includes the idea that the paper is to remain in its proper order on the file in the office.[80] Applying one or another of the definitions above given, but depending, of course, on the circumstances of the particular case, it has been held that in order for a paper to be considered "filed" certain requirements are essential, as indicated in the footnote.[81] Sometimes the word has different connotations,

Cal.—City Street Improvement Co. v. Babcock, 68 P. 584, 585, 6 Cal. Unrep.Cas. 910.

Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494, citing **Corpus Juris.**

(3) The term denotes that the paper has been placed with the proper official and assigned by the law to his official keeping.—Ex parte Leifeste, 77 S.W.2d 675, 676, 127 Tex. Cr. 445.

(4) Other similar statements see 25 C.J. p 1124 note 3 [a].

78. Mich.—People v. Madigan, 193 N.W. 806, 807, 223 Mich. 86, quoting **Corpus Juris.**

Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494, quoting **Corpus Juris.**

25 C.J. p 1125 note 4.

Similarly expressed

(1) Deposited in the proper office with a person in charge thereof, with directions to record it.

Idaho.—In re Dunn's Estate, 260 P. 432, 45 Idaho 23.

Okl.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 422, 168 Okl. 632, 96 A.L.R. 1294.

(2) Deposited with and received by the proper officer for filing, and the necessary fee paid, if demanded.—Golden v. McKim, 204 P. 602, 603, 45 Nev. 350.

(3) Lodged with the proper officer.—Mahnken v. Meltz, 116 A. 794, 795, 97 N.J.Law 159.

(4) Presented at the proper office and deposited with the papers.—Dillon v. Superior Court of Nevada County, 142 P. 503, 505, 24 Cal.App. 760.

Nature of the custody

The custody may, however, be in certain cases prescribed by statute temporary in its nature. The nature of the custody depends in a great measure upon the terms of the law authorizing or requiring the deposit. In the class of the temporary deposits are included such as were made under our statutes for the purpose of registration, or spreading a copy at length upon books provided for the purpose. When a deed or mortgage of land is filed for record with the county clerk, it is for the purpose of having it copied into his books and returned to the party depositing it, and not for the purpose of becoming a permanent record in his office. The books are the records of his office, not the instrument filed."—Brothers v. Mundell, Munzesheimer & Co., 60 Tex. 240, 244.

79. U.S.—In re Gubelman, C.C.A.N.Y., 10 F.2d 926, 929.

Ark.—Horton v. Gillespie, 279 S.W. 1020, 1025, 170 Ark. 107.

Colo.—Crowley v. Farmers State Bank of Yuma, 123 P.2d 407, 409, citing **Corpus Juris.**

Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494, citing **Corpus Juris.**

25 C.J. p 1125 note 7.

"When a paper is filed, it is a record"

Ala.—Phillips v. Beene, 38 Ala. 248, 251.

80. Wis.—Bergeron v. Hobbs, 71 N.W. 1056, 96 Wis. 641, 643, 65 Am.S.R. 85.

Withdrawal from custody

"If a party causes the Clerk to mark upon a paper, 'filed,' but afterwards withdraws it from the custody of the Clerk, and from the inspection of the opposite party and the Court, the paper will not be considered as having been filed, in contemplation of law."—Helge v. Wood, Tex.Civ.App., 65 S.W.2d 352, 353, citing **Corpus Juris.**

81. **Writing required**

Ky.—Board of Registration Com'rs v. Campbell, 65 S.W.2d 713, 718, 251 Ky. 597.

Actual delivery

(1) The paper must be actually delivered, as distinguished from deposited in the mail.

U.S.—Poynor v. Commissioner of Internal Revenue, C.C.A.Tex., 81 F.2d 521, 522—Tyson v. U. S., C.C.A. N.C., 76 F.2d 533, 534.

D.C.—Wampler v. Snyder, 66 F.2d 195, 196, 62 App.D.C. 215.

Fla.—Hewitt v. International Shoe Co., 155 So. 725, 115 Fla. 508.

Minn.—State v. Erickson, 188 N.W. 736, 152 Minn. 349.

N.Y.—Cheesman v. Cheesman, 196 N.Y.S. 820, 822, 203 App.Div. 533.

Ohio.—Muskingum Watershed Conservancy Dist. v. Steinmetz, 15 N.E.2d 164, 166, 57 Ohio App. 502.

25 C.J. p 1124 note 3 [e].

(2) Papers, such as notices, mailed may be considered "filed" where circumstances warrant such construction.

N.J.—Loeloff v. Kelly Press Division of American Type Foundry Co., 163 A. 1, 2, 10 N.J.Misc. 1156.

N.Y.—Sweeney v. City of New York, 122 N.E. 243, 244, 225 N.Y. 271.

Pa.—Laffey v. Philadelphia & Reading Coal & Iron Co., 189 A. 509, 511, 125 Pa.Super. 9.

Both delivery and receipt

(1) A paper is filed only at the time it is delivered to and received by the designated officer.—Creasy v. U. S., D.C.Va., 4 F.Supp. 175, 178.

(2) A paper is filed when it is delivered to the proper official and by him received and filed.

U.S.—U. S. v. Lombardo, Wash., 36 S.Ct. 508, 509, 241 U.S. 73, 60 L.Ed. 897.

Ohio.—Fulton v. State ex rel. General Motors Corporation, 200 N.E. 636, 637, 130 Ohio St. 494.

Delivery to proper person or place

(1) A paper in a case is not filed by presenting it to the judge, but is filed only when deposited with the clerk of the court, for the purpose of making it a part of the records of the case.—In re Gubelman, C.C.A.N.Y., 10 F.2d 926, 929.

(2) Delivery at a place other than the office where it is to be filed is not a sufficient filing.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 422, 168 Okl. 632, 96 A.L.R. 1294.

Payment of fee

(1) "The filing party is entitled to the benefit of his act when he places the document in the custody and control of the proper officer for the purpose of filing, if accompanied by payment or tender of fees, when fees are required, unless advance payment is waived."—Gove v. Armstrong, 89 A. 868, 869, 87 Vt. 468.

(2) Payment of fee held necessary before a paper is said to be filed.—Hilts v. Hilts, 72 P. 697, 698, 43 Or. 162—25 C.J. p 1125 note 3 [f].

Action by receiving officer

(1) Some action on part of receiving official is necessary, or at least an intention on his part to treat the paper as similar papers are treated in the regular routine of office, in order that papers may be regarded as "filed."—Edward Sales Co. v. Harris Structural Steel Co., D.C.Me., 17 F.2d 155, 158.

(2) "A bill in chancery is said to be filed, when it is delivered to the clerk, and he states the day when it was brought into his office, numbers it, and receives it into his custody."—Phillips v. Beene, 38 Ala. 248, 251.

as when speaking of an affidavit, it may have the meaning of made;[82] and when applied to messages it may mean accepted for transmission.[83]

In particular connections, the term has been held equivalent to, or synonymous with, "lodged,"[84] "made,"[85] "mailed,"[86] "recorded,"[87] and "sent."[88] It has been compared with, or distinguished from, "deposited" see 26 C.J.S. p 724 note 34, "docketed" see 27 C.J.S. p 1309 note 67, "entered,"[89] "indorsed,"[90] and "recorded."[91]

Phrases employing the word are set out in the note.[92] Other phrases as to which more recent ad-

Indorsement and entry

(1) In some cases, it has been said that "No paper is filed unless it has the proper indorsement of the clerk; merely placing it in the court papers is no filing."—Mutual Life Ins. Co. v. Phinney, Wash., 76 Fed. 617, 621, 22 C.C.A. 425—Amy v. Shelby County, C.C.Tenn., 1 F.Cas.No.345, 1 Flipp. 104.

(2) "The evidence which is looked to by the court in determining whether the paper has been filed or not is the clerk's indorsement of the fact upon the paper itself."—Hanover F. Ins. Co. v. Shrader, 32 S.W. 872, 33 S.W. 112, 89 Tex. 35, 42, 59 Am.S.R. 25, 27, 30 L.R.A. 498.

(3) In the English chancery practice a bill is not deemed filed until it receives the proper indorsement of the clerk.—Mutual Life Ins. Co. v. Phinney, supra—25 C.J. p 1124 note 3 [g] (2).

(4) "The term 'filed' . . . has a broader signification than the mere indorsement to that effect, and comprehends more especially, in its proper interpretation, the entry made by the clerk on the record."—Pope v. Thomason, 66 Mo. 661, 662—25 C.J. p 1124 note 3 [d] (1).

(5) In other cases it has been said that it is not essential that the filed paper should be marked "filed."—Brannon v. Pringle, 47 So. 674, 675, 94 Miss. 215—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 74 Miss. 221, 228, 60 Am.S.R. 504, 36 L.R.A. 796—25 C.J. p 1124 note 3 [d] (5), (6).

(6) The indorsement of the clerk may not in all cases be essential to constitute a "filing."—Mutual Life Ins. Co. v. Phinney, Wash., 76 Fed. 617, 621, 22 C.C.A. 425.

(7) Indorsement has been held to be only a memorandum of evidence that the filing has been done.

Okl.—Norris v. Cross, 105 P. 1000, 1003, 25 Okl. 287.

Tex.—Maddux v. Booth, Civ.App., 108 S.W.2d 329, 331, citing **Corpus Juris.**

25 C.J. p 1124 note 3 [d] (4).

Docket memorandum

"A demurrer is not 'filed' until a memorandum thereof is made in the appearance docket, and this is so of a demurrer upon which a referee is asked to rule."—Sloanaker v. Howerton, 166 N.W. 78, 81, 182 Iowa 487.

82. Ind.—Cole v. State, 82 N.E. 796, 797, 169 Ind. 393.

83. As applied to telegrams

"The word 'filed' might be construed to mean only such messages as the company chose to accept and file for transmission. In its strict sense, it would not include even messages received and sent at once before filing."—State Trenton & New Brunswick Turnpike Co. v. American & European Commercial News Co., 43 N.J.Law 381, 384.

84. Ky.—Wilson v. Lawrence, 103 S.W.2d 955, 957, 268 Ky. 179.

85. Ga.—Hilt v. Young, 43 S.E. 76, 77, 116 Ga. 708.

Ind.—Cole v. State, 82 N.E. 796, 797, 169 Ind. 393.

Mo.—St. Louis Law Printing Co. v. Aufderheide, 45 S.W.2d 543, 545, 226 Mo.App. 680.

86. N.J.—Loeloff v. Kelly Press Division of American Type Foundry Co., 163 A. 1, 2, 10 N.J.Misc. 1156.

87. Wis.—Wood v. Union Gospel Church Bldg. Assoc., 22 N.W. 756, 758, 63 Wis. 9.

88. Statutory reports

In a particular connection a requirement that certain reports be "filed" has been satisfied if they are "sent" or "mailed."—Loeloff v. Kelly Press Division of American Type Foundry Co., 163 A. 1, 2, 10 N.J.Misc. 1156.

89. "Entered" not synonymous

S.D.—State v. Lamm, 69 N.W. 592, 9 S.D. 418, 420. See also 30 C.J.S. p 260 note 74.

90. Iowa.—Mills v. Board of Sup'rs of Monona County, 290 N.W. 50, 51, 227 Iowa 1141.

Mont.—Pierce v. Pierce, 89 P.2d 269, 270, 271, 108 Mont. 42.

91. Minn.—Willis v. Jelineck, 6 N.W. 373, 375, 27 Minn. 18.

92. Phrases construed

(1) "By affidavit filed in term time," construed not to require that affidavit be made in term time.—Gunderman v. State, 191 N.E. 338, 343, 207 Ind. 515.

(2) "Filed and determined," as requiring final judgment.—Phillips v. Albright, 16 A.2d 200, 201, 126 N.J. Law 14.

(3) "Filed as hereinafter provided," as referring only to the place of filing.—In re Labb, D.C.N.Y., 42 F. Supp. 542, 545.

(4) "Filed away," as meaning substantially the same thing as "discontinued" and "stricken from the docket" and as necessarily inferring that case has been stricken from docket for want of prosecution or on motion of plaintiff or court.—Goff v. National Rubber & Leather Co., 60 S.W.2d 944, 945, 249 Ky. 363—25 C.J. p 1125 note 15.

(5) "Filed by the issuer in the office of the secretary of state."—People v. Glassberg, 158 N.E. 103, 110, 326 Ill. 379.

(6) "Filed direct interrogatories," as equivalent to "called to testify" see 12 C.J.S. p 885 note 27.

(7) "Filed for record."—In re Grodzins, D.C.Cal., 27 F.Supp. 521, 523, 524—25 C.J. p 1125 note 17.

(8) "Filed in term time" and "filed in vacation," as relating to time of filing, not time of making, affidavits.—Gunderman v. State, 191 N.E. 338, 342, 207 Ind. 515.

(9) "Filed in the cause."—Tillison v. Griffin, Tex.Civ.App., 148 S.W.2d 873, 875.

(10) "Filed in the office [of the board, clerk, or other official]."

Ill.—McCarthy v. City of Chicago, 38 N.E.2d 519, 524, 312 Ill.App. 268.

Mass.—Town of Greenfield v. Burnham, 145 N.E. 306, 309, 250 Mass. 203.

N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797.

N.D.—Hooge v. City of Milnor, 217 N.W. 163, 167, 56 N.D. 285.

(11) "Filed the report," as distinguished from "adopted the report" see 2 C.J.S. p 363 note 44.

(12) "Filed with the clerk."

Cal.—Cox v. Tyrone Power Enterprises, App., 121 P.2d 829, 836.

Neb.—Jolliffe v. City of North Platte, 297 N.W. 666, 668.

(13) "Filed with the state."—Loeloff v. Kelly Press Division of American Type Foundry Co., 163 A. 1, 2, 10 N.J.Misc. 1156.

(14) "Shall be filed."

D.C.—Wampler v. Snyder, 66 F.2d 195, 196, 62 App.D.C. 215.

Okl.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 422, 168 Okl. 632, 96 A.L.R. 1294.

Tenn.—Johnson v. Baker, 259 S.W. 909, 911, 149 Tenn. 613.

(15) "Wherein said bond is filed."—Bachus v. Foster, 122 S.W.2d 1058, 1060, 132 Tex. 183.

judications have not been found see 25 C.J. p 1125 note 9–p 1126 note 34.

——**Filing.** Originally the filing of a paper consisted in having the proper officer put it upon a string (filum) upon which the other papers in the proceeding were placed.[93] In practice, the term may refer to, or indicate, either the act of one of the parties in bringing the paper and depositing it with the officer for keeping, or the act of the officer in folding, indorsing, and putting up the paper.[94] In the first sense, the most accurate definition is said to be the delivery of a paper to the proper officer to be kept on file;[95] and it has also been defined as bringing the paper and depositing it with the officer for keeping;[96] depositing with the clerk for official custody;[97] placing and leaving a paper among the files;[98] placing a paper in the proper official custody;[99] presenting a paper at the proper office and leaving it there, deposited with the papers in such office,[1] especially in the case of a paper the filing of which carries notice or affects

93. Ky.—Campbell v. Mason, 106 S.W.2d 100, 103, 269 Ky. 128.
N.J.—Mahnken v. Meltz, 116 A. 794, 795, 97 N.J.Law 159.
Or.—Wooldridge v. Arens, 102 P.2d 717, 724, 164 Or. 410, quoting **Corpus Juris.**
25 C.J. p 1126 note 36.

Phraseology retained

"Though the ancient mode of filing papers has gone into disuse, the phraseology of the ancient practice is retained in the common expressions 'to file,' 'to put on file,' 'to take off the files.'"
U.S.—Milton v. U. S., D.C.La., 105 F.2d 253, 255.
Tex.—Holman v. Chevaillier, 14 Tex. 337, 339.

94. La.—State v. Lewis, 22 So. 327, 328, 49 La.Ann. 1207, 1211.
Or.—Wooldridge v. Arens, 102 P.2d 717, 724, 164 Or. 410, quoting **Corpus Juris.**
25 C.J. p 1126 note 46, p 1127 note 47.

"The origin of the term indicates very clearly, that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the 'string' or 'wire.' Accordingly, we find that filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing the paper, and the making of the appropriate endorsement by the officer."
Ala.—Phillips v. Beene, 38 Ala. 248, 251.
N.Y.—Smith v. Geraty, 109 N.Y.S. 738, 739, 58 Misc. 556.
25 C.J. p 1126 note 46 [a].

95. Ind.—Thompson v. State, 130 N.E. 412, 413, 190 Ind. 363.
Iowa.—Mills v. Board of Sup'rs of Monona County, 290 N.W. 50, 52, 227 Iowa 1141.
Miss.—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 13, 74 Miss. 221, 228, 60 Am.S.R. 504, 36 L.R.A. 796.
N.M.—Gallagher v. Linwood, 231 P. 627, 629, 30 N.M. 211, 37 A.L.R. 664.
N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797, citing **Corpus Juris.**
Okl.—Willard v. State, 92 P.2d 600, 602, 66 Okl.Cr. 344.
Tex.—West v. State, 2 S.W.2d 271, 272, 108 Tex.Cr. 647.
25 C.J. p 1126 note 40.

Similarly expressed

(1) Delivery of a paper to the proper officer for the purpose of being kept on file by him in the proper place.—Grabowski v. Benzsa, 140 N.E. 76, 77, 80 Ind.App. 214.

(2) The filing of a paper is the delivery of it to the officer at his office, to be kept by him as a paper on file.—Creasy v. U. S., D.C.Va., 4 F.Supp. 175, 177.

(3) "Depositing for the purpose of being filed."—Rex v. Wade, 1 B. & Ad. 861, 872, 20 E.C.L. 721, 109 Reprint 1006.

96. N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797, citing **Corpus Juris.**

"The sole object of filing is to deposit the document in a public place so that it may be seen and examined by any person interested."—Matter of Lance, 106 N.Y.S. 211, 215, 55 Misc. 13, 19.

97. Ind.—Cleveland, C. C., & St. L. R. Co. v. Morrey, 88 N.E. 932, 934, 172 Ind. 513, 516.
25 C.J. p 1126 note 38.

98. Ill.—Pfirmann v. Henkel, 1 Ill. App. 145, 152.
Miss.—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 13, 74 Miss. 221, 226, 60 Am.S.R. 504, 36 L.R.A. 796.

99. Mass.—Hobart-Farrell Plumbing & Heating Co. v. Klayman, 19 N.E.2d 805, 806, 302 Mass. 508.
N.J.—Mahnken v. Meltz, 116 A. 794, 795, 97 N.J.Law 159.
25 C.J. p 1126 note 42.

Similarly expressed

(1) Delivery into the custody of the proper officer.—Ex parte Phillips, 165 So. 80, 84, 231 Ala. 364.

(2) Delivery of the paper into the actual custody of the proper officer.—Casalduc v. Diaz, C.C.A.Puerto Rico, 117 F.2d 915, 916.

(3) Delivery of the thing filed into the actual custody of the proper officer keeping the records of the court. —The Washington, C.C.A.N.Y., 16 F. 2d 206, 208.

(4) Actual delivery to the clerk, without regard to any action that he may take thereon.—Brooks v. Edwards, 231 P. 83, 84, 107 Okl. 239.

(5) "Placing of paper, legally entitled to be filed, in the official custody of clerk, is filing thereof."—Blackburn v. State ex rel. Echols, Tex.Civ.App., 72 S.W.2d 627, 629, citing **Corpus Juris.**

"The test of filing seems to be whether the officer in whose custody the paper is placed is the one entitled to retain the same."
U.S.—In re Von Borcke, D.C.N.J., 94 F. 352.
Okl.—Pardoe v. Dean, 44 P.2d 84, 86, 172 Okl. 101.

1. Cal.—Cox v. Tyrone Power Enterprises, App., 121 P.2d 829, 836.
Idaho.—In re Dunn's Estate, 260 P. 432, 45 Idaho 23.
Ky.—Campbell v. Mason, 106 S.W.2d 100, 103, 269 Ky. 128.
N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797, citing **Corpus Juris.**
25 C.J. p 1126 note 44.

Similarly expressed

(1) "The act of leaving or depositing the paper in the proper office."
Ark.—Stanislaus v. Austin, 150 S.W. 2d 610, 611, 202 Ark. 441—Buchanan v. Commercial Investment Trust, 7 S.W.2d 318, 319, 177 Ark. 579.
Ky.—Campbell v. Mason, 106 S.W.2d 100, 103, 269 Ky. 128.

(2) "The word 'filing', in reference to matters of practice, is very commonly used to express the duty of bringing to the proper office, as the case may be, writs, pleadings, affidavits and other such matters for safe custody, or enrollment."—Hunter v. Caldwell, 10 Q.B. 69, 81, 59 E.C.L. 69, 116 Reprint 28.

private rights.[2] In the second sense of receiving for custody, "filing" has been defined as an act of the clerk,[3] receiving a paper into custody, and giving it a place among other papers.[4] It has also been used as referring to or including both acts, and has then been defined as the act of depositing or lodging an instrument for filing in the proper office and the act of accepting it for that purpose;[5] the delivery of the paper or document to the proper officer and the lodging thereof by him in his office;[6] the delivery to the clerk and his acceptance for record in his office;[7] placing a paper in the proper official's custody by the party charged with this duty, and the making of the proper indorsement by the officer.[8] The term generally imports or implies that the document is delivered and received;[9] that the officer authorized to receive it has knowledge of its filing,[10] that the paper shall remain with the clerk as a record,[11] and that it has not been subsequently withdrawn,[12] for the word connotes a deposit for permanent preservation as a public record,[13] unless a contrary intention is clearly indicated;[14] also that any requirements as to custody, place of deposit, and payment of a filing fee have been complied with.[15]

Although indorsement of the document as having been filed may be required under particular circumstances,[16] and the word "filing" has sometimes been described in terms of indorsement,[17] the indorsement upon the paper of the time of its reception is not, strictly speaking, a part of the operation of filing; it is a mere memorandum serving as evidence of the fact;[18] nor is the placing of a document in

2. Idaho.—In re Dunn's Estate, 260 P. 432, 45 Idaho 22.

3. Wyo.—Lee v. Cook, 1 Wyo. 413, 418.

4. S.D.—State v. Lamm, 69 N.W. 591, 9 S.D. 418, 420.

5. Mo.—Ferguson v. Long, 107 S.W.2d 7, 11, 341 Mo. 182.

6. U.S.—Young v. U. S., D.C.Idaho, 5 F.Supp. 590, 591.

7. Tex.—Maddux v. Booth, Civ.App., 108 S.W.2d 229, 231, citing **Corpus Juris.**

8. Ill.—Edwin Pratt's Sons' Co. v. Schafer, 7 N.E.2d 901, 903, 290 Ill.App. 80.

N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797, citing **Corpus Juris.**

Pa.—Petition of Winn, 9 Pa.Dist. & Co. 443, 24 Luz.Leg.Reg. 345, citing **Corpus Juris.**

25 C.J. p 1126 note 43.

9. U.S.—Weaver v. U. S., C.C.A.N.C., 72 F.2d 20, 21.

Ala.—Ex parte State ex rel. Breitling, 128 So. 788, 221 Ala. 398.

Cal.—W. J. White Co. v. Winton, 183 P. 277, 278, 41 Cal.App. 693.

Ga.—McDougald v. Banks, 13 Ga. 451, 455.

Mo.—St. Louis Law Printing Co. v. Aufderheide, Mo., 45 S.W.2d 543, 545, 226 Mo.App. 680.

Okl.—City of Maud v. Tulsa Rig, Reel & Mfg. Co., 25 P.2d 792, 165 Okl. 181—Piersol v. State, 254 P. 104, 105, 122 Okl. 124.

Essential requisite

(1) Anything short of delivery would leave the filing a disputable fact.—U. S. v. Lombardo, D.C.Wash., 228 F. 980, 983.

(2) Filing is not complete until the document is delivered and received.

U.S.—U. S. v. Lombardo, Wash., 36 S.Ct. 508, 509, 241 U.S. 73, 60 L.Ed. 897.

Ohio.—Fulton v. State, 200 N.E. 636, 637, 130 Ohio St. 494, quoting **Corpus Juris.**

25 C.J. p 1127 note 49.

10. Mo.—Ferguson v. Long, 107 S.W.2d 7, 16, 341 Mo. 182.

11. N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797, citing **Corpus Juris.**

25 C.J. p 1127 note 48.

"The thing essential to a filing is a deposit of the paper with the officer, with notice of the purpose, and intent that he should retain it."—Yates v. Tatum, 155 P. 328, 329, 60 Colo. 484.

12. "A paper withdrawn would not constitute a filing."

Cal.—In re Carniglia's Guardianship, 24 P.2d 944, 946, 134 Cal.App. 106.

Tex.—Helge v. Wood, Civ.App., 65 S.W.2d 352, 353, citing **Corpus Juris.**

As not affording notice

"An instrument merely delivered to the clerk and then withdrawn without leaving a copy, affords no notice or information to persons subsequently dealing with the property affected."—Nations v. Lowenstern, 204 P. 60, 61, 27 N.M. 613.

13. N.M.—Nations v. Lowenstern, 204 P. 60, 61, 27 N.M. 613.

N.Y.—In re Yakel, 195 N.Y.S. 355, 357, 118 Misc. 641.

14. Limited or special filing

"Where a paper is required to be filed only for a specified purpose, or to remain on file for only a limited time, the special or limited character of such filing is usually indicated by the statute."—Pfirmann v. Henkel, 1 Ill.App. 145, 152.

15. Delivery to the proper official

"There can be no 'filing' of a paper in a legal sense, except by its delivery to an official whose duty it is to file papers and who is required to keep and maintain an office or other public place for their deposit, and the paper must either be delivered personally to such officer with the intent that the same shall be filed by him, or delivered at the place where the same should be filed."

N.Y.—Stanley v. Board of Appeals of Village of Piermont, 5 N.Y.S.2d 956, 959, 168 Misc. 797—Matter of Lance, 106 N.Y.S. 211, 215, 55 Misc. 13.

Okl.—McIntosh v. Palmer, 48 P.2d 815, 816, 173 Okl. 367.

Receipt by the proper officer

N.Y.—Cheesman v. Cheesman, 139 N.E. 775, 236 N.Y. 47.

Place of delivery

N.Y.—Hathaway v. Howell, 54 N.Y. 97, 102—In re Norton, 53 N.Y.S. 924, 25 Misc. 48.

Fee required

Under a statute requiring payment of a filing fee in advance, leaving a paper with the filing officer is not a filing.—Jacobsen v. Jeffries, 47 P.2d 892, 893, 86 Utah 587—25 C.J. p 1126 note 44 [c] (2).

Statutory conditions precedent

"But a filing may depend upon the terms of the statute authorizing it, and will not become operative until the requisites are first complied with, at least in substance."—Hilts v. Hilts, 72 P. 697, 698, 43 Or. 162.

16. Cal.—City St. Impr. Co. v. Babcock, 68 P. 584, 586, 6 Cal.Unrep. Cas. 910.

La.—Ford v. Brooks, 35 La.Ann. 151, 153.

17. N.Y.—Lent v. New York & M. R. Co., 29 N.E. 988, 989, 130 N.Y. 504.

Tex.—Jones v. Wells, 3 Willson, Civ. Cas.Ct.App. § 94.

18. U.S.—Creasy v. U. S., D.C.Va., 4 F.Supp. 175, 178.

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6. U.S.—Young v. U. S., D.C.Idaho, 5 F.Supp. 500, 501.

7. Tex.—Maddux v. Booth, Civ.App., 105 S.W.2d 320, 321, citing **Corpus Juris.**

8. Ill.—Edwin Pratt's Sons' Co. v. Schafer, 7 N.E.2d 901, 903, 290 Ill. App. 80.

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Mo.—St. Louis Law Printing Co. v. Aufderheide, Mo., 45 S.W.2d 543, 545, 226 Mo.App. 680.

Okl.—City of Maud v. Tulsa Rig, Reel & Mfg. Co., 25 P.2d 792, 165 Okl. 181—Piersol v. State, 254 P. 104, 105, 122 Okl. 124.

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Tex.—Jones v. Wells, 3 Willson, Civ. Cas.Ct.App. § 94.

18. U.S.—Creasy v. U. S., D.C.Va., 4 F.Supp. 175, 178.

a proper receptacle, with a file number or other notation of it having been filed, a condition precedent to the filing thereof.[19]

The term has been held synonymous with "lodging."[20] It has been compared with, or distinguished from, "custody" see 25 C.J.S. p 70 note 94, "delivery" see 26 C.J.S. p 697 note 56, "endorsing" or "indorsing,"[21] "entering" see 30 C.J.S. p 260 note 77, "entering of record" see 30 C.J.S. p 260 note 78 (3), "entry" see 30 C.J.S. p 268 note 22, "indexing,"[22] "presentation,"[23] "recording,"[24] "registration,"[25] "returning,"[26] and "service."[27]

For references to specific uses see 25 C.J. p 1126 note 35, also the phrases infra note 28.

Phrases employing the word are set out in the note.[28] Other phrases as to which more recent ad-

Ark.—Buchanan v. Commercial Investment Trust, 7 S.W.2d 318, 319, 177 Ark. 578—Hogue v. Hogue, 208 S.W. 579, 582, 137 Ark. 485.

Fla.—Coult v. McIntosh Inv. Co., 182 So. 594, 600, 133 Fla. 141—Vickers v. Glenn, 136 So. 326, 327, 102 Fla. 535—Waring v. O'Doniel, 135 So. 850, 852, 102 Fla. 354.

Ky.—Campbell v. Mason, 106 S.W.2d 100, 103, 269 Ky. 128.

Mo.—Wiatt v. Suedekum, App., 158 S.W.2d 235, 236.

Mont.—Pierce v. Pierce, 89 P.2d 269, 270, 271, 108 Mont. 42.

Okl.—State ex rel. Hunzicker v. Pulliam, 37 P.2d 417, 422, 168 Okl. 632, 96 A.L.R. 1294—Protest of Chicago, R. I. & P. Ry. Co., 11 P.2d 138, 139, 157 Okl. 134.

Tex.—Maddux v. Booth, Civ.App., 108 S.W.2d 329, 331, citing **Corpus Juris**—Blackburn v. State ex rel. Echols, Tex.Civ.App., 72 S.W.2d 627, 629, citing **Corpus Juris**—Ex parte Leifeste, 77 S.W.2d 675, 676, 127 Tex.Cr. 445.

Wyo.—Walls v. Evans, 265 P. 29, 30, 38 Wyo. 103.

25 C.J. p 1127 notes 52, 53

Similarly expressed

(1) "To constitute filing it is not necessary that the clerk make the notation of filing, for all that a litigant can do in the matter of filing a document is to deposit it with the proper official and pay or tender the fee therefor, if there be any."—City of Fallon v. Churchill County Bank Mortgage Corporation, 54 P.2d 273, 57 Nev. 9, citing **Corpus Juris.**

(2) The filing of a paper is not merely the indorsement which the clerk makes, but the fact that the instrument is placed in his custody with intent to make it effective.—Robinson v. Phegley, 177 P. 942, 943, 93 Or. 299.

Failure to indorse

(1) While the lack of a filing mark was not conclusive of fact of filing, the circumstance was to be considered with other evidence in determining whether note had been "filed."—Crowley v. Farmers State Bank of Yuma, Colo., 123 P.2d 407, 409, citing **Corpus Juris.**

(2) "Of course, the clerk's failure to indorse a minute of the filing upon the paper lodged with him cannot operate to destroy the rights of the party so lodging it for filing."—Mahnken v. Meltz, 116 A. 794, 795, 97 N.J.Law 159.

Indorsement of date as evidence

(1) It is prima facie the date of filing.—Foster v. Brick, 141 N.W. 101, 102, 121 Minn. 173, 175.

(2) It is not necessarily conclusive.—State National Bank v. Lowenstein, 155 P. 1127, 1129, 52 Okl. 259, 266.

(3) "The indorsement by the clerk is the highest legal evidence of the filing, yet the filing, in contemplation of law, is as perfect before as after such indorsement, and dates from the receipt by the clerk and its lodgment in his office."—Eureka Stone Co. v. Knight, 100 S.W. 878, 881, 82 Ark. 164, 171.

(4) "The actual date of the filing and not the date written on the instrument controls."—H. M. Cohen Lumber & Building Co. v. Panos, Tex.Civ.App., 154 S.W.2d 206, 208, citing **Corpus Juris.**

Fact of filing as matter in pais

Ohio.—Haines v. Lindsey, 4 Ohio 88, 90, 19 Am.D. 586—Stokes v. Logan County, 2 Ohio Dec., Reprint, 688, 691, 4 West.L.Month. 590.

Proof of actual delivery must be clear and positive

Cal.—Boyd v. Desmond, 21 P. 755, 756, 79 Cal. 250, 254.

19. Nev.—Golden v. McKim, 204 P. 602, 603, 45 Nev. 350.

20. Ky.—Wilson v. Lawrence, 103 S.W.2d 955, 958, 268 Ky. 179.

21. Minn.—Gorham v. Summers, 25 Minn. 81, 85.

22. U.S.—In re Labb, D.C.N.Y., 42 F. Supp. 542, 544.

Minn.—Gorham v. Summers, 25 Minn. 81, 85.

23. N.Y.—Matter of Lance, 106 N.Y. S. 211, 216, 55 Misc. 13.

24. Ga.—Benson v. Green, 4 S.E. 851, 80 Ga. 230, 231.

La.—MacLeod v. Hoover, 105 So. 305, 306, 159 La. 244.

Mass.—Chapin v. Kingsbury, 135 Mass. 580, 581.

25. Eng.—Ex parte Thorne, L.R. 8 Ch. 722, 726.

26. Eng.—Hunter v. Caldwell, 10 Q. B. 69, 81, 59 E.C.L. 69, 116 Reprint 28.

27. Cal.—Boyd v. Burrel, 60 Cal. 280, 282.

28. **"Date of filing," "filing date," and "filing day"**

(1) The day on which the papers are deposited with the proper custodian, and not that on which they are marked "filed."—Brooks v. Edwards, 231 P. 83, 84, 107 Okl. 239.

(2) The day on which an application is filed, not the day on which the fee is paid.—Hazeltine Corporation v. Electric Service Engineering Corporation, D.C.N.Y., 18 F.2d 662, 668.

(3) May be synonymous with "return day."—Davenport v. Richards, 75 S.E. 648, 649, 138 Ga. 611, 612—Everett v. Ferst, 55 S.E. 916, 126 Ga. 662.

Other phrases construed

(1) "Filing a proof of claim," as distinguished from "bringing of an action" see 11 C.J.S. p 1141 note 78.

(2) "Filing for record."—Benson v. Green, 4 S.E. 851, 80 Ga. 230, 232.

(3) "Filing in the bureau."—Creasy v. U. S., D.C.Va., 4 F.Supp. 175, 178.

(4) "Filing of a case," as including the filing of a complaint for the purpose of securing a search warrant.—Furnia v. Grays Harbor County, 291 P. 1111, 1114, 158 Wash. 619.

(5) "Filing of papers."—People v. Ramirez, 297 P. 51, 52, 112 Cal.App. 507.

(6) "Filing of the bill."

Ga.—Knoxville Iron Co. v. Wilkins, 74 Ga. 493, 496.

W.Va.—Stepp v. State Road Commission, 151 S.E. 180, 182, 108 W.Va. 346—Darnell v. Flynn, 71 S.E. 16, 18, 69 W.Va. 146.

(7) "Filing of the suit."

U.S.—Milton v. U. S., C.C.A.La., 105 F.2d 253, 255.

La.—National Homestead Ass'n v. Graham, 147 So. 348, 352, 176 La. 1032.

Tex.—Adams v. Consolidated Underwriters, 124 S.W.2d 840, 842, 133 Tex. 26—Hutt v. Hutt, Civ.App., 76 S.W.2d 567, 571.

25 C.J. p 1128 note 67.

(8) "Filing of the transcript," as meaning the delivery of it, with the filing fee, and the proper request to a clerk, or a deputy clerk, of the appellate court.—Dreher v. Guaranty

judications have not been found see 25 C.J. p 1127 note 54–p 1128 note 74.

FILEINJAID. British, a name given to villeins in the laws of Hoel Dda.[29]

FILIACIÓN. In Spanish law, filial relationship.[30]

FILIAL. Of or pertaining to a son or daughter, as becoming to a child with relation to its parents; as filial obedience; bearing or assuming the relation of a child.[31]

FILIATE. To fix a bastard child on some one, as its father; to declare whose child it is.[32]

FILIATION. Primarily, the relation of parent and child;[33] hence the judicial assignment of an illegitimate child to a designated man as its father.[34] The term is the correlative of "paternity,"[35] and although it does not import legitimacy it is often a step to that end.[36]

FILIATIO NON POTEST PROBARI.[37]

FILICETUM. In old English law, a ferny or bracky ground, a place where fern grows.[38]

FILIOLUS or **FILIOUS.** In old records, a godson.[39]

FILIUS. A child, a son.[40]

Bond & Finance Co., 192 So. 246, 247, 193 La. 757.

(9) "Filing or entry of judgment," as distinguished from "rendition of judgment."—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 1029, 48 Ariz. 552. See also the C.J.S. title Judgments § 100, also 34 C.J. p 44 note 57–p 46 note 62.

(10) "Filing with receiver."—Freeman v. Craft, 294 S.W. 822, 827, 220 Ky. 15.

(11) "Filing with the auditor."—Mills v. Board of Sup'rs of Monona County, 290 N.W. 50, 52, 227 Iowa 1141.

(12) "Filing with the clerk."—Benson v. Green, 4 S.E. 851, 80 Ga. 230, 232.

Phrases treated elsewhere

(1) "Filing and indorsement" and "filing away and reinstatement" of indictment see the C.J.S. title Indictments and Informations §§ 29, 30, also 31 C.J. p 588 note 22–p 589 note 46.

(2) "Filing and recording of conditional sale contract" see the C.J.S. title Sales §§ 576–586, also 55 C.J. p 1242 note 93–p 1268 note 12.

(3) "Filing of appeal bond" see Appeal and Error §§ 562–565.

(4) "Filing of bill," as constituting commencement of suit in equity see Actions, § 129 c.

(5) "Filing of claim" see specific C.J.S. titles such as Bankruptcy § 434; Carriers §§ 233–236; Executors and Administrators § 394 et seq.; Exemptions § 133; Insurance § 981 et seq; Mechanics' Lien § 131 et seq, also 40 C.J. p 174 note 49 et seq; Municipal Corporations § 1282, also 44 C.J. p 472 note 44–p 473 note 53; States § 198 et seq, also 59 C.J. p 284 note 42 et seq; and Workmen's Compensation Acts § 458 et seq, also 71 C.J. p 1000 note 93 et seq.

(6) "Filing of complaint, declaration, or petition," as constituting commencement of action at law see Actions § 129 b (2).

(7) "Filing of court papers" see Courts § 228 a.

(8) "Filing of information" as commencement of prosecution which tolls the statute of limitations see Criminal Law § 234.

(9) "Filing of interrogatories" see Discovery § 60.

(10) "Filing of notice" see specific C.J.S. titles such as Carriers §§ 233–240; Insurance § 981 et seq; Motions and Orders § 18, also 42 C.J. p 487 notes 29, 30; and New Trial § 133, also 46 C.J. p 309 notes 7–10.

(11) "Filing of petition" for special local election see Elections § 69.

(12) "Filing of petition and bond" for removal of cause from state to federal court see the C.J.S. title Removal of Causes § 218, also 54 C.J. p 329 note 77–p 330 note 8.

(13) "Filing of pleading" see the C.J.S. title Pleading §§ 408–410, 416, also 49 C.J. p 651 note 32–p 652 note 74, and p 656 note 67–p 658 note 93.

(14) "Filing of records" see the C.J.S. title Records §§ 4–8, also 53 C.J. p 607 note 54–p 609 note 13.

(15) "Filing of transcript of judgment" see the C.J.S. title Judgments § 129, also 34 C.J. p 91 note 70–p 95 note 19.

(16) "Filing, recording, or registration of chattel mortgage" see Chattel Mortgages §§ 130–174.

(17) "Notice of filing" of claim against estate of deceased see Executors and Administrators § 413.

29. Black L.D.

30. Escriche Diccionario.

31. Tex.—Janes v. Gulf Production Co., Civ.App., 15 S.W.2d 1102, 1105.

"Filial kindness and attention," as not implying an onerous consideration, but only such attention as is becoming to a daughter with relation to her old father, that is, the usual and natural treatment of the father by the daughter.—Janes v. Gulf Production Co., supra.

32. Black L.D.

33. Ala.—Lay v. Fuller, 59 So. 609, 610, 178 Ala. 375.

Mass.—Rodrigues v. Rodrigues, 190 N.E. 20, 22, 286 Mass. 77.

In the civil law, the descent of son or daughter, with regard to his or her father, mother, and their ancestors. Black L.D.

34. Black L.D.

Phrases construed

(1) "Filiation proceedings."

N.Y.—Commissioner of Public Welfare of City of New York on Complaint of Gordon, v. Fagan, 18 N.Y. S.2d 228, 229, 259 App.Div. 727.

Or.—State v. Morrow, 75 P.2d 737, 738, 739, 744, 158 Or. 412—State v. Tokstad, 8 P.2d 86, 88, 139 Or. 63.

See generally Bastards §§ 32–141.

(2) "Order of filiation and maintenance" as the judgment or order in bastardy proceedings, see Bastards §§ 109–117.

35. Black L.D.

36. Mass.—Rodrigues v. Rodrigues, 190 N.E. 20, 22, 286 Mass. 77.

As to presumptions in favor of legitimacy see Bastards § 3.

37. A maxim meaning "Filiation cannot be proved, that is, the husband is presumed to be the father of a child born during coverture."—Black L.D.

38. Black L.D.

39. Black L.D.

40. Black L.D.

Distinguished from "hæres" and "liberus"

"As distinguished from heir, *filius* is a term of nature, *hæres* a term of law. . . . In the civil law, the term was used to denote a child generally. . . . A distinction was sometimes made, in the civil law, between *'filii'* and *'liberi;'* the latter word including grandchildren, (*nepotes*), the former not. . . . But according to Paulus and Julianus,

Phrases employing the word are set out in the note.[41]

FILIUS CONSTAT ESSE IN FAMILIA PATRIS ET NON MATRIS.[42]

FILIUS EST NOMEN NATURÆ, SED HÆRES NOMEN JURIS.[43]

FILIUS IN UTERO MATRIS EST PARS VISCERUM MATRIS.[44]

FILL.

As a Noun

In general, that which fills.[45]

In engineering or grading operations, in contrast with "cut," a depositing of earth upon an area, to raise its level;[46] hence an embankment.[47]

Among cattlemen, the feeding and watering of cattle just before they are offered for sale, so as to increase their weight.[48]

As a Verb

——**Present Tense.** To make full, to complete, to satisfy or fulfill; to possess and perform the duties of; to occupy the whole capacity or extent of, so as to leave no space vacant;[49] to compound, as a prescription.[50] Also the term may be employed as implying a promise to pay.[51]

Used in the sense of to possess and perform the duties of, the word has been distinguished from "appoint" see 6 C.J.S. p 87 note 13.

Phrases employing the word are set out in the note.[52]

——**Filled.** The preterit or past participle of "fill."[53] As a participle, the word is used adjectively; and, applied generally to goods, it is not, strictly speaking, a commercial term, although to a limited extent it is used in commerce as a technical term, its meaning depending on its signification among the manufacturers to whose business it relates.[54]

——**Filling.** The present participle of "fill."[55]

Among civil engineers and contractors the word has a well settled meaning, and as applied by them to street improvements has been defined as meaning to be filled with clay, sand, clean earth, or any solid, imperishable material, raising the surface of a roadway to be improved to a certain height by using earth, clay, sand, or other suitable materials

they were of equally extensive import."—Black L.D.

41. **Phrases defined**

(1) "Filius familias," in the civil law, the son of a family, an unemancipated son.—Black L.D.

(2) "Filius mulieratus," in old English law, the eldest legitimate son of a woman, who previously had an illegitimate son by his father; otherwise called a "mulier."—Black L.D.

(3) "Filius nullius," the son of no one, and "filius populi," the son of the people; names sometimes given to an illegitimate, or natural, child.

Ill.—Blacklaws v. Milne, 82 Ill. 505, 506, 15 Am.R. 339.

Ind.—Jackson v. Hocke, 84 N.E. 830, 831, 171 Ind. 371.

Iowa.—In re Clark's Estate, 290 N.W. 13, 29, 228 Iowa 75—In re Ellis' Estate, 282 N.W. 758, 762, 225 Iowa 1279, 120 A.L.R. 975.

See also Bastards § 1.

42. A maxim meaning "A son appears to be in the family of the father, and not of the mother."—Trayner Leg.Max.

43. A maxim meaning "Son is a name of nature, but heir is a name of law."—Black L.D.

44. A maxim meaning "A son in the mother's womb is part of the mother's vitals."—Black L.D.

45. Webster Int.D.

46. Pa.—In re Sedgley Ave., 66 A. 546, 547, 217 Pa. 313, 316.

47. Ala.—Anderson v. Birmingham Mineral R. Co., 19 So. 519, 109 Ala. 128, 129.

48. **Not necessarily fraudulent**

"There is no fraud in this, since it is permissible and understood by the 'trade.'"—Texas & P. Ry. Co. v. West Bros., Tex.Com.App., 207 S.W. 918, 922.

49. Black L.D.

Similarly expressed

(1) To hold, as an office.—English L.D.

(2) "To insert in or make complete, [as a document]."—Standard D.

(3) "To occupy so that no space remains."—English L.D.

50. Standard D.

51. Me.—Bangor Bridge Co. v. McMahon, 10 Me. 478, 480.

52. **Phrases construed**

(1) "Fill in the agreement," as meaning merely to fill in the blank spaces in the agreement.—Dozier v. National Borax Co., 170 P. 638, 640, 35 Cal.App. 612.

(2) "Fill up" may mean to pay the assessments.—Bangor Bridge Co. v. McMahon, 10 Me. 478, 480.

(3) "Fill up such vacancy."—Johnston v. Wilson, 2 N.H. 202, 204, 9 Am.D. 50.

(4) "To 'fill' embroidery" is to stuff out the figure, which is the ornamentation, by covering the stuffing with the silk, cotton, or other threads used by the embroiderer.—G. Reis & Bro. v. Reform Initial Co., C.C.A.N.Y., 266 F. 219.

53. Webster New Int.D.

Phrases construed

(1) "Filled in with brick."—Fowler v. Ætna F. Ins. Co., 6 Cow., N.Y., 673, 16 Am.D. 460, 7 Wend. 270, 274.

(2) "Filled stope" see the C.J.S. title Mines and Minerals § 3, also 25 C.J. p 1128 note 93.

(3) "Filled with," defined as packed or reinforced with.—Standard D.

54. U.S.—U. S. v. Pinney, Casse & Lackey Co., N.Y., 105 F. 934, 935, 45 C.C.A. 138.

"Filled cotton goods"

"Formerly, in England, the term 'filled cotton goods' was synonymous with 'weighted goods,' and meant that the interstices of the fabric were loaded or weighted with foreign substances, among which inorganic substances, like china clay, chalk, or Glauber's salts were used; and that, although starch was used, some other material, like clay, or perhaps glue or glucose, must be used also."—U. S. v. Pinney, Casse & Lackey Co., supra.

"Filled milk" see Food § 15.

55. Webster New Int.D.

free from animal and vegetable substances or other offensive materials.[56]

As employed by manufacturers of cotton cloth, the term has been defined as the substantial closing of the interstices of the cloth, thus creating a permanent plain surface.[57] In this use of the term it has been distinguished from "starching."[58]

As a verbal noun, the word "filling," in its ordinary sense, means something that fills, and in weaving relates to the threads filling the interstices in the warp and thus constituting an essential element of the woven fabric.[59] In this use, the term has been held synonymous with "weft."[60]

Phrases employing the word, in one or another of the above senses, are set out in the note.[61]

FILLERS. As one of the three classes of leaf tobacco, "fillers" are leaves that make up the main body of a cigar,[62] being distinguished from the other two classes, "binders" and "wrappers."[63]

FILLY. A female colt, a young horse, especially a young mare. The term is also applied sometimes to a lively, roistering, or wanton girl.[64] It has been compared with "horse" and "mare."[65]

FILM. The layer, usually of gelatin or collodion, containing the sensitive salts of photographic plates; also the flexible sheet of celluloid or similar material upon which this layer is sometimes mounted.[66]

FILTER. As a noun, any porous article, as a cloth, paper, sand, or charcoal, through which water or other liquid is passed to separate from it matter held in suspension, or in some cases dissolved impurities or coloring matter; also a chamber or device containing such substance.[67]

As a verb, to purify or defecate, as liquor, by causing it to pass through a filter or porous substance that retains the feculent matter.[68]

"Filtering," as applied to water, means the purification of it through sand, involving the removal of physical impurities;[69] and while the process is dif-

56. Ill.—Levy v. Chicago, 113 Ill. 650, 652, 653.

57. **An elastic term** as the manufacturers of cotton cloth use it, and "in business directions is often used loosely, and instructs the finisher to fill the particular goods so far as needful for the particular purpose for which they are to be used, or to fill in accordance with the style of cloth which is to be filled."—U. S. v. Pinney, Casse & Lackey Co., N.Y., 105 F. 934, 935, 936, 45 C.C.A. 138.

"The importer's definition of filling is satisfied if the goods contain in addition to starch an appreciable quantity of inorganic material."—U. S. v. Pinney, Casse & Lackey Co., supra.

58. U.S.—U. S. v. Pinney, Casse & Lackey Co., supra.

59. U.S.—Wimpfheimer v. U. S., C.C.N.Y., 142 F. 849, 851.

60. U.S.—Wimpfheimer v. U. S., supra.

61. **Phrases construed**

(1) "Filling blanks" see Alteration of Instruments §§ 62–74, Bills and Notes §§ 120, 136–138, Bonds § 20, Deeds § 33, and, in connection with imperfect and incomplete instruments as subject of the forgery, the C.J.S. title Forgery § 18, also 26 C.J. p 911 note 19–p 912 note 36.

(2) "Filling chamber," as meaning a chamber in which a bottle mouth is held while being filled.—Crown Cork & Seal Co. v. Carper Automatic Bottling Mach. Co., D.C.Md., 229 F. 748, 750.

(3) "Filling of the place [or office]."—Opinion to Governor, 51 A. 221, 222, 23 R.I. 635. See also Elections § 70 notes 92–97, § 72 notes 19–24, and § 93.

(4) "Filling prescriptions" see Druggists § 6 d notes 95–99, and as compared with "compounding of drugs" see 15 C.J.S. p 700 note 38.

(5) "Filling stations" see the C.J.S. title Motor Vehicles §§ 770–778, also 42 C.J. p 1304 note 66–p 1309 note 71.

(6) "Filling the street."—Levy v. Chicago, 113 Ill. 650, 652.

(7) "Filling vacancies in the higher classifications."—Sinclair Prairie Oil Co. v. Dose, Okl., 118 P.2d 210, 215.

(8) "Filling vacancy [or vacancies]" see Elections §§ 70, 72, 93; and as equivalent to "appointment" see 6 C.J.S. p 89 note 76.

62. U.S.—Falk v. Robertson, N.Y., 11 S.Ct. 41, 42, 137 U.S. 225, 34 L.Ed. 645.

Phrases construed

(1) "Filler tobacco," as meaning, or including all leaf tobacco, other than that suitable for cigar wrappers, hence distinguished from "wrapper tobacco."—U. S. v. Seventy-Five Bales of Tobacco, N.Y., 147 F. 127, 132, 77 C.C.A. 353—Dominguez v. U. S., C.C.Pa., 122 F. 556, 557.

(2) "Wrappers, fillers, and binders" see 11 C.J.S. p 349 note 42.

63. U.S.—Falk v. Robertson, N.Y., 11 S.Ct. 41, 42, 137 U.S. 225, 34 L.Ed. 645.

64. Tex.—Lunsford v. State, 1 Tex. App. 448, 450, 451, 28 Am.R. 414.

65. Tex.—Lunsford v. State, supra.

66. Webster New Int.D.

Phrases construed

(1) "Film or other pictorial representation of a prize fight," as including a negative as well as a positive print.—Kalisthenic Exhibition Co. v. Emmons, D.C.Me., 225 F. 902, 904.

(2) "Reactive film," defined as one in which a chemical change or reaction occurs on spreading the film and subjecting it to heat, light, air, motion, or electricity, but without the addition of some other chemical substance.—General Bakelite Co. v. Nikolas, D.C.N.Y., 225 F. 539, 549.

(3) "Tape film," described as a tape-like film capable of being moved continuously or intermittently across the lens of a camera, so that successive portions of it may be exposed to the operation of the lens.—Edison v. American Mutoscope & Biograph Co., C.C.N.Y., 144 F. 121, 123.

67. Webster Int.D.

"Filter operator"

Duties of "filter operator" in a new water purification plant held not substantially the same as duties of a "watch engineer" in old style water works plant.—Horlander v. City of Owensboro, 158 S.W.2d 418, 420, 289 Ky. 181.

68. Or.—Town of Pendleton v. Saunders, 24 P. 506, 510, 19 Or. 9.

69. U.S.—Permutit Co. v. Graver Corporation, D.C.Ill., 37 F.2d 385, 393.

"Filtering paper," as including the so-called "filters" or disks of filter-

ferent from that of "softening" water, since the latter involves chemical changes in the water, the two have been said to be at least analogous.[70]

FILTH. Primarily, anything that soils or defiles; defilement; foul, offensive matter; pollution;[71] and so, derivatively, anything that sullies or befouls the moral character.[72]

FILTHY. Containing or involved in filth; foul, dirty, nasty, noisome, polluted, scurvy.[73] As applied to food, the term has been held to include a substance containing bacilli liable to cause disease to such an extent as to make it dangerous for food purposes,[74] and food designed for human consumption containing worms and their excreta.[75] The term may apply to food substances in such condition as to offend the æsthetic tastes and sensibilities of the consuming public; it does not imply necessarily that the food is injurious to health.[76]

In a derived sense, the term has been defined as meaning that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, or morally depraving and debasing;[77] hence contemptible, low, mean, morally foul, or defiled by sinful practices.[78]

In its derived sense, referring to language, ideas, literature, etc., "filthy" is, for all practical purposes, coextensive with "obscene;"[79] but in its primary sense it may be distinguished therefrom.[80]

FILTRATE. The liquid which has been passed through a filter.[81] The use of the word with reference to a particular liqueous mixture indicates that it has been filtered.[82]

FILTRATION. Passing through; the act or process of filtering; the mechanical separation of a liquid from the dissolved particles floating in it.[83]

FILUM. A Latin word signifying a thread.[84] In particular applications, it has been defined as meaning a file, that is, a thread or wire on which papers were strung, that being the ancient method of filing;[85] also an imaginary thread or line passing through the middle of a stream or road.[86]

Phrases employing the word are set out in the note.[87]

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ing paper.—Murphy v. U. S., C.C.N.Y., 148 F. 336.

70. U.S.—Permutit Co. v. Graver Corporation, D.C.Ill., 37 F.2d 385, 393.

71. U.S.—U. S. v. Davidson, D.C.N.Y., 244 F. 523, 529.

Snow as filth

Eng.—Reg. v. Wood, 5 E. & B. 49, 55, 85 E.C.L. 49, 119 Reprint 400.

Filth, garbage, or refuse

(1) As a nuisance see the C.J.S. title Nuisances § 49, also 46 C.J. p 708 note 2–p 709 note 15.

(2) Municipality's power to regulate collection and disposition of, see the C.J.S. title Municipal Corporations § 265, also 43 C.J. p 377 note 46–p 379 note 79.

72. U.S.—U. S. v. Davidson, D.C.N.Y., 244 F. 523, 529.

73. U.S.—U. S. v. Davidson, supra.

74. U.S.—U. S. v. Sprague, D.C.N.Y., 208 F. 419, 421.

Phrases construed

(1) "Filthy . . . animal or vegetable substance."—U. S. v. 133 Cases of Tomato Paste, D.C.Pa., 22 F.Supp. 515, 516.

(2) "Filthy, decomposed, and putrefied."—U. S. v. Sprague, D.C.N.Y., 208 F. 419, 421.

75. U.S.—U. S. v. 133 Cases of Tomato Paste, D.C.Pa., 22 F.Supp. 515, 516.

76. U.S.—U. S., v. 133 Cases of Tomato Paste, supra.

See also the C.J.S. title Food §§ 15, 16, and 26 C.J. p 760 note 58–p 762 note 78.

77. U.S.—Tyomies Pub. Co. v. U. S., Mich., 211 F. 385, 390, 128 C.C.A. 47.

78. U.S.—U. S. v. Davidson, D.C.N.Y., 244 F. 523, 529.

As referring to sexual matters

"And every filthy," added to the words "every obscene, lewd, or lascivious," and referring to books, letters, etc., construed as necessarily referring to sexual matters, and calculated to corrupt morals.—U. S. v. Limehouse, D.C.S.C., 58 F.2d 395, 397 —U. S. v. Davidson, D.C.N.Y., 244 F. 523, 528.

See also the C.J.S. title Post Office § 21, and 49 C.J. p 1161 notes 72–75.

79. U.S.—U. S. v. Limehouse, D.C.S.C., 58 F.2d 395, 396.

80. Broader than "obscene"

The word "filthy" covers some ground not covered by "obscene," for "filthy" may refer to the physical, material condition of an article.—U. S. v. Limehouse, D.C.S.C., 58 F.2d 395, 396.

81. Century D.

82. "Powdered nutgalls and water 'filtrate'"

U.S.—U. S. v. Proctor, C.C.Mass., 145 F. 126, 129.

83. Or.—Town of Pendleton v. Saunders, 24 P. 506, 510, 19 Or. 9.

Phrases construed

(1) "Contact filtration process" see Contact 16 C.J.S. p 1523 in Pocket Parts.

(2) "Shall not lose from evaporation and filtration."—Town of Pendleton v. Saunders, 24 P. 506, 510, 19 Or. 9.

84. Miss.—Meridian Nat. Bank v. Hoyt & Bros. Co., 21 So. 12, 13, 74 Miss. 221, 60 Am.S.R. 504, 36 L.R.A. 796.

25 C.J. p 1129 note 36.

85. Black L.D.

86. Black L.D.

See also Boundaries § 27 b (2) note 69, § 33.

87. "Filum aquæ"

(1) A thread of water, a line of water, the middle line of a stream of water, supposed to divide it into two equal parts, and constituting in many cases the boundary between the riparian proprietors on each side. —Black L.D.

(2) Middle of the river.—Ingraham v. Wilkinson, 4 Pick., Mass., 268, 273, 16 Am.D. 342—25 C.J. p 1129 note 38.

(3) The thread of a stream.—Knight v. Wilder, 2 Cush., Mass., 199, 207, 48 Am.D. 660.

"Usque ad filum aquæ"

(1) Up to the middle of the stream.—Black L.D.

(2) It applies to small streams, not navigable.—Gilchrist's Appeal, 4 Kulp, Pa., 3.

(3) It may limit the right of fishing.—Claremont v. Carlton, 2 N.H. 369, 371, 9 Am.D. 88.

FIN. French and Spanish, an end or limit, a limitation, or period of limitation.[88]

FINAL. A word of well understood and accepted meaning,[89] derived from the Latin word "finis," end;[90] and descriptive of a boundary or end of something.[91] In its ordinary signification, last,[92] latest; relating to the end; ultimate.[93] In legal parlance, it signifies conclusive,[94] decisive, definitive, as a final judgment,[95] from which there is no appeal;[96] necessarily precluding review;[97] precluding further controversy on the question passed upon;[98] that which absolutely ends or concludes a matter,[99] as in the case of an agreement to accept a particular transaction as "final;"[1] that which terminates or ends a matter or proceeding;[2] although, it has been said, the termination need not necessarily be absolute;[3] for common speech, as well as juridical usage, will sometimes justify a limitation of the word to the jurisdiction of the particular officer or tribunal concerned.[4]

"Final" sometimes has been held equivalent to, and sometimes has been distinguished from, "definitive" see 26 C.J.S. p 681 notes 62, 65. It has been contrasted with, or distinguished from "becoming due,"[5] "effective" see 28 C.J.S. p 839 note 6, "interlocutory,"[6] and "provisional."[7]

References to specific uses are listed in 25 C.J. p 1129 note 42.

(4) It may mark the extent of a boundary of land bounded by rivers.—In re McDonough, 30 U.C.Q.B., Ont., 288, 290.

Other phrases

(1) "Filum forestæ"—the border of the forest.—Black L.D.

(2) "Filum viæ"—the thread, or the middle line of a road; an imaginary line drawn through the middle of a road, and constituting the boundary between the owners of the land on each side.—Black L.D.

(3) "Medium filum"—the middle of the thread, sometimes used as equivalent to "filum aquæ."—Black L.D.

(4) "Usque ad filum mediæ."—Cox v. Freedley, 33 Pa. 124, 128, 75 Am.D. 584.

(5) "Usque ad filum viæ"—up to the middle of the road.—Black L.D.

88. Black L.D.

"Fin de non recevoir"

In French law, an exception or plea founded on law, which, without entering into the merits of the action, shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called "prescription," or that there has been a compromise, accord and satisfaction, or any other cause which has destroyed the right of action which once subsisted.—Black L.D.

89. Ind.—Pittsburgh, Ft. W. & C. R. Co. v. Gillespie, 63 N.E. 845, 846, 158 Ind. 454.

90. La.—State v. Twenty-First Judicial Dist. Democratic Committee, 47 So. 405, 407, 122 La. 83.

91. U.S.—U. S. v. Tod, C.C.A.N.Y., 1 F.2d 246, 252.
Iowa.—Scott v. State Board of Assessment and Review, 267 N.W. 111, 114, 221 Iowa 1060.

92. U.S.—U. S. v. Tod, C.C.A.N.Y., 1 F.2d 246, 252—Standard Oil Co., New Jersey, v. U. S., Ct.Cl., 10 F. Supp. 550, 560.
25 C.J. p 1129 note 45.

93. S.C.—Garrison v. Dougherty, 18 S.C. 486, 488.

Similarly expressed

"Pertaining to the end."
U.S.—U. S. v. Tod, C.C.A.N.Y., 1 F. 2d 246, 252.
Ill.—Saylor v. Duel, 86 N.E. 119, 121, 236 Ill. 429, 19 L.R.A.,N.S., 377.

94. U.S.—U. S. v. Tod, C.C.A.N.Y., 1 F.2d 246, 252—Standard Oil Co. (New Jersey) v. U. S., Ct.Cl., 10 F. Supp. 550, 560.
Fla.—State ex rel. Grodin v. Barns, 161 So. 568, 574, 119 Fla. 405.
25 C.J. p 1129 note 49.

95. Fla.—State ex rel. Grodin v. Barns, 161 So. 568, 574, 119 Fla. 405.

Judgment essential

Prosecution in trial court is not "final" until there is a judgment entered of record.—Lovelace v. Commonwealth, 147 S.W.2d 1029, 1034, 285 Ky. 326.

96. U.S.—U. S. v. Tod, C.C.A.N.Y., 1 F.2d 246, 252.
Or.—Crowell Elevator Co. v. Kerr Gifford & Co., 236 P. 1047, 1050, 114 Or. 675.

97. Mich.—Hoste v. Dalton, 100 N. W. 750, 751, 137 Mich. 522.

98. Ind.—Pittsburgh, Ft. W. & C. R. Co. v. Gillespie, 63 N.E. 845, 846, 158 Ind. 454.
25 C.J. p 1129 note 50.

99. Minn.—Rondeau v. Beaumette, 4 Minn. 224, 228.

1. Mo.—Mudd v. Farmers' and Merchants' Bank, 162 S.W. 314, 317, 175 Mo.App. 398.

2. U.S.—U. S. v. Tod, C.C.A.N.Y., 1 F.2d 246, 252.
Minn.—Rondeau v. Beaumette, 4 Minn. 224, 228.

3. Minn.—Rondeau v. Beaumette, 4 Minn. 224, 228.
25 C.J. p 1130 note 53.

"It is not essential to a final decree in all cases that it be the very last step in the proceeding or put an absolute end to it. The word final in this connection refers to the effect of the decree rather than the mere order of time."—Kingsley v. City of Fall River, 182 N.E. 841, 843, 280 Mass. 395.

4. U.S.—Rodgers v. U. S., Pa., 157 F. 381, 385, 85 C.C.A. 79.

Conclusiveness limited

(1) Statutory provisions that the findings or decisions of particular committees or judges shall be "final" held not to preclude judicial review.
Fla.—D'Alemberte v. State, 47 So. 489, 499, 56 Fla. 162.
N.Y.—Anderson v. School Dist. No. 15, 85 N.Y.S. 943, 945, 89 App.Div. 231.

(2) A provision making selection of route of trunk highways final, held to mean that selection of route by highway commission is not appealable or subject to review, but not to mean that route may not be changed by the commission itself.—Agnew v. Hotchkiss, 206 N.W. 849, 850, 189 Wis. 1.

(3) A requirement that the result of an election shall be final held not to preclude a second election but only that there shall be no judicial interference with the declaration of the result.—Gibbs v. Milk Control Board of Georgia, 196 S.E. 791, 794, 185 Ga. 844.

5. U.S.—Arrow Stevedore Co. v. Pillsbury, D.C.Cal., 12 F.Supp. 920, 922—Twine v. Locke, D.C.N.Y., 3 F.Supp. 1012, 1013.

6. U.S.—Beighle v. Le Roy, C.C.A. N.J., 94 F.2d 30, 31.
Cal.—Bixler's Appeal, 59 Cal. 550, 556.
N.J.—State v. Wood, 23 N.J.Law 560, 561.
Ont.—Whiting v. Hovey, 12 Ont.App. 119, 125.

7. N.Y.—In re Levine, 32 N.Y.S.2d 218, 220, 177 Misc. 412.

Phrases employing the word are listed in the | note.[8] Other phrases as to which more recent ad-

8. **"Final jurisdiction"**

(1) As referring to the power to render judgments of sentence or acquittal.—State v. Fox, 76 A. 302, 304, 83 Conn. 286, 19 Ann.Cas. 682—State v. Campane, 57 A. 164, 76 Conn. 549.

(2) As not equivalent to "exclusive jurisdiction."—Small v. State, 192 N.E. 790, 791, 128 Ohio St. 548.

"Exclusive jurisdiction" defined see Courts § 18.

Other phrases construed

(1) "Date on which decisions of the Board . . . become final," as meaning that, at the indicated point of time, the decision of the board must stand as rendered, without power in the board or in the courts to modify it thereafter.—Sweet v. Commissioner of Internal Revenue, C.C.A., 120 F.2d 77, 81.

(2) "Final and binding."—Legg v. Brandt, 26 N.Y.S.2d 374, 377, 261 App.Div. 319.

(3) "Final assessment."

Ala.—Howell & Graves v. Curry, 5 So.2d 105, 107, 242 Ala. 122—Stovall v. City of Jasper, 118 So. 467, 474, 218 Ala. 282.

Ga.—Fallis v. City of Nashville, 190 S.E. 557, 560, 184 Ga. 55.

(4) "Final canvass," as distinct from "election" or "time when votes were cast."—State v. Nelson, 169 N.W. 788, 789, 141 Minn. 499.

(5) "Final choice."—Hudgins v. Nashville Bridge Co., 113 S.W.2d 738, 739, 172 Tenn. 580.

(6) "Final completion."—San Luis Valley Drainage Dist. No. 1 v. Stanley, 189 P. 855, 68 Colo. 393.

(7) "Final conclusion."—First Nat. Bank v. Walgren, 216 N.W. 946, 947, 52 S.D. 240.

(8) "Final decision upon the merits," as meaning a determination on the merits of a cause which will in due time by operation of law lead to a final judgment in the cause.—Rosenthal v. Halsband, 152 A. 320, 321, 51 R.I. 119.

(9) "Final determination" as synonymous with "final judgment."—Pape v. Red Cab Mut. Casualty Co., 219 N.Y.S. 135, 136, 128 Misc. 456.

(10) "Final disallowance."—U. S. v. Borg-Warner Corporation, C.C.A.Ill., 108 F.2d 424, 427.

(11) "Final discharge."—Hickman v. Barrett, 52 P.2d 40, 44, 175 Okl. 262.

(12) "Final disposition of claim."—Industrial Commission of Ohio v. Lucas, 177 N.E. 283, 284, 39 Ohio App. 141.

(13) "Final disposition upon merits," as not including a reversal because of trial errors and excessiveness of verdict, and remitting cause "for further proceedings."—Rousseau v. Rosche, 290 P. 806, 808, 158 Wash. 310.

(14) "Final election."—Candado Stevedoring Corporation v. Lowe, C.C.A.N.Y., 85 F.2d 119, 120.

(15) "Final judgment of conviction."—In re Phillips, 109 P.2d 344, 346, 17 Cal.2d 55, 132 A.L.R. 644—People v. Lopez, 110 P.2d 140, 146, 43 Cal.App.2d 854.

(16) "Final legislative act," and "final legislative action."

U.S.—Beaver Valley Water Co. v. Driscoll, D.C.Pa., 28 F.Supp. 722, 725.

Mass.—In re Opinion of the Justices, 197 N.E. 95, 98, 291 Mass. 578.

(17) "Final liquidation."—V. Mueller & Co. v. U. S., Cust. & Pat.App., 115 F.2d 354, 363.

(18) "Final location."—State Highway Commission v. Williams, 121 S.E. 55, 58, 138 Va. 217—25 C.J. p 1130 note 78.

(19) "Final payment."

U.S.—U. S., for Use and Benefit of F. B. Spear & Sons, v. Arthur Storm Co., C.C.A.Mich., 101 F.2d 524, 526—O'Neil v. First Nat. Bank, D.C.Nev., 15 F.Supp. 133, 138.

Cal.—Skidmore v. Alameda County, 90 P.2d 577, 580, 13 Cal.App.2d 534—Skidmore v. Alameda County, App., 82 P.2d 612, 613.

Minn.—National Tea Co. v. McDonough, 227 N.W. 205, 206, 178 Minn. 388.

N.Y.—Leonardi v. Chase Nat. Bank of City of New York, 33 N.Y.S.2d 706, 711, 263 App.Div. 552.

25 C.J. p 1131 note 83.

(20) "Final process."

Ga.—Kennedy v. Miller, 175 S.E. 588, 589, 179 Ga. 234—Harris v. Houston, 179 S.E. 645, 646, 51 Ga.App. 116—Kennedy v. Miller, 176 S.E. 102, 49 Ga.App. 505.

N.M.—Crowell v. Kopp, 189 P. 652, 653, 26 N.W. 146.

N.C.—Edgerton v. Johnson, 10 S.E.2d 918, 919, 218 N.C. 300—Crow v. Morgan, 185 S.E. 668, 670, 210 N.C. 153.

25 C.J. p 1131 note 87.

(21) "Final quod recuperet judgment."—Turk v. City of Chicago, 185 N.E. 258, 260, 352 Ill. 171.

(22) "Final resolution."—Miles v. McKinney, 199 A. 540, 546, 174 Md. 551, 117 A.L.R. 207.

(23) "Final sentence."—People v. Fisher, 212 N.W. 70, 71, 237 Mich. 504—25 C.J. p 1131 note 90.

(24) "Final trial."—Wynne v. Smith, 98 S.E. 271, 272, 23 Ga.App. 330—25 C.J. p 1131 note 96.

(25) "Final voucher."—U. S. v. Title Guaranty & Surety Co., C.C.A. Ill., 254 F. 958, 959.

Phrases discussed elsewhere

(1) "Final account" see the C.J.S. titles Executors and Administrators §§ 904–908, Guardian and Ward §§ 143, 148, 149, 166, also 28 C.J. p 1209 notes 55–68, p 212 note 25–p 1213 note 40, and p 1237 note 56–p 1239 note 73, Receivers § 376, also 53 C.J. p 373 notes 1–12, and Trusts § 416, also 65 C.J. p 940 note 35–p 941 note 50.

(2) "Final action," "final adjudication," "final decision," "final decree," "final determination," "final disposition," "final judgment," "final order," and similar phrases see generally the C.J.S. titles Appeal and Error §§ 92–108; Certiorari § 20; Courts § 181 a note 79; Criminal Law §§ 1643–1657; Equity § 582 notes 57–71; Judgments § 11, also 33 C.J. p 1061 note 29–p 1063 note 47; Motions and Orders § 2, also 42 C.J. p 468 notes 65–74; and specifically the particular titles in the Descriptive-Word Index sub verbo "Final or Interlocutory Judgments and Decrees."

(3) "Final and conclusive" see 15 C.J.S. p 802 note 17.

(4) "Final award" and similar phrases see the C.J.S. titles Arbitration and Award § 81 a, and Workmen's Compensation Acts §§ 655, 656, also 71 C.J. p 1195 note 87–p 1197 note 35.

(5) "Final certificate," in building and construction contracts see Contracts § 498 b (7), and in connection with public land entries see the C.J.S. title Public Lands § 69, also 50 C.J. p 954 notes 81–91.

(6) "Final destination" see 26 C.J.S. p 1245 note 87.

(7) "Final distribution" and "final division and distribution" see 27 C.J.S. p 365 notes 60, 61.

(8) "Final division" see 27 C.J.S. p 512 note 1.

(9) "Final estimate" see 31 C.J.S. p 183 note 49 (8).

(10) "Final finding" see the C.J.S. title Workmen's Compensation Acts § 637, also 71 C.J. p 1182 notes 76–8[illegible].

(11) "Final hearing."

U.S.—The Rondo, D.C.N.Y., 16 F.Supp. 867, 868—The Lady Drake, D.C.N.Y., 1 F.Supp. 319—Warner v. Liquid Carbonic Co., D.C.Ga., 270 F. 294, 295.

Ala.—Irwin v. Winton, 98 So. 318, 319, 19 Ala.App. 480.

Ill.—Menard v. Bowman Dairy Co., 15 N.E.2d 1014, 1015, 296 Ill.App. 323.

N.J.—Laredef Corporation v. Federal Seaboard Terra Cotta Corporation, 25 A.2d 433, 435, 131 N.J.Eq. 368.

See also Admiralty § 200 b (2) note 57, and Equity § 480 note 29.

(12) "Final passage" see the C.J.S. title Statutes § 37, also 59 C.J. p 560 note 60–p 561 note 76.

judications have not been found see 25 C.J. p 1130 note 57–p 1131 note 99.

FINALIS CONCORDIA. A final or conclusive agreement.[9]

FINALITY. A word of clear meaning derived from the Latin word "finis,"—end; and pertaining to the conclusion and the end.[10] In law, it indicates the end with respect to a suit,[11] frequently relating to the exercise of the right of appeal or review.[12]

FINALLY. A word, which, as used in a particular statute, is said to have a meaning to which some effect should be given.[13] It may be used as meaning at last;[14] at the end or conclusion, lastly, or ultimately.[15]

Phrases employing the word are set out in the note.[16] Other phrases as to which more recent adjudications have not been found see 25 C.J. p 1131 notes 13–15

FINANCE.

As a noun, frequently in the plural, monetary affairs, pecuniary affairs; also, funds on hand or coming in; income; revenue; revenue funds in the treasury or accruing to it;[17] money resources generally, the state of the finances of individuals or corporations, being their condition from a monetary point of view; the cash on hand, and that which they expect to receive, as compared with the engagements to pay; also the public wealth of a state or government, considered either statically as the property or money which a state now owns, or dynamically as its income, revenue, or public resources.[18]

As a verb, to conduct the finances of; to provide capital for.[19] One of the meanings attributed to the word is the borrowing of money at interest.[20]

Phrases employing the word are set out in the note.[21]

FINANCIAL. Pertaining to finance or to reve-

(13) "Final settlement" see generally Compromise and Settlement §§ 26–28, and specifically such C.J.S. titles as Executors and Administrators §§ 904–908, Guardian and Ward §§ 143, 148, 166, also 28 C.J. p 1209 notes 55–68, p 1212 notes 25–27, p 1237 note 56–p 1239 note 73, and United States § 113, also 65 C.J. p 1330 note 15–p 1332 note 36.

(14) "Final submission," as affecting plaintiff's right to dismiss see Dismissal and Nonsuit § 20.

(15) "Final termination of proceeding," as essential to an action for malicious prosecution see the C.J.S. title Malicious Prosecution §§ 54–60, also 38 C.J. p 437 note 54–p 445 note 24.

(16) "Receiver's final receipt" see the C.J.S. title Public Lands § 69, also 50 C.J. p 954 note 85 [a].

9. Black L.D.

In levying a fine

"In the process of 'levying a fine,' this was a final agreement entered by the litigating parties upon the record, by permission of court, settling the title to the land, and which was binding upon them like any judgment of the court."—Black L.D.

10. La.—State v. Twenty-First Judicial Dist. Democratic Committee, 47 So. 405, 407, 122 La. 83, 90.

"Date of 'finality'" as determining liability of property owner with respect to city taxes.—Supplee v. Magruder, D.C.Md., 36 F.Supp. 722, 726.

11. La.—State v. Twenty-First Judicial Dist. Democratic Committee, 47 So. 405, 407, 122 La. 83.

12. Ind.—Hoffman v. Romack, 8 N.E.2d 831, 835, 212 Ind. 421.
Mo.—State ex rel. United Brick & Tile Co. v. Wright, 95 S.W.2d 804, 805, 339 Mo. 160.
Tex.—First State Bank of Tenaha v. Collinsworth, Civ.App., 111 S.W.2d 309, 311.

"Finality of judgment" as not inconsistent with the mere reservation of jurisdiction to file an opinion later on, and to make any further orders in the case.—Johnson v. Wilson, C.C.A. Nev., 118 F.2d 557, 558.

13. La.—State v. Twenty-First Judicial Dist. Democratic Committee, 47 So. 405, 407, 122 La. 83.

14. Century D.

15. Ind.—Bear v. Reese, 89 N.E. 522, 523, 44 Ind.App. 465.
La.—State v. Twenty-First Judicial Dist. Democratic Committee, 47 So. 405, 406, 122 La. 83.

16. **Phrases construed**

(1) "Finally adjudged guilty" see 2 C.J.S. p 49 note 66.

(2) "Finally adopted."—McClain v. Wirsching, 11 P.2d 392, 393, 215 Cal. 469.

(3) "Finally and summarily."—State v. Twenty-First Judicial District Democratic Committee, 47 So. 405, 407, 122 La. 83.

(4) "Finally compelled."—City of Texarkana, Tex., v. Arkansas Louisiana Gas Co., Tex., 59 S.Ct. 448, 455, 306 U.S. 188, 620, 83 L.Ed. 598.

(5) "Finally decide."—Beech v. U. S. Fidelity & Guaranty Co., 30 P.2d 1079, 1082, 54 Idaho 255, 92 A.L.R. 264.

(6) "Finally declared invalid."—State v. Sinclair Refining Co., 282 N.W. 624, 628, 230 Wis. 265.

(7) "Finally defeated or canceled."—Hager v. Hale, 230 P. 327, 328, 117 Kan. 98.

(8) "Finally determine," "finally determining," and "finally determined" see 26 C.J.S. p 1260 notes 13, 17, 27.

(9) "Finally disposed of" see 27 C.J.S. p 349 note 61.

(10) "Finally past and clear of her" see Collision § 57 note 78.

(11) "Finally sentenced."—Gargan v. Sculley, 144 N.Y.S. 205, 207, 82 Misc. 667.

(12) "Finally submitted."
Iowa.—Marion v. Home Mut. Ins. Ass'n of Iowa, 217 N.W. 803, 805, 205 Iowa 1300.
Mont.—Marias River Syndicate v. Big West Oil Co., 38 P.2d 599, 603, 98 Mont. 254.

17. N.Y.—Newburgh v. Dickey, 150 N.Y.S. 175, 177, 164 App.Div. 791.

18. Black L.D.

19. Webster New Int.D.

20. Cal.—Du Quesnay v. Henderson, 74 P.2d 294, 295, 24 Cal.App.2d 11.

21. **Phrases construed**

(1) "Finance a corporation."—Hobgood v. Ehlen, 53 S.E. 857, 859, 141 N.C. 344.

(2) "Finance charge," as meaning the consideration for the privilege of deferring payment of purchase price.—Cowart v. Lang, 298 N.Y.S. 875, 252 App.Div. 720.

(3) "Finance the company for its financial needs."—Fred G. Clark Co. v. E. C. Warner Co., 247 N.W. 225, 229, 188 Minn. 277.

(4) "Finance the purchase,"—State v. Walla Walla Fruit Growers, 248 P. 54, 55, 140 Wash. 94.

nue.[22] In a particular connection, it has been held to mean paid up and not in arrears.[23]

It has been held synonymous with "fiscal."[24]

Phrases employing the word are set out in the note.[25] Other phrases as to which more recent adjudications have not been found see 25 C.J. p 1132 notes 25–29.

FINANCIALLY. With relation to finance; in respect of funds.[26]

FINANCIER. A person skilled in matters appertaining to the judicious management of money affairs; one employed in the economical management and application of public money.[27] An officer of a lodge who keeps a book in which assessments are entered, and who sends out notices of assessments is sometimes called a "financier."[28]

FINCA. In Spanish law, real property, usually acquired by inheritance, the income or rent from which one is entitled to receive.[29]

FIND.

As a Noun

A finding, or something found.[30]

As a Verb

——**Present Tense.** In its primary meaning, to come to, to arrive at, to attain to, to meet, or to reach;[31] to discover.[32] It may also mean to furnish or to supply.[33]

In a derived legal sense, particularly when referring to the acts of a judicial, or quasi-judicial, officer or body,[34] it means to ascertain by judicial inquiry;[35] to determine and declare an issue of fact by its verdict or decision as a court or jury.[36] The

22. Century D.

23. La.—Allen v. Enterprise Benevolent & Burial Ass'n, App., 159 So. 127, 128.

24. N.Y.—Armstrong v. State Bank, 165 N.Y.S. 5, 8, 177 App.Div. 265.

25. **Phrases construed**

(1) "Financial condition" see Bankruptcy §§ 520, 521, concealment of, or false statements concerning, as ground for denial of discharge; Banks and Banking § 156, receiving deposits when insolvent, § 267, depositor's knowledge of bank's condition; and False Pretenses § 13, false statement as to financial ability or condition.

(2) "Financial corporation," as including a federal savings and loan association.—First Federal Savings & Loan Ass'n of Altadena v. Johnson, 122 P.2d 84, 87, 49 Cal.App.2d 465.

(3) "Financial difficulties," as covering proceedings in bankruptcy instituted by creditors.—In re Columbia Tobacco Co., D.C.N.Y., 37 F.Supp. 460, 461.

(4) "Financial institution."
Ala.—State v. National Credit Co., 181 So. 769, 771, 236 Ala. 224.
Ind.—Todd v. Brock, 14 N.E.2d 902, 903.

(5) "Financial loss."—In re Lilly. 19 A.2d 92, 94, 95, 341 Pa. 171.

(6) "Financial paper or trade journal," described as a newspaper which, in addition to publishing general news, regularly publishes news relating to financial matters, and also publishes from time to time notices of sale of municipal bonds.—Kornegay v. City of Goldsboro, 105 S.E. 187, 194, 180 N.C. 441.

(7) "Financial standing," as distinguished from "credit" see 21 C.J.S. p 1044 note 97.

(8) "Financial statement" see Bankruptcy § 521 b, obtaining credit on false statement as ground for denial of discharge; and Banks and Banking § 150 a, criminal liability of officers for making false entries in.

(9) "Financial worth" of a person is the value of his property less what he owes, or the value of his resources less his liabilities.—Boney v. Central Mut. Ins. Co. of Chicago, 196 S.E. 837, 841, 213 N.C. 470.

26. Century D.

Phrases construed

(1) "Financially able" construed as not requiring that one must have all the necessary money in his immediate possession or to his credit at a bank, but only that he must be able to command the necessary funds to close the deal within the required time.
Cal.—Hersh v. Garau, 23 P.2d 1022, 1025, 218 Cal. 460.
Miss.—Hays v. Goodman-Leonard Realty Co., 111 So. 869, 870, 146 Miss. 766.

(2) "Financially able to perform the lease," as equivalent to "able, ready, and willing to execute the lease."—Harrity v. Steers, 185 N.Y.S. 704, 195 App.Div. 11.

(3) "Financially dependent."—Davis v. East St. Louis Lodge No. 4, 197 Ill.App. 25, 28.

(4) "Financially interested as a partner, associate or profit sharer."—Warner v. Marchetti, 125 P.2d 838, 840, 52 Cal.App.2d 172.

(5) "Financially solvent."—Matter of Farmers' L. & T. Co., 121 N.Y.S. 1099, 1100, 65 Misc. 418.

27. Black L.D.

Similarly expressed

One who is intrusted with the control of financial interests; one who regulates or manages the public revenues.—Century D.

28. Minn.—Backdahl v. Grand Lodge A. O. U. W., 48 N.W. 454, 455, 46 Minn. 61.

29. Escriche Diccionario.

30. Webster New Int.D.

31. N.Y.—Carter v. Youngs, 42 N.Y. Super. 169, 172.

"**'To find' . . . 'coincides in origin with venio,'** but in sense with invenio. And the literal signification of 'invenio' is to come upon, to get at."—Carter v. Youngs, supra.

32. Pa.—Smith v. Hickman, 14 Pa. Super. 46, 51.

33. Pa.—Smith v. Hickman, supra.
25 C.J. p 1132 note 41.

34. S.C.—Dunbar v. Fant, 170 S.E. 460, 463, 170 S.C. 414, 90 A.L.R. 1412, citing **Corpus Juris.**

35. Conn.—State v. Bulkeley, 23 A. 186, 190, 61 Conn. 287, 14 L.R.A. 657.
Mo.—State v. Crandall, 190 S.W. 889, 893, 269 Mo. 44.

Two meanings of "find" and "finding"

Where a cause is tried by the court, the finding means the facts which the court considers the evidence establishes. The court states such facts which constitute the finding. The jury finds a verdict or an issue in favor of one party or the other without stating any facts, except in a special verdict."—State v. Beloit, 42 N.W. 110, 74 Wis. 267, 269.

36. Mo.—State v. Crandall, 190 S.W. 889, 893, 269 Mo. 44.
S.C.—Dunbar v. Fant, 170 S.E. 460, 463, 170 S.C. 414, 90 A.L.R. 1412, quoting **Corpus Juris.**

word conveys the idea of discovering or ascertaining by search or study or especial effort of any kind;[37] and under particular circumstances, may import the discovery of a fact, as distinguished from the determination of a fact in controversy, as by a referee or arbitrator.[38]

As employed with reference to indictments, see the C.J.S. title Indictments and Informations §§ 24–26, also 31 C.J. p 583 note 19–p 587 note 4.

The term has been held equivalent to, or synonymous with, "apportion" see 6 C.J.S. p 90 note 22, "be of opinion,"[39] "furnish,"[40] "introduce," "procure,"[41] "satisfy,"[42] "think,"[43] and "to the satisfaction of the jury."[44]

Phrases employing the word are set out in the note.[45] Other phrases as to which more recent adjudications have not been found see 25 C.J. p 1132 notes 45–51.

——**Found.** The past participle of "find,"[46] the equivalent of the Latin word "inventus,"[47] and variously defined as meaning chanced upon; fell in with; met with by accident;[48] got at;[49] reached;[50] traced to,[51] in contradistinction to "reside;"[52] also ascertained to lie and be;[53] discovered;[54] perceived;[55] and seen;[56] and, in a somewhat different sense, supplied.[57]

In a particular connection, the word has come to have the meaning of doing business,[58] or being present.[59]

The term has been held equivalent to, or synonymous with, "caught" see 14 C.J.S. p 35 note 54, "detected" see 26 C.J.S. p 1250 note 24, and "produced."[60] It has been distinguished from "brought" see 11 C.J.S. p 1142 note 4, "gotten,"[61] and "transact or transacting business."[62]

For the meaning of the word as used in various statutory provisions relating to jurisdiction and venue see the C.J.S. titles Copyright and Literary Property § 147, Corporations § 1932 b, Courts § 73, Monopolies § 97, also 41 C.J. p 187 note 41–p 188 note 46, and Venue §§ 7, 88–92, also 67 C.J. p 24 notes 17, 18, and p 100 note 98–p 101 note 20; also as used in statutory provisions governing deportation of aliens see Aliens § 94 d (1), in attachment statutes see Attachment §§ 7, 68, 92, and in statutes

37. N.Y.—In re Cashman's Will, 289 N.Y.S. 328, 333, 159 Misc. 881, citing **Corpus Juris.**

38. U.S.—Stonega Coke & Coal Co. v. Price, C.C.A.W.Va., 106 F.2d 411, 418.

39. Tenn.—Woodruff v. State, 51 S.W.2d 843, 847, 164 Tenn. 530.

40. Vt.—Gregory v. Tomlinson, 35 A. 350, 351, 68 Vt. 410.

41. Ind.—Platt v. Johr, 36 N.E. 294, 295, 9 Ind.App. 58.
Mo.—Vigeant v. Fidelity Nat. Bank & Trust Co., App., 158 S.W.2d 184, 189—Low v. Paddock, App., 220 S.W. 969, 972.

42. Ind.—Shoemaker v. Indiana Rys. & Light Co., 133 N.E. 591, 594, 77 Ind.App. 261—Baltimore & O. S. W. R. Co. v. Walker, 84 N.E. 730, 735, 41 Ind.App. 588.

43. Mo.—Iiges v. St. Louis Transit Co., 77 S.W. 93, 95, 102 Mo.App. 529.
S.C.—Pinkussohn v. Great Atlantic and Pacific Tea Co., 192 S.E. 283, 286, 184 S.C. 171.

44. Ind.—Terre Haute Traction & Light Co. v. Payne, 89 N.E. 413, 417, 45 Ind.App. 132.
56 C.J. p 128 note 10 [a].

45. **Phrases construed**
(1) "'Find' mitigating circumstances," as the equivalent of "be of opinion that there were mitigating circumstances."—Woodruff v. State, 51 S.W.2d 843, 847, 164 Tenn. 530.
(2) "Finds he cannot work this lease at a profit."—Stonega Coke & Coal Co. v. Price, C.C.A.W.Va., 106 F.2d 411, 418.
(3) "Finds him guilty," as denoting the action of an executive body after making such inquiries as it deemed sufficient.—Bogadek v. Butkovic, 9 A.2d 388, 390, 336 Pa. 284.
(4) "Find the facts," defined as to determine and declare the facts that have been established by the evidence and characterized as a judicial function.—State v. Halaby, 86 So. 561, 563, 148 La. 1.
(5) "We find that," as distinguished from "it is ordered that."—Shannahan v. U. S., D.C.Ind., 20 F. Supp. 1002, 1004.

46. Mo.—State v. Crandall, 190 S.W. 889, 893, 269 Mo. 44.
To "found" in the sense of establish see Found post.

47. N.Y.—Carter v. Youngs, 42 N.Y.Super. 169, 172.

48. Ont.—McNair v. Collins, 27 Ont. L. 44, 3 Ont.W.N. 1639, 22 Ont.W.R. 891, 6 Dom.L.R. 510, 512.

49. N.Y.—Steinhardt v. Baker, 46 N.Y.S. 707, 709, 20 Misc. 470.

50. N.Y.—Steinhardt v. Baker, supra.

51. Or.—State v. Minnick, 102 P. 605, 607, 54 Or. 86.

52. Nev.—Tiedemann v. Tiedemann, 137 P. 824, 826, 36 Nev. 494.

53. Eng.—Jowett v. Spencer, 1 Exch. 647, 650, 154 Reprint 275.
Ont.—McNair v. Collins, 27 Ont.L. 44, 56, 3 Ont.W.N. 1639, 2 Ont.W.R. 891.

In construction of instrument
The word "found" connotes the ascertainment, in accordance with judicial standards, of the meaning of the language of the conveyor's will or deed.—Am.L.Inst.Restatement, Property § 279 c.

54. Or.—State v. Minnick, 102 P. 605, 607, 54 Or. 86.
25 C.J. p 1132 note 61.

55. Ill.—Chicago v. Atwood, 110 N.E. 127, 128, 269 Ill. 624.

56. Eng.—Attorney General v. Delano, 6 Price 383, 396, 397, 398, 400, 146 Reprint 841.

57. Pa.—Smith v. Hickman, 14 Pa. Super. 46, 52.

58. U.S.—Hansen Packing Co. v. Armour & Co., D.C.N.Y., 16 F.Supp. 784, 786.

59. U.S.—Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co., D.C.Ky., 54 F.2d 107, 108.

60. Ohio.—Tedrow v. Shaffer, 155 N.E. 510, 511, 23 Ohio App. 343.
See also the C.J.S. title Mines and Minerals § 198, and 40 C.J. p 1054 note 37–p 1055 note 43.

61. Eng.—Jowett v. Spencer, 1 Exch. 647, 649, 154 Reprint 275.

62. U.S.—Northern Kentucky Telephone Co. v. Southern Bell Telephone and Telegraph Co., D.C.Ky., 54 F.2d 107, 108—Hansen Packing Co. v. Armour & Co., D.C.N.Y., 16 F.Supp. 784, 786.

governing extradition of fugitives from justice see Extradition §§ 10, 15.

For other references to specific uses see 25 C.J. p 1132 note 56.

Phrases employing the word are set out in the note.[63] Other phrases as to which more recent adjudications have not been found see 25 C.J. p 1133 notes 71–4.

——**Finding.** A word which imports the ascertainment of a fact in a judicial proceeding.[64] Specifically applied, the term is defined as an ascertainment of facts by the court see the C.J.S. titles Equity § 493, and Trial § 609, also 64 C.J. p 1227 notes 10–16, and 25 C.J. p 1133 notes 8–14, or by an administrative board as the result of a hearing;[65] also, in a trial to the jury, a statement by the court in narrative form of the evidence which a party offers and his claims of proof, as distinguished from a determination of facts as such.[66]

In another sense, the term has been held to mean supplying;[67] and, in the garment manufacturing industry, it is used as a verbal noun, usually in the plural, as referring to canvas, buckles, parts of interlinings, buttons, and thread.[68]

In the sense of ascertainment of facts on evidence presented, the term imports definite action,[69] and has been contrasted with "refusal to consider."[70] The term has been sometimes loosely used as interchangeable with "order" and "report;"[71] has been compared with "decision" see Courts § 181 a notes 71–75; and has been distinguished from "minute entry"[72] and "seizing."[73]

For use of the term in bankruptcy appeals see Bankruptcy § 621 b, c, and with respect to findings of the interstate commerce commission in railroad reorganization proceedings see Bankruptcy § 912 notes 91.3–91.5 in Pocket Parts; also as used on hearing for an injunction see the C.J.S. title Injunctions § 199, also 32 C.J. p 366 notes 5–11, and in compensation proceedings see the C.J.S. title Workmen's Compensation Acts §§ 627–637, also 71 C.J. p 1170 note 68–p 1182 note 90.

Phrases employing the word are set out in the note.[74]

63. **Phrases construed**

(1) "Defendant or some one of the defendants shall be found."—Van Alstyne v. Short Line, Inc., 192 A. 479, 480, 58 R.I. 286.

(2) "Found among his valuable papers."
N.C.—In re Stewart's Will, 152 S.E. 685, 686, 198 N.C. 577.
Tenn.—Fransioli v. Podesta, 113 S.W. 2d 769, 774, 21 Tenn.App. 577.

(3) "Found and determined," as compared with "fixed and prescribed."—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

(4) "Found by the owner."—People's Nat. Bank v. Jones, 61 S.W.2d 17, 249 Ky. 468.

(5) "Found, indorsed, and presented."—State v. Johnson, 217 N.W. 205, 208, 52 S.D. 273.

(6) "Found in paying quantities."
Ohio.—Tedrow v. Shaffer, 155 N.E. 510, 511, 23 Ohio App. 343.
Okl.—Pine v. Webster, 246 P. 429, 430, 118 Okl. 12.
W.Va.—South Penn Oil Co. v. Snodgrass, 76 S.E. 961, 966, 71 W.Va. 438.
25 C.J. p 1133 note 80.
See also the C.J.S. title Mines and Minerals § 202, and 40 C.J. p 1063 note 65–p 1064 note 68.

(7) "Found in the soil."—Newhoff Packing Co. v. Sharpe, 240 S.W. 1101, 1103, 146 Tenn. 293.

(8) "Found on defendant's premises."—Nelson v. State, 203 N.W. 343, 345, 186 Wis. 648.

(9) "Found violating any of the provisions of this Act."—State v. Jenkins, 14 S.W.2d 624, 625, 321 Mo. 1237.

64. Me.—Tebbetts v. Tebbetts, 127 A. 720, 722, 124 Me. 262.
Mass.—Garden Cemetery Corporation v. Baker, 105 N.E. 1070, 1072, 218 Mass. 339, Ann.Cas.1916B 75.

65. Pa.—Mulholland v. Unemployment Compensation Board of Review, 20 A.2d 877, 879, 144 Pa.Super. 566—Thomas v. Unemployment Compensation Board of Review, Department of Labor and Industry, 19 A.2d 488, 489, 144 Pa.Super. 369.

66. Conn.—Boardman v. Burlingame, 197 A. 761, 764, 123 Conn. 646—Tuckel v. City of Hartford, 172 A. 222, 224, 118 Conn. 334—Baker v. Paradiso, 169 A. 272, 273, 117 Conn. 539—Peterson v. Meehan, 163 A. 757, 758, 116 Conn. 150—Marks v. Dorkin, 133 A. 915, 916, 104 Conn. 660—State v. Reynolds, 110 A. 844, 845, 95 Conn. 186.

Not a "finding" in the strict sense

"The finding in a case tried to the jury is not in the strict sense a 'finding,' since the jury determine the facts established by the evidence and the finding as made by the court is a fair narrative of what each of the parties offered evidence and claimed to have proved, either by direct evidence or by legitimate inferences, of the occurrences of the trial, of the rulings and claims of law made, and the instruction given the jury by the court."—Marks v. Dorkin, 133 A. 915, 916, 104 Conn. 660.

"Finding" in a trial to the court distinguished

"In a trial to the court, the facts found are the court's best judgment of what the entire evidence establishes. If they stand uncorrected, they settle the ultimate facts. In the case tried to the jury the finding as made does not establish the facts. It is merely a fair statement of the facts claimed to have been proven by each party, and 'made with a sufficient fulness to present the questions sought to be raised by the appeal.'"—Marks v. Dorkin, supra.

67. Eng.—Abbott v. Bates, 45 L.J. C.P. 117, 120.

68. Ind.—Oster v. Department of Treasury, App., 33 N.E.2d 799, 800.

69. W.Va.—Pushia v. State Compensation Com'r, 166 S.E. 695, 696, 113 W.Va. 33.

70. W.Va.—Pushia v. State Compensation Com'r, supra.

71. U.S.—Shannahan v. U. S., D.C. Ind., 20 F.Supp. 1002, 1003.

72. Ariz.—McFadden v. McFadden, 196 P. 452, 453, 22 Ariz. 246.
See also Courts § 226 notes 23–29.

73. Eng.—Attorney-General v. Delano, 6 Price 383, 397, 146 Reprint 841.

74. **"Finding and determination"**

(1) A contemplating something more than merely the reason set forth in the opinion to sustain a decision about to be made.—People ex rel. Central New England Ry. Co. v. State Tax Commission, 26 N.Y.S.2d 425, 429, 261 App.Div. 416.

FINDER OF PROPERTY. See Finding Lost Goods §§ 2–6.

FINDER'S FEE. A sum of money that is paid by a banker to one who brings to him a deal out of which he makes money.[75] It is sometimes referred to a "finder's commission."[76]

FINDING. See Find supra notes 64–74.

(2) Essentially a "final judgment."—Mangani v. Hydro, Inc., 194 A. 264, 265, 119 N.J.Law 71.

"Finding of an ultimate fact"

(1) A conclusion of fact drawn from evidentiary facts.

Ill.—Stevenson v. Earling, 125 N.E. 322, 324, 290 Ill. 565.

N.M.—Porter v. Mesilla Valley Cotton Products Co., 76 P.2d 937, 940, 42 N.M. 217.

(2) A finding of the facts on which the plaintiff's right of recovery or the defendant's right to defeat a recovery necessarily depends.—Gerue v. Medford Bridge Co., 236 N.W. 528, 529, 205 Wis. 68. See also the C.J.S. title Trial § 648, and 64 C.J. p 1276 note 1–p 1277 note 10.

"General finding"

(1) A finding by the court which covers both facts and law.—Talbot v. Talbot, 167 N.E. 535, 538, 91 Ind.App. 333.

(2) Such finding is a finding of every special thing necessary to support it.—Miller v. Thompson, 194 P. 103, 105, 80 Okl. 70.

(3) It includes a special finding on every fact necessary to support a general judgment.—Fry v. Wolfe, 234 P. 191, 193, 106 Okl. 289.

Other phrases construed

(1) "Finding entry," as neither a "judgment" nor a "final order."—In re Wuichet's Estate, 34 N.E.2d 804, 805, 66 Ohio App. 429.

(2) "Finding of fact" see the C.J.S. titles Appeal and Error § 980, Equity § 493, and Trial §§ 609, 647, also 64 C.J. p 1227 notes 12–16, and p 1273 note 1–p 1275 note 85.

(3) "Finding of law," as meaning a finding of the trial court on undisputed facts.—Bowen v. Gradison Const. Co., 32 S.W.2d 1014, 1020, 236 Ky. 270.

(4) "Finding of the money inclosed."—Keron v. Cashman, N.J.Ch., 33 A. 1055, 1056.

(5) "Finding of value."—Taylor v. Standard Gas & Electric Co., C.C.A. Okl., 96 F.2d 693, 706.

(6) "Finding or producing a purchaser."—Baars v. Hyland, 67 N.W. 1148, 1149, 65 Minn. 150.

(7) "Findings made by court."—Easterly v. Cook, 35 P.2d 164, 168, 140 Cal.App. 115.

(8) "Special finding," as a finding by the court limited to facts.—Talbot v. Talbot, 167 N.E. 535, 538, 91 Ind.App. 333.

75. U.S.—Cray, McFawn & Co. v. Hegarty, Conroy & Co., D.C.N.Y., 27 F.Supp. 93, 97.

76. **"A kind of commission** as to which there is no percentage fixed by custom. In the absence of any agreement thereon, the percentage allowed to the finder depends on how much work is done by him and what his position is in the deal vis-a-vis the persons with whom the banker is negotiating it."—Cray, McFawn & Co. v. Hegarty, Conroy & Co., supra.

FINDING LOST GOODS

This Title includes the finding and taking possession of lost goods of another, whereby the finder may acquire title thereto; nature, requisites, and incidents of such finding and possession; and rights, duties, and liabilities of finders of lost goods as to the owners or losers and as to others in general.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

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§ 1. Definitions and General Principles

Personal property is lost in the legal sense only when it is casually and involuntarily parted with. If it is voluntarily laid down and forgotten, or if it is in another's possession, it is not lost. The place where property claimed as lost was found is important in determining that question. Treasure-trove is any gold or silver in coin, plate, or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of which is unknown.

Goods or chattels are lost in the legal sense of the word only when the possession has been casually and involuntarily parted with,[1] so that the mind has no impress of, and can have no recourse to, the event.[2] A thing voluntarily laid down and forgotten is not lost within the meaning of the rule giving the finder title to lost property.[3] Although as a general rule the title and right to possession of the finder are not affected by the ownership of the property in or on which the thing lost is found, see infra § 5 c (1), in determining whether property has been lost or only misplaced or concealed, the place

1. Ala.—Automobile Ins. Co. of Hartford, Conn., v. Kirby, 144 So. 123, 124, 25 Ala.App. 245, quoting **Corpus Juris.**
Ga.—Groover v. Tippins, 179 S.E. 634, 635, 51 Ga.App. 47, quoting **Corpus Juris.**
N.Y.—Foulke v. New York Consol. R. Co., 127 N.E. 237, 228 N.Y. 269, 9 A.L.R. 1384, affirming 168 N.Y.S. 72, 180 App.Div. 848.
Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 663, 52 Ohio App. 373, citing **Corpus Juris.**
25 C.J. p 1134 note 1.

Money

Twenty dollar bill which passenger found on street car floor was held lost property.—Cleveland Ry. Co. v. Durschuk, 166 N.E. 909, 31 Ohio App. 248.

Stolen property

When property is stolen and then abandoned or hid by the thief at a place unknown to the owner, such property is "lost" within statutes relating to finding of lost property.
Ala.—Automobile Ins. Co. of Hartford, Conn. v. Kirby, 144 So. 123, 25 Ala.App. 245.
Iowa.—Flood v. City Nat. Bank of Clinton, 253 N.W. 509, 218 Iowa 898.

2. Ala.—Automobile Ins. Co. of Hartford, Conn. v. Kirby, 144 So. 123, 124, 25 Ala.App. 245, quoting **Corpus Juris.**
Ga.—Groover v. Tippins, 179 S.E. 634, 635, 51 Ga.App. 47, quoting **Corpus Juris.**
Or.—Ferguson v. Ray, 77 P. 600, 44 Or. 557, 564, 102 Am.S.R. 648.
"Losing" distinguished from "abandonment" see Abandonment § 2 b (5).

3. Ga.—Groover v. Tippins, 179 S.E. 634, 635, 51 Ga.App. 47, quoting **Corpus Juris.**
Mo.—State ex rel. Scott v. Buzard, 144 S.W.2d 847, 235 Mo.App. 636.
N.Y.—Foulke v. New York Consol. R. Co., 127 N.E. 237, 228 N.Y. 269, 9 A.L.R. 1384, affirming 168 N.Y.S. 72, 180 App.Div. 848.
25 C.J. p 1135 note 3.

Discovery of article voluntarily laid down

(1) Where wrecking company purchased residence building and, during process of removal, part of wall fell, revealing metal box containing valuables, assignee of employee who found the box was not entitled to possession of contents as "lost property," irrespective of whether wrecking company was owner of building or merely in possession.—State ex rel. Scott v. Buzard, 144 S.W.2d 847, 235 Mo.App. 636.

(2) For other cases see 25 C.J. p 1135 note 3 [b].

in which the property claimed as lost was found is a potent factor.[4] Property in someone's possession cannot be found in the sense of the law of lost property;[5] thus, if the article is in the possession and protection of the owner of the place where it is found, it is not lost in the legal sense.[6] If the chattel is discovered in a public or semipublic place where the public generally is invited and expected to be, the proprietor of the premises occupies no relationship of agent or fiduciary toward the owner, which prevents its being considered a lost article,[7] but, where it is found in a private place, where only a limited class of people have the right to be, or can be, and that class is composed of the customers of the owner of the premises, who has the duty of preserving the property of his customers, it is in the constructive custody of the owner of the premises.[8]

Treasure-trove. At common law a distinction was made between lost property and treasure-trove.[9] "Treasure-trove" is usually defined as any gold or silver in coin, plate, or bullion found concealed[10] in the earth,[11] or in a house or other private place,[12] but not lying on the ground,[13] the owner of the discovered treasure being unknown.[14] If the owner of the property is known, or if it can be ascertained who is the owner, the property is not treasure-trove.[15] It seems to be generally considered that the treasure must be either gold or silver, coin or bullion;[16] but treasure-trove has been held to include paper representatives of gold and silver, especially when they are found hidden with both of these precious metals.[17]

§ 2. Title and Rights of Finder

The finder does not obtain absolute title to the lost property. To obtain any title or rights he must appropriate the property and not merely intend to do so. In many jurisdictions the rights of finders of lost property are controlled by express statutory provisions.

In general absolute title to personal property that is lost is not vested in the finder.[18]

Appropriation. The mere fact of finding is not sufficient to vest in the finder any right or title to the thing found, although he may at the time have intended to appropriate it; his title as such finder may become complete only when he has taken such possession of the thing as its nature and circumstances will permit.[19]

Statutory provisions. The rights and duties of a finder of lost goods are now generally regulated by statutes which provide, inter alia, for the advertisement of the goods found, and that, if the owner does not appear within a certain time, they shall belong absolutely to the finder, or partly to the finder and partly to some public fund; and in some jurisdictions the right is given exclusively to the public,

4. Ky.—Silcott v. Louisville Trust Co., 265 S.W. 612, 205 Ky. 234, 43 A.L.R. 28.
W.Va.—Kuykendall v. Fisher, 56 S. E. 48, 61 W.Va. 87, 8 L.R.A.,N.S., 94, 11 Ann.Cas. 700.

5. Mo.—Foster v. Fidelity Safe Deposit Co., 145 S.W. 139, 162 Mo. App. 165.
25 C.J. p 1135 note 6.

6. Ky.—Silcott v. Louisville Trust Co., 265 S.W. 612, 205 Ky. 234, 43 A.L.R. 28.
25 C.J. p 1135 note 7.
Things imbedded in soil generally see infra § 5 c (2).

Constructive possession
Where liberty bond was found by renter of safety vault box on floor of private room of safety vault department of trust company, to which only patrons of that department were admitted, trust company's right to custody of bond was superior to that of finder, trust company being agent of its customers, and occupying fiducial relationship, although owner was unknown.—Silcott v. Louisville Trust Co., supra.

7. Ky.—Silcott v. Louisville Trust Co., supra.
Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 52 Ohio App. 373.

Bank lobby
Money found by bank employee in bank lobby leading to safety deposit department and other offices into which there was entrance only through electrically-operated door, which was used by number of persons who were not customers of safety deposit department, was held "lost property."—Toledo Trust Co. v. Simmons, supra.

8. Ky.—Silcott v. Louisville Trust Co., 265 S.W. 612, 205 Ky. 234, 43 A.L.R. 28.

9. Or.—Danielson v. Roberts, 74 P. 913, 44 Or. 108, 102 Am.S.R. 627, 65 L.R.A. 526.
Merger of law relating to treasure-trove with law relating to lost property found see infra § 5 a.

10. Ga.—Groover v. Tippins, 179 S. E. 634, 51 Ga.App. 47.

Determining characteristic
It is the hiding, and not the losing or abandoning, of property which gives it its characteristic as treasure-trove.—Groover v. Tippins, supra—25 C.J. p 1135 note 11 [b].

11. Ga.—Groover v. Tippins, supra.
Ind.—Vickery v. Hardin, 133 N.E. 922, 77 Ind.App. 558.
25 C.J. p 1135 note 9.

12. Ga.—Groover v. Tippins, 179 S. E. 634, 51 Ga.App. 47.
Ind.—Vickery v. Hardin, 133 N.E. 922, 77 Ind.App. 558.
25 C.J. p 1135 note 10.

13. Ga.—Groover v. Tippins, 179 S. E. 634, 51 Ga.App. 47.
Ind.—Vickery v. Hardin, 133 N.E. 922, 77 Ind.App. 558.
25 C.J. p 1135 note 11.

14. Ga.—Groover v. Tippins, 179 S. E. 634, 51 Ga.App. 47.
Ind.—Vickery v. Hardin, 133 N.E. 922, 77 Ind.App. 558.
25 C.J. p 1136 note 12.

15. Ga.—Groover v. Tippins, 179 S. E. 634, 51 Ga.App. 47.
25 C.J. p 1136 note 13.

16. Ind.—Vickery v. Hardin, 133 N. E. 922, 77 Ind.App. 558.
25 C.J. p 1136 note 14.

17. Iowa.—Zornes v. Bowen, 274 N. W. 877, 223 Iowa 1141.
Pa.—Huthmacher v. Harris, 38 Pa. 491, 499, 80 Am.D. 502.

18. Ark.—Crosson v. Lion Oil & Refining Co., 275 S.W. 899, 169 Ark. 561, 42 A.L.R. 574.

19. Ark.—Eads v. Brazelton, 22 Ark. 499, 79 Am.D. 88.
25 C.J. p 1136 note 17.

making an allowance to the finder of his necessary expenses and costs.[20]

§ 3. —— Against Owner or His Representative Generally

The finder of lost property or treasure-trove is not entitled thereto as against the true owner. If the true owner is deceased, the finder of lost property is not entitled thereto as against the owner's personal representative, but the finder of treasure-trove has been held to have title as against the heirs of the original owner.

The finder is only the apparent general owner of the thing found, under an uncertain or contingent title which may be defeated by the discovery of the true owner;[21] the owner and loser's title is unaffected by the mere fact that his chattel has been lost.[22] Before a perfect title accrues to the finder, it is necessary that the true owner should have completely relinquished and abandoned his title,[23] although, as appears infra § 8 a (1), the finder's inchoate title is sufficient to maintain trover thereon against everyone except the true owner. Since the finder acquires no title to the goods found, as against the true owner, he can transmit none to any other person;[24] but, if the thing found is of a perishable nature, he may sell it and retain the proceeds for the owner, in case he shall be found.[25] If the true owner dies before his title and right to the lost chattel are discovered, his personal representative has the same right over the lost chattel as he has over other property of decedent's estate.[26]

Treasure-trove. The finder of treasure-trove is not entitled thereto as against the true owner;[27] but the heirs of a person who secreted treasure-trove have been held not entitled thereto as against the finder.[28]

§ 4. —— Right to Compensation and Lien Therefor

The finder of goods is entitled to recover from the owner the necessary and reasonable expenses incurred in the successful recovery and preservation of the goods, but he has no lien therefor. Under some statutes a reward is also provided for.

The finder of lost goods is entitled to recover from the owner his necessary and reasonable expenses incurred in the successful recovery and preservation of the goods,[29] and perhaps for his time and trouble,[30] but he has no lien therefor,[31] and he

20. N.Y.—Garramone v. Simmons, 30 N.Y.S.2d 465, 177 Misc. 330.
25 C.J. p 1136 note 16.

Effect of statute applicable to stolen property

Under statute providing for sale of unclaimed stolen property, property clerk of police department of city of New York had no authority to accept deposit and maintain possession of lost property for period of six months.—Garramone v. Simmons, supra.

21. Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 52 Ohio App. 373.
25 C.J. p 1139 note 57.

Subject to owner's claim

Lost property becomes the property of the finder, subject to the superior claim of the owner.—Crosson v. Lion Oil & Refining Co., 275 S.W. 899, 169 Ark. 561, 42 A.L.R. 574.

Right of carrier to forfeit ticket lost by original owner when presented by stranger see Carriers § 608.

22. Kan.—Dougherty v. Norlin, 78 P. 2d 65, 147 Kan. 565.
Mo.—Metzger v. Columbia Terminals Co., 50 S.W.2d 680, 227 Mo.App. 135.
N.C.—Stricker v. Buncombe County, 172 S.E. 188, 205 N.C. 536.
25 C.J. p 1139 note 58.

Canceled currency

One who allegedly found gold certificate which, after cancellation, had been removed by persons unknown from records of the general accounting office of the United States, had no property right therein as against the United States as the actual owner, and hence federal reserve bank to which certificate was presented by finder with object of securing payment properly returned it to the general accounting office.—Gross v. Federal Reserve Bank of Cleveland, D.C.Ohio, 29 F.Supp. 1005.

Oil

Oil which escaped from pipe line of plaintiff and flowed onto land occupied by defendants, and which was there impounded by them in a pit dug for that and other purposes, was held still to remain property of plaintiff, where it was not voluntarily allowed to escape, and plaintiff asserted its claim as soon as it ascertained that oil had escaped and was in possession of defendants.—Crosson v. Lion Oil & Refining Co., 275 S.W. 899, 169 Ark. 561, 42 A.L.R. 574.

Stolen property

Money lost by theft is still property of owner.—Flood v. City Nat. Bank of Clinton, 253 N.W. 509, 218 Iowa 898.

23. La.—Eastman v. Harris, 4 La. Ann. 193.
25 C.J. p 1139 note 59.
What constitutes abandonment see Abandonment § 3.

24. N.Y.—New York & H. R. Co. v. Haws, 56 N.Y. 175.
Title of finder or of purchaser from finder of negotiable instrument see Bills and Notes § 507.

25. Ohio.—Millcreek Tp. v. Brighton Stockyards Co., 27 Ohio St. 435.

26. Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167.
Pa.—Warren v. Ulrich, 18 A. 618, 130 Pa. 413.
25 C.J. p 1139 note 63.

Paper money concealed in bag

Where traveling bag in which deceased had concealed gold certificates had been sold after his death, buyer and his wife, who found certificates knowing they had belonged to deceased, acquired no interest by virtue of finding certificates, and administrator was entitled to recover.—Baugh v. Williams' Adm'r, 94 S.W. 2d 330, 264 Ky. 167.

27. Ga.—Groover v. Tippins, 179 S.E. 634, 51 Ga.App. 47.

28. Ind.—Vickery v. Hardin, 133 N. E. 922, 77 Ind.App. 558.

29. N.C.—Meekins v. Simpson, 96 S. E. 894, 176 N.C. 130.
25 C.J. p 1140 note 76.

Storage fee

The finder of a lost automobile who took possession thereof is entitled to a reasonable storage fee.—Automobile Ins. Co. of Hartford, Conn. v. Kirby, 144 So. 123, 25 Ala. App. 245.

30. Ky.—Reeder v. Anderson, 4 Dana 193.

31. Mich.—Wood v. Pierson, 7 N.W. 888, 45 Mich. 313.
25 C.J. p 1140 note 78.

cannot pay himself for his expense and trouble by using the property for that purpose;[32] nor, as appears in the C.J.S. title Rewards § 31, also 54 C.J. p 796 notes 30–32, in the absence of statute so providing, is the finder of lost property entitled to a reward for finding it if none has been offered. The fact that the finder was caring for like goods is no obstacle to his recovery for services and expenses, if such services and expenses can be ascertained.[33]

Under statutes. Some statutes specifically provide that the finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it.[34] Such statutes have been held valid.[35] They are not inconsistent with statutes providing for the restoration to the owner of the property by the finder, or providing that a finder who knows the owner is guilty of larceny if he appropriates the goods.[36] They are enacted for the laudable purpose of aiding people to find lost property, and must be considered beneficial. In effect they declare it to be the public policy of the state for the good and welfare of its citizens to provide a reward to the finder of lost goods, and in effect allow a compensation for such finding and fix the reasonable value of such services.[37]

§ 5. —— Against Third Persons

a. In general
b. As affected by character of thing found
c. As affected by place of finding
d. Relation of finder to third person
e. Subsequent finder
f. Bailee

a. In General.

In general the finder of a lost chattel not buried in, or attached to, the soil, or the finder of treasure-trove, acquires title thereto and the right to possession as against all except the true owner.

By the general rule of the common law one who finds and appropriates a lost chattel not buried in, or attached to, the soil acquires the title thereto and the right to possession thereof against all the world except the true owner.[38] Under some statutes, however, if the true owner does not appear and claim the property within a certain period after publication of the finding of the article, the finder is entitled to only a specified portion of the property, the state, or some division or agency thereof, being entitled to the other portion.[39]

Treasure-trove. By the early common law the finder of treasure-trove took title thereto against all the world, except the true owner,[40] but by the statute of 4 Edward I the title to treasure-trove was vested in the crown, subject to the claims of the true owner.[41] It has been stated that in this country the law relating to treasure-trove has generally been merged into the law relating to lost property found;[42] but there is authority which seems to hold that the old law of treasure-trove is not merged in the statutory law relating to lost property.[43] In either case, in the absence of statute providing to the contrary the title to treasure-trove belongs to the finder as against all the world except the true owner;[44] and as between the true owner of the prop-

Lien for reward see the C.J.S. title Rewards § 31, also 54 C.J. p 797 notes 39–44.

32. Or.—Watts v. Ward, 1 Or. 86, 62 Am.D. 299.

33. Mont.—Kirk v. Smith, 138 P. 1088, 48 Mont. 489.

34. Iowa.—Flood v. City Nat. Bank of Clinton, 253 N.W. 509, 218 Iowa 898.
Mont.—Kirk v. Smith, 138 P. 1088, 48 Mont. 489.

35. Iowa.—Flood v. City Nat. Bank of Clinton, 253 N.W. 509, 218 Iowa 898.
Validity as to national banks of statute providing for reward in favor of finder of lost goods see Banks and Banking § 567.

36. Iowa.—Flood v. City Nat. Bank of Clinton, supra.

37. Iowa.—Flood v. City Nat. Bank of Clinton, 263 N.W. 321, 220 Iowa 935, certiorari denied City Nat. Bank of Clinton, Iowa v. Flood, 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390.
Knowledge of owner
As regards right of finder of lost goods to statutory reward, it is immaterial whether he knew who owner of property was.—Flood v. City Nat. Bank of Clinton, 253 N.W. 509, 218 Iowa 898.

38. U.S.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.
N.Y.—Garramone v. Simmons, 30 N.Y.S.2d 465, 177 Misc. 330.
N.C.—Stricker v. Buncombe County, 172 S.E. 188, 205 N.C. 536.
Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 663, 52 Ohio App. 373, citing **Corpus Juris**—Cleveland Ry. Co. v. Durschuk, 166 N.E. 909, 31 Ohio App. 248.
25 C.J. p 1136 note 21.
Chattels buried in, or attached to, soil see infra § 5 c (2).
Necessity of appropriation see supra § 2.

39. Or.—Sovern v. Yoran, 20 P. 100, 16 Or. 269, 8 Am.S.R. 273.

40. Ga.—Groover v. Tippins, 179 S.E. 634, 51 Ga.App. 47.
25 C.J. p 1137 note 26.

41. Ga.—Groover v. Tippins, supra.
25 C.J. p 1137 note 27.
General law of nations
This seems to have been the general rule of law of nearly all nations.—Livermore v. White, 74 Me. 452, 43 Am.R. 600—25 C.J. p 1137 note 28.

42. Or.—Danielson v. Roberts, 74 P. 913, 44 Or. 108, 102 Am.S.R. 627, 65 L.R.A. 526.
25 C.J. p 1137 note 31.

43. Iowa.—Zornes v. Bowen, 274 N.W. 877, 223 Iowa 1141.
25 C.J. p 1136 note 16 [b].

44. Ga.—Groover v. Tippins, 179 S.E. 634, 51 Ga.App. 47.
Ind.—Vickery v. Hardin, 133 N.E. 922, 77 Ind.App. 558.
Iowa.—Zornes v. Bowen, 274 N.W. 877, 223 Iowa 1141.
25 C.J. p 1137 note 32.

erty and the state, the state has no claim to treasure-trove.[45]

b. As Affected by Character of Thing Found

In general the character of the thing found does not affect the title of the finder.

In general the rule that the finder of a lost chattel has title thereto against all the world except the true owner is not affected by the character of the thing found.[46] However, under some decisions this does not include choses in action;[47] but banknotes, etc., which, although not money in a strict sense, ordinarily pass as such by delivery from hand to hand, are subject to the same rules as other chattels when they are lost by the owner, that is to say, the finder acquires a complete title as against all the world except the former owner by whom they were lost.[48]

c. As Affected by Place of Finding

(1) In general
(2) Thing imbedded in, or attached to, soil

(1) In General

The title and right to possession of the finder of lost property are not affected by the ownership of the property in or on which it is found, except where the place it is found is such that the article found is in law considered in the constructive possession of the owner of the premises and, therefore, not legally a lost article.

As a general rule the title and the right to possession of the finder are not affected by the ownership of the property in or on which the thing lost is found,[49] unless it is imbedded in, or attached to, the soil, considered infra § 5 c (2). This rule is applicable where the chattel is found in a public or semipublic place, that is, one to which the public generally is invited, or such other place that the owner of the premises is not considered as owing a duty to preserve the property for its owner.[50] Thus, if a lost article is found on the surface of the ground,[51] in the public parlor of a hotel,[52] near a table at an open-air place of amusement,[53] or in a vehicle[54] or the car of a railroad or street railroad,[55] it becomes, except as against the loser, the property of the finder who appropriates it, without any reference to the ownership of the property in or on which the article was found or from which it was taken. So, too, if the thing lost is found within a chattel transferred by sale, the finder takes title to the thing found unaffected by the property rights of the purchaser of the chattel[56] for, unless the purchaser of the chattel had knowledge, when he made his purchase, of the thing contained therein, no title to the thing found passed to him by the sale.[57] However, if the chattel is found in a place such that the owner of the premises is considered in constructive possession or custody of it, even though he had no knowledge of it, and it is, therefore, not a lost article in the legal sense, see supra § 1, the owner of the premises where the chattel is found has the right to the possession of the article as against the finder thereof.[58] Thus, if the thing is voluntarily laid down on a table, counter, or other place and forgotten, or if it is found in such a place and under such circumstances that it appears to have been voluntarily laid down and forgotten, the owner of the shop,[59] bank,[60] or other place[61] where the thing has been left is the proper custodian rather than the person who has discovered it and rather than all other persons except the owner.

(2) Thing Imbedded in, or Attached to, Soil

Chattels buried in, or attached to, the soil belong to the owner of the land as against the finder, unless the article is treasure-trove, in which case it belongs to the finder.

If a chattel is buried or imbedded in the soil and

45. Or.—Sovern v. Yoran, 20 P. 100, 16 Or. 269, 8 Am.S.R. 273.
25 C.J. p 1137 note 30.

46. U.S.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.

47. N.Y.—McLaughlin v. Waite, 5 Wend. 404, 21 Am.D. 232, affirming 9 Cow. 670.
25 C.J. p 1137 note 33.

48. Va.—Tancil v. Seaton, 28 Gratt. 601, 69 Va. 601, 26 Am.R. 380.
25 C.J. p 1137 note 34.

49. U.S.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.
Ga.—Groover v. Tippins, 179 S.E. 634, 51 Ga.App. 47.
25 C.J. p 1137 note 36.

50. Ky.—Silcott v. Louisville Trust Co., 265 S.W. 612, 205 Ky. 234, 43 A.L.R. 28.

51. N.Y.—Burdick v. Chesebrough, 88 N.Y.S. 13, 94 App.Div. 532.
25 C.J. p 1137 note 37.

52. Pa.—Hamaker v. Blanchard, 90 Pa. 377, 35 Am.R. 664.

53. Mo.—Hoagland v. Forest Park Highlands Amusement Co., 70 S.W. 878, 170 Mo. 335, 94 Am.S.R. 740.

54. U.S.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.

55. Ohio.—Cleveland Ry. Co. v. Durschuk, 166 N.E. 909, 31 Ohio App. 248.
25 C.J. p 1138 note 41.

56. Ind.—Bowen v. Sullivan, 62 Ind. 281, 30 Am.R. 172.
25 C.J. p 1138 note 42.

57. Pa.—Huthmacher v. Harris, 38 Pa. 491, 80 Am.D. 502.

58. Ky.—Silcott v. Louisville Trust Co., 265 S.W. 612, 205 Ky. 234, 43 A.L.R. 28.

59. Mass.—McAvoy v. Medina, 11 Allen 548, 87 Am.D. 733.
25 C.J. p 1137 note 23.

60. Mo.—Foster v. Fidelity Safe Deposit Co., 145 S.W. 139, 162 Mo. App. 165.
25 C.J. p 1137 note 24.

Safety vault
Safety vault company in whose private rooms chattel was found is the proper custodian of the article as against the person who discovered it.—Silcott v. Louisville Trust Co., 265 S.W. 612, 205 Ky. 234, 43 A.L.R. 28.

61. Mo.—Hoagland v. Forest Park Highlands Amusement Co., 70 S.W. 878, 170 Mo. 335, 94 Am.S.R. 740.

does not belong to that class of chattels which when so found should be considered treasure-trove, see supra § 1, title is in the owner of the soil, unless in some instances at least, the depositor owner is known.[62] Such a chattel becomes a part of the soil and passes by gift, sale, or descent of the real property as a part thereof.[63]

Honey in tree. A person who finds a swarm of bees in a tree on another's land is not entitled to the honey as against the owner of the land.[64]

Treasure-trove. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land.[65]

d. Relation of Finder to Third Person

Ordinarily the title and right of possession of the finder of a lost chattel are not affected by his relation to the owner of the place where it was found. Police officers are not entitled to lost property which they find.

The title and right of possession of the finder of a lost chattel are not ordinarily affected by the relation of the finder to the owner of the place where the lost article was found.[66] It has generally been held that, where the finder stands in the relation of servant or employee to a third person, he is not, by virtue of such relation, deprived of his rights as finder, and that the master or employer has no right to the thing found, although it was found on his premises while the finder was engaged in the performance of the duties of his employment.[67] However, it has been held that, where a servant, while engaged in the performance of his duties as such, found an article which had been lost on his master's premises, the master, and not the servant, was entitled to the thing so found.[68]

Police officer. It has been held that a police officer who finds lost property is not entitled thereto as against the city or other governmental agency employing him, even though there is no ordinance or general law governing the matter;[69] and this is particularly true where the rules and regulations of the police force of which he is a member require that lost property found by a member of the force shall be turned over to a specified person, and, if unclaimed, sold, and the proceeds paid into a specified fund.[70]

e. Subsequent Finder

The first finder of a lost chattel has a superior title to that of a subsequent finder.

It is a necessary consequence of the general rule as to the title of the finder of a lost chattel, see supra § 5 a, that the first finder who appropriates the chattel found and then loses it has a superior title to that of a subsequent finder, against whom the first finder's rights can be enforced.[71]

f. Bailee

A finder of a lost article, if it is unclaimed by the true owner, may recover it from a third person to whom he delivered it to be kept for the owner, or for the finder if the owner did not claim it, unless the bailee discovers that the finder intends wrongfully to convert the article.

Where the finder of a lost article has delivered it to a third person to be kept for the owner, or for the finder in case the owner does not claim it, the finder, on the refusal of the bailee to return the article, may recover it, if no claim has in the meantime been made by the true owner.[72] However, where a bailee of a finder ascertains that the finder has the intention wrongfully to convert the property to his own use, it becomes the duty of the bailee to retain it until the owner can be found.[73]

62. Ga.—Groover v. Tippins, 179 S. E. 634, 51 Ga.App. 47.
N.Y.—Burdick v. Chesebrough, 88 N. Y.S. 13, 94 App.Div. 532.
25 C.J. p 1138 notes 46, 48.

63. N.Y.—Burdick v. Chesebrough, 88 N.Y.S. 13, 94 App.Div. 532.

64. N.H.—Fisher v. Steward, Smith 60.

65. Ga.—Groover v. Tippins, 179 S.E. 634, 51 Ga.App. 47.
Ind.—Vickery v. Hardin, 133 N.E. 922, 77 Ind.App. 558.
Iowa.—Zornes v. Bowen, 274 N.W. 877, 223 Iowa 1141.
Or.—Danielson v. Roberts, 74 P. 913, 44 Or. 108, 102 Am.S.R. 627, 65 L.R.A. 526.
25 C.J. p 1138 note 50.
"Treasure-trove" defined see supra § 1.

66. U.S.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.

67. Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 663, 52 Ohio App. 373, citing **Corpus Juris.**
25 C.J. p 1138 note 51.
Bank employee who found property in semi-public part of bank was entitled to such property as against the bank.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 52 Ohio App. 373.

68. N.Y.—McDowell v. Ulster Bank, 60 Alb.L.J. 346.
25 C.J. p 1138 note 52.

69. Cal.—Noble v. City of Palo Alto, 264 P. 529, 89 Cal.App. 47.

70. N.Y.—Majewski v. Farley, 196 N.Y.S. 508, 203 App.Div. 77.
Condition of membership
Compliance by a policeman with such rules and regulations is a condition of his membership in the force, and by joining and remaining on the force he relinquishes any right he otherwise might have to claim lost property found by him.—Majewski v. Farley, supra.
Off duty
Such rules apply, even though the policeman finding the property is off duty or not in uniform at the time, for his powers, duties, rights, and responsibilities still attach to him.—Majewski v. Farley, supra.

71. Tenn.—Deaderick v. Oulds, 5 S. W. 487, 86 Tenn. 14, 6 Am.S.R. 812.
25 C.J. p 1139 note 54.

72. N.Y.—Garramone v. Simmons, 30 N.Y.S.2d 465, 177 Misc. 330.
Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 52 Ohio App. 373.
25 C.J. p 1139 note 55.

73. Mo.—Lavelle v. Belliu, 97 S.W. 200, 121 Mo.App. 442.

§ 6. —— Joint Finders

Joint finders of lost property take title thereto in common.

If a lost chattel is discovered by two or more persons under circumstances which fairly show that it was found by all, the finders take a qualified title in common.[74]

§ 7. Duties and Liabilities of Finder to Owner

a. In general
b. Care and custody of property

a. In General

The finder of a chattel, if he exercises his option to possess it, should restore it to its owner if he is known, and if he is unknown, should follow any procedure required by statute for discovering the owner. Reasonable opportunity to inspect the property for purposes of identification should be granted a person claiming it as owner.

It is entirely at the option of the finder of lost property whether he will or will not take possession of it;[75] if he does he should restore it to its owner,[76] and he should, in the absence of knowledge as to who the true owner is, follow any procedure required by statute for discovering the owner.[77] It seems that the finder is bound to give to one who claims as owner a fair and just opportunity, dependent on the circumstances of the case, to inspect the property found for the purpose of identification.[78]

b. Care and Custody of Property

The finder of lost property who takes possession of it assumes the duties of a bailee without compensation.

The finder of lost property who takes possession of it assumes the duties of a bailee [79] without compensation.[80] One who voluntarily assumes the duty of such finder also holds as bailee for the owner.[81] One who has found an article and assumed possession of it is bound to exercise only slight diligence, and is responsible only for gross neglect.[82]

§ 8. Actions by or against Owner or Finder

a. Right and form
b. Pleading
c. Evidence
d. Trial
e. Measure of recovery

a. Right and Form

(1) By finder
(2) By true owner

(1) By Finder

The finder of lost property or treasure-trove may protect his rights by action against anyone who infringes on them.

The finder may protect his rights by an action against anyone who infringes on them.[83] He may defend the property against all others than the true owner with every remedy which is available to a bailee.[84] At common law he has a special property in the thing found sufficient to enable him to main-

74. N.J.—Keron v. Cashman, Ch., 33 A. 1055.
25 C.J. p 1139 note 64.

75. N.Y.—Murgoo v. Cogswell, 1 E. D.Smith 359.

76. Ala.—Cotton v. Harris Transfer & Warehouse Co., 106 So. 220, 21 Ala.App. 136, certiorari denied Ex parte Harris Transfer & Warehouse Co., 106 So. 223, 214 Ala. 6.
25 C.J. p 1139 note 65, p 1136 note 16 [c].

77. N.H.—Jones v. Smyth, 18 N.H. 119.
25 C.J. p 1139 note 66, p 1136 note 16 [a] (2).

Deposit with governmental agency

(1) Under penal code provision penalizing finder who, having knowledge or means of inquiry as to true owner of lost property, appropriates such property to his own use, and administrative code provision relating to lost property, a finder of lost property is not required to deposit such property with police department to enable true owner to be located through such agency, and, even under amendment to administrative code, has only duty to report the finding to the police department.—Garramone v. Simmons, 30 N.Y.S.2d 465, 177 Misc. 330.

(2) Under administrative code provision dealing with registering and advertising stolen property, property clerk of the police department of the city of New York had no authority to require finder of a diamond to deposit it with him to enable the police department to locate the true owner, notwithstanding title of statute reads "unclaimed, lost or stolen property to be registered and advertised."—Garramone v. Simmons, supra.

Effect of custom

The custom of depositing lost property with the property clerk of the police department of the city of New York for the purpose of advertising for the true owner could not be invoked to take the place of statutes which do not require that lost articles be deposited with the property clerk.—Garramone v. Simmons, supra.

78. Mich.—Wood v. Pierson, 7 N.W. 888, 45 Mich. 313.

79. Wis.—Burns v. State, 128 N.W. 987, 145 Wis. 373, 140 Am.S.R. 1081.
Liability of bailees in general see Bailments §§ 22–40.

80. N.C.—Meekins v. Simpson, 96 S. E. 894, 176 N.C. 130.

81. Wis.—Burns v. State, 128 N.W. 987, 145 Wis. 373, 140 Am.S.R. 1081.

82. Iowa.—Daugherty v. Posegate, 3 Iowa 88.
25 C.J. p 1140 note 72.

83. N.Y.—New York & H. R. Co. v. Haws, 35 N.Y.Super. 372, reversed on other grounds 56 N.Y. 175.
25 C.J. p 1140 note 83.

Summary proceeding in federal court

Federal court was held justified in dealing with summary proceeding for return of money to taxicab driver as finder, after government's use thereof as exhibit in criminal case on its merits.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.

84. U.S.—In re Savarino, supra.

tain trover for its conversion against anyone except the true owner.[85] Thus a first finder may maintain trover against a subsequent finder,[86] and, where each of several joint finders of treasure-trove consisting of coins is entitled to the possession of an equal share of the coins, if one joint finder having possession of all the coins refuses to surrender to the others their respective shares, each of such other joint finders may maintain an action of trover against him.[87] Where the finder of money has delivered it to a third person to be kept for the owner, or for the finder in case the owner does not claim it, on the refusal of the third person to return it, the finder may protect his rights by an action against the bailee to recover the money.[88]

(2) By True Owner

The true owner may enforce his rights against the finder by trover, replevin, or, if the property lost was money, or if it was converted into money, by an action for money had and received.

The true owner may enforce his rights against the finder by trover[89] or replevin,[90] or, if it was money that was lost,[91] or if he seeks to recover the proceeds from the finder's sale and conversion of the property,[92] he may bring an action against the finder for money had and received. However, the finder may retain possession of the property until the owner furnishes proof of his ownership, and for doing this he is not liable as for conversion.[93] The owner's right of action for property for the return of which he has offered a reward is not defeated by neglect to tender the reward.[94]

b. Pleading

The general rules of pleading are applicable.

In accordance with the general rules of pleading, considered in the C.J.S. title Pleading, in actions to enforce rights or liabilities arising out of finding lost goods, the declaration must, by definite and certain allegations, aver every material fact which constitutes plaintiff's cause of action.[95] Thus in trover by a finder against his bailee, he must allege some ownership in himself,[96] and, in an action brought under a statute entitling the finder to compensation for his services and reward, the complaint must allege that the goods were lost.[97] The petition should be construed most strongly against the pleader.[98]

Issues, proof, and variance. An allegation of ownership of goods admits proof of general or special ownership.[99] There is no fatal variance between a complaint for money had and received and evidence that defendant found coupons and had them redeemed, for plaintiff had the right to waive the tort and sue in contract.[1]

c. Evidence

The general rules of evidence apply.

The general rules of evidence in civil cases apply in actions to enforce rights or liabilities arising out of finding lost goods.[2]

85. Or.—Danielson v. Roberts, 74 P. 913, 44 Or. 108, 102 Am.S.R. 627, 65 L.R.A. 526.
25 C.J. p 1140 note 84.

86. Del.—Clark v. Maloney, 3 Del. 68.
Finder's title as against subsequent finder see supra § 5 e.

87. Me.—Weeks v. Hackett, 71 A. 858, 104 Me. 264, 129 Am.S.R. 390, 19 L.R.A.,N.S., 1201, 15 Ann.Cas. 1156.
Title of joint finders see supra § 6.

88. Ohio.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 52 Ohio App. 373.
Pa.—Batteiger v. Pennsylvania Co., 64 Pa.Super. 195.

89. Kan.—Dougherty v. Norlin, 78 P.2d 65, 66, 147 Kan. 565, quoting **Corpus Juris.**
25 C.J. p 1141 note 88.

90. Kan.—Dougherty v. Norlin, supra, quoting **Corpus Juris.**
25 C.J. p 1141 note 89.

91. Kan.—Dougherty v. Norlin, supra, quoting **Corpus Juris.**
Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167.

92. Kan.—Dougherty v. Norlin, 78 P.2d 65, 147 Kan. 565.

93. Mich.—Wood v. Pierson, 7 N.W. 888, 45 Mich. 313.

94. Mich.—Wood v. Pierson, supra.
Right to reward see the C.J.S. title Rewards § 31, also 54 C.J. p 796 note 30–p 797 note 44.

95. Mont.—Kirk v. Smith, 138 P. 1088, 48 Mont. 489.
Or.—Roberson v. Ellis, 114 P. 100, 58 Or. 219, 35 L.R.A.,N.S., 979.

96. Or.—Roberson v. Ellis, supra.

97. Mont.—Kirk v. Smith, 138 P. 1088, 48 Mont. 489.

98. Ga.—Groover v. Tippins, 179 S.E. 634, 51 Ga.App. 47.

99. Or.—Roberson v. Ellis, 114 P. 100, 58 Or. 219, 35 L.R.A.,N.S., 979.

1. Ind.—Rittenhouse v. Knoop, 36 N.E. 384, 9 Ind.App. 126.

2. Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167.
25 C.J. p 1141 note 2.

Best proof

The best proof that money found in bank was lost property is that in fifteen years no one appeared to claim it.—Toledo Trust Co. v. Simmons, 3 N.E.2d 661, 52 Ohio App. 373.

Evidence held sufficient

(1) To warrant jury's finding that customer's purse, left on counter, was found by another and turned over to clerk of store.—J. G. McCrory Co. v. Hanley, 175 N.E. 232, 37 Ohio App. 461.

(2) Other instances see 25 C.J. p 1141 note 2 [c].

Evidence held insufficient to establish ownership of claimant to lost property.—Garramone v. Simmons, 30 N.Y.S.2d 465, 177 Misc. 330.

Finding of property

(1) In action to recover statutory reward for finding money stolen from bank during holdup and hidden in junk pile, evidence was held to show that intervener did not find or participate in finding of money so as to be entitled to any part of reward.—Flood v. City Nat. Bank of Clinton, 263 N.W. 321, 220 Iowa 935, certiorari denied City Nat. Bank of Clinton, Iowa v. Flood, 56 S.Ct. 749, 298 U.S. 666, 80 L.Ed. 1390.

(2) Evidence in summary proceeding for return of money to taxicab

d. Trial

Disputed questions of fact are for the jury. Where the evidence is convincing and undisputed, a directed verdict is authorized.

Conformably to the rules applicable in civil actions generally, see the C.J.S. title Trial §§ 203–219, also 64 C.J. p 296 note 48–p 367 note 25, in these actions disputed questions of fact are for the jury.[3] Where the evidence is convincing and undisputed, a directed verdict is authorized.[4]

e. Measure of Recovery

In a successful action for conversion of the thing found, defendant is liable for its value and interest thereon from the time of the conversion.

If the finder is successful in an action for conversion of the thing found, defendant is liable for its value[5] and the interest thereon, running usually from the time of the conversion.[6]

FINE.

As a Noun

As a pecuniary punishment imposed on a person convicted of an offense see Fines post. The word, however, does not always mean a pecuniary punishment inflicted by a court in the exercise of criminal jurisdiction. It has other meanings, and its true signification depends somewhat on the context, and its meaning must be gathered from the intention, if it can fairly be ascertained from the language used.[7] It has been sometimes used in cases of contract as meaning liquidated damages,[8] and as synonymous with "forfeit."[9] Also the term has been used in judicial discussion as applicable by analogy to damages in a civil suit assessed wholly with reference to the degree of culpability of the defendant.[10]

In old English law, the term was used as meaning a sum of money or price paid for obtaining a benefit, favor, or privilege, as the ancient fines for obtaining a writ and for alienation;[11] and also used in conveyancing to denote an amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties.[12]

As a statutory method of barring estates tail see Estates § 27 notes 23, 24; and as the common-law method for a married woman to convey realty see the C.J.S. title Husband and Wife § 196, also 30 C.J. p 755 notes 8–14

The noun sometimes has been said to be equivalent to, or synonymous with, but it is more accurately distinguished from, "forfeit," "forfeiture," and "penalty" see the C.J.S. title Fines § 1, also 25 C.J. p 1149 note 10–p 1150 note 27.

Phrases employing the noun are set out in the note.[13]

driver as finder was held to show that money was found by federal officer.—In re Savarino, D.C.N.Y., 1 F.Supp. 331.

3. Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167.
25 C.J. p 1141 note 4.

4. Ky.—Baugh v. Williams' Adm'r, supra.

5. Ky.—Baugh v. Williams' Adm'r, supra.
25 C.J. p 1141 note 6.

6. Ky.—Baugh v. Williams' Adm'r, supra.
25 C.J. p 1141 note 7.

7. Okl.—Holliman v. Cole, 34 P.2d 597, 598, 168 Okl. 473.

8. Cal.—United Farmers Ass'n of California v. Klein, App., 107 P.2d 631, 633.
Miss.—Goodman v. Durant Bldg. & Loan Ass'n, 14 So. 146, 147, 71 Miss. 310.

9. N.M.—Keinath v. Reed, 137 P. 841, 844, 18 N.M. 358.
Okl.—Holliman v. Cole, 34 P.2d 597, 599, 168 Okl. 473.

10. **Damages as "fine"**
Damages allowed against tort-feasor under a particular statute have been described as constituting in effect "a fine levied upon him for his wrongful conduct."—Oliveria v. Oliveria, 25 N.E.2d 766, 769, 305 Mass. 297.
Costs as "fine" see Fines § 1.

11. N.Y.—De Peyster v. Michael, 6 N.Y. 467, 495, 57 Am.D. 470.
In the law of tenure, a money payment made by a feudal tenant to his lord. The most usual fine was that payable on the admittance of a new tenant, but there were also due in some manors fines on alienation, on a license to demise the lands, or on the death of the lord, or other events.—Black L.D.

12. Mont.—Helena First Nat. Bank v. Roberts, 23 P. 718, 721, 9 Mont. 323.
25 C.J. p 1141 note 3.
Origin and use in this country
(1) "The practice of levying fines is as ancient in England, from which country we derived it, as any court of record, and dates back beyond the Conquest. . . . It continued in this state [New York] as a mode of conveyancing from its earliest settlement by the English till the year 1830, when with other antiquities it was abolished by the legislature, and a simpler system substituted in its stead."—McGregor v. Comstock, 17 N.Y. 162, 166.
(2) It "derived its very name from its putting an end to that suit and to all other controversies concerning the same matter."—Hitz v. Jenks, D. C., 8 S.Ct. 143, 145, 123 U.S. 297, 31 L.Ed. 156.
(3) "It was a proceeding in a court of record; and consequently the proceedings, and record thereof, could properly be termed 'judicial.' "—Helena First Nat. Bank v. Roberts, 23 P. 718, 721, 9 Mont. 323.
(4) Further brief treatment of the subject matter, including Blackstone's discussion of the proceedings, see 25 C.J. p 1141 note 3 [c], [e].
"Fine and Recovery Act"
The name given to the English statutes 3 & 4 Wm. IV c 74, for abolishing fines and recoveries.—Black L.D.

13. **"Municipal fine"**
(1) As used in a particular statute,

As a Verb

To impose a pecuniary punishment or mulct; to sentence a person convicted of an offense to pay a penalty in money.[14] In another sense, to make fine or pure, purify, clarify, or refine.[15]

Fining. In the manufacture of glass, the process of melting in which the purified particles sink and find their level.[16]

As an Adjective

In general, finished; consummate; perfect in form or quality; polished, adroit, in manner or action; delicate, slender, minute, thin, rare, in size, proportion, or consistence: opposed to coarse, gross, crude, rought, unfinished, etc.[17] The term has been distinguished from "good."[18]

Phrases employing the adjective are set out in the note.[19]

FINE ANULLANDO LEVATO DE TENEMENTO QUOD FUIT DE ANTIQUO DOMINICO. An abolished writ for disannulling a fine levied of lands in ancient demesne to the prejudice of the lord.[20]

FINE CAPIENDO PRO TERRIS. An obsolete writ which lay for a person who, upon conviction by jury, had his lands and goods taken, and his body imprisoned, to be remitted his imprisonment, and have his lands and goods redelivered to him, on obtaining favor of a sum of money, etc.[21]

FINELY. Minutely; thinly.[22]

the term has been construed as referring to a fine imposed by a municipal corporation as distinguished from all fines imposed by the laws of the state.—People v. Johnson, 30 Cal. 98, 102.

(2) It usually does not include a penalty given by statute or municipal ordinance where no issue is made as to the legality of a "municipal fine," tax, assessment, or toll.—In re Thomas, 22 P. 80, 80 Cal. 40.

(3) As to a municipality's power to impose fines generally see the C. J.S. title Municipal Corporations § 179, also 43 C.J. p 265 note 46–p 266 note 52.

Other phrases construed

(1) "Executed fine" see 33 C.J.S. p 120 note 34 (8).

(2) "Fine for alienation," defined as one anciently payable on the alienation of a feudal estate and the substitution of a new tenant.—Black L. D.

(3) "Fine for endowment," as one anciently payable to the lord by the widow of a tenant, without which she could not be endowed of her husband's lands.—Black L.D.

(4) "Fine for violation of law."—State v. Taylor, 73 S.W.2d 378, 380, 335 Mo. 460, 95 A.L.R. 476.

(5) "Finem facere"—to make or pay a fine.—Black L.D.

(6) "Fines le roy"—the king's fines, that is, fines formerly payable to the king for any contempt or offense, as where one committed any trespass or falsely denied his own deed, or did anything in contempt of law.—Black L.D.

(7) "Fine sur cognizance de droit come ceo que il ad de son done"—a fine on acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor, whereby the deforciant acknowledged in court a former feoffment or gift in possession to have been made by him to the plaintiff.—Black L.D.

(8) "Fine sur cognizance de droit tantum"—a fine upon acknowledgment of the right merely, and not with the circumstance of a preceding gift from the cognizor; this was commonly used to pass a reversionary interest which was in the cognizor, of which there could be no feoffment supposed.—Black L.D.

(9) "Fine sur concessit"—a fine upon concessit, (he hath granted) that is, a species of fine, where the cognizor, in order to make an end of disputes, although he acknowledged no precedent right, yet granted to the cognizee an estate de novo, usually for life or years, by way of supposed composition.—Black L.D.

(10) "Fine sur done grant et render"—a double fine, comprehending the fine sur cognizance de droit come ceo and the fine sur concessit; it might be used to convey particular limitations of estates, whereas the fine sur cognizance de droit come ceo, etc., conveyed nothing but an absolute estate, either of inheritance, or at least freehold. In this last species of fines, the cognizee, after the right was acknowledged to be in him, granted back again or rendered to the cognizor, or perhaps to a stranger, some other estate in the premises.—Black L.D.

(11) "Joint fine," in old English law, "if a whole vill is to be fined, a joint fine may be laid, and it will be good for the necessity of it; but, in other cases, fines for offenses are to be severally imposed on each particular offender, and not jointly upon all of them."—Black L.D.

(12) "Note of a fine," in old conveyancing, one of the parts of a fine of lands, being an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement.—Black L.D.

14. Black L.D.

15. Century D.

16. U.S.—Benjamin v. Chambers & McKee Glass Co., Pa., 59 F. 151, 155, 8 C.C.A. 61.

17. Century D.

18. Eng.—Hutchison v. Bowker, 5 M. & W. 535, 151 Reprint 227.

19. **Phrases construed**

(1) "Fine art" see 6 C.J.S. p 772 notes 25, 26.

(2) "Fine cut chewing tobacco" see 25 C.J.S. p 436 note 69.

(3) "Fine-force," defined as absolute necessity or inevitable constraint.—Black L.D.

(4) "Fine granulated," when applied to sugar, relates to the size of the granules, not to the quality.—McNeil & Higgins Co. v. Czarnikow-Rienda Co., D.C.N.Y., 274 F. 397, 398.

(5) "Fine rolls," as the Chancery Rolls, 1199–1641, called also Oblate Rolls, containing records of payments to the king by way of oblate or fine for the grant of privileges, or by way of amercement for breach of duty.—Black L.D. sub verbo Oblate Rolls.

(6) "Fine sugar," as meaning fine granulated sugar.—De Sousa v. Crocker First Nat. Bank, D.C.Cal., 23 F.2d 118, 122.

20. Black L.D.

21. Black L.D.

22. Century D.

Phrases construed

"Finely pulverized" and "finely pulverizing" as referring to a method of producing metals and alloys from metallic compounds.—Goldschmidt Thermit Co. v. Primos Chemical Co., C.C.A.Pa., 292 F. 362, 371.

FINE NON CAPIENDO PRO PULCHRE PLACITANDO. An obsolete writ to inhibit officers of courts to take fines for fair pleading.[23]

23. Black L.D.

FINE PRO REDISSEISINA CAPIENDO. An old writ that lay for the release of one imprisoned for a redisseizin, on payment of a reasonable fine.[24]

24. Black L.D.

FINES

This Title includes pecuniary punishments imposed by [illegible] of crime, nature and scope of such punishment in general; constitutional and statutory provisions relating thereto; in what cases and for what offenses fines are imposed in general; jurisdiction over and proceedings for enforcement of fines; review of proceedings; costs in such proceedings; payment or working out fines and costs, and imprisonment for nonpayment thereof; discharge from fines or from imprisonment therefor; and disposition of moneys received for fines; and recovery of fines paid.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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§ 1. Definitions and Distinctions

A fine is a pecuniary punishment imposed by a lawful tribunal on a person convicted of a crime or misdemeanor.

A fine is a sum expressly imposed in lieu of, or in addition to, a term of imprisonment, or as any part of the punishment for an offense;[1] it is a pecuniary punishment imposed by a lawful tribunal on a person convicted of a crime or misdemeanor.[2] Strictly speaking, the term does not embrace those pecuniary penalties or forfeitures provided by stat-

1. La.—State v. Hebert, 103 So. 742, 158 La. 209, affirmed Hebert v. State of Louisiana, 47 S.Ct. 103, 272 U.S. 312, 71 L.Ed. 270, 48 A.L.R. 1102.

2. Cal.—Petersen v. Civil Service Board of City of Oakland, 227 P. 238, 240, 67 Cal.App. 70, citing **Corpus Juris.**
Conn.—Second Nat. Bank v. Loftus, 185 A. 423, 121 Conn. 454—Bankers' Trust Co. v. State, 114 A. 104, 96 Conn. 361, affirmed Bankers' Trust Co. v. Blodgett, 43 S.Ct. 233, 260 U.S. 647, 67 L.Ed. 439.
Del.—Vitelli v. Mayor and Council of Wilmington, 199 A. 283, 9 W.W. Harr. 336.
Md.—Dorsey v. Petrott, 13 A.2d 630, 178 Md. 230.
Mo.—State v. Dishman, 68 S.W.2d 797, 798, 334 Mo. 874, citing **Corpus Juris.**
Neb.—Sinner v. State, 260 N.W. 275, 276, 128 Neb. 759, quoting **Corpus Juris.**
Okl.—Holliman v. Cole, 34 P.2d 597, 598, 168 Okl. 473, citing **Corpus Juris.**
Or.—Murphy v. State, 250 P. 834, 835, 119 Or. 658, 49 A.L.R. 384, citing **Corpus Juris.**
Pa.—In re Chester School District's Audit, 151 A. 801, 301 Pa. 203.
Wash.—Bergman v. State, 60 P.2d 699, 187 Wash. 622, 106 A.L.R. 1007.
25 C.J. p 1148 notes 3, 4.

ute that a civil action may be brought to recover.[3] In a sense "fine" is synonymous with "punishment;"[4] but a fine is distinguishable from a sentence of imprisonment in that it is pecuniary rather than personal punishment,[5] and one cannot properly be said to be "fined" by imprisonment.[6] A fine is not a debt,[7] nor is a fine a tax levied.[8] The word "fine" as used in some constitutional and statutory provisions has been held to be limited to fines imposed as punishment for offenses against the state and not to include fines imposed for violation of municipal ordinances or regulations.[9]

Amercement distinguished see the definition Amercement 3 C.J.S. p 1044 note 80. Costs distinguished see Costs § 1 b.

Forfeiture distinguished. A fine is a pecuniary penalty, while a forfeiture is a penalty by which one loses his rights and interests in his property.[10] The terms have been used indiscriminately[11] and as synonymous,[12] and it has been held that the word "forfeit," or "forfeiture," when used in a criminal statute to denote a punishment for crime, is equivalent to "fine,"[13] and that a fine may include a forfeiture.[14]

Penalty distinguished. The terms "fine" and "penalty" are not identical in meaning, but are often confused in loose statements.[15] The term "penalty" in its broadest sense includes all punishment of whatever kind,[16] and in the broad sense it is a generic term which includes fines as well as all other kinds of punishments.[17] As generally understood, a fine is a sum of money exacted of a person guilty of a crime, the amount of which may be fixed by law or left in the discretion of the court;[18] while a penalty is a sum of money for which the law exacts payment by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done, which violation may or may not be a crime.[19] A fine is imposed in a criminal action or proceeding, but a penalty ordinarily is recoverable in a civil action.[20]

3. Va.—Southern Express Co. v. Commonwealth, 22 S.E. 809, 92 Va. 59, 41 L.R.A. 436, affirmed 18 S. Ct. 947, 168 U.S. 705, 42 L.Ed. 1212.
25 C.J. p 1149 note 5.

4. Ind.—Beggs v. State, 23 N.E. 693, 122 Ind. 54, 56.

5. N.Y.—Hart v. Norman, 155 N.Y. S. 238, 92 Misc. 185.
25 C.J. p 1149 note 7.

Not same nature

"Imprisonment and fine are not punishments of the same nature."—Norvell v. State, 50 Ala. 174, 178.

6. Neb.—Sinner v. State, 260 N.W. 275, 128 Neb. 759.

7. La.—State v. Hebert, 103 So. 742, 158 La. 209, affirmed Hebert v. State of Louisiana, 47 S.Ct. 103, 272 U.S. 312, 71 L.Ed. 270, 48 A.L.R. 1102.

8. Ark.—Allis v. Jefferson County, 34 Ark. 307.

9. Wis.—State v. Hamley, 119 N.W. 114, 137 Wis. 458.
25 C.J. p 1149 notes 8, 9.

10. Wis.—Stierle v. Rohmeyer, 260 N.W. 647, 654, 218 Wis. 149, quoting **Corpus Juris.**
25 C.J. p 1149 note 11.

11. Iowa.—Gosselink v. Campbell, 4 Iowa 296.
25 C.J. p 1149 note 12.

12. Ky.—Commonwealth v. Avery, 14 Bush 625, 638, 29 Am.R. 429.
Wis.—Oshkosh v. Schwartz, 13 N.W. 552, 55 Wis. 483.

13. N.H.—State v. McConnell, 46 A. 458, 70 N.H. 159.
25 C.J. p 1149 note 14.

"When imposed as a punishment for a statutory offense, there is no substantial difference between a fine and a forfeiture. A fine is a pecuniary punishment for an offense, and a pecuniary punishment called a 'forfeiture' is equivalent to the same pecuniary punishment called a 'fine.'"—Holliman v. Cole, 34 P.2d 597, 599, 168 Okl. 473.

14. Del.—Vitelli v. Mayor and Council of Wilmington, 199 A. 283, 9 W.W.Harr. 336.
N.C.—State v. Addington, 57 S.E. 398, 143 N.C. 683, 11 Ann.Cas. 314.

15. N.Y.—City of Buffalo v. Neubeck, 204 N.Y.S. 737, 209 App.Div. 386.
25 C.J. p 1148 notes 1, 2.

16. Conn.—Bankers' Trust Co. v. State, 114 A. 104, 96 Conn. 361, affirmed Bankers' Trust Co. v. Blodgett, 43 S.Ct. 233, 260 U.S. 647, 67 L.Ed. 439.

17. N.J.—Silberman v. Skouras Theatres Corporation, 169 A. 170, 171, quoting **Corpus Juris.**
N.Y.—City of Buffalo v. Neubeck, 204 N.Y.S. 737, 738, 209 App.Div. 386, citing **Corpus Juris.**
25 C.J. p 1149 note 17.

Fine is in its nature a penalty.—Bergman v. State, 60 P.2d 699, 187 Wash. 622, 106 A.L.R. 1007.

Fine may include a penalty.
Del.—Vitelli v. Mayor and Council of Wilmington, 199 A. 283, 9 W.W. Harr. 336.
Ohio.—Toledo, C. & O. R. R. Co. v. Miller, 140 N.E. 617, 619, 108 Ohio St. 388.

Pecuniary penalty

The word "fine" in its ordinary acceptation has the distinct meaning of a pecuniary penalty.—State v. King, 119 So. 252, 253, 167 La. 350—Hanks v. Shreveport Yellow Cabs, La.App., 187 So. 817.

18. N.Y.—City of Buffalo v. Neubeck, 204 N.Y.S. 737, 209 App.Div. 386.
Okl.—Holliman v. Cole, 34 P.2d 597, 168 Okl. 473.
Utah.—State v. Franklin, 226 P. 674, 676, 63 Utah 442.

19. U.S.—Kausch v. Moore, D.C.Mo., 268 F. 668, 671.
N.J.—Silberman v. Skouras Theatres Corporation, 169 A. 170, 171, quoting **Corpus Juris.**
N.Y.—City of Buffalo v. Neubeck, 204 N.Y.S. 737, 209 App.Div. 386.
Okl.—Holliman v. Cole, 34 P.2d 597, 168 Okl. 473.
S.C.—State v. Liggett & Myers Tobacco Co., 172 S.E. 857, 865, 171 S.C. 511.
Utah.—State v. Franklin, 226 P. 674, 63 Utah 442.
25 C.J. p 1149 note 18.

"A penalty in its primary sense denotes a punishment imposed for the commission of an offense or for some violation."—Hanks v. Shreveport Yellow Cabs, La.App., 187 So. 817, 819.

20. N.Y.—City of Buffalo v. Neubeck, 204 N.Y.S. 737, 209 App.Div. 386.

Additional liability

Where a statute imposes liability for actual damages and also imposes additional liability for the same act, such additional liability is a "fine" or a "penalty."—Sunderland Bros. Co. v. Chicago, B. & I. R. Co., 177 N.W. 156, 157, 104 Neb. 319.

When the word "fine" is used in its restrictive sense it does not convey the idea expressed by the word "penalty."[21] While a fine is always a penalty, a penalty is not always a fine.[22] The main distinction between the terms, as used in the restricted sense, seems to be based on the fact that a penalty may be incurred by reason of acts or omissions that involve no idea of criminality.[23] Ordinarily a penalty is a sum certain which goes to the statutory beneficiary, while a fine is discretionary within the limits prescribed and is paid to the state.[24] The terms "fine" and "penalty" are, however, often used as synonymous; and the term "fine" has been held broad enough to include penalties for the violation of law, recoverable in civil actions when such violations are neither made misdemeanors nor felonies.[25] Sometimes the word "penalty" is used to signify a fine.[26] The true signification of these terms, when used in a statute or constitution, must be ascertained according to the ordinary methods of interpretation.[27]

§ 2. Constitutional and Statutory Provisions

The imposition and regulation of fines, subject to constitutional restriction, rests within the discretion of the legislature.

Subject to constitutional restriction, the imposition and regulation of fines belong to the legislature, and to its judgment and discretion in this behalf a wide latitude must necessarily be accorded.[28] The general rules as to the construction of penal statutes apply to statutes providing for fines,[29] and such statutes are to be strictly construed.[30]

§ 3. Recovery and Imposition

Fines constitute in whole or in part the punishment for many offenses.

Fines constitute in whole or in part the punishment for many offenses at common law,[31] as well as for many offenses created by statute.[32] Fines are fixed with reference to the object they are designed to accomplish.[33] The degree of criminality of the offense, and the illegality or impolicy of the act intended to be punished or prevented, are elements that are considered.[34]

§ 4. —— Modes of Recovery

A criminal prosecution is the usual mode of recovery of a fine.

Penalty held not a fine
Kan.—Tucker v. Missouri Pac. Ry. Co., 108 P. 89, 82 Kan. 222, reversed on other grounds Missouri Pac. R. Co. v. Tucker, 33 S.Ct. 961, 230 U.S. 340, 57 L.Ed. 1507.

21. La.—State v. Price, 50 So. 794, 124 La. 917, 134 Am.S.R. 523, 18 Ann.Cas. 881.

22. Conn.—Bankers' Trust Co. v. State, 114 A. 104, 96 Conn. 361, affirmed Bankers' Trust Co. v. Blodgett, 43 S.Ct. 233, 260 U.S. 647, 67 L.Ed. 439.
25 C.J. p 1149 note 21.

23. Ill.—Ewbanks v. Ashley, 36 Ill. 177.
Kan.—Bemis v. Becker, 1 Kan. 226.
Va.—Southern Express Co. v. Commonwealth, 22 S.E. 809, 92 Va. 59, 41 L.R.A. 436, affirmed 18 S.Ct. 947, 168 U.S. 705, 42 L.Ed. 1212.
25 C.J. p 1149 note 22.

24. N.C.—State v. Maultsby, 51 S.E. 956, 139 N.C. 583.
Tenn.—Poindexter v. State, 193 S.W. 126, 137 Tenn. 386, L.R.A.1917C 954.

25. Mo.—State v. West Plains Tel. Co., 135 S.W. 20, 232 Mo. 579.
25 C.J. p 1149 notes 24, 25.

As used in constitution
The word "fine," as used in a constitutional provision prohibiting excessive fines, ordinarily is applicable to criminal prosecutions, or quasi-criminal proceedings. In the instant case, the court assumed, but did not decide, that the word "fine" as so used was synonymous with the word "penalty," as used in a statute prescribing the penalty for failure to pay a levy tax.—St. Francis Levee Dist. v. Dorroh, 289 S.W. 925, 316 Mo. 398.

26. Minn.—State v. Horgan, 56 N.W. 688, 55 Minn. 183.
N.C.—Buncombe County School Directors v. Asheville, 50 S.E. 279, 137 N.C. 503—Buncombe County School Directors v. Asheville, 38 S.E. 874, 128 N.C. 249.

27. Kan.—State v. Rose, 97 P. 788, 78 Kan. 600.
N.C.—State v. Addington, 57 S.E. 398, 143 N.C. 683, 11 Ann.Cas. 314.

28. Fla.—Amos v. Gunn, 94 So. 615, 84 Fla. 285.
25 C.J. p 1150 notes 31, 32.
Constitutional guaranties against:
Bills of attainder see Constitutional Law §§ 452–455.
Classification and class legislation see Constitutional Law § 501.
Denial of:
Equal protection of the laws see Constitutional Law § 564.
Privileges and immunities of citizens see Constitutional Law § 487.
Deprivation of life or liberty generally see Constitutional Law §§ 579–594.
Power of legislature to prescribe punishment generally see Criminal Law §§ 1975–1979.

29. **Enactments at same session** should receive, if possible, a construction which will give effect to each.—Tubbs v. Commonwealth, 58 S.W.2d 236, 248 Ky. 24.

Proviso held meaningless
Tex.—Ex parte Polly, 15 S.W.2d 16, 111 Tex.Cr. 431, followed in Rowley v. State, 15 S.W.2d 1118, 112 Tex.Cr. 163.

Repeal
A subsequent act relating to fines will repeal a prior general act to the extent that it is inconsistent therewith.—State ex rel. Crabbe v. City of Cleveland, 154 N.E. 738, 115 Ohio St. 484.

30. Ark.—Town of De Witt v. Stephen, 293 S.W. 740, 173 Ark. 833.

31. N.C.—State v. Burton, 18 S.E. 657, 113 N.C. 655.
Va.—Southern Express Co. v. Commonwealth, 22 S.E. 809, 92 Va. 59, 41 L.R.A. 436, affirmed 18 S.Ct. 947, 168 U.S. 705, 42 L.Ed. 1212.
Extent generally of punishment for crime see Criminal Law §§ 1980–1994.

32. N.C.—State v. Burton, 18 S.E. 657, 113 N.C. 655.
Vt.—State v. Constantino, 56 A. 1101, 76 Vt. 192.
Va.—Southern Express Co. v. Commonwealth, 22 S.E. 809, 92 Va. 59, 41 L.R.A. 436, affirmed 18 S.Ct. 947, 168 U.S. 705, 42 L.Ed. 1212.

33. Vt.—State v. Constantino, 56 A. 1101, 76 Vt. 192.
Va.—Southern Express Co. v. Commonwealth, 22 S.E. 809, 92 Va. 59, 41 L.R.A. 436, affirmed 18 S.Ct. 947, 168 U.S. 705, 42 L.Ed. 1212.

34. Vt.—State v. Constantino, 56 A. 1101, 76 Vt. 192.

Since the word "fine" in its strict technical sense is to be regarded as a punishment for a criminal offense, a criminal prosecution is the usual mode of recovery.[35] However, the mode in which fines and penalties are to be recovered is a matter of legislative discretion;[36] and the method pursued for the recovery of a fine depends on the particular statutes rather than on any rule of general application.[37] Many of the statutes provide for the recovery of fines by civil action [38] or by indictment.[39] A statute providing that on conviction the party guilty of violating it shall be fined or imprisoned or both ordinarily contemplates a criminal proceeding only.[40] So, also, where the statute creating the offense makes it a misdemeanor punishable by fine and imprisonment, without more, an indictment will lie as at common law.[41] The rule has been laid down that in the absence of any special provision as to the mode of procedure, the use of the word "fine" determines the form of the remedy; and the remedy is a criminal prosecution.[42] Where the statute does not prescribe any particular proceeding, but authorizes recovery in any appropriate form of action or proceeding an indictment will ordinarily lie.[43] Where a statute specifies a "bill, plaint or information," as a mode of recovering a fine it has been held that an indictment will not lie;[44] but the contrary has also been held.[45] Under a statute which provides that a forfeiture may be sued for and recovered in a civil action and that the word forfeiture shall include any penalty in money or goods, other than a fine, a criminal prosecution in the name of the state is the proper remedy to recover a fine from a person charged with a public offense committed in violation of a statute of the state;[46] but the word "fine" as used in the statute does not include fines imposed for breaches of municipal ordinances which are not also misdemeanors,[47] and the proper remedy for the recovery of such fines is by civil action.[48]

Nature of civil action. Although the recovery may be sought in the form of a civil action such a proceeding in nature and effect is a proceeding for the punishment of a criminal offense and should substantially adhere to the essential principles governing such proceedings.[49] The technical rules governing summary convictions do not apply with the same strictness to such an action. However, the essential principles governing such summary proceedings, necessary for the protection of the citizen, have never been relaxed, and many of them are applicable.[50]

Statutory mode as exclusive. Where a statute creating a new offense and imposing a fine also prescribes the mode of its enforcement, the mode so prescribed will be held to be exclusive.[51] Where the proceeding is designated in a statute subsequent to that prohibiting the act, or in a subsequent, distinct, substantive clause of the same act, such remedy is not exclusive.[52] Under some statutes by express provision the fine may be recovered by indictment, although the statute defining the offense may provide for another specified remedy.[53]

Waiver of proper proceeding. When the court has jurisdiction of the person of defendant and of the subject matter, the objection that the proceeding is by indictment instead of by civil action is

35. Mass.—Bryant v. Rich's Grill, 103 N.E. 925, 216 Mass. 344, Ann. Cas.1915B 869.
25 C.J. p 1150 note 38.

36. Pa.—Commonwealth v. Engle, 9 Pa.Dist. & Co. 333, 3 Som.Leg.J. 81.
25 C.J. p 1150 note 39.

37. Pa.—Commonwealth v. Wormser, 7 Pa.Dist. 318.
Va.—Wells v. Commonwealth, 57 S.E. 588, 107 Va. 834.
25 C.J. p 1150 note 40.

38. Ill.—Proctor v. People, 24 Ill. App. 599.
25 C.J. p 1150 note 41.

City judge may enforce fine collectable by him by civil process.—City of Shreveport v. Bayse, 117 So. 775, 166 La. 689.

Previous conviction a prerequisite

Under a municipal ordinance providing for the imposition of a fine, where a person is convicted of a violation of the ordinance, and the fine is "to be collected as similar debts are now by law collected," it has been held that the fine cannot be collected by a suit before a justice until after the person charged has been convicted of violating the ordinance.—Wilcox v. Knoxville Borough, 2 Pa.Dist. 721, 12 Pa.Co. 641.

39. Or.—State v. Carr, 6 Or. 133.
25 C.J. p 1150 note 42.

40. U.S.—U. S. v. Claflin, N.Y., 97 U.S. 546, 24 L.Ed. 1082, 1085.
25 C.J. p 1151 note 43.

41. N.Y.—People v. Brown, 16 Wend. 561—People v. Stevens, 13 Wend. 341.

42. Minn.—State v. Horgan, 56 N.W. 688, 55 Minn. 183.
25 C.J. p 1151 note 45.

43. U.S.—U. S. v. Craft, D.C.Ky., 43 F. 374—U. S. v. Moore, C.C.N.H., 11 F. 248—U. S. v. Bougher, C.C. Ohio, 24 F.Cas.No.14,627, 6 McLean 277.

44. Mo.—State v. Corwin, 4 Mo. 609.

45. S.C.—State v. Helfrid, 11 S.C.L. 233, 10 Am.D. 591.
25 C.J. p 1151 note 49.

46. Wis.—State v. Hamley, 119 N. W. 114, 137 Wis. 458.

47. Wis.—State v. Hamley, supra—Oshkosh v. Schwartz, 13 N.W. 552, 55 Wis. 483.

48. Wis.—Oshkosh v. Schwartz, supra.

49. Pa.—Commonwealth v. Davison, 11 Pa.Super. 130.

50. Pa.—Commonwealth v. Davison, 11 Pa.Super. 130—City v. Junker, 9 Pa.Dist. 673.

51. Mass.—Commonwealth v. Smith, 111 Mass. 407—Commonwealth v. Fahey, 5 Cush. 408.
25 C.J. p 1151 note 57.

52. Tex.—Phillips v. State, 19 Tex. 158.

53. Mo.—State v. Mackin, 51 Mo. App. 129.
25 C.J. p 1151 note 60.

waived unless seasonably taken.[54]

§ 5. —— Imposition

A fine may be legally assessed only by a judicial officer in a case wherein he has jurisdiction, properly invoked, of the offense charged and of the person of accused.

A fine may be legally assessed only by a judicial officer [55] in a case wherein he has jurisdiction, properly invoked, of the offense charged and of the person of accused.[56] The imposition of a fine necessarily presupposes forbidden conduct by the party punished.[57] The fine must be imposed in compliance with the law at the time the offense is committed.[58] Directions as to the time and manner of payment of the fine must be in conformity with the applicable statutes.[59] As discussed in Criminal Law § 1982, the court or jury in assessing the fine on conviction of an offense must conform to the statute prescribing the punishment for the offense, and as a general rule any departure therefrom makes the sentence illegal.

Province of court and jury. According to the common-law practice, the jury find whether or not the prisoner is guilty, and if they find him guilty the court must assess the fine,[60] but the rule making it the province of the court to assess the fine has been variously modified by statute in the different jurisdictions.[61] Under some statutes the jury must assess the fine,[62] and the jury cannot find defendant guilty and fine him or not fine him as they choose.[63] So, it has been provided that, when a fine is limited between two fixed amounts, it is to be assessed by the jury;[64] and this has been held to be necessary even on a plea of guilty.[65] When a fine is over a certain amount, it must, under some statutes, be fixed by the jury and not by the court.[66] Where the statute fixes with certainty the amount of the fine which can neither be increased nor diminished by the jury, the verdict of the jury need not assess it.[67]

When the jury are not authorized to fix the fine, but that duty devolves on the court, an assessment made by the jury may be adopted by the court as its judgment.[68]

Amount of fine. Where an offense is punishable by fine, the amount thereof is usually left to the discretion of the court to be exercised within constitutional and statutory boundaries.[69] Statutes frequently place limits on the amount of fines, and within such limits the amount of the fine imposed is discretionary with the court;[70] but the sentence as so imposed must conform to the statute,[71] and the fine cannot exceed the amount prescribed by law.[72]

Where the statute fixes the minimum amount of fine to be imposed on conviction of a certain offense, the court or jury has no authority to impose a judgment for an amount less than such minimum.[73] Under some statutes where the jury assesses the fine at less than the lowest limit prescribed, the court may render judgment for the lowest limit fixed by law.[74]

54. Mo.—State v. Saxauer, 48 Mo. 454—State v. Warnke, 48 Mo. 451.

55. Okl.—Cox v. State, 244 P. 206, 33 Okl.Cr. 436.

56. Okl.—Cox v. State, supra.
25 C.J. p 1151 note 64.

57. Kan.—State v. Rose, 97 P. 788, 78 Kan. 600.

Punishment for offense
In criminal procedure, trial court cannot impose a fine except as a punishment for an offense.—State v. Wilson, 4 S.E.2d 440, 216 N.C. 130.

58. Ohio.—Derby v. State, 24 Ohio Cir.Ct. 304.
Okl.—Smith v. State, 159 P. 941, 12 Okl.Cr. 513.

Court held to have discretion to impose fine or prison sentence.—State v. Escalade, 91 So. 135, 150 La. 638.

59. **Mayor of city**
A statute providing that, when any court is empowered to impose sentence of fine for any misdemeanor such court may direct the time and manner of payment of such fine confers power on a mayor to direct the time and manner of payment of fines imposed by him. A statute requiring court to commit to custody of officer of court person against whom conditional sentence has been imposed for violation or misdemeanor punishable either by fine or imprisonment was held not to affect the power of a mayor.—Butterfield v. Taylor, 198 N.E. 600, 50 Ohio App. 421.

60. Ala.—Hawkins v. State, 3 Stew. & P. 63.
25 C.J. p 1151 note 67.

61. Tenn.—State v. Schlitz Brewing Co., 59 S.W. 1033, 104 Tenn. 715, 78 Am.S.R. 941.
25 C.J. p 1151 note 68.
Power to fix punishment generally see Criminal Law § 1570.

62. Ala.—Nelson v. State, 46 Ala. 186.
25 C.J. p 1151 note 69.

63. Ind.—Welsh v. State, 25 N.E. 883, 126 Ind. 71, 9 L.R.A. 664.

64. Ky.—Herron v. Commonwealth, 79 Ky. 38.

65. Ky.—Ervin v. Commonwealth, 5 Dana 216.

66. Tenn.—Madden v. State, 67 S.W. 74—McGhee v. State, 2 Lea 622—Wickham v. State, 7 Coldw. 525.

67. Tenn.—France v. State, 6 Baxt. 478.
25 C.J. p 1152 note 74.

68. Ill.—Armstrong v. People, 37 Ill. 459—Young v. People, 6 Ill.App. 434.

69. N.Y.—In re Hershey Farms, 24 N.Y.S.2d 163, 175 Misc. 641.
25 C.J. p 1152 note 76.

70. S.C.—Greenville v. Kemmis, 36 S.E. 727, 58 S.C. 427, 50 L.R.A. 725.
25 C.J. p 1152 note 77.

71. Cal.—Ex parte Gilmore, 12 P. 800, 71 Cal. 624.
25 C.J. p 1152 note 78.

72. U.S.—Pervear v. Massachusetts, Mass., 5 Wall. 475, 18 L.Ed. 608.
Ohio.—Derby v. State, 24 Ohio Cir. Ct. 304.
S.C.—State v. Thompson, 33 S.C.L. 12, 47 Am.D. 588.

73. Ark.—Graham v. State, 1 Ark. 171.
25 C.J. p 1152 note 80.

74. Mo.—State v. McQuaig, 22 Mo. 319.

The power of the legislature to prescribe excessive fines is discussed in Criminal Law § 1978 c.

Joint offenders, who are jointly indicted and tried, must be severally fined.[75]

§ 6. Payment or Security

Except as otherwise authorized by statute, a fine must be paid in money.

In the absence of language to the contrary, it will be presumed that the court in imposing a fine contemplated payment of the fine in the ordinary currency of the country.[76] Except to the extent that he is authorized to do so by statute an officer has no authority to receive anything other than money in payment of a fine;[77] and it has been held that a court officer, by accepting a promise to pay, discharges the sentence and becomes bound for the fine, and that he must collect the fine from the promisor.[78] Under statute in some jurisdictions it has been held that fines may be paid in county warrants,[79] in coupons from state bonds,[80] or by defendant giving his promissory note [81] or some other security.[82] The nature of the security which may be accepted is dependent on the provisions of the statute, and the security given and accepted for the payment of a fine must conform to the statute.[83] The failure of such security to conform with the provisions of the statute, however, does not invalidate it as a common-law obligation, and binds the principal and surety for the payment of the amount named therein.[84]

A void sentence is not affected by the payment of the fine imposed by it.[85]

Confession of judgment. As a substitute for the cash payment of a fine and imprisonment in default of payment, provision is made by statute in some jurisdictions for a confession of judgment by defendant for his fine and costs, with good and sufficient sureties.[86] Under some of these statutes a tender of security for a confessed judgment for a fine may be made to the court, and need not be made to the clerk.[87] Some of these statutes require more than one surety.[88] The court may refuse to accept a judgment by confession unless good and sufficient sureties are furnished as required by statute.[89] The practice of allowing a par-

75. Ark.—Straughan v. State, 16 Ark. 37.
25 C.J. p 1152 note 85.

76. S.C.—State v. Robertson, 49 S.C.L. 17.
25 C.J. p 1153 note 86.

77. Ark.—Hubbard v. State, 75 S.W. 853, 71 Ark. 467.
25 C.J. p 1153 note 87.

Particular modes held insufficient

(1) Mortgage.—Kelley v. Tillamook County, 215 P. 176, 107 Or. 607, 29 A.L.R. 4—25 C.J. p 1153 note 87 [a] (2).

(2) Other means see 25 C.J. p 1153 note 87 [a].

78. Ga.—Long v. Collier, 115 S.E. 9, 154 Ga. 673.

Rearrest

Discharge of prisoner by accepting another's promise to pay fine precludes rearrest for nonpayment of fine.—Pridgen v. James, 149 S.E. 48, 168 Ga. 770.

79. Ark.—Russell v. Rowland, 1 S.W. 74, 47 Ark. 203—McKibben v. State, 31 Ark. 46.
25 C.J. p 1153 note 88.

Statute held not repealed

Local acts authorizing payment of fines in certain counties with certain claims against counties held not impliedly repealed by amended Code section providing for disposition of surplus arising from fines and forfeitures in county treasury.—Reid v. Wallace, 168 So. 900, 27 Ala.App. 199.

80. U.S.—In re Shaner, C.C.Va., 39 F. 869—In re Mitchell, 39 F. 386.
Va.—Clarke v. Tyler, 30 Gratt. 134, 71 Va. 134.

81. Iowa.—State v. Van Vleet, 23 Iowa 168.
Me.—Bates v. Butler, 46 Me. 387.
25 C.J. p 1153 note 90.

Defenses in actions on notes

In an action on a note given in payment of a fine, it has been held that it is no defense that the court imposing the fine had no jurisdiction; that the conviction was illegal; or that the conviction was obtained in a municipal court and subsequent thereto defendant was charged in the state court with the same offense.—Felker v. Stark, 78 S.E. 202, 12 Ga. App. 695.

82. Tenn.—State v. Endsley, 126 S.W. 103, 122 Tenn. 647, 135 Am.S.R. 886.
25 C.J. p 1153 note 91.

Execution of stay bond, under some statutes, is not a payment of the fine and costs, but is merely a stay or suspension of the payment for a term on the conditions enumerated.—Ex parte Bailey, 296 P. 998, 50 Okl.Cr. 53.

Rules of board of county commissioners, providing for cash and installment payments on fine in proportion to amount of fine, held reasonable and not arbitrary or capricious.—State v. Shelby County Com'rs, 285 S.W. 45, 154 Tenn. 141.

83. Ark.—Wilson v. White, 102 S.W. 201, 82 Ark. 407, 12 Ann.Cas. 378.
25 C.J. p 1153 note 93 [a].

Land

Under some statutes defendant arrested on execution for a fine may surrender land in discharge of his body.—Walsh v. Ringer, 2 Ohio 327, 15 Am.D. 555.

Personal security

Some statutes contemplate personal security only and not a mortgage or lien on property.—Hubbard v. State, 75 S.W. 853, 71 Ark. 467.

84. Ark.—Wilson v. White, 102 S.W. 201, 82 Ark. 407, 12 Ann.Cas. 378.

85. Neb.—Knothe v. State, 211 N.W. 619, 115 Neb. 119.

86. Ala.—Harris v. State, 189 So. 787, 28 Ala.App. 528—Bryant v. State, 184 So. 288, 28 Ala.App. 363.
Ill.—People v. Horan, 127 N.E. 673, 293 Ill. 314.
25 C.J. p 1153 note 2.

To avoid imprisonment

Under some statutes, if defendant appealing from a conviction for misdemeanor desires to preserve his right to discharge his liability by paying the fine, he must confess judgment therefor with sufficient sureties.—Jackson v. Nesmith, 147 So. 175, 226 Ala. 389.

87. Tenn.—Halfacre v. State, 79 S.W. 132, 112 Tenn. 609.

88. Tenn.—Halfacre v. State, supra.
25 C.J. p 1153 note 5.

89. Ala.—Bowen v. State, 12 So. 808, 98 Ala. 83.
25 C.J. p 1153 note 6.

ty committed for nonpayment of a fine to confess judgment with sureties in satisfaction of the original judgment has been adopted in some jurisdictions apart from statutory authority;[90] but in other jurisdictions the method is deemed to be purely statutory and unknown to the common law.[91]

Replevying judgment. The effect of replevying a judgment assessing a fine has been held to be to merge the judgment, unless it is void for want of jurisdiction.[92]

Time of payment. Although it has been held that the law requires immediate payment of the fine, or imprisonment,[93] it has also been held that when an alternative sentence of fine or imprisonment is passed the court should fix some reasonable time within which the prisoner may pay the fine;[94] and if the court fails to do so, the law will allow defendant a reasonable time within which to pay the fine.[95] What constitutes a reasonable time depends on the circumstances of each particular case.[96] Some statutes prescribe the time within which defendant has a right to pay.[97]

Statutory authority to a justice of the peace to grant leave to pay a fine or costs by installments, justifies leave to pay both fine and costs in that manner.[98]

To whom payment is to be made. The officer or officers entitled to receive payment of a fine is largely a matter of statutory regulation,[99] and, in order to discharge defendant from further liability for a fine, payment or tender must be made to an official authorized by law to receive it.[1] While the sheriff may not be the proper officer to whom the payment of the fine should be made,[2] it has been held that, where all other conditions requisite to entitle defendant to his discharge have been complied with, a tender to the sheriff is sufficient.[3]

Interest on fines. A fine imposed by the judgment of the court on a person convicted of crime does not bear interest under a statute allowing interest on judgments.[4] This has been held true, although the enforcement of the judgment was stayed by bond pending defendant's writ of error.[5] Where under statute a fine draws interest, a tender of an amount insufficient to pay both fine and interest is bad.[6]

§ 7. —— Effect of Death

A fine abates on the death of the person fined.

As a general rule, a judgment for a fine imposed as a punishment for an offense is abated by the death of defendant pending an appeal,[7] and a fine cannot be enforced after the death of defendant as a claim against his estate.[8]

90. N.C.—State v. Cooley, 80 N.C. 398—State v. Love, 23 N.C. 264.
25 C.J. p 1154 note 7.

91. Ill.—Lambert v. State, 43 Ill. App. 223.

92. Ky.—Tompkins v. Manning, 265 S.W. 830, 205 Ky. 327.

93. Ky.—Routt v. Feemster, 7 J.J. Marsh. 131.

94. Ga.—Dunaway v. Hodge, 55 S.E. 483, 127 Ga. 690.
25 C.J. p 1154 note 11.

95. Ga.—Broomhead v. Chisolm, 47 Ga. 390.
25 C.J. p 1154 note 12.

96. Ga.—Dunaway v. Hodge, 55 S.E. 483, 127 Ga. 690.
25 C.J. p 1154 note 13.

97. Vt.—State v. Wooley, 44 Vt. 363.

98. Pa.—In re Payment of Fines & Costs, 28 Pa.Dist. 406.

Apportionment of costs
In such a case the justice may not deduct more than the proportionate part of his costs from any payment. —In re Payment of Fines & Costs, supra.

99. **Justice of the peace**
Under statute respecting collection of fines imposed by justices of the peace, no such justice has right to receive fine imposed by him.—State v. Seitz, Del., 14 A.2d 710, 1 Terry 572.

Recorder of sixth-class city held to have duty to receive and to pay over fines, in absence of statutory provision for collection.—People v. Floyd, 247 P. 917, 78 Cal.App. 11.

1. Vt.—Smith v. Dana, 22 A. 629, 63 Vt. 537.
Wis.—Manitowoc County v. Sullivan, 8 N.W. 12, 51 Wis. 115.
25 C.J. p 1154 note 16.

2. Ga.—Crowder v. Maples, 72 S.E. 934, 10 Ga.App. 142—Abram v. Maples, 72 S.E. 932, 10 Ga.App. 137.
Ky.—Commonwealth v. Shanks, 6 Ky. L. 524.

3. Ga.—Crowder v. Maples, 72 S.E. 934, 10 Ga.App. 142—Abram v. Maples, 72 S.E. 932, 10 Ga.App. 137.

4. Cal.—People v. Sutter St. R. Co., 62 P. 104, 129 Cal. 545, 79 Am.S.R. 137.
25 C.J. p 1154 note 21.

5. U.S.—U. S. v. Jacob Schmidt Brewing Co., D.C.N.D., 254 F. 714.

6. Vt.—State v. Wooley, 44 Vt. 363.

7. Or.—State v. Hurst, 41 P.2d 1079, 1081, 149 Or. 519, citing **Corpus Juris.**
25 C.J. p 1154 note 25.

However, it has been said that at common law, on the death of defendant, the executor or administrator was chargeable with the payment of the fine out of the assets of deceased in his hands for administration.—O'Sullivan v. People, 32 N.E. 192, 144 Ill. 604, 20 L.R.A. 143—25 C. J. p 1154 note 24.

8. Pa.—Commonwealth, to Use of Bradford County v. Embody, 17 A. 2d 620, 143 Pa.Super. 354.
25 C.J. p 1154 note 26.

Procedure
Where defendant, who has been sentenced to pay a fine and costs of prosecution, dies with the judgment unappealed from, and the county solicitor thereafter causes a certified record of the judgment to be filed in the court of common pleas, the question whether defendant's death abated the judgment in the criminal action, and therefore the judgment in the common pleas, may properly be raised by a rule in the common pleas to show cause why the judgment therein, and also the judgment in the criminal action, should not be declared abated and satisfied.—Commonwealth v. Embody, 37 Pa.Dist. & Co. 280, affirmed Commonwealth to Use of Bradford County v. Embody, 17 A.2d 620, 143 Pa.Super. 354.

§ 8. Enforcement of Payment

For particular matters relating to the enforcement of fines see the sections immediately following.

Examine Pocket Parts for later cases.

§ 9. —— By Execution against Property

A fine ordinarily may be enforced by execution against defendant's property.

After a fine has been imposed by the sentence of the court, it is regarded as in the nature of a debt of record due the state,[9] and ordinarily it may be enforced by execution against defendant's property [10] both at common law [11] and under statutes in many jurisdictions.[12] However, it seems that in some jurisdictions a fine can be enforced only by imprisonment and that an execution cannot issue against the property of defendant.[13] The execution may issue whether the sentence is for a fine alone, or a fine coupled with a definite term of imprisonment;[14] and under some statutes it may issue, although defendant's body has already been taken in execution for the fine.[15] However, under a statute providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied, and providing that defendant shall be entitled to a credit on the fine at a certain rate for each day of imprisonment, it has been held that the imprisonment of defendant for the full period operates to satisfy and discharge the judgment in full, see infra § 12, and that thereafter there is no authority to issue an execution based on such judgment.[16] Executions in these cases are, as a general rule, governed by the principles applicable to executions in civil cases,[17] and this rule has been specifically provided for by some statutes.[18]

§ 10. —— By Execution against Person

In the absence of a statute to the contrary, where a judgment for a fine is rendered in the absence of defendant, a special writ of capias pro fine issues against him.

At common law, where a judgment for a fine is rendered in the absence of defendant, a special writ of capias pro fine issues against him, the exigency of which is that his body be taken and committed to jail until the fine is paid,[19] and provision is made by statute in many states for the use of this writ in the enforcement of the payment of fines.[20] Such a writ is a substitute for a fieri facias,[21] and is in all respects an execution.[22] The right to issue a capias pro fine is not affected by statutes abolishing the writ of capias ad satisfaciendum.[23] Although a judgment imposing a fine may

9. W.Va.—Gill v. State, 20 S.E. 568, 39 W.Va. 479, 480, 45 Am.S.R. 928, 26 L.R.A. 655.
25 C.J. p 1155 note 27.

10. Ga.—Dickson v. Officers of the Court, 136 S.E. 537, 36 Ga.App. 341.
Ky.—Commonwealth v. Partin, 3 S.W. 2d 779, 223 Ky. 405.
25 C.J. p 1155 note 28.

Fine against corporation

Court may properly issue execution for collection of fine against corporation as in case of money judgment or decree.—Krentler-Arnold Hinge Last Co. v. Leman, C.C.A.Mass., 50 F. 2d 699, certiorari granted Leman v. Krentler-Arnold Hinge Last Co., 52 S.Ct. 33, 284 U.S. 605, 76 L.Ed. 519, reversed in part on other grounds Leman v. Krentler-Arnold Hinge Last Co., 52 S.Ct. 238, 284 U.S. 448, 76 L.Ed. 389.

11. W.Va.—Gill v. State, 20 S.E. 568, 39 W.Va. 479, 45 Am.S.R. 928, 26 L.R.A. 655.
25 C.J. p 1155 note 29.

12. U.S.—Hill v. U. S. ex rel. Wampler, Pa., 56 S.Ct. 760, 298 U.S. 460, 80 L.Ed. 1283—U. S. v. Bailey, D.C. Ga., 52 F.2d 286—U. S. v. St. Clair, C.C.A.Neb., 42 F.2d 26—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435—U. S. v. Smith, D. C.Pa., 28 F.Supp. 726.
Alaska.—Ex parte Vendetti, 6 Alaska 381.
D.C.—Green v. Peak, 65 F.2d 809, 62 App.D.C. 176.
25 C.J. p 1155 note 30.

13. N.Y.—Colon v. Lisk, 43 N.Y.S. 364, 13 App.Div. 195, affirmed 47 N.E. 302, 153 N.Y. 188, 60 Am.S. R. 609—People v. Sage, 43 N.Y.S. 372, 13 App.Div. 135.
25 C.J. p 1155 note 31.

14. Ga.—Dickson v. Officers of the Court, 136 S.E. 537, 36 Ga.App. 341.
25 C.J. p 1155 note 32.

15. Colo.—Enderman v. Alexander, 187 P. 729, 68 Colo. 110.
25 C.J. p 1155 note 33.

16. Mont.—Petelin v. Kennedy, 75 P. 82, 29 Mont. 466.

17. U.S.—Pierce v. U. S., C.C.A.Mo., 257 F. 514, 171 C.C.A. 1.
25 C.J. p 1156 note 36.

Delay in issuance

Under a statute providing that the clerk of the court in which the conviction is had shall, at the end of the term, issue an execution for every fine that shall have been imposed during the term and remains unpaid, a failure to issue an execution at such time does not invalidate a writ subsequently issued, where the delay was largely caused by defendant. —People v. Pierson, 253 Ill.App. 114.

Discovery

Writ of execution being returned "no property found," bill of discovery was proper step to collect fine, and bill was properly brought in county in which the judgment was rendered.—Commonwealth v. Partin, 3 S.W.2d 779, 223 Ky. 405.

18. Okl.—Ex parte Steed, 117 P. 887, 6 Okl.Cr. 183.
25 C.J. p 1156 note 37.

19. Va.—Commonwealth v. Webster, 8 Gratt. 702, 49 Va. 702.
25 C.J. p 1156 note 38.

20. Ky.—Board of Councilmen of City of Frankfort v. Rice, 61 S.W. 2d 614, 249 Ky. 771.
25 C.J. p 1156 note 39.

Restraint held illegal

A restraint under a capias pro fine which is not signed by the issuing justice, which does not show the amount due or unpaid on the fine, and which was executed four days after its return day, is illegal.—Ex parte Palvado, 129 S.W.2d 306, 137 Tex.Cr. 308.

21. Ky.—Board of Councilmen of City of Frankfort v. Rice, 61 S.W. 2d 614, 249 Ky. 771.
25 C.J. p 1156 note 39 [c].

22. Ky.—Board of Councilmen of City of Frankfort v. Rice, supra.

23. Tenn.—Cagle v. State, 6 Humphr. 391.

expressly award a capias pro fine for its collection,[24] the writ may issue in the absence of an order in the judgment for its issuance,[25] unless the judgment imposing the fine expressly provides some other mode for its enforcement.[26] It has been held that the fact that execution against property may or may not issue does not prevent the incarceration of defendant under capias pro fine.[27] It appears that a capias pro fine can issue at any time before the judgment is paid although an execution against property does not issue.[28] Even where the right to issue a capias pro fine is suspended by the levy of a fieri facias, yet where the property levied on is released, the suspension ceases and the capias may be issued.[29] Where a judgment in a criminal case is void, a capias pro fine issued in furtherance of execution and enforcement of the judgment is also void,[30] and where a judgment for a fine is merged in security, such as a replevin bond, given and accepted under statutory authority, a capias pro fine cannot properly be issued thereafter.[31] Imprisonment on a wrongfully issued capias pro fine may be prevented by injunction in the proper court.[32]

Capias ad satisfaciendum. A capias ad satisfaciendum in the form appropriate to civil cases was not issuable at common law for enforcing the payment of fines,[33] although a different rule obtains under statute in some jurisdictions.[34]

§ 11. —— By Imprisonment

As a general rule, a fine may be enforced by imprisonment.

As a general rule, the right to impose a fine gives authority to compel payment of the fine by imprisonment,[35] even in the absence of a statute especially providing therefor;[36] and where the punishment for the offense is a fine, it is a part of the sentence that he stand committed until the fine is paid.[37]

Imprisonment of defendant until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court.[38] If he refuses to pay, he is not sentenced to a term in prison; the duration of his imprisonment is in his own control;[39] by payment

Va.—Commonwealth v. Webster, 8 Gratt. 702, 49 Va. 702.
25 C.J. p 1156 note 40.

24. Va.—Commonwealth v. Webster, supra.

25. Ky.—Farris v. Dozier, 82 S.W. 615, 26 Ky.L. 892—Long v. Wood, 78 Ky. 392.
Va.—Commonwealth v. Webster, 8 Gratt. 702, 49 Va. 702.
25 C.J. p 1157 note 42.

26. U.S.—In re Teuscher, C.C.Mo., 23 F.Cas.No.13,846.

27. Tex.—Ex parte Cook, 188 S.W. 979, 80 Tex.Cr. 77.
25 C.J. p 1157 note 44.

28. Tex.—Ex parte Cook, supra.
25 C.J. p 1157 note 45.

29. Ky.—Faris v. Commonwealth, 3 B.Mon. 79.

30. Tex.—Ex parte Grimes, 195 S.W. 858, 81 Tex.Cr. 405.

31. Ky.—Commonwealth v. Merrigan, 8 Bush 131.

32. Ky.—Ledford v. Lewis, 36 S.W. 2d 852, 238 Ky. 124.

33. U.S.—Ex parte Watkins, D.C., 7 Pet. 568, 8 L.Ed. 786.
25 C.J. p 1157 note 51.

34. U.S.—Ex parte Watkins, supra.
S.C.—Atty.-Gen. v. Baker, 30 S.C. Eq. 521.
25 C.J. p 1157 note 52.

35. U.S.—Cahill v. Biddle, C.C.A. Kan., 13 F.2d 827.
Nev.—Ex parte Converse, 198 P. 229, 230, 45 Nev. 93, citing **Corpus Juris.**
25 C.J. p 1157 note 54—16 C.J. p 1367 note 2.

Forfeiture of specific sum
Since a provision for forfeiture of a specific sum is equivalent to the imposition of a fine for that amount, a statutory provision that one convicted shall "forfeit" a specific amount authorizes imposition of a fine and the imprisonment of accused until it is paid.—Ex parte Alexander, 39 Mo.App. 108.

Special judge of city court has all the duties and powers of the mayor or city court, and one of these duties is to issue a commitment to enforce a judgment which he has pronounced. Such commitment is an execution to enforce the valid part of the judgment and is not a supplemental proceeding.—Hunnicutt v. Frauhiger, 158 N.E. 572, 199 Ind. 501.

36. U.S.—Ex parte Garrison, D.C. Cal., 297 F. 509.

37. Mo.—Ex parte Secrest, 32 S.W. 2d 1085, 326 Mo. 837.
25 C.J. p 1157 note 55.

Necessity of order
Under some statutes, defendant cannot be imprisoned under an order of court assessing a fine without an order that he be committed until the fine is paid.—Ex parte Roller, 106 P. 548, 3 Okl.Cr. 384.

38. U.S.—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435.
Cal.—Ex parte Huewitt, 282 P. 406 102 Cal.App. 24.
Del.—Mullin v. State, on Complaint of Williams, 194 A. 578, 8 W.W Harr. 533.
Mont.—State v. Sorenson, 210 P. 752 65 Mont. 65.
N.Y.—McKinney v. Hamilton, 26 N.E. 2d 949, 282 N.Y. 393, 127 A.L.R. 1283, reversing 13 N.Y.S.2d 786, 257 App.Div. 1061, affirming 10 N.Y.S.2d 140, 170 Misc. 270, reargument denied 14 N.Y.S.2d 1001, 257 App.Div. 1085—City of Buffalo v. Murphy, 239 N.Y.S. 206, 228 App.Div. 279, followed in City of Buffalo v. Heimburg, 239 N.Y.S. 219, 228 App. Div. 753.
Okl.—Harry v. State, 58 P.2d 340, 59 Okl.Cr. 302—Ex parte Wagner, 50 P.2d 1135, 58 Okl.Cr. 161—Ex parte Autry, 50 P.2d 239, 58 Okl.Cr. 88.
S.D.—Foertsch v. Jameson, 204 N.W. 175, 48 S.D. 328.
25 C.J. p 1157 note 56.

Females
A female can be committed to the county jail to enforce payment of a fine, notwithstanding a statute providing that every female person who shall be convicted of any offense punishable by imprisonment shall be sentenced to the state industrial farm for women, since imprisonment for nonpayment of a fine is not punishment inflicted for the commission of the offense.—State ex rel. Grant v. Gibson, 26 P.2d 284, 285, 138 Kan. 457, quoting **Corpus Juris.**

39. N.Y.—Hart v. Norman, 155 N.Y.S. 238, 92 Misc. 185.

of the fine he can at any time secure his release, as discussed infra § 12. The sentence is not, therefore, open to the objection that the magistrate rendering it has no jurisdiction of offenses which are punishable by imprisonment.[40]

The practice and authority for directing that one ordered to pay a fine stand committed until it is paid is now commonly provided by statute;[41] and, although there is authority to the contrary,[42] even in the absence of a provision in the judgment that defendant should be imprisoned on making default in payment of the fine, the law, under such a statute, supplies the deficiency.[43] This is a proper

40. Ill.—Newton v. Locklin, 77 Ill. 103—Matter of Bollig, 31 Ill. 88—Brown v. People, 19 Ill. 613.

41. Alaska.—U. S. v. Stromberger, 9 Alaska 689.
Ill.—People v. Isonhart, 259 Ill.App. 9.
Iowa.—State v. McCoy, 194 N.W. 265, 196 Iowa 278.
Mont.—State v. Griebel, 211 P. 331, 65 Mont. 390.
Nev.—Ex parte Converse, 198 P. 229, 230, 45 Nev. 93, quoting **Corpus Juris.**
N.Y.—People v. Harris, 274 N.Y.S. 171, 153 Misc. 390.
Ohio.—Kohler v. State, 156 N.E. 510, 24 Ohio App. 272.
Okl.—Odom v. State, 95 P.2d 916, 68 Okl.Cr. 117.
25 C.J. p 1158 note 61—16 C.J. p 1368 note 4.

Condition of probation
The imposition of a fine as a condition of probation is not a judgment imposing fine within a statute providing that a judgment that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied.—Ex parte McVeity, 277 P. 745, 98 Cal.App. 723.

Imprisonment held mandatory, under the statute, unless the fine is satisfied by actual payment.—Ex parte Smith, 242 P. 284, 33 Okl.Cr. 175.

County ordinance may authorize court to impose jail sentence as alternative to payment of fine levied thereunder.—People v. Sayre, 70 P. 2d 546, 26 Cal.App.2d Supp. 757.

Judgment construed
Judgment held to impose a sentence of six months' imprisonment, but to give the party convicted the opportunity to escape such punishment by the payment of a fine, rather than to provide for imprisonment for nonpayment of the fine.—Ex parte Frankovitch, 213 P. 39, 190 Cal. 439.

Statute construed
A statute prescribing, as punishment for public drunkenness, a fine "To be paid in money" does not mean that defendant may not be sentenced to hard labor if he fail or refuse to pay the fine. The statute is to guard against payment in depreciated fine and forfeiture claims issued by the county.—Chambers v. State, 157 So. 230, first case, 26 Ala.App. 200, certiorari denied 157 So. 230, second case, 229 Ala. 328.

Stay bond
(1) Under some statutes, if defendant shall be fined on a conviction for a misdemeanor, and shall stay the collection of such fine by executing a stay bond, and thereafter shall fail to pay the fine so stayed within the time fixed, he shall be committed until he shall have served out the fine or shall have paid it.—Ex parte Taylor, 45 P. 2d 1110, 57 Okl.Cr. 149—Ex parte Bailey, 296 P. 998, 50 Okl.Cr. 53.

(2) The fact that the stay bond has been forfeited and suit to recover the penalty has been ordered does not affect this rule.—Ex parte Colbert, 5 P.2d 765, 52 Okl.Cr. 392.

Unauthorized fine
Imprisonment for nonpayment of a fine which is in excess of that authorized by statute is improper.—Ex parte Brandamour, 108 So. 895, 91 Fla. 889.

Federal courts
(1) Under 18 U.S.C.A. § 569, the court has been held to have discretionary power to order defendant imprisoned in case of his failure to pay a fine.
U.S.—Vollmer v. U. S., C.C.A.Tex., 2 F.2d 551—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435—U. S. v. Smith, D.C.Pa., 28 F. Supp. 726—Wampler v. Hill, D.C. Pa., 11 F.Supp. 540.
D.C.—Green v. Peak, 65 F.2d 809, 62 App.D.C. 176.

(2) This statute impliedly provides for imprisonment for nonpayment of fines.—U. S. v. Pratt, D.C.N.H., 23 F. 2d 333—U. S. v. Wampler, D.C.Md., 10 F.Supp. 609.

(3) The intention to take from court its authority to commit defendant until fine is paid, or defendant is otherwise discharged according to law, should clearly appear from provisions of statute and should not rest on inference.—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435.

42. Ariz.—Smith v. State, 293 P. 23, 37 Ariz. 262—Stuart v. State, 282 P. 276, 36 Ariz. 28—Dunbar v. Territory, 50 P. 30, 5 Ariz. 184.

Nunc pro tunc order
Where conviction and sentence imposing fine and imprisonment did not provide an alternative of further imprisonment for nonpayment of fine and did not order imprisonment of defendant for nonpayment of fine, trial court was without jurisdiction, when time of imprisonment expired, to make an additional order imprisoning defendant until the fine was paid, not exceeding a certain sum per day.—Ex parte Claudette, 69 P.2d 1021, 21 Cal.App.2d 688.

Subsequent written judgment
Where court orally pronounced against one convicted of driving a motor vehicle while he was intoxicated, a fine and a jail sentence, and two days later the judge signed a written judgment containing the additional provision that on motorist's failure to pay the fine he must serve an additional day in jail for every two dollars of the fine remaining unpaid, the additional provision was invalid.—State ex rel. Perry v. Garecht, 297 N.W. 132, 70 N.D. 599.

In federal courts
(1) In the federal courts, if the direction for imprisonment until the fine is paid is omitted from the judgment, the remedy by execution is exclusive.—Hill v. U. S. ex rel. Wampler, Pa., 56 S.Ct. 760, 298 U.S. 460, 80 L.Ed. 1283—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435—U. S. v. Smith, D.C.Pa., 28 F.Supp. 726.

(2) It is discretionary with the court to order defendant imprisoned in case of his failure to pay a fine; and if the court does not direct such imprisonment, the clerk is acting without authority when he makes such an entry a part of the commitment.—Boyd v. Archer, C.C.A.Wash., 42 F.2d 43, followed in, C.C.A.Ga., Van Gorder v. Aderhold, 61 F.2d 1044.

(3) It has been held, however, that a sentence to pay fine in criminal case implies commitment of defendant until fine is paid or he is otherwise legally discharged, whether sentence does or does not include in addition to fine specific term of imprisonment.—U. S. v. Wampler, D.C. Md., 10 F.Supp. 609.

In Minnesota it has been held that one sentenced to pay a fine in a justice's court cannot be imprisoned to enforce payment, unless the justice so determines when the sentence is pronounced and therein specifies the duration of the confinement for nonpayment.—State v. Rice, 177 N.W. 348, 145 Minn. 359.

43. Mo.—Ex parte Campbell, App., 197 S.W. 1058.
Okl.—Ex parte Barnes, 93 P.2d 765, 67 Okl.Cr. 235—Ex Parte Clemmons, 225 P. 184, 27 Okl.Cr. 50.

means for the collection of a fine, and is not regarded as a part of the punishment.[44] Some of these statutes are confined to cases of misdemeanors and do not authorize imprisonment for the nonpayment of a fine imposed as part of the punishment on a conviction for a felony;[45] and before the court has jurisdiction to provide, on a conviction for a felony, a term of imprisonment for failure to pay a fine, such procedure must be authorized under the act providing the punishment for the crime, or must be otherwise provided for by law.[46] Under statutes in some jurisdictions, where the party is convicted of an offense and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine is paid.[47] It is generally held that a person sentenced to pay a fine may be imprisoned for nonpayment under a general law authorizing imprisonment for nonpayment of fines, although the particular statute under which he was convicted contains no provision for enforcement of the fine by imprisonment.[48] In some jurisdictions where all offenses are statutory and punishments are regulated by statute, it is held that a court has no authority to commit for nonpayment of a fine in the absence of statute specifically authorizing the commitment.[49] If a statute imposing a fine prescribes another method for its enforcement, the court has no authority to sentence one convicted of violating the statute to imprisonment for the nonpayment of the fine imposed.[50] Since a provision for forfeiture of a specific sum is equivalent to the imposition of a fine for that amount, a statutory provision that one convicted shall "forfeit" a specific amount authorizes imposition of a fine and the imprisonment of accused until it is paid.[51]

The imprisonment for the nonpayment of fines and the statutes providing therefor have been repeatedly held not to be in violation of constitutional prohibitions.[52]

Where both fine and imprisonment are imposed. As a general rule, where the punishment for an offense is both fine and imprisonment, the court may order defendant, for a failure to pay the fine, to be imprisoned, and that such imprisonment begin after the expiration of the term fixed as a punishment for the crime.[53] In some jurisdictions it is held that a statute which provides for imprisonment in default of payment of fine extends only to cases where a fine alone is imposed, and not to cases where both imprisonment and fine are specified as the punishment.[54] In other jurisdictions, however,

Or.—Harlow v. Clow, 223 P. 541, 110 Or. 257.

Commitment for term and fine is broad enough to require commitment until the fine is paid.—Ex parte Baker, 35 P.2d 285, 56 Okl.Cr. 139.

To carry out sentence and judgment

Judgment imposing jail sentence and fine on accused and remanding him to custody of sheriff to carry out sentence and judgment was equivalent to judgment requiring accused to be confined in jail until fine was paid or satisfied.—State ex rel. Marasco v. Mundell, 256 N.W. 519, 127 Neb. 673.

44. Cal.—Ex parte Garrison, 223 P. 64, 193 Cal. 37.

Nev.—Ex parte Converse, 198 P. 229, 230, 45 Nev. 93, quoting **Corpus Juris.**

16 C.J. p 1368 note 5.

45. Ohio.—Smith v. State, 24 Ohio Cir.Ct. 140.

In Arkansas where there is no provision made for imprisonment on failure to pay the fine provided for in the act denouncing the crime, a fine imposed as a part of the punishment for a felony cannot be enforced by imprisonment.—Burrell v. State, 160 S.W.2d 218, 203 Ark. 1124 —25 C.J. p 1158 note 62 [a].

46. **Legislature has power** to fix the penalty of imprisonment for nonpayment of fine and costs in felony cases.—Burrell v. State, 160 S.W.2d 218, 203 Ark. 1124.

47. Neb.—Luther v. State, 124 N.W. 117, 85 Neb. 674.

25 C.J. p 1158 note 63.

In Arizona, under a statute providing that a judgment directing that defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, and specify the extent of imprisonment, which must not exceed one day for every dollar of the fine, a judgment providing that defendant be fined and that he be delivered or remanded to the custody of the sheriff until such fine is paid is void.—Dunbar v. Territory, 50 P. 30, 5 Ariz. 184.

48. U.S.—Ex parte Garrison, D.C. Cal., 297 F. 509.

Cal.—Ex parte Irvin, 271 P. 202, 205 Cal. 411—Ex parte Glavich, 239 P. 708, 196 Cal. 723—Ex parte Garrison, 223 P. 64, 193 Cal. 37—Ex parte Huewitt, 282 P. 406, 102 Cal. App. 24—People v. Magoni, 238 P. 112, 73 Cal.App. 78—Ex parte Adams, 214 P. 467, 61 Cal.App. 239 —Ex parte Kinney, 200 P. 966, 53 Cal.App. 792.

La.—State v. Sharp, 100 So. 454, 156 La. 358.

25 C.J. p 1158 note 64.

49. Ohio.—Brown v. State, 11 Ohio 276.

16 C.J. p 1367 note 3—25 C.J. p 1158 note 65.

50. N.Y.—People v. Stock, 50 N.Y.S. 483, 26 App.Div. 564, affirmed 51 N.E. 1092, 157 N.Y. 681—People v. Hazard, 52 N.Y.S. 670, 23 Misc. 477.

51. Mo.—Ex parte Alexander, 39 Mo. App. 108.

52. Nev.—Ex parte Converse, 198 P 229, 45 Nev. 93.

Or.—Harlow v. Clow, 223 P. 541, 542, 110 Or. 257, citing **Corpus Juris.**

25 C.J. p 1158 note 68.

53. Alaska.—Gozovich v. Sullivan, 7 Alaska 197—Ex parte Vendetti, 6 Alaska 381.

Fla.—Thomas v. State, 76 So. 780, 74 Fla. 200.

Idaho.—State v. Anderson, 174 P. 124, 31 Idaho 514.

La.—State v. Sharp, 100 So. 454, 156 La. 358—State v. McGuire, 94 So. 896, 152 La. 953.

Nev.—Ex parte Converse, 198 P. 229, 45 Nev. 93.

Okl.—Ex parte Autry, 50 P.2d 239, 58 Okl.Cr. 88—Ex parte Walker, 236 P. 919, 31 Okl.Cr. 36.

Wash.—State v. Tullock, 203 P. 932, 118 Wash. 496.

25 C.J. p 1159 note 70.

54. Cal.—Ex parte Wadleigh, 23 P. 190, 82 Cal. 518—People v. Velarde, 188 P. 59, 45 Cal.App. 520.

25 C.J. p 1159 note 71—16 C.J. p 1368 note 7.

Justices' and police courts

The construction of the statute relating to superior courts, as set forth in the text, should be given to a similar statute relating to justices' and police courts.—People v. Sayre, 70 P.

the application of similar statutes is not so limited,[55] nor is it necessary that the part of the sentence imposing imprisonment should be enforced before requiring defendant to work out his fine.[56]

Necessity of first proceeding against property. Apart from express statutory requirement,[57] it is not a condition precedent to the power to imprison that an effort should have been made first to satisfy the fine out of the property of defendant.[58]

Place of confinement. As a general rule, where the sentence is to pay a fine and in default of payment to be imprisoned, the imprisonment may and should be in a common jail or workhouse, rather than in a prison or penitentiary.[59] Under some statutes authorizing imprisonment for the nonpayment of a fine, if the primary punishment includes a term of imprisonment in a prison, the convict may be required to serve out his fine in the same institution and need not be transferred to a county jail for this purpose.[60] The intent of a statute providing that no person shall be committed to the penitentiary, reformatory, or other state institution for the recovery of a fine has been held to be to prevent defendant's sentence to the penitentiary, reformatory, or other state institution from being extended by compelling him to submit to further imprisonment to pay his fine.[61] Under such a statute, where the primary punishment includes a term of imprisonment in the state prison, it is proper to order that, if at the expiration of the penitentiary sentence the fine is not paid, defendant should be confined in a county house of correction until the fine is paid or worked out.[62] Of course, a convicted person cannot be sentenced, on nonpayment of a fine, to confinement in a place not authorized by the statute providing for the places of confinement in such cases.[63]

A statute authorizing the imprisonment of federal prisoners for the nonpayment of fines does not, in the absence of express provision, confer authority to imprison in the state prison.[64]

§ 12. —— Duration of Imprisonment and Discharge Therefrom

a. In general
b. Discharge from imprisonment

a. In General

Ordinarily, under the various statutes, a person sentenced to pay a fine may be imprisoned until the fine has been paid or settled in accordance with law.

2d 546, 550, 26 Cal.App.2d Supp. 757, citing **Corpus Juris.**

In North Dakota, under Comp.L. 1913, § 9157, providing that a judgment of a "fine only" may also direct that defendant be imprisoned until the same is satisfied, the word "only" limits the authority of the justice of the peace to imprison for fine to cases where the punishment inflicted is a fine only and in no other case. —Ex parte Salhus, 247 N.W. 401, 63 N.D. 238.

55. Idaho.—State v. Goodrich, 196 P. 1043, 33 Idaho 654.
25 C.J. p 1159 note 72—16 C.J. p 1368 note 8.

56. Tex.—Ex parte Stephens, 127 S. W. 819, 59 Tex.Cr. 177.
16 C.J. p 1368 note 9.

57. Mich.—Sheldon v. Hill, 33 Mich. 171.
N.Y.—People v. Rochester, 8 N.Y.St. Rep. 291.
25 C.J. p 1159 note 73.

58. Neb.—State ex rel. Marasco v. Mundell, 256 N.W. 519, 127 Neb. 673.
25 C.J. p 1159 note 74.

59. U.S.—Smith v. U. S., C.C.A.Ark., 50 F.2d 46—Bonner v. U. S., C.C.A. Ark., 46 F.2d 619, certiorari denied 51 S.Ct. 560, 283 U.S. 851, 75 L.Ed. 1459—McMillan v. U. S., C.C.A.Okl., 27 F.2d 94—Cahill v. Biddle, C.C.A. Kan., 13 F.2d 827.
Fla.—Alford v. State, 181 So. 839, 132 Fla. 624—Franklin v. State, 163 So. 55, 120 Fla. 686—Albritton v. State, 150 So. 607, 112 Fla. 472—Brooke v. State, 128 So. 814, 99 Fla. 1275, 69 A.L.R. 1173—Sykes v. State, 82 So. 778, 78 Fla. 167—Clifton v. State, 79 So. 707, 76 Fla. 244—Thomas v. State, 76 So. 780, 74 Fla. 200.
25 C.J. p 1159 note 75, p 1160 note 76—16 C.J. p 1376 note 18.

Where punishment for felony is only a fine or a term in jail, or both, under some statutes the imprisonment for failure to pay the fine should be in the jail.—Johnson v. State, 72 S.W.2d 288, 126 Tex.Cr. 466.

Workhouse or jail
There is no difference between workhouse and jail in relation to confinement under sentence for default of fines and costs in criminal cases. —State v. Sherrill, 27 Ohio N.P.,N.S., 31.

In Oklahoma
(1) Imprisonment in the state penitentiary to enforce payment of fine and costs has been held to be unlawful.—Ex parte Farve, 79 P.2d 1034, 64 Okl.Cr. 326—Ex parte Autry, 50 P. 2d 239, 58 Okl.Cr. 88, expressly overruling Ex parte McCoy, 281 P. 813, 45 Okl.Cr. 52.
(2) This rule has been followed even where the sentence was a term in the penitentiary and to pay a fine and costs.—Ex parte Wagner, 50 P.2d 1135, 58 Okl.Cr. 161.
(3) Prior to the decision in Ex parte Autry, supra, it had been held that, when a judgment in a criminal action imposed confinement in the state penitentiary and in addition thereto a fine and costs, defendant, at the termination of the confinement specified, could be held in prison until such fine and costs were paid at the rate of one dollar a day. —Ex parte Meyers, 24 P.2d 1011, 55 Okl.Cr. 75—Ex parte Eurick, 288 P. 467, 143 Okl. 280—Ex parte McCoy, 281 P. 813, 45 Okl.Cr. 52.

60. U.S.—Haddox v. Richardson, W. Va., 168 F. 635, 94 C.C.A. 99—U. S. v. Wampler, D.C.Md., 10 F.Supp. 609.
S.D.—Foertsch v. Jameson, 204 N.W. 175, 48 S.D. 328.
25 C.J. p 1160 note 77.

61. Ill.—People v. Stavrakas, 167 N. E. 852, 335 Ill. 570.

62. Ill.—People v. Mangano, 188 N. E. 475, 354 Ill. 329—People v. Stavrakas, 167 N.E. 852, 335 Ill. 570.

63. Ill.—People v. Barney, 200 Ill. App. 531.

64. U.S.—In re Greenwald, C.C.Cal., 77 F. 590.
16 C.J. p 1377 note 33.

In many and probably most of the states, the duration of the imprisonment for nonpayment of fine is expressly regulated by statutes,[65] and the imprisonment imposed cannot exceed the time as so limited.[66] Ordinarily, under the various statutes, it is proper to provide in the judgment that defendant shall be imprisoned until the fine has been paid or settled in accordance with law,[67] and a common provision for the satisfaction of fines is for a per diem credit for the time imprisoned.[68] It has been held that a statute providing that defendant who is adjudged to pay a fine may be committed until the fine is paid, but prescribing no particular term of imprisonment, does not authorize a commitment for a specific term unless the fine is "sooner paid."[69] Some statutes limiting terms of imprisonment in a county or city jail apply only to misdemeanors and have no application to such imprisonments for failure to pay a fine imposed on conviction for a felony.[70] In the absence of a statute limiting the duration of the imprisonment to enforce the payment of a fine, it seems that the convict may be imprisoned for an unlimited time in default of payment of the fine.[71] A constitutional provision forbidding indefinite imprisonment is not violated by a sentence imposing a fine and directing the commitment of defendant until it is paid,[72] for the reason that the punishment is the fine, and

65. U.S.—U. S. v. Wampler, D.C.Md., 10 F.Supp. 609.
Ala.—Ex parte Etheridge, 103 So. 66, 212 Ala. 466—Thompson v. State, 77 So. 967, 16 Ala.App. 387.
Okl.—Ex parte Walker, 236 P. 919, 31 Okl.Cr. 36.
25 C.J. p 1160 note 81.

Failure to provide work
In West Virginia, where a person has been sentenced to confinement in the county jail to pay a fine and costs, and to work on the county roads or in the preparation of road materials, under the provisions of Code 1931, 17-15-1, he cannot be detained for more than ten days after the expiration of the term of imprisonment for the payment of the fine and costs, as provided in Code 1931, 50-18-9, unless he is furnished work on the county roads, or in the preparation of road materials.—State v. Stephenson, 164 S.E. 38, 112 W.Va. 218.

Judgment should define term of imprisonment as required by statute.—State v. Dill, 196 N.W. 992, 197 Iowa 208—State v. Ludden, 194 N.W. 49, 196 Iowa 275—State v. Williams, 191 N.W. 790, 195 Iowa 374.

Suspended sentence
The fact that more than two years had elapsed since the imposition of a fine, which was improperly suspended, and the taking of defendant into custody to enforce the fine does not relieve defendant of serving time for the fine, as he is not within a statute providing that no convict shall be held in continuous confinement for failure to pay a fine for a period of more than two years.—Cameron v. Thompson, 173 So. 422, 178 Miss. 434.

66. Ala.—Thompson v. State, 77 So. 967, 16 Ala.App. 387.
Ga.—Davis v. State, 117 S.E. 267, 30 Ga.App. 183.

67. Ill.—People v. Welch, 162 N.E. 113, 331 Ill. 20—People v. Lavendowski, 160 N.E. 582, 329 Ill. 223.
Wash.—State v. Tullock, 203 P. 932, 118 Wash. 496.

Commitment must be definite as to when the imprisonment shall commence and terminate.—People v. Welch, 162 N.E. 113, 331 Ill. 20.

Termination on payment
A sentence imposing imprisonment by way of compelling payment of a fine is bad if it does not provide that the imprisonment shall have a definite outside limit, and that it shall end as much earlier as the fine is paid.—Brownbridge v. People, 38 Mich. 751.

On revocation of parole within term of sentence by police court, prisoner is not entitled to release until balance of fine is paid.—Simons v. Walston, 255 P. 975, 123 Kan. 574.

Federal courts
(1) The district courts of the United States, including the supreme court of the District of Columbia, may, in default of payment of a fine, commit a defendant to jail until the fine is paid.
U.S.—U. S. v. Ridgewood Garment Co., D.C.N.Y., 44 F.Supp. 435.
D.C.—Dodd v. Peak, 47 F.2d 430, 60 App.D.C. 68.

(2) District court has no authority to impose specific term of additional imprisonment in default of payment of fine.—U. S. v. Wampler, D.C.Md., 10 F.Supp. 609.

(3) Under Code T. 18, §§ 155, 165, the police court of the District of Columbia may, in default of payment of a fine, commit defendant for such a term as the court thinks right and proper, not to exceed one year.—Dodd v. Peak, supra.

68. Iowa.—State v. Gillman, 210 N.W. 435, 202 Iowa 428—State v. Ellis, 192 N.W. 802, 196 Iowa 407.
Mont.—State v. Griebel, 211 P. 331, 65 Mont. 390—State v. Sorenson, 210 P. 752, 65 Mont. 65.
Pa.—Commonwealth v. Bostek, 9 Pa. Dist. & Co. 632, 7 Pittsb.Leg.J. 885, 27 Lack.Jur. 224.
25 C.J. p 1161 note 87.

Justices' courts
Statute allowing one to pay fine by confinement in jail at rate of three dollars per day applies alone to conviction before justices of the peace.—Ex parte McLaughlin, 60 S.W.2d 786, 124 Tex.Cr. 40.

Statute held to supersede prior statute
Tex.—Ex parte Polly, 15 S.W.2d 16, 111 Tex.Cr. 431, followed in Rowley v. State, 15 S.W.2d 1118, 112 Tex.Cr. 163.

Validity
The statutes providing for allowance of different amounts daily as credits on fines and costs, assessed against persons sentenced to work or imprisonment in jail on convictions of misdemeanors when unable to pay such fines and costs, in different counties according to their populations, are unconstitutional as not giving equal protection to all citizens of state.—Ex parte Ferguson, 132 S.W.2d 408, 137 Tex.Cr. 494, followed in Ex parte Patterson, 132 S.W.2d 411, 137 Tex.Cr. 504, Ex parte Williams, 132 S.W.2d 411, 137 Tex.Cr. 514, Ex parte Yates, 132 S.W.2d 412, 137 Tex.Cr. 515, and Ex parte Sudderth, 132 S.W.2d 412, 137 Tex.Cr. 506.

69. Va.—Ex parte Marx, 9 S.E. 475, 86 Va. 40.

70. **In California**
(1) Pen.Code § 19a does not apply to imprisonments in the county jail for failure to pay a fine imposed in a felony case.—Ex parte Bellotti, 54 P.2d 1115, 12 Cal.App.2d 103, hearing denied 55 P.2d 864, 12 Cal.App.2d 103.

(2) The contrary, however, has also been held.—Ex parte Rasmussen, 41 P.2d 181, 4 Cal.App.2d 263.

71. U.S.—Grier v. Kennan, C.C.A.Mo., 64 F.2d 605, 607, citing **Corpus Juris.**
25 C.J. p 1160 note 78—16 C.J. p 1368 note 11.

72. Kan.—State ex rel. Grant v. Gibson, 26 P.2d 284, 285, 138 Kan. 457, quoting **Corpus Juris.**
25 C.J. p 1160 note 79—16 C.J. p 1368 note 12.

the committing to custody is only a means of its enforcement.[73]

Some authorities hold that the term of imprisonment for the nonpayment of a fine is not limited by statutes prescribing a maximum period as punishment for the offense,[74] but in other jurisdictions, sometimes by virtue of express statutory provision, the contrary is held.[75] In some jurisdictions, in view of a statute conferring on one who is unable to pay a fine, and who has been confined in prison thirty days for nonpayment, the right to be discharged, it has been held that the imposition of a term of imprisonment exceeding thirty days for nonpayment of a fine is improper.[76]

Concurrent sentences. A statute providing for the allowance of a per diem credit on unpaid fines for each day the prisoner remains in jail has been held not to authorize the application of the same credit at the same time to two or more fines imposed on the same individual in separate sentences for separate violations of law.[77] Where by statute the fine and costs are made a part of the penalty, and where a judgment and sentence on a second or subsequent conviction runs concurrent with a prior judgment and sentence, it has been held that the fine and costs in the subsequent judgment and sentence are discharged by imprisonment under the prior sentence in the same manner as the judgment of imprisonment is discharged.[78]

Deduction of time during unauthorized release. Where one sentenced to imprisonment for the nonpayment of a fine is released by the officer without authority, the time of his absence cannot be considered as spent in imprisonment in satisfaction of the judgment.[79]

Reduction of imprisonment by partial payment. It has been held that one committed for nonpayment of a fine must remain in custody for the whole of the term fixed in the sentence, unless the whole fine is sooner paid, and that the prisoner is not entitled to a reduction of his term for partial payment of the fine.[80]

Time of commitment and suspension of sentence. When a person may be sentenced to pay a fine and also to be imprisoned as a punishment, the term of imprisonment for the enforcement of the fine will begin after the expiration of the term of imprisonment inflicted as a punishment.[81] It has been held that, while a court should immediately commit defendant to imprisonment on failure to pay a fine imposed, yet if the court extends indulgence to him by giving him time in which to pay, a mittimus subsequently issued is not void.[82] However, it has also been held that a court has no power to suspend execution of a sentence except as incident to a writ of error or some other legal ground; that, where the court has sentenced defendant to pay a fine and to stand committed until it was paid or, in default of payment, until the expiration of a prescribed period, the term of imprisonment on failure to pay the fine commences at once; and that, if the court without legal cause suspends execution of the

73. U.S.—Grier v. Kennan, C.C.A. Mo., 64 F.2d 605, 608, quoting **Corpus Juris**—United States v. Wampler, D.C.Md., 10 F.Supp. 609, 612, citing **Corpus Juris.**
Kan.—State ex rel. Grant v. Gibson, 26 P.2d 284, 285, 138 Kan. 457, quoting **Corpus Juris.**
25 C.J. p 1160 note 80—16 C.J. p 1368 note 13.

74. La.—State v. Shelfer, 116 So. 825, 166 La. 128—State v. Scott, 103 So. 757, 158 La. 249—State v. Carlander, 103 So. 755, 158 La. 244 —State v. Hebert, 103 So. 742, 158 La. 209, affirmed Hebert v. State of Louisiana, 47 S.Ct. 103, 272 U.S. 312, 71 L.Ed. 270, 48 A.L.R. 1102 —State v. Gani, 101 So. 726, 157 La. 5—State v. Sharp, 100 So. 707, 156 La. 531.
S.D.—Foertsch v. Jameson, 204 N.W. 175, 48 S.D. 328.
Wash.—State v. Tullock, 203 P. 932, 118 Wash. 496.
25 C.J. p 1160 note 82.

75. Ariz.—Silver v. State, 295 P. 311, 37 Ariz. 418.
Cal.—People v. Velarde, 188 P. 59, 45 Cal.App. 520.
Fla.—Lyle v. Walter, 131 So. 383, 100 Fla. 1457.
Mich.—Howard v. People, 3 Mich. 207.
25 C.J. p 1160 notes 83, 84.

Justices' or police courts

Pen.Code § 1205, which is contained in a title dealing with proceedings in the superior court and which provides that the imprisonment for nonpayment of a fine shall not exceed the maximum period for which imprisonment might be imposed as a punishment for the offense, does not apply to convictions in justices' or police courts, which are governed by Pen.Code § 1446, authorizing imprisonment for nonpayment of a fine not to exceed one day for each dollar of the fine. Consequently, one fined in such a court for an offense which is not punishable by imprisonment may be imprisoned for nonpayment of the fine.—Ex parte Kennerly, 214 P. 857, 190 Cal. 774—Ex parte Huewitt, 282 P. 406, 102 Cal.App. 24—Ex parte Maldonado, 275 P. 495, 97 Cal. App. 288—Jones v. Police Court of City of Alhambra, 260 P. 919, 86 Cal. App. 332.

Extent of jurisdiction as to punishment generally see Criminal Law § 386.

Sentence held not to exceed statutory maximum imprisonment.—Ex parte Miller, 24 P.2d 766, 218 Cal. 698.

76. U.S.—Chapman v. U. S., C.C.A. Tex., 10 F.2d 124, certiorari denied 46 S.Ct. 482, 271 U.S. 667, 70 L.Ed. 1141.

77. Ohio.—Anderson v. Brown, 159 N.E. 372, 117 Ohio St. 393.

78. Okl.—Ex parte Bell, 246 P. 893, 34 Okl.Cr. 354.

79. Cal.—Ex parte Vance, 27 P. 209, 90 Cal. 208, 13 L.R.A. 574.

80. Iowa.—Galles v. Wilcox, 27 N.W. 816, 68 Iowa 664.

81. Wyo.—Fisher v. McDaniel, 64 P. 1056, 9 Wyo. 457, 87 Am.S.R. 971.
25 C.J. p 1161 note 89.

82. Ind.—McLaughlin v. Etchison, 27 N.E. 152, 127 Ind. 474, 22 Am.S.R. 658.
25 C.J. p 1161 note 90.

sentence until further order, and no further order is made until after the expiration of the period, defendant cannot thereafter be committed, although the fine remains unpaid.[83]

b. Discharge from Imprisonment

Payment of the fine, or compliance with a statute providing for relief from such imprisonment, entitles one imprisoned for nonpayment of a fine to a discharge. In the absence of a statute to the contrary, imprisonment for nonpayment of a fine does not relieve defendant of his liability for the fine.

To authorize a discharge, there must be a strict compliance with the statutes prescribing the methods by which it may be obtained.[84] As a general rule, defendant is entitled to his discharge when the amount of the fine has been fully paid;[85] when the fine has been remitted by the proper authority;[86] when defendant has remained in custody the length of time required by law to satisfy the amount of the judgment;[87] or when he has satisfied the judgment against him by complying with such statutory provisions as are in force, to enable him to avoid imprisonment.[88]

A proper tender of the fine to an officer authorized to accept it entitles defendant to his discharge from further custody,[89] but, when such tender is made after the time which the law allows for paying fines, it does not have the effect of payment entitling defendant to a discharge.[90]

Where a prisoner is conditionally discharged, in accordance with statute, it has been held that he may be imprisoned on failure to comply with the conditions.[91]

Inability to pay. Under the theory that a fine is not a debt but a punishment for crime, a person in confinement under execution for the nonpayment of a fine imposed in a criminal proceeding is not entitled to the benefit of general acts passed for the relief of insolvent debtors,[92] unless such acts expressly include persons imprisoned for nonpayment of fines;[93] but where the action to enforce the fine is a qui tam action to recover a penalty, civil in its nature and not criminal, it has been held that defendant is entitled to the benefit of relief under insolvent debtors' acts.[94] Statutes in many jurisdictions, however, make special provision for the discharge of one imprisoned for nonpayment of a fine,

83. Wis.—In re Webb, 62 N.W. 177, 89 Wis. 354, 46 Am.S.R. 846, 27 L.R.A. 356.

84. Mo.—Ex parte Secrest, 32 S.W. 2d 1085, 326 Mo. 837.

85. Ga.—Gordan v. Johnson, 55 S.E. 489, 126 Ga. 584.
25 C.J. p 1162 note 12.

Acceptance of security

It seems that, where security is accepted in lieu of payment as provided by statute, defendant cannot be rearrested on failure to collect the fine in an action on the security.—Hamilton v. State, 9 Baxt., Tenn., 355, 356—25 C.J. p 1162 note 15.

Security as payment see supra § 6.

Evidence of fact

Confinement of prisoner for nonpayment of fine and costs is illegal after payment thereof, but prisoner is not entitled to discharge until he furnishes jailer proper evidence of that fact.—Hatzell v. Dover, 270 S.W. 723, 208 Ky. 149.

Promise of another

It has been held that where a sheriff releases a prisoner and takes the promise of another to pay the fine, he cannot afterward hold defendant or arrest him for not paying fine. —Russell v. Tatum, 30 S.E. 812, 104 Ga. 332—Williams v. Mize, 72 Ga. 129—Howard v. Tucker, 77 S.E. 191, 12 Ga.App. 353—25 C.J. p 1162 note 16.

86. Tex.—Spradley v. State, 56 S.W. 114, 23 Tex.Civ.App. 20—Ex parte Cook, 188 S.W. 979, 80 Tex.Cr. 77.

87. Tex.—Ex parte Chapman, 198 S.W. 575, 82 Tex.Cr. 119.
25 C.J. p 1161 note 96.

Fine not fully satisfied

Defendant who was convicted of a felony and sentenced to penitentiary while in jail for failure to pay fine and costs assessed on conviction for a misdemeanor, and was arrested on a capias pro fine after release from penitentiary and confined in jail until payment of balance of fine and costs remaining unpaid, was not entitled to be released from custody, where defendant admitted that he had not fully discharged fine and costs, and there was no proof that they had been remitted by the proper authorities.—Ex parte Williams, 109 S.W.2d 171, 133 Tex.Cr. 116.

88. Mo.—Ex parte Secrest, 32 S.W.2d 1085, 326 Mo. 837.
25 C.J. p 1161 note 97.

89. Ga.—Abram v. Maples, 72 S.E. 932, 10 Ga.App. 137.
25 C.J. p 1162 note 14.

90. Ga.—Pappas v. Aldredge, 15 S.E. 2d 718, 192 Ga. 482.

91. Kan.—In re Boyd, 9 P. 240, 34 Kan. 570.

92. Ohio.—Boyer v. State ex rel. Haly-Burton, 162 N.E. 38, 40, 118 Ohio St. 582, citing **Corpus Juris**, and followed in State ex rel. Shephard v. Miller, 174 N.E. 140, 122 Ohio St. 616.
25 C.J. p 1161 notes 2, 3.

In Ohio

(1) Insolvent Debtor's Act does not apply to a person convicted of a misdemeanor and sentenced to pay a fine and costs and to stand committed to a workhouse "until such fine and costs shall be paid or the prisoner be otherwise discharged according to law," since the act specially excepts a case in which the judgment requires imprisonment until the fine, penalty, and costs are paid. The phrase that such prisoner might be "otherwise discharged according to law" does not bring the convict within the act, as he might be so discharged by pardon, parole, or credit on such fine, as provided by law, until the amount is so paid. —Boyer v. State ex rel. Haly-Burton, 162 N.E. 38, 118 Ohio St. 582, followed in State ex rel. Shephard v. Miller, 174 N.E. 140, 122 Ohio St. 616.

(2) An earlier court of appeals case had held to the contrary, in which case it was also decided that an act prohibiting remittance of fine or sentence did not apply to commissioner of insolvents, acting under Insolvent Debtors Act, and that, on failure of officers unanimously to consent to indigent prisoner's parole, prisoner's only remedy was release by commissioner of insolvents.—Kohler v. State, 156 N.E. 510, 24 Ohio App. 272.

93. Ark.—Edwards v. State, 22 Ark. 303.
25 C.J. p 1161 note 4.

94. N.J.—Brophy v. Perth Amboy, 44 N.J.Law 217, reversing 43 N.J. Law 589.

upon compliance with certain specified conditions.[95] To be entitled to a discharge thereunder, the prisoner must be within the terms of the statute.[96] One of the usual provisions under such statutes is that the prisoner must have served a minimum time before he is entitled to a discharge.[97] Under some statutes, it has been held that where fines on different counts constitute parts of the sentence under one indictment or information, and commitments thereon run to the same type of institution, one period of imprisonment of the minimum time satisfies the statute.[98] It is no ground for a refusal to discharge defendant who is unable to pay the fine that some of defendant's friends are able to pay it, or that defendant may at some indefinite time do so if he is kept in prison.[99] Ordinarily the statutes require an application to the court in which the conviction took place;[1] and an affidavit as to defendant's inability to pay.[2]

Imprisonment as discharging fine. Undergoing imprisonment for nonpayment of a fine does not in most jurisdictions operate to relieve defendant of his liability for the payment of the fine,[3] and a mere release from imprisonment is not a release of the fine.[4] Under some statutes, allowing defendants credit on fines of certain amounts for each day of imprisonment, the imprisonment for the full period operates to satisfy the judgment in full;[5] and the prisoner may at any time pay the sum remaining

95. Md.—Cohen v. State, 195 A. 532, 173 Md. 216, reargument denied 196 A. 819, 173 Md. 216, certiorari denied Cohen v. State of Maryland. 58 S.Ct. 764, 303 U.S. 660, 82 L.Ed. 1119.

25 C.J. p 1162 note 5.

General statute

The statute concerning inability to pay fine in misdemeanor cases is a "general statute" and applies to all misdemeanors generally, unless there appears in the code a more specific statute dealing with some subject therein.—Ex parte Young, 136 S.W.2d 863, 138 Tex.Cr. 418.

Prisoner held entitled to discharge

Tex.—Ex parte Fernandez, 57 S.W.2d 578, 122 Tex.Cr. 641.

Repeal

The statute providing for relief of persons imprisoned and who were too poor to pay or secure fines and costs imposed by judgment of court was not "remedial" in character, but was an amendment to state's criminal laws prescribing punishment imposed for certain offenses and should be read into such laws as a part thereof. Where statute was in effect at time relator was convicted, relator was entitled to benefit of such statute, notwithstanding that statute was repealed without saving clause more than month prior to time that relator would have been entitled to a release under provisions of such statute.—Hutton v. State ex rel. Moore, 131 S.W.2d 11, 175 Tenn. 44.

Since police court of District of Columbia was a court of the United States for the trial and conviction of offenders against the National Prohibition Act, it was also treated as a court of the United States for the relief of such convicts under the provisions of the National Indigent Prisoners' Act, 18 U.S.C.A. § 641.—Green v. Peak, 65 F.2d 809, 62 App.D.C. 176.

Statute held mandatory

Tex.—Ex parte Fernandez, 57 S.W.2d 578, 122 Tex.Cr. 641.

In Alaska

(1) Act of congress, approved May 24, 1935, 49 U.S.St. at L. p 289, 48 U.S.C.A. § 101a, provided that the district court of Alaska shall be deemed a court of the United States, within the meaning of 18 U.S.C.A. § 641, providing for the relief of poor debtors imprisoned for nonpayment of fines. It appears that congress intended that § 641 of this act should be made applicable to all poor convicts imprisoned for nonpayment of fines in Alaska, whether they were confined on a judgment of the district court or on a judgment of a justice of the peace.—U. S. v. Stromberger, 9 Alaska 689.

(2) Prior to the enactment of this statute, it was held that 18 U.S.C.A. § 641 did not apply to the district court of Alaska.—In re Kehoe, 7 Alaska 51.

96. Fla.—Hudson v. State, 129 So. 106, 99 Fla. 1021.

Express provision otherwise

Where the statute providing for the relief of poor convicts qualifies its application by the phrase "Except when otherwise expressly provided," a convict sentenced to imprisonment under a statute providing that, in default of payment of fine, he shall be imprisoned for six months is not entitled to the relief of the statute. —Violette v. Macomber, 134 A. 561, 125 Me. 432.

Sentence to labor in payment

Where a proper order is entered requiring the payment of a fine in labor at a per diem credit, defendant, under some statutes, cannot secure a discharge under the statute providing for the relief of poor persons imprisoned for fines.—People v. Herman, 245 Ill.App. 94.

97. Pa.—In re Lindsey, 16 Pa.Dist. 1014, 23 Montg.Co. 63, 20 York.Leg. Rec. 206, 10 Del.Co. 313.

Tex.—Ex parte Young, 136 S.W.2d 863, 138 Tex.Cr. 418.

Part payment

Where relator was convicted of a misdemeanor in justice court and fined one dollar and costs, amounting to thirteen dollars and fifty cents, on which relator paid seven dollars and fifty cents, relator was not entitled to be released after serving two days in jail on ground that statute which would have required relator to serve minimum of ten days if he had paid nothing did not apply because relator did not owe both fine and costs.—Ex parte Harrington, 148 S.W.2d 1110, 141 Tex.Cr. 347.

98. U.S.—Grier v. Kennan, C.C.A. Mo., 64 F.2d 605—U. S. v. Wampler, D.C.Md., 10 F.Supp. 609.

99. Ohio.—In re Moore, 14 Ohio Cir. Ct. 237, 7 Ohio Cir.Dec. 575.

1. Ill.—People v. Windes, 119 N.E. 297, 283 Ill. 251.

2. Tex.—Ex parte Rodriquez, 73 S. W. 1050, 45 Tex.Cr. 76—Ex parte Jones, 41 S.W. 626, 38 Tex.Cr. 142.

3. Pa.—Brown v. Commonwealth, 6 A. 152, 114 Pa. 335.

25 C.J. p 1162 note 18.

Release by poor debtor's oath

(1) Defendant, relieved of imprisonment after serving the minimum statutory time, by taking the poor debtor's oath, is not discharged of the pecuniary obligation to the government.—U. S. v. Pratt, D.C.N.H., 23 F. 2d 333.

(2) Under such circumstances the fine may still be enforced by execution.—Grier v. Kennan, C.C.A.Mo., 64 F.2d 605.

4. Ala.—State v. Richardson, 18 Ala. 109.

25 C.J. p 1163 note 22.

5. Alaska.—In re Kehoe, 7 Alaska 51.

Mont.—Petelin v. Kennedy, 75 P. 82, 29 Mont. 466.

Work at hard labor

Under some statutes where the judgment provides that defendant shall work at hard labor until his

unsatisfied and claim his discharge.[6] In some jurisdictions where defendant has been sentenced to pay a fine and costs and in case of default to serve a term in the county jail, and where he has secured his release by giving bond to pay the fine within a certain time, if he surrenders himself and begins serving his alternative term of imprisonment before the bond is defaulted, an execution on the bond should not be enforced while he is serving the alternative sentence; and if the alternative sentence is fully satisfied, the bond should be duly canceled.[7]

Improper discharge or escape. If a prisoner, after being fined and ordered into custody, escapes before his term of imprisonment expires, with or without the consent of the officer into whose custody he has been placed, he is not thereby legally set at liberty and may be retaken and imprisoned.[8]

§ 13. —— By Application of Defendant's Funds in Possession of Court

Defendant's funds in the possession of the court may be applied in payment of a fine imposed on him.

Where money is deposited in lieu of bail for a prisoner,[9] or is found on the person of the prisoner when arrested for intoxication and searched by the police,[10] it may be applied in payment of any fine imposed on the prisoner. Even though money deposited in lieu of bail was so deposited by a third person, it may be applied to the satisfaction of the fine imposed against defendant.[11] Although the judgment is in the alternative and would be satisfied by either payment or by imprisonment, the prisoner has no right to elect to be imprisoned instead of thus paying the fine.[12]

§ 14. —— By Working Out

In the absence of statutory authorization, a court has no power to sentence one on whom a fine has been imposed to hard labor in default of the payment of the fine, but provision for working out fines is usually made by statute in the various jurisdictions.

Unless so conferred by statute the court has no authority to sentence one on whom a fine has been imposed to hard labor in default of the payment of the fine.[13] Under the statutes in many jurisdictions, however, subject to some modifications in some instances, it is proper to hire out or to put to work on public improvements, on a per diem credit, persons who have been fined and who have defaulted in payment thereof;[14] and when the earnings of

fine is satisfied, imprisonment is a complete satisfaction of the fine.—Commonwealth v. Winchester, 300 S.W. 606, 222 Ky. 193.

6. Or.—Murphy v. State, 250 P. 834, 835, 119 Or. 658, 49 A.L.R. 384, citing **Corpus Juris.**
25 C.J. p 1161 note 86.

7. Fla.—Carver v. State, 183 So. 719, 134 Fla. 232.

8. Miss.—Ex parte Grayson, 61 So. 306, 104 Miss. 242.
25 C.J. p 1162 note 17.

9. Iowa.—Wills v. Neilan, 55 N.W. 527, 88 Iowa 548.
N.Y.—People v. Laidlaw, 7 N.E. 910, 102 N.Y. 588.

10. Pa.—McCann v. Barr, 6 Pa.Dist. 721, 19 Pa.Co. 669, 13 Montg.Co. 179—McCann v. Barr, 16 Lanc.L.Rev. 183, 13 York.Leg.Rec. 63.

11. N.Y.—People v. Laidlaw, 7 N.E. 910, 102 N.Y. 588.

12. Ga.—Dickson v. Officers of the Court, 136 S.E. 537, 36 Ga.App. 341.
25 C.J. p 1163 note 25.

Supersedeas bond
Under some statutes, where defendant has prosecuted an appeal and executed a supersedeas bond, the supersedeas bond has the effect of a judgment, thereby providing a means of collection of the fine, and defendant does not have the right to serve out the fine by imprisonment.—Tubbs v. Commonwealth, 58 S.W.2d 236, 248 Ky. 24.

13. Ark.—Burrell v. State, 160 S.W. 2d 218, 203 Ark. 1124.
Ill.—People ex rel. Martin v. Kuca, 245 Ill.App. 202.
25 C.J. p 1163 note 28.

14. Ill.—People v. Allen, 30 N.E. 2d 116, 307 Ill.App. 241—People v. Greenberg, 30 N.E.2d 116, 307 Ill.App. 241—People v. Ramashla, 30 N.E.2d 117, 307 Ill.App. 241.
Va.—Owens v. Commonwealth, 136 S.E. 765, 147 Va. 624—Graham v. Commonwealth, 124 S.E. 429, 140 Va. 452.
W.Va.—State v. Conley, 160 S.E. 227, 111 W.Va. 19.
25 C.J. p 1163 note 29.

Failure to confess judgment
(1) In some jurisdictions, one failing to pay a fine assessed against him, or to confess judgment therefor with proper sureties, will be sentenced to hard labor for the county for a period sufficient to pay the fine at a per diem rate.—Harris v. State, 189 So. 787, 28 Ala.App. 528—Allen v. State, 187 So. 648, 28 Ala.App. 474—Bryant v. State, 184 So. 288, 28 Ala.App. 363—Nix v. State, 166 So. 716, 27 Ala.App. 94, certiorari denied 166 So. 719, 232 Ala. 53—Hill v. State, 147 So. 448, 25 Ala.App. 400.
(2) Where defendant cannot pay the entire fine, the court should allow a confession of judgment for such part of the fine as defendant is able to make, with proper security, and impose a sentence for hard labor for such part as is not paid or confessed.—Bowen v. State, 12 So. 808, 98 Ala. 83.
(3) A sentence at hard labor to pay a fine has been held to be improper.—Henson v. State, 141 So. 718, 25 Ala.App. 118.

Form of sentence
Ill.—People v. Cary, 245 Ill.App. 100—People v. Herman, 245 Ill.App. 94.

Improper return
The return, by the superintendent of the penitentiary, of a prisoner, sentenced to the convict road gang to work out time for nonpayment of a fine, to the sheriff of the county from which the prisoner was sentenced, under the erroneous impression that the prisoner had completed his term, did not alter his position as a member of the convict road force, but he was still a member of such force, and should be returned to complete his sentence.—May v. Dillard, 114 S.E. 593, 134 Va. 707.

Not imprisonment at hard labor
A sentence to work on the public works of the parish is lawfully imposed under a statute providing for the working of persons sentenced to the parish jail, and is not imprisonment at hard labor.—State v. McGuire, 94 So. 896, 152 La. 953.

Rate per diem
General statute prescribing working rate was held to repeal a prior statute prescribing a different rate for fines for a specific offense.—By-

the prisoner for such services equal the amount of the fine and costs, the obligation is discharged and the prisoner is entitled to be released.[15] Some of these statutes are considered to be in the interest of the convicted person, as they authorize the shortening of the period of imprisonment.[16] Some of such statutes have been held to apply only when the imprisonment is for the nonpayment of a fine imposed as a punishment for a misdemeanor and not for a felony.[17] It has been held that a person who is in custody accused of a felony cannot be hired out for the purpose of satisfying a fine;[18] and he is not entitled to credit on the fine for the period of such custody.[19] A rule or regulation made by the prison authorities whereby it is provided that a convict held in custody under sentence of a court to work out fines or costs shall receive credit for labor voluntarily performed by him before conviction and while in prison awaiting trial is unauthorized and void.[20] It has been held that a law reducing a per diem allowance as a credit on a fine when working it out by manual labor can have no application to a judgment which was rendered and in process of execution prior to the passage of the law.[21] Under some statutes a person sentenced to hard labor if he defaults in paying a fine has the option of either paying or replevying, or serving out the fine,[22] and where defendant is placed at hard labor, he is not subject to release unless the fine is paid or replevied.[23]

Matters concerning convict labor generally are discussed in Convicts §§ 13–26, the employment of convicts on public works generally in Criminal Law § 1992, and the requiring of labor for payment of costs in criminal proceedings in Costs § 461 b.

Effect of inability to work. Some statutes permit a person working out his fine to be discharged on the ground of inability to work. Under such statutes there must be a sufficient showing of such inability.[24] By statute in some jurisdictions a convict who from age, disease, or other disability, physical or mental, is unable to do manual labor, shall not be required to work, but shall remain in jail until his term of imprisonment is ended or until the fine and costs charged against him are discharged at the rate of one dollar for each day of such confinement in jail.[25]

Effect of invalidity of contractor's bond. Where a person sentenced to pay a fine and committed to jail in default of payment thereof has been released under a county convict bond which is void, he may be arrested.[26] Under such circumstances it has been held that the fact that he may have settled with his hirer or principal in the bond does not satisfy the judgment for the fine;[27] and that he is not entitled to his discharge, although he worked long enough to have discharged the fine which he believed he was working out.[28]

§ 15. —— Lien of Judgment Imposing Fine

Under some statutes, a judgment imposing a fine constitutes a lien on defendant's property.

Some statutes provide that a judgment imposing

bee v. Woodcock, 3 S.W.2d 1099, 223 Ky. 553.

Special county road law, limiting convicts' credits on fines and costs for work on county farm to less than allowance under general statute, was held invalid.—Ex parte Sizemore, 8 S.W.2d 134, 110 Tex.Cr. 232, 59 A.L.R. 430.

Statute held applicable to particular offenses
Ill.—People v. Hassil, 173 N.E. 355, 341 Ill. 286, 74 A.L.R. 307.
Ky.—Bybee v. Woodcock, 3 S.W.2d 1099, 223 Ky. 553.

Statute applicable
Code 1919 § 4953, providing that prisoners confined to jail for nonpayment of a fine cannot be held longer than three months, has no application where a prisoner is sentenced to the convict road gang to work out time for the nonpayment of a fine, but, under § 2095, he may be held for six months, in view of § 4950, providing that anyone sentenced to jail for the nonpayment of a fine may be hired out to anyone who will pay the fine for a period not over six months.—May v. Dillard, 114 S.E. 593, 134 Va. 707.

Statute mandatory
Under Rash-Gullion Act, relating to punishment of persons convicted thereunder, the court is required to sentence defendant convicted thereunder to hard labor, where he fails to pay his fine, and also where a jail sentence is inflicted.—Galloway v. Commonwealth, 273 S.W. 63, 209 Ky. 501.

15. Kan.—Dutton v. Board of Com'rs of Ford County, 16 P.2d 949, 136 Kan. 567.

16. Ill.—People v. Leoni, 198 Ill.App. 376.

17. Ky.—Sullivan v. Commonwealth, 18 S.W. 530, 13 Ky.L. 869.

Conspiracy to injure property
Statute authorizing misdemeanor convict to be required to work out fine in workhouse was held applicable to offense of conspiracy to injure property.—People v. Stavrakas, 167 N.E. 852, 335 Ill. 570.

18. Tex.—Ex parte Jones, 41 S.W. 626, 38 Tex.Cr. 142—Ex parte Godfrey, 11 Tex.App. 34.

19. Tex.—Ex parte Jones, 41 S.W. 626, 38 Tex.Cr. 142.

20. Tenn.—Vanvabry v. Staton, 12 S.W. 786, 88 Tenn. 334.

21. Tex.—Ex parte Hunt, 13 S.W. 145, 28 Tex.App. 361.

22. Ky.—Commonwealth v. Winchester, 300 S.W. 606, 222 Ky. 193.

23. Ky.—Commonwealth v. Winchester, supra.

24. Tenn.—Vanvabry v. Staton, 12 S.W. 786, 88 Tenn. 334.
25 C.J. p 1164 note 38.

25. Tex.—Ex parte Anderson, 28 S.W. 807, 34 Tex.Cr. 14.
25 C.J. p 1164 note 39.

26. Tex.—Ex parte Millsap, 45 S.W. 20, 39 Tex.Cr. 93—Ex parte Price, 39 S.W. 369, 37 Tex.Cr. 275.

27. Tex.—Ex parte Millsap, 45 S.W. 20, 39 Tex.Cr. 93.

28. Tex.—Ex parte Ransom, 41 S.W. 637, 38 Tex.Cr. 141.

a fine shall constitute a lien on defendant's property,[29] and such lien attaches immediately on the docketing of the judgment.[30] Such statutes apply whether the judgment is one of fine and imprisonment[31] or whether it is simply a judgment for fine without imprisonment.[32] Some statutes have been held to create a lien on the property of defendant, not only in the hands of the accused, but also in the hands of any person possessing or holding it, after the arrest is made or indictment is found, until accused is discharged or the fine adjudged against him is paid. The lien also attaches to defendant's after-acquired property.[33] Where the owner of property is found guilty but conveys the property before enforcement of the fine, the same owner on subsequently acquiring title to the property, takes it subject to the judgment, even though in the particular jurisdiction the judgment would not theretofore have been a lien on the property.[34]

§ 16. —— Staying Collection

Under some statutes the collection of a fine may be stayed for a period by giving a bond.

Some statutes provide for the giving of a bond to stay the collection of a fine for a certain period.[35] These statutes have been held not to infringe on the pardoning power vested in the executive.[36]

§ 17. Recovery Back of Fine Paid

A fine involuntarily paid may be recovered back, but one voluntarily paid cannot be so recovered.

A fine illegally imposed may be recovered back where it was paid involuntarily or under duress, for example, where it was paid to avoid or obtain release from imprisonment;[37] but there can be no recovery where the fine, although illegally imposed, was voluntarily paid under a mistake of law,[38] or where the payment was induced, not because of threatened imprisonment but to avoid further inconvenience and trouble.[39] The mere fact that the judgment imposing a fine is void, as being in excess of the jurisdiction of the court, does not constitute a sufficient ground for recovering back money paid without objection or protest.[40] If defendant has an alternative to making payment of the fine, the payment must be regarded as having been voluntary and therefore not revocable.[41] Accordingly, where at the time of the payment of a fine which has been imposed on him, accused has the right to an appeal and pays the fine before appealing, the payment will be deemed a voluntary one and the fine cannot be recovered back even though the conviction is set aside.[42] Where the whole transaction culminating in payment is improper, illegal, and in defiance of law and defendant plays a prominent part therein with full knowledge of the facts, considerations of public policy may preclude a recovery.[43] Neither the court nor any federal officer has authority to make an agreement obligating the United States to repay a fine in case the statute under which it is exacted shall be declared to be unconstitutional, and the district court, in the absence of a special jurisdictional statute, is without jurisdiction in a suit to

29. Iowa.—Jasper County v. Sparham, 101 N.W. 134, 125 Iowa 464.
25 C.J. p 1164 note 45.

Statute held not impliedly repealed
Neb.—Mancuso v. State, 242 N.W. 430, 123 Neb. 204.

30. N.C.—Osborne v. Board of Education of Guilford County ex rel. State, 177 S.E. 642, 207 N.C. 503.

31. Cal.—People v. Brown, 45 P. 181, 113 Cal. 35.

32. Cal.—People v. Brown, supra.

33. Ark.—Western Tie & Timber Co. v. Campbell, 169 S.W. 253, 113 Ark. 570, Ann.Cas.1916C 943.

34. Iowa.—Jasper County v. Sparham, 101 N.W. 134, 125 Iowa 464.

35. Okl.—Ironside v. State, 148 P. 97, 46 Okl. 41—Burkett v. State, 146 P. 23, 44 Okl. 655.
25 C.J. p 1164 note 53.

36. Okl.—Burkett v. State, 146 P. 23, 44 Okl. 655.

37. U.S.—U. S. v. Rothstein, Ill., 187 F. 268, 109 C.C.A. 521.
25 C.J. p 1164 note 56.

38. U.S.—Deppe v. Lufkin, C.C.A. Mass., 116 F.2d 483, affirming, D.C., 31 F.Supp. 323.
Mo.—Ferguson v. Butler County, 247 S.W. 795, 297 Mo. 20, 26 A.L.R. 1519.
N.Y.—Gubin v. City of New York, 269 N.Y.S. 46, 150 Misc. 182, reversed on other grounds 276 N.Y.S. 515, 154 Misc. 547—Novara v. Wyoming County, 259 N.Y.S. 932, 144 Misc. 920.
Ohio.—Ocean Accident & Guarantee Corporation v. Reynolds, 30 Ohio N.P.,N.S., 550.
Pa.—Torado v. Commonwealth, 9 Pa. Dist. & Co. 314.
25 C.J. p 1164 note 57.

Incidental expense
The clerk of court and the judge are limited, in paying out funds received from fines, to the incidental expenses of the court, and a return of a fine voluntarily paid cannot be considered an incidental expense of the court.—In re Dalton, 8 Alaska 338.

However, it has been indicated, but not held, that, even if fines were paid voluntarily, this would not prevent the recovery thereof if they were in fact unlawfully collected.—Rio Cape Line v. U. S., 89 Ct.Cl. 307.

39. Wyo.—Houtz v. Uinta County, 70 P. 840, 11 Wyo. 152.

40. Mo.—Ferguson v. Butler County, 247 S.W. 795, 297 Mo. 20, 26 A.L.R. 1519.
Ohio.—Leach v. City of Xenia, 159 N.E. 854, 26 Ohio App. 317.
25 C.J. p 1164 note 59.

41. N.J.—D'Aloia v. Summit, 97 A. 722, 89 N.J.Law 154.
25 C.J. p 1165 note 60.

42. Ga.—Goodwin v. MacNeill, 3 S.E.2d 675, 188 Ga. 182.
Ill.—People v. Bandy, 239 Ill.App. 273.
Nev.—State v. Pray, 94 P. 218, 30 Nev. 206.
N.J.—D'Aloia v. Summit, 97 A. 722, 89 N.J.Law 154.

Under some statutes it seems that such a payment can be recovered back.—Commonwealth v. Stamm, 57 Montg.Co., Pa., 356.

43. Me.—Houlehan v. Kennebec County, 81 A. 449, 108 Me. 397, Ann.Cas.1913B 435.

recover a fine exacted under an unconstitutional statute.[44]

Estoppel. A person otherwise entitled to recover back a fine paid may be estopped by his acts and declarations to set up the want of jurisdiction of the tribunal imposing it or the fact of duress in its payment.[45]

Persons liable. Ordinarily a fine, if recoverable back, may be recovered from the person receiving it.[46] Under a statute prescribing both fine and imprisonment for a violation of its provisions, it has been held that, where the person sentenced has paid the fine, he cannot recover it in an action against the justice, who imposed it, in his individual capacity, where the fine is only erroneous but not void as being without jurisdiction.[47] It has been held that whatever may be the defects in the proceedings whereby the fine was collected, the county is not answerable for the money so collected, unless it is shown to have been paid into the county treasury.[48] So it has been held that no action can be maintained against the United States for the recovery of a fine illegally imposed by a military commission while it remains in the hands of the military officers.[49] Where a fine has been paid under a misapprehension of the law, the officer who imposed the fine and undertook to regain and refund it by an express promise has been held liable under such promise.[50]

Restitution after vacation of judgment. Where a fine illegally imposed has been paid, on reversal of the judgment a writ of restitution may issue against the parties who received the fine.[51] However, restitution is not necessarily a matter of right,[52] being dependent on whether the payment was voluntarily[53] or involuntarily made.[54] Recovery may be had, where the imposition of the fine was adjudged under such circumstances as to make it proper that restitution should be ordered, in order to restore defendant to his legal rights.[55] Where there is no statute prescribing the procedure for the restoration of a fine paid by defendant, where the conviction has been reversed and a new trial ordered, the procedure in civil cases on reversal may be followed.[56] A right to restitution does not exist after reversal by an intermediate appellate court and during the pendency of an appeal to a still higher court.[57]

Actions. Indebitatus assumpsit for money had and received, it has been held, is a proper form of action against the government or a county for the recovery back of a fine illegally collected.[58] So, also, it has been held that an action for money had and received is the proper form of action to recover from a justice of the peace a fine illegally imposed by him.[59]

Jurisdiction of an action to recover back a fine from a city is not vested in a municipal court of the city of New York.[60]

A complaint or petition in an action to recover a fine illegally imposed must state facts from which the court may determine that the payment was compulsory.[61]

§ 18. Remission of Fine

The power to remit fines is usually vested solely in the executive branch of the government, but in some jurisdictions this power may be exercised by the courts.

The general pardoning power which is vested in the president and the governors of the various states in the United States usually extends to the remission of fines,[62] and in any case the executive may discharge from imprisonment for nonpayment.[63]

44. U.S.—U. S. v. Gettinger, N.Y., 47 S.Ct. 276, 272 U.S. 734, 71 L.Ed. 499.

Payment under protest may be sufficient to overcome an estoppel, but no contract arises from such a protest obligating the United States to return the fine.—U. S. v. Gettinger, supra.

45. U.S.—Carver v. U. S., 4 S.Ct. 561, 111 U.S. 609, 28 L.Ed. 540, affirming 16 Ct.Cl. 361.
25 C.J. p 1165 note 63.

46. N.Y.—Frye v. Lockwood, 4 Cow. 454.

47. Me.—Bragdon v. Somerby, 55 Me. 92.

48. Wyo.—Houtz v. Uinta County, 70 P. 840, 11 Wyo. 152.

49. U.S.—Carver v. U. S., 16 Ct.Cl. 361, affirmed 4 S.Ct. 561, 111 U.S. 609, 28 L.Ed. 540.

50. Conn.—Richards v. Comstock, 1 Conn. 150.

51. N.J.—New Jersey S. P. C. A. v. Knoll, 71 A. 116, 77 N.J.Law 138.

52. Pa.—Hazleton v. Birdie, 10 Kulp 98—Leffingwell v. Wilkes-Barre, 4 Kulp 494.

53. Pa.—Commonwealth v. Gipner, 12 A. 306, 118 Pa. 379—Commonwealth v. Barbona, 23 Pa.Dist. 635.

54. Mich.—People v. Wayne County, 49 N.W. 921, 41 Mich. 223.
25 C.J. p 1165 note 80.

55. Pa.—Lucas v. Commonwealth, 24 Pa.Dist. 159.

56. N.Y.—People v. Cornell, 121 N.Y.S. 972, 65 Misc. 452.

57. N.Y.—People v. Cornell, supra.

58. U.S.—Devlin v. U. S., 12 Ct.Cl. 266.

59. Ky.—Stromberg v. Earick, 6 B. Mon. 578.
Wyo.—Houtz v. Uinta County, 70 P. 840, 11 Wyo. 152.

60. N.Y.—Harrington v. City of New York, 81 N.Y.S. 667, 40 Misc. 165.

61. N.Y.—Harrington v. City of New York, supra.

Allegations held insufficient
N.Y.—Harrington v. City of New York, supra.

62. Ill.—People ex rel. Wineland v. Calhoon, 4 N.E.2d 898, 287 Ill.App. 273.
Tex.—Ex parte Thomas, 2 S.W.2d 270, 108 Tex.Cr. 653.
25 C.J. p 1168 note 32.
Pardoning power of president and governors see the C.J.S. title Pardons § 3, also 46 C.J. p 1185 notes 34–37.

63. U.S.—Pardoning Power of President, 5 Op.Atty.-Gen. p 579.

The fact that a statute directs the disposition to be made of a fine does not interfere with the power of the executive to remit such fine.[64]

When the authority to remit a fine is vested in one branch of the government, that authority cannot be usurped by any other branch.[65] As a general rule, under the constitutions and statutes in the various jurisdictions, the courts cannot remit fines which have been lawfully and finally imposed,[66] but under the constitutions and statutes in some jurisdictions this power is extended to the courts.[67] Under some statutes, a court with jurisdiction concurrent with that of the court imposing the fine also has power to remit fines,[68] but such power should not be exercised until the court of original jurisdiction has had an opportunity to reconsider its own judgment.[69] The right to intervene, under such a statute, must be exercised only after a clear case of abuse of discretion; and the sentence pronounced must stand unless it is either illegal or unjust or plainly excessive.[70]

The authority to exercise the power to remit a fine continues until a vested right intervenes,[71] but thereafter it cannot be exercised.[72] The power to remit fines only authorizes the remission of fines in pursuance of the provisions of the law.[73] The power to remit the whole of a fine includes the power to remit a part thereof.[74] Where a court has power to remit a fine, it ought not to exercise it unless some good reason for so doing is shown.[75] A remission of a fine should not be based on the good conduct of the prisoner,[76] or on a comparison of previous fines imposed against defendant,[77] nor is such remission to be ordered as a matter of private interests, calculated on the basis of the effect of such fine on the business of the party concerned.[78]

Where power is granted to suspend the collection of a fine for a limited period of time, there is no power to make an indefinite suspension of the fine; and a suspension for more than the period prescribed is void ab initio, and not valid for such period.[79]

Operation and effect. If a release is confined to

Wis.—Manitowoc County v. Sullivan, 8 N.W. 12, 51 Wis. 115.

64. Ark.—Fischel v. Mills, 18 S.W. 237, 55 Ark. 344, 15 L.R.A. 395—Baldwin v. Scoggin, 15 Ark. 427.

65. Tex.—Ex parte Thomas, 2 S.W. 2d 270, 108 Tex.Cr. 653.
25 C.J. p 1169 note 38.

66. N.C.—State v. Manuel, 20 N.C. 144.
25 C.J. p 1168 note 36.

Commissioners' court

The power to remit fines is vested in the governor, and the commissioners' court is without jurisdiction to remit a fine.—Ex parte Thomas, 2 S.W.2d 270, 108 Tex.Cr. 653.

Expiration of term

(1) The court cannot remit a fine after the expiration of the term during which it was imposed.—Commonwealth v. Smith, 18 Pa.Dist. & Co. 460, 48 Montg.Co. 164.

(2) It has also been held that the court is powerless after final judgment to remit or modify a fine, even though the term at which the fine was imposed has not yet adjourned.—People ex rel. Wineland v. Calhoon, 4 N.E.2d 898, 287 Ill.App. 273.

Justice of peace

After payment of fine legally imposed by justice of the peace, he has no further jurisdiction over matter and no power to remit fine.—State v. Seitz, 14 A.2d 710, 1 Terry, Del., 572.

Particular fines

A statute prohibiting courts from remitting particular fines is valid.—Madjorous v. State, 156 N.E. 916, 24 Ohio App. 146.

67. N.Y.—People v. New York Ct. Spec. Sess., 156 N.Y.S. 61, 170 App. Div. 575, affirmed 112 N.E. 1070, 217 N.Y. 674.

68. **Scope and purpose** of such statutes are not to be regarded as an appeal.—In re Hershey Farms, 24 N.Y.S.2d 163, 175 Misc. 641.

69. N.Y.—In re Hershey Farms, supra.

70. N.Y.—In re Hershey Farms, supra—People v. Kelly, 66 N.Y.S. 733, 32 Misc. 319.

71. Ark.—Fischel v. Mills, 18 S.W. 237, 55 Ark. 344, 15 L.R.A. 395.
25 C.J. p 1169 note 39.

Until payment to county

Under some statutes, when fines are paid by prisoners, the money should go into the county treasury, and, until it finds its way there, or is in some way appropriated to the use of the county, it is subject to remission by executive clemency. Accordingly, where a contractor, under contract with county for hire of county prisoners, accepted, pursuant to agreement, defendant's check for half the amount of prisoner's fine, so that the prisoner, taken into custody of sheriff for purpose of collecting fine or making delivery to contractor, was released, such contractor could not recover from defendant on the check, payment of which was stopped after the governor remitted fine.—Hendrix v. Reed, 208 S.W. 800, 137 Ark. 454.

72. Ill.—Meul v. People, 64 N.E. 1106, 198 Ill. 258.
25 C.J. p 1169 note 40.

73. Ind.—Ryan v. State, 95 N.E. 561, 176 Ind. 281.
Nev.—Ex parte Connella, 111 P. 295, 33 Nev. 380—Ex parte Shelor, 111 P. 291, 33 Nev. 361.

74. N.C.—State v. Twitty, 11 N.C. 193.
S.C.—State v. Williams, 10 S.C.L. 26.

75. N.Y.—People v. Kelly, 66 N.Y.S. 733, 32 Misc. 319.
25 C.J. p 1169 note 42.

Agreement of district attorney

Under the facts of the case the court stated that if the district attorney would agree to a reduction of a fine, the court was willing to be guided by his advice.—U. S. v. Velez, 6 Puerto Rico Fed. 306.

Burden

Where defendant attacks the justice of a sentence on an application for a remission, he must prove reasonable grounds justifying it.—In re Hershey Farms, 24 N.Y.S.2d 163, 175 Misc. 641.

Remission denied, where defendant had an unenviable criminal record.—People ex rel. v. Philips, 18 N.Y.S.2d 426.

76. N.Y.—People v. Kelly, 66 N.Y.S. 733, 32 Misc. 319.

77. N.Y.—In re Hershey Farms, 24 N.Y.S.2d 163, 175 Misc. 641.

78. N.Y.—In re Hershey Farms, supra.

79. Nev.—Ex parte Connella, 111 P.

a part of the fine, it will not be extended beyond that part.[80] It has been held that a commutation merely releasing the property of defendant from liability does not relieve him of any personal liability;[81] and that a respite of the collection of a fine after it has been replevied does not release the surety in the replevy bond.[82] In order for remission of a fine to be effective, there must be a compliance with the conditions on which it is granted.[83]

§ 19. Disposition of Proceeds in General

The disposition to be made of the proceeds of fines is a matter of constitutional and statutory regulation.

By the common law all fines belong to the crown, or in this country to the state as succeeding to the prerogative of the crown.[84] Constitutional or statutory provisions very generally prescribe the application and disposition to be made of fines, and distribution is to be made in accordance therewith.[85] Accordingly, under the various constitutional and statutory provisions, such funds, or the proceeds of particular fines, or the proceeds of fines imposed by particular courts, should be paid over to the state,[86] county,[87] town or city,[88] fish and game

295, 33 Nev. 380—Ex parte Shelor, 111 P. 291, 33 Nev. 361.

80. Miss.—Buck v. State, 60 So. 321, 103 Miss. 276.

81. Iowa.—McKay v. Woodruff, 42 N.W. 428, 77 Iowa 413.

82. Ky.—Nall v. Springfield, 9 Bush 673.

83. Iowa.—McKay v. Woodruff, 42 N.W. 428, 77 Iowa 413.
25 C.J. p 1169 note 51.

84. Mass.—Bryant v. Rich's Grill, 103 N.E. 925, 216 Mass. 344, Ann. Cas.1915B 869.
25 C.J. p 1165 note 85.

Public treasury

A willful violation of the terms of an injunction order would be a criminal contempt, and any fine imposed would be punishment and would go into the public treasury.—Ross v. Thousand Island Park Ass'n, 196 N.Y.S. 811, 203 App.Div. 499.

85. Ala.—State v. Town of Springville, 125 So. 387, 220 Ala. 286, reversing 125 So. 385, 23 Ala.App. 343.
N.H.—Cofran v. Griffin, 153 A. 817, 85 N.H. 29.
Ohio.—Barth v. State, 140 N.E. 650, 107 Ohio St. 154.
Pa.—In re Collection of Fines and Penalties, 14 Pa.Dist. & Co. 205.
Tenn.—Nelson v. Loudon County, 144 S.W.2d 791, 176 Tenn. 632.
25 C.J. p 1166 note 86, p 1167 note 3.

Particular statutes construed and proper disposition of proceeds determined.
Cal.—Los Angeles County v. Emme, 108 P.2d 695, 42 Cal.App.2d 239.
Ill.—Galpin v. City of Chicago, 159 Ill.App. 135, affirmed 94 N.E. 961, 249 Ill. 554.
Md.—Mayor and City Council of Baltimore v. Deegan, 161 A. 282, 163 Md. 234.
Ohio.—State ex rel. Crabbe v. City of Cleveland, 154 N.E. 738, 115 Ohio St. 484.

Special act disposing of fines for liquor violations is to be construed in pari materia with act disposing of fines generally.—State ex rel. Crabbe v. City of Cleveland, supra.

86. Ky.—Conover v. Commonwealth, 254 S.W. 901, 200 Ky. 318.
N.Y.—People v. City of Yonkers, 30 N.Y.S.2d 678, 177 Misc. 406—People v. Town of Yorktown, 36 N.Y.S. 2d 83.
Pa.—Appeal of Free, 151 A. 583, 301 Pa. 82.
Va.—Criner v. Town of Vinton, 170 S.E. 562, 161 Va. 987.
25 C.J. p 1166 note 87.

Violations of Highway Law

(1) Under some statutes, the proceeds of fines collected for violations of the Highway Law are payable to the state treasurer.—People v. Strohm, 230 N.Y.S. 183, 224 App. Div. 309—People v. Jones, 218 N.Y.S. 370, 218 App.Div. 443.

(2) The provision contained in the Highway Law § 280 et seq., with reference to payment of fines to the state, was intended to be of general application, the exception being made for fines collected for the violation of city ordinances, and hence a city, in order to be entitled to retention of fines collected, must bring itself within the exception by clearly establishing that informations charged violations of city ordinances.—People v. City of Yonkers, 30 N.Y.S.2d 678, 177 Misc. 406.

(3) Village, under such statutes, cannot retain fines which have been collected for violations of the village ordinances, when the offenses should have been prosecuted under the Highway Law.—People v. President, etc., of Village of Ossining, 265 N.Y.S. 521, 238 App.Div. 684, affirmed 191 N.E. 571, 264 N.Y. 574.

(4) The charter provision of a city penalizing intoxication which violates public decency is not an "act in relation to the use of public highways by motor vehicles," within the meaning of the Highway Law. Where the officers of the city elected to prosecute drunken drivers only under such a charter provision, the state could not recover fines thus collected, despite impropriety of the practice.—People v. City of Hornell, 8 N.Y.S.2d 976, 256 App.Div. 113, affirmed 9 N.Y.S.2d 792, 256 App.Div. 113, appeal denied 11 N.Y.S.2d 551, 256 App.Div. 1055, affirmed 24 N.E.2d 982, 282 N.Y. 555.

State game and fish department was held entitled to fines for illegal fishing, collected by clerk of city court of Darien.—Twitty v. Britt, 158 S.E. 360, 43 Ga.App. 158.

87. Cal.—Fresno County v. Shaw, 237 P. 560, 72 Cal.App. 356, followed in City of Coalinga v. Shaw, 237 P. 562, 72 Cal.App. 799.
Fla.—Crandon v. Nelson-Bullock Co., 147 So. 582, 109 Fla. 341.
Pa.—In re Collection of Fines and Penalties, 14 Pa.Dist. & Co. 205.
S.C.—State v. Stevens, 107 S.E. 906, 116 S.C. 210.
25 C.J. p 1166 note 88.

Fines collected as condition of probation

Cal.—Los Angeles County v. Emme, 108 P.2d 695, 42 Cal.App.2d 239.

88. N.H.—Cofran v. Griffin, 153 A. 817, 85 N.H. 29.
N.Y.—Town of Putnam Valley v. Slutzky, 28 N.E.2d 860, 283 N.Y. 334, reversing 19 N.Y.S.2d 19, 259 App.Div. 824, appeal granted 19 N.Y.S.2d 1021, 259 App.Div. 834, and reargument denied 29 N.E.2d 665, 284 N.Y. 590—People v. City of Hornell, 8 N.Y.S.2d 976, 256 App. Div. 113, affirmed 9 N.Y.S.2d 792, 256 App.Div. 113, appeal denied 11 N.Y.S.2d 551, 256 App.Div. 1055, affirmed 24 N.E.2d 982, 282 N.Y. 555.
25 C.J. p 1166 note 89.

After trial de novo on appeal

Under a statute providing that all fines recovered in a city police court shall be paid into the treasury of the city, the city is entitled to the proceeds of a fine collected from a judgment entered, after trial de novo, in the circuit court on appeal from the police court.—City of Maysville v. Key, 247 S.W. 374, 197 Ky. 454.

commissioner,[89] or to some charitable institution,[90] or should be devoted to the support of the public schools or to some other educational purpose,[91] or to the payment of costs in criminal proceedings when the person convicted is insolvent.[92] In the absence of constitutional restriction, where a statute so directs, the proceeds of a fine, in whole or in part, may be paid to the person injured by the act constituting the crime,[93] but, in the absence of such a statute, the court has been held not to be warranted in directing such payment to the injured person.[94] A statute making disposition of certain fines "collected" has been held to mean fines recovered in money, and not to include fines worked out on streets or other public works.[95] Although all proper deductions from the proceeds of fines should be made before the funds are disposed of as provided by statute,[96] improper deductions may not be made therefrom.[97]

The proceeds of fines should be disposed of within or at the time contemplated by the statute directing such disposition,[98] and where there has been a failure to pay over as directed by statute, the sum

Fines not collected as condition of probation
Cal.—Los Angeles County v. Emme, 108 P.2d 695, 42 Cal.App.2d 239.

89. Utah.—Siddoway v. Utah County, 190 P. 941, 56 Utah 310.
25 C.J. p 1166 note 90.

90. Wash.—Storey v. City of Seattle, 215 P. 514, 124 Wash. 598.
25 C.J. p 1166 note 91.

91. Colo.—City and County of Denver v. School Dist. No. 1 in City and County of Denver, 30 P.2d 866, 94 Colo. 406.
Idaho.—School Dist. No. 27 of Cassia County v. Twin Falls, 90 P. 735, 13 Idaho 471.
Kan.—Holloway v. People's Water Co., 167 P. 265, 100 Kan. 414, 2 A.L.R. 161.
Ky.—Fuqua v. Hager, 84 S.W. 325, 119 Ky. 407, 27 Ky.L. 46.
Wis.—Emerson v. Huss, 106 N.W. 518, 127 Wis. 215.
25 C.J. p 1166 note 92.

Established libraries
Statute appropriating half of police court forfeitures, fines, and costs to maintenance of free public libraries in cities and towns of classes named, was held to be applicable to cities and towns in which libraries were already established as well as to those where libraries were to be thereafter established.—City of Owensboro v. Board of Trustees of Public Library of Owensboro, 276 S.W. 143, 210 Ky. 482.

Districts entitled
A school district is not entitled to any of the proceeds of the fines collected under the ordinances of a city unless some part of its territory is included within the territorial limits of such city.—School District No. 30 of Hall County v. School District of City of Grand Island, Hall County, 88 N.W. 120, 63 Neb. 44.

92. Ga.—Dade County v. Lyemance, 108 S.E. 825, 27 Ga.App. 420.
25 C.J. p 1167 note 93.

Solvent convicted defendants
Officers of the court are entitled to receive their fees accruing as result of prosecutions from the fine and forfeiture fund in cases in which defendants are acquitted or are unable to pay such fees, but there is no authorization for payment of such fees from the fine and forfeiture fund in cases in which the convicted defendant is able to pay the costs.—Pound v. Faulkner, Ga., 18 S.E.2d 749.

Statute construed
(1) Under a statute providing that "money arising from fines, or collected on forfeited recognizances in the superior courts, or for a violation of the penal laws, shall be first applied to the extinguishment of the insolvent lists of the officers bringing it into court and those of justices and constables pro rata, and then to the orders of former officers in proportion to their claims," a former solicitor general, during whose term the fine was assessed and appeal urged, is not entitled to claim the fine as against the solicitor general in office when the fine is paid.—Lane v. Duke, 139 S.E. 122, 37 Ga.App. 146, affirmed 144 S.E. 652, 166 Ga. 849.

(2) The approved cost bills of the immediate predecessor in office of an incumbent are not entitled to priority over those of former officers, unless such immediate predecessor is the officer bringing the funds into court.—Dade County v. Lyemance, 108 S.E. 825, 27 Ga.App. 420.

(3) After the costs of the officers who bring funds into court have been paid, the surplus does not belong to the county to the exclusion of former officers who have itemized bills of costs approved by the court, even though such officers may not be the immediate predecessors of the incumbents.—Dade County v. Lyemance, supra.

(4) Where a clerk of the superior court has issued subpœnas for witnesses to appear before grand jury, and has properly presented his account therefor, and the account has been allowed by the judge, this insolvent cost will be paid out of the fines and forfeitures fund as other insolvent costs are paid.—Dade County v. Lyemance, supra.

93. Okl.—Postelwait v. State, 228 P. 789, 28 Okl.Cr. 17.
25 C.J. p 1167 note 94.

94. Pa.—Commonwealth v. Irvine, 190 A. 171, 125 Pa.Super. 606.

Contrary to public policy
All fines imposed go to the county, and the court erred, in a prosecution for obtaining money by false pretenses, in incorporating in the sentence the requirement that defendant pay to the prosecutor a certain amount of money, and such part of the sentence was a nullity, as contrary to public policy.—State v. Stevens, 107 S.E. 906, 116 S.C. 210.

95. Ky.—Board of Trustees of Carnegie Public Library v. City of Paducah, 7 S.W.2d 858, 225 Ky. 224—Power v. Fleming County, 35 S.W. 541, 99 Ky. 200, 18 Ky.L. 61.

96. Ala.—Culver v. Sparkman, 149 So. 877, 25 Ala.App. 544.

"Clear proceeds"
Under a constitutional provision appropriating the clear proceeds of all penalties and forfeitures of all fines to the school fund, the "clear proceeds" of a fine includes the total sum, less only the sheriff's fees for collection in case the fine and costs are not collected in full.—State v. Maultsby, 51 S.E. 956, 139 N.C. 583.

97. **Court expenses**
Where a portion of the net amount of all fines collected is appropriated to a particular purpose, the expenses of operating the court cannot be deducted in determining the sum appropriated.—City of Owensboro v. Board of Trustees of Public Library of Owensboro, 276 S.W. 143, 210 Ky. 482.

Expense of hiring detectives
Where one half of the money arising from fines in the enforcement of the prohibition laws belongs to the state, municipal councils are not authorized to expend or appropriate any of such portion for the purpose of hiring attorneys, detectives, or secret service officers.—State v. Felton, 148 N.E. 230, 112 Ohio St. 519.

98. N.Y.—Becher v. Case, 277 N.Y.S. 733, 243 App.Div. 375.

so withheld has been held to bear interest from the time it should have been paid.[99] Likewise, it has been held that the interest accumulated on funds derived from fines is to be distributed among the parties entitled to the principal in the same proportion.[1]

Constitutionality of statutes. In the absence of constitutional restrictions,[2] the legislature may make such disposition of fines as it may deem advisable,[3] and may change the disposition thereof at will.[4] Where the constitution has already provided for the distribution of the fine, a legislative provision inconsistent therewith is invalid;[5] but, as in other cases, where the invalid part is separable from, and independent of, the remaining parts of the statute, its invalidity will not affect the validity of the remainder of the statute.[6]

In view of the fact that fines, when paid, become public funds, it has been held that the person fined cannot attack the validity of the statutory disposition of the funds, and that only the state has the right to interfere to prevent the fine from being illegally diverted.[7]

Actions for wrongful disposition. Where a disposition unauthorized by law has been made, of the proceeds of fines, the right thereto may be enforced in an appropriate action.[8] The action must be brought within the period of time limited by statute;[9] and the complaint must state a cause of action.[10] Where the statute makes a particular appropriation of the proceeds of fines imposed in a police court, it is no defense in an action against the city that the funds have been paid into the city's general revenue fund and used for other purposes.[11]

§ 20. Rights and Remedies of Informers

Where a statute so provides, an informer may be entitled to a portion of the proceeds of a fine.

The practice of paying a moiety of fines to informers was in frequent use in England from very early times; and in this country congress or the legislature in fixing fines has in many cases provided, with a view to stimulating prosecutions, that an informer should be entitled to a part of the fine.[12] If a whole or any part of a fine is to go to an informer for setting the prosecution afoot, the statute must so provide.[13] It seems that a party claiming an informer's share must be the first informer.[14] One may be entitled to an informer's share by giving information leading to other information.[15] It is not necessary that he shall be a witness in the case or have such personal knowledge of the crime as to make him a competent witness.[16] Under some

99. N.Y.—People v. President, etc., of Village of Ossining, 265 N.Y.S. 521, 238 App.Div. 684, affirmed 191 N.E. 571, 264 N.Y. 574.

1. Ill.—Galpin v. Chicago, 109 N.E. 713, 269 Ill. 27, L.R.A.1917B 176.

2. Pa.—In re Collection of Fines and Penalties, 14 Pa.Dist. & Co. 205.
25 C.J. p 1167 note 96.

3. Okl.—Postelwait v. State, 228 P. 789, 790, 28 Okl.Cr. 17, citing **Corpus Juris.**
25 C.J. p 1167 note 97.

Courts not within constitutional provision
Where a constitutional provision relating to the disposition of the proceeds of fines relates only to particular courts, the legislature may validly provide what disposition shall be made of the proceeds of fines imposed by other courts.—In re Collection of Fines and Penalties, 14 Pa. Dist. & Co. 205.

City funds
It is within power of legislature to appropriate money covered into treasury of city, which has come from operation of one of its departments of government, as has been done by a statute appropriating one half of net amount of forfeitures, fines, and costs collected in police court for use of free public library. —City of Owensboro v. Board of Trustees of Public Library of Owensboro, 276 S.W. 143, 210 Ky. 482.

4. Mo.—Watson Seminary v. Pike County Ct., 50 S.W. 880, 149 Mo. 57, 45 L.R.A. 675.
25 C.J. p 1167 note 98.

5. Fla.—State v. Board of Com'rs of Hillsborough County, 87 So. 917, 81 Fla. 271.
25 C.J. p 1167 note 99.

Overtime wages
An order of the court of industrial relations fixing wages for overtime at time and one half does not violate a constitutional provision, providing that the proceeds of fines for breach of penal laws shall be exclusively applied in the several counties to the support of common schools.—Court of Industrial Relations v. Charles Wolff Packing Co., 227 P. 249, 114 Kan. 487, modifying 219 P. 259, 114 Kan. 304.

6. Mo.—State v. Lief, 154 S.W. 1133, 248 Mo. 722—State v. Newell, 41 S. W. 751, 140 Mo. 282—State v. Bockstruck, 38 S.W. 317, 136 Mo. 335.

7. Ohio.—Beamer v. State, 21 Ohio Cir.Ct. 440, 12 Ohio Cir.Dec. 4.
Okl.—Postelwait v. State, 228 P. 789, 28 Okl.Cr. 17.

8. Ark.—Pocahontas v. State, 170 S. W. 89, 114 Ark. 448.
25 C.J. p 1167 note 4.

Action in nature of assumpsit held to be the proper remedy.—City and County of Denver v. School Dist. No. 1 in City and County of Denver, 30 P.2d 866, 94 Colo. 406.

9. Ky.—Harrodsburg v. Harrodsburg Educational Dist., 7 S.W. 312, 9 Ky.L. 605.
N.H.—Hillsborough County v. Manchester, 49 N.H. 57.
N.C.—Buncombe County v. Asheville, 38 S.E. 874, 128 N.C. 249.

10. N.Y.—Green Island v. Williams, 79 N.Y.S. 791, 79 App.Div. 260.

11. Ky.—City of Owensboro v. Board of Trustees of Public Library of Owensboro, 276 S.W. 143, 210 Ky. 482.

12. Wis.—State v. De Lano, 49 N.W. 808, 80 Wis. 259.
25 C.J. p 1167 notes 9, 10.

Claimant held to be informer, entitled to a share in a fine collected.—Smith v. Myers, 290 S.W. 459, 220 Mo.App. 1238.

13. Mass.—Bryant v. Rich's Grill, 103 N.E. 925, 216 Mass. 344, Ann. Cas.1915B 869.

14. U.S.—U. S. v. Simons, D.C.Mich., 7 F. 709.
25 C.J. p 1168 note 12.

15. U.S.—U. S. v. Simons, supra.
25 C.J. p 1168 note 13.

16. Md.—Sanner v. State, 37 A. 165. 85 Md. 523.
25 C.J. p 1168 note 15.

statutes, an informer who attempts to aid the accused person to escape forfeits his right to a share in the fine.[17] A person whose duty it is to disclose information, and who violates such duty if he does not disclose it, cannot be an informer.[18] It seems that to entitle the informer to his reward, his name need not be entered on the docket or appear on the records of the court in connection with the prosecution.[19] Under some statutes in order for an informer to be entitled to a part of the fine, his name must be written or indorsed on the indictment or at its foot,[20] but, in the absence of a statute so requiring, it has been held that it is unnecessary that the informer sign the complaint.[21]

The judgment in the prosecution in which the fine is imposed should be rendered in favor of the state;[22] and where it is so rendered, an execution thereon in favor of the informer is invalid.[23] The informer's share, if not claimed, is payable to the state.[24]

Under the various state constitutions making provision for the application of the proceeds of fines to educational or other purposes, acts of the legislature giving shares of fines collected to the informers have been upheld in most instances.[25] However, where the constitution provides for the disposition of the entire amount of the fine, such statutes have been held unconstitutional.[26]

Actions. The right of the informer to a portion of the fine is complete and enforceable only when the fine has been collected.[27] Complainant, under a statute imposing a fine, cannot recover in an action of debt against the person fined that portion of the fine to which, by the terms of the statute, he may be entitled, in the absence of a special provision to that effect.[28] Under a statute providing that all fines and penalties, when recovered, shall be paid to the county or city where the same may be imposed, unless directed to be paid otherwise by the law imposing them, but that if there is an informer he shall have half, unless otherwise provided, it has been held that the state had no interest in, and could not maintain, an action against a sheriff to recover fines which he collected and claimed as informer's fees.[29] An interpleader proceeding between several persons claiming an informer's share in a fine collected has been held to be in equity.[30] The burden of proof to the right to the informer's portion of a fine is on the person who claims to be the informer, or on the person who claims, as of right, to withhold moneys from the state on the ground that they belong to the informers.[31]

FINES, FORFEITURES, AND PENALTIES. See the titles Fines, ante p 780, Forfeitures, post, and Penalties, also 25 C.J. p 1178 note 1–p 1215 note 40.

FINES MANDATORUM DOMINI REGIS PER RESCRIPTA SUA (SCIL. BREVIA) DILIGENTER SUNT OBSERVANDI.[1]

FINGER. A digit of the fore limb; any one of the terminal or distal members of the hand.[2] When used restrictively, the term does not include the thumb.[3]

Phrases employing the word are set out in the note.[4]

17. **Evidence held not to show** that informer attempted to aid dynamiter to escape.—Smith v. Myers, 290 S.W. 459, 220 Mo.App. 1238.

18. U.S.—U. S. v. Simons, D.C.Mich., 7 F. 709.

19. N.H.—Northumberland v. Coos, 51 N.H. 557.

20. W.Va.—State v. Parkins, 61 S.E. 337, 63 W.Va. 385.

21. Mo.—Smith v. Myers, 290 S.W. 459, 220 Mo.App. 1238.

22. Ala.—Bass v. State, 63 Ala. 108.
25 C.J. p 1168 note 21.

23. Ala.—Bass v. State, supra.
Iowa.—Dupont v. Downing, 6 Iowa 172.

24. Md.—State v. Green, 87 A. 1101, 120 Md. 681.

25. Va.—Southern Express Co. v. Commonwealth, 22 S.E. 809, 92 Va. 59, 41 L.R.A. 436.
25 C.J. p 1168 note 28.

26. Fla.—State v. Hillsborough County, 87 So. 917, 81 Fla. 271.
25 C.J. p 1168 note 29.

27. Miss.—Grenada County v. Little, 71 So. 871, 111 Miss. 605.

28. N.H.—Slayton v. Marshall, 15 A. 210, 64 N.H. 549, 1 L.R.A. 51.

29. Md.—Sanner v. State, 35 A. 158, 83 Md. 648.

30. Mo.—Smith v. Myers, 290 S.W. 459, 220 Mo.App. 1238.

31. Md.—State v. Green, 87 A. 1101, 120 Md. 681.
25 C.J. p 1168 note 25.

1. A maxim meaning "The limits of the king's mandates in his rescripts (i.e., writs) are to be diligently observed."—Peloubet Leg.Max.
Applied in Blumfield's Case, 5 Coke 86a, 87a, 77 Reprint 185.

2. Century D.

3. N.Y.—Doris v. James Butler, Inc., 192 N.Y.S. 515, 516, 199 App.Div. 116.

4. **"Finger prints"**
(1) The tracings of physical characteristics or the lines upon the fingers, used in establishing identity.—People v. Sallow, 165 N.Y.S. 915, 918, 924, 100 Misc. 447.
(2) History, origin, and process discussed.
Nev.—State v. Kuhl, 175 P. 190, 191, 42 Nev. 185, 36 A.L.R. 1694.
N.Y.—People v. Sallow, supra.
(3) As evidence in criminal prosecutions see the C.J.S. titles Criminal Law § 616 b (2), § 656 notes 23, 24, § 876 notes 17–19; and Homicide § 215, also 30 C.J. p 163 notes 99, 1.
(4) Dactylography as the scientific study of finger prints see 25 C.J.S. p 439 note 35.
Other phrases
(1) "Finger injury," contrasted with "hand injury," and held not to include cut in palm inch below base of middle finger, severing finger tendon, even though the finger may be

FINING. See Fine ante page 778 note 10.

FININGS. An article consisting of gelatin containing a considerable proportion of sulphurous acid or sulphite as a preservative.[5]

FINIQUITO. In Spanish law, a final settlement; hence, specifically, the approval of an agent's accounts.[6]

FINIRE. Latin, in old English law, to end or finish a matter; also to fine or pay a fine.[7]

FINIS. A Latin word denoting the end.[8] Defined as meaning an end, hence a boundary or terminus, a limit; also, in Law Latin, a fine.[9]

FINIS FINEM LITIBUS IMPONIT.[10]

FINISH.

As a noun. The conclusion or last stage of anything.[11]

As a verb. To complete.[12]

The past tense, or past participle, "finished," has been employed with respect to a house[13] and a railroad.[14] In the furniture trade it has a particular trade meaning that an article has been varnished, stained, oiled, polished, or the like.[15]

Finishing, the present participle, has been used with respect to goods,[16] and, in a particular context, may be one of the operations included in manufacturing.[17]

Phrases employing the word are set out in the note.[18]

FINIS REI ATTENDENDUS EST.[19]

FINIS TALIS CONCORDIA FINALIS DICITUR EO QUOD FINEM IMPONIT NEGOTIO, ADEO QUOD NEUTRA PARS LITIGANTIUM, AB EO DE CÆTERO POTEST RECEDERE.[20]

FINIS UNIUS DIEI EST PRINCIPIUM ALTERIUS.[21]

FINITIO. An ending; hence death, as the end of life.[22]

FINIUM REGUNDORUM ACTIO. In civil law, an action for regulating boundaries; the name of an action which lay between those who had lands bordering on each other, to settle disputed boundaries.[23]

FINORS. Those who purify gold and silver, parting them by fire and water from coarser metals; and therefore, in the statute of 4 Hen. VII c 2, they are also called "parters."[24]

FINS. The thin extra portions of metal exuded

involved.—Moore v. List & Weatherly Const. Co., La.App., 144 So. 147, 150.

(2) "Loss of finger."—Doris v. James Butler, Inc., 192 N.Y.S. 515, 516, 199 App.Div. 116.

Award of damages for see Damages § 198 g (10).

5. U.S.—Sonoma Wine & Brandy Co. v. U. S., C.C.N.Y., 123 F. 999, 1000.

6. Escriche Diccionario.

7. Black L.D.

8. La.—State v. Twenty-First Judicial Dist. Democratic Committee, 47 So. 405, 407, 122 La. 83.

9. Black L.D.

Phrase construed

"Finis est amicabilis compositio et finalis concordia ex concensu et concordia domini regis vel justiciarum," literally "A fine is an amicable settlement and decisive agreement by consent and agreement of our lord, the king, or his justices."—Black L. D.

10. A maxim meaning "A fine puts an end to litigation."—Black L.D.

Applied in State v. Lee, 30 A. 1110, 65 Conn. 265, 271, 48 Am.S.R. 202, 27 L.R.A. 498.

11. Standard D.

12. U.S.—Davis & Roesch Temperature Controlling Co. v. Tagliabue, N.Y., 159 F. 712, 713, 86 C.C.A. 466.

N.Y.—Stewart v. Keteltas, 22 N.Y.Super. 261, 282.

13. Mass.—Robbins v. Blodgett, 121 Mass. 584, 586.

14. Pa.—In re Bartol, 38 A. 527, 530, 182 Pa. 407.

15. U.S.—In re Herrman, N.Y., 56 F. 477, 479, 5 C.C.A. 582.

16. Eng.—Hardcastle v. Jones, 3 B. & S. 153, 161, 113 E.C.L. 153, 122 Reprint 59.

17. N.Y.—People, on Complaint of Strosahl v. Cross & Brown Co., 251 N.Y.S. 138, 139, 232 App.Div. 587.

18. **Phrases construed**

(1) "Finished carpenter" is a person who can perform all kinds of carpentry work necessary in the construction of a building from its foundation to the roof, both inclusive.—Hibbard v. Blane, La.App., 183 So. 39, 40.

(2) "Finished feather articles."—U. S. v. Gross, 12 Ct.Cust.App. 413, 415. See also Customs Duties § 45 g note 96.

(3) "Finished product," as including scrap iron, processed and turned into a product which might be used as a charge in open-hearth furnaces, in the manufacture of steel.—Middletown Iron & Steel Co. v. Evatt, 38 N.E.2d 585, 591, 139 Ohio St. 113.

(4) "Finish sound," as used in a contract that castings shall finish sound, construed as meaning that they shall, when finished, be sound; that is, free from cracks and air holes, both obvious and hidden.—Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co., 75 N.E. 624, 189 Mass. 344, 345.

19. A maxim meaning "The end of a thing is to be attended to."—Black L.D.

20. A maxim meaning "A final concord is that by which an end is put to the business, from which end neither litigant can recede."—Morgan Leg.Max.

21. A maxim meaning "The end of one day is the beginning of another."—Black L.D.

22. Black L.D.

23. Black L.D.

Judicial proceedings to determine boundaries see Boundaries, § 96 et seq.

24. Black L.D.

sidewise from between grooved rolls in the manufacture of steel. Also called "overfills."[25]

FIRDFARE. Saxon, in old English law, a summoning forth to a military expedition, indictio ad profectionem militarem.[26]

FIRDIRINGA. Saxon, a preparation to go into the army.[27]

FIRDSOCNE. Saxon, in old English law, exemption from military service.[28]

FIRDWITE. In old English law, a fine for refusing military service, "mulcta detrectantis militiam;" a mulct or penalty imposed on military tenants for their default in not appearing in arms or coming to an expedition. In a somewhat different sense, a fine imposed for murder committed in the army; also an acquittance of such fine.[29]

FIRE.

As a Noun

In the popular understanding of the word, in contrast to the technical meaning developed from a scientific analysis of its nature and properties, it is an effect rather than an elementary principle;[30] and has been specifically defined as combustion with the presence of flame or glow;[31] the effect of combustion;[32] the evolution of light and heat in the combustion of bodies; the visible heat or light evolved by the action of a high temperature on certain bodies, which are in consequence styled inflammable or combustible.[33]

The term has been held equivalent to "burning" and "ignition."[34] It has been distinguished from "combustion" or "spontaneous combustion" see 15 C.J.S. p 242 notes 81, 84, and from "heat."[35]

As construed in policies of insurance see the C.J. S. title Insurance §§ 809–816, also 26 C.J. p 340 note 45–p 342 note 86.

Phrases employing the noun are set out in the footnote.[36]

As a Verb

To cause to explode;[37] also, in veterinary surgery, to cauterize.[38]

As an Adjective

Phrases employing the adjective are set out in the footnote.[39]

25. U.S.—Witherow Steel Corporation v. Donner Steel Co., D.C.N.Y., 31 F.2d 157, 161.

26. Black L.D.

27. Black L.D.

28. Black L.D.

29. Black L.D.

30. Conn.—Lavitt v. Hartford County Mut. Fire Ins. Co., 136 A. 572, 574, 105 Conn. 729.

In common parlance one has not had a "fire" so long as it has only burned in the place where it was intended to burn, but the word relates to a "hostile" fire.
Idaho.—Mode, Limited v. Fireman's Fund Ins. Co., 110 P.2d 840, 841, 842, 843, 133 A.L.R. 791.
Tex.—Reliance Ins. Co. v. Naman, 6 S.W.2d 743, 745, 118 Tex. 21.

31. U.S.—The Buckeye State, D.C. N.Y., 39 F.Supp. 344, 348.

32. Conn.—Lavitt v. Hartford County Mut. Fire Ins. Co., 136 A. 572, 574, 105 Conn. 729.

33. U.S.—Western Woolen Mill Co. v. Northern Assur. Co. of London, C.C.A.Kan., 139 F. 637, 639.
Kan.—Sun Ins. Office of London v. Western Woolen Mill Co., 82 P. 513, 517, 72 Kan. 41.

Similarly expressed
(1) "Fire" is caused by ignition or combustion.—The Buckeye State, D. C.N.Y., 39 F.Supp. 344, 347.
(2) It includes the idea of visible heat or light.
U.S.—The Buckeye State, supra.
Okl.—Security Ins. Co. of New Haven, Conn., v. Choctaw Cotton Oil Co., 299 P. 882, 884, 149 Okl. 140.

34. Conn.—Lavitt v. Hartford County Mutual Fire Ins. Co., 136 A. 572, 574, 105 Conn. 729.

35. U.S.—The Buckeye State, D.C.N. Y., 39 F.Supp. 344, 347.
Conn.—Lavitt v. Hartford County Mutual Fire Ins. Co., 136 A. 572, 574, 105 Conn. 729.

36. **Phrases construed**
(1) "Damage by fire."—Scully v. Bremer County Farmers' Mut. Fire Ins. Ass'n, 245 N.W. 280, 282, 215 Iowa 368.
(2) "Fire in a building," as contrasted with "burning of a building" see 12 C.J.S. p 759 note 41.
(3) "Fires, storms, shipwrecks, or other casualty."—Shearer v. Anderson, C.C.A.N.Y., 16 F.2d 995, 996, 51 A.L.R. 534.
(4) "Letters of fire and sword," in old Scotch law, letters issued from the privy council in Scotland, addressed to the sheriff of the county, authorizing him to call for the assistance of the county to dispossess a tenant retaining possession contrary to the order of a judge or the sentence of a court.—Black L.D.
(5) "Skin fire," described as a fire that runs around a room very rapidly and destroys light material.—Pulver v. Rochester German Ins. Co., 35 Ill. App. 24, 25.

37. Webster New Int.D.
"Firing a large sized Colt's revolving pistol"
Ind.—Shepherd v. State, 54 Ind. 25, 28.

38. Century D.
"Firing a horse" defined as a process, or surgical operation, which is performed by puncturing holes through hide around joints with instrument heated to red glow after anæsthetizing parts to kill pain.—Hartford Live Stock Ins. Co. v. Everett, 169 N.E. 473, 474, 93 Ind.App. 238.

39. **"Fire bug"**
(1) A word of well defined and commonly accepted meaning, an incendiary, a pyromaniac.—Blechner v. Kraser, 157 N.Y.S. 256.
(2) It was coined about 1895, as a popular phrase referring to persons guilty of the crime of arson.—Blechner v. Kraser, supra.
"Fire escape"
(1) A contrivance or apparatus on a building to enable the occupants to escape without injury in case of fire.—English L.D.
(2) A fire ladder is a fire escape, and "fire escapes," include fire ladders of such sort and location as to permit safe descent of persons

FIREARMS. See the C.J.S. title Weapons §§ 1, 6, also 68 C.J. p 4 notes 16–19, p 26 note 35.

FIREBOTE. See Common Lands § 4 b (2) notes 57, 58.

FIRECRACKER. See Explosives §§ 1, 10.

FIRE INSURANCE. See the title Insurance in Corpus Juris Secundum, also 26 C.J. p 1 et seq.

FIREMAN or FIREMEN. Those whose duty is to extinguish fires and to protect property and life therefrom.[40]

FIREMEN'S BENEFIT FUND or RELIEF ASSOCIATION. See generally the C.J.S. title Municipal Corporations §§ 614, 615, also 43 C.J. p 842 note 8–p 849 note 29.

FIREPLACE. The part of a chimney which opens into an apartment, and in which fuel is burned; in a restricted sense, a place for a fire in which the fuel is supported on andirons or is placed upon the hearth.[41]

FIREPROOF. Incombustible, proof against fire;[42] by context, reasonably depended on to resist the ac-

caught in a building on fire.—West v. Spratling, 86 So. 32, 36, 204 Ala. 478.

(3) The term has been held not to include a balcony or an interior staircase in a hotel.—West v. Spratling, 86 So. 32, 36, 204 Ala. 478.

(4) For some specific uses of the term see 25 C.J. p 1216 note 44 and consult Descriptive-Word Index.

Other phrases

(1) "Fire alarm," as not necessarily requiring the ringing of a bell or the blowing of a whistle.—Hommel v. Town of Saugerties, 1 N.Y.S.2d 208, 211, 253 App.Div. 84.

(2) "Fire alarm system" or "fire alarm service" see the C.J.S. title Telegraphs and Telephones § 279, also 62 C.J. p 299 notes 75–78.

(3) "Fire board," "fire chief," "fire commissioners," "fire department," or "fire force" and other similar terms see the C.J.S. title Municipal Corporations §§ 591–615, also 43 C.J. p 823 note 81–p 849 note 29, and consult Descriptive-Word Index.

(4) "Fire brick" see 11 C.J.S. p 878 notes 7–11.

(5) "Fire clay" see 14 C.J.S. p 1197 note 96.

(6) "Fire damp" see the C.J.S. title Mines and Minerals § 3, also 25 C.J. p 1216 notes 36, 37.

(7) "Fire department vehicles" as privileged under traffic regulations see the C.J.S. title Motor Vehicles §§ 372, 373, also 42 C.J. p 1026 note 36–p 1027 note 56.

(8) "Fire district" as municipal subdivision see the C.J.S. title Municipal Corporations § 81, also 43 C.J. p 150 note 55–p 151 note 57.

(9) "Fire division," as describing one or more fireproof compartments in same building.—St. Paul Fire & Marine Ins. Co. v. Lipsitz, Tex.Civ. App., 295 S.W. 343, 346.

(10) "Fire door," as a fireproof barrier for closing openings to prevent the spread of fire.—People v. One Hundred and Thirty-One Boerum St. Co., 135 N.E. 327, 328, 233 N.Y. 268.

(11) "Fire engine," defined as an engine, the primary purpose of which is to extinguish fires.—Des Moines Water Co.'s Appeal, 48 Iowa 324, 329.

(12) "Fire engine house," power of municipality to acquire, furnish, and hold, see the C.J.S. title Municipal Corporations § 959, also 43 C.J. p 1332 notes 53, 54.

(13) "Fire exit" is a reasonable, practicable, safe exit.—Keefe v. Annpaul Realty Co., 213 N.Y.S. 637, 642, 215 App.Div. 301.

(14) "Fire fighting machine" is an instrument of public utility designed and used exclusively for putting out fires.—American-La France Fire Engine Co. v. Riordan, C.C.A.N.Y., 6 F. 2d 964, 966.

(15) "Fire fighting operations," as governmental function imposing no liability on municipality see the C.J.S. title Municipal Corporations § 776, also 43 C.J. p 967 note 68–p 970 note 3.

(16) "Fire hunting," as the statutory equivalent of "camp hunting" see 12 C.J.S. p 889 note 23.

(17) "Fire job," as a term sometimes applied to the act of repairing a building after its partial destruction by fire.—Monteleone v. Royal Ins. Co., 18 So. 472, 473, 47 La.Ann. 1563, 56 L.R.A. 784.

(18) "Fire limits" within which use of inflammable materials in buildings is prohibited see the C.J.S. title Municipal Corporations §§ 255, 771, also 43 C.J. p 369 note 82–p 370 note 98, p 960 notes 85–88.

(19) "Fire ordeal," defined in Saxon and old English law, as the ordeal by fire or red-hot iron, which was performed either by taking up in the hand a piece of red-hot iron, of one, two, or three pounds weight, or by walking barefoot and blindfolded over nine red-hot plowshares, laid lengthwise at unequal distances.—Black L.D.

(20) "Fire or other casualty," as meaning some unforeseen accident of like character and operation as fire.—Stieffen v. Darling, 163 S.E. 353, 354, 158 Va. 375.

(21) "'Fire packed' bale of cotton" is cotton which has become ignited in ginning process and then packed in bale, constituting a latent defect or infirmity.—Gulf, C. & S. F. Ry. Co. v. Downs, Tex.Civ.App., 70 S.W. 2d 318, 320.

(22) "Fire pan," a vehicle, usually of the trailer type, used by street repair crews for heating their tools.—Thompson v. Kansas City, Mo.App., 153 S.W.2d 127.

(23) "Fire point," defined as the temperature of heated oil at which, upon the application to it of fire, combustion continues uninterruptedly until the oil is entirely consumed; distinguished from "flash point."—State v. Boylan, 65 A. 595, 596, 79 Conn. 463.

(24) "Fire raising," in Scotch law, willfully setting on fire buildings, growing or stored cereals, growing wood, or coalheughs.—Black L.D.

(25) "Fire regulations" see the C. J.S. title Municipal Corporations §§ 254–257, also 43 C.J. p 368 note 64–p 371 note 29.

(26) "Fire tools," as contrasted with "fuel transportation devices."—U. S. for Benefit of Rhode Island Covering Co. v. James Miles & Son Co., D.C.Mass., 55 F.2d 249.

(27) "Fire wall," as meaning one that is noncombustible.—Robenson v. Turner, 251 S.W. 857, 860, 199 Ky. 642.

40. Minn.—Behr v. Soth, 212 N.W. 461, 462, 170 Minn. 278.
See also the C.J.S. title Municipal Corporations §§ 598–613 and 43 C. J. p 830 note 46–p 842 note 7.

41. Century D.
As to their use in party walls see the C.J.S. title Party Walls § 15, also 47 C.J. p 1340 notes 41–43.

42. Kan.—Diebold Safe & Lock Co. v. Huston, 39 P. 1035, 1038, 55 Kan. 104, 28 L.R.A. 53.

tion of ordinary fires.[43] As applied to houses, it may include such as are not absolutely proof against fires; it is intended to refer to houses built of brick, stone, iron, or other material on the outside, so as to form barriers that will resist the action of ordinary fires;[44] it excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fireproof buildings.[45] As applied to safes, the term does not mean that the safe would resist heat of any particular duration, but that it is constructed of fireproof materials, such as iron, lined with asbestos.[46]

Phrases employing the word are set out in the footnote.[47]

43. Iowa.—Lane-Moore Lumber Co. v. Storm Lake, 130 N.W. 924, 928, 151 Iowa 130.

44. Tex.—Chimene v. Baker, 75 S. W. 330, 331, 32 Tex.Civ.App. 520.

45. N.Y.—Hickey v. Morrell, 7 N.E. 321, 323, 102 N.Y. 454, 55 Am.R. 824—Dietz v. Yetter, 54 N.Y.S. 258, 260, 34 App.Div. 453.

46. Ark.—National Liberty Ins. Co. of America v. Spharler, 290 S.W. 594, 596, 172 Ark. 715.

47. **Phrases construed**

(1) "Fireproofed lumber," as capable of a use for which ordinary lumber is not adequate and is not adapted; and, by the process which has been applied to it, advanced into a new material adapted to a particular use, that of making fireproof structures.—Myers v. U. S., N.Y., 147 F. 204, 205, 77 C.C.A. 430.

(2) "Fireproof materials," as meaning such material as would exclude or resist ordinary fires.—Brenham v. Holle, Tex.Civ.App., 153 S.W. 345, 349.

(3) "Fireproof roofs."—Lane-Moore Lumber Co. v. Storm Lake, 130 N.W. 924, 928, 151 Iowa 130.

(4) "Fireproof safe."—Richardson v. Carlis, 128 N.W. 168, 170, 26 S.D. 202, Ann.Cas.1913B 47.

(5) "Fireproof warehouse."—Vaughan v. Matlock, 23 Ark. 9, 11.

FIRES

This Title includes burning or setting fire to property other than buildings and similar structures and their contents, and refusing to aid in or obstructing extinguishment of fires; nature and extent of criminal responsibility therefor, and grounds of defense; prosecution and punishment of such acts as public offenses; civil liability for willful burning or setting fire; compensation for aiding extinguishing of fires; liability for expense of extinguishing fires; and investigation of origin of fires.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. CRIMINAL LIABILITY

§ 1. Nature and Elements of Offense

Various offenses exist both at common law and under statute arising out of the burning or setting fire to property of various kinds and under certain conditions. Crimes involving the burning or setting fire to property other than buildings or similar structures are considered infra §§ 2–8. Criminal liability for failure to extinguish a fire as provided by statute is considered infra § 15; criminal liability for fires caused by negligence is considered in the C.J.S. title Negligence § 306, also 45 C.J. p 1371 note 16–p 1373 note 39. The crime of arson, in so far as it involves the burning or setting fire to buildings or other habitable structures, is considered in the title Arson.

Examine Pocket Parts for later cases.

§ 2. —— Burning Another's Property

The willful and malicious burning of another's property usually constitutes a punishable offense both at common law and under statute.

The act of willfully and maliciously burning another's property, other than buildings and similar structures and their contents, such as stacks of hay or grain, grasses, fences, woods, and the like, usually constitutes a punishable offense.[1] The act is punishable as a misdemeanor both at common law[2] and under most of the statutes relating to such burnings,[3] although in some jurisdictions and under some circumstances the offense constitutes a felony.[4]

What acts are necessary to a conviction under such statutes depends, of course, on the language of the particular statute.[5] "Willfully" within the meaning of such a statute means with evil intent, legal malice, or bad purpose,[6] and the "malice" must have as its object some person, ordinarily the owner of the property and not the property itself.[7]

§ 3. —— Burning One's Own Property

Statutes exist making it a punishable offense willfully or negligently to set fire to one's own property of a designated nature under varying circumstances. So setting fire to one's own property to defraud an insurer is made a crime.

Under some statutes it is a misdemeanor willfully or negligently to set fire to one's own woods, or fallow, or prairie land, or other specified areas,[8] or to do so without giving proper notice thereof to the owners of adjoining lands,[9] or willfully or negligently to let a fire kindled upon his own wood or prairie land escape to the injury of an adjoining landowner's property.[10] Some statutes apply not only to wild or prairie land but also to cultivated grounds.[11] The purpose of this legislation is to guard against disastrous conflagrations which might be innocently caused by an imprudent landowner.[12]

Such statutes, however, do not apply to ordinary acts of husbandry which are conducted in a lawful and careful manner;[13] or to other acts which a

1. S.C.—State v. Pope, 9 S.C. 273.
5 C.J. p 545 note 86.

Offense as arson

(1) Under some statutes some of these offenses are treated as arson.—State v. Harvey, 42 S.W. 938, 141 Mo. 343, affirming 32 S.W. 1110, 131 Mo. 339—5 C.J. p 545 note 89.

(2) It was not arson at common law.
Ill.—Creed v. People, 81 Ill. 565.
Md.—Black v. State, 2 Md. 376.
5 C.J. p 545 note 84.

(3) Neither is it so under other of the statutes.—State v. Pope, 9 S.C. 273.

(4) As to whether the burning of a stack of grain was anciently counted arson the authorities are not in accord.—State v. Sutcliffe, 35 S.C.L. 372.

(5) See the title Arson for a consideration of the crime of arson.

2. Md.—Black v. State, 2 Md. 376.
Tex.—Phillips v. State, 19 Tex. 158.

3. Cal.—Galvin v. Gualala Mill Co., 33 P. 93, 98 Cal. 268.
26 C.J. p 580 note 3.

Hay

Stalks, stems, and other residue, left after bean plants have been threshed and bean kernel or seeds removed, are not "hay," within meaning of statute prohibiting malicious burning of hay.—State v. Choate, 238 P. 538, 41 Idaho 251.

4. Nev.—State v. McMahon, 30 P. 1000, 17 Nev. 365.
26 C.J. p 581 note 4.

5. Va.—Erskine v. Commonwealth, 8 Gratt. 624, 49 Va. 624.
26 C.J. p 581 note 6.

6. Cal.—Galvin v. Gualala Mill Co., 33 P. 93, 98 Cal. 268.
26 C.J. p 581 note 7.

7. Iowa.—State v. Leslie, 115 N.W. 897, 138 Iowa 104, 128 Am.S.R. 160.
26 C.J. p 581 note 8.

8. N.Y.—Lawyer v. Smith, 1 Den. 207.
Tex.—Pipe v. State, 3 Tex.App. 56.
26 C.J. p 581 note 11.

Resident and nonresident distinguished

Under the Georgia statute nonresidents of the county are wholly prohibited from setting fires as prescribed, while residents are prohibited from so doing except during specified months on giving notice as provided.—Stembridge v. Fowler, 13 S.E. 2d 523, 64 Ga.App. 426.

9. Ga.—Stembridge v. Fowler, supra.
26 C.J. p 581 note 12.

10. Mich.—Rogers v. Parker, 123 N.W. 1109, 159 Mich. 278, 34 L.R.A., N.S., 955, 18 Ann.Cas. 753.
26 C.J. p 581 note 13.

11. Ill.—Nall v. Taylor, 156 Ill.App. 145, affirmed 93 N.E. 359, 247 Ill. 580.
26 C.J. p 581 note 14.

12. Ga.—Acree v. State, 50 S.E. 180, 122 Ga. 144.
26 C.J. p 581 note 15.

13. Ga.—Acree v. State, 50 S.E. 180, 122 Ga. 144.
26 C.J. p 581 note 16.

landowner is required to do in performance of a duty prescribed by statute.[14]

Defrauding insurer. Some statutes make it a crime to set or cause to be set a fire to one's property for the purpose of defrauding an insurer.[15]

§ 4. —— Refusing Aid in Extinguishing Fire

The right of fire wardens to call on others to aid in extinguishing fires is considered infra § 15, and compensation of such persons infra § 16.

Examine Pocket Parts for later cases.

§ 5. Defenses

Waiver of a required notice to adjoining landowners of a burning is no defense to a prosecution for a fire set without such notice; nor is it a defense to a prosecution for maliciously burning another's property that defendant believed that he had a right to possession of the land on which the burned property was located.

Under statutes requiring notice of the burning to be given to adjoining landowners, waiver of such notice by such owners is no defense to an indictment for the misdemeanor.[16] On a prosecution for maliciously burning another's property it is no defense that accused believed he had a legal right to the possession of the land on which the burned property was located.[17]

Defenses to criminal prosecutions generally are considered in Criminal Law §§ 38–54.

§ 6. Indictment, Information, or Complaint

The indictment or information must set forth the essential elements of the offense charged.

In accordance with general rules, the indictment or information should contain allegations showing that an offense is being charged.[18] It should charge all the elements of the offense with particularity and clearness,[19] but it need not pursue strictly the language of the statute, if words of equivalent import are employed,[20] and an indictment substantially in the form prescribed by the statute is sufficient.[21]

The use of the word "unlawfully" in the complaint is unnecessary where it is manifest that the statute in its general terms declares an unlawful offense.[22]

Charging grade of offense. The indictment should not charge the offense as of a grade other than that made by the statute.[23]

Variance. In accordance with the general rules pertaining to a variance between the allegations

14. Ill.—Checkley v. Illinois Cent. R. Co., 100 N.E. 942, 257 Ill. 491, 44 L.R.A.,N.S., 1127, Ann.Cas.1914A 1201.

15. Ala.—Dean-State, 197 So. 53, 240 Ala. 8.—Newman v. State, App., 9 So.2d 768, certiorari denied, Sup., 9 So.2d 744.
N.D.—State v. Isensee, 249 N.W. 898, 64 N.D. 1.
Burning of building or similar structure for such purpose see Arson § 2 b.

16. N.C.—Lamb v. Sloan, 94 N.C. 534.

17. Fla.—Heron v. State, 22 Fla. 86.

18. **Prohibition of acts**
Without allegations of existence of conditions precedent to governor's right to issue proclamation prohibiting building of fires out of doors, or that proclamation was issued at certain date, effective for certain time and covering certain sections, or that fire was kindled in territory designated, complaint charges no offense.—State v. Merrill, 167 A. 172, 132 Me. 103.
Fire to defraud insurer
In a prosecution for setting fire to property in order to defraud an insurer thereof, an indictment otherwise in proper form and charging the offense is not bad for failure to name the insurer.—Newman v. State, Ala. App., 9 So.2d 768, certiorari denied, Sup., 9 So.2d 744.

19. N.C.—State v. Avery, 13 S.E. 931, 109 N.C. 798—State v. Simpson, 9 N.C. 460.
26 C.J. p 582 note 23.
"It is best for the proper administration of justice that reasonable exactness and precision of statement be required."—State v. Merrill, 167 A. 172, 174, 132 Me. 103.
Description of property
(1) The property burned should be described with such particularity that it may be seen from the face of the charge that it is within the language of the statute on which the indictment is based.—Chapman v. Commonwealth, 5 Whart., Pa., 427, 34 Am.D. 565—26 C.J. p 582 note 28.
(2) Charging burning of haystacks is within a statute covering "goods, wares or merchandise or other chattels," and "grass . . . standing in the field."—State v. Harvey, 42 S.W. 938, 141 Mo. 343, 345.
Ownership of the property should be averred.—Brinegar v. State, 118 N.W. 475, 82 Neb. 558.
Allegations as to:
Place of offense see the C.J.S. title Indictments and Informations §§ 120–122, also 31 C.J. p 674 note 72—p 680 note 63.
Time of offense see the C.J.S. title Indictments and Informations §§ 123–125, also 31 C.J. p 680 note 64—p 687 note 71.

20. Me.—State v. Merrill, 167 A. 172, 132 Me. 103—State v. Hyman, 102 A. 231, 116 Me. 419.
26 C.J. p 582 note 24.
"Building" or "kindling" fire
Complaint for kindling a fire out of doors during suspension of open season was held not demurrable because charge should have been that of building a fire, since phrases "kindling a fire" and "building a fire" are equivalent.—State v. Merrill, 167 A. 172, 132 Me. 103.
"Felonious" not equivalent to "malicious or willful"
Under a statute as to "willfully and maliciously" setting fire, an indictment charging that defendant "feloniously" set the fire is insufficient, since the words are not synonymous and the word "feloniously" is used to distinguish the various classes of offenses called "felonies" from those called "misdemeanors," and is not intended to be descriptive of any particular offense.—State v. Hyman, 102 A. 231, 116 Me. 419.

21. Ala.—Dean v. State, 197 So. 53, 240 Ala. 8—Newman v. State, App., 9 So.2d 768, certiorari denied, Sup., 9 So.2d 744.

22. Me.—State v. Merrill, 167 A. 172, 132 Me. 103.

23. Md.—Black v. State, 2 Md. 376.
26 C.J. p 582 note 25.

of an indictment and the proof, the proof must correspond to, and be in support of, the material allegations in the indictment or information,[24] and if there is a variance in a material matter there can be no conviction.[25]

§ 7. Evidence

In prosecutions under the various fire statutes the prosecution must establish the essential elements of the offense charged beyond a reasonable doubt.

In accordance with general rules, in a prosecution under the various fire statutes the prosecution must prove all the essential elements of the offense charged[26] beyond a reasonable doubt.[27]

In such prosecutions competent, relevant, and material evidence is admissible, while evidence not competent, relevant, or material is not admissible.[28] Thus accused may introduce competent evidence of any fact which tends to explain or obviate the force of incriminating evidence introduced against him.[29]

§ 8. Trial and Judgment

General rules govern the trial and judgment in prosecutions for wrongful fires.

The rules relating to trials in criminal cases generally, discussed in Criminal Law §§ 927–1417, apply in the trial of prosecutions for wrongful fires. These rules govern with respect to the conduct of the trial,[30] questions of law and fact as for the court or jury,[31] and instructions to the jury.[32]

Judgment. The rules relating to judgments or sentences in criminal cases generally, discussed in Criminal Law §§ 1556–1622, apply in prosecutions for wrongful fires. Accordingly if, in the particular case, the offense is a misdemeanor only, a valid judgment cannot be pronounced on an indictment and verdict charging and finding it as a felony.[33]

II. LIABILITY FOR PENALTY

§ 9. In General

Some of the statutes prohibiting or regulating the setting of fires impose penalties on persons violating their provisions.

Under some statutes setting fire to another's woods, prairie, etc., or to one's own woods, prairie, etc., without giving proper notice thereof to adjoin-

24. Neb.—Brinegar v. State, 118 N. W. 475, 82 Neb. 558.
26 C.J. p 582 note 35.

25. Cal.—People v. Doyle, 110 P. 458, 13 Cal.App. 611.
26 C.J. p 582 note 36.

26. **Participation by defendant**
(1) To justify a conviction, it is necessary to prove that defendant committed the crime.—State v. Sieff, 168 P. 524, 54 Mont. 165.
(2) However, where the distinction between accessaries and principals in the commission of a crime has been done away with, all being tried as principals, it is unnecessary for the state to prove that defendant actually set the fire himself in a prosecution for burning property with intent to defraud an insurer of such property, direct physical participation of defendant in the act being unnecessary.—Newman v. State, Ala. App., 9 So.2d 768, certiorari denied, Sup., 9 So.2d 744.

Intent
(1) Where accused, on his own property, started fire which spread across road to prosecutrix' fence, and there was no evidence that accused intentionally set fire to fence, evidence was insufficient to sustain conviction of willfully setting fire to another's fence.—Barker v. State, Tex.Cr., 157 S.W.2d 896.
(2) Mere proof of setting fire on his own land, which spreads to another's land, without proof of evil intent or negligence, does not show an unlawful act.—Galvin v. Gualala Mill Co., 33 P. 93, 98 Cal. 268.

Malice or willfulness
(1) Where willfulness or malice is an essential ingredient of the offense, it should be shown that the burning was done willfully or maliciously.—Galvin v. Gualala Mill Co., 33 P. 93, 98 Cal. 268—People v. Wilkison, 158 P. 1067, 30 Cal.App. 473.
(2) Malice may be inferred from the nature of the act and from the circumstances accompanying and characterizing it.—State v. Leslie, 115 N.W. 897, 138 Iowa 104, 128 Am. S.R. 160.

27. Mont.—State v. Sieff, 168 P. 524, 54 Mont. 165.
26 C.J. p 582 note 37.

Evidence sufficient
(1) To sustain verdict in prosecution for setting fire with intent to defraud insurer.—State v. Isensee, 249 N.W. 898, 64 N.D. 1.
(2) Other instances see 26 C.J. p 582 note 37 [a].

Evidence insufficient
(1) To sustain conviction in prosecution for burning automobile insured against loss by fire.—Lewallen v. State, 29 S.W. 2d 371, 115 Tex.Cr. 144.
(2) To support verdict in prosecution for burning seed cotton.—Hightower v. State, 237 S.W. 1112, 91 Tex. Cr. 187.
(3) To identify defendant as the offender.—Hightower v. State, supra.
(4) To establish criminal negligence.—Turner v. State, 16 S.E.2d 160, 65 Ga.App. 292.
(5) Other instances see 26 C.J. p 582 note 37 [b].

Applicability of statute
Evidence sufficient to show.—State v. Patton, 19 S.E.2d 142, 221 N.C. 117.

28. N.D.—State v. Isensee, 249 N.W. 898, 64 N.D. 1.

29. N.D.—State v. Isensee, supra.
Fire to defraud insurer
N.D.—State v. Isensee, supra.

30. **Reception of evidence**
Propriety of admitting before jury agreement of defense to admit automobile burned was insured held for trial judge.—Lewallen v. State, 29 S. W.2d 371, 115 Tex.Cr. 144.

31. Iowa.—State v. Leslie, 115 N.W. 897, 138 Iowa 104, 128 Am.S.R. 160.
26 C.J. p 583 note 42.

Guilt or innocence
The evidence permitting, the guilt or innocence of accused is a question of fact for the jury.—State v. Isensee, 249 N.W. 898, 64 N.D. 1.
Value of the property is not a question for the jury, as the gist of the offense is the malicious burning, without regard to value.—Heron v. State, 22 Fla. 86.

32. Cal.—People v. Wilkison, 158 P. 1067, 30 Cal.App. 473—People v. Doyle, 110 P. 458, 13 Cal.App. 611.

33. Md.—Black v. State, 2 Md. 376.

ing landowners, and without taking effectual care to extinguish such fire before it shall reach near or adjoining lands, renders the wrongdoer liable to a penalty at the suit of any one designated therein.[34] Under some of these statutes in reference to burning waste land or forest land, a person is liable to the penalty for permitting fire to escape from his own land, although he does not do so willfully.[35] Under others a landowner is not liable for such penalty where he sets a fire from necessity as where he seeks to subdue a fire by firing against it,[36] or where, in lawfully burning something on his own farm, the fire accidentally escapes to an adjoining farm or woods.[37]

§ 10. Proceedings

The penalty provided by the fire statutes may be recovered in an action of debt. The penalty and actual damages resulting from the wrongful act may sometimes be recovered in one action.

Statutory damages in the nature of a penalty may be recovered in an action of debt.[38] A person entitled to a penalty imposed may sue for it, and also for his actual damages for the wrongful act, in one action.[39]

In an action to recover the penalty, it will not be presumed that safeguards taken by defendant in compliance with the statute were not such as the statute prescribed.[40] Proof which merely raises a suspicion that defendant might have caused fires forbidden in the statute is not sufficient to support a verdict.[41]

Defenses. It is no defense to an action for the penalty under some statutes that the land on which the fire was set out belonged to defendant.[42]

An agreement of one adjoining landowner to waive the required notice will not bar a stranger from recovering the prescribed penalty.[43]

III. CIVIL LIABILITY FOR DAMAGES

§ 11. Right of Action and Defenses

a. Liability or right of action
b. Defenses

a. Liability or Right of Action

Both at common law and under or by reason of statute one who willfully and intentionally sets an unlawful fire has been held civilly liable in damages for the consequences proximately resulting therefrom. Some of the statutes prohibiting or regulating the setting of fires impose liability for resulting damages on one violating their provisions.

At common law, one who willfully and intentionally sets a fire has been held to be responsible for the consequences proximately resulting from it, and civilly liable in damages therefor,[44] and some of the statutes which create a criminal liability for setting certain fires expressly reserve all existing civil remedies in favor of the person injured by such fires.[45]

Even if, prior to the enactment of a criminal statute as to setting of fires, as discussed supra §§ 1–4, the act denounced as criminal did not constitute a tort on which to ground a civil action at com-

34. Iowa.—Lewis v. Schultz, 67 N.W. 266, 98 Iowa 341.
26 C.J. p 583 note 48.

Construction of statutes
(1) Some cases hold that such a statute, being a penal statute, should be strictly construed.
N.J.—State Bd. of Forest Park Reservation Comrs. v. McCloskey, 94 A. 411, 87 N.J.Law 470.
N.C.—Averitt v. Murrell, 49 N.C. 322.
(2) Others hold that the statute is remedial and should be construed in the light of the mischief the legislature sought to cure and the remedy intended to be provided.—Board of Conservation and Development v. Veeder, 99 A. 335, 89 N.J.Law 561, reversing 94 A. 414, 87 N.J.Law 479.

Who may sue
State board of forest park reservation commissioners.—State Bd. of Forest Park Reservation Comrs. v. McCloskey, 94 A. 411, 87 N.J.Law 470.

35. N.J.—Board of Conservation and Development v. Veeder, 99 A. 335, 89 N.J.Law 561, reversing 94 A. 414, 87 N.J.Law 479, and impliedly disapproving State Bd. of Forest Park Reservation Comrs. v. McCloskey, 94 A. 411, 87 N.J.Law 470.
26 C.J. p 583 note 51.

36. N.C.—Tyson v. Rasberry, 8 N.C. 60.
Tenn.—Tiller v. Wilson, 1 Lea 392.

37. Mo.—Finley v. Langston, 12 Mo. 120.

38. N.C.—Averitt v. Murrell, 49 N.C. 322.

39. Miss.—Gloster Lumber Co. v. Wilkinson, 79 So. 96, 118 Miss. 289—Gilchrist-Fordney Co. v. Parker, 69 So. 290, 109 Miss. 445.

40. N.J.—State Bd. of Forest Park Reservation Comrs. v. McCloskey, 94 A. 411, 87 N.J.Law 470.
26 C.J. p 583 note 55.

41. N.J.—State Bd. of Forest Park Reservation Comrs. v. McCloskey, supra.

42. Mo.—Finley v. Langston, 12 Mo. 120.

43. N.C.—Lamb v. Sloan, 94 N.C. 534—Roberson v. Kirby, 52 N.C. 477—Wright v. Yarborough, 4 N.C. 687.

44. Ala.—De Bardeleben v. Sellers, 84 So. 403, 17 Ala.App. 247.
26 C.J. p 586 note 89 [c].

Basis for rule
The basis for the rule is the general rule that, where one does an illegal or mischievous act which is likely to prove injurious to others, he is answerable for all the consequences which may directly or naturally result from his conduct.—Bizzell v. Booker, 16 Ark. 308.

45. Ill.—Nall v. Taylor, 156 Ill.App. 145, affirmed 93 N.E. 359, 247 Ill. 580.

mon law for damages, under rules discussed in Actions §§ 11, 12, where such a statute imposes a duty in favor of certain individuals or classes of individuals, as in this instance persons who suffer damages proximately caused by the fire, a civil action will lie for damages proximately resulting from a breach of that duty, regardless of whether the statute does or does not provide for the maintenance of such action.[46]

Where plaintiff, disregarding any element of negligence, seeks to enforce this statutory liability, he must bring his case substantially within the terms, spirit, and intent of the statute.[47] Under some statutes there must have been some willful, affirmative, or intentional act on the part of the wrongdoer in setting the fire or in permitting it to escape;[48] and "willfully," within the meaning of such a statute means with evil intent, legal malice, or bad purpose.[49] Under others, however, the injured party may recover the damages sustained by the unlawful burning, irrespective of the wrongdoer's intent or motive,[50] regardless of his intention to do the particular injury occasioned by the fire, or indeed any injury at all,[51] and under still others the liability for an unlawful burning is absolute, irrespective of the question of care in setting the fire,[52] and regardless of his subsequent care or diligence with relation thereto.[53] However, a person is not liable where the fire is set and guarded in a lawful manner and the damage is caused without any fault on his part.[54]

Liability for obstructing or preventing extinguishment of a fire is considered infra § 15, liability for fires caused by negligence generally is considered in the C.J.S. title Negligence § 72, also 45 C.J. p 850 note 8–p 855 note 92, and liability for fires caused by railroads is considered in the C.J.S. title Railroads §§ 484–546, also 51 C.J. p 1143 note 25–p 1255 note 34.

Back fires. Where a person sets out a fire on a prairie between the dates when such fires are prohibited by statute, he is liable for damage to another's property from a back fire set out by the owner with a view of protecting his property from the original fire, where it appears that the property would have been destroyed by the original fire had

46. Ga.—Stembridge v. Fowler, 13 S.E.2d 523, 64 Ga.App. 426.
N.C.—Mizell v. Branning Mfg. Co., 73 S.E. 802, 158 N.C. 265.
Or.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 139 Or. 282.
Tenn.—Pruitt v. Williams, 106 S.W. 2d 892, 21 Tenn.App. 171.
26 C.J. p 585 note 78.

Object of statutes

The object of some of these statutes is "to prevent those prairie fires so disastrous to this state, and make those who set the prairies on fire responsible for all damages done thereby."—Atchison, T. & S. F. R. Co. v. Dennis, 17 P. 153, 38 Kan. 424, 426.

47. Wash.—Waldy v. Preston Mill Co., 141 P. 192, 80 Wash. 25.

Effect of negligence

"If the act is merely a negligent one, there is no occasion for the application of the statute. In such case the common law affords ample remedy."—Johnston v. Marriage, 86 P. 461, 87 P. 74, 74 Kan. 208, 210—Emerson v. Gardiner, 8 Kan. 452.

Lands within statute

(1) Some statutes apply only to fires set on woodlands.—Mizell v. Branning Mfg. Co., 73 S.E. 802, 158 N.C. 265.

(2) "Woods," as used in some statutes, means various lands in their natural state, as contradistinguished from lands cleared and enclosed for cultivation.—Averitt v. Murrell, 49 N.C. 322.

(3) Instances under other statutes see 26 C.J. p 585 note 82 [e].

Persons within statute

Defendant must be the one who set the fire or caused it to be set, in order to be liable under some statutes.—Sauczcuk v. Frankoski, 124 A. 719, 100 Conn. 700.

What constitutes setting fire

Setting fire to a stack of flax straw in the midst of a stubble field is, in the eyes of the law, a setting fire to the stubble in the fields.—Seckerson v. Sinclair, 140 N.W. 239, 24 N.D. 625, followed in Hawkins v. Sinclair, 140 N.W. 246, 24 N.D. 623, and Burger v. Sinclair, 140 N.W. 246, 24 N.D. 624.

Who entitled to notice

A tenant on land adjoining woods of another has sufficient interest to be entitled to the notice required to be given to adjoining landowners before one sets fire to his own woods.—Pruitt v. Williams, 106 S.W.2d 892, 21 Tenn.App. 171.

Consent of ranger

Statute prohibiting burning of forest material in any county in which there is a warden or ranger during certain months without permission of such warden or ranger does not apply where rangers are sent to superintend the burning and actually take charge thereof, and it has not been customary to issue permits in such circumstances.—Waldy v. Preston Mill Co., 141 P. 192, 80 Wash. 25.

48. N.C.—Mizell v. Branning Mfg. Co., 73 S.E. 802, 158 N.C. 265.
26 C.J. p 585 note 83.

"To recover under this statute, disregarding the element of negligence, it is necessary to show a direct and intentional setting of fire to woods, marsh or prairie."—Johnston v. Marriage, 86 P. 461, 87 P. 74, 74 Kan. 208.

Accidental or unintentional fires

Some statutes do not apply to merely accidental fires.—Mizell v. Branning Mfg. Co., 73 S.E. 802, 158 N.C. 265—26 C.J. p 585 note 83 [b].

49. Cal.—Galvin v. Gualala Mill Co., 33 P. 93, 98 Cal. 268.

50. Kan.—Hunt v. Haines, 25 Kan. 210.
26 C.J. p 586 note 85.

51. Ark.—Bizzell v. Booker, 16 Ark. 308.

52. Minn.—State v. Phillips, 223 N. W. 912, 176 Minn. 472.
N.C.—Lamb v. Sloan, 94 N.C. 534.

53. N.D.—Seckerson v. Sinclair, 140 N.W. 239, 24 N.D. 625.
26 C.J. p 586 note 89.

Power of legislature

Legislature may make one starting fire on his own premises and suffering it to spread to other property absolutely liable for resulting damage and expense of extinguishing fire.—State v. Phillips, 223 N.W. 912, 176 Minn. 472.

54. Mo.—Belk v. Stewart, 142 S.W. 485, 160 Mo.App. 706.
26 C.J. p 586 note 90.

not the back fire been set out.[55] However, an owner is not liable to an adjoining owner for damages to the latter's property by a back fire which the former sets out as a matter of necessity to protect his own property, and which he guards with every proper precaution to prevent it from spreading to other property.[56]

Acts of agent or servant. In accordance with general rules, a principal may be liable for the acts of his agent or servant in setting such a fire,[57] but not where the rule of respondeat superior does not apply,[58] as in the case of an independent contractor.[59]

b. Defenses

To escape liability defendant may and must show a legal excuse or justification if any exists.

To escape liability for a fire set in violation of the statute, defendant may and must show a legal excuse or justification if any exists,[60] as, for example, that the fire alleged to have been wrongful comes within the exceptions of the statute imposing liability.[61] However, it is no defense to an action for the damages sustained by the fire that defendant had been indicted for the offense,[62] that plaintiff had already recovered the penalty imposed by the statute,[63] that the property had been insured [64] and plaintiff had been paid his loss by the insurers,[65] or that he had agreed to sue for their benefit, after being indemnified.[66]

Under statutes requiring notice of fire. Since, in actions for damages under statutes which require notice to be given to adjoining landowners, neighbors, or other persons of the setting of the fire, a failure to comply with the statutory requirement and damage done are the basis of the action, it is no defense that defendant used reasonable care to prevent the spread of the fire after it was set.[67] It is, however, a good defense that the burning was done from necessity,[68] or that plaintiff had waived [69] or had received the required notice,[70] and it is immaterial so far as plaintiff is concerned that such notice was not given to others.[71]

§ 12. Nature, Form, and Election of Remedy

a. Nature and form of action
b. Election of remedy

a. Nature and Form of Action

An action for damages from a wrongful fire is one in tort.

An action for damages resulting from a wrongful fire is one in tort,[72] the form of the action at common law being trespass [73] or trespass on the case,[74] as the case may be.

b. Election of Remedy

The injured party need not elect between his remedy under the statute or under the common law.

The statutes imposing a special liability for the wrongful setting out of fires are remedial and cumulative and do not supersede the common-law liability previously existing,[75] and hence a party injured by such fire may seek his remedy either under the statute or under the common law, or may

55. Iowa.—McKenna v. Baessler, 53 N.W. 103, 86 Iowa 197, 17 L.R.A. 310.

56. Ill.—Burton v. McClellan, 3 Ill. 434.
N.C.—Lamb v. Sloan, 94 N.C. 534.
26 C.J. p 586 note 92.

57. Iowa.—Lewis v. Schultz, 67 N. W. 266, 98 Iowa 341.
26 C.J. p 584 note 65.
Liability of master for willful or malicious acts of servant see the C.J.S. title Master and Servant § 572, also 39 C.J. p 1292 note 70–p 1294 note 82.
Liability of principal for wanton and malicious acts of agent generally see Agency § 258.

58. **Where fire is set by stranger** and negligently allowed to spread without any fault or participation on the landowner's part owner is not liable.—Kilby v. Erwin, 78 A. 1021, 84 Vt. 266.

59. Mich.—Rogers v. Parker, 123 N. W. 1109, 159 Mich. 278, 34 L.R.A., N.S., 955, 18 Ann.Cas. 753.
26 C.J. p 584 note 67.

60. Ill.—Johnson v. Barber, 10 Ill. 425, 50 Am.D. 416.

61. Ill.—Johnson v. Barber, supra.

62. N.C.—Lamb v. Sloan, 94 N.C. 534.
26 C.J. p 587 note 2.

63. N.C.—Lamb v. Sloan, supra.

64. Ill.—Dunleavy v. Stockwell, 45 Ill.App. 230.
Mass.—Hayward v. Cain, 105 Mass. 213.

65. Mass.—Hayward v. Cain, supra.

66. Mass.—Hayward v. Cain, supra.

67. N.C.—Lamb v. Sloan, 94 N.C. 534.

68. N.C.—Lamb v. Sloan, supra—Tyson v. Rasberry, 8 N.C. 60.
Tenn.—Tiller v. Wilson, 1 Lea 392.

69. N.C.—Stanland v. Rouke, 84 S.E. 845, 168 N.C. 568.
26 C.J. p 587 note 11.

70. Fla.—Saussy v. South Florida R. Co., 22 Fla. 327.

71. Fla.—Saussy v. South Florida R. Co., supra.

72. Conn.—Grannis v. Cummings, 25 Conn. 165.
As to expenses incurred
A statute making defendant liable for the expenses incurred in fighting a fire in an action for debt does not revive the common-law action of debt and permits recovery of such expenses as an element of damages in a tort action brought under the statute for damages resulting from the fire, such recovery not constituting a wrongful joinder of a tort action with an action of debt.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P.2d 703, 149 Or. 126.

73. Conn.—Grannis v. Cummings, 25 Conn. 165.

74. Ill.—Armstrong v. Cooley, 10 Ill. 509.
26 C.J. p 587 note 99.

75. Kan.—Jarrett v. Apple, 3 P. 571, 31 Kan. 693—Emerson v. Gardiner, 8 Kan. 452.
Mo.—Campbell v. Missouri Pac. R. Co., 25 S.W. 936, 121 Mo. 340, 42 Am.S.R. 530, 25 L.R.A. 175.

pursue both remedies in the same action,[76] and under some statutes he may sue in one action for the actual damages sustained and also for the penalty prescribed by the statute, as discussed supra § 10.

§ 13. Actions

a. Who may sue or parties
b. Pleading
c. Evidence
d. Trial

a. Who May Sue or Parties

Ordinarily only the owner of the damaged property may sue, provided, under some statutes, he is an adjoining landowner.

An action for the damages sustained must be brought by, or in the name of, the owner of the property damaged,[77] although he need not be the owner of the freehold.[78]

Some statutes give this right of action to adjoining landowners only, and hence the statutory action cannot be maintained by one who is damaged by fire started on land which is not adjoining his,[79] although, as discussed in the C.J.S. title Negligence § 190, also 25 C.J. p 587 note 18, if the complaint alleges that defendant willfully permitted the fire to spread over and burn plaintiff's property, it in effect alleges negligence, and may be sustained as a common-law action for negligence.

b. Pleading

General rules of pleading control in actions for damages arising out of a wrongful fire. The allegations must bring the case within the statute when the action is based on a breach of a statutory duty.

Plaintiff's declaration, complaint, or petition must comply with the usual requirements,[80] as discussed in the C.J.S. title Pleading §§ 63–98, also 49 C.J. p 128 note 30–p 179 note 56, and when recovery is sought for breach of the statutory duty, as distinguished from a common-law duty, his pleading must bring the case within the statute.[81]

A pleading founded on common-law negligence alone cannot be considered as stating the statutory cause of action;[82] but the fact that the pleading unnecessarily charges negligence is not determinative of the nature of the action as being at common law.[83] Where, however, negligence is the gist of the action, no application of the statutory remedy is necessary.[84]

The pleading may be broad enough to cover both an action arising under the statute and one at common law,[85] or it may be sufficient to cover only one of such causes of action and not the other.[86] Under some statutes the persons injured may claim both actual and statutory damages in one proceeding.[87]

Matters of excuse or justification must be specially pleaded and cannot be set up on a general denial.[88]

That the fire unlawfully set out was not the proximate cause of the injury for which damages are asked may be set up as a defense.[89]

76. Kan.—Jarrett v. Apple, 3 P. 571, 31 Kan. 693.
26 C.J. p 586 note 95.
Election of remedies generally see Election of Remedies 28 C.J.S. p 1056.

77. Me.—Rockingham Mut. Fire Ins. Co. v. Bosher, 39 Me. 253, 63 Am. D. 618.
Tenn.—Pruitt v. Williams, 106 S.W. 2d 892, 896, 21 Tenn.App. 171, quoting **Corpus Juris.**
26 C.J. p 587 note 14.

78. Ill.—Armstrong v. Cooley, 10 Ill. 509.
Tenn.—Pruitt v. Williams, 106 S.W. 2d 892, 896 21 Tenn.App. 171, quoting **Corpus Juris.**

79. N.C.—Roberson v. Morgan, 24 S. E. 667, 118 N.C. 991.

80. Ala.—De Bardeleben v. Sellers, 84 So. 403, 17 Ala.App. 247.
26 C.J. p 587 note 19.
Fire to defraud insurer
Where compromise settlement was effected between insured and insurer, failure of insurer suing for defendants' fraudulent conduct in destroying insured property by fire to allege that it relied on any false representations or concealments in paying loss and failure to prove that it had no knowledge, at time of payment, of incendiary origin of fire, did not authorize directed verdict for defendants or require submission of such questions to jury, since insurer had right to rely on statements in proof of loss that fire was of unknown origin, and it being assumed that it did rely thereon.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14.

81. Kan.—Jarrett v. Apple, 3 P. 571, 31 Kan. 693.
26 C.J. p 587 note 20.

82. U.S.—Great American Ins. Co. v. Glenwood Irr. Co., C.C.A.Colo., 265 F. 594.
26 C.J. p 587 note 21.

83. Mo.—Campbell v. Missouri Pac. R. Co., 25 S.W. 936, 121 Mo. 340, 42 Am.S.R. 530, 25 L.R.A. 175—Walker v. Missouri Pac. R. Co., 68 Mo.App. 465.

84. Kan.—Emerson v. Gardiner, 8 Kan. 452.

85. Kan.—Johnston v. Marriage, 86 P. 461, 87 P. 74, 74 Kan. 208.
26 C.J. p 587 note 24.

86. Colo.—Spencer v. Murphy, 41 P. 841, 6 Colo.App. 453.
Mo.—Yorger v. Weindel, App., 204 S. W. 744.
26 C.J. p 587 note 25.
Breach of duty
Declaration, which states facts from which the law raises a duty, and which shows an omission of duty on defendant's part, resulting in injury, states a cause of action, although it is based on a statute punishing any person willfully or negligently setting a fire, regardless of the proper construction of the statute.—Nall v. Taylor, 93 N.E. 359, 247 Ill. 580.

87. Miss.—Gloster Lumber Co. v. Wilkinson, 79 So. 96, 118 Miss. 289—Gilchrist-Fordney Co. v. Parker, 69 So. 290, 109 Miss. 445.

88. Iowa.—Thoburn v. Campbell, 45 N.W. 769, 80 Iowa 338.

89. Iowa.—Ellsworth v. Ellingson, 64 N.W. 774, 96 Iowa 154.

Issues, proof, and variance. Applying the general rules, it has been held that a complaint, which alleges that a fire was set to prairie land by defendant, his servant, or agent, raises the issue whether the servant who set the fire was the agent of defendant,[90] and whether such agent was acting within the scope of his authority.[91]

A general denial, in an action for damages for a malicious burning, does not admit evidence of the general good character of defendant.[92]

c. Evidence

Plaintiff must prove every material element of the offense and its connection with the loss sustained by proper and sufficient evidence.

Plaintiff must prove every material fact necessary to constitute the offense and to connect it with the loss sustained.[93] Under some statutes plaintiff need only prove that defendant set the fire which caused the injury, and if the latter has any excuse or justification for the act he must prove its existence.[94]

Where defendant admits that he set the fire without giving the statutory notice, in the absence of evidence to the contrary, the law presumes that he set it willfully.[95]

Admissibility. The general rules governing the admissibility of evidence in civil cases apply in an action for damages caused by willfully or maliciously setting fires, etc.[96] Evidence tending to show the malice or intent of defendant is admissible.[97]

Weight and sufficiency. In order that plaintiff may recover damages sustained, the evidence produced must be sufficient to show the offense alleged and the damages sustained thereby.[98]

Where an action is founded on the commission of an act denounced as a crime, the proof of the charge must be clear and strong, but it need be no clearer and no stronger than is sufficient reasonably to satisfy the jury, as in other civil cases, of the truth of the charge made,[99] it not being necessary that proof be so clear and strong as to convince the jury beyond a reasonable doubt.[1]

d. Trial

The trial in actions for damages resulting from a wrongful fire is governed by general rules. Thus questions of fact are ordinarily for the jury, and the case should be submitted to the jury under proper instructions.

In accordance with general rules governing the trial of civil actions, questions of fact in actions for damages resulting from fires ordinarily should be determined by the jury,[2] and where the evidence is conflicting or doubtful, it should be submitted to the jury and not be disposed of by the court alone as by an affirmative charge.[3] Thus it is generally

90. Iowa.—Lewis v. Schultz, 67 N. W. 266, 98 Iowa 341.

91. Iowa.—Lewis v. Schultz, supra.

92. Ind.—Gebhart v. Burkett, 57 Ind. 378, 26 Am.R. 61.

93. Cal.—Galvin v. Gualala Mill Co., 33 P. 93, 98 Cal. 268.
Mo.—Russell v. Reagan, 34 Mo.App. 242.

Injury
Ill.—Johnson v. Barber, 10 Ill. 425, 50 Am.D. 416.

Setting fire without notice
In an action based on failure to give a required notice before the setting of a fire, plaintiff is required to show only that the required notice was not given and that the damage sustained was caused by the fire so wrongfully set.—Pruitt v. Williams, 106 S.W.2d 892, 21 Tenn. App. 171.

94. Ill.—Johnson v. Barber, 10 Ill. 425, 50 Am.D. 416.

95. N.C.—Lamb v. Sloan, 94 N.C. 534.

96. Ky.—Ratliff v. Daniel, 121 S.W. 1034, 137 Ky. 55.
26 C.J. p 588 note 42.

Amount of insurance on defendant's property admissible.—Barley v. Davis, 116 S.E. 438, 123 S.C. 228.

Notice of setting fire
Evidence as to the giving of the statutory notice to persons other than plaintiff is immaterial where the latter has received such notice, and may not be admitted.—Saussy v. South Florida R. Co., 22 Fla. 327.

Other similar acts inadmissible.—Prymek v. Herink, 289 P. 412, 131 Kan. 77.

97. Me.—Sturgis v. Robbins, 62 Me. 289.
Mo.—Morris v. Mattingly, 218 S.W. 922, 204 Mo.App. 669.
26 C.J. p 588 note 43.

Ill will
Evidence of defendant's ill will against plaintiff is admissible on the issue of willfulness.—Morris v. Mattingly, supra.

98. Ark.—Hall v. Jones, 195 S.W. 399, 129 Ark. 18.
26 C.J. p 588 note 46.

Evidence sufficient
(1) To sustain verdict that defendants did not set the fire or cause it to be set.—Crosby v. Moriarity, 181 N. W. 199, 148 Minn. 201.

(2) To support judgment for insurer suing defendants for fraudulent action in destroying insured property by fire thereby damaging insurer to amount paid insured under policy.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14.

(3) To sustain verdict for plaintiff.—Wilkerson v. Joyce-Watkins Co., 5 Tenn.App. 356.

(4) Other instances see 26 C.J. p 588 note 46 [a].

99. N.C.—Champion v. Daniel, 87 S. E. 214, 170 N.C. 331.
26 C.J. p 589 note 49.

1. Mich.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14.
25 C.J. p 589 note 50.

Preponderance of evidence is sufficient.—Hanover Fire Ins. Co. of New York v. Furkas, supra.

2. Ala.—Bowdoin v. Bradley, 66 So. 823, 11 Ala.App. 530.
N.C.—Mizell v. Branning Mfg. Co., 73 S.E. 802, 158 N.C. 265.
Okl.—Leach v. Hepler, 124 P. 68, 32 Okl. 729.

3. Ala.—Bowdoin v. Bradley, 66 So. 823, 11 Ala.App. 530.
26 C.J. p 589 note 53.

Direction of verdict
In an action for damages for the willful burning of a house in which plaintiffs had property, evidence that defendant had refused to allow the rescue of plaintiffs' property was

a question of fact for the jury as to whether defendant did or did not intentionally start the fire,[4] whether his act in starting a fire close to plaintiff's land was willful,[5] whether defendant did or did not start the fire, within the meaning of the statute,[6] whether a fire started by defendant did the damage,[7] whether defendant used reasonable endeavors to prevent a loss,[8] whether the land on which the fire was set out is of the character required by the statute,[9] or whether the person who set the fire was the authorized agent of defendant and was acting within the scope of his employment.[10]

Instructions. The rules relating to instructions in civil cases generally, as discussed in the C.J.S. title Trial §§ 266–488, also 64 C.J. p 510 note 3–p 1008 note 15–199, control in actions for damages resulting from a wrongful fire.[11]

Verdict. Under some statutes the jury, under proper instructions, may award treble damages in a general verdict, or the trial court may require the jury to return a verdict on actual damages and a special finding on malice, and thereupon award treble damages.[12]

§ 14. Damages

Plaintiff generally can recover only the loss actually sustained by reason of the fire and proximately caused thereby.

As a general rule, the damages recoverable consist of, and are confined to, the loss actually sustained by plaintiff by reason of the fire,[13] and proximately caused thereby,[14] and which by reasonable endeavor and expense plaintiff could not prevent.[15]

In the absence of a permissory statute, it has been held that exemplary damages are not recoverable,[16] but under some statutes double or treble damages are recoverable.[17]

The fact that the destroyed property was insured does not affect the amount of damages recoverable.[18]

Elements of damages. Under some statutes plaintiff is entitled to recover all expenses incurred in fighting the fire as an element of damage,[19] although under others voluntary services rendered by plaintiff in putting out the fire are not so recoverable.[20]

An attorney's fees are not an element of the damages in such cases.[21]

Interest on the value of the property from the time it was destroyed may be allowed as part of the damages.[22]

sufficient to warrant the denial of a directed verdict for defendant.—Barley v. Davis, 116 S.E. 438, 123 S.C. 228.

4. Kan.—Hunt v. Haines, 25 Kan. 210.
26 C.J. p 589 note 54.

5. Mo.—Morris v. Mattingly, 218 S.W. 922, 204 Mo.App. 669.

6. Kan.—Hunt v. Haines, 25 Kan. 210.

7. Mo.—Belk v. Stewart, 142 S.W. 485, 160 Mo.App. 706.
26 C.J. p 589 note 57.

8. Mo.—Waters v. Brown, 44 Mo. 302.

9. Kan.—Interstate Galloway Cattle Co. v. Kline, 32 P. 628, 51 Kan. 23.
26 C.J. p 589 note 59.

10. Iowa.—Lewis v. Schultz, 67 N.W. 266, 98 Iowa 341.

11. Kan.—Johnston v. Marriage, 86 P. 461, 87 P. 74, 74 Kan. 208.
Mo.—Belk v. Stewart, 142 S.W. 485, 160 Mo.App. 706.
26 C.J. p 589 note 63.

Charging on criminal statute not error
Ga.—Stembridge v. Fowler, 13 S.E. 2d 523, 64 Ga.App. 426.

12. N.D.—Wacker v. Mertz, 171 N.W. 830, 41 N.D. 620.

13. Colo.—Spencer v. Murphy, 41 P. 841, 6 Colo.App. 453.
26 C.J. p 589 note 69.

14. Ill.—Nall v. Taylor, 156 Ill.App. 145, affirmed 93 N.E. 359, 247 Ill. 580.

15. Mo.—Waters v. Brown, 44 Mo. 302.

16. Colo.—Spencer v. Murphy, 41 P. 841, 6 Colo.App. 453.
26 C.J. p 589 note 72.
Right to exemplary damages generally see Damages §§ 117–127.

17. Cal.—Osborne v. Winter, 24 P. 2d 892, 133 Cal.App. 664.
Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P. 2d 703, 149 Or. 126.
26 C.J. p 589 note 73.

Statutes valid
Cal.—Kennedy v. Minarets & W. Ry. Co., 266 P. 353, 90 Cal.App. 563.
26 C.J. p 589 note 73 [a].

Applicability of statute
Cal.—Haverstick v. Southern Pac. Co., 37 P.2d 146, 1 Cal.App.2d 605.

Repeal of statute
(1) Although the California statute providing for treble damages was seemingly repealed, doubt has been expressed whether the attempt at repeal was successful.—Haverstick v. Southern Pac. Co., supra.

(2) Michigan Pub.L.1903, p 409 No. 249, providing for the preservation of the forests of the state and for the prevention and suppression of forest and prairie fires, declaring that nothing in the act shall be construed as affecting any right of action for damages, but repealing acts inconsistent with it, does not impliedly repeal Comp.L. § 11653, authorizing the recovery of double damages for the destruction of property by fire set by another.—Allen v. Bainbridge, 108 N.W. 732, 145 Mich. 366.
Multiple damages generally see Damages § 128.

18. Ill.—Dunleavy v. Stockwell, 45 Ill.App. 230.
Insurance as affecting damages generally see Damages § 99.

19. Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P.2d 703, 149 Or. 126.

20. Colo.—Spencer v. Murphy, 41 P. 841, 6 Colo.App. 453.

21. Colo.—Spencer v. Murphy, 41 P. 841, 6 Colo.App. 453.
Attorney fees as element of damages generally see Damages § 50.

22. N.Y.—Hinds v. Barton, 25 N.Y. 544.
Interest as element of damages generally see Damages §§ 51–54.

IV. EXTINGUISHMENT OF FIRES

§ 15. In General

Various statutes impose a duty on persons responsible for an uncontrolled fire to report, or make reasonable effort to extinguish it. Fire officials are sometimes authorized to call on designated persons to aid in extinguishing fires.

Statutes in some jurisdictions impose a duty on persons responsible for uncontrolled fires on forest lands to make reasonable effort to control or extinguish such fires, and give authority to foresters or fire wardens or rangers so to do on failure of such persons to act.[23] This duty is sometimes imposed on the person on whose property the fire exists or from which it spreads.[24] Other statutes impose a duty on persons owning land in the vicinity of a forest area to report an uncontrolled or unauthorized fire on such land to designated officials.[25]

Failure of one setting a fire in designated areas to extinguish the same or to make reasonable effort so to do is made an offense by some statutes.[26]

Assistance in fighting fires. Under some statutes the fire warden or other fire official may call on designated persons to aid in extinguishing a fire.[27]

Obstructing or preventing extinguishment. Since, as discussed in the C.J.S. title Negligence § 72, also 26 C.J. p 584 note 68, one, who by his negligence obstructs or interferes with a lawful attempt to extinguish a dangerous fire, is liable for the damages which otherwise might have been prevented, a fortiori, he is liable in such a case where his interference or obstruction was malicious, unlawful, wanton, or willful,[28] if such interference or obstruction was the proximate cause of the injury.[29]

§ 16. Compensation and Expenses

Violators of regulatory provisions of fire statutes are frequently made liable for the expenses of fighting and extinguishing unlawful fires. Persons lawfully called on to assist in extinguishing fires are entitled to compensation in accordance with the statutory provision therefor.

Statutes frequently impose liability on persons violating the regulatory provisions of the fire statutes for the expense of fighting and extinguishing unlawful fires.[30] Some of the statutes make per-

23. Or.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State v. City of Marshfield, 259 P. 203, 22 Or. 330.
Precautions against fire in forest lands generally see the C.J.S. title Woods & Forests § 7, also 71 C.J. p 4 note 48–p 5 note 57.

24. U.S.—First State Bank of Thompson Falls v. U. S., C.C.A. Mont., 92 F.2d 132, reversing, D.C., U. S. v. First State Bank of Thompson Falls, 17 F.Supp. 162.

25. Minn.—State v. Phillips, 223 N. W. 912, 176 Minn. 472.

26. **Power of legislature**
(1) Respecting validity of statutes punishing anyone accidentally setting fire and not using every possible effort to extinguish it, legislature was authorized to exact higher degree of care than standard conduct of reasonably prudent person.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 139 Or. 282.
(2) Congress has been held to have power to require one building fire in or near timber or inflammable material on public domain to extinguish it.—U. S. v. Alford, Fla., 47 S. Ct. 597, 274 U.S. 264, 71 L.Ed. 1040.
Every "possible" effort
Statute punishing anyone accidentally setting fire and failing to use every "possible" effort to extinguish it requires nothing but what is practicable and reasonable.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 139 Or. 282.
Fire built outside public domain
Criminal liability for failure to extinguish fires built near inflammable material "on the public domain" may attach, notwithstanding fire was built outside public domain. —U. S. v. Alford, Fla., 47 S.Ct. 597, 274 U.S. 264, 71 L.Ed. 1040.
Application of statute to power company
Statutes punishing anyone accidentally setting fire and not using every possible effort to extinguish it were held not invalid, as applied to power company whose wires were struck by tree.—Sullivan v. Mountain States Power Co., 9 P.2d 1038, 139 Or. 282.

27. U.S.—Rosenbluth v. State, 269 N.W. 292, 222 Wis. 623.
26 C.J. p 590 note 80.
Refusing to give aid as an offense see supra § 4.

28. Mo.—Hurley v. Missouri, K. & T. Ry. Co., 156 S.W. 57, 170 Mo. App. 235.
26 C.J. p 584 note 69.

29. Iowa.—Bosch v. Burlington & M. R. Co., 44 Iowa 402, 22 Am.R. 754.
N.Y.—Mott v. Hudson River R. Co., 24 N.Y.Super. 585.

30. N.Y.—Adamson v. Greenwood Cemetery, 150 N.Y.S. 467, 164 App. Div. 832.
Legislature has power to impose such liability.—State v. Phillips, 223 N.W. 912, 176 Minn. 472.
Construction of statute
The language of the section of Virginia statute respecting liability of a person for expenses incurred in fighting a fire caused by such person's negligence may not be construed contrary to its obvious meaning in order to make it uniform with other provisions of the Forestry Act of 1926.—U. S. v. Chesapeake & O. Ry. Co., C.C.A.Va., 130 F.2d 308.
Who may recover
Under Virginia statute respecting liability of a person for expenses incurred in fighting a fire caused by such person, mere fact that a method of procedure was provided for the putting out of fires and recovery of proper expenses in doing so by state officials only does not nullify provision of statute that the negligent party shall be liable for amount of expenses incurred in fighting the fire, but means that the negligent party shall be liable for all expenses incurred in fighting the fire by anyone who is justified in fighting it.—U. S. v. Chesapeake & O. Ry. Co., supra.
Sufficiency of complaint
U.S.—U. S. v. Chesapeake & O. Ry. Co., supra.
Steps taken to fight fire
In action by the United States against a railroad to recover expenses incurred by the United States Forest Service in extinguishing a fire, whether plaintiff was justified in the steps it took to extinguish fire was question for jury.—U. S. v. Chesapeake & O. Ry. Co., supra.

sons responsible for uncontrolled fires on forest land which they fail to control or extinguish liable for the cost of so doing by foresters, fire wardens, or rangers.[31]

Under statutes authorizing fire wardens or rangers to call on persons within the town or district to aid in extinguishing a fire in fields or woods, a person who renders such assistance or who has been ordered to the place of the fire may receive compensation for his services;[32] but a person is not entitled to such compensation where he renders his services voluntarily,[33] or where he renders his services at the instance of one who has no authority to order such assistance.[34]

V. INVESTIGATION OF ORIGIN OF FIRES

§ 17. In General

Statutes sometimes provide for the investigation of the origin of fires by designated officials.

Under some statutes certain officers, such as the fire marshal, state police, or insurance commissioner, may investigate the origin of fires.[35] Since such a statute is enacted to promote freedom of examination in the public interest, it should be liberally construed.[36]

A statutory provision for a tax on the business of insurance companies to raise a fund for expenses in investigating the source of and preventing fires is a valid exercise of the police power.[37]

31. U.S.—U. S. v. Chesapeake & O. Ry. Co., supra.

Validity of statute

(1) Such statutes have been upheld as valid.—U. S. v. First State Bank of Thompson Falls, D.C.Mont., 17 F. Supp. 162, reversed on other grounds, C.C.A., First State Bank of Thompson Falls v. U. S., 92 F.2d 132.

(2) That reasonable cost of fighting forest fire starting on land might exceed land's value was held not to render statute giving lien on land therefor unconstitutional.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State v. City of Marshfield, 259 P. 203, 122 Or. 330.

Liability of city

(1) City comes within statute making "any person, firm, or corporation" liable.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State v. City of Marshfield, 259 P. 203, 22 Or. 330.

(2) Capacity of city in ownership of land as governmental or otherwise is held immaterial.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State v. City of Marshfield, 259 P. 203, 22 Or. 330.

Liability as between vendor and vendee

(1) Where the theory of liability is failure of one owning land to make reasonable effort to control or extinguish fire, the fact that the vendor reserved merchantable timber on the land at the time of the purchase of the land does not excuse the vendee from liability.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State v. City of Marshfield, 259 P. 203, 22 Or. 330.

(2) Under a statute rendering liable the person "on whose property such fire exists," a vendor, possessing but the bare legal title under an executory contract to sell under which the purchaser has the right to possession, is not liable, such statute being intended to place responsibility of guarding against fire on person whose ownership includes right of possession since he is the person presumably nearest the fire contemplated by the statute.—First State Bank of Thompson Falls v. U. S., C.C.A.Mont., 92 F.2d 132, reversing, D.C., U. S. v. First State Bank of Thompson Falls, 17 F.Supp. 162.

Extent of liability

Liability extends as well to cost of extinguishing fire on defendant's land as to the land to which fire spread by reason of defendant's failure to act.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State v. City of Marshfield, 259 P. 203, 22 Or. 330.

Actions

Where statute provides that the action be brought in name of the state, thus obviating danger that defendant might have to pay twice, evidence that state paid money for controlling or extinguishing forest fire was held not necessary for recovery therefor against owner of land.—State v. City of Marshfield, 259 P. 201, 122 Or. 323, followed in State of City of Marshfield, 259 P. 203, 22 Or. 330.

32. N.Y.—Matter of Stokes, 68 N. Y.S. 439, 33 Misc. 448—Baker v. Warren County, 11 Pa.Super. 170.

Liability of state

When men are called on to work in putting out fires, at request of state forest ranger under statute making such service compulsory, conservation commission must allow them some compensation, and, if commission refuses to pay, state is liable to compensate men for reasonable value of their work up to maximum limit of statute.—Rosenbluth v. State, 269 N.W. 292, 222 Wis. 623.

Value of services

Wis.—Rosenbluth v. State, supra.

33. N.Y.—Matter of Stokes, 68 N.Y. S. 439, 33 Misc. 448.
26 C.J. p 590 note 82.

United States

Where a national forest in Virginia was endangered by approach of a rapidly spreading fire allegedly caused by defendant railroad's negligence, the United States was not a "volunteer" when it took steps to prevent destruction of forest, as respects its right to recover from defendant for expenses incurred in extinguishing fire, it being immaterial that no one had requested the United States to take steps to protect.—U. S. v. Chesapeake & O. Ry. Co., C.C.A. Va., 130 F.2d 308.

34. Pa.—Baker v. Warren County, 11 Pa.Super. 170.
26 C.J. p 590 note 83.

Corpus Juris quoted by analogy in case where person assisting at fire was seeking recovery under Workmen's Compensation Act.—City of Los Angeles v. Industrial Accident Commission, 47 P.2d 1096, 1099, 8 Cal.App.2d 580.

35. N.Y.—Harris v. People, 64 N.Y. 148.
Pa.—In re Investigation of Fires by State Police, 11 Pa.Dist. & Co. 199.
Tex.—Niagara Fire Ins. Co. v. Pool, Civ.App., 31 S.W.2d 850, error dismissed.
26 C.J. p 590 note 85.

36. N.Y.—People v. Klein, 173 N.Y. S. 108, 185 App.Div. 86.
Tenn.—Rhinehart v. State, 117 S.W. 508, 121 Tenn. 420, 17 Ann.Cas. 254.

37. Tenn.—Rhinehart v. State, supra.

§ 18. Powers and Proceedings

An investigation may be instituted whenever a fire occurs, and the investigating official generally has power to summon witnesses and administer oaths.

The occurrence of a fire within the territorial limits of the community over which the fire marshal or other officer has jurisdiction is sufficient to justify and authorize an investigation into its origin and circumstances.[38] A complaint is not necessary to call into action his power to proceed.[39]

The statutes generally empower the fire marshal or commissioner to compel the attendance of witnesses and administer oaths.[40]

Under some statutes the testimony taken at the investigation cannot be used in a criminal proceeding [41] against the person giving such testimony,[42] and under others, neither the result of the investigation nor statements made by an insurance company or its officers and agents, or insured or his representatives, at the investigation can be admitted in evidence in, or made the basis of, any civil action for damages.[43]

FIREWOOD. Wood suitable for fuel, not including standing or felled timber which is suitable and valuable for other purposes.[1]

FIREWORKS. Contrivances of inflammable and explosive materials combined in various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea or for various purposes in war.[2] Not classified as an "explosive" see Explosives § 1. Civil liability for injuries caused by unlawful discharge see Explosives § 10. As constituting a nuisance see the C.J.S. title Nuisances § 75, also 46 C.J. p 707 notes 47–55.

FIRKIN. A measure of capacity, equal to nine gallons. The word is also used to designate a weight, used for butter and cheese, of fifty-six pounds avoirdupois.[3]

FIRLOT. A Scotch measure of capacity, containing two gallons and a pint.[4]

FIRM. As a noun, the term is defined in the C.J. S. title Partnership § 1, also 47 C.J. p 647 notes 1–5. It is said to be a conventional term applicable only to the persons who, on each particular occasion when the name is used, are members of the firm.[5]

As an adjective, fixed in character; stable; enduring; established; steadfast; stanch; as firm credit, firm prices, a firm friend, a firm conviction.[6]

38. N.Y.—Harris v. People, 64 N.Y. 148.

Place of investigation

Under a statute authorizing the insurance commissioner to investigate the origin of fires, such investigation may take place at the commissioner's office in the state capitol, although the fire under investigation occurred in another county.—Rhinehart v. State, 117 S.W. 508, 121 Tenn. 420, 17 Ann.Cas. 254.

39. N.Y.—Harris v. People, 64 N.Y. 148.

40. N.Y.—Harris v. People, supra—People v. Klein, 173 N.Y.S. 108, 185 App.Div. 86.
Pa.—In re Investigation of Fires by State Police, 11 Pa.Dist. & Co. 199.
Tenn.—Rhinehart v. State, 117 S.W. 508, 121 Tenn. 420, 17 Ann.Cas. 254.

Power to issue subpœnas

A statute vesting in the insurance commissioner or his deputy all the powers of a trial justice for the purpose of compelling attendance of witnesses to testify in investigations of the origin of fire, and another statute, providing that "the magistrate before whom an information is made may issue subpœnas to any part of the state for witnesses," authorizes the insurance commissioner, in such investigations, to issue subpœnas for bringing before him witnesses from any part of the state.—Rhinehart v. State, supra.

Confinement of witness

Statutes conferring on state fire marshal or deputy power to separate witnesses and prevent their communication did not authorize marshal or deputy to detain witness in custody and confine him in order to prevent communication.—Geldon v. Finnegan, 252 N.W. 369, 213 Wis. 539.

41. N.Y.—People v. Klein, 173 N.Y. S. 108, 185 App.Div. 86, distinguishing People v. Schneider, 139 N.Y.S. 104, 154 App.Div. 203.

42. Pa.—In re Investigation of Fires by State Police, 11 Pa.Dist. & Co. 199.

Voluntary statements are not within rule.—In re Investigation of Fires by State Police, supra.

43. **Action on fire policy**

Under statute barring evidence by state fire marshal, testimony of city fire marshal as to condition of building was admissible in action on fire policy, where it was not shown that witness was acting for state fire marshal.—Niagara Fire Ins. Co. v. Pool, Tex.Civ.App., 31 S.W.2d 850, error dismissed.

1. Black L.D.

"The right to cut firewood from woodland . . . cannot be extended to the use of more valuable timber for other purposes, and does not include the right to cut such timber into lumber, and with the proceeds buy fuel, so long at least as there is an abundance of fuel timber."—Hogan v. Hogan, 61 N.W. 73, 74, 102 Mich. 641.

2. Mo.—Henderson v. Massachusetts Bonding & Ins. Co., 84 S.W.2d 922, 925, 337 Mo. 1.

3. Black L.D.

4. Black L.D.

5. Black L.D.

Phrases construed

(1) "Any individual, firm, copartnership, and every corporation."—State v. Phelps, 176 N.W. 217, 219, 171 Wis. 13.

(2) "Person, firm or corporation having a place of business within this State."—Liggett & Meyers Tobacco Co. v. Goslin, 160 A. 804, 809, 163 Md. 74.

6. Century D.

"Firm bid," defined as meaning an

FIRMA. In old English law, the contract of lease or letting; also the rent, or farm, reserved upon a lease of lands, which was frequently payable in provisions, but sometimes in money, in which latter case it was called "alba firma," white rent.[7] Other meanings were a messuage with the house, garden, or lands, etc., connected therewith; also a banquet, or supper; provisions for the table, hence a tribute or custom paid toward entertaining the king for one night.[8]

In Spanish law, a signature, hence a firm, as used with reference to partnership.[9] In a different sense, a proceeding under the law of Aragón, by which one possessing property or rights was maintained therein; also the order for such maintenance.[10]

FIRMAN. A Turkish word denoting a decree or grant of privileges, or passport to a traveler; a passport granted by the Great Mogul to captains of foreign vessels to trade within the territories over which he has jurisdiction; a permit.[11]

FIRMARATIO. The right of a tenant to his lands and tenements.[12]

FIRMARIUM. In old records, a place in monasteries, and elsewhere, where the poor were received and supplied with food; hence, the word "infirmary."[13]

FIRMARIUS. In old English and Scotch law, a lessee for a term; one having a term, ferm, or farm in lands;[14] a fermor; a lessee of a term.[15]

FIRMATIO. The doe season; also a supplying with food.[16]

FIRME. In old records, a farm.[17]

FIRMIOR ET POTENTIOR EST OPERATIO LEGIS QUAM DISPOSITIO HOMINIS.[18]

FIRMITAS. In old English law, an assurance of some privilege, by deed or charter.[19]

FIRMLY. In a firm manner.[20] Comprised in the term "faithfully" see 35 C.J.S. p 491 note 16, and held equivalent to "verily."[21]

FIRMURA. In old English law, liberty to scour and repair a mill-dam, and carry away the soil, etc.[22]

FIRST. Being before all others; being the initial unit or aggregate in order of occurrence or arrangement as to time, place, or rank;[23] preceding all others; first in time or a series, position, or rank; earliest in time or succession; foremost in position; in front of, or in advance of, all others; foremost in rank, importance, or worth.[24] The term has been contrasted with "at the same moment," "coincident with,"[25] "second," and "subordinate."[26]

First floor. A term equivalent to "first story" of the building,[27] and it naturally includes the walls,[28] but not the water pipes above the ceiling.[29] The

offer by the purchaser which does not become binding until accepted by the seller.—Hanlon-Gregory Galvanizing Co. v. Vogelstein, 166 N.Y.S. 229, 231, 179 App.Div. 43.

"Firm rock" distinguished from "earth" see 28 C.J.S. p 614 note 36.

7. Black L.D.

Phrases construed

(1) "Firma burgi"—the right in medieval days to take the profits of a borough, paying for them a fixed sum to the crown or other lord of the borough.—Black L.D.

(2) "Firma feodi"—in old English law, a farm or lease of a fee; a fee-farm.—Black L.D.

8. Black L.D.

9. Escriche Diccionario.

10. Escriche Diccionario.

11. Black L.D.

12. Black L.D.

13. Black L.D.

14. Burrill L.D.

15. Black L.D.

"Firmarius nihil habet nisi tantum usumfructum"

"The fermor or lessee has nothing but only the usufruct."—Burrill L. D.

"Fermarii comprehend all such as hold by lease for life or lives or for year, by deed or without deed."—Black L.D.

Waste by "fermors" punished by 52 Hen. III, commonly called the statute of Marlebridge.—Sackett v. Sackett, 8 Pick., Mass., 309, 313.

16. Black L.D.

17. Black L.D.

18. A maxim meaning "The operation of law is firmer and more powerful than the will of man."—Bouvier L.D.

19. Black L.D.

20. Century D.

Phrases construed

(1) "Firmly believes."—Thompson v. White, 4 Serg. & R., Pa., 135, 137—Bradley v. Eccles, 1 Browne, Pa., 258.

(2) "Firmly bound to pay," as equivalent to "owes and is indebted."—Shattuck v. People, 5 Ill. 477, 480.

21. **"Verily** is as strong a word as firmly."—Thompson v. White, 4 Serg. & R., Pa., 135, 137.

22. Black L.D.

23. Century D.

24. Ill.—In re Lalla's Estate, 281 Ill.App. 124, 133.

25. Or.—Walker v. Hewitt, 220 P. 147, 152, 109 Or. 366, 35 A.L.R. 100.

26. **Means neither second nor subordinate**

"Indeed, judicial elaboration adds little to the popular and customary understanding that 'first' means neither second nor subordinate to any other of the same kind."—In re Lalla's Estate, 281 Ill.App. 124, 133.

27. Mass.—Lowell v. Strahan, 12 N.E. 401, 404, 145 Mass. 1, 1 Am.S.R. 422.

28. Ark.—Whipple v. Gorsuch, 101 S.W. 735, 736, 82 Ark. 252, 10 L.R.A.,N.S., 1133, 12 Ann.Cas. 38.

Mass.—Lowell v. Strahan, 12 N.E. 401, 404, 145 Mass. 1, 1 Am.S.R. 422.

29. Mich.—Nederlander v. Cadillac Clay Co., 250 N.W. 281, 282, 264 Mich. 434.

term has been distinguished from "room."[30]

First in, first out, rule. The equitable doctrine that, in case of payments by a debtor to his creditor on distinct transactions and for different amounts, when neither party makes an appropriation at the time, the payments are applied by law to the liabilities of earliest date.[31] The term has also been applied to the commingling of trust funds and personal funds in the same account, the rule attributing the first drawing out to the first payment in,[32] and to the identification of shares, or of lots or parcels of property, where sales are made from the mingled shares, or combined lots or parcels, having different costs, the rule presuming, in determining the gain from each transaction, that the share or lot first sold is the share or lot first bought.[33] For application of the rule, and the principle involved, see the C.J.S. titles Internal Revenue, Payment § 72, also 48 C.J. p 657 note 3–p 659 note 19, and Trusts § 438, also 65 C.J. p 977 note 5–p 978 note 10.

First purchaser. A purchaser who first acquired the estate, through his family, whether it was transferred to him by sale or by gift, or by any other method, except only that of descent.[34]

Other phrases employing the word are set out in the note.[35] For still other phrases for which more

30. Mass.—Lowell v. Strahan, 12 N.E. 401, 404, 145 Mass. 1, 1 Am.S.R. 422.

31. U.S.—Lowden v. Northwestern Nat. Bank & Trust Co. of Minneapolis, C.C.A.Minn., 84 F.2d 847, 851—Saltonstall v. Hassett, D.C.Mass., 32 F.Supp. 583, 586.

32. **"The first item on the debit side** of the ledger must be charged to the first item on the credit side."—Idoni v. Down, 8 N.Y.S.2d 719, 721, 170 Misc. 303.

Presumption that trustee takes own funds first see the C.J.S. title Trusts § 438, also 65 C.J. p 975 note 97.

33. U.S.—Keeler v. Commissioner of Internal Revenue, C.C.A., 86 F.2d 265, 266, 267—Commissioner of Internal Revenue v. Oliver, C.C.A., 78 F.2d 561, 562—Snyder v. Commissioner of Internal Revenue, C.C.A., 73 F.2d 5, 6—Commissioner of Internal Revenue v. Merchants' & Manufacturers' Fire Ins. Co., C.C.A., 72 F.2d 408, 409—Ninth Bank & Trust Co. v. U. S., D.C.Pa., 15 F.Supp. 951, 952.

"Not a rule of law or logic but a rule of thumb. It is a presumption of fact and really a regulation of the burden of proof."—Ninth Bank & Trust Co. v. U. S., supra.

Rule applied

U.S.—Helvering v. Campbell, 61 S.Ct. 798, 801, 313 U.S. 15, 85 L.Ed. 1159—Snyder v. Commissioner of Internal Revenue, 55 S.Ct. 737, 739, 295 U.S. 134, 79 L.Ed. 1351—Helvering v. Rankin, 55 S.Ct. 732, 735, 295 U.S. 123, 79 L.Ed. 1343—Commissioner of Internal Revenue v. Gambrill, C.C.A., 112 F.2d 530, 534—Curtis v. Helvering, C.C.A., 101 F.2d 40, 41—Kraus v. Commissioner of Internal Revenue, C.C.A., 88 F.2d 616, 617—Hitchcock v. U. S., D.C.Mich., 36 F.Supp. 507, 510.

34. U.S.—Gardner v. Collins, R.I., 2 Pet. 58, 93, 7 L.Ed. 347—Blair v. Adams, C.C.Tex., 59 F. 243, 247.

35. **Phrases construed**

(1) "First and prior right and option to re-lease premises."—Buddenberg v. Welch, 185 N.E. 865, 866, 97 Ind.App. 87.

(2) "First charge."—Merchants' Bank & Trust Co. v. Pettison, 153 A. 789, 791, 112 Conn. 652—26 C.J. p 591 note 25.

(3) "First come, first served rule."—Meredith v. Mortgage & Securities Corporation, Fla., 1 So.2d 720, 722—State ex rel. Garland v. City of West Palm Beach, 193 So. 297, 298, 141 Fla. 244.

(4) "First cuts," as meaning old ewes cut out of the herd for the first time in the fall of the year and sold.—Yellowstone Sheep Co. v. Diamond Dot Live Stock Co., 297 P. 1107, 1110, 43 Wyo. 15, 75 A.L.R. 1151.

(5) "First domestic processing."—Tasty Baking Co. v. U. S., Ct.Cl., 38 F.Supp. 844, 848—Colgate-Palmolive-Peet Co. v. U. S., D.C.Del., 37 F.Supp. 794, 796—Cincinnati Soap Co. v. U. S., D.C.Ohio, 22 F.Supp. 141, 143—Loose-Wiles Biscuit Co. v. Rasquin, D.C.N.Y., 20 F.Supp. 805, 807, 808.

(6) "First fruits," as meaning, in English ecclesiastical law, the first year's whole profits of every benefice or spiritual living, anciently paid, by the incumbent to the pope, but afterwards transferred to the fund called "Queen Anne's Bounty," for increasing the revenue from poor livings; and, in feudal law, one year's profits of land which belonged to the king on the death of a tenant in capite; otherwise called "primer seisin." One of the incidents to the old feudal tenures.—Black L.D.

(7) "First heir," defined as the person who will be first entitled to succeed to the title to an estate after the termination of a life estate or estate for years.—Winter v. Perratt, 5 Barn. & C. 48.

(8) "First in possession."—Associated Brewers Distributing Co. v. Riley, 102 P.2d 781, 782, 39 Cal.App.2d 235.

(9) "First in time, first in right."—U. S. v. City of Greenville, C.C.A.S.C., 118 F.2d 963, 966—In re Gallimore, D.C.Ga., 16 F.2d 800, 801. See also Courts § 492, as to priority of jurisdiction; and the C.J.S. title Liens § 10, also 37 C.J. p 328 note 21–p 329 note 39, and Mechanics' Liens §§ 198, 200, also 40 C.J. p 283 note 24–p 284 note 30 and p 288 note 16–p 294 note 71, as to priority in time with reference to liens.

(10) "First make payment."—Walker v. Hewitt, 220 P. 147, 151, 109 Or. 366, 35 A.L.R. 100.

(11) "First measure."—James v. Ketterer, 180 N.E. 704, 706, 125 Ohio St. 165.

(12) "First meeting."—Smith v. State, 288 S.W. 458, 462, 105 Tex.Cr. 327.

(13) "First members."—Eustace v. Dickey, 132 N.E. 852, 858, 240 Mass. 55.

(14) "First monthly meeting," as referring to the first meeting in the month preceding the "second month."—Cicchillo v. Ricciotti Garibaldi Mutual & Beneficial Soc. of Scranton, 21 A.2d 447, 448, 145 Pa.Super. 508.

(15) "First named on ballot cast."—Denny v. Pratt, 135 A. 40, 41, 105 Conn. 256—Beckley v. Alling, 99 A. 1034, 1036, 91 Conn. 362.

(16) "First net profits."—Crocker v. Barteau, 110 S.W. 1062, 1066, 212 Mo. 359.

(17) "First option."

Kan.—Landowners Co. v. Pendry, 100 P.2d 632, 633, 151 Kan. 674, 127 A.L.R. 890.

N.Y.—Jurgensen v. Morris, 185 N.Y.S. 386, 387, 194 App.Div. 92.

(18) "First option to buy," as equivalent to "first privilege of buying."—Hake v. Groff, 205 N.W. 145, 146, 232 Mich. 233.

(19) "First or return term."—Atlantic Coast Line R. Co. v. Georgia Sweet Potato Growers' Ass'n, 154 S.E. 698, 699, 171 Ga. 30.

recent adjudications have not been found see 26 C.J. p 591 note 17–p 592 note 79.

FIRST-CLASS. A relative term,[36] defined as meaning of the most superior or excellent grade or kind; belonging to the head or chief or numerically precedent of several classes into which the general subject is divided.[37] It has been held to include and to be synonymous with "good condition," and "good quality,"[38] and to negative "bad condition," "damaged," "inferior quality," "injurious," "off grade," "unfit for feeding purposes," and "unsafe."[39]

Phrases employing the word are set out in the note.[40] For other phrases as to which more recent adjudications have not been found see 26 C.J. p 592 notes 83–93.

FIRST-RATE. Of the first rate or order.[41]

(20) "First payment."—City of Philadelphia v. Muller, 143 A. 20, 21, 293 Pa. 360.

(21) "First privilege of buying," as equivalent to "first option to buy." —Hake v. Groff, 205 N.W. 145, 146, 232 Mich. 233.

(22) "First processor."—Lindner Packing & Provision Co. v. Commissioner of Internal Revenue, C.C.A., 118 F.2d 656, 658.

(23) "First relief."—Belknap County v. Carroll County, N.H., 13 A.2d 150, 151.

(24) "First return."—Scaife Co. v. Commissioner of Internal Revenue, 62 S.Ct. 338, 340, 314 U.S. 459, 86 L. Ed. 339—J. E. Riley Inv. Co v. Commissioner of Internal Revenue, 61 S. Ct. 95, 96, 311 U.S. 55, 85 L.Ed. 36—Haggar Co. v. Helvering, Tex., 60 S. Ct. 337, 340, 308 U.S. 389, 84 L.Ed. 340—Wm. B. Scaife & Sons Co. v. Commissioner of Internal Revenue, C.C.A., 117 F.2d 572, 574—J. E. Riley Inv. Co. v. Commissioner of Internal Revenue, C.C.A., 110 F.2d 655, 657 —J. E. Riley Inv. Co. v. Commissioner of Internal Revenue, C.C.A., 108 F. 2d 713, 716, 718—C. H. Mead Coal Co. v. Commissioner of Internal Revenue, C.C.A., 106 F.2d 388, 390, 391—Glenn v. Oertel Co., C.C.A.Ky., 97 F.2d 495, 497—Western Fruit Express Co. v. U. S., Ct.Cl., 31 F.Supp. 164, 166—Philadelphia Brewing Co. v. U. S., Ct.Cl., 27 F.Supp. 583, 587.

(25) "First right to re-lease."—Cloverdale Co. v. Littlefield, 133 N.E. 565, 240 Mass. 129.

(26) "First-run theaters."—Interstate Circuit v. U. S., Tex., 59 S.Ct. 467, 475, 306 U.S. 208, 83 L.Ed. 610.

(27) "First salted."—C. D. Brown & Co. v. Standard Hide Co., 152 A. 557, 558, 301 Pa. 543.

(28) "First school year."—Gibson v. Mitchell, 72 P.2d 740, 743, 9 Cal. 2d 718.

(29) "First story," as equivalent to "first floor."

Mass.—Lowell v. Strahan, 12 N.E. 401, 404, 145 Mass. 1, 8, 1 Am.S.R. 422.

Ohio.—Benzing v. Board of Education of Hamilton City School Dist., 181 N.E. 150, 152, 41 Ohio App. 468.

(30) "First term," construed in a particular application, as meaning the term at which the prosecuting officer demands the arraignment and trial of a defendant.—John v. State, 1 Head, Tenn.. 49, 51. See also Courts § 147 notes 78–80, "appearance term" as first term.

(31) "First three days."—Honea v. Federal Land Bank of St. Louis, 61 S.W.2d 436, 438, 187 Ark. 619.

(32) "First use."—Heer Engine Co. v. Papan, 218 S.W. 202, 203, 142 Ark. 171.

(33) "In the first instance."—People ex rel. Folk v. McNulty, 9 N.Y.S. 2d 380. 386, 256 App.Div. 82—People v. Cooper, 286 N.Y.S. 961, 962, 158 Misc. 419.

Phrases treated elsewhere

(1) "Burns of the first degree" or "first-degree burns" see 12 C.J.S. p 758 notes 20, 21.

(2) "First meeting of creditors" see Bankruptcy § 281 a.

(3) "First-born" see Eldest 28 C. J.S. p 1052 note 56.

(4) "First cause" see 14 C.J.S. p 43 note 18.

(5) "First cost and charges" see 20 C.J.S. p 243 note 5.

(6) "First cousin" and "first cousin once removed" see 21 C.J.S. p 863 notes 3, 13.

(7) "First day" see the C.J.S. title Time § 13, also 62 C.J. p 983 note 56–p 1000 note 86.

(8) "First degree burglary" see Burglary § 27 notes 56–69.

(9) "First degree murder" see the C.J.S. title Homicide §§ 30–34, also 29 C.J. p 1104 note 38–p 1118 note 83.

(10) "First degree robbery" see the C.J.S. title Robbery § 25, also 54 C.J. p 1029 note 34–p 1031 note 58.

(11) "First draw" see 28 C.J.S. p 487 note 6. See also the C.J.S. title Pensions § 6, also 48 C.J. p 790 notes 92–6.

(12) "First impression," as referring to absence of precedent for an alleged cause of action see Actions § 16.

(13) "First inventor" see the C.J. S. title Patents § 86, also 48 C.J. p 114 note 52–p 116 note 72.

(14) "First lien" see the C.J.S. title Liens § 10, also 37 C.J. p 328 note 21–p 329 note 34.

(15) "First of exchange" see Exchange 33 C.J.S. p 1 note 6 (11); Bills and Notes § 736 note 31.

Other specific uses see 26 C.J. p 591 note 10.

36. Ill.—Cleveland v. Martin, 75 N.E. 772, 778, 218 Ill. 73, 3 L.R.A.,N.S., 629.

37. Black L.D.

38. Cal.—Pacific Feed Co. v. Kennel, 218 P. 274, 275, 63 Cal.App. 108.

39. Cal.—Pacific Feed Co. v. Kennel, supra.

40. **Phrases construed**

(1) "First-class condition."—McKinster v. Prescott, 214 P. 639, 640, 67 Mont. 88.

(2) "First-class dwelling house" see 28 C.J.S. p 605 note 45.

(3) "First-class mail-matter" see the C.J.S. title Post Office § 20, also 49 C.J. p 1155 note 49.

(4) "First-class misdemeanant," in English law under the prisons act, 28 & 29 Vict. c 126 § 67, prisoners in the county, city, and borough prisons convicted of misdemeanor, and not sentenced to hard labor, are divided into two classes, one of which is called the "first division;" and it is in the discretion of the court to order that such a prisoner be treated as a misdemeanant of the first division, usually called "first-class misdemeanant," and as such not to be deemed a criminal prisoner, that is, a prisoner convicted of a crime.—Black L.D.

(5) "First-class printing," defined in particular contracts as the cheapest grade of printing, and distinguished from "second-class printing." —Commonwealth v. Bacon, 111 S.W. 387, 392, 33 Ky.L. 935.

(6) "First-class private residences only."—Pulitzer v. Campbell, 262 N. Y.S. 743, 746, 147 Misc. 700.

(7) "First-class shape."—Stovall v. Newell, 75 P.2d 346, 347, 158 Or. 206.

41. Webster New Int.D.

"First-rate building plot of freehold ground"

Eng.—Dykes v. Blake, 4 Bing.N.Cas. 463, 476, 33 E.C.L. 806, 132 Reprint 866.

FISC. An Anglicized form of the Latin "fiscus,"[42] and defined as meaning a treasury of a kingdom or a state; money chest.[43]

FISCAL.

As a Noun

A financial secretary or minister;[44] a treasurer;[45] a procurator fiscal; a public law officer.[46]

In Spanish law, it is sometimes used as in English to denote that which pertains to the "fisco" or public treasury; more commonly, however, it means a public attorney, or public prosecutor, and corresponds generally to a district, or prosecuting attorney; and sometimes to an attorney general.[47]

As an Adjective

Financial, pertaining to finance;[48] relating to accounts or the management of revenue;[49] of or pertaining to the treasury or public finances of a government.[50] The term imports some relation to financial operations,[51] and has been held synonymous with "financial" see Financial 36 C.J.S. p 765 note 24. For references to specific uses see 26 C.J. p 592 note 98.

Phrases employing the word are set out in the note.[52] For other phrases as to which more recent adjudications have not been found see 26 C.J. p 592 text and notes 4–11.

FISCO. In Spanish law, the department of the government which collects, receives, and pays money;[53] the public treasury. It is regarded in law as a person and, in seeking restitution of rights, it has been given the status of a minor; and various other rights and privileges have been extended to it.[54]

FISCUS. In Roman law, the treasury of the prince or emperor, as distinguished from "ærarium," which was the treasury of the state;[55] also the treasury or property of the state, as distinguished from the private property of the sovereign.[56] From this term is derived the word "confiscate," that is, to appropriate to the fiscus or fisc.[57]

In English law, the king's treasury, as the repository of forfeited property; the treasury of a noble, or of any private person.[58]

FISH. As a noun, used to designate an aquatic animal see Fish § 1. In well-drilling, an object which has to be removed from a well which is being drilled.[59]

As a verb employed in the participial form as taking fish by angling or drawing a net see Fish § 1. Used in the sense of seeking information in a pending action, "fishing" has been defined as meaning ordering a party to a suit to produce all of his books and papers for examination by the other party.[60]

Phrases employing the word are set out in the note.[61]

42. Black L.D.

43. N.D.—Daly v. Beery, 178 N.W. 104, 109, 45 N.D. 287.

44. N.D.—Daly v. Beery, supra.

45. N.Y.—Eagan v. Board of Education, 115 N.Y.S. 167, 168.

46. Webster New Int.D.

47. Escriche Diccionario.

48. N.Y.—Eagan v. Board of Education, 115 N.Y.S. 167, 168.
N.D.—Daly v. Beery, 178 N.W. 104, 109, 45 N.D. 287.

49. Ill.—Lynn v. Trustees of School of Township No. 16, Pope County, 271 Ill.App. 539, 546.

50. N.D.—Daly v. Beery, 178 N.W. 104, 109, 45 N.D. 287.

51. Mass.—Opinion of the Justices, 32 N.E.2d 298, 303.

52. **Phrases construed**

(1) "Fiscal agent" see Banks and Banking § 809, federal reserve banks as government fiscal agents; § 1062, loan and trust company acting for other corporations.

(2) "Fiscal and legal expense," as including insurance during the period of construction of a public works project.—State v. Dade County, 200 So. 848, 850, 146 Fla. 331.

(3) "Fiscal concerns" see 15 C.J.S. p 799 note 19.

(4) "Fiscal court" see Counties § 175 note 26, and Courts § 264 note 35.

(5) "Fiscal judge," described as a public officer named in the laws of the Ripuarians and some other Germanic peoples, apparently the same as the "Graf," "reeve," "comes," or "count," and so called because charged with the collection of public revenues, either directly or by the imposition of fines.—Black L.D.

(6) "Fiscal officer."
U.S.—Mermis v. Jackson, C.C.A.Kan., 93 F.2d 579, 583.
Ky.—Dorain v. Walters, 116 S.W. 313, 314, 132 Ky. 54.
Pa.—Dunn v. Berks County, 14 A.2d 310, 313, 339 Pa. 282.

(7) "Fiscal year" see the C.J.S. title Time § 9, also 62 C.J. p 964 note 93–p 965 note 99.

53. U.S.—Molina v. U. S., 6 Ct.Cl. 269, 273.

54. Escriche Diccionario.
26 C.J. p 592 note 14 [a].

55. Black L.D.

In France the distinction was not observed.—Black L.D.

In German law the term appears to have a meaning similar to that in Spanish law.—Brown v. U. S., 5 Ct. Cl. 571, 578.

56. Black L.D.

"In course of time the fiscus absorbed the ærarium and became the treasury of the state."—Black L.D.

57. Black L.D.

58. Black L.D.

59. U.S.—Raymond v. Wickersham, Cust. & Pat.App., 110 F.2d 863, 864.

60. U.S.—Mobile Gas Co. v. Patterson, D.C.Ala., 288 F. 884, 885.

61. **Phrases using "fish"**

(1) "Fish in oil in jars."—U. S. v. Delapenha & Co., 12 Ct.Cust.App. 209, 211.

(2) "Fish in tin packages."—U. S. v. Delapenha & Co., 12 Ct.Cust.App. 209, 211.

(3) "Fish laws of the United States."—Alaska Fish Salting & By-Products Co. v. Smith, Alaska, 41 S. Ct. 219, 220, 255 U.S. 44, 65 L.Ed. 489.

(4) "Fish pots" see Fish § 1.

(5) "Fish royal or royal fish," "game fish," "shell fish," and "soft fish" see Fish § 1.

Phrases using "fishing"

(1) "Fishing banks," "fishing implement," "fishing place" see Fish § 1.

(2) "Fishing bill or expedition" see Discovery § 1 note 2.

(3) "Fishing season," defined as meaning from the date when a vessel sets out on her first trip until October 20 of the same year, but with the power in the master to terminate the season at an earlier date, and distinguished from "fishing voyage."—Wentzell v. Winacht, 41 N.S. 406, 408. See also Fish § 29.

(4) "Fishing stores," as including hooks, gaffs, nippers, and knives used by a boat in the fishing trade; also boats, fishing tackle, such as harpoons, lines, and rockets, casks and various other implements independent of the ship's sailing stores.

B.C.—Pichon v. The Alliance No. 2, 20 B.C. 560, 17 Can.Exch. 201, 20 Dom.L.R. 70.

Eng.—The Dundee, 1 Hagg.Adm. 137.

(5) "Fishing tool, defined as a tool affixed to the bottom of a jarring tool, interposed in a string of drill pipe and designed to grapple or otherwise engage the object,—commonly called a "fish,"—which is to be removed from a drilled well.—Raymond v. Wickersham, Cust. & Pat. App., 110 F.2d 863, 864.

(6) "Fishing vessel" see Collision § 27 note 35, subject to federal regulations generally; § 53, reliance on vessels sailing free giving way § 93 notes 92, 93, signals in daytime, § 94 e, lights, § 121 note 9, reliance on other vessels reducing speed in fog.

FISH

This Title includes animals inhabiting the water; regulations for their preservation; and nature and incidents of rights of fishery.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. IN GENERAL

§ 1. Meaning of Terms

The word "fish" in its broadest sense is a designation of almost any exclusively aquatic animal.

"Fish," in its broadest sense, is a designation of almost any exclusively aquatic animal, vertebrate, or invertebrate.[1] The term "fish" includes in itself oysters, clams, and other shell fish,[2] and has also been held to be included in the term "game."[3] The term "agricultural products" does not include fish.[4]

Fish are classified in the law, largely perhaps because of their migratory characteristics and want of a fixed habitat, as animals ferae naturae.[5]

A "fishery" is the right to take fish at a certain place, or in particular waters;[6] a right to employ within a particular stretch of water lawful means for the taking of fish which may be found there;[7] a place for catching fish or other sea products;[8] and it is the exclusive right which every owner of land on the shore of a river has to use his own property for the purpose of drawing a seine, or practicing any other device for the catching of fish.[9] The term is also used to designate a place

1. Webster New Int.D.
26 C.J. p 594 note 1.

2. U.S.—Gratz v. McKee, Mo., 258 F. 335, 169 C.C.A. 351.
26 C.J. p 594 note 4.

3. Fla.—State ex rel. Oglesby v. Hand, 119 So. 376, 378, 96 Fla. 799, citing **Corpus Juris.**
26 C.J. p 594 note 5.
"Game" defined see the C.J.S. title Game § 1, also 27 C.J. p 941 note 1–p 942 note 6.

4. Philippine.—Molina v. Rafferty, 37 Philippine 545.

5. Fla.—Nash v. Vaughn, 182 So. 827, 133 Fla. 499.
Or.—Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 160 Or. 654.
26 C.J. p 594 note 3—3 C.J. p 16 note 20.

Classified with fowls

"Blackstone, in writing of animals ferae naturae, classes fish with fowls of the air, there being in nature no distinction between one species of wild animals and another. 2 Blackstone's Com. 403."—State ex rel. Oglesby v. Hand, 119 So. 376, 378, 96 Fla. 799.

Migratory fish are deemed to be ferae naturae.—Ex parte Vitalie, 4 P.2d 171, 117 Cal.App. 553.

6. Pa.—Hart v. Hill, 1 Whart. 124.
26 C.J. p 595 note 12.

7. Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S., 396.

8. Alaska.—U. S. v. Miyata, 4 Alaska 436.

9. U.S.—Percy Summer Club v. As-

prepared for catching fish with nets or hooks, and in common parlance is applied to a place where a seine or net is drawn.[10] It has also been defined as the act, process, or occupation of taking fish or other sea products.[11]

Although a fishery is in the water, the use of the space on shore between high and low watermarks may be necessary in the use of the fishery, and may be included in the term "fishery,"[12] a fishery is to be distinguished from a fishing place, or the right to use a particular shore or beach as a basis for carrying on the business; the latter is always vested in the shore owner and is entirely distinct from the right to fish from the water.[13]

As a right of property a fishery is real, and not personal, property; it is a part of the soil and not an entity having an independent existence,[14] and, as far as it is exercised on another's land, it is a profit à prendre.[15] Hence, it cannot be claimed by way of easement,[16] and a person fishing by claim of common right can be in no sense the owner of a fishery.[17]

A several fishery is the exclusive right of fishing which is derived from the ownership of the soil;[18] the exclusive right to fish in one's own waters.[19] It is a fishery by which the party claiming it has the right of fishing independently of all others, so that no person can have a coextensive right with him in the object claimed.[20] As to whether the ownership of the soil under the water is essential to a several fishery there is a diversity of opinion, some authorities holding that it is [21] and others that it is not.[22]

A common fishery is a public or common right to fish in certain waters, and is or may be exclusive of the ownership of the soil;[23] it may be a right of fishing in another man's waters in common with certain other persons.[24] A free fishery is an exclusive privilege, derived from royal or public grant to fish in public waters, and is independent of the soil.[25] Under the common law there is a free right of fishery, which is common to all citizens of the state, extending to all rivers where the tide ebbs and flows, as well as in the sea.[26] The right of fishery in navigable rivers and arms of the sea is presumptively free.[27]

"Royal fishery" is a term which was applied at common law to the right of fishery, by virtue of the king's prerogative, in a royal or navigable river as far as the sea ebbed and flowed in it.[28]

Fishing. To be employed in taking fish as by angling or drawing a net; a pursuit consisting, not of a single act, but of many acts, according to the nature of the fishing. It is not the isolated act

tle. C.C.N.H., 145 F. 53, affirmed 163 F. 1, 90 C.C.A. 527, rehearing denied 166 F. 1020, 92 C.C.A. 667.
Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S.. 396.
Pa.—Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71.

10. Alaska.—U. S. v. Miyata, 4 Alaska 436.
26 C.J. p 595 notes 16, 17.

11. Alaska.—U. S. v. Miyata, supra.

12. Pa.—Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am.D. 597—Hart v. Hill, 1 Whart. 124.

13. Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S., 396.

14. Ga.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.
26 C.J. p 595 note 19.

Incorporeal hereditament
Fishing rights in lake were an incorporeal hereditament, since they issued out of, were concerned with, or were annexed to, those corporeal.—Miller v. Miller, 179 A. 248, 118 Pa. Super. 38.

15. N.J.—Albright v. Sussex County Lake & Park Commission, 57 A. 398, 71 N.J.Law 303, 108 Am.S.R. 749, 69 L.R.A. 768, 2 Ann.Cas. 48, affirmed 59 A. 146, 71 N.J.Law 309, 69 L.R.A. 768.
26 C.J. p 595 note 20—19 C.J. p 870 note 110.

Right reserved by grantors to take fish in waters of land conveyed was one of profits à prendre.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.

16. Ga.—Bosworth v. Nelson, supra.
26 C.J. p 595 note 21.

17. Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S., 396.

18. Mass.—Freary v. Cooke, 14 Mass. 488.
N.J.—Cobb v. Davenport, 32 N.J.Law 369.
N.Y.—Brookhaven v. Strong, 60 N.Y. 56.
Acquisition in public waters see infra § 9.

19. U.S.—Hardin v. Jordan, Ill., 11 S.Ct. 808, 140 U.S. 371, 35 L.Ed. 428.

20. Me.—Preble v. Brown, 47 Me. 284—Moulton v. Libbey, 37 Me. 472, 59 Am.D. 57.

21. N.C.—Skinner v. Hettrick, 73 N.C. 53.
26 C.J. p 596 note 35.

22. Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S., 396.
26 C.J. p 596 note 36.

23. N.J.—Albright v. Sussex County Lake & Park Commn., 53 A. 612, 68 N.J.Law 523, reversed on other grounds 57 A. 398, 71 N.J.Law 303, 108 Am.S.R. 749, 69 L.R.A. 768, 2 Ann.Cas. 48.
Common fishery and common of piscary distinguished see Common Lands § 4 b (2).

24. N.J.—Albright v. Sussex County Lake & Park Commn., supra—Cobb v. Davenport, 32 N.J.Law 369.
N.Y.—Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am.D. 582.

25. Mass.—Melvin v. Whiting, 7 Pick. 79—Freary v. Cooke, 14 Mass. 488.
N.J.—Arnold v. Mundy, 6 N.J.Law 1, 10 Am.D. 356.
26 C.J. p 596 note 41.

26. Me.—Small v. Wallace, 129 A. 444, 124 Me. 365.

27. N.Y.—Brookhaven v. Strong, 60 N.Y. 56, affirming 1 Thomps. & C. 415.

28. N.J.—Arnold v. Mundy, 6 N.J. Law 1, 10 Am.D. 356.

alone either of surrounding the fish by the net, or of taking them out of the water and obtaining manual custody of them; it is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession.[29]

Fishing banks. A fishing bank is a fishing ground of comparatively shoal water in the sea.[30]

Fishing implements. "Fishing implement" is a term which has been construed to include the use of lines, seines, spears, nets, and any of the ordinary and usual modes of catching fish in rivers or bays.[31]

A dummy trap is a sham trap, not used for fishing, but designed simply to squat on and hold a trap location.[32] A fish trap is included in the term "personal property."[33]

Fish pots are contrivances in the nature of screens and traps, placed at the junction of low dams or walls extending out from each shore and somewhat down stream, in such a way as to collect the water and send it through the pot, so that fish may be screened out there.[34]

Fishing lines may be classed as hand lines and set lines, long lines, or trawls.[35] A set line is a line with baited hooks fastened to it, set or anc ored for taking fish; a line to which a number baited hooks are attached, and which, supported b a buoy, is extended on the surface of the water.[3

A "net" is an instrument for catching fis formed with twine or thread wrought or woven i meshes.[37] A gill net is a flat net so suspended in th water that its meshes allow the heads of fish to pas but catch in the gills when they seek to extricat themselves; a net which catches fish by the gills.[3 A pod net is a species of fishing net also calle "Dutch net."[39] A "set-net" is any net that is o may be set in a desired position;[40] it may consist o several nets fastened together.[41] A "set net" ha also been defined as one fastened at one end or a both ends, so the whole net cannot drift with th current, and, notwithstanding this, be in a conditio to take fish.[42] A "drift net" is a net with both end free to drift with the current.[43] A wing net is fishing net consisting of netting stretched ove hoops somewhat similar to barrel hoops, the firs of which is about thirty inches in diameter, an the succeeding hoops greatly decreasing in size about twelve feet in length and a wing about fiv feet long on each side, one end of the net bein attached to the shore, mouth upstream.[44] A "fyke' is a fish trap consisting of several successive conical nets with wide-stretched mouths.[45] A hoop o

29. Or.—Johnson v. Hoy, 47 P.2d 252, 254, 151 Or. 196, quoting **Corpus Juris.**
Fishing as commerce see Commerce § 29.

Consummation not essential
"This involves a definition of fishing, and in the light of our personal experience, extended over half a century, we define it to be a human effort, successful or unsuccessful, by any device, to remove from the water the piscatorial denizen thereof, a performance demanding patience, involving skill, accompanied by profanity and usually followed by mendacity. The operation begins the moment that the device, for example, a hook or net, enters the water, continues all the time it is in the water, and is consummated when it brings the denizen from the water. The consummation is not essential to the definition at all, for the operator is fishing when he drops the hook or places the net in the water, fishing while he leaves the device in the water, and still fishing when he pulls it out, regardless of results."—Commonwealth v. Gushinski, 10 Pa. Dist. & Co. 202, 203, 24 Luz.Leg.Reg. 373.

30. Or.—Parker v. Thomson, 28 P. 502, 21 Or. 523.
26 C.J. p 596 note 43.

31. Mass.—Commonwealth v. Adams, 35 N.E. 851, 160 Mass. 310—Locke v. Motley, 2 Gray 265.

32. Alaska.—Territory v. Fisheries, 5 Alaska 325, 337.

33. Or.—Anderson v. Columbia Contract Co., 184 P. 240, 185 P. 231, 94 Or. 171, 7 A.L.R. 653.

34. Md.—Middlekauff v. Le Compte, 132 A. 48, 149 Md. 621.

35. Vt.—State v. Stevens, 38 A. 80, 81, 69 Vt. 411.

36. Vt.—State v. Stevens, supra.
57 C.J. p 293 notes 90–92.
Set line within statutes prohibiting use of see infra § 30.

37. Pa.—Commonwealth v. Harrison, 35 Pa.Co. 209.

38. Ind.—State v. Lewis, 33 N.E. 1024, 134 Ind. 250, 20 L.R.A. 52.

A drift is an expanse of water over which gill net fishermen drift their nets.—Radich v. Fredrickson, 10 P.2d 352, 139 Or. 378.

"A 'gill net' is much like a seine, except in its method of use. Its meshes are made of a proper size to permit the head of the fish to pass through beyond the gills, which prevents the fish from withdrawing it, and it is thereby trapped and captured. While fishermen might be expected to distinguish betweer seines and gill nets, and pound o pond nets, calling each by its dis tinguishing name, if all might no be called by the generic name o seines, certainly the gill net is a species of trap net."—Hilborn v Smith, 111 N.W. 1082, 1083, 148 Mich 474.

39. N.C.—Rea v. Hampton, 7 S.E 649, 101 N.C. 51, 9 Am.S.R. 21.

40. Or.—Mitchell v. Curtis, 296 P. 1078, 135 Or. 595.
Set net within statute prohibiting use of see infra § 30.

Fixed appliance
A set net is a fixed appliance.—State v. Vosgien, 144 P. 947, 82 Wash. 685.

"Net" and "set net" are not interchangeable and do not mean the same thing.—Mitchell v. Curtis, 296 P. 1078, 135 Or. 595.

41. Or.—Mitchell v. Curtis, supra.

42. Or.—State v. Blanchard, 189 P. 421, 96 Or. 79.

43. Or.—State v. Blanchard, supra.

44. Tenn.—Freeman v. State, 100 S. W. 723, 118 Tenn. 95.

45. Or.—Mitchell v. Curtis, 296 P. 1078, 135 Or. 595.

barrel net is not a trammel net.[46]

A seine is a kind of net used for taking fish, one of the class of encircling nets, consisting of floats at the upper edge and with leads of greater or less weight at the lower, and used to inclose a certain area of water, and, by bringing the nets together, either in a boat or on the shore, to secure the fish that may be inclosed.[47]

Fishing place. As defined by statute a fishing place is the place or places where seines or nets have been usually thrown into the water to the place or places where they have been usually taken out, or from the place or places where they may be hereafter thrown into the water to the place or places where they may be taken out;[48] it applies only to shore fisheries.[49]

Fishway. As contemplated by some statutes, a fishway means that, where there is an obstruction in the stream which prevents the fish from going up or down the stream, an artificial means is afforded to the fish to pass the obstruction.[50]

Kinds of fish. Royal or regal fish include whales, porpoises, and sturgion.[51] Scientifically speaking, a whale is not a fish, but in popular concept, a whale is deemed a fish.[52]

A "shellfish" is a fish covered with a shell;[53] any aquatic animal whose external covering consists of a shell, either testacious, as in oysters, clams, and other mollusks, or crustacious, as in lobsters or crabs. The term is chiefly applied, in commerce, to crabs, lobsters, and crayfish, oysters, mussels, periwinkles, and whelks.[54] Escallops are mollusks of the species pectinidae.[55] A mussel is any of certain marine bivalve mollusks of the genus Mytilus and related genera.[56]

Mackerel is an important scombroid fish of the North Atlantic; with or without a qualifying word applied to various fishes of the family Scombridae.[57] It seems that the word "mackerel" in the fish trade has a trade meaning, which is clear mackerel, not rusty mackerel.[58]

A "game fish" is any fish the capture of which requires skill and affords sport.[59] A soft fish is one that is not a game fish.[60]

In its common and ordinary meaning, "trout" is a word employed to designate a kind of fresh water fish, or fish which at least breed and ordinarily live in fresh water, even though they may sometimes escape to the salt water when they have an opportunity.[61]

Piscaria. All fisheries, without regard to their distinctive character, or to the method of taking fish.[62]

Private pond. In the common-law sense, a body of water wholly on the lands of a single owner, or of a single group of joint owners or tenants in common, which does not have such connection with any public waters that fish can pass from one to the other.[63]

Private preserve under some statutes is a natural pond, of not more than twenty acres, belonging to a common owner, or any artificial pond made solely for the purpose of fish culture.[64]

46. Ark.—Rhoades v. State, 131 S. W. 48, 96 Ark. 63.

47. Ind.—State v. Lewis, 33 N.E. 1024, 134 Ind. 250, 20 L.R.A. 52.
Mich.—Hilborn v. Smith, 111 N.W. 1082, 148 Mich. 474.
Pa.—Commonwealth v. Harrison, 35 Pa.Co. 209.
57 C.J. p 96 note 94–p 97 note 8.

Trammel net distinguished
A seine is a kind of net, but a trammel net is not a seine.—Rowe v. State, 103 S.W. 613, 83 Ark. 244.

48. Pa.—Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am.D. 597.
26 C.J. p 596 note 44.

49. U.S.—Bennett v. Boggs, C.C.N.J., 3 F.Cas.No.1,319, Baldw. 60.

50. Pa.—Commonwealth v. Pierce, 17 Pa.Dist. 146.
26 C.J. p 596 note 47.

51. Or.—State v. Lessard, 29 P.2d 509, 146 Or. 9.
58 C.J. p 1066 note 31.

Grand fishes of the sea, as whales and sturgeon, are royal fish.—Arnold v. Mundy, 6 N.J.Law 1, 86, 10 Am. D. 356.

52. U.S.—Central Commercial Co. v. U. S., 11 Cust.App. 131.

53. Me.—Caswell v. Johnson, 58 Me. 164.

54. N.C.—White v. Hill, 34 S.E. 432, 125 N.C. 194.

Lobster is a large macrurous crustacean used as food.—Standard D.—38 C.J. p 129 note 33.

55. N.C.—State v. Dudley, 109 S.E. 63, 182 N.C. 822.

56. Webster New Int.D.

"The fresh water mussel is one of a group of mollusks. It is a shellfish capable of locomotion, but disinclined to exercise this power if its supply of food is sufficient where it is. It sometimes floats upon the water, but usually lives in the beds of streams partially covered with mud."—Gratz v. McKee, Mo., 258 F. 335, 336, 169 C.C.A. 351, reversed on other grounds 270 F. 713, certiorari granted 41 S.Ct. 535, 256 U.S. 687, 65 L.Ed. 1172, affirmed 43 S.Ct. 16, 260 U.S. 127, 67 L.Ed. 167.

57. Webster New Int.D.

58. Mass.—Procter v. Atlantic Fish Cos., 94 N.E. 281, 208 Mass. 351.

59. Pa.—Commonwealth v. Penn Forest Brook Trout Co., 26 Pa.Co. 163.

60. Iowa.—State v. Hinshaw, 198 N. W. 634, 197 Iowa 1265.
58 C.J. p 800 note 7.

61. Me.—State v. Lewis, 33 A. 10, 87 Me. 498.

62. Me.—Caswell v. Johnson, 58 Me. 164—Moulton v. Libbey, 37 Me. 472, 59 Am.D. 57.

"Piscarial rights"
Me.—Moulton v. Libbey, supra.

63. Ind.—State v. Lowder, 153 N.E. 399, 198 Ind. 234.
50 C.J. p 371 note 92.

64. Vt.—State v. Theriault, 41 A. 1030, 70 Vt. 617, 67 Am.S.R. 695, 43 L.R.A. 290.

§ 2. Property in Fish in General

As long as fish are not reduced to possession, they belong to the state as representative and for the benefit of all the people.

Fish, as long as they remain unconfined in their natural element and are not taken and reduced to possession, are not the subject of private property, but are public property;[65] and not even the owner of the soil over which a stream frequented by fish flows owns the fish therein.[66] Likewise, the fact that a particular person is engaged in the business of taking fish does not give him any property in the fish prior to taking.[67] While they are in a state of freedom fish are the property of the sovereign power, in Great Britain, of the king;[68] and in the United States, of the state, in whose waters they may be, not as a proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common,[69] and the ownership thereof cannot be claimed by any particular individual.[70] On the other hand, except by legal fiction, a state, strictly speaking, does not have a proprietary right in the fish in its streams.[71] The distinction between royal fish, which include whales, porpoises, and sturgeon, and other fish is that title to and the right to take royal fish was held by the sovereign for his own revenue, but, as far as concerned other fish not royal and in tide waters, was in the king in trust for all his subjects.[72]

When a fish has been legally appropriated and reduced to possession, it ceases to be a wild animal in the legal sense.[73] Accordingly, in the absence of a statute to the contrary, an individual may acquire a qualified property in fish by so confining them within his immediate power as to prevent their escape and the use of their natural liberty,[74] as where

65. Fla.—Nash v. Vaughn, 182 So. 827, 133 Fla. 499.
Tex.—Stephensen v. Wood, 34 S.W.2d 246, 119 Tex. 564, answering certified questions, Civ.App., 35 S.W.2d 794.
Wash.—State ex rel. Bacick v. Huse, 59 P.2d 1101, 187 Wash. 75.
26 C.J. p 596 note 49.

The food fish in the waters of the state belong to the people of the whole state.—Vail v. Seaborg, 207 P. 15, 120 Wash. 126.

66. Vt.—State v. Haskell, 79 A. 852, 84 Vt. 429, 34 L.R.A.,N.S., 286.
26 C.J. p 597 note 50.

67. Wash.—Vail v. Seaborg, 207 P. 15, 120 Wash. 126.

68. Cal.—People v. Truckee Lumber Co., 48 P. 374, 116 Cal. 397, 58 Am. S.R. 183, 39 L.R.A. 581.
Tenn.—State v. Ashman, 135 S.W. 325, 123 Tenn. 654.

69. Ariz.—Begay v. Sawtelle, 88 P. 2d 999, 53 Ariz. 304.
Cal.—People v. K. Hovden Co., 8 P.2d 481, 215 Cal. 54—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186—People v. Glenn-Colusa Irr. Dist., 15 P.2d 549, 127 Cal.App. 30—Bayside Fish Flour Co. v. Zellerbach, 12 P. 2d 961, 124 Cal.App. 564.
Fla.—Nash v. Vaughn, 182 So. 827, 133 Fla. 499—State ex rel. Gray v. Stoutamire, 179 So. 730, 131 Fla. 698.
La.—State v. Monteleone, 131 So. 291, 171 La. 437.
Me.—McKenney v. Farnsworth, 118 A. 237, 121 Me. 450.
Mich.—People v. Soule, 213 N.W. 195, 238 Mich. 130.
Minn.—Lipinski v. Gould, 218 N.W. 123, 173 Minn. 559—Bohman v. Gould, 211 N.W. 577, 169 Minn. 374.
Mo.—Reid v. Ross, 46 S.W.2d 567.
N.Y.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.
Or.—Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 160 Or. 654.
Tex.—Stephensen v. Wood, 34 S.W.2d 246, 119 Tex. 564, answering certified questions, Civ.App., 35 S.W. 2d 794—Goldsmith & Powell v. State, Civ.App., 159 S.W.2d 534, error refused—Taylor Fishing Club v. Hammett, Civ.App., 88 S.W.2d 127, 130, error refused, citing **Corpus Juris.**
Wash.—State ex rel. Bacich v. Huse, 59 P.2d 1101, 187 Wash. 75—State ex rel. Campbell v. Case, 47 P.2d 24, 182 Wash. 334.
26 C.J. p 597 note 53.

Oysters, as well as fish and game generally, are originally property of state.—Leonard v. Earle, 141 A. 714, 155 Md. 252, affirmed 49 S.Ct. 372, 279 U.S. 392, 73 L.Ed. 754.

Wild game
The fish within the waters of the state constitute the most important constituent of that species of property commonly designated as "wild game," the general right and ownership of which is in the people of the state.—People v. Truckee Lumber Co., 48 P. 374, 116 Cal. 397, 399, 58 Am.S.R. 183, 39 L.R.A. 581.

In Alaska, fish belong to the United States except as far as they have been given to such Territory.—Anderson v. Smith, C.C.A.Alaska, 71 F. 2d 493.

70. U.S.—Gratz v. McKee, Mo., 258 F. 335, 169 C.C.A. 351, reversed on other grounds 270 F. 713, certiorari granted 41 S.Ct. 535, 256 U.S. 687, 65 L.Ed. 1172, affirmed 43 S.Ct. 16, 260 U.S. 127, 67 L.Ed. 167.
Fla.—Nash v. Vaughn, 182 So. 827, 133 Fla. 499.
Me.—McKenney v. Farnsworth, 118 A. 237, 121 Me. 450.

71. U.S.—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.

Not absolute property
Fish in public waters were not absolute property of the state, and hence a statute forbidding fishing in the Ochlockonee River between a designated highway bridge and the dam of a particular water power corporation did not relate to state property within rule that constitutional provision requiring notice of local laws to be given in locality affected was not applicable to laws relating to state property.—State ex rel. Gray v. Stoutamire, 179 So. 730, 131 Fla. 698.

72. Or.—State v. Lessard, 29 P.2d 509, 146 Or. 9.

Killing actionable
Killing of whale in inland slough and keeping possession of its body without authority of state was actionable.—State v. Lessard, supra.

Royal fish belong to the king.—Arnold v. Mundy, 6 N.J.Law 1, 86, 10 Am.D. 356.

73. Wis.—State v. Lipinske, 249 N. W. 289, 212 Wis. 421.
Rights of property in fish illegally taken see infra § 3.

74. Tex.—Jones v. State, 45 S.W.2d 612, 119 Tex.Cr. 126.
26 C.J. p 597 note 55.

First taker acquires property in fish.—Small v. Wallace, 129 A. 444, 124 Me. 365.

Oysters or clams which have been transplanted to a bed marked by stakes are personal property.—People v. Morrison, 86 N.E. 1120, 194 N.Y. 175, 128 Am.S.R. 552.

they are confined in private lakes or ponds,[75] or taken with nets or other means so that they cannot escape.[76] The mere fact that a person owns land surrounding water in which there are fish gives him no property in the fish, unless the water is so inclosed as to be absolutely within his control, and the free passage of fish to and from it is entirely and rightfully obstructed.[77] While such a qualified property exists in them, the fish are as much under the protection of the law as if they were the absolute and indefeasible property of the owner, and an action will lie against anyone who unlawfully takes or destroys them.[78] If, however, fish escape after being confined, and are found at large in their proper element, they again become public property and subject to appropriation by the first person who takes them.[79]

Usages or customs prevailing among those engaged in taking fish, and regulating conflicting rights with respect to the catch, if valid, will be recognized by the courts.[80]

§ 3. Rights of Property and Contracts as to Fish Illegally Taken

One who catches fish in violation of law has no ownership or right to possession of the fish.

Since fish in public waters are the property of the state held in trust for the people, see supra § 2, such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose.[81] One who catches fish in violation of law has no ownership in, or right to possession of, the fish.[82] Title to fish taken by a trespasser has been held, in the absence of a statute to the contrary, to be in the owner of the land.[83]

II. RIGHT OF FISHING

A. IN PRIVATE WATERS

§ 4. By Owner

The right of fishing in waters on lands owned by a private individual, as a general rule, is exclusively in such owner.

As a general rule the right of fishing in waters on land owned by a private individual is exclusively in such owner,[84] and, where such ownership is established, the right may attach to an arm of the

75. Ark.—Arkansas Game & Fish Commission v. Storthz, 29 S.W.2d 294, 181 Ark. 1089.
Wis.—State v. Lipinske, 249 N.W. 289, 212 Wis. 421.
26 C.J. p 597 note 56.

Personal property
Fish in a private fish pond are personal property, at least where the ownership of the soil is in another.—Reese v. Qualtrough, 156 P. 955, 48 Utah 23.

76. Tex.—Jones v. State, 45 S.W.2d 612, 119 Tex.Cr. 126.
26 C.J. p 597 note 57.

77. N.H.—State v. Roberts, 59 N.H. 484.

Tidal waters
Fish swimming in tidal water, as well above as below low watermark, are the property of the first taker, regardless of the ownership of the soil under the water where they are taken.—Small v. Wallace, 129 A. 444, 124 Me. 365.

78. Hawaii.—Murphy v. Hitchcock, 22 Hawaii 665, Ann.Cas.1917B 976.
N.Y.—Fleet v. Hegeman, 14 Wend. 42.
Ohio.—State v. Thomas, 11 Ohio S. & C.P. 753, 8 Ohio N.P. 653.

79. Ky.—Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204, 206, 255 Ky. 685, citing **Corpus Juris.**
26 C.J. p 597 note 60.

80. U.S.—Swift v. Gifford, D.C. Mass., 23 F.Cas.No.13,696, 2 Lowell 110.

81. Cal.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186.

Subject of commerce
Property in fish can only become subject to private ownership in qualified way, and can never be subject of commerce, except with state's consent, subject to conditions imposed.—Bayside Fish Flour Co. v. Zellerbach, 12 P.2d 961, 124 Cal.App. 564.

82. Cal.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186—Suttori v. Peckham, 191 P. 960, 48 Cal.App. 88.

Property of state
Fish in a trap operated illegally during closed season belong to state, and, where defendant pleaded guilty to illegally operating a fish trap, the court improperly refused to order payment to the state of the proceeds of a sale of the fish taken from the trap.—State v. Cramer, 8 P.2d 1004, 167 Wash. 159.

To vest title in taker
While there is no unqualified ownership of fish until they have been caught and reduced to possession, they must be lawfully taken to vest title in the taker.—Gratz v. McKee, C.C.A.Mo., 270 F. 713, reversing 258 F. 335, 169 C.C.A. 351, certiorari granted 41 S.Ct. 535, 256 U.S. 687, 65 L.Ed. 1172, and affirmed 43 S.Ct. 16, 260 U.S. 127, 67 L.Ed. 167.

83. **Statute held not to change rule**
U.S.—Gratz v. McKee, supra.

84. Ala.—Hood v. Murphy, 165 So. 219, 231 Ala. 408.
Ind.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E. 2d 396, 104 Ind.App. 540.
26 C.J. p 598 note 63.

Navigable stream
The public has no right to fish on a navigable river, the soil under which is privately owned, but such rights are exclusively in such owner. A statute, setting aside the submerged and swamp lands belonging to the state in Kalamazoo River and other waters for a public fishing and hunting ground, has no application, where the land between meander line and middle thread of stream is privately owned.—Sewers v. Hacklander, 188 N.W. 547, 219 Mich. 143.

Submerged land
Owner of fee in soil acquired before waters submerged it was entitled to exclusive fishing rights

sea, where the tide ebbs and flows.[85] In accordance with this rule, the owners of land on the banks of a nonnavigable stream ordinarily have the exclusive right of fishing opposite their respective lands to the middle of the stream, and, if the lands on both sides of the stream belong to the same person, he has the same exclusive right of fishing in the whole stream, as far as his lands extend along it.[86] Although there is a general right in the public to fish in public streams and waters, see infra § 6, this does not permit a trespass on the lands of another to fish,[87] and, although a person is entitled to fish in a river, that right does not entitle him to fish in waters which are on another's land because of overflows, or which are not a part of the natural channel of the river.[88]

Clearing out a fishing place, whether in navigable or nonnavigable waters, has been held not to give an exclusive right of fishing,[89] although there is authority to the contrary.[90]

An owner's exclusive right of fishery may be lost, or at least restricted, where another shows a right of fishery, in the waters on the owner's land, acquired in some way recognized by law.[91] Although an exclusive right of fishery may be regulated or restricted by the state, see infra § 26, it is not divested or extinguished by a legislative act condemning the land to the use of another for mill purposes, unless the words of the grant conferring the authority to construct the dam plainly indicate that such was the intention of the legislature;[92] nor does the owner lose his fishing rights by making the water navigable for his own purposes.[93]

The manner in which a riparian owner may exercise his exclusive right of fishery is subject to the right of the state to regulate and preserve the fish by statute for the good of the public in general, see infra § 26; and, even in the absence of statute, the right must be exercised in such a manner as not to injure other proprietors above or below on the same stream.[94] He has no right wantonly to injure or destroy the fish passing through water over his

thereon.—Fisher v. Barber, Tex.Civ. App., 21 S.W.2d 569.

85. Tex.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 443, 126 Tex. 129, citing **Corpus Juris**, and affirming, Civ.App., 58 S.W.2d 566.
26 C.J. p 598 note 65.

86. U.S.—Bowles v. Kinney, D.C. Wash., 292 F. 419.
Ala.—Hood v. Murphy, 165 So. 219, 220, 231 Ala. 408, citing **Corpus Juris.**
Ark.—Meriwether Sand & Gravel Co. v. State, 26 S.W.2d 57, 181 Ark. 216.
Ga.—Spivey v. Barwick, 122 S.E. 594, 157 Ga. 853.
Mo.—Reid v. Ross, 46 S.W.2d 567—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717.
Ohio.—East Bay Sporting Club v. Miller, 161 N.E. 12, 118 Ohio St. 360.
26 C.J. p 598 note 66.
Riparian rights as to nonnavigable waters generally see the C.J.S. title Waters §§ 5–12, also 67 C.J. p 682 note 1–p 696 note 35.

No easement
The waters of a concededly nonnavigable river were private, and title of its riparian proprietors extended to thread of river, and hence fisherman, who was drowned when boat capsized near old submerged dam which had been constructed by power company, did not enter on river under an easement enjoyed by the general public, as contended by fisherman's administratrix suing power company for his death.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 400, 104 Ind.App. 540, citing **Corpus Juris.**

Qualified property right
"Under the common law as it has existed, and still exists, in England, and generally as transmitted to the states of the Union, modified by statutory enactment and supplemented by usage, the owner of the soil would have a qualified, but substantial, property interest in the fish upon his own land, with the exclusive right to reduce it to possession superior to that of others, and subject only to regulation by the state as a sovereign and under its police powers."—Gratz v. McKee, C.C.A. Mo., 270 F. 713, 718, reversing, 1919, 258 F. 335, 169 C.C.A. 351, certiorari granted 41 S.Ct. 535, 256 U.S. 687, 65 L.Ed. 1172, and affirmed 43 S.Ct. 16, 260 U.S. 127, 67 L.Ed. 167.

Right on public domain
One is not warranted in entering on privately inclosed land for fishing because all have right to fish on public domain.—Herrin v. Sutherland, 241 P. 328, 74 Mont. 587, 42 A.L.R. 937.

87. Tex.—Heath v. Diversion Lake Club, Civ.App., 33 S.W.2d 479.

Trespass
(1) The state's right to control fishing does not affect an individual's right to maintain trespass against those invading his property for fishing purposes.—Giddings v. Rogalewski, 158 N.W. 951, 192 Mich. 319.
(2) Defendant, by wading up and down a nonnavigable creek running through plaintiff's land catching fish, committed trespass.—Herrin v. Sutherland, 241 P. 328, 331, 74 Mont. 587, 42 A.L.R. 937, citing **Corpus Juris.**
(3) Owner has right to recover damages from those who commit trespass by fishing on his land without his consent.—Herrin v. Sutherland, 241 P. 328, 74 Mont. 587, 42 A.L.R. 937.
Actions for wrongful interference with right of fishery see infra § 20.

88. Tex.—Heath v. Diversion Lake Club, Civ.App., 33 S.W.2d 479.
Utah.—Knudson v. Hull, 148 P. 1070, 46 Utah 114.

89. Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S., 396.
26 C.J. p 598 note 68.

90. Conn.—Munson v. Baldwin, 7 Conn. 168—Pitkin v. Olmstead, 1 Root 217.
26 C.J. p 598 note 69.

91. Ga.—Lee v. Mallard, 42 S.E. 372, 116 Ga. 18.
N.H.—Beach v. Morgan, 41 A. 349, 67 N.H. 529, 61 Am.S.R. 692.
26 C.J. p 599 note 79.

92. U.S.—Holyoke Co. v. Lyman, Mass., 15 Wall. 500, 21 L.Ed. 133.
Right to fish in inland lake as not subject to condemnation see Eminent Domain § 71.
Rights remaining in owner after condemnation of property generally see Eminent Domain § 450.

93. Fla.—Clement v. Watson, 58 So. 25, 63 Fla. 109, Ann.Cas.1914A 72.
26 C.J. p 599 note 85.

94. Wash.—Griffith v. Holman, 63 P. 239, 23 Wash. 347, 83 Am.S.R. 821, 54 L.R.A. 178.
26 C.J. p 599 note 87.

land;[95] nor has he the right by means of dams or other artificial obstructions to prevent the passage of fish up and down the stream;[96] and it is generally held that the right to obstruct the free passage of fish cannot be acquired by prescription.[97]

Although a stream above the ebb and flow of the tide is not navigable in a strict technical sense, yet if it is capable of being navigated by boats, rafts, or logs, the exclusive right of fishery of a riparian owner on its banks is subject to the use of the stream as a public highway for purposes of transportation and commercial intercourse.[98]

Small lakes and ponds. The persons owning land bordering on small lakes or ponds have the right to take fish therefrom subject only to the right of the state to regulate and preserve for the public.[99] The right of fishing in a small lake or pond inclosed by the owner's land and having no communication through which fish are accustomed to pass to other waters belongs exclusively to the owner thereof;[1] but it has been held otherwise as to lakes having outlets to other waters through which fish are accustomed to pass.[2] A person who owns land adjacent to a lake or pond which is owned by another is not entitled to take fish in such lake or pond.[3]

Where there are several riparian owners of an inland lake or pond, it has been held that each owner may use the surface of the whole lake or pond for fishing, so far as he does not interfere with the reasonable use of the waters by other riparian owners.[4] Where, however, a person, by specific grant from the state, owns the land under a definite and specific portion of the lake, he has a right to control that part of the surface of the lake above his land, including the right to fish thereon.[5]

§ 5. By Another than Owner of Soil

The right to fish in the waters of another may be acquired by grant or by prescription, but such a right cannot be gained by custom or by public use of the waters for fishing purposes.

The right to take fish in any water which is not navigable, although it belongs prima facie to the owner of the soil,[6] follows the ownership of the water if that is separated from the ownership of the soil.[7] The right of fishing in private waters, and other rights pertaining thereto, may be acquired by grant from the owner of the land over which the waters flow,[8] the extent of the rights conveyed being

95. Cal.—People v. Truckee Lumber Co., 48 P. 374, 116 Cal. 397, 58 Am. S.R. 183, 39 L.R.A. 581.
Ill.—Parker v. People, 111 Ill. 581, 53 Am.R. 643.
Vt.—State v. Haskell, 79 A. 852, 84 Vt. 429, 34 L.R.A.,N.S., 286.

96. Vt.—State v. Haskell, supra.
26 C.J. p 600 note 89.

97. Ill.—Parker v. People, 111 Ill. 581, 53 Am.R. 643.
26 C.J. p 600 note 91.

98. Ill.—Schulte v. Warren, 75 N. E. 783, 218 Ill. 108, 134 L.R.A.,N.S., 745.
26 C.J. p 600 note 93.

99. Ark.—Arkansas Game & Fish Commission v. Storthz, 29 S.W.2d 294, 181 Ark. 1089.

1. Ark.—Arkansas Game & Fish Commission v. Storthz, supra.
Okl.—Newman v. Ardmore Rod & Gun Club, 125 P.2d 191, 192, 190 Okl. 470, quoting **Corpus Juris.**
26 C.J. p 599 note 73.

Legislative power
The legislature is without power to confer on anyone a right to go on land of another to catch fish in lakes thereon, and a refusal to enjoin landowner's interfering with persons going on his land to fish is proper.—Smith v. Godart, Tex.Civ.App., 295 S.W. 211.

Trespass
(1) Fact that there may be in privately owned pond fish which are not private property and that state may control fishing therein does not justify trespass by one who enters pond without license from owner for purpose of fishing.—Winans v. Willetts, 163 N.W. 993, 197 Mich. 512.
(2) Where defendant accepted benefit of acts of persons accompanying him when he went on premises where plaintiff had a pond used to store fish, with knowledge that neither of the persons had authority to go on premises to take fish from pond, defendant was liable in trespass.—Smith v. Gvirtzman, Colo., 124 P.2d 926.

2. Okl.—Newman v. Ardmore Rod & Gun Club, 125 P.2d 191, 192, 190 Okl. 470, quoting **Corpus Juris.**
26 C.J. p 599 note 74.

3. Ohio.—Lembeck v. Nye, 24 N.E. 686, 47 Ohio St. 336, 21 Am.S.R. 828, 8 L.R.A. 578.
Pa.—Baylor v. Decker, 19 A. 351, 133 Pa. 168.

4. Mich.—Bauman v. Barendregt, 231 N.W. 70, 251 Mich. 67—Manney v. Prouse, 227 N.W. 685, 248 Mich. 655—Beach v. Hayner, 173 N.W. 487, 207 Mich. 93, 5 A.L.R. 1052.
mett, Civ.App., 88 S.W.2d 127, 130,
Tex.—Taylor Fishing Club v. Ham-
error dismissed, citing **Corpus Juris.**

The Corpus Juris text has been cited for the proposition that each of several riparian owners, his licensees, and members of the general public who can gain access thereto without committing a trespass in so doing may use the entire surface of the lake for fishing so far as he does not interfere with a similar reasonable use thereof by others, except such fishing as requires the use of the shore or bottom of the lake, the right to which is in the owner of the shore or bottom.—State Game and Fish Commission v. Louis Fritz Co., Miss., 193 So. 9, 11, 13.

5. Tex.—Taylor Fishing Club v. Hammett, Civ.App., 88 S.W.2d 127, error refused.

6. **Presumption**
In absence of some agreement to the contrary, the law presumes that the ownership of soil and the right to fish on waters over soil are vested in the same person.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 104 Ind.App. 540.

7. Ga.—Bosworth v. Nelson, 152 S. E. 575, 170 Ga. 279.

8. Ga.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.
26 C.J. p 600 note 95.

Failure of one grantee to join
Where a grantor signs and acknowledges a contract granting a fishing license to two grantees, and permits it to be recorded, although it contains the signature of only one of the grantees, the grant becomes effective in behalf of the one grantee.—Boyd v. Colgan, 268 P. 794, 126 Kan. 497.

Part payment
Where an owner of land grants the fishing privileges thereon for a term

determined by the application of the ordinary rules of construction to the language of the grant.[9] It has been held to be competent for a grantor to convey the fee of land and reserve to himself, his heirs, and assigns, fishing privileges in the waters covering the land conveyed,[10] and the right of profits à prendre thus reserved has been regarded as an estate or an interest in land which is inheritable when granted in fee.[11] The grant of fishing privileges to the grantee "his heirs and assigns" has also been held to be assignable,[12] although not to be divisible so as to subject the dominant tenement to a greater burden than originally contemplated.[13] A mere personal right to fish, however, can be neither assigned nor inherited.[14]

A grant or lease of land on the banks of a nonnavigable stream carries with it, as an incident, the right of fishing, unless such right is expressly reserved,[15] or unless the terms of the grant or the circumstances under which it is made are such as to indicate conclusively that the fishery is not intended to pass.[16] A grant of land under or around a nonnavigable pond or lake prima facie carries with it by implication the exclusive right of fishing in the waters of such pond or lake.[17] So, also, the grant of the water in a nonnavigable river or lake without the soil passes the right of fishing in such water.[18]

By custom. A right to take fish in another's fishery being a right of profit in lands as distinguished from an easement cannot be claimed by custom, for the reason that, if such a custom were allowed, it might and probably would result in the destruction of the subject matter to which it applies.[19]

By prescription. The right of fishing in nonnavigable waters over or on the soil of a private proprietor may be acquired by an uninterrupted and exclusive occupation and enjoyment, adverse to the owner of the soil, and continued for twenty years, or for the period of time, whatever it may be, limited by the statute of limitations for the right of entry on land.[20] There must, however, be an actual and exclusive occupation and enjoyment of the fishery, adverse to the riparian proprietor;[21] the annual

of years at an annual rental and accepts and retains a partial payment of the specified rental, he is not in a position to repudiate the contract on the ground that the first year's rent was not paid in full in advance, when the instrument itself was not fairly susceptible of such a requirement.—Boyd v. Colgan, supra.

9. Utah.—Haynes v. Hunt, 85 P.2d 861, 96 Utah 348.
Va.—Schultz v. Carter, 151 S.E. 130, 153 Va. 730.
26 C.J. p 600 note 96.

Permits to others
Grantee under contract granting fishing privileges had no authority to give permit to others to exercise privileges.—Boyd v. Colgan, 268 P. 794, 126 Kan. 497.

Termination
A written agreement between an owner of a slough, covered with water by building a dam, and a club granting to the club exclusive fishing rights in the waters of the slough, except those reserved to himself, terminable by either party, was terminated by the club's action in cutting the dam.—Thomas v. Fin & Feather Club, 171 S.W. 698, 106 Tex. 490, reversing Fin & Feather Club v. Thomas, Civ.App., 138 S.W. 150.

10. **Two grants**
Where owner conveyed part of land adjoining creek and thereafter conveyed additional land to same grantee reserving boating and fishing privileges to cover all property heretofore conveyed, reservation covered both conveyances.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.

Subsequent grantees
Contract by purchaser of land granting vendor right to hunt and fish, made part of conveyance, conveyed "interest in land" and waters binding on subsequent grantee of purchaser.—Jones v. Trulock, 158 S.E. 326, 172 Ga. 558.

11. Ga.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.

12. Pa.—Miller v. Lutheran Conference & Camp Ass'n, 200 A. 646, 331 Pa. 241, 130 A.L.R. 1245.

13. Pa.—Miller v. Lutheran Conference & Camp Ass'n, supra.

14. Va.—Schultz v. Carter, 151 S.E. 130, 153 Va. 730.
26 C.J. p 600 note 97.

Particular grant construed
In action by subsequent grantee to quiet his title to land, where a prior deed conveyed irrevocable fishing rights in two lakes within the boundaries of the land, right to use road to lakes, and camping privileges at lakes, evidence warranted finding that rights were personal to prior grantees and not inheritable, were acquired conjointly with subsequent grantee, which were not unreasonably to interfere with subsequent grantee's grazing and watering privileges.—Haynes v. Hunt, 85 P.2d 861, 96 Utah 348.

15. Ill.—Beckman v. Kreamer, 43 Ill. 447, 92 Am.D. 146.
26 C.J. p 600 note 98, p 601 note 99.

Mill privileges
The grant by the owner of the fee of mill privileges carries the right to the reasonable use of land and water necessary to the operation of a mill, but does not grant any fishing privileges.—Spivey v. Barwick, 122 S.E. 594, 157 Ga. 853—26 C.J. p 601 note 1 [a].

16. Ga.—Thompson v. Tennyson, 98 S.E. 353, 148 Ga. 701.
N.Y.—Canal Comrs. v. People, 5 Wend. 423.
26 C.J. p 601 note 1.

17. U.S.—Smith v. Miller, C.C.R.I., 22 F.Cas.No.13,080, 5 Mason 191.
Conn.—Turner v. Hebron, 22 A. 951, 61 Conn. 175, 14 L.R.A. 386.

18. Conn.—Turner v. Hebron, supra.
N.Y.—Jackson v. Halstead, 5 Cow. 216.

19. Ga.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.
Ind.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 400, 104 Ind.App. 540, citing **Corpus Juris.**
Mo.—Greisinger v. Klinhart, App., 282 S.W. 473, quashed on jurisdictional grounds State ex rel. Greisinger v. Cox, Sup., 292 S.W. 75.
26 C.J. p 601 notes 11, 12.

20. Ind.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 104 Ind.App. 540.
26 C.J. p 601 note 6.

21. U.S.—Lowndes v. Huntington, N.Y., 14 S.Ct. 758, 153 U.S. 1, 38 L.Ed. 615.
26 C.J. p 601 note 7.

License to fish
A person who has a license from the officers of a town to use a reservoir for fishing and sailing during his natural life cannot, by the use of this license, obtain an absolute right

temporary use of a fishing privilege is not sufficient.[22] A trespasser cannot acquire a prescriptive right of fishery.[23] Where the owner of a fishery does not himself work it for profit but suffers the public to fish in it without objection, a user by an individual, which is not distinguished from that of the public, will be considered permissive, and not adverse, unless there is evidence that it was under a claim of right in himself, and that the owner, knowing of such claim, acquiesced in it.[24]

By public. Since certainty of person as to the grantee is necessary to the validity of a grant, the general public cannot acquire a right of fishery by grant, or by prescription, which presupposes a grant;[25] nor can such right be acquired by dedication, see Dedication § 8; nor can a license to enter on land and take fish be implied from a custom or usage, in the country at large, since the public generally cannot accept a license.[26] It has also been held that the fact that the state stocks a private pond or stream with fish does not give the public any right to fish therein.[27]

B. IN PUBLIC WATERS

§ 6. In General

As a general rule, the public has a common right to fish in navigable waters.

As a general rule all the members of the public have a common and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters,[28]

by prescription to fish and boat.—Dunham v. City of New Britain, 11 A. 354, 55 Conn. 378.

22. N.J.—Cobb v. Davenport, 32 N.J. Law 369.
26 C.J. p 601 note 8.

23. Cal.—Heckman v. Swett, 33 P. 1099, 99 Cal. 303.

Occasional trespasses, although continued for many years, will not form a basis for a prescriptive right to fish.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 104 Ind.App. 540.

24. Ga.—Bosworth v. Nelson, 152 S.E. 575, 170 Ga. 279.

25. Ga.—Bosworth v. Nelson, supra.
Ind.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 400, 104 Ind.App. 540, citing **Corpus Juris.**
26 C.J. p 601 note 14.

26. N.J.—Albright v. Cortright, 45 A. 634, 64 N.J.Law 330, 81 Am.S.R. 504, 48 L.R.A. 616.
N.C.—Winder v. Blake, 49 N.C. 332.
26 C.J. p 602 note 16.

27. Ind.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E. 2d 396, 104 Ind.App. 540.
Mo.—Greisinger v. Klinhart, App., 282 S.W. 473, quashed on jurisdictional grounds State ex rel. Greisinger v. Cox, Sup., 292 S.W. 75.
26 C.J. p 602 note 17.

28. U.S.—Ne-Bo-Shone Ass'n v. Hogarth, D.C.Mich., 7 F.Supp. 885, affirmed, C.C.A., 81 F.2d 70—Canoe Pass Packing Co. v. U. S., Alaska, 270 F. 533.
Ark.—Anderson v. Reames, 161 S.W. 2d 957, 961, quoting **Corpus Juris.**
Fla.—State ex rel. Gray v. Stoutamire, 179 So. 730, 131 Fla. 698.
Ind.—Millspaugh v. Northern Indiana Public Service Co., 12 N.E.2d 396, 104 Ind.App. 540.
N.H.—Whitcher v. State, 181 A. 549, 87 N.H. 405.
Or.—Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 160 Or. 654—Johnson v. Hoy, 47 P.2d 252, 151 Or. 196—Driscoll v. Berg, 1 P.2d 611, 137 Or. 499.
Tex.—Heath v. Diversion Lake Club, Civ.App., 33 S.W.2d 479.
Wis.—Nekoosa Edwards Paper Co. v. Railroad Commission, 228 N.W. 144, 201 Wis. 40, rehearing denied 229 N.W. 631, 201 Wis. 40, affirmed 51 S.Ct. 352, 283 U.S. 787, 75 L.Ed. 1415.
26 C.J. p 602 note 19.
State ownership of soil under navigable waters as in trust for fishing see the C.J.S. title Navigable Waters § 92, also 45 C.J. p 539 note 68 [c] (3).
What are navigable waters see the C.J.S. title Navigable Waters §§ 1–9, also 45 C.J. p 404 note 1–p 419 note 18.

Fishing from boat

Defendant had right to row boat and fish in navigable stream flowing through plaintiff's land at low-water mark, if he did not trespass on plaintiff's property.—Herrin v. Sutherland, 241 P. 328, 74 Mont. 587, 42 A.L.R. 937.

Fish trap

One person is not entitled to maintain a fish trap in navigable waters which deprives others of the right to fish therein.—Radich v. Fredrickson, 10 P.2d 352, 139 Or. 378.

Riparian rights inapplicable

English common-law rule giving to riparian owners along navigable streams above tidewater the exclusive right to fish therein because of their ownership of stream beds is not applicable in determining right to fish in navigable streams in Texas, beds of which are owned by state for benefit of public.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 444, 126 Tex. 129, citing **Corpus Juris,** and affirming, Civ.App., 58 S.W.2d 566.

Statutory navigable streams in Texas are public, and their beds and waters are owned by state in trust for benefit of people and subject to use by public for fishing to same extent as streams navigable in fact.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 126 Tex. 129, affirming, Civ.App., 58 S.W.2d 566.

In Hawaii

(1) One acquiring title to portion of ahupuaa has right of piscary in sea adjoining, subject to rights of konohiki in fishery.—Damon v. Tsutsui, 31 Hawaii 678—Smith v. Laamea, 20 Hawaii 750.

(2) Fishing rights granted by 1846 statutes to tenants were granted also to those who might thereafter become tenants, and each succeeding tenant derived fishing rights from statute, not grantor or lessor.—Damon v. Tsutsui, supra.

(3) Explicit and implicit in the Hawaiian Organic Act §§ 95, 96, is the purpose of the congress of the United States to make all fisheries in the sea waters of the Territory, not included in any fish pond or artificial enclosure, free to all citizens of the United States. To that end it repealed all of the preëxisting laws of the Republic of Hawaii which conferred exclusive fishing rights and provided a method by which, in conjunction with the local statutes pertaining to eminent domain, private fishing rights, which in law constituted vested rights, might be segregated and acquired for the use of the citizens of the United States on making just compensation.—Bishop v.

except in so far as he has acquired such right by grant or prescription, as discussed in § 9, infra. This rule applies notwithstanding the title to the bed of such a stream is in the riparian owner,[29] and notwithstanding his ownership of the abutting upland carries with it the right of access to deep water.[30] In some jurisdictions the right of a riparian owner to fish in the river arises from his right to share in the common right of fishing reserved to the public, and not from his ownership of the soil;[31] but in some jurisdictions the owner of land adjacent to tidewater has a right of fishery therein, which is exclusive of the common right of fishery in all public waters.[32] It has been held that the right of fishing is incident to the right of navigation,[33] but it has also been held that the right to take fish from public waters exists because such waters are public and not as an incident to the right of navigation, which also exists because such waters are public.[34] The right of fishing on the high seas, without the territorial limits of any state, is a right common to all mankind, and cannot be granted or restricted by any particular nation.[35]

§ 7. In Great Ponds and Lakes

The right to fish in a navigable lake is a public right, and in some jurisdictions the public has the right to fish in great ponds.

It is generally held that, in the absence of a special legislative grant, the right of fishing in large fresh water lakes and ponds is a public right;[36] and under some statutes and colonial ordinances the right to take fish from a great pond of more than a specified area is a public right which every inhabitant who can obtain access to the pond without trespass may exercise so long as he does not interfere with the reasonable exercise by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority.[37] The right of fishing in such ponds, however, may be appropriated by the legislature or by local governments, such as towns, acting under its authority;[38] and under some statutes such a pond may be leased to private individuals for the purpose of fish culture, the lessees having the exclusive right of fishing therein.[39] An owner of land abutting on one of such lakes or ponds has no greater rights than others to fish in front of his land, except to the extent that he is given greater rights by statute,[40] or acquires them by grant or prescription, as hereinafter discussed in § 9.

The right of fishing in the "Great Lakes" and in their contiguous bays is a public right just as much as if those waters were subject to the ebb and flow of the tide; and the particular rights of fishing are not limited to the particular portions thereof which are navigable.[41]

§ 8. Extent of Right

The right of the public to fish in navigable waters must be exercised with due regard to the rights of others.

The right of fishing in navigable waters, being open to all the people in common, must be exercised by each person with due regard to the rights of the others, that is without interfering with the reasonable exercise of the same right by others,[42] and, hence, where a person acquires possession of a par-

Mahiko, 35 Hawaii 608—Damon v. Tsutsui, supra.

(4) Within meaning of Organic Act, fishing rights granted by 1846 statutes to tenants were exclusive, and fishing rights were not "vested" in case of persons who did not become tenants until after April 30, 1900.—Damon v. Tsutsui, supra.

(5) Organic Act repealing laws conferring exclusive fishing rights is not unconstitutional in so far as it affected persons becoming tenants after April 30, 1900.—Damon v. Tsutsui, supra.

(6) Other particulars of Hawaiian rule see 26 C.J. p 602 note 19 [a].

29. U.S.—Ne-Bo-Shone Ass'n v. Hogarth, D.C.Mich., 7 F.Supp. 885, affirmed, C.C.A., 81 F.2d 70.
26 C.J. p 603 note 21.

30. Alaska.—Hampton v. Columbia Canning Co., 3 Alaska 100.
26 C.J. p 603 note 22.

31. Me.—Small v. Wallace, 129 A. 444, 124 Me. 365.

32. N.J.—Ross v. Mayor and Council of Borough of Edgewater, 180 A. 866, 115 N.J.Law 477, affirmed 184 A. 810, 116 N.J.Law 447, certiorari denied 57 S.Ct. 37, 299 U.S. 543, 81 L.Ed. 400.

33. Wis.—Diana Shooting Club v. Husting, 145 N.W. 816, 156 Wis. 261, Ann.Cas.1915C 1148.

34. U.S.—Ne-Bo-Shone Ass'n v. Hogarth, D.C.Mich., 7 F.Supp. 885, affirmed, C.C.A., 81 F.2d 70.
Ill.—Schulte v. Warren, 75 N.E. 783, 218 Ill. 108, 13 L.R.A.,N.S., 745.

35. N.C.—Collins v. Benbury, 27 N.C. 118, 42 Am.D. 155.

36. Mich.—Putnam v. Kinney, 227 N.W. 741, 248 Mich. 410.
26 C.J. p 603 note 25.

37. N.H.—Whitcher v. State, 181 A. 549, 87 N.H. 405.
26 C.J. p 603 note 26.

38. Mass.—Fay v. Salem & Danvers Aqueduct Co., 111 Mass. 27—Paine v. Woods, 108 Mass. 160—West Roxbury v. Stoddard, 7 Allen 158.

39. Mass.—Commonwealth v. Vincent, 108 Mass. 441.
26 C.J. p 603 note 28.

40. Ark.—Anderson v. Reames, 161 S.W.2d 957, 961, quoting **Corpus Juris.**
26 C.J. p 604 notes 29, 30.

Obstruction
Public rights to free passage of migratory sea fish may not be destroyed or unduly diminished by dam on stream or at outlet of natural pond.—Whitcher v. State, 181 A. 549, 87 N.H. 405.

41. Ohio.—East Bay Sporting Club v. Miller, 161 N.E. 12, 118 Ohio St. 360.
26 C.J. p 604 notes 32–34.

42. Me.—Smith v. Wallace, 129 A. 444, 445, 124 Me. 365, citing **Corpus Juris.**
N.C.—Bell v. Smith, 87 S.E. 987, 171 N.C. 116.

ticular fishing place, he has a prior right to fish at that place so long as he maintains such possession,[43] and complies with statutory regulations.[44] A right of fishing in navigable waters does not include the right to erect huts on the shore for fishermen.[45] A riparian owner's right to dig a ditch to prevent flooding of his lands is not necessarily prevented because the fishing value of the lake might be diminished.[46] A common right of fishery in public waters is subject to legislative regulation or restriction by the states, see infra § 26, and to the rights which the Constitution of the United States provides shall be exercised by the general government.[47]

Artificial level. It has been held that if a riparian owner voluntarily and artificially raises the level of the waters of a navigable lake, river, or stream so as to flood his own land, the public right of fishery is correspondingly extended so long as the artificial condition exists.[48]

Rights of navigation. Both the common right of fishing in navigable waters and a private exclusive right of fishing in such waters acquired by grant or prescription are subordinate to the public right of navigation, and must be so used as not to prejudice that right where it is exercised with due care and skill;[49] but this rule does not permit the common right of fishery to be obstructed or interfered with by an unnecessary or unreasonable exercise of the right of navigation.[50]

Right to trap site. Under some statutes where a person acquires physical possession of a certain trap site or location in public waters, he will be protected from trespass by another; but in order to maintain a continuous right to such site the owner must maintain actual physical possession or occupancy by substantial improvements, and if his structures are destroyed or carried away by the elements he must again assert his dominion over the site by either an inclosure or the erection of such improvements as the nature of the situation, or the purpose for which it is to be used, requires. Where such possession is not acquired or maintained, he cannot claim an exclusive right to fish by a trap at a particular place, even though he has a permit from the war department to establish a fish trap in such waters, and even though he has a license from the territorial government to engage in the business of catching fish by means of a fish trap.[51]

Territorial extent. Fishing implies a reasonable use of the waters and shore line of navigable streams,[52] and as long as they do not go on the uplands of the riparian owner, the public may go on navigable streams to fish without committing a trespass;[53] but the right to fish in public water does not carry with it a right to cross or trespass on privately owned land in order to reach the water.[54] The public right of fishing in navigable waters extends to high-water mark,[55] even where the title of the adjoining riparian owner runs to low-water mark;[56] and within the territory below high-water mark the public right of fishery is paramount to the uses of the riparian owner,[57] except where the

43. Alaska.—Columbia Salmon Co. v. Berg, 5 Alaska 538—Hampton v. Columbia Canning Co., 3 Alaska 100.
Conn.—Stannard v. Hubbard, 34 Conn. 370.

44. Wash.—Vail v. McGuire, 96 P. 1042, 50 Wash. 187.

45. N.Y.—Spring v. Conklin, 159 N.Y.S. 1027, 173 App.Div. 719, affirmed 119 N.E. 1079, 223 N.Y. 697.
26 C.J. p 604 note 39.

46. Ark.—Beck v. State, 14 S.W.2d 1101, 179 Ark. 102.

47. U.S.—Shively v. Bowlby, Or., 14 S.Ct. 548, 152 U.S. 1, 38 L.Ed. 331.
26 C.J. p 604 note 41.

48. Tex.—Diversion Lake Club v. Heath, Civ.App., 58 S.W.2d 566, affirmed 86 S.W.2d 441, 126 Tex. 129.

Subsequent owner is bound by predecessor's acts.—Diversion Lake Club v. Heath, supra.

49. U.S.—The Armorica, D.C.N.C., 189 F. 503.
26 C.J. p 604 note 43.

50. Or.—Anderson v. Columbia Contract Co., 184 P. 240, 185 P. 231, 94 Or. 171, 7 A.L.R. 653.
26 C.J. p 604 note 44.

Ownership of soil

Whether or not the owner of fish nets had a statutory right to set them where they were, or whether as between himself and the owner of the shore he was a trespasser, is immaterial in an action for injuries negligently caused to such nets by a vessel.—Bishop v. Baldwin, 110 N.W. 139, 147 Mich. 22.

51. Alaska.—Columbia Salmon Co. v. Berg, 5 Alaska 538.
26 C.J. p 604 note 45.

52. Tex.—Diversion Lake Club v. Heath, Civ.App., 58 S.W.2d 566, affirmed 86 S.W.2d 441, 126 Tex. 129—Dincans v. Keeran, Civ.App., 192 S.W. 603.

53. Mich.—Collins v. Gerhardt, 211 N.W. 115, 237 Mich. 38.

54. Tex.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 126 Tex. 129, affirming, Civ.App., 58 S.W.2d 566.

55. R.I.—Allen v. Allen, 32 A. 166, 19 R.I. 114, 61 Am.S.R. 738, 30 L.R.A. 497.
26 C.J. p 605 note 50.

Banks of lake

Where a riparian owner on a statutory navigable stream creates an artificial diversion lake, flooding part of the riparian lands, the public, although having the right to fish in the diversion lake, has no right to use the banks of the lake for fishing.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 126 Tex. 129, affirming, Civ.App., 58 S.W.2d 566.

56. Del.—Bickel v. Polk, 5 Del. 325.
N.Y.—Brink v. Richtmyer, 14 Johns. 255.

In Montana, in view of the statute providing that the owner of land boardering on a navigable lake or stream takes to the low-water mark, waters above channel of navigable stream at low-water mark are public waters, in which public has right to fish, except as restrained by general law.—Herrin v. Sutherland, 241 P. 328, 74 Mont. 587, 42 A.L.R. 937.

57. R.I.—Allen v. Allen, 32 A. 166.

soil below such mark has been granted to such owner.[58]

Above high-water mark the public have no right to go for the purpose of fishing, and hence in the exercise of the right of fishing must not trespass on adjoining private lands above such mark.[59] The exclusive right of using that portion of the shore or beach above high-water mark, as a general rule, belongs to the riparian proprietor, but he cannot exercise any prerogative in the manner of catching fish which differs from that which may be legally asserted by every other citizen.[60]

§ 9. Private Rights

A private exclusive right to fish in a portion of public waters generally may be acquired by grant or by prescription.

A several or exclusive right of fishery in a portion of navigable or public waters may be acquired by ancient grant, or by or under the authority of a legislative enactment,[61] subject to rights of navigation, see supra § 8, except that such a grant cannot be given by the legislature if it infringes a special statutory or constitutional provision,[62] or if it interferes with the vested rights of particular individuals.[63] Such grants, however, are strictly construed, and an intention to part with any portion of such public right will not be presumed unless clear and special words are used to denote it,[64] but a grant or lease which is valid on its face is presumptively valid.[65] A grant or lease of fishing grounds in public waters, which is valid on its face, is not subject to collateral attack, but the validity of such a grant is subject to attack by a proceeding in equity, or in proceedings between persons claiming

19 R.I. 114, 61 Am.S.R. 738, 30 L.R.A. 497.
26 C.J. p 605 note 52.

58. N.Y.—Whittaker v. Burhans, 62 Barb. 237.
26 C.J. p 605 note 53.

59. Wis.—Nekoosa Edwards Paper Co. v. Railroad Commission, 228 N.W. 144, 201 Wis. 40, rehearing denied 229 N.W. 631, 201 Wis. 40, affirmed 51 S.Ct. 352, 283 U.S. 787, 75 L.Ed. 1415.
26 C.J. p 605 note 54.

Injunction

The trial court correctly enjoined defendants from trespassing on any of the land owned by plaintiff surrounding the waters of the lake, while permitting them to go on the lake from a public road which crossed the lake on a low bridge.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 126 Tex. 129, affirming, Civ.App., 58 S.W.2d 566.

Right to complain

Defendants having no rights in river frontage of island could not complain of plaintiffs' use of island, although plaintiffs had no fishery rights on island.—Smith v. P. J. McGowan & Sons, 284 P. 189, 131 Or. 522.

60. Or.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766, 70 Or. 1.
26 C.J. p 605 note 56.

61. Me.—State v. Leavitt, 72 A. 875, 105 Me. 76, 26 L.R.A.,N.S., 799.
26 C.J. p 605 note 60.

Town

Trustees of freeholders and commonalty of Southampton hold title to lands under waters of Mecox Bay and right to manage productions thereof.—People v. Miller, 257 N.Y.S. 300, 235 App.Div. 226, affirmed 184 N.E. 103, 260 N.Y. 585.

Franchise

An exclusive right to fish in certain waters manifestly is a franchise if it is a private, exclusive monopoly of a public right.—Slingerland v. International Contracting Co., 60 N.Y.S. 12, 43 App.Div. 215, affirmed 61 N.E. 995, 169 N.Y. 60, 56 L.R.A. 494.

In Hawaii

(1) At the time of the annexation of the Hawaiian Islands to the United States, no official records of the boundaries of private fishing rights were in existence. The original statutory grant of private rights of piscary in the sea waters adjoining the Islands by the ordinance of 1839 did not contemplate an ultimate official determination of their boundaries. The fisheries were apportioned, under the ordinance, accordingly as they existed by "ancient regulation." Under the statutes defining private fishing rights, the extent of the area subject to a statutory private fishing right depended on "ancient regulation." Proof of the incidents of ancient regulation, including the boundaries of private sea fisheries, depended on the facts.—Bishop v. Mahiko, 35 Hawaii 608.

(2) No judicial or administrative procedure existed prior to annexation for officially establishing the boundaries of private fisheries. The mahele division did not include descriptions of the lands included therein, each land being designated by name. It made no reference to fisheries. The commissioners to quiet titles were without jurisdiction to award fisheries, except as the same, in the exercise of their jurisdiction to settle titles to "lands," might incidentally come in question. Under the laws of Hawaii, awards of ahupuaas and ilis were made by name only, both by the commission to quiet land titles and the minister of the interior, and until their boundaries were established officially they afforded no means of identification of the fishery belonging thereto. The boundary commissioners were without jurisdiction to settle the boundaries of fisheries.—Bishop v. Mahiko, supra.

(3) At the time the Islands were annexed to the United States, it could not be said with any degree of assurance how many private fisheries existed in the Territory.—Bishop v. Mahiko, supra.

(4) Other particulars of Hawaii rule see 26 C.J. p 605 note 60 [c].

62. N.Y.—Slingerland v. International Contracting Co., 60 N.Y.S. 12, 43 App.Div. 215, affirmed 61 N.E. 995, 169 N.Y. 60, 56 L.R.A. 494.
26 C.J. p 606 note 62.

63. Mass.—Hathaway v. Thomas, 16 Gray 290.
N.Y.—Gould v. Hudson River R. Co., 6 N.Y. 522.

64. U.S.—U. S. v. Big Horn Land & Cattle Co., C.C.A.Colo., 17 F.2d 357.
26 C.J. p 606 note 64.

Grants not passing fishery

(1) Homestead location in Alaska.—Alaska General Fisheries v. Smith, 7 Alaska 635.

(2) Permit to riparian owner on statutory navigable stream to impound and divert water for irrigation.—Diversion Lake Club v. Heath, 86 S.W.2d 441, 126 Tex. 129, affirming, Civ.App., 58 S.W.2d 566.

(3) Statute authorizing appropriation of state's waters for purpose of game preserves and recreation and pleasure resorts, and permit authorizing such appropriation by riparian owner which had created lawful diversion lake by damming statutory navigable stream.—Diversion Lake Club v. Heath, supra.

(4) Other grants see 26 C.J. p 606 note 64 [a].

65. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann. Cas.1912B 65.

adversely under different grants.[66]

Fishing location. Under some statutes, a person may acquire a right to fish with certain appliances at a certain location, provided he establishes his location and appliances in the prescribed manner and secures a license therefor,[67] and the locator may claim the exclusive right of fishing with certain appliances at such location for the period of his license.[68] The rights thus secured are personal rights and are personal property.[69] A locator who has properly established a location may enjoin another licensee from infringing on his rights in violation of the statute;[70] but where a location is abandoned, the same territory may be located by another, regardless of its prior use,[71] and a location will be regarded as abandoned if the locator does not take the steps prescribed by statute for the continuation thereof.[72] If a location is invalid because of a prior location, it will not ripen into a valid location at the expiration of the prior license, nor by its abandonment.[73] Permits from the federal government having only to do with possible obstructions to navigation are immaterial in determining the right to a fishing location under a state statute;[74] and whether one locating a fishery in public waters has a federal permit is a matter wholly between the locator and the federal authorities, and the want of such permit does not authorize another person subsequently to appropriate the location.[75]

It has been held that the first person acquiring actual peaceable physical possession of a location of a fish trap on unoccupied public land of the United States in Alaska, not reserved from such location, placing substantial improvements thereon, continuing the same to completion with reasonable diligence, and maintaining it for a lawful purpose, acquires a right thereto.[76] All acts of giving notice of preparation become immaterial, as one cannot keep another from taking possession of an unoccupied site for a fish trap by putting up a notice or anchoring a buoy.[77] Some statutes prohibit the

66. R.I.—Payne v. Providence Gas Co., supra.

67. Wash.—Muller v. Apex Fish Co., 106 P. 625, 57 Wash. 140.
26 C.J. p 634 note 89.
Fishing licenses generally see infra § 36.

Extent of right
Location of mooring dolphins over three hundred feet from fish trap lead line in waters long used by licensed purse seiners was unreasonable.—Vitalich v. Pacific American Fisheries, 284 P. 805, 155 Wash. 411.

Person first complying with statute has the prior right to the location.—Davis v. Olsen, 222 P. 891, 128 Wash. 393.

68. Or.—Williams v. Seufert Bros. Co., 188 P. 165, 189 P. 636, 96 Or. 163.
26 C.J. p 634 note 90.

69. Wash.—Irwin v. J. K. Lumber Co., 205 P. 424, 119 Wash. 158.

70. Alaska.—Alaska General Fisheries v. Smith, 7 Alaska 635.
Wash.—Carlisle Packing Co. v. Pacific American Fisheries, 295 P. 155, 160 Wash. 353.
26 C.J. p 634 note 92.
Injunction to protect fishing rights generally see infra § 24.

71. Or.—Williams v. Seufert Bros. Co., 188 P. 165, 189 P. 636, 96 Or. 163.
Wash.—White Crest Canning Co. v. Sims, 70 P. 1003, 30 Wash. 374.

72. Or.—Williams v. Seufert Bros. Co., 188 P. 165, 189 P. 636, 96 Or. 163.
Wash.—Legoe v. Chicago Fishing Co., 64 P. 141, 24 Wash. 175.
26 C.J. p 635 note 94.

Application for extension of fishing location, after having abandoned location beyond certain point, was application for new location.—Carlisle Packing Co. v. Pacific American Fisheries, 295 P. 155, 160 Wash. 353.

Failure to construct appliances
(1) Failure to construct fishing appliances within the time prescribed by statute constitutes an abandonment of the location.—Sherman v. Pacific American Fisheries, 18 P.2d 486, 171 Wash. 560—26 C.J. p 635 note 94 [a] (1).

(2) Failure to construct fishing appliance beyond certain point for statutory period constituted "abandonment" of location beyond that point, since to maintain continuous right to fishing location, licensee must maintain actual and physical possession thereof.—Carlisle Packing Co. v. Pacific American Fisheries, 295 P. 155, 160 Wash. 353.

(3) Where there is a controversy as to whether the location is in Washington or in Oregon, as long as applicant keeps her tender and application seasonably standing, the enforced failure to build a trap within the time prescribed by law will not be deemed an abandonment thereof.—Gile v. Hoy, 289 P. 1061, 133 Or. 699.

(4) Under a statute providing that, if the locator or owner neglects to construct his appliances for two consecutive fishing seasons covered by this license, such location shall be deemed abandoned, the term "fishing season" is identical and coextensive with the license year.—Olsen v. Davis, 258 P. 838, 145 Wash. 1.

(5) Accordingly, one securing fishing license in July, renewing same next April, and constructing trap in August has not abandoned location.—Olsen v. Davis, supra.

(6) Other cases relating to failure to construct appliances see 26 C. J. p 635 note 94 [a].

Filing of new map by fisheries company, claiming different location for fish trap from original map, was not as matter of law abandonment of original filing, so as to postpone forfeiture under four-year period of nonuser, where company at all times intended to retain original location.—Sherman v. Pacific American Fisheries, 18 P.2d 486, 171 Wash. 560.

73. Wash.—Womer v. O'Brien, 79 P. 474, 37 Wash. 9—White Crest Canning Co. v. Sims, 70 P. 1003, 30 Wash. 374.

74. Wash.—Davis v. Olsen, 222 P. 891, 128 Wash. 393.

75. Wash.—Muller v. Apex Fish Co., 106 P. 625, 57 Wash. 140.

76. Alaska.—Alitak Packing Co. v. Alaska Packers' Ass'n, 6 Alaska 277.

Defendant, abandoning work on fish trap under order closing area to fishing, was restrained from constructing trap within prohibited distance from plaintiff's trap when area was released.—Alaska General Fisheries v. Smith, 7 Alaska 635.

77. Alaska.—Alitak Packing Co. v. Alaska Packers' Assn., 6 Alaska 277.

location of fish traps within a certain distance of another lawfully located trap, or within a certain distance of the mouth of any river,[78] and the location of a fish trap within the prohibited distance may be enjoined by the holder of the prior trap site,[79] provided he can show that it works material injury to himself.[80]

An applicant for a license to set a fish trap in the public waters of the state is not asserting a property right; he is seeking a privilege and must be content with the means employed by the state in bestowing this privilege.[81]

Where a fish trap or other stationary gear is so placed in navigable waters as to interfere with the exercise of the common right of fishery, it is unlawful and may be restrained, as shown infra § 24, and any license issued purporting to authorize the construction or maintenance of such fixed gear is a nullity.[82]

Assignment of grant. An exclusive right to take fish in navigable waters, acquired by grant from the state, may be assigned,[83] unless the terms of the grant are such as to preclude an assignment;[84] but where a right of fishery resides in common in the inhabitants of a place, a release or assignment by one of them does not convey any right nor extinguish any interest in him.[85]

Effect of Magna Charta. According to some authorities, the crown or sovereign has no power since the Magna Charta to grant a several or exclusive right of fishery in navigable tidal waters,[86] but that act did not affect several rights of fishery which had already been enjoyed for some time prior thereto,[87] and consequently, according to these authorities, if a private exclusive right of fishery in tidal waters is claimed by a grant from the crown, it must have had its origin not later than the reign of Henry II.[88] By other authorities, however, it is held that Magna Charta had no effect and in no way restricted the power of the crown to grant such a several right of fishery.[89]

Since Magna Charta the power to grant exclusive rights of fishery in navigable waters in England and Canada resides in parliament,[90] and in the United States in congress in regard to land under water within a territory,[91] or, if within a state, in the state legislature.[92] The colonies prior to the revolution exercised such a right by the governor and colonial assemblies.[93]

By prescription. A prescriptive right of several fishery in navigable or public waters may be acquired by the long, exclusive, and uninterrupted enjoyment of such right;[94] but as this right is based on the supposition that a previous grant has been made, every presumption is against it and it must be clearly proved.[95] It cannot be presumed where a prior grant could not have been made;[96] nor can it be presumed from the mere uninterrupted use,

78. Location of mouth

(1) Under a statute prohibiting fish traps within five hundred yards of the mouth of any river in Alaska, and providing that for the purposes of the statute the mouth of the river shall be taken to be the point determined as such mouth by the Secretary of Commerce, the boundaries of the prohibited area cannot be determined until the Secretary of Commerce has determined the mouth of the river.—Booth Fisheries Co. v. U. S., C.C.A.Alaska, 6 F.2d 500.

(2) Act June 6, 1924 § 3, providing that mouth of creek shall be taken to be point determined by Secretary of Commerce, applies to § 4, prohibiting taking of salmon except by certain means within five hundred yards of mouths of creeks, in Alaska.—Booth Fisheries Co. v. U. S., supra.

79. Alaska.—Harris & Co. v. Thlinkèt Packing Co., 5 Alaska 493.

80. Alaska.—Alitak Packing Co. v. Alaska Packers' Ass'n, 6 Alaska 277.

81. Determination of priority

Harbor commission's decision on priority of applicants for license to set fish traps, following hearing of both parties with access to records, was not subject to attack for want of formal hearing where the statute made no provision therefor.—Coggeshall v. Harbor Commission, 146 A. 482, 50 R.I. 175.

82. Or.—Johnson v. Hoy, 47 P.2d 252, 151 Or. 196.

83. Mass.—Watertown v. White, 13 Mass. 477.
R.I.—State v. Sutton, 2 R.I. 434.
Assignment of grants generally see Assignments § 10.

84. Conn.—Munson v. Baldwin, 7 Conn. 168.

85. N.Y.—Jacobson v. Fountain, 2 Johns. 170.

86. N.J.—Arnold v. Mundy, 6 N.J. Law 1, 10 Am.D. 356.
26 C.J. p 606 note 71.

87. N.J.—Arnold v. Mundy, supra.

88. N.J.—Wooley v. Campbell, 37 N.J.Law 163.
Pa.—Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am.D. 597.
26 C.J. p 607 note 74.

89. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann.Cas. 1912B 65.
26 C.J. p 607 note 75.

90. Va.—Commonwealth v. City of Newport News, 164 S.E. 689, 698, 158 Va. 521, citing **Corpus Juris.**
26 C.J. p 607 note 76.

91. U.S.—Shively v. Bowlby, Or., 14 S.Ct. 548, 152 U.S. 1, 38 L.Ed. 331.
Alaska.—Columbia Salmon Co. v. Berg, 5 Alaska 538—Hampton v. Columbia Canning Co., 3 Alaska 100.

92. U.S.—McCready v. Commonwealth of Virginia, Va., 94 U.S. 391, 24 L.Ed. 248.
Va.—Commonwealth v. City of Newport News, 164 S.E. 689, 698, 158 Va. 521, citing **Corpus Juris.**

93. N.Y.—Brookhaven v. Strong, 60 N.Y. 56, affirming 1 Thomps. & C. 415.

94. Conn.—Turner v. Hebron, 22 A. 951, 61 Conn. 175, 14 L.R.A. 386.
26 C.J. p 607 note 83.

95. S.C.—Jackson v. Lewis, 25 S.C.L. 259.
26 C.J. p 607 note 84.

96. N.Y.—Slingerland v. International Contracting Co., 61 N.E. 995, 169 N.Y. 60, 56 L.R.A. 494, affirming 60 N.Y.S. 12, 43 App.Div. 215.
26 C.J. p 607 note 85.

and enjoyment of such right in common with others; but it must appear that all others have been kept out by claimant and his grantors from fishing in the particular place in any manner.[97]

§ 10. Rights as to Oysters, Clams, and Other Shellfish

Except in so far as an exclusive right has been obtained, the right to take shellfish from lands or flats under public waters is in the public.

As a general rule the right of taking oysters, clams, and other shellfish from land or flats under public waters, below highwater mark, is in the public, except in so far as an exclusive right to a portion of such fisheries is acquired by an individual by a grant or lease from the state,[98] or by lease from the local government,[99] or an exclusive privilege is acquired by prescription.[1] It has been held, however, that an exclusive right to take oysters, etc., cannot be acquired by user alone,[2] especially by a nonresident, and that such a right, although properly acquired, cannot be retained by a former resident after he has removed from the state.[3] The possession and use of such exclusive right and a successful maintenance of the right when disputed or resisted, if not sufficient to give title by prescription, may give claimant the benefit of every legitimate presumption to supply any defects in his title.[4]

A statute declaring that the ownership of all fish is in the state is only in aid of the state's power of regulation, and leaves the interest of a landowner in mussels in a stream on the land as it was before.[5] A constitutional provision that the natural oyster beds, rocks, and shoals in the waters of the state shall not be leased, rented, or sold, but shall be held in trust for the benefit of the people of the state, subject to such regulations and restrictions as the general assembly may prescribe, does not limit the public use to which the legislature may put the natural beds to the propagation and taking of shellfish, and the legislature may authorize a proper public use of the tidal waters over such beds, even though such use renders the waters unfit for the taking of shellfish.[6]

Private lands. Clams grown on beds in private ownership are the property of the owner.[7]

§ 11. —— Right to Plant and Cultivate Oysters in General

Shellfish which are planted at a place where they do not naturally grow and the location of which is properly marked are the subjects of private ownership.

Oysters and clams, which are planted at places where they do not naturally grow, and where no oysters or clams are growing at the time, and the location of which is marked by posts or otherwise, are the subjects of private ownership, and are the property of the person who plants them, and the right of the owner of the bed is not restricted to the identical oysters planted, but extends to and embraces the offspring of parent oysters so planted, which remain within the bed,[8] and other persons cannot impair the planter's title to the oysters which he has planted, by depositing other oysters in the same place;[9] nor can his possession be questioned by a mere wrongdoer;[10] and the interfering with or taking of them by another person is a trespass for which an action will lie, see infra § 21. Such a planting of oysters is a legitimate exercise of the common right of fishery, and is not inconsistent with its reasonable enjoyment by others.[11]

97. Or.—Hume v. Rogue River Packing Co., 83 P. 391, 92 P. 1065, 96 P. 865, 51 Or. 237, 131 Am.S.R. 732, 31 L.R.A.,N.S., 396.
26 C.J. p 608 note 86.

98. R.I.—Allen v. Allen, 32 A. 166, 19 R.I. 114, 61 Am.S.R. 738, 30 L.R.A. 497.
26 C.J. p 608 notes 88, 89.

99. N.Y.—Hand v. Newton, 92 N.Y. 88.
26 C.J. p 608 note 90.

1. Conn.—Clinton v. Bacon, 16 A. 548, 56 Conn. 508.
26 C.J. p 608 note 91.

Without enclosure
The spreading of nets and the erection of signs on a sand flat without ownership, and without enclosure, were not effective to destroy the public right to take shellfish on the shore and flats below high-water mark and within one hundred rods of the upland.—Howes v. Town of Barnstable, 189 N.E. 34, 285 Mass. 361.

2. N.J.—Arnold v. Mundy, 6 N.J. Law 1, 10 Am.D. 356.
N.Y.—People v. Lowndes, 8 N.Y.S. 908, 55 Hun 469, reversed on other grounds 29 N.E. 751, 130 N.Y. 455.

3. U.S.—Huntington v. Lowndes, C. C.N.Y., 40 F. 625, affirmed 14 S.Ct. 758, 153 U.S. 1, 38 L.Ed. 615.

4. N.Y.—Brookhaven v. Strong, 60 N.Y. 56, affirming 1 Thomps. & C. 415—Smithtown v. St. James Oyster Co., 140 N.Y.S. 98, 80 Misc. 173.

5. U.S.—McKee v. Gratz, Mo., 43 S. Ct. 16, 260 U.S. 127, 67 L.Ed. 167, affirming, C.C.A.1921, Gratz v. McKee, 270 F. 713.

6. Va.—Commonwealth v. City of Newport News, 164 S.E. 689, 158 Va. 521.

7. Wash.—Wiegardt v. Brennan, 73 P.2d 1330, 192 Wash. 529.

8. N.Y.—People v. Morrison, 86 N.E. 1120, 194 N.Y. 175, 128 Am.S.R. 552, reversing 108 N.Y.S. 262, 124 App.Div. 10.
26 C.J. p 609 note 97.

Clams
One may acquire at least a qualified if not an absolute property in "clams."—Robins Island Clam Co. v. Gaffga, 8 N.Y.S.2d 969, 170 Misc. 362.

9. N.Y.—Decker v. Fisher, 4 Barb. 592.

10. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann. Cas.1912B 65.

11. N.Y.—Post v. Kreischer, 8 N.E. 365, 103 N.Y. 110, 18 Abb.N.Cas. 192, reversing 32 Hun 49, 14 Abb. N.Cas. 38.

Further, where a person violates a statute, or commits a trepass, in planting his oysters, he may be compelled to remove them, but he does not forfeit his property in them.[12] If a bed thus planted interferes with the exercise of the common right of fishing or of navigation, the interest of the owner in them will be subservient to the enjoyment of the public use,[13] but even in such a case a private person has no right to take them away and convert them to his own use.[14] Where, however, a person plants oysters on natural oyster lands, and thus mingles them with the oysters growing naturally, he is conclusively held to have abandoned them to the public, and has no property right therein, unless such right is conferred by statute.[15]

Forfeiture of right. The rights acquired by planting oysters may be forfeited by permitting the oyster bed to remain without stakes or marks of ownership for a long period of time after the original stakes have been carried away.[16] The shifting of a bed of clams, caused by an act of God, such as a hurricane, does not divest the owner thereof, who planted them, of his right thereto.[17]

§ 12. —— By Statute

a. In general
b. Nature and extent of privilege
c. Forfeiture of right

a. In General

The location or leasing of lands under public waters for the purpose of planting and taking shellfish is generally regulated by statute.

In most jurisdictions the right of planting and taking oysters, clams, etc., is now regulated by general or local statutes;[18] and these statutes have generally been held to be constitutional.[19] Limitations and conditions on private enjoyment of the right to take oysters need not be expressed as reservations of title similar to those which might be used by private grantors of property conveyed, but may result merely from legislation touching the subject.[20] While the various statutes differ in regard to particular provisions therein, it is usually provided that an individual may locate or have allotted or leased to him by the proper authorities a limited area of public flats or lands not already planted, and in which oysters or clams do not naturally exist, in which he will have the exclusive right of planting and taking oysters, clams, etc., for a limited time,[21] on his making a proper application therefor,[22] and complying with all other statutory requirements,[23] such as giving the statutory notice of his intention to locate or lease an oyster bed,[24] designating such bed by proper stakes and lines, or having it designated by the proper officials, so as to distinguish it from other parts of the water in which other individuals or the public generally has the right of fishery,[25] recording a written description thereof in the proper office,[26] actually using and occupying it in good faith for the cultivation of oysters,[27] and paying an annual rental.[28]

12. N.Y.—Vroom v. Tilly, 91 N.Y.S. 51, 99 App.Div. 516, affirmed 77 N.E. 24, 184 N.Y. 168.
26 C.J. p 609 note 3.

13. N.J.—Brown v. De Groff, 14 A. 219, 50 N.J.Law 409, 7 Am.S.R. 794.
26 C.J. p 609 note 4.

14. N.J.—Grace v. Willets, 14 A. 559, 50 N.J.Law 414.
26 C.J. p 609 note 5.

15. U.S.—Hurley v. Commission of Fisheries of Virginia, D.C.Va., 264 F. 116, affirmed 42 S.Ct. 83, 257 U.S. 223, 66 L.Ed. 206.

16. N.Y.—Brinckerhoff v. Starkins, 11 Barb. 248.

17. N.Y.—Robins Island Clam Co. v. Gaffga, 8 N.Y.S.2d 969, 170 Misc. 362.

18. Md.—Adams v. Carey, 190 A. 815, 172 Md. 173.
26 C.J. p 609 note 8.

Individual has no property rights in oysters other than such as state permits, and, after they are reduced to possession, individual's ownership may be regulated and restrained by state.—Leonard v. Earle, 141 A. 714, 155 Md. 252, affirmed 49 S.Ct. 372, 279 U.S. 392, 73 L.Ed. 754.

19. Ala.—Skrmetta v. Alabama Oyster Commission, 168 So. 168, 232 Ala. 371.
Tex.—Filipos v. Chouke, 40 S.W.2d 38, 120 Tex. 508, affirming Chouke v. Filipos, Civ.App., 10 S.W.2d 807.
26 C.J. p 609 note 9.

20. Md.—Leonard v. Earle, 141 A. 714, 155 Md. 252, affirmed 49 S.Ct. 372, 279 U.S. 392, 73 L.Ed. 754.

21. Md.—Adams v. Carey, 190 A. 815, 172 Md. 173.
26 C.J. p 610 note 10.

Lease by individual
Lease of oyster lands by private individual, not holding under lease from state, is void.—Havard v. State, 124 So. 912, 23 Ala.App. 228, certiorari denied 124 So. 915, 220 Ala. 359, and followed in Lyons v. State, 124 So. 915, second case, 23 Ala.App. 231, certiorari denied 124 So. 915, third case, 220 Ala. 360.

22. Va.—Sinclair v. Quackenbush, 43 S.E. 354, 101 Va. 245.
26 C.J. p 610 note 11.

23. N.Y.—Sutter v. Van Derveer, 47 Hun 366, affirmed 25 N.E. 907, 122 N.Y. 652.
Tex.—Jones v. Johnson, 25 S.W. 650, 6 Tex.Civ.App. 262.
Va.—West v. Adams, 27 S.E. 496.
26 C.J. p 610 note 12.

24. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann. Cas.1912B 65.
26 C.J. p 610 note 13.

25. Conn.—Keister's Appeal, 92 A. 744, 89 Conn. 7.
26 C.J. p 611 note 14.

26. Md.—Phipps v. State, 22 Md. 380, 85 Am.D. 654.

27. N.J.—Birdsall v. Rose, 46 N.J. Law 361.
N.Y.—Vroom v. Tilly, 77 N.E. 24, 184 N.Y. 168, affirming 91 N.Y.S. 51, 99 App.Div. 516, and reargument denied 77 N.E. 1017, 185 N.Y. 553.

28. **Sale of lease for rentals**
(1) Under some statutes, on failure of a lessee to pay rent punctually, the shellfish commissioners are required to enter on the leased land and terminate the lease. They may in the name of the state institute legal proceedings for the collection of rents, take possession of, and sell

Some statutes apply only to certain specified waters or to a particular class of persons.[29] Provision is also made, in some statutes, for the settlement of questions and disputes in regard to the ownership, title, extent, or location of shellfishery grounds, by the shellfish commissioners.[30]

In some of the statutes there is an express prohibition against including a natural oyster or clam bed in the bed or grounds located or assigned,[31] and provision is also made for the determination or establishment of certain areas as natural or public oyster beds,[32] and for excluding barren grounds from such beds.[33] Some statutes prohibit all persons from taking oysters and clams from certain public beds, except for family use, without a license from the proper local authorities.[34]

Unoccupied ground is open to location, under some statutes, to him who first applies for it in the manner prescribed by statute,[35] and objection to an application cannot be made by any private citizen, except one who has been granted or has already planted the territory applied for;[36] nor can one claiming as owner set up, in resistance to the granting of a lease to another, the contention that the territory in question is not, because of its being his private property, a proper subject matter of a lease.[37] The mere fact that other parties had previously rented the ground gives them no superiority or right thereto over other applicants who have complied with the statute;[38] nor is unoccupied ground bound to be allotted before ground that had been previously occupied.[39] Applicant cannot be prejudiced by a delay, in securing action on his petition, which is due to no fault on his part.[40] One who fraudulently obtains a conveyance of land, including an oyster bed, is in no position to oust another who has been continuously in possession and use of such land as oyster land for a number of years, under a statute.[41]

Nonresidents. Some statutes expressly restrict the right to citizens of the state, and exclude a nonresident from planting or taking oysters or other shellfish from waters within the limits of the state,[42] even though he is either the sole or the part owner of land within a state having such a statute.[43] This does not preclude an agreement between a nonresident and a citizen by which the nonresident acquires and holds a derivative benefit and emolument from an oyster fishery;[44] nor does it preclude a nonresident from taking oysters as a bona fide servant of one having the right to take such oysters.[45] An expression of a preference by a nonresident as to who shall lease the shellfish rights adjoining his property, even though such expression be accompanied by some active participation by the landowner in securing the lease for his preference,

at public auction, any lot leased and the oysters thereon, and receive the proceeds of such sale, and retain therefrom all sums due as rental and costs, and pay the surplus over to the lessee. The authority to sue in the name of the state is permissive, but not exclusive, and the state is not restricted to this one action by the commissioners.—Gladding v. Atchison, 115 A. 423, 44 R.I. 69.

(2) One suing shellfish commissioners, individually, to recover surplus proceeds from sale of oyster leases may properly proceed in assumpsit, and the duty of the commissioners, where a surplus of proceeds remains after sale of an oyster lease, is to pay over such surplus to the lessee, and they are individually liable to the lessee therefor, even if they have paid it over to the state treasurer.—Gladding v. Atchison, supra.

29. Md.—Powell v. Wilson, 37 A. 216, 85 Md. 347.
26 C.J. p 611 note 17.

30. Conn.—Keister's Appeal, 92 A. 744, 89 Conn. 7.
Md.—Travers v. Dean, 56 A. 388, 98 Md. 72.
R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann.Cas.1912B 65.
26 C.J. p 611 note 18.

31. N.C.—State v. Willis, 10 S.E. 764, 104 N.C. 764.
26 C.J. p 611 note 19.

Oysters planted by mistake

A statute, providing that when, by any resurvey of natural oyster beds, it shall appear that any holder, without his own default and by mistake of any officer of the state, has had assigned to him any portion of the natural oyster beds, shall be allowed two years within which to remove his oysters, is valid.
U.S.—Gloucester Seafood Workers' Ass'n v. Houston, D.C.Va., 35 F.2d 193.
Va.—Blake v. Marshall, 148 S.E. 789, 152 Va. 616.

32. N.Y.—Suffolk County v. Edwards, 148 N.Y.S. 305, 86 Misc. 283.
26 C.J. p 611 note 20.

33. Md.—Cox v. Bennett, 91 A. 141, 123 Md. 356.
26 C.J. p 612 note 21.

34. Mass.—Commonwealth v. Hilton, 54 N.E. 362, 174 Mass. 29, 45 L.R.A. 475.
Tex.—Gustafson v. State, 45 S.W. 717, 48 S.W. 518, 40 Tex.Cr. 67, 43 L.R.A. 615.
26 C.J. p 612 note 22.

35. Va.—Hundley v. Neale, 64 S.E. 947, 109 Va. 612.
26 C.J. p 613 note 45.

36. Ga.—Parsons v. Prey, 42 S.E. 234, 115 Ga. 955.
N.C.—Jones v. Riggs, 70 S.E. 465, 154 N.C. 281.
26 C.J. p 613 note 46.

37. Ga.—Parsons v. Prey, 42 S.E. 234, 115 Ga. 955.

38. Mass.—Keene v. Gifford, 32 N.E. 946, 158 Mass. 120.
26 C.J. p 613 note 48.

39. Va.—Hurst v. Dulany, 5 S.E. 802, 84 Va. 701.

40. Va.—Hundley v. Neale, 64 S.E. 947, 109 Va. 612.

41. Wash.—Scott v. Olympia Oyster Co., 115 P. 737, 63 Wash. 364.

42. Md.—Parks v. Benning, 188 A. 787, 171 Md. 326.
26 C.J. p 613 note 37.

43. Md.—Hess v. Muir, 5 A. 540, 6 A. 673, 65 Md. 586.

44. U.S.—Corfield v. Coryell, Pa., 6 F.Cas.No.3,230, 4 Wash.C.C. 371.
R.I.—New England Oyster Co. v. McGarvey, 12 R.I. 385.

45. N.C.—State v. Conner, 11 S.E. 992, 107 N.C. 931.

is not in conflict with a law preserving the right to lease to residents of the state.[46]

Proceedings before, and action of, officials. It has been held that the proceedings on an application for a lease of fishing grounds are analogous to proceedings on a writ of ad quod damnum; and that no notice need be given of the time and place of hearing on the question as to whom lands shall be leased as fishing grounds;[47] nor is it necessary that the members of a committee appointed to stake out the grounds should be notified to meet, or should meet together, before acting; and action may be taken by a majority of qualified members of the committee.[48] Under some statutes, a person whose right of property is to be affected by a decision of the commission of fisheries is entitled to a legal hearing,[49] and applicant who is not given notice of the hearing at which the commission nullifies the assignment of an oyster planting ground to him is denied a legal hearing.[50] Under a statute providing, in effect, that littoral proprietors are, on applying for locations on the foreshores adjacent to their uplands, to have preferential consideration, there is no grant to any such owner of a license or a right to a license.[51] Under some statutes an allotment or lease of such grounds to one of two or more applicants is discretionary with the shellfish commissioners, or other officials who have authority in the matter, and no appeal lies from their decision.[52] Under other statutes, if under the circumstances, applicant has a right to the land, the proper official has no discretion in the matter,[53] and it has been held that the acts of the official in assigning oyster ground are ministerial, although he is required to determine the existence of facts, which make it necessary for him to act.[54] Under some statutes the board has no jurisdiction to hear and determine an objection to a lease based on title to the bottoms affected.[55]

b. Nature and Extent of Privilege

The extent of rights conveyed by the location of a shellfish bed depend on the statute under which such location is made. Ordinarily, all that is granted is the exclusive privilege or license to plant and take shellfish therefrom.

The extent and limits of the rights conveyed by the location or designation of an oyster bed, and other shellfish beds, necessarily depend on the legislative will and intent as manifested by the act authorizing it.[56] Such grants, being in derogation of the common or public right, are to be strictly construed against the grantee, and nothing passes except what is granted specifically or by necessary implication.[57] The privilege must be extended in such a way as not to prevent other persons from enjoying similar rights,[58] and is subject to the state's right of control and regulation,[59] as well as to other public rights,[60] such as the public's right of navigation and of fishery,[61] and if it interferes therewith, the oysters or clams, etc., may be removed as a nuisance.[62] Generally, under the statutes, a person locating an oyster or clam bed has

46. Md.—Parks v. Benning, 188 A. 787, 171 Md. 326.

47. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann. Cas.1912B 65.

Ad quod damnum see 2 C.J.S. p 460 note 4.

48. Conn.—Gallup v. Tracy, 25 Conn. 10.

26 C.J. p 614 note 55.

49. Va.—Hutson v. Commission of Fisheries, 169 S.E. 736, 160 Va. 592.

50. Va.—Hutson v. Commission of Fisheries, supra.

51. Me.—Rogers v. Brown, 190 A. 632, 135 Me. 117.

52. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann. Cas.1912B 65.

53. Wash.—In re Anderson, 163 P. 767, 95 Wash. 330.

26 C.J. p 614 note 58.

54. Va.—Commission of Fisheries v. Hampton Roads Oyster Packers & Planters' Ass'n, 64 S.E. 1041, 109 Va. 565.

55. **Proper procedure,** under such circumstances, is to make the lease and to try the question of title in a suit for injunction against trespass and damages.—Jones v. State Board of Fisheries, 159 S.E. 651, 161 S.C. 309.

56. Conn.—Lovejoy v. City of Norwalk, 152 A. 210, 112 Conn. 199.

57. Conn.—Lovejoy v. City of Norwalk, supra.

26 C.J. p 612 note 27.

58. Ala.—Cain v. Simonson, 39 So. 571.

26 C.J. p 612 note 28.

59. Va.—Darling v. City of Newport News, 96 S.E. 307, 123 Va. 14, affirmed 39 S.Ct. 371, 249 U.S. 540, 63 L.Ed. 759.

60. **Discharge of sewage**

The recipient of a designation of an oyster bed takes the same subject to such rights as exist to discharge sewage into the waters, and the risk of pollution of the water naturally resulting therefrom.

Conn.—Lovejoy v. City of Norwalk, 152 A. 210, 112 Conn. 199.

Va.—Commonwealth v. City of Newport News, 164 S.E. 689, 158 Va. 521—Darling v. City of Newport News, 96 S.E. 307, 123 Va. 14, affirmed 39 S.Ct. 371, 249 U.S. 540, 63 L.Ed. 759.

61. Md.—Adams v. Carey, 190 A. 815, 172 Md. 173.

26 C.J. p 612 note 31.

Negligence

Ferryboat master was under a duty to exercise reasonable care to avoid damage to oyster bed near point at which boat ran aground during fog in attempting to free boat. He would not be liable for damage to the bed if it was a natural and proper incident to navigation of ferryboat and involved no negligence on his part. The owner of the ferryboat would not be chargeable with negligence because of efforts of master of ferryboat to free boat when it ran aground near oyster bed which caused damage to oyster bed, if neither owner nor his servants knew that oysters were or might be planted in area in which they might be affected by operation of the boat or efforts to free it.—Adams v. Carey, supra.

62. N.J.—State v. Taylor, 27 N.J. Law 117, 72 Am.D. 347.

R.I.—Payne v. Providence Gas Co.,

the exclusive right to plant and take oysters and clams from such ground during his term, and he is protected in this right from interference by others.[63] He does not take a fee simple title, nor can he use the property for any other purpose.[64] Under some statutes the privilege is merely a license,[65] which may be revoked at the pleasure of the state,[66] but not at the request of a stranger in a collateral proceeding,[67] and which ceases with the use of the land for that purpose.[68] In some jurisdictions, where oysters are planted during the continuance of such license, the licensee acquires absolute property in them and their increase, and may remove them within a reasonable time after the revocation of the license.[69] According to other authority, however, a licensee who does not remove oysters planted by him during his term cannot remove them without the consent of a subsequent licensee,[70] nor does he acquire any rights as against the representatives of the public.[71] Under some statutes, the grantee of such a privilege acquires a possessory title to the land,[72] and a property right[73] which may be transferred,[74] although there is authority to the effect that it is but a personal privilege which can neither be inherited nor assigned.[75] Under some statutes oyster leases cannot be assigned or sublet without the consent of the shellfish commissioners, it being the purpose of such a statute to prevent any one person or firm from securing a monopoly.[76]

c. Forfeiture of Right

If the grantee of the right of planting and taking shellfish fails to perform the statutory conditions imposed on such right, the right may be forfeited.

The requirements and conditions imposed on a grantee of the right of planting or taking oysters, etc., are not conditions subsequent, but are continuous, and on his failure to perform them the franchise or privilege reverts to the state without any affirmative action on its part to enforce a forfeiture,[77] or if proceedings to that end are taken, the state alone has the right to proceed in its courts to have such forfeiture declared.[78] Where the grantee of such franchise or privilege fails for a number of years to perform the requirements of the statute, and does not in good faith locate on the territory, plant a bed of oysters thereon, or continue to protect them by the marks recognized by law, a person who does so mark out the territory, and who plants a bed of oysters thereon, and protects them by proper marks, acquires a title to such oysters, and no person, not even the grantee of the franchise, has the right to take them from him,[79]

77 A. 145, 153, 31 R.I. 295, Ann. Cas.1912B 65.

Abatement of nuisance see infra § 25.

63. Regardless of title

Abutting property owner on either side of bayou included within field notes of grant was held protected in right to grow oysters regardless of title in submerged land under original grant or validating act.—Filipos v. Chouke, 40 S.W.2d 38, 120 Tex. 508, affirming Chouke v. Filipos, Civ. App., 10 S.W.2d 807.

Subsequent grant of riparian right to a bridge company could not and did not wipe out the prior rights of lessees to use the land for the purpose of planting and cultivating oysters and clams.—Thomas v. Ocean City Automobile Bridge Co., 156 A. 493, 108 N.J.Law 143.

64. Conn.—Lovejoy v. City of Norwalk, 152 A. 210, 112 Conn. 199.

65. Removal of cloud from title

A statute providing that the owner of real estate may file a bill to remove a cloud from his title does not entitle one who has been granted the right to plant and take oysters from a bay in front of certain property to maintain a bill to quiet his title to such right, as he possesses nothing but a mere privilege or license.—Catchot v. Zeigler, 45 So. 707, 92 Miss. 191.

66. R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann. Cas.1912B 65.

26 C.J. p 612 note 23.

67. Mass.—Boston, Cape Cod & New York Ship Canal Co. v. Henshaw, 18 N.E. 276, 229 Mass. 185.

68. N.Y.—Housman v. Weir, 15 Abb. N.Cas. 415.

R.I.—Payne v. Providence Gas Co., 77 A. 145, 31 R.I. 295, Ann.Cas. 1912B 65.

69. Md.—Hess v. Muir, 5 A. 540, 6 A. 673, 65 Md. 586.

70. Mass.—Keene v. Gifford, 32 N. E. 946, 158 Mass. 120.

71. Mass.—Howes v. Town of Barnstable, 189 N.E. 34, 285 Mass. 361.

72. N.Y.—Huffmire v. Brooklyn, 57 N.E. 176, 162 N.Y. 584, 48 L.R.A. 421, affirming 48 N.Y.S. 132, 22 App. Div. 406.

73. Mass.—Boston, Cape Cod & New York Ship Canal Co. v. Henshaw, 118 N.E. 276, 229 Mass. 185.

Dominion and ownership

Where the state having authority to invest a private person with the ownership of tide lands leases tide lands to an individual, the individual is invested with the right to exercise dominion and ownership over the things so closely related to the soil as clams.—Sequim Bay Canning Co. v. Bugge, 94 P. 922, 49 Wash. 127, 16 Ann.Cas. 196.

74. Ala.—Cleveland v. Alba, 46 So. 757, 155 Ala. 468.

Ga.—Jones v. Oemler, 35 S.E. 375, 110 Ga. 202.

26 C.J. p 612 note 35.

75. Cal.—Darbe & Immel Oyster & Land Co. v. Pacific Oyster Co., 88 P. 1090, 150 Cal. 392, 119 Am.S.R. 227.

Md.—Hess v. Muir, 5 A. 540, 6 A. 673, 65 Md. 586.

76. R.I.—Gladding v. Atchison, 115 A. 423, 44 R.I. 69.

Undisclosed principal

Neither the state nor shellfish commissioners had the right to hold one liable as undisclosed principal for rentals under an oyster lease, there being no written assignment made by named lessee assented to by the commissioners, and the doctrine of undisclosed principal not being applicable, whether or not the leases were under seal.—Gladding v. Atchison, supra.

77. Wash.—Frazier v. Wilson, 77 P. 1064, 35 Wash. 625.

26 C.J. p 613 note 41.

78. Ga.—Jones v. Oemler, 35 S.E. 375, 110 Ga. 202.

N.C.—Jones v. Riggs, 70 S.E. 465, 154 N.C. 281.

26 C.J. p 613 note 42.

79. N.Y.—Vroom v. Tilly, 77 N.E. 24, 184 N.Y. 168, affirming 91 N.Y. S. 51, 99 App.Div. 516, and reargu-

and this rule applies whether the propagation is by the planting of seed oysters or by the planting of oyster shells.[80] Under some statutes relating to the sale of tidelands for oyster planting, the state land commissioner on the application of any citizen, has power to cancel sales if the lands purchased are used for any other purpose.[81] The commissioner is empowered to cancel on one ground only, that the land is being used for other purposes, and he is not empowered to cancel on the ground that the purchaser has failed to use it for oyster planting purposes.[82] Such a statute contemplates notice to the defaulting party, and, in the absence of a prescribed form of notice, any timely notice which informs him of the accusation against him and which gives him an opportunity to defend is sufficient.[83]

§ 13. Whale Fisheries

According to some usages, the property in a whale belongs to the ship from which the first iron or lance is placed in the whale.

A whale not being the product of human care or labor does not of itself purport to be property;[84] but, where a full and complete possession of it has been taken, it becomes property.[85] What constitutes sufficient possession of a whale to establish ownership to it as property is determined by the usages of the various whale fisheries. According to some usages the property in a whale belongs to the ship from which the first iron or lance is placed in the whale, by which it can be identified, whether it is attached to the boat or not,[86] although the actual killing is done by the crew of another vessel or they take part therein;[87] and anyone taking such whale while it still has marks of appropriation on it is guilty of conversion[88] and liable to the owner thereof for full indemnity.[89]

The measure of damages for the conversion of a whale at sea is the value of the oil and bone at the home port, less the expense of cutting and boiling, freight, and insurance, with interest;[90] and, where the conversion is of a whale which has been killed and has drifted from its anchorage, no deduction from the owner's damages is to be made for the labor of securing and transporting the whale, where that could have been done without cost by the owner, or for the uncertainty as to whether the owner could have found and secured the whale.[91]

Contracts of mateship. By a usage in the whaling business masters of vessels meeting at sea sometimes enter into a contract of mateship, the effect of which is to establish a species of partnership in the business of taking whales and procuring oil, so that, if the vessels cruise together, they divide equally the oil obtained before they separate; if they cruise separately, they make an equal division on their first meeting afterward; if they accidently separate and do not meet again, neither can claim of the other if one returns home full; but if they do meet abroad and neither is filled, the settlement and division take place immediately. Such a usage is reasonable and lawful, and a master, unless he has special instructions prohibiting his making such contracts, is presumed to have authority to conduct his voyage with reference to the custom; and a contract of mateship made by him is binding on the owners of the vessel.[92]

§ 14. Town Fisheries

In the absence of a statute to the contrary, or of a specific grant thereof to the town, the public has the right to fish in navigable waters within the limits of a town or other municipal corporation.

In the absence of statute, the right of fishery in navigable waters within the limits of a town or other municipal corporation belongs to the public, and

ment denied 77 N.E. 1017, 185 N.Y. 553—Davis v. Davis, 75 N.Y.S. 539, 72 App.Div. 593.

80. N.Y.—Vroom v. Tilly, 77 N.E. 24, 184 N.Y. 168, affirming, 91 N.Y. S. 51, 99 App.Div. 516, and reargument denied 77 N.E. 1017, 185 N.Y. 553.

81. Wash.—State v. Ross, 113 P. 273, 62 Wash. 82.

Statute held not repealed
Wash.—State v. Ross, supra.

82. Wash.—State v. Savidge, 140 P. 559, 79 Wash. 479.

Rule inapplicable
The rule that all grants from the state shall be strictly construed against the grantee had no application where the only question was as to the power vested in the state land commissioner under such a statute, and hence did not negative the rule that a strictly statutory power must be strictly construed.—State v. Savidge, supra.

83. Wash.—State v. Ross, 113 P. 273, 62 Wash. 82.

84. U.S.—Bartlett v. Budd, D.C. Mass., 2 F.Cas.No.1,075, 1 Lowell 223—Taber v. Jenny, D.C.Mass., 23 F.Cas.No.13,720, 1 Sprague 315.

Property in fish generally see supra § 2.

85. U.S.—Bartlett v. Budd, D.C. Mass., 2 F.Cas.No.1,075, 1 Lowell 223.

Qualified property in fish generally see supra § 3.

86. U.S.—Ghen v. Rich, D.C.Mass., 8 F. 159.

26 C.J. p 614 note 63.

87. U.S.—Bourne v. Ashley, D.C. Mass., 3 F.Cas.No.1,698.

88. U.S.—Ghen v. Rich, D.C.Mass., 8 F. 159.

Trover as to fish generally see infra § 25.

89. U.S.—Swift v. Gifford, D.C.Mass., 23 F.Cas.No.13,696, 2 Lowell 110—Taber v. Jenny, D.C.Mass., 23 F. Cas.No.13,720, 1 Sprague 315.

90. U.S.—Ghen v. Rich, D.C.Mass., 8 F. 159—Bartlett v. Budd, D.C.Mass., 2 F.Cas.No.1,075, 1 Lowell 223—Bourne v. Ashley, D.C.Mass., 3 F. Cas.No.1,699, 1 Lowell 27.

91. U.S.—Bartlett v. Budd, D.C. Mass., 2 F.Cas.No.1,075, 1 Lowell 223—Taber v. Jenny, D.C.Mass., 23 F.Cas.No.13,720, 1 Sprague 315.

92. Mass.—Baxter v. Rodman, 3 Pick. 435.

26 C.J. p 614 note 70.

the corporation as such can exercise no control over it;[93] and, where two towns adjoin a navigable river, the citizens of each may take the fish swimming therein.[94] The power to take fish and to regulate and control the right of fishing in waters within its limits may be given to such town by patent or grant,[95] or by an act of the legislature;[96] and, where such right is granted to a town, a riparian owner within its limits is liable for a violation of its regulations, notwithstanding he was accustomed to take fish from the waters before the grant to the town.[97] Under such grants or acts the right of fishing in waters within the limits of a particular town may be given exclusively to the inhabitants thereof,[98] such as the exclusive right of planting and taking oysters or other shellfish from waters within its limits;[99] or the town may be given the power to lease the right of fishery,[1] and such a lessee cannot deny the right of the town to make the lease in order to avoid the payment of the rent.[2] Where a town, although it has power to do so, has never made any restrictions as to the right of fishing within its limits, the residents of the town, in the absence of statutory restrictions, may fish therein free from restrictions.[3] A statute regulating the taking of shellfish from public or unleased lands is inapplicable to lands under water to which a town has title.[4] Where a lease of a great pond is made to a town, with covenants to be performed by the town and a provision that in case of breach of any of the covenants the fish commissioner may enter and expel the lessee, a breach of the covenants on the part of the lessee is not of itself an abandonment of the lease.[5]

§ 15. Interstate Fisheries

In the absence of a treaty between the two states, or unless the jurisdiction over the river is concurrent, the right of fishery in citizens on one side of the main channel of a river between two states can be regulated only by the laws of the state on that side.

The right of fishery in waters lying between two states is generally regulated and controlled by treaty between those states and by statutes enacted thereunder,[6] but, in the absence of such a treaty, the right of fishery in citizens on one side of the main channel of the river can be regulated only by the laws of the state on that side.[7] Where two states have concurrent jurisdiction over the waters lying between them, one state cannot prosecute a person for an act prohibited by its own laws but which is committed within the limits of the other state and is authorized in the latter state.[8]

§ 16. International Fisheries

The right to fish in international waters is regulated by custom and treaties and statutes enacted to give effect thereto.

The right to fish in international waters is generally regulated by custom and treaties and statutes enacted to give effect thereto.[9]

93. Cal.—Ex parte Bailey, 101 P. 441, 155 Cal. 472, 132 Am.S.R. 95, 31 L.R.A.,N.S., 534.
26 C.J. p 614 note 71.

94. Mass.—Coolidge v. Williams, 4 Mass. 140.

95. U.S.—The Martha Anne, D.C.N.Y., 16 F.Cas.No.9,146, Olcott 18.
26 C.J. p 615 note 74.

96. Mass.—Commonwealth v. Hilton, 54 N.E. 362, 174 Mass. 29, 45 L.R.A. 475.
26 C.J. p 615 note 75.

97. Mass.—Nickerson v. Brackett, 10 Mass. 212.

98. Mass.—Commonwealth v. Hilton, 54 N.E. 362, 174 Mass. 29, 45 L.R.A. 475—Locke v. Motley, 2 Gray 265.
N.Y.—Robins v. Ackerly, 91 N.Y. 98, affirming 24 Hun 499.
26 C.J. p 615 note 77.

99. Mass.—Commonwealth v. Hilton, 54 N.E. 362, 174 Mass. 29, 45 L.R.A. 475.
26 C.J. p 615 note 78.

1. N.Y.—Hand v. Newton, 92 N.Y. 88, affirming 26 Hun 536.
26 C.J. p 615 note 79.
Lease of property by towns generally see the C.J.S. title Towns § 94, also 63 C.J. p 160 note 75–p 161 note 89.

2. Mass.—Eastham v. Anderson, 119 Mass. 526.

3. Me.—State v. Gross, 36 A. 1003, 89 Me. 542.
26 C.J. p 615 note 81.

4. N.Y.—People v. Miller, 257 N.Y.S. 300, 235 App.Div. 226, affirmed 184 N.E. 103, 260 N.Y. 585.

5. Mass.—Commonwealth v. Eliot, 15 N.E. 81, 146 Mass. 5.

6. U.S.—Wharton v. Wise, Va., 14 S.Ct. 783, 153 U.S. 155, 38 L.Ed. 669.
26 C.J. p 615 note 83.

Compact between Maryland and Virginia

(1) The compact between Maryland and Virginia, entered into in 1785, concerning the right of citizens of Virginia to fish in the Potomac River, was abrogated by the cession of that portion of the District of Columbia originally granted by the state of Virginia and by its recession back by the United States.—Herald v. U. S., 284 F. 927, 52 App.D.C. 147—26 C.J. p 615 note 83 [a] (6).

(2) Other holdings relating to the compact see 26 C.J. p 615 note 83 [a].

7. U.S.—In re Mattson, C.C.Or., 69 F. 535.
Wis.—Roberts v. Fullerton, 93 N.W. 1111, 117 Wis. 222, 65 L.R.A. 953.
26 C.J. p 616 note 84.

8. U.S.—Nielsen v. Oregon, 29 S.Ct. 383, 212 U.S. 315, 53 L.Ed. 528, reversing 95 P. 720, 51 Or. 588, 131 Am.S.R. 765, 16 Ann.Cas. 1113.

9. **Prohibiting aliens from fishing**

Act June 14, 1906, 34 U.S.St. at L. p 263 c 3299 § 1, which makes it unlawful for aliens "to catch or kill, or attempt to catch or kill, except with rod, spear or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States," cannot be construed as prohibiting only commercial fishing, and as permitting the alien crew of a foreign vessel to take fish in violation of its provisions for their own use.—The Tokai Maru, Alaska, 190 F. 450, 111 C.C.A. 282, certiorari denied 32 S.Ct. 836, 225 U.S. 703, 56 L.Ed. 1265.

Rainy Lake

Fishing in the waters of Rainy Lake on the Minnesota side of the boundary line established by joint action of the governments of the United States and Canada is under the control of the state, until the international fisheries commission pro-

§ 17. —— Seal and Other Fur Fisheries

The taking of seals and other fur bearing animals in Alaskan waters is regulated by treaty and statutes enacted pursuant thereto.

Seal and other fur fisheries in waters within the Alaskan territory are regulated by the treaty of arbitration between the United States and Great Britain, and by statutes enacted to give effect thereto, under which treaties and statutes it is unlawful to kill fur seals anywhere within certain boundaries, or by certain instruments, or at certain seasons; and vessels, their cargoes, implements, etc., found within such boundaries engaged in that business or in killing seals with prohibited instruments, or in a prohibited season, are subject to seizure and condemnation as forfeited to the United States, or to Canada, according to the jurisdiction in which the offense is committed.[10] Under such acts the United States may lease sealing privileges in the Alaskan waters, subject to such regulations as the government may thereafter prescribe, and in case of such regulation the lessee is not entitled to damages alleged to result therefrom.[11] By the award of arbitrators under the treaty of arbitration between the United States and Great Britain, which award is the supreme law of the land and is binding on the courts as an act of congress, and which citizens of the United States have the same right to rely on as to their rights, under the statute, as citizens and subjects of Great Britain,[12] the jurisdiction of the United States to forbid the killing of fur bearing animals in waters of the Alaskan territory does not extend outside of the ordinary three-mile limit; and, therefore, an act of congress which forbids such killing must be construed to mean the waters within three miles of the shores of Alaska.[13]

A forfeiture of a vessel, etc., for a violation of such treaties and statutes does not depend on the intent of the owners of the vessel or her equipage,[14] and, therefore, instruments forming part of her equipage, although belonging to others than her owners, are forfeited,[15] as are also sealskins found on board the vessel as part of the cargo.[16]

In the absence of a statute authorizing or requiring a special license for seal hunting, it may be lawfully carried on by vessels plying only between or from ports of the United States under a coasting trade license.[17]

Presumption of violation. Where a vessel equipped for sealing is found within the prohibited zone, it is presumed, in the absence of evidence to the contrary, that she and her equipment were being used in violation of the seal fishing act; and the clearest evidence of good faith is required to exonerate the master of such a vessel.[18] The fact that such a vessel is near the prohibited zone should put her master on the alert to keep a full and accurate record of his position, courses, etc., in order that he may not pass the line and that by his records and charts he may be able, if called on, to demonstrate clearly that he was not within the prohibited area.[19]

§ 18. Indians' Rights of Fishery

Under some treaties, Indians may fish on their reservations without abridgment by state laws, but frequently, under the treaties, the state laws are applicable to Indians fishing outside their reservations.

Where a treaty with the Indians gives them the right to fish on their reservation, the state laws relating to fishing do not apply to them;[20] and, under some statutes, Indians are expressly exempted from the operation of the statute.[21] Where, however, the Indian reservation has been included within the limits of a state formed since the treaty, without reserving the rights of the Indians, such laws may

vided for by the Root-Bryce Treaty functions and assumes control.—State v. Dove, 236 N.W. 322, 183 Minn. 272.

10. U.S.—U. S. v. The Jane Gray, D.C.Cal., 77 F. 908.
26 C.J. p 616 notes 88, 90, p 617 note 91.
Seizure and forfeiture of fish, fishing equipment, and fishing vessels generally see infra § 42.

11. U.S.—North American Commercial Co. v. U. S., N.Y., 18 S.Ct. 817, 171 U.S. 110, 43 L.Ed. 98, reversing, C.C., 74 F. 145.
26 C.J. p 617 notes 92–94.
Power of United States to lease property generally see the C.J.S. title United States § 77, also 65 C.J. p 1307 notes 68–71.

12. U.S.—The La Ninfa, Alaska, 75 F. 513, 21 C.C.A. 434, reversing, D. C., 49 F. 575.
26 C.J. p 617 note 95.

13. U.S.—The Alexander, Alaska, 75 F. 519, 21 C.C.A. 441, reversing, D. C., 60 F. 914—The La Ninfa, Alaska, 75 F. 513, 21 C.C.A. 434, reversing, D.C. 49 F. 575.
Prior to execution of this treaty it was held that the unauthorized killing of fur seals anywhere within the boundaries described in the treaty of March 30, 1867 between the United States and Russia was unlawful.
U.S.—The James G. Swan, D.C.Wash., 50 F. 108.
Alaska.—U. S. v. British Schooners, 5 Alaska 11.

14. U.S.—The James G. Swan, D.C. Wash., 77 F. 473.

15. U.S.—The James G. Swan, supra.

16. Alaska.—U. S. v. The Kensei Maru, 3 Alaska 627.
26 C.J. p 617 note 2.

17. U.S.—Bird v. U. S., C.C.A.Cal., 24 F.2d 933.

18. U.S.—U. S. v. The Jane Gray, D. C.Cal., 77 F. 908.
26 C.J. p 617 notes 7–9.

19. U.S.—U. S. v. The Jane Gray, supra.

20. U.S.—Seufert v. Olney, C.C.A. Wash., 193 F. 200.
26 C.J. p 618 note 17—31 C.J. p 506 note 55 [a].

21. Wash.—State v. Lewis, 88 P. 940, 45 Wash. 475, 122 Am.S.R. 934.
26 C.J. p 618 note 18.

be enforced against them.[22] Treaties with Indians reserving in them the right of fishery will be construed according to their natural meaning and the Indians' understanding thereof.[23] A treaty with a tribe of Indians which secures to them the right of taking fish "at usual and accustomed places in common with the citizens" of the territory reserves to them the right to fish outside of the boundaries of the lands ceded by them by the treaty;[24] but such treaties, or treaties with somewhat similar terms, do not give to the Indians any exclusive or special privilege outside of their reservation, but only such rights as may be enjoyed by all citizens in common, and state laws abridging the fishing rights of citizens are equally effective as against the Indians.[25] The Indians' rights under such treaties are not subordinate to the powers acquired by a state in and over the waters in question on its being admitted to the Union as a state;[26] nor can such rights be taken from the Indians by grants to private persons, by the United States or a state.[27] A reservation, by congress, of certain islands for Indians, includes fishing rights in adjacent waters and submerged land, and the president, although not expressly authorized, can reserve such rights for them.[28]

§ 19. Rights of Aliens

A state may restrict the right of aliens to fish in state waters.

The legislature has the right to restrict fishing in state waters to citizens of the United States.[29] It has been held that the most favored nation clause of a treaty does not include the right to take fish from the public waters of a state, notwithstanding the existence of treaties with other nations providing that citizens of such nations shall have the same privileges and rights and shall not be charged any higher imposts or duties than those paid by native citizens.[30] On the other hand, it has also been held that, if a state permits one class of aliens to enjoy the privilege of fishing in state waters, it must also permit other aliens to enjoy the same privilege if their government has a treaty with the United States containing a most favored nation clause.[31]

C. CIVIL LIABILITY AND REMEDIES FOR INVASION OF RIGHTS

§ 20. Trespass and Other Actions for Damages

An action will lie for a wrongful invasion of a right of fishery.

Where a person's fishery rights are wrongfully interrupted or interfered with by another, he may maintain an action of trespass or action for damages for the injury caused thereby,[32] even against the

22. U.S.—Ward v. Race Horse, Wyo., 16 S.Ct. 1076, 163 U.S. 504, 41 L.Ed. 244, reversing, C.C., 70 F. 598.
N.Y.—People v. Pierce, 41 N.Y.S. 858, 18 Misc. 83, 11 N.Y.Cr. 325.

23. **Means of fishing**
Indians given by treaty the right of fishing at certain places were not limited to the methods of fishing used by them when the treaty was made.—U. S. ex rel. Williams v. Seufert Bros. Co., D.C.Or., 233 F. 579, affirmed Seufert Bros. Co. v. U. S., 39 S.Ct. 203, 249 U.S. 194, 63 L.Ed. 555.

Place of right
"The right of taking fish at all usual and accustomed places in common with citizens of the territory," reserved to the Yakima Tribes by the treaty of June 9, 1855, 12 U.S.St. at L. p 951, ceding the lands occupied by them on the north side of the Columbia River in Washington, will be construed, according to its natural meaning and their understanding thereof, as shown by their habitual acts thereafter, to give the right to fish in such places on the south or Oregon side of the river, in the country of another tribe, with which similar treaty was made at about the same time.—Seufert Bros. Co. v. U. S., Or., 39 S.Ct. 203, 249 U.S. 194, 63 L.Ed. 555, affirming, D.C.Or., U. S. ex rel. Williams v. Seufert Bros. Co., 233 F. 579.

24. U.S.—U. S. ex rel. Williams v. Seufert Bros. Co., Or., 233 F. 579, affirmed Seufert Bros. Co. v. U. S., 39 S.Ct. 203, 249 U.S. 194, 63 L.Ed. 555.

25. U.S.—People of State of New York ex rel. Kennedy v. Becker, 36 S.Ct. 705, 241 U.S. 556, 60 L.Ed. 1166, affirming People ex rel. Kennedy v. Becker, 109 N.E. 116, 215 N.Y. 42—Seufert v. Olney, C.C. Wash., 193 F. 200.
Wash.—State v. Meninock, 197 P. 641, 115 Wash. 528.
26 C.J. p 618 note 20.

26. U.S.—U. S. v. Winans, Wash., 25 S.Ct. 622, 198 U.S. 371, 49 L.Ed. 1089, reversing, C.C., 73 F. 72.
26 C.J. p 618 note 21.

27. U.S.—U. S. v. Winans, supra.
Wash.—U. S. v. Taylor, 13 P. 333, 3 Wash.T. 88.
26 C.J. p 618 note 22.

28. U.S.—Alaska Pacific Fisheries v. U. S., Alaska, 240 F. 274, 153 C. C.A. 200, affirmed 39 S.Ct. 40, 248 U.S. 78, 63 L.Ed. 138.

29. **Statute construed**
Under a statute providing that it shall be unlawful for any person to fish unless such person prior to Jan. 1, 1924, was a citizen of the United States or had declared his intention to become such, and from and after Jan. 1, 1924, unless such person is a citizen of the United States, an alien who had declared his intention to become a citizen prior to Jan. 1, 1924 cannot fish in state waters after that date unless he has become a citizen.—State v. Maybury, 239 P. 552, 136 Wash. 210.

30. U.S.—Leong Mow v. Board of Com'rs for Protection of Birds, Game and Fish, C.C.La., 185 F. 223, appeal dismissed 33 S.Ct. 775, 229 U.S. 606, 57 L.Ed. 1348.

31. U.S.—In re Ah Chong, C.C.Cal., 2 F. 733, 6 Sawy. 451.
Tex.—Poon v. Miller, Civ.App., 234 S.W. 573.

32. Wash.—Bales v. City of Tacoma, 20 P.2d 860, 172 Wash. 494.
26 C.J. p 618 note 25.
Right to trespass on lands of others in fishing see supra §§ 4, 8.

Drawing off water
Where a fishing club had dammed the water of a small lake so that it overflowed a slough, and the owner of the land under the slough, having a reserved fishing right, had used it and made improvements for fishing, the club had no right to change

owner of the land,[33] unless a special remedy for such interference is provided by statute.[34] Thus an action will lie where one's fishery is injured by an unlawful weir, dam, or other obstruction on the stream above or below him;[35] or by the pollution of the stream by another;[36] or where his right of fishery in a navigable stream is injured by a boat or vessel carelessly, wantonly, or designedly running into his nets or other fishing appliances,[37] or by his being otherwise wrongfully excluded from or interfered with in such right;[38] or where one wrongfully enters or takes fish from another's private fishery.[39] A person, however, is not responsible for injuries to a fishery which are caused by acts which he has a legal right to do, and which he does in a careful and proper manner.[40]

§ 21. —— For Injury to Oysters, Clams, Etc.

An action will lie for a wrongful injury or interference with a private shellfish bed.

An owner or licensee of an oyster or clam bed clearly designated and staked out, or otherwise identified as required by law, may maintain an action against any person who wrongfully injures or interferes with[41] or takes[42] oysters or clams planted by him, although his planting is a public nuisance or misdemeanor,[43] or is on a spot which is a common fishery,[44] unless he has planted them where other oysters or clams naturally exist,[45] and although his permit or license had expired when the oysters were planted.[46] An action for trespass has been employed for the purpose of questioning the title of a claimant to a designated natural oyster bed.[47] On the other hand, an action cannot be maintained for damages, to an oyster bed, which are incidental to the right of navigation conducted in a reasonable and proper manner;[48] and it has also been held that, since the state holds in trust for the public

the conditions by cutting the dam and drawing the water from the lake, so as to cause damage to the property and rights of such owner.—Thomas v. Fin & Feather Club, 171 S.W. 698, 106 Tex. 490, reversing Fin & Feather Club v. Thomas, Civ.App., 138 S.W. 150.

33. Conn.—Turner v. Hebron, 22 A. 951, 61 Conn. 175, 14 L.R.A. 386.
26 C.J. p 619 note 26.

34. Conn.—Bristol v. Ousatonic Water Co., 42 Conn. 403.
26 C.J. p 619 note 27.

Statutory penalty

One's common-law right to an action for an infringement of his fishing rights is not taken away by a statute prescribing a penalty for a violation of such rights, unless the statute provides that it shall be the only remedy.—Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 199, 160 Or. 654, citing **Corpus Juris**—26 C.J. p 619 note 35.

35. Conn.—Bristol v. Ousatonic Water Co., 42 Conn. 403.
Mass.—Barden v. Crocker, 10 Pick. 383.
26 C.J. p 619 note 28.

36. Ga.—Hodges v. Pine Product Co., 68 S.E. 1107, 135 Ga. 134, 33 L.R.A., N.S., 74, 21 Ann.Cas. 1052.
26 C.J. p 619 note 29.

37. U.S.—The Armorica, D.C.N.C., 189 F. 503.
Mich.—Bishop v. Baldwin, 110 N.W. 139, 147 Mich. 22.
N.C.—Hardison v. National Handle Co., 139 S.E. 614, 194 N.C. 351.
26 C.J. p 619 note 30.

Nets in excess of license

Where one whose fish nets defendants damaged had license to operate three set nets, he was not wrongdoer because operating six nets, and defendant was answerable to him for negligent injury of the nets.—Mitchell v. Curtis, 296 P. 1078, 135 Or. 595.

Test of liability

If the employees of defendant company in charge of its tug saw, or by the exercise of ordinary care should have seen, the nets of plaintiff fishermen outside the usual channel of navigation in time to have avoided striking and injuring them, but did not use due care to avoid such injury, defendant was liable, ordinary negligence being the test of its liability.—Spruill v. Branning Mfg. Co., 103 S.E. 911, 180 N.C. 69.

38. Mich.—Lincoln v. Davis, 19 N.W. 103, 53 Mich. 375, 51 Am.R. 116.
26 C.J. p 619 note 31.

39. Conn.—Turner v. Hebron, 22 A. 951, 61 Conn. 175, 14 L.R.A. 386.
26 C.J. p 619 note 32.

40. Mass.—Howes v. Grush, 131 Mass. 207.
26 C.J. p 619 note 33.

41. N.J.—Thomas v. Ocean City Automobile Bridge Co., 156 A. 493, 108 N.J.Law 143.
26 C.J. p 619 notes 36, 37.

Pollution of water

(1) Pollution of brook by discharge of sedimentation from filtration plant, with resulting loss of oysters in river near mouth of brook, is actionable.—Allgor v. Monmouth County Water Co., 128 A. 864, 3 N.J.Misc. 514.

(2) Plaintiff was entitled to damages caused by materials deposited on oyster land, preventing catch of spat during spawning season.—Bowman v. Helser, 255 P. 146, 143 Wash. 397.

42. Wash.—Sequim Bay Canning Co. v. Bugge, 94 P. 922, 49 Wash. 127, 16 Ann.Cas. 196.
26 C.J. p 620 note 38.

43. N.J.—Grace v. Willets, 14 A. 559, 50 N.J.Law 414—State v. Taylor, 27 N.J.Law 117, 72 Am.D. 347.

44. N.Y.—Fleet v. Hegeman, 14 Wend. 42.
26 C.J. p 620 note 41.

45. La.—Louisiana Land & Fisheries Co. v. Gasquet, 13 So. 171, 45 La. Ann. 759.
26 C.J. p 620 note 42.

46. N.Y.—Huffmire v. Brooklyn, 48 N.Y.S. 132, 22 App.Div. 406, affirmed 57 N.E. 176, 162 N.Y. 584, 48 L.R.A. 421.
26 C.J. p 620 note 43.

47. Conn.—Cook v. Raymond, 33 A. 1006, 66 Conn. 285.

48. U.S.—Richardson v. U. S., C.C. Va., 100 F. 714.
Conn.—Lane v. Smith, 41 A. 18, 71 Conn. 65.
Oyster fishery as subject to right of navigation see supra § 10.

Fact that ferryboat ran aground in fog was not sufficient of itself to show negligence in operating ferry in absence of evidence of want of care in manner in which boat was operated, as respects liability of ferryboat owner for injuries done to oyster bed through efforts to free boat.—Adams v. Carey, 190 A. 815, 172 Md. 173.

Operation in fog

Fact that ferryboat was started on special trip over its customary course which was short, but tortuous for

a tidal navigable arm of the sea, and cannot grant individual rights therein, impairing public rights, its lessee of land thereunder for oysters cannot recover of a city for injury thereto from emptying its sewage.[49] Where land and oysters thereon belong to tenants in common, neither possesses any such title to oysters planted or natural as will enable him to maintain an action for trespass against his cotenant for taking them from the land.[50] A bridge company may be charged with the negligence of its independent contractor in pumping sand to the injury of a shellfish bed, where the manner of doing the work was specifically provided for in the contract and when such manner of doing the work was improper.[51] Where defendant knew or should have known that plaintiff's lobster cars with lobsters in them were near the place where he was conducting dredging operations, he was bound to ascertain whether the pollution of the waters would injure the lobsters,[52] and, where the nature of defendant's work was not obvious, plaintiff could not be held to have had notice that the work would pollute the water near his lobster cars.[53]

§ 22. —— Pleading, Evidence, and Trial

The usual rules of pleading, evidence, and trial in civil cases apply in actions of this character.

The pleadings,[54] evidence,[55] and trial[56] in an

part of its length, in charge of "regular captain" when, due to fog, visibility was too low to permit those operating ferry to see objects marking the course, was not alone sufficient to establish negligence of ferry owner, although such conduct might be considered in determining whether manner in which ferry was operated was consistent with due care, as regards liability for damages to oyster bed while attempting to free ferry when it ran aground.—Adams v. Carey, supra.

49. Va.—Hampton v. Watson, 89 S.E. 81, 119 Va. 95.
26 C.J. p 620 note 46.

50. N.Y.—Mott v. Underwood, 42 N. E. 1048, 148 N.Y. 463, 51 Am.S.R. 711, 32 L.R.A. 270, affirming 26 N.Y.S. 307, 73 Hun 509.

51. N.J.—Thomas v. Ocean City Automobile Bridge Co., 156 A. 493, 108 N.J.Law 143.

52. Mass.—Smith v. Bay State Dredging & Contracting Co., 179 N. E. 347, 278 Mass. 24.

53. Mass.—Smith v. Bay State Dredging & Contracting Co., supra.

54. Mass.—Barden v. Crocker, 10 Pick. 383.
26 C.J. p 621 note 54.

Averments required by statute

Under some statutes a declaration for tortious injury to private rights claimed in oyster beds in navigable waters should state in the language of the statute that such rights do not cover any of the "existing natural or maternal oyster beds in the waters of this State."—Symmes v. Prairie Pebble Phosphate Co., 63 So. 1, 66 Fla. 27.

Variance

Where complaint alleged defendants damaged three "set-nets" for fishing and evidence showed damage to six "nets," there was no variance.—Mitchell v. Curtis, 296 P. 1078, 135 Or. 595.

55. Conn.—Palmer v. Hartford Dredging Co., 47 A. 125, 73 Conn. 182.
26 C.J. p 621 note 55.

A custom to take fish in alieno solo in an unnavigable river cannot be given in evidence under the general issue in defense of an action of trespass; but such custom ought to be pleaded specially.—Waters v. Lilley, 4 Pick., Mass., 145, 16 Am.D. 333.

Damage

(1) Where there is specific evidence of what plaintiff's loss of prospective profits amounted to, including such facts as that plaintiff had a market for his fish, the market value of matured fish, and the market value of fish not fully grown, the evidence is not too conjectural and speculative to afford a basis for recovery for loss of fish in a hatchery due to defendant's contamination of the water.—Bales v. City of Tacoma, 20 P. 2d 860, 172 Wash. 494.

(2) Evidence that four thousand small fish were placed in pond by riparian owners, that, following pollution of stream feeding pond, indefinite number were found dead, and that fish could escape either up or down stream did not authorize recovery from polluters for death of fish.—Williams v. Pelican Natural Gas Co., 175 So. 28, 187 La. 462.

Estimate of number

In suit for damages to clam and oyster grounds, testimony estimating number of oysters and clams was competent.—Thomas v. Ocean City Automobile Bridge Co., 156 A. 493, 108 N.J.Law 143.

Evidence held to support trial court's finding as to city's maintenance of a nuisance in polluting a fresh water stream, warranting recovery therefor.—Bales v. City of Tacoma, 20 P.2d 860, 172 Wash. 494.

Exclusion of particular evidence held proper

(1) In action for interference with fishing rights in arm of sea where tide ebbs and flows, evidence of title to shore.—Smith v. Wallace, 129 A. 444, 124 Me. 365.

(2) Irrelevant statute.—Smith v. Wallace, supra.

Good faith

On the question of punitive damages for forcibly excluding plaintiff from fishing in public waters, defendant may show that the acts complained of were not done maliciously, but with a bona fide belief in his asserted title to the fisheries in question, and in a bona fide attempt to protect what he believed to be his property.—Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 72 P. 161, 138 Cal. 632.

Negligence

Evidence that defendant failed to ascertain whether pollution of water would damage lobsters and to advise adjoining owner that its operations would pollute water was sufficient to show negligence.—Smith v. Bay State Dredging & Contracting Co., 179 N.E. 347, 278 Mass. 24.

56. U.S.—New England Trout & Salmon Club v. Mather, 35 A. 323, 68 Vt. 338, 33 L.R.A. 569.
26 C.J. p 621 note 56.

Instructions held proper or not erroneous.
Md.—Adams v. Carey, 190 A. 815, 172 Md. 173.
N.J.—Thomas v. Ocean City Automobile Bridge Co., 156 A. 493, 108 N. J.Law 143.

Questions for jury on conflicting evidence

(1) Defendant's negligence and trespass.
Md.—Adams v. Carey, 190 A. 815, 173 Md. 173.
N.J.—Thomas v. Ocean City Automobile Bridge Co., 156 A. 493, 108 N.J.Law 143.

(2) Plaintiff's contributory negligence.—Smith v. Bay State Dredging & Contracting Co., 179 N.E. 347, 278 Mass. 24.

(3) Whether defendant or person whom he induced to go with him disturbed headgate on pond used by

action for injury to fishery rights are governed by the rules which control in such actions generally. Accordingly, plaintiff must plead and prove the essential elements of his cause of action entitling him to recover.[57]

§ 23. —— Measure of Damages

Generally the amount of damages recoverable is measured by the amount of damage done.

Except where punitive or statutory damages are permitted or prescribed by statute,[58] the amount of damages to be recovered for an injury to fishing rights is generally such only as are commensurate with the injury done, having regard to all the circumstances of each particular case,[59] and where a fishery is worthless no damages can be recovered.[60] Defendant's good faith in invading plaintiff's right of fishery may be considered on the question of punitive damages, but is immaterial on the question of compensatory damages.[61] In a suit to recover for the destruction of a fish trap, it has been held that damages may also be awarded for the loss of fish resulting from the breaking of the net and interruption of the business, where there is sufficient evidence of surrounding catches to afford a reasonable basis for computation of the loss.[62] It has been held that damages cannot be recovered for consequential injuries caused by erections constructed under a license from the state,[63] unless the damage results from the careless manner in which the construction is done.[64]

Under a special jurisdictional act conferring on the court of claims jurisdiction to hear, determine, and render judgment on claims for compensation for damages sustained by claimants by reason of injury to oyster beds operated by them caused by dredging work done in a particular harbor, claimant is entitled to recover damages sustained by him as the proximate result of defendant's negligence.[65] Claimant, under such circumstances, was under a duty to mitigate his damages if possible, but this duty will not bar a recovery by him where he was not given reasonable notice of the dredging operations to be undertaken.[66]

plaintiff to store fish, resulting in draining of pond.—Smith v. Gvirtzman, Colo., 124 P.2d 926.

(4) Whether pollution of brook by discharge of sedimentation from filtration plant caused loss of oysters in river about three hundred yards from mouth of brook.—Allgor v. Monmouth County Water Co., 128 A. 864, 3 N.J.Misc. 514.

(5) Other questions held for jury see 26 C.J. p 621 note 56 [a].

Verdict and findings

(1) Evidence held sufficient to take case to jury.
Colo.—Smith v. Gvirtzman, 124 P. 2d 926.
Mich.—Bishop v. Baldwin, 110 N.W. 139, 147 Mich. 22.

(2) Evidence held to sustain verdict.
Colo.—Smith v. Gvirtzman, supra.
Me.—Smith v. Wallace, 129 A. 444, 124 Me. 365.
Mass.—Smith v. Bay State Dredging & Contracting Co., 179 N.E. 347, 278 Mass. 24.

57. Fla.—Symmes v. Prairie Pebble Phosphate Co., 63 So. 1, 66 Fla. 27.
26 C.J. p 621 notes 57, 58.

Plaintiff has burden of proving

(1) His ownership and right to take oysters.—Brinckerhoff v. Starkins, 11 Barb., N.Y., 248—26 C.J. p 621 note 57.

(2) In an action by the owner of a fish weir for injury caused by the pollution of the stream by the deposit of refuse therein, the prospective profits thereby lost to him.—Lamond v. Sea Coast Canning Co., 79 A. 385, 108 Me. 155.

(3) One suing for damages by loss of oysters from pollution of stream by discharge of sedimentation from filtration plant, that loss was natural and approximate result of such discharge.—Allgor v. Monmouth County Water Co., 128 A. 864, 3 N.J.Misc. 514.

58. R.I.—Bell v. Providence Gas Co., 90 A. 743, 36 R.I. 382.
26 C.J. p 620 note 49.

Absence of pleading

Where plaintiff states a cause of action for single damages, at common law, he cannot recover punitive damages, under a statute which permits them in certain cases.—Bell v. Providence Gas Co., supra.

Plaintiff's former trespass

In an action for forcibly excluding plaintiff from fishing in public waters, the mere fact that plaintiff at one time committed a trespass on defendant's land will not of itself preclude a recovery of punitive damages.—Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 72 P. 161, 138 Cal. 632.

59. Or.—Smith v. P. J. McGowan & Sons, 284 P. 189, 131 Or. 522.
26 C.J. p 620 note 50.

Allowance held not excessive

Wash.—Bales v. City of Tacoma, 20 P.2d 860, 172 Wash. 494.

Cost of removal

In the absence of definite proof of damage to fish weir caused by pollution of the waters by deposit of refuse, plaintiff is entitled to recover only the cost of removing the refuse.—Lamond v. Sea Coast Canning Co., 79 A. 385, 108 Me. 155.

In suit in rem for an injury by a vessel to a fish trap, punitive damages cannot be awarded, although the tort was malicious, where the owner of the vessel had no knowledge of the injury.—The Seven Brothers, D.C. R.I., 170 F. 126.

60. Pa.—Tinicum Fishing Co. v. Carter, 90 Pa. 85, 35 Am.R. 632.

61. Or.—Smith v. P. J. McGowan & Sons, 284 P. 189, 131 Or. 522.

62. U.S.—The Seven Brothers, D.C. R.I., 170 F. 126.

63. Pa.—Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am.D. 597, 90 Pa. 85, 35 Am.R. 632.
26 C.J. p 621 note 52.

64. Va.—Alexandria & W. R. Co. v. Faunce, 31 Gratt. 761, 72 Va. 761.

65. **Beds in channel**

The destruction of the oyster beds within the channel was not the proximate result of defendant's negligence; regardless of the timeliness of the notice given and the method used, it was impossible to deepen said channel without destroying the oysters and oyster beds on the channel bottom.—F. Mansfield & Sons Co. v. U. S., 94 Ct.Cl. 397.

Use of suction dredge, instead of a dipper type, was held to constitute negligence and to be the proximate cause of damage to claimant's oyster beds.—F. Mansfield & Sons Co. v. U. S., supra.

66. U.S.—F. Mansfield & Sons Co. v. U. S., supra.

§ 24. Injunction

In a proper case, an injunction may be obtained to restrain an unlawful interference with a right of fishery.

Where an action at law will not give adequate relief and irreparable injury will result to the owner of a right of fishing, he may obtain an injunction to restrain an unlawful interference therewith,[67] such as to restrain the continuance of an unlawful weir or dam,[68] or fish trap,[69] the continuance of trespasses on exclusive fishing rights,[70] the excluding of the public from a public fishery,[71] the pollution of a fresh-water stream to the injury of a private fishery therein,[72] or an interference with oyster beds,[73] even though the interference or obstruction also amounts to a public nuisance or other misdemeanor.[74] An injunction will not issue to restrain interference with the public right of fishery, unless plaintiff shows special injuries to himself;[75] nor to restrain the building of a dam across

67. U.S.—Bowles v. Kinney, D.C. Wash., 292 F. 419.
Alaska.—Harris & Co. v. Thlinket Packing Co., 5 Alaska 493.
Ohio.—East Bay Sporting Club v. Miller, 161 N.E. 12, 118 Ohio St. 360.
Or.—Johnson v. Hoy, 47 P.2d 252, 151 Or. 196—Strandholm v. Barbey, 26 P.2d 46, 145 Or. 427—Driscoll v. Berg, 1 P.2d 611, 137 Or. 499.
Wash.—Vitalich v. Pacific American Fisheries, 284 P. 805, 155 Wash. 411.
26 C.J. p 622 note 67.

Arrest and prosecution
The fact that defendant would be subject to arrest and prosecution for each and every trespass he might commit on plaintiff's fishing reserve does not afford plaintiff an adequate remedy at law.—Dennig v. Graham. 59 S.W.2d 699, 703, 227 Mo.App. 717, citing **Corpus Juris.**

Decree
(1) Decree was held erroneous, as regards portion thereof enjoining fish commission from further performance of its duties at location occupied by fish traps and wharf, maintenance of which decree enjoined.—Strandholm v. Barbey, 26 P. 2d 46, 145 Or. 427.

(2) Decree must not go beyond the pleadings and determine the rights of persons not parties.—Schultz v. Carter, 151 S.E. 130, 153 Va. 730.

Evidence held sufficient
(1) To show defendant's intention to fish in plaintiff's private waters, so as to authorize injunction.—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717.

(2) To show that waters were available for gill net operations.—Radich v. Fredrickson, 10 P.2d 352, 139 Or. 378.

Past acts
Evidence of defendant's past acts was relevant in action to enjoin him from fishing in plaintiff's private waters only as tending to show his present intention to fish therein.—Dennig v. Graham, 59 S.W.2d 699, 227 Mo.App. 717.

68. Conn.—Stannard v. Hubbard, 34 Conn. 370.
Me.—Perry v. Carleton, 40 A. 134, 91 Me. 349.
N.J.—Howell v. Robb, 7 N.J.Eq. 17.

Evidence held to support decree
In suit by state game commission to enjoin reconstruction of hydroelectric project on ground that reconstruction would interfere with the passage of migratory fish in river, evidence sustained decree denying injunction on ground that, when proposed fish-ladder was built and channel in river was improved in bona fide compliance with plans and specifications, the power project would not interfere to any appreciable extent with the free passage of fish.—State v. Beaver Portland Cement Co., Or., 124 P.2d 524, rehearing denied State by Wilson v. Beaver Portland Cement Co., 126 P.2d 1094.

69. Or.—Strandholm v. Barbey, 26 P.2d 46, 145 Or. 427—Radich v. Fredrickson, 10 P.2d 352, 139 Or. 378.

Estoppel or laches
Fishermen not objecting to granting of original licenses in 1929 for fish trap locations, and taking no action respecting renewals or reconstruction of traps until June 17, 1930, when injunction suit was filed, were not barred from relief by estoppel or laches.—Driscoll v. Berg, 1 P.2d 611, 137 Or. 499.

Evidence held to show that fish trap constituted a menace to gill net fishermen, and an unreasonable and unlawful interference with common right of fishery.—Johnson v. Hoy, 47 P.2d 252, 151 Or. 196.

70. Ohio.—East Bay Sporting Club v. Miller, 161 N.E. 12, 118 Ohio St. 360.

71. Wash.—Morris v. Graham, 47 P. 752, 16 Wash. 343, 58 Am.S.R. 33.
26 C.J. p 622 note 69.

72. U.S.—Cheat Mountain Club v. West Virginia Pulp & Paper Co., D.C.W.Va., 205 F. 195, affirmed 212 F. 373, 129 C.C.A. 49.
N.Y.—Seaman v. Lee, 10 Hun 607.
S.C.—Threatt v. Brewer Min. Co., 26 S.E. 970, 49 S.C. 95.
26 C.J. p 622 note 70.

Operator of fish hatchery, fed by creek, waters of which were contaminated by city's sewage and garbage, causing loss of many fish, sustained special injury entitling him to sue city for abatement of nuisance.—Bales v. City of Tacoma, 20 P.2d 860, 172 Wash. 494.

Use for many years
City's use of swamp draining into creek, for garbage and sewage disposal for many years, did not preclude operator of fish hatchery, fed by creek, from obtaining injunction against nuisance.—Bales v. City of Tacoma, supra.

73. Tex.—Chouke v. Filipas, Civ. App., 10 S.W.2d 807, affirmed Filipas v. Chouke, 40 S.W.2d 38, 120 Tex. 508.
26 C.J. p 622 note 71.

Evidence held insufficient to show that defendant polluted waters over plaintiff's oyster bed so as to injure his oysters and warrant injunctive relief.—Pioneer Oyster Co. v. Puget Sound Pulp & Timber Co., D.C.Wash., 41 F.Supp. 919.

74. Cal.—People v. Truckee Lumber Co., 48 P. 374, 116 Cal. 397, 58 Am. S.R. 183, 39 L.R.A. 581.
26 C.J. p 622 note 72.

75. U.S.—Ne-Bo-Shone Ass'n v. Hogarth, D.C.Mich., 7 F.Supp. 885, affirmed, C.C.A., 81 F.2d 70.
26 C.J. p 622 note 73.

Gill net fishermen held entitled to enjoin maintenance of fish trap which interfered with the common right of fishery.—Johnson v. Hoy, 47 P.2d 252, 151 Or. 196—Strandholm v. Barbey, 26 P.2d 46, 145 Or. 427.

In absence of allegations or proof of right in plaintiffs to exclusive possession of fishing trap location, that defendants had acted unlawfully in placing an obstruction there, or, as basis for allegation that plaintiffs had or would suffer great and irreparable injury, that such location was of value, plaintiffs were not entitled to relief from such obstruction.—Davis v. Lewis Fish Co., 8 Alaska 525.

Location of dolphins at distances from fish trap lead line unreasonably interfering with licensed purse seiners' prior rights warranted injunction.—Vitalich v. Pacific American Fisheries, 284 P. 805, 155 Wash. 411.

a stream on the theory that its construction will be a public nuisance through its interference with rights of fishery, where the statute which authorizes the construction of the dam requires that sufficient fishways be provided.[76] Injunction has been held to be a proper remedy for the representatives of the people to prevent destruction of fish,[77] and the attorney-general may proceed without the intervention of a private relator to enjoin the unlawful destruction of fish.[78] It has been held that the right given a city by its charter, and by statute, to discharge its sewage into the ocean does not violate the contract rights of an oyster bed lessee, holding under a statute, which grants him the absolute right of occupancy for fixed periods, since these provisions relate to the occupancy of the land and not to the quality of water over it, and hence that such lessee is not entitled to an order restraining the city from so discharging its sewage.[79]

§ 25. Other Remedies

Remedies appropriate to the specific nature of the right enforced have been held to be available for particular invasions of rights to fish and in fish.

The respective rights of the parties arising from a grant of fishery in private waters may be determined in an action to quiet title.[80] It seems that ejectment will lie to recover a right of fishery which is appurtenant to plaintiff's land.[81]

An action for possession by the state will lie to recover the possession of a body of a whale taken within the coastal or inland waters of the state.[82]

Trover. Since mussels have a practically fixed habitat, they have been held to be sufficiently within the possession of the owner of the land to support an action for conversion against a trespasser, and this is particularly true as to shells he has piled on the bank awaiting transportation.[83] One who catches fish in a manner prohibited by law has not ownership or right of possession on which to base an action of trover against another for conversion of the fish.[84]

Nuisance. At common law, and by statute in some states, an unauthorized obstruction to the passage of fish or to the public right of fishing, in navigable waters, is a public nuisance and liable to abatement.[85] Oysters planted by a private individual on a natural oyster or clam bed, in navigable waters, constitute a public nuisance which any person may abate so far as is necessary to enable him to enjoy the right of taking oysters or clams from the natural bed, provided he acts in good faith and with reasonable care in doing so;[86] but planting oysters in public waters is not such a special appro-

76. Md.—Havre de Grace v. Harlow, 98 A. 852, 129 Md. 265.

77. **Financial ability to comply**

Injunction action against irrigation district's diversion of water from river until it constructed fish screen was maintainable by people without proof that district possessed financial ability to install screen.—People v. Glenn-Colusa Irr. Dist., 15 P.2d 549, 127 Cal.App. 30.

Jurisdiction

That federal government granted authority for irrigation district's diversion of water of river did not deprive state courts of jurisdiction to enjoin diversion until district constructed fish screen.—People v. Glenn-Colusa Irr. Dist., supra.

78. Cal.—People v. Truckee Lumber Co., 48 P. 374, 116 Cal. 397, 58 Am. S.R. 183, 39 L.R.A. 581—People v. Glenn-Colusa Irr. Dist., 15 P.2d 549, 127 Cal.App. 30.

79. U.S.—Darling v. Newport News, 39 S.Ct. 371, 249 U.S. 540, 63 L. Ed. 759, affirming 96 S.E. 307, 123 Va. 14, 3 A.L.R. 748.

80. **Camping sites**

In such an action, where grantees of fishing rights on lakes, who were granted camping privileges around lakes, could not agree with subsequent grantee of land as to location of camping sites, trial court was authorized to take evidence to determine the location of such sites.—Haynes v. Hunt, 85 P.2d 861, 96 Utah 348.

Suit in equity in nature of bill of peace

U.S.—Percy Summer Club v. Astle, N.H., 163 F. 1, 90 C.C.A. 527, rehearing denied 166 F. 1020, 92 C. C.A. 667.

81. **Location of land**

Where plaintiff brings ejectment for oyster beds, claiming them as appurtenant to his land, but fails to prove the location of his land, or that it is adjacent to the oyster beds, a judgment in his favor cannot be supported for the dominant tenement must first be located before the existence of the servient tenement can be determined.—Steelman v. Lafferty, 71 S.E. 524, 112 Va. 494.

82. **Complaint**

In action by state to recover possession of body of whale, complaint alleging that state owned whale and that defendants wrongfully seized it and withheld possession was sufficient.—State v. Lessard, 29 P.2d 509, 146 Or. 9.

83. **Navigability of stream**

The jury at least might find that the navigability of a stream containing mussels did not affect the landowner's possession of the mussels, as regards conversion by a trespasser.—McKee v. Gratz, Mo., 43 S. Ct. 16, 260 U.S. 127, 67 L.Ed. 167, affirming, C.C.A., Gratz v. McKee, 270 F. 713.

Jury question

In view of a statute prohibiting hunting and fishing only on inclosed and cultivated lands and private ponds, where there was evidence of a practice to wander, shoot, and fish at will on uninclosed and uncultivated land until the owner saw fit to prohibit it, it was a question for the jury whether persons taking mussels from a stream or pools and removing the shells were entitled to rely on such practice, and if entitled to rely on it at all, whether they could do so to the extent of the considerable and systematic work done by them, and it could not be said as matter of law that they were trespassers.—McKee v. Gratz, supra.

84. Cal.—Suttori v. Peckham, 191 P. 960, 48 Cal.App. 88.

85. Conn.—Clinton v. Bacon, 16 A. 548, 56 Conn. 508.

26 C.J. p 623 note 88.

86. N.J.—Brown v. De Groff, 14 A. 219, 50 N.J.Law 409, 7 Am.S.R. 749.

priation of those waters as justifies the removal of the oysters as a nuisance, unless they interfere with the rights of the public, such as the rights of fishing.[87]

III. PROTECTION AND REGULATION

§ 26. Power to Protect and Regulate

A state has the power to protect fish and regulate fishing within its borders.

It is well established that, by reason of the state's control over fish within its limits, it is within the police power of the state, subject to constitutional restrictions, to impose by legislative enactment such restrictions and limitations on the catching of fish as may be reasonably necessary for the protection and regulation of the public's rights therein, even to the extent of restricting the use of, or right of property in, the fish after they are taken,[88] and of obliging all citizens to conform to such regulations by inflicting penalties for the violation of them.[89] The public policy, as manifested by such statutes, is aimed at the protection and conservation of fish for the present and future generations of the people of the state.[90] In the territories such laws may be enacted by congress, or by the territorial legislatures under authority from congress.[91] Granting

87. N.J.—State v. Taylor, 27 N.J. Law 117, 72 Am.D. 347.

88. U.S.—Foster-Fountain Packing Co. v. Haydel, La., 49 S.Ct. 1, 278 U.S. 1, 73 L.Ed. 147, followed in Johnson v. Haydel, La., 49 S.Ct. 6, 278 U.S. 16, 73 L.Ed. 155—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925—Gloucester Seafood Workers' Ass'n v. Houston, D.C. Va., 35 F.2d 193—U. S. v. 2,271.29 Acres, More or Less, of Land in La Crosse, Trempeleau, Vernon, and Grant Counties, D.C.Wis., 31 F.2d 617—Van Camp Sea Food Co. v. Department of Natural Resources of State of California, D. C.Cal., 30 F.2d 111—Mirkovich v. Milnor, D.C.Cal., 34 F.Supp. 409—Pavel v. Pattison, D.C.La., 24 F. Supp. 915.

Ariz.—Begay v. Sawtelle, 88 P.2d 999, 53 Ariz. 304.

Ark.—State v. Johnson, 291 S.W. 89, 172 Ark. 866.

Cal.—Svenson v. Engelke, 296 P. 281, 211 Cal. 500—Ex parte Makings, 253 P. 918, 200 Cal. 474—Ex parte Vitalie, 4 P.2d 171, 172, 117 Cal. App. 553, citing **Corpus Juris**—Ex parte Makings, 247 P. 923, 78 Cal. App. 58—Ex parte Cencinino, 160 P. 167, 31 Cal.App. 238.

Fla.—Bruce v. Malloy, 7 So.2d 123—Coleman v. State ex rel. Cass, 198 So. 695, 144 Fla. 488—State ex rel. Gray v. Stoutamire, 179 So. 730, 131 Fla. 698—White v. State, 113 So. 94, 93 Fla. 905.

La.—State v. Monteleone, 131 So. 291, 171 La. 437.

Me.—State v. Ruvido, 15 A.2d 293, 137 Me. 102.

Mich.—People v. Chosa, 233 N.W. 205, 252 Mich. 154—People v. Soule, 213 N.W. 195, 238 Mich. 130.

Minn.—Lipinski v. Gould, 218 N.W. 123, 173 Minn. 559—Bohman v. Gould, 211 N.W. 577, 169 Minn. 374.

Mo.—Marsh v. Bartlett, 121 S.W.2d 737, 342 Mo. 526.

Mont.—State v. Rathbone, 100 P.2d 86, 110 Mont. 225.

N.C.—Moore v. Bell, 131 S.E. 724, 191 N.C. 305.

Or.—Union Fishermen's Co-operative Packing Co. v. Shoemaker, 193 P. 476, 98 Or. 659, rehearing denied 194 P. 854, 98 Or. 659.

R.I.—Windsor v. Coggeshall, 169 A. 326, 54 R.I. 38—Coggeshall v. Harbor Commission, 146 A. 482, 50 R. I. 175.

Tex.—Tuttle v. Wood, Civ.App., 35 S. W.2d 1061, error refused—Poon v. Miller, Civ.App., 234 S.W. 573.

Wash.—State ex rel. Bacich v. Huse, 59 P.2d 1101, 187 Wash. 75—McMillan v. Sims, 231 P. 943, 132 Wash. 265, reversing 225 P. 240, 129 Wash. 516—Vail v. Seaborg, 207 P. 15, 120 Wash. 126.

Wis.—Krenz v. Nichols, 222 N.W. 300, 303, 197 Wis. 394, 62 A.L.R. 466, citing **Corpus Juris.**

26 C.J. p 623 note 92, p 604 note 40.

Function of government

The statute creating a commission of fisheries and relating to conservation of fisheries of tidewater Maryland is in relation to a "governmental function," since conservation of fisheries of tidewater Maryland is a function of government.—Dorsey v. Petrott, 13 A.2d 630, 178 Md. 230.

Injunction against state officers

Where a state includes harbors and bays in its boundaries, and includes a bay within a fish district, in the absence of affirmative action by congress taking control, the federal court has no jurisdiction of a bill against the officers of the fish commission for interfering with the operation of a fish reduction plant within the bay.—Ocean Industries v. Greene, D.C.Cal., 15 F.2d 862.

Jus privatum of state

The right of fishery in tidal waters is an incident of the jus privatum of the state, and is not an inherent and inseparable incident of its jus publicum. Consequently, the legislature, in the absence of any constitutional prohibition, has the right to take away such right or to authorize, permit, or suffer its tidal waters or their bottoms to be used for purposes which impair or even destroy their use for purposes of fishery.—Commonwealth v. City of Newport News, 164 S.E. 689, 158 Va. 521.

Prohibition of sale of game fish is within police power of state.—State ex rel. Fulwood v. Southeastern Express Co., 167 So. 674, 123 Fla. 515.

Public policy

It has always been the public policy of the state to protect and conserve migratory fish for the benefit of the people.—State v. Beaver Portland Cement Co., Or., 124 P.2d 524, rehearing denied State by Wilson v. Beaver Portland Cement Co., 126 P. 2d 1094.

Purpose of the game and fish statutes is to propagate and preserve such fish as benefit mankind. It is plain from such statutes that the state has asserted title to fish for the public good, releasing title at designated seasons to such of the public as lawfully reduce fish to actual possession.—State v. Freeland, 300 S.W. 675, 318 Mo. 560.

Wisdom of legislation regulating fishing is a matter for legislative consideration and action, and it is not a question for the courts.—Holland v. Roberts, Fla., 5 So.2d 608.

89. Cal.—Suttori v. Peckham, 191 P. 960, 48 Cal.App. 88.

26 C.J. p 624 note 93.

90. Cal.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186.

91. U.S.—Anderson v. Smith, C.C. A.Alaska, 71 F.2d 493.

26 C.J. p 625 note 98.

Delegation

The power to enact fish laws applicable alone to the territory may be delegated to the territorial leg-

the power of congress to establish a refuge for game, it is within the power of congress to provide for the making of such regulations, relating to the taking of nonmigratory fish, as may become necessary to maintain a proper and efficient migratory bird refuge.[92]

This legislative power extends to fisheries in private or nonnavigable waters, which by the common law would be private property,[93] at least where such waters are connected with other waters in which other persons have the right to fish.[94] It has been held, however, that the legislature cannot interfere with the fishing privileges of the owners of private ponds having no communication through which fish are accustomed to pass to other waters,[95] and the state cannot, under the guise of regulating fishing, deprive the owner of private waters of his exclusive right to fish therein and vest such right in the general public.[96]

A dealer in commercial fish is engaged in a business which is peculiarly within the control of the state under its police power.[97] Likewise, the legislature may exclude commercial fishermen from operating in public waters while admitting the public to fishing in such waters.[98]

Regulation and protection of fish under police power distinguished from condemnation is discussed in Eminent Domain § 8; regulation of fishing as exclusively within state control, in Commerce § 29; and the delegation of regulative or protective power as to fish to executive officers or boards, in Constitutional Law § 138 b (4) (e).

A municipal corporation has no such property interest in the fish in waters within the corporate limits as to authorize it to restrict by ordinance the catching of such fish, in the absence of authority delegated to it by the legislature.[99]

Fish brought from outside state. For the protection of its fish within its own waters, the state may regulate the possession and disposition of fish when brought within the state from another jurisdiction.[1] It has been held that statutes which are intended to regulate and protect the fishing industry of the state should contain an express provision that their terms shall apply to fish imported from other jurisdictions, if such be the legislative purpose, otherwise the provisions of the act will be construed as limited to the waters of the state's jurisdiction.[2]

Territorial limits. The mere establishment of concurrent jurisdiction between two states of a river lying between them does not place a limitation on the power of one of the states to protect fish within its boundaries including such river,[3] and a compact, between two states having concurrent juris-

islature.—Auk Bay Salmon Canning Co. v. U. S., C.C.A.Alaska, 300 F. 907.

92. U.S.—U. S. v. 2,271.29 Acres, More or Less, of Land in La Crosse, Trempeleau, Vernon, and Grant Counties, D.C.Wis., 31 F.2d 617.

93. Ala.—Hood v. Murphy, 165 So. 219, 220, 231 Ala. 408, citing **Corpus Juris.**
Mo.—Reid v. Ross, 46 S.W.2d 567.
26 C.J. p 624 note 94, p 626 note 12, p 599 note 86.

To grow and sell fish

(1) Under some statutes a person may establish a private pond to propagate fish in water on premises of his own, where food fish do not naturally abound, and he may propagate and grow fish therein, and may sell them himself directly to the consumer.—Sherwood v. Stephens, 90 P. 345, 13 Idaho 399—State v. Dolan, 81 P. 640, 11 Idaho 256.

(2) Where a person constructs ponds or lakes on certain streams which are the natural spawning grounds for trout and other fish, and the area of the ponds so constructed does not exceed five acres, and also constructs a dam near the mouth of one of the streams and a lumber trap to prevent the fish raised in such ponds from getting into the river, which is the natural outlet of such streams, such ponds are not private ponds within the meaning of such a statute.—State v. Dolan, supra.

94. Ind.—State v. Lowder, 153 N.E. 399, 198 Ind. 234.
26 C.J. p 624 note 95.

Confined part of time

The public are entitled to have the game fish protected where they move from place to place during the season when the stream is a running stream, although the fish may be confined in a particular lake during a portion of the year.—Ray v. State, 132 So. 755, 159 Miss. 887.

95. Mich.—People v. Lewis, 198 N. W. 957, 227 Mich. 343.
Wis.—State v. Lipinske, 249 N.W. 289, 212 Wis. 421.
26 C.J. p 624 note 96.

Stocked lakes

A statute authorizing the state game and fish commission to declare a closed season on fishing in waters of the state does not apply to private landlocked lakes, which are disconnected from other waters and streams, and which have not, subsequent to such enactment, been stocked with spawn or fish by the state at the owner's request or by his consent.—Newman v. Ardmore Rod & Gun Club, Okl., 125 P.2d 191.

Statute held inapplicable

Statute prohibiting taking of fish for commercial purposes, except under permit from game and fish commission, was inapplicable to waters wholly on premises belonging to individuals.—Arkansas Game & Fish Commission v. Storthz, 29 S.W.2d 294, 181 Ark. 1089.

Under statute, catching undersized fish in private tank held not an offense.—Jones v. State, 45 S.W.2d 612, 614, 119 Tex.Cr. 126, quoting **Corpus Juris.**

96. Ala.—Hood v. Murphy, 165 So. 219, 231 Ala. 408.

97. La.—State v. Monteleone, 131 So. 291, 171 La. 437.

98. Tex.—Tuttle v. Wood, Civ.App., 35 S.W.2d 1061, error refused.

99. Fla.—Ex parte Guthrie, 2 So.2d 121—Nash v. Vaughn, 182 So. 827, 133 Fla. 499.

1. Wash.—State v. Nelson, 261 P. 796, 146 Wash. 17.

2. Fla.—Taylor v. Penton, 128 So. 499, 99 Fla. 1067, followed in Welles v. Penton, 128 So. 500, 99 Fla. 1069—White v. State, 113 So. 94, 93 Fla. 905.

3. U.S.—Nicoulin v. O'Brien, 39 S. Ct. 23, 248 U.S. 113, 63 L.Ed. 155, affirming 189 S.W. 724, 172 Ky. 473.

diction over a river, that all regulations for preserving and protecting fish in the river should be approved by both states is merely a limitation beyond which the states may not go, but is not an inhibition against the narrowing by either state of the class of persons who may be permitted by it to take fish,[4] or of the kind of appliances they may use.[5] Of course, a compact between states requiring mutual consent and approbation of all laws and regulations as to waters covered thereby does not affect laws and regulations by one state as to waters not included in the compact.[6]

A nation may regulate and control fisheries in tide waters within its territory,[7] as defined by international law, see the C.J.S. title International Law § 7, also 33 C.J. p 406 note 68–p 408 note 78. Where congress in regulating fishing in coastal waters has occupied but a limited field, a state has authority to protect its interests therein by additional or supplementary legislation.[8] The fact that a person might find himself unable to carry on his fishing operations beyond the state's jurisdiction without entering and operating his boat in state waters does not render a statute making it necessary for him to apply for a permit to operate the boat in state waters void on its face, if the requirements of such statute are sustainable as a proper exercise of the police power in the conservation of the state's fisheries.[9] Likewise, it has been held that a state may regulate fishing from boats belonging to its citizens and operated out of the state's ports, even though such fishing is done on the high seas beyond the territorial jurisdiction of the state.[10] It has been held, however, that where a vessel is outside the waters of a state the breach by the owner of the conditions of his license and bond by refusing to stop and submit to a search, or to return to state waters, on the order of a fish warden, is a mere breach of contract and not a criminal offense since the legislative and judicial power ends at the state line.[11]

§ 27. Constitutional and Statutory Provisions

Legislative regulations of fishing must conform to constitutional requirements. The usual rules govern the construction and operation of statutes regulating fishing.

The legislative regulations or restrictions of fishery rights must, of course, come within such limitations as have been imposed by the state and federal constitutions,[12] but the courts should not, by a

Beyond middle of channel
Nebraska can enforce law forbidding use of fishing nets, traps, and seines west of the middle of Missouri River channel.—Miller v. McLaughlin, 224 N.W. 18, 118 Neb. 174, certiorari granted 50 S.Ct. 31, 280 U.S. 541, 74 L.Ed. 602, affirmed 50 S.Ct. 296, 281 U.S. 261, 74 L.Ed. 840.

4. **Qualifications of licensees**
Such compact does not affect the right of one state to prescribe the qualifications of those to whom licenses to fish in the river will be granted by that state.—Olin v. Kitzmiller, C.C.A.Or., 268 F. 348, affirmed 42 S.Ct. 510, 259 U.S. 260, 66 L.Ed. 930.

5. U.S.—P. J. McGowan & Sons v. Van Winkle, D.C.Or., 21 F.2d 76, affirmed 48 S.Ct. 435, 277 U.S. 574, 72 L.Ed. 995.

6. Md.—Middlekauff v. Le Compte, 132 A. 48, 149 Md. 621.

7. Me.—State v. Ruvido, 15 A.2d 293, 137 Me. 102.

8. U.S.—Skiriotes v. State of Florida, 61 S.Ct. 924, 313 U.S. 69, 85 L.Ed. 1193, affirming 197 So. 736, 144 Fla. 220, and rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1552.
Fla.—Lipscomb v. Gialourakis, 133 So. 104, 101 Fla. 1130, followed in Lipscomb v. Kaloroukas, 133 So. 107, 101 Fla. 1137.
26 C.J. p 626 notes 13, 14.

Penobscot Bay
Where captain of fishing schooner was fishing in Penobscot Bay and within less than three miles of the shore of Seal Island, which is a part of the state of Maine, he violated the statute prohibiting the fishing for commercial purposes by a nonresident at certain times within "territorial waters."—State v. Ruvido, 15 A.2d 293, 137 Me. 102.

Place three fourths of a mile from beach of Dauphine Island is within "territorial jurisdiction" of Alabama, under statute prohibiting nonresidents from seining for salt water shrimp.—Bosarge v. State, 121 So. 427, 23 Ala.App. 18, certiorari denied 121 So. 428, 219 Ala. 154, certiorari denied 50 S.Ct. 26, 280 U.S. 568, 74 L.Ed. 621.

Shrimp, prawn, etc.
The state primarily owns the shrimp, prawn, etc., within its salt waters, and may provide the manner in which its citizens may take them. —Silver v. State, 93 S.E. 145, 147 Ga. 162.

Sponges do not fall under the exclusive jurisdiction of the United States, and the states may regulate the taking of them.—Cunningham v. Skiriotes, C.C.A.Fla., 101 F.2d 635.

9. U.S.—Mirkovich v. Milnor, D.C. Cal., 34 F.Supp. 409.

10. U.S.—Skiriotes v. State of Florida, 61 S.Ct. 924, 313 U.S. 69, 85 L.Ed. 1193, affirming 197 So. 736, 144 Fla. 220, and rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1552.

11. Me.—State v. LeBlanc, 98 A. 119, 115 Me. 142.

12. Ariz.—Begay v. Sawtelle, 88 P. 2d 999, 53 Ariz. 304.
Ark.—State v. Johnson, 291 S.W. 89, 172 Ark. 866.
Cal.—Van Camp Sea Food Co. v. Newbert, 244 P. 946, 76 Cal.App. 445.
Tex.—Stephensen v. Wood, Civ.App., 35 S.W.2d 794, certified questions answered 34 S.W.2d 246, 119 Tex. 564—Poon v. Miller, Civ.App., 234 S.W. 573.
Wash.—State ex rel. Bacich v. Huse, 59 P.2d 1101, 187 Wash. 75.
26 C.J. p 625 note 2.

Belief entitled to weight
Respecting constitutionality of statute prohibiting angling from boats in specified part of river, belief that wider distribution of food fish might be obtained thereby was entitled to weight.—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.

Description of prohibited waters
Statutes regulating fishing were not subject to objection that prohibited waters are insufficiently and incorrectly described.—Tuttle v. Wood, Tex.Civ.App., 35 S.W.2d 1061, error refused.

narrow construction of constitutional provisions, destroy such statutory regulations.[13] The federal Constitution does not permit a state, under the guise of conservation of fish, to work out ulterior designs, and the real purpose of the legislation must be within the scope of the state's residuary sovereignty and appertain to the protection of fish.[14] The purpose of a constitutional provision giving the legislature power to enact such laws for the protection of fish as it may deem appropriate is to give the legislature ample power to protect fish, and such a constitutional provision should be liberally construed.[15] The legislature's power to change laws regulating fish is not lost because those adversely affected have been licensed to operate under prior laws.[16] Where a state has relinquished all right to dispose of the public domain, its statutes regulating fishing must not conflict with the laws of congress relating to the disposition of the public domain.[17] A statute extending provisions of a former statute regulating fishing to all waters of a county is not invalid as arbitrary and unreasonable, even, if it is true that some bodies of water in the county do not require such regulations.[18]

The construction, operation,[19] and repeal[20] of statutes regulating fish are governed by the general rules relating to statutes. A statute which applies to all "territorial waters" of the state is not void for indefiniteness because it fails to define them.[21]

Fishing incident to navigation is not protected by Ordinance of 1787, nor by Constitution.—Krenz v. Nichols, 222 N.W. 300, 197 Wis. 394, 62 A.L.R. 466.

Right to fish

Constitutional right of fishermen to fish in waters of Columbia River could not be destroyed by legislative enactment.—Driscoll v. Berg, 1 P.2d 611, 137 Or. 499.

Statutes held valid

U.S.—Skiriotes v. State of Florida, 61 S.Ct. 924, 313 U.S. 69, 85 L.Ed. 1193, affirming 197 So. 736, 144 Fla. 220, and rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1552—Bayside Fish Flour Co. v. Gentry, Cal., 56 S.Ct. 513, 297 U.S. 422, 80 L.Ed. 722, affirming, D.C., 8 F. Supp. 67, affirmed 56 S.Ct. 86, 296 U.S. 660, 80 L.Ed. 470, vacated on other grounds 56 S.Ct. 166, 296 U.S. 547, 80 L.Ed. 388—U. S. v. 2,271.29 Acres, More or Less, of Land in La Crosse, Trempeleau, Vernon, and Grant Counties, D.C., Wis., 31 F.2d 617—Van Camp Sea Food Co. v. Department of Natural Resources of State of California, D.C.Cal., 30 F.2d 111—Mirkovich v. Milnor, D.C. Cal., 34 F.Supp. 409—Bayside Fish Flour Co. v. Gentry, D.C.Cal., 8 F.Supp. 67, affirmed 56 S.Ct. 86, 296 U.S. 660, 80 L.Ed. 470, vacated on other grounds 56 S.Ct. 166, 296 U.S. 547, 80 L.Ed. 388, affirmed 56 S.Ct. 513, 297 U.S. 422, 80 L.Ed. 772.

Ala.—Skrmetta v. Alabama Oyster Commission, 168 So. 168, 232 Ala. 371.

Alaska.—Freeman v. Smith, 8 Alaska 229.

Cal.—People v. Globe Grain & Milling Co., 294 P. 3, 211 Cal. 121—Ex parte Makings, 253 P. 918, 200 Cal. 474—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186—Pacific Gas & Electric Co. v. Moore, 98 P.2d 819, 37 Cal.App.2d 91.

Fla.—State ex rel. Oglesby v. Hand, 119 So. 376, 96 Fla. 799.

Ga.—Horne v. State, 153 S.E. 749, 170 Ga. 638.

Ill.—People v. Walton, 145 N.E. 182, 314 Ill. 45.

Me.—McKenney v. Farnsworth, 118 A. 237, 121 Me. 450.

Md.—Leonard v. Earle, 141 A. 714, 155 Md. 252, affirmed 49 S.Ct. 372, 279 U.S. 392, 73 L.Ed. 754—Dean v. Slacum, 132 A. 73, 149 Md. 578.

Mich.—People v. Soule, 213 N.W. 195, 238 Mich. 130.

Minn.—Bohman v. Gould, 211 N.W. 577, 169 Minn. 374.

N.H.—Musgrove v. Parker, 153 A. 320, 84 N.H. 550.

N.Y.—People v. Brennan, 255 N.Y.S. 331, 142 Misc. 225.

Or.—State ex rel. Veatch v. Franklin, 98 P.2d 724, 168 Or. 500.

Tex.—Tuttle v. Wood, Civ.App., 35 S.W.2d 1061, error refused.

Wash.—State ex rel. Campbell v. Case, 47 P.2d 24, 182 Wash. 334—State v. Nelson, 261 P. 796, 146 Wash. 17.

Wis.—Olson v. State Conservation Commission, 293 N.W. 262, 235 Wis. 473—State v. Sorenson, 260 N.W. 662, 218 Wis. 295.

Violation of organic act

Acts of the legislature of the territory of Alaska which amend, alter, or repeal acts of congress relating to fishing in Alaska are invalid as violations of the organic act of Alaska.—Auk Bay Salmon Canning Co. v. U. S., C.C.A.Alaska, 300 F. 907.

13. Or.—State v. Blanchard, 189 P. 421, 96 Or. 79.

14. U.S.—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.

15. Cal.—Ex parte Makings, 253 P. 918, 200 Cal. 474.

16. Tex.—Tuttle v. Wood, Civ.App., 35 S.W.2d 1061, error refused.

17. Colo.—Hartman v. Tresise, 84 P. 685, 36 Colo. 146, 4 L.R.A.,N.S., 872.

18. Ark.—Merritt v. Gravenmier, 277 S.W. 526, 169 Ark. 779.

19. Mass.—Commonwealth v. Howes, 169 N.E. 806, 270 Mass. 69.

N.Y.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.

Boundary

A statute to regulate fishing in a bay north of a bridge will be applied to all of the bay north of such bridge, although some portions of it widen out so as to be outside of lines drawn due north from either end of the bridge.—Jones v. State, 112 So. 556, 93 Fla. 603.

Formation of new county from territory named in statute relating to seines does not affect operation of statute over same territory within new county.—Ex parte Brandamour, 108 So. 895, 91 Fla. 889.

Statutes held not to be in conflict

Wash.—State v. Maybury, 239 P. 552, 136 Wash. 210.

20. Cal.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186.

La.—Irion v. Conner, 128 So. 37, 170 La. 435.

Mich.—Brown v. Trudell, 198 N.W. 841, 227 Mich. 69.

S.C.—State v. Hood, 188 S.E. 134, 181 S.C. 488.

Va.—Mahoney v. Commonwealth, 174 S.E. 817, 162 Va. 846.

26 C.J. p 625 note 1.

Particular statutes repealed

Fla.—State ex rel. Scott v. Christensen, 170 So. 843, 126 Fla. 306—State ex rel. Hall v. Steele, 118 So. 210, 96 Fla. 362.

N.Y.—People v. Schlagel, 206 N.Y.S. 87, 210 App.Div. 323, affirmed 148 N.E. 748, 240 N.Y. 660.

Tenn.—State ex rel. v. Monday, 7 Tenn.App. 257.

Statute held repealed only as to one county

Ark.—State v. Kincannon, 12 S.W.2d 776, 178 Ark. 849.

21. **Intent** of the legislature in enacting statute prohibiting commer-

Special or local legislation regulating or protecting fish is considered in the C.J.S. title Statutes § 210, also 26 C.J. p 624 note 97, and 59 C.J. p 739 note 86 [c], p 740 note 88 [q] (14); regulations for preservation of fish as not invalid as deprivation of vested rights, in Constitutional Law § 239 c; the validity of fishing regulations under constitutional provisions against special privileges or immunities, in Constitutional Law § 467; and fishing regulations as being or not being a denial of privileges or immunities of citizens, in Constitutional Law § 477.

§ 28. Specific Regulations and Offenses

Under the various statutes, the time and manner of taking fish and the quantity of fish which may be taken have been regulated.

The legislature may regulate the time and manner of taking fish and make it an offense to violate such regulations.[22] The legislature may restrict the quantity of fish that may be caught;[23] and may restrict even an owner of land, or his licensee, from catching certain fish in streams or waters on his land at certain seasons of the year, or by certain methods,[24] unless the water from which they are taken is so inclosed as to prevent the passage of fish to other waters.[25] Legislation to conserve fish may be made applicable only to particular waters,[26] and some statutes exempt certain waters from the operation of the fish laws.[27]

Violation of regulations as preventing ownership is considered supra § 3.

Establishment of closed season or waters by administrative body. Under the statutes in many jurisdictions, the validity of which have been upheld, the state game and fish commission or similar or other administrative body is empowered to provide for a closed season for fishing,[28] and such a pro-

cial fishing at certain times by a nonresident in the territorial waters of Maine was to exercise authority as to all waters over which it had sovereignty under generally recognized law.—State v. Ruvido, 15 A.2d 293, 137 Me. 102.

22. Ala.—Skrmetta v. Alabama Oyster Commission, 168 So. 168, 232 Ala. 371.
Fla.—Ex parte Lewis, 135 So. 147, 101 Fla. 624.
Mich.—People v. Soule, 213 N.W. 195, 238 Mich. 130.
N.Y.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.
26 C.J. p 626 note 12.

Night fishing
The purpose of some statutes is to protect certain fish from night fishing.—State v. Waite, 166 A. 4, 105 Vt. 265.

23. Ill.—Parker v. People, 111 Ill. 581, 53 Am.S.R. 643.
Or.—State v. Savage, 184 P. 567, 189 P. 427, 96 Or. 53.
Wis.—State v. Nergaard, 102 N.W. 899, 124 Wis. 414.

Statute construed
Statute relating to transportation of black bass to and from state prohibits any individual having in his possession for transportation or otherwise more than one day's bag limit of black bass and prohibits common carriers from receiving such limit for shipment.—State ex rel. Fulwood v. Southeastern Express Co., 167 So. 674, 123 Fla. 515.

24. Ind.—State v. Lowder, 153 N.E. 399, 198 Ind. 234.
Miss.—Ray v. State, 132 So. 755, 159 Miss. 887.
Mo.—Reid v. Ross, 46 S.W.2d 567.
26 C.J. p 626 note 16.

Legislative power to regulate fishing in private waters generally see supra § 26.

Fish trap
Under a regulation prohibiting fish traps within certain distances to those already located, a homesteader acquired no right to fish particular spot in navigable waters, because of permit granted him by the war department, or possession of territorial license.—Alaska General Fisheries v. Smith, 7 Alaska 635.

Validity of statute
Persons procuring licenses to fish within two miles of shore of Saginaw Bay from riparian owner, as required by statute, cannot set up invalidity of such act, in action on lease for rent due, in absence of eviction by paramount title.—Brown v. Trudell, 198 N.W. 841, 227 Mich. 69.

25. Mich.—People v. Lewis, 198 N.W. 957, 227 Mich. 343.
26 C.J. p 626 note 17.

Any waters of state
Statute prescribing time and manner of fishing in "any of the waters of this state" was held to mean any of the waters of the state in which fish do, or may, have a habitat, except private ponds and reservoirs when wholly on the premises of the owner, and waters in which fish are artificially propagated and held in captivity.—Reid v. Ross, Mo., 46 S.W.2d 567.

26. Minn.—Bohman v. Gould, 211 N.W. 577, 169 Minn. 374.

27. Iowa.—State v. Haug, 64 N.W. 398, 95 Iowa 413, 29 L.R.A. 390.
26 C.J. p 626 note 18.

28. Okl.—Newman v. Ardmore Rod & Gun Club, 125 P.2d 191.
Possession and sale of fish during close season generally see infra § 29.

Board of county commissioners
(1) Statute authorizing such body to make such orders held valid.—Ex parte Lewis, 135 So. 147, 101 Fla. 624.
(2) Where fresh waters lie in two or more counties, board of county commissioners of each county must concur in resolution prescribing closed fishing season, in order to render resolution effective.—Ex parte Lewis, supra.

Compact not violated
Orders of state fisheries board prohibiting the taking of salmon from the waters of Puget Sound between certain dates were held not violative of the joint compact between the states of Washington and Oregon, such compact having reference only to the waters of the Columbia River and its tributaries.—Vail v. Seaborg, 207 P. 15, 120 Wash. 126.

Method of fishing
Conservation commission had power to prohibit fishing during certain months except by hook and line in inland waters in certain counties.—People v. Soule, 213 N.W. 195, 238 Mich. 130.

Private waters
A statute authorizing the state game and fish commission to declare a closed season on fishing in waters of the state does not apply to private landlocked lakes, which have not been stocked with spawn or fish by the state at the owner's request or by his consent.—Newman v. Ardmore Rod & Gun Club, Okl., 125 P.2d 191.

Stocked or planted fish
The authority of the fish commission to close waters of the state to fishing is not limited to fish spawned naturally, but includes stocked or

vision is a reasonable regulation.[29] Under some statutes prescribing a closed season for particular rivers within the state, the state fish commission cannot shorten or abolish that defined period, but it may lengthen and extend the statutory closed season on such rivers.[30] Under some statutes, on recommendation of the grand jury of any county, the board of game and fish has the power to regulate or prohibit the taking of fish during any month or months in which fish in the state waters spawn.[31]

The function performed by the secretary of the interior under the statute vesting him with power to set aside and reserve fishing areas in Alaskan waters is executive and highly discretionary, and, if the statute is assumed to contemplate that some area or areas shall be opened up, their extent and location is left entirely to the secretary's discretion.[32] The power to discriminate under this statute is geographical, temporal, mechanical, quantitative, and selective as to the different varieties of fish.[33] Limitations ordinarily applicable in the regulation of private enterprise have no application to the control of such activities.[34] In order for an individual to compel the secretary to open up additional areas for the location of fishing sites, it is necessary to show that to do so would be the only method to avoid an illegal discrimination.[35] The anti-monopoly provision in the statute, that no exclusive or several right of fishery shall be granted and that no citizen of the United States shall be denied the right to take, prepare, cure, or preserve fish in any area of the waters where fishing is permitted, does not guarantee equality in an absolute sense; it does not prohibit the reasonable discriminations required for the purpose of conservation of, and by the limitations inherent in, the type of fishing to which the secretary's judgment must be applied.[36] Such limitation was not intended to guarantee unlimited trap fishing, and in the absence of any other standard, the secretary's judgment concerning the number of traps consistent with right conservation must be accepted as conclusive.[37]

The statutes usually require that an order of an administrative body or officer establishing a closed season be published and that it be filed in certain designated offices, and a compliance with the statute is sufficient.[38]

The form of an order establishing a closed season must comply with statutory requirements, but it is not invalidated by failure to contain matters not required by the statute.[39] Accordingly, under the various statutes, it has been held that an order closing certain water against fishing with seines and nets need not name the time for which it is to be closed,[40] and that an order establishing a closed season need not recite in detail the reasons for the order.[41]

Fish and game districts. For the purpose of protecting the public's interest in fish in public waters, some states, by statute, have been divided into fish and game districts.[42]

Reduction plants. Some statutes prohibit the use of food fish in reduction plants except by permission,[43] and the use of food fish by reduction plants may be enjoined by the state.[44] The term "re-

planted fish.—State v. Gates, 206 P. 863, 104 Or. 112.

29. Mo.—Marsh v. Bartlett, 121 S.W. 2d 737, 343 Mo. 526.

30. Or.—State v. Gates, 206 P. 863, 104 Or. 112.

31. **Certification of recommendation**
When the official certificate of the action of the grand jury has been filed in the office of the game and fish board, it becomes an office document, and the secretary of the board may certify such to be a fact. The certificate need not contain a reference that the order of the board was published as required by law.—Horne v. State, 153 S.E. 749, 170 Ga. 638.

32. D.C.—Dow v. Ickes, 123 F.2d 909, 74 App.D.C. 319, followed in Gilbert v. Ickes, 123 F.2d 917, 74 App. D.C. 327.

33. D.C.—Dow v. Ickes, supra.

34. D.C.—Dow v. Ickes, supra.

35. D.C.—Dow v. Ickes, supra.

36. D.C.—Dow v. Ickes, supra.

37. D.C.—Dow v. Ickes, supra.

38. Mich.—People v. Soule, 213 N.W. 195, 238 Mich. 130.

39. Mich.—People v. Soule, supra.

40. Tex.—Sterrett v. Gibson, Civ. App., 168 S.W. 16.

41. Mich.—People v. Soule, 213 N.W. 195, 238 Mich. 130.

42. **Boundaries**
There is no uncertainty in the definition by St.1917 p 1061 § 47, of fish and game district No. 20, as including Catalina Island and the portions of the state waters within certain lines, "state waters" meaning the three-mile zone around such island, especially in view of § 48, defining district No. 20A as consisting of the portion of the state waters around that island not included in district No. 20.—Ex parte Marincovich, 192 P. 156, 48 Cal.App. 474.

Statute held not to create new district
Cal.—Ex parte Giampe, 56 P.2d 974, 13 Cal.App.2d 275.

43. **Nuisance**
Use of food fish by reduction plant, in violation of statute, is such obstruction to free use of property in fish as to interfere with comfortable enjoyment thereof by the people and as such constitutes nuisance, and hence finding that such use caused no damage to state suing for injunction was unauthorized.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186.

"Waste"
Fishing with the purpose of delivering the catch to a reduction plant constitutes a "waste" of food fish caught, within some statutory prohibitions.—People v. Monterey Fish Products Co., supra.

44. **Finding immaterial**
In suit to enjoin reduction plant's illegal use of food fish, finding that sardines accepted and received by defendant were unfit for human food was immaterial, in light of uncontradicted testimony and admission by defendant that it was also engaged in receiving at its plant fish fit for human food.—People v. Monterey Fish Products Co., supra.

duction plant" as used in such a statute is sufficiently inclusive to apply to any plant engaged in the reduction of fish into other products which are not intended to be used for human consumption.[45] The maximum amount of fish which a packer may use for reduction purposes, under such a statute, is the quantity named in the permit granted by the fish commission, which may not in any event exceed the maximum set by the statute, but the commission may prescribe a quantity less than the statutory maximum.[46] If the applications for permits for reduction of food fish exceed in the quantity requested the amount of fish which the fish commission finds may safely be taken, it is the duty of the commission to make an equitable apportionment of its permits.[47] Where the statute so provides, the permit may be revocable at the option of the fish commission,[48] and a rule of the commission that each permit issued by it be restricted to the seasonal run of the fish to be used thereunder is not unreasonable.[49]

Restricting fishing to citizens. Since the state has in trust for its own citizens title to, and ownership of, fish in public waters, so far as they are capable of ownership while in a state of freedom, it may, through its legislative power, lawfully limit and restrict the right to fish to its own citizens, or to United States citizens,[50] and the state may prohibit aliens from accepting employment from one lawfully engaged in fishing in state waters.[51]

§ 29. —— Possession and Sale in Close Season

Under some statutes the possession and sale of fish during a close season is prohibited.

Statutes have been enacted and held constitutional in many jurisdictions, making it an offense and prescribing a penalty for any person to take or have in his possession certain kinds or sizes of fish during a particular season of the year, commonly called the close or closed season,[52] or, as to certain fish, during a certain number of years;[53] or to sell, offer for sale, or to have in possession for sale certain fish during the close season,[54] or, as to some fish, at any time;[55] and, under some of these statutes, it is immaterial whether the fish were acquired without any wrongful knowledge or intent.[56] Some statutes making it unlawful to have possession of

Invasion of property right
State may maintain action in equity to enjoin violation of law by packing company using more fish in its reduction plant than authorized by its permit, on theory that use of such fish is an invasion of property rights held by state in trust for people.—People v. Stafford Packing Co., 227 P. 485, 193 Cal. 719.

45. **Reduction for poultry food**
Cal.—People v. Monterey Fish Products Co., 234 P. 398, 195 Cal. 548, 38 A.L.R. 1186.

46. Cal.—People v. Stafford Packing Co., 227 P. 485, 193 Cal. 719.

47. Cal.—People v. Globe Grain & Milling Co., 294 P. 3, 211 Cal. 121.

48. Cal.—Bayside Fish Flour Co. v. Zellerbach, 12 P.2d 961, 124 Cal. App. 564.

49. Cal.—Bayside Fish Flour Co. v. Zellerbach, supra.

50. U.S.—Lubetich v. Pollock, D.C. Wash., 6 F.2d 237.
Ala.—Williams v. State, 133 So. 737, 222 Ala. 584, denying certiorari 133 So. 736, 24 Ala.App. 225, followed in Raley v. State, 133 So. 925, 24 Ala.App. 676, and Russo v. State, 133 So. 926, two cases, 24 Ala.App. 680.
Hawaii.—Territory v. Takanabe, 28 Hawaii 43.
Or.—Alsos v. Kendall, 227 P. 286, 111 Or. 359.
Wash.—State v. Maybury, 239 P. 552, 136 Wash. 210.
26 C.J. p 626 note 10—63 C.J. p 845 note 97 [c].

Requiring alien or nonresident to secure a license to fish see infra § 36.

Alien cooks on fishing boats, having no interest in catch of fish and not actually engaged in handling of any gear or in actual taking of fish, were not punishable under a statute prohibiting catching or taking of food fish by aliens, since they did not "catch" or "take" fish within the ordinary meaning of those words.—State v. Tomich, 255 P. 122, 143 Wash. 364.

Enemy alien
Under a statute providing that no license to fish shall be issued to any person unless he is a citizen of the United States or has declared his intention to become a citizen, a subject of a country with which the United States is at war, who has declared his intention to become a citizen, is entitled to a license, where the presidential proclamation defining the status of such aliens does not prohibit the granting of such a license. The fact that such alien cannot become a citizen during the state of war is immaterial.—State v. Darwin, 173 P. 29, 102 Wash. 402, L.R.A.1918F 1012.

51. Or.—Alsos v. Kendall, 227 P. 286, 111 Or. 359.

52. Fla.—Holland v. Roberts, 5 So.2d 608.
26 C.J. p 627 note 20.
Establishment of a close season by administrative body see supra § 28.

Under some statutes, any period of time, be it from one day to another day, or one hour of a day to another hour of the same or a succeeding day, is a "close season."—State v. Waite, 166 A. 4, 105 Vt. 265.

53. Vt.—State v. Eldredge, 45 A. 753, 71 Vt. 374.
26 C.J. p 627 note 21.

54. Or.—State v. Schuman, 58 P. 661, 36 Or. 16, 78 Am.S.R. 754, 47 L.R.A. 153.
26 C.J. p 627 note 22.

Privately-owned ponds
The legislature may prohibit the sale of certain fish during a closed season, and such prohibition may apply to fish taken from privately-owned ponds.
Hawaii.—Territory v. Hoy Chong, 21 Hawaii 39.
Mass.—Commonwealth v. Gilbert, 35 N.E. 454, 160 Mass. 157, 22 L.R.A. 439.

55. N.H.—State v. Dow, 47 A. 734, 70 N.H. 286, 53 L.R.A. 314.
Or.—State v. Schuman, 58 P. 661, 36 Or. 16, 78 Am.S.R. 754, 47 L.R.A. 153.

Bream and crappie
Where the statute prohibits the sale of bass only, sale or possession for sale of bream and crappie is not prohibited.—State v. Vaughn, App., 4 So.2d 5, certiorari denied 4 So.2d 9, 241 Ala. 628.

56. Me.—State v. Huff, 36 A. 1000, 89 Me. 521.

certain fish do not apply to fishermen only, but include anyone having possession of such fish, although they were caught by another.[57] Packing and canning certain fish during the close season is prohibited under some statutes.[58]

Under some statutes, the possession or sale during the close season of prohibited fish is unlawful, although lawfully acquired during the open season;[59] but where, under the statute, only the taking of fish during a close season is prohibited, it is not an offense to have in one's possession, during a close season, fish caught during an open season.[60]

Some statutory provisions making it unlawful for any person to sell, offer for sale, or to have in his possession certain fish, during the close season, extend to such fish caught without the state or country and imported into it,[61] and the validity of such statutes has been upheld as necessary to protect local fish during a closed season.[62] In some jurisdictions, sometimes by virtue of express exception in the statute,[63] the statutes prohibiting the possession of fish during a closed season do not extend to fish caught without the state.[64]

§ 30. —— Method of Taking Fish

The method of taking fish is regulated by statute in most jurisdictions.

It is within the police power of the state to regulate the method of taking fish within the state, and in many jurisdictions penal statutes to this effect have been enacted,[65] as by making it a penal offense to catch fish in certain waters or at certain periods by means of seines, nets, or traps,[66] fishing

Vt.—State v. Harvey, 92 A. 452, 88 Vt. 358.
26 C.J. p 627 note 24.

57. Mich.—People v. Dornbos, 86 N. W. 529, 127 Mich. 136.
26 C.J. p 627 note 26.
Transportation or exportation of fish see infra § 33.

58. Me.—State v. Kaufman, 57 A. 886, 98 Me. 546.
26 C.J. p 627 note 28.

59. Cal.—People v. Haagen, 72 P. 836, 139 Cal. 115.
26 C.J. p 627 note 29.

60. Or.—State v. McGuire, 33 P. 666, 24 Or. 366, 21 L.R.A. 478.

61. Or.—Union Fishermen's Co-operative Packing Co. v. Showmaker, 193 P. 476, 98 Or. 659, rehearing denied 194 P. 854, 98 Or. 659.
26 C.J. p 628 note 31.

62. **Statutes excepting fish caught in specified locality**
A statute making it a misdemeanor to have, during closed season, possession of salmon caught outside of the state is unconstitutional, where, by proviso, it excepts salmon caught beyond the three-mile limit in specified waters, since such proviso permits the very fraud to be committed the prevention of which was the basis of sustaining the validity of such statutes.—State v. Belknap, 176 P. 5, 182 P. 570, 104 Wash. 221.

63. Pa.—Commonwealth v. Beilstein, 29 Pa.Super. 373.
26 C.J. p 628 note 32.

64. Cal.—Svenson v. Engelke, 296 P. 281, 211 Cal. 500.
26 C.J. p 628 note 33.

65. U.S.—Skiriotes v. State of Florida, 61 S.Ct. 924, 313 U.S. 69, 85 L.Ed. 1193, affirming 197 So. 736, 144 Fla. 220, and rehearing denied 61 S.Ct. 1093, 313 U.S. 599, 85 L.Ed. 1552—Miller v. McLaughlin, 50 S.Ct. 296, 281 U.S. 261, 74 L.Ed. 840, affirming 224 N.W. 18, 118 Neb. 174, certiorari granted 50 S.Ct. 31, 280 U.S. 541, 74 L.Ed. 602—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.
Ala.—Skrmetta v. Alabama Oyster Commission, 168 So. 168, 232 Ala. 371.
Fla.—Lipscomb v. Gialourakis, 133 So. 104, 101 Fla. 1130, followed in Lipscomb v. Kaloroukas, 133 So. 107, 101 Fla. 1137.
26 C.J. p 628 note 34.
City held not to have power to regulate manner of fishing within its corporate limits.—Nash v. Vaughn, 182 So. 827, 133 Fla. 499.
Purpose of Florida criminal statute prohibiting use of diving equipment by sponge fishermen was to protect and perpetuate natural resource and important industry.—Pope v. Blanton, D.C.Fla., 10 F.Supp. 18, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384.

66. Cal.—Suttori v. Peckham, 191 P. 960, 48 Cal.App. 88.
Mo.—Reid v. Ross, 46 S.W.2d 567.
Pa.—Commonwealth v. Stawasz, 8 Pa. Dist. & Co. 87, 23 Luz.Leg.Reg. 309.
Tenn.—State v. Monday, 7 Tenn.App. 257.
26 C.J. p 628 note 35.
Injunction
In an action to enjoin the maintaining of a fish trap which was prohibited by law, where the statute provided punishment for the maintaining of such trap and did not provide any other method of relief, a court of equity did not have jurisdiction to enjoin the maintenance of the trap.—State v. Monday, supra.
Enjoining invasion of private right of fishery see supra § 24.
In particular waters
Fla.—Christensen v. Commercial Fishermen's Ass'n, 187 So. 699, 137 Fla. 248.
Nongame fish
The statute forbidding "seining of fish for commercial purposes" in specified lakes and making a violation thereof a misdemeanor was not violated by a contract whereby obligor was required to catch and dispose of predatory fish in such a lake and to pay the parish stipulated royalty per pound of the nongame fish which obligor might sell, the operations to be conducted under the supervision of the department of conservation, since the real purpose of the contract as shown by the evidence was to conserve the game fish by ridding the lake of predatory fish.—Department of Conservation v. Reardon, 8 So.2d 353, 200 La. 491.
Opening of trap
Where the law requires that, during the weekly closed season for fishing for salmon, the gates of all traps shall be closed and twenty-five feet of the net of the heart of each trap on each side next to the pot shall be lifted or lowered so as to permit the free passage of salmon, a V-shaped opening is not a compliance with the statute.—P. E. Harris & Co. v. O'Malley, 7 Alaska 201—26 C.J. p 628 note 34 [a].
Particular seines, nets, or traps prohibited
(1) Dutch net.—Rea v. Hampton, 7 S.E. 649, 101 N.C. 51, 9 Am.S.R. 21.
(2) Fish pots.—Middlekauff v. Le Compte, 132 A. 48, 149 Md. 621.
(3) Net having covered crib or heart.—People v. Shawl, 272 N.W. 875, 279 Mich. 475.
Placing of nets
(1) Under a regulation of the secretary of commerce, pursuant to Comp.L.Alaska 1913 § 264, prohibiting fishing nets within six hundred feet of each other, and prohibiting fishing prior to 6 A. M. of June 5 of each year, parties placing a set net

dams or weirs,[67] poisons or explosives,[68] or by other devices,[69] except by hook and line;[70] and by making it a misdemeanor for any person to have in his possession such nets, seines, or other devices,[71] and providing for the forfeiture or destruction of such nets or other devices when found in use in violation of the statute, see infra § 42, regardless of the time of acquisition.[72] Some statutes limit the number of hooks which may be used by one person in fishing.[73] A statute prohibiting the catching of certain fish by net is not invalid as unreasonable because a fisherman lawfully fishing for other fish cannot prevent the prohibited fish from entering his net.[74] Under some statutes, it is an offense to take fish by draining or drawing off the water of a pond or lake. All persons who assist in drawing off the water in violation of such a statute are guilty as principals.[75]

after that hour within the prohibited distance of another lawfully there violated the law, although they had made locations and posted location notices several weeks earlier, and before any other fishermen were at the lake.—Canoe Pass Packing Co. v. U. S., C.C.A.Alaska, 270 F. 533.

(2) Under a fishing regulation prohibiting set nets within six hundred feet of each other, parties who laid a set net within six hundred feet of another were "fishing," within the meaning of the statute, and violated the regulation, whether or not they caught any fish.—Canoe Pass Packing Co. v. U. S., supra.

(3) Under a fishing regulation prohibiting set nets within six hundred feet of each other, parties simultaneously placing their nets twenty-five feet apart were both violators of the law, and defendants, who replaced their nets after they had been carried away by the ice, were guilty of violating the law.—Canoe Pass Packing Co. v. U. S., supra.

(4) Statute construed and held to prohibit the placing of a net or other obstruction within the mouth of any river, creek, etc., or within three hundred feet of any lock or dam.—State v. Dyer, 100 S.W.2d 653, 171 Tenn. 66.

Persons propagating fish under statutory conditions are owners, and may take them with seine.—State v. Zellmer, 210 N.W. 774, 202 Iowa 638.

Resident aliens

Law excluding resident aliens from operating fish traps in sea fisheries was constitutional.—Territory v. Takanabe, 28 Hawaii 43.

Statute held not ambiguous because one paragraph prohibits catching of striped bass except by hook and line, whereas another paragraph permits sale of bass accidently taken in shad nets in specified district during particular time.—Ex parte Vitalie, 4 P.2d 171, 117 Cal.App. 553.

Streams which dry up

(1) Where the statute prohibiting the taking of fish with a seine in any waters of the state, with certain exceptions, contains no exception as to streams, or ponds which dry up either wholly or partially in dry seasons, taking fish by seine from a pond which at times got so low as to cause fish to die was a violation of the law.—State v. Lowder, 153 N.E. 399, 198 Ind. 234.

(2) Under other statutes, taking fish with a seine from such waters is not an offense.—Ray v. State, 132 So. 755, 159 Miss. 887—Hathorn v. State, 119 So. 303, 151 Miss. 778.

Such fishing is permitted unless denounced by statute.—State v. Pyles, 176 N.E. 97, 38 Ohio App. 380.

Words "haul seine or drag net" do not contemplate or include cast nets, trammel nets, gill nets, pound nets and many other nets in common use in the fishing industry.—Christensen v. Commercial Fishmen's Ass'n, 187 So. 699, 137 Fla. 248.

67. Ark.—Lynch v. State, 64 S.W. 950, 69 Ark. 555.
26 C.J. p 629 note 36.

68. Ga.—Evans v. State, 167 S.E. 724, 46 Ga.App. 342—Wade v. State, 161 S.E. 269, 44 Ga.App. 243.
Ind.—Voyles v. State, 165 N.E. 322, 200 Ind. 531.
Mo.—State v. McMurray, 284 S.W. 806, 314 Mo. 567.
Tex.—Springer v. State, Cr.App., 5 S.W.2d 150—Schweinle v. State, 4 S.W.2d 976, 109 Tex.Cr. 411.
26 C.J. p 629 note 37.

Dynamiting pursuant to permit

Deputy game and fish warden dynamiting water to kill gar pursuant to permit was not criminally liable for killing other fish. Statutes were held to authorize dynamiting to destroy obnoxious fish when state game and fish commissioner thought that such fish would hinder or prevent propagation of game or food fish.—State v. Freeland, 300 S.W. 675, 318 Mo. 560.

69. Mich.—In re Yell, 65 N.W. 97, 107 Mich. 228.
26 C.J. p 629 note 38.

Snag pole

Under a statute prohibiting fishing with a snag pole, and defining a snag pole as any pole to which a number of fish hooks are attached and which is designed to be drawn through the water for the purpose of catching fish, in view of a statute providing that every word importing the plural number only may be applied to one thing, a pole with only one hook may be a snag pole.—Muska v. Apel, 232 N.W. 593, 203 Wis. 389—58 C.J. p 778 note 76.

70. Cal.—Ex parte Vitalie, 4 P.2d 171, 117 Cal.App. 553.
26 C.J. p 629 note 39.

Nongame fish

Under a statute prohibiting the catching of game fish by any other means than hook and line, the catching of nongame fish with the hands is not unlawful—State v. Weindel, 2 P.2d 599, 52 Okl.Cr. 25.

Snaring with hook

An affidavit, charging the attempt to take and the taking of fish by jerking line with unbaited hook back and forth in water with pole and reel, so as to cause insertion of hook into any fish which might be in way thereof, charged public offense of taking or attempting to take fish by "means other than angling with hook and line."—State v. Mears, 12 N.E. 2d 343, 213 Ind. 257.

71. U.S.—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.
26 C.J. p 630 note 40.

Construction

Since such statutes are penal in character, they should be strictly construed.—State v. Zellmer, 210 N. W. 774, 202 Iowa 638.

Purpose of possession

Under a statute providing that the possession of a seine for fishing shall be unlawful except where the use of such seine is permitted by law, a seine is not a nuisance per se. It is such only when in possession for the purpose of catching fish contrary to law.—State v. Zellmer, supra.

In Ohio the statutes exempt possession of fish nets within one mile of the Ohio River.—State v. Pyles, 176 N.E. 97, 38 Ohio App. 380.

72. U.S.—Thomson v. Dana, D.C.Or., 52 F.2d 759, affirmed 52 S.Ct. 409, 285 U.S. 529, 76 L.Ed. 925.

73. **Triple hook**

Under such a statute a triple hook having three points on it but only one shank and one eye must be counted as only one hook.—People v. Roney, 230 N.Y.S. 583, 132 Misc. 746.

74. Cal.—Ex parte Vitalie, 4 P.2d 171, 117 Cal.App. 553.

75. Vt.—State v. Searles, 184 A. 701, 108 Vt. 236.

§ 31. —— Prohibiting Obstruction of Fish

In many jurisdictions the obstruction of streams so as to prevent the passage of fish is prohibited.

Statutes, the validity of which have been upheld, have been enacted to protect the passage of migratory fish up and down streams, although such streams flow over lands entirely subject to private ownership, as by prohibiting seines or other obstructions to their passage,[76] and authorizing certain local officers or committees to remove such obstructions, see infra § 37. A person who builds a dam on a stream annually frequented by fish is generally held to be under an implied obligation to keep open sufficient sluices and fishways for the passage of fish at the proper season;[77] and although a statute requiring the owner of an existing dam to provide a sluiceway for the passage of fish has been held void,[78] under most statutes the owner of such a dam is guilty of an offense if he fails or refuses, after due notice, to maintain adequate sluices and fishways,[79] notwithstanding such dam or obstruction had been maintained for the usual period of prescription.[80]

§ 32. —— Pollution of Streams

The pollution of streams so as to injure or destroy fish is prohibited in many jurisdictions.

The states may make,[81] and under many statutes have made,[82] it an offense to place any deleterious substance in a stream or other water to the injury of the fish therein, notwithstanding such substances had been discharged into the stream for the usual period of prescription.[83] Under some statutes an evil motive to destroy fish is not an essential element of the offense,[84] but under other statutes an intention to place or cause the destructive substance to enter or flow into the water is an essential element,[85] and if the pollution of the water is a result of an accident, the offense has not been committed.[86] Under some statutes, it is a defense to show that every reasonable and practicable means has been used to abate and prevent the pollution.[87]

76. Wis.—Krenz v. Nichols, 222 N.W. 300, 303, 197 Wis. 394, 62 A.L.R. 466, citing **Corpus Juris.**
26 C.J. p 630 note 42.

77. Mo.—State v. Gilmore, 42 S.W. 817, 141 Mo. 506.
26 C.J. p 630 note 44.

State engineer's approval
Where rights for entire appropriation of water of river had been granted by state engineer prior to submission of revised plan for reconstruction of power project, state engineer's approval of plan was not a determination that such reconstruction would or would not in any way affect commercial and game fishing.—State by Wilson v. Beaver Portland Cement Co., Or., 126 P.2d 1094, denying rehearing 124 P.2d 524.

78. Tenn.—Sibley v. State, 64 S.W. 703, 107 Tenn. 515.

79. Iowa.—State v. Meek, 84 N.W. 3, 112 Iowa 338, 84 Am.S.R. 342, 51 L.R.A. 414.
26 C.J. p 630 note 46.

In New York
(1) A riparian owner's right to maintain a dam in a river has been held to be subject to the right of the legislature to require the construction and maintenance of fishways therein so as to prevent the obstruction of the free passage of fish up the stream to the detriment of other riparian proprietors.—In re Delaware River, 115 N.Y.S. 745, 131 App.Div. 403.

(2) It has been held, however, that a party who held by patent from the state an absolute title, without restriction in the use or reservation, of both sides of a nonnavigable river had the right to erect and maintain, at or near the mouth of the river, a mill dam, although it operated to prevent salmon from going up the river, and that an act of the legislature, passed after the patent, which required slopes to be made in mill dams of the character of defendants, so that salmon might freely pass over the dam, did not affect defendant's rights, and as to him was unconstitutional.—People v. Platt, 17 Johns. 195, 8 Am.D. 382.

80. Iowa.—State v. Beardsley, 79 N.W. 138, 108 Iowa 396.
26 C.J. p 631 note 47.

81. Okl.—State v. Wheatley, 200 P. 1004, 20 Okl.Cr. 28.
Pollution of waters generally and right of riparian owner to purity of water generally see the C.J.S. title Waters §§ 43–57, also 67 C.J. p 767 note 28–p 799 note 86.

Regulatory power of state extends not only to the taking of its fish, but also extends over the waters inhabited by the fish, as its care of the fish would be of no avail if it had no power to protect the waters from pollution.—Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 160 Or. 654.

82. S.C.—State v. American Agricultural Chemical Co., 118 S.E. 535, 125 S.C. 270.
26 C.J. p 631 note 49.

Construction of particular statutes
(1) Within St. § 1253, making it an offense to put into any stream any liquid, berries, powder, medicine, or other thing whereby fish may be sickened or killed, or the water rendered unfit for use, the phrase "or other thing" was intended to include any substance which would have the prohibited effect, and was not limited to substances of the same class as those enumerated, and therefore a mining corporation, which polluted the waters of a stream by drainage from its mines, so as to kill the fish therein, was guilty.—Commonwealth v. Kenmont Coal Co., 251 S.W. 1018, 199 Ky. 826.

(2) Likewise, under such statute, it is an offense to place large quantities of sawdust and other sawmill refuse in a stream, whereby fish are sickened and killed, and the waters rendered unfit for use.—Commonwealth v. Straight Creek Coal & Coke Co., 145 S.W. 738, 147 Ky. 790.

(3) Other statutes see 26 C.J. p 631 note 49 [a].

83. Mass.—Commonwealth v. Sisson, 75 N.E. 619, 189 Mass. 247, 109 Am.S.R. 630, 1 L.R.A.,N.S., 752.

84. Pa.—Commonwealth v. Immel, 33 Pa.Super. 388—Commonwealth v. Ide, 13 Pa.Dist. & Co. 680.
Va.—Good v. Commonwealth, 154 S.E. 477, 155 Va. 996.

85. S.C.—State v. American Agr. Chemical Co., 110 S.E. 800, 118 S.C. 333.

Gist of offense under statute is knowingly or willfully casting sawdust into water course above tidewater, by which fish may be destroyed.—Good v. Commonwealth, 154 S.E. 477, 155 Va. 996.

86. S.C.—State v. American Agr. Chemical Co., 110 S.E. 800, 118 S.C. 333.

87. Pa.—Appeals from Justices of the Peace, 30 Pa.Dist. 200.

so as to affect injuriously the shore owner in the enjoyment of his right.[4] It is also an offense, under some statutes, to fish without the proprietors' consent in private ponds or streams entirely within their control, and in which fish are lawfully propagated,[5] and on which notices to that effect have been posted,[6] notwithstanding such ponds or streams were stocked with fish procured from the state fish and game commissioners;[7] or for one who is not the owner of such a fishery, to sell or offer for sale any fish grown therein.[8] It has been held that, in order that a pond or other body of water may come within the protection of such a statute, there must be some improvement for the propagation of fish,[9] and the stream or pond must be so far private property, and within the control of the proprietor thereof, as to confine therein the fish with which it is stocked.[10] Under some statutes the poster must show the date on which the waters were stocked, and the owner is subject to a fine if he maintains such poster for more than a year after the waters were last stocked.[11] The owner of property, within a statute prohibiting fishing on the lands of another without permission, must be a natural person, a corporation, or a quasi person or entity, such as a partnership.[12] Under a statute making it an offense to enter on the inclosed land of another without his consent and to catch or take fish, fishing does not constitute an offense unless fish be caught or taken.[13]

§ 35. —— Offenses as to Oysters, Clams, and Other Shellfish

Various statutes define particular offenses relating to the taking of shellfish.

It is an offense under the various statutes to deposit substances in public waters injurious to shellfish;[14] to take oysters from a licensed or private bed without the consent of the licensee or owner;[15] to take more shellfish than a specified quantity at one time;[16] to take oysters or other shellfish from certain waters[17] by means of certain devices,[18] or to fail to cull in the prescribed manner oysters so taken;[19] or to plant or take oysters without a license.[20] Under some statutes, it is an offense to take or destroy certain shellfish at certain seasons,[21] and under such statutes, the validity

4. Me.—Dunton v. Parker, 54 A. 1115, 97 Me. 461—Sawyer v. Beal, 54 A. 848, 97 Me. 356.

5. Mass.—Commonwealth v. Richardson, 7 N.E. 26, 142 Mass. 71.
26 C.J. p 631 note 59.

6. N.Y.—People v. Hall, 40 N.Y.S. 183, 8 App.Div. 15.
26 C.J. p 632 note 60.

7. N.Y.—Rockefeller v. Lamora, 83 N.Y.S. 289, 85 App.Div. 254.
26 C.J. p 632 note 61.

8. Idaho.—State v. Dolan, 81 P. 640, 11 Idaho 256.

9. N.Y.—People v. Hall, 40 N.Y.S. 183, 8 App.Div. 15.
Pa.—Benscoter v. Long, 27 A. 674, 157 Pa. 208.
26 C.J. p 632 note 63.

10. N.H.—State v. Welch, 28 A. 21, 66 N.H. 178.
Pa.—Reynolds v. Commonwealth, 93 Pa. 458.
26 C.J. p 632 note 64.

11. Vt.—State v. Mack, 102 A. 58, 92 Vt. 103.
26 C.J. p 632 note 65.

12. **Estate of decedent** is not such an owner.—Hawthorne v. State, 158 S.E. 66, 43 Ga.App. 86.

13. Tex.—Roach v. State, 300 S.W. 947, 108 Tex.Cr. 352—Bodner v. State, 300 S.W. 940, 108 Tex.Cr. 353.

14. U.S.—Connolly v. Standard Oil Co., D.C.R.I., 264 F. 388.
26 C.J. p 632 note 67.

15. Conn.—Averill v. Hull, 37 Conn. 320.
Ga.—Houston v. State, 52 S.E. 757, 124 Ga. 417.

16. Mass.—Commonwealth v. Bailey, 13 Allen 541.
Or.—State v. Savage, 184 P. 567, 96 Or. 53.

17. Wash.—State v. Van Vlack, 172 P. 563, 101 Wash. 503, L.R.A.1918E 108.
26 C.J. p 632 note 70.

Contaminated waters

(1) Under a statute providing that, on the department of health finding that certain waters are contaminated, notice thereof shall be posted at or near such area, a notice complying with the statute is sufficient and needs no signature.—Commonwealth v. St. John, 159 N.E. 599, 261 Mass. 510.

(2) Action of department of public health toward declaring area contaminated, and requesting that taking of shellfish therefrom be prohibited, was sufficient under statute.—Commonwealth v. St. John, supra.

(3) Under some statutes, no new newspaper publication is essential to prosecution for taking shellfish from area proscribed under earlier statutes, and a conviction for taking clams from area proscribed under prior statute may be had, without promulgation of regulations thereunder or examination under later statute.—Commonwealth v. St. John, supra.

(4) Other matter relating to taking of shellfish from contaminated water see 26 C.J. p 632 note 70 [a].

Scallops

(1) Scallops are fish within the regulations of the state fisheries commission board, restricting the taking of fish in certain waters, and of the statute creating it.—State v. Dudley, 109 S.E. 63, 182 N.C. 822.

(2) Scallops which travel to and fro, and have no natural beds, are not within a penal ordinance against gathering shellfish from their beds of natural growth by nonresidents.—Smithtown v. Jewell, 168 N.Y.S. 88, 180 App.Div. 657.

18. Fla.—Lipscomb v. Gialourakes. 133 So. 104, 101 Fla. 1130, followed in Lipscomb v. Kaloroukas, 133 So. 107, 101 Fla. 1137.
26 C.J. p 632 note 71.

Act empowering oyster commission to exercise regulative powers, to preserve oyster life, increase and improve supply thereof, and to prevent undue depletion thereof includes power to regulate manner of taking oysters, and prohibits dredging on public reefs and state-owned bottoms.—Skrmetta v. Alabama Oyster Commission, 168 So. 168, 232 Ala. 371.

19. La.—State v. Slover, 54 So. 942, 128 La. 460.
26 C.J. p 632 note 72.

20. N.C.—State v. Goulding, 42 S.E. 563, 131 N.C. 715.
26 C.J. p 632 note 73.

21. U.S.—Gratz v. McKee, Mo., 258 F. 335, 169 C.C.A. 351, reversed on other grounds 270 F. 713, certiorari granted 41 S.Ct. 535, 256 U.S. 687,

of which has been sustained, even the owner of the shellfish cannot harvest them during the closed season,[22] notwithstanding evidence indicating that, under the circumstances, he could not harvest them during the open season.[23] It is also an offense, under some statutes, to take, sell, or have in possession certain shellfish such as lobsters under a specified size.[24]

Intent. Where the statute requires the immediate liberation, alive, of lobsters below the legal size, the intent with which short lobsters are being held is immaterial.[25]

Labels. Under some statutes, all packages used in the shipment and transportation of certain shellfish must bear a label stating certain required information.[26]

Sanitary permit. In the absence of a statute to the contrary, it is not necessary to obtain a sanitary permit to take shellfish from uncertified waters for bait purposes.[27]

Shellfish taken without state. Some statutes prohibiting the destruction of,[28] or the possession of,[29] certain shellfish apply even though they were caught without the state and brought into it, but some statutes have been held to apply only to shellfish taken within the state.[30] A proviso as to returning lobsters alive to the waters where they were taken does not apply to those caught without the state.[31]

Transportation. Under some statutes, the validity of which has been upheld, it is an offense to transport certain shellfish from certain fish and game districts into other districts.[32] A statute prohibiting the transportation of certain shellfish from a designated fish and game district does not prohibit transportation through such district.[33]

§ 36. Licenses

The statutes usually require a license to fish in public waters or by particular methods.

Under the various statutes, some of which apply particularly to nonresidents,[34] to entitle one to fish in the waters of the state, or in certain waters thereof and for certain fish, he is required to obtain a license for that purpose from the proper authorities, and it is made an offense for him to do such fishing without such a license.[35] Such a license has been required to entitle one to fish by

65 L.Ed. 1172, affirmed 43 S.Ct. 16, 260 U.S. 127, 67 L.Ed. 167.
26 C.J. p 632 note 66, p 633 note 75.

22. Md.—Windsor v. State, 64 A. 288, 103 Md. 611, 12 L.R.A.,N.S., 869.
Wash.—State v. Van Vlack, 172 P. 563, 101 Wash. 503, L.R.A.1918E 108.

23. Wash.—Wiegardt v. Brennan, 73 P.2d 1330, 192 Wash. 529.

24. Md.—Windsor v. State, 64 A. 288, 103 Md. 611, 12 L.R.A.,N.S., 869.
26 C.J. p 633 note 74.

Dead lobsters
Statute is broad enough to include dead lobsters as well as live ones.—Commonwealth v. Hodgkins, 49 N.E. 97, 170 Mass. 197.

25. Me.—State v. Morton, 130 A. 352, 125 Me. 9.
26 C.J. p 633 note 74 [c].

26. Labeling held sufficient
Seller, who delivered by truck clams in open bags to buyer in neighboring town with required labels inside bags, did not violate statute forbidding shipment and transportation of clams, unless packages bear labels, giving among other things, names of "consignor" and "consignee."—State v. Chadbourne, 164 A. 630, 132 Me. 5.

27. N.Y.—State Conservation Com'r by Foley v. Hewlett, 255 N.Y.S. 625, 143 Misc. 322.

28. Me.—State v. Craig, 13 A. 129, 80 Me. 85.

29. Mass.—Commonwealth v. Young, 43 N.E. 118, 165 Mass. 396—Commonwealth v. Savage, 29 N.E. 468, 155 Mass. 278.

30. Md.—Tyler v. State, 48 A. 840, 93 Md. 309, 52 L.R.A. 100.

31. Mass.—Commonwealth v. Savage, 29 N.E. 468, 155 Mass. 278.

32. Cal.—Ex parte Makings, 247 P. 923, 78 Cal.App. 58.

33. Cal.—Silva v. MacAuley, 26 P.2d 887, 135 Cal.App. 249, rehearing denied 27 P.2d 791, 135 Cal.App. 249.

34. Fla.—Curry v. Moran, 79 So. 637, 76 Fla. 373.
26 C.J. p 633 note 80.
Restricting fishing to citizens or residents see supra § 28.

Statutes construed
(1) L. 1915 c 6877 § 14 imposes a license tax of ten dollars on aliens or nonresidents engaged in taking fish from the salt waters of the state, whether by hook, line, rod, or reel, for purposes other than for their own individual use, while operating in whole or in part a boat engaged in the fishing industry. One who pays the license provided for in L. 1915 c 6877 § 14 is not required to pay the further tax of ten dollars on aliens or nonresidents engaged in the fishing industry, required by the succeeding paragraph of the same section. An alien or a nonresident employed on a boat engaged in the fishing industry is required to pay the license imposed by L. 1917 c. 6877 § 14, whether he actually fishes or not, and if he is on a boat not engaged in the fishing industry, but fishes for purposes other than his own use, he is required to pay the license of ten dollars; but one person is not required to pay both licenses.—McClain v. West, 87 So. 49, 80 Fla. 732.

(2) Under a statute prohibiting nonresidents from fishing in lakes and streams within the "jurisdiction of the state" without a license, the quoted words do not mean public waters only, but signify the power to declare and to enforce the law as well as the territory within which such power may be exercised.—People v. Lewis, 198 N.W. 957, 227 Mich. 343.

Statute held valid
U.S.—Haavik v. Alaska Packers' Ass'n, Cal., 44 S.Ct. 177, 263 U.S. 510, 68 L.Ed. 414.

35. Alaska.—Territory v. Alaska Pac. Fisheries, 5 Alaska 325.
Tenn.—State v. Hutton, 290 S.W. 380, 155 Tenn. 55.
26 C.J. p 633 note 81.

Employees
(1) Under some statutes mere employees of licensed fishermen, who work for wages and have no interest in the catch, must be licensed.—Alsos v. Kendall, 227 P. 286, 111 Or. 359—26 C.J. p 633 note 81 [b].

(2) Accordingly, a boat puller was required to be licensed.—Alsos v. Kendall, supra.

particular methods, such as by nets, traps, etc.;[36] or to fish for profit;[37] or to deal in fish;[38] or to transport fish of certain kinds, such as lobsters, beyond the state;[39] or to use boats in fishing,[40] or in planting or taking oysters.[41] Where under statutes, enacted under a compact between two states relating to fishing in a river serving as a boundary between them, the parties do not obligate themselves to issue any fishing licenses but limit the classes of persons who may have them, one state may narrow these classes or refuse to issue any licenses.[42] Under some statutes a license is not required for fishing in private waters.[43] The persons entitled to secure a fishing license are to be determined by the valid statutory provisions of the particular jurisdiction,[44] and under some statutes, a license to fish cannot be issued to a corporation.[45] Some statutes do not require the fish commissioners to issue a license to fish by certain methods merely on application, and the granting or denial of a license rests in their sound discretion.[46] Under some statutes, in order to obtain a license to seine, it is necessary that applicant have title or interest in real property on which to land the seines.[47]

The licensing of a fishing location is considered supra § 9, in connection with the acquisition of a private right of fishery in public waters.

Application. Under some statutes the issuance of a fishing license may be refused where the application therefor is not made in accordance with the statute, as where it does not state that applicant is a resident of the state, or does not disclose which of the several licenses authorized by statute he desires, or does not show the situation of the proposed fishing grounds.[48]

Display of license. Under some statutes no person may fish within the state unless his license is on his person, and he must exhibit it on the request of any fish warden or other public officer.[49] Also, under some statutes, no person may so fish unless a license button be at such time continually displayed on his outer garments in such a manner that the license figures are plainly visible.[50]

Municipality

In the Philippines, a grant of power to a municipality to impose a license tax on the privilege of fishing in municipal waters is valid.—Ayson v. Provincial Board of Rizal, 39 Philippine 931.

Statute held valid

The act of congress imposing taxes on fish oil works and fertilizer works in Alaska does not import a license to such works, and an act of the territorial legislature levying a license tax on manufacturers of fish oil and fertilizer, claimed to be prohibitory, is not in conflict therewith.—Alaska Fish Salting & By-Products Co. v. Smith, Alaska, 41 S.Ct. 219, 255 U.S. 44, 65 L.Ed. 489.

36. Ark.—State v. Adams, 218 S.W. 845, 142 Ark. 411.

26 C.J. p 634 note 82.

37. U.S.—Ashon v. Board of Comrs. for Protection of Birds, Game & Fish, C.C.La., 185 F. 221, appeal dismissed 33 S.Ct. 775, 229 U.S. 606, 57 L.Ed. 1348.

Ohio.—State v. Hanlon, 82 N.E. 662, 77 Ohio St. 19, 122 Am.S.R. 472, 13 L.R.A.,N.S., 539.

Revenue tax

Since statute, making it unlawful for one to engage in the business of carrying fishing parties for hire in a boat not propelled exclusively by oars in certain waters without a license, requires no examination of the boat or operator, and no option or power is vested in the issuing authority to refuse the license on tender of the prescribed fee, the act is an act to raise revenue, and was not passed as an exercise of the "police power" of the state, and the fee required is a "tax" rather than a "license fee."—Conard v. State, Del. Super., 16 A.2d 121.

38. Fla.—Ex parte Powell, 70 So. 392, 70 Fla. 363.

26 C.J. p 634 note 84.

Commercial fish

"The right of persons to purchase commercial fish for resale is not an absolute right, but a mere privilege which the state may grant or withhold at its pleasure. When the privilege is granted, however, the state may for its exercise exact such charges and impose such conditions as it may deem necessary to secure the preservation and conservation of its property."—State v. Monteleone, 131 So. 291, 292, 171 La. 437.

Wholesale sponge dealer

The statute imposing license tax on wholesale seafood dealers is not applicable to wholesale dealer in commercial sponges, as against contention that the statute imposes license tax on all wholesale dealers in any kind of salt water product.—Cunningham v. Stefanidi, 197 So. 722, 144 Fla. 214.

39. Me.—State v. Dodge, 104 A. 5, 117 Me. 269.

Transportation or exportation of fish generally see supra § 33.

40. Noncommercial boats

(1) Provision of the statute regulating commercial salt-water fishing, and exempting from license provisions persons fishing with hook and line or rod and reel, was not made part of statute requiring the licensing of all boats engaged in fishing in the salt waters of the state, so as to except from license provision owner of boat used in noncommercial salt-water sport fishing by use of hooks and lines or rods and reels.—Coleman v. State ex rel. Cass, 198 So. 695, 144 Fla. 488.

(2) A disabled world war veteran was held not exempt from payment of license tax on use of boats owned by him in noncommercial sport fishing.—Scott v. Worthington, 199 So. 766, 145 Fla. 461.

41. U.S.—Dize v. Lloyd, C.C.Md., 36 F. 651.

N.J.—State v. Loper, 46 N.J.Law 321.

42. U.S.—Olin v. Kitzmiller, Or., 42 S.Ct. 510, 259 U.S. 260, 66 L.Ed. 930, affirming, C.C.A., 268 F. 348.

Territorial limits of right to regulate fishing see supra § 26.

43. N.J.—State v. Biggs, 187 A. 199, 17 N.J.Law 240, affirming Williams v. Biggs, 175 A. 362, 12 N.J.Misc. 833.

44. Wash.—State ex rel. Bacich v. Huse, 59 P.2d 1101, 187 Wash. 75.

45. Or.—Booth Fisheries Co. v. Kendall, 227 P. 291, 111 Or. 377.

46. Pa.—Weindorf v. French, 39 Pa. Dist. & Co. 65, 49 Dauph.Co. 49.

47. Or.—Smith v. P. J. McGowan & Sons, 284 P. 189, 131 Or. 522.

48. Vt.—Rockwell v. Titcomb, 88 A. 526, 87 Vt. 112.

49. Pa.—Commonwealth v. Neyhart, 30 Pa.Dist. & Co. 408.

50. Taking of bait fish or minnows constitutes angling or fishing within such statutes.—Commonwealth v. Neyhart, supra.

Fee. The license fee must be a reasonable one;[51] but, if the statute providing for the license fee was valid at the time of its enactment, the fact that the fees collected under it are subsequently found to be in excess of that which is necessary to enforce the statute, does not render it invalid.[52] An amendatory act imposing an additional fee has been held to be applicable to licenses issued prior to its passage.[53]

Persons engaged in packing or canning salmon, oysters, etc., may be required to take out a license and to pay a tax based on the amount packed, canned, or sold,[54] although they are caught in, and shipped from, another state.[55] Under such a statute every person, firm, or corporation engaged in canning and packing fish is liable for the poundage fee, irrespective of in whose name the license to can and pack was granted or of whether a license was granted at all.[56] Such an exaction is not a regulatory charge made in the exercise of the state's police power, but is a license or privilege tax on a business or occupation.[57] Under some statutes, the poundage fee on fish packed constitutes a first lien on the cannery, packing plant, boat, and the equipment used in the canning, receiving, or transporting of the fish.[58]

In the absence of a statute providing therefor, a fishing license fee voluntarily paid without protest cannot be recovered back, although assessed and collected without legal authority.[59]

51. Cal.—Ex parte Parra, 141 P. 393, 24 Cal.App. 339.

Tax held not confiscatory

U.S.—Alaska Pacific Fisheries v. Territory of Alaska, Alaska, 236 F. 52, 149 C.C.A. 262, certiorari denied 37 S.Ct. 242, 242 U.S. 648, 61 L.Ed. 544, error dismissed 39 S.Ct. 208, 249 U.S. 53, 63 L.Ed. 474.

Validity under organic act

(1) The territory cannot impose a license fee on nonresidents which is destructive of the right of citizens of the United States to fish in Alaskan waters as reserved by the organic act.—Freeman v. Smith, C.C.A. Alaska, 44 F.2d 703, certiorari denied Smith v. Freeman, 51 S.Ct. 333, 282 U.S. 904, 75 L.Ed. 796.

(2) A license fee of two hundred and fifty dollars for nonresidents as against a fee of one dollar for residents is accordingly invalid.—Freeman v. Smith, C.C.A.Alaska, 62 F.2d 291—Freeman v. Smith, C.C.A.Alaska, 44 F.2d 703, certiorari denied Smith v. Freeman, 51 S.Ct. 333, 282 U.S. 904, 75 L.Ed. 796.

(3) An annual license fee of twenty-five dollars required of nonresidents is not invalid under such rule.—Anderson v. Smith, C.C.A.Alaska, 71 F.2d 493.

(4) An act imposing taxes on fish traps as a license on fisheries is valid under the organic act.—Alaska Pacific Fisheries v. Territory of Alaska, Alaska, 236 F. 52, 149 C.C.A. 262, certiorari denied 37 S.Ct. 242, 242 U.S. 648, 61 L.Ed. 544, error dismissed 39 S.Ct. 208, 249 U.S. 53, 63 L.Ed. 474.

52. Ark.—Merritt v. Gravenmier, 277 S.W. 526, 169 Ark. 779.

53. U.S.—Alaska Consol. Canneries v. Territory of Alaska, C.C.A.Alaska, 29 F.2d 401.

Preparatory work in canning salmon, such as making of cans before license statute became effective, gave canner no right under previous statute as to such pack.—Territory v. P. E. Harris & Co., 7 Alaska 430.

54. U.S.—Pacific American Fisheries v. Territory of Alaska, Alaska, 46 S.Ct. 110, 269 U.S. 269, 70 L.Ed. 270, affirming, C.C.A., 2 F.2d 9, certiorari granted 45 S.Ct. 353, 267 U. S. 589, 69 L.Ed. 801.

26 C.J. p 634 note 87.

Application and payment

Under some statutes the application for the license must be made before actually packing the fish and payment is to be made after the packing is done.—Pioneer Packing Co. v. U. S., C.C.A.Alaska, 99 F.2d 547.

License tax for catching and a license tax for canning are a valid exercise of legislative power.—Territory v. Alaska Pacific Fisheries, 5 Alaska 411, affirmed Hoonah Packing Co. v. Territory of Alaska, 236 F. 61, 149 C.C.A. 271.

55. Md.—Applegarth v. State, 42 A. 941, 89 Md. 140.

56. **Partner** in fishing business was liable for poundage fees that accrued during license year until time of his withdrawal from the partnership, notwithstanding license for that year was applied for in name of third person.—State ex rel. Veatch v. Franklin, 98 P.2d 724, 168 Or. 500.

57. Or.—State ex rel. Veatch v. Franklin, supra.

58. Or.—State ex rel. Veatch v. Franklin, supra.

Proceedings for enforcement

(1) In the absence of statute providing how the lien should be enforced, a general statutory provision as to enforcement of liens authorizes foreclosure proceedings in the name of the state.—State v. Swensk, 89 P. 2d 587, 161 Or. 281.

(2) Such foreclosure cannot be defeated by a claim that equity has no jurisdiction over the subject matter and that an adequate remedy exists at law.—State v. Swensk, supra.

(3) That payment of poundage fees was secured by bonds filed by surety companies did not defeat state's proceeding to foreclose lien, on ground that state was not "real party in interest" and that suit was being prosecuted for benefit of surety companies, where the state had not assigned its claim of liens.—State v. Swensk, supra.

(4) In foreclosure proceedings, it is not incumbent on the state to show that any particular machine of the plant was used in canning or packing the fish on which poundage fees are claimed. It is sufficient that the machinery or equipment was a part of the plant and that the fish on which poundage fees are claimed were packed in such plant.—State v. Swensk, supra.

(5) It is the use of the machinery and equipment, and not its ownership, on which the lien is based. The owner thereof is bound to know that his machinery and equipment are being used in such cannery operation, and that a lien will attach to such property to insure payment of poundage fees, at least where the statute was in existence at the time the property was acquired.—State v. Swensk, supra.

Waiver of lien

(1) The fish commission has no authority as an agency of the state to waive lien.—State v. Swensk, supra.

(2) The acceptance of bonds by state fish commission, to secure payment of poundage fees for fish received or packed by cannery, did not waive state's statutory lien on cannery, for poundage fees, even if commission had power to waive lien.—State v. Swensk, supra.

59. Miss.—Schmittler v. Sunflower County, 125 So. 534, 156 Miss. 227, suggestion of error overruled 126 So. 39, 156 Miss. 227.

Revocation, suspension, or alteration. A license to fish granted by the state is in no sense a contract or property right, and may be revoked by the sovereignty which granted it at its pleasure and without notice,[60] and a person, in accepting a fishing license, takes it subject to the state's right to revoke it.[61] Likewise, the legislature may alter existing fishing licenses and impose new and additional burdens or licenses.[62] In order that a statute operate as a revocation of licenses outstanding under a former statute, an express declaration is not necessary, if such is the obvious intent of the legislature.[63] Under a statute providing that the director of sea and shore fisheries in his discretion may suspend the license of any person whenever he has evidence that such person has violated any of the laws relating to lobsters, notice and hearing are not a condition precedent to suspension of a license to trap lobsters.[64]

The nature and extent of a fishing license depends on the terms of the particular statute under which it is granted, as well as on the terms of the license itself.[65] It may be required to be renewed every year,[66] or may be personal to the licensee and not subject to be exercised by an unlicensed agent.[67] Under some statutes it is a misdemeanor to assign a fishing license without notice to the fish commissioner, and a transfer without giving such notice confers no right on the assignee.[68]

§ 37. Fish Wardens and Other Officers

Statutes frequently provide for the appointment of fish wardens and other officers or administrative bodies, and such officers and bodies may exercise such powers as are conferred on them.

Most fish laws provide for the appointment of special commissioners, committees, wardens, or other officers, and confer powers and duties on them in regard to protecting and regulating the fisheries under their jurisdiction,[69] and also provide for their compensation,[70] and under some statutes a penalty is imposed on any person who opposes such officers or boards in the discharge of their duties.[71]

Although such officers may exercise such powers as are expressly or impliedly conferred on them by statute,[72] they must act strictly within the power

60. Me.—State v. Pulsifer, 152 A. 711, 129 Me. 423.

61. Me.—State v. Pulsifer, supra.

62. Wis.—Olson v. State Conservation Commission, 293 N.W. 262, 235 Wis. 473.

In Alaska revenue to be raised by act of April 29, 1915, Sess.L.1915 p 185, imposing other and additional license taxes on fish traps in Alaska, including tax sued for, was a local tax for the support of the territory, and was not open to the constitutional objection for want of uniformity throughout the United States.—Territory v. Alaska Pacific Fisheries, 5 Alaska 325.

63. Me.—State v. Pulsifer, 152 A. 711, 129 Me. 423.

64. Me.—State v. Cote, 120 A. 538, 122 Me. 450.

65. Alaska.—Alaska General Fisheries v. Smith, 7 Alaska 635.
Ariz.—Barlow v. Jones, 294 P. 1106, 37 Ariz. 396.
Wash.—State ex rel. Campbell v. Case, 47 P.2d 24, 182 Wash. 334.
26 C.J. p 635 note 96.

66. Fla.—Scott v. Worthington, 187 So. 369, 136 Fla. 708.

67. Hawaii.—Territory v. Takanabe, 28 Hawaii 43.

68. Wash.—Gerhard v. Worrell, 55 P. 625, 20 Wash. 492.

69. R.I.—Meunier v. Commissioners of Shell Fisheries, 168 A. 907, 54 R. I. 12.
26 C.J. p 635 note 6.

All public waters

The jurisdiction of the fisheries commission board extends to all the public waters of the state or over which it has control, notwithstanding that particular waters are also specified.—State v. Dudley, 109 S.E. 63, 182 N.C. 822.

Composition of commission

Under statute providing that division of game and fish under department of conservation shall be headed by a director and that governor shall appoint advisory game and fish commission of five members, division is not made up of director alone, but is composed of director and five members, although commission is designated as "advisory."—Tipton v. Brown, 126 S.W.2d 1067, 277 Ky. 625.

Function of government

The statute creating a commission of fisheries and relating to conservation of fisheries of tidewater Maryland is in relation to a "governmental function" since conservation of fisheries of tidewater Maryland is a function of government.—Dorsey v. Petrott, 13 A.2d 630, 178 Md. 230.

Purpose of statutes creating the state game and inland fish commission and a commission of fisheries was to abolish the theretofore existing conservation commission and to substitute two separate commissions.—Dorsey v. Petrott, supra.

70. Mich.—Moore v. Wayne County, 51 N.W. 279, 90 Mich. 269.
26 C.J. p 635 note 7.

Fees as compensation

Under a statute providing for the taking of soft fish by seine and providing that such taking must be under the supervision of the game warden or one of his deputies, "without expense to the state," the state game warden cannot be required to account to the state for fees charged for the services of his deputies in such supervision.—State v. Hinshaw, 198 N.W. 634, 197 Iowa 1265.

Profits

Where during war, state officials permitted state game warden to buy fish from fishermen and resell them to people, for profit, on his own risk and with his own funds, the warden could not be required to account to the state for profits, in the absence of fraud or discrimination, although he shipped fish under tags bearing his official title, and wrote letters on official stationery.—State v. Hinshaw, supra.

71. Me.—Fossett v. Bearce, 27 Me. 117.

72. Tex.—Tuttle v. Wood, Civ.App., 35 S.W.2d 1061, error refused.

Authority not terminated

Since game and fish commissioner, in conducting fishing operations, was not agent of commission of public safety, abolishing that commission did not terminate authority of commissioner to conduct fishing operations.—Lipinski v. Gould, 218 N.W. 123, 173 Minn. 559.

Fish guides

Under some statutes a person acting as guide of inland fisheries is liable to a penalty unless he is registered and certified by the commissioners of such fisheries.—State v.

conferred,[73] and they cannot exercise powers which are not expressly or impliedly conferred on them.[74] An administrative body or officer of this character may make reasonable rules and regulations,[75] which, of course, must not conflict with existing legislative enactments;[76] but such a body cannot be

Snowman, 46 A. 815, 94 Me. 99, 80 Am.S.R. 380, 50 L.R.A. 544.

Removal of office

Under some statutes, the tidewater commissioner's office need not be permanently established in fixed place but is removable by game and fish board.—City of Darien v. Clancy, 146 S.E. 767, 167 Ga. 848.

Transfer of funds

In statute providing that a per cent of game and fish funds, not exceeding a certain sum in any fiscal year, may be used in Custer State Park and be paid out on vouchers approved by state park board, word "may" is permissive only and leaves transfer of funds to discretion of game and fish commission.—State ex rel. South Dakota Game and Fish Commission v. O'Neill, 254 N.W. 265, 62 S.D. 522.

Under proper statutory authorization such officers may:

(1) Employ person to oversee commercial seining operations.—Department of Natural Resources, Division of Fish and Game v. Industrial Accident Commission, 14 P.2d 746, 216 Cal. 434.

(2) Establish and maintain a fish hatchery.—Cannon v. Montgomery, 192 S.E. 206, 184 Ga. 588.

(3) Exercise other powers see 26 C.J. p 635 note 10–p 636 note 20.

73. Or.—Monroe v. Withycombe, 165 P. 227, 84 Or. 328.

26 C.J. p 636 note 23.

Certificates of sanitary condition

Commissioners of shellfisheries are not confined in issuing certificates of sanitary condition to places where shellfish are sold since shellfish might have been obtained from polluted areas.—Meunier v. Commissioners of Shell Fisheries, 168 A. 907, 54 R.I. 12.

Extending prohibition

The statutory provision, prohibiting sale of "bass" in state, regardless of where taken, evinced legislative intent to confine prohibition to sale of bass only and not to delegate to any administrative agency, such as state conservation department, authority to extend prohibition to other game fish, such as bream and crappies, taken in waters without state.—State v. Vaughan, 4 So. 2d 9, 241 Ala. 628, denying certiorari, App., 4 So.2d 5.

Statutory facts

Where a statute authorizes a certain finding by the commission, based on certain existing material facts, an order made by the commission which does not rest on such authority is a nullity.—Van Camp Sea Food Co. v. Newbert, 244 P. 946, 76 Cal.App. 445.

74. Acquisition of property

Statutes being silent on whether fish and game commission had power of eminent domain for purpose of condemning site for fish rearing pond, and statutory powers of commission being exercisable without resort to condemnation, it was presumed that legislature intended necessary property should be acquired by contract.—State v. Aitchison, 30 P.2d 805, 96 Mont. 335.

Buying fish

Statutes did not authorize game and fish commissioner to buy fish for purpose of reselling them, and a complaint seeking to enjoin game and fish commissioner from buying and reselling fish in open market was good against demurrer.—Lipinski v. Gould, 218 N.W. 123, 173 Minn. 559.

Depositary of funds

The director of the department of conservation was required to collect from county, city, and village clerks proceeds of fees, fines, and penalties collected by them pursuant to fish and game codes and turn them over to the state treasurer, and it was no part of his duties to select a depositary for those funds.—People, by Barrett, v. Bradford, 22 N.E.2d 691, 372 Ill. 63.

75. N.H.—Musgrove v. Parker, 153 A. 320, 84 N.H. 550.

R.I.—Meunier v. Commissioners of Shell Fisheries, 168 A. 907, 54 R.I. 12.

Wash.—Vail v. Seaborg, 207 P. 15, 120 Wash. 126.

Wis.—Olson v. State Conservation Commission, 293 N.W. 262, 235 Wis. 473.

26 C.J. p 636 note 24.

Hearings and determination of facts

(1) Granting power to fish and game commission to hold hearings and determine facts incidental to regulation of fishing and to grant permits to take and use fish is valid as administrative or regulatory power.—Globe Cotton Oil Mills v. Zellerbach, 252 P. 1038, 200 Cal. 276—People v. Glenn-Colusa Irr. Dist., 15 P.2d 549, 127 Cal.App. 30.

(2) The fish and game commission cannot be invested with judicial functions under some state constitutions.—Van Camp Sea Food Co. v. State Fish and Game Commission, 243 P. 702, 75 Cal.App. 764, followed in Stafford Packing Co. v. Fish and Game Commission of State of California, 243 P. 704, 75 Cal.App. 790, Pacific Marine Products Co. v. Fish and Game Commission of State of California, 243 P. 705, 75 Cal.App. 791, Southern California Fish Corporation v. Fish and Game Commission of State of California, 243 P. 705, 75 Cal.App. 792, Los Angeles Sea Food Packing Co. v. Fish and Game Commission of State of California, 243 P. 705, 75 Cal.App. 793, and Franco-Italian Packing Co. v. Fish and Game Commission of State of California, 243 P. 705, 75 Cal.App. 794.

Constitutionality of statutes conferring judicial power on executive officers see Constitutional Law § 173.

Intent of rule

Conservation commission rule that artificially propagated trout must be tagged is intended to protect fish of commonwealth and to prevent waste of natural resources to detriment of the general public.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.

Procedure

Where no rules of procedure have been prescribed by statute, the administrative body is free to make its own, provided they are fair and reasonable.—Coggeshall v. Harbor Commission, 146 A. 482, 50 R.I. 175.

Trial of basis of order

Authorized administrative orders, auxiliary to purely police legislation touching no private rights, are no more open to trial of the conditions or facts on which they are based than the legislation authorizing them.—People v. Soule, 213 N.W. 195, 238 Mich. 130.

Wide discretion

The legislature has given the board of fish commissioners a wide discretion as to the administration of laws for the encouragement, promotion, and development of fishery interests, and the protection, propagation, and distribution of fish.—Weindorf v. French, 39 Pa.Dist. & Co. 65, 49 Dauph.Co. 49.

76. Ga.—Creed v. State, 159 S.E. 291, 43 Ga.App. 479.

26 C.J. p 636 note 25.

Penalty

Regulations of the conservation commission fixing size of fish nets to be used by licensed commercial fishermen in outlying waters of the state were not invalid on claimed ground that commission changed the prior law with respect to commercial fishing and indirectly changed the penalty, since statute specifically provides that the commission cannot alter penalty provisions.—Olson v. State Conservation Commission, 293 N.W. 262, 235 Wis. 473.

vested with authority to make rules and regulations which constitute an exercise of exclusive legislative powers.[77] In making rules and regulations, the administrative body must not be arbitrary or unreasonable [78] or discriminatory.[79]

The powers given to a committee under some statutes must be exercised by a majority of them.[80]

In the absence of fraud or corruption the acts and decisions of such officers or boards, in regard to matters within their powers, cannot be reviewed in a collateral proceeding,[81] and even on a direct proceeding, such act or decision will not be disturbed where the facts and circumstances warrant it.[82] It will be assumed that a fish and game commission will exercise its discretionary power in consonance with the legitimate objects toward which the legislation was aimed.[83]

Where injury results to an individual from negligent or unnecessary and unreasonable action on the part of an officer or board, he has a remedy by an action at law therefor.[84] A state game warden cannot be required to account to the state for funds, voluntarily contributed by fishermen, which were to be used, and which were used, to improve the various public waters in the state for fishing purposes.[85] A state fish commission cannot be required by court order to make an order not within its powers.[86]

Appointment and removal. Under a statute authorizing the commissioner of fisheries to appoint competent citizens as fish wardens, an appointment of a fish warden as shown by a card from the fish commissioner is sufficient authority for him to act as such.[87] Under some statutes, the office of county fish warden is a county office, and cannot be filled by an appointment.[88] Where the statute is silent as to the manner of filling the office after initial appointment, it should be filled in the same manner as the initial filling.[89]

Under some statutes, fish wardens or commissioners are removable by the appointing power,[90] and under particular statutes, this removal is at the pleasure of the appointing power.[91] Under a statute authorizing removal for cause, whenever the executive proposes to act on charges involving malfeasance, misfeasance, or nonfeasance in office, or

77. Iowa.—State v. Van Trump, 275 N.W. 569, 224 Iowa 504.
Legislative right to empower executive officers or bodies to administer statutes regulating fishing or protecting fish see Constitutional Law § 138 b (4) (e).

78. Wash.—McMillan v. Sims, 225 P. 240, 129 Wash. 516.

Particular rules held reasonable

(1) Imposition of additional burdens on licensed commercial fishermen.—Olson v. State Conservation Commission, 293 N.W. 262, 235 Wis. 473.

(2) Regulation limiting the number of trap-net licenses to be issued for Lake Erie for the year 1936, and forbidding them thereafter.—Weindorf v. French, 39 Pa.Dist. & Co. 65, 49 Dauph.Co. 49.

(3) Requiring wardens to be in attendance for commercial fishing, and requiring commercial fishermen to pay their transportation, board, and lodging for a period of not less than six days.—State v. Sorenson, 260 N.W. 662, 218 Wis. 295.

(4) Reserving waters for fish propagation.—Schmidt v. Gould, 215 N.W. 215, 172 Minn. 179.

(5) Rules regulating fishing in boundary waters.—State v. Sorenson, supra.

(6) That applicant for certificate of sanitary condition must agree to handle only shellfish obtained from areas approved by board and to comply with rules of board.—Meunier v. Commissioners of Shell Fisheries, 168 A. 907, 54 R.I. 12.

79. Wash.—State ex rel. Bacich v. Huse, 59 P.2d 1101, 187 Wash. 75.

To grant privilege to some persons to take food fish and to deny the privilege to others similarly situated is arbitrary and discriminatory.—McMillan v. Sims, 225 P. 240, 129 Wash. 516.

80. Me.—Stephenson v. Gooch, 7 Me. 152.
26 C.J. p 636 note 26.

81. Me.—Fossett v. Bearce, 27 Me. 117.
26 C.J. p 636 note 27.

82. Or.—Williams v. Seufert Bros. Co., 188 P. 165, 189 P. 636, 96 Or. 163.
R.I.—Meunier v. Commissioners of Shell Fisheries, 168 A. 907, 54 R.I. 12.
26 C.J. p 636 note 19 [b].

83. U.S.—Mirkovich v. Milnor, D.C. Cal., 34 F.Supp. 409.

84. Cal.—Argyropolus v. Barnes, 151 P. 1156, 28 Cal.App. 254.
26 C.J. p 636 note 29.

Acts of deputy

(1) A deputy commissioner who unlawfully confiscates fish in the possession of another is liable in damages therefor.—Noack v. Zellerbach, 53 P.2d 986, 11 Cal.App.2d 186, motion denied 57 P.2d 1390, 14 Cal.App.2d 249.

(2) The fish and game commissioner was not liable for such damages where he did not know of, instruct, or ratify deputies' actions.—Noack v. Zellerbach, supra.

85. Iowa.—State v. Hinshaw, 198 N.W. 634, 197 Iowa 1265.

86. Cal.—Van Camp Sea Food Co. v. Newbert, 244 P. 946, 76 Cal.App. 445.

Value of nongame fish

A riparian owner was not entitled to recover from the state game and fish commission or its members the value of fish taken from lake by a contractor acting under contract with commission to remove nongame gross fish from that lake and other lakes.—State Game and Fish Commission v. Louis Fritz Co., 193 So. 9, 187 Miss. 539.

87. Pa.—Commonwealth v. Stawasz, 8 Pa.Dist. & Co. 87, 23 Luz.Leg. Reg. 309.

88. Ohio.—State v. Halliday, 55 N.E. 175, 61 Ohio St. 171.
15 C.J. p 482 note 23.

89. W.Va.—State v. Board of Control, 100 S.E. 215, 84 W.Va. 417.

90. **"Unless sooner removed"**

Where the tenure of fish commissioners is for a fixed term "unless sooner removed," the phrase "unless sooner removed" implies power in the appointing power to remove.—State ex rel. Nagle v. Sullivan, 40 P. 2d 995, 98 Mont. 425, 99 A.L.R. 321.

91. Mich.—Portman v. State Fish Com'rs, 15 N.W. 106, 50 Mich. 258.

which directly reflect on the official or personal integrity of the incumbent, notice and an opportunity to disprove the charges is necessary.[92] An attempt to justify a removal by a showing of cause therefor is unavailing, as an ex post facto showing of cause cannot cure failure to give the necessary notice of hearing on such charges.[93]

Bond. Under some statutes a state game, fish, and oyster commissioner is required to give bond that he will faithfully perform his duties. The commissioner, as principal, and the sureties on his bond are charged with notice of his powers, duties, and liabilities for the wrongful use of his official authority, and the legal effect of his undertaking.[94] Sureties on the bond of a fish commissioner or warden are not liable for his breaches of duty which are not covered by the terms of his bond.[95]

Making information public. The purpose of a statutory provision prohibiting the fish commission from making public certain information received from packers of fish is to prevent annoyance and injury to those in the industry through exposure of their private business affairs.[96]

§ 38. Penalties

The penalties which may be imposed for a violation of the fish laws are a matter of statutory regulation.

The penalties which may be recovered or imposed for violations of the fish laws are generally prescribed by such laws [97] which must not violate constitutional provisions against excessive fines and punishment.[98] These statutes usually provide for a specified fine or imprisonment or both;[99] or for the seizure and sale of vessels or appliances used in violation of such laws, see infra § 42. Before a penalty can be recovered there must be a strict compliance with all the duties enjoined on those claiming it.[1]

§ 39. —— Right of Action and Defenses

The person who may be entitled to enforce a penalty is a matter of statutory regulation. Any matter which defeats the right to enforce the penalty is available as a defense.

The person entitled to recover a penalty for a violation of the fish laws is determined from the language and intent of such laws.[2] Under some statutes an action or prosecution to recover the penalty may be brought by a common informer in his own name,[3] or by the district attorney at the instance of the fish and game warden or other officer or committee,[4] and under other statutes it can be instituted only by such officer or committee.[5] In the absence of statutory authority in a local body or officer, a violation which is merely a matter between the state and the guilty parties can be prosecuted by the state alone;[6] and not by a private individual.[7] A complaint, in a prosecution by a grand juror, for trespassing on another's land for the purpose of fishing, need not be brought at the request of the owner of the land; nor does it affect the case that the person described in the complaint as the owner of the land had leased the right of fishing to another.[8] Under some statutes, however,

92. Mont.—State ex rel. Nagle v. Sullivan, 40 P.2d 995, 98 Mont. 425, 99 A.L.R. 321.

Wrongful removal

Under a statute authorizing the removal of a county fish warden for cause, an order attempting to remove one as such officer without charges, notice thereof, and opportunity to be heard is void, entitling him to the compensation fixed for the office.—Welch v. Ware, 119 P. 1080, 161 Cal. 641.

93. Mont.—State ex rel. Nagle v. Sullivan, 40 P.2d 995, 98 Mont. 425, 99 A.L.R. 321.

94. **On a plea of privilege** of such sureties to be sued in the county of their residence, they are charged with notice, when they execute his bond, that the commissioner guarantees the individual members of the public in every county against the wrongful acts of himself or his deputies.—Boyd v. Genitempo, Tex. Civ.App., 260 S.W. 934.

95. Ariz.—Truog v. American Bonding Co. of Baltimore, 107 P.2d 203, 56 Ariz. 269.

N.C.—Midgett v. Nelson, 199 S.E. 393, 214 N.C. 396.

96. Or.—State ex rel. Veatch v. Franklin, 98 P.2d 724, 168 Or. 500.

97. Me.—Donnell v. Joy, 26 A. 1017, 85 Me. 118.

26 C.J. p 636 note 31.

Punishment in criminal prosecutions see infra § 46.

Applicability of general statute

(1) The general statute providing for the penalty for violating the fish laws is inapplicable to an offense for which a specific punishment is provided.—People v. Schlagel, 206 N.Y.S. 87, 210 App.Div. 323, affirmed 148 N. E. 748, 240 N.Y. 660.

(2) Where the penalty for a specific offense is invalid, the penalty provided by the general statute is applicable.—Ex parte Brandamour, 108 So. 895, 91 Fla. 889.

98. Me.—Campbell v. Burns, 46 A. 812, 94 Me. 127.

26 C.J. p 637 note 32.

99. Cal.—People v. Tom Nop, 56 P. 786, 124 Cal. 150.

26 C.J. p 637 note 33.

1. Me.—Hancock County v. Eastern River Lock & Sluice Co., 16 Me. 303.

26 C.J. p 637 note 35.

2. Me.—State v. Hanna, 58 A. 1061, 99 Me. 224.

26 C.J. p 637 note 37.

3. N.J.—Hoffman v. Peters, 17 A. 113, 51 N.J.Law 244.

26 C.J. p 637 note 38.

4. N.Y.—Roberts v. Hatch, 40 Hun 53.

5. Me.—Fassett v. Geyer, 55 Me. 160.

N.J.—Bradford v. De Luca, 103 A. 692, 90 N.J.Law 434.

26 C.J. p 637 note 40.

6. Wash.—Hastings v. Anacortes Packing Co., 69 P. 776, 29 Wash. 224.

26 C.J. p 637 note 41.

7. Wash.—Hastings v. Anacortes Packing Co., supra.

8. Conn.—State v. Turner, 22 A. 542, 60 Conn. 222.

an action of debt for a penalty for catching fish in another's pond can be maintained only by the owner or lessee of the land under or around the pond.[9]

Defenses. Anything which defeats the right to recover the penalty may be set up in defense.[10] Where, under the statute, in order for a person to be guilty of the violation subjecting him to the penalty, he must have acted knowingly, the absence of such knowledge is available as a defense.[11] The fact that defendant had caught no fish is a defense to an action for a penalty for failure to report fish caught under a license to fish.[12] It is no defense to an action to recover a penalty under the fish laws that searches and seizures of forfeited property under such laws were not made in the manner prescribed thereby,[13] or that there has been a criminal prosecution for the same offense,[14] especially where such prosecution was a nullity, and not a real prosecution.[15] One penalty only may be recovered for the same offense,[16] and where several join in committing it, a recovery and satisfaction against one of the offenders has been held to be a bar to an action brought against the other; but if they were acting severally, each on his own account, it has been held that they would be severally liable for the penalty, and a recovery from one would not bar a judgment against the other.[17]

§ 40. —— Remedies and Proceedings for Enforcement

A civil action is usually the proper proceeding to enforce a penalty for a violation of the fish laws.

A proceeding to recover a penalty for violation of the fish laws is ordinarily a civil, rather than a criminal, proceeding.[18] Under the various fish laws, a qui tam action at the instance of an informer,[19] or an action of debt,[20] has been held to be a proper remedy. Under some statutes, however, a proceeding by an indictment[21] or a complaint[22] is a proper remedy to enforce such a penalty.

Pleading. The rules which govern the pleadings and proof in actions for penalties generally apply in an action to recover a penalty for a violation of the fish laws.[23] The declaration or complaint should charge the offense at least substantially in the terms of the statute imposing the penalty.[24] It must also show that the person seeking to maintain the action is clearly within the provision of the statute,[25] and must not violate the rules against duplicity.[26] Intent must generally be directly alleged where it is the essence of the particular offense,[27] but not where it can be inferred from the act charged.[28] A material variance between the pleadings and proof is fatal.[29]

Evidence. The person who claims the penalty must show every fact necessary to constitute the offense alleged, and which will entitle him to the penalty;[30] but where possession of prohibited fish during the close season is once shown, it is, under some statutes, prima facie proof of a violation of the statute, and casts on the possessor the burden of showing that his possession is lawful.[31] The rules which govern in ordinary civil actions apply to the admissibility,[32] and weight and sufficiency[33] of the

9. N.H.—Chase v. Baker, 59 N.H. 347.
N.Y.—Hill v. Bishop, 17 N.Y.S. 297.

10. N.Y.—People v. Roney, 230 N.Y.S. 583, 132 Misc. 746.

11. N.Y.—People v. Roney, supra.

12. Wash.—State v. Hoffman, 188 P. 25, 110 Wash. 82.

13. Me.—Campbell v. Burns, 46 A. 812, 94 Me. 127.
26 C.J. p 637 note 47.

14. N.Y.—Rollins v. Breed, 8 N.Y.S. 48, 54 Hun 485.

15. Me.—Thompson v. Smith, 8 A. 687, 79 Me. 160.

16. Mass.—Boutelle v. Nourse, 4 Mass. 431.
N.Y.—People v. Robbins, 39 Hun 137.
26 C.J. p 637 note 50.

17. Mass.—Boutelle v. Nourse, 4 Mass. 431.

18. N.J.—Minard v. Dover, R. & P. O. Gas Co., 68 A. 910, 76 N.J.Law 132.

19. Mass.—Burnham v. Webster, 5 Mass. 266.
Vt.—Drew v. Hilliker, 56 Vt. 641.
26 C.J. p 637 note 55.

20. Me.—Donnell v. Joy, 26 A. 1017, 85 Me. 118.
26 C.J. p 637 note 56.

21. N.H.—State v. Roberts, 59 N.H. 484.
26 C.J. p 638 note 58.

22. Me.—State v. Hanna, 58 A. 1061, 99 Me. 224.

23. Mass.—Briggs v. Murdock, 13 Pick. 305.
N.Y.—People v. Wolf, 98 N.Y.S. 381, 112 App.Div. 449.

24. Mass.—Watertown v. Draper, 4 Pick. 165.
26 C.J. p 638 note 61.

25. Wis.—State v. Nergaard, 102 N.W. 899, 124 Wis. 414.
26 C.J. p 638 note 62.

26. N.H.—Purinton v. Ladd, 58 N.H. 596.
26 C.J. p 638 note 63.

27. Mass.—Atwood v. Caswell, 19 Pick. 493.

28. Me.—State v. Huff, 36 A. 1000, 89 Me. 521.

29. **Offense of assisting** in unlawful angling is different than offense of engaging in unlawful angling.—People v. Roney, 230 N.Y.S. 583, 132 Misc. 746.

30. Me.—Thompson v. Smith, 8 A. 687, 79 Me. 160.
26 C.J. p 638 note 66.

Intent need not be shown where it is not an essential element of the offense alleged.
Me.—State v. Chadwick, 109 A. 372, 119 Me. 45.
Wash.—State v. Cherry Point Fish Co., 130 P. 499, 72 Wash. 420.

31. Mass.—Commonwealth v. Savage, 29 N.E. 468, 155 Mass. 278.
26 C.J. p 638 note 67.

32. Wis.—State v. Nergaard, 102 N.W. 899, 124 Wis. 414.
26 C.J. p 638 note 68.

33. Vt.—Payne v. Gould, 52 A. 421, 74 Vt. 208.
26 C.J. p 638 note 69.

evidence in an action for a penalty under the fish laws. The guilt of defendant need not be proved beyond a reasonable doubt, a preponderance of the evidence being sufficient.[34]

Trial and judgment. The usual rules of procedure which relate to trial in civil actions generally apply in this case of actions,[35] such as that the verdict must be in accordance with the evidence and pleadings.[36] The judgment must follow the pleadings and proof, and a material variance therefrom is fatal.[37] Under some statutes, the judgment for the penalty may be enforced by execution against the person of defendant,[38] or by making it a lien on the vessel engaged in the unlawful fishing.[39]

Review. Where a statute prescribes the exact form of convictions under the fish and game law, in a proceeding before a justice of peace to recover a penalty for violation of such law, where neither the prescribed form nor court rule require the justice to return the evidence as part of his transcript, a return of such evidence is not a part of the record, and will not be considered by the court on certiorari.[40]

§ 41. —— Disposition of Proceeds

The disposition of the proceeds of a penalty for a violation of the fish laws is a matter of statutory regulation.

Under the various statutes, the penalties recovered are to be devoted to a certain fund,[41] or to be paid over to certain commissioners or officers,[42] or the proceeds thereof divided in specified proportions between the state, or some local branch thereof, and the informer or officer securing the apprehension and conviction of the offender.[43]

§ 42. Searches, Seizures, and Forfeitures

Appliances used in violation of the fishing laws usually, under the various statutes, may be seized and forfeited; and, under some statutes, at least if the appliances are of small value, they may be summarily taken or destroyed.

Under some statutes nets, seines, and other appliances used in violation of the laws regulating and protecting fish and fishing rights,[44] and also the fish which are unlawfully taken or possessed,[45] may by proper proceedings be searched for, seized and destroyed, or sold by the fish warden, or other proper officer, unless the appliances were used pursuant to licenses presumably issued in good faith.[46]

A vessel used or employed in violation of the fish or oyster laws may, under some statutes, be seized and searched, and after proper proceedings be declared forfeited and destroyed or sold,[47] although

34. Me.—Campbell v. Burns, 46 A. 812, 94 Me. 127.
Wis.—State v. Nergaard, 102 N.W. 899, 124 Wis. 414.
26 C.J. p 638 note 70.

35. Wis.—State v. Nergaard, supra.

36. Me.—Thompson v. Smith, 8 A. 687, 79 Me. 160.
26 C.J. p 638 note 73.

37. **Recovery on another ground**
Plaintiff, seeking to recover penalty for unlawful angling, could not recover on ground that defendant assisted in unlawful angling.—People v. Roney, 230 N.Y.S. 583, 132 Misc. 746.

38. N.Y.—Rollins v. Breed, 8 N.Y.S. 48, 54 Hun 485.

39. U.S.—The Tokai Maru, Alaska, 190 F. 450, 111 C.C.A. 282, certiorari denied 32 S.Ct. 836, 225 U.S. 703, 56 L.Ed. 1265.
Alaska.—The Tokai Maru, 4 Alaska 311.
26 C.J. p 639 note 75.

40. N.J.—Minard v. Dover, R. & P. O. Gas Co., 68 A. 910, 76 N.J.Law 132.

41. Fla.—Douglas v. Smith, 63 So. 844, 66 Fla. 460.
26 C.J. p 639 note 77.

42. N.Y.—People v. Crennan, 36 N.E. 187, 141 N.Y. 239.

43. Ky.—Commonwealth v. Drain, 35 S.W. 269, 99 Ky. 162, 18 Ky.L. 50.
Mass.—Nye v. Lamphere. 2 Gray 295—Vinton v. Welsh, 9 Pick. 87.

44. N.Y.—Lawton v. Steele, 23 N.E. 878, 119 N.Y. 226, 16 Am.S.R. 813, 7 L.R.A. 134, affirming 6 N.Y.S. 15, and affirmed 14 S.Ct. 499, 152 U.S. 133, 38 L.Ed. 385.
26 C.J. p 639 note 80.

"Designed" use
Under a statute providing for the forfeiture of any device or apparatus designed to be, and capable of being, used to take fish, and which was used in committing the offense, rowboats, outboard motor, oars, coats, and motor tools used in connection with catching fish with set line, were "devices" or "apparatus" "designed" to be, and capable of being, used to take fish which were subject to forfeiture when used in an illegal operation of set line, notwithstanding that such property was not designed and manufactured for catching fish with a set line, the intent of the manufacturer being immaterial.—Bruce v. Sibeck, 78 P.2d 741, 25 Cal.App.2d 691.

Duty of officers
Officers in whose presence arrestees were illegally engaged in fishing with set line had duty to arrest such persons and take possession of property being used in commission of the offense and see that it was safely cared for until the time of trial as against contention that arrest and seizure of property was unlawful; and they had the duty to take possession of boats in the possession of such persons for safekeeping in order to prevent escape and loss of boats not only to persons arrested but also to the right of the state to forfeiture thereof.—Bruce v. Sibeck, supra.

45. Mass.—Dunn v. Lowe, 89 N.E. 1046, 203 Mass. 516, 133 Am.S.R. 326.
Tex.—Raymond v. Kibbe, 95 S.W. 727, 43 Tex.Civ.App. 209.
26 C.J. p 639 note 81.

Fish lawfully taken cannot be seized and sold where possession of them was not unlawful.—Hodges v. Filstrup, 114 So. 521, 94 Fla. 943.

46. Or.—Monroe v. Withycombe, 165 P. 227, 84 Or. 328.

47. U.S.—The Bessie Mac., D.C. Wash., 21 F.Supp. 220.
26 C.J. p 639 note 83.

Power of state legislature
The infliction of the penalty of seizure and forfeiture of a vessel for a violation of valid regulations for the operation of such vessel is within the power of the state legislature.—Mirkovich v. Milnor, D.C.Cal., 34 F.Supp. 409.

Seizure of vessel for violation of fisheries law, effected by warden posting notice stating that vessel was seized and warning all persons

the owner is not implicated in the offense, and the vessel is so employed without his knowledge or consent;[48] and the seizure may be made after the illegal transaction, although the vessel is not at the time engaged in an illegal act.[49] Under some statutes, however, a vessel cannot be seized and sold for fishing on private grounds;[50] and it has been held, that, where the sole purpose of such statute is to regulate private interests, and enforce private rights of a particular class of persons, it cannot be justified under the police power of the state.[51]

Under some statutes, the validity of which have been upheld, there may be a summary taking or destruction of nets, seines, and other appliances of small value used in violation of the statutes.[52] Under other statutes, although there may be a seizure of a vessel or an appliance without a warrant,[53] the destruction or confiscation can be made only after proper judicial proceedings,[54] within the time fixed by statute, or if no time is fixed, within a reasonable time after the seizure;[55] and it has been held that the legislature cannot authorize the confiscation or destruction, especially where the property is of great value, without such a hearing.[56] A statute, providing that fishing equipment illegally used shall be forfeited and shall be seized and sold under the direction of the court in which the forfeiture is declared, contemplates an executive seizure, and the phrase "under the direction of the court" means that only the sale shall be made under the direction of the court.[57]

Judicial proceedings for the confiscation of fishing appliances used illegally are civil in nature.[58] Under some statutes providing that appliances used illegally in fishing "shall" be confiscated to the state, on a finding that the appliances were being so illegally used, the court must order such confiscation, and it has no discretion in the matter.[59] The conviction of a fisherman for fishing without a license, being a proceeding in personam, does not operate as a forfeiture of a vessel used by him, since the procedure therefor is in rem.[60] Under a stat-

to keep off, was sufficient to give court jurisdiction to enforce forfeiture, notwithstanding captain was thereafter allowed to sleep on vessel. —The M. & M., 8 Alaska 17.

48. Va.—Boggs v. Commonwealth, 76 Va. 989.
Wash.—State v. Umaki, 174 P. 447, 103 Wash. 232.
26 C.J. p 639 note 84.

49. N.J.—Day v. Compton, 37 N.J. Law 514.

50. Conn.—Doolan v. The Greyhound, 66 A. 511, 79 Conn. 697.
26 C.J. p 640 note 86.

51. N.Y.—Colon v. Lisk, 47 N.E. 302, 153 N.Y. 188, 60 Am.S.R. 609, affirming 43 N.Y.S. 364, 13 App.Div. 195.

52. Fla.—Bruce v. Malloy, 7 So.2d 123.
26 C.J. p 640 note 92.

Nuisance per se

(1) Mere possession of trap and gill nets is not a nuisance per se, but the legislature may decree that possession under certain circumstances is a public nuisance and authorize summary abatement.—Allen v. Mather, 30 N.Y.S.2d 76, affirmed 30 N.Y.S. 2d 112, 262 App.Div. 940.

(2) Under Conservation Law, which must be strictly construed, the provision that any net prohibited by law to be possessed, set, or used in any waters of the state or the shores or islands thereof, is declared to be a public nuisance and may be seized, abated, and destroyed by any game protector, two elements are essential to constitute a "public nuisance," first, the net must be prohibited by law, and secondly it must be possessed, set, or used in any waters of the state or the shores or islands thereof,—Allen v. Mather, supra.

53. Conn.—Ely v. Bugbee, 98 A. 121, 90 Conn. 584, L.R.A.1916F 910.
La.—Nugent v. McCurdy, 6 La.App. 615.

In New York, under Conservation Law provision authorizing seizure and abatement of any net prohibited by law to be possessed, set, or used in any waters of the state or shores or islands thereof, special game protector did not have authority under a warrant, authorizing search of owner's dwelling, to seize fishtrap nets found in owner's barn.—Allen v. Mather, 30 N.Y.S.2d 76, affirmed 30 N.Y.S.2d 112, 262 App.Div. 940.

54. U.S.—The Bessie Mac., D.C. Wash., 21 F.Supp. 220.
26 C.J. p 640 note 94.

Petition alleging that a purse seine net "is and was at all times herein mentioned an appliance used for the taking of fish" and was used in violation of specified section of Fish and Game Code, constituted a sufficient allegation that net was illegally used to catch fish so as to state a cause of action for forfeiture of net.—Moore v. Purse Seine Net, 118 P.2d 1, 18 Cal.2d 835, prior opinion 105 P.2d 919, prior opinion, App., 98 P.2d 766.

Illegality of seine

Whether seine is legal or illegal mesh, licensed or unlicensed, is question of fact for court, and conservation agents cannot determine whether seines used are of illegal mesh, licensed or unlicensed.—Nugent v. McCurdy, 6 La.App. 615.

Process

Judgment refusing to forfeit fisherman's boat for fishing during closed season on petition by fishing inspector for forfeiture was void, where no service was had.—State v. Fishing Appliances, 16 P.2d 822, 170 Wash. 426.

55. Conn.—Ely v. Bugbee, 98 A. 121, 90 Conn. 584, L.R.A.1916F 910.
26 C.J. p 640 notes 95, 96.

56. U.S.—Ashon v. Board of Comrs. for Protection of Birds, Game & Fish, C.C.La., 185 F. 221, appeal dismissed 33 S.Ct. 775, 229 U.S. 606, 57 L.Ed. 1348.
26 C.J. p 640 note 97.

57. Alaska.—U. S. v. One Floating Fish Trap, 7 Alaska 334.

58. **Appeal**

(1) State may appeal from an adverse final order.—State v. Cramer, 8 P.2d 1004, 167 Wash. 159.

(2) Where order, providing for forfeiture of fishing devices unlawfully used, allowed owner thirty days from entry of the order to assert ownership of the property, and ownership was not asserted until after expiration of that period, the judge was without power to reopen the order which had become a "final judgment." —Bruce v. Malloy, Fla., 7 So.2d 123.

59. **Conclusion that confiscation would be unjust** was not binding on appellate court, although state failed to except to such finding.—State v. Mavrikas, 269 P. 805, 148 Wash. 651.

60. U.S.—The Bessie Mac., D.C. Wash., 21 F.Supp. 220.

ute providing that, when any illegal or illegally used fishing device is found in the waters of the state, and the owner thereof shall not be known to the officer finding the same, such officer shall immediately procure an order forfeiting such device, where the owner of the device escaped and was not apprehended by the officer, the conviction of the owner of the device is not a condition precedent to a forfeiture thereof.[61]

Under some statutes, the procedure for the condemnation and sale of boats, seines, nets, and traps employed in violation of the fish laws is required to be under the rules of admiralty.[62] Under an admiralty rule providing that all informations and libels of information on seizures for any breach of the laws of the United States shall state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States and the district within which the property is brought and where it then is, a libel of information not containing such requisites must be dismissed.[63] It has been held that, before the court will allow a release of the res under stipulation, as permitted by admiralty rules, either an affidavit of merits must accompany the application for appraisement and release, or a petition for a hearing before the court, to determine from the facts produced whether there is reasonable cause to believe that there is a defense on the merits, a mere statement by claimant that he believes he has a good defense being insufficient.[64] After a vessel is brought into the custody of the United States marshal by proper admiralty process, any irregularity in the initial seizure is immaterial and waived by the filing of a claim or answer.[65] To authorize a condemnation of property seized by the administrative officers as forfeited, the evidence of a violation of the law must be clear and convincing, although proof beyond a reasonable doubt is not necessary.[66]

Liability for wrongful seizure. A person whose property is illegally seized may replevy it from the officer seizing it,[67] or, if it has been illegally destroyed, he may have an action for its value.[68] In such case, the burden is on defendant to prove a justification,[69] and the officer cannot justify his acts under a statute which has been repealed.[70] A deputy fish commissioner who arrests a person on the charge of illegal fishing and, as authorized by statute, seizes the boat and net so employed is not personally liable for seizure of the evidence.[71] He is responsible, however, for the care of the property while in his custody, and he may be required to respond in damages for injury resulting to it by reason of his negligence.[72] Where a fish warden acted in good faith in seizing fishing appliances which he considered were being operated in violation of law, it has been held that he was not liable to puni-

61. Fla.—Bruce v. Malloy, 7 So.2d 123.

62. Alaska.—U. S. v. One Fish Trap, 7 Alaska 215.

63. Alaska—U. S. v. One Floating Fish Trap, 7 Alaska 334.

64. Alaska.—U. S. v. One Fish Trap, 7 Alaska 215.

65. Alaska.—The M. & M., 8 Alaska, 17.

66. Alaska.—U. S. v. The Pacific, 7 Alaska 260.

Evidence held to establish that vessel was being used to fish for salmon for commercial purposes in waters closed to such fishing, and hence was subject to forfeiture under statute. —The M. & M., 8 Alaska 17.

67. Cal.—Silva v. MacAuley, 26 P.2d 887, 135 Cal.App. 249, rehearing denied 27 P.2d 791, 135 Cal.App. 249.

68. La.—Nugent v. McCurdy, 6 La. App. 615.
26 C.J. p 640 note 98.

Conversion

(1) Officer illegally seizing crabs was guilty of conversion, and plaintiff was entitled to their market value at the time of seizure, with interest. —Silva v. MacAuley, 26 P.2d 887, 135 Cal.App. 249, rehearing denied 27 P.2d 791, 135 Cal.App. 249.

(2) Where seizure of fishtrap nets by special game protector was illegal from its inception, so that conversion was accomplished at the time of seizure, demand for return of trap nets was not "condition precedent" to an action for conversion.—Allen v. Mather, 30 N.Y.S.2d 76, affirmed 30 N.Y.S.2d 112, 262 App.Div. 940.

Erroneous holding of guilt

Deputy fish and game commissioners' liability for illegal seizure of plaintiffs' crabs was not affected by fact that justice of peace, after seizure, erroneously held plaintiffs' truck driver guilty of misdemeanor in transporting crabs.—Silva v. MacAuley, 26 P.2d 887, 135 Cal.App. 249, rehearing denied 27 P.2d 791, 135 Cal. App. 249.

Individual liability

Liability of deputy fish and game commissioners acting alone in illegal seizure of truckload of crabs, was individual and personal.—Silva v. MacAuley, supra.

Value

To prove compensatory damages, it is proper to prove the value of the articles seized when they were purchased and to prove the time when they were purchased, so as to show what the reasonable depreciation, if any, would be.—Lilly v. Bronson, 177 So. 218, 129 Fla. 675.

69. Cal.—Silva v. MacAuley, 26 P. 2d 887, 135 Cal.App. 249, rehearing denied 27 P.2d 791, 135 Cal.App. 249.

70. Me.—Staples v. Peabody, 22 A. 113, 83 Me. 207.

71. Wash.—Douglas v. Mack, 118 P. 2d 171, 10 Wash.2d 682.

72. **Officer held not liable**

Where a state deputy fisheries commissioner arrested owner of fishing net and boat on charge of illegal fishing and seized net and boat, and net was cleaned and stored and boat was placed in a loft, and, following dismissal of charge against owner, net and boat were tendered to her and tender was rejected, owner was not entitled to recover under evidence for alleged loss of fishing net and boat on ground that net and boat tendered to her were not in as good condition as at time of seizure.—Douglas v. Mack, supra.

tive or exemplary damages.[73]

§ 43. Criminal Prosecutions

Prosecutions for violations of fish laws must be in accordance with the governing statutes.

The question of criminal liability and prosecutions for a violation of the fish laws depends on the language of the particular statute, and the prosecution must proceed in accordance with the governing statute,[74] including the court before which the prosecution should be brought [75] and the person or officer who may or must institute the proceedings.[76] Such offenses are rendered indictable under some statutes by a refusal to pay the penalty assessed by the magistrate or justice of the peace.[77] Parties concurring in a violation of the statute may be prosecuted together.[78] A proceeding to deprive a person of a fishing privilege granted by the state is not, in its nature, criminal, so as to make an order to produce papers against the owner thereof unconstitutional.[79]

§ 44. —— Indictment, Information, or Complaint

An indictment, information, or complaint should allege with certainty all the essential elements of the offense.

An indictment, information, or complaint, for a violation of the fish laws should allege with certainty [80] all the essential elements of the offense defined by the statute under which it is drawn,[81] including, where this is essential, the time and place of the offense.[82] An indictment or complaint charging the offense in the language of the statute,[83] or in the language of the statute and regulation which defines it,[84] is ordinarily sufficient; but the precise words of the statute need not be employed if words of like import are used, and all

73. Fla.—Lilly v. Bronson, 177 So. 218, 129 Fla. 675.

74. Mass.—Commonwealth v. Howes, 169 N.E. 806, 270 Mass. 69.
26 C.J. p 641 note 1.

Laws of another state cannot be invoked to show that fishing with nets in Ohio River is not permitted. —State v. Pyles, 176 N.E. 97, 38 Ohio App. 380.

75. Va.—Morgan v. Commonwealth, 35 S.E. 448, 98 Va. 812.
26 C.J. p 641 note 2.
Jurisdiction of justices of the peace of prosecutions under fish laws see Criminal Law § 125 b.
Venue of prosecutions under fish laws see Criminal Law § 185.

76. Me.—State v. Giles, 64 A. 619, 101 Me. 349.
26 C.J. p 641 note 3.

77. Pa.—Commonwealth v. Boettcher, 10 Pa.Dist. 101, 24 Pa.Co. 456, 10 Kulp 155.
26 C.J. p 641 note 4.

78. Mass.—Commonwealth v. Weatherhead, 110 Mass. 175.

79. Cal.—Paladini v. San Francisco Super. Ct., 173 P. 588, 178 Cal. 369.

80. Tenn.—State v. Hutton, 290 S. W. 380, 155 Tenn. 55.
26 C.J. p 641 note 8.

Close season

(1) Reference in complaint charging illegal fishing, to period between two hours after sunset and one hour before sunrise, during which fishing was prohibited, as "close season," was proper.—State v. Waite, 166 A. 4, 105 Vt. 265.

(2) Indictment for violating fishing laws need not specify what was closed season for fishing in particular county.—Horne v. State, 153 S.E. 749, 170 Ga. 638.

Portion of stream

Indictment charging defendants with fishing in named stream within named county was sufficient without naming portion of stream.—Horne v. State, supra.

81. Alaska.—U. S. v. Libby, McNeill & Libby, 7 Alaska 356.
Cal.—Ex parte Berto, 235 P. 735, 195 Cal. 774.
Fla.—Lehman v. Sawyer, 143 So. 310, 106 Fla. 396—McLeod v. Johnson, 143 So. 303, 106 Fla. 307—Ex parte Brandamour, 108 So. 895, 91 Fla. 889.
Ga.—Creed v. State, 159 S.E. 291, 43 Ga.App. 479—Hawthorne v. State, 158 S.E. 66, 43 Ga.App. 86.
Ind.—State v. Davis, 136 N.E. 843, 192 Ind. 423.
Tex.—Taylor v. State, 102 S.W.2d 219, 132 Tex.Cr. 58.
26 C.J. p 641 note 9.

Catching fish

Where fishing in closed season is an offense, the complaint need not allege that accused "did catch" fish. —State v. Parker, 167 A. 854, 132 Me. 137.

Indictments, informations, or complaints held sufficient in prosecutions for:

(1) Dynamiting fish.
Ind.—Voyles v. State, 165 N.E. 322, 200 Ind. 531.
Tex.—Shipp v. State, 232 S.W. 840, 89 Tex.Cr. 584.

(2) Fishing during closed season. —Camp v. State, 130 S.E. 606, 34 Ga.App. 591.

(3) Illegally taking commercial sponges.—Lipscomb v. Gialourakis, 133 So. 104, 101 Fla. 1130, followed in Lipscomb v. Kaloroukas, 133 So. 107, 101 Fla. 1137.

(4) Illegally transporting fish or shellfish.—Ex parte Makings, 253 P. 918, 200 Cal. 474—26 C.J. p 641 note 9 [b] (1).

(5) Other offenses.—State v. Dyer, 100 S.W.2d 653, 171 Tenn. 66—26 C. J. p 641 note 9 [b].

Unlawfully

Where the word "unlawfully" is not a part of the description of the statutory offense, the complaint need not use such word in describing it. —State v. Parker, 167 A. 854, 132 Me. 137.

82. Me.—State v. Parker, supra.
26 C.J. p 642 note 10.

Fishing in particular rivers prohibited

Where the statute makes it unlawful to fish for the market in certain designated rivers, the omission to charge that defendant fished for the market in one or more of such rivers is fatal.—State v. Hutton, 290 S.W. 380, 155 Tenn. 55.

Name of landowner

Indictment for hunting or fishing on lands of another without permission should give name of landowner. —Hawthorne v. State, 158 S.E. 66, 43 Ga.App. 86.

83. Cal.—Ex parte Berto, 235 P. 735, 195 Cal. 774.
Me.—State v. Munsey, 96 A. 729, 114 Me. 408.
Mo.—State v. McMurray, 284 S.W. 806, 314 Mo. 567.
Or.—State v. Shaw, 29 P. 1028, 22 Or. 287.
Tex.—Butler v. State, 299 S.W. 420, 108 Tex.Cr. 177.
31 C.J. p 716 note 21 [a].

84. U.S.—Canoe Pass Packing Co. v. U. S., C.C.A.Alaska, 270 F. 533.

the facts which constitute the offense are stated.[85] Matters which are unnecessary and are mere surplusage need not be averred.[86] Exceptions and provisos which form a part of the definition of the offense must be negatived,[87] but other exceptions, whether contained in the same or other statutes, which are mere matters of defense need not be anticipated and negatived by allegations in the indictment or complaint.[88] The indictment or complaint should not charge defendant disjunctively or alternatively in such a manner as to leave it uncertain as to what is relied on as the accusation against him.[89]

Issues, proof, and variance. Questions relating to the issues, proof, and variance in a prosecution for a violation of the fish laws are governed by the rules which apply in criminal prosecutions generally.[90] In accordance with such rules the offense must be proved as charged,[91] and defendant is entitled to an acquittal if there is a material variance between the allegations in the indictment or complaint and the proof as to some matter which is legally essential to the charge;[92] but not where there is no variance or it is an immaterial one.[93] Where a person prosecuted for unlawful fishing admits the use of an unlawful device, he cannot at the same time contend that the statute forbidding such device was not violated because the fish taken were not game or food fish.[94]

§ 45. —— Evidence

The rules as to evidence applicable to criminal cases generally are applicable to prosecutions for violations of fish laws.

Except in so far as governed by special statute,[95] the rules of evidence which govern in criminal prosecutions generally, apply in a prosecution for a violation of the fish laws,[96] as to burden of proof,[97] presumptions,[98] and the admissibility,[99] and weight and sufficiency [1] of the evidence. As in other criminal prosecutions, in order to convict defendant, the jury must be satisfied from the evidence, beyond a reasonable doubt, of his guilt,[2] and this may be es-

85. Ark.—Sherrill v. State, 106 S.W. 967, 84 Ark. 470—Richardson v. State, 91 S.W. 758, 77 Ark. 321.

86. Me.—State v. Parker, 167 A. 854, 132 Me. 137.
26 C.J. p 642 note 12.

87. Tex.—Duncan v. State, 37 S.W.2d 1030, 118 Tex.Cr. 133.
26 C.J. p 642 note 13.

Enacting clause
Exceptions not contained in the enacting clause need not be negatived. —People v. Lewis, 198 N.W. 957, 227 Mich. 343.

88. Ala.—Newby v. State, 108 So. 272, 21 Ala.App. 353.
Mich.—People v. Lewis, 198 N.W. 957, 227 Mich. 343.
26 C.J. p 642 note 14.

89. Tex.—Turbyville v. State, 39 S.W.2d 66, 118 Tex.Cr. 35.
26 C.J. p 642 note 15.

90. Cal.—People v. Haagen, 72 P. 836, 139 Cal. 115.
Mich.—People v. Neal, 106 N.W. 857, 143 Mich. 271.

91. Tex.—Gill v. State, 76 S.W. 575, 45 Tex.Cr. 256.
26 C.J. p 643 note 20.

Negativing exceptions
State must prove that fish were not taken within prescribed exceptions.—Newby v. State, 108 So. 272, 21 Ala. App. 353.

Pollution of stream
In a prosecution for polluting a stream, it must be shown that the stream is suitable for breeding them or was inhabited by them at such a time. Evidence which did not connect the oil deposited by defendant at a place named, with the stream named in the indictment, is insufficient.—Neptune v. State, 200 P. 1008, 20 Okl.Cr. 54.

92. Alaska.—U. S. v. Libby, McNeill & Libby, 7 Alaska 356.
26 C.J. p 643 note 21.

93. Mass.—Commonwealth v. Hodgkins, 49 N.E. 97, 170 Mass. 197.
26 C.J. p 643 note 22.

94. Pa.—Commonwealth v. Allen, 36 Pa.Super. 220—Commonwealth v. Kenney, 32 Pa.Super. 544.

95. R.I.—State v. Sheehan, 66 A. 66, 28 R.I. 160.
26 C.J. p 643 note 24.

96. Mich.—People v. Neal, 106 N.W. 857, 143 Mich. 271.

Notice issued by commonwealth
In prosecution for taking clams from proscribed area, notice issued by commonwealth that such area was contaminated was evidence of truth of facts therein stated.—Commonwealth v. St. John, 159 N.E. 599, 261 Mass. 510.

97. Ind.—Voyles v. State, 165 N.E. 322, 200 Ind. 531.
Pa.—Commonwealth v. Locher, 24 Pa.Dist. 532, 42 Pa.Co. 290, 31 Lanc. L.Rev. 290.
26 C.J. p 643 note 27.

98. La.—State v. Guidry, 76 So. 849, 142 La. 441.
26 C.J. p 643 note 28.

99. Ga.—Horne v. State, 153 S.E. 749, 170 Ga. 638.
Mass.—Commonwealth v. St. John, 159 N.E. 599, 261 Mass. 510.
26 C.J. p 644 note 29.

Dead fish
Where defendant assisted in draining pond for purpose of taking fish in violation of statute, fish which died because of lack of water were "taken" by defendant within statute, and hence admission of evidence tending to show number of fish which died from lack of water after pond was drained was not error.—State v. Searles, 184 A. 701, 108 Vt. 236.

Evidence held inadmissible or exclusion thereof proper
(1) In prosecution for possession of short lobsters, inquiries regarding the weight of lobsters as legislature had furnished explicit method of measurement to determine legal size of lobsters.—State v. Morton, 130 A. 352, 125 Me. 9.

(2) Questions concerning season of the year when the short lobsters were found.—State v. Morton, supra.

1. Ga.—Horne v. State, 153 S.E. 749, 170 Ga. 638—Ahl v. State, 4 S.E. 2d 692, 60 Ga.App. 629—Phillips v. State, 1 S.E.2d 225, 59 Ga.App. 466—Williamson v. State, 198 S.E. 563, 58 Ga.App. 387—Evans v. State, 167 S.E. 724, 46 Ga.App. 342—Wade v. State, 161 S.E. 269, 44 Ga.App. 243.
Ky.—Little v. Commonwealth, 158 S.W.2d 955, 289 Ky. 475—Reed v. Commonwealth, 158 S.W.2d 380, 289 Ky. 173.
N.J.—Williams v. Biggs, 175 A. 362, 12 N.J.Misc. 833, affirmed 187 A. 199, 117 N.J.Law 240.
Tex.—Duncan v. State, 37 S.W.2d 1030, 118 Tex.Cr. 133—Meyer v. State, 279 S.W. 464, 103 Tex.Cr. 14.
26 C.J. p 644 note 30.

2. Tex.—Wade v. State, 94 S.W.2d 460, 130 Tex.Cr. 350.
26 C.J. p 644 note 32.

tablished by circumstantial evidence.[3] Where a prima facie case is made out against defendant, as where, under some statutes, he is shown to have had possession of prohibited fish,[4] or an illegal device,[5] the burden is on him to adduce evidence of his matters of defense.[6]

§ 46. —— Trial, Punishment, and Review

The general rules as to trial in criminal cases are applicable. Statutes denouncing fish offenses usually prescribe the punishment therefor, but, in the absence of such provision, the general statutes providing for the punishment of offenses are applicable.

The rules which govern trials in other criminal cases apply to the trial of a criminal prosecution for a violation of the fish laws, such as with regard to the instructions,[7] questions of law and fact,[8] and the verdict and findings.[9] In the absence of a necessity for special findings the verdict may be general,[10] and special findings when given are not conclusive unless responsive.[11]

Punishment. The punishment for violations of the fish laws is generally prescribed by the statutes creating the offenses;[12] but even independently of such statutes defendant may be committed until payment of a fine as in other prosecutions.[13] Where the fish law prescribes no punishment,[14] or where the punishment therein prescribed is invalid,[15] defendant may be punished under a general statute relating to offenses of the same grade.

FISHERY. See Fish § 1.

FISHGARTH. A dam or weir in a river for taking fish.[1]

FISHMEN. A term construed from its context as meaning fishermen who go out to the fishing grounds in small boats and bring in their catch to be disposed of by sale to a fish company which packs the fish and prepares them for open market.[2]

FISHWAY. See Fish § 1.

FISK. In Scotch law, the fiscus or fisc; the revenue of the crown.[3]

FISSURE. A narrow opening made by the parting of any substance; a cleft, as a fissure of a rock.[4] As a mining term see the C.J.S. title Mines and Minerals § 3, also 40 C.J. p 743 notes 7, 8.

FISTUCA or **FESTUCA.** In old English law, the rod or wand, by the delivery of which the property in land was formerly transferred in making a feoffment; called also "baculum," "virga," and "fustis."[5]

3. Mo.—State v. McMurray, 284 S. W. 806, 314 Mo. 567.
Tex.—Springer v. State, Cr., 5 S.W. 2d 150—Schweinle v. State, 4 S.W. 2d 976, 109 Tex.Cr. 411.
26 C.J. p 644 note 33.
Corpus delicti may be proved by circumstantial evidence.—Newby v. State, 108 So. 272, 21 Ala.App. 353.

4. Hawaii.—Territory v. Hoy Chong, 21 Hawaii 39.
R.I.—State v. Sheehan, 66 A. 66, 28 R.I. 160.

5. Pa.—Commonwealth v. Shupp, 15 Pa.Dist. 631, 32 Pa.Co. 178.

6. Hawaii.—Territory v. Hoy Chong, 21 Hawaii 39.
Pa.—Commonwealth v. Beilstein, 29 Pa.Super. 373.
26 C.J. p 644 note 36.

7. Ind.—State v. Lowder, 153 N.E. 399, 190 Ind. 234.
Miss.—Ray v. State, 132 So. 755, 159 Miss. 887.
S.C.—State v. American Agricultural Chemical Co., 118 S.E. 535, 125 S. C. 270.
Tex.—Pope v. State, 26 S.W.2d 635, 114 Tex.Cr. 551.
26 C.J. p 644 note 38.

8. Ala.—Williams v. State, 133 So. 736, 24 Ala.App. 225, certiorari denied 133 So. 737, 222 Ala. 584, followed in Raley v. State, 133 So. 925, 24 Ala.App. 676, and Russo v. State, 133 So. 926, two cases, 24 Ala.App. 680.
Ky.—Little v. Commonwealth, 158 S. W.2d 955, 289 Ky. 475.
Mass.—Commonwealth v. St. John, 159 N.E. 599, 261 Mass. 510.
Mo.—State v. McMurray, 284 S.W. 806, 314 Mo. 567.
26 C.J. p 644 note 39.

9. Md.—Dean v. State, 56 A. 481, 98 Md. 80.

Directed verdict
Motion for directed verdict of not guilty properly denied in view of the evidence of defendant's guilt.—Reed v. Commonwealth, 158 S.W.2d 380, 289 Ky. 173.

Finding held supported by evidence
N.J.—Williams v. Biggs, 175 A. 362, 12 N.J.Misc. 833, affirmed 187 A. 199, 117 N.J.Law 240.

Number of short lobsters
A finding by the jury of a definite number of short lobsters in possession of accused is not necessary, as any number would justify verdict of guilty, and number justified by evidence fixes penalty which court must impose.—State v. Morton, 130 A. 352, 125 Me. 9.

10. Md.—Dean v. State, 56 A. 481, 98 Md. 80.
26 C.J. p 644 note 41.

11. Mo.—State v. Gilmore, 42 S.W. 817, 141 Mo. 506.
26 C.J. p 645 note 42.

12. Md.—Dean v. State, 56 A. 481, 98 Md. 80.
26 C.J. p 645 note 45.

13. Md.—Dean v. State, supra.
26 C.J. p 645 note 46.

14. Fla.—Douglas v. Smith, 63 So. 844, 66 Fla. 460—Stinson v. State, 58 So. 722, 63 Fla. 42.
Md.—Dean v. State, 56 A. 481, 98 Md. 80.

15. Fla.—State ex rel. Gray v. Stoutamire, 179 So. 730, 131 Fla. 698.

1. Black L.D.

2. Fla.—Ricou v. Crosland, 88 So. 380, 381, 81 Fla. 574.

3. Black L.D.
Generally used of the personal estate of a rebel which has been forfeited to the crown.—Black L.D.

4. U.S.—L. E. Waterman Co. v. Forsyth, C.C.N.Y., 121 F. 107, 108.
"Fissure vein" see the C.J.S. title Mines and Minerals § 3, also 26 C. J. p 645 note 13.

5. Black L.D.

FISTULA. A reed; a pipe.[6] In the civil law, a pipe for conveying water.[7] In the pathological sense, a narrow passage or duct, formed by disease or injury, leading from an abscess to a free surface, or furnishing an abnormal means of egress from some normal cavity, as in vesicovaginal fistula.[8]

FIT.

As a Noun

Adaptedness; adjustment; the quality, state, or manner of being fitted, as of dress to the wearer.[9] In medical jurisprudence, a stroke of disease; a sudden and violent attack of a disorder;[10] an attack or spasm of muscular convulsions, generally attended with loss of self-control and of consciousness; particularly, such attacks as occur in epilepsy; also, in a more general sense, the period of an acute attack of any disease, physical or mental, as, a fit of insanity.[11] Also, in the plural, a laymen's term for epilepsy.[12]

As a Verb

Furnishing a thing suitable for the use of another; to furnish with things proper or necessary; to make suitable; to prepare.[13] In its preterit form, the word has been held synonymous with "calculated"[14] and "capable" see 12 C.J.S. p 1115 note 24.

Fitting. In the participial form, the word has been held synonymous with "capable" see 12 C.J.S. p 1115 note 24. Used as a verbal noun, the common understanding of the term is anything employed in fitting up permanently, used generally in the plural, in the sense of fixtures, tackle, apparatus, equipment; anything used in fitting up, especially, in the plural, necessary fixtures or apparatus;[15] auxiliary parts, as of a boiler, or the small separately made parts of a machine; the fittings of a room; gas fittings; bicycle fittings.[16] In a particular context, the term has been held not to include furniture.[17]

Phrases employing the word are set out in the note.[18] For other phrases employing the word as to which more recent American adjudications have not been found see 26 C.J. p 646 notes 36–42.

As an Adjective

It has been said that the term was anciently defined as in correspondence with some other thing,[19] but that in modern times it is properly used to import a number of shades of meaning,[20] under particular circumstances having the significance either of an existing capacity or of a capacity that may be consummated by further action.[21] In modern use, it has been defined as meaning adapted to an end, object or design; suitable by nature or by art; suited by character, qualities, circumstances, education, etc., qualified; competent; worthy;[22] adequate; conformed to a standard of duty or taste; congruous.[23] It has also been defined or construed

6. Century D.

7. Black L.D.

8. Century D.

"Fistula in ano" is a generic term, whereas "blind internal fistula in ano" is a specific term; the term "fistula in ano" is incomplete, whereas "blind internal fistula in ano" is complete, but the general description includes the specific.—Brown v. Hebb, 175 A. 602, 605, 167 Md. 535, 97 A.L.R. 366.

9. Webster New Int.D.

10. Webster New Int.D.

11. Black L.D.
"Fit of mania" see the C.J.S. title Insane Persons § 1, also 32 C.J. p 615 note 98 [a].

12. Cal.—Westphall v. Metropolitan Life Ins. Co., 151 P. 159, 162, 27 Cal.App. 734.

"Fainting fits"
Eng.—Shilling v. Accidental Death Ins. Co., 1 F. & F. 116, 121.

13. Mass.—Ware v. Gay, 11 Pick. 106, 109.
26 C.J. p 646 notes 33–35.

14. Colo.—Polly v. People, 108 P.2d 220, 223, 107 Colo. 6.

15. U.S.—Bloom v. Locke, Cust. & Pat.App., 69 F.2d 113, 116.
Ga.—Brown v. State, 42 S.E. 795, 116 Ga. 559, 560.

"As the fittings of a church or study"
Ga.—Brown v. State, 42 S.E. 795, 116 Ga. 559, 560.

16. U.S.—Bloom v. Locke, Cust. & Pat.App., 69 F.2d 113, 116.

17. U.S.—Howe & Rogers Co. v. Lynn, C.C.A.N.Y., 71 F.2d 283, 284.

18. **Phrases using the verb**
(1) "Fit out a vessel," as distinguished from "build a vessel" see 12 C.J.S. p 377 note 34.
(2) "Fitting glasses," as meaning fitting them to the eyes as well as to the face.—Rowe v. Standard Drug Co., 9 N.E.2d 609, 614, 132 Ohio St. 629.

Phrases using the verbal noun
(1) "Any meter . . . and any fittings for the gas."—Hughes v. Little, 3 T.L.R. 14, 15.
(2) "Fittings for measuring the amount of the gas."—Gaslight, etc., Co. v. Hardy, 17 Q.B.D. 619.
(3) "Fittings" for waterworks.—Grand Junction Waterworks Co. v. Rodocanachi, 1904, 2 K.B. 230, 233.

19. Md.—Powell v. State, 18 A.2d 587, 589, 179 Md. 399.

Use in third century
"It seems that this word was the subject of discussion many centuries ago. In fact, as early as the end of the third century 'fit' was defined as 'in correspondence with some other thing.' "—Ballabanos v. State, 15 Ohio App. 520, 521, 522.

20. Okl.—Thomas v. State, 244 P. 816, 34 Okl.Cr. 49.

21. U.S.—U. S. v. Nomel Products Co., D.C.N.Y., 41 F.2d 544, 545.

22. Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.
Md.—Powell v. State, 18 A.2d 587, 589, 179 Md. 399.

Similarly expressed
"Adapted to an end, aim, work, or design; competent; qualified."—U. S. v. Nomel Products Co., D.C.N.Y., 41 F.2d 544, 545.

23. U.S.—U. S. v. Nomel Products Co., supra.

Similarly expressed
(1) "Conformable to a standard of right, duty, or appropriateness."—Powell v. State, 18 A.2d 587, 589, 179 Md. 399.
(2) "Suitable to a standard of duty, propriety or taste."—Meyer v. Board of Public Works of City of Los Angeles, Cal.App., 125 P.2d 50, 56.

as meaning appropriate; suitable;[24] befitting;[25] proper;[26] also in a state of preparation; ready; as if; all but; well nigh.[27] It has been said that the term implies adaptation, competence, or, frequently, conformity to a standard,[28] and, by context, it has been held to imply an intention for a particular use.[29]

The term has been held equivalent to, or synonymous with, "adapted to,"[30] "appropriate,"[31] "designed" see 26 C.J.S. p 1238 note 99, "prepared,"[32] "proper,"[33] and "suitable."[34] It has also been distinguished from "appropriate," "proper," and "suitable."[35]

Phrases employing the word are set out in the note.[36] For other phrases as to which more recent adjudications have not been found see 26 C.J. p 646 notes 19–31.

FIT FABRICANDO FABER.[37]

FITFUL. Irregularly variable; spasmodic.[38]

FITNESS. Adaptedness; serviceableness; suitable; the quality of being suitable and adapted to the performance of certain duties; the quality or state of being fit; also use; utility.[39] As applied to the eligibility of a person for a particular service, the term includes ambition, discretion, disposition, energy, habits, industry, knowledge of human nature, shrewdness, suitable physical presence, and tact,[40] and has been distinguished from "merit."[41] As subject of warranty in sales of personal property see the C.J.S. title Sales §§ 325, 326, also 55 C.J. p 750 note 39–p 758 note 7.

FITZ. A Norman word, meaning "son."[42]

FIVE. Four and one added; one more than four.[43]

Phrases employing the word are set out in the note.[44]

24. U.S.—U. S. v. Nomel Products Co., D.C.N.Y., 41 F.2d 544, 545.
Md.—Powell v. State, 18 A.2d 587, 589, 179 Md. 399.
Okl.—Whisnant v. State, 264 P. 837, 839, 39 Okl.Cr. 214.

25. Md.—Powell v. State, 18 A.2d 587, 589, 179 Md. 399.

26. Md.—Powell v. State, supra.

27. U.S.—U. S. v. Nomel Products Co., D.C.N.Y., 41 F.2d 544, 545.

28. Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.

29. Ark.—Logan v. State, supra.

30. Okl.—Thomas v. State, 244 P. 816, 34 Okl.Cr. 49.

31. Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.
Okl.—Thomas v. State, 244 P. 816, 34 Okl.Cr. 49.

32. Okl.—Thomas v. State, supra.

33. Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.
N.C.—Hanes v. Southern Public Utilities Co., 131 S.E. 402, 406, 191 N.C. 13.

34. U.S.—Oil Seeds Pressing Co. v. U. S., C.C.N.Y., 114 F. 793.
Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.
Cal.—Meyer v. Board of Public Works of City of Los Angeles, App., 125 P.2d 50, 56.
Okl.—Whisnant v. State, 264 P. 837, 839, 39 Okl.Cr. 214—Thomas v. State, 244 P. 816, 34 Okl.Cr. 49.

35. Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.

36. "Fit for"
(1) As meaning intended for.—Dickerson v. State, 255 S.W. 873, 874, 161 Ark. 60.

(2) As distinguished from mere adaptability.—Milliner v. State, 243 S.W. 861, 862, 154 Ark. 608—Neal v. State, 242 S.W. 578, 579, 154 Ark. 324—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.

Other phrases construed
(1) "Fit for distillation."
U.S.—U. S. v. Prussing, D.C.Ill., 27 F.Cas.No.16,095, 2 Biss. 344.
Ark.—Logan v. State, 234 S.W. 493, 494, 150 Ark. 486.
Okl.—Whisnant v. State, 264 P. 837, 839, 39 Okl.Cr. 214—Thomas v. State, 244 P. 816, 34 Okl.Cr. 49.

(2) "Fit for the purpose intended."—Roby Motors Co. v. Harrison, 139 So. 686, 688, 19 La.App. 659—Standard Motor Car Co. v. St. Amant, 134 So. 279, 282, 18 La.App. 298.

(3) "Fit for use for beverage purposes."
U.S.—Luppino v. U. S., C.C.A.Wash., 65 F.2d 687, 688—Burtnett v. U. S., C.C.A.Kan., 62 F.2d 452, 455—U. S. v. Nomel Products Co., D.C.N.Y., 41 F.2d 544, 546—Hawthorne v. U. S., C.C.A.Md., 37 F.2d 316, 318—Blaine v. U. S., C.C.A.Tex., 29 F.2d 651, 653.
Mont.—State v. Miller, 220 P. 97, 98, 69 Mont. 1.
N.Y.—Boliver v. Monnat, 238 N.Y.S. 616, 620, 135 Misc. 446.
Ohio.—Mahood v. Caldwell, 169 N.E. 317, 320, 33 Ohio App. 292.

37. A maxim meaning "The law presumes that a workman becomes an expert by a long continued exercise of his particular vocation."—Morgan Leg.Max.

38. Webster New Int.D.

"Fitful acts of ownership"
Ark.—Connerly v. Dickinson, 99 S.W. 82, 83, 81 Ark. 258, 261.

39. N.Y.—People v. Knauber, 57 N.Y.S. 782, 783, 27 Misc. 253.

Phrases construed
(1) "Fitness for police duty," as meaning the ability to discharge with average efficiency the duty of the grade to which the member of the police force belongs.
Cal.—Brooks v. Pension Board of City of Alameda, 85 P.2d 956, 958, 30 Cal.App.2d 118.
Wash.—Clark v. Board of Police Pension Fund Com'rs of City of Yakima, 66 P.2d 307, 310, 189 Wash. 555.

(2) "General fitness."—Application of Brennan, 243 N.Y.S. 705, 714, 230 App.Div. 218.

(3) "Reasonable fitness."—Garnett v. Phœnix Bridge Co., C.C.Pa., 98 F. 192, 195—52 C.J. p 1186 note 97.

40. N.Y.—People v. Knauber, 57 N.Y.S. 782, 783, 27 Misc. 253.

41. N.Y.—People v. Knauber, 60 N.Y.S. 298, 300, 43 App.Div. 342—People v. Knauber, 57 N.Y.S. 782, 783, 27 Misc. 253.

42. Black L.D.

Used in law and genealogy
As Fitzherbert, the son of Herbert; Fitzjames, the son of James; Fitzroy, the son of the king. It was originally applied to illegitimate children.—Black L.D.

Phrase construed
"Fitz en ventre sa mere," as meaning a child unborn.—Burrill L.D.

43. Webster New Int.D.

44. Phrases construed
(1) "Five and one-half consecutive work days."—Crevisour v. Hendrix, 136 S.W.2d 404, 410, 234 Mo.App. 1012.

(2) "Five and one per cent."—Citizens' State Bank v. Chambers, 105 N.W. 692, 694, 129 Iowa 414.

FIX.

In General

A word variously defined as meaning to decide definitely, to settle;[45] to determine;[46] to direct without variation;[47] to establish invariably;[48] to fasten;[49] to fasten immovably; to make firm, stable, or fast; to set or place permanently;[50] to give permanence to something, especially as it already exists;[51] to make permanent something that is unsettled;[52] to make sure;[53] to name;[54] to secure from displacement;[55] to settle permanently.[56]

The word is sometimes used in a broad sense and sometimes in a narrow sense.[57] It is sometimes used in the sense of "allow,"[58] and the right to "fix" may include the right to "increase," although the ordinary meaning of "fix" is to make permanent something that is unsettled.[59] While, properly speaking, it does not mean "pay," it is not infrequently used to convey such meaning.[60] The term implies finality, and, in the absence of qualifying words, precludes the idea of variableness or alteration.[61] In a particular connection, it may imply the establishment of a definite rate,[62] but the power to "fix" does not include the power to fix a fee at one time and arbitrarily to change it at another where contract rights are involved.[63]

The term has been held equivalent to, or synonymous with, "adjust,"[64] "confirm,"[65] "declare" see 26 C.J.S. p 40 note 12, "define" see 26 C.J.S. p 678 note 97, "delimit," "determine," "limit," "place," "set,"[66] and "settle;"[67] and has been compared

(3) "Five burners."
Nev.—Virginia City Gas Co. v. Virginia City, 3 Nev. 320, 321.
Tex.—O'Connor v. Towns, 1 Tex. 107, 109.

(4) "Five days before."—State v. Gasconade County Ct., 33 Mo. 102.

(5) "Five days' written notice."—Lesk v. London & Lancashire Indemnity Co., 18 N.Y.S.2d 219, 220, 173 Misc. 512.

(6) "Five dollar bill," defined as a bank bill for the payment of five dollars.—Johnson v. State, 45 S.E. 960, 962, 119 Ga. 257—Allen v. State, 12 S.E. 651, 86 Ga. 399, 400.

(7) "Five-eighths of those voting on the question."—Powers v. Village of Chisholm, 178 N.W. 607, 608, 146 Minn. 308.

(8) "Five-mile act," an act of parliament, directed against nonconformists, and passed in 1665, whereby nonconformist ministers who refused to take the oath of nonresistance were prohibited from coming within five miles of any corporate town, or other place, where they had preached or lectured since the passing of the act of oblivion in 1660. It was nullified by the act of 1689.—Black L.D.

(9) "Five per cent grade," as meaning a rise of five feet in a hundred feet, said to be an easy, safe, and practicable grade for all kinds of travel.—Alexandria v. Morgan's Louisiana & T. R. & S. S. Co., 33 So. 65, 69, 109 La. 50.

(10) "Five per cent interest."—Ledford v. Hartford F. Ins. Co., 161 Ill.App. 233, 240.

(11) "Five-ply built up," a term relating to roofing material and meaning that the rolls of material, thirty-six inches wide, were to be laid across the sheathing with seventeen inches exposed and nineteen inches covered and that after the base sheet was laid asphalt was to be applied to its surface and another sheet laid thereon and the process was to be repeated until the required number of plys had been laid.—West Bros. v. Pierson, La.App., 2 So.2d 71, 74.

(12) "Five-twenty bonds," as a term applied to certain United States bonds from the fact that they were redeemable after five, but were not payable until twenty, years after a given date.—Morgan v. U. S., Ct.Cl., 5 S.Ct. 588, 589, 113 U.S. 476, 497, 28 L.Ed. 1044.

(13) "Five years of service in a position or positions."—Brown v. Sturgeon, 287 N.W. 834, 836, 227 Iowa 136.

(14) "Within five days."—Davis v. Preston, 20 S.W.2d 723, 724, 230 Ky. 716.

45. Ga.—Culberson v. Watkins, 119 S.E. 319, 322, 156 Ga. 185.
Mont.—In re McLure's Estate, 220 P. 527, 530, 68 Mont. 556.
26 C.J. p 647 notes 62, 71.

46. Ga.—Culberson v. Watkins, 119 S.E. 319, 322, 156 Ga. 185.
Mont.—In re McLure's Estate, 220 P. 527, 530, 68 Mont. 556.
26 C.J. p 647 note 63.

47. La.—Durnford v. Patterson, 7 Mart. 460, 463, 12 Am.D. 514.
Mo.—Rackliff v. Peters, 115 S.W. 503, 504, 136 Mo.App. 168.

48. La.—Durnford v. Patterson, 7 Mart. 460, 463, 12 Am.D. 514.

49. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

50. Cal.—Dougherty v. Austin, 28 P. 834, 29 P. 1092, 1099, 94 Cal. 601, 16 L.R.A. 161.

Similarly expressed

"To make fast, firm, or immovable."—Logansport & W. V. Gas Co. v. Peru, C.C.Ind., 89 F. 185, 187.

51. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

52. N.C.—Kendall v. Stafford, 101 S.E. 15, 17, 178 N.C. 461.

53. Ga.—Culberson v. Watkins, 119 S.E. 319, 322, 156 Ga. 185.
26 C.J. p 647 note 69.

54. Va.—Commonwealth v. Rose, 168 S.E. 356, 160 Va. 177.

55. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

56. Tex.—Huck v. Gaylord, 50 Tex. 578, 582.

57. Mo.—Gist v. Rackliffe-Gibson Constr. Co., 123 S.W. 921, 926, 224 Mo. 369.

58. Dak.—Polk v. Minnehaha County, 37 N.W. 93, 94, 5 Dak. 129.
Mo.—Gist v. Rackliffe-Gibson Constr. Co., 123 S.W. 921, 926, 224 Mo. 369.

59. N.C.—Kendall v. Stafford, 101 S.E. 15, 17, 178 N.C. 461.

60. Tex.—McCauley v. Cross, Civ.App., 111 S.W. 790, 791.

61. Ga.—Culberson v. Watkins, 119 S.E. 319, 322, 156 Ga. 185.

62. N.Y.—Morse v. Delaney, 218 N.Y.S. 571, 577, 128 Misc. 317.

63. Mo.—Baynes v. Bank of Caruthersville, App., 118 S.W.2d 1051, 1053.

64. Tex.—Longview v. Capps, Civ.App., 123 S.W. 160, 162.

65. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

66. Colo.—Smith-Brooks Printing Co. v. Young, supra.

67. Colo.—Smith-Brooks Printing Co. v. Young, supra.
Iowa.—Lynch v. Nugent, 46 N.W. 61, 63, 80 Iowa 422.

with, or distinguished from, "counsel" see 20 C.J.S. p 715 note 79, "define,"[68] "establish" see 30 C.J.S. p 1232 note 37, and "regulate."[69]

Phrases employing the word are set out in the note.[70] For other phrases for which more recent adjudications have not been found see 26 C.J. p 647 notes 77–85.

Fixed

A term of no technical significance,[71] which imports certainty and definiteness both as to obligation and amount,[72] denotes predetermination, establishment, and a degree of constancy and invariability which excludes subservience alone to mere occasion,[73] and has been defined as meaning established; firm;[74] fastened;[75] finally determined upon;[76] immovable; securely placed; unalterable;[77] lasting;[78] liquidated or rendered certain;[79] of an established, unchanging, permanent character;[80] settled.[81] Sometimes it is used in the sense of "allowed."[82] In shipping, the term is sometimes roughly used as equivalent to "closed," "not free," and "tied up."[83]

"Fixed" as excluding grace see Bills and notes § 257.

The term has been held synonymous with "estimated" see 31 C.J.S. p 184 note 62, and "settled;"[84] and has been distinguished from "definite" see 26 C.J.S. p 679 note 25, "inchoate," or "in the process of becoming."[85]

Phrases employing the word are set out in the note.[86] For other phrases for which more recent adjudications have not been found see 26 C.J. p

Tex.—Longview v. Capps, Civ.App., 123 S.W. 160, 162.

68. Colo.—Smith-Brooks Printing Co. v. Young, 85 P.2d 39, 41, 103 Colo. 199.

69. Cal.—Dougherty v. Austin, 28 P. 834, 29 P. 1092, 1099, 94 Cal. 601, 16 L.R.A. 161.
Kan.—Higgins v. Mitchell County, 51 P. 72, 73, 6 Kan.App. 314.
N.Y.—Morse v. Delaney, 218 N.Y.S. 571, 577, 128 Misc. 317.

70. **Phrases using "fix"**
(1) "Fix a compensation."
Or.—Flagg v. Columbia County, 94 P. 184, 186, 51 Or. 172.
Va.—Commonwealth v. Rose, 168 S. E. 356, 160 Va. 177.
(2) "Fix and prescribe."—Smith-Brooks Printing Co. v. Young, 85 P. 2d 39, 41, 103 Colo. 199.
(3) "Fix it up with you."—Shaw v. Bubier, 109 A. 373, 374, 119 Me. 83.
(4) "Fix maximum rates."—Hutchins Mut. Ins. Co. of District of Columbia v. Hazen, 105 F.2d 53, 55, 70 App.D.C. 174.
(5) "Fix the fees."—Baynes v. Bank of Caruthersville, Mo.App., 118 S.W.2d 1051, 1053.
(6) "Fix the salary."—Kendall v. Stafford, 101 S.E. 15, 17, 178 N.C. 461.
(7) "To fix the compensation of," as implying discretionary power to regulate such compensation.
Cal.—Kacsur v. Board of Trustees of South Whittier Elementary School Dist., App., 109 P.2d 731, 736.
N.Y.—Abrams v. La Guardia, 21 N. Y.S.2d 891, 893, 894, 174 Misc. 421.
(8) "To fix value of," as equivalent to "to ascertain value of."—State ex rel. Ambrose v. Trimble, 263 S.W. 840, 842, 304 Mo. 533.
(9) "Regulate and fix wages."—Morse v. Delaney, 218 N.Y.S. 571, 577, 128 Misc. 317.

Phrases using "fixing"
(1) "'Fixing' . . . of the assessment . . . upon the stockholders."—Mathers v. Citizens' Banking Co. of Eastman, 158 S.E. 455, 457, 43 Ga.App. 260.
(2) "Fixing prices" as violating due process guaranty see Constitutional Law §§ 690–696, and specifically as to manufacturer's fixing prices to be charged on resale by his vendee see the C.J.S. title Monopolies § 51, also 41 C.J. p 140 note 80–p 143 note 28.

71. U.S.—Richichi v. James B. Drake & Sons, D.C.Me., 280 F. 421, 425.

72. N.J.—Commercial Casualty Ins. Co. v. State Board of Tax Appeals, 194 A. 390, 391, 119 N.J.Law 94.

73. Iowa.—State v. Blecha & Owen Transfer, 239 N.W. 125, 128, 213 Iowa 1269.
Minn.—State v. Boyd Transfer & Storage Co., 209 N.W. 872, 874, 168 Minn. 190.

74. Ariz.—Yavapai County v. Stephens, 177 P. 261, 262, 20 Ariz. 115.
Cal.—San Francisco Pioneer Woolen Factory v. Brickwedel, 60 Cal. 166, 177.

75. U.S.—National Candy Co. v. Miller, Mo., 160 F. 51, 56, 87 C.C.A. 207.

76. N.Y.—People v. Nassau County, 104 N.Y.S. 353, 355, 54 Misc. 323.

77. U.S.—National Candy Co. v. Miller, Mo., 160 F. 51, 56, 87 C.C.A. 207.
Ariz.—Yavapai County v. Stephens, 177 P. 261, 262, 20 Ariz. 115.

78. Ala.—Youngblood v. State, 100 So. 87, 88, 19 Ala.App. 561.

79. Okl.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 1036, 135 Okl. 285.

80. Ala.—Youngblood v. State, 100 So. 87, 88, 19 Ala.App. 561.

81. Ala.—Youngblood v. State, supra.
26 C.J. p 647 note 93.

82. Ariz.—Daggs v. Phœnix Nat. Bank, 53 P. 201, 204, 5 Ariz. 409.
26 C.J. p 647 note 95.

83. U.S.—Richichi v. James B. Drake & Sons, D.C.Me., 280 F. 421, 425.

84. N.Y.—Casler v. Connecticut Mut. L. Ins. Co., 22 N.Y. 427, 429.

85. U.S.—Helvering v. McGlue's Estate, C.C.A., 119 F.2d 167, 170.

86. **"Fixed asset"**
(1) Defined as an asset which is essential to the continuance of the undertaking and the proper operation of the business.—Ruden v. City of Platte, 252 N.W. 32, 35, 62 S.D. 175.
(2) As comprising those assets which are held for the purpose of conducting a business, in contradistinction to those assets which the proprietor holds for the purpose of converting into cash, and they include real estate, buildings, machinery, and stock of other companies where this is held as a permanent investment for the purpose of controlling the activities of a subordinate company.—Rathborne v. Collector of Internal Revenue, 200 So. 149, 153, 196 La. 795.

Other phrases construed
(1) "Fixed and certain liabilities."—National Commercial Title & Mortgage Guaranty Co. v. City of Newark, 11 A.2d 759, 763, 18 N.J.Misc. 186.
(2) "Fixed and definite salaries" see Definite 26 C.J.S. p 680 note 37.
(3) "Fixed and prescribed," as compared with "found and determined," see 36 C.J.S. p 767 note 63(3).
(4) "Fixed as to liability."—In re Beechwood, D.C.N.J., 36 F.Supp. 140, 142.

647 note 98–p 648 note 36.

FIXATION. The act of fixing; the state of being fixed.[87]

FIXATUR SOLO, SOLO CEDIT.[88]

(5) "Fixed by law."
U.S.—U. S. Fidelity & Guaranty Co. v. Guenther, Ohio, 50 S.Ct. 165, 166, 281 U.S. 34, 74 L.Ed. 683, 72 A.L.R. 1064.
Ala.—Stone v. State ex rel. Goetz, App., 8 So.2d 208, 209.
Mass.—McCarthy v. City of Malden, 22 N.E.2d 104, 108, 303 Mass. 563.
N.J.—Maxwell v. Board of Com'rs of City of Wildwood, 168 A. 143, 144, 111 N.J.Law 181—Holloway v. Board of Com'rs of Borough of Haddonfield, 160 A. 682, 683, 10 N.J.Misc. 704.
Tenn.—Hunter v. Western & Southern Indemnity Co., App., 92 S.W.2d 878, 879, 19 Tenn.App. 589.

(6) "Fixed canon of interpretation," defined as a canon of interpretation so firmly established as to have become a fixed rule of law.—McLaughlin v. Collins, Colo., 125 P.2d 633, 636. See generally the C.J.S. titles Contracts § 294, Statutes § 311, also 59 C.J. p 943 note 29–p 944 note 49, and Wills § 589, also 69 C.J. p 50 note 90–p 52 note 25.

(7) "Fixed capital reserves," as including the depreciation reserve and the reserve for amortization of intangible capital.—Lindheimer v. Illinois Bell Telephone Co., Ill., 54 S.Ct. 658, 663, note, 292 U.S. 151, 78 L.Ed. 1182.

(8) "Fixed charge."
Md.—Fleet-McGinley Co. v. Bothwell, 122 A. 202, 203, 143 Md. 324—Standard Printing & Publishing Co. v. Bothwell, 122 A. 195, 198, 143 Md. 303, 31 A.L.R. 1269.
Mo.—Smith v. Smith, 233 S.W. 183, 186, 289 Mo. 405.

(9) "Fixed contractual liability."—Commercial Casualty Ins. Co. v. State Board of Tax Appeals, 194 A. 390, 391, 119 N.J.Law 94.

(10) "Fixed, contractual right."—Shanik v. White Sewing Mach. Corporation, Del.Ch., 15 A.2d 169, 173.

(11) "Fixed conviction of guilt 'arising out of the evidence,'" see Conviction 18 C.J.S. p 99 note 17.

(12) "Fixed crane," described as one in which the central post or pivot is firmly fixed in a permanent position, and distinguished from "portable crane."—Willamette-Hyster Co. v. Pacific Car & Foundry Co., C.C.A. Or., 122 F.2d 492, 493 note.

(13) "Fixed damages" see Damages § 101 a.

(14) "Fixed indebtedness."—State ex rel. Hawkins v. State Board of Examiners, 35 P.2d 116, 120, 97 Mont. 441.

(15) "Fixed interpretation."—Browder v. Gunter, 125 So. 646, 648, 220 Ala. 407.

(16) "Fixed liability."
N.J.—New Jersey Ins. Co. v. State Board of Tax Appeals, 195 A. 719, 720, 119 N.J.Law 245—National Commercial Title & Mortgage Guaranty Co. v. City of Newark, 11 A.2d 759, 763, 18 N.J.Misc. 186.
Okl.—Oklahoma Cotton Growers' Ass'n v. Groff, 275 P. 1032, 135 Okl. 285.
26 C.J. p 647 note 18.

(17) "Fixed liability, absolutely owing" see Bankruptcy §§ 394 a, 395–399, 404.

(18) "Fixed opinion," as equivalent to "deliberate conviction."—Peterson v. State, 150 So. 156, 159, 227 Ala. 361—26 C.J. p 648 note 23. As affecting competency of juror see the C.J.S. title Juries § 234, also 35 C.J. p 336 note 97–p 337 note 99.

(19) "Fixed or determinable future time."
Iowa.—Townsend v. Adams, 222 N.W. 878, 879, 207 Iowa 326.
Kan.—Osborn v. Millikan, 38 P.2d 104, 105, 140 Kan. 592.
Mich.—White v. Wadhams, 170 N.W. 60, 62, 204 Mich. 381.

(20) "Fixed pavement."—Rudolph v. Knox, 280 F. 1007, 1008, 52 App.D.C. 33.

(21) "Fixed place of residence" see Domicile § 1.

(22) "Fixed price."
U.S.—U. S. v. Masonite Corporation, N.Y., 62 S.Ct. 1070, 1076, 316 U.S. 265, 86 L.Ed. 1461—U. S. v. Socony-Vacuum Oil Co., Wis., 60 S.Ct. 811, 844, 310 U.S. 150, 84 L.Ed. 1129—U. S. v. Food and Grocery Bureau of Southern California, D.C.Cal., 43 F.Supp. 966, 972.
Philippine.—Majarabas v. Leonardo, 11 Philippine 272, 273.

(23) "Fixed purpose."—Greer's Ex'r v. Bishop, 96 S.W.2d 851, 853, 265 Ky. 352.

(24) "Fixed salary," as referring to a regular weekly salary plus allowances for overtime.—In re Starer, D.C.N.Y., 42 F.Supp. 773.

(25) "Fixed term."—Wilson v. Shaw, 188 N.W. 940, 941, 194 Iowa 28.

(26) "Fixed termini or over regular route."
Iowa.—State ex rel. Board of Railroad Com'rs v. Thompson, 252 N.W. 256, 217 Iowa 994—State v. Mercer, 246 N.W. 406, 408, 215 Iowa 611—State v. Blecha & Owen Transfer, 239 N.W. 125, 128, 213 Iowa 1269.
Minn.—State v. Boyd Transfer & Storage Co., 209 N.W. 872, 874, 168 Minn. 190.

(27) "Fixed time," as not necessarily meaning a definite period.—People v. Loeffler, 51 N.E. 785, 791, 175 Ill. 585.

(28) "Liability . . . shall be first fixed."—State v. U. S. Fidelity & Guaranty Co., 128 So. 503, 504, 157 Miss. 740.

87. Century D.

Phrases construed

(1) "Fixation of an identifiable event."—Dayton Co. v. Commissioner of Internal Revenue, C.C.A., 90 F.2d 767, 769.

(2) "Fixation of salary."—Board of Com'rs of LeFlore County v. Babb, 112 P.2d 1085, 1087, 188 Okl. 686.

88. A maxim meaning "Whatever is affixed to the soil, belongs to the soil."—Broom Leg.Max.

Applied in Elwes v. Brigg Gas Co., 33 Ch.D. 562, 567.

FIXTURES

This Title includes chattels affixed or annexed to real property; and rights and liabilities in respect of such fixtures incident to or affected by particular estates or interests in the realty.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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§ 1. Definition and Nature and Requisites of Conversion into Realty in General

In general, fixtures are articles which were personalty but which by being annexed to realty are regarded as a part thereof. They retain their identity, partake of the character and properties of realty, and ordinarily belong to the owner of the real estate. What constitutes a fixture depends on the facts and circumstances of the particular case, including the relationship of the parties, and is determined by the united application of the requisites, annexation, adaptation, and intention. The law of the jurisdiction in which the real estate is located controls.

The law recognizes that, under certain circumstances personal property becomes a part and parcel of real property and thereafter assumes the status of real property.[1] In fact it is an ancient maxim, which in the language of antiquity is expressed "quicquid plantatur solo, solo cedit,"[2] that whatsoever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties.[3] The term "fixture" is applied to articles of the nature of personal property which have been affixed to land [4] and which retain their separate identity.[5] However, in the definition of the term there is confusion among

1. Cal.—Bell v. Bank of Perris, App., 125 P.2d 829.

2. Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

3. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 529, 65 Ga.App. 102.
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

Origin of law
The law of fixtures had its origin in the maxim.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

4. Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.
Construction of term "fixtures":
As used in chattel mortgages see Chattel Mortgages § 116.
As used in fire insurance policies see the C.J.S. title Insurance § 316, also 26 C.J. p 90 notes 48–62.
Property included in term as used in chattel mortgages see Chattel Mortgages § 127.
Fixtures as subject:
Of chattel mortgage see Chattel Mortgages § 33.
To mechanics' liens see the C.J.S. title Mechanics' Liens § 190, also 40 C.J. p 277 note 14–p 278 note 28.
Fixtures for which compensation required in condemnation proceeding see Eminent Domain § 175.
Validity of chattel mortgage which includes fixtures see Chattel Mortgages § 29.

5. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

the authorities.[6] In a few jurisdictions it is held that a fixture is an article which, although annexed to the realty, is nevertheless removable at the option of the person who annexed it,[7] and in such states a fixture is not a part of the real estate unless there are facts that bring about that result.[8] Other jurisdictions hold that the term "fixtures" may be deemed to embrace all those chattels which, by reason of their annexation to the land, partake both of the nature of personalty and realty, irrespective of the question whether or not they are removable.[9] By the great weight of authority, however, a fixture is a thing which, although originally a movable chattel, is, by reason of its annexation to land, regarded as a part of the land.[10] In some jurisdictions statutes affect the question as to whether or

6. Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

Difficult to define

It is difficult, if not impossible, to give a definition of the term "fixtures" which may be regarded of universal application.—Holy Ghost Catholic Church of Two Harbors v. Clinton, 211 N.W. 13, 169 Minn. 253.

7. Iowa.—Titus Loan & Investment Co. v. Natural Gas Pipe Line Co. of America, 274 N.W. 68, 223 Iowa 944.
26 C.J. p 652 note 3.

Other definition

Fixtures are chattel property brought in and on and annexed to real property, which retain their separate identity and become realty, but which may under certain circumstances become personalty again.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

8. Iowa.—Titus Loan & Investment Co. v. Natural Gas Pipe Line Co. of America, 274 N.W. 68, 223 Iowa 944.

9. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.

Nature

Under this definition a chattel is made to partake of the nature of both personalty and realty, depending on the way in which it was affixed or attached to the realty, the circumstances under which it was attached, and the parties at issue; and thus chattels which are attached to realty may partake to some extent of incidents peculiar to personalty and in other incidents partake of the nature and characteristics of realty.—Burpee v. Athens Production Credit Ass'n, supra.

Reason for term

It is primarily because of the dual character of chattels so attached under varying circumstances, as not to lose their identity, that a reason exists for a distinct term by which such chattels may be designated as "fixtures" to distinguish them on the one hand from mere personal property and on the other hand from mere realty.—Burpee v. Athens Production Credit Ass'n, supra.

10. U.S.—U. Fujita & Co. v. U. S., 26 C.C.P.A.Customs 63, 66, citing Corpus Juris.
Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.
Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.
Me.—Wedge v. Butler, 6 A.2d 46, 136 Me. 189—Inhabitants of Whiting v. Inhabitants of Lubec, 115 A. 896, 899, 121 Me. 121.
Md.—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.
Nev.—Reno Electrical Works v. Ward, 274 P. 196, 51 Nev. 291, 62 A.L.R. 247.
26 C.J. p 651 note 1.

Other definitions

(1) A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to, and a part and parcel of, it.
Ariz.—Fechet v. Drake, 12 P. 694, 695, 2 Ariz. 239.
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

(2) The term "fixture," as generally understood, is property originally a personal chattel which has been affixed to the soil or to some structure legally a part of the soil, and which, being physically attached or affixed to the realty, has become a part of the realty.—Continental Gin Co. v. Clement, 4 S.W.2d 901, 902, 176 Ark. 864.

(3) An article which was a chattel, but which, by being physically annexed or affixed to the realty by some one having an interest in the soil, becomes part and parcel of it.
Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.
Ill.—Material Service Corporation v. McKibbin, 43 N.E.2d 939, 380 Ill. 226.

(4) A "fixture" is an original chattel which has been physically annexed or affixed to the realty with the purpose and intention of making it part and parcel of such realty, and which may not be removed without injury to the freehold.—Greenwald v. Graham, 130 So. 608, 100 Fla. 818.

(5) A "fixture" is property which was a chattel but which has been so affixed to realty for a combined functional use that it has become part and parcel of it.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E.2d 273, 135 Ohio St. 48.

(6) A fixture is anything annexed to the freehold.—Fechet v. Drake, 12 P. 694, 695, 2 Ariz. 239.

(7) An article of a personal nature affixed to the freehold.—Merritt v. Judd, 14 Cal. 59, 64, quoting 2 Kent. Comm. p 344.

(8) Things fixed in a greater or less degree to the realty.—Fechet v. Drake, 12 P. 694, 695, 2 Ariz. 239, quoting 2 Kent.Comm. p 345 note a.

Derivation of term

The term "fixture" is derived from the Latin "affixum."—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 528, 65 Ga.App. 102.

Immovables

(1) An immovable by destination was originally a movable and the movable becomes immovable by destination by the act of the owner in placing it on the land for service, etc.—Buchler v. Fourroux, 190 So. 640, 193 La. 445.

(2) There is a vast distinction between immovables by destination and immovables by nature. The status of an immovable by destination can be changed by an act of the landowner, and does change according to its use by the owner, but the status of an immovable by nature cannot be changed by any act of the landowner or any other person.—Buchler v. Fourroux, supra.

(3) In Louisiana, Civ.Code § 468 provides that all such movables as the owner has attached permanently to the building shall be immovable by destination.—Scovel v. Shadyside Co., 69 So. 745, 137 La. 918, Ann.Cas. 1917B, 178.

(4) Terms "immovable by nature" and "immovable by destination" in statutes may be considered interchangeable.—Tangipahoa Bank & Trust Co. v. Kent, C.C.A.La., 70 F.2d 139.

Inclusion within meaning of other terms

(1) Under some statutes it is specifically provided that the terms "real property," "real estate," and

not particular articles are fixtures under given circumstances.[11]

Fixtures belong to that class of property which stands on the boundary line between the two grand divisions of things real and things personal, into which the law has classified property.[12] In its ordinary signification the term "fixture" is expressive of the act of annexation;[13] it necessarily implies something having a possible existence apart from realty, but which may, by annexation, be assimilated into realty,[14] and denotes the change which has occurred in the nature and legal incidents of the property.[15] They partake of the character,[16] incidents, and properties [17] of realty, and belong, in the ordinary case at least, to the person or persons owning the land;[18] and, as appears infra §§ 21–22, ordinarily may not be severed and removed without the consent of the owner. However, the incidents of ownership of a fixture are not the same in all respects as the incidents of ownership of land. Thus title to a fixture, unlike title to land, does not carry with it rights of ownership usque ab coelum.[19]

Term used in untechnical sense. The term "fixtures" is occasionally used in an untechnical sense, particularly in private documents or transactions, as when it is applied to an article, not as constituting part of the land, but as constituting merely part of a structure on the land,[20] or when reference is made to "fixtures" with some qualifying expression added,[21] such as gas or electric fixtures, see infra § 45.

Requisites in general. There is great confusion and uncertainty in the decisions as to when an article becomes a fixture to the realty to which it is attached, and so legally a part thereof.[22] The test

"land" shall include "fixtures" within their meaning.
Kan.—Missouri, K. & T. Ry. Co. v. Miami County Com'rs, 73 P. 103, 67 Kan. 434.
Ohio.—Chapman v. First Nat. Bank of Wellington, 47 N.E. 54, 56 Ohio St. 310, affirmed 19 S.Ct. 407, 173 U.S. 205, 43 L.Ed. 669.

(2) The term "improvements" includes, but is a more comprehensive term than, "fixtures."—Cullitan v. Standard Oil Co., Ohio App., 34 N.E. 2d 256, 258—31 C.J. p 262 notes 93 [a], 95, p 308 note 9—36 C.J. p 178 note 7.

(3) The word "stock" cannot be deemed to include fixtures.—St. Regis Restaurant v. Powers, 216 N.Y.S. 129, 127 Misc. 338, reversed on other grounds 219 N.Y.S. 684, 219 App.Div. 321.

(4) Fixtures as not included in chattel mortgage of stock in trade see Chattel Mortgages § 126.

(5) Fixtures as not included in terms "household utensils" subject to customs duties see Customs Duties § 34.

Trade fixtures

(1) "Fixtures," as distinguished from movable trade fixtures, means chattels annexed to realty.—Holy Ghost Catholic Church of Two Harbors v. Clinton, 211 N.W. 13, 169 Minn. 253.

(2) The general principle involved in determining whether an article is a "trade fixture" is the distinction between the business which is carried on on the premises and the premises themselves; the former is personal, and articles that are merely accessory to the business and have been put on the premises for this purpose retain the personal character of the principal, to which they are subservient, but articles which have been annexed to the premises as accessory to the land without regard to the business there carried on become subservient to the realty and acquire its character.—American Steel & Iron Co. v. Taft, 199 A. 261, 109 Vt. 469.

(3) "Trade fixtures" defined see infra § 38.

11. Cal.—Cortelyou v. Baker, 187 P. 417, 182 Cal. 168.
26 C.J. p 652 note 4 [a].

Statutory definition

"Anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it. Machinery, not actually attached, but movable at pleasure, is not a part of the realty. Anything detached from the realty becomes personalty instantly on being so detached."—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 528, 65 Ga.App. 102.

12. Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

Proper to distinguish

It appears appropriate and necessary to distinguish this class of property from movable property possessing the nature and incidents of a chattel.
Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

13. Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

Permanent appendage

The very idea of a "fixture" is of a thing fixed or attached to something as a permanent appendage and implies firmness in position.—Brown v. North Carolina Joint Stock Land Bank of Durham, 197 S.E. 140, 142, 213 N.C. 594.

14. Mich.—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N. W. 111, 239 Mich. 161.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
R.I.—Gaspee Cab v. McGovern, 153 A. 870, 51 R.I. 247.

15. Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

16. Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.

Fixtures are real property because they are incorporated in or attached to the realty.—White Way Electric Sign & Maintenance Co. v. Chicago Title & Trust Co., 14 N.E.2d 839, 368 Ill. 482, affirming 6 N.E.2d 510, 289 Ill.App. 1.

17. Colo.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

18. Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 687, 1 W.W. Harr. 183.
Ga.—Wright v. Du Bignon, 40 S.E. 747, 114 Ga. 765, 57 L.R.A. 669.

19. N.Y.—Hynes v. New York Cent. R. Co., 131 N.E. 898, 231 N.Y. 229, 17 A.L.R. 803, reversing 179 N.Y. S. 927, 190 App.Div. 915.

20. Iowa.—McGorrisk v. Dwyer, 43 N.W. 215, 78 Iowa 279, 16 Am.S.R. 440, 5 L.R.A. 594.
26 C.J. p 652 note 6.

21. R.I.—Forbes v. Howard, 4 R.I. 364.
26 C.J. p 652 note 7.

22. Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 816, 98 Fla. 410, 64 A.L.R. 1219.

to be applied is difficult to define by general rule,[23] and there is no arbitrary standard whereby to determine, in all cases, what fixtures become realty and what retain their character as personalty.[24] Whether an article is a fixture or not depends in some degree on the facts and circumstances of the particular case,[25] including the relationship of the parties at issue,[26] as considered specifically infra §§ 23–57. Ordinarily the courts hold that for an article to become a fixture there must unite[27] the following requisites: (1) annexation to the realty or something appurtenant thereto, as discussed infra §§ 3–6; (2) adaptability or application of the chattel affixed to the use or purpose to which the realty is appropriated, as discussed infra §§ 7–11; and (3) the intention of the party making the annexation to make a permanent accession to the freehold, as discussed infra § 2.[28] These criteria are necessarily

Idaho.—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.
Neb.—Frost v. Schinkel, 238 N.W. 659, 664, 121 Neb. 784, 77 A.L.R. 1351, citing **Corpus Juris.**
Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 740, 232 Wis. 440, citing **Corpus Juris.**
26 C.J. p 652 note 14.

23. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.

24. Ariz.—Nigro v. Hatch, 11 P. 177, 2 Ariz. 144.
N.Y.—Marcus v. Rosner, 197 N.Y.S. 503, 119 Misc. 517.
Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

25. Ala.—Home Bond & Mortgage Corporation v. Alabama Utilities Service Co., 142 So. 827, 225 Ala. 322.
Cal.—Fisher v. Pennington, 2 P.2d 518, 116 Cal.App. 248—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal. App. 696.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008.
Mich.—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 239 Mich. 161.
N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.
N.Y.—Marcus v. Rosner, 197 N.Y.S. 503, 119 Misc. 517—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.
Or.—Knight v. Potter, 32 P.2d 1014, 147 Or. 339.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
Wyo.—School Dist. No. 11, Laramie County, v. Donahue, 97 P.2d 663, 55 Wyo. 220.

26. Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.
Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216—Harn v. State, 179 S.E. 553, 51 Ga.App. 34.
Or.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.
Tenn.—Farrar v. Nashville, C. & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.

Parties' relationship important
Whether article becomes fixture depends much on parties' relationship.—Glueck & Co. v. Powell, 61 S. W.2d 406, 227 Mo.App. 1226.

May differ between different parties
An article annexed to a freehold may remain personal property as to some parties, and become a fixture as to others.—Wood Hydraulic Hoist & Body Co. v. Norton, 257 N.W. 836, 269 Mich. 341.

27. Iowa.—Thomson v. Smith, 83 N. W. 789, 111 Iowa 718, 82 Am.S.R. 541, 50 L.R.A. 780—Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57, 24 Am.R. 719.
Neb.—Hillebrand v. Nelson, 95 N.W. 1068, 1 Neb., Unoff., 783.
Or.—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345.

28. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607—Willis v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520—Whitaker-Glessner Co. v. Ohio Savings Bank & Trust Co., C.C.A.Ohio, 22 F.2d 773—In re Walker Bin Co., D.C.N.Y., 9 F.Supp. 367—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.
Ala.—Southern Cotton Oil Co. v. Lowery, 163 So. 629, 231 Ala. 119—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P. 2d 94, 16 Cal.2d 142, 133 A.L.R. 416, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—Bell v. Bank of Perris, App., 125 P.2d 829—Breyfogle v. Tighe, 208 P. 1008, 58 Cal.App. 301.
Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.
Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N. E.2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008 —Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.
Iowa.—Equitable Life Assur. Soc. of United States v. Chapman, Iowa, 282 N.W. 355, 357, 225 Iowa 988—McCoun v. Drews, 265 N.W. 160, 221 Iowa 227—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343 —Thomson v. Smith, 83 N.W. 789, 111 Iowa 718, 82 Am.S.R. 541, 50 L.R.A. 780—Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57, 24 Am. R. 719.
Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372—Bank of Shelbyville v. Hartford, 104 S. W.2d 217, 268 Ky. 135—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Md.—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.
Mass.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N. E. 517, 279 Mass. 33, 81 A.L.R. 1437 —Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.
Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14—First Mortg. Bond Co. v. London, 244 N. W. 203, 259 Mich. 688—Peninsular

of a somewhat vague and indeterminate character, and, as has been judicially remarked, a judge might frequently decide either way without much danger of having his judgment impeached, or of failing to find some authority to support it.[29] Varying weight, according to the circumstances of the case, may be given to the determinative factors.[30] Also their relative determinative value has varied at different periods of time.[31] One reason which has been suggested for the shifting character of the decisions is the changes in the taste and habits of the community.[32] Where the article meets all the tests for a fixture, mere speculation tending to show that it was not placed in, and attached to, the realty as a fixture will not prevent its being so considered.[33]

Custom has been regarded as inadmissible to show that articles annexed to land were not to be regarded as part of the realty;[34] but there is authority for the contrary view.[35]

Stove Co. v. Young, 226 N.W. 25, 247 Mich. 580.

Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738—Woodling v. Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo.App. 1231, transferred, see 55 S.W.2d 477, 331 Mo. 812—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.

Mont.—Conway v. Fabian, 89 P.2d 1022, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.

Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381—Hillebrand v. Nelson, 95 N.W. 1068, 1 Neb., Unoff., 783.

N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181—Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co., 53 A. 212, 64 N.J.Eq. 140—Knickerbocker Trust Co. v. Penn Cordage Co., 50 A. 459, 62 N.J.Eq. 624, reversed on other grounds 55 A. 231, 65 N.J.Eq. 181, modified on other grounds 58 A. 409, 66 N.J.Eq. 305, 105 Am.S.R. 640.

N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.

N.D.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E.2d 273, 135 Ohio St. 48—Szilagy v. Taylor, App., 25 N.E.2d 360—McGowan v. McGowan, 18 N.E.2d 419, 59 Ohio App. 397.

Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96—Quality Milk Products Co. v. Endowment Loan & Mortgage Co., 51 P.2d 550, 175 Okl. 94—Quality Milk Products Co. v. Young, 51 P. 2d 547, 175 Okl. 93—Seminole Supply Co. v. Seminole Refining Co., 45 P.2d 1084, 173 Okl. 32—Elerick v. Reed, 240 P. 1045, 113 Okl. 195, 44 A.L.R. 474.

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.

Pa.—Waltman v. Mayer, 97 Pa.Super. 236.

S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

Tenn.—Farrar v. Nashville, C. & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.

Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ. App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed—Allen v. Selman, Civ.App., 10 S.W.2d 173.

Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Wash.—Greenkevich v. Vaivados, 19 P.2d 939, 172 Wash. 208.

Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581—Gunderson v. Swarthout, 80 N.W. 465, 104 Wis. 186, 76 Am.S.R. 860.

26 C.J. p 652 note 17.

Leading case

Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

Other statements of determining factors

(1) To constitute a fixture the thing must be of an accessory character and must be, in some way, in actual or constructive union with the realty and not merely brought on it. —Holy Ghost Catholic Church of Two Harbors v. Clinton, 211 N.W. 13, 169 Minn. 253.

(2) In determining whether a chattel is so annexed to the freehold as to become a fixture, reference must be had to the nature of the chattel itself, the position of the party placing it where found, the probable intention in putting it there, and the injury that would result from its removal; and the object of the party in placing it on the premises with reference to trade, agriculture, or ornament must be considered.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.

29. N.Y.—Noyes v. Terry, 1 Lans. 219.

30. N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y. S.2d 656.

Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

31. Ky.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135.

Ancient rule modified

The ancient rule that whatever was fixed to the realty became a part of it in contemplation of law has been modified so that what is a fixture is now determined by the character of the act by which the structure is put into its place, the policy of the law connected with its purpose, and the intention of those concerned.—Bank of Shelbyville v. Hartford, supra.

Liberal trend

The trend of modern decisions is in favor of a more liberal construction in holding fixtures to be personalty.—Thuma v. Granada Hotel Corporation, 269 Ill.App. 484.

32. Wash.—Philadelphia Mortgage & Trust Co. v. Miller, 56 P 382, 20 Wash. 607, 72 Am.S.R. 178, 44 L.R.A. 559.

26 C.J. p 653 note 19.

33. Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.

34. Pa.—Christian v. Dripps, 28 Pa. 271.

26 C.J. p 653 note 20.

35. Ark.—Choate v. Kimball, 19 S. W. 108, 56 Ark. 55.

Conflict of laws. The question of whether property is a part of real estate is to be determined according to the law of the jurisdiction in which the real estate is located.[36]

Tenant's fixtures. A term which, in its strict legal definition, is to be understood to signify things which are fixed to the freehold of the demised premises, but which nevertheless the tenant is allowed to disannex and take away, provided he seasonably exerts his right to do so.[37]

§ 2. Intention

a. In general
b. Character of intention
c. Whose intention considered
d. Intention distinguished from agreement
e. In relation to permanency

a. In General

In general the intention of the annexor as to whether the article constitutes a permanent accession to the freehold is the primary, if not the controlling, test in determining whether or not it is a fixture.

In determining whether an article is a fixture the intention of the party making the annexation,[38] and whether it was intended to make the property annexed a permanent accession to the freehold,[39] are to be considered, for the intent of the annexor to make the property annexed a permanent accession to the freehold is one of the requisites necessary to make it a fixture.[40] The intention is the

36. U.S.—U. S. v. Becktold Co., C.C. A.Mo., 129 F.2d 473—Willis v. Beeler, C.C.A.Ohio., 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U. S. 717, 82 L.Ed. 554—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520—In re American Pile Fabric Co., C.C.A. Pa., 85 F.2d 961, reversing, D.C., 12 F.Supp. 86, certiorari denied Bateman v. Ideal Building & Loan Ass'n, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454.
Wash.—Gasaway v. Thomas, 105 P. 168, 56 Wash. 77, 20 Ann.Cas. 1337.
What law governs character of property generally see Conflict of Laws § 17.

37. Mass.—Wall v. Hinds, 4 Gray 256, 64 Am.D. 64.

38. Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 16 Cal.2d 142, 133 A. L.R. 416, superseding, App., 96 P. 2d 137, and certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.
Mass.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385—Walker Dishwasher Corporation v. Medford Trust Co., 180 N.E. 517, 279 Mass. 33, 81 A.L.R. 1437—Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.
Mich.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.
Miss.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738—Woodling v. Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo.App. 1231, transferred, see 55 S.W.2d 477, 331 Mo. 812—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226—Handlan v. Stifel, App., 232 S.W. 245.
Mont.—Conway v. Fabian, 89 P.2d 1022, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484.
Nev.—Reno Electrical Works v. Ward, 274 P. 196, 51 Nev. 291, 62 A.L.R. 247.
N.H.—Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A. 556, 86 N.H. 298—Graton & Knight Mfg. Co. v. Woodworth-Mason Co., 38 A. 790, 69 N.H. 177—Langdon v. Buchanan, 62 N.H. 657.
N.J.—Future Building & Loan Ass'n v. Mazzocchi, 152 A. 776, 107 N.J. Eq. 422.
N.M.—Porter Lumber Co. v. Wade, 32 P.2d 819, 38 N.M. 333.
N.Y.—Harway Improvement Co. v. Partridge, 222 N.Y.S. 176, 220 App.Div. 595—Van Buren v. Gallo, 283 N.Y.S. 453, 157 Misc. 289.
N.D.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.
Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.
Pa.—Waltman v. Mayer, 97 Pa.Super. 236—Diamond v. Butler, 17 Pa.Dist. & Co. 183.
Tenn.—Farrar v. Nashville, C. & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ.App., 100 S.W.2d 1029, error dismissed—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused—Allen v. Selman, Civ.App., 10 S.W.2d 173—Campbell v. Teeple, Civ.App., 273 S.W. 304—Bantuelle v. Chapman, Civ.App., 256 S.W. 936.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.
Va.—Hagan v. Richmond Trust Co., 139 S.E. 317, 321, 148 Va. 528, citing **Corpus Juris.**
Wash.—Strong v. Sunset Copper Co., 114 P.2d 526, 9 Wash.2d 214, 135 A.L.R. 423—Reeder v. Smith, 203 P. 951, 118 Wash. 505.
Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.
Intent as determining whether or not fixtures are removable see infra § 22.

39. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696—Breyfogle v. Tighe, 208 P. 1008, 58 Cal. App. 301.
Okl.—Quality Milk Products Co. v. Young, 51 P.2d 547, 175 Okl. 98—Seminole Supply Co. v. Seminole Refining Co., 45 P.2d 1084, 173 Okl. 32.

40. U.S.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607—In re Voight-Pros't Brewing Co., C.C.A.Mich., 115 F.2d 733—Willis v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520—Whitaker-Glessner Co. v. Ohio Savings Bank & Trust Co., C.C.A.Ohio, 22 F.2d 773—In re Walker Bin Co., D.C.N.Y., 9 F.Supp. 367.
Ala.—Southern Cotton Oil Co. v. Lowery, 163 So. 629, 231 Ala. 119.
Ark.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492.
Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31—Bell v. Bank of Perris, App., 125 P.2d 829.
Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.
Fla.—Commercial Finance Co. v.

primary test, the one of paramount importance.[41] | Such intention, the one of primary importance,

Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.
Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.
Iowa.—McCoun v. Drews, 265 N.W. 160, 221 Iowa 227—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372—Bank of Shelbyville v. Hartford, 104 S. W.2d 217, 268 Ky. 135—Young v. Hill, 85 S.W.2d 867, 260 Ky. 397—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W. 2d 517, 255 Ky. 800—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77—Morrow Mfg. Co. v. Race Creek Coal Co., 2 S.W.2d 662, 222 Ky. 807—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Bankers' & Merchants Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.
Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643—Colton v. Michigan Lafayette Bldg. Co., 255 N. W. 433, 267 Mich. 122—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688—Peninsular Stove Co. v. Young, 226 N.W. 25, 247 Mich. 580.
Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.
Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.
N.Y.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.
Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E.2d 273, 135 Ohio St. 48—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634—Szilagy v. Taylor, 25 N.E.2d 360, 63 Ohio App. 105—McGowan v. McGowan, 18 N.E.2d 419, 59 Ohio App. 397.
Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96—Elerick v. Reed, 240 P. 1045, 113 Okl. 195, 44 A.L.R. 474.
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ. App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
Wash.—Greenkevich v. Vaivados, 19 P.2d 939, 172 Wash. 208.
W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.
Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

Intent must clearly appear

(1) The intention to make an article a permanent accession to the realty must affirmatively and plainly appear.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573.
Mont.—Butte Electric Ry. Co. v. Brett, 257 P. 478, 80 Mont. 12.
Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.

(2) If the matter is left in doubt and uncertainty, the legal qualities of the article are not changed and it must be deemed a chattel.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., supra.
Mont.—Butte Electric Ry. Co. v. Brett, supra.

(3) Mirrors on wall, held in place by moulding, are personal property, in the absence of evidence of intention to attach them to real estate.—Waltman v. Mayer, 97 Pa.Super. 236.

41. U.S.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F. 2d 607—In re Danville Hotel Co., C.C.A.Ill., 38 F.2d 10, affirming in part and reversing in part, D.C., 33 F.2d 162.
Ark.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492.
Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31—Bell v. Bank of Perris, App., 125 P.2d 829—Placer County v. Lake Tahoe Ry. & Transportation Co., 209 P. 900, 58 Cal.App. 764.
Ill.—Guardian Life Ins. Co. of America v. Swanson, 3 N.E.2d 324, 286 Ill.App. 278.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573.
Iowa.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Me.—Wedge v. Butler, 6 A.2d 46, 136 Me. 189—Cumberland County, Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Md.—Bankers' & Merchants Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.
Miss.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408, citing **Corpus Juris.**
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738—Moller-Vandenboom Lumber Co. v. Boudreau, 85 S.W.2d 141, 231 Mo.App. 1127.
Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Butte Electric Ry. Co. v. Brett, 257 P. 478, 80 Mont. 12.
N.Y.—Marcus v. Rosner, 197 N.Y.S. 503, 119 Misc. 517—Application of Wier, 20 N.Y.S.2d 304, reversed on other grounds 19 N.Y.S.2d 247, 259 App.Div. 839.
Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Tenn.—Knoxville Gas Co. v. W. I. Kirby & Sons, 32 S.W.2d 1054, 1055, 161 Tenn. 490, quoting **Corpus Juris.**
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ. App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.

has been said to be controlling;[42] and ordinarily, if the person annexing chattels to real estate intends them to become a permanent accession to the realty, they are fixtures and part of the realty in the eyes of the law,[43] but only then,[44] and not where the annexor's intention was that the annexation be temporary.[45] Intention, however, is not by itself sufficient to make an article a fixture.[46]

b. Character of Intention

The intention considered is not a secret or undisclosed intent, but the apparent intent, that inferred from all the facts and circumstances, such as the relation and situation of the annexor, the policy of the law, the manner of annexation, and the purpose or use for which the annexation was made. The actual intention of the annexor may be immaterial, or under proper circumstances it may be a valid consideration.

The test of intention is given a broad signification.[47] Subject to the rules as to the effect of agreements as to whether an article shall or shall not be a chattel, discussed infra §§ 12–20, the intention which controls is not a secret or undisclosed

Wis.—McCorkle v. Robbins, 267 N.W. 295, 222 Wis. 12—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.
26 C.J. p 654 note 31.

Fundamental test

The fundamental test, in determining whether personalty attached to realty is "fixture," is whether purpose of annexation was to make personalty a permanent part of freehold.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.

Modern tendency

The definite tendency in modern times is to accord less significance to the manner of annexation and more to the intention of the person making it.—Marine Midland Trust Co. of Binghamton v. Ahern, supra.

Machinery

The rule applies with regard to machinery in manufacturing plants the same as in the case of any other kind of chattel.—In re Highland Silk Co., D.C.Pa., 41 F.2d 404.

Property held to be a fixture

D.C.—Evans v. Ockershausen, 100 F.2d 695, 69 App.D.C. 285, 128 A.L.R. 177, certiorari denied Smith v. Ockerhausen, 59 S.Ct. 462, two cases, 306 U.S. 633, 83 L.Ed. 1034.

42. U.S.—In re American Pile Fabric Co., C.C.A.Pa., 85 F.2d 961, reversing, D.C., 12 F.Supp. 86, certiorari denied Bateman v. Ideal Building & Loan Ass'n, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454—Kennedy v. Crumlish, C.C.A.Pa., 85 F.2d 665—Delaware County Nat. Bank v. Montgomery, C.C.A.Pa., 78 F.2d 616.
Ark.—Bank of Mulberry v. Hawkins, 10 S.W.2d 898, 178 Ark. 504.
Cal.—Gosliner v. Briones, 204 P. 19, 187 Cal. 557—Alderman v. Baggett, 25 P.2d 532, 134 Cal.App. 501—Fisher v. Pennington, 2 P.2d 518, 116 Cal.App. 248.
Colo.—Dawson v. Scruggs-Vandervoort Barney Realty Co., 268 P. 584, 84 Colo. 152.
Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.
Ill.—Savage v. University State Bank of Champaign, 263 Ill.App. 457.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.
Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
Wash.—Strong v. Sunset Copper Co., 114 P.2d 526, 9 Wash.2d 214, 135 A.L.R. 423—Reeder v. Smith, 203 P. 951, 118 Wash. 505.
W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.
Wis.—Zimmerman v. Treleven, 212 N.W. 266, 192 Wis. 214.

Modern rule

Modern decisions permit fixtures to remain personal property where intent that they should remain personal property can be gathered from conduct of parties.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.

When detachable without damage

(1) Intention of parties ordinarily determines whether article so annexed to building that it can be detached without material damage becomes a fixture.—East Ohio Building & Loan Co. v. Holland Furnace Co., 194 N.E. 598, 48 Ohio App. 545.

(2) Intention of one annexing article to building and detachable without material damage to building ordinarily determines whether it becomes fixture.—Industrial Bank of Richmond v. Holland Furnace Co., 153 S.E. 309, 109 W.Va. 176.

(3) Chattels, so affixed to realty as to be removable without destroying or materially injuring them or realty, become part of realty or remain personalty, according to parties' intention at time of annexation.—Clayton v. Lienhard, 167 A. 321, 312 Pa. 433.

In disputes between private parties

Cal.—Southern California Tel. Co. v. State Board of Equalization, 82 P.2d 422, 12 Cal.2d 127.

Trade fixtures

The rule is applicable in determining whether an article is a trade fixture or a part of the realty.—Reeder v. Smith, 203 P. 951, 118 Wash. 505.

Necessity for annexation see infra § 3.

43. Cal.—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal. App.2d 531.
Tenn.—Knoxville Gas Co. v. W. I. Kirby & Sons, 32 S.W.2d 1054, 1055, 161 Tenn. 490, quoting **Corpus Juris.**
Tex.—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused—Allen v. Selman, Civ.App., 10 S.W.2d 173.

Immovable by destination

Movable becomes "immovable by destination" when owner unites it with his realty, intending that movable shall be merged and associated with destiny of realty.—Richardson v. Item Co., 134 So. 380, 172 La. 421.

Articles within rule

(1) Articles which are ponderous and firmly attached and are difficult to remove, including complete buildings, may retain character of pure chattels if such is intention of parties.—Nadien v. Bazata, 22 N.E.2d 1, 303 Mass. 496.

(2) The rule has special application to heavy machinery.—Joyner v. Mitchell, 267 Ill.App. 427.
26 C.J. p 654 note 31.

44. Tenn.—Knoxville Gas Co. v. W. I. Kirby & Sons, 32 S.W.2d 1054, 1055, 161 Tenn. 490, quoting **Corpus Juris.**
26 C.J. p 654 note 31.

45. Cal.—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal. App.2d 531.

46. N.C.—State v. Martin, 53 S.E. 874, 141 N.C. 832.
26 C.J. p 655 note 32.

47. Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

intent,[48] nor need it be expressed in words,[49] although the expressed intent, if any, of the annexor, while not necessarily controlling,[50] is to be considered.[51] It is the apparent intent,[52] that manifested by the physical facts,[53] the intention to be inferred from all the facts and circumstances of the annexation,[54] which is considered; and the actual intention of the party making the annexation may be immaterial.[55] However, occasionally the view has been more or less clearly indicated that the actual intention of the party who made the annexation is a valid consideration in this regard;[56] and such a view appears to be involved in the occasional statements that intention controls only when there is a reasonable doubt as to whether the chattel has changed its status,[57] when severance would not work an injury to the realty[58] or when the article is not especially adapted for use in that place.[59]

In determining the intent there are considered the

48. Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 16 Cal.2d 142, 133 A.L.R. 416, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—Bell v. Bank of Perris, App., 125 P.2d 829.
Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.
Iowa.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Mass.—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.
Mich.—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 239 Mich. 161.
Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.
N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.
Okl.—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419.
Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Pa.—Diamond v. Butler, 17 Pa.Dist. & Co. 183.
Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W. 2d 603, error dismissed.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 349, 178 Va. 223, citing **Corpus Juris.**
26 C.J. p 655 note 34.

49. Cal.—Bell v. Bank of Perris, App., 125 P.2d 829.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

50. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N. E.2d 444, 216 Ind. 573.
Iowa.—Equitable Life Assur. Soc. of U. S. v. Chapman, 282 N.W. 355, 225 Iowa 988.

Present statements of annexor are not to be considered.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.

51. Cal.—Alderman v. Baggett, 25 P.2d 532, 134 Cal.App. 501—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.
S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79.
Va.—Hagan v. Richmond Trust Co., 139 S.E. 317, 148 Va. 528.

52. Cal.—Hammond Lumber Co. v. Gordon, 258 P. 612, 84 Cal.App. 701.

53. Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 16 Cal.2d 142, 133 A. L.R. 416, superseding App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego County v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31—Bell v. Bank of Perris, App., 125 P.2d 829.

54. U.S.—In re Walker Bin Co., D.C. N.Y., 9 F.Supp. 367.
Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.
Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385.
Me.—Wedge v. Butler, 6 A.2d 46, 136 Me. 189.
Miss.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408.
N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.
Or.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Pa.—Diamond v. Butler, 17 Pa.Dist. & Co. 183.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—C. D. Shamburger Lumber Co. v. Bredthauer, Civ. App., 62 S.W.2d 603, error dismissed.
Va.—Hagan v. Richmond Trust Co., 139 S.E. 317, 148 Va. 528.
26 C.J. p 655 note 35.

Not from expressed intent alone
As respects question whether chattel becomes a fixture, the intention of the parties making the annexation of a chattel to a freehold is determined not from the expressed intention alone, but such intention must be reasonably inferable from the facts and circumstances surrounding the annexation.—Equitable Life Assur. Soc. of U. S. v. Chapman, 282 N.W. 355, 225 Iowa 988.

Value
In absence of agreement as to whether concrete bank vault constructed by lessee is a fixture, consideration is to be given to value of the lot and building to which the vault is attached, the cost of removal, whether the property will be worth more or less after removal of the vault, and whether the property was increased in value or damaged by the construction of the vault for all general purposes.—Savage v. University State Bank of Champaign, 263 Ill.App. 457.

55. Vt.—Kendall v. Hathaway, 30 A. 859, 67 Vt. 122.
26 C.J. p 656 note 36.

56. N.J.—Oradell Gardens v. Mooney, 178 A. 270, 13 N.J.Misc. 364, citing **Corpus Juris.**
26 C.J. p 656 note 40.

When ownership of chattel and realty the same
This is particularly true when the ownership of the chattel and the realty is in one and the same person.—Oradell Gardens v. Mooney, 178 A. 270, 13 N.J.Misc. 364.

57. Ill.—Sword v. Low, 13 N.E. 826, 122 Ill. 487.
26 C.J. p 656 note 41.

58. Or.—Alberson v. Elk Creek Gold-Min. Co., 65 P. 978, 39 Or. 552.
26 C.J. p 656 note 42.

59. U.S.—New York Life Ins. Co. v. Allison, N.Y., 107 F. 179, 46 C.C.A. 229, certiorari denied 21 S. Ct. 923, 181 U.S. 618, 45 L.Ed. 1030.

relation[60] and the acts and conduct[61] of the parties; the nature of the transaction;[62] the nature or mode of annexation;[63] the purpose or use for which the annexation was made;[64] the adaptability of the article to the use to which the realty is appropriated;[65] and the character of the building to which the property is attached;[66] or, as it has been stated generally in many cases, the intention is to be inferred from the nature of the article affixed; the relation and situation of the party making the annexation, and the policy of the law in relation thereto; the structure and mode of the annexation, and the purpose or use for which the annexation has been made.[67] Under these rules for determin-

60. Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

Important factor
The relation and situation of the party making the annexation are an important factor in determining whether annexation was made with intention of making articles permanent accession to realty.
Ind.—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008.
Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.

Matters considered
The interest in the realty of the annexor is to be considered.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408.

61. U.S.—Kennedy v. Crumlish, C.C. A.Pa., 85 F.2d 665.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N. E.2d 444, 216 Ind. 573.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Mass.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.
Mich.—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 239 Mich. 161.
Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.
S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79.

62. Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

63. U.S.—In re Highland Silk Co., D.C.Pa., 41 F.2d 404.
N.Y.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.

Not conclusive but important
The mode of annexation, although not conclusive, is frequently of importance in ascertaining the intention.—In re Voight-Pros't Brewing Co., C.C.A.Mich., 115 F.2d 733.

64. Miss.—Love v. Union Central Life Ins. Co., 150 So. 794, 168 Miss. 408.

Sometimes controlling
One sometimes controlling circumstance where the annexation was made by the owner of the realty is whether the article was annexed for the more convenient and profitable use of the realty itself, for the general purpose for which a person making the annexation intended to use it.—Love v. Union Central Life Ins. Co., supra.

Not conclusive but important
The manner of use, although not conclusive, is frequently of importance in ascertaining the intention.—In re Voight-Pros't Brewing Co., C.C.A.Mich., 115 F.2d 733.

65. Cal.—Placer County v. Lake Tahoe Ry. & Transportation Co., 209 P. 900, 58 Cal.App. 764.

66. U.S.—In re Highland Silk Co., D.C.Pa., 41 F.2d 404.

67. U.S.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603.
Ark.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492.
Cal.—Bell v. Bank of Perris, App., 125 P.2d 829—Breyfogle v. Tighe, 208 P. 1008, 58 Cal.App. 301.
Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.
Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008.
Ky.—Young v. Hill, 85 S.W.2d 867, 260 Ky. 397.
Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.
Mo.—Handlan v. Stifel, App., 232 S. W. 245.
Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.
Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858.
N.Y.—Harway Improvement Co. v. Partridge, 222 N.Y.S. 176, 220 App. Div. 595.
Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419—Quality Milk Products Co. v. Young, 51 P. 2d 547, 175 Okl. 98—Quality Milk Products Co. v. Endowment Loan & Mortgage Co., 51 P.2d 550, 175 Okl. 94.
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused—Southwestern Public Service Co. v. Smith, Civ.App., 31 S. W.2d 472, error dismissed.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 349, 178 Va. 223, citing **Corpus Juris.**
26 C.J. p 656 note 39.

Leading case
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634.

Matters considered
(1) In determining intention of parties as to whether machinery installed in manufacturing establishment was to remain personalty, their actions as evidenced by their contracts, permanence of installation of machinery, its nature, and its relation to concern as a going business, must be considered.—In re American Pile Fabric Co., C.C.A.Pa., 85 F.2d 961, reversing, D.C., 12 F.Supp. 86, certiorari denied Bateman v. Ideal Building & Loan Ass'n, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454.

(2) When not expressly stated, the intention must be ascertained from the relations of the parties, from what they did and said, and from the character of the property and the use for which it was intended.—Kennedy v. Crumlish, C.C.A.Pa., 85 F.2d 665.

Where removable without injury
Where the chattel may be removed

ing intent it has been held that the other tests considered essential in determining whether or not property is a fixture, that is, the character of the annexation to the realty, see infra §§ 4–6, and the character of the article and its adaptability to the uses of the realty, see infra §§ 7–11, may be considered subsidiary elements employed as tests for determining the intention.[68]

Time of intention. In general the intention considered is the intention at the time the property is annexed to the realty;[69] but it has been stated that the intent which is regarded as controlling is not the initial intention at the time the chattel is acquired.[70]

c. Whose Intention Considered

It is the intention of the annexor, and not that of some other person, which is controlling. However, if the annexor does not own the realty, his intention is immaterial.

In general it is the intention of the annexor which is controlling,[71] and the intention of another person is in itself immaterial,[72] except as it may be incorporated in a contract which is valid and effective by reason of such other's interest in the land or in the article annexed, as considered infra §§ 12–20. Where the person making the annexation has an absolute estate in the land and is the owner of the chattel, the absence of any conflicting interests at the time of annexation makes his intention an appropriate consideration in determining the character of the article, as when, for instance, the question subsequently arises between his heir and executor, see infra § 30, or as between one claiming that the article passed on a subsequent conveyance of the land and one denying such claim, see infra §§ 44, 49–51. The applicability of the theory of intention is, however, not so clear when one annexes his chattel to land belonging to another, see infra § 25, and there is authority to the effect that in such case the intention of the annexor is immaterial.[73] It has been said in this connection that if, as between himself and the owner of the soil, the person making an erection thereon has no right to erect it as property separate and distinct from the freehold, an intention so to do, no matter how clearly manifested, is of no avail.[74] However, a contrary view has been indicated, at least in cases involving mistake in affixing the property to the other's realty.[75]

d. Intention Distinguished from Agreement

The intention of the annexor is to be distinguished from the joint intention of two or more parties as indicated by an agreement between them which may determine the status of the article as between such parties.

The question of the intention of the individual party making the annexation, which is regarded as controlling, is to be distinguished from that of joint intention, as indicated by agreement between them, of two or more parties, each of whom has, at the time of annexation, an interest in either the land or in the article annexed. Such an agreement, when made with the owner of the chattel before or at the time of annexation, has perhaps occasionally been referred to as of weight in determining the intention with which the annexation was made.[76] Thus, when the courts refer, as they quite

without injury to it or the realty, the manner of its annexation and other circumstances and facts, including its possible uses, are to be considered in determining the intention of the party annexing it.—Whitaker-Glessner Co. v. Ohio Savings Bank & Trust Co., C.C.A.Ohio, 22 F. 2d 773.

68. Cal.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31—Gosliner v. Briones, 204 P. 19, 187 Cal. 557—Alderman v. Baggett, 25 P.2d 532, 134 Cal.App. 501.
Ill.—Guardian Life Ins. Co. of America v. Swanson, 3 N.E.2d 324, 286 Ill.App. 278.
N.Y.—Van Buren v. Gallo, 283 N.Y.S. 453, 157 Misc. 289.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ.App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ.App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.

Chief value
Such other tests derive their chief value as evidence of intention.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.

A criterion for determination
Whether the article is physically affixed to building is only one of the criteria in determining whether there was intention to make it a permanent accession to realty.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.

69. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.
Miss.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408.
Wis.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536.

70. N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y. S.2d 656.

71. Wash.—Reeder v. Smith, 203 P. 951, 118 Wash. 505.
26 C.J. p 657 note 52.

72. Iowa.—Hooven, Owens, Rentschler Co. v. City of Atlantic, 144 N. W. 635, 163 Iowa 380.
26 C.J. p 657 note 52.

73. Me.—Readfield Telephone & Telegraph Co. v. Cyr, 49 A. 1047, 95 Me. 287.
26 C.J. p 657 note 47.

Only of incidental importance
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.

74. Ga.—Wright v. Du Bignon, 40 S. E. 747, 114 Ga. 765, 57 L.R.A. 669.
26 C.J. p 657 note 48.

75. Mich.—Curtis v. Leasia, 44 N. W. 500, 78 Mich. 480.

76. Mass.—Jennings v. Vahey, 66 N. E. 598, 183 Mass. 47, 97 Am.S.R. 409.
26 C.J. p 657 note 50.

frequently do, not to the intention of the particular party making the annexation, but to "the intention of the parties," as controlling in this regard,[77] they have in mind, it appears, the joint intention of the parties in interest as evidenced by agreement between them, which is considered infra §§ 12–20.

e. In Relation to Permanency

The intention to make the article annexed a permanent accession to the freehold does not require an intent that it be perpetual, but it is sufficient if it is intended that the annexation shall continue until the article is worn out or superseded, or its purpose accomplished, except where the purpose is of a temporary character.

In the requirement of an intention to make the article annexed a permanent accession to the land the expression "permanent" does not, it seems, imply that the annexation must be intended to be perpetual,[78] but rather that the article shall appear to be intended to remain where fastened until worn out,[79] until the purpose to which the realty is devoted has been accomplished,[80] or until the article is superseded by another article more suitable for the purpose.[81] It appears to be sufficient that it is intended to remain where placed as long as the land or building to which it is annexed may be used for the same purpose.[82] The intention of the annexor that the article shall remain "indefinitely" has also been referred to as the criterion.[83] In a number of cases the purpose for which the annexation was made was recognized as in itself of so temporary a character as to show that the intention could not have been to make the article a permanent accession.[84] However, the fact that the character of the operations on land is such that an exhaustion of the material therefor on the land will necessitate, at some time in the future, a cessation of such operations, or a change in the character of the machinery necessary therefor, has not ordinarily been regarded as showing an intention that the machinery originally installed for the conduct of such operations was not intended to be for the permanent improvement of the land and was consequently not a part of the realty.[85] On the other hand the fact that the operation of the machinery involves the destruction of the supply of material on the land has occasionally been referred to as indicating a temporary purpose.[86]

§ 3. Necessity of Annexation to Realty

a. In general
b. Articles not yet in place
c. Adaptation of realty

a. In General

Annexation is necessary in order to render an article a fixture, except in Pennsylvania and perhaps in a few other jurisdictions.

It is ordinarily stated, expressly or by implication, that annexation of a chattel to the realty is necessary in order to render it a part of the realty,[87] or, at least, it must be mechanically fitted so as, in ordinary understanding, to constitute a part

77. Cal.—Miller v. Struven, 218 P. 287, 63 Cal.App. 128.
Ill.—Hopwood v. Green, 34 N.E.2d 559, 310 Ill.App. 411, transferred, see 30 N.E.2d 656, 375 Ill. 167—Edwards v. North Shore Gas Co., 6 N.E.2d 489, 289 Ill.App. 32.
Pa.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.
Tex.—Reader v. Christian, Civ.App., 234 S.W. 155, error refused.
26 C.J. p 657 note 54.

78. Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 98, 16 Cal.2d 142, 133 A.L.R. 416, citing **Corpus Juris**, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.
N.Y.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.
26 C.J. p 657 note 56.
Under statute including as realty that which is affixed to land, and providing that thing is deemed to be affixed to land when it is permanently rested on it, "permanently resting" is used in a sense contrasted with transient or temporary, and means that fixtures are as permanent as the business in which they are used, as determined from surrounding circumstances, and not that they must remain there forever.—Nelson v. Kloster, 277 N.W. 390, 68 N.D. 108.

79. Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P. 2d 94, 98, 16 Cal.2d 142, 133 A.L.R. 416, citing **Corpus Juris**, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego County v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.
N.Y.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.
Tex.—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused.
26 C.J. p 657 note 57.

80. Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P. 2d 94, 98, 16 Cal.2d 142, 133 A.L. R. 416, citing **Corpus Juris**, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego County v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.
26 C.J. p 657 note 58.

81. Cal.—San Diego Trust & Savings Bank v. San Diego County, supra, citing **Corpus Juris.**
N.Y.—New York Security & Trust Co. v. Saratoga Gas & Electric Light Co., 34 N.Y.S. 890, 88 Hun 569, affirmed 51 N.E. 1092, 157 N. Y. 689—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.

82. Mass.—Hook v. Bolton, 85 N.E. 175, 199 Mass. 244, 17 L.R.A.,N.S., 699, 127 Am.S.R. 487.
26 C.J. p 658 note 60.

83. N.J.—State v. Cruse, 90 A. 673, 83 N.J.Eq. 232.

84. Mich.—Comstock v. Fletcher, 3 N.W. 162, 41 Mich. 125, 32 Am.R. 170.
26 C.J. p 658 note 62.

85. Nev.—Arnold v. Goldfield Third Chance Mining Co., 109 P. 718, 32 Nev. 447.
26 C.J. p 658 note 63.

86. Mich.—Burrill v. S. N. Wilcox Lumber Co., 32 N.W. 824, 65 Mich. 571.
26 C.J. p 658 note 64.

87. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli,

of the structure itself.[88] The existence of the other determinative factors, such as the intent of the party to make the article a permanent accession to the freehold,[89] or its adaptability or necessity to the conduct of the business or other purpose to which the realty is devoted,[90] is not sufficient in most jurisdictions, in the absence of annexation, to constitute an article a fixture; nor does it necessarily follow from the fact that the requirement of annexation is satisfied that the article is a part of the

C.C.A.Mo., 118 F.2d 607—Willis v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520—Whitaker-Glessner Co. v. Ohio Savings Bank & Trust Co., C.C.A.Ohio, 22 F.2d 773—In re Walker Bin Co., D.C.N.Y., 9 F.Supp. 367.

Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.

Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.

Ark.—Continental Gin Co. v. Clement, 4 S.W.2d 901, 176 Ark. 864.

Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.

Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.

Ill.—Material Service Corporation v. McKibbin, 43 N.E.2d 939, 380 Ill. 226.

Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.

Iowa.—McCoun v. Drews, 265 N.W. 160, 221 Iowa 227—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.

Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.

Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 796, 165 Md. 484, quoting **Corpus Juris**—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.

Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688—Peninsular Stove Co. v. Young, 226 N.W. 225, 247 Mich. 580.

Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738—Woodling v. Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo.App. 1231, transferred, see 55 S.W.2d 477, 331 Mo. 812—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.

Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E.2d 273, 135 Ohio St. 48.

Okl.—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96—Seminole Supply Co. v. Seminole Refining Co., 45 P.2d 1084, 173 Okl. 32—Elerick v. Reed, 240 P. 1045, 113 Okl. 195, 44 A.L.R. 474.

Or.—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.

S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ. App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ. App., 31 S.W.2d 472, error dismissed—Allen v. Selman, Civ.App., 10 S.W.2d 173.

Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Wash.—Greenkevich v. Vaivados, 19 P.2d 939, 172 Wash. 208.

W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.

Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

26 C.J. p 658 note 69.

Prerequisite to consideration of other factors

Chattel's adaptation to use of part of realty to which connected, intention to make it permanent accession to freehold, situation of party making annexation, and mode and purpose thereof, become factors in determining whether it is fixture only when actual or constructive annexation thereof to freehold is indicated.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 165 Md. 484.

Annexation to personalty

Machinery attached to building which is personal property does not become a part of the realty.—In re Ballard, D.C.Tex., 279 F. 574.

Beds

Rollaway beds installed in apartments, but not annexed thereto in any way, are not fixtures.—Gray v. Prudential Ins. Co. of America, 77 F.2d 563, 182 Okl. 342.

Office furniture

(1) Office furniture used by manufacturing plant in connection with operation of business does not become "immovable by destination" merely because furniture is placed in office for such use.—Campbell v. Hammond Box & Veneer Co., La. App., 167 So. 111.

(2) Articles, such as showcases, typewriter, iron safe, adding machine, gun case, settee, heater, and scales, which were merely placed in building, are not immovable by destination.—Day v. Goff, 2 La.App. 75.

88. Minn.—Wolford v. Baxter, 21 N.W. 744, 33 Minn. 12, 53 Am.R. 1.

N.Y.—Vanderpoel v. Van Allen, 10 Barb. 157.

89. Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 796, 165 Md. 484, quoting **Corpus Juris.**

Minn.—Wolford v. Baxter, 21 N.W. 744, 33 Minn. 12, 53 Am.R. 1.

26 C.J. p 655 note 32.

Intent see supra § 2.

90. Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 165 Md. 484.

26 C.J. p 668 note 35.

Character of article annexed see infra §§ 7–11.

realty, since other circumstances may negative its status as a fixture.[91] In Pennsylvania, however, annexation has been stated not to be necessary, at least as regards machinery in a mill, factory, or other industrial enterprise, it being there considered that the adaptation or necessity of the article to the use for which the freehold is devoted is the determining factor in deciding whether it is a part of the realty,[92] except where the intention not to make it a part of the realty is shown.[93] There are also judicial expressions in other jurisdictions, made in cases involving the question of whether or not a certain article passed by a conveyance of the land, to the effect that what is adapted or necessary to the use to which the land is appropriated is a fixture, although in no way annexed, which would indicate that the solution depends primarily on the construction of the language used in the conveyance.[94] The view that annexation is not required has been criticized.[95]

b. Articles Not Yet in Place

In some jurisdictions articles or materials lying on the land and intended to be subsequently attached thereto or incorporated therein have been held a part of the realty, but in others the contrary view is followed.

In a number of cases the view has been adopted that articles or materials lying on the land, if intended to be subsequently attached thereto or incorporated therein, constitute a part of the realty.[96] In other cases a contrary view has been asserted to the effect that there is, under such circumstances, no annexation in any sense of the articles or materials, and that they consequently retain the character of personalty.[97] In so far as the question may be whether such articles or materials are included in a conveyance or mortgage of the land, as appears infra §§ 43–51, the intention of the parties to the instrument, as determined by a construction of the language used in the light of the surrounding circumstances, is the important consideration, and whether they are legally a part of the land is important only in its bearing on such intention.

c. Adaptation of Realty

The adaptation of the realty for the purpose of attaching particular equipment thereto may be such as to render the article attached a fixture.

In general, where a structure is designed and built with a view of having certain equipment made a part thereof, such equipment when attached thereto becomes a fixture.[98] So, although the fact that a place was prepared in which to put an article does not in itself make the article part of the realty,[99] the fact that a recess or excavation was prepared in order that an article might be placed therein has been referred to as tending to show that the article so placed has become a fixture.[1]

91. Mich.—Manwaring v. Jenison, 27 N.W. 899, 61 Mich. 117.
N.Y.—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S.2d 655, 253 App.Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N.Y.S. 2d 1010, 253 App.Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E.2d 135, 278 N.Y. 714—Holt v. Male, 29 N.Y.S. 2d 111.

Annexation not alone determinative

Annexation to the freehold is not alone determinative, but the relationship of the parties, the kind and use of the property, and the intention of the owner as to its use are the determining factors.—Pennington v. Black, 88 S.W.2d 969, 261 Ky. 728.

92. U.S.—In re Yough Brewing Co., D.C.Pa., 27 F.Supp. 729.
Pa.—McClure v. Atlantic Rock Co., 14 A.2d 124, 339 Pa. 296—Titus v. Poland Coal Co., 119 A. 540, 275 Pa. 431—Sachem Petroleum Co. v. Fox, 58 Montg.Co. 57.
26 C.J. p 659 note 70.

How put in place

The old common-law criterion of physical attachment is no longer operative. On the contrary the question of whether or not an article is a fixture depends on the nature and character of the act by which the structure is put in place, the policy of the law and the intentions of those concerned in the act.—Waltman v. Mayer, 97 Pa.Super. 236.

93. U.S.—Delaware County Nat. Bank v. Montgomery, C.C.A.Pa., 78 F.2d 616.
Controlling effect of intention see supra § 2 a.

94. Ky.—Reyman v. Henderson Nat. Bank, 34 S.W. 697, 98 Ky. 748, 17 Ky.L. 1291.
26 C.J. p 660 note 71.

95. Minn.—Wolford v. Baxter, 21 N. W. 744, 33 Minn. 12, 53 Am.R. 1.
26 C.J. p 660 note 72.

96. W.Va.—McFadden v. Crawford, 15 S.E. 408, 36 W.Va. 671, 32 Am. S.R. 894.
26 C.J. p 662 note 87.

97. Me.—Bassett v. Breen, 107 A. 832, 118 Me. 279.
26 C.J. p 662 note 88.

98. Ark.—Feldman v. Feldman, 287 S.W. 384, 171 Ark. 1097.

Conversion to specific purpose

In determining whether machinery is a fixture there is no distinction between machinery placed in a factory erected for a specific manufacturing purpose and like machinery placed in a building constructed for an entirely different purpose, but thereafter converted to a use for which the machinery is essential. A building converted and adapted to a specific purpose occupies the same status as a building erected for a like purpose. —Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Articles held fixtures

(1) Machinery placed in building especially designed to house it.—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S.2d 655, 253 App. Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N.Y.S.2d 1010, 253 App.Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E.2d 135, 278 N.Y. 714—Holt v. Male, 29 N.Y.S.2d 111.

(2) Hay unloading equipment attached to barn.—Feldman v. Feldman, 287 S.W. 384, 171 Ark. 1097.

99. N.Y.—Kerby v. Clapp, 44 N.Y.S. 116, 15 App.Div. 37.
26 C.J. p 663 note 98.

1. Mo.—Rogers v. Crow, 40 Mo. 91, 93 Am.D. 299.
26 C.J. p 663 note 96.

§ 4. Mode and Sufficiency of Annexation

In determining whether an article is a fixture its manner of annexation is considered, and while that may be such as to show without reference to other considerations an intention to make the article a permanent accession to the realty, it is ordinarily considered as only one factor and that a minor one. Statutes sometimes enumerate various modes of annexation which are sufficient to constitute an article a fixture.

At common law the general rule is that articles attached to the realty become fixtures,[2] and in general where the other criteria are satisfied articles annexed to the realty are fixtures.[3] In determining whether there has been an annexation sufficient to comply with the requirement therefor, see supra § 3, the character or manner of the annexation to the realty,[4] having permanent usage in view,[5] is considered, together with the circumstances under which the article was placed on the realty,[6] and also, it has been held, the effect on the plant as a complete unit of the presence or absence of the particular thing.[7] What constitutes a compliance with the requirement of annexation is a subject of very considerable difficulty, with regard to which it is impossible to give any comprehensive rules, in view of the various forms which annexation may assume and the character of the cases themselves, in which the mode of annexation is frequently considered only in connection with other considerations growing out of the character of the articles and the purpose to which the realty is devoted, as discussed infra §§ 7–11. Varying weight, according to the circumstances of the case, is given to the mode of annexation.[8] It may be such as alone to

2. Ga.—Wolff v. Sampson, 51 S.E. 335, 123 Ga. 400—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216.
W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.

Mode of annexation controls

At common law, the mode of annexation, slight and temporary, or immovable and permanent, is the single criterion for determining the character of chattels as fixtures.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

3. Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
Colo.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

Essential to complete structure

A chattel which is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the use for which it was obviously designed, becomes a part of the realty where it is actually, purposely, and lawfully affixed to and into the structure.—Rinbrand Well Drilling Co. v. L & H Theatres, 20 A.2d 358, 126 N.J. Law 446, affirmed 23 A.2d 404, 127 N.J.Law 604—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293, 111 A.L.R. 357—Mugler Auto Pit Co. v. Tide Water Oil Co., 185 A. 542, 14 N.J.Misc. 471.

Articles held fixtures

(1) A glass show window.—Chapman v. I. Silver & Bro., 89 S.E. 590, 18 Ga.App. 476.

(2) Power wiring, fuse boxes, starting switches and controllers, dust arrestor, oven, cranes and overhead track, cupola, and other articles, securely attached to foundry building and purchased or made for, and especially adapted to, particular use to which they were appropriated therein.—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.

(3) Machinery placed in a building, where the land, building, and machinery are used together as a factory or plant.—U. S. v. Becktold Co., C.C.A.Mo., 129 F.2d 473.

Articles held not fixtures

Leased pipe organ which was not in use for as long as eight weeks at one time was held not so intimately connected with building and so essential to moving picture business conducted therein that, on installation, it became part of realty.—M. P. Moller, Inc., v. Mainker, 171 A. 476, 314 Pa. 314.

4. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.
Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 16 Cal.2d 142, 133 A.L.R. 416, superseding, App., 96 P.2d 137, certiorari denied U. S. Nat. Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App.2d 66.
Iowa.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419.
Mass.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N.E. 517, 279 Mass. 33, 81 A.L.R. 1437—Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.
Minn.—Wolford v. Baxter, 21 N.W. 744, 33 Minn. 12, 53 Am.R. 1.
Mont.—Conway v. Fabian, 89 P.2d 1022, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.
N.D.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.

5. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607.

Permanency required

(1) Annexation of a permanent character is required.
U.S.—In re Walker Bin Co., D.C.N.Y., 9 F.Supp. 367.
N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.

(2) Intention as to permanency of annexation see supra § 2 e.

That annexation was made in permanent manner tends to establish the article as a fixture.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.

Permanent structures

Permanent structures erected on land ordinarily are considered part of real estate.—National Mfg. & Engineering Co. v. Farmers' Trust & Savings Bank of Kokomo, 185 N.E. 146, 204 Ind. 535.

6. Ga.—Wolff v. Sampson, 51 S.E. 335, 123 Ga. 400—Consolidated Warehouse Co. v. Smity, 189 S.E. 724, 55 Ga.App. 216—Harn v. State, 179 S.E. 553, 51 Ga.App. 34.

Character of act by which the structure is put into its place is considered.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135.

7. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607.

8. N.Y.—Marine Midland Trust Co.

show, without reference to other considerations, an intention that the articles shall be a permanent accession to the realty,[9] and it is within this class of cases that those decisions may be considered to fall which consider only the mode of annexation in determining that the article in question is part of the realty.[10] Generally, however, the mode of annexation, when considered at all, is considered as only one factor,[11] and not necessarily a controlling one,[12] in the determination of the character of the article annexed. Although there is some authority to the effect that the manner of attachment of the article to the realty is the principal factor in determining whether it is a fixture,[13] the weight of the modern authority treats it as a minor consideration in determining whether the article annexed constitutes a part of the realty,[14] except at least as the article may have been so incorporated with the realty as to be incapable of severance without substantial injury thereto, see infra § 5 e. In general, if there is annexation of the article to the realty, and in the majority of jurisdictions the annexation may be either actual, see infra § 5 a or constructive, see infra § 6, the nature and strength of the union is immaterial.[15]

It is generally held, except in so far as statutes provide otherwise,[16] that a house or other structure of movable character may be so placed or erected

of Binghamton v. Ahern, 16 N.Y.S. 2d 656.

9. Iowa.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Tex.—Van Valkenburgh v. Ford, Civ. App., 207 S.W. 405, affirmed Ford v. Van Valkenburg, Com.App., 228 S.W. 194.
26 C.J. p 660 note 77.

Generally

Generally, permanent annexation to the soil of a thing in itself personalty makes it a part of the realty.—Paschal v. Hart, Tex.Civ.App., 105 S.W.2d 337.

10. Mass.—Greene v. Lampert, 174 N.E. 669, 274 Mass. 386.
26 C.J. p 660 note 77.

Articles held fixtures

(1) Plumbing and heating appliances wrought into and attached to realty.—Greene v. Lampert, supra.

(2) Electrical refrigeration system.—Frigidaire Sales Corporation v. Syracuse Inv. Corporation, 265 N.Y. S. 566, 239 App.Div. 880.

(3) Thirty thousand pound engine, embodied in six-foot deep concrete foundation, by four feet long, one and one half inch in diameter, bolts, covered with concrete.—Van Valkenburgh v. Ford, Tex.Civ.App., 207 S.W. 405, affirmed Ford v. Van Valkenburg, Com.App., 228 S.W. 194.

(4) Steam-heating plant attached to building in many ways with pipes and fixtures, the installation of which requires cutting of holes in the building.—Petty v. Jones, 121 So. 372, 10 La.App. 409.

(5) Water heater actually attached to building and connected with water pipe is "an immovable by its nature."—Scott v. Brennan, 109 So. 822, 161 La. 1017, 48 A.L.R. 1143, modifying 5 La.App. 45—Scott v. Brennan, 3 La.App. 452.

(6) Other instances see 26 C.J. p 660 note 77 [a].

11. Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31.
Ky.—Pennington v. Black, 88 S.W. 2d 969, 261 Ky. 728.
Tex.—Export Ins. Co. v. Axe, Civ. App., 36 S.W.2d 572, affirmed Export Ins. Co. of New York v. Axe, Com.App., 58 S.W.2d 39.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.
26 C.J. p 660 note 78.

12. Iowa.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.

13. Ill.—Material Service Corporation v. McKibbin, 43 N.E.2d 939, 380 Ill. 226.

14. Iowa.—McCoun v. Drews, 265 N. W. 160, 221 Iowa 227.
Mo.—Woodling v. Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo. App. 1231, transferred, see 55 S. W.2d 477, 331 Mo. 812—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246—Farrar v. Nashville, C. & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.
Tex.—Clark v. Clark, Civ.App., 107 S.W.2d 421.
W.Va.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W.Va. 397.
Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440.
26 C.J. p 660 note 79.

Reason for change

This later rule is due to great advances in the science of mechanical engineering, bringing on great changes in industrial conditions, and creating a situation in the manufactories in which a building is only one of the incidents or accessories of a manufacturing plant considered as a unit.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Little weight

The method or extent of the annexation of a chattel to realty carries little weight, in determining whether it is a fixture, except in so far as the method or extent relates to the nature of the article, the use to which it is applied, and other attending circumstances as indicating the intention of the party making the annexation.—Danville Holding Corporation v. Clement, supra.

Slight circumstance showing intention

The method of the annexation to the realty receives slight consideration and then only as a circumstance from which the intention of the annexor may be deduced.—Danville Holding Corporation v. Clement, supra.

Degree of force by which attached

Permanency of attachment does not depend so much on degree of physical force with which personalty is attached as on motive and intention of party in attaching the personalty.—Van Buren v. Gallo, 283 N.Y.S. 453, 157 Misc. 289—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y. S.2d 656.

Slight annexation

(1) That the annexation is slight and easily displaced will not prevent an article becoming a fixture where the other requisites are satisfied.—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.

(2) Annexation need be only very slight.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N. E.2d 273, 135 Ohio St. 48.

15. N.C.—State v. Martin, 53 S.E. 874, 141 N.C. 832.

16. La.—Vaughn v. Kemp, 4 La.App. 682.

Without foundation

Under statute so providing, buildings or other constructions, even

on land as to be and remain ab initio not a part of the realty, but personalty.[17] In determining whether a building is a fixture, its manner of construction [18] and whether it is annexed to, or imbedded in, the soil [19] is to be considered. The foundation on which a building is constructed is considered,[20] but it is not conclusive in determining whether it is or is not a fixture.[21] Thus buildings may become realty without having foundations thereunder or being attached to the ground.[22] The facts that it is constructed on mudsills,[23] and that the soil was not disturbed in the process of building,[24] are circumstances to be considered, but they do not establish conclusively that the structure is not a fixture.[25]

It has been held that machinery is normally personal property,[26] and is not deemed a fixture except where it is installed in such manner that its removal will result in material injury to it or the realty, see infra § 5 e, or where the building in which it is placed was specially designed to house it, see supra § 3 c, or where there is other evidence that its installation was of a permanent nature.[27]

A change in the character of an article from that of personalty to that of a fixture may sometimes occur from a change in the relationship of the owner to the premises rather than any change in the character of annexation.[28]

Statutory provisions exist in some states to the effect that a thing is to be deemed affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting on it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.[29] Such a statutory provision is simply a rule for general guidance, however;[30] the means of attachment mentioned are not exclusive, and an article may be attached by other means than the examples given.[31] Also, the

without foundation, are immovable by nature.—Vaughn v. Kemp, supra.

17. Fla.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.

Held not fixture

Movable house resting on temporary posts and blocks located on uncleared and ungraded street, and not intended to be annexed to realty.—Greenkevich v. Vaivados, 19 P.2d 939, 172 Wash. 208.

18. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

Building held realty

Where defendant had moved building to his property, had it practically rebuilt, replaced it on concrete foundation with concrete driveways leading to and from it, with usual fixtures and equipment used in connection with automobile service station, constructed new concrete floor and new roof, and made necessary repairs, all of which was done with express knowledge and acquiescence of representatives of plaintiff, building had become part of defendant's realty and could not be recovered in action of claim and delivery.—Standard Oil Co. v. Braun, 204 N.W. 972, 53 N.D. 104.

19. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

Connected by basement and plumbing

Dwelling, connected with real estate by basement and plumbing, becomes an integral part of the realty and cannot be removed without destruction of substantial part of value.—Crawford-Fayram Lumber Co. v. Mann, 211 N.W. 225, 203 Iowa 748.

20. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

Building held realty

(1) Store building, for conversion of which holder of chattel mortgage thereon sued owner of realty on which mortgagor erected it, was held affixed to realty, where half of its periphery rested on old rock foundation and rest on concrete posts set in ground.—Simpson v. Emery, 183 A. 842, 134 Me. 213.

(2) Greenhouses constructed on realty in the usual manner, with posts sunk into the earth on which the superstructure was raised, were fixtures which went with the freehold, especially in view of their existence for a period of over forty years.—Saling v. Saling, 124 A. 249, 95 N.J.Eq. 611.

21. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

22. N.D.—Nelson v. Kloster, 277 N. W. 390, 68 N.D. 108.

23. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

24. Cal.—Bond Inv. Co. v. Blakeley, supra.

25. Cal.—Bond Inv. Co. v. Blakeley, supra.

26. N.Y.—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S.2d 655, 253 App.Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N.Y. S.2d 1010, 253 App.Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E.2d 135, 278 N. Y. 714—Holt v. Male, 29 N.Y.S.2d 111.

27. N.Y.—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S. 2d 655, 253 App.Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N. Y.S.2d 1010, 253 App.Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E.2d 135, 278 N. Y. 714—Holt v. Male, 29 N.Y.S.2d 111.

28. N.Y.—Van Buren v. Gallo, 283 N.Y.S. 453, 157 Misc. 289.

29. U.S.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216, 225.
Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 666, 217 Cal. 708—Fisher v. Pennington, 2 P.2d 518, 116 Cal. App. 248—Hammond Lumber Co. v. Gordon, 258 P. 612, 613, 84 Cal. App. 701.
N.D.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.
Okl.—Gray v. Prudential Life Ins. Co. of America, 77 P.2d 563, 182 Okl. 342.
26 C.J. p 661 note 81.

Articles held fixtures

(1) Balconies nailed and bolted to building.—Hammond Lumber Co. v. Gordon, 258 P. 612, 84 Cal.App. 701.

(2) A fence.—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.

30. Cal.—Fisher v. Pennington, 2 P. 2d 518, 116 Cal.App. 248.

31. Cal.—Fisher v. Pennington, supra.
Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342.

fact that an article is attached by means of one of the examples given is not alone determinative of its permanent attachment to the realty.[32]

§ 5. —— Actual

a. In general
b. Retention in place by gravity
c. Enclosure of article
d. Connection with motive power
e. Injury by removal
f. Movability of article
g. Attachment to other land

a. In General

In general any actual annexation is sufficient for the requirements of a fixture, and although there are general statements to the effect that actual annexation is required, as a general rule it is not absolutely essential.

In general any actual annexation of the article to the realty or to something appurtenant thereto is sufficient to constitute an article a fixture.[33] In many cases it has been stated, frequently merely as a reiteration of the early rule, and generally as a part of a general statement of the requisites of a fixture and not in a consideration of the necessity for an actual physical attachment, that in order for an article to become a fixture actual annexation to the realty or to something appurtenant thereto is required.[34] The modern rule generally followed, however, is that it is not absolutely necessary for an article to be actually fastened to the freehold in order to make it a part thereof,[35] and, as appears

Construction to include words "for instance"

In statute prescribing that thing is deemed affixed to land when "permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws," the phrase "for instance" may be understood after word "as" and different means mentioned are not exclusive but are mere examples of permanent attachment.—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419.

32. Cal.—Fisher v. Pennington, 2 P. 2d 518, 116 Cal.App. 248.

Methods not alone determinative

That screw or nail fastens article to realty is not determinative of its permanent attachment to realty.—Fisher v. Pennington, supra.

33. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607.
Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.
Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372—Bank of Shelbyville v. Hartford, 104 S. W.2d 217, 268 Ky. 135—First State Bank of Eubank v. Crab Orchard Banking Co., 78 S.W.2d 517, 255 Ky. 800—Dell v. Guthrie, 24 S.W. 2d 947, 233 Ky. 77—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 165 Md. 484—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.
Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122—Peninsular Stove Co. v. Young, 226 N.W. 225, 247 Mich. 580.
Minn.—Wolford v. Baxter, 21 N.W. 744, 33 Minn. 12, 53 Am.R. 1.
Ohio.—XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corporation, 10 N.E.2d 229, 56 Ohio App. 188, appeal dismissed XXth Century Heating & Ventilating Co. v. Fazckas, 9 N.E.2d 2, 132 Ohio St. 476.
Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419.
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42—Alberson v. Elk Creek Gold-Min. Co., 65 P. 978, 39 Or. 552.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S. C. 16, 41 A.L.R. 592.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ. App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
Wis.—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

Immovables by destination

The rule applies to immovables by destination.—Bank of White Castle v. Clark, 159 So. 409, 181 La. 303.

34. Ala.—Southern Cotton Oil Co. v. Lowery, 163 So. 629, 231 Ala. 119.
Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.
Iowa.—McCoun v. Drews, 265 N.W. 160, 221 Iowa 227—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858.
N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.
N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.
Ohio.—Teaff v. Hewitt, 1 Ohio St. 511, 59 Am.D. 634—McGowan v. McGowan, 18 N.E.2d 419, 59 Ohio App. 397.
Okl.—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96—Quality Milk Products Co. v. Endowment Loan & Mortgage Co., 51 P.2d 550, 175 Okl. 94—Seminole Supply Co. v. Seminole Refining Co., 45 P.2d 1084, 173 Okl. 32—Elerick v. Reed, 240 P. 1045, 113 Okl. 195, 44 A.L.R. 474.
Wash.—Greenkevich v. Vaivados, 19 P.2d 939, 172 Wash. 208.
Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A. L.R. 1306.

35. Colo.—Dawson v. Scruggs-Vandervoort Barney Realty Co., 268 P. 584, 84 Colo. 152.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Mich.—Detroit Trust Co. v. Detroit

infra § 6, constructive annexation may be sufficient to constitute an article a fixture.

b. Retention in Place by Gravity

Mere juxtaposition, as where the article is retained in place by gravity without any fastening, has been held sufficient annexation for a fixture.

Mere juxtaposition when accompanied with sufficient other elements has been regarded as sufficient to make an article a fixture.[36] So, although retention in place by gravity, without any fastening, has been held to be insufficient,[37] other cases, some decided under statutes which embody the idea,[38] have regarded this as sufficient, provided that the other requisites of intention, considered supra § 2, and adaptability, considered infra §§ 7–11, are satisfied and the article or structure is so heavy that it is as effectively kept in place by gravity as if it were fastened.[39]

c. Enclosure of Article

The fact that the article is so inclosed in a building or structure that it cannot be removed without either taking the article itself to pieces or making or enlarging an opening in the building or structure tends to show that it is a fixture, but it is not conclusive; nor on the other hand does the fact that the article can be removed as a whole through an existing opening conclusively establish it to be personalty.

In accord with the decisions that an article is not necessarily a fixture because its removal would cause injury to the realty, see infra § 5 e, are decisions that the article is not a fixture because so inclosed in a building or structure that it cannot be removed without either taking the article itself to pieces, or making or enlarging an opening in the building or structure.[40] However, this has been regarded as tending to show that the article is a fixture,[41] while on the other hand the fact that an article can be removed as a whole through an existing opening has been referred to as evidence to show that it is personalty.[42]

d. Connection with Motive Power

Connection with the motive power by which a machine is run, as by belt or other mode of gearing, is not of itself sufficient to make an article a fixture, but it may be considered. Disconnection of the article from the motive power does not alone show that it was not originally intended to be an integral part of the plant.

That a machine is connected with the motive power by a belt or other mode of gearing is not in itself sufficient to make it a fixture.[43] However, some weight has occasionally been attached to a

City Service Co., 247 N.W. 76, 262 Mich. 14.
Nev.—Reno Electrical Works v. Ward, 274 P. 196, 51 Nev. 291, 62 A.L.R. 247.
N.M.—Porter Lumber Co. v. Wade, 32 P.2d 819, 38 N.M. 333.
Ohio.—XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corporation, 10 N.E.2d 229, 56 Ohio App. 188, appeal dismissed XXth Century Heating & Ventilating Co. v. Fazckas, 9 N.E.2d 2, 132 Ohio St. 476.

Physical attachment
Physical attachment of structure to soil or to appurtenance thereto is not essential to make structure part of realty.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.

Immovable by destination
An "immovable by destination" may be created either without any physical attachment to fundus, but merely by dedication to service of fundus, or by means of physical attachment affixing movable permanently.—Bank of White Castle v. Clark, 159 So. 409, 181 La. 303.

36. Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

37. Cal.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.
26 C.J. p 661 note 82.

Not alone sufficient
Annexation by weight and gravity is not always alone a sufficient indication of an intent to make the article a permanent fixture and part of the realty.—M. P. Moller, Inc. v. Wilson, supra.

Held not fixture
A school building, merely set on ground without foundation under it, was not affixed to realty so as to become part thereof.—School Dist. No. 11, Laramie County, v. Donahue, 97 P.2d 663, 55 Wyo. 220.

38. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.
26 C.J. p 662 note 84.

39. U.S.—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520.
Cal.—Bell v. Bank of Perris, 125 P.2d 829, 834, 52 Cal.App.2d 66, quoting **Corpus Juris.**
Ill.—Joyner v. Mitchell, 267 Ill.App. 427, 430, citing **Corpus Juris.**
Iowa.—Comly v. Lehmann, 253 N.W. 501, 503, 218 Iowa 644, citing **Corpus Juris**—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.
Minn.—Wolford v. Baxter, 21 N.W. 744, 33 Minn. 12, 53 Am.R. 1.
Mo.—Denvir v. Crowe, 9 S.W.2d 957, 959, 321 Mo. 212, citing **Corpus Juris.**
Neb.—Frost v. Schinkel, 238 N.W. 659, 670, 121 Neb. 784, 77 A.L.R. 1381, citing **Corpus Juris.**
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
26 C.J. p 661 note 83.

Articles held fixtures
(1) Buildings resting on timbers, blocks, or stones.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246—26 C.J. p 661 note 83 [a] (1).
(2) Bakery oven.—Comly v. Lehmann, 253 N.W. 501, 218 Iowa 644.
(3) Pipe organ.—Denvir v. Crowe, 9 S.W.2d 957, 321 Mo. 212.
(4) Motor generator, placed on concrete foundation in mine, generally becomes part of realty.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.
(5) Other instances see 26 C.J. p 661 note 83 [a].

40. Ill.—Ottawa Public Finance Corporation v. Blackley-Gould Corporation, 281 Ill.App. 447.
26 C.J. p 665 note 11.

41. U.S.—In re Famous Cleaning & Dyeing Co., D.C.Pa., 7 F.Supp. 280.
26 C.J. p 665 note 12.

Article held fixture
Boiler necessary for operation of cleaning and dyeing plant, in which it was placed for permanent use, and not removable without tearing down part of building, became fixture.—In re Famous Cleaning & Dyeing Co., supra.

42. Mass.—Smith v. Bay State Sav. Bank, 88 N.E. 1086, 202 Mass. 482.

43. Minn.—Shepard v. Blossom, 69 N.W. 221, 66 Minn. 421, 61 Am.S.R. 431.
26 C.J. p 665 note 14.

connection of that character.[44] On the other hand, the fact that a motor has been disconnected from other machinery does not show that it was not originally intended or has ceased to be an integral part of the plant, where it has not been removed or disconnected from its foundation.[45]

e. Injury by Removal

The fact that the article is removable without injury to the freehold or itself does not prevent its being a fixture, nor does the fact that its removal will injure the freehold or itself alone establish that it is a fixture; but the fact that removal of the article will or will not injure the freehold or itself is a factor to be considered, although not a conclusive one.

The fact that removal of the article will or will not injure the realty[46] or will or will not injure the article itself[47] is a factor to be considered in determining whether it is or is not a fixture. That the article is removable without injury to the freehold does not prevent its being a fixture;[48] but that its removal will not injure the realty[49] or the article,[50]

44. Wis.—State ex rel. Gisholt Mach. Co. v. Norsman, 169 N.W. 429, 168 Wis. 442.
26 C.J. p 665 note 15.

45. Miss.—Planters' Mfg. Co. v. Greenwood Agency Co., 152 So. 476, 168 Miss. 892.
Severance see infra § 21.

46. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.
Mass.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N.E. 517, 279 Mass. 33, 81 A.L.R. 1437.
Miss.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.
Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858.
N.Y.—De Bevoise v. Maple Ave. Constr. Co., 127 N.E. 487, 228 N.Y. 496.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.

Meaning of material injury

(1) The test as to whether the article may be removed without "material injury to the premises" means physical damage to the premises and not mere deprivation of the value of the chattels.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.

(2) In some cases impairment of the enjoyment or usefulness of the realty seems to be considered as constituting injury to the freehold.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

(3) The word "material" means not only material injury to the structure, but also injury to the institution of which the structure is a part.—Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574, followed in MacLeod v. Walter J. Satterthwaid, Inc., 166 A. 163, 113 N.J. Eq. 238, affirming 157 A. 670, 109 N.J. Eq. 414.

(4) If the severance of the article will prevent the structure from being used for the purposes for which it was erected or for which it has been adapted, then it is not severable without material injury to the freehold.—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293, 111 A.L.R. 357—Mugler Auto Pit Co. v. Tide Water Oil Co., 185 A. 542, 14 N.J. Misc. 471.

Elevator system installed in building held severable without material injury to freehold.—Harvard Financial Corporation v. Greenblatt Const. Co., 184 N.E. 748, 261 N.Y. 169, reversing 258 N.Y.S. 993, 236 App.Div. 742, motion denied 185 N.E. 796, 261 N.Y. 694.

47. U.S.—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.
Minn.—Holy Ghost Catholic Church of Two Harbors v. Clinton, 211 N.W. 13, 169 Minn. 253.

48. U.S.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603.
Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Mass.—Greene v. Lampert, 174 N.E. 669, 274 Mass. 386.
26 C.J. p 664 note 99.

It is sufficient that appliance is affixed to outfit to which it belongs in such manner as its use contemplates, and is an important part of the outfit, and the intention that the outfit shall be permanent fixture is shown.—Southern Cotton Oil Co. v. Lowery, 163 So. 629, 231 Ala. 119.

Articles held fixtures

(1) Oil drilling equipment, substantially affixed to realty by owner.—Connecticut Mut. Life Ins. Co. v. Bowe, 187 N.E. 195, 45 Ohio App. 347.

(2) Pumping plant placed on land for its service and improvement is immovable by destination.—Pan-American Life Ins. Co. v. Reynaud, 4 La.App. 290.

Integral part of building

That heavy machinery installed for use in operating plant was not an integral part of permanent buildings wherein machinery was housed did not militate against conclusion that at time of installation machinery and plant were a single whole in contemplation of law.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603.

49. Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
Minn.—Holy Ghost Catholic Church of Two Harbors v. Clinton, 211 N.W. 13, 169 Minn. 253.
26 C.J. p 664 note 1.

Articles held not fixtures

(1) Oil burner erected on concrete foundation, but removable without damage to building.—Succession of Sussman, 122 So. 62, 168 La. 349.

(2) Blower system used in connection with shoe factory, although not especially designed therefor, and consisting of series of large galvanized iron pipes on outside of building with branches therefrom extending from machines to chamber near roof, where electric motor operated fan.—Mathey v. Charlestown Five Cents Sav. Bank, 195 N.E. 731, 290 Mass. 510.

(3) Bed attached to closet side of door of furnished apartment by small plates fastened by a few screws that could easily be removed with but slight disfigurement to the closet side of the door.—Fisher v. Pennington, 2 P.2d 518, 116 Cal.App. 248.

(4) Machinery in sugar factory which was bolted to foundation and which could be easily removed at nominal cost without injury to factory held not "immovables by nature."—Folse v. Loreauville Sugar Factory, La.App., 156 So. 667, followed in Builders' Supply Co. v. Loreauville Sugar Factory, 156 So. 672.

50. Ark.—Sessoms v. Ballard, 254 S.W. 446, 160 Ark. 146.
26 C.J. p 665 note 8.

Articles held not fixtures

A gin and grist mill, consisting of gin built on oak sills, resting on posts, boiler set in brick walls, scales set in excavation, and double revolving press set in an opening in the earth, all of which were substantially constructed and constituted a permanent improvement, but could be moved to another location and set up

or both,[51] has been regarded as a consideration tending to show that it is not a fixture; and the fact that injury would not result to the realty has in some cases been considered conclusive on that question,[52] although, under the facts existing in a number of cases, the fact that removal would not cause injury to the article has been regarded as of little or no weight as showing the article not to be a fixture.[53] On the other hand, the fact that the annexation is such that the article annexed cannot be removed without injury to the building does not, it seems, conclusively establish it as a part of the realty;[54] but the fact that the removal of the article would cause injury to the realty,[55] or substantial injury to the article itself,[56] has been regarded as tending to show that it is a fixture. In some cases, that removal would cause injury to the realty[57] or to the article itself[58] has been regarded as practically conclusive that the article has not retained the character of personalty.

Under the foregoing rules, articles affixed to a building by an owner in complement to facilitate its use and occupation in general,[59] and articles at-

without injury thereto.—Sessoms v. Ballard, supra.

51. La.—Liquid Carbonic Corporation v. Crow, 148 So. 442, 177 La. 379.

Articles held not fixtures

La.—Liquid Carbonic Corporation v. Crow, supra.

52. Fla.—Meena v. Drousiotis, 200 So. 362, 146 Fla. 168.

26 C.J. p 664 note 2.

Against lien

Where substantial evidence established that machinery, on which statutory lien for labor was claimed, was so installed as to be removable without damage to other machinery or to the building in which installed, such machinery remained "personal property" against which lien could be enforced.—Meena v. Drousiotis, supra.

53. La.—Milliken & Farwell v. Roger, 70 So. 848, 138 La. 823.

26 C.J. p 665 note 9.

54. Ky.—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800.

Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.

26 C.J. p 664 note 4.

55. Cal.—Fisher v. Pennington, 2 P.2d 518, 116 Cal.App. 248.

N.J.—Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574, followed in MacLeod v. Walter J. Satterthwaid, Inc., 166 A. 163, 113 N.J.Eq. 238, affirming 157 A. 670, 109 N.J.Eq. 414.

Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.

26 C.J. p 664 note 5, p 661 note 80.

Articles held fixtures

Bakery oven placed on concrete floor in bakery shed, necessary to bakery business, not removable without destruction of shed wall, and installed with permanent brick flues.—C. D. Shamburger Lumber Co. v. Bredthauer, Tex.Civ.App., 62 S.W.2d 603, error dismissed.

Bed

Bed may be made part of realty by permanent attachment to realty as by building it into wall so that it would be immovable, and its destruction injurious to realty.—Fisher v. Pennington, 2 P.2d 518, 116 Cal.App. 248.

56. Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 16 Cal.2d 142, 133 A.L.R. 416, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.

26 C.J. p 665 note 7.

Articles held fixtures

Machinery installed in such a manner that its removal will result in material injury to it.—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S.2d 655, 253 App.Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N.Y.S.2d 1010, 253 App.Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E.2d 135, 278 N.Y. 714—Holt v. Male, 29 N.Y.S.2d 111.

57. Mo.—Cooper County Bank v. Bank of Bunceton, 288 S.W. 95, 221 Mo.App. 814, transferred, see 276 S.W. 622, 310 Mo. 519.

Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.

Tex.—Van Valkenburgh v. Ford, Civ. App., 207 S.W. 405, affirmed Ford v. Van Valkenburg, Com.App., 228 S.W. 194.

26 C.J. p 664 note 6.

General rule

Generally, fixtures and machinery annexed to building so as to be incapable of being removed without damage to building become part of building and freehold.—M. L. Virden Lumber Co. v. Sherrod, 139 So. 813, 167 Miss. 297, amended 142 So. 508.

Irrespective of intent

Any chattel, permanently annexed to the freehold, and which cannot be severed without material injury to the premises, becomes a part of the realty, irrespective of the intention with which it was attached.

Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.

Pa.—Clayton v. Lienhard, 167 A. 321, 312 Pa. 433.

Articles held fixtures

(1) Machinery installed in such a manner that its removal will result in material injury to the realty.—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S.2d 655, 253 App.Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N.Y.S.2d 1010, 253 App. Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E.2d 135, 278 N.Y. 714—Holt v. Male, 29 N.Y.S.2d 111.

(2) Machinery attached to concrete beds specifically built to receive them.—Van Valkenburgh v. Ford, Tex.Civ.App., 207 S.W. 405, affirmed Ford v. Van Valkenburg, Com.App., 228 S.W. 194.

(3) Electrical refrigeration system installed in apartment building.—Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574, followed in MacLeod v. Walter J. Satterthwait, Inc., 166 A. 163, 113 N.J.Eq. 238, affirming 157 A. 670, 109 N.J.Eq. 414.

58. Pa.—Clayton v. Lienhard, 167 A. 321, 312 Pa. 433.

Regardless of intention

Chattels, so annexed to realty that they cannot be removed without material injury to themselves, are realty, notwithstanding expressed intention that they shall be considered personalty.—Clayton v. Lienhard, supra.

Articles held fixtures

Automatic sprinkler system, so affixed to building that it could not be removed without material injury to itself and building, became realty.—Clayton v. Lienhard, supra.

59. Mich.—Wood Hydraulic Hoist & Body Co. v. Norton, 257 N.W. 836, 269 Mich. 341—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 239 Mich. 161.

tached to a building for the obvious purpose for which the building was erected, or to increase its value for such purpose, and to be used permanently in connection therewith,[60] as, for example, machinery placed in, and attached to, a mill or other manufacturing plant,[61] ordinarily are a part of the realty, even though they are removable without injury to themselves or the realty, or without injury to the basic structure to which they have been affixed,[62] and even though they may be removed and used elsewhere.[63] On the other hand, the attachment of an article such as a gas stove to supply pipes by a screw which can be detached without any injury to the realty will not operate to make the article a fixture contrary to the intention of the annexor.[64]

In condemnation proceedings. It has been held that in condemnation proceedings if so-called fixtures can be removed without substantial injury either to the real estate or to the article, they remain personalty and need not be taken as part of the realty.[65]

f. Movability of Article

The fact that the article may be moved from place to place on the land has been held to indicate that it is not a fixture, but is not conclusive.

That the article is not so attached to the land as to indicate an intention that it shall remain in one place on the land has been referred to as indicating that it continues personalty;[66] but the removability of a structure is not the sole test of whether it is a fixture or not,[67] and occasionally an article has been regarded as constituting a fixture, in legal contemplation, although capable of removal from place to place on the land and intended to be so moved.[68]

g. Attachment to Other Land

An appliance or other article placed on one piece of land may be so physically attached to another piece and used in connection therewith that it is regarded as a fixture to the latter land.

It may occur that an appliance, piece of apparatus, or other article, while placed on or in one piece of land, and physically attached thereto, is, in purpose and method of its utilization, so associated with another piece of land, that it is to be regarded as legally annexed, that is, a fixture, to the latter land rather than the former.[69]

§ 6. —— Constructive

Constructive annexation, as when an article is severed for a temporary purpose, or when the article is an accessory or essential part of an article or structure which is actually annexed, may be sufficient to constitute an article a fixture.

It is held in some cases that under certain circumstances constructive annexation, rather than actual physical connection, is sufficient to constitute an article a fixture,[70] as, for example, in the

60. Ga.—Brigham v. Overstreet, 57 S.E. 484, 128 Ga. 447, 10 L.R.A.,N.S., 452, 11 Ann.Cas. 75—Chapman v. I. Silver & Bro., 89 S.E. 590, 18 Ga.App. 476.

61. Ga.—Cunningham v. Cureton, 23 S.E. 420, 96 Ga. 489—Brooks v. John Hancock Mut. Life Ins. Co., 136 S.E. 166, 36 Ga.App. 261.
Ill.—Joyner v. Mitchell, 267 Ill.App. 427.
Mass.—Southbridge Sav. Bank v. Mason, 18 N.E. 406, 147 Mass. 500, 1 L.R.A. 350.

Machinery held fixtures
Dough mixer and engine, physically attached to building, are immovable by destination.—Breaux v. Ganucheau, 3 La.App. 481.

62. Cal.—Dauch v. Ginsburg, 6 P. 2d 952, 214 Cal. 540.

Articles held fixtures
(1) Plumbing fixtures.—Dauch v. Ginsburg, supra.
(2) Heating equipment.—Dauch v. Ginsburg, supra.

63. Ill.—Joyner v. Mitchell, 267 Ill. App. 427.

64. Ark.—Anderson v. Southern Realty Co., 4 S.W.2d 27, 176 Ark. 752.

65. D.C.—Potomac Electric Power Co. v. U. S., 85 F.2d 243, 66 App. D.C. 77, certiorari denied 57 S.Ct. 27, 299 U.S. 565, 81 L.Ed. 416—Futrovsky v. U. S., 66 F.2d 215, 62 App.D.C. 235.

66. Ala.—Langston v. State, 11 So. 334, 96 Ala. 44.
26 C.J. p 666 note 23.

67. Mo.—Moller-Vandenboom Lumber Co. v. Boudreau, 85 S.W.2d 141, 231 Mo.App. 1127.

68. Iowa.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.

Articles held fixtures
(1) Hoghouse or farrowing pens.—Cornell College v. Crain, supra.
(2) Motor to be used with pumps constituting part of irrigation system.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.
(3) Other instances, see 26 C.J. p 666 note 24 [a].

69. Ga.—Blain v. Corbin, 180 S.E. 854, 855, 51 Ga.App. 472, citing **Corpus Juris.**
26 C.J. p 666 note 25.

Water pump and motor
A water pump and gasoline motor actually installed on certain premises because of the lowness thereof, for the specific purpose of supplying water to another and adjacent higher lot of land is, in purpose and method of its utilization, so associated with the lot of land where the pipes therefrom convey the water and for the use of which the pump was installed that it is to be regarded as legally annexed, that is, a fixture, to the latter land rather than to the lot of land on which it is actually installed.—Blain v. Corbin, 180 S.E. 854, 51 Ga.App. 472.

70. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607.
Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008—Menzenberger v. American State Bank, 198 N.E. 819, 101 Ind.App. 600.
Ky.—City of Newport v. Dersel Co., 136 S.W.2d 11, 281 Ky. 372—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135—First State Bank of Eubank v. Crab Orchard

case of articles severed for a temporary purpose,[71] or of articles which, although not themselves actually annexed to the realty, are parts of or accessories to articles or structures which are annexed.[72] Not infrequently, when a machine is so annexed to the land and of such a character that it is regarded as a fixture to the land, a tool or appliance which is in effect an essential part of such machine is also regarded as a fixture.[73]

Rolling stock of a railroad has sometimes been treated as realty on the theory of constructive annexation or principles analogous thereto.[74] The later and best reasoned cases are, however, opposed to such view.[75]

§ 7. Character of Article Annexed

Apart from an agreement between the parties, the nature or character of an article annexed to realty is a factor in determining its status as a fixture.

Apart from an agreement between the parties, discussed infra §§ 12–20, and apart from, or in addition to, the other elements, considered supra §§ 1–6, the nature or character of the article annexed to the realty has generally been considered a factor in determining whether or not it has become a fixture.[76]

Banking Co., 75 S.W.2d 517, 255 Ky. 800—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.

Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.

Md.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 165 Md. 484—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.

Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122—Peninsular Stove Co. v. Young, 226 N.W. 225, 247 Mich. 580.

Minn.—Wolford v. Baxter, 21 N.W. 744, 33 Minn. 12, 53 Am.R. 1.

Ohio.—XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corporation, 10 N.E.2d 229, 56 Ohio App. 188, appeal dismissed XXth Century Heating & Ventilating Co. v. Fazckas, 9 N.E.2d 2, 132 Ohio St. 476.

Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419.

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.

S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—Clark v. Clark, Civ. App., 107 S.W.2d 421—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.—Malone v. Burdick, Civ. App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed.

Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Wis.—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

26 C.J. p 662 note 90.

What constitutes

(1) Constructive annexation is deemed to exist where the chattel, without being physically fastened to the realty, is dedicated thereto and its status as personalty caused to cease by the owner's duly manifested intention to make it a part of the realty.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.

(2) Chattel is "constructively annexed" to realty when it is an indispensable, integral part thereof.—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

Immovable by destination

An immovable by destination may be created without any physical attachment to the fundus, but merely by the dedication of the movable to the service of the fundus.—Bank of White Castle v. Clark, 159 So. 409, 181 La. 303.

71. Minn.—Wolford v. Baxter, 21 N. W. 744, 33 Minn. 12, 53 Am.R. 1.

Temporary severance as sufficient to restore fixture to status of personalty see infra § 21.

72. Ky.—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77.

Mo.—Globe Automatic Sprinkler Co. v. Boester, 95 S.W.2d 825, 829, 231 Mo.App. 203, citing **Corpus Juris.**

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

26 C.J. p 663 note 91.

Beds

In-a-door beds, constituting part of the equipment of efficiency apartments, and which are so constructed as to size and shape that they can be pushed back into a closet especially constructed in the building for their reception, are fixtures.—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77.

Doors and windows have been considered part of the realty because they are part of the house.—Slane v. Curtis, 286 P. 372, 376, 41 Wyo. 402, 69 A.L.R. 906, citing **Corpus Juris,** and rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906—26 C.J. p 663 note 91 [b].

Articles held not fixtures

(1) Broom corn slats, being small pieces of board sawed in certain dimensions and sizes, and used in connection with curing broom corn, which were in no wise attached to the realty, other than piled down on the ground in a shed on the premises, are personal property and not an indispensable part of broom corn shed located on the premises.—Holmes v. Neill, 222 P. 670, 96 Okl. 295.

(2) Other instances, see 26 C.J. p 662 note 90 [b].

73. Ga.—Brooks v. John Hancock Mut. Life Ins. Co., 136 S.E. 166, 36 Ga.App. 261.

Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419.

Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

26 C.J. p 663 note 92.

Articles held fixtures

Spare motors, parts, machinery, and equipment constituting replacements specially adapted to full enjoyment of realty devoted to manufacture of ice.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.

74. Ill.—Titus v. Ginheimer, 27 Ill. 462.

26 C.J. p 663 note 93.

75. N.C.—State v. Martin, 53 S.E. 874, 141 N.C. 832.

26 C.J. p 663 note 94.

76. Ark.—Dent v. Bowers, 265 S.W. 636, 166 Ark. 418, 36 A.L.R. 443.

Mass.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N. E. 517, 279 Mass. 33, 81 A.L.R. 1437—Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7—Commercial

The status of the person making the annexation and his relation to other persons as factors in determining the character of articles annexed to realty as fixtures are considered infra §§ 23–53.

§ 8. —— Adaptation to Particular Use or Place

The adaptation or appropriation of an article annexed to realty to the use or purpose to which the realty is devoted is an important consideration in determining its status as a fixture, such adaptation or appropriation frequently being an essential element.

As stated supra § 7, the nature or character of the article annexed to the realty is a determining factor in answering the question of whether or not the article is a fixture, it being said that to-day the emphasis is placed on the nature of the article and the uses and purposes for which it is held or employed.[77] By the nature or character of the article is usually meant its relation to the purpose to which the land or realty itself has been devoted, such relationship being a leading consideration in determining whether the article is to be regarded as legally constituting a part of the land, the theory sometimes being that if the article is of such a character as to conduce to the realization of this purpose, it is presumably intended by the annexor to be a permanent accession.[78] Thus it is frequently said that one essential to the conversion of a chattel into realty is its adaptation, appropriation, or application to the use or purpose to which the realty with which it is connected is appropriated,[79] although many other cases refer to the adaptation of an article to the use to which the realty is appropriated as merely one of the factors or tests which should or must be considered in determining that it is a part of the realty.[80] Still other cases

Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.

Mich.—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122.

Miss.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.

Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.

External indication

The external indications which show whether or not an article belongs to a building as an article designed to become part of the building, and to be used with it, to promote the object for which it has been erected, or to which it has been adapted and devoted, determine the character of the article as a fixture.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

77. Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

78. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.

Tenn.—Farrar v. Nashville, C. & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.

"The . . . test—adaptation of the chattel to the use of the property to which it is annexed—is entitled to great weight, especially in connection with the element of intention."—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 349, 178 Va. 223.

79. U.S.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607—Whitaker-Glassner Co. v. Ohio Savings Bank & Trust Co., C.C.A.Ohio, 22 F.2d 773—In re Walker Bin Co., D.C.N.Y., 9 F.Supp. 367—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.

Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385—Boise-Payette Lumber Co. v. McCornick, 186 P. 252, 32 Idaho 462.

Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.

Iowa.—McCoun v. Drews, 265 N.W. 160, 221 Iowa 227—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.

Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.

Mass.—Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7.

Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643.

Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

N.J.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.

N.M.—Porter Lumber Co. v. Wade, 32 P.2d 819, 38 N.M. 333.

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E. 2d 273, 135 Ohio St. 48.

Okl.—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96.

S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 879, 132 S.C. 16, 41 A.L.R. 592, citing **Corpus Juris.**

Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

26 C.J. p 666 note 27.

80. U.S.—Willis v. Beeler, C.C.A. Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Petition of Johns-Manville Sales Corporation, C.C.A. Mich., 88 F.2d 520.

Ala.—Southern Cotton Oil Co. v. Lowery, 163 So. 629, 231 Ala. 119.

Ark.—Dent v. Bowers, 265 S.W. 636, 638, 166 Ark. 418, 36 A.L.R. 443, citing **Corpus Juris.**

Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P. 2d 94, 16 Cal.2d 142, 133 A.L.R. 416, superseding, App., 96 P.2d 137, and certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App.2d 66—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696—Placer County v. Lake Tahoe Ry. & Transportation Co., 209 P. 900, 58 Cal.App. 764.

Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.

Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216—Harn v. State, 179 S.E. 553, 51 Ga.App. 34.

Ind.—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008—Menzenberger v. American State Bank, 198 N. E. 819, 101 Ind.App. 600.

Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372—Bank of Shelbyville v. Hartford, 104 S. W.2d 217, 268 Ky. 135—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800—Doll v. Guthrie, 24 S.W. 2d 947, 233 Ky. 77—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.

speak of the character of the use of the article annexed as important.[81]

Adaptation to particular place. That the article was specially constructed or fitted with a view to its location and use on the particular land, or in the particular building, it being consequently less readily susceptible of use elsewhere, tends to show that it was intended to constitute a part of the land.[82]

Adaptation to use elsewhere. The fact that the article annexed is adapted to use elsewhere is sometimes mentioned as a consideration tending to show that it retains its chattel character,[83] although this is by no means conclusive.[84]

Articles not designed to be part of the realty retain their character as personalty.[85]

Part of architectural design. Occasionally, the fact that an article annexed is necessary or desirable as a part of the architectural design or finish of the room or building has been referred to as a consideration indicative of its character as a fixture.[86] Such conformity of itself, however, does not make the article annexed a part of the realty.[87]

§ 9. —— Necessity of Article

The necessity of the article to the use to which the realty is devoted is an important element in determining its character as a fixture.

The necessity of the article or structure for the particular use to which the land or realty is devoted has frequently been said to be an important element in determining its character as realty,[88] and is a view which has been quite frequently ap-

Md.—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.

Mass.—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.

Mich.—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688—Peninsular Stove Co. v. Young, 226 N.W. 225, 247 Mich. 580.

Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.

Mont.—Conway v. Fabian, 89 P.2d 1022, 108 Mont. 287, certiorari denied Fabian v. Conway, 60 S.Ct. 94, 308 U.S. 578, 84 L.Ed. 484—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.

N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.

N.D.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.

Ohio.—Szilagy v. Taylor, 25 N.E.2d 360, 63 Ohio App. 105—McGowan v. McGowan, 18 N.E.2d 419, 59 Ohio App. 397.

Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419—Quality Milk Products Co. v. Young, 51 P.2d 547, 175 Okl. 98—Quality Milk Products Co. v. Endowment Loan & Mortgage Co., 51 P.2d 550, 175 Okl. 94—Seminole Supply Co. v. Seminole Refining Co., 45 P.2d 1084, 173 Okl. 32—Elerick v. Reed, 240 P. 1045, 113 Okl. 195, 44 A.L.R. 474.

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31—Knight v. Potter, 32 P.2d 1014, 147 Or. 339—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed—Malone v. Burdick, Civ.App., 58 S.W.2d 1048—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed—Allen v. Selman, Civ.App., 10 S.W.2d 173.

Wash.—Greenkevich v. Vaivados, 19 P.2d 939, 172 Wash. 208.

Wis.—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60.

26 C.J. p 667 note 28.

Varying weight given

N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.

Mechanics' liens as affecting fixtures see the C.J.S. title Mechanics' Liens, also 40 C.J. p 277 note 14—p 278 note 31.

81. Mo.—Woodling v. Westport Hotel Operating Co., 63 S.W.2d 207, 227 Mo.App. 1231, transferred, see 55 S.W.2d 477, 331 Mo. 812.

26 C.J. p 667 note 29.

82. Mich.—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122.

N.H.—E. J. Caron Enterprises v. State Operating Co., 179 A. 665, 87 N.H. 371, citing **Corpus Juris.**

N.Y.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.

26 C.J. p 668 note 32.

83. Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

26 C.J. p 667 note 30.

84. Mich.—Morris v. Alexander, 175 N.W. 264, 208 Mich. 387.

26 C.J. p 668 note 31.

85. N.H.—Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A. 556, 86 N.H. 298.

86. U.S.—New York Life Ins. Co. v. Allison, N.Y., 107 F. 179, 46 C.C.A. 229, certiorari denied 21 S.Ct. 923, 181 U.S. 618, 45 L.Ed. 1030.

26 C.J. p 670 note 47.

87. Pa.—Peoples-Pittsburgh Trust Co. v. Security Peoples Trust Co., 1 A.2d 520, 133 Pa.Super. 18.

Church organ

Where it does not appear that removal of organ would destroy symetry of interior of building or impair use of church building as place of worship, that in itself did not cause a change in its character from personalty to realty.—Peoples-Pittsburgh Trust Co. v. Security Peoples Trust Co., 1 A.2d 520, 133 Pa.Super. 18.

88. Cal.—Broadway Improvement & Investment Co. v. Tumansky, 41 P.2d 553, 2 Cal.2d 465—Dauch v. Ginsburg, 6 P.2d 952, 214 Cal. 540.

Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 348, 178 Va. 223.

26 C.J. p 668 note 33.

"If the chattel is essential to the purposes for which the building is used or occupied, it will be considered a "fixture", although its connection with the realty is such that it may be severed without injury to either."—Danville Holding Corporation v. Clement, supra.

"The fact that articles affixed are necessary . . . to the use of a building for the purpose for which it is designed is generally treated as tending to indicate they are realty."—Southern California Tel. Co. v. State Board of Equalization, 82 P.2d 422, 427, 12 Cal.2d 127.

Essential element of adaptation

Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

plied in the case of machinery or other apparatus, regarded as a necessary or approximately necessary part of a manufacturing or other industrial plant, regarded as a whole.[89]

In some jurisdictions the adaptation or necessity of the article to the use to which the realty is devoted is the only consideration in determining its character as a fixture, at least in the case of a chattel placed in an industrial establishment for permanent use, the article being considered a fixture if indispensible to the carrying on of the specific business to which the realty is devoted.[90] The rule aforesaid is sometimes called the institution doctrine, to the effect that, when a chattel, which is permanently essential to the completeness of a structure, with regard to its character and its functioning in the use for which it was intended, is actually, purposely, and lawfully affixed to the structure, it becomes part of the realty.[91]

§ 10. —— Purpose of Annexation

The purpose for which a chattel is annexed to the realty is an important factor in determining its status as a fixture.

The purpose for which a chattel has been annexed to the realty has often been held to be an important consideration in determining its status as a fixture.[92] So it has been said that an article may be regarded as a fixture if annexed to improve the realty,[93] or to enhance the value of the realty,[94]

Annexation by weight and gravity
Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31.

Building designed for special purpose
In the ordinary case of articles necessary or convenient for the use of a building designed for a special purpose, the building, with equipment, has a resale or leasing value for the purpose for which it has been specially built, and hence, equipment should pass with the building as part of the realty for the convenient use thereof.—Southern California Tel. Co. v. State Board of Equalization, 82 P.2d 422, 12 Cal.2d 127.

Furnishings of "efficiency apartment"
Kitchen furnishings, designed for, and peculiarly adapted to, "efficiency apartment" building, became fixtures when installed, where building was originally designed and built as "efficiency apartment" and could not be thus used without such equipment.—Mortgage Bond Co. v. Stephens, 74 P. 2d 361, 181 Okl. 419.

Seats in theater
Seats in theater are considered as fixtures, since "theater" is permanent structure, and without seating capacity would be incomplete.—In re Albanese, D.C.N.Y., 44 F.2d 602.

Disrupting purpose as defense to foreclosure
It has been held, however, that the mere fact that removal of machinery placed in a building erected for a particular purpose would prevent the successful carrying out of purpose for which building was erected would not constitute such removal a damage to the realty, so as to establish a defense to suit to foreclose against such machinery a statutory lien for labor.—Meena v. Drousiotis, 200 So. 362, 146 Fla. 168.

89. Pa.—Central Lithograph Co. v. Eatmor Chocolate Co., 175 A. 697, 316 Pa. 300.
26 C.J. p 668 note 34.

Test
If a chattel is so attached and so necessary and useful that its removal would prevent the operation of the plant, it is usually held to be a "fixture" as an integral part of the plant, but if it can be removed without disrupting the operation of the plant, it ordinarily is regarded as "personalty."—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.

90. Pa.—Pennsylvania Chocolate Co., for Use of Commonwealth Trust Co. of Pittsburgh, v. Hershey Bros., 175 A. 694, 316 Pa. 292, 99 A.L.R. 139—Commonwealth Trust Co. of Pittsburgh v. Harkins, 167 A. 278, 312 Pa. 402.
26 C.J. p 659 note 70, p 660 note 71.
Necessity of annexation, see supra § 3.

91. N.J.—Rinbrand Well Drilling Co. v. L & H Theatres, 20 A.2d 358, 126 N.J.Law 446, affirmed 23 A.2d 404, 127 N.J.Law 604—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293, 111 A.L.R. 357.

Theater cooling system
Turbine pump installed in theater building as part of the theater's cooling system became part of realty. —Rinbrand Well Drilling Co. v. L & H Theatres, 20 A.2d 358, 126 N.J.Law 446, affirmed 23 A.2d 404, 127 N.J.Law 604.

92. Mass.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N.E. 517, 279 Mass. 33, 81 A.L.R. 1437—Commercial Credit Corporation v. Commonwealth Loan Co., 177 N.E. 88, 276 Mass. 335.
N.H.—Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A. 556, 86 N.H. 298—Graton & Knight Mfg. Co. v. Woodworth Mason Co., 38 A. 790, 69 N.H. 177—Langdon v. Buchanan, 62 N.H. 657.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223—Hagan v. Richmond Trust Co., 139 S.E. 317, 148 Va. 528.
W.Va.—Pocahontas Coal & Coke Co. v. By-Products Pocahontas Co., 164 S.E. 504, 112 W.Va. 390.
26 C.J. p 669 note 37.

Use and fitness
Whether article brought on freehold becomes part thereof depends largely on use to which it is to be applied and fitness therefor.—Reno Electrical Works v. Ward, 274 P. 196, 51 Nev. 291, 62 A.L.R. 247.

As element of intent
The use for which the article is designed is a subsidiary element used to test the intention.
Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

93. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.
26 C.J. p 669 notes 38, 45.

In Louisiana
(1) Under Civ.Code art 468, things which the owner of a tract of land has placed on it, for its service and improvement, are immovables by destination.—Lighting Fixture Supply Co. v. Pacific Fire Ins. Co. of New York, 146 So. 35, 176 La. 499—26 C.J. p 669 note 45 [b].

(2) Instances of immovables by destination, given in the statute, are merely illustrative, and not restrictive.—Breaux v. Ganucheau, 3 La. App. 481.

(3) Thereunder, a tramway laid on servitude of way is immovable, although the servitude is not perpetual.—Coguenhem v. Trosclair, 69 So. 800, 137 La. 985.

(4) Refrigeration plant became immovable by destination when it was attached to building, but did not become part of building.—Hamilton Co. v. Medical Arts Bldg. Co., 135 So. 94, 17 La.App. 508.

94. Ind.—Citizens Bank of Green-

while, conversely, if it is attached for a use that does not enhance the value of the realty, and if it may be removed at the pleasure of the one who attaches it, it remains a chattel.[95]

Sometimes the important question is stated to be whether the annexation is for the purpose of the permanent improvement or use of the land,[96] or for the improvement of the land for the purpose for which it is used.[97] Hence, an article attached to the realty to effect a temporary purpose only has been held to be personalty,[98] while, on the other hand, it has been said that whatever is placed in a building to carry out the purpose for which it was erected or to which it has been devoted and permanently to increase its value for such purpose may be regarded as a part of the realty.[99]

Attachment for convenience. It has been held that a chattel annexed to the realty to render the premises more convenient in use,[1] or for the better enjoyment thereof,[2] may render the same a fixture.

Convenience in use of chattel. That a machine or piece of apparatus is fastened to the building for the purpose merely of steadying it, or of otherwise making it more convenient or effectual in use, has been referred to as insufficient to give to it the character of a fixture.[3] However, such articles may become fixtures, notwithstanding this manner of attachment,[4] as where convenience or steadying of the article is not the only purpose for its attachment to the realty.[5]

§ 11. —— Particular Classes of Articles

The test of the character of an article annexed to realty, as related to the use to which the realty is devoted, has been applied to various articles held or held not to be fixtures under the circumstances of particular cases.

The test of the character of the article annexed, usually as related to the use to which the realty is devoted, in its various aspects, has been applied to various particular articles held to be fixtures [6] or not to be fixtures.[7]

field v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.
26 C.J. p 669 note 41, 45.

95. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., supra.

96. Tenn.—McDavid v. Wood, 5 Heisk. 95.
26 C.J. p 669 note 42.

97. N.J.—Knickerbocker Trust Co. v. Penn Cordage Co., 58 A. 409, 66 N.J.Eq. 305, 105 Am.S.R. 640.
26 C.J. p 669 note 43.

98. N.J.—Oradell Gardens v. Mooney, 178 A. 270, 13 N.J.Misc. 364.
Tenn.—Cowart v. Cowart, 3 Lea 57.
26 C.J. p 669 note 44 [b] (2).

Nonexclusive use

That both building and ovens therein constructed with same immediate purpose of using the building as a bakery was held not to necessitate that the ovens be regarded as fixtures, it not appearing that the building was intended for a bakery and for nothing else.—Baker v. McClurg, 64 N.E. 701, 198 Ill. 28, 92 Am.S.R. 261, 59 L.R.A. 131.

Use distinct from that of occupier of realty

A manifest intention to use the article annexed in some employment distinct from that of the occupier of the real estate, or to use it in carrying on trade, prevents its consideration as part of the realty.—De Laine v. Alderman, 9 S.E. 950, 31 S.C. 267—Evans v. McLucas, 15 S.C. 67, 70.

99. Ga.—Brigham v. Overstreet, 57 S.E. 484, 128 Ga. 447, 10 L.R.A.,N.S., 452, 11 Ann.Cas. 75.
26 C.J. p 669 note 44.

1. Cal.—Fratt v. Whittier, 58 Cal. 126, 41 Am.R. 251.

"Whatever is affixed to a building by an owner in complement, to facilitate its use and occupation in general, becomes a part of the realty, though capable of removal without injury to building."—Sequist v. Fabiano, 265 N.W. 488, 489, 274 Mich. 643—Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 112, 239 Mich. 161.

Convenience of occupants

A telephone instrument, installed in a house in the ordinary manner, has been decided not to be a fixture, it being placed therein not for the improvement of the house but for the convenience of the occupants.—Hickman v. Booth, 173 S.W. 438, 131 Tenn. 32.

2. N.H.—Wadleigh v. Janvrin, 41 N.H. 503, 77 Am.D. 780.
26 C.J. p 669 note 40.

3. Ill.—Long v. Cockern, 21 N.E. 201, 128 Ill. 29.
26 C.J. p 665 note 16.

4. Iowa.—Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57, 24 Am.R. 719.
N.H.—Langdon v. Buchanan, 62 N.H. 657.

5. Mass.—Hopewell Mills v. Taunton Sav. Bank, 23 N.E. 327, 150 Mass. 519, 15 Am.S.R. 235, 6 L.R.A. 249.
N.Y.—McRea v. Troy Cent. Nat. Bank, 66 N.Y. 489, reversing 50 How.Pr. 51.

6. **Articles in churches**

(1) Bulky, heavy articles attached to a church adapted to be part thereof.—Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A. 556, 86 N.H. 298.

(2) Pews.—Holy Trinity Polish National Catholic Church v. O'Dowd, supra.

Bricks, stones, and plaster placed in the walls of a building.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Other articles

Cross and switch ties, piling, bridge timber, telephone and telegraph poles and cross-arms.—Wood Preserving Corporation v. State Tax Commission, 179 So. 254, 235 Ala. 438.

7. **Church property**

Portable ecclesiastical and household furnishings.—Holy Trinity Polish National Catholic Church v. O'Dowd, 167 A. 556, 86 N.H. 298.

Furniture generally

(1) Articles of furniture, although attached to buildings, are ordinarily not fixtures.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.

(2) "Household furniture" connotes all movable chattels added to interior of a house for enjoyment therewith by householder, even though attached to realty by screws, nails, or brackets.—In re Speyer's Will, 35 N.Y.S.2d 705.

(3) Chattels, which are manifestly furniture, as distinguished from improvements, and not peculiarly fitted to realty with which used, always remain personalty.—Clayton v. Lienhard, 167 A. 321, 312 Pa. 433—Klaus v. Majestic Apartment House Co., 95 A. 451, 250 Pa. 194.

Beds

(1) Bed, even a "Murphy" bed, or-

Buildings. The character of a building[8] and its adaptability to the purposes for which the land is used[9] have been held to be factors to be considered in determining whether or not it constitutes a fixture. Ordinarily, however, buildings placed upon the land have been regarded as part of the realty, occasionally without reference to any actual fastening to the ground, on the theory presumably that they are accessory to the realty as being necessarily, or at least presumptively, built for the purpose of improving it,[10] although buildings of light construction, especially if not firmly attached to the land, have occasionally been regarded as personalty, as being evidently annexed for temporary purposes only.[11]

Store buildings. It has been held that, generally speaking, such articles as shelving, electric ceiling fans, and signboards attached to a store building are considered parts of such building.[12]

Mines. By statute in some jurisdictions machinery and tools used in working or developing a mine are deemed affixed to the realty composing the mine.[13]

Fences likewise have ordinarily been regarded, in the same manner, as a part of the realty;[14] but they are not necessarily so.[15]

Machinery or apparatus in buildings. The test of the character of the article annexed, as related to the use to which the realty is devoted, has been applied in connection with machinery or apparatus in a building, it often being said or held that when a building is erected for, or permanently adapted or devoted to, a particular purpose, anything annexed to the building for the carrying out of that purpose may be considered as accessory to the realty itself,[16] while such articles annexed merely for the purpose for which the building happens at the time to be used are not to be so regarded.[17]

dinarily is not part of realty.—Fisher v. Pennington, 2 P.2d 518, 116 Cal. App. 248—Southern California Hardwood & Mfg. Co. v. Borton, 189 P. 1022, 46 Cal.App. 524.

(2) Injury to realty by removal of bed as factor indicating that bed is a fixture see supra § 5 e.

Carrousel

Pa.—Gerhart v. Treichler, 53 Montg. Co. 235.

Electric refrigerators

Not fixtures under the circumstances.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.

Gas ranges

N.Y.—Modern Security Co. of Philadelphia v. Thwaites, 246 N.Y.S. 405, 138 Misc. 469, reversing Modern Security Co. v. Thwaites, 242 N.Y.S. 594, 137 Misc. 485, and affirmed Modern Security Co. of Philadelphia v. Thwaites, 252 N.Y.S. 930, 234 App.Div. 671—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Lighting fixtures

N.Y.—Lightolier Co. v. Del Mar Club Holding Co., 259 N.Y.S. 97, 144 Misc. 876, reversed on other grounds 262 N.Y.S. 32, 237 App.Div. 432, affirmed 189 N.E. 711, 263 N.Y. 588.

Refrigerators

N.Y.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Works of art

U.S.—In re Speyer's Will, 35 N.Y.S. 2d 705.

8. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

Value as factor

Cal.—Bond Inv. Co. v. Blakeley, supra.

9. Cal.—Bond Inv. Co. v. Blakeley, supra.

10. Conn.—Rayhol Co. v. Holland, 148 A. 358, 110 Conn. 516.

26 C.J. p 671 note 52.

Prima facie

Where building is erected on the land of another, it is prima facie a part of the realty.—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.

Purpose of conveyance

A building erected on land for the purpose for which the land was conveyed ordinarily becomes part of the realty.—New Hebron Consol. School Dist. v. Sutton, 118 So. 303, 151 Miss. 475.

Immovable by nature

Under Civ.Code art 464, buildings erected on land by any one are immovable by their nature.—Lighting Fixture Supply Co. v. Pacific Fire Ins. Co. of New York, 146 So. 35, 176 La. 499.

11. Cal.—Miller v. Waddingham, 27 P. 750, 91 Cal. 377, 13 L.R.A. 680.

26 C.J. p 671 note 53.

12. Tex.—Bantuelle v. Chapman, Civ.App., 256 S.W. 936.

13. U.S.—Big Sespe Oil Co. v. Cochran, C.C.A.Cal., 276 F. 216.

Cal.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 14 Cal.2d 196, superseding, App., 86 P. 2d 673.

14. Tex.—Long v. Chapman, Civ. App., 151 S.W.2d 879.

26 C.J. p 671 note 54.

15. Cal.—Pennybacker v. McDougal, 48 Cal. 160.

Mont.—Mattison v. Connerly, 126 P. 851, 46 Mont. 103.

16. Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

Ill.—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.

Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372.

W.Va.—Pocahontas Coal & Coke Co. v. By-Products Pocahontas Co., 164 S.E. 504, 112 W.Va. 390.

26 C.J. p 670 note 48.

Nature of use as factor

Okl.—Seminole Supply Co. v. Seminole Refining Co., 45 P.2d 1084, 173 Okl. 32—Great Western Mfg. Co. v. Bathgate, 79 P. 903, 15 Okl. 87.

Va.—City of Newport News v. York County, 168 S.E. 927, 160 Va. 350—City of Newport News v. Warwick County, 166 S.E. 570, 159 Va. 571, rehearing denied and supplemented 167 S.E. 583, 159 Va. 571.

System of machinery

"Annexation of appliances which are ordinarily to be considered personal property results from such appliances being connected as integral parts with a single system of machinery which as a whole has been annexed to the land."—Fehr Constr. Co. v. Postl System of Health Bldg., 124 N.E. 315, 288 Ill. 634, 642.

17. U.S.—In re Walker Bin Co., D.C. N.Y., 9 F.Supp. 367.

26 C.J. p 670 note 48.

Water meters not fixtures in view of character of appliance and nature of use.—City of Newport News v. York County, 168 S.E. 927, 160 Va. 350—City of Newport News v. Warwick County, 166 S.E. 570, 159 Va. 571, rehearing denied and supplemented 167 S.E. 583, 159 Va. 571.

It has sometimes been said that the chief test in the determination is whether the machinery is permanent and essential to the purpose for which the building is occupied or employed.[18] In this test no distinction is made between machinery placed in a factory erected for a specific manufacturing purpose and like machinery placed in a building constructed for an entirely different purpose, but thereafter converted to a use for which the machinery is essential.[19]

Motive power machinery distinguished. The test of adaptability or appropriateness to the use to which the realty is devoted has sometimes been applied as in part determining that engines and other apparatus furnishing the motive power of a factory or mill are a part of the realty,[20] occasionally in contradistinction to machinery other than motive power considered personalty as being accessory to a business merely.[21] The latter class of machinery has, however, quite as frequently been considered to be a part of the realty by an application of the same or analogous principles.[22]

Railroad tracks, structures, and equipment. Railroad tracks and material therein, railroad structures, and other equipment on the right of way over the land of another are generally regarded as constituting personalty,[23] sometimes on the theory that they were annexed without any idea of serving or improving the land,[24] sometimes because considered to be in the nature of trade fixtures,[25] and sometimes because of an implied agreement, discussed infra § 14 d. As personalty, such property may be removed by the railroad or its successors on abandonment of the right of way or within a reasonable time thereafter.[26]

§ 12. Agreements

Whether or not an article annexed to realty constitutes a fixture is often dependent on an agreement with respect thereto. Such agreements as between the parties are considered infra § 13 if express, and infra § 14 if implied. Agreements between landlord and tenant are considered infra § 15. The effect of such agreements as to third persons is considered infra §§ 17–20.

Constructive severance by agreement is considered infra § 21.

Examine Pocket Parts for later cases.

§ 13. —— As between the Parties in General

As a general rule parties, as between themselves, may fix on a chattel to be annexed to realty the character of personalty, but they are limited sometimes to chattels which do not lose their identity, or which can be removed without material injury to the freehold.

As a general rule, parties, as between themselves, may, in their dealings with chattels annexed to, or used in connection with, real estate, fix on them whatever character, as realty or personalty, on which they may agree,[27] such right being, in some

18. Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Value of other tests is the evidence they give in support of the controlling test.—Danville Holding Corporation v. Clement, supra.

19. Va.—Danville Holding Corporation v. Clement, supra.

20. Ill.—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.

26 C.J. p 670 note 49.

21. Ohio.—Case Mfg. Co. v. Garven, 13 N.E. 493, 45 Ohio St. 289, 299.

26 C.J. p 670 note 50.

22. Ill.—Fifield v. Farmers' Nat. Bank, 35 N.E. 802, 148 Ill. 163, 39 Am.S.R. 166.

26 C.J. p 670 note 51.

23. Cal.—Placer County v. Lake Tahoe Ry. & Transportation Co., 209 P. 900, 58 Cal.App. 764.

Tex.—Texas & N. O. R. Co. v. Schoenfeld, 146 S.W.2d 724, 136 Tex. 173, reversing, Civ.App., 124 S.W.2d 910.

26 C.J. p 671 note 57.

Nature of annexed articles as between owner of easement and owner of land subject thereto see infra § 53.

24. Cal.—Placer County v. Lake Tahoe Ry. & Transportation Co., 209 P. 900, 908, 58 Cal.App. 764.

26 C.J. p 671 note 57.

"The maintenance of railroad tracks and the essential equipments of the transportation business upon a piece of land involves as a rule the appropriation of so much of the land thus occupied to a use or purpose to which it is not naturally or customarily adapted. In other words, when realty is so appropriated and used, it is not devoted to the ordinary or usual purposes or uses of land. Nor, obviously, can it be said that the structures erected upon the land in dispute has had or can have the effect of enhancing the value of the land or improving or benefiting it for the purpose to which otherwise it might be devoted or, in ordinary circumstances, is adapted."—Placer County v. Lake Tahoe Ry. & Transportation Co., supra.

25. Vt.—American Steel & Iron Co. v. Taft, 199 A. 261, 109 Vt. 469.

Trade fixtures in case of relation of landlord and tenant see infra § 38.

26. U.S.—American Steel & Iron Co. v. Taft, supra.

Tracks serving owner of realty

When tracks are installed solely to serve the private enterprise of the owner of the land, are constructed and maintained at his expense, and can be used for no other purpose, the company's right to remove them depends on whether or not they are fixtures.—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., 205 P. 224, 62 Mont. 281, 21 A.L.R. 1080.

Damages for removal of fixtures.—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., supra.

Right of railroad to remove tracks or other equipment generally see the C.J.S. title Railroads § 117, also 51 C.J. p 616 note 90–p 617 note 94.

27. Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708—Clawson v. Harris, 52 P.2d 496, 10 Cal.App.2d 521—Miller v. Struven, 218 P. 287, 63 Cal.App. 128.

Mo.—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.

jurisdictions, recognized by statute,[28] and the law will enforce such understanding whenever the rights of third parties will not be prejudiced.[29] Thus it is generally held that an agreement by the owner of the land, in favor of the owner of the article at the time of annexation, or of one then having a lien thereon, to the effect that the article shall retain its personal character or be removable as personalty, is ordinarily valid and effective as against the former, precluding a claim by him to the article as part of the land, to the exclusion of the latter.[30] As discussed infra § 14, an implied agreement to this effect is equally effective.

App. 832—Kolb v. Golden Rule Baking Co., 9 S.W.2d 840, 222 Mo. App. 1068.
Mont.—Hardie v. Peterson, 282 P. 494, 86 Mont. 150.
N.D.—Dunham Lumber Co. v. Gresz, 2 N.W.2d 175—Newell v. McMurray, 201 N.W. 845, 51 N.D. 901—Mathews v. Hanson, 124 N.W. 1116, 19 N.D. 692.
Okl.—Hall v. Woody, 69 P.2d 379, 180 Okl. 370.
Or.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.
R.I.—Cohen v. General Motors Acceptance Corporation, 152 A. 693, 51 R.I. 153.
S.C.—Lane v. Bell Lumber Co., 115 S.E. 207, 122 S.C. 140.
S.D.—Curran v. Curran, 289 N.W. 418, 67 S.D. 119.

Law of fixtures yields to contract
General rules of law pertaining to fixtures must yield to the provisions of the contract made by the parties.—Bantuelle v. Chapman, Tex.Civ. App., 256 S.W. 936—Reader v. Christian, Tex.Civ.App., 234 S.W. 155, error dismissed.

Mutual intent controls
(1) "As between private parties such as those bearing the relationship to each other of landlord and tenant, or vendor and vendee under a conditional sales contract, their mutual intention as to whether an article is a fixture and part of the realty or is personalty is the controlling factor."—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 97, 16 Cal.2d 142, 133 A.L.R. 416, certiorari denied U. S. National Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118.

(2) Parties' intent, expressed in contract, determines whether machinery attached to realty becomes part thereof, where third parties' rights are not involved.—Kolb v. Golden Rule Baking Co., 9 S.W.2d 840, 222 Mo.App. 1068.

(3) The intention of the parties as to whether personalty attached to land constitutes a fixture is determined from the language of the contract, the circumstances under which the contract was made, and the purpose for which it was made.—Reader v. Christian, Tex.Civ.App., 234 S. W. 155, error refused.

Exception to statutory definition
Cal.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 14 Cal.2d 196, superseding, App., 86 P.2d 673—Nead v. Specimen Hill Mining Co., 126 P.2d 450, 52 Cal. App.2d 475—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal.App.2d 531.

28. Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708—Dauch v. Ginsburg, 6 P.2d 952, 214 Cal. 540.
Okl.—Revell's Estate v. Herron, 105 P.2d 426, 187 Okl. 618, 130 A.L.R. 1029.

29. S.D.—Curran v. Curran, 289 N. W. 418, 67 S.D. 119.
Operation and effect of agreements as to third persons see infra §§ 17–20.

30. U.S.—Sweeney v. Medler, C.C.A. N.M., 78 F.2d 148.
Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708—Dauch v. Ginsburg, 6 P.2d 952, 954, 214 Cal. 540, citing **Corpus Juris**—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal.App.2d 531.
Ga.—Wofford Oil Co. v. Weems-Fuller Co., 142 S.E. 887, 166 Ga. 173—Columbus Heating & Ventilating Co. v. Burt, 146 S.E. 918, 39 Ga. App. 384.
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N. E.2d 444, 216 Ind. 573.
Iowa.—Schiltz v. Ferguson, 231 N.W. 358, 210 Iowa 677.
Md.—Lewis v. E. F. Schlichter Co., 112 A. 282, 137 Md. 217.
Mo.—Grinnell Co. v. Farm & Home Savings & Loan Ass'n of Missouri, App., 74 S.W.2d 1097—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.
Mont.—Hardie v. Peterson, 282 P. 494, 86 Mont. 150.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 877, 127 Neb. 740, citing **Corpus Juris.**
N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corp., 156 A. 28, 33, 108 N.J.Eq. 567, citing **Corpus Juris.**
N.D.—Dunham Lumber Co. v. Gresz, 2 N.W.2d 175—Newell v. McMurray, 201 N.W. 845, 847, 51 N.D. 901, citing **Corpus Juris.**
Okl.—Revell's Estate v. Herron, 105 P.2d 426, 187 Okl. 618, 130 A.L.R. 1029.
Or.—Mattechek v. Pugh, 55 P.2d 730, 732, 153 Or. 1, citing **Corpus Juris.**
Pa.—American Laundry Machinery Co. v. Miners' Trust Co. of Nanticoke, 161 A. 306, 307 Pa. 395.
S.D.—Curran v. Curran, 289 N.W. 418, 67 S.D. 119.
Wis.—Brunswick - Balke - Collender Co. v. Franzke-Schiffman Realty Co., 248 N.W. 178, 211 Wis. 659.
26 C.J. p 676 note 21.

Construction of agreement
(1) Drilling rig, placed on land by drilling contractor, under contract with owner of mining claim entitling contractor to abandon the work on written notice to owner and remove all personal property placed by him on the land, was held personalty, and not fixture as between contractor and owner of mining claim.—Midland Oil Fields Co. v. Rudneck, 204 P. 1074, 188 Cal. 265.

(2) In conditional contract for sale of warm air "heater," use of word "heating" in title reservation clause was held mere clerical error, word intended being "heater."—Holland Furnace Co. v. Bird, 21 P.2d 825, 45 Wyo. 471.

Chattel mortgage
Tex.—Wagner Supply Co. v. Bateman, 18 S.W.2d 1052, 118 Tex. 498, reversing in part and affirming in part, Civ.App., 260 S.W. 672—First Nat. Bank v. Hickman, Civ.App., 45 S.W.2d 808—David v. Roe, Civ. App., 271 S.W. 196.

Conditional sales contract
Ark.—Continental Gin Co. v. Clement, 4 S.W.2d 901, 176 Ark. 864.
Cal.—Oakland Bank of Savings v. California Pressed Brick Co., 191 P. 524, 183 Cal. 295—Nead v. Specimen Hill Mining Co., 126 P.2d 450, 52 Cal.App.2d 475—P. J. Freiermuth Co. v. Faustino, 7 P.2d 370, 120 Cal.App. 136.
Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145.
Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.
Idaho.—Anglo-American Mill Co. v. Community Mill Co., 240 P. 446, 41 Idaho 561.
Ill.—Nu-Way Boiler & Engineering Co. v. Morensky, 268 Ill.App. 211.
Ind.—J. H. Day Co. v. Public Sav. Ins. Co. of America, 151 N.E. 361, 85 Ind.App. 78.
Md.—Abramson v. W. W. Penn & Co.,

This right of control by agreement has been stated to be limited to the extent that it cannot apply where the article annexed or mode of annexation is such that the article is entirely deprived of the character of personal property,[31] or when the article annexed has been so built into the realty as to become an essential part thereof,[32] or as to lose its identity.[33] Such agreements are also sometimes held to be valid and effective as preserving the character of annexed chattels if they may be removed without injury to the realty,[34] while, conversely, occasionally the fact that the removal of the article would involve substantial injury to it or to the realty has been regarded as invalidating such an agreement or rendering it ineffective.[35] There are cases, however, which hold that the right

143 A. 795, 156 Md. 186, 73 A.L.R. 742.
Mass.—Hough v. Omansky, 160 N.E. 330, 263 Mass. 112.
Mo.—Grinnell Co. v. Farm & Home Savings & Loan Ass'n, App., 75 S.W.2d 409—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.
N.H.—National Bank of Bellows Falls v. Vermont Packing Co., 6 A.2d 176, 90 N.H. 232.
Okl.—T. J. Stewart Lumber Co. v. Cloud Chief Gin, 50 P.2d 230, 174 Okl. 224.
Tex.—Citizens' Nat. Bank of Abilene v. Elk Mfg. Co., Com.App., 29 S.W.2d 1062, reversing Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene, Civ.App., 18 S.W.2d 747.

Filing of conditional sales contract is unnecessary as between parties.—In re White Plains Ice Service, C.C.A.N.Y., 109 F.2d 913.

Buildings

(1) Character of house as personalty, although attached to the realty as fixture, may be determined by agreement of the parties.—Edwards v. Thannisch, Tex.Civ.App., 254 S.W. 523.

(2) Owner of land may by agreement permit another to erect building thereon and have title thereto as personalty.
Mich.—Michigan Trust Co. v. Grand Rapids Hotel Co., 251 N.W. 414, 265 Mich. 328.
Mo.—Holtgreve v. Sobolewski, 31 S.W.2d 993, 326 Mo. 412.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.

No lien on realty

Seller of personal property attached to realty under conditional sale could not be awarded lien on real property, not having brought himself within mechanics' lien law.—East New York Electric Co. v. Petmaland Realty Co., 154 N.E. 530, 243 N.Y. 477, 58 A.L.R. 1119, reversing 210 N.Y.S. 844, 214 App.Div. 730.

Statutory bond unnecessary

Seller reserving title to opera chairs by conditional sale contract was not required to furnish bond to indemnify vendee for injuries to freehold in removing them, especially where one to whom mortgagee, purchasing theater at foreclosure sale, conveyed premises, furnished security to retain possession of chairs after seller obtained writ of replevin.—National Theatre Supply Co. v. Mishler Theatre Co., 167 A. 324, 312 Pa. 250.

Clear showing essential

Exception to rule that structures erected on land of another become part of realty requires agreement clearly showing right of removal.—People ex rel. Hudson River Day Line v. Franck, 177 N.E. 312, 257 N.Y. 69, reversing 248 N.Y.S. 839, 232 App.Div. 779.

Loss of statutory seller's lien on movables by incorporation into immovable property see the C.J.S. title Sales § 399, also 55 C.J. p 901 note 72, and 26 C.J. p 676 note 21 [a].

31. N.Y.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.
26 C.J. p 677 note 23.

Nature of chattel conditionally sold and annexed to realty, under law of fixtures, depends on intention of parties.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.

32. Idaho.—Anglo-American Mill Co. v. Community Mill Co., 244 P. 446, 41 Idaho 561.
Mo.—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.

33. Idaho.—Anglo-American Mill Co. v. Community Mill Co., 240 P. 446, 41 Idaho 561.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 877, 127 Neb. 740, citing **Corpus Juris.**
N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corp, 156 A. 28, 33, 108 N.J.Eq. 567, citing **Corpus Juris.**
26 C.J. p 677 note 24.

34. Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill. App. 561.
Mich.—Woodliff v. Citizens' Building & Realty Co., 215 N.W. 343, 240 Mich. 413, modified on other grounds 222 N.W. 730, 245 Mich. 292, certiorari denied 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 620.
Mo.—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.
N.J.—Workingmen's Building & Loan Ass'n of Newark v. Smith, 155 A. 20, 108 N.J.Eq. 349—Manufacturers' Building & Loan Ass'n of Newark v. Public Service Electric & Gas Co., 150 A. 196, 106 N.J.Eq. 68.
N.Y.—Kohler Co. v. Brasun, 219 N.Y.S. 432, 128 Misc. 507, reversed 226 N.Y.S. 60, 222 App.Div. 338, reversed 164 N.E. 31, 249 N.Y. 224.
Or.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Tex.—Clow Gasteam Heating Co. v. Hixson, Civ.App., 67 S.W.2d 619, error dismissed—David v. Roe, Civ.App., 271 S.W. 196.

Elevator

Elevator which may be removed by unbolting cab, motor, and machinery may be removed without injury to freehold, permitting enforcement of agreement that it remain chattel till paid for.—Woodliff v. Citizens' Building & Realty Co., 215 N.W. 343, 240 Mich. 413, modified on other grounds 222 N.W. 730, 245 Mich. 292, certiorari denied 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 620.

Test of removability

In determining removability of goods sold under conditional sales contract and affixed to realty, as regards status of goods as "fixtures" or personal property, test is whether detaching goods would result in material injury to freehold, and not whether goods are essential to proper functioning of plant or building in which they have been placed for use.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310.

35. Ill.—Jones v. Jos. Greenspon's Son Pipe Corporation, 40 N.E.2d 561, 313 Ill.App. 651.
Mo.—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 877, 127 Neb. 740, citing **Corpus Juris.**
N.Y.—Modern Security Co. v. Thwaites, 242 N.Y.S. 594, 137 Misc. 485, reversed on other grounds Modern Security Co. of Philadelphia v. Thwaites, 246 N.Y.S. 405,

of removal conferred by agreement is, as between the parties, not affected by the fact that removal might injure the realty.[36]

Necessity for writing. To be effective, the agreement need not be in writing, being in regard to personalty.[37]

Competency of parties. The parties to the agreement must be competent to contract with each other.[38]

Effect as preserving personal character of article. The cases which recognize the effectiveness of such an agreement ordinarily state or assume that it operates to preserve the personal character of the article annexed,[39] and consequently, as discussed infra § 60, trover or replevin may be brought with respect to such articles, and, as discussed infra § 56, execution may be levied thereon as personalty. However, there are cases in which it is asserted or indicated that the agreement does not preserve the chattel character of the article annexed, but merely operates to give a right of removal to the beneficiary of the agreement.[40]

It has been said that the article annexed is a fixture as regards persons not parties to the agreement, although it is personalty as between the parties.[41]

Loss of character as personalty. Conceding that the article annexed retains its chattel character by

138 Misc. 469, affirmed 252 N.Y.S. 930, 234 App.Div. 671.
26 C.J. p 677 note 25.

Intent not controlling

Where personal property, sold under conditional sale, cannot be removed without practically destroying it, intent of parties as to character of property does not control.—East New York Electric Co. v. Petmaland Realty Co., 154 N.E. 530, 243 N.Y. 477, 58 A.L.R. 1119, reversing 210 N.Y.S. 844, 214 App.Div. 730.

Material injury to freehold as test of removability

Meat packing machinery, sold under conditional sale, which was cemented into floor of plant in such manner that two of machines could not be removed without taking down wall of plant, became part of "realty" and was not subject to removal under the common law or under conditional sales act.—National Bank of Bellows Falls v. Vermont Packing Co., 6 A.2d 176, 90 N.H. 232.

36. Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E.2d 444, 216 Ind. 573.
Mo.—Kolb v. Golden Rule Baking Co., 9 S.W.2d 840, 222 Mo.App. 1068.
N.C.—Brunswick - Balke - Collender Co. v. Carolina Bowling Alleys, 169 S.E. 186, 204 N.C. 609.

37. Okl.—Hall v. Woody, 69 P.2d 379, 380, 180 Okl. 370, quoting **Corpus Juris.**
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.
26 C.J. p 677 note 26.

38. Md.—Lewis v. E. F. Schlichter Co., 112 A. 282, 137 Md. 217.
26 C.J. p 677 note 27.

39. U.S.—Sweeney v. Medler, C.C.A.N.M., 78 F.2d 148—Champion Box Co. v. Manatee Crate Co., C.C.A.Ga., 75 F.2d 840.
Ark.—Continental Gin Co. v. Clement, 4 S.W.2d 901, 176 Ark. 864.
Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145.
Fla.—Commercial Finance Co. v. Brooksville Hotel Co., 123 So. 814, 98 Fla. 410, 64 A.L.R. 1219.
Ga.—Wofford Oil Co. v. Weems-Fuller Co., 142 S.E. 887, 166 Ga. 173—Columbus Heating & Ventilating Co. v. Burt, 142 S.E. 551, 166 Ga. 158.
Idaho.—Anglo-American Mill Co. v. Community Mill Co., 240 P. 446, 41 Idaho 561.
Md.—Abramson v. W. W. Penn & Co., 143 A. 795, 156 Md. 186, 73 A.L.R. 742.
Mass.—Quincy Oil Co. v. New England Road Machinery Co., 174 N.E. 670, 274 Mass. 419.
Minn.—Pennig v. Schmitz, 249 N.W. 39, 189 Minn. 262.
Mo.—Kolb v. Golden Rule Baking Co., 9 S.W.2d 840, 222 Mo.App. 1068.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 127 Neb. 740—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
N.J.—Workingmen's Building & Loan Ass'n of Newark v. Smith, 155 A. 20, 108 N.J.Eq. 349.
N.D.—Newell v. McMurray, 201 N.W. 845, 51 N.D. 901.
Okl.—Hall v. Woody, 69 P.2d 379, 180 Okl. 370—T. J. Stewart Lumber Co. v. Cloud Chief Gin, 50 P.2d 230, 174 Okl. 224.
Or.—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.
Tex.—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, error dismissed—David v. Roe, Civ.App., 271 S.W. 196.
Wis.—Brunswick - Balke - Collender Co. v. Franzke-Schiffman Realty Co., 248 N.W. 178, 211 Wis. 659.

As between parties

Where parties agree by contract that a chattel shall, notwithstanding its annexation to the freehold, retain the character and incidents of personal property, as between themselves such chattel shall be treated as personalty, notwithstanding the chattel, but for such agreement, would, by reason of its extrinsic physical characteristics after its annexation to the soil, be regarded as a part of the freehold.—Lewis v. E. F. Schlichter Co., 112 A. 282, 137 Md. 217.

Intent

That chattel was sold under agreement that it should remain personalty furnished indication that conditional buyer did not intend that it should become part of realty.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385.

As permitting sale of chattel, or mortgage thereof, as personalty see infra § 16.

40. U.S.—Smith v. McKenna Brass Mfg. Co., C.C.A.Pa., 98 F.2d 537.
Pa.—Clayton v. Lienhard, 167 A. 321, 312 Pa. 433.
26 C.J. p 678 note 33.

Effect on title

Person installing automatic sprinkler system in building under bailment lease contract, providing for retention of title until full payment therefor, with right to remove system on default, had contractual right to remove it in such case, although title passed to building owner.—Clayton v. Lienhard, supra.

Automatic sprinkler system

Parties to bailment lease contract, contemplating that automatic sprinkler system should be built into building as permanent improvement, were bound to know that it became integral part of realty as matter of law.—Clayton v. Lienhard, supra.

41. Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.
Mich.—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688.
26 C.J. p 678 note 34.
Effect of agreement as to third persons see infra §§ 17–20.

reason of the agreement, it loses such character as soon as the separate interest of the beneficiary under the agreement is extinguished,[42] as by his transfer of the article to the landowner,[43] his discharge of the obligation,[44] his receipt of payment extinguishing his right,[45] his relinquishment of his claim,[46] or the acquisition by one person of both the land and chattel.[47]

Waiver of right of removal. A right of removal under an agreement may be lost by waiver.[48]

§ 14. —— Implied Agreements

a. In general
b. From making of chattel mortgage
c. From conditional character of sale
d. From annexation under license

a. In General

An agreement preserving the character of articles annexed to land as personalty or conferring a right of removal may be implied from the circumstances.

The agreement preserving the character of a chattel to be annexed to the realty as personalty or giving a right of removal with respect thereto may be implied from the circumstances.[49] Thus the making of such an agreement before annexation may be inferred from the recognition by the landowner, subsequently thereto, of rights in another person,[50] and even, under some circumstances, from his mere acquiescence in the act of annexation.[51]

b. From Making of Chattel Mortgage

A chattel mortgage on articles to be annexed to the realty has been held the equivalent of an agreement preserving the character of the articles as personalty.

The giving of a mortgage on articles before their annexation to the land of the mortgagor has been held to be equivalent to an agreement by him that they shall remain personalty for the purpose of the mortgage.[52]

c. From Conditional Character of Sale

An agreement preserving the character of the chattel or conferring a right to remove it may be implied from a conditional sales contract reserving title in the conditional seller.

Where articles are sold on the condition that the title shall not pass until they are paid for, or until some other condition is fulfilled, their annexation to the realty of the purchaser does not render them a part of the realty and irremovable, but an agreement preserving the character of the articles as personalty or reserving the right of removal thereof is implied,[53] it being said occasionally, however, that the conditional vendor has a right of removal

42. Cal.—Bell v. Bank of Perris, 125 P.2d 829, 835, 52 Cal.App.2d 66, quoting **Corpus Juris.**
Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 255, 124 Conn. 59, 123 A.L.R. 687, quoting **Corpus Juris.**
26 C.J. p 678 note 38.

43. Cal.—Bell v. Bank of Perris, 125 P.2d 829, 835, 52 Cal.App.2d 66, quoting **Corpus Juris.**
26 C.J. p 678 note 38.

44. **Under conditional sales contract**
When buyer's obligation to seller is discharged, the property reverts to its normal condition as a fixture and becomes part of the realty.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

45. U.S.—Sweeney v. Medler, C.C.A. N.M., 78 F.2d 148.

46. Mass.—Curtis v. Riddle, 7 Allen 185.

47. Ind.—Bricker v. Whisler, 117 N.E. 550, 65 Ind.App. 492.

48. **Election of inconsistent remedy**
A right of removal under a conditional sales contract may be lost by the vendor declaring the whole unpaid balance due absolutely as a debt, and foreclosing and selling the whole of the property as real estate of the debtor and mortgagor, who had given a real estate mortgage on the whole of the property as additional security for the debt.—St. Paul Trust Co. v. U. S. Cereal Co., 206 N.W. 385, 165 Minn. 252.
Filing of mechanic's lien claim for article conditionally sold was held to involve waiver of claim to article as chattel.
Ala.—Barbour Plumbing, H. & E. Co. v. Ewing, 77 So. 430, 16 Ala.App. 280.
N.Y.—Kirk v. Crystal, 103 N.Y.S. 17, 118 App.Div. 32, affirmed 86 N.E. 1126, 193 N.Y. 622.

49. Ga.—Wofford Oil Co. v. Weems-Fuller Co., 142 S.E. 887, 166 Ga. 173.
Okl.—Revell's Estate v. Herron, 105 P.2d 426, 187 Okl. 618, 130 A.L.R. 1029.
26 C.J. p 678 note 41.

50. Mass.—Barnes v. Hosmer, 82 N.E. 27, 196 Mass. 323.
26 C.J. p 678 note 42.

51. Mo.—Brown v. Baldwin, 25 S.W. 863, 121 Mo. 126.
26 C.J. p 679 note 50 [c].

52. Tex.—Lubbock Nat. Bank v. Nickels, Civ.App., 63 S.W.2d 764, 766, citing **Corpus Juris**—Texas Power & Light Co. v. Malone, Civ. App., 42 S.W.2d 845, 848, citing **Corpus Juris,** and error dismissed.
26 C.J. p 678 note 44.
Provisions of mortgage
(1) An agreement preserving the status of the chattel was inferred where the mortgage provided that the article should be treated as personalty and that it should be subject to seizure and sale as a chattel on the nonpayment of the debt.—Sword v. Lowe, 13 N.E. 826, 122 Ill. 487.
(2) It does not seem, however, that a lack of a provision as to the status of the chattel would be material.—Sisson v. Hibbard, 10 Hun 420, affirmed 75 N.Y. 542.
Express provisions in chattel mortgage see supra § 13.

53. U.S.—In re Voight-Pros't Brewing Co., C.C.A.Mich., 115 F.2d 733.
Cal.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 877, 127 Neb. 740, citing **Corpus Juris**—Frost v. Schinkel, 238 N.W. 659, 669, 121 Neb. 784, 77 A.L.R. 1381, citing **Corpus Juris.**
N.J.—Manufacturers' Building & Loan Ass'n of Newark v. Public Service Electric & Gas Co., 150 A. 196, 106 N.J.Eq. 68.
N.Y.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.
N.C.—Standard Motors Finance Co. v. Weaver, 153 S.E. 861, 199 N.C. 178.

because the purchaser of the chattel, not being the owner thereof, had no right to annex it, see infra § 24.

That a mortgage is taken on the land, to secure the purchase price of the article, the payment of which was the condition of the sale, has been held not to affect the right of the conditional vendor as regards the article.[54]

d. From Annexation under License

An agreement preserving the character of chattels to be attached to realty or conferring a right to remove them may be inferred from the fact that the attachment is pursuant to license or permission of the owner of the realty.

An agreement that the article annexed shall retain the character of personalty, and be removable as such, is ordinarily implied from the fact that the article or structure was annexed or erected by the license or permission of the landowner.[55]

However, it is not a necessary implication from such license or permission, and will not be inferred when a contrary understanding or agreement appears to exist.[56] Thus the fact that the person making the annexation has himself an interest in the land has been regarded as tending to exclude any inference of an agreement for removal based on the permission of the other owner,[57] a principle which is apparently applied in the case of annexations by a purchaser of the land, in possession thereof, made by permission of the vendor, discussed infra § 43.

Annexation by railroad on right of way. Annexations by a railroad company under express permission, or by force of the grant to it of a right of way, have been regarded as retaining their personal character.[58]

The invalidity of the grant or deed on the faith of which the annexations are made does not ex-

S.C.—Liddell Co. v. Cork, 113 S.E. 327, 120 S.C. 481, 23 A.L.R. 800.
Wash.—King v. Blickfeldt, 191 P. 748, 111 Wash. 508.
26 C.J. p 679 note 47.

54. Tex.—Harkey v. Cain, 6 S.W. 637, 69 Tex. 146.

55. Alaska.—Inland Finance Co. v. Standard Salmon Packers, 7 Alaska 131, 147, citing **Corpus Juris.**
Mont.—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.
26 C.J. p 679 note 50.

Mistake

(1) Agreement is implied that building placed on another's land through mutual mistake remains builder's property, in absence of contrary equity or indication.—Karpik v. Robinson, 214 N.W. 59, 171 Minn. 318.

(2) Mutual mistake as constituting attached article or structure personalty see infra § 25.

Buildings

(1) If a building is erected on land with the landowner's permission, an agreement is implied that it remains the property of the builder in the absence of circumstances showing a contrary intent.—Williamson v. Pye, Tex.Civ.App., 18 S.W.2d 707.

(2) Under Civ.Code art 21 it was held that an agreement whereunder a father erected a building on his children's land in return for the use of the premises must be interpreted according to equity because there is no positive law governing it, and that as so interpreted the building became part of the realty belonging to the children and did not belong to the father.—Bank of Terrebonne v. Engeron, La.App., 140 So. 58.

(3) A house erected by one on the land of another for the use of the former with expectation or agreement that the one erecting the house would ultimately become the owner of the land and the house constitutes a fixture where there is no agreement, express or implied, for right of removal.
Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.
Okl.—Davis v. Spurrier Lumber Co., 15 P.2d 131, 159 Okl. 261.

Public property

(1) City pipe lines not fixture.—City of Vallejo v. Burrill, 221 P. 676, 64 Cal.App. 399.

(2) School house held personalty.—School Dist. No. 11, Laramie County, v. Donahue, 97 P.2d 663, 55 Wyo. 220.

(3) Building, placed on school ground by school board's permission, subject to removal at board's request, never became annexed to soil, but remained personal property.—Wilson v. Modica, Tex.Civ.App., 80 S.W.2d 411.

Time of removal

A reasonable time for removal is allowed after the expiration of the license.—Wright v. MacDonell, 30 S.W. 907, 88 Tex. 140—Moore v. Carey Bros. Oil Co., Tex.Com.App., 269 S.W. 75, 39 A.L.R. 1247—Meers v. Frick-Reid Supply Corporation, Tex.Civ.App., 127 S.W.2d 493, error dismissed, judgment correct.

Theory of trade fixtures applied

Ga.—Gainesville v. Dunlap, 94 S.E. 247, 147 Ga. 344.
26 C.J. p 679 note 50 [e].
Trade fixtures as between landlord and tenant see infra § 38.

56. Ark.—Kilmer v. Kilmer, 41 S.W.2d 779, 184 Ark. 170.
26 C.J. p 680 note 51.

57. Minn.—Merchants' Nat. Bank v. Stanton, 56 N.W. 821, 55 Minn. 211, 43 Am.S.R. 491.
26 C.J. p 680 note 52.
Improvement by husband on wife's land held to be part of realty see infra § 29.

58. Mont.—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., 205 P. 224, 229, 62 Mont. 281, 21 A.L.R. 1080.
26 C.J. p 680 note 54.
"It is the general rule that, where the superstructure of a railroad is placed upon the land of another, the railroad company cannot be said to have intended to attach the rails and other appliances to the land so as to make them a part thereof, and the rule ordinarily applies to side tracks and spurs constructed by the company to aid it in the discharge of its obligations as a public carrier, as well as to those constructed for the purpose of accommodating the owners of manufacturing and like enterprises situated along or near its main line."—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., supra.

Nature of:
- Annexed article as between owner of easement and owner of land subject thereto see infra § 53.
- Railroad property on land of another and purpose of its annexation as determining character as fixture see supra § 11.

Right of:
- Railroad to remove tracks or other equipment generally see the C.J.S. title Railroads § 117, also 51 C.J. p 616 note 90–p 617 note 94.
- Removal as to tracks serving land on which located see supra § 11.

clude a claim that, having been made by permission, they are removable as personalty.[59] However, a grant of permission by one lacking in jural capacity is ineffective for this purpose.[60]

Revocation of the license under which the article was annexed to the land does not in itself deprive the licensee of the right of removal, he being entitled to a reasonable time in which to remove the article.[61] Where a railroad company furnishing materials for construction of a spur track by a mining company on the latter's property without agreement as to the ownership of such track is a mere licensee, it cannot remove the track unless the license is revoked directly on notice by the mining company, or indirectly by cessation of the mining operations which involve use of the track.[62]

Cessation of occupation or intention to cease occupation, on the part of the person who annexed the article or structure, does not deprive him of the right of removal within a reasonable time.[63]

§ 15. —— As between Landlord and Tenant

a. In general
b. Stipulations granting right of removal
c. Stipulations restricting right of removal

a. In General

Rights between landlord and tenant with respect to fixtures may be modified, restricted, or extended by agreement.

As a general rule, the rights as between a landlord and tenant with respect to articles or fixtures annexed to the realty, as discussed infra §§ 33–42, may be modified, restricted, or extended by agreement.[64] Agreements conferring right of removal on the tenant are considered infra subdivision b of this section, while agreements restricting such right of removal are considered infra subdivision c of this section.

b. Stipulations Granting Right of Removal

(1) In general
(2) Time of removal and loss of right

(1) In General

Articles annexed to the realty by a tenant may retain their character as personalty or be subject to removal by agreement between the landlord and tenant.

Between landlord and tenant, as between other persons, an article or structure annexed to the land may retain its character as personalty or be subject to removal by the person who made the annexation, in this case the tenant, by reason of an agreement to that effect,[65] and such agreement may so far fix

59. Minn.—Little v. Willford, 17 N. W. 282, 31 Minn. 173.
26 C.J. p 680 note 55.

60. **Grant by married woman**
Hawaii.—Adams v. Kauwa, 6 Hawaii 280.
Me.—Doak v. Wiswell, 38 Me. 569.
Mass.—Washburn v. Sproat, 16 Mass. 449.
Grant by minor child
N.Y.—Copley v. O'Neil, 1 Lans. 214.

61. Cal.—Watterson v. Cruse, 176 P. 870, 179 Cal. 379.
26 C.J. p 680 note 58.
Parole licensee
Railroad company which furnished materials from which spur tracks were constructed and maintained by a mining company on the latter's property, without any agreement as to the title thereto, was not a mere parol licensee, with power to remove the rails on revocation of the license. —Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., 205 P. 224, 62 Mont. 281, 21 A. L.R. 1080.

62. Mont.—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., supra.

63. U.S.—Skinner v. Ft. Wayne, T. H. & S. W. R. Co., C.C.Ind., 99 F. 465.
26 C.J. p 680 note 59.

64. U.S.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 9 F.2d 599.
Lease and construction contract construed together.—Slane v. Curtis, 269 P. 31, 39 Wyo. 1, rehearing denied 270 P. 541, 39 Wyo. 1.

65. Ark.—Romich v. Kempner Bros. Realty Co., 92 S.W.2d 215, 192 Ark. 454.
Cal.—Clark v. Talmadge, 74 P.2d 825, 23 Cal.App.2d 703—Cone v. Western Trust & Savings Bank, 68 P.2d 981, 21 Cal.App.2d 176—Clawson v. Harris, 52 P.2d 496, 10 Cal.App.2d 521—Roberts v. Mills, 205 P. 872, 56 Cal.App. 556.
Ky.—American Rolling Mill Co. v. Carol Mining Co., 137 S.W.2d 725, 282 Ky. 64.
Or.—General Petroleum Corporation of California v. Schefter, 16 P.2d 645, 141 Or. 349.
Pa.—Prudential Ins. Co. of America v. Kaplan, 198 A. 68, 330 Pa. 33.
Tex.—Compton v. W. F. & J. F. Barnes Lumber Co., Civ.App., 99 S.W.2d 634, 636, citing **Corpus Juris**—Loftus v. Ray, Civ.App., 46 S.W.2d 1034, error dismissed—Allen v. Selman, Civ.App., 10 S.W.2d 173.
Wash.—Sweet v. Lease, 280 P. 742, 154 Wash. 25.
Wis.—Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 207 N.W. 276, 189 Wis. 120.
Wyo.—Slane v. Curtis, 269 P. 31, 39 Wyo. 1, rehearing denied 270 P. 541, 39 Wyo. 1.
26 C.J. p 710 note 96.
Such agreements valid
Cal.—Dauch v. Ginsburg, 6 P.2d 952, 214 Cal. 540—Cone v. Western Trust & Savings Bank, 68 P.2d 981, 21 Cal.App.2d 176.
Agreement implied
(1) Such a stipulation may be inferred from the circumstances.—Galbreath v. Thayer, 113 So. 180, 147 Miss. 556, 53 A.L.R. 288—26 C.J. p 711 note 3.
(2) A provision of a lease that lessee does not have right to remove specified buildings constructed by lessee gives rise to implication that lessee has no right to remove other buildings constructed by him.—Galbreath v. Thayer, supra.
Renewal lease
(1) Notwithstanding fixtures placed by tenant might have become part of realty and belonged to landlord on expiration of original lease, landlord could by subsequent lease waive right thereto and grant the tenant a right to remove the fixtures during new term.—McComish v. Kaufman, 185 P. 476, 43 Cal.App. 507.
(2) Lease provision authorizing lessee to remove "all fixtures, equipment and other property of lessee

the rights of the parties with respect thereto as to make inapplicable the common-law rules governing fixtures.[66]

The agreement may be effective, even though entered into after the annexation is complete.[67]

Injury to premises. If there is a stipulation clearly giving to the tenant the right to remove annexations of a named character, the fact that the removal will result in injury to the leased premises is immaterial.[68] The language of the stipulation may, however, call for a different construction.[69] So the fact that the right to remove trade fixtures otherwise existing without regard to agreement, see infra § 38, is provided for by the lease does not enlarge or extend such right so as to allow removal of a fixture which would cause substantial injury to the freehold.[70]

Annexation by consent. In accordance with the rule stated supra § 14 d, the fact that the annexation by the tenant under a lease was with the landlord's consent has occasionally been regarded as justifying the inference of a stipulation for the right of removal.[71] The fact, however, that the tenant has an estate in the land during the existence of which he may enjoy the benefit of the annexation makes the inference less imperative than when he has no estate therein.[72]

Conditional right of removal. Occasionally the lease gives to the tenant in terms the right to remove fixtures only on the performance of some condition precedent on his part.[73] Such a provision has been held to displace the tenant's common-law

placed on . . . premises by lessee during term of this or any previous lease" gave lessee right to remove steel structural filling station building erected by lessee during period of previous lease.—Texas Co. v. Cason, 193 S.E. 898, 56 Ga.App. 836.

Subsequent lease

Where landlord's agent represented to prospective tenant that, if tenant bought fixtures from third person, they would remain personal property during and after expiration of lease, fixtures continued to be personal property, although not removed during term.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.

Lease of sprinkler system

Building owner may lawfully contract for installation and lease of fire sprinkler system and agree that contract binds assigns, and that on default lessor of sprinklers may remove or shut off sprinklers.—Phillips Co. v. Wagner, 155 So. 842, 115 Fla. 631.

Machinery

Under agreement giving tenant right to remove machinery, an air hose pipe affixed to a compressor, not attached to the realty, and indispensable to the operation of the compressor, was held a part of compressor, and removable.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

Structures erected by tenant

Where lessor and lessee expressly or impliedly so agree, structures placed on leased premises by lessee remain lessee's personal property.—Helvering v. Atlas Life Ins. Co., C.C.A., 78 F.2d 166.

"Tenant's fixtures" defined see supra § 1.

Necessity for writing

(1) As discussed in the C.J.S. title Frauds, Statute of § 74, also 27 C.J. p 196 note 27 [a], and p 239 notes 84, 85, a stipulation granting to the tenant the right to remove an article annexed by him is not within the statute of frauds, and consequently need not be in writing.

(2) However, as stated in Evidence § 919, an agreement conferring a right of removal cannot be added to a lease by parole evidence.

66. N.D.—Warner v. Intlehouse, 235 N.W. 638, 640, 60 N.D. 542, citing **Corpus Juris.**
Tex.—Loftus v. Ray, Civ.App., 46 S.W.2d 1034, error dismissed.
26 C.J. p 711 note 97.

As indicating intent

A provision that the fixtures put in by the tenant were his property and might be removed at the expiration of the lease might not convert into removable fixtures things ordinarily not removable, but the provision emphasizes the intention of the parties that the tenant was about to make additions for the purposes of the business, which would be regarded as fixtures and be removable as such.—In re New York City, 84 N.E. 1105, 192 N.Y. 295, 127 Am.S.R. 903, 18 L.R.A.,N.S., 423, affirming 92 N.Y.S. 8, 101 App.Div. 527.

67. N.D.—Warner v. Intlehouse, 235 N.W. 638, 60 N.D. 542.

68. Tex.—Gulf Oil Corporation v. Horton, Civ.App., 143 S.W.2d 132, 134, quoting **Corpus Juris.**
26 C.J. p 711 note 98.

69. Mo.—Powell v. McAshan, 28 Mo. 70—Red Diamond Clothing Co. v. Steidemann, 152 S.W. 609, 169 Mo. App. 306.
26 C.J. p 711 note 99.

"Movable fixtures" which lessee was given permission to remove were held not to include alterations involving removal of doors and their frames, extension of inclosures and doors into the street, and countersinking of marble platforms.—Excelsior Brewing Co. v. Smith, 110 N.Y.S. 8, 125 App.Div. 668, affirmed 92 N.E. 1084, 198 N.Y. 519.

70. N.Y.—Davies v. Iroquois Gas Corporation, 292 N.Y.S. 111, 115, 161 Misc. 103, reversed 288 N.Y.S. 927, 248 App.Div. 670, reversed 4 N.E.2d 742, 272 N.Y. 572.

"Such removal clause does not 'convert into a removable fixture that which ordinarily would be a permanent irremovable improvement to the freehold.' "—Davies v. Iroquois Gas Corporation, supra.

71. Tex.—Wright v. Macdonnell, 30 S.W. 907, 88 Tex. 140.
26 C.J. p 711 note 5.

That lease was for purpose of erecting structure, and contained option in lessor to purchase structure, was regarded as making structure personal property, removable after end of term if not purchased.—Calder's Park Co. v. Corless, 172 P. 310, 51 Utah 586.

72. Mass.—Howard v. Fessenden, 14 Allen 124.
26 C.J. p 711 note 6.

73. Okl.—Shelton v. Jones, 167 P. 458, 66 Okl. 83, L.R.A.1918A 830.
26 C.J. p 711 note 7.

Payment of rent

(1) A provision for payment of rent due as a condition on the right of removal does not prevent removal of fixtures on vacation of premises before expiration of term without payment of rent to fall due for balance of term, where there is no showing that tenant would not be able to pay rent as it fell due.—Reed Oil Co. v. Schnable, 271 S.W. 957, 168 Ark. 863—26 C.J. p 711 note 7 [b].

(2) A provision that the tenant might remove trade fixtures provided there was no rent in arrear was held to displace the tenant's common-law right of removal, and, the fixtures having been removed by the tenant's receiver in insolvency and sold, the landlord was entitled to a lien on the

right of removal discussed infra §§ 33–40, and in effect to restrict it.[74]

Effect as rendering article personalty. The cases are ordinarily to the effect that an article which is annexed by the tenant, subject to a stipulation granting him the right of removal, retains its chattel character, as long as the right of removal continues,[75] as between the parties,[76] although it may lose its chattel character, if so closely annexed as to become an integral part of the land.[77]

There are, however, cases which appear to regard an article annexed by the tenant, even though removable by agreement, as constituting part of the land,[78] at least as to third persons,[79] and occasionally the article so annexed, or the tenant's interest therein, has been referred to as a "chattel real."[80]

(2) Time of Removal and Loss of Right

A tenant's right to remove articles annexed to the realty, conferred by agreement, may be lost under various circumstances as in the case of his failure timely to exercise it.

The tenant's right to remove articles attached to the realty, by reason of express agreement, may be lost by his surrender of the leasehold without exercising his right of removal.[81] It has been held, however, that a mere abandonment of the leasehold does not of itself deprive the tenant of his right to remove the fixtures or vest the lessor with title thereto.[82]

Forfeiture. It has been held that a right of removal conferred by agreement is not lost by reason of a forfeiture of the leasehold,[83] unless the language of the stipulation as to removal otherwise provides.[84]

Effect of new lease. The authorities are not in accord on the effect of a new lease which does not reserve the right of removal on such a right contained in a former lease between the parties. Some of the cases hold that such right of removal is not lost by the lessee's acceptance of a new lease which is silent on the subject,[85] while others hold that, if the lease is renewed without reserving the tenant's rights, he loses the benefit of a provision authorizing the removal of fixtures.[86] Of course, if the

proceeds for rent in arrear.—In re Delaware Candy Co., 85 A. 1069, 10 Del.Ch. 142.

(3) The fact, however, that the lease gave a right to remove improvements only "if the conditions of this lease are fully complied with" was held not to render them irremovable in equity because the rent, stipulated to be paid in advance, was thirteen days in arrear before a tender thereof was made.—Estabrook v. Hughes, 1 N.W. 132, 8 Neb. 496.

Casings in producing well

Oil and gas lease giving lessee "the right to remove at any time all machinery and fixtures placed on said premises from any exhausted or dry well or other operation including the right to draw and remove casing" did not entitle lessee to remove casings from a gas or oil producing well, the casing having become a fixture when production was reached.—Wisconsin-Texas Oil Co. v. Clutter, Tex. Civ.App., 258 S.W. 265, reversed on other grounds, Com.App., 268 S.W. 921.

Conditional tender of performance insufficient

A provision that the lessee shall have the right of removal, "all covenants being complied with" on his part, has been regarded as rendering the performance of the covenants a condition precedent to the removal, so that a tender of performance on condition that the lessor would permit the removal was insufficient.—Clemens v. Murphy, 40 Mo. 121—26 C.J. p 711 note 8.

74. Del.—In re Delaware Candy Co., 85 A. 1069, 10 Del.Ch. 142.

75. U.S.—Glenn v. W. C. Mitchell, C.C.A.N.D., 9 F.2d 599.
Alaska.—Inland Finance Co. v. Standard Salmon Packers, 7 Alaska 131.
Ark.—Taylor v. Walker, 231 S.W. 550, 149 Ark. 134.
Cal.—Clawson v. Harris, 52 P.2d 496, 10 Cal.App.2d 521.
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
Mo.—Sanderson v. Nunn, App., 259 S. W. 892.
Tex.—Loftus v. Ray, Civ.App., 46 S. W.2d 1034, error dismissed—Allen v. Selman, Civ.App., 10 S.W.2d 173.
26 C.J. p 711 note 10.

Right of removal not right to compensation

N.Y.—Goldberg v. Himlyn, 201 N.Y.S. 837, 121 Misc. 580.

Effect of lessor's lien

Agreement that landlord was to have a lien for unpaid rents and royalties on property of tenant, as to which lease gave him right of removal, does not change character of article as personalty subject to lessor's lien when tenant defaults in payment of rent.—American Rolling Mill Co. v. Carol Mining Co., 137 S. W.2d 725, 282 Ky. 64.

76. Wis.—Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 207 N.W. 276, 189 Wis. 120.

77. Or.—Hershberger v. Johnson, 60 P. 838, 37 Or. 109.

78. Mass.—Trask v. Little, 64 N.E. 206, 182 Mass. 8.
Nev.—Prescott v. Wells, 3 Nev. 82.
26 C.J. p 712 note 12.

79. Ill.—Dobschuetz v. Holliday, 82 Ill. 371.
26 C.J. p 712 note 12 [a].

80. Ind.—Lincoln Nat. Bank & Trust Co. of Fort Wayne v. Nathan, 19 N.E.2d 243, 215 Ind. 178, superseding 14 N.E.2d 731.
N.J.—Newhoff v. Mayo, 23 A. 262, 48 N.J.Eq. 619, 27 Am.S.R. 455.
26 C.J. p 712 note 13.

81. Ky.—McClelland v. Murphy, 264 S.W. 733, 204 Ky. 329.
26 C.J. p 712 note 22.

Effect of merger

Conceding that the merger of the leasehold in the reversion by reason of a conveyance of the latter to the tenant would terminate the right of removal, the disaffirmance of such conveyance on account of the grantor's infancy would reëstablish the right.—Beauchamp v. Bertig, 119 S. W. 75, 90 Ark. 351, 23 L.R.A.,N.S., 659.

82. Tex.—Pearson v. Black, Civ.App., 120 S.W.2d 1075.

Agreement conferring right to remove at will

Tex.—Pearson v. Black, supra.

83. Pa.—Wick v. Bredin, 42 A. 17, 189 Pa. 83.
26 C.J. p 712 note 23.

84. Ill.—Frank v. Woodward, 210 Ill. App. 98.

85. Iowa.—Ray v. Young, 142 N.W. 393, 160 Iowa 613, 46 L.R.A.,N.S., 947, Ann.Cas.1915D 258.
26 C.J. p 713 note 26.

86. N.Y.—Talbot v. Cruger, 45 N.E. 364, 151 N.Y. 117.
26 C.J. p 713 note 30.

renewal lease or extension of the term is expressly made subject to the same terms and conditions as the original lease, the right of removal is preserved,[87] as it is in a case where a tenant continues to occupy the premises after the term by permission of the lessor under circumstances giving rise to a presumption or inference that the extended term is on the same terms and conditions as the original lease.[88] However, the right to remove is lost by failure timely to act thereon, notwithstanding the tenant continues to occupy the premises without the consent of the landlord.[89]

Time for removal generally. Apart from, or without reference to, any stipulation as to the time when a tenant's right of removal, which has been conferred by agreement, may be exercised, it has been held that, notwithstanding the tenant may be guilty of a technical trespass on the land if he undertakes to remove the fixtures after expiration of his term or after relinquishing possession, he nevertheless retains title to them as personalty.[90] There are cases, however, that hold that, under a right of removal contained in a lease, the removal can be made only during the term of the lease and before relinquishment of possession,[91] or while the tenant is still in possession.[92]

Other cases hold that the right of removal must be exercised within the term, or within a reasonable time thereafter,[93] or within a reasonable time.[94]

Express provision as to time. An express provision as to the period after the expiration of the lease within which the removal is to take place has been regarded as precluding a removal thereafter.[95] However, a provision for removal "at any time" has been construed to permit a removal only within a reasonable time after the expiration of the term, but not thereafter.[96] So, a clause authorizing re-

87. Mo.—Neiswanger v. Squier, 73 Mo. 192.
Utah.—Young v. Consolidated Impl. Co., 65 P. 720, 23 Utah 586.

Month to month tenancy

Where lease provided that month to month tenancy after expiration of lease should be otherwise on all the conditions thereinbefore specified so far as applicable, the right, given by lease, of removal of equipment did not lapse with termination of original lease.—Schultz v. England, C. C.A.Cal., 106 F.2d 764.

88. Ky.—McClelland v. Murphy, 264 S.W. 733, 204 Ky. 329.
26 C.J. p 713 note 28.

89. Ark.—Wilson v. Davis, 153 S.W. 2d 171, 202 Ark. 827.

90. Ala.—Broaddus v. Smith, 26 So. 34, 121 Ala. 335, 77 Am.S.R. 61.
26 C.J. p 712 note 18.

91. Ky.—McClelland v. Murphy, 264 S.W. 733, 735, 204 Ky. 329, citing **Corpus Juris.**
26 C.J. p 712 note 19.

92. N.Y.—Talbot v. Cruger, 45 N.E. 364, 151 N.Y. 117.
26 C.J. p 712 note 21.

93. Or.—General Petroleum Corporation of California v. Schefter, 16 P. 2d 645, 141 Or. 349.
Pa.—Black v. Hoffman, 188 A. 149, 324 Pa. 193.
26 C.J. p 712 note 23 [a].

Oil and gas lease

Ky.—Patton v. Woodrow, 248 S.W. 226, 198 Ky. 85.

94. Cal.—Cone v. Western Trust & Savings Bank, 68 P.2d 981, 983, 21 Cal.App.2d 176, citing **Corpus Juris.**
26 C.J. p 712 note 20.

95. U.S.—Smith v. U. S., C.C.A.Okl., 113 F.2d 191.
26 C.J. p 713 note 33.

As material covenant

R.I.—Dwelly v. Rocklin, 133 A. 85, 47 R.I. 327.

Stipulation as to reasonable time

(1) The parties to a lease may stipulate regarding what shall constitute a reasonable time within which lessee is entitled to remove fixtures.—Smith v. U. S., C.C.A.Okl., 113 F.2d 191.

(2) Failure to remove within such reasonable time results in loss of right of removal.—Smith v. U. S., supra.

(3) The lease, requiring removal within reasonable time after termination of lease, held that the lessor having asserted a forfeiture and notified tenant to remove within sixty days, the latter might remove the articles shortly after the expiration of the sixty days, this being a reasonable time under the circumstances.—Cowgill v. Little Persimmon Min. Co., Mo.App., 183 S.W. 346.

96. Ind.—Perry v. Acme Oil Co., 88 N.E. 859, 44 Ind.App. 207.
W.Va.—Gartland v. Hickman, 49 S. E. 14, 56 W.Va. 75, 67 L.R.A. 694.

What constitutes reasonable time

(1) What is reasonable time after expiration of lease within which lessee is entitled to remove fixtures is to be determined from all circumstances of particular case.
Okl.—Stevens v. Iverson, 66 P.2d 12, 179 Okl. 401—Stephens v. Lundy, 44 P.2d 843, 172 Okl. 79.
Tex.—Armstrong v. Federal Supply Co., Civ.App., 17 S.W.2d 170.

(2) Time alone is not the determinable factor.—Stephens v. Lundy, supra.

Oil and gas leases

Ind.—Michaels v. Pontius, 137 N.E. 579, 83 Ind.App. 66.
Ky.—Kentucky Block Cannel Coal Co. v. Stacy, 98 S.W.2d 61, 266 Ky. 59.
Okl.—Stevens v. Iverson, 66 P.2d 12, 179 Okl. 401—Stephens v. Lundy, 44 P.2d 843, 172 Okl. 79.
Tex.—Armstrong v. Federal Supply Co., Civ.App., 17 S.W.2d 170—Terry v. Crosswy, Civ.App., 264 S.W. 718.
26 C.J. p 713 note 34 [a].

After termination by abandonment

(1) Lessee had only reasonable time after abandonment within which to remove fixtures whether lease terminated by virtue of its own provisions, or, as a matter of law, as result of abandonment.—Kentucky Block Cannel Coal Co. v. Stacy, 98 S. W.2d 61, 266 Ky. 59.

(2) Lapse of five or six years from date of abandonment by cessation of operations was held unreasonable time precluding removal of fixtures.—Michaels v. Pontius, 137 N.E. 579, 83 Ind.App. 66.

(3) Intention to abandon oil well casing could not be implied from lessee's failure to remove casing, which had been drawn, for fourteen months after lease expired.—Schaffner v. Benson, 166 N.E. 881, 90 Ind. App. 420.

Forfeiture

(1) A right of removal at any time was held to continue a reasonable time after enforcement of forfeiture for nonpayment of rent.—Gartland v. Hickman, 49 S.E. 14, 56 W.Va. 75, 67 L.R.A. 694.

(2) Failure of lessee to remove fixtures within reasonable time after expiration of lease resulted in forfeiture, making them part of the

moval "at the end of the term," or "upon termination of the term," has been regarded as enabling the tenant to remove within a reasonable time after the end of the term.[97] The latter clause has also been held to authorize removal before as well as at the end of the term,[98] but not after enforcement by the landlord of a forfeiture for the breach of a condition.[99]

Prevention of removal. As in the case when articles are removable because affixed for purposes of trade, see infra § 41, so when they are removable by express stipulation, the fact that the landlord prevents their removal at the end of the term, or induces the tenant, by act or word, not to remove them, is to be considered in determining whether the articles were removed with a sufficient degree of promptitude.[1]

c. Stipulations Restricting Right of Removal

A tenant's right to remove articles annexed by him to the leased premises may be restricted or extinguished by agreement with his landlord.

A tenant's right to remove fixtures annexed to the realty by the tenant, as discussed infra §§ 33–40, may be restricted or extinguished by express agreement between the landlord and tenant,[2] and, as dis-

realty and vesting the owner of the fee with title thereto.—Terry v. Crosswy, Tex.Civ.App., 264 S.W. 718.

97. Cal.—Cone v. Western Trust & Savings Bank, 68 P.2d 981, 983, 21 Cal.App.2d 176, citing **Corpus Juris.**
26 C.J. p 713 note 35.

Effect of additional provisions
Under lease containing provisions for redelivery of premises in good order and for removal by lessee of buildings, tanks, and certain other property at any time during term, and provision that "upon the termination" of lease lessee should surrender possession and remove such property, lessee could remove such property within reasonable time after termination of lease.—Cone v. Western Trust & Savings Bank, 68 P. 2d 981, 21 Cal.App.2d 176.

98. Ark.—Buffalo Zinc & Copper Co. v. Hale, 206 S.W. 661, 136 Ark. 10.
Kan.—Alexander v. Touhy, 13 Kan. 64.
N.C.—Causey v. Orton, 88 S.E. 513, 171 N.C. 375.
26 C.J. p 713 note 36.

99. Cal.—Whipley v. Dewey, 8 Cal. 36.
N.J.—West Shore R. Co. v. Wenner, 68 A. 225, 75 N.J.Law 494, 127 Am. S.R. 806.
26 C.J. p 713 note 37.

1. Ala.—Chalifoux v. Potter, 21 So. 322, 113 Ala. 215.
Ill.—Mason v. Fenn, 13 Ill. 525.
Tenn.—Cheatham v. Plinke, 1 Tenn. Ch. 576.

Delay not excused
(1) That lessee was delayed in obtaining land to which to remove cottages by lessor's negotiations to obtain the same land is no ground for relief against forfeiture of cottages which were not removed within the required time, in absence of fraud.—Dwelly v. Rocklin, 133 A. 85, 47 R.I. 327.

(2) That lessor terminated many leases on the same day, thus making it impossible for tenants to obtain moving facilities, was held not an accident or mistake entitling lessees to relief against forfeiture of buildings which they were entitled to remove, where, if tenants had acted separately, some of them might have removed their buildings within time, and where the inability to move the buildings was due to delay of tenants, acting in concert, in securing new lots for the buildings.—Dwelly v. Rocklin, supra.

2. U.S.—Reber v. Conway, Pa., 203 F. 12, 121 C.C.A. 364, affirming, D.C., In re Bahl's Ice Cream & Baking Co., 195 F. 986.
Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.
Conn.—Beach v. Beach Hotel Corporation, 156 A. 865, 113 Conn. 716.
Ga.—Commercial Inv. Co. v. G. G. Henderson Furniture Co., 153 S.E. 86, 41 Ga.App. 402.
La.—Lighting Fixture Supply Co. v. Pacific Fire Ins. Co. of New York, 146 So. 35, 176 La. 499.
Pa.—Isman v. Hanscom, 66 A. 329, 217 Pa. 135.
Wash.—Olympia Lodge No. 1, F. & A. M. v. Keller, 252 P. 121, 142 Wash. 93, 52 A.L.R. 795.
Wyo.—Slane v. Curtis, 269 P. 31, 39 Wyo. 1, rehearing denied 270 P. 541, 39 Wyo. 1.
26 C.J. p 714 note 40.

Agreement prevails over statute
La.—Lighting Fixture Supply Co. v. Pacific Fire Ins. Co. of New York, 146 So. 35, 176 La. 499.

On termination of lease
(1) Agreement for surrender of fixtures in consideration of cancellation of lease and release from further payment of rent deprives tenant of any right to remove fixtures.—Hirschfeld v. Cherry, 261 N.W. 324, 272 Mich. 268.

(2) Lessor, on termination of lease through foreclosure, was held entitled to furnishings, given to lessor by terms of lease, where parties had expressly made lease subordinate to mortgage.—Beach v. Beach Hotel Corporation, 156 A. 865, 113 Conn. 716.

Appurtenant fixtures and equipment
Lease, providing that building and all appurtenant fixtures and equipment should be deemed attached to freehold, did not cover restaurant equipment readily removable without permanently damaging freehold.—Mine Realty Corporation v. 2131 Broadway Corporation, 1 N.Y.S.2d 979, 253 App.Div. 299.

Buildings
Provision against removal of buildings erected by manufacturing company held to include materials which went into construction of buildings, and also such fixtures and attachments as were built into and constituted a part of the plant and could be utilized for no other purpose.—Niagara Falls Hydraulic Power & Mfg. Co. v. Schermerhorn, 111 N.Y.S. 576, 60 Misc. 209, affirmed 117 N.Y.S. 10, 132 App.Div. 442, affirmed 91 N.E. 1118, 197 N.Y. 542.

Grandstand
Lessor's right to grandstand erected by tenant under terms of lease does not include seats fastened to grandstand by screws and easily removable.—Handlan v. Stifel, Mo. App., 232 S.W. 245.

Trade fixtures not within agreement
Provision in lease that lessee might not without written consent of lessors remove any of buildings then on the land did not preclude removal by tenant of trade fixtures placed by tenant on premises.—Moffat v. White, 279 N.W. 732, 203 Minn. 47.

Receiver of tenant bound
(1) As respects whether manufacturing equipment installed in plant by original lessee belonged to lessor or receivers of corporation which had assumed covenants of lease, receivers stood in position of original lessee and were bound by such covenants.—Union Bldg. Co. of Pennsylvania v. Pennell, C.C.A.Pa., 78 F.2d 959.

(2) Lessor's waiver of right to claim default against lessee's receiver was held not to destroy lessor's right under lease to recover furnishings on termination of lease.—Beach

cussed supra subdivision b of this section, a conditional right of removal in the tenant may operate to restrict rather than to enlarge his common-law right of removal.

Construction generally. Clauses restricting the tenant's right of removal should be strictly construed[3] in favor of the tenant,[4] and cannot be extended by implication.[5] Plain terms expressive of a clear intent that trade fixtures placed on the leased premises by the tenant shall become property of the lessor are required before such construction will be adopted.[6]

The sense in which the parties used the words constituting the restrictive clause must be determined from the agreement as a whole.[7]

Delivery of premises in repair or condition. It has been held that a covenant by the lessee to yield up the premises in repair should not, in the ordinary case, preclude the tenant from removing fixtures which he is otherwise entitled to remove.[8] So a covenant to keep in repair all buildings and erections, and to surrender them at the end of the lease, has been held to apply only to buildings and erections previously on the land and those subsequently placed there by the lessor.[9] On the other hand, the fact that the removal of an article annexed would involve an injury to the premises leased has been regarded as rendering applicable a covenant to deliver up the premises in as good condition as at the time of the lease, so as to preclude removal.[10]

Purchase option to lessee. That the lessee is given an option to purchase the premises at a price named does not prevent the removal by the tenant of fixtures annexed by him which are ordinarily removable.[11] However, where the lessee actually agreed to purchase the premises and subsequently annexed fixtures, he was regarded as making the annexation as purchaser and not as tenant and as not having the right of removal.[12]

When the lease, while giving the lessee the right to purchase the premises at a certain price, provided that, should he fail to do so, the fixtures should go to the lessor, the fact that the lessee agreed to purchase the premises was held not to entitle him to the fixtures if he made default in payment of the price.[13]

Sale or option to lessor. The right to remove existing fixtures by virtue of an agreement may be surrendered by agreement,[14] as where tenant agrees not to remove the property at the termination of the lease, but to sell it to the lessor.[15]

An option in the lessor to appropriate any alterations and improvements has been held not to require him to give notice of his exercise of the option at the time that the alterations and improvements were made, it being sufficient that a notice to that effect was given four weeks before the end of the term.[16]

Provision for valuation. Where the landlord was, by the terms of the lease, required either to grant an extension of the term or to take the fixtures at a valuation, that he did grant an extension

v. Beach Hotel Corporation, 156 A. 865, 113 Conn. 716.

3. Md.—Rasch v. Safe Deposit & Trust Co., 111 A. 121, 136 Md. 435.

4. Pa.—Lindsay v. Curtis Pub. Co., 84 A. 783, 236 Pa. 229, 42 L.R.A., N.S., 546.
26 C.J. p 714 note 41.

5. Md.—Rasch v. Safe Deposit & Trust Co., supra.

6. U.S.—In re Mount Holly Paper Co., C.C.A.Pa., 110 F.2d 220.

7. U.S.—Schultz v. England, C.C.A. Cal., 106 F.2d 764.

"Movable furniture" excepted

(1) "Movable furniture put in at the expense of the lessee" within lease providing that any additions, alterations, and improvements except "movable furniture put in at the expense of the lessee" should attach to the realty included equipment which was connected to leased building by pipes or by wiring, and belting, but which could be removed without injury to the building.—Schultz v. England, supra.

(2) Office carpet tacked to strips nailed to wooden plugs in concrete floor was held "movable office furniture," within lease excepting movable office furniture from clause restricting removal by tenant.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536.

8. Ind.—Newcastle Theatre Co. v. Ward, 104 N.E. 526, 57 Ind.App. 473.
N.J.—Fox v. Lynch, 64 A. 439, 71 N.J.Eq. 537.
26 C.J. p 714 note 47.

Substitute for worthless fixture

A covenant to restore the premises in as good a state of repair as that in which he received them was held not to prevent the removal of a boiler and attachments thereto, substituted for another boiler on the premises at the time of the lease, which was worthless and could not be repaired.—Mason v. Fenn, 13 Ill. 525.

9. U.S.—Brown v. Reno Electric Light & Power Co., C.C.Nev., 55 F. 229.
26 C.J. p 714 note 48.

10. Mich.—Murray v. Moross, 27 Mich. 203.

"This clause . . . required the tenant to leave on the premises all additions to the . . . building and all structures in the nature of trade fixtures which could not be removed without injury to the building."—Delano v. Tennent, 244 P. 273, 138 Wash. 39, 45 A.L.R. 766.

11. U.S.—Brown v. Reno Electric Light & Power Co., C.C.Nev., 55 F. 229.
Mass.—Holbrook v. Chamberlin, 116 Mass. 155, 17 Am.R. 146.

12. Miss.—Perkins v. Swank, 43 Miss. 349.

13. Cal.—Merritt v. Judd, 14 Cal. 59.

14. Cal.—Bank of America Nat. Trust & Savings Ass'n v. New York Life Ins. Co., 61 P.2d 364, 16 Cal.App.2d 719.

15. Cal.—Bank of America Nat. Trust & Savings Ass'n v. New York Life Ins. Co., supra.

16. Pa.—Isman v. Hanscom, 66 A. 329, 217 Pa. 133.

was held not to affect the tenant's right to remove trade fixtures at the end of the extended term.[17]

That the lease provided for the purchase of the fixtures by the landlord at a valuation was regarded as not affecting the tenant's right of removal if the landlord took no steps to effect the purchase.[18]

Stipulations as to "improvements." A clause giving to the lessor all "improvements" placed by the tenant on the premises has been regarded as including every addition, alteration, erection, or annexation, made by the lessee, "improvements" being said to be a more comprehensive term than "fixtures."[19] However, the term "improvements" has also been treated as synonymous with "fixtures."[20]

It has been said or held that to be an "improvement" the article must savor of the realty,[21] and to be so attached as to become a part of the realty.[22] Hence it does not include mere loose articles about the premises in no way attached to the freehold.[23]

It has been regarded as including,[24] and not including,[25] trade fixtures.

The word "improvements" may obviously be limited in scope by other language of the instrument.[26]

Stipulations as to "fixtures." The word "fixtures," used in a stipulation providing for the same to go to the lessor on expiration of the term, does not ordinarily include articles not actually annexed to the soil.[27]

In a stipulation that the tenant should not remove "any repairs, improvements, additions or fixtures," the word "fixtures" was held to apply only to permanent ameliorations, such as were covered by the other words used, and not to include trade fixtures.[28]

Stipulated improvements by tenant. Unless qualified by other provisions,[29] a provision in the lease that the lessee shall make improvements of a certain character is ordinarily construed as precluding him from removing them at the end of the term, it being presumed that such a provision is intended to benefit the lessor, and no such benefit accruing to him if the improvements are removable.[30]

"Erections" and "additions." It has been held that a covenant by the lessee to deliver up at the end of the term "all future erections or additions" to or on the premises did not preclude the removal of trade fixtures, but was to be confined to new buildings erected, or old buildings added to, during the term.[31]

A provision that any addition or alteration to a certain frame building on the premises should belong to the lessor was construed as not applying to a brick engine house, not connected with the building except by belts and shafting, transmitting power to machinery in the building.[32]

Alterations. Occasionally the word "alterations" is used in a stipulation of this character either by itself[33] or in connection with "improvements" or

17. N.Y.—Howe's Cave Ass'n v. Houck, 21 N.Y.S. 40, 66 Hun 205, affirmed 36 N.E. 740, 141 N.Y. 606.

18. R.I.—Pawtucket Inst. for Sav. v. Almy, 13 R.I. 68.
26 C.J. p 715 note 58.

19. Wash.—Olympia Lodge No. 1, F. & A. M. v. Keller, 252 P. 121, 142 Wash. 93, 52 A.L.R. 795.
26 C.J. p 715 note 65.

20. N.J.—Ames v. Trenton Brewing Co., 38 A. 858, 56 N.J.Eq. 309, affirmed 45 A. 1090, 57 N.J.Eq. 347.
26 C.J. p 716 note 66.

21. Wash.—Olympia Lodge No. 1, F. & A. M. v. Keller, 252 P. 121, 142 Wash. 93, 52 A.L.R. 795.

22. Minn.—Cohen v. Whitcomb, 170 N.W. 851, 142 Minn. 20.
N.J.—Ames v. Trenton Brewing Co., 38 A. 858, 56 N.J.Eq. 309, affirmed 45 A. 1090, 57 N.J.Eq. 347.
Scenery in theater not attached held not within covenant as to alterations, additions, changes, or improvements.—Academy of Music Co. v. Mishler, 17 Pa.Dist. 630.

23. Wash.—Olympia Lodge No. 1, F. & A. M. v. Keller, 252 P. 121, 142 Wash. 93, 52 A.L.R. 795.

24. Wash.—Olympia Lodge No. 1, F. & A. M. v. Keller, supra.

25. Ala.—Walker v. Tillis, 66 So. 54, 188 Ala. 313, L.R.A.1915A 654.

26. Mich.—Wright v. La May, 118 N.W. 964, 155 Mich. 119.
26 C.J. p 716 note 69.
Permanent improvements except machinery
Under provision giving landlord permanent improvements except machinery which lessee could remove, buildings and tracks go to lessor as part of realty.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

27. U.S.—Ex parte Morrow, D.C. Mass., 17 F.Cas.No.9,850, 1 Lowell 386.
Substantial attachment unnecessary
"Fixtures attached to the realty" held to apply to articles not substantially attached.—Shiels v. Byrd, 153 N.Y.S. 728, 168 App.Div. 112.

28. Tenn.—Cubbins v. Ayres, 4 Lea 329.
26 C.J. p 715 note 64.

29. Pa.—Hey v. Bruner, 61 Pa. 87.
26 C.J. p 717 note 74 [c].

30. Iowa.—Fletcher v. Kelly, 55 N.W. 474, 88 Iowa 475, 21 L.R.A. 347.
26 C.J. p 716 note 74.

31. Mass.—Holbrook v. Chamberlin, 116 Mass. 155, 17 Am.R. 146.
Dynamos and other electrical machinery used to furnish power for an electric light system extending to other buildings were not "erections and additions" within a removal clause.—Liebe v. Nicolai, 48 P. 172, 30 Or. 364.

32. Mass.—Smith v. Whitney, 18 N.E. 229, 147 Mass. 479.

33. **Trade fixtures not included**
Provision that lessee should not make alterations held to apply only to substantial alterations, and not to affect the tenant's right to remove as a trade fixture an engine substituted.—Andrews v. Day Button Co., 30 N.E. 831, 132 N.Y. 348.

other words of the same general character.[34]

Conditional clause. If the lease merely gives the fixtures to the landlord on the happening of a particular contingency,[35] or merely a right to take them at a valuation named or to be named,[36] he acquires, it seems, no title thereto until the contingency happens or payment is made. A stipulation that the fixtures annexed by the tenant shall become the landlord's property in case the tenant makes default in the payment of rent has been regarded in equity as merely creating a lien for the rent on the fixtures[37] while at law the landlord has been regarded as entitled to take possession on the tenant's default.[38]

Title to articles during term. When it is stipulated that articles or structures, ordinarily removable by the tenant, shall belong to the landlord on the expiration of the term, the latter, it seems, acquires a vested interest in such articles or structures immediately on their annexation,[39] which interest is capable of transfer.[40] However, it has been held that a tenant's repudiation of the provision before expiration of the term does not constitute a transfer of title to the landlord with a right of possession.[41]

The tenant cannot remove the article before the expiration of the term,[42] nor can he affect the landlord's rights by undertaking to transfer the fixtures to a third person.[43]

The removal of things annexed or erected under such a stipulation has been regarded as waste,[44] but it has also been said that for such a removal the remedy is by action on the contract rather than by an action for waste.[45]

The lessee is under no obligation in such a case to replace the fixture, for the benefit of the landlord, if destroyed by fire.[46]

Although the tenant is precluded by his agreement from removing the fixture, he has an interest therein to the same extent as in the land itself, which is the subject of mortgage by him.[47]

34. N.Y.—Center v. Everard, 43 N.Y.S. 416, 19 Misc. 156.
26 C.J. p 716 note 73.

"Alterations, improvements, and additions"

(1) Terms "improvements, additions or alterations" are of broad significance and include practically every change that can be made in premises and every chattel that can be installed therein.—Union Bldg. Co. of Pennsylvania v. Pennell, C.C.A. Pa., 78 F.2d 959.

(2) Electric power and lighting appliances installed by the tenant held not to be included in provision as to "alterations, improvements, and additions."—Lindsay v. Curtis Pub. Co., 84 A. 783, 236 Pa. 229, 42 L.R.A.,N.S., 546.

Exceptions in stipulation

(1) An exception of "movable fixtures" in a stipulation giving the lessor all alterations was held limited to such fixtures as are removable without injury to the realty.—Excelsior Brewing Co. v. Smith, 110 N.Y.S. 8, 125 App.Div. 668, affirmed 92 N.E. 1084, 198 N.Y. 519.

(2) An exception of "movable furniture" in a clause giving the lessor "all alterations, additions, and improvements" was held not to give the lessee dumb-waiters, wall decorations, ovens, toilet rooms, electric light apparatus, and inlaid floors.—Isman v. Hanscom, 66 A. 329, 217 Pa. 133.

Pipe organ

Lease providing that alterations, additions, and changes, including stages erected and electric wiring, should become realty did not include installation of pipe organ in theater.—Conover v. Burns & Schaffer Amusement Co., 149 A. 66, 8 N.J. Misc. 118.

35. Pa.—Watts v. Lehman, 107 Pa. 106—Lemar v. Miles, 4 Watts 330.

36. N.Y.—Massachusetts Nat. Bank v. Shinn, 46 N.Y.S. 329, 18 App.Div. 276, affirmed 57 N.E. 611, 163 N.Y. 360.
Pa.—Seitzinger v. Marsden, 2 Pennyp. 463.
R.I.—Pawtucket Inst. for Sav. v. Almy, 13 R.I. 68.
26 C.J. p 717 note 84.

37. Ill.—Rooney v. Crary, 8 Ill.App. 329.
N.Y.—Lewis v. Ocean Nav. & Pier Co., 26 N.E. 301, 125 N.Y. 341.

38. N.C.—Stamps v. Cooley, 91 N.C. 316.

Estoppel

Where the lease contained a clause mortgaging all buildings to be erected by the lessee, to secure the rent, and, after the lease and the buildings erected by the lessee had been transferred by the lessee to a third person, the lessor renewed the mortgage, the lessor was regarded as estopped to claim the buildings.—Platto v. Gettelman, 55 N.W. 167, 85 Wis. 105.

39. Mass.—Thrall v. Hill, 110 Mass. 328.
Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 154 S.E. 518, 521, 155 Va. 249, quoting **Corpus Juris.**

40. Mass.—Thrall v. Hill, 110 Mass. 328.

41. Fla.—Demmon v. Millsom, 130 So. 462, 100 Fla. 955.

42. Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 154 S.E. 518, 521, 155 Va. 249, quoting **Corpus Juris.**
26 C.J. p 717 note 77.

Agreement construed as not prohibiting removal during term

(1) A lease for a long term of years, providing that at the expiration of the term the lessee should surrender the premises "with all improvements, additions and extensions without any compensation to be paid for said improvements, additions and extensions," vested title only to such improvements as remained when the lease was terminated, and the lessee could remove trade fixtures while the lease remained in force.—In re Montello Brick Works, D.C.Pa., 163 F. 624, affirmed Montello Brick Co. v. Trexler, 167 F. 482, 93 C.C.A. 118.

(2) Covenant by tenant to deliver up in good condition at end of term does not affect his right to remove fixtures belonging to the landlord during the term, provided he restores them by end of term.—Fox v. Lynch, 64 A. 439, 71 N.J.Eq. 537.

43. N.C.—Forbes v. Williams, 46 N.C. 393.
Utah.—Podlech v. Phelan, 44 P. 838, 13 Utah 333.

44. Va.—Roanoke Marble & Granite Co. v. Standard Gas & Oil Supply Co., 154 S.E. 518, 521, 155 Va. 249, quoting **Corpus Juris.**
26 C.J. p 717 note 79.

45. Mass.—Wall v. Hinds, 4 Gray 256, 64 Am.D. 64.
26 C.J. p 717 note 80.

46. Ill.—Clemson v. Trammell, 34 Ill.App. 414.

47. N.H.—French v. Prescott, 61 N.H. 27.

§ 16. —— In Favor of Third Persons

Articles annexed to the realty but retaining their character as personalty by agreement may be mortgaged and sold as such.

The articles or structures being, by virtue of the agreement, regarded as personalty distinct from the land, they may, it has been decided, be mortgaged and sold as such, so as to give to the mortgagee or purchaser a good title thereto as against the landowner,[48] with the same right of removal as the agreement accorded the original owner.[49]

§ 17. —— As against Third Persons in General

a. In general

b. Statutory provisions affecting agreements

a. In General

Innocent third persons without notice are usually not affected by agreements preserving the chattel character of articles annexed to the realty or conferring a right of removal with respect to such articles.

Apart from statute, it is usually held or stated, as a general rule, that, although the parties may, as between themselves, agree that chattels to be annexed to realty shall remain personalty or be subject to a right of removal, see supra §§ 12–15, such agreements cannot ordinarily affect the rights of innocent third persons without notice thereof,[50] while, on the other hand, such agreements will bind third persons having actual or constructive notice thereof,[51] provided the fixture can be removed without material injury to the realty.[52]

b. Statutory Provisions Affecting Agreements

For a conditional sales contract reserving title in the conditional vendor as to chattels to be annexed to the realty to be valid as against third persons, statutes in some jurisdictions require the agreement to be filed or recorded in accord with their provisions, or, in some instances, to be assented to by persons affected.

Statutes exist in some jurisdictions which regulate the rights of parties with respect to conditional sales of articles to be annexed to real estate by providing for assent to, or the filing or recording of, such agreements as against third persons generally or as against particular classes of persons specified.[53] While it has been held that the statute, not the law of fixtures, controls the rights of the parties in situations covered thereby,[54] it has also

48. U.S.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 9 F.2d 599.
26 C.J. p 681 note 61.

49. **Assignee of lease**
Assignee of lease, which treated improvements as personalty and provided for lessee's removal thereof had right to remove property.—Glenn v. W. C. Mitchell Co., supra.

50. Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.
Mo.—Kelvinator St. Louis v. Schader, 39 S.W.2d 385, 225 Mo.App. 479.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 127 Neb. 740—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
Or.—Washburn v. Inter-Mountain Mining Co., 109 P. 382, 56 Or. 578, Ann.Cas.1912C 357.
R.I.—Cohen v. General Motors Acceptance Corporation, 152 A. 693, 51 R.I. 153.
Secret intent of parties immaterial
As to third persons who are not parties to agreement, the intent which controls is not a secret, hidden intent, but that manifested by the physical facts, giving due consideration to the status of party by whom the article has been installed.—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App.2d 66.
Effect of constructive severance against third persons see infra § 21.

51. Cal.—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal. App.2d 531.
Or.—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1.
Wash.—King v. Blickfeldt, 191 P. 748, 111 Wash. 508.
Agreement reserving title lacking
Ill.—First Union Trust & Savings Bank v. Stolof, 2 N.E.2d 383, 285 Ill.App. 583.

52. Ga.—Farrell v. Atlanta Gas Light Co., 5 S.E.2d 607, 61 Ga. App. 18, affirmed Atlanta Gas-Light Co. v. Farrell, 9 S.E.2d 625, 190 Ga. 437.

53. Pa.—Ridgway Dynamo & Engine Co. v. Werdler, 135 A. 216, 287 Pa. 358.
Effect of statutes
As to Subsequent purchasers or mortgagees see infra § 18.
As to Prior mortgagee see infra § 19.
As to Others see infra § 20.
Strict construction and observance of statute required.—Greene v. Elkins, 235 N.Y.S. 438, 134 Misc. 118.
Construction as a whole
N.Y.—Paragon Plumbing Supply Corporation v. Umansky Plumbing & Heating Co., 9 N.Y.S.2d 639, 170 Misc. 428.
Statute as to chattels generally inapplicable to chattels becoming fixtures.—Beloit Iron Works v. Lockhart, 144 A. 283, 294 Pa. 376.
Statute inapplicable to lease of fixture so as to require recording thereunder.—Western Machinery Co. v. Graetz, 108 P.2d 711, 42 Cal.App. 2d 296.
Proper recording protects vendor
Pa.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.

54. N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.
Wis.—Myhre v. Michigan Silo Co., 265 N.W. 703, 220 Wis. 593—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A. L.R. 1306.
Statute stands by itself
N.J.—General Motors Acceptance Corporation v. Smith, 127 A. 179, 101 N.J.Law 154—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.
Elements controlling
(1) Law relating to conditional sales alters general rule that intent determined whether chattels affixed to realty became fixtures.—Crown v. Regna Const. Co., 146 A. 346, 104 N.J.Eq. 469, affirmed, Err. & App., 150 A. 918.
(2) Under statute, neither intention with which chattel is annexed to realty nor use to which chattel is appropriated determines efficacy of conditional sales agreement, but test is whether detachment will materially injure freehold.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.

been held that the basic law of fixtures has not been changed by such a statute,[55] at least with respect to matters not coming within its purview,[56] the law of fixtures being merely restricted in its application.[57]

The theory or purpose of these statutes is to afford protection to persons dealing with the realty to which articles sold conditionally are attached as well as to conditional sellers who comply with the requirements of the statutes.[58]

Where particular classes of third persons are afforded protection by the statute, filing or recording thereunder is essential or effective only as to persons coming within the classes designated.[59]

Nature of article annexed as factor. The protection accorded by some of the statutes applies only to such chattels as, but for the agreement, would become part of the realty.[60]

A further distinction is made under some of the statutes, such as the Uniform Conditional Sales Act § 7, between fixtures which cannot be removed without material injury to the freehold and those which can be so removed. Assent of the persons interested is essential to protect the conditional seller in the former case,[61] while appropriate filing or recording is necessary in the latter case.[62]

Statute in derogation of common law
The statute concerning conditional sales of chattels attached, or to be attached, to realty and regulating the filing and effect of conditional sales contracts is an enactment in derogation of the common law in so far as it purports to fix by contract the character of fixtures annexed to realty.—Land Title Bank & Trust Co. v. Stout, 14 A.2d 282, 339 Pa. 302.

Uniform Conditional Sales Act and authorities reviewed
Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

55. N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.

56. N.J.—Farmers' Nat. Bank of Sussex, N. J. v. Salmon, 178 A. 635, 118 N.J.Eq. 241.

Statute inapplicable where rights of conditional seller not involved.—Farmers' Nat. Bank of Sussex, N. J. v. Salmon, supra.

57. N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.

Material injury to freehold is determined by law of fixtures.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, supra.

58. U.S.—In re Brownsville Brewing Co., C.C.A.Pa., 117 F.2d 463.
N.Y.—Kohler Co. v. Brasun, 164 N.E. 31, 249 N.Y. 224, reversing 226 N.Y.S. 60, 222 App.Div. 338, reversing 219 N.Y.S. 432, 128 Misc. 507—Prudential Ins. Co. of America v. Estates of Cotswold, Limited, 17 N.Y.S.2d 302.
Or.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310.

Notice as purpose
Only purpose of statute, requiring conditional seller of goods affixed to realty to record statement describing realty to retain title against subsequent purchasers thereof, was to give actual or constructive notice to such purchasers.—Public Service Electric Gas Co. v. Sanford, 161 A. 507, 10 N.J.Misc. 885.

Conditional sales protected
One of purposes of statute defining rights of parties to property conditionally sold and attached to realty is to protect conditional sales, not to thwart or prevent them.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Innocent purchasers and encumbrancers
N.Y.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.
Or.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310.

59. U.S.—In re St. Mark's Hospital of New York City, C.C.A.N.Y., 59 F.2d 1001—Staude Mfg. Co. v. Wolfe, C.C.A.Pa., 17 F.2d 907.
N.Y.—Russ Soda Fountain Co. v. Desind, 268 N.Y.S. 452, 150 Misc. 568.
Rights of trustee in bankruptcy of conditional vendee see Bankruptcy § 191.

60. U.S.—In re St. Mark's Hospital of New York City, C.C.A.N.Y., 59 F.2d 1001.
N.Y.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Gas ranges do not come within this category.—Orbon Stove Co. v. Schroeder, 271 N.Y.S. 242, 241 App. Div. 832.

Pipe organ, built into a building constructed so as to provide suitable space expressly for it. which cannot easily be moved at will comes within terms of statute.—In re St. Mark's Hospital of New York City, C.C.A. N.Y., 59 F.2d 1001.

Soda fountain not within statute.—In re Banos, D.C.Pa., 8 F.2d 95.

Refrigerating plant whose machinery could be unbolted from foundation held not "fixtures" within statute.—In re Lloyd, D.C.Pa., 6 F.Supp. 514.

61. Del.—Power Mfg. Co. v. Bailey, 131 A. 696, 3 W.W.Harr. 129.
N.J.—B & O Radio v. Prudential Ins. Co. of America, 184 A. 208, 116 N.J.Law 301—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293, 111 A.L.R. 357—Future Building & Loan Ass'n v. Mazzocchi, 152 A. 776, 107 N.J.Eq. 422—Mugler Auto Pit Co. v. Tide Water Oil Co., 185 A. 542, 14 N.J.Misc. 471.
N.Y.—Metropolitan Stone Works v. Probel Holding Corporation, 227 N.Y.S. 414, 131 Misc. 519.

Filing alone insufficient
N.J.—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293, 111 A.L.R. 357.

Anyone not assenting protected
Uniform Conditional Sales Act makes reservation of title to property affixed to realty in conditional sales contract void as against anyone not expressly assenting thereto, and not merely in actions by or against such persons.—Power Mfg. Co. v. Bailey, Del., 131 A. 696, 3 W.W.Harr., 129.

62. U.S.—Medical Tower Corporation v. Otis Elevator Co., C.C.A. Pa., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F.Supp. 4—In re St. Mark's Hospital of New York City, C.C.A. N.Y., 59 F.2d 1001.
N.J.—Layne-New York Co. v. President Hotel Co., 165 A. 89, 11 N.J. Misc. 155, affirmed 168 A. 442, 111 N.J.Law 338.
N.Y.—Paragon Plumbing & Supply Corporation v. Umansky Plumbing & Heating Co., 9 N.Y.S.2d 639, 170 Misc. 428.
Wis.—Brunswick - Balke - Collender Co. v. Franzke-Schiffman Realty Co., 248 N.W. 178, 211 Wis. 659.

Butts and hinges holding doors to building.—G. Goldberg & Sons v. Weisberg-Goldman Corporation, 262 N.Y.S. 99, 146 Misc. 720, affirmed

Place of filing or recording. Filing is generally required to be in the manner in which, and at the place where, deeds affecting the realty are recorded or registered.[63]

What constitutes material injury to freehold. Under these statutes the important consideration is whether the fixture can be removed without material injury to the freehold.[64] In construing "material injury to the freehold," as used in the Uniform Conditional Sales Act § 7, the courts have held it in one sense to mean physical injury,[65] while in another sense, injury to the institution of which the structure, to which the chattel is attached, is a part.[66] In the latter sense, some courts have held that there is such an injury as to chattels which have become part of a structure if severance will prevent the structure from being used for the purposes for which it was erected or to which it has been adapted.[67]

255 N.Y.S. 958, 959, 235 App.Div. 717, affirmed in part and reversed in part on other grounds, 184 N.E. 147, 260 N.Y. 690, modified and amended in part on other grounds 185 N.E. 727, 261 N.Y. 535.

Assent by owner insufficient to bind subsequent purchaser or mortgagee.—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293.

Filing in accord with statute renders the reservation of title valid.—Modern Security Co. of Philadelphia v. Thwaites, 246 N.Y.S. 405, 138 Misc. 469, reversing 242 N.Y.S. 594, 137 Misc. 485, and affirmed 252 N.Y.S. 930, 234 App.Div. 671—Metropolitan Stone Works v. Probel Holding Corporation, 227 N.Y.S. 414, 131 Misc. 519.

63. County where realty located

N.Y.—Lightolier Co. v. Del Mar Club Holding Co., 262 N.Y.S. 32, 237 App.Div. 432, reversing 259 N.Y.S. 97, 144 Misc. 876, and affirmed 189 N.E. 711, 263 N.Y. 588.

Filing as ordinary conditional sale insufficient

Under Uniform Conditional Sales Act, conditional seller of fixtures should not get protection by filing contract with ordinary conditional sale contracts and making a record similar to that made in the case of chattel mortgages.—In re Brownsville Brewing Co., C.C.A.Pa., 117 F.2d 463.

Description of realty

(1) Where neither the statement accompanying filed contract, nor the contract, nor statement of refiling accurately described the realty by street or street numbers, the filing was invalid.—In re Brownsville Brewing Co., supra.

(2) Where statement of refiling of contract for conditional sale of fixtures contained a fuller description than that contained in original statement and contract, but description merely added one correct street designation to prior incorrect designations, and where three years had elapsed at time of refiling since the original sale, and a state receivership had superseded buyer in operation of its business, insufficiency of original filing was not cured by the refiling.—In re Brownsville Brewing Co., supra.

(3) The filing of an agreement showing conditional sale of bottling machine to brewing company at designated Pennsylvania town in which brewery had been erected in five buildings on three contiguous parcels of land, each of which was encumbered with a separate mortgage, did not comply with statute providing for filing of contract with statement briefly describing realty.—In re Yough Brewing Co., D.C.Pa., 27 F. Supp. 729.

Time of filing

Filing under the Pennsylvania statute must be within reasonable time from the sale and delivery of the fixtures.—In re Brownsville Brewing Co., C.C.A.Pa., 117 F.2d 463.

64. N.J.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23.

N.Y.—Metropolitan Stone Works v. Probel Holding Corporation, 227 N.Y.S. 414, 131 Misc. 519.

"Freehold" defined

The word "freehold," as used in the act, refers to the freehold as of the time as of which the inquiry is made. It may mean before or after annexation according as the identity of the chattel is lost or not.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.

Efficacy of conditional sales contract is determined by whether fixture is removable without material injury to freehold.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, supra.

Electric refrigerator held severable without injury to freehold.—Minett v. Durnherr, 238 N.Y.S. 448, 135 Misc. 259.

Elevator system detachable without material injury.—Harvard Financial Corporation v. Greenblatt Const. Co., 184 N.E. 748, 261 N.Y. 169, reversing 258 N.Y.S. 993, 236 App. Div. 742, and motion denied 185 N.E. 796, 261 N.Y. 694.

Finishing hardware and lock sets detachable without material injury to freehold.—G. Goldberg & Sons v. Weisberg-Goldman Corporation, 262 N.Y.S. 99, 146 Misc. 720, affirmed 255 N.Y.S. 958, 959, 235 App.Div. 717, affirmed in part and reversed in part on other grounds, 184 N.E. 147, 260 N.Y. 690, amended on other grounds 185 N.E. 727, 261 N.Y. 535.

Heating system

Heating system whose removal would merely leave holes is removable without material injury to freehold.—Modern Security Co. of Philadelphia v. Thwaites, 246 N.Y.S. 405, 138 Misc. 469, reversing 242 N.Y.S. 594, 137 Misc. 485, and affirmed 252 N.Y.S. 930, 234 App.Div. 671.

Holes

The fact that holes would be left by removal of the fixture is not by itself sufficient to constitute it a fixture not removable without material injury to the freehold.—Modern Security Co. of Philadelphia v. Thwaites, supra.

Water pumping machinery removable without material injury to freehold.—Treat v. Nowell, 294 P. 273, 37 Ariz. 290.

Materiality of injury to freehold as considered in rights of prior mortgagee see infra § 19.

65. N.J.—Russ Distributing Corporation v. Lichtman, 166 A. 513, 111 N.J.Law 21—MacLeod v. Walter J. Satterthwait, Inc., 157 A. 670, 109 N.J.Eq. 414, affirmed 166 A. 163, 113 N.J.Eq. 238, following Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574—Future Building & Loan Ass'n v. Mazzocchi, 152 A. 776, 107 N.J.Eq. 422.

66. N.J.—Russ Distributing Corporation v. Lichtman, 166 A. 513, 111 N.J.Law 21—MacLeod v. Walter J. Satterthwait, Inc., 157 A. 670, 109 N.J.Eq. 414, affirmed 166 A. 163, 113 N.J.Eq. 238, following Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574—Future Building & Loan Ass'n v. Mazzocchi, 152 A. 776, 107 N.J.Eq. 422.

67. N.J.—Domestic Electric Co., Inc., v. Mezzaluna, 162 A. 722, 109 N.J.Law 574.

"When a chattel which, clearly, is permanently essential to the completeness of a structure, having regard to the character of that structure and the functioning of it in the

Material injury to the freehold has also been construed to mean material injury to the operating plant, and as not confined to injury to the physical structure of the building.[68]

Other courts, however, on the theory that the law of conditional sales rather than the law of fixtures governs, hold that by material injury to the freehold is meant a physical injury to the realty, and not an injury which would prevent the functioning or operation of the building or plant.[69]

§ 18. —— As against Subsequent Purchaser or Mortgagee of Land

a. In general
b. With notice
c. Without notice
d. What constitutes notice
e. Statutory provisions affecting agreements

a. In General

The agreement between the seller and purchaser of a chattel to be annexed to the realty is not in itself determinative of the character of the article as a fixture as against a subsequent purchaser or mortgagee of the realty.

It has been said that in determining whether or not an article installed in a building becomes a fixture or remains personalty as to a subsequent purchaser or mortgagee of the real estate, the agreement between the seller of the article and the purchaser thereof plays no part, it may however, as discussed in the following subdivisions of this section have a determinative effect as to parties charged with notice.[70]

b. With Notice

Apart from statute, an agreement between the parties, preserving the character of articles to be annexed to realty or giving a right of removal with respect thereto, is valid as against a subsequent purchaser or mortgagee of the realty with notice, at least as to chattels which are removable without material injury to the freehold.

Apart from statute, the authorities are generally in accord that an agreement preserving the character of a chattel to be annexed to realty, or conferring a right of removal with respect thereto, prevails as against a subsequent purchaser or mortgagee of the realty who has notice, actual or constructive, of the agreement,[71] where, or provided, it is sometimes held, the chattel can be removed without

use for which it was obviously designed, is actually, purposely, and lawfully affixed to and into the structure, it becomes a part of the realty; and if the severance of it will prevent the structure from being used for the purposes for which it was erected or for which it has been adapted, then the article is not severable without material injury to the freehold within the meaning of . . . the Uniform Conditional Sales Act."—Smyth Sales Corporation v. Norfolk Building & Loan Ass'n, 184 A. 204, 116 N.J.Law 293, 111 A.L.R. 293.

Lubricating pit in filling station
N.J.—Mugler Auto Pit Co. v. Tide Water Oil Co., 185 A. 542, 14 N.J. Misc. 471.

Refrigerating system in apartment house
N.J.—B & O Radio v. Prudential Ins. Co. of America, 184 A. 208, 116 N.J.Law 301—Russ Distributing Corporation v. Lichtman, 166 A. 513, 111 N.J.Law 21—MacLeod v. Walter J. Satterthwait, Inc., 157 A. 670, 109 N.J.Eq. 414, affirmed 166 A. 163, 113 N.J.Eq. 238, following Domestic Electric Co., Inc., v. Mezzaluna, 162 A. 722, 109 N.J. Law 574.

Fact that chattel is integral part of common plant does not prevent it from being removable without material injury to freehold.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J. Eq. 567.

68. U.S.—Medical Tower Corporation v. Otis Elevator Co., C.C.A. Pa., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F.Supp. 4.
Pa.—Holland Furnace Co. v. Suzik, 180 A. 38, 118 Pa.Super. 405.

Elevators in tall office building are fixtures in this category.—Medical Towers Corporation v. Otis Elevator Co., C.C.A.Pa., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F.Supp. 4.

Part of operating plant
Statute, providing that goods to be affixed to realty cannot become part of realty or freehold to which they are attached or of any operating plant of which they may form part if contract with statement describing realty is filed in office of prothonotary, extended to conditional vendors right to reclaim their goods in manufacturing plants if statutory requirements were observed by them. —In re Yough Brewing Co., D.C.Pa., 27 F.Supp. 729.

69. Wis.—Myhre v. Michigan Silo Co., 265 N.W. 703, 220 Wis. 593.

Law of conditional sales, not law of fixtures, determines meaning.—Myhre v. Michigan Silo Co., supra.

Test of removability of goods sold under conditional sales contract and affixed to realty is "material injury to freehold," not whether goods are essential to functioning of plant or building.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Institution rule disapproved
Wis.—People's Savings & Trust Co. v. Munsert, supra.

70. Mo.—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.
Effect of constructive severance as against subsequent purchaser or mortgagee see infra § 21.

71. Cal.—Nead v. Specimen Hill Mining Co., App., 126 P.2d 450—Hammel Radiator Corporation v. Mortgage Guarantee Co., 18 P.2d 993, 129 Cal.App. 468—P. J. Freiermuth Co. v. Faustino, 7 P.2d 370, 120 Cal.App. 136.
Fla.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.
Ga.—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 879, 34 Ga.App. 396, citing **Corpus Juris.**
Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.
Mass.—Lawrenson v. Worcester Lunch Car & Carriage Mfg. Co., 15 N.E.2d 978, 300 Mass. 543.
Mo.—Holtgreve v. Sobolewski, 31 S. W.2d 993, 326 Mo. 412—Cox v. Mc-

material injury to the freehold or the usefulness of the chattel.[72] This rule has been applied as against purchasers at a judicial sale.[73]

The purchaser of the land with notice, however, does not take subject to the agreement, it has been held, if his vendor was, without notice thereof,[74] applying the generally recognized rule, discussed in the C.J.S. title Vendor and Purchaser § 360, also 66 C.J. p 1188 note 58, to the effect that a purchaser with notice of an outstanding title or interest is protected if his vendor acquired title without notice.

c. Without Notice

Ordinarily and apart from statute, an agreement preserving the character of an article to be annexed to the realty, which would otherwise be a fixture, or giving a right of removal with respect thereto, is not effective against a subsequent purchaser or mortgagee of the realty without notice.

Except as to chattels which retain their character as personalty apart from any agreement,[75] it is

Kinney, 258 S.W. 445, 212 Mo.App. 522.
N.D.—Kittelson v. Collette, 240 N.W. 920, 61 N.D. 768—Newell v. McMurray, 201 N.W. 845, 847, 51 N.D. 901, citing **Corpus Juris.**
Or.—Kennedy v. City of Hood River, 259 P. 911, 122 Or. 531.
Pa.—M. P. Moller, Inc., v. Mainker, 171 A. 476, 314 Pa. 314.
S.C.—Lane v. Bell Lumber Co., 115 S.E. 207, 122 S.C. 140—Liddell Co. v. Cork, 113 S.E. 327, 329, 120 S.C. 481, 23 A.L.R. 800, quoting **Corpus Juris.**
Tex.—Grossman v. Jones, Civ.App., 157 S.W.2d 448, error refused—Edwards v. Thannisch, Civ.App., 254 S.W. 523.
Utah.—Workman v. Henrie, 266 P. 1033, 1035, 71 Utah 400, 58 A.L.R. 1346, citing **Corpus Juris.**
26 C.J. p 681 note 66.

Agreement as to appraisal of fixture immaterial
Where owner of house and separate owner of lot on which house stood agreed that when latter sold his lot appraisers should be chosen, and the value of the house as determined by them should be paid to the owner of the house, the fact that appraisers were not chosen prior to sale of lot to defendant with notice did not affect the houseowner's rights in the house.—Edwards v. Thannisch, Tex.Civ.App., 254 S.W. 523.

Lease
Tenant's right of removal under lease may be asserted against subsequent purchaser or mortgagee with notice.—M. P. Moller, Inc., v. Mainker, 171 A. 476, 314 Pa. 314—26 C.J. p 718 note 10.

Purchaser at void tax sale
Chattel mortgagee could subject mortgaged soda fountain to mortgage, where purchaser at tax sale and at realty foreclosure sale acquired no title to fountain, and his transferees knew of such fact at time of transfer.—Liquid Carbonic Corporation v. Crow, 148 So. 442, 177 La. 379.

72. Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill. App. 561.
Minn.—North Shore Co. v. Broman, 247 N.W. 505, 188 Minn. 433.
Okl.—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96.

Agreement between landlord and tenant
Or.—General Petroleum Corporation of California v. Schefter, 16 P.2d 645, 141 Or. 349.

Renewal mortgagee party to agreement
Refrigeration equipment purchased under conditional sales contract providing that it should be considered as personalty, and placed in mortgaged building after mortgage had been purchased by plaintiff but before giving of renewal mortgage, was held not subject to renewal mortgage where plaintiff acquiesced in agreement that renewal mortgage should not cover refrigeration system, which consisted of articles which could be installed in any building and easily removed therefrom without damage thereto.—Hall v. Woody, 69 P.2d 379, 180 Okl. 370.

Immovables by destination.
Chattel mortgage covering mules, agricultural implements, and farm equipment, made mortgageable by statute, was held valid as against subsequent farm mortgage, although movables described were "immovable by destination" because of their dedication by owner to service of his land, since effect of execution and recordation of chattel mortgage was to deimmobilize movables.—Bank of White Castle v. Clark, 159 So. 409, 181 La. 303.

73. Ga.—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 879, 34 Ga.App. 396, citing **Corpus Juris.**
26 C.J. p 681 note 67.

74. N.J.—Oil City Boiler Works v. New Jersey Water, etc., Co., 79 A. 451, 81 N.J.Law 491.
Vt.—Powers v. Dennison, 30 Vt. 752.

75. Ga.—Empire Cotton Oil Co. v. Continental Gin Co., 93 S.E. 525, 20 Ga.App. 16.

Test
As to purchaser without notice, whether machine placed in building is real estate or personal property depends on external indications.—Cohen v. General Motors Acceptance Corporation, 152 A. 693, 51 R.I. 153.

Laundry machine
Sheriff's sale under subsequent mortgage did not pass title to laundry machinery leased to mortgagor and not part of real estate.—American Laundry Machinery Co. v. Miners' Trust Co. of Nanticoke, 161 A. 306, 307 Pa. 395.

Residence organ
Installation of residence pipe organ was held not to create deceitful appearance, so as to deprive conditional seller of organ under unrecorded contract from right to remove organ as against subsequent purchasers of residence.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.

Scales
Platform scales, installed partly on mortgaged real estate by corporation occupying part of building on mortgaged property, retained character as personal property as between mortgagee of real estate and buyer of scales.—Sweet v. Lease, 280 P. 742, 154 Wash. 25.

Unrecorded conditional sale or chattel mortgage
(1) Contract of conditional sale of chattel was held to protect seller against subsequent purchasers or encumbrances of realty, even though contract was not recorded, if chattel retained its original character as personalty.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.

(2) Fact that mortgage of machinery not fixtures was unrecorded gives purchaser of realty under subsequent trust deed no lien on machinery.—Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene, Tex.Civ.App., 18 S.W.2d 747, reversed, on other grounds, Citizens Nat. Bank of Abilene v. Elk Mfg. Co., Com.App., 29 S.W.2d 1062.

(3) Where buyer agreed that chattels acquired by conditional sale should not be permanently attached to realty, buyer's successor as owner of the realty could not repudiate agreement and prevent removal

generally held, apart from statute, that a subsequent purchaser or mortgagee of the land without notice of the agreement is not affected thereby,[76] provided a valuable consideration was given for the inter-

thereof, if removable without injury to the realty.—Manufacturers' Building & Loan Ass'n of Newark v. Public Service Electric & Gas Co., 150 A. 196, 106 N.J.Eq. 68.

Right of removal under lease

Record showing that lease authorized lessee to sublease land to United States for airport, that sublease subsequently executed authorized United States to erect and remove necessary buildings and attachments, and that United States occupied the airport under sublease for a number of years, disclosed intention of parties that airplane hangar constructed by the United States should be removable, and hence United States had right to remove the hangar as against purchasers of the realty at mortgage foreclosure sale, even though the hangar was bolted to concrete piers which were attached to the realty, no question of notice arising, however.—U. S. v. Swaney, D.C.Pa., 30 F.Supp. 946.

76. Cal.—Western Machinery Co. v. Graetz, 108 P.2d 711, 42 Cal.App.2d 296—Patch v. Mortgage Guarantee Co., 14 P.2d 856, 126 Cal.App. 563—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 116 Cal.App. 569—Bell v. Mortgage Guarantee Co., 292 P. 660, 109 Cal.App. 203.

Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.

Fla.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.

Ga.—Lasch v. Columbus Heating & Ventilating Co., 163 S.E. 486, 174 Ga. 618, answers conformed to 164 S.E. 211, 45 Ga.App. 200.

Idaho.—Anglo-American Mill Co. v. Community Mill Co., 240 P. 446, 447, 41 Idaho 561, citing **Corpus Juris.**

Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573—J. H. Day Co. v. Public Sav. Ins. Co. of America, 151 N.E. 361, 364, 85 Ind.App. 78, citing **Corpus Juris.**

Iowa.—Hooven, Owens, Rentschler Co. v. City of Atlantic, 144 N.W. 635, 163 Iowa 380.

Kan.—St. Marys Mach. Co. v. Iola Mill & Elevator Co., 155 P. 1077, 97 Kan. 464.

Mass.—Murphy Door Bed Co. v. New England Bond & Mortgage Co., 176 N.E. 802, 276 Mass. 93.

Mich.—Wood Hydraulic Hoist & Body Co. v. Norton, 257 N.W. 836, 269 Mich. 341.

Mo.—Glueck & Co. v. Powell, 61 S.W. 2d 406, 408, 227 Mo.App. 1226, citing **Corpus Juris**—Francis v. Garner, App., 56 S.W.2d 158—Kelvinator St. Louis v. Schader, 39 S.W. 2d 385, 225 Mo.App. 479.

Mont.—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E.2d 273, 135 Ohio St. 48—XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corporation, 10 N.E.2d 229, 56 Ohio App. 188, appeal dismissed XXth Century Heating & Ventilating Co. v. Fazckas, 9 N.E.2d 2, 132 Ohio St. 476 —Connecticut Mut. Life Ins. Co. v. Bowe, 187 N.E. 195, 45 Ohio App. 347.

Okl.—Kapsemalis v. Doughlas, 61 P. 2d 211, 177 Okl. 522.

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

Pa.—Diamond v. Butler, 17 Pa.Dist. & Co. 183.

S.C.—Liddell Co. v. Cork, 113 S.E. 327, 329, 120 S.C. 481, 23 A.L.R. 800, citing **Corpus Juris.**

Tenn.—W. J. Savage & Co. v. Mayfield, 11 S.W.2d 855, 157 Tenn. 676 —McLean v. McLean Stone Co., 84 S.W.2d 1046, 19 Tenn.App. 249.

Tex.—Grossman v. Jones, Civ.App., 157 S.W.2d 448, error refused—Texas Power & Light Co. v. Malone, Civ.App., 42 S.W.2d 845, error dismissed.

Utah.—Saunders v. Kidman, 284 P. 997, 75 Utah 303.

Wash.—King v. Blickfeldt, 191 P. 748, 111 Wash. 748.

Wis.—Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 207 N.W. 276, 189 Wis. 120.

26 C.J. p 681 note 70.

Reasons for rule

(1) "The reason for the rule is that an integral part of the consideration paid by the purchaser was on the faith of the chattel . . . being a fixture, as it appeared to be, and that he would be prejudiced by the severance of the chattel from the freehold."—Industrial Bank of Richmond v. Holland Furnace Co., 153 S.E. 309, 310, 109 W.Va. 176.

(2) "This rule is based on the fact that the subsequent incumbrancer has been misled by the fact that the conditional vendor has permitted the chattels to become attached to the realty so as to have ostensibly become a part thereof."—Dauch v. Ginsburg, 6 P.2d 952, 954, 214 Cal. 540.

(3) "The reason for the rule has been stated to be based on two grounds. The first is that the seller, voluntarily placing personal property in the possession and control of his vendee with knowledge that it would be affixed to the land if put to the use for which it is designed, is presumed to have agreed that it should be or might be converted into realty. The second reason is that where one of two innocent persons must suffer, he should bear the loss who caused the deceitful appearances."—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 41, 116 Cal.App. 569.

Oral reservation

As against bona fide purchaser from grantee, an oral exception of fixture between grantor and grantee is a nullity.—Muir v. Jones, 31 P. 646, 23 Or. 332, 19 L.R.A. 441.

Bona fide purchaser without notice

(1) Bona fide purchaser of realty without notice of recorded contract reserving title to bathroom fixtures acquired title to fixtures.

Ga.—Skinner v. Stewart Plumbing Co., 155 S.E. 97, 42 Ga.App. 42.

N.J.—James Leo Co. v. Jersey City Bill Posting Co., 73 A. 1046, 78 N. J.Law 150.

(2) Mortgagee purchasing realty at his own foreclosure sale is not bona fide purchaser.—Mallory v. Agee, 147 So. 881, 226 Ala. 596, 88 A.L.R. 1107.

(3) Mortgagee as purchaser at his own sale, under power of sale generally see the C.J.S. title Mortgages § 594, also 41 C.J. p 1009 notes 78, 79.

Agreement recordable

Where personalty, designed for such purpose, is affixed to realty, it is brought under operation of laws for recording contracts affecting realty.—Bell v. Mortgage Guarantee Co., 292 P. 660, 109 Cal.App. 203.

Chattel mortgage not refiled

Okl.—Continental Gin Co. v. Sims, 229 P. 818, 103 Okl. 191.

Purchaser at foreclosure sale

(1) A purchaser at a foreclosure sale is held to be within the protection of the rule.

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E. 2d 273, 135 Ohio St. 48—Concrete Silo Co. v. Warstler, 198 N.E. 189, 50 Ohio App. 334.

Tenn.—W. J. Savage & Co. v. Mayfield, 11 S.W.2d 855, 157 Tenn. 676.

(2) This is not so as to a secured creditor purchasing the realty for a nominal sum at his own foreclosure sale.—Industrial Bank of Richmond v. Holland Furnace Co., 153 S.E. 309, 109 W.Va. 176.

Right of removal under lease

Purchasers without notice are unaffected by an agreement made between the owner of the chattel and a lessee of the land for whose benefit the articles were annexed.

U.S.—Luria Bros. & Co. v. Central R. Co. of New Jersey, C.C.A.N.J., 113 F.2d 78.

Mo.—Francis v. Garner, App., 56 S. W.2d 158.

26 C.J. p 681 note 70 [b].

est in the land,[77] a view which is based, in some of the cases, and to some extent, on the theory that the beneficiary under the agreement consented to the annexation of the article to the land, or had reason to know that such annexation would be made, and thereby aided in clothing the vendor or mortgagor of the land with the apparent title.[78] However, there are some early cases which have stated the rule to be that, apart from statute requiring filing or recording of the agreement, a subsequent purchaser or mortgagee cannot claim the articles annexed, although ignorant of the agreement by which they were to retain their personal character.[79]

d. What Constitutes Notice

Timely actual notice or knowledge of the agreement or of such information with respect thereto as imposes a duty of making inquiry is usually required to render the agreement effective against a subsequent purchaser or mortgagee of the realty. Certain public records of the agreement sometimes constitutes sufficient notice.

For an agreement preserving the character of the chattel or conferring a right of removal to be effective as against a subsequent purchaser or mortgagee of the realty, he usually must have either actual notice or knowledge of the agreement or rights thereunder, or such reliable information with respect thereto as to impose on him a duty of making inquiry,[80] if such notice or knowledge is obtained

Chattels necessary to operation of machinery attached to realty are within protection of rule.—J. H. Day Co. v. Public Sav. Ins. Co. of America, 151 N.E. 361, 85 Ind.App. 78.

Permanent buildings pass to vendee of land without knowledge that buildings belong to another.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.

Personalty losing individual characteristics

U.S.—Ritchey v. Southern Gem Coal Corporation, D.C.Ill., 12 F.2d 605.

Lighting plant housed in wooden frame house, engine and generator being bolted to concrete base, was held "fixture" so that chattel mortgage on plant, not complying with recording statute, created no lien, as against innocent purchaser of realty. —Schumann v. Jenkins, Tex.Civ.App., 40 S.W.2d 214, error refused.

Refrigerating system installed in apartment house under conditional sales contract was held to pass to innocent purchaser of apartment house without notice.—Cohen v. General Motors Acceptance Corporation, 152 A. 693, 51 R.I. 153.

Corpus Juris quoted as stating sound rule.—Citizens' Nat. Bank of Abilene v. Elk Mfg. Co., Tex.Com. App., 29 S.W.2d 1062, 1067, reversing Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene, Civ.App., 18 S.W.2d 747.

77. **Mortgage for preëxisting debt** is not for a valuable consideration and hence is subject to conditional sales agreement.

Idaho.—Anglo-American Mill Co. v. Community Mill Co., 240 P. 446, 41 Idaho 561.

Wash.—Cherry v. Arthur, 32 P. 744, 5 Wash. 787.

Voluntary transfer not protected. —Southern California Hardwood & Mfg. Co. v. Borton, 189 P. 1022, 46 Cal.App. 524.

78. Cal.—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 116 Cal. App. 569.

S.C.—Liddell Co. v. Cork, 113 S.E. 327, 329, 120 S.C. 481, 23 A.L.R. 800, citing **Corpus Juris.**

Tex.—Citizens' Nat. Bank of Abilene v. Elk Mfg. Co., Com.App., 29 S. W.2d 1062, 1067, quoting **Corpus Juris,** and reversing Elk Mfg. Co. v. Citizens' Nat. of Abilene, Civ. App., 18 S.W.2d 747.

26 C.J. p 682 note 71.

Presumption of agreement

Seller under conditional sales contract, delivering personalty designed for being affixed to land, is presumed to have agreed that it may be converted into real property.—Bell v. Mortgage Guarantee Co., 292 P. 660, 109 Cal.App. 203.

Bailment with option to purchase

Company permitting electric refrigerator, delivered by it to apartment building owner as bailee with option to purchase, to remain in building, apparently as fixture, after execution of warranty and trust deeds of realty without notice to grantee and mortgagee of such delivery, cannot say in bailor's replevin suit that it is not fixture.—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.

79. Ala.—W. T. Adams Mach. Co. v. Interstate Bldg. & Loan Ass'n, 24 So. 857, 119 Ala. 97.

26 C.J. p 682 note 72.

80. Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.

Mo.—Dunscott Land Co. v. Brewer, App., 252 S.W. 979.

Duty to inquire generally

(1) Purchaser at foreclosure sale of land had duty to inquire regarding machine attached to cement block which would disclose that machine was chattel conditionally sold and not fixture.—Catlin v. C. E. Rosenbaum Machinery Co., 22 S.W.2d 906, 180 Ark. 739.

(2) Purchaser of real estate, without inquiry, held not innocent purchaser as bearing on issue whether gin elevator belonged to vendor.—Continental Gin Co. v. Clement, 4 S. W.2d 901, 176 Ark. 864.

(3) Where mortgagee received mortgage subsequent to mortgagor's agreement with tenant that tenant at termination of tenancy might remove sheds and fencing placed by him upon premises, tenant was entitled to remove such fixtures as against claim of mortgagee which failed to make inquiry concerning that matter.—Penn Mut. Life Ins. Co. v. Kimble, 272 N.W. 231, 132 Neb. 408.

Acceptance of chattel mortgage

Purchaser of land who accepted chattel mortgage from a former purchaser of the land to whom it was sold under a conditional sale was held to be charged with notice that it was to be regarded as personalty and hence took subject to the conditional sale.—Lansing Iron & Engine Works v. Wilbur, 69 N.W. 667, 111 Mich. 413, explained in Wickes v. Hill, 73 N.W. 375, 115 Mich. 333.

Installation by tenant

Notice that articles were installed by tenant under lease held to charge purchaser with notice that the articles were possibly removable by the tenant as trade fixtures, and so with notice that they belonged to the conditional vendor from whom they were bought by such tenant.—Marker v. Williams, 179 P. 735, 39 Cal.App. 674.

Occupancy of building

(1) That one licensed to erect a building on another's land is in occupation of such building has been regarded as not constituting notice of his claim of title to the building.

Conn.—Prince v. Case, 10 Conn. 375, 27 Am.D. 675.

Mo.—Dunscott Land Co. v. Brewer, App., 252 S.W. 979, 980.

Vt.—Powers v. Dennison, 30 Vt. 752.

(2) "Defendant's possession would convey notice of his right of occupancy, just as the possession of a tenant would convey notice of his

prior to the purchase or mortgage of the realty.[81]

Chattel mortgage or conditional sales records. Apart from statutes dealing with the filing or recording of chattel mortgages or conditional sales involving fixtures, the proper filing or recording of such instruments under statutes covering chattels generally has sometimes been held to be sufficient to charge the subsequent purchaser or mortgagee of the realty with constructive notice thereof,[82] but it has also been held that such filing or recording is insufficient to constitute notice, usually because the purchaser or mortgagee of the realty has been considered to be under no obligation to search the records of chattel mortgages or conditional sales in order to discover whether any article annexed to the land was subjected to a mortgage lien before its annexation.[83] A distinction is sometimes made between chattels which do not necessarily become merged with the realty by incorporation therewith and which are susceptible of retaining their character as personalty, and those which become integrated with the realty or are incapable of removal without material injury to the realty, such filing or recording being held to be constructive notice as to the former,[84] but not as to the latter.[85]

In any state, it seems that one who purchases or takes a mortgage of a chattel which is subsequently annexed to land is charged with notice of a prior chattel mortgage by the record thereof.[86]

Record in land records. In some states the agreement for removal, if properly acknowledged, would be capable of record among the land records, and if it specifically refers to the land a subsequent purchaser would be affected with notice thereof,[87]

right of occupancy; but there it would stop. His possession would not be notice of a right to remove or put a purchaser upon inquiry as to that question, because such a right does not, ipso facto, go with a right of occupancy, but depends upon a separate agreement in no way connected with the possession of the building or the title to the land."—Dunscott Land Co. v. Brewer, supra.

Operation of telegraph line

The fact that a telegraph line on a railroad right of way was being operated by a telegraph company was sufficient notice of the claim of such company to the line.—Western Union Tel. Co. v. Burlington & S. W. R. Co., C.C.Iowa, 11 F. 1, 3 McCrary 130.

Recital in deed

Under a statute requiring inquiry to be made under certain circumstances, recital in deed obligating purchaser to pay notes due for refrigeration equipment held notice of claim to subsequent purchaser of realty.—Shippen v. Georgia Power Co., 159 S.E. 268, 172 Ga. 913.

81. **Notice just before foreclosure sale,** but after execution of the mortgage or deed, is insufficient.—Glueck & Co. v. Powell, 61 S.W.2d 406, 227 Mo.App. 1226.

82. Ga.—Lasch v. Columbus Heating & Ventilating Co., 163 S.E. 486, 174 Ga. 618, in effect overruling Skinner v. Stewart Plumbing Co., 155 S.E. 97, 42 Ga.App. 42, and answers conformed to 164 S.E. 211, 45 Ga.App. 200—Colonial Hill Co. v. Moncrief Furnace Co., 158 S.E. 343, 43 Ga.App. 204—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 34 Ga.App. 396.

Okl.—Continental Gin Co. v. Sims, 229 P. 818, 103 Okl. 191.

26 C.J. p 683 note 80, p. 684 note 83.

Strict compliance with statute necessary

Mo.—Grinnell Co. v. Farm & Home Savings & Loan Ass'n, 75 S.W.2d 409.

83. Iowa.—Bringholff v. Munzenmaier, 20 Iowa 513.

Mo.—Kelvinator St. Louis v. Schader, 39 S.W.2d 385, 225 Mo.App. 479.

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E.2d 273, 135 Ohio St. 48—XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corporation, 10 N.E. 2d 229, 56 Ohio App. 188, appeal dismissed XXth Century Heating & Ventilating Co. v. Fazckas, 9 N.E. 2d 2, 132 Ohio St. 476.

Tex.—Murray Co. v. Randolph, Civ. App., 174 S.W. 825.

26 C.J. p 683 note 81, p 684 note 85.

Realty titles not affected by such records

Ohio.—Holland Furnace Co. v. Trumbull Savings & Loan Co., 19 N.E. 2d 273, 135 Ohio St. 48.

84. Md.—Abramson v. W. W. Penn & Co., 143 A. 795, 156 Md. 186, 73 A.L.R. 742.

S.C.—Liddell Co. v. Cork, 113 S.E. 327, 120 S.C. 481, 23 A.L.R. 800.

So on finding in favor of the conditional vendor as against a purchaser at a foreclosure, it was stated that the place of recording was immaterial, the determining factor being the character of the property.—Standard Motors Finance Co. v. Weaver, 153 S.E. 861, 199 N.C. 178.

Reason for rule

"The presence of such fixtures in quantity should put a prospective purchaser of the land upon inquiry as to their history. Instruments covering property of that character, even if separately recorded pursuant to the express provisions of the statute in the chattel mortgage book, cannot be said to be instruments which are not in the line of the title of the real estate to which such property may be annexed as fixtures."—Liddell Co. v. Cork, 113 S.E. 327, 330, 120 S.C. 481.

Mortgage of buildings

The assignee of a duly recorded mortgage on two houses subsequently moved to mortgagor's lots to which it was understood, at the time of the execution of the mortgage, they were to be moved, such agreement being recited in the mortgage, was entitled to foreclosure against a subsequent purchaser of the lots, at least as to the houses.—Doyle v. Lytle Inv. Co., Iowa, 184 N.W. 721.

85. Ga.—Lasch v. Columbus Heating & Ventilating Co., 163 S.E. 486, 174 Ga. 618, answers conformed to 164 S.E. 211, 45 Ga.App. 200—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 34 Ga.App. 396.

Md.—Abramson v. W. W. Penn & Co., 156 Md. 186, 143 A. 795, 73 A.L.R. 742.

Apparently contra statement

Ga.—Shippen v. Georgia Power Co., 159 S.E. 268, 172 Ga. 913.

Identity of chattel must be retained and chattel be capable of identification.—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 34 Ga.App. 396.

86. Iowa.—Snowden v. Craig, 26 Iowa 156, 96 Am.D. 125.

N.Y.—Rowland v. West, 17 N.Y.S. 330, 62 Hun 583.

A lease which expressly creates a lien on fixtures which may be annexed to the land leased should be recorded as a chattel mortgage.

Ill.—Joliet First Nat. Bank v. Adam, 28 N.E. 955, 138 Ill. 483.

Mich.—Lake Superior Ship Canal Railway & Iron Co. v. McCann, 48 N.W. 692, 86 Mich. 106.

87. Kan.—Rowland v. Anderson, 6 P. 255, 33 Kan. 264, 52 Am.R. 529.

statutes in some jurisdictions expressly so providing.[88]

e. Statutory Provisions Affecting Agreements

Some statutes expressly provide for filing or recording in accord with their provisions to render a conditional sales agreement involving articles to be attached to the realty effective as against subsequent purchasers or mortgagees of the realty.

Under the statutes in effect in some jurisdictions, a reservation of title or right of removal in a conditional sale contract with respect to chattels to be attached or affixed to the realty is void as to subsequent purchasers or mortgagees for value without notice unless the sales contract is properly filed or recorded in accord with the statute in the place where deeds affecting the realty would be recorded.[89] Filing or recording in accord with the statute will protect the conditional vendor as against

S.C.—Lane v. Bell Lumber Co., 115 S. E. 207, 122 S.C. 140.

Lease of fixture

Where mining machinery leased under written rental agreement was to be attached to land and would become part of realty but for provisions of lease, rental agreement was within scope of statute authorizing recording of any "instrument affecting title to or possession of real property."—Western Machinery Co. v. Graetz, 108 P.2d 711, 42 Cal.App. 2d 296.

Reservation in recorded deed

Recorded deed containing exception and reservation as to fixtures was notice to subsequent purchaser of grantor's interest in fixtures.—Kennedy v. City of Hood River, 259 P. 911, 122 Or. 531.

Effect of nonrecordation

Where lease of personal property to be attached to realty was unrecorded, although it could have been recorded under the statute, fact of nonrecordation would not of itself be a defense to a bona fide encumbrancer as would be the situation were a conditional sales contract involved, but proof of the existence of notice would still be necessary.—Western Machinery Co. v. Graetz, 108 P.2d 711, 42 Cal.App.2d 296.

88. **In Texas**

(1) Under the Texas statute an instrument reserving title or conferring a lien on machinery or other manufactured articles susceptible of being attached to realty in such manner as to become fixtures, recorded in the county where the realty is located in such manner as the statute specifies, constitutes notice which protects such reservation or lien.—Texas Power & Light Co. v. Malone, Civ.App., 42 S.W.2d 845, error dismissed.

(2) Thereunder a record of chattel mortgage not describing realty to which mortgaged machinery was attached was not notice to subsequent purchasers or mortgagees of realty.—Texas Power & Light Co. v. Malone, supra—Schumann v. Jenkins, Civ.App., 40 S.W.2d 214, error refused.

(3) The statute has no application to property remaining personal.—Cave v. Talley Co., Civ.App., 298 S.W. 912.

89. U.S.—In re Brownsville Brewing Co., C.C.A.Pa., 117 F.2d 463.

Mass.—Gar Wood Industries v. Colonial Homes, 24 N.E.2d 767, 305 Mass. 41, 126 A.L.R. 591—Automatic Sprinkler Corporation of America v. Rosen, 156 N.E. 693, 259 Mass. 319.

N.J.—Layne New York Co. v. President Hotel Co., 168 A. 442, 111 N.J.Law 338, affirming 165 A. 89, 11 N.J.Misc. 155.

N.Y.—Kohler Co. v. Brasun, 164 N.E. 31, 249 N.Y. 224, reversing 226 N. Y.S. 60, 222 App.Div. 338, reversing 219 N.Y.S. 432, 128 Misc. 507—Horowitz v. Welt, 229 N.Y.S. 519, 224 App.Div. 37—Cohen v. 1165 Fulton Ave. Corporation, 226 N.Y. S. 209, 222 App.Div. 378, affirmed 166 N.E. 792, 251 N.Y. 24, reargument denied 170 N.E. 149, 252 N. Y. 576—G. Goldberg & Sons v. Weisberg-Goldman Corporation, 262 N.Y.S. 99, 146 Misc. 720, affirmed 255 N.Y.S. 958, 959, 235 App.Div. 717, affirmed in part and reversed in part on other grounds 184 N.E. 147, 260 N.Y. 690, modified and amended on other grounds 185 N.E. 727, 261 N.Y. 535—Greene v. Elkins, 235 N.Y.S. 438, 134 Misc. 118.

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

Wis.—Brunswick-Balke-Collender Co. v. Franzke-Schiffman Realty Co., 248 N.W. 178, 211 Wis. 659—Schmidt v. Carrol, 231 N.W. 181, 201 Wis. 631.

Mortgagee as purchaser under statute applicable to "purchaser."

N.J.—Crown v. Regna Const. Co., 146 A. 346, 104 N.J.Eq. 469, affirmed, Err. & App., 150 A. 918.

N.Y.—Harvard Financial Corporation v. Greenblatt Const. Co., 184 N.E. 748, 261 N.Y. 169, reversing 258 N. Y.S. 993, 236 App.Div. 742, motion denied 185 N.E. 796, 261 N.Y. 694.

Wis.—American Laundry Machinery Co. v. Larson, 257 N.W. 608, 217 Wis. 208.

"Purchaser" and "mortgagee" in such statute mean a subsequent purchaser and a subsequent encumbrancer.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310.

Purchaser at mortgage foreclosure

(1) Purchaser at mortgage foreclosure sale is protected by failure to file under the statute.

Mass.—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11.

N.J.—Pflieger v. Holland Furnace Co., 174 A. 720, 114 N.J.Law 43.

N.Y.—Curry v. Geier Const. Co., 234 N.Y.S. 59, 225 App.Div. 498—G. Goldberg & Sons v. Gilet Bldg. Corporation, 237 N.Y.S. 258, 135 Misc. 158.

(2) Purchaser at mortgage foreclosure sale was held to be within protection of statute even though mortgage preceded installation of fixture and even though purchaser was also the mortgagee.—Voss v. Melrose Bond & Mortgage Corporation, 288 N.Y.S. 576, 160 Misc. 30.

(3) Purchaser on foreclosure of second mortgage obtained no greater right to chattels annexed to premises than second mortgagee had.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Purchaser at land contract foreclosure is within protection of statute.—Kohler Co. v. Brasun, 164 N.E. 31, 249 N.Y. 224, reversing 226 N.Y. S. 60, 222 App.Div. 338, reversing 219 N.Y.S. 432, 128 Misc. 507.

Purchaser from mortgagee

Purchaser from mortgagee of realty to which personalty sold under conditional sales agreement had become affixed held subsequent purchaser for value and entitled to such personalty as against conditional seller who had failed to comply with recording statute notwithstanding mortgagee had not relied on such personalty in taking mortgage.—Capital Motion Picture Supply Corporation v. Mapes-Bergen Amusements, 187 A. 161, 117 N.J.Law 185.

Subsequent advances

(1) Subsequent advances by a prior mortgagee have been protected.

N.J.—Mississippi Valley Trust Co. v. Cosmopolitan Club, 162 A. 396, 111 N.J.Eq. 277.

N.Y.—Central Chandelier Co. v. Irving Trust Co., 182 N.E. 10, 259 N. Y. 343, reversing 251 N.Y.S. 1012, 234 App.Div. 669, and motion denied 184 N.E. 94, 260 N.Y. 564—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332—G. Goldberg & Sons v. Gilet Bldg. Corporation, 237 N.Y.S. 258, 135 Misc. 158—Prudential Ins. Co. of America v. Estates

subsequent purchasers or mortgagees,[90] even if without actual notice or knowledge of the seller's rights.[91] On the other hand, subsequent purchasers or mortgagees who have actual notice or knowledge of the conditional seller's rights prior to acquiring their interest in the realty are not protected by the seller's failure to file under the statute.[92]

Nature of article annexed as factor. The protection of the statute as to both the vendor and subsequent purchaser or mortgagee is accorded only with respect to chattels coming within the terms of the statute.[93] Under statutes, such as Uniform Conditional Sales Act § 7, the protection accorded either to the conditional vendor or the subsequent purchaser of the realty is only as to chattels which but for the agreement would become fixtures when affixed to the realty,[94] if severable without material

of Cotswold, Limited, 17 N.Y.S.2d 302.

26 C.J. p 686 note 6.

(2) However, it has been held that a building loan mortgage given before ranges were purchased by mortgagor did not give mortgagee priority over conditional seller, although final advances on mortgage were made after ranges were installed and before conditional sales agreement was filed.—New York Title & Mortgage Co. v. Mapark Holding Corporation, 258 N.Y.S. 378, 236 App.Div. 219.

Second mortgagee subordinating mortgage to first mortgage

Second mortgagee did not become purchaser without notice of fixtures delivered after mortgage was recorded, by subordinating his mortgage to the installments advanced by the first mortgagee.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Purchaser at foreclosure sale as custodian of fixtures

Purchaser at foreclosure sale of second mortgage, not acquiring title to refrigerators annexed to realty is a custodian for the first mortgagee and may not permit removal thereof by conditional seller without being liable for waste to first mortgagee acquiring title, so that he is not liable in conversion to conditional seller.—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

Sale to contractor included

Law requiring conditional sales contract to be filed before goods were affixed to realty applied to sale of goods to contractor.—Crown v. Regna Const. Co., 146 A. 346, 104 N.J. Eq. 469, affirmed, Err. & App., 150 A. 918.

Trustee under deed of trust to bid in mortgaged estate at foreclosure sale did not become "purchaser" within statute providing that conditional sales of personal property to be attached to realty so as to become fixtures should be void as to any purchaser or mortgagee of real property if memorandum of sale has not been filed.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310.

Effect as to unrecorded mortgage of land

Seller removing furnace from building under unrecorded conditional sale contract after buyer's default held not liable to holder of subsequent unrecorded mortgage.—Security Co-op. Bank of Brockton v. Holland Furnace Co., 174 N.E. 721, 274 Mass. 389.

Under earlier statute

U.S.—Hammond v. Carthage Sulphite Pulp & Paper Co., C.C.A.N.Y., 8 F. 2d 35.

N.Y.—McCloskey v. Henderson, 131 N.E. 865, 231 N.Y. 130, reversing 173 N.Y.S. 913, 187 App.Div. 900—Crocker-Wheeler Co. v. Genesee Recreation Co., 125 N.Y.S. 721, 140 App.Div. 726.

26 C.J. p 683 note 73.

90. U.S.—In re Highland Silk Co., C.C.A.Pa., 41 F.2d 405.

Ariz.—Treat v. Nowell, 294 P. 273, 37 Ariz. 290.

N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567—Manufacturers' Building & Loan Ass'n of Newark v. Public Service Electric & Gas Co., 150 A. 196, 106 N.J.Eq. 68.

Pa.—National Theatre Supply Co. v. Mishler Theatre Co., 167 A. 324, 312 Pa. 250.

As against assignee of mortgagee

N.Y.—Minett v. Durnherr, 238 N.Y.S. 448, 135 Misc. 259.

As against purchaser at mortgage foreclosure

N.Y.—Metropolitan Stone Works v. Probel Holding Corporation, 227 N.Y.S. 414, 131 Misc. 519.

Grantee from purchaser at foreclosure sale

(1) One to whom mortgagee, purchasing theater at foreclosure sale, conveyed premises after installation of opera chairs under conditional sale contract recorded before conveyance, was subsequent purchaser, as against whom seller's reservation of property was valid.—National Theatre Supply Co. v. Mishler Theatre Co., 167 A. 324, 312 Pa. 250.

(2) This is so even though no statutory bond was furnished to indemnify vendee for injuries to freehold in removing chairs.—National Theatre Supply Co. v. Mishler Theatre Co., supra.

91. N.Y.—Harvard Financial Corporation v. Greenblatt Const. Co., 184 N.E. 748, 261 N.Y. 169, reversing 258 N.Y.S. 993, 236 App.Div. 742, motion denied 185 N.E. 796, 261 N.Y. 694.

92. N.Y.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y. S.2d 424.

Wis.—American Laundry Machinery Co. v. Larson, 257 N.W. 608, 217 Wis. 208.

93. **"Other personal property"**

Statute applying to chattels listed "or other personal property" applies only to the materials specially mentioned or such as are ejusdem generis of the same general description as the articles specifically mentioned.

U.S.—Chicago Pneumatic Tool Co. v. Arnold, C.C.A.Mass., 282 F. 43.

Mass.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349—Babcock-Davis Corporation v. Paine, 134 N.E. 342, 240 Mass. 438.

Property within protection of statute

Soda fountain constituted "other articles of personal property" within statute requiring recordation of conditional sale contract.—American Soda Fountain Co. v. Parsons, C.C.A. Mass., 32 F.2d 737.

Property not within protection of statute

(1) Air compressor.—Chicago Pneumatic Tool Co. v. Arnold, C.C.A.Mass., 282 F. 43.

(2) Iron staircase.—Babcock-Davis Corporation v. Paine, 134 N.E. 342, 240 Mass. 438.

(3) Standard equipment constituting part of brick-drying machine, removable without injuring building, held not "heating apparatus" or "plumbing goods" within statute.—Lancaster Iron Works v. Otter River Brick Co., 177 N.E. 827, 277 Mass. 102.

(4) Before amendment of statute adding portable or sectional buildings to property protected by statute, sales of portable garages were held not required to be recorded as conditional sales of "other articles of personal property."—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

94. N.Y.—Madfes v. Beverly Development Corporation, 166 N.E. 787, 251 N.Y. 12, modifying 229 N.Y.S. 881, 224 App.Div. 671, and remitti-

injury to the freehold.[95] Under others, however, protection is accorded only as to chattels which are wrought in or attached to the realty, regardless of whether they would otherwise be considered fixtures.[96]

Manner of filing or recording. To afford protection to the conditional vendor, as against a subsequent purchaser or mortgagee, the filing or recording must be in accord with the requirements of the statute.[97]

tur amended 168 N.E. 438, 251 N.Y. 589.

Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

55 C.J. p 1243 note 1 [a].

Chairs in theater attached directly to concrete floors are fixtures within statute.—In re Albanese, D.C.N.Y., 44 F.2d 602.

Furnace

Furnace conditionally sold under unrecorded agreement could be considered so intimately connected with freehold as to become essentially part thereof, so as to preclude seller's recovery of furnace in replevin, where freehold was sold to purchaser without notice after furnace was installed, notwithstanding statement in unrecorded conditional sale agreement that furnace should remain personal property.—Holland Furnace Co. v. Suzik, 180 A. 38, 118 Pa.Super. 405.

Electric light fixtures not within statute.—New York Title & Mortgage Co. v. Grossman Properties, 253 N.Y.S. 533, 142 Misc. 274, affirmed 257 N.Y.S. 1031, two cases, 236 App.Div. 665, and 257 N.Y.S. 1032, three cases, 236 App.Div. 665, motion denied 257 N.Y.S. 1032, 236 App.Div. 666, affirmed County Trust Co. v. Grossman Properties, 257 N.Y.S. 1033, 236 App.Div. 665.

Electric refrigerators retain character of personal property.—Kelvinator Sales Corporation v. Byro Realty Corporation, 241 N.Y.S. 632, 136 Misc. 720, 241 N.Y.S. 632.

Gas ranges not fixtures in this category.—Alf Holding Corporation v. American Stove Co., 171 N.E. 703, 253 N.Y. 450, affirming 234 N.Y.S. 739, 226 App.Div. 809—Madfes v. Beverly Development Corporation, 166 N.E. 787, 251 N.Y. 12, modifying 229 N.Y.S. 881, 224 App.Div. 671, and remittitur amended 168 N.E. 438, 251 N.Y. 589—New York Title & Mortgage Co. v. Grossman Properties, 253 N.Y.S. 533, 142 Misc. 274, affirmed 257 N.Y.S. 1031, two cases, 236 App.Div. 665, and 257 N.Y.S. 1032, three cases, 236 App.Div. 665, motion denied 257 N.Y.S. 1032, 236 App.Div. 666, affirmed County Trust Co. v. Grossman Properties, 257 N.Y.S. 1033, 236 App.Div. 665.

Heavy machinery for making of ice substantially fastened to realty comes within statutes as fixture but for the agreement.

U.S.—In re White Plains Ice Service, C.C.A.N.Y., 109 F.2d 913.

N.Y.—Voss v. Melrose Bond & Mortgage Corporation, 288 N.Y.S. 576, 160 Misc. 30.

Intention of parties as factor

Intention of parties to conditional sale contract must be considered in determining whether personalty became part of realty, so as to require seller to record statement describing realty to retain title against subsequent purchaser thereof.—Public Service Electric Gas Co. v. Sanford, 161 A. 507, 10 N.J.Misc. 885.

Under earlier statute

N.Y.—McCloskey v. Henderson, 131 N.E. 865, 231 N.Y. 130, reversing 173 N.Y.S. 913, 187 App.Div. 900—Craine Silo Co. v. Alden State Bank, 218 N.Y.S. 143, 218 App.Div. 263—Cutler Mail Chute Co. v. Crawford, 152 N.Y.S. 750, 167 App. Div. 246.

26 C.J. p 683 note 73 [a].

95. N.J.—Pflieger v. Holland Furnace Co., 174 A. 720, 114 N.J.Law 43.

N.Y.—Minett v. Durnherr, 238 N.Y.S. 448, 135 Misc. 259.

Materiality of injury to freehold in case of prior mortgagee see infra § 19.

What constitutes material injury under the statute see supra § 17 b.

96. Mass.—Gar Wood Industries v. Colonial Homes, 24 N.E.2d 767, 771, 305 Mass. 41, 126 A.L.R. 591.

"The statute is concerned not with whether the articles remain personal property after attachment to the real estate, but only with the question whether they have in fact been wrought into or attached to it. That there may not have been an intention to make the attachment permanent is not material."—Gar Wood Industries v. Colonial Homes, supra.

Test

"The word 'attached,' followed . . . by 'whether they are fixtures at common law or not,' means something more than annexed to the realty by . . . tenuous connections. . . . There must be something in the connection to indicate a bonding intended to permanent rather than temporary relationship between realty and the article in question. Sealing necessary to obtain a tight junction should not necessarily determine whether an attachment is or is not within the statute."—Gardner v. Buckley & Scott, 181 N.E. 802, 804, 280 Mass. 106.

Oil storage tank and oil burner installed in dwelling house under unregistered "rental agreement" held not within statute, and, because it remained personalty, did not pass to bona fide mortgagee and parties claiming under mortgagee.—Gardner v. Buckley & Scott, supra.

Soda fountain was wrought into or attached to real estate within statute requiring recordation of conditional sale contract.—American Soda Fountain Co. v. Parsons, C.C.A.Mass., 32 F.2d 737.

97. **Additional statement necessary**

(1) The Uniform Conditional Sales Act, in effect in a number of jurisdictions, requires a statement signed by the seller briefly describing the realty and stating that the goods are, or are to be, affixed thereto to be filed together with the conditional sales contract or a copy thereof.—Capital Motion Picture Supply Corporation v. Mapes-Bergen Amusements, 187 A. 161, 117 N.J.Law 185—Public Service Electric Gas Co. v. Sanford, 161 A. 507, 10 N.J.Misc. 885.

(2) Mere filing of conditional sales agreement does not protect title of conditional seller as against subsequent purchaser of realty.—Capital Motion Picture Supply Corporation v. Mapes-Bergen Amusements, supra—General Motors Acceptance Corporation v. Capital Associates, 158 A. 107, 108 N.J.Law 421, affirmed 164 A. 20, 110 N.J.Law 61.

(3) Statement that equipment should be delivered and not removed without seller's written consent, held not to meet requirements of statute.—Capital Motion Picture Supply Corporation v. Mapes-Bergen Amusements, supra.

(4) Recorded statement correctly describing premises in which electric refrigerator was installed by lot and plot number on municipal assessment map, held sufficient notice of sale contract to subsequent purchaser of realty, though incorrectly stating street number and name, in such case the description of premises by lot and plot number on municipal map prevailing over conflicting description by street name and number.—Public Service Electric Gas Co. v. Sanford, supra.

Form and contents sufficient.—Harvard Financial Corporation v. Greenblatt Const. Co., 184 N.E. 748, 261 N.Y. 169, reversing 258 N.Y.S. 993, 236 App.Div. 742, motion denied 185 N.E. 796, 261 N.Y. 694.

Place

Filing is generally required to be in the manner that, and at the place

General conditional sales statutes. In some jurisdictions a failure to file or record a conditional sale contract, under statutes dealing with conditional sales generally, renders it ineffective as against an innocent purchaser or mortgagee of the realty to which articles involved have been annexed.[98]

§ 19. —— As against Prior Mortgagee of Land

a. In general
b. Effect of after-acquired property clause
c. Notice and record
d. Injury by removal
e. Article becoming essential or integral part of realty
f. Article substituted for another
g. Statutes regulating rights of parties

a. In General

In the absence of statute, an agreement that an article attached to realty shall remain personalty and be removable is generally given full effect as against a prior mortgagee of the land, in so far as removal will not interfere with the security of the prior mortgage.

Subject to statutory modifications, see infra subdivision g of this section, as a general rule, an agreement that an article or structure attached to the realty shall be removable or shall remain personalty, whether expressed, or merely implied from the making of a chattel mortgage thereon, the conditional character of a sale thereof, or its annexation under license, is given full effect as against a mortgage of the realty made previous to annexation, in so far as this will not interfere with the security of such mortgage, the mortgagee not having been misled and having advanced nothing on the faith of such annexation,[99] it being occasional-

where, deeds affecting the realty are recorded or registered.
U.S.—In re Brownsville Brewing Co., C.C.A.Pa., 117 F.2d 463.
N.Y.—Lightolier Co. v. Del Mar Club Holding Co., 262 N.Y.S. 32, 237 App. Div. 432, reversing 259 N.Y.S. 97, 144 Misc. 876, and affirmed 189 N. E. 711, 263 N.Y. 588.

Time of filing
(1) Under the Uniform Conditional Sales Act, filing after attachment of a chattel is sufficient if done before the sale or mortgage of the realty.—Harvard Financial Corporation v. Greenblatt Const. Co., 184 N. E. 748, 261 N.Y. 169, reversing 258 N.Y.S. 993, 236 App.Div. 742, motion denied 185 N.E. 796, 261 N.Y. 694.

(2) Filing thereafter is insufficient to protect the conditional seller.—G. Goldberg & Sons v. Gilet Bldg. Corporation, 237 N.Y.S. 258, 135 Misc. 158.

(3) Where elevator company installed elevator under contract by which title was to remain in company until contract price was paid in full, and providing that forty per cent of price was payable when second mortgage was placed, filing of said contract a few days after work of installation was substantially completed did not comply with statute, notwithstanding it was filed before sale in second mortgage foreclosure action, in absence of showing that mortgagee had knowledge of existence of contract, or of fact that elevator had not been paid for in full at time of its installation.—Greene v. Elkins, 235 N.Y.S. 438, 134 Misc. 118.

(4) Where plaintiff, a real estate mortgagee, on Nov. 10, 1938, advanced the last installment of money to defendant owner under a building and loan mortgage, which covered plumbing fixtures, and between Aug. 24, 1938, and Jan. 3, 1939, codefendant sold plumbing materials to defendant owner under a conditional sales agreement dated Dec. 6, 1938, and filed by codefendant Febr. 14, 1939, plaintiff was a "bona fide encumbrancer," within meaning of Personal Property Law, as to materials affixed at time of last advancement.—Prudential Ins. Co. of America v. Estates of Cotswold, Limited, 17 N. Y.S.2d 302.

(5) Under statute requiring recording not later than specified number of days after delivery of the property, the time for recording is computed from the date of the first delivery in case of goods delivered from time to time.—Automatic Sprinkler Corporation of America v. Rosen, 156 N.E. 693, 259 Mass. 319.

(6) Thereunder, notice recorded before any part of system was delivered on realty sufficiently complied with statute to entitle conditional seller to enforce agreement as against subsequent realty mortgagee.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385.

(7) Under statutes requiring recording within specified time after making of contract, time runs from such date, and not from date of delivery.—Chicago Pneumatic Tool Co. v. Arnold, C.C.A.Mass., 282 F. 43.

Refiling unnecessary
One filing in accord with the statute is sufficient to protect the conditional vendor, a refiling under the statute dealing with chattels generally being unnecessary.—In re White Plains Ice Service, C.C.A.N.Y., 109 F.2d 913.

Recording in "conditional sales book" sufficient under some recording statutes.—Treat v. Nowell, 294 P. 273, 37 Ariz. 290.

98. U.S.—Weber Showcase & Fixture Co. v. Waugh, D.C.Wash., 42 F.2d 515.
Mo.—Glueck & Co. v. Powell, 61 S.W. 2d 406, 408, 227 Mo.App. 1226, citing **Corpus Juris.**
Tenn.—Knoxville Gas Co. v. W. I. Kirby & Sons, 32 S.W.2d 1054, 161 Tenn. 490.
26 C.J. p 683 note 73.

Law governing
Where fixtures were shipped into Washington, public policy of Washington as regards unrecorded conditional sales contracts accepted in California could not be subordinated to California laws.—Weber Showcase & Fixture Co. v. Waugh, D.C. Wash., 42 F.2d 515.

99. U.S.—Franklin Sav. Bank of Franklin, N. H., v. Garot, C.C.A. Ark., 69 F.2d 487.
Ala.—Viking Equipment Co. v. Prudential Ins. Co. of America, 168 So. 566, 232 Ala. 543.
Ark.—Evans v. Argenta Building & Loan Ass'n, 22 S.W.2d 377, 180 Ark. 654.
Cal.—Dauch v. Ginsburg, 6 P.2d 952, 954, 214 Cal. 540, citing **Corpus Juris.**
Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145.
D.C.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.
Ga.—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 879, 34 Ga.App. 396, citing **Corpus Juris.**
Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill. App. 561—Lincoln Nat. Life Ins. Co. v. Vodnik, 6 N.E.2d 503, 288 Ill. App. 622—Holland Furnace Co. v. Lithuanian Building & Loan Ass'n of Waukegan, 3 N.E.2d 934, 286

ly said, more particularly with reference to a claim under a chattel mortgage, as against the subsequent realty mortgage, that the rights of the parties should be adjusted on equitable principles, with a view to the theory that a mortgage attaches only to such interest in the article as the mortgagor acquired, and that this interest is limited by the existence of the chattel mortgage.[1]

In some jurisdictions a contrary view, the Massachusetts rule, prevails, to the effect that it is not in the power of the mortgagor, by any agreement to which the mortgagee is not a party, to affect the rights of the latter as to accessions to the realty, he being no more able to empower another to sever such accessions as against the mortgagee than to sever them himself.[2] However, even where

Ill.App. 453—Sears Roebuck & Co. v. Piasa Building & Loan Ass'n, 276 Ill.App. 389—Thuma v. Granada Hotel Corporation, 269 Ill.App. 484, 495, quoting **Corpus Juris.**
Ind.—Citizens Bank of Greenfield v. Mergenthaler Linotype Co., 25 N.E. 2d 444, 216 Ind. 573.
Iowa.—Comly v. Lehmann, 253 N.W. 501, 503, 218 Iowa 644, citing **Corpus Juris.**
Ky.—Gas & Electric Shop v. Corey-Scheffel Lumber Co., 13 S.W.2d 1009, 227 Ky. 657, 62 A.L.R. 208.
Mich.—Title & Bond Guaranty Co. v. Pointer, 220 N.W. 786, 243 Mich. 415.
Minn.—Holland Furnace Co. v. Jefferson, 216 N.W. 795, 797, 173 Minn. 121, citing **Corpus Juris.**
Miss.—Layne Central Co. v. Gulf Coast Ice Co., 157 So. 84, 86, 171 Miss. 94, citing **Corpus Juris.**
Mo.—Globe Automatic Sprinkler Co. v. Boester, 95 S.W.2d 825, 827, 231 Mo.App. 203, citing **Corpus Juris**—Grinnell Co. v. Farm & Home Savings & Loan Ass'n of Missouri, App., 74 S.W.2d 1097—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832—Wayne Tank & Pump Co. v. Quick Service Laundry Co., App., 29 S.W.2d 161.
Neb.—Omaha Loan & Building Ass'n v. Bigelow, 274 N.W. 574, 133 Neb. 275.
N.H.—Cochran v. Flint, 57 N.H. 514.
N.J.—Kramer v. Yocum, 144 A. 188, 104 N.J.Eq. 79.
N.C.—Standards Motors Finance Co. v. Weaver, 153 S.E. 861, 199 N.C. 178.
Ohio.—East Ohio Building & Loan Co. v. Holland Furnace Co., 194 N.E. 598, 601, 48 Ohio App. 545, citing **Corpus Juris**—Holland Furnace Co. v. Joy, 32 Ohio N.P., N.S., 17.
Okl.—Kapsemalis v. Douglas, 61 P.2d 211, 177 Okl. 522.
Or.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.
Tenn.—Lenoir Land Co. v. Haynes Heating Co., 63 S.W.2d 659, 166 Tenn. 494, quoting **Corpus Juris**—McLean v. McLean Stone Co., 84 S.W.2d 1046, 1050, 19 Tenn.App. 249, citing **Corpus Juris.**
Tex.—Stewart v. Woods Electric Co., Civ.App., 73 S.W.2d 657—Texas Power & Light Co. v. Malone, Civ.App., 42 S.W.2d 845, error dismissed—Southwestern Public Service Co. v. Smith, Civ.App., 31 S.W.2d 472, 476, error dismissed, citing **Corpus Juris.**
Wash.—Provident Mut. Life Ins. Co. of Philadelphia v. Smith, 27 P.2d 580, 175 Wash. 356.
W.Va.—Industrial Bank of Richmond v. Holland Furnace Co., 153 S.E. 309, 310, 109 W.Va. 176, citing **Corpus Juris.**
Wyo.—Holland Furnace Co. v. Bird, 21 P.2d 825, 828, 45 Wyo. 471, citing **Corpus Juris.**
26 C.J. p 684 note 87—11 C.J. p 445 note 86.
Effect of agreement as against purchaser of realty at mortgage foreclosure sale see supra § 18.
Operation and effect of conditional sales contract as to third persons generally see the C.J.S. title Sales § 572 et seq, also 55 C.J. p 1233 note 15 et seq.

Agreement before or after mortgagor's default

Right to remove improvement removable without impairing value of realty as it existed when mortgage was executed may be reserved by contract between mortgagor and another, as against mortgagee, whether right to remove was created before or after mortgagor's default.—Mallory v. Agee, 147 So. 881, 226 Ala. 596, 88 A.L.R. 1107.

Annexation by lessee of mortgagor

Okl.—Smith v. Bush, 44 P.2d 921, 173 Okl. 172, 101 A.L.R. 330.
26 C.J. p 719 note 21.

Extent of mortgagee's right in chattel

Special equitable property right of owner of building in article attached thereto under title reservation contract becomes subject to prior trust deed, but the article itself does not become subject to the deed of trust.—Industrial Bank of Richmond v. Holland Furnace Co., 153 S.E. 309, 109 W.Va. 176.

Consent of mortgagee

Security deed grantee who orally consented to lease provision authorizing lessee to remove improvements made during term was not entitled to injunction against such removal, since consent, although oral, estopped security deed grantee from objecting to removal.—Peachtree Gun Club v. Trimble, 186 S.E. 669, 182 Ga. 630.

In Florida

(1) A conditional seller of personalty attached to a building has a superior right to the chattel as against a prior mortgagee of the land, if the chattel may be removed without substantial damage to the realty.—Standard Finance Co. v. Central Farmers' Trust Co., 157 So. 520, 117 Fla. 217.

(2) In an earlier case, in which the court relied on Meagher v. Hayes, 25 N.E. 105, 152 Mass. 228, 23 Am.S.R. 819, it was stated that the mortgagee's right to sell a building under foreclosure sale as part of the mortgaged realty cannot be affected by agreements in regard thereto, to which the mortgagee was not a party, nor by notice of claims of others given to purchaser at foreclosure sale.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.

1. Ind.—Binkley v. Forkner, 19 N.E. 753, 117 Ind. 176, 3 L.R.A. 33.
26 C.J. p 685 note 88.

2. U.S.—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 9 F.Supp. 112.
Me.—Wedge v. Butler, 6 A.2d 46, 136 Me. 189—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153—Gaunt v. Allen-Lane Co., 145 A. 255, 128 Me. 41, 73 A.L.R. 738.
Mass.—Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335—Greene v. Lampert, 174 N.E. 669, 274 Mass. 386—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349—Waverley Co-op. Bank v. Haner, 173 N.E. 699, 273 Mass. 477.
26 C.J. p 685 note 89.

Annexation by lessee of mortgagor

The rights of the prior mortgagee are superior although the chattels are purchased and installed by the mortgagor's lessee under an agreement for removal by the seller.—Vorsec Co. v. Gilkey, 170 A. 722, 132 Me. 311.

In Maryland

(1) A garage, when erected, was part of freehold covered by lien of

this view is adopted, it is recognized that the priority of the realty mortgage in this regard is lost in case the holder of such mortgage assents to the agreement by which the right of removal is reserved.[3] Further, the rule does not apply where the chattel does not become part of the mortgaged premises.[4]

Representations by the conditional vendor of a chattel, made to the mortgagee of the land before the mortgage was made, but after the making of the sale, that the article had been paid for, have been referred to as operating in favor of the mortgagee's claim.[5]

As regards subsequent advances made by the mortgagee after the annexation of the article in question, he is, it seems, in the position of a subsequent mortgagee of the land,[6] and, in most jurisdictions, is, as shown supra § 18, protected as such if without notice of the agreement.

b. Effect of After-Acquired Property Clause

An agreement that chattels annexed to land shall remain personalty and be removable usually is given effect as against a prior mortgagee of the land, although the prior mortgage contains an after-acquired property clause.

The fact that the prior mortgage of the real estate in terms covers after-acquired property, while occasionally referred to in support of a decision giving priority to such mortgage, as against the claim to a chattel annexed,[7] does not appear, even in such cases, to be a controlling factor in the decision, while in other cases it is accorded absolutely no weight.[8] Likewise a provision in the mortgage that articles annexed shall become part of the realty has been regarded as inoperative as against the claim to the article as a chattel.[9]

c. Notice and Record

The claim of the owner of chattels having notice of the existence of a prior mortgage on the realty to which the chattels are annexed may, according to some cases, be subordinated to the claim of the prior mortgagee of the land.

According to some authorities, when a person sells personal property under a condition that it shall remain the property of the seller until paid for, and the seller has notice that the personalty is to be installed in a building subject to a mortgage,

mortgage, and provision in contract that title to garage should not pass was not binding on prior mortgagee, where its consent thereto was not obtained.—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.

(2) It has also been stated that a conditional vendor of fixtures may assert right against prior mortgagee of realty, where removal will not materially injure premises.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.

In Wisconsin

(1) A purchase-money chattel mortgage on personalty annexed to mortgaged land is subordinate to the prior mortgage on the realty.—Frankland v. Moulton, 5 Wis. 1.

(2) As between a seller of personalty annexed to the realty and a prior mortgagee of the land, an agreement between the seller and buyer of the chattel for removal is not binding.—Fuller-Warren Co. v. Harter, 85 N.W. 698, 110 Wis. 80, 84 Am. S.R. 867.

(3) A tenant of the mortgagor of land, who annexes chattels to the realty under agreement with the mortgagor that they may be removed, may recover such chattels as against the prior mortgagee of the land, the court stating that it has never approved the Massachusetts rule so broadly as to give preference to a prior mortgagee of land over a tenant of the mortgagor, especially where the chattels annexed by the tenant are trade fixtures and may be removed without material injury to the freehold.—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60.

(4) The application of the Uniform Conditional Sales Act is discussed infra subdivision g of this section.

3. Me.—Hawkins v. Hersey, 30 A. 14, 86 Me. 394.
26 C.J. p 685 note 90.

4. Mass.—Commercial Credit Corporation v. Gould, 175 N.E. 264, 275 Mass. 48—Quincy Oil Co. v. New England Road Machinery Co., 174 N.E. 670, 274 Mass. 419.
Chattels annexed to, or on, land as subject to existing mortgage see infra § 49.

5. Ind.—Larue v. American Diesel Engine Co., 96 N.E. 772, 176 Ind. 609.

6. Cal.—Hammel Radiator Corporation v. Mortgage Guarantee Co., 18 P.2d 993, 129 Cal.App. 468.
26 C.J. p 685 note 92.

7. U.S.—In re Sunflower State Refining Co., Kan., 195 F. 180, 115 C. C.A. 132.
26 C.J. p 685 note 95.

8. U.S.—Wheat v. Otis Elevator Co., C.C.A.Fla., 23 F.2d 152.
Ark.—Hachmeister v. Power Mfg. Co., 264 S.W. 976, 165 Ark. 469.
Colo.—McClain v. Saranac Mach. Co., 28 P.2d 1009, 94 Colo. 145.
Ill.—Thuma v. Granada Hotel Corporation, 269 Ill.App. 484, 495, quoting **Corpus Juris.**
Mo.—Greene County Building & Loan Ass'n v. Holland Furnace Co., 59 S.W.2d 749, 227 Mo.App. 972.
N.Y.—Herold v. Cohrone Boat Co., 292 N.Y.S. 81, 249 App.Div. 318—Prisco & Soverio v. Bifulco Bros., 254 N.Y.S. 459, 234 App.Div. 122—Perfect Lighting Fixtures Co. v. Grubar Realty Corporation, 239 N.Y.S. 286, 228 App.Div. 141—Chasnov v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.
Pa.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.
26 C.J. p 685 note 96.

Provision making property subject to unpaid price

Where trust deed provided that it was a lien on all machinery now installed and in operation, or that will hereafter be installed and be in operation, "subject to the unpaid purchase price of any hereafter acquired property," property sold under a conditional sales contract remained personalty and conditional vendor's rights were superior.—Wayne Tank & Pump Co. v. Quick Service Laundry Co., Mo.App., 29 S.W.2d 161.

9. N.Y.—Davis v. Bliss, 79 N.E. 851, 187 N.Y. 77, 10 L.R.A.,N.S., 458, reversing 94 N.Y.S. 1127, 105 App. Div. 636.
26 C.J. p 686 note 97.

and the chattel is of such a character and is so installed that, if paid for, it would become subject to the mortgage, then it will become subject to the prior mortgage on the building, as against the conditional seller, even though the price is unpaid.[10] There are cases in which the fact that the mortgage, containing an after-acquired property clause, is of record, and that the conditional seller is thereby charged with notice of such clause, is referred to as a consideration of decided significance adverse to the claim of such seller,[11] although this fact is not always of controlling importance.[12]

Notice to the prior mortgagee of the realty that there is a conditional sale contract reserving title to chattels, and that the chattels are annexed to the realty, is not essential to preserve the vendor's right to the chattels.[13] However, the fact that the mortgagee knew of the mortgagor's consent to the erection of a structure by another person with a right of removal in the latter, and made no objection, has been referred to as showing an assent by the mortgagee which would preclude him from claiming the structure under the mortgage.[14]

Record of conditional sale. That the conditional sale of a chattel has not been recorded as provided by statute has ordinarily been regarded as not affecting the question of priority as between the vendor and one claiming under a prior mortgage of the realty to which it is subsequently annexed, a prior mortgagee not being a purchaser for value within the protection accorded by such statute.[15] Occasionally, however, a contrary view has been indicated.[16]

d. Injury by Removal

A chattel mortgagee or conditional seller of chattels may not, as against a prior mortgagee of the land to which the articles are annexed, remove such articles if their removal will cause substantial injury to the realty.

The right of a chattel mortgagee or conditional vendor to claim the article annexed as against the prior mortgagee of the realty has been said to exist only in so far as its removal will not cause substantial injury to the realty,[17] this corresponding

10. Md.—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.
R.I.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.
26 C.J. p 687 note 13.
Construction loan and mortgage
Cal.—Pacific Mortg. Guaranty Co. v. Rosoff, 67 P.2d 110, 20 Cal.App.2d 383—Hammel Radiator Corporation v. Mortgage Guarantee Co., 18 P.2d 993, 129 Cal.App. 468.

11. Ind.—Larue v. American Diesel Engine Co., 96 N.E. 772, 176 Ind. 609.
Pa.—Bullock Electric Mfg. Co. v. Lehigh Valley Tract Co., 80 A. 568, 231 Pa. 129.
Effect of after-acquired property clause see supra subdivision b of this section.

12. Mo.—Greene County Building & Loan Ass'n v. Holland Furnace Co., 59 S.W.2d 749, 227 Mo.App. 972.

13. Kan.—Bromich v. Burkholder, 158 P. 63, 98 Kan. 261, L.R.A.1916F, 1275.
N.C.—Cox v. New Bern Lighting, etc., Co., 65 S.E. 648, 151 N.C. 62, 134 Am.S.R. 966, 18 Ann.Cas. 936.

14. Vt.—Paine v. McDowell, 41 A. 1042, 71 Vt. 28.

15. Ill.—Holland Furnace Co. v. Lithuanian Building & Loan Ass'n of Waukegan, 3 N.E.2d 934, 286 Ill.App. 453.
Mo.—Greene County Building & Loan Ass'n v. Holland Furnace Co., 59 S.W.2d 749, 227 Mo.App. 972—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo. App. 832.
Or.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.
26 C.J. p 686 note 4.
Statutes regulating conditional sales of fixtures see infra subdivision g of this section.
When chattel is incorporated in structure and becomes an integral part of the realty, it not only loses its character as personal property, but also the benefit of any notice which follows from recordation, such as recording of conditional sales contract.—Heating & Plumbing Finance Corporation v. Becker, 173 A. 198, 167 Md. 222.

16. N.C.—Clark v. Hill, 23 S.E. 91, 117 N.C. 11, 53 Am.S.R. 574.
26 C.J. p 686 note 5.

17. Ala.—Viking Equipment Co. v. Prudential Ins. Co. of America, 168 So. 566, 232 Ala. 543.
Ark.—Hachmeister v. Power Mfg. Co., 264 S.W. 976, 165 Ark. 469.
Cal.—Dauch v. Ginsburg, 6 P.2d 952, 954, 214 Cal. 540, citing **Corpus Juris.**
Iowa.—Comly v. Lehmann, 253 N.W. 501, 218 Iowa 644.
Ky.—Morrow Mfg. Co. v. First Nat. Bank, 47 S.W.2d 926, 243 Ky. 132—Morrow Mfg. Co. v. Race Creek Coal Co., 2 S.W.2d 662, 222 Ky. 807.
Mo.—Grinnell Co. v. Farm & Home Savings & Loan Ass'n of Missouri, App., 74 S.W.2d 1097—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo.App. 832.
Tenn.—Lenoir Land Co. v. Haynes Heating Co., 63 S.W.2d 659, 166 Tenn. 494.
Tex.—Compton v. W. F. & J. F. Barnes Lumber Co., Civ.App., 99 S.W.2d 634, 636, citing **Corpus Juris.**
26 C.J. p 686 note 7.
Material injury to freehold under statutes regulating rights of parties see infra subdivision g of this section.
Injury must be physical damage, defacement, or tearing down, as of walls or structures, not merely the deprivation of things that may be useful or advantageous in carrying on enterprises on the land.
U.S.—Franklin Sav. Bank of Franklin, N. H., v. Garot, C.C.A.Ark., 69 F.2d 487.
Ill.—Holland Furnace Co. v. Lithuanian Building & Loan Ass'n of Waukegan, 3 N.E.2d 934, 286 Ill. App. 453.
Diminishing mortgagee's security
(1) The right to reclaim cannot be exercised where the removal of the chattels would materially injure the premises, for the reason that the conditional vendor has no right, by injuring the premises, to impair or diminish the mortgagee's security.
Ala.—Viking Equipment Co. v. Prudential Ins. Co. of America, 168 So. 566, 232 Ala. 543.
Ark.—Evans v. Argenta Building & Loan Ass'n, 22 S.W.2d 377, 180 Ark. 654.
Okl.—Smith v. Bush, 44 P.2d 921, 173 Okl. 172, 101 A.L.R. 330.

with the general rule, discussed supra § 13, limiting the effect of an agreement to give a right of removal. On the other hand, it has been said that if the detachment of the article annexed will occasion some diminution in the value of the freehold, as it would have stood had the attachment not been made, then the depreciation must be made whole and the rights of the parties adjusted according to the equities of the case.[18]

In so far as the doctrine prevails that the mortgagor of the realty cannot, as against the mortgagee, empower a third person to sever accessions to the realty, see supra subdivision a of this section, the question whether the article can be severed from the realty without injury thereto is of no signifiance.[19]

e. Article Becoming Essential or Integral Part of Realty

According to some authorities an agreement that chattels annexed to land shall remain personalty and be removable is not binding on the prior mortgagee of the land where the chattels have become an essential and integral part of the realty.

Even in some of the cases which recognize and assert the rule favoring the person claiming the articles as personalty under an agreement for removal, as against the prior mortgagee of the realty, that rule has been stated not to be applicable in case the articles have, through annexation, become an essential or integral part of the realty.[20] In some cases, however, in which this distinction is referred to, it is assumed that an article is necessarily an integral part of the realty if so annexed that, apart from agreement, it would be a fixture,[21]

(2) Where the removal of the fixtures will substantially damage or injure the security of the prior mortgagee, the rights of the conditional seller must be subordinated, although the articles can be removed without substantial injury to the realty.—Dauch v. Ginsburg, 6 P.2d 952, 214 Cal. 540—Pacific Mortg. Guaranty Co. v. Rosoff, 67 P.2d 110, 20 Cal.App.2d 383—Hammel Radiator Corporation v. California Sec. Loan Corporation, 35 P.2d 353, 140 Cal.App. 407—Hammel Radiator Corporation v. Mortgage Guarantee Co., 18 P.2d 993, 129 Cal.App. 468.

Chattels held removable

(1) Bathroom closet combination.—Evans v. Argenta Building & Loan Ass'n, 22 S.W.2d 377, 180 Ark. 654.

(2) Bottle washing and pasteurizing machinery in brewery.—In re Voight-Pros't Brewing Co., C.C.A. Mich., 115 F.2d 733.

(3) Elevators in hotel buildings.—Wheat v. Otis Elevator Co., C.C.A. Fla., 23 F.2d 152.

(4) Refrigerating equipment in apartment house.—Provident Mut. Life Ins. Co. of Philadelphia v. Smith, 27 P.2d 580, 175 Wash. 356.

Chattels held not removable

(1) Gas radiators.—Hammel Radiator Corporation v. California Sec. Loan Corporation, 35 P.2d 353, 140 Cal.App. 407—Hammel Radiator Corporation v. Mortgage Guarantee Co., 18 P.2d 993, 129 Cal.App. 468.

(2) Plumbing and heating fixtures in hotel.—Dauch v. Ginsburg, 6 P.2d 952, 214 Cal. 540.

(3) Wall beds attached to wall of apartment building by means of brackets or plates screwed to building and linoleum cemented to floors and curtain rods screwed to walls.—Pacific Mortg. Guaranty Co. v. Rosoff, 67 P.2d 110, 20 Cal.App.2d 383.

(4) Water pipes where removal would leave holes in floor and walls and require excavation of adjoining premises.—Evans v. Argenta Building & Loan Ass'n, 22 S.W.2d 377, 180 Ark. 654.

Sprinkler system

(1) Held removable.

Fla.—Standard Motors Finance Co. v. Central Farmers' Trust Co., 157 So. 520, 117 Fla. 217.

N.C.—Standard Motors Finance Co. v. Weaver, 153 S.E. 861, 199 N.C. 178.

(2) Held not removable.—Viking Equipment Co. v. Central Hotel Co., 91 S.W.2d 94, 230 Mo.App. 304.

Offer at trial to pay damage

In action seeking removal of automatic sprinkler system installed in mortgaged property so as to become fixture, on default in payments after purchase of realty on foreclosure sale by mortgagee, offer at the trial to pay such damage that might be done in removing system had no effect on decision of case, since person seeking removal must show title and right to immediate possession at time action for detinue and trover was brought.—Viking Equipment Co. v. Prudential Ins. Co. of America, 168 So. 566, 232 Ala. 543.

18. N.J.—Campbell v. Roddy, 14 A. 279, 44 N.J.Eq. 244, 252, 6 Am.S.R. 889.
26 C.J. p 686 note 9.

19. Me.—Gaunt v. Allen-Lane Co., 145 A. 255, 128 Me. 41, 73 A.L.R. 738.
Mass.—Greene v. Lampert, 174 N.E. 669, 274 Mass. 386.
26 C.J. p 687 note 11.

20. Ark.—Hachmeister v. Power Mfg. Co., 264 S.W. 976, 165 Ark. 469.

Material injury to freehold within statutes regulating rights of parties see infra subdivision g of this section.

Articles regarded as integral part of realty

(1) Boilers, smokestacks, etc., installed in creamery plant, removal of which would incapacitate plant.—In re Moultrie Creamery & Produce Co., C.C.A.Ga., 2 F.2d 129, certiorari denied J. B. Schofield's Sons Co. v. Citizens' Bank of Moultrie, 45 S.Ct. 226, 266 U.S. 635, 69 L.Ed. 480.

(2) Engine parts attached to pumping engines which were permanent fixtures.—Hachmeister v. Power Mfg. Co., 264 S.W. 976, 165 Ark. 469.

(3) Gas steam radiators installed in apartment house.—Hammel Radiator Corporation v. California Sec. Loan Corporation, 35 P.2d 353, 140 Cal.App. 407—Hammel Radiator Corporation v. Mortgage Guarantee Co., 18 P.2d 993, 129 Cal.App. 468.

(4) Plumbing and heating fixtures installed in hotel under construction.—Dauch v. Ginsburg, 6 P.2d 952, 214 Cal. 540.

(5) Sprinkler system.—Viking Equipment Co. v. Central Hotel Co., 91 S.W.2d 94, 230 Mo.App. 304.

(6) Other cases see 26 C.J. p 687 note 12 [a].

Articles not regarded as integral part of realty

(1) Refrigerating equipment.—Provident Mut. Life Ins. Co. of Philadelphia v. Smith, 27 P.2d 580, 175 Wash. 356.

(2) Other cases see 26 C.J. p 687 note 12 [b].

21. U.S.—Tippett v. Barham, Va., 180 F. 76, 103 C.C.A. 430, 37 L.R.A., N.S., 119.
26 C.J. p 687 note 13.

thus adopting the minority rule, discussed supra subdivision a of this section, that the prior mortgage on the land takes priority over any claim by a third person under an agreement evidenced by conditional sale or otherwise. It has been held that the fact tha. the article annexed is an essentia: in dispensable part of the completed structure contemplated by the mortgage of the realty does not preclude the conditional vendor of such article from asserting a claim thereto, the court distinguishing the case of property which has become so intimately connected with or embodied in that which is subject to the mortgage that to reclaim it would more or less physically disintegrate the property held by the mortgagee.[22]

f. Article Substituted for Another

The effect of an agreement as against a prior mortgagee of land that an article annexed to the land shall remain personalty and be removable usually is not controlled by the fact that the article annexed is substituted for another chattel which was part of the realty when the mortgage was executed.

That the article annexed is substituted for another article which was part of the realty at the time of the making of the mortgage thereon has not been regarded as in itself entitling the mortgagee to priority,[23] provided the substitution does not impair the security afforded by the mortgage.[24]

g. Statutes Regulating Rights of Parties

In some jurisdictions the rights of a prior mortgagee of land and a conditional seller of chattels annexed to the land are governed by statutes.

In some jurisdictions the effect, as against a prior mortgagee of land, of an agreement between the mortgagor of the land and a third person that a chattel annexed to the land shall remain personalty is regulated by express statutory provisions,[25] the usual statutes being those which regulate the rights of a prior mortgagee of land with respect to chattels placed on the land under a conditional sales contract.[26] For instance, it is sometimes provided by statute that, as agains· a prior mortgagee of the realty, who has not assented to the reservation of title in the goods, if any of the chattels are so attached to the realty as not to be severable without material injury to the freehold, the reservation of property in the chattels so attached shall be void, notwithstanding the filing of the contract,[27] or the rights of a prior mortgagee of land and a condition-

22. U.S.—Detroit Steel Cooperage Co. v. Sistersville Brewing Co., W. Va., 34 S.Ct. 753, 233 U.S. 712, 58 L.Ed. 1166, reversing 195 F. 447, 1023, 115 C.C.A. 349.

26 C.J. p 687 note 15.

23. N.Y.—Davis v. Bliss, 79 N.E. 851, 187 N.Y. 77, 10 L.R.A.,N.S., 458.

26 C.J. p 687 note 16.

Equitable adjustment of rights of parties

Where furnace was installed by conditional vendor on mortgaged premises, old furnace was removed without mortgagee's knowledge, and new furnace was not secured to realty and could be removed without injury thereto, vendor would be permitted to repossess new furnace on mortgagor's default, as against mortgagee, but rights of parties on account of removal of old furnace may be equitably adjusted if the facts making such course possible are pleaded and proved.—Omaha Loan & Building Ass'n v. Bigelow, 274 N.W. 574, 133 Neb. 275.

Substituted article not within mortgage

In action in replevin to recover bottle labeling machine by conditional vendor, resisted by purchaser's realty mortgagee, who foreclosed mortgage and claimed title to machine as result of such foreclosure, the contention of mortgagee that machine became subject to mortgage because it was a substitution for old machine did not support mortgagee's right to machine, where it appeared that old machine was personalty and was not within terms of mortgage.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.

24. Ind.—Binkley v. Forkner, 19 N. E. 753, 117 Ind. 176, 3 L.R.A. 33—Bass Foundry & Machine Works v. Galdentine, 99 Ind. 525.

25. N.J.—Lumpkin v. Holland Furnace Co., 178 A. 788, 118 N.J.Eq. 313.

26 C.J. p 686 note 5.

26. Pa.—Land Title Bank & Trust Co., 14 A.2d 282, 339 Pa. 302—Star Equipment Corporation v. Rice, 5 Fay.L.J. 19.

Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Statutes regulating rights of conditional seller and subsequent purchaser or mortgagee of land see supra § 18.

Statutes regulating rights of "any" mortgagee

(1) Statutes invalidating conditional sales contracts as against "any" mortgagee of real estate, unless such conditional sales contracts are recorded in the registry of deeds within the time prescribed, do not apply to prior mortgagees.

Mass.—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11—Commercial Credit Corporation v. Gould, 175 N. E. 264, 275 Mass. 48—Waverley Co-op. Bank v. Haner, 173 N.E. 699, 273 Mass. 477.

Or.—Miller v. McCarthy, 36 P.2d 346, 148 Or. 310.

(2) Under such statutes the conditional seller's rights are not affected by his failure to record the contract.

Mass.—Commercial Credit Corporation v. Gould, supra, stating that Abeloff v. Peacard, 171 N.E. 14, 272 Mass. 56, is not authority to the contrary

Or.—Miller v. McCarthy, supra.

(3) Such statutes do not give conditional sellers who comply with their terms the right to hold the property against prior mortgagees.—Commercial Credit Corporation v. Gould, supra—Greene v. Lampert, 174 N.E. 669, 274 Mass. 386—Waverley Co-op. Bank v. Haner, 173 N.E. 699, 273 Mass. 477.

27. U.S.—Buss Mach. Works v. Watsontown Door & Sash Co., D.C.Pa., 2 F.Supp. 758.

Pa.—Land Title Bank & Trust Co. v. Stout, 14 A.2d 282, 339 Pa. 302.

Assent of mortgagee

(1) Where conditional seller's petition for reclamation of property installed in bankrupt's brewery was opposed only by mortgagee who had consented to removal of property by conditional seller at any time, mortgagee's assent to removal was binding, and conditional seller was entitled to reclaim property.—In re Penn Brewing Co., D.C.Pa., 21 F. Supp. 633.

al seller of chattels may be governed by the first clause of the Uniform Conditional Sales Act § 7, which provides that, if the goods are so affixed to realty at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed as against any person who has not expressly assented to the reservation.[28] Where such statutes exist, the rights of prior mortgagees of land and conditional sellers of personalty are controlled by the statute and not by the law of fixtures,[29] although such statutes are inapplicable where the chattel placed on the land is deemed personalty for all purposes, regardless of whether any intention to treat it as personalty is evidenced by a conditional sale agreement or otherwise.[30]

Material injury to freehold. Within statutes regulating the rights of a prior mortgagee of land and a conditional seller of chattels annexed to, or placed on, the land, various articles have been held to be removable without material injury to the freehold.[31] According to some authorities, the test of material injury to the freehold is not whether the goods are essential to the functioning of the plant or building in which they are placed but whether the attachment of the chattel to the realty is of such a character as to cause the chattel to become irrevocably a part of the land.[32]

According to other authorities, however, material injury to the freehold is not necessarily to be tested by the damage done to the buildings, but the injury to the operation of the business, plant or building is considered.[33] In the case of an industrial plant, material injury to the freehold means injury

(2) A mortgagee, agreeing that machinery about to be delivered to mortgagor as buyer under conditional sale contract was released from lien of mortgage on buyer's plant, cannot in equity and good faith deprive seller of vendor's lien on machinery by foreclosure proceedings after mortgagor's bankruptcy trustee's sale of plant and bankrupt's interest in machinery.—Smith v. McKenna Brass Mfg. Co., C.C.A.Pa., 98 F.2d 537.

28. Del.—Power Mfg. Co. v. Bailey, 131 A. 696, 3 W.W.Harr. 129.
N.J.—Lumpkin v. Holland Furnace Co., 178 A. 788, 118 N.J.Eq. 313—Workingmen's Building & Loan Ass'n of Newark v. Smith, 155 A. 20, 108 N.J.Eq. 349.
N.Y.—Modern Security Co. of Philadelphia v. Thwaites, 246 N.Y.S. 405, 138 Misc. 469, reversing Modern Security Co. v. Thwaites, 242 N.Y.S. 594, 137 Misc. 485, and affirmed Modern Security Co. of Philadelphia v. Thwaites, 252 N.Y.S. 930, 234 App.Div. 671—Prudential Ins. Co. of America v. Estates of Cotswold, 17 N.Y.S.2d 302.
Wis.—Vorclone Corporation v. Larson, 257 N.W. 611, 217 Wis. 214—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Prior mortgagee is not subsequent purchaser for value and without notice within the second clause of the act.—Prudence-Bonds Corporation v. 1000 Island House Co., 252 N.Y.S. 60, 141 Misc. 39—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.

Subordination agreement
Fixtures are subject to lien of real estate mortgage, where conditional bill of sale covering fixtures was subordinated to mortgage.—Future Building & Loan Ass'n v. Mazzocchi, 152 A. 776, 107 N.J.Eq. 422.

Liability of seller for restoration of building
Conditional seller, removing sprinkler system which was removable without material injury to the freehold, is not liable to prior mortgagee, for amount necessary to restore building to original condition, but is liable to mortgagee for damage to freehold occasioned by negligence in removing system.—Prudence-Bonds Corporation v. 1000 Island House Co., 252 N.Y.S. 60, 141 Misc. 39.

29. N.J.—Bank of America Nat. Ass'n v. La Reine Hotel Corp., 156 A. 28, 108 N.J.Eq. 567.
Wis.—Myhre v. Michigan Silo Co., 265 N.W. 703, 220 Wis. 593—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

30. Pa.—Peoples-Pittsburgh Trust Co. v. Security Peoples Trust Co., 1 A.2d 520, 133 Pa.Super. 18.

Election to treat property as personalty
Holder of mortgage on quarry in which stone crusher was installed, who levied on stone crusher as personal property, was bound by his election to treat stone crusher as personal property, as respects validity of conditional sale contract of stone crusher.—Williams Patent Crusher & Pulverizer Co. v. Reily, 180 A. 156, 118 Pa.Super. 64.

31. **Heating system**
N.Y.—Modern Security Co. of Philadelphia v. Thwaites, 246 N.Y.S. 405, 138 Misc. 469, reversing Modern Security Co. v. Thwaites, 242 N.Y.S. 594, 137 Misc. 485, and affirmed Modern Security Co. of Philadelphia v. Thwaites, 252 N.Y.S. 930, 234 App.Div. 671.

Kitchen cabinets in apartment house
N.Y.—Prisco & Soverio v. Bifulco Bros., 254 N.Y.S. 459, 234 App.Div. 122.

Pipe organ
N.Y.—Washington Mortg. Corporation v. Forways Realty Corporation, 255 N.Y.S. 110, 235 App.Div. 642, affirmed 184 N.E. 108, 260 N.Y. 595.

Sprinkler system
N.Y.—Prudence-Bonds Corporation v. 1000 Island House Co., 252 N.Y.S. 60, 141 Misc. 39.

32. Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Property removable without injury
(1) Machinery, including veneer dryer, bolting saw, veneer jointer, cutter grinder, and automatic fire extinguishing system, installed in factory.—People's Savings & Trust Co. v. Munsert, supra.

(2) Twenty-foot silo constructed of thirty-inch concrete staves placed on but not fastened to concrete foundation and used in connection with wooden runway fastened to barn but not to silo.—Myhre v. Michigan Silo Co., 265 N.W. 703, 220 Wis. 593.

33. Pa.—Central Lithograph Co. v. Eatmor Chocolate Co., 175 A. 697, 316 Pa. 300.

Institution doctrine
N.J.—Russ Distributing System v. Lichtman, 166 A. 513, 111 N.J. Law 21—Lumpkin v. Holland Furnace Co., 178 A. 788, 118 N.J.Eq.

to the operating plant and is not confined to the physical structure of the building alone.[34] The removal of machinery in a manufacturing plant, necessary for its operation as a complete going concern, constitutes material injury to the freehold.[35] Further, it has been held that there is material injury to the freehold by removing a refrigerator system in an apartment house,[36] or a furnace system in a dwelling house,[37] or by removing elevators installed in an apartment house[38] or in an office building.[39] On the other hand, under these authorities the removal of certain chattels has been held in particular cases not to constitute material injury to the freehold.[40]

§ 20. —— As against Person Other than Mortgagee or Purchaser of Land

a. Claimant of mechanic's lien
b. Lessor of land
c. Owner of land
d. Vendor of land; vendor's lien
e. Other persons

a. Claimant of Mechanic's Lien

A mechanic's lien claimant without notice of the existence of a conditional sale or chattel mortgage on chattels affixed to the realty has been given preference over the conditional vendor or chattel mortgagee.

One claiming a mechanic's lien on an article annexed to the realty, as constituting a part thereof, is not affected, it has been held, by the existence of a conditional sale contract or a chattel mortgage in favor of another, unless such contract or mortgage was placed on record before annexation of the article,[41] or, according to other decisions, before the doing of the work or furnishing of materials, for which the lien is claimed.[42] However, the failure to record has been regarded as immaterial provided the lien claimant knew of the vendor's claim.[43] The claimant of the lien is not a subsequent purchaser within the statute, and entitled as such to priority over a chattel mortgage, because the latter is not recorded in the real estate mortgage books.[44] The lien claimant is entitled to priority, it has also been decided, as against the claim under a chattel mortgage of which he was ignorant at the time of doing the work.[45]

313—Future Building & Loan Ass'n v. Mazzocchi, 152 A. 776, 107 N.J.Eq. 422.

34. Pa.—Land Title Bank & Trust Co. v. Stout, 14 A.2d 282, 339 Pa. 302—Central Lithograph Co. v. Eatmor Chocolate Co., 175 A. 697, 316 Pa. 300.

35. Pa.—Central Lithograph Co. v. Eatmor Chocolate Co., supra.

Particular machinery

(1) Beer meters and strainers installed in brewery.—In re Penn Brewing Co., D.C.Pa., 21 F.Supp. 633.

(2) Machinery installed by conditional seller in chocolate factory for candy manufacturing purposes.—Central Lithograph Co. v. Eatmor Chocolate Co., 175 A. 697, 316 Pa. 300—Central Lithograph Co. v. Eatmor Chocolate Co., 175 A. 702, 316 Pa. 312.

(3) Refrigeration machinery and equipment conditionally sold, installed in chocolate manufacturing plant in addition to old equipment together with which they formed one continuous system.—Central Lithograph Co. v. Eatmor Chocolate Co., 175 A. 701, 316 Pa. 312.

36. N.J.—Russ Distributing Corporation v. Lichtman, 166 A. 513, 111 N.J.Law 21—MacLeod v. Walter J. Satterthwait, Inc., 157 A. 670, 109 N.J.Eq. 414, affirmed 166 A. 163, 113 N.J.Eq. 238, following Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574.

37. Replacement of old heating system

Conditional seller's attempt to reserve title to furnace system substituted for heating system that was in dwelling house at time of antecedent mortgage was void as against nonassenting mortgagee, where substituted furnace could not be removed without material, physical damage to building, and heating system was essential, and substituted system could not be removed without material injury to freehold.—Lumpkin v. Holland Furnace Co., 178 A. 788, 118 N.J.Eq. 313.

38. Pa.—Land Title Bank & Trust Co. v. Stout, 14 A.2d 282, 339 Pa. 302.

39. Thirty-story building

U.S.—Medical Towers Corporation v. Otis Elevator Co., C.C.A.Pa., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F. Supp. 4.

40. Removal of particular articles

(1) Heating system in a dwelling house.—Reliable Building & Loan Ass'n of City of Newark v. Purifoy, 163 A. 151, 111 N.J.Eq. 575.

(2) Heating system in restaurant building.—Sellitto v. Heating & Plumbing Finance Corporation, 174 A. 147, 116 N.J.Eq. 247, affirmed 174 A. 708, 117 N.J.Eq. 19.

(3) Organ in a church.—Peoples-Pittsburgh Trust Co. v. Security Peoples Trust Co., 1 A.2d 520, 133 Pa. Super. 18.

(4) Portable boiler installed in factory.—Provident Building & Loan Ass'n of Passaic County v. William Day Sons Realty Co., 194 A. 53, 122 N.J.Eq. 326.

(5) Ranges and boilers in a dwelling house.—Arlotto v. Hauck Realty Co., 177 A. 691, 13 N.J.Misc. 305.

41. Neb.—Geer Co. v. Wolcott, 246 N.W. 456, 458, 124 Neb. 306, citing **Corpus Juris.**

26 C.J. p 688 note 31.

Mechanic's lien covering fixtures, materials, and personalty see the C.J.S. title Mechanics' Liens § 190, also 40 C.J. p 277 note 14 et seq.

Steel service and comfort stations, sold under conditional sales contract and erected on land leased by buyer, were fixtures as to claimant of mechanic's lien for installing plumbing and wiring therein.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.

42. N.C.—Fulp v. Kernersville Light & Power Co., 72 S.E. 867, 157 N.C. 157.

Or.—Washburn v. Inter Mountain Min. Co., 109 P. 382, 56 Or. 578, Ann.Cas.1912C, 357.

43. Mo.—Landreth Mach. Co. v. Roney, 171 S.W. 681, 185 Mo.App. 474.

Tex.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Civ.App., 30 S.W.2d 364.

44. Iowa.—Fletcher v. Kelly, 55 N. W. 474, 88 Iowa 475, 21 L.R.A. 347.

45. Minn.—Northwestern Lumber &

Without reference to any question of notice or record, the lien claimant has been regarded as unaffected by an agreement for removal entered into between a lessor and lessee of land,[46] especially when the work for which the lien is claimed was done in the course of construction of the structure or appliance sought to be removed.[47] There is, however, authority to the effect that the fact that the article annexed was sold under a contract of conditional sale makes it personalty, so as not to be subject to a mechanic's lien.[48] The rules applicable as between vendor and purchaser, or between heir and personal representative, and not the rule applicable as between landlord and tenant, govern in determining whether articles affixed by a lessee with the lessor's consent are subject to a mechanic's lien.[49]

As between the landowner and a mechanic's lien claimant, it is immaterial that the fixture was sold to the landowner under a conditional sale contract.[50]

Statutes regulating rights of parties. In some jurisdictions statutes exist which may determine the rights of claimant of a mechanic's lien with respect to chattels annexed to, or placed on, land under an agreement, express or implied, for removal.[51]

b. Lessor of Land

An agreement that an article attached to realty shall be removable has been given effect as against the lessor of the land, although in some jurisdictions the rights of the parties are governed by statute.

As against a lessor of land, an agreement reserving the right to remove articles attached to the realty, as in the case of a conditional sale, has been held to be effective,[52] especially where the lessor has knowledge of the agreement[53] and, at least,

W. Co. v. Parker, 145 N.W. 964, 125 Minn. 107.

46. Ill.—Dobschuetz v. Holliday, 82 Ill. 371.

47. Cal.—West Coast Lumber Co. v. Apfield, 24 P. 993, 86 Cal. 335.

48. U.S.—In re Superior Drop Forge & Mfg. Co., D.C.Ohio, 208 F. 813.

Casing furnished for oil well under contract reserving title did not become part of realty, so as to be subject to drilling contractor's lien. —Cheadle v. Bardwell, 26 P.2d 336, 95 Mont. 299.

Frigidaire equipment

Seller's retention of title and stipulation that frigidaire equipment, removable without injury to realty, should remain personalty, gave right of removal as against mechanic's lienholder on realty.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Tex.Civ.App., 30 S.W.2d 364.

Lighting fixtures, installed under agreement providing for payment when house was sold, with provision allowing removal if sale was not made within ninety days or if purchaser at an earlier sale preferred cheaper fixtures, were not subject to mechanic's lien executed two months prior to execution of installation agreement, where the fixtures could be removed without injury to building.—Stewart v. Woods Electric Co., Tex.Civ.App., 73 S.W.2d 657.

49. Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.

Ill.—Fehr Constr. Co. v. Postl System of Health Bldg., 124 N.E. 315, 288 Ill. 634.

50. Wash.—King v. Blickfeldt, 191 P. 748, 111 Wash. 508.

26 C.J. p 689 note 43.

51. **Uniform Conditional Sales Act**

A mechanic's lien claimant is not a subsequent purchaser of the realty, within the second clause of the Uniform Conditional Sales Act § 7. —People's Savings & Trust Co. v. Munsert, 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306, denying rehearing 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306.

52. Ariz.—Ensign v. Koyk, 250 P. 246, 248, 31 Ariz. 1, quoting **Corpus Juris.**

Cal.—Western Machinery Co. v. Graetz, 108 P.2d 711, 42 Cal.App.2d 296.

D.C.—Palm v. Bachrach, Inc., 5 F.2d 125, 55 App.D.C. 302.

Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.

Md.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 644, 156 Md. 368, 62 A.L.R. 358, quoting **Corpus Juris.**

26 C.J. p 689 note 45.

Title of bankruptcy trustee as to fixtures on leased premises see Bankruptcy § 172 b.

Tenant may not, by annexing chattels conditionally sold to him, vest title thereto in his landlord.—Fears v. Watson, 187 S.W. 178, 124 Ark. 341.

Lessor as purchaser

(1) Lessor of mine, who repossesses mine after recording of conditional sales contract of mine equipment, is not bona fide purchaser without notice.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.

(2) Lessors of theater in which sublessee installed new organ, receiving credit from their conditional vendor for lessors' old organ, did not become purchasers for value of new organ.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.

Enhancement of land of lessor

It is not presumed that vendor selling machinery to tenant under chattel mortgage intended to enhance value of freeholder.—David v. Roe, Tex.Civ.App., 271 S.W. 196.

Assignment of lease

Rights of one installing elevator in building under conditional sale contract with lessee were not affected by lessee's assignment of lease to one who gave renewal note for balance due on elevator, or by a second assignment to corporation, without reference to elevator or remaining indebtedness thereon.—Palm v. Bachrach, Inc., 5 F.2d 125, 55 App. D.C. 302.

Landlord may not object, on grounds open only to tenant and mortgagor, to removal of movable fixtures where tenant and mortgagor consented to removal.—Moran v. Otoe County Nat. Bank, 213 N.W. 824, 115 Neb. 515.

Taking of replaced article as part payment

Conditional vendor of organ sold sublessee and installed in theater was entitled thereto as against lessors claiming under lease, notwithstanding vendor took lessors' old organ as part payment.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.

53. Ark.—Thos. Cox & Sons Machinery Co. v. Blue Trap Rock Co., 251 S.W. 699, 159 Ark. 209.

Recording of conditional sale contract was constructive notice to all that purchaser was not the owner of the property, but that it belonged to the seller.—Ensign v. Koyk, 250 P. 246, 31 Ariz. 1.

Failure of chattel mortgage to describe real estate, on which was lo-

where the article does not constitute an integral and necessary part of the realty[54] and may be removed without material damage to the premises;[55] and the fact that the lease provided that all improvements should belong to the lessor,[56] or that the landlord should have a lien for rent on all things brought on the land,[57] has been regarded as immaterial in this respect.

On the other hand, there is authority that there is no right of removal in favor of the conditional vendor of the chattel annexed, as against the lessor of the land,[58] and a conditional sale to the lessee has been regarded as inoperative as against the lessor if not recorded in a reasonable time as required by statute.[59] Further, it has been held that the agreement is inoperative as against the lessor of the land, where the article becomes an integral part of the realty and is essential to the operation of the building thereon,[60] or where its removal will cause substantial damage to the premises.[61] The view has also been asserted that, even though the article is originally removable by the vendor as against the landlord, the right of removal is lost, unless exercised during the term.[62]

cated the building in which mortgagee placed machinery sold to tenant, pursuant to Rev.St. art. 5661, as amended by L. 1917 c 153 § 1, Vernon's Civ.St.Annot.Suppl.1918 art 5661, did not afford claim of priority for rent by owner of building, who did not own the realty on which the building was located.—David v. Roe, Tex.Civ.App., 271 S.W. 196.

54. Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.

55. U.S.—Interstate Trust & Banking Co. v. Warren, C.C.A.Fla., 69 F.2d 368.
Alaska.—Eureka Gold Mines v. Cube Mines Co., 6 Alaska 110.
Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.
Md.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.
Minn.—Holland Furnace Co. v. Jefferson, 216 N.W. 795, 173 Minn. 121.

Removal where damage can be compensated
Under conditional sales contract covering bowling equipment placed in leased property, seller was entitled to possession as against owners of building, although removal would cause material damage to building, where damage could be compensated by money.—Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys, 169 S.E. 186, 204 N.C. 609.

56. Alaska.—Eureka Gold Mines v. Cube Mines Co., 6 Alaska 110.
Ariz.—Ensign v. Koyk, 250 P. 246, 31 Ariz. 1.
26 C.J. p 689 note 46.

Forfeiture clause in case of default
(1) Conditional sale contract, reserving title in vendor, was not nullified by lessee's prior agreement to forfeit fixtures to lessor in case of default by lessee.—Ridgway Dynamo & Engine Co. v. Werder, 135 A. 216, 287 Pa. 358.
(2) Under terms of theater lease, title to sign purchased by operating company and attached to outside of building did not pass to owner on forfeiture.—Lu-mi-Nus Signs Co. v. Regent Theatre Co., 231 N.W. 128, 250 Mich. 535.

57. Ariz.—Ensign v. Koyk, 250 P. 246, 31 Ariz. 1.
26 C.J. p 689 note 47.

58. Colo.—Puzzle Mining & Reduction Co. v. Morse Bros. Machinery & Supply Co., 131 P. 791, 24 Colo. App. 74.
Ga.—Atlanta Gas-Light Co. v. Farrell, 9 S.E.2d 625, 190 Ga. 437, affirming Farrell v. Atlanta Gas Light Co., 5 S.E.2d 607, 61 Ga.App. 18.
Mass.—J. H. Gerlach Co. v. Noyes, 134 N.E. 612, 241 Mass. 69.

Knowledge of conditional seller and lessor
(1) Where certain machinery was sold to the lessee of a rock quarry, title in the seller being reserved until payment of the purchase price, if the seller knew that the machinery was of a character that, when attached to the land, it would become a fixture which could not be removed without injury to the freehold, and if the lessor was ignorant of the fact that the seller had reserved title, then the seller would not be entitled to recover the machinery as against the lessor, on failure of the lessee to pay therefor.—Thos. Cox & Sons Machinery Co. v. Blue Trap Rock Co., 251 S.W. 699, 159 Ark. 209.
(2) A lessor, whose lease provided that bowling alleys constructed by the tenants should be deemed affixed to the real estate and not removed without his consent, was bound by a conditional contract between the tenants and one from whom they purchased bowling alleys, if he had knowledge of the agreement.—J. H. Gerlach Co. v. Noyes, 134 N.E. 612, 241 Mass. 69.

Purchaser from lessor
A gas burner installed in furnace at instance of tenant without consent of landlord became a part of the realty although it could be detached without injury thereto and hence burner could not be removed over objection of subsequent purchaser of the real property, notwithstanding the notice afforded by recording of title retention contract.—Farrell v. Atlanta Gas Light Co., 5 S.E.2d 607, 61 Ga.App. 18, affirmed Atlanta Gas-Light Co. v. Farrell, 9 S.E.2d 625, 190 Ga. 437.

59. Conn.—Camp v. Charles Thatcher Co., 52 A. 953, 75 Conn. 165.

Payment by lessor to conditional buyer
Failure to register conditional sale agreement of refrigerating plant precluded retaking plant from hotel owner, who thereafter paid conditional buyer leasing hotel, notwithstanding owner knew that plant was not fully paid for.—Brown v. Burlington Hotel Corporation, 161 S.E. 735, 202 N.C. 82.

60. Ill.—White Way Electric Sign & Maintenance Co. v. Chicago Title & Trust Co., 14 N.E.2d 839, 368 Ill. 482, affirming 6 N.E.2d 510, 289 Ill.App. 1.

61. U.S.—Interstate Trust & Banking Co. v. Warren, C.C.A.Fla., 69 F.2d 368.
Mo.—Globe Automatic Sprinkler Co. v. Boester, 95 S.W.2d 825, 231 Mo. App., 203.

Removal of part of unit
Conditional seller of sprinkler system having contracted for installation thereof as unit in clubhouse, seller's assignee was precluded from urging that system should be viewed otherwise than as unit in determining its character as personalty or realty as between lessor of clubhouse and seller's assignee.—Globe Automatic Sprinkler Co. v. Boester, supra.

62. Ind.—Hamilton v. Huntley, 78 Ind. 521, 41 Am.R. 593.
26 C.J. p 689 note 50.

In Massachusetts
(1) Bowling alleys, conditionally sold to lessee, did not become part of realty, regardless of terms of sale, on theory that purchasers could give

Statutes regulating rights of parties. In some jurisdictions the rights of a lessor of land and a person having an agreement for the removal of chattels annexed to the land are regulated by statute; such statutes usually regulate the rights of the lessor of the land and a conditional seller of chattels placed on the land,[63] as in the case of the Uniform Conditional Sales Act § 7.[64] However, statutes providing that a conditional sale of chattels is invalid, under certain circumstances, as against third persons acquiring title to the chattels from the conditional buyer without notice of the reservation of title,[65] or as against subsequent purchasers of the realty without notice,[66] do not apply to a lessor of the land.

c. Owner of Land

An owner of land is usually protected against the claim of a conditional seller of chattels sold to a contractor and annexed to the land; in some jurisdictions, the rights of the parties are regulated by statute.

The question of the effectiveness of an agreement for removal as against the landowner, when he is not a party thereto, has arisen not infrequently in the case of an article sold to a contractor by conditional sale, and annexed by him to the land on which his contract is being performed, and it has usually been decided that the landowner is protected as against the claim of the vendor of the chattel,[67] especially when he made payments to the contractor in ignorance of the conditional character of the sale.[68] Apart from the making of payments by the landowner to the contractor, the fact that the former knew of the conditional character of the sale of the article has been referred to as giving priority to the vendor of the chattel;[69] and such a view is involved in decisions adverse to the right of the vendor in so far as based on the landowner's ignorance of the character of the sale.[70] On the other hand it has been asserted that the mere fact of notice to the owner of land that the contractor is intending to attach to the land personalty which is subject to a mortgage or condition that it shall be

only such rights as they as tenants had, namely, right to remove during term, and that therefore right of removal was lost, because no demand was made during existence of term.—J. H. Gerlach Co. v. Noyes, 147 N.E. 24, 251 Mass. 558, 45 A.L.R. 961.

(2) If a ventilator sold under a conditional sales contract to a tenant is to be treated as a trade fixture, it becomes a part of the freehold if it is not removed on the expiration of the term.—Natural Autoforce Ventilator Co. v. Winslow, 102 N.E. 705, 215 Mass. 478.

63. **Articles included in statute**
St.1912 c 271, Gen.L. c 184 § 13, providing that no conditional sale of heating apparatus, plumbing goods, gas ranges, or other articles of personal property which are afterward wrought into, or attached to, real estate, shall be valid as against purchasers or grantees, unless notice thereof is recorded, applies only to the articles mentioned and personal property of a like kind, and does not include bowling alleys.—J. H. Gerlach Co. v. Noyes, 134 N.E. 612, 241 Mass. 69.

64. N.J.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23—Lifschitz v. Vorclone Corporation, 148 A. 899, 8 N.J.Misc. 83.
N.Y.—Le Vine v. Rosenthal, 298 N.Y.S. 887, 252 App.Div. 808.

Effect of recording lease
Prior recordation of lease prohibiting removal of equipment on surrender of building to lessor does not affect relationship, under Uniform Conditional Sales Act, of lessee and seller of sprinkling system, especially since lease anticipated only fixtures belonging to lessee and lessor had not parted with anything nor changed position because of installation of system.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23.

Material injury to freehold
(1) Where equipment essential to the operation of a motion picture projecting machine covered by conditional sales agreement could be removed without damage to the realty, but without substitution of like parts the theater where the machine was located would be unable to show moving pictures, reservation of title to the equipment in the conditional seller was valid as against the owner and lessee of the theater not consenting to the reservation, the "institution doctrine" being inapplicable.—Amusement Supply Co. v. Kaybe Amusement Co., 24 A.2d 570, 128 N.J.Law 98.

(2) Owner and lessor of building are entitled to restrain conditional seller from removing tanks and pipes buried underground.—Lifschitz v. Vorclone Corporation, 148. A. 899, 8 N.J.Misc. 83.

(3) Machinery attached to floor with screws and with removable connections to steam pipes was removable without material injury to freehold.—Lifschitz v. Vorclone Corporation, supra.

(4) Owner and lessor of building were not entitled to restrain conditional seller from removing machinery not attached to realty.—Lifschitz v. Vorclone Corporation, supra.

65. D.C.—Palm v. Bachrach, Inc., 5 F.2d 125, 55 App.D.C. 302.

66. N.Y.—Marnall Steel Products v. Bernard, 263 N.Y.S. 485, affirmed Marnell Steel Products v. Bernard, 269 N.Y.S. 907, 241 App.Div. 616.

67. Cal.—Frick v. Frigidaire Corporation, 7 P.2d 321, 324, 119 Cal. App. 707, quoting **Corpus Juris**—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 116 Cal.App. 569.
Ga.—J. S. Schofield's Sons Co. v. Woodward, 72 S.E. 509, 137 Ga. 65.
Pa.—S. F. Bowser & Co. v. Franklin Mortgage & Investment Co., 158 A. 170, 172, 305 Pa. 459, citing **Corpus Juris.**
26 C.J. p 689 note 54.

68. Cal.—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 116 Cal. App. 569.
Pa.—S. F. Bowser & Co. v. Franklin Mortg. & Inv. Co., 158 A. 170, 305 Pa. 459.
26 C.J. p 689 note 55.

69. N.J.—Oil City Boiler Works v. New Jersey Water & Light Co., 79 A. 451, 81 N.J.Law 491.
N.Y.—Realty Associates v. Conrad Constr. Co., 173 N.Y.S. 25, 185 App. Div. 464.
26 C.J. p 689 note 56.

70. Cal.—Peninsula Burner & Oil Co. v. McCaw, 3 P.2d 40, 116 Cal. App. 569.
N.Y.—Jacobs v. Feinstein, 117 N.Y.S. 823, 133 App.Div. 416.
Pa.—S. F. Bowser & Co. v. Franklin Mortg. & Inv. Co., 158 A. 170, 305 Pa. 459.
26 C.J. p 690 note 57.

taken and removed for nonpayment of the price cannot bind such owner in the absence of his consent thereto.[71] Occasionally, the fact that the vendor of the article knew that it was to be annexed to land not belonging to his purchaser has been referred to as an additional ground for according preference to the owner of the land.[72]

An agreement by one having an easement in the land for the removal of an article annexed in the exercise of the easement, will, it seems, bind the owner of the land.[73]

Statutes regulating rights of parties. In some jurisdictions the effect, as against the owner of land, of an agreement that chattels annexed to the realty may be removed is controlled by statutory provisions,[74] the usual provision being one which regulates the rights of the owner of the land with respect to chattels placed on the land by a conditional vendor,[75] as, for instance, the provision of the Uniform Conditional Sales Act § 7 that, as against the owner of realty, the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof, but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller, briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed, before they are so affixed, in the office where a deed would be recorded or registered to affect such realty.[76] Such statutes, rather than the law of fixtures, control in determining the rights of an owner of realty and a conditional seller of chattels placed thereon.[77]

According to some authorities, material injury to the freehold, within statutes regulating the rights of an owner of realty and a conditional seller of chattels placed thereon is not to be tested necessarily by the physical injury done to the premises, but the injury to the operation of the business, plant, or building is to be considered,[78] and the proper test, according to other authorities, is whether the

71. U.S.—Otis El. Co. v. Palmetto Constr. Co., S.C., 237 F. 769, 150 C.C.A. 523.

72. Cal.—Frick v. Frigidaire Corporation, 7 P.2d 321, 119 Cal.App. 707.
N.Y.—Jacobs v. Feinstein, 117 N.Y. S. 823, 133 App.Div. 416.
Pa.—S. F. Bowser & Co. v. Franklin Mortg. & Inv. Co., 158 A. 170, 305 Pa. 459.
26 C.J. p 690 note 59.

73. S.C.—Evans v. McLucas, 15 S.C. 67.

74. Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

75. U.S.—Medical Towers Corporation v. Otis Elevator Co., C.C.A. Pa., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F.Supp. 4.

76. N.J.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23—Lifschitz v. Vorclone Corporation, 148 A. 899, 8 N.J.Misc. 83.
N.Y.—Pike v. Naylon Securities Co., 251 N.Y.S. 659, 140 Misc. 734.
Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Purpose of statute is to protect conditional seller and owner of realty in their property rights, where there is uncertainty as to whether property is realty or personalty.—Paragon Plumbing Supply Corporation v. Umansky Plumbing & Heating Co., 9 N.Y.S.2d 639, 170 Misc. 428.

Knowledge and assent as substitute for recording

Statute requires notice to owner only as substitute for actual knowledge, and knowledge and assent of owner to conditional sales agreement between conditional seller and contractor would put owner on notice as to his rights in property to be affixed to realty.—Paragon Plumbing Supply Corporation v. Umansky Plumbing & Heating Co., supra.

Statute should be confined in its application to situations where the need of protection of the owner of the realty is clear.—Dryja v. Twarozynski, 267 N.Y.S. 578, 239 App.Div. 509, modifying 261 N.Y.S. 848, 238 App.Div. 760—Paragon Plumbing Supply Corporation v. Umansky Plumbing & Heating Co., 9 N.Y.S. 639, 170 Misc. 428.

"Owner of realty"

(1) Statute does not apply where owner of realty himself purchases such goods, but only where conditional buyer attaches goods to another's realty.
U.S.—In re St. Mark's Hospital of New York City, C.C.A.N.Y., 59 F.2d 1001.
N.J.—Crown v. Regna Const. Co., 146 A. 346, 104 N.J.Eq. 469, affirmed, Err. & App., 150 A. 918.
Wis.—American Laundry Machinery Co. v. Larson, 257 N.W. 608, 217 Wis. 208—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

(2) Nonassenting wife of buyer of heating plant affixed to realty owned by them as tenants by entirety is not an owner of realty within the act.—Dryja v. Twarozynski, 267 N.Y.S. 578, 239 App.Div. 509, modifying 261 N.Y.S. 848, 238 App.Div. 760.

Subsequent purchaser from owner of realty

Where lease by trustee and remainderman provided that repairs should be at tenant's expense, and without trustee's knowledge or consent and without remainderman's consent plumber installed plumbing for tenant, which was affixed to realty but was severable without material injury to realty, conditional sales contract filed by plumber, that did not contain signed statement that plumbing was to be affixed to realty, was void as against trustee and remainderman, and hence void as against subsequent purchaser of premises who took deed with actual knowledge of plumber's claim.—Le Vine v. Rosenthal, 298 N.Y.S. 887, 252 App.Div. 808.

77. N.J.—Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574.

78. U.S.—Medical Towers Corporation v. Otis Elevator Co., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F.Supp. 4.

Institution doctrine

N.J.—Amusement Supply Co. v. Kaybe Amusement Co., 24 A.2d 570, 128 N.J.Law 98—Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574.

chattel is attached to the realty in such manner as to cause it to become irrevocably a part of the realty, and not whether the article is necessary to the functioning of the building or plant to which it is annexed.[79]

d. Vendor of Land; Vendor's Lien

An agreement with a purchaser of land in possession for the removal of articles placed on the land during such possession ordinarily is effective as against the vendor of the land.

An agreement with a purchaser of land in possession thereof for the removal of articles or structures placed on the land during such possession, as in the case of a conditional sale, has ordinarily been given effect as against the vendor of the land, claiming them on the purchaser's default,[80] provided, at least, the removal will not involve a substantial injury to the realty,[81] and provided the vendor of the land has not made any advances or lost any rights by reason of the annexation of the articles in question.[82] That the contract for the sale of the land expressly provided that articles annexed to the land should become a part thereof has been decided to be immaterial in this connection.[83] The fact that the article annexed is essential to the use of the building does not give the vendor of the land the right to appropriate it where it may be removed without material injury to the freehold.[84] The fact that a chattel mortgage on articles annexed by the purchaser of land was given before he exercised his option to purchase the land has been regarded as making the mortgage effective as against the vendor of the land who subsequently enforced a forfeiture, the articles so annexed being regarded by the court as personalty until the exercise of the option, by reason of the lack of any presumption of intention at that time to make a permanent annexation.[85]

On the other hand, the right of removal as against the vendor of the land has been denied.[86] It has been held that the agreement is inoperative against the vendor of the land where he makes advances on the faith of the article annexed,[87] or where the article has become an integral part of the realty.[88] Further, the right of removal as against the vendor of the land has been regarded as existing only in so far as his consent thereto can be inferred from his knowledge of the agreement at the time of annexation and his failure to object thereto.[89] The right of removal has been held not to exist when the vendor of the land had undertaken to erect a building in consideration of the purchaser's agreement to furnish the article in question, which was to be considered a part of the realty, and the vendor was ignorant of the agreement with the vendor of the article for its removal in case of nonpayment of the price.[90]

Holder of vendor's lien. A chattel mortgage on

Chattels removable without material injury

Equipment essential to operation of motion picture projecting machine.—Amusement Supply Co. v. Kaybe Amusement Co., 24 A.2d 570, 128 N.J.Law 98.

Chattels not removable without material injury

(1) Elevators installed in thirty-story office building.—Medical Towers Corporation v. Otis Elevator Co., C.C.A.Pa., 104 F.2d 133, reversing, D.C., Otis Elevator Co. v. Arey-Hauser Co., 22 F.Supp. 4.

(2) Refrigerating system in apartment house installed during construction.—Domestic Electric Co. v. Mezzaluna, 162 A. 722, 109 N.J.Law 574.

79. Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

Material injury to freehold of prior mortgagee see supra § 19 g.

80. Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 879, 127 Neb. 740, citing **Corpus Juris.**

Tex.—Grossman v. Jones, Civ.App., 157 S.W.2d 448, 451, quoting **Corpus Juris,** and error refused.

26 C.J. p 688 note 20.

Articles annexed by purchaser under land contract as fixtures see infra § 49.

Effect of agreement as against purchaser of realty at foreclosure sale see supra § 18.

Agreement with tenant of purchaser

Tex.—Grossman v. Jones, Civ.App., 157 S.W.2d 448, error refused.

Furnace installation contract, reserving title in seller, with right to repossess furnace unless paid for, was valid against vendor of land.—Smith v. Holland Furnace Co., 278 P. 719, 128 Kan. 580.

81. Mich.—Woodliff v. Citizens' Building & Realty Co., 215 N.W. 343, 240 Mich. 413, modified on other grounds 222 N.W. 730, 245 Mich. 292, certiorari denied 50 S.Ct. 26, 280 U.S. 567, 74 L.Ed. 620.

Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 127 Neb. 740.

N.Y.—Kohler Co. v. Brasun, 226 N.Y.S. 60, 222 App.Div. 338, reversing 219 N.Y.S. 432, 128 Misc. 507, and reversed on other grounds 164 N.E. 31, 249 N.Y. 224.

Tex.—Grossman v. Jones. Civ.App., 157 S.W.2d 448, error refused.

26 C.J. p 688 note 21.

82. N.Y.—Davis v. Bliss, 79 N.E. 851, 187 N.Y. 77, 10 L.R.A.,N.S., 458.

83. N.Y.—Davis v. Bliss, supra.

84. Mich.—Woodliff v. Citizens' Building & Realty Co., 215 N.W. 343, 240 Mich. 413, modified on other grounds 222 N.W. 730, 245 Mich. 292, certiorari denied 50 S. Ct. 26, 280 U.S. 567, 74 L.Ed. 620.

85. Or.—Alberson v. Elk Creek Min. Co., 65 P. 978, 39 Or. 552.

86. Iowa.—Des Moines Improvement Co. v. Holland Furnace Co., 212 N.W. 551, 204 Iowa 274.

87. Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 127 Neb. 740.

88. **Furnace**

Iowa.—Holland Furnace Co. v. Pope, 215 N.W. 943, 204 Iowa 737—Des Moines Improvement Co. v. Holland Furnace Co., 212 N.W. 551, 204 Iowa 274.

89. Ark.—Brannon v. Vaughan, 48 S.W. 909, 66 Ark. 87.

90. R.I.—McCrillis v. Cole, 55 A. 196, 25 R.I. 156, 105 Am.S.R. 875.

articles subsequently annexed has been held to be entitled to priority over a vendor's lien on the land existing at the time of annexation,[91] provided at least their removal does not substantially injure the land.[92] Further, a conditional vendor of articles annexed has been given priority over a vendor's lien on the land existing at the time of annexation, where the lienor did not rely on the articles as part of his security and where the removal of the chattels would not injure the freehold,[93] although in some cases the holder of the vendor's lien has been given preference over the conditional vendor of the chattels annexed.[94]

e. Other Persons

The effect of an agreement for the removal of chattels annexed to land has been considered with respect to such persons as creditors, receivers, claimants under judgments, and purchasers of the chattels.

The effect of an agreement for the removal of chattels annexed to, or placed on, the land as against various other persons than those mentioned supra §§ 18, 19, and supra subdivisions a–d of this section, has been considered by the courts.[95]

Claimant under judgment. The holder of a judgment lien on land cannot, it appears, claim an article annexed as against an agreement by the judgment debtor giving a right of removal,[96] although the holder of the judgment lien may have priority by reason of statute.[97] A purchaser at an execution sale, having only the right which the judgment

91. Tex.—Willis v. Munger Improved Cotton Mach. Mfg. Co., 36 S.W. 1010, 13 Tex.Civ.App. 677.
26 C.J. p 688 note 28.
Vendor's lien on fixtures see infra § 51.

92. Tex.—Mundine v. Pauls, 66 S.W. 254, 28 Tex.Civ.App. 46.

93. **Machinery**
Tenn.—McLean v. McLean Stone Co., 84 S.W.2d 1046, 19 Tenn.App. 249.

94. **Boiler and equipment in waterworks plant**
Va.—McClintic v. Hechmer, 92 S.E. 653, 80 W.Va. 325.

95. **Former lessee may recover from later lessee** of same premises for a boiler, etc., erected by the former while tenant as against the latter's claim that the property had become a part of the realty, where the landlord made no claim to the property, and did not object to the plaintiff taking it, as the fixtures remained personal property by reason of the landlord's consent.—Stone v. National Surgical Stores Co., 193 N.Y.S. 684.

Holder of lien for damages
A landowner who had a lien on the location of a railroad for damages occupies the same position as a prior mortgagee of the land, as against an agreement with a vendor of chattels subsequently annexed.—Hunt v. Bay State Iron Co., 97 Mass. 279—26 C.J. p 689 note 44.

Irrigation district having lien on realty
Where contract for purchase of mining claims contained agreement that contracting purchaser should retain title to machinery and equipment subsequently installed as his own personalty with privilege of removal, instrument was duly acknowledged and recorded, and machinery and equipment were not on property when irrigation district's lien for assessments vested, district was charged with constructive notice of terms of reservation of title to machinery and equipment and was bound by the agreement.—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P. 2d 340, 47 Cal.App.2d 531.

Creditors
Under some statutes, a conditional sale of fixtures is invalid as to subsequent creditors of the buyer, unless the contract is properly recorded.—Weber Showcase & Fixture Co. v. Waugh, D.C.Wash., 42 F.2d 515.

Receiver
(1) Under some statutes, a conditional sales contract of a chattel attached to realty gives the conditional seller no rights as against the receiver of the conditional buyer where the contract was never filed.—Beloit Iron Works v. Lockhart, 144 A. 283, 294 Pa. 376.

(2) However, the receiver of the conditional buyer who is the owner of the land is not an "owner of realty," within the third clause of the Uniform Conditional Sales Act § 7.
N.J.—Crown v. Regna Const. Co., 146 A. 346, 104 N.J.Eq. 469, affirmed 150 A. 918.
Wis.—People's Savings & Trust Co. v. Munsert, 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306, rehearing denied 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306.

(3) Interest of receiver in property conditionally sold generally see the C.J.S. title Receivers § 111, also 53 C.J. p 101 note 38 et seq.

Vendor of leasehold, not party to purchaser's agreement to buy oil burner, was not bound by terms of agreement in respect of whether apparatus installed was fixture.—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.

Title of bankruptcy trustee to fixtures obtained under conditional sales contract see Bankruptcy § 191 b.

96. Ind.—Young v. Baxter, 55 Ind. 188.
26 C.J. p 687 note 18.

Unless there is complete merger with realty by incorporation of chattel so as to prevent removal without material injury to realty, intention manifested by title retention contract that property is to remain personalty until debt is satisfied may not be defeated at suit of subsequent judgment lien creditor.—People's First Nat. Bank v. Coe Mfg. Co., C. C.A.Ga., 67 F.2d 312.

97. **Uniform Conditional Sales Act**
(1) One having judgment lien against realty of conditional vendee may be one against whom reservation of property in goods affixed to realty in sales contract would be void, under the first clause of the Uniform Conditional Sales Act § 7.—Power Mfg. Co. v. Bailey, Del., 131 A. 696, 3 W.W.Harr, 129.

(2) Judgment creditor is not "subsequent purchaser," within the second clause of the Uniform Conditional Sales Act § 7, providing that, if goods are affixed to realty at time of conditional sale or subsequently so as to become part thereof but to be severable without material injury to freehold, reservation of property shall be void as against "subsequent purchasers" of realty for value and without notice.—People's Savings & Trust Co. v. Munsert, 250 N.W. 385, 212 Wis. 449, 88 A.L.R. 1306, denying rehearing 249 N.W. 527, 212 Wis. 449, 88 A.L.R. 1306.

(3) Conditional seller of sprinkler system was not prevented from removing system on purchaser's default as against purchaser's judgment and execution creditor, because of failure to file conditional sales contract until after system was installed; and the third clause of the Uniform Conditional Sales Act § 7, governing the rights of the owner of realty, is not applicable.—Prudence-Bonds Corporation v. 1000 Island

debtor had, likewise takes subject to an agreement for removal.[98]

Purchaser of personalty. A purchaser of the article with notice of the agreement for removal takes subject thereto.[99] Further, it has been held that one who purchases the article as personalty takes subject to the agreement for removal regardless of whether he has notice thereof.[1]

§ 21. Severance

a. In general
b. Tortious severance
c. Severance by act of God
d. Temporary severance
e. Constructive severance
f. As against third persons

a. In General

Fixtures may become personalty again by a severance, which must ordinarily be made by the owner of the realty. An unexecuted intent to sever is ineffective.

Articles which have become part of the realty by annexation can become personalty again by severance from the realty;[2] but a mere intention to sever, without any positive action to carry out the intention, is ineffective.[3] A severance, to be valid and effective, must, generally speaking, be by the owner of the land, since he is the only person who has any right of control over the articles annexed thereto,[4] although, as shown supra §§ 12, 13, there may be a right of removal in a person other than such owner, by reason of an agreement, express or implied, to that effect, or owing to other considerations connected with the circumstances under which the annexation was made, as discussed infra § 25.

b. Tortious Severance

On a wrongful severance the owner of the realty may treat the articles severed as personalty and recover them as such.

If the severance is by a person who has no right to make it, the article severed continues to belong to the previous owner, and he may adopt such unauthorized act and treat the article as personalty,[5] as by bringing trover, replevin, or a similar action under principles discussed infra §§ 59–67. The owner's rights in this regard accrue immediately,[6] even though the wrongful severance is by a tenant, whose term has yet some time to run,[7] and even though the severance was made by the tenant in order to preserve the article from destruction by fire.[8]

Successive estates. Where there are several estates in the land, he who has the first estate of inheritance, it is said, becomes the general owner of the chattel wrongfully severed, and if he is a tenant for life without impeachment of waste, and the property is such as he might lawfully have severed from the realty, he becomes the general owner, and

House Co., 252 N.Y.S. 60, 141 Misc. 39.

98. N.Y.—Sisson v. Hubbard, 75 N. Y. 542, affirming 10 Hun 420.
26 C.J. p 687 note 19.

99. **Recording**
Contract between steam boiler's seller, taking chattel mortgage, and buyer that property remain chattel was binding against buyer of boiler from original buyer, register in county records being notice to world. —First Nat. Bank v. Hickman, Tex. Civ.App., 45 S.W.2d 808.
Estoppel to assert rights
Conditional sellers of store fixtures, without knowledge of chattel mortgages placed on fixtures, or sale thereof, were not estopped to assert rights as against subsequent buyer. —Hough v. Omansky, 160 N.E. 330, 263 Mass. 112.
Operation and effeet of conditional sales contract as to third persons generally see the C.J.S. title Sales § 572 et seq, also 55 C.J. p 1233 note 15 et seq.

1. Cal.—March v. McKoy, 56 Cal. 85.
26 C.J. p 689 note 53.

2. La.—Wakefield State Bank v. T. Fitz-Williams & Co., 104 So. 734, 158 La. 838—Wakefield State Bank v. Baker-Wakefield Cypress Co., 4 La.App. 676.
Tex.—Bantuelle v. Chapman, Civ. App., 256 S.W. 936.
26 C.J. p 690 note 61.
Well casings
Oil well casings which were used in a well and afterward lawfully withdrawn, even though they had at one time been a part of realty, yet, having been withdrawn, became personalty.—Moore v. Carey Bros. Oil Co., Tex.Com.App., 272 S.W. 440, 39 A.L.R. 1247, overruling motion 269 S.W. 75, 39 A.L.R. 1247, affirming, Civ.App., 246 S.W. 1083—Paschal v. Hart, Tex.Civ.App., 105 S.W.2d 337.

3. La.—Maginnis v. Union Oil Co., 18 So. 459, 47 La.Ann. 1489.
Or.—Enterprise Mercantile & Milling Co. v. Cunningham, 165 P. 224, 84 Or. 319.
26 C.J. p 690 note 62.

4. Kan.—Docking v. Frazell, 7 P. 618, 34 Kan. 29.
Va.—Lewis v. Rosler, 16 W.Va. 333.
Consent of owner
Fixtures may not be severed or removed without consent of owner. —Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

5. N.S.—Reynolds v. Dechman, 14 N.S. 459.
Recovery against innocent purchaser
Where furnace was a chattel attached to realty of grantee in security deed as an irremovable fixture, and, after execution of security deed, it was detached and carried away by grantor in security deed, as to grantee furnace became a removable "fixture" and an action would lie for its recovery, and fact that furnace was subsequently attached to realty of grantor in another county but did not lose its identity as a furnace and that such realty was sold to an innocent purchaser did not deprive grantee of his property.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.

6. Ind.—Moore v. Combs, 56 N.E. 35, 24 Ind.App. 464.
26 C.J. p 690 notes 66, 68.

7. Mass.—Leonard v. Stickney, 131 Mass. 541.
26 C.J. p 690 note 69.

8. Ga.—Pope v. Garrard, 39 Ga. 471.

may sue for it specifically.[9]

c. Severance by Act of God

The authorities conflict as to whether a physical severance by storm or other act of God effects a legal severance, but agree that if articles so severed are thereafter treated by the owner as personalty they should be regarded as severed in contemplation of law.

It has been decided in some cases that the severance may be by act of God, such as flood, fire, or storm;[10] but a contrary view has also been asserted, on the theory that the assent of the owner is necessary in order to change the character of property.[11] If articles so severed are thereafter treated by the owner as personalty, they are presumably legally such in any jurisdiction.[12]

d. Temporary Severance

Temporary detachment of fixtures without intent to make them personalty ordinarily does not effect a severance, but there is contrary authority.

The severance must be with the intention that the articles shall become personalty and not be for merely temporary purposes.[13] Fencing material placed on the ground along the line of a contemplated fence, or, temporarily detached from an existing fence, has been held to be a part of the freehold,[14] but there is authority to the contrary.[15]

e. Constructive Severance

(1) In general
(2) Exception in deed
(3) Separate sale or mortgage

(1) In General

Fixtures remaining attached to the realty may be constructively severed by act or agreement of the parties clearly evincing such intent.

Even though there is no physical detachment of articles or structures affixed to realty, there may be a constructive severance by act or agreement of the parties.[16] A constructive severance may be made by express agreement,[17] and a severance may, it seems, be brought about by the treatment of articles annexed as personalty by the persons interested therein,[18] but acts or agreements failing to show mutual intent to treat the fixture as personalty will not effectuate a constructive severance.[19]

The doctrine of constructive severance is inap-

9. Mass.—Nelson v. Burt, 15 Mass. 204.
N.Y.—Schermerhorn v. Buell, 4 Den. 422.
26 C.J. p 690 note 71.

10. S.C.—Padgett v. Cleveland, 11 S.E. 1069, 33 S.C. 339.
26 C.J. p 690 note 72.

11. Tex.—Glenn v. Shamburger, Civ.App., 240 S.W. 701, error refused.
26 C.J. p 690 note 73.

Heavy oil-burning engine was held to remain fixture, notwithstanding fire which damaged it and necessitated extensive repairs.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492.

Preservation of vendor's lien

Where a house erected by a vendee under an executory contract became a fixture and part of the realty, and no agreement was shown whereby it should remain personalty, a severance of the house from the realty by a storm in no way changed its character as a fixture, and a mortgage to a materialman after the severance did not defeat the vendor's right to include the house in his lien.—Glenn v. Shamburger, Tex.Civ. App., 240 S.W. 701, error refused.

12. N.Y.—Thayer v. Rock, 13 Wend. 53.

13. Pa.—Titus v. Poland Coal Co., 119 A. 540, 543, 275 Pa. 431, citing **Corpus Juris.**
26 C.J. p 691 note 75.

14. Ill.—McLaughlin v. Johnson, 46 Ill. 163.
N.Y.—Goodrich v. Jones, 2 Hill 142.
Wis.—Conklin v. Parsons, 1 Chandl. 240.
26 C.J. p 691 note 75½.
Fence temporarily detached as passing under conveyance of land see Deeds § 106 c.

15. Ala.—Thweat v. Stamp, 67 Ala. 96.
Iowa.—Robertson v. Phillips, 3 Greene 220.

16. Me.—Fuller v. Tabor, 39 Me. 519.
Md.—O'Brien v. Mueller, 53 A. 663, 96 Md. 134.
Okl.—Continental Gin Co. v. De Bord, 150 P. 892, 49 Okl. 32.

17. Iowa.—Schiltz v. Ferguson, 231 N.W. 358, 210 Iowa 677.
Mo.—Denvir v. Crowe, 9 S.W.2d 957, 959, 321 Mo. 212, citing **Corpus Juris.**
Or.—Blake-McFall Co. v. Wilson, 193 Pa. 902, 98 Or. 626, 14 A.L.R. 1275.
S.D.—Home Owners' Loan Corporation v. Gotwals, 297 N.W. 36, 67 S.D. 579.
Tex.—Westchester F. Ins. Co. v. Roan, Civ.App., 215 S.W. 985.

Cupboard was not such an inseparable part of house as to preclude agreement that it be given the legal character of personal property.—Home Owners' Loan Corporation v. Gotwals, 297 N.W. 36, 67 S.D. 579.

Construction of agreement

Where general contractor sublet demolition work to plaintiff wrecking company in accordance with plans and specifications submitted to bidders prior to award of contract, provision in plans and specifications that owners of property being cleared for site of housing project would have right to remove "all fixtures and equipment from said premises pertaining to the business of owners thereof" would be construed as meaning that owners would have right to remove only such fixtures and such equipment as pertained to their business, as against contention that phrase should be construed as granting owners right to remove all fixtures of every kind and also such equipment as pertained to business of the owner.—Cleveland Wrecking Co. v. Struck Const. Co., D.C.Ky., 41 F.Supp. 67.

18. Colo.—Moul v. Thompson, 14 P. 2d 1004, 1005, 91 Colo. 323, citing **Corpus Juris.**
Ind.—Horn v. Indianapolis Nat. Bank, 25 N.E. 558, 125 Ind. 381, 21 Am.S.R. 231, 9 L.R.A. 676.
N.D.—Kittelson v. Collette, 240 N.W. 920, 921, 61 N.D. 768, citing **Corpus Juris.**
W.Va.—Snuffer v. Spangler, 92 S.E. 106, 79 W.Va. 628, L.R.A.1918C 149.
26 C.J. p 691 note 76.

19. Wis.—David G. Janes Co. v. Weed, 253 N.W. 181, 214 Wis. 402.
26 C.J. p 691 note 76 [a].

Separate insurance of fixture

Separate insurance of bowling alleys by purchaser of premises and vendor's acceptance of small down

plicable to chattels which have never been so attached to the realty as to become fixtures.[20]

A mere oral recognition by the landowner of another as owner of an article previously annexed has been regarded as effectuating a severance, giving the article the character of personalty,[21] sometimes on the theory that this is equivalent to a previous permission to make the annexation.[22] In other cases it has been denied that an oral agreement or understanding, after annexation, can operate in this regard as does an agreement prior to annexation,[23] it being recognized, however, that the existence of an agreement made prior to annexation may be inferred from the subsequent recognition or admission of rights thereunder.[24]

(2) Exception in Deed

A constructive severance of fixtures may be effected by an exception inserted in a deed to realty.

A severance, making the article personalty, has been regarded as effected by the exception or reservation, in a conveyance of land, of articles which would otherwise pass as part of the realty.[25]

(3) Separate Sale or Mortgage

While there is contrary authority, a separate sale or mortgage of articles or structures affixed to realty will, it is more generally held, effect a severance in contemplation of law, even though there be no actual, physical severance thereof.

By the weight of authority, a separate sale or mortgage of articles previously annexed to the land has the effect of rendering them personalty, although in no way physically severed;[26] but there is authority to the effect that no legal severance and change of the fixture from realty into personalty occurs until there has been an actual severance.[27] In any event, a sale or mortgage operates as a license actually to sever and to remove the article,[28] within the time limited, where time is

payment made by prospective buyer of alleys from purchaser was held not severance of alleys from land so as to bar vendor's lien thereon as against chattel mortgagee's lien on alleys.—David G. Janes Co. v. Weed, supra.

Contingent on removal

(1) Vendor's reservation in contract of sale, of right to remove fixtures by named date was contingent on physical detachment and removal before the named day, failing which, they would retain their nature as realty and pass to vendee.—Maryland Wrecking & Equipment Co. v. News Pub. Co., 129 A. 836, 148 Md. 560—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.

(2) Reservation in sale contract by vendor of right to remove boxwood plants did not prevent absolute deed to land from passing title to plants, so as to render plants repleviable from purchaser.—Montgomery v. McKeever, 171 A. 853, 166 Md. 586.

(3) Under vendor's reservation of right to remove fixtures by a named date, the fixtures became personalty only when actually severed and removed, but as between the vendor and purchaser of the fixtures they were potential personal property, and their sale one of goods and chattels.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., supra.

Unconsummated arrangement

That vendor having lien on property might consent to severance on payment of value of severed property does not bar his right against entire property as it existed prior to discussion of proposed arrangement where such arrangement was never consummated.—David G. Janes Co. v. Weed, 253 N.W. 181, 214 Wis. 402.

20. Iowa.—Equitable Life Assur. Soc. of U. S. v. Chapman, 282 N. W. 355, 225 Iowa 988.

Machinery bolted to floor merely to prevent vibration

Where electric lighting plant was installed on farm and bolted to cement base to prevent vibration, and plant maintained its character as a movable chattel at all times, doctrine of severance was inapplicable so as to pass plant to purchaser at foreclosure sale of a mortgage on the farm on ground that failure of tenant, who had installed the plant, to remove it on termination of tenancy rendered the plant a part of the realty.—Equitable Life Assur. Soc. of U. S. v. Chapman, supra.

21. Mo.—Hines v. Ament, 43 Mo. 298.

26 C.J. p 691 note 79.

22. Me.—Fuller v. Tabor, 39 Me. 519.

Mo.—Hines v. Ament, 43 Mo. 298.

23. Mass.—Barnes v. Hosmer, 82 N. E. 27, 196 Mass. 323.

26 C.J. p 691 note 81.

24. Mass.—Morris v. French, 106 Mass. 326.

26 C.J. p 691 note 82.

25. Mo.—Denvir v. Crowe, 9 S.W.2d 957, 959, 321 Mo. 212, citing **Corpus Juris.**

Or.—Kennedy v. City of Hood River, 259 P. 911, 122 Or. 531.

26 C.J. p 692 note 83.

Severed movables as passing under conveyance of land see Deeds § 106 c.

Exception on partition by agreement

Partition agreement of devisees by which house was conveyed, expressly excepting fixtures previously divided, pipe organ therein being given to another distributee, effected severance of organ from realty.—Denvir v. Crowe, 9 S.W.2d 957, 321 Mo. 212.

Limitation on right to remove

Limitation of right of grantor to enter on premises to remove building and fixtures did not convey building to either grantee or his successors in interest.—Kennedy v. City of Hood River, 259 P. 911, 122 Or. 531.

26. Ark.—Soule v. First Nat. Bank of Fort Smith, 150 S.W.2d 204, 206, 202 Ark. 326, quoting **Corpus Juris.**

N.Y.—Burton v. Jurgensen, 244 N.Y. S. 320, 138 Misc. 69.

N.D.—Kittelson v. Collette, 240 N.W. 920, 61 N.D. 768.

Wis.—Lindoft v. Vandenberg, 230 N.W. 46, 201 Wis. 330.

26 C.J. p 692 note 84.

Machinery

A lot owner's sale of pieces of machinery separately and apart from building in which they were located on such lot effected a "severance", which destroyed their character as "fixtures" and invested them with character of "personalty."—Soule v. First Nat. Bank of Fort Smith, 150 S.W.2d 204, 202 Ark. 326.

Sheriff's sale

Sale of dwelling house under judgment enforcing mechanic's lien on building alone, separate from land, converted dwelling into personalty and effected a severance in contemplation of law.—Wyman v. Hall, 276 P. 944, 84 Mont. 571.

27. Colo.—Eddy v. Hall, 5 Colo. 576.

26 C.J. p 692 note 85.

28. Mass.—Barry v. Woodbury, 91 N.E. 902, 205 Mass. 592.

26 C.J. p 692 note 86.

made of the essence.[29]

Formal conveyance as essential to constructive severance. The view has been asserted that, in order to effect a severance, the conveyance or mortgage must be so executed as to comply with the statutory requirements as to the conveyance of land.[30]

f. As against Third Persons

(1) Prior lienor
(2) Subsequent purchaser or other subsequent claimant
(3) Grantor enforcing forfeiture

(1) Prior Lienor

While there is contrary authority, the generally accepted view is that a constructive severance, such as a separate mortgage or sale of fixtures, cannot affect adversely the security of a prior mortgage covering land and fixtures thereon, and that not even an actual severance will destroy a prior mortgage or other lien.

While there is some authority to the contrary,[31] the cases are generally in agreement that, after executing a mortgage on land which covers articles annexed thereto as part thereof, one cannot affect the security of the mortgage by a merely constructive severance, as for instance by a separate mortgage or sale of the articles annexed.[32] Even in the case of an actual severance, the mortgagee has been regarded as retaining his lien on the article severed,[33] and, where a mortgagor, without the knowledge or consent of the mortgagee, removes a building from the premises, leaving the land inadequate as security for the mortgage debt, the lien of the mortgagee on such building is not impaired or lost[34] as against anyone having notice;[35] but there is authority to the contrary,[36] at least, where the removed building has become part of another freehold;[37] and it was held that, when a building had been taken apart and the materials used by the mortgagor in erecting a structure on other land, the mortgagee, although having the legal title to the land, lost all right as regards such materials.[38]

As against a prior lienor other than a mortgagee, even an actual physical severance by the owner has been regarded as ineffectual to divest the lien,[39] although there are decisions to the contrary.[40]

(2) Subsequent Purchaser or Other Subsequent Claimant

A subsequent purchaser of land, or other subsequent claimant, may be protected as against a constructive severance of fixtures even, according to some cases, when he has notice; but he is not protected as against an actual, physical severance.

An actual severance is effective as against a subsequent purchaser of the land.[41] But a mere constructive severance is not effective as against a subsequent purchaser or person standing in the position of a purchaser, who is without notice of the severance.[42] An attaching creditor has been regarded as entitled to protection within such a rule,[43] but not a purchaser at execution sale[44] or an assignee in bankruptcy.[45] According to some authorities a constructive severance is not effective as against a subsequent purchaser, or claimant, even though he has notice thereof,[46] while by others he is not protected if he takes with notice.[47]

29. N.Y.—Heckscher Bldg. Corp. v. Melton, 184 N.Y.S. 624, 113 Misc. 184.

30. Ala.—Johnston v. Philadelphia Mortg. & Trust Co., 30 So. 15, 129 Ala. 515, 87 Am.S.R. 75.
Del.—Rice v. Adams, 4 Del. 332.
26 C.J. p 692 note 90.
Necessity of writing to validity of contract or conveyance see the C.J.S. title Frauds, Statute of, § 74, also 27 C.J. p 195 note 16–p 196 note 34.

31. Idaho.—Anderson v. Creamery Package Mfg. Co., 67 P. 493, 8 Idaho 200, 101 Am.S.R. 188, 56 L.R.A. 554.
26 C.J. p 692 note 92 [a].

32. Colo.—Fisk v. People's Nat. Bank, 59 P. 63, 14 Colo.App. 21.
Iowa.—Peoria Stone & Marble Works v. Sinclair, 124 N.W. 772, 146 Iowa 56.
26 C.J. p 692 note 92.

33. N.J.—First Nat. Bank & Trust Co. of Woodbury v. Hager Oil Co., 146 A. 878, 105 N.J.Eq. 62.
26 C.J. p 692 note 93.
Action to recover property see infra § 60.

34. N.J.—See First Nat. Bank & Trust Co. of Woodbury v. Hager Oil Co., 146 A. 878, 105 N.J.Eq. 62, citing **Corpus Juris.**
N.C.—Turner v. Mebane, 14 S.E. 974, 110 N.C. 413, 28 Am.S.R. 697.
S.D.—Dakota L. & T. Co. v. Parmalee, 58 N.W. 811, 5 S.D. 341.
Tex.—Bowden v. Bridgman, Civ.App., 141 S.W. 1043.
41 C.J. p 506 note 88.

35. Minn.—Hamlin v. Parsons, 12 Minn. 108, 90 Am.D. 284.
N.J.—Betz v. Muench, Ch., 13 A. 622.

36. Cal.—Stowell v. Waddingham, 34 P. 436, 100 Cal. 7—Buckout v. Swift, 27 Cal. 433, 87 Am.D. 90.

37. Ky.—Harris v. Bannon, 78 Ky. 568.

38. Mass.—Peirce v. Goddard, 22 Pick. 559, 33 Am.D. 764.

39. N.C.—Latham v. Blakely, 70 N.C. 368.
Pa.—Witmer's Appeal, 45 Pa. 455, 84 Am.D. 505.
26 C.J. p 693 note 97.

40. Cal.—Stowell v. Waddingham, 34 P. 436, 100 Cal. 7.
Mo.—State v. Goodnow, 80 Mo. 271.
26 C.J. p 693 note 98.

41. Iowa.—Bringholff v. Munzenmaier, 20 Iowa 513.
Me.—Fulton v. Norton, 64 Me. 410.
Neb.—Moore v. Moran, 89 N.W. 629, 64 Neb. 84.

42. Iowa.—Schiltz v. Ferguson, 231 N.W. 358, 210 Iowa 677.
26 C.J. p 693 note 2.

43. Me.—Trull v. Fuller, 28 Me. 545.

44. Mich.—Manwaring v. Jenison, 27 N.W. 899, 61 Mich. 117.

45. U.S.—Ex parte Ames, D.C.Mass., 1 F.Cas.No.323, 1 Lowell 561.

46. Mass.—Gibbs v. Estey, 15 Gray 587.
26 C.J. p 693 note 6.

47. Iowa.—Schiltz v. Ferguson, 231 N.W. 358, 210 Iowa 677.
26 C.J. p 693 note 7.

A subsequent purchaser of the land is, it has been decided, not charged with notice of a prior mortgage on the fixture by the fact that it is recorded among the chattel mortgage records.[48]

(3) Grantor Enforcing Forfeiture

The grantee's severance of a fixture may be effective as against his grantor's assertion of a forfeiture for breach of condition subsequent.

The severance of an article by the grantee of land has apparently been regarded as effective as against a grantor of the land asserting a forfeiture for breach of condition subsequent.[49]

§ 22. Removal

The right to remove fixtures may spring from act or agreement of the parties and should be exercised within a reasonable time. Resultant injury to the fixture has been held not to preclude exercise of the right of removal, and injury to the freehold must be substantial to have such effect.

The right of removal of fixtures may arise from the express or implied agreement of the parties, under principles discussed supra §§ 12–20; but in the absence of mutual agreement, the disclosed intent of the annexor is ordinarily deemed of controlling importance.[50] Ordinarily, it is a characteristic of a "fixture" that under some circumstances it may be removed.[51]

Time of removal. One having the right of removal of a fixture has a reasonable time from its accrual within which to exercise such right.[52] A reasonable delay in exercising the reserved right to remove fixtures does not show an abandonment of such right,[53] but an unreasonable delay in exercising the right may result in its loss.[54]

Injury occasioned by removal. To preclude exercise of the right of removal on the ground of injury to the freehold, it must appear that removal would occasion an injury of a substantial and material character.[55] In a proper case one having the right of removal may be compelled to indemnify the owner of the realty for damage resulting from its exercise.[56] The fact that removal of a fixture may cause injury to the article or structure, although not injuring the realty, will not destroy the right of removal.[57]

Statutory provisions. Statutes authorizing removal of improvements to which a lienholder has contributed, if removal can be accomplished without material injury to the buildings, have been construed as limited in their application to buildings already on the land and to which the improvements are attached, and such statutes do not pre-

Mortgagee with notice of prior severance

Where the seller took a purchase-money mortgage to secure repayment of money he had loaned the buyer with which to pay off a bank loan, contracted to enable the buyer to buy the lot, the seller, in effect, acquired the same mortgage security which the bank had owned, and, where the bank's mortgage had not extended to fixtures theretofore constructively severed by a sale separate from the realty, the seller's intervention in the bank's suit to foreclose a chattel mortgage on the fixtures, so as to exclude such fixtures from a foreclosure sale under the chattel mortgage, was properly dismissed.—Soule v. First Nat. Bank of Fort Smith, 150 S.W.2d 204, 202 Ark. 326.

48. Iowa.—Peoria Stone & Marble Works v. Sinclair, 124 N.W. 772, 146 Iowa 56.
26 C.J. p 693 note 8.

49. Or.—Bay City Land Co. v. Craig, 143 P. 911, 72 Or. 31.

50. Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
Intent as determining whether article or structure constitutes a fixture see supra § 2.
Removal of improvements see the C.J.S. title Improvements § 4, also 31 C.J. p 311 note 55–p 312 note 88.

51. Mass.—Gar Wood Industries v. Colonial Homes, 24 N.E.2d 767, 305 Mass. 41, 126 A.L.R. 591.

Article which has not become fixture

(1) Machinery which has not become a "fixture" and a part of the realty, but has remained "personalty," is removable by the person who installed it.—Holt v. Male, 29 N.Y.S. 2d 111.

(2) Entry to remove it by the owners of a building which did not become a fixture, made within a reasonable time after decree of court establishing their right in the building, was not unlawful.—Lyman v. Leighton, 112 A. 381, 80 N.H. 12.

52. Ky.—Pennington v. Black, 88 S.W.2d 969, 261 Ky. 728.
Mo.—Holtgreve v. Sobolewsky, 31 S.W.2d 993, 326 Mo. 412.
Wash.—M. H. B. Co. v. Desmond, 275 P. 733, 151 Wash. 344.

53. Or.—Kennedy v. City of Hood River, 259 P. 911, 122 Or. 531.

54. Tex.—Clark v. Clark, Civ.App., 107 S.W.2d 421.

"It is a well-settled principle of law that failure to exercise the right of removal of fixtures from real estate within a reasonable time after the right accrues forfeits that right." —Clark v. Clark, supra.

Seven years after tax sale of realty

Property owners, who had lost title to premises by tax sales and failed to remove equipment and appliances used in connection with gas wells, could not assert right of removal seven years later.—United Natural Gas Co. v. James Bros. Lumber Co., 191 A. 12, 325 Pa. 469.

Question of fact and law

What constitutes reasonable time for removal of fixtures is question of fact, or, at most, mixed question of law and fact.—Clark v. Clark, Tex. Civ.App., 107 S.W.2d 421.

55. Ill.—Thuma v. Granada Hotel Corporation, 269 Ill.App. 484.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
That removal would involve substantial injury to fixture or to realty as invalidating agreement that fixture shall be removable see supra § 12.

56. N.C.—Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys, 169 S.E. 186, 204 N.C. 609.

Damages denied in absence of resultant injury

Ohio.—East Ohio Building & Loan Co. v. Holland Furnace Co., 194 N.E. 598, 48 Ohio App. 545.

57. Ill.—Thuma v. Granada Hotel Corporation, 269 Ill.App. 484.

clude the removal of improvements consisting of new buildings placed on the land and unattached to previously existing structures, even though injury may result to such new buildings.[58]

§ 23. Person Making Annexation in General

The relationship of the parties to each other and to the property involved is important in the determination of whether or not a chattel annexed to realty has become a fixture.

The relationship of the parties to the controversy may be determinative as to whether an article annexed is a fixture,[59] as may also the relation of the person making the annexation to the property on which the annexation is made;[60] and where the person making the annexation is also the owner of the realty it tends strongly to show that a permanent accession to the realty was intended.[61] For the making of a mortgage on realty and annexed articles or structures to have any influence as a factor in determining the real or personal character of the fixtures, it must appear that the mortgage was made by the owner or by one having an interest in the property concerned.[62]

§ 24. —— Person Not Owning Chattel Annexed

As a general rule, personalty should be attached to realty by the owner of such personalty, or with his real or presumed consent, in order that it may become an irremovable fixture.

Ordinarily an article or structure must be annexed by its owner or with his consent in order to become a part of the realty, and where the annexation is by another than the chattel owner and without the latter's consent, the chattel remains personalty in the eyes of the law.[63] The right of the legal owner of the chattel to claim it has been recognized even as against a bona fide purchaser for value of the land to which it has been annexed, the defense of bona fide purchase being available only as against the holder of an equity.[64] However, a contrary view has also been asserted, that even when an article is wrongfully and without the owner's consent annexed to another's land, it becomes a part of such land, so as to be irremovable by the former owner of the article,[65] provided at least the character of the article and mode of annexation were such that the identity of the article was lost.[66]

58. S.D.—Wilson v. Hayes-Lucas Lumber Co., 226 N.W. 343, 55 S.D. 331, modifying 207 N.W. 155, 49 S.D. 341.
Statutory provisions as to landlord and tenant see infra § 35.

59. Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.
Tenn.—Farrar v. Nashville, C. & St. L. Ry., 36 S.W.2d 95, 162 Tenn. 313.

60. N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S. 2d 656.

Decisive in doubtful case
In determining whether personalty attached to realty was intended to be a permanent accession to realty so as to be "fixture," relationship to realty of person making attachment may be decisive in doubtful case.—Marine Midland Trust Co. of Binghamton v. Ahern, supra.

61. N.Y.—Marine Midland Trust Co. of Binghamton v. Ahern, supra.

Intent to make permanent improvement
If the proprietor of the land himself annexes the chattels, a doubt as to his intention to annex them permanently will in most cases be resolved in favor of such intent, on the theory that his design is to place permanent improvements on his property, which will enhance the usefulness of the property and consequently its market value.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

Refrigeration machine
In determining whether refrigeration machine attached to realty was intended to be a permanent accession to the realty so as to be a "fixture," considerable weight should be given to fact that machine was purchased and annexed by owner of realty since owner is more likely to intend permanency than one in possession of premises temporarily, as a tenant.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.

62. Or.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.

63. U.S.—In re Pfeiffer Silk Corporation, D.C.Pa., 15 F.Supp. 618.
Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga. App. 102.
26 C.J. p 671 note 58.

Annexation by bailee
Where plaintiff by written agreement leased a tank to be used on the land of lessee, the transaction was a bailment, and setting it in the ground and covering it with earth, as between plaintiff and the lessee, did not cause it to become real estate.—Standard Oil Co. of New York v. Dolgin, 115 A. 235, 95 Vt. 414, 17 A.L.R. 1218.

Annexation by purchaser
Where bottle labeling machine was sold under conditional sales contract and machine was set up by vendor on floor plates and the four legs of the heavy section of the machine was set on cement blocks laid on floor, it was conclusively shown that parties intended that machine should remain a chattel until fully paid for, and the fact that purchaser altered manner of affixation by setting the legs in cement blocks and screwing legs of conveyor to floor to eliminate vibration did not cause machine to become a "fixture."—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.

Under statute
A buyer of mining machinery and equipment, installed by him in his leased mine without having fully paid purchase price thereof, did not own it, and hence did not "affix his property" to mine within statute providing that when person affixes his property to another's land, without an agreement permitting him to remove it, it belongs to landowner, unless he chooses to require its removal by the person affixing it.—Nead v. Specimen Hill Mining Co., Cal.App., 126 P.2d 450.

64. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.
Mont.—Eisenhauer v. Quinn, 93 P. 38, 36 Mont. 368, 122 Am.S.R. 370, 14 L.R.A.,N.S., 435.

65. Mass.—Peirce v. Goddard, 22 Pick. 559, 33 Am.D. 764.
Vt.—Jackson v. Walton, 28 Vt. 43.
26 C.J. p 672 note 61.

66. Vt.—Standard Oil Co. of New York v. Dolgin, 115 A. 235, 95 Vt. 414, 17 A.L.R. 1218.
26 C.J. p 672 note 62.

§ 25. —— Person Having No Estate in Land

a. In general
b. Effect of mistake
c. Erections on public land
d. Annexation by public or by quasi-public corporations

a. In General

The general rule, subject to certain exceptions and qualifications, is that personalty affixed by one to the land of another becomes part of the freehold and passes to the owner of the land.

Where the matter is not otherwise arranged by agreement between the landowner and the chattel owner, as discussed supra § 13, at common law and under statutes declaratory thereof, personalty affixed by one to the land of another ordinarily becomes a part of the freehold and title passes to the fee owner.[67] Contrary dicta are, however, to be

Annexation by bailee to his land of personal property bailed, with or without knowledge and consent of bailor, does not make it realty, and bailor can recover it from bailee's grantee, even though he is an innocent purchaser, unless the annexation was of such a character that the identity of the chattel is lost, and it cannot be removed without substantial injury to itself or the real estate.—Standard Oil Co. of New York v. Dolgin, supra—26 C.J. p 681 note 70 [c].

Decision as to loss of identity

The intention of bailee attaching personal property to land, and the damage involved in its removal have a controlling influence in deciding whether the identity of the personalty is lost so as to make it realty.—Standard Oil Co. of New York v. Dolgin, supra.

67. Ark.—Kilmer v. Kilmer, 41 S.W. 2d 779, 780, 184 Ark. 170, citing **Corpus Juris.**
Ill.—White Way Electric Sign & Maintenance Co. v. Chicago Title & Trust Co., 14 N.E.2d 839, 368 Ill. 482, affirming 6 N.E.2d 510, 289 Ill.App. 1.
Kan.—Blankenship v. School Dist. No. 28 of Wyandotte County, 15 P.2d 438, 136 Kan. 313.
Mass.—Meeker v. Oszust, 30 N.E.2d 246, 307 Mass. 366.
Miss.—New Hebron Consol. School Dist. v. Sutton, 118 So. 303, 151 Miss. 475.
N.Y.—In re Triborough Bridge Approach, City of New York, 288 N. Y.S. 697, 159 Misc. 617.
Okl.—McDowell v. King, 96 P.2d 37, 186 Okl. 90—Revell's Estate v. Herron, 105 P.2d 426, 187 Okl. 618, 130 A.L.R. 1029.
Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.
Wis.—David G. Janes Co. v. Weed, 253 N.W. 181, 214 Wis. 402—Schmidt v. Carrol, 231 N.W. 181, 201 Wis. 631.
26 C.J. p 672 note 65.

The maxim "whatever is affixed to the soil belongs to the soil," may be applied as between the owner of the fee and a stranger annexing articles or structures to the realty without his consent.
Pa.—Titus v. Poland Coal Co., 119 A. 540, 275 Pa. 431.
Wis.—Huebschmann v. McHenry, 29 Wis. 655.
26 C.J. p 672 note 65.

Prima facie, dwelling houses and other buildings belong to owner of land on which they stand as part of realty, although built by party having no interest in land, unless there is express or implied agreement with landowner that they shall remain personal property.—Meeker v. Oszust, 30 N.E.2d 246, 307 Mass. 366.

Right of personal property in building can exist only when it is erected on the land of another with the latter's consent and express or implied agreement that the builder may remove it.—Meeker v. Oszust, 30 N.E.2d 246, 307 Mass. 366—Murphy v. Marland, 8 Cush., Mass., 578.

Articles affixed by trespasser

(1) An electric fan and motor, the rails and spikes from a tram track, and the copper trolley wire placed on premises by trespasser, who used the premises for coal mine, are fixtures which belong to the owner of the premises.—Titus v. Poland Coal Co., 119 A. 540, 275 Pa. 431.

(2) Where an owner of coal in adjoining premises, intending to condemn a right to do so under a statute later declared unconstitutional, entered on the premises in controversy, erected buildings and other structures thereon necessary for the operation of the mine, and made five openings in the premises, it constituted a coal mining operation as regarded question of trade fixtures on ejectment, which fixtures became a part of the realty because such mine owner was a mere trespasser and not a tenant nor licensee.—Titus v. Poland Coal Co., supra.

In Louisiana

(1) "In order for an object or thing which, from its nature, is movable, to be immobilized by destination on being attached to an immovable, it is essential that the ownership of the movable and immovable must be in the same person."—Buckley v. Lindsey Mercantile Co., 5 La.App. 467, 469—26 C.J. p 676 note 16 [a].

(2) Under Rev.Civ.Code art 468, things become immobilized by destination only when placed on a tract of land for its service and improvement by the owner himself, or when he, the owner, has attached them permanently to the tenement or to the building.—Richardson v. Item Co., 134 So. 380, 172 La. 421—Folse v. Loreauville Sugar Factory, App., 156 So. 667, followed in Builders' Supply Co. v. Loreauville Sugar Factory, 156 So. 672.

(3) Under statutory provisions to the effect that, where a third person with his own materials constructs improvements or fixtures on the land of another, the owner of the soil may, at his option, compel such third person to remove or demolish the same, or, on the other hand, may retain the same on reimbursing the builder for labor and materials, the fact that title to land is in one person and that a house is built thereon by another person does not prevent the house from continuing to remain the property of its builder. —Davis-Wood Lumber Co. v. Insurance Co. of North America, App., 154 So. 760, followed in Davis-Wood Lumber Co. v. Colonial Fire Underwriters of Hartford, Conn., 154 So. 767 and Davis-Wood Lumber Co. v. Security Ins. Co. of New Haven, Conn., 154 So. 767.

(4) In this connection it has been said that the works built by one on the land of another remain the property of the builder until the owner of the soil has made his election under the statute.—Baldwin v. Union Insurance Co., 2 Rob. 133.

(5) It has also been held that the owner of the soil has the right, under such code provisions, to prevent the purchaser at a sheriff's sale of the property of the builder from removing a house constructed on the soil owner's land by a third person. —Poche v. Theriot, 23 La.Ann. 137.

(6) Where defendant, while in good-faith possession of plaintiff's land, buried a carbide tank in ground for supplying residence with lighting, and tank could be removed without injuring land or building, defend-

found,[68] and occasional decisions,[69] more particularly in connection with annexations or erections made in good faith and under mistake as discussed in the following subdivision of this section; and there is authority, as shown infra § 28, to the effect that unity of ownership in land and chattel is essential to render the latter a part of the former when affixed to the land in a mode permitting severance without injury.

b. Effect of Mistake

It is generally held that, even where personalty is affixed to the land of another through mistake, the owner of the personalty has no right to remove it, but there are authorities to the contrary. Where the mistake is mutual, consent of the realty owner may be implied so as to afford a right of removal.

That one in attaching an article to, or erecting a structure on, another's land, acts in good faith under a mistake as to the title to the land or his rights therein, has been held to give him no right to remove the article or structure.[70] In some states, however, a contrary view has been adopted and it is held that one's mistake as to the ownership of the land entitles him to remove the article or structure,[71] provided such removal does not cause damage to the property of the landowner.[72] If the mistake is mutual, being participated in by the owner of the land, so that he in effect consents to the annexation to his land, the article or structure may be regarded as removable,[73] in accordance with the ordinary presumption of an agreement for removal in the case of an annexation under license, discussed supra § 14.

c. Erections on Public Land

Personalty affixed to public lands by a stranger to the title ordinarily becomes a part of such land and passes to the landowner; but where the personalty is affixed under a contract subsequently broken by the public, the original owner of the personalty may be accorded a right of removal. One lacking title to the interest in public land to which personalty is affixed may not claim the same as his realty.

The rule that an article annexed to land by a stranger to the title becomes a part of the land and so the property of the landowner has been applied to structures placed on lands of the United States by one having no rights therein, these being held to pass as part of the realty to one subsequently entering or purchasing the land;[74] but a contrary view has also been asserted.[75] The rule that the fixture becomes part of the realty likewise applies, it seems, to erections on, or attachments to, land of a municipality.[76] However, when articles or materials are furnished to a municipality under contract, and the municipality refuses to pay therefor, because of the invalidity of the contract, or noncompliance with the terms thereof by the contractor, or for other reasons, the contractor may recover the articles or materials, even though annexed to municipal land or to the bed of a street or highway, if their removal will not involve material damage to the municipality or to property owners,[77] this apparently involving an application of the ordinary doctrine, discussed supra § 14, that an agreement for removal may be inferred when an article is annexed under license from the owner of the land.

d. Annexation by Public or by Quasi-Public Corporations

The right of removal has been recognized in the

ant would be permitted to remove tank although value thereof was not sued for by defendant under claim in reconvention in petitory action to recover land.—Peters v. Crawford, App., 199 So. 433.

68. Ind.—Price v. Malott, 85 Ind. 266.
Iowa.—Fehleisen v. Quinn, 165 N.W. 213, 182 Iowa 1283.

69. **Tramway rails laid temporarily** on another's lands, without permission, although without objection, in order to connect a sawmill with a railroad, were held not to be fixtures.—De Laine v. Alderman, 9 S.E. 950, 31 S.C. 267.

70. Ark.—Kilmer v. Kilmer, 41 S.W. 2d 779, 780, 184 Ark. 170, citing **Corpus Juris.**
Tex.—Bollinger v. McMinn, 104 S.W. 1079, 47 Tex.Civ.App. 89.
Wis.—Lee v. Bielefeld, 186 N.W. 587, 176 Wis. 225.
26 C.J. p 673 note 69.

71. Mich.—Curtis v. Leasia, 44 N.W. 500, 78 Mich. 480.
26 C.J. p 673 note 70.

72. Iowa.—Guthrie v. McMurren, 149 N.W. 71, 167 Iowa 154, L.R.A.1915B 187.

73. Minn.—Karpik v. Robinson, 214 N.W. 59, 171 Minn. 318.
26 C.J. p 673 note 72.

74. Ala.—Mitchell v. Billingsley, 17 Ala. 391.
Nev.—Treadway v. Sharon, 7 Nev. 37.
N.M.—Patterson v. Chaney, 173 P. 859, 24 N.M. 156, 6 A.L.R. 90.
26 C.J. p 673 note 74.

75. Idaho.—Bingham County Agricultural Assoc. v. Rogers, 59 P. 931, 7 Idaho 63.
26 C.J. p 673 note 75.

Drilling rig placed on land by drilling contractor under contract with owner of placer mining claim after location notice was posted, as required by Civ.Code, § 1426d, was held personalty and not fixture as between contractor and owner of land who made homestead entry thereon, under Act Congr. July 17, 1914, U.S.Comp. St. §§ 4640a–4640c, reserving to the United States deposits of oil or gas, with the right to prospect for, mine, and remove such deposits, regardless of whether the mining claim was valid under Act Congr. June 25, 1910, § 2, U.S.Comp.St. § 4524, as against the government or a subsequent mining claimant.—Midland Oil Fields Co. v. Rudneck, 204 P. 1074, 188 Cal. 265.

76. Cal.—Griffith v. Happersberger, 25 P. 137, 487, 86 Cal. 605.
Ill.—Moore v. Cunningham, 23 Ill. 328.
26 C.J. p 673 note 76.

77. Kan.—Salt Creek Tp. v. King Iron Bridge & Mfg. Co., 33 P. 303, 51 Kan. 520.
Ky.—Floyd County v. Owego Bridge Co., 137 S.W. 237, 143 Ky. 693.
Utah.—Moe v. Millard County, School Dist., 179 P. 980, 982, 54 Utah 144.
26 C.J. p 673 note 77.

case of structures erected by the United States on the lands of private owners. The right of removal by railroads or other public corporations which have made annexations on private lands has been both upheld and denied under the circumstances of particular cases.

In some cases the view has been asserted that, in the absence of an express agreement for removal, or of circumstances calling for the implication of such an agreement, as considered supra § 14, articles annexed to private land by a railroad corporation or other public company, without any permission, express or implied, are not removable by it as against the landowner.[78] However, where a railroad company made annexations to private land, in the belief that this was its own land, it was allowed to remove the appliances on discovering its mistake;[79] and a right of removal has been recognized even in the absence of mistake.[80] It has also been decided that tracks wrongfully laid on another's land by a railroad company do not become part of the realty so as to pass by a tax sale of the land.[81]

The rule that annexations by a railroad under express permission or by force of a grant to it of the right of way retain their personal character, discussed supra § 14, does not apply where the dominent estate in the land and in the improvements is vested in the same owner.[82]

Articles attached to the bed of a street by a public service corporation, for the purpose of conducting its business, have been regarded as retaining the character of personalty where the right so to utilize the street was subject to revocation by the municipal authorities,[83] while a different view has been adopted as regards articles which the municipality could not at any time require to be removed.[84] However, even apart from any power in the municipality to require their removal, it has been held that rails laid in a street by a street railway company, under a valid grant of the right, are to be regarded as retaining the character of personalty, since the company has no legal interest in the street, or right of exclusive control thereover, as has a steam railroad company in the land covered by its right of way.[85]

Structures erected by the United States, in time of war, for military and hospital purposes, without the consent of the owners of the land, were held not to belong to the latter, it being said, as grounds for the decision, that there was no intent to improve the ground, or to make it accessory to some business or employment, no assertion of title in the soil, or of an intention to hold an adverse possession, and no resemblance to the case of a tort-feasor who annexes his structures to the freehold and is, therefore, presumed to intend to convert the chattel into realty.[86]

§ 26. —— Person Having Fee Simple Estate in Land

Where an article is annexed by the owner to land in which he has a fee simple estate or in which he thereafter acquires such an estate, it is ordinarily regarded as becoming a part thereof, although the relationship between the owner and the party claiming the property may lead to the application of a different rule.

Ordinarily, the owner of a fee simple to land, or one who becomes such owner after owning a less interest, by his annexation of personal property, renders it an accession to the land,[87] although whether or not the personalty affixed will be regarded as an accession to the land or as still retaining its character as personalty depends, to some extent, on the relationship subsisting between the fee simple owner of the land and the adverse claimant, under principles discussed in respect of a grantee or mortgagee of the land infra §§ 43–51, in respect of the holder of a vendor's lien supra § 21,

78. Mass.—Meriam v. Brown, 128 Mass. 391.
Mo.—Hatton v. Kansas City, C. & S. R. Co., 162 S.W. 227, 253 Mo. 660—Hunt v. Missouri Pac. R. Co., 76 Mo. 115.
Compensation for improvements by taker of land see Eminent Domain § 175 c.

79. Kan.—Atchison, T. & S. F. R. Co. v. Morgan, 21 P. 809, 42 Kan. 23, 16 Am.S.R. 471, 4 L.R.A. 284.
Effect of mistake generally see supra subdivision b of this section.

80. Miss.—Illinois Cent. R. Co. v. Le Blanc, 21 So. 760, 74 Miss. 650.
Tex.—Preston v. Sabine & E. T. R. Co., 7 S.W. 825, 70 Tex. 375.

81. Miss.—Illinois Cent. R. Co. v. Le Blanc, 21 So. 760, 74 Miss. 650.

82. Kan.—Union Pac. R. Co. v. Board of Com'rs of Jefferson County, 217 P. 315, 114 Kan. 156.

83. Me.—Portland v. New England Tel. & Tel. Co., 68 A. 1040, 103 Me. 240.
26 C.J. p 674 note 85.

84. Me.—Paris v. Norway Water Co., 27 A. 143, 85 Me. 330, 35 Am.S.R. 371, 21 L.R.A. 525.

85. Mass.—Lorain Steel Co. v. Norfolk & B. St. R. Co., 73 N.E. 646, 187 Mass. 500.

86. Pa.—Meigs' Appeal, 62 Pa. 44, 28, 1 Am.R. 372.

87. Ohio.—Joseph Schonthal Co. v. Village of Sylvania, 21 N.E.2d 1008, 60 Ohio App. 407.
Pa.—Witmer's Appeal, 45 Pa. 455, 84 Am.D. 505.
26 C.J. p 674 note 97.
Equitable owner of land, who annexes personalty thereto and thereafter acquires the legal title to the land also acquires title to the personalty as a fixture, so that it becomes subject to the lien of one having a judgment against such landowner.—Witmer's Appeal, supra.
Not removable after termination of fee
Buildings used as car barns, machine shops, and offices, erected on land by owner of fee subject to an executory estate, became part of realty and were not subject to removal after owner's fee was determined.—Joseph Schonthal Co. v. Village of Sylvania, 21 N.E.2d 1008, 60 Ohio App. 407.

and in respect of the holder of a mechanic's lien supra § 20. In § 30 infra, is a discussion of the respective rights in this connection of the landowner's personal representatives and heirs, and of his personal representatives and devisees; and in § 32 infra is taken up the matter of rights arising as between a landowner and his cotenants.

§ 27. —— Person Having Limited Estate in Land

The same article or structure cannot be at the same time a fixture and realty as to one undivided interest in land and personalty as to another undivided interest in the same land.

A thing cannot be a fixture and realty as to one undivided interest in land and remain personalty as to another undivided interest.[88] In the case of an article annexed by one having a life estate in land, the question whether it is to be regarded as a part of the land ordinarily arises as between such life tenant, or one claiming in his right, on the one side, and the remainderman, on the other side, as discussed infra § 31. In the case of an annexation by one holding as tenant under a lease, the question as to the effect thereof ordinarily arises as between the tenant, or his successor in interest, and the landlord, having the reversion, although occasionally the question arises as between the tenant and one to whom he has undertaken to transfer the article, or his entire interest in the land, and such matters are considered infra §§ 33–42.

§ 28. —— Persons Having Different Interests in Land and Chattel

Where an article owned by one person is affixed to land owned by another and is capable of severance without injury to the owner of the land, there is some authority to the effect that it cannot become a part of the land.

The view has occasionally been expressed that, in order that an article annexed may become a part of the realty, the same person must own both the article and the land to which the article is annexed and must, moreover, own the same interest in each,[89] this view having been applied when the undivided interest in the chattel of the one making the annexation was not of the same extent as his undivided interest in the land,[90] and when the sole owner of the article annexed owned merely an undivided interest in the land.[91]

Annexation by firm. The requirement of identity of interest in the chattel and in the land has been applied in the case of a chattel annexed by a partnership to land belonging to one member thereof, with the result of regarding it as still retaining its chattel character,[92] but more usually an article so annexed by a partnership to land belonging to one of the partners has been regarded as a part of the realty.[93]

§ 29. Between Persons in Family Relation and Their Privies

It has been held that ordinarily articles or structures of a permanent character, affixed by a husband to his wife's realty, become a part of the realty without right of removal, but that, where the husband is a tenant by the curtesy following his wife's decease, the ordinary rule does not apply. An analogous rule has been applied to a surviving wife.

Articles or structures placed by a husband on his wife's property, if of a permanent nature, have been held to belong to the freehold, with no right of removal in him or his representatives;[94] and the fact that the wife consented to the annexations was regarded as immaterial, she having no power to contract with her husband.[95] That the fixtures were annexed by the husband for purposes of trade has also been regarded as immaterial in this connection.[96] In case, however, the husband survives the wife, and becomes a tenant by the curtesy, and as such annexes articles for purposes of trade, he has, it has been decided, the right of removal;[97] and a right of removal has been accorded a widow remaining in possession of her deceased husband's land pending settlement of his estate.[98]

88. Ga.—Holland Furnace Co. v. Lowe, 159 S.E. 277, 172 Ga. 815.
Rights as to fixtures as between tenants in common generally see infra § 32.

89. Ariz.—Nigro v. Hatch, 11 P. 177, 2 Ariz. 144.
Ga.—Holland Furnace Co. v. Lowe, 159 S.E. 277, 172 Ga. 815.
Mich.—Adams v. Lee, 31 Mich. 440.
26 C.J. p 676 note 16.
Annexation by person having no estate in land see supra § 25.

90. Mich.—Adams v. Lee, 31 Mich. 440.

91. Ga.—Holland Furnace Co. v. Lowe, 159 S.E. 277, 172 Ga. 815.
26 C.J. p 676 note 18.

92. Mich.—Robertson v. Corsett, 39 Mich. 777.
26 C.J. p 676 note 19.

93. Mass.—Thompson v. Vinton, 121 Mass. 139.
26 C.J. p 676 note 20.

94. Hawaii.—Adams v. Kauwa, 6 Hawaii 280.
Pa.—Albert v. Uhrich, 36 A. 745, 180 Pa. 283.
26 C.J. p 674 note 90.

95. Me.—Doak v. Wiswell, 38 Me. 569.
Tenn.—Marable v. Jordan, 5 Humphr. 417, 42 Am.D. 441.

96. Pa.—Albert v. Uhrich, 36 A. 745, 180 Pa. 283, apparently overruling Hinds' Estate, 5 Whart. 138, 34 Am. D. 542.

97. N.C.—Overman v. Sasser, 12 S.E. 64, 107 N.C. 432, 10 L.R.A. 722.
26 C.J. p 674 note 93.

98. Wash.—In re Bloor's Estate, 197 P. 614, 115 Wash. 507.

§ 30. Between Personal Representative and Heir of Decedent, Devisees, and Their Privies

a. Heir and personal representative
b. Devisee and legatee or personal representative

a. Heir and Personal Representative

The rule that personalty affixed to the realty becomes a part thereof is strictly applied in favor of the heir of a decedent as against the latter's personal representative, although where the article or structure is readily removable without injury to the real estate it may be held personalty passing to the representative.

The rule that what has been annexed to the freehold becomes part thereof is stated to apply with full force in favor of an heir as against a personal representative of the landowner;[99] but where the article or structure is so affixed that it is readily removable, it has been held personalty passing to decedent's representative and not to his heir.[1]

Domestic and ornamental fixtures. While there are early decisions to the effect that articles annexed to the freehold for purposes of ornament or domestic convenience pass to the executor rather than to the heir, no such exception to the general rule is recognized in the later cases, such articles being assumed to pass to the heir if so annexed as to be part of the realty.[2]

Trade fixtures. Articles evidently annexed for trade purposes have been regarded as fixtures passing to the heir,[3] but there is authority to the contrary.[4]

Particular articles or structures. In application of the above rules, various particular articles or structures have been held fixtures passing to the heir,[5] or personalty passing to the representative,[6] under the circumstances disclosed in the particular case.

b. Devisee and Legatee or Personal Representative

In the absence of a contrary intent revealed by the will, the devisee of real estate is entitled to articles or structures affixed thereto, as against the claims of those entitled to the personal estate.

The right of the devisee of land to the articles annexed thereto is said to be determined by the same considerations as arise on a claim by the heir.[7] Unless the will evidences a contrary intent, articles or structures affixed to the land pass to the devisee of the realty to which they are attached rather than to a legatee or personal representative.[8] However, a thing not physically affixed to the realty devised will be deemed personalty and will not pass to the devisee,[9] since, as shown in the C.J.S. title Wills § 786, also 69 C.J. p 404 notes 44–46, a devise of realty does not ordinarily include personalty.

§ 31. Between Life Tenant and Remainderman and Their Privies

As between the life tenant and remainderman, the law allows the greatest latitude and indulgence in favor of the presumption that particular articles are to be considered as personal chattels.

Articles placed on the premises by the life tenant which are not so affixed as to become a part of the

Widow building house for own convenience

Where the widow of decedent permitted by the court to remain in possession of a farm pending the settlement of the estate built a root house for her own convenience, she had a right to remove it.—In re Bloor's Estate, supra.

99. Ark.—Stone v. Suckle, 224 S.W. 735, 145 Ark. 387.
26 C.J. p 693 note 9.
Fixtures as subject to descent generally see Descent and Distribution § 9.

1. Va.—Crenshaw v. Crenshaw, 2 Hen. & M. 22, 12 Va. 22.

2. Mass.—Bainway v. Cobb, 99 Mass. 457.
N.H.—Tuttle v. Robinson, 33 N.H. 104.
26 C.J. p 694 notes 13, 14.

3. Iowa.—Kinsell v. Billings, 35 Iowa 154.
26 C.J. p 694 note 10.

4. Tenn.—McDavid v. Wood, 5 Heisk. 95.
26 C.J. p 694 notes 11, 12.

5. **Cotton gin running gear**
S.C.—McKenna v. Hammond, 21 S.C. L. 331, 30 Am.D. 366.
Gasometer and gas generator
N.J.—Hays v. Doane, 11 N.J.Eq. 84.
Gravestones
N.H.—Sabin v. Harkness, 4 N.H. 415, 17 Am.D. 437.
Hay scales set in stone excavation
N.H.—Dudley v. Foote, 63 N.H. 57, 56 Am.R. 489.
Other particular articles or structures
U.S.—Powell v. Monson & Brimfield Mfg. Co., C.C.Mass., 20 F.Cas.No. 11,357, 3 Mason 459.
26 C.J. p 694 note 15 [a].

6. **Still**
Va.—Crenshaw v. Crenshaw, 2 Hen. & M. 22, 12 Va. 22.

7. Pa.—Bannerot v. Bannerot, 86 A. 489, 238 Pa. 606.

8. Pa.—Bannerot v. Bannerot, 86 A. 489, 238 Pa. 606.
26 C.J. p 730 note 15 [a].

Plantation bell resting on a wooden stand or frame and attached thereto by removable metal bolts was a "fixture," which passed as part of realty under the will, and not to a residuary legatee.—Winn v. Eatherly, 192 So. 431, 187 Miss. 159.

9. N.H.—Dana v. Burke, 62 N.H. 627.

Boat was held not to pass under the devise of a cottage, in connection with which the boat was used, there being no actual or constructive annexation to the realty and it not being adapted for use in connection therewith nor essential to the enjoyment of the estate.—Dana v. Burke, supra.

Unfastened mirror resting on bracket does not pass with devise of house, although mirrors clamped to the walls do pass to the devisee.—Lockwood v. Lockwood, 3 Redf.Surr., N.Y., 330.

freehold may be removed by him,[10] but improvements which are intended to, and do, become a part of the realty may not be removed by the life tenant or those claiming under him.[11] It has been said that as between the life tenant and remainderman the law allows the greatest latitude and indulgence in favor of the presumption that particular articles are to be considered as personal chattels, rather than as part of the freehold.[12] As between a tenant of land for life, or his representative, and the remainderman or reversioner, the rule forbidding removal is, it is said, applied with less strictness than between executor and heir and with more strictness than between landlord and tenant.[13]

A lessee from the tenant for life has no greater rights than the tenant for life himself.[14] The lessee's rights cannot be increased by an agreement with the tenant for life, not assented to by the remainderman, giving the lessee the right of removal.[15] The acceptance of rent from the lessee by the remainderman will not be deemed a ratification of such agreement where it is collateral to the lease, and it does not appear that the remainderman was apprised of it.[16] The fact that the remainderman did not give notice of his rights to one deriving title from the life tenant does not create an estoppel against him to claim improvements.[17] On the other hand, an agreement between the lessee from the life tenant and the life tenant, that buildings erected by the lessee shall belong to him and shall be removable by him, has been held to make them personalty, even after the transfer of such buildings by the lessee to the life tenant.[18]

Trade fixtures. The tenant for life, or his personal representative, has ordinarily been permitted to remove articles annexed by him for purposes of trade.[19]

Agricultural fixtures. Agricultural fixtures have been regarded as not removable by the life tenant or his representative.[20] Fixtures used for mixed purposes of trade and agriculture belong to the tenant.[21] On the other hand, agricultural implements which are easily removable, and which are considered as personalty, belong to the life tenant and are not part of the realty.[22]

Domestic and ornamental fixtures. It is public policy to permit a tenant for life to make the most profitable and comfortable use of the premises that can be obtained consistently with the rights of the owner of the freehold, and the law allows the greatest indulgence in favor of the presumption that domestic and ornamental fixtures are to be considered as personal chattels.[23] Under this rule, a lighting plant, installed by the life tenant, has been held to be a personal chattel, rather than part of the freehold.[24]

§ 32. Between Tenants in Common and Their Privies

A tenant in common who annexes articles or structures to land owned by him in common with another has no right to remove such articles if they have been so annexed as to become part of the realty.

One who annexes articles or structures to land owned by him and another in common has no right to remove such articles.[25] In determining whether

10. **Crib**
Removal of crib, placed by the life tenant on a rock and not affixed to the freehold, was not waste.—Clemence v. Steere, 1 R.I. 272, 53 Am.D. 621.

Where railroad company lawfully enters on property under a conveyance from a life tenant, and makes thereon improvements of a character necessary for its business, it has the right, if it intends to abandon the premises at the expiration of the life estate, to remove such improvements from the property.
Ga.—Charleston & W. C. R. Co. v. Hughes, 30 S.E. 972, 105 Ga. 1, 70 Am.S.R. 17.
Ill.—Chicago & A. R. Co. v. Goodwin, 111 Ill. 273, 53 Am.R. 622.

11. **Improvements by husband** on land in which wife held life interest were regarded as belonging to the remainderman, as if made by the wife herself.—Glidden v. Barnett, 43 N.H. 306.

12. Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.

13. Pa.—White v. Arndt, 1 Whart. 91.
26 C.J. p 694 note 16.

14. Pa.—Brandmeier v. Pond Creek Coal Co., 26 Pa.Dist. 29.
Tenn.—Cannon v. Hare, 1 Tenn.Ch. 22.

15. Ark.—Demby v. Parse, 14 S.W. 899, 53 Ark. 526, 12 L.R.A. 87.

16. Ohio.—Haflick v. Stober, 11 Ohio St. 482.
Pa.—White v. Arndt, 1 Whart. 91.

17. Miss.—Stewart v. Matheny, 5 So. 387, 66 Miss. 21, 14 Am.S.R. 538.

18. Ind.—Merrell v. Garver, 101 N. E. 152, 54 Ind.App. 514.

19. N.Y.—Buckley v. Buckley, 11 Barb. 43.
Pa.—Hinds' Estate, 5 Whart. 138, 34 Am.D. 542.
26 C.J. p 695 note 17.

20. Ohio.—Haflick v. Stober, 11 Ohio St. 482.
26 C.J. p 695 note 18.

Permanent fence, erected by life tenant, becomes a part of the realty and passes to the remainderman.—Glidden v. Barnett, 43 N.H. 306.

21. N.C.—Overman v. Sasser, 12 S. E. 64, 107 N.C. 432, 10 L.R.A. 722.

22. **Cream separator and milling plant,** installed by life tenant, were held removable fixtures.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.

23. Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 1057, 218 Ky. 691, citing **Corpus Juris.**
26 C.J. p 695 note 20.

24. Ky.—De Charette's Guardian v. Bank of Shelbyville, supra, citing **Corpus Juris.**

25. Conn.—Baldwin v. Breed, 16 Conn. 60.
Miss.—Stillman v. Hamer, 8 Miss. 421.
Pa.—Crest v. Jack, 3 Watts 238, 27 Am.D. 353.
26 C.J. p 720 note 30.

articles are so annexed to the land as to be part of the realty as between tenants in common, the principles which control as between grantor and grantee are to be applied.[26] Consent of his coöwners obtained by a tenant in common before erecting a building on the land held in common does not entitle him to treat the building as belonging exclusively to him;[27] but there are cases apparently to the contrary.[28]

§ 33. Between Landlord and Tenant and Their Privies

As between landlord and tenant, improvements of a permanent nature placed on the leased premises by the tenant with the intention that they should be permanently annexed are not removable by the tenant and his privies.

As between landlord and tenant, fixtures cease to be personal property removable by the tenant when they are firmly attached to the real estate so that they cannot be removed without material injury to the realty, and when they are adapted to the use of the realty, and it is the intention of the parties that they should be permanently annexed.[29]

26. Conn.—Baldwin v. Breed, 16 Conn. 60.
Me.—Parsons v. Copeland, 38 Me. 537.
26 C.J. p 720 note 32.
Rules as between vendor and purchaser see infra §§ 43–51.

27. Conn.—Baldwin v. Breed, 16 Conn. 60.
26 C.J. p 720 note 33.

28. Mass.—Fair v. Fair, 121 Mass. 559—Howard v. Fessenden, 14 Allen 124.
26 C.J. p 720 note 34.

29. U.S.—U. S. v. Certain Lands in Jo Daviess County, C.C.A.Ill., 120 F.2d 561.
Cal.—Clark v. Talmadge, 74 P.2d 825, 23 Cal.App.2d 703.
Ga.—Powell v. Griffith, 142 S.E. 466, 38 Ga.App. 40.
N.Y.—Crater's Wharf v. Valvoline Oil Co., 196 N.Y.S. 815, 204 App.Div. 840.
Wash.—Reinoehl v. Vervaeke, 82 P.2d 861, 196 Wash. 348.
26 C.J. p 696 note 24.
Judicial recognition of custom showing what are or are not fixtures as between landlord and tenant see Customs and Usages § 19 h.
Tenant's fixtures defined see supra § 1.
Removable fixtures as realty or personalty see infra § 37.
Requisites of conversion into realty, intention, and necessity of annexation generally see supra §§ 1–3.

Law applicable

Rights of parties to suit by owner of plant to prevent removal and sale by lessee of machinery and equipment installed by lessee, but which the owner alleged to be part of the realty, are controlled by law of state in which the case arose.—Union Bldg. Co. of Pennsylvania v. Pennell, C.C.A.Pa., 78 F.2d 959.

Particular structures and articles held not removable

(1) Awning for which tenant supplied fabric.—Gordon v. Cohn, 30 P.2d 19, 220 Cal. 193.

(2) Buildings erected by lessee.
Mo.—Buhlinger v. United Firemen's Ins. Co. of Philadelphia, App., 16 S.W.2d 699.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
Ohio.—McGowan v. McGowan, 18 N.E.2d 419, 59 Ohio App. 397.
Or.—General Petroleum Corporation of California v. Schefter, 16 P.2d 645, 141 Or. 349.
26 C.J. p 696 note 24 [a] (1)–(16).

(3) Buildings even while being constructed.—Rogers v. Goldman, 227 N.W. 672, 249 Mich. 31.

(4) Core oven, electric transformer, jib crane, hoist, and addition to building erected by lessee to be used in connection with building for conducting foundry.—Delano v. Tennent, 244 P. 273, 138 Wash. 39, 45 A.L.R. 766.

(5) Doors and windows, including transoms.—Slane v. Curtis, 286 P. 372, 41 Wyo. 402, 69 A.L.R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.

(6) Electric elevator, installed in the landlord's storehouse by a tenant as a substitute for an elevator previously built, the elevator being permanently installed on a cement or concrete foundation, the several floors through which it passed being materially modified so it could not be removed without injury to the freehold.—Alabama Machinery & Supply Co. v. Roquemore, 87 So. 435, 205 Ala. 244.

(7) Electric fans.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.

(8) Filling station.
Ark.—Dent v. Bowers, 265 S.W. 636, 166 Ark. 418, 36 A.L.R. 443.
Wis.—Northwestern Loan & Trust Co. v. Topp Oil & Supply Co., 248 N.W. 466, 211 Wis. 489.

(9) Lighting plant.—Boykin v. Boykin, 4 La.App. 210.

(10) Pump which was necessary adjunct of well sunk by lessee.—Jones v. Conrad, 98 So. 397, 154 La. 860.

(11) Linoleum supplied and cemented to floor by tenant.—Gordon v. Cohn, 30 P.2d 19, 220 Cal. 193.

(12) Other objects.
Mich.—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122.
N.Y.—People ex rel. Pennsylvania R. Co. v. Leo, 183 N.Y.S. 597, 112 Misc. 578, affirmed 188 N.Y.S. 226, 196 App.Div. 426.
26 C.J. p 696 note 24 [a].

Piping, rods, and tubes in oil well are presumptively a part of the realty, and this presumption can be rebutted only on a showing that lessee under his contract had the right of removal.—Terry v. Crosswy, Tex. Civ.App., 264 S.W. 718.

Sprinkler system

(1) Parts of a concealed sprinkler system built into a building on leased premises became part of the freehold where it could not be removed without causing substantial damage.
U.S.—Interstate Trust & Banking Co. v. Warren, C.C.A.Fla., 69 F.2d 368.
Mo.—Globe Automatic Sprinkler Co. v. Boester, 95 S.W.2d 825, 231 Mo. App. 203.

(2) It has also been held that a sprinkler system becomes a fixture and an inseparable part of the leased premises.—People v. Leo, 183 N.Y.S. 597, 112 Misc. 578.

(3) Tanks or minor parts, such as nozzles, which can be removed with no appreciable damage, do not become part of the freehold.—Interstate Trust & Banking Co. v. Warren, supra.

(4) On the other hand, where the sprinkler system may be removed without material damage to the building, it may be removed by the lessee installing it.
Ark.—Romich v. Kempner Bros. Realty Co., 92 S.W.2d 215, 192 Ark. 454.
La.—Richardson v. Item Co., 134 So. 380, 172 La. 421.

(5) The fact that some expense may be incurred in adopting the sprinkler system to, and installing it in, another building is not of controlling importance, but is a circumstance to be considered in determining the intent of the parties.—Romich v. Kempner Bros. Realty Co., supra.

On the other hand, particularly in view of the tendency to favor the tenant, see infra § 34, it is generally held that where fixtures are erected on and attached to real property by a tenant for a specific use connected with the occupancy during the leasehold term, and without any contrary agreement, they may be removed by the tenant, or by those lawfully claiming under him, during the term of the tenancy, provided the severance can be accomplished without material injury to the freehold.[30] The intent of the parties is a controlling criterion in ascertaining whether property supplied by the lessee retains its character as personalty and is removable by him;[31] the character of the annexation to the land and the use made of the property being subsidiarily employed for the purpose of testing the intention of the parties.[32] The fact that the tenant in removing an improvement placed on the freehold by him will not leave the premises in exactly the same condition as they were before he entered thereon is not controlling in determining whether he has the right to remove such improvement.[33] Although the right to remove fixtures may be, and frequently is, the subject of an express agreement between the landlord and tenant, see supra § 15, the tenant needs no express stipulation in the lease to give him the right to remove improvements which have not become a part of the freehold.[34]

Vault doors, etc.

(1) A vault door and frame, lock-boxes, burglar alarm, and marble, bronze, and wood fixtures in a bank were held not removable.—Greensburg Bank v. Department of Financial Institutions, Ind.App., 11 N.E.2d 1008.

(2) Likewise, wainscoting, vault, closet, and doors installed by bank tenant, but not a time lock door, were not removable.—Inge v. First State Bank of Denton, Tex.Civ.App., 57 S.W.2d 217, error dismissed.

(3) A vault door, however, has been held to be removable.—Bennett v. Taylor, 49 S.W.2d 608, 185 Ark. 794.

(4) Likewise, a bank vault and night depository were banking "trade fixtures."—President and Directors of Manhattan Co. v. Mosler Safe Co., 299 N.Y.S. 417, 252 App.Div. 863, appeal denied 13 N.E.2d 480, 277 N.Y. 740.

30. Neb.—Moran v. Otoe County Nat. Bank, 213 N.W. 824, 115 Neb. 515.
S.D.—Conway v. Belatti, 175 N.W. 703, 175 S.D. 703.
Wis.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536.
26 C.J. p 704 note 26.

Particular objects held removable

(1) Building merely set on ground without foundation under it.—School Dist. No. 11, Laramie County, v. Donahue, 97 P.2d 663, 55 Wyo. 220.

(2) Garage tools.—Hill's Garage, v. Rice, 234 P. 1023, 134 Wash. 101.

(3) Office carpet tacked to strips nailed to wooden plugs in concrete floor.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536.

(4) Organ installed in theater.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.

(5) Temporary derrick.—Jones v. Conrad, 98 So. 397, 154 La. 860.

31. U.S.—Union Bldg. Co. of Pennsylvania v. Pennell, C.C.A.Pa., 78 F.2d 959—Societa Italiana di Mutua Beneficenza v. Burr, C.C.A.Cal., 71 F.2d 496.
Cal.—San Diego Trust & Savings Bank v. San Diego County, 105 P.2d 94, 16 Cal.2d 142, 133 A.L.R. 416, superseding, App., 96 P.2d 137, certiorari denied U. S. Nat. Bank of San Diego v. San Diego County, 61 S.Ct. 449, 312 U.S. 679, 85 L.Ed. 1118—Jahnke v. Jahnke, 253 P. 752, 81 Cal.App. 387.
Md.—Rudolph Wurlitzer Co. v. Cohen, 144 A. 641, 156 Md. 368, 62 A.L.R. 358.
Mass.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.
Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., 205 P. 224, 62 Mont. 281, 21 A.L.R. 1080.
Okl.—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175.
Pa.—Copley v. Stewart, 14 Pa.Dist. & Co. 733.
Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.
W.Va.—Freeman v. Truax, 136 S.E. 697, 103 W.Va. 132.
Wis.—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542, 225 Wis. 627—Shields v. Hansen, 230 N.W. 51, 201 Wis. 349—Zimmerman v. Treleven, 212 N.W. 266, 192 Wis. 214—Hanson v. Ryan, 201 N.W. 749, 185 Wis. 566, 36 A.L.R. 1516.
Intention generally see supra § 2.

Attachment

The fact that, at commencement of suit by lessor he regarded property placed on leased premises as property of assignee of lease and procured an order of attachment against it, although not necessarily controlling, was relevant in determining whether the parties intended that on termination of lease the property should remain in assignee or whether it should become a part of the realty and vest in lessor.—American Rolling Mill Co. v. Carol Mining Co., 137 S.W.2d 725, 282 Ky. 64.

Giving and taking of chattel mortgage expresses an agreement and an intention of the parties that the property covered therein shall retain its character as personal property.—Ottawa Public Finance Corporation v. Blackley-Gould Corporation, 281 Ill.App. 447.

Question of intention

Whether fixtures on leased premises are removable is question of intention of landlord and tenant.—In re Shelar, D.C.Pa., 21 F.2d 136.

Subsequent statements

The fact that bank's statements and reports showed that bank was owner of certain fixtures did not divest articles of character of fixtures which they acquired at time of annexation to building.—Greensburg Bank v. Department of Financial Institutions, Ind.App., 11 N.E.2d 1008.

32. Cal.—Jahnke v. Jahnke, 253 P. 752, 81 Cal.App. 387.
Mass.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.
W.Va.—Pocahontas Coal & Coke Co. v. By-Products Pocahontas Co., 164 S.E. 504, 112 W.Va. 390.

Mere fact of attachment does not determine whether it belongs to the owner of the fee or the tenant, as ownership depends on the manner of attachment and on the agreement of the parties, express or implied.—Prudential Ins. Co. of America v. Kaplan, 198 A. 68, 330 Pa. 33.

33. Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345.

34. Wis.—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542, 225 Wis. 627—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536—Shields v. Hansen, 230 N.W. 51, 201 Wis. 349.

Articles not annexed by tenant. Articles which are on the leased premises at the time of the making of the lease, and which are mere chattels not a part of the realty, do not pass by a lease of the premises so as to entitle the tenant to the use thereof,[35] or to subject him to liability, under an agreement to deliver up the premises in good condition at the end of the term, for damage done to such articles.[36] On the other hand, a tenant does not have the right to remove fixtures on the premises at the time of the leasing thereof.[37]

§ 34. —— Tendency to Favor Tenant

The law is extremely indulgent to the tenant with respect to fixtures.

The general rule that whatever is affixed to the realty becomes part thereof does not obtain in its fullness as between landlord and tenant.[38] The law is extremely indulgent to the tenant with respect to fixtures,[39] and it has been held that to prevent removal of fixtures by a lessee, accession to the realty must affirmatively appear.[40] Indeed, it has been said that, as between landlord and tenant, more than in the case of any other relation, the greatest latitude and indulgence are to be allowed in favor of the tenant's claim to have particular articles considered as personal chattels rather than as part of the freehold or inheritance.[41] This tendency to favor the tenant may also arise from the character of the tenancy. Thus, it has been presumed, in the absence of an agreement to the contrary, that it was not the intention of a tenant at will to enhance the value of the freehold, and that improvements placed thereon were for his own use and benefit, and that they should retain their character as personalty.[42]

§ 35. —— Statutory Provisions

The right of a tenant to remove fixtures placed by him on the leased premises is regulated in some jurisdictions by statute.

In several states there is a statutory provision that a tenant may remove from the demised premises at any time during the continuance of his term, anything affixed thereto for the purpose of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the prem-

Judicial recognition of custom permitting tenant to remove fixtures see Customs and Usages, § 19 h.

35. Mass.—Kimball v. Grand Lodge of Masons, 131 Mass. 59.
26 C.J. p 696 note 25 [a].

36. Mass.—Holbrook v. Chamberlin, 116 Mass. 155, 17 Am.R. 146.
26 C.J. p 696 note 25 [b].

37. Ga.—Wolff v. Sampson, 51 S.E. 335, 123 Ga. 400.
Wis.—Baringer v. Evenson, 106 N.W. 801, 127 Wis. 36.
26 C.J. p 696 note 25 [c], [d].

38. Colo.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

39. U.S.—In re Shelar, D.C.Pa., 21 F.2d 136.
Miss.—Frederick v. Smith, 111 So. 847, 147 Miss. 437—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.
Tex.—Sanders v. Lefkovitz, Civ.App., 292 S.W. 596.
Wis.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536.

Different test
The legal test by which a court may treat realty and a chattel attached thereto as a single whole, where both are owned by the annexor, is not necessarily the legal test by which a court would determine whether the separate owner of a chattel had lost it by a tenant's annexation to the freehold.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603—26 C.J. p 695 note 21 [b] (1).

Doctrine is applied liberally to the protection of tenant in the right of removal.—Davidson v. Ginsberg, 181 N.W. 661, 190 Iowa 1327.

Founded on public policy
"The right of the tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased is one founded upon public policy and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of."
Mich.—Cameron v. Oakland County Gas & Oil Co., 269 N.W. 227, 230, 277 Mich. 442, 107 A.L.R. 1142.
Minn.—Moffat v. White, 279 N.W. 732, 735, 203 Minn. 47.

40. Wis.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536.

41. U.S.—Chatham Gold Dredging Co. v. Burns, C.C.A.Alaska, 84 F.2d 717, 720, citing **Corpus Juris**—Bee Bldg. Co. v. Daniel, C.C.A.Neb., 57 F.2d 59.
Ark.—Romich v. Kempner Bros. Realty Co., 92 S.W.2d 215, 192 Ark. 454—Bank of Mulberry v. Hawkins, 10 S.W.2d 898, 178 Ark. 504—Arkansas Cold Storage & Ice Co. v. Fulbright, 285 S.W. 12, 171 Ark. 552.
Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.
Ky.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 218, 268 Ky. 135, quoting **Corpus Juris**—Schultz v. Seiler Motor Car Co., 48 S.W.2d 1068, 1069, 243 Ky. 459, quoting **Corpus Juris**—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
26 C.J. p 695 note 21.

Law looks with favor
Where the question as to whether a chattel annexed to the freehold has become a part of the realty or otherwise arises between landlord and tenant, the law looks with favor on the right of the tenant to remove as personalty articles furnished or installed by him for the purposes of his occupancy, although they may ordinarily be deemed fixtures.—Handlan v. Stifel, Mo.App., 232 S.W. 245.

Rule is much more liberal than as between vendor and purchaser or mortgagor and mortgagee.
Ky.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135.
Miss.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.
N.C.—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474.
Wash.—Olympia Lodge No. 1, F. & A. M., v. Keller, 252 P. 121, 142 Wash. 93, 52 A.L.R. 795.
Wis.—Hanson v. Ryan, 201 N.W. 749, 185 Wis. 566, 36 A.L.R. 1516.
26 C.J. p 695 note 21 [b] (2).

42. Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345.

ises.[43] Occasionally, other statutory provisions exist bearing on the tenant's right of removal.[44]

§ 36. —— Removability as Based on Chattel Character of Article

The removability of articles annexed by a tenant to leased premises has been based by some decisions on the chattel character of the article.

An article annexed by the tenant under a lease has been not infrequently decided to be a chattel, in view more particularly of the apparent intention with which it was annexed.[45] As hereinafter pointed out in § 37, however, a removable fixture, while it is annexed to the realty, is in the twilight zone between real and personal property.

43. **Agreement**

Under Civ.Code § 1013, in order to warrant removal an agreement between the parties must be shown, but to make § 1019, which is set out in the text, applicable, no agreement for removal is necessary.—Roberts v. Mills, 205 P. 872, 56 Cal.App. 556.

Articles held removable under statute

(1) Pump and motor.—Societa Italiana di Mutua Beneficenza v. Burr, C.C.A.Cal., 71 F.2d 496.

(2) Pump station.—Kay County Gas Co. v. Bryant, 276 P. 218, 135 Okl. 135.

(3) Storage tank supported by timbers laid horizontally to build up base four or five feet high on leased automobile filling station premises.—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175.

(4) Other articles see 26 C.J. p 705 note 27 [a].

Articles held not removable under statute

(1) Show windows, decks, and shelving in building, which were attached to building with spikes, nails, bolts, and screws.—Hinkle v. Bass Furniture & Carpet Co., 246 P. 228, 117 Okl. 207.

(2) Other articles see 26 C.J. p 705 note 27 [b].

44. **Things affixed**

(1) Under some statutes, a thing is deemed to be affixed to land when it is attached to it by roots, or imbedded in it, or permanently resting on it, or is permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.—Goldberg v. Stanton, 258 P. 417, 84 Cal.App. 665.

(2) A heavy refrigerator attached to a building by quarter-round molding tacked to ceiling is not such a fixture.—Goldberg v. Stanton, supra.

(3) A light plant in the basement of a farm dwelling, together with the necessary equipment, and a hay carrier system have been held to be annexed to the land within such a statute.—Klocke v. Troske, 222 N.W. 262, 57 N.D. 404.

In Georgia, Code § 3120, providing that a tenant, during the term or a continuation thereof, or while he is in possession under the landlord, may remove fixtures erected by him, is construed as giving a right to remove trade fixtures only.—Powell v. Griffith, 142 S.E. 466, 38 Ga.App. 40—26 C.J. p 705 note 28 [a].

In Louisiana

(1) Under Civ.Code § 2726, lessee may remove improvements and additions made by him, if he leaves the thing let in the condition in which he received it, but additions made with lime and cement the lessor may retain on paying a fair price.—Lighting Fixtures Supply Co. v. Fidelity Union Fire Ins. Co., C.C.A.La., 55 F.2d 110, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292—26 C.J. p 705 note 28 [b].

(2) Landlord does not acquire ownership of movables in leased premises merely because tenant owes rent.—Bladg v. Giacomino, 128 So. 661, 170 La. 638.

(3) For a movable to become an immovable by destination, it must necessarily by placed on, or attached to, the immovable by the owner himself. When such things are placed on an immovable by a lessee as an improvement or addition, they remain movables, and may be carried away by him unless attached with lime and cement.—Richardson v. Item Co., 134 So. 380, 172 La. 421.

(4) Building owner, if intending to sell sprinkler system with building, could convey no title thereto, where sprinkler was installed and owned by lessee.—Richardson v. Item Co., supra.

(5) The provision in statute entitled "An Act To grant the right to mortgage movable property," etc., making it lawful to place a chattel mortgage on buildings on leased ground, does not impliedly repeal statute under which buildings on leased ground are immovables, in absence of anything to indicate such legislative intent.—Buchler v. Fourroux, 190 So. 640, 193 La. 445.

In Montana

(1) Under Rev.Codes 1935 § 6670, sluiceboxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine. A dredge used in placer gold mining was "mining machinery," as respects a lessee's right of removal. Whether the lessee was entitled to remove the dredge depends on the intention of the parties, due consideration being given to the effect of the statute.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.

(2) A railroad company, the predecessors of which furnished materials from which a mining company constructed a spur track on its property without any agreement as to ownership thereof, was not a tenant of the mining company within such statute.—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., 205 P. 224, 62 Mont. 281, 21 A.L.R. 1080.

45. Tex.—Hubert v. Collard, Civ.App., 141 S.W.2d 677, error dismissed, judgment correct.
26 C.J. p 696 note 26.

Bowling alleys and racks installed by tenant in their nature may be pure chattels instead of either trade fixtures or irremovable parts of realty.—Nadien v. Bazata, 22 N.E.2d 1, 303 Mass. 496.

Things held chattels

(1) Buildings, usually not strongly attached to the soil.—School Dist. No. 11, Laramie County v. Donahue, 97 P.2d 663, 55 Wyo. 220—26 C.J. p 696 note 26 [a] (1).

(2) Electric light and gas fixtures of small value and simple character.—O'Donal v. Aurentz, 235 S.W. 826, 210 Mo.App. 641.

(3) Lunch stand on wheels.—Gray v. Crowell, 108 So. 239, 214 Ala. 425.

(4) Ordinary movable office furniture.—Colton v. Michigan Lafayette Bldg. Co., 255 N.W. 433, 267 Mich. 122.

(5) Portable garage.—Hanson v. Ryan, 201 N.W. 749, 185 Wis. 566, 36 A.L.R. 1516.

(6) Safe which was not attached to building and was movable at pleasure on its rollers with no injury to building.—Cozart v. Johnson, 182 S.E. 502, 505, 181 Ga. 337, citing **Corpus Juris.**

(7) Water tank, pump, and engine placed on leased premises by tenant after destruction by windstorm.—Frederick v. Smith, 111 So. 847, 147 Miss. 437.

(8) Other objects see 26 C.J. p 696 note 26 [a].

As discussed infra § 41, the right to remove chattels from the leased premises is not lost by a failure to remove them within the time during which fixtures may be removed.

§ 37. —— Removable Fixtures as Realty or Personalty

It seems that fixtures which are removable by a tenant are a part of the realty until removed.

The question frequently arises whether fixtures, which are removable by the tenant who has annexed them, are, before removal, to be regarded as part of the realty or as personalty. Courts have generally refrained from attempting to lay down fixed and definite rules for determining their legal character,[46] and it has been said that such fixtures are a species of property which are the dividing line, or the twilight zone, between real and personal property.[47] Frequently, where their precise legal character is not in issue, the courts speak of such fixtures as being personalty, and without discussion of the question, apparently considering that this status necessarily follows from the fact that they are removable.[48] Similarly, where no right of removal exists, the articles annexed have been spoken of as a part of the realty.[49] Strictly speaking, it would seem that removable fixtures, like other fixtures, are part of the realty until removed; the right to remove them existing in the tenant's favor apart from, and independently of, his unquestioned right to remove any article which, although on the land, has not become a part thereof for any purpose, that is, which is a mere personal chattel.[50] The view that removable fixtures are chattels seems incompatible[51] with the rule, hereinafter discussed in § 41, that the tenant loses his right to remove fixtures, but not mere chattels not constituting fixtures, if he fails to remove them from the leased premises within the proper time. The view that a removable fixture is a part of the land has been applied in connection with the appropriation of land for public use, it being decided that the fixture was part of the land for which payment must be made by the appropriator, the payment going to the tenant by reason of his right of removal.[52] It has also been decided that a mortgage by lessee of all the personalty on the premises did not cover trade fixtures or fixtures removable by the tenant under an express stipulation.[53] If regarded as personalty, the articles annexed may be transferred or mortgaged as such by the tenant,[54] while if regarded as part of the land, they cannot, in some states, be so disposed of.[55]

Whether removable fixtures of a tenant are subject to attachment is considered in Attachment § 74 a (1), and the liability of a tenant to his landlord for damages to the freehold from the removal of fixtures in the C.J.S. title Landlord and Tenant § 260, also 35 C.J. p 1222 note 82.

On transfer of land. In jurisdictions where removable fixtures are regarded as part of the land, a transfer of the land by the lessor will pass title to the fixtures, unless they are expressly excepted therefrom;[56] and a transferee by the lessee of his interest in the land will also pass a like interest in the fixtures, together with his right of removal.[57]

46. Ky.—Pennington v. Black, 88 S.W.2d 969, 261 Ky. 728.

47. Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

48. U.S.—Union Bldg. Co. of Pennsylvania v. Pennell, C.C.A.Pa., 78 F.2d 959—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.
N.Y.—Davies v. Iroquois Gas Corporation, 292 N.Y.S. 111, 161 Misc. 103, reversed on other grounds 288 N.Y.S. 927, 248 App.Div. 670, reversed on other grounds 4 N.E.2d 742, 272 N.Y. 572.
Okl.—Widick v. Phillips Petroleum Co., 49 P.2d 132, 173 Okl. 325, 104 A.L.R. 228.
Tex.—O'Neil v. Quilter, 234 S.W. 528, 111 Tex. 345.
Wis.—Lindoft v. Vandenberg, 230 N.W. 46, 201 Wis. 330—Zimmerman v. Treleven, 212 N.W. 266, 192 Wis. 214—Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 207 N.W. 276, 189 Wis. 120.
26 C.J. p 697 note 32.

49. Ind.—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008.
Iowa.—Davidson v. Ginsberg, 181 N.W. 661, 190 Iowa 1327.
Mo.—Buhlinger v. United Firemen's Ins. Co. of Philadelphia, App., 16 S.W.2d 699.
Wis.—Northwestern Loan & Trust Co. v. Topp Oil & Supply Co., 248 N.W. 466, 211 Wis. 489.
26 C.J. p 697 note 33.

50. Me.—Simpson v. Emery, 183 A. 842, 134 Me. 213.
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
Wis.—Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 207 N.W. 276, 189 Wis. 120.
26 C.J. p 698 notes 34, 35, 45.

51. Mass.—Talbot v. Whipple, 14 Allen 177.
26 C.J. p 698 note 46.

52. N.Y.—Matter of New York, 122 N.Y.S. 321, 66 Misc. 488.
26 C.J. p 698 note 40.

53. U.S.—Sampson v. Camperdown Cotton Mills, C.C.S.C., 64 F. 939.

54. Okl.—Wideck v. Phillips Petroleum Co., 49 P.2d 132, 173 Okl. 325, 104 A.L.R. 228.
26 C.J. p 698 note 42.

55. Mass.—Bliss v. Whitney, 9 Allen 114. 85 Am.D. 745.
26 C.J. p 698 note 43.
Formality necessary in separate sale or mortgage of fixtures generally see supra § 21.

56. Me.—Davis v. Buffum, 51 Me. 160.
Mass.—Bliss v. Whitney, 9 Allen 114, 85 Am.D. 745.
Mo.—Walsh v. Sichler, 20 Mo.App. 374.

57. Cal.—San Francisco Breweries v. Schurtz, 38 P. 92, 104 Cal. 420—McNally v. Connolly, 11 P. 320, 70 Cal. 3.

Regarding removable fixtures as personal property, on the other hand, a lease of the land by the lessor does not include the fixtures.[58] There are occasional decisions which, it is conceived, are not entirely consistent in this respect, they regarding the removable fixture as part of the land for the purpose of a conveyance thereof, but regarding it as personalty for other purposes.[59] A sale of fixtures to a person taking or having an interest in the land, such as the landlord, is regarded as in the nature of an abandonment or waiver of the right of removal, and need not be in writing to avoid the operation of the statute of frauds.[60]

Rights as to fixtures between vendor and purchaser generally are discussed infra §§ 43–51.

§ 38. —— Trade Fixtures

a. In general
b. What are trade fixtures

a. In General

A tenant ordinarily has the right to remove, during his term, trade fixtures placed by him on the leased premises.

Articles annexed to the realty by a tenant for the purpose of carrying on a trade are ordinarily removable by him during his term,[61] and this has been held to be the case when the annexation was made by the lessor, before the lessee's entry, at the request of the latter and at his expense.[62] That the fixture is particularly adapted to the particular type of building in which it is placed has been stated not to make it irremovable;[63] but, where the article was not placed in the building for the sole purpose of enabling the tenant to transact his business, but to make the building structure itself peculiarly adapted as a particular type of building, the article is not removable as a trade fixture.[64] It is not material that, if the fixture is removed, the landlord will be unable to collect the rent.[65]

The question whether an improvement remains as a removable trade fixture is frequently said to be one of intent.[66] Occasionally the courts, in discussing the question of the tenant's right to remove

Ill.—Joliet First Nat. Bank v. Adam, 28 N.E. 955, 138 Ill. 483.
26 C.J. p 699 note 52.

58. Mich.—Lovett v. Bermingham-Seaman-Patrick Co., 158 N.W. 881, 192 Mich. 372.

59. N.Y.—Globe Marble Mills Co. v. Quinn, 76 N.Y. 23, 32 Am.R. 259.
26 C.J. p 699 note 55.

60. Md.—South Baltimore Co. v. Muhlbach, 16 A. 117, 69 Md. 395, 1 L.R.A. 507.

61. U.S.—In re Mount Holly Paper Co., C.C.A.Pa., 110 F.2d 220—Midwest Fuel & Timber Co. v. West, C.C.A.Colo., 106 F.2d 973—Bee Bldg. Co. v. Daniel, C.C.A.Neb., 57 F.2d 59, 61, citing **Corpus Juris**—In re Henry Duffy Players, C.C.A.Cal., 50 F.2d 737—In re Benson-Beckmann Paint Co., C.C.A.Ala., 36 F.2d 580—Colonial Oil Co. v. American Oil Co., D.C.S.C., 43 F.Supp. 718—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.
Cal.—Southern California Tel. Co. v. State Board of Equalization, 82 P. 2d 422, 12 Cal.2d 127.
Colo.—Seaton-Hayden Mines Co. v. Renshaw, 73 P.2d 999, 101 Colo. 342.
Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216—Currin v. Milhollin, 185 S.E. 380, 382, 53 Ga.App. 270, citing **Corpus Juris.**
Ill.—Hopwood v. Green, 34 N.E.2d 559, 310 Ill.App. 411, transferred, see, 30 N.E.2d 656, 375 Ill. 167.
Ky.—Tabor v. Tabor, 280 S.W. 134, 213 Ky. 312.
Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419.
Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
Neb.—Frost v. Schinkel, 238 N.W. 659, 667, 121 Neb. 784, 77 A.L.R. 1381, citing **Corpus Juris.**
N.Y.—Crater's Wharf v. Valvoline Oil Co., 196 N.Y.S. 815, 204 App.Div. 840—Estate Property Corporation v. Hudson Coal Co., 249 N.Y.S. 418, 139 Misc. 808.
N.C.—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474.
Okl.—Carte-Caldwell v. Berryhill, 112 P.2d 370, 188 Okl. 617—Gibson v. Exchange Nat. Bank of Pauls Valley, 42 P.2d 511, 172 Okl. 106.
Tex.—Inge v. First State Bank of Denton, Civ.App., 57 S.W.2d 217, error dismissed.
Wash.—Olympia Lodge No. 1, F. & A. M., v. Keller, 252 P. 121, 142 Wash. 93, 50 A.L.R. 795.
Wis.—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60—Lindoft v. Vandenberg, 230 N.W. 46, 201 Wis. 330.
Wyo.—Slane v. Curtis, 269 P. 31, 39 Wyo. 1, rehearing denied 270 P. 541, 39 Wyo. 1.
26 C.J. p 699 note 60.
Time of removal and loss of rights by tenant see infra § 41.

Trespasser
For the benefit of trade, a tenant may, during his possession of the demised premises, remove a fixture he had placed thereon, but a trespasser is not a tenant within the rule.—Titus v. Poland Coal Co., 119 A. 540, 275 Pa. 431.

Removability of trade fixtures is determined by consideration of physical annexation, adaption to realty, nature of fixtures, legal policy, situation of parties, and purpose of making annexation.—In re Shelar, D.C. Pa., 21 F.2d 136.

Rule liberally applied
Rule with respect to trade fixtures brought on, installed in, or erected on leased premises by tenants is liberally applied.—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542, 225 Wis. 627.

62. Ga.—Armour v. Block, 95 S.E. 228, 147 Ga. 639.

63. Neb.—Frost v. Schinkel, 238 N. W. 659, 121 Neb. 784, 77 A.L.R. 1381.
Wash.—Ballard v. Alaska Theatre Co., 161 P. 478, 93 Wash. 655.

64. Ind.—Greensburg Bank v. Department of Financial Institutions, App., 11 N.E.2d 1008.

65. Vt.—Snow v. Smith, 83 A. 269, 86 Vt. 58.

66. Ill.—Hopwood v. Green, 34 N.E. 2d 559, 310 Ill.App. 411, transferred, see, 30 N.E.2d 656, 375 Ill. 167—Ottawa Public Finance Corporation v. Blackley-Gould Corporation, 281 Ill.App. 447.
Iowa.—Davidson v. Ginsberg, 181 N. W. 661, 190 Iowa 1327.
Pa.—See Diehl v. Colegrove, 50 Dauph.Co. 132.
Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.
Wis.—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542.

an article annexed for purposes of trade, use language to the effect that there is no right of removal if the tenant made the annexation with the intention that it should be permanent, but that there is such right if the intention was of a contrary character.[67] Occasionally the courts refer, in this connection, to the intention, not of the tenant alone, but of the parties or of the tenant and landlord.[68]

The purpose of the rule allowing a tenant to remove as a trade fixture what has apparently become affixed to the land is for the encouragement of trade and industry.[69] Occasionally it has been said to be based on the presumption of an intention on the part of the tenant to remove the article annexed.[70] It has been said that, in the absence of an express contract on the subject, there is an implied contract that the tenant may remove trade fixtures at a proper time and in a proper manner.[71]

As a general rule, a tenant has no right to remove a trade fixture if its removal would substantially injure the freehold,[72] but, of course, in order to preclude a removal, the injury which would result must be substantial.[73] It has been held that, if the fixture is so attached that it cannot be removed without substantial damage to the property, it tends to show an intention to make it a part of the realty.[74] So, also, if the damage caused by its removal is disproportionate to the value of the fixture itself, it tends in the same direction.[75] It has been said, however, that "it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the mere purposes of trade, may not be removed at the end of the term."[76] To determine whether the removal would involve an injury to the freehold, the condition in which the premises would be left by the removal is to be compared with their condition at the time of annexation, and the removal is not allowable if, to make the annexation, the premises were altered or cut away, and the removal of the fixture would leave the premises in a maimed or unfinished condition.[77] The fact that the tenant is willing, at his own expense, to restore the premises to their former condition, or that provision was made for such restoration, has been considered in

225 Wis. 627—Zimmerman v. Treleven, 212 N.W. 266, 192 Wis. 214.
26 C.J. p 701 notes 87–89.

Estoppel

Where lessor, with knowledge of mortgage on trade fixture on leased premises, filed claim to participate in proceeds of bankrupt lessee's estate and mortgagee relying on mortgage filed on claim, lessor was estopped from claiming trade fixture.—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175.

67. Ark.—Bank of Mulberry v. Hawkins, 10 S.W.2d 898, 178 Ark. 504—Arkansas Cold Storage & Ice Co. v. Fulbright, 285 S.W. 12, 171 Ark. 552.
26 C.J. p 701 notes 85, 86.

68. Cal.—Roberts v. Mills, 205 P. 872, 56 Cal.App. 556.
Mich.—Cameron v. Oakland County Gas & Oil Co., 269 N.W. 227, 277 Mich. 442, 107 A.L.R. 1142.
Wis.—Hartberg v. American Founders' Securities Co., 249 N.W. 48, 212 Wis. 104, 91 A.L.R. 536—Shields v. Hansen, 230 N.W. 51, 201 Wis. 349—Zimmerman v. Treleven, 212 N.W. 266, 192 Wis. 214.
26 C.J. p 701 note 90.
"The common law with reference to trade fixtures has been much modified in this country, so that the question of attachment to the soil or its adaptation for the purposes is not considered of so much importance as the intention of the parties at the time of the attachment of the fixtures to the premises."—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542, 544, 225 Wis. 627—Shields v. Hansen, 230 N.W. 51, 52, 201 Wis. 349.

69. N.C.—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474.
26 C.J. p 699 notes 64, 65.

70. Ark.—Field v. Morris, 129 S.W. 543, 95 Ark. 268.
26 C.J. p 699 note 66.

71. Or.—General Petroleum Corporation of California v. Schefter, 16 P. 2d 645, 141 Or. 349.
Pa.—Marx v. Perrus, 10 Pa.Dist. & Co. 175, 15 West.Co. 119.
26 C.J. p 700 note 68.
However, it has been held that, where demised buildings were specially constructed for a grocery warehouse and bakery so that, when installed by lessee, the manufacturing equipment became essential part of the construction, and lease contained no provision that such equipment was to revert to lessee and be removed at termination of lease, law implied a covenant that lessee intended that such equipment, whether fast or loose, ordinary chattels or trade fixtures, should become a part of realty and belong to lessor.—Union Bldg. Co. of Pennsylvania v. Pennell, C.C.A.Pa., 78 F.2d 959.

72. U.S.—U. S. v. 44,549 Square Feet of Land in Borough of Brooklyn, D.C.N.Y., 45 F.Supp. 853.
Mass.—Wright v. Michelman, 141 N. E. 234, 246 Mass. 401.
Neb.—Frost v. Schinkel, 238 N.W. 659, 667, 121 Neb. 784, 77 A.L.R. 1381, citing **Corpus Juris.**
N.Y.—Davies v. Iroquois Gas Corporation, 292 N.Y.S. 111, 161 Misc. 103, reversed 288 N.Y.S. 927, 248 App.Div. 670, reversed 4 N.E.2d 742, 272 N.Y. 572.
Okl.—Gibson v. Exchange Nat. Bank of Pauls Valley, 42 P.2d 511, 172 Okl. 106.
Pa.—Union Nat. Mt. Joy Bank v. Harman, 9 Som.Leg.J. 310.
R.I.—McHale v. Rosenblatt, 184 A. 172, 168 R.I. 120, 168.
Tenn.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.
26 C.J. p 700 note 71.

73. Ill.—Ottawa Public Finance Corporation v. Blackley-Gould Corporation, 281 Ill.App. 447.
26 C.J. p 700 note 75.

Removal of wall

Tenant who installed steam boiler for clothes cleaning and pressing business was entitled to remove boiler at end of term, although removal and replacing of small portion of brick wall are necessary.—Rothery v. Dohrse, 240 N.W. 296, 122 Neb. 259.

74. Iowa.—Davidson v. Ginsberg, 181 N.W. 661, 190 Iowa 1327.

75. Iowa.—Davidson v. Ginsberg, supra.

76. U.S.—Wiggins Ferry Co. v. Ohio & M. R. Co., Ill., 12 S.Ct. 188, 142 U.S. 396, 35 L.Ed. 1055.

77. Neb.—Friedlander v. Ryder, 47 N.W. 83, 30 Neb. 783, 9 L.R.A. 700.
26 C.J. p 700 note 74.

determining the removability of trade fixtures,[78] but the fact that the tenant offers to repair all damages which he may cause by the act of removal is not of itself determinative of his right.[79]

That the fixture must be taken in pieces in order to be removed does not exclude the right of removal.[80] It has been said, however, that the fixture must be such as to be capable of removal without losing its essential character as a chattel,[81] and by occasional decisions, the tenant cannot remove a trade fixture, if the removal will result in the destruction of the fixture or its reduction to a mere mass of crude materials.[82] Opposed to such a view, however, are a number of cases in which, without any reference to this consideration, a brick or stone structure has been regarded as removable by the tenant,[83] and the view referred to has been expressly repudiated,[84] as has the view that the right of removal is excluded by the fact that removal would injure the article removed,[85] which has been asserted.[86]

Identity of purpose. That a fixture was erected in a building with a view to its use in the same business for which the landlord had erected the building has been held not to affect the right of removal, the building being available for other purposes.[87]

Substituted fixtures. A fixture substituted by the tenant for another fixture, which was on the premises at the time of the making of the lease, cannot ordinarily be removed by him, if the original fixture has been injured or permanently removed, since the effect of the removal of the substituted fixture would be to leave the premises in worse condition than when he took the lease.[88] A replacement of articles destroyed or rendered useless by a storm, when there was no obligation on the tenant to replace them, is not a substitution, but an addition of articles which he has a right to remove.[89]

b. What Are Trade Fixtures

An article may generally be regarded as a trade fixture if it is annexed for the purpose of aiding in the conduct by the tenant of a calling exercised on the leased premises for the purpose of pecuniary profit.

The general principles applicable to the question of trade fixtures are well settled, but the courts have experienced much difficulty in applying them to variant fact situations, and, as a result, it may be said that what constitutes a "trade fixture" depends on the facts of the particular case.[90]

As a general rule, an article may be regarded as a trade fixture if annexed for the purpose of aiding in the conduct by the tenant of a calling exercised on the leased premises for the purpose of pecuniary profit,[91] and that the article has also the qualities of a domestic or agricultural fixture is immaterial in this regard.[92] To constitute any chattel that has been attached to the freehold a "trade fixture," it is only necessary that it be devoted to what is known as a trade purpose, and the form or size of the annexed chattel is immaterial.[93]

There have been numerous adjudications on the

78. Wash.—Ballard v. Alaska Theatre Co., 161 P. 478, 93 Wash. 655.
26 C.J. p 700 note 73.

79. Iowa—Davidson v. Ginsberg, 181 N.W. 661, 190 Iowa 1327.

Immaterial
That the tenant is willing to repair the damage is immaterial.—Fortescue v. Bowler, 38 A. 445, 55 N.J.Eq. 741.

80. Neb.—Rothery v. Dohrse, 240 N.W. 296, 122 Neb. 259—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
26 C.J. p 701 note 77.

81. Ark.—Field v. Morris, 129 S.W. 543, 95 Ark. 268.
Tenn.—Cubbins v. Ayres, 4 Lea 329—McDavid v. Wood, 5 Heisk. 95.

82. Ark.—Buffalo Zinc & Copper Co. v. Hale, 206 S.W. 661, 136 Ark. 10—Field v. Morris, 129 S.W. 543, 95 Ark. 268.
Mass.—Collamore v. Gillis, 22 N.E. 46, 149 Mass. 578, 14 Am.S.R. 460, 5 L.R.A. 150.
26 C.J. p 701 note 79.

83. Mass.—Smith v. Whitney, 18 N.E. 229, 147 Mass. 479.
26 C.J. p 701 note 80.

84. Ill.—Baker v. McClurg, 64 N.E. 701, 198 Ill. 28, 92 Am.S.R. 261, 59 L.R.A. 131.

85. N.Y.—In re New York City, 84 N.E. 1105, 192 N.Y. 295, 127 Am.S.R. 903, 18 L.R.A.,N.S., 423.

86. Ind.—Newcastle Theatre Co. v. Ward, 104 N.E. 526, 57 Ind.App. 473.

87. Ill.—Baker v. McClurg, 64 N.E. 701, 198 Ill. 28, 92 Am.S.R. 261, 59 L.R.A. 131.

88. R.I.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.
Wyo.—Slane v. Curtis, 286 P. 372, 376, 41 Wyo. 402, 69 A.L.R. 906, citing **Corpus Juris,** and rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.
26 C.J. p 700 note 76.

89. Miss.—Frederick v. Smith, 111 So. 847, 147 Miss. 437.

90. N.C.—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474.

91. Ky.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135.
Minn.—Moffat v. White, 279 N.W. 732, 735, 203 Minn. 47, quoting **Corpus Juris.**
Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738, 741, citing **Corpus Juris.**
Neb.—Rothery v. Dohrse, 240 N.W. 296, 122 Neb. 259—Frost v. Schinkel, 238 N.W. 659, 667, 121 Neb. 784, 77 A.L.R. 1381, citing **Corpus Juris.**
26 C.J. p 701 note 92.

92. Mass.—Wall v. Hinds, 4 Gray 256, 64 Am.D. 64.
N.Y.—Holmes v. Tremper, 20 Johns. 29, 11 Am.D. 238.
26 C.J. p 701 note 94.

93. Ky.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135.

Form or size of building is not determinative of right to remove.—Cameron v. Oakland County Gas &

subject of whether particular articles were removable as trade fixtures.[94] Engines and boilers,[95] other industrial machinery and apparatus of various kinds,[96] appliances and erections annexed by the proprietor of a place of public entertainment,[97] buildings,[98] or part of a building,[99] and even plants

Oil Co., 269 N.W. 227, 277 Mich. 442, 107 A.L.R. 1142.

94. Air conditioning system

An elaborate, intricate, heavy, and complicated air conditioning system, entering integrally into and forming part of necessary reconstruction of leased building for modern uses generally, cannot be regarded as such a concomitant of tenant's dry goods and department store business as to be removable therewith.—Nine Hundred Main v. City of Houston, Tex. Civ.App., 150 S.W.2d 468, error dismissed, judgment correct.

Held trade fixtures

(1) Mirrors attached to building by wooden pegs inserted in wall, fans attached to ceiling by screws, and suction fan attached to building by bolts by tenant who occupied building and conducted restaurant therein.—Gibson v. Exchange Nat. Bank of Pauls Valley, 42 P.2d 511, 512, 172 Okl. 106, citing **Corpus Juris.**

(2) Mirrors attached to posts and electrical fixtures in clothing store.—Sanders v. Lefkovitz, Tex.Civ.App., 292 S.W. 596.

(3) Gasoline pumps and tanks, oil tanks, air compressor, toilet fixtures, and electric sign.—Olympia Lodge No. 1, F. & A. M., v. Keller, 252 P. 121, 142 Wash. 93, 50 A.L.R. 795.

(4) Storage tank supported by timbers laid horizontally to build up base four or five feet high on leased automobile filling station premises.—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175.

(5) Other fixtures.—Lindoft v. Vandenberg, 230 N.W. 46, 201 Wis. 330.

95. Neb.—Rothery v. Dohrse, 240 N. W. 296, 122 Neb. 259.
26 C.J. p 702 note 96.

96. Held trade fixtures

(1) Gasoline tanks and pumps.
Iowa.—McCoun v. Drews, 265 N.W. 160, 221 Iowa 227.
Minn.—Moffat v. White, 279 N.W. 732, 203 Minn. 47.
Wis.—Standard Oil Co. v. La Crosse Super Auto Service, 258 N.W. 791, 217 Wis. 237, 99 A.L.R. 60.

(2) Machinery for making ice cream and soft drinks.—Arkansas Cold Storage & Ice Co. v. Fulbright, 285 S.W. 12, 171 Ark. 552—26 C.J. p 702 note 97 [a] (1).

(3) Mining machinery and appliances.
U.S.—Midwest Fuel & Timber Co. v. West, C.C.A.Colo., 106 F.2d 973.
W.Va.—Pocahontas Coal & Coke Co. v. By-Products Pocahontas Co., 164 S.E. 504, 112 W.Va. 390.
26 C.J. p 702 note 97 [a] (16).

(4) Oil or gas well casings, and machinery and appliances used in drilling and operating the well.
Pa.—United Natural Gas Co. v. James Bros. Lumber Co., 191 A. 12, 325 Pa. 469.
Tex.—Orfic Gasoline Production Co. v. Herring, Civ.App., 273 S.W. 944—Moore v. Carey Bros. Oil Co., Civ.App., 248 S.W. 470, conditionally overruling motion 246 S.W. 1083, affirmed, Com.App., 269 S.W. 75, 39 A.L.R. 1247, motion overruled 272 S.W. 440.
26 C.J. p 702 note 97 [a] (17).

(5) Railroad tracks laid by lessee of coal mine.—Estate Property Corporation v. Hudson Coal Co., 249 N.Y. S. 418, 139 Misc. 808.

(6) Steel greasing pit installed by lessee under earth floor of larger pit of automobile service station.—Marnall Steel Products v. Bernard, 263 N.Y.S. 485, affirmed Marnell Steel Products v. Bernard, 269 N.Y.S. 907, 241 App.Div. 616.

(7) Other fixtures.
U.S.—In re Benson-Beckmann Paint Co., C.C.A.Ala., 36 F.2d 580.
Wis.—Dougan v. H. J. Grell Co., 182 N.W. 350, 174 Wis. 17.
26 C.J. p 702 note 97 [a].

Sprinkling plant and heating plant held not trade fixtures.—Red Diamond Clothing Co. v. Steidemann, 152 S.W. 609, 168 Mo.App. 306—26 C.J. p 702 note 97 [b].

97. Held trade fixtures

(1) Booths, lights, refrigerators, soda fountain, bar, etc., used for restaurant purposes.—Matz v. Miami Club Restaurant, Mo.App., 127 S.W. 2d 738.

(2) Brass railing around orchestra pit in theater.—Cohen v. Reif, 4 S.W. 2d 388, 223 Ky. 603.

(3) Cyclorama attached by cleats to building erected by lessee of cyclorama.—McConnell v. Frost, Tex. Civ.App., 45 S.W.2d 777, error refused.

(4) Electric sign attached to theater by temporary fastenings.—In re Henry Duffy Players, C.C.A.Cal., 50 F.2d 737.

(5) Pipe organ.—Conover v. Burns & Schaffer Amusement Co., 149 A. 66, 8 N.J.Misc. 118.

(6) Other fixtures see 26 C.J. p 702 note 98 [a].

Heating plant was held not to be a trade fixture.—Levenson Wrecking Co. v. Hillebrand, 157 N.Y.S. 515, 93 Misc. 530—26 C.J. p 702 note 98 [b].

98. U.S.—Kleinschmidt v. Brown, D. C.Ark., 28 F.Supp. 86.
Cal.—Roberts v. Mills, 205 P. 872, 56 Cal.App. 556.
Miss.—Waldauer v. Parks, 106 So. 881, 141 Miss. 617.
N.Y.—Debobes v. Butterly, 205 N.Y.S. 104, 210 App.Div. 50.
Okl.—Kay County Gas Co. v. Bryant, 276 P. 218, 135 Okl. 135.
Pa.—Copley v. Stewart, 14 Pa.Dist. & Co. 733.
Wis.—Dougan v. H. J. Grell Co., 182 N.W. 350, 174 Wis. 17.
26 C.J. p 702 note 99.

Buildings held removable

(1) Depot.—Pennington v. Black, 88 S.W.2d 969, 261 Ky. 728—26 C.J. p 702 note 99 [a] (7).

(2) Fences, electrically lighted signs, and temporary office building, placed on lot by lessee for use in secondhand automobile business.—Schultz v. Seiler Motor Car Co., 48 S. W.2d 1068, 243 Ky. 459.

(3) Filling station.—Cameron v. Oakland County Gas & Oil Co., 269 N. W. 227, 277 Mich. 442, 107 A.L.R. 1142.

(4) Removable garage.—Diehl v. Colegrove, 50 Dauph.Co., Pa., 132.

(5) Other buildings see 26 C.J. p 702 note 99 [a].

Dwellings merely accessory to mining or lumbering operations have been held removable.—Rogers v. Vanderbilt, 1 S.W.2d 71, 175 Ark. 977—Barnes v. Jeffus, 291 S.W. 990, 991, 173 Ark. 100, citing **Corpus Juris**—26 C.J. p 702 note 99 [c].

Contrary intention

Where intention of lessor of land to be used in operating tourist camp and filling station was that buildings erected by lessee should become part of realty, and there was no agreement or claim otherwise, and removal would cause substantial damage to the freehold, tourist cabins and a shed erected by lessee became part of the realty acquired by innocent purchaser from lessor and could not be removed by lessee.—Dudzick v. Lewis, 133 S.W.2d 496, 175 Tenn. 246.

99. U.S.—Bee Bldg. Co. v. Daniel, C.C.A.Neb., 57 F.2d 59.
26 C.J. p 703 note 1.

Doors and windows generally are part of realty when affixed and not removable by tenant as trade fixtures.—Slane v. Curtis, 286 P. 372, 41 Wyo. 402, 69 A.L.R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L. R. 906.

Held removable as trade fixtures

(1) Vault door in bank.—Bennett v. Taylor, 49 S.W.2d 608, 185 Ark. 794.

(2) Other fixtures see 26 C.J. p 703 note 1 [a].

grown by a nursery man or market gardener for sale[1] have all been regarded as trade fixtures in particular cases, and as therefore removable. A building erected merely for the purpose of leasing has been held not to be removable as a trade fixture;[2] and a like view has been taken of a building which, although erected for use by the tenant in connection with his business, was afterward leased by him to another for other purposes,[3] and also of a dwelling erected by the tenant for his own occupation, on premises utilized by him for the most part for manufacturing purposes.[4] Even a house and barn erected on the leased premises in order to facilitate their use as a game preserve have been regarded as trade fixtures.[5] A permanent pavement,[6] electric wiring in a building,[7] and alterations of a building, attached with nails, spikes, bolts, and screws,[8] have been held not to be trade fixtures.

§ 39. —— Agricultural Fixtures

Agricultural fixtures placed on leased premises by a tenant are usually removable by him during his term.

As a general rule a tenant may remove agricultural fixtures which have been affixed by him to the leased premises for his personal use or comfort.[9] This right of removal is based on the ground that it is a matter of public policy to encourage tenants to improve property for agricultural purposes as well as for trade purposes.[10] Likewise, an article annexed to a farm for the purpose of putting agricultural products in form or condition for the market has been regarded as removable as a trade fixture.[11] On the other hand, agricultural equipment which is permanently affixed to the land has been held not to be removable by the tenant.[12] It has also been held that an agricultural fixture is not removable if it was annexed without any intention on the part of the tenant to remove it,[13] and the matter of intention has been referred to as determinative of whether a structure, in that case a barn, was an agricultural fixture as having been intended to be such.[14]

§ 40. —— Domestic and Ornamental Fixtures

A tenant may remove domestic and ornamental fixtures placed by him on the leased premises.

The tenant under a lease may remove what are known as domestic and ornamental fixtures, these being articles annexed to a dwelling in order to render it more comfortable and attractive as such.[15] This exception in favor of the tenant is based on public policy and convenience to permit the tenant to make the most profitable and comfortable use of the premises demised, that can be obtained consistently with the rights of the owner of the freehold.[16]

The right to remove domestic and ornamental fixtures is subject to the limitation which prevails as regards trade fixtures, see supra § 38, that the removal is not permissible if it will cause substantial damage to the freehold,[17] and that an article or structure was substituted by the tenant for one there at the time of the lease may also be a reason for denying the right to remove it.[18] It has been held that a domestic or ornamental fixture is not removable if its removal involves its disintegration.[19] It has also been held that a domestic or ornamental fixture is not removable if it is so affixed as to be-

1. N.Y.—Duffus v. Bangs, 25 N.E. 980, 122 N.Y. 423.
26 C.J. p 703 note 2.

2. Tenn.—Cannon v. Hare, 1 Tenn. Ch. 22.

3. Ohio.—Burkhardt v. Hopple, 6 Ohio S. & C.P. 127.

4. Tenn.—Johnson v. Willingby, 3 Tenn.Cas. 338.

5. Cal.—Shafter Estate Co. v. Alvord, 84 P. 279, 2 Cal.App. 602.
26 C.J. p 703 note 6.

6. Ga.—City of Savannah v. Standard Fuel Supply Co., 106 S.E. 178, 151 Ga. 145, 13 A.L.R. 1451.

7. Iowa.—Davidson v. Ginsberg, 181 N.W. 661, 190 Iowa 1327.

8. Okl.—Hinkle v. Bass Furniture & Carpet Co., 246 P. 228, 117 Okl. 207.

9. U.S.—In re Shelar, D.C.Pa., 21 F. 2d 136.
Ohio.—Dunkel v. Hedges, 15 Ohio App. 259.
Wis.—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542, 545, 225 Wis. 627, quoting **Corpus Juris.**
26 C.J. p 703 note 8.

10. Wis.—Old Line Ins. Co. of America v. Hawn, supra, quoting **Corpus Juris.**
26 C.J. p 703 note 9.

11. N.Y.—Holmes v. Tremper, 20 Johns. 29, 11 Am.D. 238.

12. N.D.—Klocke v. Troske, 222 N. W. 262, 57 N.D. 404.

13. Pa.—Carver v. Gough, 25 A. 1124, 153 Pa. 225.
26 C.J. p 703 note 11.

14. Neb.—Stevens v. Burnham, 87 N.W. 546, 62 Neb. 672.

15. U.S.—In re Shelar, D.C.Pa., 21 F.2d 136.
Ga.—Wright v. Du Bignon, 40 S.E. 747, 114 Ga. 765, 57 L.R.A. 669.
Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.
Tenn.—Knoxville Gas Co. v. W. I. Kirby & Sons, 32 S.W.2d 1054, 1056, quoting **Corpus Juris.**

Office
It has even been suggested that an article annexed to a room leased as an office, to render it more comfortable and convenient, may be regarded as a "domestic fixture" for this purpose.—Hayford v. Wentworth, 54 A. 940, 97 Me. 347.

16. Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 1058, 218 Ky. 691, citing **Corpus Juris.**
Mass.—Gaffield v. Hapgood, 17 Pick. 192, 195, 28 Am.D. 290.

17. U.S.—In re Lexington Motors Co. of New York, C.C.A.N.Y., 294 F. 233.
26 C.J. p 704 note 18.

18. Tex.—Bovet v. Holzgraft, 23 S. W. 1014, 5 Tex.Civ.App. 141.

19. Mass.—Hanrahan v. O'Reilly, 102 Mass. 201—Wall v. Hinds, 4 Gray 256, 64 Am.D. 64.

come permanently incorporated with the land or structure to which it is attached.[20]

There have been quite a number of decisions as to whether particular articles were to be regarded as domestic fixtures or ornamental fixtures, for the purpose of removal by the tenant.[21]

§ 41. —— Time of Removal and Loss of Rights by Tenant

A tenant who fails timely to remove fixtures from leased premises loses his right thereto.

The tenant's failure to remove fixtures within the proper time is generally held to have the effect of vesting title thereto irrevocably in the landlord.[22] In some cases the tenant has been deemed to forfeit his fixtures by reason of his breach of an implied condition of his tenancy.[23] In other cases, the tenant is deemed to have abandoned the fixtures by his failure to remove them.[24] Of course, the tenant, or one claiming under him, does not, by neglecting to remove them within the proper time for removal of fixtures, lose the right to remove chattels on the land which are not affixed thereto or which are not of such a character as to become fixtures.[25]

The question of the time at which the tenant must exercise his right of removal has frequently been the subject of consideration. In some cases it is stated that the removal must be made during the term,[26] or before the expiration of the term,[27] in others, that the right expires with the tenancy,[28] and in still others, that it may be exercised a "reasonable time" after the expiration of the term.[29] A number of cases recognize the right of the ten-

20. Ga.—Wright v. Du Bignon, 40 S.E. 747, 114 Ga. 765, 57 L.R.A. 669.
26 C.J. p 704 note 23.

21. Ga.—Wright v. Du Bignon, 40 S. E. 747, 114 Ga. 765, 57 L.R.A. 669.
26 C.J. p 704 notes 24, 25.

Particular fixtures held removable

(1) Gas stoves.—Kemble v. Wolfe, 14 Tenn.App. 545.

(2) Other fixtures see 26 C.J. p 704 note 24 [a].

22. U.S.—Smith v. U. S., C.C.A.Okl., 113 F.2d 191.
Ark.—Hoing v. River Valley Gas Co., 121 S.W.2d 513, 196 Ark. 1165.
Ga.—Powell v. Griffith, 142 S.E. 466, 38 Ga.App. 40.
Hawaii.—Pioneer Mill Co. v. Ward, 34 Hawaii 686.
Ill.—Miller v. Bennett, 239 Ill.App. 306.
Kan.—Newlands v. Ellis, 292 P. 754, 756, 131 Kan. 479, quoting **Corpus Juris.**
Ky.—Wilson v. Wilson, 133 S.W.2d 722, 280 Ky. 461—Bain v. Graber, 112 S.W.2d 66, 271 Ky. 393.
Me.—Simpson v. Emery, 183 A. 842, 134 Me. 213—Henderson v. Robbins, 138 A. 68, 69, 126 Me. 284, citing **Corpus Juris.**
Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Tex.—Texas & N. O. R. Co. v. Clevenger, Civ.App., 223 S.W. 1036.
26 C.J. p 706 note 37.

As against trespasser

A lessor has an inchoate right in fixtures installed on the land which may ripen into possession on abandonment by the lessee, which right is superior to that of a trespasser or another in possession not showing title from lessee.—Michaels v. Pontius, 137 N.E. 579, 83 Ind.App. 66.

Notice to terminate month to month tenancy held sufficient and to entitle landlord to buildings not removed within thirty days after giving of notice.—Thomas v. Utilities Bldg. Corporation, 74 S.W.2d 578, 335 Mo. 900.

Person first seizing

Fixtures abandoned with an oil lease become the lessor's property and are not subject to become the property of whoever first seizes the same.—Michaels v. Pontius, 137 N.E. 579, 83 Ind.App. 66.

Trover

After the expiration or abandonment of the term, lessee cannot maintain trover against the landlord to recover for fixtures which lessee had attached to the freehold during his tenancy but suffered to remain thereon.
Me.—Simpson v. Emery, 183 A. 842, 134 Me. 213.
Or.—Rosenau v. Syring, 35 P. 844, 25 Or. 386.
65 C.J. p 25 note 55 [a].

23. Me.—Henderson v. Robbins, 138 A. 68, 126 Me. 284.

24. Ind.—Hedderick v. Smith, 2 N. E. 315, 103 Ind. 203, 53 Am.R. 509.
Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
26 C.J. p 706 note 44.

25. Ark.—Hoing v. River Valley Gas Co., 121 S.W.2d 513, 196 Ark. 1165.
Tex.—Hubert v. Collard, Civ.App., 141 S.W.2d 677, error dismissed, judgment correct.
Wash.—Hill's Garage v. Rice, 234 P. 1023, 134 Wash. 101.
26 C.J. p 699 notes 48, 49, p 706 note 46.
Property of tenant on premises at termination of lease generally see the C.J.S. title Landlord and Tenant § 317, also 36 C.J. p 63 note 24—p 65 note 60.

Stock dining car, rolled on rear of leased premises, did not become part of realty, so as to prevent removal by lessee after expiration of lease, so long as car rested on its wheels, or thereafter when wooden blocks were substituted for front wheels. Under such circumstances, a suit by purchaser of land to restrain removal of car after expiration of lease was not governed by rules applicable to removal of tenant's fixtures, nor by rules applicable to removal of a part of real estate under agreement permitting such removal.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.

26. Me.—Bodwell Water Power Co. v. Old Town Electric Co., 51 A. 802, 96 Me. 117.
26 C.J. p 705 note 31.

"If a tenant fails to remove trade fixtures during his term, or such further term as is allowed in certain cases, the right of removal is lost, and the tenant cannot thereafter claim the fixtures as against the owner of the realty."—Looney v. Trimount Theatres, 184 N.E. 683, 684, 282 Mass. 275.

27. Mass.—Wright v. Michelman, 141 N.E. 234, 246 Mass. 401.

Tenant loses right after expiration of term, unless such right is reserved in renewal lease.—Crater's Wharf v. Valvoline Oil Co., 196 N.Y.S. 815, 204 App.Div. 840.

28. Me.—Simpson v. Emery, 183 A. 842, 134 Me. 213—Henderson v. Robbins, 138 A. 68, 69, 126 Me. 284, citing **Corpus Juris.**
Wash.—Hill's Garage v. Rice, 234 P. 1023, 134 Wash. 101.
26 C.J. p 705 note 32.

29. Ark.—Hoing v. River Valley Gas Co., 121 S.W.2d 513, 196 Ark. 1165.
Ky.—Bain v. Graber, 112 S.W.2d 66, 271 Ky. 393.
26 C.J. p 705 note 33.

Failure to remove within eighteen months held failure to remove within reasonable time.—Smith v. U. S., C.C.A.Okl., 113 F.2d 191.

ant to remove fixtures even after the term, provided he does so before he relinquishes possession of the land, it being said in some that he may make the removal before the relinquishment of possession,[30] and in others that he must do so.[31] This rule is based on the theory that, as long as the tenant remains in possession, the presumption that he has abandoned the fixtures cannot arise.[32] In some jurisdictions, in order for a tenant to have the right to remove fixtures after the expiration of his term and while he is still in possession, the possession must be held under a right still to be considered the tenant of the lessor,[33] or during what may, for this purpose, be considered as an "excrescence on the term."[34] In some jurisdictions the tenant's continued possession may, with other circumstances, tend to prove a waiver of the landowner's rights, but does not ipso facto extend the tenant's privilege of removing fixtures.[35] On the other hand, it has been held that a tenant may remove trade fixtures after the expiration of his term and after he has relinquished possession, although he may be liable as a trespasser on the soil and for breaking the close.[36] Where a removable fixture is considered as personalty, see supra § 37, if the tenant yields possession and leaves the structure standing, such fact may be evidence that it was not used or intended except for the purpose of trade or manufacture, or may be evidence of abandonment of it, but it cannot change the established character of the property so as to defeat his right to remove it.[37] Of course, a tenant holding over by permission, that is, rightfully, retains the right of removal.[38]

Extension of time for removal. The landlord may expressly stipulate or consent that the tenant may remove the fixtures even after the end of the term or his relinquishment of possession,[39] and such stipulation or consent may be either oral or in writing.[40]

If the landlord, by his conduct or language, induces the tenant to leave the fixtures on the premises for some particular purpose,[41] as, for instance, that they may be sold for him by the landlord,[42] or with a view to pending negotiations looking toward their purchase by the landlord,[43] the latter cannot claim the fixtures by reason of the delay in removal so induced by him.

Forfeiture of leasehold. By the weight of authority, a tenant loses his right to remove fixtures if by any act or omission he has forfeited his interest under the lease,[44] provided, according to

Four years held not unreasonable under the facts.—North v. Augusta Real Estate Ass'n, 155 A. 36, 130 Me. 254.

What constitutes reasonable time for an oil and gas lessee to remove machinery and fixtures from land after expiration of lease is a question of fact that must be determined from circumstances of each case.—Wilson v. Wilson, 133 S.W.2d 722, 280 Ky. 461—Bain v. Graber, 112 S.W.2d 66, 271 Ky. 393.

30. Ga.—Powell v. Griffith, 142 S.E. 466, 38 Ga.App. 40.
26 C.J. p 706 notes 36, 40.

31. Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
26 C.J. p 706 note 41.

Dedication

When a tenant quits possession without removing a fixture, he is understood as making dedication of it to the landlord.—Youngblood v. Eubank, 68 Ga. 630.

32. Md.—Carlin v. Ritter, 13 A. 370, 16 A. 301, 68 Md. 478, 6 Am. S.R. 467.
26 C.J. p 706 note 44.

33. U.S.—Chatham Gold Dredging Co. v. Burns, C.C.A.Alaska, 84 F.2d 717.
Ga.—Youngblood v. Eubank, 68 Ga. 630—Powell v. Griffith, 142 S.E. 466, 38 Ga.App. 40.
Ill.—Savage v. University State Bank of Champaign, 263 Ill.App. 457.
Ind.—Cromie v. Hoover, 40 Ind. 49.
26 C.J. p 705 note 34.

34. Utah.—Miller v. Johnson, 134 P. 1017, 43 Utah 468, 48 L.R.A.,N.S., 294.
26 C.J. p 706 note 35.

35. Me.—Henderson v. Robbins, 138 A. 68, 126 Me. 284.

36. N.Y.—Holmes v. Tremper, 20 Johns 29, 11 Am.D. 238.
N.C.—Western North Carolina R. Co. v. Deal, 90 N.C. 110—Pemberton v. King, 13 N.C. 376.

37. N.C.—Western North Carolina R. Co. v. Deal, 90 N.C. 110.

38. Me.—North v. Augusta Real Estate Ass'n, 155 A. 36, 130 Me. 254.
26 C.J. p 707 note 51.

39. Ind.—McCracken v. Hall, 7 Ind. 30.
Neb.—Free v. Stuart, 57 N.W. 991, 39 Neb. 220.
26 C.J. p 710 note 89.

Under lease providing that on its termination lessee should have a reasonable time for removal of improvements, where a house belonging to lessee was torn down before a reasonable time elapsed, lessor was liable to lessee for the damage suffered.—Texas & N. O. R. Co. v. Clevenger, Tex.Civ.App., 223 S.W. 1036.

40. Cal.—McComish v. Kaufman, 185 P. 476, 43 Cal.App. 507.
Ind.—McCracken v. Hall, 7 Ind. 30.
N.J.—Torrey v. Burnett, 38 N.J.Law 457, 20 Am.R. 421.

41. **Forfeiture not waived**

Owner by his conduct held to have treated lease as abandoned and to have assumed to be the owner of oil casings left on the premises.—Bain v. Graber, 112 S.W.2d 66, 271 Ky. 393.

42. N.J.—Torrey v. Burnett, 38 N.J. Law 457, 20 Am.R. 421.
N.Y.—Thorn v. Sutherland, 25 N.E. 362, 123 N.Y. 236.
26 C.J. p 710 note 93.

43. Ala.—Chalifoux v. Potter, 21 So. 322, 113 Ala. 215.
Utah.—Young v. Consolidated Impl. Co., 65 P. 720, 23 Utah 586.
Wash.—Merriam v. Ridpath, 47 P. 416, 16 Wash. 104.
26 C.J. p 710 note 94.

44. U.S.—Societa Italiana di Mutua Beneficenza v. Burr, C.C.A.Cal., 71 F.2d 496.
Me.—Simpson v. Emery, 183 A. 842, 134 Me. 213.
26 C.J. p 708 note 62.

The Corpus Juris text has been cited as showing the rule according to the weight of authority.—Hamilton v. Charlebois, 248 N.W. 676, 678, 63 N.D. 504.

some cases, there has been an enforcement by the landlord of the forfeiture,[45] as by a reëntry [46] or a summary proceeding.[47] There are, however, cases to the effect that the tenant has, even after his loss of possession by forfeiture, a reasonable time in which to remove fixtures.[48] Under a reservation in a lease giving the lessee a right to remove his equipment within a stipulated period after the termination of the lease, the right of removal exists when the lease is forfeited to the same extent as it does in case it is terminated by lapse of time.[49]

New lease or agreement. By the weight of authority, the tenant, by accepting from the landlord a new lease, which contains no mention of fixtures annexed by him during the tenancy under the previous lease, loses his right to remove such fixtures, the theory being that, the fixtures being a part of the land, the tenant, by accepting the new lease, acquires only such an interest in the fixtures as he does in the land, a merely temporary interest.[50]

There are, however, a number of cases in which such doctrine is repudiated,[51] and it has been held that the execution of a new lease without a reservation of the right of the tenant to remove fixtures placed on the demised premises under a prior lease does not ipso facto deprive him of the right of removal at the expiration of the new lease.[52] The minority rule would seem properly to control in any jurisdiction in which fixtures, because removable by the tenant, are regarded as personalty, since as such they would not be covered by the new lease, in terms of the land only.[53] In several cases the majority rule appears to have been regarded as inapplicable to the trade fixtures there in question, because not a part of the realty, although conceded to be applicable to trade fixtures which are a part of the realty,[54] thus suggesting a classification of trade fixtures which does not appear to be recognized in other connections. There are statutes providing in terms that the tenant's right to remove fixtures shall not be impaired by acceptance of a new lease.[55] Of course, a provision in the new lease reserving the right of removal will be effective for that purpose,[56] and even in the absence of any express provision in this regard, the understanding of the parties that the right of removal shall continue, inferred from the circumstances of the case, has been regarded as sufficient to protect the tenant's rights.[57] That the new lease contains a covenant by the lessee to yield up the premises at the end of the term in as good condition as at the time of the lease, or an equivalent covenant, has been not infrequently referred to, in this connection, as a consideration of greater or less weight adverse to the right of removal.[58]

The applicability of the majority rule has been viewed as dependent on whether the right of con-

45. Idaho.—Bush v. Havird, 86 P. 529, 12 Idaho 352, 10 Ann.Cas. 107.
Ohio.—Paine v. Coffin, 4 Ohio Dec. (Reprint) 351, 2 Clev.L.Rep. 1.
Wis.—Keogh v. Daniell, 12 Wis. 163.

Failure to pay rent

Failure of plaintiff promptly to pay rent to defendant, on whose land plaintiff's house was situate, and concerning which it had been agreed that plaintiff might remove it, did not confer on defendant authority to destroy or convert the house.—Edwards v. Thannisch, Tex.Civ.App., 254 S.W. 523.

46. U.S.—Little Falls Water Power Co. v. Hausdorf, C.C.Minn., 127 F. 442.
Wis.—Keogh v. Daniell, 12 Wis. 163.

47. Conn.—Morey v. Hoyt, 26 A. 127, 62 Conn. 542, 19 L.R.A. 611.
26 C.J. p 708 note 66.

48. N.D.—Hamilton v. Charlebois, 248 N.W. 676, 63 N.D. 504.
26 C.J. p 708 note 68.

49. Kan.—Newlands v. Ellis, 292 P. 754, 131 Kan. 479.

50. Ind.—Niestadt v. Joseph, 139 N. E. 336, 81 Ind.App. 355.
N.Y.—Crater's Wharf v. Valvoline Oil Co., 196 N.Y.S. 815, 204 App. Div. 840.
Wash.—Bernard v. Crosby, 209 P. 524, 525, 121 Wash. 257, citing **Corpus Juris.**
26 C.J. p 708 note 69.

51. Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.
Wis.—Shields v. Hansen, 230 N.W. 51, 201 Wis. 349—Second Nat. Bank of Beloit, Wis. v. O. E. Merrill Co., 34 N.W. 514, 69 Wis. 501.
26 C.J. p 708 note 70.

In Ohio

(1) The text rule has been followed.—Dunkel v. Hedges, 15 Ohio App. 259—Wittenmeyer v. Brooklyn Board of Education, 10 Ohio Cir.Ct. 119, 6 Ohio Cir.Dec. 258.

(2) An earlier case was to the contrary.—Cook v. Sheid, 6 Ohio Dec. (Reprint) 867, 8 Am.L.R. 493.

52. N.C.—Springs v. Atlantic Refining Co., 171 S.E. 635, 205 N.C. 444, 110 A.L.R. 474.

53. Md.—Carlin v. Ritter, 13 A. 370, 16 A. 301, 68 Md. 478, 6 Am.S.R. 467.
26 C.J. p 708 note 72.

54. Ky.—Thomas v. Gayle, 120 S.W. 290, 134 Ky. 330, 135 Am.S.R. 412, 28 L.R.A.,N.S., 767, 20 Ann.Cas. 766.
26 C.J. p 708 note 73.

In New Jersey, while recognizing that structural fixtures would pass to the landlord on the execution of a new lease without a title reservation to the tenant, it has been held that the rule does not apply to store fixtures.—Greenspan-Greenberger Co. v. Goerke Co., 162 A. 87, 111 N.J.Eq. 249.

55. **In Maryland,** under Pub.Code Gen.L. art 53 § 28, assignee of original lessee, and owner of fixtures under transfer from him, being the accepted tenant of lessors, is not required to remove the fixtures at expiration of the tenancy under the original lease, or to reserve its rights therein by any provision inserted in the lease subsequently executed.—Rasch v. Safe Deposit & Trust Co., 111 A. 121, 136 Md. 435.

56. Neb.—Ogden v. Garrison, 117 N. W. 714, 82 Neb. 302, 17 L.R.A.,N.S., 1135.
26 C.J. p 709 note 80.

57. Tex.—Inge v. First State Bank of Denton, Civ.App., 57 S.W.2d 217, error dismissed.
26 C.J. p 709 note 81.

58. Cal.—Wadman v. Burke, 81 P. 1012, 147 Cal. 351, 1 L.R.A.,N.S., 1192, 3 Ann.Cas. 330.
26 C.J. p 709 note 82.

tinued possession is given orally or in writing.[59] It has also been held that a mere extension or renewal of the old lease does not deprive the tenant of the right to remove fixtures,[60] although, it has been held, to the contrary, that a mere holding over by consent does deprive the tenant of his right of removal.[61] Occasionally, the fact that a lease was made during a preëxisting tenancy, and not at the end thereof, appears to have been regarded as tending to deprive it of the character of a new lease for the purpose of the rule, at least where it is apparent that the parties did not intend the transaction to constitute a new leasing.[62]

In analogy to the doctrine that the tenant loses the right of removal by taking a new lease of the premises, he has been held to have lost such right when he took a contract for the sale to him of the premises, which he failed to carry out.[63]

Removal prevented by landlord. If the landlord prevents the tenant, by legal process or otherwise, from removing fixtures which he is entitled to remove, the time for removal is extended until removal becomes possible.[64]

It has been asserted that if the tenancy is "wrongfully terminated" by the landlord and the tenant is ousted, the latter has a reasonable time within which to remove the fixtures annexed by him.[65] It has also been held that the tenant may remove removable fixtures after his term has expired if he was deprived of the opportunity to remove them by a wrongful retaking of possession of the premises by the landlord.[66]

Surrender or merger of leasehold. By surrendering his unexpired leasehold estate to the landlord, the tenant loses his right to remove fixtures annexed by him,[67] and a surrender by operation of law is as effective for this purpose, it seems, as an express surrender;[68] nor is it material that, after the surrender, the tenant under the original lease acquires a new lease of the same premises from the same landlord; the right of removal is not thereby revived.[69] As hereinafter discussed in § 42, a surrender is not effective, however, to prevent removal by one to whom the fixtures had previously been transferred.

When a merger of the leasehold occurs, without a surrender, as by a conveyance of the reversion by the landlord to the tenant, there is ordinarily no room for question as to the right to remove the fixtures, there being but one party in interest. It may, however, be shown that the conveyance of the reversion was merely by way of security, and that consequently there was no merger of the leasehold, preventing removal of the fixtures by the lessee or one claiming under him.[70]

Tenancy of uncertain duration. In the case of a tenancy of uncertain duration, such as a tenancy at will, or one subject to termination on a named contingency, the tenant has, it has been said, a "reasonable time" after the termination of the tenancy in which to make the removal,[71] provided, it seems, he has not in the meanwhile relinquished possession.[72] In some jurisdictions this rule has been applied in the case of a tenancy under a lease made by a life tenant, which comes to an end by reason of the life tenant's death,[73] but in other jurisdictions the tenant under the lease is not allowed thereafter to remove the fixtures annexed by him, as against the remainderman.[74] The rule has been regarded as not applying when the notice necessary to terminate the tenancy is of such length that the tenant, after its receipt would have sufficient time for removal of the fixture.[75]

59. U.S.—Ex parte Hemenway, D.C. Mass., 11 F.Cas.No.6,346, 2 Lowell 496.

60. N.Y.—Crater's Wharf v. Valvoline Oil Co., 196 N.Y.S. 815, 204 App.Div. 840.
26 C.J. p 709 note 78.

61. Cal.—Earle v. Kelly, 132 P. 262, 21 Cal.App. 480.
26 C.J. p 709 note 78 [a].

62. Ill.—Baker v. McClurg, 64 N.E. 701, 198 Ill. 28, 92 Am.S.R. 261, 59 L.R.A. 131.
26 C.J. p 709 note 79.

63. Cal.—Merritt v. Judd, 14 Cal. 59.

64. Utah.—Podlech v. Phelan, 44 P. 838, 13 Utah 333.
26 C.J. p 710 note 86.

65. Or.—Eldridge v. Hoefer, 77 P. 874, 45 Or. 239.

66. Ga.—Raymond v. Strickland, 52 S.E. 619, 124 Ga. 504, 3 L.R.A., N.S., 69.

67. Conn.—Webb v. New Haven Theatre Co., 87 A. 274, 87 Conn. 129.
26 C.J. p 707 note 56.

68. Cal.—Jungerman v. Bovee, 19 Cal. 354.
Mass.—Talbot v. Whipple, 14 Allen 177.
26 C.J. p 707 note 58.

69. Mass.—Shepard v. Spaulding, 4 Metc. 416.
26 C.J. p 707 note 59.

70. Cal.—Security Loan & Trust Co. v. Willamette Steam Mills Lumbering & Mfg. Co., 34 P. 321, 99 Cal. 636.

71. Me.—Henderson v. Robbins, 138 A. 68, 69, 126 Me. 284, citing **Corpus Juris.**
26 C.J. p 707 note 52.

72. Hawaii.—Akiona v. Kohala Sugar Co., 5 Hawaii 359.
N.H.—State v. Elliot, 11 N.H. 540.
Wis.—Mueller v. Chicago, M. & St. P. R. Co., 87 N.W. 239, 111 Wis. 300.
26 C.J. p 707 note 53.

73. Iowa.—Ray v. Young, 142 N.W. 393, 160 Iowa 613, 46 L.R.A.,N.S., 947, Ann.Cas.1915D 258.
26 C.J. p 707 note 54 [a].

74. Ohio.—Haflick v. Stober, 11 Ohio St. 482.
Pa.—White v. Arndt, 1 Whart. 91.
W.Va.—Jones v. Shufflin, 31 S.E. 975, 45 W.Va. 729, 72 Am.S.R. 848.

75. Ill.—Fellows v. Johnson, 183 Ill. App. 42.
26 C.J. p 707 note 55.

§ 42. —— Right of Removal by or against Third Persons

a. Persons claiming under tenant
b. Against person other than lessor

a. Persons Claiming under Tenant

Ordinarily a person claiming under the tenant has the same, but no greater, right to remove fixtures as possessed by the tenant.

The right to remove a fixture annexed by the tenant may be exercised by one to whom the tenant, after making the annexation, has undertaken to transfer the fixture, either absolutely [76] or by way of mortgage.[77] In determining whether something attached to realty has become a part of it, as between landlord and tenant, the intention with which the article was annexed is of paramount importance, see supra § 33, but, where the controversy is between the lessor of the premises and general creditors of the lessee, the question of intention is only of incidental importance, and the ultimate issue between the contesting parties is to be determined with more particular emphasis on the character of the annexation and the uses and purposes of the property or chattels annexed.[78]

A creditor or other person claiming under the tenant has ordinarily no right of removal if the tenant would not have such right.[79] Accordingly, although a buyer of removable fixtures is entitled to a reasonable time within the term of the lease to remove such fixtures,[80] if the tenant would have no right of removal owing to the expiration of the tenancy or his relinquishment of possession, one to whom he has sold [81] or mortgaged [82] the article would not have such right. Where the tenant was not the owner of the chattel annexed, however, it has been held that his failure to remove such chattel from the premises within a reasonable time after the termination of his tenancy did not deprive the owner of the chattel of his right thereto.[83]

In some jurisdictions, as the tenant loses the right of removal by the acceptance of a new lease, see supra § 41, so a person claiming under him may do so,[84] and it has been decided that such a transferee of the tenant loses his right of removal if his transferor, while still in possession of the premises, takes a new lease.[85] The rule has even been applied as against a sublessee who, after making annexations, took a new lease from the original lessor.[86]

Agreement with third person. As already discussed supra § 20, if the tenant annexes a chattel procured by him from a third person under an agreement that the title shall remain in the latter, or on which he has given a mortgage to a third person, the rights of such third person take precedence of any right which the landlord may have to claim the article annexed.

That the leasehold is surrendered by the tenant does not, by the weight of authority, affect the right of removal by one to whom the fixture has previously been transferred or mortgaged,[87] or by one who owns the chattel and has leased it to the tenant,[88] and under such circumstances he has a reasonable time to remove the property from the leased premises.[89] There is, however, authority for

76. Neb.—Frost v. Schinkel, 238 N. W. 659, 121 Neb. 784, 77 A.L.R. 1381.
Pa.—Prudential Ins. Co. of America v. Kaplan, 198 A. 68, 330 Pa. 33.
S.D.—Conway v. Bilatti, 175 N.W. 703, 175 S.D. 703.
26 C.J. p 717 note 87.

Assignment of leasehold in violation of covenant of the lease does not deprive the assignee of the right to remove a house erected by the lessee, such covenant not appearing to be intended to control the sale of the house, and the assignee having paid a considerable sum for the assignment.—Upton v. Hosmer, 49 A. 96, 70 N.H. 493.

77. Okl.—Hedges v. First Nat. Bank, 39 P.2d 57, 170 Okl. 175.
Wash.—M. H. B. Co. v. Desmond, 275 P. 733, 735, 151 Wash. 344, quoting **Corpus Juris.**
26 C.J. p 717 note 88.

Intention and notice
The giving of a chattel mortgage to become due at a future date on the fixtures in stone quarry leased from lessor was evidence that lessee considered property personalty, and due execution and recording of mortgage were "implied notice" to lessor of such claim.—Hopgood v. Green, 34 N.E.2d 559, 310 Ill.App. 411, transferred, see 30 N.E.2d 656, 375 Ill. 167.

78. Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.

79. Wash.—M. H. B. Co. v. Desmond, 275 P. 733, 735, 151 Wash. 344, quoting **Corpus Juris.**
26 C.J. p 718 notes 93, 94.

Chattel mortgagee
A landlord has a prior lien on fixtures placed in rented building by tenant if there is any rent due or to become due when tenant gives chattel mortgage on fixtures to third party.—Bonneville v. Wehrman, Tex. Civ.App., 106 S.W.2d 834.

80. S.D.—Conway v. Belatti, 175 N. W. 703, 175 S.D. 703.

81. Wis.—Fitzgerald v. Anderson, 51 N.W. 554, 81 Wis. 341.
26 C.J. p 718 note 96.

82. Neb.—Fuller v. Brownell, 67 N. W. 6, 48 Neb. 145.
26 C.J. p 718 note 97.

83. Tex.—Hubert v. Collard, Civ. App., 141 S.W.2d 677, error dismissed, judgment correct.

84. N.Y.—Talbot v. Cruger, 45 N.E. 364, 151 N.Y. 117—Van Vleck v. White, 72 N.Y.S. 1026, 66 App.Div. 14.
26 C.J. p 718 note 99.

85. Md.—Bauernschmidt Brewing Co. v. McColgan, 42 A. 907, 89 Md. 135.

86. Mass.—McIver v. Estabrook, 134 Mass. 550.

87. Okl.—Gibson v. Exchange Nat. Bank of Pauls Valley, 42 P.2d 511, 512, 172 Okl. 106, quoting **Corpus Juris.**
Wash.—M. H. B. Co. v. Desmond, 275 P. 733, 735, 151 Wash. 344, quoting **Corpus Juris.**
26 C.J. p 718 note 3.

88. Wis.—Hanson v. Ryan, 201 N.W. 749, 185 Wis. 566, 36 A.L.R. 1516.

89. Okl.—Gibson v. Exchange Nat.

a contrary view.[90] On the analogy of the decisions above referred to, that one claiming under the tenant does not lose his right of removal by reason of the tenant's surrender, it has been held that he does not lose such right by reason of a forfeiture in favor of the landlord based on a voluntary act by the tenant;[91] but here also there is authority to the contrary.[92]

Statutory lien of vendor of chattel sold to the tenant and by him annexed has been regarded as taking priority over the claim of the landlord to such article, on his reëntry for breach of a condition.[93]

b. Against Person Other than Lessor

A tenant ordinarily has the same right to remove fixtures against one claiming under the landlord as he would have had against the landlord.

The right to remove a trade fixture may be asserted as against a transferee of the reversion, taking with notice that the fixture was annexed by the tenant.[94] Conversely, a purchaser of the reversion should not be affected by a right of removal in a tenant if he purchased without notice of such right.[95] Presumably, in those states in which it is the law that one who has, by agreement, the right to remove articles annexed by him to another's land may exercise such right as against a purchaser of the land, even though the latter is without notice of the agreement, see supra § 18, the right of a tenant to remove fixtures, as against a purchaser of the reversion, is independent of the question of notice.[96]

The possession of the tenant has been regarded as charging the purchaser with notice of rights of removal in the former,[97] but there are to be found occasional cases to a contrary effect.[98] Where there is no reference in a written lease to an agreement between the landlord and tenant giving the tenant the right to remove fixtures, it has been held that, even though, under the statutes in the jurisdiction, occupancy by a tenant holding under a lease is notice to one purchasing from the landlord, it is not notice of the right on the part of the tenant to remove permanent fixtures placed on the premises by the tenant before the sale by the landlord.[99]

Lapse of time, or other circumstances, which would deprive the tenant of the right of removal as against the lessor, will deprive him of such right as against the lessor's transferee.[1]

Claimant under mortgage prior to annexation. As against one claiming under a mortgage of the reversion prior to the annexation of an article by the tenant under a lease, where the mortgagor is not prohibited from leasing, the lessee has been regarded as entitled to remove such article either under an agreement for removal, see supra § 19, or by reason of its being a trade fixture,[2] provided at least

Bank of Pauls Valley, 42 P.2d 511, 172 Okl. 106.

90. Mass.—Talbot v. Whipple, 14 Allen 177.
Wash.—Donahue v. Hardman Estate, 157 P. 478, 91 Wash. 125.

91. Wash.—M. H. B. Co. v. Desmond, 275 P. 733, 735, 151 Wash. 344, quoting **Corpus Juris.**

Duly executed and filed chattel mortgage on laundry machinery, thereafter attached to a building rented for laundry purposes, affords to the holder of the mortgage a lien superior to the right of the landlord who, after the cancellation of the lease, attempts to hold the machinery as a fixture.—Martyn v. Hamilton, 244 N.W. 15, 62 N.D. 445.

92. Idaho.—Bush v. Havird, 86 P. 529, 12 Idaho 352, 10 Ann.Cas. 107.
N.Y.—Massachusetts Nat. Bank v. Shinn, 46 N.Y.S. 329, 18 App.Div. 276, affirmed 57 N.E. 611, 163 N.Y. 360.

93. Mich.—Marinette Iron Works Co. v. Cody, 66 N.W. 334, 108 Mich. 381.

94. Me.—Davis v. Buffum, 51 Me. 160.
Vt.—Wing v. Gray, 36 Vt. 261.
26 C.J. p 718 note 9.

Right of tenant to remove under stipulation therefor as against subsequent transferee with notice see supra § 18.

Conversion

A lease or a conveyance of the premises by the landlord has been held not to involve a conversion of the tenant's fixtures.—Huntington v. Herrman, 98 N.Y.S. 48, 111 App.Div. 875, affirmed 81 N.E. 1166, 188 N.Y. 622—26 C.J. p 734 note 50.

95. Ga.—City of Savannah v. Standard Fuel Supply Co., 106 S.E. 178, 151 Ga. 145, 13 A.L.R. 1451.
Ill.—Radcliff v. Hanger, 239 Ill.App. 292.
Wis.—Anglo American Mill Co. v. Wisconsin Hydro Electric Co., 207 N.W. 276, 189 Wis. 120.
26 C.J. p 719 note 11.

Conversion

A landlord's sale of the premises without a reservation of the tenant's right to remove a building thereon is a conversion thereof.—Smyth v. Stoddard, 67 N.E. 980, 203 Ill. 424, 96 Am.S.R. 314.

96. Colo.—Royce v. Latshaw, 62 P. 627, 15 Colo.App. 420.
N.Y.—Globe Marble Mills Co. v. Quinn, 76 N.Y. 23, 32 Am.R. 259.
Wash.—O'Daniel v. Streeby, 137 P. 1025, 77 Wash. 414, L.R.A.1915F 634.
26 C.J. p 719 note 14.

97. Tex.—Shelton v. Pines, Civ.App., 126 S.W. 65.
26 C.J. p 719 note 16.

98. Conn.—Prince v. Case, 10 Conn. 375, 27 Am.D. 675.
Vt.—Powers v. Dennison, 30 Vt. 752.
26 C.J. p 719 note 17.

Customary outbuildings do not put a prospective purchaser inspecting a farm on inquiry relative to the ownership of the buildings, although he knows that the farm is occupied by a tenant.—Roden v. Williams, 158 N.W. 360, 100 Neb. 46, L.R.A.1917A 415.

99. Ga.—City of Savannah v. Standard Fuel Supply Co., 106 S.E. 178, 151 Ga. 145, 13 A.L.R. 1451.

1. Mass.—Bliss v. Whitney, 9 Allen 114, 85 Am.D. 745.

2. Pa.—Prudential Ins. Co. of America v. Kaplan, 198 A. 68, 330 Pa. 33.
Wis.—Old Line Life Ins. Co. of America v. Hawn, 275 N.W. 542, 225 Wis. 627—Standard Oil Co. v. La Crosse Super Auto Service, 258

the removal does not affect the security of the mortgage.[3] On the other hand, improvements placed on the premises by the lessee which are of such a character that they are not removable by him as against the lessor become subject to the lien of the mortgage.[4] As regards a tenant holding under a lease subsequent to the mortgage, it would seem that, if a mortgagor is, after the making of the mortgage, unable himself to remove fixtures, see infra § 49, he should not be able, by the making of a lease, to enable another to do so.[5] By the strict rule of the common law, the legal title being in the mortgagee, a lease by the mortgagor, made after the mortgage, is a nullity, and cannot, it would seem, confer on the tenant thereunder any rights of removal as such.[6]

Claimant under mortgage subsequent to annexation. As against one to whom the reversion is mortgaged after annexation of the article in question, the tenant can remove it, provided at least the mortgagee took with notice of the right of removal;[7] and he would have the same right as against a purchaser at a sale under foreclosure of the mortgage.[8] On the other hand, particularly where the lease expressly provides that it shall be subject to any mortgage which shall be placed on the premises, the lessee is not entitled to remove fixtures which were intended to become permanently a part of the realty and which were annexed prior to the mortgage.[9]

Effect of merger of leasehold. Where the reversion on a leasehold is subject to a mortgage, the acquisition by one person of both the reversion and the leasehold interest would seem to operate, by way of merger of the leasehold, to subject to the mortgage fixtures previously annexed by the lessee, provided they can be regarded as part of the realty,[10] while, if not regarded as part of the realty, they would not appear to be so subject to the prior mortgage on the reversion.[11]

§ 43. Between Mortgagor and Mortgagee or Vendor and Purchaser of Land and Their Privies

As between a mortgagor and mortgagee or vendor and purchaser of land, the usual tests in determining whether an article has become a fixture are annexation, adaptation, and intention to make the annexation permanent.

The general rules as to what constitutes fixtures are discussed supra §§ 1–11. In deciding whether an article used in connection with real property should be considered as a fixture and a part and parcel of the land, as between a mortgagor and mortgagee or vendor and purchaser of the land, the usual tests are real or constructive annexation of the article to the realty; appropriation or adaptation to the use or purpose of the realty with which it is connected; and the intention to make the annexation permanent.[12] The manner of annexation of chattels to realty is not controlling on the question as to

N.W. 791, 217 Wis. 237, 99 A.L.R. 60.
26 C.J. p 719 note 22.

3. Ala.—Broaddus v. Smith, 26 So. 34, 121 Ala. 335, 77 Am.S.R. 61.
Del.—Equitable Guarantee & Trust Co. v. Hukill, 85 A. 60, 10 Del.Ch. 88.
Vt.—Paine v. McDowell, 41 A. 1042, 71 Vt. 28.

4. **New industrial activity**
Where mortgaged premises on which there was an operating coal plant were converted into stone quarry, creditor of lessee from mortgagor could not defeat lien of mortgage on stone quarry machinery installed subsequent to the execution of mortgage on ground that stone quarry was a new and distinct industrial activity not contemplated at time mortgage was created, where parties intended that any industrial use of premises should inure to benefit of mortgagee and mortgage indicated that quarrying operations might be undertaken on mortgaged premises.—McClure v. Atlantic Rock Co., 14 A.2d 124, 339 Pa. 296.

Notice
Personal property placed in, and annexed to, mortgaged building by tenant under lease executed by mortgagor after mortgage was executed is subject to mortgage where tenant by language of lease has actual notice of mortgage.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.

Permanent improvement
Where entrance structure erected by tenant was merely an extension of front of theater building and was valuable only when used in connection with building, and building and new entrance made one complete theater building, and structure was erected pursuant to lease providing therefor and that on termination of lease possession should be surrendered together with "improvements," the entrance structure did not constitute a "trade fixture" that could be removed by tenant even with consent of landlord against objection of mortgagee, but was an "improvement" which is a valuable addition or betterment, such as a building on land, and under terms of lease and mortgage passed to mortgagee.—Provident Mut. Life Ins. Co. of Philadelphia v. Doughty, 6 A.2d 184, 125 N.J.Eq. 442.

Tenant of purchaser under executory contract to purchase cannot remove, as against the vendor, permanent improvements placed on the premises.—Oakley Co. v. Butler, 59 P.2d 826, 15 Cal.App.2d 572.

5. Pa.—McClure v. Atlantic Rock Co., 14 A.2d 124, 339 Pa. 296.
26 C.J. p 720 note 25.

6. Mass.—Lynde v. Rowe, 12 Allen. 100.

7. Colo.—Royce v. Latshaw, 62 P. 627, 15 Colo.App. 420.

8. Ark.—Bank of Mulberry v. Hawkins, 10 S.W.2d 898, 178 Ark. 504.
26 C.J. p 719 note 20.

9. U.S.—In re American Pile Fabric Co., C.C.A.Pa., 85 F.2d 961, reversing, D.C., 12 F.Supp. 86, certiorari denied Bateman v. Ideal Building v. Loan Ass'n, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454.

10. Mich.—Jones v. Detroit Chair Co., 38 Mich. 92, 31 Am.R. 314.

11. N.Y.—Globe Marble Mills Co. v. Quinn, 76 N.Y. 23, 32 Am.R. 259.

12. Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.
Or.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.
S.C.—Planters' Bank v. Lummus

whether they constitute fixtures, but the purpose and intent of annexation are the most important considerations.[13]

The rule for determining what is a fixture is construed strongly against the mortgagor or vendor and in favor of the mortgagee or purchaser,[14] whereas, as shown supra § 34, in the case of landlord and tenant the tendency is to hold that chattels are not a part of the realty. Many chattels are held to be fixtures, as between mortgagor and mortgagee or vendor and purchaser, which do not lose their character of personal chattels when the question is between landlord and tenant.[15]

§ 44. —— Annexation before Conveyance or Mortgage in General

In the absence of an agreement or statute otherwise providing, chattels previously annexed to, and structures erected on, land pass with the land on a conveyance or mortgage thereof.

In determining whether an article or structure placed on land is a part thereof for the purpose of a mortgage, the same considerations apply as in determining whether such an article or structure passes by an absolute conveyance of the land,[16] and in determining either question, the same general rule applies, it is said, as applies between heir and personal representative,[17] not that as between landlord and tenant,[18] that what is annexed to the realty will pass as a part thereof.[19] Consequently, in the absence of an agreement or statute otherwise providing, it may be said that chattels previously annexed to, and structures previously erected on, land pass with the land on a conveyance or mortgage thereof,[20] and the grantor or mortgagor may not

Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

S.D.—Arlt v. Langley, 227 N.W. 469, 56 S.D. 79.

Time as of which character of property determined

In action by former possessor against mortgagee to recover bowling alleys which were located in mortgaged building, the character of the alleys as realty or personalty should be determined as of the date when they were placed in the building.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

13. U.S.—In re Walker Bin Co., D.C. N.Y., 9 F.Supp. 367.

Secret intention

The law concerning fixtures ignores secret intention of owner of fee making annexation that chattels should not become fixtures when rights of innocent purchasers and mortgagees are involved.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.

14. Ark.—Stone v. Suckle, 224 S.W. 735, 145 Ark. 387.

Cal.—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708.

Conn.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Homeseekers' Realty Co. v. Silent Automatic Sales Corp., 163 A. 841, 163 Md. 541.

Miss.—Frederick v. Smith, 111 So. 847, 147 Miss. 437.

N.Y.—Van Buren v. Gallo, 283 N.Y.S. 453, 157 Misc. 289.

R.I.—Hale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.

Wash.—Reeder v. Smith, 203 P. 951, 118 Wash. 505.

Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

Rigor of common-law rule as to whether article is fixture or chattel has not been relaxed in cases of mortgagor and mortgagee and vendor and purchaser, as in case of landlord and tenant.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 165 Md. 484.

In mortgages on, and sales of, some kinds of mines, factories, plants, etc., many things are, as between mortgagor and mortgagee, considered fixtures such as go with plants, which originally might not have been so treated.—Talbott v. Maryland Silicite Co., 125 A. 401, 144 Md. 654.

15. Md.—Bankers' & Merchants' Credit Co. v. Harlem Park B. & L. Ass'n, 153 A. 64, 160 Md. 230.

All things necessary to full and free enjoyment of freehold, and which are in any way attached to it, are held to be fixtures as between vendor and purchaser and mortgagor and mortgagee.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.

16. Or.—Roseburg Nat. Bank v. Camp, 173 P. 313, 89 Or. 67.

26 C.J. p 720 note 35.

17. Ark.—Stone v. Suckle, 224 S.W. 735, 145 Ark. 387.

As between heir and personal representative see supra § 30.

18. Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626.

Between landlord and tenant see supra §§ 33–42.

19. U.S.—In re Shelar, D.C.Pa., 21 F.2d 136.

26 C.J. p 720 note 38.

20. U.S.—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 9 F.Supp. 112.

Ark.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492—Anderson v. Southern Realty Co., 4 S.W.2d 27, 176 Ark. 752—Hall v. Burns, 225 S.W. 227, 146 Ark. 157.

Cal.—Southern Pac. Co. v. Riverside County, 95 P.2d 688, 35 Cal.App.2d 380.

Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.

Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga. App. 102—Currin v. Milhollin, 185 S.E. 380, 53 Ga.App. 270—Skinner v. Stewart Plumbing Co., 155 S.E. 97, 42 Ga.App. 42—Brooks v. John Hancock Mut. Life Ins. Co., 136 S. E. 166, 36 Ga.App. 261.

Idaho.—Beebe v. Pioneer Bank & Trust Co., 201 P. 717, 34 Idaho 385.

Ky.—Young v. Hill, 85 S.W.2d 867, 260 Ky. 397—Gas & Electric Shop v. Corey-Scheffel Lumber Co., 13 S. W.2d 1009, 227 Ky. 657, 62 A.L.R. 208.

La.—Scott v. Brennan, 5 La.App. 45, modified on other grounds 109 So. 822, 161 La. 1017, 48 A.L.R. 1143.

Md.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.

Mass.—Gar Wood Industries v. Colonial Homes, 24 N.E.2d 767, 305 Mass. 41, 126 A.L.R. 591.

Mich.—Tyler v. Hayward, 209 N.W. 801, 235 Mich. 674.

Minn.—St. Paul Trust Co. v. U. S. Cereal Co., 206 N.W. 385, 165 Minn. 252.

Miss.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.

Neb.—Home Savings & Loan Ass'n v. Mount Zion Baptist Church, 299 N.W. 287, 139 Neb. 867—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

remove, or otherwise dispose of, such chattels without the consent of the grantee or mortgagee.[21] On the other hand, if chattels on the land are not part of the realty, they do not, under the law of fixtures, pass with the land on a conveyance or mortgage thereof.[22]

It is to be recognized that the primary consideration in determining whether an article on land, annexed or not annexed, is covered by a conveyance or mortgage is one of the intention of the parties, as determined by a construction of the language of the instrument in question.[23] The parties may, as between themselves, agree that the chattel shall not pass by conveyance or mortgage.[24] However, the right of removal by the grantor pursuant to an agreement with the grantee may be lost by failure to exercise it within a reasonable time.[25]

A purchaser at foreclosure sale stands in the same position as the original mortgagee as regards articles annexed to the land by the mortgagor or other owner of the land.[26]

Trade fixtures. Trade fixtures pass with the land on a conveyance thereof,[27] and the grantor is without any right of removal as against the grantee.[28]

Mortgage of leasehold. A mortgage by the tenant of his leasehold interest covers articles annexed to the freehold which he has the right to remove as against his landlord.[29]

§ 45. —— Specific Articles and Structures

Various articles annexed to, or structures erected on, land, including machinery, have been regarded as a part of the realty under the circumstances of particular cases for the purpose of a conveyance or mortgage.

Various articles annexed to land have been held to be a part of the realty for the purpose of a conveyance or mortgage,[30] while other articles have

N.J.—Farmers' Nat. Bank of Sussex, N. J., v. Salmon, 178 A. 635, 118 N.J.Eq. 241.
Ohio.—Szilagy v. Taylor, 25 N.E.2d 360, 63 Ohio App. 105.
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.
Pa.—Golle v. Charleroi Savings & Trust Co., 20 Wash.Co. 169.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
Tex.—Citizens' Nat. Bank of Abilene v. Elf Mfg. Co., Com.App., 29 S.W.2d 1062, reversing Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene, Civ.App., 18 S.W.2d 747—Pickrell v. Pickrell, Civ.App., 134 S.W.2d 740.
Wash.—Reeder v. Smith, 203 P. 951, 118 Wash. 505.
26 C.J. p 721 note 40.

Effect of statute
Under Rev.Civ.Code art 508, where owner of sugar factory did not exercise options granted by statute of electing to keep machinery installed in factory by third persons and paying for it, or requiring it to be taken away or demolished, title to machinery remained in third persons, and hence owner's sale of factory did not transfer title to machinery.—Folse v. Loreauville Sugar Factory, La. App., 156 So. 667, followed in Builders' Supply Co. v. Loreauville Sugar Factory, La.App., 156 So. 672.

21. Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216.
Severance of fixtures see supra § 21.

Mortgagor could not change character of property conveyed from realty to personalty to mortgagee's prejudice.—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251.

Conveyance by mortgagor
Mortgagor not having legal title to irremovable fixture, but only equitable title, could convey only such title.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492.

Waiver by grantee by acceptance of deed, etc.
Acceptance of deed and payment of purchase price do not establish purchaser's waiver of right to cabin removed from land after vendor contracted to sell.—Saunders v. Kidman, 284 P. 997, 75 Utah 303.

22. U.S.—Hubbard v. Missouri Pac. R. Co., D.C.Ark., 288 F. 945.

23. Ind.—General Parts Corporation v. First Trust & Savings Bank, 161 N.E. 695, 87 Ind.App. 501.
26 C.J. p 721 note 41.
Property conveyed by deed generally see Deeds §§ 100–108.
Property covered by real estate mortgage generally see the C.J.S. title Mortgages §§ 181–193, also 41 C.J. p 475 note 23 et seq.

24. Md.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.
Agreement or exception extraneous to instrument see infra § 47.
Exception or reservation in instrument see infra § 46.

25. Tex.—Clark v. Clark, Civ.App., 107 S.W.2d 421.

26. N.Y.—Craine Silo Co. v. Alden State Bank, 218 N.Y.S. 143, 218 App.Div. 263—Preferred Mut. Fire Ins. Co. of Chenango County v. Wager, 252 N.Y.S. 56, 140 Misc. 909.
26 C.J. p 721 note 47.

27. Ga.—Currin v. Milhollin, 185 S. E. 380, 53 Ga.App. 270.
26 C.J. p 721 note 48.
Trade fixtures as between landlord and tenant see supra § 38.

28. Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216.
26 C.J. p 721 note 48.

29. Mont.—Standard Oil Co. of California v. Idaho Community Oil Co., 37 P.2d 660, 662, 98 Mont. 131, citing **Corpus Juris.**
26 C.J. p 721 note 49.
Fixtures as between landlord and tenant see supra §§ 33–41.

30. Del.—Taylor v. Plunkett, 56 A. 384, 20 Del. 467.
25 C.J. p 726 note 83 [a].
Specific articles as realty or personalty when tested with respect to their character see supra § 11.
Specific articles and structures annexed or erected after sale, conveyance, or mortgage see infra § 49.

Held part of realty
(1) Crude oil in tank, rope, and dummy engine were "fixtures" of sugar house.—Brauds' Sugars v. Williams Richardson Co., 132 So. 670, 15 La.App. 616.
(2) Flagpole.—Hall v. Dare, 266 P. 162, 147 Wash. 264—Hall v. Dare, 252 P. 926, 142 Wash. 222, 50 A.L.R. 635.
(3) In-a-door beds, linoleums, window shades, and curtain rods in efficiency apartments.—Doll v. Guthrie, 24 S.W.2d 947, 233 Ky. 77.
(4) Wall beds in hotel.—City Nat. Bank of Duluth v. Cascade Apartment Co., 229 N.W. 349, 179 Minn. 362.
(5) Scales and gasoline pumps.—Tyler v. Hayward, 209 N.W. 801, 235 Mich. 674.
(6) Windmill.—Logan v. Greer, 136 S.E. 165, 36 Ga.App. 200.

been held not to be a part of the realty.[31]

Motive power. Articles furnishing the motive power of a factory or machine shop, etc., such as engines and boilers,[32] and water wheels, with the attachments thereto,[33] have been regarded as part of the realty, so as to be covered by a conveyance or mortgage thereof, although occasionally engines and boilers have been held to be personalty.[34]

Shafting, belting, and gearing connecting machinery with the motive power have usually been held to be part of the realty.[35]

Other machinery and apparatus, distinct from that furnishing or transmitting motive power, have perhaps, in the majority of cases, been regarded as a part of the realty for the purpose of a conveyance or mortgage,[36] although there are also deci-

(7) Other instances see 25 C.J. p 726 note 83 [a].

Articles in theater

(1) Seats, electric fans, picture machine, pipe organ, and drop curtain, attached to theater, were "fixtures."—Alwes v. Richheimer, 47 S.W.2d 1084, 185 Ark. 535.

(2) Theater curtains and scenery were part of realty. Filley v. Christopher, 80 P. 834, 39 Wash. 22, 109 Am.S.R. 853.

(3) Real estate mortgagee was entitled to chairs attached by screws to floor of theater building situated on realty covered by mortgage, as against holder of subsequently executed chattel mortgage on chairs, notwithstanding part of consideration of debt secured by chattel mortgage was used in payment of balance due on debt secured by conditional sales contract of chairs, since there was no subrogation of holder of chattel mortgage to lien of conditional seller.—Kapsemalis v. Douglas, 61 P.2d 211, 177 Okl. 522.

Railroad rails and switches, spiked down as they must be in railroad building, are attached to the soil, and, under Puerto Rico Civ.Code § 335, become a part of the realty, and subject to any mortgage, which may cover the realty.—Lee v. Koppel Industrial Car & Equipment Co., C.C.A.Puerto Rico, 295 F. 23, certiorari denied Koppel Industrial Car & Equipment Co. v. Lee, 44 S.Ct. 459, 265 U.S. 584, 68 L.Ed. 1191.

31. **Held not part of realty**

(1) Bowling alleys.—Bank of Shelbyville v. Hartford, 104 S.W.2d 217, 268 Ky. 135.

(2) Breakfast sets.—Tudor Arms v. McKendall Land Co., 6 A.2d 735, 63 R.I. 52.

(3) Furniture, household furnishings, tableware, and the like used in hotel.—Klaus v. Majestic Apartment House Co., 95 A. 451, 250 Pa. 194.

(4) Post office furniture and fixtures.—Evans Mercantile Co. v. Lowry, 271 P. 934, 47 Idaho 10.

(5) Roll about beds in apartment house.—Dunn v. Assets Realization Co., 16 P.2d 370, 141 Or. 298, rehearing denied 17 P.2d 1118, 141 Or. 298.

(6) As between mortgagor and creditors other than bond holders under first mortgage on ice plant, horses, wagons, motor vehicles, office furniture, typewriters, adding machines, and other movable personal property, including portable ice storage houses, were "chattels" and not "fixtures" covered by real estate mortgage.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.

(7) Other instances see 26 C.J. p 726 note 84 [a].

32. Ga.—Blain v. Corbin, 180 S.E. 854, 855, 51 Ga.App. 472, citing **Corpus Juris.**

26 C.J. p 722 note 51.

Motive power to pump well water

A motive-power pump and engine used for pumping water out of an artesian well, and the pipes and other accessories connected therewith, installed on premises for the purpose of furnishing water, are ordinarily considered a part of the realty.—Blain v. Corbin, 180 S.E. 854, 51 Ga.App. 472.

33. N.J.—Keeler v. Keeler, 31 N.J. Eq. 181.

Vt.—Davenport v. Shants, 43 Vt. 546.

34. N.J.—Early v. Burtis, 4 A. 765, 40 N.J.Eq. 501.

26 C.J. p 722 note 53.

35. Ga.—Brooks v. John Hancock Mut. Life Ins. Co., 136 S.E. 166, 36 Ga.App. 261.

26 C.J. p 722 note 54.

36. U.S.—Kennedy v. Crumlish, C.C.A.Pa., 85 F.2d 665.

Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419.

N.Y.—Curry v. Geier Const. Co., 234 N.Y.S. 59, 225 App.Div. 498.

Pa.—First Nat. Bank v. Ser-Vus C. & D. Co., 85 Pittsb.Leg.J. 749—Star Equipment Corporation v. Rice, 5 Fay.L.J. 19.

26 C.J. p 722 note 55 [a].

Machinery need not be specifically mortgaged to be covered by lien of mortgage on industrial plant.—Commonwealth Trust Co. of Pittsburgh v. Harkins, 167 A. 278, 312 Pa. 402.

Fact that some of machinery was detachably connected with engines and that parts were detachable from each other was not determinative of issue whether machinery constituted part of realty.—Willis v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L. Ed. 554.

Fact that machinery in mortgaged plant was covered by unexpired patents, and, therefore, could not be used does not affect lien of mortgage thereon.—Commonwealth Trust Co. of Pittsburgh v. Harkins, 167 A. 278, 312 Pa. 402.

Held part of realty

(1) Machinery and appliances in machine shop or foundry.

Ill.—Kenny v. T. L. Arzt Foundry Co., 31 N.E.2d 620, 308 Ill.App. 251—Joyner v. Mitchell, 267 Ill. App. 427.

Wis.—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

26 C.J. p 722 note 55 [a] (11).

(2) Machinery for manufacturing ice.

U.S.—Triumph Electric Co. v. Patterson, Ark., 211 F. 244, 127 C.C.A. 612, affirming, D.C., In re W. O. Craig Mfg. Co., 201 F. 548.

Mich.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.

(3) Machines of printing machinery manufacturer.—Commonwealth Trust Co. of Pittsburgh v. Harkins, 167 A. 278, 312 Pa. 402.

(4) Machinery in asphalt plant, including forge, lathe, and bag cleaner.—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520.

(5) Machinery and appliances in packing plant.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F.2d 607.

(6) Machinery for operating creamery.—Farmers' Nat. Bank of Sussex, N. J., v. Salmon, 178 A. 635, 118 N. J.Eq. 241.

(7) Machinery and apparatus in canning factory.

U.S.—Whitaker-Glessner Co. v. Ohio Savings Bank & Trust Co., C.C.A. Ohio, 22 F.2d 773.

Md.—Dudley v. Hurst, 8 A. 901, 67 Md. 44, 1 Am.S.R. 368.

(8) Machines used in soft drink manufacturing and bottling plant.—McCorkle v. Robbins, 267 N.W. 295, 222 Wis. 12.

(9) Machinery, ovens, and equipment in bakery.—J. H. Day Cc. v.

sions in which machinery and apparatus of various kinds have been held to be personalty, by reason of the mode of annexation and the character and use of the articles.[37]

Machinery and appliances on farms or plantations have not infrequently been held to be part of the realty for the purpose of a conveyance or mortgage.[38]

Buildings and other structures have usually been regarded as part of the realty and so covered by a conveyance or mortgage thereon,[39] although under particular circumstances they may constitute per-

Public Sav. Ins. Co. of America, 151 N.E. 361, 85 Ind.App. 78.

(10) Mining machinery and equipment.—Strong v. Sunset Copper Co., 114 P.2d 526, 9 Wash.2d 214, 135 A.L.R. 423—Reeder v. Smith, 203 P. 951, 118 Wash. 505—26 C.J. p 722 note 55 [a] (17), (18).

(11) Oil and gas well equipment.—Young v. Hill, 85 S.W.2d 867, 260 Ky. 397.

(12) Refrigerating plant for storage of furs connected with freehold by brine pipes and brackets.—Dawson v. Scruggs-Vandervoort Barney Realty Co., 268 P. 584, 84 Colo. 152.

(13) Other instances see 26 C.J. p 722 note 55 [a].

Woodworking machinery

(1) Woodworking machinery is a part of the realty.—Bemis v. First Nat. Bank, 40 S.W. 127, 63 Ark. 625—26 C.J. p 722 note 55 [a] (2).

(2) However, wood working machines have also been held to be personalty.—In re Walker Bin Co., D.C. N.Y., 9 F.Supp. 367.

26 C.J. p 722 note 55 [a] (2) contra cases.

37. Mich.—O'Dell v. Day, 166 N.W. 872, 200 Mich. 259.

26 C.J. p 723 note 56 [a].

Held not part of realty

(1) Electric traveling crane.—Consolidated Gas, Electric Light & Power Co. of Baltimore v. Ryan, 169 A. 794, 165 Md. 484.

(2) Laundry machinery in hotel.—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 9 F. Supp. 112.

(3) Winch and hoist tower with motor which was intended only for temporary construction work.—Manufacturers Bank & Trust Co. of St. Louis v. Lauchli, C.C.A.Mo., 118 F. 2d 607.

(4) Other instances see 26 C.J. p 723 note 56 [a].

38. Held part of realty

(1) Corn mill.—Jenkins v. Floyd, 154 S.E. 733, 199 N.C. 470, 70 A.L.R. 1125.

(2) Corncrib built on skids.—Cornell College v. Crain, 235 N.W. 731, 211 Iowa 1343.

(3) Granary on skids.—Cornell College v. Crain, supra.

(4) Heavy oil-burning engine in gin house of plantation set on concrete base with bolts imbedded and tank buried in ground.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W. 2d 90, 183 Ark. 492.

(5) Machinery incased in brick and gin attached to sills of building.—Brooks v. John Hancock Mut. Life Ins. Co., 136 S.E. 166, 36 Ga.App. 261.

(6) Hoghouse constructed on skids.—Cornell College v. Crain, supra.

(7) Sawmill.—Southern Cotton Oil Co. v. Lowery, 163 So. 629, 231 Ala. 119.

(8) Other instances see 26 C.J. p 724 note 57 [a].

Cotton gins

(1) Held part of realty.

Ala.—Southern Cotton Oil Co. v. Lowery, supra.

Miss.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408.

N.C.—Jenkins v. Floyd, 154 S.E. 733, 199 N.C. 470, 70 A.L.R. 1125.

26 C.J. p 724 note 57 [a] (1).

(2) Held not part of realty.

Ala.—Hancock v. Jordan, 7 Ala. 448, 42 Am.D. 600.

Ga.—Smith v. Odom, 63 Ga. 499.

Tex.—Cole v. Roach, 37 Tex. 413.

28 C.J. p 707 note 17 [a].

(3) Burr extractors placed in cotton gins held fixtures.—Citizens' Nat. Bank of Abilene v. Elk Mfg. Co., Tex. Com.App., 29 S.W.2d 1062, reversing Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene, Civ.App., 18 S.W.2d 747.

Electric lighting plant

(1) Held part of realty.—Frederick v. Smith, 111 So. 847, 147 Miss. 437.

(2) Held not part of realty.—Equitable Life Assur. Soc. of U. S. v. Chapman, 282 N.W. 355, 225 Iowa 988.

Pumps

(1) Five and six inch centrifugal pumps, annexed to land, and a ten horsepower electric motor as a part of the pumping system, which was sometimes detached from one pump and moved to, and connected with, another part of the system, but which was never disconnected or removed from the land, which pumps and motor were essential to the irrigation and drainage of the land, were fixtures.—First State & Savings Bank v. Oliver, 198 P. 920, 101 Or. 42.

(2) Where intention of owners to make centrifugal pumps a permanent part of irrigation system on ranch was disclosed by manner of installation of the pumps which were placed on concrete foundations, and were inclosed in specially constructed pump houses, and the pumps became an integral part of an interconnected irrigation system without which the ranch could not be operated, the pumps were "fixtures" and were covered by mortgage on the realty, and the fact that pumps were removed on one occasion for purpose of being overhauled and then put back in place did not establish an intention that installation of the pumps was not to be permanent.—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App. 2d 66.

39. Neb.—Home Savings & Loan Ass'n v. Mount Zion Baptist Church, 299 N.W. 287, 139 Neb. 867.

Pa.—Sachem Petroleum Co. v. Fox, 58 Montg.Co. 57.

26 C.J. p 724 note 58.

Particular buildings

(1) House and garage on lot, occupied by husband and wife.—Glasgow v. John Hancock Mut. Life Ins. Co., Civ.App., 117 S.W.2d 888, affirmed John Hancock Mut. Life Ins. Co. v. Glasgow, 141 S.W.2d 942, 135 Tex. 470.

(2) Service stations standing on lands leased for term of years.—Standard Oil Co. of California v. Idaho Community Oil Co., 37 P.2d 660, 98 Mont. 131.

Asphalt plant, including smokestack sixty-three feet high, two large horizontal oil tanks mounted on concrete foundations extending below frost line and connected with rest of plant by pipe lines in concrete ducts two and a half feet below ground surface, and other equipment supported by concrete foundations, so that removal of concrete pillars, foundation, driveways, and sidings would damage land itself, as would also removal of building, constituted "real property," covered by realty mortgage.—Petition of Johns-Manville Sales Corporation, C.C.A.Mich., 88 F.2d 520.

Building on piers

(1) As between mortgagor and mortgagee under real estate mortgage, buildings supported by piers and posts were fixtures.—Schmidt v. Carrol, 231 N.W. 181, 201 Wis. 631.

(2) Dance hall constructed by mortgagor on piers on farm became a fixture.—Van Buren v. Gallo, 283 N.Y. S. 453, 157 Misc. 289.

Part of building on another's land

Where part of the mortgagor's house was built on another person's

sonalty.[40]

Fences have been regarded as part of the realty for the purpose of a conveyance or mortgage.[41]

Water pipes, cisterns, and attachments have usually been held to be part of the realty for the purpose of a conveyance or mortgage.[42]

Steam heating apparatus in a building has been held to be part of the realty for the purpose of a conveyance or mortgage.[43]

Hot water heating apparatus for heating a building by hot water has been regarded as realty for the purpose of a conveyance or mortgage.[44]

Furnaces and stoves. Furnaces have usually been regarded as part of the realty,[45] but occasionally they have been regarded as personalty, particularly when portable in character.[46] Stoves have usually been regarded as personalty.[47] As regards both furnaces and stoves the intention with which the annexation was apparently made has been regarded as controlling in this connection.[48]

Cooking stoves and ranges,[49] including gas ranges,[50] have occasionally been regarded as part of the realty, although it has also been held that gas ranges are not a part of the realty.[51]

Gas and electric appliances. Gas pipes,[52] gas logs,[53] and gas generators[54] have been regarded as part of the realty, and the same view has been taken as to dynamos for generating electricity,[55] and as to switchboards[56] and electric wiring.[57] Gas and electric lighting fixtures, such as chandeliers, brackets, and burners, have more usually been regarded as personalty and so not included in a conveyance or mortgage of the land,[58] but there are decisions to the contrary, occasionally, but not always, based on the permanent character of the an-

land, such part became attached to such person's land, and was not included in the mortgage.—Collins v. Michigan Commercial Underwriters, 6 Tenn.App. 528.

40. Cal.—Pennybecker v. McDougal, 48 Cal. 160.

Lumber camp which was moved onto a wood lot in three sections on skids, such three sections never being united, and no foundation ever being placed, they resting on spruce poles placed under them, at the time they were moved did not become a fixture, but remained the personal property of the owner.—Lyman v. Leighton, 112 A. 381, 80 N.H. 12.

Sand and gravel washing plant which could be dismantled and taken down in sections was not part of realty and was not covered by realty mortgage.—McDonald v. H. B. McDonald Const. Co., 175 A. 87, 117 N.J.Eq. 181.

41. Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858.
26 C.J. p 724 note 59.

42. **Held part of realty**
(1) Bath tubs.—Frederick v. Smith, 111 So. 847, 147 Miss. 437—26 C.J. p 724 note 60 [a] (3).
(2) Kitchen sink.—Frederick v. Smith, 111 So. 847, 147 Miss. 437.
(3) Pump for supplying water.—Blain v. Corbin, 180 S.E. 854, 51 Ga. App. 472—26 C.J. p 724 note 60 [a] (5).
(4) Other instances see 26 C.J. p 724 note 60 [a].

Pipe line
Where a pipe line was used to carry water from a point of diversion on one mining claim to another mining claim, it was not a "fixture" within Civ.Code § 1013, with respect to the mining claim on which the line originated where the diversion occurred.—Melrose v. Cooley, 196 P. 105, 50 Cal.App. 768.

Water heater
A water heater which was part of hot water system for building is an immovable within Civ.Code art 467, as amended by Act 1912 No. 51, notwithstanding water heaters are not expressly named therein.—Scott v. Brennan, 109 So. 822, 161 La. 1017, 48 A.L.R. 1143, modifying 5 La.App. 45—Scott v. Brennan, 3 La.App. 452.

43. Minn.—Pond & Hasey Co. v. O'Connor, 73 N.W. 159, 248, 70 Minn. 266.
26 C.J. p 724 note 61.

44. Me.—Young v. Hatch, 59 A. 950, 99 Me. 465, 2 Ann.Cas. 374.
26 C.J. p 724 note 62.

45. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.
Neb.—Bankers Life Ins. Co. v. Ohrt, 270 N.W. 497, 131 Neb. 858.
Wyo.—Holland Furnace Co. v. Bird, 21 P.2d 825, 45 Wyo. 471.
26 C.J. p 724 note 63.

46. N.J.—Rahway Sav. Inst. v. Irving St. Baptist Church, 36 N.J.Eq. 61.
26 C.J. p 724 note 64.

Gas burner installed on basement floor on approval, for heating, attached by coupling to gas pipe extending from furnace, and removed without injuring freehold, continued personalty, not subject to personal property law or lien of mortgage.—Delaware Hill Development Co. v. Delaware Bldg. Corporation, 244 N.Y.S. 324, 137 Misc. 672.

47. Pa.—Harmony Bldg. Ass'n v. Berger, 99 Pa. 320.
26 C.J. p 725 note 65.

48. N.J.—Erdman v. Moore, 33 A. 958, 58 N.J.Law 445.
26 C.J. p 725 note 66.

49. Minn.—City Nat. Bank of Duluth v. Cascade Apartment Co., 229 N.W. 349, 179 Minn. 362.
N.J.—Erdman v. Moore, 33 A. 958, 58 N.J.Law 455.
26 C.J. p 725 note 68.

50. **In apartment house**
R.I.—Tudor Arms v. McKendall Land Co., 6 A.2d 735, 63 R.I. 52.

51. N.Y.—Delaware Hill Development Co. v. Delaware Bldg. Corporation, 244 N.Y.S. 324, 137 Misc. 672—Bibeault v. Hefgold Realty Corporation, 21 N.Y.S.2d 970, affirmed 295 N.Y.S. 125, 250 App.Div. 761, reargument denied 296 N.Y.S. 827, 250 App.Div. 857.
26 C.J. p 725 note 69.

52. N.Y.—Smyth v. Sturges, 15 N.E. 544, 108 N.Y. 495.
26 C.J. p 725 note 70.

53. N.J.—Cunningham v. Seaboard Realty Co., 58 A. 819, 67 N.J.Eq. 210.

54. N.J.—Keeler v. Keeler, 31 N.J. Eq. 181.

55. Wis.—Gunderson v. Swarthout, 80 N.W. 465, 104 Wis. 186, 76 Am. S.R. 860.
26 C.J. p 725 note 73.

56. Wash.—Filley v. Christopher, 80 P. 834, 39 Wash. 22, 109 Am.S.R. 853.
26 C.J. p 725 note 74.

57. Ariz.—Fechet v. Drake, 12 P. 694, 2 Ariz. 239.
N.J.—Prudential Ins. Co. v. Guild, Ch., 64 A. 694.

58. N.Y.—Blumberg v. 4602 Fourteenth Ave. Corporation, 248 N.Y.S. 751, 232 App.Div. 844, affirmed 251 N.Y.S. 882, 233 App.Div. 866.
26 C.J. p 725 note 76.

nexation.[59]

Electric fans[60] and electrical refrigerators[61] have been held to be fixtures.

Mirrors have, according to the mode of annexation, been treated as a part of the realty[62] or as personalty.[63]

Trees and plants in a nursery have been regarded as part of the realty, so as to pass by a deed or a mortgage thereof.[64]

Store counters, shelving, show cases, racks, and the like, have been regarded as part of the realty for the purpose of a conveyance or mortgage.[65]

§ 46. —— Language of Particular Instrument

The language of the particular conveyance or mortgage may determine whether an article or structure on land passes to the grantee or mortgagee or is reserved to the grantor or mortgagor.

The question whether an article or structure on land is within the operation of a conveyance or mortgage being primarily one of the intention of the parties to the instrument, see supra § 44, that is, of the construction of the language thereof, the specific terms of description may determine whether the particular articles are embraced therein, irrespective of the character of such articles as part of the realty or as personalty.[66]

Conveyance of factory by name. A conveyance or mortgage of a mill or manufacturing establishment by a general name, or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging thereto, whether annexed to the freehold or not.[67]

Conveyance of "fixtures." The term "fixtures," when used in a conveyance, is construed, it seems, as meaning articles annexed to the realty,[68] unless it appears to have been intended by the parties to have some other meaning.[69]

Exception or reservation in instrument. An express exception or reservation in the instrument of an article which would otherwise, by reason of its annexation to the realty, pass as part thereof, is effective to exclude it from the operation of the instrument.[70]

59. N.J.—Security Trust Co. v. Temple Co., 58 A. 865, 67 N.J.Eq. 514.
26 C.J. p 725 note 77.

60. Ark.—Stone v. Suckle, 224 S.W. 735, 145 Ark. 387.

Installed in hotel
Ark.—Stone v. Suckle, supra.
26 C.J. p 725 note 78 [a].

Installed in theater
Ark.—Alwes v. Richheimer, 47 S.W. 2d 1084, 185 Ark. 535.

61. Installed by owner in apartment building
Mo.—Glueck & Co. v. Powell, 61 S. W.2d 406, 227 Mo.App. 1226.

62. N.Y.—Ward v. Kilpatrick, 85 N. Y. 413, 39 Am.R. 674.
26 C.J. p 725 note 79 [a].

63. N.J.—Cranston v. Beck, 56 A. 121, 70 N.J.Law 145.
26 C.J. p 725 note 80 [a].

64. Colo.—Dubois v. Bowles, 69 P. 1067, 30 Colo. 44.
26 C.J. p 725 note 81.

65. Miss.—Crumbley Grocery Co. v. Ferguson, 132 So. 737, 159 Miss. 861.
26 C.J. p 725 note 82.

66. Ind.—General Parts Corporation v. First Trust & Savings Bank, 161 N.E. 695, 87 Ind.App. 501.
Property conveyed by deed generally see Deeds §§ 100–108.
Property covered by real estate mortgage generally see the C.J.S. title Mortgages §§ 181–193, also 41 C.J. p 475 note 23 et seq.

"Improvements"
(1) "Improvements," in trust deed of certain land with all improvements thereon, did not include electric light fixtures.—R. Williams & Co. v. Farm & Home Savings & Loan Ass'n, 272 S.W. 1006, 217 Mo.App. 554.
(2) Improvements covered by a mortgage on land, with all the buildings and improvements thereon, did not include heavy ornamental vases standing in the garden of the house on the premises, but not in any way fastened to the soil, or a stepping stone on the sidewalk in front of said premises.—Pfluger v. Carmichael, 66 N.Y.S. 417, 418, 54 App.Div. 153.

"Machinery, tools, and apparatus"
Polishing brushes used in manufacturing automobiles purchased after sale of plant by mortgagor were not within real estate mortgage covering "machinery, tools, and apparatus."—General Parts Corporation v. First Trust & Savings Bank, 161 N.E. 695, 87 Ind.App. 501.

67. Mich.—Dehring v. Beck, 110 N. W. 56, 146 Mich. 706.
26 C.J. p 727 note 87.

68. Iowa.—Pickerell v. Carson, 8 Iowa 544.
26 C.J. p 727 note 88.

69. Tex.—Copp v. Swift, Civ.App., 26 S.W. 438.
26 C.J. p 727 note 89.

70. Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga. App. 216.
Or.—Kennedy v. City of Hood River, 259 P. 911, 122 Or. 531.
26 C.J. p 727 note 90, p 733 note 39 [c].
Severance by exception or reservation in instrument see supra § 21.

Steam heating system as "equipment" reserved
Where the sale contract reserved to the vendor the right to remove "the balance of the machinery, belting, shafting, and equipment in said mill," the steam heating system was not part of the "equipment" which the vendor was authorized to remove. —Kent Storage Co. v. Grand Rapids Lumber Co., 214 N.W. 111, 239 Mich. 161.

Removal by purchaser of fixtures
Vendee, receiving deed while a purchaser of fixtures was in possession, removing them took with notice of such purchaser's rights and subject thereto, especially where vendor reserved right to remove fixtures, and vendee had extended time for removal, and permitted the work to continue after expiration of the extension.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.

Quitclaim deed
Whether sprinkler system, installed on property conveyed by quitclaim deed of realty only, was personal property or became real property by being affixed to realty, was immaterial in action against grantor, for conversion thereof, where plaintiff retained all rights which he had

§ 47. —— Extraneous Agreement or Exception

Articles annexed to the land may be reserved by a grantor or mortgagor by an agreement with the grantee or mortgagee extraneous to the conveyance or mortgage.

An extraneous agreement that certain articles, although annexed, shall not pass thereby has been given effect regardless of the fact that the agreement is in no way referred to in the mortgage instrument or conveyance.[71] Even an oral exception or reservation of fixtures on the premises has been held effective to withdraw them from the operation of the instrument,[72] although there are cases to the effect that an oral exception or reservation of fixtures is a nullity.[73]

§ 48. —— Contemporaneous Chattel Mortgage or Bill of Sale

The execution of a chattel mortgage on articles annexed to the realty concurrently with the making of the real estate mortgage is some evidence that the parties intended that the articles included in the chattel mortgage should not be embraced within the mortgage on the land.

That a chattel mortgage was also given on the article annexed does not show, conclusively at least, that the article is not to be regarded as part of the realty for the purpose of a mortgage on the latter, it being recognized that this may be merely a measure of precaution,[74] although this circumstance has been referred to as evidence that the article included in the chattel mortgage was not intended to be covered by the mortgage on the realty.[75]

That a separate bill of sale of articles annexed was executed at the time of a conveyance of the realty has occasionally been regarded as not affecting the vendor's right to claim such articles as covered by a purchase-money mortgage on the realty,[76] although in other decisions a contrary view has apparently been asserted.[77]

§ 49. —— Annexation after Sale, Conveyance, or Mortgage

a. In general
b. Annexation by purchaser under land contract
c. Annexation after mortgage

a. In General

In the absence of an agreement, articles annexed to, or structures erected on, land after a conveyance become part of the realty.

Articles annexed to, or structures erected on, land after a conveyance thereof become part of the realty,[78] but the right of removal may exist in favor of the grantee by reason of an agreement with the grantor.[79]

in personal property before execution of deed.—Phillips v. Bank of America Nat. Trust & Savings Ass'n, 40 P.2d 316, 3 Cal.App.2d 557.

71. Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga. App. 216.
Okl.—Hall v. Woody, 69 P.2d 379, 381, 180 Okl. 370, quoting **Corpus Juris.**
26 C.J. p 727 note 91.

Combined fence and signboard
Where plaintiff and defendant, as joint owners of land, permitted the erection of a combined fence and signboard, with right of removal, and defendant exchanged his interest in the land for plaintiff's interest in the corporation which erected the sign, the fact of defendant's conveyance of his interest to plaintiff did not affect the right of removal of the board, plaintiff not being in the position of an innocent purchaser, without knowledge of the circumstances under which the structure was erected.—Breyfogle v. Tighe, 208 P. 1008, 58 Cal.App. 301.

72. Ind.—Pea v. Pea, 35 Ind. 387—Frederick v. Devol, 15 Ind. 357.
26 C.J. p 727 note 92.
Oral reservation of fixtures as within statute of frauds see the C.J.S. title Frauds, Statute of § 106, also 27 C.J. p 211 note 10.

Announcement at administrator's sale
Where administrators, at the time of the sale of intestate's farm, announced in the presence and hearing of the purchaser that certain scales were not being offered for sale with the land, and that they could be purchased by separate contract, and where purchaser bought the land with full knowledge of the fact that the scales had been treated as personal property, and so treated the scales himself after his purchase of the land, he could not thereafter claim the scales as a part of the land.—McCarty v. Twibell, 131 N.E. 826, 76 Ind.App. 454.

73. Tex.—Citizens' Nat. Bank of Abilene v. Elk Mfg. Co., Com.App., 29 S.W.2d 1062, reversing, Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene, Civ.App., 18 S.W.2d 747—Clark v. Clark, Civ.App., 107 S.W. 2d 421.
26 C.J. p 728 note 93.

74. U.S.—In re Danville Hotel Co., D.C.Ill., 33 F.2d 162, affirmed in part and reversed in part on other grounds, C.C.A., 38 F.2d 10.
Mich.—Studley v. Ann Arbor Sav. Bank, 70 N.W. 426, 112 Mich. 181.
26 C.J. p 728 note 94.
Severance by separate sale or mortgage of articles see supra § 21.

75. Mich.—Studley v. Ann Arbor Sav. Bank, 70 N.W. 426, 112 Mich. 181.
Corpus Juris cited in holding that a conditional seller of chattels placed on the mortgagor's land has a right to remove the chattels as against a subsequent mortgagee of the land.—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 9 F.Supp. 112.

76. N.Y.—Cooper v. Harvey, 16 N.Y. S. 660.
Pa.—Morris' Appeal, 88 Pa. 368.

77. N.J.—Felin v. Arrow Motor Mach. Co., 124 A. 448, 96 N.J.Eq. 44.
26 C.J. p 728 note 97.

78. Ky.—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800.

79. **Where timber deed permitted grantee to remove** his logging tramroad within a certain time, the tramroad did not become a fixture.—Lane v. Bell Lumber Co., 115 S.E. 207, 122 S.C. 140.

Effect of failure to remove property
(1) Where personal property belonging to one person is attached to the land of another under circumstances preserving its character as personal property, the fact that a subsequent deed of the land contains a license to remove the personalty

The forfeiture of fixtures annexed by the grantee on the breach of a condition named, and the right of the grantor to a lien on fixtures for the unpaid purchase price are discussed infra §§ 50, 51.

b. Annexation by Purchaser under Land Contract

In the absence of an agreement, articles annexed or structures erected by a purchaser of land in possession under a contract of purchase become part of the land and may not be removed by the purchaser or those claiming under him without the consent of the vendor.

In the absence of an agreement, articles annexed or structures erected by a purchaser of land who is in possession by virtue of his contract of purchase, but who has not yet obtained title to the premises, become part of the land, his intention to that effect being presumed, from his interest under his contract and expectation of acquiring absolute title.[80] Such articles or structures ordinarily may not be removed by the purchaser without the consent of the vendor.[81] In the event of the purchaser's default, the articles or structures thus annexed or erected belong to the vendor.[82] The purchaser in such case stands in a position analogous to that of a mortgagor, and has no greater rights of removal than the mortgagor has as against the mortgagee.[83]

In determining whether chattels placed on the land by the purchaser have become part of the realty, the law favors annexation to the land as in the case of mortgagor and mortgagee and grantor and grantee.[84] The court cannot be governed by the consideration that the vendor has been well compensated while creditors of the insolvent purchaser will suffer great loss.[85] However, machinery annexed merely to test the property for mining purposes by one who had an option on the property,[86] or who had actually contracted to purchase it, but had only made a first payment,[87] has been regarded as retaining its character as personalty and so to be removable by him.

within a specified time without any condition of forfeiture does not change the status of the personalty to that of a fixture on failure to remove the property within the terms of the license.—Lane v. Bell Lumber Co., supra.

(2) If a right to remove a tramroad constructed on land under an agreement that it might be removed within a specified time was forfeited by failure to make such removal within the time agreed, such forfeiture was not automatic, but the right to the forfeiture must have been claimed and asserted by the person entitled thereto.—Lane v. Bell Lumber Co., supra.

Effect of agreement as against third persons see supra §§ 17–20.

80. Cal.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 118, 14 Cal.2d 196, citing **Corpus Juris** and superseding, App., 86 P. 2d 673.

Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del. Ch. 288.

Wash.—Pioneer Sand & Gravel Co. v. Hedlund, 34 P.2d 878, 178 Wash. 273.

26 C.J. p 675 note 4.

Corpus Juris cited for the proposition that when an owner places improvements on his land, such as a house, the presumption is that he intends such improvements to become fixtures.—Clark v. Clark, Tex.Civ. App., 107 S.W.2d 421, 424.

Replacements

Land contract, providing that all substitutions and replacements of machinery on property should be made only with written consent of seller to protect seller in security for balance due, did not prohibit unauthorized betterment replacements, but constituted such replacements part of security.—Wilson v. Boyer, 267 N.W. 760, 275 Mich. 667.

81. Cal.—Bacigalupi v. Western Machinery Co., 26 P.2d 701, 135 Cal. App. 242.

Mich.—Wilson v. Boyer, 267 N.W. 760, 275 Mich. 667.

Wash.—Pioneer Sand & Gravel Co. v. Hedlund, 34 P.2d 878, 178 Wash. 273.

26 C.J. p 675 note 4.

Removal by occupant having option to purchase

Where owner constructed building for banking purposes under contract whereby bank was to pay for fixtures and to pay ten per cent of cost of building annually, until bank purchased building by reimbursing owner for cost thereof, bank would have no right to remove fixtures.—Myers v. Department of Financial Institutions, 14 N.E.2d 914, 214 Ind. 162.

82. Cal.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 14 Cal.2d 196, superseding App., 86 P.2d 673.

Forfeiture of rights of grantee under conveyance see infra § 50.

83. Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.

26 C.J. p 675 note 5.

84. Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.

26 C.J. p 675 note 5.

Rule as to fixtures between mortgagor and mortgagee and grantor and grantee see supra § 43.

Chattels removable

Cottage placed on land by purchaser's husband.—Alderman v. Baggett, 25 P.2d 532, 134 Cal.App. 501.

Chattels not removable

(1) Buildings.

Cal.—Oakley Co. v. Butler, 59 P.2d 826, 15 Cal.App.2d 572.

Iowa.—O'Bryon v. Weatherly, 206 N. W. 828, 201 Iowa 190.

26 C.J. p 675 note 4 [b] (1).

(2) Electric light plant.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.

(3) Machinery.—Bacigalupi v. Western Machinery Co., 26 P.2d 701, 135 Cal.App. 242.

26 C.J. p 675 note 4 [b] (2).

85. Del.—Martindale v. Bowers Beach Corporation, 118 A. 299, 13 Del.Ch. 288.

86. Or.—Alberson v. Elk Creek Min. Co., 65 P. 978, 39 Or. 552.

26 C.J. p 675 note 9.

Failure to exercise option

Under contract giving right to possession of mining claims, right to make improvements and right to buy claim, where possession was taken and improvements were made but right to buy claims was never exercised, mining machinery placed on premises by person having such right did not become part of realty but was subject to attachment by his creditor.—Dierks v. Fischer, 43 P.2d 162, 96 Colo. 387.

87. Alaska.—Mineral Creek Min. Co. v. Ramsey, 4 Alaska 734.

Wash.—Gasaway v. Thomas, 105 P. 168, 56 Wash. 77, 20 Ann.Cas. 1337.

Default by vendor. If the contract fails of actual consummation through the default of the vendor, the general rule does not apply, and a right of removal exists in favor of the purchaser.[88]

An agreement between the vendor and purchaser according the right of removal will operate in favor of the purchaser,[89] and the right of removal exists, it has been said, when the contract of purchase provides that the purchaser may abandon it if, on testing the value of the property, the result is not satisfactory.[90]

Claimant under purchaser. One who claims, under the purchaser, the articles annexed has no greater rights than the purchaser himself,[91] and this is true as to one to whom, for instance, he has transferred the articles annexed,[92] or mortgaged them,[93] or as to an attaching creditor of the purchaser.[94] However, as shown supra § 20, an agreement for removal entered into by the purchaser with a third person, as in the case of a conditional sale of an article to be annexed, has been regarded as effective in favor of such person.

c. Annexation after Mortgage

In the absence of an agreement or a statute otherwise providing, fixtures annexed by a mortgagor of land after the execution of the mortgage are subject thereto.

In the absence of an agreement or statute otherwise providing, fixtures annexed by a mortgagor of land after making the mortgage are subject thereto.[95] The right of the mortgagee to such fixtures is superior to the right of the mortgagor and those claiming under him.[96] While the mortgage remains

88. Neb.—Waters v. Reuber, 19 N.W. 687, 16 Neb. 99.
26 C.J. p 675 note 6.

89. U.S.—In re Rodgers, D.C.Pa., 143 F. 594.
26 C.J. p 675 note 7.
Agreement between purchaser and third person as against vendor of land see supra § 20.

90. N.C.—Moore v. Vallentine, 77 N.C. 188.

91. Cal.—Oakley Co. v. Butler, 59 P.2d 826, 15 Cal.App.2d 572.
Tex.—Willard v. Geary, Civ.App., 53 S.W.2d 489.
Removal by tenant of purchaser as against vendor of land see supra § 42.

92. Wash.—Pacific Exploitation Co. v. Strickland, 188 P. 766, 110 Wash. 646.
26 C.J. p 675 note 11.

93. Miss.—Perkins v. Swank, 43 Miss. 349.
26 C.J. p 675 note 12.

94. Cal.—Conde v. Sweeney, 116 P. 319, 16 Cal.App. 157.
26 C.J. p 675 note 13.
Levy on articles annexed as personalty see infra § 56.

95. Cal.—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App.2d 66.
D.C.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.
Fla.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed 154 So. 926, 114 Fla. 772—Greenwald v. Graham, 130 So. 608, 100 Fla. 818.
Ga.—Brooks v. John Hancock Mut. Life Ins. Co., 136 S.E. 166, 36 Ga. App. 261.
Ill.—Chappel v. Burwell, 273 Ill. App. 348.
Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230—Solter v. Macmillan, 128 A. 356, 147 Md. 580.
Mass.—Greene v. Lampert, 174 N.E. 669, 274 Mass. 386—Waverley Co-op. Bank v. Haner, 173 N.E. 699, 273 Mass. 477.
Miss.—M. L. Virden Lumber Co. v. Sherrod, 139 So. 813, 816, 167 Miss. 297, citing **Corpus Juris**, and amended 142 So. 508.
N.Y.—Prudential Ins. Co. of America v. Sanford Real Estate Corporation, 282 N.Y.S. 840, 246 App.Div. 567, affirming 284 N.Y.S. 73, 157 Misc. 563.
N.C.—Brown v. North Carolina Joint Stock Land Bank of Durham, 197 S.E. 140, 142, 213 N.C. 594, citing **Corpus Juris.**
N.D.—Klocke v. Troske, 222 N.W. 262, 263, 57 N.D. 404, citing **Corpus Juris.**
Or.—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 163 Or. 31.
Pa.—Diamond v. Butler, 17 Pa.Dist. & Co. 183.
R.I.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
Va.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.
Wis.—Brunswick-Balke-Collender Co. v. Franzke-Schiffman Realty Co., 248 N.W. 178, 211 Wis. 659.
26 C.J. p 728 note 99.
Agreement between mortgagor and third person as affecting rights of prior mortgagee see supra § 19.

Annexation by purchaser of mortgagor's land
A purchaser of the interest of the mortgagor of the land who annexes his own chattels to the land stands in the same position as the mortgagor.—Greenwald v. Graham, 130 So. 608, 100 Fla. 818.

First and second mortgage
Where bowling alleys were installed in mortgaged building, alleys each weighed six tons, rested on specially prepared foundations, and could be removed without damage to building, but floor of building would have to be reconstructed, conditional sales contract stated that alleys were personalty, second mortgagee foreclosed on realty, conveyed premises, and received another second mortgage thereon which stated that alleys were part of realty, second mortgagee went into possession on default of mortgage, first mortgagee foreclosed, and second mortgagee surrendered possession, alleys were part of realty as a matter of law at time first mortgagee foreclosed, so that first mortgagee was not liable for conversion.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

96. Ark.—Boston Mut. Life Ins. Co. v. Power Mfg. Co., 31 S.W.2d 541, 182 Ark. 374.
Miss.—M. L. Virden Lumber Co. v. Sherrod, 139 So. 813, 167 Miss. 297, amended 142 So. 508.
Pa.—McClure v. Atlantic Rock Co., 14 A.2d 124, 339 Pa. 296.
R.I.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.
Removal of fixtures by tenant as against mortgagee of land see supra § 42.

Subsequent chattel mortgagee of fixtures
Ill.—Guardian Life Ins. Co. of America v. Swanson, 3 N.E.2d 324, 286 Ill.App. 278.
N.J.—Sunshine Building & Loan Ass'n v. Meola, 194 A. 251, 122 N.J. Eq. 381.
N.Y.—Rosenthal v. 269 W. 72d St. Corporation, 264 N.Y.S. 744, 148 Misc. 854.
Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342—John E. Mitchell Co. v. Chick-

in force such fixtures may not be removed or otherwise disposed of by the mortgagor, or by one claiming under him, without the consent of the mortgagee.[97] On the other hand, if the chattels do not become part of the realty mortgaged, they do not, under the law of fixtures, become subject to the mortgage.[98]

In determining whether articles placed on the land become part of the realty and subject to the mortgage, the same rules usually apply as in the case when the annexation is previous to a mortgage or conveyance.[99] Occasionally, however, consider-

asha Cotton Oil Co., 47 P.2d 590, 173 Okl. 272.

S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

Subsequent purchaser of fixtures

Fla.—Greenwald v. Graham, 130 So. 608, 100 Fla. 818.

97. Fla.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.

Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.

26 C.J. p 728 note 99 [c].

Severance see supra § 21.

98. Mass.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

N.Y.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.

99. Md.—Bankers' & Merchants' Credit Co. v. Harlem Park Building & Loan Ass'n, 153 A. 64, 160 Md. 230.

Pa.—Uptegrove Lumber Co. v. Inland City Cigar Box Co., 53 York Leg. Rec. 97.

Wis.—McCorkle v. Robbins, 267 N.W. 295, 222 Wis. 12.

26 C.J. p 729 note 1.

No specific rule can be laid down designating when articles not permanently attached to realty become subject to a mortgage thereon.—O'Dell v. Day, 183 N.W. 17, 214 Mich. 566.

Foreclosure of mortgages covering realty on which portable garages were erected did not change nature of garages as personalty.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

Landowner's acceptance of advances from mortgagee for garages was not controlling on question whether portable garages remained personalty.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

Elements considered

(1) Question whether personalty brought onto mortgaged premises becomes part of realty depends on whether real intention is to incorporate the equipment with the mortgaged property so as to make of it real estate, the old test of physical attachment and capability of removal without injury to freehold no longer being the sole test.—In re American Pile Fabrics Co., D.C.Pa., 12 F.Supp. 86, reversed on other grounds, C.C.A., 85 F.2d 961, certiorari denied Bateman v. Ideal Building & Loan Ass'n, 57 S.Ct. 320, 299 U.S. 615, 81 L.Ed. 454.

(2) Whether equipment installed in manufacturing plant has been incorporated in realty so as to become subject to lien of mortgage thereon is primarily a question of intention, and where there is no express provision in mortgage on the subject, such intention is to be determined from mortgage and surrounding circumstances.—Jankey v. Ellis Silk Hosiery Co., D.C.Pa., 16 F.Supp. 927.

(3) The intention of the parties that articles annexed after the making of the mortgage should remain chattels might be shown, although such evidence as to the existing fixtures would be inadmissible as varying the instrument.—Heitkamp v. La Motte Granite Co., 59 Mo.App. 244.

(4) Intention of mortgagor that articles annexed by him should remain personalty keeps them free from the lien.—Ferris v. Quimby, 2 N.W. 9, 41 Mich. 202.

(5) Secret intention does not control.

Mass.—Ferdinand v. Earle, 134 N.E. 603, 241 Mass. 92.

Mich.—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688.

(6) In determining whether church pews constitute personal property as between mortgagee and judgment creditor, character and purpose of annexation and intent of parties are controlling.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.

(7) However, it has been stated that as between mortgagor and mortgagee, intent of party making annexation of chattel to realty can be inquired into, only if annexation was made after execution of mortgage.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

Chattels held subject to mortgage

(1) Awning.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643.

(2) Carpets made especially for rooms of hotel, and glued and nailed to floor.—In re Danville Hotel Co., D.C.Ill., 33 F.2d 162, affirmed in part and reversed in part on other grounds, C.C.A., 38 F.2d 10.

(3) Complete gas, water, and waste vent systems installed in apartment building.—Hannin v. Fisher, 43 P.2d 815, 5 Cal.App.2d 673.

(4) Electric light fixtures.—Sequist v. Fabiano, supra.

(5) Electric pump installed on farm in place of original pump.—In re Hein, D.C.N.Y., 60 F.2d 966.

(6) Elevator system in apartment building.—Broadway Improvement & Investment Co. v. Tumansky, 41 P.2d 553, 2 Cal.2d 465.

(7) Gas steam radiators in apartment building.

Cal.—Broadway Improvement & Investment Co. v. Tumansky, supra.

Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342.

(8) Gas stoves.—Gray v. Prudential Ins. Co. of America, supra.

(9) Heating plant.

Mass.—Stiebel v. Beaudette & Graham Co., 175 N.E. 267, 275 Mass. 108.

Mich.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643.

(10) Hot water heating system installed in cottage.—Heating & Plumbing Finance Corporation v. Becker, 173 A. 198, 167 Md. 222.

(11) Ice hoist, sheds, and housing attached to icehouse.—Menard v. Courchaine, 179 N.E. 167, 278 Mass. 7.

(12) Kitchen furnishings in apartment house.—Mortgage Bond Co. v. Stephens, 74 P.2d 361, 181 Okl. 419.

(13) Linoleum cemented to felt padding cemented to floors of apartment house.—Nicklas v. Pickford, 289 N.Y.S. 174, 160 Misc. 254.

(14) Oil burner.—L. P. Steuart & Bro. v. Capital View Realty Co., 112 F.2d 583, 72 App.D.C. 193.

(15) Oil heating system in apartment house.—Nicklas v. Pickford, supra.

(16) Partition.—Sequist v. Fabiano, 265 N.W. 488, 274 Mich. 643.

(17) Steam boiler, weighing several tons and connected by steam pipes to radiators and coils in the building in which it was installed, and also in a garage on an adjoining lot.—Ferdinand v. Earle, 134 N.E. 603, 241 Mass. 92.

(18) Wall beds in apartment house.

Cal.—Broadway Improvement & Investment Co. v. Tumansky, 41 P.2d 553, 2 Cal.2d 465.

Ill.—Chicago Title & Trust Co. v. Waldman, 5 N.E.2d 737, 288 Ill.App. 21.

Wis.—Leisle v. Welfare Building &

ations are referred to in this connection which are | inapplicable in the case of an annexation previous

Loan Ass'n, 287 N.W. 739, 232 Wis. 440.

Chattels held not subject to mortgage

(1) Church organ.—Peoples-Pittsburgh Trust Co. v. Security Peoples Trust Co., 1 A.2d 520, 133 Pa.Super. 18.

(2) Electric lighting plant on farm.—Equitable Life Assur. Soc. of U. S. v. Chapman, 282 N.W. 355, 225 Iowa 988.

(3) Heating equipment.

Mass.—Stiebel v. Beaudette & Graham Co., 175 N.E. 267, 275 Mass. 108.

Miss.—Hamilton Bros. Co. v. Baxter, 195 So. 335, 188 Miss. 610.

(4) Kitchen cabinets.

Ark.—Anderson v. Southern Realty Co., 4 S.W.2d 27, 176 Ark. 752.

N.Y.—Nicklas v. Pickford, 289 N.Y.S. 174, 160 Misc. 254.

(5) Office furniture.—Lundquist v. Olympia Nat. Bank, 234 P. 453, 133 Wash. 600.

(6) Pews and benches.—Diamond v. Art Contracting Co., 262 N.Y.S. 471, 147 Misc. 88.

(7) Rollaway beds installed in apartment buildings.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342.

(8) Tapestry on walls of hotel, tables, beds, settees, chairs, lamps, draperies, curtains, and shades.—In re Danville Hotel Co., D.C.Ill., 33 F. 2d 162, affirmed in part and reversed in part on other grounds, C.C.A., 38 F.2d 10.

Buildings and other structures

(1) Whether building placed on land without mortgagee's knowledge or consent shall be deemed part of mortgaged land, or as removable before foreclosure, depends on whether building as placed is of such character that it may be inferred that it was placed on mortgaged land with intention of having it permanently remain thereon.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed in 154 So. 926, 114 Fla. 772.

(2) Permanent building held subject to mortgage.—Stutsman v. State, 275 N.W. 387, 67 N.D. 618.

(3) Barn constructed on farm held subject to mortgage.—Botsford Lumber Co. v. State, 246 N.W. 902, 188 Minn. 247.

(4) Residence held subject to mortgage.—Federal Land Bank of New Orleans v. Cook, 155 So. 249, 179 La. 857.

(5) Portable garages held not subject to mortgage.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

(6) Sectional portable building resting on wooden posts held personalty and not subject to mortgage.—Hannah v. Frawley, 188 N.E. 385, 285 Mass. 28.

Gas stoves

(1) Gas stoves installed in apartment building or hotel held subject to mortgage.

Ill.—Chicago Title & Trust Co. v. Waldman, 5 N.E.2d 737, 288 Ill.App. 21.

Wis.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440.

(2) Gas stoves in apartment building held not subject to mortgage.—Anderson v. Southern Realty Co., 4 S.W.2d 27, 176 Ark. 752.

Machinery, appliances, and equipment.

(1) Generally, any machinery that is necessary to the operation of a mill or factory is subject to a prior real estate mortgage on the premises, executed by the owner.—Danville Holding Corporation v. Clement, 16 S. E.2d 345, 178 Va. 223.

(2) In determining whether machinery placed in an industrial establishment covered by mortgage is subject to the lien of the mortgage, question is whether machinery forms an integral part of the complete going concern, and not whether any of the machinery can be removed from the mortgaged premises without physical injury to the realty.—McClure v. Atlantic Rock Co., 14 A.2d 124, 339 Pa. 296.

(3) Whether machinery, because of its character, use, and manner, or its attachment to the premises, becomes a part of the realty, and therefore subject to the lien of a mortgage thereon, is largely a matter of intention.—Goldthorp v. Keenan, 181 N.W. 777, 192 Iowa 22.

(4) Where it is contemplated when mortgage is given that mortgage should cover operating plant, machinery and appliances subsequently placed in the plant and necessary to functioning of complete plant are "fixtures" and bound by the lien of the mortgage.—McClure v. Atlantic Rock Co., supra—Pennsylvania Chocolate Co., for Use of Commonwealth Trust Co. of Pittsburgh v. Hershey Bros., 175 A. 694, 316 Pa. 292, 99 A.L.R. 139—Commonwealth Trust Co. of Pittsburgh v. Harkins, 167 A. 278, 312 Pa. 402.

(5) Where lien on completed manufacturing plant was contemplated, that building was erected to be suitable for number of manufacturing or other purposes did not take machinery of plant out of lien of mortgage. —Commonwealth Trust Co. of Pittsburgh v. Harkins, supra.

(6) Machinery, appliances, and equipment held subject to mortgage.

Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419.

Wis.—McCorkle v. Robbins, 267 N.W. 295, 222 Wis. 12.

(7) Renewals and replacements of machinery, repairs or betterments, improvements in nature of accessions to go with plant held subject to mortgage.—Lundquist v. Olympia Nat. Bank, 234 P. 453, 133 Wash. 600.

(8) Machinery placed in bakery plant held subject to mortgage.—Danville Holding Corporation v. Clement, 16 S.E.2d 345, 178 Va. 223.

(9) Machinery placed in bottle factory held subject to mortgage.—Bass v. Southern States Bottle Co., 136 So. 159, 17 La.App. 304.

(10) Machines used in soft drink manufacturing and bottling plant held subject to mortgage.—McCorkle v. Robbins, supra.

(11) Machinery placed in chocolate manufacturing plant held subject to mortgage.—Pennsylvania Chocolate Co., for Use of Commonwealth Trust Co. of Pittsburgh v. Hershey Bros., 175 A. 694, 316 Pa. 292, 99 A.L.R. 139.

(12) Machinery placed in tire factory held subject to mortgage.—Holland v. Bartholomew, C.C.A.Pa., 93 F.2d 533.

(13) Rings, molds, and cores in tire factory held subject to mortgage.—Solter v. Macmillan, 128 A. 356, 147 Md. 580.

(14) Machinery held not subject to mortgage.

U.S.—In re Hemmer, D.C.N.Y., 280 F. 414.

N.J.—Sunshine Building & Loan Ass'n v. Meola, 194 A. 251, 122 N.J. Eq. 381.

(15) Machinery installed by subsequent owner of land held not subject to mortgage.—McConnell v. Chelton Trust Co., C.C.A.Pa., 282 F. 105.

(16) Tools, cogwheels, and other articles of personalty that were in mill building when it was sold under mortgage foreclosure, if unconnected with, and unattached to, fixtures or freehold, were personalty and did not become purchaser's property.—Brown v. North Carolina Joint Stock Land Bank of Durham, 197 S.E. 140, 213 N.C. 594.

(17) Pumps in oil refinery held not subject to mortgage.—Mogul Producing & Refining Co. v. Southern Engine & Pump Co., Tex.Civ.App., 244 S.W. 212.

Refrigerators and refrigerating systems

(1) Refrigerating system held subject to mortgage.—Dolan v. Doher-

to the mortgage, such as the purpose for which the loan was ostensibly secured,[1] the mortgagee's right to any appreciation in the value of the security,[2] and a provision in the instrument extending it to after-acquired property.[3]

Removal by mortgagee after redemption. A mortgagee has been allowed, after a decree of redemption, to remove a structure placed by him on the land, in so far as this did not involve material injury to the freehold.[4]

Trade fixtures. That the articles were annexed by the mortgagor for purposes of trade gives him no right to remove them.[5] Even though the realty mortgage was made by one who was or became a member of a firm which was occupying the mortgaged premises, chattels annexed by the firm have been regarded as subject to the mortgage,[6] although there are cases indicating a contrary view.[7]

§ 50. —— Forfeiture of Rights under Sale or Conveyance

Articles or structures annexed by the grantee to the land conveyed may be forfeited to the grantor on the happening of a condition specified in the conveyance.

A grantee, holding under a conveyance containing a forfeiture clause, loses his right to articles annexed, or structures erected, by him in case of the enforcement of a forfeiture for breach of the condition named.[8] Further, as shown supra § 49 b, a purchaser under a land contract loses his right to

ty, 272 N.Y.S. 892, 242 App.Div. 671, modified on other grounds 275 N.Y.S. 1004, 242 App.Div. 897.

(2) Refrigerating system in apartment house held subject to mortgage.
Cal.—Broadway Improvement & Investment Co. v. Tumansky, 41 P.2d 553, 2 Cal.2d 465.
Ill.—Chicago Title & Trust Co. v. Waldman, 5 N.E.2d 737, 288 Ill. App. 21.
Mich.—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688.
Okl.—Gray v. Prudential Ins. Co. of America, 77 P.2d 563, 182 Okl. 342.

(3) Electric refrigerators which were mentioned in application for mortgage loan and which were connected to refrigerating unit in basement of mortgaged apartment building as part of complete unit were fixtures.—Leisle v. Welfare Building & Loan Ass'n, 287 N.W. 739, 232 Wis. 440.

(4) Refrigeration machine to keep beer cool held subject to mortgage.—Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656.

(5) Refrigerators in apartment building held not subject to mortgage.
Ark.—Anderson v. Southern Realty Co., 4 S.W.2d 27, 176 Ark. 752.
Me.—Cumberland County Power & Light Co. v. Hotel Ambassador, 183 A. 132, 134 Me. 153.
Mass.—Stiebel v. Beaudette & Graham Co., 175 N.E. 267, 275 Mass. 108—Commercial Credit Corporation v. Gould, 175 N.E. 264, 275 Mass. 48.

(6) Combination gas refrigerators and ranges installed in apartment house held not subject to mortgage.—Nicklas v. Pickford, 289 N.Y.S. 174, 160 Misc. 254.

Transmission lines
Where an operating company, which has leased from a consolidated interurban railroad company all its lines encumbered with mortgages covering after-acquired property, builds new transmission lines, partly on railroad rights of way, and partly on separate property, such separate property becomes an appurtenant to the contiguous railroad property, and all such transmission lines become fixtures and subject to the mortgages.—Citizens' Savings & Trust Co. v. Cincinnati & D. Traction Co., 140 N.E. 380, 106 Ohio St. 577.

In Kentucky
(1) Chattels attached to the realty by the mortgagor after the execution of the mortgage, and not mentioned therein, are not subject to the lien unless so attached that a removal will impair it, this view being based on the fact that in that state the mortgagor retains the legal title and has power and control over the property.—Clore v. Lambert, 78 Ky. 224.

(2) General rule seems to be that chattel placed on realty after execution of mortgage does not pass under mortgage lien unless it cannot be removed without injury to freehold.—Gas & Electric Shop v. Corey-Scheffel Lumber Co., 13 S.W.2d 1009, 227 Ky. 657, 62 A.L.R. 208.

(3) In view of other and later decisions, however, the element of annexation does not seem to be the absolute controlling element.—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800.
26 C.J. p 729 note 1 [b] (2).

1. Fla.—Seedhouse v. Broward, 16 So. 425, 34 Fla. 509.
26 C.J. p 729 note 2.

2. Pa.—Muehling v. Muehling, 37 A. 527, 181 Pa. 483, 59 Am.S.R. 674.

3. U.S.—In re Russell Falls Co., D.C.Mass. 249 F. 260, affirmed 253 F. 536, 165 C.C.A. 206, certiorari denied 39 S.Ct. 259, 249 U.S. 602, 63 L.Ed. 797.
Ohio.—Citizens' Savings & Trust Co. v. Cincinnati & D. Traction Co., 140 N.E. 380, 106 Ohio St. 577.
26 C.J. p 729 note 4.
After-acquired property as subject to real estate mortgage see the C.J.S. title Mortgages § 185, also 41 C.J. p 480 note 97 et seq.

4. Mass.—Taylor v. Townsend, 8 Mass. 411, 5 Am.D. 107.

5. Fla.—Greenwald v. Graham, 130 So. 608, 100 Fla. 818.
Neb.—Frost v. Schinkel, 238 N.W. 659, 121 Neb. 784, 77 A.L.R. 1381.
26 C.J. p 729 note 5.

6. Mass.—Thompson v. Vinton, 121 Mass. 139.

7. Mich.—Robertson v. Corsett, 39 Mich. 777.
26 C.J. p 729 note 7.

8. U.S.—St. Andrews Bay Lumber Co. v. Drummond, C.C.A.Fla., 299 F. 238.
26 C.J. p 729 note 9.
Severance by grantee see supra § 21.
Rails in place when deed to right of way was made were a part of the realty, which revested in grantor according to terms of deed, on abandonment of operation on the line.—St. Andrews Bay Lumber Co. v. Drummond, C.C.A.Fla., 299 F. 238.

School building
(1) Where land was conveyed for the purpose of a public school on the condition that the land would revert to the grantor when it ceased to be used for a public school, on the happening of the condition the building erected by the grantee reverted to the grantor.—New Hebron Consol. School Dist. v. Sutton, 118 So. 303, 151 Miss. 475.

(2) However, in view of various statutory provisions as to powers of school trustees, it has been held that a building erected for public school did not vest in grantor of land on forfeiture of land by reason of discontinuance of school.—Allen v. Franks, Tex.Civ.App., 166 S.W. 384.

articles annexed by him owing to his failure to perform his contract.

§ 51. —— Vendor's Lien on Fixtures

Articles which pass with the land on a conveyance thereof, or which are annexed by the grantee as parts of the land after conveyance, are subject to the grantor's lien for the unpaid purchase price.

Articles which pass on the conveyance of the realty as being part thereof are subject to the grantor's lien for the price,[9] as are articles so annexed by the grantee of the land as to become part thereof.[10] In determining whether an article is a fixture for this purpose the same considerations apply as ordinarily apply between grantor and grantee and mortgagor and mortgagee.[11]

§ 52. Between Seller and Buyer of Chattels and Their Privies

Whether an article becomes a fixture as between the seller and buyer thereof is primarily a question of intention.

The general rules as to what constitutes fixtures are treated supra §§ 1–11. In determining whether an article becomes a fixture, as between the seller and buyer thereof, the intention of the parties is the real test.[12]

The effect of an agreement between the seller and the buyer of chattels, express or implied, that the chattels sold shall remain personalty, as where they are conditionally sold or the price is secured by a purchase-money chattel mortgage, including the effect as against third persons, is discussed supra §§ 13–20. Loss of a vendor's statutory privilege on movable property by incorporation into immovable property is considered in the C.J.S. title Sales § 399, also 55 C.J. p 901 note 72.

§ 53. Between Owner of Easement and Owner of Land Subject Thereto

As between the owner of an easement and the owner of the land, a chattel annexed may retain its character as personalty.

Chattels annexed to land under a mere easement granted by the owner of the land may, as between the owner of the easement and the owner of the land, retain their personal character.[13] As between a railroad having a right of way and the owner of the land subject thereto, rails and other equipment laid on the right of way, only as incident to the use of the right of way, and with no intention that they

9. Ala.—Huddleston v. Fuller, 155 So. 556, 229 Ala. 74.
26 C.J. p 729 note 10.
Property subject to vendor's lien generally see the C.J.S. title Vendor and Purchaser § 385, also 66 C.J. p 1228 note 55 et seq.

10. Ky.—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800.
26 C.J. p 730 note 11—66 C.J. p 1231 note 81.
Effect of agreement between grantee and owner of chattel as against holder of vendor's lien see supra § 20.

Holder of vendor's lien as good-faith purchaser

Holder of vendor's lien purchasing at foreclosure sale did not stand in position of good-faith purchaser as to dairy equipment installed by vendee after creation of vendor's lien, as regards question whether title to dairy equipment passed under foreclosure proceeding.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Tex.Civ.App., 100 S.W.2d 1029, error dismissed.

11. Tex.—McJunkin v. Dupree, 44 Tex. 500.
26 C.J. p 730 note 13.
Fixtures as between grantor and grantee and mortgagor and mortgagee see supra §§ 43–49.

Machinery

(1) Machinery installed on milling property after creation of vendor's lien was "fixtures" and subject to vendor's prior lien as against lien of subsequent mortgage, where it appeared that all machines were attached to freehold, were necessary for operation of mill, and were not only adaptable but actually applied to use for which purchased.—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800.

(2) Machinery substituted for other machinery on the premises at the inception of the lien becomes subject thereto.—Van Valkenburgh v. Ford, Tex.Civ.App., 207 S.W. 405.

(3) A vendor of timber land by an executory contract giving the purchasers the right to cut timber thereon did not have a lien on a portable sawmill and boiler placed on the land by bankrupt, a timber company, under a contract with the purchasers and with the knowledge and consent of the vendor, bankrupt not having assumed any of the indebtedness to the vendor, and the machinery having been placed on blocks and posts, and not permanently attached to the land.—In re Northern Hardwood Co., D.C.N.Y., 278 F. 554.

In Kentucky

(1) A chattel annexed to the freehold by the purchaser after his purchase does not become a part of the realty subject to the vendor's lien unless the purchaser so intended or it has been so incorporated into the realty as not to be removable without injuring the property.—Clore v. Lambert, 78 Ky. 224.

(2) "It is true that the law has been stated in the above form, Clore v. Lambert, 78 Ky. 224, and for a long time the question, whether a thing was a fixture or not, depended alone on whether it was in fact so annexed to the realty that it could not be removed without injury to the freehold; but . . . the ancient rule has been enlarged and liberalized with the increase of varying business interests, and the present current of authority is opposed to any arbitrary or unyielding rule upon the subject."—First State Bank of Eubank v. Crab Orchard Banking Co., 75 S.W.2d 517, 255 Ky. 800.

12. Ark.—Continental Gin Co. v. Clement, 4 S.W.2d 901, 176 Ark. 864.
Cal.—Bell v. Bank of Perris, 125 P. 2d 829, 52 Cal.App.2d 66.

Culverts sold to county and placed in roads ceased to be personal property.—Dixie Culvert Mfg. Co. v. Perry County, 12 S.W.2d 10, 178 Ark. 454.

13. U.S.—Wiggins Ferry Co. v. Ohio & M. Ry. Co., Ill., 12 S.Ct. 188, 142 U.S. 396, 35 L.Ed. 1055.
26 C.J. p 680 note 54.
Annexation of chattels under license as implying agreement for removal see supra § 14.

shall remain after the easement has terminated or been abandoned, retain their character as personalty, although affixed to the soil.[14] This rule is always subject, among other tests, to the test of intention of the parties to make the article annexed a permanent accession to the freehold, and intention in this respect is gathered as well from the circumstances and purposes of the annexation as from the expressed intention of the parties.[15]

§ 54. Rights and Remedies of Creditors and of Purchasers at Execution Sale

The rights and remedies of creditors and of purchasers at an execution sale of property which may or may not have become a part of the realty are discussed, where the question arises in connection with the levy of an execution on the property as realty, in § 55 infra, and where it has arisen in connection with a levy of an execution on articles annexed as personalty in § 56.

Examine Pocket Parts for later cases.

§ 55. —— Levy on Land

In general, a levy on, and sale of, realty will pass to the purchaser all fixtures thereon.

Whether or not articles have become a part of the realty so as to pass by levy of execution on the land or a sale thereunder is determined in general by the principles, discussed supra §§ 43–51, which apply as between the mortgagor and mortgagee of land or the vendor and purchaser of land and their privies.[16] The general rule is that a levy on, and sale of, realty will pass to the purchaser all fixtures and improvements thereon;[17] however, if a fixture is detached and converted into personalty by the agreement of the owners and the lien creditors, it does not pass under a levy on, and sale of, realty.[18]

Articles annexed, or buildings erected, after sale. Articles annexed by the debtor after the sale, but before the sheriff's deed, pass under the deed;[19] but it has been held that a building erected by the purchaser at an execution sale may be removed by him on redemption when not annexed to the soil.[20]

§ 56. —— Levy on Articles Annexed as Personalty

a. In general

b. Articles removable by agreement or under lease

a. In General

Where an execution debtor has the right to treat chattels annexed to realty as personalty, the execution creditor has, as a rule, a similar right.

14. Va.—Hagan v. Richmond Trust Co., 139 S.E. 317, 148 Va. 528—Talley v. Drumheller, 130 S.E. 385, 143 Va. 439.

26 C.J. p 680 note 54, p 671 note 57.

Right of railroad to remove tracks or other equipment on abandonment of right of way see the C.J.S. title Railroads § 117, also 51 C.J. p 616 note 90 et seq.

Trade fixtures

(1) It is sometimes said that they are in the nature of trade fixtures, although the cases are not always placed on that ground.—Talley v. Drumheller, supra.

(2) Trade fixtures as between landlord and tenant see supra § 38.

Spur tracks

U.S.—Hubbard v. Missouri Pac. R. Co., D.C.Ark., 288 F. 945.

Tex.—Texas & N. O. R. Co. v. Schoenfeld, 146 S.W.2d 724, 136 Tex. 173, reversing, Civ.App., 124 S.W.2d 910.

Abandonment of equipment

Where owners of servient estates had made no claim of title to rails of unused tramway, and raised no objection to rails remaining and gave no notice to remove them, owner had right to presume that status quo of rails remained unchanged.—Talley v. Drumheller, 130 S.E. 385, 143 Va. 439.

Removal by purchaser of railroad without franchise

Section houses erected by railroad on premises over which railroad had easement to run railroad tracks, to assist railroad in carrying on railroad's business, could not be removed after abandonment of railroad and its insolvency, by purchaser of all railroad property, without franchise, from receiver having custody of property, under court order.—Jackson v. Crutchfield, 191 S.E. 468, 184 Ga. 412.

15. Va.—Hagan v. Richmond Trust Co., 139 S.E. 317, 148 Va. 528.

16. U.S.—La Crosse & M. R. Co. v. James, Wis., 6 Wall. 750, 18 L.Ed. 854.

26 C.J. p 730 notes 17–19.

Particular articles held part of realty

(1) Theater stage appliances and theater seats.—Bender v. King, C.C. Mont., 111 F. 60, affirmed 116 F. 813, 54 C.C.A. 317, certiorari denied 23 S. Ct. 843, 187 U.S. 643, 47 L.Ed. 346.

(2) Other specific articles see 26 C.J. p 730 note 19 [a].

Particular articles held not part of realty

(1) Frigidaire.—Stallknecht v. Gilbert Appliance Corporation, 259 N.Y.S. 189, 144 Misc. 626.

(2) Other specific articles see 26 C.J. p 730 note 19 [b].

17. Pa.—Wright v. Chestnut Hill Iron Ore Co., 45 Pa. 475.

In spite of agreement that building remain personalty as between the bailor and bailee of a garage erected on the residence property of the bailee, its erection as a building constituted it a part of the freehold as to an innocent purchaser at a sheriff's sale of the freehold under a preexisting mortgage.—Diamond v. Butler, 17 Pa.Dist. & Co. 183.

Erection on another's land

However, where a building was erected on the land of another under an agreement that the landowner should obtain an interest in the building if he would pay off a judgment which was a lien on the land, it was held that until the judgment was so paid off the building remained the personal property of the person constructing it, so as not to pass under a sale of the land on execution against its owner.—Yater v. Mullen, 24 Ind. 277.

18. Neb.—Dewey v. Walton, 48 N. W. 960, 31 Neb. 819.

Pa.—Harlan v. Harlan, 20 Pa. 303.

19. Colo.—Hayes v. New York Gold Min. Co., 2 Colo. 273.

20. Cal.—Tyler v. Decker, 10 Cal. 435.

Inasmuch as the right of a creditor to treat chattels annexed to the freehold as personal property depends on the right of the debtor to do so, it follows that whatever fixtures the debtor is at liberty to remove may be seized and removed by the execution creditor,[21] and the purchaser at a sale has a right to enter on the premises and remove them.[22]

Articles which are so annexed to land as to be part thereof cannot be levied on as personalty under an execution against the owner of the land.[23] The execution creditor or levying officer cannot, by severing articles from the realty, render them subject to the execution.[24]

Whether a particular article is to be regarded as part of the realty, so as not to be subject to execution as personalty, is, it seems, determined by the same criteria as in cases arising between grantor and grantee and mortgagor and mortgagee,[25] which are discussed supra §§ 43–51, 55. Although it has been said that the rule to be applied is the one governing cases arising between landlord and tenant,[26] as discussed supra §§ 33–42. Plaintiff and defendant in execution may, if no other person then has the right to object, agree that an article levied on shall be sold as personal property, and it will pass by a sale as such.[27] Where the execution creditor, after levying on articles as personalty, consents to their attachment to the realty, they become fixtures and he thereby releases his execution lien.[28]

A parol transfer of fixtures does not sever them so as to render them liable to execution as property of the transferee.[29]

Articles to be attached. Articles not yet attached to the land, but intended to be attached thereto, have in some instances been regarded as not subject to levy as personalty;[30] but there is authority for a contrary view.[31]

Articles accidentally severed, as by a flood, have been held not to be thereby converted into personal property so as to be subject to execution.[32]

b. Articles Removable by Agreement or Under Lease

Articles annexed to another's land under an agreement or lease reserving the right of removal are generally subject to levy and sale as personalty under execution against their owner.

The effect of agreements as determining whether or not an article affixed or annexed to real property has become part of the realty is considered supra §§ 12–20, and the effect of such agreement between landlord and tenant, supra § 15; and for the rule of law generally applicable in determining whether removable fixtures are realty or personalty as between landlord and tenant and their privies, see supra § 37. Since articles and structures erected on, or annexed to, another's land under an agreement reserving the right of removal are generally regarded as retaining their character as personalty, they have been held subject to levy and sale as such under execution against their owner;[33] accordingly, articles which are removable by the tenant under a lease have generally been held subject to levy and sale as chattels on execution against him.[34] On the other hand, articles held to be part of the realty as between a lessee and his attaching creditors pass on an execution sale of his interest in the realty, notwithstanding an agreement with his lessor that he might remove them on the expiration of the

21. Pa.—Ritchie v. McAllister, 14 Pa.Co. 267.
26 C.J. p 732 note 31 [a].

22. Pa.—Ritchie v. McAllister, 14 Pa.Co. 267.

23. N.Y.—Preferred Mut. Fire Ins. Co. of Chenango County v. Wager, 252 N.Y.S. 56, 140 Misc. 909.
26 C.J. p 730 note 20, p 732 note 31 [b].

Lessee of minerals also owner of land

Where scales, limestone cars, iron on sidings, wire cable, iron on the incline, wheels, axles, three bank cars, railroad iron in the quarry, and a tramway, belonging to a limestone quarry, were placed on the property by the owner of the land, although he was merely lessee of an undivided two thirds of the minerals in the land, and the lease reserved the right to remove all fixtures, the lesser title merged into the greater and the articles in question were part of the freehold and not subject to execution against the owner as personalty.—Ritchie v. McAllister, 14 Pa.Co. 267.

24. Ill.—Titus v. Mabee, 25 Ill. 257.
Iowa.—Dubuque Congr. Soc. v. Fleming, 11 Iowa 533, 79 Am.D. 511.

25. U.S.—Giddings v. Freedley, Vt. 128 F. 355, 63 C.C.A. 85, 65 L.R.A. 327, affirming 119 F. 438.
26 C.J. p 731 note 22, p 732 note 31.

26. Ind.—Taffe v. Warnick, 3 Blackf. 111, 23 Am.D. 383.

27. Pa.—Mitchell v. Freedley, 10 Pa. 198.
26 C.J. p 731 note 20 [a].

28. W.Va.—Patton v. Moore, 16 W. Va. 428, 37 Am.R. 789.

29. Del.—Rice v. Adams, 4 Del. 332.

30. W.Va.—McFadden v. Crawford, 15 S.E. 408, 36 W.Va. 671, 32 Am. S.R. 894.

31. N.H.—Carkin v. Babbitt, 58 N.H. 579.

32. Me.—Goddard v. Bolster, 6 Me. 427, 20 Am.D. 320.
W.Va.—Patton v. Moore, 16 W.Va. 428, 37 Am.R. 789.

33. U.S.—Glenn v. W. C. Mitchell Co., 9 F.2d 599, 600, citing **Corpus Juris.**
26 C.J. p 731 note 26.
Agreement by parties in execution for sale of article as personalty see supra § 56 a.

34. Colo.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.
Okl.—Uncle Sam Oil Co. v. Union Petroleum Co., 216 P. 443, 90 Okl. 135.
24 C.J. p 731 note 24.

If the tenant has lost his right of removal, the execution creditor has no right to levy on the articles.—Friedlander v. Ryder, 47 N.W. 83, 30 Neb. 783, 9 L.R.A. 700.

lease;[35] and, where a buyer of chattels under a contract stipulating that they shall be regarded as the personal property of the seller, with the right of removal until paid for, attaches the property to real estate so as to make them fixtures, the chattels have been regarded as fixtures against everyone except the seller, so that a judgment creditor of the buyer, or a purchaser at an execution sale, may not claim the property as personal property by virtue of the contract.[36]

§ 57. —— Distress

The distress of fixtures is considered in the C.J.S. title Landlord and Tenant, § 681, also 36 C.J. p 599 note 81–p 560 note 90.

§ 58. Estoppel as Regards Fixtures

One may be estopped by his conduct or declarations from claiming as realty an article annexed to land, or from claiming that an article is not part of the realty.

By reason of conduct or declarations, one may be estopped from claiming that an article annexed to the realty is part of it,[37] as where he has treated it as personalty for the purpose of sale [38] or chattel mortgage;[39] but the fact that a deed or mortgage describes or treats articles as chattels has been held not to preclude the grantee or mortgagee from claiming them as part of the realty,[40] and the fact that a mortgagee of realty has taken a chattel mortgage on chattels attached has been held not to prevent him from claiming them as realty.[41]

On the other hand, one may be precluded by estoppel from claiming that an article is not part of the realty and is, therefore, removable,[42] as where he has treated it as realty for the purpose of sale[43] or lease.[44] The lease of land by a licensee, without mention of the article in question, has been held not to estop him from claiming it as his personal property.[45]

Effect of attachment or action in replevin. The fact that one attached certain articles as personal property was held not to estop him from claiming them as fixtures and part of the real estate.[46] However, an attachment of the articles in question as personalty,[47] or a suit in replevin to recover property,[48] has been held strong evidence against the person bringing the proceeding that the articles were not realty.

§ 59. Actions Relating to Fixtures

Actions involving fixtures are controlled by general rules.

For injuries to rights in fixtures, actions at law to recover possession or damages will lie, as appears infra § 60 a; in a proper case relief may be had in equity, as appears infra § 60 b.

Laches. An action to recover the possession or value of an article as personalty is not barred by laches where demand therefor was made within a few months after defendant acquired the realty, and the action followed.[49]

§ 60. —— Nature and Form

a. Actions at law
b. Relief in equity; injunctions

a. Actions at Law

In so far as an article, including a fixture annexed by a tenant, is regarded as part of the realty, it is not the subject of trover, replevin, detinue, or any action lying only for personalty; but in so far as an article attached to land or severed therefrom is regarded as personalty, or may, at the election of the owner of the article, be considered such, such an action will lie. An article that has become part of the realty may be the subject of an action of trespass quare clausum fregit.

Since trover lies only in the case of personal property, the general rule is that the action cannot

35. Cal.—McNally v. Connolly, 11 P. 320, 70 Cal. 3.
26 C.J. p 731 note 24 [b].

36. Nev.—Arnold v. Goldfield Third Chance Min. Co., 109 P. 718, 32 Nev. 447.

37. Pa.—Meigs' Appeal, 62 Pa. 28, 1 Am.R. 372.
26 C.J. p 733 note 41.

38. Me.—Folsom v. Moore, 19 Me. 252.
26 C.J. p 733 note 39.

39. Ill.—Ballou v. Jones, 37 Ill. 95.
26 C.J. p 733 note 40 [a], [c].

40. Ill.—Jenney v. Jackson, 6 Ill. App. 32.
N.J.—Keve v. Paxton, 26 N.J.Eq. 107.

41. Ill.—Fifield v. Farmers' Nat. Bank, 35 N.E. 802, 148 Ill. 163, 39 Am.S.R. 166.

42. Pa.—Levin v. McClaskey, 97 A. 682, 252 Pa. 520.
26 C.J. p 733 note 42 [b], [c].

Conditional vendor

(1) Conditional vendor selling machinery to contractor held estopped to claim it from owner of the land who paid for the machinery.—Harter v. Delno, 194 P. 300, 49 Cal.App. 729—26 C.J. p 733 note 42 [d].

(2) Conditional seller held not estopped by delay to claim the property covered by its contract.—Holland Furnace Co. v. Lithuanian Building & Loan Ass'n of Waukegan, 3 N.E.2d 934, 286 Ill.App. 453.

Failure to assert rights and bidding at auction held insufficient to establish estoppel.—Hanrahan v. O'Reilly, 102 Mass. 201—23 C.J. p 733 note 42 [f].

43. Ind.—Dutton v. Ensley, 51 N.E. 380, 21 Ind.App. 46, 69 Am.S.R. 340.

44. Mich.—Bracelin v. McLaren, 26 N.W. 533, 59 Mich. 327.

45. S.C.—Sullivan v. Jones, 14 S.C. 362.

46. Pa.—Christian v. Dripps, 28 Pa. 271.

47. Ill.—Hewitt v. General Electric Co., 45 N.E. 725, 164 Ill. 420—Hewitt v. Watertown Steam Engine Co., 65 Ill.App. 153.

48. Ill.—Long v. Cockern, 21 N.E. 201, 128 Ill. 29.

49. Cal.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.

be maintained for the recovery of fixtures which have been annexed to the soil or freehold,[50] and it will not, as a rule, lie on account of fixtures which have not been severed from the soil, and hence are part of the realty.[51] Articles which are not so annexed as to become part of the realty, and hence are merely chattels, are a proper subject for this form of action.[52]

For the same reason, the action of replevin does not lie for articles so annexed to the realty as to be part thereof,[53] as, for example, a house [54] or a turbine pump constituting part of a building's cooling system;[55] but articles not part of the realty, although attached to it, may be replevied,[56] as, for example, a counter and showcase,[57] mirrors,[58] or buildings resting on blocks.[59]

Likewise, detinue will not lie for articles which have become part of the realty.[60]

An action of trespass de bonis asportatis will lie against one wrongfully removing fixtures.[61] Trespass quare clausum will lie in favor of the owner of the freehold against one wrongfully entering and severing fixtures therefrom;[62] but such an action does not lie for the removal of an article, although attached, if not a part of the realty.[63] A lessor not in possession cannot sue in trespass for the wrongful removal of fixtures placed on the premises by the lessee.[64]

Effect of severance. Where, under the rules of law discussed supra § 21, the actual or constructive severance of a fixture has again made it personalty, it is a proper subject for an action of trover;[65] under such rules, after the wrongful severance of fixtures from the land, they are, at the option of the owner, personalty, and it has been generally held that he may then bring trover for their value against the wrongdoer.[66] There is, however, authority that to constitute a conversion there must be a taking distinct from the severance.[67] It is ordinarily sufficient that plaintiff has the right of immediate possession of the articles severed;[68] but trover has been held not to lie for fixtures severed by one in possession of the land under claim of title, since this would involve a trial of the title to land.[69]

Replevin also lies to recover fixtures which have been severed.[70] After the wrongful severance of articles constituting part of the realty, the landowner may ordinarily bring replevin for such articles as chattels [71] or he may elect to sue for damages to the land.[72] He cannot, however, maintain replevin against one in actual adverse possession of the land under claim of title, because then the action would be made the means of litigating the title to realty.[73]

Detinue will lie for an article which has, by reason of severance, resumed its character of personalty.[74] The owner of land may in this form of ac-

50. N.Y.—American Union Tel. Co. v. Middleton, 80 N.Y. 408.
65 C.J. p 25 note 55.

51. Mich.—Osborn v. Potter, 59 N. W. 606, 101 Mich. 300.
26 C.J. p 733 note 43.

52. Minn.—Shapira v. Barney, 14 N. W. 270, 30 Minn. 59.

Particular articles

(1) Furnace.—Colonial Hill Co. v. Moncrief Furnace Co., 158 S.E. 343, 43 Ga.App. 204.

(2) A glass case, a stand of drawers, and a mirror in a restaurant, screwed or nailed to the ceiling.—Guthrie v. Jones, 108 Mass. 191.

53. N.J.—Rinbrand Well Drilling Co. v. L & H Theatres, 20 A.2d 358, 126 N.J.Law 446, affirmed 23 A.2d 404, 127 N.J.Law 604.
26 C.J. p 735 note 67.

54. Okl.—Davis v. Spurrier Lumber Co., 15 P.2d 131, 159 Okl. 261.

55. N.J.—Rinbrand Well Drilling Co. v. L & H Theatres, 20 A.2d 358, 126 N.J.Law 446, affirmed 23 A.2d 404, 127 N.J.Law 604.

56. **Litigation of other issues**

Where conditional seller, bringing replevin action for furnace against prior mortgagee of realty to whom premises were conveyed, was entitled to judgment for possession of furnace, defendant was not entitled to litigate legal rights arising from removal of old furnace by plaintiff.—Holland Furnace Co. v. Bird, 21 P. 2d 825, 45 Wyo. 471.

57. Ill.—Wells v. Merle & Heaney Mfg. Co., 66 Ill.App. 292.

58. N.J.—Cranston v. Beck, 56 A. 121, 70 N.J.Law 145.

59. Cal.—Pennybecker v. McDougal, 48 Cal. 160.

60. N.C.—Pemberton v. King, 13 N. C. 376.
Va.—McFadden v. Crawford, 15 S.E. 408, 36 W.Va. 671, 32 Am.S.R. 894.

61. N.H.—Wadleigh v. Janvrin, 41 N. H. 503, 77 Am.D. 780.
26 C.J. p 735 note 66.

62. Me.—Symonds v. Harris, 51 Me. 14, 81 Am.D. 553.
26 C.J. p 735 note 64.

63. Miss.—Terry v. Robins, 13 Miss. 291.
26 C.J. p 735 note 65.

64. Ala.—Middleton v. Alabama Power Co., 71 So. 461, 196 Ala. 1.

65. Mo.—Denvir v. Crowe, 9 S.W.2d 957, 960, 321 Mo. 212, quoting **Corpus Juris.**
26 C.J. p 734 note 59.

66. Ga.—Blain v. Corbin, 180 S.E. 854, 51 Ga.App. 472.
26 C.J. p 734 note 60.

67. N.Y.—American Union Tel. Co. v. Middleton, 80 N.Y. 408.

68. Ala.—Middleton v. Alabama Power Co., 71 So. 461, 196 Ala. 1.
26 C.J. p 735 note 62.

69. Pa.—Harlan v. Harlan, 15 Pa. 507, 53 Am.D. 612.
26 C.J. p 735 note 63.

70. Ark.—Hensley v. Brodie, 16 Ark. 511.
N.Y.—Cresson v. Stout, 17 Johns. 116, 8 Am.D. 373.

71. Cal.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 14 Cal.2d 196, superseding, App., 86 P.2d 673.
26 C.J. p 736 note 77.

72. Ky.—Martin v. Ferguson, 103 S. W. 257, 31 Ky.L. 590, rehearing denied 104 S.W. 698, 31 Ky.L. 1095.

73. Pa.—Harlan v. Harlan, 15 Pa. 507, 53 Am.D. 612.
26 C.J. p 736 note 78.

74. Ark.—Hensley v. Brodie, 16 Ark. 511.

tion recover an article wrongfully severed,[75] provided, as in the case of trover or replevin, defendant is not in possession of the land and claiming adversely.[76]

Articles removable by agreement, under the rules of law discussed supra §§ 12–20, may be the subject of an action of trover even before severance;[77] the refusal of the person in possession of the land to allow the removal of such articles by their owner has been regarded as constituting a conversion,[78] although a mere failure to deliver the articles to their owner on demand has not been so regarded.[79] Where articles removable by agreement are regarded as part of the realty, trover will not lie.[80] Articles which are personalty, or removable, by agreement, although affixed to the land, may be recovered in replevin.[81]

Articles removable by tenant. In so far as trade and domestic fixtures annexed by the tenant, although removable by him, are regarded as part of the realty, as considered supra §§ 15, 33–42, they are not the subject of an action of trover;[82] but in so far as such removable fixtures are regarded as personalty, trover will lie therefor, even before their severance,[83] the action of the landlord in preventing the removal of the fixtures by the tenant being regarded as a conversion,[84] as is his appropriation of the tenant's fixtures.[85]

As is true with respect to trover, fixtures removable by a tenant under a lease, where regarded as part of the realty, cannot be recovered in replevin by the tenant or one claiming under him;[86] but, where such fixtures are regarded as personalty, they may be so recovered.[87]

As in the case of trover or replevin, if, as between landlord and tenant, fixtures are a part of the land, they are not the subject of an action of detinue.[88]

Articles annexed by wrongdoer. One who wrongfully annexes another's personal property to his own land does not thereby convert it into realty so as to prevent the owner from maintaining trover therefor;[89] and the application of the general rule that after wrongful severance of fixtures from the land the owner at his election may bring trover against a wrongdoer is not affected by the fact that the article is reattached to another freehold.[90] Under the apparent weight of authority, if an article is wrongfully annexed to another's land without the assent of the owner of the article, it retains its chattel character for the purpose of replevin by such owner;[91] on the other hand, it has been held that replevin will not lie, because the article has become part of the realty.[92]

Action by mortgagee or person in similar capacity. A mortgagee of realty having merely a lien cannot, on the ground that an article removed from the mortgaged premises is a fixture, maintain an action in replevin for the possession of the article.[93] A mortgagee having legal title to the land, how-

75. Ala.—Adler v. Prestwood, 24 So. 999, 122 Ala. 367.
26 C.J. p 736 note 84.

76. Ala.—Adler v. Prestwood, supra—Cooper v. Watson, 73 Ala. 252.

77. Ga.—International Clay Machinery Co. v. Moultrie Banking Co., 129 S.E. 877, 34 Ga.App. 396.
Md.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.
Mich.—Lu-mi-Nus Signs Co. v. Regent Theatre Co., 231 N.W. 128, 250 Mich. 535.
Minn.—Pennig v. Schmitz, 249 N.W. 39, 189 Minn. 262.
26 C.J. p 734 note 54.

78. Ill.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill.App. 561.
26 C.J. p 734 note 56.

79. N.J.—Temple Co. v. Penn Mut. Life Ins. Co., 54 A. 295, 69 N.J. Law 36.
26 C.J. p 734 note 57.

80. Nev.—Prescott v. Wells, 3 Nev. 82.

81. Mich.—United Store Fixture Co. v. Grubiak, 284 N.W. 602, 287 Mich. 671.
Minn.—Pennig v. Schmitz, 249 N.W. 39, 189 Minn. 262.
Utah.—Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.
26 C.J. p 736 note 75.

82. Mass.—Looney v. Trimount Theatres, 184 N.E. 683, 282 Mass. 275.
26 C.J. p 734 note 46.

83. Minn.—Shapira v. Barney, 14 N.W. 270, 30 Minn. 59.
26 C.J. p 734 note 47.

84. Minn.—Stout v. Stoppel, 14 N.W. 268, 30 Minn. 56.
26 C.J. p 734 note 48.

85. Pa.—Cassell v. Crothers, 44 A. 446, 193 Pa. 359.
26 C.J. p 734 note 49.

86. Mass.—Lord v. Rowse, 80 N.E. 822, 195 Mass. 216—Brown v. Wallis, 115 Mass. 156.

87. Ga.—Raymond v. Strickland, 52 S.E. 619, 124 Ga. 504, 3 L.R.A.,N.S., 69.
26 C.J. p 735 note 72, p 736 note 75 [a].

88. N.C.—Pemberton v. King, 13 N.C. 376.

89. Ill.—Bartley v. Rogers, 104 Ill. App. 164.
Ky.—Dawson v. Powell, 9 Bush 663, 15 Am.R. 745.
But where ties were taken and used by a contractor for building a railroad, and the road was in use before it was delivered to the railroad company, the owner of the ties, after waiting until such delivery to claim his property, could not, it was held, bring trover against the company, since the only conversion took place before the company had any control over the property.—Detroit & B. C. R. Co. v. Busch, 6 N.W. 90, 43 Mich. 571.

90. Ga.—Woods v. McCall, 67 Ga. 506.

91. Mont.—Eisenhauer v. Quinn, 93 P. 38, 36 Mont. 368, 122 Am.S.R. 370, 14 L.R.A.,N.S., 435.
26 C.J. p 735 note 73.

92. Ill.—Ogden v. Stock, 34 Ill. 522, 85 Am.D. 332.
26 C.J. p 736 note 74.

93. Kan.—Clark v. Reyburn, 1 Kan. 281.
Neb.—Moore v. Moran, 89 N.W. 629, 64 Neb. 84.

ever, may, it has been held, bring an action in replevin to recover a fixture removed from the land, such as a house, provided it is not attached to the soil of another freehold,[94] and he may have an action of trespass quare clausum fregit.[95] The grantee in a security deed may bring an action for the recovery as personalty of a chattel annexed to realty as an "irremovable fixture," if wrongfully severed, although attached to realty again and bought as such by an innocent purchaser.[96] The purchaser of a house with notice that it is subject to a deed of trust to secure the payment of a bond, if he removes such house from the premises, is liable in damages to the trustee in an action to recover the balance due on the bond.[97]

b. Relief in Equity; Injunctions

A fixture may be the subject of equitable relief, as by injunction.

Unless the remedy at law is adequate,[98] a fixture may be a proper subject for equitable relief, as in a proceeding to protect the interests of a bailor,[99] a lessee,[1] a mortgagee,[2] a purchaser at a foreclosure sale,[3] the vendor in a conditional sale,[4] or the owner of property which has been appropriated and not paid for.[5] A cross bill cannot be maintained in foreclosure proceedings to obtain a decree that a warm-air furnace and certain of its piping and connections were personal property and not subject to complainant's mortgage where, prior to its filing, the sheriff levied on, and had made a sale of, the property in question.[6]

N.J.—Kircher v. Schalk, 39 N.J.Law 335.

Right to house

Where the mortgagor of real property had the right to possession and the right to remove any fixture unless such removal unreasonably impaired the mortgage security, an action will not lie by the holder of a note secured by a mortgage on the realty against the purchaser of a house removed therefrom after commencement of an action to foreclose the mortgage, although the purchaser had actual knowledge of the mortgage lien, where no showing is made that he acted fraudulently.—Tomlinson v. Thompson, 27 Kan. 70.

94. Ill.—Dorr v. Dudderar, 88 Ill. 107.

Bona fide purchase

However, even if as between the mortgagor and mortgagee the latter is regarded as having the legal title to the land, where fixtures are severed from the realty by a mortgagor in possession before foreclosure and afterward sold to one who buys in good faith and for value and with merely constructive notice of the mortgage, they cannot be recovered by the mortgagee from such purchaser in an action of replevin.—McKelvey v. Creevey, 45 A. 4, 72 Conn. 464, 77 Am.S.R. 321.

A mortgagee in rightful possession can maintain an action in replevin for the possession of fixtures removed from the mortgaged premises.—Cresson v. Stout, 17 Johns., N.Y., 116, 8 Am.D. 373.

95. Me.—Smith v. Goodwin, 2 Me. 173.

96. Ga.—Burpee v. Athens Production Credit Ass'n, 15 S.E.2d 526, 65 Ga.App. 102.

Furnace

Ga.—Burpee v. Athens Production Credit Ass'n, supra.

97. N.C.—Beck v. Zimmerman, 75 N.C. 60.

98. **Replevin**

Where mortgagee brought replevin to repossess house removed from mortgaged land by party who had erected house, such party could not subsequently maintain chancery action to determine right of ownership and possession of house on ground that it had remained personalty, since on that theory he had adequate remedy at law in the replevin action.—Paeth v. Squire, 269 N.W. 175, 277 Mich. 283.

99. Pa.—Wetherill v. Gallagher, 60 A. 905, 211 Pa. 306, 107 Am.S.R. 575.

1. **Right to remove improvements**

Where a lease of land to the government provided that on the termination of the lease the government could remove buildings and improvements placed on the land by it, and the lessor prevented such removal, the government could maintain a suit in equity to have its rights adjudicated, and for assistance in its efforts to remove the property, the lessor being insolvent and the remedy at law uncertain.—Mack Copper Co. v. U. S., C.C.A.Cal., 26 F.2d 664.

2. **Building removed from mortgaged premises**

Where, after the execution of a mortgage on a lot and the buildings thereon, the buildings are removed to another lot without the mortgagee's consent, the mortgagee, or a bona fide assignee of the mortgage, does not lose his lien thereon as against one claiming under a sale and conveyance by quitclaim deed from the mortgagor, although such purchaser may have had no knowledge that the buildings were so removed; and, in an action to foreclose the mortgage on the lot and the buildings so removed, where the purchaser is made a defendant by reason of his claim to the buildings as a purchaser from the mortgagor, the right of complainant to a lien on the buildings may be determined.—Partridge v. Hemenway, 50 N.W. 1084, 89 Mich. 454, 28 Am.S.R. 322.

3. **Removal of "fixtures"**

Where, pending foreclosure sale pursuant to the final decree, one buys and removes "fixtures" from a building covered by the mortgage, the chancellor might properly, at the instance of the purchaser at the foreclosure sale, issue an order requiring the buyer either to return the "fixtures" to the general master or show cause why they should not be returned.—Greenwald v. Graham, 130 So. 608, 100 Fla. 818.

4. Ala.—Town of Camden v. Fairbanks, Morse & Co., 86 So. 8, 204 Ala. 112.

Lien against leased premises denied

Where a lessee installs a fixture to which the vendor retains title until payment in full under a contract expressly so providing and providing that the fixture should remain personalty, the vendor cannot have a lien against the land for the balance due on the bankruptcy of the lessee.—Nu-Way Boiler & Engineering Co. v. Morensky, 268 Ill.App. 211.

5. U.S.—Ocmulgee River Lumber Co. v. Ocmulgee Valley Ry. Co., D.C. Ga., 251 F. 161, 164.

Public use as no defense

"Usually public interests are not well conserved at the instance of those who seize, appropriate, and do not pay for the property of others; and the state, which is the appropriate guardian of the public, is not a party here."—Ocmulgee River Lumber Co. v. Ocmulgee Valley R. Co., supra.

6. N.J.—Workingmen's Building & Loan Ass'n v. Del Vecchio, 151 A. 282, 8 N.J.Misc. 563.

Injunctions. In the absence of an adequate remedy at law, and in a proper case, as where the right to, or the nature of, the article is in dispute, an injunction may issue to stay the removal of a fixture,[7] at the suit of the landlord,[8] the owner of rights in the premises,[9] a contract vendor,[10] a purchaser under contract of purchase from the lessor,[11] a mortgagee,[12] a purchaser at a foreclosure sale,[13] or a judgment creditor.[14] An injunction may also issue to protect the rights of one who claims as personalty articles attached to the land.[15]

§ 61. —— Parties

In so far as a right of intervention is recognized in the local practice, parties interested may intervene in pending litigation as to fixtures.

In particular circumstances, a mortgagee has been held not to be a necessary party defendant to an action involving a fixture;[16] but a complaint against the owner of realty to recover a fixture to which the vendor retained title has been held demurrable for defect of parties defendant where the vendee was not made a party.[17]

Intervention. Parties interested in pending litigation as to fixtures may intervene in so far as a right of intervention in favor of interested parties may be recognized in the local practice.[18]

§ 62. —— Pleading

General rules of pleading have been applied in actions involving fixtures. Authorities differ as to whether, in replevin of an article which may be a fixture, the complaint must aver facts showing it to be personalty.

In replevin of an article which may be a fixture, the complaint has been required to allege such facts as will show it to be personalty;[19] but the contrary has also been held.[20] Since a building on land

7. Conn.—Camp v. Charles Thacher Co., 52 A. 953, 75 Conn. 165.
26 C.J. p 736 note 86.

Injunction pendente lite
N.J.—Ashby v. Ashby, 46 A. 528, 59 N.J.Eq. 536.

8. Mass.—Trask v. Little, 64 N.E. 206, 182 Mass. 8.
26 C.J. p 736 note 86 [c] (3).

Tenant
(1) A tenant may be enjoined from removing fixtures during the term.—Walker v. Tillis, 66 So. 54, 188 Ala. 13, L.R.A.1915A 654.
(2) He may also be enjoined from doing so at the end of the term.—Holmes v. Standard Pub. Co., N.J.Ch., 55 A. 1107.

Conversion not involved
The action of the landlord in seeking an injunction to restrain the removal of the fixtures by the tenant has been regarded as not involving a conversion.—Felcher v. McMillan, 61 N.W. 791, 103 Mich. 494—26 C.J. p 734 note 52.

9. N.Y.—Davies v. Iroquois Gas Corporation, 4 N.E.2d 742, 272 N.Y. 572, reversing 288 N.Y.S. 927, 248 App.Div. 670, reversing 292 N.Y.S. 111, 161 Misc. 103.

10. Wis.—Taylor v. Collins, 8 N.W. 22, 51 Wis. 123.
26 C.J. p 736 note 86 [c] (4).

11. Ill.—Davis v. Carsley Mfg. Co., 112 Ill.App. 112.

Tenant enjoined.—Davis v. Carsley Mfg. Co., supra.

12. Cal.—Pomeroy v. Bell, 50 P. 683, 118 Cal. 635.
26 C.J. p 736 note 86 [c] (1).

13. Md.—Dudley v. Hurst, 8 A. 901, 67 Md. 44, 1 Am.S.R. 368.

14. Pa.—Witmer's Appeal, 45 Pa. 455, 84 Am.D. 505.

15. **Purchaser at execution sale**
Where a boiler, engine, and sawmill were placed on land under a lease providing that they should not become a part of the realty, and plaintiff's assignor purchased them under execution as personalty, plaintiff might enjoin the sheriff from thereafter levying on the property under a subsequent attachment against the property as realty.—Hershberger v. Johnson, 60 P. 838, 37 Or. 109.

16. **In builder's action against subsequent purchaser of land** to recover possession of house erected with consent of defendant's vendor, and under agreement that house should remain personal property of builder, and be removable, mortgagee of defendant was held not a necessary party where defendant had actual notice of the agreement by which title to the house was reserved, notwithstanding the fact that the house was not expressly reserved by the deed. —Workman v. Henrie, 266 P. 1033, 71 Utah 400, 58 A.L.R. 1346.

17. N.Y.—Otis Elevator Co. v. Rochester Friendly Home, 169 N.Y. S. 389, 391, 103 Misc. 76.

In action to recover elevator installed in defendant's building under a conditional sales contract made with a contractor, "the vendee should be made a party, so that the entire controversy between the parties interested may be determined in one action. That is the principle that should control, rather than the doctrine that he should not be brought in if the court can determine the controversy without prejudice to the rights of others or saving their rights. The defendant should not be put to the double hazard of a recovery in this action and also in a subsequent action by the vendee. The vendee should be made a party, so as to be bound by the judgment."—Otis Elevator Co. v. Rochester Friendly Home, supra.

18. **Mortgagee of realty** was allowed to intervene where the vendor of a chattel annexed sought to have it sold to pay his claim.—Swoop v. St. Martin, 34 So. 426, 110 La. 237.

Conditional vendor of chattel was allowed to intervene where a purchaser of the realty claimed the chattel as a fixture.—Thomson v. Smith, 83 N.W. 789, 111 Iowa 718, 82 Am.S. R. 541, 50 L.R.A. 780.

Chattel mortgagee was allowed to intervene where one claimed under a mechanic's lien as against a mortgagee of the realty.—Edwards & Bradford Lumber Co. v. Rank, 77 N. W. 765, 57 Neb. 323, 73 Am.S.R. 514.

Claim as to property included in mortgage
Those who claim as their own specific property included in a mortgage by another have a right, under Code Prac. art 396, to urge their ownership in a proceeding to foreclose the mortgage and seek to have the specific property they claim released from the effects of the mortgage.—Bank of Terrebonne v. Engeron, La.App., 140 So. 58.

19. Or.—Burdick v. Tum-A-Lum Lumber Co., 179 P. 245, 91 Or. 417.

Building
Or.—Enterprise Mercantile Co. v. Cunningham, 165 P. 224, 84 Or. 319.
26 C.J. p 736 note 80.

20. N.J.—Brearley v. Cox, 24 N.J. Law 287.

Character of building, as realty or personalty, is to be settled by evidence.—Elliott v. Black, 45 Mo. 372—26 C.J. p 736 note 81.

is prima facie a part of the land, one seeking to recover a building in replevin must aver it to be personalty.[21] In actions of replevin, averment of performance, or waiver of performance by the landowner, of a condition precedent to the removal of a building has been required,[22] and particular averments as to demand for possession have been held sufficient.[23] In an action for the possession of personal property, a mortgagee whose mortgage is not due but who is in lawful possession, need not allege that his security is not ample or will become insufficient.[24] Under a statute designed to afford protection against conditional contracts, if the vendor seeks to recover the property covered by such a contract when annexed to realty, he must allege that he has filed his contract as required by the statute or that the landowner knew its terms.[25]

One suing for the conversion of an article affixed to the realty must allege that the article was removable and not part of the realty;[26] but in an action to recover possession of real estate and for damage to certain buildings thereon, a specific allegation that plaintiff owned the buildings is not essential, where he alleges that he owned the land from which they were severed.[27] In an action for damages involving an article that may be a fixture, a particular complaint has been held sufficient.[28]

In an action to foreclose a chattel mortgage, where the jurisdiction of the court was questioned on the ground that the petition showed the property to be attached to the realty, an allegation as to the giving of a parol chattel mortgage and the subsequent giving of a written one was sufficient to show an intention on the defendant's part that the property in question should not become part of the realty.[29]

Under a statute providing for a vendor's lien on fixtures in certain instances, a petition by an intervener in a receivership proceeding, claiming a vendor's lien, has been held sufficient to state a cause of action.[30]

Counterclaim; cross complaint; reply to counterclaim. In actions involving fixtures, general rules have been applied with respect to the filing of a counterclaim,[31] cross action,[32] cross complaint,[33] or reply to a counterclaim.[34]

Issues and proof; admissibility of evidence under pleadings. In actions involving fixtures, general rules have been applied with respect to issues,[35]

21. Ill.—Chatterton v. Saul, 16 Ill. 149.
N.J.—Brearley v. Cox, 24 N.J.Law 287.

22. Kan.—Ala v. Schwinn, 46 P.2d 604, 142 Kan. 379.

23. N.Y.—Perfect Lighting Fixtures Co. v. Grubar Realty Corporation, 239 N.Y.S. 286, 228 App.Div. 141.

24. Or.—Johnson v. Pacific Land Co., 164 P. 564, 84 Or. 356.

25. N.Y.—Otis Elevator Co. v. Rochester Friendly Home, 169 N.Y. S. 389, 103 Misc. 76.

Complaint held sufficient
In replevin by conditional seller, complaint alleging contract between seller and contractor for goods which were so affixed to realty as to be severable, with knowledge and assent of owner, stated a cause of action against owner under Personal Property Law § 67, notwithstanding failure to allege time of annexation of fixtures or date of filing of alleged contract.—Paragon Plumbing Supply Corporation v. Umansky Plumbing & Heating Co., 9 N.Y.S.2d 639, 170 Misc. 428.

26. **Bakery oven**
Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.

27. Ind.—Cromie v. Hoover, 40 Ind. 49.

28. Mont.—Helena & Livingston Smelting & Reduction Co. v. Northern Pac. Ry. Co., 205 P. 224, 62 Mont. 281, 21 A.L.R. 1080.

29. Tex.—Malone v. Burdick, Civ. App., 58 S.W.2d 1048.

30. U.S.—Tangipahoa Bank & Trust Co. v. Kent, C.C.A.La., 70 F.2d 139.

31. **Counterclaim by realty mortgagee**
In action in replevin by conditional vendor to recover machine resisted by purchaser's realty mortgagee, who foreclosed mortgage and claimed title to machine as result of such foreclosure, if vendor in installing machine wrongfully removed old machine, mortgagee should have counterclaimed for its value or should have otherwise appropriately pleaded.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N.Y.S.2d 424.

32. **Wrongful levy on building**
Where suit is instituted by distress warrant to secure payment of rent and cross action for wrongful levy on a building is filed, and tenant contends that the building is his and that only the lot is rented, he must allege the circumstances under which the building was erected and by virtue of which he became owner, in order to show that the building was not a fixture and part of the lot.—Counts v. Dobbs, Tex.Civ.App., 235 S.W. 716.

33. **Cross complaint to determine removability**
In an action to foreclose a mortgage on realty, a company which put coal bunkers on the land could properly file a cross complaint to determine whether they were part of the realty or might be removed.—National Mfg. & Engineering Co. v. Farmers' Trust & Savings Bank of Kokomo, 185 N.E. 146, 204 Ind. 535.

34. **In proceeding to foreclose mortgage** on realty, reply to counterclaim by conditional vendor of fixtures, alleging that chattels cannot readily be removed and that mortgagee did not assent to reservation of rights, as required by statute, was held sufficient.—Harmony Realty Co. v. Bronxwick Holding Corporation, 242 N.Y.S. 125, 137 Misc. 16.

35. **In replevin by conditional vendor** of silo to recover it from purchaser of farm under execution, where plaintiff alleged that defendant took and unjustly detained the silo, which plaintiff owned, and in his pleas defendant denied the taking, and claimed the title to the silo, the plea of non cepit was more or less meaningless, and the only issue was the title to the property, the determination of that issue depending on whether or not the silo was to be regarded as a fixture.—Lewis v. E. F. Schlichter Co., 112 A. 282, 137 Md. 217.

Pleading affirmative defense
In action by former possessor against mortgagee for conversion of bowling alleys, where mortgagee de-

proof,[36] and the admissibility of evidence under the pleadings.[37]

§ 63. —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

A presumption as to whether an article attached or annexed to realty has become part of it or remains personalty may arise from the character of the article and the circumstances of the attachment. Except in the case of a building, the burden of proof is generally on one who asserts that an article attached to realty is part of it.

Where the annexation or attachment of an article was made by the owner of the land, the presumption is that the article became a fixture and part of the realty;[38] this presumption may be overcome by evidence that it was not the intent of such owner that it should become part of the realty.[39] On the other hand, if the annexation was by a tenant, and was of such character that the article might be removed without material injury to the freehold, the presumption is that he did not intend to make a permanent accession to the freehold, but intended to reserve to himself title to the article annexed.[40] Likewise, where structures were erected on land by a licensee, consent on the part of the landowner that the structures remain the property of the licensee will be presumed, in the absence of facts showing a different intention.[41] Under a statutory provision that, where a person affixes his property to the land of another, without an agreement permitting him to remove such property, the property affixed belongs to the owner of the land, one in possession of land as owner is presumed to be the owner of the fixtures on it;[42] and the person asserting the contrary must prove it by a preponderance of the evidence.[43]

As a rule, a building is presumed to be a part of the realty,[44] and belongs prima facie to the own-

nied conversion and plaintiff admitted in reply that mortgagee had obtained title and possession of the premises in which the alleys were located, the issue as to whether alleys were part of the realty was raised by pleadings, so that mortgagee was not required specially to plead the fact as an affirmative defense.—Lesser v. Bridgeport-City Trust Co., 198 A. 252, 124 Conn. 59, 123 A.L.R. 687.

36. **Admission by answer**
In action for conversion of personalty, defendant's answer, admitting that underground tanks were still installed at filling station taken over by him, but that he had at all times been ready and willing to pay reasonable value thereof or to permit plaintiff to remove them from the premises, could be considered in determining whether the tanks constituted fixtures, and defendant's lease of the tanks to another could be considered on the question of appropriation.—Colonial Oil Co. v. American Oil Co., D.C.S.C., 43 F.Supp. 718.

37. **Allegation of value of house**
In action for conversion of house not a part of soil, allegation that house had certain value was held to warrant admission of testimony concerning value of toilet, electric wiring, gas pipes, lavatory, and similar appliances, since they were permanently attached to the house.—Davenport v. Taylor County Tuberculosis Ass'n, Tex.Civ.App., 72 S.W.2d 407.

Plea of general issue
Under a statute providing that plea of general issue in an action of replevin shall put in issue not only the detention, but also the property of plaintiff and his right of possession, in an action of replevin to recover chairs installed for lessee pursuant to agreement reserving title as security, evidence that seller had actual notice of defendant lessor's rights under lease was admissible under general issue.—Luce v. Scott Realty Co., 167 N.W. 869, 201 Mich. 587.

38. Md.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.
Mich.—Tyler v. Hayward, 209 N.W. 801, 235 Mich. 674.
Tex.—Clark v. Clark, Civ.App., 107 S.W.2d 421.
Wash.—Nearhoff v. Rucker, 287 P. 658, 156 Wash. 621.

Structures of a permanent nature which are erected on the land by the owner in fee simple are, as a general rule, presumed to become a part of the realty.—Pioneer Sand & Gravel Co. v. Hedlund, 34 P.2d 878, 178 Wash. 273.

Person in possession under contract to buy
The presumption is that articles attached to the realty by one in possession of a leasehold estate in realty under a contract to buy it have become part of the realty.—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.

"**As between mortgagor and mortgagee,** valuable chattels placed upon the land by the former and calculated to be of great benefit to the property, are presumed to be a part of the land."—Metropolitan Life Ins. Co. v. Kimball, 94 P.2d 1101, 1109, 163 Or. 31.

House
Tex.—Clark v. Clark, Civ.App., 107 S.W.2d 421.

Removable flagpole
Wash.—Hall v. Dare, 252 P. 926, 142 Wash. 222, 50 A.L.R. 635.

39. Md.—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.

40. Mo.—Handlan v. Stifel, App., 232 S.W. 245.

Buildings
Ky.—McClelland v. Murphy, 264 S.W. 733, 204 Ky. 329.

41. Cal.—Gosliner v. Briones, 204 P. 19, 187 Cal. 557.

Dwelling house
There is a presumption that a dwelling house constructed on land by a temporary tenant or licensee is personal property and belongs to the tenant.—O'Neil v. Quilter, Tex.Civ.App., 236 S.W. 116.

42. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App.2d 696.
Mont.—Cheadle v. Bardwell, 26 P.2d 336, 95 Mont. 299.

Rule applied to fences
Mont.—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.

43. Mont.—Cheadle v. Bardwell, 26 P.2d 336, 95 Mont. 299—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.

44. Fla.—Burbridge v. Therrell, 148 So. 204, 110 Fla. 6, followed 154 So. 926, 114 Fla. 772.
Idaho.—Perkins v. Bundy, 247 P. 751, 42 Idaho 560.
26 C.J. p 654 note 30.

er of the land.[45]

There is some authority, chiefly in the form of dicta, to the effect that articles not attached to realty otherwise than by their own weight are prima facie personalty, that articles affixed to land in fact, although only slightly, are prima facie realty, and that the burden of proof is on the one contending that the former is realty or that the latter is personalty;[46] such a view does not, however, appear to accord with statements to the effect that even though an article is physically attached to the land it is not to be regarded as a part thereof in the absence of proof of an intention to make it a permanent accession thereto.[47] In the absence of evidence of abandonment by a tenant, where title to the articles in question has not been asserted by the owner of the servient estate, there is a presumption that the articles remain on the land with the consent of the servient owner.[48]

Where machinery is indispensable to the operation of a particular factory, there is a presumption that the intention of the owner in placing the machinery there was to affix it permanently to the building and make the machinery part of the realty.[49] Where machinery is more or less permanently attached to the buildings,[50] or where it is essential to the business as a going concern,[51] or where the buildings were constructed particularly for certain machinery and removal would injure either its intrinsic value or its physical condition or both,[52] the law presumes that the machinery was intended to remain permanently as part of the realty; and the presumption under such facts has been termed "practically irrebuttable."[53] Under a statute providing that machinery used in working or developing a mine is to be deemed affixed to it, there is a presumption that such a machine was intended to become part of the realty.[54] The presumption is that a purchaser of premises containing an electric refrigerator bargained for the realty only as including the refrigerator, in the absence of a contrary showing.[55]

The burden of proof has been held to be upon one asserting that the circumstances of the annexation are such as to make an article part of the realty;[56] so, inasmuch as machinery is generally personal property, the burden of proof is on one asserting that it has become part of the realty.[57] On

Mortgage

Prima facie, buildings affixed to land become a part thereof, and, in the absence of other showing, a mortgage of them would not require the formalities of a chattel mortgage.—Perkins v. Bundy, 247 P. 751, 42 Idaho 560.

Overcoming presumption

Where this presumption has been incorporated in a statute, it may be overcome by evidence which discloses that the building was constructed in such a manner or under such circumstances as to preclude the intent to have the building become part of the realty.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

45. Mont.—Shipler v. Potomac Copper Co., supra.

46. Ill.—Owings v. Estes, 100 N.E. 205, 256 Ill. 553, 43 L.R.A.,N.S., 675.
26 C.J. p 662 note 85.

47. Iowa.—Johnson v. Mosher, 47 N. W. 996, 82 Iowa 29.
26 C.J. p 662 note 86.

48. Va.—Talley v. Drumheller, 130 S.E. 385, 143 Va. 439.

Tramway

Va.—Talley v. Drumheller, 130 S.E. 385, 143 Va. 439.

49. U.S.—In re Theodore A. Kochs Co., C.C.A.Ill., 120 F.2d 603—In re Highland Silk Co., D.C.Pa., 41 F. 2d 404.

50. U.S.—Kennedy v. Crumlish, C.C. A.Pa., 85 F.2d 665.

51. U.S.—Kennedy v. Crumlish, supra.

52. U.S.—Kennedy v. Crumlish, supra.

53. U.S.—Kennedy v. Crumlish, supra.

54. Mont.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.

The presumption is rebutted by evidence of an express agreement that machinery so affixed may be removed, as between the parties to the agreement and those having notice of it.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.

55. N.J.—Public Service Electric Gas Co. v. Sanford, 161 A. 507, 10 N.J.Misc. 885.

56. U.S.—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 9 F.Supp. 112.
26 C.J. p 654 note 29.

Affirmative showing of accession

To justify decision that lessee has no right to remove fixtures, accession to realty must affirmatively appear.—Shields v. Hansen, 230 N.W. 51, 201 Wis. 349.

In detinue the burden is on defendant.—Calhoun County v. Art Metal Constr. Co., 44 So. 876, 152 Ala. 607.

Purchaser

(1) In suit by purchaser of premises to prevent removal therefrom of stock dining car after expiration of lease, burden was on him to prove that car was part of realty.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.

(2) But in suit by purchaser of theater at mortgage foreclosure sale to restrain removal of furnishings and equipment installed by mortgagor's lessee, defendant had burden of proving that purchaser would be unjustly enriched if such furnishings and equipment were left in theater.—McHale v. Rosenblatt, 184 A. 172, 56 R.I. 120, 168.

Extension of time for removal

Burden of proof was held to be on tenant asserting oral extension of time in replevin for annexed article.—Vanhoozer v. Gattis, 214 S.W. 44, 139 Ark. 390.

In Louisiana

Where the evidence established that factory in which improvements were installed was operated by trustee for benefit of partnership in control and not for record owner, corporation obtaining title to factory from record owner could establish title to improvements only on proof that they were so merged with realty as to be immovables by nature.—Folse v. Loreauville Sugar Factory, App., 156 So. 667, followed in Builders' Supply Co. v. Loreauville Sugar Factory, App., 156 So. 672.

57. U.S.—Houlton Sav. Bank v. American Laundry Machinery Co., D.C.Me., 9 F.Supp. 112.

Tests

In absence of proof that machinery is installed in such manner that

the other hand, since a building, as a rule, is presumed to be realty, the burden of proof is on one who claims that it is personalty.[58] Under a statutory provision that, when a person affixes his property to the land of another without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, the burden is on one who seeks to remove such property to show that it was placed there with permission to remove it.[59]

In suits involving conditional sales, the burden of proof has been variously placed on one who claims the article in question to be personalty[60] or to have become realty,[61] depending on the particular facts of each case or the construction of the statutory provisions held applicable; and the burden is on a purchaser from a conditional vendee of an article affixed to the realty of such vendee to show that he is a bona fide innocent third party.[62]

A realty mortgagee claiming priority over a chattel mortgagee, with respect to articles annexed, has the burden of establishing that he acquired his lien on the land in good faith.[63]

its removal will result in material injury to it or the realty, or that the building in which it is placed was specially designed to house it, or that its installation was of a permanent nature, the machinery does not become a "fixture" and a part of the realty, but remains "personalty."—In re Whitlock Avenue in City of New York, 16 N.E.2d 281, 278 N.Y. 276, reversing 1 N.Y.S.2d 655, 253 App.Div. 719, reargument denied In re Opening and Extending Whitlock Avenue, Borough of Bronx, City of New York, 2 N.Y.S.2d 1010, 253 App.Div. 810, and reargument denied In re Whitlock Avenue in Borough of Bronx, City of New York, 17 N.E. 2d 135, 278 N.Y. 714—Holt v. Male, 29 N.Y.S.2d 111.

In Louisiana

In a suit involving a cotton press, gin stands, and other equipment, where ownership of the movable and immovable property is not in the same person, the burden of proof is on one who alleges that the movable property cannot be detached from the immovable without injury.—Buckley v. Lindsey Mercantile Co., 5 La.App. 467.

58. Mont.—Shipler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86. Ohio.—McGowan v. McGowan, 18 N. E.2d 419, 59 Ohio App. 397.

Chattel mortgagee seeking to recover dwelling house apparently part of farm has burden of proof.—O'Bryon v. Weatherly, 206 N.W. 828, 201 Iowa 190.

Fences

The burden of showing that fences are not a part of the realty rests on the party who so asserts.—Brown v. Bridges, 31 Iowa 138.

School building

A consolidated school district, in order to recover a building owned by a former public school, must allege and prove that it had been erected by patrons with the landowner's consent, either express or implied, that it should not become part of the realty.—New Hebron Consol. School Dist. v. Sutton, 118 So. 303, 151 Miss. 175.

Wooden building on brick foundation

Mass.—Meeker v. Oszust, 30 N.E.2d 246, 307 Mass. 366.

59. Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.

60. **Attachment by one in possession under contract to buy**

The conditional seller of a chattel attached to realty by one in possession of a leasehold estate under a contract to buy the land has the burden of overcoming the presumption that the chattel became part of the realty.—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.

As against mortgagee

(1) Where elevators and their equipment were installed in a hotel by seller, after execution of a mortgage with after-acquired property clause, the burden is on the seller, claiming right of removal as against the mortgagee, to prove, not only that the sale was conditional with title reserved until full payment, but also that the elevators were not so attached to the building as to lose their character of personalty and to have become a part of the freehold.—Wheat v. Otis Elevator Co., C.C.A.Fla., 23 F.2d 152.

(2) But, where gas ranges were of such a determinate character as movables that they remained personal property after their annexation to the real estate, independently of any agreement between the buyer and seller, in an action by conditional seller to recover ranges claimed by mortgagees thereof as buyers under foreclosure sale, mortgagees had burden to establish themselves as bona fide purchasers of ranges.—Orbon Stove Co. v. Schroeder, 271 N.Y.S. 242, 241 App.Div. 832.

As against purchaser at receiver's sale

Under a statutory provision that all conditional sales of personalty where the property is placed in the possession of the vendee shall be absolute as to all bona fide purchasers and subsequent creditors unless a memorandum of the sale is filed as directed by statute, the burden is on a plaintiff who did not record his conditional sale of fixtures to show that the creditors were not subsequent and that defendant did have notice of the sale and was, therefore, not bona fide.—Weber Showcase & Fixture Co. v. Waugh, D.C.Wash., 42 F. 2d 515.

61. **Burden on mortgagee**

(1) In action of replevin by conditional vendor of hardware against a builder and his mortgagee, it is defendants' burden to establish that, in view of the pertinent provisions of the Conditional Sales Act, plaintiff's reservation of title was not good against the mortgagee.—G. Goldberg & Sons v. Weisberg-Goldman Corporation, 262 N.Y.S. 99, 146 Misc. 720, affirmed 255 N.Y.S. 958, 959, 235 App.Div. 717, affirmed in part and reversed in part on other grounds 184 N.E. 147, 260 N.Y. 690, amended on other grounds 185 N.E. 727, 261 N.Y. 535.

(2) Holders of subordinated purchase-money mortgage, claiming lien prior to that of conditional vendor, on chattels severable without material injury to freehold, had burden in foreclosure suit to prove that title company making advance under first mortgage before filing of conditional sales agreement had no actual notice of reservation of title to such chattels previously furnished mortgagor.—Murphy v. Luverne Realty Corporation, 257 N.Y.S. 694, 235 App. Div. 874.

Burden on purchaser

In conditional seller's action for conversion of silo material against purchaser at foreclosure sale of farm on which silo was erected, burden was on purchaser to show that silo became a fixture or, under an applicable statute, that purchaser was subsequent purchaser or mortgagee in good faith.—Craine Silo Co. v. Alden State Bank, 218 N.Y.S. 143, 218 App.Div. 263.

62. Or.—Pelton Water Wheel Co. v. Oregon Iron & Steel Co., 170 P. 317, 87 Or. 248.

63. Tex.—Texas Power & Light Co. v. Malone, Civ.App., 42 S.W.2d 845, error dismissed.

b. Admissibility

Evidence of the circumstances and purposes in attaching an article to land has been held admissible to show an intention to make the article part of the realty or to have it remain personalty. To the same end, evidence of the subsequent claims or conduct of the parties involved may be admissible.

To show an intention to make an article annexed part of the freehold,[64] or an intention to have the article remain personalty,[65] evidence of the circumstances and purposes of the annexation is admissible. Such evidence may include evidence of the expression of an intention,[66] an instrument in writing,[67] and evidence of the adaptability and necessity of the article in question[68] and of the mode of attachment.[69]

Evidence of a claim, or of the failure to assert a claim, to an article as part of the realty[70] or as personalty[71] has been held admissible. Evidence that a purchaser of land knew that a tenant had the right to remove a building is admissible, in a suit to enjoin the removal, on the question of the purchaser's good faith;[72] and, in an action to re-

64. Va.—Hagan v. Richmond Trust Co., 139 S.E. 317, 148 Va. 528.

65. Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.
26 C.J. p 696 note 24 [c].

Evidence not exclusive
Testimony of lessee's officials that lessee did not intend articles in question to become part of realty held admissible, but not exclusive; the intention was also inferable "from the nature of the article, the situation of the parties interested, the mode of annexation, the circumstances which require the installation and the use to be made thereof."—Inge v. First State Bank of Denton, Tex. Civ.App., 57 S.W.2d 217, 218, error dismissed.

66. Va.—Hagan v. Richmond Trust Company, 139 S.E. 317, 148 Va. 528.
26 C.J. p 675 note 4 [e].

Grantor's declarations and acts after execution of deed held inadmissible in determining whether annexation to freehold was intended to make an article a permanent accession.—Anderson v. Perpetual Building & Loan Ass'n of Granite, Baltimore County, 190 A. 747, 172 Md. 94, 109 A.L.R. 1419.

67. **Chattel mortgage**
In determining whether stock dining car on leased premises was a part of the realty so as to prevent its removal after expiration of lease, giving of a chattel mortgage on the car by lessee was some evidence of lessee's intention that car should not become a part of the realty, although giving of such mortgage could not change the nature of the car if it had become a part of the realty.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.

Conditional sale contract
(1) In determining whether stock dining car on rear of premises was real or personal property, fact that car was bought by lessee under conditional sale agreement was held some evidence that he intended that car should remain personalty, and should be considered, although lessor did not know of conditional purchase.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.

(2) As between the conditional seller of a portable garage and a mortgagee of the land, the fact that the garage was bought on a conditional sale contract, even if unknown to the mortgagee, had some tendency to show that the landowner did not intend the garage to become realty.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

Lease
In action against realty owners for conversion of filling station structures, lease executed by defendants' predecessor to plaintiff's lessor and subsequent instrument authorizing plaintiff's lessor to execute sublease with right of removal of fixtures were held admissible to prove plaintiff sublessee's title to structures.—General Petroleum Corporation of California v. Schefter, 16 P.2d 645, 141 Or. 349.

Agreement between mortgagor and mortgagee
Where tenant signed a written agreement as attorney for mortgagor to install electric fixtures, plumbing, etc., and subsequently tenant installed such fixtures, this agreement has a bearing on the issue whether these articles retained their character as personalty as against purchaser at mortgage foreclosure sale.—Marcus v. Rosner, 197 N.Y.S. 503, 119 Misc. 517.

Mortgage on manufacturing plant
(1) In determining whether machinery became subject to mortgage on manufacturing plant, terms of mortgage, fact that mortgagor at time mortgage was given did not own machinery, and subsequent acts of parties are proper for consideration as showing parties' intention.—In re Highland Silk Co., D.C.Pa., 41 F.2d 404.

(2) Such a mortgage is admissible in evidence, not as a conveyance of future acquired chattels, but "as it may have a bearing upon the intent as to the permanent use of such articles in connection with the work of the factory."—Solter v. Macmillan, 128 A. 356, 358, 147 Md. 580.

Application for mortgage loan held inadmissible
In an action by a mortgagee, who acquired title to the mortgaged premises after foreclosure sale, to recover and enjoin removal of improvements, introduction in evidence of written application for a loan secured by the mortgage foreclosed, stating that the mortgagor would use part of the funds to purchase woven wire fencing, to show whether fence was intended to be a fixture, was held reversible error where "the error in admitting it in evidence might have been harmless, except for the emphasis placed on it by the court's instruction telling the jury that the representation became a condition of the mortgage which the 'law presumes' the defendant fulfilled."—Federal Land Bank of Omaha v. Sells, 280 P. 98, 100, 40 Wyo. 498.

68. Ill.—Thuma v. Granada Hotel Corporation, 269 Ill.App. 484.

69. **Gasoline storage tank**
In an action to establish title to a gasoline storage tank, evidence tending to show that no material damage was done to the tank or the land by its removal is admissible.—Standard Oil Co. of New York v. Dolgin, 115 A. 235, 95 Vt. 414, 17 A.L.R. 1218.

Oil burner
Testimony as to what would be necessary to remove oil burner and equipment from building is properly admitted in replevin action by conditional seller against vendor of leasehold interest.—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.

70. U.S.—Jenkins v. Boyd, C.C.A. Cal., 6 F.2d 844.

71. **Notice of claim read at foreclosure sale** of realty.—M. P. Moller, Inc., v. Mainker, 171 A. 476, 314 Pa. 314.

72. Wash.—Lynn v. Waldron, 80 P. 292, 38 Wash. 82.

plevy machinery conditionally sold to a contractor, evidence of payment by defendant has been held admissible on the question of estoppel.[73] Where articles attached to the realty were removed, evidence has been held admissible to show that no actual damage was suffered.[74]

Proof of a custom is not admissible, as opposed to a general rule of law, to show that an article annexed by a purchaser of land is not a fixture.[75] Particular evidence, likewise, has been held inadmissible as irrelevant or immaterial in cases involving an article attached to the land.[76]

Article as covered by instrument. In determining whether an article annexed, or not annexed, to the land is covered by a conveyance or mortgage, evidence as to the intention of the parties to the instrument is held admissible.[77]

c. Weight and Sufficiency

With respect to various particular articles, the sufficiency of evidence to establish that they did or did not become part of the realty has been adjudicated, as has the sufficiency of evidence on such questions as the removal or abandonment of articles, and their removability without damage.

In determining whether an article annexed to realty is personalty or has become part of the realty, greater weight is given to intention and use than to mere physical attachment.[78] A contract has been held substantial evidence of intention that an article remain personalty;[79] and mere testimony by a buyer of his intention that an article become realty has been held of no weight against the chattel mortgage he has given.[80]

In particular cases, evidence has been held sufficient, or insufficient, to show a building,[81] machin-

73. Iowa.—Hooven, Owens, Rentschler Co. v. City of Atlantic, 144 N.W. 635, 163 Iowa 380.

74. Mass.—W. & R. Inv. Co. v. Edwards Supply Co., 24 N.E.2d 518, 304 Mass. 650.

Replacement of articles removed

Where a contractor abandoned work on a building, and a subcontractor wrongfully removed plumbing which he had attached to the house, the fact that the owner paid for replacing the articles taken, from the unpaid balance due the contractor, was immaterial in an action for damages against the subcontractor by the owner.—Munroe v. Armstrong, 60 N.E. 475, 179 Mass. 165.

75. Pa.—Christian v. Dripps, 28 Pa. 271.

76. **Advances from mortgagee**

As between a conditional seller of a portable garage and the mortgagee of the land, the landowner's acceptance of advances from mortgagee for erection of garage, if amounting to representation that portable garage became part of realty, was immaterial, where conditional seller did not know of advances.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.

Contractor's bond

In a seller's action against a city to replevy machinery conditionally sold to a contractor for installation in the city's lighting plant, the contractor's bond to the city was properly excluded as immaterial, where it did not appear that the city had been recouped for the value of the property in controversy.—Hooven, Owens, Rentschler Co. v. City of Atlantic, 144 N.W. 635, 163 Iowa 380.

Duration of assignee's ownership

In action by an assignee of a vendor in a foreclosed conditional sales contract covering an elevator against owner of building in which elevator was installed, to establish assignee's title to elevator, while assignee's ownership of elevator was essential to establishment of his cause of action, length of time during which assignee had owned elevator, under a written instrument or otherwise, was immaterial on the issue of the statute of limitations, where action was not founded on, and did not arise out of, a written instrument.—Harrison v. Consolidated Holding Co., 93 P.2d 729, 200 Wash. 434.

Files in another suit

In replevin against lessor for chairs installed by seller for lessee buyer, under agreement reserving title as security, the court erred in admitting in evidence files in a suit by lessor against lessee to show that defendant had lien.—Luce v. Scott Realty Co., 167 N.W. 869, 201 Mich. 587.

Rescission of contract under which article was attached

In detinue for an elevator installed in defendant's storehouse by a tenant, evidence as to the rescission of a contract whereby the elevator was installed after defendant had paid the tenant therefor and after he had been ejected was held immaterial.—Alabama Machinery & Supply Co. v. Roquemore, 87 So. 435, 205 Ala. 244.

77. Colo.—Dubois v. Bowles, 69 P. 1067, 30 Colo. 44.
26 C.J. p 721 note 41 [a].

78. Wis.—Thomsen v. Cullen, 219 N.W. 439, 196 Wis. 581.

Application to use or purpose of that part of the realty with which the article is connected controls as evidence of intention; the degree of annexation is of some, but minor, importance.—Bank of America Nat. Ass'n v. La Reine Hotel Corporation, 156 A. 28, 108 N.J.Eq. 567.

That sprinkler system could be removed without damage was not controlling in determining whether system was a "fixture," although it was to be considered in determining intention of parties.—Romich v. Kempner Bros. Realty Co., 92 S.W.2d 215, 192 Ark. 454.

79. U.S.—Colonial Oil Co. v. American Oil Co., D.C.S.C., 43 F.Supp. 718.

Conditional sale

(1) A conditional sale was held to be some evidence that a mortgagor did not intend that the equipment should become a part of the realty; but the intention thus manifested was not conclusive.—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.

(2) The intention of the buyer that refrigerating system would always remain and ultimately become a part of his building and permanently affixed thereto was subordinate to the intention evidenced by the conditional sales contract that the annexing of the system to property should not change its character from chattel to realty until the price therefor was paid.—Southwestern Public Service Co. v. Smith, Tex.Civ. App., 31 S.W.2d 472, error dismissed.

80. Tex.—Texas Power & Light Co. v. Malone, Civ.App., 42 S.W.2d 845, error dismissed.

81. **Evidence held sufficient**

Cal.—Bond Inv. Co. v. Blakeley, 257 P. 189, 83 Cal.App. 696.
N.D.—Gray v. Krieger, 262 N.W. 343, 66 N.D. 115.

ery,[82] or other articles[83] to be part of the realty. Evidence has, likewise, been held sufficient to show a building,[84] machinery,[85] or other articles[86] to be personalty.

With respect to particular questions, evidence has been held sufficient, or insufficient, to show title to the article in question,[87] or the right to possession

82. **Evidence held sufficient**
(1) Gin.—John E. Mitchell Co. v. Chickasha Cotton Oil Co., 47 P.2d 590, 173 Okl. 272.
(2) Lighting plant.
Ind.—Biggs v. Bank of Marshfield, 169 N.E. 71, 90 Ind.App. 467.
La.—Boykin v. Boykin, 4 La.App. 210.
(3) Machinery in mill.—Willis v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554—Schumacher v. Beeler, C.C.A.Ohio, 90 F.2d 538, certiorari denied 58 S.Ct. 38, 302 U.S. 717, 82 L.Ed. 554.
(4) Refrigerating equipment.
Cal.—Etienne v. Millbrae Golf & Country Club, 81 P.2d 245, 27 Cal. App.2d 452—Frick v. Frigidaire Corporation, 7 P.2d 321, 119 Cal. App. 707.
Mich.—First Mortgage Bond Co. v. London, 244 N.W. 203, 259 Mich. 688.
(5) Scale.
Ga.—Consolidated Warehouse Co. v. Smith, 189 S.E. 724, 55 Ga.App. 216.
Ind.—Biggs v. Bank of Marshfield, 169 N.E. 71, 90 Ind.App. 467.
(6) Sprinkler system.—Grinnell Co. v. Farm & Home Savings & Loan Ass'n of Missouri, Mo.App., 74 S.W. 2d 1097.

Evidence held insufficient
(1) Equipment of spring water bottling company.—Holt v. Male, 29 N.Y. S.2d 111.
(2) Machinery and equipment for manufacture of hosiery.—Jankey v. Ellis Silk Hosiery Co., D.C.Pa., 16 F.Supp. 927.
(3) Power plant.—Texas Power & Light Co. v. Malone, Tex.Civ.App., 42 S.W.2d 845, error dismissed.
(4) Refrigerating equipment.—Southwestern Public Service Co. v. Smith, Tex.Civ.App., 31 S.W.2d 472, error dismissed.

83. **Evidence held sufficient**
(1) Bakery oven.—Comly v. Lehmann, 253 N.W. 501, 218 Iowa 644.
(2) Boiler.—Comly v. Lehmann, supra.
(3) Bowling alley.—Brunswick-Balke-Collender Co. v. Franzke-Schiffman Realty Co., 248 N.W. 178, 211 Wis. 659.
(4) Floor in tavern.—Jahnke v. Jahnke, 253 P. 752, 81 Cal.App. 387.
(5) Gas stoves, Murphy wall beds, radiator shields, and ice boxes.—First Mortg. Bond Co. v. London, 244 N.W. 203, 259 Mich. 688.
(6) Plumbing and heating fixtures.—Waverley Co-op. Bank v. Haner, 173 N.E. 699, 273 Mass. 477.
(7) Water tank.—Biggs v. Bank of Marshfield, 169 N.E. 71, 90 Ind.App. 467.
(8) Windows in mill building.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 14 Cal.2d 196, superseding, App., 86 P.2d 673.

84. **Evidence held sufficient**
(1) Business house.—Edwards v. Thannisch, Tex.Civ.App., 254 S.W. 523.
(2) Dining car.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.
(3) Grain elevator.—Glenn v. W. C. Mitchell Co., C.C.A.N.D., 9 F.2d 599.

Evidence held sufficient to show trade fixture
(1) Building used for saloon.—Roberts v. Mills, 205 P. 872, 56 Cal. App. 556.
(2) Mill and other structures for reducing or refining ore.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

85. **Evidence held sufficient**
(1) Machinery, implements, and appliances.—Miller v. Struven, 218 P. 287, 63 Cal.App. 128.
(2) Bottle-washing and pasteurizing machinery in brewery.—In re Voight-Pros't Brewing Co., C.C.A. Mich., 115 F.2d 733.
(3) Equipment in coal mine tipple.—Kanawha Nat. Bank v. Blue Ridge Coal Corporation, 148 S.E. 383, 107 W. Va. 397.
(4) Gasoline pumps at service station.
Ill.—Shell Petroleum Corporation v. Feldman, 17 N.E.2d 81, 297 Ill.App. 631.
Tex.—Service Station Equipment Co. v. Hewitt, Civ.App., 282 S.W. 286.
(5) Gin.
Okl.—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96.
Tex.—Murray Co. v. Simmons, Com. App., 229 S.W. 461, modifying Murray Co. v. Jacksboro Oil & Milling Co., Civ.App., 205 S.W. 517.
(6) Ice plant.—Cobb v. York Ice Machinery Corporation, 159 So. 811, 230 Ala. 95.
(7) Refrigeration equipment.
Cal.—Andrews v. First Realty Corporation, 44 P.2d 628, 6 Cal.App.2d 407.
Ohio.—Wissel v. McCormick, 194 N. E. 43, 48 Ohio App. 431.
Tex.—Hugh Cooper Co. v. American Nat. Exchange Bank of Dallas, Civ. App., 30 S.W.2d 364.
(8) Sprinkler system.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385.

Evidence held sufficient to show trade fixture
(1) Air compressor.—Rucker v. Hunt, 163 S.E. 612, 44 Ga.App. 836.
(2) Machinery and equipment for reducing and refining ores.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.
(3) Machinery in manufacturing ice cream and handling dairy products.—Quality Milk Products Co. v. Endowment Loan & Mortgage Co., 51 P.2d 550, 175 Okl. 94—Quality Milk Products Co. v. Young, 51 P.2d 547, 175 Okl. 98.
(4) Refrigerating machine.—Quality Milk Products Co. v. Young, supra.

86. **Evidence held sufficient**
(1) Filling station equipment, including underground tanks.—Shell Petroleum Corporation v. Feldman, 17 N.E.2d 81, 297 Ill.App. 631.
(2) Gas furnace.—Home Bond & Mortgage Corporation v. Alabama Utilities Service Co., 142 So. 827, 225 Ala. 322.
(3) Hog houses and feed bunks.—Speer v. Donald, 207 N.W. 581, 201 Iowa 569.
(4) Oil burner.—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11.
(5) Pipe organ.—M. P. Moller, Inc., v. Wilson, 63 P.2d 818, 8 Cal.2d 31.
(6) Signboard.—Breyfogle v. Tighe, 208 P. 1008, 58 Cal.App. 301.
(7) Stoves.
Mass.—Morrison v. Segal, 169 N.E. 789, 270 Mass. 292.
Ohio.—Wissel v. McCormick, 194 N.E. 43, 48 Ohio App. 431.
(8) Tavern equipment, including hardwood floor, grill-room woodwork, windows, window reflectors, looking-glasses, and range hood.—Jahnke v. Jahnke, 253 P. 752, 81 Cal.App. 387.

Evidence held sufficient to show trade fixture
(1) Boiler for laundry.—Hamilton v. Charlebois, 248 N.W. 676, 63 N.D. 504.
(2) Miniature golf-course equipment, including wiring, lights, poles, and appliances.—Johnson v. Grady, 244 N.W. 409, 187 Minn. 104.

87. **Evidence held sufficient to show title**
Ky.—Bain v. Graber, 112 S.W.2d 66, 271 Ky. 393.

thereof,[88] that the article was the subject of an agreement[89] or conditional sale,[90] that there was proper notice of a bailment contract[91] or of a conditional sale,[92] that the article might be removed without damage,[93] that it was removed,[94] that it was abandoned[95] or that the article was convert-

Tex.—Clark v. Clark, Civ.App., 107 S.W.2d 421—Loftus v. Ray, Civ. App., 46 S.W.2d 1034, error dismissed.

Evidence held insufficient to show title

Okl.—Carte-Caldwell v. Berryhill, 112 P.2d 370, 188 Okl. 617.

Evidence held sufficient to show lack of title

Tex.—Lewis v. Clark, Civ.App., 149 S.W.2d 244, error dismissed, judgment correct.

88. **Evidence held insufficient**

Okl.—Carte-Caldwell v. Berryhill, 112 P.2d 370, 188 Okl. 617.

89. **Evidence held sufficient to show agreement** under which article was to be personalty or subject to right of removal.

U.S.—In re Shelar, D.C.Pa., 21 F.2d 136.

Mo.—Holtgreve v. Sobolewski, 31 S. W.2d 993, 326 Mo. 412.

S.D.—Curran v. Curran, 289 N.W. 418, 67 S.D. 119.

Wis.—Shields v. Hansen, 230 N.W. 51, 201 Wis. 349.

Evidence held sufficient to show no agreement that improvement remain personalty.—Middelton v. Dunham Lumber Co., 205 N.W. 621, 53 N.D. 315.

Evidence held insufficient to show right of removal

Tex.—Texas & N. O. R. Co. v. Schoenfeld, Civ.App., 124 S.W.2d 910, reversed on other grounds 146 S.W. 2d 724, 136 Tex. 173.

Notice of right of removal

In action for conversion of filling station structures, evidence supported finding that defendants, when acquiring title to realty, knew of plaintiff sublessee's right to remove structures under agreement.—General Petroleum Corporation of California v. Schefter, 16 P.2d 645, 141 Or. 349.

Agreement for additional security

In replevin by vendors of mine to recover machinery, tools, and equipment removed from mine by purchaser after default, evidence was held to authorize findings that certain machinery placed on the premises by purchaser was merely mortgaged, by virtue of contract provision that unattached and movable equipment should be considered additional security, rather than part of the realty.—Teater v. Good Hope Development Corporation, 93 P.2d 112, 14 Cal.2d 196, superseding, App., 86 P.2d 673.

Conditional agreement

Evidence established that agreement of purchase of trade fixtures used in developing oil and gas lease under which lessor was claiming was conditional in that it became effective only on a contingency which never transpired, and hence lessor's claim by virtue of purchase could not be upheld.—Lewis v. Clark, Tex.Civ. App., 149 S.W.2d 244, error dismissed, judgment correct.

90. **Evidence held sufficient**

Cal.—Peronnet v. Ralph, 296 P. 329, 112 Cal.App. 97.

Evidence held insufficient

N.Y.—Newman v. Montrose Realty Co., 155 N.Y.S. 253, 92 Misc. 182.

Evidence held sufficient to show purchaser not innocent

Ala.—Home Bond & Mortgage Corporation v. Alabama Utilities Service Co., 142 So. 827, 225 Ala. 322.

Evidence held insufficient to show purchaser in good faith

N.Y.—Craine Silo Co. v. Alden State Bank, 218 N.Y.S. 143, 218 App.Div. 263.

Retention of title until purchaser satisfied

Evidence showed that a furnace installed in a house before plaintiff purchased it was installed under agreement between plaintiff's grantor and defendant, seller of the furnace, that title to the furnace would remain in seller until it demonstrated its capacity to heat the house to satisfaction of plaintiff's grantor.—Newell v. McMurray, 201 N.W. 845, 51 N.D. 901.

Seller's election

Evidence was held insufficient to establish that seller had elected to treat transaction as unconditional sale.—Crown v. Regna Const. Co., 146 A. 346, 104 N.J.Eq. 469, affirmed, Err. & App., 150 A. 918.

91. **Evidence held insufficient**

Pa.—S. F. Bowser & Co. v. Franklin Mortg. & Inv. Co., 158 A. 170, 305 Pa. 459.

92. **Evidence held insufficient to show notice**

Mo.—Grinnell Co. v. Farm & Home Savings & Loan Ass'n of Missouri, App., 74 S.W.2d 1097.

Evidence held sufficient to show no notice

Cal.—Etienne v. Millbrae Golf & Country Club, 81 P.2d 245, 27 Cal. App.2d 452.

Time of affixing

Evidence was held insufficient, in replevin action by conditional vendor of hardware fixtures, to establish what part of fixtures was affixed before mortgagee, making advances on building loan, had notice of reservation of title.—G. Goldberg & Sons v. Weisberg-Goldman Corporation, 262 N.Y.S. 99, 146 Misc. 720, affirmed 255 N.Y.S. 958, 959, 235 App.Div. 717, affirmed in part and reversed in part on other grounds 184 N.E. 147, 260 N. Y. 690, amended on other grounds 185 N.E. 727, 261 N.Y. 535.

93. **House**

Decree that a house valued at seven thousand five hundred dollars could be separated from the realty without substantial injury was not sustained by evidence showing destruction in value of two thousand dollars by removal.—Crawford-Fayram Lumber Co. v. Mann, 211 N.W. 225, 203 Iowa 748.

Refrigerating system

Evidence held insufficient to show that compressors and cabinets could not be removed without damage to the realty.—Southwestern Public Service Co. v. Smith, Tex.Civ.App., 31 S.W.2d 472, error dismissed.

Sprinkler system

(1) Evidence was held to show that removal would substantially damage clubhouse.—Globe Automatic Sprinkler Co. v. Boester, 95 S.W.2d 825, 231 Mo.App. 203.

(2) Under act for protection of prior mortgagees against attachment of goods to realty so as not to be severable without material injury to freehold, evidence, in reclamation proceedings by conditional vendor of sprinkler system installed in mill, sustained finding that system was not removable without material injury to freehold.—Buss Mach. Works v. Watsontown Door & Sash Co., D.C. Pa., 2 F.Supp. 758.

(3) Finding that system was "removable without serious damage to the real estate" was held not to be plainly wrong.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 38, 288 Mass. 385.

94. **Evidence held sufficient to show removal**

N.H.—Delay Mfg. Co. v. Carey, 13 A. 2d 152, 91 N.H. 44.

Damages

Evidence was held to establish that lessor was entitled to at least two hundred eighty dollars for cost of replacing electric wiring and switches removed by lessee.—Slane v. Curtis, 286 P. 372, 41 Wyo. 402, 69 A.L. R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.

95. **Evidence held sufficient to show abandonment**

Ky.—Kentucky Block Cannel Coal Co. v. Stacy, 98 S.W.2d 61, 266 Ky. 59.

Evidence held insufficient to show abandonment

Ill.—Hopwood v. Green, 34 N.E.2d

ed,[96] and that there was a proper demand before commencement of a replevin action.[97]

§ 64. —— Questions of Law and Fact

Whether a particular article annexed to realty remains a chattel or becomes a fixture and part of the realty is generally a question of fact or a mixed question of law and fact; but if the facts are undisputed or susceptible of only one inference, the question is one of law.

Whether a particular article annexed to realty remains a chattel or becomes a fixture and part of the realty has been said to be a mixed question of law and fact,[98] or in part, at least, a question of fact;[99] and the question cannot be ruled on as a matter of law,[1] except when the facts are undisputed or are susceptible of but one inference.[2] Another view is that whether or not an article annexed to realty is a fixture is a question of fact to be determined by the triers of fact on the evidence in the particular case.[3] Whether an article might be re-

559, 310 Ill.App. 411, transferred, see 30 N.E.2d 656, 375 Ill. 167.
N.D.—Hamilton v. Charlebois, 248 N. W. 676, 63 N.D. 504.
Tex.—Pearson v. Black, Civ.App., 120 S.W.2d 1075.

Evidence held sufficient to show no abandonment
Ark.—Hoing v. River Valley Gas Co., 121 S.W.2d 513, 196 Ark. 1165.
Ill.—Shell Petroleum Corporation v. Feldman, 17 N.E.2d 81, 297 Ill.App. 631.
Okl.—Stevens v. Iverson, 66 P.2d 12, 179 Okl. 401.

Time for removal
In action of trespass de bonis for removal of doors and windows from building claimed by parties as chattel property, jury were held justified in finding that two months from termination of tenancy was sufficient time for removal of tenant's fixtures, that such right then expired, and building, with doors and windows, became landowner's property, and that title passed to purchaser from such owner.—Henderson v. Robbins, 138 A. 68, 126 Me. 284.

96. **Evidence held sufficient to show conversion**
Mont.—Schmuck v. Beck, 234 P. 477, 72 Mont. 606.
Tex.—Bonneville v. Wehrman, Civ. App., 106 S.W.2d 834.

Evidence held insufficient to show conversion
Tex.—Lewis v. Clark, Civ.App., 149 S.W.2d 244, error dismissed, judgment correct.

97. N.Y.—Edward Ermold Co. v. Chemical Bank & Trust Co., 14 N. Y.S.2d 424.

98. Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala.App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Mass.—Gar Wood Industries v. Colonial Homes, 24 N.E.2d 767, 305 Mass. 41, 126 A.L.R. 591—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349—Automatic Sprinkler Corporation of America v. Rosen, 156 N.E. 693, 259 Mass. 319.
Neb.—Swift Lumber & Fuel Co. v. Elwanger, 256 N.W. 875, 127 Neb. 740.
N.Y.—Craine Silo Co. v. Alden State Bank, 218 N.Y.S. 143, 218 App.Div. 263.
26 C.J. p 653 note 22.

Question is to be determined by consideration of character of annexation, use made of personalty and realty, and intention of parties.—Craine Silo Co. v. Alden State Bank, 218 N.Y.S. 143, 218 App.Div. 263.

Intention as determinative of the nature of the article annexed is ordinarily regarded as a mixed question of law and fact.—Vail v. Weaver, 19 A. 138, 132 Pa. 363, 19 Am.S.R. 598—26 C.J. p 658 note 66.

Rule applied to particular articles
(1) Article placed in dwelling, factory, or other building.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N.E. 517, 279 Mass. 33, 81 A.L.R. 1437—Ferdinand v. Earle, 134 N.E. 603, 241 Mass. 92.
(2) Dining car.—Titcomb v. Carroll, 191 N.E. 410, 287 Mass. 131.
(3) Laundry machinery.—Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries, 181 N.E. 262, 279 Mass. 314.
(4) Oil burner.—Sacks v. McKane, 183 N.E. 140, 281 Mass. 11.
(5) Pit cars.—Titus v. Poland Coal Co., 119 A. 540, 275 Pa. 431.
(6) Refrigerating equipment.—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335—Commercial Credit Corporation v. Gould, 175 N.E. 264, 275 Mass. 48.

99. Neb.—Brownell v. Fuller, 83 N. W. 669, 60 Neb. 558.
26 C.J. p 653 note 23.

1. Mass.—Automatic Sprinkler Corporation of America v. Rosen, 156 N.E. 693, 259 Mass. 319.
26 C.J. p 725 note 77 [a].

Erection of building on realty does not necessarily make it a fixture.
Cal.—Erickson v. Wilson, 14 P.2d 96, 125 Cal.App. 779.
Tex.—Williamson v. Pye, Civ.App., 18 S.W.2d 707.

Gasoline pumps used at automobile service station were held not fixtures to building as matter of law.—Service Station Equipment Co. v. Hewitt, Tex.Civ.App., 282 S.W. 286.

Portable garage
(1) Portable garage is not within class of property which is realty as matter of law because of nature of annexation to realty, or because it is manifestly furniture as distinguished from improvements.—Medford Trust Co. v. Priggen Steel Garage Co., 174 N.E. 126, 273 Mass. 349.
(2) Under the rule that a tenant can remove what he has added if it can be done without injury to the freehold unless he has made it a part of the original, the holding as a matter of law that a portable garage was a part of the realty was not warranted.—Hanson v. Ryan, 201 N.W. 749, 185 Wis. 566, 36 A.L.R. 1516.

2. Ala.—Farmers & Merchants Bank v. Sawyer, 163 So. 657, 26 Ala. App. 520, certiorari denied 163 So. 659, 231 Ala. 137.
Mich.—Lakeside Resort Corporation v. Sprague, 264 N.W. 851, 274 Mich. 426.
Pa.—Waltman v. Mayer, 11 Pa.Dist. & Co. 479, affirmed 97 Pa.Super. 236.
26 C.J. p 654 notes 27, 28, p 658 note 68.

Question referred to as one of law
Mass.—Jennings v. Vahey, 66 N.E. 598, 183 Mass. 47, 97 Am.S.R. 409.
26 C.J. p 654 note 26.

3. U.S.—Luria Bros & Co. v. Central R. Co. of New Jersey, C.C.A.N.J., 113 F.2d 78.
Cal.—M. P. Moller, Inc. v. Wilson, 63 P.2d 818, 8 Cal.2d 31—R. Barcroft & Sons Co. v. Cullen, 20 P.2d 665, 217 Cal. 708—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App.2d 66—Bank of America Nat. Trust & Savings Ass'n v. New York Life Ins. Co., 61 P.2d 364, 16 Cal.App. 2d 719.
Mich.—Lakeside Resort Corporation v. Sprague, 264 N.W. 851, 274 Mich. 426.
Miss.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408.
Pa.—Waltman v. Mayer, 11 Pa.Dist. 479, affirmed 97 Pa.Super. 236.
26 C.J. p 653 note 24, p 654 note 25.

Question is to be determined not only by manner in which the article is affixed to the realty, but also by

moved without material injury to the freehold has been held a question of fact,[4] as has the question as to whether there was notice of a conditional sale.[5] What is a reasonable time for a tenant to exercise his right of removal has been held a mixed question of law and fact,[6] or a question of fact.[7]

the relationship between the parties to the controversy.—Bell v. Bank of Perris, 125 P.2d 829, 52 Cal.App.2d 66.

Annexation, purpose, intention, and agreement

(1) Whether the article in question constitutes realty or personalty is a question of fact depending on the intention with which it was placed on the realty.—Hannah v. Frawley, 188 N.E. 385, 285 Mass. 28.

(2) Intention with which article was annexed involves a question of fact for the jury.
S.C.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.
Tex.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Civ.App., 100 S.W.2d 1029, error dismissed—Malone v. Burdick, Civ.App., 58 S.W.2d 1048—Dunman v. Gulf, etc., R. Co., Civ.App., 26 S.W. 304.
26 C.J. p 658 note 67.

(3) Whether there was actual annexation, application to the purpose with which that part of realty was connected, and whether the then owner intended to make permanent annexation to freehold of timber, monorail, and trolley, were questions for jury.—Nearhoff v. Rucker, 287 P. 658, 156 Wash. 621.

(4) Damage to the freehold, as showing the mode of attachment, is a question of fact for the jury.—Standard Oil Co. of New York v. Dolgin, 115 A. 235, 95 Vt. 414, 17 A.L.R. 1218.

(5) Whether mortgage covering realty included machinery on realty was a question for jury, on conflicting evidence as to intention and agreement.—Sawyer v. Foremost Dairy Products, 169 S.E. 115, 176 Ga. 854.

Where it is doubtful whether article connected with, or attached to, realty becomes part of realty not removable therefrom, the question is for the jury.—Harn v. State, 179 S.E. 553, 51 Ga.App. 34.

Trade fixtures

(1) Whether or not articles or improvements are trade fixtures is largely a question of fact for the jury.—Borchers Bros. Co. v. Ciaparro, 295 P. 1035, 211 Cal. 507—26 C.J. p 702 note 95 [a].

(2) Whether sloping false floor installed by tenant was movable trade fixture, or could be removed with little or no injury to building, was a question for jury.—Holy Ghost Catholic Church of Two Harbors v. Clinton, 211 N.W. 13, 169 Minn. 253.

Particular articles

(1) Amusement park equipment.—Lakeside Resort Corporation v. Sprague, 264 N.W. 851, 274 Mich. 426.

(2) Beaver board placed on walls.—Clark v. Grand Rapids Trust Co., 217 N.W. 10, 241 Mich. 379.

(3) Building.
Cal.—Gosliner v. Briones, 204 P. 19, 187 Cal. 557—Alderman v. Baggett, 25 P.2d 532, 134 Cal.App. 501—Erickson v. Wilson, 14 P.2d 96, 125 Cal.App. 779.
Mass.—Hannah v. Frawley, 188 N.E. 385, 285 Mass. 28.

(4) Conveyor used to handle rock.—Thos. Cox & Sons Machinery Co. v. Blue Trap Rock Co., 251 S.W. 699, 159 Ark. 209.

(5) Dairy equipment.—Dallas Joint Stock Land Bank of Dallas v. Lancaster, Tex.Civ.App., 100 S.W.2d 1029, error dismissed.

(6) Dwelling.
Ariz.—Brooks v. McDevitt, 11 P.2d 826, 40 Ariz. 221.
Tex.—Williamson v. Pye, Civ.App., 18 S.W.2d 707.

(7) Furnace.—Holland Furnace Co. v. Jefferson, 216 N.W. 795, 173 Minn. 121.

(8) Gas stoves.—Wissel v. McCormick, 194 N.E. 43, 48 Ohio App. 431.

(9) Gin stands.—Love v. Union Cent. Life Ins. Co., 150 So. 794, 168 Miss. 408.

(10) Hot air furnace.—Baringer v. Evenson, 106 N.W. 801, 127 Wis. 36.

(11) Machinery in grape juice plant.—O'Dell v. Day, 183 N.W. 17, 214 Mich. 566.

(12) Machines in worsted mill.—Stone v. Livingston, 110 N.E. 297, 222 Mass. 192.

(13) Mining dredge.—Story Gold Dredging Co. v. Wilson, 76 P.2d 73, 106 Mont. 166.

(14) Oil burner.—Homeseekers' Realty Co. v. Silent Automatic Sales Corporation, 163 A. 841, 163 Md. 541.

(15) Portable bars and ventilators in doors of hotel.—Public Operating Corporation v. Weingart, 13 N.Y.S.2d 182, 257 App.Div. 379.

(16) Refrigerating equipment.
Cal.—Andrews v. First Realty Corporation, 44 P.2d 628, 6 Cal.App.2d 407—Benchley v. Durkee Famous Foods, 17 P.2d 1020, 128 Cal.App. 604.
Ohio.—Wissel v. McCormick, 194 N.E. 43, 48 Ohio App. 431.

(17) Sawmill and shingle mill.—Brown v. North Carolina Joint Stock Land Bank of Durham, 197 S.E. 140, 213 N.C. 594.

(18) Shelving.—Baker v. Chaney, 28 P.2d 1092, 167 Okl. 164.

(19) Sinks.—Walker Dishwasher Corporation v. Medford Trust Co., 180 N.E. 517, 279 Mass. 33, 81 A.L.R. 1437.

(20) Sprinkler system.—Automatic Sprinkler Corporation of America v. Rosen, 156 N.E. 693, 259 Mass. 319.

(21) Tavern fixtures.—Jahnke v. Jahnke, 253 P. 752, 81 Cal.App. 387.

(22) Ventilator.—Natural Autoforce Ventilator Co. v. Winslow, 102 N.E. 705, 215 Mass. 462.

4. **Oil well casing**
Okl.—Smith v. Bush, 44 P.2d 921, 173 Okl. 172, 101 A.L.R. 330.

Part of building
Mo.—Burgess v. Joplin Lumber Co., App., 145 S.W.2d 1004.

Plumbing material
N.Y.—Sunrise Plumbing Supply Co. v. Barrett, 33 N.Y.S.2d 1020, 263 App.Div. 1017.

Sprinkler system
N.J.—Independent Ætna Sprinkler Corporation v. Morris, 175 A. 102, 114 N.J.Law 23—H. G. Vogel Co. v. 295 Halsey St. Co., 160 A. 364, 109 N.J.Law 83.

Under Uniform Conditional Sales Act
U.S.—In re Smith, D.C.Pa., 19 F. Supp. 595.

5. Del.—Atlantic Refining Co. v. Feinberg, 112 A. 685, 1 W.W.Harr. 183.
Minn.—Holland Furnace Co. v. Jefferson, 216 N.W. 795, 173 Minn. 121.
N.D.—Newell v. McMurray, 201 N.W. 845, 51 N.D. 901.

6. Tex.—Lewis v. Clark, Civ.App., 149 S.W.2d 244, error dismissed, judgment correct.—Armstrong v. Federal Supply Co., Civ.App., 17 S.W.2d 170.

Evidence established as matter of law that trade fixtures used in developing oil and gas lease were removed from premises within a "reasonable time" after termination of lease, and that no forfeiture occurred under terms of lease requiring removal of fixtures by lessee within reasonable time after termination of lease under penalty of forfeiture.—Lewis v. Clark, Tex.Civ.App., 149 S.W.2d 244, error dismissed, judgment correct.

7. Ark.—Salmon v. Boyer, 213 S.W. 383, 139 Ark. 236.
Ill.—Berger v. Hoerner, 36 Ill.App. 360.
Ky.—Kentucky Block Cannel Coal Co. v. Stacy, 98 S.W.2d 61, 266 Ky. 59—Patton v. Woodrow, 248 S.W. 226, 198 Ky. 85.

Where the tenant's right to remove fixtures is governed by the express provisions of his lease, the question of such right is one of law.[8] Particular questions of waiver and estoppel have been held questions of fact.[9]

§ 65. —— Instructions

In actions involving articles affixed to realty, the propriety of particular instructions is controlled by the circumstances of the particular case.

In actions involving articles affixed to realty, particular instructions to the jury have been held proper [10] or erroneous, or properly refused.[11]

§ 66. —— Verdict, Findings, and Judgment

In actions involving fixtures, general rules govern questions as to the verdicts and findings. A general finding that articles in dispute are trade fixtures includes a specific finding of every material fact within the issues raised by the pleadings and essential to the judgment pronounced.

In actions involving fixtures, particular verdicts have been held proper [12] or erroneous,[13] particular findings warranted,[14] and particular rulings consistent with findings.[15] A general finding that articles in dispute are trade fixtures includes a specific finding of every material fact within the issues raised by the pleadings and essential to the judgment pronounced on the general finding;[16] but in an action for conversion a finding that plaintiff did not intend to affix the article in question permanently, without additional evidence showing such intention openly and plainly, was held insufficient to sustain a judgment for plaintiff on the ground that the

Tex.—Lewis v. Clark, Civ.App., 149 S.W.2d 244, error dismissed, judgment correct.

8. Ark.—Buffalo Zinc & Copper Co. v. Hale, 206 S.W. 661, 136 Ark. 10.

Pa.—McClintock & Irvine Co. v. Ætna Explosives Co., 103 A. 622, 260 Pa. 191, Ann.Cas.1918E 1078.

9. **Delay in asserting rights**

Whether conditional sellers waived, or were estopped to assert, rights by delay in asserting them, were held fact questions.—Hough v. Omansky, 160 N.E. 330, 263 Mass. 112.

Estoppel of realty mortgagee

Evidence that gin company, after taking chattel mortgage on machinery installed on realty on which bank held mortgage, secured from president of bank, who was also president of insurance company, insurance on such machinery, without protest being made that machinery was being covered by bank's mortgage, was held to raise question for jury whether bank had waived or was estopped to assert its lien.—Planters' Bank v. Lummus Cotton Gin Co., 128 S.E. 876, 132 S.C. 16, 41 A.L.R. 592.

10. **Attachment of shelving**

Where shelving supplied by tenant for use in rented premises was attached to 2x4's laid on the floor of a storeroom, and evidence was conflicting as to whether 2x4's were attached to the floor, the charge that, if shelving was not intended to be attached to realty, but in driving nails through shelving into base support some of the nails unintentionally protruded through unattached base into the floor, this fact would not as a matter of law make shelving part of the realty, was held not error.—Powell v. Griffith, 142 S.E. 466, 38 Ga.App. 40.

11. **Deterioration of machinery**

In an action by a lessee against the lessor to recover possession of the machinery and fixtures left on the premises by the lessee and damages for detention, an instruction directing the jury to return a verdict for plaintiff for the amount of his damages, plus the deterioration of the machinery, was erroneous where the petition did not aver that the machinery had deteriorated in value after plaintiff had abandoned the premises, and no evidence was offered to prove such deterioration.—Patton v. Woodrow, 248 S.W. 226, 198 Ky. 85.

Notice of lease

In replevin of sprinkler system sold under conditional sales agreement and installed in leased building, requested instruction that seller was charged with notice of recorded lease was properly refused, since right to remove system if it were personal and not real property existed regardless of provisions of lease.—Independent Ætna Sprinkler Corporation v Morris, 175 A. 102, 114 N.J. Law 23.

Test as prerequisite to passing of title

In a seller's action against a city to replevy an engine conditionally sold to a contractor to be installed in a city electric lighting plant, an instruction making test and acceptance of the engine by the city, pursuant to its agreement with the contractor, a prerequisite to the passing of title to the city was properly refused, the provision for the test being for the benefit of the city and not of plaintiff.—Hooven, Owens, Rentschler Co. v. Atlantic, 144 N.W. 635, 163 Iowa 380.

12. **Verdict for unpaid purchase price**

In replevin for value of fixtures sold under title-retaining contract, general verdict for seller for unpaid purchase price of property withheld by defendant without assessing value of property at time of conversion was not objectionable, since such verdict was in effect an assessment of value.—United Store Fixture Co. v. Grubiak, 284 N.W. 602, 287 Mich. 671.

13. **Verdict for unpaid purchase price; credit**

In replevin for value of fixtures sold under title-retaining contract, where part of fixtures were not delivered to defendant, verdict fixing measure of damages as unpaid balance of purchase price without crediting defendant with value of undelivered fixtures was error.—United Store Fixture Co. v. Grubiak, supra.

14. **Building part of realty**

A master's findings, based on view of school building, that it was of wood and placed on brick foundation, with base below surface of ground and cellar window on one side, and that there was small hallway, large schoolroom, and brick chimney extending from beneath floor through roof, warranted his finding that building was so attached to land as to become part thereof.—Meeker v. Oszust, 30 N.E.2d 246, 307 Mass. 366.

15. **Equipment as part of realty; parties' intention**

Finding that conditional seller and buyer did not intend refrigerating equipment to become part of realty was not inconsistent with ruling that, as between assignee of conditional seller and mortgagee, such equipment was part of realty.—Commercial Credit Corporation v. Commonwealth Mortgage & Loan Co., 177 N.E. 88, 276 Mass. 335.

16. Colo.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

Finding as mixed one of law and fact

Colo.—Rare Metals Min. & Mill. Co. v. Western Colorado Power Co., 213 P. 124, 73 Colo. 30.

article was a removable fixture.[17]

In trespass for the unlawful removal of fixtures, a nonsuit is proper where there is no evidence of permanent annexation.[18] In replevin for the value of articles sold under a title-retaining contract, the seller could not recover for the value of those articles which the buyer would not accept, although the seller claimed that he was holding them for the buyer.[19]

In proper circumstances, a receiver may be appointed.[20]

Indemnity. Where conditional sellers were entitled to possession of equipment placed in leased premises, the court could in its judgment require the seller to indemnify the owners of the building for damage caused by removal.[21]

§ 67. —— Damages

Damages for injuries to rights in articles that may or may not be fixtures are to be determined by the rule which is best suited, in the particular circumstances, for measuring the loss.

Generally, the measure of damages for the removal of fixtures which have become part of the freehold is that applicable to injury to real property;[22] but the primary object is to determine the amount of the loss, and whatever rule is best suited for that purpose should be adopted.[23] Damages for the removal of fixtures which became part of the realty may be properly fixed by their separate value, as distinguished from the change in the value of the realty,[24] and by considering their original cost as well as the replacement cost [25] and any depreciation;[26] but an assessment of damages based on the secondhand value of the articles removed is erroneous.[27] With respect to particular personal property, such as a building,[28] an elevator,[29] and with respect to refrigeration equipment,[30] and a

17. Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.

Bakery oven

Tex.—C. D. Shamburger Lumber Co. v. Bredthauer, supra.

18. Pa.—Waltman v. Mayer, 97 Pa. Super. 236.

19. Mich.—United Store Fixture Co. v. Grubiak, 284 N.W. 602, 287 Mich. 671.

20. **Restoration of property**

In a suit to foreclose a mortgage, where the bill prayed for a mandatory writ to compel a stranger to restore certain tanks to their former position, the court held that a decree of that nature would be wholly unenforceable, except persuasively by process of contempt, and instead appointed a receiver to restore the property to its former position, the cost to be included in the decree, and left the liability of the stranger for the damages to be enforced at law.—First Nat. Bank & Trust Co. of Woodbury v. Hager Oil Co., 146 A. 878, 105 N.J.Eq. 62.

21. N.C.—Brunswick-Balke-Collender Co. v. Carolina Bowling Alleys, 169 S.E. 186, 204 N.C. 609.

22. Tex.—Sanders v. Lefkovitz, Civ. App., 292 S.W. 596.

23. Wyo.—Slane v. Curtis, 286 P. 372, 41 Wyo. 402, 69 A.L.R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.

24. Wyo.—Slane v. Curtis, supra.

Value at time of conversion

Purchase of irremovable fixture from mortgagor with actual or constructive notice of mortgage covering it, in effect constituted conversion and renders purchaser liable for value of property at time of conversion.—Morgan Utilities v. Kansas City Life Ins. Co., 37 S.W.2d 90, 183 Ark. 492.

25. Wyo.—Slane v. Curtis, 286 P. 372, 41 Wyo. 402, 69 A.L.R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.

Value of article, cost of restoration, and interest

Vendor, recovering building and electing to take money judgment on conditional seller's removal of furnace, constituting part of realty, is entitled to the value of the furnace, cost of restoring the property to its original condition, and interest from the date of removal.—Holland Furnace Co. v. Pope, 215 N.W. 943, 204 Iowa 737.

Replacement value of machine

For the wrongful retaking by a conditional seller, on default of buyer, of a machine which was sold to be attached to the realty, and which at time of retaking constituted part of a plant in the hands of the receiver of the buyer, the measure of damages is its replacement value as of that time, irrespective of the amount due under the contract of purchase, or of the sum for which the seller had expressed a willingness to resell to the receiver.—Beloit Iron Works v. Lockhart, 144 A. 283, 294 Pa. 376.

Referee's assessment of damages of two hundred seventy-four dollars for rewiring building held proper.—Delay Mfg. Co. v. Carey, 13 A.2d 152, 91 N.H. 44.

26. Wyo.—Slane v. Curtis, 286 P. 372, 375, 41 Wyo. 402, 69 A.L.R. 906, rehearing denied 288 P. 12, 41 Wyo. 402, 69 A.L.R. 906.

If property removed is as good as new, deterioration or depreciation will not be deemed important in fixing damages.—Slane v. Curtis, supra.

Computation to a nicety will not be made of the difference in value between old and new.—Slane v. Curtis, supra.

27. Wyo.—Slane v. Curtis, supra.

"The value of the property removed [heating plant and plumbing] would naturally be much more in place than as removed."—Slane v. Curtis, supra.

28. **Measure of damages for destruction**

Where a lease of part of a railroad right of way provided that on termination of the lease the lessee should be allowed reasonable time to remove improvements, the measure of damages for the destruction of a house without allowing the lessee a reasonable time for its removal was not the difference between the value of the lumber in the house and its value after the house was torn down, but the value of the house at the time it was destroyed, less the reasonable cost of removing it, and also less the value of the lumber and material saved.—Texas & N. O. Co. v. Clevenger, Tex.Civ.App., 223 S.W. 1036.

Money reasonably spent in erecting building on leased premises was held recoverable for landlord's conversion. —Bantuelle v. Jones, Tex.Civ.App., 52 S.W.2d 93.

29. **Value as part of building**

Or.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626.

26 C.J. p 734 note 54 [a].

30. **Damage by installation**

In action by assignee of chattel

sprinkler system,[31] the damages will depend on the form of action and the particular facts.

Exemplary damages. To warrant exemplary damages in a suit for conversion, malicious intent must be sustained by some act other than the mere fact of withholding or preventing removal of the property.[32]

FLAG. The noun, in its primary sense of a national or state insignia, is defined in Flags § 1. As to the constitutionality of laws or regulations relating to flags see Constitutional Law § 206 notes 80, 81, § 488 note 70, with reference to salutes to the flag in schools; and § 668 notes 95–1, with reference to the prohibition of the use of the national flag for advertising. As to regulating the use or abuse of various flags see Flags §§ 2–5.

As a verb, the term signifies to signal with, or as with, a flag,[1] and does not necessarily imply or require the actual use of a flag.[2]

In an entirely different sense, both as a noun and as a verb, the word refers to a manner of paving or to a species of pavement, the noun being defined as a flat slab of stone used for paving.[3]

Flagging. One species of pavement, namely, a paving with flat stone,[4] a pavement of flag stones.[5]

The term has been compared with, or distinguished from, "paving"[6] and "pavement."[7]

Phrases employing the word are set out in the note.[8]

FLAGELLAT. An entry on old Scotch records, meaning whipped; scourged.[9]

FLAGMAN. See the C.J.S. titles Insurance § 1512, also 45 C.J. p 95 notes 49, 50, as constituting hazardous employment within mutual benefit society's by-laws; and Railroads § 728, also 52 C.J. p 202 note 90–p 208 note 98, duty of railroad to provide.

FLAGRANS. Latin; burning, raging, in actual perpetration.[10]

FLAGRANT. Glaring, notorious, scandalous.[11]

mortgage, given under conditional sales contract, against prior realty mortgagee to recover such part of refrigeration equipment as contract provided should remain personalty, damage done by installation of equipment which, under sales contract, became realty, could not be considered.—General Motors Acceptance Corporation v. Farm & Home Savings & Loan Ass'n, 58 S.W.2d 338, 227 Mo. App. 832.

31. **Conversion by landlord**
Where landlord, on forfeiture of leasehold estate, converted sprinkler system bought by tenant under conditional sales contract, measure of damages was not amount due on contract but value of system at time of conversion.—National Bank of Republic of Chicago v. Wells-Jackson Corporation, 193 N.E. 215, 358 Ill. 356, 98 A.L.R. 618, reversing 272 Ill. App. 561.

32. Tex.—Loftus v. Ray, Civ.App., 46 S.W.2d 1034, error dismissed.

In determining issue of malicious intent or wanton disregard, deemed equivalent to such intent, withholding of the property may be considered in connection with any other act, fact, or circumstance.—Loftus v. Ray, supra.

1. Mo.—Bergfeld v. Kansas City Rys. Co., 227 S.W. 106, 110, 285 Mo. 654.

2. **As signal**
In common parlance, the verb "to flag," with reference to signaling, does not necessarily mean the actual use of a flag, but by figure of speech the word is used in the secondary sense and signifies the giving of a signal as with a flag, that is to say, as by a waving of the hand for the purpose of communicating information.—Bergfeld v. Kansas City Rys. Co., supra.

3. Century D.

4. N.Y.—In re Phillips, 60 N.Y. 16, 21.

5. Va.—Roanoke v. Harris, 19 S.E. 179, 180.

6. N.Y.—Matter of Burmeister, 76 N.Y. 174, 181, 56 How.Pr. 416—Schenectady v. Union College, 21 N.Y.S. 147, 151, 66 Hun 179.

7. N.Y.—Vandeweghe v. City of New York, 270 N.Y.S. 570, 573, 240 App. Div. 169.
26 C.J. p 737 note 4 [b].

8. **Phrases construed**
(1) "Duty of the flag," described as an ancient ceremony, in acknowledgment of British sovereignty over the British seas, by which a foreign vessel struck her flag and lowered her top-sail on meeting the British flag.—Black L.D.

(2) "Flag captain" see the C.J.S. title Shipping § 57, also 26 C.J. p 737 note 1.

(3) "Flagged cars" see the C.J.S. title Railroads § 1, also 26 C.J. p 737 note 2.

(4) "Flagged sidewalk."—In re Garvey, 77 N.Y. 523, 524—New York v. Brown, 57 N.Y.S. 742, 744, 27 Misc. 218.

(5) "Flag lieutenant" as meaning in the United States navy, the senior aid of the flag officer.—U. S. v. Miller, Ct.Cl., 28 S.Ct. 199, 200, 208 U.S. 32, 52 L.Ed. 376. See also Army and Navy § 16.

(6) "Flag of truce," as used for communicating between belligerent forces see the C.J.S. title War § 24, also 67 C.J. p 387 note 34.

(7) "Flag said crossing."—Bergfeld v. Kansas City Rys. Co., 227 S.W. 106, 110, 285 Mo. 654.

(8) "Flag station" see Railroads § 1, also 26 C.J. p 739 note 1.

(9) "Law of the flag" see Flags § 6.

9. Black L.D.

10. Black L.D.

"Flagrans bellum"—a war actually going on.—Black L.D.

"Flagrans crimen"—a fresh or recent crime. This term designated a crime in the very act of its commission, or while it was of recent occurrence.—Black L.D.

"Flagrante bello"—during an actual state of war.—Black L.D.

"Flagrante delicto"—in the very act of committing the crime.—Black L.D.

11. Century D.

"Flagrant delite"
In French law, a crime which is in actual process or perpetration or

FLAGRANTLY. In a flagrant manner; glaringly; notoriously.[12]

"Flagrantly against the evidence." A phrase sometimes applied to verdicts instead of the more usual phrase "contrary to the evidence," discussed generally in the C.J.S. titles Criminal Law § 1452 and New Trial § 69, also 46 C.J. p 170 note 40-p 183 note 96; and described as based on testimony contradictory to the admitted physical facts;[13] so shockingly against the evidence as to show passion or prejudice or other unpermissible controlling factors;[14] without any or without substantial support in the evidence.[15]

which has just been committed.—Black L.D.

Other phrases construed

(1) "Flagrant necessity," defined as a case of urgency rendering lawful an otherwise illegal act, as an assault to remove a man from impending danger.—Black L.D.

(2) "Flagrant misrepresentation of a statute."—State ex rel. Schwartz v. Leonard, 29 N.E.2d 619, 620, 65 Ohio App. 251.

12. Century D.

13. Ky.—Coney Island Co. v. Brown, 162 S.W.2d 785, 788, 290 Ky. 750.

14. Ky.—Little v. Commonwealth, 158 S.W.2d 955, 956, 289 Ky. 475.

Similarly expressed

(1) So unsupported by proof and so overwhelmingly contradicted as to force the conclusion that it was the result of passion and prejudice on the part of the jury.—Cloversplint Coal Co. v. Blair, 151 S.W.2d 1052, 1053, 287 Ky. 158.

(2) So much against the weight of the evidence as to shock the conscience and clearly to make it appear the result of passion and prejudice of the jury.—Smith v. Commonwealth, 288 S.W. 752, 754, 216 Ky. 813.

15. Ky.—Williams v. Commonwealth, 125 S.W.2d 221, 223, 276 Ky. 754—Combs v. Commonwealth, 83 S.W.2d 46, 48, 259 Ky. 703.

Phrase not applicable merely because the verdict was not supported by the testimony of as many witnesses as those testifying to the contrary, nor when supported by sufficient testimony to carry conviction.—Cloversplint Coal Co. v. Blair, 151 S.W.2d 1052, 1053, 287 Ky. 158.

FLAGS

This Title includes adoption and use of government flags; regulation or prohibition of use of other flags; prosecution and punishment of offenses relating to flags not constituting another particular offense; and law of the flag.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

Analysis

§ 1. Definitions—p 1019
2. Laws relating to United States or state flags—p 1019
3. Laws relating to other flags—p 1021
4. —— Flags of forbidden colors—p 1021
5. —— Enemy or rebel flags—p 1021
6. Law of the flag—p 1021

§ 1. Definitions

A flag may be defined as a light flexible cloth, usually oblong, and bearing a device or devices to indicate nationality, party, etc., or to give or ask information, commonly attached to a staff or halyard.

A flag may be defined as a light flexible cloth, usually oblong, and bearing a device or devices to indicate nationality, party, etc., or to give or ask information, commonly attached to a staff or halyard.[1] The national flag is the emblem of national authority.[2]

Jack. A modification or portion of a country's flag used for particular signaling purposes is called a "Jack."[3]

§ 2. Laws Relating to United States or State Flags

Under the Uniform Flag Law and other statutes, the desecration or mutilation of the flag of the United States or of a state is an offense. Such statutes are upheld as a proper exercise of the police power as tending to prevent breaches of the peace and as upholding the dignity of the flag.

Either congress[4] or a state legislature[5] may, under the police power,[6] prohibit or regulate the use of the national flag of the United States; and a state has the same powers with respect to the state flag or other state insignia. Numerous statutes have been enacted making it an offense to display, expose, or make use of such a flag, standard, color, or other insignia by persons or corporations under certain circumstances and conditions,[7] or to deface, defile, defy, desecrate, destroy, disfigure, mutilate,

1. Webster New Int.D.

2. Neb.—Halter v. State, 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079.

26 C.J. p 738 note 2.

Object of patriotic adoration

To the citizen the flag is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future.—Halter v. State, 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079.

Change of flag as entitling seamen to discharge see the C.J.S. title Seamen § 37, also 56 C.J. p 945 note 52.

Flag as evidence of vessel's nationality:

Generally see the C.J.S. title Shipping § 1, also 58 C.J. p 31 note 12.

As affecting liability of vessel and property to capture in time of war see the C.J.S. title War § 28, also 67 C.J. p 401 note 80–p 402 note 88.

"Flag" as a verb see the definition Flag supra p 1017 notes 1, 2.

3. U.S.—The Ullock, D.C.Or., 19 F. 207, 209, 9 Sawy. 634.

Union Jack see the C.J.S. definition Union Jack, also 65 C.J. p 1243 note 4.

4. U.S.—Halter v. Nebraska, 27 S. Ct. 419, 205 U.S. 34, 51 L.Ed. 696, 10 Ann.Cas. 525, affirming 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079.

5. U.S.—Halter v. State, 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079, affirmed 27 S. Ct. 419, 205 U.S. 34, 51 L.Ed. 696, 10 Ann.Cas. 525.

6. U.S.—Halter v. Nebraska, 27 S.Ct. 419, 205 U.S. 34, 51 L.Ed. 696, 10 Ann.Cas. 525, affirming 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079.

12 C.J. p 925 note 38 [a] (1), (3)–(5).

7. N.Y.—People v. Picking, 23 N.Y. S.2d 148.

26 C.J. p 738 note 8.

For advertising purposes

(1) Proximity to United States flag of advertisements directly above and next to such flag, painted on sides of automobile, is violation of statute prohibiting advertising matter attached, appended, affixed, or annexed to United States flag represented on any substance.—People v. Picking, supra.

(2) Other cases see 26 C.J. p 738 note 8 [a].

trample on, or cast contempt on the same;[8] and under the police power[9] these statutes have been upheld as valid against various constitutional objections, such as the constitutional prohibition against denying or abridging the privileges or immunities of citizens, see Constitutional Law § 473, or the constitutional prohibition against deprivation of property without due process of law, see Constitutional Law § 668. Their aim is to uphold the dignity of the national flag;[10] and they are designed to prevent that which would shock the public sense, and, because of the publicity accompanying it, would be likely to result in breaches of the peace.[11] The question of whether or not a requirement of a salute and pledge of allegiance in public schools to the national flag is an infringement of the constitutional guaranty of religious liberty and freedom of conscience is discussed in Constitutional Law § 206 c (1), and, as noted in § 488 of the same title, a statute making it the duty of a commissioner of education to prepare a program providing for a salute to the flag for use in the public schools is not invalid as an abridgment of the privileges and immunities of the citizens of the United States.

Defenses. It is no defense that the act constituting the violation of such a statute was done in the performance of a contract made prior to the passage of the statute;[12] nor does the fact that the flag was a part of a trade-mark place defendant in any more favorable position.[13]

Indictment or information. Where the statute has clearly defined the offense, an indictment setting forth the offense substantially in the language of the statute is sufficient.[14]

Evidence. The general rules, considered in Criminal Law, §§ 530–926, govern as to the evidence.[15]

Offer and reception of evidence. The general rules, considered in Criminal Law, §§ 999–1057, govern as to the offer and reception of evidence.[16]

8. Ark.—Johnson v. State, 163 S.W. 2d 153.
N.J.—State v. Schlueter, 23 A.2d 249, 127 N.J.Law 496.
26 C.J. p 738 note 9.

Strict construction

The provision of Uniform Flag Act that it should be construed so as to effectuate its general purpose was a mere declaration of fundamental principle applicable to all statutory construction and did not modify principle that a penal statute must be strictly construed.—State v. Peacock, Me., 25 A.2d 491.

"Deface or defile"

Statute, penalizing any person who shall publicly mutilate, trample on, or otherwise deface or defile any flag of the United States, uses the words "deface" and "defile" in their meaning of "dishonor" which imputes a lively sense of shaming or an equivalent acquiescent callousness.—State v. Schlueter, 23 A.2d 249, 127 N.J.Law 496.

Essence of offense

The very essence of the statutory offense of mutilating or casting contempt on the United States flag is publicity.—State v. Peacock, Me., 25 A.2d 491.

Intent required

Statute penalizing any person who shall publicly mutilate, trample on, or otherwise deface or defile any flag of the United States requires no greater intent than the words of the offense carry.—State v. Schlueter, 23 A.2d 249, 127 N.J.Law 496.

9. Neb.—Halter v. State, 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079, affirmed 27 S.Ct. 419, 205 U.S. 34, 51 L.Ed. 696, 10 Ann.Cas. 525.
N.Y.—People v. Van De Carr, 86 N.Y.S. 644, 91 App.Div. 20, affirmed 70 N.E. 965, 178 N.Y. 425, 102 Am.S.R. 516, 66 L.R.A. 189.

10. N.Y.—People v. Picking, 23 N.Y.S.2d 148.

11. Me.—State v. Peacock, 25 A.2d 491.

12. Mass.—Commonwealth v. R. I. Sherman Mfg. Co., 75 N.E. 71, 189 Mass. 76, 4 Ann.Cas. 268.

13. Neb.—Halter v. State, 105 N.W. 298, 74 Neb. 757, 121 Am.S.R. 754, 7 L.R.A.,N.S., 1079, 1083, affirmed 27 S.Ct. 419, 205 U.S. 34, 51 L.Ed. 696, 10 Ann.Cas. 525.

14. Mass.—Commonwealth v. R. I. Sherman Mfg. Co., 75 N.E. 71, 189 Mass. 76, 4 Ann.Cas. 268.
N.J.—State v. Schlueter, 23 A.2d 249, 127 N.J.Law 496.

Necessity to charge willfulness

Under a statute requiring no greater intent than the words of the offense carry, an indictment charging the offense in the words of the statute need not mention that the act was committed willfully, maliciously, or with evil intent.—State v. Schlueter, supra.

Sufficiency

An indictment, charging in words of statute that accused did publicly mutilate, deface, and defile the flag of the United States of America, contrary to the form of the statute in such case made and provided, was sufficient, notwithstanding that it did not allege that the act was committed willfully, or with a willful, malicious, or evil intent.—State v. Schlueter, supra.

15. **Showing previous similar conduct**

In a prosecution, under Gen.St. 1915 § 3706, for the public use of language casting contempt on the United States flag, evidence of previous use of other language expressing contempt is admissible.—State v. Shumaker, 175 P. 978, 103 Kan. 741.

Sufficiency

(1) Evidence that accused deliberately and with intent pulled a small American flag from the front of her motorcycle, broke the staff, tore, and crumbled the flag, and threw the flag to the ground sustained conviction for publicly mutilating, defacing, and defiling the flag of the United States of America.—State v. Schlueter, 23 A.2d 249, 127 N.J.Law 496.

(2) Evidence that defendant, after refusing to salute United States flag when at welfare commissary to procure commodities for himself and family, addressed a large number of people telling them that the flag meant nothing to him and was only a "rag," was sufficient to support conviction of wilfully and publicly exhibiting contempt for United States flag.—Johnson v. State, Ark., 163 S.W.2d 153.

(3) In prosecution for desecrating the United States flag, evidence supported finding that automobile, on which appeared at six different places defendant's name, emblem, and appeal to "Travel America," constituted one advertisement to which the flag was affixed in violation of the statute.—People v. Picking, 33 N.Y.S.2d 317, 263 App.Div. 366.

16. Mass.—Commonwealth v. R. I. Sherman Mfg. Co., 75 N.E. 71, 189 Mass. 76, 4 Ann.Cas. 268.
26 C.J. p 739 note 17.

Instructions. It is proper to instruct the jury as to the meaning and essential significance of the words of the indictment charging the offense.[17]

Punishment. In a prosecution under a flag desecration statute providing a misdemeanor penalty, a verdict assessing the penalty of a felony is contrary to law.[18] In Massachusetts, although the statute creating the offense does not provide a punishment therefor, it may be punished in conformity to the "common usage and practice of this commonwealth."[19]

§ 3. Laws Relating to Other Flags

Under some statutes the display of flags having certain inscriptions is prohibited.

Under statutes so providing, the use or carrying in parade of flags or emblems having certain inscriptions on them is prohibited.[20]

§ 4. —— Flags of Forbidden Colors

Under some statutes the display or carrying, in any public assembly, parade, or demonstration, of a red or black flag is prohibited. Slight variations or the fact that the flag is the banner of a society or a political party will not constitute a defense.

Under some statutes the display or carrying of any red or black flag in any public assembly, parade, or demonstration is prohibited.[21] Color alone brings a flag within the terms of the act.[22] If the flag is of the forbidden color in its essential and dominating characteristics, then the mere circumstance that it bears also an inscription or device of another color is not enough to prevent its being a red flag;[23] nor does the fact that it is the usual banner of a society affiliated with a political party constitute a defense.[24] The use of a red flag in violation of statute has, under a statutory provision so providing, been held prima facie evidence of its use as an emblem of anarchy;[25] but where the prohibition in the statute against the display of a red flag in public assembly is general and not limited by the presumption concerning anarchy, proof beyond a reasonable doubt that the red flag was used as an emblem of anarchy is not required in order to warrant conviction.[26]

§ 5. —— Enemy or Rebel Flags

A statute making it an offense to expose to public view enemy or rebel flags includes within its provisions flags similar in type to those mentioned. It does not require a specific criminal intent, apart from the act of displaying or exposing, as a necessary element of the offense.

Under a statute, such as the Philippine Flag Law, making it an offense to expose to public view any flag or banner used in an insurrection to designate or identify those in armed rebellion against the United States, a specific criminal intent, apart from the act of displaying or exposing, is not a necessary element of the offense.[27] Such statute includes not only the identical flags, banners, emblems, or devices actually used for the purposes therein mentioned, but also every flag, banner, emblem, or device of that type.[28]

§ 6. Law of the Flag

The law of the flag is a rule to the effect that a vessel is a part of the territory of the nation whose flag she flies and is governed by the law thereof.

The law of the flag has been defined as a rule to the effect that a vessel is a part of the territory of the nation whose flag she flies.[29] The term is used to designate the right under which a shipowner, who

17. N.J.—State v. Schlueter, 23 A.2d 249, 127 N.J.Law 496.

Good practice
It is good practice for counsel to request an appropriate charge.—State v. Schlueter, supra.

Public
An instruction, to the effect that words and acts are spoken or done "publicly" if they are spoken or done in presence of persons other than the one uttering words or doing the acts and with intent of exhibiting the contempt which the latter feels for the flag, was erroneous as ignoring distinction between what is "public" and what is "private."—State v. Peacock, Me., 25 A.2d 491.

18. Ind.—McKee v. State, Ind., 37 N.E.2d 940.

19. Mass.—Commonwealth v. R. I. Sherman Mfg. Co., 75 N.E. 71, 189 Mass. 76, 4 Ann.Cas. 268.

20. Mass.—Commonwealth v. Karvonen, 106 N.E. 556, 219 Mass. 30, 31, L.R.A.1915B 706, Ann.Cas.1916D 846.
26 C.J. p 739 note 20.
Validity of statute as to display of flags as contravention of guaranty of right of assembly see Constitutional Law § 214 a note 59.

21. Mich.—People v. Immonen, 261 N.W. 59, 271 Mich. 384.
26 C.J. p 739 note 21.

Validity
Such statutes are valid.—People v. Immonen, supra.

Red flag
The red flag is the emblem, the advocate, and teacher of anarchy. It is not an emblem of peaceful means of accomplishing governmental revolution. Instead, in common acceptance, it is a challenge and a threat of the use of force and the resort to destruction incident to governmental revolution.—People v. Immonen, supra—26 C.J. p 739 note 21 [a].

22. Mass.—Commonwealth v. Karvonen, 106 N.E. 556, 219 Mass. 30, L.R.A.1915B 706, 707, Ann.Cas. 1916D 846.

23. Mass.—Commonwealth v. Karvonen, supra.

24. Mass.—Commonwealth v. Karvonen, supra.

25. Mich.—People v. Immonen, 261 N.W. 59, 271 Mich. 384.

26. Mich.—People v. Immonen, supra.

27. Philippine.—U. S. v. Go Chico, 14 Philippine 128.
26 C.J. p 739 note 25.

28. Philippine.—U. S. v. Go Chico, supra.
26 C.J. p 739 note 27.

29. N.Y.—Carrington v. Panama Mail S. S. Co., 241 N.Y.S. 347, 136 Misc. 850.

sends his vessel into a foreign port, gives notice by his flag to all who enter into contracts with the ship master that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all.[30]

FLANGE. A projecting flat rim, collar, or rib used to strengthen an object, to guide it, to keep it in place, etc.;[1] specifically, the spread-out portion of the eyelet used in the manufacture of shoes.[2]

FLANKING. As a term used in towing, see the C. J.S. title Towage § 47, also 26 C.J. p 739 note 3.

FLARE. Used both as a noun and a verb.[3] As a noun, an unsteady glaring light, a blaze of fire or light, used to signal, illuminate, or attract attention, as on a ship or on an aviation field at night. As a verb, in one sense to burn with an unsteady or waving flame, to flame up brightly, or to shine out with a sudden light; and, in another sense, to open or spread outward, to project beyond the perpendicular.[4] A flare may be used for guarding trucks when they are temporarily halted on the road at night;[5] and is distinguished from a "torch" only by its size.[6]

FLASH. As a noun, a sudden burst of flame or light; a light instantaneously appearing and disappearing.[7]

As a technical term in metal rolling it has been described as an ordinary fin or overfill, comprising the thin extra portions of metal exuded sidewise from between grooved rolls.[8]

As a verb, to burst into sudden flame; specifically, to ignite and flare up with sudden and transient brilliancy, to emit a bright flame for a moment, as the flashing point of oil.[9]

Flashing. As a technical term in the oil cracking art, it is descriptive of a process of immediate vaporization accomplished by sudden decrease of pressure upon oil heated almost to the vaporization point;[10] in a particular context, may be synonymous with the phrase "to vaporize portions of the oil."[11]

As an adjective, the word occurs in several phrases.

Flash point. The temperature of heated oil at which the vapor rising from it flashes momentarily into a perceptible flame upon the application to it of fire, and then immediately goes out.[12] With reference to liquid asphalt road oils, it is said to mean solubility under heat.[13]

The term has been distinguished from "fire point" see ante p 806 note 39(23).

Law of flag as governing:
Citizenship see Citizens § 5.
Construction and operation of charter party see the C.J.S. title Shipping § 32, also 58 C.J. p 131 notes 45, 46.
Contracts of:
Affreightment for carriage of goods by sea see the C.J.S. title Shipping § 107, also 58 C. J. p 343 note 80–p 345 note 5.
Seamen see the C.J.S. title Seamen § 4, also 56 C.J. p 925 note 6–p 926 note 10.
Jurisdiction of offense committed on the high seas see Criminal Law § 138 d.
Lien of master of vessel for wages and disbursements see the C.J.S. title Shipping § 69, also 58 C.J. p 286 notes 54–56.
Seaman's lien for wages see the C. J.S. title Seamen § 6, also 56 C.J. p 928 notes 44–46.
Torts against seamen see the C.J. S. title Seamen § 5, also 56 C.J. p 926 note 12–p 928 note 42.

30. Ill.—Ruhstrat v. People, 57 N.E. 41, 185 Ill. 133, 144, 76 Am.S.R. 30, 49 L.R.A. 181.

1. U.S.—Beardsley v. Howard & Bullough American Mach. Co., C.C.R.I., 176 F. 619, 621.

Phrases construed

(1) "Flange coupling," as a "safety coupling."—Freeberg v. St. Paul Plow-Works, 50 N.W. 1026, 1027, 48 Minn. 99.

(2) "Flange wheels."—Cottam v. Guest, 6 Q.B.D. 70, 73.

2. U.S.—United Shoe Machinery Corporation v. Atlas Tack Corporation, D.C.N.Y., 27 F.Supp. 499, 501.

3. U.S.—Rushmore v. Saxon, C.C.N. Y., 158 F. 499, 508.

4. Webster New Int.D.

Phrases construed

(1) "Flare front," as applied to automobile lamps, characterized as an arbitrary term, not a descriptive one, and strictly speaking ungrammatical, since it should be "flared front" or "flaring front," but held to indicate that such front would cause a wavering, glaring light to emanate from the lamp, or that the front spread outward, or that it was an ostentatious showy lamp or front.—Rushmore v. Saxon, C.C.N.Y., 158 F. 499, 508.

(2) "Flare-up light" see Collision § 2 b note 58, and §§ 97, 98.

5. U.S.—Standard Parts v. Toledo Pressed Steel Co., C.C.A.Ohio, 93 F.2d 336.

6. U.S.—Standard Parts v. Toledo Pressed Steel Co., supra.

7. Century D.

8. U.S.—Witherow Steel Corporation v. Donner Steel Co., D.C.N.Y., 31 F. 2d 157, 161.

9. Century D.

10. D.C.—Gyro Process Co. v. Coe, 107 F.2d 195, 197, 198, 70 App.D.C. 390.

11. D.C.—Gyro Process Co. v. Coe, supra.

12. U.S.—Louisiana Oil Refining Corporation v. Reed, C.C.A.La., 38 F.2d 159, 161.
Conn.—State v. Boylan, 65 A. 595, 596, 79 Conn. 463.

13. N.J.—Kingston Bituminous Products Co. v. City of Long Branch, 12 A.2d 237, 238, 124 N.J. Law 472.

Other phrases, employing the adjective in a different sense, are set out in the note.[14]

FLASHER. A contrivance by which incandescent lamps are momentarily illuminated or extinguished.[15]

FLASHOVER. See Electricity § 1 b note 50.

FLASK. A bottle, especially one of some peculiar form or material; also a vessel used in a laboratory for sublimation, for digesting in a sand-bath, or for any similar purpose.[16]

FLAT.

In General

A word which may be used in different senses.[17] It has no technical or legal meaning.[18]

As a Noun

The flat part or side of anything, as the extended palm and fingers of the hand. In the common use of the word, levelness or horizontalness is implied, especially a level plain, a field.[19] The term has been distinguished from "stria."[20]

——**Geographical Sense.** Land covered by the water at high tide, and left bare at low;[21] land situated between high water and low water;[22] a level place over which the water stands or flows;[23] shallow or shoal water.[24] The term may be employed as equivalent to, or synonymous with, "beach" see 10 C.J.S. p 217 note 97, and "shore" see Boundaries § 4 note 40. It has been compared with "beach," "shore," and "strand;"[25] and has been distinguished from "channel."[26]

"Flat" or "flats" used as a boundary see Boundaries § 4 notes 39–41.

——**Structural Sense.** A "flat," in its original etymological sense, was a floor in a building,[27] or a portion of such a floor.[28] Later the use of the word became restricted to a floor completely equipped for housekeeping purposes, or for separate housekeeping;[29] a floor which forms a complete residence in itself, a floor divided into rooms and fitted for the occupancy of a single family; an apartment.[30] A building containing such floors, so equipped, each of which is called a "flat," is itself termed a "flat," although properly speaking, it should be termed a "flathouse."[31] A duplex house may be a "flat," which may be used as a lodging house or rooming house.[32]

The term is synonymous with "apartment" see Apartment 3 C.J.S. p 1422 note 72.1 in Pocket

14. **Phrases defined**
(1) "Flash check" defined as a check drawn on a banker by a person who has no funds at the banker's, and knows that such is the case.—Black L.D.
(2) "Flash notes," as meaning forged or counterfeit notes.—Century D.

15. New Standard D.
Similarly expressed
Que.—Macey Sign Co. v. Routtenberg, 48 Que.Super. 346.

16. Century D.
Phrases construed
(1) "Koch flasks," described as bottle-like containers made of thin glass and used in chemical operations.—Eimer & Amend v. U. S., C.C.N.Y., 126 F. 439, 440. As "bottles or jars" within the Tariff Acts see Customs Duties § 33.
(2) "Woulf flasks," described as bottle-like containers, differing from ordinary bottles in that they have high flat shoulders and more than one neck, some having two and some, three.—Eimer & Amend v. U. S., C.C. N.Y., 126 F. 439, 440. As "bottles or jars" within the Tariff Acts see Customs Duties § 33.

17. Conn.—Stannard v. Hubbard, 34 Conn. 370, 376.

18. Mo.—Godfrey v. Hampton, 127 S. W. 626, 628, 148 Mo.App. 157.

19. Ill.—Maxim Mfg. Co. v. Imperial Mach. Co., C.C.A.Ill., 286 F. 79, 83.

20. U.S.—Maxim Mfg. Co. v. Imperial Machine Co., supra.

21. Pa.—Jones v. Janney, 8 Watts & S. 436, 443, 42 Am.D. 309.

22. Mass.—City of Boston v. Boston Port Development Co., 30 N.E.2d 896, 900, 308 Mass. 72.

23. Conn.—Church v. Meeker, 34 Conn. 421, 424.
Phrase construed
"Sedge-flat," as importing a tract of land below high water mark. "Salt 'sedge' grows only on land covered by the tide at ordinary high water."—Church v. Meeker, supra.

24. **Where fish may be taken**
"This word itself is obviously one which may be used in different senses, but in this statute it is confined to some place or places within a river, cove, creek, or harbor where fish may be taken. It implies, therefore, that it must be a place more or less under water. It is frequently used by nautical men to distinguish it from the channel of a river or harbor, and in this sense, while it includes the idea of being under water, it is used as descriptive of a place not navigable with safety by ordinary vessels, on account of the shallowness of the water."—Stannard v. Hubbard, 34 Conn. 370, 376.
As including a mussel bed
Kan.—Fowler v. Wood, 85 P. 763, 776, 73 Kan. 511, 117 Am.S.R. 534, 6 L.R.A.,N.S., 162.
Me.—King v. Young, 76 Me. 76, 79, 49 Am.R. 596.

25. Mass.—Doane v. Willcut, 5 Gray 328, 335, 66 Am.D. 369.

26. Conn.—Stannard v. Hubbard, 34 Conn. 370, 376.

27. N.J.—Lignot v. Jaekle, 65 A. 221, 223, 72 N.J.Eq. 233.
"A floor, loft, or story, in a building"
Mo.—Godfrey v. Hampton, 127 S.W. 626, 628, 148 Mo.App. 157.

28. Mo.—Godfrey v. Hampton, supra.

29. N.J.—Lignot v. Jaekle, 65 A. 221, 223, 72 N.J.Eq. 233.

30. Mo.—Godfrey v. Hampton, 127 S.W. 626, 628, 148 Mo.App. 157.
Phrase construed
"Self-contained flat," defined as a flat which is a complete residence, containing all that is reasonably necessary for the persons who reside there, but not depending upon "its having an outer door or bar," or upon all the rooms being "within one outer door, or cut off from other parts of the house."—Darrall v. Whitaker, 92 L.J.K.B. 882, 884.

31. N.J.—Lignot v. Jaekle, 65 A. 221, 223, 72 N.J.Eq. 233.

32. Cal.—Edwards v. City of Los Angeles, App., 119 P.2d 370, 373.

Parts, and while sometimes used interchangeably with "apartment house," it has also been distinguished therefrom see 3 C.J.S. p 1423 notes 87, 88; also the term has been compared with, or distinguished from, "adjoining houses"[33] "bungalow or ranch building,"[34] and "dwelling" see 28 C.J.S. p 604 note 19.

Machinery or equipment. In sawmills, a contrivance upon which lumber is piled, and which is not movable by wheels affixed thereto but must be moved by the use of jacks.[35]

As an Adjective

Having an even and horizontal surface, or nearly so, without marked prominences or depressions;[36] having a surface that is a horizontal plane or nearly so;[37] level without inclination, plane;[38] level, without rotundity, curvature, or other variation or irregularity;[39] also uniform.[40]

As applied to bonds or other securities purchased the term may imply a sale for the face value[41] without taking into account the accrued interest,[42] but not always so.[43]

Phrases employing the word are set out in the note.[44] Other phrases as to which more recent adjudications have not been found see 26 C.J. p 740 notes 31–34.

FLATTEN. To make flat; reduce to an equal or even surface; level.[45]

Flattened. Made flat.[46]

FLATTERY. An effort to influence another by use of false or excessive praise; insincere, complimentary language or conduct.[47] As constituting undue influence see the C.J.S. titles Contracts § 180 b note 26, and Wills § 226, also 68 C.J. p 749 note 80. As element in seduction see the C.J.S. title Seduction § 35, also 57 C.J. p 49 note 99.

FLAVIANUM JUS. In Roman law, the title of a book containing the forms of actions published A.U.C. 449, by Cneius Flavius.[48]

FLAVOR. That quality of anything which affects the taste.[49]

The term has been held not synonymous with "extract" see the C.J.S. title Food § 45, also 26 C.J. p 776 note 16 [a].

FLAX. The cleaned fibre of the flax plant, prepared for spinning.[50]

As embraced within the term "grain," in a warehouse statute see the C.J.S. title Warehousemen and Safe Depositaries § 14, also 67 C.J. p 455 note 50 [a]. For classification under the tariff acts see Customs Duties § 41.

FLAXSEED. An article used as food for man and beast, and included within the definition of "grain."[51]

FLECTA. A feathered or fleet arrow.[52]

33. Cal.—McDowell v. Hyman, 48 P. 984, 986, 117 Cal. 67.

34. N.J.—Lignot v. Jaekle, 65 A. 221, 224, 72 N.J.Eq. 233.

35. Miss.—Mengel Co. v. Parker, 7 So.2d 521, 522.

36. U.S.—Imperial Machine & Foundry Corporation v. American Machinery Co., D.C.N.Y., 276 F. 436, 438.

37. U.S.—Georgiev v. Fruth, Cust. & Pat.App., 102 F.2d 222, 224.

Not restricted to a literally plane surface

U.S.—Imperial Machine & Foundry Corporation v. American Machinery Co., D.C.N.Y., 276 F. 436, 438, 439.

38. U.S.—Imperial Machine & Foundry Corporation v. American Machinery Co., supra.

39. U.S.—Long v. Noye Mfg. Co., C. C.N.Y., 192 F. 566, 569.

40. Standard D.

41. N.Y.—Citizens' Sav. Bank v. Greenburgh, 65 N.E. 978, 980, 173 N.Y. 215.

42. Ill.—Morris v. Jamieson, 68 N.E. 742, 743, 205 Ill. 87.

N.Y.—Citizens' Sav. Bank v. Greenburgh, 65 N.E. 978, 980, 173 N.Y. 215.

43. **"In New York** they [bonds] are sold 'flat' as it is termed; that is, for a price which includes accrued interest."—Hemenway v. Hemenway, 134 Mass. 446, 447.

44. **"Flat house"**

(1) A building containing "flats." —Skillman v. Smatheurst, 40 A. 855, 856. 57 N.J.Eq. 1.

(2) Any building consisting of more than one story, in which building there are one or more suites of rooms on each floor equipped for separate housekeeping purposes.—Lignot v. Jaekle, 65 A. 221, 223, 72 N. J.Eq. 233.

(3) "Garage and store room" not included.—Jones v. Williams, 106 P. 166, 168, 56 Wash. 588.

Other phrases construed

(1) "Flat land" is land between high and low water mark.—Gibson v. Hoffman, 164 A. 783, 310 Pa. 51.

(2) "Flat rate or rates" see the C.J.S. titles Licenses § 22, also 26 C.J. p 740 note 31 [a], and Waters § 298, also 67 C.J. p 1260 note 27–p 1261 note 33, also 26 C.J. p 740 note 31 [b].

(3) "Flat scale," contrasted with "sliding scale."—Walton v. Proutt, 174 S.W. 1152, 1153, 117 Ark. 388, L.R.A.1915D 917.

"Accumulative scale" contrasted see Accumulative 1 C.J.S. p 768 note 19.

45. Century D.

46. U.S.—Georgiev v. Fruth, Cust. & Pat.App., 102 F.2d 222, 224.

47. Ala.—Hall v. State, 32 So. 750, 759, 134 Ala. 90—Suther v. State, 24 So. 43, 45, 118 Ala. 88—Hayes v. State, 96 So. 647, 19 Ala.App. 241.

48. Black L.D.

49. Webster New Int.D.

Phrase construed

"Flavor of vanilla."—U. S. v. St. Louis Coffee & Spice Mills, D.C.Mo., 189 F. 191, 193.

50. Webster New Int.D.

"Flax mill" see the C.J.S. title Mills § 2, also 26 C.J. p 741 note 41.

51. Iowa.—Hewitt v. Watertown F. Ins. Co., 7 N.W. 596, 55 Iowa 323, 324, 39 Am.R. 174.

52. Black L.D.

FLEDWITE. A discharge or freedom from amercements where one, having been an outlawed fugitive, came to the place of the lord of his own accord; the liberty to hold court and take up the amercements for beating and striking; also the fine set on a fugitive as the price of obtaining the king's freedom.[53]

FLEE. To run away; take flight; seek escape or safety by flight.[54] The term may be used interchangeably with "retreat" or "run."[55]

Flee, or fleeing, from justice. To leave one's home or residence or known place of abode, with intent to avoid detection or punishment for some public offense;[56] a departure by a person from his usual place of abode, or from the place where he has committed an offense, with intent to avoid detection and prosecution for such public offense.[57] Its essential characteristic is leaving one's residence or usual place of abode or resort, or concealing one's self with intent to avoid punishment.[58] The term presupposes the commission of a crime,[59] and implies or requires actual flight,[60] and a purpose to avoid detection.[61]

As used in particular statutes, the terms "fleeing from justice" and "fugitive from justice" are not synonymous.[62]

For references to specific uses see 26 C.J. p 741 note 44.

Other phrases are listed in the note.[63]

FLEECE. The coat of wool that covers a sheep, or that is shorn from a sheep at one time.[64]

As subject to lien on mortgaged sheep see Chattel Mortgages § 122, and as exempt from execution see Exemptions § 52 note 60.

FLEET. A creek or inlet of water, a place where the tide flows; also a company of ships, a navy.[65]

Fleet prison. Formerly in England the prison of the court of chancery and of the court of common pleas.[66]

FLEETING. Not durable; passing rapidly; transient.[67] The term has been held synonymous with "transient."[68]

FLEE TO THE WALL. See Flee supra note 63 (3).

FLEET PRISON. See Fleet supra note 66.

FLEM. In Saxon and old English law, a fugitive bondman or villein; also the privilege of having the goods and fines of fugitives.[69]

FLEMENE FRIT, FLEMENES FRINTHE, or **FLYMENA FRYNTHE.** The reception or relief of a fugitive or outlaw.[70]

53. Black L.D.

54. Century D.

55. Ala.—Spurling v. State, 191 So. 919, 920, 29 Ala.App. 73.

56. Miss.—Ex parte Austin, 93 So. 369, 370, 129 Miss. 869, quoting **Corpus Juris.**
Neb.—Colling v. State, 217 N.W. 87, 88, 116 Neb. 308, citing **Corpus Juris.**
26 C.J. p 741 note 45.

Statutory definition
"To leave one's home or residence or known place of abode within the district, or to conceal one's self therein with intent in either case to avoid detection or punishment for some public offense against the United States."
Miss.—Ex parte Austin, 93 So. 369, 370, 129 Miss. 869.
Or.—State v. Lem Woon, 107 P. 974, 979, 112 P. 427, 57 Or. 482.

57. Neb.—Taylor v. State, 292 N.W. 233, 235, 138 Neb. 156.

58. U.S.—Brouse v. U. S., C.C.A. Mass., 68 F.2d 294, 295.

59. N.J.—Renner v. Renner, 181 A. 191, 199, 13 N.J.Misc. 749.

60. **Actual fleeing required**
One who stands still does not "flee;" and in order for any person to "flee from justice," there must be an actual fleeing, and the words "who shall flee" do not include a person who never was in the country from which he is said to have fled.—Drumm v. Pederson, 259 N.W. 208, 209, 219 Iowa 642.
See also Extradition § 10.

61. **Connotes concealment**
"The term 'fleeing from justice' necessarily contemplates that the accused has departed from his usual place of residence to a place where he cannot be found in the exercise of reasonable diligence by the officers."—Emery v. State, 295 N.W. 417, 418, 138 Neb. 776.

62. U.S.—Ferebee v. U. S., C.C.A.Va., 295 F. 850, 851.
Neb.—Taylor v. State, 292 N.W. 233, 235, 138 Neb. 156—Colling v. State, 217 N.W. 87, 88, 116 Neb. 308.

63. **Phrases construed**
(1) "Absconding or fleeing from justice," as meaning absconding or fleeing from the arresting or prosecuting officers of this state and not from similar officers of some other state.—State v. Berryhill, 177 So. 663, 664, 666, 188 La. 549.
(2) "Fled from justice," as equivalent, under some statutes, to "absconded" or "fugitive from justice."—State v. Berryhill, supra.
(3) "Flee to the wall," a metaphorical expression, used in connection with homicide done in self-defense, signifying the exhaustion of every possible means of escape, or of averting the assault, before killing the assailant.—Black L.D. See also the C.J.S. title Homicide § 128, also 30 C.J. p 68 note 17–p 69 note 23.

64. Century D.

65. Black L.D.

66. Eng.—Wade v. Wood, 1 C.B. 462, 463, 50 E.C.L. 462, 135 Reprint 620.
So called from a river or ditch formerly in its vicinity. It was abolished by statute 5 & 6 Vict. c. 22.—Black L.D.

67. Century D.
"Fleeting or evanescent," as contrasted with "of a substantial character."—Benjamin v. Storr, L.R. 9 C.P. 400, 407, 19 E.R.C. 263.

68. La.—Loque v. Baptist-Golding Motor Co., 102 So. 91, 92, 157 La. 124—Tilly v. Woodham, App., 163 So. 771, 772.

69. Black L.D.

70. Black L.D.

FLEMESWITE. The possession of the goods of fugitives.[71]

FLEMISH BOND. In bricklaying, an arrangement of bricks along a course so that alternating stretchers, or the length of brick exposed, and headers, or the width of brick exposed, follow each other, while in the succeeding course the header is in the center of the stretcher below so that alternating courses are alike.[72]

FLESH. In its broadest sense, the soft parts of the body of an animal, especially a vertebrate animal, usually excluding the integument.[73] The term may include both live flesh and dead flesh.[74]

FLET. In Saxon law, land; a house; home.[75]

FLETA. An ancient treatise on the laws of England, founded mainly upon the writings of Bracton and Glanville, and supposed to have been written in the time of Edward I, while its unknown author was confined in Fleet prison, whence the name.[76]

FLETADOR. In Spanish law, a charter party, one who leases a ship from the owner.[77]

FLETAMENTO. In Spanish law, a contract of charter party or lease of ship.[78]

FLETANTE. In Spanish law, one who leases or charters his ship to another.[79]

FLETAR. In Spanish law, to lease or charter a ship to another.[80]

FLETE. In Spanish law, the price fixed for the lease or charter of a ship, hence the word is commonly used as the equivalent of the English "freight."[81]

FLEX. To bend.[82]

FLEXIBILITY. The quality of being flexible, in any sense; pliancy; flexibleness.[83] A relative term and the antithesis of "rigidity."[84]

FLEXIBLE. Capable of being bent without breaking.[85] The term is necessarily implied in "resilient."[86] It has been compared with, or distinguished from, "deformable" see 26 C.J.S. p 682 note 92, and "resilient."[87]

Phrases employing the word are set out in the note.[88]

FLICHWITE. In Saxon law, a fine on account of

71. Black L.D.

72. N.Y.—Seglin Const. Co. v. State, 22 N.Y.S.2d 94, 96.

Modifications

"Double Flemish," where two stretchers are followed by a header throughout the entire course, while on the succeeding course the header is centered over the vertical joint between the two stretchers of the course below. "Triple Flemish," three stretchers between headers. "Random Flemish," some courses with one stretcher, some with two and some with three.

N.Y.—Seglin Const. Co. v. State, supra.

Practice not Flemish

The bricklaying practice which in England is called Flemish bond is unknown in Flanders, and is followed in the British Isles alone.—Century D.

73. Webster New Int.D.

Phrases construed

(1) "Flesh gained," as referring to an increase in the weight of cattle in a period fixed.—Winch v. Baldwin, 28 N.W. 62, 64, 68 Iowa 764.

(2) "Flesh of a diseased animal, and unwholesome flesh."—Commonwealth v. Horn, 2 Pa.Dist. 487, 488, 13 Pa.Co. 164, 166.

Diseased animals generally see Animals §§ 51–66.

74. **"If flesh in the Old Testament,** especially in the ritual books, means dead flesh, the same word in the New means the living creature. Indeed Job says, 'Yet in my flesh shall I see God.' "—Commonwealth v. Horn, 2 Pa.Dist. 487, 488, 13 Pa.Co. 164, 166.

75. Black L.D.

76. Black L.D.

77. Escriche Diccionario.

Charter party generally see the C.J.S. title Shipping § 26, et seq., also 58 C.J. p 106 note 74 et seq.

78. Escriche Diccionario.

See generally the C.J.S. title Shipping § 26 et seq, also C.J. p 106 note 74 et seq.

79. Escriche Diccionario.

80. Escriche Diccionario.

81. Escriche Diccionario.

82. U.S.—Saler v. Hallock, Cust. & Pat.App., 109 F.2d 254, 257.

83. Century D.

84. **Not an absolute quality**

The antithetical qualities of rigidity and flexibility of a structure are not absolute but relative; it may be more rigid than some and more flexible than others; too rigid for some purposes and too flexible for others. The one quality may be increased and the other diminished by choice of materials from which the structure is made and by variation in its proportions.—Schriber-Schroth Co. v. Cleveland Trust Co., Ohio, 59 S.Ct. 8, 13, 305 U.S. 47, 83 L.Ed. 34—Hastings Mfg. Co. v. Automotive Parts Corporation, D.C.Mich., 39 F.Supp. 319, 326.

85. U.S.—Kitson Co. v. Lattimer-Stevens Co., C.C.A.Pa., 37 F.2d 562, 563, 564.

Similarly expressed

Capable of being bent or changed in figure without breaking; specifically, easily bent, pliant, not stiff, as a flexible rod, a flexible plant.—Century D.

86. U.S.—Kitson Co. v. Lattimer-Stevens Co., supra.

87. U.S.—Kitson Co. v. Lattimer-Stevens Co., supra.

88. **Phrases construed**

(1) "Flexible bar" means a bar which can be bent without breaking, and it is immaterial whether or not it returns to its original shape and position after bending.—Kitson Co. v. Lattimer-Stevens Co., C.C.A.Pa., 37 F. 2d 562, 563. "Deformable bar" distinguished see 26 C.J.S. p 682 note 94.

(2) "Flexible mandrel," in wire rope manufacturing, is a helical spring inserted in a tube to be bent to preserve its circular section.—In re Sunderland, Cust. & Pat.App., 68 F.2d 318, 320.

(3) "Flexible participation bank night" or "flexible participation scheme" see the C.J.S. title Lotteries § 3.

brawls and quarrels.[89]

FLIGHT. In its primary sense, the act or power of flying; a passing through the air by the help of wings.[90] In a derived sense, the act of fleeing, the act of running away to escape danger or expected evil.[91]

More specifically, in legal application, the absenting of one's self from the community of the crime out of a sense of guilt, out of fear of, or to avoid, arrest;[92] the evading of the course of justice by voluntarily withdrawing one's self in order to avoid arrest or detention or the institution or continuance of criminal proceedings.[93]

For a discussion of the term as so used and its relevancy in criminal prosecutions see Criminal Law § 625.

The term has been held not synonymous with the phrase "leaving a community."[94]

In another sense, a continuous series of steps or stairs, the part of a stairway extending directly from one floor or one landing to another.[95]

FLIP A CAR. To steal a ride.[96]

FLITTER. A fine bit of metal, or such bits collectively, used for ornamentation.[97]

FLOAT.

As a Noun

Primarily, an object which floats on a liquid, or buoys up something.[98]

Derivatively, a banking term applied to checks in the process of collection which, when entered in a depositor's account, remain a conditional credit until paid in money or solvent credits.[99]

In manufacturing, a defect caused by the warp not being woven into the cloth, and the weft passing underneath the warp instead of being woven into the warp.[1]

As used in the lumber trade see the C.J.S. title Logs and Logging § 1, also 26 C.J. p 741 note 61, in mining see the C.J.S. title Mines and Minerals § 3, also 26 C.J. p 741 note 63, and with respect to land grant in aid of railroads see the C.J.S. title Public Lands § 149, also 26 C.J. p 741 notes 64, 65, and 50 C.J. p 1029 note 9 [a].

As a Verb

To rest on the surface of water or other liquid, with or without movement; more commonly, to be buoyed up by water and moved by its motion alone.[2]

The present participle "floating" is used adjectively as in the phrases listed in the note.[3]

89. Black L.D.

90. Century D.

91. Century D.

"Immediate flight"

Del.—State v. Johnson, 78 A. 605, 607, 25 Del. 49.

92. Ala.—Walters v. State, 135 So. 600, 602, 223 Ala. 355—McAllister v. State, App., 6 So.2d 32, 37—Gilbert v. State, 100 So. 566, 568, 20 Ala.App. 28.

93. Ill.—People v. Herbert, 196 N.E. 821, 825, 361 Ill. 64, quoting **Corpus Juris.**

Pa.—Commonwealth v. Myers, 200 A. 143, 146, 131 Pa.Super. 258, quoting **Corpus Juris.**

Philippine.—U. S. v. Alegado, 25 Philippine 510, 511.

Similarly expressed

The act of one under accusation who evades the law by voluntarily withdrawing himself.—Black L.D.

94. S.C.—State v. Turnage, 93 S.E. 182, 107 S.C. 478.

95. Century D.

Flight of stairs

A stairway; a series of steps ascending or descending to a different level.—Montgomery Ward & Co. v. Snuggins, C.C.A.Minn., 103 F.2d 458, 461.

96. Ill.—Union Tract. Co. v. Lundahl, 74 N.E. 155, 159, 215 Ill. 289.

97. Webster New Int.D.

Composition and use

Made of thin sheets of composition metal, reduced by a manufacturing process to very small pieces, although not to the condition of powder. It is employed to sprinkle over the face of surfaces where it is desired to produce a glittering metallic effect.—U. S. v. Meier, N.Y., 136 F. 764, 765, 69 C.C.A. 421.

As "composition metal" under tariff acts

U.S.—U. S. v. Meier, N.Y., 136 F. 764, 765, 69 C.C.A. 421.

See also Customs Duties § 64 note 9.

98. Standard D.

99. Ill.—Lewis v. West Side Trust & Savings Bank, 32 N.E.2d 907, 914, 376 Ill. 23—Hillmer v. Chicago Bank of Commerce, 31 N.E.2d 309, 316, 375 Ill. 266.

1. Eng.—Smith v. Walton, 3 C.P.D. 109, 110.

2. Century D.

3. **Phrases construed**

(1) "Floating bog" is a mass of grass reeds or other aquatic vegetation growing and floating on the water, and is distinguished from "land" and "soil."—Attorney General v. Bay Boom Wild Rice & Fur Farm, 178 N.W. 569, 572, 172 Wis. 363.

(2) "Floating capital," defined as the capital which is consumed at each operation of production and reappears transformed into new products, and as including raw materials destined for fabrication, such as wool and flax, products in the warehouses of manufacturers or merchants, such as cloth and linen, and money for wages and stores; also as capital retained for the purpose of meeting current expenditure, and as equivalent to "circulating capital."—Black L.D.

(3) "Floating charge," a recognized form of security under English law, is what might be called here an "equitable lien," a continuing charge on the assets of the company creating it, but permitting the company to deal freely with the property in the usual course of business until the security holder shall intervene to enforce his claim, whereupon the lien or charge becomes fixed or crystallized and the company which gave it has no further authority to deal with property, nor can general creditors take it.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses, D.C.Me., 26 F.Supp. 379, 387.

FLOATABLE. In a particular connection, the term has been held practically synonymous with "navigable."[4]

FLOCK. The refuse of wool, or the shearings of woolen goods, or old cloth or rags torn or broken up by the machine called the devil, used for stuffing mattresses, upholstering furniture, etc.[5]

FLODE-MARK. Flood-mark, or high-water mark; the mark which the sea, at flowing water and highest tide, makes on the shore.[6]

FLOGGING. Corporal punishment by stripes inflicted with a cat, or any punishment which in substance or effect amounts thereto;[7] thrashing or beating with a whip or lash.[8] "Flogging" on merchant vessels see the C.J.S. title Seamen §§ 227, 257, 260, also 56 C.J. p 1121 notes 35–52, p 1138 notes 66–68, p 1144 notes 14, 15. For other references to specific uses see 26 C.J. p 742 note 81.

FLOGGING HAMMER. A small sledge hammer used for striking a large cold chisel in chipping castings.[9]

FLOOD. A body of moving water; a body of water rising, swelling, and overflowing land not usually covered with water; a great body or stream of any fluid or substance; a great flow of water; an inundation;[10] an inundation of water over land not usually covered by it.[11] It is a relative term, and may refer to mere surface water causing a mere temporary inconvenience, or to such quantities of water as cause damage,[12] but it does not refer to the ordinary maximum flow of water in a river during the wet season of the year.[13]

The term has been distinguished from "storm"[14] and "tempest."[15]

As to flooding lands and liability therefor see the C.J.S. title Waters §§ 24–30, also 67 C.J. p 711 not

(4) "Floating kidney," described as that condition in which for any cause, the fat or tissues holding the kidneys in place are obstructed or in any way become stretched, causing the organ to float forward.—Mackey v. Interurban St. R. Co., 101 N.Y.S. 439, 440, 115 App.Div. 467.

(5) "Floating Power" a trade name of a particular automobile manufacturer.—Chrysler Corporation v. Trott, Cust. & Pat.App., 83 F.2d 302, 310.

(6) "Floating security" is an equitable charge on the assets for the time being of a going concern.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses, D.C.Me., 26 F.Supp. 379, 387. Also called "debenture" see 25 C.J.S. p 1303 note 47.

(7) "Floating structure," as not including a seaplane.—People ex rel. Cushing v. Smith, 196 N.Y.S. 241, 242, 119 Misc. 294. As not being a vessel subject to admiralty jurisdiction see Admiralty § 18 notes 56, 57.

Phrases treated elsewhere

(1) "Adjustable floating stern dock" see 2 C.J.S. p 52 note 42.

(2) "Floating boats" in narrow channels see Collision § 141.

(3) "Floating bridge" as within the attractive nuisance rule see the C.J.S. title Negligence § 29, also 45 C.J. p 781 note 76 [c].

(4) "Floating debt or indebtedness," defined generally see Debt 26 C.J.S. p 11 notes 26–32; distinguished from "bonded debt" see Bond 11 C.J. S. p 393 note 93; as municipal indebtedness see the C.J.S. title Municipal Corporations § 1910, also 44 C.J. p 1186 note 24 [a].

(5) "Floating dock" see the C.J.S. title Wharves § 1.

(6) "Floating elevator" see 29 C. J.S. p 663 note 56.

(7) "Floating logs" see the C.J.S. title Logs and Logging § 46, also 38 C.J. p 203 note 81–p 205 note 96.

(8) "Floating policy" see the C. J.S. title Insurance § 322, also 26 C. J. p 96 note 47, and 57 C.J. p 1144 note 49.

(9) "Floating warehouse" and liability of keeper thereof see the C.J. S. title Warehousemen and Safe Depositaries § 42, also 67 C.J. p 515 note 64.

(10) "Indeterminate or floating intention" see Domicile § 11 e (3).

4. Me.—Smart v. Aroostook Lumber Co., 68 A. 527, 531, 103 Me. 37, 14 L.R.A.,N.S., 1083.
Wis.—Nekoosa Edwards Paper Co. v. Railroad Commission, 228 N.W. 144, 147, 201 Wis. 40.

Due to customary use

"The extended application of the right of the public to use navigable streams, whether tidal or nontidal, even those of inconsiderable size, as highways for transporting merchandise, rafting and driving logs, and propelling boats, has made the terms 'navigable' and 'floatable' practically synonymous."—Smart v. Aroostook Lumber Co., 68 A. 527, 531, 103 Me. 37, 14 L.R.A.,N.S., 1083.

"Floatable stream," as not distinguishable from "navigable stream."—Nekoosa Edwards Paper Co. v. Railroad Commission, 228 N.W. 144, 147, 201 Wis. 40.
See also the C.J.S. titles Logs and Logging § 46, also 38 C.J. p 203 note 81–p 205 note 96, and Navigable Waters § 6, also 45 C.J. p 409 note 33–p 413 note 52.

5. Century D.

Phrase construed

"Rag flock," as meaning flock manufactured from rags.—Guilford Corporation v. Brown, [1915] 1 K.B. 256, 259—Cooper v. Swift, [1914] 1 K.B. 253—51 C.J. p 368 note 75 [a].

6. Black L.D.

7. U.S.—U. S. v. Cutler, C.C.R.I., 25 F.Cas.No.14,910, 1 Curt. 501.
See also Cat 14 C.J.S. p 33 note 33.

8. Black L.D.

In the United States, the act of June 4, 1920, c 227, subchapter II, § 1, 41 U.S.St. at L. p 795, 10 U.S.C.A. § 1512, prohibits as to the army "cruel and unusual punishments of every kind, including flogging." Flogging is likewise prohibited in the navy. See 34 U.S.C.A. § 1200, art. 49.—Black L.D.
See also Army and Navy § 57 b (1) note 80.

9. Ga.—Williams v. Garbutt Lumber Co., 64 S.E. 65, 70, 132 Ga. 221.

10. Pa.—Stover v. Insurance Co., 3 Phila. 38, 42.

11. Black L.D.

12. Okl.—City of Tulsa v. Grier, 243 P. 753, 757, 114 Okl. 93.

13. Cal.—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 138, 39 Cal.App.2d 739.

14. Pa.—Riale v. Old Guard Mutual Fire and Storm Ins. Co., 14 Pa. Dist. 639, 641—Stover v. Insurance Co., 3 Phila. 38, 42.

15. Pa.—Stover v. Insurance Co., supra.

51–p 725 note 44. For other references to specific uses see 26 C.J. p 742 note 85.

Flood wall. A levee, an embankment to prevent the overflow of rivers.[16] When constructed, it becomes an integral part of the river front.[17]

Flood water or *flood waters.* Defined generally as waters above the highest line of the ordinary flow of a stream,[18] waters which spread out from overflowing streams having definite channels,[19] or which flow out of, or have escaped from, a natural watercourse, of which they were once a part.[20] The term does not apply to annually occurring accretions in the amount and flow of the stream resulting from natural and regular causes, such as heavy rainfalls and melting of snow.[21]

It has been compared with, or distinguished from, "stream water" and "surface water" see the C.J.S. title Waters § 112, also 67 C.J. p 863 notes 26–29.

Riparian owner's rights in connection with such waters see the C.J.S. title Waters § 19, also 67 C.J. p 703 note 50–p 704 note 64, to construct defensive-works as protection against them, § 59, also 67 C.J. p 801 notes 11–13, to divert them.

Ordinary flood. One the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen;[22] one, the repetition of which, although at uncertain intervals, might, by the exercise of ordinary diligence in investigating the character and habits of the stream, have been anticipated.[23] Distinguished from "extraordinary flood" see 35 C.J.S. p 376 note 30 (5).

FLOOR.

As a Noun

A descriptive word, variable in meaning, which has more or less comprehensive significance according to the particular connection in which it is used.[24]

——**Structural Sense.** The word is variously used, as meaning the layer of boards on which people tread, and as also meaning the framework or structure of joists supporting the flooring of a room,[25] and specifically defined as the mere bottom plane of an inclosure or artificial structure; the bottom or lower part of any room, the part upon which we stand; the structure formed of beams, girders, etc., with proper covering, which divides a building horizontally into stories; the surface or the platform of a structure on which to walk or travel, as the floor of a bridge, the surface on which we walk, ride, or travel; or such surface or plane, together with the timbers, framework, and materials which enter into and form part of its construction.[26]

In a derived sense, the space between two adjacent floors of an entire building; a story;[27] a section of a building between horizontal planes.[28]

In one or another of the senses above indicated, the word has been said to include the outer walls[29] and the wooden stringers or joists;[30] but not to include the attic or basement of a building.[31]

It has been held synonymous with "flooring;"[32] and distinguished from "room."[33]

As to liability for defects in floors see the C.J.S.

16. Ky.—Jefferson County Fiscal Court v. Jefferson County ex rel. Grauman, 128 S.W.2d 230, 232, 278 Ky. 68.
See generally the C.J.S. titles Levees and Flood Control § 1, also 36 C.J. p 997 notes 2–5, and Waters § 19, also 67 C.J. p 702 note 41–p 704 note 64.

17. Ohio.—State ex rel. Bateman v. Zachritz, 22 N.E.2d 84, 86, 135 Ohio St. 580.

18. Tex.—Motl v. Boyd, 286 S.W. 458, 468, 116 Tex. 82—Texas Co. v. Burkett, Civ.App., 296 S.W. 273, 277.

19. Cal.—Seufert v. Cook, 241 P. 418, 421, 74 Cal.App. 528.
S.D.—Poole v. Sun Underwriters Ins. Co. of New York, 274 N.W. 658, 660, 65 S.D. 422.

20. Cal.—Mogle v. Moore, 104 P.2d 785, 789, 16 Cal.2d 1—Horton v. Goodenough, 194 P. 34, 35, 184 Cal. 451—Everett v. Davis, App., 107 P.2d 650, 657.

21. Cal.—Herminghaus v. Southern California Edison Co., 252 P. 607, 610, 200 Cal. 81.

22. N.D.—Soules v. Northern Pac. Ry. Co., 157 N.W. 823, 830, 34 N.D. 7, L.R.A.1917A 501.
Tex.—Gulf, C. & S. F. Ry. Co. v. Pool, 8 S.W. 535, 537, 70 Tex. 713.

23. Okl.—Chicago, R. I. & P. Ry. Co. v. McKone, 127 P. 488, 490, 36 Okl. 41, 42 L.R.A.,N.S., 709.

24. Iowa.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 155 N.W. 842, 844, 173 Iowa 386.

25. U.S.—Missouri Pac. R. Co. v. Holt, C.C.A.Ark., 293 F. 155, 161.
Wooden floors usually consist of beams, commonly called "joists" or "floor joists," one or two thicknesses of flooring boards, and, in a finished building, of a ceiling underneath the beams.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 155 N.W. 842, 843, 844, 173 Iowa 386.

26. Iowa.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, supra.
Phrases construed
(1) "Floor supported on sill flanges," as meaning a floor in contact with upper surfaces of sill flanges.—Field v. Stow, Cust. & Pat.App., 49 F.2d 1072, 1073.
(2) "Water on each floor, with hose."—New York Belting & Packing Co. v. Washington F. Ins. Co., 23 N.Y.Super. 428, 434.

27. Standard D.

28. Mass.—Lowell v. Strahan, 12 N.E. 401, 404, 145 Mass. 1, 1 Am.S.R. 422.

29. Mass.—Leominster Fuel Co. v. Scanlon, 137 N.E. 271, 272, 243 Mass. 126, 24 A.L.R. 1459.

30. U.S.—Missouri Pac. R. Co. v. Holt, C.C.A.Ark., 293 F. 155, 161.

31. N.Y.—New York Belting & Packing Co. v. Washington F. Ins. Co., 23 N.Y.Super. 428, 433.

32. Iowa.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 155 N.W. 842, 843, 173 Iowa 386.

33. Mass.—Lowell v. Strahan, 12 N.

title Negligence § 81, also 45 C.J. p 865 note 29, p 866 notes 43–52.

——**Parliamentary Sense.** A term used metaphorically to denote the exclusive right to address the body in session,[34] or the particular place from which one addresses the body.[35]

As a Verb

To cover or furnish with a floor: as to floor a house with pine boards; also to place upon a floor.[36]

Among automobile dealers, the term designates their general practice of obtaining the aid of finance companies to "floor" cars, that is, to finance the purchase thereof under a trust receipt, or similar title retention document, whereby a retail dealer obtains possession of automobiles for exhibition and sale on the floor of his salesroom.[37]

Flooring. As a verbal noun, the word is descriptive, varies in meaning, and has more or less comprehensive significance, according to the particular connection in which it is used. Thus it may be employed to signify a floor, floors collectively, or material from which to make a floor.[38] If used without reference to a structure in its completed form, it would ordinarily convey the idea of materials suitable for use in constructing a floor or, in a narrower sense, the boards or planks for covering the framework of a floor. When used with reference to a completed structure it may mean either the materials of which the floor is composed or the completed floor structure.[39]

As an Adjective

Floor-cloth canvas. A commercial term implying a well-known article of merchandise thus described and used for the manufacture of floor oil-cloth.[40] It has been said that commercially the term is the equivalent of "oil-cloth foundations;"[41] and distinguished from "burlap" see 12 C.J.S. p 758 note 16.

Other phrases are listed in the note.[42]

FLORENTINE PANDECTS. A copy of the Pandects discovered accidentally about the year 1137, at Amalphi, a town in Italy, near Salerno.[43]

E. 401, 404, 145 Mass. 1, 1 Am.S.R. 422.

34. Black L.D.

Having the floor

A member who has been recognized by the chairman, and who is in order, is said to "have the floor," until his remarks are concluded.—Black L.D.

35. "Floor of the house"

The main part of the hall where the members sit, as distinguished from the galleries, or from the corridors or lobbies.—Black L.D.

Floor of the court

In England, the floor of a court is that part between the judge's bench and the front row of counsel. Litigants appearing in person, in the high court or court of appeal, are supposed to address the court from the floor.—Black L.D.

36. Century D.

37. Cal.—Commercial Credit Co. v. Barney Motor Co., 76 P.2d 1181, 1183, 10 Cal.2d 718.

Phrases construed

(1) "Floor planned," a term used in the motor car trade in the sense of "financed."—Ford Motor Co. v. National Bond & Investment Co., 14 N.E.2d 306, 308, 294 Ill.App. 585.

(2) "Floor planning," the name given to the entire transaction of financing motor car sales which is regarded as a single transaction, although it may involve several steps and more than one instrument of writing.—Associates Discount Corporation v. Haynes Garage, 24 N.E.2d 685, 687, 304 Mass. 526.

38. U.S.—Field v. Stow, Cust. & Pat.App., 49 F.2d 840, 842.
Iowa.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 155 N.W. 842, 843, 844, 173 Iowa 386.

39. Iowa.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, supra.

Phrases construed

(1) "Double flooring," as consisting of single fir joists called binding, bridging, and ceiling joists.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, supra.

(2) "Flooring comprising the lowermost . . . member of the car."—Field v. Stow, Cust. & Pat. App., 49 F.2d 840, 842.

(3) "Naked flooring," defined as the framework or structure of joists supporting the flooring of a room; the framing which forms the structural part of the floor without the flooring and ceiling; one in which the floor joists extend from wall to wall. In carpentry the timber and framework on which the floor boarding is laid.
U.S.—Missouri Pac. R. Co. v. Holt, C.C.A.Ark., 293 F. 155, 161.
Iowa.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 155 N.W. 842, 843, 173 Iowa 386.

(4) "Single flooring," as consisting of one row of wood joists resting on the wall or partition at each end without any intermediate support, and receiving the floor boards on the upper surface and the ceiling on the under side.—Cedar Rapids & M. C. R. Co. v. Cedar Rapids, supra.

40. U.S.—Arthur v. Cumming, N.Y., 91 U.S. 362, 364, 23 L.Ed. 438.

41. U.S.—Arthur v. Cumming, supra.

42. Phrases construed.

(1) "Floor broker" see Brokers § 1 a note 18.

(2) "Floor coverings not specially provided for."—Central Warehouse Co. v. U. S., 12 Ct.Cust.App. 563.

(3) "Floor plan rule," whereby an owner who has placed a car on the floor of a retail dealer's showroom for sale is estopped to deny the title of an innocent purchaser who has purchased from such dealer in the ordinary retail dealing, without knowledge of any conflicting claim.—National Guarantee & Finance Co. v. Pfaff Motor Car Co., 176 N.E. 678, 679, 124 Ohio St. 34—National Guarantee & Finance Co. v. Russell, Ohio App., 36 N.E.2d 1015, 1018.

(4) "Floor-plan service" means the buying and financing of automobiles by finance company and placing them on the floor of the dealer, so that dealer may resell automobiles to his retail trade.—Associates Discount Corporation v. Haynes Garage, 24 N.E.2d 685, 687, 304 Mass. 526.

(5) "Floor tax."—Greenbrier Distillery Co. v. United States, D.C.Ky., 288 F. 893, 895.

43. Black L.D.

FLORES DE LAS LEYES. Literally "Flowers of the law." The title given to a Spanish law book of the thirteenth century composed, it is said, by Jacobo Ruiz at the direction of King Alphonso the learned. It has been characterized as a clear and methodical compendium of the best laws relative to the order and administration of justice to judicial procedure. An evidence of its appreciation by the same monarch is the fact that most of it was incorporated, literally or substantially, into the later work, the "Siete Partidas," or Seven Grand Divisions, which has given him his greatest fame.[44]

FLORICULTURE. The cultivation of flowers or of flowering plants.[45] It is a branch of horticulture and is said to be included in agriculture in its broadest sense.[46]

FLORIDA. The name of one of the states of the United States of America, being the fourteenth admitted to the Union.[47]

Florida water. A preparation used as a deodorant in a sick room, and as a remedial agent in alleviating pain and sick headache.[48]

FLORIN. A coin said to have originated at Florence, and now to have the value of about two English shillings.[49]

FLORIST. One engaged in floriculture; a cultivator of, or dealer in, ornamental flowers and plants.[50] The term has been defined by statute as one who conducts the business of selling cut flowers and potted plants at a store or at a fixed place on the street or elsewhere outside of a regular store.[51] So limited, it has been held that the term cannot be extended by implication to embrace a producer of plants and flowers.[52]

FLOSS CANDY. Candy consisting of threadlike or silklike filaments formed from melted sugar or candy.[53]

Equivalent to "spun candy."[54]

FLOTAGES. Such things as by accident float on the top of great rivers or the sea; also a commission paid to water bailiffs.[55]

FLOTATION. In finance, the word is said to mean inviting subscriptions from the public for the purpose of launching a company;[56] also the grouping of a certain number of claims to be formed in a company to be worked at a profit.[57]

As a step in the process of recovering minerals from ore see the C.J.S. title Mines and Minerals § 3.

FLOTSAM or **FLOTSAN.** A term applied to a ship when it is sunk or otherwise perishes, and the goods it contained float upon the sea;[58] also to goods that are found floating on the waves.[59] The term has been compared with, or distinguished from, "jetsam" and "ligan;"[60] and from, "wreck" see the C.J.S. title Shipping § 258, also 58 C.J. p 682 note 39–p 683 note 50.

As subject to admiralty jurisdiction see Admiralty § 21; and as subject to salvage see the C.J.S. title Salvage §§ 27–29, also 56 C.J. p 26 note 56–p 28 note 1.

FLOUD-MARKE. In old English law, high-water mark, flood-mark.[61]

FLOUNCING. Material for making flounces, or flounces collectively, as Chantilly flouncings.[62]

44. Escriche Diccionario.

45. Century D.

46. Ark.—Hardin v. Vestal, 162 S.W. 2d 923, 925.

47. Historical
It was discovered by Ponce de Leon in 1513; settled by Hugenots in 1562, and permanently settled by Spaniards at St. Augustine in 1565; and ceded to Great Britain in 1763, to Spain in 1783, and to the United States in 1819. The Americans took possession in 1821. It was admitted into the Union in 1845, and the present constitution was adopted Feb. 25, 1868, and amended in 1896.—Bouvier L.D.

48. Tex.—Tood v. State, 18 S.W. 642, 30 Tex.App. 667, 668.

49. Black L.D.

50. Ark.—Hardin v. Vestal, 162 S. W.2d 923, 925.

51. Tenn.—Doran v. Crenshaw, 61 S.W.2d 469, 166 Tenn. 346.

52. Tenn.—Doran v. Crenshaw, supra.

"Florists' and nursery products"
Phrase discussed and distinguished from "agricultural products," and "farm produce."—Hardin v. Vestal, Ark., 162 S.W.2d 923, 925.

53. U.S.—Electric Candy Mach. Co. v. Morris, C.C.Mo., 156 F. 972, 973.

54. U.S.—Electric Candy Mach. Co. v. Morris, supra.

55. Black L.D.

56. Eng.—Torva Exploring Syndicate v. Kelly, [1900] A.C. 612, 617.

"'Flotation' . . . is complete when the public have responded and the capital is provided."—Torva Exploring Syndicate v. Kelly, supra.

57. Eng.—Torva Exploring Syndicate v. Kelly, [1900] A.C. 612, 617.

Under an amalgamation of two companies, meaning of this word see Gifford v. Willoughby, 15 T.L.R. 71.

58. Pa.—Lacaze v. State, Add. 59, 64.
26 C.J. p 743 note 33.

59. Eng.—Legge v. Boyd, 1 C.B. 92, 113, 50 E.C.L. 92, 135 Reprint 471.

Blackstone's definition
"Flotsam is where they continue floating on the surface of the waves between high and low water."—Commonwealth v. Garner, 3 Gratt. 624, 724, 44 Va. 624, 724, citing 1 Blackstone Comm. p 292.

Held not to include a cargo of coal lying at the bottom of a lake.—Murphy v. Dunham, D.C.Mich., 38 F. 503, 509.

60. Black L.D.

61. Black L.D.

62. Century D.

"Embroidered flouncings"
U.S.—U. S. v. Smith & Co., 12 Ct. Cust.App., 384, 386.
Tariff classification see Customs Duties § 45 c note 77.

ties, to make flush or level.[97]

As an adjective, fully supplied or well filled; also unbroken or even in surface.[98]

FLUSHER. A device for washing city streets with water applied with some force.[99] It has been compared with, and distinguished from, "street sprinkler."[1]

FLUTE and FLUTES. In the singular, the word conveys the idea of a noticeable depression of some length in a surface.[2] It has been held equivalent to "groove."[3]

In the plural, longitudinal parallel ruffles with round edges.[4] In this sense, it has been distinguished from "plaits."[5]

FLUVIUS. Latin, a river, a public river; also flood, or flood-tide.[6]

FLUX. Any substance or mixture used to promote fusion, especially the fusion of metals or minerals. Common metallurgical fluxes are silica and silicates, lime and limestone and fluorite.[7] Specifically in the smelting of copper ore, the term is applied to a combination material composed of silica and other ingredients.[8] And in making asphaltic cement for paving, the term is applied to a paraffine flux obtained in particular localities which is added to the refined asphalt to bring it a certain degree of softness or ductility and to make it adhesive.[9]

As used in paving, the term is equivalent to "residuum."[10]

FLUXUS. In old English law, flow.[11]

FLY. To move through the air by the aid of wings, as do birds; also, to move or pass with swiftness or alacrity; go rapidly or at full speed.[12]

Phrases employing the word are set out in the note.[13]

FLYER POLICY. See the C.J.S. title Insurance § 49, also 26 C.J. p 744 note 58.

FLYMA. In old English law, a runaway, a fugitive; one escaped from justice, or who had no "hlaford."[14]

FLYMAN-FRYMTH. A variant spelling of Flemene Frit ante p 1025 note 70.

(2) "The fact that the flushing of the street is conducive to the public health in preventing the spread of dust and germs and otherwise is a beneficial incident to the proper maintenance of the street."—McLeod v. City of Duluth, supra.

"Sprinkling" compared and distinguished

Minn.—McLeod v. City of Duluth, supra.

See also the C.J.S. title Municipal Corporations §§ 1698, 1699, also 44 C.J. p 940 note 2–p 941 note 16.

97. Webster New Int. D.

"Flush the joints" or "flushing the joints"

(1) A term used in bricklaying to describe the process of filling the face of the joints between the exterior brick with mortar, and covering each layer of interior brick with mortar before the next is laid on, so that some of the mortar crowds into the vertical interstices.—Laycock v. Parker, 79 N.W. 327, 330, 103 Wis. 161.

(2) Compared with, or distinguished from, "slush the joints" or "slushing the joints."—Laycock v. Parker, supra.

98. Webster New Int. D.

Phrase construed

"As nearly 'flush' . . . as will permit proper drainage" as employed in an ordinance governing the construction of sidewalk elevator doors, the requirement was held satisfied where the door was "pretty fairly even with the grade of the sidewalk."—Clarke v. Foster's, Inc., Cal.App., 125 P.2d 60, 62.

99. Minn.—McLeod v. City of Duluth, supra.

1. Minn.—McLeod v. City of Duluth, supra.

2. U.S.—Schreiber & Conchar Mfg. Co. v. Adams Co., Iowa, 117 F. 830, 832, 833, 54 C.C.A. 128.

Phrase construed

"Fitted loosely in the grooves or flutes."—Schreiber & Conchar Mfg. Co. v. Adams Co., supra.

3. U.S.—Schreiber & Conchar Mfg. Co. v. Adams Co., supra.

4. U.S.—Kursheedt Mfg. Co. v. Naday, N.Y., 107 F. 488, 490, 46 C.C.A. 422.

5. U.S.—Kursheedt Mfg. Co. v. Naday, supra.

6. Black L.D.

7. Webster New Int.D.

8. U.S.—United Verde Copper Co. v. Peirce-Smith Converter Co., C.C.A. Del., 7 F.2d 13, 14.

9. Ill.—Chicago Union Tract. Co. v. Chicago, 78 N.E. 54, 55, 222 Ill. 144.

10. Ill.—Chicago Union Tract. Co. v. Chicago, supra.

11. Black L.D.

Per fluxum et refluxum maris—by the flow and reflow of the sea.—Black L.D.

12. Century D.

13. **Phrases construed**

(1) "Fly for it," in old English criminal practice, it was the custom, after verdict, to inquire, "Did he fly for it?" and even if not guilty, forfeiture of goods followed conviction upon such inquiry; the practice was abolished by 7 & 8 Geo. IV c 28.—Black L.D.

(2) "Flying drill" see the C.J.S. title Railroads § 1, also 26 C.J. p 745 note 59.

(3) "Flying machine," defined as a heavier-than-air machine, one capable of soaring in the air and susceptible to being guided by a pilot into different altitudes when aloft, the basic elements of which are exerting lift, propelling means, and control mechanism.—Myers v. United States, Ct.Cl., 25 F.Supp. 500, 501. See also Aerial Navigation § 2 notes 8, 10–12.

(4) "Flying switch" see the C.J.S. title Railroads § 1, also 26 C.J. p 745 notes 60–63.

(5) "Fly power," defined as a stock transfer executed in blank, a written assignment in the form generally used on the reverse of stock certificates, which, when signed and attached to such certificate, is sufficient to transfer the same in like manner as an indorsement thereon.—Carlisle v. Norris, 109 N.E. 564, 565, 215 N.Y. 400, Ann.Cas.1917A 429—Carlisle v. Norris, 142 N.Y.S. 393, 396, 157 App.Div. 313. See also Corporations § 395 c.

14. Black L.D.

FLYWHEEL. A wheel that equalizes its momentum; or accumulates power for a variable or intermitting resistance.[15]

The term has been compared with "momentum wheel."[16]

FOAL. As a noun, the young of an animal of the horse family, a colt or filly.[17]

As verb, to bring forth young, said of animals of the horse family.[18]

F. O. B. See Abbreviations 1 C.J.S. p 276 note 5. As applied to sale of merchandise destined for shipment see the C.J.S. title Sales § 75, also 55 C.J. p 230 notes 74–78 and p 231 notes 84–88.

Phrases employing the word are set out in the note.[19] For other phrases as to which more recent adjudications have not been found see 26 C.J. p 745 note 74–p 746 note 97.

FOCAGE. House-bote; fire-bote.[20]

FOCALE. In old English law, firewood; the right of taking wood for the fire, or fire-bote.[21]

FODA. An Anglo-Saxon word meaning "food."[22]

FODDER. The word is derived from the Anglo-Saxon word "foda," food;[23] and is also sometimes referred to by its law Latin name, "foderum."[24]

As food for domestic animals see Food § 1.

In feudal law, the term also denoted a prerogative of the prince to be provided with corn, etc., for his horses by his subjects in his wars.[25]

Used adjectively, as in the phrase "fodder house."[26]

FODERTORIUM. Provisions paid by custom to the royal purveyors.[27]

FODERUM. See Fodder supra note 24.

FODINA. A mine.[28]

15. U.S.—American Road Mach. Co. v. Pennock & Sharp Co., C.C.Pa., 45 F. 252, 253.

16. U.S.—American Road Mach. Co. v. Pennock & Sharp Co., supra.

17. Webster New Int.D.

"Foal getter"
A male horse able to do reasonable service in getting foals.—Wingate v. Johnson, 101 N.W. 751, 126 Iowa 154 —26 C.J. p 745 note 69.

18. Ala.—O'Rear v. Richardson, 81 So. 865, 866, 17 Ala.App. 87.

19. **Phrases construed**
(1) "F. o. b. at a given point."—Pond Creek Mill & Elevator Co. v. Clark, C.C.A.Ill., 270 F. 482, 486.
(2) "F. o. b. at [named place]."
Ill.—Runkle Co. v. Twin Produce Co., 224 Ill.App. 13, 15.
N.Y.—Maddalino Olive Oil Co. v. Aquino, 180 N.Y.S. 724, 726, 191 App.Div. 51.
R.I.—Lee v. Northway Motor Sales Co., 121 A. 425, 426.
Tex.—Border-Milling Co. v. Bednarz & Billimek, Civ.App., 254 S.W. 587 —Von Harten & Clark v. Nevels, Civ.App., 234 S.W. 676, 678.
(3) "F. o. b. buyer's cars."—Magna Oil & Refining Co. v. Parkville Oil Corporation, 221 P. 65, 68, 96 Okl. 157.
(4) "F. o. b. cars."
Cal.—Fernholtz Machinery Co. v. Wilson, 5 P.2d 679, 682, 118 Cal. App. 573—Acton Rock Co. v. Lone Pine Utilities Co., 186 P. 809, 811, 44 Cal.App. 597.
Idaho.—Hatcher v. Ferguson, 198 P. 680, 681, 33 Idaho 639, 16 A.L.R. 590.
N.Y.—Sarachen & Rosenthal v. Wilson & Co., 202 N.Y.S. 591, 593, 207 App.Div. 768.
Va.—Fulton v. W. R. Grace & Co., 129 S.E. 374, 378, 143 Va. 12.
26 C.J. p 746 note 80.
(5) "F. o. b. cars at [named place or station]."
Ala.—J. H. Hamlen & Son v. Rosengrant, 100 So. 217, 211 Ala. 186.
Tex.—Sealy Oil Mill & Mfg. Co. v. Baronian, Civ.App., 279 S.W. 303, 304—Heid Bros. v. Reisto, Civ.App., 247 S.W. 349, 350—Lee v. Gilchrist Cotton Oil Co., Civ.App., 215 S.W. 977, 978.
(6) "F. o. b. factory."—Richter v. Zoccoli, 150 A. 1, 2, 8 N.J.Misc. 289.
(7) "F. o. b. mill."
Mich.—Hettrick Mfg. Co. v. Srere, 209 N.W. 97, 98, 235 Misc. 306.
N.Y.—Berkshire Cotton Mfg. Co. v. Cohen, 198 N.Y.S. 240, 241, 204 App.Div. 397.
(8) "F. o. b. place of manufacture."—State ex rel. Day Pulverizer Co. v. Fitts, 60 S.W.2d 167, 170, 166 Tenn. 156.
(9) "F. o. b. point of manufacture."—Humphries v. Frick Co., 192 S.E. 247, 248, 56 Ga.App. 124.
(10) "F. o. b. point of shipment."
Ala.—Steele By-Products Co. v. McGee & Cowart, 94 So. 268, 270, 19 Ala.App. 29.
Ill.—Sparta Produce Exchange v. Wilson & Co., 223 Ill.App. 126, 129.
Tex.—Ferguson Seed Farms v. Ash, Civ.App., 275 S.W. 161, 162.
(11) "F. o. b. price."—Swerdfeger v. United Acceptance Corporation, 50 P.2d 818, 820, 9 Cal.App.2d 590.
(12) "F. o. b. railway cars."—Partin & Fugate v. Hawkins, Tex.Civ. App., 257 S.W. 571, 572.
(13) "F. o. b. respective factories."—Bott v. N. Snellenburg & Co., 14 S. E.2d 372, 374, 177 Va. 331.
(14) "F. o. b. time of sale."—Sparta Produce Exchange v. Wilson & Co., 223 Ill.App. 126, 130.
(15) "F. o. b. where goods are sold."—Craig Brokerage Co. v. Joseph A. Goddard Co., 175 N.E. 19, 22, 92 Ind.App. 234.
(16) "Twenty-four and one-half cents per pound, net cash, f. o. b. Chicago," held only to fix the price, and not to fix the place of delivery at Chicago.—Early-Foster Co. v. A. P. Moore's Sons, Tex.Civ.App., 238 S.W. 299, 303.

20. Black L.D.
See also Common Lands § 4 b (2) notes 57, 58.

21. Black L.D.
See also Common Lands § 4 b (2) note 58.

22. La.—Fallin v. Stovall, 74 So. 911, 915, 141 La. 220.
"Food" defined see Food § 1.

23. La.—Fallin v. Stovall, supra.
Construed and defined in English statute
Eng.—Clements v. Smith, 3 E. & E. 238, 243, 107 E.C.L. 238, 121 Reprint 431.

24. Bouvier L.D.

25. Black L.D.

26. S.C.—State v. Jeter, 24 S.E. 889, 891, 47 S.C. 2.
Not included in "barn" see 9 C.J.S. p 1544 note 16.

27. Black L.D.

28. Black L.D.

FŒDUS. In international law, a treaty, or compact; a league.[29]

FŒMINÆ AB OMNIBUS OFFICIIS CIVILIBUS VEL PUBLICIS REMOTÆ SUNT.[30]

FŒMINÆ NON SUNT CAPACES DE PUBLICIS OFFICIIS.[31]

FŒMINA VIRO CO-OPERTA. A married woman; a feme covert.[32]

FŒNERATION. Lending money at interest; the act of putting out money to usury.[33]

FŒNUS. Latin, in the civil law, interest on money; the lending of money on interest.[34]

FŒSA. In old records, grass, herbage.[35]

FŒTICIDE. See Feticide ante p 732, note 22. See also the C.J.S. titles Abortion § 1; and Homicide § 2, also 29 C.J. p 1050 notes 28–37.

FŒTURA. In the civil law, the produce or fruit of animals or other property, belonging to the owner of such animals or property by virtue of his right.[36]

FŒTUS. In medical jurisprudence, an unborn child; an infant en ventre sa mere.[37]

FOG. See Collision § 2 a notes 57–59.

FOGAGIUM. In old English law, foggage or fog; a kind of rank grass of late growth.[38]

FOGAJE. In Spanish law, a tax or tribute formerly paid by heads of families.[39]

FOI. In French feudal law, faith; fealty.[40]

FOINESUN. In old English law, the fawning of deer.[41]

FOIRFAULT. In old Scotch law, to forfeit.[42]

FOIRTHOCHT. In old Scotch law, forethought; aforethought or premeditated.[43]

FOITERERS. Vagabonds.[44]

FOLC. In Saxon law, people.[45]

FOLDAGE. An allowance for the benefit to the land by the dung of sheep folded thereon;[46] a privilege possessed in some places by the lord of a manor, which consists in the right of having his tenant's sheep to feed on his fields, so as to manure the land. The name of foldage is also given in parts of Norfolk to the customary fee paid to the lord for exemption at certain times from this duty.[47]

FOLD-COURSE. A term applicable to any sheep-walk or any right, however derived, of one person to take by his sheep the vesture from the land of another.[48] Defined as land to which the sole right of folding the cattle of others is appurtenant. Sometimes it means merely such right of folding. The right of folding on another's land, which is called "common foldage."[49]

FOLD-SOKE. A feudal service which consisted in the obligation of the tenant not to have a fold of his own but to have his sheep lie in the lord's fold.

29. Black L.D.

30. A maxim meaning "Women are excluded from all civil and public charges or offices."—Black L.D.

31. A maxim meaning "Women are not admissible to public offices."—Black L.D.

32. Black L.D.

33. Black L.D.

34. Black L.D.

"Fœnus nauticum"

Nautical or maritime interest; an extraordinary rate of interest agreed to be paid for the loan of money on the hazard of a voyage; sometimes called "usura maritima;" the extraordinary rate of interest, proportioned to the risk, demanded by a person lending money on a ship, or on "bottomry," as it is termed.—Black L.D.

"Fœnus unciarium"

Interest of one-twelfth, that is, interest amounting annually to one-twelfth of the principal, hence at the rate of eight and one-third per cent per annum. This was the highest legal rate of interest in the early times of the Roman republic.—Black L.D.

35. Black L.D.

36. Black L.D.

37. Black L.D.

38. Black L.D.

39. Escriche Diccionario.

40. Black L.D.

41. Black L.D.

42. Black L.D.

43. Black L.D.

44. Black L.D.

45. Black L.D.

Folc-gemote

Spelled also folkmote, folcmote, folkgemote; from folc, people, and gemote, an assembly. In Saxon law, a general assembly of the people in a town or shire. The name was also given to any sort of a popular assembly.—Black L.D.

Folc-land

In Saxon law, land of the folk or people; land belonging to the people or the public. Folc-land was the property of the community. It was subject to many burdens and exactions from which boc-land was exempt.—Black L.D.

Folc-mote

A general assembly of the people, under the Saxons.—Black L.D.

Folc-right

"The common right of all the people. 1 Bl.Comm. 65, 67. The *jus commune*, or common law, mentioned in the laws of King Edward the Elder, declaring the same equal right, law, or justice to be due to persons of all degrees."—Black L.D.

46. Eng.—Webb v. Plummer, 2 B. & Ald. 746, 106 Reprint 537—Re Constable, 80 L.T.Rep.N.S. 164, 166.

47. Black L.D.

48. Eng.—Robinson v. Dunleep Singh, 11 Ch.D. 798, 806, 814.

49. Black L.D.

He was said to be "consuetus ad foldam," tied to the lord's fold.[50]

FOLGARII or **FOLGERS.** Menial servants or followers.[51]

FOLGERE. In old English law, a freeman, who had no house or dwelling of his own, but was the follower or retainer of another, heorthfœst, for whom he performed certain predial services.[52]

FOLGERS. See Folgarii or Folgers supra note 51.

FOLGOTH. Official dignity.[53]

FOLIE BRIGHTIQUE, FOLIE CIRCULAIRE, and **FOLIE DE GRANDEUR.** See Insane Persons § 1, also 32 C.J. p 611 notes 68–69½.

FOLIO. As a noun, it has been defined as meaning a leaf,[54] a leaf of a book or manuscript,[55] a sheet of paper once folded;[56] as a verb, to mark with its number each folio (in a pleading, brief, affidavit, etc.);[57] and as an adjective, formed of sheets each folded once making two leaves, or four pages.[58]

In law. A certain number of words taken as a unit or division in a document for purposes of measurement or reference.[59] The term has been compared with "em" see 29 C.J.S. p 666 note 51.

In printing, the figure at the top or bottom of a page.[60]

FOLK-LAND and **FOLK-MOTE.** See Folc ante p 1036 note 45.

FOLLOW. To go or come after; to move behind in the same path or direction;[61] to conform to, comply with, or be fixed or determined by; as in the expressions "costs follow the event of the suit," "the situs of personal property follows that of the owner," "the offspring follows the mother," partus sequitur ventrem;[62] to walk in; to proceed along, as a road, or course; to attend upon closely, as a profession or calling;[63] also, to accrue;[64] to ensue.[65] In the construction of statutes the word generally means next after, unless the context requires a different construction.[66] The term has been held synonymous with "accrue" see 1 C.J.S. p 760 note 62.

Phrases employing the word are set out in the note.[67] Other phrases as to which more recent ad-

50. Black L.D.

51. Black L.D.

52. Black L.D.

53. Black L.D.

54. Black L.D.

55. Burrill L.D.

56. Webster New Int.D.

In the book trade

A large size of book, the page being obtained by folding the sheet of paper once only in the binding. Many of the ancient law books were "folios."—Black L.D.

57. Webster New Int.D.

58. Webster New Int.D.

59. Fla.—Mahin v. Mahin, 179 So. 651, 131 Fla. 546.
26 C.J. p 746 note 19.

For legal documents

A certain number of words varying from seventy-two to one hundred, but generally in the United States consisting of one hundred.—Reed v. Sackett, 273 P. 1002, 1004, 135 Okl. 69.

For printed matter in advertising the unit is made two hundred and fifty ems by statute in some states of the United States.—Webster New Int.D.

Origin

The term seems to have originated in the practice of writing a certain number of words on a sheet, which, becoming invariable, gave the name of the sheet or leaf (folio) to the number of words written upon it.—Burrill L.D.

60. Wharton L.Lex.

61. Webster New Int.D.

62. Black L.D.

63. Ky.—Spears v. Ford, 247 S.W. 713, 197 Ky. 575.

64. Idaho.—Ercanbrack v. Faris, 79 P. 817, 819, 10 Idaho 584.

65. Iowa.—Agricultural Publishers' Ass'n v. Homestead Co., 197 N.W. 314, 315, 197 Iowa 380.

66. Ind.—Indianapolis v. Mansur, 15 Ind. 112, 114.
26 C.J. p 747 note 24.

67. **"Following any occupation"**

(1) As used in a particular connection, the phrase means something more than the doing of one or more acts pertaining to one's occupation. It involves the idea of continuity, and it involves also the doing of all of those things which are an essential part of the work or business in which a person is engaged.
Minn.—Carson v. New York Life Ins. Co., 203 N.W. 209, 211, 162 Minn. 458—Monahan v. Supreme Lodge of Columbian Knights, 92 N.W. 972, 973, 88 Minn. 224.
Tex.—Winters Mut. Aid Ass'n, Circle No. 2, v. Reddin, Civ.App., 31 S.W. 2d 1103, 1107.

(2) "The performance of the minor acts relating to his business, done under the advice of his physicians, to bring about a restoration of his health, cannot be clothed with such potency and importance as to constitute . . . 'following any occupation.'"—Eisenhauer v. New York Life Ins. Co., 189 A. 561, 563, 125 Pa. Super. 403.
See also the C.J.S. title Insurance § 1579, and 45 C.J. p 229 note 86–p 230 note 92.

"Follows the property"

(1) As used in a particular connection, the phrase connotes a time relationship as well as suggesting a change of ownership.—Tonopah Mining Co. of Nevada v. Commissioner of Internal Revenue, C.C.A., 127 F.2d 239, 244.

(2) Held synonymous with "adheres to the property."—Tonopah Mining Co. of Nevada v. Commissioner of Internal Revenue, supra.

Other phrases construed

(1) "Accruing in that year but paid in the following year" see Accrue 1 C.J.S. p 765 note 24.

(2) "'Following' arraignment," as equivalent to "'after' arraignment" and "upon arraignment."—People ex rel. Edwards v. Superintendent of Bellevue and Allied Hospitals of City of New York, 139 N.E. 553, 554, 235 N.Y. 398.

(3) "Following companies," as contrasted with "leading company."—Alexander, Ramsay & Kerr v. National Union Fire Ins. Co., C.C.A.N.Y., 104 F.2d 1006, 1007.

judications have not been found see 26 C.J. p 747 notes 25–33.

FOLLY. The character or conduct of a fool; the state of being foolish; weakness of judgment or character, or actions which spring from it; want of understanding; weak or light-minded conduct.[68] Distinguished from "negligence" see the C.J.S. title Negligence § 1, also 45 C.J. p 634 note 71.

FONDEO. In Spanish law, an inspection of ships.[69]

FONDLE. To caress; to treat with tenderness.[70]

Fondling. A person or thing fondled or caressed; one treated with foolish or doting affection.[71]

FONDNESS. The quality or state of being fond, doting affection, tender liking; also appetite or propensity.[72]

FONDO. In Spanish law a fund; capital.[73]

FONDS. A French word, from the Latin "fundus," said to have no exact synonym in English.[74] It has been translated as "lands" or "a tract of land;" but it has also been said that the meaning should not be restricted to land or ground, but rather that it should be interpreted to mean landed property, real estate, so as to include buildings.[75]

FONSADERA. In Spanish law, all tribute or contribution for war expenses; military service. One who bore arms or furnished a horse was exempt.[76]

FONTANA. A fountain or spring.[77]

(4) "Following month."—Sovereign Camp, W. O. W., v. Reed, 94 So. 910, 913, 208 Ala. 457.

(5) "Following said party state proposal meeting."—Danforth v. Coyne, 207 N.W. 79, 81, 49 S.D. 153.

(6) "Following upon," as compared with "thereupon."—Atlanta Gaslight Co. v. Sams, 116 S.E. 21, 25, 29 Ga. App. 446.

(7) "Follows stealing everything he can get his hands on."—Spears v. Ford, 247 S.W. 713, 197 Ky. 575.

(8) "Follow the occupation of a barber."—Winters Mutual Aid Ass'n., Circle No. 2 v. Reddin, Tex.Civ.App., 31 S.W.2d 1103, 1107.

(9) "Follow the settlements."—Alexander, Ramsay & Kerr v. National Union Fire Ins. Co., C.C.A.N.Y., 104 F.2d 1006, 1008.

(10) "Reasonably certain to follow," as substantially equivalent to "reasonably be expected to suffer in the future" see Expect 35 C.J.S. p 203 note 33 (5).

68. Century D.

69. Escriche Diccionario.

70. Tex.—Gay v. State, 2 Tex.App. 127, 134.

71. Tex.—Gay v. State, supra.

72. Webster New Int.D.

"Fondness for women does not, ex vi termini, convey the meaning of lustful desire, and its unlawful gratification."—Cauley v. State, 9 So. 456, 92 Ala. 71, 73.

73. Escriche Diccionario.

"Fondo muerto perdido ó vitalicio" —a fund placed at interest for the period of one or more lives with the condition that, in case of the death of him or them during whose lives it is so placed, it becomes the property of the holder.—Escriche Diccionario.

"Fondo pio beneficial"—a pious beneficial fund—an establishment created and endowed with a third of ecclesiastical income for objects of beneficence.—Escriche Diccionario.

74. La.—Straus v. City of New Orleans, 118 So. 125, 130, 131, 166 La. 1035.

75. La.—Straus v. City of New Orleans, supra.

"Fonds ou batiment"

Variously construed as meaning "land or building" and "tenement or building."—Straus v. City of New Orleans, supra.

"Fonds et biens" see Bien 10 C.J.S. p 358 notes 66, 67.

"Fonds perdus"

In French law, a capital is said to be invested "a fonds perdus" when it is stipulated that in consideration of the payment of an amount as interest, higher than the normal rate, the lender shall be considered to be repaid his capital in this manner, hence the borrower, after paying the interest for the period stipulated is free as regards the capital, or principal, itself.—Black L.D.

76. Escriche Diccionario.

77. Black L.D.

FOOD

This Title includes regulation of manufacture, sale, or use of articles of food and drink and of substitutes and imitations thereof both for human consumption and for animals; rights of property and traffic in unwholesome or adulterated articles used as food, etc.; liabilities for injuries from the sale, use, etc., thereof; and violations of laws relating to such articles, and prosecution and punishment thereof as public offenses.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. IN GENERAL

§ 1. Definitions

Except as used in some statutes, the word "food" includes that which is drunk, as well as that which is eaten, for nourishment. As used in statutes, it may include food for animals as well as food for human beings, although in common use the word "feed" is employed when referring to articles fed to animals.

In the general sense of the term, food is "that which is eaten or drunk for nourishment."[1] It includes lard,[2] milk,[3] milk chocolate,[4] cheese,[5] coffee,[6] condiments,[7] confectionery,[8] popcorn,[9] and oleo oil;[10] but not talc,[11] tobacco,[12] whisky,[13] or saccharin.[14] What constitutes food within the meaning of statutes making it an offense to mingle poisons with food is considered in the C.J.S. title Poisons § 9, also 49 C.J. p 1058 notes 2, 3.

In food statutes the term usually includes all articles used for food or drink by man,[15] or by man

1. N.C.—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213.
Tex.—Liggett & Myers Tobacco Co. v. Wallace. Civ.App., 69 S.W.2d 857.
26 C.J. p 750 note 1.

Other definitions

(1) Nutritive material taken into the body for the purpose of growth, repair, or maintenance.
N.C.—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213.
Pa.—Commonwealth v. Pflaum, 84 A. 842, 236 Pa. 294, Ann.Cas.1913E 1287—Nock v. Coca-Cola Bottling Works of Pittsburgh, 156 A. 537, 102 Pa.Super. 515.
Tex.—Liggett & Myers Tobacco Co. v. Wallace, Civ.App., 69 S.W.2d 857.

(2) Whatever supplies nourishment to organic bodies.
N.C.—Corum v. R. J. Reynolds Tobacco Co., supra.
Pa.—Commonwealth v. Pflaum, supra.
Tex.—Liggett & Myers Tobacco Co. v. Wallace, supra.

(3) Further definitions see 26 C. J. p 750 note 1 [a].

Cooking as test

The fact that an article has not been cooked is not decisive as to whether it is food.—Totten v. Pittsburgh Melting Co., Pa., 232 F. 694, 146 C.C.A. 620, affirmed 38 S.Ct. 3, 248 U.S. 1, 63 L.Ed. 97.

"Victuals" commonly refers to food ready to eat.—Friend v. Childs Dining Hall Co., 120 N.E. 407, 231 Mass. 65.

Food and drink distinguished

(1) Some authorities point out that there is a plain and fundamental distinction between food and drink and that in common usage and understanding they are complementary and associate, but not synonymous, terms.—Commonwealth v. Kebort, 61 A. 895, 212 Pa. 289—Nock v. Coca-Cola Bottling Works of Pittsburgh, 156 A. 537, 102 Pa.Super. 515.

(2) Also it is said that in popular usage the term "food" seems to imply solid material, such as meat, bread, etc.; that the mere fact that milk, as all other liquids, may, in the terminology of the medical profession and dictionaries, be classified as food cannot deprive the consuming public of its own definition; and that, to the man on the street, milk means a liquid and not food.—Rialto Luncheonette v. 1481 Broadway Corporation, 11 N.Y.S.2d 39, 170 Misc. 754.

2. U.S.—Totten v. Pittsburgh Melting Co., Pa., 232 F. 694, 146 C.C.A. 620, affirmed 38 S.Ct. 3, 248 U.S. 1, 63 L.Ed. 97.

3. Ill.—Merle v. Beifeld, 194 Ill.App. 364.
40 C.J. p 708 note 3 [a].
Diverse view see supra note 1.

4. Tex.—Saleh v. State, 239 S.W. 207, 91 Tex.Cr. 316, 21 A.L.R. 752.

5. U.S.—Kraft-Phenix Cheese Corporation v. Consolidated Beverages, Cust. & Pat.App., 107 F.2d 1004.

6. U.S.—Tillman & Bendel v. California Packing Corporation, C.C.A. Cal., 63 F.2d 498.

7. U.S.—Savage v. Scovell, C.C.Ky., 171 F. 566.

8. Ohio.—Andrews v. Tax Commission of Ohio, 21 N.E.2d 106, 107, 135 Ohio St. 374.
Pa.—Commonwealth v. Pflaum, 84 A. 842, 236 Pa. 294, Ann.Cas.1913E 1287, affirming 50 Pa.Super. 55.

9. U.S.—Kraft-Phenix Cheese Corporation v. Consolidated Beverages, Cust. & Pat.App., 107 F.2d 1004.

10. U.S.—Totten v. Pittsburgh Melting Co., Pa., 232 F. 694, 146 C.C.A. 620, affirmed 38 S.Ct. 3, 248 U.S. 1, 63 L.Ed. 97.

11. U.S.—U. S. v. R. C. Boeckel & Co., Mass., 221 F. 885, 137 C.C.A. 455.

12. Ill.—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.
N.C.—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213.
26 C.J. p 750 note 1 [g].

13. N.Y.—Bolivar v. Monnat, 248 N.Y.S. 722, 232 App.Div. 33.

14. N.Y.—People v. Excelsior Bottling Works, 168 N.Y.S. 570, 35 N.Y.Cr. 62, reversed on other grounds 171 N.Y.S. 733, 184 App.Div. 45.

15. Ill.—City of Chicago v. Chicago Beverage Co., 22 N.E.2d 708, 372 Ill. 33—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.
Ohio.—Yochem v. Gloria, Inc., 17 N.E.2d 731, 134 Ohio St. 427.
Tex.—Harkey v. State, 234 S.W. 221, 90 Tex.Cr. 212, 17 A.L.R. 1276.
26 C.J. p 750 note 2.

Terms "other provisions" and "all other provisions," following enumerations of particular articles of food in other statutes, are the equivalent of "food" as defined in a pure food statute.—City of Chicago v. Chicago Beverage Co., 22 N.E.2d 708, 372 Ill. 33.

Particular substances included either expressly or by construction

(1) Baking powder.—Royal Baking Powder Co. v. Emerson, C.C.A.Ark., 270 F. 429, appeal dismissed 43 S.Ct. 166, 260 U.S. 752, 67 L.Ed. 496.

(2) Coffee.—Arbuckle v. Blackburn, Ohio, 113 F. 616, 51 C.C.A. 122, 65 L.R.A. 864, appeal dismissed 24 S.Ct. 148, 191 U.S. 405, 48 L.Ed. 239.

(3) Confectionery and condiments.—Crackerjack Co. v. City of Chicago, 161 N.E. 479, 330 Ill. 320, 58 A.L.R. 287—12 C.J. p 398 note 74 [d]—26 C.J. p 750 note 2 [a].

and other animals,[16] whether simple, mixed, or compound.[17] In construing certain statutes, however, it has been held that the term "food" does not include a beverage or drink;[18] and it is also held that, while the usual pure food statute which expressly provides that the term "food" shall include articles used for drink would undoubtedly cover the ordinary beverage, it does not comprehend an article, such as whisky, which at the time is outlawed as a beverage.[19] While articles used for medicines and also used for food are within some food statutes,[20] concentrated mineral spring water is not a food within the meaning of the federal statute where it is not in its original condition as it came from the earth and the processes of separation of the constituent drug elements have been carried to the extent that the water can no longer be used as a beverage, but only in small quantities or doses as a drug.[21] A legislative body may provide its own definition of food, under a law which it enacts, and, when it does so, that definition must necessarily control regardless of dictionary definitions,[22] or even though it goes beyond the ordinary meaning of the term.[23]

Feed is a word with a very definite and well-understood meaning.[24] It has been defined as that which is eaten; especially, food for beasts; fodder; feeding stuff; pasture, hay; grain, ground or whole; an allowance of provender given to a horse, cow, etc.; a meal; as a feed of corn or oats.[25] In its ordinary sense it is used with reference to cattle and hogs.[26] It is employed in common use as referring to articles to be fed to animals, and especially in connection with the names of particular grains or vegetables to describe the by-products of such grains or vegetables, consisting of the residue after subtracting those parts which are useful for human food.[27]

Fodder is a word derived from the Anglo-Saxon word "foda," and is defined as meaning food; that which is fed out to domestic animals; especially coarse food for cattle, horses, and sheep, as hay, vegetables, etc.[28] Peanuts may be regarded as within the term.[29]

§ 2. Rights of Property and Contracts

A statute relating to food does not affect a contract for the sale of food, or the rights and remedies of the parties thereunder, unless it makes the contract illegal or prescribes a standard which becomes a part of the contract and the measure of performance, or modifies the contract in respect of price.

Where a sale of food is unlawful or illegal by virtue of a statute the seller cannot recover the purchase price.[30] This is true in respect of the purchase price of a diseased animal sold for food purposes, although the seller had no knowledge of the diseased condition and it was not discovered until an inspection was made by a government inspector.[31] It is also true where, at the time of the consummation of the sale by delivery, the condi-

(4) Eggs.—Newton Tea & Spice Co. v. U. S., C.C.A.Ohio, 288 F. 475—26 C.J. p 750 note 2 [e].

(5) Fruits and vegetables.—Ferch v. People, 74 P.2d 712, 101 Colo. 471.

(6) Maple syrup.—U. S. v. 52 Drums Maple Syrup, C.C.A.Vt., 110 F. 2d 914.

(7) Meat.—Ferch v. People, supra.

(8) Milk.—Ferch v. People, supra—26 C.J. p 750 note 2 [b].

(9) Soft drinks or carbonated beverages.—City of Chicago v. Chicago Beverage Co., 22 N.E.2d 708, 372 Ill. 33.

(10) Wine.—U. S. v. Sweet Valley Wine Co., D.C.Ohio, 208 F. 85.

16. U.S.—Union Dairy Co. v. U. S., Ill., 250 F. 231, 162 C.C.A. 367.
26 C.J. p 751 note 3.

17. Ill.—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.
Ohio.—Yochem v. Gloria, Inc., 17 N.E. 2d 731, 134 Ohio St. 427.
26 C.J. p 751 note 4.

18. Pa.—Nock v. Coca-Cola Bottling Works of Pittsburgh, 156 A. 537, 102 Pa.Super. 515.
26 C.J. p 751 note 5.

19. N.Y.—Bolivar v. Monnat, 248 N. Y.S. 722, 232 App.Div. 33.

20. U.S.—Savage v. Scovell, C.C.Ky., 171 F. 566.
Mich.—Pratt Food Co. v. Bird, 112 N. W. 701, 148 Mich. 631, 118 Am.S.R. 601.

21. U.S.—Goodwin v. U. S., C.C.A. Ohio, 2 F.2d 200.

22. Wis.—McCarthy v. State, 175 N. W. 785, 170 Wis. 516.
26 C.J. p 751 note 7.

23. N.Y.—Bolivar v. Monnat, 248 N. Y.S. 722, 232 App.Div. 33.

24. Iowa.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Kimball, 222 N.W. 31, 33, 206 Iowa 1251.

25. Iowa.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Kimball, 222 N.W. 31, 33, 206 Iowa 1251, quoting Webster New Int.D.
Okl.—Maney v. Cherry, 41 P.2d 82, 84, 170 Okl. 469.

Similar definitions

(1) Food for cattle.
Iowa.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Kimball, 222 N.W. 31, 33, 206 Iowa 1251, quoting **Corpus Juris.**
La.—Atlas Feed Products Co. v. New Orleans, 37 So. 531, 533, 113 La. 611.

(2) Food, properly for domestic animals.—Hage v. E. L. Wellman Co., 187 N.W. 404, 406, 217 Mich. 537.

26. Iowa.—Aetna Casualty & Surety Co. of Hartford, Conn. v. Kimball, 222 N.W. 31, 33, 206 Iowa 1251, quoting Bouvier L.D.

27. U.S.—U. S. v. One Car Load of Corno Horse & Mule Feed, D.C. Ala., 188 F. 453.

As including unground corn

It has been said that to nontechnical persons of common understanding unground corn is regarded as feed for domestic animals and poultry.—Hage v. E. L. Wellman Co., 187 N.W. 404, 406, 217 Mich. 537.

28. La.—Fallin v. Stovall, 74 So. 911, 915, 141 La. 220.

Similarly expressed

"Food for horses or cattle."—Black L.D.

29. La.—Fallin v. Stovall, 74 So. 911, 915, 141 La. 220.

30. N.H.—Moskwa v. Nassikas, 133 A. 821, 82 N.H. 559.

31. S.D.—Wess v. South Dakota

tion of the food was such as to bring it within the statute, even though at the time of the making of the executory agreement to sell the food was in sound condition and the agreement was valid.[32] However, where one buys sound articles of food for future delivery, such articles to be put in storage and the buyer to stand the depreciation, the seller is not prevented, by reason of a statute making it an offense to have in one's possession with intent to sell any decomposed articles of food, from a recovery because such articles are decomposed when delivered.[33] Under a statute making it unlawful to sell an article imitating or resembling butter it is not a defense to an action for the recovery of the purchase price that the article sold was designed to take the place of butter, this not being unlawful.[34] A pure food statute does not change the rules of law governing express or implied warranties, as relating to the sales of food products.[35]

A contract to sell milk means a contract which fulfills the requirements of the statute, defining standard milk and making the sale of milk below such standard a misdemeanor, and a delivery of milk below the standard fails to comply with a contract to sell and deliver milk.[36] It has been held, however, that a statute prohibiting the making, selling, or exchanging of condensed milk unless manufactured from unadulterated and wholesome milk from which the cream has not been removed, will not prevent a manufacturer of condensed milk made from half skimmed and half whole milk, who sold the article as such, from recovering the price from one who bought with knowledge.[37] The failure of the vendor of milk to register his dairy, under a statute making such failure an offense, will not prevent the recovery of the price of milk which complies with the standard fixed by statute.[38] Recovery has been allowed where plaintiff did not have a required state license,[39] and denied where he did not have a required permit from a municipal department of health,[40] to sell milk.

A contract to purchase milk is not abrogated, but merely modified as to price, by a subsequent statute creating a milk control board and authorizing it to fix prices to be charged for milk;[41] and, where the purchaser continues to receive milk after the board fixes a minimum price higher than the price specified in the contract, it becomes obligated to pay for the milk at the higher price.[42] No recovery can be had for breach of a contract providing for a rebate from the price fixed by a valid order of an officer, board, or commission;[43] but an order which is void [44] and has been so adjudged [45] has no effect on the right to, or amount of, recovery in an action between parties to a contract for the sale of milk; and where a contract between the state and a milk company for delivery of milk to a state institution, although violating a statute, has been executed, an injunction to restrain state officials from making payments thereon will not be granted.[46]

Violation, or intended violation, of law on resale. An importer and seller of adulterated gelatine, who gave bond to obtain its release and to assure the federal authorities that it would be sold only for technical purposes and not for consumption as food, is entitled to recover the amount which he was compelled to pay to the federal authorities under the bond from the purchaser where the latter purchased with knowledge of the federal restrictions and with the understanding that he would comply therewith, but resold the gelatine for food purposes.[47] On the

Packing & Shipping Co., 180 N.W. 510, 43 S.D. 467.

32. Cal.—MacRae v. Heath, 212 P. 228, 60 Cal.App. 64.

33. Mich.—Stacy v. Moher, 166 N.W. 849, 200 Mich. 81.

34. N.Y.—Waterbury v. Egen, 23 N.Y.S. 115, 3 Misc. 355.

35. Ohio.—Kean v. Bachelor, 23 Ohio Cir.Ct.,N.S., 129, 4 Ohio App. 350.
Warranties as to articles sold for human or animal consumption see the C.J.S. title Sales § 331, also 55 C.J. p 764 note 91–p 769 note 54.

36. Mass.—Whitcomb v. Boston Dairy Co., 105 N.E. 554, 218 Mass. 24—Copeland v. Boston Dairy Co., 68 N.E. 218, 184 Mass. 207.

37. N.Y.—Genesee Valley Milk Products Co. v. W. H. Jones Corp., 128 N.Y.S. 191, 143 App.Div. 624, reversing 124 N.Y.S. 1009, 69 Misc. 236.

38. Cal.—Luchini v. Roux, 157 P. 554, 29 Cal.App. 755.

39. N.Y.—John E. Rosasco Creameries v. Cohen, 11 N.E.2d 908, 276 N.Y. 274, 118 A.L.R. 641, reversing 292 N.Y.S. 1, 249 App.Div. 228.

40. N.Y.—Chesterfield Farms v. Loftus, 20 N.Y.S.2d 966.

41. Pa.—Zeuger Milk Co. v. School Dist. of Pittsburgh, 5 A.2d 885, 334 Pa. 277.

42. Pa.—Zeuger Milk Co. v. School Dist. of Pittsburgh, supra.

Deliveries before and after order
Where 1934, but not 1933, statute authorized division of milk control to regulate business between dealers, and when selling dealers first raised price disregarding contract, no order had been issued by board requiring them to do so, but subsequently order was made, buying dealer could recover overcharges only for period during which no price was fixed for sales from dealer to dealer.—Knoeller v. Karsten, 283 N.Y.S. 58, 157 Misc. 130.

43. N.Y.—Bossom Dairy Co. v. Rockdale Creamery Corporation, 13 N.Y.S.2d 635, 171 Misc. 657, affirmed 16 N.Y.S.2d 720, 258 App.Div. 961.

44. N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

45. Pa.—Everitt v. Lotz Bros. Dairy, 3 Monroe L.R. 129.

46. Pa.—Penn Cress Ice Cream Co. v. Stites, 51 Dauph.Co. 305.

47. N.Y.—George B. Ritchie & Co. v. Paul Puttmann, Inc., 222 N.Y.S. 283, 220 App.Div. 676, affirmed 161 N.E. 172, 247 N.Y. 535.

other hand, where the seller has not performed, and the contract has on its face no taint of illegality, a buyer for resale will not be denied relief unless he contemplated an illegal method of performing the contract or intended to violate the law in disposing of the property.[48]

Contract made in another state. A statute prohibiting the making or selling of an article of food has no extraterritorial force,[49] and a contract made and executed in another state for the sale of such article is enforceable in the state where such sale is forbidden,[50] the sale of such article being legal at common law,[51] and it not being unlawful under such statute to send or bring such article into such state.[52] Knowledge that defendant might, or even that he intended to, violate the food laws of a state will not vitiate a contract made and executed in another state.[53] Where food stuffs shipped from one state to another are graded according to the standard fixed by the statute of the former state, a buyer who did not specify any quality has no cause of complaint even if that standard is below the standard of the state to which the shipment is made.[54]

Evidence. A pure food statute which makes a violation thereof a criminal offense does not change the established rules of evidence,[55] or the proof required,[56] in actions for damages growing out of the sale and delivery of food products. In an action to recover the purchase price of an article of food the burden of proof is on plaintiff to show that the article delivered by him was up to the standard prescribed by statute;[57] but this does not make it necessary for him to show that an analysis of the article has been made,[58] it being sufficient to show this by evidence of other relevant facts and circumstances.[59] Where in an action for the price of food stuffs, and for work performed by plaintiff in buying such food stuffs, defendant claims a deduction on the ground that the food stuffs are misbranded in violation of the statute, he has the burden of proving misbranding.[60]

II. STATUTORY AND MUNICIPAL REGULATIONS

§ 3. In General

Many regulations of the production, manufacture, sale, marketing, and transportation of food have been enacted or adopted for the protection of the public health, and frequently also for the purpose of protecting the public from fraud, and sometimes for the further purpose of preventing economic disturbance and unfair practices in a particular food industry.

The selling of unwholesome provisions was, as noted infra § 39, an offense at common law; but the common law being inadequate to the complete protection of the public against abuses in connection with the production and sale of food,[61] or at least having become so with the growth in complexity of social and economic structures,[62] many regulations of the production, manufacture, sale, marketing, and transportation of food have been enacted or adopted by regulatory bodies and considered by the courts. Some of these regulations have been made by congress,[63] many others by state or municipal legislative bodies,[64] and some, especially in recent years, by boards or other agencies vested with regulatory powers. One of the purposes,[65] indeed, the prima-

48. Mo.—Hefernan v. Neumond, 201 S.W. 645, 198 Mo.App. 667.

49. N.Y.—Boston Dairy Co. v. J. H. Jones Corp., 129 N.Y.S. 70, 72 Misc. 17.

50. N.Y.—Boston Dairy Co. v. J. H. Jones Corp., supra.
Pa.—Braunn v. Keally, 23 A. 389, 146 Pa. 519, 28 Am.S.R. 811.

51. N.Y.—Boston Dairy Co. v. J. H. Jones Corp., 129 N.Y.S. 70, 72 Misc. 17.

52. N.Y.—Boston Dairy Co. v. J. H. Jones Corp., supra.

53. Pa.—Braunn v. Keally, 23 A. 389, 146 Pa. 519, 28 Am.S.R. 811.

54. Me.—Look v. Watson, 108 A. 106, 118 Me. 339.

55. Ohio.—Kean v. Bachelor, 23 Ohio Cir.Ct.,N.S., 129, 4 Ohio App. 350.
Va.—Walker v. Gateway Milling Co., 92 S.E. 826, 121 Va. 217.

56. Ohio.—Kean v. Bachelor, 23 Ohio Cir.Ct.,N.S., 129, 4 Ohio App. 350.

57. Mass.—Copeland v. Boston Dairy Co., 68 N.E. 218, 184 Mass. 207.

58. Mass.—Copeland v. Boston Dairy Co., 75 N.E. 704, 189 Mass. 342.

59. Mass.—Copeland v. Boston Dairy Co., 75 N.E. 704, 189 Mass. 342.

60. Me.—Look v. Watson, 108 A. 106, 118 Me. 339.

61. N.Y.—Boston Dairy Co. v. J. H. Jones Corp., 129 N.Y.S. 70, 72 Misc. 17.

62. Cal.—State v. Schwartz, 70 P.2d 1017, 28 Cal.App.2d Supp. 775.

63. U.S.—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87.
26 C.J. p 751 note 12.

64. Cal.—State v. Schwartz, 70 P.2d 1017, 1018, 28 Cal.App.2d Supp. 775, citing **Corpus Juris.**
Fla.—L. Maxcy, Inc., v. Mayo, 139 So. 121, 103 Fla. 552.
26 C.J. p 751 note 13.

65. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.
Cal.—Dorsa v. Board of Sup'rs of Santa Clara County, 72 P.2d 912, 23 Cal.App.2d 217.
D.C.—Leaman v. District of Columbia, 55 F.2d 1020, 60 App.D.C. 395.
Fla.—Setzer v. Mayo, 9 So.2d 280—State ex rel. Hogan v. Spencer, 190 So. 506, 139 Fla. 237.
Kan.—Carolene Products Co. v. Mohler, 102 P.2d 1044, 152 Kan. 2.
N.H.—Whitney v. Watson, 157 A. 78, 85 N.H. 238.
N.Y.—S. H. Cranston, Inc. v. Department of Health of City of New York, 6 N.Y.S.2d 275, 168 Misc. 749—People, on Complaint of Department of Health of City of New York, v. Grandview Ice Cream & Dairy Products, 3 N.Y.S.2d 655, 167 Misc. 138.
Tex.—Blain v. Service Mut. Ins. Co. of Texas, Civ.App., 159 S.W.2d 538, error granted.

ry purpose,[66] of such regulations is the protection of the public health. Another purpose of many regulations of this nature is the protection of the public from fraud.[67] The purpose of the federal statute relating to food generally is well established;[68] and it has been conclusively presumed that a state had a like purpose in adopting an act applicable to intrastate commerce.[69] While the purpose of a state milk control law is to procure, maintain, and safeguard an adequate supply of milk for public consumption,[70] it may have another purpose, namely, that of eliminating economic disturbances and unfair practices or methods of competition in the milk industry.[71] The various regulations are not designed primarily for the protection [72] or punishment [73] of dealers, but rather for the protection of producers [74] or consumers [75] or both.[76]

§ 4. Power to Make Regulations

a. In general
b. Power of officer, board, or other agency

a. In General

Regulations of the milk business or other food regu-

Wis.—Day-Bergwall Co. v. State, 207 N.W. 959, 190 Wis. 8.
26 C.J. p 758 note 43, p 768 note 68.

Enforcement of sanitary standards or conditions is the purpose of some statutes.
U.S.—Cudahy Packing Co. v. McBride, C.C.A.Neb., 92 F.2d 737, certiorari denied 58 S.Ct. 526, 303 U.S. 639, 82 L.Ed. 1099.
Cal.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.

Protection of stock from deleterious food is one of the purposes of statute regulating manufacture and sale of concentrated commercial feeding stuff.—Bloemer v. Turner, 137 S.W.2d 387, 281 Ky. 832.

66. U.S.—U. S. v. Lexington Mill & Elevator Co., Mo., 34 S.Ct. 337, 232 U.S. 399, 58 L.Ed. 658, L.R.A.1915B 774.

67. U.S.—U. S. v. Lexington Mill & Elevator Co., supra—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014—Royal Baking Powder Co. v. Emerson, C.C.A.Ark., 270 F. 429, appeal dismissed 43 S.Ct. 166, 260 U.S. 752, 67 L.Ed. 496.
Fla.—Setzer v. Mayo, 9 So.2d 280.
Kan.—Carolene Products Co. v. Mohler, 102 P.2d 1044, 152 Kan. 2.
Ky.—Bloemer v. Turner, 137 S.W.2d 387, 281 Ky. 832.
N.Y.—People v. Miller, 8 N.Y.S.2d 363, 169 Misc. 648.
Wis.—Day-Bergwall Co. v. State, 207 N.W. 959, 190 Wis. 8.
26 C.J. p 759 note 44, p 760 note 56, p 761 note 69, p 762 note 79, p 768 note 68.

68. U.S.—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87.

69. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.

70. Cal.—Ex parte Willing, 86 P.2d 663, 12 Cal.2d 591.
Ind.—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind. App. 196.

Main purpose of the milk control law is to insure a sufficient supply of wholesome milk, which cannot be accomplished unless the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk.—Rieck-McJunkin Dairy Co. v. Milk Control Commission, 18 A.2d 868, 341 Pa. 153.

At lowest cost
(1) It is said that milk control law provision permitting determination of minimum wholesale prices by director of agriculture was written in the public interest to supply good, pure, wholesome milk to the consumer at the lowest cost the traffic will permit.—Challenge Cream & Butter Ass'n v. Parker, Cal.App., 125 P.2d 864.

(2) Previously, however, it was said in the same jurisdiction that the Milk Control Act is not primarily aimed at what the dealer or consumer shall pay, but what the producer shall receive.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.

71. Cal.—Ex parte Willing, 86 P.2d 663, 12 Cal.2d 91.
Wis.—Golden Harvest Dairy Co. v. Department of Agriculture and Markets of Wisconsin, 286 N.W. 865, 232 Wis. 240.

Cutthroat competition
The Agricultural Marketing Agreement Act of 1937 and milk marketing order issued thereunder were intended to achieve fair division of more profitable fluid milk market among all producers, thereby eliminating disorganizing effects of cutthroat competition among producers striving for fluid milk market.—Elm Spring Farm v. U. S., C.C.A.Mass., 127 F.2d 920, modifying, D.C., U. S. v. Elm Spring Farm, 38 F.Supp. 508.

Real purpose of milk control act was to regulate the marketing and price of milk, not to provide for sanitary regulations relative to its production or distribution.—Milk Control Board v. Pursifull, Ind., 38 N.E.2d 246.

72. N.Y.—John E. Rosasco Creameries v. Cohen, 11 N.E.2d 908, 276 N.Y. 274, 118 A.L.R. 641, reversing 292 N.Y.S. 1, 249 App.Div. 228.

73. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299.

74. Tex.—Texas Underwriters v. Martinal, Civ.App., 140 S.W.2d 582.

Industry
(1) The purpose of the statute requiring labeling of containers of canned citrus fruit and juices to show state in which fruit was grown and requiring word "Florida" to be embossed upon or stamped into tin of containers of citrus fruit or juice produced in Florida was to protect the citrus industry of the state.—Polk Co. v. Glover, D.C.Fla., 22 F.Supp. 575, reversed on other grounds 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6.

(2) The purpose of the act dealing with the grading of milk and cream obtained from producers for commercial use is to encourage and reward the production of the highest quality of cream and milk, thereby effecting the improvement of one of the state's principal industries.—State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 84 P.2d 471, 160 Or. 205.

75. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637.

76. U.S.—Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 528, 306 U.S. 346, 83 L.Ed. 752, reversing 200 A. 854, 332 Pa. 34, certiorari granted Milk Control Board of Commonwealth of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 229, 305 U.S. 589, 83 L.Ed. 372, and rehearing denied 59 S.Ct. 773, 306 U.S. 669, 83 L.Ed. 1063.
N.Y.—John E. Rosasco Creameries v. Cohen, 11 N.E.2d 908, 276 N.Y. 274, 118 A.L.R. 641, reversing 292 N.Y.S. 1, 249 App.Div. 228.

lations for permissible purposes will be upheld where they are within the power of the particular body making them, do not violate constitutional provisions, and are not arbitrary, capricious, or unreasonable.

The business of making and selling bread may be regulated.[77] Also, the milk business, including the production and sale of milk and the manufacture and sale of milk products, is affected with a public interest and subject to regulation,[78] in the interest of the public health [79] or for the purpose of preventing deception of the public.[80] Regulations of such businesses, as well as other food regulations, must, where they are within the power of the particular body making them, and do not offend constitutional provisions, be upheld unless they are arbitrary or capricious and do not bear a reasonable relation to the preservation of the public health or the protection of the public from imposition.[81]

Puerto Rican statutes prohibiting the adulteration of milk [82] and coffee [83] are within the power of the legislature to enact, and are valid.

b. Power of Officer, Board, or Other Agency

Within the scope of the power conferred on him or it by a valid statute or municipal ordinance, and in the manner required by governing law, an officer, board, or other agency may make, enact, or issue rules, regulations, ordinances, or orders concerning food, provided they are reasonable and are not inconsistent with constitutional or statutory provisions or, in some cases, municipal ordinances. As provided by statute, an order of this character must be preceded by notice, hearing, and findings; and it is subject to judicial review.

When conferred on him or it by a valid state or federal statute, or municipal ordinance, as the case may be, a board of health, milk control board, secretary of agriculture, or other officer, board, department, commission, or agency has power to make, enact, or adopt rules, regulations, ordinances, or orders relating to foods or food products, including, among others, those pertaining to the definitions, standards, production, manufacture, handling, or marketing of such foods or food products.[84] In such case a particular order, ordinance, rule, or regulation may be valid [85] or invalid [86] accordingly

77. U.S.—Wonder Bakeries Co. v. White, D.C.Ohio, 3 F.Supp. 311.

78. Cal.—Meridian, Limited v. Sippy, App., 128 P.2d 884.
N.J.—Sheffield Farms Co. v. Seaman, 177 A. 372, 114 N.J.Law 455.
Wis.—State ex rel. Department of Agriculture and Markets v. Gagnon, 296 N.W. 627, 237 Wis. 617.

79. R.I.—First Nat. Stores v. Lewis, 155 A. 534, 51 R.I. 448.
For purpose of securing wholesome product and preventing disease
Pa.—Simco Sales Service of Pennsylvania v. Brackin, 26 A.2d 323.

80. Pa.—Simco Sales Service of Pennsylvania v. Brackin, supra.

81. N.J.—Sheffield Farms Co. v. Seaman, 177 A. 372, 114 N.J.Law 455.
Pa.—Simco Sales Service of Pennsylvania v. Brackin, 26 A.2d 323.
Legitimate articles of commerce
Milk and other dairy products are legitimate subjects of commerce and the right to sell them should not be abridged by legislative bodies further than reasonably necessary to protect and safeguard the public health.
Ky.—Grant v. Leavell, 82 S.W.2d 283, 259 Ky. 267.
Tex.—Prescott v. City of Borger, Civ. App., 158 S.W.2d 578, error refused.

82. U.S.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F. 2d 427.

83. U.S.—Gonzalez v. People of Porto Rico, C.C.A.Puerto Rico, 51 F.2d 61.

84. U.S.—U. S. v. Wrightwood Dairy Co., Ill., 62 S.Ct. 523, 315 U.S. 110, 86 L.Ed. 726, reversing, C.C.A., 123 F.2d 100, certiorari granted 62 S. Ct. 362, 314 U.S. 605, 86 L.Ed. 486 and Wrightwood Dairy Co. v. U. S., 62 S.Ct. 362, 314 U.S. 605, 86 L.Ed. 486—U. S. v. Borden Co., Ill., 60 S.Ct. 182, 308 U.S. 188, 84 L.Ed. 181, reversing, D.C., 28 F.Supp. 177—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F.Supp. 534, and rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526—Quaker Oats Co. v. Federal Security Aministrator, C.C.A., 129 F.2d 76—Roloff v. Perdue, D.C.Iowa, 33 F.Supp. 513.
Ala.—Taylor v. State ex rel. Alabama State Milk Control Board, 186 So. 463, 237 Ala. 178.
Ark.—Belzung v. State, 36 S.W.2d 397, 183 Ark. 472.
Cal.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.
Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.
Kan.—State v. Reynolds, 107 P.2d 728, 152 Kan. 762.
Mass.—Commonwealth v. Johnson Wholesale Perfume Co., 24 N.E.2d 8, 304 Mass. 452.
N.Y.—Stracquadanio v. Department of Health of City of New York, 32 N.E.2d 806, 285 N.Y. 93, affirming 20 N.Y.S.2d 965, 259 App.Div. 994, affirming 20 N.Y.S.2d 964, appeal denied 21 N.Y.S.2d 611, 259 App. Div. 1073—New York State Guernsey Breeders Co-op. v. Noyes, 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240, and followed in 32 N.E.2d 823, 285 N.Y. 523, modifying 21 N.Y.S. 2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App. Div. 841.
Vt.—State v. Auclair, 4 A.2d 107, 110 Vt. 147.
26 C.J. p 758 note 43 [a] (1).
Power is quasi-legislative
U.S.—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 122 F.2d 564.

85. U.S.—Nebbia v. People of State of New York, 54 S.Ct. 505, 291 U. S. 502, 78 L.Ed. 940, 89 A.L.R. 1469, affirming People v. Nebbia, 186 N. E. 694, 262 N.Y. 259—Green Valley Creamery v. U. S., C.C.A.Mass., 108 F.2d 342, affirming, D.C., U.S. v. H. P. Hood & Sons, 26 F.Supp. 672—U. S. v. David Buttrick Co., D.C.Mass., 28 F.Supp. 878.
Mass.—Commonwealth v. E. E. Wilson Co., 135 N.E. 376, 241 Mass. 406.
N.Y.—Muller Dairies v. Baldwin, 274 N.Y.S. 975, 242 App.Div. 296—Village of Herkimer v. Potter, 207 N.Y.S. 35, 123 Misc. 57—Moll v. City of Lockport, 194 N.Y.S. 250, 118 Misc. 573.
26 C.J. p 758 note 43 [a] (3).

86. U.S.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76—Miller v. Williams, D. C.Md., 12 F.Supp. 236—Morgan v. Nolan, D.C.Ind., 3 F.Supp. 143, affirmed, C.C.A., 69 F.2d 471.
Kan.—State v. Reynolds, 107 P.2d 728, 152 Kan. 762.
N.H.—Whitney v. Watson, 157 A. 78, 85 N.H. 238.

as it is or is not within the power conferred,[87] is reasonable or unreasonable,[88] is consistent or inconsistent with constitutional provisions[89] and is

Wash.—Tacoma Bread Co. v. Mankertz, 57 P.2d 1056, 186 Wash. 302.

87. U.S.—U. S. v. Rock Royal Co-op., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F.Supp. 534, and rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526—A. E. Staley Mfg. Co. v. Secretary of Agriculture, C.C.A., 120 F.2d 258—Green Valley Creamery v. U. S., C.C.A. Mass., 108 F.2d 342, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F. Supp. 672—U. S. v. David Buttrick Co., D.C.Mass., 28 F.Supp. 878—U. S. v. Seven Oaks Dairy Co., D.C. Mass., 10 F.Supp. 995—W. B. Wood Mfg. Co. v. U. S., C.C.A.Ill., 286 F. 84.

Ala.—Thompson v. Alabama State Milk Control Board, 1 So.2d 381, 241 Ala. 100.

Ark.—Belzung v. State, 36 S.W.2d 397, 183 Ark. 472.

Ind.—Wallace v. Feehan, 190 N.E. 438, 206 Ind. 422.

Ky.—Bloemer v. Turner, 137 S.W.2d 387, 281 Ky. 832.

N.J.—Supplee-Wills-Jones Milk Co. v. Duryee, 181 A. 908, 116 N.J.Law 75.

N.Y.—New York State Guernsey Breeders' Co-op. v. Noyes, 21 N.Y.S. 2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App. Div. 841, and modified on other grounds 32 N.E.2d 823, 285 N.Y. 523, following 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240—People v. Linden Farms Milk & Cream Co., 280 N.Y.S. 144, 244 App.Div. 830—Grandview Dairy v. Baldwin, 269 N.Y.S. 116, 239 App.Div. 640—S. H. Cranston, Inc., v. Department of Health of City of New York, 6 N.Y. S.2d 275, 168 Misc. 749—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236—Village of Herkimer v. Potter, 207 N.Y.S. 35, 123 Misc. 57—Moll v. City of Lockport, 194 N.Y.S. 250, 118 Misc. 573.

Pa.—Penn Dairies v. Milk Control Commission, 26 A.2d 431—Green v. Milk Control Commission, 16 A.2d 9, 340 Pa. 1, followed in Harrisburg Dairies v. Milk Control Commission, 16 A.2d 12, and certiorari denied Milk Control Commission of Pennsylvania v. Green, 61 S.Ct. 826, 312 U.S. 708, 85 L.Ed. 1140.

Wash.—Tacoma Bread Co. v. Mankertz, 57 P.2d 1056, 186 Wash. 302.

Wis.—State v. Dairy Distributors, 258 N.W. 386, 217 Wis. 167.

26 C.J. p 758 note 43 [a] (2), (4).

Lack of implied power

Director of Agriculture is a public official and as such, under the milk control law, has powers with reference to fixing milk prices expressly enumerated by the statute, and implied powers necessary to the exercise of the powers expressly granted; but, where his order fixing different prices for milk sold in glass containers and milk sold in fiber containers was not necessary to the exercise by him of the express powers given him in the milk control law, power to make such order was not implied.—Challenge Cream & Butter Ass'n v. Parker, Cal.App., 125 P.2d 864.

Promotion of honesty and fair dealing in interest of consumers

Under the statute authorizing the federal security administrator to promulgate regulations fixing definitions and standards of identity of food whenever in his judgment such action will promote honesty and fair dealing in the interest of consumers, administrator's action in the interest of consumers is expressly limited to the promotion of honesty and fair dealings in their behalf. The words "honesty and fair dealing" were used in the statute in their ordinary sense and did not indicate an intent to promote the consumers' health or authorize action merely to avoid confusion on the part of consumer or to educate the public as to dietary requirements.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76.

Jurisdiction as between different agencies

(1) In Kansas, the statutes dealing specifically with milk and other dairy products confer on the state board of agriculture the exclusive jurisdiction to promulgate rules and regulations in matters dealt with by such statutes. Under provisions of the Food and Drugs Act relating to foods and drugs generally, and dealing with the subjects of adulteration and misbranding, and in absence of comparable or corresponding provisions in the milk acts, the state board of health, which is charged with duty of enforcing provisions relative to adulteration and misbranding, may promulgate reasonable rules and regulations thereunder applicable to milk and other dairy products, relating only to the ingredients, the constituent elements, and the character or nature of such products in order to safeguard public health or to prevent deception, but such regulations may not otherwise relate to sale or to production, manufacture and handling of such products, or to other matters subject to exclusive regulation by state board of agriculture.—State v. Reynolds, 107 P.2d 728, 152 Kan. 762.

(2) In New York, except for the items mentioned in Agriculture and Markets Law art 4-a, the inspection and supervision of sanitary measures as to milk and milk products consumed are controlled by the department of health.—Aerated Products Co. of Buffalo v. Godfrey, 35 N.Y.S. 2d 124, 263 App.Div. 685.

88. U.S.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76—U. S. v. Wrightwood Dairy Co., C.C.A.Ill., 127 F.2d 907—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 122 F.2d 564—A. E. Staley Mfg. Co. v. Secretary of Agriculture, C.C.A., 120 F.2d 258—Morgan v. Nolan, D.C.Ind., 3 F. Supp. 143, affirmed, C.C.A., Nolan v. Morgan, 69 F.2d 471.

Ala.—Thompson v. Alabama State Milk Control Board, 1 So.2d 381, 241 Ala. 100.

Ark.—Belzung v. State, 36 S.W.2d 397, 183 Ark. 472.

Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

Idaho.—Marshall v. Department of Agriculture of Idaho, 258 P. 171, 44 Idaho 440.

Ind.—Wallace v. Feehan, 190 N.E. 438, 206 Ind. 422.

Mass.—Brielman v. Monroe, 17 N.E. 2d 187, 301 Mass. 407.

N.Y.—Village of Herkimer v. Potter, 207 N.Y.S. 35, 123 Misc. 57—Moll v. City of Lockport, 194 N.Y.S. 250, 118 Misc. 573—Stracquadanio v. Department of Health of City of New York, 20 N.Y.S.2d 964, affirmed 20 N.Y.S.2d 965, 259 App. Div. 994, appeal denied 21 N.Y.S.2d 611, 259 App.Div. 1073, affirmed 32 N.E.2d 806, 285 N.Y. 93.

Pa.—Simco Sales Service of Pennsylvania v. Brackin, 26 A.2d 323—Colteryahn Sanitary Dairy v. Milk Control Commission, 45 Dauph.Co. 191.

Presumption arises that milk control board's order fixing prices is reasonable and valid exercise of the authority conferred by statute, and burden of establishing contrary is on him who asserts it.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

Orders held not arbitrary

N.Y.—Crowley's Milk Co. v. Ten Eyck, 283 N.Y.S. 166, 246 App.Div. 654, affirmed 1 N.E.2d 119, 270 N. Y. 328—Baldwin v. Dellwood Dairy Co., 270 N.Y.S. 418, 150 Misc. 762.

89. U.S.—U. S. v. H. P. Hood & Sons, D.C.Mass., 26 F.Supp. 672, certio-

consistent or inconsistent with statutory provisions[90] or regulatory provisions enacted or adopted by a superior regulatory body,[91] and is or is not made or issued by a proper and regular exercise of the power conferred.[92] A regulation made under authority granted by an unconstitutional statute is itself unconstitutional and void.[93]

From a procedural standpoint, it is ordinarily necessary and sufficient that, before the issuance of an order, the steps and proceedings required by statute be taken.[94] This is true as to compliance with statutory provisions relating to the initiation of the proceedings,[95] notice,[96] hearing,[97] and stat-

rari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032, and affirmed H. P. Hood & Sons v. U. S., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478.

Ga.—Wright v. Richmond County Department of Health, 186 S.E. 815, 182 Ga. 651.

Ind.—Milk Control Board v. Crescent Creamery, 14 N.E.2d 588, 214 Ind. 240, mandate modified on other grounds 15 N.E.2d 80, 214 Ind. 240, appeal dismissed Crescent Creamery v. Milk Control Board of State of Indiana, 59 S.Ct. 87, 305 U.S. 559, 83 L.Ed. 352, rehearing denied 59 S.Ct. 143, 305 U.S. 671, 83 L.Ed. 435.

Mass.—Commonwealth v. E. E. Wilson Co., 135 N.E. 376, 241 Mass. 406.

90. U.S.—Morgan v. Nolan, D.C.Ind., 3 F.Supp. 143, affirmed, C.C.A., 69 F.2d 471.

Ark.—Belzung v. State, 36 S.W.2d 397, 183 Ark. 472.

Mass.—Commonwealth v. Johnson Wholesale Perfume Co., 24 N.E.2d 8, 304 Mass. 452.

N.Y.—Village of Herkimer v. Potter, 207 N.Y.S. 35, 123 Misc. 57.

Order should not violate statutory purpose

Cal.—Challenge Cream & Butter Ass'n v. Parker, App., 125 P.2d 864.

91. **Inconsistency between regulations by manager of health and ordinance**

Colo.—City and County of Denver v. Gibson, 24 P.2d 751, 93 Colo. 122.

Lack of conflict between rules of district and state health board

Ark.—Belzung v. State, 36 S.W.2d 397, 183 Ark. 472.

92. U.S.—U. S. v. Andrews, D.C. Mass., 26 F.Supp. 123.

Mass.—Commonwealth v. E. E. Wilson Co., 135 N.E. 376, 241 Mass. 406.

N.Y.—Moll v. City of Lockport, 194 N.Y.S. 250, 118 Misc. 573.

93. La.—State v. Maitrejean, 192 So. 361, 193 La. 824.

94. U.S.—H. P. Hood & Sons v. U. S., Mass., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F. Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032—U. S. v. Wrightwood Dairy Co., C.C.A.Ill., 127 F.2d 907.

Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

Validity of statute and provisions of order must be assumed while considering the manner of the adoption of the order.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F.Supp. 534 and rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526.

Nisi order need not be issued.—Harrisburg Dairies v. Milk Control Commission of Commonwealth of Pennsylvania, 49 Dauph.Co., Pa., 413.

95. Cal.—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275.

Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

Petition not fatally defective

Petition on which commissioner of agriculture and markets based order providing for minimum milk prices and equalization was not so defective as to invalidate commissioner's order, where party seeking to review order was in no way surprised or misled by failure to make petition more specific as to facts, and there was a complete hearing on all matters essentially involved in the order.—New York State Guernsey Breeders' Co-op. v. Noyes, 21 N.Y.S.2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App.Div. 841, modified on other grounds 32 N.E.2d 823, 285 N.Y. 523, following 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y. S.2d 132, 260 App.Div. 240.

96. U.S.—U. S. v. Wrightwood Dairy Co., C.C.A.Ill., 127 F.2d 907.

Mich.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.

N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236—Baldwin v. Dellwood Dairy Co., 270 N.Y.S. 418, 150 Misc. 762.

One notice and hearing

Under a particular milk control statute, notice and public hearing may be necessary before a milk control area is established by the milk commission, but not, after the establishment of such area, before the promulgation of rules and regulations.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

97. U.S.—U. S. v. Wrightwood Dairy Co., C.C.A.Ill., 127 F.2d 907.

N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

Pa.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

Presumption exists that milk control board prior to fixing prices made investigation and took proofs in absence of contrary showing.—Supplee-Wills-Jones Milk Co. v. Duryee, 181 A. 908, 116 N.J.Law 75.

Due process

Where only a limited judicial review is authorized by statute, there must be such a fair hearing before the board as to satisfy the requirement of due process of law.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.

Hearing before predecessor

Where authority under federal Food, Drug and Cosmetic Act to promulgate regulations for food was transferred from secretary of agriculture to federal security administrator during course of a hearing on a regulation, administrator could promulgate a regulation on the basis of the hearing had and evidence adduced while food and drugs administration was under supervision of the secretary of agriculture; and fact that only six days intervened between transfer of the duties to administrator and his promulgation of the regulation would not authorize declaring order invalid on ground that administrator did not read the record before issuance of his order, especially where order contained an affirmative recitation of official regularity.—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 122 F.2d 564.

Consideration and record of evidence and investigation

(1) Under some milk control acts, the milk control board or commission may, in fixing minimum prices, consider not only the facts presented at a public hearing, but also those

utory provisions relating to the findings,[98] statement in writing of the reasons for the order,[99] and the holding of a referendum on the approval or disapproval of the proposed order.[1] However, where an order has been expressly ratified and confirmed by a subsequently enacted statute, it is

otherwise before it, such as those disclosed by its own investigation or an investigation by a legislative committee.

U.S.—Highland Farms Dairy v. Agnew, D.C.Va., 16 F.Supp. 575, affirmed 57 S.Ct. 549, 300 U.S. 608, 81 L.Ed. 835.

N.Y.—Baldwin v. Dellwood Dairy Co., 270 N.Y.S. 418, 150 Misc. 762.

(2) In determining prices, the board must ground those prices on investigation and proofs.—Supplee-Wills-Jones Milk Co. v. Duryee, 181 A. 908, 116 N.J.Law 75.

(3) The mandate for a public hearing and notice thereof imports an obligation to consider whatever testimony is given.—New York State Guernsey Breeders Co-op. v. Noyes, 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240, followed in 32 N.E.2d 823, 285 N.Y. 523, modifying 21 N.Y.S.2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App.Div. 841.

(4) The general intent and purpose of a milk control act is that in the promulgation, revision, or change of official orders fixing prices, a definite record shall be made of all evidence produced before milk control commission, and of all matters on which it bases its order.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

(5) An order of the secretary of agriculture was not in accordance with the law, where it was impossible to tell from the record whether the secretary weighed the evidence and cast it aside in the exercise of his administrative discretion, or whether the evidence was considered at all.—A. E. Staley Mfg. Co. v. Secretary of Agriculture, C.C.A., 120 F.2d 258.

98. U.S.—A. E. Staley Mfg. Co. v. Secretary of Agriculture, supra.

N.Y.—New York State Guernsey Breeders' Co-op. v. Noyes, 21 N.Y.S.2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App.Div. 841, modified on other grounds 32 N.E.2d 823, 285 N.Y. 523, following 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240.

Pa.—Harrisburg Dairies v. Milk Control Commission of Commonwealth of Pennsylvania, 49 Dauph.Co. 413.

Vt.—In re Swanton Market Area, 23 A.2d 536, 112 Vt. 285.

Wis.—State v. Dairy Distributors, 258 N.W. 386, 217 Wis. 167.

Determination of issues of fact

In order that the basis for the determination may be definite and certain, and in order that the determination may be reviewed, a duty is imposed on the determining body or officer to set forth the factual grounds of the decision, particularly where the relief sought is denied; and, in a particular case, the findings, although satisfying generally the statutory prerequisites to the issuance of the order, may be deemed inadequate to determine an issue of fact raised by the showing at the hearing.—New York State Guernsey Breeders Co-op. v. Noyes, 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240, followed in 32 N.E.2d 823, 285 N.Y. 523, modifying 21 N.Y.S.2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App.Div. 841.

Initial finding

Power of milk control board to fix prices of milk did not depend on initial finding by board that it ought to do so, where statute expressed policy and board's powers, one of which was to fix prices.—Supplee-Wills-Jones Milk Co. v. Duryee, 181 A. 908, 116 N.J.Law 75.

On amendment

(1) It is not necessary, on amending an order, to repeat findings previously made, or to make new findings, in respect of matters as to which the amendment makes no change.—H. P. Hood & Sons v. U. S., Mass., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F.Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031 and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032.

(2) A finding made on amendment may cure a prior omission.—H. P. Hood & Sons v. U. S., Mass., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F.Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032.

99. Pa.—Harrisburg Dairies v. Milk Control Commission of Commonwealth of Pennsylvania, 49 Dauph. Co. 413.

1. N.Y.—New York State Guernsey Breeders' Co-op. v. Noyes, 21 N.Y.S.2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App.Div. 841, modified on other grounds 32 N.E.2d 823, 285 N.Y. 523, following 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240.

Statute held followed

U.S.—H. P. Hood & Sons v. U. S., Mass., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F. Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 307 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 307 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032—U. S. v. Wrightwood Dairy Co., C.C.A.Ill., 127 F.2d 907.

Extraneous matters

(1) Where milk marketing order issued by secretary of agriculture was submitted to milk producers for approval after hearings specified in statute, and full text of order with explanatory pamphlets was mailed to each prospective voter, erroneous statements in pamphlets could not be permitted to render submission futile and require an equity court to refuse to enforce order.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F.Supp. 534, and rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526 and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526.

(2) Also, if ulterior motives of corporate aggrandizement stimulated activities of associations of milk producers having a vital interest in establishment of an efficient marketing system in exercising coercion on handlers to agree to marketing order, their efforts were not thereby rendered unlawful and did not require an equity court to refuse to enforce order.—U. S. v. Rock Royal Co-op., supra.

(3) Where secretary of agriculture declared that three fourths of milk producers affected by marketing order issued by him approved its terms, and litigants challenging validity of order did not deny that three fourths of voters voted for institution of order, the courts could not go behind secretary's conclusion to inquire into influences which caused producers to favor order.—U. S. v. Rock Royal Co-op., supra.

unnecessary to pass on its alleged invalidity because of failure to comply with statutory provisions regarding notice, hearing and findings.[2] A regulation must be promulgated, even though no specific method for doing so is prescribed by statute.[3]

Such judicial review of an order as is authorized by statute may be had[4] by a person adversely affected;[5] but a particular issue or contention cannot properly be raised or made in court by a person without the requisite interest or injury.[6] A dis-

2. U.S.—U. S. v. H. P. Hood & Sons, D.C.Mass., 26 F.Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U. S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031 and Brannon v. U. S., 59 S.Ct. 791, 306 U. S. 629, 83 L.Ed. 1032, affirmed H. P. Hood & Sons v. U. S., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478.

3. Pa.—Commonwealth v. Paschall, 53 Dauph.Co. 135.

4. Ind.—Milk Control Board v. Crescent Creamery, 14 N.E.2d 588, 214 Ind. 240, mandate modified on other grounds 15 N.E.2d 80, 214 Ind. 240, appeal dismissed Crescent Creamery v. Milk Control Board of State of Indiana, 59 S.Ct. 87, 305 U.S. 559, 83 L.Ed. 352, rehearing denied 59 S.Ct. 143, 305 U.S. 671, 83 L.Ed. 435.

Mich.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.

N.Y.—Dairy Sealed v. Ten Eyck, 289 N.Y.S. 85, 248 App.Div. 352, followed in Sunshine Farms v. Ten Eyck, 289 N.Y.S. 89, 248 App.Div. 814, and Sheehy v. Ten Eyck, 289 N.Y.S. 89, 248 App.Div. 814, and reversing Dairy Sealed v. Ten Eyck, 288 N.Y.S. 641, 159 Misc. 716.

Pa.—Nelson v. Pennsylvania Milk Control Commission, 37 Pa.Dist. & Co. 56, 55 Montg.Co. 94.

Requesting commission to revise its findings, is not necessary preliminary to an appeal, but is only permissive procedure.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

Supersedeas

(1) Under statute declaring that no appeal from an order of the milk control commission shall be permitted to act as a supersedeas except on special order, the special order required is one which will preserve the status quo pending the adjudication of the appeal.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, supra.

(2) Where a supersedeas is properly granted, and a dealer does not see fit to file a bond, dealer will be required to pay price fixed by commission until he does file a bond, or until matter is adjudicated, and when bond is filed producer selling to that dealer comes under provisions of act relating to such bonds, since bond given by each dealer pursuant to supersedeas runs only to producers who sell to him, and it does not inure to the benefit of all of the producers in the given milk area.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, supra.

Record

Where major portion of hearings which resulted in order establishing definitions and standards of identity of farina and enriched farina was devoted to flour and most of the findings pertained to flour, on a review of such order, evidence and findings pertaining to flour were properly included in the record, since there is such a close relationship between some grades of flour and farina that it would be impractical to consider the evidence and findings concerning one without giving consideration to the other.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76.

Pleadings

(1) All that is required in an appeal petition is a brief statement of the action complained of, the objections thereto, and sufficient facts to make out a prima facie case.—Harrisburg Dairies v. Milk Control Commission of Commonwealth of Pennsylvania, 49 Dauph.Co., Pa., 413.

(2) However, the failure of appellants to state facts in support of their objections, sufficient to constitute a prima facie case as required by statute, is fatal to proceedings.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

(3) It seems that no penalty is provided for the failure of the milk control commission to file an answer to an appeal petition before the return day, as required by Milk Control Law of April 28, 1937, § 904, P. L. p 417, 31 P.S. § 700j—904, and certainly an appellant cannot contend in a supplemental brief, after the appeal has been argued, that all the facts in the appeal petition must be taken as admitted because the commission's answer, although filed before argument, was not filed until after the return day.—Sando v. Pennsylvania Milk Control Commission, 41 Pa.Dist. & Co. 391.

Evidence

(1) On appeals from orders of the milk control commission, the burden of proof is on appellants.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

(2) Although the legislature has conferred on the court the right to hear evidence on appeal, the evidence produced in court should be confined to that which was not available to present to the commission and could only be procured after promulgation of the order appealed from.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, supra.

5. U.S.—A. E. Staley Mfg. Co. v. Secretary of Agriculture, C.C.A., 120 F.2d 258.

Intervention

On milk dealers' appeal from order of milk control commission fixing price to be paid to producers in Pittsburgh for class 1 fluid milk, Dauphin County court improperly denied producers leave to intervene individually or through association recognized by statute as their representative.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

Consolidation of appeals by numerous milk dealers from orders of the milk control commission fixing the price to be paid to producers in a certain area was proper.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, supra.

6. U.S.—Green Valley Creamery v. U. S., C.C.A.Mass., 108 F.2d 342, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F.Supp. 672.

Lack of financial interest

Neither cooperative handlers of milk nor a proprietary corporation handling milk could raise issue of lack of statutory authority in secretary of agriculture to issue order authorizing payments to cooperatives and certain handlers from a producer settlement fund where none of them had any financial interest in fund.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F.Supp. 534, and rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L. Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op. 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526.

Person who complied with rules of district health board could not con-

cretionary determination will not be reviewed,[7] except for abuse of discretion;[8] and, as expressly provided by some statutes, findings of fact, if supported by substantial evidence, are binding on the court;[9] but the findings may be reviewed for lack of substantial evidence to support them;[10] and the court is not bound by the conclusions of law arrived at by the officer or agency issuing the order.[11] A finding, practically in the language of the statute, as to the facts necessary to authorize the board to act will be construed by the court as a determination by the board that such facts actually exist, especially where the statute provides that the board's findings on questions properly before it shall be deemed prima facie lawful and reasonable.[12] The court may remand or return the cause to the board, commission, or administrator for further and proper consideration of the evidence,[13] the reception of additional evidence,[14] or the making of supplementary findings;[15] and, where it has retained jurisdiction, the supplementary findings have been made, and they were required only by the court as a convenience in the review proceeding, and not by statute to give validity to the promulgating order, it may make a final disposition of the case in the light of such findings.[16]

A person dissatisfied with an order should utilize the remedy of review provided by statute before resorting to a suit for injunction to contest the validity of the order;[17] and he may be precluded from questioning the order collaterally on a ground which was not presented at the hearing before the commission or by appeal from the order.[18]

§ 5. —— Power of States Generally

The right of a state to regulate food is referable to its inherent police power.

A food regulation is within the general scope of the police power inherent in a state;[19] and, where the regulation is reasonable and suitable and not violative of constitutional provisions, it is a proper and valid exercise of such power.[20] Proper subjects of regulation under the police power of a state include: The citrus fruit industry;[21] the milk

tend that rules conflicted with those of state board.—Belzung v. State, 36 S.W.2d 397, 183 Ark. 472.

Person who participated in hearing could not question the sufficiency of notice.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76.

7. U.S.—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 122 F.2d 564.

8. U.S.—U. S. v. Wrightwood Dairy Co., C.C.A.Ill., 127 F.2d 907.
Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.

9. U.S.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 122 F.2d 564.

10. U.S.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76—A. E. Staley Mfg. Co. v. Secretary of Agriculture, C.C.A., 120 F.2d 258.
Vt.—In re Swanton Market Area, 23 A.2d 536, 112 Vt. 285.

11. U.S.—Quaker Oats Co. v. Federal Security Administrator, C.C.A., 129 F.2d 76.

12. Vt.—In re Swanton Market Area, 23 A.2d 536, 112 Vt. 285.

13. Pa.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

14. Pa.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, supra.

15. U.S.—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 123 F.2d 396—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 122 F.2d 564.
N.Y.—New York State Guernsey Breeders Co-op. v. Noyes, 30 N.E.2d 471, 284 N.Y. 197, modifying 22 N.Y.S.2d 132, 260 App.Div. 240, followed in 32 N.E.2d 823, 285 N.Y. 523, modifying 21 N.Y.S.2d 347, 260 App.Div. 139, appeal granted 22 N.Y.S.2d 633, 260 App.Div. 841.

16. U.S.—Twin City Milk Producers Ass'n v. McNutt, C.C.A., 123 F.2d 396.

17. N.Y.—Co-operative Dairymen of Fraser v. Ten Eyck, 286 N.Y.S. 351, 158 Misc. 726.

18. Pa.—Commonwealth v. Jackson, 22 A.2d 299, 146 Pa.Super. 328, adopted 28 A.2d 894, 345 Pa. 456—Commonwealth v. Ziegler Dairy Co., 11 A.2d 669, 139 Pa.Super. 224.

19. U.S.—Corvallis Creamery Co. v. Van Winkle, D.C.Or., 274 F. 454, appeal dismissed 43 S.Ct. 247, 260 U.S. 758, 67 L.Ed. 499.
Cal.—Ex parte Bear, 15 P.2d 489, 216 Cal. 536, 83 A.L.R. 1402.
Ind.—Wallace v. Feehan, 190 N.E. 438, 206 Ind. 422.
Ohio.—Longbrake v. State, 146 N.E. 417, 112 Ohio St. 13, 41 A.L.R. 925.
Tex.—Ex parte Vaughan, 246 S.W. 373, 93 Tex.Cr. 112—Corzine v. State, 227 S.W. 1102, 88 Tex.Cr. 468.

20. Cal.—Natural Milk Producers Ass'n v. City and County of San Francisco, 124 P.2d 25, prior opinion, App., 112 P.2d 930.
Conn.—Shelton v. City of Shelton, 150 A. 811, 111 Conn. 433.
Neb.—State v. McCosh, 279 N.W. 775, 134 Neb. 780.
Pa.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.
Tenn.—Jacobs Packing Co. v. Flanery, 151 S.W.2d 1073, 177 Tenn. 546.
Tex.—Texas Underwriters v. Martinal, Civ.App., 140 S.W.2d 582.
26 C.J. p 752 notes 18, 20.

Exercise of police power to protect food at source of supply within state boundary is legitimate function of sovereignty.—Miller v. McLaughlin, 224 N.W. 18, 118 Neb. 174, certiorari granted 50 S.Ct. 31, 280 U.S. 541, 74 L.Ed. 602, and affirmed 50 S.Ct. 296, 281 U.S. 261, 74 L.Ed. 840.

Condemnation

In the exercise of its police power to condemn and destroy articles of food endangering the health of the community, the state may authorize the condemnation and destruction of food products deleterious to health.
Colo.—Munn v. Corbin, 44 P. 783, 8 Colo.App. 113.
Conn.—Raymond v. Fish, 51 Conn. 80, 50 Am.R. 3.
N.Y.—Williams v. Divenburg, 129 N.Y.S. 473, 145 App.Div. 93.
26 C.J. p 755 note 72.

21. Fla.—Mayo v. Polk Co., 169 So. 41, 124 Fla. 534, appeal dismissed Polk Co. v. Mayo, 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376—L. Maxcy,

industry;[22] the making and sale of bread;[23] the sale of meat[24] or nonintoxicating malt liquors;[25] and the marketing of farm products.[26] The authority of the police power, as applied to food, extends to requiring a fixed minimum amount of nutritional elements.[27]

§ 6. —— Validity of State Statutes

With some exceptions, state regulatory statutes pertaining to food have been held constitutional.

The legislature of a state may take steps to prevent adulteration of food;[28] may determine in what places,[29] and at what time,[30] food may be sold; and in general regulate the conditions and business of producing, manufacturing, handling, and distributing food.[31] Legislative enactments having for their object the regulation or prohibition of the production, sale, or use of articles of food are presumed to be constitutional,[32] and will be sustained

Inc., v. Mayo, 139 So. 121, 103 Fla. 552.

22. Or.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.
Pa.—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A.2d 775, 332 Pa. 15, 122 A.L.R. 1049.

Public interest or welfare

(1) The milk business or industry of a state is affected with a public interest and hence is subject to regulation in the exercise of the police power of the state.
Ala.—Taylor v. State ex rel. Alabama State Milk Control Board, 186 So. 463, 237 Ala. 178.
Ind.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.
Pa.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235.
Vt.—State v. Auclair, 4 A.2d 107, 110 Vt. 147.

(2) It bears such relation to the welfare of those dependent on the use of milk as to be clothed with a public interest and subject to regulation under the police power.—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.

(3) The milk industry bears a close relation to the public welfare and is sufficiently clothed with a public interest to warrant its regulation under exercise of the police power, not only in emergencies but at all times.—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275.

(4) The milk industry is of public concern, and may be regulated in the public interest, in the exercise of the police power of the state.—Green v. Milk Control Commission of Pennsylvania, 48 Dauph.Co., Pa., 385.

(5) The distribution of milk is a "business affected with a public interest," which is equivalent to saying that it is subject to the exercise of the police power, in the sense that he who enters the business of producing, selling, or distributing milk or its products subjects to regulation not only those efforts on his part which affect the quality of the product as it reaches the consumer, but also the property which he contributes to the enterprise.—Stracquadanio v. Department of Health of City of New York, 32 N.E.2d 806, 285 N.Y. 93, affirming 20 N.Y.S.2d 965, 259 App.Div. 994, affirming 20 N.Y.S.2d 964, appeal denied 21 N.Y.S.2d 611, 259 App.Div. 1073.

Parts of business subject to regulation under police power

(1) Production, distribution, marketing, and sale of milk.
Cal.—Natural Milk Producers Ass'n v. City and County of San Francisco, 124 P.2d 25, prior opinion, App., 112 P.2d 930.
Conn.—Shelton v. City of Shelton, 150 A. 811, 111 Conn. 433.
Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 276 Ky. 736.

(2) Traffic in milk and cream.—Pacific Coast Dairy v. Police Court of City and County of San Francisco, 8 P.2d 140, 214 Cal. 668, 80 A.L.R. 1217.

(3) Price of milk.
Cal.—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.
N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.
Pa.—Commonwealth v. Jackson, 22 A.2d 299, 146 Pa.Super. 328, adopted 28 A.2d 894, 345 Pa. 456.

23. U.S.—Jay Burns Baking Co. v. Bryan, 44 S.Ct. 412, 264 U.S. 504, 68 L.Ed. 813, 32 A.L.R. 661, reversing Jay Burns Baking Co. v. McKelvie, 189 N.W. 383, 108 Neb. 674, 26 A.L.R. 24.
Cal.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.
Neb.—P. F. Petersen Baking Co. v. Bryan, 247 N.W. 39, 124 Neb. 464, affirmed 54 S.Ct. 277, 290 U.S. 570, 78 L.Ed. 505, 90 A.L.R. 1285.

24. Cal.—Justesen's Food Stores v. City of Tulare, 111 P.2d 424, 43 Cal.App.2d 616.

Slaughtering of meat for sale
Ariz.—Tovrea Packing Co. v. Live Stock Sanitary Board of Arizona, 34 P.2d 420, 44 Ariz. 151.

Conduct of meat markets
Cal.—Justesen's Food Stores v. City of Tulare, 84 P.2d 140, 12 Cal.2d 324.

25. Minn.—State v. Ives, 297 N.W. 563—Bernick v. City of Little Falls, 253 N.W. 369, 191 Minn. 128.

26. U.S.—Detweiler v. Welch, D.C. Idaho, 46 F.2d 71, affirmed, C.C.A., 46 F.2d 75, 73 A.L.R. 1440.

State may establish reasonable grades for farm products when sold in usual containers.—Marshall v. Department of Agriculture of Idaho, 258 P. 171, 44 Idaho 440.

27. Wis.—State v. Emery, 189 N.W. 564, 178 Wis. 147.

28. U.S.—Crossman v. Lurman, N.Y., 24 S.Ct. 234, 192 U.S. 189, 48 L.Ed. 401.
26 C.J. p 753 note 21.

29. Conn.—State v. Reynolds, 58 A. 755, 77 Conn. 131.
26 C.J. p 753 note 22.

30. N.Y.—People v. Hagan, 73 N.Y.S. 564, 36 Misc. 349.

31. Cal.—Ex parte McNeal, 89 P.2d 1096, 1098, 32 Cal.App.2d 391, citing **Corpus Juris.**
26 C.J. p 753 notes 21, 24.

Adequate supply of essential article
Where economic conditions and business practices are likely to interfere with adequate supply of an essential article of food, the legislature is authorized to provide a remedy for the situation.—State v. Auclair, 4 A.2d 107, 110 Vt. 147.

Exercise of care to protect consumers
It is within the power of the legislature, acting in interests of the people, to require manufacturers and retailers of food intended for human consumption to exercise care to protect persons consuming such food, even to the extent of making manufacturers and retailers "insurers" of their products, provided there is no discrimination in the application of such regulation.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637.

Fruit industries
Legislature can enact reasonable regulations for fruit industries, on the theory that they are affected with a public interest.—McRae v. Robbins, Fla., 9 So.2d 284.

Business of selling confections is a proper subject for legislative regulation.—Bauer v. State, 110 P.2d 154, 7 Wash.2d 476.

32. Pa.—Commonwealth v. Curry, 6 Pa.Dist. 143, 18 Pa.Co. 513.
26 C.J. p 753 note 25.

as within the legitimate exercise of the police power, provided they are enacted for the preservation of the public health,[33] or for the protection of the public against fraud and imposition,[34] or for the accomplishment of some other legitimate, public object, such as the correction of an economic evil by stablizing the market in a food industry;[35] and provided they bear a real or substantial relation to one of these purposes,[36] are not discriminatory,[37] arbitrary and discriminatory,[38] or arbitrary and unreasonable,[39] and do not forbid or wholly prevent the production or sale of a wholesome, nutritious, and harmless article of food,[40] unless it is so prepared as to deceive the purchaser by leading him to believe it is something it is not;[41] and provided they do not violate constitutional provisions nor invade rights secured by the fundamental law.[42] The fact that good reasons may be advanced for the enactment of a law broader in scope than the act under consideration affords no sufficient reason for holding such act unconstitutional.[43]

Statutes relating to bread and bakeries. Statutes regulating the location of bakeries,[44] requiring the wrapping of loaves of bread in paper before they are offered for sale,[45] or requiring loaves of bread

33. Cal.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.
Mo.—Poole & Creber Market Co. v. Breshears, 125 S.W.2d 23, 343 Mo. 1133.
26 C.J. p 753 note 26.

34. Cal.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.
Mo.—Poole & Creber Market Co. v. Breshears, 125 S.W.2d 23, 343 Mo. 1133.
26 C.J. p 753 note 27.

35. Or.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.

36. Mich.—Carolene Products Co. v. Thompson, 267 N.W. 608, 276 Mich. 172.
N.Y.—Noyes v. Erie & Wyoming Farmers Co-op. Corporation, 22 N.E.2d 334, 281 N.Y. 187, reversing 10 N.Y.S.2d 114, 170 Misc. 42.
26 C.J. p 754 note 34.

37. Cal.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.
Colo.—In re Interrogatories of the Governor on Chapter 118, Sess. Laws 1935, 52 P.2d 663, 97 Colo. 587.
Ohio.—Longbrake v. State, 146 N.E 417, 112 Ohio St. 13, 41 A.L.R. 925.
Or.—State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 84 P.2d 471, 160 Or. 205.
Tex.—Berry v. McDonald, Civ.App., 123 S.W.2d 388.
Wis.—Fitger Co. v. Kremer, 226 N.W. 310, 199 Wis. 338.
26 C.J. p 754 note 38.

38. U.S.—Mayflower Farms v. Ten Eyck, 56 S.Ct. 457, 297 U.S. 266, 80 L.Ed. 675, reversing Mayflower Farms v. Baldwin, 195 N.E. 532, 267 N.Y. 9, affirming 275 N.Y.S. 669, 242 App.Div. 881, and reargument denied 198 N.E. 371, 268 N.Y. 495.
Or.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.
Pa.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235.
Vt.—State v. Auclair, 4 A.2d 107, 110 Vt. 147.

39. U.S.—Jay Burns Baking Co. v. McKelvie, 44 S.Ct. 412, 264 U.S. 504, 68 L.Ed. 813, 32 A.L.R. 661, reversing 189 N.W. 383, 108 Neb. 674, 26 A.L.R. 24, error dismissed 43 S.Ct. 359, 261 U.S. 625, 67 L.Ed. 833, motion granted 43 S.Ct. 433, 261 U.S. 608, 67 L.Ed. 824—Quaker Baking Co. v. Herring, D.C. Iowa, 3 F.Supp. 118.
Ala.—State v. Curran, 124 So. 909, 220 Ala. 4—State v. Curran, 124 So. 911, 23 Ala.App. 275, certiorari denied 124 So. 912, 220 Ala. 6.
Neb.—Carolene Products Co. v. Banning, 268 N.W. 313, 131 Neb. 429.
Or.—State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 84 P.2d 471, 160 Or. 205.
Wis.—Day-Bergwall Co. v. State, 207 N.W. 959, 190 Wis. 8.

40. Mich.—Carolene Products Co. v. Thomson, 267 N.W. 608, 276 Mich. 172.
Neb.—Carolene Products Co. v. Banning, 268 N.W. 313, 131 Neb. 429.
26 C.J. p 754 note 35.

41. Pa.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235.
26 C.J. p 754 note 36.

Remedy for fraud in sale of a wholesome and nutritious food product is said to be by legislative regulation and not by destruction of the business.—Carolene Products Co. v. Banning, 268 N.W. 313, 131 Neb. 429.

42. Ala.—Franklin v. State ex rel. Alabama State Milk Control Board, 169 So. 295, 232 Ala. 637.
Cal.—Pacific Coast Dairy v. Department of Agriculture, 123 P.2d 442, 19 Cal.2d 818—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.
Fla.—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579.
Kan.—Carolene Products Co. v. Mohler, 102 P.2d 1044, 152 Kan. 2.
Mich.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.
Mo.—Poole & Creber Market Co. v. Breshears, 125 S.W.2d 23, 343 Mo. 1133.
Pa.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235—Commonwealth v. Curry, 6 Pa.Dist. 143, 18 Pa.Co. 513—Commonwealth v. Paschall, 53 Dauph.Co. 135.
Tex.—Texas Underwriters v. Martinal, Civ.App., 140 S.W.2d 582.
Utah.—Rowell v. State Board of Agriculture, 99 P.2d 1, 98 Utah 353.
26 C.J. p 754 note 34.

State constitutional guaranty of natural rights
Ind.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.
Pa.—Rohrer v. Milk Control Board, 186 A. 336, 322 Pa. 257, reversing 184 A. 133, 121 Pa.Super. 281.
26 C.J. p 754 note 28.

State constitutional guaranty of general right to engage in business
Mich.—Carolene Products Co. v. Thompson, 267 N.W. 608, 276 Mich. 172.
26 C.J. p 754 note 28.

Municipal enterprise
Within its constitutional limitations the legislature may authorize a municipal corporation to engage in the business of the purchase and sale of food in cases of emergency or extraordinary conditions.—Howard v. New York, 191 N.Y.S. 878, 199 App. Div. 596, reversed on other grounds 140 N.E. 206, 236 N.Y. 91—43 C.J. p 371 note 32½.
Delegation of legislative power see Constitutional Law § 138 b (1), (19).
Denial of due process of law see Constitutional Law §§ 606, 674, 690.
Denial of equal protection of laws see Constitutional Law §§ 511 e (2), 516.
Interference with interstate commerce or conflict with federal commerce legislation see Commerce §§ 65, 86, 98.

43. Wash.—Bauer v. State, 110 P.2d 154, 7 Wash.2d 476.

44. Wis.—Benz v. Kremer, 125 N.W. 99, 142 Wis. 1, 26 L.R.A.,N.S., 842.

45. N.H.—State v. Normand, 85 A.

sold through an agent or intermediate dealer to bear a label or trade-mark identifying the manufacturer,[46] have been held constitutional, as have also some,[47] but not other,[48] statutes fixing standard weights of loaves of bread.

Statutes relating to citrus fruits. A statute which makes it an offense to use arsenical sprays on bearing citrus trees,[49] provides for the destruction of, and makes it unlawful to sell, citrus fruit containing arsenic or its derivatives,[50] prohibits a person from being a dealer in citrus fruit unless he obtains a license and files a bond guaranteeing payment for fruit purchased on credit,[51] or requires the name of the state to be embossed on, or stamped into, the tin of containers of citrus fruit or juice produced in the state,[52] is a valid exercise of the police power of the state.

Statutes relating to milk or milk products, or imitations thereof, or substitutes therefor. A state legislature has power to regulate and control, by proper legislation, the production, transportation, processing, storage, distribution, and sale of milk and milk products for human consumption.[53] In most states wherein they have been enacted, milk control, marketing, or stabilization laws, which create a milk control board or similar agency, regulate, or provide for the regulation of, the dairy industry of the state, and provide, among other matters, for the fixing of maximum and minimum prices for milk, have been held constitutional either entirely or as to their main and principal features,[54] and any holding of unconstitutionality in such a

899, 76 N.H. 541, Ann.Cas.1913E 996.

Puerto Rico.—People v. Mayol, 26 Puerto Rico 398.

46. Cal.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.

47. **Statute prohibiting manufacture and sale in less than one-pound loaves**

U.S.—Wonder Bakeries Co. v. White, D.C.Ohio, 3 F.Supp. 311.

Statutes authorizing or allowing tolerances or variations

Neb.—P. F. Petersen Baking Co. v. Bryan, 247 N.W. 39, 124 Neb. 464, affirmed 54 S.Ct. 277, 290 U.S. 570, 78 L.Ed. 505, 90 A.L.R. 1285.

Tex.—City of Dallas v. Taystee Baking Co., Civ.App., 163 S.W.2d 687, error refused.

Vt.—State v. Gladstone, 22 A.2d 490, 112 Vt. 233.

48. Ala.—State v. Curran, 124 So. 909, 220 Ala. 4—State v. Curran, 124 So. 911, 23 Ala.App. 275, certiorari denied 124 So. 912, 220 Ala. 6.

Provision fixing maximum weight

U.S.—Holsum Baking Co. v. Green, D.C.Ohio, 45 F.2d 238.

Maximum variations and tolerances

(1) Provisions of statute fixing maximum variations and tolerances in weight of bread were held invalid as arbitrary and unreasonable.—Quaker Baking Co. v. Herring, D.C. Iowa, 3 F.Supp. 118.

(2) Where the limits of tolerance allowed are so narrow as to require that evaporation be retarded by artificial means, the provision is unreasonable and arbitrary, and hence unconstitutional.—Jay Burns Baking Co. v. Bryan, 44 S.Ct. 412, 264 U.S. 504, 68 L.Ed. 813, 32 A.L.R. 661, reversing Jay Burns Baking Co. v. McKelvie, 189 N.W. 383, 108 Neb. 674, 26 A.L.R. 24.

49. Fla.—L. Maxcy, Inc., v. Mayo, 139 So. 121, 103 Fla. 552.

50. Fla.—Snively Groves v. Mayo, 184 So. 839, 135 Fla. 300.

51. Tex.—Texas Underwriters v. Martinal, Civ.App., 140 S.W.2d 582—Berry v. McDonald, Civ.App., 123 S.W.2d 388.

52. U.S.—Polk Co. v. Glover, D.C. Fla., 22 F.Supp. 575, reversed on other grounds 59 S.Ct. 15, 305 U.S. 5, 83 L.Ed. 6.

53. Ind.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.

Dairy industry, sale of products, and prices

(1) The legislature has power to regulate the dairy industry in the public interest, and to fix prices as an incident, irrespective of whether a temporary emergency is the subject of regulation.—Noyes v. Erie & Wyoming Farmers Co-op. Corporation, 10 N.Y.S.2d 114, 170 Misc. 42, reversed on other grounds 22 N.E.2d 334, 281 N.Y. 187.

(2) The general assembly may, by proper legislation, regulate the sale of milk and milk products in the state and provide for the fixing of prices of milk and milk products.—State v. Stoddard, 13 A.2d 586, 126 Conn. 623.

(3) It has been said, however, that while the legislature undoubtedly has power so to regulate the sale of dairy products as reasonably to insure purity, it may regulate sale of dairy products only so far as protection of public health requires, and beyond this, marketing of such products is matter of right.—Whitney v. Watson, 157 A. 78, 85 N.H. 238.

Use of coloring matter

Legislature has power absolutely to prohibit use of harmless coloring matter in cheese.—People v. Lefkoff, 263 N.Y.S. 297, 147 Misc. 70.

It is province of legislature to determine what measures are necessary in protecting traffic in milk and cream.—Pacific Coast Dairy v. Police Court of City and County of San Francisco, 8 P.2d 140, 214 Cal. 668, 80 A.L.R. 1217.

54. U.S.—Highland Farms Dairy v. Agnew, 57 S.Ct. 549, 300 U.S. 608, 81 L.Ed. 835, affirming, D.C., 16 F. Supp. 575.

Ala.—Ex parte Homewood Dairy Products Co., 3 So.2d 58, 241 Ala. 470—Thompson v. Alabama State Milk Control Board, 1 So.2d 381, 241 Ala. 100—Franklin v. State ex rel. Alabama State Milk Control Board, 169 So. 295, 232 Ala. 637.

Cal.—Pacific Coast Dairy v. Department of Agriculture, 123 P.2d 442, 19 Cal.2d 818—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.

Fla.—Alderman v. Puritan Dairy, 1 So.2d 177, 146 Fla. 345—Milk Commission v. Dade County Dairies, 200 So. 83, 145 Fla. 579—Miami Home Milk Producers Ass'n v. Milk Control Board, 169 So. 541, 124 Fla. 797.

Ga.—Holcombe v. Georgia Milk Producers Confederation, 3 S.E.2d 705, 188 Ga. 358—Gibbs v. Milk Control Board of Georgia, 196 S.E. 791, 185 Ga. 844.

Ind.—Milk Control Board v. Pursifull, 38 N.E.2d 246—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.

Mich.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.

N.J.—Reck Milk Co. v. Humphreys, 197 A. 279, 119 N.J.Law 526—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504—State Board of Milk Control v. Richman Ice Cream Co., 175 A. 796, 117 N.J.Eq. 296.

N.Y.—Noyes v. Erie & Wyoming Farmers Co-op. Corporation, 22 N.E.2d 334, 281 N.Y. 187, reversing 10 N.Y.S.2d 114, 170 Misc. 42—Ten Eyck v. Eastern Farm Products,

statute has been limited to particular provisions thereof;[55] but in a few states such laws have been held unconstitutional either entirely or as to their main features.[56] Particular statutes of different scope which have been held constitutional include acts regulating the sale of milk;[57] for the protection of milk against contamination by bacteria, disease germs, or bacilli;[58] dealing with the grading of milk and cream obtained from producers for commercial use;[59] forbidding the sale of milk below a certain standard of quality,[60] or of milk from cows fed by still slop,[61] or of skimmed milk without making it known that it is such;[62] regulating the manufacture and sale of "renovated butter;"[63] prohibiting the sale of imitation butter, except in sealed packages, marked with the name and address of the manufacturer;[64] prohibiting the use, by a person, firm, or corporation dealing in substitute dairy products of certain words as part of a trade or corporate name or in describing the product in advertising matter or on labels, packages, or containers;[65] fixing a standard of butter fat for ice cream [66] and dairy products made in the semblance of ice cream;[67] and regulating the preparation and sale of condensed milk.[68] A statute allowing dealers in unadvertised milk to sell it at a price lower than that of milk sold under a well-advertised trade name is valid,[69] unless it is limited to dealers engaged in business on the effective date of the statute and does not extend to dealers becoming such subsequent to that date.[70]

290 N.Y.S. 477, 160 Misc. 404—People, on Complaint of McDonough, v. Bratowsky, 276 N.Y.S. 418, 154 Misc. 432—Noyes v. Landel, 18 N.Y.S.2d 676, affirmed 21 N.Y.S.2d 616, 259 App.Div. 1108, reargument denied 22 N.Y.S.2d 536, 260 App.Div. 827, affirmed 33 N.E. 2d 865, 284 N.Y. 563, reargument granted 32 N.E.2d 833, 285 N.Y. 548, affirmed 34 N.E.2d 906, 285 N.Y. 749.

Or.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.

Pa.—Rieck-McJunkin Dairy Co. v. Milk Control Commission, 18 A.2d 868, 341 Pa. 153—Zeuger Milk Co. v. School Dist. of Pittsburgh, 5 A.2d 885, 334 Pa. 277—Colteryahn Sanitary Dairy v. Milk Control Commission of Pennsylvania, 1 A. 2d 775, 332 Pa. 15, 122 A.L.R. 1049—Rohrer v. Milk Control Board, 186 A. 336, 322 Pa. 257, reversing 184 A. 133, 121 Pa.Super. 281—Commonwealth v. Licini, 18 Lehigh L.J. 238, affirmed 10 A.2d 923, 138 Pa.Super. 277.

Vt.—State v. Auclair, 4 A.2d 107, 110 Vt. 147.

Va.—Reynolds v. Milk Commission of Virginia, 179 S.E. 507, 163 Va. 957.

Wis.—State ex rel. Department of Agriculture and Markets v. Gagnon, 296 N.W. 627, 237 Wis. 617—State ex rel. Department of Agriculture v. Marriott, 296 N.W. 622, 237 Wis. 607, appeal dismissed Reuter v. State of Wisconsin ex rel. Department of Agriculture, 62 S.Ct. 76, 314 U.S. 571, 86 L.Ed. 463.

The leading case is Nebbia v. People of State of New York, N.Y., 54 S.Ct 505, 291 U.S. 502, 78 L.Ed. 940, 89 A.L.R. 1469.

Mich.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.

Or.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.

55. Ind.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.

La.—State v. Maitrejean, 192 So. 361, 193 La. 824.

Wis.—State ex rel. Department of Agriculture v. Marriott, 296 N.W. 622, 237 Wis. 607, appeal dismissed Reuter v. State of Wisconsin ex rel. Department of Agriculture, 62 S.Ct. 76, 314 U.S. 571, 86 L.Ed. 463.

Section relating to personnel of board

Mich.—Johnson v. Michigan Milk Marketing Board, 295 N.W. 346, 295 Mich. 644.

Provision giving director of agriculture power to fix amount of damages

Cal.—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.

56. Conn.—State v. Stoddard, 13 A. 2d 586, 126 Conn. 623.

Md.—Maryland Co-op. Milk Producers v. Miller, 182 A. 432, 170 Md. 81.

N.H.—In re Opinion of the Justices, 190 A. 713, 88 N.H. 497.

Utah.—Rowell v. State Board of Agriculture, 99 P.2d 1, 98 Utah 353.

57. Iowa.—State v. Schlenker, 84 N. W. 698, 112 Iowa 642, 84 Am.S.R. 360, 51 L.R.A. 347.

58. Ill.—Economy Dairy Co. v. Kerner, 25 N.E.2d 108, 303 Ill.App. 259, transferred, see 20 N.E.2d 568, 371 Ill. 261.

Sanitary receptacles

Legislature, in placing on distributor of dairy products duty to provide sanitary receptacles, acted within scope of police power.—Pacific Coast Dairy v. Police Court of City and County of San Francisco, 8 P.2d 140, 214 Cal. 668, 80 A.L.R. 1217.

59. Or.—State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 84 P.2d 471, 160 Or. 205.

60. Mass.—Commonwealth v. Titcomb, 118 N.E. 328, 229 Mass. 14.

26 C.J. p 755 note 45.

61. Ky.—Sanders v. Commonwealth, 77 S.W. 358, 117 Ky. 1, 25 Ky.L. 1165, 111 Am.S.R. 219, 1 L.R.A., N.S., 932.

62. N.Y.—People v. Abramson, 122 N.Y.S. 115, 137 App.Div. 549.

Particular statute

A statute prohibiting the manufacture or sale of skimmed milk, when concentrated or compounded, in other than five-pound cans labeled with words "concentrated skimmed milk" and "unfit for infants" in half-inch letters, is a proper regulation in the interests of public health, particularly that of children.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235.

63. Pa.—Commonwealth v. Seiler, 20 Pa.Super. 260.

64. N.Y.—People v. Wilcox, 170 N. Y.S. 944, 103 Misc. 289.

65. U.S.—Corvallis Creamery Co. v. Van Winkle, D.C.Or., 274 F. 454, appeal dismissed 43 S.Ct. 247, 260 U.S. 758, 67 L.Ed. 499.

66. Iowa.—State v. Hutchinson Ice Cream Co., 147 N.W. 195, 168 Iowa 1, L.R.A.1917B 198, affirmed 37 S. Ct. 28, 242 U.S. 153, 61 L.Ed. 217.

Pa.—Commonwealth v. Crowl, 91 A. 922, 245 Pa. 554, affirmed 37 S.Ct. 28, 242 U.S. 153, 61 L.Ed. 217.

67. Neb.—State v. McCosh, 279 N.W. 775, 134 Neb. 780.

68. U.S.—Hebe Co. v. Shaw, Ohio, 39 S.Ct. 125, 248 U.S. 297, 63 L.Ed. 255—Hebe Co. v. Calvert, D.C.Ohio, 246 F. 711.

69. U.S.—Borden's Farm Products Co. v. Ten Eyck, N.Y., 56 S.Ct. 453, 297 U.S. 251, 80 L.Ed. 669, affirming, D.C., 11 F.Supp. 599.

70. U.S.—Mayflower Farms v. Ten Eyck, 56 S.Ct. 457, 297 U.S. 266, 80 L.Ed. 675, reversing Mayflower Farms v. Baldwin, 195 N.E. 532,

There is a conflict of authority as to the validity of state statutes, known as filled milk acts, which prohibit the manufacture or sale of milk, or milk products or derivatives, to which has been added any fat or oil other than milk fat, they being held constitutional in some states,[71] and unconstitutional in others.[72]

It has been held in a number of cases that a state may absolutely prohibit the manufacture or sale of oleomargarine.[73] According to a number of authorities, however, as oleomargarine, when properly made, is a wholesome food product, statutes entirely prohibiting its manufacture or sale are invalid.[74] At any rate, the legislature may legally require that oleomargarine shall be sold for what it is and not for butter, and that in making such sales foreign substances shall not be added to it to make it resemble butter;[75] may prohibit any person selling oleomargarine from selling, giving, or delivering with it any coloring matter;[76] or may require the use of oleomargarine to be published on bills of fare and in placards.[77] Also, statutory provisions as to advertising, vitamin content, and inspection of oleomargarine may be reasonable regulations under the police power of the state.[78] An act prohibiting the sale of oleomargarine unless it shall be of some other color than that of yellow butter has been sustained;[79] but, on the other hand, a similar statute prohibiting the manufacture or sale of oleomargarine of a shade or tint of yellow has been held void as to such product, where it is not injurious to health and the color has been produced as a natural result of the ingredients used.[80] Statutes requiring oleomargarine or other articles sold as a substitute for butter to be colored pink have been held valid;[81] but, as appears in Commerce § 65, they have also been held invalid. The validity of state statutes relating to oleomargarine as against an objection that they interfere with interstate commerce is considered in Commerce §§ 65, 86.

Provisions in milk-control or other statutes, requiring certain classes of persons dealing in milk to obtain a license[82] and to give a bond to secure payment for milk purchased,[83] and authorizing revocation of the license for enumerated reasons,[84] have generally been considered constitutional; but there is some authority for the view that a requirement of a bond is unconstitutional;[85] and it seems that a statute providing for a license to sell dairy

267 N.Y. 9, affirming 275 N.Y.S. 669, 242 App.Div. 881, reargument denied 198 N.E. 371, 268 N.Y. 495.

71. Fla.—Setzer v. Mayo, 9 So.2d 280.
Kan.—Carolene Products Co. v. Mohler, 102 P.2d 1044, 152 Kan. 2.
Mo.—Poole & Creber Market Co. v. Breshears, 125 S.W.2d 23, 343 Mo. 1133.
Pa.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235.
Wis.—State ex rel. Carnation Milk Products v. Emery, 189 N.W. 564, 178 Wis. 147.

72. Ill.—Carolene Products Co. v. McLaughlin, 5 N.E.2d 447, 365 Ill. 62—People v. Carolene Products Co., 177 N.E. 698, 345 Ill. 166.
Mich.—Carolene Products Co. v. Thomson, 267 N.W. 608, 276 Mich. 172.
Neb.—Carolene Products Co. v. Banning, 268 N.W. 313, 131 Neb. 429.

73. U.S.—Powell v. Pennsylvania, 8 S.Ct. 992, 1257, 127 U.S. 678, 32 L. Ed. 253, affirming 7 A. 913, 114 Pa. 265. 60 Am.R. 350.
26 C.J. p 755 note 73.

74. Wis.—John F. Jelke Co. v. Emery, 214 N.W. 369, 193 Wis. 311, 53 A.L.R. 463.
26 C.J. p 756 note 74.

75. U.S.—McCray v. U. S., Ohio, 24 S.Ct. 769, 195 U.S. 27, 49 L.Ed. 78, 1 Ann.Cas. 561.
26 C.J. p 756 note 75.

76. N.Y.—People v. Von Kampen, 134 N.Y.S. 710, 149 App.Div. 887, affirmed 104 N.E. 942, 210 N.Y. 381.

77. Minn.—State v. Hammond Packing Co., 117 N.W. 606, 105 Minn. 359.

78. Tenn.—Jacobs Packing Co. v. Flanery, 151 S.W.2d 1073, 177 Tenn. 546.

79. N.H.—State v. Collins, 45 A. 1080, 70 N.H. 218.

80. Minn.—State v. Hanson, 136 N. W. 412, 118 Minn. 85, 40 L.R.A.,N. S., 65, Ann.Cas.1913E 405.

81. U.S.—Armour Packing Co. v. Snyder, C.C.Minn., 84 F. 136.
Minn.—State v. Horgan, 56 N.W. 688, 55 Minn. 183.
W.Va.—State v. Myers, 26 S.E. 539, 42 W.Va. 822, 57 Am.S.R. 887, 35 L.R.A. 844.

82. U.S.—Highland Farms Dairy v. Agnew, Va., 57 S.Ct. 549, 300 U.S. 608, 81 L.Ed. 835, affirming, D.C., 16 F.Supp. 575.
Cal.—Ex parte Willing, 86 P.2d 663, 12 Cal.2d 591—Ex parte Willing, 80 P.2d 1027, 27 Cal.App.2d 367.
N.Y.—People v. Perretta, 171 N.E. 72, 253 N.Y. 305, 84 A.L.R. 636, reversing 239 N.Y.S. 63, 228 App. Div. 420, affirming 236 N.Y.S. 293, 134 Misc. 652.

83. Cal.—Ex parte Willing, 86 P.2d 663, 12 Cal.2d 591—Ex parte Willing, 80 P.2d 1027, 27 Cal.App.2d 367.
N.Y.—Ten Eyck v. Eastern Farm Products, 290 N.Y.S. 475, 160 Misc. 402, affirmed 292 N.Y.S. 787, 249 App.Div. 891.
Pa.—Harrisburg Dairies v. Eisaman, 11 A.2d 875, 338 Pa. 58, affirming 46 Dauph.Co. 122, exceptions dismissed 47 Dauph.Co. 20—Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 200 A. 854, 332 Pa. 34, certiorari granted Milk Control Board of Commonwealth of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 229, 305 U.S. 589, 83 L.Ed. 372, reversed on other grounds Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 528, 306 U.S. 346, 83 L.Ed. 752, rehearing denied Milk Control Board of Commonwealth of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 773, 306 U.S. 669, 83 L.Ed. 1063—Commonwealth v. Lic'ni, 10 A.2d 923, 138 Pa.Super. 277—Commonwealth ex rel. Margiotti v. Ortwein, 200 A. 859, 132 Pa.Super. 166.

Contrary view was taken on preliminary objections.—Harrisburg Dairies v. Eisaman, 45 Dauph.Co. 61, appeal dismissed 195 A. 337, 328 Pa. 195.

84. N.Y.—Application of Linden Farms Milk & Cream Co., 15 N.Y. S.2d 658, 257 App.Div. 737.

85. Me.—State v. Old Tavern Farm, 180 A. 473, 133 Me. 468, 101 A.L.R. 810.

products would be unconstitutional if it vested unguided and uncontrolled discretion in a city board of health as to the issuance of the license.[86]

Other statutes. Among statutes that have been upheld by the courts as constitutional are those providing for the inspection of food stuffs,[87] and requiring the payment of a reasonable inspection fee;[88] requiring the producers of, or dealers in, certain foods to take out a license;[89] forbidding the sale of food products below a certain standard of quality;[90] regulating the sale of cold storage eggs [91] and food stuffs;[92] requiring the sale of eggs according to established grades;[93] regulating potato sales;[94] prohibiting and punishing the sale of meat falsely represented to be "kosher;"[95] prohibiting the sale for food of meat of an animal that has died otherwise than by slaughter;[96] prohibiting the sale as an article of food of veal from a calf under a certain age when killed;[97] making the use of sulphur or sulphurous acid in articles of human food illegal;[98] prohibiting the sale of food containing boric acid [99] or benzoate of soda;[1] prohibiting the use of saccharin in bottled soft drinks;[2] prohibiting the adulteration of food by coloring, whereby inferiority is concealed or it is made to appear better than it really is, but providing that nothing in the act shall prevent the coloring of pure butter;[3] prohibiting the coloring of vinegar;[4] requiring the labeling of proprietary foods and syrups;[5] requiring the markings on honey containers to show the name of the producer, weight, and grade;[6] denouncing the mislabeling, for marketing purposes, of fruits, nuts, or vegetables;[7] and providing that food products sold in package form shall be deemed misbranded if the package contains any gifts, premiums, or prizes.[8] A statute making it an offense to sell unwholesome food, irrespective of whether the seller knows it to be unwholesome, is valid.[9] On the other hand, statutes have been declared void which require the name of the manufacturer and the location of his factory to be stated on each container,[10] or require the exact weight of a package to be marked in letters of a certain size,[11] or which are so vague or uncertain as not to be intelligible.[12] Also, a statute penalizing the failure to mark packages of food stuffs with the net weight of contents is unconstitutional as applied to food stuffs which are subject to variations in weight according to climatic conditions.[13]

§ 7. —— Power of Congress

A federal statute concerning food, or a manufacturer thereof, or dealer therein, is sustainable when it is a proper exercise by congress of one of the powers conferred on it by the constitution, such as the power of taxation, the power to regulate foreign and interstate commerce, or the power to legislate for the District of Columbia.

86. N.H.—Whitney v. Watson, 157 A. 78, 85 N.H. 238.

87. Mo.—Coca-Cola Bottling Co. v. Mosby, 233 S.W. 446, 289 Mo. 462.
26 C.J. p 755 note 42.

88. Mo.—Coca-Cola Bottling Co. v. Mosby, supra.
26 C.J. p 755 note 43.

89. N.D.—Cofman v. Ousterhous, 168 N.W. 826, 40 N.D. 390.
Tex.—Ex parte Mehlman, 75 S.W.2d 689, 127 Tex.Cr. 257, followed in Greiner v. State, 75 S.W.2d 1110, 127 Tex.Cr. 283.

90. Mich.—People v. Worden Grocer Co., 77 N.W. 315, 118 Mich. 604.
N.Y.—People v. Biesecker, 61 N.E. 990, 169 N.Y. 53, 88 Am.S.R. 534, 57 L.R.A. 178.
26 C.J. p 755 note 46.

91. N.Y.—Dillon v. James Butler, Inc., 174 N.Y.S. 198.

92. N.Y.—People v. Buffalo Cold Storage Co., 185 N.Y.S. 790, 113 Misc. 479.
26 C.J. p 755 note 54.

93. N.Y.—People v. Wilson & Co., 246 N.Y.S. 111, 138 Misc. 440.

94. U.S.—Detweiler v. Welch, C.C.A. Idaho, 46 F.2d 75, 73 A.L.R. 1440, affirming, D.C., 46 F.2d 71.

95. U.S.—Hygrade Provision Co. v. Sherman, N.Y., 45 S.Ct. 141, 266 U.S. 497, 69 L.Ed. 402.
N.Y.—People v. Atlas, 170 N.Y.S. 834, 183 App.Div. 595—Greenwald v. Noyes, 17 N.Y.S.2d 707, 172 Misc. 780—People v. Gordon, 14 N.Y.S.2d 333, 172 Misc. 543, reversed on other grounds 16 N.Y.S.2d 833, 258 App.Div. 421, affirmed 28 N.E.2d 717, 283 N.Y. 705.

96. Tex.—Corzine v. State, 227 S.W. 1102, 88 Tex.Cr. 468—Cozine v. State, 220 S.W. 102, 87 Tex.Cr. 92.

97. N.Y.—People v. Bishopp, 94 N.Y.S. 773, 106 App.Div. 266, affirming 89 N.Y.S. 709, 44 Misc. 12—People v. Dennis, 114 N.Y.S. 7.

98. Ill.—People v. Quality Provision Co., 12 N.E.2d 615, 367 Ill. 610, 114 A.L.R. 1210.
26 C.J. p 755 note 58.

99. Ill.—People v. Price, 101 N.E. 196, 257 Ill. 587, Ann.Cas.1914A 1154, affirmed 35 S.Ct. 892, 238 U.S. 446, 59 L.Ed. 1480.

1. U.S.—Curtice Bros. Co. v. Barnard, Ind., 209 F. 589, 126 C.C.A. 411.

2. Ohio.—Longbrake v. State, 146 N.E. 417, 112 Ohio St. 13, 41 A.L.R. 925.

3. Mich.—People v. Hinshaw, 97 N.W. 758, 135 Mich. 378.

4. Ill.—People v. William Henning Co., 103 N.E. 530, 260 Ill. 554, 49 L.R.A.,N.S., 1206.
26 C.J. p 755 note 61.

5. Kan.—Corn Products Refining Co. v. Eddy, 163 P. 615, 99 Kan. 63, affirmed 39 S.Ct. 325, 249 U.S. 427, 63 L.Ed. 689.

6. Cal.—Graham v. Justice's Court of Colusa Judicial Tp., 67 P.2d 127, 20 Cal.App. 328.

7. Cal.—Ex parte Hayes, 25 P.2d 230, 134 Cal.App. 312.

8. Neb.—In re Indovina, 152 N.W. 321, 98 Neb. 140—In re Arigo, 152 N.W. 319, 98 Neb. 134, L.R.A.1917A 1116.

9. Mich.—People v. Snowberger, 71 N.W. 497, 113 Mich. 86, 67 Am.S.R. 449.
N.Y.—People v. Meyer, 60 N.Y.S. 415, 44 App.Div. 1.

10. S.D.—Jewett v. Small, 105 N.W. 738, 20 S.D. 232.

11. Cal.—Ex parte Dietrich, 84 P. 770, 149 Cal. 104, 5 L.R.A.,N.S., 873.

12. Mo.—St. Louis v. Bippen, 100 S.W. 1048, 201 Mo. 528.
26 C.J. p 755 note 71.

13. Tex.—Ex parte Lysaght, 260 S.W. 860, 97 Tex.Cr. 244—Overt v. State, 260 S.W. 856, 97 Tex.Cr. 202.

Under its power to legislate for the District of Columbia, congress may pass laws for the reasonable regulation of the sale of food products within the District.[14]

Whether congress may legislate concerning food or manufacturers thereof, or dealers therein, in the exercise of its power of taxation is considered in the C.J.S. title Internal Revenue, also 33 C.J. p 326 note 4, p 330 notes 74, 75, p 331 note 1, and whether it may so legislate in the exercise of its power to regulate foreign and interstate commerce is considered in Commerce §§ 65, 86, 98. Particular federal statutes relating or applicable to food which have been upheld include the Food and Drugs Act,[15] the Filled Milk Act,[16] the Agricultural Marketing Agreement Act of 1937,[17] an act prohibiting the importation of inferior tea see Commerce § 65 and Customs Duties § 30 b, and a statute prohibiting producing in, or sending into, the District of Columbia for sale milk, cream, or ice cream without a health officer's permit.[18]

§ 8. —— Conflict between State and Federal Power

Little conflict has been found to exist between the regulatory power of a state as to food and the exercised or unexercised power of congress to legislate on the same subject.

State statutes are not necessarily void as to products imported from a foreign country,[19] or transported from one state to another,[20] nor are they necessarily nullified or otherwise affected by the subsequent enactment by congress of a statute forbidding the importation or interstate shipment of adulterated articles of food.[21] The validity of state food statutes as against an objection that they regulate, burden, interfere with, or discriminate against foreign or interstate commerce or conflict with acts of congress on the same subject is considered in Commerce §§ 65, 86. In the absence of conflict between state and federal statutes, a broad latitude is allowed the states in protecting their citizens from adulterated or misbranded articles of food.[22]

§ 9. —— Powers of Municipal Corporations

The authority of a municipality to enact regulatory ordinances pertaining to food is part of the police power delegated to the municipality; and a particular ordinance of this nature will be sustained when, and only when, it is within the scope, and is a proper exercise, of the power delegated.

As stated in Constitutional Law § 178, the police power of the state may be delegated by it to municipal corporations within the state; and regulatory municipal ordinances pertaining to food are valid, provided they are within the general scope of the state's police power,[23] provided they are authorized by the municipal charter[24] or are authorized by

14. D.C.—Weigand v. District of Columbia, 22 App.D.C. 559.

15. U.S.—U. S. v. Shreveport Grain & Elevator Co., 53 S.Ct. 42, 287 U. S. 77, 77 L.Ed. 175, reversing, D.C., 46 F.2d 354—A. O. Andersen & Co. v. U. S., C.C.A.Wash., 284 F. 542—U. S. v. 420 Sacks of Flour, D.C.La., 180 F. 518.

16. U.S.—U. S. v. Carolene Products Co., Ill., 58 S.Ct. 778, 304 U.S. 144, 82 L.Ed. 1234—Carolene Products Co. v. Wallace, D.C.D.C., 30 F.Supp. 266, affirmed 60 S.Ct. 113, 308 U.S. 506, 84 L.Ed. 433.

Contra U. S. v. Carolene Products Co., D.C.Ill., 7 F.Supp. 500.

17. U.S.—U. S. v. Wrightwood Dairy Co., Ill., 62 S.Ct. 523, 315 U.S. 110, 86 L.Ed. 726, reversing, C.C.A., 123 F.2d 100, certiorari granted 62 S. Ct. 362, 314 U.S. 605, 86 L.Ed. 486 and Wrightwood Dairy Co. v. U. S., 62 S.Ct. 362, 314 U.S. 605, 86 L.Ed. 486—U.S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F. Supp. 534, rehearing denied 60 S. Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S. Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Milk Producers Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526—U. S. v. H. P. Hood & Sons, D.C.Mass., 26 F. Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 307 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032, affirmed H. P. Hood & Sons v. U. S., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, and Green Valley Creamery v. U. S., 108 F.2d 342.

Agricultural Adjustment Act as amended in 1935, authorizing secretary of agriculture to regulate handling of milk in interstate commerce, is constitutional.—U. S. v. David Buttrick Co., D.C.Mass., 28 F.Supp. 878.

18. D.C.—Leaman v. District of Columbia, 55 F.2d 1020, 60 App.D.C. 395.

19. N.Y.—Crossman v. Lurman, 63 N.E. 1097, 171 N.Y. 329, 98 Am.S.R. 599, affirmed 24 S.Ct. 234, 192 U.S. 189, 48 L.Ed. 401.

Notice of foreign origin of eggs or egg products
U.S.—Amos Bird Co. v. Thompson, D.C.Wash., 274 F. 702.
Cal.—Ex parte Bear, 15 P.2d 489, 216 Cal. 536, 83 A.L.R. 1402.
Wash.—Parrott v. Benson, 194 P. 986, 114 Wash. 117.

20. U.S.—Savage v. Jones, Ind., 32 S.Ct. 715, 225 U.S. 501, 56 L.Ed. 1182—Plumley v. Massachusetts, 15 S.Ct. 154, 155 U.S. 461, 39 L.Ed. 223, affirming 30 N.E. 1127, 156 Mass. 236, 15 L.R.A. 839.
N.Y.—People v. Bishopp, 94 N.Y.S. 773, 106 App.Div. 266, affirming 89 N.Y.S. 709, 44 Misc. 12.

21. U.S.—Crossman v. Lurman, 24 S.Ct. 234, 192 U.S. 189, 48 L.Ed. 401, affirming 63 N.E. 1097, 171 N.Y. 329, 98 Am.S.R. 599.
26 C.J. p 754 note 33.

22. U.S.—Royal Baking Powder Co. v. Emerson, C.C.A.Ark., 270 F. 429, appeal dismissed 43 S.Ct. 166, 260 U.S. 752, 67 L.Ed. 496.

23. Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.
26 C.J. p 756 note 83.

24. Ariz.—Gardenhire v. State, 221 P. 228, 26 Ariz. 14.
Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.
Minn.—State v. Houston, 298 N.W. 358.
N.Y.—People ex rel. Domingo v. French Bottling Works, 180 N.E. 537, 259 N.Y. 4, affirming People, on Complaint of Domingo, v. French Bottling Works, 252 N.Y.S. 950, 234 App.Div. 680.
26 C.J. p 756 note 84.

other statute,[25] and, according to the decisions, constitute a proper exercise of the police power[26] in that they are reasonable,[27] and not arbitrary [28] or discriminatory,[29] or in conflict with a constitutional provision [30] or any direct enactment of the legislature.[31] If an ordinance makes violation thereof an offense, it must, to be valid, not be ambiguous and indefinite.[32] Subject to the foregoing limitations, a municipal corporation may regulate the sale [33] and distribution [34] of food, as well as the business

25. Ala.—Barrett v. Rietta, 93 So. 636, 207 Ala. 651.
Iowa.—City of Des Moines v. Fowler, 255 N.W. 880, 218 Iowa 504.
Tex.—Prescott v. City of Borger, Civ. App., 158 S.W.2d 578—Ex parte Ernest, 136 S.W.2d 595, 138 Tex. Cr. 441.
26 C.J. p 756 note 85.

Statutory authorization of regulation of "other provisions" includes

(1) Cooked as well as uncooked articles of food.—City of Chicago v. R. & X. Restaurant, 15 N.E.2d 725, 369 Ill. 65, 117 A.L.R. 1313.

(2) Coffee, tea, spices, and flavoring extracts.—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.

(3) Candy, peanuts, popcorn and gum.—Larson v. City of Rockford, 21 N.E.2d 396, 371 Ill. 441.

(4) Ice cream.—City of Rockford v. Hey, 9 N.E.2d 317, 366 Ill. 526.

Nonenactment of similar ordinances by other municipalities does not affect the power of a city to enact an ordinance pertaining to food.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400.

26. Cal.—Justesen's Food Stores v. City of Tulare, 84 P.2d 140, 12 Cal. 2d 324—Justesen's Food Stores v. City of Tulare, 111 P.2d 424, 43 Cal.App.2d 616.
N.Y.—People v. Reicherter, 112 N.Y. S. 936, 128 App.Div. 675.
Or.—Korth v. City of Portland, 261 P. 895, 123 Or. 180, 58 A.L.R. 665.
Wash.—Brown v. City of Seattle, 272 P. 517, 150 Wash. 203, modified on other grounds 278 P. 1072, 150 Wash. 203.

Use of saccharin in food products may be regulated, but cannot be prohibited, under the exercise of the police power.—People v. Excelsior Bottling Works, 171 N.Y.S. 733, 184 App.Div. 45, reversing 168 N.Y.S. 570, 35 N.Y.Cr. 62.

27. Ark.—Coleman v. City of Little Rock, 88 S.W.2d 58, 191 Ark. 844.
Cal.—Justesen's Food Stores v. City of Tulare, 84 P.2d 140, 12 Cal.2d 324.
Fla.—Logan v. Alfieri, 148 So. 872, 110 Fla. 439.
Ill.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400.
Iowa.—City of Des Moines v. Fowler, 225 N.W. 880, 218 Iowa 504.
Kan.—McCulley v. City of Wichita, 98 P.2d 192, 151 Kan. 214, 127 A. L.R. 312.
Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S. W.2d 216, 276 Ky. 736.
Minn.—State v. Houston, 298 N.W. 358.
Mo.—State ex rel. Knese v. Kinsey, 282 S.W. 437, 314 Mo. 80.
N.J.—American Grocery Co. v. Board of Com'rs of City of New Brunswick, 11 A.2d 599, 124 N.J.Law 293, affirmed 19 A.2d 696, 126 N.J.Law 367—Giant Tiger Corporation of Camden v. Board of Com'rs of City of Camden, 4 A.2d 775, 122 N.J. Law 240.
N.Y.—People v. Reicherter, 112 N.Y. S. 936, 128 App.Div. 675.
Tex.—McKenna v. City of Galveston, Civ.App., 113 S.W.2d 606, error dismissed—A-Loaf Baking Co. v. Pace, Civ.App., 19 S.W.2d 459.
Wis.—City of Milwaukee v. Childs Co., 217 N.W. 703, 195 Wis. 148.
26 C.J. p 756 note 87—43 C.J. p 322 note 16, p 372 notes 39, 44.

There must be some logical connection between the object sought to be accomplished by the ordinance and the means prescribed to accomplish the end.—Chicago v. Chicago & N. W. R. Co., 113 N.E. 849, 275 Ill. 30, L.R.A.1917C 238.

Adaptation or tendency

(1) The ordinance must be reasonably adapted to promote the public health and welfare in some particular manner and must tend to prevent some existing or directly anticipated menace thereto.—Brown v. City of Seattle, 272 P. 517, 150 Wash. 203, modified on other grounds 278 P. 1072, 150 Wash. 203.

(2) It must tend to protect the health, safety, or welfare of the community.—Chicago v. Netcher, 55 N.E. 707, 183 Ill. 104, 75 Am.S.R. 93, 48 L.R.A. 261.

28. Fla.—Logan v. Alfieri, 148 So. 872, 110 Fla. 439.
Ill.—Larson v. City of Rockford, 21 N.E.2d 396, 371 Ill. 441—Chicago v. Netcher, 55 N.E. 707, 183 Ill. 104, 75 Am.S.R. 93, 48 L.R.A. 261.
Iowa.—City of Des Moines v. Fowler, 225 N.W. 880, 218 Iowa 504.
Kan.—McCulley v. City of Wichita, 98 P.2d 192, 151 Kan. 214, 127 A. L.R. 312.
Mich.—Ritter v. City of Pontiac, 267 N.W. 641, 276 Mich. 416.
Minn.—State v. Houston, 298 N.W. 358.
N.J.—American Grocery Co. v. Board of Com'rs of City of New Brunswick, 11 A.2d 599, 124 N.J.Law 293, affirmed 19 A.2d 696, 126 N.J.Law 367.

29. Ill.—Larson v. City of Rockford, 21 N.E.2d 396, 371 Ill. 441—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400.
Kan.—McCulley v. City of Wichita, 98 P.2d 192, 151 Kan. 214, 127 A. L.R. 312.
Mich.—Ritter v. City of Pontiac, 267 N.W. 641, 276 Mich. 416.
N.J.—American Grocery Co. v. Board of Com'rs of City of New Brunswick, 11 A.2d 599, 124 N.J.Law 293, affirmed 19 A.2d 696, 126 N.J. Law 367—Giant Tiger Corporation of Camden v. Board of Com'rs of City of Camden, 4 A.2d 775, 122 N. J.Law 240.
Ohio.—City of Dayton v. Jacobs, 165 N.E. 844, 120 Ohio St. 225.
26 C.J. p 757 note 88—43 C.J. p 372 note 40.

30. Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.
Kan.—McCulley v. City of Wichita, 98 P.2d 192, 151 Kan. 214, 127 A.L. R. 312.
Mo.—State ex rel. Knese v. Kinsey, 282 S.W. 437, 314 Mo. 80.
N.J.—Giant Tiger Corporation of Camden v. Board of Com'rs of City of Camden, 4 A.2d 775, 122 N.J.Law 240.

31. Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.
Kan.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.
Mo.—State ex rel. Knese v. Kinsey, 282 S.W. 437, 314 Mo. 80.
Ohio.—Village of North College Hill v. Woebkenberg, 18 N.E.2d 614, 59 Ohio App. 458.
26 C.J. p 756 note 86—43 C.J. p 322 note 17.

32. N.Y.—People v. Paprin, 286 N.Y. S. 428, 159 Misc. 162.

33. Ill.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.

Sale of eggs

Minn.—State v. Houston, 298 N.W. 358.

Sale of meats

Ohio.—City of Dayton v. Jacobs, 165 N.E. 844, 120 Ohio St. 225.
26 C.J. p 757 note 15.

34. Ill.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400.

of selling or dispensing it,[35] or an occupation connected with its manufacture or sale,[36] provide for its inspection,[37] require a license[38] or a permit[39] for its sale or the business of selling it, require the payment of a proper fee for inspection,[40] or a license[41] or permit,[42] and, in general, enact such regulations as are appropriate to assure sanitary conditions in the production, distribution, and sale of food offered to the public.[43]

As to time, place, and manner of sale generally. The authority of a municipal corporation to regulate the sale of food may be exercised by regulating and controlling the place and manner of sale[44] or, generally speaking, by designating or prescribing the times and places for the sale of perishable food.[45] The municipality may regulate the location and conduct of markets[46] and victualing shops;[47] and it may prohibit the hawking or peddling of food, the retailing thereof from vehicles, or its sale on the streets[48] in the case of meats, fruits, vegetables, or other perishable foods[49] or where the prohibition is limited to an area desig-

35. Ill.—City of Chicago v. R. & X. Restaurant, 15 N.E.2d 725, 369 Ill. 65, 117 A.L.R. 1313—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.

36. Cal.—Justesen's Food Stores, Inc., v. City of Tulare, 84 P.2d 140, 12 Cal.2d 324.

Medical examination

Municipal corporations may require that persons engaged in handling food products off-red for sale subject themselves to medical examinations, and may prohibit the employment of persons suffering with infectious or contagious diseases.—Langley v. Dallas, Tex.Civ.App., 252 S.W. 203.

37. Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.
Ill.—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.
Kan.—McCulley v. City of Wichita, 98 P.2d 192, 151 Kan. 214, 127 A.L.R. 312.
Or.—Sterrett & Oberle Packing Co. v. Portland, 154 P. 410, 79 Or. 260.

Meat

(1) The inspection of meat may be required.—Ex parte Boyle, 123 S.E. 9, 128 S.C. 535—26 C.J. p 757 note 16.

(2) Municipality may provide for inspection of meat according to standard established by municipality or equally high standard.—City of Dayton v. Jacobs, 165 N.E. 844, 120 Ohio St. 225.

(3) An ordinance prohibiting the keeping of any meat in a store or market in the city or within mile thereof unless it bears the inspection stamp required by federal law governing interstate shipments of meat or the stamp of the city meat inspector is not invalid as discriminatory, where record fails to show that one who has a store or market in area outside of corporate limits may not present his meat for inspection and keep it in market without interference by municipal authorities the same as he could do were his business situated in corporate limits.—State ex rel. Hogan v. Spencer, 190 So. 506, 139 Fla. 237.

(4) The inspection of animals before and after slaughter may be required.—Feld v. Passaic Bd. of Health, 90 A. 672, 86 N.J.Law 95.

38. Ill.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.
N.J.—American Grocery Co. v. Board of Com'rs of City of New Brunswick, 11 A.2d 599, 124 N.J.Law 293, affirmed 19 A.2d 696, 126 N.J. Law 367.
26 C.J. p 757 note 18.

License from wholesale food establishments may be required.—City of Chicago v. Great Atlantic & Pacific Tea Co., 282 Ill.App. 337.

39. Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.
N.Y.—People v. Vandecar, 67 N.E. 913, 175 N.Y. 540, affirmed 26 S.Ct. 144, 199 U.S. 552, 50 L.Ed. 305.
Wash.—Brown v. City of Seattle, 272 P. 517, 150 Wash. 203, modified on other grounds 278 P. 1072, 150 Wash. 203.

40. Cal.—Ex parte McKeon, 49 P.2d 618, 9 Cal.App.2d 223.
Ky.—Hartman v. City of Louisville, 138 S.W.2d 948, 282 Ky. 487.
La.—Oubre v. City of Donaldsonville, 120 So. 30, 167 La. 625.
Ohio.—City of Dayton v. Jacobs, 165 N.E. 844, 120 Ohio St. 225.
26 C.J. p 758 note 42.

41. Ill.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400.
Ky.—Hartman v. City of Louisville, 138 S.W.2d 948, 282 Ky. 487.
N.J.—American Grocery Co. v. Board of Com'rs of City of New Brunswick, 11 A.2d 599, 124 N.J.Law 293, affirmed 19 A.2d 696, 126 N.J.Law 367—Giant Tiger Corporation of Camden v. Board of Com'rs of City of Camden, 4 A.2d 775, 122 N.J.Law 240.

Considerations affecting amount

The license fee which a municipality may exact for purpose of regulating sale of foods is limited to an amount which will bear some reasonable relation to the additional burdens and expenses imposed on the city; but mere probability that license fee may exceed, in some degree, expense of issuing license and inspecting business, will not render ordinance invalid as a revenue measure.—Larson v. City of Rockford, 21 N.E.2d 396, 371 Ill. 441.

42. Fla.—McCroan v. Bloodworth, 193 So. 431, 141 Fla. 435.

43. Ill.—American Baking Co. v. City of Wilmington, 19 N.E.2d 172, 370 Ill. 400—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.
43 C.J. p 371 note 33.

Duty to enact

City fathers of city of Portland are bound to safeguard health of those who purchase food and drink of a victualer by rigid requirements as to sterilization of drinking glasses.—Donahue v. City of Portland, 15 A.2d 287, 137 Me. 83.

Protection from flies, dust, filth, or contamination

Ala.—Barrett v. Rietta, 93 So. 636, 207 Ala. 651.
26 C.J. p 757 note 10—43 C.J. p 372 notes 34, 35.

44. Ill.—City of Chicago v. Arbuckle Bros., 176 N.E. 761, 344 Ill. 597.

The regulation of automatic vending machines by a municipality was warranted on ground of danger of stale, moldy or wormy confections and of short weights.—Larson v. City of Rockford, 21 N.E.2d 396, 371 Ill. 441.

45. Fla.—Jacksonville v. Ledwith, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.
43 C.J. p 372 note 42.

Sale of oysters away from oyster stand may be prohibited.—Morano v. New Orleans, 2 La. 217.

46. Iowa.—State v. Smith, 96 N.W. 899, 123 Iowa 654.
26 C.J. p 757 note 11.

47. Vt.—St. Johnsbury v. Thompson, 9 A. 571, 59 Vt. 300, 59 Am.R. 731.

48. Tenn.—Dooley v. City of Cleveland, 135 S.W.2d 649, 175 Tenn. 439.

49. Ky.—Hahn v. Newport, 194 S.W. 114, 175 Ky. 185.
43 C.J. p 372 note 47.

nated as a congested one.[50] However an ordinance restricting the sale of perishable foods to inspection hours is invalid where it is so framed as to be applicable only to operators of grocery stores and meat markets and not to operators of restaurants, drug stores, or similar establishments where foods are prepared for sale;[51] and while there is authority that an ordinance restricting the hours during which uncured and uncooked meats may be sold at an established place of business may be valid,[52] there is also authority that such an ordinance is invalid.[53] The statutory power of a municipality to engage in the purchase and sale of food must be exercised in the manner or method prescribed by statute.[54]

As to bread, bakers, and bakeries. In the exercise of its general police powers,[55] as, for instance, under its power to protect the health of the inhabitants,[56] a municipal corporation may, within reasonable limits, regulate the trade or occupation of bakers and their places of business.[57] It may regulate the sale of bread or other food products of bakeries[58] and the sanitary conditions under which they are produced;[59] it may prescribe the size[60] and quality[61] of loaves of bread; and it may require the name of the maker to be stated on the package or container in which bread is sold;[62] but, while municipal regulations dealing with the weight of bread have been upheld in some cases,[63] they have been held invalid in other cases.[64] An ordinance prohibiting all deliveries of bakery goods during certain hours is not justified;[65] and an ordinance is void where it is an attempt by the municipality to exercise, without legislative authority, extraterritorial jurisdiction over bakeries located outside the city.[66] Also an ordinance requiring bakery products baked outside the municipal limits to be unwrapped, inspected, and rewrapped has been condemned.[67]

As to milk and milk products. A municipal corporation may enact ordinances reasonably regulating the production,[68] preparation,[69] handling,[70] distribution,[71] delivery,[72] and sale[73] of milk for consumption by its inhabitants. So also it may regulate the manufacture[74] and sale[75] of ice cream or other milk products. Particular ordinances which

50. Tenn.—Dooley v. City of Cleveland, 135 S.W.2d 649, 175 Tenn. 439.

51. Kan.—McCulley v. City of Wichita, 98 P.2d 192, 151 Kan. 214, 127 A.L.R. 312.

52. Cal.—Justesen's Food Stores v. City of Tulare, 111 P.2d 424, 43 Cal.App.2d 616.

County ordinance
Cal.—Dorsa v. Board of Sup'rs of Santa Clara County, 72 P.2d 912, 23 Cal.App.2d 217.

53. Wash.—Brown v. City of Seattle, 272 P. 517, 150 Wash. 203, modified on other grounds 278 P. 1072, 150 Wash. 203.

54. N.Y.—Howard v. New York, 140 N.E. 206, 236 N.Y. 91.

55. Ill.—Chicago v. Drogasawacz, 99 N.E. 869, 256 Ill. 34.

56. Ill.—Chicago v. Drogasawacz, supra.

57. Ala.—Mobile v. Yuille, 3 Ala. 137, 36 Am.D. 441.
Ill.—Chicago v. Drogasawacz, 99 N.E. 869, 256 Ill. 34.
Mich.—People v. Wagner, 49 N.W. 609, 86 Mich. 594, 24 Am.S.R. 141, 13 L.R.A. 286.
43 C.J. p 321 note 2.

58. Ill.—City of Chicago v. R. & X. Restaurant, 15 N.E.2d 725, 369 Ill. 65, 117 A.L.R. 1313.
43 C.J. p 321 note 6.

59. Ill.—Chicago v. Drogasawacz, 99 N.E. 869, 256 Ill. 34.

60. Ohio.—Allion v. Toledo, 124 N.E. 237, 99 Ohio St. 416, 6 A.L.R. 426.

61. Ill.—City of Chicago v. R. & X. Restaurant, 15 N.E.2d 725, 369 Ill. 65, 117 A.L.R. 1313.

62. Ill.—Chicago v. Schmidinger, 90 N.E. 372, 243 Ill. 190.

63. Ill.—City of Chicago v. R. & X. Restaurant, 15 N.E.2d 725, 369 Ill. 65, 117 A.L.R. 1313.
Tex.—City of Dallas v. Taystee Baking Co., Civ.App., 163 S.W.2d 687, error refused.
43 C.J. p 321 notes 9–11, 13, 14.

64. N.Y.—Buffalo v. Collins Baking Co., 57 N.Y.S. 347, 39 App.Div. 432.
Ohio.—Allion v. Toledo, 20 Ohio N.P., N.S., 353.
43 C.J. p 322 note 18.

65. Cal.—Skaggs v. City of Oakland, 57 P.2d 478, 6 Cal.2d 222.

66. Tex.—Ex parte Ernest, 136 S.W.2d 595, 138 Tex.Cr. 441.

67. Tex.—A-Loaf Baking Co. v. Pace, Civ.App., 19 S.W.2d 459.

68. Kan.—Dorssom v. City of Atchison, 124 P. 475, 155 Kan. 225.

69. N.Y.—Lang's Creamery v. City of Niagara Falls, 231 N.Y.S. 368, 224 App.Div. 483, affirmed 167 N.E. 464, 251 N.Y. 343.

70. Ala.—Gilchrist Drug Co. v. City of Birmingham, 174 So. 609, 234 Ala. 204, 111 A.L.R. 103.
Kan.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.

71. Ky.—Grant v. Leavell, 82 S.W.2d 283, 259 Ky. 267.

72. U.S.—Birkheiser v. City of Los Angeles, D.C.Cal., 11 F.Supp. 689.
N.Y.—Lang's Creamery v. City of Niagara Falls, 231 N.Y.S. 368, 224 App.Div. 483, affirmed 167 N.E. 464, 251 N.Y. 343.

73. Ill.—City of Quincy v. Burgdorf, 235 Ill.App. 560.
Iowa.—City of Des Moines v. Fowler, 255 N.W. 880, 218 Iowa 504.
Kan.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.
Ky.—Grant v. Leavell, 82 S.W.2d 283, 285, 259 Ky. 267, citing **Corpus Juris.**
Or.—Korth v. City of Portland, 261 P. 895, 123 Or. 180, 58 A.L.R. 665.
Pa.—Hoar v. City of Lancaster, 137 A. 664, 290 Pa. 117.
Wis.—City of Milwaukee v. Childs Co., 217 N.W. 703, 195 Wis. 148.
26 C.J. p 757 note 90.

Business of milk sellers, although lawful, is not exempt from reasonable police regulations by municipalities.—City of St. Louis v. Kellmann, 243 S.W. 134, 295 Mo. 71, error dismissed Kellman v. City of St. Louis, 44 S.Ct. 132, 263 U.S. 679, 68 L.Ed. 503, motion denied 44 S.Ct. 136.

74. **Borough regulations**
Pa.—Simco Sales Service of Pennsylvania v. Brackin, 26 A.2d 323.

75. Iowa.—City of Des Moines v. Fowler, 255 N.W. 880, 218 Iowa 504.

have been sustained include those which: Protect milk against contamination by bacteria, disease germs, or bacilli;[76] regulate dairies;[77] regulate the care and feeding of milch cows;[78] prohibit the sale of milk drawn from cows not previously subjected to certain tests;[79] require inspection of milk, milch cows, stables where kept, etc.;[80] require milk wagons to be kept neatly painted;[81] require the immediate cleaning of receptacles used in the transportation and delivery of milk;[82] require milk peddlers to provide a special room for storing milk and for cleansing utensils as a condition to obtaining licenses;[83] denounce adulteration of milk;[84] prohibit the sale of milk containing a preservative[85] or coloring matter;[86] prohibit the sale of milk[87] or cream[88] below a certain standard; or prohibit the sale of bottled chocolate milk containing less than a prescribed percentage of butter fat.[89]

While a municipal corporation may require a person selling milk or milk products within the city to obtain a license[90] or permit[91] and pay a reasonable license,[92] permit,[93] or inspection[94] fee, it may not confer arbitrary and capricious power on an officer to discriminate improperly in granting or withholding permits.[95]

Ordinarily, a municipal corporation may prohibit the sale of milk at retail,[96] or in certain places,[97] except in sealed bottles, as well as require the capacity thereof to be stated on bottles of milk.[98] However, a city has no authority to outlaw paper or single service containers where they have been legalized by the state.[99] While an ordinance requiring the use of a bottle or other container bearing a name, trade-name or trade-mark truly and correctly showing the identity of the producer or distributor would be valid,[1] an ordinance is invalid where it goes further and prohibits the use of a bottle or other container bearing any other name, as it precludes the use of the name of the manufacturer of the bottle and such name could not reasonably mislead the consumer or have any relation to his health.[2]

Notwithstanding some authority to the contrary,[3] it is held that a city may require the pasteurization of milk,[4] or of all milk except certified milk,[5] and prescribe reasonable regulations under which it shall be done or conducted,[6] as by requiring that it

Regulations by borough
Pa.—Simco Sales Service of Pennsylvania v. Brackin, 26 A.2d 323.

76. Ill.—Economy Dairy Co. v. Kerner, 25 N.E.2d 108, 303 Ill.App. 259, transferred, see 20 N.E.2d 568, 371 Ill. 261.

77. Mo.—St. Louis v. Fischer, 67 S.W. 872, 167 Mo. 654, 64 L.R.A. 679, 99 Am.S.R. 614, affirmed 24 S.Ct. 673, 194 U.S. 361, 48 L.Ed. 1018.

78. Ky.—Owensboro v. Evans, 189 S.W. 1153, 172 Ky. 831.

79. Kan.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.
26 C.J. p 757 note 94.

80. Okl.—Grider v. City of Ardmore, 287 P. 776, 46 Okl.Cr. 33.
26 C.J. p 757 note 2.

81. Ky.—Owensboro v. Evans, 189 S.W. 1153, 172 Ky. 831.

82. N.Y.—People v. Fruedenburg, 103 N.E. 166, 209 N.Y. 218.

83. N.Y.—People ex rel. Shelter v. Owen, 116 N.Y.S. 502.

84. Ariz.—Gardenhire v. State, 221 P. 228, 26 Ariz. 14.

85. Mo.—St. Louis v. Schuler, 89 S.W. 621, 190 Mo. 524, 1 L.R.A.,N.S., 928.

86. Mo.—St. Louis v. Polinsky, 89 S.W. 625, 190 Mo. 516.

87. La.—City of New Orleans v. Vinci, 96 So. 110, 153 La. 528, 28 A.L.R. 1382.
26 C.J. p 757 note 95.

88. Mo.—St. Louis v. Reuter, 89 S.W. 628, 190 Mo. 514.

89. Fla.—Anderson v. City of Tampa, 164 So. 546, 121 Fla. 670.

90. Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 276 Ky. 736.
N.C.—State v. Edwards, 121 S.E. 444, 187 N.C. 259.

91. Ga.—Wright v. Richmond County Department of Health, 186 S.E. 815, 182 Ga. 651.
Iowa.—City of Des Moines v. Fowler, 255 N.W. 880, 218 Iowa 504.
Mo.—City of St. Louis v. Kellmann, 243 S.W. 134, 295 Mo. 71, error dismissed Kellman v. City of St. Louis, 44 S.Ct. 132, 263 U.S. 679, 68 L.Ed. 503, motion denied 44 S.Ct. 136.

92. Kan.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.
Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 276 Ky. 736.
Okl.—Stephens v. Oklahoma City, 1 P.2d 367, 150 Okl. 199—Grider v. City of Ardmore, 287 P. 776, 46 Okl.Cr. 33.
Or.—Korth v. City of Portland, 261 P. 895, 123 Or. 180, 58 A.L.R. 665.
26 C.J. p 757 note 4.

93. Kan.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.

94. Ark.—Coleman v. City of Little Rock, 88 S.W.2d 58, 191 Ark. 844.

95. Ky.—Grant v. Leavell, 82 S.W.2d 283, 259 Ky. 267.

96. Ohio.—Staas v. State, 33 Ohio Cir.Ct. 159, affirmed 21 N.E. 1139, 81 Ohio St. 497.

97. Conn.—State v. Stokes, 98 A. 294, 91 Conn. 67.

98. Ill.—Chicago v. Bowman Dairy Co., 84 N.E. 913, 234 Ill. 294, 123 Am.S.R. 100, 17 L.R.A.,N.S., 684, 14 Ann.Cas. 700.

99. U.S.—Fieldcrest Dairies v. City of Chicago, C.C.A.Ill., 122 F.2d 132, reversing, D.C., 35 F.Supp. 451.

1. Fla.—Logan v. Alfieri, 148 So. 872, 110 Fla. 439.

2. Fla.—Logan v. Alfieri, supra.

3. Mo.—Knese v. Kinsey, 282 S.W. 437, 314 Mo. 80.

4. Ariz.—City of Phœnix v. Breuninger, 72 P.2d 580, 50 Ariz. 372.
N.C.—State v. Edwards, 121 S.E. 444, 187 N.C. 259.

In making ice cream
Ordinance requiring use of method of freezing ice cream involving pasteurization and continuous flow from processing to freezing was held valid.—Gilchrist Drug Co. v. City of Birmingham, 174 So. 609, 234 Ala. 204, 111 A.L.R. 103.

5. Cal.—Natural Milk Producers Ass'n v. City and County of San Francisco, 124 P.2d 25, 20 Cal.2d 101.
N.Y.—People ex rel. Ogden v. McGowan, 195 N.Y.S. 286, 118 Misc. 828, affirmed 191 N.Y.S. 946, 200 App.Div. 836.

6. N.C.—State v. Edwards, 121 S.E. 444, 187 N.C. 259.
Tex.—Prescott v. City of Borger, Civ. App., 158 S.W.2d 578, error refused.

be done or conducted in a particular manner[7] or according to reasonable standards of perfection;[8] but an ordinance requiring the pasteurization to be done within the city is invalid[9] as to producers whose dairies, although located outside the city, are in a district having the same inspection service as the municipality, where such inspection district or service has been approved, as provided by statute, by a state official,[10] although such an ordinance has been held valid as to milk brought in from another inspection district,[11] and an ordinance prohibiting the sale in the city of ice cream not pasteurized and frozen on the same premises in the city has also been held valid.[12]

As to soft or nonintoxicating drinks. Under a statute authorizing it to regulate "other provisions," a city has authority to regulate soft drinks.[13] While, under its general police power, in the absence of express authority, a municipal corporation may not absolutely prohibit the sale of nonintoxicating drinks,[14] especially where the state has licensed the sale thereof,[15] the business of selling such drinks may be a proper subject of municipal regulation,[16] especially where the places where it is conducted may become mere covers for illegal liquor traffic[17] or centers for crime and meeting places for criminals.[18] In the exercise of the power the corporation may provide for the inspection of such establishments by designated public officials; it may require that samples of beverages on sale be furnished for examination or analysis; it may require an unobstructed view of the interior of the establishment; and, within reasonable limits, it may regulate the opening and closing hours of business.[19] Also it may require that a license be obtained for the conduct of the business of selling nonintoxicating drinks;[20] but, in the absence of express authority, it is without power to require licenses from persons engaged in driving trucks for the delivery of nonintoxicating beverages to retail dealers.[21]

It is within the police power of a municipal corporation to regulate the sale of cider.[22] In the exercise of that power, it may prohibit the sale of cider in smaller quantities than that specified,[23] and it may forbid the drinking thereof at the place of sale.[24]

While the use of saccharin in nonalcoholic carbonated drinks or beverages may not be prohibited entirely, even indirectly by making its use practically impossible,[25] its presence in such drinks or beverages may properly be required to be made known to the public by a proper label.[26]

§ 10. Construction and Operation of Regulations Generally

Valid food regulations are construed, if possible, so as to give effect to the intent or purpose of their enactment and to the usual and ordinary meaning of the language employed therein. As so construed, and within their intended and legitimate scope, they are operative and will be accorded effect.

An authorized municipal ordinance pertaining to food has the force of law and is as obligatory within the municipality as though enacted by the legislature.[27] Food regulations, whether consisting of statutes, ordinances, or rules or orders of a board or like agency, are subject to general rules of con-

7. Ill.—Koy v. Chicago, 104 N.E. 1104, 263 Ill. 122, Ann.Cas.1915C 67.
Wis.—Pfeffer v. City of Milwaukee, 177 N.W. 850, 171 Wis. 514.

8. N.Y.—Lang's Creamery v. City of Niagara Falls, 231 N.Y.S. 368, 224 App.Div. 483, affirmed 167 N.E. 464, 251 N.Y. 343.

9. Minn.—State ex rel. Larson v. City of Minneapolis, 251 N.W. 121, 190 Minn. 138.

Ordinance requiring pasteurization within county
Tex.—Prescott v. City of Borger, Civ. App., 158 S.W.2d 578, error refused.

10. Cal.—La Franchi v. City of Santa Rosa, 65 P.2d 1301, 8 Cal.2d 331, 110 A.L.R. 639—Van Gammeren v. City of Fresno, App., 124 P.2d 621.

11. Cal.—Witt v. Klimm, 274 P. 1039, 97 Cal.App. 131.

12. Tex.—McKenna v. City of Galveston, Civ.App., 113 S.W.2d 606, error dismissed.

13. Ill.—City of Chicago v. Chicago Beverage Co., 22 N.E.2d 708, 372 Ill. 33—Larson v. City of Rockford, 21 N.E.2d 396, 371 Ill. 441.

14. N.C.—State v. Dannenberg, 63 S.E. 946, 150 N.C. 799.

15. N.C.—State v. Dannenberg, supra.

16. Ark.—Kirby v. Paragould, 251 S.W. 374, 159 Ark. 29.
43 C.J. p 372 note 52.

17. Md.—Kimmell v. Westernport, 117 A. 748, 140 Md. 506, 511.
N.Y.—Safee v. Buffalo, 198 N.Y.S. 646, 204 App.Div. 561.
43 C.J. p 372 note 53.

18. N.Y.—Safee v. Buffalo, supra.
43 C.J. p 373 note 54.

19. N.Y.—Safee v. Buffalo, supra.

20. Minn.—State v. Ives, 297 N.W. 563.
43 C.J. p 373 note 58.

Business of selling at wholesale
Ill.—City of Chicago v. Chicago Beverage Co., 22 N.E.2d 708, 372 Ill. 33.

21. Ill.—Westville v. Rainwater, 128 N.E. 492, 294 Ill. 409.

22. Kan.—Monroe v. Lawrence, 24 P. 1113, 44 Kan. 607, 10 L.R.A. 520.

23. Kan.—Monroe v. Lawrence, supra.
43 C.J. p 373 note 63.

24. Kan.—Monroe v. Lawrence, supra.
43 C.J. p 373 note 64.

25. N.Y.—People, on Complaint of Holborow, v. Jacobowitz, 229 N.Y.S. 369, 224 App.Div. 111.

26. N.Y.—People ex rel. Domingo v. French Bottling Works, 180 N.E. 537, 259 N.Y. 4, affirming People, on Complaint of Domingo, v. French Bottling Works, 252 N.Y.S. 950, 234 App.Div. 680.

27. N.Y.—People v. Reicherter, 112 N.Y.S. 936, 128 App.Div. 675.

struction, including, where the rules are statutory, the rule that statutes in pari materia should be construed with a view to harmonizing them and giving effect to both,[28] and including also the rule that every word in a statute is to be given effect if possible.[29] They are to be construed so as to give effect, if possible, to the intent or purpose of their enactment[30] and so as to give effect to the usual and ordinary meaning, at the time of enactment,[31] of the words employed therein.[32] Notwithstanding some authority to the contrary,[33] it is held that they are not to be strictly construed,[34] except to the extent that they are of a penal nature,[35] but instead should be liberally construed.[36] In any event, they should be given a reasonable construction.[37] They should not be narrowed, in their construction, so as to exclude cases clearly within their intent;[38] nor should they be stretched beyond their legitimate scope to cover matters not clearly meant to be included.[39] In case of an ambiguity they should be

28. Mich.—Jasnowski v. Recorder's Ct. Judge, 161 N.W. 907, 195 Mich. 269.
S.D.—State v. Manley, 150 N.W. 291, 34 S.D. 634.
Tex.—Mantel v. State, 117 S.W. 855, 55 Tex.Cr. 456, 131 Am.S.R. 818, followed in Sue Lung v. State, Cr., 117 S.W. 857.
26 C.J. p 764 note 5 [a].

Statutes are not in pari materia where they were not enacted at the same time and each had a separate and distinct purpose in view.—Columbus Packing Co. v. State, 140 N.E. 376, 106 Ohio St. 469, 37 A.L.R. 1525.

29. Mass.—Commonwealth v. Cohen, 146 N.E. 228, 250 Mass. 570.

30. U.S.—Fieldcrest Dairies v. City of Chicago, C.C.A.Ill., 122 F.2d 132, reversing, D.C., 35 F.Supp. 451—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F.Supp. 714.
Cal.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.
Ind.—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind. App. 196.
N.Y.—Noyes v. Landel, 18 N.Y.S.2d 676, affirmed 21 N.Y.S.2d 616, 259 App.Div. 1108, reargument denied 22 N.Y.S.2d 536, 260 App.Div. 827, affirmed 33 N.E.2d 865, 284 N.Y. 563, reargument granted 32 N.E.2d 833, 285 N.Y. 548, affirmed 34 N.E.2d 906, 285 N.Y. 749.
26 C.J. p 764 note 9.

Declared or executed intent

The extent to which the legislature has regulated the milk industry is not to be determined by its sweeping declaration of the power which it intended to give to the commission, but by the language which it used in actually bestowing power on the commission.—Green v. Milk Control Commission of Pennsylvania, 48 Dauph.Co., Pa., 385.

31. U.S.—Fieldcrest Dairies v. City of Chicago, C.C.A.Ill., 122 F.2d 132, reversing, D.C., 35 F.Supp. 451.

32. U.S.—Fieldcrest Dairies v. City of Chicago, supra.
Mass.—Commonwealth v. Cohen, 146 N.E. 228, 250 Mass. 570.
26 C.J. p 764 note 8.

Plain meaning and import must be given by the court to the words of a food law.—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill. App. 39.

33. N.J.—State Board of Milk Control v. Richman Ice Cream Co., 175 A. 796, 117 N.J.Eq. 296.

34. U.S.—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F. Supp. 714—A. O. Andersen & Co. v. U. S., C.C.A.Wash., 284 F. 542.

35. Pa.—Commonwealth v. Crist, 39 Pa.Dist. & Co. 325, 54 York Leg. Rec. 61—Commonwealth v. Drucker, 38 Pa.Dist. & Co. 169, 27 North. Co. 218.
S.C.—Delk v. Liggett & Myers Tobacco Co., 186 S.E. 383, 180 S.C. 436.
26 C.J. p 765 note 13.

36. N.Y.—S. H. Cranston, Inc., v. Department of Health of City of New York, 6 N.Y.S.2d 275, 168 Misc. 749.
26 C.J. p 764 note 9.

The term "restaurant" in the sanitary code of the City of New York is given the broadest possible interpretation.—People, on Complaint of Canniano, v. Kupas, 13 N.Y.S.2d 488, 171 Misc. 480.

37. Cal.—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal. 2d 620.
Minn.—State v. Witt's Market House, 254 N.W. 596, 191 Minn. 425.
26 C.J. p 764 note 9 [b].

38. Tenn.—Jacobs Packing Co. v. Flanery, 151 S.W.2d 1073, 177 Tenn. 546.
26 C.J. p 764 note 10.

Milk control act should not be emasculated by unduly technical construction.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.

Handler

(1) Where milk produced in a certain marketing area was handled in current of interstate commerce, persons engaged continuously in purchasing milk from producers or other handlers, and processing, distributing, and handling milk in such area in competition with all other handlers in area, were "handlers" of milk in current of interstate commerce, so as to be subject to order of secretary of agriculture regulating handlers of milk in such area.—U. S. v. Beck, D.C.Iowa, 36 F.Supp. 307.

(2) A person is a handler within the meaning of such an order where, although he deals in milk produced and sold wholly within the state, about half of the milk produced for sale in the marketing area is actually moved in interstate commerce while being brought to market, and the milk which he handles is sold in the market in active competition with milk brought there in interstate commerce.—U. S. v. Adler's Creamery, C.C.A.N.Y., 107 F.2d 987.

Distributor

Provisions in milk control act defining distributor as meaning any person whether or not such person is a producer or an association of producers, engaged in business of distributing or handling fluid milk, and defining person as meaning an individual, firm, corporation, association, or any other business unit, indicated a legislative intent to include all associations within scope of act. Coöperative marketing associations are "distributors" for their members, and therefore are subject to operation and control of the act.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.

"Whoever" includes a corporation

Mass.—Commonwealth v. Graustein, 95 N.E. 97, 209 Mass. 38.

"Any person"

Shipment by a warehouseman, not a manufacturer or dealer, of adulterated or misbranded articles of food from one state to another was within the Pure Food and Drugs Act forbidding such shipment by "any person."—U. S. v. Buffalo Cold Storage Co., D.C.N.Y., 179 F. 865.

The term "cane sugar", as used in a statute, was construed to include beet sugar.—Curtice Bros. Co. v. Barnard, Ind., 209 F. 589, 126 C.C.A. 411.

The term "common table salt", as used in a statute, was construed to include rock salt.—Curtice Bros. Co. v. Barnard, supra.

39. Ala.—Miller Grain & Commission Co. v. International Sugar

given a construction that will render them intelligible and valid rather than vague and contradictory, or otherwise void.[40] An act relating to a specific article takes precedence over a general statute.[41]

A food law will not have a retroactive effect, unless its express letter or clearly manifested intention requires that it should have such effect.[42] It continues in effect without reference to the continuance of an economic depression.[43]

A state food law does not apply to the governor of a home for federal soldiers established by and operated under an act of congress;[44] but a state milk control act, or a reasonable order or regulation made thereunder by a state milk control board or commission, applies to, and must be obeyed by, a person selling milk in the state, even though he deals with the United States government, as by selling milk for consumption on a military reservation or in a veterans' hospital, or other federal institution.[45] That a food product is prepared by a process which is or has been protected by letter patent of the United States does not prevent it from coming within the operation of laws passed by a state in the exercise of its police powers.[46] A state statute forbidding the shipment of unwholesome articles applies to all shipments of such articles whether intra-state or interstate.[47]

Statutory bond. Where a milk dealer has given a statutory bond guaranteeing payment to producers, recovery may be had on the bond [48] in a proper action [49] wherein there are proper parties [50] and a cause of action is proved [51] or a warrant of attorney to confess judgment, contained in the bond, is exercised.[52] Defendant cannot properly inject results flowing from his own inaction as a defense to a suit on the bond.[53] The principal matter to be litigated in such a suit is whether or not there has been a default in the condition of the bond;[54] and the official bringing suit is not required to give no-

Feed No. 2 Co., 72 So. 368, 197 Ala. 100.

N.J.—State Board of Milk Control v. Richman Ice Cream Co., 175 A. 796, 117 N.J.Eq. 296.

Tex.—Meisner v. State, 232 S.W. 841, 89 Tex.Cr. 547.

26 C.J. p 764 note 11.

The term "distributor," as defined by an act dealing with the stabilization and marketing of fluid milk and cream, refers to distributors of fluid milk and cream, and does not include those who manufacture and sell dairy products.—Ex parte Willing, 86 P.2d 663, 12 Cal.2d 591.

Store or operator thereof

(1) Distributing plants where milk is collected, pasteurized, and distributed by solicitors working on a commission basis are not "stores" within a milk control law or a statute imposing a privilege tax on retailers.—Lee v. Poinsettia Dairy Products, 200 So. 369, 145 Fla. 610.

(2) A person who operates a store from which he regularly sells milk, the average daily sale being from one to one and one-half gallons, and who by a printed sign on front of building occupied by him as a store and residence advertises milk for sale, and who sells milk to the general public, is not a person who sells milk on a "non-commercial basis" within the Milk Control Act, L. 1937 p 247.—McKinney v. State, 199 S.E. 115, 186 Ga. 886.

"Standard milk bottles"

An ordinance requiring that milk and milk products, when sold in quantities of less than one gallon, be delivered in "standard milk bottles," referred to the glass milk bottle in common use, and not to paper containers.—Fieldcrest Dairies v. City of Chicago, C.C.A.Ill., 122 F.2d 132, reversing, D.C., 35 F.Supp. 451.

"Final"

Under milk control act, after first election resulting in a vote against adoption of act in a particular area, designated a milk shed, a second election may be had, since expression in act that declaration of result of any such election shall be "final" merely means that there shall be no judicial interference with declaration of result as made by the board and does not mean that another election shall not be had.—Gibbs v. Milk Control Board of Georgia, 196 S.E. 791, 185 Ga. 844.

40. Cal.—In re Hoffman, 99 P. 517, 155 Cal. 114, 132 Am.S.R. 75.

Mo.—St. Louis v. Kruempeler, 139 S.W. 446, 235 Mo. 710.

41. Mich.—Pierre Viaus Maple Co. v. Bird, 117 N.W. 553, 154 Mich. 73.

42. N.Y.—People v. Wendel, 111 N.E. 846, 217 N.Y. 260, Ann.Cas.1916B 701.

43. Ala.—Taylor v. State ex rel. Alabama State Milk Control Board, 186 So. 463, 237 Ala. 178.

44. U.S.—Ohio v. Thomas, Ohio, 19 S.Ct. 453, 173 U.S. 276, 43 L.Ed. 699, affirming 87 F. 453, 31 C.C.A. 8.

45. Mass.—Milk Control Board v. Gosselin's Dairy, Inc., 16 N.E.2d 41, 301 Mass. 174.

N.J.—Paterson Milk & Cream Co. v. Milk Control Board, 192 A. 838, 118 N.J.Law 383.

Pa.—Penn Dairies v. Milk Control Commission, 26 A.2d 431—Commonwealth v. Rohrer, 37 Pa.Dist. & Co. 410, 45 Lanc.Rev. 553.

46. U.S.—Arbuckle v. Blackburn, Ohio, 113 F. 616, 51 C.C.A. 122, 65 L.R.A. 864 appeal dismissed 24 S.Ct. 148, 191 U.S. 405, 48 L.Ed. 239.

47. N.Y.—People v. Bishopp, 89 N.Y.S. 709, 44 Misc. 12, affirmed 94 N.Y.S.2d 773, 106 App.Div. 266.

48. N.Y.—Pyrke v. Brudno, 278 N.Y.S. 353, 243 App.Div. 493, affirmed 200 N.E. 42, 269 N.Y. 652.

49. **Receivership proceeding** in federal equity court against corporate milk dealer is "proper action" under state statutes for liquidation and distribution of proceeds of bonds to unpaid milk producers; but in such receivership proceeding the fund arising from proceeds of the bond will be administered separate and apart from other funds in the hands of the receivers and solely for the beneficiaries of the security.—Young v. Pequest Dairy, D.C.N.J., 13 F.Supp. 164.

50. N.Y.—Ten Eyck v. Columbia Casualty Co., 284 N.Y.S. 691, 246 App.Div. 867.

Pa.—Commonwealth ex rel. Margiotti v. Ortwein, 28 Pa.Dist. & Co. 350, 43 Dauph.Co. 340.

51. N.Y.—Pyrke v. Continental Casualty Co., 260 N.Y.S. 245, 144 Misc. 801.

52. Pa.—Commonwealth v. Dibble, 41 Pa.Dist. & Co. 206, 50 Dauph. Co. 310.

53. Pa.—Commonwealth ex rel. Margiotti v. Ortwein, 200 A. 859, 132 Pa.Super. 166.

54. N.Y.—Pyrke v. Continental Casualty Co., 260 N.Y.S. 245, 144 Misc. 801.

tice to claimants to file their claims until he has recovered on the bond and has something to distribute.[55] Particular producers, for whose benefit additional security has been given, need not realize on such security before sharing in the distribution of the proceeds of the statutory bond;[56] and, where the proceeds are insufficient to satisfy all claims, the balance owing on each claim may be considered a claim against the general estate of the producer in the hands of receivers for distribution.[57] A particular state statute is construed to limit participation in the proceeds to producers resident in the state.[58]

The bond applies automatically to new prices fixed by order of a board during the effective period of the bond;[59] but it does not apply to transactions between dealers.[60] A statutory citrus dealer's bond is not retroactive and does not cover obligations created before, and existing on, its effective date.[61]

§ 11. Amendment and Repeal of Regulations

General rules are resorted to in determining whether or not there has been an amendment or repeal of a food regulation and, if so, the effect thereof.

An existing statute or ordinance relating to food is repealed by a subsequent one covering the whole of the same subject matter, and intended as a substitute for the former,[62] or, to the extent of the inconsistency, by a subsequent inconsistent one;[63] but repeal by implication is not favored;[64] and the later act will be regarded as merely an additional regulation where it does not cover the same subject matter or is not so repugnant to the earlier statute that both may not be enforced together.[65] The enactment of a pure food law by the legislature does not operate to repeal an existing law authorizing municipal corporations to pass ordinances to promote the public health.[66] The later act may sometimes continue, rather than repeal, the earlier one,[67] or it may continue and extend the earlier act, as amended, for a specified period of time.[68] An amendment does not affect orders previously issued,[69] nor does it necessarily invalidate a petition previously filed and partially acted on, or prevent its use as a basis for a new plan conforming to the amendment.[70] The repeal of a statute requiring a bond does not take away the protection of a bond in reliance on which transactions took place while the statute was in force.[71]

§ 12. License, Inspection, Marking, and Branding

a. License or permit
b. Inspection
c. Marking, branding, or labeling

a. License or Permit

A valid and applicable statute or ordinance relating to a license or permit to manufacture or deal in a designated kind of food is binding and controlling on both a manufacturer or dealer within its terms and the officer, board, or commission charged with duties in respect of the issuance, revocation, or suspension of the license or permit. A refusal or revocation of a license is reviewable.

It is necessary to comply with a valid and applicable statute or ordinance requiring a manufacturer of, or dealer in, certain articles of food,[72] such as bread,[73] citrus fruit,[74] fish,[75] oleomargarine,[76] or renovated butter,[77] to obtain a license and

55. N.Y.—Pyrke v. Continental Casualty Co., supra.

56. N.Y.—Andes Co-op. Dairy Co. v. Baldwin, 189 N.E. 705, 263 N.Y. 578, affirming 266 N.Y.S. 18, 238 App.Div. 726.

57. U.S.—Young v. Pequest Dairy, D.C.N.J., 13 F.Supp. 164.

58. U.S.—Young v. Pequest Dairy, supra.

59. Pa.—Commonwealth ex rel. Margiotti v. Ortwein, 200 A. 859, 132 Pa.Super. 166.

60. N.Y.—Pyrke v. Brudno, 278 N.Y.S. 353, 243 App.Div. 493, affirmed 200 N.E. 42, 269 N.Y. 652.

61. Tex.—Texas Underwriters v. Martinal, Civ.App., 140 S.W.2d 582.

62. D.C.—District of Columbia v. Coburn, 35 App.D.C. 324.
Ind.—State v. Squibb, 84 N.E. 969, 170 Ind. 488.
Mich.—People v. Brill, 78 N.W. 1013, 120 Mich. 42.

63. Cal.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.

64. Colo.—Ferch v. People, 74 P.2d 712, 101 Colo. 471.
26 C.J. p 765 note 18.
Statute held not repealed
Mass.—Commonwealth v. E. E. Wilson Co., 135 N.E. 376, 241 Mass. 406.

65. Mo.—St. Louis v. Kruempeler, 139 S.W. 446, 235 Mo. 710.
26 C.J. p 765 note 19.

66. Ill.—Chicago v. Union Ice Cream Mfg. Co., 96 N.E. 872, 252 Ill. 311, Ann.Cas.1912D 675.

67. Wis.—State v. Beck, 119 N.W. 300, 139 Wis. 37.

68. Ind.—Milk Control Board v. Pursifull, 36 N.E.2d 850.

69. Pa.—Commonwealth ex rel. Margiotti v. Ortwein, 200 A. 859, 132 Pa.Super. 166.

70. Cal.—Ray v. Parker, 101 P.2d 665, 15 Cal.2d 275.

71. Pa.—Commonwealth ex rel. Margiotti v. Ortwein, 200 A. 859, 132 Pa.Super. 166.

72. Pa.—Commonwealth v. Wormser, 7 Pa.Dist. 318.
26 C.J. p 758 note 36.

73. Ala.—American Bakeries Co. v. City of Opelika, 157 So. 206, 229 Ala. 388.

74. Fla.—Mayo v. Polk Co., 169 So. 41, 124 Fla. 534, appeal dismissed Polk Co. v. Mayo, 57 S.Ct. 39, 299 U.S. 507, 81 L.Ed. 376.

75. Tex.—Ex parte Mehlman, 75 S.W.2d 689, 127 Tex.Cr. 257, followed in Greiner v. State, 75 S.W.2d 1110, 127 Tex.Cr. 283.

76. Ga.—Coy v. Linder, 189 S.E. 26, 183 Ga. 583.
Tenn.—Jacobs Packing Co. v. Flanery, 151 S.W.2d 1073, 177 Tenn. 546.
26 C.J. p 758 note 37.

77. Pa.—Commonwealth v. Seiler, 20 Pa.Super. 260.

pay a license fee or tax, or containing like requirements in respect of a manufacturer or seller at wholesale of any article of food, confection, condiment, or drink,[78] or an owner or operator of a restaurant, ice cream parlor, or other place where food or refreshments are served to be eaten on the premises;[79] but there are, of course, cases in which such requirements are not applicable[80] or which fall within an express exemption.[81] A statute or ordinance imposing such requirements is regulatory in nature;[82] it inhibits no one, regardless of his other activities, or of what might be regarded as the principal one, from engaging in the business in question.[83] Where the statute defines a word employed therein, such definition will be accorded effect;[84] but where it does not do so the word must be taken in the sense in which it is commonly understood.[85]

The judicial review of the act of an official in revoking or suspending a license is, when provided for by statute only in general terms, limited to that permissible under the common-law writ of certiorari.[86]

To deal in milk or milk products. The activities of a particular person in the milk industry may not be of such a character as to bring him within a valid statute, ordinance, or other regulation requiring a milk dealer or a dealer in milk products to obtain a license or permit.[87] On the other hand, where he is within the application of such a regulation, he not only must obtain the required license or permit before making further sales,[88] but he is entitled to a license or permit on application therefor, as well as to a continuance thereof, without suspension or revocation, for the prescribed term, and to a renewal on the expiration of the term, unless the lawfully prescribed conditions to issuance of the license or permit are not fulfilled or there is adequate legal ground for denial, suspension, or revocation[89] and the proceedings leading

78. Ill.—City of Chicago v. Chicago Beverage Co., 22 N.E.2d 708, 372 Ill. 33—City of Chicago v. Great Atlantic & Pacific Tea Co., 282 Ill. App. 337.

79. D.C.—District of Columbia v. Pearson, 271 F. 377, 50 App.D.C. 303.
N.Y.—People, on Complaint of Canniano, v. Kupas, 13 N.Y.S.2d 488, 171 Misc. 480.

80. Tenn.—Goodman v. Jacobs Packing Co., 126 S.W.2d 309, 174 Tenn. 399.

81. Wis.—Janke v. City of Milwaukee, 231 N.W. 261, 202 Wis. 214.

82. Tex.—Texas Underwriters v. Martinal, Civ.App., 140 S.W.2d 582.

83. Colo.—In re Interrogatories of the Governor on Chapter 118, Sess. Laws 1935, 52 P.2d 663, 97 Colo. 587.

84. Tenn.—Jacobs Packing Co. v. Flanery, 151 S.W.2d 1073, 177 Tenn. 546.

85. Tex.—Ex parte Mehlman, 75 S.W.2d 689, 127 Tex.Cr. 257, followed in Greiner v. State, 75 S.W.2d 1110, 127 Tex.Cr. 283.

Building
In "fruit and vegetable ordinance" requiring higher license fees for nonestablished wholesale dealers than for established dealers, and defining "established dealer" as one occupying a regularly established building, store, or warehouse and having other qualifications, the word "building" was used in its most restricted sense, not including stalls and open booths, and hence persons operating stalls in market were not entitled to license as "established dealers."—Netter v. Scholtz, 138 S.W.2d 951, 282 Ky. 493.

86. Fla.—Mayo v. Winter Haven Packing Co., 3 So.2d 400.

87. Ind.—Milk Control Board v. Pursifull, 38 N.E.2d 246.
Mich.—People v. Powell, 274 N.W. 372, 280 Mich. 699, 111 A.L.R. 721.
N.Y.—People v. Shoemaker, 239 N.Y.S. 71, 228 App.Div. 314, reversing 236 N.Y.S. 70, 134 Misc. 542.

88. U.S.—Miller v. Williams, D.C. Md., 12 F.Supp. 236.
D.C.—Leaman v. District of Columbia, 55 F.2d 1020, 60 App.D.C. 395.
Ind.—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind. App. 196.
Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 276 Ky. 736.
N.Y.—Dusinberre v. Noyes, 33 N.Y.S.2d 646, 263 App.Div. 445—Baldwin v. Burdick, 276 N.Y.S. 675, 243 App.Div. 250—Baldwin v. Lenahan, 293 N.Y.S. 742, 161 Misc. 711.
Pa.—Milk Control Board v. Stafford, 29 Pa.Dist. & Co. 506, 19 Erie Co. 68—Milk Control Board v. Bonsall, 27 Del.Co. 111—Commonwealth v. Licini, 18 Leh.L.J. 238, affirmed 10 A.2d 923, 138 Pa.Super. 277.
Wis.—State ex rel. Department of Agriculture and Markets v. Gagnon, 296 N.W. 627, 237 Wis. 617.
Injunction to prevent selling without license see infra § 29.

89. Iowa.—City of Des Moines v. Fowler, 255 N.W. 880, 218 Iowa 504.
N.H.—Whitney v. Watson, 157 A. 78, 85 N.H. 238.
N.J.—Sheffield Farms Co. v. Seaman, 177 A. 372, 114 N.J.Law 455—Urban v. Taylor, 188 A. 232, 14 N.J. Misc. 887.
N.Y.—Dusinberre v. Noyes, 31 N.E.2d 34, 284 N.Y. 304, reversing 20 N.Y.S.2d 323, 259 App.Div. 582—Lang's Creamery v. City of Niagara Falls, 167 N.E. 464, 251 N.Y. 343, affirming 231 N.Y.S. 368, 224 App.Div. 483—In re Morris, 219 N.Y.S. 143, 128 Misc. 280, affirmed Morris v. Department of Health of City of New York, 220 N.Y.S. 890, 219 App.Div. 810.
Pa.—Simco Sales Service of Pennsylvania v. Brackin, 26 A.2d 323.
Wis.—Golden Harvest Dairy Co. v. Department of Agriculture and Markets of Wisconsin, 286 N.W. 865, 232 Wis. 240—Buhler v. Department of Agriculture and Markets, 280 N.W. 367, 229 Wis. 133.

Temporary license granted on condition may be revoked for failure to perform the condition.—Karsten Dairies v. Baldwin, 276 N.Y.S. 659, 243 App.Div. 656, motion denied 196 N.E. 615, 267 N.Y. 634, and appeal dismissed 199 N.E. 674, 269 N.Y. 566.

Violation of statute or order
(1) A violation of a statute is ground for revocation or denial of an application for renewal.
Kan.—Limpp v. Dodge, 73 P.2d 1001, 146 Kan. 948.
N.J.—Reck Milk Co. v. Humphreys, 197 A. 279, 119 N.J.Law 526.
N.Y.—Linden Farms Milk & Cream Co. v. Ten Eyck, 284 N.Y.S. 721, 246 App.Div. 869, appeal dismissed 3 N.E.2d 473, 271 N.Y. 661.

(2) Also violation of an order of a milk board or commission is ground for denial of an application for renewal.

to, and culminating in, the denial, revocation, or spension are not fatally defective.[90] Under a rticular statute, a person within its terms is enled to a license in the first instance unless a complaint is filed against its issuance.[91] The action of an officer or board in refusing or revoking a license is reviewable[92] and may be annulled where it is not based on a sound and legal reason for

J.—Reck Milk Co. v. Humphreys, supra.

.—Milk Control Commission v. Paulishak. 40 Pa.Dist. & Co. 563.

(3) However, the fact that reornized corporation which applied r license to engage in retail milk siness employed drivers who were ıployed by old corporation and re parties to violations of state and market orders while emɔyed by the old corporation was t ground for denial of license to e reorganized corporation, in abnce of finding that the drivers re guilty of any violations after e reorganization, after which drivs were given positive orders to mply strictly with laws and orders the department of agriculture and ırkets.—National Guernsey Dairy State ex rel. Department of Agrilture and Markets, 286 N.W. 868, 2 Wis. 248.

(4) An application for a license is operly denied where applicant has ld milk without a license in violan of law.—Dusinberre v. Noyes, N.Y.S.2d 646, 263 App.Div. 445—ynolds v. Noyes, 32 N.Y.S.2d 1, 3 App.Div. 907.

Public policy is not ground for resal.—Dusinberre v. Noyes, 33 N.Y. 2d 646, 263 App.Div. 445.

. N.J.—Paterson Milk & Cream Co. v. Milk Control Board, 192 A. 838, 118 N.J.Law 383.

is.—Buhler v. Department of Agriculture and Markets, 280 N.W. 367, 229 Wis. 133.

Prior proceeding in another license ar is not a bar where no order ıs entered therein.—Nelson v. nnsylvania Milk Control Commisɔn, 37 Pa.Dist. & Co. 56, 55 Montg. . 94.

An order requiring milk company show cause why its milk dealer's ense should not be revoked beuse of sales to unlicensed dealers fficiently apprised company of the ecific complaint against it.—Application of Linden Farms Milk & 'eam Co., 15 N.Y.S.2d 658, 257 App. iv. 737.

earing and evidence

(1) Health board issuing license sell milk may prescribe uniform ıd reasonable rules respecting the me, place, and extent of hearings ı applications and fixing the minium requirements as to the characr and quantity of evidence, such gulations not being the imposition additional conditions on an applint, to receive a license, but being ermissible procedural rules incidental to the discharge of the duties imposed on it.—Whitney v. Watson, 157 A. 78, 85 N.H. 238.

(2) Petitioner may not complain of act of commissioner of agriculture and markets in fixing place and time for holding of hearing unless such determination is arbitrary or capricious.—Linden Farms Milk & Cream Co. v. Ten Eyck, 284 N.Y.S. 721, 246 App.Div. 869, appeal dismissed 3 N. E.2d 473, 271 N.Y. 661.

(3) However, the proceeding is jurisdictionally defective where it is held a shorter time after the applicant's receipt of notice than that prescribed by statute.—Dairy Distributers v. Department of Agriculture and Markets, 280 N.W. 400, 228 Wis. 418.

(4) Also, difficulty in establishing by proof classification of milk purchased by dealer with regard to price fixing does not justify milk control board in disregarding fundamental laws of evidence or failure to prove by competent evidence violation of milk control act in proceedings for revocation of license.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

(5) Statute providing for revoking milk dealer's license requires hearing before impartial tribunal, confrontation of licensee by complainant, licensee's representation by counsel, and that he have opportunity to produce witnesses.—Grandview Dairy v. Baldwin, 269 N.Y.S. 116, 239 App.Div. 640.

(6) A single member of state milk control board is authorized by statute to hear and record evidence in proceedings for revocation of milk producer-distributor's license and submit such evidence to all members of board for final determination.—Thompson v. Alabama State Milk Control Board, 1 So.2d 381, 241 Ala. 100.

Findings generally

(1) An applicant is entitled to findings which will show particular matter determined against him.—Elite Dairy Products v. Ten Eyck, 3 N.E.2d 606, 271 N.Y. 488, modifying 288 N.Y.S. 162, 247 App.Div. 443.

(2) Determination of commissioner of agriculture and markets revoking milk dealer's license would be annulled, where commissioner's proposed findings were mere recitals of evidence and did not state facts found.—Beyerdale Dairy v. Ten Eyck, 292 N.Y.S. 580, 249 App.Div. 904.

Judgment or finding as to money

(1) The board has no authority to render a personal judgment against the dealer for the amount of an underpayment to a producer and to order his license revoked if the judgment is not paid.

Ala.—Ex parte Homewood Dairy Products Co., 3 So.2d 58, 241 Ala. 470.

N.Y.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

(2) However, it may make a finding as to the amount which should be paid and order the license revoked if it is not paid.—Ex parte Homewood Dairy Products Co., supra.

91. Cal.—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.

92. Ala.—Thompson v. Alabama State Milk Control Board, 1 So.2d 381, 241 Ala. 100.

N.Y.—Elite Dairy Products v. Ten Eyck, 3 N.E.2d 606, 271 N.Y. 488, modifying 288 N.Y.S. 162, 247 App. Div. 443.

Pleadings, affidavits, return, and issues

(1) Where milk dealer's license was canceled by commissioner of agriculture because of price cutting, attaching to petition to review commissioner's determination affidavit setting forth that dealer was being furnished milk by dairy at a price satisfactory to dealer and dairy was not improper, notwithstanding affidavit was extrinsic to record on which commissioner based his determination, since, in so far as dealer might be entitled to mandamus to compel commissioner to reinstate license, affidavit might be material as showing why commissioner's action was illegal.—Marian Creamery Corporation v. Noyes, 3 N.Y.S.2d 5, 254 App.Div. 618.

(2) Where applicant for milk dealer's license sought a review of denial of application by certiorari, applicant was entitled to have findings of fact stricken from return of commissioner of agriculture and markets, where findings were of date subsequent to that of denial of application.—Highland Farms v. Ten Eyck, 293 N.Y.S. 761, 250 App.Div. 793.

(3) A rule on defendant to show cause why its answer should not be stricken off was discharged notwithstanding the answer was not filed within the time required by statute.—Freeman v. Pennsylvania Milk Control Board, 18 Leh.L.J. 199.

(4) Dairyman who failed to appear at hearing of milk control

preventing an applicant or licensee from engaging in a business which is otherwise lawful;[93] but the conclusion of the officer or board should not be disturbed where it is reasonably supported by findings of requisite facts and such findings are in turn supported by substantial evidence.[94] The officer or board is vested with discretion,[95] at least in determining whether the requisite facts have been shown,[96] and to the extent that the action or determination is discretionary it will not be reviewed except for an arbitrary and capricious exercise thereof [97] or lack of any scope for the reasonable exercise thereof in the manner complained of.[98] The court, on annulling the officer's determination, will not direct the officer to issue a license where the record does not conclusively establish that the applicant is entitled thereto.[99] Under statutory authority, it may, in a proper case, remit the record to the officer, board, or commission for the taking of further testimony.[1] Where the period of the suspension of a license is unreasonably long under the circumstances, the court will reduce it.[2]

A blanket license issued to the trade in general should not be so formulated as to be beyond the power delegated by statute to the official issuing it.[3]

A license which by its terms is limited to a restricted territory cannot be correctly interpreted to cover additional territory;[4] but where an extension to cover other territory has been granted without an application therefor, the licensee has no ground for complaint.[5] A denial of an application for extension or modification of a license in respect of territory or other matters may be proper on the showing made;[6] but it will be annulled where it is arbitrary.[7]

An action to restrain an official from canceling a license is premature where the official is merely conducting a hearing and the license has not been, and may not be, revoked;[8] but such a procedural objection is purely formal and not substantial, in a suit to restrain the official from enforcing a blanket license against plaintiff, where the official form-

board or to appeal from its findings and order fixing milk prices was thereby precluded on appeal from revocation of his milk dealer's license from complaining that board had apparently failed to make definite findings of fact, especially in view of his admission that facts found were correct.—Rohrer v. Milk Control Board, 186 A. 336, 322 Pa. 257.

(5) On appeal from decision of court of common pleas sustaining order of milk control board revoking milk dealer's license, milk dealer was not entitled to raise issues not presented to court of common pleas, in view of express statutory provision and general rule that superior court will not consider law questions not raised in lower court.—Eisenhart v. Pennsylvania Milk Control Board, 190 A. 405, 125 Pa.Super. 483.

There is no right to jury trial on certiorari.—Ex parte Homewood Dairy Products Co., 3 So.2d 58, 241 Ala. 470.

93. N.Y.—Elite Dairy Products v. Ten Eyck, 3 N.E.2d 606, 271 N.Y. 488, modifying 288 N.Y.S. 162, 247 App.Div. 443.

94. N.Y.—Dusinberre v. Noyes, 31 N.E.2d 34, 284 N.Y. 304, reversing 20 N.Y.S.2d 323, 259 App.Div. 582.
Wis.—Gagnon v. Department of Agriculture and Markets, 286 N.W. 549, 232 Wis. 259.

If supported by any credible evidence, the findings of department of agriculture and markets will not be disturbed.—Golden Harvest Dairy Co. v. Department of Agriculture and Markets of Wisconsin, 286 N.W. 865, 232 Wis. 240.

Evidence held sufficient

(1) To support finding.—Nelson v. Pennsylvania Milk Control Commission, 37 Pa.Dist. & Co. 56, 55 Montg. Co. 94.

(2) To support conclusions.—Application of Linden Farms Milk & Cream Co., 15 N.Y.S.2d 658, 257 App. Div. 737.

Evidence held insufficient

(1) To sustain finding.—National Guernsey Dairy v. State ex rel. Department of Agriculture and Markets, 286 N.W. 868, 232 Wis. 248.

(2) To support revocation of license.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

95. Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
N.Y.—Application of Downing, 17 N.Y.S.2d 539, 258 App.Div. 998—Application of Purity Farms, 26 N.Y.S.2d 34, 175 Misc. 984.

96. N.Y.—Dusinberre v. Noyes, 31 N.E.2d 34, 284 N.Y. 304, reversing 20 N.Y.S.2d 323, 259 App.Div. 582.

97. Ala.—Walker v. City of Birmingham, 112 So. 823, 216 Ala. 206.
N.Y.—Silverman v. Department of Health of City of New York, 300 N.Y.S. 979, 252 App.Div. 678—Application of Purity Farms, 26 N.Y. S.2d 34, 175 Misc. 984.

98. N.Y.—Stracquadanio v. Department of Health of City of New York, 32 N.E.2d 806, 285 N.Y. 93, affirming 20 N.Y.S.2d 965, 259 App. Div. 994, affirming 20 N.Y.S.2d 964, appeal denied 21 N.Y.S.2d 611, 259 App.Div. 1073.

99. N.Y.—Elite Dairy Products v. Ten Eyck, 3 N.E.2d 606, 271 N.Y. 488, modifying 288 N.Y.S. 162, 247 App.Div. 443.

1. Pa.—Nelson v. Pennsylvania Milk Control Commission, 37 Pa.Dist. & Co. 56, 55 Montg.Co. 94—Levengood v. Eisaman, 36 Pa.Dist. & Co. 184.

2. Pa.—Wolfe v. Milk Control Commission, 40 Pa.Dist. & Co. 687, 23 Erie Co. 337.

3. U.S.—Royal Farms Dairy v. Wallace, D.C.Md., 8 F.Supp. 975.

4. N.Y.—Crowley's Milk Co. v. Ten Eyck, 1 N.E.2d 119, 270 N.Y. 328, affirming 283 N.Y.S. 166, 246 App. Div. 654.

5. N.Y.—Crowley's Milk Co. v. Ten Eyck, supra.

6. N.Y.—Application of Dellwood Dairy Co., 32 N.Y.S.2d 411, 263 App.Div. 923, appeal denied 34 N.Y.S.2d 268, 263 App.Div. 1029—Application of Kraft Cheese Co., 30 N.Y.S.2d 920, 263 App.Div. 761—Sheffield Farms Co. v. Ten Eyck, 299 N.Y.S. 340, 252 App.Div. 825—Karsten Dairies v. Baldwin, 276 N.Y.S. 659, 243 App.Div. 656, motion denied 196 N.E. 615, 267 N.Y. 634, and appeal dismissed 199 N.E. 674, 269 N.Y. 566.

7. N.Y.—Begent v. Noyes, 22 N.Y.S. 2d 129, 260 App.Div. 231, appeal dismissed 30 N.E.2d 485, 284 N.Y. 229.

8. N.Y.—Co-operative Dairymen of Fraser v. Ten Eyck, 286 N.Y.S. 351, 158 Misc. 726.

ally and definitely takes the position that plaintiff is subject to the license and has violated it, and various people in the trade have been warned not to deal with plaintiff as a violator of the license;[9] and where the license is not applicable to plaintiff he is not obliged to exhaust administrative procedure before bringing suit.[10]

A license fee accompanying an application may not, on denial of the application, be recovered back from an official where, under the statutes, the fee is absorbed in a general fund, the official has no authority to repay the applicant, and any duty to make reimbursement is the duty of the state.[11]

b. Inspection

The courts accord proper construction and effect to food inspection laws.

Provided they have not been repealed,[12] valid statutes, ordinances, and rules and regulations having the force of law, relating to the inspection of meats or other designated articles of food, or of the premises where they are manufactured, prepared, or sold,[13] and requiring the payment of an inspection fee by the producer or dealer,[14] or otherwise relating to payment of the cost of inspection,[15] will be given effect to the extent that, as properly construed, they are applicable. So too an express exemption in an inspection statute or ordinance will, when applicable, be accorded effect;[16] and a limitation of the exemption, not found in the statute or ordinance, will not be read into it.[17] There is no right to recover back market inspection fees which, although excessive, have been paid under an existing ordinance and expended for public purposes.[18]

c. Marking, Branding, or Labeling

Statutes relating to the marking, branding, or labeling of articles of food, or the containers thereof, are construed by the courts and, as so construed, are or are not given effect accordingly as they are or are not applicable.

Federal[19] and state[20] statutes relating to the marking, branding, or labeling of articles of food, or the containers thereof, have been construed and, as so construed, accorded or not accorded effect accordingly as they were or were not applicable, although the question, considered infra § 23, most frequently arising under such statutes is what constitutes a misbranding in violation thereof. State statutes of this nature are deemed not to refer to cases of private consumption of food, but rather to deal with articles or packages as put into, or sold in, commerce and to refer to labels used in marketing;[21] and, although they may disclose an intent to impose the duty of marking or labeling on the manufacturer,[22] they do not require him to perform this duty until the processes of manufacture are complete.[23] Some of the statutes, in their use of the words "mark" and "label," do not manifest an intent to make any particular distinction between them.[24] Statutes requiring a statement on a con-

9. U.S.—Royal Farms Dairy v. Wallace, D.C.Md., 8 F.Supp. 975.

10. U.S.—Royal Farms Dairy v. Wallace, supra.

11. N.Y.—Samuel Adler, Inc. v. Noyes, 32 N.E.2d 781, 285 N.Y. 34, reversing 18 N.Y.S.2d 253, 259 App. Div. 776, appeal denied 20 N.Y.S.2d 414, 259 App.Div. 941.

12. Ark.—Coleman v. City of Little Rock, 88 S.W.2d 58, 191 Ark. 844.

Office of meat and milk inspector held impliedly abolished

Ky.—Fisher v. City of Paducah, 76 S.W.2d 21, 256 Ky. 300.

13. Mo.—Coca-Cola Bottling Co. v. Mosby, 233 S.W. 446, 289 Mo. 462.

N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.

N.Y.—People, on Complaint of Ringler, v. Zeleznik, 193 N.E. 638, 266 N.Y. 59, reversing 271 N.Y.S. 1055, 242 App.Div. 608.

26 C.J. p 758 notes 39, 43, p 759 note 45.

14. Cal.—Ex parte McKeon, 49 P.2d 618, 9 Cal.App.2d 223.

26 C.J. p 758 note 41.

15. **Negative provision**

In a milk control act directing the state milk control board to coöperate with any city, county, or state health authorities concerning enforcement of sanitary regulations in any marketing area, provided board shall not permit or authorize any sums to be checked off from the funds of any distributor or producer to be used to pay for cost of making inspection for the health department of any municipality, the proviso should not be given a distorted meaning wholly at variance with the spirit of the statute where there is a logical interpretation in harmony with the purpose of the law; the statute is a marketing measure and the proviso prevents the diversion of check-off funds from marketing to sanitary purposes.—Sullivan v. Catt, Ind., 38 N.E.2d 568.

16. Colo.—Burtis v. City of Montrose, 247 P. 186, 79 Colo. 475.

17. Colo.—Burtis v. City of Montrose, supra.

18. La.—Oubre v. City of Donaldsonville, 131 So. 293, 171 La. 443.

19. U.S.—U. S. v. Lee, C.C.A.Wis., 131 F.2d 464, reversing, D.C., 40 F. Supp. 801.

26 C.J. p 758 note 43, p 759 note 44.

Provision restricting applicability of statute to original unbroken packages, as against a receiver of a misbranded article of food shipped from another state, does not apply as against the shipper.—U. S. v. Great Atlantic & Pacific Tea Co., C. C.A.Vt., 92 F.2d 610, 113 A.L.R. 961.

Provision directing exercise of administrative power is deemed not to be a part of the definition of an offense.—U. S. v. Centralia Dairy Co., D.C.Wash., 60 F.2d 141.

20. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.

N.Y.—People v. Coney Island Soda Water Co., 256 N.Y.S. 639, 142 Misc. 919.

26 C.J. p 759 note 45.

21. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.

Cal.—Ex parte Hayes, 25 P.2d 230, 134 Cal.App. 312.

22. Pa.—Commonwealth v. Crist, 39 Pa.Dist. & Co. 325, 54 York Leg. Rec. 61.

23. Ohio.—Bitner v. State, 134 N.E. 451, 103 Ohio St. 532.

24. Cal.—Graham v. Justice's Court of Colusa Judicial Tp., 67 P.2d 127, 20 Cal.App.2d 328.

tainer or package of the weight or quantity of its contents are considered infra § 14.

§ 13. Taking Samples for Analysis

Statutory provisions are controlling as to the rights and duties of officers and sellers in respect of the taking of samples of suspected foods or food products by officers for the purpose of analysis.

Effect is accorded statutes providing for the taking of samples of suspected merchandise by certain officers, for the purpose of analysis, and making it compulsory on sellers to furnish such samples on demand by the proper officer and compliance by him with the statutory formalities;[25] but the sample must not be taken from a part of the article offered for sale which does not fairly represent the whole;[26] and a mere agent of the officer, acting without authority, cannot compel a dealer to give a sample against his will.[27] When so provided by statute, the taker of a sample for analysis must divide it, on demand, or in some cases without demand, into a specified number of parts, or take duplicate samples, and deliver one of such parts or duplicate samples to the seller;[28] but in the absence of a statutory provision making it the duty of the taker of a sample for analysis to leave a part of it with the seller it seems that the seller cannot compel the prosecution to furnish him with such a part.[29] In the absence of statutory provision therefor, payment for the sample taken is not a condition precedent to the right to demand a sample.[30]

§ 14. Quantity and Price

To the extent that, as properly construed, they are applicable, valid statutes, ordinances, or orders relating to the quantity or price of articles of food sold must be complied with; but, by virtue of express provision, some variation or tolerance is generally permissible in respect of quantity.

It is necessary to comply with valid and applicable statutes or ordinances prescribing the weight of loaves of bread sold[31] or requiring, in the case of all or certain articles of food sold in containers or package form, the actual or net quantity of the contents to be stated or marked on the outside of the container or package in terms of weight, measure, or numerical count;[32] but where the statutes or ordinances provide, as they generally do, for variations or tolerances, it is not necessary that the actual weight be the same as that marked on the wrapper, container, or package;[33] and if they provide for the establishment of variations or tolerances by rules and regulations by a designated official it is mandatory on him to prescribe such rules and regulations.[34] Statutes or ordinances of this character must be given a proper and reasonable construction.[35] By virtue of an exemption or exception therein, the statute may not apply in respect of transactions between a wholesaler and a retailer;[36] and a statute making it an offense for dealers in certain articles of food to refuse to sell them in small quantities may have only a limited application.[37]

Price of milk. A valid milk marketing or price fixing order has the force of a statute[38] and must be complied with,[39] in respect of matters within its

25. Mass.—Commonwealth v. Ryberg, 58 N.E. 155, 177 Mass. 67.
26 C.J. p 759 note 47.

26. N.Y.—People v. Gilmor, 77 N.Y.S. 273, 73 App.Div. 483—People v. Wiard, 69 N.Y.S. 1142, 61 App.Div. 612, affirmed 63 N.E. 1120, 170 N.Y. 590.
26 C.J. p 760 note 48.

27. Mass.—Commonwealth v. Smith, 6 N.E. 89, 141 Mass. 135.

28. D.C.—Weigand v. District of Columbia, 22 App.D.C. 557.
N.Y.—People v. Weaver, 101 N.Y.S. 961, 116 App.Div. 594.
26 C.J. p 760 note 53.

29. Mich.—People v. Worden Grocer Co., 77 N.W. 315, 118 Mich. 604.

30. La.—State v. Dupaquier, 15 So. 502, 46 La.Ann. 577, 49 Am.S.R. 334, 26 L.R.A. 162.
26 C.J. p 760 note 52.

31. Wis.—M. Carpenter Baking Co. v. Department of Agriculture and Markets, 257 N.W. 606, 217 Wis. 196.

32. Ill.—Chicago v. Bowman Dairy Co., 84 N.E. 913, 234 Ill. 294, 123 Am.S.R. 100, 17 L.R.A.,N.S., 684, 14 Ann.Cas. 700.
26 C.J. p 760 note 56.

33. Vt.—State v. Gladstone, 22 A.2d 490, 112 Vt. 233.

34. Tex.—Ex parte Humphrey, 244 S.W. 822, 92 Tex.Cr. 501.

35. Ill.—Chicago v. Schweinfurth, 174 Ill.App. 64.

Liberal construction in favor of purchaser

Statute prohibiting delivery of less quantity than represented was intended primarily for protection of purchasers of food, and should be liberally construed to protect them.—Abounader v. Strohmeyer & Arpe Co., 215 N.Y.S. 702, 217 App.Div. 43, affirmed 154 N.E. 309, 243 N.Y. 458.

Where statute defines a term employed therein, the popular meaning attached to the term should not be substituted for the statutory definition.—M. Carpenter Baking Co. v. Department of Agriculture and Markets, 257 N.W. 606, 217 Wis. 196.

36. Pa.—Commonwealth ex rel. v. Armour & Co., 30 Pa.Dist. & Co. 374.

37. Mass.—Commonwealth v. Woods, 113 N.E. 837, 225 Mass. 78.
26 C.J. p 764 note 1–3 [a].

38. N.Y.—Muller Dairies v. Baldwin, 274 N.Y.S. 975, 242 App.Div. 296.

39. U.S.—H. P. Hood & Sons v. U. S., Mass., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F. Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032.
Cal.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.
N.Y.—Muller Dairies v. Baldwin, 274 N.Y.S. 975, 242 App.Div. 296—Noyes v. Landel, 18 N.Y.S.2d 676,

operation,[40] by a person subject thereto;[41] but a particular order, or the statute under which it is made, may not be applicable to certain persons,[42] products,[43] or contracts;[44] and a person who is not within the order, so as to be bound to comply therewith, is not entitled to the benefits thereof.[45] A broker or jobber in milk may be subject to, and bound to comply with, a particular order when he buys from a coöperative,[46] but not when he buys from a handler of milk who is not a coöperative.[47] A proper construction should be given a statute or order relating to the price of milk [48] and in arriving at that construction it may be proper or necessary to determine the meaning of a particular term or terms employed in the statute or order.[49]

In view of statutory provision, 7 U.S.C.A. § 608

affirmed 21 N.Y.S.2d 616, 259 App. Div. 1108, reargument denied 22 N.Y.S.2d 536, 260 App.Div. 827, affirmed 33 N.E.2d 865, 284 N.Y. 563, reargument granted 32 N.E.2d 833, 285 N.Y. 548, affirmed 34 N.E.2d 906, 285 N.Y. 749.

Pa.—Zeuger Milk Co. v. School Dist. of Pittsburgh, 5 A.2d 885, 334 Pa. 277—Penn Cress Ice Cream Co. v. Stites, 51 Dauph. 305.

Strict compliance with all the requirements of administrative regulations in connection with administration of milk equalization pool under the Agricultural Marketing Agreement Act of 1937, is essential to qualify one to receive the benefits thereunder.—Vogt's Dairies v. Wickard, D.C.N.Y., 45 F.Supp. 94.

Inequality in enforcement of milk price fixing orders of milk control board does not constitute defense against effort to enforce orders against dealer by whom orders were violated.—Royce v. Rosasco, 287 N.Y.S. 692, 159 Misc. 236.

Contract providing for rebate of part of price of milk was illegal and void.—Bossom Dairy Co. v. Rockdale Creamery Corporation, 16 N.Y.S.2d 720, 258 App.Div. 961, affirming 13 N.Y.S.2d 635, 171 Misc. 657.

Recovery on contract violating order see supra § 2.

40. **Operation unaffected by decision**

A decision of court of appeals, on appeal in proceeding to review milk marketing order, which sustained the order as valid but directed the commissioner of agriculture to determine breeders' association's claim for differential with respect to Guernsey milk, did not remove Guernsey milk from operation of the order until determination of the claim for differential, in view of statute providing that equalization shall include milk of all grades and produced by all breeds of cows.—Noyes v. Landel, 33 N.E.2d 865, 284 N.Y. 563, affirming 21 N.Y.S.2d 616, 259 App. Div. 1108, affirming 18 N.Y.S.2d 676, reargument denied 22 N.Y.S.2d 536, 260 App.Div. 827, affirmed 34 N.E.2d 906, 285 N.Y. 749, reargument and stay granted 32 N.E.2d 833, 285 N.Y. 548.

41. U.S.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F. Supp. 534, rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S. Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Corporative Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L. Ed. 526—Elm Spring Farm v. U. S., C.C.A.Mass., 127 F.2d 920, modifying, D.C., U. S. v. Elm Spring Farm, 38 F.Supp. 508—U. S. v. H. P. Hood & Sons, D.C.Mass., 26 F. Supp. 672, certiorari granted H. P. Hood & Sons v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, Whiting Milk Co. v. U. S., 59 S.Ct. 647, 306 U.S. 627, 83 L.Ed. 1031, and Brannon v. U. S., 59 S.Ct. 791, 306 U.S. 629, 83 L.Ed. 1032, affirmed H. P. Hood & Sons v. U. S., 59 S.Ct. 1019, 307 U.S. 588, 83 L.Ed. 1478, and Green Valley Creamery v. U. S., 101 F.2d 342.

Mass.—Milk Control Board v. Gosselin's Dairy, 16 N.E.2d 641, 301 Mass. 174.

N.Y.—Noyes v. Landel, 33 N.E.2d 865, 284 N.Y. 563, affirming 21 N.Y.S. 2d 616, 259 App.Div. 1108, affirming 18 N.Y.S.2d 676, reargument denied 22 N.Y.S.2d 536, 260 App. Div. 827, affirmed 34 N.E.2d 906, 285 N.Y. 749, reargument and stay granted 32 N.E.2d 833, 285 N.Y. 548.

Vt.—State v. Auclair, 4 A.2d 107, 110 Vt. 147.

42. U.S.—Elm Spring Farm v. U. S., C.C.A.Mass., 127 F.2d 920, modifying, D.C., U. S. v. Elm Spring Farm, 38 F.Supp. 508.

Ala.—Taylor v. State ex rel. Alabama State Milk Control Board, 186 So. 463, 237 Ala. 178.

43. U.S.—Roloff v. Perdue, D.C.Iowa, 33 F.Supp. 513.

44. **Consignment contracts**

Pa.—Green v. Milk Control Commission, 16 A.2d 9, 340 Pa. 1, affirming 48 Dauph.Co. 385, and certiorari denied Milk Control Commission of Commonwealth of Pennsylvania v. Green, 61 S.Ct. 826, 312 U. S. 708, 85 L.Ed. 1140, and followed in Harrisburg Dairies v. Milk Control Commission, Pa., 16 A.2d 12.

45. U.S.—Vogt's Dairies v. Wickard, D.C.N.Y., 45 F.Supp. 94.

46. U.S.—U. S. v. Dake, D.C.N.Y., 42 F.Supp. 833.

47. U.S.—U. S. v. Dake, supra.

48. **Requirement that uniform pool price be paid** obviously means that each producer shall receive the same price for the same class of milk as fixed by the board.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.

49. **"Basic average"** is an expression not defined in a particular milk control act, but it has a well-known meaning in the milk industry, it being a device developed in coöperative effort to meet the evil of uncontrolled surplus.—Savage v. Martin, supra.

"Buy," "sell," "purchase," or "purchased"

(1) Since the words "buy," "sell," and "purchase," are not defined in the Milk Control Law of 1937, P.L. 417, 31 P.S. § 700j–101 et seq, they are to be interpreted as an ordinary man would use them; to interpret such words to mean "consignment," would produce an oddity or strained meaning which the legislature did not contemplate.—Green v. Milk Control Commission of Pennsylvania, 48 Dauph.Co. 385, affirmed 16 A.2d 9, 340 Pa. 1, followed in Harrisburg Dairies v. Milk Control Commission, 16 A.2d 12, certiorari denied Milk Control Commission of Commonwealth of Pennsylvania v. Green, 61 S.Ct. 826, 312 U.S. 708, 85 L.Ed. 1140.

(2) The word "purchased" means acquired for marketing.—U. S. v. Rock Royal Co-op., N.Y., 59 S.Ct. 993, 307 U.S. 533, 83 L.Ed. 1446, modifying, D.C., 26 F.Supp. 534, rehearing denied 60 S.Ct. 66, 308 U.S. 631, 84 L. Ed. 526, Dairymen's League Cooperative Ass'n v. Rock Royal Co-op., 60 S.Ct. 66, 308 U.S. 631, 84 L.Ed. 526, and Metropolitan Cooperative Bargaining Agency v. Rock Royal Co-op., 60 S.Ct. 67, 308 U.S. 631, 84 L.Ed. 526.

Different kinds of milk

(1) Under statutes relating to stabilization and marketing of fluid milk and fluid cream and defining fluid milk as milk produced in conformity with quality standards prescribed for "market milk," which is defined as milk supplied to the consumer in the natural fluid state or prepared for human consumption without being converted into any other form or product as distinguished from "manufacturing milk," which is not defined, "manufacturing milk" comprises and includes all milk supplied or prepared for human consumption except market or fluid milk.—Jersey Maid

c (15), for administrative review by the secretary of agriculture of the action of a market administrator, a federal court will not interfere in the first instance with allegedly improper details of administration of a milk marketing order by the market administrator;[50] and its review of a ruling of the secretary as to the correctness of the action of the administrator extends and is limited to a determination of whether the ruling is in accordance with law.[51]

§ 15. Purity and Quality

Various valid regulations defining and forbidding adulteration, or otherwise dealing with the purity and quality, of food or particular kinds of food have been construed and given or not given effect, accordingly as they were or were not applicable.

When, as properly construed, they are applicable, but not otherwise, effect is given to valid statutes, ordinances, or other regulations, relating to articles of food introduced into commerce, or sold, or intended to be sold, which prohibit the production of such articles under certain conditions;[52] fix a standard for articles of food that may be sold;[53] forbid adulteration of articles of food;[54] and declare what shall constitute adulteration or when an article of food shall be deemed adulterated,[55] as by providing that the article shall be deemed adulterated if it contains any poisonous or deleterious substance which may render it injurious to health,[56] or contains any added substance or ingredient which is poisonous or injurious to the health,[57] or if any valuable or necessary constituent or ingredient has been wholly or in part abstracted from

Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.

(2) Milk used for manufacturing purposes is included in a statutory provision declaring that "milk includes fluid milk" generally, without expressing any limitation as to the purpose, whether for human consumption directly or for manufacturing, for which the fluid milk is to be used.—Rieck-McJunkin Dairy Co. v. Milk Control Commission, 18 A.2d 868, 341 Pa. 153.

"Economic relationship"

As used in a statutory provision relating to the fixing of minimum prices for fluid milk and fluid cream on a basis of the "economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk," the term "economic relationship" means that the price designated to be paid to producers by distributors for market milk shall be based on the relative costs incurred in producing and marketing fluid milk to the cost of producing and marketing manufacturing milk.—Jersey Maid Milk Products Co. v. Brock, 91 P.2d 577, 13 Cal.2d 620.

A "homogenized" mixture is a mixture of milk or cream, which has been run through a homogenizer, and to which has been added sugar, or some other form of flavoring, and which is used in the manufacture of ice cream. As used in an order, the word "homogenized" is to be defined in accordance with its general meaning in the trade.—M. H. Renken Dairy Co. v. Wickard, D.C.N.Y., 45 F. Supp. 332.

"Pooling" and "averaging" are words of common use and their significance is commonly known.—Savage v. Martin, 91 P.2d 273, 161 Or. 660.

"Price"

The word "price," in provision of Milk Control Act authorizing director of agriculture to fix minimum price which producer may receive for his milk, was not used in technical sense, and meant any return received by producer from distributor in the marketing of the milk.—United Milk Producers of California v. Cecil, 118 P.2d 830, 47 Cal.App.2d 758.

Words "well advertised," within statute establishing differential in minimum milk price in favor of dealers not having "well advertised trade name," mean well known.—Borden's Farm Products Co. v. Baldwin, N.Y., 55 S.Ct. 187, 293 U.S. 194, 79 L.Ed. 281, reversing, D.C., 7 F.Supp. 352, and mandate granted 55 S.Ct. 239.

50. U.S.—Green Valley Creamery v. U. S., C.C.A.Mass., 108 F.2d 342, affirming, D.C., U. S. v. H. P. Hood & Sons, 26 F.Supp. 672.

51. U.S.—Vogt's Dairies v. Wickard, D.C.N.Y., 45 F.Supp. 94—Fairview Creamery v. Wickard, D.C.Me., 42 F.Supp. 757.

52. Mo.—State v. Burk, 176 S.W. 487, 188 Mo.App. 683.
Wis.—Benz v. Kremer, 125 N.W. 99, 142 Wis. 1, 26 L.R.A.,N.S., 842.

53. Ala.—Fuqua v. Birmingham, 82 So. 626, 17 Ala.App. 142.
26 C.J. p 761 note 61.

Particular statute may be limited, as where it does not forbid a producer to sell unless he produces an article of a certain grade or standard, but merely requires an article, when sold or offered for sale in receptacles, to bear a brand showing what grade or specification it comes under and to conform thereto.—Marshall v. Department of Agriculture of Idaho, 258 P. 171, 44 Idaho 440.

54. Wis.—Barron County Canning & Pickle Co. v. Niana Pure Food Co., 211 N.W. 764, 191 Wis. 635, 50 A.L.R. 69.
26 C.J. p 760 note 59.
Vinegar see infra § 20.

55. U.S.—Knapp v. Callaway, D.C. N.Y., 52 F.2d 476.
Ohio.—Yochem v. Gloria, Inc., 17 N.E 2d 731, 134 Ohio St. 427.
Pa.—Commonwealth v. Aleva, 35 Pa. Co. 171.
2 C.J. p 3 note 24—26 C.J. p 760 note 60.

Restriction of territorial effect

A state pure food and drug act under which it is unlawful to manufacture or sell or offer for sale any article of food adulterated, etc., within the definition of the act should be restricted in effect to territory of the state.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1.

Food in, or not in, sealed package

The statutory definition of an adulterated article of food is not limited to food in a sealed package.—Donaldson v. Great Atlantic & Pacific Tea Co., 199 S.E. 213, 186 Ga. 870, 128 A. L.R. 456, answers to certified questions conformed to 200 S.E. 498, 59 Ga.App. 79.

Air in bread

Admixture of more air into loaf of bread than other loaves contain is not "adulteration" within a statutory definition.—Tacoma Bread Co. v. Mankertz, 57 P.2d 1056, 186 Wash. 302.

56. U.S.—U. S. v. 1232 Cases American Beauty Brand Oysters, D.C.Mo., 43 F.Supp. 749.
N.Y.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637, affirmed 34 N. Y.S.2d 37, 264 App.Div. 723.

57. Pa.—Commonwealth v. Kevin, 51 A. 594, 202 Pa. 23, 25, 90 Am.S.R. 613.
26 C.J. p 761 notes 62 [b], 63 [a].

it,[58] or any inferior or cheaper substance or substances have been substituted for it wholly or in part,[59] or if it is mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed,[60] or consists in whole or in part of a filthy, decomposed, or putrid substance,[61] or of any portion of an animal unfit for food,[62] or is the product of a diseased animal,[63] or if it is unfit for food;[64] or they may create exceptions or exemptions or provide what shall not be deemed an adulteration.[65] The test of whether some statutory provisions, relating to adulteration of food or expressly declaring what constitutes an adulterated article of food, are applicable is not whether the food, or the foreign substance added to, or mixed with, it, is unwholesome or injurious to health;[66] and where, in a particular state, there are different statutes dealing with the sale of adulterated food and the sale of unwholesome provisions without making their condition known to the buyer, and they cover different situations, the courts will follow and make effective the statutory distinction.[67] Also, the test of adulteration is not what is customarily done, but what is properly done.[68] It is held not to be the intention of the legislative body to prevent manufacturers of articles of food from

58. N.Y.—People v. Kuperschmid, 176 N.Y.S. 828, 107 Misc. 506.
26 C.J. p 761 note 64.

59. Wis.—Barron County Canning & Pickle Co. v. Niana Pure Food Co., 211 N.W. 764, 191 Wis. 635, 50 A.L.R. 69.

60. N.Y.—Lash, Inc. v. A. C. Ogden Milk Co., 297 N.Y.S. 1008, 163 Misc. 407.

Statutory provision should be strictly construed on account of its penal character.—People v. Lefkoff, 263 N.Y.S. 297, 147 Misc. 70.

Inferiority

(1) As used in such a statutory definition, "inferiority" is a term of comparison, implying a standard, which is to be found in the usual quality of the thing which the product under question purports to be.—U. S. v. Nesbitt Fruit Products, C.C.A.La., 96 F.2d 972, affirming, D.C., U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, 20 F.Supp. 520, rehearing denied, C.C.A., U. S. v. Nesbitt Fruit Products, 97 F.2d 1018.

(2) It means that an ingredient of food was, in the first instance, of low grade or quality.—U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, D.C.La., 20 F.Supp. 520, affirmed, C.C.A., U. S. v. Nesbitt Fruit Products, 96 F.2d 972, rehearing denied 97 F.2d 1018.

(3) Where orange juice preparation was sold in interstate commerce to retailers to be diluted in customer's presence and sold over the counter as an iced drink, preparation and sale of diluted drink was not within the federal statute, because it was not shipped in interstate commerce, and inferiority of diluted drink to pure orange juice did not cause original preparation to be an adulterated product.—U. S. v. Nesbitt Fruit Products, C.C.A.La., 96 F.2d 972, affirming, D.C., U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, 20 F.Supp. 520, rehearing denied, C.C.A., U. S. v. Nesbitt Fruit Products, 97 F.2d 1018.

Coloring

(1) The coloring of a compound which is the mere natural result of the combination of ingredients, and not of the addition of artificial coloring, is not within such a provision.—U. S. v. Weeks, D.C.N.Y., 225 F. 1017.

(2) Also, the use of annatto to color pot cheese is not within such a provision.—People v. Lefkoff, 263 N.Y.S. 297, 147 Misc. 70.

(3) Under a statute declaring that an article shall be deemed adulterated "if it is colored . . . whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is," the use of coal-tar dye in vanilla extract, although harmless, constituted adulteration because it made the extract look stronger than it was.—People v. Hinshaw, 97 N.W. 758, 135 Mich. 378.

(4) However, the use of harmless coloring matter in lemon extract does not constitute adulteration, where there is no evidence that the color of lemon extract is indicative of its character or value.—People v. Jennings, 94 N.W. 216, 132 Mich. 662.

61. U.S.—Knapp v. Callaway, D.C.N.Y., 52 F.2d 476.
Cal.—State v. Schwartz, 70 P.2d 1017, 28 Cal.App.2d Supp. 775.

Inclusiveness of statute

(1) The federal statute to this effect is all inclusive and prevents the shipment in interstate commerce of any food which contains any decomposed matter.—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F.Supp. 714.

(2) It includes adulteration by nature, although the ordinary use of the word "adulteration" implies an actual addition to the original substance, through human agency.—U. S. v. Sprague, D.C.N.Y., 208 F. 419.

The word "decomposed," as used in such a statute, means more than the beginning of decomposition; it means a state of decomposition.—A. O. Andersen & Co. v. U. S., C.C.A. Wash., 284 F. 542.

62. Ga.—Donaldson v. Great Atlantic & Pacific Tea Co., 200 S.E. 498, 59 Ga.App. 79, conforming to answers to certified questions 199 S.E. 213, 186 Ga. 870, 128 A.L.R. 456.

63. N.Y.—Dressler v. Merkel, Inc., 284 N.Y.S. 697, 247 App.Div. 300, affirmed 4 N.E.2d 744, 272 N.Y. 574.

64. N.Y.—Catalanello v. Cudahy Packing Co., 34 N.Y.S.2d 37, 264 App.Div. 723, affirming 27 N.Y.S.2d 637.

65. U.S.—U. S. v. 1232 Cases American Beauty Brand Oysters, D.C.Mo., 43 F.Supp. 749.
26 C.J. p 761 note 63 [a].

Provision construed

As used in a provision that no article shall be deemed adulterated within the meaning of the statute when it is intended for export to any foreign country, and is prepared or packed according to the specifications or directions of the foreign purchaser, and no substance is used in the preparation or packing which is in conflict with the laws of the foreign country to which the article is intended to be shipped, the words "prepared or packed" mean any condition or grade of merchandise, including any deteriorated state of goods, considering the class to which they belong.—U. S. v. Catz American Co., C.C.A.Cal., 53 F.2d 425.

66. U.S.—Knapp v. Callaway, D.C.N.Y., 52 F.2d 476—U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D.C.Tex., 289 F. 157.
N.Y.—People v. Miller, 8 N.Y.S.2d 363, 169 Misc. 648.
26 C.J. p 761 note 63.

67. Ohio.—Drock v. Great Atlantic & Pacific Tea Co., 22 N.E.2d 547, 61 Ohio App. 291.
Regulations directed against unwholesomeness or unfitness for use see infra § 16.

68. U.S.—W. B. Wood Mfg. Co. v. U. S., C.C.A.Mo., 292 F. 133.

improving such articles so long as no infringement of the law or spirit of the act defining adulteration takes place.[69]

Milk or milk products. Valid statutes or ordinances relating to the purity or quality of milk or milk products shipped in interstate commerce, or sold or intended to be sold, are given effect to the extent, and only to the extent, that, as properly construed, they are applicable. This is true of statutes or ordinances which prohibit the adulteration of milk [70] by the addition of a foreign substance;[71] are directed against "filled milk" or milk to which any fat or oil other than milk fat is added;[72] prescribe a standard of pure milk, as that it shall contain a certain per cent of butter fat, or a certain per cent of solids, or not more than a certain per cent of water or fluids, and provide that all milk falling below this standard shall be deemed to be adulterated;[73] prohibit the sale, or possession with intent to sell, as pure milk or otherwise than as skimmed milk, of milk from which the cream or any part thereof has been removed;[74] make an exception to a prohibition of the manufacture of cheese from milk from which any of the fat originally contained therein has been removed;[75] regulate the source of supply;[76] impose requirements as to pasteurization of milk;[77] or require the grading of milk and cream obtained from producers for any commercial use or purpose.[78] The dilution of milk with water is an adulteration;[79] but under statutes containing different provisions relating thereto, adulterated milk and skimmed milk are not necessarily the same;[80] and a statute relating to the adulteration of food generally does not apply to milk which is excepted therefrom as being specially provided for by other legislation.[81] Pure milk, as it is given by the cows, is not within a statute merely prohibiting the adulteration or dilution of milk,[82] even though it falls below the standard required by sanitary regulations;[83] but, when it is below the standard, it is within a statute declaring that milk shall be deemed adulterated when it is below a prescribed standard.[84]

Tea. The construction accorded to words "quality" and "purity," as used in the federal statute relating to imported tea, is stated in Customs Duties § 30 b.

69. U.S.—U. S. v. Forty Barrels and Twenty Kegs of Coca Cola, Tenn., 36 S.Ct. 573, 241 U.S. 265, 60 L.Ed. 995, reversing 215 F. 535, 132 C. C.A. 47.
Mich.—People v. Jennings, 94 N.W. 216, 132 Mich. 662.
26 C.J. p 761 note 66.

70. U.S.—Martinez v. People of Puerto Rico, C.C.A.Puerto Rico, 46 F.2d 427.

Absence of statutory definition

(1) Where a statute denounces adulterated milk without defining adulteration, the meaning given the term by lexicographers may be allowed or at least considered; and hence the term may mean or include corruption or debasement by the admixture of a foreign substance.
Mo.—St. Louis v. Jud, 139 S.W. 441, 236 Mo. 1.
Puerto Rico.—People v. Pinto, 15 Puerto Rico 789.

(2) Also, it may include an artificial concealment of defects or treatment to simulate a better article.—St. Louis v. Jud, supra.

71. Mass.—Commonwealth v. Schaffner, 16 N.E. 280, 146 Mass. 512.
2 C.J. p 4 note 41.

72. U.S.—Mahoney v. Carolene Products Co., C.C.A.Mass., 2 F.2d 366, affirming, D.C., Carolene Products Co. v. Mahoney, 294 F. 902.
Mo.—State ex rel. McKittrick v. Carolene Products Co., 144 S.W.2d 153, 346 Mo. 1049—State v. Hershman, 143 S.W.2d 1025, 346 Mo. 892, followed in State v. Gilden, 143 S.W. 2d 1027.

Implied repeal of other statutory provisions

Filled Milk Act, 21 U.S.C.A. §§ 61–63, prohibiting shipment in interstate commerce of compound of skimmed milk and coconut oil, impliedly repealed parts of Food and Drug Act permitting shipments of such compound when properly labeled.—U. S. v. Carolene Products Co., D.C.Ill., 7 F.Supp. 500.

73. N.Y.—People v. Martin, 151 N.Y. S. 69, 88 Misc. 519.
Ohio.—Unkrich v. State, 16 Ohio Cir. Ct.,N.S., 287—Bitner v. State of Ohio, 22 Ohio N.P.,N.S., 294.
Pa.—Pure Food Law, 1 Pa.Dist. & Co. 14.
2 C.J. p 5 note 42—26 C.J. p 761 note 61.

74. Ohio.—Bitner v. State of Ohio, 22 Ohio N.P.,N.S., 294.

75. Wis.—State v. Langlade County Creamery Co., 213 N.W. 664, 193 Wis. 113.

76. D.C.—District of Columbia v. Simpson, 47 App.D.C. 6.

Tuberculin test

(1) Where a city requires owner of dairy herd selling milk within city to have cows tuberculin tested, compliance with such regulation at owner's expense is a condition precedent to sale of milk.—Dorssom v. City of Atchison, 124 P.2d 475, 155 Kan. 225.

(2) Provision of ordinance of village board of health requiring certain grade of milk to be produced from tuberculin tested cows did not make new grade of milk.—Village of Herkimer v. Potter, 207 N.Y.S. 35, 123 Misc. 57.

77. U.S.—Economy Dairy Co. v. Kerner, 25 N.E.2d 108, 303 Ill.App. 259, transferred, see 20 N.E.2d 568, 371 Ill. 261.

78. Or.—State ex rel. Van Winkle v. Farmers Union Co-op. Creamery of Sheridan, 84 P.2d 471, 160 Or. 205.

79. N.Y.—People v. West, 44 Hun 162, 7 N.Y.St. 843, 26 N.Y.Wkly.Dig. 215, 6 N.Y.Cr. 382, affirmed 12 N. E. 610, 106 N.Y. 293, 60 Am.R. 452.

Previously it was said that the question admits of some doubt and that evidence thereon should be furnished to the court; but the evident intent of the statute under consideration in the case wherein the statement was made was, as stated in the title of the act, to prevent the traffic in impure and unwholesome milk.—People v. Fauerback, 5 Park. Cr., N.Y., 311.

80. Ohio.—Bitner v. State of Ohio, 22 Ohio N.P.,N.S., 294.

81. Pa.—Commonwealth v. Foulkrod, 17 Pa.Dist. 360.

82. U.S.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F. 2d 427.

83. Puerto Rico.—People v. Pinto, 15 Puerto Rico 789.

84. N.Y.—People v. Bosch, 114 N.Y. S. 65, 129 App.Div. 660.

§ 16. Unwholesomeness or Unfitness for Use

Statutes and ordinances intended to prevent the manufacture or sale of food or food products that are unwholesome or unfit for human consumption will be enforced in accordance with their proper construction.

Valid statutes or ordinances, especially directed at the prevention of the sale for food of articles that are unwholesome [85] or not fit for human consumption,[86] either by reason of the nature of their composition or ingredients,[87] or of their being the products of diseased animals,[88] or by reason of their decay,[89] or because of immaturity or unripeness,[90] will or will not be enforced and given effect accordingly as, when properly construed, they are or are not applicable. The statutes are not intended to regulate tastes or appetites,[91] and the courts will not deem an article of food unwholesome merely because it is unpalatable to many, or even most, persons.[92] Furthermore, an article of food is not unwholesome, within the meaning of such a statute, merely because it is unwholesome to a particular individual or to normal persons under abnormal conditions; it must have such qualities that normal persons generally, in a normal condition, would be adversely affected by its consumption.[93] It has been said that the condition of a product in the hands of a consumer is the place and time to test its fitness for food;[94] and that the practice of a shipper of keeping bottled spring water in storage for such a length of time as would leave no doubt of its wholesomeness before it was put on the market, would not clear him of the charge of shipping unwholesome water if it was unwholesome at the time of shipment.[95] Whether unfit or unwholesome articles are within statutes relating to adulteration see supra § 15.

§ 17. Substitutes or Imitations

Statutes relating to articles of food which are imitations of, or substitutes for, other articles of food, when applicable, as properly construed, will be accorded effect.

Valid statutes forbidding the manufacture or sale of any article of food which is an imitation of, or is sold under the name of, another article,[96] or which is branded or labeled falsely,[97] or in a manner naturally to mislead the purchaser into a belief that it is something it is not,[98] are given effect when, and only when, as properly construed, they are applicable; and the same is true of an exception, in such a statute, of such food mixtures or compounds as are commonly known by their own distinctive names.[99] It is not essential to the application of such statutes that the imitating article or substance be harmful or deleterious;[1] but, as noted infra § 23, many statutes of this nature are held not to be violated by the manufacture or sale of a wholesome or harmless substitute or imitation where the purchaser or consumer is given notice

85. N.Y.—S. H. Cranston, Inc. v. Department of Health of City of New York, 6 N.Y.S.2d 275, 168 Misc. 749.
Utah.—Baker v. Latses, 206 P. 553, 60 Utah 38.

86. Ga.—Leontas v. City of Savannah, 138 S.E. 154, 164 Ga. 278.
N.Y.—People, on Complaint of Department of Health of City of New York v. Grandview Ice Cream & Dairy Products, 3 N.Y.S.2d 655, 167 Misc. 138.
Utah.—Baker v. Latses, 206 P. 553, 60 Utah 38.

87. U.S.—U. S. v. Green, D.C.N.Y., 137 F. 179.
Mo.—State v. Layton, 61 S.W. 171, 160 Mo. 474, 83 Am.S.R. 487, 62 L.R.A. 163.
26 C.J. p 762 note 74.

Use of materials or ingredients
A statute providing that no spoiled or contaminated ingredient or material which might render a bakery product unwholesome, unfit for food, or injurious to health, should be used in bakery products or the ingredients thereof deals specifically with, and is limited to, ingredients and materials and the use thereof in manufacturing bakery products, as distinguished from the manufactured products and the handling thereof; and where the statute carries a penalty for its infraction it must be strictly construed.—Johnson v. Stoddard, 37 N.E. 2d 505, 310 Mass. 232.

Sale of wholesome old or stale bread is not prohibited.—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.

88. Wis.—Adams v. Milwaukee, 129 N.W. 518, 144 Wis. 371, 43 L.R.A., N.S., 1066.
26 C.J. p 762 note 75.

89. Mass.—Commonwealth v. Prince, 89 N.E. 1047, 203 Mass. 602.
26 C.J. p 762 note 76.

90. Fla.—Moran v. Le Jeune, 83 So. 668, 78 Fla. 643.
26 C.J. p 762 note 77 [a].

91. La.—McNeill & Higgins Co. v. Martin, 107 So. 299, 160 La. 443.

92. La.—McNeill & Higgins Co. v. Martin, supra.

93. Ohio.—Mills Restaurant Co. v. Clark, 185 N.E. 470, 45 Ohio App. 25.

94. U.S.—U. S. v. Four Hundred and Forty-Three Cans of Frozen Egg Product, N.J., 193 F. 589, 113 C.C.A. 457, reversed on other grounds 33 S.Ct. 50, 226 U.S. 172, 57 L. Ed. 175.

95. U.S.—U. S. v. Ninety-Four Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, D.C.Pa., 48 F.2d 378, affirmed, C.C.A., 51 F. 2d 913.

96. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.
Mo.—State ex rel. McKittrick v. Carolene Products Co., 144 S.W.2d 153, 346 Mo. 1049—State v. Hershman, 143 S.W.2d 1025, 346 Mo. 892, followed in State v. Gilden, 143 S.W. 2d 1027.
26 C.J. p 762 note 79.

Statute relating to imitation by coloring
Wis.—Day-Bergwall Co. v. State, 207 N.W. 959, 190 Wis. 8.

97. N.Y.—People v. Luke, 106 N.Y.S. 621, 122 App.Div. 64.
Branding or labeling generally see supra § 12 c.

98. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.
26 C.J. p 762 note 81.

99. U.S.—Baltimore Butterine Co. v. Talmadge, supra.
26 C.J. p 762 note 83.

1. Wis.—Day-Bergwall Co. v. State, 207 N.W. 959, 190 Wis. 8.
26 C.J. p 762 note 79 [a].

by color, label, or otherwise of the exact and true nature of the article.

§ 18. —— Oleomargarine and Other Imitations of Dairy Products

Statutes relating to oleomargarine and other imitations of, or substitutes for, butter will be given effect according to their terms and the proper construction thereof.

Statutes relating to oleomargarine and other imitations of, or substitutes for, butter will be applied in,[2] and only in,[3] proper cases. They have been construed [4] and generally are considered not to prohibit absolutely the manufacture and sale of the products,[5] but merely to regulate their manufacture and sale in such a manner as to prevent their being sold for genuine butter.[6] Statutes directed against the sale or manufacture of colored oleomargarine have been construed;[7] and while some of them have been construed not to forbid the sale or manufacture of oleomargarine which has been given a yellow color, not by means of artificial coloring matter, but by the use of ingredients naturally producing a yellowish color,[8] others have been construed as forbidding the manufacture or sale of oleomargarine or imitation butter of the color of yellow butter, regardless of whether the color is produced by the use of coloring matter or the use of ingredients which naturally produce the color of yellow butter.[9]

§ 19. —— Imitations of Lard and the Like

If, as properly construed, they are applicable, effect will be given statutes regulating the manufacture and sale of substitutes for lard.

Statutory regulations of the manufacture and sale of cottolene and other substitutes for lard and the like will be construed and, if applicable accorded effect.[10]

§ 20. —— Imitations of Vinegar

Valid regulations directed against imitations of vinegar are given effect, provided, as properly construed, they are applicable.

When, as properly construed, they are applicable, but not otherwise, effect will be given to valid statutes or other regulations establishing a standard or test for vinegar,[11] and prohibiting the manufacture or sale of any adulterated[12] or artificially colored [13] vinegar, or any vinegar or product in imitation of cider vinegar which is not cider vinegar,[14] or prohibiting the misbranding of such substitutes or adulterated products so as to mislead the public.[15]

III. VIOLATIONS OF REGULATIONS

§ 21. In General

The guilt of a person accused of violation of a food regulation depends upon whether his acts are inhibited by the terms of the regulation.

Where one is accused of the violation of a food regulation, his guilt depends on whether his acts come within the terms of such regulation,[16] as rea-

2. Md.—Hicken v. State, 126 A. 123, 146 Md. 251.

3. Ill.—People v. Waskow Butter Co., 239 Ill.App. 604.
26 C.J. p 763 note 85 [a], [b].

4. Ill.—People v. Waskow Butter Co., supra.
Mo.—State v. Maurer, 164 S.W. 551, 255 Mo. 152, Ann.Cas.1915C 178.
26 C.J. p 763 note 85.

5. N.Y.—People v. Peterson, 131 N.E. 748, 231 N.Y. 100, reversing 180 N.Y.S. 948.
26 C.J. p 762 note 84.

6. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904, affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014.
26 C.J. p 763 note 86.

7. Mich.—Jasnowski v. Detroit Recorder's Ct. Judge, 160 N.W. 907, 195 Mich. 269—People v. Rotter, 91 N.W. 167, 131 Mich. 250.
S.D.—State v. Manley, 150 N.W. 291, 34 S.D. 634.
26 C.J. p 763 note 87.

8. Mich.—Bennett v. Carr, 96 N.W. 26, 134 Mich. 243.
26 C.J. p 763 note 88.

9. Iowa.—State v. Armour Packing Co., 100 N.W. 59, 124 Iowa 323, 2 Ann.Cas. 448.
26 C.J. p 763 note 89.
Earlier statute in Pennsylvania was construed otherwise.—McCann v. Commonwealth, 48 A. 470, 198 Pa. 509—Commonwealth v. Vandyke, 13 Pa.Super. 484.
Statute expressly including ingredients
Sellers of packaged vegetable shortening and vitamin fortifier which when mixed by purchaser produce a pound of yellow oleomargarine are subject to regulations imposed by statute including in definition of oleomargarine all ingredients essential to, and used in, manufacture, mixing, or compounding of oleomargarine.—Jacobs Packing Co. v. Flanery, 151 S.W.2d 1073, 177 Tenn. 546.

10. Iowa.—State v. Neslund, 120 N.W. 107, 141 Iowa 461—State v. Snow, 47 N.W. 777, 81 Iowa 642, 11 L.R.A. 355.
N.Y.—People v. Finch, 131 N.Y.S. 1039, 74 Misc. 575.
26 C.J. p 763 note 91.

11. Mass.—National Vinegar Co. v. Jaffe, 158 N.E. 342, 261 Mass. 86.
26 C.J. p 763 note 95.

12. N.Y.—People v. Niagara Fruit Co., 77 N.Y.S. 805, 75 App.Div. 11, affirmed 66 N.E. 1114, 173 N.Y. 629.
26 C.J. p 763 note 92.

13. Mo.—State v. Earl, 133 S.W. 402, 152 Mo.App. 235.
N.Y.—People v. Lang, 164 N.Y.S. 5.
Pa.—Commonwealth v. Terry, 25 Pa. Dist. 575, 44 Pa.Co. 691.
26 C.J. p 763 note 93.

14. N.Y.—People v. Niagara Fruit Co., 77 N.Y.S. 805, 75 App.Div. 11, affirmed 66 N.E. 1114, 173 N.Y. 629.
26 C.J. p 763 note 94 [a], [b].

15. N.Y.—People v. Douglas Packing Co., 139 N.E. 759, 236 N.Y. 1, reversing 198 N.Y.S. 489, 206 App. Div. 645, motion denied 142 N.E. 314, 236 N.Y. 635—People v. Douglas Packing Co., 194 N.Y.S. 633, 118 Misc. 775, affirmed 196 N.Y.S. 810.
26 C.J. p 763 note 96.

16. U.S.—W. B. Wood Mfg. Co. v. U. S., C.C.A.Ill., 286 F. 84.

sonably and properly construed,[17] and whether intent and guilty knowledge, on his part, are shown, where these constitute essential ingredients of the offense, see infra § 22. The violation of rules or regulations prescribed by executive officers does not constitute an offense where such regulations are not authorized by statute or are not given the force and authority of law;[18] and violations of such regulations, which are not in themselves violations of any legislative act or of the common law, are not criminal, in the absence of a previous legislative act prescribing a punishment therefor, and neither forfeitures, fines, nor penalties may be prescribed, imposed, or inflicted therefor, either by executive officers, or by courts.[19]

§ 22. Knowledge and Intent

Neither intent nor guilty knowledge is an essential element of the offenses created by most food statutes and ordinances, especially the more recently enacted legislation.

While there are, or at times have been, food statutes or ordinances under which the intent of accused is an essential element,[20] as a general rule, especially under the more recently enacted legislation, a specific criminal intent is not essential to sustain a conviction for the violation of a food statute or ordinance.[21] Thus such an intent is not an essential element of such offenses as selling food that is adulterated [22] or below the legal standard,[23] or the sale of which is otherwise forbidden by law,[24] or shipping adulterated or misbranded articles of food in interstate commerce,[25] or of the offense of over reading or under reading or in any other manner making an untrue test of butter or cream.[26] Intent is not an essential element of the offense of wrongfully selling oleomargarine under the name of, and under the pretense that the same is, butter, under some statutes,[27] but under others it is.[28] So, also, under some,[29] but not other,[30] statutes or ordinances, intent is an essential element of the offense of keeping, possessing, or exposing or offering for sale, certain articles of food, such as adulterated or unwholesome articles.

Ill.—People v. Quality Provision Co., 12 N.E.2d 615, 367 Ill. 610, 114 A.L.R. 1210—City of Chicago v. Scott Peterson Corporation, 15 N.E. 2d 57, 295 Ill.App. 620.
Neb.—State v. McCosh, 279 N.W. 775, 134 Neb. 780.
N.Y.—People v. Gordon, 16 N.Y.S.2d 833, 258 App.Div. 421, reversing 14 N.Y.S.2d 333, 172 Misc. 543, affirmed 28 N.E.2d 717, 283 N.Y. 705 —People v. Miller, 8 N.Y.S.2d 363, 169 Misc. 648—People v. Cavo, 248 N.Y.S. 776, 140 Misc. 24.
Ohio.—Yochem v. Gloria, Inc., 17 N. E.2d 731, 134 Ohio St. 427—State of Ohio v. Polonsky, 29 Ohio N.P., N.S., 364.
Tex.—Sekaly v. State, 136 S.W.2d 854, 138 Tex.Cr. 415.
26 C.J. p 765 note 22.

Statute held violated by subterfuge
Kan.—Limpp v. Dodge, 73 P.2d 1001, 146 Kan. 948.

17. Fla.—Ex parte Kilgore, 143 So. 610, 106 Fla. 723.
26 C.J. p 765 note 23.

18. Neb.—State v. Elam, 136 N.W. 59, 91 Neb. 460, 39 L.R.A.,N.S., 686.

Ruling not published as required by law
Pa.—Commonwealth v. Priski, 31 Pa. Dist. & Co. 592, 20 Erie Co. 38.

Violation of unauthorized regulation is not violation of statute.—W. B. Wood Mfg. Co. v. U. S., C.C. A.Ill., 286 F. 84.

Standard prescribed prior to enactment of statute creating offense
(1) It was held that a standard prescribed by the secretary of agriculture under statutory authority, but prior to the enactment of the statute creating the offense, may be considered in determining the question of guilt or innocence.—U. S. v. Frank, D.C.Ohio, 189 F. 195.
(2) However, the contrary was also held.—U. S. v. St. Louis Coffee & Spice Mills, D.C.Mo., 189 F. 191.

19. U.S.—U. S. v. 11,150 Pounds of Butter, Minn., 195 F. 657, 115 C.C.A. 463.

20. U.S.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F. 2d 427.
Pa.—Commonwealth ex rel. v. Armour & Co., 30 Pa.Dist. & Co. 374.
26 C.J. p 766 note 38.

Intent to defraud
(1) The gravamen of the crime created by statute making it a misdemeanor to sell meat falsely represented to be kosher is an intent to defraud.—Greenwald v. Noyes, 17 N. Y.S.2d 707, 172 Misc. 780.
(2) Under an ordinance prohibiting the fraudulent sale of diseased, spoiled, or unwholesome meat, the mere sale of spoiled meat does not show a fraudulent intent within the meaning of the ordinance.—DeWeese v. People, 156 P. 594, 61 Colo. 140, L.R.A.1916E 326.
Intent as element of offense of illegal manufacture see infra § 24.

21. Cal.—State v. Schwartz, 70 P.2d 1017, 28 Cal.App.2d Supp. 775.
N.Y.—People v. Swift & Co., 35 N.E. 2d 652, 654, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299, citing **Corpus Juris.**
Vt.—State v. Field, 115 A. 296, 95 Vt. 375.
26 C.J. p 765 note 29.

22. N.Y.—People v. Tsitsera, 122 N. Y.S. 915, 138 App.Div. 446—People v. Miller, 8 N.Y.S.2d 363, 169 Misc. 648.

23. D.C.—Weigand v. District of Columbia, 22 App.D.C. 559.
Mass.—Commonwealth v. Wheeler, 91 N.E. 415, 205 Mass. 384, 137 Am.S. R. 456, 18 Ann.Cas. 519.

24. D.C.—Weigand v. District of Columbia, 22 App.D.C. 559.
26 C.J. p 766 note 33.

25. U.S.—U. S. v. 267 Boxes of Macaroni, D.C.Pa., 225 F. 79.
26 C.J. p 766 note 34.

26. Neb.—State v. Thorp, 143 N.W. 202, 94 Neb. 310, Ann.Cas.1914D 180.

27. Mo.—State v. Maurer, 165 S.W. 551, 255 Mo. 152, Ann.Cas.1915C 178, reversing 156 S.W. 991, 174 Mo.App. 162.

28. N.Y.—People v. Laning, 57 N.Y. S. 1057, 40 App.Div. 227.
Wis.—State v. Essex, 175 N.W. 795, 170 Wis. 512.
26 C.J. p 766 note 37.

29. U.S.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F.2d 427.
26 C.J. p 768 notes 75, 76.

30. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299—People, on Complaint of Goldberg, v. B. M. Reeves, Inc., 5 N.Y.S.2d 144, 168 Misc. 70.
Contra People, on Complaint of Levinson, v. Waldorf System, 15 N.Y. S.2d 53, 257 App.Div. 626.
26 C.J. p 765 notes 30, 31, p 768 note 77.

Guilty knowledge. In earlier times, dealing in unwholesome food was treated to a large extent like other crimes, and proof of guilty knowledge was essential to a conviction.[31] However, where the statute makes knowledge of the unwholesomeness or adulteration of the food an essential ingredient of the offense, it is necessary that such knowledge should appear;[32] but, as a general rule, under the statutes, such knowledge is not an essential element and need not be shown.[33] Where the offense is purely statutory, the question of whether a conviction may properly be had without proof of knowledge is one of statutory construction and not one for the application of a common-law rule.[34] At any rate, where there is knowledge, coupled with the doing of the forbidden act, the transaction is within the operation of the statute.[35]

§ 23. Notice to Purchasers or Public

The gravamen of the offenses created by some food statutes is the failure to give notice, either generally or in a prescribed mode, to the public or to purchasers or consumers, of the true character or condition of the article of food sold or furnished, and, under other statutes, it is the making of false or misleading statements in a brand or label.

Notice to the purchaser will not exempt the seller from liability under a statute wholly prohibiting the sale of the article in question;[36] but under other statutes the failure of the person selling or furnishing the food in question to make its unwholesome condition known to the buyer,[37] or to inform the purchaser or consumer of the fact that it is an imitation or substitute,[38] or to indicate by the display of proper and specific signs that both kosher and nonkosher meats are sold or displayed,[39] is an essential element, and indeed the gravamen, of the offense denounced. Frequently, the manufacture or sale of wholesome or harmless imitations or substitutes,[40] and sometimes the sale of food products which are of an inferior quality,[41] are deemed permissible, and not violative of statutory provisions, where, by color, label, or otherwise, the purchaser or consumer, or the public, is given notice of the true and exact nature of the articles. Nevertheless, a statute requiring notice to be given in a particular mode is violated by failure to comply therewith,[42] even though notice is given in some other way, as where the statute requires posted notices and information is given by bills of fare,[43] or the statute requires a brand or label indicating the nature of the product and information is conveyed by oral notice.[44] Likewise, where a statutory prohibition is limited to coloring in imitation of the genuine color of another substance, such a coloring is a violation of the statute, even though the product is truthfully labeled.[45]

Various matters have been held not to be a misbranding or other violation of statutes relating to

31. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299.

32. Or.—Swank v. Battaglia, 164 P. 705, 84 Or. 159, L.R.A.1917F 469.
26 C.J. p 766 note 42.

Willful disregard of regulation of board
The action of defendant in disregarding the regulation of a board must be willful; otherwise a citizen might be charged criminally for the violation of an order or regulation when he had no knowledge and no means of knowing that such was in force.—Commonwealth v. Paschall, Pa., 53 Dauph.Co. 135.

33. U.S.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F.2d 427.
Cal.—State v. Schwartz, 70 P.2d 1017, 28 Cal.App.2d Supp. 775.
S.C.—Hobbs v. Carolina Coca-Cola Bottling Co., 10 S.E.2d 25, 194 S.C. 543—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185.
Vt.—State v. Field, 115 A. 296, 95 Vt. 375.
26 C.J. p 766 note 43.

34. Pa.—Commonwealth v. Jackson, 22 A.2d 299, 146 Pa.Super. 328, adopted 28 A.2d 894, 345 Pa. 456.

35. Utah.—Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 73 P.2d 1272, 93 Utah 414.

36. N.Y.—People v. Meyer, 85 N.Y.S. 834, 89 App.Div. 185.
Ohio.—Drock v. Great Atlantic & Pacific Tea Co., 22 N.E.2d 547, 61 Ohio App. 291.

37. Mass.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515.
Ohio.—Drock v. Great Atlantic & Pacific Tea Co., 22 N.E.2d 547, 61 Ohio App. 291.

38. Wis.—Welch v. State, 129 N.W. 656, 145 Wis. 86, 32 L.R.A.,N.S., 746.
26 C.J. p 766 note 44½.

Putting up signs and printing bills of fare containing this information is not a sufficient compliance with the requirement where a customer to whom a substitute is served does not see the signs or read the bill of fare.—Commonwealth v. Stewart, 34 N.E. 84, 159 Mass. 113.

39. N.Y.—People v. Tarlow, 291 N.Y.S. 918, 249 App.Div. 224.

40. U.S.—Baltimore Butterine Co. v. Talmadge, D.C.Ga., 32 F.2d 904 affirmed, C.C.A., Talmadge v. Baltimore Butterine Co., 37 F.2d 1014
26 C.J. p 762 note 82, p 767 note 48

41. Mass.—Commonwealth v. Smith 20 N.E. 161, 148 Mass. 9.
26 C.J. p 767 note 49.

42. **Signs not properly displayed**
Hanging the placards on the inside of a covered wagon, having the front and rear ends open, is not a compliance with a statute, which makes it unlawful to sell oleomargarine from a wagon, etc., without having on both sides of a vehicle a placard, "Licensed to Sell Oleomargarine."—Commonwealth v. Crane, 3 N.E. 388, 158 Mass. 218.

43. N.Y.—People v. Wellner, 149 N.Y.S. 999, 87 Misc. 334.

44. Mass.—Commonwealth v. Russell, 39 N.E. 110, 162 Mass. 520.
26 C.J. p 767 note 54.

45. Wis.—Day-Bergwall Co. v. State, 207 N.W. 959, 190 Wis. 8.

brands or labels,[46] while other matters may be,[47] as where there is placed on a package, without further explanation, a term that, as commonly understood, describes a different article from that contained in the package,[48] or, by means of the words used or the manner of their display, the purchaser is misled or liable to be misled into the belief that the product is something it is not.[49] It is not necessary that an article of food, to be misbranded, be dangerous to the public.[50]

§ 24. Illegal Manufacture

A statute prohibiting the manufacture of a food product is not violated unless there is an act or acts within its terms and unless there is also a certain intent, if such intent is made an element of the offense. Negligence in fact is not a material element of the offense.

Where the statute provides against the manufacture of compounds in imitation of well-known articles of food, the gist of the offense consists in the imitation.[51] However, the statutory prohibition is aimed at a designed and intentional imitation[52] and not at a mere resemblance of qualities inherent in the articles themselves and common to both.[53] It is not usually unlawful for a person to manufacture wholesome substances and sell them for what they are;[54] and in order to convict it must be established that he intended to sell such substances for

46. U.S.—Nolan v. Morgan, C.C.A. Ind., 69 F.2d 471, affirming, D.C., Morgan v. Nolan, 3 F.Supp. 143—U. S. v. Ninety-Four Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, D.C.Pa., 48 F.2d 378, affirmed, C.C.A., 51 F.2d 913—U. S. v. Kraft Phenix Cheese Corporation, D.C.N.Y., 18 F.Supp. 60—U. S. v. 397 Cases, etc., of Salad Oil, D.C.N.J., 16 F.Supp. 387—U. S. v. 52 One-Gallon Cans, More or Less, of Salad Oil, D.C.Conn., 16 F. Supp. 385.

N.Y.—People v. Douglas Packing Co., 139 N.E. 759, 236 N.Y. 1, reversing 198 N.Y.S. 489, 206 App.Div. 645, and motion denied 142 N.E. 314, 236 N.Y. 635—People v. Peterson, 131 N.E. 748, 231 N.Y. 100, reversing, 180 N.Y.S. 948.

Pa.—Commonwealth v. Joseph, 30 Pa.Dist. & Co. 98, 85 Pittsb.Leg.J. 529.

26 C.J. p 758 note 43 [e], p 759 note 45 [e], p 767 note 53 [a] (3), (4).

Mistake

Fact that product for flavoring edible oils, trade-marked as "Olevermol," was labeled as "Olivaromol," did not establish misbranding where label was an old one and apparently used by mistake.—U. S. v. One Can of Kololiva, D.C.Mass., 24 F.Supp. 110.

Where product has had extensive sales, it may be assumed, in absence of molestation by government, that it is not misbranded.—Orange Crush Co. v. California Crushed Fruit Co., 297 F. 892, 54 App.D.C. 313.

47. U.S.—U. S. v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar, Ohio, 44 S.Ct. 529, 265 U.S. 438, 68 L.Ed. 1094, reversing, C.C.A., Ninety-Five Barrels, More or Less, Apple Cider Vinegar v. U. S., 289 F. 181, certiorari granted U. S. v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar, 44 S.Ct. 37, 263 U.S. 695, 68 L.Ed. 510—U. S. v. Great Atlantic & Pacific Tea Co., C.C.A.Vt., 92 F.2d 610, 113 A.L.R. 961—U. S. v. Feeders' Supply & Manufacturing Co., D.C.Mo., 15 F.Supp. 385—U. S. v. 154 Sacks of Oats, D.C.Va., 294 F. 340—Newton Tea & Spice Co. v. U. S., C.C.A. Ohio, 288 F. 475—W. B. Wood Mfg. Co. v. U. S., C.C.A.Ill., 286 F. 84—U. S. v. 426 Bags of Economy Special Hog Feed, D.C.Mich., 276 F. 34—U. S. v. Newton Tea & Spice Co., D.C.Ohio, 275 F. 394—Royal Baking Powder Co. v. Emerson, C. C.A.Ark., 270 F. 429, appeal dismissed 43 S.Ct. 166, 260 U.S. 752, 67 L.Ed. 496.

Cal.—Ex parte Hayes, 25 P.2d 230, 134 Cal.App. 312.

N.Y.—People v. Wyman, 235 N.Y.S. 218, 226 App.Div. 220.

Pa.—Simco Sales Service of Pennsylvania v. Board of Health of Lower Merion Tp., 42 Pa.Dist. & Co. 139, 57 Montg.Co. 331.

26 C.J. p 758 note 43 [d], p 759 notes 44 [a], 45 [b].

48. U.S.—Brina v. U. S., N.Y., 179 F. 373, 105 C.C.A. 558.

Meaning in trade

Canned salmon, labeled "select" and "fresh fish," when the pack is of inferior quality and not fresh, as the terms are used in the trade, is misbranded.—U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D.C.Tex., 289 F. 157.

49. U.S.—U. S. v. Ninety-Five Barrels (More or Less) Alleged Apple Cider Vinegar, Ohio, 44 S.Ct. 529, 265 U.S. 438, 68 L.Ed. 1094, reversing, C.C.A., Ninety-Five Barrels More or Less, Apple Cider Vinegar v. U. S., 289 F. 181, certiorari granted U. S. v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar, 44 S.Ct. 37, 263 U.S. 695, 68 L.Ed. 510.

Cal.—Ex parte Hayes, 25 P.2d 230, 134 Cal.App. 312.

N.Y.—People v. Wilson & Co., 246 N.Y.S. 111, 138 Misc. 440.

26 C.J. p 767 note 53.

Deception may result from statements not literally false, and statements liable to mislead should be read favorably to the accomplishment of purposes of statute against shipment in interstate commerce of misbranded foods.—Taylor v. U. S., C.C.A.Ga., 80 F.2d 604, certiorari denied 56 S.Ct. 503, 297 U.S. 708, 80 L. Ed. 995.

Change in product

Where complainant, manufacturer of "Price's Cream Baking Powder," had for many years advertised the fact that its product was made with cream of tartar, and contained no phosphate or alum, claiming superiority and greater healthfulness on that ground, by which means it had acquired a high reputation for its product and a valuable good will, its continued use, after it had substituted phosphate for cream of tartar therein, of labels on its cans bearing the same name and having the same coloring, style of printing, and general appearance as those previously used, which would be accepted by the average purchaser accustomed to its product as denoting the same article, was a misbranding, although it truthfully stated the ingredients in an inconspicuous place on the back of the can, and although for a new and unknown product the label might not be objectionable.—Royal Baking Powder Co. v. Emerson, C.C. A.Ark., 270 F. 429, appeal dismissed 43 S.Ct. 166, 260 U.S. 752, 67 L.Ed. 496.

50. U.S.—U. S. v. Krumm, D.C.Pa., 269 F. 848.

51. Mich.—Jasnowski v. Recorder's Ct. Judge, 161 N.W. 907, 195 Mich. 269.

26 C.J. p 767 note 55.

52. U.S.—Lexington Mill & Elevator Co. v. U. S., Mo., 202 F. 615, 121 C.C.A. 23, affirmed 34 S.Ct. 337, 232 U.S. 399, 58 L.Ed. 658.

26 C.J. p 767 note 56.

53. Mich.—People v. Miller, 170 N. W. 55, 203 Mich. 596.

26 C.J. p 767 note 57.

54. N.Y.—People v. Dold, 18 N.Y.S. 643, 63 Hun 583—People v. Guiton, 133 N.Y.S. 353, 73 Misc. 408,

another product.[55]

A statute applicable only to the complete manufacture of ice cream is not violated by the mere freezing of a mixture of ingredients prepared by, and purchased from, another person.[56]

Negligence in fact is not a material element of a statutory offense of manufacturing an article of food containing a deleterious ingredient which may render the food injurious to health.[57]

§ 25. Illegal Sale

A sale of a food product in violation of a penal statute or ordinance is punishable.

Provided there is a violation of a penal statute or ordinance, it is an offense to make a sale of a certain food product,[58] such as a food product that is adulterated,[59] diseased,[60] or is below the standard fixed by law,[61] or is so prepared as to work a fraud on the public;[62] and a like rule obtains as to a particular kind of sale of a food product, such as a sale by short weight[63] or a sale of milk at a price less than that fixed by a milk control board.[64] The foregoing is true in respect of a sale for food purposes;[65] and, since the entire object of the statutes prohibiting the sale of unwholesome and adulterated food stuffs is to preserve the public health and to prevent fraud and imposition, see supra § 3, it must generally appear that the article was sold as food,[66] or at least in the ordinary course of trade.[67] A sale of adulterated food for the purpose of analysis on demand made for that purpose by the proper officer is, therefore, not a violation of the statutes against sale,[68] but is such violation, if the sample is sold in the ordinary course of trade, although it is obtained by the purchaser for analysis.[69]

Where an article, the sale of which is prohibited, is sold in one state for delivery in another, the transaction constitutes a violation of the law of the state where the sale is made,[70] but not of the law of the state of delivery.[71] So, for the purpose of determining the application of statutes relating to sales, the sending by a purchaser in one place of an order to the seller in another place, where it is accepted, constitutes a sale where it is accepted,[72] but not at the place from which it is sent.[73]

§ 26. Having Possession or Exposing for Sale

Statutes or ordinances making it an offense to have possession of or expose certain articles of food for sale have been violated in some, but not other, cases.

In a particular case there may be a violation of a statute or ordinance making it an offense to hold, keep, have possession of, or expose certain articles of food "for sale"[74] or "with intent to sell."[75] The possession coupled with the intent constitutes the offense, where intent is an element thereof;[76] but, as noted supra § 22, intent is not an element under some statutes or ordinances. One cannot be held to be keeping a forbidden commodity for the pur-

affirmed 103 N.E. 773, 210 N.Y. 1, L.R.A.1915A 757.

55. N.Y.—People v. Wahle, 109 N.Y. S. 629, 124 App.Div. 762.
26 C.J. p 767 note 59.

56. Va.—Robertson v. Commonwealth, 191 S.E. 773, 168 Va. 752.

57. S.C.—Hobbs v. Carolina Coca-Cola Bottling Co., 10 S.E.2d 25, 194 S.C. 543—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185.

58. Wash.—Arden Farms Co. v. City of Seattle, 99 P.2d 415, 2 Wash.2d 640—Royal Dairy Products Co. v. Spokane Dairy Products Co., 225 P. 412, 129 Wash. 424.
26 C.J. p 767 note 60.

59. Colo.—Ferch v. People, 74 P.2d 712, 101 Colo. 471.
26 C.J. p 767 note 61.

60. U.S.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135.
Tex.—Corzine v. State, 227 S.W. 1102, 88 Tex.Cr. 468.

61. N.Y.—State Bd. of Pharmacy v. Gasau, 102 N.Y.S. 539, 52 Misc. 490, affirmed 107 N.Y.S. 1146, 122 App. Div. 803.
26 C.J. p 767 note 62.

62. Wis.—McDermott v. State, 126 N.W. 888, 143 Wis. 18, 21 Ann.Cas. 1315.
26 C.J. p 768 note 63.

63. Pa.—Commonwealth ex rel. v. Armour and Co., 32 Pa.Dist. & Co. 229.

64. N.Y.—People, on Complaint of McDonough, v. Bratowsky, 276 N. Y.S. 418, 154 Misc. 432.

65. Kan.—State v. Reynolds, 107 P. 2d 728, 152 Kan. 763.

66. Ind.—Schmidt v. State, 78 Ind. 41.
26 C.J. p 768 note 68.

67. Neb.—Lansing v. State, 102 N. W. 254, 73 Neb. 124.
26 C.J. p 768 note 69.

68. Cal.—People v. Wolin, 2 P.2d 60, 119 Cal.App., Supp., 770.
Neb.—Lansing v. State, 102 N.W. 254, 73 Neb. 124.

69. Neb.—Lansing v. State, supra.
N.Y.—People v. Greenberg, 119 N.Y. S. 325, 134 App.Div. 599.

70. N.Y.—People v. Abramson, 122 N.Y.S. 115, 137 App.Div. 549.

71. Minn.—State v. Gruber, 133 N. W. 571, 116 Minn. 221, 45 L.R.A., N.S., 591.

72. Pa.—Commonwealth v. Gardner, 16 Montg.Co. 171.

73. Minn.—State v. Gruber, 133 N. W. 571, 116 Minn. 221, 45 L.R.A., N.S., 591.
Pa.—Commonwealth v. Gardner, 16 Montg.Co. 171.

74. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299—People, on Complaint of Goldberg v. B. M. Reeves, Inc., 5 N.Y.S.2d 144, 168 Misc. 70—People, on Complaint of Department of Health of City of New York, v. Grandview Ice Cream & Dairy Products, 3 N. Y.S.2d 655, 167 Misc. 138.
26 C.J. p 768 note 72 [b].

"Expose for sale" means having in stock.—People ex rel. Goldstein v. Glass, 278 N.Y.S. 764, 154 Misc. 569—People on Complaint of Waller v. Jacob Branfman & Son, 263 N.Y.S. 629, 147 Misc. 290.

75. Mass.—Commonwealth v. Elm Farm Milk Co., 108 N.E. 911, 221 Mass. 68.
26 C.J. p 768 note 72 [a].

76. Mo.—State v. Snyder, 44 Mo.App. 429.
26 C.J. p 768 note 73.

pose of sale, unless he has authority to make a contract of sale.[77] Furthermore, where a contract of sale is entered into in one state for the delivery of oleomargarine in another state, the goods being separated from the general stock and actually delivered to the purchaser, the seller is not guilty of keeping oleomargarine colored in imitation of butter on hand for sale in the latter state, since such goods were already delivered when they reached such state.[78]

§ 27. Furnishing

A violation of a statute may consist of furnishing adulterated or unwholesome food for use.

Since the statutes in regard to adulterated or unwholesome food are intended primarily to prevent its use, they are usually so worded and construed as to prohibit furnishing it, or in any manner causing it, to be used.[79]

§ 28. Storage

Statutes and ordinances relating to the cold storage of food vary somewhat in their requirements and prohibitions, and consequently there is a variance as to what constitutes a violation thereof.

There should be no violation of applicable statutes requiring all food received in cold storage to be reported to a designated officer[80] or prohibiting the holding of fresh fish in cold storage for a longer period than one year without the consent of designated state officers.[81] However, a particular storage act is not per se violated by the mere storage of food longer than a stated time, but only when food held in storage longer than that time is sold or offered or exposed for sale.[82] Also, as properly construed, an ordinance requiring meat and fish to be kept in a refrigerator or cooling room, at all times other than during the usual business hours is not violated by keeping meat and fish in refrigerator display cases where they are preserved as well as, or better than, in a cooling room.[83]

§ 29. Injunction to Prevent Violation

An injunction against further violations of food or milk control statutes may be granted under statutory authority.

Under statutory authority, further violations of certain food or milk control statutes may be enjoined.[84] The injunction granted should not be so broad as to cover an act not prohibited by statute.[85]

The proceedings before a milk control board or commission will not be opened in the suit for an injunction;[86] and sometimes the court refuses an injunction in view of the annulment by the board or commission of its order in a related matter.[87]

IV. PENALTIES AND ACTIONS THEREFOR

§ 30. In General

Civil liability, and a civil action to recover a penalty, for violation of a food regulation are contemplated by some statutes which are within the competency of a state legislature to enact.

A number of statutes relating to penalties for violations of food regulations and actions for the recovery thereof have been enacted by state legislatures and considered by the courts.[88]

It is competent for the legislature to impose a civil, as well as a criminal, liability for a breach or violation of a food regulation.[89] So, also, the legislature may, without altering or impairing the criminal liability, provide that in certain cases the additional civil liability shall not be enforced.[90] Some

77. Mo.—State v. Swift, 200 S.W. 1066, 273 Mo. 462, L.R.A.1918C 1150, reversing, App., 198 S.W. 457.

78. Mo.—State v. Swift, supra.

79. N.H.—State v. Buckman, 8 N.H. 203, 29 Am.D. 646.
Pa.—In re Almshouse Oleomargarine, 28 Pa.Co. 290.
Wis.—Welch v. State, 129 N.W. 656, 145 Wis. 86, 32 L.R.A.,N.S., 746.
26 C.J. p 768 note 80.
Furnishing as part of meal is sale
Ohio.—Yochem v. Gloria, Inc., 17 N.E.2d 731, 134 Ohio St. 427.
Wash.—State v. Grays Harbor Commercial Co., 214 P. 13, 124 Wash. 227.
26 C.J. p 768 note 80 [a].

80. Wis.—Green Bay Fish Co. v. State, 202 N.W. 667, 186 Wis. 330.

81. Mass.—Commonwealth v. Dyer, 138 N.E. 296, 243 Mass. 472, certiorari denied Dyer v. Commonwealth of Massachusetts, 43 S.Ct. 700, 262 U.S. 751, 67 L.Ed. 1214.

82. Ohio.—Columbus Packing Co. v. State, 140 N.E. 376, 106 Ohio St. 469, 37 A.L.R. 1525.

83. Minn.—State v. Witt's Market House, 254 N.W. 596, 191 Minn. 425.

84. Ind.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.
N.Y.—Ten Eyck v. Eastern Farm Products, 292 N.Y.S. 787, 249 App. Div. 891, affirming 290 N.Y.S. 475, 160 Misc. 402—Baldwin v. Burdick, 276 N.Y.S. 675, 243 App.Div. 250—People v. Schintzius, 113 N.Y.S. 313, 61 Misc. 410.
Pa.—Milk Control Commission of the Commonwealth of Pennsylvania v. Barfield, 48 Dauph.Co. 189.

85. N.Y.—Noyes v. Dusinberre, 33 N.Y.S.2d 649, 263 App.Div. 1025.

86. Pa.—Milk Control Commission of Commonwealth of Pennsylvania v. Barfield, 48 Dauph.Co. 189.

87. N.Y.—Baldwin v. Dellwood Dairy Co., 270 N.Y.S. 418, 150 Misc. 762.

88. Ill.—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill.App. 39.
26 C.J. p 768 note 83.

89. U.S.—Ripper v. U. S., Mo., 178 F. 24, 101 C.C.A. 152, rehearing denied 179 F. 497, 103 C.C.A. 478.
26 C.J. p 768 note 82.

90. N.Y.—People v. Beaman, 92 N.Y.S. 295, 102 App.Div. 151—People

statutes do not contemplate both a prosecution and an action in debt for the same offense and, while allowing either, do not permit both.[91]

An action in debt for the recovery of a fine or penalty for violation of a food regulation is a civil action,[92] and the rules of criminal procedure are not applicable thereto.[93] If the statute limits the time for bringing the action, it must be brought within that time.[94] The power of amendment vested in the court by statute may be sufficiently comprehensive to enable the court to amend the summons in respect of the amount of the penalty so as to make it conform to statutory provisions.[95]

§ 31. Number and Amount of Penalties

Although statutory provisions control the maximum number and amount of penalties recoverable, the maximum penalty provided by statute should not be imposed where there was no intent to violate the law.

The number and amount of the penalties recoverable depend on the terms of the several statutes,[96] and a cumulative recovery will be allowed where it appears that such was the intent of the legislature.[97] Where one violating a food law is entirely innocent of any intent so to do, the maximum penalty provided by the statute should not be imposed.[98]

§ 32. Who May Sue

According to the usual statutory requirement, an action for a penalty should be brought by a designated officer in the name of the people or the state.

Under a statute so providing, the action for a penalty must be brought in the name of the people or state, at the suit of a designated officer[99] or with his advice and consent.[1] An action for a penalty, under a statute for the protection of butter and cheese manufacturers against the sale to them of diluted milk, must be brought in the name of the party injured and defrauded by the sale of such milk and not in the name of such a manufacturer unless he has been so defrauded.[2]

§ 33. Persons Liable

A person may be liable for a penalty by reason of his personal violation of a food law or because of his responsibility for acts done by his agent, employee, or partner.

A wholesaler or commission merchant, as well as a retailer, may be liable for a penalty.[3] The principal is liable for a penalty where a violation of a food law is committed by an employee or agent acting within the general scope of his authority.[4] Where an unlawful sale is made by one member of a partnership, in the course of the partnership business, the partners are jointly liable for the penalty provided by statute.[5]

§ 34. Defenses

Matters to be defenses to an action to recover a penalty for violation of a food regulation must be such as show that the regulation has not been violated.

The failure of the proper officer to perform an act which by the statute is made a condition precedent to the imposition of the penalty is a good defense.[6] Also, the fact that the product in question was manufactured or in process of manufacture at the time of the passage of the act, imposing the penalty, so as to be exempt from the operation thereof by its express terms is a matter of defense.[7]

On the other hand, it is no defense to an action for a penalty for selling an article of food of a quality condemned by law that defendant did not produce the condition complained of,[8] or that the

v. Salisbury, 37 N.Y.S. 420, 2 App. Div. 39.

91. Ill.—People v. Milwaukee Dairy Co., 244 Ill.App. 341.

92. Ill.—People v. Milwaukee Dairy Co., supra.

93. Ill.—People v. Milwaukee Dairy Co., supra.

94. Ill.—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill.App. 39.

95. N.J.—Board of Health of Jersey City v. Fruhman, 143 A. 736, 6 N.J.Misc. 1021.

96. U.S.—Ripper v. U. S., Mo., 178 F. 24, 101 C.C.A. 152, rehearing denied 179 F. 497, 103 C.C.A. 478.
N.Y.—People v. Bremer, 74 N.Y.S. 570, 69 App.Div. 14, affirmed 66 N.E. 1113, 173 N.Y. 599.

97. N.Y.—People v. Spencer, 94 N.E. 614, 201 N.Y. 105, Ann.Cas.1912A 818.
26 C.J. p 769 note 86.

98. N.Y.—People v. Seco, 113 N.Y.S. 487.

99. N.J.—State v. Newton, 19 A. 174, 51 N.J.Law 553, affirming 18 A. 77, 50 N.J.Law 549.
26 C.J. p 769 note 88.

Milk control board may, under the provisions of a particular milk control act, be authorized to maintain suit to recover penalty for violation of act.—Albert v. Milk Control Board, 200 N.E. 688, 210 Ind. 283.

1. Ill.—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill. App. 39.

2. Vt.—Tabor v. Herrick, 54 Vt. 630.

3. N.Y.—People v. Wilson & Co., 246 N.Y.S. 111, 138 Misc. 440.

4. N.J.—Harvey v. Newton, 19 A. 793, 52 N.J.Law 369.
N.Y.—Verona Cent. Cheese Co. v. Murtaugh, 50 N.Y. 314.
26 C.J. p 769 note 90.

Corpus Juris is cited in a case involving, however, a criminal prosecution, rather than an action for a penalty.—People v. Schwartz, 70 P. 2d 1017, 1020, 28 Cal.App.2d Supp. 775.

5. N.J.—Bayles v. Newton, 18 A. 77, 50 N.J.Law 549.

6. U.S.—Friend v. Washington, D.C., 9 F.Cas.No.5,121, 2 Cranch C.C. 19.

7. N.Y.—People v. Briggs, 20 N.E. 820, 114 N.Y. 56, 23 Abb.N.Cas. 108, affirming 47 Hun 266, 13 N.Y.St. 365, 28 N.Y.Wkly.Dig. 217.

8. N.J.—State Bd. of Health v. Vandruens, 72 A. 125, 77 N.J.Law 443.

quality of the article sold was impaired with the consent of the agent of the purchaser who is also the nominal plaintiff in the action,[9] or that a public officer attempted to abrogate the provisions of the statute,[10] or that the sale was made in accordance with a trade usage or custom repugnant to the express provisions of the statute.[11] Also, in an action for a penalty for selling milk diluted with water, it is no defense that defendant, before offering it for sale, told the buyer and the inspector, who was about to make a test, that a certain quantity of pure water had been accidentally spilled into the milk;[12] and in an action to recover a penalty for possession and use, without the consent of the owner, of milk cans marked with the name of the owner, it is no defense that defendant procured the cans from a public dump.[13] In an action to recover a penalty for the sale of an adulterated article, in violation of a state law, a defense, based on the fact that the article was imported and the provision of the federal constitution giving congress power to regulate commerce with foreign nations, is unavailing where defendant does not establish a sale in the original package of a legitimate article of commerce.[14]

§ 35. Jurisdiction and Venue

Statutory provisions are determinative of the jurisdiction of particular courts of actions for penalties for violations of food regulations.

The question as to what courts have jurisdiction of actions for penalties for violations of the pure food laws is dependent on the terms of the several statutes.[15]

§ 36. Pleading

A complaint complying with local requirements and alleging facts showing a violation of the statute under which a recovery of the penalty is sought is sufficient; and evidence in support thereof is admissible. The allowance of an amendment is within the power and discretion of the court.

Where a civil action and a criminal prosecution are alternative, but not conjunctive, remedies for violation of a food regulation, it is no excuse for failure to file an affidavit of merits that, by such affidavit, defendant might incriminate himself.[16] Under a particular statute, no pleadings, except a sworn complaint, are necessary.[17]

The complaint must allege facts sufficient to show a violation of the statute under which a recovery of the penalty is sought;[18] but, if such facts are alleged with reasonable precision, it will be sufficient.[19] Evidentiary matter need not be alleged;[20] and it is not necessary to negative statutory exceptions or provisos[21] having no relation to the facts alleged in the complaint.[22]

In compliance with the local practice it has been held that separate causes of action should be set out in separate counts, numbered as such.[23] A sale of several packages of adulterated food at one time and place to one person as a single transaction should be alleged in the complaint as one cause of action,[24] even though the statute provides that the sale of each one of the several packages shall constitute a separate violation and the seller may be liable thereunder for a separate penalty for each package sold.[25]

Amendment. The court has statutory power to amend the pleadings to conform to the statute in respect of the amount of the penalty.[26] The granting of leave to serve an amended complaint, as well as the imposition of costs as a condition, is within the sound discretion of the court,[27] and the court is not bound to deny such leave on the ground of laches, where a large part of the delay is chargeable to defendant.[28]

Evidence admissible under pleadings. Under a complaint alleging a sale by defendant in violation of law, evidence of a sale by his agent or servant is admissible;[29] and evidence of the analysis of a

N.Y.—People v. Butler, 125 N.Y.S. 556, 140 App.Div. 705.

9. N.Y.—Cornwall v. Cagwin, 17 N.Y.S. 299.

10. Pa.—Commonwealth v. Ellis, 46 Pa.Super. 72.

11. Pa.—Commonwealth v. Ellis, supra.

12. N.Y.—People v. Hart, 181 N.Y.S. 796, 110 Misc. 714.

13. N.Y.—Milk Bottlers' Federation v. Donald E. Muncy, Inc., 261 N.Y.S. 514, 237 App.Div. 531, reversing 256 N.Y.S. 663, 143 Misc. 436.

14. N.Y.—People v. Schmidt, 112 N.E. 755, 218 N.Y. 256.

15. N.J.—Fort v. Dilks, 108 A. 305, 93 N.J.Law 307—McGuire v. Doscher, 46 A. 576, 65 N.J.Law 139.

16. Ill.—People v. Milwaukee Dairy Co., 244 Ill.App. 341.

17. N.J.—Hoeberg v. Newton, 9 A. 751, 49 N.J.Law 617.

18. N.Y.—People v. Clark, 124 N.Y.S. 1023, 140 App.Div. 150.
26 C.J. p 769 note 5.

19. N.Y.—People v. Douglas Packing Co., 196 N.Y.S. 810, 203 App.Div. 878, affirming 194 N.Y.S. 633, 118 Misc. 775.
26 C.J. p 769 note 6.

20. N.Y.—People v. Bailey, 120 N.Y.S. 618, 136 App.Div. 130.

21. N.Y.—People v. Wyman, 235 N.Y.S. 218, 226 App.Div. 220.

22. N.Y.—People v. Lewis, 115 N.Y.S. 909, 131 App.Div. 336.

23. N.Y.—People v. Sheriff, 79 N.Y.S. 783, 78 App.Div. 46.
26 C.J. p 770 note 9.

24. N.Y.—People v. Buell, 83 N.Y.S. 143, 85 App.Div. 141.

25. N.Y.—People v. Buell, supra.

26. N.J.—Board of Health of Jersey City v. Fruhman, 143 A. 736, 6 N.J.Misc. 1021.

27. N.Y.—People v. Munn, 115 N.Y.S. 803, 131 App.Div. 341.

28. N.Y.—People v. Munn, supra.

29. N.Y.—People v. Lewis, 122 N.Y.S. 1025, 138 App.Div. 673.

sample is admissible, although the complaint does not set out in full the manner in which the sample was obtained.[30]

What must be proved. Where it is alleged that an article of food is manufactured in imitation of another article, the evidence must show a standard by which a comparison may be made.[31] Matters appearing in the definitions of terms need not be shown by testimony.[32]

§ 37. Evidence

Except to the extent that they are affected by statute, the rules of evidence obtaining in civil actions generally are applicable in a civil action to recover a penalty for violation of a food regulation.

The burden of proof is on plaintiff to show all facts necessary to establish a violation of the statute under which the action is brought;[33] and the burden rests on defendant to bring himself within an exception.[34]

Judicial notice will be taken that glucose enters into many different articles of food and is not used by itself as such.[35]

Admissibility. Except to the extent that evidence of a particular kind may be required by statute,[36] any material and ordinarily competent evidence which tends to sustain[37] or to rebut[38] any essential allegation of the complaint is admissible.

Weight and sufficiency. The evidence in particular cases has been held sufficient[39] and in other cases insufficient.[40] Where proof of adulteration or failure to comply with a standard fixed by law is sought to be made by evidence of the analysis of a sample of the article, and a statute prescribes the manner in which the sample must be taken, or in which the analysis must be made, the evidence will be insufficient if it fails to show compliance with such requirements,[41] and, on the other hand, it will be sufficient if it shows compliance with the requirements[42] and the fairness of the samples or of the analysis is not impugned.[43] However, where no particular manner is prescribed in which the sample must be taken or the analysis made, it is not necessary to show that such acts were performed in any particular manner.[44]

§ 38. Trial and Judgment

A trial or hearing and the submission of questions of fact to a jury or the making of proper findings of fact by the court are prerequisite to the rendition of a judgment for a penalty.

On a trial before a jury, questions of fact should be submitted to it[45] with proper instructions.[46] Where the trial is before the court without a jury, as it is under some statutes,[47] a judgment for a penalty should be rendered when,[48] and only when,[49] findings showing a violation of law by defendant have been made. Even though defendant has defaulted, it is not permissible for the court to fix the amount of the fine or penalty without a hearing.[50]

30. N.Y.—People v. Woodbeck, 67 N.Y.S. 38, 55 App.Div. 277, 15 N.Y.Cr. 250.

31. N.Y.—People v. Hillman, 69 N.Y.S. 66, 58 App.Div. 571, 15 N.Y.Cr. 394.

32. Ill.—People v. Quality Provision Co., 12 N.E.2d 615, 367 Ill. 610, 114 A.L.R. 1210.

33. N.Y.—People v. Henderson, 131 N.Y.S. 997, 74 Misc. 577—People v. Terwilliger, 110 N.Y.S. 1034, 59 Misc. 617—People v. Lang, 164 N.Y.S. 5.

34. N.Y.—People v. Briggs, 20 N.E. 820, 114 N.Y. 56, 23 Abb.N.Cas. 108, affirming 47 Hun 266, 13 N.Y. St. 365, 28 N.Y.Wkly.Dig. 217.

35. N.Y.—People v. Berghoff, 95 N.Y.S. 257, 47 Misc. 1, affirmed 99 N.Y.S. 201, 112 App.Div. 772.

36. N.Y.—People v. Schintzius, 113 N.Y.S. 313, 61 Misc. 410.
26 C.J. p 770 note 25.

37. N.Y.—People v. Bailey, 120 N.Y.S. 618, 136 App.Div. 130—People v. Berwind, 77 N.Y.S. 859, 38 Misc. 315.
26 C.J. p 770 note 26.

38. N.Y.—People v. Nut-Ola Fat Products, 288 N.Y.S. 219, 248 App. Div. 152.
26 C.J. p 770 note 27.

39. N.Y.—Milk Bottlers' Federation v. Donald E. Muncy, Inc., 261 N.Y.S. 514, 237 App.Div. 531, reversing 256 N.Y.S. 663, 143 Misc. 436.
26 C.J. p 770 note 28.
Preponderance of evidence is sufficient.—People v. Briggs, 20 N.E. 820, 114 N.Y. 56.

40. N.Y.—People v. Corcoran, 186 N.Y.S. 366, 113 Misc. 692.
26 C.J. p 770 note 29.

41. N.Y.—People v. Corcoran, supra.
26 C.J. p 771 note 33.

42. N.Y.—People v. Weaver, 101 N.Y.S. 961, 116 App.Div. 594.

43. N.Y.—People v. Butler, 125 N.Y.S. 556, 140 App.Div. 705.
26 C.J. p 771 note 35.

44. N.J.—Vandegrift v. Meihle, 49 A. 16, 66 N.J.Law 92.

45. N.Y.—People v. Nut-Ola Fat Products, 288 N.Y.S. 219, 248 App. Div. 152.
26 C.J. p 771 note 37 [a].

46. **When court's charge is not clear** or explicit, a request to make it so should be made in express terms.—People v. Waters, 100 N.Y.S. 177, 114 App.Div. 669, affirmed 81 N.E. 1171, 188 N.Y. 632.

47. N.J.—Hoeberg v. Newton, 9 A. 751, 49 N.J.Law 617.

48. Ind.—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind.App. 196.

49. Pa.—Commonwealth v. Davison, 11 Pa.Super. 130.

50. Ill.—People v. Milwaukee Dairy Co., 244 Ill.App. 341.

V. CRIMINAL PROSECUTIONS

§ 39. In General

Selling unwholesome provisions for use as human food was an indictable offense at common law; today, violations of pure food laws generally constitute criminal offenses.

Selling unwholesome provisions for use as human food was an indictable offense at common law;[51] and it has been held that furnishing such provisions in any manner, or causing such unwholesome matter to be used, likewise constitutes a common-law offense.[52] Today, in most if not all jurisdictions, there are statutes regulating the manufacture, sale, and use of food products, see supra §§ 3–20, and violations of such regulations generally constitute criminal offenses.[53] While some particular officer or department is usually charged by statute with the prosecution of offenders against and with the enforcement of the pure food laws,[54] yet the enforcement of such laws is not ordinarily dependent on action by such officer or department,[55] and prosecutions may be instituted on complaint of other officers[56] or of private individuals,[57] unless the statute does not permit any private prosecution.[58] Under some statutes, the department or officer authorized to prosecute offenders has considerable discretion in determining whether to prosecute or to give an opportunity to rectify mistakes.[59] In any prosecution for violation of a food law, the court has the double duty of protecting the public against misbranded or adulterated foods, and, at the same time, of protecting merchants against improper prosecution.[60]

§ 40. Defenses

Whether or not a particular fact constitutes a defense to a prosecution for violation of a pure food law depends on the provisions of the statute. Under the federal Pure Food and Drugs Act and similar state statutes, a guaranty by the seller from whom defendant purchased the articles to the effect that they are not adulterated or misbranded is a defense to a prosecution of the dealer if it conforms to the statutory requirements.

Whether or not a particular fact constitutes a defense to a prosecution for violation of a pure food law depends on the provisions of the statute. Thus, on a prosecution for selling the meat of an animal that has died otherwise than by slaughter, it is no defense that the meat was wholesome.[61] So, too, a custom of the trade to label packages so as to state approximately the quantity in liquid or solid measure, nearest the general size of the package, is not a defense to the violation of a statute against misbranding.[62] On a prosecution for the violation of an ordinance prohibiting the fraudulent sale of diseased, spoiled, or unwholesome meat, the fact that the purchaser selected the meat and thought at the time it was good is not a defense.[63] The attempt on the part of an officer charged with the enforcement of the pure food laws to abrogate the plain provisions of such laws is no defense to a criminal prosecution for their violation.[64]

Guilty knowledge or intent as essential to constitute a violation of a pure food law is considered supra § 22.

Warranty or guaranty of vendor. Under the federal Pure Food and Drugs Act and similar state statutes, a guaranty by the seller from whom defendant purchased the articles to the effect that they are not adulterated or misbranded is a defense to a prosecution of a dealer under the act.[65] If the

51. Cal.—State v. Schwartz, 70 P.2d 1017, 1018, 28 Cal.App.2d Supp. 775, citing **Corpus Juris.**
Colo.—Ferch v. People, 74 P.2d 712, 714, 101 Colo. 471, citing **Corpus Juris.**
26 C.J. p 771 note 43.

52. N.H.—State v. Buckman, 8 N.H. 203, 29 Am.D. 646.

53. Colo.—Ferch v. People, 74 P.2d 712, 101 Colo. 471.
Ill.—People ex rel. Schoonover v. McLaughlin, 278 Ill.App. 197—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill.App. 39.
26 C.J. p 771 note 45.
Prosecutions for adulterations generally see Adulteration §§ 13–18.

54. Ill.—People ex rel. Schoonover v. McLaughlin, 278 Ill.App. 197—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill.App. 39.
26 C.J. p 771 note 46.

Expenses of agents
In Pennsylvania, special agents of dairy and food department are entitled to have their mileage and witness' fees taxed as costs, but should pay such sums to department, since appropriation is made for covering expenses of such officers.—In re Special Agents Witness Fees, 32 Pa. Co. 188.

55. Mass.—Commonwealth v. McDonnell, 32 N.E. 361, 157 Mass. 407.

56. Mass.—Commonwealth v. Mullen, 57 N.E. 331, 176 Mass. 132.
26 C.J. p 771 note 48.

57. Ind.—Isenhour v. State, 62 N.E. 40, 157 Ind. 517, 87 Am.S.R. 228.
26 C.J. p 771 note 49.

58. Ill.—People v. Consumers' Sanitary Coffee & Butter Stores, 247 Ill. App. 39.

59. Ill.—People ex rel. Schoonover v. McLaughlin, 278 Ill.App. 197.

60. Pa.—Commonwealth v. Wilson, 42 Pa.Dist. & Co. 495, 89 Pittsb. Leg.J. 469.

61. Tex.—Cozine v. State, Cr., 220 S.W. 102.

62. U.S.—U. S. v. Rigney & Co., D. C.N.Y., 220 F. 734.

63. Colo.—DeWeese v. People, 156 P. 594, 61 Colo. 140, L.R.A.1916E 326.

64. Pa.—Commonwealth v. Ellis, 46 Pa.Super. 72.

65. Cal.—State v. Schwartz, 70 P.2d 1017, 28 Cal.App.2d Supp. 775.
Mass.—Commonwealth v. Johnson Wholesale Perfume Co., Mass., 24 N.E.2d 8, 304 Mass. 452.
Pa.—Commonwealth v. Pflaum, 84 A. 842, 236 Pa. 294, Ann.Cas.1913E 1287—Commonwealth v. Lutz, 9 A. 2d 481, 137 Pa.Super. 449, affirming 87 Pittsb.Leg.J. 551.

statute so provides, the guaranty, to afford protection, must be given by a seller resident within the United States, and must bear the signature, name, and address of the seller who is himself liable to the penalties prescribed by the act if the articles sold are adulterated or misbranded,[66] but the statute may dispense with a particular requirement, as, for example, the requirement that the guaranty be signed by the seller.[67] The guaranty must relate to the identical article sold, and is not sufficient if it merely covers a constituent of the article transported or sold in violation of the act.[68] Such a provision does not exempt dealers from liability for placing in such articles substances "poisonous or injurious to health in any quantity for any purpose whatever."[69]

§ 41. Persons Liable

As a general rule a principal may be convicted on proof of a prohibited sale by his employee or agent in the course of his employment; but an employee is generally not liable to prosecution for merely clerical acts in accordance with instructions, unless his acts come within the definition of the offense.

Under the statutes prohibiting certain sales in general terms or prohibiting certain sales either in person or through another, a principal may be convicted on proof of such a sale by his employee or agent acting in the general course of his employment,[70] and the employee is liable if his own acts come within the definition of the offense.[71] Officers and stockholders in a corporation are not liable as such for a violation of the pure food laws by the manager of the corporation, but, to the extent that they confer on the manager the authority to do the acts which are performed by him in violation of law, they are liable.[72] An employee, who merely delivers an article of food under orders from his employer, is not liable to conviction, although such article is not protected from contamination as required by law.[73] A clerk of a dealer who merely receives an order, and, on its being accepted by his employer, selects and ships out the goods, does not violate a statute against the sale of adulterated food.[74] An agent who, in good faith, takes an order for pure food stuffs does not violate a pure food law if his principal fills the order with adulterated goods[75] without the knowledge of the agent and without an opportunity on his part to examine such goods.[76] A salesman who takes an order for an article of food in one state, subject to acceptance or rejection by the manufacturer in another state, which sale is accepted, by the shipment of an article which is adulterated within the meaning of the statute of the state where the order is taken, is not guilty of selling an adulterated article in that state or of aiding or abetting in such sale.[77] Where, however, one takes an order for a food product and receives payment for it and such product is delivered to him by the manufacturer, who resides in another state, and it is delivered by him to the purchaser, he is guilty, if a violation of the food law of the state where the order is taken results from such transaction.[78]

§ 42. Preliminary Proceedings

Where a provision for preliminary notice to the accused and an opportunity for hearing is merely administrative or directory, such notice and opportunity are not prerequisite to a prosecution; and the same is true of a provision for the delivery of the result of an analysis to the person from whom the sample was taken.

Under the federal Pure Food and Drugs Act the secretary of agriculture, after an investigation of the alleged violation of the law, is required to certify at once the fact to the United States district

Tenn.—Turner v. State, 100 S.W.2d 236, 171 Tenn. 36.
26 C.J. p 772 note 57.

66. 26 Opinion Attorney-General 449.

67. Mass.—Commonwealth v. Johnson Wholesale Perfume Co., 24 N.E.2d 8, 304 Mass. 452.

68. U.S.—U. S. v. Mayfield, D.C. Ala., 177 F. 765.

69. Mo.—St. Louis v. Wortman, 112 S.W. 520, 213 Mo. 131.

Possibility that dealer added matter

In prosecution for adulteration of meat, defense that preservative used was guaranteed under the national Pure Food and Drugs Act was held unavailable, despite statute exempting dealers who rely on such guaranty, where the meat sold actually contained a deleterious substance that might have been added by defendant.—Turner v. State, 100 S.W.2d 236, 171 Tenn. 36.

70. Pa.—Commonwealth v. Jackson, 22 A.2d 299, 146 Pa.Super. 328, adopted 28 A.2d 894, 345 Pa. 456.
26 C.J. p 772 note 65.

Reason for rule

"The duty placed upon the dealer in foods is absolute within the limits of his control. . . . If he has such [adulterated] food in his stock of goods, whether he knows its condition or not, and has a clerk authorized to make sales from such stock, then any sale made therefrom by such clerk is a sale by the employer, because they are the employer's goods, sold through his agent."—State v. Schwartz, 70 P.2d 1017, 1020, 28 Cal.App.2d Supp. 775.

71. Pa.—Commonwealth v. Lutz, 9 A.2d 481, 137 Pa.Super. 449, affirming 87 Pittsb.Leg.J. 551.
Tenn.—Turner v. State, 100 S.W.2d 236, 171 Tenn. 36.

72. U.S.—U. S. v. Mayfield, D.C. Ala., 177 F. 765.

73. Puerto Rico.—People v. Rodriguez, 23 Puerto Rico 392.

74. Mo.—State v. McCormick, 165 S.W. 815, 183 Mo.App. 153.

75. Mich.—People v. Morse, 90 N.W. 673, 131 Mich. 68—People v. Skillman, 89 N.W. 330, 129 Mich. 618.

76. Pa.—Commonwealth v. Richards, 16 Montg.Co. 176.

77. Minn.—State v. Gruber, 133 N.W. 571, 116 Minn. 221, 45 L.R.A., N.S., 591.

78. Mo.—State v. Newell, 41 S.W. 751, 140 Mo. 282.
26 C.J. p 773 note 73.

attorney in whose district the prosecution should be brought,[79] who must, on receiving such certificate, institute a prosecution.[80] A provision in this statute for preliminary notice of a finding of a violation and an opportunity for a hearing before complaint is made has been held merely administrative or directory, and failure to give such notice and opportunity does not bar a prosecution;[81] and the same has been held true with respect to a similar provision of a state pure food law.[82] The delivery of the result of the analysis of a sample of milk to the person from whom the sample was taken or to the person responsible for the condition of the milk, as required by a pure food statute, has been held not a prerequisite to a prosecution for having possession of milk below the prescribed standard.[83] A statute providing for written notice to a milk producer requiring him to make the milk conform to standard as a condition precedent to prosecution for selling milk below standard is not applicable to a prosecution under another statute for removing cream from milk.[84]

§ 43. Process

Under appropriate statutory provisions, accused persons may be brought before the court by summons or capias, and witnesses by subpoenas, properly issued.

Under appropriate statutory provisions, persons accused of violating food laws may be brought before the court by a summons or capias, but such process should not be issued before facts showing the existence of probable cause have been presented to the judge.[85] Subpœnas for witnesses should be issued in the ordinary form and in the customary way.[86]

§ 44. Indictment, Information, or Complaint

The sufficiency of the allegations of the indictment, information, or complaint is generally determined by whether or not they sufficiently identify the offense charged and state all the facts necessary to constitute the offense.

Prosecutions for the violation of food laws are begun by an indictment,[87] an information,[88] or a complaint in the nature of an indictment.[89] The form and sufficiency of allegations are dependent on the terms of the statute and the exact nature of the offense charged;[90] and, in general, the allegations will be held sufficient[91] or insufficient,[92] in accordance with whether or not they sufficiently identify the offense charged, and state all the facts necessary to constitute it. No particular form of words is necessary;[93] but an indictment which substantially follows the language of the statute is usually sufficient.[94]

In accordance with these principles, an indict-

79. U.S.—U. S. v. J. L. Hopkins & Co., D.C.N.Y., 199 F. 649.

80. U.S.—U. S. v. Morgan, N.Y., 32 S.Ct. 81, 222 U.S. 274, 56 L.Ed. 198, reversing, C.C., 181 F. 587.

81. U.S.—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F. Supp. 714—U. S. v. Wells, D.C. Tenn., 225 F. 320.
26 C.J. p 773 note 85.

82. Mass.—Commonwealth v. Previte, 198 N.E. 646, 292 Mass. 378.

83. Wash.—State v. Burnam, 128 P. 218, 71 Wash. 199.

84. Mass.—Commonwealth v. Rapoza, 178 N.E. 530, 277 Mass. 206.

85. U.S.—United States v. Wells, D. C.Tenn., 225 F. 320.

86. Mich.—Chase v. Kalamazoo Cir. Judge, 117 N.W. 660, 154 Mich. 271.
26 C.J. p 774 note 89.

87. U.S.—U. S. v. Carolene Products Co., C.C.A.Ill., 104 F.2d 969.
Md.—Hicken v. State, 126 A. 123, 146 Md. 251.
26 C.J. p 774 note 91.

88. U.S.—U. S. v. Centralia Dairy Co., D.C.Wash., 60 F.2d 141—Martinez v. People of Porto Rico, C.C.A. Puerto Rico, 46 F.2d 427—Newton Tea & Spice Co. v. U. S., C.C.A. Ohio, 288 F. 475—U. S. v. Newton Tea & Spice Co., D.C.Ohio, 275 F. 394—U.S. v. Krumm, D.C.Pa., 269 F. 848—United States v. Wells, D. C.Tenn., 225 F. 320.
Ill.—People v. Rodeen, 266 Ill.App. 206.
Mo.—State v. Redmon, App., 8 S.W.2d 1084.
Vt.—State v. Gladstone, 22 A.2d 490, 112 Vt. 233.
26 C.J. p 774 note 92.

89. Cal.—Graham v. Justice's Court of Colusa Judicial Tp., 67 P.2d 127, 20 Cal.App.2d 328.
Me.—State v. Long, 117 A. 303, 121 Me. 365.
26 C.J. p 774 note 93.

90. Mo.—State v. Hershman, 143 S. W.2d 1025, 346 Mo. 892, followed in State v. Gilden, 143 S.W.2d 1027.
26 C.J. p 774 notes 98, 99.

91. U.S.—U. S. v. Centralia Dairy Co., D.C.Wash., 60 F.2d 141—Newton Tea & Spice Co. v. U. S., C.C.A. Ohio, 288 F. 475—U. S. v. Newton Tea & Spice Co., D.C.Ohio, 275 F. 394.
Cal.—Graham v. Justice's Court of Colusa Judicial Tp., 67 P.2d 127, 20 Cal.App.2d 328.
Ill.—People v. Rodeen, 266 Ill.App. 206.
Me.—State v. Long, 117 A. 303, 121 Me. 365.
Md.—Hicken v. State, 126 A. 123, 146 Md. 251.
Mich.—People v. Hinshaw, 97 N.W. 758, 135 Mich. 378.
Mo.—State v. Redmon, App., 8 S.W. 2d 1084.
Pa.—Commonwealth v. Paschall, 53 Dauph.Co. 135.
Tex.—Sekaly v. State, 136 S.W.2d 854, 138 Tex.Cr. 415.
Vt.—State v. Gladstone, 22 A.2d 490, 112 Vt. 233.
26 C.J. p 774 note 94.

92. U.S.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F.2d 427—Nave-McCord Mercantile Co. v. U. S., Mo., 182 F. 46, 104 C.C.A. 486.
Conn.—State v. Tyrell, 122 A. 924, 100 Conn. 101.
Mo.—State v. Hershman, 143 S.W.2d 1025, 346 Mo. 892, followed in State v. Gilden, 143 S.W.2d 1027—State v. Shortell, 156 S.W. 988, 174 Mo. App. 153.
26 C.J. p 774 note 95.

93. N.Y.—Goodrich v. People, 19 N. Y. 574, affirming 3 Park.Cr. 622.
26 C.J. p 774 note 96.

94. Md.—Hicken v. State, 126 A. 123, 146 Md. 251.
26 C.J. p 775 note 6.

One additional word

Under an act relating to pure foodstuff an information naming cotton seed cake described therein as "concentrated commercial feeding stuff,"

ment or equivalent pleading for selling an adulterated article is sufficient in general if it alleges that defendant has sold an impure article and sets out the facts which show the adulteration, with appropriate averments as to time, place, person, and other circumstances identifying the particular transaction.[95] In a prosecution for knowingly having in possession an adulterated article with intent to sell it, a specification of the person by whom the adulterating was done is unnecessary.[96] Misrepresentation or concealment of the nature of the article, where this is the gist of the offense, should be charged.[97]

Matters of defense, which can be shown under a plea of not guilty, need not be anticipated and negatived.[98] Thus, a proviso or exception in the statute, not descriptive of the offense, is a matter of defense, and need not be negatived.[99]

§ 45. —— Particular Allegations

The necessity and sufficiency of allegations of particular facts depend on the terms of the statute defining the offense charged.

Description of accused. Where the statute makes punishable a certain class of persons, such as manufacturers or dealers in a particular article, the indictment should allege that defendant belonged to the class specified, as that he was a manufacturer or dealer.[1]

Description of purchaser. The name of the person or persons to whom the food was sold, if such person or persons are known, should usually be alleged,[2] but this is not always necessary.[3] Where the names of the purchasers are unknown, it is both proper and sufficient to allege that the sales were made by persons to the jurors unknown.[4] It has been held, however, that such an allegation is not authorized unless a careful investigation has been made to learn the names of the purchasers.[5] Where, under the statute, possession and exposure for sale of the adulterated article constitutes the offense, it is not necessary to allege the name of the purchaser.[6]

Description of article or product. The indictment should contain a description of the article sufficient to show that it was within the class of articles the handling of which in the stated manner is forbidden by law,[7] as that it was unwholesome[8] or adulterated,[9] and, in alleging misbranding, should state not only the brands used but also wherein they were illegal or improper;[10] but an information charg-

when the statute omits the word "commercial," is sufficient.—Guild v. State, 187 S.W. 215, 79 Tex.Cr. 603.

Composite language of two statutes

Complaint and information charging egg dealer with selling and exposing for sale eggs unfit for human consumption, which adopted composite language of Pure Food and Drugs Act and of the Egg Law were sufficient to charge an offense under provision of the Pure Food and Drugs Act relating to sale of adulterated food.—Ferch v. People, 74 P.2d 712, 101 Colo. 471.

If the language of one section of the statute does not include all the facts necessary to constitute the offense, an indictment following that one section alone and omitting other essential facts is insufficient.—State v. Shortell, 156 S.W. 988, 174 Mo.App. 153.

95. Mo.—St. Louis v. Liessing, 89 S.W. 611, 190 Mo. 464, 109 Am.S.R. 774, 1 L.R.A.,N.S., 918, 4 Ann.Cas. 112.
26 C.J. p 774 note 1.

96. Ind.—Isenhour v. State, 62 N.E. 40, 157 Ind. 517, 87 Am.S.R. 228.

97. Wyo.—State v. Weeden, 100 P. 114, 17 Wyo. 418.

98. Ind.—State v. Closser, 99 N.E. 1057, 179 Ind. 230.
N.Y.—People v. West, 44 Hun 162, affirmed 12 N.E. 610, 106 N.Y. 293, 60 Am.R. 452.

99. Mo.—State v. Bockstruck, 38 S.W. 317, 136 Mo. 335.
26 C.J. p 775 note 6.

1. U.S.—Morris v. U. S., Mo., 168 F. 682, 94 C.C.A. 168, reversing 161 F. 672, 88 C.C.A. 532, and certiorari denied 29 S.Ct. 704, 214 U.S. 527, 53 L.Ed. 1068.
26 C.J. p 775 note 7.

2. N.Y.—People v. Burns, 6 N.Y.S. 611, 53 Hun 274.
26 C.J. p 775 note 8.

3. Kan.—State v. Hupp, 118 P.2d 579, 154 Kan. 410.
Mo.—State v. Maurer, 164 S.W. 551, 255 Mo. 152, Ann.Cas.1915C 178, reversing 156 S.W. 991, 174 Mo. App. 162.

4. N.Y.—Goodrich v. People, 3 Park. Cr. 622, affirmed 19 N.Y. 574.
26 C.J. p 775 note 10.

5. Tex.—Marxen v. State, 68 S.W. 277, 44 Tex.Cr. 41.

6. Tex.—Quaternick v. State, Cr., 204 S.W. 328.

7. Mo.—State v. Hershman, 143 S.W.2d 1025, 346 Mo. 892, followed in State v. Gilden, 143 S.W.2d 1027.
26 C.J. p 775 note 13.

Allegations held sufficient

(1) The restriction of the application of the statute to original unbroken packages applies only to those who receive in interstate commerce and thereafter deliver adulterated or misbranded articles, not to those who ship or deliver for shipment, so that an information charging that defendant shipped misbranded food in interstate commerce need not allege that it was shipped in original unbroken packages.—U. S. v. Krumm, D.C.Pa., 269 F. 848.

(2) A complaint, charging that accused unlawfully offered for sale one firkin containing forty pounds of lard, twenty pounds of butter, and one bowl containing two pounds of lard, which food was then and there adulterated in that it was not protected from contamination and was exposed to unclean and unsanitary conditions, was held sufficient as against demurrer that it was the firkin and bowl, and not the contents, that accused was charged with offering for sale.—State v. Long, 117 A. 303, 121 Me. 365.

8. Ind.—Isenhour v. State, 62 N.E. 40, 157 Ind. 517, 87 Am.S.R. 228.

9. Mo.—St. Louis v. Ameln, 139 S.W. 429, 235 Mo. 669.
26 C.J. p 776 note 15.

Shipping adulterated food

Information charging defendant with shipping food "adulterated" by substitution of product containing less than eighty per centum by weight of milk fat for "butter" was held not demurrable.—U. S. v. Centralia Dairy Co., D.C.Wash., 60 F.2d 141.

10. U.S.—Nave-McCord Mercantile

ing defendant with having possession of adulterated food with intent to sell it need not allege that a certain substance with which it was alleged to be adulterated was either poisonous or injurious to health, or that the article in question violated a standard of purity established by the board of health.[11] It is not necessary that it should deny that it is a mixture or compound within a proviso of the statute by which mixtures or compounds recognized as articles of food not injurious to health are excepted from its operation.[12] An indictment charging defendant with selling a butter substitute not properly branded need not specifically describe the substitute;[13] and an information under a statute making unlawful the sale of filled milk containing oil other than milk fat in imitation or semblance of real milk need not charge in what way the product was in semblance or imitation.[14] A complaint for the violation of an ordinance providing for the protection of meats and other foods from filth and contamination need not designate the kind of meat which defendant is accused of having exposed for sale.[15] Where the gist of the offense, under the statute, is the addition of matter to conceal the inferiority of the article sold, actual inferiority should be alleged.[16] Where the statute makes the addition of poisonous or injurious ingredients essential to constitute the offense, an affidavit on which to base a criminal prosecution is insufficient if it fails to allege the addition of such substance.[17] A specification of the particular adulterant used is not generally necessary,[18] although in some instances it is required;[19] and the quantity used need not ordinarily be alleged.[20]

Intent or guilty knowledge. Wherever, under the rules considered supra § 22, the intention of accused is necessary to constitute the offense, such intent must be alleged in every material part of the indictment,[21] but otherwise such an allegation is not necessary.[22] So, too, it is not necessary to allege guilty knowledge on the part of defendant, where the mere fact of possession or sale is an offense;[23] but, where guilty knowledge is one of the elements of the offense, see supra § 22, there must be not only an allegation of such knowledge,[24] but such allegation must cover each element of the offense mentioned in the statute.[25]

Intent to sell for food. That the article in question was sold as an article of food must be alleged in an indictment under a statute prohibiting a sale of such article as food,[26] and, where the statute

Co. v. U. S., Mo., 182 F. 46, 104 C.C. A. 486.
26 C.J. p 776 note 16.

"Flavor" not "extract"

Allegation of misbranding because a liquid labeled "Flavor of Vanilla" did not contain any extract of vanilla is insufficient, the words "extract" and "flavor" not being synonymous. —U. S. v. St. Louis Coffee & Spice Mills, D.C.Mo., 189 F. 191.

Allegations held sufficient

(1) Information charging article containing less than eighty per centum by weight of milk fat was "misbranded," in that statements "butter" and "one pound net" on packages were false and misleading, was held not demurrable.—U. S. v. Centralia Dairy Co., D.C.Wash., 60 F.2d 141.

(2) An information, alleging that statements of label were false and misleading, in that they represented to the purchaser that the article was a substitute for eggs and could be used in place of eggs for cooking and baking, whereas, in truth, such article was not then and there a substitute for eggs, and could not be used in place of eggs for baking and cooking, was sufficient, as against an objection that it did not set forth why or in what manner the article could not be used as a substitute for eggs.—U. S. v. Newton Tea & Spice Co., D.C.Ohio, 275 F. 394.

Allegations held insufficient

Since "macaroni" is defined as made from a paste from the flour of hard glutinous wheat, and "semolina" is defined as the hard grains retained in the bolting machine after the fine flour has passed through, an indictment charging interstate shipment of an article labeled "macaroni," which was adulterated and misbranded because made of flour, not of semolina, is not sufficiently definite, even though macaroni must not contain the fine flour which passes through the bolting machine.—U. S. v. Krumm, D.C.Pa., 269 F. 848.

11. Ind.—Isenhour v. State, 62 N.E. 40, 157 Ind. 517, 87 Am.S.R. 228.

12. Ind.—Isenhour v. State, supra.

13. Md.—Hicken v. State, 126 A. 123, 146 Md. 251.

14. Mo.—State v. Hershman, 143 S. W.2d 1025, 346 Mo. 892, followed in State v. Gilden, 143 S.W.2d 1027.

15. Hawaii.—Territory v. Hop Kee, 21 Hawaii 206, Ann.Cas.1915D 1082.

16. Mich.—People v. Hinshaw, 97 N. W. 758, 135 Mich. 378.
26 C.J. p 776 note 22.

17. Ohio.—Strong v. State, 3 Ohio S. & C.P. 284, 2 Ohio N.P. 93.
26 C.J. p 776 note 23.

18. Mass.—Commonwealth v. Keenan, 29 N.E. 477, 139 Mass. 193.

Where the adulterant is specified in such a way as to be essentially descriptive of the article which defendant is alleged to have had in his possession, the allegation cannot be rejected as surplusage, but must be proved.—Commonwealth v. Luscomb, 130 Mass. 42, followed in Commonwealth v. Tobias, 6 N.E. 217, 141 Mass. 129.

19. Tex.—Dorsey v. State, 44 S.W. 514, 38 Tex.Cr. 527, 70 Am.S.R. 762, 40 L.R.A. 201.
26 C.J. p 776 note 24 [b].

20. Mass.—Commonwealth v. Schaffner, 16 N.E. 280, 146 Mass. 512.

21. Mass.—Commonwealth v. Boynton, 12 Cush. 499.
N.Y.—People v. Fauerback, 5 Park. Cr. 311.

Intent to sell should be alleged in indictment for having in possession with intent to sell.—People v. Paprin, 286 N.Y.S. 428, 159 Misc. 162—People v. Fauerback, 5 Park.Cr., N.Y., 311.

22. Md.—Fox v. State, 50 A. 700, 94 Md. 143, 89 Am.S.R. 419.

23. Mo.—State v. Maurer, 164 S.W. 551, 255 Mo. 152, Ann.Cas.1915C 178, reversing 156 S.W. 991, 174 Mo.App. 162.
26 C.J. p 776 note 30.

24. Tex.—Sanchez v. State, 10 S.W. 756, 27 Tex.App. 14.
26 C.J. p 776 note 32.

25. Mass.—Commonwealth v. Boynton, 12 Cush. 499.
Mo.—State v. Falk, 38 Mo.App. 554.

26. Neb.—Lansing v. State, 102 N. W. 254, 73 Neb. 124.
26 C.J. p 777 note 34.

prohibits the possession of certain articles or products with intent to sell them as food, the information or indictment must allege that the intent was so to sell them;[27] but under other statutes prohibiting the sale of articles in general terms, without regard to the purpose for which they are to be used, it is not necessary to allege that they were sold as food.[28]

Intent to injure health. An indictment for selling unwholesome food, as good and wholesome food, need not allege that defendant intended to injure the health of any person or persons or that it did injure their health.[29]

§ 46. —— Issues, Proof, and Variance

All material allegations of the indictment must be proved as laid, but an immaterial variance will be disregarded. Averments constituting surplusage need not be proved.

As in other criminal prosecutions, in a prosecution for violation of a food law all the material allegations of the indictment must be proved as laid,[30] but an immaterial variance will be disregarded.[31] Averments in the complaint constituting surplusage need not be proved.[32]

In accordance with these principles it has been held that an indictment charging defendant personally with selling a prohibited article is sustained by proof that the sale was made by an employee of defendant under his authority;[33] and a complaint alleging possession of an adulterated article contrary to statute, by defendant, is supported by evidence of possession by defendant's servant in the course of his employment.[34] An information charging a sale to a certain person is sustained by evidence that the person named purchased the article as agent for another;[35] and an averment of having possession for sale is sustained by proof of a consummated sale.[36] Under an indictment charging that to an article sold by defendant had been added a certain foreign substance, a further description whereof is unknown to complainant, evidence as to what the foreign substance was or consisted of is not inadmissible as a variance.[37] In a prosecution for possession of meat of several calves less than four weeks old with intent to sell, the state was not required to show that all of the calves slaughtered were under four weeks of age.[38] The fact that an information for selling misbranded feed stuff alleged that defendant was the agent of a corporation and that the proof showed that the concern was a partnership does not constitute a fatal variance;[39] but it has been held under a statute forbidding the sale of any adulterated article of food or drugs that an allegation of the sale of a prohibited article as a drug is not sustained by proof of its sale as food.[40] Averments as to the nature of the article adulterated must be sustained by the evidence as to all important particulars.[41] It has been held, however, that proof of adulteration of cream is sufficient to sustain an averment of adulteration of milk.[42] A conviction of one offense against the food laws cannot be upheld on proof of commission of another distinct offense, the commission of which is not charged.[43]

§ 47. Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

27. Ind.—List v. State, 131 N.E. 513, 191 Ind. 24—Schmidt v. State, 78 Ind. 41.

For human consumption

Information charging keeping and offering for sale adulterated milk, not alleging that milk was intended for human consumption, was held fatally defective.—Martinez v. People of Porto Rico, C.C.A.Puerto Rico, 46 F.2d 427.

28. Ohio.—State v. Smith, 68 N.E. 1044, 69 Ohio St. 196—State v. Kelly, 43 N.E. 163, 54 Ohio St. 166, reversing 2 Ohio S. & C.P. 239.

29. N.Y.—Goodrich v. People, 3 Park.Cr. 622, affirmed 19 N.Y. 574.

30. N.Y.—People v. F. W. Woolworth Co., 284 N.Y.S. 835, 246 App. Div. 838.

31. Tex.—Cogdell v. State, 193 S.W. 675, 81 Tex.Cr. 66.

32. Mass.—Commonwealth v. Rowell, 15 N.E. 154, 146 Mass. 128.
26 C.J. p 777 note 53.

33. Ohio.—Williams v. State, 25 Ohio Cir.Ct. 673.
Contra Heider v. State, 4 Ohio S. & C.P. 227.

34. Mass.—Commonwealth v. Proctor, 42 N.E. 335, 165 Mass. 38.

35. Kan.—State v. Miller, 124 P. 361, 87 Kan. 454.
Mass.—Commonwealth v. Farren, 9 Allen 489.

36. Mass.—Commonwealth v. Tobias, 6 N.E. 217, 141 Mass. 129.

37. Mass.—Commonwealth v. Graustein, 95 N.E. 97, 209 Mass. 38.

38. Mich.—People v. Ferris, 278 N.W. 740, 283 Mich. 699.

39. Tex.—Cogdell v. State, 193 S.W. 675, 81 Tex.Cr. 66.

40. N.Y.—People v. Fulle, 12 Abb. N.Cas. 196, 1 N.Y.Cr. 172.

41. Mass.—Commonwealth v. Luscomb, 130 Mass. 42.
26 C.J. p 777 note 54.

42. Mass.—Commonwealth v. Gordon, 33 N.E. 709, 159 Mass. 8.

43. N.Y.—People v. Linden Farms Milk & Cream Co., 280 N.Y.S. 144, 244 App.Div. 830.

Variance held fatal

(1) One cannot be convicted of keeping adulterated ginger for sale under complaint charging that he did "hold out for sale" such ginger.—People v. Wolin, 2 P.2d 60, 119 Cal. App., Supp., 770.

(2) Accused could not be convicted of selling misbranded olive oil because labeled and branded so as to deceive and mislead purchaser under count which was based on part of statute which was intended to protect particular purchaser from deception, where person to whom accused had sold oil and inspectors who purchased oil from such person were not purchasers deceived or misled.—Commonwealth v. Previte, 198 N.E. 646, 292 Mass. 378.

a. Presumptions and Burden of Proof

The state has the burden of proving beyond a reasonable doubt every element necessary to constitute the offense; but certain elements, such as intent or guilty knowledge, may be presumed from proved facts, unless rebutted. Defendant must prove affirmative defenses.

The burden of proof is on the state to establish[44] beyond a reasonable doubt[45] every element necessary to constitute the offense; and defendant is entitled to his recognized presumption of innocence.[46] Where, in accordance with the rules stated supra § 22, the intent with which the act charged was done is not an essential element of the offense, intent need not be shown,[47] but, where it is an essential element, it must be shown.[48] So, too, where guilty knowledge on the part of defendant is necessary to constitute the offense charged, such knowledge must be shown,[49] but proof of such knowledge is not necessary where it is not an essential element of the offense.[50] The intent to use or sell prohibited food stuffs may be presumed in the first instance from the possession of such food stuffs by a dealer therein,[51] particularly where such food stuffs are found among unprohibited products,[52] but such a presumption may be rebutted,[53] as, for example, by proof of compliance with regulatory provisions governing the segregation, removal, and destruction of such merchandise.[54] The intent or fact of conscious imitation may be inferred from the fact that the article sold is actually an imitation.[55] On an indictment for selling diseased meat without making it known to the buyer, it is sufficient for the state to prove that defendant knowingly sold such meat, the presumption arising from such proof being that the sale was unlawful, and it is incumbent on defendant to prove that he disclosed to the buyer the fact that the meat was unsound.[56] Under a statute providing that a sale of oleomargarine or other article by any person representing it to be butter shall be presumptive evidence of guilt, the presumption is not rebutted by showing the absence of knowledge of the adulteration and of an intent to deceive, and may be met only by controverting the prosecutor's evidence showing the sale and false representations.[57] An intent to do an act in violation of law is not negatived by the testimony of defendant that he had endeavored to comply with the law.[58] If the state proves all the necessary facts, the burden passes to defendant to establish any affirmative defense he may have.[59] Thus defendant must prove by a preponderance of the evidence the affirmative defense of a signed guaranty by the seller from whom defendant bought the food that it is not adulterated or misbranded.[60]

44. U.S.—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F. Supp. 714.
N.Y.—People v. Tarlow, 291 N.Y.S. 918, 249 App.Div. 224.
26 C.J. p 778 note 61.

Reasonableness of tolerances
In prosecution for misbranding based on shipment in interstate commerce of cheese labeled with weight more than true weight, government had burden of showing that deficiency transcended reasonable variation and tolerance, where the statute expressly permitted reasonable variations and tolerances.—U. S. v. Kraft Phenix Cheese Corporation, D.C.N.Y., 18 F.Supp. 60.

45. N.Y.—People, on Complaint of Ringler, v. Zeleznik, 193 N.E. 638, 266 N.Y. 59, reversing 271 N.Y.S. 1055, 242 App.Div. 608.

46. U.S.—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F. Supp. 714.

47. N.Y.—People, on Complaint of Goldberg v. B. M. Reeves, Inc., 5 N.Y.S.2d 144, 168 Misc. 70.
However, in a memorandum opinion, a conviction for unlawfully keeping and offering for sale food not wholesome and fit for human consumption was reversed, where food was kept in locked storeroom and it was the custom to inspect food therein and destroy that which had become unwholesome before it was offered for sale.—People v. F. W. Woolworth Co., 295 N.Y.S. 76, 250 App.Div. 864.

48. Ind.—List v. State, 131 N.E. 513, 191 Ind. 24.
26 C.J. p 778 note 63.

49. Ind.—List v. State, supra.
26 C.J. p 778 note 69.

50. Cal.—State v. Schwartz, 70 P.2d 1017, 28 Cal.App.2d Supp. 775.
Pa.—Commonwealth v. Jackson, 22 A. 2d 299, 146 Pa.Super. 328, adopted 28 A.2d 894, 345 Pa. 456.
26 C.J. p 778 note 70.

51. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299—People on Complaint of Johnson v. A. J. Capone Co., Inc., 4 N.Y.S.2d 610, 254 App.Div. 235.

52. N.Y.—People, on Complaint of Goldberg, v. B. M. Reeves, Inc., 5 N.Y.S.2d 144, 168 Misc. 70—People, on Complaint of Department of Health of City of New York v. Grandview Ice Cream & Dairy Products, 3 N.Y.S.2d 655, 167 Misc. 138.

53. N.Y.—People v. Swift & Co., 35 N.E.2d 652, 286 N.Y. 64, reversing 25 N.Y.S.2d 512, 261 App.Div. 299—People on Complaint of Johnson v. A. J. Capone Co., Inc., 4 N.Y.S.2d 610, 254 App.Div. 235.

54. N.Y.—People, on Complaint of Goldberg v. B. M. Reeves, Inc., 5 N.Y.S.2d 144, 168 Misc. 70.

55. Wis.—State v. Essex, 175 N.W. 795, 170 Wis. 512.

56. W.Va.—Seibright v. State, 2 W. Va. 591.

57. N.Y.—People v. Mahaney, 41 Hun 26.

58. N.Y.—People v. McDermott-Bunger Dairy Co., 77 N.Y.S. 888, 38 Misc. 365.

59. Pa.—Commonwealth v. Scott-Powell Dairies, 194 A. 684, 128 Pa. Super. 598.

Sale by servant or agent
The unlawful sale by a servant or agent of milk below the minimum retail price as forbidden by the Milk Control Law is "prima facie evidence" of assent to the sale by the employer or principal, and will impose liability on him unless rebutted.—Commonwealth v. Jackson, 22 A.2d 299, 146 Pa.Super. 328, adopted 28 A. 2d 894, 345 Pa. 456.

Unreasonableness of ordinance
In absence of contrary evidence, an ordinance regulating the sale of milk and levying a license fee is presumed reasonable, and the burden of proving its unreasonableness is on the one asserting it.—Grider v. City of Ardmore, 287 P. 776, 46 Okl.Cr. 33.

60. Pa.—Commonwealth v. Lutz, 9 A.2d 481, 137 Pa.Super. 449.

b. Admissibility

The admissibility of evidence in a prosecution for violation of a pure food law is governed by the usual rules of evidence as applied to criminal cases. The results of an analysis of food, made in accordance with the requirements of the statute, are admissible.

On a criminal prosecution for violation of the pure food laws, evidence will be held admissible[61] or inadmissible[62] in accordance with the usual rules of evidence as applied to criminal cases. Thus, on a trial for selling adulterated milk evidence that pure milk does not always come up to the standard fixed by statute is not admissible.[63] Where knowledge of the adulteration is not necessary to a conviction, evidence of defendant's lack of such knowledge is irrelevant and inadmissible.[64] Under an indictment charging sale of a prohibited article, evidence is admissible to show that the article defendant was charged with selling was not embraced within the terms of the statute defining the offense.[65]

Results of analysis. A common mode of proof of adulteration of food is by showing the result of an analysis of the suspected article, and in a number of jurisdictions such proof is admissible under express statutory provision.[66] For evidence of the analysis to be admissible, and to have the effect provided by statute, the sample must be taken and the analysis made strictly in accordance with the method prescribed,[67] although, where the methods provided for are merely directory, failure to comply therewith strictly does not of itself exclude the result of the analysis.[68] Where there is no suggestion in the statute to the contrary, the provision of a mode of proof by analysis does not exclude other appropriate evidence.[69]

c. Weight and Sufficiency

The weight and sufficiency of the evidence are governed by the rules of evidence applicable in criminal cases generally. The result of an analysis may be made conclusive evidence of adulteration, but such evidence does not preclude evidence attacking the manner in which the analysis was made.

On a criminal prosecution for the sale of a prohibited article of food or other violation of the pure food laws, the evidence will be held sufficient[70] or insufficient[71] to sustain a conviction, or to establish a prima facie case,[72] or to take the case to the

61. U.S.—Newton Tea & Spice Co. v. U. S., C.C.A.Ohio, 288 F. 475.
Mass.—Commonwealth v. Cohen, 146 N.E. 228, 250 Mass. 570.
Minn.—State v. Eidsvold Creamery Co., 194 N.W. 17, 156 Minn. 27.
26 C.J. p 778 note 74.

Moisture in butter

On the indictment of one charged with selling adulterated butter, it was competent for the commonwealth to show what proportion of moisture is found in the butter of commerce.—Commonwealth v. Kiefer, 78 Pa. Super. 460.

62. Mass.—Commonwealth v. E. E. Wilson Co., 135 N.E. 376, 241 Mass. 406.
Pa.—Commonwealth v. Drucker, 38 Pa.Dist. & Co. 169, 27 North.Co. 218.
26 C.J. p 778 note 75.

Cleanliness of dairy selling without license

In a prosecution for selling milk without a permit in violation of a city ordinance, testimony that defendant's dairy was clean and sanitary, and that milk sold therefrom was pure and wholesome was properly excluded, his right to a permit not being involved.—City of St. Louis v. Kellmann, 243 S.W. 134, 295 Mo. 71, error dismissed Kellman v. City of St. Louis, 44 S.Ct. 132, 263 U.S. 679, 68 L.Ed. 503, motion denied 44 S.Ct. 136.

63. N.H.—State v. Campbell, 13 A. 585, 64 N.H. 402, 10 Am.S.R. 419.

64. Ohio.—Myer v. State, 10 Ohio Cir.Ct. 226, 6 Ohio Cir.Dec. 477, error denied 43 N.E. 164, 54 Ohio St. 242.

65. Md.—Fox v. State, 43 A. 775, 89 Md. 381, 73 Am.S.R. 193.

66. Mass.—Commonwealth v. Previte, 198 N.E. 646, 292 Mass. 378.
26 C.J. p 778 note 80.

67. Mass.—Commonwealth v. Previte, supra.
26 C.J. p 779 note 81.

68. Mass.—Commonwealth v. Previte, supra.

69. Mass.—Commonwealth v. Spear, 9 N.E. 632, 143 Mass. 172.
26 C.J. p 779 note 82.

70. U.S.—U. S. v. Carolene Products Co., C.C.A.Ill., 104 F.2d 969.
Mich.—People v. Ferris, 278 N.W. 740, 283 Mich. 699.
Minn.—City of Duluth v. City Market Co., 244 N.W. 552, 187 Minn. 149.
Mo.—State v. Redmon, App., 8 S.W. 2d 1084.
N.Y.—People v. Sweet Life Food Corporation, 2 N.Y.S.2d 658, 254 App. Div. 573—People v. Gordon, 14 N.Y. S.2d 333, 172 Misc. 543, reversed on other grounds 16 N.Y.S.2d 833, 258 App.Div. 421, affirmed 28 N.E.2d 717, 283 N.Y. 705—People, on Complaint of Goldberg v. B. M. Reeves, Inc., 5 N.Y.S.2d 144, 168 Misc. 70—People, on Complaint of Department of Health of City of New York v. Grandview Ice Cream & Dairy Products, 3 N.Y.S.2d 655, 167 Misc. 138—People on Complaint of Waller v. Jacob Branfman & Son, 263 N.Y.S. 629, 147 Misc. 290.
Pa.—Commonwealth v. Lutz, 9 A.2d 481, 137 Pa.Super. 449.
Tenn.—Turner v. State, 100 S.W.2d 236, 171 Tenn. 36.
Tex.—Mince v. State, 111 S.W.2d 277, 133 Tex.Cr. 373.
Wis.—City of Milwaukee v. Childs Co., 217 N.W. 703, 195 Wis. 148—Day-Bergwall Co. v. State, 207 N. W. 959, 190 Wis. 8.
26 C.J. p 779 note 83.

71. U.S.—U. S. v. Commercial Creamery Co., D.C.Wash., 43 F. Supp. 714—U. S. v. Kraft Phenix Cheese Corporation, D.C.N.Y., 18 F.Supp. 60.
Cal.—People v. Merola, 300 P. 447, 115 Cal.App., Supp. 784.
Ill.—People v. Rodeen, 266 Ill.App. 206.
Ind.—List v. State, 131 N.E. 513, 191 Ind. 24.
N.Y.—People v. Wallace & Co., 26 N. E.2d 959, 282 N.Y. 417, reversing 16 N.Y.S.2d 701, 258 App.Div. 811—People, on Complaint of Ringler v. Zeleznik, 193 N.E. 638, 266 N.Y. 59, reversing 271 N.Y.S. 1055, 242 App.Div. 608—People v. Soiefer Farms, 295 N.Y.S. 177, 251 App.Div. 174—People v. F. W. Woolworth Co., 284 N.Y.S. 835, 246 App.Div. 838—People v. Hillman, 69 N.Y.S. 66, 58 App.Div. 571, 15 N.Y.Cr. 394—People ex rel. Goldstein v. Eichen, 5 N.Y.S.2d 817, 168 Misc. 276—People v. Paprin, 286 N.Y.S. 428, 159 Misc. 162.
Pa.—Commonwealth v. Priski, 31 Pa. Dist. & Co. 592, 20 Erie Co. 38.
26 C.J. p 779 note 84.

72. Pa.—Commonwealth v. Scott-

jury,[73] or to prove particular facts,[74] in accordance with the rules applicable in criminal cases generally. So, too, on a preliminary hearing the sufficiency of the evidence to warrant holding accused to answer is governed by the general rules applicable to such hearings,[75] as discussed in Criminal Law § 345.

Results of analysis. It has been held to be competent for the legislature to provide that a chemical analysis showing adulteration shall be conclusive evidence of adulteration and incapable of contradiction except by another analysis.[76] However, such evidence does not preclude evidence on the part of defendant to show that the sample analyzed was not a fair sample,[77] or that the analysis was so long delayed that the sample must have become, by natural deterioration, worthless for analytical purposes;[78] and, where it is not practicable to controvert the testimony as to the results of an analysis by another analysis, it can be controverted by evidence of collateral facts going to prove that the analysis was incorrect.[79] It has also been held that, where, through the prosecution's fault, defendant is precluded from having a proper analysis made on his own behalf, evidence of the prosecution's analysis is insufficient to support a conviction.[80] The Puerto Rico statute, as to adulteration of milk, does not make the report of the government expert an irrebuttable presumption of adulteration or dilution.[81] Apart from the question of its conclusiveness, the sufficiency of evidence of the results of analysis to sustain a conviction or prove particular facts is governed by the general principles of evidence.[82]

Circumstantial evidence. The fact of adulteration is provable in general by either direct or circumstantial evidence.[83] Likewise, a knowledge of the adulteration[84] and an intent to sell,[85] where essential to a conviction, need not be proved by positive and direct evidence, but may be inferred from all the circumstances.

§ 48. Trial and Review

The rules as to the trial of criminal cases generally and review thereof are applicable in prosecutions for violations of pure food laws.

The rules as to the trial of criminal cases generally, see Criminal Law §§ 927–1417, are applicable in prosecutions for violations of food laws.[86]

Appeal and error. Applying the general rules

Powell Dairies, 194 A. 684, 128 Pa. Super. 598.
26 C.J. p 779 note 83 [a].
Burden of proof see supra subdivision a of this section.

73. Kan.—State v. Hupp., 118 P.2d 579, 154 Kan. 410.
Mass.—Commonwealth v. Smith, 9 N. E. 631, 143 Mass. 169.
N.Y.—People v. Hills, 72 N.Y.S. 340, 64 App.Div. 584.
26 C.J. p 779 note 83 [b].

74. Minn.—State v. Eidsvold Creamery Co., 194 N.W. 17, 156 Minn. 27.
Evidence held sufficient
(1) To show that food was exposed for sale.—People v. Dennis, 114 N.Y.S. 7.
(2) To show intent.—Gardner v. State, 108 N.E. 230, 183 Ind. 101—26 C.J. p 779 note 83 [f].
(3) To show identity of the sample analyzed with the product sold.—State v. Eidsvold Creamery Co., 194 N.W. 17, 156 Minn. 27.
Evidence held insufficient to show intent.—People v. McDermott-Bunger Dairy Co., 77 N.Y.S. 888, 38 Misc. 365—26 C.J. p 779 note 84.

75. N.Y.—People, on Complaint of McDonough v. Bratowsky, 276 N.Y.S. 418, 154 Misc. 432.

76. N.Y.—People v. Thompson, 14 N.Y.S. 819.
26 C.J. p 780 note 89.

77. N.Y.—People v. Hodnett, 22 N.Y.S. 809, 68 Hun 341.

78. N.Y.—Stearns v. Ingraham, 1 Thomps. & C. 218.

79. N.H.—State v. Campbell, 13 A. 585, 64 N.H. 402, 10 Am.S.R. 419.
26 C.J. p 780 note 92.

80. Mass.—Commonwealth v. Lockhardt, 10 N.E. 511, 144 Mass. 132—Commonwealth v. Kenneson, 9 N. E. 761, 143 Mass. 418.
General effect of such conduct by prosecution
Where the article of food purchased is of a perishable nature, each case must stand on its own facts, and if the trial judge is satisfied that the commonwealth has improperly destroyed it so as to prevent an independent analysis thereof or if the commonwealth has unnecessarily delayed prosecution for the purpose of making such independent analysis impossible or impractical, these matters will weigh heavily against the commonwealth and in favor of defendant at the trial of the case.—Commonwealth v. Wilson, 42 Pa.Dist. & Co. 495, 89 Pittsb.Leg.J. 469.

81. Puerto Rico.—People v. Vazquez, 26 Puerto Rico 13.

82. **Evidence held sufficient**
(1) In general.—Commonwealth v. Rapoza, 178 N.E. 530, 277 Mass. 206.
(2) Analysis of the state's chemist was adequate proof of the presence of lard in the butter, and that its presence reduced the quality and strength thereof.—State v. Eidsvold Creamery Co., 194 N.W. 17, 156 Minn. 27.
Evidence held insufficient
(1) In general.
Ill.—People v. Rodeen, 266 Ill.App. 206.
N.Y.—People ex rel. Goldstein v. Eichen, 5 N.Y.S.2d 817, 168 Misc. 276.
(2) Evidence that defendant took samples of the run of butter every day, and placed such samples in cold storage, and employed a chemist, who analyzed three samples taken from the cold storage, and found each sustained the federal test for pure butter, but admitted that such test did not prove that there might not have been a considerable percentage of lard present in the samples analyzed, was held insufficient to establish a defense.—State v. Eidsvold Creamery Co., 194 N.W. 17, 156 Minn. 27.

83. N.Y.—People v. Bowen, 74 N.E. 489, 182 N.Y. 1.
Pa.—Commonwealth v. Darlington, 9 Pa.Dist. 700.

84. Ind.—Isenhour v. State, 62 N.E. 40, 157 Ind. 517, 87 Am.S.R. 228.

85. N.Y.—People v. Fauerback, 5 Parker Cr. 311.

86. Kan.—State v. Hupp, 118 P.2d 579, 154 Kan. 410.
26 C.J. p 780 note 98.
Propriety of instructions
(1) While it is the duty of inspector, under certain statutory provisions, to make sure that all laws

with respect to appeals in criminal cases, see Criminal Law §§ 1623–1957, it has been held that a notice of appeal from a conviction for violation of the pure food law in which the name of the appealing party is inserted in the body thereof is sufficient;[87] and that defendant, as a general rule, may not rely on objections that were not made at the trial.[88] Defendant cannot on an appeal from a conviction for violating an order of a milk control board, attack the order as being based on erroneous considerations, where he failed to appeal from the order when promulgated as provided by statute.[89]

§ 49. Sentence and Punishment

The provisions of the statutes with regard to sentence and punishment must be strictly followed.

It has been said that the disposition on a conviction for willful violation of a food law should be swift and severe.[90] The provisions of the statutes with regard to sentence and punishment must be strictly followed.[91] Thus, if the statute imposes a fine for the first offense and both fine and imprisonment for the second offense, on a trial of defendant on two indictments, a sentence of imprisonment for the offense committed prior in time should not be imposed,[92] but such sentence of fine and imprisonment may be imposed for a second offense, although the indictment for the second offense was returned by the grand jury only on the day immediately following sentence for the first offense.[93] A statute for the violation of which the court is bound to impose a sentence of imprisonment is not applicable to a corporation.[94]

VI. SEARCHES, SEIZURES, AND FORFEITURES

§ 50. In General

Under appropriate statutes or ordinances, unwholesome food may in proper cases be seized and destroyed; but as a rule such destruction is authorized only where there is some immediate necessity for it.

In a number of jurisdictions, under statutes or ordinances enacted pursuant to the police power for the protection of the public health, unwholesome food may, in proper cases, be seized and destroyed.[95]

applicable to slaughter of calves and their preparation for food are complied with, his stamp does not certify compliance with other provisions, and in prosecution, under one of such other provisions, for selling calves weighing less than forty pounds when dressed, instruction that defendant could not rely on such stamp was proper.—Commonwealth v. Cohen, 146 N.E. 228, 250 Mass. 570.

(2) In a prosecution for having in possession with intent to sell decomposed and contaminated food, an instruction that, if the meat was not kept by defendant to be served to boarders, but was to be laid aside for the purpose of being thrown away, the verdict should be for defendant was held sufficiently to present the defense that the meat was not to be served, but was to be thrown away.—State v. Grays Harbor Commercial Co., 214 P. 13, 124 Wash. 227.

(3) In prosecution for transporting in interstate commerce sacks of animal food branded "protein not less than 43%," but containing not more than thirty-eight and fifty-six one hundredths per cent protein content, charge authorizing conviction on finding that protein content fell short of forty-three per cent "by any fraction of a per cent" was held proper. —U. S. v. Feeders' Supply & Manufacturing Co., D.C.Mo., 15 F.Supp. 385.

(4) Other instructions.
Mass.—Commonwealth v. Cohen, 146 N.E. 228, 250 Mass. 570.
N.Y.—People v. Bremer, 74 N.Y.S 570, 69 App.Div. 14, appeal dismissed 66 N.E. 1113, 173 N.Y. 599.
Pa.—Commonwealth v. Kiefer, 78 Pa. Super. 460.
26 C.J. p 780 note 99 [b].

Questions of fact for jury

(1) In prosecution for possession of meat of calves less than four weeks old with intention of selling it, comparative weight to be given testimony of veterinarians and of lay witnesses was a question for jury.—People v. Ferris, 278 N.W. 740, 283 Mich. 699.

(2) In prosecution of egg dealer wherein acts were charged which would render egg dealer subject to conviction under provision of Pure Food and Drug Act relating to sale of adulterated food or under provision of Egg Law prohibiting sale of, or exposing for sale, eggs for human consumption which are not free from mould and other defects, whether egg dealer sold eggs or exposed them for sale or whether eggs were offered for sale within prohibition of the respective statutes were questions for jury.—Ferch v. People, 74 P.2d 712, 101 Colo. 471.

(3) In prosecution of egg dealer for selling or offering for sale eggs unfit for human consumption, whether dealer had the bad eggs in his place of business for sale to owners of fox farms and for feeding hogs was a question for jury.—Ferch v. People, supra.

(4) Other questions.—Greenwald v. Noyes, 17 N.Y.S.2d 707, 172 Misc. 780.
26 C.J. p 780 note 99 [a].

87. N.J.—State Bd. of Health v. McCue, 60 A. 1094.

88. U.S.—Frank v. U. S., Ohio, 192 F. 864, 113 C.C.A. 188.

89. Pa.—Commonwealth v. Ziegler Dairy Co., 11 A.2d 669, 139 Pa.Super. 224, affirming 32 Berks Co.L.J. 47.

90. N.Y.—People v. Miller, 8 N.Y.S. 2d 363, 169 Misc. 648.

91. Mo.—State v. Bockstruck, 38 S. W. 317, 136 Mo. 335.
N.Y.—People v. Henry Maillard, Inc., 182 N.Y.S. 547, 192 App.Div. 201.
26 C.J. p 780 note 2.

92. Pa.—Commonwealth v. Fink, 16 Pa.Super. 191.

93. Pa.—Commonwealth v. McDermott, 37 Pa.Super. 1.

94. U.S.—U. S. v. Braun, D.C.N.J., 158 F. 456.

95. U.S.—North American Cold Storage Co. v. Chicago, Ill., 29 S.Ct. 101, 211 U.S. 306, 53 L.Ed. 195, 15 Ann.Cas. 276, modifying, C.C., 151 F. 120.
26 C.J. p 781 note 12.
Validity of statutes see supra § 6.

State interference with federal control

(1) Although there is no authority under the federal Renovated Butter Act to confiscate or destroy materials, the power to condemn being restricted to the finished product, nevertheless a state attempting under its own law to condemn butter ma-

Such destruction is usually authorized only on its being made to appear that there is some immediate necessity for it,[96] and, at least in some jurisdictions, after notice to the owner and an opportunity to be heard in defense of his property, see infra § 52. An officer who condemns and destroys food stuffs must keep strictly within the power conferred by the statute, and if he exceeds his authority he is individually liable for the value of the food stuffs destroyed.[97]

§ 51. Under Federal Pure Food and Drug Law

Under the federal Pure Food and Drugs Act the seizure and destruction of adulterated or misbranded articles of food transported in interstate shipment is authorized, and the proceedings for forfeiture must conform as near as may be to proceedings in admiralty. On payment of costs and filing a proper bond, seized goods may be repossessed by the owner.

Under the federal Pure Food and Drugs Act, the seizure and destruction of adulterated or misbranded articles of food transported in interstate commerce for sale are authorized.[98] The remedy

terials used to make finished butter to be sold in interstate commerce would be interfering with the federal law for inspection, grading, etc., of finished butter, but the state has power over any of the finished product when offered for sale within the state.—Cloverleaf Butter Co. v. Patterson, Ala., 62 S.Ct. 491, 315 U.S. 148, 86 L.Ed. 754, reversing, C.C.A., 116 F.2d 227, certiorari granted 61 S.Ct. 834, 313 U.S. 551, 85 L.Ed. 1515.

(2) Conflict between state and federal power generally see supra § 8.

96. Colo.—Munn v. Corbin, 44 P. 783, 8 Colo.App. 113.

Conn.—Raymond v. Fish, 51 Conn. 80, 50 Am.R. 3.

Food only partly unfit

(1) Public health officers have no right to confiscate and destroy articles of food in bulk simply because some portion may be affected and unfit for use, when the good can be detected and readily separated, provided the spoiled portion does not contaminate the whole.—Baker v. Latses, 206 P. 553, 60 Utah 38.

(2) In proceedings to condemn eggs the court may in its discretion order an inspection to determine what eggs are good, and turn such eggs over to claimant.—People v. Fifty Cases of Eggs, 198 Ill.App. 319.

97. N.Y.—Williams v. Rivenburg, 129 N.Y.S. 473, 145 App.Div. 93.

98. U.S.—U. S. v. One Can of Kololiva, D.C.Mass., 24 F.Supp. 110.

26 C.J. p 781 note 17.

Purposes of statute

(1) The object of this act is to keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce to condemn them while in transit, or in original or unbroken packages after reaching their destination.—Hipolite Egg Co. v. U. S., Ill., 31 S.Ct. 364, 220 U.S. 45, 55 L.Ed. 364.

(2) The provision for confiscation and condemnation of food which consists in whole or in part of a filthy animal or vegetable substance was designed to protect the aesthetic tastes and sensibilities of consuming public.—U. S. v. 133 Cases of Tomato Paste, D.C.Pa., 22 F.Supp. 515.

What constitutes adulteration

(1) The fact that oats, which in their natural state contain up to twenty-five per cent of foreign matter, are permitted to be shipped does not prevent the forfeiture of oats containing less than twenty-five per cent of foreign matter, where a certion proportion of the foreign matter had been intentionally added to the natural oats and thus constituted an adulteration.—U. S. v. 154 Sacks of Oats, D.C.Va., 283 F. 985.

(2) For food to be adulterated by reason of its being mixed, colored, coated, or stained in a manner whereby damage or inferiority is concealed, it is necessary that the food be damaged or inferior, and that it was mixed so that its inferiority was concealed.—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F. 2d 87.

(3) So, an orange juice preparation sold in interstate commerce to retailers for dilution and sale over the counter as an iced drink, truthfully labeled as consisting of orange juice, sugar, fruit acid, certified color, and benzoate of soda, was not "adulterated" so as to be subject to condemnation on ground that its inferiority to pure orange juice was concealed.—U. S. v. Nesbitt Fruit Products, C.C.A.La., 96 F.2d 972, affirming, D.C., U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, 20 F.Supp. 520, rehearing denied, C. C.A., U. S. v. Nesbitt Fruit Products, 97 F.2d 1018.

(4) For food to be adulterated by the presence of filthy, decomposed, or putrid animal or vegetable substance, so as to warrant its condemnation, it need not be injurious to the health.—U. S. v. 133 Cases of Tomato Paste, D.C.Pa., 22 F.Supp. 515—U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D. C.Tex., 289 F. 157.

(5) The same is true of food adulterated by the mixture or addition of substances, so as to reduce or lower or injuriously affect its quality or strength.—A. O. Andersen & Co. v. U. S., C.C.A.Wash., 284 F. 542.

(6) A product is adulterated if it contains any poisonous or deleterious substance which may render it injurious to health.—United States v. 1232 Cases American Beauty Brand Oysters, D.C.Mo., 43 F.Supp. 749.

(7) If the poisonous or deleterious substance is not added but inheres in the product itself, the quantity of such substance must be such as ordinarily renders the product injurious to health.—United States v. 1232 Cases American Beauty Brand Oysters, supra.

(8) Even if the poisonous or deleterious substance is added, the test of whether the product may be injurious to health is not the proportionate amount of harmful ingredient in the food product itself, but amount contained in final product intended to be consumed by the public.—U. S. v. One Can of Kololiva, D.C.Mass., 24 F.Supp. 110.

(9) A food which consists in whole or in part of a "filthy" animal or vegetable substance is subject to confiscation, whether or not the filth is perceptible to the consumer.—U. S. v. 133 Cases of Tomato Paste, D.C.Pa., 22 F.Supp. 515.

(10) Other holdings relating to confiscation for adulteration see 26 C.J. p 781 note 17 [e].

(11) Adulteration of food generally see supra § 15.

Misbranding

(1) While a distinctive name may be purely arbitrary, it must be one that distinguishes the article; and where more than one name, each descriptive of an article, are united, it amounts to misbranding if the article sold does not contain any of the articles generally known individually by any of such names.—U. S. v. Forty Barrels and Twenty Kegs of Coca Cola, Tenn., 36 S.Ct. 573, 241 U.S. 265, 60 L.Ed. 995.

(2) Where the term "orange juice sweetened" was descriptive and meant an orange juice that had been made sweet without any limitation as to degree of sweetness, condem-

in rem so provided applies not only where adulterated goods have been shipped from one state to another for sale, but also where they were intended by the consignee to be used solely as raw material in the manufacture of some other product.[99] Under this act, the proceedings for forfeiture are required to conform as near as may be to the proceedings in admiralty;[1] but it was not intended to liken such proceedings to those in admiralty beyond the seizure of the property by process in rem,[2] rights being determined as in. any action at law.[3] It has been pointed out that the statute does not declare the goods ipso facto forfeited by an infraction of the act,[4] nor authorize the seizure of food claimed to be subject to forfeiture prior to the commencement of proceedings for a forfeiture in court,[5] nor does it authorize seizure by a private person.[6]

Imported goods. Under this statute there is also authority for the examination of articles of food sought to be imported, for the exclusion of such as are found to be adulterated or misbranded, and for the destruction of such excluded goods unless exported within three months from the date of notice or refusal of entry.[7]

Repossession of seized goods by the owner may be obtained on payment of costs and the giving of a bond to the effect that the goods will not be sold or otherwise disposed of contrary to the provisions of the act, or of the laws of any state, territory, district, or insular possession.[8]

The right to intervene in a libel against food cannot be determined on the same basis as a strict admiralty proceeding involving a ship, and the government should not interpose technical objections to deprive persons vitally interested in the result of the litigation of an opportunity to be heard.[9]

nation of preparation described as "orange juice sweetened" because fifty per cent sugar or certified coloring matter had been added, was not authorized.—U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, D. C.La., 20 F.Supp. 520, affirmed, C.C. A., U. S. v. Nesbitt Fruit Products, 96 F.2d 972, rehearing denied 97 F. 2d 1018.

(3) Oats of the "sample grade" being a natural mixture of oats containing a certain proportion of wild oats, selling as "sample grade" a mixture containing such proportion of wild oats, part of which were intentionally added, is misbranding. —U. S. v. 154 Sacks of Oats, D.C. Va., 294 F. 340.

Use after interstate shipment

The use to which adulterated food may be put after it has been shipped in interstate commerce is immaterial on the question of the government's right to forfeit because of such shipment.—U. S. v. 52 Drums Maple Syrup, C.C.A.Vt., 110 F.2d 914—U. S. v. Nesbitt Fruit Products, C.C.A. La., 96 F.2d 972, affirming, D.C., U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, 20 F.Supp. 520, rehearing denied, C.C.A., U. S. v. Nesbitt Fruit Products, 97 F.2d 1018.

For foreign shipment

Dried figs prepared for foreign purchaser who processed like fruit to make coffee flavoring were not subject to seizure, although shipment contained deleterious matter and law of purchaser's country prohibited use of impure materials in coffee admixtures, since foreign purchaser might free figs of deleterious matter before converting them to coffee flavoring, or might divert them to another proper use.—U. S. v. Catz American Co., C.C.A.Cal., 53 F.2d 425.

Entire shipment or contents of separate packages

(1) The word "article" in the statute providing for seizure and condemnation of "any article of food" that is adulterated or misbranded is used in a broad and comprehensive sense, and as applied to a shipment of a food product in containers, as canned salmon, has reference to the shipment as a whole, and to authorize condemnation it is not necessary to prove that each individual can is adulterated.—A. O. Andersen & Co. v. U. S., C.C.A.Wash., 284 F. 542.

(2) On the other hand, it has been held that the word "article," applies to the food itself, and not to the case or package in and by means of which the shipment is effected, and that only the contents of those packages found bad may be condemned. —U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D.C.Tex., 289 F. 157.

99. U.S.—Hipolite Egg Co. v. U. S., Ill., 31 S.Ct. 364, 220 U.S. 45, 55 L.Ed. 364—U. S. v. Two Barrels of Desiccated Eggs, D.C.Minn., 185 F. 302.

1. U.S.—U. S. v. Eighteen Cases of Tuna Fish, D.C.Va., 5 F.2d 979—Goodwin v. U. S., C.C.A.Ohio, 2 F. 2d 200—U. S. v. 397 Cases, etc., of Salad Oil, D.C.N.J., 16 F.Supp. 387.

26 C.J. p 781 note 19.

On taking of libel pro confesso, by reason of claimant's failure to answer or contest the allegations, it is nevertheless the duty of the court, before entering a decree of condemnation, to see that a case is made out.—U. S. v. Six Hundred Fifty Cases of Tomato Catsup, D.C.R.I., 166 F. 773.

Effect of decree

As in the case of a decree in admiralty, a decree forfeiting food is binding on all parties in interest if proper notice of the proceedings is given.—Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 73 P.2d 1272, 93 Utah 414.

2. U.S.—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87.

26 C.J. p 782 note 20.

"The provision[s] that a libel shall be filed and the proceedings shall conform as near as may be to the proceedings in admiralty, relate only to procedure and not to jurisdiction." —Goodwin v. U. S., C.C.A.Ohio, 2 F. 2d 200.

3. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, D.C.N.J., 16 F.Supp. 387.

4. U.S.—U. S. v. G. Spraul & Co., Ohio, 185 F. 405, 107 C.C.A. 569.

5. U.S.—U. S. v. Two Barrels of Desiccated Eggs, D.C.Minn., 185 F. 302.

6. U.S.—U. S. v. Two Barrels of Desiccated Eggs, supra.

7. U.S.—U. S. v. Nine Barrels of Olives, D.C.Pa., 179 F. 983.

26 C.J. p 782 note 26.

8. U.S.—U. S. v. 1,443 Cases, More or Less, Canned Salmon, etc., D. C.Wash., 7 F.Supp. 77—A. O. Andersen & Co. v. U. S., C.C.A.Wash., 284 F. 542.

9. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, D.C.N.J., 16 F.Supp. 387.

Obligation to compensate for goods seized

In libel against cans of salad oil for alleged misbranding, refiner and packer of oil who owned trade-mark

§ 52. Preliminary Proceedings

Proceedings for condemnation under the federal Pure Food and Drugs Act may be instituted by the district attorney on recommendation of the secretary of agriculture, on the complaint of any state health officer, or on any adequate proof, and a hearing on notice is not a condition precedent, although under state statutes destruction of food stuffs is usually authorized only after notice and opportunity to be heard.

Proceedings under the federal Pure Food and Drugs Act for the condemnation of goods for adulteration or misbranding may be instituted by the district attorney on recommendation of the secretary of agriculture,[10] on complaint of any state health officer,[11] or on any adequate proof,[12] and a hearing, on notice, is not a condition precedent to the institution of such proceedings;[13] nor is a seizure of the food a condition precedent to the filing of a libel for its condemnation.[14] However, in order to render the decree binding on parties in interest it is necessary, as in admiralty proceedings, to give notice by publication of the seizure and of the time assigned for the return of the process and the hearing of the cause.[15] Under state statutes or municipal ordinances, the destruction of food stuffs is usually authorized only after notice to the owner and opportunity to be heard,[16] but under some circumstances destruction has been authorized on an ex parte hearing without notice to the owner;[17] and it has been held that whether or not any notice or hearing shall be given is largely a matter of legislative discretion.[18]

Monitions and attachments. In view of the provision of the federal Pure Food and Drugs Act that proceedings shall conform as near as may be to the proceedings in admiralty, see supra § 51, the cour may order the issue of monitions and attachment on informations which are wholly unsupported b oath or affirmation.[19]

§ 53. Defenses

The act of a government agent in misbranding a foo product is no defense; neither is the undisclosed inten of the owner not to use goods as food a defense, wher the article comes within the definition of food.

The act of an agent of the government in mis branding a food product cannot be set up as a de fense in a proceeding for the condemnation of suc product.[20] The undisclosed intent of the owner no to use goods for the purpose of food is no defens in such a proceeding, when such goods come withi the definition of an adulterated article of food.[21]

§ 54. Pleading and Evidence

a. Pleadings
b. Evidence

a. Pleadings

The libel should allege all the facts necessary t make out a case for forfeiture; exceptions to the libel, serving the same purpose as a motion to strike, may b filed, and the libel may be summarily dismissed. Th material allegations of a libel must be proved as laid.

In view of the provision of the federal Pure Foo and Drugs Act that proceedings for forfeiture shal conform as near as may be to proceedings in ad miralty, reference to the discussion of pleadings i Admiralty §§ 118–131 may be found useful in con sidering questions relating to pleadings in a pro ceeding for condemnation of food. A libel unde

on cans and who would have to compensate purchaser for any loss by reason of seizure was entitled to intervene as vitally affected by proceedings.—U. S. v. 397 Cases, etc., of Salad Oil, supra.

When objection may be made

(1) After the case has been tried, it is too late to question the right of claimant to intervene.—U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D.C.Tex., 289 F. 157.

(2) Objection by district attorney to claimant's being permitted to interplead or file a brief in condemnation suit, in absence of evidence that claimant is a party in interest or bona fide owner of property seized, is made too late, where court had previously permitted claimant to answer, and the answer had been withdrawn with assent of district attorney.—U. S. v. Forty-Six Packages & Bags of Sugar, D.C.Ohio, 183 F. 642.

10. U.S.—U. S. v. Morgan, N.Y., 32 S.Ct. 81, 222 U.S. 274, 56 L.Ed. 198, reversing, C.C., 181 F. 587.

11. U.S.—U. S. v. Morgan, supra.

12. U.S.—U. S. v. Morgan, supra.

13. U.S.—U. S. v. W. T. Rawleigh Co., C.C.A.Colo., 57 F.2d 505—U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D.C., 48 F.2d 378.
26 C.J. p 782 note 30.

14. U.S.—U. S. v. 100 Barrels of Vinegar, D.C.Minn., 188 F. 471.
26 C.J. p 782 note 31.

15. Utah.—Kansas City Wholesale Grocery Co. v. Weber Packing Corporation, 73 P.2d 1272, 93 Utah 414.

16. Colo.—Munn v. Corbin, 44 P. 783, 8 Colo.App. 113.
Conn.—Raymond v. Fish, 51 Conn. 80, 50 Am.R. 3.

Before trial of issues

In a proceeding for violation of the cold storage act by keeping pork loins more than six months in storage, where the controversy involved the right of property, it was error for the court, on application of plaintiff and before trial on the merits, t order the seizure and sale of suc property by provisional orders, wher such seizure and sale would rende ineffectual a judgment obtained afte trial.—Columbus Packing Co. v. State, 140 N.E. 376, 106 Ohio St. 469, 37 A.L.R. 1525.

17. U.S.—Adams v. City of Milwaukee, Wis., 33 S.Ct. 610, 228 U.S. 572, 57 L.Ed. 971.

18. U.S.—North American Cold Storage Co. v. City of Chicago, Ill., 29 S.Ct. 101, 211 U.S. 306, 53 L.Ed. 195, 15 Ann.Cas. 276.

19. U.S.—U. S. v. Eighteen Cases of Tuna Fish, D.C.Va., 5 F.2d 979.

20. U.S.—U. S. v. Fifty Barrels of Whisky, D.C.Md., 165 F. 966.

21. U.S.—U. S. v. Thirteen Crates of Frozen Eggs, D.C.N.Y., 208 F. 950, affirmed 215 F. 584, 131 C.C.A. 652, error dismissed 215 F. 585, 131 C. C.A. 653.

the federal Pure Food and Drugs Act for the destruction of unwholesome food that has been transported in interstate commerce and remains unloaded, unsold, or in original unbroken packages, need not allege that such transported food was "for sale;"[22] and where the libel describes the articles transported as articles of food, it need not allege that they were intended for other than good uses.[23] It is not necessary to allege the date when the goods were shipped in interstate commerce,[24] or to state the place of seizure or the district within which the property is brought beyond the mere allegation that the property is within the district.[25] A libel to condemn food on the ground of misbranding should set forth the brand used and the facts necessary to show its falsity or misleading character.[26] The want of a sufficient verification of a libel is not a ground for exception or demurrer to the substance of the libel.[27]

Exceptions to the libel may be filed,[28] which serve practically the same purpose as a motion to strike for failure to disclose a cause of action,[29] so that averments in the libel properly pleaded, but not the conclusions of libelant, are deemed to be true in determining the sufficiency of the libel.[30] However, the court is not compelled on the argument of the exceptions to accept as true averments that are conclusively shown to have no basis in fact,[31] and where the court finds that there is no basis in fact for the libel, it may dismiss it summarily,[32] although such absence of a basis in fact should be so obvious that the jury could return but one possible verdict.[33]

Issues, proof, and variance. A libel charging a misbranding of an article of food in a specified particular cannot be supported by evidence of misbranding in a different particular.[34] A libel for condemnation of bottled waters, for false statements on the label regarding the curative or therapeutic effects of the water, is sustained by sufficiently showing the false and fraudulent character of any such claims.[35] Under a libel directed against particular containers of food, the issue is confined to the wholesomeness of the food in those containers only.[36]

b. Evidence

The burden is on the government to prove the facts alleged by at least a preponderance of the evidence, and on the claimant to prove any special facts which would exempt the food from forfeiture. The admissibility and sufficiency of the evidence is governed by general rules.

The burden of proving the facts alleged in the libel and necessary to make out a case is on the government,[37] and such facts must be proved by clear and satisfactory evidence,[38] or, at least by a fair preponderance of the evidence.[39] The burden

22. U.S.—U. S. v. Three Hundred Cans of Frozen Eggs, N.Y., 189 F. 351, 111 C.C.A. 83, overruling U. S. v. Forty-Six Packages & Bags of Sugar, D.C.Ohio, 183 F. 642.

23. U.S.—U. S. v. Three Hundred Cans of Frozen Eggs, N.Y., 189 F. 351, 111 C.C.A. 83.

24. U.S.—U. S. v. Two Barrels of Desiccated Eggs, D.C.Minn., 185 F. 302.

25. U.S.—U. S. v. George Spraul & Co., Ohio, 185 F. 405, 107 C.C.A. 569.

26. U.S.—U. S. v. Six Hundred Fifty Cases of Tomato Catsup, D.C.R.I., 166 F. 773.
26 C.J. p 782 note 42.

Libel held sufficient
Libel in proceeding to condemn bottled waters, which, after quoting from label "a long list of ailments for which the water was said to be beneficial, with 'healing powers' and a 'reliable remedy,'" denies that the water can produce the therapeutic effects so claimed, states a case under the statute.—Goodwin v. U. S., C.C.A.Ohio, 2 F.2d 200.

27. U.S.—U. S. v. Two Barrels of Desiccated Eggs, D.C.Minn., 185 F. 302.

28. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, D.C.N.J., 16 F.Supp. 387.

29. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, supra.

30. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, supra.

31. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, supra.

32. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, supra.

Judicial notice of proper facts may be taken by the court in arriving at its decision.—U. S. v. 52 One-Gallon Cans, More or Less, of Salad Oil, D.C.Conn., 16 F.Supp. 385.

33. U.S.—U. S. v. 397 Cases, etc., of Salad Oil, D.C.N.J., 16 F.Supp. 387.

34. U.S.—Lexington Mill & Elevator Co. v. U. S., Mo., 202 F. 615, 121 C.C.A. 23, affirmed 34 S.Ct. 337, 232 U.S. 399, 58 L.Ed. 658.

35. U.S.—Goodwin v. U. S., C.C.A. Ohio, 2 F.2d 200.

36. U.S.—U. S. v. Ninety-Four Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, D.C. Pa., 48 F.2d 378, affirmed, C.C.A., 51 F.2d 913.

37. U.S.—U. S. v. Washington Dehydrated Food Co., C.C.A.Mo., 89 F. 2d 606—U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, D.C.La., 20 F.Supp. 520, affirmed, C.C.A., U. S. v. Nesbitt Fruit Products, 96 F.2d 972, rehearing denied 97 F.2d 1018—Ninety-Five Barrels, More or Less, Apple Cider Vinegar v. U. S., C.C.A.Ohio, 289 F. 181, certiorari granted U. S. v. Ninety-Five Barrels, More or Less, Alleged Apple Cider Vinegar, 44 S.Ct. 37, 263 U.S. 695, 68 L.Ed. 510, and reversed on other grounds 44 S.Ct. 529, 265 U.S. 438, 68 L.Ed. 1094—U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D.C.Tex., 289 F. 157—U. S. v. Six Hundred Fifty Cases of Tomato Catsup, D.C.R.I., 166 F. 773.

38. U.S.—U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, D.C.La., 20 F.Supp. 520, affirmed, C.C.A., U. S. v. Nesbitt Fruit Products, 96 F.2d 972, rehearing denied 97 F.2d 1018.

"A higher degree of proof than a mere preponderance, a mere balance of evidence in favor of the Government is required."—Van Camp Sea Food Co. v. U. S., C.C.A.Pa., 82 F.2d 365, 366.

39. U.S.—U. S. v. Sixty Barrels of Wine, D.C.Mo., 225 F. 846.

of proving that words contained in the label or brand have a special meaning to the purchaser, so as to render the brand not misleading, is on claimant.[40] On the question as to whether the food sought to be condemned is within the class of food substances the transportation of which in interstate commerce is forbidden by law, the government is not limited to standards mentioned, nor to methods of analysis adopted in bulletins or circulars theretofore issued by the department of agriculture,[41] but may introduce evidence of the results of any test shown to be accurate.[42] The testimony of revenue officers acting under a search warrant is admissible if otherwise relevant,[43] although the warrant itself may have been illegal.[44] It is error to admit claimant's evidence of his intention to purify the product which was in an adulterated condition when shipped.[45] The sufficiency of the evidence is governed by the rules applicable to the sufficiency of evidence in general.[46]

§ 55. Trial and Review

Although the federal Pure Food and Drugs Act requires condemnation proceedings thereunder to conform as near as may be to proceedings in admiralty, the trial proceeds as in a court of common-law jurisdiction, and the method of review follows the practice in law actions.

Notwithstanding the federal Pure Food and Drugs Act provides that condemnation proceedings thereunder shall conform as nearly as may be to the proceedings in admiralty, yet the court in cases of seizures on land proceeds, not as a court of admiralty, but as a court of common-law jurisdiction, on a trial by jury.[47] Whether a sample of a food product, taken in proceedings under this statute, is fairly representative of the whole is a preliminary question to be determined by the court; although the circumstances may be such as to warrant the court in submitting this question to the jury.[48] Whether caffeine added to a food product is a deleterious ingredient within this statute is a question for the jury where the evidence is conflicting.[49] It is not error for the court, in the course of proceedings to condemn food under a pure food law, to order the taking and examination of additional samples if necessary to ascertain the truth of the issue.[50]

Appeal and error. The provision that proceedings under the federal Pure Food and Drugs Act shall conform, as near as may be, to proceedings in admiralty does not include appellate proceedings.[51] The method of review follows the practice in law actions,[52] and the proceeding is reviewable under the former practice only on writ of error.[53] The ruling of the trial court as to whether a sample of

40. U.S.—U. S. v. 154 Sacks of Oats, D.C.Va., 294 F. 340.

41. U.S.—U. S. v. 100 Barrels of Vinegar, D.C.Minn., 188 F. 471.

42. U.S.—U. S. v. 100 Barrels of Vinegar, supra.
26 C.J. p 783 note 50.

43. U.S.—Ripper v. U. S., Mo., 178 F. 24, 101 C.C.A. 152, rehearing denied 179 F. 497, 103 C.C.A. 478.

44. U.S.—Ripper v. U. S., supra.

45. U.S.—U. S. v. 52 Drums Maple Syrup, C.C.A.Vt., 110 F.2d 914.

46. U.S.—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87.
26 C.J. p 783 note 53.

Evidence held sufficient

(1) In general.—U. S. v. Nesbitt Fruit Products, C.C.A.La., 96 F.2d 972, affirming, D.C., U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, 20 F.Supp. 520, and rehearing denied, C.C.A., U. S. v. Nesbitt Fruit Products, 97 F.2d 1018—U. S. v. 462 Bags of Flour, D.C.La., 8 F. Supp. 79—U. S. v. Ninety-Four Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, D.C.Pa., 48 F. 2d 378, affirmed, C.C.A., 51 F.2d 913.

(2) To make case for jury.—U. S. v. 52 Drums Maple Syrup, C.C.A.Vt., 110 F.2d 914—Duffy-Mott Co. v. U. S., C.C.A.Pa., 285 F. 737.

(3) To support finding that entire lot of frozen eggs was adulterated within the meaning of a state pure food law.—People v. 237 30-Lb. Cans of Whole Hen Eggs, 72 P.2d 929, 23 Cal.App.2d 292.

Evidence held insufficient

(1) In general.—Van Camp Sea Food Co. v. U. S., C.C.A.Pa., 82 F.2d 365—U. S. v. 492 Cases, More or Less, of Orange Juice, Each Case Containing Two One-Gallon Jugs, D.C.La., 20 F.Supp. 520, affirmed, C.C.A., U. S. v. Nesbitt Fruit Products, 96 F.2d 972, rehearing denied 97 F.2d 1018—U. S. v. 1,443 Cases, More or Less, Canned Salmon, Etc., D.C.Wash., 7 F. Supp. 77.

(2) To show adulteration.—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87.

(3) To show "misbranding."—U. S. v. Ten Cases, More or Less, Bred Spred, supra—U. S. v. One Can of Kololiva, D.C.Mass., 24 F.Supp. 110.

For condemnation of entire lot

While proof that the contents of twenty per cent of cans in a shipment of salmon were adulterated, with nothing more, might authorize the inference that the whole product was bad, and therefore support a condemnation of the lot, where the same proof which establishes the adulteration of one fifth establishes the lack of adulteration of the balance, the government must fail in its case, except as to the cans particularly identified as adulterated.—U. S. v. Two Hundred Cases, More or Less, of Canned Salmon, D.C.Tex., 289 F. 157.

47. U.S.—U. S. v. George Spraul & Co., Ohio, 185 F. 405, 107 C.C.A. 569.

48. D.C.—Galt v. U. S., 39 App.D.C. 470.

49. U.S.—U. S. v. Forty Barrels and Twenty Kegs of Coca Cola, Tenn., 36 S.Ct. 573, 241 U.S. 265, 60 L.Ed. 995, reversing judgment 215 F. 535, 132 C.C.A. 47.

50. Ala.—State v. 2147 Pounds of Packing Stock Butter, 199 So. 739, 29 Ala.App. 607.

51. U.S.—443 Cans of Frozen Egg Product v. U. S., N.J., 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174—U. S. v. Ten Cases, More or Less, Bred Spred, C.C.A.Iowa, 49 F.2d 87.

52. U.S.—U. S. v. Ten Cases, More or Less, Bred Spred, supra.
26 C.J. p 783 note 62.

53. U.S.—443 Cans of Frozen Egg Product v. U. S., N.J., 33 S.Ct. 50, 226 U.S. 172, 57 L.Ed. 174.
26 C.J. p 783 note 62.

a food product, taken in a condemnation proceeding, is fairly representative will not be reviewed on appeal in the absence of the evidence on which it was based, and then only when error clearly appears;[54] nor will a finding of fact be reviewed where the evidence claimed to support a contrary finding is not part of the record.[55] Indeed, it has been held that where a jury is waived, the appellate court cannot reverse the judgment on the ground that the trial court had decided an issue of fact contrary to the weight of evidence.[56]

§ 56. Costs

A judgment for costs may be entered against claimant, and if there is a sale the costs and expenses may be taken out of the proceeds; costs against the government are not allowable. The payment of costs is a condition to the return of goods seized.

It has been held that, in a proceeding in rem under the federal Pure Food and Drugs Act, the court has jurisdiction to enter personal judgment for costs against claimant.[57] It has also been held that, under this statute, if the articles seized are sold, the costs and expenses of the proceeding are to be taken out of the proceeds of the sale,[58] but if such articles are destroyed no one is made liable for the costs and expenses.[59] Payment of costs is a condition to the return of goods seized.[60] Costs against the government are not allowable.[61]

VII. LIABILITY FOR INJURIES OR LOSSES

§ 57. In General

A person who sells or purveys articles of food must exercise reasonable care to insure their being wholesome and fit for consumption, and is liable in an action ex delicto on the ground of negligence for any injury resulting from their being unwholesome or unfit, and attributable to his lack of due care. The negligence must be the proximate cause of the injury, and the injured person's contributory negligence will, as a rule, bar any recovery.

Generally speaking, a person who sells or purveys articles of food is under a legal duty to exercise reasonable care to insure their being wholesome and fit for consumption, and is liable in an action ex delicto on the ground of negligence for any injury resulting from their being unwholesome or unfit if he knew, or by the exercise of reasonable care could have known, of their defective condition.[62]

54. D.C.—Galt v. U. S., 39 App.D.C. 470.

55. U.S.—U. S. v. 94 Dozen, More or Less, Half-Gallon Bottles Capon Springs Water, C.C.A.Pa., 51 F.2d 913, affirming, D.C., 48 F.2d 378.

56. U.S.—U. S. v. Washington Dehydrated Food Co., C.C.A.Mo., 89 F. 2d 606.

57. U.S.—Hipolite Egg Co. v. U. S., Ill., 31 S.Ct. 364, 220 U.S. 45, 55 L. Ed. 364.

58. U.S.—U. S. v. 1,590 Cases of Tomato Pulp, D.C.Pa., 255 F. 228.

59. U.S.—U. S. v. 1,590 Cases of Tomato Pulp, supra.

60. U.S.—A. O. Andersen & Co. v. U. S., C.C.A.Wash., 284 F. 542.

61. U.S.—U. S. v. French Sardine Co., C.C.A.Wash., 80 F.2d 325—U. S. v. One Can of Kololiva, D.C. Mass., 24 F.Supp. 110.

62. Ark.—Great Atlantic & Pacific Tea Co. v. Gwilliams, 76 S.W.2d 65, 189 Ark. 1037.
Ga.—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga.App. 82.
La.—Lee v. Smith, App., 168 So. 727.
N.J.—Amabile v. Kramps, 2 A.2d 178, 121 N.J.Law 219—Sheehan v. Menkes, 152 A. 326, 8 N.J.Misc. 867.
R.I.—Chisholm v. S. S. Kresge Co., 182 A. 4, 55 R.I. 422.
S.C.—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 162, 188 S.C. 98, quoting **Corpus Juris**—Burnette v. Augusta Coca Cola Bottling Co., 154 S.E. 645, 157 S.C. 359—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris.**
Wash.—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606.
26 C.J. p 783 note 69.

Other statements of care required

(1) A purveyor of foods is required to exercise that degree of care which a prudent man exercises in selection of foods for consumption of himself and family.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404.

(2) Purveyor of food and drink must use high degree of care and surveillance to exclude injurious foreign substances.—Levy v. Horn & Hardart Baking Co., 157 A. 369, 103 Pa.Super. 282.

Sale

Custom approved by storekeeper whereby customers helped themselves to drinks was in effect an invitation to customers to wait on themselves and constituted a continuing offer of sale while store was open.—Cordell v. Macon Coca-Cola Bottling Co., 192 S.E. 228, 56 Ga.App. 117.

Knowledge presumed

Seller of unwholesome food is presumed to know its condition and is liable in damages to purchaser who is made ill as result of its consumption.—MacLehan v. Loft Candy Stores, La.App., 172 So. 367.

Statute imposing civil liability

(1) A statute imposing civil liability on any person who knowingly or carelessly sells to another unwholesome provisions, the defect being unknown to the purchaser, by the use of which damage results to the purchaser or his family, has been held fairly to state the common-law rule although not stating the precise basis of liability; and liability under such a statute is not affected by the fact that defendant has a guaranty from his vendor which exonerates him from criminal liability under a penal pure food law, the only effect of such a guaranty in a civil action being that plaintiff cannot rely on a violation of the penal statute as constituting negligence per se. However, if defendant does not have such a guaranty, plaintiff need not allege or establish knowledge or negligence in fact to satisfy the civil liability statute, since he may establish the negligence referred to therein by showing negligence in law arising from the violation of the penal statute.—Donaldson v. Great Atlantic & Pacific Tea Co., 199 S.E. 213, 186 Ga. 870, 128 A.L.R. 456, answers to certified questions conformed to 200 S.E. 498, 59 Ga.App. 79.

(2) The statute does not apply to clerks or agents not shown to have undertaken to perform duty of inspection required of distributors or retailers, but is applicable only to principals.—Crosby v. Calaway, 16 S.E.2d 155, 65 Ga.App. 266.

A retail store agent or clerk, merely passing out articles of food sold and receiving the price thereof for the principal, is not liable for defects therein, unless he has actual knowledge of such defects, or assumes the legal responsibility of retailers and distributors of food, or owes some particular duty to the purchaser.[63] So, too, a bottler's delivery agent, who delivers sealed bottles to dealers, is not liable to the consumer for injuries due to deleterious matter in a bottle.[64]

The liabilities arising from the particular relationship of the persons involved in the sale, dispensation, and consumption of injurious food are considered infra §§ 58–64.

Proximate cause. In an action for injuries from food based on the theory of negligence, the negligence must be the proximate cause of the injuries.[65] On the theory that there can be no recovery for physical injuries resulting from fright, it has been held that plaintiff cannot recover for illness caused by his seeing an insect in the food which he was eating;[66] but there is authority for the view that physical illness, caused by the mere sight of insects in the food which plaintiff was eating, is the proximate result of their presence, and warrants the recovery of damages.[67]

Contributory negligence. The general rules relating to contributory negligence as affecting the right to recover for negligence, considered in the C.J.S. title Negligence §§ 116–174, also 45 C.J. p 941 note 27–p 1044 note 77, apply to the right of recovery for negligence in the sale or dispensation of food. Thus under the general common-law doctrine relating thereto, the contributory negligence of the person injured by impure food bars any recovery therefor,[68] and this is true notwithstanding the seller's liability is statutory[69] or based on the theory of negligence per se because of a violation of a penal statute.[70]

Negligence per se. While the sale of food in violation of the provisions of a pure food law is generally held to constitute negligence per se,[71] this

63. Ga.—Crosby v. Calaway, supra.

64. Ark.—Coca-Cola Bottling Co. v. Swilling, 57 S.W.2d 1029, 186 Ark. 1149.

65. La.—Lee v. Smith, App., 168 So. 727.

Violation of statute as proximate cause

In action against grocery store owner for injuries allegedly resulting from eating canned corn, finding of jury that "eating of the canned corn" was proximate cause of the injury exonerated grocery store owner from liability, on theory that such owner was negligent per se by selling the corn in violation of the pure food laws, since finding that act of selling the corn was proximate cause of injuries would be conflicting with finding of jury.—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, 631, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57.

Retailer's failure to inspect

Negligent omission of retailer to inspect coffee containing deleterious foreign substance is not such intervening cause of customer's injuries as relieves manufacturer.—Maddox Coffee Co. v. Collins, 167 S.E. 306, 46 Ga.App. 220.

Foreseeability of full extent of harm

If defendant's conduct is a substantial factor in bringing about the injury, he is liable, even though a physical condition of the injured person, which was neither known nor should have been known to defendant, makes the injury greater than that which defendant as a reasonable man should have foreseen as a probable result of his conduct.—Delta Nehi Bottling Co. v. Lucas, 185 So. 561, 184 Miss. 693.

Concurrent cause

Under Ohio law, if retailer and wholesaler were negligent in selling pork infected with trichinella, their negligence was the proximate cause of injuries sustained by plaintiff who ate the pork, even though negligence of another in not thoroughly cooking the meat may have contributed thereto.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135.

66. N.J.—Legac v. Vietmeyer Bros., 147 A. 110, 7 N.J.Misc. 685.

Pa.—Koplin v. Louis K. Liggett Co., 185 A. 744, 322 Pa. 333, reversing 181 A. 381, 119 Pa.Super. 529, and affirming 22 Pa.Dist. & Co. 442—Martin v. Walgreen Co., 4 Fay.L.J. 10.

67. N.Y.—Carroll v. New York Pie Baking Co., 213 N.Y.S. 553, 215 App.Div. 240.

68. Ohio.—Rubbo v. Hughes Provision Co., 34 N.E.2d 202, 138 Ohio St. 178, affirming 36 N.E.2d 144, 67 Ohio App. 123—Great Atlantic & Pacific Tea Co. v. Hughes, 3 N.E. 2d 415, 131 Ohio St. 501, affirming 4 N.E.2d 700, 53 Ohio App. 225.

S.C.—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris**.

26 C.J. p 787 note 25.

Failure to examine contents of bottle before drinking thereof is not contributory negligence in law.

Ga.—Cordell v. Macon Coca-Cola Bottling Co., 192 S.E. 228, 56 Ga.App. 117—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga. App. 369—Atlanta Coca-Cola Bottling Co. v. Sinyard, 164 S.E. 231, 45 Ga.App. 272.

N.C.—Broadway v. Grimes, 169 S.E. 194, 204 N.C. 623.

Tenn.—Coca Cola Bottling Works v. Kennedy, 13 Tenn.App. 199.

Tex.—Texas Coca Cola Bottling Co. v. Lovejoy, Civ.App., 112 S.W.2d 203, error dismissed—Tennessee Dairies v. Seibenhausen, Civ.App., 99 S.W.2d 323, error dismissed.

Plaintiff held not negligent

(1) In failing to discover pin in candy bar.—Gross v. Loft, Inc., 185 A. 80, 121 Conn. 394.

(2) For failure to remove from a trout a concealed tag which defendant had permitted to remain therein when serving plaintiff.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.

69. S.C.—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.

70. Ohio.—Rubbo v. Hughes Provision Co., 34 N.E.2d 202, 138 Ohio St. 178, affirming 36 N.E.2d 144, 67 Ohio App. 123—Great Atlantic & Pacific Tea Co. v. Hughes, 3 N.E.2d 415, 131 Ohio St. 501, affirming 4 N.E.2d 700, 53 Ohio App. 225.

71. N.Y.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637.

Ohio.—Yochem v. Gloria, Inc., 17 N.E.2d 731, 134 Ohio St. 427.

Negligence per se as applicable to particular sellers or purveyors of food see infra §§ 58–64.

is not always the case.[72]

Implied warranty, as a basis for an action to recover for injuries suffered through unwholesome food, is considered in the C.J.S. title Sales §§ 305, 331, also 55 C.J. p 669 note 1–p 670 note 20, p 733 note 91–p 766 note 18.

§ 58. Liability of Dealer or Trader to Consumer

A retailer of food for human consumption must exercise due care to see that it is reasonably fit for the purpose intended, and is liable in negligence for failure to exercise the care required under the circumstances. Such liability extends to any person who might reasonably be expected to suffer injury from the unfit food.

It has been said broadly that a retailer of food for human consumption must exercise ordinary care to see that it is reasonably fit for the purpose intended.[73] Lack of due care is, of course, an essential element of a food case grounded on negligence[74] but what constitutes due care varies with the circumstances. Thus one who sells articles of food not in an original sealed package or container owes a duty of reasonable inspection of the commodity before placing it on the market for consumption, and if a discoverable defect or deleterious object is in the commodity when sold the seller may be held liable for negligence[75] although his particular dereliction is not shown.[76] On the other hand, to hold a retailer of standard packaged or bottled goods liable for defects therein more positive negligence is generally required.[77] In the handling or sale of such packaged or bottled goods, inspection is not ordinarily required, expected, or anticipated of the dealer,[78] his duty as to such goods

72. N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.

Seller as insurer

Statute prohibiting sale of adulterated foods was not intended to impose on producer absolute civil responsibility of insurer where every reasonable means designed to guarantee safety of food for normal use has been employed.—Cheli v. Cudahy Bros. Co., 255 N.W. 414, 267 Mich. 690.

73. Ark.—H. J. Heinz Co. v. Duke, 116 S.W.2d 1039, 196 Ark. 180—Kroger Grocery & Baking Co. v. Turner, 100 S.W.2d 82, 193 Ark. 227—Safeway Stores v. Ingram, 51 S.W.2d 985, 185 Ark. 1175.

Ga.—Davis v. Williams, 198 S.E. 357, 58 Ga.App. 274—Crowley v. Lane Drug Stores, 189 S.E. 380, 54 Ga. App. 859.

"The retail dealer . . . is charged with . . . that degree of care necessary for the protection of customers against impurities or contamination that might ordinarily be discoverable by any usual or ordinary tests. This cannot mean, however, that the retail dealer must make or apply such tests as would in every case operate to insure absolute safety."—Green v. Wilson, 105 S.W.2d 1074, 1075, 194 Ark. 165—Great Atlantic & Pacific Tea Co. v. Gwilliams, 76 S.W.2d 65, 68, 189 Ark. 1037.

Microscopic examination is not required.—H. J. Heinz Co. v. Duke, 116 S.W.2d 1039, 196 Ark. 180—Green v. Wilson, 105 S.W.2d 1074, 194 Ark. 165—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494—Great Atlantic & Pacific Tea Co. v. Gwilliams, 76 S.W.2d 65, 189 Ark. 1037.

74. Ark.—Green v. Wilson, 105 S.W. 2d 1074, 194 Ark. 165—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494.

Md.—Child's Dining Hall Co. v. Swingler, 197 A. 105, 173 Md. 490.

N.H.—Wadleigh v. Howson, 189 A. 865, 88 N.H. 365.

Selling pork containing trichinæ is not negligence.—Dressler v. Merkel, Inc., 284 N.Y.S. 697, 247 App.Div. 300, affirmed 4 N.E.2d 744, 272 N.Y. 574.

75. Ga.—Crowley v. Lane Drug Stores, 189 S.E. 380, 54 Ga.App. 859.

Ohio.—Great Atlantic & Pacific Tea Co. v. Hughes, 3 N.E.2d 415, 131 Ohio St. 501, affirming 4 N.E.2d 700, 53 Ohio App. 225.

That recovery may be had on warranty does not relieve seller of duty to exercise ordinary care.—Safeway Stores v. Ingram, 51 S.W.2d 985, 185 Ark. 1175.

Where purchaser has equal opportunity to inspect

Where consumer ate part of pie after observing retailer cut pie on removing it from baking company package, which consumer knew had just arrived from baking company, retailer was not liable for illness from unfitness of pie, if any, since consumer did not rely on retailer to inspect pie.—Green v. Wilson, 105 S.W.2d 1074, 194 Ark. 165.

76. Mich.—Hertzler v. Manshun, 200 N.W. 155, 228 Mich. 416.

Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa. Super. 474.

77. Ala.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404.

Mass.—Cleary v. First National Stores, 196 N.E. 868, 291 Mass. 172.

Miss.—Elmore v. Grenada Grocery Co., 197 So. 761, 189 Miss. 370.

N.J.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.

W.Va.—Pennington v. Cranberry Fuel Co., 186 S.E. 610, 117 W.Va. 680.

Where the manufacturer is alone to blame for the unwholesome condition of packaged food, a dealer who resells the food in the same package and condition as when received incurs no liability based on negligence in fact.

N.J.—Cornelius v. B. Filippone & Co., 197 A. 647, 119 N.J.Law 540.

N.Y.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637.

78. Ala.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404.

Ark.—H. J. Heinz Co. v. Duke, 116 S.W.2d 1039, 196 Ark. 180—Great Atlantic & Pacific Tea Co. v. Gwilliams, 76 S.W.2d 65, 189 Ark. 1037.

N.J.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.

The reason for the rule is that there is ordinarily no way for the dealer to inspect the food without breaking the package, which would of itself in many cases make the food unfit and in most cases unmarketable.—Davis v. Williams, 198 S. E. 357, 58 Ga.App. 274.

Patent imperfections

(1) If there is anything about the condition of an unbroken or sealed package or bottle that indicates that its contents may be unfit or unwholesome, it has been held to be the retailer's duty, in the exercise of reasonable care, to investigate further the condition of the food before selling it.—Davis v. Williams, 198 S. E. 357, 58 Ga.App. 274.

(2) Thus it has been held that a retailer who sells a bottled beverage containing foreign or deleterious matter visible through the transparent glass bottle and through the transparent contents, may be found to have been negligent, and may be liable even if the consumer was likewise negligent, since the duty of one who sells food for immediate consumption, to know of unwholesome-

being limited to supplying goods packed by reliable manufacturers, and such as are without imperfections that may be discovered by the exercise of the care, skill, and experience of dealers in such products generally.[79]

Negligence per se. The sale of food in violation of the provisions of a pure food law is actionable negligence per se.[80]

Extent and character of liability. Where the cause of action is predicated, not on implied warranty, but on the negligent sale by a retail dealer of unwholesome food products for immediate consumption, liability for the damages resulting from the sale of such food products is not confined alone to the immediate purchaser thereof.[81] The liability extends to any persons who might reasonably be expected to suffer injury therefrom.[82] A seller of contaminated food in the original package without actual knowledge of the contamination is not jointly liable with the manufacturer, but is at most only secondarily liable to the injured customer,[83] primary liability being that of the manufacturer, bottler, or packer who put out the article, see infra § 59.

ness of the food, differs from the buyer's duty in that seller has duty of knowing or exercising reasonable care to know, whereas buyer's duty arises only after knowledge, and there is no duty to know.—Albany Coca-Cola Bottling Co. v. Shiver, Ga. App., 20 S.E.2d 181—Davis v. Williams, supra.

(3) But according to other authority the retailer is not negligent in such case, there being no greater duty on the seller than on the buyer to discover such deleterious matter in the bottle.—Coca-Cola Bottling Co. v. Swilling, 57 S.W.2d 1029, 186 Ark. 1149.

79. Ala.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404.

Ark.—H. J. Heinz Co. v. Duke, 116 S.W.2d 1039, 196 Ark. 180—Green v. Wilson, 105 S.W.2d 1074, 194 Ark. 165—Great Atlantic & Pacific Tea Co. v. Gwilliams, 76 S.W.2d 65, 189 Ark. 1037—Coca-Cola Bottling Co. v. Swilling, 57 S.W.2d 1029, 186 Ark. 1149.

Rule applied to wholesale distributor
Ga.—Fleetwood v. Swift & Co., 108 S.E. 909, 27 Ga.App. 502.

80. Ga.—Donaldson v. Great Atlantic & Pacific Tea Co., 200 S.E. 498, 59 Ga.App. 79, conforming to answers to certified questions 199 S. E. 213, 186 Ga. 870, 128 A.L.R. 456.

Ohio.—Rubbo v. Hughes Provision Co., 34 N.E.2d 202, 138 Ohio St. 178, affirming 36 N.E.2d 144, 67 Ohio App. 123—Canton Provision Co. v. Gauder, 196 N.E. 634, 130 Ohio St. 43—Portage Markets Co. v. George, 146 N.E. 283, 111 Ohio St. 775.

Pork containing trichinæ
(1) Pork containing trichinæ and sold in a condition requiring cooking or further processing before consumption is generally held not within the contemplation of statutes forbidding the sale of unfit, unwholesome, or adulterated food, since such pork when properly cooked is not unwholesome or unfit for consumption.
U.S.—Feinstein v. Daniel Reeves, Inc., D.C.N.Y., 14 F.Supp. 167.
Ill.—Zorger v. Hillman's, 4 N.E.2d 900, 287 Ill.App. 357.
N.Y.—Dressler v. Merkel, Inc., 284 N.Y.S. 697, 247 App.Div. 300, affirmed 4 N.E.2d 744, 272 N.Y. 574.

(2) But pork which has been processed and is sold for consumption without cooking or further processing it, if it contains trichinæ, adulterated so as to be unfit for food within the meaning of such a statute.—Catalanello v. Cudahy Packing Co., 34 N.Y.S.2d 37, 264 App.Div. 723, affirming 27 N.Y.S.2d 637.

(3) An animal containing trichinæ has been held not "diseased" in the ordinary sense of the term as used in a statute prohibiting the sale of the product of a diseased animal.—Dressler v. Merkel, Inc., supra.

(4) However, there is authority to the effect that such animal is "diseased" within the meaning of a pure food law.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135, Ohio law.

"Unwholesome" within statute providing for punishment of seller of unwholesome provisions without making condition thereof known to buyer, means diseased, corrupted, adulterated, or other condition having effect of rendering food deleterious to health of normal persons generally.—Great Atlantic & Pacific Tea Co. v. Hughes, 3 N.E.2d 415, 131 Ohio St. 501, affirming 4 N.E.2d 700, 53 Ohio App. 225.

If defendant has a guaranty from his vendor which, under the provisions of the pure food law, relieves him of criminal liability for a violation thereof, the penal statute is not available to make out negligence per se.—Donaldson v. Great Atlantic & Pacific Tea Co., 199 S.E. 213, 186 Ga. 870, 128 A.L.R. 456, answers to certified questions conformed to 200 S. E. 498, 59 Ga.App. 79.

Knowledge of unwholesomeness
If a statute making it an offense to sell unfit, deleterious, unwholesome, or adulterated food does not require guilty knowledge on the part of the seller, such knowledge need not be alleged or proved in order to invoke the violation of the statute as negligence per se.
U.S.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135.
Ga.—Donaldson v. Great Atlantic & Pacific Tea Co., 199 S.E. 213, 186 Ga. 870, 128 A.L.R. 456, answers to certified questions conformed to 200 S.E. 498, 59 Ga.App. 79.
Mass.—Schuler v. Union News Co., 4 N.E.2d 465, 295 Mass. 350.
Ohio.—Rubbo v. Hughes Provision Co., 36 N.E.2d 144, 67 Ohio App. 123, affirmed 34 N.E.2d 202, 138 Ohio St. 178.
Wash.—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606.

Making condition known to buyer
Under statute denouncing sale of unwholesome provisions without making their condition known to buyer, buyer need not inquire whether provisions are unwholesome, and seller's silence at time of purchase makes the statute applicable.—Drock v. Great Atlantic & Pacific Tea Co., 22 N.E.2d 547, 61 Ohio App. 291.

81. Va.—Colonna v. Rosedale Dairy Co., 186 S.E. 94, 166 Va. 314.
26 C.J. p 783 note 70.

82. Ohio.—Rubbo v. Hughes Provision Co., 34 N.E.2d 202, 138 Ohio St. 178, affirming 36 N.E.2d 144, 67 Ohio App. 123—Drock v. Great Atlantic & Pacific Tea Co., 22 N.E.2d 547, 61 Ohio App. 291.
Va.—Colonna v. Rosedale Dairy Co., 186 S.E. 94, 166 Va. 314.
26 C.J. p 783 note 71.

Buyer's donee has cause of action against seller in tort for negligence.—Hanback v. Dutch Baker Boy, 107 F.2d 203, 70 App.D.C. 398.

83. Ohio.—Canton Provision Co. v. Gauder, 196 N.E. 634, 130 Ohio St. 43.

Liability to consumer. Although differing in their reasoning,[84] it is generally agreed by the authorities that a manufacturer, packer, or bottler of foods or beverages is directly liable to a consumer for an injury caused by the unwholesomeness or the unfitness of such articles, although purchased from a dealer or middleman and not from such manufacturer, bottler or packer,[85] and, a fortiori, where it is purchased by the consumer directly from such manufacturer, packer, or bottler;[86] and a manu-

84. U.S.—Quinn v. Swift & Co., D.C. Pa., 20 F.Supp. 234, 237, quoting **Corpus Juris.**
Ky.—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65, quoting **Corpus Juris**—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
N.J.—Cassini v. Curtis Candy Co., 172 A. 519, 113 N.J.Law 91.
R.I.—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334.
S.C.—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris.**
S.D.—Whitethorn v. Nash-Finch Co., 293 N.W. 859, 860, 67 S.D. 465, quoting **Corpus Juris.**
Tex.—Dunn v. Texas Coca-Cola Bottling Co., Civ.App., 84 S.W.2d 545, 548, quoting **Corpus Juris,** and error dismissed—Brown Cracker & Candy Co. v. Jensen, Civ.App., 32 S.W.2d 227.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 498, 162 Va. 107, quoting **Corpus Juris.**
26 C.J. p 785 note 85.

85. U.S.—Swift & Co. v. Blackwell, C.C.A.Va., 84 F.2d 130—Newcomb v. Armour & Co., D.C.Pa., 39 F. Supp. 716—Quinn v. Swift & Co., D.C.Pa., 20 F.Supp. 234, 237, quoting **Corpus Juris**—Karger v. Armour & Co., D.C.Mass., 17 F.Supp. 484.
Ala.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404—Coca-Cola Bottling Co. v. Crook, 132 So. 898, 222 Ala. 369—Birmingham Chero-Cola Bottling Co. v. Clark, 89 So. 64, 205 Ala. 678, 17 A.L.R. 667—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.
Cal.—Klein v. Duchess Sandwich Co., 93 P.2d 799, 14 Cal.2d 272, prior opinion, App., 86 P.2d 858—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 23.
Ga.—Atlanta Coca-Cola Bottling Co. v. Shipp, 154 S.E. 385, 41 Ga.App. 705, conforming to answer 154 S.E. 243, 170 Ga. 817, 71 A.L.R. 1295.
Ind.—Coca Cola Bottling Works of Evansville v. Williams, App., 37 N.E.2d 702.
Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033.
Ky.—Great Atlantic & Pacific Tea Co. v. Eiseman, 81 S.W.2d 900, 259 Ky. 103—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65, citing **Corpus Juris**—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
La.—Auzenne v. Gulf Public Service, App., 181 So. 54.
Md.—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 140 Md. 488.
Mass.—Johnson v. Stoddard, 37 N.E.2d 505, 310 Mass. 232—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516—Sullivan v. Manhattan Market Co., 146 N.E. 673, 251 Mass. 395—Richenbacher v. California Packing Corporation, 145 N.E. 281, 250 Mass. 198—Tonsman v. Greenglass, 142 N.E. 756, 248 Mass. 275—Newhall v. Ward Baking Co., 134 N.E. 625, 240 Mass. 434.
Mich.—Cheli v. Cudahy Bros. Co., 255 N.W. 414, 267 Mich. 690—Hertzler v. Manshun, 200 N.W. 155, 228 Mich. 416.
Miss.—Cudahy Packing Co. v. Baskin, 155 So. 217, 170 Miss. 834—Bufkin v. Grisham, 128 So. 563, 157 Miss. 746—Chenault v. Houston Coca Cola Bottling Co., 118 So. 177, 151 Miss. 366.
N.J.—Cassini v. Curtis Candy Co., 172 A. 519, 113 N.J.Law 91—De Groat v. Ward Baking Co., 130 A. 540, 102 N.J.Law 188—Brussels v. Grand Union Co., 187 A. 582, 14 N.J.Misc. 751.
N.Y.—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338—Cohen v. Dugan Bros., 230 N.Y.S. 743, 132 Misc. 896, reversed on other grounds 236 N.Y.S. 769, 227 App. Div. 714—Ritchie v. Sheffield Farms Co., 222 N.Y.S. 724, 129 Misc. 765—Singer v. Zabelin, 24 N.Y.S.2d 962.
N.C.—Caudle v. F. M. Bohannon Tobacco Co., 16 S.E.2d 680, 220 N.C. 105—Whitley v. Coca-Cola Bottling Works of Greenville, 182 S.E. 109, 208 N.C. 846—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305—Thomason v. Ballard & Ballard Co., 179 S.E. 30, 33, 208 N.C. 1, quoting **Corpus Juris**—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213—Broadway v. Grimes, 169 S.E. 194, 204 N.C. 623—Dry v. Charlotte Coca-Cola Bottling Co., 167 S.E. 801, 204 N.C. 222—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.
R.I.—Minutilla v. Providence Ice Cream Co., 144 A. 884, 886, 50 R.I. 43, 63 A.L.R. 334, citing **Corpus Juris.**
S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S.C. 98—Delk v. Liggett & Myers Tobacco Co., 186 S.E. 383, 180 S.C. 436—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris**—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.
S.D.—Whitethorn v. Nash-Finch Co., 293 N.W. 859, 860, 67 S.D. 465, quoting **Corpus Juris.**
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn.App. 36—Coca-Cola Bottling Co. v. Rowland, 66 S.W.2d 272, 16 Tenn.App. 184—Coca Cola Bottling Works v. Kennedy, 13 Tenn.App. 199—Coca Cola Bottling Works v. Lewis, 9 Tenn. App. 485.
Tex.—Dunn v. Texas Coca-Cola Bottling Co., Civ.App., 84 S.W.2d 545, error dismissed—Brown Cracker & Candy Co. v. Jensen, Civ.App., 32 S.W.2d 227.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 498, 162 Va. 107, quoting **Corpus Juris.**
Wash.—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606.
W.Va.—Webb v. Brown & Williamson Tobacco Co., 2 S.E.2d 898, 899, 121 W.Va. 115, citing **Corpus Juris.**

Primarily, rather than jointly, liable
Manufacturer is primarily liable and retailer only secondarily liable for injuries sustained by customer purchasing unwholesome food in original package from retailer; the several liabilities are not joint.—Canton Provision Co. v. Gauder, 196 N.E. 634, 130 Ohio St. 43—26 C.J. p 785 note 86.

86. Ky.—Kroger Grocery & Baking Co. v. Schneider, 60 S.W.2d 594, 249 Ky. 261.
La.—Kelly v. Ouachita Dairy Dealers Co-op. Ass'n, App., 175 So. 499.

facturer of food products has been held liable for injuries to one who did not buy the food from the manufacturer or from a dealer to whom the manufacturer had sold it, but who nevertheless had partaken of it and been injured thereby.[87]

Although, as appears in the C.J.S. title Sales § 305, also 55 C.J. p 669 note 1–p 670 note 20, there is considerable difference of opinion as to whether a consumer may recover from the manufacturer on the theory of implied warranty, most authorities agree that such a recovery may be grounded on negligence,[88] as an exception to the general rule that a manufacturer is not liable for negligence to third persons not in privity.[89]

§ 59. Liability of Manufacturer, Packer, or Bottler

A manufacturer, packer, or bottler of foods or beverages must exercise at least reasonable care to see that such articles are fit and wholesome, and he is liable for injuries resulting from their unwholesomeness if, and according to some authorities, only if, he is negligent. His liability extends even to a consumer who purchased

87. Cal.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 33, superseding, App., 67 P.2d 686.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 498, 162 Va. 107, quoting **Corpus Juris.**
26 C.J. p 785 note 87.

88. U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190—Newcomb v. Armour & Co., D.C.Pa., 39 F.Supp. 716—Karger v. Armour & Co., D.C.Mass., 17 F.Supp. 484, Massachusetts law.
Ala.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404—Coca-Cola Bottling Co. v. Crook, 132 So. 898, 222 Ala. 369—Birmingham Chero-Cola Bottling Co. v. Clark, 89 So. 64, 205 Ala. 678, 17 A.L.R. 667—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala. App. 606.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Cal.—Klein v. Duchess Sandwich Co., 93 P.2d 799, 14 Cal.2d 272, prior opinion, App., 86 P.2d 858—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 23.
Ga.—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga. App. 369.
Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033.
La.—Auzenne v. Gulf Public Service, App., 181 So. 54.
Md.—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 140 Md. 488.
Mass.—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516—Sullivan v. Manhattan Market Co., 146 N.E. 673, 251 Mass. 395—Tonsman v. Greenglass, 142 N.E. 756, 248 Mass. 275—Newhall v. Ward Baking Co., 134 N.E. 625, 240 Mass. 434.
Mich.—Cheli v. Cudahy Bros. Co., 255 N.W. 414, 267 Mich. 690—Hertzler v. Manshun, 200 N.W. 155, 228 Mich. 416.
Miss.—Bufkin v. Grisham, 128 So. 563, 157 Miss. 746.
N.J.—Cassini v. Curtis Candy Co., 172 A. 519, 113 N.J.Law 91—De Groat v. Ward Baking Co., 130 A. 540, 102 N.J.Law 188.
N.Y.—Bourchiex v. Willow Brook Dairy, 196 N.E. 617, 268 N.Y. 1, 98 A.L.R. 1492, reversing 277 N.Y.S. 292, 243 App.Div. 721—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338—Cohen v. Dugan Bros., 230 N.Y.S. 743, 132 Misc. 896, reversed on other grounds 236 N.Y.S. 769, 227 App.Div. 714—Ritchie v. Sheffield Farms Co., 222 N.Y.S. 724, 129 Misc. 765—Singer v. Zabelin, 24 N.Y.S.2d 962.
N.C.—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213—Broadway v. Grimes, 169 S.E. 194, 204 N.C. 623—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.
Ohio.—Canton Provision Co. v. Gauder, 196 N.E. 634, 130 Ohio St. 43.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.
S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S.C. 98—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.
S.D.—Whitethorn v. Nash-Finch Co., 293 N.W. 859, 67 S.D. 465.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn.App. 36—Merriman v. Coca Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn. App. 433—Coca-Cola Bottling Co. v. Rowland, 66 S.W.2d 272, 16 Tenn. App. 184—Coca-Cola Bottling Works v. Kennedy, 13 Tenn.App. 199—Coca-Cola Bottling Works v. Lewis, 9 Tenn.App. 485.
Tex.—Dunn v. Texas Coca-Cola Bottling Co., Civ.App., 84 S.W.2d 545, error dismissed—Brown Cracker & Candy Co. v. Jensen, Civ.App., 32 S.W.2d 227.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.
Wash.—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606.
W.Va.—Webb v. Brown & Williamson Tobacco Co., 2 S.E.2d 898, 121 W.Va. 115.
26 C.J. p 785 note 89.

Liability for injuries

(1) From glass in bottle.
Ga.—Atlanta Coca-Cola Bottling Co. v. Shipp, 154 S.E. 385, 41 Ga.App. 705, conforming to answer 154 S.E. 243, 170 Ga. 817, 71 A.L.R. 1295.
N.C.—Whitley v. Coca-Cola Bottling Works of Greenville, 182 S.E. 109, 208 N.C. 846.

(2) From glass in can.
U.S.—Swift & Co. v. Blackwell, C.C.A.Va., 84 F.2d 130.
Mass.—Richenbacher v. California Packing Corporation, 145 N.E. 281, 250 Mass. 198.

(3) From glass in package.—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334.

(4) From poison in bottle.—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.

(5) From foreign substance in chewing tobacco.
Ky.—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65.
N.C.—Caudle v. F. M. Bohannon Tobacco Co., 16 S.E.2d 680, 220 N.C. 105.
S.C.—Delk v. Liggett & Myers Tobacco Co., 186 S.E. 383, 180 S.C. 436.

89. U.S.—Karger v. Armour & Co., D.C.Mass., 17 F.Supp. 484.
Ala.—Birmingham Chero-Cola Bottling Co. v. Clark, 89 So. 64, 205 Ala. 678.
Ky.—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
Mass.—Tonsman v. Greenglass, 142 N.E. 756, 248 Mass. 275—Newhall v. Ward Baking Co., 134 N.E. 625, 240 Mass. 434.
S.C.—Delk v. Liggett & Myers Tobacco Co., 186 S.E. 383, 180 S.C. 436.

from a middleman, and with whom the manufacturer, packer, or bottler, is not in privity.

A manufacturer, packer, or bottler of foods or beverages is required to exercise due care to see that such articles are fit and wholesome.[90] Some authorities have said that a high or the highest degree of care is required,[91] while others have held that there must be reasonable care[92] at least,[93] or ordinary care,[94] or that degree of skill, care, and diligence that a reasonably skillful and diligent person engaged in a similar business would have used,[95] and it has been pointed out that even the

90. Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.
Mass.—Johnson v. Stoddard, 37 N.E. 2d 505, 310 Mass. 232.
N.Y.—Singer v. Zabelin, 24 N.Y.S.2d 962.
N.C.—Caudle v. F. M. Bohannon Tobacco Co., 16 S.E.2d 680, 220 N.C. 105—Smith v. Coca-Cola Bottling Co. of Henderson, 196 S.E. 822, 213 N.C. 544—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S. E. 582, 208 N.C. 305—Broadway v. Grimes, 169 S.E. 194, 204 N.C. 623.

91. Ala.—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.
Cal.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 23—Ex parte McNeal, 89 P.2d 1096, 32 Cal.App.2d 391.
Ga.—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga. App. 369—Atlanta Coca-Cola Bottling Co. v. Shipp, 154 S.E. 385, 41 Ga.App. 705, conforming to answer 154 S.E. 243, 170 Ga. 817, 71 A.L.R. 1295.
Md.—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 870, 140 Md. 488, quoting **Corpus Juris.**
Mass.—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106—Flynn v. First National Stores, 6 N.E.2d 814, 296 Mass. 521—Sullivan v. Manhattan Market Co., 146 N.E. 673, 251 Mass. 395—Newhall v. Ward Baking Co., 134 N.E. 625, 240 Mass. 434.
Miss.—Chenault v. Houston Coca Cola Bottling Co., 118 So. 177, 151 Miss. 366.
N.C.—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.
Pa.—Menaker v. Supplee-Wills-Jones Milk Co., 189 A. 714, 125 Pa.Super. 76—Murphy v. Yuengling Dairy Products, 34 Pa.Dist. & Co. 355, 2 Schuyl.Reg. 242.
S.C.—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.
Tenn.—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn.App. 36—Coca-Cola Bottling Co. v. Rowland, 66 S.W.2d 272, 16 Tenn.App. 184—Coca Cola Bottling Works v. Lewis, 9 Tenn.App. 485.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.
26 C.J. p 784 note 79.

Nature of duty described

(1) The degree of care that must be exercised is commensurate with danger and possible results of negligence.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Mass.—Johnson v. Stoddard, 37 N.E. 2d 505, 310 Mass. 232.

(2) A higher degree of care is normally required of the producer of foodstuffs than is usually made applicable in other charges of negligence.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003.

(3) Manufacturer dealing in food for human consumption must exercise greater care than one dealing in animal food, and impliedly represents its wholesomeness.—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.

(4) All reasonably scientific and up-to-date methods must be employed to obviate the presence of foreign injurious substances.
U.S.—Newcomb v. Armour & Co., D. C.Pa., 39 F.Supp. 716.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.

Inspection

A manufacturer of foods and beverages owes the duty of reasonable inspection before placing a commodity on the market.
U.S.—Newcomb v. Armour & Co., D. C.Pa., 39 F.Supp. 716.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.

92. U.S.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003.
Ga.—Slaughter v. Atlanta Coca-Cola Bottling Co., 172 S.E. 723, 48 Ga. App. 327.
N.J.—Amabile v. Kramps, 2 A.2d 178, 121 N.J.Law 219—Cassini v. Curtis Candy Co., 172 A. 519, 113 N.J. Law 91—De Groat v. Ward Baking Co., 130 A. 540, 102 N.J.Law 188—Brussels v. Grand Union Co., 187 A. 582, 14 N.J.Misc. 751.

Different views reconciled

"The difference [in the various statements of the degree of care required] will ordinarily be found to lie rather in a variance in the vigilance, caution and skill required to insure the wholesomeness of different products than in the degree of care required. For instance, reasonable care might require very much more elaborate precautions to make sure that canned oysters or canned fish are free from toxic substances . . . than would be needed to make sure that rolled oats are safe and wholesome."—Armour & Co. v. Leasure, 9 A.2d 572, 580, 177 Md. 393.

That food will be consumed in its existing state is a circumstance to be considered in determining whether a baker used reasonable care.—Bissonette v. National Biscuit Co., C.C.A. Vt., 100 F.2d 1003.

93. Tenn.—Gentry v. Betty Lou Bakeries, 100 S.W.2d 230, 171 Tenn. 20.

94. Ga.—Slaughter v. Atlanta Coca-Cola Bottling Co., 172 S.E. 723, 48 Ga.App. 327.

95. U.S.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003.
Ala.—Collins Baking Co. v. Savage, 150 So. 336, 227 Ala. 408—Try-Me Beverage Co. v. Harris, 116 So. 147, 217 Ala. 302.
Ga.—Slaughter v. Atlanta Coca-Cola Bottling Co., 172 S.E. 723, 48 Ga. App. 327.

Standard in the trade

(1) It has been held that the custom of others engaged in a like business is not the absolute test; the test is what an ordinarily prudent person engaged in such business would do.
Ala.—Collins Baking Co. v. Savage, 150 So. 336, 227 Ala. 408.
Tex.—Texas Coca-Cola Bottling Co. v. Kubena, Civ.App., 109 S.W.2d 1098.

(2) But it has also been held that if defendant used the machinery, methods, and processes which were accepted as standard in the trade, and which were as reliable and satisfactory as any others, it did not fail in the exercise of proper care.—Gerber v. Faber, Cal.App., 129 P.2d 485.

Due care after bottling

A bottler's duty does not end with the bottling but continues until delivery to the retailer.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.

Issuing instructions with food

A person placing on the market an article represented by the circulars.

use of such care as an ordinarily careful and prudent person in a like business would use will not relieve a manufacturer of liability for the negligence of his employees.[96] For an injury resulting from the failure to exercise such care he is liable to respond in damages.[97] Nevertheless, authorities have frequently pointed out that, however exacting the duty or high degree of care imposed on manufacturers, negligence is a necessary element in the right of action,[98] and that the manufacturer is not an insurer of the wholesomeness and fitness of his product,[99] although it has been said that he is practically one.[1]

Negligence per se. If a manufacturer of a food product disobeys the prohibition or neglects to perform the duty imposed by a pure food statute, negligence is implied from such violation or neglect,[2] and, if the pure food law does not make knowledge or intent an element of the offense, he is liable for injuries resulting from the unwholesomeness of such food product regardless of his lack of knowledge of its unwholesomeness[3] or of the absence of

and labels accompanying it as safe and wholesome is under the duty of issuing with it proper instructions as to its preservation and use to insure the safety of its user, if, from time or surroundings, after leaving his hands, it is subject to deterioration rendering its use unsafe.—Rosenbusch v. Ambrosia Milk Corp., 168 N.Y.S. 505, 181 App.Div. 97.

96. Ala.—Alabama Coca-Cola Bottling Co. v. Causey, 180 So. 588, 28 Ala.App. 115, certiorari denied 180 So. 590, 235 Ala. 570.

97. U.S.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003.
Ala.—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.
La.—Hollis v. Ouachita Coca-Cola Bottling Co., App., 196 So. 376.
Md.—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 870, 140 Md. 488, quoting **Corpus Juris.**
Mass.—Sullivan v. Manhattan Market Co., 146 N.E. 673, 251 Mass. 395.
N.J.—Amabile v. Kramps, 2 A.2d 178, 121 N.J.Law 219—De Groat v. Ward Baking Co., 130 A. 540, 102 N.J.Law 188.
N.Y.—Rosenbusch v. Ambrosia Milk Corp., 168 N.Y.S. 505, 181 App.Div. 97.
N.C.—Thomason v. Ballard & Ballard Co., 179 S.E. 30, 208 N.C. 1—Corum v. R. J. Reynolds Tobacco Co., 171 S.E. 78, 205 N.C. 213.
26 C.J. p 784 note 81.

98. Ga.—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga.App. 228, affirmed 149 S.E. 698, 169 Ga. 201.
N.J.—Sonenthal v. Harry Weinstein & Son, 185 A. 917, 14 N.J.Misc. 368.
N.C.—Thomason v. Ballard & Ballard Co., 179 S.E. 30, 208 N.C. 1—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.
S.C.—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S.C. 98—Delk v. Liggett & Myers Tobacco Co., 186 S.E. 383, 180 S.C. 436—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721—Merriman v. Coca-Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn.App. 433—Coca-Cola Bottling Co. v. Rowland, 66 S.W.2d 272, 16 Tenn.App. 184—Coca Cola Bottling Works v. Lewis, 9 Tenn. App. 485.

Actual or imputed knowledge

Under Massachusetts law, to render manufacturer preparing meat for human consumption liable to third person who purchased pork chops from dealer, proof that manufacturer knew or ought to have known that it was putting into channels of trade pork which was diseased, as alleged, and that a reasonable inspection would have disclosed presence of the trichinæ held essential.—Karger v. Armour & Co., D.C.Mass., 17 F.Supp. 484.

99. Cal.—Gerber v. Faber, App., 129 P.2d 485.
Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130—Moore v. Macon Coca-Cola Bottling Co., 179 S.E. 916, 51 Ga.App. 148, conforming to answers 178 S.E. 711, 180 Ga. 335—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga.App. 228, affirmed 149 S.E. 698, 169 Ga. 201.
Ky.—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
Minn.—Swenson v. Purity Baking Co., 236 N.W. 310, 183 Minn. 289.
N.C.—Thomason v. Ballard & Ballard Co., 179 S.E. 30, 208 N.C. 1.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721.
Breach of warranty as a basis for recovery see the C.J.S. title Sales §§ 305, 331, also 55 C.J. p 669 note 1–p 670 note 20, p 733 note 91–p 766 note 18.

1. La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426.

Knowledge imputed

A manufacturer of food products is chargeable with knowledge of the condition of the food which it distributes and sells for public consumption.—Hollis v. Ouachita Coca-Cola Bottling Co., La.App., 196 So. 376—MacLehan v. Loft Candy Stores, La.App., 172 So. 367.

2. Minn.—Meshbesher v. Channellene Oil & Mfg. Co., 119 N.W. 428, 107 Minn. 104, 131 Am.S.R. 441.
N.Y.—Catalanello v. Cudahy Packing Co., 34 N.Y.S.2d 37, 264 App.Div. 723, affirming 27 N.Y.S.2d 637.
S.C.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1—Hobbs v. Carolina Coca-Cola Bottling Co., 10 S.E.2d 25, 194 S.C. 543—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 644, 193 S.C. 51, 127 A.L.R. 1185, citing **Corpus Juris**—Irick v. People's Baking Co., 196 S.E. 887, 187 S.C. 238—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.

Facts not within statute

(1) In suit against manufacturer for negligently permitting food to become contaminated, injuring purchaser, a provision of the pure food law prohibiting adulteration of food was inapplicable since within the meaning of the statute "adulteration" means "adding" a foreign substance.—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga.App. 228, affirmed 149 S.E. 698, 169 Ga. 201.

(2) A statute prohibiting sale of impure, adulterated, or unwholesome milk or cream was inapplicable to sale of cream in bottle containing pieces of broken glass since the glass did not become an ingredient or component part of the cream and hence was not the kind of adulterant contemplated by the statute.—Bourcheix v. Willow Brook Dairy, 196 N.E. 617, 268 N.Y. 1, 98 A.L.R. 1492, reversing 277 N.Y.S. 292, 243 App.Div. 721.

(3) The penal provision of federal meat inspection act denouncing sale of diseased or unwholesome meat for interstate or foreign commerce is limited to farmers, butchers, and retail dealers and affords no basis for recovery for injuries from packing company whose products are inspected and passed by inspection officers.—Kierstein v. Cudahy Packing Co., C.C.A.Pa., 80 F.2d 518, affirming, D.C., 9 F.Supp. 990.

3. S.C.—Hobbs v. Carolina Coca-Cola Bottling Co., 10 S.E.2d 25, 194 S.C. 543—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 644, 193 S.C. 51, 127 A.L.R. 1185, quoting **Corpus Juris**—Floyd v. Flor-

intent.[4]

Holding one's self out as manufacturer. One who puts out as his own an article of food manufactured by another is subject to the same liability as though he were its manufacturer.[5]

§ 60. Liability of Manufacturer or Wholesale Dealer to Retail Dealer

A manufacturer or wholesale dealer may be liable to a retail dealer for the loss of business, profits, and reputation resulting to the latter from the sale of unwholesome food of the former.

A manufacturer or wholesale dealer is not only liable to the consumer for injuries resulting from the sale of unwholesome food, see supra § 59, but is also liable to the retail dealer for the loss of business,[6] profits,[7] and reputation,[8] resulting to the latter from the sale of such food to his customers; and under certain circumstances the manufacturer has also been held liable to a retail dealer for the amount of a penalty incurred by the latter from the possession or resale of the goods sold.[9] Under a statute requiring the marking on any container of food of the net contents thereof, and making it unlawful to misrepresent in so doing, and providing that the name appearing on the container and the marking shall be deemed to constitute a guaranty, a dealer who purchased mislabeled cans from a wholesaler may recover from the manufacturer the losses he has suffered thereby even though there is no element of negligence involved.[10]

The principles governing the liability over of a manufacturer for damages paid by a retailer are considered in the C.J.S. title Indemnity §§ 20–27, also 31 C.J. p 446 note 83–p 457 note 79.

§ 61. Liability of Keeper of Public Eating Place

A keeper of a public eating place must use due care to see that the food served is fit for human consumption, and is liable for an injury caused by his negligence in failing to observe this duty. Although some authorities hold otherwise, the weight of authority is that a restaurant keeper is not an insurer of the food he serves.

A keeper of a public eating place, engaged in the business of serving food to customers, is bound to use due care and see that the food served to his customers, at his place of business, is fit for human consumption and may be eaten without its causing injury, and for an injury caused by negligence in failing to observe this duty to his patrons such keeper is liable.[11] It has been held that a seller of

ence Nehi Bottling Co., 198 S.E. 161, 162, 188 S.C. 98, quoting **Corpus Juris**—Irick v. People's Baking Co., S.C., 196 S.E. 887, 888, 187 S.C. 238, quoting **Corpus Juris**—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris.**

26 C.J. p 785 note 84.

4. U.S.—Gray v. Pet Milk Co., C.C.A. Ill., 108 F.2d 974, certiorari denied Pet Milk Co. v. Gray, 60 S.Ct. 890, 309 U.S. 688, 84 L.Ed. 1031.

5. U.S.—Swift & Co. v. Blackwell, C.C.A.Va., 84 F.2d 130.

Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.

Miss.—Swift & Co. v. Hawkins, 164 So. 231, 174 Miss. 253.

N.J.—Slavin v. Francis H. Leggett & Co., 177 A. 120, 114 N.J.Law 421, affirming 173 A. 597, 12 N.J.Misc. 549, and affirmed 186 A. 832, 117 N.J.Law 101.

Tex.—Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57, reversing Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627.

Mere guarantor of weight

Printing on a package of butter, whereby defendant professed to act as distributor of such brand of butter and guaranteed the correctness of the weight when packed, cannot be construed as an adoption by defendant of the product as its own so as to render it liable for a deleterious condition of the butter, if acquired in good faith from a reputable manufacturer.—Fleetwood v. Swift & Co., 108 S.E. 909, 27 Ga.App. 502.

6. Ohio.—Canton Provision Co. v. Gauder, 196 N.E. 634, 130 Ohio St. 43.

26 C.J. p 786 note 92.

7. Wash.—Mazetti v. Armour, 135 P. 633, 75 Wash. 122, 48 L.R.A.,N.S., 213, Ann.Cas.1915C 140.

8. Ohio.—Canton Provision Co. v. Gauder, 196 N.E. 634, 130 Ohio St. 43.

Wash.—Mazetti v. Armour, 135 P. 633, 75 Wash. 122, 48 L.R.A.,N.S., 213, Ann.Cas.1915C 140.

9. N.Y.—Rossano v. Kaminsky, 134 N.Y.S. 895.

Under guaranty

Where the person selling the goods to the retailer guarantees its purity, he is liable to the retailer for a penalty incurred by the latter by reason of its impurity.—Dannenhauer v. Woods, 16 Pa.Dist. 227, 33 Pa.Co. 258.

10. N.Y.—Abounader v. Strohmeyer & Arpe Co., 154 N.E. 309, 243 N.Y. 458, affirming 215 N.Y.S. 702, 217 App.Div. 43.

Cost of legal services in defending prosecutions against the dealer may be recovered.—Abounader v. Strohmeyer & Arpe Co., supra.

11. U.S.—Horn & Hardart Baking Co. v. Lieber, C.C.A.Pa., 25 F.2d 449.

Cal.—Silva v. F. W. Woolworth Co., 83 P.2d 76, 28 Cal.App.2d 649—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 1079, 138 Cal. App., Supp., 777, citing **Corpus Juris.**

Conn.—Lynch v. Hotel Bond Co., 167 A. 99, 100, 117 Conn. 128, citing **Corpus Juris.**

Del.—Roseberry v. Wachter, 138 A. 273, 3 W.W.Harr. 253.

D.C.—Picard v. Smith, 40 F.2d 803, 59 App.D.C. 291.

Md.—Child's Dining Hall Co. v. Swingler, 197 A. 105, 173 Md. 490.

N.J.—Panza v. Bickford's Inc., of New Jersey, 28 A.2d 188, 129 N.J. Law 50—Corin v. S. S. Kresge Co., 166 A. 291, 110 N.J.Law 378, affirming 159 A. 799, 10 N.J.Misc. 489—Nisky v. Childs Co., 135 A. 805, 806, 103 N.J.Law 464, 50 A.L.R. 227, quoting **Corpus Juris**—Rickner v. Ritz Restaurant Co. of Passaic, 181 A. 398, 13 N.J.Misc. 818.

N.Y.—Bernstein v. Queens County Jockey Club, 225 N.Y.S. 449, 222 App.Div. 191.

Ohio.—Tipple v. High Street Hotel Co., App., 41 N.E.2d 879—Clark Restaurant Co. v. Rau, 179 N.E. 196, 41 Ohio App. 23—Clark Restaurant Co. v. Simmons, 163 N.E. 210, 29 Ohio App. 220.

food, at a public eating place, to be consumed on the premises, is presumed to know of any unwholesome condition of the food and is liable for damages to a purchaser who is made ill on account of such unwholesomeness.[12] According to some authorities an innkeeper is not the insurer of the food he serves, and is not liable in the absence of negligence,[13] but according to other authority he is;[14] and the duty imposed by a statute may be so exacting as to render a restaurant keeper practically an insurer,[15] and no less liable when he buys the unfit food from others than when he makes it himself.[16] A restaurant keeper must use the same care in preparing food for patrons who have not yet entered the restaurant as for those who have.[17]

§ 62. Liability of Public Caterer

A public caterer is liable to an action of tort for negligence to any person attending an entertainment and made ill by the food furnished by the caterer.

A public caterer, who is employed by those who arrange for an entertainment to furnish food for all who may attend, is liable to an action of tort for negligence to any person who attends such entertainment and is made ill by partaking of the food furnished by him.[18]

§ 63. Liability of Person Furnishing Board to Laborers or Servants

One who for pay furnishes board at his table for laborers is liable for injuries resulting from unfit or unwholesome food furnished by him.

One who for pay furnishes board at his table for laborers,[19] whether employed by him or another,[20] is liable for injuries resulting from unwholesome or unfit food furnished by him.

§ 64. Liability for Injuries to Animals

One who sells poisonous animal fodder with knowledge of its condition is liable in tort to the purchaser.

Pa.—Levy v. Horn & Hardart Baking Co., 157 A. 369, 103 Pa.Super. 282.
R.I.—Ford v. Waldorf System, 188 A. 633, 57 R.I. 131—Chisholm v. S. S. Kresge Co., 182 A. 4, 55 R. I. 422.
26 C.J. p 786 note 97.

What is due care

(1) Reasonable care of café in preparation and preservation of fish as food takes into account that fish spoils quickly.—C. C. Hooper Café Co. v. Henderson, 137 So. 419, 223 Ala. 579.

(2) A restaurant operator must exercise same degree of care in selection and cooking of food for customers that a reasonably prudent man, skilled in such art, would exercise in selection and preparation of food for own private table.—Louis Pizitz Dry Goods Co. v. Waldrop, 186 So. 151, 237 Ala. 208—McCarley v. Wood Drugs, 153 So. 446, 228 Ala. 226—Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.

(3) If ordinary men would have forseen danger that some foreign substance might get into food, a restaurant keeper is under a duty to anticipate it.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.

(4) If carrier, by exercise of reasonable care, would have known that food served in its dining car was contaminated it is liable.—King v. Davis, 296 F. 986, 54 App.D.C. 239.

Food unfit when bought by innkeeper

(1) Retailer and employee who actually dispenses ice cream by removing it from container in small quantities must exercise ordinary care to see that ice cream so furnished customers is free from harmful foreign matter, notwithstanding foreign matter entered into ice cream as result of manufacturer's negligence.—Crowley v. Lane Drug Stores, 189 S.E. 380, 54 Ga.App. 859.

(2) But where a restaurateur served a customer a can of chili which he first heated, unless the appearance of the chili put him on notice that something was wrong with it, he was entitled to assume that proper care was taken in its manufacture and canning, and was not required to exercise any extraordinary caution.—H. J. Heinz Co. v. Duke, 116 S.W.2d 1039, 196 Ark. 180.

That food is taken away and eaten elsewhere, so as to give rise to a possible action on implied warranty, does not affect the rule as to liability for negligence.—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga. App. 82.

Bones which are a natural part of the food served, as in the case of chicken, or turkey, or chops, are not foreign substances, and a customer cannot recover for injuries sustained by swallowing fragments of them.
Cal.—Mix v. Ingersoll Candy Co., 59 P.2d 144, 6 Cal.2d 674—Silva v. F. W. Woolworth Co., 83 P.2d 76, 28 Cal.App.2d 649.
Iowa.—Brown v. Nebiker, 296 N.W. 366, 229 Iowa 1223.

One operating a dining car is within this rule.
D.C.—King v. Davis, 296 F. 986, 54 App.D.C. 239.
Ga.—Rowe v. Louisville & N. R. Co., 113 S.E. 823, 29 Ga.App. 151.
26 C.J. p 786 note 97 [c].

12. Pa.—Campbell v. G. C. Murphy Co., 186 A. 269, 270, 122 Pa.Super. 342, quoting **Corpus Juris.**
26 C.J. p 786 note 98.

13. U.S.—Horn & Hardart Baking Co. v. Lieber, C.C.A.Pa., 25 F.2d 449.
Ala.—McCarley v. Wood Drugs, 153 So. 446, 228 Ala. 226.
Cal.—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 138 Cal.App., Supp., 777.
Conn.—Lynch v. Hotel Bond Co., 167 A. 99, 117 Conn. 128.
Del.—Roseberry v. Wachter, 138 A. 273, 3 W.W.Harr. 253.
D.C.—King v. Davis, 296 F. 986, 54 App.D.C. 239.
Ga.—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga.App. 82—Rowe v. Louisville & N. R. Co., 113 S.E. 823, 29 Ga.App. 151.
Md.—Child's Dining Hall Co. v. Swingler, 197 A. 105, 173 Md. 490.
N.H.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.
Pa.—Lieber v. Horn & Hardart Baking Co., 10 Pa.Dist. & Co. 362.

14. Mo.—Smith v. Carlos, 247 S.W. 468, 215 Mo.App. 488.

15. Ohio.—Clark Restaurant Co. v. Simmons, 163 N.E. 210, 29 Ohio App. 220.

16. Ohio.—Clark Restaurant Co. v. Simmons, supra.

17. N.H.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.

18. Mass.—Bishop v. Weber, 1 N.E. 154, 139 Mass. 411, 52 Am.S.R. 715.
26 C.J. p 787 note 9.

19. Minn.—Bark v. Dixson, 131 N. W. 1078, 115 Minn. 172, Ann.Cas. 1912D 775.
26 C.J. p 787 note 10.

20. Kan.—Malone v. Jones, 142 P. 274, 92 Kan. 708, L.R.A.1915A 333, 138 P. 387, 91 Kan. 815, L.R.A. 1915A 328.

One who sells poisonous animal fodder with knowledge of its condition is liable in tort to the purchaser for the death of an animal caused by eating it.[21] Implied warranty as a basis for recovery for injuries to animals resulting from their consumption of unfit food is considered in the C.J.S. title Sales § 331, also 55 C.J. p 768 note 40–p 769 note 50.

§ 65. Actions

Restaurant patrons who partook of the same food may join as plaintiffs; in an action based on negligence it is proper to join as defendants a manufacturer and his agent or a manufacturer and a retailer.

Questions relating to actions for injuries resulting from unfit or contaminated food are dealt with hereinafter in this section and in §§ 66–71.

Parties. In an action by a customer to recover for injuries resulting from eating food in defendant's restaurant, other persons who partook of the same food may join as plaintiffs.[22] In an action based on negligence it has been held proper to join as defendants a manufacturer and his agent,[23] or a manufacturer and a retailer.[24]

§ 66. —— Nature and Form of Action

Where recovery may be had either on the theory of negligence or on the theory of implied warranty, the plaintiff may ground his action on either theory or on both; and it has been held immaterial on which theory the action rests where the evidence is sufficient to justify a recovery on either.

Where recovery may be had either on the theory of negligence or on the theory of an implied warranty, the plaintiff may ground his action on either theory[25] or on both,[26] and it has been held that the court should not require plaintiff to elect whether to proceed in tort or on the implied warranty.[27] Indeed, it has been said that whether such an action is called one of warranty or of negligence it comes to the same thing; it sounds in tort;[28] and it is immaterial on which theory the action rests where the evidence is sufficient to justify a recovery on either theory.[29] It is likewise immaterial whether the foundation of an action for injuries occasioned by unwholesome or unfit food is laid in negligence or warranty, where the liability of defendant arises from his violation of a food statute.[30] The rule that where there is a positive duty created by implication of law independent of contract, although arising out of a relation or state of facts created by contract, an action on the case as for a tort will lie for violation or disregard of that duty, has been applied in actions for injuries caused by unfit or unwholesome food.[31]

§ 67. —— Defenses

Due care on the part of the defendant is a defense, and contributory negligence is likewise a defense even where the defendant's liability is statutory. The absence of notice to a manufacturer of the presence of foreign substances in the food is no defense.

The exercise of due care on the part of defendant is a defense to an action based on negligence in selling unwholesome food.[32] The fact that food has been duly inspected, as provided by statute, does not relieve a vendor thereof for liability for its unwholesomeness or unfitness.[33] Notwithstanding the

21. Mass.—French v. Vining, 102 Mass. 132, 3 Am.R. 440.

22. La.—Ogden v. Rosedale Inn, App., 189 So. 162.

23. Miss.—Bufkin v. Grisham, 128 So. 563, 157 Miss. 746.

24. U.S.—Dobrenski v. Blatz Brewing Co., D.C.Mich., 41 F.Supp. 291.

25. U.S.—Dobrenski v. Blatz Brewing Co., D.C.Mich., 41 F.Supp. 291.
Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033—Davis v. Van Camp Packing Co., 176 N.W. 382, 189 Iowa 775, 17 A.L.R. 649.
Mich.—Hertzler v. Manshum, 200 N. W. 155, 228 Mich. 416.
Breach of warranty as basis of recovery see the C.J.S. title Sales §§ 305, 331, also 55 C.J. p 669 note 1–p 670 note 20, p 733 note 91–p 766 note 18.

26. Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033—Davis v. Van Camp Packing Co., 176 N.W. 382, 189 Iowa 775, 17 A.L.R. 649.
R.I.—Ford v. Waldorf System, 188 A. 633, 57 R.I. 131.

27. Iowa.—Davis v. Van Camp Packing Co., 176 N.W. 382, 189 Iowa 775, 17 A.L.R. 649.

28. Ga.—Davis v. Williams, 198 S. E. 357, 58 Ga.App. 274.
Wash.—Flessher v. Carstens Packing Co., 160 P. 14, 93 Wash. 48.

29. Minn.—Bark v. Dixson, 131 N.W. 1078, 115 Minn. 72, Ann.Cas.1912D 775.

30. Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

31. Wash.—Flessher v. Carstens Packing Co., 160 P. 14, 93 Wash. 48.

32. Mich.—Cheli v. Cudahy Bros. Co., 255 N.W. 414, 267 Mich. 690.
N.Y.—Dickinson v. Sperling, 286 N. Y.S. 934, 158 Misc. 905.
S.C.—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris.**
26 C.J. p 787 note 23.
Mere use of proper methods and modern and approved machinery does not relieve manufacturer, packer, or bottler, of liability, since accident may have occurred through the negligence of the person operating or overseeing such machinery or methods.
U.S.—Newcomb v. Armour & Co., D. C.Pa., 39 F.Supp. 716.
Cal.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 33.
N.C.—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.
Mere care in employing servants does not exempt bottler from liability.—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.

33. N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.
S.C.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1—Tate v. Mauldin, 154 S.E. 431, 433, 157 S.C. 392, quoting **Corpus Juris.**
26 C.J. p 787 note 24.

statutory liability of the seller of impure food, the defense of plaintiff's contributory negligence is available.[34] A retail dealer may not recover of a a manufacturer or wholesaler damages for loss of trade sustained by him by reason of the sale of such product to his customers, if he was guilty of contributory negligence in making such sales.[35] Absence of notice to a manufacturer or bottler of the presence of foreign substances in the package or bottle is no defense.[36] A regulation requiring certain fish to be tagged and forbidding the removal of the tag by anyone other than the consumer does not relieve a restaurant keeper from liability for injuries to a customer caused by the presence of the metal tag, since the restaurant and not the person actually eating the fish is the consumer within the meaning of the statute.[37] The fact that the consumer acquired the food through an illegal transaction, as in a bingo game, is no defense for the manufacturer in the absence of any causal relation between the illegal act and the injury.[38]

§ 68. —— Pleading

a. In general
b. Issues, proof, and variance

a. In General

The declaration or complaint should aver plainly and distinctly all the facts showing plaintiff's right to recover, and this is generally accomplished by setting forth the facts from which the duty rises, the neglect thereof, and the resulting injury. In some instances negligence may be averred generally, but in others specific acts of negligence must be set forth.

As in civil actions generally, the declaration, complaint, or petition in an action for injuries from unwholesome food should aver plainly and distinctly all the facts showing plaintiff's right to recover.[39] As a general rule, it is sufficient to set forth the facts from which defendant's duty springs, the neglect of that duty, and the resulting injury.[40] It

34. Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

35. Minn.—Neiman v. Channellene Oil & Mfg. Co., 127 N.W. 394, 112 Minn. 11, 140 Am.S.R. 458.

36. N.C.—Broom v. Monroe Coca-Cola Bottling Co., 156 S.E. 152, 200 N.C. 55.

37. N.Y.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.

38. Conn.—Bagre v. Daggett Chocolate Co., 13 A.2d 757, 126 Conn. 659.

39. U.S.—Karger v. Armour & Co., D.C.Mass., 17 F.Supp. 484.
N.Y.—Wisniewski v. Mykytyn, 282 N.Y.S. 852, 246 App.Div. 570.
Tex.—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W. 2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57.

Complaint properly dismissed

(1) For absence of proper allegation of negligence.—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334.

(2) For absence of showing that beverage was bottled or marketed by bottling company.—Sox v. Carrollton Coca-Cola Bottling Co., 1 S.E.2d 42, 59 Ga.App. 367.

(3) For failure to allege facts showing dealer's agent's personal liability for sale of contaminated food. —Crosby v. Calaway, 16 S.E.2d 155, 65 Ga.App. 266.

Pleadings construed

(1) Generally.—Coca-Cola Bottling Co. v. Jenkins, 82 S.W.2d 15, 190 Ark. 930.

(2) Action against restaurant owner for injuries received when plaintiff was served sandwich containing two pieces of glass held not based on sale of goods and warranty that food was free from injurious substance so as to defeat recovery on theory of negligence.—Rickner v. Ritz Restaurant Co. of Passaic, 181 A. 398, 13 N.J.Misc. 818.

(3) Action against manufacturer for selling falsely labeled containers purchased from wholesaler held not based on warranty, but on statute.—Abounader v. Strohmeyer & Arpe Co., 154 N.E. 309, 243 N.Y. 458, affirming 215 N.Y.S. 702, 217 App.Div. 43.

40. Ala.—Whistle Bottling Co. v. Searson, 92 So. 657, 207 Ala. 387.
26 C.J. p 788 note 30.

Complaint held sufficient

(1) In general.
U.S.—Saunders v. Goldstein, D.C.D. C., 30 F.Supp. 150.
Ala.—Steele-Smith Dry Goods Co. v. Blythe, 94 So. 281, 208 Ala. 288—Alabama Coca-Cola Bottling Co. v. Ezzell, 114 So. 278, 22 Ala.App. 210.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L. R. 1260.
Ga.—Davis v. Williams, 198 S.E. 357, 58 Ga.App. 274.
Tex.—Coca Cola Bottling Co. v. Heckman, Civ.App., 113 S.W.2d 201.

(2) Complaint alleging status of respective parties, that plaintiff purchased of defendant edible preparation for immediate consumption, which contained foreign substances deleterious to body and tissues unknown and hidden from plaintiff, followed by statement of resultant injuries, expenses, and losses.—Rickner v. Ritz Restaurant Co. of Passaic, 181 A. 398, 13 N.J.Misc. 818.

(3) Complaint alleging that restaurant served spoiled fish, consumed by customer made sick, held to show causal connection between negligence and injury.—George's Restaurant v. Dukes, 113 So. 53, 216 Ala. 239.

(4) A complaint alleging that as the direct and proximate result of the sale of impure food by defendant to plaintiff's husband, and her partaking of such food, she was made violently ill, to her great damage.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

(5) Petition alleging that manufacturer negligently permitted glass particles to be in coffee and that retailer negligently sold coffee made question for jury whether manufacturer alone or manufacturer and retailer were responsible for customer's injury.—Maddox Coffee Co. v. Collins, 167 S.E. 306, 46 Ga.App. 220.

Nature of foreign substance

A statement of claim in an action against an ice cream manufacturer for personal injuries resulting from a foreign substance allegedly contained in ice cream need not specify the nature of the substance, where it is apparent from the statement that it was swallowed and could not be successfully removed so that it would obviously be impossible to state its exact nature with certainty.—Murphy v. Yuengling Dairy Products, 34 Pa.Dist. & Co. 355, 6 Schuyl.Reg. 242.

Special damage from the use of the unwholesome food need not be alleged, as damage may be presumed. —Peckham v. Holman, 11 Pick., Mass., 484.

Nature of injury

A statement of claim in an action for personal injuries which alleges

is not necessary to aver in terms the existence of the relation casting the duty on the vendor,[41] or that he knew of the injurious quality of the food;[42] but it is sufficient if it is made to appear that he ought to have known of it and was negligent in furnishing unwholesome food, by reason whereof plaintiff was injured.[43]

Some authorities have held that in proper cases a general averment of negligence is sufficient, it being unnecessary to aver specific acts of negligence,[44] at least where the doctrine of res ipsa loquitur applies;[45] and it has been held sufficient if the complaint avers by way of conclusion defendant's breach of his duty.[46] It has also been held that while a general averment of negligence is sufficient against a general demurrer,[47] where a special demurrer is filed, raising the objection that the allegations are too general, the particulars of the negligence must be set forth.[48] However, even where a general averment of negligence is insufficient, it has been held that the complaint need only set forth what constituted the negligence, as by alleging that defendant caused or permitted a foreign substance to enter the food,[49] and need not specify the particular operation with respect to which defendant was negligent.[50]

Negligence per se. A petition alleging facts constituting a violation of a pure food law by defendant sufficiently alleges negligence per se,[51] but if the petition fails to allege all the facts necessary to show a violation of the statute it is insufficient.[52] It is not necessary to plead the pure food law in violation of which the articles of food were sold, as it is the duty of the court to take judicial notice of all public statutes.[53]

Joining counts. In a jurisdiction where recovery

as an item of damage that plaintiff's nervous system was severely shocked is in that respect insufficient; it should specify whether the alleged shock to the nervous system caused an injury of a functional or of an organic nature.—Murphy v. Yuengling Dairy Products, 34 Pa. Dist. & Co. 355, 6 Schuyl.Reg. 242.

41. Wash.—Flessher v. Carstens Packing Co., 160 P. 14, 93 Wash. 48.

42. Ga.—Southern Grocery Stores v. Donehoo, 200 S.E. 335, 59 Ga.App. 212.
26 C.J. p 788 note 32.

43. Ga.—Southern Grocery Stores v. Donehoo, 200 S.E. 335, 59 Ga.App. 212.
Mass.—Bishop v. Weber, 1 N.E. 154, 139 Mass. 411, 52 Am.R. 715.

Lack of opportunity as defense
Whether restaurant had opportunity to observe unfitness of food was a matter of defense.—Costello v. Morrison Cafeteria Co. of Louisiana, 135 So. 245, 18 La.App. 40.

44. Ala.—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.

Allegation held sufficient
In action by cafe patron against Illinois packing company for damage from eating allegedly impure ham, complaint, charging that patron partook of ham bearing label of company, that company warranted the product to be a superior food for human consumption, but that it was in fact impure and contained deleterious matter which caused patron to become ill and that company in preparing, producing, packing, and offering the ham for sale was negligent, reckless, willful, and wanton, contained a sufficient general charge of negligence, of which general denial of answer made an issue submissible to the jury under proper instructions.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1.

45. La.—Auzenne v. Gulf Public Service Co., App., 181 So. 54—Costello v. Morrison Cafeteria Co. of Louisiana, 135 So. 245, 18 La. App. 40.
Pa.—Murphy v. Yuengling Dairy Products, 34 Pa.Dist. & Co. 355, 2 Schuyl.Reg. 242.
S.D.—Whitethorn v. Nash-Finch Co., 293 N.W. 859, 67 S.D. 465.
Tex.—Coca-Cola Bottling Co. of Fort Worth v. Smith, Civ.App., 97 S.W. 2d 761.

46. Ala.—Jefferson Dairy Co. v. Williams, 112 So. 125, 215 Ala. 559.

47. Ga.—Howard v. Phillips, 161 S. E. 163, 44 Ga.App. 233—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga. App. 228, affirmed 149 S.E. 698, 169 Ga. 201—Beckham v. Jacobs Pharmacy Co., 103 S.E. 857, 25 Ga.App. 592.

48. Ga.—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga.App. 228, affirmed 149 S.E. 698, 169 Ga. 201.

49. Ga.—Armour & Co. v. Miller, supra.
Ohio.—Ward Baking Co. v. Trizzino, 161 N.E. 557, 27 Ohio App. 475.

Allegations held sufficient
A petition against bottling company for injuries from drinking bottled beverage containing a mouse was sufficiently specific in stating each ground of negligence where petition alleged negligence in putting bottle on market with dead mouse therein knowing that it would be offered for sale for human consumption, in filling, capping, and putting bottle on market without having first removed mouse, in failing properly to sterilize bottle before refilling, in failing to properly inspect bottle after it was filled and capped and in putting bottle on market for sale through a retailer without knowing beverage to be fit for human consumption.—Texas Coca-Cola Bottling Co. v. Kubena, Tex.Civ.App., 109 S.W.2d 1098.

50. Ga.—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga.App. 228, affirmed 149 S.E. 698, 169 Ga. 201.

51. Ga.—Donaldson v. Great Atlantic & Pacific Tea Co., 199 S.E. 213, 186 Ga. 870, 128 A.L.R. 456, answers to certified questions conformed to 200 S.E. 498, 59 Ga.App. 79.

Defense of signed guaranty
In action for injuries resulting from eating of unwholesome food purveyed by dealer, whether dealer had prescribed guaranty signed by person from whom he purchased excepting him from prosecution under the provisions of pure food law was a matter for defense and not one which plaintiff would be required to negative in her petition.—Donaldson v. Great Atlantic & Pacific Tea Co., supra.

52. U.S.—Kierstein v. Cudahy Packing Co., D.C.Pa., 9 F.Supp. 99, affirmed, C.C.A., 80 F.2d 518.

"Adulteration"
Grocery store owner was not liable under pure food laws for injuries sustained by buyer and his wife allegedly resulting from eating canned corn, in absence of allegations that food was "adulterated."—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57.

53. Minn.—Meshbesher v. Channellene Oil & Mfg. Co., 119 N.W. 428, 107 Minn. 104, 131 Am.S.R. 441.

may be had either on the theory of an implied warranty or on the theory of negligence, it has been held proper to include counts based on each theory in the complaint.[54]

b. Issues, Proof, and Variance

The evidence offered or relied on to support or defeat a recovery must be confined to the issues raised by the pleadings. An immaterial variance may be disregarded.

As in other actions at law, the evidence offered or relied on to support or defeat a recovery in a food case must be confined to the issues raised by the pleadings.[55] Variance between an allegation that defendant negligently placed an injurious foreign substance in a bottle of beverage and proof that it was placed in the bottle by someone else and was there when the bottle was filled is immaterial and may be disregarded.[56] Where, in an action for selling unwholesome meat, plaintiff pleaded a particular sale, recovery could not be based on other sales on other days;[57] but under an allegation that plaintiff's injury occurred on, "to wit," a certain day, plaintiff is not strictly confined to proof that the injury occurred on that day.[58]

§ 69. —— Evidence

a. Presumptions and burden of proof
b. Admissibility
c. Weight and sufficiency

a. Presumptions and Burden of Proof

(1) In general
(2) Presumptions and inferences of negligence; res ipsa loquitur

(1) In General

The burden is on the plaintiff to prove all the facts necessary to constitute a cause of action; but if he establishes a prima facie case the burden shifts to the defendant to rebut or overcome such case.

In actions to recover for injuries caused by unfit or contaminated food, the general rules as to presumptions and burden of proof apply.[59] Thus the burden of proof is on plaintiff to show the existence of all the facts necessary to constitute a cause of action.[60] Plaintiff must show defendant's connection with the food, that is, he must show that defendant manufactured, sold, or served the food, as the case may be;[61] he must prove that he ate or drank of the food alleged to have been unfit,[62] that such food was unwholesome or deleterious or contained a foreign substance,[63] and that the injuries resulted therefrom,[64] or, as some authorities have held, that the injury or illness was prob-

54. Cal.—Mix v. Ingersoll Candy Co., 59 P.2d 144, 6 Cal.2d 674.

55. Ga.—Fleetwood v. Swift & Co., 108 S.E. 909, 27 Ga.App. 502.

Negligence "in and about bottling"

In action by consumer for unwholesome substance in bottled drink resulting from negligence of bottling company in and about bottling of drink, "negligence in and about bottling" as alleged in complaint included conduct in that respect which continued to time bottle was delivered to another for sale or consumption as against contention that complaint did not include negligence after the bottle left bottling machine.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.

Evidence of care

Where restaurant, sued for selling spoiled fish, pleaded general issue, evidence of restaurant's care was admissible.—George's Restaurant v. Dukes, 113 So. 53, 216 Ala. 239.

56. Tenn.—Boyd v. Coca-Cola Bottling Works, 177 S.W. 80, 132 Tenn. 23.

57. Conn.—Askam v. Platt, 83 A. 529, 85 Conn. 448.

58. Ala.—Great Atlantic & Pacific Tea Co. v. Crabtree, 161 So. 508, 230 Ala. 443.

59. N.J.—Schlosser v. Goldberg, 9 A.2d 699, 123 N.J.Law 470.
26 C.J. p 788 note 41.

60. Ala.—Buffalo Rock Bottling Co. v. Stephenson, 118 So. 498, 22 Ala. App. 605.
Cal.—Reese v. Smith, 70 P.2d 933, 9 Cal.2d 324, prior opinion, App., 61 P.2d 786.
La.—Russo v. Louisiana Coca-Cola Bottling Co., App., 161 So. 909.
Md.—Armour v. Leasure, 9 A.2d 572, 177 Md. 393.
N.J.—Schlosser v. Goldberg, 9 A.2d 699, 123 N.J.Law 470—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.

61. Ala.—George's Restaurant v. Dukes, 113 So. 53, 216 Ala. 239.
Miss.—Jackson Coca-Cola Bottling Co. v. Grubbs, 108 So. 732, 143 Miss. 590.

62. Ala.—Buffalo Rock Bottling Co. v. Stephenson, 118 So. 498, 22 Ala. App. 605.
La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426.

63. Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130.
Ill.—Wiehardt v. Krey Packing Co., 264 Ill.App. 504.
Iowa.—Brown v. Nebiker, 296 N.W. 366, 229 Iowa 1223.
La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426—Palmer v. Rosedale Catering Co., App., 195 So. 859—Lee v. Smith, App., 168 So. 727—Watts v. Ouachita Coca-Cola Bottling Co., App., 166 So. 151.
Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.
N.J.—Piscatore v. V. La Rosa & Sons, 8 A.2d 332, 123 N.J.Law 364, affirming 2 A.2d 327, 121 N.J.Law 288.
N.C.—Reece v. Durham Coca-Cola Bottling Co., 150 S.E. 198, 197 N.C. 661.

64. Ala.—C. C. Hooper Café Co. v. Henderson, 137 So. 419, 223 Ala. 579—George's Restaurant v. Dukes, 113 So. 53, 216 Ala. 239.
Ind.—Coca Cola Bottling Works of Evansville v. Williams, App., 37 N.E.2d 702.
La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426—Hollis v. Ouachita Coca-Cola Bottling Co., App., 196 So. 376—Palmer v. Rosedale Catering Co., App., 195 So. 859—Ogden v. Rosedale Inn, App., 189 So. 162—Lee v. Smith, App., 168 So. 727—Watts v. Ouachita Coca-Cola Bottling Co., App., 166 So. 151.
Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.
Okl.—Safeway Stores v. Fuller, 118 P.2d 649, 189 Okl. 556.

Defendant need not show other cause of illness or injuries.

ably caused thereby, although every other possible cause is not excluded;[65] and he must show that defendant was guilty of negligence[66] or willful misconduct[67] in causing or permitting the food to be in the condition alleged. If plaintiff establishes a prima facie case, the burden shifts to defendant to rebut or overcome the case so made.[68]

In appropriate cases, presumptions may be relied on to prove particular facts.[69]

Negligence per se. Where the violation of a pure food law is relied on as proof of negligence per se, the burden is on plaintiff to prove such a violation.[70]

(2) Presumptions and Inferences of Negligence; Res Ipsa Loquitur

The burden of proving defendant's negligence is often satisfied, or at least lightened, by proof of circumstances raising a presumption or inference of negligence under the doctrine of res ipsa loquitur, or apart from that doctrine. The facts on which the application of the doctrine depends must be established by independent evidence, which, however, may also be circumstantial. A presumption of negligence so arising is rebuttable and shifts to the defendant the burden of rebutting it.

The burden of proving defendant's negligence in food cases so as to make out a prima facie case is often held satisfied by proof of circumstances raising a presumption or inference of negligence under the doctrine of res ipsa loquitur.[71] Where this

Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130.

N.J.—Piscatore v. V. La Rosa & Sons, 8 A.2d 332, 123 N.J.Law 364, affirming 2 A.2d 327, 121 N.J.Law 288.

Negligence per se consisting of violation of pure food law must be shown to have been proximate cause of injury.—Great Atlantic & Pacific Tea Co. v. Walker, Civ.App., 104 S.W.2d 627, reversed on other grounds Walker v. Great Atlantic & Pacific Tea Co., 112 S.W.2d 170, 131 Tex. 57.

65. Mass.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515—Johnson v. Kanavos, 6 N.E.2d 434, 296 Mass. 373—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516.

Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa. Super. 474.

"They [plaintiffs] were required to show by evidence only a greater likelihood that it [the illness] came from an act of negligence for which defendant is responsible than from a cause for which it is not."—Flynn v. Growers Outlet, 30 N.E.2d 250, 252, 307 Mass. 373.

66. Ala.—Collins Baking Co. v. Savage, 150 So. 336, 227 Ala. 408.

Cal.—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 138 Cal. App., Supp., 777.

Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga. App. 228, affirmed 149 S.E. 698, 169 Ga. 201.

La.—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159.

Md.—Armour v. Leasure, 9 A.2d 572, 177 Md. 393.

Mass.—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106.

Minn.—Swenson v. Purity Baking Co., 236 N.W. 310, 183 Minn. 289.

Miss.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803—Blount v. Houston Coca-Cola Bottling Co., Miss., 185 So. 241, 184 Miss. 69.

N.H.—Ballas v. F. W. Woolworth Co., 10 A.2d 233, 90 N.H. 428.

N.J.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.

N.Y.—Bourchieux v. Willow Brook Dairy, 196 N.E. 617, 288 N.Y. 1, 98 A.L.R. 1492, reversing 277 N.Y.S. 292, 243 App.Div. 721—Steinberg v. Bloom, 5 N.Y.S.2d 774.

Okl.—Safeway Stores v. Fuller, 118 P.2d 649, 189 Okl. 556.

Tenn.—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn. App. 36.

67. Ga.—Armour & Co. v. Miller, 147 S.E. 184, 39 Ga.App. 228, affirmed 149 S.E. 698, 169 Ga. 201.

68. Ala.—Collins Baking Co. v. Savage, 150 So. 336, 227 Ala. 408.

La.—Dye v. American Beverage Co., App., 194 So. 438.

Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.

Mich.—Hertzler v. Manshum, 200 N.W. 155, 228 Mich. 416.

Tenn.—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn. App. 36.

Distributor of packaged goods must, on proof of injury and deleterious condition of the product, show his own diligence to the extent that he had in good faith purchased the merchandise from a reputable dealer or manufacturer as an article reasonably sound and safe for the use intended.—Fleetwood v. Swift & Co., 108 S.E. 909, 27 Ga.App. 502.

69. N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.

Scienter

Where meat sold for immediate consumption was in fact unwholesome and caused the purchaser's sickness, scienter on the part of the dealer is presumed as a matter of law, especially where the vendor is not only the dealer, but also the manufacturer.—Flessher v. Carstens Packing Co., 160 P. 14, 93 Wash. 48.

Contributory negligence is not to be presumed but must be made to appear by the evidence offered either by plaintiff or defendant.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

70. Mass.—Johnson v. Stoddard, 37 N.E.2d 505, 310 Mass. 232.

Failure to make known bad condition

In consumers' actions for injuries allegedly sustained from eating unwholesome chickens sold by defendant to retail dealer, consumers had burden of proving that defendant did not make known to retailer the condition of the chickens in violation of penal statute relating to sale of unwholesome food, as evidence of defendant's negligence per se.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515.

71. U.S.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003.

Ala.—Louis Pizitz Dry Goods Co. v. Waldrop, 186 So. 151, 237 Ala. 208—Reichert Milling Co. v. George, 162 So. 393, 230 Ala. 3, conformed to 162 So. 383, 26 Ala. App. 417, certiorari denied 162 So. 402, 230 Ala. 589.

Conn.—Bagre v. Daggett Chocolate Co., 13 A.2d 757, 126 Conn. 659—Gross v. Loft, Inc., 185 A. 80, 121 Conn. 394.

D.C.—Fisher v. Washington Coca-Cola Bottling Works, 84 F.2d 261, 66 App.D.C. 7, 105 A.L.R. 1034.

Ga.—Watkins v. Dalton Coca-Cola Bottling Co., 19 S.E.2d 316, 66 Ga. App. 848—Albany Coca Cola Bottling Co. v. Shiver, 12 S.E.2d 114, 63 Ga.App. 755—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369—Atlanta Coca-Cola Bottling Co. v. Sinyard, 164 S.E. 231, 45 Ga.App. 272—Atlanta Coca Cola Bottling Co. v. Dean, 160 S.E. 105, 43 Ga.App. 682—Copeland v. Curtis, 136 S.E. 324,

doctrine is applied two factors are generally present: (1) The immediate cause and the circumstances of the misadventure are such as would not have happened in the ordinary course of events if the person charged had used due care; (2) The manufacturer or dispenser is in a better position to know how the food was handled, the consumer not being presumed to have such knowledge as to enable him to prove the specific acts of negligence.[72] So it is generally held that the presence of a foreign substance in food, particularly where such food is within a sealed package, container, or bottle, raises a presumption of negligence on the part of someone connected with its preparation or handling.[73] A number of cases, without apparently referring to the doctrine of res ipsa loquitur, have held that circumstantial evidence of this nature may constitute prima facie proof of negligence,[74] sufficient, if un-

36 Ga.App. 255—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga. App. 82.
Ind.—Coca Cola Bottling Works of Evansville v. Williams, App., 37 N.E.2d 702.
Ky.—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
La.—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159—Freeman v. Louisiana Coca-Cola Bottling Co., App., 179 So. 621—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45—Lee v. Smith, App., 168 So. 727.
Md.—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 140 Md. 488.
Mich.—Hertzler v. Manshum, 200 N.W. 155, 228 Mich. 416.
Miss.—Coca Cola Bottling Works of Columbus v. Petty, 200 So. 128, 190 Miss. 631—Blount v. Houston Coca Cola Bottling Co., 185 So. 241, 184 Miss. 69.
N.Y.—Ritchie v. Sheffield Farms Co., 222 N.Y.S. 724, 129 Misc. 765.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114.
W.Va.—Blevins v. Raleigh Coca-Cola Bottling Works, 3 S.E.2d 627, 121 W.Va. 627—Parr v. Coca-Cola Bottling Works of Charleston, 3 S.E. 2d 499, 121 W.Va. 314.

72. Ala.—Louis Pizitz Dry Goods Co. v. Waldrop, 186 So. 151, 237 Ala. 208—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548—Reichert Milling Co. v. George, 162 So. 393, 230 Ala. 3, conformed to 162 So. 383, 26 Ala.App. 417, certiorari denied 162 So. 402, 230 Ala. 589.
Conn.—Bagre v. Daggett Chocolate Co., 13 A.2d 757, 126 Conn. 659.
D.C.—Fisher v. Washington Coca Cola Bottling Works, 84 F.2d 261, 66 App.D.C. 7, 105 A.L.R. 1034.
Ga.—Atlanta Coca Cola Bottling Co. v. Dean, 160 S.E. 105, 43 Ga. 682—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga.App. 82.
Ky.—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65.
La.—Auzenne v. Gulf Public Service Co., App., 181 So. 54.
Md.—Armour & Co. v. Leasure, 9 A. 2d 572, 177 Md. 393—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 140 Md. 488.
Mass.—Ash v. Childs Dining Hall Co., 120 N.E. 396, 231 Mass. 86, 3 A.L.R. 1556.
Mich.—Hertzler v. Manshum, 200 N. W. 155, 228 Mich. 416.
N.J.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.
Tex.—Coca-Cola Bottling Co. of Fort Worth, Civ.App., 97 S.W.2d 761.

73. Ala.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548—Reichert Milling Co. v. George, 162 So. 393, 230 Ala. 3, conformed to 162 So. 383, 26 Ala.App. 417, certiorari denied 162 So. 402, 230 Ala. 589.
D.C.—Fisher v. Washington Coca-Cola Bottling Works, 84 F.2d 261, 66 App.D.C. 7, 105 A.L.R. 1034.
Ga.—Albany Coca Cola Bottling Co. v. Shiver, 12 S.E.2d 114, 63 Ga.App. 755—Atlanta Coca-Cola Bottling Co. v. Sinyard, 164 S.E. 231, 45 Ga. App. 272.
Ind.—Coca Cola Bottling Works of Evansville v. Williams, App., 37 N. E.2d 702.
La.—Dye v. American Beverage Co., App., 194 So. 438—Freeman v. Louisiana Coca-Cola Bottling Co., App., 179 So. 621—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45.
Md.—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 140 Md. 488.
Pa.—Nock v. Coca-Cola Bottling Works of Pittsburgh, 156 A. 537, 102 Pa.Super. 515.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721.
Tex.—Rogers v. Coca Cola Bottling Co., Civ.App., 156 S.W.2d 325, error refused.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S. E. 497, 162 Va. 107.
W.Va.—Blevins v. Raleigh Coca-Cola Bottling Works, 3 S.E.2d 627, 121 W.Va. 427—Parr v. Coca-Cola Bottling Works of Charleston, 3 S.E. 2d 499, 121 W.Va. 314.

Circumstances warranting application

(1) Animal matter in bottled beverage.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Miss.—Coca Cola Bottling Works of Columbus v. Petty, 200 So. 128, 190 Miss. 631—Blount v. Houston Coca Cola Bottling Co., 185 So. 241, 184 Miss. 69.
Tex.—Coca-Cola Bottling Co. of Fort Worth v. Smith, Civ.App., 97 S.W. 2d 761.

(2) Pin in chocolate bar.—Gross v. Loft, 185 A. 80, 121 Conn. 394.

(3) Glass in bottled beverage.
Ga.—Atlanta Coca Cola Bottling Co. v. Dean, 160 S.E. 105, 43 Ga.App. 682.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114.
Tex.—Dunn v. Texas Coca-Cola Bottling Co., Civ.App., 84 S.W.2d 545.

(4) Nail in bread.—Freeman v. Shults Bread Co., 163 N.Y.S. 396, 100 Misc. 528.

(5) Safety pin in bottled beverage.—Watkins v. Dalton Coca-Cola Bottling Co., 19 S.E.2d 316, 66 Ga.App. 848.

(6) Worm in plug of chewing tobacco.—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65.

The presence of poison in animal fodder does not warrant the application of the doctrine.—Blanchard v. Kronick, 169 N.E. 438, 269 Mass. 464.

74. Ark.—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.
Cal.—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 138 Cal. App., Supp., 777.

Prima facie case shown

(1) By alkali in bottled beverage.—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369.

(2) By glass in can of condensed milk.—Swift & Co. v. Blackwell, C.C. A.Va., 84 F.2d 130.

(3) By glass in can of pork and beans.—Campbell Soup Co. v. Davis, 175 S.E. 743, 163 Va. 89.

(4) By glass in package of processed oats.—Linker v. Quaker Oats Co., D.C.Okl., 11 F.Supp. 794.

rebutted, to sustain a verdict for plaintiff,[75] or may warrant an inference of negligence,[76] or may constitute evidence of negligence.[77]

Some authorities hold that the doctrine of res ipsa loquitur is inapplicable to establish actionable negligence on the part of a food manufacturer, as by the mere showing of a foreign deleterious substance in a sealed container, and that some additional evidence of negligence is required,[78] but that such additional evidence need only be circumstantial in order that an inference of negligence may arise;[79] and a similar rule has been recognized in cases holding the doctrine inapplicable under the facts of the particular case.[80] The distinction between a mere inference of negligence arising from proved circumstances and the presumption arising from the doctrine of res ipsa loquitur has been said to be that in the latter case no further proof of negligence is required to shift the burden to defendant, whereas in the former case the inference does not necessarily affect the burden of proof.[81] The fact that res ipsa loquitur may be available in a

(5) By glass in sandwich spread.—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407.

Prima facie case not shown by presence of particles of glass in shortcake made by seller from berries and cream purchased from others.—O'Brien v. Louis K. Liggett Co., 152 N.E. 57, 255 Mass. 553, 47 A.L.R. 146.

75. Ark.—Coca-Cola Bottling Co. of Southeast Arkansas v. Mooney, 161 S.W.2d 753.
N.Y.—Miller v. National Bread Co., 286 N.Y.S. 908, 247 App.Div. 88—Cohen v. Dugan Bros., 230 N.Y.S. 743, 132 Misc. 896, reversed on other grounds 236 N.Y.S. 769, 227 App. Div. 714.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693—Campbell Soup Co. v. Davis, 175 S.E. 743, 163 Va. 89.

76. U.S.—Linker v. Quaker Oats Co., D.C.Okl., 11 F.Supp. 794.
Cal.—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 138 Cal. App., Supp., 777.
Mass.—Flynn v. First National Stores, 6 N.E.2d 814, 296 Mass. 521—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516.
N.J.—Panza v. Bickford's Inc., of New Jersey, 28 A.2d 188, 129 N.J. Law 50—Lewis v. V. La Rosa & Sons, 26 A.2d 879.
N.Y.—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338—Cohen v. Dugan Bros., 230 N.Y.S. 743, 132 Misc. 896, reversed on other grounds 236 N.Y.S. 769, 227 App. Div. 714.
Okl.—Safeway Stores v. Fuller, 118 P.2d 649, 189 Okl. 556.
R.I.—Chisholm v. S. S. Kresge Co., 182 A. 4, 55 R.I. 422.
S.D.—Whitethorn v. Nash-Finch Co., 293 N.W. 859, 67 S.D. 465.

Negligence inferred

(1) From bolt in mince pie, as against manufacturer of mincemeat.—Sheehan v. Menkes, 152 A. 326, 8 N.J.Misc. 867.

(2) From glass in coleslaw in restaurant.—Corin v. S. S. Kresge Co., 166 A. 291, 110 N.J.Law 378, affirming 159 A. 799, 10 N.J.Misc. 489.

(3) From glass in ice cream.—Crowley v. Lane Drug Stores, 189 S. E. 380, 54 Ga.App. 859.

(4) From glass and metal in bread.—De Groat v. Ward Baking Co., 130 A. 540, 102 N.J.Law 188.

77. U.S.—Newcomb v. Armour & Co., D.C.Pa., 39 F.Supp. 716.
Ala.—Kirkland v. Great Atlantic & Pacific Tea Co., 171 So. 735, 233 Ala. 404—Lewis v. Linkett, 167 So. 286, 232 Ala. 233—Coca-Cola Bottling Co. v. Crook, 132 So. 898, 222 Ala. 369—Try-Me Beverage Co. v. Harris, 116 So. 147, 217 Ala. 302—Buffalo Rock Bottling Co. v. Stephenson, 118 So. 498, 22 Ala.App. 605.
Ohio.—Clark Restaurant Co. v. Rau, 179 N.E. 196, 41 Ohio App. 23.

78. N.C.—Evans v. Charlotte Pepsi-Cola Bottling Co., 6 S.E.2d 510, 216 N.C. 716—Tickle v. Hobgood, 4 S. E.2d 444, 216 N.C. 221—Blackwell v. Coca-Cola Bottling Co., 182 S.E. 469, 208 N.C. 751—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.
S.C.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S.C. 170.
Tenn.—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn.App. 36—Merriman v. Coca-Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn.App. 433.

79. N.C.—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.
S.C.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S. C. 170—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S. C. 98.
Tenn.—Merriman v. Coca-Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn.App. 433.

Facts sufficient to warrant inference

In action by cafe patron against packing company for damage from eating impure ham, evidence that patron became ill after eating the ham, that it was discolored and soft, that all who ate it were similarly affected, and none who ate in cafe on same day but who did not eat the ham became ill, coupled with medical diagnosis of food poisoning, warranted jury's inference of negligence in selection, processing, handling, and inspection of the meat.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1.

Similar occurrences

(1) The usual and approved method of establishing negligence is by offering evidence tending to show that like products manufactured under similar conditions and sold by the defendant at about the same time contained foreign or deleterious substances.
U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F. 2d 190, North Carolina law—Tickle v. Hobgood, 4 S.E.2d 444, 216 N.C. 221.

(2) And it has been held that, in the absence of such proof, no inference of negligence could arise so as to make the manufacturer liable.
U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, supra.
N.C.—Evans v. Charlotte Pepsi-Cola Bottling Co., 6 S.E.2d 510, 216 N. C. 716—McLeod v. Lexington Coca Cola Bottling Co., 194 S.E. 82, 212 N.C. 671.

80. Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.
Tenn.—Merriman v. Coca Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn.App. 433.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.

81. Ala.—Reichert Milling Co. v. George, 162 So. 393, 230 Ala. 3, conformed to 162 So. 383, 26 Ala. App. 417, certiorari denied 162 So. 402, 230 Ala. 589.

given case to create a presumption of defendant's negligence does not dispense with proper proof of other elements of the cause of action.[82] It has been said that once the case goes to the trier of facts the doctrine of res ipsa loquitur has no application, but the facts making the doctrine applicable in the first instance so as to take the case to the jury are available as a basis of inferring negligence.[83]

Mere proof that food was eaten and resulted in illness does not, under the doctrine of res ipsa loquitur or otherwise, raise a presumption or make out a prima facie case of negligence on the part of the person charged, in the absence of other proof or circumstances connecting such person with the unwholesome or deleterious condition of the food.[84]

Conditions essential to application of doctrine of res ipsa loquitur generally. Since the application of the doctrine of res ipsa loquitur raises a presumption that the immediate cause of the injury was put into operation by defendant's negligence, at least two things must be shown by independent evidence before the doctrine can be applied. First, plaintiff must show the immediate cause of the injury, that is, he must show that the food was unwholesome or defective or contained a foreign deleterious substance, and that such condition caused the illness or injury;[85] but such evidence may be circumstantial[86] and need only be sufficient to warrant an inference of the fact.[87] Second, it is necessary to connect defendant with the unwholesome or defective condition of the food or the foreign substance in it; in other words, plaintiff must show that the condition existed when the product was in defendant's control, or at least must negative the possibility of its having been created after the product left his control.[88] Where the action is one against the manufacturer or bottler of a food product for injuries caused by the presence in the package or bottle of a foreign deleterious substance, there appears to be considerable disagreement as to how much proof of such connection must be adduced,[89] but much of this apparent lack of harmony has been said to arise from differences of fact which affect the principle.[90] Thus, where the package or bottle passes directly from the agent of the bottler or manufacturer to the consumer, the "thing speaks for itself" and creates a presumption not only that someone was negligent but that it was such bottler or manufacturer who was so negligent.[91] The same rule has been applied where the package or bottle comes from the manufacturer so sealed or otherwise so constructed that its contents reach the consumer without possibility of alteration by intermediate parties,[92] although there is au-

82. La.—Lee v. Smith, App., 168 So. 727—Watts v. Ouachita Coca-Cola Bottling Co., App., 166 So. 151.

83. Conn.—Bagre v. Daggett Chocolate Co., 13 A.2d 757, 126 Conn. 659.

84. Ala.—C. C. Hooper Café Co. v. Henderson, 137 So. 419, 223 Ala. 579.
Mass.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106.
Miss.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803.
N.C.—Broadway v. Grimes, 169 S.E. 194, 204 N.C. 623.
S.C.—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S.C. 98.

85. Ala.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.
Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga.App. 82.
Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.
W.Va.—Blevins v. Raleigh Coca-Cola Bottling Works, 3 S.E.2d 627, 121 W.Va. 427.

86. Ala.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.
Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130.
W.Va.—Blevins v. Raleigh Coca-Cola Bottling Works, 3 S.E.2d 627, 121 W.Va. 427.

87. Ala.—Louis Pizitz Dry Goods Co. v. Waldrop, 186 So. 151, 237 Ala. 208.
Ga.—McPherson v. Capuano & Co., 121 S.E. 580, 31 Ga.App. 82.
Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.

88. U.S.—Swift & Co. v. Blackwell, C.C.A.Va., 84 F.2d 130.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Ark.—Coca Cola Bottling Co. of Southeast Arkansas v. Spurlin, 132 S.W.2d 828, 199 Ark. 126—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494.
Conn.—Gross v. Loft, Inc., 185 A. 80, 121 Conn. 394.
D.C.—Fisher v. Washington Coca-Cola Bottling Works, 84 F.2d 261, 66 App.D.C. 7, 105 A.L.R. 1034.
Ga.—Albany Coca Cola Bottling Co. v. Shiver, 12 S.E.2d 114, 63 Ga. App. 755—Atlanta Coca-Cola Bottling Co. v. Dean, 160 S.E. 105, 43 Ga.App. 682.
Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393—Goldman & Freiman Bottling Co. v. Sindell, 117 A. 866, 140 Md. 488.
Miss.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803.
Pa.—Werner v. Armour & Co., 183 A. 48, 320 Pa. 440.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721—Hoback v. Coca Cola Bottling Works of Nashville, 98 S.W.2d 113, 20 Tenn. App. 280.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693—Campbell Soup Co. v. Davis, 175 S.E. 743, 163 Va. 89.
Clear and convincing evidence of such fact must be adduced.—Jenkins v. Bogalusa Coca Cola Bottling Co., La.App., 1 So.2d 426.

89. Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721.

90. Tenn.—Coca-Cola Bottling Works v. Sullivan, supra.

91. Tenn.—Coca-Cola Bottling Works v. Sullivan, supra.
Where bottle was placed in a vending machine by defendant and taken therefrom by plaintiff, the jury could find that a safety pin therein could not likely have gotten in after the bottle had been capped by defendant.—Watkins v. Dalton Coca-Cola Bottling Co., 19 S.E.2d 316, 66 Ga.App. 848.

92. U.S.—Swift & Co. v. Blackwell, C.C.A.Va., 84 F.2d 130.
N.Y.—Singer v. Zabelin, 24 N.Y.S.2d 962.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721.

thority denying that this is the test;[93] and it is likewise applied where the foreign substance is so planted or imbedded in the article purchased by the consumer, that its physical location therein conclusively demonstrates its presence there when the article came from the manufacturer;[94] but where the physical possession of the article has been in a third person, such as an intermediary vendor, and the conclusive continuity of control between defendant and the consumer is broken, as in the case of soft drink or milk bottles inclosed by caps which it is possible to remove and replace by the use of care, it has been held that a higher degree of proof, namely, a preponderance of evidence, is required to show that there has been no reasonable opportunity for tampering with the container or its contents in the time between the physical control by the bottler or manufacturer and by the consumer, and that its condition was unchanged.[95] If the evidence tends to show that the unwholesome condition of the food or the foreign substance therein may with equal or greater likelihood be the result of external causes operating thereon after the package or bottle left the manufacturer's control, the doctrine is inapplicable.[96]

The circumstances shown must be such as reasonably to exclude any conclusion other than that defendant's negligence caused the injury.[97] So the doctrine will not apply where defendant's proved conduct could not constitute negligence unless it occurred under circumstances not shown to have existed.[98] Where there is evidence of specific acts of negligence, the doctrine is inapplicable.[99]

Pleadings as affecting applicability of doctrine. The effect of plaintiff's pleading specific acts of negligence on his right to rely on or invoke the doctrine of res ipsa loquitur in food cases depends on the view taken in the particular state as to the effect of such pleading in negligence cases generally, there being, as appears in the C.J.S. title Negligence § 220, also 45 C.J. p 1225 note 80–p 1228 note 94, considerable conflict among the authorities on that question. So there is authority for the view that the doctrine cannot be invoked by a plaintiff who alleges specific acts of negligence,[1] at least where he does not also allege negligence generally.[2] If the complaint alleges negligence generally, it is not necessary that it allege plaintiff's ignorance of the specific acts of negligence, his inability to ascertain them, and defendant's exclusive control.[3]

Rebuttal. The rebuttable[4] presumption of negligence arising from the application of the doctrine

93. Mich.—Hertzler v. Manshum, 200 N.W. 155, 157, 228 Mich. 416.

"Plaintiff's rights do not rest upon the character of the container employed, whether capable of being misused or tampered with or not, but upon the fact that the poison was in the flour. When and how the poison got there involve questions of fact, not to be ruled by the character of the container, but by evidence of actual care exercised, or want thereof."—Hertzler v. Manshum, supra.

94. Ky.—Liggett & Myers Tobacco Co. v. Rankin, 54 S.W.2d 612, 246 Ky. 65.
Tenn.—Coca-Cola Bottling Works v. Sullivan, 158 S.W.2d 721.

95. Tenn.—Coca-Cola Bottling Works v. Sullivan, supra.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.

However, there is authority holding that the presence of a foreign substance in a soft drink bottle at the time plaintiff drank from it raises a presumption of its having been there when it left defendant's possession.—Coca Cola Bottling Co. of Southeast Arkansas v. Spurlin, 132 S.W.2d 828, 199 Ark. 126.

Proof to legal and reasonable certainty that foreign substance did not get into container after it left defendant's possession is required.—Jenkins v. Bogalusa Coca Cola Bottling Co., La.App., 1 So.2d 426.

Evidence held sufficient

(1) In general.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
D.C.—Fisher v. Washington Coca-Cola Bottling Works, 84 F.2d 261, 66 App.D.C. 7, 105 A.L.R. 1034.
Ga.—Atlanta Coca-Cola Bottling Co. v. Dean, 160 S.E. 105, 43 Ga.App. 682.
Ind.—Coca Cola Bottling Works of Evansville v. Williams, App., 37 N.E.2d 702.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114.

(2) Where it showed that bottle was not opened from time it left company's plant to time that it was opened by dealer and delivered to customer.—Albany Coca Cola Bottling Co. v. Shiver, 12 S.E.2d 114, 63 Ga.App. 755.

96. U.S.—Quinn v. Swift & Co., D.C.Pa., 20 F.Supp. 234.
Ga.—Floyd v. Swift & Co., 200 S.E. 531, 59 Ga.App. 154.
La.—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159.
Md.—Armour & Co. v. Leasure, 9 A.2d 572, 177 Md. 393.
Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.
Tenn.—Hoback v. Coca Cola Bottling Works of Nashville, 98 S.W.2d 113, 20 Tenn.App. 280.

97. N.J.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.

Tack in pie

In action against restaurant company for injuries from tack in blueberry pie, doctrine of res ipsa loquitur did not apply.—Ash v. Childs Dining Hall Co., 120 N.E. 396, 231 Mass. 86, 3 A.L.R. 1556.

98. Ga.—Moree v. Shiver, 12 S.E.2d 118, 63 Ga.App. 761.

Dealer selling canned food

Res ipsa loquitur was inapplicable to create a presumption of negligence against retail grocer who sold allegedly spoiled canned fish in a sealed container without having participated in its preparation or packing.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.

99. Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.

1. D.C.—King v. Davis, 296 F. 986, 54 App.D.C. 239.

2. Cal.—Smith v. McClary, 82 P.2d 712, 28 Cal.App.2d 468.

3. Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.

4. Tex.—Rogers v. Coca Cola Bottling Co., Civ.App., 156 S.W.2d 325, error refused.

of res ipsa loquitur casts on defendant the burden of explaining, rebutting, or otherwise overcoming such presumption,[5] as by showing that he used due care,[6] or that it is reasonably certain that the misadventure was not caused by any negligence on his part,[7] or that the foreign substance found in the food did not enter it while it was under his control.[8] As appears infra § 70 b, the sufficiency of defendant's rebuttal evidence is generally a question for the jury.

b. Admissibility

The general rules governing admissibility of evidence are applicable to food cases.

The general rules governing admissibility of evidence in civil actions are applicable in actions to recover for injuries caused by unfit or unwholesome food products.[9] Subject to those rules, it may be said generally that it is proper to admit any evidence tending to establish or to disprove the allegations of the declaration or complaint,[10] or of the answer,[11] as, for example, evidence relating to the proximate cause of the injury or illness,[12] defendant's freedom from negligence,[13] and plaintiff's injuries.[14] In an action against a manufacturer, similar instances of injury may be shown as evidence of a probable like occurrence at the time of plaintiff's injury, when accompanied by proof of substantially similar circumstances and reasonable proximity in time.[15] On the other hand, evidence

5. Ala.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.
Ark.—Coca-Cola Bottling Co. of Southeast Arkansas v. Mooney, 161 S.W.2d 753—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.
La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426—Auzenne v. Gulf Public Service Co., App., 181 So. 54—Freeman v. Louisiana Coca-Cola Bottling Co., App., 179 So. 621—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45.
N.Y.—Miller v. National Bread Co., 286 N.Y.S. 908, 247 App.Div. 88.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.

6. Ark.—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.
Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130.
Ky.—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
Tex.—Rogers v. Coca Cola Bottling Co., 156 S.W.2d 325, error refused.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.

Defendant is not required to account satisfactorily for the occurrence; he must merely show that he used due care.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474.

What manufacturer must prove
If evidence that substance was in bottled beverage when consumer opened its original seal for consumption was sufficient to cast on manufacturer a presumption of negligence, its duty was to rebut that presumption by showing proper equipment, appliances, and due care on its part both in the process of cleaning, filling, and capping the bottles and in handling them up to the time of delivery to its purchaser.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.

7. La.—Auzenne v. Gulf Public Service Co., App., 181 So. 54.

8. La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426—Freeman v. Louisiana Coca-Cola Bottling Co., App., 179 So. 621—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45.

Proof of methods and precautions
The presumption is not necessarily rebutted by proof that defendant maintained a modern, sanitary plant, with efficient machinery, and required inspections and other precautions, for the reason, as some cases point out, that there remains the possibility that some employee was negligent in operating the machinery or in permitting the foreign substance to get into the food or in failing to discover its presence.
U.S.—Quinn v. Swift & Co., D.C.Pa., 20 F.Supp. 234.
Ark.—Coca-Cola Bottling Co. v. Davidson, 102 S.W.2d 833, 193 Ark. 825—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.
Conn.—Bagre v. Daggett Chocolate Co., 13 A.2d 757, 126 Conn. 659.
Ga.—Curtiss Candy Co. v. Johnson, 3 S.E.2d 776, 60 Ga.App. 268—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga.App. 369—Atlanta Coca-Cola Bottling Co. v. Sinyard, 164 S.E. 231, 45 Ga.App. 272.
La.—Dye v. American Beverage Co., App., 194 So. 438.
Pa.—Nock v. Coca-Cola Bottling Works of Pittsburgh, 156 A. 537, 102 Pa.Super. 515.

9. Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033.
N.Y.—O'Sullivan v. Cushman's Sons, 20 N.Y.S.2d 318, 259 App.Div. 926.
26 C.J. p 788 note 42.

10. U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486.
Ala.—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.
Mo.—Fantroy v. Schirmer, App., 296 S.W. 235.

Government inspection
In action by baker against meat dealer for damages caused by sale to baker of contaminated pork, president and general manager of dealer were held entitled to show quality of meat purchased and to that end to state that it was government-inspected pork.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.

11. S.C.—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.

12. Ala.—Louis Pizitz Dry Goods Co. v. Waldrop, 186 So. 151, 237 Ala. 208.

Medical history of decedent is relevant in considering medical testimony on question as to whether or not he died of food poisoning or other causes.—Doherty v. S. S. Kresge Co., 278 N.W. 437, 227 Wis. 661.

13. Ohio.—Witham v. Kroger Grocery & Baking Co., 1 N.E.2d 949, 51 Ohio App. 499.

14. **Evidence held admissible**
Evidence that plaintiff, before injury from swallowing glass, had complained of stomach pains, was admissible as indicating pains later complained of were not due to injury.—Upton v. Harrison, C.C.A.N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486.

15. N.C.—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305.
26 C.J. p 788 note 42 [b].

Other instances of foreign substances in bottles of the same beverage manufactured or bottled by same defendant at or about the same time may be shown.
U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190.

which falls within the general exclusionary rules of evidence applied in other actions for negligence is inadmissible,[16] as, for example, incompetent or irrelevant evidence relating to similar occurrences.[17] Proof that there had been no other complaints that the product was impure or contaminated has been held inadmissible,[18] but there is authority to the contrary.[19]

Proof that the manufacturer of food violated a pure food law is available in a suit by a retail dealer[20] as well as by a consumer.[21] A showing that defendant's conduct was a violation of a pure food law and so constituted negligence per se does not preclude plaintiff from introducing other evidence of negligence.[22]

c. Weight and Sufficiency

In the absence of inferences or presumptions, every essential fact must be proved by a preponderance of the evidence, and the weight and sufficiency of the evidence to prove particular facts or to support a verdict are determined in accordance with general principles of evidence.

General rules of evidence governing the weight and sufficiency of evidence in civil actions are applicable in food cases.[23] In addition to presumptions or inferences of negligence arising from the application of the doctrine of res ipsa loquitur or otherwise, other facts required to be proved may be sufficiently established by circumstantial evidence warranting an inference of such facts.[24] However, in the absence of any presumption or infer-

Mo.—Hutchison v. Moerschel Products Co., 133 S.W.2d 701, 234 Mo. App. 518.

N.C.—Tickle v. Hobgood, 4 S.E.2d 444, 216 N.C. 221—Blackwell v. Coca-Cola Bottling Co. of Asheville, 191 S.E. 887, 211 N.C. 729—Collins v. Lumberton Coca-Cola Bottling Co., 184 S.E. 834, 209 N.C. 821—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305—Broadway v. Grimes, 169 S.E. 194, 204 N.C. 623—Perry v. Kelford Coca-Cola Bottling Co., 146 S.E. 805, 196 N.C. 690—Perry v. Kelford Coca-Cola Bottling Co., 145 S.E. 14, 196 N.C. 175.

S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185.

Other food served by restaurant

In action against restaurateur for damages for illness caused by food containing dead insect, testimony of plaintiff's companion that similar articles of food served to him at same time made him sick was held relevant and material.—Franklin v. Argyro, 100 So. 811, 211 Ala. 506.

Injuries in former instances

The court, in action for injuries sustained from drinking bottled beverage containing deleterious substances, may permit evidence of injurious character of foreign substances found in bottles by other persons, but care should be taken by restricting scope of evidence or by express warnings to jury to prevent prejudice to bottling company from emphasis on injuries which jury should not consider in arriving at amount of verdict.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190.

16. U.S.—Coca-Cola Bottling Co. of Henderson v. Munn, supra.

Ala.—Try-Me Beverage Co. v. Harris, 116 So. 147, 217 Ala. 302.

Ga.—Hathcox v. Atlanta Coca-Cola Bottling Co., 178 S.E. 404, 50 Ga. App. 410.

Ky.—Coca Cola Bottling Co. of Shelbyville v. Creech, 53 S.W.2d 745, 245 Ky. 414.

Va.—Campbell Soup Co. v. Davis, 175 S.E. 743, 163 Va. 89.

Evidence held inadmissible

(1) In action for personal injury caused by alleged poisonous contents of bottled drink, excluding sanitary inspection certificates showing general state of cleanliness of defendant's plant at other times was held not error.—Lewis v. Linkett, 167 So. 286, 232 Ala. 233.

(2) Testimony offered by café, being sued for serving unfit food, regarding food served by café on previous occasions, was held properly excluded.—C. C. Hooper Cafe Co. v. Henderson, 137 So. 419, 223 Ala. 579.

(3) In action to recover damages for illness caused by eating sausage manufactured and sold in sealed can by defendant, testimony as to decomposed and unwholesome condition of remaining contents of can ten days after it was first opened was not competent on question of condition thereof when can was opened.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803.

(4) Evidence that inspectors employed by manufacturer, sued for injuries from defective goods, were colored persons, was held inadmissible to show inefficiency.—Atlanta Coca-Cola Bottling Co. v. Shipp, 154 S.E. 243, 170 Ga. 817, 71 A.L.R. 1295, answer conformed to 154 S.E. 385, 41 Ga.App. 705.

17. U.S.—Upton v. Harrison, C.C.A. N.C., 68 F.2d 232, certiorari denied 54 S.Ct. 718, 292 U.S. 633, 78 L.Ed. 1486.

N.J.—Parsonnet v. Keil's Newark Bakery, 196 A. 661, 119 N.J.Law 301.

Tenn.—Coca Cola Bottling Works v. Lewis, 9 Tenn.App. 485.

Evidence inadmissible because:

(1) Time when other bottles were sold by defendant was not shown.—Collins v. Lumberton Coca-Cola Bottling Co., 184 S.E. 834, 209 N.C. 821.

(2) Occurrences were too remote in time.—Enloe v. Charlotte Coca-Cola Bottling Co., 180 S.E. 582, 208 N.C. 305.

(3) Circumstances and conditions were not sufficiently similar.—Enloe v. Charlotte Coca-Cola Bottling Co., supra.

(4) In offering to show that flour manufactured and sold by another retailer had caused illness, there was no evidence of the care employed by such other retailer in handling the flour.—Hertzler v. Manshum, 211 N. W. 754, 237 Mich. 289.

18. N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.

W.Va.—Parr v. Coca-Cola Bottling Works of Charleston, 3 S.E.2d 499, 121 W.Va. 314.

19. S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185.

20. Wash.—Mazetti v. Armour, 135 P. 633, 75 Wash. 622, 48 L.R.A.,N.S., 213, Ann.Cas.1915C 140.

Liability of manufacturer or wholesale dealer to retail dealer see supra § 60.

21. Wash.—Mazetti v. Armour, supra.

22. S.C.—Hobbs v. Carolina Coca-Cola Bottling Co., 10 S.E.2d 25, 194 S.C. 543—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185.

23. Mass.—Ash v. Childs Dining Hall Co., 120 N.E. 396, 231 Mass. 86, 4 A.L.R. 1556.

26 C.J. p 788 note 43.

24. Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516.

N.H.—Ballas v. F. W. Woolworth Co., 10 A.2d 233, 90 N.H. 428.

N.Y.—Weiner v. Mager & Throne, 3 N.Y.S.2d 918, 167 Misc. 338.

ence, every essential fact must be proved by a preponderance of the evidence,[25] or, as some authorities have required, to a reasonable certainty,[26] or sufficiently to satisfy a reasonable, well-balanced mind.[27]

General principles of evidence are determinative of the probative weight or significance of particular evidence in food cases.[28] Accordingly, it has been held that evidence that a consumer swallowed glass is itself evidence of injury,[29] and that evidence of a violation of a pure food law is evidence,[30] or at least some evidence,[31] of negligence per se. The sale of an adulterated article of food by a wholesale dealer is prima facie evidence of negligence, although the package was properly labeled.[32]

The sufficiency of the evidence of defendant's negligence is determined by the facts involved and the general rules of evidence.[33] So, too, the facts of the particular case and the general rules of evidence determine the sufficiency or insufficiency of

Ohio.—Witham v. Kroger Grocery & Baking Co., 1 N.E.2d 949, 51 Ohio App. 499.
Okl.—Safeway Stores v. Fuller, 118 P.2d 649, 189 Okl. 556.

25. Cal.—Reese v. Smith, 70 P.2d 933, 9 Cal.2d 324, superseding, App., 61 P.2d 786.
Ill.—Wiehardt v. Krey Packing Co., 264 Ill.App. 504.
La.—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45—Lee v. Smith, App., 168 So. 727—Russo v. Louisiana Coca-Cola Bottling Co., App., 161 So. 909.
N.Y.—Bourcheix v. Willow Brook Dairy, 196 N.E. 617, 268 N.Y. 1, 98 A.L.R. 1492, reversing 277 N.Y.S. 292, 243 App.Div. 721.
Tex.—Joynes v. Jones Fine Bread Co., Civ.App., 147 S.W.2d 1112.

Evidence carefully scrutinized

In an action against a manufacturer, packer, or bottler, plaintiff's evidence should be most carefully scrutinized, especially where defendant shows extreme care in the course of manufacturing and packing or bottling.
La.—Hollis v. Ouachita Coca-Cola Bottling Co., App., 196 So. 376—Comforto v. Cloverland Dairy Products Co., App., 194 So. 43—Freeman v. Louisiana Coca-Cola Bottling Co., App., 179 So. 621—Russo v. Louisiana Coca-Cola Bottling Co., App., 161 So. 909.
Miss.—Swift & Co. v. Hawkins, 164 So. 231, 174 Miss. 253.

Proof beyond all doubt is not required.—Ogden v. Rosedale Inn, La. App., 189 So. 162.

26. La.—Palmer v. Rosedale Catering Co., App., 195 So. 859.

27. U.S.—Newcomb v. Armour & Co., D.C.Pa., 39 F.Supp. 716.
Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa. Super. 474.

28. Ala.—Alabama Coca-Cola Bottling Co. v. Causey, 180 So. 588, 28 Ala.App. 115, certiorari denied 180 So. 590, 235 Ala. 570.
Mass.—Johnson v. Kanavos, 6 N.E. 2d 434, 296 Mass. 373.

Evidence of presence or absence of peculiar taste in food has some probative significance on issue of whether or not such food was wholesome and the cause of subsequent illness of person eating it.—Johnson v. Kanavos, supra.

29. Ohio.—Clark Restaurant Co. v. Rau, 179 N.E. 196, 41 Ohio App. 23.

30. Mass.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515.
S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S.C. 170.
Wash.—Mazetti v. Armour, 135 P. 633, 75 Wash. 622, 48 L.R.A.,N.S., 213, Ann.Cas.1915C 140.

Evidence held insufficient

Proof in support of petition alleging injury from consumption of canned soup containing impure, tainted, poisonous, deleterious, and unwholesome matter, which was negligently permitted by manufacturer to become mixed with contents of the can, did not establish "negligence per se" as a breach of an alleged statutory duty.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga. App. 130.

31. Mass.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373.

32. Minn.—Neiman v. Channellene Oil, etc., Co., 127 N.W. 394, 112 Minn. 11, 140 Am.S.R. 458.

33. **Evidence held sufficient**

(1) Generally.
Ark.—Anheuser-Busch, Inc. v. Southard, 84 S.W.2d 89, 191 Ark. 107.
Cal.—Klein v. Duchess Sandwich Co., 93 P.2d 799, 14 Cal.2d 272, superseding, App., 86 P.2d 858.
Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.
D.C.—Picard v. Smith, 40 F.2d 803, 59 App.D.C. 291.
Ga.—Curtiss Candy Co. v. Johnson, 3 S.E.2d 776, 60 Ga.App. 268.
N.Y.—Moreno v. France Milling Co., 26 N.Y.S.2d 400, 261 App.Div. 991.
Pa.—McCabe v. Pennsylvania R. Co., 166 A. 843, 311 Pa. 229.
Tenn.—Roddy Mfg. Co. v. Cox, 7 Tenn.App. 147.

(2) Evidence that frankfurters manufactured by manufacturer of meat products were purchased by consumer, that a frankfurter eaten by consumer contained particle of wire, and that the frankfurters were in the exclusive control of the manufacturer until they reached consumer, was sufficient to establish negligence on part of the manufacturer.—Newcomb v. Armour & Co., D.C.Pa., 39 F.Supp. 716.

(3) In action for injuries from glass in beverage bottle, jury's findings that bottle contained particles of glass at time it left possession of defendant, and that bottle was offered for sale for human consumption were held to warrant jury's conclusion that manufacturer was negligent.—Dunn v. Texas Coca-Cola Bottling Co., Tex.Civ.App., 84 S.W.2d 545, error dismissed.

(4) In action against baking company for injuries resulting from eating bread containing particles of glass, evidence that glass was actually found in samples of bread tested warranted finding that company was negligent.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 33.

Evidence held insufficient

Ark.—H. J. Heinz Co. v. Duke, 116 S.W.2d 1039, 196 Ark. 180.
Cal.—Gindraux v. Maurice Mercantile Co., 47 P.2d 708, 4 Cal.2d 206.
Mass.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515.
Miss.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803.
N.Y.—De Nault v. Friedman & Co., 277 N.Y.S. 284, 243 App.Div. 396, affirmed 199 N.E. 694, 269 N.Y. 608—Steinberg v. Bloom, 5 N.Y. S.2d 774.
S.C.—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268.

Feasibility of inspection

Although fact that ordinary inspection of food during its preparation in restaurant would have disclosed foreign substance therein did not alone prove negligence from failure to discover dead mouse therein, it was evidence that inspection of food was feasible and practical.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.

the evidence to show that the food which caused the injury was manufactured, prepared, canned, bottled, or sold by defendant,[34] to show that the food was contaminated or contained a foreign substance when it left defendant's possession,[35] and that such condition arose while it was in defendant's possession,[36] to show that the consumer partook of the food in the manner and under the circumstances alleged,[37] to show contributory negligence[38] or freedom from contributory negligence,[39] to show that defendant's negligence,[40] or that the condition of the food or a substance therein,[41] was the proximate cause of the illness, injury, or death, to prove certain injuries,[42] or to support a verdict or judgment in favor of plaintiff[43] or in favor of defend-

34. Ark.—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407.
Mass.—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516—Richenbacher v. California Packing Corporation, 145 N.E. 281, 250 Mass. 198.
Minn.—Shindelus v. Sevcik, 1 N.W.2d 399.
N.J.—De Groat v. Ward Baking Co., 130 A. 540, 102 N.J.Law 188.
N.Y.—De Nault v. Friedman & Co., 277 N.Y.S. 284, 243 App.Div. 396, affirmed 199 N.E. 694, 269 N.Y. 608.
S.C.—Boylston v. Armour & Co., 12 S.E.2d 34, 196 S.C. 1.

35. U.S.—Linker v. Quaker Oats Co., D.C.Okl., 11 F.Supp. 794.
La.—Gunter v. Alexandria Coca Cola Bottling Co., App., 197 So. 159—Hollis v. Ouachita Coca-Cola Bottling Co., App., 196 So. 376—Wilson v. Moore, App., 159 So. 399.
Miss.—Cudahy Packing Co. v. McPhail, 155 So. 163, 170 Miss. 508.
N.H.—Howson v. Foster Beef Co., 177 A. 656, 87 N.H. 200.
N.Y.—Kelly v. Wegman's Food Markets, Inc., 31 N.Y.S.2d 976, 262 App. Div. 687.
Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa. Super. 474.
Tex.—Dunn v. Texas Coca-Cola Bottling Co., Civ.App., 84 S.W.2d 545, error dismissed.

Evidence held sufficient

In action for injuries caused by drinking a bottled beverage containing concrete, evidence that concrete was in bottle from which plaintiff drank, that bottle was received by seller in sealed condition from defendant manufacturer, that no third party had an opportunity to tamper with the bottle, and that the cleaning, filling, bottling, and inspection of the beverage sold by defendant to its customers was under the sole control of defendant, warranted jury's conclusion that the concrete was in the bottle when it left defendant's plant.—Coca Cola Bottling Works of Evansville v. Williams, Ind.App., 37 N.E.2d 702.

36. Ark.—Anheuser-Busch, Inc., v. Southard, 84 S.W.2d 89, 191 Ark. 107.
Mass.—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516.

Evidence insufficient to disprove

In action for injuries sustained by customer who ate ice cream containing glass purchased at soda fountain in defendant's store, evidence that no glass had been broken at fountain for several hours before customer was injured, and that ice cream was being rapidly dispensed at, and just prior to, time of customer's purchase, was insufficient to show that glass did not enter ice cream on defendant's premises.—Ballas v. F. W. Woolworth Co., 10 A.2d 233, 90 N.H. 428.

37. Cal.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 33.
La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45.

38. N.C.—Walker v. Hickory Packing Co., 16 S.E.2d 668, 220 N.C. 158.

39. Ark.—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407.
Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.

Evidence sufficient

Evidence that maid opened can of lobster and stated in luncheon guest's presence that she did not like smell thereof, whereupon guest ate small piece of lobster, although disliking its taste, and, after eating another small piece, proceeded to make salad and continued to taste lobster four or five times and, after saying that salad should not be used, tasted lobster in another can notwithstanding odor, was held to justify finding of contributory negligence.—Friedman v. Beck, 293 N.Y.S. 649, 250 App. Div. 87, motion granted 10 N.E.2d 554, 274 N.Y. 566.

40. N.H.—Kenney v. Wong Len, 128 A. 343, 81 N.H. 427.
Tex.—Coca-Cola Bottling Co. of Fort Worth v. Smith, Civ.App., 97 S.W. 2d 761.

41. U.S.—Newcomb v. Armour & Co., D.C.Pa., 39 F.Supp. 716.
Ark.—Coca-Cola Bottling Co. of Southeast Arkansas v. Bell, 109 S. W.2d 115, 194 Ark. 671.
D.C.—Picard v. Smith, 40 F.2d 803, 59 App.D.C. 291.
Ill.—Zorger v. Hillman, 4 N.E.2d 900, 287 Ill.App. 357.
La.—Jenkins v. Bogalusa Coca Cola Bottling Co., App., 1 So.2d 426—Hollis v. Ouachita Coca-Cola Bottling Co., App., 196 So. 376—Palmer v. Rosedale Catering Co., App., 195 So. 859—Dye v. American Beverage Co., App., 194 So. 438—MacLehan v. Loft Candy Stores, App., 172 So. 367—Hill v. Louisiana Coca-Cola Bottling Co., App., 170 So. 45—Lee v. Smith, App., 168 So. 727—Watts v. Ouachita Coca-Cola Bottling Co., App., 166 So. 151—Dean v. Alexandria Coca-Cola Bottling Co., App., 148 So. 448.
Mass.—Mellace v. John P. Squire Co., 29 N.E.2d 26, 306 Mass. 515—Gracey v. Waldorf System, 146 N. E. 232, 251 Mass. 76.
Mich.—Hertzler v. Manshum, 211 N. W. 754, 237 Mich. 289.
Miss.—Delta Nehi Bottling Co. v. Lucas, 185 So. 561, 184 Miss. 693.
N.Y.—Singer v. A. Krasne, 34 N.Y. S.2d 236.
Wash.—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606.

Absence of medical testimony

In action for illness sustained by eating unwholesome food served by defendant, failure of plaintiff's attending physicians to testify that the food was the cause of illness will not preclude recovery, if there is other evidence warranting such a finding.—Flynn v. Growers Outlet, 30 N.E.2d 250, 307 Mass. 373—Johnson v. Kanavos, 6 N.E.2d 434, 296 Mass. 373.

Fall causing injury

Evidence warranted finding that proximate cause of injury to plaintiff's back was fall from dizziness caused by drinking poisoned soft drink.—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.

42. Cal.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal.2d 33.

43. **Evidence sufficient**
U.S.—Newcomb v. Armour & Co., D. C.Pa., 39 F.Supp. 716.
Ala.—Opelika Coca-Cola Bottling Co. v. McEachern, 7 So.2d 570—Dr Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Ark.—Coca Cola Bottling Co. of Southeast Arkansas v. Spurlin, 132 S.W.2d 828, 199 Ark. 126—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407—Kroger Grocery & Baking Co. v. Turner, 100 S.W.2d 82, 193 Ark. 227—Great Atlantic & Pacific Tea

ant.[44] Evidence has been held sufficient[45] and insufficient[46] to overcome the presumption of negligence arising from the application of res ipsa loquitur.

The sufficiency of evidence to go to the jury is considered infra § 70.

§ 70. —— Trial

a. In general
b. Province of court and jury
c. Instructions
d. Verdict

a. In General

General rules are applicable in the conduct of the trial. Misconduct by counsel in asking an improper question may be cured by an admonition to the jury to disregard it.

In an action for injuries resulting from defendant's violation of a pure food and drugs act, the act of plaintiff's counsel in asking questions, to show that defendant had been previously prosecuted for violation of such law, if prejudicial misconduct, must be regarded as removed by the court's admonition to the jury thereon.[47]

b. Province of Court and Jury

Questions of law are for the court and questions of fact or mixed law and fact are for the jury. If there is evidence sufficient to justify one of several possible findings or if there is conflicting evidence on an issue, the question is one of fact for the jury, but if there is no evidence on an issue or only such evidence as will permit but a single inference to be drawn therefrom the matter is one for the court to dispose of.

As in other civil actions, questions of law are for the determination of the court, while questions of fact or mixed law and fact are ordinarily to be determined by the jury under proper instructions from the court.[48] If there is evidence sufficient to justify one of several possible findings, or if there is conflicting evidence on any issue, the question is one of fact that should be submitted to the jury,[49]

Co. v. Gwilliams, 87 S.W.2d 581, 191 Ark. 650.
Cal.—Klein v. Duchess Sandwich Co., 93 P.2d 799, 14 Cal.2d 272, superseding, App., 86 P.2d 858.
Ga.—Albany Coca-Cola Bottling Co. v. Shiver, App., 20 S.E.2d 181—Atlanta Coca-Cola Bottling Co. v. Childers, 11 S.E.2d 831, 63 Ga.App. 665—Curtiss Candy Co. v. Johnson, 3 S.E.2d 776, 60 Ga.App. 268—Southern Grocery Stores v. Donehoo, 200 S.E. 335, 59 Ga.App. 212—Crowley v. Lane Drug Stores, 189 S.E. 380, 54 Ga.App. 859—Atlanta Coca-Cola Bottling Co. v. Holbrook, 149 S.E. 316, 40 Ga.App. 269.
Ind.—Coca Cola Bottling Works of Evansville v. Williams, App., 37 N.E.2d 702.
La.—Dye v. American Beverage Co., App., 194 So. 438—Ogden v. Rosedale Inn, App., 189 So. 162—Kelly v. Ouachita Dairy Dealers Co-op. Ass'n, App., 175 So. 499.
Mass.—Groce v. First Nat. Stores, 167 N.E. 308, 268 Mass. 210—Doyle v. Continental Baking Co., 160 N.E. 325, 262 Mass. 516.
Miss.—Swift & Co. v. Hawkins, 164 So. 231, 174 Miss. 253.
N.J.—Cassini v. Curtis Candy Co., 172 A. 519, 113 N.J.Law 91.
N.Y.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637—Singer v. Zabelin, 24 N.Y.S.2d 962.
Ohio.—Drock v. Great Atlantic & Pacific Tea Co., 22 N.E.2d 547, 61 Ohio App. 291—Nath v. S. S. Kresge Co., 7 N.E.2d 4, 54 Ohio App. 315—Great Atlantic & Pacific Tea Co. v. Hughes, 4 N.E.2d 700, 53 Ohio App. 255, affirmed 3 N.E.2d 415, 131 Ohio St. 501.
R.I.—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334.

Evidence insufficient
Ala.—Reichert Milling Co. v. George, 162 So. 383, 26 Ala.App. 417, conforming to 162 So. 393, 230 Ala. 3, certiorari denied 162 So. 402, 230 Ala. 589.
Ark.—Green v. Wilson, 105 S.W.2d 1074, 194 Ark. 165.
Cal.—Reese v. Smith, 70 P.2d 933, 9 Cal.2d 324.
Ga.—Armour & Co. v. Gulley, 6 S.E.2d 165, 61 Ga.App. 414.
Ill.—Wiehardt v. Krey Packing Co., 264 Ill.App. 504.
La.—Palmer v. Rosedale Catering Co., App., 195 So. 859—Comforto v. Cloverland Dairy Products Co., App., 194 So. 43—Kohlman v. Jefferson Bottling Co., App., 192 So. 113—Russo v. Louisiana Coca-Cola Bottling Co., App., 161 So. 909.
Mass.—Johnson v. Stoddard, 37 N.E.2d 505, 310 Mass. 232.
Miss.—Johnston v. Swift & Co. of Illinois, 191 So. 423, 186 Miss. 803—Cudahy Packing Co. v. McPhail, 155 So. 163, 170 Miss. 508.
N.Y.—Singer v. A. Krasne, 34 N.Y.S.2d 236.
Wis.—Walraven v. Sprague, Warner & Co., 292 N.W. 883, 235 Wis. 259.

44. U.S.—Nichols v. Continental Baking Co., C.C.A.N.J., 34 F.2d 141.
Ga.—Floyd v. Swift & Co., 200 S.E. 531, 59 Ga.App. 154.
Ill.—Zorger v. Hillman's, 4 N.E.2d 900, 287 Ill.App. 357.
La.—Freeman v. Louisiana Coca-Cola Bottling Co., App., 179 So. 621.
Tex.—Joynes v. Jones Fine Bread Co., Civ.App., 147 S.W.2d 1112.

45. Ga.—H. J. Heinz Co. v. Fortson, 8 S.E.2d 443, 62 Ga.App. 130.

46. Ark.—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.
Tex.—Coca-Cola Bottling Co. of Fort Worth v. Smith, Civ.App., 97 S.W.2d 761.

47. Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

48. Ark.—Coca-Cola Bottling Co. v. Hill, 90 S.W.2d 210, 210 Ark. 154.
26 C.J. p 788 note 53.

49. Ala.—Louis Pizitz Dry Goods Co. v. Waldrop, 186 So. 151, 237 Ala. 208—Alabama Coca Cola Bottling Co. v. Smith, 195 So. 560, 29 Ala. App. 324.
Ark.—Coca Cola Bottling Co. v. Cromwell, 159 S.W.2d 744, 203 Ark. 933.
Ill.—Sullivan v. Coca Cola Bottling Co. of Chicago, 40 N.E.2d 579, 313 Ill.App. 517.
N.C.—Woody v. Coca-Cola Bottling Co. of Asheville, 10 S.E.2d 706, 218 N.C. 217.

Evidence held for jury
(1) On question of whether food was contaminated or contained foreign substance.
Ala.—Alabama Coca-Cola Bottling Co. v. Causey, 180 So. 588, 28 Ala. App. 115, certiorari denied 180 So. 590, 235 Ala. 570—Buffalo Rock Bottling Co. v. Stephenson, 118 So. 498, 22 Ala.App. 605.
Ark.—Coca Cola Bottling Co. of Arkansas v. Morrison, 106 S.W.2d 601, 194 Ark. 248—Coca-Cola Bottling Co. v. Jenkins, 82 S.W.2d 15, 190 Ark. 930.
Mass.—Schuler v. Union News Co., 4 N.E.2d 465, 295 Mass. 350.
Mo.—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849.

and in such case the court may properly refuse to take the question from the jury, as by a nonsuit, dismissal, direction of a verdict, or a peremptory instruction, and it is error for it so to do.[50] On the other hand, if there is no evidence on an issue of fact, or the evidence thereon is legally insufficient to be submitted to the jury or is such that but one inference can reasonably be drawn therefrom, the question becomes one of law for the court itself to determine,[51] and it may dispose of the issue by a dismissal or nonsuit, by sustaining a demurrer to the evidence, or by direction of a verdict, as may be appropriate in the particular case,[52] and it is error to submit the issue to the jury.[53]

Negligence generally. The question of defendant's negligence with respect to an injury or illness caused by unfit food, or its contents, is one of fact and should be submitted to the jury if there is sufficient evidence to warrant a finding, whether or not there is conflicting evidence, that defendant was negligent;[54] and the same rule applies with respect

N.J.—Lewis v. V. La Rosa & Sons, 26 A.2d 879, 128 N.J.Law 474—Amabile v. Kramps, 2 A.2d 178, 121 N.J.Law 219.

Pa.—Campbell v. G. C. Murphy Co., 186 A. 269, 122 Pa.Super. 342.

S.C.—Caines v. Marion Coca Cola Bottling Co., 14 S.E.2d 10, 196 S.C. 502.

(2) On question of whether food became contaminated or foreign substance entered it while it was in defendant's possession.

U.S.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190.

Mass.—O'Brien v. Louis K. Liggett Co., 185 N.E. 28, 282 Mass. 438—Tonsman v. Greenglass, 142 N.E. 756, 248 Mass. 275.

Mo.—Hutchison v. Moerschel Products Co., 133 S.W.2d 701, 234 Mo. App. 518.

N.Y.—Miller v. National Bread Co., 286 N.Y.S. 908, 247 App.Div. 88.

Pa.—Koplin v. Louis K. Liggett Co., 181 A. 381, 119 Pa.Super. 529, reversed on other grounds 185 A. 744, 322 Pa. 333.

(3) Question held for jury despite evidence of processes employed, rendering it improbable that extraneous substance could have entered without being discovered.

U.S.—Swift & Co. v. Blackwell, C.C.A. Va., 84 F.2d 130.

Ark.—Coca-Cola Bottling Co. of Arkansas v. Massey, 100 S.W.2d 681, 193 Ark. 423—Coca-Cola Bottling Co. v. Hill, 90 S.W.2d 210, 210 Ark. 154.

Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033.

La.—King v. Louisiana Coca-Cola Bottling Co., App., 151 So. 252.

Pa.—Menaker v. Supplee-Wills-Jones Milk Co., 189 A. 714, 125 Pa.Super. 76.

Tenn.—Merriman v. Coca Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn.App. 433.

Uncontradicted evidence may be for jury where it is not such as to require a particular finding.—Greenway v. Great Atlantic & Pacific Tea Co., Tex.Civ.App., 114 S.W.2d 435.

50. U.S.—Bolton v. Kroger Grocery & Baking Co., C.C.A.Ind., 123 F. 2d 526.

Ala.—Lewis v. Linkett, 167 So. 286, 232 Ala. 233—Alabama Coca-Cola Bottling Co. v. Causey, 180 So. 588, 28 Ala.App. 115, certiorari denied 180 So. 590, 235 Ala. 570—Buffalo Rock Bottling Co. v. Stephenson, 118 So. 498, 22 Ala.App. 605.

Ark.—Swift & Co. v. Mabry, 159 S. W.2d 61, 203 Ark. 818.

Ga.—Crowley v. Lane Drug Stores, 189 S.E. 380, 54 Ga.App. 859.

Mo.—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849.

N.J.—Piscatore v. V. La Rosa & Sons, 2 A.2d 327, 121 N.J.Law 288, affirmed 8 A.2d 332, 123 N.J.Law 364—Amabile v. Kramps, 2 A.2d 178, 121 N.J.Law 219.

N.Y.—Miller v. National Bread Co., 286 N.Y.S. 908, 247 App.Div. 88.

N.C.—Scott v. Swift & Co., 200 S.E. 21, 214 N.C. 580—Smith v. Coca-Cola Bottling Co. of Henderson, 196 S.E. 822, 213 N.C. 544—Blackwell v. Coca-Cola Bottling Co., 191 S.E. 887, 211 N.C. 729—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331.

Pa.—Menaker v. Supplee-Wills-Jones Milk Co., 189 A. 714, 125 Pa.Super. 76.

S.C.—Caines v. Marion Coca Cola Bottling Co., 14 S.E.2d 10, 196 S.C. 502—Hobbs v. Carolina Coca-Cola Bottling Co., 10 S.E.2d 25, 194 S.C. 543.

Tenn.—Merriman v. Coca Cola Bottling Co. of McMinnville, Tenn., 68 S.W.2d 149, 17 Tenn.App. 433.

51. Pa.—Werner v. Armour & Co., 183 A. 48, 320 Pa. 440.

Evidence held insufficient

(1) Evidence that plaintiff purchased a crate of soda water products from defendant, that about three hours after supper plaintiff drank part of a bottle which came from such crate and in one half hour thereafter became very sick, and that examination of remaining contents of bottle disclosed that it contained "considerable sediment and slimy-appearing substance" was insufficient to carry case to the jury.—McCarn v. Gastonia 3-Centa Bottling Co., 196 S. E. 837, 213 N.C. 543.

(2) Evidence of café being sued for serving unfit fish to customer held to entitle café to have suitableness of ice box eliminated as issue before jury.—C. C. Hooper Café Co. v. Henderson, 137 So. 419, 223 Ala. 579.

52. La.—Von Herr v. Louisiana Coca-Cola Bottling Co., App., 148 So. 75.

N.J.—Feduniewicz v. Gropp, 155 A. 23, 9 N.J.Misc. 595.

N.C.—Thompson v. Dr. Pepper Bottlers Corporation, 8 S.E.2d 234, 217 N.C. 795—Tickle v. Hobgood, 4 S.E. 2d 444, 216 N.C. 221—McCarn v. Gastonia 3-Centa Bottling Co., 196 S.E. 837, 213 N.C. 543.

Pa.—Galda v. Maurer's Dairy, 15 Northumb.Leg.J. 54.

53. N.J.—Feduniewicz v. Gropp, 155 A. 23, 9 N.J.Misc. 595.

N.C.—Tickle v. Hobgood, 4 S.E.2d 444, 216 N.C. 221.

54. U.S.—Gray v. Pet Milk Co., C.C. A.Ill., 108 F.2d 974, certiorari denied Pet Milk Co. v. Gray, 60 S.Ct. 890, 309 U.S. 688, 84 L.Ed. 1031—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003—Linker v. Quaker Oats Co., D.C.Okl., 11 F. Supp. 794.

Ala.—C. C. Hooper Café Co. v. Henderson, 137 So. 419, 223 Ala. 579—Coca-Cola Bottling Co. v. Crook. 132 So. 898, 222 Ala. 369—Alabama Coca-Cola Bottling Co. v. Causey, 180 So. 588, 28 Ala.App. 115, certiorari denied 180 So. 590, 235 Ala. 570—Buffalo Rock Bottling Co. v. Stephenson, 118 So. 498, 22 Ala. App. 605—Coca-Cola Bottling Co. v. Barksdale, 88 So. 36, 17 Ala.App. 606.

Ark.—Swift & Co. v. Mabry, 159 S. W.2d 61, 203 Ark. 818—Coca-Cola Bottling Co. of Arkansas v. Langston, 127 S.W.2d 263, 198 Ark. 59—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407—Coca-Cola Bottling Co. of Arkansas v. Raymond, 100 S.W.2d 963—Coca-Cola Bottling Co. of Arkansas v. Eudy, 100 S.W.2d 683, 193 Ark. 436—Coca-Cola Bottling Co. v. Jenkins, 82 S.W.2d 15, 190 Ark. 930—Coca-Cola Bottling Co. v. McBride, 20 S.W.2d 862, 180 Ark. 193.

Cal.—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 138 Cal. App., Supp., 777.

to questions as to particular facts bearing on the question of negligence, such as whether failure to discover a foreign substance was negligence,[55] whether a reasonable and proper inspection would have disclosed it,[56] or whether the condition of the food was due to the negligence of a third person.[57] On the other hand, if there is no evidence of negligence, or if the evidence is legally insufficient to warrant a finding of negligence, the court should itself dispose of the question, as by granting a nonsuit or dismissal, or by directing a verdict for defendant.[58]

Ga.—Cordell v. Macon Coca-Cola Bottling Co., 192 S.E. 228, 56 Ga.App. 117.

Mass.—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106—Schuler v. Union News Co., 4 N.E. 2d 465, 295 Mass. 350.

Mich.—Craft v. Parker, Webb & Co., 55 N.W. 812, 96 Mich. 245, 21 L.R. A. 139.

Mo.—Bell v. S. S. Kresge Co., App., 129 S.W.2d 932—Hickman v. St. Louis Dairy Co., 90 S.W.2d 177, 232 Mo.App. 117.

N.H.—Ballas v. F. W. Woolworth Co., 10 A.2d 233, 90 N.H. 428.

N.J.—Panza v. Bickford's Inc., of New Jersey, 28 A.2d 188, 129 N.J. Law 50—McKittrick v. Dugan Bros. of New Jersey, 197 A. 905, 119 N.J.Law 605, affirmed 1 A.2d 331, 121 N.J.Eq. 49—Rickner v. Ritz Restaurant Co. of Passaic, 181 A. 398, 13 N.J.Misc. 818—Wilson v. Deschner, 167 A. 670, 11 N.J.Misc. 609—Sheehan v. Menkes, 152 A. 326, 8 N.J.Misc. 867—Rudolph v. Coca-Cola Bottling Co., 132 A. 508, 4 N.J.Misc. 318.

N.C.—Breece v. Asheville Coca-Cola Bottling Co., 193 S.E. 269, 212 N.C. 388—Daniels v. Swift & Co., 183 S. E. 748, 209 N.C. 567—Hampton v. Thomasville Coca-Cola Bottling Co., 180 S.E. 584, 208 N.C. 331.

Ohio.—Ward Baking Co. v. Trizzino, 161 N.E. 557, 27 Ohio App. 475.

Pa.—Menaker v. Supplee-Wills-Jones Milk Co., 189 A. 714, 125 Pa.Super. 76—Levy v. Horn & Hordart Baking Co., 157 A. 369, 103 Pa.Super. 282.

R.I.—Chisholm v. S. S. Kresge Co., 182 A. 4, 55 R.I. 422—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334.

S.C.—Boylston v. Armour & Co., 12 S. E.2d 34, 196 S.C. 1—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S.C. 98—Irick v. Peoples Baking Co., 196 S.E. 887, 187 S.C. 238—Housand v. Armour & Co., 175 S.E. 516, 173 S.C. 268—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.

Tenn.—Coca Cola Bottling Works v. Kennedy, 13 Tenn.App. 199—Coca Cola Bottling Works v. Lewis, 9 Tenn.App. 485.

Tex.—Greenway v. Great Atlantic & Pacific Tea Co., Civ.App., 114 S.W. 2d 435—Texas Coca-Cola Bottling Co. v. Wimberley, Civ.App., 108 S. W.2d 860, error dismissed.

Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.

Wis.—Prinsen v. Russos, 215 N.W. 905, 194 Wis. 142.

26 C.J. p 788 note 53.

The test is whether or not circumstances are such as would satisfy a reasonable and well-balanced mind that accident resulted from defendant's negligence.—Quinn v. Swift & Co., D.C.Pa., 20 F.Supp. 234.

Evidence held sufficient

(1) In action against grocery company for negligence in selling hamburg steak containing small pieces of wire, direction of verdict for defendant was held error, under evidence that such wire did not get into steak after leaving the store and testimony of grocery manager that there was no wire in steak when it came into the store, since facts warranted inference of negligence.—Flynn v. First National Stores, 6 N. E.2d 814, 296 Mass. 521.

(2) In action for injury caused by deleterious substances in bottled beverage, testimony of plaintiff that she swallowed portions of one or more bugs which caused her illness, and observed in bottle a brownish gray slimy looking substance, and found in bottle a yellow jacket and cockroach, with testimony of other like instances, was sufficient to take case to jury.—Blackwell v. Coca-Cola Bottling Co. of Asheville, 191 S.E. 887, 211 N.C. 729.

(3) Evidence that customer became ill after eating sausage, that others who ate of sausage also became ill, and that grocer who sold sausage testified that can in which sausage was packed was rusted on inside, presented question for jury as to whether manufacturer was negligent, notwithstanding testimony of manufacturer that samples of sausage taken from can in question were submitted to tests and no trace of poison of any kind was found, and that its methods of manufacturing meats were the most modern and approved methods employed in manufacturing of such foods.—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S.C. 170.

55. Ark.—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407.

Ga.—Albany Coca-Cola Bottling Co. v. Shiver, App., 20 S.E.2d 181—Davis v. Williams, 198 S.E. 357, 58 Ga.App. 274.

S.C.—Floyd v. Florence Nehi Bottling Co., 198 S.E. 161, 188 S.C. 98—Tate v. Mauldin, 154 S.E. 431, 157 S.C. 392.

56. Mass.—O'Brien v. Louis K. Liggett Co., 185 N.E. 28, 282 Mass. 438—Sullivan v. Manhattan Market Co., 146 N.E. 673, 251 Mass. 395.

Miss.—Blount v. Houston Coca Cola Bottling Co., 185 So. 241, 184 Miss. 69.

57. S.C.—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S.C. 170.

58. Ala.—McCarley v. Wood Drugs, 153 So. 446, 228 Ala. 226.

Ark.—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494—Great Atlantic & Pacific Tea Co. v. Gwilliams, 76 S.W.2d 65, 189 Ark. 1037.

Minn.—Swenson v. Purity Baking Co., 236 N.W. 310, 183 Minn. 289.

Miss.—Blount v. Houston Coca Cola Bottling Co., 185 So. 241, 184 Miss. 69.

N.H.—Smith v. Salem Coca-Cola Bottling Co., 25 A.2d 125.

N.C.—Manning v. Harvey C. Hines Co., 10 S.E.2d 727, 218 N.C. 779—Williams v. Elson, 10 S.E.2d 668, 218 N.C. 157—Tickle v. Hobgood, 4 S.E 2d 444, 216 N.C. 221—Reece v. Durham Coca-Cola Bottling Co., 150 S.E. 198, 197 N.C. 661—Lamb v. Boyles, 135 S.E. 464, 192 N.C. 542, 49 A.L.R. 589, followed in Gill v. Ceases Lunch System, 139 S.E. 925, 194 N.C. 803.

Evidence held insufficient

(1) In action against owner of store by customer to recover for illness allegedly caused by eating allegedly tainted sausage purchased at the store, evidence most favorable to customer that she ate the sausage along with other food and became ill, that she purchased only the sausage from owner of store, that spoiled sausage will sometimes cause such illness as that suffered by her, and that the cheese and milk that she consumed at the same time, if tainted, would cause the same kind of illness, was not sufficient for jury on question of negligence on part of owner of store.—Safeway Stores v. Fuller, 118 P.2d 649, 189 Okl. 556.

(2) Evidence that package of oats, which allegedly contained particles of glass, was unopened by retailer when sold to plaintiff, that retailer had no opportunity to inspect package without breaking seal, and that product was that of reputable manu-

Under doctrine of res ipsa loquitur. Where the circumstances are such as to raise a presumption of negligence under the doctrine of res ipsa loquitur, considered supra § 69 a (2), and such presumption is not rebutted or overcome as a matter of law, the issue of negligence is one for the jury,[59] the sufficiency of defendant's rebuttal evidence to overcome the presumption being itself, as a rule, a question for the jury.[60] If there is clear and undisputed evidence sufficient in law to refute the presumption, the issue of negligence may[61] or may not[62] be submitted to the jury, depending on whether the evidence, without the aid of the presumption, is or is not sufficient to raise the issue.

Negligence per se. If there is some evidence tending to establish plaintiff's right to recover on the theory of defendant's negligence per se in violating a pure food law, the issue should be submitted to the jury;[63] but where the evidence is insufficient in law to make out a violation of such a statute, the issue should not be submitted to the jury, and the court may dispose of the issue by a dismissal or nonsuit or a directed verdict.[64]

Contributory negligence. If the evidence is sufficient to warrant a finding that plaintiff was guilty of contributory negligence or if there is conflicting evidence on such issue, the question is one for the jury.[65]

facturer, was held insufficient for jury as regards retailer's liability. —Linker v. Quaker Oats Co., D.C. Okl., 11 F.Supp. 794.

(3) In action to recover for damages allegedly resulting from drinking bottled beverage, evidence that bottle was not uniform in shape, and that it contained a poisonous substance was insufficient to present jury question as to bottler's negligence, in absence of evidence that any other like products manufactured under substantially similar conditions and sold about same time contained deleterious substances, or evidence of defect in machinery or failure to inspect bottled beverages.—Evans v. Charlotte Pepsi-Cola Bottling Co., 6 S.E.2d 510, 216 N.C. 716.

(4) In action against retailer to recover for injuries resulting from the drinking of a bottled beverage allegedly containing dead flies, evidence was insufficient to present jury question as to retailer's negligence where there was nothing in the appearance of bottle which would have put retailer on notice that it was unfit for human consumption.—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S. W.2d 416, 24 Tenn.App. 36.

59. Ark.—Coca-Cola Bottling Co. of Southwest Arkansas v. Strather, 96 S.W.2d 14, 192 Ark. 999.
Ga.—Coleman v. Dublin Coca-Cola Bottling Co., 170 S.E. 549, 47 Ga. App. 369—Copeland v. Curtis, 136 S.E. 324, 36 Ga.App. 255.
Ky.—Kroger Grocery & Baking Co. v. Schneider, 60 S.W.2d 594, 249 Ky. 261.
Miss.—Blount v. Houston Coca Cola Bottling Co., 185 So. 241, 184 Miss. 69.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.

60. U.S.—Quinn v. Swift & Co., D. C.Pa., 20 F.Supp. 234—Linker v. Quaker Oats Co., D.C.Okl., 11 F. Supp. 794.
Ala.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548—Collins Baking Co. v. Savage, 150 So. 336, 227 Ala. 408.
Ark.—Coca-Cola Bottling Co. of Southeast Arkansas v. Mooney, 161 S.W.2d 753—Coca Cola Bottling Co. of Southeast Arkansas v. Spurlin, 132 S.W.2d 828, 199 Ark. 126—Coca Cola Bottling Co. of Arkansas v. Morrison, 106 S.W.2d 601, 194 Ark. 248—Coca-Cola Bottling Co. v. Davidson, 102 S.W.2d 833, 193 Ark. 825—Coca-Cola Bottling Co. of Southwest Arkansas v. Strather, 96 S.W.2d 14, 192 Ark. 999—Coca Cola Bottling Co. v. Bennett, 42 S.W.2d 213, 184 Ark. 329.
Miss.—Coca Cola Bottling Works of Columbus v. Petty, 200 So. 128, 190 Miss. 631.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa.Super. 474—Nock v. Coca-Cola Bottling Works of Pittsburgh, 156 A. 537, 102 Pa.Super. 515.
Va.—Norfolk Coca-Cola Bottling Works v. Krausse, 173 S.E. 497, 162 Va. 107.
W.Va.—Blevins v. Raleigh Coca-Cola Bottling Works, 3 S.E.2d 627, 121 W.Va. 427—Parr v. Coca-Cola Bottling Works of Charleston, 3 S.E. 2d 499, 121 W.Va. 314.

61. Tex.—Rogers v. Coca Cola Bottling Co., Civ.App., 156 S.W.2d 325, error refused.

62. Ala.—Dr. Pepper Co. v. Brittain, 176 So. 286, 234 Ala. 548.
Tenn.—Coca-Cola Bottling Co. v. Rowland, 66 S.W.2d 272, 16 Tenn. App. 184.

63. Ohio.—Great Atlantic & Pacific Tea Co. v. Hughes, 3 N.E.2d 415, 131 Ohio St. 501, affirming 4 N.E.2d 700, 53 Ohio App. 225.
S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185.

64. Ohio.—Mills Restaurant Co. v. Clark, 185 N.E. 470, 45 Ohio App. 25.

65. Ark.—Kraft-Phenix Cheese Corporation v. Spelce, 113 S.W.2d 476, 195 Ark. 407.
Cal.—Stell v. Townsend California Glace Fruits, 28 P.2d 1077, 138 Cal.App., Supp., 777.
Ga.—Albany Coca-Cola Bottling Co. v. Shiver, App., 20 S.E.2d 181—Cordell v. Macon Coca-Cola Bottling Co., 192 S.E. 228, 56 Ga.App. 117.
Mich.—Craft v. Parker, Webb & Co., 55 N.W. 812, 96 Mich. 245, 21 L.R. A. 139.
N.J.—Rudolph v. Coca-Cola Bottling Co., 132 A. 508, 4 N.J.Misc. 318.
Pa.—Madden v. Great Atlantic & Pacific Tea Co., 162 A. 687, 106 Pa. Super. 474.
S.C.—Caines v. Marion Coca-Cola Bottling Co., 17 S.E.2d 315, 198 S. C. 204.
Tenn.—Coca Cola Bottling Works v. Kennedy, 13 Tenn.App. 199.

Reasonable time for consumption

In suits against bakers for plaintiffs' illness allegedly caused by eating cream cakes purchased from bakers, bakers' motion for judgment, based on ground that evidence disclosed that cakes were not consumed within a reasonable time after purchase, was properly denied by the trial judge, sitting as a jury, where evidence tended to show that cakes were purchased in the evening and were eaten at eight o'clock the following morning after having been kept overnight in electric refrigerator, since question of what constituted a reasonable time was a fact question for the trial judge.—Amabile v. Kramps, 2 A.2d 178, 121 N.J. Law 219.

Evidence held for jury

(1) Evidence that plaintiff drank half a cup of milk to find out what was wrong with it after her husband and son had complained that something was wrong with tea into which some of the milk had been poured.—

Proximate cause. If there is sufficient evidence to warrant a finding that the unwholesome condition of the food or its contents, or defendant's negligence generally, was the proximate cause of plaintiff's injury or illness, or where the evidence on such issue is conflicting, a jury question is presented;[66] but if there is no evidence to warrant such a finding, or if the evidence is such as to permit of but one logical inference, the issue is one of law for the decision of the court.[67]

Company or person liable. Whether or not defendant or a particular defendant manufactured, bottled, packed, sold or served the food which caused the illness or injury is a question for the jury if there is sufficient evidence to support a finding on the question;[68] but if there is no evidence sufficient to support a finding, or if the evidence is so clear as to permit of but one logical inference, the court may and should dispose of the issue as a matter of law.[69]

McAteer v. Sheffield Farms Co., 152 A. 469, 9 N.J.Misc. 33.

(2) Evidence that plaintiff continued to masticate and swallow bread after discovering gritty substance therein.—Dryden v. Continental Baking Co., 77 P.2d 833, 11 Cal. 2d 33.

(3) Evidence showing that plaintiff drank small part of contents of bottle after he ascertained that it contained something tasting like sand.—Dunn v. Texas Coca-Cola Bottling Co., Tex.Civ.App., 84 S.W.2d 545, error dismissed.

(4) Evidence that consumer ate from jar of wafer-sliced dried beef prepared by defendant, the jar having previously been unopened, without first examining its contents.—Armour & Co. v. Roberts, 12 S.E.2d 376, 63 Ga.App. 846.

66. U.S.—Murphy v. Campbell Soup Co., C.C.A.Mass., 62 F.2d 564.
Ark.—Swift & Co. v. Mabry, 159 S.W.2d 61, 203 Ark. 818—Coca-Cola Bottling Co. v. Jenkins, 82 S.W.2d 15, 190 Ark. 930.
Kan.—Taylor v. F. W. Woolworth Co., 98 P.2d 114, 151 Kan. 233.
Ky.—Great Atlantic & Pacific Tea Co. v. Eiseman, 81 S.W.2d 900, 259 Ky. 103—Kroger Grocery & Baking Co. v. Schneider, 60 S.W.2d 594, 249 Ky. 261.
Md.—Armour & Co. v. Leasure, 9 A. 2d 572, 177 Md. 393.
Mass.—Bergantino v. General Baking Co., 9 N.E.2d 521, 298 Mass. 106—Sullivan v. Manhattan Market Co., 146 N.E. 673, 251 Mass. 395.
N.J.—Lipari v. National Grocery Co., 198 A. 393, 120 N.J.Law 97.
N.Y.—Miller v. National Bread Co., 286 N.Y.S. 908, 247 App.Div. 88.
N.C.—Harper v. Bulluck, 152 S.E. 405, 198 N.C. 448.
Ohio.—Tipple v. High Street Hotel Co., App., 41 N.E.2d 879—Witham v. Kroger Grocery & Baking Co., 1 N.E.2d 949, 51 Ohio App. 499.
Pa.—Rozumailski v. Philadelphia Coca-Cola Bottling Co., 145 A. 700, 296 Pa. 114—Koplin v. Louis K. Liggett Co., 181 A. 381, 119 Pa. Super. 529, reversed on other grounds 185 A. 744, 322 Pa. 333.
S.C.—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.
Wis.—Doherty v. S. S. Kresge Co., 278 N.W. 437, 227 Wis. 661.

Expert opinion evidence is not indispensable to raising issue of whether or not foreign substance in food was cause of plaintiff's illness or injury.—Gannon v. S. S. Kresge Co., 157 A. 541, 114 Conn. 36.

Meager evidence held sufficient.—Barringer v. Ocean S. S. Co. of Savannah, 134 N.E. 265, 240 Mass. 405.

Jury question presented by evidence that plaintiffs who ate the cream cakes became ill soon thereafter, and that other persons at the same meal who did not eat the cakes were unaffected.—Amable v. Kramps, 2 A.2d 178, 121 N.J.Law 219.

67. U.S.—Murphy v. Campbell Soup Co., C.C.A.Mass., 62 F.2d 564.
Ark.—Jonesboro Coca-Cola Bottling Co. v. Young, 132 S.W.2d 382, 198 Ark. 1032—Coca-Cola Bottling Co. v. Wood, 123 S.W.2d 514, 197 Ark. 489—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494.

Dismissal as to one of several defendants

In consumer's action against operators of dairy farm, a dairy company to which operators sold milk, and individual who conducted milk route selling milk purchased from dairy company, for damages sustained from undulant fever contracted by consumer while drinking milk produced and marketed by defendants, dismissal of action as to operators of farm did not require dismissal as to other defendants, where dismissal was on ground that consumer failed to sustain burden of proving that fever was contracted through milk produced by operators because proofs showed that milk obtained by remaining defendants from a third party was also infected.—Nelson v. West Coast Dairy Co., 105 P.2d 76, 5 Wash.2d 284, 130 A.L.R. 606.

68. Ala.—Try-Me Beverage Co. v. Harris, 116 So. 147, 217 Ala. 302.
Mich.—Cheli v. Cudahy Bros. Co., 255 N.W. 414, 267 Mich. 690.
Mo.—Hutchison v. Moerschel Products Co., 133 S.W.2d 701, 234 Mo. App. 518.
N.J.—Carbone v. California Packing Corporation, 169 A. 866, 12 N.J. Misc. 209—Rudolph v. Coca-Cola Bottling Co., 132 A. 508, 4 N.J. Misc. 318.
S.C.—Gantt v. Columbia Coca-Cola Bottling Co., 7 S.E.2d 641, 193 S.C. 51, 127 A.L.R. 1185—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.
Tex.—Dunn v. Texas Coca-Cola Bottling Co., Civ.App., 84 S.W.2d 545, error dismissed.

Whether label represented distributor as manufacturer so as to render distributor liable was a question of fact for the jury.—Slavin v. Francis H. Leggett & Co., 177 A. 120, 114 N.J.Law 421, affirming 173 A. 597, 12 N.J.Misc. 549, and affirmed 186 A. 832, 117 N.J.Law 101.

69. U.S.—Murphy v. Campbell Soup Co., C.C.A.Mass. 62 F.2d 564.
Ky.—Nehi Bottling Co. v. Thomas, 33 S.W.2d 701, 236 Ky. 684.
Miss.—Jackson Coca-Cola Bottling Co. v. Grubbs, 108 So. 732, 143 Miss. 590.
Pa.—Werner v. Armour & Co., 183 A. 48, 320 Pa. 440.
Tenn.—Wilkes v. Memphis Grocery Co., 134 S.W.2d 929, 23 Tenn.App. 550, rehearing denied Wilkes v. Jones, 139 S.W.2d 416, 24 Tenn. App. 36.

Evidence held insufficient

In action for damage from drinking carbonated beverage, evidence, which failed to show that individual who allegedly delivered products from plant of alleged manufacturer to dealer from whom bottle in question was purchased was an employee of alleged manufacturer, or to dispute lease showing that plant was leased by alleged manufacturer to another, or to show that purported advertisement of beverage by manufacturer was authorized or paid for by it, was insufficient for jury on question of manufacturer's liability.—Neely v. Jackson Coca Cola Co., 184 So. 467, 183 Miss. 635.

Weight and credibility. The credibility of witnesses[70] and the weight to be accorded their testimony[71] are matters solely for the determination of the jury.

c. Instructions

Rules governing instructions in civil cases generally, are applicable as to the necessity, propriety and requisites of instructions in food cases.

The rules of law governing instructions in civil cases generally, apply as to the necessity, propriety, and requisites of the instructions in an action for injuries caused by unfit food or food products.[72] Thus instructions must be in conformity with the evidence,[73] and the pleadings,[74] and must not be misleading or confusing.[75] Such rules have been applied to instructions with respect to defendant's duty[76] and liability,[77] the burden[78] and sufficiency[79]

70. U.S.—Bolton v. Kroger Grocery & Baking Co., C.C.A.Ind., 123 F.2d 526.
Ark.—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494.
Ohio.—Witham v. Kroger Grocery & Baking Co., 1 N.E.2d 949, 51 Ohio App. 499.

71. Ark.—Kroger Grocery & Baking Co. v. Melton, 102 S.W.2d 859, 193 Ark. 494—Anheuser-Busch, Inc., v. Southard, 84 S.W.2d 89, 191 Ark. 107.

72. Ala.—Try-Me Beverage Co. v. Harris, 116 So. 147, 217 Ala. 302.
Ohio.—Witham v. Kroger Grocery & Baking Co., 1 N.E.2d 949, 51 Ohio App. 499.

73. Ark.—Jonesboro Coca-Cola Bottling Co. v. Young, 132 S.W.2d 382, 198 Ark. 1032.
Ga.—Moree v. Shiver, 12 S.E.2d 118, 63 Ga.App. 761—Albany Coca-Cola Bottling Co. v. Shiver, 12 S.E.2d 114, 63 Ga.App. 755—Hathcox v. Atlanta Coca-Cola Bottling Co., 178 S.E. 404, 50 Ga.App. 410—Slaughter v. Atlanta Coca-Cola Bottling Co., 172 S.E. 723, 48 Ga.App. 327.
Ky.—Great Atlantic & Pacific Tea Co. v. Eiseman, 81 S.W.2d 900, 259 Ky. 103.
Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.
Tex.—Texas Coca-Cola Bottling Co. v. Lovejoy, Civ.App., 138 S.W.2d 254, error refused—Texas Coca-Cola Bottling Co. v. Wimberley, Civ.App., 108 S.W.2d 860, error dismissed.
Wis.—Prinsen v. Russos, 215 N.W. 905, 194 Wis. 142.

74. U.S.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135.

75. Ala.—Coca-Coca Bottling Co. v. Crook, 132 So. 898, 222 Ala. 369—Travis v. Louisville & N. R. Co., 62 So. 851, 183 Ala. 415.
Ga.—Hathcox v. Atlanta Coca-Cola Bottling Co., 178 S.E. 404, 50 Ga. App. 410—Slaughter v. Atlanta Coca-Cola Bottling Co., 172 S.E. 723, 48 Ga.App. 327.
N.J.—McAteer v. Sheffield Farms Co., 152 A. 469, 9 N.J.Misc. 33.

76. **Instructions held proper or not erroneous**
(1) In general.
U.S.—Bissonette v. National Biscuit Co., C.C.A.Vt., 100 F.2d 1003.
Ariz.—Eisenbeiss v. Payne, 25 P.2d 162, 42 Ariz. 262.
Ga.—Moore v. Macon Coca-Cola Bottling Co., 179 S.E. 916, 51 Ga.App. 148, conforming to answers 178 S.E. 711, 180 Ga. 335—Slaughter v. Atlanta Coca-Cola Bottling Co., 172 S.E. 723, 48 Ga.App. 327.
N.J.—McAteer v. Sheffield Farms Co., 152 A. 469, 9 N.J.Misc. 33.
S.C.—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359.
(2) Charge that lack of care by defendant need not be proved where evidence made out case of negligence per se.—Hunter v. Derby Foods, C. C.A.N.Y., 110 F.2d 970, 133 A.L.R. 255.
Instructions held improper or properly refused
(1) In general.—Whistle Bottling Co. v. Searson, 92 So. 657, 207 Ala. 387—Alabama Coca-Cola Bottling Co. v. Causey, 180 So. 588, 28 Ala.App. 115, certiorari denied 180 So. 590, 235 Ala. 570.
(2) Charge that ordinary care would relieve defendant of liability where evidence made out case of negligence per se.—Donaldson v. Great Atlantic & Pacific Tea Co., 200 S.E. 498, 59 Ga.App. 79, conforming to answers to certified questions 199 S.E. 213, 186 Ga. 870, 128 A.L.R. 456.

77. U.S.—F. W. Woolworth Co. v. Wilson, C.C.A.Tex., 74 F.2d 439, 98 A.L.R. 681.
S.C.—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S. C. 359.
Violation of pure food law
Where the complaint alleges, as the only basis for recovery, the negligence of defendant in selling diseased meat unfit for human food, it is error to submit, as the law governing defendant's liability, sections of a pure food act, prohibiting anyone selling adulterated food, defined to include meat unfit for food.—Flessher v. Carstens Packing Co., 142 P. 694, 81 Wash. 241.

78. **Instructions held not improper or erroneous**
(1) In general.
Ala.—Whistle Bottling Co. v. Searson, 92 So. 657, 207 Ala. 387.
Ark.—Coca Cola Bottling Co. of Southeast Arkansas v. Spurlin, 132 S.W.2d 828, 199 Ark. 126.
Ill.—Zorger v. Hillman's, 4 N.E.2d 900, 287 Ill.App. 357.
Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.
(2) On doctrine of res ipsa loquitur.—Gainesville Coca-Cola Bottling Co. v. Stewart, 179 S.E. 734, 51 Ga. App. 102.
(3) As applying doctrine of res ipsa loquitur.
Mass.—Tonsman v. Greenglass, 142 N.E. 756, 248 Mass. 275.
R.I.—Minutilla v. Providence Ice Cream Co., 144 A. 884, 50 R.I. 43, 63 A.L.R. 334.
Instructions held improper or properly refused
(1) In general.—Great Atlantic & Pacific Tea Co. v. Crabtree, 161 So. 508, 230 Ala. 443—Coca-Cola Bottling Co. v. Crook, 132 So. 898, 222 Ala. 369.
(2) As placing on defendant burden of proving freedom from negligence.—Schlosser v. Goldberg, 9 A. 2d 699, 123 N.J.Law 470.

79. **Instructions held proper**
(1) In general.—Chevy Chase Dairy v. Mullineaux, 71 F.2d 982, 63 App.D.C. 259, followed in 71 F.2d 984, 63 App.D.C. 261 and 71 F.2d 985. 63 App.D.C. 262.
(2) On question of what circumstances, if found to exist, would make out prima facie case of negligence.—Coca-Cola Bottling Co. of Southeast Arkansas v. Spurlin, 132 S.W.2d 828, 199 Ark. 126.
Instructions held improper
(1) As declaring as matter of law sufficiency of evidence to overcome prima facie presumption.—Coca-Cola Bottling Co. of Southeast Arkansas v. Bell, 109 S.W.2d 115, 194 Ark. 671.
(2) As informing jury what evidence would justify inference of negligence.—Moore v. Macon Coca-Cola Bottling Co., 178 S.E. 711, 180 Ga. 335, answers conformed to 179 S.E. 916, 51 Ga.App. 148.
(3) As suggesting that plaintiff's accident alone constituted evidence

of proof to make out a case or defense, or to make a prima facie case or justify an inference, proximate cause,[80] negligence per se,[81] and contributory negligence.[82]

Under the rule announced by some authorities that the liability of a manufacturer for placing on the market food unfit for consumption may be based on negligence or on breach of warranty, see supra § 59, and that plaintiff may rely on either or both in bringing action, see supra § 66, it has been held proper to submit the case to the jury on both theories.[83]

d. Verdict

General rules governing verdicts apply in food cases.

The general rules relating to verdicts in civil actions apply to verdicts in food cases.[84]

§ 71. Damages

Damages may be recovered for loss of earnings during illness, pain and suffering, permanent injuries, and death. Punitive damages are not allowable unless defendant's conduct was malicious, reckless, or wanton.

There being no standard fixed by law for measuring the value of human health and happiness, in such cases wide latitude must be allowed for exercise of the jury's judgment, and, unless the amount is so grossly out of all proportion to the injury received as to shock the conscience, the court cannot substitute its judgment for that of the jury.[85] Damages may be recovered not only for suffering endured for a considerable time, and for permanent injuries,[86] but also, in an action based on negligence, for the death of the consumer.[87] Such earnings as the jury find plaintiff would have made and was not able to make because of his sickness may be recovered.[88]

Punitive damages should not be allowed unless defendant's conduct is shown to have been malicious, reckless, or wanton.[89]

FOOL. See the C.J.S. title Insane Persons § 2, also 32 C.J. p 622 notes 74–81.

FOOLISHLY DRUNK. See Drunk 28 C.J.S. p 539 note 27.

FOOT. The terminal part of the leg of a man or animal; that part of an animal upon which it rests when standing, or upon which it moves; in man, the pes, or part of the leg below the ankle joint or tibiotarsal articulation;[1] that portion of the leg below the ankle joint; a part of the support of the human body, and, when used in connection with the rest of the leg as a means of locomotion, essentially

of actionable negligence.—Coca-Cola Bottling Co. of Henderson v. Munn, C.C.A.N.C., 99 F.2d 190.

80. Instructions held proper or not erroneous

Ark.—Jonesboro Coca-Cola Bottling Co. v. Young, 132 S.W.2d 382, 198 Ark. 1032.

S.C.—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359.

Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.

Instructions held erroneous or properly refused

Instruction that, if illness of customer suing café for serving unfit food "could" have resulted from other causes than fish poisoning, jury should find for café.—C. C. Hooper Cafe Co. v. Henderson, 137 So. 419, 223 Ala. 579.

81. U.S.—Troietto v. G. H. Hammond Co., C.C.A.Ohio, 110 F.2d 135.

Ohio.—Rubbo v. Hughes Provision Co., 36 N.E.2d 144, 67 Ohio App. 123, affirmed 34 N.E.2d 202, 138 Ohio St. 178.

S.C.—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S.C. 170—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359—Culbertson v. Coca-Cola Bottling Co., 154 S.E. 424, 157 S.C. 352.

82. Ga.—Moree v. Shiver, 12 S.E.2d 118, 63 Ga.App. 761—Albany Coca Cola Bottling Co. v. Shiver, 12 S.E.2d 114, 63 Ga.App. 755—Hathcox v. Atlanta Coca-Cola Bottling Co., 178 S.E. 404, 50 Ga.App. 410.

Ky.—Great Atlantic & Pacific Tea Co. v. Eiseman, 81 S.W.2d 900, 259 Ky. 103.

S.C.—Burnette v. Augusta Coca-Cola Bottling Co., 154 S.E. 645, 157 S.C. 359.

Tenn.—Hall Grocery Co. v. Wall, 13 Tenn.App. 203.

Tex.—Texas Coca Cola Bottling Co. v. Lovejoy, Civ.App., 112 S.W.2d 203, error dismissed.

Va.—Middlesboro Coca-Cola Bottling Works v. Campbell, 20 S.E.2d 479, 179 Va. 693.

83. Iowa.—Anderson v. Tyler, 274 N.W. 48, 223 Iowa 1033.

84. Consistency

In action against manufacturer of pancake flour and retailer by wife for pain and suffering caused by pancakes made from the flour and by husband for loss of services and medical expenses, where court instructed jury that if wife asked for the particular brand the jury might exculpate the retailer, a verdict in favor of the retailer was not inconsistent with finding of negligence of manufacturer.—Moreno v. France Milling Co., 26 N.Y.S.2d 400, 261 App. Div. 991.

85. Mont.—Kelley v. John R. Daily Co., 181 P. 326, 56 Mont. 63.

Damages allowed or held not excessive

One hundred and fifty dollars for breaking of artificial tooth.—Grossman v. Hotel Astor, 1 N.Y.S.2d 307, 166 Misc. 80.

86. N.Y.—Rosenbusch v. Ambrosia Milk Corp., 168 N.Y.S. 505, 181 App. Div. 97.

Pa.—Stamp v. Abbott, 21 Pa.Dist. 629.

87. Conn.—Burkhardt v. Armour & Co., 161 A. 385, 115 Conn. 249, 90 A.L.R. 1260.

88. Pa.—Stamp v. Abbott, 21 Pa. Dist. 629.

89. N.C.—Perry v. Kelford Coca-Cola Bottling Co., 146 S.E. 805, 196 N.C. 690.

1. Mich.—Reno v. Holmes, 214 N.W. 174, 175, 238 Mich. 572.

a part of the leg;[2] the human foot has been held to embrace the arch.[3] In a broader sense, the base, bottom, or foundation of anything; the end or termination.[4]

As a measure of length see the C.J.S. title Weights and Measures § 1, also 26 C.J. p 790 note 3.

Phrases employing the word are set out in the note.[5] Other phrases as to which more recent adjudications have not been found are listed in 26 C.J. p 790 notes 5–10.

FOOTBALL. A well-known game, described as a spirited contest or struggle between two sets of players to drive a large ball, usually covered with leather, to one end or other of the field on which the game is played.[6]

FOOTBOARD. Boards placed lengthwise of railroad freight cars, and above their loads, in such manner as to afford a convenient way for the use of brakemen in passing from one part of the train to another;[7] also a running board six or eight inches wide projecting along the outside of open or summer street cars.[8] The term is used interchangeably with "running board."[9]

Liability for injuries to passengers riding on footboard see Carriers § 752 note 98; and power to regulate operating equipment of railroad rolling stock generally see the C.J.S. title Railroads §§ 424-427, also 51 C.J. p 1023 note 45–p 1040 note 73. For references to other specific uses see 26 C.J. p 790 note 13.

FOOTGELD. In the forest law, an amercement for not cutting out the ball or cutting off the claws of a dog's feet.[10]

FOOTING. Established place; firm position; relative condition.[11]

In another sense, an enlargement at the lower end of a wall, pier, or column, to distribute the

2. Ky.—Mills v. Mills & Connelly, 283 S.W. 1010, 1011, 214 Ky. 675.

3. U.S.—Trustees for Arch Preserver Shoe Patents v. James McCreery & Co., Cust. & Pat.App., 49 F. 2d 1068, 1071.

4. Black L.D.

5. **"Foot-acre method"**

(1) Defined as a method of determining market value of coal lands for assessment, a "foot-acre" being one acre of coal one foot thick.—In re Hudson Coal Co., 193 A. 8, 10, 327 Pa. 247.

(2) Held not to include exhausted areas, barrier pillars, or coal areas entirely unminable because of physical conditions, or areas of unproved minability, unless development and exploration discloses such areas to contain minable coal.—In re Hudson Coal Co., supra.

See also the C.J.S. title Taxation § 404.

"Foot passenger"

(1) Defined as one who passes or travels on foot, as over a toll bridge.—Regina v. Yates, 6 Can.Cr.Cas. 282, 292.

(2) May include those arriving by rail from points outside and entering a ferry from a railroad station, as well as those entering without having been passengers on the railroads.—New York Central & H. R. R. Co. v. Hudson County, 65 A. 860, 861, 74 N.J.Law 367.

"Foot drop"

(1) Described generally as an inability to control the lifting and sidewise movement of the foot.—Engelking v. Carlson, 88 P.2d 695, 696, 13 Cal.2d 216.

(2) More specifically, it consists of a loss of ability to turn the foot inward, a loss of ability to extend the toes and to raise them, and a loss of sensation in the lower frontal portions of the leg below the knee, and the greater portion of the top of the foot.—Engelking v. Carlson, Cal.App., 80 P.2d 96, 97.

Other phrases construed

(1) "Foot front rule," "foot frontage rule," or "front-foot rule," as a method of apportioning assessment of benefits for public improvements see the C.J.S. title Municipal Corporations § 1428, also 44 C.J. p 661 note 82–p 662 note 85.

(2) "Foot lock," defined as a support for a scaffold, consisting of a short joist, one end of which is inserted into the wall along which the scaffold is to be used, and an upright post placed under the other end of the joist to sustain it in a horizontal position, and employed where a trestle, by reason of its projecting legs, cannot be brought sufficiently near the end of the scaffold to prevent the ends from tipping.—U. S. Smelting Co. v. Parry, Utah, 166 F. 407, 409, 72 C.C.A. 159.

(3) "Foot of the fine," defined as the fifth part of the conclusion of a fine; it includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied.—Black L.D.

(4) "Foot pound," defined as a unit of energy, or work, equal to the work required to raise one pound avoirdupois against the force of gravity to the height of one foot.—Black L.D.

(5) "Foot race," as meaning a race run by a person on foot; it may refer to one person running alone against time.—Lynall v. Longbothom, 2 Wils.C.P. 36, 38, 95 Reprint 671.

(6) "Impact velocity of 3200 foot pounds," as meaning having a force sufficient to raise thirty two hundred pounds one foot.—Healey v. Moran Towing and Transportation Co., C.C.A.N.Y., 253 F. 334, 337.

6. Can.—Regina v. Carter, 31 Can.L. J. 664, 665.

Phrase construed

"Football season," as beginning with the first frost, and ending "very appropriately with the day of general thanksgiving."—Sieberts v. Spangler, 118 N.W. 292, 293, 140 Iowa 236.

7. Iowa.—Hosic v. Chicago, R. I. & P. R. Co., 37 N.W. 963, 964, 75 Iowa 683, 9 Am.S.R. 518.

8. Or.—Anderson v. City & Suburban Ry. Co., 71 P. 659, 42 Or. 505.

9. Iowa.—Hosic v. Chicago, R. I. & P. R. Co., 37 N.W. 963, 964, 75 Iowa 683, 9 Am.S.R. 518.

10. Black L.D.

11. Neb.—State v. Boyd, 48 N.W. 739, 749, 51 N.W. 602, 31 Neb. 682.

Phrases construed

(1) "On an equal footing with the original states."—State v. Boyd, supra.

(2) "On the footing of," as meaning on the same principle as.—Wilding v. Sanderson, 1897, 2 Ch. 534, 548.

(3) "Upon the footing of a bill of exchange."—Tandy v. Wolfe, 110 S. W.2d 277, 278, 270 Ky. 556.

load, and, with the foundation, generally understood as constituting a part of the structure.[12]

FOOTMAN. A pedestrian or person walking on the sidewalk, as contrasted with a person riding a bicycle on the sidewalk.[13]

FOOTPATH. A highway for foot passengers only;[14] a path for persons on foot.[15] The term has been distinguished from "causeway."[16]

FOOTPRINTS. Impressions made upon earth, snow, or other surface by the feet of persons, or by the shoes, boots, or other covering of the feet.[17] As means of identification see Criminal Law § 616 b (3).

FOOTWALK. A sidewalk.[18]

FOOTWAY. A path or passage for pedestrians; footpath;[19] a term used merely to distinguish an ordinary passageway from a horse- or carriage-way.[20]

As included by terms, "public way" or "highway" see the C.J.S. title Highways § 1, also 29 C.J. p 365 note 23.

FOR. Most commonly appearing as a preposition, the term has been used in numberless relations and with many meanings.[21] It has been frequently used as denoting agency,[22] and as meaning as agent of, in behalf of, or in place of;[23] by;[24] and representing.[25] With somewhat different shades of meaning it has also been defined as in favor of;[26] in lieu of, or instead of;[27] on;[28] on charge of;[29] to be applied to;[30] in a sum not exceeding; to the amount of;[31] to the extent, number, quantity, or amount of;[32] with regard to;[33] with respect to;[34] and also before or in front of.[35]

When used to express or refer to cause or purpose, the term connotes the end with reference to which anything is, acts, serves, or is done;[36] and construed in its most general sense, as indicating that in consideration of which, in view of which, or with reference to which, anything is done or takes place, or as indicating the end to which anything acts, serves, or is done;[37] is often employed in a sense denoting suitability,[38] and has been specifically defined as meaning appropriate or adapted to;

12. Iowa.—Keith Furnace Co. v. Minear, 293 N.W. 36, 38, 228 Iowa 989.

"Footing stone"

(1) Defined as any stone for the footing of a wall.—Webster New Int. D.

(2) May be synonymous with "dimension stone," see 26 C.J.S. p 1313 note 10.

(3) Compared with, and distinguished from, "rubblestone."—Nugent v. Armour Packing Co., Mo. App., 81 S.W. 506, 507.

"Footing or heavy dimension stone" see 26 C.J.S. p 1313 note 12.

13. Ind.—Mercer v. Corbin, 20 N.E. 132, 134, 117 Ind. 450, 10 Am.S.R. 76, 3 L.R.A. 221.

14. Eng.—Regina v. Pratt, L.R. 3 Q.B. 64, 65.

15. Can.—Regina v. Yates, 6 Can.Cr. Cas. 282, 292.

16. Eng.—Regina v. Pratt, L.R. 3 Q. B. 64, 66.

17. Black L.D.

18. Can.—Regina v. Yates, 6 Can. Cr.Cas. 282, 292.

19. Can.—Regina v. Yates, supra.

Meaning depends on context

When used in a statute, the context must govern its meaning.—Regina v. Pratt, L.R. 3 Q.B. 64, 65—Scales v. Pickering, 4 Bing. 448, 453, 13 E.C.L. 582, 130 Reprint 840.

As part of road

"Footways are part of the road, i. e. . . . the part of the road most convenient for foot-passengers is as much part of the road as the other part which can be used by horses and carriages."

Eng.—Curtis v. Kesteven County Council, 45 Ch.D. 504, 509.

Can.—Regina v. Yates, 6 Can.Cr.Cas. 282, 292.

"Public footway," defined as a footway for the use of the public; one of the kinds of public ways.—Tyler v. Sturdy, 108 Mass. 196, 197.

20. Mass.—Gerrish v. Shattuck, 132 Mass. 235, 238.

21. U.S.—Mudge v. Black, Sheridan & Wilson Co., Mo., 224 F. 919, 921, 140 C.C.A. 397.

Cal.—Marlenee v. Brown, App., 128 P.2d 137, 143, citing **Corpus Juris.**

D.C.—Work v. U. S. ex rel. Rives, 295 F. 225, 227, 54 App.D.C. 84.

22. U.S.—The Iristo, D.C.N.Y., 43 F.Supp. 29, 33, citing **Corpus Juris.**

Cal.—Marlenee v. Brown, App., 128 P.2d 137, 143, quoting **Corpus Juris.**

23. Cal.—Marlenee v. Brown, supra, quoting **Corpus Juris.**

N.M.—Medler v. Henry, 97 P.2d 661, 662, 44 N.M. 63.

26 C.J. p 791 note 38.

Form of signature by agent "for" principal see Agency § 127 d (3) (b).

24. Ohio.—Meriden Silver Plate Co. v. Flory, 7 N.E. 753, 755, 44 Ohio St. 430.

25. N.M.—Medler v. Henry, 97 P.2d 661, 662, 44 N.M. 63.

26. Century D.

27. U.S.—Mudge v. Black, Sheridan & Wilson Co., Mo., 224 F. 919, 921, 140 C.C.A. 397.

N.M.—Medler v. Henry, 97 P.2d 661, 662, 44 N.M. 63.

26 C.J. p 791 note 45.

28. Eng.—Doe v. Smith, 1 B. & B. 97, 113, 5 E.C.L. 525, 129 Reprint 660.

29. Me.—Stacy v. Portland Pub. Co., 68 Me. 279, 286.

30. Okl.—McGannon v. State, 124 P. 1063, 1067, 33 Okl. 145, Ann.Cas. 1914B 620.

31. Pa.—Farmers' Mut. F. Ins. Co. v. Moyer, 97 Pa. 441, 448, 449.

32. Century D.

33. Nev.—State v. Consolidated Virginia Min. Co., 16 Nev. 432, 445—Gibson v. Mason, 5 Nev. 283, 304.

34. Mo.—Elmore-Schultz Grain Co. v. Stonebraker, 214 S.W. 216, 221, 202 Mo.App. 81.

26 C.J. p 791 note 56.

35. Wis.—Ready v. Sommer, 37 Wis. 265, 268.

36. Me.—Bates v. Schillinger, 145 A. 395, 399, 128 Me. 14.

Similarly expressed

"Indicating the cause, motive or occasion of an act, state or condition."—American Ins. Co. v. Naylor, 87 P.2d 260, 265, 103 Colo. 461.

37. U.S.—Fleming v. Atlantic Co., D. C.Ga., 40 F.Supp. 654, 660.

38. N.H.—Sullivan v. Anglo-Ameri-

suitable to the purpose, requirement, character or state of; with reference to the needs, purposes, or uses of;[39] as a preparation toward or in view of; having as goal or object; to serve as part of; to supply the need of; in order to effect;[40] as the effect of;[41] because of; by reason of; on account of;[42] designed to be or serve as;[43] for the benefit of; for the use of;[44] for the sake of;[45] growing out of;[46] in connection with;[47] in consequence of;[48] in consideration of;[49] in the direction of; toward; with a view of reaching.[50] It has been held, however, that the word per se does not disclose a testamentary intention.[51]

When applied to time the term signifies duration[52] and has been defined as meaning during;[53] during the continuance of;[54] through;[55] throughout;[56] throughout the period specified;[57] and has also been defined with approval to mean the space of all time through which an action or state extends.[58]

Again this word is sometimes employed as importing a condition precedent,[59] or as a word of limitation.[60]

The word is sometimes used as a conjunction meaning "because."[61]

The term has been held equivalent to, or synonymous with, "because of" see 10 C.J.S. p 222 in Pocket Parts, "during" see 28 C.J.S. p 593 note 7, "in,"[62] "in behalf of" and "on his behalf,"[63] "in respect of,"[64] "of,"[65] "on,"[66] "on account of,"[67] and "pro."[68] It has been compared with, or distinguished from, "affecting,"[69] "before" see 10 C.J.S. p 231 note 62, "descriptive of,"[70] "during" see 28 C.J.S. p 593 note

can Inv. Trust Co., 193 A. 225, 227, 89 N.H. 112.

39. Ohio.—Robert V. Clapp Co. v. Fox, 178 N.E. 586, 588, 124 Ohio St. 331.

Similarly expressed

(1) With a view to the use, benefit, comfort, convenience, etc., of.—Century D.—26 C.J. p 791 note 53.

(2) For the purpose of.
Eng.—Atty.-Gen. v. Sillem, 10 Jur.,N. S., 393, 396.

40. U.S.—Chapman v. Home Ice Co., D.C.Tenn., 43 F.Supp. 424, 428—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, 660.

41. Colo.—American Ins. Co. v. Naylor, 87 P.2d 260, 265, 103 Colo. 461.

42. Cal.—Kelly v. State Personnel Board of California, 88 P.2d 264, 266, 31 Cal.App.2d 443.
Colo.—American Ins. Co. v. Naylor, 87 P.2d 260, 265, 103 Colo. 461.
N.H.—Lumbermens Mut. Casualty Co. v. Yeroyan, 5 A.2d 726, 727, 90 N. H. 145.
26 C.J. p 791 note 48.

Similarly expressed

"On account of; because or by means of."—Cormier v. Hudson, 187 N.E. 625, 626, 284 Mass. 231—Balian v. Ogassian, 179 N.E. 232, 235, 277 Mass. 525, 78 A.L.R. 1021.

43. Century D.

44. D.C.—Work v. U. S. ex rel. Rives, 295 F. 225, 227, 54 App.D.C. 84.
26 C.J. p 791 note 53.

45. Colo.—American Ins. Co. v. Naylor, 87 P.2d 260, 265, 103 Colo. 461.

46. Mass.—Cormier v. Hudson, 187 N.E. 625, 626, 284 Mass. 231—Balian v. Ogassian, 179 N.E. 232, 235, 277 Mass. 525, 78 A.L.R. 1021—Mulvey v. Boston, 83 N.E. 402, 403, 197 Mass. 178, 14 Ann.Cas. 349.

47. N.M.—Medler v. Henry, 97 P.2d 661, 662, 44 N.M. 63.

48. Cal.—Kelly v. State Personnel Board of California, 88 P.2d 264, 266, 31 Cal.App.2d 443.
Colo.—American Ins. Co. v. Naylor, 87 P.2d 260, 265, 103 Colo. 461.

49. D.C.—Work v. U. S. ex rel. Rives, 295 F. 225, 227, 54 App.D.C. 84.
26 C.J. p 791 note 43.

50. Ohio.—Robert V. Clapp Co. v. Fox, 178 N.E. 586, 588, 124 Ohio St. 331.

51. "The naked word 'for,' never could amount to a testament."—Plumstead's Appeal, 4 Serg. & R., Pa., 545, 547.

52. Fla.—Burdine v. Sewell, 109 So. 648, 653, 92 Fla. 375.
Tenn.—Progressive Building & Loan Ass'n v. McIntyre, 89 S.W.2d 336, 337, 169 Tenn. 491.
Tex.—Cunningham v. State, 44 S.W. 2d 739, 119 Tex.Cr. 572.
26 C.J. p 791 note 57.

53. Ill.—Haas v. Lincoln Park Com'rs, 171 N.E. 526, 530, 339 Ill. 491.
Tex.—Cunningham v. State, 44 S.W. 2d 739, 119 Tex.Cr. 572.
26 C.J. p 791 note 58.

54. Ky.—Jenkins v. City of Bowling Green, 64 S.W.2d 457, 458, 251 Ky. 119.
Mont.—Garry v. Martin, 227 P. 573, 576, 70 Mont. 587.
Ohio.—State v. Kuhner, 140 N.E. 344, 346, 107 Ohio St. 406.
26 C.J. p 791 note 61.

55. Or.—Watson v. Salem, 164 P. 567, 568, 1184, 84 Or. 666.
Pa.—Keppelman v. Reading, 14 Pa. Dist. 61, 62.

56. Ky.—Jenkins v. City of Bowling Green, 64 S.W.2d 457, 458, 251 Ky. 119.
Mont.—Garry v. Martin, 227 P. 573, 576, 70 Mont. 587.
Ohio.—State v. Kuhner, 140 N.E. 344, 346, 107 Ohio St. 406.
26 C.J. p 791 note 60.

57. Ill.—Haas v. Lincoln Park Com'rs, 171 N.E. 526, 530, 339 Ill. 491.

58. Mo.—State v. Tucker, 32 Mo.App. 620, 621.

59. Eng.—Cowper v. Andrews, Hob. 39, 80 Reprint 189.
26 C.J. p 791 note 64.

60. Neb.—Pratt v. Miller, 37 N.W. 263, 265, 23 Neb. 496, 498.
26 C.J. p 792 note 65 [a].

61. Century D.

62. U.S.—Grainger & Co. v. Johnson, C.C.A.Ky., 286 F. 833, 834, 33 A.L.R. 315.

63. S.D.—State v. Jameson, 215 N. W. 697, 698, 51 S.D. 540.

64. Mass.—Codman v. American Piano Co., 118 N.E. 344, 346, 229 Mass. 285.

65. Md.—Slymer v. State, 62 Md. 237, 242.
Mich.—Snell v. Scott, 2 Mich.N.P. 108, 110.

66. Mass.—Codman v. American Piano Co., 118 N.E. 344, 346, 229 Mass. 285.

67. R.I.—Desjourdy v. Mesrobian, 158 A. 719, 52 R.I. 146.

68. Eng.—Cowper v. Andrews, Hob. 39, 80 Reprint 189.
26 C.J. p 791 note 44 [a].

69. U.S.—Chapman v. Home Ice Co., D.C.Tenn., 43 F.Supp. 424, 428.

70. B.C.—In re Moody, 14 B.C. 206.

10, "in,"[71] "of,"[72] "on account of,"[73] "throughout,"[74] and "upon."[75]

Phrases employing the word are set out in the note.[76] For still other phrases as to which more

71. **Held not equivalent**
Colo.—Bowen v. West, 50 P. 1085, 1086, 10 Colo.App. 322.

Distinction sometimes difficult to draw
Ala.—Maguire v. Board of Revenue and Road Commissioners of Mobile County, 71 Ala. 401, 422.

72. Mich.—Snell v. Scott, 2 Mich. N.P. 108, 110.

Variation sometimes substantial
"The variation between the word 'for' and the word 'of' seems at first slight, but in the connection with which they are used in signatures of this kind the difference is substantial."
Mass.—Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, 105.
N.D.—Donovan v. Welch, 90 N.W. 262, 264, 11 N.D. 113.

73. Mass.—Cormier v. Hudson, 187 N.E. 625, 626, 284 Mass. 231.

74. **"Throughout" contrasted**
Ky.—Scott v. A. Arnold & Sons Transfer & Storage Co., 116 S.W.2d 296, 297, 273 Ky. 163.

75. Ohio.—Robert V. Clapp Co. v. Fox, 178 N.E. 586, 588, 124 Ohio St. 331.

76. **"For a year"**
(1) As meaning through, throughout, or during the continuance of a year.—Keppelman v. Reading, 14 Pa. Dist. 61, 62.

(2) As equivalent to "for the year."—Commonwealth v. Morris, 56 N.E. 896, 897, 176 Mass. 19.

(3) As equivalent to "by the year" see 12 C.J.S. p 872 note 52.

Other phrases construed
(1) "For account of."—Equitable Trust Co. of New York v. Rochling, N.Y., 48 S.Ct. 58, 59, 275 U.S. 248, 72 L.Ed. 264—26 C.J. p 792 note 75.

(2) "For a cottage or tent for a private residence."—Chautauqua Assembly v. Alling, 46 Hun, N.Y., 582, 585.

(3) "For all purposes."
N.J.—Northeastern Telephone & Telegraph Co. v. Hepburn, 69 A. 249, 250, 73 N.J.Eq. 657.
Pa.—In re Kates' Estate, 128 A. 97, 99, 282 Pa. 417.

(4) "For all school purposes."—Gillham School District No. 47 of Sevier and Polk Counties v. Millard, 160 S.W.2d 215, 216, 203 Ark. 1121.

(5) "For a longer period."—Meuse's Case, 169 N.E. 517, 270 Mass. 29.

(6) "For and during her natural life."—In re Kuhn's Estate, 279 N.W. 893, 895, 284 Mich. 450.

(7) "For and during such time," as equivalent to "temporarily."—Burdine v. Sewell, 109 So. 648, 653, 92 Fla. 375.

(8) "For and on account of."—Dyer v. Broadway Central Bank, 225 N.Y.S. 525, 527, 130 Misc. 842.

(9) "For a period not less than thirty days."—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A.Ky., 52 F.2d 939, 941.

(10) "For at least [stated period]."
Cal.—Hanson v. Goldsmith, 150 P. 364, 365, 170 Cal. 512.
Ky.—Scott v. A. Arnold & Sons Transfer & Storage Co., 116 S.W. 2d 296, 297, 273 Ky. 163—Jenkins v. City of Bowling Green, 64 S.W. 2d 457, 458, 251 Ky. 119.

(11) "For bodily injuries."
Mass.—Cormier v. Hudson, 187 N.E. 625, 626, 284 Mass. 231.
N.H.—Lumbermens Mut. Casualty Co. v. Yeroyan, 5 A.2d 726, 727, 90 N.H. 145.

(12) "For carrying out of the foregoing bequests."—In re Kelleher's Estate, 272 P. 1060, 1061, 205 Cal. 757.

(13) "For cause."
U.S.—In re American S. S. Nav. Co., D.C.Pa., 14 F.Supp. 106, 108.
Mo.—State ex rel. Eckles v. Kansas City, App., 257 S.W. 197, 200.
Mont.—State ex rel. Matson v. O'Hern, 65 P.2d 619, 623, 104 Mont. 126—State ex rel. Holt v. District Court of First Judicial Dist., in and for Lewis and Clark County, 63 P.2d 1026, 1028, 103 Mont. 438—State ex rel. Nagle v. Sullivan, 40 P.2d 995, 998, 98 Mont. 425, 99 A.L.R. 321.
Or.—Winslow v. Minto, 102 P.2d 919, 923, 164 Or. 495.
R.I.—Narragansett Racing Ass'n v. Kiernan, 194 A. 49, 51, 59 R.I. 79.
26 C.J. p 792 note 94.
See also 14 C.J.S. p 48 note 53, p. 49 notes 55–59.

(14) "For coming year."—Boswell v. Consolidated School Dist. No. 8 of Newton County, Mo.App., 10 S.W. 2d 665, 667.

(15) "For consideration paid."—Flynn v. Kenrick, 189 N.E. 207, 209, 285 Mass. 446.

(16) "For costs and disbursements," as meaning the statutory costs and disbursements taxable in favor of the prevailing party in a civil action.—Brown v. Fitcher, 97 N. W. 416, 417, 91 Minn. 41. See also Costs § 1 b notes 21–26.

(17) "For diversion."—B. C. Baer & Son v. Hooks, 149 S.E. 719, 720, 40 Ga.App. 425.

(18) "For drunkenness," as indicating that article so labeled was intended as a cure, mitigation, treatment or prevention of drunkenness.—United States v. 11¼ Dozen Packages of Article Labeled in part Mrs. Moffat's Shoo Fly Powders for Drunkenness, D.C.N.Y., 40 F.Supp. 208, 210.

(19) "For each full time special teacher of a special class."—Marcovitz v. School Dist. of Philadelphia, 5 A.2d 540, 541, 334 Pa. 206.

(20) "For four consecutive weeks."—Progressive Building & Loan Ass'n v. McIntyre, 89 S.W.2d 336, 337, 169 Tenn. 491—26 C.J. p 792 note 3.

(21) "For further action," construed to mean "for further hearing."—State ex rel. Anderson Motor Service Co. v. Public Service Commission, Mo., 154 S.W.2d 777, 778.

(22) "For her own personal comfort," as meaning for her personal support.—Bishop v. Groten Sav. Bank, 114 A. 88, 89, 96 Conn. 325.

(23) "For him, or under his control or direction."—Kirchner v. N. & W. Overall Co., D.C.S.C., 16 F.Supp. 915, 917.

(24) "For hire."
Colo.—People v. Montgomery, 19 P. 2d 205, 207, 92 Colo. 201—Armstrong v. Johnson Storage & Moving Co., 268 P. 978, 979, 84 Colo. 142—Armstrong v. Denver Saunders System Co., 268 P. 976, 977, 84 Colo. 138.
Fla.—Travis v. Fry, 190 So. 793, 795, 139 Fla. 522.
Md.—Weller v. Kolb's Bakery & Dairy, 4 A.2d 130, 132, 176 Md. 191.
Wash.—State v. Ferry Line Auto Bus Co., 168 P. 893, 894, 99 Wash. 64.

(25) "For hire car."—State v. Hertz Driv-Ur-Self Stations, 271 P. 331, 332, 149 Wash. 479.

(26) "For hire carriers."—State ex rel. Scott v. Superior Court for Thurston County, 24 P.2d 87, 88, 173 Wash. 547.

(27) "For his support."—Ortman v. Streeter, R.I., 23 A.2d 189, 191.

(28) "For his use and benefit," as broader in scope than "for support and maintenance."—Merchants' Nat. Bank & Trust Co. v. Port Gibson Oil Works, 141 So. 283, 286, 165 Miss. 314.

(29) "For his use and the use of his children."—In re Rudd's Will, 300 N.Y.S. 1257, 1261, 164 Misc. 833, 165 Misc. 238.

(30) "For injuries."—Balian v. Ogassian, 179 N.E. 232, 235, 277 Mass. 525, 78 A.L.R. 1021.

(31) "For life," as used in pension fund rule, held to assume the continuance of pension fund in manner expressly provided by rules.—Cowles v. Morris & Co., 242 Ill.App. 548, 557.

recent adjudications have not been found see 26 C.J. | p 792 note 72–p 794 note 81.

(32) "For loss of services."—Desjourdy v. Mesrobian, 158 A. 719, 52 R. I. 146.

(33) "For market, as used to distinguish between the slaughtering of hogs by or for an owner for home consumption and the slaughtering of hogs where the resultant product is sold.—Fuhrman & Forster Co. v. Commissioner of Internal Revenue, C. C.A., 114 F.2d 863, 866.

(34) "For masters and owners," as denoting agency.—The Iristo, D.C.N. Y., 43 F.Supp. 29, 33.

(35) "For materials or labor furnished."
Ala.—Union Indemnity Co. v. State, 118 So. 148, 153, 218 Ala. 132.
Mass.—Loonie v. Wilson, 124 N.E. 272, 275, 233 Mass. 420.

(36) "For more than [stated time]."
Ala.—Wise v. State, 144 So. 838, 25 Ala.App. 276.
D.C.—Johnson v. Capital City Ben. Soc., 57 F.2d 603, 61 App.D.C. 83.

(37) "For or upon property."—Work v. U. S. ex rel. Rives, 295 F. 225, 227, 54 App.D.C. 84.

(38) "For our own use."—Metro-Goldwyn-Mayer Corporation v. Fear, C.C.A.Cal., 104 F.2d 892, 898.

(39) "For profit."
U.S.—John Church Co. v. Hilliard Hotel Co., N.Y., 221 F. 229, 231, 136 C.C.A. 639.
Fla.—Miami Beach College Corporation v. Tomlinson, 196 So. 608, 609, 143 Fla. 57.

(40) "For reasons stated in writing."—Kelly v. State Personnel Board of California, 88 P.2d 264, 266, 31 Cal.App.2d 443.

(41) "For rent," as equivalent to "for the use and occupation of premises."—Logan v. Davis, 180 N.W. 184, 185, 190 Iowa 278.

(42) "For safe-keeping."—New Albany Hotel Co. v. Dingman, 181 P. 126, 127, 66 Colo. 306—26 C.J. p 793 note 29.

(43) "For sale."
Colo.—Ferch v. People, 74 P.2d 712, 714, 101 Colo. 471.
N.J.—Stengel v. Sergeant, 68 A. 1106, 1110, 74 N.J.Eq. 20.

(44) "For school purposes."
Ark.—Hopewell School Dist. No. 28 v. Bush, 15 S.W.2d 985, 179 Ark. 316.
Ky.—Bridwell v. McGrew, 14 S.W. 2d 1085, 1086, 228 Ky. 334.
Pa.—T. W. Phillips Gas & Oil Co. v. Lingenfelter, 105 A. 888, 889, 262 Pa. 500, 5 A.L.R. 1495.

(45) "For selling liquor," as including "keeping for sale."—Brown v. State, 86 So. 214, 17 Ala.App. 414.

(46) "For so long as," held equivalent to "temporarily."—Burdine v. Sewell, 109 So. 648, 653, 92 Fla. 375.

(47) "For so long as she . . . remain sole and unmarried."—Storey v. Storey, 18 N.E. 329, 332, 125 Ill. 608, 8 Am.S.R. 417, 1 L.R.A. 320.

(48) "For street and road construction."—Barber Asphalt Paving Co. v. Headley Good Roads Co., D.C. Del., 283 F. 236, 237.

(49) "For support and maintenance" of an individual, held limited to necessities and comforts of life for such individual in station in which he is accustomed to live.—Merchants' Nat. Bank & Trust Co. v. Port Gibson Oil Works, 141 So. 283, 286, 165 Miss. 314. "For his own use and benefit" distinguished see supra this note (28).

(50) "For the benefit of."
U.S.—Ferguson v. Forstmann, C.C.A. N.J., 25 F.2d 47, 49—In re Rose, D. C.Pa., 24 F.2d 253.
Fla.—Brite v. Orange Belt Securities Co., 182 So. 892, 895, 133 Fla. 266.
26 C.J. p 792 note 89.

(51) "For their own use and benefit for life."—Renaker v. Tanner, 83 S.W.2d 54, 55, 260 Ky. 281.

(52) "For their use and benefit during their lives."—West v. Chase, N.H., 25 A.2d 688, 689.

(53) "For the purpose of."
U.S.—Chidester v. City of Newark, D.C.N.J., 31 F.Supp. 892, 893—Carey v. U. S., C.C.A.Neb., 265 F. 515, 516—U. S. v. Whelpley, D.C.Va., 125 F. 616, 619.
Conn.—Levecque v. Dupuis, 175 A. 782, 784, 119 Conn. 224—Carlson v. Miller, 172 A. 872, 874, 118 Conn. 367.
Del.—State v. Derrickson, 114 A. 286, 288, 1 W.W.Harr. 342.
Ill.—Mallinger v. Shapiro, 244 Ill. App. 228, 232.
Iowa.—Tepesch v. Johnson, 296 N.W. 740, 742—Gardner v. Trustees of Main St. M. E. Church of Ottumwa, 250 N.W. 740, 745, 217 Iowa 1390.
Mont.—Vinson v. Pelletier, 255 P. 1067, 1072, 78 Mont. 254.
N.Y.—Damron v. Doubleday, Doran & Co., 231 N.Y.S. 444, 446, 133 Misc. 302.
Ohio.—Tax Commission of Ohio v. Security Sav. Bank & Trust Co. of Toledo, 159 N.E. 570, 572, 117 Ohio St. 443.
Okl.—Colbert Mill & Feed Co. v. Oklahoma Tax Commission, 109 P.2d 504, 506, 188 Okl. 366.
Tenn.—Frix v. State, 256 S.W. 449, 450, 148 Tenn. 478—Nelson v. Bergman, 242 S.W. 387, 390, 146 Tenn. 376.
Tex.—Moreland v. City of San Antonio, Civ.App., 116 S.W.2d 823, 825.
Wyo.—In re Lamont, 41 P.2d 497, 503, 48 Wyo. 56.
26 C.J. p 793 note 56.

(54) "For the reasons."—Dunn v. O'Connor, 89 F.2d 820, 826, 67 App. D.C. 76.

(55) "For the said Society."—Bates v. Schillinger, 145 A. 395, 399, 128 Me. 14.

(56) "For the time" and "for the time being," as equivalent to "temporarily."—State v. Cunningham, 55 A. 654, 75 Vt. 332.

(57) "For the use and occupation of premises."—Logan v. Davis, 180 N.W. 184, 185, 190 Iowa 278. "For rent" equivalent see supra this note (41).

(58) "For the use of" and similar phrases.
Cal.—In re Houk's Estate, 200 P. 417, 418, 186 Cal. 643.
D.C.—Work v. U. S. ex rel. Rives, 295 F. 225, 226, 54 App.D.C. 84.
N.Y.—Colgate v. Guaranty Trust Co. of New York, 288 N.Y.S. 463, 466, 159 Misc. 664.
26 C.J. p 793 note 67.

(59) "For the year."—Commonwealth v. Morris, 56 N.E. 896, 897, 176 Mass. 19. "For a year" equivalent see supra this note.

(60) "For two consecutive weeks."
Ky.—Jenkins v. City of Bowling Green, 64 S.W.2d 457, 251 Ky. 119.
Ohio.—State v. Kuhner, 140 N.E. 344, 346, 107 Ohio St. 406.

(61) "For two weeks next preceding."—Garry v. Martin, 227 P. 573, 576, 70 Mont. 587.

(62) "For value."
U.S.—Egyptian Supply Co. v. Boyd, C.C.A.Ky., 117 F.2d 608, 612.
N.J.—Unger v. Mayer, 147 A. 509, 510, 105 N.J.Eq. 253.

(63) "For value received."
Ga.—Brenner v. Wright, 194 S.E. 553, 555, 185 Ga. 280.
Neb.—Peterson v. Dethlefs, 298 N.W. 155, 156.
Nev.—White Sewing Mach. Co. v. Fowler, 78 P. 1034, 28 Nev. 94.
N.Y.—National Citizens' Bank v. Toplitz, 71 N.E. 1, 2, 178 N.Y. 464—Prindle v. Caruthers, 15 N.Y. 425, 426.
26 C.J. p 793 note 73.

(64) "For which the second party is not to blame," as equivalent to "over which the second party has no control."—Robinson v. Kistler, 59 S. E. 505, 508, 62 W.Va. 489.

(65) "Furnishes machinery, material, or fuel . . . for," as distinguished from "does work or labor upon."—Robert V. Clapp Co. v. Fox, 178 N.E. 586, 588, 124 Ohio St. 331.

(66) "Made 'for' automobiles," as meaning that the manufacturer ca-

FORAGE. Vegetable food of any kind for animals, especially for horses and cattle;[77] hay and straw for horses, particularly in the army.[78]

FORAGIUM. Straw when the corn has been threshed out.[79]

FORAKER ACT. A name usually given to the act of congress of April 12, 1900, 31 U.S.St. at L. p 77 c 191, 48 U.S.C.A. § 731 et seq, which provided civil government for Puerto Rico.[80]

FORAL. In Spanish law, that which pertains to a "fuero."[81]

FORAMINA. In the language of laymen, openings in the vertebræ through which nerves pass.[82]

FORANEOUS. One from without, hence a stranger or a foreigner.[83]

FORATHE. In forest law, one who could make oath, that is, bear witness for another.[84]

FORBALCA. In old records, a forebalk; a balk, that is, an unplowed piece of land, lying forward or next the highway.[85]

FORBANNITUS. One banished, hence an outlaw, a pirate.[86]

FORBARRER. Law French, to bar out, to preclude; hence, to estop.[87]

FORBATUDUS. In old English law, the aggressor slain in combat.[88]

FORBEAR. To abstain or desist from; to give up.[89] With reference to a debt, in the popular sense, and if unqualified by terms of restriction, the word has regard to a general forbearance and is equivalent to "wait," without any adjunct whatever.[90]

FORBEARANCE. Refraining from action;[91] the act or state of forbearing; the cessation or intermission of an act commenced, or a refraining from beginning an act; also command of temper or restraint of passions.[92] In law, a delay in enforcing rights,[93] a suspension of an existing demand,[94] refraining from claiming a right;[95] more specifically,

ters to the automobile trade.—Philadelphia Storage Battery Co. v. Lederer, D.C.Pa., 21 F.2d 320, 321.

(67) "Production for commerce," as indicating or inferring a direct relation with commerce and not an indirect connection as where the production merely "affects" commerce.—Chapman v. Home Ice Co., D.C.Tenn., 43 F.Supp. 424, 428—Fleming v. Atlantic Co., D.C.Ga., 40 F.Supp. 654, 660.

(68) "Purchase . . . for his own use and benefit," as indicating a purchase made with the intention and purpose of deriving whatever profit or advantage may accrue through such purchase for one's self alone, rather than a purchase for the profit and advantage of another.—Henshall v. Marsh, 90 P. 693, 695, 151 Cal. 289, 296.

(69) "Sentence to imprisonment 'for life'" as referring only to defendant's life and not to that of another.—Sullivan v. State, 94 So. 473, 208 Ala. 473. See also Criminal Law § 1585 notes 20, 21.

Phrases elsewhere discussed

(1) "For any cause" see 3 C.J.S. p 1412 note 75.

(2) "For cash or on credit" see 14 C.J.S. p 19 note 11.

(3) "For collection" and related phrases see Collection 14 C.J.S. p 1323 notes 94–98; and the C.J.S. titles Banks and Banking §§ 212, 222 b notes 59–66, and Bills and Notes § 214 c (4).

(4) "For collection and credit" and "for credit" see 21 C.J.S. p 1046 notes 34, 35.

(5) "For further hearing" see supra this note (21).

(6) "For loss" and "for loss or damage," as distinguished from "against loss" and "against loss or damage" see 2 C.J.S. p 1013 notes 9, 11.

(7) "For that" and "for that whereas" see the C.J.S. title Pleading § 69, also 26 C.J. p 997 notes 13, 14.

(8) "For the balance of the purchase price" see 8 C.J.S. p 379 note 79.

(9) "For the other," as contrasted with "against the other" see 2 C.J. S. p 1013 note 24.

(10) "For whom it may concern" and related phrases see 15 C.J.S. p 799 notes 22, 23.

(11) "To provide for collection of special taxes imposed by law" see 14 C.J.S. p 1323 note 3.

77. Webster New Int.D.

"Provisions and forage"

Tex.—Stephens v. Hobbs, 36 S.W. 287, 14 Tex.Civ.App. 148, 149.

78. Black L.D.

79. Black L.D.

80. Black L.D.

Synopsis of the act

U.S.—Downes v. Bidwell, N.Y., 21 S.Ct. 770, 826, 182 U.S. 244, 390, 45 L.Ed. 1088.

81. Escriche Diccionario.

82. Iowa.—Eller v. Paul Revere Life Ins. Co., 300 N.W. 535, 537, 230 Iowa 1255.

83. Black L.D.

84. Black L.D.

85. Black L.D.

86. Black L.D.

87. Black L.D.

88. Black L.D.

89. Cal.—O. A. Graybeal Co. v. Cook, 295 P. 1088, 1092, 111 Cal.App. 518, quoting **Corpus Juris.**

90. Cal.—O. A. Graybeal Co. v. Cook, supra, quoting **Corpus Juris.**

Pa.—Downing v. Funk, 5 Rawle 69, 73.

Phrases construed

(1) "Forbear and give further time."—King v. Upton, 4 Me. 387, 388, 16 Am.D. 266.

(2) "Forbearing to press for the immediate payment."—Oldershaw v. King, 2 H. & N. 517, 523, 157 Reprint 213.

91. Black L.D.

92. Century D.

93. Ill.—Johnson Oil Refining Co. v. Smoot, 242 Ill.App. 438, 450.

Me.—Shaw v. Philbrick, 151 A. 423, 425, 129 Me. 259, 74 A.L.R. 290.

"Forbearance of his right"

Eng.—Pillans v. Mierop, 3 Burr. 1663, 1673, 97 Reprint 1035—Jones v. Ashburnham, 4 East 455, 463, 102 Reprint 905.

94. U.S.—Goodman v. Simonds, Mo., 20 How. 343, 370, 15 L.Ed. 934.

95. English L.D.

an engagement which ties up the hands of a creditor, an act of the creditor depriving himself by something obligatory of the power to sue,[96] the act by which a creditor waits for the payment of a debt due him by the debtor after it becomes due,[97] the giving day for the return of a loan, or, more properly, the giving a further day, when the time originally agreed on is passed.[98] In the sense of command or control of temper, the word is the antonym of "anger" see 3 C.J.S. p 1073 note 71, and in general jurisprudence the term is used in contradistinction to "act," or "action."[99]

As employed in the usury acts, see the C.J.S. title Usury § 23, also 66 C.J. p 192 note 44. For references to other specific uses see 26 C.J. p 794 note 91.

FORCE.

As a Noun

Force has been spoken of as being of various kinds, religious, moral, political, economic, or physical;[1] its meaning in a particular case depending on the circumstances, and so it has sometimes been held to imply the exercise and application of physical power,[2] a physical constraint of the will,[3] and not only actual application of physical force, but such threats or display of physical force as might reasonably be calculated to inspire fear of death or bodily harm;[4] and sometimes not to imply necessarily actual physical combat,[5] the use of actual, active, physical force,[6] violence,[7] or the inflicting of pain or bodily harm or the leaving of a physical mark.[8] The word is ordinarily defined or discussed with reference to its intensity or amount, its direction, its power of application, and the time at which it exists;[9] and it has been variously defined as efficacy, energy, might, momentum, necessity, power, active power, strength, vigor,[10] power statically considered, that is, at rest, or latent, but capable of being called into activity on occasion for its exercise;[11] also power dynamically considered, that is, in motion or in action, hence, with varying shades of meaning, constraining power, compulsion, strength directed to an end;[12] strength applied or exerted;[13] any manipulation or effort employed to overcome any obstruction whatsoever;[14] unlawful violence;[15] unlawful violence offered to persons or things;[16] unlawful violence which may be implied, as in every trespass;[17] and it has been said that the definition nearest to the exact meaning of the word is violence, power exerted against will or consent.[18]

96. N.Y.—Reynolds v. Ward, 5 Wend. 501, 504.

97. Cal.—Murphy v. Agen, 268 P. 480, 481, 92 Cal.App. 468.
Ill.—Johnson Oil Refining Co. v. Smoot, 242 Ill.App. 438, 450.

98. Ala.—Henry v. Thompson, Minor 209, 232.

In substance a loan

(1) "The forbearance or giving time for the payment of a debt, is in substance a loan."
N.J.—Diercks v. Kennedy, 16 N.J.Eq. 210, 211.
N.Y.—Van Schaick v. Edwards, 2 Johns.Cas. 355, 357.

(2) In a particular connection, it has been said that the term cannot be applied to anything other than a loan of money.
U.S.—Siebert v. Hall, C.C.A.Ark., 63 F.2d 517, 522.
N.Y.—Dry Dock Bank v. American L. Ins. & Trust Co., 3 N.Y. 344, 355.

99. Black L.D.

1. U.S.—Colyer v. Skeffington, D.C. Mass., 265 F. 17, 61.

2. U.S.—Colyer v. Skeffington, supra.
Ky.—McGeorge v. Commonwealth, 35 S.W.2d 530, 531, 237 Ky. 358.

3. Ga.—Allen v. State, 3 S.E.2d 780, 782, 60 Ga.App. 248.

4. Mont.—Lambert v. Helena Adjustment Co., 222 P. 1057, 1058, 69 Mont. 510.
Tex.—Smith v. Sinclair Refining Co., Civ.App., 77 S.W.2d 894, 895.

"Any conduct which would result in bodily fear or terror is sufficient to constitute force."—Yarbrough v. Brookins, Tex.Civ.App., 294 S.W. 900, 902.

5. Tex.—Smith v. Sinclair Refining Co., Civ.App., 77 S.W.2d 894, 895.

6. Tex.—Yarbrough v. Brookins, Civ.App., 294 S.W. 900, 902.

Use of chemicals

"Force may be chemical as well as physical; poison gas may be as deadly as a bullet."—Lewin v. U. S., C.C.A.Mass., 62 F.2d 619, 620.

7. Iowa.—State v. Metcalfe, 212 N.W. 382, 389, 203 Iowa 155.

8. Cal.—People v. James, 48 P.2d 1011, 1012, 9 Cal.App.2d 162.

9. Mo.—Middleton v. St. Joseph Railway, Light, Heat & Power Co., 195 S.W. 527, 528, 196 Mo.App. 258.

10. Me.—State v. Blake, 39 Me. 322, 324.

11. Black L.D.

12. N.Y.—Watson v. Oswego St. R. Co., 28 N.Y.S. 84, 85, 7 Misc. 562.

In Scotch law, coercion, or duress. —Black L.D.

13. Mont.—Lambert v. Helena Adjustment Co., 222 P. 1057, 1058, 69 Mont. 510.

14. Tex.—Wilson v. State, 281 S.W. 844, 846, 103 Tex.Cr. 403.
The use of "force" as implied by the verb, "break," see 11 C.J.S. p 834 note 9.

15. Mont.—Lambert v. Helena Adjustment Co., 222 P. 1057, 1058, 69 Mont. 510.

Classification

"It is either simple, as entering upon another's possession, without doing any other unlawful act; compound, when some other violence is committed, which of itself alone is criminal; or implied, as in every trespass, rescous, or disseisin."—Black L.D.

16. Ind.—Summers v. Tarney, 24 N.E. 678, 679, 123 Ind. 560.

Similarly expressed

(1) "Strength or power exercised without law upon persons or things." —Watson v. Oswego St. R. Co., 28 N.Y.S. 84, 85, 7 Misc. 562.

(2) "Strength or power exercised without law, or contrary to law, upon persons or things."—Summers v. Tarney, 24 N.E. 678, 679, 123 Ind. 560.

17. N.Y.—Watson v. Oswego St. R. Co., 28 N.Y.S. 84, 85, 7 Misc. 562.

18. Me.—State v. Blake, 39 Me. 332, 324.
Mo.—State v. Massey, 204 S.W. 541, 543, 274 Mo. 578—Agee v. Employers' Liability Assur. Corporation,

In other senses, or applications, the word may mean validity, virtue,[19] or legal validity;[20] also armament;[21] and, in the plural, the military and naval power of a country.[22]

In old English law, it was applied, as a technical term, to a species of accessory before the fact.[23]

In the accompanying notes some examples are given of what, in particular connections, the term has been held to include,[24] and not to include.[25]

Depending on the circumstances, "force" has been held equivalent to, or synonymous with, "coercion"[26] "vi et armis,"[27] and "violence;"[28] and has been compared with, or distinguished from, "artifice" see 6 C.J.S. p 777 note 66, "coercion" see 14 C.J.S. p 1307 notes 49–52, "fraud" see the C.J.S. title Fraud § 1, also 26 C.J. p 1060 note 16, "intimidation,"[29] and "violence."[30]

For references to specific uses of the word in particular legal connections see 26 C.J. p 794 note 1.

By force. Forcibly, violently.[31] In some connections, the word has been held equivalent to "violently" and "violently . . . against her will;"[32] but in others it has been said not to be interchangeable with "violently."[33]

Force majeure, fuerza mayor, and *vis major.* Three terms, respectively French, Spanish, and Latin which are practically equivalent and which are used in the civil law for irresistible or superior force, corresponding in a general way to the "Act of God" of the common law,[34] although sometimes distinguished from "Act of God" see 1 C.J.S. p 1431 notes 17, 19, 27; and specifically defined as an accident produced by physical cause which is irresistible;[35] a fact or accident which human prudence can neither forsee nor prevent;[36] a fortuitous event;[37] inevitable accident or casualty;[38] irresistible force, overpowering force, or unforeseen event.[39]

In force. Being in existence; having the force of the law.[40] When used with reference to particular contracts the phrase implies the performance

Limited, of London, Eng., 253 S. W. 46, 48, 213 Mo.App. 693.
Mont.—Lambert v. Helena Adjustment Co., 222 P. 1057, 1058, 69 Mont. 510.
Tex.—Robinson v. State, 149 S.W. 186, 188, 67 Tex.Cr. 79.

19. Me.—State v. Blake, 39 Me. 322, 324.

20. **"This is the meaning** when we say that a statute or a contract is 'in force.' "—Black L.D.
See also "in force" infra notes 40–42.

21. Me.—State v. Blake, 39 Me. 322, 324.

22. Black L.D.

23. Black L.D.

24. **Held to include**
(1) The use, as a means of escape, of a smoke screen which has an unfavorable physical effect on the pursuers.—Lewin v. U. S., C.C.A.Mass., 62 F.2d 619, 620.
(2) The use of weapons, bombs, and the like.—Colyer v. Skeffington, D.C.Mass., 265 F. 17, 63.

25. **Held not to include**
(1) A general strike.—Colyer v. Skeffington, supra.
(2) Cursing.—McGeorge v. Commonwealth, 35 S.W.2d 530, 531, 237 Ky. 358.
(3) Persuasion or overpowering personality.—Rouse v. Creech, 166 S. E. 174, 175, 203 N.C. 378.
(4) The use of a smoke screen which merely conceals an escape by stealth.—Lewin v. U. S., C.C.A.Mass., 62 F.2d 619, 620.

26. Pa.—Santer v. Santer, 174 A. 651, 652, 115 Pa.Super. 1.

27. **As equivalent to "vi et armis"**
Ill.—Harper v. Sallee, 34 N.E.2d 860, 864, 376 Ill. 540.

28. Cal.—People v. James, 48 P.2d 1011, 1012, 9 Cal.App.2d 162.

29. **Intimidation as constructive force**
"When the Code speaks of force, it means actual violence; and when it speaks of intimidation, it still means force; not actual and direct, but exerted upon the person robbed by operating upon his fears—the fear of injury to his person, or property, or character. . . . Intimidation . . . is constructive force."—Long v. State, 12 Ga. 293, 315, 320.

30. U.S.—Colyer v. Skeffington, D.C. Mass., 265 F. 17, 61.
Iowa.—State v. Metcalfe, 212 N.W. 382, 389, 203 Iowa 155.

31. Iowa.—State v. Rohn, 119 N.W. 88, 90, 140 Iowa 640.
La.—State v. Williams, 32 La.Ann. 335, 336, 36 Am.R. 272.

32. La.—State v. Williams, supra.
Tex.—Robinson v. State, 149 S.W. 186, 188, 67 Tex.Cr. 79.
67 C.J. p 252 note 40 [a].

33. Me.—State v. Blake, 39 Me. 322, 324.

34. La.—Losecco v. Gregory, 32 So. 985, 988, 108 La. 648, 656.
26 C.J. p 795 note 41.
"Force majeure" are words taken from the Code Napoleon
Eng.—Matsoukis v. Priestman, [1915] 1 K.B. 681, 685.

35. Philippine.—Pons y Compania v. La Compania Martima, 9 Philippine 125, 129, quoting 2 Blackstone Comm. p 122.
Blackstone cites as examples
Earthquakes, inundations, lightning, perils of the sea, tempest, and even the sudden illness or death of a person.—Pons y Compania v. La Compania Martima, supra, quoting 2 Blackstone Comm. p 122.
It has been written "force majesture" and has been said to include lightnings, earthquakes, storms, flood, sunstrokes, freezing, etc.—Fogg v. Van Saun Coal Co., N.J.Dept. Labor, 174 A. 419, 420, 12 N.J.Misc. 680.

36. U.S.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 973, 120 U.S. 707, 30 L.Ed. 776.
La.—Lehman, Stern & Co. v. Morgan's Louisiana & Texas R. & S. S. Co., 38 So. 873, 874, 115 La. 1, 112 Am.S.R. 259, 70 L.R.A. 562, 5 Ann. Cas. 818.

37. Philippine.—Tan Chiong Sian v. Inchausti, 22 Philippine 152, 169, 170.

38. U.S.—The Rob, D.C.N.Y., 32 F. Supp. 195, 197.
Philippine.—Pons y Compania v. La Compania Martima, 9 Philippine 125, 129.

39. U.S.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 973, 120 U.S. 707, 30 L.Ed. 776.

40. Ont.—In re Denison, 19 Ont.L. 5, 7, 13 Ont.W.R. 1056.
Imports legal validity
Black L.D.

of conditions precedent;[41] and with reference to a statute it implies, or presupposes, that the law was duly adopted.[42]

Irresistible force. Such an interposition of human agency as is, from its nature and power, absolutely uncontrollable.[43] It has been held equivalent to "cas fortuit" see 13 C.J.S. p 1768 note 15, and "casus fortuitus" see 14 C.J.S. p 32 note 18.

Superior force. Accidental or uncontrollable events, force majeure, or an accident which human prudence can neither foresee nor prevent;[44] vis major.[45]

Other phrases employing the word are set out in the note.[46]

As a Verb

To do violence to, especially to violate or to ravish; also to constrain or compel by physical, moral or intellectual means, to coerce; also to break open, as a gate or lock.[47]

In particular applications, the term has been held a synonym of "ravish,"[48] and the antithesis of "decoy" see 26 C.J.S. p 42 note 74.

"Forced," in the past tense, may be the equivalent of "compelled" see 15 C.J.S. p 650 note 46.

"Forcing," the present participle, used as a building term referring to the process by which plaster is applied to concrete and masonry walls and ceilings, is broad enough to cover a variety of methods of forcing in gravel, sand, or other key material commonly used, including air blasting.[49] Used in another sense, the term refers to forcing or breaking open buildings and other depositories, in order to steal therefrom.[50]

Forced sale. A sale which is made under the process of the court and in the mode prescribed by law.[51] The term has also been applied to the sale by a buyer under particular circumstances in order to prevent or reduce loss resulting from breach of contract by the seller.[52] Examples of transactions which, under particular circumstances, have been held not to constitute forced sales are set out in the note.[53]

41. N.Y.—McDonnell v. Mutual Life Ins. Co. of New York, 116 N.Y.S. 35, 38, 131 App.Div. 643.

42. Mo.—State v. Campbell, 119 S.W. 494, 495, 137 Mo.App. 105.

43. La.—Lehman v. Morgan's Louisiana & Texas R. & S. S. Co., 38 So. 873, 874, 115 La. 1, 112 Am.S.R. 259, 70 L.R.A. 562, 5 Ann.Cas. 818—Noel Bros. v. Texas & P. Ry. Co., 133 So. 830, 832, 16 La.App. 622.
33 C.J. p 816 note 58.

44. La.—Lehman v. Morgan's Louisiana & Texas R. & S. S. Co., 38 So. 873, 874, 115 La. 1, 112 Am.S.R. 259, 70 L.R.A. 562, 5 Ann.Cas. 818.
60 C.J. p 1153 note 85.

45. La.—Brousseau v. The Hudson, 11 La.Ann. 427, 428.

46. Phrases construed

(1) "Actual force" see 1 C.J.S. p 1441 note 28 and definition in Pocket Parts.

(2) "Effected by force."—National Surety Co. v. Volk Bros. Co., Tex.Civ. App., 63 S.W.2d 223, 224.

(3) "Force and arms" see the C.J.S. titles Indictments and Informations § 107, also 26 C.J. p 795 note 35, and Trespass § 76, also 63 C.J. p 978 note 10.

(4) "Force and fear," called also "vi metuque," and meaning that any contract or act extorted under the pressure of force, vis, or under the influence of fear, metus, is voidable on that ground, provided, of course, that the force or the fear was such as influenced the party.—Black L.D.

(5) "Force of law," as applied to regulations reënacted into substantially identical provisions in statutes.—Commissioner of Internal Revenue v. Laguna Land & Water Co., C.C.A., 118 F.2d 112, 115.

(6) "Force or violence."
U.S.—Colyer v. Skeffington, D.C. Mass., 265 F. 17, 61.
D.C.—Spencer v. U. S., 116 F.2d 801, 802, 73 App.D.C. 98.

(7) "Implied force," defined as force implied by law from the commission of an unlawful act.—Cyclopedic L.D.

(8) "Of force," defined as meaning in force; extent; not obsolete; existing as a binding or obligatory power.—Black L.D.

(9) "Physical force," as synonymous with "violence."—Lambert v. Helena Adjustment Co., 222 P. 1057, 1058, 69 Mont. 510.

(10) "Unlawful force," as synonymous with "violence."—Johnson v. State, 50 So. 529, 530, 58 Fla. 68.

(11) "Use of force," as used to describe conduct which invades any of another's interests of personalty, and so is unless privileged, a battery, assault, or false imprisonment.—Westerman v. Oregon Automobile Credit Corporation, Or., 122 P.2d 435, 441.

(12) "Violently and with great force," as implying a proposed wrong in the doing of the act.—Summers v. Tarney, 24 N.E. 678, 679, 123 Ind. 560.

47. Webster New Int.D.

48. Iowa.—State v. Montgomery, 45 N.W. 292, 293, 79 Iowa 737.

49. U.S.—Vortex Mfg. Co. v. Ply-Rite Contracting Co., D.C.Md., 33 F.2d 302, 311.

50. Mass.—Commonwealth v. Tilley, 28 N.E.2d 245, 248, 306 Mass. 412, 129 A.L.R. 381.

51. Tex.—Sampson v. Williamson, 6 Tex. 102, 110, 55 Am.D. 762.
Generally see the C.J.S. titles Executions § 196 and Judicial Sales § 1, also 35 C.J. p 8 note 12.
Exemption from forced sale see the C.J.S. titles Exemptions § 1 and Homesteads §§ 203–205, also 29 C.J. p 966 note 65–p 968 note 15.

52. Sale of perishable goods
N.Y.—Fine v. Pennsylvania R. Co., 34 N.Y.S.2d 308, 310.

53. Held not "forced sales"

(1) A sale of homestead, directly or indirectly, consented to by owner.—White v. Rosenthal, 35 P.2d 154, 155, 140 Cal.App. 184.

(2) A sale, in probate proceedings, to procure funds to pay testator's indebtedness.—Manning v. Dosher, 29 P.2d 966, 968, 167 Okl. 368.

(3) A sale of real property under a judgment, decreeing specific performance of contract for its sale.—Strahan v. Haynes, 262 P. 995, 999, 33 Ariz. 128.

(4) A sale under mortgage foreclosure decree.—White v. Rosenthal, 35 P.2d 154, 155, 140 Cal.App. 184.

(5) A sale by a trustee under voluntary deed of trust or mortgage with power of sale.—City of Dayton

In particular connections, the term has been held equivalent to, or synonymous with, "judicial sale"[54] and "sale at a sacrifice;"[55] and has been distinguished from "auction sale" see Auctions and Auctioneers § 1 a note 1, "foreclosure sale," whether under power of sale contained in the mortgage, or in pursuance of a decree,[56] "sale in partition,"[57] and "sale on execution" see Executions § 196 note 75.

Other phrases are listed in the note.[58]

As an Adjective

Phrases employing the word are set out in the note.[59]

FORCIBLE. Effected or brought about by the employment of force.[60] In legal contemplation, the word may connote an act against the will of another whose possession is invaded, however quietly the act may be done.[61]

Phrases employing the word are set out in the note.[62]

v. Allred, 68 S.W.2d 172, 179, 123 Tex. 60.

54. U.S.—Woodward, Wight & Co. v. Dillworth, La., 75 F. 415, 418, 21 C.C.A. 417.

55. Mich.—Ritzer v. Ritzer, 220 N.W. 812, 815, 243 Mich. 406.

56. S.D.—Karcher v. Gans, 83 N.W. 431, 432, 13 S.D. 383, 79 Am.S.R. 893.

26 C.J. p 795 note 38 [c].

57. Kan.—Towle v. Towle, 107 P. 228, 233, 81 Kan. 675, 688, 27 L.R.A.,N.S., 550.

58. **Phrases construed**

(1) "Did compel and force."—Rex v. Lloyd, 1 C. & P. 301, 302, 12 E.C.L. 180.

(2) "Forced out of the company," interpreted, in the light of surrounding circumstances as referring to exclusion from the active and responsible management of the business of a corporation, and from the beneficial enjoyment of anticipated profits of the enterprise, as distinguished from legal expulsion from membership in the corporation.—Havana Press Drill Co. v. Ashurst, 35 N.E. 873, 879, 148 Ill. 115.

(3) "Forced to incur these expenses."—Temple Lumber Co. v. Living, Tex.Civ.App., 289 S.W. 746, 749.

(4) "Forced heirs," see Descent and Distribution § 26, the C.J.S. title Wills § 98, 68 C.J. p 513 note 95–p 516 note 40.

59. **Phrases construed**

(1) "Force-feed lubricator," described as a pump device for supplying oil to an engine where pressure is required in order positively to force the oil from the source of supply to the parts to be lubricated.—Greene v. Buckley, N.Y., 135 F. 520, 522, 68 C.C.A. 70.

(2) "Force pump," as not including a hose, by implication.—Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553, 562.

60. Standard D.

61. Ill.—Harper v. Sallee, 34 N.E.2d 860, 864, 376 Ill. 540.

62. **Phrases construed**

(1) "Forcible and secret imprisonment."—Doss v. State, 123 So. 231, 232, 220 Ala. 30, 68 A.L.R. 712.

(2) "Forcible confinement or detention," defined as bondage, restraint; not necessarily implying physical or manual force.—U. S. v. Gordon, C.C.N.Y., 25 F.Cas.No.15,231, 5 Blatchf. 18, 25.

(3) "Forcible entry and detainer" see generally Forcible Entry and Detainer; and specifically the C.J.S. titles Executions § 310 a, by purchaser at execution sale; Judicial Sales § 43, also 35 C.J. p 86 notes 37–39, by purchaser at judicial sale; Mortgages § 306, also 41 C.J. p 617 note 63, between mortgagor and mortgagee of real property; and Vendor and Purchaser § 465, also 66 C.J. p 1343 notes 43–51, between vendor and purchaser.

(4) "Forcible interference."—Lewin v. U. S., C.C.A.Mass., 62 F.2d 619. See also the C.J.S. titles Customs Duties § 250, and Obstructing Justice § 5, also 46 C.J. p 874 note 84–p 876 note 26.

(5) "Forcible or unlawful entry or detainer" see Forcible Entry and Detainer § 1.

(6) "Forcible ravishing."—State v. Atkins, Mo., 292 S.W. 422, 425. See also the C.J.S. title Rape § 12, also 52 C.J. p 1018 note 97–p 1019 note 19.

(7) "Forcible taking."

U.S.—Gross v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y., 72 F.2d 223, 224.

Or.—State v. Metcalf, 278 P. 974, 980, 129 Or. 577.

S.C.—Graydon v. Graydon, 147 S.E. 749, 750, 150 S.C. 117.

See also the C.J.S. titles Kidnapping § 1, also 35 C.J. p 904 note 56–p 905 note 65, and Robbery § 15, also 54 C.J. p 1019 note 82–p 1020 note 96.

(8) "Forcible trespass," a term used in North Carolina to denote an invasion of the rights of another with respect to his personal property, of the same character, or under the same circumstances, which would constitute a "forcible entry and detainer" of real property at common law. It consists in taking or seizing the personal property of another by force, violence, or intimidation or in forcibly injuring it.—Black L.D. See also the C.J.S. title Trespass § 141, also 63 C.J. p 1075 note 2–p 1076 note 11.

(9) "Forcible trespasser."—Anthony v. Teachers' Protective Union, 173 S.E. 6, 8, 206 N.C. 7.

FORCIBLE ENTRY AND DETAINER

This Title includes violently taking or retaining possession of property, with threats, force, or arms, against the will of another entitled to its possession, and without authority of law; nature and extent of liability therefor in general; remedies for recovery of possession; and criminal responsibility for such forcible entry or forcible detainer, and prosecution and punishment thereof as a public offense.

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1. DEFINITIONS AND DISTINCTIONS

§ 1. Definitions

A forcible entry or detainer generally consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law.

While the nature and elements of the civil action of forcible entry and detainer are usually prescribed by the statute setting up the cause of action, a forcible entry or detainer generally consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law.[1] As appears infra § 2, a distinction is often drawn between forcible entry and detainer, forcible detainer, and unlawful detainer.

§ 2. Distinctions

Forcible entry and forcible detainer are distinguishable in that the former is based on an entry upon another's possession by force or violence, whereas the latter is based upon an unlawful forcible detention after an entry without force. Unlawful detainer is distinguishable from forcible detainer with respect to the element of force in the detention.

Forcible entry and detainer is a separate offense or ground of liability and the remedy therefor is distinguishable from statutory writ of entry, see Entry, Writ of § 3 b; from common law ejectment, see Actions § 36 g; from statutory ejectment, see Ejectment § 3; and from trespass, see Actions § 36 i.

While the term "forcible entry and detainer" is often comprehensively used, it is recognized under many statutes that its components, "forcible entry" and "forcible detainer", are separate and distinct wrongs.[2] The action or offense of forcible entry is generally based on an entry upon another's possession by force or violence,[3] whereas the gist of the action of forcible detainer is the unlawful detention of property with force and a strong hand, following on an entry which is lawful,[4] or which is wrongful or unlawful, but without force.[5]

"Unlawful detainer" is a separate, distinct offense under various statutes, and is distinguishable from forcible detainer in that no element of force is required in the former.[6] Unlawful detainer is usually confined to cases where there has been an entry under some contractual relationship.[7]

1. Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
26 C.J. p 800 note 1.
Definition of unlawful detainer see infra § 2.

Statutory definitions

(1) "An entry without the consent of the person having the actual possession."—Moore v. Ramsey, 114 S.W.2d 1101, 272 Ky. 582—Conley v. Shepherd, 35 S.W.2d 5, 6, 237 Ky. 128—26 C.J. p 800 note 1 [f].

(2) An entry upon land in the possession of another with such a show of force as to make it useless for the occupant to try to maintain his possession.—Southern Ry. Co. v. Lima Wood & Coal Co., 159 S.E. 69, 156 Va. 829.

Unlawful entry

(1) Within the meaning of a statute prohibiting such entry into lands, tenements, or other possessions, an unlawful entry is a forcible entry by fraud, or without color of title.—Dickinson v. Maguire, 9 Cal. 46.

(2) Not every forcible entry is unlawful.—Blaco v. Haller, 1 N.W. 978, 9 Neb. 149.

2. Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.
26 C.J. p 801 note 3.

3. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631
26 C.J. p 801 note 4.

4. Ky.—Sayers & Muir Service Station v. Indian Refining Co., 100 S.W.2d 687, 266 Ky. 779.
26 C.J. p 801 note 5 [a].

Distinction based on lawfulness of entry

It has been said that the two offenses of forcible entry and detainer, and forcible detainer, are distinguishable depending on the lawfulness or unlawfulness of the entry; whenever the entry is unlawful, whether forcible or not, and the subsequent conduct is forcible and tortious, the offense committed is a forcible entry and detainer, but wherever the original entry is lawful, and the subsequent holding forcible and tortious, then the offense is an unlawful detainer only.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
N.J.—Pullen v. Boney, 4 N.J.Law 145.

5. Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
26 C.J. p 801 note 6.

6. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Minn.—Mercantile State Bank v. Vogt, 226 N.W. 847, 178 Minn. 282.
Mo.—Rust v. Dames, App., 142 S.W.2d 797—Porter v. Gibbs, App., 242 S.W. 1016.
Wash.—Angel v. Ladas, 255 P. 945, 143 Wash. 622.
26 C.J. p 801 note 7.

Definitions

(1) Unlawful detainer is the unjustifiable retention of the possession of lands by one whose original entry was lawful and of right, but whose right to the possession has terminated and who refuses to quit, as in the case of a tenant holding over after the termination of the lease and in spite of a demand for possession by the landlord.—Correa v. Correa, 32 Puerto Rico 254.

(2) "Unlawful detainer is where the defendant enters by contract, either as a tenant or as assignee of a tenant, or as personal representative of a tenant, or as subtenant, or by collusion with a tenant, and in either case, willfully and without force, holds over the possession from the landlord, or the assignee of the remainder or reversion."—Shepperson v. Burnette, 92 S.W. 762, 116 Tenn. 117.

(3) Similar statutory definitions.
Ala.—Barnewell v. Stephens, 38 So. 662, 663, 142 Ala. 609—McDevitt v. Lambert, 2 So. 438, 440, 80 Ala. 536.
Mo.—State ex rel. Kelly v. Trimble, 247 S.W. 187, 190, 297 Mo. 104, explained in 247 S.W. 1009, 297 Mo. 104—Powell v. Camp, 60 Mo. 569, 570.

7. Tenn.—Westmoreland v. Farmer, 7 Tenn.App. 385.

II. CIVIL LIABILITY

A. NATURE AND ELEMENTS AND PROPERTY SUBJECT OF ACTION

§ 3. In General

Forcible entry and detainer is a summary statutory proceeding, strictly possessory in nature, providing a remedy for the protection of the actual possession of realty against forcible invasion, in cases coming fairly within the terms of the statute; the remedy is merely cumulative of any other remedy that a party may have.

Forcible entry and detainer as a civil proceeding is based on, and has by modern legislation been evolved from, the English forcible entry and detainer which was a criminal proceeding merely.[8] The remedy is purely statutory[9] and is summary in character;[10] and, while not a common-law action,[11] it is an action at law relating to real property[12] sounding in tort.[13]

While the scope and extent of the remedy varies under different statutes, generally speaking, forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its objects being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence.[14] The action is strict-

8. Del.—Wallen v. Collins, 173 A. 801, 802, 6 W.W.Harr. 266, citing **Corpus Juris.**
Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ill.—French v. Willer, 18 N.E. 811, 126 Ill. 611, 9 Am.S.R. 651, 24 L.R.A. 717.
Ky.—Sayers & Muir Service Station v. Indian Refining Co., 100 S.W. 2d 687, 689, 266 Ky. 779, citing **Corpus Juris.**

Proceeding is civil and not criminal in character
Kan.—Hale v. Brown, 239 P. 963, 119 Kan. 303.

9. Cal.—Woods-Drury v. Superior Court in and for City and County of San Francisco, 63 P.2d 1184, 18 Cal.App.2d 340—Nineteenth Realty Co. v. Diggs, 25 P.2d 522, 134 Cal. App. 278.
Colo.—MacKenzie v. Porter, 91 P. 916, 40 Colo. 340.
Del.—Wallen v. Collins, 173 A. 801, 802, 6 W.W.Harr. 266, citing **Corpus Juris**—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.
Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ill.—Biebel Roofing Co. v. Pritchett, 25 N.E.2d 800, 373 Ill. 214, transferred, see 30 N.E.2d 196, 307 Ill. App. 247—City of Chicago v. Chicago S. S. Lines, 159 N.E. 301, 328 Ill. 309—Layzod v. Martin, 26 N.E. 2d 423, 305 Ill.App. 1—Van Winkle v. Weston, 276 Ill.App. 66—Personal Home Mortgage Co. v. Seegrin, 275 Ill.App. 419.
Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189—Ashpole v. Delaney, 253 N.W. 30, 217 Iowa 792—Rasmussen v. Alberts, 246 N.W. 620, 215 Iowa 644.
Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814.
Mo.—Rust v. Dames, App., 142 S.W. 2d 797—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800—Porter v. Gibbs, App., 242 S. W. 1016.
Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.
Tex.—Rose v. Skiles, Civ.App., 245 S.W. 127.
Wyo.—Allen v. Houn, 219 P. 573, 30 Wyo. 186, denying rehearing 213 P. 757, 29 Wyo. 413.
26 C.J. p 811 note 36.

Special proceeding
Unlawful detainer is a summary and special proceeding.—Fajardo Sugar Co. v. Torres, 27 Puerto Rico 337—Cabassa v. Reyes, 27 Puerto Rico 333—Colon v. Colon, 27 Puerto Rico 81.

Statutory procedure is exclusive
Ky.—Hoskins v. Morgan, 61 S.W.2d 30, 249 Ky. 576—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

10. Del.—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.
Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—City of Chicago v. Chicago S. S. Lines, 159 N.E. 301, 328 Ill. 309.
Minn.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.
Mo.—Rust v. Dames, App., 142 S.W. 2d 797—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.
Tex.—Rose v. Skiles, Civ.App., 245 S. W. 127.
Utah.—Paxton v. Fisher, 45 P.2d 903, 86 Utah 408.
Wash.—Yukon Inv. Co. v. Crescent Meat Co., 248 P. 377, 140 Wash. 136.
26 C.J. p 811 note 37.

11. Del.—Wallen v. Collins, 173 A. 801, 802, 6 W.W.Harr. 266, citing **Corpus Juris.**

Remedy is one in derogation of common law and does not exist under act adopting English common law and statutes.—City of Chicago v. Chicago S. S. Lines, 159 N.E. 301, 328 Ill. 309.

At common law, one entitled to enter could do so with force and arms and retain possession by force.—City of Chicago v. Chicago S. S. Lines, supra.

12. Okl.—Coddington v. Andrews, 64 P.2d 666, 179 Okl. 63.
Or.—Reckard v. Ryan, 288 P. 1053, 133 Or. 108.
26 C.J. p 811 note 38.

Exercise of equitable jurisdiction not involved
Wash.—Yukon Inv. Co. v. Crescent Meat Co., 248 P. 377, 140 Wash. 136.
26 C.J. p 840 note 10.

13. Ala.—Harris v. Harris, 67 So. 465, 190 Ala. 619.
Ky.—Sayers & Muir Service Station v. Indian Refining Co., 100 S.W.2d 687, 266 Ky. 779.

14. Conn.—Orentlicherman v. Matarese, 121 A. 275, 99 Conn. 122.
Fla.—State ex rel. Rich v. Ward, 185 So. 846, 135 Fla. 885—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—City of Chicago v. Chicago S. S. Lines, 159 N.E. 301, 328 Ill. 309—Van Winkle v. Weston, 276 Ill.App. 66—Chicago Ry. Equipment Co. v. Wilson, 250 Ill. App. 231.
Ky.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.
Mont.—Herzog v. Texas Co., 294 P. 962, 88 Mont. 580.
Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
Ohio.—Martin v. Bircher, 188 N.E. 365, 46 Ohio App. 239.
Okl.—Wilson v. Davis, 78 P.2d 279, 182 Okl. 435.
Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
Utah.—Paxton v. Fisher, 45 P.2d 903, 86 Utah 408.
Va.—Southern Ry. Co. v. Lima Wood & Coal Co., 159 S.E. 69, 156 Va.

ly possessory in its nature,[15] so that ordinarily the immediate right to possession is all that is involved or can be determined.[16] If defendant wishes to enforce his title or his legal right to possession he must resort to the proper action at law for this purpose, see infra §§ 6, 7.

A forcible entry and detainer proceeding is not exclusive, but is cumulative of any other remedy that a party may have.[17] So the action does not supersede any available common-law remedy.[18]

A right of action for forcible entry and detainer exists only where the acts complained of come within the terms of the applicable statute.[19] Broadly speaking, the elements of the action, warranting recovery of possession, are plaintiff's prior possession of the property, see infra § 8, and an intrusion by defendant on such possession either forcibly or by threats, or peaceably without plaintiff's permission or consent.[20] The motive[21] or the good or bad faith of defendant in making the entry does not affect his liability and is not to be inquired into.[22]

As a rule, no particular contractual relation need exist to authorize restoration of the party entitled to possession.[23] Accordingly, unless the statute so provides, it is not limited to cases where the relation of landlord and tenant exists.[24]

829—Daily v. Rucker, 144 S.E. 466, 151 Va. 72.
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 811 note 41.
"The general purpose of the statutes relating to forcible entry and detainer, both in England and in this country, is that, regardless of the actual condition of the title to the property, the party in actual, peaceable, and quiet possession shall not be turned out by strong hand, violences, or terror. One who becomes guilty of a forcible entry, therefore, or of a forcible detainer after a peacable but unlawful entry, was not only made subject to indictment, but was required to restore possession to the party from whom the property was so taken or detained, and in a proper case to pay damages, notwithstanding the entrant may have had the admittedly superior title, or the better right to possession taken."—Hewitt v. State, 146 So. 578, 579, 108 Fla. 335.

Conspiracy not gist of action

In action for damages based on alleged acts of conspiracy and forcible entry and forcible detainer or trespass, averments of complaint respecting conspiracy are not gist of action, as that lies in wrongful and damaging acts done.—Dahlquist v. Mattson, 233 P. 883, 40 Idaho 378.

15. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.
Cal.—Anglo-California Nat. Bank of San Francisco v. Superior Court in and for Glenn County, 59 P.2d 1053, 15 Cal.App.2d 676.
Ill.—Wein v. Albany Park Motor Sales So., 38 N.E.2d 556, 312 Ill. App. 357.
Miss.—McCallum v. Gavin, 116 So. 94, 149 Miss. 885.
Mo.—Peoples Finance Corporation v. Lincoln, 131 S.W.2d 520, 345 Mo. 113—Noonan v. Mason, App., 285 S. W. 118—Porter v. Gibbs, App., 242 S.W. 1016—Slover v. Kramer, 232 S.W. 1110, 207 Mo.App. 470.
Okl.—Scissem v. Bradley, 29 P.2d 69, 167 Okl. 161.
Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.
Wyo.—Allen v. Houn, 219 P. 573, 580, 30 Wyo. 186, citing **Corpus Juris,** and denying rehearing 213 P. 757, 29 Wyo. 413.
26 C.J. p 812 note 42.

16. Ala.—Lipscomb v. Moore, 153 So. 393, 228 Ala. 365.
Cal.—Bank of America Nat. Trust & Savings Ass'n v. McLaughlin Land & Livestock Co., 105 P.2d 607, 40 Cal.App.2d 620, certiorari denied McLaughlin Land & Livestock Co. v. Bank of America Nat. Trust & Savings Ass'n, 61 S.Ct. 958, 313 U. S. 571, 85 L.Ed. 1529—California Products, Inc., v. Mitchell, 198 P. 646, 52 Cal.App. 312.
Ill.—Biebel Roofing Co. v. Pritchett, 25 N.E.2d 800, 373 Ill. 214, transferred, see 30 N.E.2d 196, 307 Ill. App. 247.
Ky.—Snyder v. Crutcher, 160 S.W. 2d 156, 290 Ky. 71—Conley v. Shepherd, 35 S.W.2d 5, 237 Ky. 128.
Minn.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.
Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
Okl.—Coddington v. Andrews, 64 P. 2d 666, 179 Okl. 63.
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Tex.—Mabin v. Fitzgerald, Civ.App., 45 S.W. 611.
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.

Matters not involved

(1) Forcible detainer would not lie to recover unpaid consideration not provided for by deed, although agreed on.—Bishop v. Armstrong, 14 S.W.2d 784, 228 Ky. 250.

(2) Action does not necessarily involve ownership of crops growing or grown by defendant during his occupancy, or right of plaintiff to recover damages on appeal bond given to supersede judgment in such action for rental value of premises in separate action thereafter instituted.—Douglas v. Cutlip, 246 P. 392, 118 Okl. 21.

(3) In action for unlawful detainer, court improperly rendered decree disposing of money and checks of defendant in hands of plaintiff.—Beman v. Rocky Ford Nat. Bank, 65 P.2d 708, 100 Colo. 64.

17. Cal.—Gilbert v. Peck, 121 P. 315, 162 Cal. 54, Ann.Cas.1913C 1349.
Tex.—Scott v. Hewitt, 90 S.W.2d 816, 127 Tex. 31, 103 A.L.R. 977—Holcombe v. Lorino, 79 S.W.2d 307, 124 Tex. 446, reversing, Lorino v. Holcombe, Civ.App., 71 S.W.2d 402.

18. Wyo.—Allen v. Houn, 219 P. 573, 582, 30 Wyo. 186, citing **Corpus Juris,** and denying rehearing 213 P. 757, 29 Wyo. 413.
26 C.J. p 812 note 45.

19. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.

20. Ala.—Jefferson County v. Parker, 100 So. 338, 211 Ala. 289.
Necessity of force see infra § 16.

Entry not shown

Defendant's removal of fence did not establish his entry upon plaintiffs' property without their consent, where fence had been leaning against defendant's carriage house, since under those circumstances he had a right to remove it.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.

21. Ill.—Baker v. Hays, 28 Ill. 387.

22. Cal.—California Products, Inc. v. Mitchell, 198 P. 646, 52 Cal.App. 312.
26 C.J. p 812 note 49.

23. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
26 C.J. p 811 note 41 [a].

24. Ill.—West Side Trust & Savings Bank v. Lopoten, supra.
Mo.—Bruner v. Stevenson, App., 73

§ 4. Statutory Provisions

Authorities are divided as to whether the statutes governing forcible entry and detainer are to be strictly construed or liberally construed. The legislative intent is controlling with respect to the amendment or repeal of such statutes, but in any case the law in force at the time of the commencement of the action governs.

According to some decisions, forcible entry and detainer statutes are highly penal in character, and in derogation of the common-law, and recoveries under them should be confined to cases strictly within their provisions.[25] It has been held, on the other hand, that proceedings under such statutes are remedial in character, and that, in order to render effectual the remedy provided, they should be liberally construed.[26]

The terms of a statute as to forcible entry and detainer will not be considered affected, repealed, or amended by other statutory provisions unless it directly appears that such is the legislative intent.[27]

By what law governed. The law in force at the time of the commencement of actions of the character under consideration, rather than that at the time of the entry, governs.[28]

§ 5. Right of Entry to Take Possession without Action

The fact that a party has title to realty and is entitled to immediate possession does not justify him in making a forcible entry to acquire such possession; but an owner has the right to make an entry in a peaceable, open manner.

Although one may have the title to realty and be justly entitled to the immediate possession thereof, yet if he enters by violence on the actual peaceable possession of another who has no title or right whatever, he is liable to an action of forcible entry and detainer.[29] The constructive possession which follows the title does not justify the owner in making a forcible entry.[30] On the other hand, the forcible entry and detainer statutes do not deprive an owner or one who bona fide claims title of the right of entry on to his land if effected in a peaceable, open manner.[31]

§ 6. Title

As a general rule, title to property is not involved and cannot be inquired into in actions of forcible entry and detainer, except as an incident tending to show the right of possession where such right is involved.

Except in the very few instances in which there is special statutory authority for adjudicating title,[32] title to the premises is not involved and can-

S.W.2d 413—Porter v. Gibbs, App., 242 S.W. 1016.
26 C.J. p 812 note 47.

Unlawful detainer
Under Remington Code 1915 § 812 subd 6, owner could maintain action for unlawful detainer against a person who went into possession without permission of the owner and without color of title, although no tenancy arose.—Lake Union Realty Co. v. Woolfield, 205 P. 14, 119 Wash. 331—Pacific Mut. Life Ins. Co. of California v. Munson, 196 P. 633, 115 Wash. 119.

25. Del.—Knight v. Haley, 176 A. 461, 6 W.W.Harr. 366—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.
Ill.—Biebel Roofing Co. v. Pritchett, 25 N.E.2d 800, 373 Ill. 214, transferred, see 30 N.E.2d 196, 307 Ill. App. 247—Craft v. Calmeyer, 274 Ill.App. 296—Cody Trust Co. v. Dittmar, 272 Ill.App. 167—Wentworth v. Sankstone, 233 Ill.App. 48.
Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814.
Mo.—Rust v. Dames, App., 142 S.W. 2d 797—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.
26 C.J. p 812 note 50.

Substantial compliance with method or procedure prescribed by statute is necessary.—White v. Veitch, 197 P. 983, 27 Wyo. 401.

Statute held inapplicable
Statute extending summary remedy for possession of property to cases where property has been sold was held inapplicable where party in possession raised complete issues as to title and right of possession in court of equity under which circumstances court had power not only to decide issues presented but to carry decrees into effect.—Furlott v. Security-First Nat. Bank of Los Angeles, 57 P.2d 952, 14 Cal.App.2d 118.

26. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—Truly Warner Co. v. Royal Indemnity Co., 259 Ill.App. 485.
Iowa.—Ashpole v. Delaney, 253 N.W. 30, 217 Iowa 792.

27. Colo.—Hewitt v. Landis, 225 P. 842, 75 Colo. 277.

Statute not self-sufficient
Where statute relating to forcible detention was not self-sufficient, it was held that the legislative intent was to have other chapters of the code on matters not covered apply thereto.—Robinson v. Riley, 159 N.E. 112, 25 Ohio App. 465.

Civil practice act
Where so provided, the statute governing civil practice generally applies to actions for forcible entry and detainer.—First Nat. Bank v. Bohnhorst, 27 N.E.2d 319, 305 Ill. App. 251—Wainscott v. Penikoff, 4 N.E.2d 511, 287 Ill.App. 78.

28. Wash.—Columbia & P. S. R. Co. v. Moss, 87 P. 951, 44 Wash. 589.

Reason for rule
Plaintiff has no vested right to a remedy; and as long as the remedy given satisfies the requirements of due process of law there can be no just ground for complaint.—Columbia & P. S. R. Co. v. Moss, supra.

29. Minn.—Mutual Trust Life Ins. Co. v. Berg, 246 N.W. 9, 187 Minn. 503.
Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453.
Tenn.—Cutshaw v. Campbell, 3 Tenn. App. 666.
Utah.—Paxton v. Fisher, 45 P.2d 903, 86 Utah 408.
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 815 note 62.

30. N.Y.—Oyster Bay v. Jacob, 96 N.Y.S. 620, 109 App.Div. 613.

31. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.

32. Cal.—Mortgage Guarantee Co. v. Smith, 50 P.2d 835, 9 Cal.App.2d 618.
26 C.J. p 812 note 51.

Element of remedy
Under some statutes, the question of title must be tried when controverted as a necessary element of the remedy of unlawful detainer.—

not be inquired into in actions of forcible entry and detainer,[33] or in an action for unlawful detainer;[34] and the secret equities between the parties are not matters for investigation.[35] If defendant has any title to the land it must be tried in some action proper for trying such questions.[36] So the fact that the title to the premises involved is in the government instead of in an individual does not affect the right to maintain an action of forcible entry and detainer.[37]

In any event, title may be inquired into only as an incident tending to show the right to possession,[38] where the right to possession under a particular statute may be involved, see infra § *7*.

§ 7. Right to Possession

As a general rule, the legal right to possession of the premises sought to be recovered is not involved in a forcible entry and detainer action, it being sufficient for plaintiff to establish actual peaceable possession at the time of the entry; but the right to possession may be inquired into incidentally or directly under some statutes.

For the same reason and as a corollary to the

Mortgage Guarantee Co. v. Smith, 50 P.2d 835, 9 Cal.App.2d 618—Nineteenth Realty Co. v. Diggs, 25 P.2d 522, 134 Cal.App. 278—Hewitt v. Justice's Court, 21 P.2d 641, 131 Cal. App. 439.

Rule in equity

It has been held that, although in forcible entry and detainer the title cannot be inquired into in an action at law, the rule is different in equity.—Brown v. Grayson, 24 S.W.2d 894, 160 Tenn. 374.

33. Ala.—Lipscomb v. Moore, 153 So. 393, 228 Ala. 365—Gault v. McCalley, 149 So. 841, 227 Ala. 381—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.

Ark.—Black v. Handley, 240 S.W. 411, 158 Ark. 640.

Cal.—Bank of America Nat. Trust & Savings Ass'n v. McLaughlin Land & Livestock Co., 105 P.2d 607, 40 Cal.App.2d 620, certiorari denied McLaughlin Land & Livestock Co. v. Bank of America Nat. Trust & Savings Ass'n, 61 S.Ct. 958, 313 U. S. 571, 85 L.Ed. 1529—Delpy v. Masayoshi Ono, 70 P.2d 960, 22 Cal. App.2d 301—Anglo-California Nat. Bank of San Francisco v. Superior Court in and for Glenn County, 59 P.2d 1053, 1054, 15 Cal.App.2d 676, citing **Corpus Juris**—Clement v. Reynolds, 4 P.2d 286, 117 Cal.App. 484—Hedden v. Waldeck, 265 P. 344, 89 Cal.App. 494—California Products, Inc., v. Mitchell, 198 P. 646, 52 Cal.App. 312.

Ill.—Biebel Roofing Co. v. Pritchett, 25 N.E.2d 800, 373 Ill. 214, transferred, see 30 N.E.2d 196, 307 Ill. App. 247—Wein v. Albany Park Motor Sales Co., 38 N.E.2d 556, 312 Ill.App. 357—Cohn v. Litwin, 35 N.E.2d 410, 311 Ill.App. 55—Dillow v. Hileman, 21 N.E.2d 632, 300 Ill.App. 509—Goldblatt Bros. v. Hoefeld, Inc., 1 N.E.2d 573, 284 Ill. App. 31—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231—Hooper v. Buvidas, 239 Ill.App. 596.

Ky.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71—Lunsford v. Hughes, 130 S.W.2d 39, 279 Ky. 175—Moore v. Ramsey, 114 S.W.2d 1101, 272 Ky. 582—Baker v. Burton, 104 S.W.2d 1081, 268 Ky. 358—Pemberton v. Hardin, 80 S.W.2d 589, 258 Ky. 538—Conley v. Shepherd, 35 S.W.2d 5, 237 Ky. 128.

Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814—McCallum v. Gavin, 116 So. 94, 149 Miss. 885.

Mo.—Peoples Finance Corporation v. Lincoln, 131 S.W.2d 520, 345 Mo. 113—McAdams v. Austin, App., 72 S.W.2d 513—Kimes v. Conran, App., 9 S.W.2d 549—Koger v. Ward, App., 243 S.W. 413.

Mont.—State v. Justice's Court of Union Tp., 88 P.2d 1, 4, 108 Mont. 12, citing **Corpus Juris**.

Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453.

N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.

Okl.—Wilson v. Davis, 78 P.2d 279, 182 Okl. 435—Scissem v. Bradley, 29 P.2d 69, 167 Okl. 161.

Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.

Puerto Rico.—Fajardo Sugar Co. v. Torres, 27 Puerto Rico 337—Colon v. Colon, 27 Puerto Rico 81.

S.C.—Frederick v. Chapman, 142 S.E. 247, 144 S.C. 137.

Tenn.—Hunt v. Foley, 9 Tenn.App. 96.

Tex.—Benevides v. Lucio, Com.App., 13 S.W.2d 71, reversing, Benavides v. Lucio, Civ.App., 297 S.W. 476—Farrell v. Sien, Civ.App., 145 S.W. 2d 606—Null v. De Young, Civ.App., 71 S.W.2d 335.

Va.—Daily v. Rucker, 144 S.E. 466, 151 Va. 72.

Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.

Wyo.—Allen v. Houn, 219 P. 573, 30 Wyo. 186, denying rehearing 213 P. 757, 29 Wyo. 413.

26 C.J. p 812 note 52, p 832 notes 32, 35.

Entry by holder of title see supra § 5.

34. Idaho.—Richardson v. King, 10 P.2d 323, 51 Idaho 762.

Mo.—Peoples Finance Corporation v. Lincoln, 131 S.W.2d 520, 345 Mo. 113.

Mont.—State v. Justice's Court of Union Tp., 88 P.2d 1, 4, 108 Mont. 12, citing **Corpus Juris**.

26 C.J. p 814 note 53.

35. Minn.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.

Miss.—Clark v. Bourgeois, 38 So. 187, 86 Miss. 1.

Mo.—Porter v. Gibbs, App., 242 S.W. 1016.

Neb.—Northwestern State Bank of Hay Springs v. Hanks, 225 N.W. 119, 118 Neb. 442.

S.D.—Aegerter v. Hayes, 226 N.W. 345, 55 S.D. 337.

36. Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.

Iowa.—Citizens' State Bank of Panora v. Snyder, 131 N.W. 675.

Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.

S.D.—Raich v. Weisman, 234 N.W. 664, 58 S.D. 4, denying rehearing and reversing 231 N.W. 897, 57 S. D. 182.

26 C.J. p 814 note 55.

Action of forcible entry and unlawful detainer in justices' court changed to ejectment when transferred as involving title see Actions § 40 a.

Ejectment as proper remedy in place of forcible entry and detainer see Ejectment § 5.

37. Va.—Mears v. Dexter, 11 S.E. 538, 86 Va. 828.

26 C.J. p 814 note 59.

38. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.

Ark.—Black v. Handley, 240 S.W. 411, 158 Ark. 640.

Cal.—Anglo-California Nat. Bank of San Francisco v. Superior Court in and for Glenn County, 59 P.2d 1053, 15 Cal.App.2d 676—Nineteenth Realty Co. v. Diggs, 25 P. 2d 522, 134 Cal.App. 278.

Ky.—Pemberton v. Hardin, 80 S.W.2d 589, 258 Ky. 538.

Miss.—McCallum v. Gavin, 116 So. 94, 149 Miss. 885.

Mont.—State v. Justice's Court of Union Tp., Mont., 88 P.2d 1, 5, 108 Mont. 12, citing **Corpus Juris**.

Or.—Schroeder v. Woody, 109 P. 597, 166 Or. 93.

W.Va.—Wiles v. Walker, 106 S.E. 423, 88 W.Va. 147.

Wyo.—Allen v. Houn, 219 P. 573, 30 Wyo. 186, denying rehearing 213 P. 757, 29 Wyo. 413.

26 C.J. p 815 note 60.

rule stated supra § 6 that title to the premises is not involved in actions for forcible entry and detainer, the general rule also is that the right to possession of the premises is not involved,[39] that is, the legal right to possession as distinguished from plaintiff's present right of possession based on his prior actual possession of which he is deprived;[40] and it is sufficient for plaintiff merely to establish actual peaceable possession at the time of the forcible entry or detainer complained of.[41] If defendant wishes to enforce his legal right to possession he must resort to the proper action at law to do so.[42]

However, the right to possession, as well as the title, may be inquired into incidentally under the provisions of some of the statutes as to forcible entry and detainer, and kindred actions,[43] and especially under statutes which make right to possession an element of protection of the particular statute.[44] So, where the action is not for a forcible entry and detainer, but for an unlawful detention of the premises after a lawful or peaceable entry, it is held that only one who shows that he is entitled to possession at the commencement of the action may recover such possession.[45] Under the express terms of some statutes, only persons "entitled to the premises,"[46] or persons having "right to possession,"[47] or persons "lawfully entitled to possession"[48] may fall within the protection of the statutes.

§ 8. Plaintiff's Prior Possession

The right to maintain an action for forcible entry and detainer on the basis of actual possession in plaintiff at the time of the entry or detainer irrespective of the legal right to possession is considered supra § 7. The necessity for establishing prior possession as a condition to recovery of the property and the character of such necessary pos-

39. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.
Cal.—Clement v. Reynolds, 4 P.2d 286, 117 Cal.App. 484—California Products, Inc. v. Mitchell, 198 P. 646, 52 Cal.App. 312.
Colo.—Hendron v. Bolander, 74 P.2d 706, 101 Colo. 414.
Ky.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.
Mich.—Westminster Realty Co. v. Reuling, 255 N.W. 290, 267 Mich. 515.
Mo.—Kimes v. Conran, App., 9 S.W. 2d 549—Fink v. Schmidt, App., 245 S.W. 566.
Mont.—State v. Justice's Court of Union Tp., Mont., 88 P.2d 1, 4, 108 Mont. 12, citing **Corpus Juris.**
Okl.—Johnson v. Connaway, 88 P.2d 338, 184 Okl. 516—Wilson v. Davis, 78 P.2d 279, 182 Okl. 435.
Wash.—Randolph v. Husch, 294 P. 236, 159 Wash. 490.
26 C.J. p 815 note 69.

40. Ky.—Moore v. Ramsey, 114 S.W. 2d 1101, 272 Ky. 582.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 816 note 70.

Basis of right of action

The right to maintain action for unlawful detention of real property is not determined by plaintiff's right of possession, but by whether he has been in possession and such possession has been taken from him by force, or, having been obtained from him peaceably, is unlawfully withheld.
Ark.—Grammer v. Blansett, 124 S.W. 1037, 83 Ark. 421.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
Ky.—Belcher v. Howard, 280 S.W. 131, 212 Ky. 816.
Okl.—Johnson v. Connaway, 88 P.2d 338, 184 Okl. 516—Clark v. Keith, 207 P. 87, 86 Okl. 156.

"Right to" and "right of" possession distinguished

(1) The "right to possession" is a right ordinarily resting on title, while that "right of possession" which is the basis of the action of forcible entry and detainer is the right of a person in possession not to be forcibly dispossessed, although he may have obtained or retained possession by force.—Cahill v. Pine Creek Oil Co., 130 P. 64, 38 Okl. 568.

(2) In unlawful detainer action, sole question involved is right of possession, and no other issues may be injected.—Richardson v. King, 10 P.2d 323, 51 Idaho 762.

41. Ky.—Belcher v. Howard, 280 S. W. 131, 212 Ky. 816.
Mo.—Koger v. Ward, App., 243 S.W. 413—Avero v. Wells, App., 232 S.W. 1069.
N.Y.—Schick v. Wolf, 202 N.Y.S. 601, 207 App.Div. 652.
Okl.—Johnson v. Connaway, 88 P.2d 338, 184 Okl. 516.
Wash.—Randolph v. Husch, 294 P. 236, 159 Wash. 490.
26 C.J. p 817 note 82.

42. Okl.—Wilson v. Davis, 78 P.2d 279, 182 Okl. 435.
26 C.J. p 814 note 55, p 816 note 72.

43. Mont.—State v. Justice's Court of Union Tp., 88 P.2d 1, 108 Mont. 12.
W.Va.—Wiles v. Walker, 106 S.E. 423, 88 W.Va. 147.
26 C.J. p 816 note 74.

44. Mont.—State v. Justice's Court of Union Tp., 88 P.2d 1, 108 Mont. 12.
26 C.J. p 816 note 75.

45. Ky.—Moore v. Ramsey, 114 S.W. 2d 1101, 272 Ky. 582.
N.J.—Seidman v. John Craven & Sons Co., 143 A. 726, 6 N.J.Misc. 1062.
26 C.J. p 816 note 76.

Right to possession shown

(1) Where plaintiff suing for unlawful detainer of farm lands was in possession thereof under executory contract to purchase, sheriff's sale of plaintiff's interest in property did not divest plaintiff of right to possession during year of redemption.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.

(2) Suit was held "determined," within contract providing that claimants would put plaintiffs in possession until such determination; and hence claimants were entitled to maintain unlawful retainer.—Olson v. Gehlert, Mo.App., 3 S.W.2d 279.

Right to possession not shown

Mo.—Widick v. Vandergrift, App., 37 S.W.2d 663.

46. Mass.—Page v. Dwight, 48 N.E. 850, 170 Mass. 29, 39 L.R.A. 418.
Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.

47. Ind.—Hammond Savings & Trust Co. v. Boney, 107 N.E. 480, 61 Ind.App. 295.
26 C.J. p 815 note 66.

48. N.J.—Seidman v. John Craven & Sons Co., 143 A. 726, 6 N.J.Misc. 1062.
26 C.J. p 815 note 67.

Plaintiff held not lawfully entitled to possession

Mich.—Union Guardian Trust Co. v. Stillman, 1 N.W.2d 439, 300 Mich. 27.

session is considered infra §§ 9–15.

Examine Pocket Parts for later cases.

§ 9. —— Necessity

Unless otherwise provided by the statute, only one who was in possession at the time of the wrongful entry and detainer may maintain an action to recover such possession.

As appears supra § 3, an action of forcible entry and detainer is strictly possessory in its nature, and, as a general rule, only one who was in peaceful and exclusive possession of the premises in controversy at the time of the acts complained of can maintain an action to recover possession.[49] Such possession need only exist prior to the inception of the wrongful possession by defendant, that is, prior to the beginning of the unlawful entry and detainer.[50]

On the other hand, under the express provisions of some statutes, one unlawfully deprived of possession of property to which he is entitled may maintain an action for the recovery thereof regardless whether he was theretofore in possession or not.[51] Accordingly, where a statute so provides, a person entitled to possession of property may be restored thereto when without right or title entry has been made by another into vacant or unoccupied lands or tenements.[52]

§ 10. —— Character of Possession in General

As a rule, it is essential that plaintiff's prior possession should have been actual, peaceable, exclusive, adverse, and continuous; but each case rests on its own facts in determining what constitutes possession.

Every action for forcible entry and detainer rests on its own facts in determining what constitutes possession by plaintiff.[53] As a rule, however, it is essential that plaintiff's prior possession should have been actual, see infra § 11, peaceable,[54] exclusive,[55] adverse,[56] and continuous[57] in the sense that it must not be an interrupted or scrambling possession, see infra § 13, although it is usually not essential that the possession should have lasted for any definite period of time.[58] Under some statutes, however, possession for a specified period of time is sufficient and necessary to sustain the action,[59] and these statutes do not conflict with the federal statutes relating to homestead entries.[60]

Ordinarily, the manner in which plaintiff obtained possession of which he has been forcibly ousted is immaterial;[61] but it has been held that possession obtained by fraud or by stealth cannot be made the predicate of an action of forcible entry and de-

49. Ala.—Whaley v. Wynn, 95 So. 16, 208 Ala. 342.
Del.—Phillips v. Gumby, 117 A. 383, 1 W.W.Harr. 462.
Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ill.—Layzod v. Martin, 26 N.E.2d 423, 305 Ill.App. 1—Davis v. Robinson, 23 N.E.2d 816, 302 Ill.App. 365.
Mo.—Roxana Petroleum Corporation v. Smith, App., 24 S.W.2d 652.
N.J.—Seidman v. John Craven & Sons Co., 143 A. 726, 6 N.J.Misc. 1062.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
26 C.J. p 817 notes 79, 81, p 818 note 93.
Actual possession as constituting sufficient ground for recovery in forcible entry and detainer action see supra § 7.

50. Ala.—Whaley v. Wynn, 95 So. 16, 208 Ala. 342.

51. Fla.—Gray v. Callahan, 197 So. 396, 143 Fla. 673—State ex rel. Rich v. Ward, 185 So. 846, 135 Fla. 885.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—City Nat. Bank & Trust Co. of Chicago v. Wainauskas, 13 N.E.2d 835, 294 Ill.App. 604.
26 C.J. p 816 note 78.

52. Ill.—Davis v. Robinson, 23 N.E.2d 816, 302 Ill.App. 365.
Vacancy not shown
To warrant recovery under such a statute the property must not be in the possession of any one, and plaintiff cannot succeed where the property was at no time vacant.—Davis v. Robinson, supra.

53. N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.

54. Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 1098, 19 Tenn.App. 327, citing **Corpus Juris.**
The words "lawfully possessed" as used in a statute relating to forcible entry and detainer mean "peaceable" possession.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.

55. Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 1098, 19 Tenn.App. 327, citing **Corpus Juris**—Westmoreland v. Farmer, 7 Tenn.App. 385, 388, citing **Corpus Juris.**
An exception to the rule occurs when one tenant in common has been dispossessed by his cotenant.
Ill.—Haas v. Juul, 178 Ill.App. 397.
Mo.—Bixeman v. Reichel, App., 187 S.W. 269.

56. Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 1098, 19 Tenn.App. 327, citing **Corpus Juris.**
26 C.J. p 817 note 86.

57. Tenn.—Jones v. Czaza, supra, citing **Corpus Juris.**
26 C.J. p 817 note 87.

58. Tenn.—Jones v. Czaza, supra, citing **Corpus Juris.**
26 C.J. p 817 note 89.

59. Wash.—Randolph v. Husch, 294 P. 236, 159 Wash. 490.
Five days
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 818 note 91.

60. U.S.—Denee v. Ankeny, 38 S.Ct. 226, 246 U.S. 208, 62 L.Ed. 669, affirming, Morrison v. Gunning, 157 P. 1199, 91 Wash. 693, affirming Ridpath v. Denee, 148 P. 15, 85 Wash. 322.

61. Ky.—Belcher v. Howard, 280 S.W. 131, 212 Ky. 816.
Possession obtained by injunction subsequently dissolved
Ky.—Belcher v. Howard, 280 S.W. 131, 212 Ky. 816.
Peaceable entry
Judgment was properly entered for owner of premises whose entry was peaceable, as against one occupying premises without lease or rental agreement.—Hendershot v. Feldpausch, 225 N.W. 485, 247 Mich. 48.

tainer.[62] Acts which contemplate a purely prospective possession are insufficient to support a recovery.[63]

§ 11. —— Actual Possession

a. In general
b. What constitutes actual possession

a. In General

Recovery for forcible entry and detainer may be had only where actual possession by plaintiff has been interfered with.

It is only an actual possession that has been interfered with that may be restored by an action for forcible entry and detainer.[64] A mere semblance of possession,[65] or mere constructive possession such as the law in many cases imputes to the owner of the legal title,[66] is not sufficient. Such actual possession is sufficient and necessary as would, if continued for the necessary period, vest title in plaintiff.[67]

b. What Constitutes Actual Possession

Generally, actual possession consists in exercising acts of dominion over the land in dispute and in using it, and the effect of particular acts varies with the situation of the parties, the character of the land, and the purpose to which it is adapted.

Generally speaking the actual possession which is sufficient consists in exercising acts of dominion over the land in dispute and in making the ordinary use of it, and it may consist in, and be shown by, a great number and combination of acts, the character of which must necessarily vary with the situation of the parties, the character of the land, and the purpose to which it is adapted.[68]

Inclosure. A sufficient inclosure is of itself a sufficient means of taking and holding actual possession of land without residence, cultivation, or other acts of dominion over it.[69] However, there may be actual possession where a person incloses land partly by fences and partly by the use of natural barriers.[70] Moreover, there may be an actual possession without fences or inclosures of any kind,[71] although in such cases it must appear that plaintiff has exercised exclusive dominion and control over that portion of land of which defendant took possession.[72]

Cultivation. A substantial cultivation of the land

62. Tenn.—Jones v. Czaza, 86 S.W. 2d 1096, 19 Tenn.App. 327.

63. N.M.—Heron v. Ramsey, 117 P. 2d 247, 45 N.M. 491.

64. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ill.—Whitehill v. Cooke, 140 Ill.App. 520.
Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 19 Tenn.App. 327.
26 C.J. p 818 note 93.
"The person who seeks to avail himself of this remedy must have actual possession of the premises, it must be something more than a mere mental state. It must be of such a character that the law will frown down upon anyone interfering with the possession for the reason that such interference would tend to create a breach of the peace."—Heron v. Ramsey, 117 P.2d 247, 250, 45 N.M. 491.

Trespasser
If one is actually in possession of land, the fact that a prior trespasser gets possession does not render the entry of a subsequent trespasser any the less a forcible and wrongful entry as to the first party named, and he may maintain his writ of forcible entry against the latter, equally as against the first trespasser.—Alexander v. Fowler, 6 Ky.L. 444, 13 Ky.Op. 120—26 C.J. p 818 note 95.

65. Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 19 Tenn.App. 327.

66. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
26 C.J. p 818 notes 93, 93½, p 857 note 90.

67. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ky.—Conley v. Shepherd, 35 S.W.2d 5, 237 Ky. 128.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
26 C.J. p 819 notes 96, 97.

68. Ariz.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.
Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Okl.—Johnson v. Connaway, 88 P.2d 338, 339, 184 Okl. 516, quoting **Corpus Juris.**
26 C.J. p 819 note 98.

Use and dominion
"In order to take possession of land there must be some immediate use made of it. The use and dominion over the land should be such as the land will warrant. Merely walking on the land and posting a sign for others to keep off, or merely cutting some posts on the land do not . . . constitute possession."—Heron v. Ramsey, 117 P.2d 247, 250, 45 N.M. 491.

Doors open and unlocked
Possession of a house, by plaintiff in forcible entry and detainer, was not prevented by the fact that doors were left open and unlocked.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.

Locating mining claim
One who locates part of a public domain as a claim by monumenting it and causes notice of location to be recorded under the Mining Law and does proper assessment work yearly has actual possession within the rule as against a squatter thereon, although he had never been personally on the claim.—Foster v. Black, 176 P. 845, 20 Ariz. 64.

69. Cal.—Knowles v. Crocker Estate Co., 86 P. 715, 149 Cal. 278.
26 C.J. p 819 note 99.

Possession not shown
Where plaintiff went on unfenced grazing land and, for his own purposes, located one boundary line thereof, and plaintiff later returned to land and posted "No Trespass" signs and sent his employees on land to cut fence posts, plaintiff did not have such "possession" as would authorize him to maintain a forcible entry and detainer action against defendant who subsequently went on land and put livestock thereon.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.

70. Ill.—Hammond v. Doty, 56 N.E. 371, 184 Ill. 246, affirming 84 Ill. App. 19.
26 C.J. p 820 note 2.

71. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Mo.—Koger v. Ward, App., 243 S.W. 413.
26 C.J. p 820 note 3.

72. Cal.—McCormick v. Sheridan, 19 P. 419, 77 Cal. 253.

in controversy,[73] especially where there are other acts denoting ownership,[74] such as fencing the premises,[75] or fencing the premises and building a stable thereon, constitutes actual possession;[76] but mere entry on the land and plowing a few furrows across a portion of it does not make out such a case of actual possession on his part as to warrant a verdict in his favor.[77]

Taking natural products of land. A mere entry on land and cutting timber thereon does not of itself constitute actual possession,[78] especially where the cutting of timber is at widely separated intervals of time[79] or where the whole tract on a part of which the entry was made is within the boundaries of defendant's deed and part of it in the actual possession of defendant and his tenants;[80] but in connection with other circumstances it may form a very material link in the chain of evidence to establish actual possession.[81]

The grazing of stock over uninclosed lands has been held not such possession of any specific portion of the lands in the owner of the stock as will enable him to maintain forcible entry and detainer;[82] but the use of land for pasturing and ranging live stock taken in connection with other acts may constitute sufficient possession on which to base the action, as where the land used for pasture is inclosed,[83] or where in addition to pasturing the stock on the premises the owner of the stock locks the doors of the house thereon and closes the windows.[84]

Payment of taxes. Payment of taxes on the land does not constitute actual possession of it;[85] but the requirements as to possession are satisfied where in addition to payment of taxes the party paying them had a deed for the land and continuously cut timber on it for a period of twenty years.[86]

Actual occupancy or personal presence. Mere occupancy or personal presence on the premises in dispute is not sufficient to constitute the requisite possession.[87] On the other hand actual pedis possessio or residence on the premises at the time of the entry complained of is not essential.[88] The owner is not bound to be continually on his land either in person or by agent, or to station his servants there to keep intruders away.[89]

The possession to which the summary remedy applies is not confined to the pedis possessio or actual inclosure of the occupant.[90] It applies to any possession which is sufficient to sustain an action of trespass,[91] and may apply in a case where trespass will not lie, as against the owner of land who may defend against an action of trespass by the plea of liberum tenementum.[92] An entry, coupled with such acts of open and visible ownership as clearly indicate his intention to take and hold permanent possession under claim of right to exclusive possession, will be sufficient to enable him to maintain this form of action to repel an unlawful intrusion.[93]

Possession of part under claim to whole tract. One who is in possession of part of a tract of land under claim and color of title to the whole is by intendment of law in possession of the whole tract lying within the boundaries of his colorable title, or at least of so much as is not in the adverse possession of others; and such possession will entitle him to maintain an action of forcible entry and detainer against one who makes a forcible entry on any part of the tract not adversely held by oth-

73. Mo.—Koger v. Ward, App., 243 S.W. 413.
26 C.J. p 820 note 5.

74. Ariz.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.
26 C.J. p 820 note 6.

75. Neb.—Galligher v. Connell, 53 N.W. 383, 35 Neb. 517.

76. Cal.—Valencia v. Couch, 32 Cal. 339, 91 Am.D. 589.

77. Mo.—Edwards v. Cary, 60 Mo. 572.

78. N.M.—Heron v. Ramsey, 117 P. 2d 247, 45 N.M. 491.
26 C.J. p 820 note 11.

79. Ala.—Chessen v. Harrelson, 24 So. 716, 119 Ala. 435.
26 C.J. p 820 note 12.

80. Ky.—Childers v. Hieronymus, 105 S.W. 979, 32 Ky.L. 394.

81. Mo.—Powell v. Davis, 54 Mo. 315.

82. Cal.—Buel v. Frazier, 38 Cal. 693.

83. Tenn.—Hopkins v. Calloway, 3 Sneed 11.

84. Tenn.—Davidson v. Phillips, 9 Yerg. 93, 30 Am.D. 393.

85. Colo.—Jenkins v. Tynon, 27 P. 893, 1 Colo.App. 133.
26 C.J. p 820 note 19.

86. Ill.—Pensoneau v. Bertke, 82 Ill. 161.

87. N.M.—Heron v. Ramsey, 117 P. 2d 247, 45 N.M. 491.
26 C.J. p 820 note 23.

88. Ariz.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.
Fla.—Adelhelm v. Dougherty, 176 So. 775, 129 Fla. 680—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Mo.—Koger v. Ward, App., 243 S.W. 413.
26 C.J. p 820 note 24.

89. Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Okl.—Johnson v. Connaway, 88 P.2d 338, 339, 184 Okl. 516, quoting **Corpus Juris.**

90. Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 820 note 24.

Tenancy

Plaintiff may hold sole and exclusive possession of property as against defendant, even though part of property is occupied by tenants.—Sunday v. Moore, supra.

91. Va.—Olinger v. Shepherd, 12 Gratt. 462, 53 Va. 462.
26 C.J. p 821 note 26.

92. Ill.—Ft. Dearborn Lodge v. Klein, 3 N.E. 272, 115 Ill. 177, 56 Am.R. 133.
26 C.J. p 821 note 27.

93. Okl.—Johnson v. Connaway, 88 P.2d 338, 339, 184 Okl. 516, quoting **Corpus Juris.**
26 C.J. p 821 note 29.

ers.[94] Also this possession is sufficient to authorize an action of forcible detainer.[95] However, actual possession of an inclosed contiguous tract is not constructive possession of an unfenced tract acquired under another grant.[96] Also, where the occupant is a mere disseizor, his possession for the purposes of this action must be confined to the land actually occupied.[97]

§ 12. —— Peaceable Possession without Right

Unless otherwise provided by statute, a bare possession without right, if unlawfully invaded by force, will be protected and restored.

Except under some statutes restricting recovery for forcible entry and detainer to one having the legal right to possession,[98] it is generally held that even a bare possession without right, if unlawfully invaded by force, will be protected and restored.[99] Indeed, recovery may be had even against the owner or lessee of the premises who is legally entitled to possession, if plaintiff was in actual possession at the time of the forcible ouster,[1] and it is no defense that his own possession originated in a trespass.[2] Any peaceable possession is a legal possession as against a wrongdoer who forcibly ejects the occupant.[3]

§ 13. —— Scrambling or Interrupted Possession

A mere scrambling or interrupted possession is insufficient to warrant recovery for forcible entry and detainer.

As appears supra §§ 10, 11, plaintiff's prior possession must have been actual, peaceable, and exclusive; the action for forcible entry and detainer cannot be maintained on a mere scrambling or interrupted possession.[4] Where one in the peaceable possession of premises is forcibly ousted therefrom and subsequently himself forcibly regains possession, the person who had ousted him cannot treat the temporary possession he had himself gained by force as lawful, and on that ground maintain an action for forcible entry on himself.[5]

§ 14. —— Possession by Agent or Servant

Generally, one in possession by an agent or servant has sufficient possession to warrant recovery for forcible entry and detainer.

As a general rule, one in possession of property by an agent or servant may maintain an action of forcible entry and detainer in his own name.[6] The actual personal presence of the employer is not required to constitute possession in him; and the employee's possession is that of the employer.[7] It has been held, however, that a person whose occupancy of land is through his servants and who has never been in possession cannot maintain an action under a statute providing for recovery of property from one who unlawfully detains it after entering during the absence of the "occupant."[8] One in actual possession of land is in no way affected in his rights by the guilty acts of an employee in possession in selling the improvements on the land.[9]

§ 15. —— Abandonment of Possession before Entry Complained of

Forcible entry and detainer may not be maintained

94. Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 821 note 31.

95. Ill.—Nauman v. Burch, 91 Ill. App. 48.

96. Tenn.—Westmoreland v. Farmer, 7 Tenn.App. 385.

97. Ky.—Belcher v. Howard, 280 S. W. 131, 212 Ky. 816.
26 C.J. p 822 notes 33, 34.

98. Mass.—Page v. Dwight, 48 N. E. 850, 170 Mass. 29, 39 L.R.A. 418.
26 C.J. p 822 note 35.

Presumption of right in possessor

Under a statute providing that an entry without the consent of the person having actual possession shall be considered a forcible entry, such actual possession must be capable of bearing a presumption of right in the possessor, and one who unlawfully takes possession cannot recover as against the person formerly in possession who has retaken it.—Benevides v. Lucio, Tex.Com.App., 13 S. W.2d 71, reversing Benavides v. Lucio, Civ.App., 297 S.W. 476.

99. Wash.—Randolph v. Husch, 294 P. 236, 159 Wash. 490—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 822 note 36.

1. Wash.—Sunday v. Moore, supra.
26 C.J. p 822 note 37.

2. Fla.—Greeley v. Spratt, 19 Fla. 644.
26 C.J. p 822 note 38.

3. Cal.—California Products, Inc., v. Mitchell, 198 P. 646, 52 Cal.App. 312.
26 C.J. p 822 note 39.

Other statement of rule

The party having peaceable possession is entitled to hold it until divested by the judgment of a court of competent jurisdiction.

Kan.—Doty v. Cone, 115 P. 977, 85 Kan. 1.

Ky.—Holman v. Parsons, 172 S.W. 920, 162 Ky. 454.

4. Tenn.—Jones v. Czaza, 86 S.W.2d 1096, 1098, 19 Tenn.App. 327, citing **Corpus Juris.**
26 C.J. p 822 note 44.

Where two parties are struggling for possession of unimproved lands, neither can maintain an action of forcible entry and detainer against the other, until he has acquired an actual possession which has ripened into peaceable occupation.—Voll v. Butler, 49 Cal. 74.

5. Mass.—Lawton v. Savage, 136 Mass. 111.
26 C.J. p 823 note 46.

6. Ala.—Whaley v. Wynn, 95 So. 16, 208 Ala. 342.
Okl.—Johnson v. Connaway, 88 P. 2d 338, 184 Okl. 516.
26 C.J. p 824 note 47.

7. Cal.—Baker v. Dickson, 62 Cal. 19.

8. Cal.—Hammel v. Zobelein, 51 Cal. 532.

9. Ariz.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.

where plaintiff, before the entry complained of, abandoned possession of the property in question with the intention of not returning thereto.

The possession necessary to entitle one to recover for forcible entry and detainer does not exist where plaintiff voluntarily abandoned the possession of the premises in controversy before the entry complained of.[10] This, however, is a question of intention and not a question of time, except as far as the jury are entitled to consider lapse of time in connection with all the other facts and circumstances tending to show claim or nonclaim on the part of plaintiff.[11] It must be made to appear that he relinquished possession without any intention of returning or making further use of the premises.[12]

§ 16. Force on Part of Defendant

Intrusion on plaintiff's possession as an element of forcible entry and detainer is considered supra § 3. The necessity that the entry or detainer be forcible and the sufficiency of particular acts to constitute force are considered infra §§ 17–19.

Examine Pocket Parts for later cases.

§ 17. —— Necessity

a. In general
b. Exceptions to rule

a. In General

As a general rule, actual or threatened force by defendant is essential to support an action for forcible entry and detainer or an action of forcible detainer.

Except when otherwise provided by statute, force, either actually applied or justly to be feared from the conduct of defendant, is essential to support an action for forcible entry and detainer,[13] or an action of forcible detainer.[14] Accordingly, if a person entitled to possession enters peaceably, he is not liable to an action of forcible entry and detainer,[15] and, having gained possession peaceably, he may resist forcibly an attempt by the former occupant to retake possession.[16] Where, however, one peaceably enters on premises, but, through force, fear of personal violence, or threats, keeps one entitled to possession out of it, the former is subject to an action for forcible detainer.[17]

b. Exceptions to Rule

Where so provided by statute, the general rule as to the necessity of force by defendant as an element of forcible entry and detainer does not apply.

In some jurisdictions there are exceptions to the general rule stated supra subdivision a of this section as to the force necessary to maintain actions of this character.

Entry against will of occupant. In some jurisdictions the rule is that to maintain forcible entry and detainer it is not necessary that actual force or violence be used in taking possession of the premises, but that any entry which is against the will or consent of the occupant is a forcible entry;[18] and to constitute a forcible entry it is not necessary that the entry should have been against the "expressed will" of the party in possession.[19] It has been held, however, that, where statutes of this character are in force, to constitute a forcible detainer there must be an actual force with a strong hand except where the parties stand in certain relationships.[20]

10. Tenn.—Hopkins v. Calloway, 3 Sneed 11.
26 C.J. p 824 note 50.
Abandonment of possession as defense see infra § 26.

11. W.Va.—Mitchell v. Carder, 21 W.Va. 277.
26 C.J. p 824 note 51.

12. Mo.—King v. St. Louis Gaslight Co., 34 Mo. 34, 81 Am.D. 68.
26 C.J. p 824 note 52.
A mere temporary absence is not an abandonment, and the actual possession continues in the person so absent so as to enable him to maintain an action of forcible entry and detainer against those who take possession during such absence.—Lewis v. Yoakum, Tex.Civ.App., 32 S.W. 237—26 C.J. p 824 note 52 [a].

13. Ala.—Jefferson County v. Parker, 100 So. 338, 211 Ala. 289.
Cal.—Baxley v. Western Loan & Building Co., 27 P.2d 387, 135 Cal. App. 426.
Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.
La.—Booker v. McKnight, App., 179 So. 332.
Mich.—Prestage v. Hanley, 242 N.W. 851, 259 Mich. 97—Christian v. Amster, 235 N.W. 199, 253 Mich. 400.
Or.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.
Va.—Southern Ry. Co. v. Lima Wood & Coal Co., 159 S.E. 69, 71, 156 Va. 829, citing **Corpus Juris.**
26 C.J. p 817 note 81, p 824 note 54.

14. Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.
26 C.J. p 817 note 81, p 825 note 55.

15. Cal.—Baxley v. Western Loan & Building Co., 27 P.2d 387, 135 Cal. App. 426.
Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
26 C.J. p 825 note 56, p 836 notes 15–17.

16. Ark.—Winn v. State, 18 S.W. 375, 55 Ark. 360.
26 C.J. p 825 note 57.

17. Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
26 C.J. p 826 note 58.

18. Ariz.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.
Ill.—Harper v. Sallee, 34 N.E.2d 860, 376 Ill. 540, 135 A.L.R. 189, affirming 26 N.E.2d 987, 305 Ill.App. 85, transferred, see 23 N.E.2d 27, 372 Ill. 199.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
26 C.J. p 826 note 61.
Symbolic delivery
Delivery of key by tenant to defendant on demand constituted symbolic delivery of possession and was "forcible entry," where it was without owner's consent.—Conley v. Shepherd, 35 S.W.2d 5, 237 Ky. 128.

19. Mo.—Tolbert v. Kendrick, 77 Mo.App. 272.

20. Ky.—Cammack v. Macy, 3 A.K. Marsh. 296.

Entry by fraud, strategy, or stealth. In some jurisdictions the action of forcible entry and detainer may be maintained when defendant has entered on the possession of another by fraud or stealth as well as by force or intimidation.[21]

Turning out or withholding. Under some statutes an action of forcible entry and detainer or forcible detainer may be brought against one who, after entering peaceably on the premises, by unlawful refusal[22] or by force, threats, or menacing conduct,[23] turns plaintiff out of possession or keeps him out of possession.[24]

So, under the particular statute it may be sufficient to sustain the charge of forcible detainer that the person unlawfully in possession refused to vacate the premises on lawful notice so to do.[25]

Entry peaceable but unlawful. If an entry on land, although peaceable, is unlawful, the particular statute may authorize the owner to recover possession in an action of unlawful entry and detainer.[26]

An unlawful entry during the absence of the occupant and a refusal to surrender the same on demand may under the particular statute constitute a forcible detainer and authorize a recovery without proof that the entry was in fact forcible.[27] It is sometimes provided that any person who enters on a mining claim, in the temporary absence of those in possession of the claim, is liable to an action of forcible entry and detainer.[28]

§ 18. —— Sufficiency

To render an entry forcible, it must be accompanied either by actual violence or by circumstances tending to excite terror in the person in possession and prevent him from maintaining his rights; but the acts done need not constitute an assault and battery or a breach of the peace.

As a general rule, to render an entry forcible it must be accompanied either by actual violence, or by circumstances tending to excite terror in the owner or other persons in possession, and to prevent them from maintaining their rights. There must be at least apparent violence or some unusual weapons, or the attendance of an unusual number of people, some menaces or other acts giving reasonable cause to fear that the person making the forcible entry will do some bodily harm to those in possession, if they do not give up the same.[29] An entry merely against the will of the occupant is not forcible.[30] However, it is not necessary that the intruder should do such acts as would constitute an assault and battery.[31] The same circumstances of force or violence that amount to a forcible entry will also amount to a forcible detainer.[32]

Mere trespass insufficient. As a rule, something more than a mere trespass on the premises of plaintiff is necessary to support an action under the statutes relating to forcible entry and detainer;[33] but it has been held that an action for unlawful de-

21. Miss.—Parker v. Eason, 8 So. 844, 68 Miss. 290.
26 C.J. p 826 note 67.

22. Okl.—Wilson v. Davis, 78 P.2d 279, 182 Okl. 435.
26 C.J. p 826 note 69.

23. Cal.—Templar Mining Co. v. Williams, 72 P.2d 566, 23 Cal.App. 2d 45.
26 C.J. p 826 note 70.

24. Ala.—Lorah v. Emerson, 45 So. 228, 154 Ala. 145.
26 C.J. p 827 note 71.

25. Neb.—Post v. Bohner, 36 N.W. 508, 23 Neb. 257—Estabrook v. Hateroth, 34 N.W. 634, 22 Neb. 281.

26. Mo.—Porter v. Gibbs, App., 242 S.W. 1016.
26 C.J. p 827 note 72.

Detention held not unlawful

"When contractual relations exist between the parties whereby the right to possession has been given to the one taking possession by means of the peaceable entry, then neither the entry nor detention of the property is 'unlawful' within the meaning of . . . section 1160 dealing with forcible detainer."—Baxley v. Western Loan & Building Co., 27 P.2d 387, 389, 135 Cal.App. 426.

In Minnesota

(1) Under a statute so providing, recovery may be had where the entry was either unlawful or forcible, or the detention was unlawful.—Mutual Trust Life Ins. Co. v. Berg, 246 N.W. 9, 187 Minn. 503.

(2) Under a former statute, the action could be maintained only in case of an entry or detainer which was both unlawful and forcible.—Ruff v. Schafer, 196 N.W. 661, 157 Minn. 485—Mastin v. May, 148 N.W. 893, 127 Minn. 93, Ann.Cas.1916C 493—Davis v. Woodward, 19 Minn. 174.

27. Okl.—Casey v. Kitchens, 168 P. 812, 66 Okl. 169, L.R.A.1918B 667.
26 C.J. p 827 note 73.

28. Mont.—Wells v. Darby, 34 P. 1092, 13 Mont. 504.

29. La.—Booker v. McKnight, App., 179 So. 332, 333, quoting **Corpus Juris.**
N.Y.—Quinn v. McCochrane, 206 N.Y. S. 550, 210 App.Div. 569, affirmed 148 N.E. 748, 240 N.Y. 660.
Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
26 C.J. p 827 note 76.

An entry by consent or contractual agreement is not forcible entry, actual or constructive.—Jefferson County v. Parker, 100 So. 338, 211 Ala. 289.

"Force" is synonymous with "violence" under a statute requiring the entry to be by violence or terror.—Lambert v. Helena Adjustment Co., 222 P. 1057, 69 Mont. 510.

Indictable at common law

Nothing constitutes "forcible entry" which would not have been indictable at common law.—Christian v. Amster, 235 N.W. 199, 253 Mich. 400.

30. W.Va.—Wiles v. Walker, 106 S. E. 423, 88 W.Va. 147.
26 C.J. p 828 note 77.

31. Ark.—Holzman v. Gattis, 114 S. W.2d 3, 195 Ark. 773.
Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
26 C.J. p 830 note 98.

32. N.Y.—Hallock v. New York Cent. & H. R. R. Co., 95 N.E. 644, 202 N. Y. 201.
26 C.J. p 828 note 78.

33. Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.

tainer is a proper remedy for a continuing trespass.[34]

Threats and appearance of violence. When a person entering on the land of another by his behavior or speech gives those who are in possession just reason to think that he intends to take possession by force if they do not give way to him, his entry is to be deemed forcible, whether he causes the apprehension of the use of violence by taking with him an unusual number of attendants or by arming himself in such a manner as plainly to indicate a design to back his pretentions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions plainly implying a purpose of using force against those who make resistance.[35] It is against an entry under terrorizing conditions that the statute is aimed.[36]

Breaking into house. Breaking into a dwelling house occupied by a person or a family, being in itself calculated to inspire terror or the fear of personal violence, constitutes a forcible entry and detainer,[37] but, in the absence of special statutory provision, it is held that one who breaks and enters into a dwelling house from which the occupant is absent leaving no one in charge is not liable to such action,[38] and that the action does not lie where the building broken and entered in the absence of the occupant is not a dwelling but a mere outhouse.[39] Under some statutes, however, breaking and entering a dwelling house from which the occupant is absent leaving no one in charge will sustain an action of forcible entry and detainer;[40] and it has been held that, where plaintiff had land inclosed by wire fence and defendant took it away and erected an iron fence around the land, this would constitute a forcible entry within a statute providing that the force used may be "breaking open a door, window, or other part of a house."[41]

Entering without breaking. Generally, entering by the ordinary means of entrance without any breaking in or any threat of violence to the person does not amount to a forcible entry,[42] such as an entry into a close by the mere opening of a gate,[43] or an entry into a house by the use of a key[44] or by drawing a latch.[45]

Breach of peace. An entry made with such force or under such circumstances as tend to produce a breach of the pace will of course support this action.[46] On the other hand, it is not necessary to constitute a forcible entry that there be proof of such acts of violence as amount to a breach of the peace,[47] although there is some authority to the contrary.[48] So, it is not necessary that the occupant should resist until he compels the doing of an overt act in breach of the peace;[49] and it will be sufficient if the actual possession of another is invaded, taken, and held under circumstances to show that it will not be surrendered without a breach of the peace on the one side or the other.[50]

Mich.—Christian v. Amster, 235 N.W. 199, 253 Mich. 400.
S.C.—Barbee v. Winnsboro Granite Corporation, 2 S.E.2d 737, 190 S.C. 245.
26 C.J. p 828 note 80.

34. Wash.—Cogswell v. Cogswell, 126 P. 433, 70 Wash. 184.

Successive trespasses

Where one trespasser succeeds another in the possession of property and continues and consummates the original trespass without any claim of new title, he is liable in summary proceedings to recover possession.
Cal.—Stark v. Barnes, 4 Cal. 412.
Ky.—Alexander v. Fowler, 6 Ky.L. 444.

35. Ark.—Holzman v. Gattis, 114 S.W.2d 3, 195 Ark. 773.
Mich.—Christian v. Amster, 235 N.W. 199, 253 Mich. 400.
Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
Tex.—Smith v. Sinclair Refining Co., Civ.App., 77 S.W.2d 894.
Va.—Southern Ry. Co. v. Lima Wood & Coal Co., 159 S.E. 69, 156 Va. 829.
26 C.J. p 829 note 82.

36. N.Y.—Central Park Baptist Church v. Patterson, 30 N.Y.S. 248, 9 Misc. 452, 24 N.Y.Civ.Proc. 79.

37. Cal.—Scarlett v. Lamarque, 5 Cal. 63.
26 C.J. p 829 note 84.

Breaking of lock to enter building is sufficient to constitute forcible entry.—Saferian v. Baer, 287 P. 142, 105 Cal.App. 238—Rutledge v. Barger, 255 P. 537, 82 Cal.App. 356.

38. Or.—Smith v. Reeder, 28 P. 890, 21 Or. 541, 15 L.R.A. 172.
26 C.J. p 829 note 85.

39. Mich.—Shaw v. Hoffman, 25 Mich. 162.
26 C.J. p 829 note 86.

40. Cal.—Rutledge v. Barger, 255 P. 537, 82 Cal.App. 356.
26 C.J. p 829 note 87.

41. Ala.—Mallon v. Moog, 25 So. 583, 121 Ala. 303, 307.
26 C.J. p 830 note 88.

42. S.C.—Barbee v. Winnsboro Granite Corporation, 2 S.E.2d 737, 190 S.C. 245.
26 C.J. p 830 note 89.

43. Ala.—Fowler v. Pritchard, 41 So. 667, 148 Ala. 261.

44. S.C.—Barbee v. Winnsboro Granite Corporation, 2 S.E.2d 737, 190 S.C. 245.
26 C.J. p 830 note 91.

45. Mass.—Pike v. Witt, 104 Mass. 595.

46. Cal.—Ely v. Yore, 11 P. 868, 71 Cal. 130.
26 C.J. p 830 note 93.

47. Cal.—Pacific States Auxiliary Corporation v. Farris, 5 P.2d 452, 118 Cal.App. 522.
26 C.J. p 830 note 95.

48. Mich.—Harrington v. Scott, 1 Mich. 17.

49. Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
Va.—Southern Ry. Co. v. Lima Wood & Coal Co., 159 S.E. 69, 156 Va. 829.
26 C.J. p 830 note 96.

Ejection unnecessary

Persons in lawful possession of premises were not required to attempt to eject forcibly persons who unlawfully took possession by force. —Schick v. Wolf, 202 N.Y.S. 601, 207 App.Div. 652.

50. Or.—Crossen v. Campbell, 202 P. 745, 102 Or. 666.
Va.—Southern Ry. Co. v. Lima Wood

§ 19. —— Entry by Legal Authority

An action for forcible entry and detainer may not be maintained against one who enters by virtue of legal authority; but, if the writ by which plaintiff was dispossessed was wrongfully issued or void, or did not run against plaintiff or the property in question, he may maintain such action.

The entry for which the law affords a redress is an entry by a person of his own wrong and by his own mere act without authority of law, and therefore this action cannot be maintained when one is put in possession by an officer of the law under and by the command of a court of competent jurisdiction,[51] although in so doing he turned out one whom he could not lawfully dispossess by virtue of his writ.[52] This, it is said, does not constitute a forcible entry and detainer within either the letter or spirit of the law;[53] neither is the officer guilty of forcible entry if he acts in good faith under a writ of restitution.[54]

On the other hand, if the writ is wrongfully issued,[55] or void,[56] one who enters under it is a mere intruder or trespasser from whom recovery of possession may be obtained. In order to justify an entry under authority of a writ, the party claiming its protection must show a judgment as well as an execution.[57]

Although there is authority to the contrary,[58] it is held that, if a person is dispossessed under and by virtue of a writ of possession issued on a judgment to which he is neither a party,[59] nor a privy,[60] or under a writ of restitution for different premises,[61] or where one is put in possession under a writ of possession against the execution of which an injunction has been granted,[62] the party thus unlawfully dispossessed may maintain forcible entry and detainer to regain possession.

Public force of the state lawfully exercised as a means of recovering its own property does not constitute a forcible entry.[63]

§ 20. Property as to Which Action Lies

Ordinarily forcible entry and detainer lies only for the recovery of real property and not for the recovery of personalty.

Forcible entry and detainer cannot be maintained for the recovery of personalty, but it is maintainable only when the possession of real property is sought in the absence of statute otherwise providing.[64] Some of the statutes make express provision for the recovery of tenements as well as of lands.[65]

B. PERSONS BY AND AGAINST WHOM ACTION MAINTAINABLE

§ 21. By Whom

a. In general
b. Heirs, devisees, and personal representatives
c. Landlord and tenant
d. Licensees and servants
e. Married women
f. Owners of easements

& Coal Co., 159 S.E. 69, 156 Va. 829.
26 C.J. p 830 note 97.

51. Okl.—Frantz v. Saylor, 71 P. 217, 12 Okl. 282.
26 C.J. p 830 note 99.

52. Cal.—Janson v. Brooks, 29 Cal. 214.
26 C.J. p 830 note 1.

53. Tenn.—Scott v. Newsom, 4 Sneed 457.

54. Cal.—Janson v. Brooks, 29 Cal. 214.
Mo.—Link v. Harrington, 23 Mo.App. 429.

55. La.—Cappel v. Meeker Sugar Refining Co., 126 So. 695, 169 La. 1170.

56. Fla.—Stark v. Billings, 15 Fla. 318.

57. Fla.—Stark v. Billings, 15 Fla. 318.
Ill.—Brush v. Fowler, 36 Ill. 53, 85 Am.D. 382.

58. Cal.—Janson v. Brooks, 29 Cal. 214.
Tenn.—Scott v. Newsom, 4 Sneed 457.

59. Ill.—Brush v. Fowler, 36 Ill. 53, 85 Am.D. 382.
26 C.J. p 830 note 7.

Reason for rule

A person in peaceable possession before and at the time of the commencement of a suit to which he is not a party is not affected by the decree or subject to be dispossessed under a writ of assistance.—Brush v. Fowler, 36 Ill. 53, 85 Am.D. 382—26 C.J. p 831 note 12.

60. Ky.—Chiles v. Stephens, 1 A.K. Marsh. 333.

61. Ill.—Hubner v. Feige, 90 Ill. 208.
Tex.—Granberry v. Storey, 127 S.W. 1122, 61 Tex.Civ.App. 9.

62. Tenn.—Farnsworth v. Fowler, 1 Swan 1, 55 Am.D. 718.

63. Mo.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.
26 C.J. p 831 note 13.

64. Ill.—See U. S. Brewing Co. of Chicago v. Pochek, 195 Ill.App. 369.
Kan.—Woodworth v. Maddox, 223 P. 275, 115 Kan. 445.
Wash.—Hager v. Parcher, 240 P. 924, 136 Wash. 518.
26 C.J. p 831 note 14.

65. Okl.—Polson v. Parsons, 104 P. 326, 23 Okl. 78, 25 L.R.A.,N.S., 104.
26 C.J. p 831 note 15.

Easements

A statute which prohibits the forcible entry on lands and tenements is broad enough to protect an easement.—Vance v. Ferguson, 85 S.E. 241, 101 S.C. 125.

Land

It has been held that "tenement," as used in a statute providing for an action by landlord against a tenant to recover possession of a "house or tenement," is used in a comprehensive sense and signifies land as well as a house or building.—Sacket v. Wheaton, 17 Pick., Mass., 103.

Leasehold

Statute giving a right of action when lands or tenements have been conveyed by any grantor in possession, or sold under a judgment or decree or by virtue of a power contained in any mortgage or trust deed, and possession is withheld after written demand, did not apply where a leasehold was sold under the power of a chattel mortgage and the purchaser brought forcible detainer.—Vinje v. Pagels, 222 Ill.App. 310.

g. Purchasers or assignees
h. Successful claimant of homestead entry
i. Tenants in common

a. In General

Forcible entry and detainer may be maintained only by the person or persons entitled to the immediate possession of the premises.

As shown supra § 3, generally speaking, forcible entry and detainer may be maintained by him whose peaceable and exclusive possession of the premises in controversy has been forcibly disturbed. However, it can only be maintained by the person or persons entitled to the immediate possession of the premises.[66] It cannot be maintained by one person to the use of another,[67] but should be brought by the real party in interest.[68] One who has acquired possession has no right thereafter to bring an action for a prior forcible entry and detainer.[69] Where the parties by whom an action may be maintained are specifically enumerated by statute, the action can be maintained only by those so enumerated.[70]

A judgment creditor who has complied with a statute authorizing a redemption of land from a mortgage foreclosure sale may maintain an action of unlawful detainer.[71]

Grantor who has agreed to put grantee in possession. Forcible detainer proceedings may be maintained, after plaintiff had delivered a deed to the premises, which had not yet been recorded, and in which he agreed to put the grantee in possession of the property.[72]

Owner of the reversion cannot after the death of the tenant by the curtesy maintain unlawful detainer against his lessee, there being no privity between them.[73]

Trespasser. A mere trespasser on land cannot maintain this action, although he may have been forcibly removed from the premises.[74]

Municipal corporations. Where a municipal corporation owns land of which it is in possession, it may maintain an action of forcible entry and detainer against anyone who unlawfully intrudes thereon.[75]

b. Heirs, Devisees, and Personal Representatives

Heirs and devisees usually may maintain an action of forcible entry and detainer for land, possession of which the decedent was entitled to, and the personal representative may bring the action if he is entitled to possession.

In the absence of statute otherwise providing, where the possession of the ancestor was such that he might have maintained forcible entry and detainer, the action may be maintained by the heirs, for the title and right of the ancestor at once descend to and vest in them.[76] Further, it has been held that an heir may maintain a warrant of forcible detainer against the tenant of his ancestor, who holds over without first reducing the premises to actual possession.[77] The heirs have, however, no greater right than the ancestor, if living, would have had.[78]

66. Mo.—Welden v. Myers, 253 S.W. 1086, 212 Mo.App. 479.
26 C.J. p 831 note 21.
Forcible entry and detainer by foreign corporation see Corporations § 1904.
Parties to action for forcible entry and detainer see infra § 34.

One entitled to possession of land is proper party to maintain proceedings to recover possession.—Muirhead v. McCullough, 207 N.W. 886, 234 Mich. 52.

One holding chattel mortgage on crops and pasture, who left the assignee of the unassignable lease in possession and care of the premises, was not an occupant entitled to maintain action in unlawful detainer, under Remington Comp.St. § 811, permitting such action to the occupant against every one entering at nighttime or during the occupant's absence and refusing to surrender the premises for three days, and defining "occupant" as one who for five days next preceding was in peaceable and undisturbed possession.—Wynn v. Vessey, 221 P. 295, 127 Wash. 492.

Trustee

A deceased ranch owner's brother who held ranch in trust for owner and after his death for his administrator could not maintain unlawful detainer action against lessee in possession under owner and administrator.—Costa v. Neves, 82 P.2d 600, 12 Cal.2d 121.

67. Mo.—Furguson v. Lewis, 27 Mo. 249.
N.Y.—Novick v. Washington, 176 N.Y.S. 387.
26 C.J. p 831 note 22.

68. Neb.—Towles v. Hamilton, 143 N.W. 935, 94 Neb. 588.

69. Iowa.—Chicago Great Western R. Co. v. Iowa Cent. R. Co., 119 N.W. 261, 142 Iowa 459.
Va.—Hurst v. Delany, 5 S.E. 802, 84 Va. 701.

70. Miss.—Holmes v. Elmer, 181 So. 325, 182 Miss. 171—McCorkle v. Yarrell, 55 Miss. 576.

71. Ala.—Ford v. Lewis, 41 So. 144, 146 Ala. 190—Anniston First Nat. Bank v. Elliott, 27 So. 7, 125 Ala. 646, 82 Am.S.R. 268, 47 L.R.A. 742.

72. Ky.—Lemaster v. Lemaster, 224 S.W. 466, 188 Ky. 829.
26 C.J. p 831 note 28.

73. Miss.—Wolfe v. Angevine, 57 Miss. 767.

74. Ky.—Derrington v. Childers, 161 S.W. 216, 156 Ky. 452.
26 C.J. p 823 note 45.

75. Va.—Norfolk City v. Cooke, 27 Gratt. 430, 68 Va. 430.
26 C.J. p 835 note 97 [a].
Forcible entry and detainer by county see Counties § 320 a.

76. Ala.—Kellum v. Balkum, 9 So. 463, 93 Ala. 317.
26 C.J. p 833 note 57.
Title and possession of heirs of realty of ancestor see Descent and Distribution § 66 et seq.

77. Ky.—Turly v. Foster, 2 A.K. Marsh. 204.

78. Mo.—McCartney v. Alderson, 45 Mo. 35.

A devisee may maintain the action,[79] for the will when probated relates back to the death of the testator and vests his possessory rights in the devisee.[80]

Personal representative. By statute in some jurisdictions the personal representative may maintain the action where the right to possession and control of decedent's real estate passes to him as an incident of administration,[81] but it has been held that he cannot maintain the action without statutory authority therefor.[82]

c. Landlord and Tenant

A tenant in possession of land is the proper person, rather than the landlord, to maintain an action of forcible entry and detainer for wrongful entry on the premises.

Since the action of forcible entry and detainer is for the benefit of him whose possession is invaded, where a wrongful entry has been made on the premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain the action.[83] Even though the term of the tenant has expired and he has left the premises, the landlord cannot maintain a forcible entry and detainer, if the entry complained of was made during the tenant's term,[84] unless otherwise provided by statute,[85] or unless, it has been held, there are special circumstances which would render the enforcement of the rule inequitable.[86] A mere tenant at will may maintain the action.[87]

Lessee never in possession. Under the rule which prevents one who has never had prior possession from maintaining forcible entry and detainer, see supra § 9, it is usually held that a lessee who has never been in possession of the premises cannot maintain the action,[88] and that a landlord who has executed leases to third persons giving them the right of possession is nevertheless the proper and only party to bring action to recover possession from a former tenant who refuses to deliver up the premises.[89] Where prior possession is not essential as a basis for actions of this character, it has been held that the landlord is not entitled to maintain an action under these circumstances,[90] and the lessee may maintain the action against one holding over after the cancellation of his contract for the sale of the land[91] and against a tenant remaining in possession after the expiration of his lease.[92]

On abandonment or expiration of the tenancy possession revests in the landlord, and it has been held that he may maintain an action of unlawful detainer against one to whom the tenant on abandonment wrongfully delivered the possession,[93] or an action of forcible entry and detainer against an intruder on the premises after the termination of the lease and after the tenant had vacated the premises without making a formal reëntry,[94] or an action of forcible entry and detainer against one who, after the expiration of the tenancy but before the tenant had moved, went on the land without objection from the tenants and claimed title superior to that of the landlord.[95]

79. Ohio.—Brown v. Burdick, 25 Ohio St. 260.
26 C.J. p 833 note 60.

80. Ohio.—Brown v. Burdick, supra.

81. Okl.—Cutburth v. Bell, 55 P. 157, 155 P. 1136.
26 C.J. p 833 note 62—24 C.J. p 139 note 86.
Authority over, and control of, decedent's realty by personal representative see Executors and Administrators § 252 et seq.

82. Ky.—Prewitt v. Durham, 5 T.B. Mon. 17.
Miss.—McMullen v. Mayo, 16 Miss. 298.
24 C.J. p 139 note 88.

83. Tenn.—Hunt v. Foley, 9 Tenn. App. 96, 99, citing **Corpus Juris.**
26 C.J. p 833 note 69.
Reëntry and recovery of possession by landlord see the C.J.S. title Landlord and Tenant §§ 716–792, also 36 C.J. p 597 note 83 et seq.
Action against purchaser of property from landlord
Where owner leased oil service station and then agreed to operate it for lessee, forcible detainer by lessee was proper remedy against purchaser of station, who attempted to cease operating under agreement and claimed possession by virtue of title. —Phillips Petroleum Co. v. Skinner, 36 P.2d 968, 140 Kan. 413.

84. Ala.—McKeen v. Nelms, 9 Ala. 507.
26 C.J. p 834 note 70.

85. Ky.—Willis v. Whayne, 134 S.W. 150, 142 Ky. 194.
26 C.J. p 834 note 71.

86. Ill.—Thomasson v. Wilson, 34 N.E. 432, 146 Ill. 384.
26 C.J. p 834 note 72.

87. Cal.—Jones v. Shay, 50 Cal. 508.
26 C.J. p 834 note 73.

88. Ark.—Willliams v. Petty, 271 S.W. 9, 168 Ark. 642.
Mass.—Woodside v. Ridgeway, 126 Mass. 292.
26 C.J. p 834 note 76.

89. Ky.—Mattingly v. Brents, 159 S.W. 1157, 155 Ky. 570.
Mich.—Vincent v. Defield, 56 N.W. 1104, 98 Mich. 84.
26 C.J. p 834 note 76.

90. Ill.—Allen v. Webster, 56 Ill. 393—Dudley v. Lee, 39 Ill. 339.

91. **Lessee as real party in interest**
(1) Lessee was "real party in interest" entitled to maintain unlawful detainer action against possessor holding over after cancellation of contract for deed.—Gruenberg v. Saumweber, 248 N.W. 724, 188 Minn. 568.
(2) Where lease described same property as that described in canceled contract for deed, but in addition lease exempted portion occupied by filling station, description entitled lessee to maintain unlawful detainer action against defendant holding over under canceled contract. —Gruenberg v. Saumweber, supra.

92. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
Minn.—Burton v. Rohrbeck, 15 N.W. 678, 30 Minn. 393.
36 C.J. p 60 note 33.

93. Mo.—Krank v. Nichols, 6 Mo. App. 72.

94. Utah.—Woodbury v. Bunker, 98 P.2d 948, 98 Utah 216.
26 C.J. p 834 note 81.

95. Okl.—Bilby v. Brown, 137 P. 102, 41 Okl. 98.
26 C.J. p 834 note 82.

Execution of writ prevented by injunction. Where an officer serving a writ of possession had succeeded only in placing the tenant's goods on the land and was about to eject the tenant when the sheriff arrived with an injunction staying the execution of the writ, and the tenant thereupon took up his abode in an outbuilding on the premises, such writ of possession was not executed before the service of the injunction, so as to deprive the tenant of possession and thereby deprive him of his right to maintain forcible entry and detainer against plaintiff in the writ of restitution.[96]

d. Licensees and Servants

A mere licensee usually may not maintain an action for forcible entry and detainer, although the possession of an agent or servant may be such as to authorize him to maintain the action.

An action for forcible entry and detainer will not lie where the ousted occupier is a mere licensee.[97] Further, an action does not lie in favor of a servant who has been ousted from possession of the master's house by the master on termination of the employment.[98] However, the possession of an agent or servant may be such as to authorize him to maintain the action against a forcible entrant or withholder.[99]

e. Married Women

Under modern statutes a married woman may maintain an action for forcible entry and detainer in her own name to recover possession of land belonging to her separate estate.

The wife, although she occupies premises jointly with her husband is, as a rule, not a necessary party plaintiff to vindicate the possession,[1] even though she may have the legal title to the premises invaded.[2] It has been held, however, that an action brought by a wife for a forcible invasion of property in her possession should not be dismissed solely on the ground that the husband is the proper party to bring the action because she might hold possession of the land with her husband's consent,[3] and that, where a wife had the right to the rents and the use of premises, the trustee holding only the naked legal title, the warrants were properly issued in the name of the husband and wife.[4]

Under modern statutes, the wife may maintain this proceeding in her own name to recover possession of land belonging to her statutory separate estate.[5] Under a statute which empowers a wife who has been deserted by her husband to prosecute or defend actions in his name, she may after such desertion maintain forcible entry and detainer in her husband's name against an intruder who ousts her from possession.[6] Further, a woman who together with her husband has received a deed of release from her coheirs for a tract of land in which they held a joint estate may maintain a warrant of forcible detainer without joining her children after her husband's death.[7]

f. Owners of Easements

A person who has the exclusive right to the enjoyment of an easement may maintain an action for forcible entry and detainer for a disturbance of possession.

Since to sustain an action of forcible entry and detainer the possession disturbed must be an exclusive one, see supra § 10, one who enjoys an easement in common with others has no such possession as will entitle him to maintain an action of forcible entry and detainer for a disturbance of such possession.[8] However, where it is made to appear

Forcibly ejecting tenant

Plaintiff landlord may maintain action where defendant, after making forcible entry on land with shotgun, terrorizing plaintiff's farm tenants into acquiescence and taking complete possession under false claim of title, negotiated with plaintiff to buy land and to rent it for year, admitted plaintiff's title and right of pos~ession, and agreed to move off without giving her trouble over possession if she insisted and would not sell or rent land.—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.

Lease of land to tenant by third person

Where plaintiff rented premises to codefendants who paid rent to January 27, 1937, when defendant took possession under a tax deed and rented premises to codefendants who reëntered or remained in occupancy and did not notify plaintiff of repudiation of plaintiff's lease, plaintiff could accept codefendants' repudiation of tenancy under plaintiff as a termination of codefendants' tenancy as of time of defendant's entry, and defendant's entry and occupation through codefendants, after proper notice to vacate, constituted an "unlawful entry" as against, and a "forcible detainer" from, plaintiff, who, through codefendants, would be considered as having had occupancy within five days of defendant's entry.—Woodbury v. Bunker, 98 P.2d 948, 98 Utah 216.

96. Tenn.—Farnsworth v. Fowler, 1 Swan 1, 55 Am.D. 718.

97. N.Y.—Napier v. Spielmann, 111 N.Y.S. 983, 127 App.Div. 567, affirmed 90 N.E. 1162, 196 N.Y. 575.
26 C.J. p 832 note 52.

Reason for rule

In such a case the possession is not changed, but remains in the licensor.—Napier v. Spielmann, supra.

98. N.D.—Davis v. Long, 178 N.W. 936, 45 N.D. 581.
26 C.J. p 833 note 54.

99. Iowa.—Emsley v. Bennett, 37 Iowa 15.
26 C.J. p 833 note 55.

1. Mo.—State v. Henning, 26 Mo. App. 119.
26 C.J. p 834 note 84 [a]—30 C.J. p 981 note 39 [b] (2).

2. Mo.—Gray v. Dryden, 79 Mo. 106.

3. Mo.—Bobb v. Taylor, 25 Mo.App. 583.

4. Ky.—Robards v. Mason, 7 Ky. Op. 285.

5. Ala.—Hurst v. Thompson, 68 Ala. 560.
30 C.J. p 981 note 39 [b] (1).

6. Minn.—Davis v. Woodward, 19 Minn. 174.

7. Ky.—Rogers v. Turley, 4 Bibb 355.

8. **Easement of way**

Mo.—Nelson v. Nelson, 30 Mo.App. 184.

N.M.—Roberts v. Trujillo, 1 P. 855, 3 N.M. 50.

that the party complaining has the exclusive right to the enjoyment of an easement, forcible entry and detainer may be maintained,[9] especially where the statute under which the action is brought prohibits the forcible entry "on lands and tenements."[10]

g. Purchasers or Assignees

Unless otherwise provided by statute, where there has been a forcible entry on land the right to maintain an action for forcible entry and detainer does not pass to the assignee or purchaser of the one whose possession was invaded.

A purchaser who is the equitable owner of the premises and who has been let into possession by the vendor may maintain an action for forcible entry and detainer.[11] Under some statutes, a grantee of a grantor in possession may maintain an action of forcible entry and detainer against the tenant of the grantor when delivery of possession is refused,[12] and under other statutes the right to maintain forcible entry and detainer is conferred on the grantees and assigns of any lands, tenements, or other real possessions.[13]

Transfer after forcible entry. The matter is purely statutory, but as a rule, where there has been a forcible or unlawful entry on land, the right to maintain an action of forcible entry and detainer therefor vests at once in the one whose possession is invaded, and this right must be exercised in his own name and does not pass to his assignee or purchaser.[14] Where this is the rule, the words in the statute concerning forcible entry and detainer, which give a right of action to the person entitled to the possession, apply to cases brought for forcible detainer simply and not to those for forcible entry and detainer.[15] Where plaintiff conveys property pendente lite his recovery inures to the benefit of the purchaser.[16]

h. Successful Claimant of Homestead Entry

A homestead entryman whose rights have been finally determined may bring an action of forcible entry and detainer against one whose claim to the land has been canceled by the land department.

Forcible entry and detainer is a proper remedy for a homestead entryman whose rights have been finally determined, as against one whose claim to the land has been canceled by the land department,[17] and although the decision of the secretary of the interior making the award may be wrong, the unsuccessful claimant cannot raise this question in the action;[18] nor is he entitled to hold possession until the improvements are appraised and paid for under the occupying claimant's act.[19]

While it has been held that, until the contest is finally closed before the interior department and the land is awarded to one or the other, an action of unlawful detainer will not lie in behalf of either,[20] it has also been held that the right as between the two settlors for the possession of the land may properly be determined in an action of this character and the question of title to the land afterward determined by proper proceedings in the land department of the government,[21] and that, although the court will not decide questions arising out of conflicting boundaries, priority of settlement, or other questions properly belonging to the land office, it will nevertheless protect actual possession.[22]

i. Tenants in Common

Tenants in common may join in an action of forcible entry and detainer against a third person, but a tenant in common or joint tenant may also maintain such action without joining his cotenants as plaintiffs.

Tenants in common of the whole estate may join in summary proceedings to recover its possession,[23]

9. Ala.—Farley v. Bay Shell Road Co., 27 So. 770, 125 Ala. 184.
26 C.J. p 833 note 66 [a].

10. S.C.—Vance v. Ferguson, 85 S.E. 241, 101 S.C. 125.

11. Ill.—Spero v. Shapiro, 162 Ill. App. 603.
Forcible entry and detainer by:
Landlord's grantee, assignee, or successor in interest see the C.J.S. title Landlord and Tenant § 762, also 36 C.J. p 633 note 4–p 634 note 14.
Mortgagee see the C.J.S. title Mortgages § 306, also 41 C.J. p 617 note 63.
Purchaser against vendor see the C.J.S. title Vendor and Purchaser § 546, also 66 C.J. p 1544 notes 37–39.
Purchaser at execution sale see Executions § 310 a.
Purchaser at judicial sale see the C.J.S. title Judicial Sales § 43, also 35 C.J. p 86 notes 37–39.
Purchaser at mortgage foreclosure sale see the C.J.S. title Mortgages § 589, 770, also 41 C.J. p 998 notes 44–47, 42 C.J. p 273 notes 79–81.
Vendor against purchaser see the C.J.S. title Vendor and Purchaser § 465, also 66 C.J. p 1343 note 43 et seq.

12. Ill.—Muller v. Balke, 47 N.E. 355, 167 Ill. 150.
26 C.J. p 832 note 33.

13. Mo.—Kelly v. Clancy, 15 Mo. App. 519.

14. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
26 C.J. p 832 note 30.

15. Ill.—Dudley v. Lee, 39 Ill. 339.
26 C.J. p 832 note 31.

16. Ill.—Bell v. Bruhn, 30 Ill.App. 300.
26 C.J. p 832 note 32.

17. Okl.—Hibbard v. Craycraft, 121 P. 198, 32 Okl. 160.
26 C.J. p 835 note 91.

18. Okl.—Brennan v. Shanks, 103 P. 705, 24 Okl. 563.

19. Okl.—Howe v. Parker, 90 P. 15, 18 Okl. 282.

20. Okl.—Best v. Frazier, 85 P. 1119, 16 Okl. 523.
26 C.J. p 835 note 94.

21. Kan.—Lyman v. Todd, 22 P. 1003, 43 Kan. 70.

22. Wash.—Colwell v. Smith, 1 Wash.T. 92.
26 C.J. p 835 note 96.

23. Cal.—Bowers v. Cherokee Bob, 45 Cal. 495.
26 C.J. p 835 note 98.

although, if it is shown that the right of action does not exist in favor of all plaintiffs joined in the action, it must fail.[24] One tenant in common,[25] one coparcener,[26] or one joint tenant,[27] may maintain the action against a stranger, without joining his cotenants as plaintiffs, because the possession of one is the possession of all and as against a stranger to the title each is entitled to possession of the whole estate.[28]

§ 22. Against Whom

a. In general
b. Corporations

a. In General

In the absence of statute otherwise providing, an action of forcible entry and detainer ordinarily may be maintained only against one in possession of the premises at the time of the commencement of the action.

As shown supra § 5, in case of forcible entry by the owner of the property an action of forcible entry and detainer may be maintained against him and that too, although he may have the legal right to possession. It is the person who makes the forcible entry who is liable in proceedings of this character.[29]

Except as otherwise provided by statute,[30] an action of forcible entry and detainer usually may be maintained only against one in possession at the commencement of the action, and not against one who does not in fact hold the land.[31] However, possession by an agent will satisfy the requirements of this rule,[32] and the action may be brought also against the agent.[33] So where an agent without authority forcibly ejects a tenant from the premises and places the landlord in possession, the landlord as well as the party ejecting the tenant is guilty of forcible entry.[34] A change of possession pending the suit does not affect plaintiff's right of recovery.[35]

Infants and married women. It has been held without mentioning any particular statutory provision that "the remedy of forcible entry and detainer, or the lawful detainer, will lie against married women, and persons under age."[36]

Licensee. Forcible entry and detainer may be

Forcible entry and detainer by joint tenant or tenant in common against cotenant see the C.J.S. titles Joint Tenancy § 13, also 26 C.J. p 835 notes 5–7, 33 C.J. p 913 notes 23–25; Tenancy in Common § 94, also 26 C.J. p 835 notes 5–7.

24. Ky.—Thomas v. Jones, 2 A.K. Marsh. 336.
26 C.J. p 835 note 99.

25. Ill.—Kelly v. Parker, 221 Ill. App. 273.
Tenn.—Hunt v. Foley, 9 Tenn.App. 96.
26 C.J. p 835 note 1.

26. Va.—Allen v. Gibson, 4 Rand. 468, 25 Va. 468.

27. Ill.—Kelly v. Parker, 221 Ill.App. 273.
26 C.J. p 835 note 3.

28. Miss.—Rabe v. Fyler, 18 Miss. 440, 48 Am.D. 763.
Va.—Allen v. Gibson, 4 Rand. 468, 25 Va. 468.

29. Ill.—Clark v. Barker, 44 Ill. 349.
26 C.J. p 836 note 9 [a].
Force on part of defendant see supra §§ 16–19.
Forcible entry and detainer against:
Heir see Descent and Distribution § 90 a.
Mere trespasser see supra § 18.
Purchaser by vendor of land see the C.J.S. title Vendor and Purchaser § 465, also 66 C.J. p 1343 notes 43–51.
Parties see infra § 34.

30. Ill.—Wieboldt v. Best Brewing Co., 163 Ill.App. 246.
26 C.J. p 836 note 10.

31. Mo.—Jackson v. Black, App., 264 S.W. 432—Welden v. Myers, 253 S. W. 1086, 212 Mo.App. 479—Slover v. Kramer, 232 S.W. 1110, 207 Mo.App. 470.
26 C.J. p 836 note 11.

Only person in actual possession need be sued to recover judgment in unlawful detainer.—Stuart v. Hatch, 146 So. 557, 108 Fla. 443.

Person having no estate in premises and not in possession thereof cannot be held liable for forcible entry and detainer.—Seidman v. John Craven & Sons Co., 143 A. 726, 6 N. J.Misc. 1062.

Mere participation in forcible entry
One cannot be guilty of forcible entry and detainer merely because he participated in the alleged forcible entry.—Jackson v. Black, Mo. App., 264 S.W. 432.

Person who had merely signed with another contract to purchase from state land which state had leased to plaintiff was not liable for forcible detainer.—Paxton v. Fisher, 45 P.2d 903, 86 Utah 408.

Entrant under permission of tenant of owner
Where a tenant who has not repudiated tenancy by notice to landlord permits an entrant to enter on possession of tenant, the entrant does not acquire possession of premises but is no more than a "permittee," whose rights on premises are limited by permission given him and the term of tenant's lease, and entrant's entrance is not an "unlawful entry" and hence such entrant is not ordinarily the subject of an action of forcible detainer.—Woodbury v. Bunker, 98 P.2d 948, 98 Utah 216.

Persons under "color of title"
"Color of title" is that which in appearance is title but which in reality is not title, and parents of owner of property, who had moved on property at owner's request for purpose of caring for it and maintaining home for owner's children, were not holding possession under "color of title" so as to preclude maintenance of forcible entry and detainer action against them by guardian of children after death of owner.—Boland v. Heck, 65 P.2d 1213, 179 Okl. 403.

Possession by one defendant and tenants
Possession by defendants in an action of unlawful entry and detainer at the institution of the action, justifying recovery against them, is sufficiently shown where it appears that the premises were then occupied by one of defendants and their tenants.—Superior v. Peters, 118 S.E. 540, 94 W.Va. 376.

32. Mo.—Slover v. Kramer, 232 S. W. 1110, 207 Mo.App. 470.
26 C.J. p 836 note 12.

33. Mo.—Slover v. Kramer, supra.
26 C.J. p 836 note 13.

34. Ind.T.—Quigley v. Stephens, 54 S.W. 814, 3 Ind.T. 265.

35. Ill.—Lesher v. Sherwin, 86 Ill. 420.
26 C.J. p 836 note 19.

36. Tenn.—Skipwith v. Johnson, 5 Coldw. 454, 456.

brought against a licensee in possession after notice of revocation of the license has been given.[37]

One coming in under person liable. Probably the action of forcible entry and detainer may lie against any person going in under the person who has made a forcible entry collusively, with knowledge of such force and for the purpose of availing himself of it, because such person may well be considered as himself committing a forcible entry.[38]

Party entering under conveyance by tenant by curtesy. Under a statute, defining unlawful detainer as where defendant enters by contract, either as tenant or claiming through or under a tenant, the action of unlawful detainer lies only where defendant entered by contract and as lessee, or under a lessee, and hence that form of action will not lie against one who entered under a conveyance from a tenant by curtesy.[39]

Persons procuring forcible entry. A person may be guilty of forcible entry who is not actually present and does not actively assist therein, if it is done by one who acted at the time under his direction and procurement.[40]

b. Corporations

Forcible entry and detainer may be maintained against a private or municipal corporation.

Forcible entry and detainer will lie against a private corporation,[41] unless the act complained of was a voluntary, willful trespass on the part of its officers or servants.[42] An action of unlawful detainer will lie against a municipal corporation.[43]

C. NOTICE TO QUIT AND DEMAND FOR POSSESSION

§ 23. Necessity and Waiver

When required by statute, a notice to quit or demand for possession is a condition precedent to an action for forcible entry and detainer, although the right to the notice may be waived.

In actions for forcible entry and detainer, no notice to quit or demand for possession is necessary,[44] especially where it would be unavailing,[45] unless a notice or demand is required by statute.[46] Where the statutes require notice, the courts acquire no jurisdiction unless such notice has been given.[47]

Under some of the statutes it seems that notice or demand is necessary in all cases of forcible entry and detainer.[48] Under others, it has been decided that it is not necessary where the relation of landlord and tenant does not exist between the parties,[49] or where the original entry was forcible[50] or wrongful,[51] or where defendant after entering peaceably on real property turns out by force, threats, or menacing conduct the party in possession,[52] or where he by force or by menaces and threats of violence unlawfully holds and keeps possession of any real property, whether the same was acquired peaceably or otherwise.[53] Under the statutes relating merely to unlawful detainer, a notice or demand is ordinarily necessary,[54] some of the statutes making a failure or refusal to deliver possession after demand a constituent element of the offense.[55] A demand is not necessary for the maintenance of the action to recover possession

37. Ill.—Dunstedter v. Dunstedter, 77 Ill. 580.
Mo.—Aubuchon v. Foster, 215 S.W. 781, 202 Mo.App. 225.

38. Ill.—Clark v. Barker, 44 Ill. 349.

39. Tenn.—Shepperson v. Burnette, 92 S.W. 762, 116 Tenn. 117.

40. Cal.—Minturn v. Burr, 16 Cal. 107, 20 Cal. 48.

41. U.S.—Iron Mountain & H. R. Co. v. Johnson, Ark., 7 S.Ct. 339, 119 U.S. 608, 30 L.Ed. 504.
Philippine.—Archbishop v. Rosario, 14 Philippine 176.
Possessory actions against corporation for recovery of property generally see Corporations § 1293.

42. N.Y.—People v. New York Cent. R. Co., 51 N.Y. 623.
26 C.J. p 837 note 27 [a].

43. W.Va.—Hicks v. City of Bluefield, 103 S.E. 323, 86 W.Va. 367.
26 C.J. p 837 note 28.

44. Ill.—Sullivan v. Culp, 260 Ill. App. 443.
26 C.J. p 838 note 60.

45. Ill.—Sullivan v. Culp, supra.

46. Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24.
Pleading notice to quit and demand for possession see infra § 43.
Process in action for forcible entry and detainer see infra § 35.

47. S.D.—Meservy v. Stoner, 208 N.W. 781, 50 S.D. 147.
26 C.J. p 837 note 48.

48. Okl.—Gibson v. Johnson, 69 P.2d 329, 180 Okl. 417—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.
26 C.J. p 837 note 49.

49. Wash.—Shannon v. Grandstaff, 40 P. 123, 11 Wash. 536.
26 C.J. p 838 note 50.
Notice to quit or demand for possession in action by landlord against tenant see the C.J.S. title Landlord and Tenant § 769, also 36 C.J. p 639 note 52 et seq.

50. Cal.—Rutledge v. Barger, 255 P. 537, 82 Cal.App. 356.
26 C.J. p 838 note 51.
Where seizure and detention were active violations of plaintiff's rights, plaintiff need not demand possession as condition to maintaining suit for recovery of property.—Cappel v. Meeker Sugar Refining Co., 126 So. 695, 169 La. 1170.

51. Mo.—Silvey v. Summer, 61 Mo. 253.
26 C.J. p 838 note 52.

52. N.D.—Savold v. Baldwin, 146 N.W. 544, 27 N.D. 342.

53. N.D.—Savold v. Baldwin, supra.

54. Cal.—Samuels v. Singer, 36 P.2d 1098, 1 Cal.App.2d 545, amended and rehearing denied 37 P.2d 1050, 1 Cal.App.2d 545.
26 C.J. p 838 note 55.

55. Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24.
26 C.J. p 838 note 56.

where defendant's right of possession has terminated by limitation.[56]

Waiver of notice or defects therein. The right to the notice required by statute in actions for forcible entry and detainer,[57] or in actions of forcible[58] or unlawful[59] detainer,[60] may be waived. However, an appearance before a justice does not waive any defect in the notice under the statute.[61]

§ 24. Form and Contents

The form and contents of a notice to quit or demand for possession required as a condition precedent to an action of forcible entry and detainer must comply with statutory requirements.

The notice to quit or demand for possession as a condition precedent to an action for forcible entry and detainer need not be in writing,[62] unless a written notice or demand is required by statute.[63] When a written notice is necessary under the statute, the giving of such a notice is a prerequisite to jurisdiction.[64]

As to the form and contents of the notice or demand a substantial compliance with the statute is sufficient,[65] and, if there is a statutory form of notice, it will of course be sufficient to give a notice in the language prescribed.[66] The notice must contain a description of the property sought to be recovered,[67] but it is only necessary that the description should be sufficient to identify the premises.[68] It must also appear who claims the premises and makes the demand therefor;[69] and no one but the person who thus claims the premises and makes the demand can maintain the action under such notice;[70] but this may be shown from the signature at the end and need not appear in the body of the notice or demand.[71] The notice need not state that damages will be asked if the possession is not surrendered.[72] It is not necessary that a demand for possession should specify any date at which the property must be given up.[73] The name and address of defendant need not appear on the demand.[74]

Signature. The notice or demand may be signed by plaintiff's agent or attorney,[75] but must be signed in his representative capacity.[76] If the required notice is not signed by plaintiff or his agent or attorney the court acquires no jurisdiction, and any judgment rendered is a nullity.[77]

Amendment. The court cannot acquire jurisdiction by amending a notice not in compliance with the statutory requirements so as to comply with the required form, because by so doing defendant is not given the time required by statute.[78]

§ 25. Service

A notice to quit or demand for possession as a prerequisite to an action for forcible entry and detainer must be served in the manner prescribed by the statute.

Where the statute specifically describes the man-

56. Ill.—Henion v. Vavrik, 126 Ill. App. 292.

57. Okl.—Polson v. Parsons, 104 P. 336, 23 Okl. 78, 25 L.R.A.,N.S., 104.

58. Ill.—Horvitz v. Shanfeld, 198 Ill. App. 254.

59. N.M.—Santa Fe Bd. of Education v. Astler, 151 P. 462, 21 N.M. 1.
26 C.J. p 838 note 63.

Failure to exhibit deed

In unlawful detainer suit, defendants' conduct at time of, and prior to, service of demand for possession waived complaint that plaintiffs failed to exhibit their deed to property when demand for possession was served, in view of fact that possession was delivered to plaintiffs before either defendant claimed right of possession adverse to plaintiffs.—Smith v. Spencer, Mo.App., 130 S.W. 2d 653.

60. Ill.—Espen v. Hinchcliff, 23 N.E. 592, 131 Ill. 468, reversing 30 Ill. App. 371.
26 C.J. p 838 note 64.

61. Ill.—Seem v. McLees, 24 Ill. 192.

62. Ala.—Knowles v. Ogletree, 12 So. 397, 96 Ala. 555.

63. Ala.—Zion Star Baptist Church v. Hart, 152 So. 44, 228 Ala. 24.
Wash.—Lake Union Realty Co. v. Woolfield, 205 P. 14, 119 Wash. 331.
26 C.J. p 838 note 69.

64. N.J.—Collins v. Wheaton, 89 A. 1004, 85 N.J.Law 508.

65. Kan.—Hale v. Brown, 239 P. 963, 119 Kan. 303.
Okl.—Gibson v. Johnson, 69 P.2d 329, 180 Okl. 417.
26 C.J. p 838 note 71.

Notices held sufficient

(1) Notice from owner requiring person who had entered into possession without permission of owner and without color of title to pay rent within three days, or in the alternative to surrender the premises, was sufficient as a condition to commencement of unlawful detainer proceeding, under Remington Code 1915 § 812 subd 3.—Lake Union Realty Co. v. Woolfield, 205 P. 14, 119 Wash. 331.

(2) Other cases see 26 C.J. p 838 note 71 [a].

66. Ky.—Tolbert v. Young, 189 S.W. 209, 172 Ky. 269.

67. Okl.—Avants v. Bruner, 136 P. 593, 39 Okl. 730, 732.
26 C.J. p 838 note 73.

68. Neb.—Cummings v. Winters, 28 N.W. 302, 19 Neb. 719.
26 C.J. p 839 note 74.

69. Kan.—Nason v. Best, 17 Kan. 408.
Okl.—Best v. Frazier, 85 P. 1119, 16 Okl. 523.

70. Okl.—Best v. Frazier, supra.
26 C.J. p 839 note 76.

71. Okl.—Vansellous v. Huene, 108 P. 1102, 26 Okl. 243.
26 C.J. p 839 note 77.

72. Ala.—Ullman v. Herzberg, 8 So. 408, 91 Ala. 458.

73. Iowa.—Ashpole v. Delaney, 253 N.W. 30, 217 Iowa 792.
Kan.—Hale v. Brown, 239 P. 963, 119 Kan. 303.
26 C.J. p 839 note 79.

74. Ill.—Gardner v. Eberhart, 82 Ill. 316.

75. Neb.—Post v. Bohner, 36 N.W. 508, 23 Neb. 257.
26 C.J. p 839 note 80.

76. Ala.—Kennedy v. Hitchcock, 4 Port. 230.
26 C.J. p 839 note 81.

77. Ill.—Benjamin v. Allison, 201 Ill.App. 34.

78. N.J.—Collins v. Wheaton, 89 A. 1004, 85 N.J.Law 508.

ner in which the notice to quit or demand for possession shall be served, its requirements must be strictly observed.[79] Under some of the statutes service must be made by leaving a copy with defendant[80] or, if he is absent, with some person over a certain age on the premises.[81] Under most[82] but not all[83] of these statutes either form of service is sufficient. It is not sufficient merely to read a copy to defendant[84] or to send a copy by mail.[85] The demand must be made on the party who is in possession and detaining the possession,[86] but may be delivered by an agent or attorney instead of by plaintiff personally.[87] Notwithstanding a notice may be addressed to two parties it is sufficient if it is served on the party on whom the demand should have been made.[88]

Time. In the absence of a statutory requirement the time of the notice or demand is immaterial,[89] provided it is given before the suit is instituted[90] and after the particular entry complained of.[91] Under some of the statutes the notice or demand must be served a certain number of days before suit is instituted,[92] and a compliance with this requirement is jurisdictional,[93] but the fact that a longer notice is given is immaterial and does not affect the jurisdiction of the court,[94] provided the action is commenced within a reasonable time thereafter,[95] but a delay for an unreasonable time after giving notice of bringing suit may operate as an abandonment or waiver of the notice.[96]

D. DEFENSES

§ 26. In General

Defendant may set up any and all defenses which would bar plaintiff's right of recovery.

In forcible or unlawful entry and detainer proceedings defendant may set up any and all defenses which would bar plaintiff's right of recovery.[97]

79. Mo.—Hyde v. Goldsby, 25 Mo. App. 29.
26 C.J. p 839 note 87.

80. Neb.—Post v. Bohner, 36 N.W. 508, 23 Neb. 257.
26 C.J. p 839 note 88.

81. Kan.—Peddicord v. Berk, 86 P. 465, 74 Kan. 236.
26 C.J. p 839 note 89.

82. Mo.—Hinniger v. Trax, 67 Mo. App. 521.
26 C.J. p 839 notes 88–90.

83. Ill.—Doran v. Gillespie, 54 Ill. 366.
26 C.J. p 839 note 91.

84. Colo.—Does v. Craig, 1 Colo. 177.
26 C.J. p 839 note 92.

85. Mo.—Hyde v. Goldsby, 25 Mo. App. 29.

86. Cal.—Brawley v. Risdon Iron Works, 38 Cal. 676.
26 C.J. p 839 note 94.

Second demand on heirs of deceased defendant

Where a formal written demand for possession was served on the original defendant who died, it is not necessary, on revivor of the action against the original defendant's heirs, that another demand be served on them.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.

87. Okl.—Burns v. Noell, 69 P. 1076, 12 Okl. 133.
26 C.J. p 839 note 95.

88. Ill.—Gibbs v. Van Derslice, 134 Ill.App. 183.

89. Tex.—Beauchamp v. Runnels, 79 S.W. 1105, 34 Tex.Civ.App. 212.
26 C.J. p 840 note 2.

90. Ala.—Jefferson County v. Parker, 100 So. 338, 211 Ala. 289.
26 C.J. p 840 note 3.

91. Cal.—Mecham v. McKay, 37 Cal. 154.

92. Cal.—Samuels v. Singer, 36 P.2d 1098, 1 Cal.App.2d 545, amended and rehearing denied 37 P.2d 1050, 1 Cal.App.2d 545.
Iowa.—Ashpole v. Delaney, 253 N.W. 30, 217 Iowa 792.
S.D.—Meservy v. Stoner, 208 N.W. 781, 50 S.D. 147.
26 C.J. p 839 note 96.

Insufficient compliance with statute

(1) Notice to quit premises, served on defendant on February 15, did not confer jurisdiction to issue summons on February 18, in view of Rev.Code 1919 § 2172, requiring three days' written notice to quit before institution of proceedings, and § 10665, excluding first day, and including last, in computing time in which any act provided by law is to be done.—Meservy v. Stoner, 208 N. W. 781, 50 S.D. 147.

(2) Other cases see 26 C.J. p 839 note 96 [a].

93. Ill.—Craft v. Calmeyer, 274 Ill. App. 296.
Okl.—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.
S.D.—Meservy v. Stoner, 208 N.W. 781, 50 S.D. 147.
26 C.J. p 840 note 97.

94. Iowa.—Shuver v. Klinkenberg, 25 N.W. 770, 67 Iowa 544.
Kan.—Hale v. Brown, 239 P. 963, 119 Kan. 303.

95. Kan.—Douglass v. Whitaker, 4 P. 874, 32 Kan. 381.
Okl.—New v. Collins, 96 P. 607, 21 Okl. 430.

96. Okl.—New v. Collins, supra.
26 C.J. p 840 note 1.

97. Fla.—Harrell v. Martin, 158 So. 287, 117 Fla. 754.
Ky.—Paducah Home Oil Co. v. Paxton, 2 S.W.2d 650, 222 Ky. 778, 56 A.L.R. 797.
Defenses in action by landlord against tenant see the C.J.S. title Landlord and Tenant § 759, also 36 C.J. p 644 note 12 et seq.

One who has regained possession of property may show in defense to an action for forcible entry and detainer that he was a stranger to the legal proceedings under which he was turned out.—Kercheval v. Ambler, 7 J.J.Marsh., Ky., 626, 23 Am.D. 446—26 C.J. p 830 note 11.

Joint ownership

Where one joint tenant cannot employ the writ of forcible entry to oust his cotenant, defendant, in proceedings on such writ, has the right to prove that plaintiff and defendant's landlord are joint owners of the land.—Chapman v. Farris, 242 S. W. 359, 195 Ky. 362.

Persons by whom action maintainable see supra § 21.

An unsuccessful contestant for government land who, during the contest, has made improvements upon the land, is not entitled to hold possession until the improvements are appraised and paid for under the Occupying Claimant's Act, and such a defense cannot be made in an action for forcible entry and detainer.—Howe v. Parker, 90 P. 15, 18 Okl. 282—Cook v. McCord, 75 P. 294, 13 Okl. 506.

Thus he may set up as a defense the invalidity of a deed on which plaintiff based his claim,[98] and where the statute so provides possession by defendant for a specified period of time prior to the alleged entry is an available defense.[99] So it is a good defense that plaintiff voluntarily abandoned the possession of the premises in controversy before the entry complained of,[1] that prior to the entry plaintiff disclaimed to defendant any interest or claim to the premises,[2] or, as will be seen infra § 33, that the proceedings were not brought within the time prescribed by statute. Equitable defenses, however, are not available in these proceedings,[3] unless there is special statutory authority therefor.[4] So it is not a defense that the entry by defendant was made in good faith,[5] that plaintiff had leased the premises to one with whose right defendant does not connect himself,[6] that the premises had been leased for an immoral purpose,[7] that plaintiff conveyed his interest to a third person pending suit,[8] that plaintiff held title as trustee where under the trust he was entitled to possession,[9] that plaintiff abandoned the land after defendant's entry,[10] that defendant has yielded up or lost possession of a part of the premises,[11] that defendant has become bankrupt during the pendency of an appeal by him,[12] that possession of the premises was delivered to plaintiff after institution of the suit in the absence of proof of settlement,[13] that plaintiff regained possession of the premises pending an appeal by defendant,[14] that a corporation plaintiff has so conducted its affairs as to subject it to a quo warranto by the state,[15] that defendant did not refuse to quit possession, if it appears that he holds over an unreasonable length of time after demand,[16] that defendant in committing the acts complained of was acting in the capacity of agent and not in his own right,[17] or that plaintiff has been guilty of the same wrong toward defendant.[18]

Matter in abatement only is available as a defense in some jurisdictions;[19] but in other jurisdictions the contrary rule prevails.[20]

§ 27. Title or Right of Possession of Defendant

In the absence of contrary statute, ownership or pos-

98. Miss.—Gardner v. Cook, 158 So. 150, 173 Miss. 244.

But it is no defense that plaintiff's title was acquired in violation of a statute prohibiting corporations from acquiring agricultural land.—Middleton v. Georgetown Mercantile Co., 77 So. 956, 117 Miss. 134.

99. **In New York**

Under Civ.Pract. Act § 1426, that defendant and his predecessors have been in undisturbed possession for more than three years before the alleged entry or detainer is an available defense if defendant's interest in the premises is not ended at the time of the trial.—Kedrovsky v. Rojdesvensky, 204 N.Y.S. 442, 123 Misc. 159.

1. Mo.—DeGraw v. Prior, 60 Mo. 56.
26 C.J. p 824 note 50.

2. Ill.—Dudley v. Lee, 39 Ill. 339.
26 C.J. p 824 note 50 [b].

3. Del.—Pefkaros v. Harman, 174 A. 124, 126, 20 Del.Ch. 238, citing **Corpus Juris.**
Ill.—Wein v. Albany Park Motor Sales Co., 38 N.E.2d 556, 312 Ill. App. 357—Cody Trust Co. v. Dittmar, 272 Ill.App. 167—Meyer v. Surkin, 262 Ill.App. 83.
Mich.—People's Mortg. Corporation v. Wilton, 208 N.W. 60, 234 Mich. 252.
Minn.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.
Mo.—Morris v. Davis, 66 S.W.2d 883, 334 Mo. 411—Noonan v. Mason, 285 S.W. 118.
26 C.J. p 840 note 12.

The proper remedy, where the defense is an equitable one, is for defendant to resort to equity for its assertion.
Del.—Pefkaros v. Harman, 174 A. 124, 20 Del.Ch. 238.
Mo.—Morris v. Davis, 66 S.W.2d 883, 334 Mo. 411.

4. Colo.—Adcock v. Lieber, 117 P. 993, 51 Colo. 373.
26 C.J. p 840 note 11.
Interposition of equitable defense in forcible entry and detainer action as not converting it into equitable suit see Actions § 54 d.

In unlawful detainer, equitable defenses are available.—Schubert v. Lowe, 223 P. 550, 193 Cal. 291—Gray v. Maier, 84 P. 280, 2 Cal.App. 653.

In Kentucky

(1) On plea of not guilty in forcible detainer proceeding, all defenses, both legal and equitable, may be made.—Paducah Home Oil Co. v. Paxton, 2 S.W.2d 650, 222 Ky. 778, 56 A. L.R. 797.

(2) But the defense of equitable estoppel is not available on the trial of the traverse in a proceeding in forcible detainer.—Jones v. Commonwealth, 104 S.W. 782, 31 Ky.L. 1148.

5. Ariz.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.
26 C.J. p 840 note 13.

6. Cal.—Yosemite Commissioners v. Barnard, 32 P. 982, 98 Cal. 199.

7. Neb.—King v. Wilson, 95 N.W. 494, 1 Neb., Unoff., 93.

8. Ill.—Kelsey v. Palmer, 184 Ill. App. 325—Golden v. Menker, 132 Ill.App. 25.

9. Ill.—Meier v. Hilton, 100 N.E. 520, 257 Ill. 174.

10. Mont.—Spellman v. Rhode, 81 P. 395, 33 Mont. 21.
26 C.J. p 840 note 18.

11. N.Y.—Oyster Bay v. Jacob, 96 N.Y.S. 620, 109 App.Div. 613.

12. Ala.—Lomax v. Spear, 51 Ala. 532.
26 C.J. p 841 note 20.

13. Ill.—Hickox v. Armstrong, 181 Ill.App. 107.
26 C.J. p 841 note 21.

14. Ala.—Beck v. Glenn, 69 Ala. 121 —Lomax v. Spear, 51 Ala. 552.

15. Miss.—Home Mut. Bldg. & Loan Assoc. v. Leonard, 25 So. 351, 77 Miss. 39.

16. Ark.—Floyd v. Ricks, 11 Ark. 451.

17. Ala.—Luling v. Sheppard, 21 So. 352, 112 Ala. 588.

18. Ala.—Bibby v. Thomas, 31 So. 432, 131 Ala. 350.

19. Kan.—Bond v. White, 24 Kan. 45.
Particular matters as ground for abatement of action:
Another action pending see infra § 29.
Death of party see infra § 30.
Transfer of title, right, or interest see Abatement and Revival § 106 a.

20. Ky.—Jones v. Commonwealth, 104 S.W. 782, 31 Ky.L. 1148.
26 C.J. p 841 note 30.

sessory right is no defense to an action of forcible entry and detainer.

In accordance with the rules heretofore considered supra §§ 6, 7, unless the rule has been changed by statute,[21] it is not a defense to an action of forcible entry and detainer that defendant held title to the land himself[22] or was entitled to the possession thereof.[23]

§ 28. Set-Off, Counterclaim, or Recoupment

Generally no set-off, counterclaim, cross complaint, or cross demand in the nature of a recoupment can be interposed in forcible entry and detainer proceedings.

Under the statutes of some jurisdictions, defendant cannot in forcible entry and detainer proceedings file a set-off or counterclaim of any character,[24] a cross complaint,[25] or any cross demand in the nature of a recoupment;[26] and it has been held that if it is conceded that a counterclaim may be filed in proceedings of this nature a counterclaim which requires cross judgments to be rendered at law for relief which is only appropriate to a court of chancery is not permissible.[27] Under statutes of some states no counterclaim can be pleaded in a justice's court except as a set-off for rent or damages in cases where judgment for rent or damages is claimed.[28] Defendant cannot counterclaim damages resulting from a wrongful eviction under the writ issued in an action of forcible entry and detainer, but must resort to a separate action on the bond.[29]

E. ABATEMENT OF ACTION

§ 29. Pendency of Another Action or Proceeding

The pendency of a prior action for the same cause of action between the same parties ordinarily is a ground for abatement of a later action of forcible or unlawful entry and detainer.

Although there is authority to the contrary,[30] as a general rule the pendency of a prior action, in a

21. **In Arkansas**
An answer setting up that the land had been leased to defendant for an unexpired three-year term in consideration that defendant put the land under cultivation, that defendant was performing the agreement, and that plaintiff purchased with notice of defendant's rights states a meritorious defense.—Cady v. Pack, 205 S.W. 819, 135 Ark. 445.

In Washington an arbitration award, which goes solely to the right of possession, may be interposed as a defense in an action of unlawful detainer.—Taylor v. Basyde, 205 P. 16, 119 Wash. 263.

22. Conn.—Orentlicherman v. Matarese, 121 A. 275, 99 Conn. 122.
Ky.—Conley v. Shepherd, 35 S.W. 2d 5, 237 Ky. 128.
Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453—Tarpenning v. King, 82 N.W. 621, 60 Neb. 213.
Okl.—Cope v. Braden, 67 P. 475, 11 Okl. 291.
26 C.J. p 840 note 8.

In forcible detainer action, defendant's affirmative defense and counterclaim asserting a tax title to property in question and a right to possession thereunder and seeking to have title quieted in himself would not lie.—Woodbury v. Bunker, 98 P. 2d 948, 98 Utah 216.

Joint ownership
Where plaintiffs had been in peaceable adverse possession for a year of foundation on which fence torn down by defendant had been erected, defendant could not avoid liability in forcible entry proceeding on ground that the foundation was a division wall or was owned jointly by defendant and plaintiffs.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.

In Illinois
(1) It has been held that superior title in defendant is no defense.—Thomasson v. Wilson, 34 N.E. 432, 146 Ill. 384—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.

(2) But it has also been held that defendant is entitled to show performance of conditions entitling him to a bond for deed.—Dillow v. Hileman, 21 N.E.2d 632, 300 Ill.App. 509.

23. Conn.—Orentlicherman v. Matarese, 121 A. 275, 99 Conn. 122.
Ky.—Conley v. Shepherd, 35 S.W.2d 5, 237 Ky. 128.
Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453—Tarpenning v. King, 82 N.W. 621, 60 Neb. 213.

24. Ill.—Mark v. Schumann Piano Co., 105 Ill.App. 490.
26 C.J. p 841 note 33.

In an action in unlawful detainer, a set-off or counterclaim is not permissible.
Cal.—Arnold v. Krigbaum, 146 P. 423, 169 Cal. 143, Ann.Cas.1916D 370—Inman v. Schecher, 260 P. 605, 86 Cal.App. 193—Knight v. Black, 126 P. 512, 19 Cal.App. 518.
Minn.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.
Utah.—Forrester v. Cook, 292 P. 206, 77 Utah 137—Dunbar v. Hansen, 250 P. 982, 68 Utah 398.
26 C.J. p 841 note 33.

Counterclaim for damages
Purchasers' claim for damages for false representations of vendor, set up as offset against amount of their default, is a counterclaim, and cannot be made in action of forcible entry and detainer.—Votruba v. Hanke, 210 N.W. 753, 202 Iowa 658.

25. **In an action in unlawful detainer** a cross complaint is not permissible.—Henderson v. Miglietta, 273 P. 581, 206 Cal. 125—Schubert v. Lowe, 223 P. 550, 193 Cal. 291—Arnold v. Krigbaum, 146 P. 423, 169 Cal. 143, Ann Cas.1916D 370—Knight v. Black, 126 P. 512, 19 Cal.App. 518.

26. Ala.—Abrams v. Watson, 59 Ala. 524.
Ill.—Geiger v. Brown, 167 Ill.App. 534.

27. Ark.—Collins v. Karatopsky, 36 Ark. 316.

28. N.D.—Vidger v. Nolin, 87 N.W. 593, 10 N.D. 353.
Puerto Rico.—Banco Territorial y Agricola v. Arvelo, 7 Puerto Rico 551.

29. Wash.—Owens v. Swanton, 64 P. 921, 25 Wash. 112.

30. **Election rather than abatement required**
"If two cases for the same wrong be pending at the same time, an election might be directed. But neither of the suits should be abated."—Boucher v. Williamson, Ky., 1 Dana 227.

court of competent jurisdiction, predicated on the same cause of action, and between the same parties, constitutes good ground for abatement of a later action of forcible or unlawful entry and detainer.[31] To constitute ground for abatement, however, the actions must be identical or substantially identical, that is, they must be between the same parties, based on the same cause of action, involve the same issues, and be capable of authorizing the same relief;[32] and a prior action which has been effectively terminated, of course, cannot be pleaded in abatement of a subsequent action.[33]

§ 30. Death of Party

In the absence of a saving statute an action of forcible or unlawful entry and detainer abates on the death of either party.

Whether an action of forcible or unlawful entry or detainer abates on the death of a party depends on the terms of the survival statute in the particular jurisdiction. In the absence of a saving statute it abates on the death of either party.[34] Under the statute in some jurisdictions, however, the action survives;[35] but an action brought by one who has only a life estate in the land abates by his death.[36]

F. JURISDICTION, VENUE, TIME TO SUE, AND LIMITATIONS

§ 31. Jurisdiction

Statutory provisions determine the courts which have jurisdiction of actions of forcible or unlawful entry and detainer and the extent of their powers and jurisdiction.

As a rule, original jurisdiction of actions of forcible or unlawful entry and detainer is given to courts of justices of the peace or to courts of like inferior and limited jurisdiction,[37] such as court commissioners,[38] probate courts,[39] county courts,[40] district courts,[41] municipal courts within the territorial lim-

31. N.D.—McLain v. Nurnberg, 112 N.W. 245, 16 N.D. 138.
26 C.J. p 841 note 31.
Another action pending as ground of abatement in general see Abatement and Revival §§ 17–81.

32. Ill.—Meier v. Hilton, 100 N.E. 520, 257 Ill. 174.
1 C.J. p 70 note 85—26 C.J. p 841 note 31.

Prior action involving title

(1) The pendency of a prior action to adjudicate title is not ground for abatement of a forcible entry and detainer action which involves only possession.—Lyons v. Lyons, 90 P.2d 391, 185 Okl. 70—26 C.J. p 841 note 31 [d].

(2) Accordingly the pendency of a suit in ejectment cannot abate a subsequent action of forcible or unlawful detainer with respect to the same premises.
Ill.—Merki v. Merki, 113 Ill.App. 518, affirmed 72 N.E. 9, 212 Ill. 121.
Mo.—Drey v. Doyle, 28 Mo.App. 249.

Prior action to enforce equitable rights

The scope and purpose of an action under the unlawful detainer statute is so essentially different from that of a district court action to enforce equitable rights in the property that the pendency of the latter action is not a bar to a prosecution of the former.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.

In Texas the action of forcible entry and detainer and the action of trespass to try title or other possessory action in the district court provide cumulative and not exclusive remedies and may be resorted to and prosecuted concurrently.—Omohundro v. Nowlin, Civ.App., 142 S.W.2d 399.

33. Iowa.—Music v. De Long, 229 N. W. 673, 209 Iowa 1068.
26 C.J. p 841 note 31 [e].

34. N.Y.—Mulligan v. O'Brien, 102 N.Y.S. 911, 53 Misc. 4, affirmed 104 N.Y.S. 301, 119 App.Div. 355.
1 C.J. p 207 note 81.
Abatement and survival of action on death of party generally see Abatement and Revival §§ 114–186.

35. Ala.—Ridgeway v. Waugh, 51 Ala. 423.
1 C.J. p 207 note 82.

Incidental claim for damages also survives

Under statute allowing survival of unlawful detainer action, claim for damages, which was merely incidental, also survived, notwithstanding claim sounded in tort, since claim was founded on injury to property and was measured by property's rental value, and would therefore be considered as quasi contractual.—McFarland v. Carpenter, 63 P. 2d 859, 18 Cal.App.2d 205.

36. Mass.—Brown v. Kendall, 13 Gray 272.

37. Del.—Knight v. Haley, 176 A. 461, 6 W.W.Harr. 366.
Iowa.—Owens v. Smith, 204 N.W. 439, 200 Iowa 261.
Mo.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo. App. 760.
Mont.—State ex rel. Hamshaw v. Justice's Court of Union Tp. in and for Madison County, 88 P.2d 1, 108 Mont. 12.
Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453.
N.M.—Bell v. Beck, 92 P.2d 992, 43 N.M. 315.
Ohio.—Martin v. Bircher, 188 N.E 365, 46 Ohio App. 239—Baughman v. Bounds, 29 Ohio N.P., N.S., 544.
Okl.—Clark v. Keith, 207 P. 87, 86 Okl. 156.
Tex.—Farrell v. Sien, Civ.App., 145 S.W.2d 606—Cohran v. Fischer, Civ. App., 61 S.W.2d 577, error dismissed.
Wyo.—Allen v. Houn, 219 P. 573, 30 Wyo. 186, denying rehearing 213 P. 757, 29 Wyo. 413.
26 C.J. p 842 note 39—25 C.J. p 981 note 39—35 C.J. p 505 note 16.
Appellate jurisdiction see infra § 78.

Justices' courts have no jurisdiction in some states of this class of actions.—Strozzi v. Wines, 55 P. 828, 24 Nev. 389, rehearing denied 57 P. 832—26 C.J. p 842 notes 39 [b], 49 [a], [b].

38. Mich.—Bulter v. Bertrand, 56 N. W. 342, 97 Mich. 59.
Utah.—Hyndman v. Stowe, 33 P. 227, 9 Utah 23.

39. Okl.—Anderson v. Fergeson, 71 P. 225, 12 Okl. 307.
26 C.J. p 842 note 41.

40. Fla.—State ex rel. West's Drug Stores v. Cornelius, 149 So. 332, 110 Fla. 299—Hewitt v. State, 146 So. 578, 108 Fla. 335.
26 C.J. p 842 note 42.

In Kentucky the county court has no jurisdiction.—Johnson v. Erwine, 3 Metc. 251.

41. N.J.—Seidman v. John Craven & Sons Co., 143 A. 726, 6 N.J.Misc. 1062.

its of their respective municipalities,[42] and police courts of cities of a designated class.[43] In some states this original jurisdiction of justices of the peace and like courts is exclusive;[44] in others courts of general original jurisdiction have also original jurisdiction of these summary proceedings,[45] and in some localities these courts have both appellate and concurrent original jurisdiction in this class of cases.[46] In still other states some of these courts of general jurisdiction have exclusive jurisdiction of this class of actions.[47]

The extent of jurisdiction and powers of the court on which jurisdiction is conferred in this class of actions is measured by the terms of the statutes conferring jurisdiction in the particular state.[48] Where jurisdiction is conferred on courts of inferior or limited jurisdiction, their powers and duties are defined by the particular statute respecting forcible entries and detainers and not by the statute defining and limiting the jurisdiction of such courts generally.[49] So, where jurisdiction in this class of actions is conferred on courts of superior jurisdiction, they do not proceed, under the statutes in some states, by virtue of their powers as courts of general jurisdiction but derive their authority wholly from the particular statute respecting forcible entries and detainers.[50] Accordingly, depending on the terms of the statutes in the particular state, courts of superior[51] or inferior[52] jurisdiction are regarded in some states as courts of special and limited jurisdiction when exercising jurisdiction in forcible entry and detainer proceedings, while in other states courts of inferior jurisdiction, such as justices' courts, are considered as courts of general jurisdiction in such proceedings.[53]

While improper and unnecessary allegations as to title, whether made by plaintiff or defendant, do not deprive the court in which an action is properly brought of jurisdiction,[54] an action involving title brought in a court without jurisdiction to try questions of title should be dismissed,[55] or, as appears in Courts § 502 b, be removed to a court which pos-

In Wyoming the district court has no original jurisdiction.—Allen v. Houn, 219 P. 573, 30 Wyo. 186, denying rehearing 213 P. 757, 29 Wyo. 413.

42. Iowa.—Owens v. Smith, 204 N.W. 439, 200 Iowa 261.
Minn.—Mercantile State Bank v. Vogt, 226 N.W. 847, 178 Minn. 282.
Ohio.—Martin v. Bircher, 188 N.E. 365, 46 Ohio App. 239—State v. Miller, 183 N.E. 41, 43 Ohio App. 173—Burrow v. Miller, 24 Ohio N.P., N.S., 152.
26 C.J. p 842 note 43.

43. Ky.—Allen v. Moore, 191 S.W. 93, 173 Ky. 394.

44. Mo.—State ex rel. Kelly v. Trimble, 247 S.W. 187, 297 Mo. 104, explained in 247 S.W. 1009, 297 Mo. 104—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760.
Tex.—Farrell v. Sien, Civ.App., 145 S.W.2d 606.
26 C.J. p 842 note 46.

In Iowa the jurisdiction of justices of the peace was formerly exclusive.—Owens v. Smith, 204 N.W. 439, 200 Iowa 261.

45. Iowa.—Owens v. Smith, supra.
Mont.—State ex rel. Hamshaw v. Justice's Court of Union Tp. in and for Madison County, 88 P.2d 1, 108 Mont. 12.
26 C.J. p 842 note 47.

46. Ill.—Davis v. Hamilton, 53 Ill. App. 94.

47. Nev.—Strozzi v. Wines, 55 P. 828, 24 Nev. 389, rehearing denied 57 P. 832.
26 C.J. p 842 note 49.

48. Ohio.—State v. Miller, 183 N.E. 41, 43 Ohio App. 173—Baughman v. Bounds, 29 Ohio N.P.,N.S., 544—Burrow v. Miller, 24 Ohio N.P., N.S., 152.
26 C.J. p 842 note 39.

Extent of jurisdiction under particular statutes

(1) General statutory provision authorizing justices of peace to inquire into unlawful and forcible entries gives justices jurisdiction in other cases besides those set out in statute respecting specific cases in which jurisdiction may be exercised.—Martin v. Bircher, 188 N.E. 365, 46 Ohio App. 239.

(2) Under provision of constitution giving justices' courts concurrent jurisdiction with district courts in cases of "forcible entry" and "unlawful detainer," all actions falling within the general category of forcible and unlawful entry and forcible and unlawful detainer are included in its terms, since the words "forcible entry" are sufficient to comprehend "unlawful entry" and words "unlawful detainer" are sufficient to comprehend "forcible detainer."—State ex rel. Hamshaw v. Justice's Court of Union Tp. in and for Madison County, 88 P.2d 1, 108 Mont. 12.

(3) Justice of the peace has no jurisdiction of subject matter of forcible detainer complaint, where statement of claim disclosed that defendants were vendees in default and not tenants.—Knight v. Haley, 176 A. 461, 6 W.W.Harr., Del., 366.

(4) Statute limiting jurisdiction of justices of the peace in townships having between two hundred thousand and four hundred thousand population in unlawful detainer action to lands lying within respective townships, together with following statutory section, repeals statutes making action cognizable before any justice of peace of county in so far as statute relates to justices of peace in townships of between two hundred thousand and four hundred thousand population.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.

49. Ohio.—Martin v. Bircher, 188 N.E. 365, 46 Ohio App. 239.
Wis.—Savage v. Carney, 8 Wis. 162.

50. Ill.—City of Chicago v. Chicago S. S. Lines, 159 N.E. 301, 328 Ill. 309.
26 C.J. p 842 note 47 [a].

51. Ill.—City of Chicago v. Chicago S. S. Lines, 159 N.E. 301, 328 Ill. 309—Burns v. Nash, 23 Ill.App. 552.

52. Del.—Knight v. Haley, 176 A. 461, 6 W.W.Harr. 366.

53. Tex.—Cohran v. Fischer, Civ. App., 61 S.W.2d 577, error dismissed.

54. Or.—Heiney v. Heiney, 73 P. 1038, 43 Or. 577.
26 C.J. p 843 note 63.

55. Fla.—Hewitt v. State, 146 So. 578, 108 Fla. 335.
26 C.J. p 842 notes 40 [a], 50.

The mere filing of a plea of title by defendant does not oust the court of jurisdiction, but it loses jurisdiction only when it appears that the question of title is necessarily involved.
Mich.—Butler v. Bertrand, 56 N.W. 342, 97 Mich. 59.

sesses jurisdiction; and if it appears that, on account of the limited jurisdiction of the court in which the forcible entry and detainer proceedings are pending, all matters between the parties cannot be adjudicated, either party may maintain an action in a court of competent jurisdiction for proper relief.[56]

Compliance with statutes as jurisdictional requisite. Since, as appears supra § 3, the action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, it follows that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding will be coram non judice and void,[57] unless the defects in procedure may be, and are, waived.[58] There is no presumption in favor of the record.[59] It must appear that the statutory remedy was strictly pursued and the facts which give jurisdiction must appear affirmatively on the face of the record, otherwise the proceedings will be not merely voidable, but absolutely void, as being coram non judice.[60]

Value of property in controversy. The jurisdiction is not affected by the value of the property, the possession of which is sought to be recovered;[61] and it has been held that in an action for forcible entry and detainer the jurisdiction of justices in the matter of damages is not limited to the amount specified as the limit of their jurisdiction in civil actions generally.[62]

Abandonment of premises by defendant. Where, pending the trial, no question of damages being involved, it is made to appear after issue joined that defendant abandoned the premises and his claim to possession thereof, the court is without jurisdiction in some states to proceed further and render judgment for plaintiff.[63]

Objections to jurisdiction. The question of jurisdiction may properly be raised at any stage of the proceedings.[64]

§ 32. Venue

The venue of forcible entry and detainer actions is generally fixed by statute. Ordinarily such actions must be brought in the county where the land lies.

The venue of forcible entry and detainer actions is frequently regulated by specific statutory provisions in which cases these specific provisions control as to questions of venue.[65] Under these provisions the action of forcible entry and detainer is generally local in its nature[66] and must be brought in the county in which the land in question lies.[67] Under the statutes in some states the action may be brought before any justice of the peace of such county;[68] but under the statutes of other states it must ordinarily be brought in the precinct where the property is situated,[69] unless there is no justice of the peace in that precinct able or qualified by law to act, in which case the action may be brought be-

Okl.—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.

56. Tex.—Holcombe v. Lorino, 79 S.W.2d 307, 124 Tex. 446, reversing Lorino v. Holcombe, Civ.App., 71 S.W.2d 402.

57. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
Mo.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760.
26 C.J. p 843 note 54.

Substantial compliance with the statute is a jurisdictional requirement.—Meservy v. Stoner, 208 N.W. 781, 50 S.D. 147.

58. **Organization of court**
Where a court of unlawful entry and detainer was organized composed of three justices of the peace, pursuant to proceeding instituted in that behalf, it acquired jurisdiction of the subject matter without regard to whether the two justices other than the one issuing the process had been summoned in manner required by law, and such court was vested with authority to enter a judgment in the cause at such time and place as was permitted by law.—Amis v. Home Owners Loan Corporation, Miss., 5 So.2d 425, overruling suggestion of error 5 So.2d 12.

59. Ill.—Burns v. Nash, 23 Ill.App. 552.
Mo.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 824, 228 Mo.App. 800, citing **Corpus Juris.**

60. Mo.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 824, 228 Mo. App. 800, citing **Corpus Juris.**
26 C.J. p 843 notes 54 [b], 58.

61. Ohio.—State v. Miller, 183 N.E. 41, 43 Ohio App. 173.
S.C.—American Oil Co. v. Cox, 189 S.E. 660, 662, 182 S.C. 419, citing **Corpus Juris.**
26 C.J. p 843 note 59.

62. Me.—Silvey v. Summer, 61 Me. 253.

63. Okl.—Hampdon v. Lynch, 153 P. 1119, 53 Okl. 249.
Delivery of premises to plaintiff after commencement of suit as a defense see supra § 26.
Loss of possession of part of premises as a defense see supra § 26.

64. Mo.—Jackson v. Black, App., 286 S.W. 410.

65. Colo.—Reynolds v. Larkins, 14 P. 114, 10 Colo. 126.
26 C.J. p 843 note 64.
Venue under general principles of venue and general venue statutes see the C.J.S. title Venue § 1 et seq., also 67 C.J. p 11 note 1 et seq.

66. Ill.—Billings v. Chapin, 2 Ill. App. 555.

67. Ill.—Billings v. Chapin, supra.
Action not confined to county
Under statute providing that party held out of possession may exhibit his complaint before any justice of peace of county within which land may lie, it is not essential to jurisdiction that affidavit be made before justice of peace of county in which lands lie, since the word "may" is not used in the statute in mandatory sense.—Gee v. Rimmer, 195 So. 342, 188 Miss. 460.

68. Mo.—Keim v. Daugherty, 8 Mo. 498.
26 C.J. p 843 note 64.

69. N.M.—Tietjen v. McCoy, 172 P. 1144, 24 N.M. 164—Brasswell v. Halliburton, 143 P. 476, 19 N.M. 386.

fore a justice of the peace in any adjoining precinct.[70]

The grant of concurrent jurisdiction to two states over a river forming a common boundary does not authorize the bringing of the action in one of these states for the recovery of lands situated anywhere within the territorial limits of the other.[71]

§ 33. Time to Sue and Limitations

Forcible or unlawful entry and detainer actions are barred unless brought within the time prescribed by statute.

Ordinarily the forcible or unlawful entry and detainer statutes prescribe the time within which actions based on such statutes must be brought, and unless the action is brought within the time prescribed it will be barred.[72] Such statutes are subject to strict construction.[73] An entry on unimproved land with intent to clear and fit it for cultivation is sufficient to put the statute of limitations in operation.[74] An inclosure is unnecessary.[75] If a statute provides that peaceable and uninterrupted possession with plaintiff's knowledge for a designated time shall be a bar, defendant cannot rely on it unless plaintiff had knowledge of the adverse possession.[76] Under such a statute defendant's possession is not interrupted by a notice against trespass not acceded to by him.[77]

G. PARTIES, PROCESS, AND APPEARANCE

§ 34. Parties

General rules as to parties ordinarily apply in forcible or unlawful entry and detainer actions.

The usual rules governing questions as to parties in civil actions in general ordinarily apply in forcible entry and detainer actions.[78] Thus one who is present and participates in the forcible entry and continues to support and assist the party entering to remain on the premises may properly be joined as a party defendant in forcible entry and detainer;[79] but two or more persons who hold in severalty different parts of the premises in controversy cannot be joined as codefendants in the action,[80] unless the statute so permits.[81]

Husband and wife. It has been held that, in a case of a joint occupancy of premises by husband and wife, the husband is as a general rule the only proper party defendant.[82] The wife generally is not in joint possession with the husband merely because she is there and is neither a necessary party plaintiff to vindicate[83] nor a necessary party to defend[84] the possession. Even though it appears that the wife was the active participant in making the wrongful entry, if there is enough in the proof to

70. N.M.—Sanchez v. Candelaria, 23 P. 239, 5 N.M. 400.

Justice nearest to land

It is a justice of the peace of an adjoining precinct, and not necessarily the justice nearest to the land in question, on whom jurisdiction is conferred in such cases.—Bell v. Beck, 92 P.2d 992, 43 N.M. 315.

71. Mo.—Cooley v. Golden, 52 Mo. App. 229.

72. Okl.—Johnson v. Connaway, 88 P.2d 338, 184 Okl. 516.
26 C.J. p 844 notes 68, 69.
Limitations under general statutes of limitations see the C.J.S. title Limitations of Actions § 1 et seq, also 26 C.J. p 844 notes 76, 77 and 37 C.J. p 684 note 1 et seq.

Answer setting up statute held insufficient

Under a statute making a year's possession immediately preceding the filing of the complaint a defense unless the estate in the premises be ended, an answer alleging that defendant had been in the quiet possession of the premises for more than a year before the filing of the complaint, but which fails to allege that the estate therein is not ended, presents no defense.—Bellingham Bay & B. C. R. Co. v. Strand, 23 P. 928, 1 Wash. 133.

73. Wash.—Smith v. Seattle Camp No. 69 W. W., 107 P. 372, 57 Wash. 556.

74. Ky.—Humphrey v. Jones, 3 T.B. Mon. 261.

75. Ky.—Humphrey v. Jones, supra.

76. Iowa.—Fultz v. Black, 3 Iowa 569.

77. Ala.—Lipscomb v. Moore, 153 So. 393, 228 Ala. 365.

78. **Beneficiary as sole party plaintiff**

Code 1923 § 5700, providing that, where suits are brought in the name of the person having the legal right for the use of another, the beneficiary must be considered the sole party on the record, is inapplicable to an action of forcible entry and detainer since such action is one in tort.—Walker v. Adler, 112 So. 458, 216 Ala. 76.

Substitution of parties plaintiff so as to make suit for use of party originally named as plaintiff held to make complaint demurrable.—Walker v. Adler, 112 So. 458, 216 Ala. 76.
Parties generally see the C.J.S. title Parties § 1 et seq, also 47 C.J. p 14 note 1 et seq.
Persons against whom action may be brought see supra § 22.

79. Mo.—Welden v. Myers, 253 S.W. 1086, 212 Mo.App. 479.
26 C.J. p 836 note 22.

Member of purchaser's family

One entering into and remaining in possession of realty as member of purchaser's family may be joined as defendant in an action of unlawful detainer against the purchaser.—Mercantile State Bank v. Vogt, 226 N.W. 847, 178 Minn. 282.

80. Philippine.—Santos v. Limuco, 5 Philippine 15.
26 C.J. p 836 note 24.

81. **Where action is joint in its inception**

By special statute in some jurisdictions, where the action is joint in its inception, and the tenancy is afterward severed, all may be joined in certain cases in one suit but the verdict and judgment should be several. —Gould v. Hendrickson, 9 Ill.App. 171.

82. Mo.—State v. Henning, 26 Mo. App. 119.
26 C.J. p 837 note 31.

83. Mo.—State v. Henning, supra.
26 C.J. p 837 note 31.

84. Tex.—Madison v. Martinez, Civ. App., 42 S.W.2d 84, 87, citing Corpus Juris.
26 C.J. p 837 note 31.

justify the conclusion that the husband had advised and consented to the proceeding, if he had not expressly directed it, he is a proper party defendant;[85] but a wife cannot be ousted from her own property in an action of forcible entry and detainer against her husband alone.[86] Where forcible entry and detainer constitute the joint act of both husband and wife, both are proper parties to an action to recover possession.[87] Where the principal defendant was a married woman, doing business as a sole trader, it has been held that it is proper[88] and even necessary[89] to join her husband as a party defendant; but there is authority apparently to the contrary.[90]

§ 35. Process and Appearance

To give the court jurisdiction, a valid and sufficient summons or other process must, as a general rule, be issued and served in the manner provided by statute.

As a general rule a valid summons or other process must issue at the time of the filing of the complaint in order to give the court jurisdiction.[91] The form and sufficiency thereof depends largely on statutory provisions,[92] and as to these matters it has been decided that a summons is only required "to be sufficient on its face to show what is intended thereby;"[93] that the complaint made and verified by plaintiff under oath may be looked to in aid of a warrant;[94] that if the summons contains the substance of the complaint so as to apprise defendant of the nature and extent of the claim it is sufficient without reciting the complaint fully,[95] although a summons in which the nature of the action is not stated or the relief demanded mentioned is void;[96] that a summons is not rendered defective by its omission to state that the place at which defendant is to appear is the usual place of holding the justice's court in the district;[97] that a process is not bad because plaintiffs in describing their possession stated that they were possessed as executors;[98] and that a summons need not negative the defense of the statute of limitations.[99]

Description of land. A summons should describe the land in controversy with convenient certainty so as to enable the officer to deliver possession, but the description need not be so certain as in itself and alone to enable him to do so; if it can be rendered certain by extrinsic evidence it is sufficient.[1]

Service and return. Process must be made returnable within the time,[2] and to the court[3] and to the term of court,[4] provided by statute; and it must be served within the time[5] and in the manner[6] prescribed by statute, unless service is waived,

85. Ill.—Bauerschmitz v. Bailey, 29 Ill.App. 295.

86. Ill.—Cofoid v. Bishop, 11 Ill. App. 117.

87. Minn.—Mercantile State Bank v. Vogt, 226 N.W. 847, 178 Minn. 282.
26 C.J. p 837 note 34.

88. Cal.—Howard v. Valentine, 20 Cal. 282.

89. Va.—Farley v. Tillar, 81 Va. 275.

90. Ill.—McGivern v. Parkhill, 195 Ill.App. 343.
26 C.J. p 837 note 37.

91. Wash.—Big Bend Land Co. v. Huston, 168 P. 470, 98 Wash. 640.
Notice to quit see supra §§ 23–25.

In Mississippi, on presentation of affidavit on which unlawful entry and detainer proceeding is instituted to a justice of peace duly signed and certified by a justice of the peace, the justice before whom the proceeding is instituted may issue warrant, and summon other justices, who may proceed to hear the controversy. —Gee v. Rimmer, 195 So. 342, 188 Miss. 460.

92. **Summons held sufficient**
A summons stating that defendants unlawfully withhold from plaintiff the possession of the premises, sufficiently complies with Code c. 89 § 1, requiring the summons to set forth that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question. —Superior v. Peters, 118 S.E. 540, 94 W.Va. 376.

93. W.Va.—Brumbaugh v. Sterringer, 35 S.E. 854, 48 W.Va. 121.
26 C.J. p 844 note 80.

94. Va.—Kincheloe v. Tracewells, 11 Gratt. 587, 52 Va. 587.

95. U.S.—Russell v. Wheeler, Ark. Super., 21 F.Cas.No.12,164a, Hempst. 3.
26 C.J. p 844 note 82.

96. Wash.—Big Bend Land Co. v. Huston, 168 P. 470, 98 Wash. 640.

97. Miss.—Brown v. Ashford, 56 Miss. 677.

98. Vt.—Edmonds v. Morrill, Brayt. 20.

99. Va.—Daily v. Rucker, 144 S.E. 466, 151 Va. 72.
W.Va.—Martin v. Cochran, 119 S.E. 174, 94 W.Va. 432.

1. W.Va.—Simpkins v. White, 27 S. E. 361, 43 W.Va. 125.
26 C.J. p 844 note 87.

Description held sufficient
"Four rooms and bath, located on the second floor" of a certain building, which are shown to comprise the entire floor, is sufficient description of the premises in the summons.—Superior v. Peters, 118 S.E. 540, 94 W.Va. 376.

2. Minn.—Kenny v. Seu Si Lun, 112 N.W. 220, 101 Minn. 253, 11 L.R.A., N.S., 831, 11 Ann.Cas. 60.
26 C.J. p 844 note 88.

3. W.Va.—Gorman v. Steed, 1 W.Va. 1.

4. Minn.—Watier v. Buth, 91 N.W. 756, 92 N.W. 331, 87 Minn. 205.
26 C.J. p 844 note 91 [b].

5. Cal.—Kent v. West, 50 Cal. 185.
26 C.J. p 844 note 91.

Action in municipal court
Code 1924 § 12272, having been superseded by §§ 10666–10668, original notices in actions of forcible entry and detainer in municipal courts must be served at least five days before the time fixed for appearance.—Owens v. Smith, 204 N.W. 439, 200 Iowa 261.

6. S.C.—Moore v. Moore, 197 S.E. 507, 187 S.C. 144.
26 C.J. p 844 note 92.

In Illinois
(1) Under Mun.Ct.Act § 48, Cahill St. c 37 par. 436, and the Forcible Entry and Detainer Act, Cahill Ill.St. p 57, substituted service is now permissible in forcible entry and detainer cases in the municipal court where no claim for rent or damages is included.—MacLean Drug Co. v. Stoeffhas, 229 Ill.App. 492.

(2) Formerly, substituted service could not be employed in actions commenced in the municipal court,

as by a general appearance.[7] Under a statute providing that when a summons is served by a person other than the sheriff, it must be returned with an affidavit of service by such person, it is not necessary that it should appear that the party making the service did so at the request of plaintiff or his attorney.[8]

To what county. Although the action may be confined by statute to the county in which the land is situated, yet process may issue to and be served in the county where defendant resides,[9] although different from that where the land is located.[10]

Against several defendants. Where process issues against several defendants, it is no legal objection to the service that it was not served on all of them,[11] and plaintiff may proceed against those on whom process has been served.[12]

Amendment. Where the names of the parties are properly set out in the complaint and bond, but wholly omitted from the writ, plaintiff, pending a motion to quash the writ, should be permitted to amend.[13]

New process. If a summons is void, or not served, defendant may be brought into court by a new summons.[14]

H. PLEADING

§ 36. Mode and Form in General

The mode and form of pleading in actions for forcible entry and detainer are considered with reference to the complaint infra §§ 37–46, with reference to a plea, answer, or cross complaint infra § 47, and with reference to a reply infra § 48.

Examine Pocket Parts for later cases.

§ 37. Complaint

A complaint in forcible entry and detainer is sufficient where it is in conformity with a statute prescribing its contents, or where it sets out the facts entitling plaintiff to a recovery.

A complaint which contains all the allegations required by a statute prescribing what it shall allege[15] or which follows a form prescribed by statute[16] is sufficient, and a complaint will be sufficient which follows a precedent furnished by a state form book, notwithstanding it may appear defective if treated as a technical pleading, where it has long been adopted in practice and has received the sanction of the courts.[17] It is said that a complaint which follows a statute prescribing the necessary allegations therefor is sui generis, and the proceedings based on the statute are not to be measured or determined by the ordinary rules and proceedings in civil cases.[18] Notwithstanding the sufficiency of a complaint drawn in accordance with the statutory provisions, complainant is not bound to avail himself of the benefits of those statutes, but is still at liberty to set out in full the particular facts to bring his case within the statutes. If, however, he elects to do this, he can omit no fact which is essential to his case or which is necessarily included in, or implied by, the general form of complaint indicated by statute.[19]

Where a petition shows a suit is based on defendant's unlawful seizure and detention of real property, the fact that the prayer for relief includes a prayer for rent, as well as prayers for restoration of the property, does not render the action one ex contractu.[20] An averment of a forcible and unlawful entry, and that defendants forcibly detained the premises so unlawfully taken, does not lay the de-

—Naughton v. Anderson, 155 Ill.App. 504—26 C.J. p 844 note 92 [c].

7. **In Missouri**

(1) It was at one time held that service of process on defendant in the manner prescribed by statute could not be waived by the voluntary appearance of defendant.—State ex rel. Kelly v. Trimble, 247 S.W. 187, 297 Mo. 104, explained in 247 S.W. 1009, 297 Mo. 104.

(2) But this holding has been criticized as "so anomalous that it cannot be treated as a precedent."—Gary Realty Co. v. Swinney, 269 S.W. 961, 967, 306 Mo. 592.

(3) And it now appears to be established that service of process in the manner prescribed by statute may be waived and is waived by the entry of defendant's general appearance to the suit.—Gary Realty Co. v. Swinney, supra—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760—Jackson v. Black, App., 286 S.W. 410.

8. Cal.—Block v. Kearney, 64 P. 267, 6 Cal.Unrep.Cas. 660.

9. Ill.—Billings v. Chapin, 2 Ill.App. 555.

10. Ill.—Billings v. Chapin, supra.

11. Conn.—Dutton v. Tracy, 4 Conn. 79.

12. Va.—Harman v. Odell, 6 Gratt. 207, 47 Va. 207.

13. Ark.—Galbreath v. Mitchell, 32 Ark. 278.

14. Wash.—Hughes v. Crowley, 5 P.2d 982, 165 Wash. 580.

15. Ill.—Magnuson v. Jechort, 6 N.E. 2d 514, 288 Ill.App. 624.
Kan.—Armour Packing Co. v. Howe, 75 P. 1014, 68 Kan. 663.
Neb.—Blachford v. Frenzer, 62 N.W. 1101, 44 Neb. 829.
26 C.J. p 846 note 23.

16. N.M.—Springer v. Wasson, 167 P. 712, 23 N.M. 277.
26 C.J. p 846 note 24.

17. N.J.—Townley v. Rutan, 21 N.J. Law 674, affirming 20 N.J.Law 604.

18. Mo.—Gary Realty Co. v. Kelly, 214 S.W. 92, 278 Mo. 450.

19. Mich.—Bryan v. Smith, 10 Mich. 229.

20. La.—Cappel v. Meeker Sugar Refining Co., 126 So. 695, 169 La. 1170.

tainer as an independent ground of relief.[21]

§ 38. —— Necessity of Written Complaint

Written pleadings are ordinarily but not universally requisite in proceedings for forcible entry and detainer, the matter being largely regulated by statute.

Under the rule prevailing in some jurisdictions written pleadings are not required.[22] Under the rule prevailing in other jurisdictions, a written complaint drawn in compliance with the requirements of the governing statute is essential to jurisdiction,[23] and failure to comply with the provisions of the statute in such respect renders the proceedings coram non judice and void.[24] It has also been held that, unless dispensed with by statute, a written complaint is necessary, although the proceedings are commenced before a justice of the peace;[25] that a mere verbal complaint is insufficient;[26] and that if no written complaint is filed the circuit court acquires no jurisdiction on appeal from the justice.[27]

§ 39. —— Requisites and Sufficiency in General

Great strictness of pleading is, as a rule, not required, although jurisdiction must be shown.

In suits brought under the statutes relating to forcible entry and detainer, particularly where instituted in courts of justices of the peace, great strictness in the complaint or affidavit is not requisite.[28] Nevertheless, to give the court jurisdiction it is necessary that the complaint should embody such a statement of facts as brings the party clearly within some one of the class of cases for which the statutes provide a remedy,[29] as these proceedings are summary and contrary to the course of the common law.[30] The complaint must show enough on its face to give the court jurisdiction without resort to parol testimony.[31] It must show where the premises are situated.[32] It is better practice for the complaint to show that the premises are within the territorial jurisdiction of the court wherein suit is instituted;[33] and if action is instituted before a justice of the peace, the complaint should show that the premises are situated in the county in which he sits,[34] and in his precinct, if his jurisdiction is limited to his precinct,[35] or that there is no justice in the precinct where the premises are situated.[36] However, if the action is cognizable before any justice of the county where the acts are committed, the complaint need not allege the property to have been in the city ward of the justice before whom the complaint was filed,[37] and a complaint, which describes the premises in compliance with a statute merely enjoining on complainant the duty to describe the property, without in terms requiring a specific averment that the property is within the district of the justice, has been held sufficient despite omission of such a specific averment, the court taking the view that failure to include such an averment is not a fatal defect even though the record of the case must show somewhere that the property is within the jurisdiction of the justice.[38]

21. Cal.—Preston v. Kehoe, 15 Cal. 315.

22. Ky.—Jones v. Commonwealth, 104 S.W. 782, 31 Ky.L. 1148.
26 C.J. p 845 note 3.

23. Mo.—Purcell v. Merrick, 158 S. W. 478, 172 Mo.App. 412.
Wyo.—White v. Veitch, 197 P. 983, 27 Wyo. 401.

24. Wyo.—White v. Veitch, supra.

25. Ill.—Redfern v. Botham, 70 Ill. App. 253.
26 C.J. p 845 note 5.

26. Ill.—Stolberg v. Ohnmacht, 50 Ill. 442.

27. Ill.—Stillo v. Pelletiere, 140 Ill. App. 428.
26 C.J. p 845 note 7.

28. N.M.—Tietjen v. McCoy, 172 P. 1144, 24 N.M. 164.
26 C.J. p 845 note 8.

Complaints held sufficient
Ark.—Holzman v. Gattis, 114 S.W.2d 3, 195 Ark. 773.
Puerto Rico.—Coira v. Ortiz, 18 Puerto Rico 211.
26 C.J. p 845 note 2 [a].

Complaints held insufficient
Wyo.—White v. Veitch, 197 P. 983, 27 Wyo. 401.

29. Colo.—Kenney v. Daugherty, 185 P. 471, 67 Colo. 56.
26 C.J. p 845 note 9.

30. Ill.—Wells v. Hogan, 1 Ill. 337.
N.M.—Tietjen v. McCoy, 172 P. 1144, 24 N.M. 164.

31. Ind.—Boxley v. Collins, 4 Blackf. 320.
Me.—Treat v. Brent, 51 Me. 478.

32. N.J.—Banks v. Murray, 5 N.J. Law 849.
Ohio.—Murphy v. Lucas, 2 Ohio 255.
Description of premises generally see infra § 41.

33. Ind.—Boxley v. Collins, 4 Blackf. 320.
26 C.J. p 846 note 14.

34. Ind.—Boxley v. Collins, supra.
Mo.—Johnson v. Fischer, 56 Mo.App. 552.
26 C.J. p 846 note 15.

35. Tex.—Lasater v. Fant, Civ.App., 43 S.W. 321—Yarbrough v. Chamberlin, 1 Tex.A.Civ.Cas. § 1122.

Location within township
(1) In unlawful detainer action before justice of peace in township of between two hundred thousand and four hundred thousand population, complaint must allege that land involved was situated in township; and complaint not alleging that lands involved were situated in township was fatally defective, and justice acquired no jurisdiction.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.

(2) Failure to allege that lands involved were situated within township, rendered all proceedings in cause void, regardless of other claimed objects, and neither first justice nor justice to whom cause was transferred nor circuit court to which judgment was appealed acquired jurisdiction.—State ex rel. Brown v. Bird, supra.

36. N.M.—Tietjen v. McCoy, 172 P. 1144, 24 N.M. 164.
26 C.J. p 846 note 17.

37. Mo.—Wishart v. Gerhart, 78 S. W. 1094, 105 Mo.App. 112.

38. Mo.—Barry v. Banneman, 157 S. W. 853, 175 Mo.App. 142.
26 C.J. p 845 note 13.

Mere clerical mistakes[39] or surplusage[40] will not ordinarily vitiate the complaint.

Recovery as for trespass. Where the complaint is insufficient to warrant a recovery under the forcible entry statute, it has been held that it may be such as to authorize a recovery as in an ordinary action of trespass, if the facts warrant it.[41]

Allegations respecting personalty. The complaint in forcible entry and detainer should not contain allegations respecting defendant's appropriation of personal property.[42]

Under statutes prescribing the form of complaint, a departure from the prescribed form is not fatal if in substance a cause of action in forcible entry and detainer or in unlawful detainer is set forth.[43]

§ 40. —— Allegations as to Title or Possession

a. Plaintiff's possession
b. Plaintiff's title or estate

a. Plaintiff's Possession

(1) Fact of possession
(2) Right of possession

(1) Fact of Possession

Ordinarily the complaint in an action for forcible entry and detainer should allege plaintiff's actual possession of the premises at the time of the alleged entry in terms or in equivalent language, and an averment of title or ownership is insufficient; but under some statutes there may be an allegation of constructive possession.

The general rule is that in an action for forcible entry and detainer the complaint must allege that plaintiff was in actual possession of the premises at the time of the alleged forcible entry.[44] The general allegation that plaintiff was in the actual peaceable possession of the premises at the time of the entry is a sufficient averment of actual possession;[45] the evidentiary facts by which such allegations are to be proved need not be set out,[46] nor is it necessary to allege in terms that the possession was actual, if this fact sufficiently appears from other averments in the complaint.[47] On the other hand, it is not sufficient to allege that plaintiff was lawfully entitled to possession,[48] that he was "seized" of the premises,[49] or the owner thereof,[50] or was lawfully and peaceably possessed of a leasehold interest,[51] that plaintiff purchased the premises from the state "as an occupant,"[52] or that plaintiff was in possession on a particular day and that defendant at a subsequent day forcibly entered.[53] Inconsistent averments as to possession render the complaint bad.[54] The complaint need not state the precise time when plaintiff was possessed of the premises and, if stated, it may be rejected as surplusage.[55]

Constructive possession. If under the provisions of the particular statute, where the premises sought to be recovered are public domain, it is made a condition precedent that the boundaries of the claim shall be marked and staked by the holder, the complaint to be sufficient must show the segregation of the land of which plaintiff claims to be in the peaceable possession and that it was segregated in the fashion pointed out by the statute.[56] Under the express provisions of some statutes, where the complaint is based on a forcible holding out of the premises, the complaint must allege that the premises were in the constructive possession of plaintiff at the time of the holding out.[57]

(2) Right of Possession

Unless the plaintiff's right to possession is involved, there need be no allegation in the complaint as to such right.

39. Mich.—Olson v. Muskegon Cir. Judge, 13 N.W. 369, 49 Mich. 85.
26 C.J. p 846 note 19.

40. N.J.—O'Hagan v. Crossman, 14 A. 752, 50 N.J.Law 516.
26 C.J. p 846 note 20.

41. Minn.—Bagley v. Sternberg, 26 N.W. 602, 34 Minn. 470.

42. Cal.—Gillam v. Sigman, 29 Cal. 637.
Ill.—U. S. Brewing Co. of Chicago v. Pochek, 195 Ill.App. 369.

43. N.M.—Puckett v. Walz, 72 P.2d 623, 41 N.M. 612.

44. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—Davis v. Robinson, 23 N.E.2d 816, 302 Ill.App. 365.
26 C.J. p 846 note 30.

45. Utah.—Holladay Coal Co. v. Kirker, 57 P. 882, 20 Utah 192.
26 C.J. p 846 note 31.

46. Utah.—Holladay Coal Co. v. Kirker, supra.
26 C.J. p 847 note 32.

47. Cal.—More v. Del Valle, 28 Cal. 170.
Conn.—Lee v. Stiles, 21 Conn. 500.
26 C.J. p 847 note 33.
Allegation of "peaceable possession" is sufficient to support proof of "actual possession" and, while not identical in meaning, is enough to sustain a judgment.—Lewis v. Yoakum, Tex.Civ.App., 32 S.W. 237.

48. Ark.—McGuire v. Cook, 13 Ark. 448.

49. Ark.—McGuire v. Cook, supra.

50. Ill.—Spurck v. Forsyth, 40 Ill. 438.
Wash.—McGrew v. Lamb, 72 P. 100, 31 Wash. 485.

51. Ala.—Townsend v. Van Aspen, 38 Ala. 572.

52. Ala.—Wright v. Mullens, 2 Stew. & P. 219.

53. Ill.—Spurck v. Forsyth, 40 Ill. 438.

54. Kan.—Schuster v. Gray, 55 P. 489, 8 Kan.App. 222.
26 C.J. p 847 note 40.

55. Ala.—Bliss v. Winston, 1 Ala. 344.

56. Colo.—Kelly v. Andrew, 32 P. 175, 3 Colo.App. 122.

57. N.Y.—Lowman v. Sprague, 26 N.Y.S. 568, 73 Hun 408.

Inasmuch as the right to possession is not ordinarily involved, stated supra § 7, no allegation as to plaintiff's right of possession is necessary or proper, unless required by some special statutory provision.[58] Where, however, plaintiff's right to possession is involved, the complaint should contain a sufficient averment of such right.[59] Under some statutes making an allegation of plaintiff's right to possession necessary, it is sufficient to allege generally that plaintiff is entitled to possession,[60] while under others, the facts showing the right to possession are required to be set out,[61] and even in jurisdictions where it is unnecessary to set out the facts, if the pleader assumes to do so they must be set forth fully and with precision.[62] An affidavit in the present tense alleging plaintiff's right of possession but filed several months later is not a sufficient allegation as to right of possession.[63] In actions where plaintiff has only constructive possession, it has been held that he must allege his right of possession and the facts on which this right is based.[64]

b. Plaintiff's Title or Estate

While allegations as to plaintiff's title or estate are ordinarily not necessary in a complaint for forcible entry and detainer, they may become so by virtue of statutory provisions therefor. Where required, such allegations should set forth a title or estate within the governing statute and should comply with the usual rules of good pleading as respects certainty and avoidance of mere conclusions.

Since title is not involved in an action for forcible entry and detainer, as shown supra § 6, where the entry or the infringement of plaintiff's possession is with force and a strong hand, the complaint need not, in the absence of some statute requiring it, allege the title or estate of plaintiff in the premises.[65] Nevertheless, if required by statute, the complaint must set out plaintiff's title[66] or interest,[67] or the nature of his estate in the premises.[68] Where the statute renders it necessary to show that plaintiff had some estate or right in the premises, it is not essential to describe his interest with technical accuracy but it is sufficient merely to aver that he has an estate within the statute without describing the particular estate.[69] The following allegations as to plaintiff's estate have been held sufficient: That plaintiff claims by virtue of a fee simple,[70] or has a "freehold in fee simple"[71] or an unexpired term of years,[72] or had "lawful and peaceable possession of the premises for the space of five years."[73] It has been held sufficient to allege that plaintiff was possessed as tenant for years of a leasehold estate not yet ended,[74] or is a tenant at will,[75] and allegations showing facts fairly implying ownership have been held sufficient.[76] On the other hand a statement that complainant had a legal right and estate to the premises is bad as amounting to a conclusion of law,[77] and an allegation that complainants were "tenants for years or lessors" of the premises is bad for uncertainty.[78] An allegation that petitioner "became entitled" and went into possession of the premises "by virtue of a certain arrangement with the lessee thereof,"[79] or that he was in the peaceable possession and occupancy of

58. N.Y.—Mendelson v. Kitt, 92 N.Y.S. 127.

59. Colo.—Laffey v. Chapman, 12 P. 152, 9 Colo. 304.
26 C.J. p 847 note 49.

Lack of specific allegation permissible
Where there was no specific allegation in complaint that plaintiff in detainer suit was entitled to possession, an allegation that defendant wrongfully detained and withheld possession from plaintiff implied an allegation that plaintiff was entitled to possession and, even though such statement was a conclusion, was sufficient after judgment.—Puckett v. Walz, 72 P.2d 623, 41 N.M. 612.

60. Wash.—Shannon v. Grindstaff, 40 P. 123, 11 Wash. 536.
26 C.J. p 847 note 50.

61. Colo.—Laffey v. Chapman, 12 P. 152, 9 Colo. 304.
26 C.J. p 847 note 51.

62. Minn.—Pinney v. Fridley, 9 Minn. 34.
26 C.J. p 847 note 52.

63. Ind.T.—Wilson v. Smith, 89 S.W. 1009, 6 Ind.T. 108.
26 C.J. p 847 note 53.

64. Utah.—Barnes v. Cox, 41 P. 557, 12 Utah 47.
26 C.J. p 847 note 54.

65. Tenn.—Rhea v. Redus, 7 Tenn. App. 478.
26 C.J. p 848 note 56.

Allegations of title disregarded on demurrer
Where evidence of title is inadmissible in a forcible entry and detainer action, the setting up in a complaint of facts constituting title, which could not be proved on the trial of such action, adds nothing to the sufficiency of the complaint when challenged by demurrer.—Schroeder v. Woody, 109 P.2d 597, 166 Or. 93.

66. Wis.—Bracken v. Preston, 1 Pinn. 365.
26 C.J. p 848 note 57.

67. N.Y.—Fuchs v. Cohen, 19 N.Y.S. 236.

68. N.J.—Wall v. Hunt, 9 N.J.Law 37.
26 C.J. p 848 note 59.

69. Tenn.—Turner v. Lumbrick, Meigs 7.

70. Ala.—Ward v. Lewis, 1 Stew. 26.

71. Ala.—Lecatt v. Stewart, 2 Stew. 474.

72. Ala.—Mead v. Daniel, 2 Port. 86.

73. Ala.—McRae v. Tillman, 6 Ala. 486.

74. N.J.—Berry v. Williams, 21 N.J. Law 423.
26 C.J. p 848 note 65.

75. Ala.—McDonald v. Gayle, Minor 98.

76. La.—Cappel v. Meeker Sugar Refining Co., 126 So. 695, 169 La. 1170.

77. N.Y.—People v. Field, 58 Barb. 270.

78. N.J.—Wall v. Hunt, 9 N.J.Law 37.

79. N.Y.—Potter v. New York Baptist Mission Soc., 52 N.Y.S. 294, 23 Misc. 671.

the premises and lawfully entitled to remain and continue in possession,[80] or that he "is the tenant of the premises pursuant to an agreement with the landlord,"[81] does not satisfy a statutory requirement that "the interest" of plaintiff in the premises shall be described. An allegation of interest is not equivalent to a description of the interest; the petition should disclose the nature of the right to the possession and how and from whom it was acquired.[82]

§ 41. —— Description of Premises

a. Necessity of description
b. Sufficiency of description

a. Necessity of Description

It is essential that the complaint in a proceeding for forcible entry and detainer describe the premises.

The complaint must contain a description of the premises,[83] and where no written pleadings are necessary, there should be a description of the premises in the warrant.[84] The description is jurisdictional,[85] and unless the complaint sufficiently describes the property, the justice will be without jurisdiction and his subsequent proceedings thereon void.[86] No premises not described in the complaint can be recovered.[87]

b. Sufficiency of Description

Generally speaking a description of the premises in a complaint for forcible entry and detainer is sufficient if it enables identification of the property. It may be sufficient to describe the premises by metes and bounds, by recognized house numbers or by section, subdivision, township, and range, but descriptions omitting county and state have been held defective.

Any description by which the premises can be readily identified and located will be sufficient.[88] Reasonable and not absolute certainty of description is required.[89] Such certainty in description as apprises defendant of the premises which he is charged with entering and will guide in executing the writ of restitution is all that is requisite,[90] but at least this degree of certainty is necessary.[91]

Description of property located in a city by the number of the lot, its location, and the manner in which it is used, is sufficient,[92] as is also a description of the property by recognized house numbers;[93] but a description of the property as the lot on which a building with a designated number was situated at a past date is not a sufficient description without showing that the building still stands on the lot.[94] A description of the land by section and subdivisions thereof, township, and range, the state and county being given, will be sufficient;[95] and it has been held that this will be sufficient without designating the state and county,[96] or the state, county, and meridian.[97] There is, however, authority to the effect that the omission of the state or county in which the land is situated will render the complaint fatally defective.[98] The premises may be described by reference in the complaint to

80. N.Y.—Schneider v. Leizman, 11 N.Y.S. 434, 57 Hun 561, 19 N.Y.Civ. Proc. 217.

81. N.Y.—Fuchs v. Cohen, 19 N.Y.S. 236.
26 C.J. p 848 note 71.

82. N.Y.—Fuchs v. Cohen, supra.

83. Utah.—Holladay Coal Co. v. Kirker, 57 P. 882, 20 Utah 192.
26 C.J. p 848 note 76.
Allegation as to location of premises see supra § 39.

84. Tenn.—Settle v. Settle, 10 Humphr. 504.

85. Neb.—Bishop v. Spaulding, 156 N.W. 1080, 99 Neb. 573.
If no description whatever is given of the land, the defect in the complaint is jurisdictional and fatal and not open to amendment, but where there is a description, although faulty, it may be cured by amendment.—Aubuchon v. Foster, 215 S.W. 781, 202 Mo.App. 225.

86. Neb.—Bishop v. Spaulding, 156 N.W. 1080, 99 Neb. 573.

87. Mo.—Lamme v. Buse, 70 Mo. 463.
Neb.—Bishop v. Spaulding, 156 N.W. 1080. 99 Neb. 573.
Wash.—Cohen v. McKenna Lumber Co., 176 P. 1, 104 Wash. 245.

88. N.M.—Patten v. Balch, 106 P. 388, 15 N.M. 276.
26 C.J. p 848 note 80.

89. N.M.—Patten v. Balch, 106 P. 388, 15 N.M. 276.
W.Va.—Moore v. Douglass, 14 W.Va. 708.

90. Mo.—Muckey v. Fetiz, 145 S.W. 493, 162 Mo. 684.
Neb.—Bishop v. Spaulding, 156 N.W. 1080, 99 Neb. 573.
N.J.—O'Hagan v. Crossman, 14 A. 752, 50 N.J.Law 516.
Great strictness not essential
Great strictness and accuracy of description are not required in complaints in forcible entry and detainer. —Fink v. Schmidt, Mo.App., 245 S.W. 566.

91. Ala.—Parker v. Jefferson County, 95 So. 364, 209 Ala. 138.
26 C.J. p 849 note 83.
Particular descriptions held insufficient
Ala.—Parker v. Jefferson County, supra.
26 C.J. p 849 note 83 [a].

92. Ala.—House v. Camp, 32 Ala. 541.
26 C.J. p 849 note 84.

93. Ill.—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231—Armstrong v. Crilly, 51 Ill.App. 504, affirmed 38 N.E. 936, 152 Ill. 646.

94. Ill.—Burns v. Nash, 23 Ill.App. 552.

95. Ala.—Huffaker v. Boring, 8 Ala. 87.
Ill.—Preston v. Davis, 112 Ill.App. 636.
26 C.J. p 849 note 91.

96. Neb.—Cummings v. Winters, 28 N.W. 302, 19 Neb. 719.

97. Neb.—Devine v. Burleson, 52 N.W. 1112, 35 Neb. 238.
26 C.J. p 849 note 93.

98. Ala.—McRae v. Tillman, 6 Ala. 486.
Mo.—Johnson v. Fischer, 56 Mo.App. 552.
Stating county and state in caption
Petition in unlawful detainer suit which did not name in body county and state in which property in question was situated, but which contained name of township, county, and state in caption, with an appropriate reference thereto in the body of the

an exhibit containing a description.[99] A description of the premises as part of a tract designated without specifying the part meant is insufficient,[1] but, where other facts are alleged by which the premises can be readily identified, it will be sufficient.[2]

Erroneous statements in the description may be rejected as surplusage if the remaining statements sufficiently identify the property.[3] If the property is otherwise distinctly described, error in describing it by section, township, etc., will not vitiate the complaint.[4] Unnecessary prolixity of description does not vitiate the complaint, if the property can be readily identified therefrom;[5] and, if the complaint states one cause of action in several counts, the description of the premises in one count will be sufficient.[6]

Description by metes and bounds. A description of the premises by metes and bounds is sufficient,[7] unless the metes and bounds given do not inclose any land;[8] and it is not necessary in addition to metes and bounds to specify the land by statutory demarcation of section, township, and range.[9] It is not necessary, however, that the premises be described by metes and bounds if they are otherwise described with sufficient certainty.[10]

Stating quantity. It is not necessary to state the amount of land if it is otherwise described with reasonable certainty;[11] and an erroneous statement of the quantity of land may be rejected as surplusage where the description is otherwise accurate and complete.[12] When the other parts of the description are not sufficiently certain, the quantity becomes essential in determining the identity of the land, although as an element in the description of land the statement of the quantity is the least reliable.[13]

§ 42. —— Allegations as to Force, Entry, and Detainer

a. Entry and detainer
b. Force and unlawfulness

a. Entry and Detainer

A complaint for forcible entry and detainer should allege both the forcible entry and the subsequent detainer, but no allegation as to entry is required where the action is based only on the forcible detainer.

In actions for forcible entry and detainer, an allegation of entry by defendant on the premises in question is necessary.[14] While there is authority to the effect that no such allegation is necessary where the action is based on a forcible detainer only,[15] it has been held, under statutes providing for an action of unlawful detainer where a lawful and peaceable entry was followed by an unlawful or forcible holding, that the complaint should allege not only the subsequent unlawful or forcible detention but also the preceding lawful and peaceable entry.[16]

Since a forcible entry is the gist of an action for forcible entry and detainer, the averment as to detainer in such an action is not stated as an independent ground of relief but as a mere continuation or consequence of the entry.[17] It is, however, necessary always to allege a detention of the premises[18] at the time of the institution of the action,[19] for in the absence of such detention the acts complained of would amount to no more than a trespass.[20] It would seem that the complaint should sufficiently show that it was plaintiff from whom

complaint, was sufficient to confer jurisdiction on justice of peace.—Thomas v. Thomas, Mo.App., 74 S.W.2d 263.

99. Tex.—Steele v. Steele, 2 Tex.A. Civ.Cas. § 345.

1. Ill.—Schaumtœffel v. Belm, 77 Ill. 567.
26 C.J. p 850 note 2.

2. Ky.—Smith v. White, 5 Dana 376.
26 C.J. p 850 note 3.

3. Mo.—Silvey v. Summer, 61 Mo. 253.

4. Mo.—Rosenberger v. Wabash R. Co., 70 S.W. 395, 96 Mo.App. 504.

5. Ala.—Bell v. Killcrease, 11 Ala. 685.

6. Cal.—Porter v. Murray, 12 P. 425, 2 Cal.Unrep.Cas. 687.

7. Cal.—More v. Del Valle, 28 Cal. 170.
26 C.J. p 849 note 87.

8. Ill.—Maloney v. Shattuck, 15 Ill. App. 44.

9. Ala.—Mead v. Daniel, 2 Port. 86.

10. Cal.—Castro v. Gill, 5 Cal. 40.
26 C.J. p 849 note 90.

11. Ind.—College Corner & Richmond Gravel Road Co. v. Moss, 92 Ind. 119.
Va.—Allen v. Gibson, 4 Rand. 468, 25 Va. 468.
W.Va.—Moore v. Douglass, 14 W.Va. 708.

12. Ind.—College Corner & Richmond Gravel Road Co. v. Moss, 92 Ind. 119.

13. Ind.—College Corner & Richmond Gravel Road Co. v. Moss, supra.

14. Ill.—Whitaker v. Gautier, 8 Ill. 443.
Miss.—Brown v. Ashford, 56 Miss 677.
26 C.J. p 850 note 6.

15. Ala.—Lecatt v. Stewart, 2 Stew. 474.

16. Wyo.—White v. Veitch, 197 P. 983, 27 Wyo. 401.

Complaint saying nothing as to entry is insufficient.—White v. Veitch, supra.

17. Cal.—Morris v. Turley, 271 P. 916, 94 Cal.App. 691.

18. Cal.—Davies v. Stark, 144 P. 315, 25 Cal.App. 519.
26 C.J. p 850 note 9.

19. Cal.—Davies v. Stark, supra.
26 C.J. p 850 note 10.

20. Cal.—Bell v. Haun, 97 P. 1126, 9 Cal.App. 41.
26 C.J. p 850 note 11.

the land was detained.[21] The complaint need not deny the existence of possession by defendant for such a time as would bar the action.[22] A complaint showing that defendant has been in possession of the property for over a year, but which does not show such possession to have been quiet, is not bad as showing a defense under a statute making quiet possession for a year by defendant a defense.[23]

b. Force and Unlawfulness

A complaint for forcible entry and detainer or for forcible detainer should allege the use of force, although the particular acts need not be set forth, and, where the statute requires the acts to be unlawful, the unlawfulness thereof should be averred.

Subject to exceptions under statutes modifying the usual requirement of force, discussed supra § 17,[24] whether the cause of action is a forcible entry and detainer or a forcible detainer, an averment of force in the commission of the acts complained of is necessary,[25] and, if the words of the statute descriptive of the acts are "unlawfully and by force," the omission of the word "unlawfully" in the complaint vitiates it.[26] It is not necessary to set out the particular facts constituting a forcible entry or detainer.[27] It is sufficient to follow the language of the statute on which the complaint is based.[28]

§ 43. —— Allegations as to Notice to Quit and Demand for Possession

The authorities agree that, where it is essential to the cause of action, there must be an allegation of notice to quit and demand for possession, but they disagree as to whether the complaint must allege that such notice or demand was written in character. Details as to time and mode of service of notice are not essential to set forth. If a demand is not necessary to the cause of action, none need be alleged.

The complaint must allege notice to quit and demand for possession when necessary to the cause of action, or it will be fatally defective.[29] It has been held unnecessary to allege that the notice to quit was in writing;[30] but there is authority to the contrary.[31] It is not necessary to allege how the notice was served,[32] and, if the fact of the service is distinctly alleged, this allegation will be construed, as against a general demurrer, to include everything necessary to constitute a sufficient service.[33] It is not necessary to allege the exact date at which the notice was given;[34] it is sufficient to allege that, subsequent to the unlawful entry while defendants were in possession and prior to the commencement of the action, the notice to surrender was given and refused for a designated period after the notice was given.[35] It is also unnecessary expressly to state that the demand was made "by the plaintiff."[36] If no demand for possession is necessary, the complaint need not allege a demand,[37] but an allegation of a demand when a demand is unnecessary will not vitiate the complaint.[38]

§ 44. —— Allegations as to Damages

Under statutes authorizing recovery of damages in actions for forcible entry and detainer, the complaint

21. **Detention from client rather than attorney sufficiently alleged**
Complaint in action of unlawful entry and detainer reciting that named person, by his attorney, complained that named persons unlawfully withheld from him possession of lands, was held not subject to objection that it disclosed that possession was withheld from attorney and not client.—Huff v. Murray, 158 So. 475, 171 Miss. 656.

22. Ind.—Ward v. Crane, 3 Blackf. 393.

23. Mont.—Kennedy v. Dickie, 69 P. 672, 27 Mont. 70.

24. **Unlawfulness of seizure under executory process sufficiently alleged**
La.—Cappel v. Meeker Sugar Refining Co., 126 So. 695, 169 La. 1170.
In Missouri Rev.St.1889 § 5089 makes him guilty of unlawful detainer who wrongfully and without force by disseizin shall obtain and keep possession of realty and shall fail to quit after written demand by the person having the legal right of possession. A complaint was sufficient which alleged that defendant unlawfully and without force by disseizin obtained possession and kept it after demand made in writing for its delivery.—School Dist. No. 4 v. Holmes, 53 Mo.App. 487.

25. Ala.—Ferguson v. Carter, 40 Ala. 607.
26 C.J. p 850 note 15.
Allegation of "force" equivalent to one of "violence"
Under a statute providing that every person is guilty of a forcible entry who enters on real property by any kind of violence or circumstance of terror, an allegation that defendant forcibly entered on the premises and so ejected plaintiff was equivalent to an allegation of the use of violence and sufficient to state a cause of action as to entry by means of violence.—Lambert v. Helena Adjustment Co., 222 P. 1057, 69 Mont. 510.

26. Neb.—Blaco v. Haller, 1 N.W. 978, 9 Neb. 149.

27. Okl.—Greenameyer v. Coates, 72 P. 377, 13 Okl. 452.
26 C.J. p 851 note 17.

28. Neb.—Blachford v. Frenzer, 62 N.W. 1101, 44 Neb. 829.
26 C.J. p 851 note 18.

29. Okl.—Howard v. Davis, 168 P. 429, 66 Okl. 260.
Utah.—Barnes v. Cox, 41 P. 557, 12 Utah 47.
26 C.J. p 851 notes 20, 21.

30. Neb.—Hitchcock v. McKinster, 31 N.W. 507, 21 Neb. 148.
26 C.J. p 851 note 22.

31. Ala.—Spear v. Lomax, 42 Ala. 576.
Mo.—Parker v. Whaley, App., 45 S.W.2d 886.
26 C.J. p 851 note 24.

32. Cal.—Knowles v. Murphy, 40 P. 111, 107 Cal. 107.

33. Cal.—Knowles v. Murphy, supra.

34. Utah.—Holladay Coal Co. v. Kirker, 57 P. 882, 20 Utah 192.

35. Utah.—Holladay Coal Co. v. Kirker, supra.

36. Ala.—Spear v. Lomax, 42 Ala. 576.

37. Cal.—Craig v. Gray, 82 P. 699, 1 Cal.App. 598.
Mont.—McCleary v. Crowley, 56 P. 227, 22 Mont. 245.

38. Colo.—Miller v. Sparks, 4 Colo. 303.

should claim only such damages as are the proximate consequence of the act complained of and no damages may be allowed in excess of those claimed. If there is a statutory form of pleading omitting claim for damages, damages may be recovered without pleading them, and under some statutes exemplary damages may be recovered even when not pleaded.

If the statute authorizes the recovery of damages, under principles discussed infra §§ 58–61, the damages claimed in the complaint must be such as are the natural and proximate consequences of the act complained of,[39] and in no event can damages in a larger sum than that demanded by the complaint be awarded.[40] It is not necessary that the claim should allege a specific sum as damages;[41] but if it does, neither the court nor the jury can find a sum in excess thereof.[42] If no demand for rent is set up in the complaint, rent is not recoverable.[43] However, it is not necessary to allege the value of rents and profits as a basis for the recovery thereof.[44] In some jurisdictions the view is taken that the provisions of the statutes in respect of doubling or trebling damages are mandatory, as stated infra § 60, and, where this view prevails, if the complaint contains proper averments as to damages sustained, it need not ask for the double or treble damages authorized by statute; the court will, on a recovery by plaintiff, double or treble the damages, although double or treble damages were not asked;[45] and it has been held that treble damages are recoverable in a statutory action therefor if the declaration sufficiently states the cause of action and specifically refers, for authority, to the statute allowing the court to treble the damages.[46] On the other hand it has been held that, where the statute is regarded as directory only, double damages will not be allowed unless the claim is made in the complaint.[47] Since a charge of forcible detainer of real property carries an implication that it was from a bad motive, an allegation of forcible detainer is sufficient without more to sustain an award of exemplary damages.[48]

Statutory form of complaint. Where there is a form of pleading provided for by statute and it does not contain an averment or claim for damages, a complaint will be sufficient without an averment or claim for damages.[49]

§ 45. —— Verification, Signature, and Filing

The complaint in an action for forcible entry and detainer should be verified, signed, and filed in compliance with statutory requirements, but, in the absence of statutory requirement, an unverified complaint is sufficient.

In the absence of statute so providing, no verification of the complaint is necessary,[50] but, where the statute requires verification, a failure to comply renders the complaint fatally defective according to some authorities,[51] while other authority is to the effect that such failure does not render the complaint void,[52] and that, in the absence of objection where defendant goes to trial as though the complaint were duly verified, the complaint will be deemed sufficient after judgment.[53] The verification must be made by complainant in the absence of some special statutory provision authorizing verification by some other person.[54] A verification reciting that the complaint is "true in substance" is insufficient,[55] and so is a complaint verified by an agent "to the best of his knowledge, information, and belief,"[56] or a complaint verified on knowledge and on information and belief but not stating which facts are on which basis or giving the sources of

39. Cal.—Anderson v. Taylor, 56 Cal. 131, 38 Am.R. 52.
26 C.J. p 851 note 34.

40. Mo.—Feedler v. Schroeder, 59 Mo. 364—Moore v. Dixon, 50 Mo. 424.

41. Cal.—Holmes v. Horber, 21 Cal. 55.
Mo.—Hixon v. Selders, 46 Mo.App. 275.

42. Mo.—Feedler v. Schroeder, 59 Mo. 364—Moore v. Dixon, 50 Mo. 424—Coles v. Foley, 13 Mo. 249.

43. Miss.—Johnson v. Tuggles, 27 Miss. 836.

44. Cal.—Holmes v. Horber, 21 Cal. 55.

45. Cal.—Watson v. Whitney, 23 Cal. 375—Hart v. Moon, 6 Cal. 161—O'Callaghan v. Booth, 6 Cal. 63.
26 C.J. p 852 note 42.

46. Mich.—Hitchcock v. Pratt, 16 N. W. 639, 51 Mich. 263.
26 C.J. p 852 note 43.

47. Wash.—Gaffney v. Magrath, 39 P. 973, 11 Wash. 456.

48. Cal.—San Francisco & Suburban Home Bldg. Soc. v. Leonard, 119 P. 405, 17 Cal.App. 254.

49. Ala.—Helton v. Ft. Gaines Oil & Guano Co., 39 So. 925.

50. Ill.—Patterson v. Graham, 30 N. E. 460, 140 Ill. 541.

51. Ark.—McGuire v. Cook, 13 Ark. 448.
26 C.J. p 852 note 61.

52. N.M.—Puckett v. Walz, 72 P.2d 623, 41 N.M. 612.
Verification on amendment see infra § 46 text and note 83.

53. N.M.—Puckett v. Walz, supra.

Defect not fatal to jurisdiction
Although the jurisdiction of a justice of the peace cannot be presumed and must appear affirmatively from the record, the absence of an oath to complaint in forcible entry and detainer suit is not fatal to jurisdiction where the party entitled to complain does not object, but, on the contrary, proceeds to trial as though the complaint were duly verified.—Puckett v. Walz, supra.

54. R.I.—Levy v. David, 52 A. 1080, 24 R.I. 249.
26 C.J. p 852 notes 62, 63.

55. Mo.—Wiltshire v. Triplett, 71 Mo.App. 332—Tegler v. Mitchell, 46 Mo.App. 349—Reilly v. Powell, 34 Mo.App. 431.

56. Mich.—Miles v. Goffinet, 16 Mich. 472—Seitz v. Miles, 16 Mich. 456.

information.[57] The complaint may be sworn to before anyone qualified to administer an oath.[58]

Signature. A statutory requirement that the complaint be signed by the party or his attorney is mandatory and noncompliance with this requirement renders the complaint fatally defective.[59] In the absence of any statutory provision to the contrary the complaint may be signed by an agent or attorney;[60] and it has been held that the complaint may be signed by a receiver where the lease to be terminated was itself executed by the receiver.[61]

Filing. A complaint in forcible entry and detainer should be filed in compliance with statutory requirements.[62]

§ 46. —— Amendments

The courts are liberal in the allowance of amendments of complaints in actions for forcible entry and detainer, but none may be permitted where the court lacks the power, as where the complaint fails to invoke its jurisdiction.

In most jurisdictions much liberality is exercised in allowing amendments in proceedings of the character under consideration,[63] especially where it appears to be reasonably clear that full justice may not be done without such amendments.[64] This rule, however, is inapplicable where the court lacks power to permit the amendment, as in the case of a jurisdictional defect.[65]

Time and terms. It has been said: "It is hardly ever too late to amend pleadings, whether before or after verdict, on such terms as justice may seem to demand."[66] When seasonably requested proper amendments should be allowed as of course without the imposition of terms.[67]

Amendments permissible. While amendments which change the cause of action will not be permitted,[68] amendments which do not change substantially the cause of action will ordinarily be allowed.[69] The following have been held to be permissible amendments: Correcting or adding to the description of the property;[70] changing the date on which the forcible entry was alleged to be committed;[71] increasing the amount of damages;[72] alleging certain specified sums as special damages and claiming punitive damages for vindictiveness;[73] showing that the land was situated in the county in which suit was brought,[74] or in the precinct

57. N.Y.—People v. Whitney, 1 Thomps. & C. 533.

58. Ga.—Crow v. Borris, 15 Ga. 303.

59. Mo.—Hargadien v. Van Horn, 72 Mo. 370—Purcell v. Merrick, 158 S. W. 478, 172 Mo.App. 412.
26 C.J. p 853 note 69.

60. Ill.—Patterson v. Graham, 30 N. E. 460, 140 Ill. 531.
26 C.J. p 853 note 70.

61. Ill.—McKeag v. Pirie, 134 Ill. App. 652.

62. Ariz.—Tweed v. Guild, 11 P. 753, 2 Ariz. 753.
26 C.J. p 853 note 72.

Minute of time of exhibition
Vt.—Allen v. Ormsby, 1 Tyler 345.
26 C.J. p 853 note 72 [a].

Time of filing
S.D.—Browne v. Haseltine, 70 N.W. 648, 9 S.D. 524.
26 C.J. p 853 note 72 [b].

With whom filed
Ariz.—Tweed v. Guild, 11 P. 753, 2 Ariz. 207.
26 C.J. p 853 note 72 [c].

Entry on justice's docket
N.J.—O'Hagan v. Crossman, 14 A. 752, 50 N.J.Law 516.
26 C.J. p 853 note 72 [d].

63. Cal.—San Francisco & Suburban Home Bldg. Soc. v. Leonard, 119 P. 405, 17 Cal.App. 254.
26 C.J. p 853 note 75.

Amendment unnecessary under facts
In forcible detainer action, where plaintiff alleged that he had rented premises to codefendants, who paid rent to Jan. 27, 1937, and that defendant then took possession of premises under a tax deed and rented the premises to codefendants who reentered or remained in occupancy and did not notify plaintiff of repudiation of plaintiff's lease, an amendment to pleadings was not necessary to enable plaintiff to recover, even if codefendants did not abandon premises and were there when defendant entered.—Woodbury v. Bunker, 98 P. 2d 948, 98 Utah 216.

64. Cal.—San Francisco & Suburban Home Bldg. Soc. v. Leonard, 119 P. 405, 17 Cal.App. 254.

65. Mo.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.

Failure to state case within jurisdiction of justice court
Defect in complaint, in unlawful detainer action before justice of the peace in township of between two hundred thousand and four hundred thousand population, in not alleging lands involved were situated in township could not be remedied by amendment.—State ex rel. Brown v. Bird, supra.

In New Jersey
(1) No power has been conferred on justices to permit amendments in proceedings under the forcible entry and detainer statute.—Krause v. Dayton, 17 A. 91, 51 N.J.Law 272—Waters v. Haynes, 9 A. 770, 49 N.J. Law 598—Wilson v. Bayley, 42 N. J.Law 132.

(2) Where the complaint is allowed to be amended so as substantially to change an allegation material to be charged and proved to justify a judgment for possession, the judgment cannot be sustained.—Waters v. Haynes, supra.

66. Ill.—Thompson v. Sornberger, 78 Ill. 353, 354.
26 C.J. p 853 note 78.

67. Ark.—Brinkley v. Mooney, 9 Ark. 445.
26 C.J. p 853 note 79.

68. Ark.—Necklace v. West, 33 Ark. 682.
Wash.—State v. Pierce County Super. Ct., 172 P. 826, 102 Wash. 215.
26 C.J. p 853 note 80.

69. Kan.—Schuster v. Gray, 55 P. 489, 8 Kan.App. 222.

70. Ala.—Bibby v. Thomas, 31 So. 432, 131 Ala. 350.
Tex.—Granberry v. Storey, 127 S.W. 1122, 61 Tex.Civ.App. 9, disapproving Ochoa v. Garza, 1 Tex.A.Civ. Cas. § 939.
26 C.J. p 853 note 82.

71. Ind.T.—Hunt v. Hicks, 54 S.W. 818, 3 Ind.T. 275.

72. Mo.—Hixon v. Selders, 46 Mo. App. 275—Lucas v. Fallon, 40 Mo. App. 551—Elliott v. Abell, 39 Mo. App. 346.

73. Cal.—San Francisco & Suburban Home Bldg. Soc. v. Leonard, 119 P. 405, 17 Cal.App. 254.

74. Mo.—McKinney v. Harral, 36 Mo.App. 337.

where suit was brought, where the complaint contains a sufficient description of the premises from which it could have been shown that they were in such precinct;[75] showing that plaintiff at the time of the entry was in peaceable possession;[76] correcting contradictory statements as to possession;[77] showing that plaintiff's attorney made the affidavit and that his name which did not appear on the complaint was omitted by mistake;[78] changing a complaint in an action for forcible entry and detainer which alleges an unlawful entry so as to allege an unlawful and forcible entry;[79] curing misjoinder of causes of action;[80] conforming pleadings to proof;[81] excluding matters over which a justice of the peace has no jurisdiction;[82] verifying the complaint.[83]

§ 47. Plea, Answer, or Cross-Complaint

The necessity for a written plea or answer by defendant in an action for forcible entry and detainer depends on the circumstances of the case as governed by statute. Where such a plea or answer is required, the plea of "not guilty", akin to that of the general issue, ordinarily suffices except where special matter is involved, which should be specially pleaded. It has been held that no cross-complaint may be interposed in an action for unlawful detainer.

The necessity of written pleadings on the part of a defendant in actions for forcible entry and detainer is controlled largely by the provisions of the statutes as applied to the circumstances revealed. Under the practice prevailing, it has been variously held that there is no need for a written plea or answer,[84] as under statutes prescribing a form for a complaint in unlawful entry and detainer proceedings on the filing of which the cause is at issue without further pleading,[85] that a written plea or answer is required only where defendant sets up new matter in excuse, justification, or avoidance,[86] or that in the absence of contrary statute a written plea or answer is essential,[87] and that unless filed it is error to swear the jury to try the matter in difference between the parties because there is no issue.[88] Where a complaint is amended after demurrer has been sustained thereto, and an amended complaint is filed, defendant must plead to the complaint as amended.[89] Under a statute providing that defendant shall file with the clerk his written answer, demurrer, or demurrer and answer, defendant does not waive his right to answer by demurring without answer at the same time.[90] The statute of limitations, if available as a defense, under principles discussed supra § 33, must be taken advantage of by plea, and is not good matter for demurrer to the complaint.[91]

Sufficiency. If the answer does not deny the material allegations of the complaint and no material new matter is set up, no issue is raised and plaintiff is entitled to judgment on the pleadings.[92] Except where it is otherwise provided by statute,[93] the plea of not guilty puts in issue all material allegations of the complaint and is in general sufficient;[94] and a special plea setting up matter available under the plea of not guilty is bad on demurrer,[95] and may properly be stricken on the court's own motion.[96] Matter in abatement[97] and new

75. Tex.—McRae v. White, Civ.App., 42 S.W. 793.

76. Ky.—Hoffman v. Mann, 75 S.W. 219, 25 Ky.L. 255.

77. Kan.—Schuster v. Gray, 55 P. 489, 8 Kan.App. 222.

78. Miss.—Johnson v. Tuggle, 27 Miss. 836.

79. Kan.—Wilson v. Campbell, 88 P. 548, 75 Kan. 159, 121 Am.S.R. 366, 8 L.R.A.,N.S., 426, 12 Ann.Cas. 766.

80. Fla.—Liddon v. Hodnett, 22 Fla. 271.
26 C.J. p 854 note 92.

81. Cal.—Shelby v. Houston, 38 Cal. 410—Valencia v. Couch, 32 Cal. 339, 91 Am.D. 589.
Okl.—Best v. Frazier, 85 P. 1119, 16 Okl. 523.
26 C.J. p 854 note 93.

82. Cal.—Howard v. Valentine, 20 Cal. 282.

83. N.M.—Sanchez v. Luna, 1 N.M. 238.
Verification generally see supra § 45.

84. Ind.—Poffenberger v. Blackstone, 57 Ind. 288.
Ky.—Aufenkamp v. Storch, 127 S.W. 529, 138 Ky. 104.
26 C.J. p 854 note 97.

Defendant's failure properly to set up homestead rights in an action for forcible entry and detainer will not defeat them where under applicable statute and rules of the municipal court wherein the action is brought written pleadings are not required.—Van Winkle v. Weston, 276 Ill.App. 66.

85. Miss.—Holmes v. Elmer, 181 So. 325, 182 Miss. 325.

Demurrers and replies are improper under statutes placing the cause at issue on the filing of a complaint.—Holmes v. Elmer, supra.

86. Minn.—Berryhill v. Healey, 95 N.W. 314, 89 Minn. 444.

87. W.Va.—Raleigh County v. Ellison, 8 W.Va. 308.

In New Mexico the statute contemplates that defendant shall file an answer or other plea in an unlawful detainer action brought before a justice of the peace.—Bell v. Beck, 92 P.2d 992, 43 N.M. 315.

88. W.Va.—Raleigh County v. Ellison, 8 W.Va. 308.

89. Ark.—Brockaway v. Thomas, 32 Ark. 311.

90. Cal.—Maumus v. Hamblon, 38 Cal. 539.

91. Ala.—Ferguson v. Carter, 40 Ala. 607.

92. Cal.—More v. Del Valle, 28 Cal. 170.
26 C.J. p 854 note 8.

93. Colo.—Kenney v. Daugherty, 185 P. 471, 67 Colo. 56.
26 C.J. p 854 note 9.

94. Mo.—Barber v. Todd, App., 128 S.W.2d 290, 293, citing **Corpus Juris.**
26 C.J. p 854 note 10.

95. Ala.—Bibby v. Thomas, 31 So. 432, 131 Ala. 350.
26 C.J. p 854 note 11.

96. Ala.—Cooley v. U. S. Savings & Loan Co., 39 So. 515, 144 Ala. 538.

97. Ill.—Shepardson v. McDole, 49 Ill.App. 350.

matter by way of excuse, justification, or avoidance[98] must be specially pleaded, unless the necessity therefor is dispensed with by statute, as explained below. By the express provisions of some statutes, however, a general denial will be sufficient in all cases,[99] even in respect of matters of excuse, justification, or avoidance.[1] Where an entry by fraud and stealth is alleged, an answer alleging an entry with plaintiff's consent is good.[2] A denial that defendant entered unlawfully admits the entry and tenders issue only on its unlawfulness.[3] An allegation in the answer of actual possession raises no question of title[4] and an allegation of right to possession is a conclusion of law.[5] An answer which alleges that defendant purchased the property in controversy from a person named, but which does not show that such person had any interest in the premises or right to dispose thereof or of the possession, fails to show that his entry was based on any claim of right.[6] Where the complaint alleged that defendant forcibly entered on a tract of land described, an answer admitting the taking and holding of possession, but denying that he did so forcibly, unlawfully, or wrongfully, did not tender any issue as to the legality of defendant's entry.[7] Where an abstract of title is set up in a paragraph of the complaint in compliance with a statutory requirement, defendant's failure to deny this paragraph does not admit its truth where the answer denies plaintiff's title or right to possession.[8] If the allegations in the complaint are stated conjunctively, an answer which denies them in that form does not raise an issue,[9] and any defense distinctly and separately stated must be an answer to the whole cause of action.[10] If plaintiff regains possession of the premises pending an appeal by defendant to a court of record this fact can be taken advantage of only by a plea puis darrien continuance.[11]

Cross-complaint. Under statutes limiting defendant in an unlawful detainer action to an answer or demurrer, a cross-complaint may not be interposed.[12]

§ 48. Reply

Under the practice prevailing in some jurisdictions it has been held that no reply or subsequent pleading should be interposed.

By virtue of statutory provisions in some jurisdictions it is not necessary in an action for unlawful detainer to reply to affirmative matter contained in the answer,[13] and under the practice prevailing in some jurisdictions replications or replies and subsequent pleadings are improper in an action for forcible entry and detainer or for unlawful detainer.[14] Where the unlawful detainer act requires a written complaint and answer, it by implication excludes the necessity of any further written pleadings.[15]

§ 49. Method of Raising Objections and Waiver

The general rules applicable to pleading, and to pleadings in the court of a justice of the peace, apply to the method of raising objections to pleadings in an action for forcible entry and detainer, or the like, and to waiver of such objections.

Under the general rules governing defects, objections, and waiver, as set forth in the C.J.S. title Pleading §§ 547–602, also 49 C.J. p 818 note 85–p

98. Ark.—Brockway v. Thomas, 36 Ark. 518.
Minn.—Sodini v. Gaber, 111 N.W. 962, 101 Minn. 155.
26 C.J. p 854 note 14.

99. Okl.—Oklahoma City v. Hill, 46 P. 568, 4 Okl. 521.
26 C.J. p 854 note 16.

1. Cal.—Henderson v. Allen, 23 Cal. 519.

2. Iowa.—Oleson v. Hendrickson, 12 Iowa 222.

3. Cal.—Leroux v. Murdock, 51 Cal. 541.

4. Mont.—Parks v. Barkley, 1 Mont. 514.
26 C.J. p 855 note 21.

5. Mont.—Parks v. Barkley, supra.

6. Cal.—Brown v. Martin, 139 P. 823, 23 Cal.App. 736.

7. Cal.—Brown v. Martin, supra.

8. Wash.—Roberts v. Center, 67 P. 151, 26 Wash. 435.
26 C.J. p 855 note 26.

9. Cal.—Leroux v. Murdock, 51 Cal. 541—Burke v. Carruthers, 31 Cal. 467—More v. Del Valle, 28 Cal. 170.

10. N.Y.—Mendelson v. Kitt, 92 N.Y.S. 127.
26 C.J. p 855 note 28.

11. Ala.—Lomax v. Spear, 51 Ala. 532.

12. Cal.—Schubert v. Lowe, 223 P. 550, 193 Cal. 291—Arnold v. Krigbaum, 146 P. 423, 169 Cal. 143, Ann. Cas.1916D 370.

Cross complaint held to state a cause of action in ejectment and not one of forcible entry and detainer
Okl.—Long v. Bagwell, 133 P. 50, 38 Okl. 312.

13. Wash.—Fife v. Olson, 32 P. 766, 5 Wash. 789.

14. Colo.—Babnik v. Culig, 3 P.2d 801, 89 Colo. 449.
Miss.—Holmes v. Elmer, 181 So. 325, 182 Miss. 171.

Replication

In actions in unlawful detainer before justices of the peace, no replication is required.—Babnik v. Culig, 3 P.2d 801, 89 Colo. 449.

Replications, rejoinders, and surrejoinders are improper in an action for unlawful entry and detainer where the statute provides for a complaint and under such statute the cause is at issue on the filing of the complaint.—Holmes v. Elmer, 181 So. 325, 182 Miss. 171.

15. Colo.—Joss v. Hallett, 89 P. 809, 39 Colo. 392.

Where the detainer act fails to provide for a replication, the necessity for such a pleading in such an action is excluded by implication.—Weir v. Welch, 203 P. 1100, 71 Colo. 66.

886 note 58, and in the C.J.S. title Justices of the Peace § 90, also 35 C.J. p 636 note 55–p 637 note 72, it has been variously held that if the complaint is defective in substance the objection may be availed of by motion to quash;[16] that an objection raised after the trial is commenced comes too late;[17] that matter in abatement must be pleaded as soon as practicable or it will be waived;[18] that all objections based on defects of form in a complaint are cured by going to trial without objection,[19] and by verdict;[20] that an objection to the description of the premises may be raised by demurrer,[21] but may be waived by going to trial[22] or cured by verdict,[23] if it identifies the premises with sufficient certainty to enable the executive officer of the court to ascertain the land recovered;[24] that answering and going to trial on the merits waives an objection that the complaint is defective in failing to state where the premises are situated;[25] that where actual possession in plaintiff is defectively alleged the objection may be taken advantage of by special demurrer on the ground of uncertainty;[26] that objections based on defects of this character cannot be raised after verdict;[27] that a defect in alleging the time of entry is waived by appearance and trial on the merits;[28] that informality in alleging a withholding of the premises by defendant at the commencement of the action is cured by verdict,[29] as is also an objection that the complaint contains no prayer for a judgment of ouster;[30] that objections for failure to describe plaintiff's interest in the premises is waived by general appearance and answer, and consent to a postponement of the case;[31] that objection for want of a jurat is waived by going to trial;[32] that objections based on improper joinder of causes of action should be raised by demurrer[33] or by motion to strike or to amend the pleading;[34] that improper joinder is not a ground for motion to dismiss the complaint;[35] that where a complaint is for an unlawful entry and forcible and unlawful detainer, and the summons is to answer for a forcible entry and detainer, the variance is cured by plea to the merits;[36] and that where, in a forcible detainer suit, a counterclaim is interposed, no damages or rent being claimed, the right to object to the introduction of any evidence in support of such counterclaim is not waived by replying instead of demurring to the counterclaim.[37] Where a replication is unnecessary, under principles discussed supra § 48, the court may properly refuse to grant defendants time in which to demur or move against a replication unnecessarily filed by plaintiff.[38]

§ 50. Issues, Proof, and Variance

a. In general
b. Conformity of pleadings and proof
c. Variance

a. In General

Generally speaking, the issues in a suit for forcible entry and detainer are the actual possession of the plaintiff and his forcible ouster by the defendant, and the plaintiff must prove both. In a suit for detainer only, it is not necessary for plaintiff to prove his own possession.

Generally speaking, the issues in a suit for forcible entry and detainer are whether the tenant was in actual, peaceful, and physical possession of the premises,[39] and whether defendant forcibly took such possession from him.[40] Under a plea of not guilty, plaintiff must prove every fact necessary to entitle him to recover,[41] for, as stated supra § 47, where the plea of not guilty is proper all material

16. Ill.—Doran v. Gillespie, 54 Ill. 366.
26 C.J. p 855 note 35.
17. Ill.—Haynes v. Sherwin-Williams Co., 126 Ill.App. 414.
18. Ala.—Beck v. Glenn, 69 Ala. 121.
26 C.J. p 855 note 37.
19. Ala.—Matlock v. Thompson, 18 Ala. 600—Wright v. Lyle, 4 Ala. 112.
Tex.—Clay v. Clay, 7 Tex. 250.
20. Iowa.—Shaw v. Gordon, 2 Greene 376.
21. Ind.—College Corner & Richmond Gravel Road Co. v. Moss, 92 Ind. 119.
22. Ark.—Davis v. Goodman, 35 S. W. 231, 62 Ark. 262.
26 C.J. p 855 note 43.
23. Ala.—Payne v. Martin, 1 Stew. 407.
Mo.—Stone v. Halstead, 62 Mo.App. 136.
24. Ala.—Snoddy v. Watt, 9 Ala. 609—Wright v. Lyle, 4 Ala. 112.
25. Minn.—Gibbens v. Thompson, 21 Minn. 398.
26. Cal.—Knowles v. Crocker Est. Co., 57 P. 998, 125 Cal. 264.
27. Ind.—Test v. Devers, 2 Blackf. 80.
28. N.J.—O'Hagan v. Crossman, 14 A. 752, 50 N.J.Law 516.
29. Cal.—Cronise v. Carghill, 4 Cal. 120.
26 C.J. p 855 note 51.
30. Colo.—Ensley v. Page, 59 P. 225, 13 Colo.App. 452.
26 C.J. p 855 note 52.
31. N.Y.—Crane v. Van Derveer, 60 N.Y.S. 1040, 45 App.Div. 139.
26 C.J. p 856 note 53.
32. Ill.—Center v. Gibney, 71 Ill. 557.
33. Cal.—Treat v. Forsyth, 40 Cal. 484.
Fla.—Liddon v. Hodnett, 22 Fla. 271.
34. Fla.—Liddon v. Hodnett, supra.
35. Fla.—Liddon v. Hodnett, supra.
36. Ala.—Grice v. Ferguson, 1 Stew. 36.
37. N.D.—Vidger v. Nolan, 87 N.W. 593, 10 N.D. 353.
38. Colo.—Weir v. Welch, 203 P. 1100, 71 Colo. 66.
39. Mont.—Herzog v. Texas Co., 294 P. 962, 88 Mont. 580.
40. Mont.—Herzog v. Texas Co., supra.
41. Minn.—Sodini v. Gaber, 111 N. W. 962, 101 Minn. 155.
Neb.—Galligher v. Connell, 36 N.W. 566, 23 Neb. 391.

Throwing burden on plaintiff

In an action for forcible entry and detainer, the plea of "not guilty," which is similar to the general issue ordinarily used in civil actions, casts on plaintiff the burden of proving

allegations of the complaint are put in issue by such plea.

In an action for forcible entry and detainer or the like, plaintiff must prove allegations of his actual, prior possession of the premises,[42] and defendant's invasion thereof;[43] but it is sufficient for plaintiff to show his peaceable possession and his forcible ejectment by defendant,[44] and he need not go further and show his right to possession.[45] In an action for forcible detainer, as distinguished from one for entry and detainer, it is unnecessary for the plaintiff to show his possession or that defendant secured possession from plaintiff.[46]

Possession of defendant. While the possession of defendant at the time of suit is ordinarily not an issue, where it is in issue under the facts of the case plaintiff must show that defendant was in possession of the premises at the time of suit.[47]

Notice to quit. It has been held unnecessary to allege that a notice to defendant to quit was in writing, as shown supra § 43, but it has also been held that on the trial such fact must be proved.[48]

Refusal to surrender premises on demand. If the answer admits refusal to deliver possession pursuant to plaintiff's demand, plaintiff need not prove this fact.[49]

b. Conformity of Pleadings and Proof

The usual rules respecting conformity of pleadings and evidence apply in actions for forcible entry and detainer. Under a general denial defendant may introduce evidence of anything tending to disprove plaintiff's case.

As in other actions, plaintiff in his evidence is confined to proof of the facts alleged in his complaint.[50] Under a statute which provides but one form of declaration, namely, that it summon defendant to answer the complaint, the fact that defendant is in possession and unlawfully withholds from plaintiff the premises in question, and evidence of forcible entry by defendant, which is unlawful, is admissible thereunder, without specific allegation thereof.[51] Under a complaint charging defendant with obtaining possession by collusion with plaintiff's tenant, evidence negativing the averment of collusion is competent, and its competency is in no way affected by the fact of plaintiff's presence or absence when defendant obtained possession.[52] If suit is brought against defendants jointly, testimony is admissible to show that they occupied the tract in severalty.[53]

Under a general denial in an unlawful detainer case defendant is not limited to showing matters specially pleaded but may give evidence of anything tending to disprove the right of plaintiff to recover.[54] It has been held, however, that under a general denial defendant may not show the relationship of the parties so as to prove that plaintiff had no right to possession.[55]

c. Variance

In actions for forcible entry and detainer, as in civil actions generally, the plaintiff must prove his case as laid and a material variance is fatal, such as one in respect of the description of the land. The authorities are not in harmony as to the necessity of proving the time of the defendant's entry as alleged.

Under general rules there must be a substantial conformity between plaintiff's allegations and his proof.[56] If the complaint alleges forcible entry only, there can be no recovery on proof making out a case of forcible detainer only.[57] Proof of some other statutory case not set out in the complaint will not sustain the action.[58] While any of the

every material allegation of his complaint.—Galligher v. Connell, supra.

42. Ala.—Lipscomb v. Moore, 153 So. 393, 228 Ala. 365.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—Davis v. Robinson, 23 N.E.2d 816, 302 Ill.App. 365.
Ky.—New York-Kentucky Gas Co. v. Miller, 220 S.W. 535, 187 Ky. 742.
26 C.J. p 857 note 89.

43. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631—Davis v. Robinson, 23 N.E.2d 816, 302 Ill.App. 365.

44. N.Y.—Isaacs v. Washougal Clothing Co., 253 N.Y.S. 387, 233 App.Div. 568—Gulish v. Johnston, 199 N.Y.S. 97, 206 App.Div. 625.

45. N.Y.—Isaacs v. Washougal Clothing Co., 253 N.Y.S. 387, 233 App.Div. 568—Gulish v. Johnston, 199 N.Y.S. 97, 206 App.Div. 625.

46. Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.

47. Mo.—Jackson v. Black, App., 264 S.W. 432.

48. Neb.—Hitchcock v. McKinster, 31 N.W. 507, 21 Neb. 148.

49. Colo.—Ensley v. Page, 59 P. 225, 13 Colo.App. 452.

50. Cal.—Harris v. Seidell, 36 P.2d 1104, 1 Cal.App.2d 410.
26 C.J. p 856 note 64.

51. W.Va.—Fisher v. Harman, 68 S.E. 885, 67 W.Va. 619.

52. Mo.—Smith v. Meyers, 45 Mo. 434.

53. Ill.—Springer v. Cooper, 11 Ill. App. 267.

54. Minn.—Ruff v. Schafer, 196 N.W. 661, 157 Minn. 485.

Specially pleading lease and justifying possession on other grounds

In an action in forcible entry and detainer by a receiver appointed in action to foreclose a mortgage, where the answer contained a general denial, and pleaded as a further defense that defendant was in possession under a lease from the administratrix of the estate in which the title to the land stood, defendant was not limited to the lease in justifying his retention of possession, but might also assert a right of possession as heir of deceased mortgagor.—Ruff v. Schafer, supra.

55. N.Y.—Gulish v. Johnston, 199 N.Y.S. 97, 206 App.Div. 625.

56. Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453.

57. N.C.—Jordan v. Rouse, 46 N.C. 119.

58. Me.—Gilbert v. Gerrity, 80 A. 704, 108 Me. 258.

species of actions of entry or detainer may be prosecuted under the single form of warrant specified by an applicable statute, if plaintiff does not follow the prescribed form, which is comprehensive, but uses his own form, then he is confined to the particular action which he sets forth and can recover only on proof of facts supporting such particular action.[59]

Description of land. A material variance between pleading and proof in respect of the description of the land is fatal to a recovery.[60]

Plaintiff's possession. Where there is no proof to sustain an allegation of actual possession by plaintiff, a judgment for defendant is proper.[61] A complaint charging that plaintiff was in possession of certain premises is not sustained by evidence that he was in possession of only a portion thereof, and a recovery is not authorized.[62]

Defendant's possession and detention. As respects possession by defendant of the premises in controversy, evidence that plaintiff was in possession of a very small portion will be deemed an immaterial variance.[63] In the absence of evidence showing that defendant wrongfully withholds possession from plaintiff, the latter may not recover.[64] A variance in the pleading and proof as to the amount of land charged to be detained has been held immaterial and a recovery allowed of so much as the jury found was detained.[65] Proof of an unlawful entry does not support an allegation of detention by force.[66]

Where the complaint charges that defendant's possession was forcibly obtained and held, the test of plaintiff's right to recover is the character of the entry and detention.[67]

Time of entry. According to some decisions the allegation of time of the entry is material and the date must be proved as alleged;[68] but according to the weight of authority it is not necessary to prove the time of entry exactly as alleged.[69] As long as the proof shows an entry before filing complaint,[70] and that the entry was made within the period in which suits for forcible entry and detainer must be brought to avoid the bar of the statute of limitation, a variance between the time alleged and that proved is immaterial.[71]

I. PROCEEDINGS FOR TAKING AND DELIVERY OF POSSESSION

§ 51. In General

Under statutes providing for the issuance of a writ of restitution on the commencement of an action for forcible entry or detainer, it has been held that the action is deemed to begin on the filing of the complaint in so far as issuance of such writ is concerned. Where the writ fails, a new or alias writ may be issued by the clerk without further application to the court if there has been no change in conditions.

Under a statute broadly providing that plaintiff, at the time of commencing an action of forcible entry or detainer, or at any time thereafter, may apply for a writ of restitution restoring to plaintiff the property described in the complaint, it has been held that for the purpose of issuing the writ the action is to be deemed to be commenced when the complaint is filed,[72] and that the statute does not require service of defendant with process before the writ can issue.[73]

59. Tenn.—Westmoreland v. Farmer, 7 Tenn.App. 385.

60. Ill.—Fanning v. Northwestern Mut. L. Ins. Co., 6 Ill.App. 536.
Miss.—Paden v. Gibbs, 40 So. 871, 88 Miss. 274.
26 C.J. p 856 note 68.

61. N.Y.—Sarconi v. De Falo, 67 N.Y.S. 923, 33 Misc. 780.

62. Ill.—House v. Wilder, 47 Ill. 510.
Ind.T.—Garner v. Bonham, 49 S.W. 45, 3 Ind.T. 752.
26 C.J. p 856 note 78.

63. Okl.—Seeley v. Adamson, 26 P. 1069, 1 Okl. 78.

64. Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814.

Nature of defendant's entry and relationship between parties

The mere fact that plaintiff had an outstanding muniment of title was not proof that defendant held possession of land unlawfully, and plaintiff could not recover in an action of unlawful entry and detainer where there was no evidence showing how defendant entered possession or what relation there was between plaintiff and defendant or between defendant and any of plaintiff's predecessors in title.—Sistrunk v. Majure, supra.

65. Wis.—Jarvis v. Hamilton, 19 Wis. 187.
26 C.J. p 856 note 77.

66. N.J.—Marquez v. Bovero, 127 A. 698, 101 N.J.Law 28.

Proof as insufficient under either provision of statute

Petition for forcible detainer, under Dist. Ct. Act § 97, which alleged defendant's entry, and holding and keeping possession with force and by violence, was not supported by proof of unlawful entry nor would it support recovery under § 117c, where there had been no holding after demand and notice in writing.—Marquez v. Bovero, supra.

67. Neb.—Miller v. Maust, 259 N.W. 181, 128 Neb. 453.

68. Mich.—Hoffman v. Harrington, 25 Mich. 146.
26 C.J. p 856 note 73.

69. Ala.—Bliss v. Winston, 1 Ala. 344.
26 C.J. p 856 note 74.

70. Ala.—Bliss v. Winston, supra.

71. Cal.—Amador Gold Mine, Inc. v. Amador Gold Mine, 46 P. 80, 114 Cal. 346.
Mo.—Warran v. Ritter, 11 Mo. 354.
26 C.J. p 856 note 76.

72. Wash.—Hughes v. Crowley, 5 P. 2d 982, 165 Wash. 580.

73. Wash.—Hughes v. Crowley, supra.

Where an issued writ of restitution fails to accomplish its purpose for a reason other than a change of conditions, it is not necessary to present another application for a new writ,[74] and in the absence of a change of conditions the clerk, as an officer of the court, has inherent power on failure of the original writ to issue as many aliases as may be necessary fully to accomplish the authorized purpose;[75] but where the writ fails on a change of conditions, there should be another application for issuance of a new writ.[76]

§ 52. Bond

The purpose of a bond executed on issuance of a writ of restitution giving possession of the premises to plaintiff, in a suit for entry or detainer, is to protect defendant as to damages arising from his summary eviction in the event that it is eventually proved that such eviction was not justified, and in a separate action on the bond its obligee may recover for damages proximately resulting from his dispossession. Attorneys' fees are ordinarily not a proper item of damage in such suits.

Under some statutes plaintiff may give a bond and dispossess defendant at the commencement of the action.[77] The purpose of a bond, written on issuance of a writ of restitution, is to enable plaintiff in the detainer action to obtain possession of the premises and to protect defendant in his right of possession, if any, by indemnifying him for damage sustained by reason of the issuance of the writ if it is proved that it was unlawfully issued,[78] and where damages are sought they should be recovered in a separate action on the bond.[79] Where the court has jurisdiction of the subject matter, the bond is binding and recovery may be had for damages sustained from its breach, even though the court may have failed to obtain jurisdiction over the person because of faulty proceedings.[80] Under a statute providing that, before a writ of possession in an action of forcible entry or unlawful detainer shall be executed by an officer, plaintiff shall execute to the officer having the writ a bond with sufficient surety, an action will lie for breach of the bond even though the original action in which the bond was given was not prosecuted to final judgment, and an action on the bond will not be precluded by delay in prosecution of the original action.[81]

Damages. In an action on the bond written on issuance of a writ of restitution or possession, the person deprived of the premises unlawfully is entitled to all resultant damages up to the amount of the bond.[82] The extent of the damages is a question of fact for determination by the trial court;[83] but the party dispossessed is entitled only to such damages as result proximately from the wrongful dispossession,[84] and where a house on the premises is burned during the period of dispossession either from accidental causes or from willful act of some person other than defendant, or the latter's tenant in possession, plaintiff may not recover any damages for loss of the house.[85] Where it appears that, in their defense to a forcible detention action, defendants in such action did not ask to be restored to possession of the premises but acquiesced in the proceeding in so far as it sought to determine their right of possession, deprivation of the use of the premises was not an element of damages recoverable in an action on the bond given on issuance of the writ of restitution to plaintiff who was put into possession under the writ.[86] In an action on the bond it has been held that no recovery may be had for attorney's fees incurred in defense of the action in detainer,[87] nor for those incurred in prosecution

74. Wash.—Hughes v. Crowley, supra.

75. Wash.—Hughes v. Crowley, supra.

76. Wash.—Hughes v. Crowley, supra.

77. Ark.—Richardson v. Harrell, 36 S.W. 573, 62 Ark. 469.
26 C.J. p 869 note 92.

78. U.S.—Huston v. Big Bend Land Co., C.C.A.Wash., 1 F.2d 93.

79. Ark.—Turner v. Vaughan, 238 S. W. 1059, 152 Ark. 475.

80. U.S.—Huston v. Big Bend Land Co., C.C.A.Wash., 1 F.2d 93.

No valid summons issued

A bond given when writ of restitution was issued in unlawful detainer suit was obligatory, although writ was invalid, because no valid summons was issued, and there was a breach of the bond by the mere fact that summons was not served, plaintiff being required by bond to prosecute action without delay, under Remington Code 1915 § 817.—Huston v. Big Bend Land Co., supra.

81. Ark.—Turner v. Vaughan, 238 S. W. 1059, 152 Ark. 475.

82. Ark.—Turner v. Vaughan, supra.

Failure of defendant's family to care properly for his property on his dispossession will not limit his recovery where he has not made them his agents.—Turner v. Vaughan, supra.

What bond covers

Such a bond covers actual damages resulting from the dispossession, including the value of crops destroyed by plaintiff while in possession, but does not cover claims for malicious prosecution of the suit.—Thompson v. Gatlin, Ind.T. 58 F. 534, 7 C.C.A. 351.

83. Wash.—Easterbrooks v. Abrahams, 94 P.2d 486, 200 Wash. 636.

Award of four hundred dollars sustained

In action on restitution bond in forcible entry and detainer, evidence justified an award of four hundred dollars to plaintiff on the ground that she was not a tenant of defendant and that his eviction of her was wrongful.—Easterbrooks v. Abrahams, supra.

84. Ark.—Turner v. Vaughan, 238 S. W. 1059, 152 Ark. 475.

85. Ark.—Turner v. Vaughan, supra.

86. Wash.—Enbody v. Hartford Accident & Indemnity Co., 265 P. 734, 147 Wash. 237.

87. Wash.—Easterbrooks v. Abrahams, 94 P.2d 486, 200 Wash. 636—Enbody v. Hartford Accident & Indemnity Co., 265 P. 734, 147 Wash. 237.

of the action on the bond.[88]

New bond on renewal of writ. Where a new or alias writ is issued without change of conditions, the failure of the original writ of restitution does not require issuance of a new bond.[89]

J. EVIDENCE

§ 53. Burden of Proof and Presumptions

The burden rests on plaintiff to prove all essential elements of his case under the statute under which he sues, such as his actual, prior possession of the premises and defendant's entry or detainer, and its forcible or unlawful character. Defendant need introduce no evidence until plaintiff has put in his case, but has the burden of proving an affirmative defense.

In actions for forcible entry and detainer, and the like, the plaintiff carries the burden of proof[90] and must show all facts essential to his recovery under the particular statute involved,[91] such as plaintiff's actual prior possession of the premises,[92] and defendant's entry[93] or detainer[94] by force,[95] within the period of limitations,[96] and that defendant unlawfully withholds possession of the land in controversy.[97] Where the possession of the premises by defendant at the time of commencing suit is in issue, the burden rests on plaintiff to prove this fact.[98] To authorize a recovery plaintiff must prove the giving of such notice[99] or the making of such demand for the surrender of the premises[1] as is required by statute, and must show that defendant refused to or neglected to surrender possession, and the latter fact is not to be presumed from the fact of defendant's possession before the demand.[2] Consent to defendant's possession will not be presumed from plaintiff's silence for any period shorter than designated by the statute of limitations.[3] If damages are claimed he must offer evidence in support of the claim.[4] If plaintiff relies on the possession of another, the burden is on him to show that the latter was his tenant.[5]

Description of premises. Plaintiff must give in evidence such a description of the premises in question as will enable the court to describe them in its judgment with such accuracy that an officer with the writ issued pursuant thereto could locate such premises and enforce the writ.[6]

Where there is a dispute respecting the identifi-

88. Wash.—Easterbrooks v. Abrahams, 94 P.2d 486, 200 Wash. 636.

89. Wash.—Hughes v. Crowley, 5 P.2d 982, 165 Wash. 580.

90. W.Va.—Wiles v. Walker, 106 S.E. 423, 88 W.Va. 147.

91. Me.—Gilbert v. Gerrity, 80 A. 704, 108 Me. 258.
Utah.—Welling v. Abbott, 173 P. 245, 52 Utah 240.
Wash.—Columbia & P. S. R. Co. v. Moss, 87 P. 951, 44 Wash. 589.

92. Ala.—Bush v. Thomas, 50 So. 133, 162 Ala. 168.
Conn.—Carrier v. Carrier, 82 A. 187, 85 Conn. 203.
Fla.—Goffin v. McCall, 108 So. 556, 91 Fla. 514.
Ill.—West Side Trust & Savings Bank v. Lopoten, 193 N.E. 462, 358 Ill. 631.
Ind.T.—Hunt v. Hicks, 54 S.W. 818, 3 Ind.T. 275.
Puerto Rico.—Igartua v. Perez, 12 Puerto Rico 266.
26 C.J. p 857 note 89, p 818 note 93.

93. Cal.—Preston v. Kehoe, 15 Cal. 315.
Ga.—Lewis v. State, 26 S.E. 496, 99 Ga. 692.
Mo.—Bell v. Cowan, 34 Mo. 251.

94. Mo.—Bell v. Cowan, supra.
Utah.—Welling v. Abbott, 173 P. 245, 52 Utah 240.

95. Utah.—Welling v. Abbott, supra.
26 C.J. p 857 note 97.

In action for forcible detention of land after forcible entry thereupon, before plaintiff can recover he must prove that defendant holds the possession either by actual violence or such a show of force as is reasonably calculated to intimidate plaintiff.—Gipe v. Cummins, 19 N.E. 466, 116 Ind. 511—26 C.J. p 825 note 55 [a].

96. Va.—Daily v. Rucker, 144 S.E. 466, 151 Va. 72.
W.Va.—Karnes v. Johnston, 52 S.E. 658, 58 W.Va. 595.
26 C.J. p 857 note 97.

97. Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814.

Burden not sustained by presumptions

Where plaintiff, who was seeking to prove that defendants were in possession of the premises unlawfully, relied on presumptions that they had obtained possession by virtue of a deed of an administratrix, at a sale of the property in the probate court to pay debts of deceased owner of the land and that such deed was void for failure to make a judgment creditor of decedent a party thereto, the court, in holding that plaintiff had not sustained the burden of proving defendant's possession unlawful, denied existence of either presumption that plaintiff relied on, where it held that the presumption that possessors hold by deed in probate sale does not arise in absence of proof of lack of possession prior to deed, and that no presumption arises that possessors' deed in probate sale to pay debts is void for failure to make judgment creditor a party thereto.—Hooper v. Buvidas, 239 Ill.App. 596.

98. Fla.—Wolfe v. Hall, 54 So. 777, 61 Fla. 492.
Ill.—Bender v. Bender, 221 Ill.App. 494.
26 C.J. p 857 note 94.

Presumption of possession of defendant may arise from the fact that he jointly owned and quitclaimed property, since in the absence of contrary evidence it will be presumed that defendant was in possession at such time.—Austinville Bldg. Corporation v. Lurie, 277 Ill.App. 364.

99. Okl.—Gibson v. Johnson, 69 P.2d 329, 180 Okl. 417—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.
26 C.J. p 857 note 99.

1. Ill.—Lehman v. Whittington, 8 Ill.App. 374.
26 C.J. p 857 note 1.

2. Ill.—Hersey v. Westover, 11 Ill. App. 197.

3. Mont.—Boardman v. Thompson, 3 Mont. 387.

4. Cal.—Lee Chuck v. Quan Wo Chong, 28 P. 45, 91 Cal. 593.

5. Mo.—Redman v. Perkins, 98 S.W. 1097, 122 Mo.App. 164.

6. Ill.—Rockhold v. Doering, 122 Ill. App. 194.

cation of the premises the burden is on plaintiff to prove that the property occupied by defendant is the property described in plaintiff's complaint.[7]

Plaintiff's right to possession. Where the right to possession becomes material, the actual and peaceable possession of property raises a presumption that the occupants are in rightful possession, and the burden of proof is on plaintiff suing in forcible detainer to overcome such presumption.[8] It is necessary for plaintiff to establish his right of possession.[9] He cannot rely on lack of right of possession in defendant.[10]

Defendant's burden. The defendant is not required to offer any proof until plaintiff by the weight of his evidence has shifted the burden of defense on defendant;[11] but he has the burden of proving an affirmative defense.[12] If defendant seeks to justify his possession under the authority of some other person than plaintiff the burden is on him to prove the title of such person,[13] and where the only way in which defendant can prove his right to present possession is under the terms of a lease, it is incumbent on defendant to prove his right by introducing the lease into evidence, and if the evidence is insufficient to show the terms of the purported lease defendant does not sustain his burden.[14]

Undefended action. Under the provisions of some statutes plaintiff must prove the allegations of his complaint whether defendant appears and defends or not.[15]

Burden of proof in actions by purchasers at judicial sales. Where the benefit of forcible detainer statutes is extended to purchasers at judicial sales after the time for redemption has expired, under principles considered in the C.J.S. title Judicial Sales § 43, also 35 C.J. p 86 notes 37–39, and 26 C.J. p 832 notes 36–41, plaintiff must show that his purchase conformed to the law authorizing the officer to sell;[16] and for this purpose it is not sufficient merely to introduce the deed,[17] but he must produce a valid judgment and execution as well as a deed for the premises on a sale by the officer under the judgment,[18] since this constitutes the evidence that the land has been sold and not redeemed.[19] When defendant in forcible detainer is a stranger to the judgment under which the land was sold, it must be shown that the party in possession holds the land in subordination to the title or possession of the judgment debtor,[20] and that his right to the possession was acquired by him subsequent to the lien of the judgment under which the land was sold.[21] An action cannot be maintained under this statute without the introduction in evidence, at the trial, of the grantee's deed, in order to show not only the extent of his possession, but also his right to the possession.[22]

§ 54. Admissibility

General rules govern the admissibility of evidence in proceedings of the character under consideration. Questions as to the admissibility of evidence on issues of title and possession are considered infra § 55, and questions as to the admissibility of evidence as to other matters, infra § 56.

Examine Pocket Parts for later cases.

§ 55. —— Title and Possession

a. Title
b. Possession

a. Title

In actions for forcible entry and detainer, evidence of title is ordinarily inadmissible where offered for the purpose of securing an adjudication of title and not for any collateral matter.

Inasmuch as the question of title cannot be adjudicated unless the statutes expressly so provide, as explained supra § 6, evidence offered for the purpose of showing title to the premises is ordinarily inadmissible.[23] Thus documents are inadmis-

7. Puerto Rico.—Igartua v. Perez, 12 Puerto Rico 266.

8. Ill.—Hooper v. Buvidas, 239 Ill. App. 596.

9. Ill.—McIlwain v. Karstens, 38 N. E. 555, 152 Ill. 135—Wheelan v. Fish, 2 Ill.App. 447.

10. Ill.—McIlwain v. Karstens, 38 N.E. 555, 152 Ill. 135.

11. Ind.T.—Fisk v. Arnold, 104 S.W. 824, 7 Ind.T. 526.

12. Iowa.—Nugent v. Dittel, 239 N. W. 559, 213 Iowa 671.

13. Iowa.—Kelley v. Kelley, 174 N. W. 342, 187 Iowa 349.
Mass.—Hogan v. Harley, 8 Allen 525.
26 C.J. p 857 note 5.

14. Cal.—Nineteenth Realty Co. v. Diggs, 25 P.2d 522, 134 Cal.App. 278.

15. Okl.—Bullock v. Peek, 168 P. 797, 66 Okl. 240.

16. Ill.—Kratz v. Buck, 111 Ill. 40—Kepley v. Luke, 106 Ill. 395, dismissing error 10 Ill.A. 403—Johnson v. Baker, 38 Ill. 98, 87 Am.D. 293.

17. Ill.—Antognoli v. O'Have Zedek, 139 Ill.App. 142.

18. Ill.—Kratz v. Buck, 111 Ill. 40—Johnson v. Baker, 38 Ill. 98, 87 Am. D. 293—Antognoli v. O'Have Zedek, 139 Ill.App. 142.
26 C.J. p 832 note 44.

19. Ill.—Kratz v. Buck, 111 Ill. 40.

20. Ill.—Nicholson v. Walker, 4 Ill. App. 404.

21. Ill.—Nicholson v. Walker, supra.

22. Ill.—Peters v. Balke, 48 N.E. 1012, 170 Ill. 304.

23. Conn.—Carrier v. Carrier, 82 A. 187, 85 Conn. 203.
26 C.J. p 857 note 9.

Lease

In action for forcible entry and detainer by county against discharged warden occupying house in

sible to show adverse title in defendant,[24] and defendant cannot show title in a third person;[25] but where evidence of title is not offered for the purpose of determining contradictory title claims, it may be admissible for the purpose of clarifying other rights of the parties,[26] such as the right, character, and extent of possession, as shown infra subdivision b of this section.

b. Possession

(1) In general
(2) Character and extent of possession
(3) Right to possession

(1) In General

The general rules govern admissibility of evidence as to the possession of plaintiff or defendant.

Broadly speaking, all otherwise competent, relevant, and material evidence is admissible in an action for forcible entry and detainer where it sheds light on the fact of possession,[27] and evidence as to possession must be competent, relevant, and material.[28]

Evidence concerning the possession of the locus in quo must, to be relevant, be such as to connect the party asserting such possession with the actual possession at the time of the alleged forcible entry.[29] On the question of plaintiff's possession of the premises at the time of the acts complained of it is competent to show that a third person had left personal property on the premises with plaintiff's permission;[30] that plaintiff had instructed his agent to take possession of the premises on the removal of his tenant;[31] and that plaintiff had entered upon the land and cut timber on it.[32] It is also competent to show a written agreement of a party to deliver peaceable possession to plaintiff,[33] the execution of a lease by plaintiff to a third person,[34] a preliminary injunction against defendant issued in a former suit between the same parties concerning the same property,[35] and a recovery in trespass by plaintiff for injuries to the land in controversy;[36] and plaintiff may be permitted to prove payment of taxes by one under whom he claims, for the purpose of showing that the claim and possession of the lattter are in good faith.[37] It has been held that declarations of a person in possession of land showing that he held in his own right and not as tenant or agent of another are admissible as evidence on the principle of res gestæ;[38] but there is authority to the contrary.[39] To show that plaintiff was not in possession at the time of the alleged in-

convict camp, evidence of title being irrelevant, proof of lease to defendant from alleged owner and lessor to plaintiff was held improperly admitted under code provisions precluding inquiry into the merits of title in such actions.—Jefferson County v. Parker, 100 So. 338, 211 Ala. 289—26 C.J. p 857 note 9 [b].

24. Ill.—Goldblatt Bros. v. Hoefeld, Inc., 1 N.E.2d 573, 284 Ill.App. 31.

25. Conn.—Carrier v. Carrier, 82 A. 187, 85 Conn. 203—Bliss v. Bange, 6 Conn. 78.

26. Ill.—Layzod v. Martin, 26 N.E.2d 423, 305 Ill.App. 1—Goldblatt Bros. v. Hoefeld, Inc., 1 N.E.2d 573, 284 Ill.App. 31—Chicago Ry. Equipment Co. v. Wilson, 250 Ill.App. 231.

27. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.

Relation of parties

All evidence of relations of parties shedding light on actual possession at time of bringing suit is admissible.—Washington v. Spriggs, supra.

Deeds bearing on possession

(1) Generally.—Conroy v. Duane, 45 Cal. 597—26 C.J. p 858 note 24 [a].

(2) Where plaintiff introduced evidence tending to show possession by C at the time of the alleged forcible entry, a deed of the premises from C to plaintiff dated one month prior to the entry has been held admissible to show that at the time of the entry the apparent possession by C was the possession of plaintiff.—Morgan v. Higgins, 37 Cal. 59.

(3) A deed offered to show right of possession was not inadmissible because unrecorded until after filing of the complaint, where it was executed before institution of the suit; nor was it inadmissible because no copy of the deed was filed with the complaint, the statute not so requiring in the case of a suit for unlawful entry and detainer.—Huff v. Murray, 158 So. 475, 171 Miss. 656.

28. Kan.—Wisecarver v. Wells, 197 P. 219, 108 Kan. 842.

Deeds not bearing on possession

(1) Generally.

Cal.—Sanchez v. Loureyro, 46 Cal. 641.

Nev.—Lachman v. Barnett, 16 Nev. 154.

(2) Exclusion of quitclaim deed from defendants to plaintiff, nondelivery of which defendants offered to prove, was not error, there being no showing that deed affected plaintiff's actual possession.—Mutual Trust Life Ins. Co. v. Berg, 246 N.W. 9, 187 Minn. 503.

(3) Court properly excluded deed not affecting title or right of possession of any party.—Nineteenth Realty Co. v. Diggs, 25 P.2d 522, 134 Cal. App. 278.

Lease

In unlawful detainer by purchaser at sale under trust deed, leases to defendants were properly excluded where their efficacy had been destroyed by the trustee's sale of the property.—Nineteenth Realty Co. v Diggs, 25 P.2d 522, 134 Cal.App. 278.

29. Cal.—Morgan v. Higgins, 37 Cal. 59.

30. Ala.—Huffaker v. Boring, 8 Ala. 87.

31. Ala.—Bibbey v. Thomas, 31 So. 432, 131 Ala. 350.

32. Mo.—Powell v. Davis, 54 Mo. 315.

33. Ala.—Huffaker v. Boring, 8 Ala. 87.

34. Mo.—Robinson v. Ramsey, 176 S.W. 282, 190 Mo.App. 206—Gooch v. Hollan, 30 Mo.App. 450.
26 C.J. p 858 note 18.

35. Ind.T.—Hunt v. Hicks, 54 S.W. 818, 3 Ind.T. 275.

36. Ky.—Moore v. Massie, 3 Litt. 296.
26 C.J. p 858 note 20.

37. Neb.—Galligher v. Connell, 53 N.W. 383, 35 Neb. 517.

38. Ala.—Turnley v. Hanna, 2 So. 483, 82 Ala. 139.
Mo.—Moore v. Shoup, 100 S.W. 53, 123 Mo.App. 409.

39. Miss.—McMullen v. Mayo, 16 Miss. 298.
26 C.J. p 858 note 23.

jury defendant may introduce in evidence an agreement of plaintiff to quit possession.[40]

To show possession by defendant at the time of the injury complained of he may introduce evidence that he had been in possession for two years under a lease at the time of the alleged forcible entry; that he had not surrendered possession but had leased the premises for the succeeding year;[41] or a record of a judgment in defendant's favor in an action of trespass for injuries to the premises in question.[42] The declaration of a person, since deceased, made at the time of such occupation, that he held the house under defendant as a tenant, is admissible,[43] and a witness may testify that he controlled the lands in controversy for defendant while he was absent during war.[44] For the purpose of showing possession in himself, defendant may show that a former owner of the land in question under which he claimed title had been in undisputed possession at one time during his ownership and within a designated time before the commission of the acts complained of.[45] Where defendants put in evidence the possession of one under whom they claimed, it was proper for plaintiffs to show that such person took possession under a lease from them.[46] A writ of possession issued in a former action between the same parties for the same lands awarding defendant possession of a portion of the premises is not admissible where the possession of such portion is not questioned.[47] Proof of payment of taxes on the property by defendant,[48] or payment of rent to the person from whom he claims to derive his claim of possession,[49] or that defendant had for two years past been in actual possession of a large tract of land which originally included the land in controversy, none of the tract mentioned being shown to be contiguous to the land in question,[50] is not admissible to show possession on the part of defendant. On an issue whether defendants forcibly entered a disputed strip of land between them and adjoining proprietors, evidence that an entry had been made prior to the alleged entry mentioned, in the complaint, under an agreement to establish the line by a survey, is admissible on the question of who was in possession at the time of the alleged entry.[51]

(2) Character and Extent of Possession

Evidence of title is admissible to show the character and extent of possession.

While the validity of titles cannot be tried in proceedings of the character under consideration, as discussed supra § 6, deeds or other evidences of title are admissible to show the character or extent of the possession claimed,[52] provided evidence has been given of actual possession of the land or a part of it,[53] and provided the possession has been peaceably obtained,[54] but not otherwise.[55] To show the character of the possession relied on by plaintiff defendant may show that he had held prior possession and that plaintiff had taken possession by force during defendant's absence and sought to maintain it by force.[56] He cannot, however, for the purpose of showing that plaintiff had only a scrambling possession, introduce evidence to show that during the whole period of plaintiff's possession third persons with whom defendant was not in privity were stopping near the demised premises awaiting an opportunity to take possession when they could do so without force.[57]

Evidence of title is admissible only to prove the right, character, or extent of possession,[58] and, where a deed has been admitted for this purpose, testimony that the grantor had been working the land is irrelevant as drawing the attention of the jury to the question of title rather than possession.[59] It is error to admit a deed which on its

40. Mo.—Tolbert v. Hendricks, 77 Mo.App. 272.

41. Iowa.—Peddicord v. Kile, 49 N.W. 997, 83 Iowa 542.

42. Conn.—Gray v. Finch, 23 Conn. 495.

43. Ala.—Bliss v. Winston, 1 Ala. 344.

44. Ala.—Turnley v. Hanna, 2 So. 483, 82 Ala. 139.

45. Conn.—Hale v. Wiggins, 33 Conn. 101.

46. Ala.—Dent v. Stovall, 75 So. 941, 200 Ala. 193.

47. Ind.T.—Hunt v. Hicks, 54 S.W. 818, 3 Ind.T. 275.

48. Wash.—Bellingham Bay & B. C. Co. v. Strand, 23 P. 928, 1 Wash. 133.

49. Mo.—St. Louis Agricultural & Mechanical Ass'n v. Reinecke, 21 Mo.App. 478.

50. Wash.—Bellingham Bay & B. C. Co. v. Strand, 23 P. 928, 1 Wash. 133.

51. Cal.—Flint v. Lovdall, 55 P. 424, 122 Cal. 551.

52. Miss.—McCallum v. Gavin, 116 So. 94, 149 Miss. 885.
26 C.J. p 859 note 40.
Admission on behalf of either party
Deed is admissible in evidence by either party in forcible detainer proceedings to show character and extent of possession.—Hines v. Perkins, 19 S.W.2d 991, 230 Ky. 339.

53. Ala.—Bush v. Thomas, 50 So. 133, 162 Ala. 168.

54. Okl.—Howard v. Davis, 136 P. 401, 40 Okl. 86.

55. Ala.—Bush v. Thomas, 50 So. 133, 162 Ala. 168.

56. Dak.—Murry v. Burris, 42 N.W. 25, 6 Dak. 170.

57. Cal.—Bowers v. Cherokee Bob, 45 Cal. 495.

58. Ill.—Hooper v. Buvidas, 239 Ill. App. 596.
Miss.—Sistrunk v. Majure, 192 So. 5, 186 Miss. 814.
26 C.J. p 859 note 44.

59. Ala.—Dent v. Stovall, 75 So. 941, 200 Ala. 193.

face does not show the boundaries of the land intended to be embraced therein or with certainty and definiteness describe any land, especially where no promise is made by the party proffering such deed to follow it up and connect it with other evidence which would make it material and relevant.[60] The draft of a lease unexecuted by the lessor is not competent evidence in behalf of plaintiff who is the lessee named therein and who has signed it to prove the extent of the land claimed by him.[61]

Evidence of staking a claim is admissible to show the extent of plaintiff's possession in the same manner as a deed would be.[62]

(3) Right to Possession

Deeds or other evidence of title may be admissible as bearing on the right to possession, as may other evidence.

Although very few of the statutes authorize or permit determination of title, as shown supra § 6, yet in proceedings based on such of the statutes as recognize that the right to possession is involved, under principles discussed supra § 7, evidence of title is admissible to establish this right,[63] as is also any other evidence concerning the source of plaintiff's claim and right to the possession of the premises.[64] On the other hand, where plaintiff introduces evidence of title to establish his right to possession, defendant may introduce evidence to show the invalidity of the conveyance[65] or will[66] under which plaintiff claims, and a writ of possession in favor of defendant from a court of competent jurisdiction is admissible proof of the lawfulness of his possession without producing the whole record.[67]

§ 56. —— Other Matters

a. In general
b. Identification and location of premises
c. Entry and use of force
d. Demand and notice thereof
e. Damages

a. In General

The general rules govern admissibility of evidence in actions for forcible entry and detainer and the like, and under such rules the court may exclude evidence of occupation of lands other than those involved or as to the character of the house kept by the plaintiff or of other matters irrelevant to the action.

Under the general rules governing admissibility of evidence in civil actions, evidence in actions for forcible entry and detainer, or the like, has been held admissible[68] or inadmissible.[69] Evidence that plaintiff had conveyed an interest in land to which he makes no claim is not admissible,[70] nor is evidence as to how the parties held and occupied other lands claimed by plaintiff in the neighborhood.[71]

60. Fla.—McMillan v. Reese, 55 So. 388, 61 Fla. 360.

61. Cal.—Roff v. Duane, 27 Cal. 565.

62. Mont.—Boardman v. Thompson, 3 Mont. 387.

63. Ariz.—Hixon v. Davis, 52 P.2d 1166, 1167, citing **Corpus Juris.**
Ill.—Layzod v. Martin, 26 N.E.2d 423, 305 Ill.App. 1.
Miss.—McCallum v. Gavin, 116 So. 94, 149 Miss. 885.
Tex.—Holcombe v. Lorino, 79 S.W.2d 307, 124 Tex. 446, reversing Lorino v. Holcombe, Civ.App., 71 S.W.2d 402.
26 C.J. p 859 note 51.

64. Neb.—Cummings v. Winters, 28 N.W. 302, 19 Neb. 719.
26 C.J. p 860 note 52.

Admission of lease to show color of right

In forcible entry suit, lease of ranch from state was admissible to show color of right in lessees so as to require purchaser to resort to forcible entry and detainer statute to acquire possession of the ranch, and to refrain from entering ranch during absence of lessees.—Paxton v. Deardon, 76 P.2d 561, 94 Utah 149.

65. Ill.—Douglas v. Hartzell, 15 Ill. App. 251.
26 C.J. p 860 note 53.

66. N.Y.—Smith v. Smith, 174 N.Y. S. 747.

67. Tenn.—Thomasson v. White, 6 Baxt. 148.

68. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.
Cal.—Baxley v. Western Loan & Building Co., 27 P.2d 387, 135 Cal. App. 426.
Miss.—Huff v. Murray, 158 So. 475, 171 Miss. 656.

Corporate books

If a corporation brings an action of unlawful detainer against an ex-officer thereof for possession of a house allowed him as residence while in office, the books of the corporation are admissible to show the arrangement made between the parties.—Frazier v. Virginia Military Inst., 81 Va. 59.

Evidence of sales contract admissible for defendant

Where plaintiff sued defendant in forcible entry and detainer, and on the trial it appeared that defendant vendor had peaceably entered when the manager of the vendee's assignee placed the vendor's representative in possession of the premises and accepted employment as manager under the vendor, the entry was not "forcible," and where possession was taken under a sales contract the entry and detention were not "unlawful," and consequently evidence of the sales contract and defaults thereunder were admissible when offered by defendant, as against plaintiff's contention that neither title nor right to possession are admissible in actions of forcible entry and detainer, the rule urged by plaintiff being inapplicable because no forcible entry or detainer had been shown.—Baxley v. Western Loan & Building Co., 27 P.2d 387, 135 Cal.App. 426.

69. Fla.—Harrell v. Martin, 158 So. 287, 117 Fla. 754.

Writ of restitution

In forcible entry and detainer proceeding, admission of writ of restitution with return of sheriff thereon ousting defendant from possession of property was error, where there was no showing that writ was based on valid judgment, since validity of judgment could not be assumed, and accordingly no sufficient predicate had been laid for introduction of the writ into evidence.—Harrell v. Martin, supra.

70. Ind T.—Anderson v. Thomas, 47 S.W. 301, 2 Ind.T. 79.

71. Mo.—Balch v. Myers, 65 Mo.App. 422.

Evidence as to the character of the house kept by plaintiff is irrelevant.[72] In an action for wrongful eviction under writ of restitution by the heirs of a mortgagor against the mortgagee, testimony tending to show that the mortgagee entertained malice toward such heirs several months after the eviction in suit was inadmissible.[73] Where the defense is that the entry was made after plaintiff's abandonment of the premises, evidence that it was originally taken by plaintiff's agent and so held is not admissible.[74] If one sues the owner of an adjoining lot for forcible entry and detainer of a narrow strip of ground between their lots, the title to which was in dispute, evidence as to the use of a fence erected thereon many years before is immaterial.[75] Where the fact that a previous suit had been brought for the property has no bearing on the forcible entry or on the title to the land in controversy, it is irrelevant.[76]

b. Identification and Location of Premises

Any competent evidence is admissible which is relevant and material to identification or location of the premises.

Where the identification of the premises is in issue, it is proper to admit evidence that plaintiff owns no other property in the same locality if such evidence has a bearing on identification,[77] and this is true even though such evidence may also bear on the matter of title, which ordinarily is not in issue in actions of this character.[78] The complaint on which the original writ was issued by the justice may be looked to by the court in aid of the description of the premises contained in the writ.[79] An objection to the introduction of any evidence which seeks to challenge the sufficiency of the description of the property sought to be recovered is properly overruled, if the description as to a portion of the property is correct.[80]

c. Entry and Use of Force

Any competent evidence is admissible to show the entry where relevant and material to such issue. Declarations and threats by or on behalf of defendant are competent on the issue of force.

In an action for forcible entry, evidence that defendant remained in possession of the premises is admissible to show that he made his entry complete, although he may not be charged with forcible detainer.[81] It is competent to show that plaintiff was arrested at defendant's instance for the purpose of getting him away from the premises so that defendant might enter and take possession.[82] Evidence to show good faith in an entry is not admissible, the question of good or bad faith not affecting the right of recovery.[83] Evidence that defendants had expended large sums of money in improvements upon the premises is not admissible on the issue as to whether there had been an unlawful entry.[84]

Force. Declarations of defendant's agent while taking possession are competent on the question of force,[85] and so are threats of bodily harm and the character of defendant for violence.[86] In actions for forcible entry evidence of force employed to maintain possession is not admissible to characterize by relation acts otherwise peaceable by which possession was previously obtained.[87] Records of other suits between other parties with respect to the property are prima facie irrelevant on the question of forcible entry.[88] Evidence that plaintiff's lessor had forcibly evicted defendant from the premises five days previous to defendant's forcible entry is not admissible in justification of the latter.[89]

d. Demand and Notice Thereof

Demand for possession may be proved by any competent evidence, but parol proof of service of a written notice of demand is inadmissible without prior notice to defendant to produce the original. Service of notice should be proved by the testimony of the person effecting such service, or the personal testimony of another having knowledge of the facts, and ordinarily may not be proved by an indorsement on the paper.

It has been held that testimony of plaintiff's agents is admissible to show their demand for possession.[90] Where the delivery of a written notice

72. Ala.—Brown v. French, 49 So. 255, 159 Ala. 645.

73. Ky.—Smith v. Berry, 181 S.W. 379, 167 Ky. 646.

74. Mo.—Keyser v. Rawlings, 22 Mo. 126.

75. Iowa.—Delmonico Hotel Co. v. Smith, 84 N.W. 906, 112 Iowa 659.

76. Ala.—Fowler v. Pritchard, 41 So 667, 148 Ala. 261.

77. Mo.—Miller v. Halleran, 270 S W. 427, 219 Mo.App. 195.

78. Mo.—Miller v. Halleran, supra.

79. W.Va.—Moore v. Douglass, 14 W. Va. 708.

80. Neb.—Weatherford v. Union Pac. R. Co., 98 N.W. 1089, 5 Neb. (Unoff.) 464.

81. Ga.—Lissner v. State, 11 S.E. 500, 84 Ga. 669, 20 Am.S.R. 389.

82. Cal.—Lasserot v. Gamble, 46 P. 917, 5 Cal.Unrep.Cas. 510.

83. Cal.—Holland v. Green, 62 Cal. 67.
26 C.J. p 860 note 60.

84. Conn.—Lee v. Stiles, 21 Conn. 500.

85. Ala.—Bibby v. Thomas, 31 So. 432, 131 Ala. 350.

86. Ala.—Ladd v. Dubroca, 45 Ala. 421.
26 C.J. p 860 note 63.

87. Mich.—Hoffman v. Harrington, 22 Mich. 52.

88. Ala.—Horsefield v. Adams, 10 Ala. 9.
26 C.J. p 860 note 65.

89. Cal.—Roff v. Duane, 27 Cal. 565.

90. Ala.—Jefferson County v. Parker, 100 So. 338, 211 Ala. 289.

Error to exclude
In action for forcible entry and unlawful detainer by county to recover possession of house from form-

of demand is essential to maintain the action, as discussed supra § 23, parol proof thereof is inadmissible without a prior notice to defendant to produce the original,[91] but there is some authority to the contrary.[92] Service cannot be proved by an indorsement on the original paper either by a private person[93] or an officer,[94] whether sworn or not, especially where the officer was not authorized to serve notice.[95] A person who serves the notice or some other person who has knowledge that such service was made should be called to prove such facts.[96] It may, however, be established by admissions of defendant.[97] Where evidence of threats by defendant warning plaintiff to keep off the premises was admitted to show that defendant was holding by force and defendant had admitted that he had threatened plaintiff with a prosecution for trespass if he entered the premises, such evidence was admissible as dispensing with other further proof by plaintiff of a demand for possession before bringing suit.[98]

e. Damages

In proving damages, evidence of injury to the freehold is ordinarily inadmissible, but evidence of rental values may be admissible, such as evidence of the location and surrounding conditions.

Evidence of injury committed by the disseizor to the freehold is ordinarily held to be incompetent as indicating plaintiff's damages in an action of forcible entry and detainer.[99] It has been held admissible to look to the title in view of the question of damages or rent to be recovered in an action brought by a mere intruder against the wrongful owner of the land or where claimant by fraud induces another to take a lease or to enter under him upon a false representation as to his title.[1] In such cases the title may be looked to on the question whether the case made out constitutes in law a wrongful entry or detainer.[2] In determining the rental value of premises, the peculiar location and conditions surrounding them may be shown and considered;[3] but evidence as to what profits might be expected if the premises wrongfully withheld had been available to plaintiff for use in connection with other property is not competent to prove the fair rental value.[4]

§ 57. Weight and Sufficiency

The general rules applicable to evidence in civil actions govern the weight and sufficiency of evidence in actions for forcible entry or detainer, as with respect to such matters as the plaintiff's possession or right of possession and his demand for surrender of the premises, and as to the defendant's entry or detainer and the forcible or unlawful character thereof. The plaintiff must prove his case by a preponderance of the evidence.

The rules relating to the weight and sufficiency of evidence in forcible entry and detainer actions are the same as those in other civil actions,[5] and plaintiff must prove his case by a preponderance of the evidence;[6] but a preponderance is sufficient.[7] Under such general rules the evidence in particular actions of forcible entry and detainer or the like, under the decisions, has been held sufficient [8]

er warden of convict camp, it was error to exclude testimony of demands for possession by two of plaintiff's agents and defendant's statement that he would give possession as soon as he could.—Jefferson County v. Parker, supra.

91. Ala.—Bates v. Ridgeway, 48 Ala. 611.
26 C.J. p 860 note 68.

92. Ohio.—Heller v. Beal, 23 Ohio Cir.Ct. 540.
26 C.J. p 860 note 69.

93. Ill.—Vennum v. Vennum, 56 Ill. 430.
Okl.—Smith v. Travel, 94 P. 529, 20 Okl. 512.

94. Ill.—Vennum v. Vennum, 56 Ill. 430.
Okl.—Tankersley v. Castanien, 162 P. 191, 63 Okl. 18—Smith v. Travel, 94 P. 529, 20 Okl. 512.
26 C.J. p 860 note 71.

95. Okl.—Tankersley v. Castanien, 162 P. 191, 63 Okl. 18.

96. Ill.—Vennum v. Vennum, 56 Ill. 430.
Okl.—Smith v. Travel, 94 P. 529, 20 Okl. 512.

97. Okl.—Tankersley v. Castanien, 162 P. 191, 63 Okl. 18.

98. Ala.—Bibby v. Thomas, 31 So. 432, 131 Ala. 350.

99. Tenn.—White v. Suttle, 1 Swan 169.
Waste as element of damages see infra § 59.

1. Tenn.—Philips v. Sampson, 2 Head 429.

2. Tenn.—Philips v. Sampson, supra.

3. Minn.—Noyes v. French Lumbering Co., 83 N.W. 385, 80 Minn. 397.

4. Philippine.—Sparrevohn v. Fisher, 2 Philippine 676.

5. Tenn.—Westmoreland v. Farmer, 7 Tenn.App. 385, 388; citing **Corpus Juris.**

6. W.Va.—Wiles v. Walker, 106 S.E. 423, 88 W.Va. 147.

Showing superior possessory entry
In forcible entry and detainer plaintiff cannot prevail unless by preponderance of the evidence he shows a possessory entry superior to that of the defendant.—Wiles v. Walker, supra.

7. Ohio.—Nasar v. Upton, 25 Ohio Cir.Ct., N.S., 193.

8. Ill.—Russell v. Barnowski, 35 N.E.2d 688, 311 Ill.App. 293.
Ky.—Lunsford v. Hughes, 130 S.W.2d 39, 279 Ky. 175.
Minn.—Mutual Trust Life Ins. Co. v. Berg, 246 N.W. 9, 187 Minn. 503.
Mo.—Bedell v. Garton, App., 70 S.W.2d 372—Vance v. Morrish, App., 279 S.W. 173.
Okl.—Bardwell v. Riverside Oil & Refining Co., 280 P. 1083, 139 Okl. 26.
26 C.J. p 861 note 95 [a].

To authorize recovery of possession and damages
Ark.—Alexander-Armberg v. Hollis, 171 S.W. 915, 115 Ark. 589.

To make out prima facie case of unlawful detainer
Wash.—Columbia & Puget Sound R. Co. v. Moss, 87 P. 951, 44 Wash. 589.

Two or more defendants
(1) Evidence held to support judgment that one defendant was guilty of forcible detainer but not that another was so guilty.—Paxton v. Fisher, 45 P.2d 903, 86 Utah 408.

(2) Evidence held to support plaintiff's judgment of forcible entry and detainer as to one defendant and not as to another defendant charged

to authorize recovery by plaintiff or insufficient[9] to authorize recovery by plaintiff; or sufficient or insufficient to show particular matters,[10] such as plaintiff's possession of the premises,[11] which must be shown by proof of physical facts and not by mere public rumor;[12] or has been held sufficient or insufficient to show the fact of entry by defendant,[13] or a detention of the premises by him,[14] or to show the employment of force,[15] as in effecting an entry[16] or in maintaining a detention;[17] or to show the unlawful character of defendant's entry or detainer;[18] or to show defendant's possession of the premises at commencement of the suit;[19] or to

with having aided and abetted.—Jackson v. Black, Mo.App., 286 S.W. 410.

(3) Evidence that defendants in forcible detainer employed persons who removed plaintiffs' effects from house and furnished codefendant with supplies and assistance, enabling her to maintain possession against plaintiffs' return, held to warrant trial judge's conclusion that they were parties to eviction, although their own testimony would warrant different conclusion.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.

(4) Evidence held sufficient to show that defendants aiding and abetting others to enter and maintain their unlawful possession of the premises were responsible for resultant damages even though such aiding defendants were never personally in possession.—Sunday v. Moore, supra.

9. Ga.—Cate v. Knight, 73 S.E. 1079, 10 Ga.App. 664.
26 C.J. p 862 note 96.

10. **Defendant's knowledge of plaintiff's rights in public land**

In a forcible entry and detainer proceeding for a tract of public land, evidence held sufficient to show that defendant took possession with notice that plaintiff corporation was the owner of the improvements and in constructive possession of the premises, although in any event defendant's good faith would have afforded no defense.—Willows Cattle Co. v. Connell, 220 P. 1082, 25 Ariz. 592.

Identification of property

Evidence held to sustain finding in unlawful detainer that property described in trust deed as north half of lot 5 was same tract which defendants occupied and refused to give up, although designated as lot 4 on plat dealing with adjacent lots.—Miller v. Halleran, 270 S.W. 427, 219 Mo. App. 195.

Relationship of parties

In unlawful detainer action, evidence held to sustain finding relation of landlord and tenant did not exist.—Richardson v. King, 10 P.2d 323, 51 Idaho 762.

Want of good faith

Evidence held sufficient to show defendant's caprice and want of good faith.—Nichols v. Eustis, 131 N.Y.S. 265, 146 App.Div. 475.

11. **At time of entry**

(1) Evidence held sufficient to show plaintiff's possession of the premises at time of entry.—McCormick v. McDowell, 90 S.W. 541, 121 Ky. 832—26 C.J. p 861 note 95 [j].

(2) Evidence held insufficient to show plaintiff's possession at time of entry.—Bush v. Thomas, 50 So. 133, 162 Ala. 168—26 C.J. p 862 note 96 [e] (1).

Five days' peaceable and undisturbed possession

(1) Evidence held sufficient to show that plaintiff was in the peaceable and undisturbed possession of the land for a period of five days next preceding defendant's entry.—Randolph v. Husch, 294 P. 236, 159 Wash. 490—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.

(2) Evidence held to support finding that plaintiff was not in peaceable possession of premises at time defendant went into possession, nor at any time within five days next preceding that date, within Remington Comp.St. § 811.—Hager v. Parcher, 240 P. 924, 136 Wash. 518.

At commencement of suit

Evidence held sufficient to show plaintiff's possession at commencement of suit.—Pensoneau v. Bertke, 82 Ill. 161—Huftalin v. Misner, 70 Ill. 205.

Possession within three years

In unlawful detainer suit, evidence established plaintiffs' possession within three years prior to institution of suit.—Smith v. Spencer, 130 S.W.2d 653, 234 Mo.App. 1.

Possession through another

Evidence held sufficient to show plaintiff's possession through a third person who was a share cropper or laborer.—Douglass v. Lamb, 247 S.W. 77, 157 Ark. 11.

Scrambling possession

Evidence held sufficient to show that plaintiff's possession was a mere "scrambling" one insufficient to support the action.—Welling v. Abbott, 173 P. 245, 52 Utah 240.

12. Mo.—Milem v. Freeman, 117 S.W. 644, 136 Mo.App. 106.

13. Cal.—Orly v. Russell, 200 P. 732, 53 Cal.App. 660.

14. Cal.—Orly v. Russell, supra.

15. N.Y.—Quinn v. McCochrane, 206 N.Y.S. 550, 210 App.Div. 569, affirmed 148 N.E. 748, 240 N.Y. 660.
Pa.—Mayer v. Chelten Ave. Bldg. Corporation, 183 A. 773, 321 Pa. 193.

Evidence held sufficient to warrant submission to jury of issue whether defendant used force necessary to sustain the action.
Ark.—Douglass v. Lamb, 247 S.W. 77, 157 Ark. 11.
Mont.—Sprinkle v. Anderson, 187 P. 909, 57 Mont. 219.

16. **Evidence held sufficient**

(1) To show forcible character of entry.
Ark.—Black v. Handley, 240 S.W. 411, 158 Ark. 640.
Cal.—Morris v. Turley, 271 P. 916, 94 Cal.App. 691.

(2) To show no forcible entry.—Bisencon v. Walters, 203 Ill.App. 28.

Evidence held insufficient to show forcible entry.—Spellman v. Rhode, 81 P. 395, 33 Mont. 21—26 C.J. p 862 note 96 [c].

17. **Evidence held sufficient** to show forcible detainer.
Ill.—Merrin v. Lewis, 90 Ill. 505.
N.Y.—Pharis v. Gere, 18 N.E. 135, 110 N.Y. 336, 1 L.R.A. 270.

Evidence held insufficient to show lack of forcible detainer or to sustain finding that defendant was not guilty of forcible detainer after demand for possession.—Kelsey v. Palmer, 184 Ill.App. 325.

18. Miss.—Sistrunk v. Majure, 193 So. 5, 186 Miss. 814.
26 C.J. p 861 note 95 [g], [h], [n].

Defendant's forfeited patent and plaintiff's muniment of title

A forfeited tax land patent from the state held by defendant in possession of certain lands did not show that defendant was wrongfully withholding possession of lands or that he had wrongfully turned plaintiff out of possession, nor did the fact that plaintiff had an outstanding muniment of title prove that defendant held possession unlawfully, and, in absence of evidence showing wherein or how defendant entered possession, plaintiff could not recover.—Sistrunk v. Majure, supra.

19. **Evidence held sufficient** to show defendant's possession.—Moore v. Blackstone, 180 P. 526, 20 Ariz. 328—26 C.J. p 861 note 95 [m].

Evidence held insufficient to show defendant's possession.

(1) Generally.—Preston v. Davis, 112 Ill.App. 636.

(2) Proof that defendant is still in possession does not suffice to show that he was in possession when suit

show a right of possession by plaintiff[20] or defendant;[21] or to show plaintiff's demand for possession of the premises,[22] or to show service of notice to quit or surrender possession.[23]

K. DAMAGES AND COSTS

§ 58. Right to Damages

Plaintiff or defendant, if successful in the action, is entitled to recover damages only to the extent that such a recovery is authorized by statute.

The action being purely statutory, the right to recover damages of either plaintiff or defendant depends on the language of the statute which creates the remedy.[24] In the absence of some statutory provision expressly authorizing it, damages cannot be recovered by plaintiff;[25] nor is defendant, although an action of unlawful detainer is decided in favor of him, entitled to an inquest of damages.[26] Under some statutory provisions, however, a successful plaintiff may be awarded damages in actions of this character,[27] unless he has waived his right thereto.[28] However, damages can be allowed plaintiff only as an incident to the right of possession,[29] and if there is no claim to recover possession[30] or no recovery of possession[31] there can be no award of damages, a claim for which must be asserted in an ordinary civil action.[32] Under some statutory provisions also, if defendant in forcible detainer disputes plaintiff's right to possession, he may prove his damages,[33] and on a verdict in his favor the court should render judgment for damages assessed against plaintiff and his sureties,[34] but this rule does not apply where defendant is in possession without right, and plaintiff's failure to recover is due entirely to his seeking relief by the wrong form of action.[35] If defendant is ousted from possession of only part of the premises he is not entitled to recover damages for the detention of the whole.[36]

§ 59. Measure and Elements of Damages

The damages recoverable are such as are the natural and proximate result of the acts complained of, and usually involve the elements of loss of rents, loss of all or part of a crop, the expense of protecting the property, and, under some statutes, waste. In a proper case exemplary damages may be awarded.

was begun.—Godair's Estate v. Case, 220 Ill.App. 348.

20. Ill.—Layzod v. Martin, 26 N.E. 2d 423, 305 Ill.App. 1.
26 C.J. p 861 note 95 [l].

Deed

(1) In action of unlawful entry and detainer, deed to plaintiff, in absence of evidence to contrary, has been held to constitute sufficient evidence of plaintiff's right to possession of land, since recitals in deed were prima facie correct.—Huff v. Murray, 158 So. 475, 171 Miss. 656.

(2) On the other hand, it has been held that the mere taking of a deed from a third person, without evidence showing title or possession in him, does not establish right of possession in plaintiff.—Layzod v. Martin, 26 N.E.2d 423, 305 Ill.App. 1.

21. Ky.—Lemaster v. Lemaster, 224 S.W. 466, 188 Ky. 829.
26 C.J. p 862 note 96 [g], [i].

22. **Evidence held sufficient** to show that demand for surrender of premises had been made by plaintiff.—Paxton v. Fisher, 45 P.2d 903, 86 Utah 408.

Evidence held insufficient to show demand.—Edwards v. Bodkin, 185 P. 423, 43 Cal.App. 405.

23. **Evidence held sufficient**

(1) To show proper service of demand.—Huftalin v. Misner, 70 Ill. 205—Campbell v. McFarland, 86 Ill. App. 467.

(2) To show service of notice to quit.

N.M.—Springer v. Wasson, 183 P. 393, 25 N.M. 379.
Okl.—Northcutt v. Bastable, 134 P. 423, 39 Okl. 124—Martin v. Hartshorne, 87 P. 854, 17 Okl. 586.

Evidence held insufficient to show service of demand.—Ball v. Peck, 43 Ill. 482.

24. Ark.—White River Land & Timber Co. v. Hawkins, 194 S.W. 9, 128 Ark. 277.

25. Ala.—Cassady v. Williams, 174 So. 481, 485, 234 Ala. 282, citing **Corpus Juris.**
Or.—Reckard v. Ryan, 288 P. 1053, 133 Or. 108.
Utah.—Forrester v. Cook, 292 P. 206, 214, 77 Utah 137, quoting **Corpus Juris.**
26 C.J. p 862 note 97.
Restitution of premises as being only proper judgment for plaintiff see infra § 72.

26. Ark.—White River Land Co. v. Hawkins, 194 S.W. 9, 128 Ark. 277.
26 C.J. p 862 note 99.

27. Ala.—H. G. Hill Co. v. Taylor, 174 So. 481, 485, 234 Ala. 282, citing **Corpus Juris.**
Colo.—Lane v. Morris, 237 P. 154, 77 Colo. 343.
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414—Tobakas v. Gaty, 208 P. 257, 121 Wash. 136.
26 C.J. p 862 note 4.

Statutory damages are not intended as a penalty for withholding of premises, but as compensation for use thereof.—Lane v. Morris, 237 P. 154, 77 Colo. 343.

28. Mo.—McKinney v. Harral, 36 Mo.App. 337.
Wash.—Huston v. Big Bend Land Co., 179 P. 101, 106 Wash. 130.
26 C.J. p 862 note 13.

29. Ind.T.—Wilson v. Smith, 89 S. W. 1009, 6 Ind.T. 108.
Mont.—McCleary v. Crowley, 56 P. 227, 22 Mont. 245.
26 C.J. p 862 note 8.

30. Wash.—Stevens v. Jones, 82 P. 754, 40 Wash. 484.

31. Cal.—Edwards v. Bodkin, 185 P. 423, 43 Cal.App. 405.
26 C.J. p 862 note 10.

32. Wash.—Stevens v. Jones, 82 P. 754, 40 Wash. 484.
Separate action to recover double or treble damages see infra § 61.

33. Ark.—Denton v. Young, 242 S. W. 801, 154 Ark. 538—White River Land & Timber Co. v. Hawkins, 194 S.W. 9, 128 Ark. 277.
Okl.—Lipscomb v. Allen, 102 P. 86, 23 Okl. 818.

34. Okl.—Lipscomb v. Allen, supra.

35. Ark.—Williams v. Petty, 271 S. W. 9, 168 Ark. 642—Denton v. Young, 242 S.W. 801, 154 Ark. 538—White River Land & Timber Co. v. Hawkins, 194 S.W. 9, 128 Ark. 277.

36. Cal.—Thompson v. Smith, 28 Cal. 527.

The damages recoverable are such as are the natural and proximate result of the acts complained of, and nothing beyond this.[37] Items of damages recoverable include the loss of all[38] or part[39] of a crop that could have been obtained in the absence of the acts complained of, and the expense of protecting the property, etc.[40] On the other hand, there can be no recovery for injury to business,[41] for bodily and mental pain,[42] for losses resulting to plaintiff on the breach of defendant's expressed promise to surrender possession,[43] or for the expenses of defending the suit and attorney's fees;[44] nor can damages for conversion of plaintiff's chattels be recovered.[45] Damages cannot be recovered for timber taken from the land which had previously been determined to belong to defendant in a replevin suit.[46]

Rents and profits. Where under the statute damages are recoverable, the reasonable value of the rents and profits, or the rental value, of the land is an element of damage which is generally to be taken into consideration,[47] without regard to the nature or extent of the right or title by which possession was held,[48] and according to some decisions this is the proper measure of damages.[49] Where it is shown that defendant soon after the institution of the suit abandoned the premises and that other persons intruded, claiming not for defendant but for themselves, defendant will not be responsible for the rent accruing after the abandonment.[50] Interest on damages awarded is not recoverable where the damages are based on the reasonable rental value of the premises, and not on a fixed or agreed rental.[51]

Improvements. In the absence of a statute authorizing it, compensation for improvements cannot be claimed in an action for forcible entry and detainer[52] or for unlawful detainer.[53]

Waste. Under some statutes it has been held that waste committed upon the premises is an ele-

37. Tex.—Perry v. Luettich, Civ. App., 93 S.W.2d 790, reversed on other grounds 121 S.W.2d 332, 132 Tex. 159.
Utah.—Forrester v. Cook, 292 P. 206, 211, 77 Utah 137, citing **Corpus Juris.**
Wash.—Tobakas v. Gaty, 208 P. 257, 121 Wash. 136.
26 C.J. p 862 note 14.

The measure of damages for the unlawful detention of land is the difference between the value of the land when taken possession of by the defendant and when it was restored to the complainant, together with the rental value while in defendant's possession.—Taylor v. Beaty, 8 Tenn. App. 310.

Entry by lessee's surety
The measure of a lessee's damages for a forcible entry and detainer by the lessee's surety, who paid the rent to the lessor, is the difference between the rent reserved and the value of the premises for the period plaintiff was out of possession.—Quinn v. McCochrane, 206 N.Y.S. 550, 210 App.Div. 569, affirmed 148 N.E. 748. 240 N.Y. 660.

Damages held excessive
(1) $100 damages, where only evidence as to monthly rents and profits placed them at $3 per month, fixed at $21 in the verdict.—Jackson v. Black, Mo.App., 264 S.W. 432.

(2) $450, where the maximum damage shown by the evidence could have been only $250.—Orly v. Russell, 200 P. 732, 53 Cal.App. 660.

Damages held not excessive
Award of $75 damages for wrongful entry and detainer and $183 rents and profits where plaintiff filed remittitur of $183.—Jackson v. Black, Mo.App., 286 S.W. 410.

38. Ind.T.—Case v. Hall, 46 S.W. 180, 2 Ind.T. 8.
26 C.J. p 863 note 16.

39. Cal.—Giddings v. '76 Land & Water Co., 23 P. 196, 83 Cal. 96.

40. Cal.—San Francisco & Suburban Home Bldg. Soc. v. Leonard, 119 P. 405, 17 Cal.App. 254.

41. Mo.—Wanborg v. Karst, 4 Mo. App. 563.

42. Cal.—Anderson v. Taylor, 56 Cal. 131, 38 Am.R. 52.

43. Mich.—Howser v. Melcher, 40 Mich. 185.

44. Tex.—Perry v. Luettich, 121 S. W.2d 332, 132 Tex. 159, reversing, Civ.App., 93 S.W.2d 790.

45. Mo.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.

46. Tenn.—Taylor v. Beaty, 8 Tenn. App. 310.

47. D.C.—Green v. McIntire, 42 App. D.C. 250.
Tenn.—Taylor v. Beaty, 8 Tenn.App. 310.
Utah.—Forrester v. Cook, 292 P. 206, 211, 77 Utah 137, citing **Corpus Juris.**
Wash.—Sunday v. Moore, 237 P. 1014, 1016, 135 Wash. 414, quoting **Corpus Juris.**
26 C.J. p 863 note 27.

Computation of period for which rental value allowed
In action for unlawful detainer predicated on judgment creditor's failure to remove from debtor's farm cattle purchased at sheriff's sale, permitting jury in ascertaining fair rental value of land during period of detention to begin period as of date of sheriff's sale was erroneous where it was to debtor's advantage to have cattle remain on farm while he negotiated for repurchase of cattle.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.

48. Cal.—Roff v. Duane, 27 Cal. 565.
Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.

49. Cal.—McFarland v. Carpenter, 63 P.2d 859, 18 Cal.App.2d 205.
Wash.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.
26 C.J. p 863 note 29.

Minimum damages
Although damages recoverable for unlawful detainer may not be restricted to rental value, and may include more, rental value is minimum recovery.—Forrester v. Cook, 292 P. 206, 214, 77 Utah 137, citing **Corpus Juris.**

Where no proof was offered of permanent damages to realty by defendant during detention, plaintiff suing for unlawful detainer was limited to fair rental value thereof. —Reichlin v. First Nat. Bank, 51 P. 2d 380, 184 Wash. 304.

50. Miss.—Newman v. Mackin, 21 Miss. 383.

51. Cal.—McFarland v. Carpenter, 63 P.2d 859, 18 Cal.App.2d 205.

52. Me.—U. S. v. Burrill, 78 A. 568, 107 Me. 382, Ann.Cas.1912D 512.
26 C.J. p 863 note 33.
Right to compensation for improvements generally see the C.J.S. title Improvements § 6, also 31 C.J. p 313 note 89—p 318 note 60.

53. Ind.T.—Pybos v. McLaughlin, 51 S.W. 1075, 2 Ind.T. 432.
Mo.—Sims v. Kelsay, 75 Mo. 68.

ment of damage which must be considered by the jury.[54]

Exemplary or punitive damages may be recovered, under the statutes, where the entry was wanton and malicious,[55] but not where the acts complained of were done under color of right and in good faith and without malice.[56]

Nominal damages. If the injury caused by the violation of one's possession is merely technical, nominal damages only will be awarded.[57]

§ 60. Double or Treble Damages

The damages awarded by the jury may, under some statutes, be doubled or trebled by the court.

Some statutes authorize a judgment for plaintiff for double or treble damages.[58] These statutes are highly penal in their character and are subject to strict construction;[59] and ordinarily they are regarded as mandatory and as imposing the duty on the court to double or treble the damages awarded by the jury,[60] although some statutes have been considered to be merely directory.[61] They are not retroactive and no damages are recoverable which accrued prior to the time that the statute went into effect.[62]

The damages which may be doubled or trebled are the actual damages sustained[63] and not the actual and punitive damages.[64] Moreover, nothing can be doubled or trebled but what the jury specifically report as damages;[65] and the terms of their verdict must control,[66] unless the damages awarded by the jury are in excess of the amount claimed in the complaint.[67] If the complaint states a cause of action in addition to the forcible entry and detainer complained of and the verdict is general, the court has no power to treble the amount of the verdict since this cannot be done without trebling damages which the statute does not authorize to be trebled.[68] Double or treble damages cannot be recovered unless the force essential to constitute a forcible entry or forcible detainer, such as will authorize a restitution of the premises, is established;[69] a mere trespass, however wrongful

54. D.C.—Green v. McIntire, 42 App. D.C. 250.
26 C.J. p 863 note 35.

In Tennessee

(1) Damages for waste have been held recoverable.—Taylor v. Beaty, 8 Tenn.App. 310.

(2) Earlier cases, however, stated that the damages should not include injury merely to the freehold.—Spillman v. Walt, 12 Heisk. 574—White v. Suttle, 1 Swan 169.

55. Cal.—Orly v. Russell, 200 P. 732, 53 Cal.App. 660.
Mo.—Wamsganz v. Wolff, 86 Mo.App. 205.
Double or treble damages see infra § 60.

56. Ky.—Smith v. Berry, 181 S.W. 379, 167 Ky. 646.

57. Cal.—Pacific States Auxiliary Corporation v. Farris, 5 P.2d 452, 453, 118 Cal.App. 522, citing **Corpus Juris.**

Nominal damages only will be awarded

(1) Where plaintiff was forcibly ejected from property and defendant was entitled to possession if he had proceeded lawfully.—Cutshaw v. Campbell, 3 Tenn.App. 666.

(2) When the owner enters on land forcibly and ejects a person who is in the actual possession, without title.—Mosseller v. Deaver, 11 S.E. 529, 106 N.C. 494, 19 Am.S.R. 540, 8 L.R.A. 537.

(3) In absence of evidence showing rental value of apartment occupied by one taking possession of apartment building for about two weeks or expenses incurred.—Pacific States Auxiliary Corporation v. Farris, 5 P.2d 452, 118 Cal.App. 522.

58. N.Y.—Nichols v. Eustis, 131 N.Y.S. 265, 146 App.Div. 475.
26 C.J. p 863 note 38.

59. Utah.—Forrester v. Cook, 292 P. 206, 77 Utah 137.
26 C.J. p 863 note 39.

60. Mo.—Feedler v. Schroeder, 59 Mo. 364.
Utah.—Forrester v. Cook, 292 P. 206, 77 Utah 137.
26 C.J. p 863 note 42.

61. Nev.—Glock v. Elges, 159 P. 629, 39 Nev. 415.
Wash.—Gaffney v. Megrath, 39 P. 973, 11 Wash. 456.

Reason for rule

"Penalties are not favored in the law, and . . . and the use of the word 'may' in the statute was intended to permit, but not require, treble damages."—Glock v. Elges, 159 P. 629, 631, 39 Nev. 415.

62. Mich.—Newkirk v. Tracey, 27 N.W. 884, 61 Mich. 174.

63. S.C.—Vance v. Ferguson, 85 S.E. 241, 101 S.C. 125.
Utah.—Forrester v. Cook, 292 P. 206, 77 Utah 137.
26 C.J. p 864 note 44.

Rents

Under a statute which provides for the recovery of rents, damages and waste, but for the trebling only of damages, rents accruing before termination of tenancy may not be trebled in computing damages for unlawful detainer; but after tenancy has been terminated by statutory notice, person in unlawful possession becomes liable for rental value or reasonable value of use and occupation, which is recoverable as damages and therefore may be trebled.—Forrester v. Cook, supra.

64. S.C.—Vance v. Ferguson, 85 S.E. 241, 101 S.C. 125.
26 C.J. p 864 note 44.

65. Utah.—Forrester v. Cook, 292 P. 206, 77 Utah 137.
26 C.J. p 864 note 45.

The jury should fix the damages, and then, if the plaintiff so desires, he should appeal to the court to have the damages doubled or trebled.—Orly v. Russell, 200 P. 732, 53 Cal. App. 660.

66. Mich.—Howser v. Melcher, 40 Mich. 185.

67. Mo.—Feedler v. Schroeder, 59 Mo. 364.
Allegation in complaint see supra § 44.

68. Mich.—Thayer v. Sherlock, 4 Mich. 173.

69. Cal.—Orly v. Russell, 200 P. 732, 53 Cal.App. 660.
N.Y.—Arout v. Azar, 219 N.Y.S. 431, 219 App.Div. 260—Billig v. Nelson Properties, 2 N.Y.S.2d 364, 166 Misc. 301.
26 C.J. p 864 note 48.

Unusual force

A statutory provision allowing recovery of treble damages for forcible entry or detainer applies only where force is unusual, or tends to bring about breach of the peace, and entry is with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life and limb, or under circumstances which

it may be, is not sufficient,[70] nor do the statutes ordinarily apply as against one who takes or holds possession under a claim of right.[71] However, the particular statute may provide for double damages in case of an unlawful detainer,[72] or for unlawful detainer provided the detention was willful and knowingly wrongful on the part of the tenant.[73]

§ 61. Recovery by Separate Action

The damages may, under some statutes, be recovered in a separate action for trespass.

Under some of the statutes, damages for forcible entry and detainer may be recovered in a separate action for trespass.[74]

§ 62. Costs

Costs ordinarily are awarded in favor of the successful party, whether plaintiff or defendant.

As a general rule a successful plaintiff in an action for forcible entry and detainer is entitled to costs[75] and where defendant prevails costs should be awarded in his favor.[76] However, even though judgment is rendered for plaintiff, defendant may be awarded costs, if, on demand by suit, where there has been no previous demand, he offers to give up possession when served with process, on filing his plea;[77] and he is not liable for costs where it appears that the only possession had by plaintiff of the land in question consisted of placing some lumber on it, which was removed by defendant.[78] Where by consent of counsel it is made to appear to the court after issue joined that defendant had yielded possession of the premises in controversy to plaintiff, thereby extinguishing the cause of action, the court is without jurisdiction to render judgment for plaintiff and tax defendant with the costs.[79] The amount and items which are allowable as costs depend on the statutory provisions.[80]

Judgment on disclaimer. If defendant pleads that he is not in possession, the judgment will be for costs against plaintiff,[81] or if issue joined the only issue involved will be as to whom the costs would be taxed.[82]

Security for costs. When the statute requires a bond for costs to be given when the action is brought, it will be dismissed for the want of such bond.[83]

L. TRIAL AND NEW TRIAL

§ 63. In General

The rules relating to trials in civil action in general apply, except in so far as they are modified by the statutory provisions or peculiar facts involved.

The rules relating to trials in civil actions in general apply to a trial of an action for forcible entry and detainer, except to the extent that they are modified by the statutory provisions, or by the peculiar nature of the facts, involved in such an action.[84] Under some statutes relating to trials for

would naturally inspire fear and lead one to apprehend danger of personal injury if he defended his possession.—Billig v. Nelson Properties, 2 N.Y.S.2d 364, 166 Misc. 301.

Breaking fence by railroad on its own right of way, allowing adjoining landowner's cattle to escape, is not forcible entry and detainer, permitting trebling of damages.—Brown v. Southern Ry. Co., 131 S.E. 681, 136 S.C. 214.

70. Mich.—Shaw v. Hoffman, 25 Mich. 162.
N.Y.—Arout v. Azar, 219 N.Y.S. 431, 219 App.Div. 260—Billig v. Nelson Properties, 2 N.Y.S.2d 364, 166 Misc. 301.

Damages to personal property by trespasser are not grounds for treble damages.—Arout v. Azar, 219 N.Y.S. 431, 219 App.Div. 260.

71. Idaho.—Read v. La Shonse, 261 P. 773, 45 Idaho 299.
S.D.—Woodring v. Winner Nat. Bank of Winner, S.D., 227 N.W. 438, 56 S.D. 43—Baldwin v. Bohl, 122 N.W. 247, 23 S.D. 395.

72. Mo.—Michau v. Walsh, 6 Mo. 346.

73. Fla.—McLean v. Spratt, 20 Fla. 515.

74. Mich.—Lane v. Ruhl, 61 N.W. 347, 103 Mich. 38.
26 C.J. p 864 note 55.

75. Wash.—Tobakas v. Gaty, 208 P. 257, 121 Wash. 136.
26 C.J. p 882 note 11.

In the city court of New York, it has been held that if a plaintiff recovers judgment for fifty dollars, in an action for forcible entry and detainer, he is entitled to costs.—Mandel v. Fertig, 121 N.Y.S. 669, 65 Misc. 310.

76. Ark.—Williams v. Petty, 271 S.W. 9, 168 Ark. 642.
Ill.—Chapman v. Knowles, 34 Ill.App. 558.

77. Miss.—Rabe v. Fyler, 18 Miss. 440, 48 Am.D. 763.

78. Ark.—Salinger v. Gunn, 33 S.W. 959, 61 Ark. 414.

79. Okl.—Obert v. Kahn, 145 P. 403, 45 Okl. 219, 220.

80. Mich.—Dibell v. People, 22 Mich. 371.
26 C.J. p 882 note 16.

81. Miss.—Murf v. Maupin, 74 So. 614, 113 Miss. 670.

82. Miss.—Murf v. Maupin, supra.

83. Vt.—Whittaker v. Perry, 37 Vt. 631.

84. R.I.—Levy v. David, 52 A. 1080, 24 R.I. 249.

The question of granting separate trials to several defendants is within the discretion of the trial judge.—Levy v. David, supra.

An offer of further proof by defendant made at the conclusion of the trial and following argument of counsel, in unlawful detainer by purchaser at a sale under a trust deed, respecting a purported settlement of the obligations of the original owner of the property to defendant, may be rejected as containing nothing constituting a defense.—Nineteenth Realty Co. v. Diggs, 25 P.2d 522, 134 Cal.App. 278.

forcible entry and detainer before justices, the justice should enter upon his docket the evidence rejected or admitted over objection,[85] his reasons for admitting or rejecting such evidence,[86] and the return of the sheriff to the venire.[87] Under some statutes, also, one who has been wrongfully ousted from possession of land may be entitled to have the damages sustained by him assessed by the jury trying the main issue in forcible entry and detainer.[88] Under a statute authorizing the summons to be returnable to, and the case heard and determined at, any term of the court, the action may be brought, docketed, and tried during a term of court.[89]

§ 64. Questions of Law and Fact

Questions of law are to be determined by the court, and questions of fact on which the evidence is conflicting or doubtful are for the determination of the jury; but if the evidence is clear and undisputed the court may direct a verdict, or sustain a demurrer to the evidence, or grant a nonsuit.

If the evidence is clear and undisputed the case is to be decided by the court as a matter of law;[90] but, on the other hand, questions of fact on which the evidence is conflicting or of a doubtful character are for the determination of the jury.[91] What acts or circumstances will constitute possession is a question of law for the court,[92] but whether these acts or circumstances exist and plaintiff was in actual possession at the time of the entry complained of is a question of fact for the jury.[93] Where the evidence is sufficient to be submitted to the jury, and is conflicting or of a doubtful character, it is also for the jury to decide whether a forcible entry was in fact made[94] and who made it,[95] whether the person making it acted in his own behalf or as the representative of another,[96] what degree of force or violence was used,[97] and whether there was unlawful detainer, that is, whether plaintiff was kept out of possession through fear or personal violence.[98] It is also usually a question of fact for the jury whether the notice or demand required by statute was given,[99] and whether the remedy for unlawful entry and detainer is barred by possession for a specified number of years.[1] The question of exemplary damages may be withdrawn from the jury where no malice is shown;[2] and under a statute which declares that the damages occasioned to plaintiff by any forcible entry or detainer shall be as-

Waiver, and reasonable notice of intention to insist on contract

In an action of forcible detainer, brought against purchasers of realty, questions of the waiver for a season of the provision making time of the essence of defendants' contract, and of reasonable notice of a later intention to insist on the strict terms of the contract, are within the trial court's jurisdiction.—Craft v. Calmeyer, 274 Ill.App. 296.

85. Ala.—Mead v. Daniel, 2 Port. 86—Ward v. Lewis, 1 Stew. 36.

86. Ala.—Clark v. Stringfellow, 4 Ala. 353.
26 C.J. p 864 note 58.

This requirement is merely directory, and its omission will not prejudice either party.—Clark v. Stringfellow, supra.

In New Jersey

(1) This requirement was contained in an earlier statute.—Houghton v. Potter, 23 N.J.Law 338, affirmed 24 N.J.Law 735—Sauniere v. Wode, 18 N.J.Law 296—Snediker v. Quick, 13 N.J.Law 306.

(2) However, it was omitted from a later statute, Rev.St.1877 p 442, Comp.St. § 17, p 2602.—Wilson v. Bayley, 42 N.J.Law 132.

87. N.J.—Prickett v. Prickett, 12 N.J.Law 186.

88. Ark.—Denton v. Young, 223 S.W. 380, 145 Ark. 147.

89. W.Va.—Superior v. Peters, 118 S.E. 540, 94 W.Va. 376.

90. Neb.—House v. Lewis, 187 N.W. 784, 108 Neb. 257, 23 A.L.R. 877.

91. Ill.—Dillow v. Hileman, 21 N.E. 2d 632, 300 Ill.App. 509.
Ky.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.

Questions of fact held for jury

(1) Whether defendant's conceded prior possession had been abandoned before plaintiff's entry.—Brown v. McCormick, 23 Mo.App. 181.

(2) Whether defendants held as tenants or purchasers or whether they held by virtue of some agreement contained in a verbal conversation referred to in plaintiffs' written agreement to give bond for deed which would render defendants' possession lawful.—Dillow v. Hileman, 21 N.E 2d 632, 300 Ill.App. 509.

(3) What part of the land a person holds where he obtains general permission of another to occupy his land, and obtains a written lease from an adverse claimant for a part of the land and takes possession.—Goad v. Walker, 80 S.E. 873, 73 W. Va. 431.

92. Mo.—De Graw v. Prior, 60 Mo. 56—Underwood v. Caruthersville, 194 S.W. 1090, 197 Mo.App. 358.
26 C.J. p 865 note 75.

93. Mo.—De Graw v. Prior, 60 Mo. 56.
W.Va.—Hicks v. Bluefield, 103 S.E. 323, 86 W.Va. 367.
26 C.J. p 865 note 76.

94. Ala.—Harris v. Harris, 67 So. 465, 190 Ala. 619.
Ark.—Holzman v. Gattis, 114 S.W.2d 3, 195 Ark. 773.
Cal.—Pacific States Auxiliary Corporation v. Farris, 5 P.2d 452, 118 Cal.App. 522.
Mich.—Donovan v. Chappell, 30 N.W. 329, 63 Mich. 685.
Mont.—Herzog v. Texas Co., 294 P. 962, 88 Mont. 580.

95. Mich.—Donovan v. Chappell, 30 N.W. 329, 63 Mich. 685.

96. Mich.—Donovan v. Chappell, supra.
Mo.—Drehman v. Stifel, 41 Mo. 184, 97 Am D. 268, affirmed 8 Wall. 595, 19 L.Ed. 508.
26 C.J. p 865 note 79.

97. Ark.—Douglass v. Lamb, 247 S. W. 77, 157 Ark. 11.
N.J.—Berry v. Williams, 21 N.J.Law 423.

98. Ark.—Douglass v. Lamb, 247 S. W. 77, 157 Ark. 11.
Cal.—Pacific States Auxiliary Corporation v. Farris, 5 P.2d 452, 118 Cal. App. 522.
N.Y.—Fults v. Munro, 95 N.E. 23, 202 N.Y. 34, 37 L.R.A.,N.S., 600, Ann. Cas.1912D 870.

99. Ala.—Knowles v. Ogletree, 12 So. 397, 96 Ala. 555.
Mo.—Beach v. Heck, 54 Mo.App. 599.
Ohio.—Heller v. Beal, 23 Ohio Cir. Ct. 540.

1. W.Va.—Hicks v. Bluefield, 103 S. E. 323, 86 W.Va. 367.

2. Mont.—Herzog v. Texas Co., 294 P. 962, 88 Mont. 580.

sessed, and that judgment may be entered "in the discretion of the court either for the amount of the damages and rent found due or for three times the amount so found," the question whether the damages should be trebled and exemplary damages thereby awarded in an action of unlawful detainer is a question for the court, and not for the jury.[3]

Directing verdict. If the evidence is clear and without conflict, the court may direct a verdict by instructing the jury peremptorily to find for plaintiff or defendant,[4] or, which is substantially the same thing, sustain a demurrer to the evidence;[5] or it may grant a nonsuit, if the evidence is insufficient to be submitted to the jury.[6] The court, however, should not take the case from the jury by directing a verdict, or sustaining a demurrer to the evidence, where the evidence is conflicting as to any material point in issue,[7] or where there is any evidence tending to support the theory of the party against whom the instruction is asked,[8] or where there is no evidence on which a verdict in accordance with the instruction could be based.[9]

§ 65. Instructions

The instructions in an action of forcible entry and detainer are controlled by rules relating to instructions in civil actions in general.

The rules relating to instructions in civil actions in general control in determining the propriety and sufficiency of the instructions, in an action of forcible entry and detainer, in stating the law as applied to the facts of the case,[10] such as on the question of damages.[11] The instructions should state the prop-

3. Cal.—San Francisco & Suburban Home Bldg. Soc. v. Leonard, 119 P. 405, 17 Cal.App. 254.

4. Ga.—Hunter v. Jones, 138 S.E. 263, 36 Ga.App. 816.
Kan.—Phillips Petroleum Co. v. Skinner, 36 P.2d 968, 969, 140 Kan. 413, citing **Corpus Juris.**
Mich.—Christian v. Amster, 235 N.W. 199, 253 Mich. 400.
Mo.—Smith v. Spencer, 130 S.W.2d 653, 234 Mo.App. 1.
26 C.J. p 866 note 7.

Peremptory charge for defendant held proper

(1) Where plaintiff put defendant into possession more than two years before institution of proceeding.—McIntosh v. Colwell, 33 S.W.2d 678, 236 Ky. 641.

(2) Where there was evidence of more than three years' continuous occupation of disputed land by defendant immediately antedating suit.—Lipscomb v. Moore, 153 So. 393, 228 Ala. 365.

A verdict for plaintiff may be directed where the evidence of possession for such a length of time as will bar the remedy by unlawful entry and detainer is too slight to sustain a verdict based on it.—Hicks v. Bluefield, 103 S.E. 323, 86 W.Va. 367.

Directed verdict required

Where it conclusively appears that there is no question of fact for the jury to determine, there is no other course open to the court than to direct a verdict for plaintiff.—Wein v. Albany Park Motor Sales Co., 38 N.E.2d 556, 312 Ill.App. 357.

5. Mo.—Fluty v. Flemens, 6 S.W.2d 1002, 222 Mo.App. 422.

Abandonment caused by fear of violence

Where the evidence showed that defendant was driven off premises by plaintiff, and that plaintiff afterward abandoned the same for fear of defendant's future behavior, and there was no showing that defendant ever returned to such premises, or had possession thereof when plaintiff brought suit for forcible entry and detainer, a demurrer to the evidence should be sustained.—Esch v. Hirning, 80 Mo.App. 570.

Question presented

In unlawful detainer suit, question of authority of person renting premises to plaintiff was presented on defendant's demurrer to evidence.—Widick v. Vandergrift, Mo.App., 37 S.W.2d 663.

6. N.J.—Seidman v. John Craven & Sons Co., 143 A. 726, 6 N.J.Misc. 1062.

7. N.J.—Estabrook v. Hateroth, 44 N.W. 29, 27 Neb. 794.
26 C.J. p 866 note 8.
"It is an error of law for the court to instruct a verdict."—Ferguson v. Barnes, Tex.Civ.App., 274 S.W. 277, 279.

8. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.
Okl.—Hall v. Haines, 51 P.2d 570, 175 Okl. 81—Alexander v. Howard, 174 P. 745, 73 Okl. 51.

9. Fla.—Davis v. Drummond, 67 So. 99, 68 Fla. 471.
N.Y.—Quinn v. McCochrane, 206 N.Y.S. 550, 210 App.Div. 569, affirmed 148 N.E. 748, 240 N.Y. 660.

10. Mo.—Koger v. Ward, App., 243 S.W. 413.

Instructions held proper

(1) Under a statute providing that when a person wrongfully and without force, by disseizin, obtains and continues in possession of lands after demand in writing for their delivery by the person having the legal right to their possession, the person in possession shall be guilty of an unlawful detainer, in an action of unlawful detainer by a tenant against one who claimed title, directing the jury to disregard evidence as to possession long prior to the date of the entry by defendant and to disregard evidence as to title of the land in controversy was not error.—Koger v. Ward, supra.

(2) In an action against attaching creditor and sheriff for forcible and wrongful entry of plaintiff's home and occupancy after entry, an instruction that defendants had the right to enter the premises and to seize the property under the writ of attachment was not erroneous on uncontradicted evidence that sheriff procured key from constable in apparent possession and made entry peaceably and without force.—Himmelbauer v. Union Bank & Trust Co., 220 P. 84, 68 Mont. 34.

11. Ky.—Farmers Nat. Bank of Somerset v. Bolton, 97 S.W.2d 406, 265 Ky. 586.
Mont.—Hillembauer v. Union Bank & Trust Co., 220 P. 84, 68 Mont. 34.

Instructions held proper

(1) An instruction following the language of the statute that damages shall include waste and injury as well as rents and profits due both in such sum as the jury believes from the evidence, etc., is correct.—Welden v. Myers, 253 S.W. 1086, 212 Mo.App. 479.

(2) In boundary dispute with claim of damages for eviction, instruction should be given that if jury found for plaintiff, it should fix damages for sum in its discretion as it might believe from evidence was a reasonably fair value of the use of the dwelling from the time he was deprived thereof, not exceeding the amount sued for.—Farmers Nat. Bank of Somerset v. Bolton, 97 S.W.2d 406, 265 Ky. 586.

Instructions held erroneous

(1) In action for unlawful detainer wherein jury was instructed that measure of damages was fair rental value of property giving additional

ositions in such terms and with such qualifications as not to be liable to mislead the jury,[12] and should explain the meaning of legal terms used.[13] The court may instruct the jury hypothetically or on a contingent state of facts in case they shall so find from the evidence,[14] but the instruction must not be so worded as to assume as established any facts which the jury must determine from the evidence,[15] or so as to cut off from the consideration of the jury any matter of defense set up by defendant in support of which evidence has been introduced.[16]

An instruction is erroneous, and if requested may properly be refused, which puts the right of recovery on the basis of an act different from the one charged,[17] or which in setting out what must be established to authorize a recovery omits any essential element of the offense,[18] or which ignores material issues,[19] or assumes as undisputed a material question in issue,[20] or which relates to matters not to be determined by the jury.[21] Instructions as to a certain issue should be founded on all the testimony on that issue and it is error to pick out a single fact and instruct the jury as to its probative force.[22]

The different instructions must be consistent with each other,[23] and instructions given on behalf of the respective parties should be made to harmonize by the court before they are given to the jury.[24] It is not error to refuse to give requested instructions which are covered by the general charge,[25] but an entire failure to instruct on any material point in issue if requested to do so is reversible error.[26] It is improper for the court to place on one or the other of the parties a burden which he is not legally required to bear, but the error is one of which the opposite party cannot complain.[27] An instruction which submits a form of verdict which in no respect conforms to the statutory requirements should not be given.[28]

instruction that plaintiff was entitled to value of use of property during period of detention and for loss of profits was erroneous as authorizing double recovery.—Reichlin v. First Nat. Bank, 51 P.2d 380, 184 Wash. 304.

(2) In boundary dispute with claim for damages for eviction, instruction which gave jury no guide by which to determine amount of damages and which permitted them to award damages in any sum not exceeding amount sued for was erroneous.—Farmers Nat. Bank of Somerset v. Bolton, 97 S.W.2d 406, 265 Ky. 586.

12. Ky.—Farmers Nat. Bank of Somerset v. Bolton, supra.
Mo.—Koger v. Ward, App., 243 S.W. 413.
26 C.J. p 865 note 88.

13. Ill.—Blanchard v. Pratt, 37 Ill. 243.
26 C.J. p 865 note 88 [b].

14. Ill.—Wall v. Goodenough, 16 Ill. 415.
Ky.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71—Lunsford v. Hughes, 130 S.W.2d 39, 279 Ky. 175—Swartzwelder v. U. S. Bank, 1 J.J.Marsh. 38.

Instructions held proper

(1) An instruction that if plaintiff rented the land from another and at the time of entry by defendant had the land in cultivation with a crop of wheat thereon which was then in shock on the land, to find that plaintiff was in actual possession of the land, and that if plaintiff was in actual possession he was entitled to recover, was correct.—Koger v. Ward, Mo.App., 243 S.W. 413.

(2) Where defendant admitted that plaintiffs were in possession of land and claimed that in extending a fence he had done so on invitation of one of plaintiffs, jury should have been instructed that defendant should be found guilty if he entered without invitation and without consent of plaintiffs, and should be found not guilty if entry was invited or was made with consent of plaintiffs.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.

15. Ill.—Jamison v. Graham, 57 Ill. 94—Wall v. Goodenough, 16 Ill. 415.

16. Ill.—Jamison v. Graham, 57 Ill. 94.
26 C.J. p 865 note 91.

17. Mo.—Wade v. McMillen, 29 Mo. 18.
26 C.J. p 865 note 92.

18. Ark.—Holzman v. Gattis, 114 S.W.2d 3, 195 Ark. 773.
26 C.J. p 865 note 93.

An instruction is erroneous which charges that plaintiff is entitled to recover possession on mere showing that he has legal right thereto, without finding that plaintiff has been deprived of possession by force.—Holzman v. Gattis, 114 S.W.2d 3, 195 Ark. 773.

19. Ind.—Moore v. Girten, 82 S.W. 848, 5 Ind.T. 384.
W.Va.—Palmer v. Magers, 102 S.E. 100, 85 W.Va. 415.
26 C.J. p 866 note 1.

20. Neb.—Galligher v. Cornell, 53 N.W. 383, 35 Neb. 517.

21. Ala.—Fowler v. Pritchard, 41 So. 667, 148 Ala. 261.
Ark.—Herndon v. Goff, 27 Ark. 334.
Ky.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.
Mont.—Herzog v. Texas Co., 294 P. 962, 88 Mont. 580—Hillembauer v. Union Bank & Trust Co., 220 P. 84, 68 Mont. 34.
26 C.J. p 866 note 99.

Instruction relating to the question of title is erroneous since such question is not involved in the case.—Snyder v. Crutcher, 160 S.W.2d 156, 290 Ky. 71.

In an action for damages for forcible entry and continuous occupancy of her home, an instruction that to find for plaintiff personal property for the conversion of which damages were claimed in another cause of action must have been exempt, demand must have been made for its return, and the officers' conduct must have been wanton and malicious, was reversible error, since the jury need not find any of these facts to award actual damages.—Hillembauer v. Union Bank & Trust Co., 220 P. 84, 68 Mont. 34.

22. Ill.—McCartney v. McMullen, 38 Ill. 237.
Mo.—Compton v. Baker, 34 Mo.App. 133.

23. Ill.—Harms v. Stier, 70 Ill.App. 213.
Mo.—Koger v. Ward, App., 243 S.W. 413.

24. Ill.—Harms v. Stier, 70 Ill.App. 213.

25. Ind.—Riley v. Catron, 69 S.W. 908, 4 Ind.T. 376.
26 C.J. p 866 note 97.

26. N.J.—Snedeker v. Quick, 12 N.J. Law 129.

27. Ala.—Harris v. Harris, 67 So. 465, 190 Ala. 619.

28. Mo.—Aubuchon v. Foster, App., 215 S.W. 781.

§ 66. Verdict and Findings

The verdict or findings in an action of forcible entry and detainer are ordinarily controlled by the rules relating to verdicts and findings in civil actions in general.

The requisites and validity of a verdict or findings in an action of forcible entry and detainer are ordinarily controlled by the rules relating to verdicts and findings in civil actions in general,[29] such as that the verdict must be responsive to the issue,[30] must find on every issue necessary to a recovery,[31] and must be sufficiently definite and certain to authorize the entry of judgment.[32] The verdict need not be in the exact words of the issue, but is sufficient if it contains the substance of the issue,[33] and, where the form of the verdict is prescribed by statute, a substantial compliance with the statute is sufficient.[34] It need not describe the premises other than by reference to the complaint.[35]

The verdict may be either general or special,[36] and a general verdict in effect finds every essential fact necessary to authorize it.[37] If the verdict responds fully to the issue as made up, it is not necessary that it should find expressly as to any other fact.[38] A general verdict of guilty[39] or not guilty,[40] or guilty as alleged in the complaint,[41] is sufficient if responsive to the issue; but a verdict will be upheld, although in form neither guilty nor not guilty, where it is full and intelligible so as to support the judgment.[42] A verdict of guilty of forcible entry or detainer is good where the complaint charges both offenses; it is equivalent to finding defendants guilty of both offenses.[43] A verdict which finds the defendant guilty as to a part, and not guilty of the balance of the charge laid, is good.[44] However, where the warrant charges one cause of action only, a verdict for another is void.[45]

The verdict need not be signed by the jury,[46] except where the statute so provides.[47]

Merely formal defects in the verdict may be corrected by the court[48] or the court may permit the jury to amend the verdict in this respect;[49] and a clerical error may be deemed immaterial.[50]

Findings. In trials by the court without a jury special findings of fact are necessary under some of the statutes.[51] The court, however, is not authorized to make findings as to any matters not in issue;[52] but it must find on each material issue,[53] although, if the material facts are found, it is not necessary to find them in all the various ways employed in setting out the cause of action,[54] or to find as to a particular issue which is determined by the other findings made.[55] The findings must be consistent with each other.[56] The court's pronouncement at the end of the trial that it will find for one party does not have the effect of a jury's

29. Mont.—McCleary v. Crowley, 56 P. 227, 22 Mont. 245.

30. Mont.—McCleary v. Crowley, 56 P. 227, 22 Mont. 245.
26 C.J. p 866 note 12.

31. Del.—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.
26 C.J. p 866 note 13.

Peaceable possession

A verdict wherein the jury fails to find that plaintiff was in peaceable possession, as alleged, pursuant to the requirement of the statute, is fatally defective, and cannot be amended.—Phillips v. Gunby, supra.

32. Cal.—Diggs v. Porteus, 33 P. 447, 5 Cal.Unrep.Cas. 753.
Mo.—Gibson v. Lewis, 27 Mo. 532.
26 C.J. p 866 note 14.

33. U.S.—Russell v. Wheeler, Super. Ark., 21 F.Cas.No.12,164a, Hempst. 3.
Ky.—Lancaster v. Lancaster, 41 S.W. 34, 19 Ky.L. 577.
26 C.J. p 866 note 15.

34. Ohio.—Murphy v. Lucas, 2 Ohio 255.
Wis.—Dengate v. Stirmell, 39 N.W. 374, 72 Wis. 168.

35. U.S.—Russell v. Wheeler, Super. Ark., 21 F.Cas.No.12,164a, Hempst. 3.
Ala.—Beck v. Glenn, 69 Ala. 121.
26 C.J. p 867 note 30.

36. Ky.—Atchley v. Latham, 3 A.K. Marsh. 164.
Ohio.—Williams v. McMillan, 18 Ohio 167—Murphy v. Lucas, 2 Ohio 255.

37. W.Va.—Gorman v. Steed, 1 W. Va. 1.
26 C.J. p 867 note 19.

38. W.Va.—Mann v. Bryant, 12 W. Va. 516.
26 C.J. p 867 note 20.

39. Ill.—Smith v. Killeck, 10 Ill. 293.
26 C.J. p 867 note 21.

40. Ky.—Belcher v. Barrett, 4 Metc. 307.

41. Conn.—Raymond v. Bell, 18 Conn. 81.
Or.—Altree v. Moore, 1 Or. 350.

42. Ind.T.—Case v. Hall, 46 S.W. 180, 2 Ind.T. 8.

43. Ky.—Case v. Roberts, 4 Dana 596.

44. Ark.—Miller v. Turney, 13 Ark. 385.
26 C.J. p 867 note 27.

45. Ky.—Gayle v. Overton, 1 J.J. Marsh. 549.
26 C.J. p 867 note 28.

46. Ala.—Ward v. Lewis, 1 Stew. 26.

47. R.I.—Hart v. Superior Ct., 71 A. 1057, 29 R.I. 429.
26 C.J. p 867 note 32.

48. U.S.—Russell v. Wheeler, Super. Ark., 21 F.Cas.No.12,164a, Hempst. 3.
Mo.—Gibson v. Lewis, 27 Mo. 532.

A fatal defect, such as a failure to find on a material issue, cannot be so amended.—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr., Del., 462.

49. Ky.—Forsythe v. Huey, 74 S. W. 1088, 25 Ky.L. 147.

50. Ill.—Hubner v. Feige, 90 Ill. 208.
26 C.J. p 867 note 33.

51. Cal.—Lee Chuck v. Quan Wo Chong, 28 P. 45, 91 Cal. 593.
Iowa.—Rasmussen v. Alberts, 246 N. W. 620, 215 Iowa 644.
Neb.—Stover v. Hazelbaker, 60 N.W. 597, 42 Neb. 393.

52. Idaho.—Richardson v. King, 10 P.2d 323, 51 Idaho 762.
Neb.—Stover v. Hazelbaker, 60 N. W. 597, 42 Neb. 393.

53. Cal.—Lee Chuck v. Quan Wo Chong, 28 P. 45, 91 Cal. 593.
Wash.—Gaffney v. Megrath, 39 P. 973, 11 Wash. 456.

54. Cal.—Porter v. Murray, 12 P. 425, 2 Cal.Unrep.Cas. 687.

55. Wash.—Gaffney v. Megrath, 39 P. 973, 11 Wash. 456.

56. Kan.—Armour Packing Co. v. Howe, 75 P. 1014, 68 Kan. 663.
26 C.J. p 867 note 37.

verdict, and does not constitute a conclusive finding for such party.[57]

§ 67. New Trial

A new trial ordinarily cannot be granted in the court which tried the case, unless it is authorized by statute.

The party against whom a judgment is rendered in a forcible entry and detainer case is not entitled to a new trial in the same court as a matter of right;[58] and the court[59] or justice of the peace[60] who has tried the case ordinarily cannot grant a new trial, unless such power is conferred by statute,[61] although it has been held that no statutory authorization is essential to the exercise of this power.[62]

M. JUDGMENT

§ 68. Form and Sufficiency in General

The judgment must conform to the issues; but, except to the extent required by statute, it is not required to be drawn or entered in any particular form or manner, and it will not be disturbed because of mere informalities or irregularities.

A judgment, in forcible entry and detainer, must conform to the issues presented by the pleadings and proof;[63] but, except to the extent required by the statute,[64] it is not required to be drawn or entered in any particular form or manner,[65] and it will not be set aside or reversed because it is informal or slightly irregular, or because of mere surplusage in its recitals,[66] where it appears from its face that the court intended to pronounce and did clearly pronounce sentence on the facts of the case.[67] A judgment is invalid which is materially variant from the verdict,[68] or which is based on a verdict which is fatally defective,[69] or where the proceedings, in which it is entered, wholly ignore the method of procedure required by statute.[70] The

57. Ky.—Robertson v. Donelan, 127 S.W. 754, 138 Ky. 149, Ann.Cas. 1912A 1280.

58. Okl.—Geter v. Ulrich, 118 P. 713, 27 Okl. 725.

26 C.J. p 864 note 63.

Statute not applicable

A statute authorizing the party against whom judgment is rendered in an action for the recovery of real property to demand another trial has no application to forcible entry and detainer, and the only way in which a losing party may have a new trial as a matter of right, in such a case, is by appealing to the proper superior court where the statute provides for a trial de novo.—Geter v. Ulrich, supra.

59. Minn.—Clark v. Dye, 197 N.W. 209, 158 Minn. 217—Lilienthal v. Tordoff, 194 N.W. 722, 154 Minn. 225.

Miss.—Warren v. Trustees African Baptist Church, 50 Miss. 223.

Va.—Hammock v. Wilson, 2 Va.Cas. 321.

A special court authorized exclusively for the trial of cases of forcible entry and detainer, which is dissolved after the case is tried, has no authority to grant a new trial.—Warren v. Trustees African Baptist Church, 50 Miss. 223.

60. Ky.—Terry v. Henry, 120 S.W. 2d 404, 278 Ky. 778—Swanson v. Smith, 77 S.W. 700, 117 Ky. 116, 25 Ky.L. 1260.

Minn.—Lilienthal v. Tordoff, 194 N. W. 722, 154 Minn. 225.

New trial by justice of peace in general see the C.J.S. title Justices of the Peace § 102, also 35 C.J. p 653 note 91–p 655 note 14.

61. Ohio.—McFann v. Carlton, 17 Ohio Cir.Ct.,N.S., 244.

Judge of district court is authorized to grant new trial in case of forcible entry and detainer tried by him.—State ex rel. Krause v. Dayton, 17 A. 91, 51 N.J.Law 272.

In Iowa, under a statute authorizing a new trial in an action for the recovery of real property, it has been held that, where action for forcible entry and detainer brought before a justice of the peace was certified to the district court, where the trial was to a jury, and where court directed a verdict against defendants and overruled defendants' motion for a new trial made under such statute, supreme court's judgment which reversed generally the judgment of the district court did not entitle defendants to judgment restoring them to possession or its value, and the court properly granted plaintiff's motion for a new trial.—Citizens' State Bank of Panora v. Snyder, Iowa, 181 N.W. 675.

62. Ala.—Hilliard v. Carr, 6 Ala. 557—Wright v. Lyle, 4 Ala. 112.

26 C.J. p 864 note 62.

But the power of a justice to grant a new trial has been questioned.—Barr v. White, 2 Port., Ala., 342.

63. Idaho.—Richardson v. King, 10 P.2d 323, 51 Idaho 762.

Ill.—See Leslie v. Wyant, 12 N.E.2d 340, 293 Ill.App. 626.

64. Wis.—Swift v. Cornes, 20 Wis. 397.

Judgments held insufficient

(1) Entry by justice that "I give judgment accordingly."—Crane v. Dod, 2 N.J.Law 340.

(2) That "the court renders judgment according to the verdict" found by the jury by whom the case was tried.—Swift v. Cornes, 20 Wis. 397.

65. Mo.—Nelson v. Alporte, 143 S. W. 519, 161 Mo.App. 605.

66. Mich.—Union Guardian Trust Co. v. Kowalsky, 255 N.W. 171, 267 Mich. 110.

Mo.—Nelson v. Alporte, 143 S.W. 519, 161 Mo.App. 605.

26 C.J. p 867 note 41.

Immaterial defect in entry of judgment

Where warrant was signed and issued by county judge as such, and not as judge of the quarterly court, the mere fact that on the trial of the proceeding before him the resulting judgment was by mistake or inadvertence entered on the order book of the quarterly court, of which he was ex officio judge, is immaterial, assuming that such court had no jurisdiction, the papers being sent to the circuit court when the judgment was traversed, and affidavit filed in the circuit court not showing that the matter was tried in the quarterly court, except that the judgment had been entered in the order book of that court.—Pennington v. Sammons, 236 S.W. 259, 193 Ky. 328.

67. Mo.—Nelson v. Alporte, 143 S.W. 519, 161 Mo.App. 605.

68. Ill.—Chapman v. Knowles, 34 Ill. App. 558.

26 C.J. p 867 note 46.

69. Del.—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.

70. N.J.—Marquez v. Bovero, 127 A. 698, 101 N.J.Law 28.

fact, however, that the judge, at the end of the trial, pronounces that he will find for one party does not prevent him from changing his opinion, prior to the entry of his judgment, and entering a judgment for the other party.[71] The judgment must be entered within the time prescribed by statute,[72] but it will not be set aside because, as written by the clerk, it appears to have been entered one year later than it actually was.[73]

An express award of execution in the judgment is not usually necessary.[74]

For or against several parties. In an action against several defendants, if the evidence shows that only one is in possession, the judgment should be against him and not against all;[75] and, if a judgment is entered against two defendants, it is indivisible, and, if erroneous as to one, it must be reversed as to both.[76] A judgment in favor of plaintiffs, where the landlord and tenant are both plaintiffs, must be modified as to the landlord, as the tenant or one having the right to possession is the only one entitled to judgment.[77]

§ 69. Description of Land

The judgment must describe the land with such certainty as will permit an execution thereon being effectuated.

The judgment must describe the land with such certainty as will permit of an execution thereon being effectuated;[78] otherwise it is void.[79] However, it has been held that a judgment may be sufficient, if it is for the restitution of the property described in the complaint, where the complaint is for a specifically described parcel of land;[80] and that a defective description may be aided by reference to a good description contained in the complaint[81] or other parts of the record;[82] and also that deeds and previous transactions between the parties to the action may be referred to in explanation of the description in the judgment.[83] A judgment which so describes the land that it cannot be identified and located as the land mentioned in the complaint is fatally defective.[84]

§ 70. Judgment by Default or Confession

A judgment by default or confession may be entered only where it is authorized by the statute.

Under some of the statutes a judgment by default[85] or on confession[86] is not authorized. Under other statutes, if plaintiff has filed his petition and served notice on defendant within the time prescribed by statute therefor,[87] and defendant fails or refuses to answer, judgment may properly be rendered for plaintiff as in other cases of default where no damages are claimed or awarded;[88] and, if a default judgment is permissible, it is not an abuse of discretion to refuse to set it aside if defendant fails to present with his motion to open default an answer raising issues.[89] Before such a judgment may be entered, however, plaintiff, under some of these statutes, must prove the allegations of his complaint.[90]

§ 71. Extent of Award or Relief

The extent of the award or relief in favor of plaintiff is considered infra § *72,* and of defendant infra § *73.*

Examine Pocket Parts for later cases.

71. Ky.—Robertson v. Donelan, 127 S.W. 754, 138 Ky. 149, Ann.Cas. 1912A 1280.

72. Ohio.—Robinson v. Riley, 159 N.E. 112, 25 Ohio App. 465.

73. Ill.—Firminich v. Burdine, 156 Ill.App. 491.

74. Ala.—Huffaker v. Boring, 8 Ala. 87.
26 C.J. p 867 note 47.

75. Ill.—Norris v. Pierce, 47 Ill.App. 463.

Landlord and tenant as defendants
(1) A judgment for restitution cannot be rendered against both the tenant in possession and the landlord, where there is no proof that the latter was in possession at the time of instituting the suit.—McClusky v. Nelson, 179 Ill.App. 182.
(2) Where a landlord is allowed to defend an action against a tenant for forcible entry, the judgment should be entered against the tenant.—Clark v. Stringfellow, 4 Ala. 353.

Judgment against defendant and agent, who is in actual possession.—Slover v. Kramer, 232 S.W. 1110, 207 Mo.App. 470.

76. Ill.—McClusky v. Nelson, 179 Ill.App. 182.

77. Tenn.—Hunt v. Foley, 9 Tenn. App. 96.

78. Ala.—Lessley v. Prater, 75 So. 355, 200 Ala. 43.
26 C.J. p 868 note 49.

79. Ill.—Spoor v. Meyer, 152 Ill. App. 470.

80. Neb.—Locke v. Skow, 91 N.W. 572, 3 Neb., Unoff., 299.
N.J.—Townly v. Rutan, 20 N.J.Law 604, affirmed 21 N.J.Law 674.

81. Mo.—Fink v. Schmidt, App., 215 S.W. 490.
26 C.J. p 868 note 52.

82. Ill.—Adams v. Pacini, 119 Ill. App. 428.

83. Tex.—Pardue v. James, 12 S.W. 1, 74 Tex. 299.

84. Miss.—Murf v. Maupin, 74 So. 614, 113 Miss. 670.
26 C.J. p 868 note 55.

85. Minn.—Hennessey v. Pederson, 11 N.W. 63, 28 Minn. 461.
Tex.—Stacks v. Simmons, Civ.App., 58 S.W. 958.
26 C.J. p 868 note 56.

86. Ill.—French v. Willer, 18 N.E. 811, 126 Ill. 611, 9 Am.S.R. 651, L.R.A. 717.
Nev.—Paul v. Armstrong, 1 Nev. 8

87. Iowa.—Owens v. Smith, 204 N.W. 439, 200 Iowa 261.

88. Ark.—Carpenter v. Bunke, 2 S.W. 968, 145 Ark. 499.
Colo.—Fort v. Demmer, 14 P.2d 4[illegible] 91 Colo. 285.

89. Cal.—Brown v. Martin, 139 [illegible] 823, 23 Cal.App. 736.

90. Okl.—Stephens v. Sheldon, [illegible] P. 725, 109 Okl. 150—Bullock [illegible] Peek, 168 P. 797, 66 Okl. 240.

§ 72. —— To Plaintiff

A judgment in favor of plaintiff, against the person in possession of the premises, usually should be only for the restitution of the premises sued for and costs, and should not award damages unless specially authorized by statute.

Where the finding is in favor of plaintiff, in the absence of statute otherwise, the only relief that should be granted plaintiff is a judgment for the restitution of the premises sued for,[91] and costs, as explained supra § 62; and, where plaintiff has taken possession of the premises at the commencement of the action on giving bond to pay all accruing damages, if he should finally be successful, only a judgment for costs can be rendered against defendant.[92] A judgment restoring possession should be for immediate possession, and not for possession some time in the future.[93]

Against whom awarded. Ordinarily the judgment should go only against parties to the suit shown to be actually in possession when suit was brought,[94] or against those who have come into possession under them since the commencement of the suit,[95] but it has been held that a judgment of restitution is proper against those who were engaged in making the unlawful entry, although they did not detain the premises afterward,[96] as well as against those who continued in the occupation of them.[97]

Property included. The judgment should be confined to the land in controversy,[98] and whether or not it should be for the whole or only a part of the premises claimed depends on the extent of plaintiff's right of possession,[99] and not on the extent of defendant's actual possession,[1] and, if plaintiff proves a right to a part only of the land, he is entitled to a verdict and judgment pro tanto.[2] Moreover, the judgment should be limited to such portion of the land as plaintiff was dispossessed of on the day the warrant issued,[3] and cannot include other portions taken possession of pending the litigation.[4] Where the verdict gives to plaintiff the land claimed in the summons, and judgment is rendered accordingly, it is proper for the court, after plaintiff's counsel has released certain land included in the verdict which does not belong to plaintiff, to set aside the first judgment, and enter a second judgment for the land included in the verdict, less the part released.[5]

Requiring payment of money as condition of recovery. The court has no power to impose in a judgment that plaintiff recover possession the condition that he should pay defendant a sum of money; such a judgment would be irregular and voidable on direct attack.[6]

Damages. Although no damages can be awarded by the judgment unless there is special statutory authority therefor, as explained supra § 58, a judgment will not be reversed merely because one cent damages was allowed where the merits were fairly with plaintiff.[7] Even under statutes which authorize an award of damages to plaintiff, the judgment may award damages only for the amount named

91. Del.—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.
N.J.—Marquez v. Bovero, 127 A. 698, 101 N.J.Law 28.
Or.—Reckard v. Ryan, 288 P. 1053, 1054, 133 Or. 108, citing **Corpus Juris.**
Utah. Forrester v. Cook, 292 P. 206, 77 Utah 137.
Wis. Swift v. Cornes, 20 Wis. 397.
26 C.J. p 868 notes 60, 62.

Judgment held erroneous
Under a statute providing that, if defendant is found guilty, the judgment shall be that he be removed and that plaintiff be put in possession, in an action before justice to whom case was transferred by other justice after reversal of the latter by district court, judgment "reversing" decision of transferring justice and canceling removal order without finding whether or not defendant was guilty is nugatory.—Rasmussen v. Alberts, 246 N.W. 620, 215 Iowa 644.

92. Ark.—Poe v. Bradley, 44 Ark. 500.
26 C.J. p 868 note 63.
Bond as condition of taking possession see supra § 52.

93. Tex.—Maybin v. Fitzgerald, Civ. App., 45 S.W. 611.

94. Ill.—Brush v. Fowler, 36 Ill. 53, 85 Am.D. 382—McCluskey v. Nelson, 179 Ill.App. 182.
26 C.J. p 868 note 64.

95. Cal.—Fremont v. Crippen, 10 Cal. 211, 70 Am.D. 711.
Ill.—Brush v. Fowler, 36 Ill. 53, 85 Am.D. 382.
Mo.—Danforth v. Stratton, 77 Mo. 200.
26 C.J. p 868 note 65.

96. Ky.—Young v. Ringo, 1 Litt. 225.

97. Ky.—Young v. Ringo, supra.

Reason for rule
In trespass all are principals.—Young v. Ringo, supra.

98. Iowa.—Cagwin v. Chicago & N. W. R. Co., 86 N.W. 220, 114 Iowa 129.
N.J.—Haurand v. Schorb, 72 A. 107, 77 N.J.Law 365.
26 C.J. p 869 note 69.

Appurtenances
Where a portion of the machinery in a mill had been detached and another piece substituted for it, the portion so detached was considered not appurtenant to the premises so as to be embraced in a judgment for possession of the mill property.—Smith v. People, 99 Ill. 445.

99. Ill.—Hardin v. Sangamon County, 71 Ill.App. 103.

1. Ill.—Hardin v. Sangamon County, supra.

Fact that defendant was in possession of only a part of the premises cannot be urged as an objection to a judgment for the whole of the premises.—Hardin v. Sangamon County, supra.

2. Ill.—Kessel v. Mayer, 118 Ill.App. 267.
Ky.—Ball v. Lively, 2 J.J.Marsh. 181.

3. Tenn.—White v. Suttle, 11 Humphr. 449.

4. Tenn.—White v. Suttle, supra.

5. Va.—Bartley v. McKinney, 28 Gratt. (69 Va.) 750.

6. Ariz.—Brought v. Minor, 148 P. 294, 17 Ariz. 28.

7. Ill.—Brush v. Fowler, 36 Ill. 53, 85 Am.D. 382.

in the summons issued by the justice,[8] or for the amount assessed by the jury;[9] and, where there is no finding of damages by the verdict of the jury, damages cannot properly be awarded.[10] As such damages are awarded merely as incidental to a judgment for possession, see supra § 58, a judgment for damages alone is therefore erroneous.[11] Under a statute providing that a judgment against either party shall also be rendered against his sureties in a bond given under the provisions of the act, and permitting defendant to give a bond to entitle him to retain possession, a judgment may be rendered against defendant and his sureties for possession and the damages assessed.[12]

Under statutes permitting the recovery of rents and profits, see supra § 59, where one of two defendants comes into possession subsequently to the other, and holds it for a shorter time, a joint judgment for rents and profits will be improper; but, where they are put in possession in pursuance of one general design and are acting in concert to hold the possession for the same object, such judgment will not be held to be error.[13] Although the interest of plaintiff has been sold, pending the action, the judgment in his favor should be both for possession and for the rents.[14]

§ 73. —— To Defendant

A judgment in favor of the defendant ordinarily should be that the action be dismissed, unless plaintiff has given a bond and dispossessed defendant at the commencement of the action, in which case the judgment should be for the restitution of the premises, and under some statutes for damages.

Ordinarily, unless otherwise provided by statute, the only judgment that can be pronounced in case defendant is successful is that plaintiff's action be dismissed and that defendant go without day.[15] Where, however, plaintiff elects to give a bond and dispossess defendant at the commencement of the action, as he may do under some statutes, see supra § 52, a judgment for defendant should be for the restitution of the premises,[16] as where the action abates[17] or is dismissed,[18] or a demurrer is sustained to the complaint.[19] Under some of these statutes it is the duty of the court on defendant's motion to award a writ of inquiry to assess defendant's damages if he is successful.[20]

Where plaintiff, on filing the complaint, causes a writ of restitution to be issued, which is executed by ousting defendant and placing plaintiff in possession, the court does not acquire jurisdiction to determine the merits, and cannot, on dismissal, order restitution to defendant, but at most may vacate the order of restitution under which defendant was ousted, defendant's situation and remedies being the same as though plaintiff, without beginning suit, had gone on the premises and forcibly removed him.[21] So, where judgment is recovered by a plaintiff, and under it a writ of possession issues, and defendant is turned out of possession, an appeal is granted, and before trial of the case plaintiff moves the dismissal of his action, and declares that he will not further prosecute it, the court, if asked, should award a writ of possession to restore possession of the land to defendant,[22] and it is not error to refuse such dismissal except on condition that plaintiff make restitution, as the dismissal may be entered later.[23] It has been held that, if defendant surrenders possession, and the higher court sustains his writ of error and reverses the judgment for plaintiff and remands the case because a change of venue should have been granted, the justice to whom the case is transferred may dismiss the case on plaintiff's motion;[24] but he cannot cancel the removal order without setting aside the dismissal.[25] A defendant against whom judgment is rendered, which is afterward reversed, but who does not lose possession of the property under or through the judgment, is not entitled to be restored to possession as against third parties who have ousted him during the pendency of the action.[26]

§ 74. Operation and Effect

A judgment in forcible entry and detainer determines merely the right to present possession of the property.

A judgment in forcible entry and detainer merely

8. W.Va.—Bartrom v. Howard, 17 S.E.2d 326.

9. Ark.—Denton v. Young, 223 S.W. 380, 145 Ark. 147.

10. Ark.—Cannon v. Davies, 33 Ark. 56.

11. Mo.—Farwell v. Easton, 63 Mo. 446.
26 C.J. p 869 note 86.

12. Ark.—Richardson v. Harrell, 36 S.W. 573, 62 Ark. 469.

13. Mo.—Kingman v. Abington, 56 Mo. 46.

14. Tenn.—Spillman v. Walt, 12 Heisk. 574.

15. Neb.—Stover v. Hazelbaker, 60 N.W. 597, 42 Neb. 393.

16. Ark.—Davis v. Goodman, 35 S. W. 231, 62 Ark. 262.

17. Ark.—Williams v. Petty, 271 S. W. 9, 168 Ark. 642—Sumner v. Spencer, 9 Ark. 441.

18. Ark.—Runyon v. Hale, 10 Ark. 476—Fleeman v. Horen, 8 Ark. 353.

19. Ind.T.—Folsom v. Hunter, 98 S. W. 156, 6 Ind.T. 453.

20. Ind.—Folsom v. Hunter, supra

21. Wash.—State v. Big Bend Land Co., 171 P. 259, 100 Wash. 425.

22. W.Va.—McCormick v. Short, 3' S.E. 769, 49 W.Va. 1.

23. W.Va.—McCormick v. Short, supra.

24. Iowa.—Rasmussen v. Alberts 246 N.W. 620, 215 Iowa 644.

25. Iowa.—Rasmussen v. Alberts supra.

26. Cal.—Bowers v. Cherokee Bob 46 Cal. 279.

determines the right to present possession of the property.[27] It does not determine the ultimate rights of the parties,[28] and in no way affects the title of the parties to the land in controversy[29] whether legal or equitable.[30] It has the effect only of placing the parties in their original position prior to the unlawful entry.[31]

§ 75. Execution and Enforcement

The judgment ordinarily is enforced by the issuance of a writ of restitution, in compliance with the statutory requirements relating thereto, and by the execution of such writ by dispossessing the defendant and his privies. Such enforcement ordinarily cannot be restrained by injunction.

The court which renders the final judgment is the proper court in which to make application for the issuance of the writ of restitution.[32] A form of writ provided by statute may be modified to suit the appropriate judgment,[33] and clerical defects or omissions in the writ may be amended;[34] but the writ should designate the property with sufficient certainty to enable the officer to proceed to execute it.[35] The statutory requirements must be complied with as to the time,[36] manner, and other matters relating to the issuance and service of such writs.[37] Under a statute that an appeal by defendant shall not stay proceedings on the judgment unless the judge or justice before whom the same was rendered so directs, it is the duty of the sheriff to execute a writ of possession, notwithstanding an order staying execution pending appeal, where the judge issuing such order was not the judge before whom the case was tried and judgment rendered.[38]

In order to constitute a full execution of a writ, both defendant and his personal property must be removed from the premises, and the real estate given to plaintiff,[39] unless the removal of the personal property is waived by defendant.[40] Where defendant is decreed to be ejected, he must vacate and be ejected from every part of the land included within the area defined by the court in fixing the boundaries in the description of the property involved in the action,[41] and he cannot prevent execution of the writ of restitution by transferring the possession of the premises to a stranger.[42] Where, however, plaintiff, after recovering a judgment, obtains possession peaceably and without the aid of a writ of restitution, it is a complete satisfaction of the judgment, except the costs, and he cannot have a writ of restitution under it afterward.[43] Under a statute providing for an execution for restitution and for damages, rents, and costs, an execution may properly issue for rents and costs after restitution of the premises.[44] A writ of possession becomes functus officio in so far as it is a writ of execution commanding the sheriff to satisfy the part of the judgment awarding damages, where no levy is made on the judgment debtor's property prior to the return day, and there is no order staying execution, but it is still good in so far as it is a writ of posses-

27. Minn.—Wm. Weisman Realty Co. v. Cohen, 195 N.W. 898, 157 Minn. 161—William Weisman Holding Co. v. Miller, 188 N.W. 732, 733, 152 Minn. 330, citing **Corpus Juris.**

28. Minn.—Wm. Weisman Realty Co. v. Cohen, 195 N.W. 898, 157 Minn. 161—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.
Conclusiveness of forcible entry and detainer judgments generally see the C.J.S. title Judgments § 710, also 26 C.J. p 870 notes 2–9, 12–18.

29. Minn.—William Weisman Holding Co. v. Miller, 188 N.W. 732, 152 Minn. 330.
N.M.—Heron v. Ramsey, 117 P.2d 247, 45 N.M. 491.
26 C.J. p 870 note 10.

30. U.S.—Johnson v. Riddle, 36 S. Ct. 393, 240 U.S. 467, 60 L.Ed. 752, affirming 139 P. 1143, 41 Okl. 759.

31. N.M.—Heron v. Ramsey, 117 P. 2d 247, 45 N.M. 491.

32. Neb.—Magic City Realty Co. v. Scheneckerberger, 118 N.W. 567, 82 Neb. 648.

33. Mo.—McHose v. South St. Louis Fire Ins. Co., 4 Mo.App. 511.
Where claimant and defendant are cotenants or entitled to joint possession, the statutory form must be modified to suit the appropriate judgment.—McHose v. South St. Louis Fire Ins. Co., supra.

34. Ark.—Galbreath v. Mitchell, 32 Ark. 278.
Omission of parties
Where the names of the parties are properly set out in the complaint and bond, but wholly omitted from the writ pending a motion to quash the writ, its amendment should be permitted.—Galbreath v. Mitchell, supra.

35. Ala.—Burford v. Gordon, 189 So. 76, 238 Ala. 24.

36. N.J.—Funkhauser v. State, 50 A. 580, 67 N.J.Law 132.
Ohio.—Bode v. Mungavin, 4 Ohio S. & C.P. 270, 2 Ohio N.P. 269.
26 C.J. p 870 note 23.
A writ of restitution issued, after notice of appeal, prior to the expiration of the time for taking an appeal, is voidable only, no supersedeas bond being given, and affords protection to both the officer and the party at whose instance it is issued.—Olmstead v. Thompson, 8 So. 755, 91 Ala. 130—Olmstead v. Brewer, 8 So. 345, 91 Ala. 124.

37. N.D.—State v. Conrath, 206 N. W. 777, 53 N.D. 460.
Ohio.—Bode v. Mungavin, 4 Ohio S. & C.P. 270, 2 Ohio N.P. 269.
Tex.—Rosenfield v. Barnett, 64 S.W. 944, 26 Tex.Civ.App. 71.
26 C.J. p 870 note 23.

38. Cal.—Magnaud v. Traeger, 226 P. 990, 66 Cal.App. 526.

39. Cal.—Lee Chuck v. Quan Wo Chong Co., 22 P. 594, 81 Cal. 222, 15 Am.S.R. 50.

40. Cal.—Lee Chuck v. Quan Wo Chong Co., supra.

41. Puerto Rico.—Coblan v. Rivera, 7 Puerto Rico 569.

42. Cal.—Fremont v. Crippen, 10 Cal. 211, 70 Am.D. 711.

43. Ill.—Barnett v. Palmer, 79 Ill. App. 403.

44. Mo.—Cabanne v. Spaulding, 14 Mo.App. 312.

sion, directing a restitution of the premises and may be executed after the return day.[45]

Alias writ. Where a writ of restitution, issued within the statutory time after the rendition of the judgment, has been quashed, another may issue, although such period has expired.[46]

Who may be dispossessed. While it has apparently been held to the contrary,[47] by the weight of authority a writ of restitution will not authorize the officer to dispossess one who was not privy to defendant's forcible entry and detainer, and who is a stranger to the parties and the record; but it authorizes him to dispossess only defendant and his privies.[48] Nevertheless a writ of restitution will not necessarily be unavailing because the persons who were living on the land at the institution of the suit were not made defendants, as it may be enforced against the servants of the person who was made defendant; and the fact that defendant does not live in the county where the land lies does not alter the case.[49] A judgment against the head of the family is sufficient authority to dispossess his wife[50] or any other members of the family.[51]

Relief against enforcement. Although there is authority to the contrary,[52] the better view is that, except in case of fraud or mistake, or a showing of manifest irreparable injury,[53] a court of equity cannot interpose by injunction to restrain a plaintiff who has obtained judgment from having restitution of the possession,[54] and this is so notwithstanding plaintiff is insolvent[55] and defendant holds the undisputed legal title to the land[56] or has recovered judgment in ejectment for the premises.[57] Equity, however, may interfere by injunction to restrain the enforcement of a judgment which is void,[58] and the title to the land of which restitution is ordered is in litigation between the parties to the action,[59] and equity when it thus interferes will enjoin the enforcement of the judgment not only as to the land, but also as to the recovery of monthly rents and damages.[60] In a suit by defendant for such an injunction, plaintiff may amend his unverified complaint, by verifying it.[61]

A bill to quiet possession may be maintained by a purchaser in possession, under a decree of court, to prevent the enforcement of a judgment against his tenant, in unlawful entry and detainer, in which he was not a party, although the person holding the judgment would be entitled to possession on bringing a proper action to determine his right.[62]

N. REVIEW

§ 76. Appeal or Error

Questions relating to review on appeal or error from a judgment in forcible entry and detainer are considered in the immediately following §§ 77–84.

Examine Pocket Parts for later cases.

§ 77. —— Right of Review

The party against whom judgment is rendered, may obtain a review of the case by writ of error, or by appeal, to the extent that a right of appeal is given to him by constitutional or statutory provision.

A writ of error will lie to a judgment of a jus-

45. Cal.—Magnaud v. Traeger, 226 P. 990, 66 Cal.App. 526.

46. Ky.—Reed v. Williams, 3 A.K. Marsh. 521.

47. Alaska.—Ashby v. Faulkner, 4 Alaska 743.

Where the writ commands that "plaintiff have restitution of" the premises, he is entitled to possession under it, although another than defendant be found in possession.—Ashby v. Faulkner, supra—26 C.J. p 871 note 32.

48. Kan.—Wallace v. Hall, 22 Kan. 271.
Wis.—Drum v. Holton, 1 Pinn. 456.
Restitution against person entering under defendant since action brought see supra § 71.

49. Mo.—De Graw v. Prior, 68 Mo. 158.

50. Ill.—Ennis v. Lamb, 10 Ill.App. 447.

51. Cal.—Saunders v. Webber, 39 Cal. 287.

52. Ohio.—Foster v. Ellison, 31 Ohio Cir.Ct. 513.
26 C.J. p 871 note 45.

53. Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189—Lamb v. Drew, 20 Iowa 15.

54. Ala.—Hamilton v. Adams, 15 Ala. 596, 50 Am.D. 150.
Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189—Lamb v. Drew, 20 Iowa 15.
26 C.J. p 871 note 46.

Pending appeal

Defendant appealing from justice court judgment is not entitled to an injunction restraining justice of peace from issuing execution for defendant's removal pending the appeal on theory that defendant's removal from premises would render appeal moot, especially where plaintiff in forcible entry and detainer suit is not insolvent.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189.

55. Ala.—Hamilton v. Adams, 15 Ala. 596, 50 Am.D. 150.
Iowa.—Lamb v. Drew, 20 Iowa 15.

56. Ala.—Hamilton v. Adams, 15 Ala. 596, 50 Am.D. 150.

57. Ky.—Dedman v. Smith, 2 A.K. Marsh. 260.

58. Tex.—Maybin v. Fitzgerald, Civ. App., 45 S.W. 611.
26 C.J. p 871 note 50.

Enforcement of a judgment for possession at some time in the future may be restrained by injunction, since it is void.—Maybin v. Fitzgerald, supra.

59. Ariz.—Beam v. Parks, 80 P. 324, 9 Ariz. 151.
Mo.—Jones v. Pharis, 59 Mo.App. 254.
26 C.J. p 871 note 50.

60. Mo.—Jones v. Pharis, supra.

61. N.M.—Puckett v. Walz, 72 P. 2d 623, 41 N.M. 612.

62. Tenn.—Cope v. Payne, 76 S.W. 820, 111 Tenn. 128, 102 Am.S.R. 746.

tice's court in forcible entry and detainer cases, in jurisdictions where all courts are courts of record.[63] The right of the losing party to appeal in such cases exists only when and to the extent that it is conferred by constitutional or statutory provision, and is sometimes conferred by statutes relating to appeals generally or by statutes relating specially to appeals in this class of actions,[64] and, as has been expressed, this right of appeal is as clear and unqualified as in any other civil action.[65] This right, it has been held, is conferred by a general statute providing that any party to a judgment or decree may appeal therefrom,[66] but not by a constitutional provision giving the right of appeal "in all civil cases."[67] If the statute giving the right of appeal excepts from its operation judgments by default a party against whom there is a judgment by default is not entitled to an appeal, although he first moves to set aside the judgment and the motion is overruled.[68]

In forma pauperis. Under some statutes defendant in actions of forcible entry and detainer may on taking the prescribed oath appeal as a poor person.[69]

Waiver or loss of right. The losing party's right of appeal is not lost by waiver or estoppel, by his being removed by execution from the premises pending appeal,[70] or by his vacating the premises to avoid a forcible removal;[71] nor is he estopped from prosecuting error proceedings by his demanding and receiving rent from the party in possession, pending such proceedings.[72] If, however, he sues out a writ of error and waives an appeal, he thereby waives the benefit of procedure by appeal.[73] Plaintiff does not waive his right to insist on a dismissal of defendant's writ of error by filing his brief where, before he has done so, he has entered his motion to dismiss and the court reserves this motion to the hearing.[74]

§ 78. —— Appellate Jurisdiction

The court to which a forcible entry and detainer cause may be removed by appeal or writ of error is controlled by the statute applicable to such appeals or writs of error.

The court or courts to which a forcible entry and detainer cause originating in a justice's or other inferior court may be removed by appeal or writ of error are controlled by the provisions of the statute regulating such appeals,[75] and accordingly, under the various statutes, such appeal will lie to a county court,[76] a circuit court,[77] or a district court,[78] or a writ of error[79] or appeal[80] will lie to an intermediate court of appeals. Where, however, the justice or other inferior court did not acquire jurisdiction, the court to which the case is removed acquires none,[81] and evidence cannot supply the de-

63. Conn.—Hotchkiss v. Dalton, 46 Conn. 467.
26 C.J. p 871 note 53.

Writ of error as not writ of right
Ill.—Wentworth v. Sankstone, 233 Ill.App. 48.

64. Colo.—Hewitt v. Landis, 225 P. 842, 75 Colo. 277.
Ill.—Wentworth v. Sankstone, 233 Ill.App. 48.
Iowa.—Robinson v. Varner, 201 N.W. 70, 199 Iowa 109.
Kan.—Hale v. Brown, 239 P. 963, 964, 119 Kan. 303, citing **Corpus Juris.**
26 C.J. p 872 note 55.

Statute relating to justice of peace as not restricting appeal from court of record
A statutory provision that appeal from action of justice of peace in action of forcible entry and detainer will not prevent removal under execution, except with consent of plaintiff, relates only to justices' courts, and does not restrict appeal from courts of record.—Robinson v. Varner, 201 N.W. 70, 199 Iowa 109.

65. Kan.—Hale v. Brown, 239 P. 963, 119 Kan. 303.
26 C.J. p 872 note 55 [a], [b].

66. Or.—Dechenbach v. Rima, 77 P. 391, 78 P. 666, 45 Or. 500.
26 C.J. p 872 note 56.

67. Neb.—Adkins v. Andrews, 96 N.W. 228, 1 Neb. (Unoff.) 810.

68. Mo.—Ser v. Bobst, 8 Mo. 506.
26 C.J. p 872 note 58.

69. Tenn.—Burns v. Haggard, 11 Heisk. 122.

70. Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189.

71. Iowa.—Schuldt v. Lee, supra—Hanos v. Seo, 156 N.W. 852, 175 Iowa 67.

72. Ohio.—Laver v. Canfield, 28 Ohio Cir.Ct. 429.
26 C.J. p 871 note 53 [a].

73. Iowa.—Rasmussen v. Alberts, 246 N.W. 620, 215 Iowa 614.

74. Ill.—Wentworth v. Sankstone, 233 Ill.App. 48.

75. Tex.—Cochran v. Fischer, Civ. App., 61 S.W.2d 577, error dismissed.
26 C.J. p 872 note 60.

76. Colo.—Reynolds v. Larkins, 14 P. 114, 10 Colo. 126.
Tex.—Cohran v. Fischer, Civ.App., 61 S.W.2d 577, error dismissed.

Municipal court of county
Wis.—Taylor v. De Camp, 31 N.W. 728, 68 Wis. 162.

77. Ill.—Davis v. Hamilton, 53 Ill. App. 94.
Ky.—Hoskins v. Morgan, 61 S.W.2d 30, 249 Ky. 576.
Md.—Roth v. State, 43 A. 769, 89 Md. 524.
Mo.—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760—Schwoerer v. Christophel, 64 Mo.App. 81.

78. Okl.—Powers v. Myers, 105 P. 674, 25 Okl. 165.
26 C.J. p 872 note 60 [d].

79. Ill.—Kepley v. Luke, 106 Ill. 395.
Ohio.—State v. Wallace, 140 N.E. 305, 107 Ohio St. 557.

80. Tex.—Emerson v. Emerson, Civ. App., 35 S.W. 425.
26 C.J. p 872 notes 70, 71.

81. Mich.—Mulder v. Corlett, 19 N.W. 756, 54 Mich. 80.
26 C.J. p 872 note 61.

Unless mandatory requirements are rigidly complied with in justice's court, it does not acquire jurisdiction, and the circuit court on appeal acquires no jurisdiction.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.

fect;[82] neither can appellate jurisdiction be given by consent of the parties,[83] nor be conferred by amendment and the appearance of the parties where the justice's jurisdiction does not appear.[84] The failure of the inferior court to enter a judgment, in accordance with its opinion, does not deprive the appellate court of jurisdiction of the proceedings, where the parties treat the opinion as a finding of the court and as conclusive, and defendant traversing the adverse finding fails to raise a question in the appellate court as to its lack of jurisdiction.[85]

Under some statutes the supreme court has appellate jurisdiction in proceedings brought under the forcible entry and detainer statutes,[86] as on an appeal from the judgment of the circuit court on an appeal from the judgment of a justice's court,[87] or on a writ of error,[88] or on either an appeal or writ of error.[89] If the court to which the writ of error is sued out has no jurisdiction, the supreme court acquires no jurisdiction to review the alleged error.[90]

§ 79. —— What Judgments or Orders May Be Reviewed

Ordinarily an appeal lies only from a final judgment or order, and under some statutes, where damages are awarded, only where the sum awarded is in excess of a specified amount.

Ordinarily an appeal lies only from a final judgment or order,[91] and this has been held to include a judgment of dismissal of the action,[92] and a judgment by default.[93] Under a statute authorizing a party aggrieved, in the action, to appeal, defendant may appeal from a judgment which is favorable to him, but which is based on a finding contrary to his contention.[94]

In the absence of a provision to that effect, a statute regulating an appeal from a judgment of the court or justice first trying the case does not apply to a further appeal from the judgment or order of an intermediate court;[95] and it has been held that an order of the superior court setting aside a judgment of affirmance of the judgment of the justice for failure of appellant to appear at the trial is not appealable under a statute providing for an appeal on the granting of a motion for a new trial.[96]

As dependent on amount of judgment. Under some statutes an appeal lies from a judgment of a justice irrespective of the amount involved.[97] On the other hand, under other statutes, which have been held constitutional,[98] actions of forcible entry and detainer are within the pecuniary limitations regulating the right to appeal, and a judgment, in such action, is appealable only where the sum designated therein as damages is in excess of the amount specified by the statute,[99] and this is true

82. Mo.—McKinney v. Harral, 31 Mo.App. 41.

83. Colo.—Crane v. Farmer, 23 P. 454, 14 Colo. 294.
Mo.—Robinson v. Walker, 45 Mo. 117.
Neb.—Babby v. Musser, 89 N.W. 742, 64 Neb. 175—Ettenheimer v. Wallman, 88 N.W. 859, 63 Neb. 647.

84. Mo.—McQuoid v. Lamb, 19 Mo. App. 153.

85. Ky.—Bishop v. Armstrong, 14 S.W.2d 784, 228 Ky. 250.

86. Va.—Pannill v. Coles, 81 Va. 380.
W.Va.—Montgomery v. Economy Fuel Co., 57 S.E. 137, 61 W.Va. 620.
26 C.J. p 872 note 66 [a], [b].
Jurisdiction of Illinois supreme court of forcible entry and detainer appeals see Courts § 357.

87. Ind.—Moore v. Read, 1 Blackf. 177.
26 C.J. p 872 note 66.

88. Ind.—Barton v. Osborn, 6 Blackf. 145.
Va.—Pannill v. Coles, 81 Va. 380.
W.Va.—Montgomery v. Economy Fuel Co., 57 S.E. 137, 61 W.Va. 620.

89. Miss.—Gill v. Jones, 57 Miss. 367.

90. Kan.—Wideman v. Taylor, 65 P. 664, 63 Kan. 884—Armour Packing Co. v. Howe, 64 P. 42, 62 Kan. 587.

91. Kan.—Peyton v. Peyton, 9 P. 479, 34 Kan. 624.
26 C.J. p 872 note 73.

92. Fla.—Welch v. State, 95 So. 751, 85 Fla. 264.
26 C.J. p 872 note 73 [a].

93. N.M.—State ex rel. Heron v. District Court of First Judicial Dist. within and for Rio Arriba County, 128 P.2d 454—State ex rel. Heron v. District Court of First Judicial Dist. within and for Rio Arriba County, 128 P.2d 451.

Failure of defendant to appear in forcible entry and detainer proceeding in justice's court, or a personal appearance alone without a written answer, does not deprive district court of jurisdiction to entertain defendant's appeal, since district court has same jurisdiction as justice's court to proceed as on default, and that includes power to render whatever judgment the proofs call for.—State ex rel. Heron v. District Court of First Judicial Dist. within and for Rio Arriba County, N.M., 128 P.2d 454—State ex rel. Heron v. District Court of First Judicial Dist. within and for Rio Arriba County, N.M., 128 P.2d 451.

94. Ill.—Celotex Co. v. Koblitz, 241 Ill.App. 159.

95. Ill.—Gentle v. Butler, 278 Ill. App. 371.

Refusal to allow error not reviewable as judgment
Under a statute providing that in proceedings to review the judgment or final order of the justice in forcible detainer proceedings, a petition in error can be filed in the court of common pleas only by leave of such court, a refusal by the court of common pleas to allow a petition in error to be filed in such court is not reviewable on error, such refusal not being a judgment in the case pending in such court.—Rothwell v. Winterstein, 42 Ohio St. 249.

96. Mo.—Schwoerer v. Christophel, 64 Mo.App. 81.

97. Kan.—Burdsal v. Shields, 79 P. 1067, 71 Kan. 95.

98. Tex.—Beacon Lumber Co. v. Brown, Com.App., 14 S.W.2d 1022, affirming, Civ.App., 4 S.W.2d 992—Brown v. Grant, Civ.App., 119 S. W.2d 185.

99. Colo.—Brennan Mercantile Co. v. Vickers, 73 P. 45, 31 Colo. 323.
Ill.—McDole v. Shepardson, 40 N.E. 953, 156 Ill. 383.
Tex.—Beacon Lumber Co. v. Brown, Com.App., 14 S.W.2d 1022, affirming, Civ.App., 4 S.W.2d 992—Brown v. Grant, Civ.App., 119 S.W.

notwithstanding the particular statute relating to forcible entry and detainer provides for an appeal without expressly referring to such restriction.[1] Under some of these statutes, however, the fact that the judgment is for more than the statutory amount does not give the appellate court jurisdiction of the entire subject matter of the judgment.[2]

Citation on appeal. When a defendant appeals from a justice's court to a superior court, he is fully apprised of the nature of the action he is called on to defend and cannot, on appeal, raise the question of the regularity of the citation.[3]

§ 80. —— Requisites of and Proceedings for Transfer of Cause

The requisites of, and proceedings for, taking an appeal and transferring the cause to the reviewing court are governed by statutory regulations, which must be at least substantially complied with.

The requisites of, and proceedings for, taking an appeal and transferring the cause to the reviewing court, in an action of forcible entry and detainer are governed by the general statutes relating to appeals in other cases,[4] except where they are governed by statutory provisions relating to actions of this character,[5] in which cases the general statutes do not apply.[6] There should be, in the first instance, a compliance with the substantial requirements of the statute relating to taking the appeal,[7] and where there is such a compliance the appellate court should take jurisdiction of the parties and afford the appealing party the opportunity of perfecting his appeal so as to bring it within the strict compliance of the statute.[8] The statutory regulations should be complied with as to the time of taking the appeal,[9] or an extension thereof;[10] the application for the review;[11] the time and manner of giving notice of appeal;[12] and the payment or unconditional tender of the justice's fees before he is required to send up the papers.[13]

If an affidavit is required as a basis for the allowance of an appeal, it must be filed in the manner and time required by statute;[14] and it is sufficient if it conforms to the statute specially relating to actions of forcible entry and detainer.[15]

Motion for new trial. It has been held that it is not a prerequisite to an appeal that the losing party should ask for a new trial;[16] and in any event the appeal must be taken from the judgment and not from an order overruling a motion for a new trial.[17]

2d 185—Madison v. Martinez, Civ. App., 56 S.W.2d 908, error refused—Stricklin v. Joslin, Civ.App., 7 S.W.2d 165—Boyle v. Grubbs, Civ. App., 268 S.W. 277—Rose v. Skiles, Civ.App., 245 S.W. 127.

26 C.J. p 872 note 74—3 C.J. p 387 note 86.

If no judgment for damages is given, no appeal lies.—Stein v. Stely, Tex.Civ.App., 32 S.W. 861.

1. Colo.—Brennan Mercantile Co. v. Vickers, 73 P. 45, 31 Colo. 323—Crane v. Farmer, 23 P. 455, 14 Colo. 291.

2. Tex.—Madison v. Martinez, Civ. App., 56 S.W.2d 908, error refused—Boyle v. Grubbs, Civ.App., 268 S.W. 277—Rose v. Skiles, Civ.App., 245 S.W. 127.

3. Tex.—Irwin v. Davenport, 19 S. W. 692, 81 Tex. 512.

4. Ill.—Hatzenbuehler v. Misko, 27 N.E.2d 614, 305 Ill.App. 496.

N.M.—State ex rel. Heron v. District Court of First Judicial Dist. within and for Rio Arriba County, 128 P.2d 454.

Certificate of importance

Under some statutes in the absence of a certificate of importance, no appeal can be entertained by the supreme court from the judgment of the appellate court where less than a designated amount is involved.—Seator v. Fay, 59 N.E. 235, 188 Ill 507, affirming 88 Ill.App. 419.

5. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

Mo.—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760.

6. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

Tex.—Fry v. McDuffey, Civ.App., 46 S.W.2d 377—Rose v. Skiles, Civ. App., 245 S.W. 127.

Utah.—Hunsaker v. Harris, 109 P. 1, 37 Utah 226.

7. Ill.—Veach v. Hendricks, 278 Ill. App. 376—State Bank of St. Charles v. Burr, 277 Ill.App. 373.

Every detail of statute need not be strictly complied with in the first instance in order to give the circuit court jurisdiction of the parties.—State Bank of St. Charles v. Burr, supra.

8. Ill.—State Bank of St. Charles v. Burr, supra.

9. Miss.—McCandless v. Day, 140 So. 337, 162 Miss. 859.

26 C.J. p 873 note 81.

10. Mich.—Bearse v. Aldrich, 40 Mich. 529.

26 C.J. p 873 note 81 [e].

11. Ohio.—State v. Wallace, 140 N. E. 305, 107 Ohio St. 557.

Duty of clerk to file petition

Where error may be prosecuted from actions in forcible entry and detainer from any court of record in any county to the court of appeals of that county, without leave of such court of appeals or any judge thereof, it is the duty of the clerk of the court of appeals to file a petition in error tendered by the unsuccessful party on compliance with the statutory procedure in such cases.—State v. Wallace, supra.

12. Mo.—American Brass Mfg. Co. v. Phillippi, 77 S.W. 475, 765, 103 Mo.App. 47.

Tex.—Fry v. McDuffey, Civ.App., 46 S.W.2d 377.

26 C.J. p 873 note 92.

Filing appeal bond without notice of appeal required by statute does not operate to perfect an appeal for any purpose.—Veach v. Hendricks, 278 Ill.App. 376.

Appeal bonds generally see infra §§ 87–95.

13. Cal.—People v. Harris, 9 Cal. 571.

26 C.J. p 873 note 90.

14. Mo.—Robinson v. Walker, 45 Mo. 117—Stevens v. Anth, App., 147 S.W.2d 165, transferred, see, Sup., 142 S.W.2d 1008.

Wis.—Mueller v. Rice, 136 N.W. 146, 149 Wis. 548.

26 C.J. p 873 note 83.

15. Mo.—Frick Co. v. Marshall, 86 Mo.App. 463.

16. Mo.—Henry v. Lansdown, 42 Mo.App. 431.

17. Mo.—Hobart v. McNamara, 13 Mo.App. 578.

Filing transcript and other papers. If the statute requires the justice to file a transcript of the proceedings before him in the superior court within a designated time, his negligent omission to do so will not be permitted to prejudice either party.[18] If, however, the statute makes it the duty of appellant to cause the transcript to be filed in the superior court within a designated time, the statute will be considered mandatory and a compliance therewith by appellant is necessary,[19] and it is no excuse that he relied on the clerk to file the transcript;[20] but it is not necessary that the filing be done by appellant in person, it is sufficient if the transcript is filed by the justice on his behalf.[21] If the statute requires appellant to see that the complaint is filed with the transcript, he cannot take advantage of the absence of the complaint's being returned by the justice in the court with his transcript and have the action dismissed.[22] Omission to file the transcript, as required, is fatal to the appeal as the appellate court acquires no jurisdiction over the subject matter,[23] except that, under some statutes, appellee, in such a case, may produce the transcript and have the judgment affirmed.[24]

§ 81. —— Presentation and Reservation in Lower Court of Grounds for Review

Questions not presented and reserved in the trial court will not ordinarily be considered on appeal or error.

As in the case of appeals generally, questions not presented and reserved in the trial court will not be considered on appeal or error,[25] except where the question relates to the lack of jurisdiction of the lower court.[26]

§ 82. —— Amendments

Amendments may be permitted in the appellate court to correct defects or informalities in the proceedings in the lower court; but not to state a new cause of action or materially change the issues, or to remedy jurisdictional defects.

Amendments which may have been made in the lower court, may generally be made in the appellate court to correct defects or informalities in the proceedings in the justice's or other inferior court.[27] Such amendments, on appeal from a justice's court to a court of intermediate jurisdiction, if allowable are generally within the discretion of the appellate court,[28] and a refusal to exercise this discretion on the ground of want of power is error.[29] Amendments may be permitted as to the description of the land in suit,[30] even though the description in the complaint below was too indefinite to admit of restitution;[31] or amendments increasing the amount of damages,[32] or showing that the land was situated in the county where suit was brought,[33] or permitting defendant to file an amended answer.[34] The cause may be remanded for the purpose of such amendment,[35] and where the appellate court reverses a judgment because it was not shown that defendant was in possession of all the land described, the lower court on a remand of the

18. Ky.—Wayman v. Taylor, 1 Dana 527.

19. Mo.—Robinson v. Walker, 45 Mo. 117.
26 C.J. p 873 note 95.

20. Mo.—Anheuser-Busch Brewing Assoc. v. Southern Bowling Assoc., 114 S.W. 90, 134 Mo. 312.

21. Mo.—Reynolds v. Lederer, 56 Mo.App. 511.

22. Ill.—Hawthorne v. Cartier Lumber Co., 121 Ill.App. 494.

23. Mo.—Robinson v. Walker, 45 Mo. 117.
26 C.J. p 874 note 97.

24. Mo.—Keim v. Daugherty, 8 Mo. 498.

25. Fla.—Rosenstone v. Johnston, 111 So. 630, 93 Fla. 319.
Ill.—Turk v. Elliott, 69 Ill.App. 451. See Old Rose Distilling Co. v. Parkhill, 200 Ill.App. 48.
Tenn.—White v. Suttle, 1 Swan 169.
26 C.J. p 874 note 99.

Rule applied to objection
(1) For insufficient verification of complaint.—Naylor v. Chinn, 82 Mo. App. 160.
(2) For allowance of amendment of complaint.—Evetts v. Johns, Tex. Civ.App., 76 S.W. 778.
Other objections not considered see 26 C.J. p 874 note 99 [a].

Where cause goes to trial without any plea and defendant makes a full defense, he cannot set up the want of plea and issue thereon in the appellate court.—Bartley v. McKinney, 28 Gratt. 750, 69 Va. 750.

26. Wyo.—White v. Veitch, 197 P. 983, 27 Wyo. 401.

27. Mo.—Purcell v. Merrick, 158 S. W. 478, 172 Mo.App. 412—Dean v. Trax, 67 Mo.App. 517.

Defects or informalities amendable
(1) Insufficient verification of complaint.—School Dist. No. 1 v. Holt, 105 S.W. 32, 126 Mo.App. 571—Tegler v. Mitchell, 46 Mo.App. 349.

(2) Where there was intent on the part of plaintiff to comply with the requirement that the complaint be signed by plaintiff or his attorney, and it appears that a jurat was attached and that plaintiff's attorney omitted to sign his name through inadvertence.—Purcell v. Merrick, 158 S.W. 478, 172 Mo.App. 412.

28. Ill.—Spurck v. Forsyth, 40 Ill. 438—Ballance v. Curtenius, 8 Ill. 449.
N.M.—Sanchez v. Candelaria, 23 P. 239, 5 N.M. 400.
26 C.J. p 874 note 2.

29. N.M.—Sanchez v. Candelaria, supra.

30. W.Va.—Bennett v. Hollinger, 66 S.E. 502, 66 W.Va. 385—Drinkard v. Heptinstall, 47 S.E. 72, 55 W.Va. 320.
26 C.J. p 874 note 7.

31. N.M.—Sanchez v. Luna, 1 N.M. 238.

32. Mo.—Champ Spring Co. v. B. Roth Tool Co., 70 S.W. 506, 96 Mo. A. 518—Lucas v. Fallon, 40 Mo. App. 551.
26 C.J. p 874 note 9.

33. Mo.—McKinney v. Harral, 36 Mo.App. 337.

34. Cal.—Henderson v. Allen, 23 Cal. 519.

35. Ala.—McRae v. Tillman, 6 Ala. 486.

cause may permit an amendment of the complaint so as to include only a part of the land therein described,[36] and may impose as a condition thereof payment of a part of the costs.[37]

An amendment, however, should not be permitted which is equivalent to bringing a new action,[38] or which may materially change the issues.[39] An amendment also will generally not be allowed to remedy a jurisdictional defect;[40] but it has been held, under a statute providing that the appeal shall be tried anew, on the merits, that if the justice had jurisdiction but the complaint failed to allege the jurisdictional facts, the appellate court may allow an amendment adding the necessary averments.[41]

§ 83. —— Hearing and Determination of Case

a. In general

b. In intermediate court

a. In General

An appeal is generally heard and determined in accordance with the rules relating to the hearing and determination of appeals in other civil cases, except to the extent that it is controlled by special statutory provisions.

An appeal in a forcible entry and detainer case is generally heard and determined in accordance with the rules relating to the hearing and determination of appeals in other civil cases,[42] except in so far as it is controlled by the facts and special statutory provisions relating to actions of this character.[43] In accordance with these rules or provisions, it has been held that, if the case is tried and determined on a certain theory, it must be so treated on appeal;[44] that matters will not be considered which are not within the scope of the appeal,[45] or which have not been properly made a part of the record;[46] and that harmless error or matters not prejudicial will not be considered, so as to disturb the judgment;[47] but an error is not harmless which is more

36. Ill.—Thompson v. Sornberger, 78 Ill. 353.

37. Ill.—Thompson v. Sornberger, supra.

38. Iowa.—Dicks v. Hatch, 10 Iowa 380.
26 C.J. p 874 note 5.

39. Iowa.—Kuhn v. Kuhn, 28 N.W. 511, 70 Iowa 682—Dicks v. Hatch, 10 Iowa 380.

40. Mo.—Dean v. Trax, 67 Mo.App. 517.

If complaint was such that justice acquired no jurisdiction, the court to which an appeal is taken acquires no jurisdiction and cannot permit an amendment.—Kiphart v. Brenneman, 25 Ind. 152—26 C.J. p 871 note 4.

41. N.M.—Sanchez v. Candelaria, 23 P. 239, 5 N.M. 400.

42. Cal.—Watkins v. McCartney, 232 P. 982, 70 Cal.App. 137.
Ill.—Hatzenbuehler v. Miske, 27 N.E.2d 641, 305 Ill.App. 496.
Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

Where the action is by several plaintiffs against several defendants, and one respondent is entitled to judgment against one appellant, that part of the judgment will be sustained, under a constitutional provision that no judgment shall be set aside for any error of pleading or procedure unless it results in a miscarriage of justice, notwithstanding a judgment for a coplaintiff against a codefendant was unauthorized.—Watkins v. McCartney, 232 P. 982, 70 Cal.App. 137.

43. Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

44. Ala.—Fearn v. Beirne, 29 So. 558, 129 Ala. 435.

45. Ariz.—Brought v. Minor, 148 P. 294, 17 Ariz. 28.
Mo.—Langdon v. Crawford, App., 79 S.W.2d 795.

Objection not available

Where defendants appealed from adverse judgment, plaintiff who did not appeal could not question correctness of trial court's admission of evidence offered by defendants.—Bank of America Nat. Trust & Savings Ass'n v. McLaughlin, App., 71 P.2d 291, hearing denied 72 P.2d 551, 22 Cal.App.2d 111.

46. Neb.—Hitchcock v. McKinster, 31 N.W. 507, 21 Neb. 148.

If there is no bill of exceptions objections to the form of notice to quit cannot be considered on appeal.—Hitchcock v. McKinster, supra.

47. Cal.—Bank of California v. Taaffe, 18 P. 781, 76 Cal. 626.
Ill.—Kaylor v. Smith, 229 Ill.App. 110.
Mo.—Noonan v. Mason, App., 285 S.W. 118—Myers v. Miller, 55 Mo. App. 338.
Ohio.—McKibben v. Rosselot, 4 Ohio App. 331.
Okl.—Faust v. Fenton, 181 P. 940, 75 Okl. 68.
26 C.J. p 875 note 44, p 857 note 9 [e].

Errors held harmless

(1) Allowing the complaint to be read in evidence as proof of plaintiff's right to recover, where such right is established outside of the complaint.—McGrath v. Miller, 61 Ill.App. 497.

(2) Annulment of judgment against surety on appeal bond after lapse of term, which did not affect or harm defendants.—Miller v. Halleran, 270 S.W. 127, 219 Mo.App. 195.

(3) Error in the admission and exclusion of evidence on one count where the judgment may stand on another count.—Amador Gold Mine, Ltd. v. Amador Gold Mine, 46 P. 80, 111 Cal. 346.

(4) Errors in the statements of the demand or notice, where defendant was not misled or prejudiced thereby.—Miller v. Hall, 60 P. 191, 14 Colo.App. 367.

(5) Failure to find on an immaterial issue.—Amador Gold Mine, Ltd. v. Amador Gold Mine, supra.

(6) Striking out a valid special defense, where a general denial is sufficient, under the statute, in all cases.—Oklahoma City v. Hill, 46 P. 568, 4 Okl. 521.

A refusal to set aside an order dismissing the appeal is not harmful unless appellant had a meritorious defense.—Hamilton v. Stafford, 78 Ill.App. 54.

The reviewing court will not interfere on account of the amount of damages awarded unless the damages are so excessive that it appears that they were given under the influence of passion and prejudice, and that improper evidence bearing on the amount of damages was permitted to go to the jury.—Payson v. Holden, 11 Ky.Op. 771.

than a mere error of pleading or procedure and which results in a miscarriage of justice.[48] If error is not apparent in the record, a verdict[49] or findings of fact[50] on conflicting proofs will not be set aside on appeal; and the judgment will not be disturbed on the ground that the property is not sufficiently described unless it affirmatively appears that the description will not serve to identify the property.[51] Where the complaint charges both a forcible entry and forcible detainer the judgment will not be reversed if the findings of fact, although insufficient to support a judgment for forcible entry, are sufficient to support a judgment for forcible detainer.[52]

Presumptions. As a general rule, all reasonable presumptions will be indulged in favor of the correctness of the judgment appealed from,[53] such as, in the absence of a bill of exceptions, that the evidence supported the judgment[54] or authorized an assessment of special damages.[55] The amount allowed as damages may be presumed to be the reasonable value of the use of the land as fixed by the court,[56] but no such presumption should be indulged in, in order to defeat defendant's right of appeal, when it clearly appears that such was not the intention of the justice who entered the judgment.[57]

Modifications. Under some statutes or rules of court, the appellate court may correct or modify the judgment appealed from so as to give the relief intended, or in accordance with the facts,[58] and it may remand the case for the purpose of having such correction made by the lower court.[59] However, the court will not modify a judgment so as to allow treble damages where the facts are not before it.[60]

Dismissal. The appellate court may dismiss the appeal on a ground recognized by statute or rule of court[61] such as on the ground that the appeal was not taken within the time prescribed by stat-

48. Cal.—Chase v. Peters, 174 P. 116, 37 Cal.App. 358.
Mo.—Underwood v. City of Caruthersville, 184 S.W. 486.

49. Ark.—Temple v. Tobias, 56 S. W.2d 585, 186 Ark. 851.
Ky.—Cox v. Justice, 197 S.W. 1060, 177 Ky. 598.

50. Cal.—Paul v. Silver, 16 Cal. 73.
N.D.—Interior Lumber Co. v. Kunert, 237 N.W. 780, 61 N.D. 322.

51. Mo.—Warrenton v. Schowengerdt, 8 Mo.App. 572.

52. Cal.—Adams v. Helbing, 40 P. 422, 107 Cal. 298.

53. Cal.—Zucco v. Farullo, 174 P. 929, 37 Cal.App. 562.
Colo.—Simpson v. Nelson, 208 P. 455, 71 Colo. 490.
Mont.—Park Saddle Horse Co. v. Cook, 300 P. 242, 89 Mont. 414.

Particular matters presumed

(1) In the absence of findings, that the damages alleged were supported by the evidence.—Zucco v. Farullo, 174 P. 929, 37 Cal.App. 562.

(2) Trial court's fact findings unless clearly opposed to preponderance of evidence.—Interior Lumber Co. v. Kunert, 237 N.W. 780, 61 N.D. 322.

(3) Where defendant defaulted, that the trial court has taken evidence as to damages.—Zucco v. Farullo, supra.

Judgment for plaintiff non obstante veredicto will be presumed not erroneous, where abstract of record does not assume to set out all of testimony of parties, and does not abstract testimony of other witnesses.—Meese v. Hudson, 235 P. 565, 77 Colo. 165.

54. Ky.—Cornett v. Maloney, 115 S. W.2d 305, 272 Ky. 839.

Affirmance

A judgment for plaintiff is required to be affirmed on appeal in absence of bill of exceptions where pleadings were sufficient to support judgment since it was required to be presumed that evidence supported judgment.—Cornett v. Maloney, supra.

55. Ala.—Powell v. Sturdevant, 4 So. 718, 85 Ala. 243.

56. Philippine.—De Castro v. Bocaue, 33 Philippine 595.

57. Philippine.—De Castro v. Bocaue, supra.

58. Mich.—Union Guardian Trust Co. v. Kowalsky, 255 N.W. 171, 267 Mich. 110.
Okl.—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.

Judgments subject to correction or modification

(1) Judgment for "damages" instead of "the value of the rent of the premises pending the appeal."—Powell v. Sturdevant, 4 So. 718, 85 Ala. 243.

(2) Judgment for possession and damages where the verdict is for possession only.—Warrenton v. Schowengerdt, 8 Mo.App. 572.

(3) Judgment that plaintiff recover possession only on payment to defendant of a sum of money, modified by directing that the condition be stricken therefrom.—Brought v. Minor, 148 P. 294, 17 Ariz. 28.

(4) Where the supreme court reverses a judgment of the circuit court for error in dismissing a complaint instead of remanding it to the justice for amendment and the reviewing court directs the lower court so to enter judgment, if it afterward does so and awards costs against plaintiff in the certiorari, the error is a clerical one which will be corrected by the supreme court at the cost of plaintiff in error.—Tilman v. McRae, 8 Ala. 677.

59. Mich.—Union Guardian Trust Co. v. Kowalsky, 255 N.W. 171, 267 Mich. 110.

60. Nev.—Glock v. Elges, 159 P. 629, 39 Nev. 415.
26 C.J. p 876 note 56.

61. Tex.—Brown v. Grant, Civ.App., 119 S.W.2d 185.

Lack of jurisdictional amount

An appeal from a judgment against defendant for forty dollars was required to be dismissed under statute providing that no appeal shall be allowed from a county court judgment except where judgment shall be for damages exceeding one hundred dollars.—Brown v. Grant, supra.

As to land outside jurisdiction

Where plaintiff, seeking to recover tract of land in county of jurisdiction and small noncontiguous tract in another county, confessed error respecting part of judgment for restitution of second tract, supreme court, finding no substantial rights of defendant were adversely affected, would dismiss as to land in county outside trial court's jurisdiction.—Hall v. Haines, 51 P.2d 570, 175 Okl. 81.

ute,[62] or was taken prematurely.[63] It is not a ground for dismissal that, pending trial, defendant had abandoned the premises in litigation, where it appeared that on appeal by defendant to an intermediate court it rendered a judgment determining defendant's liability to pay double the value of the use and occupation of the premises from the execution of the appeal bond to the date of the judgment.[64]

Reversal; restitution of possession. A judgment which correctly awards possession to plaintiff will not be reversed merely because the writ of restitution was improperly or improvidently issued pending the trial.[65] According to some decisions, where plaintiff obtains judgment and is put in possession and defendant on appeal or error succeeds in reversing the judgment, he is entitled to be restored to possession,[66] and that too, although plaintiff has rented the premises;[67] but other decisions have reached a contrary conclusion.[68] If, subsequent to an entry of judgment for plaintiff in the detainer suit, defendant prevails in a suit to quiet title and is in possession by virtue of that suit, an affirmance of the detainer judgment will not be executed to the extent of restoring possession to plaintiff, but the cause will be remanded with directions to enforce a money judgment only.[69]

b. In Intermediate Court

The rules or statutory provisions relating to the hearing and determination of an appeal from a judgment of a justice in other cases ordinarily apply to the hearing and determination on review, by an intermediate court, of a judgment of a justice of the peace in a forcible entry and detainer case.

The rules or statutory provisions relating to the review of cases arising in a justice's court ordinarily apply to the review by an intermediate court of the judgment of a justice of the peace, in a forcible entry and detainer case, with regard to the hearing,[70] the scope of the review,[71] and the determination and disposition of the cause,[72] such as a reversal.[73] The justice's jurisdiction of the case will not be presumed where the transcript fails to show jurisdictional facts;[74] and a review of his findings as being against the weight of the evidence is not permissible in the absence of statute authorizing it.[75] In case the judgment is not in proper form for failure to describe the land it will be affirmed on the merits, but the cause will be remanded so that a proper judgment may be entered nunc pro tunc.[76] Under some statutes, if appellant fails to appear a judgment of affirmance is the only one which can be properly rendered.[77]

Remanding. Where an appeal is taken from a judgment of a justice deciding that he was without jurisdiction and the intermediate court reaches the

62. Utah.—Brandley v. Lewis, 92 P. 2d 338, 97 Utah 217—Hunsaker v. Harris, 109 P. 1, 37 Utah 226—Murphy v. Paumle, 109 P. 2, 37 Utah 228.

63. Tenn.—Carney v. Murphy, 3 Baxt. 310.

64. Okl.—Hampton v. Lynch, 153 P. 1119, 54 Okl. 249.
26 C.J. p 876 note 57.

65. Wash.—Columbia & P. S. R. Co. v. Moss, 102 P. 439, 53 Wash. 512.

66. Cal.—Pico v. Cuyas, 48 Cal. 639.
26 C.J. p 876 note 62.

67. Cal.—Pico v. Cuyas, supra.

68. Conn.—Bull v. Olcott, 2 Root 472—Bird v. Bird, 2 Root 411.
Iowa.—Citizens' State Bank of Panora v. Snyder, 181 N.W. 675.

69. Wash.—Sunday v. Moore, 237 P. 1014, 135 Wash. 414.

70. Ala.—Aldridge v. Hightower, 4 Port. 418.

Trial on record

Where the action is removed from a justice's court by writ of error, the case must be tried on the record without a declaration or jury, and the justice has no right to enter on his minutes other evidence than such as is made ground of exceptions.—Aldridge v. Hightower, supra.

Hearing and proceedings preliminary thereto on appeal or error from justice's court generally see the C.J.S. title Justices of the Peace §§ 178–181, also 35 C.J. p 810 note 39–p 815 note 2.

71. Ala.—Powers v. David, 6 Ala. 9.

It is not a material error that the record does not show that the issue was formed on the plea of not guilty entered by the court.—Powers v. David, supra—26 C.J. p 875 note 18.

Scope and extent of review on appeal from justice's judgment generally see the C.J.S. title Justices of the Peace §§ 213–219, also 35 C.J. p 841 note 58–p 845 note 7.

72. Cal.—Morris v. Turley, 271 P. 916, 94 Cal.App. 691.

Determination and disposition of cause on review of justice's judgment generally see the C.J.S. title Justices of the Peace §§ 228–233, also 35 C.J. p 850 note 77–p 855 note 48.

73. Minn.—Zuercher v. Woodward, 206 N.W. 168, 165 Minn. 262.

Grounds for reversal

(1) A confusion of findings of fact and conclusions of law, contrary to statute, is not ground for a reversal, if there is a finding of forcible entry, and the judgment is manifestly right.—Morris v. Turley, 271 P. 916, 94 Cal.App. 691.

(2) Judgment for plaintiff need not be reversed for errors in finding, where defendant pleaded no defense other than possession under subsequent contract, which disclosed that it had automatically ended, leaving first in full force, until it was terminated.—Zuercher v. Woodward, 206 N.W. 168, 165 Minn. 262.

(3) Judgment for plaintiffs could not be reversed on ground that they failed to exhibit their deed to property when demand for possession was served, where possession had been delivered to plaintiffs before either defendant claimed a right of possession adverse to rights of plaintiffs.—Smith v. Spencer, Mo.App., 130 S.W.2d 653.

74. Mo.—McQuoid v. Lamb, 19 Mo. App. 153.

75. Ohio.—State v. Wood, 22 Ohio St. 537—Mack v. Eckerlin, 27 Ohio Cir.Ct. 138.
26 C.J. p 875 note 20.

76. Mo.—Naylor v. Chinn, 82 Mo. App. 160.

77. Mo.—Schwoerer v. Christophel, 64 Mo.App. 81.

opposite conclusion, it has been held to be the duty of this court to remand the cause to the justice to determine on the merits and that a failure to do so is error.[78] So, where on appeal it appears that the title to the land is in dispute or is called in question, the appellate court should refuse to take further cognizance of the case, and should remand it to the justice with directions to proceed according to the statute.[79]

Dismissal. It is good ground for dismissal that the cause was dismissed by the justice for want of jurisdiction,[80] or was transferred from the county court to the district court because the question of title was involved and because the county court had no jurisdiction to try such issue;[81] that the required steps to perfect the appeal were not taken;[82] that the appeal was not taken within the time required by statute;[83] that there was undue delay in the prosecution of the appeal;[84] that it does not appear that a complaint was filed in the justice's court, and that such complaint is not brought into the court to which the appeal is taken or its loss accounted for;[85] that the appeal bond was not properly signed by the parties,[86] or was not filed within the required time,[87] unless the objection is waived;[88] that before or pending his appeal defendant voluntarily surrendered the premises,[89] and all matters in controversy were settled by agreement between the parties.[90] On the other hand, the fact that there is a defect in the summons is not a ground to dismiss such appeal,[91] and neither is the fact that only one of two defendants or one of two plaintiffs has appealed;[92] and it has been held that an appeal will not be dismissed for failure of appellant to make periodical payments in accordance with the judgment of the justice of the peace before whom the action originated.[93] Where defendant's appeal from a judgment for restitution in plaintiff's favor is dismissed, this does not avoid the judgment of the justice and the writ of restitution is properly issued thereafter.[94] A motion by plaintiff to dismiss the appeal because defendants had abandoned the premises pending trial is a confession that the judgment appealed from was contrary to law and the evidence.[95]

Restitution. On affirmance, the cause may be remanded to enable the justice to issue a writ of restitution,[96] or, it has been held, the writ may issue from the intermediate court itself,[97] and the court on dismissal of an appeal by defendant may award restitution.[98] It has been held that, on reversing the judgment on defendant's appeal, the court has discretionary power to order restitution to him of the premises.[99] Under some statutes, on an appeal, the intermediate court, on finding for appellant, may order a restitution of the premises, but on a writ of error it can only reverse and remand the case for a new trial.[1]

§ 84. —— Trial De Novo

An appeal from the judgment of a justice in a forcible

78. Philippine.—Lucido v. Vita, 25 Philippine 414.

79. Okl.—Davis v. Mayes, 239 P. 571, 112 Okl. 78.

80. W.Va.—Hughes v. Mount, 23 W. Va. 130.

81. Okl.—Bilby v. Stuart, 135 P. 931, 39 Okl. 451.

82. Colo.—Monte Inv. Co. v. Derby, 103 P.2d 1065, 106 Colo. 282.

Failure to file bond for use and occupation

Where plaintiff, in action before justice of the peace, had judgment for possession of the property, and defendant, attempting to appeal to the county court, filed a bond conditioned that she would prosecute her appeal with effect and pay whatever judgment might be rendered, but did not file an additional bond for use and occupation of the premises the appeal was subject to dismissal even if judgment was erroneous. —Monte Inv. Co. v. Derby, supra.

83. Mo.—Bernicker v. Miller, 37 Mo. 498.

26 C.J. p 875 note 26.

84. Ill.—Panton v. Manley, 89 Ill. 458.

Mo.—American Brass Mfg. Co. v. Phillippi, 77 S.W. 475, 765, 103 Mo. App. 47.

26 C.J. p 875 note 27.

85. Ill.—Abbott v. Kruse, 37 Ill.App. 549.

86. Ill.—Hatzenbuehler v. Miske, 27 N.E.2d 644, 305 Ill.App. 496.

87. Ill.—Gholston v. Terrell, 10 N. E.2d 868, 292 Ill.App. 192.

88. Ill.—Gholston v. Terrell, supra.

Motion to dismiss not waived

Where appellee moved to dismiss the appeal for the reason that the appeal bond was not filed within five days after the entry of judgment, she did not waive the motion to dismiss by filing her brief and argument in which she again urged that the appeal be dismissed and discussed no other point except to point out, in response to appellant's attack on the notice to terminate the lease, that there was evidently a typographical error therein.—Gholston v. Terrell, supra.—Wentworth v. Sankstone, 233 Ill.App. 48.

89. Iowa.—Schuldt v. Lee, 284 N.W. 89, 226 Iowa 189—Sherman v. Moore, 271 N.W. 606, 222 Iowa 1359—Kelley v. Kelley, 174 N.W. 342, 187 Iowa 349.

Wash.—Stevens v. Jones, 82 P. 754, 40 Wash. 484.

90. Wash.—Stevens v. Jones, supra.

26 C.J. p 875 note 29.

91. Miss.—Brown v. Ashford, 56 Miss. 677.

92. Mo.—Gray v. Dryden, 79 Mo. 106.

93. Philippine.—Domingo v. Flordeliza, 37 Philippine 694.

94. Tex.—Redden v. Vance, Civ. App., 181 S.W. 782.

95. Okl.—Hampton v. Lynch, 153 P. 1119, 54 Okl. 249.

96. Ala.—Murry v. Harper, 3 Ala. 744.

97. Mo.—Keim v. Daugherty, 8 Mo. 498.

98. Minn.—Fish v. Toner, 41 N.W. 972, 40 Minn. 211.

26 C.J. p 875 note 37.

99. Cal.—Kennedy v. Hamer, 19 Cal. 374.

Wis.—Towle v. Keith, 27 Wis. 268.

26 C.J. p 875 note 39.

1. Iowa.—Rasmussen v. Alberts, 246 N.W. 620, 215 Iowa 644.

entry and detainer case is triable de novo, subject to statutory limitations.

Under some statutes, where an appeal is taken from the judgment of a justice in an action based on the statutes relating to forcible entry and detainer the trial is de novo,[2] and it may be brought to trial at such time or term as is authorized by the statute.[3] The rights of the parties on such trial are to be judged by their status at the time of hearing in the court to which the appeal is taken.[4] The jurisdiction of the intermediate court, however, is in a sense appellate only,[5] jurisdiction in the justice being necessary to give jurisdiction to the intermediate court on a trial de novo,[6] and only such questions as are within the jurisdiction of the justice can be determined.[7] On the trial no error made by the justice before whom the cause was originally tried can be taken advantage of,[8] and the court should not inquire into irregularities of the proceedings before the justice.[9] Defendant cannot set up an equitable defense,[10] such as estoppel.[11] Under some statutes it is not necessary to file new pleadings;[12] but the court has the same power to amend as had the justice before whom the action was instituted.[13] It has been held error to permit an intervener over the objection of the parties to file a plea putting the title in issue.[14] Complainant may be required to prove the allegations of his complaint whether defendant appears and defends or not;[15] and in an action transferred from a justice's court to a superior court, he has the burden of showing prior possession in himself and either a forcible entry or unlawful detainer by defendant or else title in himself superior to that of defendant.[16] Where the question of title is in issue, and the action in effect one of ejectment, it is error to refuse defendant's offer to prove prior possession and title and to strike out similar evidence.[17]

Such judgment only can be rendered as could have been rendered by the justice;[18] and under some statutes, if appellant fails to enter an appearance on the appeal, a judgment by default may be entered against him.[19] If a judgment for damages or rent is authorized by statute, it must be limited to the constitutional amount over which the justice has jurisdiction,[20] and a judgment in excess of this amount will be invalid unless the excess is remitted;[21] but where there is no limitation in the constitution, and the statute permits damages to be recovered, the amount is unlimited.[22]

§ 85. Certiorari

Certiorari to review the judgment of a justice, in a forcible entry and detainer action, is governed by the rules and statutory provisions relating to certiorari to review a judgment of a justice of the peace in general, except where special statutory provisions relating to actions of this character apply.

2. Ill.—First Nat. Bank v. Bohnhorst, 27 N.E.2d 319, 305 Ill.App. 251.
Iowa.—Kelley v. Kelley, 174 N.W. 312, 187 Iowa 349.
Miss. Gee v. Rimmer, 195 So. 312, 188 Miss. 460.
26 C.J. p 876 note 67.

In North Dakota, a forcible entry and detainer action is not triable de novo in the supreme court, since Comp.L.1913 § 7846, providing for a trial de novo in such court, expressly provides that it shall not apply to actions or proceedings properly triable with a jury, and § 7608 provides that an action in forcible entry and detainer is properly triable to a jury.—Interior Lumber Co. v. Kunert, 237 N.W. 780, 61 N.D. 322.
Trial de novo on appeal from justice's court in general see the C.J.S. title Justices of the Peace §§ 185–219, also 35 C.J. p 815 note 4—p 840 note 38.

3. Minn.—Hoffman v. Parsons, 6 N.W. 797, 27 Minn. 236.
26 C.J. p 876 note 67 [b].

4. Iowa.—Kelley v. Kelley, 174 N.W. 342, 187 Iowa 349.
26 C.J. p 876 note 68.

5. Okl.—Brown v. Hartshorn, 69 P. 1049, 12 Okl. 121.

6. Ill.—Eckels v. Wolf, 55 Ill.App. 310—Abbott v. Kruse, 37 Ill.App. 519.

7. Okl.—Brown v. Hartshorn, 69 P. 1049, 12 Okl. 121.

8. Mo.—St. Louis Agricultural & Mechanical Assoc. v. Reinecke, 21 Mo.App. 178.

9. Ala.—Reynolds v. Harris, 62 Ala. 115.
Miss.—Brown v. Ashford, 56 Miss. 677.
26 C.J. p 877 note 76.

10. Mo.—Ridgley v. Stillwell, 28 Mo. 400—Grunewald v. Schaales, 17 Mo.App. 321.

11. Mo.—Willis v. Stevens, 24 Mo. App. 494.

12. Neb.—McCue v. Lee, 21 N.W. 1, 16 Neb. 575.

13. Miss.—Gee v. Rimmer, 195 So. 342, 188 Miss. 460.

Amendment of description
The fact that affidavit on which unlawful entry and detainer proceedings were instituted described land as being in wrong township was not fatal, since circuit court, wherein cause was tried de novo on appeal from justice of peace, had power to amend.—Gee v. Rimmer, supra.

The ad damnum may be increased on the trial de novo.—Brennan v. McMenamy, 78 Mo.App. 122—Lucas v. Fallon, 40 Mo.App. 551—35 C.J. p 827 note 99 [b] (2).
Amendment on trial de novo generally see the C.J.S. title Justices of the Peace §§ 191–203, also 35 C.J. p 822 note 64—p 836 note 38.

14. Okl.—Bilby v. Stuart, 135 P. 931, 39 Okl. 451.

15. Okl.—Stephens v. Sheldon, 231 P. 725, 109 Okl. 150—Bullock v. Peek, 168 P. 797, 66 Okl. 210.

16. Ala.—Daniel v. Williams, 58 So. 419, 177 Ala. 140—Fowler v. Pritchard, 41 So. 667, 148 Ala. 261.

17. Dak.—Murry v. Burris, 42 N.W. 25, 6 Dak. 170.

18. Ala.—Crocker v. Goldstein, 95 So. 873, 209 Ala. 172.

19. Tex.—Cox, Inc., v. Knight, Civ. App., 50 S.W.2d 915.

20. Ala.—Crocker v. Goldstein, 95 So. 873, 209 Ala. 172—Giddens v. Bollings, 9 So. 274, 92 Ala. 586.
26 C.J. p 877 note 72.

21. Ala.—Giddens v. Bolling, supra.
26 C.J. p 877 note 72.

22. Ind.—Sturgeon v. Hitchens, 22 Ind. 107.

The rules and statutory provisions relating to the review by certiorari of the judgment of a justice of the peace in general ordinarily apply to certiorari to such a judgment in a forcible entry and detainer action,[23] except to the extent that it is controlled by special statutory provisions relating to actions of this character.[24] Certiorari lies to review proceedings in these actions when authorized by statutory[25] or constitutional provisions,[26] and also where no other remedy is provided by statute, in which case it is the only remedy,[27] or where the statute expressly provides that certiorari shall be the only remedy.[28] Ordinarily certiorari will not be granted where the remedy by appeal is available,[29] but under some statutes, within certain limitations, defendant may either appeal and surrender possession of the property or he may retain the property and obtain a review by certiorari upon executing a supersedeas bond.[30] The jurisdiction of a particular court or judge to issue the writ generally depends on the constitutional or statutory provisions authorizing the writ.[31]

Grounds for writ. Want of jurisdiction in the justice trying the case is a proper ground for allowance of a writ of certiorari,[32] as is also a refusal of the justice to grant an appeal and supersedeas on tender of the statutory bond.[33] It is not an available objection that the complaint was made to, and the process issued by, one justice, and the case was tried by another, where their powers are coextensive.[34]

Right of review; parties. Where the remedy is appropriate, either party is entitled to a writ of certiorari.[35] Under a statute authorizing the removal by "the defendant," any defendant, where there are several, may cause the removal by certiorari, without other defendants joining in the application,[36] and such removal may be made by one of the defendants, who are jointly and severally liable, before other defendants are served with summons or notified by publication,[37] and such a removal operates to remove the entire case.[38]

Proceedings to procure writ. Statutory requirements of a mandatory nature as to the proceedings for procuring the writ must be strictly complied with.[39] A requirement that service of the justice's summons be had on defendant before the removal of the cause is waived by defendant's general appearance in the court to which the cause is so removed,[40] or where the removal is by one of several defendants, by the other defendants joining in the application, or voluntarily appearing and answering to the merits.[41] A failure to serve the certiorari writ on the justice does not render the removal of the cause irregular, where, in obedience to the writ, the justice or his clerk filed in the higher court the transcript required by statute.[42] The transcript need not be certified by the justice personally, but may be certified by his clerk as a ministerial act;[43] and even though the clerk has no power to affix the name of the justice to the transcript the defect may be waived by defendant making a general appearance in the higher court.[44]

The proceedings must be taken and the writ issued within the time fixed by the statute;[45] but un-

23. R.I.—East Greenwich v. Guenond, 78 A. 1015, 32 R.I. 224.
Certiorari to review decision of justice generally see the C.J.S. title Justices of the Peace §§ 243–266, also 35 C.J. p 859 note 20–p 886 note 14.

24. Tenn.—Ammons v. Coker, 139 S.W. 732, 124 Tenn. 676.

25. R.I.—East Greenwich v. Guenond, 78 A. 1015, 32 R.I. 224.
26 C.J. p 877 note 85.

26. Ga.—McDonald v. Cousins, 23 Ga. 227—Taylor v. Gay, 20 Ga. 77.

27. N.J.—Johnson v. Booge, 56 A. 238, 70 N.J.Law 193.
26 C.J. p 877 note 87.

28. Ala.—Bell v. Killcrease, 11 Ala. 685.

29. Cal.—Coley v. Superior Court in and for City and County of San Francisco, 264 P. 1110, 89 Cal.App. 330.

Neglect to appeal
Where a party having a remedy by appeal loses it through his own neglect he will not be entitled to the writ.—State v. Raum, 3 Mo.App. 589.

30. Tenn.—Ammons v. Coker, 139 S.W. 732, 124 Tenn. 676—Day v. Johnson, 4 Coldw. 231.
26 C.J. p 877 note 90 [a].

31. U.S.—Holmstead v. Smith, C.C. D.C., 12 F.Cas.No.6,630, 5 Cranch C.C. 343.
26 C.J. p 877 note 97.

32. U.S.—Kennedy v. Gorman, C.C. D.C., 14 F.Cas.No.7,702, 4 Cranch C.C. 347.
N.J.—State v. Dennis, 43 N.J.Law 380.

33. Ala.—Ex parte Grant, 53 Ala. 16.

34. Ala.—Perryman v. Burgster, 6 Port. 99.

35. U.S.—Russell v. Wheeler, Ark. Super., 21 F.Cas.No.12,164a, Hempst. 3.
Tenn.—Day v. Johnson, 4 Coldw. 231.

36. Mo.—Gary Realty Co. v. Swinney, 269 S.W. 961, 306 Mo.App. 592, certiorari denied Swinney v. Gary Realty Co., 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162.

37. Mo.—Gary Realty Co. v. Swinney, supra.

38. Mo.—Gary Realty Co. v. Swinney, supra.

39. Mo.—State ex rel. Brown v. Bird, 73 S.W.2d 821, 228 Mo.App. 800.

40. Mo.—State ex. rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760.

41. Mo.—Gary Realty Co. v. Swinney, 269 S.W. 961, 306 Mo.App. 592, certiorari denied Swinney v. Gary Realty Co., 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162.

42. Mo.—State ex rel. Morris Bldg. & Inv. Co. v. Brown, 72 S.W.2d 859, 228 Mo.App. 760.

43. Mo.—State ex rel. Morris Bldg. & Inv. Co. v. Brown, supra.

44. Mo.—State ex rel. Morris Bldg. & Inv. Co. v. Brown, supra.

45. Mo.—Kincaid v. Mitchell, 2 Mo. 223.
Tenn.—Day v. Johnson, 4 Coldw. 231.

der some statutes the writ may be awarded either in term time or in vacation;[46] and the action may be removed to the proper court by certiorari notwithstanding there have been several mistrials before the justice before whom the cause is pending.[47]

The petition for the writ must show on its face the error or illegality complained of, and that there was some attempt to make the grounds relied on for the certiorari available on the trial, or the reasons why they were not presented must be alleged.[48] The petition should also show some reason for not resorting to some other remedy if another remedy is available.[49] It has been held sufficient for the petition to state the merits alone,[50] unless it is filed after the time allowed by statute has elapsed, in which case it must also show a sufficient cause for the delay and such as would entitle the petitioner to relief under the general rules of removal relating to such writs.[51] A petition by defendant should also assert a right of possession to the premises;[52] and if the petition shows on its face that the judgment was for the right party the court will refuse the writ[53] and dismiss the petition, although the proceedings before the justices were informal and defective.[54]

Hearing and review. In cases brought up by certiorari the general rule is that errors must be assigned and the trial had on the record alone,[55] and only such errors can be reviewed as are called to the attention of the court by an assignment of error.[56] Under some statutes the only question which can be considered is whether the lower court had jurisdiction,[57] and error, if any, in rendering the judgment will not be considered.[58] Under other statutes the court to which the cause has been removed may decide on errors of fact as well as of law,[59] and may retry the facts by a jury.[60]

Determination and disposition of cause. If there is any evidence on which the verdict could be based the court on certiorari will not interfere with it.[61] It has been held, that where the complaint in the action substantially conforms to the statute, the reviewing court in reversing the judgment at the instance of defendant should remand the cause for further proceedings;[62] but under a statute authorizing the reviewing court only to set aside the justice's proceedings for irregularities it cannot remand the proceedings to the justice's court after setting them aside for irregularities.[63] It has also been held that the appellate court on reversing the judgment cannot grant a writ of restitution;[64] but, on the other hand, it has been held that, where plaintiff has been put in possession, a superior court on reversing the judgment may order restoration of possession and issue a writ of restitution, although the statute does not specially provide for such writ.[65] If a statute provides that on dismissal of certiorari the court shall enter judgment for the amount recovered in the inferior court with interest and costs, the court has no power to render judgment for the damages assessed.[66]

§ 86. Record

The record must show compliance with the statutory requirements, necessary to give the appellate court jurisdiction to review the errors complained of.

In accordance with the rules relating to the record on appeal or error from justices' courts generally, the record on appeal or error from the judgment of a justice of the peace in a forcible entry and detainer action must show at least a substantial compliance with the statutory requirements as to the existence of every fact necessary to give the appellate court jurisdiction,[67] such as that there

46. U.S.—Holmstead v. Smith, C.C. D.C., 12 F.Cas.No.6,630, 5 Cranch C.C. 343—U. S. v. Browning, C.C. D.C., 24 F.Cas.No.14,674, 1 Cranch C.C. 500.
Ala.—Childress v. McGehee, Minor 131.

47. Mo.—Kincaid v. Mitchell, 6 Mo. 223—Mason v. Pennington, 53 Mo. App. 118.

48. Tex.—Clay v. Clay, 7 Tex. 250.

49. Ala.—Wright v. Hurt, 9 So. 386, 92 Ala. 591.
26 C.J. p 878 note 2.

50. Tenn.—Edwards v. Batts, 5 Yerg. 441.

51. Tenn.—Rogers v. Wheaton, 13 S. W. 689, 88 Tenn. 665.

52. Tex.—Clark v. Hutton, 28 Tex. 123.

53. Ga.—Harrell v. Holt, 76 Ga. 25.

54. Tenn.—Childress v. Black, 9 Yerg. 446.

55. Ala.—Perryman v. Burgster, 6 Port. 99.
26 C.J. p 878 note 6.

56. Ala.—Murray v. Williams, 8 Port. 47.

57. Mich.—Parker v. Copland, 4 Mich. 528.
N.J.—Johnson v. Booge, 56 A. 238, 70 N.J.Law 193.
S.D.—Ben Oldest Child v. Circuit Court, Fourth Judicial Circuit, in and for Buffalo County, 279 N.W. 305, 66 S.D. 120.
Under a common-law writ of certiorari, the same rule applied.—Newton v. Leary, 25 N.W. 39, 64 Wis. 190.

58. S.D.—Ben Oldest Child v. Circuit Court, Fourth Judicial Circuit, in and for Buffalo County, 279 N.W. 305, 66 S.D. 120.

59. Wis.—Bracken v. Preston, 1 Pinn. 365.

60. Tenn.—Lane v. Marshall, Mart. & Y. 255.
26 C.J. p 878 note 6 [b].

61. N.J.—Berry v. Williams, 21 N. J.Law 423.

62. Ala.—Turnly v. Stinson, 1 Ala. 456—Bliss v. Winston, 1 Ala. 344.

63. Mo.—Sholar v. Smyth, 3 Mo. 416.

64. Wis.—Newton v. Leary, 25 N.W. 39, 64 Wis. 190.

65. Ala.—Wright v. Hurt, 9 So. 386, 92 Ala. 591.

66. Tenn.—Weigand v. Malatesta, 6 Coldw. 362.

67. Ill.—State Bank of St. Charles v. Burr, 277 Ill.App. 373.

was, as required by statute, a prayer for an appeal,[68] and that the justice fixed the amount of the appeal bond;[69] otherwise the appeal may be dismissed,[70] even though it may otherwise appear that the amount was so fixed.[71] However, if appellant has acted in good faith to perfect his appeal, the appellate court should grant his motion for a vacation of the order dismissing his appeal, and for a rule on the justice to furnish a full transcript of the record, which would show these requisites.[72] The record must also show that the cause of action was within the jurisdiction of the justice;[73] and must contain an assignment or specification of errors;[74] and where by statute an intermediate court on reversing the judgment of the justice tries the case de novo it is permissible on appeal to a higher appellate court to assign errors in the record arising previous to the judgment.[75] Under a statute which provides that no appeal shall be allowed from the judgment nor shall a new trial be granted in forcible entry and detainer, but such proceeding may be removed by certiorari into the supreme court, a bill of exceptions does not lie in forcible entry and detainer.[76]

§ 87. Bonds or Deposits on Appeal, Error, or Certiorari

Proceedings for approval of an undertaking or the mere filing of an undertaking will not necessarily stay proceedings on a judgment.

Under a statute providing that an appeal will not stay proceedings on the judgment unless the trial judge so directs, acts of various other judges taking part in subsequent proceedings for the approval of an undertaking will not effectuate a stay,[77] and neither will the mere filing of the undertaking.[78]

§ 88. —— Necessity

Bonds must be given on appeal or certiorari where the statute so directs; and if appellant desires to have the appeal operate as a stay, a supersedeas bond is also necessary.

Where the statute so requires, bonds must be given on appeal from,[79] or certiorari to,[80] the court in which the action is brought and, in case of a noncompliance with the statute, the appeal will be dismissed.[81] So if a defendant desires to have the appeal operate as a stay a supersedeas bond is also necessary,[82] unless as is the case in a number of jurisdictions the appeal bond itself contains the requirements of a supersedeas bond and has the effect thereof.[83] If a statute provides that an appeal from a justice shall not be effectual unless a bond is given to secure payment of costs of appeal and such bond is not given, the fact that another bond re-

Record on appeal or error from justice's judgment generally see the C.J.S. title Justices of the Peace §§ 161–169, also 35 C.J. p 789 note 29–p 804 note 45.

68. Ill.—State Bank of St. Charles v. Burr, supra.

69. Ill.—Lilly v. Lilly, 240 Ill.App. 488—Drewitz v. Sault, 228 Ill.App. 385.

Cure of defect

A transcript which fails to show that the justice fixed the amount of the appeal bond, as required by statute, cannot be cured by affidavits showing that he did actually fix the amount of the bond.—Drewitz v. Sault, supra.

70. Ill.—Lilly v. Lilly, 240 Ill.App. 488—Drewitz v. Sault, 228 Ill.App. 385.

71. Ill.—Drewitz v. Sault, supra.

72. Ill.—State Bank of St. Charles v. Burr, 277 Ill.App. 373.

73. W.Va.—Carpenter v. Swick, 182 S.E. 764, 116 W.Va. 626.

As affected by statutory limitation

To sustain judgment for plaintiff in unlawful entry and detainer action before justice of peace, record of proceeding before justice of peace must affirmatively disclose that entry complained of occurred within three years next prior to bringing of action as required by statute.—Carpenter v. Swick, supra.

74. Tex.—Madison v. Martinez, Civ. App., 56 S.W.2d 908.
26 C.J. p 874 note 1.

Portion of judgment awarding money damages, not contested by assignment of error, is not reviewable.—Madison v. Martinez, supra.

Necessity of assignment of errors on certiorari see supra § 85.

75. Ala.—Hilliard v. Carr, 6 Ala. 557.

76. R.I.—East Greenwich v. Guenond, 78 A. 1015, 32 R.I. 224.

77. Cal.—St. Clair v. Joos, 226 P. 623, 66 Cal.App. 398.

78. Cal.—St. Clair v. Joos, supra.

79. Colo.—Erbaugh v. Fields, 235 P. 568, 77 Colo. 254.
26 C.J. p 878 note 9 i.

Poverty of appellant

Bond required of appellant in forcible entry and detainer for costs and damages being condition precedent to perfecting appeal no appeal lies without giving statutory bond, notwithstanding appellant's alleged poverty.—Vinson v. McPherson, Tex.Civ. App., 54 S.W.2d 829.

80. Ohio.—Stewart v. Emory, Tapp. 100.
Tex.—Holmes v. Holloway, 21 Tex. 658.

81. Colo.—Erbaugh v. Fields, 235 P. 568, 77 Colo. 254.
26 C.J. p 878 note 11.

82. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.
Minn.—Gruenberg v. Saumweber, 248 N.W. 38, 188 Minn. 566.
26 C.J. p 878 note 12.

When necessary direction is made and bond given, the court has no further control over the matter and cannot withdraw his direction and discharge his order.—Lee Chuck v. Quan Wo Chong Co., 22 P. 594, 81 Cal. 222, 15 Am.S.R. 50.

Liability of sureties on defendant's redelivery bond

Where the appeal itself does not operate as a stay of proceedings in forcible entry and detainer cases, sureties on defendant's redelivery bond, given to enable him to retain possession and conditioned to pay plaintiffs any sum found due and costs, are liable in an action on the bond, where the judgment was not stayed and execution against defendant was returned nulla bona notwithstanding the pendency of an appeal.—Morrison v. Fidelity & Deposit Co., 166 P. 1122, 97 Wash. 623.

83. Ill.—Wood v. Tucker, 66 Ill. 276.
26 C.J. p 878 note 13.

quired by statute to authorize a stay of proceedings is given will not render the appeal effectual.[84] On an appeal from the superior court to the supreme court, an appeal bond in a sum sufficient to cover the rent of the premises pending the litigation is not necessary where there is no statute requiring it.[85] A bond conditioned to pay rent, where appellant is entitled to possession, on appeal from a judgment in unlawful detainer, is unnecessary and void.[86] A statute, one section of which provides that, where a party omits to file the bond required thereby necessary to perfect the appeal, he may be permitted to amend or perform such act, does not empower the supreme court to permit to be filed the additional undertaking for an appeal required by another section of the statute since it is a condition precedent to the appeal, and in addition to, and not a substitute for, the undertaking required by the section first mentioned.[87]

Waiver. The want of a bond may be waived by moving for judgment on the pleadings without objecting to the jurisdiction on appeal.[88]

§ 89. —— Requisites and Sufficiency

The bond must be in substantial compliance with statutory requirements, and is sufficient if it is.

A bond given without statutory authority cannot be enforced as a statutory obligation.[89] The bond or other security must be in substantial compliance with the requirements of the statute under which it is given;[90] such a bond or security, however, will be sufficient.[91] A slight variance between the language of the bond and the language of the statute will not invalidate it,[92] and the fact that the appeal bond does not contain all the conditions enumerated in the statute is not ground for dismissal of the appeal,[93] although it is said to be the better practice in all cases for the bond to comply strictly with the language of the statute.[94] If the bond contains conditions not enumerated in the statute it will be void,[95] or the condition will not be obligatory on the makers.[96] Obligors cannot object to omissions in the instrument which operate to their benefit.[97]

The bond should describe the action and the amount or substance of the recovery.[98] No specific sum need be designated as a penalty in the bond under some statutes,[99] although under others it seems that this is necessary.[1] Where the statute requires the bond to be sufficient to secure rent, damages, and costs "fixed by the court," an appeal cannot be perfected by defendant by filing a bond without first having the amount thereof fixed by the justice.[2] If the bond is a supersedeas bond, or an appeal bond which by force of the statutes operates as a stay, it must, if the statutes so provide, be conditioned on payment by defendant of all rents adjudged against him,[3] or such reasonable rent of the premises as the magistrate shall adjudge if the judgment is not reversed,[4] or of all rents accruing during the appeal,[5] or all rents becoming due, if any, from the commencement of the suit until the final termination thereof,[6] or twice the value of the yearly rent.[7] The bond must be conditioned for payment of costs and damages when the statutes so require;[8] and an undertaking to pay all costs is not

84. S.D.—Rudolph v. Herman, 50 N.W. 833, 2 S.D. 399.

85. Tenn.—Sherrill v. Madry, 6 Lea 231.

86. Tenn.—Hawkins v. Alexander, 18 S.W. 882, 91 Tenn. 359.

87. Or.—Zelig v. Blue Point Oyster Co., 104 P. 193, 51 Or. 513.

88. Colo.—Lamon v. Zamp, 259 P. 1041, 82 Colo. 294.

89. Okl.—Gillespie v. Frisbie, 148 P. 991, 46 Okl. 438.

Bond held valid as common-law undertaking

Colo.—Hewitt v. Landis, 225 P. 842, 75 Colo. 277.

Ill.—Pierson v. Lawyer, 225 Ill.App. 400.

90. Minn.—Gruenberg v. Saumweber, 218 N.W. 38, 188 Minn. 566.

Okl.—Guess v. Hogue, 98 P.2d 598, 186 Okl. 357.

Tex.—Ringgold v. Graham, Com. App., 13 S.W.2d 355, reversing Graham v. Ringgold, Civ.App., 2 S.W.2d 893.

26 C.J. p 879 note 19.

"Conditioned according to law"

Statutes dealing with appeals in forcible entry and detainer actions, stating that appeal bond should be "conditioned according to law," refer to statutes relating to appeals generally from judgments of a justice to the district court.—State ex rel. Heron v. District Court of First Judicial Dist. within and for Rio Arriba County, N.M., 128 P.2d 154.

91. Neb.—Morrison v. Boggs, 62 N.W. 173, 44 Neb. 248.

26 C.J. p 879 note 22—3 C.J. p 1164 note 62 [b].

92. Mass.—Shaw v. McIntier, 5 Allen 423.

93. Ill.—Enright v. Rehbach, 133 Ill. App. 50.

94. Kan.—Templeton v. Millis, 24 Kan. 381.

95. Me.—Merrill v. Hinckley, 49 Me. 40—Dennison v. Mason, 36 Me. 431.

96. Ill.—Tomlin v. Green, 39 Ill. 225.

26 C.J. p 879 note 23.

97. Mass.—Shaw v. McIntier, 5 Allen 423.

98. Ill.—McKoy v. Allen, 36 Ill. 429.

99. Neb.—Morrison v. Boggs, 62 N.W. 173, 44 Neb. 218.

1. Mass.—Warner v. Howard, 121 Mass. 82.

2. Ill.—Fairbank v. Streeter, 31 N.E. 494, 142 Ill. 226, reversing 41 Ill.App. 434.

26 C.J. p 879 note 28.

3. Mo.—Hastings v. Hennessey, 58 Mo.App. 205.

4. Me.—Merrill v. Hinckley, 49 Me. 40—Dennison v. Mason, 36 Me. 431.

5. Wis.—Ferber v. Watry, 16 Wis. 143.

6. Ill.—Wood v. Tucker, 66 Ill. 276.

26 C.J. p 879 note 32.

7. Ala.—Helton v. Ft. Gaines Oil & Guano Co., 39 So. 925.

26 C.J. p 879 note 33.

8. Ala.—Helton v. Ft. Gaines Oil & Guano Co., supra.

26 C.J. p 879 note 34.

Particular bond construed

Clause in bond, that compliance will be had "with such other order

a sufficient compliance with a statute requiring the undertaking to be conditioned for the payment of any judgment and costs that may be recovered.[9] A bond will be insufficient which omits a condition required by statute "that the appellant will not suffer waste to be committed."[10] The appeal bond must be executed by the party appealing;[11] it cannot be executed by another person, although he is the landlord of plaintiff;[12] but it has been held that the failure of appellant to attach his signature to the bond will not render it ineffective, where it is expressly provided by statute that the signing of the bond by appellant is not essential to its validity.[13] A bond on appeal which is approved by the justice, and which "contains words of obligation, and has a scroll [L.S.] opposite the name of one of the two signers, is sufficient where the paper is executed by both, who, contemporaneously, verify the instrument by affidavit, as their bond."[14] When the statute requires the bond to be executed by sureties, a bond without surety is not in substantial compliance therewith,[15] and appellants cannot act as sureties for each other.[16] A bond with sureties approved by the justice will be sufficient, although no justification of the sureties is annexed.[17] Approval by the justice is conclusive only as to the sufficiency of the sureties, however.[18] Deposit of security in lieu of a bond is not sufficient to stay proceedings pending appeal in the absence of statutory provision for such deposit.[19]

§ 90. —— Time of Filing

The bond must be filed within the time required by statute, and that time cannot be extended in the absence of statutory authorization.

An appeal bond must be filed within the time required by statute,[20] otherwise the appeal will be dismissed[21] or the judgment affirmed.[22] It has been held that the court has no power to extend the time for filing the bond,[23] unless specially authorized by statute.[24] Under a statute providing that if the appeal bond is insufficient a new bond may be filed within such time as shall not delay the trial, the refusal to continue on the filing of a new appeal bond is not erroneous.[25]

§ 91. —— Approval of and Fixing Amount of Bond

The court in which the action is tried, and not the appellate court, is the proper court to approve and fix the amount of the bond; and if the bond is in compliance with the statute, it should be promptly approved.

The court in which the action is tried and not the appellate court is the proper court to approve the bond.[26] If an appeal bond when presented to the justice is in proper form, it is his duty to approve it,[27] but he should not approve a bond which is not in compliance with the statutes.[28] An appeal bond when tendered must be promptly approved or rejected.[29]

The court in which the action is brought must fix the amount of the bond if this is required by statute,[30] and not the court[31] or clerk of the court[32] to which the appeal is taken. Where the bond is filed in the court to which the appeal is taken with-

as may be rendered" in addition to condition in ordinary bond, was held not equivalent to condition requiring payment of such damages as may be sustained by prosecution of appeal, as required by statute.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.

9. Mont.—State v. District Court of Tenth Dist. in and for Fergus County, 284 P. 537, 86 Mont. 396.

10. Kan.—Templeton v. Millis, 24 Kan. 381.

11. Ill.—Armson v. Forsyth, 40 Ill. 49.

Joint appeal

Ill.—Hatzenbuehler v. Miske, 27 N.E.2d 644, 305 Ill.App. 496.

12. Ill.—Armson v. Forsyth, 40 Ill. 49.

13. Kan.—Pyle v. Western Union Tel. Co., 132 P. 990, 89 Kan. 808.

14. Cal.—Canfield v. Bates, 13 Cal. 606, 609.

15. Tex.—Ringgold v. Graham, Com. App., 13 S.W.2d 355, reversing Graham v. Ringgold, Civ.App., 2 S.W.2d 893.

16. Tex.—Ringgold v. Graham, supra.

17. Cal.—Kennedy v. Hamer, 19 Cal. 374.

18. Tex.—Ringgold v. Graham, Com. App., 13 S.W.2d 355, reversing, Graham v. Ringgold, Civ.App., 2 S.W.2d 893.

19. Minn.—Gruenberg v. Saumweber, 248 N.W. 38, 188 Minn. 566.

20. Ill.—Gholston v. Terrell, 10 N.E.2d 868, 292 Ill.App. 192.
Mo.—Stephens v. Anth, App., 147 S.W.2d 165, transferred, see Sup., 142 S.W.2d 1008.
26 C.J. p 879 note 42.

21. Ill.—Gholston v. Terrell, 10 N.E.2d 868, 292 Ill.App. 192.
26 C.J. p 880 note 43.

22. Mo.—Hastings v. Hennessey, 52 Mo.App. 172.

23. Ill.—Hosher v. Hesterman, 51 Ill.App. 75—Kenny v. Jones, 37 Ill. App. 615.
26 C.J. p 880 note 45—3 C.J. p 1184 note 12 [a].

24. Cal.—Rabe v. Hamilton, 15 Cal. 31.
Minn.—Mills v. Wilson, 60 N.W. 1083, 59 Minn. 107.
26 C.J. p 880 note 46.

25. Mo.—Frick Co. v. Marshall, 86 Mo.App. 463.

26. Colo.—Getty v. Miller, 51 P. 166, 10 Colo.App. 331.

27. Neb.—State v. Clark, 38 N.W. 832, 24 Neb. 318.

28. Kan.—Templeton v. Millis, 24 Kan. 381.

29. Cal.—People v. Harris, 9 Cal. 571.
26 C.J. p 880 note 52.

30. Ill.—Drewitz v. Sault, 228 Ill. App. 385.
Wash.—State v. Benson, 59 P. 501, 21 Wash. 580.
26 C.J. p 880 note 53.

31. Ill.—Fairbank v. Streeter, 31 N.E. 494, 142 Ill. 226.
26 C.J. p 880 note 64.

32. Ill.—Bowlby v. Robinson, 45 Ill. App. 531.

out the amount of the bond being fixed by the justice, the appeal will be dismissed.[33]

§ 92. —— Amended and New Bonds

Defective, as distinguished from void, bonds may be amended in the sound discretion of the court; and a new bond may be filed after expiration of the statutory time where the defective bond it replaces was filed within the prescribed time.

In the absence of some statute authorizing the amendment of appeal bonds, a motion to amend an appeal bond is addressed to the sound discretion of the court and its decision is not reviewable;[34] but generally an amendment of a defective appeal bond will be permitted if it is made to appear to the court that the appeal was taken in good faith and not for delay.[35] A new bond may be filed after the expiration of the statutory time where the defective bond which it is intended to replace was filed within the time prescribed.[36] If no motion is made to amend a defective appeal bond when objected to, the appeal will be dismissed.[37] No amendment will be permitted if the bond is void[38] or wholly fails to comply with the statute and is inconsistent and unintelligible as to purpose and obligation;[39] and it has been held that a bond invalid for failure to comply with a statutory requirement that the amount of the bond be fixed by the justice is not amendable.[40] The superior court is not concluded by the amount of the appeal bond fixed by the justice, but may require a bond in a larger sum to be filed and in default of compliance may dismiss the appeal.[41] If the amount is fixed by statute and the amount of the bond required by the justice is less than that so fixed the court to which an appeal is taken may require defendant to increase his bond to that amount but no more,[42] and where the court requires a new bond which is excessive in amount and dismisses the appeal on failure to give it, the judgment will be reversed.[43] The court cannot exercise the power to require a new bond before commencement of the term to which the appeal is taken.[44] While the court may in its discretion require new bondsmen, an order that appellant pay to appellee the expenses incurred in investigating sureties on an appeal bond and furnish him with an abstract of their real estate, constitutes an abuse of this discretion.[45] Successive appeal bonds given in the same proceedings are cumulative in the absence of an expressed intention of the parties, or statutory provision to the contrary.[46] Whether or not the new bond shall operate to supersede the original bond depends on the character of the order;[47] but the obligations of appeal bonds furnished at different stages of the proceedings to perfect different appeals do not supersede each other.[48] Where the bond given on an appeal to an intermediate court satisfies the requirements of the statute, no further bond may be necessary as a prerequisite to an appeal from the intermediate court to the court of last resort.[49]

§ 93. —— Effect of Supersedeas Bond

A supersedeas bond stays all proceedings in the action pending the appeal, and preserves all the parties' rights.

A supersedeas bond stays all proceedings in the action pending the appeal, preserves all rights of the parties, and if defendant is appellant secures to him the right to remain in possession of the premises pending the appeal.[50] After the necessary

33. Ill.—Ton v. Nemeth, 209 Ill.App. 568.

34. Ill.—Harlan v. Scott, 3 Ill. 65.

35. Philippine.—Requepo v. Judge First Instance, 21 Philippine 77, 78.

36. Cal.—Cummins v. Scott, 23 Cal. 526.

37. Ill.—Wood v. Tucker, 66 Ill. 276 —McKoy v. Allen, 36 Ill. 429.

38. Ill.—Hatzenbuehler v. Miske, 27 N.E.2d 644, 305 Ill.App. 496.
Iowa.—Cuddelback v. Parks, 2 Greene 148.
26 C.J. p 880 note 62.

39. Okl.—Guess v. Hogue, 98 P.2d 598, 186 Okl. 357.

40. Ill.—Fairbank v. Streeter, 31 N. E. 494, 142 Ill. 226.

41. Tenn.—Skipwith v. Johnson, 5 Coldw. 454.
26 C.J. p 880 note 64.

42. Tenn.—Skipwith v. Johnson, supra.

43. Mo.—Lucas v. Fallon, 40 Mo. App. 551.

44. Ill.—Ryder v. Meyer, 66 Ill. 40.

45. Ill.—Hersey v. Westover, 7 Ill. App. 629.

46. Mo.—Gary Realty Co. v. Swinney, 17 S.W.2d 505, 322 Mo. 450.

47. Ill.—International Bank v. Poppers, 105 Ill. 491.
Mo.—Walter v. McSherry, 21 Mo. 76.
26 C.J. p 880 note 69.

48. Kan.—Coonradt v. Campbell, 29 Kan. 391.

49. Or.—Wolfer v. Hurst, 80 P. 419, 82 P. 20, 47 Or. 156, 8 Ann.Cas. 725.

50. Minn.—Lobdell v. Keene, 88 N. W. 426, 85 Minn. 90.
"Supersedeas, will lie to prevent execution upon appeal to the Supreme Court from a judgment in favor of the plaintiff in an action of forcible entry and detainer."—Robinson v. Varner, 201 N.W. 70, 71, 199 Iowa 109.

Necessity of statutory authorization

Under Rev.St. art. 3962, making the judgment of the county court in an action in forcible entry and detainer "finally disposing of the cause . . . conclusive of the litigation," and providing that "no further appeal shall be allowed, except where the judgment shall be for damages in an amount exceeding one hundred dollars," and art 3963, providing that the writ of restitution "shall not be suspended or superseded in any case by any appeal taken from such final judgment in the county court," a defendant, appealing from judgment of county court entitling plaintiff to possession and awarding to plaintiff damages for the withholding of possession, was not entitled to a writ of supersedeas to stay the writ of restitution.—Rose v. Skiles, Tex.Civ. App., 245 S.W. 127.

bond has been given the court has no further control over the matter and cannot withdraw its direction or discharge the order after it has been complied with and the appeal and stay have been perfected.[51]

§ 94. —— Liability on Bonds

a. In general
b. Extent of liability

a. In General

A statutory recognizance is construed in the light of the statute authorizing it and prescribing its conditions; and generally nothing but reversal or setting aside of the judgment will discharge the sureties.

A statutory recognizance must be construed in the light of the provisions of the statute authorizing it and prescribing its conditions.[52] Nothing will discharge the sureties on the recognizance but reversal or setting aside of the judgment;[53] and defendant's abandonment or dismissal of his appeal because he has surrendered possession of the property to plaintiff does not release the sureties from liability on a supersedeas bond executed by defendant.[54]

A condition that appellant will prosecute the appeal with effect means that appellant will prosecute the appeal successfully, and pay the judgment of the court appealed from if he does not.[55] While there is authority to the effect that no liability exists on a bond where the steps required by statute to perfect the appeal have not been taken,[56] it has been held that failure to perfect and prosecute an appeal,[57] or the dismissal of the appeal[58] or of certiorari proceedings,[59] constitutes a breach of the bond. A judgment against a petitioner for certiorari is also a breach of a condition to prosecute with effect.[60] So it has been held that an appeal is not prosecuted with effect within the meaning of an appeal bond where the judgment is affirmed.[61]

b. Extent of Liability

The extent of liability on appeal and supersedeas bonds depends on the conditions and provisions of the bonds, the sureties being generally liab'e to the extent of the penalties therein provided but no further.

Sureties on appeal and supersedeas bonds are liable thereon to the extent of the penalties therein provided for,[62] but no further.[63] It has been held, however, that an entry of judgment against defendant and his sureties for damages not included in the bond can be objected to only by the sureties where such a judgment against defendant is expressly authorized by statute.[64] The right of plaintiff to recover the rental value of the premises is to be determined by the court on the trial of the action on the bond.[65] Where the rental value is recoverable, as is usually the case,[66] the recovery is not confined to the value of the premises for the purpose for which they were used while wrongfully detained, but may be had for the highest price the premises would bring for any lawful use to which they were adapted, and for which they were available.[67] Under some statutes there can be no

51. Cal.—Lee Chuck v. Quan Wo Chong, 22 P. 594, 81 Cal. 222, 15 Am.S.R. 50.

52. Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

53. Mo.—Texas Co. v. Wax, supra.

54. Okl.—Yeargain v. Sutter, 204 P. 122, 85 Okl. 41.

55. Tex.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

56. Wis.—Mueller v. Rice, 136 N.W. 146, 149 Wis. 548.

57. Mo.—Bernecker v. Miller, 44 Mo. 126.

58. Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

59. Tex.—Levine v. Lindenthall, 1 Tex.A.Civ.Cas. § 1149.

60. Tenn.—Hurt v. Dougherty, 3 Sneed 418.

61. Ill.—Rehm v. Halverson, 64 N.E. 388, 197 Ill. 378, affirming 94 Ill.App. 627.
Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

Partial restitution
Judgment was rendered in a forcible detainer suit for the restitution of an entire building. On appeal, the judgment was for the restitution of the portion of the building occupied by defendant. It was held that defendant had not prosecuted his appeal with effect, since the Forcible Detainer Act provided that judgment should be for only that part of the premises to which plaintiff was entitled, and this act entered into the bond.—Rehm v. Halverson, 64 N.E. 388, 197 Ill. 378, affirming 94 Ill.App. 627.

62. Okl.—Boyle v. Montague, 48 P.2d 1037, 173 Okl. 402.
26 C.J. p 881 note 81.

63. Miss.—Cahn v. Wright, 80 So. 494, 119 Miss. 107.
26 C.J. p 881 note 82.

64. Ala.—Powell v. Sturdevant, 4 So. 718, 85 Ala. 243.
26 C.J. p 881 note 83.

65. Okl.—Douglas v. Cutlip, 246 P. 392, 118 Okl. 21.

66. Ill.—Shunick v. Thompson, 25 Ill.App. 619.
Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

67. Neb.—Raapke & Katz Co. v. Schmoeller & Mueller Piano Co., 118 N.W. 652, 82 Neb. 716.
26 C.J. p 881 note 85.

Lease for immoral purpose
Recovery may be had by a landlord knowingly leasing premises for immoral purposes on an appeal bond conditioned for the payment of rent; but his recovery, where he canceled the lease, is limited to the value of the premises for any lawful purpose.—White v. Holden, 206 Ill.App. 567.

recovery for rents pending appeal unless a supersedeas bond has been given,[68] and in the absence of the statutory supersedeas bond in such case, no judgment can go against defendant or the sureties on his bond for rents pending the appeal, nor can such judgment be sustained against defendant alone on the theory of his liability for rent independent of the bond, where plaintiff elected not to take a writ of restitution.[69] A condition to pay rents and profits that may be adjudged refers to rents and profits that may be adjudged by the appellate court in its disposition of the unlawful detainer action, and not in an action on the recognizance.[70] Under a condition for the payment of all rent due or becoming due before final determination of the suit, the obligee may recover for the taxes where the rent agreed to be paid included the taxes.[71] In an action on a supersedeas bond to pay the value of the use and occupation of the land, plaintiff is entitled to such compensation as will put him in as good position as if he had enjoyed use and occupation of the land.[72] Damages for injuries to the premises while unlawfully withheld are recoverable under a provision in the bond authorizing a recovery of "all damages and loss which the plaintiff may sustain, etc."[73] A provision in the bond that appellant will not commit waste covers losses by fire caused by his negligence.[74] Where defendant appeals from a judgment of restitution in the justice's court and files an appeal bond and on an affirmance appeals to the supreme court and files a supersedeas bond and the judgment is affirmed in the supreme court, the liability of the sureties on the appeal bond does not terminate until the restitution of the property.[75] Where, in an action on a bond given by defendant on appeal from a judgment for plaintiff before a justice in forcible entry, it appeared that plaintiff had recovered judgment against the sureties on the supersedeas bond given by defendant on appeal from the judgment of the superior court affirming the judgment of the justice, the amount of such judgment which had been paid should be deducted from the amount of the recovery on the appeal bond.[76] The obligee cannot recover as damages interest which he forgave.[77] A condition in a stay bond to pay all such damages as any person may sustain by reason of the suspension in case a supersedeas to the judgment shall not be allowed and be effectual within the suspension period, covers all damages, special or otherwise, sustained by plaintiff as the direct and proximate result of the suspension.[78] The surety on the bond is not liable for damages for failure of his principal to surrender possession in compliance with the decree when on appeal he is found to have been rightfully in possession.[79]

§ 95. —— Enforcement of Liability on Bonds

a. By summary proceedings
b. By action

a. By Summary Proceedings

In the absence of special statutory authorization therefor, summary judgment cannot be rendered against sureties on supersedeas or appeal bonds containing the usual conditions of supersedeas bonds.

Summary judgment cannot be rendered against sureties on supersedeas bonds or appeal bonds containing the usual conditions of supersedeas bonds,[80] unless there is special statutory authorization therefor as is the case in some jurisdictions[81] where by statutory provisions plaintiff if successful on appeal by defendant to the superior court is entitled to a judgment against defendant and his bondsman

68. Ala.—Washington v. Spriggs, 105 So. 811, 213 Ala. 622.

69. Ala.—Washington v. Spriggs, supra.

Where no bond given at all

Although statute relating to forcible entry and unlawful detainer provides for judgment against defendant and the securities on his supersedeas bond for the value of the rent of the premises pending the appeal, and the circuit court may render judgment for same, independent of the rental damages that could have been awarded by the justice, and this could be done whether claimed in the complaint or not, it could only be done in the event of the execution by defendant of a supersedeas bond and on a motion by defendant that such judgment should be rendered. Where, in an appeal from the justice's court to the circuit court in an action of forcible entry and unlawful detainer, there was no bond given at all, the appeal to the circuit court being based on a security for costs, its judgment as to rental damages in excess of one hundred dollars was error.—Crocker v. Goldstein, 95 So. 873, 209 Ala. 172.

70. Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220.

71. Ill.—Neagle v. Kelly, 34 N.E. 947, 146 Ill. 460.

72. Kan.—Nance v. Mullikin, 19 P.2d 689, 137 Kan. 181.

73. Ill.—Upton v. Swedish American Hospital, 157 Ill.App. 126.

74. Kan.—Loftus v. Taylor Corn Mill Co., 139 P. 480, 91 Kan. 856.

75. Okl.—Penny v. Richardson, 71 P. 227, 12 Okl. 256.

76. Okl.—Penny v. Richardson, supra.

77. Mo.—Abnerthy v. Schembra, App., 231 S.W. 1005.

78. W.Va.—State v. Whitt, 129 S.E. 764, 100 W.Va. 42.

79. Utah.—Paxton v. Deardon, 76 P.2d 561, 94 Utah 149.

80. Mo.—Grunewald v. Schaales, 17 Mo.App. 324.
Okl.—Schuman v. Brown, 68 P.2d 779, 180 Okl. 130.
26 C.J. p 881 note 91—4 C.J. p 1305 note 17 [c].

81. Ala.—Sprouse v. Story, 42 So. 23, 141 Ala. 542.
26 C.J. p 881 note 92.

for the rent of the premises pending the appeal,[82] and that, too, although there is no claim for damages in the complaint.[83] Jurisdiction of the supreme court to enter judgment for the damages caused by the stay has been upheld where the court granted a stay pending appeal on condition that appellant would pay any resulting damage.[84]

b. By Action

An action on the bond may be maintained against those liable thereon, and whatever operates to extinguish or discharge the claim on the bond is a defense thereto. In such action general rules as to evidence, instructions, assessment of damages, and judgment apply.

An action on an appeal bond executed in unlawful detainer proceedings may be maintained against those liable thereon,[85] and may be maintained against the sureties even though dismissed as to the principal without the sureties' consent.[86] An action for breach of the bond may be brought by the personal representative,[87] but not by an heir.[88]

Defenses. Whatever operates to extinguish or discharge the claim on the bond is a defense thereto.[89] Thus it is a good defense to an action on a supersedeas bond that plaintiff immediately after being put in possession was dispossessed under a writ against her in favor of others;[90] and in an action on an appeal bond superseding the judgment in an action for the rental value of the premises, defendants may set up as a defense the fact that the premises had been sold under mortgage foreclosure to parties other than plaintiffs, who were placed in possession under a sheriff's deed.[91] In an action for losses sustained by plaintiff because of the refusal to surrender possession as required by the judgment in a forcible detainer suit, the right of recovery depends on proof that plaintiff had the right of possession which was withheld to his damage, and it is a good defense that plaintiff had no such right of possession.[92] Parties on an undertaking on appeal are not estopped from claiming that no appeal was taken because the undertaking recited otherwise, where the party attempting to appeal did not secure the advantage or delay which would have resulted from a valid appeal.[93] The liability of sureties is not affected by the fact that the party giving the bond is under disability and his liability on the bond questionable.[94] Where a bond was given by defendant on appeal from a justice's court and another on appeal from the circuit court, an action to recover on the second bond is not barred by a recovery on the first one, where the action on the first bond did not seek to recover damages for the use and occupation of the premises after the date of the appeal to the circuit court.[95] Where an appeal bond which included all conditions required by the statute except a condition relating to waste was treated by all the parties as effecting a supersedeas, and execution was not ordered until after affirmance of the judgment, it served its purpose as such, and the surety cannot avoid liability because of the omission of the condition as to waste where no recovery for waste was sought in the action on the bond.[96] Where a judgment of the district court on appeal in a forcible detainer suit in favor of appellant, which nominally, at least, satisfied the condition of his undertaking, was attacked by appellee and set aside in the supreme court as having been rendered without jurisdiction, appellee is estopped afterward to assert that the proceedings were in any respect valid, and, accordingly, cannot recover on the undertaking by which such proceedings were begun.[97]

Evidence. It is proper to show the value of the use and occupation of the property during the time it was withheld in order to ascertain plaintiff's loss and damage, where the bond is conditioned to pay all damages and loss sustained by plaintiff by reason of the withholding of the premises.[98] If rental value is recoverable, evidence of the particular purpose for which the highest rental value can be obtained and evidence of the reasonable rental value

82. Ala.—Sprouse v. Story, supra.

83. Ala.—Helton v. Ft. Gaines Oil & Guano Co., 39 So. 925.
26 C.J. p 881 note 94.

84. Colo.—Weir v. Welch, 208 P. 452, 71 Colo. 568.

85. Ill.—See Trinity M. E. Church of Chicago v. Marie M. E. Church of Chicago, 199 Ill.App. 580.
Mo.—Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo.App. 850, certiorari quashed State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220—Bedell v. Garton, App., 86 S.W.2d 1073.

86. Mo.—Bedell v. Garton, supra.

87. Tenn.—Hurt v. Dougherty, 3 Sneed 418.
26 C.J. p 881 note 96.

88. Ill.—Keegan v. O'Callaghan, 35 Ill.App. 142.

89. Okl.—Douglas v. Cutlip, 246 P. 392, 118 Okl. 21.

90. Ky.—Evans v. Deming, 40 S.W. 676, 19 Ky.L. 405.

91. Okl.—Douglas v. Cutlip, 246 P. 392, 118 Okl. 21.

92. Utah.—Paxton v. Deardon, 76 P. 2d 561, 94 Utah 149.

93. Wis.—Mueller v. Rice, 136 N.W. 146, 149 Wis. 548.

94. Tenn.—Skipwith v. Johnson, 5 Coldw. 454.

95. Ill.—Arthur v. Doyle, 187 Ill. App. 269.

96. Mo.—Gary Realty Co. v. Swinney, 269 S.W. 961, 306 Mo. 592, certiorari denied Swinney v. Gary Realty Co., 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162.

97. Neb.—U. S. Fidelity & G. Co. v. Ettenheimer, 97 N.W. 227, 70 Neb. 144, 113 Am.S.R. 783.

98. Ill.—Rehm v. Halverson, 64 N. E. 388, 197 Ill. 378, affirming 94 Ill.App. 627—Pierson v. Lawyer, 225 Ill.App. 400.

of the premises for such purpose is competent.[99] So it has been held that evidence as to the rental value of the premises is admissible, notwithstanding the absence from the declaration of an averment of detention by defendant, the same being supplied by the plea of payment on his part, and the evidence showing his possession at the time in question.[1] Proof of the tenant's reasons for refusing possession is irrelevant.[2] Evidence that the principal persuaded the sureties to sign the bond by fraud is inadmissible against the obligee.[3] General rules as to the weight and sufficiency of the evidence apply.[4]

Instructions. In accordance with the general rules relating to instructions, the court should give, when requested, all instructions that correctly state the law, are pertinent to the issues, and are not covered by some instruction already given.[5]

Assessment of damages by jury. It has been held that defendant in an action on a bond given on the prosecution of a writ of error in a forcible entry proceeding is entitled to have the damages assessed by a jury, as such damages are unliquidated,[6] and that too notwithstanding the striking out of the affidavit of defense.[7] The action of the court in doubling the amount returned by the jury for use and occupation, finding for itself the amount of unpaid costs, and in refusing to permit a return of the full amount of the liability on the bond constitutes an invasion of the province of the jury.[8]

Judgment. A judgment on a supersedeas bond failing to set out the names of the sureties on the bond against whom judgment was rendered, while informal, was not fatally defective, provided a reference to the bond would make certain the names of the sureties against whom the judgment was rendered.[9] The validity of an order amending the judgment becomes a moot question when the judgment is reversed.[10]

§ 96. Restitution or Rerestitution on Reversal

Restitution or rerestitution on reversal may be ordered only if statutory provision therefor exists.

While the merits of a case should not ordinarily be inquired into on a motion based alone on the fact of the reversal of a judgment, a hearing on the merits may be had on defendant's motion for a writ of restitution following reversal on certiorari of a judgment for plaintiff in an action for forcible detainer, under a statute prohibiting the issuance of a writ of restitution on reversal of a judgment for plaintiff in an action for forcible detainer, unless the court considers that on the merits such writ should be awarded;[11] but this should not be done on the certiorari record alone, it being necessary that the foundation for proofs outside the record be laid by petition, affidavit, and motion.[12] The procedure to be followed in forcible entry and detainer cases being strictly statutory, it has been held under controlling statutes that on writ of error to a justice of the peace in such an action a district court sustaining a writ cannot order restitution,[13] a general statute authorizing a district court, on writ of error to a justice of the peace, to order restitution being inapplicable to a forcible entry and detainer action.[14]

O. PROCEEDINGS BY INQUISITION AND SPECIAL PROCEEDINGS AGAINST INTRUDERS AND TRESPASSERS

§ 97. In General

Under the statutes in some states trials for forcible entry and detainer may be had by way of an inquisition before a justice, the proceeding being of a summary character strictly controlled by statute.

99. Ill.—Cooke Co. v. Burke, 148 Ill.App. 155.

1. Ill.—Barrett v. Lingle, 33 Ill.App. 91.

2. Neb.—Kendall v. Uland, 120 N.W. 152, 83 Neb. 527.

3. Mo.—Bedell v. Garton, App., 86 S.W.2d 1073.

4. **Evidence held sufficient**

(1) To show that appeal bond sued on was one that was filed despite recital in record entry as to sureties at variance with bond sued on; and to warrant finding that defendant signed as surety on appeal bond without condition that it was not to be delivered and filed until signed by other surety.—Gary Realty Co. v. Swinney, 269 S.W. 961, 306 Mo. 592, certiorari denied Swinney v. Gary Realty Co., 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162.

(2) To show that parties regarded appeal bond as effective in staying execution.—Gary Realty Co. v. Swinney, supra.

5. **Instructions held proper under issues**

(1) Instruction authorizing jury to consider fact that plaintiff was prevented from sowing wheat in fall.—Nance v. Mullikin, 19 P.2d 689, 137 Kan. 181.

(2) Instruction that only point in controversy was the amount of rent due.—White v. Holden, 206 Ill.App. 567.

6. Ill.—Trinity M. E. Church v. Marie M. E. Church, 192 Ill.App. 222. See Trinity M. E. Church v. Marie M. E. Church, 199 Ill.App. 580.

7. Ill.—Trinity M. E. Church v. Marie M. E. Church, 192 Ill.App. 222.

8. Kan.—Henrie v. Buck, 18 P. 228, 39 Kan. 381.

9. Ala.—Helton v. Ft. Gaines Oil & Guano Co., 39 So. 925.

10. Mich.—August v. Collins, 251 N.W. 565, 265 Mich. 389.

11. Del.—Phillips v. Gunby, 117 A. 383, 1 W.W.Harr. 462.

12. Del.—Phillips v. Gunby, supra.

13. Iowa.—Rasmussen v. Alberts, 246 N.W. 620, 215 Iowa 644.

14. Iowa.—Rasmussen v. Alberts, supra.

Under statutes in force in some of the states, trials for forcible entry and detainer may be had by way of an inquisition before a justice. The proceeding is purely statutory and of a summary character, and the provisions of the statutes must be strictly followed.[15] Although the proceedings are authorized and regulated by a civil code, it has been held that they conform to the practice in criminal proceedings.[16]

§ 98. Petition, Complaint, or Affidavit

The proceedings are instituted by a written and sworn petition or complaint describing the premises and stating the interest of the petitioner therein.

The proceedings are instituted by presenting to the justice a petition or complaint which must be in writing and on oath,[17] and must contain a description of the premises,[18] and state the interest of the petitioner therein.[19] Also, it seems, it should contain an allegation of defendant's refusal to surrender possession on demand when proof of such refusal is required to authorize a judgment of restitution.[20]

§ 99. Warrant

On receipt of the petition or complaint, the justice issues a warrant which is to notify the accused of the charge to be inquired into and which must state the cause of complaint substantially in the form prescribed by statute.

The justice, on receipt of the petition or complaint, issues a warrant,[21] the object of which is to notify accused of the charge to be inquired into.[22] The warrant states the cause of complaint[23] and the scope of the inquiry is limited strictly by its allegations.[24] The warrant must show such a right or interest in complainant as to entitle him to maintain the proceeding under the statute,[25] and must allege that he was in the peaceable possession of the premises at the time of the entry[26] and that the entry or detainer complained of was forcible;[27] but it need not allege defendant's refusal to surrender possession on demand, although proof of such refusal is required to authorize a judgment of restitution.[28] The description of the property in the warrant need be only a general description such as is sufficient to apprise defendant of the claim set up against him.[29] It need not be stated in the warrant that the complaint on which it was issued was made under oath.[30] Both forcible entry and forcible detainer may be charged in the same warrant,[31] or accused may be charged in the alternative with forcible entry or detainer.[32] Where the form of the warrant is prescribed by statute, it need not be strictly pursued, but a substantial compliance therewith is sufficient,[33] and a warrant in the exact language and form prescribed is sufficient.[34]

The warrant must be issued by the magistrate before whom the complaint was made,[35] and must be served in the manner[36] and within the time[37] prescribed by statute.

A defective warrant may be amended before trial by the justice,[38] or it may be amended in the circuit court on the trial of the traverse, provided the amendment in no way changes the case as tried before the justice,[39] but no amendment will be allowed which introduces a new cause of action.[40]

§ 100. Conduct of Inquisition

On the inquisition the jury must be sworn, and must try the questions before it, conforming their findings to

15. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.
26 C.J. p 882 notes 22–25.
Description in writ held sufficient
Ky.—Terry v. Henry, 120 S.W.2d 404, 274 Ky. 778.

16. Ky.—Jolly v. Gilbert, 226 S.W. 354, 190 Ky. 1.
Summary criminal proceedings before justices see infra § 115.

17. N.Y.—Mauterstock v. Williams, 86 N.Y.S. 804, 42 Misc. 402.
26 C.J. p 882 note 27.

18. N.Y.—Mauterstock v. Williams, supra.

19. N.Y.—Mauterstock v. Williams, supra—Dougherty v. McMillan, 55 N.Y.S. 616, 25 Misc. 782.

20. Ky.—Jolly v. Gilbert, 226 S.W. 354, 190 Ky. 1.

21. Me.—Labaree v. Brown, 38 Me. 482.

22. Ky.—McBrayer v. Wash, 6 J.J. Marsh. 464.

23. Ky.—Gayle v. Overton, 1 J.J. Marsh. 549.

24. Ky.—McBrayer v. Wash, 6 J.J. Marsh. 464.
26 C.J. p 883 note 35.

25. Ky.—Taylor v. Monohan, 8 Bush 238—Powers v. Sutherland, 1 Duv. 151.

26. Ky.—Hord v. Sartin, 80 S.W. 794, 26 Ky.L. 77.
26 C.J. p 883 note 37.

27. Ky.—Lewis v. Stith, 2 Litt. 294.

28. Ky.—Jolly v. Gilbert, 226 S.W. 354, 190 Ky. 1.
26 C.J. p 883 note 40.

29. Ky.—Jolly v. Gilbert, supra.
26 C.J. p 883 note 41.

30. Ky.—Jolly v. Gilbert, 226 S.W. 354, 190 Ky. 1.
Me.—Lithgow v. Moody, 35 Me. 214.
26 C.J. p 883 note 42.

31. Ky.—Cammack v. Macy, 3 A.K. Marsh. 296.

32. Ky.—Rowe v. Powell, 4 J.J. Marsh. 153.
26 C.J. p 883 note 44.

33. Ky.—Smith v. White, 5 Dana 376.
26 C.J. p 883 note 45.

34. Ky.—Jolly v. Gilbert, 226 S.W. 354, 190 Ky. 1.

35. Me.—Labaree v. Brown, 38 Me. 482.

36. Ky.—Lewis v. Outten, 2 Dana 92.
26 C.J. p 883 note 51.

37. Ky.—Humphrey v. Jones, 3 T.B. Mon. 261.
26 C.J. p 883 note 52.

38. Ky.—Bailey v. Kelly, 38 S.W. 139, 18 Ky.L. 718.

39. Ky.—Hoffman v. Mann, 75 S.W. 219, 25 Ky.L. 255.
26 C.J. p 883 note 48.

40. Ky.—Powers v. Sutherland, 1 Duv. 151.

the statutory requirements, although technical precision is not required. After notice and opportunity to file a traverse given to defendant, it is the duty of the justice to render judgment on the verdict.

Where the statute does not require that the inquisition shall be held upon the premises the justice may in his discretion hold it elsewhere.[41] The jury on the inquisition must be sworn, which must appear from the record.[42] Whether plaintiff was in actual possession and whether that possession was forcibly disturbed by the entry or detainer complained of are the only questions before the jury,[43] and they cannot try questions of title[44] or plaintiff's right of entry.[45]

In a warrant for a forcible entry and detainer defendant may be convicted of either,[46] but if only one offense is charged he can be convicted only of that offense.[47]

The finding of the jury must contain a definite description of the premises[48] and must be signed by them if the statute so directs.[49] Verdicts on inquisitions are liberally construed; a technical precision and regularity is not required.[50]

Before the justice can render judgment on the verdict, defendant must be given notice of the finding and an opportunity to file a traverse,[51] and this must be shown by the record.[52] If after notice he declines to traverse,[53] or neglects to do so within the time prescribed by statute,[54] the justice must render judgment on the verdict. The justice has no power to grant a new trial[55] or to disturb the judgment after it has been entered.[56] The loss of the warrant after an inquest or forcible entry and detainer is not ground for arrest of judgment.[57] It is not necessary that the justice should sign the inquisition.[58]

On appeal from the county court to the circuit court, an amendment of the warrant of forcible entry, not changing the cause of action, but only perfecting the one originally attempted to be stated, should be allowed.[59]

§ 101. Traverse and Proceedings Thereon

The party aggrieved by an adverse finding has a right to traverse the inquisition, which is, in effect, an appeal calling in question the finding of fact; and when he does so the justice must then summon another jury to try the traverse or certify the proceedings to another court to be tried in accordance with the local practice.

The party aggrieved by an adverse finding has a right to traverse the inquisition,[60] which is in effect an appeal, differing from other appeals only in that it merely calls in question the finding of the jury and not a judgment;[61] and under some statutes this is his sole remedy.[62] Where the form of the traverse is prescribed by statute it is only necessary that the substance of the form given should be pursued.[63] It is not necessary that the traverser should sign the traverse.[64] If the inquisition is traversed the justice must then summon another jury to try the traverse before him[65] or must certify the proceedings to the circuit court.[66]

Transfer of proceedings to circuit court. Where the statute expressly requires that after a traverse is filed and bond given the proceedings must be transferred to the circuit court for the trial of the traverse. The traverser is entitled to have a trial of the traverse in the circuit court, although while the traverse is pending in the circuit court there may be a judgment rendered in that court in another case between the same parties awarding to the traversee the possession of the premises involved

41. Ill.—Bloom v. Goodner, 1 Ill. 63.

42. D.C.—Adams v. Horr, 6 D.C. 40.

43. Ky.—Hunt v. Wilson, 14 B.Mon. 44—Smith v. Dedman, 4 Bibb 192.

44. N.Y.—Carter v. Newbold, 7 How. Pr. 166.

45. Ky.—Smith v. Dedman, 4 Bibb 192.

46. Ky.—Swartzwelder v. U. S. Bank, 1 J.J.Marsh. 38.

47. Ky.—McBrayer v. Wash, 6 J.J. Marsh. 464.
26 C.J. p 883 note 59.

48. U.S.—Holmead v. Smith, C.C.D. C., 12 F.Cas.No.6,630, 5 Cranch C.C. 343.

49. Ill.—Bloom v. Goodner, 1 Ill. 63.

50. Ky.—Pollard v. Otter, 4 Dana 516.
26 C.J. p 883 note 62.

51. D.C.—Adams v. Horr, 6 D.C. 40.
26 C.J. p 883 note 63.

52. D.C.—Adams v. Horr, supra.

53. N.C.—Sherrill v. Nations, 23 N. C. 325.

54. D.C.—Adams v. Horr, 6 D.C. 40.
26 C.J. p 883 note 66.

55. Ky.—Swanson v. Smith, 77 S. W. 700, 25 Ky.L. 1260.

56. Ky.—Scaggs v. Fife, 6 Ky.L. 659.

57. Ky.—Logan v. Smith, 2 A.K. Marsh. 52.
26 C.J. p 884 note 77 [b].

58. N.J.—Covenhoven v. Vantine, 1 N.J.Law 258.

59. Ky.—Witt v. Willis, 85 S.W. 223, 27 Ky.L. 417.

60. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.
26 C.J. p 884 note 71.

61. Ky.—Powers v. Sutherland, 1 Duv. 151.

62. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

63. Ky.—Jones v. Skiles, 1 A.K. Marsh. 54.
26 C.J. p 884 note 72.

64. Ky.—Jones v. Skiles, 1 A.K. Marsh. 54.

65. D.C.—Adams v. Horr, 6 D.C. 40.
26 C.J. p 884 note 75.

66. Tenn.—State v. Dillon, 3 Hayw. 174.
26 C.J. p 884 notes 76, 77.

in the forcible detainer proceeding.[67] A traverse is necessary to stay the execution,[68] and the circuit court has no jurisdiction to retry the truth of an inquisition unless a traverse was filed[69] before the justice[70] and within the time limited by the statute.[71] A traverse filed within the statutory time after the judge had orally announced the findings preserves the traverser's rights, however, even though the filing was before entry of the formal judgment.[72] It is not essential to the virtue or validity of the traverse that it be indorsed filed by the judge or justice,[73] and the failure of the justice to indorse on a traverse bond or the traverse itself the time of filing affords no ground for a dismissal of the action.[74] Where the record does not show timely filing of the traverse, the court should hear proof on the question;[75] and the fact that the justice who heard the action transmitted the record to the circuit court is prima facie evidence that the traverse and bond were presented in proper time and that the failure so to indorse them was a mere inadvertence or oversight on his part.[76] The omission of a judge or justice to return the papers to the circuit court as directed by statute is not fatal, but may be corrected by subsequent compliance.[77] The duty may be enforced by the circuit court requiring the papers to be sent up,[78] or the interested parties may procure a transcript and present it in the circuit court.[79] The traverser has a right to dismiss the traverse if he so desires, and when he moves the court to dismiss it the court should do so.[80]

The traversee is required to join issue on the traverse in the circuit court,[81] which he does by appearing in that court and stating to the jury that the finding of the jury on the inquisition is true.[82] The truth of the inquisition is there tried de novo,[83] and the trial is conducted in the same manner as the trial of any other issue in that court.[84] The circuit court is confined to the issue tried in the inferior court,[85] the only issue being the truth of the inquisition,[86] and no evidence is admissible except such as is relevant to this issue.[87] On a traverse by defendant he is not required to prove his innocence but the burden of proof remains with plaintiff.[88] If the traverser fails on the calling of the case for trial to appear either by himself or counsel, the court may render judgment by default in favor of the traversee.[89]

§ 102. —— Bond

Where required by statute, a traverse bond must be executed and approved by the justice trying the case in the first instance; and if the traverse is not prosecuted with effect the sureties on the bond are liable according to its terms.

Where required to do so by statute, the party traversing the inquisition must give a bond,[90] within a designated time,[91] for the costs of the proceeding and all damages that may be caused to the traversee by the traverse in case it shall not be prosecuted with effect.[92] If executed by the surety it will be sufficient, although not executed by the prin-

67. Ky.—Buckner v. Kelly, 165 S.W. 419, 158 Ky. 407.
26 C.J. p 884 note 73.

68. Ky.—Berry v. Trice, 201 S.W. 37, 179 Ky. 594.

69. Ky.—Berry v. Trice, supra.
26 C.J. p 884 note 80.

70. Ky.—Burchett v. Blackburn, 4 Bush 553.

71. Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573—Hoskins v. Morgan, 61 S.W.2d 30, 249 Ky. 576—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509—Burchett v. Blackburn, 4 Bush 553.
26 C.J. p 884 note 82.

Computation of period
Day of rendition of judgment on inquest is counted as first of three days within which traverse must be filed to give jurisdiction on appeal, and "juridical days," intended as days for appeal to circuit court, are days on which court is in session.—Black v. National Bank of Kentucky, 10 S.W.2d 629, 226 Ky. 152.

72. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

73. Ky.—Mayhew v. Kentucky River Coal Corporation, supra.

74. Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

75. Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573.

76. Ky.—Citizens Coal Co. v. Foley, supra.

77. Ky.—Citizens Coal Co. v. Foley, supra—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.
26 C.J. p 884 note 77.

78. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

79. Ky.—Mayhew v. Kentucky River Coal Corporation, supra.

80. Ky.—Terry v. Henry, 120 S.W.2d 404, 274 Ky. 778.

81. Ky.—Tolbert v. Young, 189 S.W. 209, 172 Ky. 269—Belcher v. Barrett, 4 Metc. 307.

82. Ky.—Check v. Reiter, 102 S.W. 287, 31 Ky.L. 249—Mosler v. Tanner, 13 Ky.L. 636.
26 C.J. p 884 note 84.

83. Ky.—Neale v. Sheets, 5 Ky.L. 121, 127.

84. Ky.—Beauchamp v. Morris, 4 Bibb 312.
26 C.J. p 884 note 86.

85. Ky.—Atkinson v. Stansberry, 114 S.W. 1196, 131 Ky. 249.

86. Ky.—Powers v. Sutherland, 1 Duv. 151.
26 C.J. p 884 note 88.

87. Ky.—Smith v. White, 5 Dana 376.
26 C.J. p 884 note 89.

88. Ky.—Beauchamp v. Morris, 4 Bibb 312.

89. Ky.—Dibble v. Porter, 1 Duv. 190.

90. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.
26 C.J. p 884 note 92.

91. Ky.—Garrett v. Phillips, 5 Ky. Op. 622.

92. Ky.—Alderson v. Trent, 79 Ky. 259, 2 Ky.L. 248.
26 C.J. p 884 note 94.

cipal.[93] The bond must be taken by the justice and not by the judge of the circuit court before whom the traverse is tried, and must be approved by him,[94] although it is not necessary that a statement to that effect should appear in the bond itself.[95] While the approval or disapproval of the bond requires the exercise of some discretion, yet the power to approve or disapprove is not absolute, and the bond must be approved if the solvency of the surety is not open to doubt and the bond is otherwise in compliance with the statutory requirements.[96] If no valid or amendable bond is executed, the traverse should be dismissed in the circuit court to which the action is transmitted,[97] but a mere defect in the bond does not go to the jurisdiction of the circuit court.[98] If the bond is defective the traverser should be allowed to execute a new and sufficient bond within a reasonable time to be fixed by the court,[99] and if it misrecites the date of the inquisition the proceedings should not be dismissed but the traverser should be permitted to introduce evidence to identify the inquisition and reacknowledge the bond.[1] After execution and filing of the bond, the justice hearing the case has no power over it except to transmit the record to the circuit court,[2] and he must stay all further proceedings on the inquisition and return the papers and proceedings or a transcript thereof to the circuit court.[3] Where the bond has been accepted and approved by the justice, recitals therein of the justice's findings on the inquisition and of the filing of a traverse are sufficient to show the facts recited in the absence of convincing evidence to the contrary.[4] A party, having selected his adversary and executed a traverse bond to him, is estopped to deny that the finding was for him.[5] The traverse bond reciting that the traverse has been filed estops the traverser to deny that he traversed the inquisition.[6] The circuit court cannot release a surety on the traverse bond for the purpose of making him a witness and take another bond.[7]

Liability on bond. If the traverse was not prosecuted with effect the sureties on the bond are liable according to its terms,[8] and the damages for withholding the possession include the reasonable value of the rents and profits of the land illegally detained[9] from the date the traverse bond was executed until the traversee obtained possession of the land;[10] and this rule applies even where the traverser who was found guilty of the forcible detainer in the trial in the circuit court executed a supersedeas bond and appealed his case to a higher court.[11] It is not a defense to a traverse bond executed by defendant that plaintiff had no title to the property as the title is not involved.[12] In a suit on a traverse bond it is not necessary that all the obligors be made parties; any one of them may be sued.[13] The evidence in such an action should be confined to the reasonable rental value of the property during the time that plaintiff was kept out of possession, and to such damage as was caused by waste, if any. The kind of crops which might have been grown, as well as those which were on the property at the time the bond was executed may be shown, the jury being entitled to know all legitimate facts in determining what was the reasonable rental value, but evidence as to what the reasonable profits and earnings were for the period is incompetent as entirely too speculative.[14] No appeal will lie in an

93. Ky.—Smith v. Turley, 3 Bibb 188.

94. Ky.—Holeman v. Carneal, 2 A.K. Marsh. 602—Jack v. Carneal, 2 A.K.Marsh. 518.
26 C.J. p 885 note 98.

95. Ky.—Smith v. Dedman, 2 Bibb 575—Stillwell v. Harris, 1 A.K. Marsh. 342.

96. Ky.—Trivette v. Stratton, 125 S.W.2d 236, 276 Ky. 774.

97. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

98. Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573.

Irregularity held immaterial
That county judge of Perry County, in approving traverse bond in forcible entry, inadvertently added initials of Perry quarterly court to signature was immaterial, since same judge served in both courts.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

99. Ky.—Citizens Coal Co. v. Foley, 129 S.W.2d 131, 278 Ky. 573—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.
26 C.J. p 885 note 99.

1. Ky.—Wilson v. Sanders, 5 J.J. Marsh. 288—Norton v. Sanders, 5 J.J.Marsh. 287.

2. Ky.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

3. Ky.—Wayman v. Taylor, 1 Dana 527—Smith v. Dedman, 2 Bibb 575.

4. **Notation held not to disprove recitals**
Notation on bond that traverse in forcible entry action was filed with clerk of quarterly court did not disprove recitals in bond that traverse was filed with county judge, since same judge served both courts.—Mayhew v. Kentucky River Coal Corporation, 38 S.W.2d 452, 238 Ky. 509.

5. Ky.—Garrett v. Phillips, 5 Ky. Op. 624.

6. Ky.—Wayman v. Taylor, 1 Dana 527.

7. Ky.—Holeman v. Carneal, 2 A.K. Marsh. 602—Jack v. Carneal, 2 A. K.Marsh. 518.

8. Ky.—Nanney v. Hedden, 299 S.W. 161, 221 Ky. 542—Whitaker v. Gault, 6 Ky.Op. 561.

9. Ky.—Nanney v. Hedden, 299 S.W. 161, 221 Ky. 542.
26 C.J. p 884 note 94 [a].

10. Ky.—Nanney v. Hedden, supra.

11. Ky.—Nanney v. Hedden, supra.

12. Ky.—Caldwell v. McVean, 82 S.W. 992, 119 Ky. 30, 26 Ky.L. 948.

13. Ky.—Whitaker v. Gault, 6 Ky. Op. 561.

14. Ky.—Nanney v. Hedden, 299 S.W. 161, 221 Ky. 542.

action on a traverse bond where the damages demanded are less than the amount required to confer jurisdiction on the appellate court.[15]

§ 103. —— Waiver of Defects and Irregularities

The filing of the traverse is a waiver of all defects and irregularities in the form of the inquisition or in the warrant which do not affect the merits of the case or the jurisdiction of the court.

The filing of the traverse puts in issue the truth of the inquisition and is a waiver of all defects and irregularities in the form of the inquisition[16] or in the warrant;[17] but it is not a waiver of defects of substance[18] such as affect the jurisdiction of the court[19] or where the inquisition is so defective that no judgment could be rendered thereon by the justice.[20]

§ 104. Restitution

Restitution may be awarded where the proceeding is brought under a statute expressly authorizing it.

Restitution cannot be awarded unless the proceeding is brought under a statute expressly authorizing it,[21] but under statutes so providing the justice who holds the inquisition may restore the injured party to possession.[22] To authorize a judgment of restitution the verdict on the inquisition must find such an estate or interest in plaintiff as to bring him within the provisions of the statute.[23] If the inquisition is traversed, restitution cannot be awarded until the traverse is tried and determined against defendant by another jury.[24] Technical irregularities in the form of judgment for restitution entered on the trial of the traverse will not invalidate it if it conforms substantially to the statute,[25] and a clerical error in failing to provide for restitution in entering up the judgment may be corrected by the court at a subsequent term.[26]

§ 105. Appeal and Certiorari

Summary proceedings before a justice for forcible entry and detainer may be reviewed by certiorari after the finding of the inquisition, but an appeal will not lie except where it is authorized by statute.

In the absence of statute, summary proceedings before justices for forcible entry and detainer cannot be reviewed by appeal,[27] but may be reviewed by certiorari.[28] Certiorari will not lie until after the finding of the inquisition,[29] but the proceedings may be removed at any time thereafter.[30] The certiorari merely brings up the record for inspection and the facts found by the jury cannot be tried anew.[31]

An appeal from the inquisition may be taken where allowed by statute,[32] and where an appeal can be taken and on that appeal jurisdictional questions as well as those arising on the merits can be fully disposed of, a certiorari should not be allowed unless circumstances exist which show that failure of justice will result from denying it.[33] An appeal can be taken only after the entry of the judgment or final order of the justice.[34] An appeal will not lie from a judgment on a traverse in the superior court where the judgment is merely for damages and costs and there is no judgment for restitution,[35] and an order granting a new trial on a traverse is not appealable.[36]

§ 106. Special Proceedings against Intruders and Trespassers

Summary process is unavailing, in the absence of statutory authorization, to eject one who takes possession of property without right or title, but squatters, in-

15. Ky.—Caldwell v. McVean, 82 S. W. 992, 119 Ky. 30, 26 Ky.L. 948.

16. Ky.—Lunsford v. Hughes, 130 S. W.2d 39, 279 Ky. 175.
26 C.J. p 885 note 7.

17. Ky.—Carpenter v. Shepherd, 4 Bibb 501.
26 C.J. p 885 note 8.

18. Ky.—Todd v. Bates, 3 Bibb 100.
N.Y.—People v. Wilson, 13 How.Pr. 446.

19. N.Y.—People v. Whitney, 1 Thomps. & C. 533.

20. Ky.—Todd v. Bates, 3 Bibb 100—Gayle v. Overton, 1 J.J.Marsh. 549.

21. Pa.—Blythe v. Wright, 2 Ashm. 428.
26 C.J. p 885 note 13.

Restitution and re-restitution:
In criminal prosecution see infra § 122.
On reversal see supra § 96.

22. N.C.—Mitchell v. Fleming, 25 N. C. 123.
26 C.J. p 885 note 14.

23. N.C.—Mitchell v. Fleming, 25 N. C. 123—Sherrill v. Nations, 23 N.C. 325.

24. Pa.—Blythe v. Wright, 2 Ashm. 428.

25. Ky.—Wheatley v. Price, 3 J.J. Marsh. 167.
26 C.J. p 885 note 17.

26. Ky.—Norton v. Sanders, 7 J.J. Marsh. 12.

27. N.C.—Sherrill v. Nations, 23 N. C. 325.
26 C.J. p 885 note 19.

28. U.S.—Holmead v. Smith, C.C.D. C., 12 F.Cas.No.6,630, 5 Cranch C.C. 343.
26 C.J. p 885 note 20.

29. N.Y.—Haines v. Backus, 4 Wend. 213.

30. N.Y.—People v. Covill, 20 Hun 460.
26 C.J. p 885 note 22.

31. N.C.—Griffin v. Griffin, 71 N.C. 304.
26 C.J. p 885 note 23.

32. N.Y.—Lewis v. Hoffman, 5 N.Y. Civ.Proc. 141.
26 C.J. p 885 note 24.

33. Mich.—Farrell v. Taylor, 12 Mich. 113.

34. N.Y.—Lewis v. Hoffman, 5 N.Y. Civ.Proc. 141.

35. Ky.—Norton v. Sanders, 3 J.J. Marsh. 396.

36. N.Y.—People v. McManus, 47 N. Y. 661.

truders, or trespassers may be ejected by virtue of special statutory summary proceedings in some jurisdictions. Where such remedy exists, the statutes must be strictly followed.

In the absence of statutory authorization, summary process is unavailing to eject one who takes possession of property without right or title.[37] In some states, however, as shown infra this section, there are special statutory proceedings for the ejection of intruders or trespassers.

Under a statute providing for the ejection, on the determination in plaintiff's favor of an issue made by affidavit and counteraffidavit, of persons who do not in good faith claim a right to possession of land in their hands and yet refuse to abandon it, where the parties have made the required affidavits, the issue to be determined is not title but defendant's good faith in claiming the right to go upon the land,[38] although title has been held admissible as evidence of the right of possession[39] or as tending to show good faith.[40] Recovery from a mere intruder can be had on prior possession alone.[41] On the other hand, it will be sufficient to defeat proceedings of this character if defendant shows a claim in good faith of right to possession of the land in suit,[42] since the statute applies only to intruders or squatters entering in bad faith without claim of right.[43] No process or return of service is required.[44] Plaintiff's affidavit must be sufficiently certain in describing the land to enable the sheriff to identify the premises.[45] When made, defendant must tender the sheriff the counteraffidavit required by statute within three days or he will be turned out,[46] and after the time has expired and there has been a proper eviction it will be too late to file the counteraffidavit unless the delay has been caused by some misconduct of the sheriff.[47] On the other hand, it has been held that the counteraffidavit may be filed after the expiration of the statutory period provided defendant was left in possession by the sheriff and the affidavit was filed prior to actual evictment.[48] It is not necessary for the counteraffidavit to follow the statute literally.[49] However, it has been held that defendant will not be allowed to tender a defective affidavit to retain possession under it and on a decision against him tender a sufficient affidavit to protect his possession;[50] and it has further been held that no provision is made in the statutes by which any amendment of the affidavit will be permissible.[51] Where a counteraffidavit has been interposed and the papers returned to the superior court for trial, the counteraffidavit should not be dismissed because of defendant's nonappearance on the call of the case.[52] On the trial, evidence is admissible to show the good faith of defendant;[53] and in the absence of evidence that defendant did not enter and remain upon the land honestly and in good faith the court should direct a verdict for him.[54] After a verdict for plaintiff, it is error to award a new trial where there is no evidence that plaintiff in good faith claimed a legal right to the possession of the land;[55] and where, in proceedings for eviction of an intruder, no legal counteraffidavit was filed, but on trial verdict was rendered for plaintiff and motion for new trial was overruled and defendant brought error, he had no standing to contest the right of possession, nor any right to a judgment on the merits, but the judgment should be set aside and counteraffidavit dismissed.[56]

Under a statute providing for the recovery of land by summary proceedings where a person who has intruded into or squatted upon the land without the permission of the person entitled to the possession has continued to occupy it without the permis-

37. La.—Butler v. Blekham, 122 So. 871, 11 La.App. 18.

38. Ga.—Hunter v. Jones, 138 S.E. 263, 36 Ga.App. 816.
26 C.J. p 886 note 31.

39. Ga.—Poulan v. Sellers, 20 Ga. 228.

40. Ga.—Lane v. Williams, 39 S.E. 919, 114 Ga. 121—Foreman v. Pelham, 70 S.E. 158, 8 Ga.App. 822.

41. Ga.—McKay v. Kendrick, 44 Ga. 607—Tison v. South Georgia R. Co., 68 S.E. 651, 8 Ga.App. 91.
26 C.J. p 886 note 35.

42. Ga.—Hunter v. Jones, 138 S.E. 263, 36 Ga.App. 816—Hill v. Security Loan & Abstract Co., 132 S.E. 107, 35 Ga.App. 93.
26 C.J. p 886 note 36.

43. Ga.—Sheats v. Blair, 66 S.E. 812, 7 Ga.App. 272.

44. Ga.—Hill v. Security Loan & Abstract Co., 132 S.E. 107, 35 Ga. App. 93.

45. Ga.—Orme v. King, 60 Ga. 523.
26 C.J. p 886 note 38.

46. Ga.—Sheats v. Blair, 66 S.E. 812, 7 Ga.App. 272.
26 C.J. p 886 note 39.

47. Ga.—Montgomery v. Walker, 41 Ga. 681—Simpson v. Wall, 41 Ga. 105.

48. Ga.—Sheats v. Blair, 66 S.E. 812, 7 Ga.App. 272.

49. Ga.—Pratt v. Fountain, 73 Ga. 261—Paige v. Dodson, 46 Ga. 223.

50. Ga.—Hass v. Gardner, 36 Ga. 477.

51. Ga.—Cardin v. Standly, 20 Ga. 105.

52. Ga.—Yancey v. Karwisch, 59 S. E. 777, 129 Ga. 788.
26 C.J. p 886 note 45.

53. Evidence held admissible
In a suit against defendant occupying the premises solely in the right of her son as a member of his family, evidence of a written agreement between the alleged owner of the premises and defendant's son showing that the son was in possession of the premises as a tenant of the alleged owner is admissible to show defendant's good faith.—Hunter v. Jones, 138 S.E. 263, 36 Ga.App. 816.

54. Ga.—Hunter v. Jones, supra.

55. Ga.—Turner v. Barfield, 43 Ga. 267.

56. Ga.—Stephens v. Mathis, 82 S.E. 520, 142 Ga. 117.

sion of the latter, a squatter is one who settles on the lands of another without any legal authority,[57] and an intruder is one who enters upon property where he has no right;[58] and the statute is applicable only in cases in which defendant comes within the meaning of a squatter or intruder.[59] The statute furnishes no remedy against a trespasser;[60] the only question to be determined is "Did the respondent gain possession of the premises as an intruder?"[61] The petitioner can prevail only where it is shown that defendant has intruded or squatted upon the premises without permission of the person entitled thereto.[62] One entering on the lands rightfully as the spouse of the owner, cannot after separation of the spouses as husband and wife be summarily removed as an intruder or squatter,[63] either at the suit of the owner spouse[64] or at the suit of his assignees.[65] If one sought to be dispossessed has entered lawfully, no notice to leave can thereafter render him subject to the provisions of the statute.[66] A mere denial of the plaintiff's claim that he was entitled to possession of the premises as a lessee raises no issue involving the title to real estate such as will deprive an inferior court of jurisdiction.[67] In support of plaintiff's claim of title derived from the state, the letters patent which were the source of such title were admissible in the absence of any proof or claim of defect therein.[68] A stay cannot be had on appeal from an order that a warrant be issued to dispossess defendant in proceedings based on this statute unless proceedings were instituted for nonpayment of rent.[69]

Under a statute authorizing the owner of land trespassed upon to apply to any magistrate to serve a notice on the trespasser to quit the premises, and requiring the magistrate forthwith to eject him upon his refusal to comply with such notice, it has been held that the proceeding may be instituted by the owner's agent and manager,[70] and the service of notice to quit is not necessary to give jurisdiction to the justice before whom the proceedings are pending.[71] An affidavit showing that the land is situated in a certain county and in the possession of a trespasser,[72] or a rule to show cause why he should not be ejected,[73] will give a magistrate of that county jurisdiction to serve notice on the trespasser to quit. This notice need not designate the time within which a trespasser must quit, and if after the time limited by statute he refuses to quit, the magistrate shall then issue his warrant to a sheriff or constable requiring him to forthwith eject such trespasser.[74] Where a trespasser appears and objects to the jurisdiction of the magistrate because he had not been served with notice to quit, and, on the overruling of the objection, files a return, jurisdiction of his person is thereby acquired.[75] On appeal from a magistrate's order overruling a demurrer to his jurisdiction in proceedings to eject trespassers on the ground that no notice to quit had been served, reversing the judgment of the magistrate, and granting a new trial, it is the duty of the magistrate to grant the parties another hearing, and not to dismiss.[76]

P. WRONGFUL DISPOSSESSION

§ 107. Nature and Grounds of Liability

Plaintiff in a forcible entry and detainer proceeding is liable for the damages resulting from a wrongful dispossession in such proceeding where he caused the wrong to be done.

Plaintiff in a forcible detainer or forcible entry and detainer proceeding may be liable for damages resulting from wrongful dispossession in such proceeding, as where he fraudulently obtained his apparent right to institute the proceeding,[77] no judg-

57. N.Y.—Mele v. Russo, 9 N.Y.S.2d 203, 168 Misc. 760—Rosenzweig v. Portnoy, 191 N.Y.S. 900, 117 Misc. 136.

58. N.Y.—Mele v. Russo, 9 N.Y.S.2d 203, 168 Misc. 760.

59. N.Y.—Mele v. Russo, supra.

60. N.Y.—Mele v. Russo, supra.

61. N.Y.—Lincoln Trust Co. v. Hutchinson, 120 N.Y.S. 811, 65 Misc. 590—O'Donnell v. McIntyre, 41 Hun 100.

62. N.Y.—Mele v. Russo, 9 N.Y.S.2d 203, 168 Misc. 760—Frazier v. Cropsey, 207 N.Y.S. 803, 124 Misc. 367—Rosenzweig v. Portnoy, 191 N.Y.S. 900, 117 Misc. 136.
26 C.J. p 886 note 49.

63. N.Y.—Mele v. Russo, 9 N.Y.S.2d 203, 168 Misc. 760.
26 C.J. p 886 note 49 [a] (1).

64. N.Y.—Mele v. Russo, supra.
26 C.J. p 886 note 49 [a] (1).

65. N.Y.—Mele v. Russo, supra.

66. N.Y.—Walcer v. Sherman, 205 N.Y.S. 427, 123 Misc. 390—Rosenzweig v. Portnoy, 191 N.Y.S. 900, 117 Misc. 136.
26 C.J. p 886 note 50.

67. N.Y.—People v. Kelsey, 144 N.Y.S. 135, 82 Misc. 491.

68. N.Y.—White v. Lancraft, 132 N.Y.S. 1016, 148 App.Div. 692.

69. N.Y.—Smith v. Smith, 174 N.Y.S. 747.

70. S.C.—Bradley v. Bell, 12 S.E. 1071, 34 S.C. 107.

71. S.C.—Cotton v. Johnson, 51 S.E. 245, 71 S.C. 413.

72. S.C.—Sires v. Moseley, 39 S.E. 7, 60 S.C. 504.

73. S.C.—Lee v. Chaplin, 50 S.E. 501, 70 S.C. 561.

74. S.C.—Lee v. Chaplin, supra—Sires v. Moseley, 39 S.E. 7, 60 S.C. 504.

75. S.C.—Lee v. Chaplin, 50 S.E. 501, 70 S.C. 561.

76. S.C.—Cotton v. Johnson, 51 S.E. 245, 71 S.C. 413.

77. Iowa.—State Exch. Bank of Parkersburg v. Iblings, 181 N.W. 423, 190 Iowa 1045.

ment was rendered on the verdict and consequently the writ of possession was void,[78] the judgment on which the writ of restitution was issued was void because based on a default,[79] or plaintiff caused the warrant of restitution to be issued and executed prematurely.[80] He is not liable, however, for irregularities in the proceedings which might be complained of on appeal, but do not constitute an actionable tort;[81] nor is he liable for the manner in which an officer removed defendant's personal property from the premises where, in executing the warrant of restitution, the officer used his own discretion and judgment as to the method and means of removing such personal property.[82] Process as protection of officer executing writ of forcible entry and detainer is discussed in the C.J.S. title Sheriffs and Constables § 122, also 57 C.J. p 917 note 73.

§ 108. Actions

The court should not allow the jury to apply an erroneous theory of liability. It may permit the introduction in evidence of a bond given by the plaintiff in the original action; and sometimes an action on such bond is the only remedy available for the recovery of damages by the defendant in the first action.

In the absence of an applicable statutory provision, in force at the time, authorizing the recovery of damages otherwise, the remedy of defendant in an action of forcible entry and detainer which has been decided in his favor, and in which plaintiff has given a bond for his security, is on such bond.[83] In an action for damages, such a bond is properly admitted in evidence where it conforms, or is not contrary, to law;[84] but the court should not allow the jury to determine the question of liability on an erroneous theory.[85]

§ 109. Damages

The damages recoverable for wrongful dispossession of defendant in a forcible entry and detainer proceeding are such a sum as will fairly and reasonably compensate him for the losses he has sustained as a result of the dispossession.

In the case of farm property, the measure of damages for wrongful dispossession in a forcible entry and detainer proceeding is the fair and reasonable rental value of the premises from the date of ouster under the judgment and the fair and reasonable value of the crops and vegetables of which defendant in the original proceeding was deprived by the dispossession;[86] and in the case of household goods and personal effects removed from a house and exposed to the elements, it is the difference in the fair market value of such personal property immediately before and after its removal and exposure to the weather.[87]

III. CRIMINAL RESPONSIBILITY

A. OFFENSES AND RESPONSIBILITY THEREFOR

§ 110. Origin and Development

Early English statutes, more extensive than the common law, have had considerable effect in the formulation of the criminal laws of several states in respect of forcible entry and detainer.

A forcible entry was an indictable offense at common law,[88] and this common-law liability is not abrogated or affected by statutes making the offense indictable,[89] or providing the injured party a remedy by a civil action or proceeding.[90] Since, however, they furnish the injured party a more speedy and efficient remedy, they have caused the criminal proceeding to fall into disuse in many jurisdictions.[91] There is some conflict of authority as to whether a forcible detainer was indictable at common law.[92] A civil action for forcible detainer is no bar to a criminal prosecution for forcible detainer.[93]

78. Ky.—Gore v. Bates, 9 Ky.Op. 171.

79. Tex.—Stacks v. Simmons, Civ. App., 58 S.W. 958.

80. Ky.—Black Mountain Corporation v. Jowdy, 268 S.W. 794, 207 Ky. 113.

81. Tex.—Ferguson v. Barnes, Civ. App., 274 S.W. 277.

Issuance of writ during pendency of motion

A writ of restitution, voidable by reason of having been issued while a motion for a new trial was pending, constitutes absolute justification to plaintiff in the writ.—Rosenfeld v. Barnett, 64 S.W. 944, 26 Tex.Civ. App. 71.

82. Ky.—Black Mountain Corporation v. Jowdy, 268 S.W. 794, 207 Ky. 113.

83. Ark.—Strong v. Whatley, 23 Ark. 76—Bradley v. Hume, 18 Ark. 284—Fowler v. Knight, 10 Ark. 43.

84. Tex.—Ferguson v. Barnes, Civ. App., 274 S.W. 277.

85. Okl.—Schuman v. Wallace, 104 P.2d 432, 187 Okl. 535.

86. Iowa.—State Exch. Bank of Parkersburg v. Iblings, 181 N.W. 423, 190 Iowa 1045.

87. Ky.—Black Mountain Corporation v. Jowdy, 268 S.W. 794, 207 Ky. 113.

88. Del.—Hearn v. Hearn, 1 A.2d 585, 9 W.W.Harr. 427.
26 C.J. p 802 note 11.

89. S.C.—State v. Jones, 14 S.C. 344.
26 C.J. p 802 note 12.

90. N.J.—Cruiser v. State, 18 N.J. Law 206.
26 C.J. p 802 note 13.

91. Mass.—Commonwealth v. Shattuck, 4 Cush. 141.

92. N.H.—State v. Morgan, 59 N.H. 322.
26 C.J. p 802 note 15.

93. Ga.—Lewis v. State, 31 S.E. 576, 105 Ga. 657.

Under early English statutes. As judicially noted, forcible entry and detainer was a misdemeanor under the early statutes of England.[94] The first of the English statutes, Statute of 5 Richard II c 8, provided that there should be no entry except where an entry was given by law, and even then not with a strong hand or a multitude of people, and made the offense indictable.[95] The statute abrogated the old rule of the common law that a person entitled to possession might recover and maintain his possession by force if he used no more than was actually necessary for that purpose,[96] but it is said to have had no further effect.[97] As noted infra § 115, the second statute, Statute of 15 Richard II c 2, provided for a summary conviction of offenders by magistrates on view. The third statute, Statute of 8 Henry VI c 9, extended the remedy to cases where there was both a forcible entry and detainer and where there was peaceful entry followed by a forcible detainer,[98] and was the first legislation relating to forcible detainer.[99] As noted infra § 122, this and later statutes provided also for a restitution of possession to the injured party.

In United States. The English statutes making forcible entry and detainer indictable are in force in some of the states, either as a part of the common law of those states, see Common Law § 13 b, or by virtue of statutory provisions adopting certain portions of the English statute law,[1] while in others the original English statute has been substantially adopted or reënacted,[2] or there are other statutes of similar character making the offense indictable.[3] The offense, however, is recognized as indictable as a common-law offense.[4]

In New Hampshire both the common law and the English statutes, which as modified by the statutes of that state were formerly in force,[5] were repealed by the act of 1842, and a forcible entry and detainer is not as such an indictable offense in that state.[6]

§ 111. Nature and Elements of Offense

a. Character of property, possession, and title
b. Entry and force
c. Intent or purpose

a. Character of Property, Possession, and Title

It is essential that the wrong shall have been done in respect of real property, and that the person whose possession is charged to have been interfered with shall have had actual and peaceable possession; but it is not necessary that he shall have had rightful possession or legal title.

To constitute the offense of forcible entry and detainer the wrong done must be with regard to lands and tenements and not to personal property.[7] Also, it is an essential element of the offense of forcible entry or, as it is sometimes called, forcible trespass, that at the time of the offense the premises shall have been in the actual possession of him whose possession is charged to have been interfered with.[8] To constitute actual possession it is not necessary that the party be personally present on the premises at the time of the offense if he is in actual exercise of authority and control over them.[9] He will be deemed to be present and in possession, although temporarily absent, if represented by a member of his family,[10] or by a tenant;[11] and, where a tenant leaves the premises at the end of his term, the landlord, although not in actual occupancy, is regarded as in possession, and a third person who enters and violently keeps possession with force and without authority of law is guilty of forcible detainer.[12] The possession must also be peaceable as distinguished from a mere scrambling possession.[13] An actual peaceable possession, however, is all that

94. Del.—Hearn v. Hearn, 1 A.2d 585, 9 W.W.Harr. 427.

95. N.C.—State v. Davenport, 72 S.E. 7, 156 N.C. 596.
26 C.J. p 802 note 18.

96. Vt.—Dustin v. Cowdry, 23 Vt. 631.
26 C.J. p 802 note 19.

97. D.C.—U. S. v. Griffin, 6 D.C. 53.

98. Del.—Hearn v. Hearn, 1 A.2d 585, 9 W.W.Harr. 427.
26 C.J. p 802 note 24.

99. Pa.—Commonwealth v. Toram, 2 Pars.Eq.Cas. 411, 3 Pa.L.J.R. 346, 5 Pa.L.J. 296.

1. S.C.—State v. Huntington, 5 S.C.L. 111.
26 C.J. p 802 note 29.

2. N.C.—State v. Davenport, 72 S.E. 7, 156 N.C. 596.
26 C.J. p 802 note 30.

3. U.S.—Apex Hosiery Co. v. Leader, C.C.A.Pa., 90 F.2d 155, reversing, D.C., 20 F.Supp. 138, reversed on other grounds Leader v. Apex Hosiery Co., 58 S.Ct. 362, 302 U.S. 656, 82 L.Ed. 508.
Ariz.—Strickland v. State, 294 P. 617, 37 Ariz. 368.
26 C.J. p 802 note 31.
Primary object of statute is avoidance of public disturbance.—Commonwealth v. Leibowitz, 157 A. 219, 103 Pa.Super. 479.

4. S.C.—State v. Jones, 14 S.C. 344.
26 C.J. p 802 note 32.

5. N.H.—State v. Pearson, 2 N.H. 550.

6. N.H.—State v. Morgan, 59 N.H. 322.

7. Mo.—State v. Brinkerhoff, 44 Mo.A. 169.
N.C.—State v. Jacobs, 94 N.C. 950.
26 C.J. p 802 note 36.

8. N.C.—State v. Bryant, 9 S.E. 1, 103 N.C. 436.
26 C.J. p 803 note 40.

9. N.C.—State v. Davis, 13 S.E. 883, 109 N.C. 809, 14 L.R.A. 206.
26 C.J. p 803 note 41.

10. N.C.—State v. Caldwell, 47 N.C. 468.
26 C.J. p 803 note 42.

11. N.C.—State v. Robbins, 31 S.E. 669, 123 N.C. 730, 68 Am.S.R. 841.

12. Ga.—Ellis v. State, 52 S.E. 147, 124 Ga. 91.

13. Ind.—Swails v. State, 4 Ind. 516.
26 C.J. p 803 note 45.

is essential to maintain the prosecution.[14] It is immaterial whether or not such a possession is also rightful.[15]

Title. It is not necessary that the prosecutor should have any legal title in the property.[16] A prosecution for forcible entry and detainer, or for forcible trespass, does not involve any question of title,[17] except as bearing on the question of restitution, see infra § 122, and cannot be maintained or used as a means of trying title to the premises where the alleged force was committed,[18] or as a means of collateral attack on proceedings in a civil action concerning the same.[19]

b. Entry and Force

To constitute a forcible entry, there must be an actual entry with more force than amounts to a mere trespass. Furthermore, the force involved in either a forcible entry or a forcible detainer must be private force, rather than force under legal process; but the violence which must accompany the entry or detainer may be either actual violence or matters which tend to a breach of the peace or give rise to a reasonable fear or apprehension of personal injury if the possession is defended or sought to be regained.

To constitute the offense of forcible entry an actual entry is necessary;[20] and, to constitute an entry, there must be an actual taking possession of lands or tenements by entering into or setting foot thereon.[21] An unsuccessful attempt to enter is not sufficient.[22] Furthermore, to constitute a forcible entry there must be more force than amounts to a mere trespass.[23] The entry must be accompanied with some circumstances of violence either actual or threatened,[24] or, more explicitly, there must be either actual violence or such conduct, threats, demonstration of force, or other circumstances as tend or are calculated to alarm, intimidate, or terrorize,[25] or as give ground to apprehend personal injury or danger in defending possession,[26] or amount to, involve, or tend to, a breach of the peace.[27] While it is criminal for a person, not acting under judicial process, to accomplish an entry by the exertion of force against the person of an actual occupant who opposes and resists the entry,[28] it is not necessary that there be any act of great public violence or terror,[29] or that an actual personal injury to the person in possession should result.[30] It is sufficient if the entry is accompanied with such a display of force or circumstances of violence or terror as to give the party in possession reasonable ground to believe that he must yield in order to avoid a personal injury[31] or breach of the peace,[32] or that any resistance would be useless.[33] Terror may be caused by accused carrying with him such an unusual number of attendants or by arming himself in such a manner as plainly to intimate his design to back his pretensions by force,[34] by actually threatening to kill, maim, or beat those who continue in possession,[35] or by making use of expressions plainly implying a purpose of using force against those who make resistance;[36] and in such cases it is not necessary that the party in possession should make an actual forcible resistance,[37] or wait until actual

14. Ind.—Swails v. State, 4 Ind. 516.
N.Y.—People v. Leonard, 11 Johns. 504.

15. Ind.—Peelle v. State, 68 N.E. 682, 161 Ind. 378.
N.Y.—People v. Field, 52 Barb. 198.
26 C.J. p 803 note 47.

16. Ind.—Higgins v. State, 7 Ind. 549.
26 C.J. p 803 note 48.

17. N.C.—State v. Earp, 115 S.E. 23, 196 N.C. 161—State v. Davenport, 72 S.E. 7, 156 N.C. 596.
26 C.J. p 803 note 49.

18. N.C.—State v. Thompson, 41 S.E. 486, 130 N.C. 680.
26 C.J. p 803 note 50.

19. Ind.—Vess v. State, 93 Ind. 211.

20. N.C.—State v. Bryant, 9 S.E. 1, 103 N.C. 436.

21. Or.—Coghlan v. Miller, 211 P. 163, 106 Or. 46.

22. N.C.—State v. Bryant, 9 S.E. 1, 103 N.C. 436.

23. Colo.—Goshen v. Peo., 44 P. 503, 22 Colo. 270.
26 C.J. p 803 note 52.

24. N.C.—State v. Davis, 13 S.E. 883, 109 N.C. 809, 14 L.R.A. 206.
26 C.J. p 801 note 53.
Corpus Juris is cited in a civil case.—Christian v. Amster, 235 N.W. 199, 253 Mich. 100.

25. N.C.—State v. Earp, 145 S.E. 23, 196 N.C. 161.
Pa.—Commonwealth v. Leibowitz, 157 A. 219, 103 Pa.Super. 479.
26 C.J. p 801 note 53.

26. Pa.—Commonwealth v. Leibowitz, 157 A. 219, 103 Pa.Super. 479.

27. N.C.—State v. Earp, 145 S.E. 23, 196 N.C. 164—State v. Davenport, 72 S.E. 7, 156 N.C. 596.
26 C.J. p 801 note 54.

28. Or.—Coghlan v. Miller, 211 P. 163, 106 Or. 46.

29. N.C.—State v. Jacobs, 94 N.C. 950.

30. N.C.—State v. Pollok, 26 N.C. 305, 42 Am.D. 140.
Pa.—Commonwealth v. Everhart, 57 Pa.Super. 192.
S.C.—State v. Bennett, 16 S.C.L. 503, 18 Am.D. 663.
26 C.J. p 804 note 57.

31. N.C.—State v. Jacobs, 94 N.C. 950.
26 C.J. p 804 note 58.

32. N.C.—State v. Oxendine, 122 S.E. 568, 187 N.C. 658.
26 C.J. p 804 note 59.

33. Ga.—Williams v. State, 48 S.E. 149, 120 Ga. 488—Lissner v. State, 11 S.E. 500, 84 Ga. 669, 20 Am.S.R. 389.
Ind.—Strong v. State, 4 N.E. 293, 105 Ind. 1.

34. N.C.—State v. Jacobs, 94 N.C. 950—State v. Pollok, 26 N.C. 305, 42 Am.D. 140.
S.C.—State v. Bennett, 16 S.C.L. 503, 18 Am.D. 663.
26 C.J. p 804 note 61.

35. N.C.—State v. Pollok, 26 N.C. 305, 42 Am.D. 140.
S.C.—State v. Bennett, 16 S.C.L. 503, 18 Am.D. 663.

36. N.C.—State v. Pollok, 26 N.C. 305, 42 Am.D. 140.
S.C.—State v. Bennett, 16 S.C.L. 503, 18 Am.D. 663.

37. Ga.—Williams v. State, 48 S.E. 149, 120 Ga. 488—Lissner v. State, 11 S.E. 500, 84 Ga. 669, 20 Am.S.R. 389.

violence is resorted to.[38] The same circumstances of force, violence, or terror are essential to a forcible detainer as to a forcible entry.[39] There may be a forcible detainer, although the entry is peaceable;[40] and as in the case of forcible entry it is not essential that an assault should have been committed but it is sufficient that the acts of defendant were such as to cause a reasonable apprehension of physical violence.[41] Also, whoever retains a wrongful possession by keeping an unusual number of people or unusual weapons or by threatening to do some bodily hurt to the former possessor if he dares to return is guilty of a forcible detainer, although no attempt is made to reënter.[42]

Number of persons making entry. Three or more persons constitute a "multitude" within an alternative provision of the statute creating the offense.[43] However, it is not necessary that the entry should be made by a multitude of people,[44] as there may be a demonstration of force by less than three persons,[45] and a single person may commit the offense.[46]

Entry or detainer under legal process. The force involved in the offense of forcible entry is private force unlawfully exerted, and the public force of the state lawfully exercised cannot be the means of a wrongful entry.[47] An entry made with a lawful warrant executed in a lawful way by a lawful officer is not a forcible entry, although the affidavit on which the warrant was issued is false;[48] nor is a person guilty of forcible detainer by reason of forcibly retaining possession of property which has been delivered to him and taken in good faith by virtue of a writ regular on its face and issued on the judgment of a court of competent jurisdiction, although the writ may have been wrongfully issued.[49] Where, however, a justice acting without any jurisdiction assists a person in forcibly ejecting another who is in possession, it is a forcible entry on the part of both the justice and the person so entering.[50]

Breaking into buildings. It has been held that breaking into a dwelling house is a forcible entry, although there is at the time no person in the house or on the premises.[51] On the contrary, however, it has been held that such an entry, if accompanied with no more violence than is incident to effecting the entry, is a mere trespass,[52] and that, in the absence of circumstances amounting to a public breach of the peace, it is not a forcible entry to break into an unoccupied dwelling or into vacant premises.[53] So it is not a forcible entry to break into an outhouse,[54] or merely to take off the lock of a house and substitute another,[55] or, after being admitted into a house, to break open the door of a locked room.[56] One who fraudulently and without right enters into a dwelling house by means of a false key is liable for forcible entry under a statute making every person guilty of forcible entry who "by breaking open doors, windows, or other parts of a house, enters upon or into any real property."[57]

c. Intent or Purpose

Intent or purpose is not important unless made so by the wording and construction of the statute defining the offense.

A person who, for the purpose of obstructing process against a tenant, takes possession of land after the rendition of judgment against the tenant in an unlawful detainer action is guilty of a statutory offense of taking possession of land without authority from the owner.[58] However, a criminal intent is not necessary to constitute forcible detainer; the only intent required is the intent to do the act itself.[59]

38. Mo.—Wylie v. Waddell, 52 Mo. App. 226—Oakes v. Aldridge, 46 Mo.App. 11.

39. Mass.—Com. v. Dudley, 10 Mass. 403.
26 C.J. p 804 note 66.

40. U.S.—In re Munro, D.C.N.Y., 195 F. 817.
Pa.—Commonwealth v. Rogers, 1 Serg. & R. 124—Cole v. Reece, 47 Pa.Super. 212.

41. Cal.—Dickinson v. Maguire, 9 Cal. 46.
Ga.—Ellis v. State, 52 S.E. 147, 124 Ga. 91.
26 C.J. p 805 note 68.

42. U.S.—In re Munro, D.C.N.Y., 195 F. 817.
N.Y.—People v. Rickert, 8 Cow. 226.

43. N.C.—State v. Earp, 145 S.E. 23, 196 N.C. 164.

44. S.C.—Burt v. State, 5 S.C.L. 413—State v. Burt, 7 S.C.L. 489.

45. N.C.—State v. Lawson, 31 S.E. 667, 123 N.C. 740, 68 Am.S.R. 844.

46. N.C.—State v. Caldwell, 47 N.C. 468.
S.C.—State v. Bennett, 16 S.C.L. 503, 18 Am.D. 663.
26 C.J. p 805 note 72.

47. Ga.—Sewell v. State, 61 Ga. 496.
Mo.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.
Pa.—Commonwealth v. Shaffer, 32 Pa.Super. 375.
26 C.J. p 805 note 75.

48. Ga.—Sewell v. State, 61 Ga. 496.

49. Ind.—Vess v. State, 93 Ind. 211.

50. N.C.—State v. Anders, 30 N.C. 15.

51. Pa.—Commonwealth v. Johnson, 3 Pa.Co. 611.

52. Ga.—Lewis v. State, 26 S.E. 496, 99 Ga. 692, 59 Am.S.R. 255.

53. Pa.—Commonwealth v. Leach, Add. 352.

54. Pa.—Commonwealth v. Rees, 2 Brewst. 561.

55. N.C.—State v. Leary, 48 S.E. 570, 136 N.C. 578.

56. N.C.—State v. Pridger, 30 N.C. 84.

57. Cal.—Winchester v. Becker, 88 P. 296, 4 Cal.A. 382.
26 C.J. p 805 note 89.

58. Ark.—State v. Townsend, 255 S.W. 312, 161 Ark. 56.

59. Ariz.—Strickland v. State, 294 P. 617, 37 Ariz. 368.

§ 112. Defenses

An endeavor to settle a labor dispute is not a defense.

Defendants cannot justify unlawful conduct by asserting that they were endeavoring to settle a labor dispute.[60] The bar of a prosecution by a civil action is discussed supra § 110, and by former acquittal is discussed in Criminal Law § 240.

§ 113. Persons Liable

Persons aiding and abetting, as well as those performing, the wrongful acts are criminally liable.

A landlord will be liable for entering in a forcible manner where a tenant holds over;[61] a joint tenant or tenant in common will be liable for forcibly ejecting his cotenant;[62] and, where a husband and wife are living apart from each other, the husband may be prosecuted for forcibly entering on the lands of the wife.[63] Where the trustees of a church have, in a regular meeting, decided to close a building belonging to the church, it is a forcible entry for any trustee who did not assent to such action[64] or for the members of the congregation[65] afterward to forcibly break into such building; and it is said that a person out of actual possession may be criminally liable, even though he is lawfully entitled to possession;[66] but, on the other hand, it is held that a man who breaks into his own dwelling which is forcibly detained from him by one who has the bare custody of it is not liable for a forcible entry.[67]

A person who is present and is aiding and abetting the wrongful acts is guilty,[68] as are also all persons who accompany another for the purpose of making a forcible entry, whether they actually enter on the premises or not;[69] but it is otherwise as to a person who does not participate in the entry and has no knowledge thereof.[70]

B. PROSECUTION AND PUNISHMENT

§ 114. Persons Entitled to Prosecute

Whether possession by, or legal title in, the prosecutor is essential is considered supra § 111 a.

Examine Pocket Parts for later cases.

§ 115. Summary Proceedings

In most of the states no provision exists for the summary proceeding before a justice of the peace which was authorized by an early English statute.

As judicially noted, the second of the early English statutes, Statute of 15 Richard II c 2, provided for a summary conviction, for a forcible entry, by a justice of the peace on view, the justice being authorized to go on the premises, remove the force, and convict, fine, and imprison the wrongdoer.[71] This statute has been held to be in force in a few jurisdictions in this country,[72] but in most of the states it seems that the proceeding is unknown.[73] In proceedings under this statute there could be no award of restitution, see infra § 122.

§ 116. Proceedings by Indictment or Information

The requisites and sufficiency of an indictment or information and the proceedings based thereon are considered infra §§ 117–121.

Examine Pocket Parts for later cases.

§ 117. —— The Indictment or Information

Facts sufficient to constitute the commission of an indictable offense must not only be alleged, with clearness and certainty, in the indictment, but must also be proved as alleged.

The indictment must allege sufficient facts to show on its face the commission of an indictable offense,[74] and it must set out such facts with clearness and certainty.[75] It is sufficient if the offense is stated with such clearness that the jury may readily understand its nature, and defendant prepare his defense, and the court pronounce judgment according to the rights of the case.[76] Where

60. Pa.—Commonwealth v. Guthier, 34 Pa.Dist. & Co. 351.

61. Pa.—Commonwealth v. Kensey, 2 Pars.Eq.Cas. 401, 3 Pa.L.J.R. 233, 5 Pa.L.J. 119.

62. Pa.—Commonwealth v. Oliver, 2 Pars.Eq.Cas. 420.

63. Pa.—Commonwealth v. White, 18 Phila. 496.

64. Pa.—Commonwealth v. Oliver, 2

67. N.C.—State v. Curtis, 20 N.C. 363.
Pa.—Commonwealth v. Prison Keeper, 1 Ashm. 140.

68. N.C.—State v. Tyndall, 135 S.E. 451, 192 N.C. 559, 49 A.L.R. 596.

69. S.C.—State v. Bennett, 16 S.C. 503, 18 Am.D. 663.

70. Mo.—State v. Glenn, 108 S.W.

72. Pa.—Blythe v. Wright, 2 Ashm. 428.
26 C.J. p 806 note 3.

73. N.C.—State v. Yarborough, 70 N.C. 250.
26 C.J. p 806 note 4.

74. N.C.—State v. Eason, 70 N.C. 88.

75. Pa.—Commonwealth v. Goodman, 18 Pa.Dist. & Co. 318, 43

he indictment is under a statute, it is sufficient if t follows the language of the statute,[77] unless the statute fails to define or set out the facts which constitute the offense.[78]

Allegations as to force. The allegations of the ndictment must be sufficient to show the use of that legree of force or violence which is essential to constitute the offense charged.[79] To allege that defendant entered with "force and arms" is insufficient,[80] that being the technical term employed to designate the force which the law ascribes to every common trespass,[81] but, if other words are added which import actual violence, the indictment is good.[82] Aleging the entry to have been unlawful and "with strong hand" is sufficient;[83] and, if the words are found in the statute, they should appear in the inlictment.[84] The words "with strong hand" mean something more than a mere trespass and are technically appropriate to designate the degree of force necessary to constitute the offense.[85] The necessity of setting out the particular facts constituting the force or violence used has been both asserted[86] and lenied.[87] The same allegations as to force are necessary in an indictment for a forcible detainer as for a forcible entry.[88]

Allegations as to possession or title. An indictment for a forcible entry must charge that the prosecutor was in the actual and peaceable possession of the premises at the time of the alleged offense,[89] but need not state that he was personally present.[90] Such possession, however, is all that need be alleged,[91] it being unnecessary to allege any title in the prosecutor,[92] or lack of title in defendant,[93] or to state who was the owner of the premises,[94] unless, as shown infra § 122, the indictment is brought under a statute providing for restitution which requires the prosecutor to have a certain estate or interest in the premises. In forcible detainer the indictment must allege the prior possession of the prosecutor.[95]

Description of premises. The indictment must describe the place or premises where the alleged offense was committed with certainty[96] such as will inform defendant of the specific charge which he is to meet and enable the justice or sheriff to restore the injured party to possession;[97] but certainty to a reasonable intent is all that is necessary;[98] and it seems that some less degree of certainty may be permitted in cases where the prosecution is merely to punish defendant, than where the prosecutor is also seeking to be restored to possession.[99]

Proof and variance. The offense must be established as alleged in the indictment.[1] A material variance between description of the property as laid in the indictment and the evidence is fatal.[2]

§ 118. —— Evidence

Rules of evidence obtaining in criminal cases generally are applied.

The evidence must be sufficient to establish defendant's guilt beyond a reasonable doubt.[3] The burden of proof is on the prosecution to show all

77. N.Y.—People v. Farrell, supra.

78. Mo.—State v. Smith, 66 Mo.App. 403.

79. Ark.—State v. Leathers, 31 Ark. 44.
Pa.—Commonwealth v. Brown, 21 A. 17, 138 Pa. 447—Commonwealth v. Taylor, 5 Binn. 277.

80. Ark.—State v. Leathers, 31 Ark. 44.
Pa.—Commonwealth v. Brown, 21 A. 17, 138 Pa. 447—Commonwealth v. Taylor, 5 Binn. 277.

81. Ark.—State v. Leathers, 31 Ark. 44.
Pa.—Commonwealth v. Taylor, 5 Binn. 277.

82. Me.—Harding's Case, 1 Me. 22.
N.Y.—People v. Farrell, 8 N.Y.S. 230, 5 Silv.Sup. 23.

83. Mass.—Commonwealth v. Shattuck, 4 Cush. 141.
N.J.—Cruiser v. State, 18 N.J.Law 206.
N.C.—State v. Whitfield, 30 N.C. 315.

84. Pa.—Commonwealth v. Brown, 21 A. 17, 138 Pa. 447.

85. Mass.—Commonwealth v. Shattuck, 4 Cush. 141.
N.C.—State v. Whitfield, 30 N.C. 315.

86. Mo.—State v. Smith, 66 Mo.App. 403.
26 C.J. p 806 note 23.

87. N.Y.—People v. Farrell, 8 N.Y.S. 230, 5 Silv.Sup. 23.

88. Pa.—Commonwealth v. Brown, 21 A. 17, 138 Pa. 447.

89. N.C.—State v. Bryant, 9 S.E. 1, 103 N.C. 436.
26 C.J. p 806 note 27.

90. Ky.—Commonwealth v. Orr, 5 Ky.L. 687.
N.C.—State v. Shepard, 82 N.C. 614—State v. Fort, 20 N.C. 332.

91. Me.—Harding's Case, 1 Me. 22.
N.C.—State v. Whitfield, 30 N.C. 315.

92. Me.—Harding's Case, 1 Me. 22.

93. N.C.—State v. Whitfield, 30 N.C. 315.

94. Okl.—Foust v. Territory, 58 P. 728, 8 Okl. 541.

95. Pa.—Commonwealth v. Brown, 21 A. 17, 138 Pa. 447.

96. Pa.—Commonwealth v. Goodman, 18 Pa.Dist. & Co. 318, 43 Lanc.L.Rev. 273.
26 C.J. p 807 note 35.

97. Pa.—Vanpool v. Com., 13 Pa. 391.
S.C.—State v. Walker, 4 S.C.L. 255.

98. Pa.—Torrence v. Commonwealth, 9 Pa. 184.
26 C.J. p 807 note 37.

99. Ind.—Peelle v. State, 68 N.E. 682, 161 Ind. 378.
26 C.J. p 807 note 38.

1. N.C.—State v. Smith, 24 N.C. 127.
26 C.J. p 808 note 51.

2. Ind.—Ball v. State, 26 Ind. 155.

3. Pa.—Commonwealth v. Housknecht, 1 Kulp 367.

Evidence held sufficient to sustain a conviction of forcible detainer.
Ga.—Ellis v. State, 52 S.E. 147, 124 Ga. 91.
Pa.—Commonwealth v. Guthier, 34 Pa.Dist. & Co. 351.

Evidence held insufficient to support conviction of forcible entry and detainer.—Commonwealth v. Leibowitz, 157 A. 219, 103 Pa.Super. 479.

the facts essential to sustain a conviction,[4] as for instance, a prior possession in the prosecutor and an unlawful detention on the part of defendant by force and with a strong hand or by menace or threats.[5]

Evidence of an assault on the person of the party in possession is admissible to show the character of the entry,[6] and evidence that the party making the entry remained in possession is admissible to show that he made his entry complete, although he is not charged with a forcible detainer.[7] Tax receipts, while not alone sufficient evidence of the prosecutor's actual possession, are admissible to strengthen other evidence of actual possession.[8] Evidence that a civil action for the same offense is pending is irrelevant and inadmissible.[9]

Evidence of title. As the title to the premises is not in issue and cannot be tried, see supra § 111 a, evidence of title is ordinarily inadmissible,[10] and cannot be introduced either to justify the force,[11] or to avoid restitution.[12] However, it has been held that, although defendant cannot justify by showing title in himself, he may controvert the facts by which the prosecutor attempts to show title in himself.[13]

§ 119. —— Trial

If the evidence is sufficient for submission to it, the jury may and should determine questions of fact and render a proper verdict.

Questions of fact are to be determined by the jury where the evidence is sufficient for submission to it.[14]

The question of possession is a mixed one of law and fact.[15]

Whether, if there is evidence of possession, that evidence is true, is a question of fact for the jury; but whether, admitting the evidence to be true, the possession shown is of such a character as will be protected against a forcible entry is a question of law for the court.[16]

Verdict. Where both forcible entry and forcible detainer are charged in the same indictment, defendant may be acquitted of one and convicted of the other,[17] as where one offense is defectively set out and the other properly, in which case defendant may be convicted of the one offense which is properly charged.[18] However, where both counts are properly charged, a general verdict of guilty is a verdict of guilty on both counts unless defendant demands a separate verdict on each count;[19] and, where the evidence fails to support either branch of the charge, a new trial should be awarded.[20]

§ 120. —— Sentence and Punishment

Such a fine as is within the statutory limit and the jurisdiction of the court may be imposed.

Where, on an appeal from proceedings before a justice, the case is tried de novo in a higher court, that court may impose any fine within the limits of the statute, although greater in amount than the justice had jurisdiction to impose.[21]

§ 121. —— Damages and Costs

Damages will not be awarded, except under statutory authority, in a criminal prosecution, nor will costs be taxed against the prosecutor unless the prosecution was frivolous or malicious.

As judicially noted, it is provided by the English statute, Statute of 31 Elizabeth c 11, that, if defendant pleads three years' possession in bar of restitution and the plea is decided against him, he shall pay such costs and damages as the judges or justices shall assess; but in no other case can damages be awarded in a criminal proceeding.[22] Where

4. Pa.—Commonwealth v. Houskneeht, 1 Kulp 367.

5. Pa.—Commonwealth v. Randall, 63 Pa.Super. 238.

6. Ind.—Higgins v. State, 7 Ind. 549.
26 C.J. p 808 note 57.

7. Ga.—Lissner v. State, 11 S.E. 500, 84 Ga. 669, 20 Am.S.R. 389.

8. Pa.—Quinn v. Commonwealth, 11 A. 531, 7 Pa.Cas. 417.

9. Ga.—Lewis v. State, 21 S.E. 576, 105 Ga. 657.
26 C.J. p 808 note 62.

10. Ind.—Higgins v. State, 7 Ind. 549.
26 C.J. p 808 note 64.

11. N.Y.—People v. Leonard, 11 Johns. 504.
Tenn.—Black v. State, 3 Yerg. 588.

12. U.S.—Respublica v. Shryber, Pa., 1 Dall. 68, 1 L.Ed. 40.

13. N.Y.—People v. Nelson, 13 Johns. 340.

14. Ark.—State v. Townsend, 255 S W. 312, 161 Ark. 56.
N.C.—State v. Fleming, 138 S.E. 342, 194 N.C. 42.

Whether language used was threat
In a prosecution for forcible detainer based on alleged threats of violence it is a question for the jury whether such was the import of the language used.
N.Y.—People v. Fields, 52 Barb. 198—People v. Rickert, 8 Cow. 226.
Pa.—Commonwealth v. Randall, 63 Pa.Super. 238.

Motion for acquittal was properly denied where defendant entered on lands in another's possession, plowed up his crops, and erected a fence to keep him off the land.—State v. Bates, 70 S.E. 170, 87 S.C. 527.

15. N.Y.—People v. Fields, 52 Barb. 198.

16. Pa.—State v. Leach, Add. 352.

17. Ind.—Strong v. State, 4 N.E. 293, 105 Ind. 1.
26 C.J. p 809 note 81, p 801 note 3 [a].

18. Pa.—Commonwealth v. Rogers, 1 Serg. & R. 124.

19. N.C.—State v. Robbins, 31 S.E. 669, 123 N.C. 730, 68 Am.S.R. 841.

20. N.C.—State v. Ward, 16 N.C. 290.

21. Ind.—Peelle v. State, 68 N.E. 683, 161 Ind. 378.

22. Pa.—Commonwealth v. Stoever, 1 Serg. & R. 480.
26 C.J. p 809 note 95.

defendant is acquitted on the merits, costs cannot be taxed against the prosecutor unless the prosecution was frivolous or malicious.[23]

§ 122. Restitution and Rerestitution

Restitution of possession to the prosecutor may be awarded in a criminal prosecution for forcible entry and detainer only when it is authorized by statute and the proper proceedings to obtain it have been taken. Rerestitution of possession to defendant is not a matter of right, but may be ordered in a proper case.

In the absence of statute there can be no restitution of possession in a criminal proceeding for forcible entry and detainer,[24] and the early English statutes, Statutes of 5 Richard II c 8, 15 Richard II c 11, contained no such provision.[25] This was remedied by two later statutes, Statutes of 8 Henry VI c 9, 31 Elizabeth c 11, which provided that the injured party might be restored to possession.[26] These statutes were construed as providing for a restitution only where the prosecutor was seized of an estate of freehold,[27] but by a later statute, Statute of 21 James I c 15, the right was extended to tenants of lesser estates.[28] These statutes are in effect in some of the states.[29]

Proceedings to procure restitution. Under the statutes authorizing an award of restitution a justice cannot proceed summarily, but only by way of an inquest and with the intervention of a jury,[30] and defendant must be given notice of the inquest and an opportunity to be heard.[31] Defendant may traverse the force found by the jury, and if he does so restitution cannot be awarded until the traverse is tried and found against him by another jury.[32] The traverse need not be in writing, but may be made orally.[33]

On an indictment there can be no award of restitution after conviction unless there is an allegation in the indictment as to the prosecutor's estate or interest in the premises,[34] it being necessary to allege, for this purpose, such an estate or interest as is within the statutes providing for restitution.[35] Under a writ of restitution the sheriff is only authorized to dispossess defendant against whom there has been judgment and sentence and those claiming under him,[36] and cannot dispossess persons against whom an indictment is still pending.[37] An appeal from a conviction of forcible entry and detainer does not suspend the right of restitution.[38]

Effect of three years' possession. The statutes providing for restitution excepted from their operation cases where defendant had been in quiet possession for three years prior to the indictment.[39] Where such possession is pleaded, there can be no award of restitution until this question is tried.[40] The plea, however, is available only in bar of the award of restitution and not in bar of the prosecution.[41]

Rerestitution, as here used, is an order of court returning the premises to the party prosecuted. Where on appeal or certiorari an inquest or indictment is quashed, the court may award a rerestitution to the party dispossessed by the prior proceedings;[42] but rerestitution cannot be demanded as a matter of right, and the court will not grant it unless it appears that the party asking it has a right to the possession.[43]

23. Tenn.—Dillon v. State, 4 Hayw. 271.

24. N.H.—State v. Morgan, 59 N.H. 322.
Tenn.—State v. Walker, 5 Sneed, 259.
26 C.J. p 809 note 98.

25. Pa.—Blythe v. Wright, 2 Ashm. 428.

26. Del.—Hearn v. Hearn, 1 A.2d 585, 9 W.W.Harr. 427.
26 C.J. p 809 note 3.

27. Pa.—Commonwealth v. Toram, 2 Pars.Eq.Cas. 411, 3 Pa.L.J.R. 346, 5 Pa.L.J. 296.

28. N.H.—State v. Morgan, 59 N.H. 322.
Pa.—Commonwealth v. Toram, 2 Pars.Eq.Cas. 411, 3 Pa.L.J.R. 346, 5 Pa.L.J. 296.
S.C.—State v. Speirin, 3 S.C.L. 119.
26 C.J. p 809 note 8.

29. Pa.—Blythe v. Wright, 2 Ashm. 428.
26 C.J. p 809 note 9.

30. Pa.—Blythe v. Wright, 2 Ashm. 428.
In Maryland under the code a jury is dispensed with and the justice may proceed alone.—Roth v. State, 43 A. 769, 89 Md. 524.

31. N.J.—State v. Stokes, 1 N.J.Law 392.
Pa.—Blythe v. Wright, 2 Ashm. 428.

32. S.C.—State v. Speirin, 3 S.C.Law 119.
26 C.J. p 809 note 13.

33. N.Y.—People v. Anthony, 4 Johns. 198.

34. Pa.—Commonwealth v. Brown, 21 A. 17, 138 Pa. 447.
26 C.J. p 810 note 15.

35. N.C.—State v. Butler, 1 N.C. 414.
26 C.J. p 807 note 33.

36. Pa.—Commonwealth v. Gable, 1 Pennyp. 26.
26 C.J. p 810 note 22.

37. Pa.—Commonwealth v. Gable, supra.

38. S.C.—State v. Bennett, 16 S.C.L. 503, 18 Am.D. 663.

39. N.H.—State v. Morgan, 59 N.H. 322.
S.C.—State v. Speirin, 3 S.C.L. 119.

40. Pa.—Commonwealth v. Stoever, 1 Serg. & R. 480.
S.C.—State v. Speirin, 3 S.C.L. 119.

41. N.J.—State v. Covenhoven, 6 N.J.Law 396.
Pa.—Commonwealth v. Robison, Add. 14.

42. N.Y.—People v. Shaw, 1 Cal. 125.
S.C.—State v. Speirin, 3 S.C.L. 119.

43. Pa.—Blythe v. Wright, 2 Ashm. 428.

FORCIBLY. By the use of force, in a forcible manner, so as to exert force.[1] When used to describe the doing of an act, the word means with force;[2] with that degree or description of force which must be exercised in order to accomplish the intended act.[3] It does not always or necessarily imply the use of physical force[4] or violence;[5] but particular acts may be said to be done forcibly where there is a mere physical contact,[6] or even a verbal remonstrance if it is accompanied by the power to deter or by threats of physical force.[7]

Depending on the circumstances, the term has been held equivalent to "violently;"[8] and also has been distinguished therefrom.[9]

Phrases employing the word are set out in the note.[10]

FOR COLLECTION. See the definition Collection 14 C.J.S. p 1323 notes 94-98 and the titles Banks and Banking §§ 212, 222 b and Bills and Notes § 214 c (4).

FORDA. In old records, a ford or shallow, made by damming or penning up the water.[11]

FORDAL. A butt or headland, jutting out upon other land.[12]

FORDANNO. In old European law, he who first assaulted another.[13]

FOR DEPOSIT. See Banks and Banking § 222 b notes 67, 68.

FORDIKA. In old records, grass or herbage growing on the edge or bank of dykes or ditches.[14]

FORE. In Saxon, before. In French, out.[15]

In golfing, the customary warning cry uttered by a player upon addressing himself to the ball, when others are in close proximity or in such position that they may be injured by the ball, after it is struck.[16]

FORE-AND-AFT TREE. A tree in a boundary line with chops on the sides indicating the direction of the line.[17]

FORECLOSE. To bar, or shut out;[18] to cut off, preclude, prevent, shut up, or stop;[19] to end or terminate,[20] the word presupposing the existence of something to be ended or terminated.[21] In its popular significance, to enforce by any form of legal proceeding.[22] More specifically, it is a technical term used with reference to the process of destroying a mortgagor's right or equity of redemption.[23]

1. Standard D.

2. U.S.—U. S. v. Bachelder, C.C.N.H., 24 F.Cas.No.14,490, 2 Gall. 15, 19.

3. Pa.—Commonwealth v. Stephens, Super., 17 A.2d 919, 921.

4. Cal.—People v. Casagranda, 111 P.2d 672, 675, 43 Cal.App.2d 818—People v. Simmons, 55 P.2d 297, 299, 12 Cal.App.2d 329.
Pa.—Commonwealth v. Frankfeld, 173 A. 834, 836, 114 Pa.Super. 262.

5. Pa.—Commonwealth v. Stephens, Super., 17 A.2d 919, 921.

6. Pa.—Commonwealth ex rel. Case v. Smith, 3 A.2d 1007, 1010, 134 Pa. Super. 183.

7. Pa.—Commonwealth v. Frankfeld, 173 A. 834, 836, 114 Pa.Super. 262.

8. Utah.—State v. Crawford, 206 P. 717, 719, 60 Utah 6.

"'Violently' . . . against her will"

"The words do convey aptly the idea that the act was done . . . 'forcibly.'"—State v. Williams, 32 La.Ann. 335, 337, 36 Am.R. 272.

9. Ill.—People v. Jones, 105 N.E. 744, 745, 263 Ill. 564, 567.
Pa.—Commonwealth v. Stephens, Super., 17 A.2d 919, 921.

10. **Phrases construed**

(1) "Forcibly and violently."—George v. Goldsmiths & General Burglary Insurance Association, [1898] 2 Q.B. 136, 140.

(2) "Forcibly . . . effects his escape."—Crosby v. Commonwealth, 45 S.W.2d 822, 823, 242 Ky. 62. See also Escape § 2 notes 7, 8.

(3) "Forcibly ejected or excluded" has been construed to mean force of an unusual kind which tends to bring about a breach of the peace.—Crow v. Davidson, 96 P.2d 70, 72, 186 Okl. 84, 126 A.L.R. 123.

(4) "Forcibly or fraudulently," as implying actual force.—Bridgewater & Utica Plank Road Co. v. Robbins, 22 Barb., N.Y., 662, 668.

(5) "Forcibly passing," as not necessarily implying resistance by force or violence offered.—Camden, Ellisburgh and Marlton Turnp. Co. v. Fowler, 24 N.J.Law 205, 208.

(6) "Forcibly resist, prevent, or impede."—U. S. v. Bachelder, C.C.N.H., 24 F.Cas.No.14,490, 2 Gall. 15, 19.

(7) "Maliciously, forcibly, or fraudulently."—People v. Casagranda, 111 P.2d 672, 674, 43 Cal.App.2d 818—People v. Simmons, 55 P.2d 297, 299, 12 Cal.App.2d 329.

(8) "Unlawfully, willfully, feloniously, forcibly, and violently," as compared with "against her will."
Ga.—Shehany v. Lowry, 152 S.E. 114, 115, 170 Ga. 70.
La.—State v. Wilson, 67 So. 26, 27, 136 La. 345.

11. Black L.D.

12. Black L.D.

13. Black L.D.

14. Black L.D.

15. Black L.D.

16. Mo.—Page v. Unterreiner, App., 106 S.W.2d 528, 532.

17. U.S.—Belding v. Hebard, Tenn., 103 F. 532, 537, 43 C.C.A. 296.
Trees as natural monuments see Boundaries § 6 note 89.

18. U.S.—Squire v. Robertson, C.C. S.D., 191 F. 733, 737.
Okl.—Anderson v. Barr, 62 P.2d 1242, 1246, 178 Okl. 508.
Tex.—Matthews v. Deason, Civ.App., 200 S.W. 855, 857.

19. Iowa.—Kramer v. Rebman, 9 Iowa 114, 124.

20. N.J.—Milmos v. Zimmerman, 127 A. 157, 158, 95 N.J.Eq. 85.

21. N.J.—Milmos v. Zimmerman, supra.

22. Ala.—Grandin v. Hurt, 80 Ala. 116, 117.

23. Cal.—Hibernia Savings & Loan Soc. v. Lauffer, App., 107 P.2d 494, 497.
Okl.—Anderson v. Barr, 62 P.2d 1242, 1246, 178 Okl. 508.
Tex.—Matthews v. Deason, Civ.App., 200 S.W. 855, 857.
See generally the C.J.S. titles Chattel Mortgages § 354 et seq; and Mortgages § 482 et seq, also 41 C. J. p 830 note 94 et seq.

In particular connections, the term has been held synonymous with "repossess;"[24] and has been distinguished from "dispossess" see 27 C.J.S. p 351 note 2.

FORECLOSURE. In the law of mortgages, as the cutting off of the mortgagor's right to redeem or the selling of the mortgaged property to enforce payment of the debt see the C.J.S. titles Chattel Mortgages § 354 et seq; and Mortgages § 482 et seq, also 41 C.J. p 830 note 94 et seq, and 26 C.J. p 887 note 14–p 888 note 16. It is also applied to proceedings founded upon some other liens,[25] and has been defined as meaning the institution of a suit to enforce a lien against property;[26] the process provided for turning the lien into money;[27] a sale in satisfaction of a lien;[28] selling the property under the direction and in pursuance of an order of the court by an officer thereof, or a person appointed for that purpose.[29]

For references to specific uses see 26 C.J. p 887 note 13.

Phrases employing the word are set out in the note.[30]

FOREFAULT. In Scotch law, to forfeit, or lose.[31]

FOREGIFT. A premium for a lease.[32]

FOREGO or **FORGO.** To go or pass by without claiming; forbear to possess, to use, or do; voluntarily avoid or give up; renounce; resign.[33] The word has been held to be a synonym of "abandon."[34]

FOREGOERS. Royal purveyors.[35]

FOREGOING. Antecedent; going before in time, or place, or in a series; preceding.[36]

Phrases employing the word are set out in the note.[37] Other phrases as to which more recent adjudications have not been found are listed in 26 C.J. p 888 notes 21–27.

FOREHAND RENT. In English law, rent payable in advance; or, more properly, a species of premium or bonus paid by the tenant on the making of the lease, and particularly on the renewal of leases by ecclesiastical corporations.[38]

FOREIGN. A term used in various senses.[39] In one sense, not organically connected or naturally related, as a foreign body or substance.[40]

In its more usual sense relating to nationality or origin, it has been variously defined as belonging to another nation or country;[41] belonging to or relating to another sovereignty or dominion;[42] belonging to or subject to another jurisdiction;[43] that which belongs to another country; that which is strange;[44] that which is out of a certain state, country, county, liberty, manor, jurisdiction, etc.[45] As

24. Fla.—Snow v. Nowlin, 169 So. 598, 599, 125 Fla. 166.

25. Black L.D.

26. Ky.—Insurance Co. of North America v. Cheathem, 299 S.W. 545, 547, 221 Ky. 668.

27. N.C.—Rigsbee v. Brogden, 184 S.E. 24, 26, 209 N.C. 510.

28. Okl.—Service Feed Co. v. City of Ardmore, 42 P.2d 853, 857, 171 Okl. 155.

29. Iowa.—Tice v. Tice, 224 N.W. 571, 572, 208 Iowa 145.

30. Phrases construed

(1) "Foreclosure by legal proceeding."—Trustees of Schools v. St. Paul Fire & Marine Ins. Co., 129 N.E. 567, 568, 296 Ill. 99.

(2) "Foreclosure decree," as distinguished from "money judgment or decree."

Idaho.—Naylor v. Lewiston & S. E. Electric Ry. Co., 95 P. 827, 828, 14 Idaho 722.

Ill.—American Trust & Safe Deposit Co. v. Eldred, 267 Ill.App. 176, 181.

(3) "Foreclosure proceeding."

Fla.—Realty Mortgage Co. v. Moore, 85 So. 155, 156, 80 Fla. 2.

La.—Isaac Bell, Inc., v. Security Ins. Co. of New Haven, Conn., App., 139 So. 524, 525.

(4) "Foreclosure proceedings be commenced."—Springfield Fire & Marine Ins. Co. v. Blevens, 27 S.W.2d 699, 701, 234 Ky. 183.

(5) "Foreclosure process via executiva in Louisiana."—Abraham Land & Mineral Co. v. Marble Sav. Bank, D.C.La., 35 F.Supp. 500, 502.

(6) "Foreclosure process via ordinaria in Louisiana."—Abraham Land & Mineral Co. v. Marble Sav. Bank, supra.

(7) "Foreclosure suit," defined as a proceeding for legal determination of existence of lien, ascertainment of its extent, and subjection to sale of estate pledged for its satisfaction, and to settle conflicting claims by selling equity of redemption.—Reichert v. McCool, 169 N.E. 86, 88, 92 Ind.App. 406.

31. Black L.D.

32. Black L.D.

33. Century D.

34. Ky.—Commonwealth v. Louisville & N. R. Co., 258 S.W. 101, 102, 201 Ky. 670.

35. Black L.D.

36. Century D.

37. Phrases construed

(1) "Any of the foregoing which are not edible."—In re Cruikshank, C.C.N.Y., 54 F. 676, 677.

(2) "Foregoing bequests."—Smith v. Livermore, 10 N.E.2d 117, 122, 298 Mass. 223.

(3) "Foregoing division."—In re Lambell's Estate, 93 P.2d 352, 354, 200 Wash. 220.

(4) "Foregoing was duly published"—Jackson v. Cummings, 15 Ill. 449, 451.

(5) "Foregoing work."—Cauldwell-Wingate Co. v. State, 12 N.E.2d 443, 444, 276 N.Y. 365.

38. Black L.D.

39. U.S.—Goetze v. U. S., C.C.N.Y., 103 F. 72, 83.

40. N.Y.—O'Hare v. Petersen, 21 N.Y.S.2d 487, 490, 174 Misc. 481.

41. U.S.—Cherokee Nation v. Georgia, 5 Pet. 1, 56, 8 L.Ed. 25—U. S. v. The Pilot, Wash., 50 F. 437, 439, 1 C.C.A. 523.

42. U.S.—Bigley v. New York & P. R. SS. Co., D.C.N.Y., 105 F. 74, 76.

43. U.S.—U. S. v. The Pilot, Wash., 50 F. 437, 439, 1 C.C.A. 523.

44. Pa.—Borough v. Brode, 7 Pa.Co. 221, 223.

Tex.—Cowell v. State, 16 Tex.App. 57, 61.

45. Sweet L.D.

a general rule when used with relation to countries in a political sense, the term refers to the jurisdiction or government of the country.[46] The term is applicable not only to countries outside of the United States, but also to the different states within the United States, as far as their relation to each other is concerned,[47] although not to the Indian nations or tribes see the C.J.S. title Indians § 9, also 31 C.J. p 485 note 3.

For references to specific uses of the word in this sense see 26 C.J. p 888 note 28 and consult Descriptive-Word Index.

It is the correlative, and frequently used as the opposite, of "domestic" see 27 C.J.S. p 1319 notes 57, 58, and, in a particular connection, is usually regarded as synonymous with "nonresident."[48]

Foreign government. A government commonly and generally known and recognized as a national government.[49] The term has been held not to include the general government of the United States in its relation to that of the several states, or a corporation created by the federal government.[50]

Foreign law. The law of a foreign country, or of a sister state;[51] the law of a foreign state or nation.[52] Under particular circumstances, it has been said that the "Laws of Moses and Israel," as used in a particular contract, are not to be considered "foreign laws,"[53] nor may the laws of the several states be so regarded in the federal courts.[54]

Foreign market. A term applied to a market located in a foreign country.[55] It has been distinguished from "home market."[56]

Foreign plea. A plea showing some other court in which the matter should be tried.[57] The term has been applied also to a plea, where the question is made between the same parties in another case, or between the creditor and a third party bound to pay the same debt;[58] and generally, where, by the pleadings, the question of satisfaction by the arrest under the capias ad satisfaciendum comes in collaterally.[59]

Foreign port. A port or place without the United States;[60] a port or place exclusively within the sovereignty of a foreign nation;[61] a port within the dominions of a foreign sovereign, and without the dominions of the United States;[62] some spot within the territory of a foreign nation.[63] The term is also used to include all maritime ports other than those of the state where the vessel belongs.[64] Specifically, it has been held that ports of the Canal Zone are to be considered "foreign ports,"[65] but that, as used in a particular statute, a "foreign port" is not any place on the high seas outside the territorial limits of the United States.[66]

The term has been distinguished from "domestic port."[67]

Foreign state. A foreign country or nation;[68] for all legal purposes the term embraces a neighboring state,[69] but not the government of the United States with reference to the state governments.[70]

Foreign substance. A substance occurring in any part of the body or organism where it is not nor-

46. U.S.—Cherokee Nation v. Georgia, 5 Pet. 1, 55, 8 L.Ed. 25.

47. Ga.—Seaboard Air-Line R. Co. v. Phillips, 43 S.E. 494, 496, 117 Ga. 98.
26 C.J. p 888 note 39.

48. N.H.—Blanchette v. New England Telephone & Telegraph Co., 6 A.2d 161, 162, 90 N.H. 207.

49. Iowa.—Zapf v. Ridenour, 200 N. W. 618, 621, 198 Iowa 1006.

State of Hamburg, Germany, held not a foreign government within the terms of a particular statute.—Zapf v. Ridenour, supra.

50. Ariz.—Bezat v. Home Owners' Loan Corporation, 98 P.2d 852, 854, 55 Ariz. 85.

51. Black L.D.

52. N.Y.—Hurwitz v. Hurwitz, 215 N.Y.S. 184, 188, 216 App.Div. 362.

"That calls for 'a people permanently occupying a fixed territory, bound together by common laws, habits, and customs (or by a Constitution) into one body politic, exercising, through the medium of an organized government, independent sovereignty and control over all persons and things within its boundaries, capable of making war and peace, and of entering into international relations with other communities.'"—Hurwitz v. Hurwitz, supra.

53. N.Y.—Hurwitz v. Hurwitz, supra.

54. U.S.—Cray, McFawn & Co. v. Hegarty, Conroy & Co., D.C.N.Y., 27 F.Supp. 93, 95.

55. Pa.—Shuster v. Ash, 11 Serg. & R. 90, 91.

56. N.Y.—Shoemaker v. Lansing, 17 Wend. 327, 328.

57. English L.D.

58. S.C.—Mazyck v. Coil, 37 S.C.L. 235, 237.

59. S.C.—Mazyck v. Coil, supra.

60. N.Y.—King v. Parks, 19 Johns. 375, 377.

61. U.S.—The Winnie, C.C.A.Pa., 65 F.2d 706, 707.

62. U.S.—U. S. v. Hayward, C.C. Mass., 26 F.Cas.No.15,336, 2 Gall. 485, 501.
26 C.J. p 889 note 59.

63. U.S.—The Adventure, C.C.Va., 1 F.Cas.No.93, 1 Brock. 235, 239, 240.

64. U.S.—The Albany, C.C.Minn., 1 F.Cas.No.131, 4 Dill. 439, 444.
26 C.J. p 889 note 61.

"By the civil law, and the laws of France, all ports where the owner does not reside are treated as foreign."—The William and Emmeline, D.C.N.Y., 29 F.Cas.No.17,687, Blatchf. & H. 66, 72.

65. U.S.—Luckenbach S. S. Co. v. U. S., Ct.Cl., 50 S.Ct. 148, 149, 280 U. S. 173, 74 L.Ed. 356.

66. U.S.—The Winnie, C.C.A.Pa., 65 F.2d 706, 707.

67. U.S.—In re Eccleston, D.C.N.Y., 42 F.2d 278, 279.

68. Black L.D.

69. Tex.—Allen v. Bass, Civ.App., 47 S.W.2d 426, 427.
26 C.J. p 889 note 63.

70. Cal.—Gilmer v. Lime Point, 18 Cal. 229, 255.

mally found, usually introduced from without.[71]

Foreign trade. The exportation and importation of goods or the exchange of the commodities of different countries;[72] the commercial interchange of commodities from different countries; export and import trade.[73] The term has been distinguished from "coastwise trade" see 14 C.J.S. p 1302 note 71.

Foreign vessel. A vessel owned by residents in, or sailing under the flag of, a foreign nation.[74] As used in a particular statute, the term has been construed as meaning a vessel navigating under the flag of a foreign power, as distinguished from a vessel owned in whole or part by foreigners domiciled in the United States.[75] When used with reference to the United States, the term does not include a vessel owned in the United States even though built in a foreign country.[76]

Foreign voyage. A voyage to some port or place within the territory of a foreign nation;[77] a voyage intended to some place within the limits or jurisdiction of a foreign country, or at least without the territorial jurisdiction of the United States.[78] The term implies that one of the termini of the voyage for the purposes of the enterprise is within a foreign territory.[79] The term has been distinguished from "fishing voyage" and "whaling voyage."[80] In the subjoined notes examples are given of what, under particular circumstances, the term has been held to include,[81] and not to include.[82]

Other phrases are listed in the note.[83] For still

71. N.Y.—O'Hare v. Petersen, 21 N.Y.S.2d 487, 490, 491, 174 Misc. 481.

Held to be a foreign or deleterious substance

Struvite crystals in a glass jar of shrimp.—O'Hare v. Petersen, supra.

Held not "foreign substance"

A sliver of bone in a pork chop.—Brown v. Nebiker, Iowa, 296 N.W. 366, 370.

72. Pa.—In re Roofing and Sheet Metal Contractors' Assoc., 9 Pa. Dist. 569, 570.
26 C.J. p 889 note 65.

73. U.S.—Standard Oil Co. of New Jersey v. U. S., Cust. & Pat.App., 120 F.2d 340, 342.

74. Black L.D.

75. U.S.—The Sally, C.C.Mass., 21 F.Cas.No.12,257, 1 Gall. 58.

76. U.S.—The Mary Merritt, C.C. Wis., 16 F.Cas.No.9,222.
See also the C.J.S. title Shipping § 1, also 58 C.J. p 30 note 2.

77. U.S.—The Winnie, C.C.A.Pa., 65 F.2d 706, 707—Taber v. U. S., C.C. Mass., 23 F.Cas.No.13,722, 1 Story 7, 8.

78. U.S.—The Lark, C.C.Mass., 14 F. Cas.No.8,090, 1 Gall. 55, 57.
26 C.J. p 889 note 67.

79. U.S.—Taber v. U. S., C.C.Mass., 23 F.Cas.No.13,722, 1 Story 7.

80. U.S.—Taber v. U. S., supra.

81. **Held to include**

The victualing of a British ship on the high sea hovering off the port of New York.—The Alex Clark, D.C.N.Y., 294 F. 904, 905.

82. **Held not to include**

(1) A proceeding to high seas outside territorial limits of United States and making contact there with vessel of foreign registry.—The Winnie, C.C.A.Pa., 65 F.2d 706, 707.

(2) A voyage from one port of United States to another, even though the vessel sails through waters outside the territorial waters of the United States.—The Winnie, supra.

(3) The towing of a lighter from a port in the United States to a vessel hovering at sea, from which the lighter was laden with liquor, and then towing her back to port, it not appearing whether the hovering vessel was foreign or domestic.—The Esther M. Rendle, D.C.Mass., 5 F.2d 1007, 1008.

83. **Phrases construed**

(1) "Any foreign port."—The John Martin, D.C.Mich., 13 F.Cas.No.7,357, 2 Abb. 172, 179.

(2) "For any foreign port or place."—The Adventure, C.C.Va., 1 F. Cas.No.93, 1 Brock. 235, 239—The Eliza, C.C.Mass., 8 F.Cas.No.4,346, 2 Gall. 4.

(3) "Foreign answer," in old English practice an answer which was not triable in the county where it was made.—Black L.D.

(4) "Foreign apposer," in England, "an officer in the exchequer who examines the sheriff's estreats, comparing them with the records, and 'apposeth' (interrogates) the sheriff what he says to each particular sum therein."—Black L.D.

(5) "Foreign bequests," as not including bequests, devises, or gifts to natural persons unrelated to deceased and to be used within state.—State v. Hogg, Tex.Civ.App., 54 S.W.2d 274, 276.

(6) "Foreign bought and sold" as referring to a custom in London which, being found prejudicial to sellers of cattle in Smithfield, was abolished.—Black L.D.

(7) "Foreign charity" defined as a charity established by one who is domiciled in a foreign state or country.—English L.D. Administering a foreign charity see Charities §§ 78, 79.

(8) "Foreign coins," defined as coins issued as money under the authority of a foreign country.—Black L.D. See also 14 C.J.S. p 1313 note 86.

(9) "Foreign courts," as meaning the courts of a foreign state or nation, and as applied in the United States to the courts of any one of the states when its judgments or records are introduced in the courts of another.—Black L.D. For decisions of foreign courts as precedents see Courts § 207.

(10) "Foreign enlistment act," the name given to the English statute 59 George III c 69, prohibiting the enlistment, as a soldier or sailor, in any foreign service; also to the later and more stringent act, 33 & 34 Vict. c 90.—Black L.D.

(11) "Foreign exchange," as referring to drafts drawn on a foreign state or country.—Black L.D.

(12) "Foreign factor," as understood in marine matters, is a person who has charge of the cargo to handle it, dispose of it, convert it into money, or exchange it for other property, but who has nothing to do with the management of the boat when he sails thereon, at which time he is called a "supercargo."—Gilchrist Transp. Co. v. Worthington & Sill, 184 N.Y.S. 81, 83, 193 App.Div. 250.

(13) "Foreign-going ship," an English statutory term meaning any ship employed in trading, going between some place or places in the United Kingdom and some place or places situated beyond specified limits, and distinguished from "home-trade ship."—Black L.D.

(14) "Foreign kingdom," defined as a kingdom which is under the dominion of a foreign prince.—King v. Parks, 19 Johns., N.Y., 375, 376.

(15) "Foreign matter," a term in old practice meaning matter triable or done in another county.—Black L.D.

other phrases as to which more recent adjudications have not been found see 26 C.J. p 890 notes 69–93.

FOREIGNER. In general sense, the term is applied to a person or thing belonging to another nation or country,[84] and has been defined as meaning a person belonging to a foreign country, or without the country or jurisdiction under consideration.[85]

FOREIN. An old form of foreign.[86]

FOREJUDGE. To deprive or put out of a thing by the judgment of a court; to condemn to lose a thing; also, to expel or banish; and in old English law and practice, to expel from court for some offense or misconduct; as where an attorney or other officer of a court was "forejudged by the court," that is expelled for any offense.[87]

FOREJUDGER. In English practice, a judgment by which a man is deprived or put out of a thing; a judgment of expulsion or banishment.[88]

FOREMAN. The chief of a set of workmen who superintends the rest; an overseer;[89] a laborer with power to superintend those working under him;[90] the person designated by the master to direct the work of his employees;[91] a superintendent.[92] The term does not necessarily import that one employed as foreman is the alter ego of his em-

(16) "Foreign obstacle" in a railroad yard, as not including a switch stand or any parts connected with its operation.—Porsmer v. Davis, 188 N.W. 279, 281, 152 Minn. 181.

(17) "Foreign office," in England, the department, headed by a secretary of state, through which the English sovereign communicates with foreign powers.—Black L.D.

(18) "Foreign person," as referring to a nonresident.—Meyers v. Henderson, 181 N.E. 729, 732, 304 Ind. 104.

(19) "Foreign place," defined as a port or place exclusively within the sovereignty of a foreign nation.—The Eliza, C.C.Mass., 8 F.Cas.No.4,346, 2 Gall. 4, 7.

(20) "Foreign seaman," as not including an employee of an American stevedoring company.

U.S.—Zarowitch v. F. Jarka Co., D.C. N.Y., 21 F.2d 187.

Wash.—McGinn v. North Coast Stevedoring Co., 270 P. 113, 117, 149 Wash. 1.

(21) "Foreign service," in feudal law, that service whereby a mesne lord held of another, without the compass of his own fee; or that which the tenant performed either to his own lord or to the lord paramount out of the fee; also used for knight's service, or escuage uncertain.—Black L.D.

(22) "Foreign sovereignty," as not including the United States in its relation to the several states.—Severson v. Home Owners Loan Corporation, 88 P.2d 344, 347, 184 Okl. 496.

(23) "Foreign ticket," defined as a ticket purchased beyond the limits of the state, and from the agents of some connecting railway in another state.—Humphries v. Illinois Cent. R. Co., 12 So. 155, 156, 70 Miss. 453.

(24) "Foreign woods," as not including Philippine mahogany.—New York Cent. R. Co. v. Warren Ross Lumber Co., 190 N.Y.S. 835, 837.

(25) "Person of foreign birth," as referring to those eligible to citizenship under a federal statute excluding persons of the Japanese race born in Japan.—Hidemitsu Toyota v. U. S., Mass., 45 S.Ct. 563, 565, 268 U. S. 402, 69 L.Ed. 1016.

Phrases discussed elsewhere

(1) "Foreign attachment" see the C.J.S. titles Attachment § 1 note 10 and Pocket Parts, and Garnishment § 1, also 28 C.J. p 16 notes 8–11, and 26 C.J. p 888 note 40–p 889 note 42.

(2) "Foreign bill of exchange" see Bills and Notes § 4 b.

(3) "Foreign bills" or "foreign money" see Banks and Banking § 185, note 10.

(4) "Foreign car" see 12 C.J.S. p 1140 note 5.

(5) "Foreign commerce" see Commerce § 3.

(6) "Foreign corporation" see Corporations §§ 1783, 1784.

(7) "Foreign country" see 20 C.J.S. p 1299 note 14–p 1300 note 15.

(8) "Foreign dealer" see Dealer 25 C.J.S. p 1046 note 65.

(9) "Foreign dominion" see Dominion 28 C.J.S. p 51 note 38.

(10) "Foreign executor" see Executors and Administrators § 988.

(11) "Foreign insurance company [or corporation]" see the C.J.S. title Insurance § 75, also 32 C.J. p 989 note 89–p 991 note 10.

(12) "Foreign judgments or decrees" see the C.J.S. title Judgments § 888, also 34 C.J. p 1124 note 31–p 1125 note 41, defined; §§ 889–906, also 34 C.J. p 1125 note 42–p 1170 note 86, legal principles governing; and §§ 867–887, also 34 C.J. p 1104 note 77–p 1124 note 30, action upon.

(13) "Foreign jurisdiction" defined see Courts § 15 note 60; and as to presumptions applicable, see Courts § 100.

(14) "Foreign missions" see the C.J.S. title Religious Societies § 1, and also 26 C.J. p 889 note 52.

(15) "'Foreign' or 'interstate' shipment" within Interstate Commerce Act, see Commerce § 23.

(16) "Foreign railway fuel car" see 12 C.J.S. p 1140 note 6.

(17) "Foreign trust" or "foreign trust company" see the C.J.S. titles Business Trusts § 36 a; and Licenses § 74, also 37 C.J. p 273 note 75–p 274 note 81, as subject to "Blue Sky" laws.

(18) "Foreign will" see the C.J.S. title Wills § 340, also 68 C.J. p 919 notes 57, 58.

84. U.S.—Cherokee Nation v. Georgia, 5 Pet. 1, 56, 56 L.Ed. 25.
26 C.J. p 890 note 95.

85. Cal.—State v. Lyons, 7 P. 763, 764, 67 Cal. 380.

In England

In old English law, this term, when used with reference to a particular city, designated any person who was not an inhabitant of that city. According to later usage, it denotes a person who is not a citizen or subject of the state or country of which mention is made, or any one owing allegiance to a foreign state or sovereign.—Black L.D.

"In Spain foreigners are divided into two classes, the domiciliated and the transient, and there is an important difference between the rights, duties, and obligations of the two classes."—Yates v. Iams, 10 Tex. 168, 169.

86. Black L.D.

87. Black L.D.

88. Black L.D.

89. Neb.—Brokaw v. Cottrell, 211 N. W. 184, 187, 114 Neb. 858.

90. Or.—Browning v. Smiley-Lampert Lumber Co., 137 P. 777, 780, 68 Or. 502.

91. Kan.—White v. Kansas City Stockyards Co., 177 P. 522, 104 Kan. 90.

92. Black L.D.

ployer, he may be a vice-principal under particular circumstances,[93] and, although ordinarily not included by the term "employee" see 30 C.J.S. p 229 note 25 (14), yet, under particular circumstances, he may be regarded as an employee.[94]

In particular connections, the term has been held equivalent to "manager;"[95] and has been distinguished from "editor" see 28 C.J.S. p 832 note 50.

For references to specific uses see 26 C.J. p 890 note 96.

FOREMAN OF JURY. See the C.J.S. titles Grand Juries § 19, also 28 C.J. p 783 note 74–p 784 note 82; and Juries § 287, also 35 C.J. p 419 notes 63–65.

FORENSIC. Belonging to courts of justice.[96]

Forensic medicine. Also called medical jurisprudence, and defined as that science which teaches the application of every branch of medical knowledge to the purposes of the law; hence its limits are, on the one hand, the requirements of the law, and, on the other, the whole range of medicine.[97]

FORENSIS. In the civil law, belonging to, or connected with, a court; forensic.[98]

In old Scotch law, a strange man or stranger; an out-dwelling man; an "unfreeman," who dwells not within the burgh.[99]

FORESAID. A term used in Scotch law as "aforesaid" is in English, and sometimes, in a plural form, "foresaids."[1]

FORESCHOKE. Forsaken, or disavowed.[2]

FORESEE. In its primary meaning, to know beforehand, to see.[3] It may sometimes be used in the sense of "to anticipate" or "to expect."[4]

Foreseen. Apprehended; considered probable.[5]

It has been distinguished from "contemplated" see 16 C.J.S. p 1525 note 98.

FORESEEABILITY. The noun from the adjective "foreseeable,"[6] expressive of the quality of being capable of being foreseen. In discussing causation, it has been said that ordinary care and prudence should not properly be considered an element of "foreseeability" which in turn is an element of "proximate cause" taken in its technical rather than in its popular sense.[7]

FORESEEABLE. Capable of being foreseen or anticipated.[8]

In the law of negligence, as descriptive of results or conditions which may give rise to constructive knowledge so as to affect a person's liability for the performance or nonperformance of an act, see the C.J.S. title Negligence § 5, also 45 C.J. p 655 note 96–p 660 note 37–99.

"Foreseeable danger" and *"foreseeable risk."* Phrases used to describe a condition from which an accident may reasonably be anticipated; they are broadly applicable to an accident the characteristics of which are such that it can be classified among events which, sooner or later, in the absence of due care, are likely to happen, and which due care would prevent, as, for example, dangers which are likely to arise from overcrowding on a subway platform;[9] and dangers arising from requiring a stenographer to work in proximity to a steam boiler.[10] The term does not mean that the accident itself must be foreknown, or foreseen, or that exactly such an occurrence is to be expected or apprehended.[11]

93. Ga.—Ingram v. Hilton & Dodge Lumber Co., 54 S.E. 648, 649, 125 Ga. 658—Moseley v. J. S. Schofield Sons Co., 51 S.E. 309, 311, 123 Ga. 197—Postal Telegraph-Cable Co. v. Puckett, 101 S.E. 397, 399, 24 Ga. App. 458.

94. N.Y.—Seidenberg v. Duboff & Davies, 256 N.Y.S. 17, 19, 143 Misc. 167.

95. N.Y.—Waters v. Waters, 27 N.Y.S. 1004, 1006, 7 Misc. 519.

96. Black L.D.

97. **Specifically,** anatomy, physiology, medicine, surgery, chemistry, physics, and botany lend their aid as necessity arises; and in some cases all these branches of science are required to enable a court of law to arrive at a proper conclusion on a contested question affecting life or property.—Black L.D.

98. Black L.D.

"Forensis homo"

An advocate; a pleader of causes; one who practices in court.—Black L.D.

99. Black L.D.

1. Black L.D.

"These 'foresaid' boundaries"

Eng.—Lord Advocate v. Wemyss, [1900] A.C. 48, 70.

"Forsaidis" occurs in old Scotch records. "The Loirdis assesouris forsaidis."—Black L.D.

2. Black L.D.

3. Tex.—St. Louis Southwestern R. Co. v. Alexander, Civ.App., 141 S.W. 135, 136.

4. Tex.—St. Louis Southwestern R. Co. v. Alexander, supra.

5. Wis.—Coolidge v. Hallauer, 105 N.W. 568, 570, 126 Wis. 244.

"Foreseen accidents"

Those which could have been foreseen as likely to happen.—Viterbo v. Friedlander, La., 7 S.Ct. 962, 973, 120 U.S. 707, 30 L.Ed. 776.

6. Webster New Int.D.

7. Tex.—Panhandle & S. F. Ry. Co. v. Miller, Civ.App., 64 S.W.2d 1076, 1077.

8. Webster New Int.D.

9. N.J.—Nazarro v. Hudson & Manhattan R. Co., 14 A.2d 521, 522, 523, 125 N.J.Law 108.

10. Tex.—Texas Employers Ins. Ass'n v. Andrews, 110 S.W.2d 49, 51, 130 Tex. 502.

11. N.J.—Nazarro v. Hudson & Manhattan R. Co., 14 A.2d 521, 522, 523, 125 N.J.Law 108.

FORESHORE. That part of the land adjacent to the sea which is alternately covered and left dry by the ordinary flow of the tides,[12] that is, by the medium line between the greatest and least range of tide, spring tides and neap tides.[13] Distinguished from "beach" see Beach 10 C.J.S. p 217 in Pocket Parts. For references to specific uses see 26 C.J. p 890 note 8.

FORESIGHT. Action with reference to the future; foreknowledge.[14] The term implies ability to think and reason,[15] but not absolute foreknowledge, or that exactly such an accident as has happened was to be expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent.[16]

FOREST. In old English law, a certain territory of wooded ground and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in the safe protection of the prince for his princely delight and pleasure, having a peculiar court and officers; a royal hunting ground which lost its peculiar character with the extinction of its courts, or when the franchise passed into the hands of a subject.[17] Also the word is used to signify a franchise or right, being the right of keeping, for the purpose of hunting, the wild beasts and fowls of forest, chase, park, and warren, in a territory or precinct of woody ground or pasture set apart for the purpose.[18] In American law see the C.J.S. title Woods and Forests § 1, also 71 C.J. p 2 note 5-p 3 note 9.

Phrases employing the word are set out in the note.[19]

FORESTAGE or **FORESTAGIUM.** A duty or tribute payable to the king's foresters.[20]

FORESTALL. To intercept or obstruct a passenger on the king's highway; to beset the way of a tenant so as to prevent his coming on the premises; also, to intercept a deer on his way to the forest before he can regain it.[21]

Forestalling. Obstructing the highway; intercepting a person on the highway.[22]

As used specifically in the law of monopolies, and as therein compared with, or distinguished from, "engrossing" and "regrating," see the C.J.S. title Monopolies § 1, also 41 C.J. p 83 note 16-p 84 note 22.

FORESTALLER. In old English law, obstruction; hindrance; the offense of stopping the highway; the hindering a tenant from coming to his land; intercepting a deer before it can regain the forest; also, one who forestalls; one who commits the offense of forestalling.[23]

FORESTARIUS. In English law, a forester; an officer who takes care of the woods and forests; and similarly in Scotch law, a forester or keeper of woods.[24]

FORESTER. In old English law, a sworn officer of the forest appointed by the king's letters patent to walk the forest, watching both the vert and the venison, attaching and presenting all trespassers against them within their own bailiwick or walk.[25]

In American law see the C.J.S. title Woods and Forests § 1, also 71 C.J. p 3 notes 10, 11.

FORETHOUGHT FELONY. In Scotch law, murder committed in consequence of a previous design.[26]

FOREVER. Eternally;[27] for a limitless time or endless ages, everlastingly.[28] In devises or transfers of land, the word generally imports the creation of an estate in fee simple.[29]

12. N.Y.—Tenenbaum v. Sea Gate Ass'n, 1 N.Y.S.2d 224, 226, 253 App. Div. 166.

13. Black L.D.

14. Webster New Int.D.

15. N.J.—Kobylakiewicz v. Prudential Ins. Co. of America, 180 A. 491, 492, 115 N.J.Law 382.

16. N.J.—Davis v. Public Service Co-ordinated Transport, 171 A. 540, 541, 113 N.J.Law 427—Barney v. Hudson & M. R. Co., 115 A. 5, 6, 105 N.J.Law 274—McBride v. Pennsylvania R. Co., 123 A. 765, 766, 99 N.J.Law 464—Rivers v. Pennsylvania R. Co., 83 A. 883, 884, 83 N. J.Law 513.

17. Black L.D.

18. Black L.D.

19. Phrases construed

(1) "Courts of the forest" see Courts § 11 p 27 note 93.

(2) "Forest law," defined as the system or body of old law relating to the royal forests.—Black L.D.

(3) "Forest material" see the C.J. S. title Woods and Forests § 1, also 71 C.J. p 3 note 12.

(4) "Forest products," as meaning timber on the land.—Edgcomb v. Clough, 118 A. 610, 614, 275 Pa. 90. See also the C.J.S. title Woods and Forests § 1, also 71 C.J. p 3 notes 13, 14.

20. Black L.D.

21. Black L.D.

22. Black L.D.

23. Black L.D.

24. Black L.D.

De forestario apponendo

A writ which lay to appoint a forester to prevent further commission of waste when a tenant in dower had committed waste.—Black L.D.

25. Black L.D.

26. Black L.D.

27. Pa.—Riggs v. New Castle, 78 A. 1037, 1038, 229 Pa. 490, 140 Am.S. R. 733.

28. Webster New Int.D.

29. Ky.—Eakins v. Eakins, 229 S.W. 130, 131, 191 Ky. 61.

The term is sometimes used as equivalent to "as long as life doth last" see 6 C.J.S. p 781 note 78, and "permanently."[30] It has been distinguished from "always" see 3 C.J.S. p 1013 note 60, and "heirs and assigns."[31]

Phrases employing the word are set out in the note.[32] Other phrases as to which more recent adjudications have not been found are listed in 26 C.J. p 890 note 17–p 891 note 33.

FORFANG. In old English law, the taking of provisions from any person in fairs or markets before the royal purveyors were served with necessaries for the sovereign. In another sense, the seizing and rescuing of stolen or strayed cattle from the hands of a thief, or of those having illegal possession of them; also the reward fixed for such rescue.[33]

N.J.—Kutschinski v. Sheffer, 158 A. 499, 500, 109 N.J.Eq. 659.

Pa.—Riggs v. New Castle, 78 A. 1037, 1038, 229 Pa. 490, 140 Am.S.R. 733.

See also Estates § 8.

Implies durability

"The word . . . 'forever' is . . . one appropriate to . . . the durability of land."—Riggs v. New Castle, supra—Landell v. Hamilton, 34 A. 663, 665, 175 Pa. 327, 34 L.R.A. 227.

As adjunct of fee simple

"The word 'forever' is almost invariably used in an instrument which creates an estate in fee simple," and "is said to be an adjunct of a fee-simple estate."—Comford v. Cantrell, 151 S.W.2d 1076, 1077, 177 Tenn. 553.

Inconsistent with estate tail

"It is the natural adjunct of a fee simple, and inconsistent with an estate tail; which, in the nature of it, is not supposed to last for ever, but to be revertible to him from whom it came."—Hall v. Vandegrift, 3 Binn. (Pa.) 374, 390.

See also the C.J.S. titles Deeds § 109 and Wills § 810, also 69 C.J. p 435 note 26.

30. La.—Sawyer v. Arnold, 1 La. Ann. 315, 316.

31. Mass.—Dennis v. Wilson, 107 Mass. 591, 593.

32. **Phrases construed**

(1) "Forever free."—Krenz v. Nichols, 222 N.W. 300, 303, 197 Wis. 394, 62 A.L.R. 466.

(2) "Forever remain inviolate and intact."—U. S. v. Fenton, D.C.Idaho, 27 F.Supp. 816, 817.

33. Black L.D.

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4. U.S.—Murphy v. Kodz, 351 F.2d 163.

6. U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93—Muskrat v. U.S., Ct.Cl., 31 S.Ct. 250, 219 U.S. 346, 55 L.Ed. 246—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947—Benton v. Maryland, Md., 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707, on remand 260 A.2d 86, 8 Md.App. 388—County Court of Ulster County, N.Y. v. Allen, N.Y., 99 S.Ct. 2213, 442 U.S. 140, 60 L.Ed.2d 777—U.S. Parole Commission v. Geraghty, Pa., 100 S.Ct. 1202, 445 U.S. 388, 63 L.Ed.2d 479, on remand D.C., 552 F.Supp. 276, affd. C.A., 719 F.2d 1199, cert. den. 104 S.Ct. 1602.

McCurdy v. Steele, C.A.Utah, 506 F.2d 653.

D.C.—Lodge 1858, Am. Federation of Government Emp. v. Paine, C.A., 436 F.2d 882, 141 U.S.App. D.C. 152.

Hobson v. Hansen, D.C., 265 F.Supp. 902—Protestants and Other Americans United for Separation of Church and State v. O'Brien, D.C., 272 F.Supp. 712.

Absent case or controversy, exercise of judicial power constitutionally precluded

U.S.—Isaacs Bros. Co. v. Hibernia Bank, C.A.Cal., 481 F.2d 1168.

Requirements must exist when suit commenced and all appellate stages

U.S.—McDonald v. Oliver, 525 F.2d 1217, cert. den. 97 S.Ct. 61, 429 U.S. 817, 50 L.Ed.2d 77.

Congress may not require the Supreme Court to render opinions in matters which are not cases and controversies.[6.5]

6.5. U.S.—Buckley v. Valeo, 96 S.Ct. 612, 424 U.S. 1, 46 L.Ed.2d 659, motion gr. 96 S.Ct. 1153, two cases, 424 U.S. 936, 47 L.Ed.2d 727.

7. U.S.—Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, D.C.Ga., 223 F.Supp. 296. Affd., C.A., 324 F.2d 503.

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11. U.S.—Securities and Exchange Commission v. Medical Committee for Human Rights, Dist.Col., 92 S.Ct. 577, 404 U.S. 403, 30 L.Ed.2d 560—Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 99 S.Ct. 3055, 443 U.S. 658, 61 L.Ed.2d 823, on remand, C.A., 605 F.2d 492, on remand 603 P.2d 819, 92 Wash.2d 939, app. after remand 641 F.2d 1311, mod. on oth. grds. 100 S.Ct. 34, 444 U.S. 816, 62 L.Ed.2d 24, on remand 603 P.2d 819, 92 Wash.2d 939—Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, Miss., 100 S.Ct. 1166, 445 U.S. 326, 63 L.Ed.2d 427, reh. den. 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804—U.S. Parole Commission v. Geraghty, Pa., 100 S.Ct. 1202, 445 U.S. 388, 63 L.Ed.2d 479, on remand D.C., 552 F.Supp. 276, affd. C.A., 719 F.2d 1199, cert. den. 104 S.Ct. 1602—Dames & Moore v. Regan, 101 S.Ct. 2972, 453 U.S. 654, 69 L.Ed.2d 918.

Cole v. Trustees of Columbia University in City of New York, D.C.N.Y., 300 F.Supp. 1026—Press v. Pasadena Independent School Dist., D.C.Tex., 326 F.Supp. 550.

D.C.—Kalur v. Resor, D.C., 335 F.Supp. 1.

Political cases or controversies

(6) Other matters.

U.S.—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947—Powell v. McCormack, Dist.Col., 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.

Committee to Free the Fort Dix 38 v. Collins, C.A.N.J., 429 F.2d 807.

Doe v. Dunbar, D.C.Colo., 320 F.Supp. 1297—Meyers v. Nixon, D.C.N.Y., 339 F.Supp. 1388.

D.C.—Common Cause v. Democratic Nat. Committee, D.C., 333 F.Supp. 803.

Concept of uncertain meaning

U.S.—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947.

Eaton Mfg. Co. v. U.S., Cust. & Pat.App., 469 F.2d 1098, 60 CCPA 23.

Standard of justiciability met

U.S.—Berk v. Laird, C.A.N.Y., 429 F.2d 302, on remand, D.C., 317 F.Supp. 715, affd., C.A., 443 F.2d 1039, cert. den. 92 S.Ct. 94, 404 U.S. 869, 30 L.Ed.2d 113—Miller v. Washington State Bar Ass'n, C.A.Wash., 679 F.2d 1313, reh. den. 691 F.2d 430.

Suro v. Llenza, D.C.Puerto Rico, 531 F.Supp. 1094.

Elements of "justiciability"

D.C.—Wilderness Soc. v. Morton, C.A., 479 F.2d 842, 196 U.S.App.D.C. 121, cert. den. 93 S.Ct. 1550, three cases, 411 U.S. 917, 36 L.Ed.2d 309, app. after remand 495 F.2d 1026, 161 U.S.App.D.C. 441, cert. gr. 95 S.Ct. 39, 419 U.S. 823, 42 L.Ed.2d 47, revd. on oth. grds. 95 S.Ct. 1612, 421 U.S. 240, 44 L.Ed.2d 141.

Justiciable controversy held to exist

(1) Whether Congress had "declared war" on Cambodia.

U.S.—Holtzman v. Schlesinger, 94 S.Ct. 8, 414 U.S. 1316, 38 L.Ed.2d 28.

(2) Constitutionality of statute authorizing issuance of order.

D.C.—Feinberg v. Federal Deposit Ins. Corp., D.C., 420 F.Supp. 109.

(3) Suit by unendorsed political candidate.

U.S.—McKenna v. Reilly, D.C.R.I., 419 F.Supp. 1179.

(4) Other instances.

U.S.—Fernandes v. Limmer, C.A.Tex., 663 F.2d 619, reh. den. 669 F.2d 729, cert. den. 103 S.Ct. 5, 458 U.S. 1124, 73 L.Ed.2d 1395.

"Justiciability" expresses limitation on federal courts to cases and controversies

U.S.—Baxter v. Strickland, D.C.Ga., 381 F.Supp. 487.

12. U.S.—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947—Association of Data Processing Service Organizations, Inc. v. Camp, Minn., 90 S.Ct. 827, 397 U.S. 150, 25 L.Ed.2d 184—U.S. Parole Commission v. Geraghty, Pa., 100 S.Ct. 1202, 445 U.S. 388, 63 L.Ed.2d 479, on remand D.C., 552 F.Supp. 276, affd. C.A., 719 F.2d 1199, cert. den. 104 S.Ct. 1602—Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., Pa., 102 S.Ct. 752, 454 U.S. 464, 70 L.Ed.2d 700.

U.S. v. Spitz, C.A.N.M., 678 F.2d 878.

Petersen v. Clark, D.C.Cal., 285 F.Supp. 700—Lamoille Valley R. Co. v. National Mediation Bd., D.C.Vt., 539 F.Supp. 237.

Personal economic interest not required

U.S.—Scenic Hudson Preservation Conference v. Federal Power Commission, C.A.N.Y., 354 F.2d 608, cert. den. 86 S.Ct. 1462, 384 U.S. 941, 16 L.Ed.2d 540, app. after remand 453, F.2d 463, cert. den. 92 S.Ct. 2453, 407 U.S. 926, 32 L.Ed.2d 813.

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Case or controversy not shown

U.S.—Moore v. Charlotte-Mecklenburg Bd. of Ed., N.C., 91 S.Ct. 1292, 402 U.S. 47, 28 L.Ed.2d 590—Seatrain Shipbuilding Corp. v. Shell Oil Co., Dist.Col., 100 S.Ct. 800, 445 U.S. 572, 63 L.Ed.2d 36, on remand, C.A., 682 F.2d 235, 220 U.S.App. D.C. 400—GTE Sylvania, Inc. v. Consumers Union of U.S., Dist.Col., 100 S.Ct. 1194, 445 U.S. 375, 63 L.Ed.2d 467.

Clark v. Board of Ed. of Little Rock School Dist., C.A.Ark., 374 F.2d 569—Perry v. Romney, C.A.Wash., 472 F.2d 565—Benson v. Superior Court Dept. of Trial Court of Mass., C.A.Mass., 663 F.2d 355.

Green v. Board of Regents of Texas Tech. University, D.C.Tex., 335 F.Supp. 249, affd., C.A., 474 F.2d 594, reh. den. 475 F.2d 1404—Lady Ann's Oddities, Inc. v. Macy, D.C.Okl., 519 F.Supp. 1140.

Gerstle v. Continental Airlines, Inc., D.C.Colo., 50 F.R.D. 213.

Justiciable question held not shown

U.S.—Lowery v. Adams, D.C.Ky., 344 F.Supp. 446—Pueschel v. Leuba, D.C.Conn., 383 F.Supp. 576.

Case or controversy shown

U.S.—Associated Dry Goods Corp. v. Equal Employment Opportunity Commission, D.C.Va., 419 F.Supp. 814.

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14. U.S.—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947—North Carolina v. Rice, N.C., 92 S.Ct. 402, 404 U.S. 244, 30 L.Ed.2d 413—Babbitt v. United Farm Workers Nat. Union, Ariz., 99 S Ct. 2301, 442 U.S. 289, 60 L.Ed.2d 895—Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc., Va., 101 S.Ct. 2352, 452 U.S. 264, 69 L.Ed.2d 1—Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., Pa., 102 S.Ct. 752, 454 U.S. 464, 70 L.Ed.2d 700.

City of Houston v. F. A. A., C.A.5, 679 F.2d 1184.

Pittston Warehouse Corp. v. City of Rochester, D.C.N.Y., 528 F.Supp. 653.

A bona fide legal dispute, etc.

U.S.—Sioux Val. Empire Elec. Ass'n, Inc. v. Butz, C.A.S.D., 504 F.2d 168.

Moot or abstract matters

(1) In general.

U.S.—North Carolina v. Rice, N.C., 92 S.Ct. 402, 404 U.S. 244, 30 L.Ed.2d 413.

Isaacs Bros. Co. v. Hibernia Bank, C.A.Cal., 481 F.2d 1168—Gulf Pub. Co., Inc. v. Lee, C.A.Miss., 679 F.2d 44.

Eaton Mfg. Co. v. U.S., Cust. & Pat.App., 469 F.2d 1098, 60 CCPA 23.

D.C.—Nader v. Butz, C.A., 474 F.2d 426, 154 U.S.App. D.C. 178, on remand, D.C., 60 F.R.D. 381.

(2) Right of litigant to employ class action rule is procedural right only, ancillary to litigation of substantive claims; should these substantive claims become moot in Article III sense, by settlement of all personal claims for example, court retains no jurisdiction over controversy of individual plaintiffs.

U.S.—Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, Miss., 100 S.Ct. 1166, 445 U.S. 326, 63 L.Ed.2d 427, reh. den. 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804.

(3) If, on appeal from denial of class certification, it is determined that denial of class certification was proper and if named plaintiff's claim on merits has expired, case must be dismissed as moot.

U.S.—U.S. Parole Commission v. Geraghty, Pa., 100 S.Ct. 1202, 445 U.S. 388, 63 L.Ed.2d 479, on remand D.C., 552 F.Supp. 276, affd. C.A., 719 F.2d 1199, cert. den. 104 S.Ct. 1602.

(4) When court erroneously denies procedural motion which, had it been correctly decided, would have prevented action from becoming moot, an appeal from denial and corrected ruling "relates back" to date of original denial.

U.S.—U.S. Parole Commission v. Geraghty, Pa., 100 S.Ct. 1202, 445 U.S. 388, 63 L.Ed.2d 479, on remand D.C., 552 F.Supp. 276, affd. C.A., 719 F.2d 1199, cert. den. 104 S.Ct. 1602.

(5) For purposes of mootness, pregnancy is treated differently from some other conditions.

U.S.—Bernard B. v. Blue Cross and Blue Shield of Greater New York, D.C.N.Y., 528 F.Supp. 125, affd. C.A., 679 F.2d 7.

(6) Moot matter not shown.

U.S.—Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, Miss., 100 S.Ct. 1166, 445 U.S. 326, 63 L.Ed.2d 427, reh. den. 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804.

(7) Other statements.

U.S.—Free v. Landrieu, C.A.R.I., 666 F.2d 698.

Crider v. Keohane, D.C.Okl., 526 F.Supp. 727.

Subject matter jurisdiction distinguished

U.S.—Atlee v. Laird, D.C.Pa., 339 F.Supp. 1347.

"Case or controversy" requirement and "standing" prerequisite discussed

U.S.—O'Shea v. Littleton, Ill., 94 S.Ct. 669, 414 U.S. 488, 38 L.Ed.2d 674—Simon v. Eastern Kentucky Welfare Rights Organization, Dist.Col., 96 S.Ct. 1917, 426 U.S. 26, 48 L.Ed.2d 450.

Associated Students for University of California at Riverside v. Attorney General of U.S., D.C.Cal., 368 F.Supp. 11—Barnes v. Board of Trustees, Michigan Veterans Trust Fund, D.C.Mich., 369 F.Supp. 1327.

Adversary interest between parties required

U.S.—Ripp v. Dobbs House, Inc., D.Ala., 366 F.Supp. 205.

Injury in fact imparts adversary context to litigation

D.C.—Dash v. Mitchell, D.C., 356 F.Supp. 1292.

Directives from Office of Economic Opportunity may present judicially cognizable controversy

D.C.—Local 2677, Am. Federation of Government Emp. v. Phillips, D.C., 358 F.Supp. 60.

Injury in fact required

U.S.—Coalition for Environment v. Volpe, C.A.Mo., 504 F.2d 156.

Acts merely threatening injury usually not justifiable

U.S.—Industrial Communications Systems, Inc. v. Pacific Tel. & Tel. Co., C.A.Cal., 505 F.2d 152.

Litigation must involve actual controversy

U.S.—Joiner v. City of Dallas, D.C.Tex., 380 F.Supp. 754, affd. 95 S.Ct. 614, 419 U.S. 1042, 42 L.Ed.2d 637, reh. den. 95 S.Ct. 818, 419 U.S. 1132, 42 L.Ed.2d 831.

Without "standing" there is no "case or controversy"

U.S.—City of Los Angeles v. Lyons, 103 S.Ct. 1660, 461 U.S. 95, 75 L.Ed.2d 675.

Buie v. Jones, C.A.N.C., 717 F.2d 925.

League of United Latin Am. Citizens v. City of Santa Ana, 410 F.Supp. 873.

Injury traceable to defendant rather than some third-party required

U.S.—Simon v. Eastern Kentucky Welfare Rights Organization, 96 S.Ct. 1917, 426 U.S. 26, 48 L.Ed.2d 450.

15. D.C.—Palmore v. U.S., App., 290 A.2d 573, affd. 93 S.Ct. 1670, 411 U.S. 389, 36 L.Ed.2d 342.

16. U.S.—Crossen v. Breckenridge, C.A.Ky., 446 F.2d 833, on remand, D.C., 344 F.Supp. 587, vac. 93 S.Ct. 1413, 410 U.S. 950, 35 L.Ed.2d 683.

Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, D.C.Ga., 223 F.Supp. 296, affd., C.A., 324 F.2d 503.

In re Penn Central Transp. Co., Sp.Ct.R.R.R.A., 384 F.Supp. 895.

17.5. U.S.—In re Penn Central Transp. Co., Sp.Ct.R. R.R.A., 384 F.Supp. 895.

17.10. U.S.—Scenic Hudson Preservation Conference v. Federal Power Commission, C.A.N.Y., 354 F.2d 608, cert. den. 86 S.Ct. 1462, 384 U.S. 941, 16 L.Ed.2d 540, app. after remand 453 F.2d 463, cert. den. 92 S.Ct. 2453, 407 U.S. 926, 32 L.Ed.2d 813.

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20. U.S.—Goosby v. Osser, Pa., 93 S.Ct. 854, 409 U.S. 512, 35 L.Ed.2d 36.

U.S. v. Feaster, C.A.Ala., 330 F.2d 671, app. after remand 376 F.2d 147, cert. den. 88 S.Ct. 237, 389 U.S. 920, 19 L.Ed.2d 265—Park View Heights Corp. v. City of Black Jack, C.A.Mo., 467 F.2d 1208.

Brown v. Ruckelshaus, D.C.Cal., 364 F.Supp. 258.

Borror v. Sharon Steel Co., C.A.Pa., 327 F.2d 165—National Audubon Soc., Inc. v. Marshall, C.A.Ga., 424 F.2d 717.

Consent decree evoking judicial rather than arbitral functions upheld

U.S.—New Hampshire v. Maine, 96 S.Ct. 2113, 426 U.S. 363, 48 L.Ed.2d 701.

21. U.S.—Roberts v. Twin Fork Coal Co., D.C.Ky., 223 F.Supp. 752.

21.10. Admiralty as separate and distinct category of federal jurisdiction

U.S.—Crispin Co. v. M/V Korea, D.C.Tex., 251 F.Supp. 878.

§ 2. Where Vested

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22. U.S.—Graham v. Caston, C.A.Miss., 568 F.2d 1092.

Creation and elimination of district courts

U.S.—Harlan v. Pennsylvania R. Co., D.C.Pa., 180 F.Supp. 725.

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23. U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 838 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

25.10. U.S.—Glidden Co. v. Zdanok, N.Y. & App. D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

McCann v. Paris, D.C.Va., 244 F.Supp. 870.

To same effect

U.S.—State of N.H. v. National Broadcasting Co., D.C. N.H., 222 F.Supp. 915, affd., C.A., 324 F.2d 506.

No duty to provide federal forum

U.S.—Palmore v. U.S., Dist.Col., 93 S.Ct. 1670, 411 U.S. 389, 36 L.Ed.2d 342.

27. United States district court, etc.

(2) Character of district court see infra § 305.

U.S.—U.S. v. Montanez, C.A.N.Y., 371 F.2d 79, cert. den. 88 S.Ct. 147, 389 U.S. 884, 19 L.Ed. 181.

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32. U.S.—Palmore v. U.S., Dist.Col., 93 S.Ct. 1670, 411 U.S. 389, 36 L.Ed.2d 342.

U.S. v. Montanez, C.A.N.Y., 371 F.2d 79, cert. den. 88 S.Ct. 147, 389 U.S. 884, 19 L.Ed.2d 181.

In re Energy Co-op., Inc., Bkrtcy.Ill., 17 B.R. 600.

Constitutional and legislative courts compared

U.S.—U.S. v. United Steelworkers of America, C.A.Pa., 271 F.2d 676, affd. 80 S.Ct. 1, 361 U.S. 39, 4 L.Ed.2d 12, cert. den. 80 S.Ct. 669, 362 U.S. 917, 4 L.Ed.2d 738, motion den. 80 S.Ct. 1256, 363 U.S. 817, 4 L.Ed.2d 1515, reh. den. 81 S.Ct. 34, 364 U.S. 855, 5 L.Ed.2d 79.

Particularized tribunals

U.S.—Northern Pipeline Const. Co. v. Marathon Pipe Line Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 458 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Bren-

nan, with three Justices joining and two Justices concurring in the judgment).

Creation of adjunction and assignment of adjudicatory functions

U.S.—Northern Pipeline Const. Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 459 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Brennan, with three justices joining and two justices concurring in the judgment).

Legislative courts

(1) Legislative courts may be granted jurisdiction over some cases and controversies to which the Article III judicial power might also be joining and two justices concurring in the judgment. U.S.—Northern Pipeline Const. Co. v. Marathon Pipe Line Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 459 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Brennan, with three Justices joining and two Justices concurring in the judgment).

(2) Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to prove for review of those agency decisions in Article III courts.

U.S.—Northern Pipeline Const. Co. v. Marathon Pipe Line Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 459 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Brennan, with three Justices joining and two Justices concurring in the judgment).

33. U.S.—Americana of Puerto Rico, Inc. v. Kaplus, C.A.N.J., 368 F.2d 431, cert. den. 87 S.Ct. 977, 386 U.S. 943, 17 L.Ed.2d 874.

Legislative courts outside territorial limits of United States proper

U.S.—Kinsella v. Krueger, W.Va., 76 S.Ct. 886, 351 U.S. 470, 100 L.Ed. 1342, revd. on oth. grds. Reid v. Covert, 77 S.Ct. 1222, 354 U.S. 1, 1 L.Ed.2d 1148.

When congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated.[42.5]

42.5. U.S.—Northern Pipeline Const. Co. v. Marathon Pipe Line Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 459 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Brennan, with three Justices joining and two Justices concurring in the judgment.)

Congress does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state created rights as it does to adjudicate rights that it creates.[42.10]

42.10. U.S.—Northern Pipeline Const. Co. v. Marathon Pipe Line Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 459 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Brennan, with three Justices joining and two Justices concurring in the judgment.)

§ 3. Independent of State Judiciary

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45. U.S.—Monarch Ins. Co. of Ohio v. Spach, C.A. Fla., 281 F.2d 401—Lumbermen's Mut. Cas. Co. v. Wright, C.A.La., 322 F.2d 759—ABC-Paramount C.A.La., 322 F.2d 759—ABC-Paramount Distributing Co., C.A.Fla., 374 F.2d 455.

Iowa—Linn County v. City of Hiawatha, 311 N.W.2d 95.

§ 4(1). Souce and General Extent of Jurisdiction

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46. U.S.—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947—Hagans v. Lavine, N.Y., 94 S.Ct. 1372, 415 U.S. 528, 39 L.Ed.2d 577. On remand 505 F.2d 727, on remand 399 F.Supp. 421, vac. on oth. grds. 527 F.2d 1151, app. after remand, 536 F.2d 525—Owen Equipment & Erection Co. v. Kroger, Neb., 98 S.Ct. 2396, 437 U.S. 365, 57 L.Ed.2d 274—Northern Pipeline Const. Co. v. Marathon Pipe Line Co., Minn., 102 S.Ct. 2858, 458 U.S. 50, 73 L.Ed.2d 598, stayed 103 S.Ct. 199, 200, 459 U.S. 813, 74 L.Ed.2d 160, two cases (Per Justice Brennan, with three Justices joining and two Justices concurring in the judgment.)

Elastic equitable concepts

U.S.—Pennsylvania Turnpike Commission v. McGinnes, C.A.Pa., 268 F.2d 65, cert. den. 80 S.Ct. 78, 361 U.S. 829, 4 L.Ed.2d 71.

Discussion

For a discussion of major advances in federal judicial system 1922–1947 see 31 F.R.D. 307.

No statutory policy against avoidance of federal jurisdiction

U.S.—Erwin v. Allied Van Lines, Inc., D.C.Ark., 239 F.Supp. 144.

Supervisory powers

D.C.—U.S. v. Alsbrook, D.C., 336 F.Supp. 973.

47. U.S.—Jafari v. Islamic Republic of Iran, D.C.Ill., 539 F.Supp. 209.

48. U.S.—State of N.H. v. National Broadcasting Co., D.C.N.H., 222 F.Supp. 915, affd., C.A., 324 F.2d 506.

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49.5. U.S.—U.S. v. State of Cal., C.A.Cal., 328 F.2d 729, cert. den. 85 S.Ct. 34, 379 U.S. 817, 13 L.Ed.2d 29.

51. U.S.—Chas. T. Main Intern., Inc. v. Khuzestan Water & Power Authority, C.A.Mass., 651 F.2d 800.

McCann v. Paris, D.C.Va., 244 F.Supp. 870—Eastern Federal Corp. v. Wasson, D.C.S.C., 525 F.Supp. 241.

In re Energy Co-op.. Inc., Bkrtcy.Ill., 17 B.R. 600.

D.C.—First Nat. Bank of Scotia v. U.S., D.C., 530 F.Supp. 162.

51.5. U.S.—U.S. Fidelity and Guaranty Co. v. Welco Const. & Utilities Co., D.C.S.C., 463 F.Supp. 510.

51.10. U.S.—Lyle v. Village of Golden Valley, D.C. Minn., 310 F.Supp. 852—Quarles v. State of Tex., D.C.Tex., 312 F.Supp. 835.

D.C.—Senate Select Committee on Presidential Campaign Activities v. Nixon, D.C., 366 F.Supp. 51.

52. U.S.—Roadway Exp., Inc. v. Piper, 100 S.Ct. 2455, 447 U.S. 752, 65 L.Ed.2d 488.

Hurst v. Tread Shipping Co., 554 F.2d 1237, cert. den. 98 S.Ct. 188, 434 U.S. 861, 54 L.Ed.2d 134.

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53. U.S.—In re Carter, C.A.Ga., 618 F.2d 1093, cert. den. 101 S.Ct. 1410, 450 U.S. 949, 67 L.Ed.2d 378.

Jones v. U.S. Dept. of Housing and Urban Development (HUD), D.C.La., 390 F.Supp. 579.

54. U.S.—Hackbart v. Cincinnati Bengals, Inc., C.A. Colo., 601 F.2d 516, cert. den. 100 S.Ct. 275, 444 U.S. 931, 62 L.Ed.2d 188—Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, C.A.Ga., 667 F.2d 1327, reh. den. 671 F.2d 1382.

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D.C.—Eastern States Petroleum Corp. v. Rogers, C.A., 280 F.2d 611, 108 U.S.App.D.C. 63, cert. den. 81 S.Ct. 222, 364 U.S. 891, 5 L.Ed.2d 187.

N.Y.—Sands v. Weingrad, 416 N.Y.S.2d 969, 99 Misc.2d 598.

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55.5. U.S.—Snyder v. Harris, 89 S.Ct. 1053, 394 U.S. 332, 22 L.Ed.2d 319, rehearing denied 89 S.Ct. 1622, 394 U.S. 1025, 23 L.Ed.2d 50.

A. L. Rowan & Son, General Contractors, Inc. v. Department of Housing and Urban Development, C.A.La., 611 F.2d 997.

Harris v. American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594—Dodrill v. New York Cent. R. Co., D.C.Ohio, 253 F.Supp. 564—Hamlin v. Holland, D.C.Pa., 256 F.Supp. 25—Rhodes v. Houston, DC.Neb., 258 F.Supp. 546.

55.10. U.S.—Glidden Co. v. Zdanok, N.Y. & App. D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93—U.S. v. Green, 76 S.Ct. 522, 350 U.S. 415, 100 L.Ed. 494.

Where Congress has clearly established appropriate limitations on original jurisdiction of a district court, the Supreme Court is compelled to respect those limits.[55.15]

55.15. U.S.—Chase Manhattan Bank (Nat. Ass'n) v. South Acres Development Co., Guam, 98 S.Ct. 544, 434 U.S. 236, 54 L.Ed.2d 501.

56. U.S.—Cornelius v. Facilities Management Corp., D.C.Hawaii, 375 F.Supp. 916.

57. U.S.—State of S.C. v. Katzenbach, S.C., 86 S.Ct. 803, 383 U.S. 301, 15 L.Ed.2d 769.

Scope of jurisdiction

U.S.—State of N.H. v. National Broadcasting Co., D.C. N.H., 222 F.Supp. 915, affd., C.A., 324 F.2d 506.

58. U.S.—State of S.C. v. Katzenbach, S.C., 86 S.Ct. 803, 383 U.S. 301, 15 L.Ed.2d 769.

International Tel. & Tel. Corp. v. Alexander, D.C.Del., 396 F.Supp. 1150.

Whole or restricted jurisdiction, etc.

U.S.—Eldridge v. Richfield Oil Corp., D.C.Cal., 247 F.Supp. 407, affd., C.A., 364 F.2d 909, cert. den. 87 S.Ct. 750, 385 U.S. 1020, 17 L.Ed.2d 556.

59. U.S.—Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, C.A.Ga., 667 F.2d 1327, reh. den. 671 F.2d 1382.

Production credit corporation

U.S.—Wright v. Atlas Production Credit Ass'n, C.A. Okl., 468 F.2d 997, app. after remand 483 F.2d 73.

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60. U.S.—Allen v. State Bd. of Elections, Miss. & Va., 89 S.Ct. 817, 393 U.S. 544, 22 L.Ed.2d 1.

D.C.—U.S. v. District of Columbia, C.A., 669 F.2d 738, 215 U.S.App.D.C. 352.

61. U.S.—Snyder v. Harris, Kan. & Mo., 89 S.Ct. 1053, 394 U.S. 332, 22 L.Ed.2d 319, reh. den. 89 S.Ct. 1622, 394 U.S. 1025, 23 L.Ed.2d 50.

Juarez v. Quintero, D.C.Cal., 530 F.Supp. 267.

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Waiver of res judicata effect of former judgment

U.S.—U.S. v. Sioux Nation of Indians, 100 S.Ct. 2716, 448 U.S. 371, 65 L.Ed.2d 844.

62. U.S.—Allen v. State Bd. of Elections, Miss. & Va., 89 S.Ct. 817, 393 U.S. 544, 22 L.Ed.2d 1—Glidden Co. v. Zdanok, 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, rehearing denied 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

McCann v. Paris, D.C.Va., 244 F.Supp. 870—Government Emp. Ins. Co. v. LeBleu, D.C.La., 272 F.Supp. 421—Boyk v. Mitchell, D.C.Ohio, 312 F.Supp. 934, affd., C.A., 425 F.2d 263.

Duty of court to follow directions of Congress with respect to voluntary judicial policy of self-limitation absent contrary constitutional compulsion.

U.S.—Banco Nacional de Cuba v. Farr, D.C.N.Y., 243 F.Supp. 957, affd., C.A., 383 F.2d 166, cert. den. 88 S.Ct. 1038, 390 U.S. 956, 20 L.Ed.2d 1151, reh. den. 88 S.Ct. 1406, 390 U.S. 1037, 20 L.Ed.2d 298.

Review of Selective Service Board determinations

U.S.—Drake v. Selective Service Local Bd. No. 50, Hennepin County, Minn., C.A.Minn., 443 F.2d 101.

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63. U.S.—McCann v. Paris, D.C.Va., 244 F.Supp. 870.

U.S. v. Daubendiek, D.C.Iowa, 25 F.R.D. 50.

D.C.—First Nat. Bank of Scotia v. U.S., D.C., 530 F.Supp. 162.

In whole or in part

U.S.—Eldridge v. Richfield Oil Corp., D.C.Cal., 247 F.Supp. 407, affd., C.A., 364 F.2d 909, cert. den. 87 S.Ct. 750, 385 U.S. 1020, 17 L.Ed.2d 556.

64. U.S.—Jules Hairstylists of Maryland, Inc. v. U.S., D.C.Md., 268 F.Supp. 511, affd., C.A., 389 F.2d 389, cert. den. 88 S.Ct. 1847, 391 U.S. 934, 20 L.Ed.2d 854.

65. U.S.—Paris v. Profit Sharing Plan for Emp. of Howard B. Wolf, Inc., C.A.Tex., 637 F.2d 357, cert. den. 102 S.Ct. 140, 454 U.S. 836, 70 L.Ed.2d 117.

Cases arising under particular statute as not defining jurisdictional limits Congress or Constitution may set under another

U.S.—Murphy v. Kodz, C.A.Ariz., 351 F.2d 163.

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66. U.S.—Allen v. McCurry, Mo., 101 S.Ct. 411, 449 U.S. 90, 66 L.Ed.2d 308, on remand C.A., 647 F.2d 167.

67.10. Power as limited by constitutional guarantees

U.S.—Petersen v. Clark, D.C.Cal., 285 F.Supp. 700.

67.15. U.S.—McCann v. Paris, D.C.Va., 244 F.Supp. 870.

69. U.S.—Rompe v. Yablon, D.C.N.Y., 277 F.Supp. 662.

§ 4(2). —— Subject Matter

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73.50. U.S.—Powell v. McCormack, Dist. Col., 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.

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Federal courts have no jurisdiction

(4) Nor can congress vest jurisdiction to settle purely ecclesiastical disputes.

U.S.—Simpson v. Wells Lamont Corp., C.A.Miss., 494 F.2d 490.

(5) To provide forum for generalized grievances about conduct of government.

D.C.—U.S. ex rel. Thompson v. Hays, D.C., 432 F.Supp. 253.

Domestic relations exception

U.S.—McIntyre v. McIntyre, C.A.9 (Wash.), 771 F.2d 1316.

Nouse v. Nouse, D.C.Md., 450 F.Supp. 97—Andrews v. Patterson, D.C.N.C., 585 F.Supp. 553.

73.52. U.S.—Kilduff v. Kilduff, D.C.N.Y., 473 F.Supp. 873.

73.54. U.S.—Driscoll v. New Orleans Steamboat Co., C.A.La., 633 F.2d 1158.

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73.60. U.S.—vonLusch v. Hoffmaster, D.C.Md., 253 F.Supp. 633.

73.62. D.C.—Pan Am. World Airways, Inc. v. C.A.B., C.A., 392 F.2d 483, 129 U.S.App.D.C. 159.

73.64. U.S.—East Crossroads Center, Inc. v. Mellon-Stuart Co., D.C.Pa., 245 F.Supp. 191—Griffin v. Matthews, D.C.N.C., 310 F.Supp. 341, affd., C.A., 423 F.2d 272.

73.66. U.S.—Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO, Dist.Col., 101 S.Ct. 1571, 451 U.S. 77, 67 L.Ed.2d 750.

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74. U.S.—U.S. v. Nixon, Dist.Col., 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039.

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77. U.S.—Village of Belle Terre v. Boraas, N.Y., 94 S.Ct. 1536, 416 U.S. 1, 39 L.Ed.2d 797—Super Tire Engineering Co. v. McCorkle, N.J., 94 S.Ct. 1694, 416 U.S. 115, 40 L.Ed.2d 1, on remand D.C., 412 F.Supp. 192, affd. C.A., 550 F.2d 903, cert. den. 98 S.Ct. 106, 434 U.S. 827, 54 L.Ed.2d 86, reh. den. 98 S.Ct. 753, 434 U.S. 1025, 54 L.Ed.2d 773.

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D.C.—Physician's Ed. Network, Inc. v. Department of Health, Ed. and Welfare, C.A., 653 F.2d 621, 209 U.S.App.D.C. 366.

Suit held to involve justiciable controversy

U.S.—Doe v. Bolton, Ga., 93 S.Ct. 739, 410 U.S. 179, 35 L.Ed.2d 201, reh. den. 93 S.Ct. 1410, 410 U.S. 959, 35 L.Ed.2d 694.

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D.C.—Com. of Pa. v. Lynn, C.A., 501 F.2d 848, 163 U.S.App.D.C. 288.

What constitutes justiciable controversy

D.C.—Pauling v. McNamara, C.A., 331 F.2d 796, 118 U.S.App.D.C. 50, cert. den. 84 S.Ct. 1336, 377 U.S. 933, 12 L.Ed.2d 297.

78. U.S.—Ziegler v. Ziegler, C.A.La., 632 F.2d 535.

Justiciable controversy not presented

(1) U.S.—Gilligan v. Morgan, Ohio, 93 S.Ct. 2440, 413 U.S. 1, 37 L.Ed.2d 407.

U.S.—U.S. v. Cariola, C.A.N.J., 323 F.2d 180—Consolidation Coal Co. v. Bailey, C.A.Pa., 467 F.2d 1124, cert. den. 93 S.Ct. 1372, 410 U.S. 930, 35 L.Ed.2d 592—Blackwell v. Thomas, C.A.S.C., 476 F.2d 443—Armour v. City of Anniston, C.A.Ala., 654 F.2d 382.

Power Authority of State of N.Y. v. Department of Environmental Conservation of State of N.Y., D.C.N.Y., 379 F.Supp. 243.

D.C.—National Treasury Emp. Union v. Campbell, C.A., 654 F.2d 784, 210 U.S.App.D.C. 69.

(2) Since the publication of Corpus Juris Secundum, the case of U.S. v. Lawrence County, D.C.Pa., 173 F.Supp. 307 has been reversed, the court holding that a justiciable controversy was presented under the circumstances.—U.S. v. Lawrence County, C.A.Pa., 280 F.2d 462, affd. 81 S.Ct. 357, 364 U.S. 628, 5 L.Ed.2d 363.

Indian nations claim asserts federal controversy

U.S.—Oneida Indian Nation of N.Y. State v. Oneida County, New York, N.Y., 94 S.Ct. 772, 414 U.S. 661, 39 L.Ed.2d 73.

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79. Resolution of factual disputes

U.S.—Myles v. Schlesinger, D.C.Pa., 436 F.Supp. 8.

80. U.S.—Wright v. Arkansas Activities Ass'n (AAA), C.A.Ark., 501 F.2d 25.

Political overtones not "political question" foreclosing federal judicial power

U.S.—Campaign Clean Water, Inc. v. Ruckelshaus, D.C.Va., 361 F.Supp. 689, remd., C.A., 489 F.2d 492, vac. on oth. grds. 95 S.Ct. 847, 420 U.S. 136, 43 L.Ed.2d 82.

Standard for identifying nonjusticiable political questions enunciated

U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand 206 F.Supp. 341.

80.5. U.S.—DeFunis v. Odegaard, Wash., 94 S.Ct. 1704, 416 U.S. 312, 40 L.Ed.2d 164, on remand 529 P.2d 438, 84 Wash.2d 617—Sierra Club v. Morton, 92 S.Ct. 1361, 405 U.S. 727, 31 L.Ed.2d 636—S. v. D., 93 S.Ct. 1146, 410 U.S. 614, 35 L.Ed.2d 536.

U.S.—Doe v. Ellis, D.C.S.C., 350 F.Supp. 375.

D.C.—City of New York v. Ruckelshaus, D.C., 358 F.Supp. 669.

Advisory opinions by federal courts see Constitutional Law § 150.

A moot question, etc.

U.S.—Powell v. McCormack, Dist.Col., 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.

Marchand v. Director, U.S. Probation Office, C.A.Mass., 421 F.2d 331—Schuster v. Bowen, C.A. Nev., 496 F.2d 881—Newsom v. Vanderbilt University, C.A.Tenn., 653 F.2d 1100.

Becket v. Marks, D.C.N.Y., 358 F.Supp. 1180.

D.C.—Alton & Southern Ry. Co. v. International Ass'n of Machinists and Aerospace Workers, C.A., 463 F.2d 872, 150 U.S.App.D.C. 36.

Abstract questions

U.S.—State of Ala. ex rel. Baxley v. Woody, C.A.Ala., 473 F.2d 10.

Communications Workers of America, AFL-CIO v. Ohio Bel Tel. Co., D.C.Ohio, 160 F.Supp. 822, affd., C.A., 265 F.2d 221, cert. den. 80 S.Ct. 52, 361 U.S. 814, 4 L.Ed.2d 61.

Mootness of one of several issues not fatal

U.S.—State Highway Commission of Missouri v. Volpe, C.A.Mo., 479 F.2d 1099.

Abstract inquiry

U.S.—Schlesinger v. Reservists Committee to Stop the War, Dist.Col., 94 S.Ct. 2925, 418 U.S. 208, 41 L.Ed.2d 706.

Seeking only advisory opinion presents no case or controversy

U.S.—Stanton v. Ash, D.C.Ind., 384 F.Supp. 625.

Mere cessation or occurrence of illegal conduct does not moot a case, and federal jurisdiction continues if there appears a possibility of recurrence which serves to keep the case alive.[80.6]

80.6. U.S.—Sierra Club v. Lynn, C.A.Tex., 502 F.2d 43, reh. den. 504 F.2d 760, cert. den. 95 S.Ct. 2001, 421 U.S. 994, 44 L.Ed.2d 484, cert. den. 95 S.Ct. 2668, 422 U.S. 1049, 45 L.Ed.5d 701, reh. den. 96 S.Ct. 158, 423 U.S. 884, 46 L.Ed.2d 115.

Croushorn v. Board of Trustees of University of Tennessee, D.C.Tenn., 518 F.Supp. 9.

Constitutional challenge of "invocation" at graduation ceremony

U.S.—Grossberg v. Deusebio, D.C.Va., 380 F.Supp. 285.

Case and controversy held presented

U.S.—Franks v. Bowman Transp. Co., Inc., 96 S.Ct. 1251, 424 U.S. 747, 47 L.Ed.2d 444.

The "capable of repetition, yet evading review" dimension of the mootness question is one of the policy rules often invoked by the United States Supreme Court to avoid passing prematurely on constitutional questions and finds its source in policy, rather than purely constitutional considerations.[80.7]

80.7. U.S.—Franks v. Bowman Transp. Co., Inc., Ga., 96 S.Ct. 1251, 424 U.S. 747, 47 L.Ed.2d 444.

Insofar as the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power, its meaning and scope, as with all concepts of justiciability, must be derived from the fundamental policies informing the cases and controversies limitation imposed by the Constitution.[80.8]

80.8. U.S.—Franks v. Bowman Transp. Co., Inc., Ga., 96 S.Ct. 1251, 424 U.S. 747, 47 L.Ed.2d 444.

80.10. U.S.—Bossom v. Bossom, C.A.N.Y., 551 F.2d 474—Firestone v. Cleveland Trust Co., C.A.Ohio, 654 F.2d 1212.

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Burket v. Schultz, D.C.Wis., 62 F.R.D. 1.

Divorce

Jurisdiction of federal courts as to divorce see Divorce § 69.

Jurisdiction not assumed

U.S.—Gullo v. Hirst, C.A.Va., 332 F.2d 178.

Custody

(2) No jurisdiction of cases involving custody of minors.

U.S.—Hernstadt v. Hernstadt, C.A.N.Y., 373 F.2d 316.

Yow v. Crater, D.C.N.C., 526 F.Supp. 240.

Presentment of question of constitutional law as affecting jurisdiction

U.S.—Hernstadt v. Hernstadt, C.A.N.Y., 373 F.2d 316.

Jurisdiction exists in some cases

U.S.—Crouch v. Crouch, C.A.Tex., 566 F.2d 486.

Spindel v. Spindel, D.C.N.Y., 283 F.Supp. 797—Lloyd v. Loeffler, D.C.Wis., 539 F.Supp. 998, affd., C.A., 694 F.2d 489—Acord v. Parsons, D.C.Va., 551 F.Supp. 115.

Paternity suit

U.S.—Bates v. Bushey, 407 F.Supp. 163.

Justification for rule

U.S.—Crouch v. Crouch, C.A.Tex., 566 F.2d 486.

Exception not applicable where parties living together

U.S.—Korby v. Erickson, D.C.N.Y., 550 F.Supp. 136.

80.15. U.S.—Buechold v. Ortiz, C.A.Cal., 401 F.2d 371.

Druen v. Druen, D.C.Colo., 247 F.Supp. 754—Forbes v. Galway, D.C.N.Y., 266 F.Supp. 762—Lightfoot v. Hartman, D.C.Mo., 292 F.Supp. 356—Williamson v. Williamson, D.C.Okl., 306 F.Supp. 516—Bacon v. Bacon, D.C.Or., 365 F.Supp. 1019—Brown v. Brown, D.C.Ind., 541 F.Supp. 688.

Courts will not act though power is present

U.S.—In re Freiberg, D.C.La., 262 F.Supp. 482.

80.20. U.S.—Jagiella v. Jagiella, C.A.Ga., 647 F.2d 561, reh. den. 654 F.2d 723.

In re Freiberg, D.C.La., 262 F.Supp. 482—Lutsky v. Lutsky, D.C.Fla., 310 F.Supp. 517, affd., C.A., 433 F.2d 346.

§ 4(4). —— Local or Equitable Jurisdiction

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99. U.S.—U.S. v. Duke, C.A.Miss., 332 F.2d 759—Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, C.A.Tenn., 376 F.2d 337, affd. 88 S.Ct. 1235, 390 U.S. 557, 20 L.Ed.2d 126, reh. den. 88 S.Ct. 1801, 391 U.S. 929, 20 L.Ed.2d 670—Clark Equipment Co. v. Armstrong Equipment Co., C.A.Ala., 431 F.2d 54, reh. den. 434 F.2d 1039, cert. den. 91 S.Ct. 1382, 402 U.S. 909, 28 L.Ed.2d 650.

U.S. v. Gallas, D.C.Md., 269 F.Supp. 141—NVF Co. v. Sharon Steel Corp., D.C.Pa., 294 F.Supp. 1091.

Effective equitable remedy for enforcement of civil rights

U.S.—Jones v. Alfred H. Mayer Co., Mo., 88 S.Ct. 2186, 392 U.S. 409, 20 L.Ed.2d 1189—Sullivan v. Little Hunting Park, Inc., Va., 90 S.Ct. 400, 396 U.S. 229, 24 L.Ed.2d 386.

Keyes v. School Dist. No. One, Denver, Colo., D.C.Colo., 303 F.Supp. 279.

Great latitude in fashioning remedies

U.S.—Securities and Exchange Commission v. United Financial Group, Inc., C.A.Or., 474 F.2d 354—Rader v. Cliburn, C.A.Tenn., 476 F.2d 182.

"Anomalous" jurisdiction of district court

U.S.—Meier v. Heaton, C.A.Nev., 521 F.2d 548.

Equitable counterclaim

U.S.—Read v. Baker, D.C.Del., 438 F.Supp. 737, affd., C.A., 577 F.2d 728, cert. den. 99 S.Ct. 197, 439 U.S. 869, 58 L.Ed.2d 180.

Equity jurisdiction broad

U.S.—I.C.C. v. Beehive State Agr. Co-op., Inc., C.A. Utah, 575 F.2d 802.

3. U.S.—Socialist Labor Party v. Rhodes, D.C.Ohio, 290 F.Supp. 983, affd. in part, mod. in part on oth. grds. 89 S.Ct. 5, 393 U.S. 23, 21 L.Ed.2d 24.

Suit of equitable cognizance

(2) Other suits.

U.S.—MacDonald v. Best, D.C.Cal., 186 F.Supp. 217.

Exercise of remedial powers

U.S.—Schlesinger v. Councilman, Okl., 95 S.Ct. 1300, 420 U.S. 738, 43 L.Ed.2d 591.

5. **Inherent equitable powers**

U.S.—U.S. v. Brown, C.A.Colo., 331 F.2d 362—Board of Ed. of Independent School Dist. 89, Oklahoma County v. York, C.A.Okl, 429 F.2d 66, cert. den. 91 S.Ct. 968, 401 U.S. 954, 28 L.Ed.2d 237.

Nunn v. Missouri Pac. R. Co., D.C.Mo., 248 F.Supp. 304—Airlines Stewards & Stewardesses Ass'n, Local 550, Transport Workers Union of America, AFL-CIO v. Carribbean Atlantic Airlines, Inc., D.C.Puerto Rico, 289 F.Supp. 841—U.S. v. Board of School Com'rs of City of Indianapolis, Ind., D.C.Ind., 332 F.Supp. 655, affd., C.A., 474 F.2d 81, cert. den. 93 S.Ct. 3066, 413 U.S. 920, 37 L.Ed.2d 1041—Alkire v. Interstate Theatres Corp., D.C.Mass., 379 F.Supp. 1210.

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10. U.S.—Electronic Specialty Co. v. International Controls Corp., C.A.N.Y., 409 F.2d 937.

Aikens v. Abel, D.C.Pa., 373 F.Supp. 425—Conservation Council of Western Australia, Inc. v. Aluminum Co. of America (Alcoa), D.C.Pa., 518 F.Supp. 270.

Clearly unwarranted assumption of equitable jurisdiction as abuse of discretion

D.C.—Democratic Central Committee of District of Columbia v. D.C. Transit System, Inc., C.A., 459 F.2d 1178, 148 U.S.App.D.C. 154.

Congress must speak clearly to interfere with the historic equitable powers of the courts it has created.[11.5]

11.5. U.S.—In re Letourneau, C.A.N.Y., 559 F.2d 892.

§ 4(5). —— State or Federal Matters

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11.50. U.S.—Glidden Co. v. Zdanok, N.Y. & App. D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

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12. U.S.—Andrus v. Idaho, Idaho, 100 S.Ct. 1450, 445 U.S. 715, 63 L.Ed.2d 739.

Legislative apportionment

U.S.—Sobel v. Adams, D.C.Fla., 208 F.Supp. 316.

14. U.S.—Gomillion v. Lightfoot, Ala., 81 S.Ct. 125, 364 U.S. 339, 5 L.Ed.2d 110—Reynolds v. Sims, Ala., 84 S.Ct. 1362, 377 U.S. 533, 12 L.Ed.2d 506, reh. den. 85 S.Ct. 12, 379 U.S. 870, 13 L.Ed.2d 76, and 85 S.Ct. 13, two cases, 379 U.S. 871, 13 L.Ed.2d 76, 77—State of S.C. v. Katzenbach, S.C., 86 S.Ct. 803, 383 U.S. 301, 15 L.Ed.2d 769—Babbitt v. United Farm Workers Nat. Union, Ariz., 99 S.Ct. 2301, 442 U.S. 289, 60 L.Ed.2d 895.

Alaska—Bailey v. Fairbanks Independent School Dist., 370 P.2d 526.

D.C.—Wilderness Society v. Morton, C.A., 479 F.2d 842, 156 U.S.App.D.C. 121, cert. den. 93 S.Ct. 1550, three cases, 411 U.S. 917, 36 L.Ed.2d 309, app. after remand 495 F.2d 1026, 161 U.S.App. D.C. 39, 419 U.S. 823, 42 L.Ed.2d 47, revd. on oth. grds. 95 S.Ct. 1612, 421 U.S. 240, 44 L.Ed.2d 141.

Clear violation of constitution required before court will disrupt state election processes

U.S.—Toombs v. Fortson, D.C.Ga., 205 F.Supp. 248, vac. in part on oth. grds. 85 S.Ct. 598, 379 U.S. 621, 13 L.Ed.2d 527, affd. 85 S.Ct. 932, 380 U.S. 929, 13 L.Ed.2d 819—W.M.C.A., Inc. v. Simon, D.C.N.Y., 208 F.Supp. 368, revd. on oth. grds. 84 S.Ct. 1418, 377 U.S. 633, 12 L.Ed.2d 568.

Purpose of doctrine of abstention

U.S.—Allen v. County School Bd. of Prince Edward County, D.C.Va., 207 F.Supp. 349.

Qualification of voters in local elections

U.S.—Harris v. Samuels, C.A.Ala., 440 F.2d 748, cert. den. 92 S.Ct. 77, 404 U.S. 832, 30 L.Ed.2d 62.

Rule inapplicable to territories

U.S.—Pan Am. World Airways, Inc. v. Duly Authorized Government of Virgin Islands, C.A. Virgin Islands, 459 F.2d 387.

Intervention only if state violates federal constitution

U.S.—Levy v. Parker, D.C.La., 346 F.Supp. 897, affd. 93 S.Ct. 2266, 411 U.S. 978, 36 L.Ed.2d 955.

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15. U.S.—Locklair v. Locklair, D.C.S.C., 256 F.Supp. 530—Turner v. Spencer, D.C.Ala., 261 F.Supp. 542—Schaeffer v. Sharp, D.C.Miss., 328 F.Supp. 762.

16. U.S.—Lemon v. Kurtzman, Pa., 93 S.Ct. 1463, 411 U.S. 192, 36 L.Ed.2d 151—Rizzo v. Goode, 96 S.Ct. 598, 423 U.S. 362, 46 L.Ed.2d 561.

Moreno v. Henckel, C.A.Tex., 431 F.2d 1299—Lynch v. Snepp, C.A.N.C., 472 F.2d 769, cert. den. 94 S.Ct. 1576, 415 U.S. 983, 39 L.Ed.2d 880.

Leszynski v. Russ, D.C.Md., 192 F.Supp. 422.

Malapportionment of legislative branches

U.S.—Davis v. Synhorst, D.C.Iowa, 217 F.Supp. 492, affd. 84 S.Ct. 1918, 378 U.S. 565, 12 L.Ed.2d 1037, supp. 231 F.Supp. 540.

16.5. U.S.—Zeller v. Donegal School Dist., D.C.Pa., 333 F.Supp. 413, affd., C.A., 517 F.2d 600—Elan Associates, Limited v. Quackenbush Music, Limit-

ed, D.C.N.Y., 339 F.Supp. 461—Brown v. Supreme Court of Virginia, D.C.Va., 359 F.Supp. 549, affd. 94 S.Ct. 533, two cases, 414 U.S. 1034, 38 L.Ed.2d 327, reh. den. 94 S.Ct. 886, 414 U.S. 1138, 38 L.Ed.2d 764.

State prosecution

U.S.—U.S. ex rel. Schaedler v. Common Pleas Court, Twenty-Third Judicial Dist., Reading, Pa., D.C.Pa., 242 F.Supp. 526.

Internal disciplinary affairs of state agency

U.S.—Rizzo v. Goode, 96 S.Ct. 598, 423 U.S. 362, 46 L.Ed.2d 561.

No intrusion into state or local governmental agencies

U.S.—Jacobson v. Tahoe Regional Planning Agency, C.A.Cal., 566 F.2d 1353. Affd. in part, revd. in part on oth. grds. 99 S.Ct. 1171, 440 U.S. 391, 59 L.Ed.2d 401, on remand, D.C., 474 F.Supp. 901.

In the context of the federal system subsisting with state judicial, legislative and executive branches, appropriate consideration must be given to principles of federalism in determining availability and scope of equitable relief.[16.10]

16.10. U.S.—Rizzo v. Goode, 96 S.Ct. 598, 423 U.S. 362, 46 L.Ed.2d 561.

Principles of federalism have applicability not only where injunctive relief is sought from federal court against the judicial branch of a state government, but also where relief is sought against those in charge of the executive branch of an agency of a state or local government.[16.15]

16.15. U.S.—Rizzo v. Goode, 96 S.Ct. 598, 423 U.S. 362, 46 L.Ed.2d 561.

17. U.S.—Gomillion v. Lightfoot, Ala., 81 S.Ct. 125, 364 U.S. 339, 5 L.Ed.2d 110—Gray v. Sanders, Ga., 83 S.Ct. 801, 372 U.S. 368, 9 L.Ed.2d 821—Reynolds v. Sims, Ala., 84 S.Ct. 1362, U.S. 533, 12 L.Ed.2d 506, reh. den. 85 S.Ct. 12, 379 U.S. 870, 13 L.Ed.2d 76, and 85 S.Ct. 13, two cases, 379 U.S. 871, 13 L.Ed.2d 76, 77—Lemon v. Kurtzman, Pa., 93 S.Ct. 1463, 411 U.S. 192, 36 L.Ed.2d 151—Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 99 S.Ct. 3055, 443 U.S. 658, 61 L.Ed.2d 823, on remand, C.A., 605 F.2d 492, on remand 603 P.2d 819, 92 Wash.2d 939, app. after remand 641 F.2d 1311, mod. on oth. grds. 100 S.Ct. 34, 444 U.S. 816, 62 L.Ed.2d 24, on remand 603 P.2d 819, 92 Wash.2d 939.

Facts showing arbitratiness of the state action complained of required

U.S.—Alsup v. Mayhall, D.C.Ala., 208 F.Supp. 713.

Supremacy of federal constitution over state constitution

U.S.—WMCA, Inc. v. Lomenzo, N.Y., 84 S.Ct. 1418, 377 U.S. 633, 12 L.Ed.2d 568.

19. U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

20. U.S.—Trapp v. Goetz, C.A.Kan., 373 F.2d 380.
Monteleone v. Furman, D.C.N.J., 192 F.Supp. 830.

Administrative procedure not prescribed

U.S.—Pierce v. La Vallee, C.A.N.Y., 293 F.2d 233.

21. U.S.—Dove v. Parham, C.A.Ark., 282 F.2d 233—Powell v. Workmen's Compensation Bd. of State of N.Y., C.A.N.Y., 327 F.2d 131—Almenares v. Wyman, C.A.N.Y., 453 F.2d 1075, cert. den. 92 S.Ct. 962, 405 U.S. 944, 30 L.Ed.2d 815.
Shepard v. Board of Ed. of City of Englewood, D.C.N.J., 207 F.Supp. 341—Great Lakes Inter-Tribal Council, Inc. v. Voigt, D.C.Wis., 309 F.Supp. 60—Ferrara v. State of La., D.C.La., 322 F.Supp. 1293, app. dism., C.A., 443 F.2d 344, op.supp., D.C., 351 F.Supp. 265.

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21.5. U.S.—U.S. v. Raines, D.C.Ga., 172 F.Supp. 552, revd. on oth. grds. 80 S.Ct. 519, 362 U.S. 17, 4 L.Ed.2d 524.

§ 5. Constitutional and Statutory Provisions

Library References

Federal Courts ⚷4.

23.50. U.S.—General Elec. Credit Corp. v. James Talcott, Inc., D.C.N.Y., 271 F.Supp. 699.

23.55. U.S.—Sapp v. Hardy, D.C.Del., 204 F.Supp. 602.

24. U.S.—U.S. v. State of California, Em.App., 504 F.2d 750, cert. den. 95 S.Ct. 2423, 421 U.S. 1015, 44 L.Ed.2d 684.
U.S. v. Armco Steel Corp., D.C.Tex., 333 F.Supp. 1073—Webb v. Nolan, D.C.N.C., 361 F.Supp. 418, affd., C.A., 484 F.2d 1049, app. dism. 94 S.Ct. 1397, 415 U.S. 903, 39 L.Ed.2d 461.
Payton v. Freeze, D.C.Va., 49 F.R.D. 11.

25. U.S.—Henlopen Hotel Corp. v. Aetna Ins. Co., D.C.Del., 213 F.Supp. 320.

26. U.S.—Victory Carriers, Inc. v. Law, Ala., 92 S.Ct. 418, 404 U.S. 202, 30 L.Ed.2d 383, reh. den. 92 S.Ct. 731, 404 U.S. 1064, 30 L.Ed.2d 753.

27. U.S.—Ogden v. Cox, D.C.Ga., 294 F.Supp. 810—Dowling v. J. C. Penney Co., D.C.Pa., 300 F.Supp. 307—Turner v. Government Emp. Financial Corp., D.C.Pa., 351 F.Supp. 181, affd., C.A., 481 F.2d 1400.
Kan.—Appalachian Ins. Co. of Providence v. Betts, 518 P.2d 385, 213 Kan. 609.

Statute as to Outer Continental Shelf

U.S.—Aleut League v. Atomic Energy Commission, D.C.Alaska, 337 F.Supp. 534.

A statute defining jurisdiction of federal courts has been held valid.[27.15]

27.15. U.S.—Anderson v. A. & W. Tractor Products, Inc., D.C.Ill., 181 F.Supp. 90.

28. U.S.—Gilpin v. Kansas State High School Activities, Ass'n, Inc., D.C.Kan., 377 F.Supp. 1233.

30. U.S.—Pratt v. First California Co., Inc., C.A. Utah, 517 F.2d 11.
Rome v. Eltra Corp., D.C.Pa., 297 F.Supp. 314.

Matters considered

U.S.—General Elec. Credit Corp. v. James Talcott, Inc., D.C.N.Y., 271 F.Supp. 699.

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33.5. U.S.—Brotherhood of R.R. Trainmen v. Denver & R.G.W.R. Co., C.A.Colo., 370 F.2d 833, cert. den. 87 S.Ct. 1375, 386 U.S. 1018, 18 L.Ed.2d 456.

Generally, a wholly procedural statute is applicable to a suit instituted before its enactment.[37.5]

37.5. U.S.—Denver & R.G.W.R. Co. v. Brotherhood Of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 594.

§ 6. Character of Jurisdiction

Library References

Federal Courts ⚷3.

38. U.S.—Aldinger v. Howard, 96 S.Ct. 2413, 427 U.S. 1, 49 L.Ed.2d 276—County Court of Ulster County, N.Y. v. Allen, N.Y., 99 S.Ct. 2213, 442 U.S. 140, 60 L.Ed.2d 777.
Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.
Maltais v. U.S., D.C.N.Y., 439 F.Supp. 540.

Jurisdiction confined within strict limits

U.S.—U.S. v. Zang, Em.App., 653 F.2d 493, cert. den. 102 S.Ct. 323, 454 U.S. 864, 70 L.Ed.2d 164.

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39. U.S.—Amell v. U.S., Ct.Cl., 86 S.Ct. 1384, 384 U.S. 158, 16 L.Ed.2d 445.
Epps v. Bexar-Medina-Atascosa Counties Water Improvement Dist. No. 1, C.A.Tex., 665 F.2d 594.
Vigail v. U.S., D.C.Colo., 293 F.Supp. 1176, affd., C.A., 430 F.2d 1357—Bower v. U.S., D.C. Pa., 347 F.Supp. 1252—Washington v. Brantley, D.C.Fla., 352 F.Supp. 559—Jafari v. Islamic Republic of Iran, D.C.Ill., 539 F.Supp. 209.
D.C.—Merit Systems Protection Bd. v. Eastwood, D.C., 516 F.Supp. 1297.

Absence of subject matter jurisdiction

U.S.—Inland Oil & Transport Co. v. Adams, C.A.Mo., 575 F.2d 184, cert. den. 99 S.Ct. 186, 439 U.S. 863, 58 L.Ed.2d 173.

§ 7(1). State Laws Affecting Jurisdiction

Library References

Federal Courts ⚷2.

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42. U.S.—Teleco, Inc. v. Southwestern Bell Tel. Co., C.A.Okl., 511 F.2d 949, cert. den. 96 S.Ct. 145, 423 U.S. 875, 46 L.Ed.2d 106.
Lamb v. U.S., D.C.Ga., 526 F.Supp. 1117.
D.C.—U.S. v. Kuch, D.C., 288 F.Supp. 439.

Matters which cannot be affected by state legislation

(6) U.S.—Griffith v. Bank of New York, C.C.A. N.Y., 147 F.2d 899, 160 A.L.R. 1340, cert. den. 65 S.Ct. 1414, 325 U.S. 874, 89 L.Ed. 1992.
Kipbea Baking Co. v. Strauss, D.C.N.Y., 218 F.Supp. 696.
(8) U.S.—Posner v. Travelers Ins. Co., D.C.Ill., 244 F.Supp. 865.
(12) Other matters.
U.S.—McCahill v. Borough of Fox Chapel, C.A.Pa., 438 F.2d 213.
St. John v. State Farm Mut. Auto. Ins. Co., D.C.Mo., 225 F.Supp. 74.

Statutes held not to affect jurisdiction

U.S.—Rosenbloom v. St. Paul Fire & Marine Ins. Co., D.C.N.Y., 214 F.Supp. 301—Baton Rouge Contracting Co. v. West Hatchie Drainage Dist. of Tippah County, Miss., D.C.Miss., 279 F.Supp. 430.

Federal court orders prevail over conflicting state statutes

U.S.—Harvest v. Board of Public Instruction of Manatee County, Fla., D.C.Fla., 312 F.Supp. 269.

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44. U.S.—Knighton v. Johnston County, D.C.N.C., 330 F.Supp. 652.

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48. U.S.—Slater v. Stoffel, C.A.Ind., 313 F.2d 175, cert. den. 84 S.Ct. 54, 375 U.S. 818, 11 L.Ed.2d 53.

48.5. U.S.—Harris v. American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594—Baton Rouge Contracting Co. v. West Hatchie Drainage Dist. of Tippah County, Miss., D.C.Miss., 279 F.Supp. 430.

48.15. U.S.—Schultz v. Greater New Orleans Expressway Commission, D.C.La., 250 F.Supp. 89.

50. U.S.—Kipbea Baking Co. v. Strauss, D.C.N.Y., 218 F.Supp. 696.

52.5. U.S.—Meisner v. Reliance Steel & Aluminum Co., C.A.Cal., 273 F.2d 49—Forsythe v. Over-

myer, C.A.Cal., 576 F.2d 779, cert. den. 99 S.Ct. 188, 439 U.S. 864, 58 L.Ed.2d 174.

Sherman v. Ulmer, D.C.Pa., 201 F.Supp. 660—Maryland Cas. Co. v. State Highway Commission of Mo., D.C.Mo., 256 F.Supp. 666—Guillot v. Southern Pac. Co., D.C.La., 287 F.Supp. 65.

52.30. U.S.—Poverman v. Walnut Hill Plaza, Inc., D.C.R.I., 261 F.Supp. 176.

Where a state court lacks jurisdiction to bypass an administrative agency the federal court also lacks jurisdiction.[52.41]

52.41. Fireman's widow seeking pension rights
U.S.—Trapp v. Goetz, C.A.Kan., 373 F.2d 380.

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52.45. U.S.—Southland Mall, Inc. v. Garner, D.C. Tenn., 293 F.Supp. 1370 Lyon v. Juhl, D.C.Okl., 451 F.Supp. 437.

52.50. U.S.—Akin v. Louisiana Nat. Bank of Baton Rouge, C.A.La., 322 F.2d 749.

Schultz v. Greater New Orleans Expressway Commission, D.C.La., 250 F.Supp. 89—Prendergast v. Long Island State Park Commission, D.C. N.Y., 330 F.Supp. 438—Alkire v. Interstate Theatres Corp., D.C.Mass., 379 F.Supp. 1210.

Action against turnpike commission
(2) Other matters.
U.S.—Gerr v. Emrick, C.A.Pa., 283 F.2d 293, cert. den. 81 S.Ct. 698, 365 U.S. 817, 5 L.Ed.2d 695.

Moss v. Calumet Paving Co., D.C.Ind., 201 F.Supp. 426.

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52.80. U.S.—Stolz-Wicks, Inc. v. Commercial Television Service Co., C.A.Ind., 271 F.2d 586.

Embassy Pictures Corp. v. Hudson, D.C.Tenn., 226 F.Supp. 421.

52.90. U.S.—Knighton v. Johnston County, D.C. N.C., 330 F.Supp. 652.

§ 7(2). —— Suits by or against Domestic or Foreign Corporations

Library References
Federal Courts ⇐2.

53.5. U.S.—Bunge Corp. v. St. Louis Terminal Field Warehouse Co., D.C.Miss., 295 F.Supp. 1231—Aberle Hosiery Co. v. American Arbitration Ass'n, D.C.Pa., 337 F.Supp. 90, app. dism., C.A., 461 F.2d 1005.

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If, under the statute, the courts of the state are not closed to plaintiff's cause of action, in a diversity case relief may be had in a federal court.[53.20]

53.20. U.S.—Trane Co. v. Trane Mfg. Inc., D.C. Conn., 190 F.Supp. 443.

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62.5. U.S.—Szantay v. Beech Aircraft Corp., C.A. S.C., 349 F.2d 60.

§ 10(1). Right to Decline Jurisdiction

Library References
Federal Courts ⇐41–65.

69. U.S.—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440—Piper Aircraft Co. v. Reyno, Pa., 102 S.Ct. 252, 454 U.S. 235, 70 L.Ed.2d 419, reh. den. 102 S.Ct. 1296, two cases, 455 U.S. 928, 71 L.Ed.2d 474.

Delozier v. Tyrone Area School Bd., D.C.Pa., 247 F.Supp. 30—Pollard v. Roberts, D.C.Ark., 283 F.Supp. 248, affd. 89 S.Ct. 47, 393 U.S. 14, 21 L.Ed.2d 14.

Interpretation of law of foreign nation
U.S.—Hodson v. A. H. Robins Co., Inc., D.C.Va., 528 F.Supp. 809, affd. C.A., 715 F.2d 142.

Reavis v. Gulf Oil Corp., D.C.Del., 85 F.R.D. 666.

70. U.S.—Allegheny County v. Frank Mashuda Co., Pa., 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed.2d 1163, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93—Tully v. Mobil Oil Corp., N.Y., 102 S.Ct. 1047, 455 U.S. 245, 71 L.Ed.2d 120, on remand, Em.App., 689 F.2d 186.

Wheeler v. Goodman, D.C.N.C., 298 F.Supp. 935—Press v. Pasadena Independent School Dist., D.C.Tex., 326 F.Supp. 550—Nachwalter v. Christie, D.C.Fla., 538 F.Supp. 742.

Matter of First Dade Corp., Bkrtcy.Fla., 17 B.R. 887—In re Wellington Resources Corp., Bkrtcy. Tex., 20 B.R. 64.

D.C.—Atlman v. Central of Georgia Ry. Co., D.C., 254 F.Supp. 167, affd. in part, revd. in part on oth. grds., C.A., 363 F.2d 284, 124 U.S.App.D.C. 155, cert. den. 87 S.Ct. 231, 385 U.S. 920, 17 L.Ed.2d 144.

Obligation to exercise jurisdiction
U.S.—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440.

Blue v. Mathena, D.C.W.Va., 259 F.Supp. 926.

Crowded calendars
(2) Court congestion alone is no ground for denying a litigant access to the court.
U.S.—Ronson Art Metal Works v. Brown & Bigelow, D.C.N.Y., 105 F.Supp. 169, affd., C.A., 199 F.2d 760—Weiss v. Doyle, D.C.N.Y., 178 F.Supp. 566.

Declaratory judgment
U.S.—Spokane Arcades, Inc. v. Ray, D.C.Wash., 449 F.Supp. 1145, affd., C.A., 631 F.2d 135 and 102 S.Ct. 557, 454 U.S. 1022, 70 L.Ed.2d 468, reh. den. 102 S.Ct. 1040, 454 U.S. 1165, 71 L.Ed.2d 322—Consolidated Rail Corp. v. Pennsylvania Public Utility Commission, D.C.Pa., 536 F.Supp. 653, affd., C.A., 696 F.2d 981, 984.

Forum non conveniens
U.S.—Shields v. Mi Ryung Const. Co., D.C.N.Y., 508 F.Supp. 891.

71. U.S.—Sweetheart Plastics, Inc. v. Illinois Tool Works, Inc., C.A.Mass., 439 F.2d 871.

U.S. v. Hammond Lead Products, Inc., 440 F.2d 1024, 58 CCPA 129. Cert. den. 92 S.Ct. 565, 404 U.S. 1005, 30 L.Ed.2d 558.

In re RAI Marketing Services, Inc., Bkrtcy.Kan., 20 B.R. 943.

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72. U.S.—In re Mineral Hill Corp., Bkrtcy.Md., 16 B.R. 687.

73. U.S.—Liberty Mut. Ins. Co. v. Pennsylvania R. Co., C.A.Ind., 322 F.2d 963.

74. U.S.—Dixon v. Attorney General of Com. of Pa., D.C.Pa., 325 F.Supp. 966.

75. U.S.—Antypas v. Cia. Maritima San Basilio, S.A., C.A.N.Y., 541 F.2d 307, cert. den. 97 S.Ct. 1116, 429 U.S. 1098, 51 L.Ed.2d 545.

Atkins v. Clements, D.C.Tex., 529 F.Supp. 735.

77. U.S.—Lake Carriers' Ass'n v. MacMullan, Mich., 92 S.Ct. 1749, 406 U.S. 498, 32 L.Ed.2d 257.

Moreno v. Henckel, C.A.Tex., 431 F.2d 1299.

Seacoast Products, Inc. v. Douglas, D.C.Va., 432 F.Supp. 1, probable jur. noted 96 S.Ct. 1723, 425 U.S. 949, 48 L.Ed.2d 193.

78. U.S.—Mach-Tronics, Inc. v. Zirpoli, C.A.Cal., 316 F.2d 820—Romero v. Coldwell, C.A.Tex., 455 F.2d 1163—Strode Publishers, Inc. v. Holtz, C.A. Ala., 665 F.2d 333.

Mehler v. Blum, D.C.N.Y., 507 F.Supp. 14.

Administrative proceeding
U.S.—Williams v. Red Bank Bd. of Ed., C.A.N.J., 662 F.2d 1008.

Northeastern Pennsylvania Nat. Bank & Trust Co. v. Sandvick Steel, Inc., D.C.Pa., 325 F.Supp. 651.

79. U.S.—Grove Press, Inc. v. State of Kan., D.C. Kan., 304 F.Supp. 383, op. supp. 307 F.Supp. 711—Moton v. Lambert, D.C.Miss., 508 F.Supp. 367.

80. U.S.—Fairmont Foods Co. v. Manganello, D.C. N.Y., 301 F.Supp. 832.

81. U.S.—Martin v. State Farm Mut. Auto. Ins. Co., C.A.Va., 375 F.2d 720—Miller v. Miller, C.A. N.M., 423 F.2d 145.

Guy v. Rolvaag, D.C.Minn., 233 F.Supp. 301—Gray v. Johnson, D.C.Miss., 234 F.Supp. 743—Wackenhut Corp. v. Aponte, D.C.Puerto Rico, 266 F.Supp. 401, affd. 87 S.Ct. 1017, 386 U.S. 268, 18 L.Ed.2d 37, op. supp. 362 F.Supp. 715.

Interpretation of state statute
U.S.—Casbah, Inc. v. Thone, C.A.Neb., 651 F.2d 551, cert. den. 102 S.Ct. 1642, 455 U.S. 1005, 71 L.Ed.2d 874, reh. den. 102 S.Ct. 2023, 456 U.S. 950, 72 L.Ed.2d 476.

Kotarski v. Aetna Cas. & Sur. Co., D.C.Mich., 244 F.Supp. 547, affd., C.A., 372 F.2d 95.

81.10. U.S.—Ohio Bureau of Employment Services v. Hodory, Ohio, 97 S.Ct. 1898, 431 U.S. 471, 52 L.Ed.2d 513.

Barry v. St. Paul Fire & Marine Ins. Co., C.A. R.I., 555 F.2d 3, affd. 98 S.Ct. 2923, 438 U.S. 531, 57 L.Ed.2d 932.

Pollard v. Roberts, D.C.Ark., 283 F.Supp. 248, affd. 89 S.Ct. 47, 393 U.S. 14, 21 L.Ed.2d 14.

In re Dublin Properties, Bkrtcy.Pa., 20 B.R. 616.

Colo.—Ruff v. Kezer, 606 P.2d 441, 124 Ariz. 560.

81.15. U.S.—Petersen v. Klos, C.A.Miss., 426 F.2d 199, mand. am. on oth. grds. 433 F.2d 911.

81.20. U.S.—U.S. v. State of Ohio, C.A.Ohio, 614 F.2d 101.

DuVall v. Moore, D.C.Iowa, 276 F.Supp. 689—Jones Knitting Corp. v. A. M. Pullen & Co., D.C.N.Y., 50 F.R.D. 311.

In re Lafayette Radio Electronics Corp., Bkrtcy. N.Y., 8 B.R. 973.

Novel question of state law
(2) Other statements.
U.S.—American Ins. Co. v. South Carolina Ins. Co., C.A.S.C., 359 F.2d 432—Sayers v. Forsyth Bldg. Corp., C.A.Ga., 417 F.2d 65.

Only common-law questions involved
U.S.—Krakoff v. U.S., C.A.Ohio, 431 F.2d 847.

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81.25. U.S.—Hoffman v. Goberman, C.A.Pa., 420 F.2d 423.

McLouth Steel Corp. v. Jewell Coal & Coke Co., Inc., D.C.Tenn., 432 F.Supp. 10.

Management and internal affairs of foreign corporation
(5) Other matters.
U.S.—Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern Cal., Inc., C.A.Cal., 342 F.2d 393.

81.30. U.S.—Allegheny County v. Frank Mashuda Co., Pa., 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed.2d 1163, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93.

81.35. U.S.—Allegheny County v. Frank Mashuda Co., Pa., 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed.2d 1163, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93—Lindsey v. Normet, Or., 92 S.Ct. 862, 405 U.S. 56, 31 L.Ed.2d 36—Lake Carriers' Ass'n v. MacMullan, Mich., 92 S.Ct. 1749, 406 U.S. 498, 32 L.Ed.2d 257—Barry v. Barchi, N.Y., 99 S.Ct. 2642, 443 U.S. 55, 61 L.Ed.2d 365.

Herald Co. v. McNeal, C.A.Mo., 553 F.2d 1125, on remand, D.C., 511 F.Supp. 269.

Home Box Office, Inc. v. Wilkinson, D.C.Utah, 531 F.Supp. 987.

Matter of WPAS, Inc., Bkrtcy.Fla., 6 B.R. 44.

Bankruptcy court

U.S.—In re White Motor Credit, C.A.6 (Ohio), 761 F.2d 270.

Special circumstances as determined on case-by-case basis

U.S.—Hill v. City of El Paco, Tex., C.A.Tex., 437 F.2d 352.

Guy v. Rolvaag, D.C.Minn., 233 F.Supp. 301—White v. Husky Oil Co., D.C.Mont., 266 F.Supp. 239.

Declining to abstain held proper

U.S.—Lake Carriers' Ass'n v. MacMullan, Mich., 92 S.Ct. 1749, 406 U.S. 498, 32 L.Ed.2d 257.

Clark v. Ellenbogen, D.C.Pa., 319 F.Supp. 623, affd. 91 S.Ct. 1615, 402 U.S. 935, 29 L.Ed.2d 104—Northeastern Pennsylvania Nat. Bank & Trust Co. v. Sandvick Steel, Inc., D.C.Pa., 325 F.Supp. 651—Thompson v. Whitley, D.C.N.C., 344 F.Supp. 480.

Where abstention would delay operation of federal statute

U.S.—Telephone News System, Inc. v. Illinois Bell Tel. Co., D.C.Ill., 220 F.Supp. 621, affd. 84 S.Ct. 1134, 376 U.S. 782, 12 L.Ed.2d 83.

Abstention doctrine inapplicable

U.S.—Gibson v. Berryhill, Ala., 93 S.Ct. 1689, 411 U.S. 564, 36 L.Ed.2d 488.

Sotomura v. Hawaii County, 402 F.Supp. 95—U.S. v. State of Mich., D.C.Mich., 520 F.Supp. 207.

Jurisdiction held properly declined

U.S.—Blakely v. Selective Service System, Local Bd. No. 143, C.A.Fla., 455 F.2d 795—Cox v. Planning Dist. I Community Mental Health and Mental Retardation Services Bd., C.A.Va., 669 F.2d 940.

Egner v. Texas City Independent School Dist., D.C.Tex., 338 F.Supp. 931—Kilaru v. Watts, D.C. Wis., 339 F.Supp. 1362.

Burden of establishing special circumstances

U.S.—Nicholson v. Board of Com'rs of Alabama State Bar Ass'n, D.C.Ala., 338 F.Supp. 48.

State political questions

U.S.—Miller-Davis Co. v. Illinois State Toll Highway Authority, C.A.Ill., 567 F.2d 323.

Mobil Oil Corp. v. Kelley, D.C.Ala., 426 F.Supp. 230.

Jurisdiction improperly declined

U.S.—Vickers v. Trainor, C.A.Ill., 546 F.2d 739.

Factors considered

U.S.—Lendall v. Cook, D.C.Ark., 432 F.Supp. 971—Robert E. v. Lane, D.C.Ill., 530 F.Supp. 930.

The abstention doctrine does not necessarily require a federal court to defer to a state court for the decision of federal constitutional questions.[81.40]

81.40. U.S.—Wisconsin v. Constantineau, Wis., 91 S.Ct. 507, 400 U.S. 433, 27 L.Ed.2d 515—Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 96 S.Ct. 2264, 426 U.S. 572, 49 L.Ed.2d 65.

Ryan v. State Bd. of Elections of State of Ill., C.A.Ill., 661 F.2d 1130.

Sutherland v. DeWulf, D.C.Ill., 323 F.Supp. 740—Bodor v. East Coventry, Tp., D.C.Pa., 325 F.Supp. 1102.

Civil rights

(1) Abstention doctrine held applicable.

U.S.—George v. Parratt, C.A.Neb., 602 F.2d 818—Williams v. Red Bank Bd. of Ed., C.A.N.J., 662 F.2d 1008.

Jackson v. Ellington, D.C.Tenn., 316 F.Supp. 1071, cause dism. 92 S.Ct. 35, 404 U.S. 811, 30 L.Ed.2d 41—Lollis v. New York State Dept. of Social Services, D.C.N.Y., 322 F.Supp. 473—Jones v. Wittenberg, D.C.Ohio, 323 F.Supp. 93, op. supp. 330 F.Supp. 707, affd., C.A., 456 F.2d 854—Cohen v. Board of Ed. of East Ramapo Central School Dist., D.C.N.Y., 536 F.Supp. 486.

(2) Abstention doctrine may be applicable even in suits under civil rights statute.

U.S.—Harrison v. N.A.A.C.P., 79 S.Ct. 1025, 360 U.S. 167, 3 L.Ed.2d 1152.

Easter v. Olson, C.A.Neb., 552 F.2d 252.

McGuire v. State of Iowa, D.C.Iowa, 320 F.Supp. 243—Davis v. State of Kan., D.C.Kan., 327 F.Supp. 963.

(3) Where fundamental civil rights are at issue, federal court should hesitate to abstain.

U.S.—Jones v. Metzger, C.A.Ohio, 456 F.2d 854—Kimbrough v. O'Neil, 523 F.2d 1057, reh. 545 F.2d 1059.

Holt v. Brown, D.C.Ky., 336 F.Supp. 2—Church v. Board of Ed. of Saline Area School Dist. of Washtenaw County, Mich., D.C.Mich., 339 F.Supp. 538—Adams v. School Bd. of Wyoming Valley West School Dist., D.C.Pa., 53 F.R.D. 267.

(4) Use of doctrine disfavored.

U.S.—Devlin v. Sosbe, C.A.Ind., 465 F.2d 169.

Marin v. University of Puerto Rico, D.C.Puerto Rico, 346 F.Supp. 470.

(5) Abstention doctrine inappropriate.

U.S.—Moe v. Brookings County S.D., C.A.S.D., 659 F.2d 880—Heritage Farms, Inc. v. Solebury Tp., C.A.Pa., 671 F.2d 743, cert. den. 102 S.Ct. 2270, 456 U.S. 990, 73 L.Ed.2d 1285.

Tepper v. Galloway, D.C.N.Y., 481 F.Supp. 1211—Hughes v. Cristofane, D.C.Md., 486 F.Supp. 541—Silver v. Woolf, D.C.Conn., 538 F.Supp. 881, affd. C.A., 694 F.2d 8, cert. den. 103 S.Ct. 1525, 460 U.S. 1070, 75 L.Ed.2d 948.

(6) Other statements.

U.S.—Robert E. v. Lane, D.C.Ill., 530 F.Supp. 930.

In First Amendment cases use of doctrine disfavored

U.S.—Marin v. University of Puerto Rico, D.C.Puerto Rico, 346 F.Supp. 470—Medrano v. Allee, D.C. Tex., 347 F.Supp. 605, affd. in part, vac. in part on oth. grds. 94 S.Ct. 2191, 416 U.S. 802, 40 L.Ed.2d 566.

82. U.S.—Provident Tradesmens Bank & Trust Co. v. Patterson, Pa., 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936, on remand, C.A., 411 F.2d 88—Ohio Bureau of Employment Services v. Hodory, Ohio, 97 S.Ct. 1898, 431 U.S. 471, 52 L.Ed.2d 513.

Hobbs v. Thompson, C.A.Ga., 448 F.2d 456.

Burton v. Exxon Corp., D.C.N.Y., 536 F.Supp. 617.

In re Southerton Corp., Bkrtcy.Pa., 17 B.R. 472.

D.C.—Gordon v. Shoup, C.A., 316 F.2d 683, 115 U.S. App.D.C. 32.

Internal operation of state court

U.S.—Dawley v. City of Norfolk, Va., C.A.Va., 260 F.2d 647, cert. den. 79 S.Ct. 660, 359 U.S. 935, 3 L.Ed.2d 636.

Basis of doctrine is discretion, not lack of power or jurisdiction.

U.S.—Division 1287, Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, AFL-CIO v. Dalton, D.C.Mo., 206 F.Supp. 629.

82.5. U.S.—Ohio Bureau of Employment Services v. Hodory, Ohio, 97 S.Ct. 1898, 431 U.S. 471, 52 L.Ed.2d 513—Middlesex County Ethics Committee v. Garden State Bar Ass'n, N.J., 102 S.Ct. 2515, 457 U.S. 423, 73 L.Ed.2d 116, on remand, C.A., 687 F.2d 801.

Aldens, Inc. v. Packel, 524 F.2d 38, cert. den. 96 S.Ct. 1684, 425 U.S. 943, 48 L.Ed.2d 187—Alcoa S.S. Co., Inc. v. M/V Nordic Regent, C.A.N.Y., 654 F.2d 147, cert. den. 101 S.Ct. 248, 449 U.S. 890, 66 L.Ed.2d 116—Kelser v. Anne Arundel County Dept. of Social Services, C.A.Md., 679 F.2d 1092.

White v. Minter, D.C.Mass., 330 F.Supp. 1194—Alcan Aluminum Ltd. v. Franchise Tax Bd. of State of Cal., D.C.N.Y., 539 F.Supp. 512.

Friedman v. Younger, D.C.Cal., 46 F.R.D. 444.

In re Hathaway's Liquidation and Appraisers, Inc., Brktcy.Ga., 1 B.R. 189—Scientific Computers, Inc. v. Neuromedics, Inc., Bkrtcy.Minn., 20 B.R. 410.

Action already pending before state court

U.S.—Provident Tradesmens Bank & Trust Co. v. Patterson, Pa., 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936, on remand, C.A., 411 F.2d 88.

Fountain v. Metropolitan Atlantic Rapid Transit Authority, C.A.Ga., 678 F.2d 1038.

Doctrine inapplicable where further state procedure would be futile

U.S.—Monongahela Connecting R. Co. v. Pennsylvania Public Utility Commission, C.A.Pa., 373 F.2d 142, 17 A.L.R.3d 271.

Applicable to Commonwealth of Puerto Rico

U.S.—Construction Aggregates Corp. v. Rivera de Vicenty, C.A.Puerto Rico, 573 F.2d 86.

"Pullman" abstention

U.S.—Orr v. Orr, Ala., 99 S.Ct. 1102, 440 U.S. 268, 59 L.Ed.2d 306, on remand Civ.App., 374 So.2d 895, writ den. Sup., 374 So.2d 898, app. dism. and cert. den. 100 S.Ct. 993, 444 U.S. 1060, 62 L.Ed.2d 738.

Vinyard v. King, C.A.Okl., 655 F.2d 1016, app. after remand 728 F.2d 428.

Webber v. Skoko, D.C.Or., 432 F.Supp. 810.

82.10. U.S.—Middlesex County Ethics Committee v. Garden State Bar Ass'n, N.J., 102 S.Ct. 2515, 457 U.S. 423, 73 L.Ed.2d 116, on remand, C.A., 687 F.2d 801.

Barry v. St. Paul Fire & Marine Ins. Co., C.A. R.I., 555 F.2d 3, affd. 98 S.Ct. 2923, 438 U.S. 531, 57 L.Ed.2d 932—J. P. v. DeSanti, C.A.Ohio, 653 F.2d 1080—Manney v. Cabell, C.A.Cal., 654 F.2d 1280, cert. den. 102 S.Ct. 1630, 455 U.S. 1000, 71 L.Ed.2d 866.

Cicero v. Olgiati, D.C.N.Y., 426 F.Supp. 1213—Guyette v. Stauffer Chemical Co., D.C.N.J., 518 F.Supp. 521.

Matter of Jewel Terrace Corp., Bkrtcy.N.Y., 3 B.R. 36.

Wash.—Purse Seine Vessel Owners Ass'n v. Moos, 567 P.2d 205, 88 Wash.2d 799.

Constitutionality of state statute

(2) Other statements.

U.S.—Central Ave. News, Inc., v. City of Minot, N.D., C.A.N.D., 651 F.2d 565.

Goldman v. Knecht, D.C.Colo., 295 F.Supp. 897—Maier v. Good, D.C.N.Y., 325 F.Supp. 1268—Cassidy v. Ceci, D.C.Wis., 320 F.Supp. 223—McGuire v. State of Iowa, D.C.Iowa, 320 F.Supp. 243—Moyer v. Nelson, D.C.Iowa, 324 F.Supp. 1224.

Constitutionality of ordinance

U.S.—Hill v. City of El Paso, Tex., C.A.Tex., 437 F.2d 352.

Vick v. Schiro, D.C.La., 296 F.Supp. 173—Cholmakjian v. Board of Trustees of Michigan State University, D.C.Mich., 315 F.Supp. 1335.

Doubtful or unconstrued state law

U.S.—Reetz v. Bozanich, Alaska, 90 S.Ct. 788, 397 U.S. 82, 25 L.Ed.2d 68—Lake Carriers' Ass'n v. MacMullan, Mich., 92 S.Ct. 1749, 406 U.S. 498, 32 L.Ed.2d 257—Moore v. Sims, Tex., 99 S.Ct. 2371, 442 U.S. 415, 60 L.Ed.2d 994.

Hill v. City of El Paso, Tex., C.A.Tex., 437 F.2d 352.

Mengelkoch v. Industrial Welfare Commission, D.C.Cal., 284 F.Supp. 956, app. dism. 89 S.Ct. 60, 393 U.S. 83, 21 L.Ed.2d 215, reh. den. 89 S.Ct. 443, 393 U.S. 993, 21 L.Ed.2d 458, app. after remand, C.A., 442 F.2d 1119—Major v. Ferdon, D.C.Cal., 325 F.Supp. 1141—Kinsella v. Board of Ed. of Central School Dist No. 7 of Towns of Amherst and Tonawanda, Erie County, D.C.N.Y., 378 F.Supp. 54, motion den. 402 F.Supp. 1155.

Criminal ordinance

United States court cannot interpret authoritatively and finally state criminal ordinance.

U.S.—Blasecki v. City of Durham, N.C., C.A.N.C., 456 F.2d 87, cert. den. 93 S.Ct. 224, 409 U.S. 912, 34 L.Ed.2d 172.

Doctrine not applicable

U.S.—Lady Jane v. Maher, D.C.Conn., 420 F.Supp. 318, affd. 97 S.Ct. 2628, 431 U.S. 926, 53 L.Ed.2d 242.

In determining whether to apply the abstention doctrine, the federal court must take into consideration the nature of the controversy and the particular right sought to be enforced.[82.11]

82.11. U.S.—Edwards v. Sammons, C.A.Ga., 437 F.2d 1240.

No stay pending resolution by foreign court

U.S.—Reavis v. Gulf Oil Corp., D.C.Del., 85 F.R.D. 666.

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82.15. U.S.—Reetz v. Bozanich, Alaska, 90 S.Ct. 788, 397 U.S. 82, 25 L.Ed.2d 68—Middlesex County Ethics Committee v. Garden State Bar Ass'n, N.J., 102 S.Ct. 2515, 457 U.S. 423, 73 L.Ed.2d 116, on remand, C.A., 687 F.2d 801.

Forest Hills Utility Co. v. City of Heath, Ohio, C.A.Colo, 539 F.2d 592 J.P. v. DeSanti, C.A.Ohio, 653 F.2d 1080.

Varian Associates v. Santa Clara County, Cal., D.C.Cal., 317 F.Supp. 888—Baxter v. Ellington, D.C.Tenn., 318 F.Supp. 1079—Florida Poultry Federation, Inc. v. Conner, D.C.Fla., 319 F.Supp. 158—Ashland Sav. & Loan Ass'n v. Aetna Ins. Co., D.C.Ill., 322 F.Supp. 82—Press v. Pasadena Independent School Dist., D.C.Tex., 326 F.Supp. 550—Baker v. Firestone Tire & Rubber Co., D.C. Fla., 537 F.Supp. 244.

In re Eastern Consol. Utilities, Inc., Bkrtcy.Pa., 17 B.R. 809.

Federal courts need not apply a generalized doctrine of abstention in matrimonial cases.[82.20]

82.20. U.S.—Bossom v. Bossom, C.A.N.Y., 551 F.2d 474.

Spindel v. Spindel, D.C.N.Y., 283 F.Supp. 797.

Abstention not required

U.S.—Zablocki v. Redhail, Wis., 98 S.Ct. 673, 434 U.S. 374, 54 L.Ed.2d 618.

Furthermore, the abstention doctrine does not apply to in rem proceedings.[82.25]

82.25. U.S.—Mitchum v. Foster, 92 S.Ct. 2151, 407 U.S. 225, 32 L.Ed.2d 705—Toucey v. New York Life Ins. Co., 62 S.Ct. 139, 314 U.S. 118, 86 L.Ed. 100, 137 A.L.R. 967.

Eggleston v. State of Colo., D.C.Colo., 588 F.Supp. 1352.

In rem exception to the general rule that a federal court cannot enjoin or restrain proceedings in a state court see C.J.S. Courts § 543.

83. U.S.—Midwest Video Corp. v. Campbell, D.C. N.M., 250 F.Supp. 158—Com. of Pa. v. Brown, D.C.Pa., 260 F.Supp. 323—Wilke & Holzheiser, Inc. v. Reimel, D.C.Cal., 266 F.Supp. 168—Ehrenriech v. Londerholm, D.C.Kan., 273 F.Supp. 178—Spencer v. Kugler, D.C.N.J., 326 F.Supp. 1235, affd. 92 S.Ct. 707, 404 U.S. 1027, 30 L.Ed.2d 723—Stephens v. Yeomans, D.C.N.J., 327 F.Supp. 1182.

Exercise of power assumes case within court's jurisdiction

U.S.—Williams v. Murdoch, C.A.Pa., 350 F.2d 840—Moreno v. Henckel, C.A.Tex., 431 F.2d 1299.

Abstention is equitable doctrine

U.S.—Corporation of Haverford College v. Reeher, D.C.Pa., 329 F.Supp. 1196, op. supp. 333 F.Supp. 450.

83.5. U.S.—Dawley v. City of Norfolk, Va., D.C.Va., 159 F.Supp. 642, affd., C.A., 200 F.2d 647, cert. den. 79 S.Ct. 650, 359 U.S. 935, 3 L.Ed.2d 636—Arrow Lakes Dairy, Inc. v. Gill, D.C.Conn., 200 F.Supp. 729.

"Abstention" as judge-fashioned vehicle

U.S.—B-W Acceptance Corp. v. Torgerson, D.C.Mont., 234 F.Supp. 214—Landry v. Daley, D.C.Ill., 288 F.Supp. 200—Bateman v. South Carolina State Ports Authority, D.C.S.C., 298 F.Supp. 999.

83.10. U.S.—Arrow Lakes Dairy, Inc. v. Gill, D.C. Conn., 200 F.Supp. 729—Embassy Pictures Corp. v. Hudson, D.C.Tenn., 226 F.Supp. 421—Tupman Thurlow Co. v. Moss, D.C.Tenn., 252 F.Supp. 641—Alexander v. Thompson, D.C.Cal., 313 F.Supp. 1389—Baxter v. Ellington, D.C.Tenn., 318 F.Supp. 1079—Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, D.C.Pa., 319 F.Supp. 407, affd., C.A., 465 F.2d 237, cert. den. 93 S.Ct. 1367, 410 U.S. 943, 35 L.Ed.2d 609.

When remedies considered separately

U.S.—Burton v. City of St. Louis, D.C.Mo., 309 F.Supp. 1078.

83.15. U.S.—Tomiyasu v. Golden, C.A.Nev., 358 F.2d 651—Martin v. State Farm Mut. Auto. Ins. Co., C.A.Va., 375 F.2d 720—Federal Sav. & Loan Ins. Corp. v. Krueger, C.A.Ill., 435 F.2d 633—Tree Top v. Smith, C.A.Idaho, 577 F.2d 519.

U.S. v. Interlake, Inc., D.C.Ill., 429 F.Supp. 193, motion den. 432 F.Supp. 985.

Abstention inappropriate where disruption not shown

U.S.—U.S. v. Com. of Va., D.C.Va., 500 F.Supp. 729.

Threatened proceedings

U.S.—Wolfe v. City of Albany, Ga., D.C.Ga., 189 F.Supp. 217.

Complex state schemes

Under "Burford Doctrine" of abstention, federal courts have refrained from interfering with complex state regulatory schemes.

U.S.—Clutchette v. Procunier, D.C.Cal., 328 F.Supp. 767, mod. on oth. grds., C.A., 497 F.2d 809, op. mod. on oth. grds. 510 F.2d 613, revd. on oth. grds. 96 S.Ct. 1551, 425 U.S. 308, 47 L.Ed.2d 810, vac., C.A., 536 F.2d 305, on remand D.C., 471 F.Supp. 1113.

83.20. U.S.—Detroit Edison Co. v. East China Tp. School Dist. No. 3, C.A.Mich., 378 F.2d 225, cert. den. 88 S.Ct. 296, 389 U.S. 932, 19 L.Ed.2d 284.

Bessette v. Malloy, D.C.Vt., 325 F.Supp. 506.

83.25. U.S.—Dronet v. Tucker, C.A.La., 300 F.2d 559—Turf Paradise, Inc. v. Arizona Downs, C.A. Ariz., 670 F.2d 813, cert. den. 102 S.Ct. 2308, 456 U.S. 1011, 73 L.Ed.2d 1308.

Wolfe v. City of Albany, Ga., D.C.Ga., 189 F.Supp. 217—State Farm Mut. Auto. Ins. Co. v. Drewry, D.C.Va., 191 F.Supp. 852, affd., C.A., 316 F.2d 716—C'Est Bon, Inc. v. North Carolina State Bd. of Alcoholic Control, D.C.N.C., 331 F.Supp. 82.

83.30. U.S.—Mengelkoch v. Industrial Welfare Commission, D.C.Cal., 284 F.Supp. 956, app. dism. 89 S.Ct. 60, 393 U.S. 83, 21 L.Ed.2d 215, reh. den. 89 S.Ct. 443, 393 U.S. 993, 21 L.Ed.2d 458, app. after remand, C.A., 442 F.2d 1119—Barkey v. Firearms Control Bd., D.C.N.Y., 293 F.Supp. 420—Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, D.C.Pa., 319 F.Supp. 407, affd., C.A., 465 F.2d 237, cert. den. 93 S.Ct. 1367, 410 U.S. 943, 35 L.Ed.2d 609.

83.40. U.S.—Wulp v. Corcoran, C.A.Mass., 454 F.2d 826.

It is to the complaint alone that one must look to determine whether abstention is appropriate.[83.50]

83.50. U.S.—McTeague v. Sosnowski, C.A.Pa., 617 F.2d 1016.

Local Division 519, Amalgamated Transit Union, AFL-CIO v. LaCrosse Municipal Transit Utility, D.C.Wis., 445 F.Supp. 798, affd., C.A., 585 F.2d 1340.

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85. U.S.—Coleman v. Ginsberg, C.A.N.Y., 428 F.2d 767.

§ 10(2). —— Stay of Exercise of Jurisdiction

Library References

Federal Courts ⟹65.

85.50. U.S.—Reynolds v. Sims, Ala., 84 S.Ct. 1362, 377 U.S. 533, 12 L.Ed.2d 506, reh. den. 85 S.Ct. 12, 379 U.S. 870, 13 L.Ed.2d 76, and 85 S.Ct. 13, two cases, 379 U.S. 871, 13 L.Ed.2d 76, 77—Lucas v. Forty-Fourth General Assembly of State of Colo., Colo., 84 S.Ct. 1459, 377 U.S. 713, 12 L.Ed.2d 632, on remand, D.C., 232 F.Supp. 797, affd. 85 S.Ct. 715, 379 U.S. 693, 13 L.Ed.2d 699—Harman v. Forssenius, Va., 85 S.Ct. 1177, 380 U.S. 528, 14 L.Ed.2d 50—Lake Carriers' Ass'n v. MacMullan, Mich., 92 S.Ct. 1749, 406 U.S. 498, 32 L.Ed.2d 257.

Anderson v. Mills, C.A.Ky., 664 F.2d 600.

Sheldon v. Moffat Tunnel Commission of State of Colo., D.C.Colo., 335 F.Supp. 251—Dubois v. State of La., D.C.La., 339 F.Supp. 685.

Discretion

(1) U.S.—Baggett v. Bullitt, Wash., 84 S.Ct. 1316, 377 U.S. 360, 12 L.Ed.2d 377.

Purpose of doctrine

U.S.—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440.

For a discussion of federal court abstention doctrine see 24 F.R.D. 481.

(2) Other cases discussing rule.

U.S.—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440—Harmon v. Forssenius, Va., 85 S.Ct. 1177, 380 U.S. 528, 14 L.Ed.2d 50.

Bush v. Martin, D.C.Tex., 224 F.Supp. 499, affd. 84 S.Ct. 709, 376 U.S. 222, 11 L.Ed.2d 656—DuVall v. Moore, D.C.Iowa, 276 F.Supp. 689.

Special circumstances not shown

U.S.—Baggett v. Bullitt, Wash., 84 S.Ct. 1316, 377 U.S. 360, 12 L.Ed.2d 377.

Norton v. Blaylock, C.A.Ark., 409 F.2d 772.

Midwest Video Corp. v. Campbell, D.C.N.M., 250 F.Supp. 158.

Justification should be clear

U.S.—Williams v. Murdoch, C.A.Pa., 350 F.2d 840.

Action already pending before state courts

U.S.—Valanga v. Metropolitan Life Ins. Co., D.C.Pa., 259 F.Supp. 324—Kabelka v. City of New York, D.C.N.Y., 272 F.Supp. 998.

Doctrine not applicable

U.S.—National Land & Inv. Co. v. Specter, D.C.Pa., 304 F.Supp. 1004, affd., C.A., 428 F.2d 91.

Dismissal, rather than stay, required by state law

U.S.—Barrett v. Atlantic Richfield Co., C.A.Tex., 444 F.2d 38—Romero v. Coldwell, C.A.Tex., 455 F.2d 1163.

Abstention is confined to cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law; to cases where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; and to cases where, absent bad faith, harassment or a patent-

ly invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, or state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films or collection of state taxes.[85.50a]

85.50a. U.S.—Colorado River Water Conservation Dist. v. U.S., Colo., 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483, reh. den. 96 S.Ct. 2239, two cases, 426 U.S. 912, 48 L.Ed.2d 839.

Duncan v. Poythress, C.A.Ga., 657 F.2d 691, reh. den. 664 F.2d 291, cert. dism. 103 S.Ct. 368, 459 U.S. 1012, 74 L.Ed.2d 504—Knudsen Corp. v. Nevada State Dairy Commission, C.A.Nev., 676 F.2d 374.

Cohen v. Board of Ed. of East Ramapo Central School Dist., D.C.N.Y., 536 F.Supp. 486.

Abstention not required

U.S.—Womens Services, P.C. v. Douglas, C.A.Neb., 653 F.2d 355, on remand D.C., 567 F.Supp. 522, affd. C.A., 710 F.2d 465.

Extension of "Younger" abstention to civil actions

U.S.—Gresham Park Community Organization v. Howell, C.A.Ga., 652 F.2d 1227.

However, a mere potential for conflict in the results of adjudications does not, without more, warrant staying the exercise of federal jurisdiction.[85.50b]

85.50b. U.S.—Colorado River Water Conservation Dist. v. U.S., 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483, reh. den. 96 S.Ct. 2239, two cases, 426 U.S. 912, 48 L.Ed.2d 839.

O'Hair v. White, C.A.Tex., 675 F.2d 680.

Seide v. Prevost, D.C.N.Y., 536 F.Supp. 1121.

85.51. U.S.—Fay v. Noia, N.Y., 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440—Harmon v. Forssenius, Va., 85 S.Ct. 1177, 380 U.S. 528, 14 L.Ed.2d 50—Zwickler v. Koota, N.Y., 88 S.Ct. 391, 389 U.S. 241, 19 L.Ed.2d 444, on remand 290 F.Supp. 244, revd. on oth. grds. 89 S.Ct. 956, 394 U.S. 103, 22 L.Ed.2d 113—American Trial Lawyers Ass'n, New Jersey Branch v. New Jersey Supreme Court, N.J., 93 S.Ct. 627, 409 U.S. 467, 34 L.Ed.2d 651.

Stay pending legislative reapportionment

U.S.—Honsey v. Donovan, D.C.Minn., 236 F.Supp. 8—Butterworth v. Dempsey, D.C.Conn., 237 F.Supp. 302—Preisler v. Secretary of State of Mo., D.C.Mo., 238 F.Supp. 187—Schaefer v. Thomson, D.C.Wyo., 240 F.Supp. 247—Woodard v. Carteret County, N.C., D.C.N.C., 252 F.Supp. 268.

Reapportionment of board of equalization

U.S.—Silver v. Jordan, D.C.Cal., 263 F.Supp. 627.

85.52. U.S.—Aetna State Bank v. Altheimer, C.A.Ill., 430 F.2d 750.

Effect of statute limiting federal court injunction against state action need not be first determined.

U.S.—Division 1287, Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, AFL-CIO v. Dalton, D.C.Mo., 206 F.Supp. 629.

85.53. U.S.—Clay v. Sun Ins. Office Limited, Fla., 80 S.Ct. 1222, 363 U.S. 207, 4 L.Ed.2d 1170—Harmon v. Forssenius, Va., 85 S.Ct. 1177, 380 U.S. 528, 14 L.Ed.2d 50.

P.C. Utilities Corp. v. Division of Health of Dept. of Health and Rehabilitative Services, D.C. Fla., 339 F.Supp. 916, affd., C.A., 472 F.2d 1406—Seide v. Prevost, D.C.N.Y., 536 F.Supp. 1121.

D.C.—Williams v. Hot Shoppes, Inc., C.A., 293 F.2d 835, 110 U.S.App.D.C. 358, cert. den. 82 S.Ct. 1562, 370 U.S. 925, 8 L.Ed.2d 505, reh. den. 83 S.Ct. 16, 371 U.S. 854, 9 L.Ed.2d 91.

Fla.—Sun Ins. Office, Limited v. Clay, 133 So.2d 735.

N.D.—State ex rel. Paulson v. Meier, 127 N.W.2d 665.

85.54. U.S.—Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp., C.A.Mo., 660 F.2d 712.

Starr v. Parks, D.C.Md., 345 F.Supp. 795.

85.55. U.S.—Epstein v. Maddox, D.C.Ga., 277 F.Supp. 613, affd., C.A., 401 F.2d 777.

85.56. U.S.—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440.

Tomiyasu v. Golden, C.A.Nev., 358 F.2d 651.

Poe v. Menghini, D.C.Kan., 339 F.Supp. 986—Streich v. Pennsylvania Commission on Charitable Organizations, D.C.Pa., 523 F.Supp. 1377.

Mo.—**C.J.S. cited** in Chicago, B. & Q.R. Co. v. North Kansas City, 367 S.W.2d 561, 568.

N.D.—State ex rel. Paulson v. Meier, 127 N.W.2d 665.

First amendment cases

(2) Other matters.

U.S.—Landry v. Daley, D.C.Ill., 280 F.Supp. 938, app. dism. 89 S.Ct. 455, 393 U.S. 220, 21 L.Ed.2d 392, revd. on oth. grds. 91 S.Ct. 758, 401 U.S. 77, 27 L.Ed.2d 696.

Primary duty on state

U.S.—Schaefer v. Thomson, D.C.Wyo., 240 F.Supp. 247.

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85.57. U.S.—O'Hair v. White, C.A.Tex., 675 F.2d 680.

Reichenberger v. Warren, D.C.Wis., 319 F.Supp. 1237—Marin v. University of Puerto Rico, D.C. Puerto Rico, 346 F.Supp. 470—Logan v. Arafeh, D.C.Conn., 346 F.Supp. 1265, affd. 93 S.Ct. 1556, 411 U.S. 911, 36 L.Ed.2d 304—Jarvis v. Brown, D.C.Cal., 347 F.Supp. 1214—Ramey v. Rockefeller, D.C.N.Y., 348 F.Supp. 780.

Model case for abstention arises when challenged state statute is susceptible to construction by state courts that would avoid or modify the federal constitutional question.

U.S.—Lake Carriers' Ass'n v. MacMullan, Mich., 92 S.Ct. 1749, 406 U.S. 498, 32 L.Ed.2d 257.

Blasecki v. City of Durham, N.C., C.A.N.C., 456 F.2d 87, cert. den. 93 S.Ct. 224, 409 U.S. 912, 34 L.Ed.2d 172.

Opportunity to avoid constitutional issue not alone sufficient

U.S.—Colorado River Water Conservation Dist. v. U.S., Colo., 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483, reh. den. 96 S.Ct. 2239, two cases, 426 U.S. 912, 48 L.Ed.2d 839.

85.58. U.S.—Division 1287, Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America, AFL-CIO v. Dalton, D.C.Mo., 206 F.Supp. 629—Midwest Video Corp. v. Campbell, D.C.N.M., 250 F.Supp. 158.

85.60. U.S.—White v. Husky Oil Co., D.C.Mont., 266 F.Supp. 239—Haakenson v. Parkhouse, D.C. Pa., 312 F.Supp. 929—Mitchell Family Planning Inc. v. City of Royal Oak, D.C.Mich., 335 F.Supp. 738.

85.63. U.S.—Hostetter v. Idlewild Bon Voyage Liquor Corp., N.Y., 84 S.Ct. 1293, 377 U.S. 324, 12 L.Ed.2d 350—Baggett v. Bullitt, Wash., 84 S.Ct. 1316, 377 U.S. 360, 12 L.Ed.2d 377.

85.64. U.S.—Allegheny County v. Frank Mashuda Co., Pa., 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed.2d 1163, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93.

Special circumstances

(2) Other matters.

U.S.—Holmes v. New York City Housing Authority, C.A.N.Y., 398 F.2d 262.

DuVall v. Moore, D.C.Iowa, 276 F.Supp. 689—Coon v. Tingle, D.C.Ga., 277 F.Supp. 304.

Lack of power to order action by state courts where original federal jurisdiction invoked

U.S.—Williams v. Murdoch, C.A.Pa., 350 F.2d 840.

Abstention warranted

U.S.—Carey v. Sugar, 96 S.Ct. 1208, 425 U.S. 73, 47 L.Ed.2d 587.

Application of abstention unwarranted

U.S.—Colorado River Water Conservation Dist. v. U.S., Colo., 96 S.Ct. 1236, 424 U.S. 800, 47 L.Ed.2d 483, reh. den. 96 S.Ct. 2239, two cases, 426 U.S. 912, 48 L.Ed.2d 839.

85.65. U.S.—Dombrowski v. Pfister, La., 85 S.Ct. 1116, 380 U.S. 479, 14 L.Ed.2d 22—Wisconsin v. Constantineau, Wis., 91 S.Ct. 507, 400 U.S. 433, 27 L.Ed.2d 515.

Abraham v. Pekarski, D.C.Pa., 537 F.Supp. 858, app. dism. C.A., 728 F.2d 167, cert. den. 104 S.Ct. 3513, 82 L.Ed.2d 822.

Reapportionment of state legislative body

U.S.—Davis v. Mann, Va., 84 S.Ct. 1441, 377 U.S. 678, 12 L.Ed.2d 609, on remand, D.C., 238 F.Supp. 458, affd. 85 S.Ct. 713, 379 U.S. 694, 13 L.Ed.2d 698.

Cummings v. Meskill, D.C.Conn., 341 F.Supp. 139, motion den. 347 F.Supp. 1173, revd. on oth. grds. 93 S.Ct. 2321, 412 U.S. 735, 37 L.Ed.2d 298.

Doctrine applicable only when issue of state law is uncertain

U.S.—Zwickler v. Koota, N.Y., 88 S.Ct. 391, 389 U.S. 241, 19 L.Ed.2d 444, on remand 290 F.Supp. 244, revd. on oth. grds. 89 S.Ct. 956, 394 U.S. 103, 22 L.Ed.2d 113.

Joe Louis Milk Co. v. Hershey, D.C.Ill., 243 F.Supp. 351.

Ambiguity lacking

U.S.—Joe Louis Milk Co. v. Hershey, D.C.Ill., 243 F.Supp. 351.

85.66. U.S.—Allegheny County v. Frank Mashuda Co., Pa., 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed.2d 1163, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93.

Shell Oil Co. v. Mouton, C.A.La., 410 F.2d 715.

Schenley Industries, Inc. v. N. J. Wine & Spirit Wholesalers Ass'n, D.C.N.J., 272 F.Supp. 872—Decker v. Fillis, D.C.Utah, 306 F.Supp. 613.

85.67. U.S.—Keyishian v. Board of Regents of University of State of N.Y., N.Y., 87 S.Ct. 675, 385 U.S. 589, 17 L.Ed.2d 629.

Pennsylvania Ass'n for Retarded Children v. Com. of Pa., D.C.Pa., 343 F.Supp. 279.

Piecemeal adjudication as factor in application of abstention doctrine

U.S.—Baggett v. Bullitt, Wash., 84 S.Ct. 1316, 377 U.S. 360, 12 L.Ed.2d 377.

Possible invocation of unconstitutional ordinance

U.S.—Baker v. Bindner, D.C.Ky., 274 F.Supp. 658.

85.68. U.S.—Griffin v. County School Bd. of Prince Edward County, Va., 84 S.Ct. 1226, 377 U.S. 218, 12 L.Ed.2d 256, motion gr. 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d 496.

Idlewild Bon-Voyage Liquor Corp. v. Epstein, D.C.N.Y., 212 F.Supp. 376, affd. 84 S.Ct. 1293, 377 U.S. 324, 12 L.Ed.2d 350—Ehrenreich v. Londerholm, D.C.Kan., 273 F.Supp. 178—Klim v. Jones, D.C.Cal., 315 F.Supp. 109.

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85.72. U.S.—Chicago, B. & Q.R. Co. v. City of North Kansas City, Mo., C.A.Mo., 276 F.2d 932.

85.73. U.S.—Sherwood v. Bradford, D.C.Cal., 246 F.Supp. 550—Creel v. City of Atlanta, Ga., C.A. Ga., 399 F.2d 777.

85.75. U.S.—In re Critical Fork Coal Corp., Bkrtcy. Va., 18 B.R. 422.

85.77. U.S.—Reed v. Henderson, C.A.Ga., 463 F.2d 485.

Manning v. Jones, D.C.N.C., 385 F.Supp. 312.

85.78. U.S.—Mach-Tronics, Inc. v. Zirpoli, C.A.Cal., 316 F.2d 820.

§ 11. Jurisdiction of Entire Controversy

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86. U.S.—Lentino v. Fringe Emp. Plans, Inc., C.A. Pa., 611 F.2d 474.

Almenares v. Wyman, D.C.N.Y., 334 F.Supp. 512, mod. on oth. grds., C.A., 453 F.2d 1075, cert. den. 92 S.Ct. 962, 405 U.S. 944, 30 L.Ed.2d 815—Grivetti v. Illinois State Electoral Bd., D.C.Ill., 335 F.Supp. 779, affd. 92 S.Ct. 1772, 1777, 406 U.S. 913, 32 L.Ed.2d 113—Gila River Pima-Maricopa Indian Community v. U.S., 140 F.Supp. 776, 135 Ct.Cl. 180.

Three-judge court

(1) U.S.—Bradford v. Juras, D.C.Or., 331 F.Supp. 167.

(2) Other statements.

U.S.—U.S. v. Georgia Public Service Commission, Ga., 83 S.Ct. 397, 371 U.S. 285, 9 L.Ed.2d 317.

Weintraub v. Hanrahan, C.A.Ill., 435 F.2d 461.

D.C.—Green v. Connally, D.C., 330 F.Supp. 1150, affd. 92 S.Ct. 564, 404 U.S. 997, 30 L.Ed.2d 550.

In personam jurisdiction required

U.S.—Scovill Mfg. Co. v. Dateline Elec. Co., Limited, D.C.Ill., 319 F.Supp. 772, revd. on oth. grds., C.A., 461 F.2d 897.

In personam jurisdiction held acquired

U.S.—Emerson v. Falcon Mfg., Inc., D.C.Tex., 333 F.Supp. 888.

Subject matter jurisdiction required

U.S.—Travis v. Anthes Imperial Limited, D.C.Mo., 331 F.Supp. 797, revd. on oth. grds., C.A., 473 F.2d 515.

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88. U.S.—Almenares v. Wyman, C.A.N.Y., 453 F.2d 1075, cert. den. 92 S.Ct. 962, 405 U.S. 944, 30 L.Ed.2d 815.

Orn v. Universal Auto. Ass'n of Ind., D.C.Wis., 198 F.Supp. 377—Rogers v. Valentine, D.C.N.Y., 37 F.R.D. 231—Weinberger v. New York Stock Exchange, D.C.N.Y., 335 F.Supp. 139.

Discretion

U.S.—Hayes v. City of Wilmington, D.C.Del., 451 F.Supp. 696.

88.5. U.S.—Walstad v. University of Minnesota Hospitals, C.A.Minn., 442 F.2d 634.

Campbell v. Triangle Corp., D.C.Pa., 336 F.Supp. 1002.

88.15. U.S.—Matter of Cent. R. Co. of New Jersey, C.A.N.J., 579 F.2d 804, on remand 473 F.Supp. 225.

89. U.S.—TBK Partners, Ltd. v. Western Union Corp., D.C.N.Y., 517 F.Supp. 380, affd., C.A., 675 F.2d 456.

Codification of doctrine of pendent jurisdiction was not intended to limit general jurisdictional powers.[91.5]

91.5. U.S.—Jenn-Air Products Co. v. Penn Ventilator, Inc., D.C.Pa., 283 F.Supp. 591.

Theory of pendent jurisdiction is not relevant where joined actions are all independently within jurisdiction of federal courts.[91.10]

91.10. U.S.—Bay Guardian Co. v. Chronicle Pub. Co., D.C.Cal., 340 F.Supp. 76.

Close v. Calmar S.S. Corp., D.C.Pa., 44 F.R.D. 398, affd., C.A., 417 F.2d 264.

Common law remedies preserved

U.S.—Ryan v. Foster & Marshall, Inc., C.A.Or., 556 F.2d 460.

92. U.S.—Curtis Bay Towing Co. of Pa. v. National [illegible] D.C.Pa., 206 F.Supp. 741—Newman v. Freeman, D.C.Pa., 262 F.Supp. 106—Bishop v. Byrne, D.C.W.Va., 265 F.Supp. 460—Aetna Cas. & Sur. Co. v. Hatridge, D.C. Ark., 282 F.Supp. 604, affd., C.A., 415 F.2d 809—Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., D.C.Pa., 338 F.Supp. 812—Townsend v. Quality Court Motels, Inc., D.C.Del., 338 F.Supp. 1140.

Lack of "pendent jurisdiction"

U.S.—Meyerhoffer v. East Hanover Tp. School Dist., D.C.Pa., 280 F.Supp. 81—Greene v. Pennsylvania R. Co., D.C.Pa., 280 F.Supp. 194—Olivieri v. Adams, D.C.Pa., 280 F.Supp. 428—Lawes v. Nutter, D.C.Tex., 292 F.Supp. 890—Ayoub v. Helm's Exp., Inc., D.C.Pa., 300 F.Supp. 473.

Dismissal of diversity claim as defeating pendent claim

U.S.—Butler v. Colfelt, C.A.Pa., 439 F.2d 882—Seyler v. Steuben Motors, Inc., C.A.Pa., 462 F.2d 181.

Gieringer v. Silverman, D.C.Wis., 539 F.Supp. 498, affd. C.A., 731 F.2d 1272.

Not all plaintiffs meeting requirements

U.S.—Robison v. Castello, D.C.La., 331 F.Supp. 667.

Question not raised

U.S.—Friends of Yosemite v. Frizzell, D.C.Cal., 420 F.Supp. 390.

93. U.S.—Lynch v. Porter, C.A.Ark., 446 F.2d 225, cert. den. 92 S.Ct. 711, 404 U.S. 104, 30 L.Ed.2d 739.

Olympic Capital Corp. v. Newman, D.C.Cal., 276 F.Supp. 646.

93.5. U.S.—Borror v. Sharon Steel Co., C.A.Pa., 327 F.2d 165.

94. U.S.—Blake v. Pallan, C.A.Cal., 554 F.2d 947—Backus v. Spears, C.A.S.C., 677 F.2d 397.

Long Prarie Packing Co. v. Midwest Emery Freight System, Inc., D.C.Mass., 429 F.Supp. 201.

Cal.—Merry v. Coast Community College Dist., 158 Cal.Rptr. 603, 97 C.A.3d 214.

Ga.—McNeal v. Paine, Webber, Jackson & Curtis, Inc., 293 S.E.2d 331, 249 Ga. 662, on remand 296 S.E.2d 642, 163 Ga.App. 566.

Federal claim held not substantial

U.S.—St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., D.C.Minn., 316 F.Supp. 1045.

What constitutes "substantiality"

U.S.—Shaw-Henderson, Inc. v. Schneider, D.C.Mich., 335 F.Supp. 1203, affd., C.A., 453 F.2d 748—Tully v. Mott Supermarkets, Inc., D.C.N.J., 337 F.Supp. 834.

U.S. for Use of M. G. Astleford Co. v. S. J. Groves & Sons Co., D.C.Minn., 53 F.R.D. 656.

Federal claim abandoned

U.S.—Chandler v. Stern Dental Laboratory Co., D.C. Tex., 335 F.Supp. 580.

Federal claim barred

U.S.—Herreman v. U.S., D.C.Wis., 332 F.Supp. 763, affd., C.A., 476 F.2d 234.

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95. U.S.—Sims v. Western Steel Co., C.A.Utah, 551 F.2d 811, cert. den. 98 S.Ct. 182, 434 U.S. 858, 54 L.Ed.2d 131.

Tully v. Mott Supermarkets, Inc., D.C.N.J., 337 F.Supp. 834—Gerecht v. American Ins. Co., D.C. Mo., 344 F.Supp. 1056—Perez v. Lavine, D.C. N.Y., 378 F.Supp. 1390—Lieb v. American Motors Corp., D.C.N.Y., 538 F.Supp. 127.

Cal.—Lakewood Bank and Trust Co. v. Superior Court, In and For San Mateo County, 180 Cal.Rptr. 914, 129 C.A.3d 463.

Prevents piecemeal litigation

U.S.—Wolfson v. Blumberg, D.C.N.Y., 229 F.Supp. 191, app. dism., C.A., 340 F.2d 89—Edward J. Moriarty & Co. v. General Tire & Rubber Co., D.C.Ohio, 289 F.Supp. 381.

"Pendent jurisdiction" doctrine

U.S.—United Mine Workers of America v. Gibbs, Tenn., 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed.2d 218—Miller v. Youakim, Ill., 99 S.Ct. 957, 440 U.S. 125, 59 L.Ed.2d 194.

Strahan v. Pedroni, C.A.Fla., 387 F.2d 730—Greene v. Basti, C.A.Pa., 391 F.2d 892—Hymer v. Chai, C.A.Hawaii, 407 F.2d 136—Ritchie v. United Mine Workers of America, C.A.Ky., 410 F.2d 827, 36 A.L.R.3d 392—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795—Lone Ranger Television, Inc. v. Program Radio Corp., C.A.Cal., 740 F.2d 718.

Utah Welfare Rights Organization v. Lindsay, D.C.Utah, 315 F.Supp. 294—Gravenstein v. Campion, D.C.Alaska, 540 F.Supp. 7, adhered to 96 F.R.D. 137—Gruber v. Hubbard Bert Karle Weber, Inc., D.C.Pa., 608 F.Supp. 392.

Huber v. Bissel, D.C.Pa., 39 F.R.D. 346—McCann v. Falgout Boat Co., D.C.Tex., 44 F.R.D. 34—In re Arthur Treacher's Franchisee Litigation, D.C.Pa., 92 F.R.D. 398.

D.C.—Tuck v. Pan American Health Organization, C.A., 668 F.2d 547, 215 U.S.App.D.C. 201.

Ga.—Paine, Webber, Jackson & Curtis, Inc. v. McNeal, 288 S.E.2d 761, 161 Ga.App. 835, affd. in part, revd. in part on oth. grds. 293 S.E.2d 331, 249 Ga. 662, on remand 296 S.E.2d 642, 163 Ga.App. 566.

N.J.—Ferger v. Local 483 of Intern. Ass'n of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, 229 A.2d 532, 94 N.J.Super. 554, affd. 235 A.2d 482, 97 N.J.Super. 505.

Tex.—Martin v. Phillips Petroleum Co., Civ.App., 455 S.W.2d 429.

96. U.S.—Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, Ohio, 84 S.Ct. 1253, 377 U.S. 252, 12 L.Ed.2d 280—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

Lechtner v. Brownyard, C.A.Pa., 679 F.2d 322.

Placos v. Cosmair, Inc., D.C.N.Y., 517 F.Supp. 1287—Lieb v. American Motors Corp., D.C.N.Y., 538 F.Supp. 127.

Matter of Smith, Bkrtcy.Ga., 14 B.R. 712.

D.C.—Spivey v. Barry, C.A., 665 F.2d 1222, 214 U.S. App.D.C. 404.

N.Y.—Barron v. Bluhdorn, 414 N.Y.S.2d 15, 68 A.D.2d 809.

No jurisdiction where interpretation of state law required

U.S.—Borumka v. Rocky Mountain Hosp. and Medical Service, D.C.Colo., 599 F.Supp. 857.

Pendent jurisdiction not invoked in absence of federal jurisdiction

U.S.—Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, C.A.Ga., 667 F.2d 1327, reh. den. 671 F.2d 1382.

Yelinek v. Worley, D.C.Va., 284 F.Supp. 679—Payne v. Mertens, D.C.Del., 343 F.Supp. 1355.

Exercise of pendent jurisdiction refused

U.S.—Abernathy v. Schenley Industries, Inc., C.A.N.C., 556 F.2d 242, cert. den. 98 S.Ct. 2822, 436 U.S. 927, 56 L.Ed.2d 770—Johnson v. Miller, C.A.Ill., 680 F.2d 39.

Catalano v. Department of Hospitals of City of New York, D.C.N.Y., 299 F.Supp. 166—Gordon v. Lipoff, D.C.Mo., 320 F.Supp. 905—Kauffman v. Osser, D.C.Pa., 321 F.Supp. 327 Pollard v. City of Hartford, D.C.Conn., 539 F.Supp. 1156.

Tests for application of pendent jurisdiction

U.S.—Eidschun v. Pierce, D.C.Iowa, 335 F.Supp. 603.

State and federal antitrust laws

U.S.—Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., D.C.Tex., 338 F.Supp. 1019.

State claim tied to question of federal policy

U.S.—McLearn v. Cowen & Co., C.A.N.Y., 660 F.2d 845.

Thomas v. Old Forge Coal Co., D.C.Pa., 329 F.Supp. 1000—Garza v. Chicago Health Clubs, Inc., D.C.Ill., 347 F.Supp. 955.

Pending state claims totally dependent on federal causes of action

U.S.—Doyle v. Unicare Health Services Inc., Aurora Center, D.C.Ill., 399 F.Supp. 69, affd. 541 F.2d 283.

Wagner-Peiper Act and Puerto Rican law

U.S.—Vazquez v. Ferre, 404 F.Supp. 815.

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97. U.S.—Almenares v. Wyman, C.A.N.Y., 453 F.2d 1075, cert. den. 92 S.Ct. 962, 405 U.S. 944, 30 L.Ed.2d 815.

U.S. to Use of Claude C. Wood Co. v. General Ins. Co. of America, D.C.Cal., 247 F.Supp. 543.

Exercise of pendent jurisdiction

(1) In general.

U.S.—Henson v. Columbus Bank and Trust Co., C.A. Ga., 651 F.2d 320, reh. den. 664 F.2d 291, app. after remand 770 F.2d 1566.

Schwab v. Erie Lackawanna R. Co., D.C.Pa., 303 F.Supp. 1398—Eidschun v. Pierce, D.C.Iowa, 335 F.Supp. 603—Lieb v. American Motors Corp., D.C.N.Y., 538 F.Supp. 127.

(2) Justification based on considerations of judicial economy, convenience and fairness to litigants involved.

U.S.—Corum v. Beth Israel Medical Center, D.C.N.Y., 359 F.Supp. 909—Hughes v. Ford Motor Credit Co., D.C.Ark., 360 F.Supp. 15—DeBellas v. U.S., D.C.N.Y., 542 F.Supp. 999.

(3) A focal point is whether exercise of such jurisdiction will create likelihood of jury confusion.

U.S.—Eidschun v. Pierce, D.C.Iowa, 335 F.Supp. 603—Shippers & Receivers Co-op. Ass'n, Inc. v. Penn Central Transp. Co., D.C.Pa., 355 F.Supp. 949.

(4) Federal-state comity is an additional consideration.

U.S.—Reyes v. Edmunds, D.C.Minn., 416 F.Supp. 649.

98. U.S.—Miller Equipment Co. v. Colonial Steel & Iron Co., C.A.N.C., 383 F.2d 669, cert. den. 88 S.Ct. 1049, 390 U.S. 955, 19 L.Ed.2d 1148—Forest Laboratories, Inc. v. Pillsbury Co., C.A.Wis., 452 F.2d 621—Crawley v. Board of Ed. of Marion County, Ky., C.A.Ky., 658 F.2d 450.

Travers v. Paton, D.C.Conn., 261 F.Supp. 110—Sauls v. Hutto, D.C.La., 304 F.Supp. 124—Charleston v. Wohlgemuth, D.C.Pa., 332 F.Supp. 1175, affd. 92 S.Ct. 1204, 405 U.S. 970, 31 L.Ed.2d 246—National Bd. of Young Women's Christian Ass'n of U.S.A. v. Young Women's Christian Ass'n of Charleston, S.C., D.C.S.C., 335 F.Supp. 615—Adkins v. Kelly's Creek R. Co., D.C.W.Va., 338 F.Supp. 888, affd., C.A., 458 F.2d 26, cert. den. 93 S.Ct. 224, 409 U.S. 926, 34 L.Ed.2d 184—Giarrusso v. City of Chicago, D.C.Ill., 539 F.Supp. 690.

Federal issue becoming moot

U.S.—Claridge House One, Inc. v. Borough of Verona, D.C.N.J., 490 F.Supp. 706, affd., C.A., 633 F.2d 209.

D.C.—Green v. Kennedy, D.C., 309 F.Supp. 1127, app. dism. 90 S.Ct. 2169, 398 U.S. 956, 26 L.Ed.2d 539, app. dism. 91 S.Ct. 460, 400 U.S. 986, 27 L.Ed.2d 435.

. U.S.—Gem Corrugated Box Corp. v. National Kraft Container Corp., C.A.N.Y., 427 F.2d 499.

. U.S.—United Mine Workers of America v. Osborne Min. Co., C.A.Tenn., 279 F.2d 716, cert. den. 81 S.Ct. 169, 364 U.S. 881, 5 L.Ed.2d 103—Cuyahoga Metropolitan Housing Authority v. Harmody, C.A.Ohio, 474 F.2d 1102.

The use of its power to entertain a cause of action under the doctrine of pendent jurisdiction is discretionary with the federal court.[3.5]

.5. U.S.—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

Greklek v. Toia, C.A.N.Y., 565 F.2d 1259, cert. den. 98 S.Ct. 3081, 436 U.S. 962, 57 L.Ed.2d 1128—Wren v. Sletten Const. Co., C.A.Mont. 654 F.2d 529—Nilsen v. City of Moss Point, Miss., C.A.Miss., 674 F.2d 379, on reh. 701 F.2d 556—Rheaume v. Texas Dept. of Public Safety, C.A. Tex., 666 F.2d 925, cert. den. 102 S.Ct. 3484, 458 U.S. 1106, 73 L.Ed.2d 1367.

Halle & Stieglitz, Filor, Bullard Inc. v. Empress Intern., Ltd., D.C.Del., 442 F.Supp. 217—Wire Mesh Products, Inc. v. Wire Belting Ass'n, D.C. Pa., 520 F.Supp. 1004.

Cal.—Merry v. Coast Community College Dist., 158 Cal.Rptr. 603, 97 C.A.3d 214.

Or.—Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc., 611 P.2d 658, 46 Or.App. 199.

Pendent jurisdiction properly declined

U.S.—Jones v. Fitch, C.A.Miss., 665 F.2d 586—By-Prod Corp. v. Armen-Berry Co., C.A.Ill., 668 F.2d 956.

Jordan v. Montgomery Ward & Co., D.C.Minn., 317 F.Supp. 948, affd. in part, revd. in part on oth. grds., C.A., 442 F.2d 78, cert. den. 92 S.Ct. 78, 404 U.S. 870, 30 L.Ed.2d 114—Harrisburg Coalition Against Ruining Environment v. Volpe, D.C.Pa., 330 F.Supp. 918, op. supp. 381 F.Supp. 893, op. supp. 65 F.R.D. 608—Thompson v. Whitley, D.C. N.C., 344 F.Supp. 480—Sidberry v. Koch, D.C. N.Y., 539 F.Supp. 413.

Factors considered

U.S.—In re Carter, C.A.Ga., 618 F.2d 1093, cert. den. 101 S.Ct. 1410, 450 U.S. 949, 67 L.Ed.2d 378—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part. vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

St. Cyr v. Merrill Lynch, Pierce, Fenner & Smith, Inc., D.C.Tex., 540 F.Supp. 889.

Two-step process

U.S.—Lieb v. American Motors Corp., D.C.N.Y., 538 F.Supp. 127.

Brame v. Ray Bills Finance Corp., D.C.N.Y., 85 F.R.D. 568.

Open issue throughout litigation

U.S.—Dumansky v. U.S., D.C.N.J., 486 F.Supp. 1078.

4. U.S.—J.P. v. DeSanti, C.A.Ohio, 653 F.2d 1080.

Fisher v. Smith, D.C.Wash., 319 F.Supp. 855—Antal v. Budzanoski, D.C.Pa., 320 F.Supp. 161, revd. in part on oth. grds., C.A., 457 F.2d 1245, cert. den. 93 S.Ct. 65, 409 U.S. 853, 34 L.Ed.2d 96—Howmet Corp. v. Tokyo Shipping Co., D.C. Del., 320 F.Supp. 975—Davis v. Coffee City, Tex., D.C.Tex., 356 F.Supp. 550. Howmet Corp. v. Tokyo Shipping Co., D.C.Del., 320 F.Supp. 975—Meshkov v. Abington Tp., D.C.Pa., 517 F.Supp. 1280.

Ala.—Century 21 Preferred Properties, Inc. v. Alabama Real Estate Commission, 401 So.2d 764.

Ultimate adjudication of validity on merits not required

U.S.—Rumbaugh v. Winifrede R. Co., C.A.W.Va., 331 F.2d 530, cert. den. 85 S.Ct. 322, two cases, 379 U.S. 929, 13 L.Ed.2d 341.

Rogers v. Valentine, D.C.N.Y., 37 F.R.D. 231.

Same cause in two counts

U.S.—Crest Auto Supplies, Inc. v. Ero Mfg. Co., D.C. Ill., 246 F.Supp. 224, affd., C.A., 360 F.2d 896.

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5. U.S.—Richardson v. Communications Workers of America, C.A.Neb., 443 F.2d 974, app. after remand 469 F.2d 333.

6. U.S.—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

Dismissal of federal claim not automatically barring state claim adjudication

U.S.—St. Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc., D.C.Minn., 316 F.Supp. 1045.

6.5. U.S.—Hodge v. Mountain States Tel. & Tel. Co. C.A.Ariz., 555 F.2d 254—Wren v. Sletten Const. Co., C.A.Mont., 654 F.2d 529—Ellingson v. Burlington Northern, Inc., C.A.Cal., 653 F.2d 1327.

United Mine Workers of America v. Jones & Laughlin Steel Corp., D.C.Pa., 378 F.Supp. 1206—McCoy v. Thorn, D.C.La., 451 F.Supp. 351—Pruitt v. United Broth. of Carpenters and Joiners of America, D.C.Ga., 518 F.Supp. 61—Meshkov v. Abington Tp., D.C.Pa., 517 F.Supp. 1280—Armstrong v. Tennessee Valley Authority, D.C.Tenn., 536 F.Supp. 9, remd., C.A., 718 F.2d 1098.

In re Chong, Bkrtcy.Hawaii, 12 B.R. 255.

Discretionary power to dismiss exists even after trial

U.S.—Webb v. Bladen, C.A.Va., 480 F.2d 306.

Pendent state claim dismissed without prejudice

U.S.—Retail Clerks Union, Local 770 v. Retail Clerks Intern. Ass'n, D.C.Cal., 359 F.Supp. 1285.

7. U.S.—Local No. 1 (ACA) Broadcast Emp. of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Pa., 614 F.2d 846, on remand, D.C., 543 F.Supp. 1321.

U.S. for Use and Benefit of T Square Equipment Corp. v. Gregor J. Schaefer Sons, Inc., D.C.N.Y., 272 F.Supp. 962.

8. U.S.—U.S. v. Hauff, D.C.Va., 202 F.Supp. 471, affd., C.A., 312 F.2d 6.

8.5. **Separate causes and distinct ground distinguished**

U.S.—Guthrie v. U.S., D.C.Wis., 238 F.Supp. 855.

When rules of pendent jurisdiction inapplicable

U.S.—Corbi v. U.S., D.C.Pa., 298 F.Supp. 521.

Third party claims

U.S.—Lowe's of Montgomery, Inc. v. Smith, D.C.Ala., 432 F.Supp. 1008.

Pendent jurisdiction is available only to join claims, not to join parties.[8.10]

8.10. U.S.—Rundle v. Madigan, D.C.Cal., 331 F.Supp. 492, affd., C.A., 458 F.2d 1217, affd. in part, revd. in part on oth. grds. 93 S.Ct. 1785, 411 U.S. 693, 36 L.Ed.2d 596, reh. den. 93 S.Ct. 2999, 412 U.S. 963, 37 L.Ed.2d 1012—Jennings v. Davis, D.C.Mo., 339 F.Supp. 919, affd., C.A., 476 F.2d 1271—Kaufman v. Union Pac. R. Co., D.C.Cal., 351 F.Supp. 392—Drennan v. City of Lake Forest, D.C.Ill., 356 F.Supp. 1277—Shields v. Consolidated Rail Corp., D.C.N.Y., 530 F.Supp. 400.

"Pendent-party jurisdiction" is jurisdiction over claims against parties not otherwise joined.[8.15]

8.15. U.S.—Norton v. McKeon, D.C.Pa., 444 F.Supp. 384, affd. 601 F.2d 575, two cases—Silver Motor Freight Terminal, Inc. v. Teamsters Local Union No. 957, D.C.Ohio, 537 F.Supp. 188, app. dism. C.A., 725 F.2d 685.

9. U.S.—Oklahoma High School Athletic Ass'n v. Bray, C.A.Okl., 321 F.2d 269—Roecker v. U.S., C.A.Miss., 379 F.2d 400, cert. den. 88 S.Ct. 563, 389 U.S. 1005, 19 L.Ed.2d 600—Williams v. U.S., C.A.Cal., 405 F.2d 951.

Anderson v. U.S., D.C.Pa., 217 F.Supp. 814—Weiss v. Hayden Stone Inc., D.C.N.Y., 340 F.Supp. 1074.

10. U.S.—Ware v. U.S., C.A.Tex., 626 F.2d 1278.

Sherrell v. Mitchell Aero, Inc., D.C.Wis., 340 F.Supp. 219.

Personal jurisdiction for dependent claim not acquired

U.S.—Trussell v. United Underwriters, Ltd., D.C.Colo., 236 F.Supp. 801.

10.5. U.S.—Shands v. Tull, C.A.N.J., 602 F.2d 1156.

Corporacion Venebolana de Fomento v. Vintero Sales Corp., D.C.N.Y., 452 F.Supp. 1108, remd., C.A., 607 F.2d 994, two cases.

11. U.S.—United Mine Workers of America v. Gibbs, Tenn., 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed.2d 218.

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Parker v. Parker, D.C.La., 377 F.Supp. 455.

33.40. U.S.—National Audubon Soc., Inc. v. Marshall, C.A.Ga., 424 F.2d 717.

Com. of Pa. v. Brown, D.C.Pa., 260 F.Supp. 323—Franklin Life Ins. Co. v. Mast, D.C.Ariz., 290 F.Supp. 671, affd. in part, revd. in part on oth. grds., 435 F.2d 1038.

Inapplicable where construction not in independent proceeding

U.S.—Fehling v. Cantonwine, D.C.Wyo., 379 F.Supp. 1250, affd., C.A., 522 F.2d 604.

35.10. U.S.—Eyber v. Dominion Nat. Bank of Bristol Office, D.C.Va., 249 F.Supp. 531.

35.15. U.S.—Ledbetter v. Taylor, C.A.Okl., 359 F.2d 760.

§ 13(1). Ancillary or Incidental Jurisdiction

Library References

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35.50. U.S.—Murphy v. Kodz, C.A.Ariz., 351 F.2d 163—Leather's Best, Inc. v. S.S. Mormaclynx, C.A.N.Y., 451 F.2d 800, on remand 346 F.Supp. 962—U.S. v. United Pacific Ins. Co., C.A.Or., 472 F.2d 792, cert. den. 93 S.Ct. 2273, 411 U.S. 982, 36 L.Ed.2d 958—Joiner v. Diamond M Drilling Co., C.A.La., 677 F.2d 1035, app. after remand 688 F.2d 256, reh. den. 688 F.2d 840.

Brandt v. Olson, D.C.Minn., 179 F.Supp. 363—Lyons v. Weinberger, D.C.N.Y., 376 F.Supp. 248—In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, D.C.Minn., 520 F.Supp. 635.

36. U.S.—Owen Equipment & Erection Co. v. Kroger, Neb., 98 S.Ct. 2396, 437 U.S. 365, 57 L.Ed.2d 274.

McCann v. Falgout Boat Co., D.C.Tex., 44 F.R.D. 34.

For a discussion of ancillary jurisdiction and joinder of claims in federal courts, see 33 F.R.D. 27.

In diversity cases

U.S.—Lee v. Terminal Transport Co., C.A.Ind., 282 F.2d 805, cert. den. 81 S.Ct. 713, 365 U.S. 828, 5 L.Ed.2d 705.

Peerless Dental Supply Co. v. Weber Dental Mfg. Co., D.C.Pa., 299 F.Supp. 331.

Ancillary jurisdiction defined

U.S.—Alsager v. District Court of Polk County, Iowa (Juvenile Division), D.C.Iowa, 447 F.Supp. 572.

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37. U.S.—Allee v. Medrano, Tex., 94 S.Ct. 2191, 416 U.S. 802, 40 L.Ed.2d 566.

Jenkins v. Weinshienk, C.A.10, 670 F.2d 915.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

Other statements of rule

(3) Additional statements.

U.S.—Dumansky v. U.S., D.C.N.J., 486 F.Supp. 1078.

Md.—Webb v. Oxley, 173 A.2d 358, 226 Md. 339, cert. den. 82 S.Ct. 642, 369 U.S. 803, 7 L.Ed.2d 550.

"Ancillary" jurisdiction distinguished from "pendent" jurisdiction

U.S.—Jacobs v. U.S., D.C.Ariz., 367 F.Supp. 1275.

Discretion

U.S.—Stratford Land & Imp. Co., Inc. v. Blanchette, Sp.Ct.R.R.R.A., 448 F.Supp. 279.

38. U.S.—Bankers Trust Co. v. Worldwide Transp. Services, Inc., D.C.Ark., 537 F.Supp. 1101.

Heintz & Co. v. Provident Tradesmens Bank & Trust Co., D.C.Pa., 30 F.R.D. 171.

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39. U.S.—Haile v. Henderson Nat. Bank, C.A.Tenn., 657 F.2d 816, cert. den. 102 S.Ct. 1450, 455 U.S. 949, 71 L.Ed.2d 663.

General Research, Inc. v. American Emp. Ins. Co., D.C.Mich., 289 F.Supp. 735.

Doctrine as limited exception to "cases or controversies" constitutional jurisdiction

U.S.—Warren G. Kleban Engineering Corp. v. Caldwell, C.A.Miss., 490 F.2d 800.

41. U.S.—Federman v. Empire Fire and Marine Ins. Co., C.A.N.Y., 597 F.2d 798.

41.5. U.S.—U.S. for Use and Benefit of T Square Equipment Corp. v. Gregor J. Schaefer Sons, Inc., D.C.N.Y., 272 F.Supp. 962.

41.15. U.S.—Buresch v. American La France, D.C. Pa., 290 F.Supp. 265—Bankers Trust Co. v. Worldwide Transp. Services, Inc., D.C.Ark., 537 F.Supp. 1101.

R. J. Williams Co. v. Fort Belknap Housing Authority, D.C.Mont., 92 F.R.D. 17.

41.25. Claim for cure joined with action under Jones Act

(2) Pendent jurisdiction.

U.S.—Haskins v. Point Towing Co., C.A.Pa., 395 F.2d 737, app. after remand 421 F.2d 532, cert. den. 91 S.Ct. 68, 400 U.S. 834, 27 L.Ed.2d 66.

42. U.S.—Raybould v. Mancini-Fattore Co., D.C. Mich., 186 F.Supp. 235—Kipka v. Chicago & N.W. Ry. Co., D.C.Minn., 289 F.Supp. 750.

43. U.S.—New York State Ass'n for Retarded Children, Inc. v. Carey, D.C.N.Y., 438 F.Supp. 440.

44. U.S.—Schwab v. Erie Lackawanna R. Co., C.A. Pa., 438 F.2d 62.

Newman v. Freeman, D.C.Pa., 262 F.Supp. 106—Buresch v. American La France, D.C.Pa., 290 F.Supp. 265.

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45. U.S.—Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp., D.C.Tex., 201 F.Supp. 679, affd., C.A., 299 F.2d 692, cert. den. 83 S.Ct. 182, 183, 185, two cases, 371 U.S. 887, 9 L.Ed.2d 121—Formulabs, Inc. v. Hartley Pen Co., C.A. Cal., 318 F.2d 485, cert. den. 84 S.Ct. 352, 375 U.S. 945, 11 L.Ed.2d 275—Finance Co. of America v. Park Holding Corp., D.C.Pa., 60 F.R.D. 504.

46. U.S.—Seyler v. Steuben Motors, Inc., C.A.Pa., 462 F.2d 181.

Davidson v. Blaustein, D.C.Md., 247 F.Supp. 225—Haaf v. Board of County Com'rs of Benton County, D.C.Minn., 337 F.Supp. 772.

Dunbar & Sullivan Dredging Co. v. John R. Jurgensen Co., D.C.Ohio, 44 F.R.D. 467, affd. 396 F.2d 152—Paxton v. Southern Pennsylvania Bank, D.C.Md., 93 F.R.D. 503.

46.5. U.S.—IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., C.A. Fla., 676 F.2d 152.

Davis v. Jury Commission of Montgomery County, D.C.Ala., 261 F.Supp. 591.

D.C.—Holloway v. Bristol-Myers Corp., D.C., 327 F.Supp. 17, affd., 485 F.2d 986, 158 U.S.App.D.C. 207.

Third party claim, etc.

U.S.—Burlingham, Underwood, Barron, Wright & White v. Luckenbach S.S. Co., D.C.N.Y., 208 F.Supp. 544.

Conversely, etc.

(2) Other instances.

U.S.—Agrashell, Inc. v. Bernard Sirotta Co., C.A.N.Y., 344 F.2d 583.

Consent absent

U.S.—Matter of Penn Central Transp. Co., D.C.Pa., 419 F.Supp. 1376.

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50. U.S.—Threlkeld v. Tucker, C.A.Cal., 496 F.2d 1101, cert. den. 95 S.Ct. 499, 419 U.S. 1023, 42 L.Ed.2d 297.

§ 13(2). —— Ancillary Nature of Proceeding

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51.50. Md.—C.J.S. cited in Webb v. Oxley, 173 A.2d 358, 360, 226 Md. 339, cert. den. 82 S.Ct. 642, 369 U.S. 803, 7 L.Ed.2d 550.

51.60. U.S.—Eagle Star Ins. Co. v. Maltes, C.A.Fla., 313 F.2d 778.

52. U.S.—Berry v. Michigan Bell Tel. Co., D.C.Mich., 319 F.Supp. 401.

Usery v. Brandel, D.C.Mich., 87 F.R.D. 670.

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53.5. U.S.—Bay Guardian Co. v. Chronicle Pub. Co., D.C.Cal., 340 F.Supp. 76—Clark v. U.S., D.C. Iowa, 379 F.Supp. 1399.

Each claim decided separately

U.S.—Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., C.A.Ala., 426 F.2d 709.

Forum not convenient for secondary action

U.S.—Independent School Dist. No. 454, Fairmont, Minn. v. Marshall & Stevens Co., D.C.Minn., 337 F.Supp. 1278.

53.15. U.S.—T. B. Harms Co. v. Eliscu, C.A.N.Y., 339 F.2d 823, cert. den. 85 S.Ct. 1534, 381 U.S. 915, 14 L.Ed.2d 435.

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Federal issue becoming moot

U.S.—U.S. to Use of Claude C. Wood Co. v. General Ins. Co. of America, D.C.Cal., 247 F.Supp. 543.

54. U.S.—Balthazar v. Mari Limited, D.C.Ill., 301 F.Supp. 103, affd. 90 S.Ct. 397, 396 U.S. 114, 24 L.Ed.2d 307.

57.5. U.S.—Leite v. City of Providence, D.C.R.I., 463 F.Supp. 585.

57.10. After original claim settled

U.S.—Penn Finance Corp. v. Chelsea Title & Guaranty Co., D.C.Pa., 371 F.Supp. 398.

§ 13(3). —— Parties and Jurisdiction of Person

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59. U.S.—Maryville Academy v. Loeb Rhoades & Co., Inc., D.C.Ill., 530 F.Supp. 1061.

60. U.S.—Usery v. Brandel, D.C.Mich., 87 F.R.D. 670.

62. U.S.—Home Ins. Co. v. Ballenger Corp., D.C.Ga., 74 F.R.D. 93.

63. U.S.—H. L. Peterson Co. v. Applewhite, C.A. Tex., 383 F.2d 430.

Hadinger v. Bentley Laboratories, Inc., D.C.Pa., 427 F.Supp. 994.

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Tex.—Sinton Sav. Ass'n v. Ellis, Civ.App., 474 S.W.2d 281, err. ref. no rev. err.

Waiver of sovereign immunity

U.S.—DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., D.C.N.Y., 428 F.Supp. 1297, affd. C.A., 578 F.2d 1366, 1367, cert. den. 99 S.Ct. 465, 439 U.S. 970, 58 L.Ed.2d 431.

Ancillary jurisdiction denied

U.S.—New York State Ass'n for Retarded Children, Inc. v. Carey, D.C.N.Y., 438 F.Supp. 440.

64. U.S.—Data Disc, Inc. v. Systems Technology Associates, Inc., C.A.Cal., 557 F.2d 1280.

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§ 13(4). —— Particular Proceedings

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65. Ancillary jurisdiction sustained

U.S.—Davis v. Prudential Ins. Co. of America, C.A. Tex., 331 F.2d 346—Franklin Life Ins. Co. v. Mast, C.A.Ariz., 435 F.2d 1038.

66. U.S.—Aldinger v. Howard, 96 S.Ct. 2413, 427 U.S. 1, 49 L.Ed.2d 276.

Formulabs, Inc. v. Hartley Pen Co., C.A.Cal., 318 F.2d 485, cert. den. 84 S.Ct. 352, 375 U.S. 945, 11 L.Ed.2d 275.

Intervention permissive or matter of right

(1) U.S.—Hardy-Latham v. Wellons, C.A.N.C., 415 F.2d 674.

(2) U.S.—Finance Co. of America v. Park Holding Corp., D.C.Pa., 60 F.R.D. 504.

(3) Other matters.

U.S.—Kozak v. Wells, C.A.S.D., 278 F.2d 104, 84 A.L.R.2d 1400.

Court held to lack jurisdiction

U.S.—State of Md., to Use of American-Marietta Co. v. W. E. Dunn Const. Co., D.C.Md., 191 F.Supp. 297.

68. U.S.—U.S. v. American Nat. Bank and Trust Co. of Chicago, D.C.Ill., 443 F.Supp. 167.

Rollins v. Sears, Roebuck & Co., D.C.La., 71 F.R.D. 540.

69. U.S.—Rogers v. Aetna Cas. and Sur. Co., C.A. Tex., 601 F.2d 840.

Hiram Walker Inc. v. Serr, D.C.Pa., 277 F.Supp. 3—Dixon v. Northwestern Nat. Bank of Minneapolis, D.C.Minn., 276 F.Supp. 96—Wilgus v. Peterson, D.C.Del., 335 F.Supp. 1385.

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69.5. U.S.—Hamilton v. Nakai, C.A.Ariz., 453 F.2d 152, cert. den. 92 S.Ct. 2044, 406 U.S. 945, 32 L.Ed.2d 332.

71. U.S.—Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, Tex., 95 S.Ct. 1830, 421 U.S. 616, 44 L.Ed.2d 418, on remand, C.A., 518 F.2d 553, reh. den. 96 S.Ct. 156, 423 U.S. 884, 46 L.Ed.2d 114.

Testa v. Winquist, D.C.R.I., 451 F.Supp. 388.

Usery v. Brandel, D.C.Mich., 87 F.R.D. 670.

To recover alimony arrears

U.S.—Hemphill v. Hemphill, D.C.Ga., 398 F.Supp. 1134.

71.10. U.S.—U.S. v. Town of North Hempstead, C.A. N.Y., 610 F.2d 1025.

Yost v. U.S., D.C.Cal., 212 F.Supp. 410—Minersville Coal Co. v. Anthracite Export Ass'n, D.C. Pa., 55 F.R.D. 429.

Particular claims held not within ancillary jurisdiction

(5) Other claims.

U.S.—Ellicott Mach. Corp. v. Wiley Mfg. Co., D.C. Md., 297 F.Supp. 1044.

(6) U.S.—Wilson v. Kelley, D.C.Ga., 294 F.Supp. 1005, affd. 89 S.Ct. 477, 393 U.S. 266, 21 L.Ed.2d 425.

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71.20. U.S.—Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., D.C.N.Y., 305 F.Supp. 803.

71.25. U.S.—Broughten v. Voss, C.A.Fla., 634 F.2d 880.

Jersey Land & Development Corp. v. U.S., D.C. N.J., 342 F.Supp. 48.

Proceedings held within ancillary jurisdiction

(6) Other proceedings.

U.S.—State of Iowa v. Union Asphalt & Roadoils, Inc., C.A.Iowa, 409 F.2d 1239—Jenkins v. Weinshienk, C.A.10, 670 F.2d 915.

State of Iowa v. Union Asphalt & Roadoils, Inc., D.C.Iowa, 281 F.Supp. 391, affd., C.A., 408 F.2d 1171, affd. 409 F.2d 1239—Andrews v. Central Sur. Ins. Co., D.C.S.C., 295 F.Supp. 1223.

Proceedings held not within ancillary jurisdiction

(3) Other proceedings.

U.S.—Bounougias v. Peters, C.A.Ill., 369 F.2d 247, cert. den. 87 S.Ct. 1288, 386 U.S. 983, 18 L.Ed.2d 232—Jenkins v. Weinshienk, C.A.10, 670 F.2d 915.

Md.—Webb v. Oxley, 173 A.2d 358, 226 Md. 339, cert. den. 82 S.Ct. 642, 369 U.S. 803, 7 L.Ed.2d 550.

71.35. Ancillary jurisdiction entertained

U.S.—Jacobs v. U.S., D.C.Ariz., 367 F.Supp. 1275.

71.40. U.S.—Hungerford v. U.S., D.C.Cal., 192 F.Supp. 581, revd. on oth. grds., C.A., 307 F.2d 99.

§ 13(5). —— —— Cross Bills and Counterclaims

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71.50. U.S.—Scott v. Fancher, C.A.Tex., 369 F.2d 842—Corporacion Venezolana de Fomento v. Vintero Sales Corp., C.A.N.Y., 629 F.2d 786, cert. den. 101 S.Ct. 863, 449 U.S. 1080, 66 L.Ed.2d 804, app. after remand C.A., 712 F.2d 33.

Cross claim held not ancillary

U.S.—Wilkin v. Wilkin Trust, D.C.Okl., 261 F.Supp. 977—Shields v. Consolidated Rail Corp., D.C. N.Y., 530 F.Supp. 400.

71.52. U.S.—Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., C.A.Ala., 426 F.2d 709.

Halm Instrument Co. v. Sigma Engineering Service, Inc., D.C.Pa., 42 F.R.D. 416.

Question held one of ancillary, not pendent, jurisdiction

U.S.—National Bowl-O-Mat Corp. v. Brunswick Corp., D.C.N.J., 264 F.Supp. 221.

54. U.S.—Consolo v. Federal Maritime Commission, Dist. Col., 86 S.Ct. 1018, 383 U.S. 607, 16 L.Ed.2d 131, on remand, C.A., 373 F.2d 674, 126 U.S.App. D.C. 14.

Atlantic Corp. v. U.S., C.A.Mass., 311 F.2d 907.

Degree of Honor Protective Ass'n v. Charles T. Bisch & Son, Inc., D.C.Mass., 194 F.Supp. 614—Maryville Academy v. Loeb Rhoades & Co., Inc., D.C.Ill., 530 F.Supp. 1061—Bankers Trust Co. v. Worldwide Transp. Services, Inc., D.C.Ark., 537 F.Supp. 1101—Plains Ins. Co. v. Sandoval, D.C. Colo., 35 F.R.D. 293—Chicago R.I. & P.R. Co. v. Chicago, B. & Q.R. Co., D.C.Ill., 55 F.R.D. 209.

Ancillary jurisdiction not sustained as to cross claim

U.S.—Northern Natural Gas Co. v. Grounds, C.A. Kan., 441 F.2d 704, cert. den. 92 S.Ct. 268, 404 U.S. 951, 30 L.Ed.2d 267, reh. den. 92 S.Ct. 732, 404 U.S. 1065, 30 L.Ed.2d 754, cert. den. 92 S.Ct. 732, 733, 404 U.S. 1063, 30 L.Ed.2d 751, on remand 393 F.Supp. 949—Joiner v. Diamond M Drilling Co., C.A.La., 677 F.2d 1035, app. after remand 688 F.2d 256, reh. den. 688 F.2d 840.

Town of Ayer v. Lazzaro, D.C.Mass., 234 F.Supp. 372.

Ancillary jurisdiction sustained

(1) U.S.—James Stewart Co. v. Dennett-Robertson Elec., Inc., C.A.Cal., 291 F.2d 147—R. M. Smythe & Co. v. Chase Nat. Bank of City of New York, C.A.N.Y., 291 F.2d 721—L & E Co. v. U.S.A. ex rel. Kaiser Gypsum Co., C.A.Cal., 351 F.2d 880.

Coyne v. Marquette Cement Mfg. Co., D.C.Pa., 254 F.Supp. 380—Cattle Owners Corp. v. Arkin, D.C.Iowa, 267 F.Supp. 658—Home Ins. Co. v. Ballenger Corp., D.C.Ga., 74 F.R.D. 93.

Cross bill not germane to main litigation

(1) U.S.—Degree of Honor Protective Ass'n v. Charles T. Bisch & Son, Inc., D.C.Mass., 194 F.Supp. 614—Northern Natural Gas Co. v. Grounds, D.C.Kan., 292 F.Supp. 619, affd. in part, revd. in part on oth. grds., C.A., 441 F.2d 704.

71.55. U.S.—Amco Const. Co. v. Mississippi State Bldg. Commission, C.A.Miss., 602 F.2d 730.

71.56. U.S.—Great Lakes Rubber Corp. v. Herbert Cooper Co., C.A.Pa., 286 F.2d 631—Ivy Broadcasting Co. v. American Tel. & Tel. Co., C.A. N.Y., 391 F.2d 486—IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., C.A.Fla., 676 F.2d 152.

Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc., D.C.Del., 50 F.R.D. 415.

Plains Ins. Co. v. Sandoval, D.C.Colo., 35 F.R.D. 293.

Ancillary jurisdiction sustained

(1) U.S.—Princess Fair Blouse, Inc. v. Viking Sprinkler Co., D.C.N.C., 186 F.Supp. 1—A. O. Smith Corp. v. Applewhite, D.C.Tex., 255 F.Supp. 785, app. dism. in part, affd. in part, C.A., 383 F.2d 430—City of Santa Clara, Cal. v. Kleppe, D.C.Cal., 428 F.Supp. 315.

U.S. for Use and Benefit of Central Rigging & Contracting Corp. v. Paul Tishman Co., D.C.N.Y., 32 F.R.D. 223.

Md.—Lease-A-Car, Inc. v. Thomassen Lincoln Mercury, Inc., 373 A.2d 1268, 36 Md.App. 438.

Ancillary jurisdiction held lacking

(1) U.S.—Squalls v. Union Fidelity Life Ins. Co., D.C.Ill., 437 F.Supp. 971.

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71.60. U.S.—Guy v. Citizens Fidelity Bank & Trust Co., C.A.Ky., 429 F.2d 828.

71.62. U.S.—National Bowl-O-Mat Corp. v. Brunswick Corp., D.C.N.J., 264 F.Supp. 221—Easton Area Joint Sewer Authority v. Bushkill-Lower Lehigh Joint Sewer Authority, D.C.Pa., 517 F.Supp. 583.

N.M.—Hughes v. Joe G. Maloof & Co., App., 505 P.2d 859, 84 N.M. 516.

71.64. U.S.—Atlantic Corp. v. U.S., C.A.Mass., 311 F.2d 907—Parris v. St. Johnsbury Trucking Co., C.A.Vt., 395 F.2d 543.

U.S. v. Championship Sports, Inc., D.C.N.Y., 284 F.Supp. 501.

R. J. Williams Co. v. Fort Belknap Housing Authority, D.C.Mont., 92 F.R.D. 17.

71.68. U.S.—Texas Acorn v. Texas Area 5 Health Systems Agency, Inc., C.A.Tex., 559 F.2d 1019, reh. den. 565 F.2d 908—Travelers Ins. Co. v. First Nat. Bank of Shreveport, C.A.La., 675 F.2d 633.

Wetherington v. Phillips, D.C.N.C., 380 F.Supp. 426, affd., C.A., 526 F.2d 591.

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71.70. U.S.—Baker v. Gold Seal Liquors, Inc., Ill., 94 S.Ct. 2504, 417 U.S. 467, 41 L.Ed.2d 243.

Bauer v. Uniroyal Tire Co., C.A.S.D., 630 F.2d 1287.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Del Valle, D.C.Ga., 528 F.Supp. 147.

Effect of Rule on jurisdiction generally

(2) Other statements.

U.S.—General Foods Corp. v. Struthers Scientific & Intern. Corp., D.C.Del., 301 F.Supp. 354.

Particular counterclaims held "compulsory" and ancillary

(5) U.S.—Great Lakes Rubber Corp. v. Herbert Cooper Co., C.A.Pa., 286 F.2d 631—H. L. Peterson Co. v. Applewhite, C.A.Tex., 383 F.2d 430.

Princess Fair Blouse, Inc. v. Viking Sprinkler Co., D.C.N.C., 186 F.Supp. 1.

Mirkin, Barre, Saltzstein, Gordon, Hermann & Kreisberg, P.C. v. Noto, D.C.N.Y., 94 F.R.D. 184.

Ancillary jurisdiction not sustained

U.S.—Motorists Mut. Ins. Co. v. Simpson, C.A.Ind., 404 F.2d 511, cert. den. 89 S.Ct. 1470, 394 U.S. 988, 22 L.Ed.2d 763.

71.72. U.S.—Aldens, Inc. v. Packel, 524 F.2d 38 cert. den. 96 S.Ct. 1684, 425 U.S. 943, 48 L.Ed.2c 187—By-Prod Corp. v. Armen-Berry Co., C.A.Ill. 668 F.2d 956.

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U.S. For Use and Benefit of Kashulines v. Thermo Contracting Corp., D.C.N.Y., 437 F.Supp. 195.

Mirkin, Barre, Saltzstein, Gordon, Hermann & Kreisberg, P.C. v. Noto, D.C.N.Y., 94 F.R.D. 184.

Particular counterclaims held "permissive" and not ancillary

(4) Other counterclaims.

U.S.—Markus v. Dillinger, D.C.Pa., 191 F.Supp. 732—National Bowl-O-Mat Corp. v. Brunswick Corp., D.C.N.J., 264 F.Supp. 221.

Diversity of citizenship in original action held unavailable

U.S.—Markus v. Dillinger, D.C.Pa., 191 F.Supp. 732.

71.74. U.S.—U.S for Use and Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co., C.A. Conn., 430 F.2d 1077, cert. den. 91 S.Ct. 582, 400 U.S. 1021, 27 L.Ed.2d 632.

Binnick v. Avco Financial Services of Nebraska, Inc., D.C.Neb., 435 F.Supp. 359.

Counterclaim held not in nature of setoff so as to fall within the exception contemplated by the text rule.

U.S.—Kaiser Aluminum & Chemical Sales, Inc. v. Ralston Steel Corp., D.C.Ill., 25 F.R.D. 23.

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71.76. U.S.—U.S. for Use and Benefit of Central Rigging & Contracting Corp. v. Paul Tishman Co., D.C.N.Y., 32 F.R.D. 223—Coleman Capital Corp. v. Fidelity & Deposit Co. of Md., D.C.N.Y., 43 F.R.D. 407.

Diversity in original action held to support counterclaim

U.S.—Markus v. Dillinger, D.C.Pa., 191 F.Supp. 732.

Rule inapplicable to permissive counterclaims

U.S.—Hercules Inc. v. Dynamic Export Corp., D.C. N.Y., 71 F.R.D. 101.

Court's jurisdiction not expanded

U.S.—U.S. v. Drinkwater, D.C.Va., 434 F.Supp. 457.

71.80. U.S.—Scott v. Fancher, C.A.Tex., 369 F.2d 842—Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co., C.A.Ala., 426 F.2d 709.

Lankford v. Ryder Truck Systems, Inc., D.C. S.C., 41 F.R.D. 430.

71.82. U.S.—Globe Indem. Co., v. Teixeira, D.C.Hawaii, 230 F.Supp. 444—Campbell v. General Finance Corp. of Virginia, D.C.Va., 523 F.Supp. 989.

Dunbar & Sullivan Dredging Co. v. John R. Jurgensen Co., D.C.Ohio, 44 F.R.D. 467, affd. 396 F.2d 152.

71.86. U.S.—Fairview Park Excavating Co., Inc. v. Al Monzo Const. Co., Inc., C.A.Pa., 560 F.2d 1122.

Compulsory counterclaim dismissed where original claim dismissed

U.S.—Bond v. F/V Mermaid, D.C.Fla., 311 F.Supp. 1013.

71.88. U.S.—Burns v. Rockwood Distributing Co., D.C.Ill., 481 F.Supp. 841.

71.90. Ancillary jurisdiction to decide compulsory counterclaim remains

U.S.—Pipeliners Local Union No. 798, Tulsa, Okl. v. Ellerd, C.A.Colo., 503 F.2d 1193.

Dismissed on nonjurisdictional grounds

U.S.—Fairview Park Excavating Co., Inc. v. Al Monzo Const. Co., Inc., C.A.Pa., 560 F.2d 1122.

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72. U.S.—N. W. Controls, Inc. v. Outboard Marine Corp., D.C.Del., 349 F.Supp. 1254.

N.Y.—Banco do Brasil v. Madison S.S. Corp., 307 N.Y.S.2d 341, 61 Misc.2d 1028.

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(8) Other Instances.

U.S.—American Safety Table Co. v. Schreiber & Goldberg, Inc., D.C.N.Y., 320 F.Supp. 603.

Bankruptcy proceedings

(1) U.S.—In re Bowen, D.C.Ga., 222 F.Supp. 97—In re Carico, D.C.Va., 308 F.Supp. 815.

Decree provision may not limit jurisdiction to enforce

U.S.—South v. Rowe, D.C.Ill., 102 F.R.D. 152, affd. in part, revd. in part on oth. grds., 759 F.2d 610.

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73. U.S.—Martina Theatre Corp. v. Schine Cham Theatres, Inc., C.A.N.Y., 278 F.2d 798.

74. U.S.—Martina Theatre Corp. v. Schine Chain Theatres, Inc., C.A.N.Y., 278 F.2d 798—Crosby v. Mills, C.A.Colo., 413 F.2d 1273.

80. U.S.—Sigma Chi Fraternity v. Regents of University of Colo., D.C.Colo., 258 F.Supp. 515.

§ 13(8). —— —— Affecting Property in Court's Possession in General

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85.50. U.S.—Northern Natural Gas Co. v. Grounds, D.C.Kan., 292 F.Supp. 619. Affd. in part, revd. in part on oth. grds., C.A., 441 F.2d 704, cert. den. 92 S.Ct. 268, 404 U.S. 951, 30 L.Ed.2d 267, reh. den. 92 S.Ct. 732, 404 U.S. 1065, 30 L.Ed.2d 754, cert. den. 92 S.Ct. 732, 733, 404 U.S. 1063, 30 L.Ed.2d 751.

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87. U.S.—U.S. v. 164.51 Acres of Land, More or Less, in Van Buren and Cleburne Counties, Ark., D.C.Ark., 205 F.Supp. 202—Bank of Hawaii v. Benchwick, D.C.Hawaii, 249 F.Supp. 74—Andrews v. Central Sur. Ins. Co., D.C.S.C., 295 F.Supp. 1223.

§ 13(9). —— —— In Connection with Receiverships

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95.50. U.S.—Haile v. Henderson Nat. Bank, C.A. Tenn., 657 F.2d 816, cert. den. 102 S.Ct. 1450, 455 U.S. 949, 71 L.Ed.2d 663.

95.55. U.S.—Britton v. Green, C.A.Okl., 325 F.2d 377—Federal Sav. and Loan Ins. Corp. v. PSL Realty Co., C.A.Ill., 630 F.2d 515, cert. den. 101 S.Ct. 3109, 452 U.S. 961, 69 L.Ed.2d 971.

95.60. U.S.—Britton v. Green, C.A.Okl., 325 F.2d 377.

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96. U.S.—Tcherepnin v. Franz, C.A.Ill., 485 F.2d 1251, cert. den. 94 S.Ct. 1416, 415 U.S. 918, 39 L.Ed.2d 472.

Tcherepnin v. Franz, D.C.Ill., 439 F.Supp. 1340—City of Detroit, By and Through Detroit Water and Sewerage Dept. v. State of Mich., D.C.Mich., 538 F.Supp. 1169, reh. den. 543 F.Supp. 220.

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4. When ancillary

U.S.—Esbitt v. Dutch-American Mercantile Corp., C.A. N.Y., 335 F.2d 141.

5. U.S.—Esbitt v. Dutch-American Mercantile Corp., C.A.N.Y., 335 F.2d 141.

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17. Particular suits or proceedings held not ancillary

(5) U.S.—Continental Bank & Trust Co. v. Lewis, Roca, Scoville & Beauchamp, C.A.Utah, 278 F.2d 497.

18.5. U.S.—Tcherepnin v. Franz, D.C.Ill., 277 F.Supp. 472.

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18.50. U.S.—Harris v. Nelson, Cal., 89 S.Ct. 1082, 394 U.S. 286, 22 L.Ed.2d 281, reh. den. 89 S.Ct. 1623, 394 U.S. 1025, 23 L.Ed.2d 50—United States v. New York Tel. Co., N.Y., 98 S.Ct. 364, 434 U.S. 159, 54 L.Ed.2d 376.

Gurley v. Superior Court of Mecklenburg County, C.A.N.C., 411 F.2d 586—Moye v. Clerk, DeKalb County Superior Court, C.A.Ga., 474 F.2d 1275.

Dixie Highway Exp., Inc. v. U.S., D.C.Miss., 268 F.Supp. 239, revd. on oth. grds. 88 S.Ct. 539, 389 U.S. 409, 19 L.Ed.2d 639, on remand, 287 F.Supp. 473—U.S. v. State of Tex., D.C.Tex., 356 F.Supp. 469.

Provision held inapplicable

U.S.—U.S. v. McGann, D.C.Md., 163 F.Supp. 417, affd., C.A., 262 F.2d 590—Elkanich v. Alexander, D.C.Kan., 315 F.Supp. 659, affd., C.A., 430 F.2d 1178.

(1) Other statements.

U.S.—General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, Pa., 102 S.Ct. 3141, 458 U.S. 375, 73 L.Ed.2d 835.

Materiality of label

U.S.—Stern v. South Chester Tube Co., Pa., 88 S.Ct. 1332, 390 U.S. 606, 20 L.Ed.2d 177.

Beckett v. Kearney, D.C.Ga., 247 F.Supp. 219, affd., C.A., 363 F.2d 505.

20. Writ of assistance

U.S.—Hamilton v. Nakai, C.A.Ariz., 453 F.2d 152, cert. den. 92 S.Ct. 2044, 406 U.S. 945, 32 L.Ed.2d 332.

20.5. U.S.—U.S. v. Valentine, D.C.Puerto Rico, 288 F.Supp. 957.

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D.C.—Ansara v. Eastland, C.A., 442 F.2d 751, 143 U.S.App.D.C. 29.

Power to frame relief ancillary to proper order

U.S.—Bethlehem Mines Corp. v. United Mine Workers of America, D.C.Pa., 344 F.Supp. 1161, affd., C.A., 494 F.2d 726.

Inherent supervisory powers

U.S.—Rush v. U.S., 559 F.2d 455.

20.10. U.S.—Dodge v. Nakai, D.C.Ariz., 298 F.Supp. 17—Equal Employment Opportunity Commission v. Woolco Dept. Stores, D.C.La., 321 F.Supp. 811 order vacated and remanded 460 F.2d 301.

Not independent source of jurisdiction

U.S.—CCCo-Western Region v. Fellows, D.C.Cal., 35[illegible] F.Supp. 644.

20.15. U.S.—Benson v. State Bd. of Parole and Probation, C.A.Or., 384 F.2d 238, cert. den. 88 S.Ct. 1860, 391 U.S. 954, 20 L.Ed.2d 869—Brittinghan v. U.S.C.I.R., C.A.Tex., 451 F.2d 315—Hamilton v. Nakai, C.A.Ariz., 453 F.2d 152, cert. den. 9[illegible] S.Ct. 2044, 406 U.S. 945, 32 L.Ed.2d 332—Epps v Bexar-Medina-Atascosa Counties Water Improvement Dist. No. 1, C.A.Tex., 665 F.2d 594.

Hill v. U.S. Bd. of Parole, D.C.Pa., 257 F.Supp 129—Equal Employment Opportunity Commissio[n] v. Woolco Dept. Stores, D.C.La., 321 F.Supp. 81[1] order vacated and remanded 460 F.2d 301.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2[d] 728, 135 U.S.App.D.C. 160, on remand 259 A.2[d] 592.

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20.20. U.S.—Brittingham v. U.S.C.I.R., C.A.Tex., 451 F.2d 315—Commercial Sec. Bank v. Walker Bank & Trust Co., C.A.Utah, 456 F.2d 1352.

Elkanich v. Alexander, D.C.Kan. 315 F.Supp. 659, affd., C.A., 430 F.2d 1178—State Committee to Stop Sanguine v. Laird, D.C.Wis., 317 F.Supp. 664—Kivett v. Gathright, D.C.Va., 360 F.Supp. 102.

25. U.S.—Stern v. South Chester Tube Co., Pa., 88 S.Ct. 1332, 390 U.S. 606, 20 L.Ed.2d 177.

Liddell v. Board of Ed. of City of St. Louis, C.A.Mo., 677 F.2d 626, cert. den. 103 S.Ct. 172, 459 U.S. 877, 74 L.Ed.2d 142, on remand 567 F.Supp. 1037, stay den. 717 F.2d 1180, affd. in part, revd. in part on oth. grds. 731 F.2d 1294, cert. den. 105 S.Ct. 82, three cases, 83 L.Ed.2d 30, app. after remand 758 F.2d 290.

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D.C.—Powell v. McCormack, C.A., 395 F.2d 577, 129 U.S.App.D.C. 354, affd. in part, revd. in part on oth. grds. 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491—F.T.C. v. Browning, C.A., 435 F.2d 96, 140 U.S.App.D.C. 292—De Misch v. Administrator of Veterans Affairs, D.C., 303 F.Supp. 1153.

Effect of Federal Rules

(1) U.S.—Finley v. Chandler, C.A.Cal., 377 F.2d 548, cert. den. 88 S.Ct. 146, 389 U.S. 869, 19 L.Ed.2d 147—Haggard v. State of Tenn., C.A.Tenn., 421 F.2d 1384.

Rines v. Com. of Pa., D.C.Pa., 285 F.Supp. 391.

Writ properly denied

U.S.—Udall v. Tallman, Dist.Col., 85 S.Ct. 792, 380 U.S. 1, 13 L.Ed.2d 616, reh. den. 85 S.Ct. 1325, 380 U.S. 989, 14 L.Ed.2d 283.

Statute held not to enlarge scope of mandamus relief

U.S.—Prairie Band of Pottawatomie Tribe of Indians v. Udall, C.A.Kan., 355 F.2d 364, cert. den. 87 S.Ct. 70, 385 U.S. 831, 17 L.Ed.2d 67—Rural Electrification Administration v. Northern States Power Co., C.A.Minn., 373 F.2d 686, cert. den. 87 S.Ct. 2079, 387 U.S. 945, 18 L.Ed.2d 1332.

Town of East Haven v. Eastern Airlines, Inc., D.C.Conn., 282 F.Supp. 507—Bowen v. Culotta, D.C.Va., 294 F.Supp. 183.

Not available to direct state officials in performance of duties

U.S.—Moye v. Clerk, DeKalb County Superior Court, C.A.Ga., 474 F.2d 1275.

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Claim cognizable by federal courts prerequisite

U.S.—Aguayo v. Richardson, C.A.N.Y., 473 F.2d 1090, stay den. 93 S.Ct. 1350, 410 U.S. 921, 35 L.Ed.2d 583, cert. den. 94 S.Ct. 900, 414 U.S. 1146, 39 L.Ed.2d 101—Moore v. U.S. Atty.Gen., C.A.Ga., 473 F.2d 1375.

Independent basis for jurisdiction not created

U.S.—Ali v. Stae Police of Pennsylvania, D.C.Pa., 378 F.Supp. 888.

Environmental impact statements

U.S.—Harlem Val. Transp. Ass'n v. Stafford, C.A.N.Y., 500 F.2d 328.

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D.C.—National Welfare Rights Organization v. Weinberger, D.C., 377 F.Supp. 861.

Extraordinary situation required amounting to "judicial usurpation of power"

U.S.—Kerr v. U.S. Dist. Court for Northern Dist. of California, 96 S.Ct. 2119, 426 U.S. 394, 48 L.Ed.2d 725.

Not within mandamus jurisdiction

U.S.—Smith v. Grimm, 534 F.2d 1346, cert. den. 97 S.Ct. 493, 429 U.S. 980, 50 L.Ed.2d 589, app. after remand, C.A., 555 F.2d 234.

Consortium of Community Based Organizations v. Donovan, D.C.Cal., 530 F.Supp. 520.

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26. U.S.—Starbuck v. City and County of San Francisco, C.A.Cal., 556 F.2d 450.

Saucke v. F.T.C., D.C.Ga., 333 F.Supp. 1197—Iowa City-Montezuma R.R. Shippers Ass'n v. U.S., D.C.Iowa, 338 F.Supp. 1383.

No clear and imminent irreparable injury threatened

U.S.—U.S. ex rel. Schaedler v. Common Pleas Court, Twenty-Third Judicial Dist., Reading, Pa., D.C.Pa., 242 F.Supp. 526.

Absence of adequate legal remedy

U.S.—Rines v. Com. of Pa., D.C.Pa., 285 F.Supp. 391.

28. U.S.—Ortega v. Puccinelli, C.A.Cal., 444 F.2d 530.

Hooper v. Hartman, D.C.Cal., 163 F.Supp. 437, affd., C.A., 274 F.2d 429.

29.5. U.S.—Barber v. Page, D.C.Okl., 239 F.Supp. 265, remd., C.A., 355 F.2d 171, app. after remand 381 F.2d 479, cert. gr. 88 S.Ct. 115, 389 U.S. 819, 19 L.Ed.2d 69—U.S. v. Lewis, D.C.La., 342 F.Supp. 833, affd., C.A., 478 F.2d 835.

30. U.S.—Coon v. Teasdale, C.A.Mo., 567 F.2d 820—In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litigation), C.A.2 (N.Y.), 770 F.2d 328.

Brown v. Donielson, D.C.Iowa, 334 F.Supp. 294.

Questionable use

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Injoining convening of legislature

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No jurisdiction under circumstances

U.S.—Sires v. State of Wash., C.A.Wash., 314 F.2d 883.

Safeguard against prejudicial pretrial publicity

U.S.—U.S. v. Diapulse Mfg. Corp. of America, D.C. Conn., 262 F.Supp. 728.

Prosecution of independent actions

U.S.—U.S. v. Simon, C.A.N.Y., 373 F.2d 649, cert. gr. 87 S.Ct. 1485, 386 U.S. 1030, 18 L.Ed.2d 591.

§ 15. Enforcement of Rights Claimed under State Law

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38. U.S.—Markham v. City of Newport News, C.A. Va., 292 F.2d 711—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

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39.5. U.S.—Kirtz v. Wiggin, D.C.Mo., 538 F.Supp. 1218.

40. U.S.—Markham v. City of Newport News, C.A. Va., 292 F.2d 711—Fidelity & Cas. Co. of New York v. C/B Mr. Kim, C.A.La., 345 F.2d 45.

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43.15. U.S.—Kistner v. Milliken, D.C.Mich., 432 F.Supp. 1001.

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44. U.S.—Tomiyasu v. Golden, C.A.Nev., 358 F.2d 651.

44.5. U.S.—Levine v. Lacy, C.A.Va., 344 F.2d 695.

45. U.S.—Pearson v. Globe Indem. Co., C.A.Miss., 311 F.2d 517.

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51. **Matter held not binding**

U.S.—Longbottom v. Swaby, C.A.Fla., 397 F.2d 45.

§ 16. Territorial Limitations and Districts in Which Actions Must Be Brought

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55.50. U.S.—U.S. v. One 1974 Cessna Model 310R Aircraft Serial No. 310R0203, FAA Registration No. N5083J, D.C.S.C., 432 F.Supp. 364.

56. U.S.—City of Milwaukee v. Illinois and Michigan, Ill., 101 S.Ct. 1784, 451 U.S. 304, 68 L.Ed.2d 114, on remand, C.A., 731 F.2d 403, cert. den. 105 S.Ct. 979, 980.

Uhlhorn v. U.S., Gypsum Co., C.A.Ark., 366 F.2d 211, cert. den. 87 S.Ct. 753, 385 U.S. 1026, 17 L.Ed.2d 674—U.S. for Use and Benefit of Chicago Bridge & Iron Co. v. Ets-Hokin Corp., C.A.Ariz., & Cal., 397 F.2d 935—Norris v. State of Ga., C.A.N.C., 522 F.2d 1006.

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Geography not conclusive

U.S.—W. J. Jones & Son, Inc. v. Stocker, D.C.Or., 271 F.Supp. 437.

56.5. U.S.—Ruggieri v. General Well Service, Inc, D.C.Colo., 535 F.Supp. 525.

56.15. U.S.—U.S. ex rel Bryant v. Shapp, D.C.Del., 423 F.Supp. 471.

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56.20. U.S.—W. J. Jones & Son, Inc. v. Stocker, D.C.Or., 271 F.Supp. 437.

56.25. U.S.—W. J. Jones & Son, Inc. v. Stocker, D.C.Or., 271 F.Supp. 437.

Jacobs v. Flight Extenders, Inc., D.C.Pa., 90 F.R.D. 676.

56.35. U.S.—Trade & Transport, Inc. v. Directorate General of Commerce, Saigon, D.C.N.Y., 310 F.Supp. 463.

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57. U.S.—C.J.S. cited in Stewart Oil Co. v. Sohio Petroleum Co., D.C.Ill., 185 F.Supp. 765, 767—Jaffe v. Dolan, D.C.N.Y., 264 F.Supp. 845.

Factors considered

U.S.—Prejean v. Sonatrach, Inc., C.A.Tex., 652 F.2d 1260.

Minimum contact theory

U.S.—Inland Credit Corp. v. M/T Bow Egret, C.A. Tex., 556 F.2d 756.

58. U.S.—C.J.S. cited in Stewart Oil Co. v. Sohio Petroleum Co., D.C.Ill., 185 F.Supp. 765, 767.

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59.20. U.S.—Van Buskirk v. U.S., D.C.Tenn., 206 F.Supp. 553.

60. U.S.—Stewart Oil Co. v. Sohio Petroleum Co., D.C.Ill., 185 F.Supp. 765.

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62. U.S.—Grove Press, Inc. v. Central Intelligence Agency, C.A.N.Y., 608 F.2d 926, on remand D.C., 483 F.Supp. 132.

Martin v. U.S., D.C.Pa., 323 F.Supp. 1131—Babbitt Ford, Inc. v. Navajo Indian Tribe, D.C.Ariz., 519 F.Supp. 418, affd. in part, revd. in part on oth. grds., C.A., 710 F.2d 587, cert. den. 104 S.Ct. 1707.

Federal law or law of state where action pending

U.S.—Wheatley v. Phillips, D.C.N.C., 228 F.Supp. 439.

62.5. U.S.—Cerda v. Eletson Maritime Corp., D.C. Pa., 515 F.Supp. 883.

Where initial action was taken

U.S.—Rechany v. Roland, D.C.N.Y., 235 F.Supp. 79.

62.15. Statute applicable to pending actions

U.S.—Seay v. Kaplan, D.C.Iowa, 35 F.R.D. 118.

62.35. U.S.—Choryak v. Petrick, D.C.Pa., 213 F.Supp. 729.

63. U.S.—Stuart v. Al Johnson Const. Co., D.C.Pa., 236 F.Supp. 126.

U-Profit, Inc. v. Bromley Limited, Inc., D.C. Wis., 54 F.R.D. 60.

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63.10. U.S.—Rusack v. Harsha, D.C.Pa., 470 F.Supp. 285.

63.20. U.S.—District No. 1, Pacific Coast Dist., M.E. B.A. v. State of Alaska, C.A.Wash., 682 F.2d 797.

63.30. U.S.—R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co., D.C.Tenn., 199 F.Supp. 439.

Venue as substantive right

U.S.—Still v. Rossville Crushed Stone Co., C.A.Tenn., 370 F.2d 324, cert. den. 87 S.Ct. 2030, 387 U.S. 918, 18 L.Ed.2d 970.

Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

"Locality-of-claims" amendment given retrospective effect

U.S.—Penrod Drilling Co. v. Johnson, C.A.Tex., 414 F.2d 1217, cert. den. 90 S.Ct. 552, 396 U.S. 1003, 24 L.Ed.2d 495.

63.35. U.S.—Robert E. Lee & Co. v. Veatch, C.A. S.C., 301 F.2d 434, 96 A.L.R.2d 619, cert. den. 83 S.Ct. 23, 371 U.S. 813, 9 L.Ed.2d 55—U.S. ex rel. Rudick v. Laird, C.A.N.Y., 412 F.2d 16, cert. den. 90 S.Ct. 244, 396 U.S. 918, 24 L.Ed.2d 197—Ford v. Valmac Industries, Inc., C.A.Kan., 494 F.2d 330.

Johnson v. General Motors Corp., D.C.Va., 242 F.Supp. 778—Technograph Printed Circuits, Limited v. Packard Bell Electronics Corp., D.C.Cal., 290 F.Supp. 308.

Procedural matter

(2) Other statements.

U.S.—Seay v. Kaplan, D.C.Iowa, 35 F.R.D. 118.

Locality

(3) Other statements.

U.S.—Di Ciano v. Western Contracting Corp., D.C.Pa., 224 F.Supp. 803—Japan Gas Lighter Ass'n v. Ronson Corp., D.C.N.J., 257 F.Supp. 219.

Concept of convenience

U.S.—Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers, C.A.Vt., 307 F.2d 21, cert. den. 83 S.Ct. 949, 372 U.S. 954, 9 L.Ed.2d 978.

Japan Gas Lighter Ass'n v. Ronson Corp., D.C. N.J., 257 F.Supp. 219—Arnold v. Smith Motor Co., Brookfield, Missouri, D.C.Iowa, 389 F.Supp. 1020.

Similar definitions

U.S.—Brown v. Pyle, C.A.Miss., 310 F.2d 95.

63.40. U.S.—Amba Marketing Systems, Inc. v. Jobar Intern., Inc., C.A.Ariz., 551 F.2d 784.

Fuller & Dees Marketing Group, Inc. v. Outstanding American High School Students, D.C. Ala., 335 F.Supp. 913.

Convenience of litigants

(2) U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

(3) U.S.—Martin v. U.S., D.C.Pa., 323 F.Supp. 1131.

(4) Other matters.

U.S.—Thill Securities Corp. v. New York Stock Exchange, D.C.Wis., 283 F.Supp. 239.

Eisen v. Carlisle and Jacquelin, D.C.N.Y., 52 F.R.D. 253, revd. on oth. grds., C.A., 479 F.2d 1005, vac. on oth grds., 94 S.Ct. 2140, 417 U.S. 156, 40 L.Ed.2d 732.

Venue provisions relate to institution of suit

(1) In general.

U.S.—Hasburgh v. Executive Aircraft Co., D.C.Mo., 35 F.R.D. 354.

(2) Not applicable to cross claims.

U.S.—Hasburgh v. Executive Aircraft Co., D.C.Mo., 35 F.R.D. 354.

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64. U.S.—Brown v. Pyle, C.A.Miss., 310 F.2d 95—Swanson Painting Co. v. Painters Local Union No. 260, C.A.Mont., 391 F.2d 523.

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U.S.—Dixie Carriers, Inc. v. National Maritime Union of America, AFL-CIO, D.C.Tex., 35 F.R.D. 365.

64.10. U.S.—Japan Gas Lighter Ass'n v. Ronson Corp., D.C.N.J., 257 F.Supp. 219.

65. U.S.—Kipperman v. McCone, D.C.Cal., 422 F.Supp. 860.

66. U.S.—Hare v. Family Publications Service, Inc., D.C.Md., 342 F.Supp. 678.

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67.5. D.C.—Uccellini v. Jones, D.C., 182 F.Supp. 375.

67.15. U.S.—ACF Industries, Inc. v. Hecht, D.C. Kan., 284 F.Supp. 572.

Wash.—Odessa Trading Co. v. Federal Crop Ins. Corp., 493 P.2d 809, 6 Wash.App. 423.

Statute held not special venue statute

U.S.—Japan Gas Lighter Ass'n v. Ronson Corp., D.C. N.J., 257 F.Supp. 219.

67.20. Contractual provisions irrelevant

U.S.—Towne Realty Inc. v. Bishop Enterprises, Inc., D.C.Wis., 432 F.Supp. 691.

67.25. U.S.—Jacobs v. Tenney, D.C.Del., 316 F.Supp. 151—Unico Indus. Corp. v. S.S. Andros City, D.C.N.Y., 323 F.Supp. 896—Firmani v. Clarke, D.C.Del., 325 F.Supp. 689.

67.35. U.S.—Locke Mfg. Co. v. Sabel, D.C.Ky., 244 F.Supp. 829.

67.40. Provision in arbitration agreement

U.S.—Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., D.C.N.Y., 334 F.Supp. 1013.

Under a provision of the general venue statute, suit may be brought in the district in which the claim arose.[67.45]

67.45. U.S.—Leroy v. Great Western United Corp., Tex., 99 S.Ct. 2710, 443 U.S. 173, 61 L.Ed 2d 464, on remand C.A., 602 F.2d 1246.

Sutain v. Shapiro and Lieberman, C.A.Cal., 678 F.2d 115.

Grey v. Continental Marketing Associates, Inc., D.C.Ga., 315 F.Supp. 826—Henderson v. Wyeth Laboratories, Inc., D.C.Tenn., 319 F.Supp. 565—Dufour v. Smith & Hamer, Inc., D.C.Me., 330 F.Supp. 405—Peterson v. Dickison, D.C.Pa., 334 F.Supp. 551—Warren Bros. Co. v. Community Bldg. Corp. of Atlanta, Inc., D.C.N.C., 386 F.Supp. 656—Arnold v. Smith Motor Co., Brookfield, Missouri, D.C.Iowa, 389 F.Supp. 1020—Catrambone v. Bloom, D.C.Pa., 540 F.Supp. 74.

D.C.—Sharp Electronics Corp. v. Hayman Cash Register Co., C.A., 655 F.2d 1228, 210 U.S.App.D.C. 411.

Provision applied retrospectively

U.S.—Penrod Drilling Co. v. Johnson, C.A.Tex., 414 F.2d 1217, cert. den. 90 S.Ct. 552, 396 U.S. 1003, 24 L.Ed.2d 495.

"Claim" defined

U.S.—Philadephia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252—Ryan v. Glenn, D.C.Miss., 52 F.R.D. 185.

Private anti-trust action

U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

Where substantial material events took place

U.S.—U.S. ex rel. Flemings v. Chafee, D.C.N.Y., 330 F.Supp. 193, C.A., affd. 458 F.2d 544, revd. 93 S.Ct. 2926, 413 U.S. 665, 37 L.Ed.2d 873.

Performance of acts tending to injure plaintiff in forum district sufficient

U.S.—Iranian Shipping Lines, S.A. v. Moraites, D.C. N.Y., 377 F.Supp. 644.

Significant contacts

U.S.—Haeberle v. Texas Intern. Airlines, D.C.Pa., 497 F.Supp. 1294.

68. U.S.—Pan Am. Fire & Cas. Co. v. Revere, D.C. La., 188 F.Supp. 474—Montecatini Societa Generale per L'industria Mineraria e Chimica v. Humble Oil & Refining Co., D.C.Md., 261 F.Supp. 587.

§ 17(1). —— Residence of Parties in General

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69.50. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

Torres v. American Service Mut. Ins. Co., D.C. Puerto Rico, 294 F.Supp. 635—M. Dean Kaufman, Inc. v. Warnaco, D.C.Conn., 299 F.Supp. 722—Jetco Electronic Industries v. Gardiner, D.C.Tex., 325 F.Supp. 80.

Doing business in state

U.S.—Rivera v. New Jersey Bell Tel. Co., D.C.N.Y., 55 F.R.D. 166.

(1) Under long-arm statute, state may exercise jurisdiction over nonresident defendant whenever relevant contract is "to be performed in whole or in part by either party in this state," regardless of purpose of contract.

(1) Under long-arm statute, state may exercise jurisdiction over nonresident defendant whenever relevant contract is "to be performed in whole or in part by either party in this state," regardless of purpose of contract.

U.S.—Carrothers Const. Co., Inc. v. Quality Service and Supply, Inc., 586 F.Supp. 134, declining to follow to extent inconsistent, Peebles v. Murray, 411 F.Supp. 1174.

(2) Decision must rest on law of forum state in light of federally expanded concept as judicially pronounced.

U.S.—Jupp v. Global Marine Exploration Co., D.C.La., 227 F.Supp. 604—Richter v. Impulsora De Revolcadero, S.A., D.C.N.Y., 278 F.Supp. 169—Sporcam, Inc. v. Greenman Bros. Inc., D.C.Iowa, 340 F.Supp. 1168—Garrett v. Levitz Furniture Corp., D.C.Okl., 356 F.Supp. 283.

Stonecipher v. Sexton, D.C.Kan., 54 F.R.D. 435.

(3) Personal jurisdiction of nonresident under doing business theory must meet constitutional requirement of minimum contacts.

U.S.—Scovill Mfg. Co. v. Dateline Elec. Co., C.A.Ill., 461 F.2d 897—Honeywell, Inc. v. Metz Apparatewerke, C.A.Ill., 509 F.2d 1137.

Shriner v. Stong, D.C.Ill., 229 F.Supp. 71—Riverhouse Pub. Co. v. Porter, D.C.R.I., 287 F.Supp. 1—Scher v. HMH Pub. Co., D.C.Conn., 289 F.Supp. 917—Clark Advertising Agency, Inc. v. Tice, D.C.Tex., 331 F.Supp. 1058, affd., C.A., 490 F.2d 834—Air Transport, Inc. v. Ransom Aircraft Sales & Brokerage, Inc., D.C.Ohio, 333 F.Supp. 1106—Alco Standard Corp. v. Benalal, D.C.Pa., 345 F.Supp. 14—Doug Sanders Golf Intercontinental of Southeastern Wisconsin, Inc. v. American Manhattan Industries, Inc., D.C.Wis., 359 F.Supp. 918.

(4) General activity as opposed to single isolated act or transaction required.

U.S.—Elkhart Engineering Corp. v. Dornier Werke, D.C.Ala., 228 F.Supp. 949, revd. on oth. grds., C.A., 343 F.2d 861.

(5) Sufficient basis for in personam jurisdiction under state statute shown.

U.S.—E. R. Wagner Mfg. Co. v. Quadratec, Inc., D.C. Wis., 332 F.Supp. 810—H.K. Corp. v. Lauter, D.C.Ga., 336 F.Supp. 79—Topik v. Catalyst Research Corp., D.C.Md., 339 F.Supp. 1102, affd., C.A., 473 F.2d 907, cert. den. 94 S.Ct. 231, 414 U.S. 910, 38 L.Ed.2d 148—McKennis v. Collingwood, D.C.Vt., 55 F.R.D. 156—Mendelson v. Fleischmann, D.C.N.Y., 386 F.Supp. 436.

(6) Sufficient basis for in personam jurisdiction under state statute not shown.

U.S.—Wolfson v. Houston Post Co., C.A.Fla., 441 F.2d 735—Sterling Nat. Bank & Trust Co. of New York v. Fidelity Mortg. Investors, C.A.N.Y., 510 F.2d 870.

(7) Held doing business.

U.S.—U.S. v. Montreal Trust Co., D.C.N.Y., 35 F.R.D. 216.

"Purposeful availment"

U.S.—Prejean v. Sonatrach, Inc., C.A.Tex., 652 F.2d 1260.

70. U.S.—Shuford v. Anderson, C.A.Colo., 352 F.2d 755, cert. den. 86 S.Ct. 1065, 383 U.S 935, 15 L.Ed.2d 852—Solo Cup Co. v. Paper Machinery Corp., C.A.Wis., 359 F.2d 754—Daugherty v. Procunier, C.A.Cal., 456 F.2d 97.

FinanceAmerica Credit Corp. v. Kruse Classic Auction Co., Inc., D.C.Pa., 428 F.Supp. 135.

General venue provisions held controlling

U.S.—Goldberg v. Wharf Constructers, D.C.Ala., 209 F.Supp. 499—Adams Dairy Co. v. National Dairy Products Corp., D.C.Mo., 293 F.Supp. 1135.

Statutory change authorizing suits where cause of action arose

U.S.—Adams Dairy Co. v. National Dairy Products Corp., D.C.Mo., 293 F.Supp. 1135—Albert Levine Associates v. Bertoni and Cotti, D.C.N.Y., 314 F.Supp. 169—Grey v. Continental Marketing Associates, Inc., D.C.Ga., 315 F.Supp. 826.

Only federal defendants outside district

U.S.—English v. Town of Huntington, D.C.N.Y., 335 F.Supp. 1369.

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71. U.S.—Rusack v. Harsha, D.C.Pa., 470 F.Supp. 285.

Statute held inapplicable

(3) Other matters.

U.S.—Securities and Exchange Commission v. Briggs, D.C.Ohio, 234 F.Supp. 618—Arnold v. Smith Motor Co., Brookfield, Missouri, D.C.Iowa, 389 F.Supp. 1020.

Suit under patent laws

(2) Other statements.

U.S.—Didactics Corp. v. Welch Scientific Co., D.C. Ohio, 291 F.Supp. 890.

72. U.S.—Hoffman v. Goberman, C.A.Pa., 420 F.2d 423.

Dicar, Inc. v. L. E. Sauer Mach. Co., Inc., D.C.N.J., 530 F.Supp. 1083.

Statute construed

U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

Thompson v. United Artists Theatre Circuit, Inc., D.C.N.Y., 43 F.R.D. 339.

Class actions

Kan.—Shutts v. Phillips Petroleum Co., 567 P.2d 1292, 222 Kan. 527, cert. den. 98 S.Ct. 1246, 434 U.S. 1068, 55 L.Ed.2d 769, reh. den. 98 S.Ct. 1594, 435 U.S. 961, 55 L.Ed.2d 811.

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72.5. U.S.—De George v. Mandata Poultry Co., D.C. Pa., 196 F.Supp. 192—Crandall v. Conole, D.C. Pa., 230 F.Supp. 705.

One authority requires a court to accommodate "the aggrieved party" first in determining where the claim arose under the statute.[72.6] Other authority holds that a test which focuses largely on only one litigant is inappropriate[72.7] because the statute was designed to provide a convenient forum not only for litigants but for witnesses as well.[72.8]

72.6 U.S.—Gardner Engineering Corp. v. Page Engineering Co., C.A.8, 484 F.2d 27.

72.7 U.S.—Precision Rubber Products Corp. v. George McCarthy, Inc., D.C.Tenn., 605 F.Supp. 473, declining to follow Gardner Engineering Corp. v. Page Engineering Co., 484 F.2d 27.

72.8 U.S.—Leroy v. Great Western United Corp., Tex., 99 S.Ct. 2710, 443 U.S. 173, 61 L.Ed.2d 464, on remand 602 F.2d 1246.

Precision Rubber Products Corp. v. George McCarthy, Inc., D.C.Tenn., 605 F.Supp. 473.

72.10. U.S.—Ziady v. Curley, C.A.N.C., 396 F.2d 873.

United Rubber, Cork, Linoleum and Plastic Workers of America, AFL–CIO, Local 102 v. Lee Rubber & Tire Corp., D.C.N.J., 269 F.Supp. 708, affd., C.A., 394 F.2d 362, cert. den. 89 S.Ct. 108, 393 U.S. 835, 21 L.Ed.2d 105.

73. U.S.—Metropolitan Life Ins. Co. v. Chase, C.A. N.J., 294 F.2d 500.

Marino v. Landis Trucking Co., D.C.Pa., 195 F.Supp. 776—McSparran v. Kingston Contracting Co., D.C.Pa., 221 F.Supp. 459—Miller v. Steinbach, D.C.N.Y., 268 F.Supp. 255—Gorman v. King, D.C.Wis., 316 F.Supp. 801—White v. Alfred A. Knopf, Inc., D.C.Mo., 335 F.Supp. 763.

Schacht v. Javits, D.C.N.Y., 53 F.R.D. 321.

Claim arising and parties residing outside district

U.S.—Nizami v. Woods, D.C.N.Y., 263 F.Supp. 124.

73.5. U.S.—Arley v. United Pac. Ins. Co., C.A.Or., 379 F.2d 183, cert. den. 88 S.Ct. 1039, 390 U.S. 950, 19 L.Ed.2d 1140.

Foresee tort in venue state

U.S.—Brown v. Flowers Industries, Inc., C.A.Miss., 688 F.2d 328, reh. den. 691 F.2d 502, cert. den. 103 S.Ct. 1275, 460 U.S. 1023, 75 L.Ed.2d 496.

74. U.S.—Brown v. Pyle, C.A.Miss., 310 F.2d 95.

Bartlett v. Hudson Hosiery Co., D.C.N.Y., 183 F.Supp. 1.

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77.5. U.S.—Ard v. Lamensdorf, D.C.Ark., 272 F.Supp. 268.

77.10. U.S.—Brown v. Pyle, C.A.Miss., 310 F.2d 95.

Evans v. Langan, D.C.Pa., 178 F.Supp. 493.

§ 17(2). —— —— What Constitutes Residence

Library References

Federal Courts ⇐71–73.

77.50. U.S.—C.J.S. cited in Nowotny v. Turner, D.C. N.C., 203 F.Supp. 802, 804—Kaiser Steel Corp. v. Fulton, D.C.Colo., 261 F.Supp. 997—Junior Spice, Inc. v. Turbotville Dress, Inc., D.C.Pa., 339 F.Supp. 1189.

Domicile

U.S.—Smith v. Murchison, D.C.N.Y., 310 F.Supp. 1079.

(2) Other matters.

U.S.—Champion Spark Plug Co. v. Karchmar, D.C. N.Y., 180 F.Supp. 727.

Joint venture registered to do business

U.S.—Marshall v. Mole Constructors, D.C.Pa., 193 F.Supp. 617.

Stationed at naval hospital insufficient

U.S.—Johnson v. Zarefoss, D.C.Pa., 198 F.Supp. 548, affd., C.A., 305 F.2d 825.

More than mere physical presence required

U.S.—Johnson v. Zarefoss, D.C.Pa., 198 F.Supp. 548, affd., C.A., 305 F.2d 825.

One incarcerated in federal penitentiary

U.S.—Langston v. U.S. Atty. Gen., C.A.Pa., 293 F.2d 316—Dixon v. State of Tenn., C.A.Tenn., 404 F.2d 27.

Ott v. U.S. Bd. of Parole, D.C.Mo., 324 F.Supp. 1034—McCune v. U.S., D.C.N.Y., 374 F.Supp. 946.

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77.85. U.S.—First Pullen Commodity Services, Inc. v. A.G. Becker-Kipnis & Co., D.C.Fla., 507 F.Supp. 770.

§ 17(3). —— —— Statutory Exceptions to General Venue Requirements

Library References

Federal Courts ⇐71–73.

79. U.S.—North River Ins. Co. v. Davis, C.A.Va., 392 F.2d 571.

80. U.S.—TPO Inc. v. Federal Deposit Ins. Corp., D.C.N.Y., 325 F.Supp. 663.

Matter of Whippany Paper Bd. Co., Inc., Bkrtcy. N.J. 15 B.R. 312.

D.C.—Translinear, Inc. v. Republic of Haiti, D.C., 538 F.Supp. 141.

80.5. U.S.—Snyder v. Eastern Auto Distributors, Inc., C.A.S.C., 357 F.2d 552, cert. den. 86 S.Ct. 1889, 384 U.S. 987, 16 L.Ed.2d 1004.

Hoffman Motors Corp. v. Alfa Romeo S.p.A., D.C.N.Y., 244 F.Supp. 70—Hawkins v. National Basketball Ass'n, D.C.Pa., 288 F.Supp. 614—Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., D.C.Pa., 338 F.Supp. 812—C.C.P. Corp. v. Wynn Oil Co., D.C.Ill., 354 F.Supp. 1275.

Antitrust laws

U.S.—Iranian Shipping Lines, S.A. v. Moraites, D.C. N.Y., 377 F.Supp. 644.

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80.10. U.S.—Arnold v. Smith Motor Co., Brookfield, Missouri, D.C.Iowa, 389 F.Supp. 1020.

Special statute held not applicable

(4) Other statutes.

U.S.—Maxwell v. U.S., D.C.Cal., 313 F.Supp. 245.

83.5. U.S.—Pantzer v. Rogers, D.C.N.Y., 180 F.Supp. 659.

83.15. U.S.—Boltons Trading Corp. v. Killiam, D.C. N.Y., 320 F.Supp. 1182.

Inapplicable under circumstances

U.S.—Emerson Elec. Co. v. Black and Decker Mfg. Co., C.A.Mo., 606 F.2d 234.

83.30. U.S.—Wilmington Trust Co. v. Gillespie, D.C. Del., 397 F.Supp. 1337.

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83.40. U.S.—Collier v. Mikel Drilling Co., D.C. Minn., 183 F.Supp. 104—Securities and Exchange Commission v. Myers, D.C.Md., 285 F.Supp. 743—Dopp v. American Electronic Laboratories, Inc., D.C.N.Y., 55 F.R.D. 151.

Enforcement of liability or duty

(2) Other instances.

U.S.—Bath Industries, Inc. v. Blot, C.A.Wis., 427 F.2d 97.

Situs of transactions

(3) Jurisdiction lacking where no transaction within district shown.

U.S.—New Park Min. Co. v. Cranmer, D.C.N.Y., 225 F.Supp. 261.

(4) Other matters.

U.S.—Parker v. Baltimore Paint & Chemical Corp., D.C.Colo., 244 F.Supp. 267—Securities and Exchange Commission v. Memory Magnetics Intern., D.C.Cal., 310 F.Supp. 949.

"Co-conspirator" theory of venue

U.S.—Clapp v. Stearns & Co., D.C.N.Y., 229 F.Supp. 305.

D.C.—Securities and Exchange Commission v. National Student Marketing Corp., D.C., 360 F.Supp. 284.

§ 17(4). —— —— Actions against Persons Acting in Representative Capacity; Government Officials

Library References

Federal Courts ⚖71–73.

84. U.S.—Tiernan v. Westext Transport, Inc., D.C. N.Y., 243 F.Supp. 566—Smith v. Harris, D.C. Wis., 308 F.Supp. 527—Wolf v. Ackerman D.C. N.Y., 308 F.Supp. 1057.

Rule held inapplicable in Canal Zone

U.S.—Leber v. Canal Zone Cent. Labor Union and Metal Trades Council, AFL-CIO, C.A.Canal Zone, 383 F.2d 110, cert. den. 88 S.Ct. 769, 389 U.S. 1046, 19 L.Ed.2d 838.

84.5. U.S.—Kenyatta v. Kelley, D.C.Pa., 430 F.Supp. 1328.

84.30. U.S.—Carpenter v. Hall, D.C.Tex., 311 F.Supp. 1099.

85. U.S.—O'Neill v. Battisti, C.A.Ohio, 472 F.2d 789, cert. den. 93 S.Ct. 2142, 411 U.S. 964, 36 L.Ed.2d 685—Sutain v. Shapiro and Lieberman, C.A.Cal., 678 F.2d 115.

Hartke v. Federal Aviation Administration, D.C. N.Y., 369 F.Supp. 741.

Commanding officer in armed services

U.S.—McDonough v. U.S., C.A.N.H., 452 F.2d 1075.

85.2. U.S.—Town of East Haven v. Eastern Airlines, Inc., D.C.Conn., 282 F.Supp. 507—Donigian v. Laird, D.C.Md., 308 F.Supp. 449—Hartke v. Federal Aviation Administration, D.C.N.Y., 369 F.Supp. 741.

Director of Selective Service System

D.C.—Nestor v. Hershey, C.A., 425 F.2d 504, 138 U.S.App.D.C. 73.

Under a statutory amendment, a civil action against an officer or employee of the United States, or an agency thereof, acting in an official capacity, may be brought in any judicial district in which the conditions specified in the statute exist.[85.3]

85.3. U.S.—Schlanger v. Seamans, Ariz., 91 S.Ct. 995, 401 U.S. 487, 28 L.Ed.2d 251, reh. den. 91 S.Ct. 1671, 402 U.S. 990, 29 L.Ed.2d 156.

D.C.—Pruess v. Udall, C.A., 359 F.2d 615, 123 U.S. App.D.C. 301—McKenna v. Udall, C.A., 418 F.2d 1171, 135 U.S.App.D.C. 335—Nestor v. Hershey, C.A., 425 F.2d 504, 138 U.S.App.D.C. 73.

Judicial district in which plaintiff resides

U.S.—Kletschka v. Driver, C.A.N.Y., 411 F.2d 436—U.S. ex rel. Rudick v. Laird, C.A.N.Y., 412 F.2d 16, cert. den. 90 S.Ct. 244, 396 U.S. 918, 24 L.Ed.2d 197.

Independent Fish Co. v. Phinney, D.C.Tex., 252 F.Supp. 952—Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, D.C.Pa., 284 F.Supp. 809.

D.C.—Relf v. Gasch, C.A., 511 F.2d 804, 167 U.S.App. D.C. 238.

Historic jurisdiction of District Court for District of Columbia not affected

D.C.—Peoples v. U.S., Dept. of Agriculture, C.A., 427 F.2d 561, 138 U.S.App.D.C. 291.

Type of federal officials to whom applicable

(1) Those of the executive branch subject to mandamus jurisdiction granted by 28 U.S.C.A. § 1361.

U.S.—Liberation News Service v. Eastland, C.A.N.Y., 426 F.2d 1379.

(2) Neither congressmen nor congressional employees are within intendment of statute.

U.S.—Liberation News Service v. Eastland, C.A.N.Y., 426 F.2d 1379.

One's residence not changed to prison simply because incarcerated there

U.S.—Ellingburg v. Connett, C.A.Tex., 457 F.2d 240. Stone v. U.S. Bd. of Parole, D.C.Md., 360 F.Supp. 22—Billiteri v. U.S. Bd. of Parole, D.C. N.Y., 385 F.Supp. 1217, app. after remand 391 F.Supp. 260.

Plaintiff corporation as residing only where incorporated

U.S.—D.C. Electronic, Inc. v. Schlesinger, D.C.Ill., 368 F.Supp. 1029.

"Agencies" does not include local draft board beyond court's territorial jurisdiction

U.S.—Powers v. Mitchell, C.A.Ariz., 463 F.2d 212, cert. den. 93 S.Ct. 299, 409 U.S. 967, 34 L.Ed.2d 232.

Applicable only to executive branch

U.S.—Duplantier v. U.S., D.C.La., 480 F.Supp. 40, affd. and mod. on oth. grds., C.A., 606 F.2d 654.

A suit to compel official action may be maintained in the district where either the official or the plaintiff resides.[85.3a]

85.3a. U.S.—Outlaw v. Connett, C.A.Tex., 454 F.2d 719.

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85.4. U.S.—Gart v. Cole, D.C.N.Y., 166 F.Supp. 129, affd., C.A., 263 F.2d 244, cert. den. 79 S.Ct. 898, 359 U.S. 978, 3 L.Ed.2d 929.

85.6. U.S.—Honchok v. Hardin, D.C.Md., 326 F.Supp. 988.

85.16. U.S.—Ove Gustavsson Contracting Co. v. Floete, D.C.N.Y., 176 F.Supp. 544, affd., C.A., 278 F.2d 912, cert. den. 81 S.Ct. 225, 364 U.S. 894, 5 L.Ed.2d 188.

85.22. U.S.—Spinella v. Esperdy, D.C.N.Y., 188 F.Supp. 535.

85.30. **Theoretical domicile**

U.S.—State of New Jersey v. U.S., D.C.N.J., 168 F.Supp. 324, affd. 79 S.Ct. 603, 607, 359 U.S. 27, 3 L.Ed.2d 625, reh. den. 79 S.Ct. 722, 359 U.S. 950, 3 L.Ed.2d 683.

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85.36. **Venue based on representation by local United States Attorney**

U.S.—Cherry v. Postmaster General, D.C.Puerto Rico, 272 F.Supp. 982.

85.38. U.S.—Jones v. Middlesex County Bd. of Elections, D.C.N.J., 259 F.Supp. 931.

Department of Housing and Urban Affairs

U.S.—Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development, D.C. Pa., 284 F.Supp. 809.

85.40. **Statutory change authorizing actions where cause of action arose**

U.S.—Brotherhood of Locomotive Engineers v. Denver & R.G.W.R. Co., D.C.Colo., 290 F.Supp. 612, affd., C.A., 411 F.2d 1115.

Statutory change authorizing actions in district of plaintiff's residence

U.S.—Brotherhood of Locomotive Engineers v. Denver & R.G.W.R. Co., D.C.Colo., 290 F.Supp. 612, affd., C.A., 411 F.2d 115.

85.50. U.S.—Napier v. Veterans' Administration, D.C.N.J., 187 F.Supp. 723. Affd., C.A., 298 F.2d 445, cert. den. and app. dism. 83 S.Ct. 266, 371 U.S. 186, 9 L.Ed.2d 228, reh. den. 83 S.Ct. 732, 372 U.S. 925, 9 L.Ed.2d 731.

Where special statutory exceptions not applicable

U.S.—Maxwell v. U.S., D.C.Cal., 313 F.Supp. 245.

87. U.S.—Bastille Properties, Inc. v. Hometels of America, Inc., D.C.N.Y., 476 F.Supp. 175.

§ 17(6). —— —— Ancillary Proceedings

Library References

Federal Courts ⚖90.

89. U.S.—Gaspord v. Emery Transp. Co., D.C.Pa., 179 F.Supp. 207—Brandt v. Olson, D.C.Iowa, 179 F.Supp. 363—Middlewsworth v. Kansas City Athletics Division of Chas. O. Finley, D.C.Fla., 293 F.Supp. 296—Joseph Bancroft & Sons Co. v. M Lowenstein & Sons, Inc., D.C.Del., 50 F.R.D. 415.

For a discussion of ancillary jurisdiction and joinder of claims in federal courts, see 33 F.R.D. 27.

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90. U.S.—Morrison Flying Service v. Deming Nat. Bank, C.A.N.M., 404 F.2d 856, cert. den. 89 S.Ct. 628, 393 U.S. 1020, 21 L.Ed.2d 565.

§ 18. —— Coparties Resident in Different States

Library References

Federal Courts ⚖91.

94.50. U.S.—Local 15 of Independent Workers of Noble County, Inc. v. International Broth. of Elec. Workers, D.C.Ind., 273 F.Supp. 313—Schacht v. Javits, D.C.N.Y., 53 F.R.D. 321.

95. U.S.—Belieu v. Murray, D.C.S.C., 231 F.Supp. 579.

95.5. U.S.—Dow Chemical, USA v. Consumer Product Safety Commission, D.C.La., 459 F.Supp. 378.

96. U.S.—Dibble v. Cresse, C.A.Fla., 271 F.2d 426. Kenyatta v. Kelley, D.C.Pa., 430 F.Supp. 1328.

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96.5. U.S.—Sorenson v. Selective Service System, D.C.Pa., 203 F.Supp. 786—Dauphin Corp. v. Sentinel Alarm Corp., D.C.Del., 206 F.Supp. 432—Metropolitan Sanitary Dist. of Greater Chicago v. General Elec. Co., D.C.Ill., 208 F.Supp. 943—U.S. v. Brody, D.C.Mass., 213 F.Supp. 905. Affd., C.A., 331 F.2d 29.

97. U.S.—Lulling v. Barnaby's Family Inns, Inc., D.C.Wis., 482 F.Supp. 318.

Alien

U.S.—Japan Gas Lighter Ass'n v. Ronson Corp., D.C. N.J., 257 F.Supp. 219.

98. D.C.—U.S. v. Trucking Emp., Inc., D.C., 72 F.R.D. 98.

2.5. U.S.—Joscar Co. v. Consolidated Sun Ray, Inc., D.C.N.Y., 212 F.Supp. 634.

§ 19. —— Residence in States Having More than One District

Library References

Federal Courts ⚖92.

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7. U.S.—Crawford v. Lydick, D.C.Mich., 179 F.Supp. 211, affd., C.A., 280 F.2d 426, cert. den. 81 S.Ct. 93, 364 U.S. 849, 5 L.Ed.2d 72—Roark v. Bauer, D.C.Ohio, 181 F.Supp. 330—Keadle v. Benedict, D.C.Pa., 321 F.Supp. 1179.

8. U.S.—Bolding v. Holshouser, C.A.N.C., 575 F.2d 461, cert. den. 99 S.Ct. 121, 439 U.S. 837, 58 L.Ed.2d 133.

U.S. v. Mississippi, Miss., 85 S.Ct. 808, 380 U.S. 128, 13 L.Ed.2d 717. On remand, D.C., 256 F.Supp. 344—Daniels v. Murphy, D.C.Okl., 528 F.Supp. 2.

De George v. Mandata Poultry Co., D.C.Pa., 196 F.Supp. 192—Carson v. Vance Trucking Lines, Inc., D.C.S.C., 245 F.Supp. 13—Gilmore v. James, D.C.Tex., 274 F.Supp. 75, affd. 88 S.Ct. 695, 389

U.S. 572, 19 L.Ed.2d 783, reh. den. 88 S.Ct. 1027, 390 U.S. 975, 19 L.Ed.2d 1195.

8.5. U.S.—U.S. v. U.S. Klans, Knights of Ku Klux Klan, Inc., D.C.Ala., 194 F.Supp. 897—Hyden v. Baker, D.C.Tenn., 286 F.Supp. 475—Hawkins v. National Basketball Ass'n, D.C.Pa., 288 F.Supp. 614—Kirkland v. New York State Dept. of Correctional Services, D.C.N.Y., 358 F.Supp. 1349.

§ 20. —— Residence in Districts Containing More than One Division

Library References

Federal Courts ⟹20, 73.

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9. U.S.—Cobb v. National Lead Co., D.C.Ark., 215 F.Supp. 48—Union Pac. R. Co. v. Woodahl, D.C. Mont., 308 F.Supp. 1002—Henderson v. Wyeth Laboratories, Inc., D.C.Tenn., 319 F.Supp. 565.

Transfer

U.S.—Weber v. Coney, C.A.Tex., 642 F.2d 91.

§ 21(1). —— Actions by or against Corporations

Library References

Federal Courts ⟹77.

10.50. U.S.—Besumer v. Faberge, Inc., D.C.Ohio, 379 F.Supp. 278.

Dutka v. Southern Ry. Co., D.C.Ga., 92 F.R.D. 375.

Del.—Kolber v. Holyoke Shares, Inc., 213 A.2d 444, 9 Storey 66.

D.C.—Vogel v. Tenneco Oil Co., D.C., 276 F.Supp. 1008—Laffey v. Northwest Airlines, Inc., D.C., 321 F.Supp. 1041.

Presence for jurisdictional purpose of effecting valid service of process as criteria

U.S.—Champion Spark Plug Co. v. Karchmar, D.C. N.Y., 180 F.Supp. 727—Freeman v. Gordon & Breach, Science Publishers, Inc., D.C.N.Y., 398 F.Supp. 519.

Residence not defined with respect to unincorporated associations

U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

Provision as not extending to plaintiff corporations

U.S.—D.C. Electronic, Inc. v. Schlesinger, D.C.Ill., 368 F.Supp. 1029.

Action against national bank

U.S.—International Union, United Auto., Aerospace and Agr. Implement Workers of America v. Allis-Chalmers Corp., D.C.Wis., 447 F.Supp. 766.

Statute not limited to private corporations

U.S.—R. S. Mikesell Associates v. Grand River Dam Authority, D.C.Okl., 442 F.Supp. 229.

11. U.S.—White v. Waxler Towing Co., D.C.Ill., 250 F.Supp. 320—National Equipment Rental, Limited v. Sanders, D.C.N.Y., 271 F.Supp. 756—Control Data Corp. v. Carolina Power & Light Co., D.C.N.Y., 274 F.Supp. 336—Smith v. Murchison, D.C.N.Y., 310 F.Supp. 1079—U-Profit, Inc. v. Bromley Limited, Inc., D.C.Wis., 54 F.R.D. 60.

Law of state where court sits as governing

U.S.—Jim Fox Enterprises, Inc. v. Air France, C.A. Tex., 664 F.2d 63, reh. den. 705 F.2d 738.

Miller v. Trans World Airlines, Inc., D.C.Ky., 302 F.Supp. 174—Manchester Modes, Inc. v. Lilli Ann Corp., D.C.N.Y., 306 F.Supp. 622.

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11.5. U.S.—Consolidated Sun Ray, Inc. v. Steel Ins. Co. of America, D.C.Pa., 190 F.Supp. 171—Kelly v. U.S. Steel Corp., D.C.Pa., 198 F.Supp. 640—Reynolds for and on Behalf of N.L.R.B. v. Marlene Industries Corp., D.C.N.Y., 250 F.Supp. 724—Campbell v. Triangle Corp., D.C.Pa., 336 F.Supp. 1002.

In re Malone, Bkrtcy.Cal., 5 B.R. 658.

Joinder as party

(2) District court for district of Minnesota had in personam jurisdiction over Georgia corporation, successor in interest to dissolved Minnesota corporation, by virtue of joinder of Georgia corporation, even though it had no ties to Minnesota.

U.S.—Minnesota Min. & Mfg. Co. v. Eco Chem, Inc., C.A.Minn., 757 F.2d 1256.

12. U.S.—Franklin v. Blaylock, D.C.N.Y., 218 F.Supp. 261, mandamus den., C.A., 319 F.2d 533.

13. U.S.—Consolidated Sun Ray, Inc. v. Steel Ins. Co. of America, D.C.Pa., 190 F.Supp. 171—Weissfeld v. Herman Miller, Inc., D.C.Mich., 293 F.Supp. 995—A. P. Green Refractories Co. v. Peerless Boiler & Engineering Co., D.C.Mo., 303 F.Supp. 275—Breedlove v. Beech Aircraft Corp., D.C. Miss., 334 F.Supp. 1361.

14. U.S.—Pure Oil Co. v. Suarez, C.A.Fla., 346 F.2d 890, affd. 86 S.Ct. 1394, 384 U.S. 202, 16 L.Ed.2d 474.

N-Triple-C Inc. v. American Tel. & Tel. Co., D.C.Pa., 377 F.Supp. 813.

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17. U.S.—Vandusen v. J. C. Penney Co., D.C.Ark., 207 F.Supp. 529.

19. U.S.—Consolidated Sun Ray, Inc. v. Steel Ins. Co. of America, D.C.Pa., 190 F.Supp. 171—Lott v. Burning Tree Club, Inc., D.C., 516 F.Supp. 913.

20. U.S.—Duplan Corp. v. Deering Milliken, Inc., D.C.S.C., 334 F.Supp. 703.

Tortious acts in district

U.S.—Coletti v. Ovaltine Food Products, D.C.Puerto Rico, 274 F.Supp. 719—Breedlove v. Beech Aircraft Corp., D.C.Miss., 334 F.Supp. 1361—ECC Corp. v. Slater Elec., Inc., D.C.N.Y., 336 F.Supp. 148.

Pendent jurisdiction

U.S.—Travis v. Anthes Imperial Limited, D.C.Mo., 331 F.Supp. 797, revd. on oth. grds., C.A., 473 F.2d 515.

21. U.S.—State of Md. for Use of Mitchell v. Capital Airlines, Inc., D.C.N.Y., 199 F.Supp. 335—Chas. Pfizer & Co. v. Laboratori Pro-Ter Prodotti Therapeutici S.p.A., D.C.N.Y., 278 F.Supp. 148—Goldenaire, Inc. v. Lycoming Division of Avco Corp., D.C.Or., 290 F.Supp. 349—Holt v. Klosters Rederi A/S, D.C.Mich., 355 F.Supp. 354.

Doing business

(3) Other matters.

U.S.—Paragon Oil Co. v. Panama Refining Petrochemical Co., D.C.N.Y., 192 F.Supp. 259—Metropolitan Staple Corp. v. Samuel Moore & Co., D.C.N.Y., 278 F.Supp. 85.

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23. U.S.—Gould v. Brick, C.A.Fla., 358 F.2d 437.

Coleco Industries, Inc. v. Kransco Mfg., Inc., D.C.N.Y., 247 F.Supp. 571—Swift Industries, Inc. v. Botany Industries, Inc., D.C.Pa., 297 F.Supp. 1056.

Actions under Labor Management Relations Act

U.S.—Humble Oil & Refining Co. v. Local Union 866, D.C.N.Y., 271 F.Supp. 281—Giordani v. Hoffman, D.C.Pa., 295 F.Supp. 463.

Anti-trust actions

U.S.—Board of County Com'rs of Custer County v. Wilshire Oil Co. of Texas, C.A.Okl., 523 F.2d 125.

Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252 Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., D.C.Pa., 338 F.Supp. 812—McCrory Corp. v. Cloth World, Inc., D.C.N.Y., 378 F.Supp. 322.

Securities Exchange Act

U.S.—Bath Industries, Inc. v. Blot, D.C.Wis., 305 F.Supp. 526, affd., remd., C.A., 427 F.2d 97.

General venue provisions held applicable

U.S.—Medtronic, Inc. v. American Optical Corp., D.C. Minn., 337 F.Supp. 490, transf. to D.C.Mass., 56 F.R.D. 426.

23.10. U.S.—Fraley v. Chesapeake & O. Ry. Co., C.A.Pa., 397 F.2d 1, on remand 294 F.Supp. 1193.

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23.15. Review of orders

(5) Other orders.

U.S.—Atlantic Coast Line R. Co. v. U.S., D.C.Fla., 213 F.Supp. 199, affd., C.A., 334 F.2d 46, revd. on oth. grds. 86 S.Ct. 1000, 383 U.S. 576, 16 L.Ed.2d 109.

23.20. U.S.—Radzanower v. Touche Ross & Co., 96 S.Ct. 1989, 426 U.S. 148, 48 L.Ed.2d 540—Marquette Nat. Bank of Minneapolis v. First of Omaha Service, Minn., 99 S.Ct. 540, 439 U.S. 299, 58 L.Ed.2d 534.

International Travelers Cheque Co. v. BankAmerica Corp., C.A.Ill., 660 F.2d 215.

In re Neese, Bkrtcy.Va., 12 B.R. 968.

N.C.—Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., N.A., 189 S.E.2d 266, 281 N.C. 525.

Applicable to all actions

U.S.—First Nat. Bank of Boston v. U.S. Dist. Court for Central Dist. of Cal., C.A.Cal., 468 F.2d 180.

General Elec. Credit Corp. v. James Talcott, Inc., D.C.N.Y., 271 F.Supp. 699—Swiss Israel Trade Bank v. Mobley, D.C.Ga., 319 F.Supp. 374.

Statute construed

U.S.—General Elec. Credit Corp. v. James Talcott, Inc., D.C.N.Y., 271 F.Supp. 699—Rome v. Eltra Corp., D.C.Pa., 297 F.Supp. 314.

Statute not repealed by Securities Exchange Act

U.S.—General Elec. Credit Corp. v. James Talcott, Inc., D.C.N.Y., 271 F.Supp. 699—Swiss Israel Trade Bank v. Mobley, D.C.Ga., 319 F.Supp. 374—McClung v. LaSalle Nat. Bank of Chicago, Ill., D.C.Iowa, 387 F.Supp. 977.

Allied Steel & Tractor Products, Inc. v. First Nat. City Bank of New York, D.C.Ohio, 54 F.R.D. 256.

Purpose of statute

U.S.—Frankford Supply Co. v. Matteo, D.C.Pa., 305 F.Supp. 794.

Applicable to transitory actions only

U.S.—Chateau Lafayette Apartments, Inc. v. Meadow Brook Nat. Bank, C.A.La., 416 F.2d 301.

Statute inapplicable to bank officers

U.S.—Carpenter v. Hall, D.C.Tex., 352 F.Supp. 806.

Mandatory

U.S.—Bechtel v. Liberty Nat. Bank, 534 F.2d 1335.

Livera v. First Nat. State Bank of New Jersey, D.C.N.Y., 535 F.Supp. 1063, trans. to 100 F.R.D. 271.

Strictly interpreted

U.S.—Grenada Ready-Mix Concrete, Inc. v. Watkins, D.C.Miss., 426 F.Supp. 531.

In rem actions

U.S.—Shell Pipe Line Corp. v. West Texas Marketing Corp., D.C.Tex., 540 F.Supp. 1155.

Statute not applicable

U.S.—Mutual of Omaha Ins. Co. v. Dolby, D.C.Pa., 531 F.Supp. 511.

Concurrent jurisdiction of federal and state courts see Banks & Banking § 726.

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23.25. U.S.—Levin v. Great Western Sugar Co., D.C. N.J., 274 F.Supp. 974—Brown v. Bank of America Nat. Trust & Sav. Ass'n, D.C.Ill., 281 F.Supp. 82.

23.50. U.S.—Sperberg v. Firestone Tire & Rubber Co., D.C.Ohio, 61 F.R.D. 70.

23.55. U.S.—Pellerin Laundry Machinery Sales Co. v. Hogue, D.C.Ark., 219 F.Supp. 629—Setlon, Inc. v. Brema S.p.A., D.C.Ohio, 271 F.Supp. 516.

Although the contrary has been held,[23.65] a foreign corporation's status as the beneficiary of a letter of credit issued by a state bank is not sufficient to uphold personal jurisdiction over a state bank where the bank never committed an affirmative act in the state.[23.70]

23.65 U.S.—Wyle v. Bank Melli, D.C.Cal., 577 F.Supp. 1148.

23.70 U.S.—Paccar Intern., Inc. v. Commercial Bank of Kuwait, S.A.K., C.A.9 (Cal.), 757 F.2d 1058, declining to follow Wyle v. Bank Melli, 577 F.Supp. 1148.

§ 21(2). —— —— Corporation Licensed, or Doing Business, within State

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23.80. U.S.—Mack Trucks, Inc. v. Arrow Aluminum Castings Co., C.A.Ga., 510 F.2d 1029.

Cable News Network, Inc. v. American Broadcasting Companies, Inc., D.C.Ga., 528 F.Supp. 365.

RSB Mfg. Corp. v. Bank of Baroda, D.C.N.Y., 15 B.R. 650.

D.C.—Indemnity Ins. Co. of North America v. U.S. to Use and Benefit of Bailey-Lewis-Williams of Fla., Inc., C.A., 299 F.2d 930, 112 U.S.App.D.C. 99.

Withdrawal from state

(3) Other matters.

U.S.—Snyder v. Eastern Auto Distributors, Inc., C.A. S.C., 357 F.2d 552, cert. den. 86 S.Ct. 1889, 384 U.S. 987, 16 L.Ed.2d 1004.

LTM Corp. v. Edward M. Livingston & Sons, Inc., D.C.Pa., 339 F.Supp. 1270.

Authorization to do business as not equivalent to licensed to do business

U.S.—Sawyer v. Soaring Soc. of America, Inc., D.C. N.Y., 180 F.Supp. 209.

"License to do business" construed

U.S.—Buy-4-Less Drug System, Inc. v. American Distilling Co., D.C.Colo., 207 F.Supp. 391.

Venue

U.S.—Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, D.C.N.Y., 442 F.Supp. 1201.

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23.85. U.S.—Manning v. Time, Inc., D.C.La., 233 F.Supp. 985, affd., C.A., 366 F.2d 690—Color Technique, Inc. v. Don Wallace, Inc., D.C.Ill., 241 F.Supp. 952—Sweetheart Plastics, Inc. v. Illinois Tool Works, Inc., D.C.N.Y., 267 F.Supp. 938—Chemical Specialties Sales Corp.-Industrial Division v. Basic Inc., D.C.Conn., 296 F.Supp. 1106—Minnesota Automotive, Inc. v. Stromberg Hydraulic Brake & Coupling Co., D.C.Minn., 309 F.Supp. 614—Com-Share, Inc. v. Computer Complex, Inc., D.C.Mich., 338 F.Supp. 1229, C.A., affd. 458 F.2d 1341—Junior Spice, Inc. v. Turbotville Dress, Inc., D.C.Pa., 339 F.Supp. 1189.

Purpose and effect, etc.

(2) Other statements.

U.S.—Pure Oil Co. v. Suarez, Fla., 86 S.Ct. 1394, 384 U.S. 202, 16 L.Ed.2d 474.

Cessation of business

(2) Laying venue in withdrawal state held improper.

U.S.—Brenner v. Rubin, D.C.Mass., 240 F.Supp. 467—Hall v. Rubin, D.C.Mass., 240 F.Supp. 470.

Activity in district not amounting to "doing business"

U.S.—Sawyer v. Soaring Soc. of America, Inc., D.C. N.Y., 180 F.Supp. 209.

Number and importance of local contacts as factor in determination

U.S.—Sawyer v. Soaring Soc. of America, Inc., D.C. N.Y., 180 F.Supp. 209—State of N.Y. v. Morton Salt Co., D.C.Pa., 266 F.Supp. 570, affd., C.A., 385 F.2d 122, cert. den. 88 S.Ct. 1195, 390 U.S. 995, 20 L.Ed.2d 94—Costello v. Atlas Corp., D.C.Cal., 297 F.Supp. 19.

"Doing business" at time action arose rather than when suit as brought required.

U.S.—Snyder v. Eastern Auto Distributors, Inc., C.A S.C., 357 F.2d 552, cert. den. 86 S.Ct. 1889, 384 U.S. 987, 16 L.Ed.2d 1004.

Nelson v. Victory Elec. Works, Inc., D.C.Md., 210 F.Supp. 954—Ward v. Island Creek Fuel & Transp. Co., D.C.W.Va., 261 F.Supp. 810—First Pullen Commodity Services, Inc. v. A. G. Becker-Kipnis & Co., D.C.Fla., 507 F.Supp. 770.

Venue, rather than jurisdictional, statute

U.S.—Jaftex Corp. v. Randolph Mills, Inc., C.A.N.Y., 282 F.2d 508—Arrowsmith v. United Press Intern., C.A.Vt., 320 F.2d 219, 6 A.L.R.3d 1072.

D.C.—Vogel v. Tenneco Oil Co., D.C., 276 F.Supp. 1008.

25. U.S.—Beautytuft, Inc. v. Factory Ins. Ass'n, D.C. Tenn., 48 F.R.D. 15.

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26. U.S.—Sharp v. Commercial Solvents Corp., D.C. Tex., 232 F.Supp. 323.

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26.10. U.S.—Calzaturificio Giuseppe Garbuio S.A.S. v. Dartmouth Outdoor Sports, Inc., D.C.N.Y., 435 F.Supp. 1209.

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29. U.S.—Lodge No. 42 of the Intern. Broth. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers v. International Broth. of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers and Helpers, C.A.Tenn., 324 F.2d 201, cert. den. 84 S.Ct. 669, 376 U.S. 913, 11 L.Ed.2d 610.

Educational Development Corp. v. Economy Co., D.C.Okl., 376 F.Supp. 287.

30. U.S.—Attwell v. LaSalle Nat. Bank, C.A.Ga., 607 F.2d 1157, cert. den. 100 S.Ct. 1607, 445 U.S. 954, 63 L.Ed.2d 791, reh. den. 101 S.Ct. 37, 448 U.S. 916, 65 L.Ed.2d 1179—Leney v. Plum Grove Bank, C.A.Colo., 670 F.2d 878.

Elliott v. U.S. Steel Export Co., D.C.Pa., 186 F.Supp. 57—First Flight Co. v. National Carloading Corp., D.C.Tenn., 209 F.Supp. 730—McCabe v. Kevin Jenkins and Associates, Inc., D.C.Pa., 531 F.Supp. 648.

30.2. U.S.—Hayes v. Caltex Petroleum Corp., D.C. Tex., 332 F.Supp. 1205.—N-Triple-C Inc. v. American Tel. & Tel. Co., D.C.Pa., 377 F.Supp. 813.

Minimum contacts

U.S.—Wells Fargo & Co. v. Wells Fargo Exp. Co., C.A.Nev., 556 F.2d 406.

30.4. U.S.—Arkansas Poultry Co-op., Inc. v. Red Barn System, Inc., C.A.Ark., 468 F.2d 538.

30.6. U.S.—Frazier v. Alabama Motor Club, Inc., C.A.Ga., 349 F.2d 456.

30.8. U.S.—Wells Fargo & Co. v. Wells Fargo Exp. Co., C.A.Nev., 556 F.2d 406—Mississippi Interstate Exp., Inc. v. Transpo, Inc., C.A.Miss., 681 F.2d 1003.

Inference

U.S.—McIntosh v. Heil Co., D.C.Mont., 350 F.Supp. 866.

30.10. U.S.—Paragon Oil Co. v. Panama Refining & Petrochemical Co., D.C.N.Y., 192 F.Supp. 259—Dotson v. Kwiki Systems, Inc., D.C.Va., 281 F.Supp. 874—City of Philadelphia v. Morton Salt Co., D.C.Pa., 289 F.Supp. 723—Keller v. Clark Equipment Co., D.C.N.D., 367 F.Supp. 1350—Weir-Cove Bakery, Inc. v. Universal Oven Co., Inc., D.C.W.Va., 518 F.Supp. 383.

Commission of tort within state, etc.

U.S.—Alabama Great Southern R. Co. v. Allied Chemical Co., D.C.Va., 312 F.Supp. 3.

(2) Jurisdiction authorized by state "long arm" statute.

U.S.—In-Flight Devices Corp. v. Van Dusen Air, Inc., C.A.Ohio, 466 F.2d 220.

Miller v. Trans World Airlines, D.C.Ky., 302 F.Supp. 174—Sparrow v. Goodman, D.C.N.C., 376 F.Supp. 1268—Trace X Chemical, Inc. v. Gulf Oil Chemicals Co., D.C.Ark., 519 F.Supp. 826.

(3) Retroactive application of long-arm statute denied.

U.S.—Standard v. Meadors, D.C.Ga., 347 F.Supp. 908.

Contacts held sufficient

U.S.—Keeton v. Hustler Magazine, Inc., N.H., 104 S.Ct. 1473, 465 U.S. 770, 79 L.Ed.2d 790.

Snyder v. Eastern Auto Distributors, Inc., C.A. S.C., 357 F.2d 552, cert. den. 86 S.Ct. 1889, 384 U.S. 987, 16 L.Ed.2d 1004—Intermeat, Inc. v. American Poultry, Inc., C.A.N.Y., 575 F.2d 1017.

Westphal v. Stone Mfg. Co., D.C.R.I., 305 F.Supp. 1187—Carl v. Positive Safety Mfg. Co., D.C.Pa., 316 F.Supp. 1302—Raymond E. Danto, Associates, Inc. v. Arthur D. Little, Inc., D.C. Mich., 316 F.Supp. 1350.

Corporation held not subject to suit under text rule

U.S.—Barnstone v. Congregation Am Echad, C.A.Tex., 574 F.2d 286.

Contacts insufficient

U.S.—Capital Dredge & Dock Corp. v. Midwest Dredging Co., C.A.Ohio, 573 F.2d 377.

Burger King Corp. v. CPM&F, Inc., D.C.Fla., 537 F.Supp. 651.

In re Arthur Treacher's Franchisee Litigation, D.C.Pa., 92 F.R.D. 398.

Small percentage of sales

D.C.—Gatewood v. Fiat S.p.A., C.A., 617 F.2d 820, 199 U.S.App.D.C. 238.

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30.12. U.S.—Lyon v. Bonneson, D.C.Okl., 451 F.Supp. 441.

30.16. U.S.—Long v. Victor Products Corp., C.A. Mo., 297 F.2d 577.

Aquascutum of London, Inc. v. S/S American Champion, D.C.N.Y., 300 F.Supp. 26, affd. in part, revd. in part, on oth. grds., C.A., 426 F.2d 205.

30.18. U.S.—Aeronca, Inc. v. Style-Crafters, Inc., C.A.N.C., 499 F.2d 1367, app. after remand 549 F.2d 1094.

Morse v. Master Specialties Co., D.C.N.J., 239 F.Supp. 641—A. P. Green Refractories Co. v. Peerless Boiler & Engineering Co., D.C.Mo., 303 F.Supp. 275.

30.20. U.S.—Robert E. Lee & Co. v. Veatch, C.A. S.C., 301 F.2d 434, 96 A.L.R.2d 619, cert. den. 83 S.Ct. 23, 371 U.S. 813, 9 L.Ed.2d 55—Manchester Modes, Inc. v. Schuman, C.A.N.Y., 426 F.2d 629—American Cyanamid Co. v. Hammond Lead Products, Inc., C.A.N.J., 495 F.2d 1183.

30.40. U.S.—Casas v. Royal Bank of Canada, C.A. Ill., 625 F.2d 139.

Manchester Modes, Inc. v. Lilli Ann Corp., D.C. N.Y., 306 F.Supp. 622—Chattanooga Corp. v. Klingler, D.C.Tenn., 528 F.Supp. 372, remd. C.A., 704 F.2d 903.

Factors considered

U.S.—Frazier v. Alabama Motor Club, Inc., C.A.Ga., 349 F.2d 456.

Potter's Photographic Applications Co. v. Ealing Corp., D.C.N.Y., 292 F.Supp. 92.

Federal savings and loan associations

U.S.—Masterson v. First Federal Sav. & Loan Ass'n of Torrington, D.C.N.Y., 53 F.R.D. 313.

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30.41. U.S.—Houston Fearless Corp. v. Teter, C.A. Colo., 318 F.2d 822—Aftanase v. Economy Baler Co., C.A.Minn., 343 F.2d 187—Frazier v. Alabama Motor Club, Inc., C.A.Ga., 349 F.2d 456.

Control Data Corp. v. Carolina Power & Light Co., D.C.N.Y., 274 F.Supp. 336—Samson Cordage Works v. Wellington Puritan Mills, Inc., D.C.R.I., 303 F.Supp. 155—Westphal v. Stone Mfg. Co., D.C.R.I., 305 F.Supp. 1187.

State law as governing

U.S.—Burchett v. Bardahl Oil Co., C.A.Okl., 470 F.2d 793.

Crane Co. v. Federal Hydronics, Inc., D.C.Pa., 240 F.Supp. 180—Quality Beverage Co. v. Sun-Drop Sales Corp. of America, D.C.Wis., 291 F.Supp. 92—McNeely v. Clayton & Lambert Mfg. Co., D.C.Minn., 292 F.Supp. 232—Stewart v. Bus & Car Co., D.C.Ohio, 293 F.Supp. 577—Sunrise Toyota, Ltd. v. Toyota Motor Co., D.C.N.Y., 55 F.R.D. 519—Sales Arm, Inc. v. Automobile Club of Southern California, 402 F.Supp. 763.

Federal court may allow application of state long arm statute

U.S.—Newton v. Inter-American, Inc., D.C.La., 48 F.R.D. 280.

It has been held that the test of "doing business" is the same as for determining whether a corporation is amenable to service of process.[30.41a]

30.41a. U.S.—Process Church of Final Judgment v. Sanders, D.C.Ill., 338 F.Supp. 1396—McKee v. Southern Ry. Co., D.C.Ga., 339 F.Supp. 1199.

30.42. U.S.—Mizokami Bros. of Arizona, Inc. v. Baychem Corp., C.A.Ariz., 556 F.2d 975, cert. den. 98 S.Ct. 770, 434 U.S. 1035, 54 L.Ed.2d 783.

30.43. U.S.—Steiner v. Dauphin Corp., D.C.Pa., 208 F.Supp. 104—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252—Medicenters of America, Inc. v. T & V Realty & Equipment Corp., D.C.Va., 371 F.Supp. 1180.

30.45. U.S.—Glacier Refrigeration Service, Inc. v. American Transp., Inc., D.C.N.Y., 467 F.Supp. 1104—McGee v. Holan Division of Ohio Brass Co., D.C.S.C., 337 F.Supp. 72.

30.46. U.S.—Prejean v. Sonatrach, Inc., C.A.Tex., 652 F.2d 1260.

Taisho Fire and Marine v. Vessel Montana, D.C. Cal., 335 F.Supp. 1238—W. A. Kraft Corp. v. Terrace on Park, Inc., D.C.N.J., 337 F.Supp. 206.

Corporation held subject to suit under text rule

U.S.—Ameron v. Anvil Industries, Inc., 524 F.2d 1144.

Leesona Corp. v. Concordia Mfg. Co., D.C.R.I., 312 F.Supp. 392—Bollard v. Volkswagenwerke, A.G., D.C.Mo., 313 F.Supp. 126—Casano v. WDSU-TV, Inc., D.C.Miss., 313 F.Supp. 1130, affd., C.A., 464 F.2d 3—Carl v. Positive Safety Mfg. Co., D.C.Pa., 316 F.Supp. 1302—Raymond E. Danto, Associates, Inc. v. Arthur D. Little, Inc., D.C.Mich., 316 F.Supp. 1350.

Coniglio v. Holley, D.C.Iowa, 38 F.R.D. 302—Luxury Air Service, Inc. v. Cessna Aircraft Co., D.C.Ga., 78 F.R.D. 410.

D.C.—McKenna v. Udall, C.A., 418 F.2d 1171, 135 U.S.App.D.C. 335.

Pacific Seafarers, Inc. v. Pacific Far East Line, D.C., 48 F.R.D. 347.

Corporation held not subject to suit under text rule

U.S.—Donahue v. Far Eastern Air Transport Corp., C.A., 652 F.2d 1032, 209 U.S.App.D.C. 235.

Lee v. Regina Corp., D.C.Conn., 253 F.Supp. 825—Washington Scientific Industries, Inc. v. Polan Industries, Inc., D.C.Minn., 302 F.Supp. 1354.

30.47. U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

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30.52. U.S.—Manchester Modes, Inc. v. Schuman, C.A.N.Y., 426 F.2d 629.

30.53. U.S.—Hendrickson v. Reg O Co., C.A.Virgin Islands, 657 F.2d 9.

Control Data Corp. v. Carolina Power & Light Co., D.C.N.Y., 274 F.Supp. 336—Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., D.C.Pa., 338 F.Supp. 812—Bush v. Stern Bros. & Co., D.C. N.Y., 524 F.Supp. 12.

Issuance of replacement notes

U.S.—Lewis & Eugenia Van Wezel Foundation, Inc. v. Guerdon Industries, Inc., D.C.N.Y., 330 F.Supp. 1349.

30.54. U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

30.56. U.S.—In re Tech Consol., Inc., D.C.N.H., 329 F.Supp. 27—Abrams v. U.S., D.C.W.Va., 333 F.Supp. 1134—Duplan Corp. v. Deering Milliken, Inc., D.C.S.C., 334 F.Supp. 703—In re Puerto Rico Air Disaster Litigation, D.C.Puerto Rico, 340 F.Supp. 492—Andrulonis v. U.S., D.C.N.Y., 526 F.Supp. 183.

Solicitation through managing agent

U.S.—Raul Intern. Corp. v. Nu-Era Gear Corp., D.C. N.Y., 28 F.R.D. 368.

That activities performed for corporations incorporated elsewhere held immaterial

U.S.—Frazier v. Alabama Motor Club, Inc., C.A.Ga., 349 F.2d 456.

Borrowing money

U.S.—Lewis & Eugenia Van Wezel Foundation, Inc. v. Guerdon Industries, Inc., C.A.N.Y., 450 F.2d 1264.

Transactions on stock exchange

U.S.—Blau v. Tool Research & Engineering Corp., D.C. N.Y., 330 F.Supp. 1374.

30.57. U.S.—Stewart v. Bus & Car Co., D.C.Ohio, 293 F.Supp. 577.

The concept of "doing business" is narrower than the concept of "transacting business"; it takes more activity to constitute doing business than it does to meet the transacting business test.[30.57a]

30.57a. U.S.—Athletes Foot of Delaware, Inc. v. Ralph Libonati Co., Inc., D.C.Del., 445 F.Supp. 35.

30.58. U.S.—Didactics Corp. v. Welch Scientific Co., D.C.Ohio, 291 F.Supp. 890.

Maintenance of office

(2) Insufficient to merely maintain office for contact with agencies of United States Government.

D.C.—Norair Engineering Associates, Inc. v. Noland Co., D.C., 365 F.Supp. 740.

Argument that corporation not doing business in district where principal office maintained untenable

U.S.—Frazier v. Alabama Motor Club, Inc., C.A.Ga., 349 F.2d 456.

30.59. U.S.—Odom v. Thomas, D.C.Tex., 338 F.Supp. 877.

30.60. U.S.—Ratliff v. Cooper Laboratories, Inc., C.A., 444 F.2d 745, cert. den. 92 S.Ct. 271, 404 U.S. 948, 30 L.Ed.2d 265, reh. den. 92 S.Ct. 561, 404 U.S. 1006, 30 L.Ed.2d 559.

Manchester Modes, Inc. v. Lilli Ann Corp., D.C. N.Y., 306 F.Supp. 622.

Newton v. Inter-American, Inc., D.C.La., 48 F.R.D. 280—Cle-Ware Industries, Inc. of Puerto Rico v. Harte & Co., D.C.Puerto Rico, 48 F.R.D. 312.

30.61. U.S.—Greek Tourist Agency, Inc. v. Hellenic Mediterranean Lines Co., D.C.N.Y., 199 F.Supp. 6—Riverhouse Pub. Co. v. Porter, D.C.R.I., 287 F.Supp. 1.

Employee visiting subsidiary's stores as not amounting to doing business

U.S.—Farr's, Inc. v. National Shoes, Inc., D.C.Pa., 191 F.Supp. 803.

30.62. U.S.—Manchester Modes, Inc. v. Lilli Ann Corp., D.C.N.Y., 306 F.Supp. 622.

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30.63. U.S.—Samson Cordage Works v. Wellington Puritan Mills, Inc., D.C.R.I., 303 F.Supp. 155—Fanelli v. BodyScience, Inc., D.C.Pa., 540 F.Supp. 111.

Green v. Compania De Navigacion Isabella, Limited, D.C.N.Y., 26 F.R.D. 616.

Mont.—Reed v. American Airlines, Inc., 640 P.2d 912, 197 Mont. 34.

30.64. U.S.—Bierman v. Tampa Elec. Co., C.A.La., 505 F.2d 122—Lucas v. Gulf & Western Industries, Inc., C.A.N.J., 666 F.2d 800.

Andrulonis v. U.S., D.C.N.Y., 526 F.Supp. 183.

Real separation

(3) Other instances.

U.S.—Lumbermens Mut. Cas. Co. v. South Portland Engineering Co., D.C.N.Y., 252 F.Supp. 149—Smeltzer v. Deere & Co., D.C.Pa., 252 F.Supp. 552.

30.65. U.S.—Mizokami Bros. of Arizona, Inc. v. Baychem Corp., C.A.Ariz., 556 F.2d 975, cert. den. 98 S.Ct. 770, 434 U.S. 1035, 54 L.Ed.2d 783.

Goldrick v. D. M. Picton Co., D.C.Va., 56 F.R.D. 639.

30.66. U.S.—Henry v. Offshore Drilling (W.A.) Pty., Limited, D.C.La., 331 F.Supp. 340—Bland v. Kentucky Fried Chicken Corp., D.C.Tex., 338 F.Supp. 871—Phillips Gall and Son v. Garcia Corp., D.C.Ky., 340 F.Supp. 1255—Willis v. American Permac, Inc., D.C.Mass., 541 F.Supp. 118.

Jurisdiction over subsidiary

U.S.—Jayne v. Royal Jordanian Airlines Corp., D.C. N.Y., 502 F.Supp. 848.

Local company and foreign corporation treated as one

U.S.—Leach Co. v. General Sani-Can Mfg. Corp., C.A. Ill., 393 F.2d 183.

Factors considered

U.S.—Snyder v. Hampton Industries, Inc., D.C.Md., 521 F.Supp. 130, affd. 758 F.2d 649.

Superior Coal Co. v. Ruhrkohle, A.G., D.C.Pa., 83 F.R.D. 414.

Sister corporations

U.S.—Shanks v. Westland Equipment and Parts Co., C.A.Wyo., 668 F.2d 1165.

30.67. U.S.—ECC Corp. v. Slater Elec., Inc., D.C. N.Y., 336 F.Supp. 148.

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30.70. U.S.—Wilkerson v. Fortuna Corp., C.A.Tex., 554 F.2d 745, cert. den. 98 S.Ct. 430, 434 U.S. 939, 54 L.Ed.2d 299—Hendrickson v. Reg O Co., C.A.Virgin Islands, 657 F.2d 9.

Magid v. Marcal Paper Mills, Inc., D.C.Del., 517 F.Supp. 1125—Weir-Cove Bakery, Inc. v. Universal Oven Co., Inc., D.C.W.Va., 518 F.Supp. 383.

Coniglio v. Holley, D.C.Iowa, 38 F.R.D. 302—McLouth Steel Corp. v. Jewell Coal & Coke Co., Inc., D.C.Tenn., 432 F.Supp. 10—Van Schaick v. Church of Scientology of California, Inc., D.C. Mass., 535 F.Supp. 1125.

D.C.—Washington v. Hospital Service Plan of N.J., C.A., 345 F.2d 105, 120 U.S.App.D.C. 211.

Foreign railroad corporations

(1) U.S.—Scanapico v. Richmond, F. & P.R. Co., C.A.N.Y., 439 F.2d 17.

Within state longarm statute

U.S.—Black v. Acme Markets, Inc., C.A.Tex., 564 F.2d 681—Austin v. North American Forest Products, C.A.La., 656 F.2d 1076.

Boeing Co v. Spar Aerospace Products, Ltd., D.C.Pa., 380 F.Supp. 101—Bloom v. A. H. Pond Co., Inc., D.C.Fla., 519 F.Supp. 1162.

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30.71. U.S.—Pennington v. Toyomenka, Inc., C.A. Ga., 512 F.2d 1291—Jadair, Inc. v. Walt Keeler Co., Inc., C.A.Wis., 679 F.2d 131, cert. den. 103 S.Ct. 258, 459 U.S. 944, 74 L.Ed.2d 201.

Independent School Dist. No. 454, Fairmont, Minn. v. Marshall & Stevens Co., D.C.Minn., 337 F.Supp. 1278—General Instrument Corp. v. Tie Mfg., Inc., D.C.N.Y., 517 F.Supp. 1231.

In re Arthur Treacher's Franchisee Litigation, D.C.Pa., 92 F.R.D. 398.

D.C.—Fandel v. Arabian Am. Oil Co., C.A., 345 F.2d 87, 120 U.S.App.D.C. 193.

Fandel v. Arabian-American Oil Co., D.C., 231 F.Supp. 572, affd., C.A., 345 F.2d 87, 120 U.S.App. D.C. 193.

Foreign railroad corporations

(1) U.S.—Fannin v. Chesapeake & O. Ry. Co., D.C. Pa., 204 F.Supp. 154—Fraley v. Chesapeake & O. Ry. Co., D.C.Pa., 294 F.Supp. 1193.

Since the publication of Corpus Juris Secundum, the case of Shawe v. Wendy Wilson, Inc., D.C.N.Y., 171 F.Supp. 117 has been reversed, the court holding that the foreign corporation was doing business so as to permit suit in a district of the state.

U.S.—Shawe v. Wendy Wilson, Inc., C.A.N.Y., 282 F.2d 508.

Within state long-arm statute

U.S.—Concrete Detailing Services, Inc. v. Thomsson Steel Co., Inc., 411 F.Supp. 1021.

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30.80. U.S.—Hydro-Clear Corp. v. Aer-O-Flo Corp., D.C.Ohio, 317 F.Supp. 1317.

Anti-trust actions

U.S.—ABC Great States, Inc. v. Globe Ticket Co., D.C.Ill., 304 F.Supp. 1052.

30.82. U.S.—Junior Spice, Inc. v. Turbotville Dress, Inc., D.C.Pa., 339 F.Supp. 1189.

30.84. U.S.—Potter's Photographic Applications Co. v. Ealing Corp., D.C.N.Y., 292 F.Supp. 92.

30.88. U.S.—General Elec. Co. v. F.T.C., 411 F.Supp. 1004.

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31.5. U.S.—Westerman v. Grow, D.C.N.Y., 198 F.Supp. 307—Energy Resources Group, Inc. v. Energy Resources Corp., D.C.Tex., 297 F.Supp. 232.

31.20. U.S.—Allen v. Wachovia Bank & Trust Co., N.A., D.C.N.C., 470 F.Supp. 18.

Domestic corporation as residing in all districts of state for federal venue purposes

U.S.—Minter v. Fowler & Williams, Inc., D.C.Pa., 194 F.Supp. 660.

Corporation licensed to engage in trucking throughout state

U.S.—Carson v. Vance Trucking Lines, Inc., D.C.S.C., 245 F.Supp. 13.

It has also been held that a state corporation resides, as defendant, in all districts of the state for federal venue purposes.[31.25]

31.25. U.S.—De George v. Mandata Poultry Co., D.C.Pa., 196 F.Supp. 192.

33.5. U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

A foreign corporation granted a license by a state as a condition of doing business therein is a resident for venue purposes in all judicial districts within the state regardless of whether or not it is doing business in all the districts.[33.6]

33.6. U.S.—St. Joe Paper Co. v. Mullins Mfg. Corp., D.C.Ohio, 311 F.Supp. 165.

33.10. Suit maintainable in any federal district court of state

U.S.—St. Joe Paper Co. v. Mullins Mfg. Corp., D.C. Ohio, 311 F.Supp. 165.

33.20. U.S.—Vance Trucking Co. v. Canal Ins. Co., C.A.S.C., 338 F.2d 943, on remand, D.C., 249 F.Supp. 33, on remand, 251 F.Supp. 93, affd. 395 F.2d 391, cert. den. 89 S.Ct. 129, 393 U.S. 841, 21 L.Ed.2d 116.

Johnstone v. York County Gas Co., D.C.Pa., 193 F.Supp. 709—Minter, v. Fowler & Williams Inc., D.C.Pa., 194 F.Supp. 660.

Rule held inapplicable under circumstances

U.S.—Johnson v. B. G. Coon Const. Co., D.C.Pa., 195 F.Supp. 197.

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34.5. Rule held inapplicable under circumstances

U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

35. U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.

§ 21(4). —— —— District Containing More than One Division

Library References

Federal Courts ⚖92.

36.50. U.S.—Torres v. Continental Bus System, Inc., D.C.Tex., 204 F.Supp. 347—Sharp v. Commercial Solvents Corp., D.C.Tex., 232 F.Supp. 323—Johnson v. Tri-State Motor Transit Co., D.C.Mo., 263 F.Supp. 278—Henderson v. Wyeth Laboratories, Inc., D.C.Tenn., 319 F.Supp. 565.

§ 21(5). —— —— Corporations Created by Act of Congress

Library References

Federal Courts ⚖77.

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41. U.S.—Stutsman v. Patterson, D.C.Cal., 457 F.Supp. 189.

Particular corporations held not federal agencies

U.S.—Masterson v. First Federal Sav. & Loan Ass'n of Torrington, D.C.N.Y., 53 F.R.D. 313.

§ 21(6). —— —— Ancillary Proceedings

Library References

Federal Courts ⚖90.

43. U.S.—Hutter Northern Trust v. Door County Chamber of Commerce, C.A.Ill., 403 F.2d 481.

§ 21(7). —— —— Stockholder's Representative Suit

Library References

Federal Courts ⚖77.

45. U.S.—Smith v. Murchison, D.C.N.Y., 310 F.Supp. 1079.

45.5. U.S.—Messinger v. United Canso Oil and Gas Ltd., D.C.Conn., 80 F.R.D. 730.

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45.10. D.C.—Altman v. Central of Georgia Ry. Co., D.C., 254 F.Supp. 167, affd. in part, revd. in part on oth. grds., C.A., 363 F.2d 284, 124 U.S.App. D.C. 155, cert. den. 87 S.Ct. 231, 385 U.S. 920, 17 L.Ed.2d 144.

§ 21(8). —— Actions by or against Partnerships

Library References

Federal Courts ⚖85.

45.40. U.S.—Thee v. Marvin Glass & Associates, 412 F.Supp. 1116.

45.44. U.S.—Champion Spark Plug Co. v. Karchmar, D.C.N.Y., 180 F.Supp. 727.

Limited partnership

U.S.—Joscar Co. v. Consolidated Sun Ray, Inc., D.C. N.Y., 212 F.Supp. 634.

Under amendment of the general statute expanding the concept of residence in federal courts, a partnership is held amenable to suit in the district wherein it does business.[45.47]

45.47. U.S.—FSI Group v. First Federal Sav. and Loan Ass'n, D.C.N.Y., 502 F.Supp. 356.

For venue purposes only, partnerships and unincorporated associations treated similarly

U.S.—Penrod Drilling Co. v. Johnson, C.A.Tex., 414 F.2d 1217, cert. den. 90 S.Ct. 552, 396 U.S. 1003, 24 L.Ed.2d 495.

45.48. U.S.—Cohen v. Rosengarten, D.C.Pa., 88 F.R.D. 568.

Activity insufficient to confer jurisdiction

U.S.—Dooly v. Payne, C.A.Ala., 326 F.2d 941—Reliance Steel Products Co. v. Watson, Ess, Marshall & Enggas, C.A.Pa., 675 F.2d 587.

State Sec. Ins. Co. v. Frank B. Hall & Co., Inc., D.C.Ill., 530 F.Supp. 94.

Jurisdiction over nonresident partner

U.S.—Krause v. Hauser, D.C.N.Y., 272 F.Supp. 549—Hayes v. Irwin, D.C.Ga., 541 F.Supp. 397, affd. 729 F.2d 1466, two cases, reh. den. 733 F.2d 908, two cases, cert. den. 105 S.Ct. 185, 83 L.Ed.2d 119, two cases.

Minimum contacts

U.S.—Rockwell Intern. Corp. v. KND Corp., D.C.Tex., 83 F.R.D. 556.

D.C.—Manatee Cablevision Corp. v. Pierson, D.C., 433 F.Supp. 571.

45.50. U.S.—Donald Manter Co., Inc. v. Davis, C.A. N.H., 543 F.2d 419.

Rule applied to joint venture

(1) In general.

U.S.—Goldberg v. Wharf Constructers, D.C.Ala., 209 F.Supp. 499.

(2) Situs held at principal place of business.

U.S.—Goldberg v. Wharf Constructers, D.C.Ala., 209 F.Supp. 499.

§ 21(9). —— Actions by or against Associations

Library References

Federal Courts ⚖85.

45.60. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

45.62. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

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45.64. U.S.—Klein v. Bower, C.A.N.Y., 421 F.2d 338.

Smith v. American Federation of Musicians of U.S. and Canada, D.C.N.Y., 47 F.R.D. 152.

45.66. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

Cable News Network, Inc. v. American Broadcasting Companies, Inc., D.C.Ga., 528 F.Supp. 365.

45.68. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

Bituminous Coal Operators' Ass'n, Inc. v. International Union, United Mine Workers of America, D.C.Pa., 431 F.Supp. 774, affd. in part, revd. in part on oth. grds. C.A., 585 F.2d 586—Rios v. Marshall, D.C.N.Y., 530 F.Supp. 351.

Contacts not sufficient

U.S.—Selman v. Harvard Medical School, D.C.N.Y., 494 F.Supp. 603, affd., C.A., 636 F.2d 1204.

"Minimum contacts" test applied

U.S.—Calagaz v. Calhoon, C.A.Ala., 309 F.2d 248.

Thill Securities Corp. v. New York Stock Exchange, D.C.Wis., 283 F.Supp. 239.

Dixie Carriers, Inc. v. National Maritime Union of America, AFL–CIO, D.C.Tex., 35 F.R.D. 365.

45.70. U.S.—Barefoot v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Okl., 424 F.2d 1001, cert. den. 91 S.Ct. 239, 400 U.S. 950, 27 L.Ed.2d 257.

Kayser-Roth Hosiery Co., Dayton Division v. Textile Workers Union of America AFL–CIO, D.C.Tenn., 285 F.Supp. 484—McDonald v. American Federation of Musicians of U.S. of America and Canada, AFL–CIO, D.C.Ill., 308 F.Supp. 664.

Local union as separate from international

U.S.—Dixon v. Sportswear, Ski-Suits and Weatherproof Garment Workers' Union, Local 246 of Joint Council of Locals 79 and 246 Intern. Ladies' Garment Workers' Union, D.C.N.C., 205 F.Supp. 566.

Requirements must exist when suit filed to constitute proper venue

U.S.—Dixie Carriers, Inc. v. National Maritime Union of America, AFL–CIO, D.C.Tex., 35 F.R.D. 365.

§ 22. —— Actions by or against Aliens

Library References

Federal Courts ⇔86.

45.80. U.S.—Fleifel v. Vessa, D.C.Va., 503 F.Supp. 129.

1948 Judicial code not intended to change old law so as to allow alien to bring suit in district other than that in which defendants reside.

U.S.—Prudencio v. Hanselmann, D.C.Minn., 178 F.Supp. 887.

Venue purposes

U.S.—Weinstein v. Norman M. Morris Corp., D.C. Mich., 432 F.Supp. 337.

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47. U.S.—Bankers Trust Co. v. Santos O. Suarez V., D.C.N.Y., 526 F.Supp. 1262.

However, by virtue of a statute so providing, an alien may be sued in any district, and venue of the action is not limited to the district in which he could be served.[47.5]

47.5. U.S.—James Talcott, Inc. v. Allahabad Bank, Limited, C.A.Ga., 444 F.2d 451, cert. den. 92 S.Ct. 280, 404 U.S. 940, 30 L.Ed.2d 253—Noel v. S.S. Kresge Co., C.A.Ohio, 669 F.2d 1150.

Oil and Gas Ventures-First 1958 Fund, Limited v. Kung, D.C.N.Y., 250 F.Supp. 744—Japan Gas Lighter Ass'n v. Ronson Corp., D.C.N.J., 257 F.Supp. 219—Seilon, Inc. v. Brema S.p.A., D.C. Ohio, 271 F.Supp. 516.

D.C.—Translinear, Inc. v. Republic of Haiti, D.C., 538 F.Supp. 141.

Presence in state

U.S.—Rocke v. Canadian Auto. Sport Club, C.A.Cal., 660 F.2d 395.

Roorda v. Volkswagenwerk, A.G., D.C.S.C., 481 F.Supp. 868.

§ 24. —— Actions on Claims against United States

52. D.C.—Baker v. U.S., D.C., 390 F.Supp. 532.

§ 25(1). —— Local or Transitory Actions

Library References

Federal Courts ⇔93.

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In order for a venue to be proper under statute providing for venue in actions where the defendant is the United States, it is not necessary for all of the plaintiffs to reside in the district; it is sufficient if at least one of the plaintiffs resides in the district.[53.5]

53.5. U.S.—Exxon Corp. v. F.T.C., C.A., 588 F.2d 895, app. after remand 665 F.2d 1274, 214 U.S. App.D.C. 456.

National Distillers and Chemical Corp. v. Department of Energy, D.C.Del., 487 F.Supp. 34.

54. U.S.—W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp., D.C.Puerto Rico, 431 F.Supp. 1229.

55. U.S.—Olympic Capital Corp. v. Newman, D.C. Cal., 276 F.Supp. 646.

Hasburgh v. Executive Aircraft Co., D.C.Mo., 35 F.R.D. 354.

57. U.S.—Eck v. United Arab Airlines, Inc., C.A. N.Y., 360 F.2d 804.

Pellerin Laundry Machinery Sales Co. v. Hogue, D.C.Ark., 219 F.Supp. 629—Wheatley v. Phillips, D.C.N.C., 228 F.Supp. 439.

58. U.S.—Gulf Oil Corp. v. American Louisiana Pipe Line Co., C.A.Mich., 282 F.2d 401—Sax v. Sax, C.A.Fla., 294 F.2d 133.

58.5. U.S.—Small v. Wageman, C.A.N.H., 291 F.2d 734.

Cobb v. National Lead Co., D.C.Ark., 215 F.Supp. 48—Scalise v. Beech Aircraft Corp., D.C. Pa., 276 F.Supp. 58—Olympic Capital Corp. v. Newman, D.C.Cal., 276 F.Supp. 646—Gerber v. Canfield, D.C.S.C., 315 F.Supp. 1175.

However, the fact that a personal injury cause of action is transitory does not give plaintiffs the right to sue defendants either separately or together in every jurisdiction where plaintiffs may be able to accomplish service of process.[58.10]

58.10. U.S.—Small v. Wageman, C.A.N.H., 291 F.2d 734.

61. U.S.—Gorman v. King, D.C.Wis., 316 F.Supp. 801—Goudchaux's, Inc. v. Wohl Shoe Co., Inc., D.C.La., 541 F.Supp. 463.

Johnson v. Jumelle, D.C.N.Y., 64 F.R.D. 708.

"Section 1392 [28 U.S.C.A.]," etc.

U.S.—Pellerin Laundry Machinery Sales Co. v. Hogue, D.C.Ark., 219 F.Supp. 629.

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63. U.S.—Graham v. Hamilton County, State of Tenn., D.C.Tenn., 266 F.Supp. 623.

64. U.S.—Pellerin Laundry Machinery Sales Co. v. Hogue, D.C.Ark., 219 F.Supp. 629.

An in rem action etc.

U.S.—Cobb v. National Lead Co., D.C.Ark., 215 F.Supp. 48—Dersch v. United Mine Workers of America Welfare and Retirement Fund, D.C.Ind., 309 F.Supp. 395.

Restraining trespass of land

U.S.—Miracle v. Jacoby, D.C.Ark., 192 F.Supp. 907.

69. **Proceeds of realty**

(2) Other matters.

U.S.—Stewart Oil Co. v. Sohio Petroleum Co., D.C.Ill., 185 F.Supp. 765.

§ 25(2). —— —— Claim to, or Lien on, Property

Library References

Federal Courts ⇔93.

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70.54. U.S.—Landis v. Watt, D.C.Idaho, 510 F.Supp. 178.

70.58. U.S.—Schetter v. Heim, D.C.Wis., 300 F.Supp. 1070—Fabian v. Kennedy, D.C.W.Va., 333 F.Supp. 1001.

Jurisdictional amount essential to invoke statute

U.S.—Newton v. Inter-American, Inc., D.C.La., 48 F.R.D. 280.

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70.64. U.S.—Fabian v. Kennedy, D.C.W.Va., 333 F.Supp. 1001.

§ 26. Loss or Divestiture of Jurisdiction

Library References

Federal Courts ⇔26, 27, 28.

70.80. U.S.—Smith v. Maryland Cas. Co., D.C.La., 292 F.Supp. 358.

Adequacy of state remedy

U.S.—Group Assisting Sewer Proposal-Ansonia v. City of Ansonia, D.C.Conn., 448 F.Supp. 45.

70.85. U.S.—Spindel v. Spindel, D.C.N.Y., 283 F.Supp. 797.

71. U.S.—28 East Jackson Enterprises, Inc. v. Cullerton, C.A., 551 F.2d 1093, cert. den. 98 S.Ct. 123, 434 U.S. 835, 54 L.Ed.2d 96.

Contract provision specifying governing law

U.S.—Westinghouse Elec. Corp. v. Reed & Martin, Inc., D.C.N.Y., 310 F.Supp. 653, affd., C.A., 439 F.2d 1268.

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72. U.S.—Sacks Bros. Loan Co., Inc. v. Cunningham, C.A.Ind., 578 F.2d 172.

74.10. **Until satisfaction of judgment**

U.S.—In re Terrace Superette, Inc., D.C.Wis., 229 F.Supp. 371.

74.15. U.S.—Gilmore v. James, D.C.Tex., 274 F.Supp. 75, affd. 88 S.Ct. 695, 389 U.S. 572, 19 L.Ed.2d 783, reh. den. 88 S.Ct. 1027, 390 U.S. 975, 19 L.Ed.2d 1195.

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79. U.S.—Putnam v. Williams, C.A.Ga., 652 F.2d 497.

Statute taking jurisdiction from courts

81. U.S.—Merge v. Troussi, C.A.Pa., 394 F.2d 79.

82.10. U.S.—Allen v. Likins, C.A.Minn., 517 F.2d 532.

83. U.S.—Federal Deposit Ins. Corp. v. Tisch, D.C. N.Y., 89 F.R.D. 446.

85. U.S.—City of Burbank v. State of Nev., C.A.Nev., 658 F.2d 708.

§ 27. In General

Library References

Federal Courts ⟹12, 13, 161.

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93. U.S.—Ellis v. Cassidy, C.A.Hawaii, 625 F.2d 227.
Berry v. Michigan Bell Tel. Co., D.C.Mich., 319 F.Supp. 401—Phillips v. Rockefeller, D.C.N.Y., 321 F.Supp. 516, affd., C.A., 435 F.2d 976.
D.C.—Ramer v. Saxbe, C.A., 522 F.2d 695, 173 U.S. App.D.C. 83.
Vogel v. Tenneco Oil Co., D.C., 276 F.Supp. 1008—Rice v. Disabled Am. Veterans, D.C., 295 F.Supp. 131.

Federal question, etc.

U.S.—Coffman v. City of Wichita, Kan., D.C.Kan., 165 F.Supp. 765, affd., C.A., 261 F.2d 112.

Declaratory Judgment Act, etc.

U.S.—Continental Cas. Co. v. Aetna Cas. & Sur. Co., D.C.Pa., 200 F.Supp. 528.

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93.5. U.S.—Construction Industry Ass'n of Sonoma County v. City of Petaluma, C.A.Cal., 522 F.2d 897, cert. den. 96 S.Ct. 1148, 424 U.S. 934, 47 L.Ed.2d 342.

Federal jurisdiction extends to such cases even without jurisdictional statute

U.S.—Robinson v. Wolff, D.C.Neb., 349 F.Supp. 514, affd., C.A., 468 F.2d 438.

93.15. U.S.—Powell v. McCormack, Dist.Col., 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.
Rosenthal & Rosenthal, Inc. v. Aetna Cas. & Sur. Co., D.C.N.Y., 259 F.Supp. 624—Baker v. Central & South West Corp., D.C.Okl., 334 F.Supp. 752.

94. U.S.—Penney v. Municipal Court of Cherry Hill, Cherry Tp., State of N.J., D.C.N.J., 312 F.Supp. 938.

95. U.S.—Coffman v. City of Wichita, Kan., D.C. Kan., 165 F.Supp. 765, affd., C.A., 261 F.2d 112—Bela Seating Co. v. Advance Transp. Co., D.C.Ill., 344 F.Supp. 854.

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96. U.S.—Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, C.A.Minn., 370 F.2d 529.
Coffman v. City of Wichita, Kan., D.C.Kan., 165 F.Supp. 765, Affd., C.A., 261 F.2d 112—Greater Hartford Free Bridge Ass'n v. Greater Hartford Bridge Authority, D.C.Conn., 172 F.Supp. 244, affd., C.A., 265 F.2d 656.

96.15. Standing and political question

U.S.—American Jewish Congress v. Vance, C.A., 575 F.2d 939, 188 U.S.App.D.C. 58.

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96.20. U.S.—Chase Manhattan Bank (Nat. Ass'n) v. South Acres Development Co., Guam, 98 S.Ct. 544, 434 U.S. 236, 54 L.Ed.2d 501.
Stanturf v. Sipes, C.A.Mo., 335 F.2d 224, cert. den. 85 S.Ct. 676, 379 U.S. 977, 13 L.Ed.2d 567—McCorkle v. First Pennsylvania Banking & Trust Co., C.A.Md., 459 F.2d 243.
Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, D.C.Pa., 319 F.Supp. 407, affd., C.A., 465 F.2d 237, cert. den. 93 S.Ct. 1367, 410 U.S. 943, 35 L.Ed.2d 609—Essling v. Brubacker, D.C.Minn., 55 F.R.D. 360.

96.25. U.S.—King v. Randazzo, C.A.N.Y., 346 F.2d 307—San Juan Legal Services, Inc. v. Legal Services Corp., C.A.Puerto Rico, 655 F.2d 434.
Farmer v. Philadelphia Elec. Co., D.C.Pa., 215 F.Supp. 729, affd., C.A., 329 F.2d 3—Tri-State Motor Transit Co. v. Maclif Industries, Inc., D.C. Tex., 534 F.Supp. 283.
Connecticut Union of Welfare Emp. v. White, D.C.Conn., 55 F.R.D. 481.

97. U.S.—Phillips Petroleum Co. v. Texaco, Inc., Okl., 94 S.Ct. 1002, 415 U.S. 125, 39 L.Ed.2d 209.
Halder v. Standard Oil Co., C.A.Ga., 642 F.2d 107.
Practicing Doctors of Acupuncture v. Department of Professional Regulation of State of Fla., D.C.Fla., 518 F.Supp. 282.
D.C.—Hinton v. Udall, C.A., 364 F.2d 676, 124 U.S. App.D.C. 283.

Courts, alert to adjust remedies

U.S.—Ute Indian Tribe of Uintah and Ouray Reservation v. Probst, C.A.Utah, 428 F.2d 491, cert. den. 91 S.Ct. 189, 400 U.S. 927, 27 L.Ed.2d 186, and 91 S.Ct. 189, 400 U.S. 926, 27 L.Ed.2d 186—Donahue v. Staunton, C.A.Ill., 471 F.2d 475, cert. den. 93 S.Ct. 1419, 410 U.S. 955, 35 L.Ed.2d 687.

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98. U.S.—U.S. v. Nixon, Dist.Col., 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039.
Thiokol Chemical Corp. v. Burlington Industries, Inc., C.A.Del., 448 F.2d 1328, cert. den. 92 S.Ct. 284, two cases, 404 U.S. 1019, 30 L.Ed.2d 668.
Goldberg v. Stevens, D.C.Pa., 184 F.Supp. 940.
D.C.—Herian v. U.S., D.C., 363 F.Supp. 287.

99. U.S.—Chandler v. O'Bryan, C.A.Okl., 445 F.2d 1045, cert. den. 92 S.Ct. 1176, 405 U.S. 964, 31 L.Ed.2d 241, reh. den. 92 S.Ct. 1310, 405 U.S. 1049, 31 L.Ed.2d 592—Gardner v. U.S., C.A. N.Y., 446 F.2d 1195, cert. den. 92 S.Ct. 1300, 405 U.S. 1018, 31 L.Ed.2d 481, reh. den. 92 S.Ct. 1784, 406 U.S. 939, 32 L.Ed.2d 140.
Booth v. Lemont Mfg. Corp., D.C.Ill., 304 F.Supp. 235, affd., C.A., 440 F.2d 385, cert. den. 92 S.Ct. 231, 404 U.S. 1026, 30 L.Ed.2d 677.

99.5. U.S.—Hornsby v. Allen, C.A.Ga., 326 F.2d 605, reh. den. 330 F.2d 55—Hutchison v. Pan Am. Petroleum Co., C.A.Okl., 388 F.2d 111.

General statement of violation of constitutional rights as not sufficient

U.S.—Kabath v. O'Connor, D.C.N.Y., 234 F.Supp. 917.

1. Wheedin v. Wheeler, 83 S.Ct. 1441, 373 U.S. 647, 10 L.Ed.2d 605.
Aldens, Inc. v. Packel, 524 F.2d 38, cert. den. 96 S.Ct. 1684, 425 U.S. 943, 48 L.Ed.2d 187.
Paschal v. Perdue, D.C.Fla., 320 F.Supp. 1274—International Ass'n of Firefighters, Local F-100 v. U.S. Dept. of the Navy, Naval Ed. and Training Center, Newport, R.I., D.C.R.I., 536 F.Supp. 1254.
D.C.—Powell v. McCormack, C.A., 395 F.2d 577, 129 U.S.App.D.C. 354, affd. in part, revd. in part on oth. grds. 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.

Federal question held involved

(8) U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341.
Moylan v. Laird, D.C.R.I., 305 F.Supp. 551—Hanley v. Volpe, D.C.Wis., 305 F.Supp. 977—Asbestos Corp. Limited v. Compagnie De Navigation Fraissinet et Cyprien Fabre, D.C.N.Y., 345 F.Supp. 814, affd., C.A., 480 F.2d 669.
D.C.—National Welfare Rights Organization v. Weinberger, D.C., 377 F.Supp. 861—Independent Bankers Ass'n of America v. Smith, 402 F.Supp. 207, affd. 534 F.2d 921, 175 U.S.App.D.C. 184, cert. den. 97 S.Ct. 166, 429 U.S. 862, 50 L.Ed.2d 141.

Federal question held not involved

(4) U.S.—Gainey v. Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp., D.C. Pa., 177 F.Supp. 421, affd., C.A., 275 F.2d 342, cert. den. 80 S.Ct. 1248, 363 U.S. 811, 4 L.Ed.2d 1153.
(7) U.S.—In re Citroen, D.C.N.Y., 170 F.Supp. 93, revd. on oth. grds., C.A., 267 F.2d 915, cert. den. 80 S.Ct. 72, 361 U.S. 826, 4 L.Ed.2d 68.
(12) U.S.—Cornelius v. Moxon, D.C.N.D., 301 F.Supp. 783—Bouse v. Hipes, D.C.Ind., 319 F.Supp. 515—Post v. Payton, D.C.N.Y., 323 F.Supp. 799—Baker v. Northland Mortg. Co., D.C.Ill., 344 F.Supp. 1385.

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1.5. U.S.—Hanson v. Town of Flower Mound, C.A. Tex., 679 F.2d 497.
Watermeier v. Louisiana Stadium and Exposition Dist., D.C.La., 308 F.Supp. 273, affd., C.A., 90 S.Ct. 2172, 398 U.S. 955, 26 L.Ed.2d 539.

Contention that statute violates state constitution, etc.

U.S.—Gomillion v. Lightfoot, C.A.Ala., 270 F.2d 594, revd. on oth. grds. 81 S.Ct. 125, 364 U.S. 339, 5 L.Ed.2d 110.

Case proper for "Pullman" abstention

U.S.—Brooks v. Walker County Hosp. Dist., C.A.Tex., 688 F.2d 334, reh. den. 691 F.2d 502, cert. den. 103 S.Ct. 2452, 462 U.S. 1105, 77 L.Ed.2d 1332.

1.10. U.S.—Jensen v. Mitschele Contracting Co., C.A. N.J., 630 F.2d 209.
U.S. v. Crow, Pope & Land Enterprises, Inc., D.C.Ga., 340 F.Supp. 25, app. dism., C.A., 474 F.2d 200.

Contention that ordinance violates state law held not federal question

U.S.—International Harvester Co. v. Kansas City, C.A. Kan., 308 F.2d 35, cert. den. 83 S.Ct. 503, 371 U.S. 948, 9 L.Ed.2d 498.

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U.S.—City of Miami v. Woolin, C.A.Fla., 387 F.2d 893.
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U.S.—Flores v. Beto, C.A.Tex., 374 F.2d 225, cert. den. 87 S.Ct. 2087, 387 U.S. 948, 18 L.Ed.2d 1338.

Cause of action based on state law

U.S.—Smith v. Grimm, 534 F.2d 1346, cert. den. 97 S.Ct. 493, 429 U.S. 980, 50 L.Ed.2d 589, app. after remand, C.A., 555 F.2d 234.

1.20. U.S.—Pan Am. Petroleum Corp. v. Superior Court of Del. In and For New Castle County, Del., 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584.
Marydale Products Co. v. United Packinghouse Workers of America, AFL-CIO, C.A.La., 322 F.2d 224.
Dorman v. Hammonds, D.C.N.Y., 287 F.Supp. 472.

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2. U.S.—Western Min. Council v. Watt, C.A.Cal., 643 F.2d 618, cert. den. 102 S.Ct. 567, 454 U.S. 1031, 70 L.Ed.2d 474.
Moldawsky v. Lindsay, D.C.N.Y., 341 F.Supp. 1393—Taylor v. Kerr, D.C.N.C., 73 F.R.D. 691.
Ill.—Prairie States Petroleum Co. v. Universal Oil Sales Corp., 410 N.E.2d 1008, 43 Ill.Dec. 875, 88 Ill. App.3d 753.

Mere assertion

(2) Other matters.
U.S.—Jackson v. Martin Co., D.C.Md., 180 F.Supp. 475.

3. U.S.—Ventura County v. Gulf Oil Corp., C.A.Cal., 601 F.2d 1080, affd. 100 S.Ct. 1593, 445 U.S. 947, 63 L.Ed.2d 782.
Bauer v. McLaren, D.C.Iowa, 332 F.Supp. 723—Baker v. Central & South West Corp., D.C.Okl., 334 F.Supp. 752.

4. U.S.—Farkas v. Texas Instrument, Inc., C.A.Tex., 375 F.2d 629, cert. den. 88 S.Ct. 480, 389 U.S. 977, 19 L.Ed.2d 471—Preston v. Purtell, C.A. Wis., 410 F.2d 234—Broderick v. di Grazia, C.A. Mass., 504 F.2d 643.
D.C.—National Ass'n For Community Development v. Hodgson, D.C., 356 F.Supp. 1399.

5. U.S.—Ashcroft v. Mattis, Mo., 97 S.Ct. 1739, 431 U.S. 171, 52 L.Ed.2d 219, reh. den. 97 S.Ct. 2990, 433 U.S. 915, 53 L.Ed.2d 1102—Smith v. Organization of Foster Families For Equality and Reform, N.Y., 97 S.Ct. 2094, 431 U.S. 816, 53 L.Ed.2d 14—Nyquist v. Mauclet, N.Y., 97 S.Ct. 2120, 432 U.S. 1, 53 L.Ed.2d 63—Kremens v. Bartley, Pa., 97 S.Ct. 1709, 431 U.S. 119, 52 L.Ed.2d 184—Hunt v. Washington State Apple Advertising Commission, N.C., 97 S.Ct. 2434, 432 U.S. 333, 53 L.Ed.2d 383—Memphis Light, Gas

and Water Division v Craft, Tenn., 98 S.Ct. 1554, 436 U.S. 1, 56 L.Ed.2d 30

Maria Santiago v. Corporation de Renovacion Urbana Y Vivienda de Puerto Rico, C.A.Puerto Rico, 554 F.2d 1210.

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Spirt v. Teachers Ins. and Annuity Ass'n, D.C. N.Y., 93 F.R.D. 627.

D.C.—O'Hair v. U.S., D.C., 281 F.Supp. 815.

Mootness

U.S.—Iron Harrow Honor Society v. Heckler, Fla., 104 S.Ct. 373, 464 U.S. 67, 78 L.Ed.2d 58, on remand 722 F.2d 213.

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Simpson v. Miller, D.C.Ill., 93 F.R.D. 540.

Actual cases or controversies

U.S.—Clements v. Fashing, Tex., 102 S.Ct. 2836, 457 U.S. 957, 73 L.Ed.2d 508, reh. den. 103 S.Ct. 20, 458 U.S. 1133, 73 L.Ed.2d 1404, on remand, C.A., 689 F.2d 593.

Hall v. Curl, C.A.Mo., 566 F.2d 619—Marshall & Ilsley Corp. v. Heimann, C A.Wis., 652 F.2d 685, cert. den. 102 S.Ct. 1489, 455 U.S. 981, 71 L.Ed.2d 691—Gulf Pub. Co., Inc. v. Lee, C.A. Miss., 679 F.2d 44.

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D.C.—Mansfield v. Weinberger, D.C., 398 F.Supp. 965.

Ripeness

U.S.—Young v. Klutznick, C.A.Mich., 652 F.2d 617, cert. den. 102 S.Ct. 1430, 455 U.S. 939, 71 L.Ed.2d 650.

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In re De Jesus Saez, Bkrtcy.Puerto Rico, 20 B.R. 19.

Action not moot

U.S.—St. Paul Fire & Marine Ins. Co. v. Barry, R.I., 98 S.Ct. 2923, 438 U.S. 531, 57 L.Ed.2d 932—Johnson v. Board of Educ. of City of Chicago, Ill., 102 S.Ct. 2223, 457 U.S. 52, 72 L.Ed.2d 668, on remand D.C., 567 F.Supp. 290.

Doe v. Stegall, C.A.Miss., 653 F.2d 180, reh. den. 659 F.2d 1075.

Constitutional challenges held ripe

U.S.—Duke Power Co. v. Carolina Environmental Study Group, Inc., N.C., 98 S.Ct. 2620, 438 U.S. 59, 57 L.Ed.2d 595.

Would-be parties

U.S.—U.S. v. Coleman, D.C.Mich., 450 F.Supp. 433.

At time of review

U.S.—Concerned Citizens of Vicksburg v. Sills, C.A. Miss., 567 F.2d 646.

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6. U.S.—Lewis v. American Federation of State, County and Municipal Emp., AFL-CIO, C.A.Pa., 407 F.2d 1185, cert. den. 90 S.Ct. 145, 396 U.S. 866, 24 L.Ed.2d 120, reh. den. 90 S.Ct. 378, 396 U.S. 950, 24 L.Ed.2d 256.

7. U.S.—Day-Brite Lighting Division, Emerson Elec. Co. v. International Broth. of Elec. Workers, AFL-CIO, D.C.Miss., 303 F.Supp. 1086—Johnson v. Harder, D.C.Conn., 383 F.Supp. 174, affd., C.A., 512 F.2d 1188, cert. den. 96 S.Ct. 149.

7.5. U.S.—Collins v. Bolton, D.C.Ill., 287 F.Supp. 393.

7.10. U.S.—Pritchard v. Spring Branch Independent School Dist., D.C.Tex., 308 F.Supp. 570—Enka B.V. of Arnhem, Holland v. E. I. Du Pont De Nemours & Co., D.C.Del., 519 F.Supp. 356.

Personal jurisdiction not conferred

U.S.—Duplantier v. U.S., C.A.La., 606 F.2d 654, reh. den. 608 F.2d 1373, cert. den. 101 S Ct. 854, 449 U.S. 1076, 66 L.Ed.2d 798.

8. U.S.—Pan Am. Petroleum Corp v. Cities Service Gas Co., D.C.Kan., 182 F.Supp. 439—Powell v. Workmen's Compensation Bd. of State of N.Y., D.C.N.Y., 214 F.Supp 283, affd., C.A., 327 F.2d 131—American Travelers Club, Inc. v. Hostetter, D.C.N.Y., 219 F.Supp. 95.

9. U.S.—Paul v. Dade County, Fla., C.A.Fla., 419 F.2d 10, cert. den. 90 S.Ct. 1504, 397 U.S. 1065, 25 L.Ed.2d 686—Heaney v. Allen, C.A.N.Y., 425 F.2d 869—Murrow v. Clifford, C.A.N.J., 502 F.2d 1066, on remand, D.C., 404 F.Supp. 999.

Pan Am. Petroleum Corp v. Cities Service Gas Co., D.C.Kan., 182 F.Supp. 439—American Travelers Club, Inc. v. Hostetter, D.C.N.Y., 219 F.Supp. 95—Quarles v. State of Tex., D.C.Tex., 312 F.Supp. 835.

U.S.—Keesey v. Leahy, D.C.Ill., 441 F.Supp. 48.

11. U.S.—Boating Industry Associations v. Marshall, C.A.Cal., 601 F.2d 1376.

Cities Service Co. v. Department of Energy, D.C. Del., 520 F.Supp. 1132.

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11.5. U.S.—Miles Laboratories, Inc v. Frolich, D.C. Cal., 195 F.Supp. 256, affd., C.A., 296 F.2d 740, cert. den. 82 S.Ct. 1030, 369 U.S. 865, 8 L.Ed.2d 84.

D.C.—Potomac Passengers Ass'n v. Chesapeake & O. Ry. Co., C.A., 520 F.2d 91, 171 U.S.App.D.C. 359.

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12. U.S.—Milky Way Productions, Inc. v. Leary, D.C.N.Y., 305 F.Supp. 288, affd. 90 S.Ct. 817, 397 U.S. 98, 25 L.Ed.2d 78—Overstock Book Co. v. Barry, D.C.N.Y., 305 F.Supp. 842, affd., C.A., 436 F.2d 1289—Flood v. Kuhn, D.C.N.Y., 316 F.Supp. 271, affd., C.A., 443 F.2d 264, affd. 92 S.Ct. 2099, 407 U.S. 258, 32 L.Ed.2d 728—Louisville & N.R. Co. v. Bass, D.C.Ky., 328 F.Supp. 732.

Dolgow v. Anderson, D.C.N.Y., 43 F.R.D. 472.

D.C.—Powell v. McCormack, C.A., 395 F.2d 577, 129 U.S.App.D.C. 354, affd. in part, revd. in part on oth. grds. 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491—Cardinale v. Washington Technical Institute, C.A., 500 F.2d 791, 163 U.S.App.D.C. 123.

Under power of Congress to confer "protective jurisdiction"

U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 25, A. F. L. v. W.L. Mead, Inc., C.A. Mass., 230 F.2d 576, cert. dism. 77 S.Ct. 21, 352 U.S. 802, 1 L.Ed.2d 37.

Impairment of votes by discriminatory geographic classification

U.S.—W.M.C.A., Inc. v. Simon, N.Y., 82 S.Ct. 1234, 370 U.S. 190, 8 L.Ed.2d 430, on remand 208 F.Supp. 368, revd. on oth. grds., 84 S.Ct. 1418, 377 U.S. 633, 12 L.Ed.2d 568.

Clear and concrete adversity of interest required

U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341.

State of Wis. v. Zimmerman, D.C.Wis., 205 F.Supp. 673.

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12.10. U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341—Powell v. McCormack, Dist.Col., 89 S.Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.

Gosnell v. Harris, D.C.Ohio, 521 F.Supp. 956, affd. C.A., 703 F.2d 216.

D.C.—Powell v. McCormack, C.A., 395 F.2d 577, 129 U.S.App.D.C. 354, affd. in part, revd. in part on oth. grds. 89 S Ct. 1944, 395 U.S. 486, 23 L.Ed.2d 491.

Question arising only as part of defense

U.S.—International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc., C.A.Tex., 295 F.2d 209, revd. on oth. grds. 83 S.Ct. 956, 372 U.S. 682, 10 L.Ed.2d 67, reh. den. 83 S.Ct. 1533, 373 U.S. 947, 10 L.Ed.2d 702—Booth v. Lemont Mfg. Corp., C.A.Ill., 440 F.2d 385, cert. den. 92 S.Ct. 231, 404 U.S. 916, 30 L.Ed.2d 190, reh. den. 92 S.Ct. 671, 404 U.S. 1026, 30 L.Ed.2d 677.

Jurisdiction not conferred by Seventeenth Amendment

U.S.—Phillips v. Rockefeller, D.C.N.Y., 321 F.Supp. 516, affirmed 435 F.2d 976.

Constitutional claims held without merit

U.S.—Groundhog v. Keeler, C.A.Okl., 442 F.2d 674—Garvin v. Rosenau, C.A.Mich., 455 F.2d 233.

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U.S.—Louisville & N.R. Co. v. Bass, D.C.Ky., 328 F.Supp. 732.

Substantiality doctrine remains federal rule

U.S.—Hagans v. Lavine, N.Y., 94 S.Ct. 1372, 415 U.S. 528, 39 L Ed.2d 577. On remand 505 F.2d 727, on remand 399 F.Supp. 421, vac. on oth. grds. 527 F.2d 1151, app. after remand, 536 F.2d 525.

12.15. U.S.—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

Braniff Intern., Inc. v. Florida Public Service Commission, C.A.Fla., 576 F.2d 1100.

12.20. U.S.—Mahone v. Waddle, C.A.Pa., 564 F.2d 1018, cert. den. 98 S.Ct. 3122, 438 U.S. 904, 57 L.Ed.2d 1147.

Farmer v. Catmull, D.C.Utah, 339 F.Supp. 70.

Constitutional claim held without merit

U.S.—Paladino v. City of Omaha, D.C.Neb. 335 F.Supp. 897, affd., C.A., 471 F.2d 812.

12.25. U.S.—Boone v. Wyman, D.C.N.Y., 295 F.Supp. 1143, affd., C.A., 412 F.2d 857, cert. den. 90 S.Ct. 600, 396 U.S. 1024, 24 L.Ed.2d 518—Triplett v. Tiemann, D.C.Neb., 302 F.Supp. 1239.

12.30. U.S.—Tanner v. Armco Steel Corp., D.C.Tex., 340 F.Supp. 532.

Use of federal funds

U.S.—Tanner v. Armco Steel Corp., D.C.Tex., 340 F.Supp. 532.

13. U.S.—Duggins v. Hunt, C.A.Okl., 323 F.2d 746—McCabe v. Nassau County Medical Center, C.A. N.Y., 453 F.2d 698.

Mapp v. Board of Ed. of City of Chattanooga, Tenn., D.C.Tenn., 341 F.Supp. 193, affd., C.A., 477 F.2d 851, cert. den. 94 S.Ct. 445, 446, 414 U.S. 1022, 38 L.Ed.2d 313—Jim Young Development Corp. v. State Highway Commission of Mo., D.C. Mo., 56 F.R.D. 38.

State court action prerequisite under circumstances

U.S.—Rowan v. Pinnell, C.A.Tex., 453 F.2d 963.

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13.5. U.S.—Braniff Intern., Inc. v. Florida Public Service Commission, C.A.Fla., 576 F.2d 1100.

14. U.S.—McGuire v. Sadler, C.A.Tex., 337 F.2d 902.

National Cold Storage Co. v. Port of New York Authority, D.C.N.Y., 286 F.Supp. 1016.

20. U.S.—Brody v. McCoy, D.C.N.Y., 257 F.Supp. 209.

24. Interference with reasonable expectancy held insufficient

U.S.—Guardianship of Prieto v. City of Palm Springs, D.C.Cal., 328 F.Supp. 716.

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25. U.S.—Hearne v. Smylie, Idaho, 84 S.Ct. 1917, 378 U.S. 563, 12 L.Ed.2d 1036.

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Election cases

U.S.—Pontikes v. Kusper, D.C.Ill., 345 F.Supp. 1104, affd. 94 S.Ct. 303, 414 U.S. 51, 38 L.Ed.2d 260.

Limitation on assertion of fourteenth amendment right in federal courts

U.S.—Jeffers v. Whitley, C.A.N.C., 309 F.2d 621.

Brick v. Board of Ed., School Dist. No. 1, Denver, Colo., D.C.Colo., 305 F.Supp. 1316—Com of Pa. ex rel. Feiling v. Sincavage, D.C.Pa., 313 F.Supp. 967, affd., C.A., 439 F.2d 1133.

"Necessity" and "appropriateness" defined

U.S.—Crosley v. Davis, D.C.Pa., 426 F.Supp. 389.

Intentional discrimination

U.S.—Arnold v. Ballard, D.C.Ohio, 448 F.Supp. 1025, reconsideration of D.C., 390 F.Supp. 723.

26. U.S.—Duffield v. Charleston Area Medical Center, Inc., C.A.W.Va., 503 F.2d 512.

Adekalu v. New York City, D.C.N.Y., 431 F.Supp. 812—Grasso v. U.S., D.C.Mo., 535 F.Supp. 309, affd. C.A., 716 F.2d 907.

D.C.—Amos Treat & Co. v. Securities and Exchange Commission, C.A., 306 F.2d 260, 113 U.S.App. D.C. 100.

Not every case involving fraud and duress, etc.

U.S.—Beistline v. City of San Diego, C.A.Cal., 256 F.2d 421, cert. den. 79 S.Ct. 96, 358 U.S. 865, 3 L.Ed 2d 98.

Due process not involved

U.S.—Mason v. Delaware County, D.C.Pa., 331 F.Supp. 1010.

Control of urban renewal program

U.S.—Male v. Crossroads Associates, D.C.N.Y., 337 F.Supp. 1190, affd. C.A., 469 F.2d 616.

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27. U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341.

Helmsley v. City of Detroit, Mich., C.A.Mich., 320 F.2d 476—Like v. Carter, C.A.Mo., 448 F.2d 798, cert. den. 92 S.Ct. 1309, 405 U.S. 1045, 31 L.Ed.2d 588, on remand, D.C., 353 F.Supp. 405, affd. 486 F.2d 552—White v. Beal, C.A.Pa., 555 F.2d 1146.

Sincock v. Terry, D.C.Del., 207 F.Supp. 205, affd. 84 S.Ct. 1449, 377 U.S. 695, 12 L.Ed.2d 620—Thigpen v. Meyers, D.C.Wash., 211 F.Supp. 826, affd. 84 S.Ct. 1905, 378 U.S. 554, 12 L.Ed.2d 1025—Delozier v. Tyrone Area School Bd., D.C. Pa., 247 F.Supp. 30—McInnis v. Shapiro, D.C.Ill., 293 F.Supp. 327, affd. 89 S.Ct. 1197, 394 U.S. 322, 22 L.Ed.2d 308—Greater Fremont, Inc. v. City of Fremont, D.C.Ohio, 302 F.Supp. 652—Talbot v. Romney, D.C.N.Y., 334 F.Supp. 1074.

Fla.—In re Advisory Opinion to the Governor, 150 So.2d 721.

Racial discrimination

(1) U.S.—Gilmore v. City of Montgomery, Ala., D.C. Ala., 176 F.Supp. 776, mod. on oth. grds., C.A., 277 F.2d 364, on remand 337 F.Supp. 22, remd. 473 F.2d 832, cert. den. 94 S.Ct. 215, 414 U.S. 907, 38 L.Ed.2d 145, revd. in part on oth. grds. 94 S.Ct. 2416.

(4) Other matters.

U.S.—Village of Arlington Heights v. Metropolitan Housing Development Corp., Ill., 97 S.Ct. 555, 429 U.S. 252, 50 L.Ed.2d 450, on remand 558 F.2d 1283, cert. den. 98 S.Ct. 752, 434 U.S. 1025, 54 L.Ed.2d 772.

Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., C.A.N.Y., 436 F.2d 108, cert. den. 91 S.Ct. 1256, 401 U.S. 1010, 28 L.Ed.2d 546.

Lynch v. Kenston School Dist. Bd. of Ed., D.C. Ohio, 229 F.Supp. 740—Spangler v. Pasadena City Bd. of Ed., D.C.Cal., 311 F.Supp. 501—Hunter v. City of Ann Arbor, D.C.Mich., 325 F.Supp. 847.

Apportionment of state legislature

U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341.

Equal protection not involved

U.S.—Wallis v. Blue, D.C.Kan., 263 F.Supp. 965—Booth v. Lemont Mfg. Corp., D.C.Ill., 304 F.Supp. 235, affd., C.A., 440 F.2d 385, cert. den. 92 S.Ct. 231, 404 U.S. 916, 30 L.Ed. 190, reh. den. 92 S.Ct. 671, 404 U.S. 1026, 30 L.Ed.2d 677—Campagnuolo v. Harder, D.C.Conn., 319 F.Supp. 414, case remd., C.A., 440 F.2d 1225.

Not every right that conceivably could be wedged within literal breadth of due process demands federal protection.[27.5]

27.5. U.S.—Davis v. Passman, C.A.La., 571 F.2d 793, revd. on oth. grds. 99 S.Ct. 2264, 442 U.S. 228, 60 L.Ed.2d 846.

A federal court should not rule on the validity of a state regulation on the sole ground that it was not properly adopted under state law by a state administrative agency.[27.10]

27.10 U.S.—Walker v. Mintzes, C.A.6 (Mich.), 771 F.2d 920, disagreeing with contrary language in Spruytte v. Walters, 753 F.2d 498.

28. U.S.—Ayala v. District 60 School Bd. of Pueblo, Colo., D.C.Colo., 327 F.Supp. 980—Klotz v. Ohio Adult Parole Authority, D.C.Ohio, 330 F.Supp. 665, affd., C.A., 492 F.2d 1243, two cases, cert. den. 95 S.Ct. 97, 419 U.S. 853, 42 L.Ed.2d 85.

Hospital performing services for county, reversion in county

U.S.—Eaton v. Board of Managers of James Walker Memorial Hospital, D.C.N.C., 164 F.Supp. 191, affd., C.A., 261 F.2d 521, cert. den. 79 S.Ct. 941, 359 U.S. 984, 3 L.Ed.2d 934.

Government involvement must be shown

U.S.—Holton v. Crozer-Chester Medical Center, D.C. Pa., 419 F.Supp. 334, remd. and vac. on oth. grds., C.A., 560 F.2d 575.

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29. U.S.—McGuire v. Sadler, C.A.Tex., 337 F.2d 902—Peace v. City of Center, Tex., C.A.Tex., 372 F.2d 649.

Swift v. Fourth Nat. Bank of Columbus, Ga., D.C.Ga., 205 F.Supp. 563.

Relief in state courts

(3) Other instances.

U.S.—Branch v. School Dist. No. 7 of Ravalli County, D.C.Mont., 432 F.Supp. 608.

30. U.S.—Glenwal Development Corp. v. Schmidt, D.C.Puerto Rico, 336 F.Supp. 1079, motion den. 356 F.Supp. 67—Jervey v. Martin, D.C.Va., 336 F.Supp. 1350—Knisley v. Monroe, D.C.Mich., 539 F.Supp. 849.

31. U.S.—Like v. Carter, C.A.Mo., 448 F.2d 798, cert. den. 92 S.Ct. 1309, 405 U.S. 1045, 31 L.Ed.2d 588, on remand, D.C., 353 F.Supp. 405, affd. 486 F.2d 552.

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34.5. U.S.—Jeffers v. Whitley, C.A.N.C., 309 F.2d 621.

Brick v. Board of Ed., School Dist. No. 1, Denver, Colo., D.C.Colo., 305 F.Supp. 1316—Haaf v. Board of County Com'rs of Benton County, D.C. Minn., 337 F.Supp. 772.

Nor does the constitutionality of a state law, as denying an illegitimate child the right to inherit from his putative father, constitute such denial of equal protection of law as to present a substantial federal question.[34.6]

34.6. U.S.—Walker v. Walker, C.A.S.C., 274 F.2d 425, cert. den. 80 S.Ct. 1626, 363 U.S. 849, 4 L.Ed.2d 1731, reh. den. 81 S.Ct. 37, 364 U.S. 857, 5 L.Ed.2d 82.

35. U.S.—Reynolds v. State of Ga., C.A.Ga., 640 F.2d 702, reh. den. 645 F.2d 72, cert. den., 102 S.Ct. 326, 454 U.S. 865, 70 L.Ed.2d 165.

Barkey v. Firearms Control Bd., D.C.N.Y., 293 F.Supp. 420.

36. U.S.—Chance v. County Bd. of School Trustees of McHenry County, Ill., C.A.Ill., 332 F.2d 971—Magaziner v. Montemuro, C.A.Pa., 468 F.2d 782.

U.S. ex rel. Hart v. Maroney, D.C.Pa., 230 F.Supp. 468—Lupino v. Tahash, D.C.Minn., 252 F.Supp. 225, cert. den. 87 S.Ct. 1290, 386 U.S. 984, 18 L.Ed.2d 233, reh. den. 87 S.Ct. 1489, 386 U.S. 1043, 18 L.Ed.2d 617—Wood v. Conneaut Lake Park, Inc., D.C.Pa., 258 F.Supp. 777, affd., C.A., 386 F.2d 121, cert. den. 88 S.Ct. 1660, 391 U.S. 907, 20 L.Ed.2d 422—Hornbeak v. Hamm, D.C. Ala., 283 F.Supp. 549, affd. 89 S.Ct. 47, 393 U.S. 9, 21 L.Ed.2d 14.

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36.10. **Alleged incompetency or negligence etc.**

(2) Other matters.

U.S.—Christman v. Com. of Pa., D.C.Pa. 275 F.Supp. 434, cert. den. 89 S.Ct. 195, 393 U.S. 885, 21 L.Ed.2d 161.

43. U.S.—Alexander v. Fogliani, C.A.Nev., 375 F.2d 733—Sigafus v. Brown, C.A.Ill., 416 F.2d 105.

Lenske v. Sercombe, D.C.Or., 266 F.Supp. 609—Conover v. Montemuro, D.C.Pa., 304 F.Supp. 259—Haley v. Troy, D.C.Mass., 338 F.Supp. 794.

In criminal trial

(2) Other instances.

U.S.—Malone v. Emmet, D.C.Ala., 278 F.Supp. 193.

Circumstances held insufficient to confer jurisdiction

U.S.—U.S. ex rel. Herrington v. Mancusi, C.A.N.Y., 415 F.2d 205.

45. U.S.—Roberts v. Twin Fork Coal Co., D.C.Ky., 223 F.Supp. 752—Askinas v. Goldman, D.C. Mass., 298 F.Supp. 1217.

49. U.S.—Braley v. Gladden, C.A.Or., 403 F.2d 858.

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50. U.S.—Wyandotte Chemical Corp. v. City of Wyandotte, D.C.Mich., 199 Supp. 582, revd. on oth. grds., C.A., 321 F.2d 927.

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59. U.S.—Bradford Tp. v. Illinois State Toll Highway Authority, C.A.Ill., 463 F.2d 537, cert. den. 93 S.Ct. 518, 409 U.S. 1047, 34 L.Ed.2d 499.

62. U.S.—Luterman v. Levin, D.C.Md., 318 F.Supp. 11.

62.5. U.S.—Cox v. Shepherd, D.C.Cal., 199 F.Supp. 140—Fifth Ave. Peace Parade Committee v. Hoover, D.C.N.Y., 327 F.Supp. 238.

Jurisdiction not automatic

U.S.—Lord v. Kelley, D.C.Mass., 223 F.Supp. 684, app. dism., C.A., 334 F.2d 742, cert. den. 85 S.Ct. 650, 379 U.S. 961, 13 L.Ed.2d 556.

62.10. U.S.—Davis v. Passman, La., 99 S.Ct. 2264, 442 U.S. 228, 60 L.Ed.2d 846.

Hartley v. Sioux City & New Orleans Barge Lines, Inc., C.A.Pa., 379 F.2d 354.

Grabinger v. Conlisk, D.C.Ill., 320 F.Supp. 1213, affd., C.A., 455 F.2d 490.

Circumstances held insufficient to confer jurisdiction

U.S.—Deglau v. Franke, D.C.R.I., 184 F.Supp. 225—Bauer v. McLaren, D.C.Iowa, 332 F.Supp. 723.

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62.15. U.S.—Lang v. Colonial Pipeline Co., D.C.Pa., 266 F.Supp. 552, affd., C.A., 383 F.2d 986—Nixon v. Hampton, D.C.Pa., 400 F.Supp. 881, affd. 535 F.2d 1247.

62.20. U.S.—Tanner v. Armco Steel Corp., D.C.Tex., 340 F.Supp. 532.

63.50. U.S.—Martinolich v. Dean, D.C.Miss., 256 F.Supp. 612—Hornbeak v. Hamm, D.C.Ala., 283 F.Supp. 549, affd. 89 S.Ct. 47, 393 U.S. 9, 21 L.Ed.2d 14—Solomon v. LaRose, D.C.Neb., 335 F.Supp. 715.

63.60. U.S.—Perry v. Grenada Municipal Separate School Dist., D.C.Miss., 300 F.Supp. 748.

Protection against state action

(2) U.S.—Spampinato v. M. Breger & Co., D.C.N.Y., 166 F.Supp. 33, 35, rearg. den. 176 F.Supp. 278.

Jurisdiction lacking

(3) Other instances.

U.S.—Sarelas v. Anagnost, C.A.Ill., 332 F.2d 111.

Booth v. General Dynamics Corp., D.C.Ill., 264 F.Supp. 465.

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64. U.S.—Allen v. County School Bd. of Prince Edward County, D.C.Va., 207 F.Supp. 349—Sams v. Ohio Valley General Hospital Ass'n, D.C.W.Va., 257 F.Supp. 369—Rose Chalet Functions Corp. v. Evans, D.C.Mass., 264 F.Supp. 790—Hammond v. South Carolina State College, D.C.S.C., 272 F.Supp. 947—Speake v. Grantham, D.C.Miss., 317 F.Supp. 1253, affd., C.A., 440 F.2d 1351—Richmond Ed. Ass'n v. Crockford, D.C.Va., 55 F.R.D. 362.

Statute relating to proceedings in vindication of civil rights, etc.

(2) Statute neither creates rights nor confers jurisdiction.

U.S.—Barr v. U.S., C.A.N.M., 478 F.2d 1152, cert. den. 94 S.Ct. 233, 414 U.S. 910, 38 L.Ed.2d 148—Gonzalez v. Young, C.A.N.J., 560 F.2d 160, affd. 99 S.Ct. 1905, 441 U.S. 600, 60 L.Ed.2d 508, rejecting Vazquez v. Ferre, 404 F.Supp. 815.

Colorable constitutional claims sufficient

U.S.—Johnson v. Harder, C.A.Conn., 438 F.2d 7—Roberson v. Harder, C.A.Conn., 440 F.2d 687—Campagnuolo v. Harder, C.A.Conn., 440 F.2d 1225.

Wilczynski v. Harder, D.C.Conn., 323 F.Supp. 509.

Discrimination against women in public employment

U.S.—Eslinger v. Thomas, D.C.S.C., 340 F.Supp. 886, affd. in part, revd. in part on oth. grds., C.A., 476 F.2d 225.

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65. U.S.—Bussie v. Long, C.A.La., 383 F.2d 766.

66. U.S.—Bryant v. Harrelson, D.C.Tex., 187 F.Supp. 738—Ricciotti v. Warwick School Committee, D.C.R.I., 319 F.Supp. 1006.

66.15. U.S.—Quarles v. State of Tex., D.C.Tex., 312 F.Supp. 835—Blaze v. Moon, D.C.Tex., 315 F.Supp. 495, affd., C.A., 440 F.2d 1348—Paschal v. Perdue, D.C.Fla., 320 F.Supp. 1274.

Jurisdiction held to exist despite defendants' immunity

U.S.—Larsen v. Gibson, C.A.Cal., 267 F.2d 386, cert. den. 80 S.Ct. 106, 361 U.S. 848, 4 L.Ed.2d 87.

Limited to violation of equal rights

U.S.—Young v. Harder, D.C.Kan., 361 F.Supp. 64.

66.20. U.S.—Alberda v. Noell, D.C.Mich., 322 F.Supp. 1379—Hagen v. St. Paul Bd. of Ed. of Independent School Dist. No. 625, D.C.Minn., 333 F.Supp. 1355—Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia, D.C.N.J., 341 F.Supp. 1139, affd. 92 S.Ct. 2061, 406 U.S. 951, 32 L.Ed.2d 340, affd., C.A., 478 F.2d 456—Chapman v. Reynolds, D.C.Va., 378 F.Supp. 1137.

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66.25. U.S.—White v. Board of Ed. of Hobbs Municipal School Dist. No. 16, C.A.N.M., 448 F.2d 258.

Property rights

U.S.—McManigal v. Simon, C.A.Ill., 382 F.2d 408, cert. den. 88 S.Ct. 1099, 390 U.S. 980, 19 L.Ed.2d 1276, reh. den. 88 S.Ct. 1405, 390 U.S. 1036, 20 L.Ed.2d 297.

Martin v. King, D.C.Colo., 298 F.Supp. 420, affd. C.A., 417 F.2d 458.

69. U.S.—Mitchell v. Louisiana High School Athletic Ass'n, C.A.La., 430 F.2d 1155.

Right of personal liberty

U.S.—Elsen v. Eastman, C.A.N.Y., 421 F.2d 560, cert. den. 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Russo v. Shapiro, D.C.Conn., 309 F.Supp. 385—Roberge v. Philbrook, D.C.Vt., 313 F.Supp. 608.

(2) Loss required

71. U.S.—Elsen v. Eastman, C.A.N.Y., 421 F.2d 560, cert. den. 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75—Mitchell v. Louisiana High School Athletic Ass'n, C.A.La., 430 F.2d 1155.

71.5. U.S.—McCullough v. Redevelopment Authority of City of Wilkes-Barre, C.A.Pa., 522 F.2d 858.

McClellan v. Shapiro, D.C.Conn., 315 F.Supp. 484—Shannon v. Western Elec. Co., D.C.Mo., 315 F.Supp. 1374—Santiago v. McElroy, D.C.Pa., 319 F.Supp. 284—Cross v. Board of Sup'rs of San Mateo County, D.C.Cal., 326 F.Supp. 634, affd., C.A., 442 F.2d 362—Dorsey v. Community Stores Corp., D.C.Wis., 52 F.R.D. 13—Stout v. Whiteaker, D.C.Tenn., 379 F.Supp. 218.

Inadequacy of procedures involved in terminating public housing tenancies

U.S.—Escalera v. New York City Housing Authority, C.A.N.Y., 425 F.2d 853, cert. den. 91 S.Ct. 54, 400 U.S. 853, 27 L.Ed.2d 91.

McMichael v. Chester Housing Authority, D.C. Pa., 325 F.Supp. 147.

Constitutionality of replevin procedures

U.S.—Wheeler v. Adams Co., D.C.Md., 322 F.Supp. 645.

Denial of sterilization by public hospital

U.S.—McCabe v. Nassau County Medical Center, C.A. N.Y., 453 F.2d 698.

Procedure for suspension of driver's license

U.S.—McNamara v Malloy, D.C.Vt., 337 F.Supp. 732.

72. U.S.—Hall v. Garson, C.A.Tex., 430 F.2d 430, app. after remand 468 F.2d 845.

Bolger v. U.S., D.C.N.Y., 189 F.Supp. 237, affd., C.A., 293 F.2d 368, revd. on oth. grds. 83 S.Ct. 385, 371 U.S. 392, 9 L.Ed.2d 390—Henderson v. Goeke, D.C.Pa., 329 F.Supp. 1160.

Matter inappropriate for federal action

U.S.—Overstock Book Co. v. Barry, D.C.N.Y., 305 F.Supp. 842, affd., C.A., 436 F.2d 1289.

72.5. U.S.—Birnbaum v. Trussell, C.A.N.Y., 347 F.2d 86—Johnson v. Hood, C.A.Miss., 430 F.2d 610.

Lenske v. Sercombe, D.C.Or., 266 F.Supp. 609—Burruss v. Wilkerson, D.C.Va., 301 F.Supp. 1237—Russo v. Shapiro, D.C.Conn., 309 F.Supp. 385.

Filing fee for pursuing administrative remedy

U.S.—Bodor v. East Coventry Tp., D.C.Pa., 325 F.Supp. 1102.

Discharge of aliens

U.S.—Dougall v. Sugarman, D.C.N.Y., 330 F.Supp. 265.

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72.10. U.S.—Gautreaux v. Romney, C.A.Ill., 448 F.2d 731.

Cases based on racial discrimination fall within "the equal rights" provision, etc.

U.S.—Jordan v. Hutcheson, C.A.Va., 323 F.2d 597.

28 U.S.C.A. § 1343(3) in now 28 U.S.C.A. § 1343(a)(3).

Motel accommodations

U.S.—Smith v. Holiday Inns of America, Inc., D.C. Tenn., 220 F.Supp. 1, mod. on oth. grds., C.A., 336 F.2d 630.

Civil service employment

U.S.—Mow Sun Wong v. Hampton, D.C.Cal., 333 F.Supp. 527, revd. on oth. grds., C.A., 500 F.2d 1031, cert. gr. 94 S.Ct. 3067, 417 U.S. 944, 41 L.Ed.2d 664, affd. 96 S.Ct. 1895, 426 U.S. 88, 48 L.Ed.2d 495, on remand, D.C., 435 F.Supp. 37.

Discriminatory use of town zoning ordinance

U.S.—English v. Town of Huntington, D.C.N.Y., 335 F.Supp. 1369.

Residency requirement for admission to bar

U.S.—Lipman v. Van Zant, D.C.Miss., 329 F.Supp. 391.

72.15. U.S.—McNeese v. Board of Ed. for Community Unit School Dist. 187, Cahokia, Ill., Ill., 83 S.Ct. 1433, 373 U.S. 668, 10 L.Ed.2d 622.

Cary v. Board of Ed. of Adams-Arapahoe School Dist. 28-J, Aurora, Colo., D.C.Colo., 427 F.Supp. 945, affd. C.A., 598 F.2d 535.

Against teachers and principals

(2) U.S.—Brooks v. School Dist. of City of Moberly, Mo., C.A.Mo., 267 F.2d 733, cert. den. 80 S.Ct. 196, 361 U.S. 894, 4 L.Ed.2d 151.

72.20. U.S.—Gilmore v. City of Montgomery, Ala., D.C.Ala., 176 F.Supp. 776, mod. on oth. grds., C.A., 277 F.2d 364. On remand 337 F.Supp. 22, remd. 473 F.2d 832, cert. den. 94 S.Ct. 215, 414 U.S. 907, 38 L.Ed.2d 145, revd. in part 94 S.Ct. 2416.

Battle v. Municipal Housing Authority for City of Yonkers, D.C.N.Y., 53 F.R.D. 423.

72.30. U.S.—Baker v. Regional High School Dist. No. 5, D.C.Conn., 432 F.Supp. 535.

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73. U.S.—Jordan v. Hutcheson, C.A.Va., 323 F.2d 597.

Donoghue v. Behler, D.C.N.J., 429 F.Supp. 403.

D.C.—O'Hair v. U.S., D.C., 281 F.Supp. 815.

Claim held not sufficiently substantial

U.S.—Chicago Joint Bd., Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune Co., C.A.Ill., 435 F.2d 470, cert. den. 91 S.Ct. 1662, 402 U.S. 973, 29 L.Ed.2d 138.

Murphy v. Facendia, D.C.Colo., 307 F.Supp. 353.

73.5. U.S.—Jordan v. Hutcheson, C.A.Va., 323 F.2d 597.

74. U.S.—Bright v. Baesler, D.C.Ky., 336 F.Supp. 527.

Elections to Congress

(2) 28 U.S.C.A. § 1343(3) is now 28 U.S.C.A. § 1343(a)(3).

Discrimination in registration

(2) Other instance.

U.S.—U.S. v. Penton, D.C.Ala., 212 F.Supp. 193.

Unequal legislative representation

(2) Other matters.

U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341—Gray v. Sanders, Ga., 83 S.Ct. 801, 372 U.S. 368, 9 L.Ed.2d 821.

Davis v. Synhorst, D.C.Iowa, 217 F.Supp. 492, affd. 84 S.Ct. 1918, 378 U.S. 565, 12 L.Ed.2d 1037, supp. 231 F.Supp. 540.

Exhaustion of administrative remedies

U.S.—Cave v. Beame, D.C.N.Y., 433 F.Supp. 172.

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76. U.S.—Kostohryz v Hursh, D.C.Minn., 329 F.Supp. 319—Serritella v. Engelman, D.C.N.J., 339 F.Supp. 738.

77. **State income tax**

(3) Other cases involving state income taxes where federal court did not have jurisdiction.

U.S.—Gray v. Morgan, C.A.Wis., 371 F.2d 172, cert. den. 87 S.Ct. 1484, 386 U.S 1033, 18 L.Ed.2d 596.

Disputes concerning the correct amounts payable in welfare cases are treated, for jurisdictional purposes, not merely as involving property rights, but some sort of right to exist in society, which is a personal right.[79.5]

79.5. U.S.—Johnson v. Harder, C.A.Conn., 438 F.2d 7.

Wilczynski v. Harder, D.C.Conn., 323 F.Supp. 509.

Additional payments where father unemployed

U.S.—Henry v. Betit, D.C.Alaska, 323 F.Supp. 418.

Measurement of incentive earnings payments

U.S.—Roberson v. Harder, C.A.Conn., 440 F.2d 687.

Deductibility of work-related expenses

U.S.—Campagnuolo v. Harder, C.A.Conn., 440 F.2d 1225.

The Supreme Court of the United State has held that the federal courts have jurisdiction of civil rights action under the statute for deprivation, under color of law, of equal rights, without any distinction between personal liberties and proprietary rights.[79.10]

79.10. U.S.—Lynch v. Household Finance Corporation, 92 S.Ct. 1113, 405 U.S. 538, 31 L.Ed.2d 424, reh. den. 92 S.Ct. 1611, 406 U.S. 911, 31 L.Ed.2d 822, on remand 360 F.Supp. 720.

Koelfgen v. Jackson, D.C.Minn., 355 F.Supp. 243, affd. 93 S.Ct. 1502, 410 U.S. 976, 36 L.Ed.2d 173.

Loss of pension

U.S.—Kabelka v. City of New York, D.C.N.Y., 353 F.Supp. 7.

80.5. U.S.—Norlander v. Schleck, D.C.Minn., 345 F.Supp. 595.

80.10. U.S.—Adams v. Egley, D.C.Cal., 338 F.Supp. 614, affd. in part, revd. in part on oth. grds., C.A., 492 F.2d 324.

Mont.—Ham v. Holy Rosary Hospital, 529 P.2d 361, 165 Mont. 369.

Governmental powers of Indian tribe

(2) Other statements.

U.S.—Spotted Eagle v. Blackfeet Tribe of Blackfeet Indian Reservation, City of Browning, D.C.Mont., 301 F.Supp. 85.

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80.15. U.S.—Koch v. Zuieback, D.C.Cal., 194 F.Supp. 651, affd., C.A., 316 F.2d 1.

80.20. U.S.—Stinson v. Finch, D.C.Ga., 317 F.Supp. 581.

Kan.—Thomas v. Dudrey, 494 P.2d 1039, 208 Kan. 684.

80.25. U.S.—Farkas v. Texas Instrument, Inc., C.A. Tex., 375 F.2d 629, cert. den. 88 S.Ct. 480, 389 U.S. 977, 19 L.Ed.2d 471—Chicago Joint Bd., Amalgamated Clothing Workers of America, AFL–CIO v. Chicago Tribune Co., C.A.Ill., 435 F.2d 470, cert. den. 91 S.Ct. 1662, 402 U.S. 973, 29 L.Ed.2d 138.

Spampinato v. M. Breger & Co., D.C.N.Y., 166 F.Supp. 33, rearg. den. 176 F.Supp. 278—Counts v. Voorhees College, D.C.S.C., 312 F.Supp. 598, affd., C.A., 439 F.2d 723—Driscoll v. International Union of Operating Engineers, Local No. 139, D.C. Wis., 339 F.Supp. 757, affd., C.A., 484 F.2d 682, cert. den. 94 S.Ct. 1490, 415 U.S. 960, 39 L.Ed.2d 575.

80.30. U.S.—Lasher v. Shafer, C.A.Pa., 460 F.2d 343.

Palmer v. Columbia Gas Co. of Ohio, D.C.Ohio, 342 F.Supp. 241, affd., C.A., 479 F.2d 153—Brown v. U.S., D.C.Ark., 342 F.Supp. 987, affd. in part, revd. in part on oth. grds., C.A., 486 F.2d 284, on remand 374 F.Supp. 723.

80.35. U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

Cullen v. New York State Civil Service Commission, D.C.N.Y., 435 F.Supp. 546, app. dism. C.A., 566 F.2d 846.

Appointed counsel

U.S.—Jackson v. Hader, D.C.Mo., 271 F.Supp. 990.

80.40. U.S.—Leopold v. Young, D.C.Vt., 340 F.Supp. 1014—Wood v. Breier, D.C.Wis., 54 F.R.D. 7.

Patently unlawful behavior

U.S.—Ayala v. District 60 School Bd. of Pueblo, Colo., D.C.Colo., 327 F.Supp. 980.

80.55. U.S.—German v. Schmidt, D.C.Wis., 330 F.Supp. 480.

Perjury

U.S.—Tyler v. Parks, D.C.Mo., 331 F.Supp. 346.

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80.60. U.S.—Jordan v. Hutcheson, C.A.Va., 323 F.2d 597—Burnett v. Short, C.A.Tex., 441 F.2d 405, app. after remand 485 F.2d 1249.

Great Lakes Inter-Tribal Council, Inc. v. Voigt, D.C.Wis., 309 F.Supp. 60—Davis v. Weir, D.C. Ga., 328 F.Supp. 317.

§ 29. Cases Arising under Treaties of United States

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81. U.S.—Vergara v. Aeroflot "Soviet Airlines", (General Dept. of Intern. Air Services, Union of Soviet Socialistic Republics), D.C.Neb., 390 F.Supp. 1266.

Treaty not involved

U.S.—Littell v. Nakai, C.A.Ariz., 344 F.2d 486, cert. den. 86 S.Ct. 531, 382 U.S. 986, 15 L.Ed.2d 474—Buechold F. Ortiz, C.A.Cal., 401 F.2d 371.

Leech Lake Citizens Committee v. Leech Lake Band of Chippewa Indians, D.C.Minn., 355 F.Supp. 697.

International civil aviation convention

U.S.—Aerovias Interamericanas De Panama, S.A. v. Board of County Com'rs of Dade County, Fla., D.C.Fla., 197 F.Supp. 230, revd. on oth. grds., C.A., 307 F.2d 802, cert. den. 83 S.Ct. 543, 371 U.S. 961, 9 L.Ed.2d 510, reh. den. 83 S.Ct. 872, 372 U.S. 932, 9 L.Ed.2d 736.

"Tort" within statute relating to aliens

U.S.—Abdul-Rahman Omar Adra v. Clift, D.C.Md., 195 F.Supp. 857.

Paramount jurisdiction

U.S.—U.S. v. State of Wash., D.C.Wash., 459 F.Supp. 1020, affd., C.A., 645 F.2d 749.

Under Warsaw Convention

U.S.—Greenwald v. Pan American World Airways, Inc., D.C.N.Y., 547 F.Supp. 159.

81.10. U.S.—Ortman v. Stanray Corp., C.A.Ill., 371 F.2d 154—Smith v. Canadian Pac. Airways, Limited, C.A.N.Y., 452 F.2d 798.

Oliver v. Veterans Administration, D.C.Puerto Rico, 519 F.Supp. 112.

Plaintiff's status as friendly nation having treaty relations with United States insufficient

U.S.—Republic of Iraq v. First Nat. Bank of Chicago, C.A.Ill., 350 F.2d 645, cert. den. 86 S.Ct. 556, 382 U.S. 982, 15 L.Ed.2d 556.

81.15. U.S.—Dreyfus v. Von Finck, 534 F.2d 24, cert. den. 97 S.Ct. 102, 429 U.S. 835, 50 L.Ed.2d 101.

Kenai Oil and Gas, Inc. v. Dept. of Interior, D.C.Utah, 522 F.Supp. 521, affd. and remd. C.A., 671 F.2d 383.

81.20. U.S.—Aleut League v. Atomic Energy Commission, D.C.Alaska, 337 F.Supp. 534.

81.25. D.C.—Hanoch Tel-Oren v. Libyan Arab Republic, D.C., 517 F.Supp. 542, affd. 726 F.2d 774, 233 U.S. App.D.C. 384, cert. den. 105 S.Ct. 1354, 84 L.Ed.2d 377.

81.30. U.S.—Huckins v. Duval County, Fla., C.A. Fla., 286 F.2d 46, cert. den. 81 S.Ct. 1673, 366 U.S. 945, 6 L.Ed.2d 856.

Baker v. Central & South West Corp., D.C.Okl., 334 F.Supp. 752.

81.35. U.S.—Burat's Heirs v. Board of Levee Com'rs of Orleans Levee Dist. of State of La., C.A.La., 496 F.2d 1336, cert. den. 95 S.Ct. 625, 419 U.S. 1049, 42 L.Ed.2d 644.

Brandtscheit v. Britton, D.C.Cal., 239 F.Supp. 652.

82. U.S.—Upper Lakes Shipping Limited v. International Longshoremen's Ass'n, D.C.N.Y., 33 F.R.D. 348.

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83. U.S.—Pan Am. Petroleum Corp. v. Superior Court of Del. In and For New Castle County, Del., 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341—City of Greenwood, Miss. v. Peacock, Miss., 86 S.Ct. 1800, 384 U.S. 808, 16 L.Ed.2d 944.

Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419, Broth. of Painters and Allied Trades, AFL–CIO v. Brown, C.A.Colo., 656 F.2d 564.

Grabinger v. Conlisk, D.C.Ill., 320 F.Supp. 1213, affd., C.A., 455 F.2d 490—Confederated Housing Associates, Inc. v. Department of Housing & Urban Development, D.C.Ark., 538 F.Supp. 115R

Tort or contract cases

U.S.—Mullins v. First Nat. Exchange Bank of Vi D.C.Va., 275 F.Supp. 712.

Suit instituted by state

U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 138 406 U.S. 91, 31 L.Ed.2d 712.

State of Tex. v. Pankey, C.A.N.M., 441 F.2d 23

Statute does not create substantive cause action

U.S.—Brown v. U.S., D.C.Ark., 342 F.Supp. 987, af in part, revd. in part on oth. grds., C.A., 486 F. 284, on remand 374 F.Supp. 723.

83.2. U.S.—Autrey v. Williams & Dunlap, D.C.L 210 F.Supp. 491, affd. in part, revd. in part on ot grds., C.A., 343 F.2d 730, reh. den. 346 F.2d 10(

Dolgow v. Anderson, D.C.N.Y., 43 F.R.D. 4

83.4. U.S.—Seagraves v. Harris, C.A.Ga., 629 F. 385.

Table Talk Pies of Westchester v. Strauss, D. N.Y., 237 F.Supp. 514—Frenkel v. W.U. Tel. C D.C.Md., 327 F.Supp. 954.

83.6. U.S.—Stokes v. Adair, C.A.Va., 265 F.2d 6 cert. den. 80 S.Ct. 56, 361 U.S. 816, 4 L.Ed.2d

83.8. U.S.—Association for the Preservation of Fr dom of Choice, Inc. v. Simon, C.A.N.Y., 299 F. 212—Foster v. Herley, C.A.Mich., 330 F.2d

Strauss v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, D.C.Pa., 179 F.Supp. 297.

Case presenting attack on administration rahter than validity of state statute held not to involve federal question.

U.S.—Kortz v. Ellingson, D.C.Colo., 181 F.Supp. 857.

Rules adopted by Congressional committee to protect witnesses

U.S.—Randolph v. Willis, D.C.Cal., 220 F.Supp. 355.

Judicial decisions as well as congressional legislation included

U.S.—Ivy Broadcasting Co. v. American Tel. & Tel. Co., C.A.N.Y., 391 F.2d 486.

A federal common law right has been held to be one arising under the laws of the United States within the statute.[83.9]

83.9. U.S.—Illinois v City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L Ed 2d 712.

Prescription Plan Service Corp. v. Franco, C A. N.Y., 552 F.2d 493.

Ecological controversy affecting state

U.S.—State of Tex. v. Pankey, C.A.N.M., 441 F.2d 236.

83.10. U.S.—United Bonding Ins. Co. v. Alexander, C.A.Tex., 413 F.2d 1025.

Coastal States Gas Producting Co. v. Producing Properties, Inc., D.C.Tex., 203 F.Supp. 956—Quarles v. State of Tex., D.C.Tex., 312 F.Supp. 835—Latch v. Tennessee Val. Authority, D.C. Miss., 312 F.Supp. 1069—Tape Industries Ass'n of America v. Younger, D.C.Cal., 316 F.Supp. 340, app. dism. 91 S.Ct. 880, 401 U.S. 902, 27 L.Ed.2d 801.

Careful analysis required

U.S.—Barnett v. Anaconda Co., D.C.N.Y., 238 F.Supp. 766.

83.12. Failure to state claim

D.C.—Payne v. Government of Dist. of Columbia, C.A., 559 F.2d 809, 182 U.S.App.D.C. 188.

83.14. U.S.—United Mine Workers of America v. Gibbs, Tenn., 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed.2d 218.

Jurisdiction lacking

U.S.—McCall v. Shapiro, C.A.2, 416 F.2d 246.

Kelley v. Shapiro, D.C.Conn., 305 F.Supp. 855, affd., C.A., 417 F.2d 1338.

83.16. U.S.—Pan Am. Petroleum Corp. v. Superior Court of Del. In and For New Castle County, Del., 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed.2d 663, on remand, 206 F.Supp. 341.

Johnson v. City of Arcadia, Fla., D.C.Fla., 450 F.Supp. 1363.

Jurisdiction not conferred by criminal statutes

U.S.—Daviditis v. National Bank of Mattoon, C.A.Ill., 262 F.2d 884, cert. den. 79 S.Ct. 1150, 359 U.S. 1012, 3 L.Ed.2d 1037, reh. den. 79 S.Ct. 1447, 360 U.S. 940, 3 L.Ed.2d 1552.

(2) Other matters.

U.S.—Hanna v. Home Ins. Co., C.A.Tex., 281 F.2d 298, cert. den. 81 S.Ct. 751, 365 U.S. 838, 5 L.Ed.2d 747, reh. den. 81 S.Ct. 1905, 366 U.S. 955, 6 L.Ed.2d 1247.

Van Daele v. Vinci, D.C.Ill., 294 F.Supp. 71.

Mere violation of union by-law held not to give rise to federal cause of action.

U.S.—Guarnaccia v. Kenin, D.C.N.Y., 234 F.Supp. 429, affd., C.A., 339 F.2d 371—Gurton v. Manuti, D.C.N.Y., 235 F.Supp. 50.

Price-Anderson Act elements not essential

U.S.—Stibitz v. General Public Utilities Corp., C.A.Pa., 746 F.2d 993, cert. den. 105 S.Ct. 1187, 84 L.Ed.2d 334, superceding In re Three Mile Island Litigation, 87 F.R.D. 433.

Violation of Food, Drug and Cosmetic Act

U.S.—Powell v. Kull, D.C.Pa., 329 F.Supp. 193.

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83.18. U.S.—Smith v. Commanding Officer, Air Force Accounting and Finance Center, C.A.Cal., 555 F.2d 234.

Guthrie v. Alabama By-Products Co., D.C.Ala., 328 F.Supp. 1140, affd., C.A., 456 F.2d 1294, cert. den. 93 S.Ct. 1352, 410 U.S. 956, 35 L.Ed.2d 613, reh. den. 93 S.Ct. 1524, 411 U.S. 910, 36 L.Ed.2d 201.

83.20. U.S.—Jackson Transit Authority v. Local Div. 1285 Amalgamated Transit Union, AFL-CIO-CLC, Tenn., 102 S.Ct. 2202, 457 U.S. 15, 72 L.Ed.2d 639.

Bussey v. Harris, C.A.Ga., 611 F.2d 1001.

New York State Ass'n of Trial Lawyers v. Rockefeller, D.C.N.Y., 267 F.Supp 148—Owens v. New York Cent. R. Co., D C.Ill., 267 F Supp. 252—Congress of Racial Equality (Target City Project) v. Commissioner, Social Sec. Administration, D C. Md., 270 F.Supp. 537—Eickhof Const. Co. v. Great Northern Ry. Co., D.C.Minn., 291 F.Supp. 44—Huftstetler v. Davies, D.C.Ga., 309 F.Supp. 1372—Fernandez-Roque v. Smith, D.C.Ga., 539 F.Supp. 925.

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83.22. U.S.—Salerno v. American League of Professional Baseball Clubs, C.A.N.Y., 429 F.2d 1003, cert. den. 91 S Ct. 462, 400 U.S. 1001, 27 L Ed.2d 452.

National Cold Storage Co. v. Port of New York Authority, D.C.N.Y., 286 F.Supp. 1016.

83.24. U.S.—Pan Am. Petroleum Corp. v. Superior Court of Del. In and For New Castle County, Del., 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584.

Snapp v. U.S. Postal Service-Texarkana Management Sectional Center, C.A.Tex., 664 F.2d 1329.

DeCampli v. Greeley, D.C.N.J., 293 F.Supp. 746—Davidson v. General Finance Corp., D.C.Ga., 295 F.Supp. 878.

Indian suing tribal council

U.S.—Lefthand v. Crow Tribal Council of Crow Tribe of Indians of Mont., D.C.Mont., 329 F.Supp. 728.

Justiciable controversy; special damages

U.S.—Greater Hartford Free Bridge Ass'n v. Greater Hartford Bridge Authority, D.C.Conn., 172 F.Supp. 244, affd., C.A., 265 F.2d 656.

Executive orders

U.S.—Dreyfus v. Von Finck, 534 F.2d 24, cert. den. 94 S.Ct. 102, 429 U.S. 835, 50 L.Ed.2d 101.

83.26. U.S.—Insley v. Joyce, D.C.Ill., 330 F.Supp. 1228—Aleut League v. Atomic Energy Commission, D.C.Alaska, 337 F.Supp. 534.

83.28. U.S.—Fairfax Countywide Citizens Ass'n v. Fairfax County, Va., C.A.Va., 571 F.2d 1299, cert. den. 99 S.Ct. 722, 439 U.S. 1047, 58 L.Ed.2d 706.

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83.30. Violation of federal criminal statute, etc.

(2) Held not alone sufficient.

U.S.—Oppenheim v. Sterling, C.A.Colo., 368 F.2d 516, cert. den. 87 S.Ct. 1357, 386 U.S. 1011, 18 L.Ed.2d 441, reh. den. 87 S.Ct. 2127, 388 U.S. 925, 18 L.Ed.2d 1380, reh. den. 88 S.Ct. 757, 389 U.S. 1059, 19 L.Ed.2d 861.

Power of courts to afford remedies

U.S.—Brewer v. Hoxie School Dist. No. 46 of Lawrence County, Ark., C.A.Ark., 238 F.2d 91.

83.32. U.S.—Dreyfus v. Von Finck, 534 F.2d 24, cert. den. 97 S.Ct. 102, 429 U.S. 835, 50 L.Ed.2d 101.

83.34. U.S.—Fairfax Countywide Citizens Ass'n v. Fairfax County, Va., C.A.Va., 571 F.2d 1299, cert. den. 99 S.Ct. 722, 439 U.S. 1047, 58 L.Ed.2d 706.

Wells v. Wells, D.C.Ky., 240 F.Supp. 282—Lutz v. U.S. Postal Service, D.C.N.Y., 538 F.Supp. 1129.

83.36. U.S.—Beck v. Miriani, C.A.Mich., 293 F.2d 333.

Only applies when property rights are involved

U.S.—Clayton v. Shaw, C.A.Tex., 548 F.2d 1155, cert. den. 98 S.Ct. 220, 434 U.S. 873, 54 L.Ed.2d 153.

Social Security Act bars action by medicare provider

U.S.—Hadley Memorial Hosp., Inc. v. Schweiker, C.A. Kan., 689 F.2d 905.

Action challenging determination of medicare provider not federal question

U.S.—Americana Healthcare Corp. v. Schweiker, C.A. Ind., 688 F.2d 1072, cert. den. 103 S.Ct. 1187, 459 U.S. 1202, 75 L.Ed.2d 434.

83.38. U.S.—U.S. for Use and Benefit of Empire Plastics Corp. v. Western Cas. & Sur. Co., C.A. Colo., 429 F.2d 905—Merrill Tenant Council v. U.S. Dept. of Housing and Urban Development (HUD), C.A.Ill., 638 F.2d 1086.

Bryant v. Donnell, D.C.Tenn., 239 F.Supp. 681—Brown v. State Realty Co., D.C.Ga., 304 F.Supp. 1236—Kois v. Breier, D.C.Wis., 312 F.Supp. 19—Loncassion v. Leekity, D.C.N.M., 334 F.Supp. 282—Lutz v. U.S. Postal Service, D.C.N.Y., 538 F.Supp. 1129.

La.—Pool v. Kemper Ins. Group, App., 386 So.2d 1006, writ ref., Sup., 391 So.2d 456.

Capehart Act

U.S.—Continental Cas. Co. v. Allsop Lumber Co., C.A. Mo., 336 F 2d 445, cert. den. 85 S.Ct. 662, 379 U.S. 968, 13 L.Ed.2d 561.

Department of Agriculture Appropriation Act

U.S.—Adams v. Greeson, C.A.Okl., 300 F.2d 555.

Jurisdiction lacking under Hill-Burton Act

U.S.—Don v. Okmulgee Memorial Hospital, C.A.Okl., 443 F.2d 234.

Rogers v. Provident Hospital, D.C.Ill., 241 F.Supp. 633.

National Environmental Policy Act

U.S.—Olivares v. Martin, C.A.Tex., 555 F.2d 1192.

Sierra Club v. Froehlke, D.C.Tex., 359 F.Supp. 1289.

Jurisdiction lacking under Idaho Admission Act

U.S.—State of Idaho ex rel. Moon v. State Bd. of Examiners, C.A.Idaho, 567 F.2d 858, cert. den. 98 S.Ct. 3144, 438 U.S. 915, 57 L.Ed.2d 1160.

Northwest Ordinance

U.S.—Swimming Turtle v. Board of County Com'rs of Miami County, D.C.Ind., 441 F.Supp. 374.

Occupational Safety and Health Act

U.S.—Marshall v. Reinhold Const., Inc., D.C.Fla., 441 F.Supp. 685.

Truth in Lending Act

U.S.—Brame v. Ray Bills Finance Corp., D.C.N.Y., 85 F.R.D. 568.

Privacy Act

U.S.—Parks v. U.S. Internal Revenue Service, C.A. Kan., 618 F.2d 677.

Federal Trade Commission Act

D.C.—Association of Nat. Advertisers, Inc. v. F.T.C., C.A., 617 F.2d 611, 199 U.S.App.D.C. 29.

Legal Services Corporation Act

U.S.—San Juan Legal Services, Inc. v. Legal Services Corp., C.A.Puerto Rico, 655 F.2d 434.

Jurisdiction lacking under Atomic Energy Act

U.S.—UNC Resources, Inc. v. Benally, D.C.Ariz., 518 F.Supp. 1046.

Jurisdiction lacking under Comprehensive Employment and Training Act

U.S.—Consortium of Community Based Organizations v. Donovan, D.C.Cal., 530 F.Supp. 520.

84. U.S.—Rizzo v. Goode, 96 S.Ct. 598, 423 U.S. 362, 46 L.Ed.2d 561.

Fountain v. Metropolitan Atlantic Rapid Transit Authority, C.A.Ga., 678 F.2d 1038.

Martarella v. Kelley, D.C.N.Y., 349 F.Supp. 575, op. supp. 359 F.Supp. 478—Fell v. Armour, D.C. Tenn., 355 F.Supp. 1313—Partido Nuevo Progresista v. Gerineldo Barreto Perez, D.C.Puerto Rico,

507 F.Supp. 1164, revd. on oth grds. 639 F.2d 825, cert. den. 101 S.Ct. 2318, 451 U.S. 985, 68 L.Ed.2d 842—Arko v Broom, D C.Colo., 518 F.Supp. 669.

Roberson v. Great Am. Ins. Companies of New York, D.C.Ga., 48 F R.D. 404.

Ind —Riner v. Raines, 409 N E 2d 575, 274 Ind 113.

Federal court held without jurisdiction under circumstances

U.S.—Aldinger v. Howard, 96 S.Ct. 2413, 427 U.S. 1, 49 L.Ed.2d 276.

Counts v. Voorhees College, D.C.S.C., 312 F.Supp. 598, affd., C.A., 439 F.2d 723—Male v. Crossroads Associates, D C N.Y., 320 F Supp 141.

D.C.—Brown v. Turner, D.C., 490 F.Supp. 939, affd. 659 F.2d 1199, 212 U.S.App.D.C. 315.

State limit of damages immaterial

U.S.—Salazar v. Dowd, D.C.Colo., 256 F Supp. 220.

Statute confers equitable power to enforce constitutional rights

U.S.—Krahm v. Graham, C.A.Ariz., 461 F.2d 703.

Statute construed

U.S.—Johnson v. Ryder Truck Lines, Inc, C.A.N.C., 575 F.2d 471, cert. den. 99 S.Ct. 1785, 440 U.S 979, 60 L.Ed 2d 239.

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97.5. D.C.—Joseph v. U.S. Civil Service Commission, C.A., 554 F.2d 1140, 180 U.S.App.D.C. 281.

Held not to arise under federal law

U.S.—Florida Federal Sav. and Loan Ass'n v. Bauer, D.C.Fla., 515 F.Supp. 869, affd. C.A., 707 F.2d 1217.

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97.10. U.S.—Congress of Racial Equality (Target City Project) v. Commissioner, Social Sec. Administration, D C.Md., 270 F.Supp. 537.

97.50. U.S.—Andrus v. Charlestone Stone Products Co., Inc., Nev., 98 S.Ct. 2002, 436 U.S. 604, 56 L.Ed.2d 570.

L & E Co. v. U.S.A. ex rel. Kaiser Gypsum Co., C.A.Cal., 351 F.2d 880.

Anaconda Co. v. Ruckelshaus, D.C.Colo., 352 F.Supp. 697.

Limitations on application of statute

U.S.—U.S. for Use and Benefit of Central Rigging & Contracting Corp. v. Paul Tishman Co., D.C.N.Y., 32 F.R.D. 223.

Clean Air Act

U.S. v. Town of North Hempstead, C.A.N.Y., 610 F.2d 1025.

City of Chicago v. General Motors Corp., D.C. Ill., 332 F.Supp. 285, affd., C.A., 467 F.2d 1262—U.S. Steel Corp. v. Fri, D.C.Ind., 364 F.Supp. 1013.

D.C.—Natural Resources Defense Council, Inc. v. Ruckelshaus, D.C., 359 F.Supp. 1028.

General Allotment Act

U.S.—Yellowfish v. City of Stillwater, C.A.Okl., 691 F.2d 926, cert. den. 103 S.Ct. 2087, 461 U.S. 927, 77 L.Ed.2d 298.

97.55. U.S.—Jamaica Lodge 2188 of Broth. of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. v. Railway Exp. Agency, Inc., D.C. N.Y., 200 F.Supp. 253—U.S. for Use and Benefit of Victory Elec. Corp. v. Maryland Cas. Co., D.C.N.Y., 213 F.Supp. 800, adhered to 215 F.Supp. 700.

D.C.—National Ass'n of Letter Carriers, AFL-CIO v. U.S. Postal Service, D.C., 333 F.Supp. 566.

97.60. U.S.—U.S. for Use and Benefit of Mandel Bros. Contracting Corp. v. P. J. Carlin Const. Co., D.C.N.Y., 254 F.Supp. 637.

97.65. U.S.—Hot Oil Service, Inc. v. Hall, C.A.Ariz., 366 F.2d 295.

Moody v. McDaniel, D.C.Miss., 190 F.Supp. 24—United Elec. Contractors Ass'n v. Ordman, D.C.N.Y., 258 F.Supp. 758, affd., C.A., 366 F.2d 776, cert. den. 87 S.Ct. 753, 385 U.S. 1026, 17 L.Ed.2d 674.

Longshoremen's and Harbor Workers' Compensation Act

D.C.—Turner v. Christian Heurich Brewing Co., C.A., 169 F.2d 681, 83 U.S.App.D C. 333.

Statute as to form and scope of remedy

U.S —Rundle v. Madigan, D.C.Cal., 331 F.Supp. 492, affd., C.A, 458 F.2d 1217, affd. in part revd. in part on oth. grds. 93 S.Ct. 1785, 411 U.S. 693, 36 L.Ed.2d 596, reh. den. 93 S Ct. 2999, 412 U.S. 963, 37 L.Ed.2d 1012.

Resource Conservation and Recovery Act of 1976

D C.—Citizens for a Better Environment v. Costle, C.A., 617 F.2d 851, 199 U S App.D.C. 269.

Packers and Stockyards Act

U.S.—De Jong Packing Co. v. U.S. Dept. of Agriculture, C.A., 618 F.2d 1329, cert. den. 101 S.Ct. 783, 449 U.S. 1061, 66 L.Ed.2d 603.

Buy American Act

U.S.—Allis-Chalmers Corp. v. Arnold, C.A.Or., 619 F.2d 44.

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97.70. U.S.—Springdale Convalescent Center v. Mathews, C.A.Ga., 545 F 2d 943.

Miller Act

U.S.—Lasley v. U.S., for Use of Westerman, C.A.Tex., 285 F.2d 98—Autrey v. Williams and Dunlap, C.A.La., 343 F.2d 730, reh. den. 346 F.2d 1007

U.S , to Use of Monahan Insulation Co. v. Acme Missiles & Const. Corp., D.C.Pa., 221 F.Supp. 733—U.S. for Use of West Pac. Sales Co. v. Harder Indus. Contractors, Inc., D.C Or., 225 F.Supp. 699—U.S. for Use and Benefit of Sligh v. Fullerton Const. Co., D.C.S.C., 296 F.Supp. 518, affd. 407 F.2d 1339.

D C.—U.S. to Use and Benefit of Bailey-Lewis-Williams of Florida, Inc. v Peter Kiewit Sons Co. of Canada Limited, D.C., 195 F.Supp. 752, affd., C.A., 299 F.2d 930, 112 U.S.App.D.C. 99.

Immigration and Nationality Act

U.S.—Abiodun v. Martin Oil Service, Inc., C.A.Ill., 475 F.2d 142, cert. den. 94 S.Ct. 57, 414 U.S. 866, 38 L.Ed.2d 86.

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U.S.—Gage v. Commonwealth Edison Co., D.C.Ill., 356 F.Supp. 80.

National Housing Act

U.S.—People's Rights Organization v. Bethlehem Associates, D.C.Pa., 356 F.Supp. 407, affd., C.A., 487 F.2d 1395.

97.75. U.S.—Gomez v. Florida State Employment Service, C.A.Fla., 417 F.2d 569.

98. U.S.—National Ass'n of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc., C.A.Okl., 470 F.2d 265.

Franking privileges of congressmen

U.S.—Hoellen v. Annunzio, D.C.Ill., 348 F.Supp. 305, affd., C.A., 468 F.2d 522, cert. den. 93 S.Ct. 3001, 412 U.S. 953, 37 L.Ed.2d 1006—Schiaffo v. Helstoski, D.C.N.J., 350 F.Supp. 1076. Affd. in part, revd. in part on oth. grds., C.A., 492 F.2d 413.

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1.5. U.S.—Martinez v. Bell, D.C.N.Y., 468 F.Supp. 719.

1.10. U.S.—City of Charlotte v. Local 660, Intern. Ass'n of Firefighters, 96 S.Ct. 2036, 426 U.S. 283, 48 L.Ed.2d 636—Wooley v. Maynard, N.H., 97 S.Ct. 1428, 430 U.S. 705, 51 L.Ed.2d 752.

Redd v. Lambert, C.A.Miss., 674 F.2d 1032.

Amoco Oil Co. v. Local 99, Intern. Broth. of Elec. Workers, AFL-CIO, D.C.R.I., 536 F.Supp. 1203.

D.C.—Common Cause v. Democratic Nat. Committee, D.C., 333 F.Supp. 803.

By virtue of Civil Rights Act of 1960 district court has jurisdiction of action against state relating to voting rights of negro citizens in a certain county.

U.S —U S. v. State of Ala., Ala., 80 S.Ct. 924, 362 U.S. 602, 4 L.Ed.2d 982, reh. den. 80 S.Ct. 1608, 363 U S. 857, 4 L.Ed.2d 1739.

Jurisdiction held lacking in action brought by white persons

U S —Perkins v Banster, D.C.Md., 190 F.Supp. 98, affd., C.A., 285 F 2d 426.

Where defendants are federal officers acting under federal and not state law

U.S.—Perkins v. Banster, D.C Md., 190 F.Supp 98, affd., C.A., 285 F.2d 426.

Ordinary private wrongs not included

U.S.—Rosee v. Board of Trade of City of Chicago, C.A.Ill., 311 F.2d 524, cert. den. 83 S.Ct. 1693, 374 U.S. 806, 10 L.Ed.2d 1031.

Niklaus v. Simmons, D.C.Neb., 196 F.Supp. 691.

Action against city and its officials

U.S.—U.S. v. City of Jackson, Miss., C.A.Miss., 318 F.2d 1, reh. den. 320 F.2d 870.

Dr. Martin Luther King, Jr. Movement Inc. v. City of Chicago, D.C.Ill., 435 F.Supp. 1289.

Actions not involving civil rights not included.

U.S.—Swift v. Fourth Nat. Bank of Columbus, Ga., D.C.Ga., 205 F.Supp. 563.

Claim held not within purview of court's civil rights jurisdiction

U.S.—Doe v. Pringle, C.A.Colo., 550 F.2d 596, cert. den. 97 S.Ct. 2179, 431 U.S. 916, 53 L.Ed.2d 227.

Sokol v. University Hospital, Inc., 402 F.Supp. 1029.

Controversy between colored persons not within jurisdiction.

U.S.—Reed v. Pearson, C.A.Ala., 306 F.2d 690.

Sufficiency or pleading immaterial

U S.—York v. Story, C.A.Cal., 324 F.2d 450, cert. den. 84 S.Ct. 794, 376 U.S. 939, 11 L.Ed.2d 659.

Controversy held not to involve civil rights

U.S.—Oklahoma High School Athletic Ass'n v. Bray, C.A.Okl., 321 F.2d 269.

Pendent jurisdiction declined where federal claim dismissed

U.S.—Vechiola v. City of Chicago, D.C.Ill., 244 F.Supp. 45.

No distinction between rights "secured" by, "arising under", or "protected" by Constitution

U.S.—Joe Louis Milk Co. v. Hershey, D.C.Ill., 243 F.Supp. 351.

No distinction between human and property rights

U.S.—Joe Louis Milk Co. v. Hershey, D.C.Ill., 243 F.Supp. 351.

Hospitals not included

U.S.—Rogers v. Provident Hospital, D.C.Ill., 241 F.Supp. 633.

Proper regard for rightful independence of state action

U.S.—Sarisohn v. Appellate Division, Second Dept., Supreme Court of State of N.Y., D.C.N.Y., 265 F.Supp. 455.

Statute aimed at questions of personal liberty rather than property matters

U.S.—McCall v. Shapiro, 416 F.2d 246.

Social Security Act not civil rights statute

U.S.—McCall v. Shapiro, C.A.Conn., 416 F.2d 246.

Suspension of police officer

U.S.—Flynn v. Giarrusso, D.C.La., 321 F.Supp. 1295.

Exhaustion of administrative remedies

U.S.—Eisen v. Eastman, C.A.N.Y., 421 F.2d 560, cert. den. 91 S.Ct. 82, 400 U.S. 841, 27 L.Ed.2d 75.

Bessette v. Malloy, D.C.Vt., 325 F.Supp. 506.

Discrimination based on sex

U.S.—Eslinger v. Thomas, D.C.S.C., 340 F.Supp. 886, affd. in part, revd. in part on oth. grds., C.A., 476 F.2d 225—H. Kessler & Co. v. Equal Employment Opportunity Commission, D.C.Ga., 53 F.R.D. 330,

affd., C.A., 468 F.2d 25, affd. in part, revd. in part on oth. grds. 472 F.2d 1147, cert. den. 93 S.Ct. 2774, 412 U.S. 939, 37 L.Ed.2d 398.

Discriminatory assessments

U.S.—Jones v. North Bergen Tp., D.C.N.J., 331 F.Supp. 1281.

Jurisdiction lacking

U.S.—Jacobson v. Tahoe Regional Planning Agency, C.A.Cal., 566 F.2d 1353, affd. in part, revd. in part on oth. grds., 99 S.Ct. 1171, 440 U.S. 391, 59 L.Ed.2d 401, on remand, D.C., 474 F.Supp. 901.

Prohibiting retired judges from practicing law

U.S.—Schwartz v. Judicial Retirement System of New Jersey, D.C.N.J., 584 F.Supp. 711.

1.15. U.S.—Gonzalez v. Young, N.J., 99 S.Ct. 1905, 441 U.S. 600, 60 L.Ed.2d 508.

Harrison v. Brooks, C.A.Mass., 446 F.2d 404, app. after remand 519 F.2d 1358.

U.S. v. Bibb County Democratic Executive Committee, D.C.Ga., 222 F.Supp. 493—Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, D.C.Md., 226 F.Supp. 80—Gaunt v. Brown, D.C.Ohio, 341 F.Supp. 1187, affd. 93 S.Ct. 69, 409 U.S. 809, 34 L.Ed.2d 71.

Actions not involving civil rights not included

U.S.—Olan Mills, Inc. of Tenn. v. Opelika, Ala., D.C. Ala., 207 F.Supp. 332—Gremillion v. Rinaudo, D.C.La., 325 F.Supp. 375.

Under Social Security Act

U.S.—Carter v. Stanton, Ind., 92 S.Ct. 1232, 405 U.S. 669, 31 L.Ed.2d 569. On remand 350 F.Supp. 1337, vac. on oth. grds. 94 S.Ct. 1916, 416 U.S. 918, 40 L.Ed.2d 276, and 94 S.Ct. 1917, 416 U.S. 918, 40 L.Ed.2d 277.

There is no distinction between personal liberties and proprietary rights as a guide to jurisdiction under the statute.[1.16]

1.16. U.S.—Lynch v. Household Finance Corp., Conn., 92 S.Ct. 1113, 405 U.S. 538, 31 L.Ed.2d 424, reh. den. 92 S.Ct. 1611, 406 U.S. 911, 31 L.Ed.2d 822, on remand 360 F.Supp. 720.

Gilliard v. Craig, D.C.N.C., 331 F.Supp. 587, affd. 93 S.Ct. 39, 409 U.S. 807, 34 L.Ed.2d 66, reh. den. 93 S.Ct. 892, 409 U.S. 1119, 34 L.Ed.2d 704—McClellan v. University Heights, Inc., D.C. R.I., 338 F.Supp. 374.

See also supra § 28b.

1.20. U.S.—Jones v. Alfred H. Mayer Co., Mo., 88 S.Ct. 2186, 392 U.S. 409, 20 L.Ed.2d 1189.

Dodge v. Nakai, D.C.Ariz., 298 F.Supp. 17—Adams v. City of Colorado Springs, D.C.Colo., 308 F.Supp. 1397, affd. 90 S.Ct. 2197, 399 U.S. 901, 26 L.Ed.2d 555, reh. den. 91 S.Ct. 25, 400 U.S. 855, 27 L.Ed.2d 93—Local 858 of Am. Federation of Teachers v. School Dist. No. 1 in Denver County, State of Colo., D.C.Colo., 314 F.Supp. 1069—Mini Cinema 16 Inc. of Fort Dodge v. Habhab, D.C. Iowa, 326 F.Supp. 1162.

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1.25. U.S.—Redding v. Pate, D.C.Ill., 220 F.Supp. 124—Luttrell v. Douglas, D.C.Ill., 220 F.Supp. 278—Jackson v. Martin, D.C.Miss., 261 F.Supp. 902 Mini Cinema 16 Inc. of Fort Dodge v. Habhab, D.C.Iowa, 326 F.Supp. 1162—Janda v. State, D.C.Ill., 348 F.Supp. 568.

Provision deals with subject matter, not person

U.S.—Smith v. Ellington, C.A.Tenn., 348 F.2d 1021, cert. den. 86 S.Ct. 589, 382 U.S. 998, 15 L.Ed.2d 486, reh. den. 86 S.Ct. 1207, 383 U.S. 954, 16 L.Ed.2d 216.

1.50. U.S.—Pain v. United Technologies Corp., C.A., 637 F.2d 775, 205 U.S.App.D.C. 229, cert. den. 102 S.Ct. 980, 454 U.S. 1128, 71 L.Ed.2d 116.

O. F. Shearer & Sons, Inc. v. Decker, D.C.W. Va., 349 F.Supp. 1214—U.S. v. U.S. Steel Corp., D.C.Ill., 356 F.Supp. 556.

Suit for injunction against picketing of vessel not within admiralty

U.S.—Marine Cooks & Stewards, AFL v. Panama S.S. Co., C.A.Wash., 265 F.2d 780, reh. den. 268 F.2d 935, revd. on oth. grds., 80 S.Ct. 779, 362 U.S. 365, 4 L.Ed.2d 797, reh. den. 80 S.Ct. 1235, 363 U.S. 809, 4 L.Ed.2d 1151.

1.52. U.S.—Karakatsanis v. Conquestador Cia. Nav., S.A., D.C.N.Y., 247 F.Supp. 423—American Mfrs. Mut. Ins. Co. v. Manor Inv. Co., D.C.N.Y., 286 F.Supp 1007.

Not cases under laws

(1) U.S.—Huddleston v. Ohio River Co., C.A.Pa., 328 F.2d 789, cert. den. 85 S.Ct. 122, 379 U.S. 861, 13 L.Ed.2d 64—Spears v. Ohio River Co., C.A.Pa., 406 F.2d 344.

Immigration and Nationality Act

U.S.—Lechich v. Rinaldi, D.C.N.Y., 246 F.Supp. 675.

1.54. U.S.—Mitchell v. Trawler Racer, Inc., C.A. Mass., 265 F.2d 426, revd. on oth. grds., 80 S.Ct. 926, 362 U.S. 539, 4 L.Ed.2d 941.

Walker v. Dravo Corp., D.C.Pa., 210 F.Supp. 386—Testa v. Moore-McCormack Lines, Inc., D.C. N.Y., 229 F.Supp. 154—Cunningham v. Bethlehem Steel Co., D.C.N.Y, 231 F.Supp. 934—American Mfrs. Mut. Inc. Co. v. Manor Inv. Co., D.C.N.Y., 286 F.Supp. 1007.

1.56. U.S.—Grow v. Steel Gas Screw Loraine K, C.A.Mich., 310 F.2d 547—U.S. v. Ray, C.A.Fla., 423 F.2d 16.

Sociedad Armadora Aristomenis Panama, S.A. v. Tri-Coast S.S. Co., D.C.N.Y., 184 F.Supp. 738—Metropolitan Dade County v. One (1) Bronze Cannon, D.C.Fla., 537 F.Supp. 923.

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1.58. Jurisdictional effect of Jones Act

(3) Other statements.

U.S.—Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, D.C.N.Y., 255 F.Supp. 919—Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Authority, D.C.La., 274 F.Supp. 764.

General maritime law claim as pendent

U.S.—McCord v. Moore-McCormack Lines, Inc., D.C. N.Y., 242 F.Supp. 493.

1.60. U.S.—Mitchell v. Trawler Racer Inc., C.A. Mass., 265 F.2d 426, revd. on oth. grds., 80 S.Ct. 926, 362 U.S. 539, 4 L.Ed.2d 941.

1.62. U.S.—Mitchell v. Trawler Racer, Inc., C.A. Mass., 265 F.2d 426, revd. on oth. grds., 80 S.Ct. 926, 362 U.S. 539, 4 L.Ed.2d 941.

1.64. U.S.—Ballard v. Moore-McCormack Lines, Inc., D.C.N.Y., 285 F.Supp. 290.

Distinction between libel in admiralty and law action

(2) U.S.—Leonard v. Liberty Mut. Ins. Co., D.C.Pa., 165 F.Supp. 154, revd. on oth. grds., C.A., 267 F.2d 421.

§ 31. Actions under Revenue Laws

Library References

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1.80. U.S.—Popp v. Eberlein, C.A.Wis., 409 F.2d 309, cert. den. 90 S.Ct. 222, 396 U.S. 909, 24 L.Ed.2d 185—Miller & Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc., C.A.Wyo., 472 F.2d 893.

White v. C. I. R., D.C.Colo., 537 F.Supp. 679

D.C.—Benson v. U.S., C.A., 442 F.2d 1221, 143 U.S. App.D.C. 197.

Statute inapplicable

U.S.—Remis v. U.S., C.A.Mass., 273 F.2d 293.

Film Truck Service, Inc. v. Nixon, D.C.Mich., 216 F.Supp. 77—New York State Ass'n of Trial Lawyers v. Rockefeller, D.C.N.Y., 267 F.Supp. 148.

Act of Congress providing for federal tax liens

U.S.—U.S. v. Coson, C.A.Cal., 286 F.2d 453.

State court action as not prerequisite

U.S.—Salyer Land Co v. Kings County, C.A.Cal., 285 F.2d 481, cert. den. 81 S.Ct. 1094, 366 U.S. 917, 6 L.Ed.2d 241.

Matters held not related to internal revenue within court's jurisdiction

U.S.—Botsford v. Riddell, C.A.Cal., 283 F.2d 298.

Right or immunity created by act must be essential element of plaintiffs case

U.S.—Wolkstein v. Port of New York Authority, D.C. N.J., 178 F.Supp. 209.

Actions or proceedings held within statute as arising under an Act of Congress

U.S.—Arend v. De Masters, D.C.Or., 181 F.Supp. 761—Sonitz v. U.S., D.C.N.J., 221 F.Supp. 762.

Actions or proceedings held not to "arise under Act of Congress" within meaning of statute

U.S.—Wolkstein v. Port of New York Authority, D.C. N.J., 178 F.Supp 209—Leonzal v. Lethert, D.C. Minn., 226 F.Supp. 791.

Action against United States to quiet title to land covered by tax lien

U.S.—U.S. v. Creamer Industries, Inc., C.A.Tex., 349 F.2d 625, cert. den. 86 S.Ct. 434, 382 U.S. 957, 15 L.Ed.2d 361.

Jurisdiction held not shown

U.S.—Escro v. Storage & Cartage, Inc. v. Frontier Distribution Line, Inc., C.A.N.Y., 456 F.2d 182.

Spivak v. U.S., D.C.N.Y., 254 F.Supp. 517, affd., C.A., 370 F.2d 612, cert. den. 87 S.Ct. 1690, 387 U.S. 908, 18 L.Ed.2d 625—Barlow v. Marriott Corp., D.C.Md., 328 F.Supp. 624.

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2. U.S.—Kane v. Burlington Sav. Bank, C.A.Vt., 320 F.2d 545, cert. den. 84 S.Ct. 209, 375 U.S. 912, 11 L.Ed.2d 151.

Taxpayer's suit to establish tax credit not provided by state law for education of children at religious school was held beyond court's jurisdiction.[2.16]

2.16. U.S.—Hickmann v. Wujick, D.C.N.Y., 333 F.Supp. 1221, affd., C.A., 488 F.2d 875.

Under 28 USCA 2463, to the effect that all property detained under revenue law shall be deemed to be in the custody of the law and subject only to the orders of the federal courts, levied property is not placed in the custody of such courts for general adjudicatory purposes,[2.20] whether summary,[2.25] or otherwise.[2.30]

2.20. U.S.—Morris v. U.S., C.A.Mass., 303 F.2d 533, cert. den. 83 S.Ct. 48, 371 U.S. 827, 9 L.Ed.2d 66.

2.25. U.S.—Morris v. U.S., C.A.Mass., 303 F.2d 533, cert. den. 83 S.Ct. 48, 371 U.S. 827, 9 L.Ed.2d 66.

2.30. U.S.—Morris v. U.S., C.A.Mass., 303 F.2d 533, cert. den. 83 S.Ct. 48, 371 U.S. 827, 9 L.Ed.2d 66.

However, there is federal jurisdiction to decide questions concerning nature of operation of government tax liens only when the jurisdictional amount is present.[2.35]

2.35. U.S.—St. Louis Union Trust Co. v. Stone, C.A. Mo., 570 F.2d 833, on remand D.C., 468 F.Supp. 941, affd., C.A., 617 F.2d 1293.

§ 32. Actions Arising under Patent Laws

Library References

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3. U.S.—LeBlanc v. Spector, D.C.Conn., 378 F.Supp. 301.

D.C.—Amerio Contract Plate Freezers, Inc. v. Knowles, C.A., 274 F.2d 590, 107 U.S.App.D.C. 81.

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4. U.S.—Dal-Bac (Pty.), Limited v. Firma Astorwerk Otto Berning & Co., D.C.N.Y., 244 F.Supp. 513.

5. U.S.—Dal-Bac (Pty.), Limited v. Firma Astorwerk Otto Berning & Co., D.C.N.Y., 244 F.Supp. 513.

6. U.S.—Xerox Corp. v. Nashua Corp., D.C.N.Y., 314 F.Supp. 1187—Medtronic, Inc. v. American Optical Corp., D.C.Minn., 327 F.Supp. 1327—Observa-Dome Laboratories, Inc. v. McGraw-Hill, Inc., D.C.Pa., 343 F.Supp. 1030.

D.C.—Railex Corp. v. Joseph Guss & Sons, Inc., D.C., 40 F.R.D. 119, affd., C.A., 382 F.2d 179, 127 U.S.App.D.C. 230.

Suit by exclusive licensee, etc.

U.S.—Research Frontiers Inc. v. Marks Polarized Corp., D.C.N.Y., 290 F.Supp. 725.

Fact that license or contract is claimed as defense, etc.

U.S.—Morpul, Inc. v. Crescent Hosiery Mills, D.C. Tenn., 265 F.Supp. 279.

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7. U.S.—General Tire & Rubber Co. v. Watkins, C.A. Md., 326 F.2d 926, cert. den. 84 S.Ct. 1166, 377 U.S. 909, 12 L.Ed.2d 179.

I.C.E. Corp. v. Armco Steel Corp., D.C.N.Y., 201 F.Supp. 411—JFD Electronics Corp. v. Channel Master Corp., D.C.N.Y., 229 F.Supp. 514—Jones Knitting Corp. v. Morgan, D.C.Pa., 244 F.Supp. 219, revd. on oth grds., C.A., 361 F.2d 451—General Foods Corp. v. Struthers Scientific & Intern. Corp., D.C.Del., 301 F.Supp. 354.

Action held not suit under patent laws under constitutional provision authorizing Congress to grant patents to inventors.

D.C.—North Branch Products, Inc. v. Fisher, D.C., 179 F.Supp. 843, revd. on oth. grds., C.A., 284 F.2d 611, 109 U.S.App.D.C. 182, cert. den. 81 S.Ct. 713, 365 U.S. 827, 5 L.Ed.2d 705.

Claim not patent claim

U.S.—Alco Standard Corp. v. Tennessee Valley Authority, D.C.Tenn., 448 F.Supp. 1175.

Jurisdiction lacking

D.C.—Mead Corp. v. U.S., C.A., 652 F.2d 1050, 209 U.S.App.D.C. 253.

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7.5. Infringement of license

(2) Other matters.

U.S.—James v. Wilborn & Sons, Inc. v. Brandex Tilt Sash, Inc., C.A.Ill., 380 F.2d 44—Imperial Appliance Corp. v. Hamilton Mfg. Co., C.A.Wis., 430 F.2d 185.

7.10. U.S.—Minnesota Automotive, Inc. v. Stromberg Hydraulic Brake & Coupling Co., D.C.Minn., 309 F.Supp. 614.

8. U.S.—Pursche v. Atlas Scraper & Engineering Co., C.A.Cal., 300 F.2d 467, cert. den. 83 S.Ct. 251, 371 U.S. 911, 9 L.Ed.2d 170, reh. den. 83 S.Ct. 499, 371 U.S. 959, 9 L.Ed.2d 507.

Suit for disparaging plaintiff's right to sell product, because of statement that product infringes patent held to confer jurisdiction if some aspect of federal law is essential to plaintiff's success.

U.S.—Ostow & Jacobs, Inc. v. Morgan-Jones, Inc., D.C.N.Y., 180 F.Supp. 38.

9. U.S.—Koratron Co. v. Deering Milliken, Inc., C.A. Cal., 418 F.2d 1314, cert. den. 90 S.Ct. 1692, 398 U.S. [illegible], 26 L.Ed.2d 68—Kysor Indus. Corp. v. Pet, [illegible] C.A.Mich., 459 F.2d 1010, cert. den. 93 S.Ct. 3[illegible]4, 409 U.S. 980, 34 L.Ed.2d 243.

Mo.—Bunting v. McDonnell Aircraft Corp., 522 S.W.2d 161.

Patent incidentally or collaterally involved

U.S.—Muskegon Piston Ring Co. v. Olsen, C.A.Mich., 307 F.2d 85, cert. den. 83 S.Ct. 508, 371 U.S. 952, 9 L.Ed.2d 500.

Action for fraud

(1) U.S.—Cresci v. Music Publishers Holding Corp., D.C.N.Y., 210 F.Supp. 253.

Substantial patent claim

U.S.—O'Brien v. Westinghouse Elec. Corp., C.A.Pa., 293 F.2d 1.

A. H. Emery Co. v. Marcan Products Corp., D.C.N.Y., 268 F.Supp. 289, affd., C.A., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106—American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc., D.C.Pa., 268 F.Supp. 656.

Counterclaim for malicious prosecution and unfair competition

U.S.—Artvale, Inc. v. Rugby Fabrics Corp., D.C.N.Y., 232 F.Supp. 814, affd., C.A., 363 F.2d 1002.

Foreign patents

U.S.—Ortman v. Stanray Corp., C.A.Ill., 371 F.2d 154.

Determined on basis of pleading

U.S.—A. H. Emery Co. v. Marcan Products Corp., D.C.N.Y., 268 F.Supp. 289, affd., C.A., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Additional claim of misappropriation of trade secrets

U.S.—A. H. Emery Co. v. Marcan Products Corp., D.C.N.Y., 268 F.Supp. 289, affd., C.A., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

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10.10. U.S.—Mirarchi v. Porter, D.C.Mass., 355 F.Supp. 330.

10.15. U.S.—Combs v. Plough, Inc., C.A.Tenn., 681 F.2d 469.

Research Frontiers Inc. v. Marks Polarized Corp., D.C.N.Y., 290 F.Supp. 725—Chicago Fittings Corp. v. Howe, D.C.Ill., 309 F.Supp. 625—W. R. Grace & Co. v. Union Carbide Corp., D.C. N.Y., 319 F.Supp. 307.

11. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254—Arvin Industries, Inc. v. Berns Air King Corp., C.A.Ill., 510 F.2d 1070, app. after remand 525 F.2d 182.

American Needle & Novelty Co. v. Schuessler Knitting Mills, Inc., D.C.Ill., 258 F.Supp. 98, affd. in part, revd. in part on oth. grds., C.A., 379 F.2d 376.

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13. U.S.—Tycom Corp. v. Redactron Corp., D.C.Del., 421 F.Supp. 460.

15. U.S.—Tycom Corp. v. Redactron Corp., D.C.Del., 421 F.Supp. 460.

16. U.S.—Lansing Research Corp. v. Sybron Corp., D.C.N.Y., 514 F.Supp. 543.

17. U.S.—Thiokol Chemical Corp. v. Burlington Industries, Inc., C.A.Del., 448 F.2d 1328, cert. den. 92 S.Ct. 284, two cases, 404 U.S. 1019, 30 L.Ed.2d 668.

§ 33. Actions under Copyright Laws

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20.50. U.S.—Time, Inc. v. Manning, C.A.La., 366 F.2d 690—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Lieberman v. Estate of Chayefsky, D.C.N.Y., 535 F.Supp. 90.

Hill & Range Songs, Inc. v. Fred Rose Music, Inc., D.C.N.Y., 58 F.R.D. 185.

Statutory right essential to action

U.S.—Cresci v. Music Publishers Holding Corp., D.C. N.Y., 210 F.Supp. 253.

Purpose of statute

U.S.—American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc., D.C.Pa., 268 F.Supp. 656.

Pendent jurisdiction statute

U.S.—American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc., D.C.Pa., 268 F.Supp. 656.

Jurisdiction not shown

U.S.—Simon & Flynn, Inc. v. Time Inc., C.A.N.Y., 513 F.2d 832.

21. U.S.—Wihtol v. Crow, D.C.Iowa, 199 F.Supp. 682, revd. on oth. grds., C.A., 309 F.2d 777—Time, Inc. v. Manning, C.A.La., 366 F.2d 690.

22. U.S.—Manning v. Time, Inc., D.C.La., 233 F.Supp. 985, affd., C.A., 366 F.2d 690.

27. U.S.—T. B. Harms Co. v. Eliscu, C.A.N.Y., 339 F.2d 823, cert. den. 85 S.Ct. 1534, 381 U.S. 915, 14 L.Ed.2d 435.

Harrington v. Mure, D.C.N.Y., 186 F.Supp. 655—Cresci v. Music Publishers Holding Corp., D.C. N.Y., 210 F.Supp. 253—Muse v. Mellin, D.C.N.Y., 212 F.Supp. 315, affd., C.A., 339 F.2d 888—T. B. Harms Co. v. Eliscu, D.C.N.Y., 226 F.Supp. 337, affd., C.A., 339 F.2d 823, cert. den. 85 S.Ct. 1534, 381 U.S. 915, 14 L.Ed.2d 435.

27.5. U.S.—Cresci v. Music Publishers Holding Corp., D.C.N.Y., 210 F.Supp. 253—Rotardier v. Entertainment Co. Music Group, D.C.N.Y., 518 F.Supp. 919.

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28. U.S.—Cresci v. Music Publishers Holding Corp., D.C.N.Y., 210 F.Supp. 253—T. B. Harms Co. v. Eliscu, D.C.N.Y., 226 F.Supp. 337, affd., C.A., 339 F.2d 823, cert. den. 85 S.Ct. 1534, 381 U.S. 915, 14 L.Ed.2d 435—Elan Associates, Limited v. Quackenbush Music, Limited, D.C.N.Y., 339 F.Supp. 461—Silverstar Enterprises, Inc. v. Aday, D.C.N.Y., 537 F.Supp. 236.

29. U.S.—T. B. Harms Co. v. Eliscu, D.C.N.Y., 226 F.Supp. 337, affd., C.A., 339 F.2d 823, cert. den. 85 S.Ct. 1534, 381 U.S. 915, 14 L.Ed.2d 435.

29.10. U.S.—Peterson System, Inc. v. Morgan, D.C. Pa., 224 F.Supp. 957.

Jurisdiction of other actions in connection with copyright infringement actions has been considered by the courts.[29.25]

29.25. Claim for abuse of confidential relationship where copyright case dismissed

U.S.—Walters v. Shari Music Pub. Corp., D.C.N.Y., 193 F.Supp. 307, app. dism. conditionally, C.A., 298 F.2d 206.

§ 34. Actions Relating to Trade-Marks, Trade-Names, and Unfair Competition

Library References

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30. U.S.—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Apex Beauty Products Mfg. Corp. v. Brown Shoe Co., D.C.N.Y., 209 F.Supp. 73—Smith-Victor Corp. v. Sylvania Elec. Products, Inc., D.C.Ill., 242 F.Supp. 302—Goodyear Tire & Rubber Co. v. H. Rosenthal Co., D.C.Minn., 246 F.Supp. 724—Ulichny v. General Elec. Co., D.C.N.Y., 309 F.Supp. 437.

Test

U.S.—Minute Man of America, Inc. v. Coastal Restaurants, Inc., D.C.Tex., 391 F.Supp 197.

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30.5. U.S.—Sam S. Goldstein Industries, Inc. v. Botany Industries, Inc., D.C.N.Y., 301 F.Supp. 728.

31. U.S.—Hazel Bishop, Inc. v. Perfemme, Inc., C.A. N.Y., 314 F.2d 399, 5 A.L.R.3d 1031.

National Dynamics Corp. v. John Surrey, Limited, D.C.N.Y., 238 F.Supp. 422.

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33. U.S.—R. G. Barry Corp. v. Mushroom Makers, Inc., C.A.N.Y., 612 F.2d 651—Arrow United Industries, Inc. v. Hugh Richards, Inc., C.A.N.Y., 678 F.2d 410.

Miss Universe, Inc. v. Patricelli, D.C.Conn., 271 F.Supp. 104, affd., C.A., 386 F.2d 997—LeFebure Corp. v. Lefebure, Inc., D.C.La., 284 F.Supp. 617—R. F. D. Group Limited v. Rubber Fabricators, Inc., D.C.N.Y., 323 F.Supp. 521.

34. U.S.—Drop Dead Co. v. S. C. Johnson & Son, Inc., C.A.Cal., 326 F.2d 87, cert. den. 84 S.Ct. 1167, 377 U.S. 907, 12 L.Ed.2d 177.

Ju-C-Orange of America v. Kutztown Bottling Works, D.C.Pa., 332 F.Supp. 962.

Intrastate activities affecting interstate commerce

U.S.—Franchised Stores of New York, Inc. v. Winter, C.A.N.Y., 394 F.2d 664.

Use in interstate commerce held shown

U.S.—Harrison Services, Inc. v. Margino, D.C.N.Y., 291 F.Supp. 319.

35. U.S.—Shaffer v. Coty, Inc., D.C.Cal., 183 F.Supp. 662.

Intrastate activities affecting interstate commerce

U.S.—Crossbow, Inc. v. Glovemakers, Inc., D.C.Ill., 265 F.Supp. 202.

Common-law trademark insufficient

(2) U.S.—Apex Beauty Products Mfg. Corp. v. Brown Shoe Co., D.C.N.Y., 209 F.Supp. 73.

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36. U.S.—Silverstar Enterprises, Inc. v. Aday, D.C. N.Y., 537 F.Supp. 236.

37. U.S.—Paul Sachs Originals Co. v. Sachs, D.C. Cal., 217 F.Supp. 407, affd., C.A., 325 F.2d 212—Atlantic Ocean Products, Inc. v. Leth, D.C.Or., 292 F.Supp. 615, affd. 89 S.Ct. 291, 393 U.S. 127, 21 L.Ed.2d 251.

38. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254.

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39. U.S.—Shaffer v. Coty, Inc., D.C.Cal., 183 F.Supp. 662.

39.5. U.S.—Seven-Up Co. v. Blue Note, Inc., C.A.Ill., 260 F.2d 584, cert. den. 79 S.Ct. 878, 359 U.S. 966, 3 L.Ed.2d 835.

Shaffer v. Coty, Inc., D.C.Cal., 183 F.Supp. 662—Kaz Mfg. Co. v. Chesebrough-Pond's, Inc., D.C. N.Y., 211 F.Supp. 815, affd., C.A., 317 F.2d 679—Magna Pictures Corp. v. Paramount Pictures Corp., D.C.Cal., 265 F.Supp. 144—Iding v. Anaston, D.C.Ill., 266 F.Supp. 1015—Vermilion Foam Products Co. v. General Elec. Co., D.C.Mich., 386 F.Supp. 255.

State law governs

U.S.—Corning Glass Works v. Jeannette Glass Co., D.C.N.Y., 308 F.Supp. 1321, affd., C.A., 432 F.2d 784.

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39.15. U.S.—Scotch Whiskey Ass'n v. Barton Distilling Co., D.C.Ill., 338 F.Supp. 595, affd. in part, revd. in part, C.A., 489 F.2d 809.

Interstate or foreign commerce

(4) Other matters.

U.S.—Tiffany & Co. v. Boston Club, Inc., D.C.Mass., 231 F.Supp. 836.

40. U.S.—Coca-Cola Co. v. Foods, Inc., D.C.S.D., 220 F.Supp. 101.

Jurisdiction of related claims

U.S.—Proxite Products, Inc. v. Bonnie Brite Products Corp., D.C.N.Y., 206 F.Supp. 511.

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42. U.S.—Schulman v. Huck Finn, Inc., C.A.Minn., 472 F.2d 864.

Keiser v. High Point Hardware Co., D.C.N.C., 199 F.Supp. 623, revd. on oth. grds., C.A., 311 F.2d 850.

44. U.S.—American Needle & Novelty Co. v. Schuessler Knitting Mills, Inc., D.C.Ill., 258 F.Supp. 98, affd. in part, revd. in part on oth. grds., C.A., 379 F.2d 376.

On dismissal of trade mark cause

U.S.—Hertz Corp. v. Knickerbocker, D.C.N.Y., 206 F.Supp. 305.

46. U.S.—O'Brien v. Westinghouse Elec. Corp., C.A. Pa., 293 F.2d 1—A. H Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Aileen Mills Co. v. Ojay Mills, Inc., D.C.N.Y., 192 F.Supp. 131—Consolidated Vacuum Corp. v. Machine Dynamics, Inc., D.C.Cal., 230 F.Supp. 70.

Pendent jurisdiction

U.S.—Jenn-Air Products Co. v. Penn Ventilator, Inc., D.C.Pa., 283 F.Supp. 591.

Dismissal or transfer of case

U.S.—Fink v. Igoe, C.A.Ill., 279 F.2d 544.

Status of movant for dismissal immaterial

U.S.—Dal-Bac (Pty.), Limited v. Firma Astorwerk Otto Berning & Co., D.C.N.Y., 244 F.Supp. 513.

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47. U.S.—O'Brien v. Westinghouse Elec. Corp., C.A. Pa., 293 F.2d 1—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Travel Magazine, Inc. v. Travel Digest, Inc., D.C.N.Y., 191 F.Supp. 830—Doran v. Sunset House Distributing Corp., D.C.Cal., 197 F.Supp. 940, affd., C.A., 304 F.2d 251—Rosette v. Crown Record Co., D.C.N.Y., 266 F.Supp. 393.

48. U.S.—O'Brien v. Westinghouse Elec. Corp., C.A. Pa., 293 F.2d 1—International Order of Job's Daughters v. Lindeburg and Co., C.A.Cal., 633 F.2d 912, cert. den. 101 S.Ct. 3086, 452 U.S. 941, 69 L.Ed.2d 956.

Pendent jurisdiction

U.S.—Chester Barrie, Limited v. Chester Laurie, Limited, D.C.N.Y., 189 F.Supp. 98.

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49. U.S.—Coca-Cola Co. v. Foods, Inc., D.C.S.D., 220 F.Supp. 101.

Rule applied where unfair competition claim is joined with

(3) U.S.—Chester Barrie, Limited v. Chester Laurie, Limited, D.C.N.Y., 189 F.Supp. 98.

50. Claim not substantial

(3) Other claims.

U.S.—Iding v. Anaston, D.C.Ill., 266 F.Supp. 1015.

50.10. U.S.—Koufakis v. Carvel, C.A.N.Y., 425 F.2d 892.

American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc., D.C.Pa., 268 F.Supp. 656.

Infotronics Corp. v. Varian Associates Corp., D.C.Tex., 45 F.R.D. 91.

Statute based on Hurn v. Oursler

(1) U.S.—American Securit Co. v. Shatterproof Glass Corp., D.C.Del., 166 F.Supp. 813, affd., C.A., 268 F.2d 769, cert. den. 80 S.Ct. 210, 361 U.S. 902, 4 L.Ed.2d 157, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

Substantial character of federal claim

(1) U.S.—American Securit Co. v. Shatterproof Glass Corp., D.C.Del., 166 F.Supp. 813, affd., C.A., 268 F.2d 769, cert. den. 80 S.Ct. 210, 361 U.S. 902, 4 L.Ed.2d 157, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

(2) U.S.—American Securit Co. v. Shatterproof Glass Corp., 166 F.Supp. 813, affd., C.A., 268 F.2d 769, cert. den. 80 S.Ct. 210, 361 U.S. 902, 4 L.Ed.2d 157, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

(3) Other matters.

U.S.—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

Claim for unfair competition held not stated, etc.

U.S.—American Dairy Queen Corp. v. Augustyn, D.C. Ill., 278 F.Supp. 717.

Mere priority of institution of law suits as not conclusive test

U.S.—Telephonics Corp. v. Lindly & Co., D.C.N.Y., 192 F.Supp. 407, affd., C.A., 291 F.2d 445.

Liberal construction required

U.S.—Wham-O-Mfg. Co. v. Paradise Mfg. Co., C.A. Cal., 327 F.2d 748.

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50.15. U.S.—American Foresight of Philadelphia, Inc. v. Fine Arts Sterling Silver, Inc., D.C.Pa., 268 F.Supp. 656.

50.20. U.S.—Rosette v. Crown Record Co., D.C. N.Y., 266 F.Supp. 393.

50.25. U.S.—Fry v. Layne-Western Co., C.A.Mo., 282 F.2d 97—Wham-O-Mfg. Co. v. Paradise Mfg. Co., C.A.Cal., 327 F.2d 748.

Lyon v. General Motors Corp., D.C.Ill., 200 F.Supp. 89.

Requirement as to evidence

(1) U.S.—Channel Master Corp. v. JFD Electronics Corp., D.C.N.Y., 260 F.Supp. 568, rearg. den. 262 F.Supp. 292.

(2) U.S.—American Securit Co. v. Shatterproof Glass Corp., D.C.Del., 166 F.Supp. 813, 824, affd., C.A., 268 F.2d 769, cert. den. 80 S.Ct. 210, 361 U.S. 902, 4 L.Ed.2d 157, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

(3) Other statements.

U.S.—Rosette v. Crown Record Co., D.C.N.Y., 266 F.Supp. 393.

Claims as separate grounds for cause of action

U.S.—American Securit Co. v. Shatterproof Glass Corp., Del., 166 F.Supp. 813, 814, affd., C.A., 268 F.2d 769, cert. den. 80 S.Ct. 210, 361 U.S. 902, 4 L.Ed.2d 157, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

50.30. U.S.—Astor-Honor, Inc. v. Grosset & Dunlap, Inc., C.A.N.Y., 441 F.2d 627.

Northern Music Corp. v. Pacemaker Music Co., D.C.N.Y., 248 F.Supp. 278—Rosette v. Crown Record Co., D.C.N.Y., 266 F.Supp. 393.

Overlapping or intervening in proof required

U.S.—Channel Master Corp. v. JFD Electronics Corp., D.C.N.Y., 260 F.Supp. 568, rearg. den. 262 F.Supp. 292.

50.35. U.S.—Hazel Bishop, Inc. v. Perfemme, Inc., C.A.N.Y., 314 F.2d 399, 5 A.L.R.3d 1031.

Pendent jurisdiction

U.S.—Plum Tree, Inc. v. Seligson, D.C.Pa., 350 F.Supp. 441.

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50.40. U.S.—River Brand Rice Mills, Inc. v. General Foods Corp., C.A.Tex., 334 F.2d 770, cert. den. 85 S.Ct. 716, 379 U.S. 998, 13 L.Ed.2d 700.

Schulman v. Huck Finn, Inc., D.C.Minn., 350 F.Supp. 853, affd., C.A., 472 F.2d 864.

Some proof not germane to patent count

U.S.—American Securit Co. v. Shatterproof Glass Corp., D.C.Del., 166 F.Supp. 813, affd., C.A., 268 F.2d 769, cert. den. 80 S.Ct. 210, 361 U.S. 902, 4 L.Ed.2d 157, reh. den. 80 S.Ct. 584, 361 U.S. 973, 4 L.Ed.2d 553.

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Invalidity of patent as not precluding jurisdiction

U.S.—O'Brien v. Westinghouse Elec. Corp., C.A.Pa., 293 F.2d 1.

50.45. U.S.—Fry v. Layne-Western Co., C.A.Mo., 282 F.2d 97.

Universal Sewing Mach. Co. v. Standard Sewing Equipment Corp., D.C.N.Y., 185 F.Supp. 257.

Proof not relevant; different grievances

U.S.—Peterson System, Inc. v. Morgan, D.C.Pa., 228 F.Supp. 744.

50.50. U.S.—Engelhard Industries, Inc. v. Research Instrumental Corp., C.A.Cal., 324 F.2d 347, cert. den. 84 S.Ct. 1220, 377 U.S. 923, 12 L.Ed.2d 215.

50.60. U.S.—Deltec, Inc. v. Laster, C.A.Ohio, 326 F.2d 443.

Deprivation of jurisdiction of nonfederal claim held not automatic

U.S.—Sunbeam Lighting Co v. Pacific Associated Lighting Inc., C.A.Cal., 328 F.2d 300.

Rule applied as to copyright cases

U.S.—G. P. Putnam's Sons v. Lancer Books, Inc., D.C.N.Y., 251 F.Supp. 210.

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52.5. Compulsory counterclaim

(2) Other instances.

U.S.—Hy-Way Systems, Inc. v. Jadair, Inc., D.C.Wis., 311 F.Supp. 454.

52.10. Premissive counterclaim

(2) U.S.—Hy-Way Systems, Inc. v. Jadair, Inc., D.C. Wis., 311 F.Supp. 454.

52.20. U.S.—Denys Fisher (Spirograph) Limited v. Louis Marx & Co. of W.Va., D.C.W.Va., 306 F.Supp. 956.

Counterclaim held related to patent infringement

U.S.—Hy-Way Systems, Inc. v. Jadair, Inc., D.C.Wis., 311 F.Supp. 454.

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52.20. Compulsory counterclaim subject to federal jurisdiction

U.S.—Koufakis v. Carvel, C.A.N.Y., 425 F.2d 892

52.25. U.S.—Denys Fisher (Spirograph) Limited v. Louis Marx & Co. of W.Va., D.C.W.Va., 306 F.Supp. 956.

52.30. U.S.—Denys Fisher (Spirograph) Limited v. Louis Marx & Co. of W.Va., D.C.W.Va., 306 F.Supp. 956.

Counterclaim held sufficiently substantial to support jurisdiction

U.S.—Denys Fisher (Spirograph) Limited v. Louis Marx & Co. of W.Va., D.C.W.Va., 306 F.Supp. 956.

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Library References

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53. U.S.—Winningham v. U.S. Dept. of Housing and Urban Development, C.A.Ga., 512 F.2d 617.

Westinghouse Elec. Corp. v. Reed & Martin, Inc., D.C.N.Y., 310 F.Supp. 653, affd., C.A., 439 F.2d 1268—Baker v. Central & South West Corp., D.C.Okl., 334 F.Supp. 752.

Actions held within federal jurisdiction

(6) Other actions.

U.S.—Jamerson v. Miles, D.C.Tex., 421 F.Supp. 107.

Actions held not to arise under federal laws

(1) U.S.—Northern Natural Gas Co. v. Cities Service Oil Co., D.C.Iowa, 182 F.Supp. 155.

Cases not involving interstate commerce, etc.

U.S.—Chicago & N.W. Ry. Co. v. Toledo, P. & W.R. Co., C.A.Ill., 324 F.2d 936.

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54. U.S.—Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, C.A.Pa., 465 F.2d 237, cert. den. 93 S.Ct. 1367, 410 U.S. 943, 35 L.Ed.2d 609—Anderson v. United Paperworkers Intern. Union, AFL-CIO, C.A.Minn., 641 F.2d 574.

U.S. v. Boca Raton Capital Corp., D.C.Fla., 285 F.Supp. 504—Quon v. Stans, D.C.Cal., 309 F.Supp. 604.

Gager & Goldberg, Inc. v. U.S., D.C.Conn., 44 F.R.D. 477.

Suits held to arise under law regulating commerce

(4) U.S.—Ackert v. Ausman, D.C.N.Y., 198 F.Supp. 538, mandamus den., C.A., 299 F.2d 65—Wills v. Trans World Airlines, Inc., D.C.Cal., 200 F.Supp. 360—Wagner v. World Wide Automobiles Corp., D.C.N.Y., 201 F.Supp. 22—Serritella v. Engelman, D.C.N.J., 339 F.Supp. 738.

Suits held not to arise under law regulating commerce

(4) U.S.—Port Authority Bondholders Protective Committee v. Port of New York Authority, D.C.N.Y, 270 F.Supp. 947, affd., C.A., 387 F.2d 259—Mamber v. Second Federal Sav. & Loan Ass'n of Boston, D.C. Mass., 275 F.Supp. 170—Equal Employment Opportunity Commission v. Woolco Dept. Store, D.C.La., 321 F.Supp. 811, order vacated and remanded 460 F.2d 301.

Jurisdiction to aid administrative agencies

U.S.—N.L.R.B. v. British Auto Parts, Inc., D.C.Cal, 266 F.Supp. 368, affd., C.A., 405 F.2d 1182, cert. den. 89 S.Ct. 1625, 394 U.S. 1012, 23 L.Ed.2d 39.

Statute held not to create cause of action

U.S.—B. F. Goodrich Co. v. Northwest Industries, Inc., C.A.Del., 424 F.2d 1349, cert. den. 91 S.Ct. 41, 400 U.S. 822, 27 L.Ed.2d 50.

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55. U.S.—State of Or. By and Through State Highway Commission v. Tug Go-Getter, D.C.Or., 299 F.Supp. 269, mod. in part on oth. grds., affd. in part, revd. in part on oth. grds., C.A., 468 F.2d 1270.

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56. U.S.—Cunningham v. Erie R. Co., C.A.N.Y., 266 F.2d 411, on remand D.C., 243 F.Supp. 571, affd., D.C., 358 F.2d 640.

57. U.S.—Seagraves v. Harris, C.A.Ga., 629 F.2d 385.

Stewart v. Hevelone, D.C.Neb., 283 F.Supp. 842.

N.Y.—Petroleum Cargo Carriers, Limited v. Unitas, Inc., 220 N.Y.S.2d 724, 31 Misc.2d 222, affd. 224 N.Y.S.2d 654, 15 A.D.2d 735.

58.5. U.S.—Commercial Metals Co. v. Balfour, Guthrie, & Co., Ltd., C.A.Tex., 577 F.2d 264.

No jurisdiction to grant private relief

U.S.—Ve-Ri-Tas, Inc. v. Advertising Review Council of Metropolitan Denver, Inc., 411 F.Supp. 1012, affd. C.A., 567 F.2d 963; cert. den. 98 S.Ct. 2238, 436 U.S. 906, 56 L.Ed.2d 404.

59. U.S.—Jackson v. Martin Co., D.C.Md., 180 F.Supp. 475—Stewart v. Hevelone, D.C.Neb., 283 F.Supp. 842—Marquez v. Hardin, D.C.Cal., 339 F.Supp. 1364.

Irving Trust Co. v. Nationwide Leisure Corp., D.C.N.Y., 93 F.R.D. 102.

Tests for determination

(5) Other tests.

U.S.—Guinasso v. Pacific First Federal Sav. and Loan Ass'n, C.A.Or., 656 F.2d 1364, cert. den. 102 S.Ct. 1716, 455 U.S. 1020, 72 L.Ed.2d 138.

Eickhof Const. Co. v. Great Northern Ry. Co., D.C.Minn., 291 F.Supp. 44.

Commerce clause as significant source of power

U.S.—Murphy v. Colonial Federal Sav. & Loan Ass'n, C.A.N.Y., 388 F.2d 609.

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60. U.S.—Collidotronics, Inc. v. Stuyvesant Ins. Co., D.C.Pa., 290 F.Supp. 978, affd., C.A., 412 F.2d 1186—Eickhof Const. Co. v. Great Northern Ry. Co., D.C.Minn., 291 F.Supp. 44.

61. U.S.—Eastern Air Lines, Inc. v. Flight Engineers Intern. Ass'n, C.A.Fla., 340 F.2d 104, cert. den. 86 S.Ct. 23, 382 U.S. 811, 15 L.Ed.2d 59.

62.5. U.S.—Frenkel v. W.U. Tel. Co., D.C.Md., 327 F.Supp. 954.

62.25. U.S.—Comet Electronics, Inc. v. U.S., D.C. Mo, 381 F.Supp. 1233, affd. 95 S.Ct. 1439, 1440, two cases, 420 U.S. 999, 43 L.Ed.2d 758.

Action to set aside order

(3) Other actions.

U.S.—State of Vt. v. Boston & Maine Corp., D.C.Vt., 269 F.Supp. 80.

As discussed in 15 C.J.S. title Commerce § 147(5), the suspension of operation of proposed rates is vested by statute exclusively in the Commission, which deliberately extinguishes judicial power to grant such relief.[62.30]

62.30. Judicial power not restored by National Environmental Policy Act violations

U.S.—U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), Dist.Col., 93 S.Ct. 2405, 412 U.S. 669, 37 L.Ed.2d 254.

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65. U.S.—Agricultural Transp. Ass'n of Tex. v. King, C.A.Fla., 349 F.2d 873.

67. U.S.—J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc., C.A.Pa., 565 F.2d 264.

Jurisdiction under Labor Relations and Fair Labor Standards acts compared

U.S.—Quality Limestone Products, Inc. v. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Emp. and Helpers, Local 695, D.C. Wis., 207 F.Supp. 75.

No jurisdiction over private contract actions

U.S.—Baker v. Riss & Co., C.A.Mo., 444 F.2d 257, on remand 336 F.Supp. 20.

68. U.S.—Cal. Dump Truck Owners Assn., Inc. v. Associated General Contractors of American, San Diego Chapter, Inc., C.A.Cal., 562 F.2d 607—James R. Snyder Co., Inc. v. Associated General Contractors of America, Detroit Chapter, Inc., C.A.Mich., 677 F.2d 1111, cert. den. 103 S.Ct. 374, 459 U.S. 1015, 74 L.Ed.2d 508.

U.S. v. Manufacturers Hanover Trust Co., D.C. N.Y., 240 F.Supp. 867.

Federal question held not presented

U.S.—Waters v. Paschen Contractors, Inc., D.C.Ill., 227 F.Supp. 659.

Pendent jurisdiction over state action

U.S.—Knuth v. Erie-Crawford Dairy Co-op. Ass'n, C.A.Pa., 395 F.2d 420, on remand, D.C., 326 F.Supp. 48, affd. in part, revd. in part on oth. grds. 463 F.2d 470, cert. den. 93 S.Ct. 966, 410 U.S. 913, 35 L.Ed.2d 278, on remand, D.C., 58 F.R.D. 646, affd. 487 F.2d 1394.

A.B.T. Sightseeing Tours, Inc. v. Gray Line New York Tours Corp., D.C.N.Y., 242 F.Supp. 365.

69. U.S.—Feldman v. Jackson Memorial Hospital, D.C.Fla., 509 F.Supp. 815, affd. 752 F.2d 647, cert. den. 105 S.Ct. 3504, 87 L.Ed.2d 635.

Direct effect on interstate commerce required

U.S.—Waters v. Paschen Contractors, Inc., D.C.Ill., 227 F.Supp. 659.

Interstate commerce held not involved

(1) U.S.—Baldwin Hills Bldg. Material Co. v. Fibreboard Paper Products Corp., D.C.Cal., 283 F.Supp. 202.

Acts affecting interstate business but not interstate commerce immaterial

U.S.—Mar-Farr Corp. v. Copley Press, Inc., D.C.Ill., 64 F.R.D. 456—Gateway Associates, Inc. v. Essex-Costello, Inc., D.C.Ill., 380 F.Supp. 1089.

More than oblique or incidental involvement required

U.S.—Mar-Farr Corp. v. Copley Press, Inc., D.C.Ill. 64 F.R.D. 456.

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71.10. U.S.—Crest Auto Supplies, Inc. v. Ero Mfg. Co., D.C.Ill., 246 F.Supp. 224, affd., C.A., 360 F.2d 896.

71.15. U.S.—Peerless Dental Supply Co. v. Weber Dental Mfg. Co., D.C.Pa., 299 F.Supp. 331—Contract Buyers League v. F & F Inv., D.C.Ill., 300 F.Supp. 210, affd., C.A., 420 F.2d 1191, cert. den. 91 S.Ct. 40, 41 42, 400 U.S. 821, 27 L.Ed.2d 49—Ammerman v. Bestline Products, Inc., D.C. Wis., 352 F.Supp. 1077.

Counterclaim

U.S.—Crest Auto Supplies, Inc. v. Ero Mfg. Co., D.C. Ill., 246 F.Supp. 224, affd., C.A., 360 F.2d 896.

Dismissal of antitrust action held immaterial

U.S.—Hannigan v. Sears, Roebuck & Co., C.A.Ill., 410 F.2d 285, cert. den. 90 S.Ct. 214, 396 U.S. 902, 24 L.Ed.2d 178.

Metropolitan Federal Sav. & Loan Ass'n of New York v. East Brooklyn Sav. Bank, D.C.N.Y., 319 F.Supp. 393—Knuth v. Erie-Crawford Dairy Coop. Ass'n D.C.Pa., 326 F.Supp. 48. Affd. in part, revd. in part on oth. grds., C.A., 463 F.2d 470, cert. den. 93 S.Ct. 966, 410 U.S. 913, 35 L.Ed.2d 278, on remand 58 F.R.D. 646, affd., C.A., 487 F.2d 1394.

71.20. U.S.—Commercial Metals Co. v. Balfour, Guthrie, & Co., Ltd., C.A.Tex., 577 F.2d 264.

Hamilton Life Ins. Co. of New York v. Republic Nat. Life Ins. Co., D.C.N.Y., 291 F.Supp. 225, affd., C.A., 408 F.2d 606—Swift Industries, Inc. v. Botany Industries, Inc., D.C.Pa., 297 F.Supp. 1056—McDevitt & Street Co. v. Georgia Bldg. Authority, D.C.Ga., 343 F.Supp. 1238.

D.C.—Bangor & Aroostock R. Co. v. Maine Cent. R. Co., D.C., 359 F.Supp. 261.

Jurisdiction held lacking

U.S.—Monte v. Southern Delaware County Authority, C.A.Pa., 321 F.2d 870.

71.25. U.S.—Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, C.A.Fla., 637 F.2d 391, app. after remand, C.A., 675 F.2d 1169.

Children's Dress, Infant's Wear, Housedress and Bathrobe Makers' Union, Local 91, ILGWU v. Frankow Mfg. Co., D.C.N.Y., 183 F.Supp. 671—Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., D.C.N.Y., 334 F.Supp. 1013.

Court held to have jurisdiction

U.S.—Reed & Martin, Inc. v. Westinghouse Elec. Corp., C.A.N.Y., 439 F.2d 1268.

Metro Indus. Painting Corp. v. Terminal Const. Co., D.C.N.Y., 181 F.Supp. 130—Royal Indus. Union, Local 937, UAW-CIO v. Royal McBee Corp., D.C.Conn., 217 F.Supp. 277.

72. Suit not involving federal question

U.S.—Missouri Pac. R. Co. v. Travelers Ins. Co., D.C. La., 281 F.Supp. 100.

Maintenance of tracks used in interstate commerce

U.S.—Hedderman v. Staten Island Rapid Transit Operating Authority, D.C.N.Y., 593 F.Supp. 1141.

73. U.S.—Emig v. Erie Lackawanna Ry. Co., D.C. Pa., 350 F.Supp. 986, affd., C.A., 485 F.2d 679.

No jurisdiction over third-party defendant action

U.S.—McPherson v. Hoffman, C.A.Mich., 275 F.2d 466.

Regardless of amount in controversy

U.S.—Imm v. Union R. Co., C.A.Pa., 289 F.2d 858, cert. den. 82 S.Ct. 55, 368 U.S. 833, 7 L.Ed.2d 35.

Brown v. Sinclair Refining Co., D.C.N.Y., 227 F.Supp. 714.

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Miscellaneous other statutes have been considered by the courts with respect to the jurisdiction of federal courts.[74.5]

74.5. U.S.—Cuyler v. Adams, Pa., 101 S.Ct. 703, 449 U.S. 433, 66 L.Ed.2d 641.

Cate v. Blue Cross and Blue Shield of Alabama, D.C.Tenn., 434 F.Supp. 1187.

Motorboat Act of 1940, 46 U.S.C.A. § 526, held not "Act of Congress regulating commerce" under statute granting original jurisdiction to federal courts.

U.S.—Godinez v. Jones, D.C.Puerto Rico, 179 F.Supp. 135.

Investment Company Act

U.S.—Moses v. Burgin, C.A.Mass., 445 F.2d 369, cert. den. 92 S.Ct. 532, 404 U.S. 994, 30 L.Ed.2d 547.

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Federal Aviation Act

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U.S.—Crane v. Cedar Rapids & I.C. Ry. Co., Iowa, 89 S.Ct. 1706, 395 U.S. 164, 23 L.Ed.2d 176.

Ill.—Boyer v. Atchison, T. & S.F. Ry. Co., 230 N.E.2d 173, 38 Ill.2d 31, cert. den. 88 S.Ct. 1038, 390 U.S. 949, 19 L.Ed.2d 1140.

Small Business Investment Act

U.S.—U.S. v. Norwood Capital Corp., D.C.S.C., 273 F.Supp. 236.

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U.S.—Gomez v. Florida State Employment Service, C.A.Fla., 417 F.2d 569.

National Traffic and Motor Vehicle Safety Act

U.S.—General Motors Corp. v. Volpe, D.C.Del., 321 F.Supp. 1112, mod. on oth. grds., C.A., 457 F.2d 922.

Truth in Lending Act

U.S.—Sosa v. Fite, C.A.Tex., 465 F.2d 1227, app. after remand 498 F.2d 1114.

National Bank Act

U.S.—Partain v. First Nat. Bank of Montgomery, C.A. Ala., 467 F.2d 167, on remand, D.C., 59 F.R.D. 56.

United Missouri Bank of Kansas City, N.A. v. Danforth, D.C.Mo., 394 F.Supp. 774.

Social Security Act not within commerce jurisdiction

U.S.—Aguayo v. Richardson, C.A.N.Y., 473 F.2d 1090, stay den. 93 S.Ct. 1350, 410 U.S. 921, 35 L.Ed.2d 583, cert. den. 94 S.Ct. 900, 414 U.S. 1146, 39 L.Ed.2d 101—Ortego v. Weinberger, C.A.La., 516 F.2d 1005.

Home Owners' Loan Act

U.S.—Gibson v. First Federal Sav. & Loan Ass'n, D.C. Mich., 347 F.Supp. 560.

Food Stamp Act

U.S.—Irizarry v. Weinberger, D.C.N.Y., 381 F.Supp. 1146—State Through Dept. of Health and Human Resources v. Bergland, D.C.La., 531 F.Supp. 118, affd., C.A., 694 F.2d 430.

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U.S.—A. O. Smith Corp. v. F.T.C., D.C.Del., 396 F.Supp. 1108, affd. in part, vac. in part on oth. grds. 530 F.2d 515.

National Housing Act

U.S.—Dew v. McLendon Gardens Associates, D.C.Ga., 394 F.Supp. 1223.

Federal Communication Act

U.S.—Brookhaven Cable TV Inc. v. Kelly, D.C.N.Y., 428 F.Supp. 1216, affd., C.A., 573 F.2d 765, cert. den. 99 S.Ct. 1991, two cases, 441 U.S. 904, 60 L.Ed.2d 372.

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U.S.—Pierce & Stevens Chemical Corp. v. U.S. Consumer Product Safety Commission, D.C.N.Y., 439 F.Supp. 247, affd. and remd. C.A., 578 F.2d 1369, app. after remand 585 F.2d 1382.

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75. U.S.—Brennan v. Valley Towing Co., Inc., C.A. Ariz., 515 F.2d 100.

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Rights held not conferred by federal law

U.S.—Sheppard v. Cornelius, C.A.W.Va., 302 F.2d 89.

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75.5. U.S.—Bledsoe v. Wirtz, C.A.Okl., 384 F.2d 767.

Goettel v. Glenn Berry Mfrs., Inc., D.C.Okl., 236 F.Supp. 884—McClanahan v. Mathews, D.C. Ky., 292 F.Supp. 737.

75.10. U.S.—Bledsoe v. Wirtz, C.A.Okl., 384 F.2d 767.

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75.20. Mere necessity of construing Act

U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

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76. U.S.—Fagot v. Flintkote Co., D.C.La., 305 F.Supp. 407—Hodgson v. Jackson, D.C.Va., 351 F.Supp. 291.

76.5. U.S.—Hill v. Moss-American, Inc., D.C.Miss., 309 F.Supp. 1175.

Unpaid minimum wages

U.S.—Freudenberg v. Harvey, D.C.Pa., 364 F.Supp. 1087.

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76.15. U.S.—Bledsoe v. Wirtz, C.A.Okl., 384 F.2d 767.

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76.30. U.S.—Brennan v. Jaffey, D.C.Del., 380 F.Supp. 373.

76.45. Minimum wages; overtime compensation

(1) U.S.—McDaniel v. Brown & Root, C.A.Okl., 172 F.2d 466.

§ 35(3). —— Interstate Commerce Act

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Action by railroad company for freight charges

U.S.—Clinchfield R. Co. v. Boston & Maine Corp, D.C.N.Y., 258 F.Supp. 467.

Disobedience of order of Interstate Commerce Commission

U.S.—Clemens v. Central R. Co. of New Jersey, D.C. Pa., 264 F.Supp. 551, revd. on oth. grds., C.A., 399 F.2d 825.

Federal court without jurisdiction under circumstances

U.S.—Wirtz v. Highway Transp., Inc., C.A.N.C., 310 F.2d 643.

Action under Carmack Amendment

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77.5. U.S.—Land O'Lakes, Inc. v. United-Buckingham Freight Lines, Inc., D.C.Minn., 351 F.Supp. 102, op. supp., reconsideration den. 359 F.Supp. 741.

78. U.S.—Northern Natural Gas Co. v. Landon, D.C. Kan., 212 F.Supp. 856. Affd., C.A., 338 F.2d 17, cert. den. 85 S.Ct. 1529, 381 U.S. 914, 14 L.Ed.2d 435.

78.5. U.S.—McFaddin Exp., Inc. v. Adley Corp, C.A.Conn., 363 F.2d 546, cert. den. 87 S.Ct. 206, 385 U.S. 900, 17 L.Ed.2d 132.

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§ 35(4). —— Labor Injunction Law

79. U.S.—Riley v. Letter Carriers Local No. 380, D.C.N.J., 485 F.Supp. 980, reconsideration den. 493 F.Supp. 342. Affd. in part, C.A, 668 F.2d 224.

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80. U.S.—Dunlop v. Bachowski, Pa., 95 S.Ct. 1851, 421 U.S. 560, 44 L.Ed.2d 377, on remand, D.C., 405 F.Supp. 1227, on remand, C.A., 545 F.2d 363, op. supp. 413 F.Supp. 147.

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Payments to employee representatives; welfare funds

(4) U.S.—Kane v. Shulton, Inc., D.C.N.J., 189 F.Supp. 882.

(5) U.S.—Employing Plasterers' Ass'n of Chicago v. Journeymen Plasterers' Protective and Benev. Soc. of Chicago, Local No. 5 C.A.Ill., 279 F.2d 92, on remand, D.C., 186 F.Supp. 91.

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(8) Other matters.

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Purpose of statute

U.S.—Local Union No. 641 of Amalgamated Butcher Workmen v. Capitol Packing Co., D.C.Colo., 32 F.R.D. 4.

Jurisdiction held not to exist

U.S.—Cottrell v. Gulf, M. and O.R.R, D.C Ala., 321 F Supp. 1401.

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80.5. U.S.—Boys Markets, Inc. v. Retail Clerk's Union, Local 770, Cal., 90 S.Ct. 1583, 398 U.S 235, 26 L.Ed.2d 199.

Smith v. Local No. 25, Sheet Metal Workers Intern. Ass'n, C.A.Tex., 500 F.2d 741.

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Injunction against picketing

(3) Other matters.

U.S.—Knapp v. United Steelworkers of America, AFL-CIO, D C.Minn., 179 F.Supp. 90.

Election; bargaining agent or representative

(4) Other matters.

U.S.—Boire v. Miami Herald Pub. Co., C.A.Fla., 343 F.2d 17, cert. den. 86 S.Ct. 56, 382 U.S. 824, 15 L.Ed.2d 70.

Suit by union members to enjoin breach of union's fiduciary duties as bargaining agent

U.S.—Beausoleil v. United Furniture Workers of America, AFL-CIO, Dist. No. 1, Local No. 136-B, D.C.N.H., 244 F.Supp. 719.

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80.10. U.S.—Smith v. DCA Food Industries, Inc., D.C.Md., 269 F.Supp. 863.

"Single engagement industry" in musical performance has been held to be an industry affecting commerce within statute vesting jurisdiction on federal courts.

U.S.—Carroll v. Associated Musicians of Greater New York, D.C.N.Y., 206 F.Supp. 462, affd., C.A., 316 F.2d 574.

Necessity of participation by employer and union in industry affecting commerce

U.S.—Camden Industries Co. v. Carpenters Local Union No. 1688, United Broth. of Carpenters and Joiners of America, D.C.N.H., 246 F.Supp. 252, affd., C.A., 353 F.2d 178.

80.15. U.S.—Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, Tenn., 88 S.Ct. 1235, 390 U.S. 557, 20 L.Ed.2d 126, reh. den. 88 S.Ct. 1801, 391 U.S. 929, 20 L.Ed.2d 670—United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, AFL-CIO v. Local 334, United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Ind. of the U.S. and Canada, 101 S.Ct. 2546, 452 U.S. 615, 69 L.Ed.2d 280, on remand, C.A., 669 F.2d 129.

Suit for reformation as constituting suit for violation within Act

U.S.—Lodge 753 of Intern. Ass'n of Machinists v. United Aircraft Corp., D.C.Conn., 190 F.Supp. 464.

"Contracts" within statute construed

U.S.—Deaton Truck Line, Inc. v. Local Union 612, affiliated with Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Ala., 314 F.2d 418.

Burlesque Artists Ass'n v. American Guild of Variety Artists, D.C.N.Y., 187 F.Supp. 393—Thomas v. Old Forge Coal Co., D.C.Pa., 329 F.Supp. 1000.

Local union as "labor organization" within statute

U.S.—Parks v. International Broth. of Elec. Workers, C.A.Md., 314 F.2d 886, cert. den. 83 S.Ct. 1111, 372 U.S. 976, 10 L.Ed.2d 142.

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Statute not limited to actions by majority or exclusive representatives

U.S.—Retail Clerks Intern. Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., Ohio, 82 S.Ct. 541, 369 U.S. 17, 7 L.Ed.2d 503.

Sole stockholder as "employer"

U.S.—Thomas v. Old Forge Coal Co., D.C.Pa., 329 F.Supp. 1000.

80.20. U.S.—Stein Printing Co. v. Atlanta Typographical Union No. 48, D.C.Ga., 329 F.Supp. 754.

Jurisdiction held not to exist

U.S.—McFaddin Exp., Inc. v. Adley Corp., C.A.Conn., 346 F.2d 424, cert. den. 86 S.Ct. 643, 382 U.S. 1026, 15 L.Ed.2d 539—Local Division 732, Amalgamated Transit Union v. Metropolitan Atlanta Rapid Transit Authority, C.A.Ga., 667 F.2d 1327, reh. den. 671 F.2d 1382.

80.25. U.S.—Monroe Lodge No. 770, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Litton Business Systems, Inc., D.C.Va., 334 F.Supp. 310.

Mich.—Alarcon v. Fabricon Products, Division of Eagle-Picher Co., 145 N.W.2d 816, 5 Mich.App. 25.

Effect of functions of National Labor Relations Board

U.S.—Smith v. Pittsburgh Gage & Supply Co., D.C.Pa., 245 F.Supp. 864, affd., C.A., 361 F.2d 219.

No jurisdiction to review conspiracy

U.S.—Russom v. Sears, Roebuck and Co., C.A.Mo., 558 F.2d 439, cert. den. 98 S.Ct. 481, 434 U.S. 955, 54 L.Ed.2d 313.

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80.35. U.S.—Palnau v. Detroit Edison Co., C.A. Mich., 301 F.2d 702.

Kayser-Roth Hosiery Co., Dayton Division v. Textile Workers Union of America AFL-CIO, D.C.Tenn., 285 F.Supp. 484.

Prior existing jurisdiction not diminished

U.S.—U.S. Lines Co. v. International Longshoremen's Ass'n (AFL-CIO), D.C.Mass., 265 F.Supp. 666.

80.40. U.S.—Kayser-Roth Hosiery Co., Dayton Division v. Textile Workers Union of America AFL-CIO, D.C.Tenn., 285 F.Supp. 484.

However, the Supreme Court has declared that the statute ought not be given a narrow reading.

U.S.—Smith v. Evening News Ass'n, Mich., 83 S.Ct. 267, 371 U.S. 195, 9 L.Ed.2d 246.

Statute interpreted as authorizing suit by employee instead of by the Union

U.S.—Smith v. Evening News Ass'n, Mich., 83 S.Ct. 267, 371 U.S. 195, 9 L.Ed.2d 246.

International Broth. of Tel. Workers v. New England Tel. & Tel. Co., D.C.Mass., 240 F.Supp. 426—Woody v. Sterling Aluminum Products Inc., D.C.Mo., 244 F.Supp. 84, affd., C.A., 365 F.2d 448, cert. den. 87 S.Ct. 1026, 386 U.S. 957, 18 L.Ed.2d 105, reh. den. 87 S.Ct. 1371, 386 U.S. 1027, 18 L.Ed.2d 471.

Jurisdiction over past contract violations not takes away at moment union's representation ceases

U.S.—St. Louis Mailers' Union Local No. 3 v. Globe-Democrat Pub. Co., C.A.Mo., 350 F.2d 879, cert. den. 86 S.Ct. 552, 382 U.S. 979, 15 L.Ed.2d 470, reh. den. 86 S.Ct. 927, 383 U.S. 931, 15 L.Ed.2d 850.

80.45. U.S.—United Mine Workers of America v. Gibbs, Tenn., 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed.2d 218.

D.C.—Navajo Tribe v. N.L.R.B., C.A., 288 F.2d 162, 109 U.S.App.D.C. 378, cert. den. 81 S.Ct. 1649, 366 U.S. 928, 6 L.Ed.2d 387—Kinney v. International Broth. of Elec. Workers, C.A.Nev., 669 F.2d 1222.

Local 1219, American Federation of Government Emp. v. Donovan, D.C., 516 F.Supp. 1362—District 2 Marine Engineers Beneficial Association—Associated Maritime Officers, AFL-CIO v. Puerto Rico Marine Management, Inc., D.C.N.Y., 537 F.Supp. 813.

Determination of rights under collective bargaining agreement

U.S.—Retail Clerks Intern. Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., Ohio, 82 S.Ct. 541, 369 U.S. 17, 7 L.Ed.2d 503.

Harris v. Edward Hyman Co., C.A.Miss., 664 F.2d 943, reh. den. 669 F.2d 733.

Action for money damages for breach of contract

U.S.—Smith v. Evening News Ass'n, Mich., 83 S.Ct. 267, 371 U.S. 195, 9 L.Ed.2d 246.

Action by one local of union against another local, etc.

(2) Other matters.

U.S.—Local 33, Intern. Hod Carriers Bldg. and Common Laborers' Union of America v. Mason Tenders Dist. Council of Greater New York, D.C. N.Y., 186 F.Supp. 737.

Rights under contract containing check-off provisions

(3) Other matters.

U.S.—United Mine Workers of America, Dist. 22 v. Roncco, C.A.Wyo., 314 F.2d 186, on remand, D.C., 232 F.Supp. 865.

United Elec., Radio and Mach. Workers of America (UE), Local 107 v. Westinghouse Elec. Corp., D.C.Pa., 229 F.Supp. 881.

Actions as to arbitration

(1) U.S.—Printing Industries of St. Louis, Inc. v. St. Louis Bindery Women's Local Union No. 55, D.C.Mo., 347 F.Supp. 339.

(2) U.S.—Philadelphia Dress Joint Bd. of I.L.G.W.U. v. Sidele Fashions, Inc., D.C.Pa., 187 F.Supp. 97—Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n, D.C.N.Y., 293 F.Supp. 1400, affd., C.A., 414 F.2d 1326.

(3) U.S.—Food Handlers Local No. 425, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Arkansas Poultry Co-op., Inc., D.C. Ark., 199 F.Supp. 895, app. dism., C.A., 306 F.2d 491.

(4) U.S.—Amalgamated Meat Cutters and Butcher Workmen of North America, Local 195, AFL-CIO v. M. Feder & Co., D.C.Pa., 234 F.Supp. 564.

(7) U.S.—Kracoff v. Retail Clerks Local Union No. 1357 (AFL-CIO), D.C.Pa., 244 F.Supp. 38—Camden Industries Co. v. Carpenters Local Union No. 1688, United Broth. of Carpenters and Joiners of America, D.C.N.H., 246 F.Supp. 252, affd., C.A., 353 F.2d 178.

(12) U.S.—Item Co. v. New Orleans Newspaper Guild, C.A.La., 256 F.2d 855, cert. den. 79 S.Ct. 98, 358 U.S. 867, 3 L.Ed.2d 99.

(13) U.S.—Local 217, Intern. Union of Elec. Radio and Mach. Workers v. Holtzer-Cabot Corp., D.C.Mass., 277 F.Supp. 704—Espino v. Volkswagen de Puerto Rico, Inc., D.C.Puerto Rico, 289 F.Supp. 979.

Actions for violation of labor contracts seeking injunctions, even those seeking injunctions alone, held within jurisdiction, even though court cannot grant injunctive relief in certain cases.

U.S.—Publishers' Ass'n of New York City v. New York Newspaper Printing Pressmen's Union No. Two, D.C.N.Y., 246 F.Supp. 293—Katz v. Architectural and Engineering Guild, Local 66, American Federation of Technical Engineers, AFL-CIO, D.C.N.Y., 263 F.Supp. 222.

Cal.—O'Malley v. Wilshire Oil Co., 30 Cal.Rptr. 452, 381 P.2d 188, 59 C.2d 482.

Wrongful discharge

U.S.—Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local No. 14, AFL-CIO, C.A. Cal., 453 F.2d 1018.

Actions respecting pension funds

U.S.—Wilson v. Board of Trustees of Pension Trust Fund for Operating Engineers and Pension Trust Fund for Operating Engineers, C.A.Cal., 564 F.2d 1299.

Fiorelli v. Kelewer, D.C.Pa., 339 F.Supp. 796, affd., C.A., 474 F.2d 1340—Crown Cork and Seal Co. v. Teamsters Pension Fund of Philadelphia and Vicinity, D.C.Pa., 549 F.Supp. 307, affd., C.A., 720 F.2d 661.

80.46. Actions as to arbitration

(13) U.S.—Local 719, American Bakery and Confectionery Workers of America, AFL-CIO v. National Biscuit Co., D.C.N.J., 252 F.Supp. 768, affd., C.A., 378 F.2d 918, 33 A.L.R.3d 1229.

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80.50. U.S.—Calhoon v Harvey, N.Y., 85 S.Ct. 292, 379 U.S. 134, 13 L.Ed.2d 190, reh. den. 85 S.Ct. 639, 379 U.S. 984, 13 L.Ed.2d 577, motion den. 85 S.Ct. 878, 380 U.S. 901, 13 L.Ed.2d 793.

West Point-Pepperell, Inc. v. Textile Workers Union of America, AFL-CIO, CLC, C.A.Ga., 559 F.2d 304.

Ciccone v. Waterfront Commission of New York Harbor, D.C.N.Y., 438 F.Supp. 55.

Construction of collective bargaining contract; unpaid wages

(1) Since the publication of Corpus Juris Secundum the holding of, Association of Westinghouse Salaried Emp. v. Westinghouse Elec. Corp., Pa., 75 S.Ct. 489, 348 U.S. 437, 99 L.Ed. 510, reh. den. 75 S.Ct. 657, 349 U.S. 975, 99 L.Ed. 1256 has been questioned. General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Riss & Co., U.S.Ky., 83 S.Ct. 789, 372 U.S. 517, 9 L.Ed.2d 918.

Burgos v. Waterman S.S. Corp. of Puerto Rico, D.C.Puerto Rico, 189 F.Supp. 683.

(4) Since the publication of Corpus Juris Secundum, the holding cited was reversed, the court holding that the district court has jurisdiction of an action to enforce an arbitration award which was made under a collective bargaining Agreement.

U.S.—Textile Workers Union of America v. Cone Mills Corp., C.A.N.C., 268 F.2d 920, cert. den. 80 S.Ct. 157, 361 U.S. 886, 4 L.Ed.2d 121, on remand 188 F.Supp. 728.

(5) Other actions.

U.S.—United Steel Workers of America (A.F.L.-C.I.O.), Local Union No. 4264 v. New Park Min. Co., C.A.Utah, 273 F.2d 352.

Strike settlement agreement

U.S.—Retail Clerks Intern. Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., Ohio, 82 S.Ct. 541, 369 U.S. 17, 7 L.Ed.2d 503.

Moot case

U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 612 v. Deaton Truck Line, Inc., C.A.Ala., 307 F.2d 748.

Corporation's libel action against union

U.S.—R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, C.A.N.C., 336 F.2d 160, affd. 86 S.Ct. 272, 382 U.S. 145, 15 L.Ed.2d 217.

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U.S.—Amato v. Bernard, C.A.Cal., 618 F.2d 559.

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80.55. U.S.—Local 1498, Am. Federation of Government Emp. v. American Federation of Government Emp., AFL/CIO, C.A.Pa., 522 F.2d 486.

Lucas v. Kenny, D.C.Ill., 220 F.Supp. 188.

80.60. U.S.—Palnau v. Detroit Edison Co., C.A. Mich., 301 F.2d 702—Sheppard v. Cornelius, C.A. W.Va., 302 F.2d 89—Local 336, Am. Federation of Musicians, AFL-CIO v. Bonatz, C.A.N.J., 475 F.2d 433.

80.65. U.S.—Truck Drivers and Helpers Local Union No. 696 v. Grosshans & Petersen, Inc., 209 F.Supp. 164.

Rule inapplicable where collective bargaining contract controls

U.S.—International Broth. of Tel. Workers v. New England Tel. & Tel. Co., D.C.Mass., 240 F.Supp. 426.

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83.5. Intentional discrimination by union

U.S.—Richardson v. Communications Workers of America, C.A.Neb., 443 F.2d 974, app. after remand 469 F.2d 333.

Reasonableness of union constitution and by-laws

U.S.—Schonfeld v. Raftery, D.C.N.Y., 335 F.Supp. 846.

The fact that the court may determine ultimately that the claim is one on which no relief can be granted does not defeat the jurisdiction of the court.[83.10a]

83.10a. U.S.—Hughes v. Local No. 11 of Intern. Ass'n of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, 287 F.2d 810, cert. den. 82 S.Ct. 51, 368 U.S. 829, 7 L.Ed.2d 32.

Woods v. Local Union No. 613 of Intern. Broth. of Elec. Workers, 404 F.Supp. 110.

Landrum-Griffin Act, Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. § 401 et seq., requires that in order to rest jurisdiction in a federal district court it must appear that the right, title, and interest alleged to be violated has been created by, or find protection under, one of the sections of the statute.[83.11]

83.11. U.S.—Strauss v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, D.C.Pa., 179 F.Supp. 297—Gulickson v. Forest, D.C.N.Y, 290 F.Supp. 457—Rota v. Brotherhood of Ry., Airline and S.S. Clerks, D.C. Pa., 338 F.Supp. 1176—Colorado Labor Council, AFL-CIO v. American Federation of Labor and Congress of Indus. Organizations, D.C.Colo., 349 F.Supp. 37—Giraldo v. Rosen, D.C.N.Y., 355 F.Supp. 54.

"Equal rights" provision

U.S.—Nienaber v. Ohio Valley Carpenters Dist. Council, C.A.Ohio, 652 F.2d 1284.

Matters held within federal court's jurisdiction

U.S.—Zamora v. Massey-Ferguson, Inc., D.C.Iowa, 336 F.Supp. 588—Gravenstein v. Campion, D.C.Alaska, 540 F.Supp. 7, adhered to, 96 F.R.D. 137.

Matters held not within federal court's jurisdiction

U.S.—Driscoll v. International Union of Operating Engineers, Local No. 139, D.C.Wis., 339 F.Supp. 757, affd., C.A., 484 F.2d 682, cert. den. 94 S.Ct. 1490, 415 U.S. 960, 39 L.Ed.2d 575.

Act applicable prospectively only

U.S.—Durandetti v. Chrysler Corp., D.C.Mich., 195 F.Supp. 653.

Under pendent jurisdiction doctrine, joined non-federal claim held cognizable

U.S.—Sands v. Abelli, D.C.N.Y., 290 F.Supp. 677—Morrissey v. Curran, D.C.N.Y., 356 F.Supp. 312.

Cole v. Hall, D.C.N.Y., 35 F.R.D. 4.

Matters considered in determining question

U.S.—Garnaccia v. Kenin, D.C.N.Y., 234 F.Supp. 429, affd., C.A., 339 F.2d 371—Axelrod v. Stoltz, D.C. Pa., 264 F.Supp. 536, affd., C.A., 391 F.2d 549.

The Act deals with the union-member relationship,[83.12] and does not support jurisdiction of a suit involving a union as an employer.[83.13]

83.12. U.S.—Strauss v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers o America, D.C.Pa., 179 F.Supp. 297—Rinker v Local Union No. 24 of Amalgamated Lithogra phers of America, D.C.Pa., 201 F.Supp. 204, affd C.A., 313 F.2d 956—Schonfeld v. Raftery, D.C N.Y., 335 F.Supp. 846.

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83.13. U.S.—Gross v. Kennedy, D.C.N.Y., 183 F.Supp. 750—Rinker v. Local Union No. 24 of Amalgamated Lithographers of America, D.C.Pa., 201 F.Supp. 204.

Business agent's action for discharge by union held not within jurisdiction of federal district court

U.S.—Strauss v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, D.C.Pa., 179 F.Supp. 297.

Business agent's action for discharge by union held within federal court's jurisdiction

U.S.—Serio v. Liss, D.C.N.J., 189 F.Supp. 358, affd., C.A., 300 F.2d 386.

The Act does not authorize federal courts to exercise jurisdiction on behalf of union officers,[83.14] or committeemen.[83.14a]

83.14. U.S.—Arnold v. District Council Allied Trades, D.C.N.Y., 423 F.Supp. No. 9, Intern. Broth. of Painters and 861.

Claim by union officers for loss of office control and management of local

U.S.—Flaherty v. McDonald, D.C.Cal., 183 F.Supp. 300.

Disputes between international and local officers

U.S.—Ramos Ducos v. Maldonado, D.C.Puerto Rico, 207 F.Supp. 271.

83.14a. Committeeman determined disqualified to act because of prior conviction

U.S.—Jackson v. Martin Co., D.C.Md., 180 F.Supp. 475.

Reservation of remedies in the act does not confer the right to sue in the federal courts in the absence of the required diversity of citizenship.[83.14b]

83.14b. Action for damages

U.S.—Smith v. General Truck Drivers, Warehousemen and Helpers Union Local 467 of San Bernardino and Riverside Counties, D.C.Cal., 181 F.Supp. 14.

83.15. U.S.—Tucci v. International Union of Operating Engineers, Local 66, AFL-CIO, D.C.Pa., 316 F.Supp. 1127

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83.40. U.S.—Navios Corp. v. National Maritime Union of America, D.C.Pa., 236 F.Supp. 657, affd., C.A., 359 F.2d 853, cert. den. 87 S.Ct. 205, 385 U.S. 900, 17 L.Ed.2d 132.

No action against individuals

U.S.—Morgan Drive Away, Inc. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, D.C.Ind., 166 F.Supp. 885, affd., C.A., 268 F.2d 871, cert. den. 80 S.Ct. 199, 361 U.S. 896, 4 L.Ed.2d 152.

83.60. Jurisdiction of federal courts to issue injunctions in labor disputes, generally see Labor Relations § 884.

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83.85. U.S.—United Mine Workers of America v. Meadow Creek Coal Co., C.A.Tenn., 263 F.2d 52, cert. den. 79 S.Ct. 1149, 359 U.S. 1013, 3 L.Ed.2d 1038.

Long v. Emery, D.C.Kan., 228 F.Supp. 368—Kayser-Roth Corp. v. Textile Workers Union of America, AFL-CIO, D.C.Tenn., 347 F.Supp. 801, affd., C.A., 479 F.2d 524, cert. den. 94 S.Ct. 292.

Considerations in award of damages

U.S.—Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, Ohio, 84 S.Ct. 1253, 377 U.S. 252, 12 L.Ed.2d 280.

Ritchie v. United Mine Workers of America, C.A.Ky., 410 F.2d 827, 36 A.L.R.3d 392.

Secondary boycott and state tort law claims

U.S.—Federal Prescription Service, Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and its Local P-1149, 527 F.2d 269

83.90. U.S.—United Mine Workers of America v. Meadow Creek Coal Co., C.A.Tenn., 263 F.2d 52, cert. den. 79 S.Ct. 1149, 359 U.S. 1013, 3 L.Ed.2d 1038

§ 35(6). —— Radio Communications

84. U.S.—Network Project v. Corporation For Public Brodcasting, C.A., 561 F.2d 963, 183 U.S.App. D.C. 70, cert. den. 98 S.Ct. 1247, two cases, 434 U.S. 1068, 55 L.Ed.2d 770.

Post v. Payton, D.C.N.Y., 323 F.Supp. 799.

Jurisdiction for tort or breach of contract

U.S.—Ivy Broadcasting Co. v. American Tel. & Tel. Co., C.A.N.Y., 391 F.2d 486.

Exhaustion of administrative remedies

U.S.—Central New York Right to Life Federation v Radio Station W.I.B.X., D.C.N.Y., 479 F.Supp 8.

84.10. U.S.—Ivy Broadcasting Co. v. American Tel. & Tel. Co., C.A.N.Y., 391 F.2d 486

Matters relating to television included within Federal Communications Act

U.S.—Springfield Television, Inc. v City of Springfield, Mo., C.A.Mo., 428 F.2d 1375, app. after remand 462 F.2d 21.

§ 35(7). —— Railway Labor Act

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85. U.S.—Employees Protective Ass'n v. Norfolk & W. Ry. Co., C.A.Va., 511 F.2d 1040, app. after remand, C.A., 571 F.2d 185.

D.C.—Association for Benefit of Non-Contract Emp. v. National Mediation Bd., D.C., 218 F.Supp. 114, affd., C.A.D.C., 330 F.2d 853, 117 U.S.App.D.C. 387, revd. on oth. grds. 85 S.Ct. 1192. 380 U.S. 650, 14 L.Ed.2d 133.

N.Y.—Pan Am. World Airways, Inc. v. Air Line Pilots Ass'n, Intern., 206 N.Y.S.2d 98, 22 Misc.2d 148.

Discrimination against employee on account of race

U.S.—Haley v. Childers, C.A.Mo., 314 F.2d 610—Neal v. System Bd. of Adjustment (Missouri Pac. R.R.), C.A.Mo., 348 F.2d 722.

Validity of collective security agreement, etc.

(2) Other contracts.

U.S.—Haley v. Childers, C.A.Mo., 314 F.2d 610.

Wrongful discharge of employee

(1) U.S.—Cunningham v. Erie R. Co., C.A.N.Y., 266 F.2d 411, on remand, D.C., 243 F.Supp. 571, affd., C.A., 358 F.2d 640.

(2) U.S.—Hooser v. Baltimore & O.R. Co., D.C.Ind., 177 F.Supp. 186, affd., C.A., 279 F.2d 197.

(6) Other instances.

U.S.—Nobile v. Woodward, D.C.Pa., 200 F.Supp. 785.

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86. U.S.—Cunningham v. Erie R. Co., C.A.N.Y., 266 F.2d 411, on remand, D.C., 243 F.Supp. 571, affd., C.A., 358 F.2d 640.

Doctrine of pendent jurisdiction properly invoked as to nonfederal claim

U.S.—Rumbaugh v. Winifrede R. Co., C.A.W.Va., 331 F.2d 530, cert. den. 85 S.Ct. 322, two cases, 379 U.S. 929, 13 L.Ed.2d 341.

86.5. U.S.—International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc., Tex., 83 S.Ct. 956, 372 U.S. 682, 10 L.Ed.2d 67, reh. den. 83 S.Ct. 1533, 373 U.S. 947, 10 L.Ed.2d 702.

Discrimination by union against members

U.S.—Thompson v. Brotherhood of Sleeping Car Porters, C.A.S.C., 316 F.2d 191.

Hostetler v. Brotherhood of R.R. Trainmen, D.C.Md., 183 F.Supp. 281, affd., C.A., 287 F.2d 457, reh. den. 294 F.2d 666, cert. den. 82 S.Ct. 397, 368 U.S. 955, 7 L.Ed.2d 387—Roberts v. Lehigh & N.E. Ry. Co., D.C.Pa., 211 F.Supp. 379, affd., C.A., 323 F.2d 219.

Jurisdiction lacking over actions for wrongful discharge

U.S.—Rumbaugh v. Winifrede R. Co., C.A.W.Va., 331 F.2d 530, cert. den. 85 S.Ct. 322, two cases, 379 U.S. 929, 13 L.Ed.2d 341.

87. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Chicago & I.M. Ry. Co., C.A.Ill., 386 F.2d 229.

Flight Engineers' Intern. Ass'n, AFL-CIO, TWA Chapter v. Trans World Airlines, Inc., D.C. N.Y., 205 F.Supp. 137—Flight Engineers' Intern. Ass'n, EAL Chapter, AFL-CIO v. Eastern Air Lines, Inc., D.C.N.Y., 243 F.Supp. 701, affd., C.A., 359 F.2d 303.

Brotherhood of R.R. Trainmen v. Denver & R.G.W.R. Co., D.C.Colo., 31 F.R.D. 297.

D.C.—Association for Benefit of Non-Contract Emp. v. National Mediation Bd., D.C., 218 F.Supp. 114, affd., C.A.D.C., 330 F.2d 853, 117 U.S.App.D.C. 387, cert. gr. 85 S.Ct. 44.

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88. U.S.—Morrissette v. Chicago, B. & Q.R. Co., C.A.Ill., 299 F.2d 502, cert. den. 82 S.Ct. 1141, 369 U.S. 874, 8 L.Ed.2d 277—Harris v. Palm Springs Alpine Estates, Inc., C.A.Cal., 329 F.2d 909—Little v. U.S., C.A.Mo., 331 F.2d 287, cert. den. 85 S.Ct. 68, 379 U.S. 834, 13 L.Ed.2d 42—Eastern Air Lines, Inc. v. Flight Engineers Intern. Ass'n, C.A.Fla., 340 F.2d 104. Cert. den. 86 S.Ct. 23, 382 U.S. 811, 15 L.Ed.2d 59.

Seniority rights

(4) Other matters.

U.S.—Thompson v. Brotherhood of Sleeping Car Porters, C.A.S.C., 316 F.2d 191.

§ 35(8). —— Securities Acts

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89. U.S.—J. I. Case Co. v. Borak, Wis., 84 S.Ct. 1555, 377 U.S. 426, 12 L.Ed.2d 423.

Wulc v. Gulf & Western Industries, Inc., D.C. Pa., 400 F.Supp. 99.

D.C.—Investment Co. Institute v. U.S., D.C., 550 F.Supp. 1213.

Violation of reporting requirements of act

U.S.—Dasho v. Susquehanna Corp., C.A.Ill., 380 F.2d 262, cert. den. 88 S.Ct. 480, 389 U.S. 977, 19 L.Ed.2d 470.

Jurisdiction not shown

U.S.—Burke v. Triple A Mach. Shop, Inc., C.A.Cal., 438 F.2d 978—Securities and Exchange Commission v. Thermodynamics, Inc., C.A.Colo., 464 F.2d 457, cert. den. 93 S.Ct. 1358, 410 U.S. 927, 35 L.Ed.2d 588—C.N.S. Enterprises, Inc. v. G. & G. Enterprises, Inc., C.A.Ill., 508 F.2d 1354, cert. den. 96 S.Ct. 38, 423 U.S. 825, 46 L.Ed.2d 40.

Romney v. Richard Prows, Inc., D.C.Utah, 289 F.Supp. 313.

Foreign transactions

There must be a necessary and substantial act within the United States.

U.S.—Travis v. Anthes Imperial Limited, C.A.Mo., 473 F.2d 515—Securities and Exchange Commission v. United Financial Group, Inc., C.A.Or., 474 F.2d 354.

Travis v. Anthes Imperial Limited, D.C.Mo., 331 F.Supp. 797, revd. on oth. grds., C.A., 473 F.2d 515.

Securities Investor Protection Act

U.S.—Redington v. Touche Ross & Co., C.A.N.Y., 612 F.2d 68.

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90. U.S.—Miller v. Bargain City, U.S.A., Inc., D.C. Pa., 229 F.Supp. 33.

Fraudulent conduct in purchase or sale of stocks
(3) Other matters
U.S.—Bailey v. Meister Brau, Inc., D.C.Ill., 320 F.Supp. 539—Tully v. Mott Supermarkets, Inc., D.C.N.J., 337 F.Supp. 834.

91. U.S.—Mills v. Electric Auto-Lite Co., D.C.Ill., 281 F.Supp. 826, revd. on oth. grds., C.A., 403 F.2d 429, vac. on oth. grds., 90 S.Ct. 616, 396 U.S. 375, 24 L.Ed.2d 593, app. after remand, C.A., 552 F.2d 1239, cert. den. 98 S.Ct. 398, 434 U.S. 922, 54 L.Ed.2d 279, reh. den. 98 S.Ct. 649, 434 U.S. 1002, 54 L.Ed.2d 499.

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92. U.S.—Securities and Exchange Commission v. Bennett & Co., D.C.N.J., 207 F.Supp. 919—U.S. v. Steffes, D.C.Mont., 226 F.Supp. 51.

92.5. Interstate telephonic solicitation violation sufficient to confer jurisdiction
U.S.—Starck v. Dewane, D.C.Ill., 364 F.Supp. 466.

92.10. U.S.—Miller v. Bargain City, U.S.A., Inc., D.C.Pa., 229 F.Supp. 33.
N.Y.—Gallo v. Mayer, 270 N.Y.S.2d 295, 50 Misc.2d 385, affd. 272 N.Y.S.2d 1007, 26 A.D.2d 773.

Pendent jurisdiction of nonfederal claims properly refused
U.S.—Erling v. Powell, D.C.S.D., 298 F.Supp. 1154, affd., C.A., 429 F.2d 795.

Pendent jurisdiction of nonfederal claim properly invoked
U.S.—Cooper v. North Jersey Trust Co. of Ridgewood, N.J., D.C.N.Y., 226 F.Supp. 972—Weber v. C.M.P. Corp., D.C.N.Y., 242 F.Supp. 321—Glickman v. Schweickart & Co., D.C.N.Y., 242 F.Supp. 670—Bailey v. Meister Brau, Inc., D.C.Ill., 320 F.Supp. 539.

Pendent jurisdiction doctrine
N.Y.—McCollum v. Billings, 279 N.Y.S.2d 609, 53 Misc.2d 661.

§ 37. Actions Relating to Navigable Water

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5. U.S.—U.S. Steel Corp. v. Train, C.A.Ill., 556 F.2d 822.
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U.S.—U.S. v. Ray, D.C.Fla., 294 F.Supp. 532, affd. in part, revd. in part on oth. grds., C.A., 423 F.2d 16.
Pollution of interstate or navigable waters creates actions arising under "laws" of United States within federal question statute.
U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

Construction of hydroelectric plant
U.S.—Town of Springfield, Vt. v. McCarren, D.C.Vt., 549 F.Supp. 1134, affd. C.A., 722 F.2d 728, cert. den. 104 S.Ct. 360, 464 U.S. 942, 78 L.Ed.2d 322.

6. U.S.—Tatum v. Blackstock, C.A.Tex., 319 F.2d 397.
Hawkinson v. Blandin Paper Co., D.C.Minn., 54 F.R.D. 517.

7. U.S.—Guthrie v. Alabama By-Products Co., D.C. Ala., 328 F.Supp. 1140, affd., C.A., 456 F.2d 1294, cert. den. 93 S.Ct. 1352, 410 U.S. 946, 35 L.Ed.2d 613, reh. den. 93 S.Ct. 1524, 411 U.S. 910, 36 L.Ed.2d 201.

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13. U.S.—Field v. U.S., D.C.N.Y., 340 F.Supp. 175, affd., C.A., 486 F.2d 1393.

14. U.S.—Wallace v. City of Rock Island, Ill., C.A. Ill., 303 F.2d 637—Luttrell v. U.S., C.A.Or., 644 F.2d 1274.
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U.S.—Pacific Inter-Club Yacht Ass'n v Morris, D.C. Cal., 197 F.Supp. 218.

15. U.S.—Hooper v. U.S., D.C.Conn., 331 F.Supp. 1056.

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20. U.S.—Wallace v. Swafford, C.A.Okl., 273 F.2d 602—Stickelman v. U.S., C.A.Nev., 563 F.2d 413.
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Actions involving Indian lands
(8) U.S.—Cardin v. De La Cruz, C.A.Wash., 671 F.2d 363, cert. den. 103 S.Ct. 293, 459 U.S. 967, 74 L.Ed.2d 277.

21. U.S.—Mays v. Kirk, C.A.Fla., 414 F.2d 131.
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Indian land
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22. U.S.—Standage Ventures, Inc. v. State of Ariz., C.A.Ariz., 499 F.2d 248.
Burke v. Gulf, M. & O.R. Co., D.C.Ala., 324 F.Supp. 1125, affd., C.A., 465 F.2d 1206.

23. U.S.—Mays v. Kirk, C.A.Fla., 414 F.2d 131.

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24.5. U.S.—Macomber v. Bose, C.A.Mont., 401 F.2d 545.

24.10. Subsequent state statutes
(1) U.S.—Stokes v. Adair, C.A.Va., 265 F.2d 662, cert. den. 80 S.Ct. 56, 361 U.S. 816, 4 L.Ed.2d 62.
(2) U.S.—Stokes v. Adair, C.A.Va., 265 F.2d 662, cert. den. 80 S.Ct. 56, 361 U.S. 816, 4 L.Ed.2d 62.

24.20. U.S.—Sylvane v. Whelan, D.C.N.Y., 506 F.Supp. 1355.

§ 39. Actions Relating to Mines or Mineral Rights

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25. U.S.—Converse v. Udall, C.A.Or., 399 F.2d 616, cert. den. 89 S.Ct. 635, 393 U.S. 1025, 21 L.Ed.2d 569.
MacDonald v. Best, D.C.Cal., 186 F.Supp. 217—Murphy Oil Corp. v. Hickel, D.C.Ark., 307 F.Supp. 812.
D.C.—McKenna v. Udall, C.A., 418 F.2d 1171, 135 U.S.App.D.C. 335.

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26.5. Actions held to arise under federal laws
(4) Other actions.
U.S.—Texas Oil & Gas Corp. v. Phillips Petroleum Co., D.C.Okl., 277 F.Supp. 366, affd., C.A., 406 F.2d 1303, cert. den. 90 S.Ct. 80, 396 U.S. 829, 24 L.Ed.2d 80.

§ 40. Actions by or against Officers or Agents of United States

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32. U.S.—U.S. v. Lawrence County, C.A.Pa., 280 F.2d 462, affd. 81 S.Ct. 357, 364 U.S. 628, 5 L.Ed.2d 363.
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"Ginnie Mae"
U.S.—Government Nat. Mortg. Ass'n v. Terry, C.A. Ga., 608 F.2d 614.

33.5. U.S.—Griffith v. Bell-Whitley Community Action Agency, C.A.Ky., 614 F.2d 1102, cert. den. 100 S.Ct. 3025, 447 U.S. 928, 65 L.Ed.2d 1122.

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35. U.S.—Industrial Indem., Inc. v. Landrieu, C.A. Tex., 615 F.2d 644.

35.15. U.S.—Expedient Services, Inc. v. Weaver, C.A. Fla., 614 F.2d 56.
Grichenko v. U.S. Postal Service, D.C.N.Y., 524 F.Supp. 672, affd. 751 F.2d 368.

36. U.S.—Harms v. Federal Housing Administration, D.C.Md., 256 F.Supp. 757—Mullins v. First Nat. Exchange Bank of Va., D.C.Va., 275 F.Supp. 712—Coletta v. U.S., D.C.R.I., 300 F.Supp. 19.

38. U.S.—Safir v. Gibson, C.A.N.Y., 417 F.2d 972, app. after remand 432 F.2d 137—White v. Hardy, C.A.N.C., 678 F.2d 485.
Ruffalo v. Civiletti, D.C.Mo., 539 F.Supp. 949, affd. and remd. C.A., 702 F.2d 710, on remand D.C., 565 F.Supp. 34.
San Juan County v. Russell, D.C.Utah, 340 F.Supp. 1306, affd., C.A., 458 F.2d 515.

Action held to arise under federal law
(2) Other actions.
U.S.—Wheeldin v. Wheeler, Cal., 83 S.Ct. 1441, 373 U.S. 647, 10 L.Ed. 605.
Wheeldin v. Wheeler, C.A.Cal., 280 F.2d 293—Skolnick v. Parsons, C.A.Ill., 397 F.2d 523.
Rutledge v. Riddell, D.C.Cal., 186 F.Supp. 552—Chakejian v. Trout, D.C.Pa., 295 F.Supp. 97—White v. Boyle, D.C.Va., 390 F.Supp. 514, affd., C.A., 538 F.2d 1077.
D.C.—Carter v. U.S., C.A., 407 F.2d 1238, 132 U.S. App.D.C 303.

Actions held not to arise under federal law
(5) Other actions.
U.S.—Wheeldin v. Wheeler, Cal., 83 S.Ct. 1441, 373 U.S. 647, 10 L.Ed.2d 605.
Allen v. David, C.A.Tex., 334 F.2d 592, cert. den. 85 S.Ct. 660, 379 U.S. 967, 13 L.Ed.2d 560.
Bolger v. U.S., D.C.N.Y., 189 F.Supp. 237, affd., C.A., 293 F.2d 368, revd. on oth. grds., 83 S.Ct. 385, 371 U.S. 392, 9 L.Ed.2d 390.

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39. U.S.—Martin v. Wyzanski, D.C.Mass., 262 F.Supp. 925.

40. U.S.—Mullins v. First Nat. Exchange Bank of Va., D.C.Va., 275 F.Supp. 712—Jemo Associates, Inc. v. Greene Metropolitan Housing Authority, D.C.Ohio, 523 F.Supp. 186.

41. U.S.—Shivers v. Landrieu, C.A., 674 F.2d 906, 218 U.S.App.D.C. 247.
Birdsall v. U.S., D.C.Fla., 272 F.Supp. 308—Coalition for United Community Action v. Romney, D.C.Ill., 316 F.Supp. 742—Klein v. Robinson, D.C. N.Y., 328 F.Supp. 417, affd., C.A., 468 F.2d 619—Nwankpa v. Kissinger, D.C.Ala., 376 F.Supp. 122, affd., C.A., 506 F.2d 1054.

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Actions held within federal jurisdiction

(8) Other actions.

U.S.—Wilson v. Blount, C.A.Kan., 422 F.2d 866, cert. den. 91 S.Ct. 102, 400 U.S. 865, 27 L.Ed.2d 104.

42. U.S.—Kuenstler v. Occidental Life Ins. Co., D.C. Cal., 292 F.Supp. 532.

44. U.S.—Martin v. Wyzanski, D.C.Mass., 262 F.Supp. 925.

§ 41. Actions by or against United States Corporations

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46. U.S.—Lance Intern., Inc. v. Aetna Cas. & Sur. Co., D.C.N.Y., 264 F.Supp 349—Latch v. Tennessee Val. Authority, D.C.Miss., 312 F.Supp. 1069.

47. U.S.—Merge v. Sharott, C.A.Pa., 341 F.2d 989—Acron Investments, Inc. v. Federal Sav. & Loan Ins. Corp., C.A.Cal., 363 F.2d 236, cert. den. 87 S.Ct. 506, 385 U.S. 970, 17 L.Ed.2d 434.

Latch v. Tennessee Val. Authority, D.C.Miss., 312 F.Supp. 1069—City Federal Sav. and Loan Ass'n v. Crowley, D.C.Wis., 393 F.Supp. 644.

Interpleader action

U.S.—U.S. Fidelity & Guaranty Co. v. Long, D.C.Or., 214 F.Supp. 307.

49. U.S.—Harris v. American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594—Stanturf v. Sipes, D.C.Mo., 224 F.Supp. 883, affd., C.A., 335 F.2d 224, cert. den. 85 S.Ct. 676, 379 U.S. 977, 13 L.Ed.2d 567.

D.C.—Rice v. Disabled Am. Veterans, D.C., 295 F.Supp. 131.

50. U.S.—Mamber v. Second Federal Sav. & Loan Ass'n of Boston, D.C.Mass., 275 F.Supp. 170—Coleman v. Tennessee Valley Trades and Labor Council, D.C.Tenn., 396 F.Supp. 671.

Purpose of exception, etc.

(2) Other statements.

U.S.—Murphy v. Colonial Federal Sav. & Loan Ass'n, C.A.N.Y., 388 F.2d 609.

Particular corporations within statutory exception

(1) U.S.—Federal Deposit Ins. Corp. v. Sumner Financial Corp., C.A.Fla., 602 F.2d 670.

Federal Deposit Ins. Corp. v. National Sur. Corp., D.C.Iowa, 345 F.Supp. 885—Federal Deposit Ins. Corp. v. Huntington Towers, Ltd., D.C. N.Y., 443 F.Supp. 316—Federal Deposit Ins. Corp. v. Gates, D.C.Kan., 594 F.Supp. 36.

The Federal Savings & Loan Insurance Corporation, etc.

(2) Action by corporation within federal court jurisdiction.

U.S.—Federal Sav. & Loan Ins. Corp. v. Krueger, C.A.Ill., 435 F.2d 633—Katin v. Apollo Sav., C.A. Ill., 460 F.2d 422, cert. den. 92 S.Ct. 1767, 406 U.S. 918, 32 L.Ed.2d 117.

Statute held inapplicable

U.S.—Daviditis v. National Bank of Mattoon, C.A.Ill., 262 F.2d 884, cert. den. 79 S.Ct. 1150, 359 U.S. 1012, 3 L.Ed.2d 1037, reh. den. 79 S.Ct. 1447, 360 U.S. 940, 3 L.Ed.2d 1552.

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50.10. U.S.—Harris v. American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594—Home Sav. and Loan Ass'n of Joliet v. Samuel T. Issac & Assoc. Inc., 496 F.Supp. 831.

50.15. U.S.—Federal Sav. & Loan Ins. Corp. v. Fielding, D.C.Nev., 309 F.Supp. 1146.

50.30. U.S.—First Federal Sav. and Loan Ass'n of Harrison, Ark. v. Anderson, C.A.Ark., 681 F.2d 528.

Jurisdiction not granted by

(1) U.S.—Freeling v Sebring, C.A.Okl., 296 F.2d 244

(2) U.S.—Harris v American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594.

50.35. Commodity Credit Corporation

(1) U.S.—Kraft Foods Co of Wisconsin v. Commodity Credit Corp., D.C.Wis., 164 F.Supp. 168, affd. in part and revd. in part on oth. grds., C.A., 266 F.2d 254, cert. den. 80 S.Ct. 83, 361 U.S. 832, 4 L.Ed.2d 74.

§ 42. Actions by or against National Banks or Receivers or Agents Thereof

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52. U.S.—First Federal Sav. and Loan Ass'n of Puerto Rico v. Ruiz De Jesus, C.A.Puerto Rico, 644 F.2d 910.

Suburban Trust Co. v. National Bank of Westfield, D.C.N.J., 211 F.Supp. 694—Bank of Sussex County v. Saxon, D.C.N.J., 251 F.Supp. 132—First Federal Sav. & Loan Ass'n of Puerto Rico v. Zequeira, D.C.Puerto Rico, 305 F.Supp. 37—State of Iowa ex rel. Turner v. First of Omaha Service Corp. of Omaha, Neb., 401 F.Supp. 439.

53. U.S.—Southern Elec. Steel Co v. First Nat. Bank of Birmingham, C.A.Ala., 515 F.2d 1216.

Venue statute as not confirming jurisdiction

U.S.—Swift v. Fourth Nat. Bank of Columbus, Ga., D.C.Ga., 205 F.Supp. 563.

54. U.S.—Wahyou v. Central Val. Nat. Bank, C.A. Cal., 361 F.2d 755—Cupo v. Community Nat. Bank & Trust Co. of New York, C.A.N.Y., 438 F.2d 108, on remand, D.C., 324 F.Supp. 1390.

Twardzik v. Sepauley, D.C.Pa., 286 F.Supp. 346—First Nat. Bank of Lincolnwood v. Keller, D.C. Ill., 318 F.Supp. 339.

Statute held inapplicable

(1) U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

(2) U.S.—Daviditis v. National Bank of Mattoon, C.A.Ill., 262 F.2d 884, cert. den. 79 S.Ct. 1150, 359 U.S. 1012, 3 L.Ed.2d 1037, reh. den. 79 S.Ct. 1447, 360 U.S. 940, 3 L.Ed.2d 1552.

(3) Other instances.

U.S.—Winegar v. First Nat. Bank of Merritt Island, D.C.Fla., 267 F.Supp. 79.

55. U.S.—Stevens v. Lowder, C.A.Ala., 643 F.2d 1078, reh. den. 652 F.2d 1001.

Vital national interest involved

U.S.—Federal Deposit Ins. Corp. v. M. C. Honea, Jr., Inc., D.C.Ga., 440 F.Supp. 1064.

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56. U.S.—Ramapo Bank v. Camp, C.A.N.J., 425 F.2d 333, cert. den. 91 S.Ct. 57, and 91 S.Ct. 59, 400 U.S. 828, 27 L.Ed.2d 58.

61. U.S.—Twardzik v. Sepauley, D.C.Pa., 286 F.Supp. 346—Jackson v. First Nat. Bank of Cornelia, D.C. Ga., 292 F.Supp. 156, stay den. 90 S.Ct. 761, 396 U.S. 1063, 24 L.Ed.2d 758—State of Iowa ex rel. Turner v. First of Omaha Service Corp. of Omaha, Neb., 401 F.Supp. 439.

Suits held to arise under federal laws

(3) Other suits.

U.S.—Leuthold v. Camp, D.C.Mont., 273 F.Supp. 695, affd., C.A., 405 F.2d 499.

Suits held not to arise under federal laws

(7) Other suits.

U.S.—Bowman v. White, C.A.Va., 388 F.2d 756, cert. den. 89 S.Ct. 214, 393 U.S. 891, 21 L.Ed.2d 172.

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61.5. U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

Actions against directors individually, etc.

U.S.—Walker v Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S 941, 4 L.Ed.2d 361.

64.10. U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

65. Applicable in Puerto Rico

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82. U.S.—Federal Deposit Ins. Corp. v. Godshall, C.A.S.C., 558 F.2d 220.

§ 43. Actions by or against Receivers Appointed by Federal Courts

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92. U.S.—U.S v. Franklin Nat. Bank, C.A.N.Y., 512 F.2d 245.

§ 44. Cases Affecting Ambassadors, Public Ministers, or Consuls

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99. Jurisdiction not extended to families of consuls

U.S.—Anderson v. Villela, D.C.Mass., 210 F.Supp. 791.

Accredited consul of deposed regime

U.S.—Dominican Republic v. Peguero, D.C.N.Y., 225 F.Supp. 342.

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12.5. Employee of United Nations

U.S.—U.S. v. Melekh, D.C.N.Y., 190 F.Supp. 67.

§ 45. Controversies to Which United States Is a Party

Library References

Federal Courts ⚪263.

15. U.S.—Hickey v. Illinois Cent. R.R., C.A.Ill., 278 F.2d 529, cert. den. 81 S.Ct. 284, 364 U.S. 918, 5 L.Ed.2d 259 Hill v. U.S., C.A.Tenn., 453 F.2d 839—U.S. v. Marchetti, C.A.Va., 466 F.2d 1309, cert. den. 93 S.Ct. 553, 409 U.S. 1063, 34 L.Ed.2d 516—Nickerson v. U.S., C.A.R.I., 513 F.2d 31.

U.S. v. Carroll, D.C.Ark., 212 F.Supp. 422.

Diversity of citizenship not required

U.S.—U.S. for Use of Rose v. Somers Const. Co., D.C.Del., 184 F.Supp. 563.

16. U.S.—Los Angeles Customs and Freight Brokers Ass'n v. Johnson, D.C.Cal., 277 F.Supp. 525.

D.C.—Trustees of Puritan Church v. U.S., D.C., 191 F.Supp. 670, affd., C.A., 294 F.2d 734, 111 U.S. App.D.C. 105.

Held not suit against United States

U.S.—Laycock v. Kenney, C.A.Or., 270 F.2d 580, cert. den. 80 S.Ct. 373, 361 U.S. 933, 4 L.Ed.2d 355—Jones v. Hadican, C.A.Mo., 552 F.2d 249, cert. den. 97 S.Ct. 2658, 431 U.S. 941, 53 L.Ed.2d 260.

16.5. U.S.—Konecny v. U.S., C.A.Minn., 388 F.2d 59.

Guttman v. U.S., D.C.N.Y., 196 F.Supp. 384—Cooper Agency, Inc. v. McLeod, D.C.S.C., 235 F.Supp. 276, affd., C.A., 348 F.2d 919.

17. U.S.—Jones v. U.S., D.C.Cal., 179 F.Supp. 456—George v. U.S., D.C.Tex., 181 F.Supp. 522.

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18. U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

U.S. v. State of W.Va., D.C.W.Va., 537 F.Supp. 388.

Account by trustees

U.S.—U.S. v. Rose, C.A.Pa., 346 F.2d 985, cert. den. 86 S.Ct. 551, 382 U.S. 979, 15 L.Ed.2d 469.

District of Columbia ejectment statute not "Act of Congress"

D.C.—Herian v. U.S., D.C., 363 F.Supp. 287.

18.5. U.S.—U.S. v. Hermetic Seal Products Co., D.C. Puerto Rico, 198 F.Supp. 749, affd. 309 F.2d 482, cert. den. 83 S.Ct. 510, 371 U.S. 954, 9 L.Ed.2d 501—Wirtz v. Phillips, D.C.Pa., 251 F.Supp. 789.

Court held without jurisdiction

(2) Since the publication of Corpus Juris Secundum, the case of U.S. v. Lawrence County, D.C.Pa., 173 F.Supp. 307, has been reversed, the court holding that the district court did have jurisdiction under the circumstances.—U.S. v. Lawrence County, C.A.Pa., 280 F.2d 462, affd. 81 S.Ct. 357, 364 U.S. 628, 5 L.Ed.2d 363.

(3) Other instances.

U.S.—Jamieson v. Weinberger, D.C.Pa., 379 F.Supp. 28.

Substitution of parties as not defeating jurisdiction

U.S.—Jones v. Village of Proctorville, Ohio, C.A.Ohio, 303 F.2d 311.

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18.10. U.S.—Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri, Mo., 93 S.Ct. 1614, 411 U.S. 279, 36 L.Ed.2d 251.

Condemnation proceedings

(2) Other matters.

U.S.—Tyson v. State of Iowa, C.A.Iowa, 283 F.2d 802.

Consent of states not required

(1) U.S.—Marquardt Corp. v. Weber County, Utah, C.A.Utah, 360 F.2d 168.

U.S. v. State of Ala., D.C.Ala., 188 F.Supp. 759—Bush v. Orleans Parish School Bd., D.C.La., 188 F.Supp. 916, affd., 81 S.Ct. 754, 365 U.S. 569, 5 L.Ed.2d 806—U.S. v. Com. of Pa., Dept. of Highways, D.C.Pa., 349 F.Supp. 1370.

(3) Eleventh Amendment does not apply to actions by the United States.

U.S.—U.S. v. Nevada Tax Commission, C.A.Nev., 439 F.2d 435—Brennan v. State of Iowa, C.A.Iowa, 494 F.2d 100, cert. den. 95 S.Ct. 2422, 421 U.S. 1015, 44 L.Ed.2d 683.

U.S. v. State of La., D.C.La., 225 F.Supp. 353—Anderson v. Tennessee Office of Economic Opportunity, D.C.Tenn., 384 F.Supp. 788.

United States' action for adjudication of its water right claim

U.S.—Cappaert v. U.S., 96 S.Ct. 2062, 426 U.S. 128, 48 L.Ed.2d 523.

20.5. U.S.—Shaw v. U.S., C.A.Cal., 331 F.2d 493—Rasmussen v. Seamans, C.A.Colo., 432 F.2d 346.

Harris v. U.S., D.C.Mass., 204 F.Supp. 228, affd., C.A., 308 F.2d 573—Parks v. U.S., D.C. N.Y., 241 F.Supp. 297—Sayre v. U.S., D.C.Ohio, 282 F.Supp. 175—Becote v. South Carolina State Highway Dept., D.C.S.C., 308 F.Supp. 1266.

Unconsented suit

D.C.—Trustees of Puritan Church v. U.S., C.A., 294 F.2d 734, 111 U.S.App.D.C. 105.

Immunity from liability

U.S.—Peterson v. Weinberger, C.A.Tex., 508 F.2d 45, cert. den. 96 S.Ct. 50.

20.10. U.S.—Fisher v. Secretary of U.S.Dept. of Health, Ed., and Welfare, C.A.Ind., 522 F.2d 493.

Bartell v. Riddell, Cal., 202 F.Supp. 70.

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20.25. U.S.—Baker v. FCH Services, Inc., D.C.N.Y., 376 F.Supp. 1365.

However, it has also been held that an impleading petition or third-party complaint comes within the court's jurisdiction of proceedings commenced by the United States.[20.35]

20.35. Impleading of state held not barred by Eleventh Amendment

U.S.—Williams v. U.S., D.C.N.Y., 42 F.R.D. 609.

23. U.S.—Logan Planing Mill Co. v. Fidelity & Cas. Co. of New York, D.C.W.Va., 212 F.Supp. 906—United Pub. & Printing Corp. v. Horan, D.C. Conn., 268 F.Supp. 948.

24. D.C.—National Ass'n of Letter Carriers v. Blount, D.C., 305 F.Supp. 546, probable jur. noted 90 S.Ct. 1499, 397 U.S. 1062, 25 L.Ed.2d 683, app. dism. 91 S.Ct. 7, 400 U.S. 801, 27 L.Ed.2d 33.

Injunction proceedings

(2) Other instances.

U.S.—U.S. v. U.S. Klans, Knights of Ku Klux Klan, Inc., D.C.Ala., 194 F.Supp. 897.

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25. U.S.—U.S. for Use and Benefit of Victory Elec. Corp. v. Maryland Cas. Co., D.C.N.Y., 213 F.Supp. 800, Adhered to 215 F.Supp. 700.

Miller Act

U.S.—U.S. for Use and Benefit of Gigliello v. Sovereign Const. Co., D.C.Mo., 311 F.Supp. 371.

26. U.S.—Goodpasture v. Tennessee Val. Authority, C.A.Tenn., 434 F.2d 760.

27. U.S.—Republic of Iraq v. First Nat. Bank of Chicago, C.A.Ill., 350 F.2d 645, cert. den. 86 S.Ct. 556, 382 U.S. 982, 15 L.Ed.2d 556.

Becote v. South Carolina State Highway Dept., D.C.S.C., 308 F.Supp. 1266.

31. U.S.—Wirtz v. Phillips, D.C.Pa., 251 F.Supp. 789.

§ 47. —— Actions between States

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32. U.S.—Nevada v. Hall, Cal., 99 S.Ct. 1182, 440 U.S. 410, 59 L.Ed.2d 416, reh. den. 99 S.Ct. 2018, 441 U.S. 917, 60 L.Ed.2d 389.

33. U.S.—Com. of Pa. v. Porter, C.A.Pa., 659 F.2d 306, cert. den. 102 S.Ct. 3509, 458 U.S. 1121, 73 L.Ed.2d 1383.

33.10. U.S.—Standing Rock Sioux Indian Tribe v. Dorgan, C.A.N.D., 505 F.2d 1135.

§ 48. —— Actions by State

Library References

Federal Courts ⚖274, 275.

34. U.S.—Com of Mass. v. Connor, D.C.Mass., 248 F.Supp. 656, affd., C.A., 366 F.2d 778.

35.5. U.S.—Badgley v. City of New York, C.A.N.Y., 606 F.2d 358, cert. den. 100 S.Ct. 2989, two cases, 447 U.S. 906, 64 L.Ed.2d 855.

State of Okl. By and Through Corporation Commission v. U.S., D.C.Okl., 193 F.Supp. 261.

36. U.S.—State of S.C. v. Katzenbach, S.C., 86 S.Ct. 803, 383 U.S. 301, 15 L.Ed.2d 769.

State of Tex. v. Pankey, C.A.N.M., 441 F.2d 236.

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38. U.S.—State of N.H. v. National Broadcasting Co., D.C.N.H., 222 F.Supp. 915, affd., C.A., 324 F.2d 506.

39. U.S.—State of Conn. v. Levi Strauss & Co., D.C. Conn., 471 F.Supp. 363.

§ 49(1). —— Actions against State

Library References

Federal Courts ⚖264.

40. U.S.—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.)

Jordon v. Gilligan, C.A.Ohio, 500 F.2d 701, cert. den. 95 S.Ct. 1996, 421 U.S. 991, 44 L.Ed.2d 481.

Georgia Dept. of Human Resources v. Bell, D.C. Ga., 528 F.Supp. 17.

In re Ramos, Bkrtcy.Ill., 12 B.R. 250.

Mass.—ABCD, Inc. v. Commissioner of Public Welfare, 391 N.E.2d 1217, 378 Mass. 327.

Enforcement of federal right against state

U.S.—Robinson v. Pratt, D.C.Mass., 497 F.Supp. 116.

The right of individuals to sue a state, etc.

U.S.—Baton Rouge Contracting Co. v. West Hatchie Drainage Dist. of Tippah County, Miss., D.C.Miss., 279 F.Supp. 430.

Wash.—Gross v. Washington State Ferries, 367 P.2d 600, 59 Wash.2d 241.

Rule applied to Commonwealth of Puerto Rico

U.S.—Toa Baja Development Corp. v. Garcia Santiago, D.C.Puerto Rico, 312 F.Supp. 899.

Applicable standards

U.S.—Employees of Dept. of Public Health and Welfare, State of Mo. v. Department of Public Health and Welfare, State of Mo., C.A.Mo., 452 F.2d 820, affd. 93 S.Ct. 1614, 411 U.S. 279, 36 L.Ed.2d 251.

Award of double damages held improper

U.S.—Employees of Dept. of Public Health and Welfare, State of Mo. v. Department of Public Health and Welfare, State of Mo., C.A.Mo., 452 F.2d 820, affd. 93 S.Ct. 1614, 411 U.S. 279, 36 L.Ed.2d 251.

Jurisdictional bar

U.S.—Owen v. Lash, C.A.Ind., 682 F.2d 648.

Mathes v. Nugent, 411 F.Supp. 968.

However, Congress can abrogate the states' Eleventh Amendment immunity through legislation that clearly provides a federal forum for claims against states.[40.1]

40.1 Immunity limited by Fourteenth Amendment

U.S.—Hutto v. Finney, Ark., 98 S.Ct. 2565, 437 U.S. 678, 57 L.Ed.2d 522, reh. den. 99 S.Ct. 1035, 439 U.S. 1122, 59 L.Ed.2d 83.

D.C.—Fitzpatrick v. Bitzer, D.C., 96 S.Ct. 2666, 427 U.S. 445, 49 L.Ed.2d 614.

Abrogation in actions by Indian tribes

U.S.—Oneida Indian Nation of New York v. State of N.Y., D.C.N.Y., 520 F.Supp. 1278, 68 A.L.R.Fed. 606, affd. in part, revd. in part on oth. grds. 691 F.2d 1070, on remand 102 F.R.D. 445, revd. 732 F.2d 261, app. after remand 732 F.2d 259 on remand 102 F.R.D. 450, remd. 757 F.2d 19, recall of mandate den. 771 F.2d 51, cert. den. 106 S.Ct. 78, 88 L.Ed.2d 64—Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis., D.C.Wis., 595 F.Supp. 1077.

Copyright Act abrogates immunity

U.S.—Mills Music, Inc. v. State of Ariz., C.A.Ariz., 591 F.2d 1278.

Johnson v. University of Virginia, D.C.Va., 606 F.Supp. 321, declining to follow Wihtol v. Crow, 309 F.2d 777.

Copyright Act does not abrogate immunity

U.S.—Wihtol v. Crow, C.A.Iowa, 309 F.2d 777.

Mihalek Corp. v. State of Mich., D.C.Mich., 595 F.Supp. 903.

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Rehabilitation Act does not abrogate immunity

U.S.—Atascadero State Hosp. v. Scanlon, Cal., 105 S.Ct. 3142, 87 L.Ed.2d 171, reh. den. 106 S.Ct. 18, 87 L.Ed.2d 696.

40.5. U.S.—Parden v. Terminal Ry. of Alabama State Docks Dept., Ala., 84 S.Ct. 1207, 377 U.S. 184, 12 L.Ed.2d 233, reh. den. 84 S.Ct. 1903, 377 U.S. 1010, 12 L.Ed.2d 1057.

Applies to Puerto Rico

U.S.—Fernandez v Chardon, C.A.Puerto Rico, 681 F.2d 42, cert. den. 103 S.Ct. 343, 459 U.S. 989, 74 L.Ed.2d 384, affd. 103 S.Ct. 2611, 462 U.S. 650, 77 L.Ed.2d 74.

No bar to suit by United States

U.S.—U.S. v. State Bd. of Equalization, D.C.Cal, 450 F.Supp. 1030.

41. U.S.—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.).

Standing Rock Sioux Indian Tribe v. Dorgan, C.A.N.D., 505 F.2d 1135.

An-Ti Chai v. Michigan Technological University, D.C.Mich., 493 F.Supp. 1137.

Tex.—Martine v. Board of Regents, State Senior Colleges of Texas, Civ.App., 578 S.W.2d 465, app. after remand, 607 S.W.2d 638, err. ref. no rev. err.

42. U.S.—Parden v. Terminal Ry. of Alabama State Docks Dept., Ala., 84 S.Ct. 1207, 377 U.S. 184, 12 L.Ed.2d 233, reh. den. 84 S.Ct. 1903, 377 U.S. 1010, 12 L.Ed.2d 1057.

Suit as to constitutional violation held not barred

U.S.—Schaeffer v. Sharp, D.C.Miss., 328 F.Supp. 762—Eslinger v. Thomas, D.C.S.C. 340 F.Supp. 886, affd. in part, revd. in part on oth. grds., C.A., 476 F.2d 225.

Fair Labor Standards Act

U.S.—Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri, Mo., 93 S.Ct. 1614, 411 U.S. 279, 36 L.Ed.2d 251.

Dunlop v. State of N.J., C.A.N.J., 522 F.2d 504, vac. on oth. grds. New Jersey v. Usery, 96 S.Ct. 3196, 427 U.S. 909, 49 L.Ed.2d 1202.

Suits under Civil Rights Act not maintainable

U.S.—Burton v. Waller, C.A.Miss., 502 F.2d 1261, cert. den. 95 S.Ct. 1356, 420 U.S. 964, 43 L.Ed.2d 442, reh. den. 95 S.Ct. 1668, 421 U.S. 939, 44 L.Ed.2d 95—Laskaris v. Thornburgh, C.A.Pa., 661 F.2d 23, app. after remand 733 F.2d 260, cert. den. 105 S.Ct. 260, 83 L.Ed.2d 196.

Anderson v. Tennessee Office of Economic Opportunity, D.C.Tenn., 384 F.Supp. 788.

Amendment to Civil Rights Act

U.S.—Harris v. Com. of Pa., D.C.Pa., 419 F.Supp. 10.

43. U.S.—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.)

Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

Palila v. Hawaii Dept. of Land and Natural Resources, D.C.Hawaii, 471 F.Supp. 985, affd., C.A., 639 F.2d 495.

In re Friendship Medical Center, Ltd., Bkrtcy. Ill., 3 B.R. 304.

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44. U.S.—O'Neill v. Com of Pa., C.A.Pa., 459 F.2d 1.

DeLong Corp. v. Oregon State Highway Commission, D.C.Or., 233 F.Supp. 7, affd., C.A., 343 F.2d 911, cert. den. 86 S.Ct. 161, 382 U.S. 877, 15 L.Ed.2d 119.

45. U.S.—Edelman v Jordan, Ill., 94 S Ct. 1347, 415 U.S. 651, 37 L.Ed.2d 662, reh. den. 94 S Ct. 2414, 416 U.S 1000, 40 L.Ed.2d 777, on remand, D.C., 405 F Supp. 802, revd. on oth. grds, C.A., 551 F.2d 152, reh. 563 F.2d 873, affd. 99 S Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358.

United Carolina Bank v Board of Regents of Stephen F. Austin State University, C.A.Tex., 665 F.2d 553.

Pennsylvania Environmental Council, Inc. v. Bartlett, D.C.Pa., 315 F.Supp. 238, affd., C.A., 454 F.2d 613.

N.Y.—Duverney v. State, 410 N.Y.S.2d 237, 96 Misc.2d 898, affd. 429 N.Y.S.2d 70, 76 A.D.2d 962, app. dism 411 N.E.2d 784, 51 N.Y.2d 744, 432 N.Y.S.2d 365.

Suits against state within immunity rule

(3) U.S.—Dixon v. State of Md. by Carter, D.C.Md., 261 F.Supp. 746.

(5) Other suits.

U.S.—Alabama v. Pugh, 98 S.Ct. 3057, 438 U.S. 781, 57 L.Ed.2d 1114, cert. den. 98 S.Ct. 3144, 438 U.S. 915, 57 L.Ed.2d 1160.

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Attorney's fees

U.S.—Hutto v. Finney, Ark., 98 S.Ct. 2565, 437 U.S. 678, 57 L.Ed.2d 522, reh. den. 99 S.Ct. 1035, 439 U.S. 1122, 59 L.Ed.2d 83.

Jordon v. Gilligan, C.A.Ohio, 500 F.2d 701, cert. den. 95 S.Ct. 1996, 421 U.S. 991, 44 L.Ed.2d 481—Rose v. State of Neb., C.A.Neb., 748 F.2d 1258, cert. den. 106 S.Ct 61, 88 L.Ed.2d 50, reh. den. 106 S.Ct. 547, 88 L.Ed.2d 476.

McMurry v. Phelps, D.C.La., 533 F.Supp. 742.

§ 49(2). —— —— Waiver of Immunity; Consent

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48. U.S.—Parden v. Terminal Ry. of Alabama State Docks Dept., Ala., 84 S.Ct. 1207, 377 U.S. 184, 12 L.Ed.2d 233, reh. den. 84 S.Ct. 1903, 377 U.S. 1010, 12 L.Ed.2d 1057—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.)

Delaware Valley Citizens' Council for Clean Air v. Com. of Pa., C.A.Pa., 678 F.2d 470, stay den. 103 S.Ct. 14, 458 U.S. 1125, 73 L.Ed.2d 1400, cert. den. 103 S.Ct. 298, 459 U.S. 969, 74 L.Ed.2d 280.

Department of Ed., State of Hawaii v. Katherine D., D.C.Hawaii, 531 F.Supp. 517, affd. in part on oth. grds., revd. in part C.A., 727 F.2d 809, cert. den. 105 S.Ct. 2360, 86 L.Ed.2d 260.

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48.5. U.S.—Riggle v. State of Cal., C.A.Cal., 577 F.2d 579—Mills Music, Inc. v. State of Ariz., C.A.Ariz., 591 F.2d 1278.

Lemelson v. Ampex Corp., D.C.Ill., 372 F.Supp. 708.

Cal.—Coan v. State, 113 Cal.Rptr. 187, 520 P.2d 1003, 11 C.3d 286.

48.10. U.S.—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.)

Peel v. Florida Dept. of Transp., C.A.Fla., 600 F.2d 1070.

Ramos v. Lamm, D.C.Colo., 539 F.Supp. 730, remd. C.A., 713 F.2d 546.

Statute, waiving only common law immunity

U.S.—DeLong Corp v. Oregon State Highway Commission, D.C.Or., 233 F.Supp. 7, affd., C.A., 343 F.2d 911, cert. den. 86 S.Ct. 161, 382 U.S. 877, 15 L.Ed.2d 119.

Statute not affected by amendment

U.S.—Mississippi River Fuel Corp. v. Cocreham, C.A. La., 382 F.2d 929, reh. den. 390 F.2d 34, cert. den. 88 S.Ct. 1264, 390 U.S. 1014, 20 L.Ed.2d 164.

Intent of Congress

U.S.—Williamson Towing Co., Inc. v. State of Ill., 534 F.2d 758—Monroe County v. State of Fla., C.A. N.Y., 678 F.2d 1124, cert. den. 103 S.Ct. 726, 459 U.S 1104, 74 L.Ed.2d 951.

Flesch v. Eastern Pennsylvania Psychiatric Institute, D.C Pa., 434 F.Supp. 963.

Waiver not shown

U.S.—Selman v. Harvard Medical School, D.C.N.Y., 494 F.Supp. 603, affd., C.A., 636 F.2d 1204.

48.15. U.S.—Miller v. State of Vt., D.C.Vt., 201 F.Supp. 930.

48.20. U.S.—MacDonald v. Board of Regents of University of Mich., C.A.Mich., 371 F.2d 818—Brennan v University of Kan., C.A.Kan., 451 F.2d 1287—Dagnall v. Gegenheimer, C.A.La., 645 F.2d 2—Miener v. State of Mo., C.A.Mo., 673 F.2d 969, cert. den. 103 S.Ct. 215, 230, 459 U.S 909, 74 L.Ed.2d 171 and 103 S.Ct. 230, 459 U.S. 916, 74 L.Ed.2d 182, on remand 580 F.Supp. 562, op. supp. 607 F.Supp. 1425

West v. Keve, D.C.Del., 541 F.Supp. 534, app. dism. C.A., 721 F.2d 91.

Held no waiver

(2) Other instances.

U.S.—Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n, Fla., 101 S.Ct. 1032, 450 U.S. 147, 67 L.Ed.2d 132, reh. den. 101 S.Ct. 2008, 451 U.S. 933, 68 L.Ed.2d 319, on remand, C.A., 648 F.2d 241.

Jacobson v. Tahoe Regional Planning Agency, C.A.Cal., 566 F.2d 1353, affd. in part, revd. in part on oth. grds. 99 S.Ct. 1171, 440 U.S. 391, 59 L.Ed.2d 401, on remand, D.C., 474 F.Supp. 901.

Graham v. Hamilton County, State of Tenn., D.C.Tenn., 266 F.Supp. 623—Citizens Committee for Hudson Valley v. Volpe, D.C.N.Y., 297 F.Supp. 809—Hickman v. Idaho State School and Hospital, D.C.Idaho, 339 F.Supp. 463.

48.25. U.S.—Greiner v. Gunnar A. Olsen Corp., D.C. Iowa, 498 F.Supp. 908.

48.30. U.S.—Williams v. Eaton, C.A.Wyo., 443 F.2d 422, on remand 333 F.Supp. 107, affd., C.A., 468 F.2d 1079.

Sincock v. Obara, D.C.Del., 320 F.Supp. 1098.

Waiver as not creating diversity jurisdiction

U.S.—S. J. Groves & Sons Co. v. New Jersey Turnpike Authority, D.C.N.J., 268 F.Supp. 568.

48.35. U.S.—Truitt v. State of Ill., C.A.Ill., 278 F.2d 819, cert. den. 81 S.Ct. 109, 364 U.S. 866, 5 L.Ed.2d 88.

S. J. Groves & Sons Co. v. New Jersey Turnpike Authority, D.C.N.J., 268 F.Supp. 568.

48.40. U.S.—Williams v. Eaton, C.A.Wyo., 443 F.2d 422, on remand 333 F.Supp. 107, affd., C.A., 468 F.2d 1079.

State of Alaska v. O/S Lynn Kendall, D.C.Alaska, 310 F.Supp. 433—Hickman v. Idaho State School and Hospital, D.C.Idaho, 339 F.Supp. 463.

49. U.S.—State of Iowa v. Union Asphalt & Roadoils, Inc., C.A.Iowa, 409 F.2d 1239.

Seneca Nation of Indians v. State of New York, D.C.N.Y., 397 F.Supp. 685.

Mere general appearance by Attorney General insufficient

U.S.—U.S. v. DCS Development Corp., D.C.N.Y., 590 F.Supp. 1117.

Filing counterclaim

U.S.—Mohegan Tribe v. State of Conn., D.C.Conn., 528 F.Supp. 1359.

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50. U.S.—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.)

Defense on merits does not waive right to claim immunity

U.S.—Aerojet-General Corp. v. Askew, C.A.Fla., 453 F.2d 819, cert. den. 93 S.Ct. 110, 409 U.S. 892, 34 L.Ed.2d 149.

51. U.S.—State of Alaska v. O/S Lynn Kendall, D.C. Alaska, 310 F.Supp. 433.

Appearance held not waiver

U.S.—Richins v. Industrial Const., Inc., C.A.Utah, 502 F.2d 1051.

51.5. U.S.—Dagnall v. Gegenheimer, C.A.La., 645 F.2d 2.

Board of Regents of University of Nebraska v. Dawes, D.C.Neb., 370 F.Supp. 1190.

State law governs determination of waiver of immunity

U.S.—Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dept., C.A.Ala., 415 F.2d 452.

Flores v. Norton & Ramsey Lines, Inc., D.C. Tex., 352 F.Supp. 150.

51.15. U.S.—Mississippi River Fuel Corp. v. Cocreham, C.A.La., 382 F.2d 929, reh. den. 390 F.2d 34, cert. den. 88 S.Ct. 1264, 390 U.S. 1014, 20 L.Ed.2d 164.

52. U.S.—Vecchione v. Wohlgemuth, C.A.Pa., 558 F.2d 150, cert. den. 98 S.Ct. 439, 434 U.S. 943, 54 L.Ed.2d 304.

52.10. U.S.—Selman v. Harvard Medical School, D.C.N.Y., 494 F.Supp. 603, affd., C.A., 636 F.2d 1204.

52.20. U.S.—Hamilton Mfg. Co. v. Trustees of State Colleges in Colo., C.A.Colo., 356 F.2d 599.

Okl.—Nichols v. Department of Corrections, 631 P.2d 746.

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53. U.S.—Richins v. Industrial Const., Inc., C.A. Utah, 502 F.2d 1051.

Flesch v. Eastern Pennsylvania Psychiatric Institute, D.C.Pa., 434 F.Supp. 963—Prueitt v. Boone County, Iowa, D.C.Iowa, 599 F.Supp. 278, disagreeing with Greiner v. Gunnar A. Olsen Corp., 498 F.Supp. 908, and Chicago and Northwestern Transportation Co., 498 F.Supp. 1.

Civil rights statute did not waive immunity

Neb.—Wiseman v. Keller, 358 N.W.2d 768, 218 Neb. 717—Patteson v. Johnson, 367 N.W.2d 123, 219 Neb. 852.

However, there is authority that when a state waives its sovereign immunity from suit it also waives its Eleventh Amendment immunity from suit in federal court.[54.1]

54.1 U.S.—Chicago and N.W. Transp. Co. v. Hurst Excavating Co., D.C.Iowa, 498 F.Supp. 1—Greiner v. Gunnar A. Olsen Corp., D.C.Iowa, 498 F.Supp. 908.

54.10. Compact held not to amount to waiver

U.S.—DeLong Corp. v. Oregon State Highway Commission, D.C.Or., 233 F.Supp. 7, affd., C.A., 343 F.2d 911. Cert. den. 86 S.Ct. 161, 382 U.S. 877, 15 L.Ed.2d 119.

Waiver of governmental immunity while retaining constitutional immunity

U.S.—Usry v. Louisiana Dept. of Highways, D.C.La., 459 F.Supp. 56.

54.15. U.S.—Red Star Towing & Transp. Co. v. Department of Transp. of State of N.J., C.A.N.J., 423 F.2d 104.

Operation of vessel as common carrier in interstate commerce on navigable waters held to waive immunity as to seaman's action under Jones Act, but not as to common law action based on unseaworthiness.

U.S.—Cocheri v. State of Alaska, D.C.Alaska, 246 F.Supp. 328.

University board of regents held liable under Jones Act

U.S.—Huckins v. Board of Regents of University of Mich., D.C.Mich., 263 F.Supp. 622.

Operation of state docks as waiver of immunity

U.S.—Rivet v. East Point Marine Corp., D.C.Ala., 325 F.Supp. 1265.

Operation of ferry on navigable water not waiver

U.S.—Faust v. South Carolina State Highway Dept., C.A.S.C., 721 F.2d 934, cert. den. 104 S.Ct. 2678, 81 L.Ed.2d 874, declining to follow Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001.

Whether a state, by accepting federal aid, or by engaging in activities of paramount federal interest, waives its immunity depends on the circumstances in the particular case.[54.20]

54.20. U.S.—Pennsylvania Environmental Council, Inc. v. Bartlett, C.A.Pa., 454 F.2d 613.

Elliot v. Volpe, D.C.Mass., 328 F.Supp. 831—Ward v. Ackroyd, D.C.Md., 344 F.Supp. 1202.

Immunity held not waived

U.S.—Knight v. State of N.Y., C.A.N.Y., 443 F.2d 415—Daye v. Com. of Pa., C.A.Pa., 483 F.2d 294, cert. den. 94 S.Ct. 1956, 416 U.S. 946, 40 L.Ed.2d 298—Milburn v. Huecker, C.A.Ky., 500 F.2d 1279, app. after remand 538 F.2d 1241.

Daye v. Com. of Pa., D.C.Pa., 344 F.Supp. 1337, affd., C.A., 483 F.2d 294, cert. den. 94 S.Ct. 1956, 416 U.S. 946, 40 L.Ed.2d 298—Federal Deposit Ins. Corp. v. Cades, D.C.Pa., 357 F.Supp. 1111.

Federal question

U.S.—Daye v. Com. of Pa., D.C.Pa., 344 F.Supp. 1337, affd., C.A., 483 F.2d 294, cert. den. 94 S.Ct. 1956, 416 U.S. 946, 40 L.Ed.2d 298.

Mere fact of participation insufficient to establish consent to suit

U.S.—Edelman v. Jordan, Ill., 94 S.Ct. 1347, 415 U.S. 651, 37 L.Ed.2d 662, reh. den. 94 S.Ct. 2414, 416 U.S. 1000, 40 L.Ed.2d 777, on remand, D.C., 405 F.Supp. 802, revd., C.A., 551 F.2d 152, reh. 563 F.2d 873, affd. 99 S.Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358.

Burgess v. M/V Tamano, D.C.Me., 382 F.Supp. 351.

Mere participation in aid program insufficient

U.S.—Frye v. Lukehard, D.C.Va., 364 F.Supp. 1379.

55. U.S.—Fifty Associates v. Prudential Ins. Co. of America, C.A.Ariz., 446 F.2d 1187, app. after remand 450 F.2d 1007.

§ 49(3). —— —— Scope of Limitations

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56. U.S.—Bond v. Stanton, C.A.Ind., 555 F.2d 172, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161—Riggle v. State of Cal., C.A.Cal., 577 F.2d 579.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia, D.C.N.Y., 311 F.Supp. 149—Department of Ed., State of Hawaii v. Katherine D., D.C.Hawaii, 531 F.Supp. 517, affd. in part, revd. in part on oth. grds. C.A., 727 F.2d 809, cert. den. 105 S.Ct. 2360, 86 L.Ed.2d 260.

Matter of Glidden, Bkrtcy.Conn., 8 B.R. 128.

56.5. U.S.—Jordan v. Trainor, C.A.Ill., 551 F.2d 152, reh., C.A., 563 F.2d 873, affirmed 99 S.Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358.

Miller v. State of Vt., D.C.Vt., 201 F.Supp. 930—Meyerhoffer v. East Hanover Tp. School Dist., D.C.Pa., 280 F.Supp. 81.

Thurway authority

U.S.—Zeidner v. Wulforst, D.C.N.Y., 197 F.Supp. 23.

The Eleventh Amendment immunity of the states extends to actions brought under the Jones Act.[56.10]

56.10. U.S.—Smith v. State of La., Dept. of Wildlife and Fisheries, D.C.La., 586 F.Supp. 609.

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57. U.S.—Griffin v. County School Bd. of Prince Edward County, Va., 84 S.Ct. 1226, 377 U.S. 218, 12 L.Ed.2d 256, motion gr. 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d 496.

Seals v. Quarterly County Court of Madison County, Tenn., C.A.Tenn., 562 F.2d 390—Monroe County v. State of Fla., C.A.N.Y., 678 F.2d 1124, cert. den. 103 S.Ct. 726, 459 U.S. 1104, 74 L.Ed.2d 951.

Immunity waived in state courts not waived in federal courts

U.S.—Wojciechowski v. Harriman, D.C.N.M., 607 F.Supp. 631.

Immunity waived in state courts held waived in federal courts

U.S.—NA-JA Const. Corp. v. Roberts, D.C.Del., 259 F.Supp. 895.

58. U.S.—Monell v. Department of Social Services of City of New York, N.Y., 98 S.Ct. 2018, 436 U.S. 658, 56 L.Ed.2d 611.

Allen v. Lovejoy, C.A.Tenn., 553 F.2d 522.

Wojciechowski v. Harriman, D.C.N.M., 607 F.Supp. 631.

Statute precluding federal jurisdiction

U.S.—Markham v. City of Newport News, C.A.Va., 292 F.2d 711.

59. U.S.—Schultz v. Greater New Orleans Expressway Commission, D.C.La., 250 F.Supp. 89—Huckins v. Board of Regents of University of Mich., D.C.Mich., 263 F.Supp. 622—Miller v. Parsons, D.C.Pa., 313 F.Supp. 1150—Principe Compania Naviera, S.A. v. Board of Com'rs of Port of New Orleans, D.C.La., 333 F.Supp. 353.

Factors considered

U.S.—Jacintoport Corp. v. Greater Baton Rouge Port Com'n, C.A.5 (La.), 762 F.2d 435, cert. den. 106 S.Ct. 797, disapproving Missouri Pacific Railroad v. Travelers Ins. Co., 281 F.Supp. 100 to extent in conflict.

State university

U.S.—Connelly v. University of Vt. and State Agr. College, D.C.Vt., 244 F.Supp. 156.

60. U.S.—Schultz v. Greater New Orleans Expressway Commission, D.C.La., 250 F.Supp. 89—Bennett v. Gravelle, D.C.Md., 323 F.Supp. 203, affd., C.A., 451 F.2d 1011, cert. den. 92 S.Ct. 2451, 407 U.S. 917, 32 L.Ed.2d 692—Wojciechowski v. Harriman, D.C.N.M., 607 F.Supp. 631.

School district

U.S.—Fabrizio & Martin, Inc. v. Board of Ed. Central School Dist. No. 2 of Towns of Bedford et al., D.C.N.Y., 290 F.Supp. 945.

Board of education

U.S.—Hodgson v. Board of Ed., Parsippany-Troy Hills, D.C.N.J., 344 F.Supp. 79, app. dism., C.A., 468 F.2d 1325.

County school board

U.S.—Miller v. Board of Ed. of Lincoln County, D.C. W.Va., 450 F.Supp. 106.

Protected by Eleventh Amendment

U.S.—Degregorio v. O'Bannon, D.C.Pa., 86 F.R.D. 109.

The Eleventh Amendment does not apply to suits brought by the United States.[61.1]

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61.1. U.S.—U.S. v. Mississippi, 85 S.Ct. 808, 380 U.S. 128, 13 L.Ed.2d 717, on remand 256 F.Supp. 344—Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri, Mo., 93 S.Ct. 1614, 411 U.S. 279, 36 L.Ed.2d 251.

Marshall v. A & M Consolidated Independent School Dist., C.A.Tex., 605 F.2d 186—Delaware Valley Citizens' Council for Clean Air v. Com. of Pa., C.A.Pa., 678 F.2d 470, stay den. 103 S.Ct. 14, 458 U.S. 1125, 73 L.Ed.2d 1400, cert. den. 103 S.Ct. 298, 459 U.S. 969, 74 L.Ed.2d 280.

Weisbord v. Michigan State University, D.C. Mich., 495 F.Supp. 1347.

61.5. U.S.—Ellis Fischel State Cancer Hospital v. Marshall, C.A., 629 F.2d 563, cert. den 101 S.Ct. 1757, 450 U.S. 1040, 68 L.Ed.2d 237.

George A. Fuller Co. v. Coastal Plains, Inc., D.C.La., 290 F.Supp. 911—Southern Bridge Co. v. Department of Highways, State of La., D.C.La., 319 F.Supp. 948.

The joinder of other parties has been held not to convert actions into actions against states within the prohibition of the Eleventh Amendment.[61.15]

61.15. State mineral board

U.S.—Kuchenig v. California, Co., D.C.La., 233 F.Supp. 389.

§ 50(1). —— Actions against State Officers or Agencies

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62. U.S.—Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, Ohio, 97 S.Ct. 568, 429 U.S. 274, 50 L.Ed.2d 471, app. after remand, C.A., 670 F.2d 59.—Milliken v. Bradley, Mich., 97 S.Ct. 2749, 433 U.S. 267, 53 L.Ed.2d 745—Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, Nev., 99 S.Ct. 1171, 440 U.S. 391, 59 L.Ed.2d 401, on remand D.C., 474 F.Supp. 901—Toll v. Moreno, Md., 102 S.Ct. 2977, 458 U.S. 1, 73 L.Ed.2d 563—Florida Dept. of State v. Treasure Salvors, Inc., Fla., 102 S.Ct. 3304, 458 U.S. 670, 73 L.Ed.2d 1057, on remand, C.A., 689 F.2d 1254 (Per Justice Stevens with the Chief Justice and Justices Marshall and Blackmun concurring and Justice Brennan concurring in the judgment.)

Travelers Indem. Co. v. School Bd. of Dade County, Fla., C.A.Fla., 666 F.2d 505, cert. den. 103 S.Ct. 77, 459 U.S. 834, 74 L.Ed.2d 74.

Housing Authority of City of Asbury Park v. Richardson, D.C.N.J., 346 F.Supp. 1027—Kostelic v. Bernardi, D.C.Ill., 538 F.Supp. 620.

Federal court may have jurisdiction as not being suit against state, of suit.

(5) U.S.—Citizens Committee for Hudson Valley v. Volpe, D.C.N.Y., 297 F.Supp. 809.

The Eleventh Amendment is not a bar to a suit against a state-owned rail carrier, which is an alter ego of the state.[62.1]

62.1 U.S.—International Longshoremen's Ass'n, AFL-CIO v. North Carolina State Ports Authority, D.C.N.C., 370 F.Supp. 33, affd. 511 F.2d 1007—Brotherhood of Locomotive Engineers v. New Jersey Transit Rail Operations, Inc., D.C. N.Y., 608 F.Supp. 1216, adhered to 618 F.Supp. 1456.

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62.5. U.S.—Rodriguez v. Swank, C.A.Ill., 496 F.2d 1110, cert. den. 95 S.Ct. 151, 419 U.S. 885, 42 L.Ed.2d 125.

City of Altus, Okl. v. Carr, D.C.Tex., 255 F.Supp. 828, affd. 87 S.Ct. 240, 385 U.S. 35, 17 L.Ed.2d 34—Byram River v. Village of Port Chester, New York, D.C.N.Y., 394 F.Supp. 618—Bennett v. Reed, D.C.N.C., 534 F.Supp. 83, affd. C.A., 676 F.2d 690.

Jail and fine

U.S.—Hutto v. Finney, Ark., 98 S.Ct. 2565, 437 U.S. 678, 57 L.Ed.2d 522, reh. den. 99 S.Ct. 1035, 439 U.S. 1122, 59 L.Ed.2d 83.

Remedial or coercive fines

U.S.—Fortin v. Commissioner of Massachusetts Dept. of Public Welfare, C.A.Mass., 692 F.2d 790.

63. U.S.—Scheuer v. Rhodes, Ohio, 94 S.Ct. 1683, 416 U.S. 232, 40 L.Ed.2d 90, app. after remand C.A. 570 F.2d 563, application for stay den. 98 S.Ct. 29, 434 U.S. 1335, 54 L.Ed.2d 47 cert. den. 98 S.Ct. 1488, three cases, 435 U.S. 924, 55 L.Ed.2d 517—Cory v. White, Tex., 102 S.Ct. 2325, 457 U.S. 85, 72 L.Ed.2d 694, on remand, C.A., 686 F.2d 225.

Laskaris v. Thornburgh, C.A.Pa., 661 F.2d 23, app. after remand 733 F.2d 260, cert. den. 105 S.Ct. 260, 83 L.Ed.2d 196.

Langton v Maloney, D.C.Conn., 527 F.Supp. 538.

Action for declaratory judgment

(4) Suit for declaratory relief against individual state police officer alleging sex discrimination.

U.S.—Vermett v. Hough, D.C.Mich., 606 F.Supp. 732.

64. U.S.—Urbano v. Board of Managers of New Jersey State Prison, C.A.N.J., 415 F.2d 247, cert. den. 90 S.Ct. 967, 397 U.S. 948, 25 L.Ed.2d 128—Williams v. Eaton, C.A.Wyo., 443 F.2d 422, on remand 333 F.Supp. 107. Affd., C.A., 468 F.2d 1079.

Southern Illinois Builders Ass'n v. Ogilvie, D.C. Ill., 327 F.Supp. 1154, affd., C.A., 471 F.2d 680—Eslinger v. Thomas, D.C.S.C., 340 F.Supp. 886, affd. in part, revd. in part on oth. grds., C.A., 476 F.2d 225.

Action for declaratory judgment

(5) U.S.—Dorsey v. State Athletic Commission, D.C. La., 168 F.Supp. 149, affd. 79 S.Ct. 1137, 359 U.S. 533, 3 L.Ed.2d 1028, reh. den. 79 S.Ct. 1446, 360 U.S. 940, 3 L.Ed.2d 1552.

(6) Other instances.

U.S.—Lee v. Board of Regents of State Colleges, C.A. Wis., 441 F.2d 1257.

(7) Violation of constitutional rights by acts, policies and practices in state prisons.

U.S.—Holt v. Sarver, C.A.Ark., 442 F.2d 304, on remand, D.C., 363 F.Supp. 194, revd. on oth. grds., C.A., 505 F.2d 194, on remand 410 F.Supp. 251, affd. 548 F.2d 740.

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65. U.S.—Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, Ohio, 97 S.Ct. 568, 429 U.S. 274, 50 L.Ed.2d 471, app. after remand, C.A., 670 F.2d 59.

C. H. Leavell & Co. v. Board of Com'rs of Port of New Orleans, C.A.La., 424 F.2d 764.

William S. v. Gill, D.C.Ill., 536 F.Supp. 505.

Turnpike commission

(1) U.S.—Harrison Const. Co. v. Ohio Turnpike Commission, C.A.Ohio, 272 F.2d 337—Gerr v. Emrick, C.A.Pa., 283 F.2d 293, cert. den. 81 S.Ct. 698, 365 U.S. 817, 5 L.Ed.2d 695.

Moss v. Calumet Paving Co., D.C.Ind., 201 F.Supp. 426—S. J. Groves & Sons Co. v. New Jersey Turnpike Authority, D.C.N.J., 268 F.Supp. 568.

(3) U.S.—Kansas Turnpike Authority v. Abramson, C.A.Kan., 275 F.2d 711, cert. den. 80 S.Ct. 1250, 363 U.S. 813, 4 L.Ed.2d 1154.

Sports and exposition authority

U.S.—DeSantis v. Ricci, D.C.N.J., 614 F.Supp. 415.

Federal question required

U.S.—S. J. Groves & Sons Co. v. New Jersey Turnpike Authority, D.C.N.J., 268 F.Supp. 568.

66. U.S.—Palmer v. Penn-Ohio Road Materials, Inc., D.C.Pa., 470 F.Supp. 1199.

If a state agency does not come under the protection of the Eleventh Amendment, the state can only curtail federal jurisdiction by closing its own courts.[66.1]

66.1. U.S.—S. J. Groves & Sons Co. v. New Jersey Turnpike Authority, D.C.N.J., 268 F.Supp. 568.

66.5. U.S.—Cory v. White, Tex., 102 S.Ct. 2325, 457 U.S. 85, 72 L.Ed.2d 694, on remand, C.A., 686 F.2d 225.

Leonhard v. U.S., C.A.N.Y., 633 F.2d 599, cert. den. 101 S.Ct. 1975, 451 U.S. 908, 68 L.Ed.2d 295—American Re-Insurance Co. v. Janklow, C.A. S.D., 676 F.2d 1177, app. after remand 692 F.2d 1158.

Acosta v. Swank, D.C.Ill., 325 F.Supp. 1157—Prendergast v. Long Island State Park Commission, D.C.N.Y., 330 F.Supp. 438.

Pavlak v. Duffy, D.C.Conn., 48 F.R.D. 396.

Claim for damages against individual state police officer for sex discrimination

U.S.—Vermett v. Hough, D.C.Mich., 606 F.Supp. 732.

66.10. U.S.—Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., Inc., C.A.La., 625 F.2d 22.

Keller v University of Michigan, 411 F.Supp. 1055.

66.15. U.S.—Harris v. Pennsylvania Turnpike Commission, C.A.Pa., 410 F.2d 1332, cert. den. 90 S.Ct. 558, 396 U.S. 1005, 24 L.Ed.2d 497—Miener v. State of Mo., C.A.Mo., 673 F.2d 969, cert. den. 103 S.Ct. 215, 230, 459 U.S. 909, 74 L.Ed.2d 171 and 103 S.Ct. 230, 459 U.S. 916, 74 L.Ed.2d 182, on remand 580 F.Supp. 562, op. supp. 607 F.Supp. 1425.

Lovrinoff v. Helms Exp., Inc., D.C.Pa., 309 F.Supp. 145.

66.20. U.S.—Blake v. Kline, C.A.Pa., 612 F.2d 718, cert. den. 100 S.Ct. 3011, 447 U.S. 921, 65 L.Ed.2d 1112.

Prendergast v. Long Island State Park Commission, D.C.N.Y., 330 F.Supp. 438—Daye v. Com. of Pa., D.C.Pa., 344 F.Supp. 1337, affd., C.A., 483 F.2d 294, cert. den. 94 S.Ct. 1956, 416 U.S. 946, 40 L.Ed.2d 298.

66.25. U.S.—Matherson v. Long Island State Park Commission, C.A.N.Y., 442 F.2d 566.

Tardan v. Chevron Oil Co., D.C.La., 332 F.Supp. 304, C.A., affd. in part, remd. in part, 463 F.2d 651.

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66.30. U.S.—Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Dept., C.A.Ala., 415 F.2d 452.

66.35. U.S.—Excess and Cas. Reinsurance Ass'n v. Insurance Com'r of State of Cal., C.A.Cal., 656 F.2d 491.

Williams v. Eaton, D.C.Wyo., 310 F.Supp. 1342, affd. in part, vac. in part on oth. grds., C.A., 443 F.2d 422, on remand 333 F.Supp. 107, affd., C.A., 468 F.2d 1079.

Principal areas of inquiry

U.S.—Adams v. Richland School Dist. One, 412 F.Supp. 647.

66.40. U.S.—Beck v. State of Cal., D.C.Cal., 479 F.Supp. 392.

66.45. U.S.—Kimble v. Solomon, C.A.Md., 599 F.2d 599, cert. den. 100 S.Ct. 422, 444 U.S. 950, 62 L.Ed.2d 320.

James v. Almond, D.C.Va., 170 F.Supp. 331, app. dism. 79 S.Ct. 1146, 359 U.S. 1006.

66.50. U.S.—Pennhurst State School & Hosp. v. Halderman, Pa., 104 S.Ct. 900, 462 U.S. 89, 79 L.Ed.2d 67.

Graham v. Hamilton County, State of Tenn., D.C.Tenn., 266 F.Supp. 623.

Interpleader action not barred

U.S.—Skandia America Reinsurance Corp. v. Schenck, D.C.N.Y., 441 F.Supp. 715.

66.65. U.S.—Employees of Dept. of Public Health and Welfare, Missouri v. Department of Public Health and Welfare, Missouri, Mo., 93 S.Ct. 1614, 411 U.S. 279, 36 L.Ed.2d 251.

Ahmad v. Burke, D.C.Pa., 436 F.Supp. 1307.

N.D.—Burlington Northern, Inc. v. State of N.D., 460 F.Supp. 140.

Claim for damages against state police department for sex discrimination barred

U.S.—Vermett v. Hough, D.C.Mich., 606 F.Supp. 732.

University considered "arm" of state

U.S.—Perez v. Rodriguez Bou, C.A.Puerto Rico, 575 F.2d 21, app. after remand 600 F.2d 1.

Mich.—Hutchins v. Board of Trustees of Michigan State University, D.C.Mich., 595 F.Supp. 862.

66.70. U.S.—De Leavy v. Richmond County School Bd., C.A.Va., 284 F.2d 340.

Cause arising out of proprietary function as not altering immunity of state

U.S.—Scott v. Board of Sup'rs of La. State University and Agr. and Mechanical College, C.A.La., 336 F.2d 557.

66.75. U.S.—Benniefield v. Valley Barge Lines, D.C. Ala., 472 F.Supp. 314.

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67. U.S.—Fair Assessment in Real Estate Ass'n, Inc. v. McNary, Mo., 102 S.Ct. 177, 454 U.S. 100, 70 L.Ed.2d 271.

Dagnall v. Gegenheimer, C.A.La., 645 F.2d 2.

Jackson v. State of Colo., D.C.Colo., 294 F.Supp. 1065—Citizens Committee for Hudson Valley v. Volpe, D.C.N.Y., 297 F.Supp. 809.

N.Y.—Duverney v. State, 410 N.Y.S.2d 237, 96 Misc.2d 898, affd. 429 N.Y.S.2d 70, 76 A.D.2d 962, app dism. 411 N.E.2d 784, 51 N.Y.2d 744, 432 N.Y.S.2d 365.

School district

(2) Other matters.

U.S.—Wihtol v. Crow, C.A.Iowa, 309 F.2d 777.

Meyerhoffer v. East Hanover Tp. School Dist., D.C.Pa., 280 F.Supp. 81—Shepheard v. Godwin, D.C.Va., 280 F.Supp. 869.

67.5. U.S.—Epstein v. Maddox, D.C.Ga., 277 F.Supp. 613, affd., C.A., 401 F.2d 777—Raymond Intern. Inc. v. M/T Dalzelleagle, D.C.N.Y., 336 F.Supp. 679—Francis v. Davidson, D.C.Md., 340 F.Supp. 351, app. dism. 93 S.Ct. 223, 409 U.S. 907, 34 L.Ed.2d 168, affd. 93 S.Ct. 223, 409 U.S. 904, 34 L.Ed.2d 168.

67.10. U.S.—Knight v. State of N.Y., C.A.N.Y., 443 F.2d 415.

68. U.S.—Miller-Davis Co. v. Illinois State Toll Highway Authority, C.A.Ill., 567 F.2d 323—Travelers Indem. Co. v. School Bd. of Dade County, Fla., C.A.Fla., 666 F.2d 505, cert. den. 103 S.Ct. 77, 459 U.S. 834, 74 L.Ed.2d 74.

Henry v. Betit, D.C.Alaska, 323 F.Supp. 418—Doyle v. Wilson, D.C.Del., 529 F.Supp. 1343.

Board of education has title to school lands

U.S.—Aerojet-General Corp. v. Askew, C.A.Fla., 453 F.2d 819, cert. den. 93 S.Ct. 110, 409 U.S. 892, 34 L.Ed.2d 149.

Retroactive payments of benefits wrongfully withheld barred by eleventh amendment

U.S.—Edelman v. Jordan, Ill., 94 S.Ct. 1347, 415 U.S. 651, 37 L.Ed.2d 662, reh. den. 94 S.Ct. 2414, 416 U.S. 1000, 40 L.Ed.2d 777, on remand, D.C., 405 F.Supp. 802, revd. on oth. grds., C.A., 551 F.2d 152, reh. 563 F.2d 873, affd. 99 S.Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358.

Anderson v. Tennessee Office of Economic Opportunity, D.C.Tenn., 384 F.Supp. 788.

Retroactive payments or refunds conclusively barred

U.S.—City of Chicopee v. Sullivan, D.C.Mass., 379 F.Supp. 569.

No additional expenditure of public funds

U.S.—Adams v. Richland School Dist. One, 412 F.Supp. 647.

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69. U.S.—Holmes v. State Dept. of Public Welfare, C.A.Tex., 370 F.2d 371.

Miller v. State of Vt., D.C.Vt., 201 F.Supp. 930—Miller v. Parsons, D.C.Pa., 313 F.Supp. 1150.

69.5. U.S.—Hercules Inc. v. Minnesota State Highway Dept., D.C.Minn., 337 F.Supp. 795.

70. U.S.—Louisiana State Bd. of Ed. v. Allen, C.A. La., 287 F.2d 32, cert. den. 82 S.Ct. 52, 368 U.S. 830, 7 L.Ed.2d 33—Louisiana State Bd. of Ed. v. Angel, 287 F.2d 33—Miener v. State of Mo., C.A.Mo., 673 F.2d 969, cert. den. 103 S.Ct. 215, 230, 459 U.S. 909, 74 L.Ed.2d 171 and 103 S.Ct. 230, 459 U.S. 916, 74 L.Ed.2d 182, on remand 580 F.Supp. 562, op. supp. 607 F.Supp. 1425.

Newborn v. Morrison, D.C.Ill., 440 F.Supp. 623.

72.50. U.S.—Pennhurst State School & Hosp. v. Halderman, Pa., 104 S.Ct. 900, 465 U.S 89, 79 L.Ed.2d 67.

§ 50(2). —— —— Injunctive Relief

Library References

Federal Courts ⇐28, 272.

73.50. U.S.—Baker v. Carr, Tenn., 82 S.Ct. 691, 369 U.S. 186, 7 L.Ed 2d 663 on remand, 206 F.Supp. 341—Cory v. White, Tex., 102 S.Ct. 2325, 457 U.S. 85, 72 L.Ed.2d 694, on remand, C.A., 686 F.2d 225.

Heisse v. State of Vt., D.C.Vt., 519 F.Supp. 36.

Injunction limited to future violations

U.S.—Rowley v. McMillan, C.A.N.C., 502 F.2d 1326.

Prospective injunctive relief

U.S.—United Carolina Bank v. Board of Regents of Stephen F. Austin State University, C.A.Tex., 665 F.2d 553.

Crawford v. University of North Carolina, D.C. N.C., 440 F.Supp. 1047.

73.55. U.S.—U.S. ex rel. Cobb v. Maroney, D.C.Pa., 216 F.Supp. 910—Kirker v. Moore, D.C.Va., 308 F.Supp. 615, affd., C.A., 436 F.2d 423, cert. den. 92 S.Ct. 49, 404 U.S. 824, 30 L.Ed.2d 51—National Audubon Society, Inc. v. Johnson, D.C.Tex., 317 F.Supp. 1330—Grinnell Corp. v. Hackett, D.C.R.I., 344 F.Supp. 749, revd. in part on oth. grds., vac. in part on oth. grds., C.A., 475 F.2d 449, cert. den. 94 S.Ct. 59, 414 U.S. 879, 38 L.Ed.2d 124 and 94 S.Ct. 164, 414 U.S. 858, 38 L.Ed.2d 108, app. after remand 519 F.2d 595, cert. den. 96 S.Ct. 566, 423 U.S. 1033, 46 L.Ed.2d 407, reh. den. 98 S.Ct. 1514, 435 U.S. 938, 55 L.Ed.2d 534.

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73.60. U.S.—Board of Ed. of Independent School Dist. 20, Muskogee, Okl. v. State of Okl., C.A. Okl., 409 F.2d 665—Blaske v. Bowen, D.C.Ind., 437 F.Supp. 1056, affd. 559 F.2d 1224.

State legislative committee

U.S.—Jordan v. Hutcheson, D.C.Va., 208 F.Supp. 131, remd. C.A., 323 F.2d 597.

74. U.S.—MacKay v. Nesbett, C.A.Alaska, 412 F.2d 846, cert. den. 90 S.Ct. 435, 396 U.S. 960, 24 L.Ed.2d 425, reh. den. 90 S.Ct. 1111, 397 U.S. 1004, 25 L.Ed.2d 417—Barron v. Bellairs, C.A. Ga., 496 F.2d 1187.

Lenske v. Sercombe, D.C.Or., 266 F.Supp. 609—Kelly v. Wyman, D.C.N.Y., 294 F.Supp. 893, affd. 90 S.Ct. 1011, 397 U.S. 254, 25 L.Ed.2d 287.

75. U.S.—Kimble v. Solomon, C.A.Md., 599 F.2d 599, cert. den. 100 S.Ct. 422, 444 U.S. 950, 62 L.Ed.2d 320.

77. U.S.—Overstock Book Co. v. Barry, C.A.N.Y., 436 F.2d 1289.

Holding v. Nesbitt, D.C.Okl., 259 F.Supp. 694, revd. in part on oth. grds. 87 S.Ct. 1418, 387 U.S. 94, 18 L.Ed.2d 585, affd. in part 87 S.Ct. 1419, 387 U.S. 95, 18 L.Ed.2d 586.

78.5. U.S.—Vechione v Wohlgemuth, D.C.Pa., 426 F.Supp. 1297, affd., C.A., 558 F.2d 150, cert. den. 98 S.Ct. 439, 434 U.S. 943, 54 L.Ed.2d 304.

79. U.S.—Ray v. Atlantic Richfield Co., Wash., 98 S.Ct. 988, 435 U.S. 151, 55 L.Ed.2d 179.

Coalition for Basic Human Needs v. King, C.A. Mass., 654 F.2d 838—American Re-Insurance Co. v. Janklow, C.A.S.D., 676 F.2d 1177, app. after remand 692 F.2d 1158.

Housing Authority of City of Asbury Park v. Richardson, D.C.N.J., 346 F.Supp. 1027—Jones v. State of Mich., D.C.Mich., 525 F.Supp. 636, affd. C.A., 705 F.2d 454.

La.—Perez v. Rhiddlehoover, App., 186 So.2d 686, writ ref. 187 So.2d 438, 249 La. 451.

Violation of civil rights

U.S.—Johnson v. Zurz, D.C.Ohio, 596 F.Supp. 39.

Judges and clerks of court as "state officers"

U.S.—Gatling v. Butler, D.C.Conn., 52 F.R.D. 389.

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79.5. **Discrimination because of color**

(2) Other matters.

U.S.—Louisiana v. U.S., La., 85 S.Ct. 817, 380 U.S. 145, 13 L.Ed.2d 709.

Sex discrimination suit against state police officer

U.S.—Vermett v. Hough, D.C.Mich., 606 F.Supp 732.

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81. U.S.—Jordan v. Trainor, C.A.Ill., 563 F.2d 873, affd. 99 S.Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358, cert. gr. 98 S.Ct. 1447, 435 U.S. 904, 55 L.Ed.2d 494.

Pitts v. Department of Revenue for State of Wis., D.C.Wis., 333 F.Supp. 662—Parker v. Mandel, D.C.Md., 344 F.Supp. 1068—Gaither v. Sterrett, D.C.Ind., 346 F.Supp. 1095, affd. 93 S.Ct. 688, 409 U.S. 1070, 34 L.Ed.2d 660—Croom v. Manson, D.C.Conn., 367 F.Supp. 586.

Jurisdiction to enjoin enforcing of

(7) U.S.—Meredith v. Fair, C.A.Miss., 328 F.2d 586—McCoy v. Louisiana State Bd. of Ed., C.A.La., 332 F.2d 915.

(8) Election laws.

U.S.—Louisiana v. U.S., La., 85 S.Ct. 817, 380 U.S. 145, 13 L.Ed.2d 709.

(9) Discontinuance of electrical service to federal entity.

U.S.—U.S. v. Virginia Elec. & Power Co., 412 F.Supp. 165.

School boards

(2) Other matters.

U.S.—Dixon v. Alabama State Bd. of Ed., D.C.Ala., 186 F.Supp. 945, revd. on oth. grds., C.A., 294 F.2d 150, cert. den. 82 S.Ct. 368, 368 U.S. 930—Griffin v. State Bd. of Ed., D.C.Va., 239 F.Supp. 560—Goss v. Board of Ed., City of Knoxville, D.C.Tenn., 270 F.Supp. 903, affd., C.A., 406 F.2d 1183.

Alleged invalidity not of itself grounds for relief

U.S.—Wells v. Hand, D.C.Ga., 238 F.Supp. 779, affd. 86 S.Ct. 160, 382 U.S. 39, 15 L.Ed.2d 32.

82. U.S.—Quern v. Jordan, Ill., 99 S.Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358.

Laquinta v. Sloan, D.C.W.Va., 350 F.Supp. 203—Flanders v. Schoville, D.C.Iowa, 350 F.Supp. 371—Shinholster v. Graham, D.C.Fla., 527 F.Supp. 1318.

Exhaustion of administrative remedies

(3) Other matters.

U.S.—Marsh v. County School Bd. of Roanoke County, Va., C.A.Va., 305 F.2d 94.

Griffith v. Board of Ed. of Yancey County, D.C.N.C., 186 F.Supp. 511—Davis v. State of Md., D.C.Md., 248 F.Supp. 951.

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Penal statute

U.S.—Thomas v. District Court of Thirteenth Judicial Dist. of State of Mont., In and For Big Horn County, D.C.Mont., 270 F.Supp. 487.

Injunction not granted

U.S.—Borden Co. v. Liddy, D.C.Iowa, 239 F.Supp. 289.

83. U.S.—Bridgeport Hydraulic Co. v. Council on Water Co. Lands of State of Conn., D.C.Conn., 453 F.Supp. 942, affd. 99 S.Ct. 606, 439 U.S. 999, 58 L.Ed.2d 674.

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83. The Johnson Act

(8) Other statements.

U.S.—International Broth. of Elec. Workers, Local Union No. 1245 v Public Service Commission of Nevada, C.A.Nev., 614 F.2d 206.

§ 50(3). —— —— Mandatory Relief

Library References

Federal Courts ⚬=27, 272.

However, prospective injunctive relief against state agency officers is not precluded by Eleventh Amendment.[83.5]

83.5. U.S.—U.S. v. State of S.C., D.C.S.C., 445 F.Supp. 1094, affd. 98 S.Ct. 756, 434 U.S. 1026, 54 L.Ed.2d 775.

84. U.S.—Nadeau v. Helgemoe, C.A.N.H., 561 F.2d 411, app. after remand C.A., 581 F.2d 275.

Thompson v. Fugate, D.C.Va., 347 F.Supp. 120.

Power to order agency to give reasons for decision

D.C.—American Mail Line, Limited v. Gulick, C.A., 411 F.2d 696, 133 U.S.App.D.C. 382.

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88. U.S.—Ad Hoc Committee on Judicial Administration v. Com. of Mass., C.A.Mass., 488 F.2d 1241, cert. den. 94 S.Ct. 2389, 416 U.S. 986, 40 L.Ed.2d 763.

Expenditure of funds from state treasury

U.S.—Stewart v. Butz, D.C.Ky., 356 F.Supp. 1345, affd., C.A., 491 F.2d 165.

§ 51. —— Interest of State When Not a Party

90. U.S.—Blake v. Kline, C.A.Pa., 612 F.2d 718, cert. den. 100 S.Ct. 3011, 447 U.S. 921, 65 L.Ed.2d 1112.

Stubbs v. Kline, D.C.Pa., 463 F.Supp. 110.

94. U.S.—Blake v. Kline, C.A.Pa., 612 F.2d 718, cert. den. 100 S.Ct. 3011, 447 U.S. 921, 65 L.Ed.2d 1112.

§ 52. Controversies between Citizens of Same State Claiming Lands under Grants of Different States

Library References

Federal Courts ⚬=275.

97. U.S.—Port of Portland v. Tri-Club Islands, Inc., D.C.Or., 315 F.Supp. 1160.

§ 53. Controversies to Which Alien Is a Party

Library References

Federal Courts ⚬=275.

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Under 28 U.S.C.A. § 1350, the district court is given original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.[99.10]

99.10. Actions held "tort" in violation of law of nations

U.S.—Abdul-Rahman Omar Adra v. Clift, D.C.Md., 195 F.Supp. 857.

Actions held not "tort" in violation of law of nations

U.S.—Lopes v. Reederei Richard Schroder, D.C.Pa., 225 F.Supp. 292—Valanga v. Metropolitan Life Ins. Co., D.C.Pa., 259 F.Supp. 324.

1. U.S.—Compagnie Nationale Air France v. Castano, C.A.Puerto Rico, 358 F.2d 203—Dassigienis v Cosmos Carriers & Trading Corp., C.A.N.Y., 442 F.2d 1016—Corporation Venezolana de Fomento v. Vintero Sales Corp., C.A.N.Y., 629 F.2d 786, cert. den. 101 S.Ct. 863, 449 U.S. 1080, 66 L.Ed.2d 804, app. after remand C.A., 712 F.2d 33.

Neeld v. American Hockey League, D.C.N.Y., 439 F.Supp. 459.

1.5 U.S.—Giannakos v. M/V Bravo Trader, C.A.5 (La.), 762 F.2d 1295.

Salomon Englander Y CIA LTDA v. Israel Discount Bank Ltd., D.C.N.Y., 494 F.Supp. 914.

2. U.S.—Lavan Petroleum Co. v. Underwriters at Lloyds, D.C.N.Y., 334 F.Supp. 1069.

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"Subject" and "citizen" within the diversity of jurisdiction statute mean the same thing.[4.10]

4.10. U.S.—Van Der Schelling v. U.S. News & World Report, Inc., D.C.Pa., 213 F.Supp. 756, affd., C.A., 324 F.2d 956, cert. den. 84 S.Ct. 1166, 377 U.S. 906 12 L.Ed.2d 177.

5. U.S.—Cunard Line Ltd. v. Abney, D.C.N.Y., 540 F.Supp. 657.

9.5. U.S.—Hagl v. Jacob Stern & Sons, Inc., D.C.Pa., 396 F.Supp. 779—Chang v. Northwestern Memorial Hospital, D.C.Ill., 506 F.Supp. 975.

9.10. U.S.—El Hoss Engineering & Transport Co. v. American Independent Oil Co., C.A.N.Y., 289 F.2d 346, cert. den. 82 S.Ct. 51, 368 U.S. 837, 7 L.Ed.2d 38.

Akrotirianakis v. Burroughs, D.C.Md., 262 F.Supp. 918.

However, the statute does not deal with cases in which a state is a party.[9.15]

9.15. U.S.—Ohio v. Wyandotte Chemicals Corp., Ohio, 91 S.Ct. 1005, 401 U.S. 493, 28 L.Ed.2d 256.

10. U.S.—Karakatsanis v. Conquestador Cia. Nav., S.A., D.C.N.Y., 247 F.Supp. 423.

Third-party action

U.S.—Christman v. Maristella Compania Naviera, D.C.N.Y., 293 F.Supp. 442.

11. U.S.—Proulx v. Goulet, D.C.Vt., 315 F.Supp. 622—Robinson v. Anastasiou, D.C.Tex., 339 F.Supp. 472.

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11.10. U.S.—Reyes v. Penoci, D.C.Puerto Rico, 202 F.Supp. 436—Factor v. Pennington Press, Inc., D.C.Ill., 238 F.Supp. 630—Hong Kong Deposit and Guar. Co. Ltd. v. Hibdon, D.C.N.Y., 602 F.Supp. 1378.

11.30. U.S.—Factor v. Pennington Press, Inc., D.C.Ill., 230 F.Supp. 906.

12. U.S.—Field v. Volkswagenwerk AG, C.A.N.J., 626 F.2d 293.

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19. U.S.—Underwriters at Lloyd's v. Nichols, C.A.Ark., 363 F.2d 357.

20. U.S.—Resolute Ins. Co. v. State of N.C., C.A.N.C., 397 F.2d 586, cert. den. 89 S.Ct. 446, 393 U.S. 978, 21 L.Ed.2d 439.

Eisenberg v. Commercial Union Assur. Co., D.C.N.Y., 189 F.Supp. 500—Ferrigno v. Ocean Transport, Limited, D.C.N.Y., 188 F.Supp. 179—Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., D.C.N.Y., 334 F.Supp. 1013—Trans World Hosp. Supplies Ltd. v. Hospital Corp. of America, D.C.Tenn., 542 F.Supp. 869.

Diversity of citizenship

(3) Other matters.

U.S.—Camper and Nicholsons, Limited v. Yacht Fontainebleau II, D.C.Fla., 292 F.Supp. 734—Rubinfeld v. Bahama Cruise Line, Inc., D.C.N.Y., 613 F.Supp. 300.

Assignment by corporation to state citizen of rights against other alien corporation as improper under statute

U.S.—Caribbean Mills, Inc. v. Kramer, C.A.Tex., 392 F.2d 387, affd. 89 S.Ct. 1487, 394 U.S. 823, 23 L.Ed.2d 9.

20.5. U.S.—Joseph Muller Corp. Zurich v. Commonwealth Petrochemicals, Inc., D.C.N.Y., 334 F.Supp. 1013.

If an alien corporation is to be deemed a citizen of its principal place of business, this has been construed as the corporation's principal place of business anywhere in the world.[20.10] Diversity jurisdiction is not defeated by the presence of alien corporations on both sides of the controversy.[20.15]

20.10 U.S.—Eisenberg v. Commercial Union Assurance Co., D.C.N.Y., 189 F.Supp. 500—Continental Motion Pictures v. Allstate Film Co., D.C.Cal., 590 F.Supp. 67.

20.15 U.S.—Transure, Inc. v. Marsh and McLennan, Inc., C.A.9 (Cal.), 766 F.2d 1297.

21. U.S.—Pemberton v. Colonna, D.C.Pa., 189 F.Supp. 430, affd., C.A., 290 F.2d 220—Wittmeyer Trucking Co. v. Fess Transport Limited, D.C.N.Y., 191 F.Supp. 802—Van Der Schelling v. U.S. News & World Report, Inc., D.C.Pa., 213 F.Supp. 756, affd., C.A., 324 F.2d 956, cert. den. 84 S.Ct. 1166, 377 U.S. 906, 12 L.Ed.2d 177.

24. U.S.—Raphael v. Hertzberg, D.C.Cal., 470 F.Supp. 984, app. dism., C.A., 636 F.2d 1227.

§ 54. Controversies to Which Foreign Sovereign is a Party

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26. U.S.—Republic of Iraq v. First Nat. City Bank, C.A.N.Y., 353 F.2d 47, cert. den. 86 S.Ct. 648, 382 U.S. 1027, 16 L.Ed.2d 540.

Republic of Iraq v. First Nat. City Bank, D.C.N.Y., 241 F.Supp. 567, affd., C.A., 353 F.2d 47, cert. den. 86 S.Ct. 648, 382 U.S. 1027, 15 L.Ed.2d 540—Aguirre v. Nagel, D.C.Mich., 270 F.Supp. 535.

Lack of deversity

U.S.—Mota v. Boyd, Weir & Sewell, Inc., D.C.N.Y., 206 F.Supp. 306.

Suit not entertained where controversy really between private individuals

U.S.—Republic of Iraq v. First Nat. Bank of Chicago, C.A.Ill., 350 F.2d 645, cert. den. 86 S.Ct. 556, 382 U.S. 982, 15 L.Ed.2d 556.

Sovereign Immunities Act of 1976

U.S.—McKeel v. Islamic Republic of Iran, C.A.Cal., 722 F.2d 582, cert. den. 105 S.Ct. 243, 83 L.Ed.2d 182.

Ruggiero v. Companie Pervana De Vapores Inca Capac Yupanqui, D.C.N.Y., 498 F.Supp. 10, affd., C.A., 639 F.2d 872.

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27. U.S.—Schmidkunz v. Scandinavian Airlines System, C.A.Cal., 628 F.2d 1205.

27.5. Trust territory not foreign state

U.S.—World Communications Corp. v. Micronesian Telecommunications Corp., D.C.Haw., 456 F.Supp. 1122.

§ 55. Controversies between Citizens of Different States

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28.50. U.S.—Lutsky v. Lutsky, D.C.Fla., 310 F.Supp. 517, affd., C.A., 433 F.2d 346.

Federal Declaratory Judgments Act as not altering monetary requirement

U.S.—M. Swift & Sons, Inc. v. Lemon, D.C.N.Y., 24 F.R.D. 43.

28.55. U.S.—Szantay v. Beech Aircraft Corp., C.A. S.C., 349 F.2d 60—Ziady v. Curley, C.A.N.C., 396 F.2d 873—Broussard v. Columbia Gulf Transmission Co., C.A.La., 398 F.2d 885.

Lutz v. McNair, D.C.Va., 233 F.Supp. 871, affd., C.A., 340 F.2d 709—Spindel v. Spindel, D.C.N.Y., 283 F.Supp. 797—Gilchrist v. Strong, D.C.Okl., 299 F.Supp. 804.

Lack of impartial jurors

U.S.—Asher v. Pacific Power & Light Co., D.C.Cal., 249 F.Supp. 671.

Liberal rule of jurisdiction not supported

U.S.—Caso v. Lafayette Radio Electronics Corp., C.A. Mass., 370 F.2d 707.

Prerogative of Congress, not federal courts, to repeal

U.S.—Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711.

28.60. U.S.—Asher v. Pacific Power & Light Co., D.C.Cal., 249 F.Supp. 671.

Artificial devices should not be allowed to defeat diversity jurisdiction.[28.62]

28.62. U.S.—Asher v. Pacific Power & Light Co., D.C.Cal., 249 F.Supp. 671.

However, a lack of diversity of citizenship may be obtained or manufactured to defeat federal jurisdiction.[28.63]

28.63. U.S.—Hudgens v. Cook Industries, Inc., D.C. Okl., 310 F.Supp. 32.

28.65. Particular lifestyles may foreclose access to federal court

U.S.—Wasson v. Northrup Worldwide Aircraft Services, Inc., D.C.Tex., 443 F.Supp. 400.

29. U.S.—Turton v. Turton, C.A.Tex., 644 F.2d 344, reh. den. 647 F.2d 1122.

Bishop v. Allstate Ins. Co., D.C.Ark., 313 F.Supp. 875—Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., D.C.Pa., 338 F.Supp. 812.

D.C.—Rice v. Disabled Am. Veterans, D.C., 295 F.Supp. 131.

Limits of jurisdiction

(2) Other statements.

U.S.—Buell v. Sears, Roebuck & Co., C.A.Colo., 321 F.2d 468.

Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co., D.C.Mo., 220 F.Supp. 222—Dougherty v. Oberg, D.C.Minn., 297 F.Supp. 635.

Subrogation

(1) If full subrogation is sought insured's citizenship not considered for diversity purposes.

U.S.—Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., C.A.Va., 485 F.2d 78, cert. den. 94 S.Ct. 1450, two cases, 415 U.S. 935, 39 L.Ed.2d 493.

(2) However, if subrogation is only partial, only citizenship of plaintiff insured-subrogor is considered. Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., C.A.Va., 485 F.2d 78, cert. den. 94 S.Ct. 1450, two cases, 415 U.S. 935, 39 L.Ed.2d 493.

Reliance Ins. Co. v. Wisconsin Natural Gas Co., D.C.Wis., 60 F.R.D. 429.

Underlying purpose

U.S.—Hall v. Fall, D.C.N.C., 235 F.Supp. 631.

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30. U.S.—Quinn v. Book "Sixty Erotic Drawings From Juliette", D.C.Mass., 316 F.Supp. 289.

Federal court held to have jurisdiction of

(3) U.S.—Savoy v. Tidewater Oil Co., D.C.La., 218 F.Supp. 607, affd., C.A., 326 F.2d 757.

(5) U.S.—Richie v. Richie, D.C.N.Y., 186 F.Supp. 592.

(10) U.S.—Levine v. Bradlee, D.C.Pa., 248 F.Supp. 395.

(12) U.S.—Jenn-Air Products Co. v. Penn Ventilator, Inc., D.C.Pa., 283 F.Supp. 591.

(19) U.S.—Cunningham v. Erie R. Co., C.A.N.Y., 266 F.2d 411, on remand, D.C., 243 F.Supp. 571, affd., C.A., 358 F.2d 640.

(20) Other actions or proceedings.

U.S.—Purdy v. Aetna Cas. & Sur. Co., C.A.Tex., 296 F.2d 196—Hales v. Winn-Dixie Stores, Inc., C.A. N.Y., 500 F.2d 836.

No diversity jurisdiction

U.S.—Adden v. Middlebrooks, C.A.Ill., 688 F.2d 1147.

30.5. U.S.—Mazella v. Pan Oceanica A/S Panama, D.C.N.Y., 232 F.Supp. 29—Johnson v. Venezuelan Line S.S. Co., D.C.La., 314 F.Supp. 1403—Eastern Steel & Metal Co. v. Hartford Fire Ins. Co., D.C.Conn., 376 F.Supp. 763.

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31. U.S.—Duncantell v. City of Houston, Tex., D.C. Tex., 333 F.Supp. 973.

Justiciable controversy

U.S.—State Chartered Banks in Wash. v. Peoples Nat. Bank of Wash., D.C.Wash., 291 F.Supp. 180.

33. U.S.—Bowman v. Curt G. Joa, Inc., C.A.N.C., 361 F.2d 706.

34. Action on bail bond

U.S.—State of Iowa v. Sellers, D.C.Iowa, 336 F.Supp. 816.

33.5. U.S.—Smith v. Abbate, D.C.N.Y., 201 F.Supp. 105—Matteson v. Bresette, D.C.Mo., 250 F.Supp. 646—Rajotte v. Home Indem. Co., D.C.R.I., 258 F.Supp. 780—Dougherty v. Oberg, D.C.Minn., 297 F.Supp. 635—Hylte Bruks Aktiebolag v. Babcock & Wilcox Co., D.C.N.Y., 305 F.Supp. 803.

Not to be widened

U.S.—Trail v. Green, D.C.N.J., 206 F.Supp. 896—Seaboard Finance Co. v. Davis, D.C.Ill., 276 F.Supp. 507.

35. U.S.—Hamilton v. Nielsen, C.A.Ill., 678 F.2d 709.

State of Iowa ex rel. Turner v. First of Omaha Service Corp. of Omaha, Neb., 401 F.Supp. 439.

D.C.—Vogel v. Tenneco Oil Co., D.C., 276 F.Supp. 1008.

Failure to serve nonresident defendant

U.S.—Fox v. McLaughlin, D.C.Pa., 195 F.Supp. 774.

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37. U.S.—Richie v. Richie, D.C.N.Y., 186 F.Supp. 592—Jenn-Air Products Co. v. Penn Ventilator, Inc., D.C.Pa., 283 F.Supp. 591.

Federal question unnecessary

U.S.—Solo Cup Co. v. Paper Machinery Corp., C.A. Wis., 359 F.2d 754.

Scrutinizing docket to insure claimed diversity jurisdiction not abused

U.S.—Nieves v. Stamford Hospital, D.C.Conn., 345 F.Supp. 1014.

40. U.S.—U.S. Cas. Co. v. Noland Co., D.C.N.C., 286 F.Supp. 333.

43. U.S.—Aldens, Inc. v. Packel, 524 F.2d 38, cert. den. 96 S.Ct. 1684, 425 U.S. 943, 48 L.Ed.2d 187.

State of N.H. v. National Broadcasting Co., D.C. N.H., 222 F.Supp. 915, affd., C.A., 324 F.2d 506—Olsen v. Doerfler, D.C.Mich., 225 F.Supp. 540—Harris County v. Ideal Cement Co., D.C.Tex., 290 F.Supp. 956—Pullman Inc. v. Volpe, D.C.Pa., 337 F.Supp. 432—McDevitt & Street Co. v. Georgia Bldg. Authority, D.C.Ga., 343 F.Supp. 1238.

Laird v. Chrysler Corp., D.C.Mass., 92 F.R.D. 473.

Political subdivision in one state may bring action founded upon diversity jurisdiction against political subdivision of another state.

U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712—Moor v. Alameda County, Cal., 93 S.Ct. 1785, 411 U.S. 693, 36 L.Ed.2d 596, reh. den. 93 S.Ct. 2999, 412 U.S. 963, 37 L.Ed.2d 1012.

D.C.—District of Columbia v. L. B. Smith, Inc. of Virginia, D.C., 474 F.Supp. 894.

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U.S.—Moor v. Madigan, C.A.Cal., 458 F.2d 1217, affd. in part, revd. in part on oth. grds. 93 S.Ct. 1785, 411 U.S. 693, 36 L.Ed.2d 596, reh. den. 93 S.Ct. 2999, 412 U.S. 963, 37 L.Ed.2d 1012.

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D.C.—District of Columbia v. L. B. Smith, Inc. of Virginia, D.C., 474 F.Supp. 894.

44. U.S.—Ohio v. Wyandotte Chemicals Corp., Ohio, 91 S.Ct. 1005, 401 U.S. 493, 28 L.Ed.2d 256—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents, D.C.Ohio, 527 F.Supp. 1366, affd. C.A., 737 F.2d 540, cert. den. 105 S.Ct. 433, 83 L.Ed.2d 359.

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45. U.S.—Krisel v. Duran, C.A.N.Y., 386 F.2d 179, cert. den. 88 S.Ct. 1635, 390 U.S. 1042, 20 L.Ed.2d 303—Harris v. Pennsylvania Turnpike Commission, C.A.Pa., 410 F.2d 1332, cert. den. 90 S.Ct. 558, 396 U.S. 1005, 24 L.Ed.2d 497.

45.5. U.S.—Krisel v Duran, C.A.N.Y., 386 F.2d 179, cert. den. 88 S.Ct. 1635, 390 U.S. 1042, 20 L.Ed.2d 303—Dacey v. Florida Bar, Inc., C.A.Fla., 414 F.2d 195, cert. den. 90 S.Ct. 906, 397 U.S. 909, 25 L.Ed.2d 89—People of State of Ill. v. Kerr-McGee Chemical Corp., C.A.Ill., 677 F.2d 571, cert. den. 103 S.Ct. 469, 459 U.S. 1049, 74 L.Ed.2d 618.

45.10. U.S.—State of W.Va. v. Haynes, D.C.W.Va., 348 F.Supp. 1374.

Separate and distinct existence

(2) School board considered citizen separate from state although agency thereof.

U.S.—Morgan Dallas Corp. v. Orleans Parish School Bd. D.C.La., 302 F.Supp. 1208.

Turnpike commission

(1) U.S.—Gerr v. Emrick, C.A.Pa., 283 F.2d 293, cert. den. 81 S.Ct. 698, 365 U.S. 817, 5 L.Ed.2d 695.

Moss v. Calumet Paving Co., D.C.Ind., 201 F.Supp. 426.

State game and fish commission

U.S.—Kirby Lumber Corp. v. State of La. through Anacoco-Prairie State Game and Fish Commission, C.A.La., 293 F.2d 82.

45.20. U.S.—Superior Beverage Co. v. State of Ohio, D.C.Ohio, 324 F.Supp. 564—Darling v. U.S., D.C. Cal., 352 F.Supp. 565.

46. U.S.—Broadstone Realty Corp. v. Evans, D.C. N.Y., 213 F.Supp. 261.

§ 56. —— What Constitutes Citizenship

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47. U.S.—Jones v. Hadican, C.A.Mo., 552 F.2d 249, cert. den. 97 S.Ct. 2658, 431 U.S. 941, 53 L.Ed.2d 260.

Miller Dress Factory Inc. of Puerto Rico v. Douglas, D.C.Puerto Rico, 385 F.Supp. 874.

Citizenship in state established

U.S.—Lefkowitz v. Lider, D.C.Mass., 443 F.Supp. 352.

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48. U.S.—Rivera v. Chapa, D.C.Tex., 233 F.Supp. 428—Miller v. Lee, D.C.S.C., 241 F.Supp. 19—Seaboard Finance Co. v. Davis, D.C.Ill., 276 F.Supp. 507—Ferrara v. Ibach, D.C.S.C., 285 F.Supp. 1017—Huddleston v. Angeles Co-op. Creamery, D.C.Wash., 315 F.Supp. 307—Brookley v. Ranson, D.C.Iowa, 376 F.Supp. 195.

Freedom of choice

(4) Other statements.

U.S.—Milliken v. Tri-County Elec. Co-op., Inc., D.C. S.C., 254 F.Supp. 302.

49. U.S.—Walden v. Broce Const. Co., C.A.Okl., 357 F.2d 242.

49.5. U.S.—Jagiella v. Jagiella, C.A.Ga., 647 F.2d 561, reh. den. 654 F.2d 723.

Owens-Illinois Glass Co. v. American Coastal Lines, Inc., D.C.N.Y., 222 F.Supp. 923—Forman v. BRI Corp., D.C.Pa., 532 F.Supp. 49.

Citizen of United States not of any state

U.S.—Wasson v. Northrup Worldwide Aircraft Services, Inc., D.C.Tex., 443 F.Supp. 400.

50. U.S.—Mizell v. Eli Lilly & Co., D.C.S.C., 526 F.Supp. 589.

51. U.S.—Walden v. Broce Const. Co., C.A.Okl., 357 F.2d 242.

Minnesota Min. and Mfg. Co. v. Kirkevold, D.C. Minn., 87 F.R.D. 317.

So neither office [51.1] nor place of business [51.2] established citizenship.

51.1. U.S.—Owens-Illinois Glass Co. v. American Coastal Lines, Inc., D.C.N.Y., 222 F.Supp. 923.

51.2. U.S.—Owens-Illinois Glass Co. v. American Coastal Lines, Inc., D.C.N.Y., 222 F.Supp. 923.

Voting raises rebuttable presumption of citizenship of state.[51.3]

51.3. Broadstone Realty Corp. v. Evans, D.C.N.Y., 213 F.Supp. 261.

Registration to vote

U.S.—Jardine v. Intehar, D.C.W.Va., 213 F.Supp. 598.

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52. U.S.—Walker v. Paradise Taxicabs, Inc., D.C. Puerto Rico, 202 F.Supp. 469—Broadstone Realty Corp. v. Evans, D.C.N.Y., 213 F.Supp. 261—Jardine v. Intehar, D.C.W.Va., 213 F.Supp. 598—Huddleston v. Angeles Co-op. Creamery, D.C. Wash., 315 F.Supp. 307.

53. U.S.—Walden v. Broce Const. Co., C.A.Okl., 357 F.2d 242.

54. U.S.—Walden v. Broce Const. Co., C.A.Okl., 357 F.2d 242.

C.J.S. cited in Wasson v. Northrup Worldwide Aircraft Serv., Inc., 443 F.Supp. 400, 404.

55. U.S.—Seideman v. Hamilton, D.C.Pa., 173 F.Supp. 641, affd., C.A., 275 F.2d 224, cert. den. 80 S.Ct. 1258, 363 U.S. 820, 4 L.Ed.2d 1513—Campbell v. Oliva, D.C.Tenn., 295 F.Supp. 616.

Married woman held to have legal domicile separate from husband's

U.S.—Napletana v. Hillsdale College, C.A.Mich., 385 F.2d 871.

58. U.S.—Fahrner v. Gentzsch, D.C.Pa., 355 F.Supp. 349.

Death of father allows acquiring of mother's domicile

U.S.—Ziady v. Curley, C.A.N.C., 396 F.2d 873.

Unemancipated minor's domicile deemed that of parents although living elsewhere

U.S.—Curry v. Maxson, D.C.Mo., 318 F.Supp. 842.

60. U.S.—Pemberton v. Colonna, D.C.Pa., 189 F.Supp. 430, affd., C.A., 290 F.2d 220—Fahrner v. Gentzsch, D.C.Pa., 355 F.Supp. 349—McGlynn v. Employers Commercial Union Ins. Co. of America, D.C.Puerto Rico, 386 F.Supp. 774.

60.5. U.S.—Tanzymore v. Bethlehem Steel Corp., D.C.Pa., 325 F.Supp. 891, affd., C.A., 457 F.2d 1320.

§ 57. —— Time as of Which Jurisdiction Determined

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61.50. U.S.—Huddleston v. Angeles Co-op. Creamery, D.C.Wash., 315 F.Supp. 307—Parham v. Edwards, D.C.Ga., 346 F.Supp. 968, affd., C.A., 470 F.2d 1000—Gavin v. Read Corp., D.C.Pa., 356 F.Supp. 483.

Time complaint filed

U.S.—Mas v. Perry, C.A.La., 489 F.2d 1396, reh. den. 492 F.2d 1242, cert. den. 95 S.Ct. 74.

U.S.—Wasson v. Northrup Worldwide Aircraft Services, Inc., D.C.Tex., 443 F.Supp. 400.

62. U.S.—Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., C.A.Ill., 523 F.2d 543.

63. U.S.—Esler v. Northrop Corp., D.C.Mo., 86 F.R.D. 20.

64. U.S.—Field v. Volkswagenwerk AG, C.A.N.J., 626 F.2d 293.

Callan v. Lillybelle, Limited D.C.N.J., 234 F.Supp. 773—Causey v. Burgess, D.C.S.C., 236 F.Supp. 326—Dolgow v. Anderson, D.C.N.Y., 45 F.R.D. 470.

Amendment dropping party as relating back to filing of complaint

U.S.—Callan v. Lillybelle, Limited, D.C.N.J., 234 F.Supp. 773.

64.5. U.S.—Alleghany Corp. v. Kirby, D.C.N.Y., 218 F.Supp. 164, affd., C.A., 333 F.2d 327, affd. on reh. 340 F.2d 311, cert. gr. 85 S.Ct. 1772, 381 U.S. 933, 14 L.Ed.2d 698, cert. dism. 86 S.Ct. 1250, 384 U.S. 28, 16 L.Ed.2d 335, reh. den. 86 S.Ct. 1583, two cases, 384 U.S. 967, 16 L.Ed.2d 680—Ransom v. Brennan, C.A.Tex., 437 F.2d 513, cert. den. 91 S.Ct. 2205, 403 U.S. 904, 29 L.Ed.2d 680.

65. U.S.—Brough v. Strathmann Supply Co., C.A.Pa., 358 F.2d 374.

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67.5. U.S.—Brough v. Strathmann Supply Co., C.A. Pa., 358 F.2d 374.

Amdur v. Lizars, D.C.Md., 39 F.R.D. 29, affd., C.A., 372 F.2d 103.

Dismissal of claim against third-party defendant

U.S.—Kenrose Mfg. Co. v. Fred Whitaker Co., D.C. Va., 53 F.R.D. 491, affd., C.A., 512 F.2d 890.

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67.15. U.S.—Berger v. Reynolds Metals Co., D.C.Pa., 39 F.R.D. 313.

68. U.S.—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

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§ 58(1). —— Citizenship of Coparties

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69. U.S.—Owen Equipment & Election Co. v. Kroger, Neb., 98 S.Ct. 2396, 437 U.S. 365, 57 L.Ed.2d 274.

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Miss Greater New York City Scholarship Pageant v. Miss New York State Scholarship Pageant, D.C.N.Y., 526 F.Supp. 806.

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Aliens

D.C.—Hanoch Tel-Oren v. Libyan Arab Republic, D.C., 517 F.Supp. 542, affd. 726 F.2d 774, 233 U.S.App.D.C. 384, cert. den. 105 S.Ct. 1354, 84 L.Ed.2d 377.

Additional parties

(2) Other matters.

U.S.—Chance v. County Bd. of School Trustees of McHenry County, Ill., C.A.Ill., 332 F.2d 971.

(3) Other instances.

U.S.—Pfeiffer v. MacMillan Pub. Co., Inc., D.C.Mont., 530 F.Supp. 603.

Corporations of one state against corporation and citizens of another state

U.S.—Rock Island Millwork Co. v. Hedges-Gough Lumber Co., C.A.Iowa, 337 F.2d 24.

Common residence and citizenship of plaintiff and one defendant

U.S.—Callan v. Lillybelle, Limited, D.C.N.J., 234 F.Supp. 773.

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70. U.S.—Local No. 1 (ACA) Broadcast Emp. of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Pa., 614 F.2d 846, on remand, D.C., 543 F.Supp. 1321.

Carroll v. Protection Maritime Ins. Co., Ltd., D.C.Mass., 377 F.Supp. 1294, affd. in part, revd. in part on oth. grds., C.A., 512 F.2d 4—Myers v. Northwestern Nat. Ins. Co., D.C.Ark., 534 F.Supp. 117.

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71. U.S.—Silvious v. Helmick, D.C.W.Va., 291 F.Supp. 716.

72. U.S.—Noel v. Kline, C.A.La., 325 F.2d 496.

Kelly v. Weir, D.C.Ark., 243 F.Supp. 588—Honchok v. Hardin, D.C.Md., 326 F.Supp. 988.

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78. U.S.—Williams v. Humble Oil & Refining Co., D.C.La., 234 F.Supp. 985—Winegar v. First Nat. Bank of Merritt Island, D.C.Fla., 267 F.Supp. 79—People of State of Ill. ex rel. Scott v. Hunt Intern. Resources Corp., D.C.Ill., 481 F.Supp. 71.

Zahn v. International Paper Co., D.C.Vt., 53 F.R.D. 430, affd., C.A., 469 F.2d 1033, affd. 94 S.Ct. 505, 414 U.S. 291, 38 L.Ed.2d 511.

Held not class suit

(2) Other instances.

U.S.—Safeway Trails, Inc. v. Stuyvesant Ins. Co., D.C. N.C., 211 F.Supp. 227.

Citizenship of only original parties as material

U.S.—Williams v. Humble Oil & Refining Co., D.C.La., 234 F.Supp. 985.

Elimination of title as not necessarily affecting federal jurisdiction

U.S.—Caldwell v. Craighead, C.A.Tenn., 432 F.2d 213, cert. den. 91 S.Ct. 1617, 402 U.S. 953, 29 L.Ed.2d 123.

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79. U.S.—U.S. ex rel. Sero v. Preiser, C.A.N.Y., 506 F.2d 1115, cert. den. 95 S.Ct. 1587, 421 U.S. 921, 43 L.Ed.2d 789.

Hobbs v. Northeast Airlines, Inc., D.C.Pa., 50 F.R.D. 76.

79.5. U.S.—Calagaz v. Calhoon, C.A.Ala., 309 F.2d 248.
Neville v. Delta Ins. Co., D.C.Minn., 45 F.R.D. 345.

§ 58(2). —— —— Interpleader

Library References

Federal Courts ⚬=288.

80.50. U.S.—Preferred Risk Mut. Ins. Co. v. Greer, D.C.S.C., 289 F.Supp. 261.

81. U.S.—Dakota Livestock Co. v. Keim, C.A.Minn., 552 F.2d 1302.
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia, D.C.N.Y., 311 F.Supp. 149.

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82. U.S.—Brinson v. Brinson, C.A.N.C., 334 F.2d 155, 10 A.L.R.3d 795.
Builders & Developers Corp., v. Manassas Iron & Steel Co., D.C.Md., 208 F.Supp. 485—Pennsylvania Ins. Co. v. Long Island Marine Supply Corp., D.C.N.Y., 229 F.Supp. 186—Fountain Park Co-op., Inc. v. Bank of America Nat. Trust & Sav. Ass'n, D.C.Cal., 289 F.Supp. 150—MFA Mut. Ins. Co. v. Lusby, D.C.Va., 295 F.Supp. 660.

Construction of statute
(2) Other statements.
U.S.—State Farm Fire & Cas. Co. v. Tashire, Or., 87 S.Ct. 1199, 386 U.S. 523, 18 L.Ed.2d 270.

Plaintiff interested; not mere stakeholder
(4) Other matters.
U.S.—Stewart Oil Co. v. Sohio Petroleum Co., C.A.Ill., 315 F.2d 759, cert. den. 84 S.Ct. 71, 375 U.S. 828, 11 L.Ed.2d 60.

83. U.S.—State Farm Fire & Cas. Co. v. Tashire, Or., 87 S.Ct. 1199, 386 U.S. 523, 18 L.Ed.2d 270.

83.5. U.S.—National Cas. Co. v. Insurance Co. of North America, D.C.Ohio, 230 F.Supp. 617—United Ben. Life Ins. Co. v. Leech, D.C.Pa., 326 F.Supp. 598.

84. U.S.—Dunbar & Sullivan Dredging Co. v. John R. Jurgenson Co., D.C.Ohio, 396 F.2d 152.

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84.5. U.S.—Georgia Sav. Bank & Trust Co. v. Sims, D.C.Ga., 321 F.Supp. 307.

84.10. U.S.—National Cas. Co. v. Insurance Co. of North America, D.C.Ohio, 230 F.Supp. 617.

85. U.S.—Maryland Cas. Co. v. Sauter, D.C.Miss., 344 F.Supp. 433—Bache Halsey Stuart Shields Inc. v. Garmaise, D.C.N.Y., 519 F.Supp. 682.

United States as claimant
(3) United States not citizen of any state.
U.S.—Kent v. Northern California Regional Office of Am. Friends Service Committee, C.A.Cal., 497 F.2d 1325.

§ 59. —— Alignment of Parties According to Real Interest

Library References

Federal Courts ⚬=304, 305.

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85.50. U.S.—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866.

Mechanical rules not applied
U.S.—American Motorists Ins. Co. v. Trane Co., C.A. Wis., 657 F.2d 146.
Continental Illinois Nat. Bank & Trust Co. of Chicago v. Fish, D.C.N.H., 271 F.Supp. 48.

85.55. U.S.—Bliss v. Gotham Industries, Inc., C.A. Cal., 316 F.2d 848—Eikel v. States Marine Lines, Inc., C.A.Tex., 473 F.2d 959, reh. den. 475 F.2d 1404.
Continental Illinois Nat. Bank & Trust Co. of Chicago v. Fish, D.C.N.H., 271 F.Supp. 48.

86. U.S.—Brown v. McCormick, C.A.Kan., 608 F.2d 410.
Ayers v. Ackerman, D.C.S.C, 324 F.Supp. 814—In re Penn Cent. Securities Litigation, D.C.Pa., 335 F.Supp. 1026—Irwin v. West End Development Co., D.C.Colo., 342 F.Supp. 687, affd. in part, revd. in part on oth. grds., C.A., 481 F.2d 34, cert. den 94 S.Ct. 915, 414 U.S. 1158, 39 L.Ed.2d 110—Ramsey v. Merchants Nat. Bank of Ft. Smith, Ark., D.C.Ark., 534 F.Supp. 112.

Realignment held proper
U.S.—Standard Oil Co. of Cal. v. Perkins, C.A.Or., 347 F.2d 379—American Motorists Ins. Co. v. Trane Co., C.A.Wis., 657 F.2d 146.

Insured and insurer
(1) U.S.—Indemnity Ins. Co. of North America v. First Nat. Bank at Winter Park, Fla., C.A.Fla., 351 F.2d 519.
(5) Other matters.
U.S.—Fireman's Fund Ins. Co. v. Dunlap, C.A.S.C., 317 F.2d 443.
Nationwide Mut. Ins. Co. v. Simms, D.C.Md., 231 F.Supp. 787—Mission Ins. Co. v. Mackey, D.C.Mo., 340 F.Supp. 824.

Alignment not required
U.S.—Rogge v. Menard County Mut. Fire Ins. Co., D.C.Ill., 184 F.Supp. 289.

Realignment not to be distorted to device for defeating justice
U.S.—Horne v. Lewis, D.C.Miss., 206 F.Supp. 691.

Test not exclusive where parties are antagonistic
U.S.—Reed v. Robilio, C.A.Tenn., 376 F.2d 392, on remand 273 F.Supp. 954, affd. 400 F.2d 730.

Realignment held error
U.S.—Reed v. Robilio, C.A.Tenn., 376 F.2d 392, on remand 273 F.Supp. 954, affd. 400 F.2d 730.

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87. U.S.—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866.
Harris County v. Ideal Cement Co., D.C.Tex., 290 F.Supp. 956.
Dunbar & Sullivan Dredging Co. v. John R. Jurgensen Co., D.C.Ohio, 44 F.R.D. 467, affd. 396 F.2d 152.

87.5. U.S.—D. A. Foster Equipment Corp. v. Fidelity & Cas. Co. of New York, D.C.Md., 262 F.Supp. 278—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Fish, D.C.N.H., 271 F.Supp. 48—Kennedy v. Blumeyer, D.C.Mo., 309 F.Supp. 939.

87.10. U.S.—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866—Scott v. Fancher, C.A.Tex., 369 F.2d 842.

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87.15. U.S.—Schetter v. Heim, D.C.Wis., 300 F.Supp. 1070.
Benson Mfg. Co. v. Bell Tel. Co. of Pa., D.C.Pa., 35 F.R.D. 29.

87.25. U.S.—In re Sunshine Min. Co. Securities Litigation, D.C.N.Y., 496 F.Supp. 9.

87.35. U.S.—Reed v. Forcheimer, C.A.Tex., 368 F.2d 982.
Horne v. Lewis, D.C.Miss., 206 F.Supp. 691.

88. U.S.—Unanue v. Caribbean Canneries, Inc., D.C. Del., 323 F.Supp. 63.

Realignment held not required
U.S.—Belcher v. Birmingham Trust Nat. Bank, D.C. Ala., 348 F.Supp. 61, stay den., C.A., 395 F.2d 685.

Consideration of nature of case as presented by whole record
U.S.—Peter Kiewit Sons Co. v. South Dakota State Highway Commission for and on Behalf of Dept. of Highways, State of S.D., D.C.S.D., 269 F.Supp. 333.

Insurer and insured
(7) Other actions.
U.S.—Murphy v. Hertz Corp., D.C.Okl., 337 F.Supp. 967.

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90. U.S.—Unanue v. Carribean Canneries, Inc., D.C. Del., 323 F.Supp. 63.

91. U.S.—Tessari v. Herald, D.C.Ind., 207 F.Supp. 432—Rogers v. Valentine, D.C.N.Y., 306 F.Supp. 34, affd., C.A., 426 F.2d 1361—Irwin v. West End Development Co., D.C.Colo., 342 F.Supp. 687, affd. in part, revd. in part on oth. grds., C.A., 481 F.2d 34, cert. den. 94 S.Ct. 915, 414 U.S. 1158, 39 L.Ed.2d 110.

92. U.S.—In re Penn Cent. Securities Litigation, D.C. Pa., 335 F.Supp. 1026.

92.10. U.S.—Bennett v. Worden, D.C.Ark., 225 F.Supp. 42—Mutual Shares Corp. v. Genesco, Inc., D.C.N.Y., 266 F.Supp. 130, affd. in part, revd. in part, on oth. grds., C.A., 384 F.2d 540.

92.15. **Corporation as beneficiary as not dictating invariable realignment**
U.S.—Dowd v. Front Range Mines, Inc., D.C.Colo., 242 F.Supp. 591.

Corporation treated as defendant to preclude dismissal
U.S.—Dowd v. Front Range Mines, Inc., D.C.Colo., 242 F.Supp. 591.

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96. Rogers v. Valentine, C.A.N.Y., 426 F.2d 1361.

§ 60. —— Necessary, Indispensable, and Formal Parties

Library References

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97. U.S.—Navarro Sav. Ass'n v. Lee, Tex., 100 S.Ct. 1779, 446 U.S. 458, 64 L.Ed.2d 425.
State of Nev. ex rel. Beko v. Reynolds Elec. & Engineering Co., D.C.Nev., 272 F.Supp. 942—Dougherty v. Oberg, D.C.Minn., 297 F.Supp. 635—Allen v. Baker, D.C.Miss., 327 F.Supp. 706.

Formal parties are not considered, etc.
U.S.—Cole v. Continental Oil Co., D.C.Okl., 240 F.Supp. 642.

Factors considered
U.S.—Navarro Sav. Ass'n v. Lee, Tex., 100 S.Ct. 1779, 446 U.S. 458, 64 L.Ed.2d 425.
Iowa Public Service Co. v. Medicine Bow Coal Co., C.A.Iowa, 556 F.2d 400.

98. U.S.—Television Reception Corp. v. Dunbar, C.A. Ky., 426 F.2d 174.
U.S.—Lind v. Canada Dry Corp., D.C.Minn., 283 F.Supp. 861—Chipman v. Lollar, D.C.Miss., 304 F.Supp. 440.
D.C.—First Nat. City Bank of New York v. Gilliland, C.A., 257 F.2d 223, 103 U.S.App.D.C. 219, cert. den. 79 S.Ct. 61, 358 U.S. 837, 3 L.Ed.2d 73.

Formal or unnecessary parties
U.S.—In re Monocacy Park, City of Bethlehem, Pa., D.C.Pa., 181 F.Supp. 880—Suburban Trust Co. v. National Bank of Westfield, D.C.N.J., 211 F.Supp. 694—Cole v. Continental Oil Co., D.C.Okl., 240 F.Supp. 642.

Held merely nominal parties within rule
(6) U.S.—Union Paving Co. v. Downer Corp., C.A. Cal., 276 F.2d 468.

Held real party in interest and not merely nominal party
(6) U.S.—Alexander v. Washington, C.A.La., 274 F.2d 349.
Pennsylvania Lumbermens Mut. Ins. Co. v. Thomason, D.C.N.J., 178 F.Supp. 382—Bailey v. Armour Service of Okl., Inc., D.C.Okl., 228 F.Supp. 879.

Factors considered
U.S.—Provident Tradesmens Bank & Trust Co. v. Patterson, Pa., 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936, on remand, C.A., 411 F.2d 88.

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98.5. U.S.—Masterson v. Atherton, D C.Conn., 223 F.Supp. 407, affd., C.A., 328 F 2d 106—Greer v. Mid-West Nat. Fire & Cas. Ins. Co., D.C Ark., 305 F.Supp. 352, affd., C.A., 434 F.2d 215—Kansas City, Mo., ex rel. Gemco, Inc. v. American Concrete Forms, Inc., D.C.Mo., 318 F.Supp. 567—South Carolina Elec. & Gas Co. v. Ranger Const. Co., Inc., D.C.S.C., 539 F.Supp. 578.

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98.10. U.S.—Asher v Pacific Power & Light Co., D.C.Cal., 249 F.Supp. 671.

98.15. U.S.—Aetna Ins. Co. of Hartford, Conn. v. Southern, Waldrip & Harvick, D.C.Cal., 198 F.Supp. 505.

99. U.S.—Jamison v. Memphis Transit Management Co., C.A.Tenn., 381 F.2d 670.

South Carolina Elec. & Gas Co. v. Ranger Const. Co., Inc., D.C.S.C., 539 F.Supp. 578.

Jurisdictional

(2) Indispensability question not jurisdictional in technical sense of that term.

U.S.—Rippey v. Denver U.S. Nat. Bank, D.C.Colo., 42 F.R.D. 316.

99.5. U.S.—Owen Equipment & Erection Co. v. Kroger, Neb., 98 S.Ct. 2396, 437 U.S. 365, 57 L.Ed.2d 274.

Jett v. Zink, C.A.Ala., 362 F.2d 723, cert. den. 87 S.Ct. 597, 600, 385 U.S. 987, 17 L.Ed.2d 448, 600, app. after remand 474 F.2d 149.

Ramsey v. Bomin Testing, Inc., 68 F.R.D. 335.

1. U.S.—Boise Cascade Corp. v. Wheeler, D.C.N.Y., 419 F.Supp. 98, affd., C.A., 556 F.2d 554.

Dameron v. Deer, D.C.Ga., 88 F.R.D. 577.

2. U.S.—Evra Corp. v. Swiss Bank Corp, C.A.Ill., 673 F.2d 951, cert. den. 103 S.Ct. 377, 459 U.S. 1017, 74 L.Ed.2d 511.

Anderson v. Lane, D.C.S.C., 97 F.Supp. 265—Gorham v. Edwards, D.C.N.Y., 164 F.Supp. 781—Cole v. Continental Oil Co., D.C.Okl., 240 F.Supp. 642—Weatherford v. Elizondo, D.C.Tex., 52 F.R.D. 122.

Party "to be joined if feasible"

U.S.—Haas v. Jefferson Nat. Bank of Miami Beach, C.A.Fla., 442 F.2d 394.

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2.5. U.S.—Field v. Volkswagenwerk AG, C.A.N.J., 626 F.2d 293.

Allen v. Baker, D.C.Miss., 327 F.Supp. 706—Aberle Hosiery Co. v. American Arbitration Ass'n, D.C.Pa., 337 F.Supp. 90, App. Dism., C.A., 461 F.2d 1005.

D.C.—Trans-Bay Engineers & Builders, Inc. v. Hills, C.A., 551 F.2d 370, 179 U.S.App.D.C. 184.

3. U.S.—Cole v. Continental Oil Co., D.C.Okl., 240 F.Supp. 642.

5. U.S.—Anrig v. Ringsby United, C.A.Wash., 603 F.2d 1319—Brown v. Chaffee, C.A.Kan., 612 F.2d 497.

Straub v. Kean, D.C.S.C., 207 F.Supp. 420—Fullerton v. Monongahela Connecting R. Co., D.C. Pa., 242 F.Supp. 622.

Galarza v. Union Bus Lines, Inc., D.C.Tex., 38 F.R.D. 401, affd., C.A., 369 F.2d 402.

Parties held not indispensable within rule

(4) Other parties.

U.S.—National Equipment Rental, Limited v. Sanders, D.C.N.Y., 271 F.Supp. 756—Cass v. Sonnenblick-Goldman Corp., D.C.Pa., 287 F.Supp. 815—South Carolina Elec. & Gas. Co. v. Ranger Const. Co., Inc., D.C.S.C., 539 F.Supp. 578.

Morelli v. Northwest Engineering Corp., D.C. Wis., 30 F.R.D. 522.

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5.5. U.S.—Holt County, Neb. v. Johnson, D.C.Neb., 343 F.Supp. 372.

6. U.S.—Ross v. International Broth. of Elec. Workers, C.A.Ariz., 634 F.2d 453.

Milwaukee Deutsche Zeitung, Inc. v. Ethnic Am. Press, Inc., D.C.Wis., 332 F.Supp. 1092—Bage v. Hernandez, D.C.Md., 340 F.Supp. 698.

Jones Knitting Corp. v. A. M. Pullen & Co., D.C.N.Y, 50 F.R.D. 311.

Defect not curable

U.S.—Fambrough v. Gill Transp. Corp., D.C.N.Y., 228 F.Supp. 746.

7. U.S.—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866.

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9. Joinder not required

U.S.—Blizzard v. Penley, D.C.Colo., 186 F.Supp. 746.

9.5. Under federal statute insurer deemed citizen where insured is citizen

U.S.—Carvin v. Standard Acc. Ins. Co., D.C.Tenn., 253 F.Supp. 232—Cunningham v. State Farm Mut. Auto Ins. Co., D.C.Tenn., 297 F.Supp. 1138.

Action by insured for benefit of injured party

U.S.—Carvin v. Standard Acc. Ins. Co., D.C.Tenn., 253 F.Supp. 232.

§ 61. —— Actions by or against Parties Acting in Representative or Fiduciary Capacity

Library References

Federal Courts ⟹290.

9.50. Action for wrongful death

(2) In civil action seeking compensatory and punitive damages for wrongful death, surviving spouse and next of kin of decedent was person whose citizenship was controlling for diversity purposes.

U.S.—Cline v. Richards, D.C.Tenn., 455 F.Supp. 42.

10. U.S.—State of Miss. for Use of Derrow v. Durham, C.A.Miss., 444 F.2d 152—Bush v. Carpenter Bros., Inc., C.A.Miss., 447 F.2d 707.

Lang v. Elm City Const. Co., D.C.Conn., 217 F.Supp. 873, affd., C.A., 324 F.2d 235—Pontarelli Trust v. City of McAllen, D.C.Tex., 288 F.Supp. 988—Waxman v. Kealoha, D.C.Hawaii, 296 F.Supp. 1190—Burnette v. Grande Mut. Cas. Co., D.C.Tenn., 311 F.Supp. 873—Fernandez-Cerra v. Commercial Ins. Co. of Newark, D.C.Puerto Rico, 344 F.Supp. 314.

Citizenship of fiduciary and not of beneficiary controls

U.S.—O'Brien v. AVCO Corp., C.A.N.Y., 425 F.2d 1030.

11.5. U.S.—Shelden v. Trust Co. of Virgin Islands, Ltd., D.C.Puerto Rico, 535 F.Supp. 667.

However, the rule has been announced that "manufactured" diversity by the artificial selection of a nonresident fiduciary as a straw representative who has no function except to offer the use of his citizenship to create diversity in contemplated litigation does not constitute an adequate foundation for federal jurisdiction.[11.10]

11.10. U.S.—McSparran v. Weist, C.A.Pa., 402 F.2d 867—Rogers v. Bates, C.A.Neb., 431 F.2d 16.

Pistone v. Romano, D.C.Pa., 349 F.Supp. 293, affd., C.A., 481 F.2d 1399.

Appointment scrutinized for manufactured diversity jurisdiction

U.S.—Groh v. Brooks, C.A.Pa., 421 F.2d 589—Green v. Hale, C.A.Tex., 433 F.2d 324.

Factors considered in determining artificial creation of diversity

U.S.—Green v. Hale, C.A.Tex., 433 F.2d 324—Levenger v. Lehigh Val. R. Co., C.A.Pa., 435 F.2d 822.

Question of fact

U.S.—Bass v. Texas Power & Light Co., C.A.Tex., 432 F.2d 763, cert. den. 91 S.Ct. 1194, 401 U.S. 975, 28 L.Ed.2d 324.

Renner v. Vitcov, D.C.Pa., 339 F.Supp. 1020.

The appointment of a nonresident fiduciary is not improperly collusive if there is a substantial motive or justification other than the creation of diversity.[11.11]

11.11. U.S.—Farrell v. Ducharme, D.C.Vt., 310 F.Supp. 254—Aanestad v. Air Canada, Inc., D.C. Cal., 382 F.Supp. 550, motion den. 390 F.Supp. 1165, dism. C.A., 549 F.2d 806.

Generally, this rule is to be prospectively applied.[11.15]

11.15. U.S.—McSparran v. Weist, C.A.Pa., 402 F.2d 867—Law v. Converse, C.A.Pa., 419 F.2d 38—Siegel v. Slaney, C.A.Pa., 419 F.2d 176.

Perrin v. Coates, D.C.Pa., 311 F.Supp. 992—Brinkman v. Forman, D.C.Pa., 311 F.Supp. 1292.

12. U.S.—Todd County, Minn. v. Loegering, C.A. Minn., 297 F.2d 470.

Diversity of citizenship held not to exist

U.S.—Pontarelli Trust v. City of McAllen, D.C.Tex., 288 F.Supp. 988.

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13.5. U.S.—Johnson's Estate v. Bellville Hospital, D.C.Tex., 56 F.R.D. 380.

13.10. U.S.—Borror v. Sharon Steel Co., C.A.Pa., 327 F.2d 165.

First Nat. Bank of Chicago v. Mottola, D.C.Ill., 302 F.Supp. 785, affd., C.A., 465 F.2d 343.

14. U.S.—Mullins v. Seals, C.A.Vt., 562 F.2d 326.

Galloway v. Korcekwa, D.C.Miss., 339 F.Supp. 801—Harris v. Johnson, D.C.Miss., 345 F.Supp. 516.

Ancillary administrator

U.S.—Vaughan v. Southern Ry. Co., C.A.N.C., 542 F.2d 641.

Jurisdiction held to exist etc.

(2) Other matters.

U.S.—Lang v. Elm City Const. Co., C.A.Conn., 324 F.2d 235.

McElroy v. Security Nat. Bank of Kansas City, Kan., D.C.Kan., 215 F.Supp. 775.

Diversity jurisdiction held to exist

U.S.—Loegering v. Todd County, D.C.Minn., 185 F.Supp. 134, affd., C.A., 297 F.2d 470—Gebhardt v. Edgar, D.C.Pa., 251 F.Supp. 678.

Diversity jurisdiction held lacking

U.S.—Kenebrew v. Columbia Land & Timber Co., C.A. La., 454 F.2d 1146.

Welch v. Lewis, D.C.Miss., 184 F.Supp. 806—Lowe v. Loftus, D.C.Ga., 314 F.Supp. 620.

State statute held not to destroy diversity jurisdiction

U.S.—Lang v. Elm City Const. Co., D.C.Conn., 217 F.Supp. 873, affd., C.A., 324 F.2d 235.

15. U.S.—Russell v. New Amsterdam Cas. Co., C.A. Neb., 303 F.2d 674.

Friele v. Schaffer, D.C.Mont., 177 F.Supp. 654—Loegering v. Todd County, D.C.Minn., 185 F.Supp. 134. Affd., C.A., 297 F.2d 470.

15.5. U.S.—Swick v. Benscoter, D.C.Pa., 462 F.Supp. 24.

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15.15. U.S.—Janzen v. Goos, C.A.Neb., 302 F.2d 421.

Ashley v. Read Const. Co., D.C.Wyo., 195 F.Supp. 727—Gilchrist v. Strong, D.C.Okl., 299 F.Supp. 804—Novak v. Mount Marty Hospital Ass'n, D.C.S.D., 315 F.Supp. 931.

Interest due to claim upon estate for expenses

U.S.—Bettin v. Nelson, C.A.S.D., 744 F.2d 53.

"Manufactured" diversity as inadequate foundation for jurisdiction

(1) Since the publication of Corpus Juris Secundum, the cases of Jaffe v. Philadelphia & W.R. Co., 180 F.2d 1010 and Corabi v. Auto Racing, Inc., 264 F.2d 784 cited in support of the text have been overruled in a decision stating that "manufactured" diversity of citizenship by which a nonresident fiduciary is appointed to prosecute a suit for a resident does not constitute an adequate foundation for federal jurisdiction.

U.S.—McSparran v. Weist, C.A.Pa., 402 F.2d 867.

(2) Appointment held improper manufacture of jurisdiction.

U.S.—Gaulter v. Capdeboscq, 404 F.Supp. 900, injunction dissolved 423 F.Supp. 823, affd. in part and remd., C.A., 594 F.2d 127.

(3) Appointment held not improper manufacture of jurisdiction.

U.S.—Joyce v. Seigel, C.A.Pa., 429 F.2d 128—O'Brien v. Stover, C.A.Iowa, 443 F.2d 1013.

Guglielmo v. Scotti & Sons, Inc, D.C.Pa., 311 F.Supp. 722.

(4) Retrospective application of rule not warranted

U.S.—Law v. Converse, C.A.Pa., 419 F.2d 38—Siegel v. Slaney, C.A.Pa., 419 F.2d 176.

Perrin v. Coates, D.C.Pa., 311 F.Supp. 992—Brinkman v. Forman, D.C.Pa., 311 F.Supp. 1292.

Where a state statute requires nonresident beneficiaries to be represented by a resident ancillary administrator, the citizenship of the beneficiaries is controlling for diversity purposes.[15.30]

15.30. U.S.—Miller v. Perry, C.A.N.C., 456 F.2d 63.

Wrongful death action within federal diversity jurisdiction

U.S.—Johnson v. Worley, D.C.Va., 353 F.Supp. 1381.

16. U.S.—Lang v. Elm City Const. Co., D.C.Conn., 217 F.Supp. 873, affd., C.A.2d 324 F.2d 235—Xaphes v. Mossey, D.C.Vt., 224 F.Supp. 578—Hernandez v. Lucas, D.C.Tex., 254 F.Supp. 901—DiStefano v. Lehigh Val. R. Co., D.C.Pa., 258 F.Supp. 721—Obney v. Schmalzreid, D.C.Pa., 273 F.Supp. 373.

Statute requiring appointment of resident as coguardian with nonresident not applicable

U.S.—Brimhall v. Simmons, C.A.Tenn., 338 F.2d 702.

Appointment held improper "manufacture" of jurisdiction warranting dismissal

U.S.—McSparran v. Weist, C.A.Pa., 402 F.2d 867.

Richard v. Dervarics, D.C.Pa., 302 F.Supp. 709—Farrell v. Ducharme, D.C.Vt., 310 F.Supp. 254.

Appointment scrutinized for manufactured diversity jurisdiction

U.S.—Houston v. Astle, C.A.Pa., 435 F.2d 847.

16.5. U.S.—DiStefano v. Lehigh Val. R. Co., D.C.Pa., 258 F.Supp. 721.

Since the publication of Corpus Juris Secundum, the case of Fallat v. Gouran, C.A.Pa., 220 F.2d 325 cited in support of the text, was disapproved to the extent that it indicates approval of "manufactured" diversity.

U.S.—McSparran v. Weist, C.A.Pa., 402 F.2d 867.

18. U.S.—Lank v. Federal Ins. Co., D.C.Del., 309 F.Supp. 349—Federal Deposit Ins. Corp. v. National Sur. Corp., D.C.Iowa, 345 F.Supp. 885.

19. U.S.—Appelt v. Whitty, C.A.Ill., 286 F.2d 135—Ziady v. Curley, C.A.N.C., 396 F.2d 873—Butler v. Colfelt, C.A.Pa., 439 F.2d 882.

Berkowitz v. Philadelphia Chewing Gum Corp., D.C.Pa., 217 F.Supp. 80—Dougherty v. Oberg, D.C.Minn., 297 F.Supp. 635—Curry v. Maxson, D.C.Mo., 318 F.Supp. 842.

Citizenship of parents "as next friend" not determinative

U.S.—Fahrner v. Gentzsch, D.C.Pa., 355 F.Supp. 349.

Appointment of nonresident guardian scrutinized for manufactured diversity jurisdiction

U.S.—Watson v. Rusnak, D.C.Pa., 352 F.Supp. 1103.

20. U.S.—Vallentine v. Taylor Inv. Co., D.C.Colo., 305 F.Supp. 1104.

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24.5. U.S.—Waxman v. Kealoha, D.C.Hawaii, 296 F.Supp. 1190.

24.10. U.S.—Sayre v. U.S., D.C.Ohio, 282 F.Supp. 175.

§ 62. —— Actions by Cestuis Que Trust

Library References

Federal Courts ⇐290.

25.50. U.S.—Belcher v. Birmingham Trust Nat. Bank, D.C.Ala., 348 F.Supp. 61, stay den., C.A., 395 F.2d 685.

Actions required to be dismissed

U.S.—Matthies v. Seymour Mfg. Co., C.A.Conn., 270 F.2d 365, reconsideration den., C.A., 271 F.2d 740, cert. den. 80 S.Ct. 591, 361 U.S. 962, 4 L.Ed.2d 544.

§ 63(1). —— Actions by or against Corporations

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28. U.S.—Broussard v. Columbia Gulf Transmission Co., C.A.La., 398 F.2d 885—Chemical Specialties Mfrs. Ass'n, Inc. v. Lowery, C.A.N.Y., 452 F.2d 431.

Campbell Soup Co. v. Springdale Farms, Inc, D.C.Ark., 338 F.Supp. 279.

Investment trust

U.S.—Jim Walter Investors v. Empire-Madison, Inc., 401 F.Supp. 425.

29. U.S.—Mississippi Pub. Corp. v. Murphree, Miss., 66 S.Ct. 242, 326 U.S. 438, 90 L.Ed. 185.

People of State of Ill. v. Kerr-McGee Chemical Corp., C.A.Ill., 677 F.2d 571, cert. den. 103 S.Ct. 469, 459 U.S. 1049, 74 L.Ed.2d 618

E. H. Crump & Co. v. Gatewood, D.C.Ark., 497 F.Supp. 549.

Municipal corporations

(1) U.S.—Mayor and City Council of Baltimore v. Weinberg, D.C.Md., 190 F.Supp. 140—Helmsley v. City of Detroit, D.C.Mich., 205 F.Supp. 793, affd., C.A., 320 F.2d 476—Kansas City, Mo., ex rel. Gemco, Inc. v. American Concrete Forms, Inc., D.C.Mo., 318 F.Supp. 567.

(2) U.S.—Moor v. Alameda County, Cal., 93 S.Ct. 1785, 411 U.S. 693, 36 L.Ed.2d 596, reh. den. 93 S.Ct. 2999, 412 U.S. 963, 37 L.Ed.2d 1012.

Brown v. Marshall County, Ky., C.A.Ky., 394 F.2d 498.

White v. Umatilla County, D.C.Or., 247 F.Supp. 918—Harris County v. Ideal Cement Co., D.C. Tex., 290 F.Supp. 956—Universal Sur. Co. v. Lescher and Mahoney, Architects and Engineers, D.C.Ariz., 340 F.Supp. 303.

Public corporations

U.S.—John & Sal's Automotive Service, Inc. v. Sinclair Refining Co., D.C.N.Y., 165 F.Supp. 518, app. dism., C.A., 267 F.2d 862—Moss v. Calumet Paving Co., D.C.Ind., 201 F.Supp. 426.

Diversity jurisdiction held to exist

(1) U.S.—Ellis v. J-R,-m Corp., D.C.Hawaii, 324 F.Supp. 768.

Diversity jurisdiction held not to exist

(1) U.S.—Harris Diamond Co. v. Army Times Pub. Co., D.C.N.Y., 280 F.Supp. 273.

Rule inapplicable to corporation not chartered in any state

U.S.—Feuchtwanger Corp. v. Lake Hiawatha Federal Credit Union, C.A.N.J., 272 F.2d 453.

Federal Deposit Ins. Corp. v. National Sur. Corp., D.C.Iowa., 345 F.Supp. 885.

Whether "state" or "federal" standard to be applied

U.S.—Arrowsmith v. United Press Intern., C.A.Vt., 320 F.2d 219, 6 A.L.R.3d 1072.

School district

U.S.—Fabrizio & Martin, Inc. v. Board of Ed. Central School Dist. No. 2 of Towns of Bedford et al., D.C.N.Y., 290 F.Supp. 945.

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32.5. U.S.—R. G. Barry Corp. v. Mushroom Makers, Inc., C.A.N.Y., 612 F.2d 651.

Miller Dress Factory Inc. of Puerto Rico v. Douglas, D.C.Puerto Rico, 385 F.Supp. 874.

D.C.—Rice v. Disabled Am. Veterans, D.C., 295 F.Supp. 131.

La.—Sanson v. Louisiana Power & Light Co., App., 164 So.2d 151, writ ref. 165 So.2d 486, 246 La. 596.

Purpose of amendment

(2) U.S.—Canton v. Angelina Cas. Co., C.A.Tex., 279 F.2d 553.

Johnson v. Angelina Cas. Co., D.C.Tex., 177 F.Supp. 85, affd., C.A., 279 F.2d 553—Nayer v. Sears, Roebuck & Co., D.C.N.H., 200 F.Supp. 319.

(3) Other statements.

U.S.—National Spinning Co. v. City of Washington, N.C., D.C.N.C., 312 F.Supp. 958.

Boysen v. Treadway Inn of Lake Harmony, Inc., D.C.Pa., 53 F.R.D. 96, affd., C.A., 463 F.2d 247.

Statute upheld

U.S.—Eldridge v. Richfield Oil Corp., D.C.Cal., 247 F.Supp. 407, affd., C.A., 364 F.2d 909, cert. den. 87 S.Ct. 750, 385 U.S. 1020, 17 L.Ed.2d 556.

Rule inapplicable where principal place of business in foreign country

U.S.—Willems v. Barclays Bank D.C.O., D.C.N.Y., 263 F.Supp. 774.

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32.10. U.S.—Canton v. Angelina Cas. Co., C.A.Tex., 279 F.2d 553—Egan v. American Airlines, Inc., C.A.N.Y., 324 F.2d 565—Moore v. Sylvania Elec. Products, Inc., C.A.Pa., 454 F.2d 81.

Huggins v. Winn-Dixie Greenville, Inc., D.C. S.C., 233 F.Supp. 667—U-Profit, Inc. v. Bromley Limited, D.C.Wis., 330 F.Supp. 609—Campbell v. Triangle Corp., D.C.Pa., 336 F.Supp. 1002.

Narrowing jurisdiction intended

U.S.—Bender v. Hilton Riviera Corp., D.C.Puerto Rico, 367 F.Supp. 380.

32.15. U.S.—Carter v. Clear Fir Sales Co., D.C.Or., 284 F.Supp. 386—Griffin v. Air South, Inc., D.C. Ga., 324 F.Supp. 1284.

32.20. U.S.—Brown v. Kingsport Pub.Corp., D.C. Tenn., 321 F.Supp. 1352—Gavin v. Read Corp., D.C.Pa., 356 F.Supp. 483.

Principal place of business established

U.S.—Lento v. Delaware, L. & W.R. Co., C.A.N.Y., 374 F.2d 113, cert. den. 90 S.Ct. 1397, 397 U.S. 1054, 25 L.Ed.2d 670, reh. den. 90 S.Ct. 1875, 398 U.S. 954, 26 L.Ed.2d 298.

Location of corporate officers

U.S.—K.S. Corp. v. Chemstrand Corp., D.C.N.Y., 198 F.Supp. 310—Inland Rubber Corp. v. Triple A Tire Service, Inc., D.C.N.Y., 220 F.Supp. 490.

Criteria under Bankruptcy Act

(3) Other matters.

U.S.—Inland Rubber Corp. v. Triple A Tire Service, Inc., D.C.N.Y., 220 F.Supp. 490.

No single factor determinative

U.S.—Unger v. Del E. Webb Corp., D.C.Cal., 233 F.Supp. 713.

Corporation not within long-arm statute

U S—Northcross v. Joslyn Fruit Co., Inc., D.C.Ariz., 439 F.Supp. 371.

32.25. U.S.—Toms v. Country Quality Meats, Inc., C.A.Ga., 610 F.2d 313.

R. G. Barry Corp. v. Mushroom Makers, Inc., C.A.N.Y., 612 F.2d 651.

Carter v. Clear Fir Sales Co., D.C.Or., 284 F.Supp. 386.

Over-all-basis

(2) Other statements.

U.S.—National Spinning Co. v. City of Washington, N.C., D.C.N.C., 312 F.Supp. 958.

Location of executive and administrative offices

U.S.—Lancer Industries, Inc. v. American Ins. Co., D.C.La., 197 F.Supp. 894.

32.30. U.S.—Kelly v. U.S. Steel Corp., C.A.Pa., 284 F.2d 850—Egan v. American Airlines, Inc., C.A. N.Y., 324 F.2d 565—Union Camp Corp. v. Dyal, C.A.Ga., 460 F.2d 678, cert. den. 93 S.Ct. 56, 409 U.S. 849, 34 L.Ed.2d 90.

Huggins v. Winn-Dixie Greenville, Inc., D.C. S.C., 233 F.Supp. 667—Leve v. General Motors Corp., D.C.N.Y., 246 F.Supp. 761—Arnold's Ice Cream Co. v. Carlson, D.C.N.Y., 330 F.Supp. 1185.

Boysen v. Treadway Inn of Lake Harmony, Inc., D.C.Pa., 53 F.R.D. 96, affd., C.A., 463 F.2d 247.

Principal place of business determined

(2) Other matters.

U.S.—Lurie Co. v. Loew's San Francisco Hotel Corp., D.C.Cal., 315 F.Supp. 405—Fellers v. Atchison, T. & S.F. Ry. Co., D.C.Kan., 330 F.Supp. 1334.

Center of operational activities controls

U.S.—Horwat v. Paulsen-Webber Cordage Corp., D.C. Pa., 336 F.Supp. 1020.

32.35. U.S.—Inland Rubber Corp. v. Triple A Tire Service, Inc., D.C.N.Y., 220 F.Supp. 490.

32.40. U.S.—Miller Production Co. v. Champlin Petroleum Co., D.C.Okl., 505 F.Supp. 46.

Uniroyal, Inc. v. Heller, D.C.N.Y., 65 F.R.D. 83.

Doctrine held inapplicable

U.S.—Spector v. Rex Sierra Gold Corp., D.C.N.Y., 227 F.Supp. 550.

32.45. Physical plant of some significance

U.S.—Horwat v. Paulsen-Webber Cordage Corp., D.C Pa., 336 F.Supp. 1020.

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32.50. U.S.—Johnson v. Angelina Cas. Co., D.C.Tex., 177 F.Supp. 85, affd., C.A., 279 F.2d 553—Maryland Cas. Co. v. Baker, D.C.Ky., 196 F.Supp. 234.

Diversity jurisdiction held lacking

(2) Other instances.

U.S.—Lupo v. Consolidated Manners, Inc., D.C.N.Y., 261 F.Supp. 450—General Foods Corp. v. Struthers Scientific & Intern. Corp., D.C.Del., 297 F.Supp. 271.

D.C.—Vogel v. Tenneco Oil Co., D.C., 276 F.Supp. 1008.

La.—Sansone v. Louisiana Power & Light Co., App., 164 So.2d 151, writ ref. 165 So.2d 486, 246 La. 596.

Subsidiary incorporated as legal entity accorded own principal place of business

U.S.—Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp., C.A.Pa., 461 F.2d 1140.

Statutory provision that in any direct action against a liability insurer, wherein insured is not joined as a party-defendant insurer shall be deemed a citizen of the state of which insured is a citizen, refers only to cases brought by an alleged victim of a tort under a direct action statute against a liability insurer of the alleged tort-feasor.[32.55]

32.55. U.S.—White v. U.S. Fidelity & Guaranty Co., C.A.R.I., 356 F.2d 746—O M. Greene Livestock Co. v. Azalea Meats, Inc., C.A.Ga., 516 F.2d 509.

Bishop v. Allstate Ins. Co., D.C.Ark., 313 F.Supp. 875—Adams v. State Farm Mut. Auto. Ins. Co., D.C.Miss., 313 F.Supp. 1349.

Action held not "direct action" within statute

U.S.—Henderson v. Selective Ins. Co., C.A.Ky., 369 F.2d 143—Home Indem. Co. v. Moore, C.A.Ark., 499 F.2d 1202.

Statute not retroactive

U.S.—Henderson v. Selective Ins. Co. C.A.Ky., 369 F.2d 143—Olympic Towing Corp. v. Nebel Towing Co., C.A.La., 419 F.2d 230, cert. den. 90 S.Ct. 1120, 397 U.S. 989, 25 L.Ed.2d 396.

Purpose of statute

U S.—Vines v. U.S. Fidelity & Guaranty Co., D.C. Tenn., 267 F.Supp. 436—Government Emp. Ins. Co. v. LeBleu, D.C.La., 272 F.Supp. 421—Bourget v. Government Emp. Ins. Co., D.C.Conn., 313 F.Supp. 367.

Action held within meaning of statute

U.S.—Vines v. U.S. Fidelity & Guaranty Co., D.C. Tenn., 267 F.Supp. 436.

Diversity jurisdiction held not to exist

U.S.—Newsom v. Zurich Ins. Co., C.A.La., 397 F.2d 280—Ford Motor Co. v. Insurance Co. of North America, C.A.Mich., 669 F.2d 421.

Vines v. U.S. Fidelity & Guaranty Co., D.C. Tenn., 267 F.Supp. 436—Anderson v. Phoenix of Hartford Ins. Co., D.C.La., 320 F.Supp. 399—Narvaez v. British Am. Ins. Co., D.C.Puerto Rico, 324 F.Supp. 1324.

Applicability of statute where claim barred against insured

U.S.—Salgado v. Employers Ins. of Wausau, D.C.Puerto Rico, 326 F.Supp. 285.

Insured as including omnibus insured

U.S.—Williams v. Liberty Mut. Ins. Co., C.A.La., 468 F.2d 1207.

Anderson v. Phoenix of Hartford Ins. Co., D.C. La., 320 F.Supp. 399.

Statute inapplicable to action by insurance carrier

U.S.—Atlantic Mut. Ins. Co. v. Mitchell, D.C.Tex., 333 F.Supp. 70.

Workmen's compensation suit as within provision

U.S.—Hernandez v. Travelers Ins. Co., C.A.Tex., 489 F.2d 721, reh. den. 493 F.2d 664, cert. den. 95 S.Ct. 78, 419 U.S. 844, 42 L.Ed.2d 73.

Inapplicable to suit on fire insurance policy

U.S.—Ennis v. Queen Ins. Co. of America, D.C.Tenn., 364 F.Supp. 964.

Declaratory action brought by insurer

U.S.—Aetna Cas. & Sur. Ins. Co. v. Greene, C.A.Tenn., 606 F.2d 123.

Applicability of statute under accident income policy

U.S.—Kosmyna v. Bankers Life and Cas. Co., D.C. Mich., 550 F.Supp. 142.

33. U.S.—R. H. Bouligny, Inc. v. United Steelworkers of America, AFL-CIO, C.A.N.C., 336 F.2d 160, affd. 86 S.Ct. 272, 382 U.S. 145, 15 L.Ed.2d 217.

34. U.S.—Trans-Continental Inv. Corp., S.A. v. Bank of Commonwealth, D C.Cal., 500 F.Supp. 565.

35. U.S.—Dyotherm Corp. v. Turbo Mach. Co., D.C. Pa., 48 F.R.D. 380, app. dism., 434 F.2d 65.

§ 63(3). —— —— Federal Corporations; National Banks

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41. U.S.—Harris v. American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594.

D.C.—Rice v. Disabled Am. Veterans, D.C., 295 F.Supp. 131.

American Legion, etc.

U.S.—Harris v. American Legion, D.C.Ind., 162 F.Supp. 700, affd., C.A., 261 F.2d 594.

41.5. U.S.—Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127.

Savings and loan association

U.S.—First Federal Sav. and Loan Ass'n of Harrison, Ark. v. Myrick, D.C.Ark., 533 F.Supp. 1041.

§ 63(4). —— —— Corporations of District of Columbia or of Territory

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41.20. U.S.—Twardzik v. Sepauley, D.C.Pa., 286 F.Supp. 346.

41.55. U.S.—Government Emp. Ins. Co. v. LeBleu, D.C La., 272 F.Supp. 421.

§ 63(5). —— —— Incorporation in More than One State

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43.25. U.S.—Lang v. Colonial Pipeline Co., D.C.Pa., 266 F.Supp 552, affd., C.A., 383 F.2d 986—Government Emp. Ins. Co. v. LeBleu, D.C.La., 272 F.Supp. 421.

43.30. U.S.—Hudak v. Port Authority Trans-Hudson Corp., D.C.N.Y., 238 F.Supp. 790.

43.35. U.S.—Lawson v. United House of Prayer for all People of Church on Rock of Apostolic Faith, D.C.Pa., 252 F.Supp. 52.

Purpose

U.S.—Crum v. Veterans of Foreign Wars, D.C.Del., 502 F.Supp. 1377.

A federally chartered organization which is authorized and does business throughout the United States has national citizenship and thus is not a citizen of any particular state for jurisdictional purposes.[43.45]

43.45. U.S.—Burton v. U.S. Olympic Committee, D.C.Cal., 574 F.Supp. 517.

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45.5. U.S.—Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., C.A.Ill., 523 F.2d 543, applying Delaware law.

Diversity jurisdiction held to exist

(2) Other statements.

U.S.—Asher v. Pacific Power & Light Co., D.C.Cal., 249 F.Supp. 671.

47. U.S.—John Mohr and Sons v. Apex Terminal Warehouses, Inc., C.A.Ind., 422 F.2d 638.

§ 64. —— Actions by or against Unincorporated Associations

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50.50. U.S.—Calagaz v. Calhoon, C.A.Ala., 309 F.2d 248.

Webster v. Wilke, D.C.Ill., 186 F.Supp. 199—Suggs v. Brotherhood of Locomotive Firemen and Enginemen, D.C.Ga., 219 F.Supp. 770.

51. U.S.—Mason v. American Exp. Co., C.A.N.Y., 334 F.2d 392.

52. U.S.—Brocki v. American Exp. Co., C.A.Mich., 279 F.2d 785, cert. den. 81 S.Ct. 113, 364 U.S. 871, 5 L.Ed.2d 92.

Fine v. Philip Morris, Inc., D.C.N.Y., 239 F.Supp. 361.

52.5. U.S.—Loss v. Blankenship, C.A.Ind., 673 F.2d 942.

Local No. 1547, Intern. Broth. of Elec. Workers, AFL-CIO v. Local No. 959, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers, Independent, D.C.Alaska, 356 F.Supp. 636, op. supp. 361 F.Supp. 1006, affd. in part, vac. in part on oth. grds., C.A., 507 F.2d 872.

53. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954.

Grynberg v. B.B.L. Associates, D.C.Colo., 436 F.Supp. 564.

Labor Management Relations Act as not altering rule

U.S.—Smith v. United Mine Workers of America, D.C. Ga., 180 F.Supp. 796.

Joint venture

U.S.—B. L. Schrader, Inc. v. Anderson Lumber Co., D.C.Md., 257 F.Supp. 794.

Has citizenship of each member

U.S.—Baer v. United Services Auto. Ass'n, C.A.N.Y., 503 F.2d 393.

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53.5. U.S.—Underwood v. Maloney, C.A.Pa., 256 F.2d 334, cert den. 79 S.Ct. 93, 358 U.S. 864, 3 L.Ed.2d 97—Jett v. Phillips and Associates, C.A. Colo., 439 F.2d 987—Baer v. United Services Auto. Ass'n, C.A.N.Y., 503 F.2d 393.

Salerno v. American League of Professional Baseball Clubs, D.C.N.Y., 310 F.Supp. 729, affd., C.A., 429 F.2d 1003, cert. den. 91 S.Ct. 462, 400 U.S. 1001, 27 L.Ed.2d 452.

State statutes have no effect

U.S.—International Union, United Auto., Aircraft and Agr. Implement Workers of America v. Piasecki Aircraft Corp., D.C.Del., 241 F.Supp. 385.

53.10. U.S.—Kaplan v. Industrial Risk Insurers, D.C. Pa., 86 F.R.D. 484.

53.15. U.S.—Baer v. United Services Auto, Ass'n, C.A.N.Y., 503 F.2d 393.

Grynberg v. B.B.L. Associates, D.C.Colo., 436 F.Supp. 564.

Diversity jurisdiction held not to exist

(2) Other instances.

U.S.—United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., N.C., 86 S.Ct. 272, 382 U.S. 145, 15 L.Ed.2d 217.

Labor Management Relations Act

Since the publication of Corpus Juris Secundum, the case of Textile Workers Union of America v. Cone Mills Corp., D.C.N.C., 166 F.Supp. 654 has been reversed, the court holding that under the statute the district court has jurisdiction of suits for violation of collective bargaining agreements without regard to the citizenship of the parties.

U.S.—Textile Workers Union of America v. Cone Mills Corp., C.A.N.C., 268 F.2d 920, cert. den. 80 S.Ct. 157, 361 U.S. 886, 4 L.Ed.2d 121, on remand 188 F.Supp. 728.

When persons who compose an unincorporated association sue in their collective name, they are parties whose citizenship determines diversity the jurisdiction of a federal court.[54.5]

54.5. U.S.—Navarro Sav. Ass'n v. Lee, Tex., 100 S.Ct. 1779, 446 U.S. 458, 64 L.Ed.2d 425.

55.5. U.S.—Calagaz v. Calhoon, C.A.Ala., 309 F.2d 248.

Nedd v. United Mine Workers of America, D.C. Pa., 225 F.Supp. 750, affd., C.A., 332 F.2d 373.

§ 65. —— Actions by or against Partnerships

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55.50. U.S.—Eastern Metals Corp. v. Martin, D.C. N.Y., 191 F.Supp. 245.

56. U.S.—Grynberg v. B.B.L. Associates, D.C.Colo., 436 F.Supp. 564.

57. U.S.—Carlsberg Resources Corp. v. Cambria Sav. and Loan Ass'n, C.A.Pa., 554 F.2d 1254.

Erving v. Virginia Squires Basketball Club, D.C. N.Y., 349 F.Supp. 709.

Jones Knitting Corp. v. A. M. Pullen & Co., D.C.N.Y., 50 F.R.D. 311.

Jurisdiction held to exist

U.S.—Williams v. Sheraton Inns, Inc., D.C.Tenn., 514 F.Supp. 22.

Under Puerto Rican law, etc.

U.S.—Luce & Co. v. Alimentos Borinquenos, S.A., D.C.Puerto Rico, 276 F.Supp. 94.

(2) Conjugal partnership.

U.S.—Fernandez-Cerra v. Commercial Ins. Co. of Newark, D.C.Puerto Rico, 344 F.Supp. 314.

Place of business as immaterial

U.S.—Simpson v. De Vault, D.C.Va., 177 F.Supp. 914.

Actions against individual members of partnership

Resident partners not joined as parties

U.S.—Isdaner v. Beyer, D.C.Pa., 53 F.R.D. 4.

Citizenship of each general partner

U.S.—Lewis v. Odell, C.A.N.Y., 503 F.2d 445.

Limited partnership

U.S.—Westville Holdings, Inc. v. American Petroleum Partners, D.C.N.Y., 592 F.Supp. 44.

Diversity lacking where partner resides in foreign country

U.S.—Coudert Bros. v. Easyfind Intern., Inc., D.C. N.Y., 601 F.Supp. 525.

Although there is authority to the contrary,[58.1] citizenship of a limited partnership is determined by considering the citizenship of all of its partners, both general and limited.[58.2]

58.1 U.S.—Colonial Realty Corp. v. Bache & Co., C.A.N.Y., 358 F.2d 178, cert. den. 87 S.Ct. 40, 385 U.S. 817, 17 L.Ed.2d 56.

58.2 U.S.—Carlsberg Resources Corp. v. Cambria Sav. and Loan Ass'n, C.A.Pa., 554 F.2d 1254—Elston Inv., Ltd. v. David Altman Leasing Corp., C.A.Ill., 731 F.2d 436—New York State Teachers Retirement System v. Kalkus, C.A.4 (Va.), 764 F.2d 1015.

58.5. U.S.—A.D.S. Developers, Inc. v. Tucker, D.C. Pa., 263 F.Supp. 986.

58.10 Overruled case

Since the publication of the bound volume the case of Remington's Dairy v. Rutland Ry. Corp., D.C.Vt., 15 F.R.D. 488, has been overruled the court holding that for diversity purposes, partnership is citizen of each state of which general partner is citizen.

U.S.—Universal Steel & Metal Co. (1975) Ltd. v. Railco, Inc., D.C.Vt., 465 F.Supp. 7.

§ 66. —— Actions by or against Citizens of District of Columbia or of Territory

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59.50. D.C.—Trans-Bay Engineers & Builders, Inc. v. Hills, C.A., 551 F.2d 370, 179 U.S.App.D.C. 184.

Trans-Bay Engineers & Builders, Inc. v. Lynn, D.C., 396 F.Supp. 265, affd. in part, vac. in part on oth. grds 551, F.2d 370, 179 U.S.App.D.C. 184.

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61. U.S.—Lawson v. United House of Prayer for all People of Church on Rock of Apostolic Faith, D.C.Pa., 252 F.Supp. 52.

61.5. U.S.—Fernandez-Cerra v. Commercial Ins. Co. of Newark, D.C.Puerto Rico, 344 F.Supp. 314.

Puerto Rico held "territory"

U.S.—Lummus Co. v. Commonwealth Oil Refining Co., D.C.N.Y., 195 F.Supp. 47.

61.10. U.S.—Homs v. Jogan, D.C.Pa., 204 F.Supp. 108.

63. U.S.—Krisel v. Duran, D.C.N.Y., 258 F.Supp. 845, affd., C.A., 386 F.2d 179, cert. den. 88 S.Ct. 1635, 390 U.S. 1042, 20 L.Ed.2d 303.

§ 67. —— Actions on Assigned Promissory Notes or Other Choses in Action

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63.50. U.S.—O'Brien v. AVCO Corp., C.A.N.Y., 425 F.2d 1030.

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U.S.—Lester v. McFaddon, C.A.S.C., 415 F.2d 1101.

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63.55. U.S.—Bailey v. Prudence Mut. Cas. Co., C.A. Ill., 429 F.2d 1388.

DiLallo v. Fidelity & Cas Co. of New York, D.C.N.Y., 355 F.Supp. 519.

Assignee as real party in interest

(2) Other instances.

U.S.—Rosenberg v. Platt, D.C.Wis., 229 F.Supp. 8.

Motive for transfer immaterial

U.S.—City of Eufala, Ala. v. Pappas, D.C.Ala., 213 F.Supp. 749.

63.65. Challenge held not overcome

U.S.—Ferrara v. Philadelphia Laboraories, Inc., D.C. Vt., 272 F.Supp. 1000, affd., C.A., 393 F.2d 934.

63.70. U.S.—Ferrara v. Philadelphia Laboratories, Inc., D.C.Vt., 272 F.Supp. 1000, affd., C.A., 393 F.2d 934.

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21. U.S.—Dickson v. Tattnall County Hospital Authority, D.C.Ga., 316 F.Supp. 531.

§ 69. —— Intervention

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28. Field v. Volkswagenwerk AG, C.A.N.J., 626 F.2d 293.

28.50. U.S.—U.S. v. Local 638, Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Mach., Air Conditioning and General Pipefitters, D.C.N.Y., 347 F.Supp. 164.

29. U.S.—Coleman Capital Corp. v. Fidelity & Deposit Co. of Md., D.C.N.Y., 43 F.R.D. 407.

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30. U.S.—Rippey v. Denver U.S. Nat. Bank, D.C. Colo., 42 F.R.D. 316.

Stockholders' derivative action

(2) Other matters.

U.S.—Himmelblau v. Haist, D.C.N.Y., 195 F.Supp. 356.

31. U.S.—Rippey v. Denver U.S. Nat. Bank, D.C. Colo., 42 F.R.D. 316.

34.15. U.S.—Berman v. Herrick, D.C.Pa., 30 F.R.D. 9—Hamilton v. Civillico, D.C.Pa., 34 F.R.D. 1.

34.25. U.S.—Hamilton v. Civillico, D.C.Pa., 34 F.R.D. 1.

Babcock & Wilcox Co. v. Parsons Corp., C.A. Neb., 430 F.2d 531.

34.35. U.S.—State of Ga. v. City of Chattanooga, Tenn., C.A.Tenn., 406 F.2d 830.

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34.40. U.S.—McIntire v. Davis, D.C.Ohio, 246 F.Supp. 872—Gebhardt v. Edgar, D.C.Pa., 251 F.Supp. 678—Olivieri v. Adams, D.C.Pa., 280 F.Supp. 428—Lawes v. Nutter, D.C.Tex., 292 F.Supp. 890.

34.55. U.S.—Hougen v. Merkel, D.C.Minn., 47 F.R.D. 528.

38.5. U.S.—Mazzella v. Pan Oceanica A/S Panama, D.C.N.Y., 232 F.Supp. 29—Wolgin v. Atlas United Financial Corp., D.C.Pa., 397 F.Supp. 1003, affd. 530 F.2d 963 and 530 F.2d 966.

39.5. U.S.—CRI, Inc. v. Watson, C.A.Minn., 608 F.2d 1137.

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§ 70. —— Collusion to Confer Jurisdiction

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40.50. U.S.—Kramer v. Caribbean Mills, Inc., Tex., 89 S.Ct. 1487, 394 U.S. 823, 23 L.Ed.2d 9.

Garcia v. Hall, C.A.Kan., 624 F.2d 150.

Curzi v. Turiescy, D.C.Pa., 507 F.Supp. 806.

"Collusion" defined

U.S.—Silvious v. Helmick, D.C.W.Va., 291 F.Supp. 716.

Purpose

U.S.—Betar v. De Havilland Aircraft of Canada, Ltd., C.A.Ill., 603 F.2d 30, cert. den. 100 S.Ct. 1064, 444 U.S. 1098, 62 L.Ed.2d 785, reh. den. 100 S.Ct. 1347, 445 U.S. 947, 63 L.Ed.2d 782.

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Statutory prohibition extends to appointment of nonresident fiduciaries

U.S.—White v. Lee Marine Corp., C.A.Tex., 434 F.2d 1096.

Farrell v. Ducharme, D.C.Vt., 310 F.Supp. 254.

Statute not applicable

U.S.—Owen Equipment & Erection Co. v. Kroger, Neb., 98 S.Ct. 2396, 437 U.S. 365, 57 L.Ed.2d 274.

Statute applicable to alien parties

D.C.—Edlow Intern. Co. v. Nuklearna Elektrarna Krsko, D.C., 441 F.Supp. 827.

40.55. U.S.—Kramer v. Caribbean Mills, Inc., Tex., 89 S.Ct. 1487, 394 U.S. 823, 23 L.Ed.2d 9.

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41. **Doubt resolved against jurisdiction**

U.S.—Ferrara v. Philadelphia Laboratories, Inc., D.C. Vt., 272 F.Supp. 1000, affd., C.A., 393 F.2d 934.

43. U.S.—Transcontinental Oil Corp. v. Trenton Products Co., C.A.N.Y., 560 F.2d 94.

Henley & Co. v. Miller Golf Equipment Corp., D.C.Puerto Rico, 300 F.Supp. 872.

Joinder to defeat jurisdiction not fraudulent

U.S.—Schwegmann Bros. Giant Super Markets, Inc. v. Pharmacy Reports, Inc., D.C.La., 486 F.Supp. 606.

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45.5. U.S.—Bonnet v. Trustees of Schools of Tp. 41 North, Range 12 East of Third Principal Meridian, Cook County, C.A.Ill., 563 F.2d 831.

Henley & Co. v. Miller Golf Equipment Corp., D.C.Puerto Rico, 300 F.Supp. 872.

45.10. U.S.—Sessions v. Chrysler Corp., C.A.Cal., 517 F.2d 759.

46.15. U.S.—Allstate Ins. Co. v. Lumbermens Mut. Cas. Co., D.C.Conn., 204 F.Supp. 83.

Matthies v. Seymour Mfg. Co., D.C.Conn., 23 F.R.D. 64, revd. on oth. grds., C.A., 270 F.2d 365, reconsideration den. 271 F.2d 740, cert. den. 80 S.Ct. 591, 361 U.S. 962, 4 L.Ed.2d 544.

46.20. U.S.—Ferrara v. Philadelphia Laboratories, Inc., D.C.Vt., 272 F.Supp. 1000, affd., C.A., 393 F.2d 934.

Surrender of control not shown

U.S.—Matthies v. Seymour Mfg. Co., D.C.Conn., 23 F.R.D. 64, revd. on oth. grds., C.A., 270 F.2d 365, reconsideration den. 271 F.2d 740, cert. den. 80 S.Ct. 591, 361 U.S. 962, 4 L.Ed.2d 544.

§ 71. —— Change of Citizenship or Residence

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47. U.S.—IMFC Professional Services of Florida, Inc. v. Latin American Home Health Inc., C.A.Fla., 676 F.2d 152.

Seideman v. Hamilton, D.C.Pa., 173 F.Supp. 641, affd, C.A., 275 F.2d 224, cert. den. 80 S.Ct. 1258, 363 U.S. 820, 4 L.Ed.2d 1517.

Minnesota Min. and Mfg. Co. v. Kirkevold, D.C. Minn., 87 F.R.D. 317.

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48. U.S.—Leavitt v. Scott, C.A.Utah, 338 F.2d 749.

Seideman v. Hamilton, D.C.Pa., 173 F.Supp. 641, affd., C.A., 275 F.2d 224, cert. den. 80 S.Ct. 1258, 363 U.S. 820, 4 L.Ed.2d 1517—Wehrle v. Brooks, D.C.N.C., 269 F.Supp. 785, affd. 379 F.2d 288.

Necessary intention lacking

(3) Other instances.

U.S.—Mallon v. Lutz, D.C.Mich., 217 F.Supp. 454.

49. U.S.—Seideman v. Hamilton, D.C.Pa., 173 F.Supp. 641, affd., C.A., 275 F.2d 224, cert. den. 80 S.Ct. 1258, 363 U.S. 820, 4 L.Ed.2d 1517.

50. U.S.—Seideman v. Hamilton, D.C.Pa., 173 F.Supp. 641, affd., C.A., 275 F.2d 224, cert. den. 80 S.Ct. 1258, 363 U.S. 820, 4 L.Ed.2d 1517.

50.15. U.S.—Brimer v. Levi, C.A.Mo., 555 F.2d 656.

White v. Fawcett Publications, D.C.Mo., 324 F.Supp. 403.

However, imprisonment does not bar acquisition of domicile by prisoner in state where penitentiary located.[50.20]

50.20. U.S.—Stifel v. Hopkins, C.A.Ohio, 477 F.2d 1116.

51. **"Jurisdictional charade"**

D.C.—O'Brien v. Delta Gas, Inc., D.C.La., 486 F.Supp. 810.

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52. U.S.—Hall v. Fall, D.C.N.C., 235 F.Supp. 631—Kidd v. Hilton of San Juan, Inc., D.C.Puerto Rico, 251 F.Supp. 465—Wehrle v. Brooks, D.C.N.C., 269 F.Supp. 785, affd. 379 F.2d 288.

53. U.S.—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

Avins v. Hannum, D.C.Pa., 497 F.Supp. 930.

53.5. U.S.—Lewis v. Lewis, C.A.Cal., 358 F.2d 495.

Seaboard Finance Co. v. Davis, D.C.Ill., 276 F.Supp. 507.

§ 72. —— Conveyances and Transfers of Subject Matter of Action

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53.50. U.S.—Simpson v. Alaska State Commission for Human Rights, C.A.Alaska, 608 F.2d 1171.

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53.55. U.S.—Tryforos v. Icarian Development Co., S.A., D.C.Ill., 47 F.R.D. 191.

53.65. U.S.—Ferrara v. Philadelphia Laboratories, Inc., D.C.Vt., 272 F.Supp. 1000, affd., C.A., 393 F.2d 934.

Motive considered

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53.70. U.S.—Amar v. Garnier Enterprises, Inc., D.C. Cal., 41 F.R.D. 211.

54. U.S.—Prudential Oil Corp. v. Phillips Petroleum Co., C.A.N.Y., 546 F.2d 469.

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55. U.S.—Ferrara v. Philadelphia Laboratories, Inc., D.C.Vt., 272 F.Supp. 1000, affd., C.A., 393 F.2d 934.

57. U.S.—Picquet v. Amoco Production Co., D.C.La., 513 F.Supp. 938.

Partial assignment held ineffective to destroy diversity

U.S.—Gentle v. Lamb-Weston, Inc., D.C.Me., 302 F.Supp. 161.

61. U.S.—Lee v. Phillips Petroleum Co., D.C.Tex., 329 F.Supp. 579.

§ 73. Controversies between Citizens of Same State

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63. U.S.—Latch v. Tennessee Val. Authority, D.C. Miss., 312 F.Supp. 1069.

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(1) U.S.—Poole v. Lykes Bros. S.S. Co., C.A.La., 273 F.2d 423, reh. den. 274 F.2d 666.

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65. U.S.—Harris v. Stephens, C.A.Ark., 361 F.2d 888, cert. den. 87 S.Ct. 1040, two cases, 386 U.S. 964, 18 L.Ed.2d 113.

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U.S.—U.S. v. Holleman, C.A.Ind., 575 F.2d 139.

66. **Promulgation of state rules of criminal procedure unauthorized**
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U.S. ex rel. Barbry v. Rundle, D.C.Pa., 308 F.Supp. 628.
N.C.—State v. Bumper, 170 S.E.2d 457, 275 N.C. 670.
71. D.C.—U.S. v. Mitchell, D.C., 397 F.Supp 166, affd. 559 F.2d 31, 181 U.S.App.D.C. 254, cert. den. 97 S.Ct. 2641, two cases, 431 U.S. 933, 53 L.Ed.2d 250.

§ 164(2). —— Federal Rules of Criminal Procedure

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72. U.S.—U.S. v. Schwartz, C.A.N.C, 372 F.2d 678.
73. **Arrest in other district**
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74. U.S.—U.S. v. Whitted, C.A.Neb., 454 F.2d 642.
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76. U.S.—U.S. v. Leavitt, C.A.Wash., 608 F.2d 1290.
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78. Ill.—People v. Galvin, 273 N.E.2d 356, 49 Ill.2d 37.
79. U.S.—U.S. v. Morlang, C.A.W.Va., 531 F.2d 183.
80. U.S.—Rua v. U.S., C.A.Fla., 321 F.2d 140, cert. den. 84 S.Ct. 1651, 377 U.S. 969, 12 L.Ed.2d 738—Sullivan v. U.S., C.A.Okl., 411 F.2d 556.
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82. **As prescribing standards for law enforcement**
U.S.—Bolger v. U.S., D.C.N.Y., 189 F.Supp. 237, affd., C.A., 293 F.2d 368, revd. on oth. grds., 83 S.Ct. 385, 371 U.S. 392, 9 L.Ed.2d 390.
83. U.S.—Fallen v. U.S., Fla., 84 S.Ct. 1689, 378 U.S. 139, 12 L.Ed.2d 760.
84. **When plain meaning leads to absurd or futile results**
U.S.—U.S. v. Mendoza, C.A.Tex., 565 F.2d 1285, reh. 581 F.2d 89.
85. U.S.—Harris v. U.S., C.A.Mo., 288 F.2d 790—U.S. v. Rizzo, C.A.Ill., 362 F.2d 97.
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D.C.—U.S. v Mihalopoulos, D.C., 228 F.Supp. 994.
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86. U.S.—U S. v. Gray, C.A.Cal, 448 F.2d 164, cert. den. 92 S.Ct. 974, 405 U.S. 926, 30 L.Ed.2d 798.

§ 164(3). —— State Law as Not Controlling

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88. U.S.—U.S. v. Gray, C.A.Cal., 438 F.2d 1160, op. supers. on oth. grds. 448 F.2d 164, cert. den. 92 S.Ct. 974, 405 U.S. 926, 30 L.Ed.2d 798.
90. U.S.—Smith v. Director, Patuxent Institution State of Md., D.C.Md., 395 F.Supp. 813.
94. U.S.—U.S. v. Chiarizio, D.C.Conn., 388 F.Supp. 858, affd., C.A., 525 F.2d 289.
95. U.S.—U.S. v. Collins, D.C.Fla., 523 F.Supp. 239, affd. C.A., 667 F.2d 97.
96. U.S.—Denver Policemen's Protective Ass'n v. Lichtenstein, C.A.Colo., 660 F.2d 432.
97. U.S.—Januszewski v. Manson, D.C.Conn., 525 F.Supp. 805.
98. U.S.—Pierce v. State of Okl., D.C.Okl., 436 F.Supp. 1026.

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1. U.S.—U.S. v. Pastor, D.C.N.Y., 419 F.Supp. 1318.
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6. U.S.—Davis v. U.S., C.A.Miss., 409 F.2d 1095—O'Neal v. U.S., C.A.Ga., 411 F.2d 131, cert. den. 90 S.Ct. 72, 396 U.S. 827, 24 L.Ed.2d 77—Moll v. U.S., D.C.Fla., 413 F.2d 1233.
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9. U.S.—Jenkins v. Harvey, C.A.S.C., 634 F.2d 130.

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16. U.S.—U.S. v. Gillock, Tenn., 100 S.Ct. 1185, 445 U.S. 360, 63 L.Ed.2d 454.
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17. U.S.—Hayes v. U.S., C.A.Fla., 407 F.2d 189, cert. dism. 89 S.Ct. 2133, 395 U.S. 972, 23 L.Ed.2d 777—Butler v. U.S., C.A.Okl., 408 F.2d 1103.
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24. U.S.—First Southern Federal Sav. & Loan Ass'n of Mobile, Ala. v. First Southern Sav. and Loan Ass'n of Jackson County, Miss., C.A.Miss., 614 F.2d 71.
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(1) U.S.—Watson v. McCabe, 527 F.2d 286.
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Unfair competition
(1) U.S.—Phoenix Mfg. Co. v. Plymouth Mfg. Co., D.C.Mass., 286 F.Supp. 324.
(2) Application of federal or state law in actions for unfair competition generally see infra § 169(7).
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26. U.S.—Arant v. Stover, D.C.S.C., 307 F.Supp. 144.

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27. Wash.—In re Elliott, 446 P.2d 347, 74 Wash.2d 600.
28. U.S.—Sargent v. Genesco, Inc., D.C.Fla., 337 F.Supp. 1244.
29. U.S.—Appalachian Power Co. v. American Institute of Certified Public Accountants, D.C.N.Y., 177 F.Supp. 345, affirmed, C.A., 268 F.2d 844, cert. den. 80 S.Ct. 158, 361 U.S. 887, 4 L.Ed.2d 121.
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33. U.S.—Calaway v. Admiral Credit Corp., C.A. N.C., 407 F.2d 518.

34. U.S.—Hanna v. Plumer, Mass., 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8.

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35. U.S.—Brady v. State of Md., Md., 83 S.Ct. 1194, 373 U.S. 83, 10 L.Ed.2d 215—C. I. R. v. Bosch's Estate, Conn. & N.Y, 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295—Prima Paint Corp. v. Flood & Conklin Mfg. Co., N.Y., 87 S.Ct. 1801.

37. U.S.—Jerrold Stephens Co. v. Alladin Plastics, Inc., 229 F.Supp. 536.

38. U.S.—Billings v. Investment Trust of Boston, C.A.Ark., 309 F.2d 681—Delduca v. U.S., Fidelity & Guaranty Co., C.A.Fla., 357 F.2d 204, reh. den. 362 F.2d 1012—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866—Insurance Co. of North America v. Thompson, C.A.Idaho, 381 F.2d 677, 25 A.L.R.3d 1378.

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39. U.S.—Arant v. Stover, D.C.S.C., 307 F.Supp. 144.

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40. U.S.—Montesano v. Patent Scaffolding Co., D.C. Pa., 213 F.Supp. 141—Seaboard Finance Co. v. Davis, D.C.Ill., 276 F.Supp. 507—Shellburne, Inc. v. New Castle County, D.C.Del., 293 F.Supp. 237—Arant v. Stover, D.C.S.C., 307 F.Supp. 144—City of Chicago v. General Motors Corp., D.C. Ill., 332 F.Supp. 285, affd., C.A., 467 F.2d 1262.

41. U.S.—Hardy Salt Co. v. Southern Pac. Transp. Co., C.A.Utah, 501 F.2d 1156.

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42. U.S.—Kovacs v. Sun Valley Co., Inc., C.A.Idaho, 499 F.2d 1105.

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43. U.S.—Mallard v. Aluminum Co. of Canada, Ltd., C.A.Fla., 634 F.2d 236, cert. den. 102 S.Ct. 93, 454 U.S. 816, 70 L.Ed.2d 85.

44. U.S.—Brendle v. General Tire & Rubber Co., D.C.N.C., 304 F.Supp. 1262.

46. U.S.—Szantay v. Beech Aircraft Corp., C.A.S.C., 349 F.2d 60—Proctor & Schwartz, Inc. v. Rollins, C.A.S.C., 634 F.2d 738.

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53. U.S.—600 California Corp. v. Harjean Co., D.C. Tex., 284 F.Supp. 843.

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54. U.S.—Hanna v. Plumer, Mass., 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8—Birtcher Corp. v. Diapulse Corp. of America, N.Y., 87 S.Ct. 6, 17 L.Ed.2d 43.

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55. U.S.—Simler v. Conner, Okl., 83 S.Ct. 609, 372 U.S. 221, 9 L.Ed.2d 691.

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56. U.S.—Cord v. Smith, C.A.Cal., 338 F.2d 516, mand. clarified 370 F.2d 418.

57. U.S.—Carter v. Lynch, C.A.S.C., 429 F.2d 154.

58. U.S.—Iroquois Industries, Inc. v. Syracuse China Corp., C.A.N.Y., 417 F.2d 963, cert. den. 90 S.Ct. 2199, 399 U.S. 909, 26 L.Ed.2d 561.

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59. U.S.—American Indian Nat. Bank v. Red Owl, D.C.S.D., 478 F.Supp. 302.

60. Litigant's position same as in state court

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61. U.S.—Meisner v. Reliance Steel & Aluminum Co., C.A.Cal., 273 F.2d 49—Berger v. State Farm Mut. Auto Ins. Co., C.A.Kan., 291 F.2d 666—Anderson v. Moorer, C.A.Ala., 372 F.2d 747.

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62. U.S.—Rios v. Drennan, D.C.N.C., 209 F.Supp. 927—Citizens Tel. Co. v. Tel. Service Co., D.C. N.C., 214 F.Supp. 627—S. J. Groves & Sons Co. v. New Jersey Turnpike Authority, D.C.N.J., 268 F.Supp. 568.

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63. U.S.—Melton v. Greyhound Corp., C.A.Tex., 354 F.2d 970—Leckbee v. Continental Airlines, Inc., C.A.Tex., 410 F.2d 1191.

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69. U.S.—Hanna v. Plumer, Mass., 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8.

70. U.S.—Van Dusen v. Barrack, Pa., 84 S.Ct. 805, 376 U.S. 612, 11 L.Ed.2d 945, on remand, D.C., 236 F.Supp. 645—Hanna v. Plumer, Mass., 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8.

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79. U.S.—Moody v. Kirkpatrick, D.C.Tenn., 234 F.Supp. 537.

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80. U.S.—Louisiana News Co. v. Dayries, D.C.La., 187 F.Supp. 241.

84. U.S.—Forest Laboratories, Inc. v. Formulations, Inc., D.C.Wis., 320 F.Supp. 211.

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94. Whether equitable remedy is to be given

(3) U.S.—Martin v. Reynolds Metals Co., D.C.Or., 224 F.Supp., 978, app. dism., C.A., 336 F.2d 876, affd. 337 F.2d 780.

(4) Other statements.

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6. U.S.—Susquehanna Corp. v. General Refractories Co., 250 F.Supp. 797, affd. in part and reserved in part, C.A., 356 F.2d 985.

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10. U.S.—Palomar Holding Co. v. San Mateo County, C.A.Cal., 283 F.2d 390.

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12. Remedy at law held adequate

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13. Federal court held without jurisdiction

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17. U.S.—Bramlett v. Peterson, D.C.Fla., 307 F.Supp. 1311.

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33. U.S.—Kenney v. Trinidad Corp., C.A.La., 349 F.2d 832, cert. den. 86 S.Ct. 652, 282 U.S. 1030, 15 L.Ed.2d 542.

34. U.S.—Union Carbide Corp. v. Goett, C.A.W.Va., 256 F.2d 449, vac. 80 S.Ct. 357, 361 U.S. 340, 4 L.Ed.2d 341, on remand, C.A., 278 F.2d 319, cert. den. 81 S.Ct. 64, 364 U.S. 826, 5 L.Ed.2d 55.

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34.10. U.S.—Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 90 S.Ct. 1739, 398 U.S. 281, 26 L.Ed.2d 234.

36. U.S.—Kenney v. Trinidad Corp., C.A.La., 349 F.2d 832, cert. den. 86 S.Ct. 652, 382 U.S. 1030, 15 L.Ed.2d 542.

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38. U.S.—Kenney v. Trinidad Corp., C.A.La., 349 F.2d 832, cert. den. 86 S.Ct. 652, 382 U.S. 1030, 15 L.Ed.2d 542.

§ 167. In Criminal Cases

39. U.S.—U.S. v. Gaines, C.A.Cal., 563 F.2d 1352.

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43. U.S.—U.S. v. Callahan, D.C.Minn., 256 F.Supp. 739—Gandy v. Watkins, D.C.Ala., 237 F.Supp. 266, cert. den. 85 S.Ct. 1032, 380 U.S. 946, 13 L.Ed.2d 965—U.S. ex rel. Pendergrass v. Anderson, D.C.Del., 304 F.Supp. 577.

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U.S.—U.S. v. Seaboard Coast Line R. Co., D.C.Fla., 326 F.Supp. 897.

§ 168. What Law Governs

46. U.S.—Van Dusen v. Barrack, Pa., 84 S.Ct. 805, 376 U.S. 612, 11 L.Ed.2d 945, on remand, D.C., 236 F.Supp. 645—Wallis v. Pan Am. Petroleum Corp., La., 86 S.Ct. 1301, 384 U.S. 63, 16 L.Ed.2d 369, on remand, C.A., 366 F.2d 210—Aerojet-General Corp. v. Askew, C.A.Fla., 453 F.2d 819—Piper Aircraft Co. v. Reyno, Pa., 102 S.Ct. 252, 454 U.S. 235, 70 L.Ed.2d 419, reh. den. 102 S.Ct. 1296, two cases, 455 U.S. 928, 71 L.Ed.2d 474—Mills v. Rogers, Mass., 102 S.Ct. 2442, 457 U.S. 291, 73 L.Ed.2d 16, on remand C.A., 738 F.2d 1.

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Principle not extended to enable federal court to act with same power as highest state court

U.S.—City of Albertville, Ala. v. U.S. Fidelity & Guaranty Co., C.A.Ala., 272 F.2d 594.

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U.S.—Blisscraft of Hollywood v. United Plastics Co., C.A.N.Y., 294 F.2d 694, 84 A.L.R.2d 1.

On change of venue, district court must apply state law that would have been applied if there had been no change of venue.

U.S.—Van Dusen v. Barrack, Pa., 84 S.Ct. 805, 376 U.S. 612, 11 L.Ed.2d 945, on remand, D.C., 236 F.Supp. 645.

(2) Transferee court must apply state law of transfer forum.

U.S.—In re Air Crash Disaster Near Hanover, N.H., Jud.Pan.Mult.Lit., 314 F.Supp. 62.

Federal Rules of Criminal Procedure held not applicable

U.S.—Cameron v. Hauck, C.A.Tex., 383 F.2d 966, cert. den. 88 S.Ct. 777, 389 U.S. 1039, 19 L.Ed.2d 828.

The federal court should not apply the "center of gravity" or "substantial contacts" choice of law rule where it has not been adopted by the forum state.[46.5]

46.5. U.S.—Pound v. Insurance Co. of North America, C.A.N.M., 439 F.2d 1059.

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A federal court may apply conflict of laws rules generally applied by the courts in the country, in the absence of an applicable decision in the forum state.[47.5]

47.5. U.S.—Gates v. P. F. Collier, Inc., C.A.Hawaii, 378 F.2d 888, cert. den. 88 S.Ct. 774, 389 U.S. 1038, 19 L.Ed.2d 827, reh. den. 88 S.Ct. 1024, 390 U.S. 975, 19 L.Ed.2d 1193.

48. U.S.—Cayce v. Carter Oil Co., C.A.N.M., 618 F.2d 669.

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49. U.S.—Geehan v. Monahan, D.C.Wis., 257 F.Supp. 278, affd, C.A., 382 F.2d 111—Rusch Factors, Inc. v. Levin, D.C.R.I., 284 F.Supp. 85—Angel v. Ray, D.C.Wis., 285 F.Supp. 64.

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(2) Other matters.

U.S.—Maryland Cas. Co. v. Williams, C.A.Miss., 377 F.2d 389, 35 A.L.R.3d 375.

50. U.S.—Long Island Trust Co. v. Dicker, C.A.Tex., 659 F.2d 641, reh. den. 664 F.2d 289.

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51. U.S.—Textile Banking Co. v. Colonial Chemical Corp., D.C.Ga., 285 F.Supp. 824.

52. U.S.—Piper Aircraft Co. v. Reyno, Pa., 102 S.Ct. 252, 454 U.S. 235, 70 L.Ed.2d 419, reh. den. 102 S.Ct. 1296, two cases, 455 U.S. 928, 71 L.Ed.2d 474.

53. U.S.—Cornellier v. American Cas. Co., C.A.Vt., 389 F.2d 641.

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58. U.S.—Fullington v. Iowa Sheet Metal Contractors, Inc., D.C.Neb., 319 F.Supp. 243.

61. U.S.—Smith v Greyhound Lines, Inc., C.A.N.M., 382 F.2d 190.

63. U.S.—Lewis v. Food Machinery & Chemical Corp., John Bean Division, D.C.Mich., 245 F.Supp. 195.

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64. U.S.—Kelly v. Kosuga, Ill., 79 S.Ct. 429, 358 U.S. 516, 3 L.Ed.2d 475, reh. den. 79 S.Ct. 796, 359 U.S. 962, 3 L.Ed.2d 769—International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), AFL–CIO v. Hoosier Cardinal Corp., Ind., 86 S.Ct. 1107, 383 U.S. 696, 16 L.Ed.2d 192—Kramer v. Caribbean Mills, Inc., Tex., 89 S.Ct. 1487, 394 U.S. 823, 23 L.Ed.2d 9—Evans v. Abney, Ga., 90 S.Ct. 628, 396 U.S. 435, 24 L.Ed.2d 634—Espinoza v. Farah Mfg. Co., Inc., Tex., 94 S.Ct. 334, 414 U.S. 86, 38 L.Ed.2d 287—Memphis Light, Gas and Water Division v. Craft, Tenn., 98 S.Ct. 1554, 436 U.S. 1, 56 L.Ed.2d 30—U.S. v. Kimbell Foods, Inc., Ga., 99 S.Ct. 1448, 440 U.S. 715, 59 L.Ed.2d 711, on remand C.A., 600 F.2d 478—Carlson v. Green, Ind., 100 S.Ct. 1468, 446 U.S. 14, 64 L.Ed.2d 15—Princeton University v. Schmid, N.J., 102 S.Ct. 867, 455 U.S. 100, 70 L.Ed.2d 855.

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65. U.S.—Kelly v. Kosuga, Ill., 79 S.Ct. 429, 358 U.S. 516, 3 L.Ed.2d 475, reh. den. 79 S.Ct. 796, 359 U.S. 962, 3 L.Ed.2d 769.

66. U.S.—Metcalf v. National Airlines, Inc., C.A.Fla., 271 F.2d 817—Baird v. Koerner, C.A.Cal., 279 F.2d 623, 95 A.L.R.2d 303.

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(2) Other matters.

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67. U.S.—Segovia Development Corp. v. Constructora Maza, Inc., C.A.Puerto Rico, 628 F.2d 724
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N.J.—Constant v. Pacific Nat Ins. Co., 201 A.2d 405, 84 N.J.Super. 211.

68. U.S.—Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., Fla., 89 S.Ct. 1109, 394 U.S. 369, 22 L.Ed.2d 344, reh. den. 89 S.Ct. 1622, 394 U.S. 1024, 23 L.Ed.2d 51.

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(3) State law determines validity of arrest.

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55. U.S.—In re Schindler, D.C.Mo., 223 F.Supp. 512 —In re Samuel August & Co., D.C.N.J., 228 F.Supp. 443—U.S. v. Haddix & Sons, Inc., D.C. Mich., 252 F.Supp. 634.

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47. U.S.—Kemart Corp. v. Printing Arts Research Laboratories, Inc., C.A.Cal., 269 F.2d 375, cert. den. 80 S.Ct. 197, 361 U.S. 893, 4 L.Ed.2d 151.

State law followed without discussion of point
U.S.—Unistrut Corp. v. Power, D.C.Mass., 175 F.Supp. 294, vac. C.A., 280 F.2d 18.

The Supreme Court has announced a general rule for pendent claims irrespective of diversity, stating that if, considered without regard to federal or state character, plaintiff's claims are such that he would ordinarily be expected to try all in one judicial proceeding, then, assuming the substantiality of the federal issues, there is power in the federal courts to hear the whole.[47.5]

47.5. U.S.—United Mine Workers of America v. Gibbs, 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed.2d 218.

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72. U.S.—Artvale, Inc. v. Rugby Fabrics Corp., C.A. N.Y., 363 F.2d 1002, 30 A.L.R.3d 1421.

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90. Erie doctrine is not applicable, etc.

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93. U.S.—T. H. Rogers, Lumber Co. v. Apel, C.A. Okl., 468 F.2d 14.

94. D.C.—Stevan v. Union Trust Co. of District of Columbia, C.A., 316 F.2d 687, 115 U.S.App.D.C. 36.

96. U.S.—U.S. v. Supermarine, Inc., D.C.N.J., 345 F.Supp. 1305.

N.Y.—First Federal Sav. and Loan Ass'n of N.Y. v. Lewis, 218 N.Y.S.2d 857, 14 A.D.2d 150.

Tax lien

(1) U.S.—U.S. v. First Nat. Bank & Trust Co. of Fargo, N.D., C.A.N.D., 386 F.2d 646.

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Mortgage

(2) Other matters.

U.S.—U.S. v. Hauff, D.C.Neb., 267 F.Supp. 390.

However state law may determine relative priority where Congress has so provided.[96.5]

96.5. U.S.—U.S. v. Clover Spinning Mills Co., D.C. S.C., 244 F.Supp. 796, remd in part and revd. in part, on oth. grds., C.A., 373 F.2d 274, affd. 221 N.E.2d 561, 18 N.Y.2d 763, 274 N.Y.S.2d 901.

1. U.S.—Marquardt Corp. v. Weber County, Utah, C.A.Utah, 360 F.2d 168—City of New Orleans v. U.S., C.A.La., 371 F.2d 21, cert. den. 87 S.Ct. 2076, 387 U.S. 944, 18 L.Ed.2d 1330, reh. den. 88 S.Ct. 19.

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3. U.S.—Boccardo v. U.S., D.C.Cal., 341 F.Supp. 858.

5. U.S.—U.S. v. 124.21 Acres of Land, More of Less, in Jackson County, State of Minn., C.A.Minn., 458 F.2d 568.

U.S. v. Certain Parcels of Land in City of San Diego, San Diego County, Cal., D.C.Cal., 54 F.Supp. 561.

Nature of mortgagee's interest, etc.

U.S.—U.S. v. Certain Interests in Property in Champaign County, State of Illinois, D.C.Ill., 165 F.Supp. 474, revd. in part on oth. grds., C.A., 271 F.2d 379, cert. den. 80 S.Ct. 1058, 362 U.S. 974, 4 L.Ed.2d 1010.

In absence of federal statute defining real property more narrowly than law of situs state, the state law determines what constitutes realty for federal condemnation purposes.

U.S.—U.S. v. Certain Property Located in Borough of Manhattan City, County and State of New York, C.A.N.Y., 306 F.2d 439—U.S. v. Certain Property Located in Borough of Manhattan, City, County and State of N.Y., C.A.N.Y., 344 F.2d 142.

State law on questions of substantive rights held not binding

U.S.—U.S. v. Chatham, D.C.N.C., 208 F.Supp. 220, affd. in part C.A., 323 F.2d 95.

6. U.S.—U.S. v. 376.21 Acres of Land More or Less, Situate in Warren County, Tome Tract, D.C.Pa., 240 F.Supp. 163.

Just compensation

U.S.—Kimball Laundry Co. v. U.S., C.C.A.Neb., 166 F.2d 856, revd. on oth. grds. 69 S.Ct. 1434, 338 U.S. 1, 93 L.Ed. 1765, 7 A.L.R.2d 1280.

What is "property," etc.

U.S.—U.S. v. 967,905 Acres of Land, More or Less, in Cook, et al., Counties, State of Minn., C.A.Minn., 447 F.2d 764, cert. den. 92 S.Ct. 1193, 405 U.S. 974, 31 L.Ed.2d 248.

U.S. v. Certain Land in City of Newark, Essex County, State of N.J., D.C.N.J., 314 F.Supp. 836, affd., C.A., 439 F.2d 670—U.S. v. 252.36 Acres of Land, D.C.Pa., 336 F.Supp. 667.

(2) Other decisions applying state law of location as to nature of property interest condemned.

U.S.—U.S. v. Certain Property Located in Borough of Manhattan City, County and State of New York, C.A.N.Y., 306 F.2d 439.

U.S. v. 4.553 Acres of Land, More or Less, in Monterey County, State of Cal., D.C.Cal., 208 F.Supp. 127.

(3) Meaning of word "property" as federal question normally obtains its content by reference to local law.

U.S.—U.S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, N.C., 63 S.Ct. 1047, 319 U.S. 266, 87 L.Ed. 1390, mand. conf. to, C.C.A., 138 F.2d 343, cert. den. 64 S.Ct. 612, 321 U.S. 773, 88 L.Ed. 1067—U.S. v. Causby, 66 S.Ct. 1062, 328 U.S. 256, 106 Ct.Cl. 854, 90 L.Ed. 1206.

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8. U.S.—U.S. v. Certain Property Located in Borough of Manhattan, City, County and State of N.Y., C.A.N.Y., 344 F.2d 142.

U.S. v. Improved Premises Known as Cadillac Bldg., Located at No. 67–74 Columbus Ave., Borough of Manhattan, City and State of New York, D.C.N.Y., 80 F.Supp. 55.

11. U.S.—Howard v. Lyons, Mass., 79 S.Ct. 1331, 360 U.S. 593, 3 L.Ed.2d 1454, reh. den. 80 S.Ct. 40, 361 U.S. 854, 4 L.Ed.2d 93.

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14. U.S.—Pagano v. Martin, D.C.Va., 275 F.Supp. 498, affd., C.A., 397 F.2d 620, cert. den. 89 S.Ct. 628, 393 U.S. 1022, 21 L.Ed.2d 565—Colden v. Asmus, D.C.Cal., 322 F.Supp. 1163.

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D.C.—Waters v. American Auto. Ins. Co., C.A., 363 F.2d 684, 124 U.S.App.D.C. 197.

Mont.—State ex rel. Dawson v. City Council of City of Butte, 400 P.2d 629, 145 Mont. 316—State ex rel. McDonald v. District Court of Fourth Judicial Dist. In and For Missoula County, 496 P.2d 78, 159 Mont. 156.

Not followed where no written opinion rendered

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19. U.S.—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866—Delta Air Lines, Inc. v. McDonnell Douglas Corp., C.A.Ga., 503 F.2d 239, cert. den. 95 S.Ct. 1953, 421 U.S. 965, 44 L.Ed.2d 451.

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Harsh results immaterial

U.S.—Parson v. U.S., C.A.Tex., 460 F.2d 228.

19.5. Correctness of decision

U.S.—In re Hoover, C.A.La., 447 F.2d 195.

19.10. U.S.—Prudential Oil & Minerals Co. v. Hamlin, C.A.Utah, 277 F.2d 384.

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19.45. U.S.—Zeldman v. Celebrezze, D.C.N.Y., 252 F.Supp. 167.

§ 171. Validity and Construction of State Constitution and Statutes

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20. U.S.—U.S. v. Tacoma Gravel & Supply Co., C.A. Wash., 376 F.2d 343.

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Colo.—**C.J.S. cited in** White v. Anderson, 394 P.2d 333, 335, 155 Colo. 291.

21. U.S.—Cramp v. Board of Public Instruction of Orange County, Fla., Fla., 82 S.Ct. 275, 368 U.S. 278, 7 L.Ed.2d 285, on remand, 137 So.2d 828—Baggett v. Bullitt, Wash., 84 S.Ct. 1316, 377 U.S. 360, 12 L.Ed.2d 377—Reitman v. Mulkey, Cal., 87 S.Ct. 1627, 387 U.S. 369, 18 L.Ed.2d 830—Brown v. Ohio, Ohio, 97 S.Ct. 2221, 432 U.S. 161, 53 L.Ed.2d 187—Bellotti v. Baird, Mass., 99 S.Ct. 3035, 443 U.S. 622, 61 L.Ed.2d 797, reh. den. 100 S.Ct. 185, 444 U.S. 887, 62 L.Ed.2d 121.

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22. U.S.—Garner v. State of La., La., 82 S.Ct. 248, 368 U.S. 157, 7 L.Ed.2d 207—National Ass'n for Advancement of Colored People v. Button, Va., 83 S.Ct. 328, 371 U.S. 415, 9 L.Ed.2d 405—Perez v. Campbell, Ariz., 91 S.Ct. 1704, 402 U.S. 637, 29 L.Ed.2d 233—Rodriguez v. Popular Democratic Party, Puerto Rico, 102 S.Ct. 2194, 457 U.S. 1, 72 L.Ed.2d 628—New York v. Ferber, N.Y., 102 S.Ct. 3348, 458 U.S. 747, 73 L.Ed.2d 1113, on remand 441 N.E.2d 1100, 57 N.Y.2d 256, 455 N.Y.S.2d 582.

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(3) U.S.—Dickie v. Sewer Imp. Dist. No. 1 of Dardanelle, Ark., C.A.Ark., 328 F.2d 296, cert. den. 85 S.Ct. 42, 379 U.S. 821, 13 L.Ed.2d 32.

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(6) Other statements.

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(1) U.S.—Moss v. Hornig, D.C.Conn., 214 F.Supp. 324, affirmed 314 F.2d 89.

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23. U.S.—Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern Cal., Inc., C.A.Cal., 342 F.2d 393.

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30. U.S.—Kremer v. Chemical Const. Corp., N.Y., 102 S.Ct. 1883, 456 U.S. 461, 72 L.Ed.2d 262, reh. den. 103 S.Ct. 20, 458 U.S. 1133, 73 L.Ed.2d 1405.

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30.5. U.S.—Duncan v. Ward, D.C.Ill., 225 F.Supp. 195.

31. U.S.—Goldsmith v. Cheney, C.A.Wyo., 447 F.2d 624—Collins v. Swenson, D.C.Mo., 331 F.Supp. 1109—Johnston v. Luna, D.C.Tex., 338 F.Supp. 355.

32. U.S.—Fisons Limited v. U.S., C.A.Ill., 458 F.2d 1241, cert. den. 92 S.Ct. 1312, 405 U.S. 1041, 31 L.Ed.2d 581.

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42. U.S.—Ramos v. U.S. Fidelity & Guaranty Co., D.C.Puerto Rico, 55 F.R.D 175.

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52. U.S.—Griffin v. County School Bd. of Prince Edward County, Va., 84 S.Ct. 1226, 377 U.S. 218, 12 L.Ed.2d 256, motion gr. 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d 496—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295—Eisenstadt v. Baird, Mass., 92 S.Ct. 1029, 405 U.S. 438, 31 L.Ed.2d 349—California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., Cal., 100 S.Ct. 937, 445 U.S. 97, 63 L.Ed.2d 233.

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52.5. U.S.—Hawkeye-Security Ins. Co v. Davis, C.A. Mo., 227 F.2d 765.

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56. U.S.—American Fidelity & Gas. Co. v. Indemnity Ins. Co. of North America, C.A.Ohio, 308 F.2d 697, cert. den. 83 S.Ct. 935, 372 U.S. 942, 9 L.Ed.2d 968.

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63. U.S.—Georgia Pac. Corp. v. Mendocino County, D.C.Cal., 340 F.Supp. 1061, op. supp. 357 F.Supp. 380, affd., C.A., 515 F.2d 285.

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66. U.S.—Breier v. Gladden, D.C.Or., 229 F.Supp. 823.

66.15. U.S.—American Sheet Metal, Inc. v. Em-Kay Engineering Co., Inc., D.C.Cal., 478 F.Supp. 809.

66.20. U.S.—Blake v. Kline, C.A.Pa., 612 F.2d 718, cert. den. 100 S.Ct. 3011, 447 U.S. 921, 65 L.Ed.2d 1112.

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67. U.S.—Fred Meyer, Inc v. Central Mut. Ins. Co., D.C.Or., 235 F.Supp. 540—Melvin v. Rembert, D.C.Md., 259 F.Supp. 33—Risher v. U.S., D.C. Ala., 339 F.Supp. 484, C A, affd. 465 F.2d 1.

67.5. U.S.—Fred Meyer, Inc. v. Central Mut. Ins. Co., D.C.Or., 235 F.Supp. 540—Eubanks v Gladden, D.C.Or., 236 F.Supp. 129—Perschka v. Brierley, D.C.Pa., 322 F.Supp. 411—Greene v. U.S., D.C.Wis., 336 F Supp. 464. Affd., C.A., 476 F.2d 116.

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67.10. U.S.—American Fidelity & Cas. Co. v. Indemnity Ins. Co. of North America, C.A.Ohio, 308 F.2d 697, cert. den. 83 S.Ct. 935, 372 U.S. 942, 9 L.Ed.2d 968—Old Kent Bank & Trust Co. v. U.S., C.A.Mich., 362 F.2d 444.

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(4) Under Illinois law, a trial court is bound by Appellate Court in its own district when Appellate Courts differ, and such principle applies to federal courts sitting in diversity cases.

U.S.—Commercial Discount Corp. v. King, D.C.Ill., 515 F.Supp. 988.

67.15. U.S.—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295.

Sherman v. St. Barnabas Hospital, D.C.N.Y., 535 F.Supp. 564.

67.20. U.S.—American Fidelity & Cas. Co. v. Indemnity Ins. Co. of North America, C.A.Ohio, 308 F.2d 697, cert. den. 83 S.Ct. 935, 372 U.S. 942, 9 L.Ed.2d 968.

Unpublished opinion

U.S.—Southern Ry. Co. v. Foote Mineral Co., C.A. Tenn., 384 F.2d 224.

67.25. U.S.—National Farmers Union Property & Cas. Co. v. Gibbons, 338 F.Supp. 430.

67.30. U.S.—Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., C.A.Pa., 652 F.2d 1165.

In re Lightner, D.C.Cal., 184 F.Supp. 825.

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(3) Other matters.

U.S.—Gerr v. Emrick, C.A.Pa., 283 F.2d 293, cert. den. 81 S.Ct. 698, 365 U.S. 817, 5 L.Ed.2d 695.

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67.60. U.S.—Southern Bell Tel. & Tel. Co. v. City of Meridian, D.C.Miss., 154 F.Supp. 736, affd., C.A., 256 F.2d 83, vac. 79 S.Ct. 455, 358 U.S. 639, 3 L.Ed.2d 562—**C.J.S. quoted at length in** In re Jackson, D.C.Mo., 268 F.Supp. 434, 443, affd., C.A., 385 F.2d 775.

68. U.S.—Southern Bell Tel. & Tel. Co. v. City of Meridian, 154 F.Supp. 736, affd., C.A., 256 F.2d 83, vac. 79 S.Ct. 455, 358 U.S. 639, 3 L.Ed.2d 562.

69. U.S.—Dickinson v. First Nat. Bank in Plant City, Plant City, Fla., C.A.Fla., 400 F.2d 548, affd. 90 S.Ct. 337, 396 U.S. 122, 24 L.Ed.2d 312, reh. den. 90 S.Ct. 677, 396 U.S. 1047, 24 L.Ed.2d 693.

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73. U.S.—Adams Dairy Co. v. National Dairy Products Corp., D.C.Mo., 293 F.Supp. 1135.

Citation of instruction not binding

U.S.—Pre-Cast Concrete Products, Inc. v. Home Ins. Co., C.A.Ill., 417 F.2d 1323.

74. U.S.—Manalis Finance Co. v. U.S., C.A.Cal., 611 F.2d 1270.

Harrison v. McDonough Power Equipment, Inc., D.C.Fla., 381 F.Supp. 926.

75. U.S.—Priest v. American Smelting & Refining Co., C.A.Wash., 409 F.2d 1229.

75.5. U.S.—Hardy Salt Co. v. Southern Pac. Transp. Co., C.A.Utah, 501 F.2d 1156.

76. U.S.—In re Roger Craig, Inc., D.C.Md., 199 F.Supp. 502, remd., C.A., 304 F.2d 501—Rodeheaver v. Sears, Roebuck & Co., D.C.Ohio, 220 F.Supp. 120—Lange v. Farmers Federation Co-op., Inc., D.C.N.C., 249 F.Supp. 544—U.S. v. Loken, D.C.S.D., 291 F.Supp. 432—Burnett v. U.S., D.C.S.C., 314 F.Supp. 492, affd., C.A., 436 F.2d 975.

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77. U.S.—Doucet v. Middleton, C.A.Ala., 328 F.2d 97—Sherby v. Weather Bros. Transfer Co., C.A. Md., 421 F.2d 1243—Rocky Mountain Fire & Cas. Co. v. Dairyland Ins. Co., C.A.Ariz., 452 F.2d 603.

81. U.S.—Brinton v. Local Bd. No. 5 for State of Del., D.C.Del., 322 F.Supp. 972.

§ 176. Scope and Nature of Decisions

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82. U.S.—Gila River Ranch, Inc. v. U.S., C.A.Ariz., 368 F.2d 354.

Vera Cruz v. Chesapeake & O. Ry. Co., D.C. Ind., 192 F.Supp. 958—Ogden v. U.S., D.C.Tex., 217 F.Supp. 94.

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83. U.S.—Mazzi v. Greenlee Tool Co., C.A.N.Y., 320 F.2d 821.

Bittner v. Little, D.C.Pa., 168 F.Supp. 30, affd., C.A., 270 F.2d 286.

84. U.S.—Lee v. Sears Roebuck & Co., D.C.Tenn., 262 F.Supp. 232.

84.5. U.S.—Jackson v. Sam Finley, Inc., C.A.Miss., 366 F.2d 148.

85. U.S.—Peacock v. Retail Credit Co., C.A.Ga., 429 F.2d 31, cert. den. 91 S.Ct. 927, 401 U.S. 938, 28 L.Ed.2d 217, reh. den. 91 S.Ct. 1366, 402 U.S. 925, 28 L.Ed.2d 664.

87. U.S.—Hacker v. Rector, D.C.Mo., 250 F.Supp. 300—Tabben v. Ohio Cas. Ins. Co., D.C.Ky., 250 F.Supp. 853.

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88. **Characterizations by judge not binding**
U.S.—U.S. v. Certain Land in City of Augusta, Kennebec County, State of Me., D.C.Me., 220 F.Supp. 696.

96. U.S.—Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., C.A.N.Y., 341 F.2d 50, 12 A.L.R.3d 1081.

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However, a federal court must not conceive its role as applying state decisional law to the case at hand in narrow and mechanical fashion, but rather federal court must scrutinize relevant state precedents with eye toward broad policies and principles that underlie and are given concrete embodiment in the cases.[97.6]

97.6. U.S.—Medvecz v. Choi, C.A.Pa., 569 F.2d 1221.

97.10. U.S.—Ohio Cas. Ins. Co. v. Smith, C.A.Ind., 297 F.2d 265—Summers v. Watkins Motor Lines, C.A.S.C., 323 F.2d 120.
Elk Horn Coal Corp. v. Anderson Coal Co., D.C.Ky., 223 F.Supp. 746.

97.15. D.C.—Wynn v. Kelley, D.C., 223 F.Supp. 875, affd., C.A., 343 F.2d 295, 120 U.S.App.D.C. 13.

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98. U.S.—Hertz v. Graham, C.A.N.Y., 292 F.2d 443, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192—Schultz v. Tecumseh Products, C.A.Mich., 310 F.2d 426—Robak v. U.S., C.A.Ill., 658 F.2d 471.
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99. U.S.—Texas & N.O.R. Co. v. Cadoree, C.A.Tex., 333 F.2d 682.
Dupont Galleries, Inc. v. International Magne-Tape, Limited, D.C.N.Y., 300 F.Supp. 1179.

1. U.S.—In re Schmelzer, D.C.Ohio, 350 F.Supp. 429, affd., C.A., 480 F.2d 1074.

2. U.S.—Birnbaum v. U.S., D.C.N.Y., 436 F.Supp. 967, affd. in part, revd. in part on oth. grds., C.A., 588 F.2d 319.

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7. **Decision made as territorial court entitled to respect**
U.S.—Turnbull v. Bonkowski, C.A.Alaska, 419 F.2d 104.

§ 179. Rights Accrued Prior to State Decisions

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15. U.S.—Hurley v. Hinckley, D.C.Mass., 304 F.Supp. 704, affd. 90 S.Ct. 603, 396 U.S. 277, 24 L.Ed.2d 469.

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23. U.S.—Middle Atlantic Utilities Co. v. S.M.W. Development Corp., C.A.N.Y., 392 F.2d 380.

29. U.S.—Tiernan v. Westext Transport, Inc., D.C.R.I., 295 F.Supp. 1256.

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33. U.S.—Samuelson v. Susen, C.A.Pa., 576 F.2d 546.
La Place v. Sun Ins Office, Limited, D.C.Virgin Islands, 298 F.Supp. 764—U.S. v. Deardorff, D.C.N.Y., 343 F.Supp 1047—In re Kanter, D.C.Cal., 345 F.Supp. 1151, affd., C.A., 505 F.2d 228—Wall v. American Optometric Ass'n, Inc., D.C.Ga., 379 F.Supp. 175, affd. 95 S.Ct. 166, two cases 419 U.S. 888, 42 L.Ed.2d 134, reh. den. 95 S.Ct. 648, 419 U.S. 1061, 42 L.Ed.2d 659.

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U.S.—TBK Partners, Ltd. v. Western Union Corp., D.C.N.Y., 517 F.Supp. 380, affd., C.A., 675 F.2d 456.

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U.S.—Guillard v. Niagara Machine and Tool Works, C.A.Minn., 488 F.2d 20.

Necessity in interpleader
U.S.—Howell v. Union Producing Co., C.A.Tex., 392 F.2d 95

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34. U.S.—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295.
Commercial Union Ins. Co. v. Ford Motor Co., C.A.Cal., 640 F.2d 210, cert. den. 102 S.Ct. 310, 454 U.S. 858, 70 L.Ed.2d 154, on remand 599 F.Supp. 1271.
Morton v. Abbott Laboratories, D.C.Fla., 538 F.Supp. 593.
In re Sexton, Bkrtcy.Tenn., 16 B.R. 240.

35. U.S.—Deveny v. Rheem Mfg. Co., C.A.Vt., 319 F.2d 124.

35.5. U.S.—Rhynes v. Branick Mfg. Corp., C.A.Tex., 629 F.2d 409.
Cordell v. Detective Publications, Inc., D.C.Tenn., 307 F.Supp. 1212, affd. 419 F.2d 989—Cudahy Co. v. American Laboratories, Inc., D.C.Neb., 313 F.Supp. 1339—Handy v. Uniroyal, Inc., D.C.Del., 327 F.Supp. 596.
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U.S.—Criqui v. Blaw-Knox Corp., C.A.Kan., 318 F.2d 811—Nello L. Teel Co. v. Hollywood Golf Estates, Inc., C.A.Fla., 324 F.2d 669, cert. den. 84 S.Ct. 1169, 377 U.S. 909, 12 L.Ed.2d 178.

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D.C.—Glassman Const. Co. v. Fidelity & Cas. Co. of New York, C.A., 356 F.2d 340, 123 U.S.App.D.C. 1, cert. den. 86 S.Ct. 1890, 384 U.S. 987, 16 L.Ed.2d 1005.

35.10. U.S.—Oresman v. G. D. Searle & Co., D.C.R.I., 321 F.Supp. 449—Kaydee Metal Products Corp. v. Sintex Mach. Tool Mfg. Corp., D.C.Miss., 342 F.Supp. 902—Abraham v. Pekarski, D.C.Pa., 537 F.Supp. 858, app. dism. C.A., 728 F.2d 167, cert. den. 104 S.Ct. 3513, 82 L.Ed.2d 822.

36. U.S.—Murphy v. Erwin-Wasey, Inc., C.A.Mass., 460 F.2d 661.
Lovelace v. Astra Trading Corp., D.C.Miss., 439 F.Supp. 753.

Presumption as to law of forum
(3) Other instances.
U.S.—Fidelity & Cas. Co. of N.Y. v. J. A. Jones Const. Co., D.C.Ark., 200 F.Supp. 264, affd., C.A., 325 F.2d 605.

Form policy
U.S.—Oriole Paper Box Co. v. Reliance Ins. Co., D.C.Md., 153 F.Supp. 264, affd., C.A., 257 F.2d 707.

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37. U.S.—Weingarten v. Universal, C.I.T. Credit Corp., C.A.Conn., 302 F.2d 1—Jackson v. Sam Finley, Inc., C.A.Misc., 366 F.2d 148—Fireman's Fund Ins. Co. v. Canal Ins. Co., C.A.Fla., 411 F.2d 265.

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(3) Other instances.
U.S.—Small v. U.S., C.A.Del., 333 F.2d 702—First Nat. Bank of Fort Walton Beach v. U.S. Fidelity & Guaranty Co., C.A.Fla., 416 F.2d 52, reh. den. 417 F.2d 1339.

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(2) Other matters.
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Conflict of laws
(2) Other matters.
U.S.—Gray v. Travelers Indem. Co., C.A.Wash., 280 F.2d 549.
Allen v. Maryland Cas. Co., D.C.Va., 259 F.Supp. 505.

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U.S.—Wendt v. Lillo, D.C.Iowa, 182 F.Supp. 56.

Law review material
U.S.—Wendt v. Lillo, D.C.Iowa, 182 F.Supp. 56—Phelps v. Bookwalter, D.C.Mo., 210 F.Supp. 801, affd., C.A., 325 F.2d 186.

The trend of modern decisions in other jurisdictions respecting status of various doctrines has been given important consideration.[37.1]

37.1. **Trend discarding doctrine of charitable immunity**
U.S.—Howard v. Sisters of Charity of Leavenworth, D.C.Mont., 193 F.Supp. 191.

Trend adopting doctrine of strict liability for defective products
U.S.—Julander v. Ford Motor Co., C.A.Utah, 488 F.2d 839.

Abolishing rule of no contribution among active tortfeasors
U.S.—Tampa Elec. Co. v. Stone & Webster Engineering Corp., D.C.Fla., 367 F.Supp. 27.

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37.5. U.S.—Jimenez v. Almodovar, C.A.Puerto Rico, 650 F.2d 363.
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In re James Calvin Belk Const. Co., Bkrtcy. Miss., 4 B.R. 132.

Common law
(2) Other matters.
U.S.—Travelers Ins. Co. v. Castro, C.A.Puerto Rico, 341 F.2d 882.

37.10. U.S.—Oxley v. Ralston Purina Co., C.A.Mich., 349 F.2d 328—Stool v. J. C. Penney Co., C.A.Tex., 404 F.2d 562—Passwaters v. General Motors Corp., C.A.Iowa, 454 F.2d 1270.
Teel v. American Steel Foundries, D.C.Mo., 529 F.Supp. 337.

38. U.S.—Entron, Inc. v. General Cablevision of Palatka, C.A.Fla., 435 F.2d 995—Warren Bros. Co. v. Cardi Corp., C.A.Mass., 471 F.2d 1304.
Liberty Mut. Ins. Co. v. U.S. Fidelity & Guaranty Co., D.C.Mont., 232 F.Supp. 76—In re Rhine, D.C.Colo., 241 F.Supp. 86, reh. den. 242 F.Supp. 127—Belveal v. Bray, D.C.Colo., 253 F.Supp. 606—United Benefit Life Ins. Co. v. Cody, D.C.Wash., 286 F.Supp. 552.

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Supreme court

U.S.—Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission, C.A.Pa., 387 F.2d 768.

39. U.S.—Boston Chapter, NAACP, Inc v. Beecher, D.C.Mass., 423 F.Supp. 696.

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42. U.S.—Boehning v. Indiana State Emp Ass'n, Inc., Ind., 96 S.Ct. 168, 423 U.S. 6, 46 L.Ed.2d 148.

Tentative declaration

U.S.—Smoot v. State Farm Mut. Auto. Ins. Co., C.A. Ga., 299 F.2d 525.

Decision not persuasive

U.S.—Aceto v. Zurich Ins. Co., C.A.Pa., 440 F.2d 1320.

42.5. U.S.—American Universal Ins. Co. v. Chauvin, C.A.La., 329 F.2d 174—St. Paul Mercury Ins. Co. v. Price, C.A.Tex., 329 F.2d 687—MacLean v Parkwood, Inc., C.A.N.H., 354 F.2d 770—Black v. U.S., C.A.Utah, 421 F.2d 255, app. after remand 444 F.2d 1215—Krakoff v. U.S., C.A.Ohio, 431 F.2d 847.

Jones v. Electrodyne Co., D.C.Mo., 224 F.Supp. 599—Elek v. Boyce, D.C.S.C., 308 F.Supp. 26.

Mont.—Glens Falls Ins. Co. v. Irion, 474 P.2d 700, 156 Mont. 77.

Certification to state court. The problem of authoritatively determining unresolved state law involved in federal litigation has been solved in some jurisdictions by statutes which permit a federal court to certify such doubtful questions of state law to the supreme court of the state for its decision.[42.15]

42.15. U.S.—Clay v. Sun Insurance Office Limited, 80 S.Ct. 1222, 363 U.S. 207, 4 L.Ed.2d 1170.

Barry v. St. Paul Fire & Marine Ins. Co., C.A. R.I., 555 F.2d 3, affd. 98 S.Ct. 2923, 438 U.S. 531, 57 L.Ed.2d 932—Hatfield v. Bishop Clarkson Memorial Hosp., C.A.Neb., 679 F.2d 1258, on reh. 701 F.2d 1266—Fernandez v. Chardon, C.A.Puerto Rico, 681 F.2d 42, cert. den. 103 S.Ct. 343, 459 U.S. 989, 74 L.Ed.2d 384, affd. 103 S.Ct. 2611, 462 U.S. 650, 77 L.Ed.2d 74.

Minnesota Recipients Alliance v. Noot, D.C. Minn., 527 F.Supp. 140.

Fla.—Mobil Oil Corp. v. Shevin, 354 So.2d 372.

Ga.—Miree v. U.S., 249 S.E.2d 573, 242 Ga. 126, app. decided after ans. to certified ques. C.A., 588 F.2d 453.

Me.—Hiram Ricker and Sons v. Student Intern. Meditation Soc., 342 A.2d 262, app. dism. 96 S.Ct. 764, 423 U.S. 1042, 46 L.Ed.2d 631.

Md.—Smith v. Gray Concrete Pipe Co., Inc., 297 A.2d 721, 267 Md. 149—Public Service Commission v. Highfield Water Co., 441 A.2d 1031, 293 Md. 1.

Mass.—Kartell v. Blue Shield of Massachusetts, Inc., 425 N.E.2d 313, 384 Mass. 409.

R.I.—In re Shepard Co., 342 A.2d 918, 115 R.I. 290.

Wash.—In re Elliott, 446 P.2d 347, 74 Wash.2d 600.

Grant of petition for rehearing to permit certification

U.S.—Green v. American Tobacco Co., 304 F.2d 70, cert. ques. ans., Sup., 154 So.2d 169, conf. to 325 F.2d 673, cert. den. 84 S.Ct. 1349, 1351, 377 U.S. 943, 12 L.Ed.2d 306.

Particular questions certified

U.S.—Imel v. U.S., C.A.Colo., 523 F.2d 853.

Lewis v. Mid-Century Ins. Co., D.C.Mont., 278 F.Supp. 238—Pierce v. Secretary of U.S. Dept. of Health, Ed. and Welfare, D.C.Me., 302 F.Supp. 508.

Certification not warranted where state law not doubtful

U.S.—Greer v. Associated Indem. Corp., C.A.Fla., 371 F.2d 29—Motor Vehicle Cas. Co. v. Atlantic Nat. Ins. Co., C.A.Fla., 374 F.2d 601.

Superior Oil Co. v. Vanderhoof, D.C.Mont., 307 F.Supp. 84.

Decision on certification held binding

U.S.—Boyd v Bowman, C.A.Fla., 455 F.2d 927—National Ed. Ass'n, Inc. v. Lee County Bd. of Public Instruction, C.A.Fla., 467 F.2d 447.

Insufficiency of facts in record as not precluding certification

U.S.—Coastal Petroleum Co. v. Secretary of Army of U.S., C.A.Fla., 489 F.2d 777, reh. den. 491 F.2d 973, cert. den. 95 S.Ct. 73, 419 U.S. 842, 42 L.Ed.2d 70, certified question withdrawn 536 F.2d 1030, app. after remand, 547 F.2d 288.

Supreme court and federal appellate courts may certify

U.S.—Lehmen Bros. v. Schein, N.Y., 94 S.Ct. 1741, 416 U.S. 386, 40 L.Ed.2d 215, on remand 519 F.2d 453.

Resort to certification not obligatory but discretionary

U.S.—Lehmen Bros. v. Schein, N.Y., 94 S.Ct. 1741, 416 U.S. 386, 40 L.Ed.2d 215, on remand 519 F.2d 453.

Watts v. Des Moines Register and Tribune, D.C. Iowa, 526 F.Supp. 1311.

Court has discretion whether to answer questions certified

Me.—White v. Edgar, 320 A.2d 668.

W.Va.—Abrams v. West Virginia Racing Commission, 263 S.E.2d 103, 164 W.Va. 315.

Case remanded to district court to reconsider whether certification appropriate

U.S.—Lehman Bros. v. Schein, N.Y., 94 S.Ct. 1741, 416 U.S. 386, 40 L.Ed.2d 215, on remand 519 F.2d 453.

Not certified for decision

U.S.—Santasucci v. Gallen, C.A.N.H., 607 F.2d 527.

Allais v. Donaldson, Lufkin & Jenrette, D.C. Tex., 532 F.Supp. 749.

Fla.—Insurance Co. of North America v. Avis Rent-A-Car System, Inc., 348 So.2d 1149.

No authority

U.S.—Duke v. University of Texas at El Paso, C.A. Tex., 663 F.2d 522, reh. den. 669 F.2d 733, app. after remand 729 F.2d 994, cert. den. 105 S.Ct. 386, 83 L.Ed.2d 320.

Decline to answer question certified

R.I.—Jefferson v. Moran, 479 A.2d 734.

43. U.S.—Douglas v. Seacoast Products, Inc., Va., 97 S.Ct. 1740, 431 U.S. 265, 52 L.Ed.2d 304.

Scott v. Crescent Tool Co., Division of Crescent Niagara Corp., D.C.Ga., 296 F.Supp. 147—Native Am. Church of Navajoland, Inc. v. Arizona Corp Commission, D.C.Ariz., 329 F.Supp. 907, affd. 92 S.Ct. 934, 405 U.S. 901, 30 L.Ed.2d 775.

Kan.—Spencer v. Aetna Life & Cas. Ins. Co., 611 P.2d 149, 227 Kan. 914.

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44. U.S.—Nicholson v. Board of Com'rs of Alabama State Bar Ass'n, D.C.Ala., 338 F.Supp. 48.

45. U.S.—Allen v. McCurry, Mo., 101 S.Ct. 411, 449 U.S. 90, 66 L.Ed.2d 308, on remand C.A., 647 F.2d 167.

U.S. v. Bureau of Revenue of State of N.M., C.A.N.M., 291 F.2d 677.

Upholstered Furniture Action Council v. California Bureau of Home Furnishings, D.C.Cal., 442 F.Supp. 565.

46. U.S.—United Gas Pipe Line Co. v. Ideal Cement Co., Ala., 82 S.Ct. 676, 369 U.S. 134, 7 L.Ed.2d 623.

D.C.—Williams v. Hot Shoppes, Inc., C.A., 293 F.2d 835, 110 U.S.App.D.C. 358, cert. den. 82 S.Ct. 1562, 370 U.S. 925, 8 L.Ed.2d 505, reh. den. 83 S.Ct. 16, 371 U.S. 854, 9 L.Ed.2d 91.

47. U.S.—Aldrich v. Aldrich, W.Va., 84 S.Ct. 184, 375 U.S. 75, 11 L.Ed.2d 141—Douglas v. Seacoast Products, Inc., Va., 97 S.Ct. 1740, 431 U.S. 265, 52 L.Ed.2d 304.

Court of appeals judgment vacated

U.S.—United Gas Pipe Line Co. v. Ideal Cement Co., Ala., 82 S.Ct. 676, 369 U.S. 134, 7 L.Ed.2d 623.

Discretion

U.S.—Will v. Calvert Fire Ins. Co., Ill., 98 S.Ct. 2552, 437 U.S. 655, 57 L.Ed.2d 504, on remand, C.A., 586 F.2d 12.

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U.S.—Yesterday's Children v. Kennedy, C.A.Ill., 569 F.2d 431, cert. den. 98 S.Ct. 3090, 437 U.S. 904, 57 L.Ed.2d 1133.

U.S.—Rock v. East Tennessee Bonding Co., D.C.Tenn., 450 F.Supp. 321.

47.10. U.S.—Alford v. Whitsel, D.C.Miss., 322 F.Supp. 358.

Rule of procedure

U.S.—Turco v. State of Md., D.C.Md., 324 F.Supp. 61, affd., C.A., 444 F.2d 56.

47.15. U.S.—Zuck v. Interstate Pub. Corp., C.A. N.Y., 317 F.2d 727.

Mizell v. Welch, D.C.Conn., 245 F.Supp. 143—Occidental Life Ins. Co. of Cal. v. Fried, D.C. Conn., 245 F.Supp. 211.

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48.5. U.S.—Gelfand v. Tanner Motor Tours, Limited, C.A.N.Y., 339 F.2d 317—Shircliff v. Elliott, C.A. Ky., 384 F.2d 947.

Circle A Drilling Co. v. Sheehan, D.C.Colo., 251 F.Supp. 242—Landry v. Daley, D.C.Ill., 280 F.Supp. 938, app. dism. 89 S.Ct. 455, 393 U.S. 220, 21 L.Ed.2d 392, revd. on oth. grds. 91 S.Ct. 758, 401 U.S. 77, 27 L.Ed.2d 696.

Announcement of broad rule avoided

U.S.—Bullard v. Rhodes Pharmacal Co., D.C.Mont., 263 F.Supp. 79.

49. U.S.—Continental Cas. Co. v. Associated Pipe & Supply Co., D.C.La., 310 F.Supp. 1207, affd. in part, mod. in part on oth. grds. and vac. in part on oth. grds., C.A., 447 F.2d 1041.

50.5. U.S.—Norris v. State of S.C., Greenville County, D.C.S.C., 309 F.Supp. 1113.

52. U.S.—Ohio Brass Co. v. Allied Products Corp., D.C.Ohio, 339 F.Supp. 417.

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71. U.S.—Janel Sales Corp. v. Lanvin Parfums, Inc., C.A.N.Y., 396 F.2d 398, cert. den. 89 S.Ct. 303, 393 U.S. 938, 21 L.Ed.2d 275.

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72.20. U.S.—Standard Brands, Inc. v. Zumpe, D.C. La., 264 F.Supp. 254.

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U.S.—Kaiser Trading Co. v. Associated Metals & Minerals Corp., D.C.Cal., 321 F.Supp. 923, app. dism., C.A., 443 F.2d 1364.

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73. U.S.—U.S. ex rel. Coffey v. Fay, C.A.N.Y., 344 F.2d 625, on remand, D.C., 242 F.Supp. 382, affd. 356 F.2d 460, cert. den. 87 S.Ct. 1350, 386 U.S. 1014, 18 L.Ed.2d 450.

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U.S.—U.S. ex rel. Vraniak v. Randolph, D.C.Ill., 161 F.Supp. 553, affd., C.A., 261 F.2d 234, cert. den. 79 S.Ct. 733, 359 U.S. 949, 3 L.Ed.2d 681.

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U.S.—Pedicord v. Swenson, D.C.Mo., 304 F.Supp. 393, affd., C.A., 431 F.2d 92.

73.5. U.S.—U.S. ex rel. Vraniak v. Randolph, D.C. Ill., 161 F.Supp. 553, affd., C.A., 261 F.2d 234, cert. den. 79 S.Ct. 733, 359 U.S. 949, 3 L.Ed.2d 681—Wade v. Yeager, D.C.N.J., 245 F.Supp. 62—Sims v. Wainwright, D.C.Fla., 307 F.Supp. 116.

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74. U.S.—Adderley v. State of Fla., Fla., 87 S.Ct. 242, 385 U.S. 39, 17 L.Ed.2d 149, reh. den. 87 S.Ct. 698, 385 U.S. 1020, 17 L.Ed.2d 559—Mullaney v.

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74.5. U.S.—Wade v. Yeager, D.C.N.J., 245 F.Supp. 62.

74.10. Later construction contrary to prior construction not applied retroactively

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75. U.S.—Rivera-Vargas v. U.S., D.C.Puerto Rico, 307 F.Supp. 1075.

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U.S.—U.S. v. Olivares, C.A.Tex., 496 F.2d 657.

76. U.S—Matysek v. U.S., C.A.Cal., 339 F.2d 389, cert. den. 85 S.Ct. 1545, 381 U.S. 917, 14 L.Ed.2d 437—U.S v. Smith, C.A.Ala., 420 F.2d 428—Clayton v. U.S., C.A.Cal., 447 F.2d 476.

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77. U.S.—Kay v. Home Indem. Co., C.A.Tex., 337 F.2d 898—Shell Oil Co. v. Mouton, C.A.La., 410 F.2d 715—Key v. Wise, C.A.Miss., 629 F.2d 1049, reh. den. 645 F.2d 72, cert. den. 102 S.Ct. 682, 454 U.S. 1103, 70 L.Ed.2d 647.

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(1) Other instances. Welsh v. Gibbs, C.A.Ohio, 631 F.2d 436, cert. den. 101 S.Ct. 1517, 450 U.S. 981, 67 L.Ed.2d 816.

78. U.S.—Grynberg v. B. B. L. Associates, D.C.Colo., 436 F.Supp. 564.

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(3) In general.

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79.15. U.S.—Ciprari v. Servicos Aereos Cruzeiro do Sul, S.A. (Cruzeiro), D.C.N.Y., 232 F.Supp. 433—Lapides v. Doner, D.C.Mich., 248 F.Supp. 883—Fiorenza v. U.S. Steel Intern., Limited, D.C.N.Y., 311 F.Supp. 117.

State policy held not violated by failure to apply provision for suit by nonresident against non-resident corporation if cause of action arose in state.

U.S.—Szantay v. Beech Aircraft Corp., C.A.S.C., 349 F.2d 60.

79.25. U.S.—Jacobs v. Tenney, D.C.Del., 316 F.Supp. 151.

80. U.S.—Anderson v. Gladden, C.A.Or., 293 F.2d 463, cert. den. 82 S.Ct. 390, 368 U.S. 949, 7 L.Ed.2d 344—Braman v. Mary Hitchcock Memorial Hospital, C.A.Vt., 631 F.2d 6.

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Fiduciary-shield doctrine

(1) Fiduciary-shield doctrine applied and individual defendant was not subject to personal jurisdiction where that defendant acted on behalf of corporation.

U.S.—Lancer Products Inc. v. Rally Accessories, Inc., D.C.N.Y., 597 F.Supp. 440, declining to follow Kinstler v. Saturday Evening Post Co., 507 F.Supp. 113.

(2) Inapplicable where defendant's activities were such that he should have foreseen consequences in this forum and defendant was directly responsible.

U.S.—Kinstler v. Saturday Evening Post Co., D.C.N.Y., 507 F.Supp. 113.

State law as to domicile

U.S.—Napletana v. Hillsdale College, C.A.Mich., 385 F.2d 871.

In personam jurisdiction

U.S.—Poyner v. Erma Werke Gmbh, C.A.Ky., 618 F.2d 1186, cert. den. 101 S.Ct. 121, 449 U.S. 841, 66 L.Ed.2d 49.

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U.S.—Quasha v Shale Development Corp, C.A.La., 667 F.2d 483.

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80.5. U.S.—Johnston v. Time, Inc., D.C.N.C., 321 F.Supp. 837, affd. in part, vac. in part on oth. grds., C.A., 448 F.2d 378—Chattanooga Corp. v. Klingler, D.C.Tenn., 528 F.Supp. 372, remd. C.A., 704 F.2d 903.

80.10. U.S.—Matthies v. Seymour Mfg. Co., D.C. Conn., 23 F.R.D. 64, revd. on oth. grds., C.A., 270 F.2d 365, reconsideration den. 271 F.2d 740, cert. den. 80 S.Ct. 591, 361 U.S. 962, 4 L.Ed.2d 544.

81. U.S.—Stewart Oil Co. v. Sohio Petroleum Co., D.C.Ill., 185 F.Supp. 765—Goudchaux's, Inc. v. Wohl Shoe Co., Inc., D.C.La., 541 F.Supp. 463.

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82.10. U.S.—Marsh v. Kitchen, C.A.N.Y., 480 F.2d 1270—Webber v. Michela, C.A.Minn., 633 F.2d 518.

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U.S.—Dudley v. Smith, C.A.Ala., 504 F.2d 979, reh. den. 507 F.2d 1280.

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82.50. U.S.—Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, Tenn., 88 S.Ct. 1235, 390 U.S. 557, 20 L.Ed.2d 126, reh. den. 88 S.Ct. 1801, 391 U.S. 929, 20 L.Ed.2d 670.

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87.5. U.S.—Fort Smith Structural Steel Co. v. Western Sur. Co., D.C.Ark., 247 F.Supp. 674—Monohon v. Smith & Loveless Division, Union Tank Car Co., D.C.Mich., 343 F.Supp. 810.

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92. U.S.—Bank of North Carolina v. Rock Island Bank, C.A.Ill., 630 F.2d 1243.

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94. U.S.—American Plating & Mfg. Co. v. Liberty Nat. Bank and Trust Co., D.C.Ky., 468 F.Supp. 103.

96. U.S.—Puma v. Marriott, D.C.Del., 294 F.Supp. 1116.

98. U.S.—U.S. v. Terrey, C.A.Tex., 554 F.2d 685.

U.S. v. Caprice, D.C.N.J., 427 F.Supp. 1031, remd. 541 F.2d 275, on remand 427 F.Supp. 1035, affd., C.A., 556 F.2d 569.

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40. U.S.—Luse v. Valley Steel Products Co., C.A. Tex., 293 F.2d 625.

Other matters relating to general laws have been adjudicated.[40.5]

40.5. Landlord and tenant

U.S.—U S. v. Morgan, D.C.Md., 196 F.Supp. 345, affd., C.A., 298 F.2d 255.

§ 186. Construction of Federal Constitution

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41. U.S.—Franks v. Delaware, Del., 98 S.Ct. 2674, 438 U.S 154, 57 L.Ed.2d 667, on remand 398 A.2d 783.

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43. U.S.—Smayda v. U.S., C.A.Cal., 352 F.2d 251, cert. den. 86 S.Ct. 555, 382 U.S. 981, 15 L.Ed.2d 471—Burns v. Crouse, C.A.Kan., 353 F.2d 489.

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44. U.S.—Michigan Nat. Bank v. State of Mich., Mich., 81 S.Ct. 659, 365 U.S. 467, 5 L.Ed.2d 710, reh. den. 81 S.Ct. 900, 365 U.S. 874, 5 L.Ed.2d 864—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295.

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(2) U.S.—Browne v. R. & R. Engineering Co., D.C. Del., 164 F.Supp. 315, revd. on oth. grds., C.A., 264 F.2d 219.

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45. U.S.—Pedersen v. South Williamsport Area School Dist., C.A.Pa., 677 F.2d 312, cert. den. 103 S.Ct. 305, 459 U.S. 972, 74 L.Ed.2d 285.

Miss.—Snapp v. Neal, 164 So.2d 752, 250 Miss. 597, revd. on oth. grds. 86 S.Ct. 485, 382 U.S. 397, 15 L.Ed.2d 445.

N.D.—R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n, 315 N.W.2d 284.

48. U.S.—Siegrist v. Delaware, L. & W.R. Co., C.A. N.Y., 263 F.2d 616, cert. den. 79 S.Ct. 1435, 360 U.S. 917, 3 L.Ed.2d 1533—Farmers Elevator Mut. Ins. Co. v. Jewett, C.A.Kan., 394 F.2d 896.

U.S. v. Oakland Truck Sales, Inc., D.C.Pa., 207 F.Supp. 175—Diaz Castro v. U.S., D.C.Puerto Rico, 451 F.Supp. 959.

49. U.S.—Johnson v. U.S., C.A.Fla., 576 F.2d 606, app. after remand, C.A., 631 F.2d 34, reh. den.

636 F.2d 314, cert. den. 101 S.Ct. 3007, 451 U.S. 1018, 69 L.Ed.2d 389

50. U.S.—Barrack v. Van Dusen, C.A.Pa., 309 F.2d 953, revd. on oth grds. 84 S.Ct. 805, 376 U.S. 612, 11 L.Ed.2d 945, on remand, D.C., 236 F.Supp 645.

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51.5. U.S.—Lewis v. American Federation of State, County and Municipal Emp., AFL-CIO, C.A.Pa., 407 F.2d 1185, cert. den. 90 S.Ct. 145, 396 U.S. 866, 24 L.Ed.2d 120, reh. den. 90 S.Ct. 378, 396 U.S. 950, 24 L.Ed.2d 256.

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§ 188(1). Limitations and Laches

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51.50. U.S.—Smith v. Skakel, C.A.Mich., 444 F.2d 526.

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51.55. U.S.—Clay v. Sun Ins. Office Limited, Fla., 80 S.Ct. 1222, 363 U.S. 207, 4 L.Ed.2d 1170.

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52. U.S.—Bergstreser v. Mitchell, C.A.Mo., 577 F.2d 22—Citronelle-Mobile Gathering, Inc. v. Edwards, Em.App., 669 F.2d 717, cert. den. 103 S.Ct. 172, 459 U.S. 877, 74 L.Ed.2d 141.

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53.5. U.S.—Bertha Bldg. Corp. v. National Theatres Corp., C.A.N.Y., 269 F.2d 785, cert. den. 80 S.Ct. 585, 361 U.S. 960, 4 L.Ed.2d 542.

Conflict of decisions

(2) Other matters.

U.S.—Brush Beryllium Co. v. Meckley, C.A.Ohio, 284 F.2d 797.

53.10. U.S.—Graziano v. Pennell, C.A.N.Y., 371 F.2d 761—Gleason v. U.S., C.A.N.J., 458 F.2d 171.

53.15. U.S.—Watson v. Commercial Credit Corp., C.A.La., 341 F.2d 915, cert. den. 85 S.Ct. 1782, 381 U.S. 943, 14 L.Ed.2d 706—Herald Co. v. Seawell, C.A.Colo., 472 F.2d 1081.

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55.5. U.S.—Turnbull v. Bonkowski, C.A.Alaska, 419 F.2d 104.

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56. U.S.—Kossick v. U.S., D.C.N.Y., 223 F.Supp. 720, affd., C.A., 330 F.2d 933, 7 A.L.R.3d 726, cert. den. 85 S.Ct. 73, 379 U.S. 837, 13 L.Ed.2d 44.

57. U.S.—Leonhard v. U.S., C.A.N.Y., 633 F.2d 599, cert. den. 101 S.Ct. 1975, 451 U.S. 908, 68 L.Ed.2d 295.

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58.20. U.S.—Walker v. Armco Steel Corp., 100 S.Ct. 1978, 446 U.S. 740, 64 L.Ed.2d 659.

Wells Fargo & Co. v. Wells Fargo Exp. Co., C.A.Nev., 556 F.2d 406.

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58.21. Tolling of statute

(3) Other statements.

U.S.—Esplin v. Hirschi, C.A.Utah, 402 F.2d 94, cert. den. 89 S.Ct. 1194, 394 U.S. 928, 22 L.Ed.2d 459.

58.22. U.S.—Mahan v. Ohio Auto Rentals Co., D.C. Ohio, 207 F.Supp. 383—Preveza Shipping Co. v. Sucrest Corp., D.C.N.Y., 297 F.Supp. 954.

Callan v. Lillybelle, Limited, D.C.N.Y., 39 F.R.D. 600—Meredith v. Glamorene Products Corp., D.C.Wis., 55 F.R.D. 397.

58.23. U.S.—Hanna v. Plumer, Mass., 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8.

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58.24. U.S.—J. M. Blythe Motor Lines Corp. v. Blalock, C.A.Fla., 310 F.2d 77.

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58.25. U.S.—Goodman v. Mead Johnson & Co., 534 F.2d 566, cert. den. 97 S.Ct. 732, 429 U.S. 1038, 50 L.Ed.2d 748.

58.26. U.S.—Garcia v. Bernabe, C.A.Puerto Rico, 289 F.2d 690.

58.27. Leave to amend

(1) U.S.—Swartzwelder v. Hamilton, D.C.Pa., 56 F.R.D. 606.

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(2) Other instances.

U.S.—Crowder v. Gordons Transports, Inc., C.A.Ark., 387 F.2d 413, on remand 289 F.Supp. 166, revd. on oth. grds. 419 F.2d 480.

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(3) State law applied.

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58.40. U.S.—Carney v. Barnett, D.C.Pa., 278 F.Supp. 572—Gore v. Debaryshe, D.C.Ky., 278 F.Supp. 883—Prince v. Trustees of University of Pa., D.C. Pa., 282 F.Supp. 832—Wilson v. Continental Group, Inc., D.C.N.C., 451 F.Supp. 1.

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Transferee court on venue change applies transferor's limitation statute

U.S.—Burger King Corp. v. Continental Ins. Co., D.C. Pa., 359 F.Supp. 184.

58.41. U.S.—Hall v. E. I. Du Pont De Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.

Hubbard v. Brinton, D.C.Pa., 26 F.R.D. 564—Mata v. Budd Co., D.C.Pa., 44 F.R.D. 225.

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58.43. U.S.—Gaston v. B. F. Walker, Inc., C.A.Tex 400 F.2d 671.

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58.44. U.S.—Yazzie v. Olney, Levy, Kaplan & Tenner, C.A.Ariz., 593 F.2d 100.

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58.45. U.S.—Yarber v. Allstate Ins. Co., C.A.Va. 674 F.2d 232.

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58.60. U.S.—Wheeldin v. Wheeler, Cal., 83 S.Ct. 1441, 373 U.S. 647, 10 L.Ed.2d 605—Chevron Oil Co. v. Huson, La., 92 S.Ct. 349, 404 US 97, 30 L.Ed.2d 296—Runyon v. McCrary, 96 S.Ct. 2586, 427 U.S. 160, 49 L.Ed.2d 415, app. after remand, C.A., 569 F.2d 1294, cert. den. 99 S.Ct. 311, 439 U.S. 927, 58 L.Ed.2d 320—Board of Regents of University of State of N.Y. v. Tomanio, N.Y., 100 S.Ct. 1790, 446 U.S. 478, 64 L.Ed.2d 440—United Parcel Service, Inc. v. Mitchell, N.Y., 101 S.Ct. 1559, 451 U.S. 56, 67 L.Ed.2d 732.

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D.C.—N. V. Philips' Gloeilampenfabrieken v. Atomic Energy Commission, C.A., 316 F.2d 401, 114 U.S. App.D.C. 400.

Choosing limitation which best serves federal policy

U.S.—Weinberger v. New York Stock Exchange, D.C. N.Y., 335 F.Supp. 139—Dyer v. Eastern Trust & Banking Co., D.C.Me., 336 F.Supp. 890.

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U.S.—Bell v. Aerodex, Inc., C.A.Fla., 473 F.2d 869.

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58.61. U.S.—Runyon v. McCrary, 96 S.Ct. 2586, 427 U.S. 160, 49 L.Ed.2d 415, app. after remand, C.A., 569 F.2d 1294, cert. den. 99 S.Ct. 311, 439 U.S. 927, 58 L.Ed.2d 320—Board of Regents of University of State of N.Y. v. Tomanio, N.Y., 100 S.Ct. 1790, 446 U.S. 478, 64 L.Ed.2d 440.

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(2) Other circumstances.

U.S.—Luker v. Nelson, D.C.Ill., 341 F.Supp. 111.

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U.S.—Mulligan v. Schlachter, C.A.Mich., 389 F.2d 231.

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U.S.—Occidental Life Ins. Co. of California v. Equal Employment Opportunity Commission, Cal., 97 S.Ct. 2447, 432 U.S. 355, 53 L.Ed.2d 402.

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58.62. Which state law applies

(2) Other instances.

U.S.—Copitas v. Retail Clerks Intern. Ass'n, C.A.Cal., 618 F.2d 1370.

58.63. U.S.—International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW), AFL-CIO v. Hoosier Cardinal Corp., Ind., 86 S.Ct. 1107, 383 U.S. 696, 16 L.Ed.2d 192—United Parcel Service, Inc. v. Mitchell, N.Y., 101 S.Ct. 1559, 451 U.S. 56, 67 L.Ed.2d 732.

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58.64. U.S.—Roberts v. Magnetic Metals Co., C.A. N.Y., 611 F.2d 450.

Richardson v. Salinas, D.C.Tex., 336 F.Supp. 997—Johns Hopkins University v. Hutton, D.C. Md., 343 F.Supp. 245, affd. in part, revd. in part on oth. grds., C.A., 488 F.2d 912, cert. den. 94 S.Ct. 1622, 1623, 416 U.S. 916, 40 L.Ed.2d 118—Competitive Associates, Inc. v. Fantastic Fudge, Inc., D.C.N.Y., 58 F.R.D. 121.

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(2) Federal law determines procedural aspect concerning when period begins.

U.S.—Wolf v. Frank, C.A.Fla., 477 F.2d 467, reh. den. 478 F.2d 1403, cert. den. 94 S.Ct. 287, 414 U.S. 975, 38 L.Ed.2d 218, reh. den. 94 S.Ct. 739, 414 U.S. 1104, 38 L.Ed.2d 560, app. after remand 555 F.2d 1213.

(3) Where several applicable, selecting one best effectuating federal policy required.

U.S.—Kramer v. Loewi & Co., Inc., D.C.Wis., 357 F.Supp. 83.

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U.S.—Charney v. Thomas, C.A.Mich., 372 F.2d 97.

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58.65. U.S.—Alvado v. General Motors Corp., D.C. N.Y., 194 F.Supp. 314, affd., C.A., 303 F.2d 718, cert. den 83 S.Ct. 293, 371 U.S. 925, 9 L.Ed.2d 233, reh. den. 83 S.Ct. 540, 371 U.S. 965, 9 L.Ed.2d 513, and 84 S.Ct. 27, 375 U.S. 871, 11 L.Ed.2d 101, and 85 S.Ct. 12, 379 U.S. 870, 13 L.Ed.2d 76, and 86 S.Ct. 1905, 384 U.S. 1028, 16 L.Ed.2d 1047, and 87 S.Ct. 1682, 387 U.S 915, 18 L.Ed.2d 640.

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58.67. U.S.—Leh v. General Petroleum Corp., D.C. Cal., 208 F.Supp. 289, affd., C.A., 330 F.2d 288, revd. on oth grds. 86 S.Ct. 203, 382 U.S. 54, 15 L.Ed.2d 134, reh. den. 86 S.Ct. 525, 382 U.S 1001, 15 L.Ed.2d 491.

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U.S.—Shapiro v. Paramount Film Distributing Corp., D.C.Pa., 177 F.Supp. 88, affd., C.A., 274 F.2d 743.

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58.70. U.S.—Stoleson v. U.S., C.A.Wis., 629 F.2d 1265, app. after remand 708 F.2d 1217.

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Applicability of doctrine of laches

U.S.—Baker v. F & F Inv., C.A.Ill., 420 F.2d 1191, cert. den. 91 S.Ct. 40, 41, 42, 400 U.S. 821, 27 L.Ed.2d 49.

Special federal statute of limitations is created with respect to federally created right as matter of federal common law only when need for uniformity is particularly great or when nature of federal right demands particular sort of statute of limitations.

U.S.—Chevron Oil Co. v. Huson, La., 92 S.Ct. 349, 404 U.S. 97, 30 L.Ed.2d 296.

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58.72. U.S.—Henson v. Columbus Bank and Trust Co., C.A.Ga., 651 F.2d 320, reh. den. 664 F.2d 291, app. after remand 770 F.2d 1566.

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58.73. U.S.—King v. Alaska S.S. Co., C.A.Wash., 431 F.2d 994.

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(3) Other matters.

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58.76. U.S.—Pauk v. Board of Trustees of City University of New York, C.A.N.Y., 654 F.2d 856, cert. den. 102 S.Ct. 1631, 455 U.S. 1000, 71 L.Ed.2d 866.

Wis.—Burton v. Department of Health and Social Services of State of Wis., App., 309 N.W.2d 388, 103 Wis.2d 670.

58.77. U.S.—Moviecolor Limited v. Eastman Kodak Co., C.A.N.Y., 288 F.2d 80, 90 A.L.R.2d 252, cert. den. 82 S.Ct. 39, 368 U.S. 821, 7 L.Ed.2d 26—Neel v. Rehberg, C.A.Ga., 577 F.2d 262—Pauk v. Board of Trustees of City University of New York, C.A.N.Y., 654 F.2d 856, cert. den. 102 S.Ct. 1631, 455 U.S. 1000, 71 L.Ed.2d 866.

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(2) Other matters.

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(2) Other matters.

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(2) U.S.—Stricker v. Morgan, D.C.Miss., 158 F.Supp. 830, affd., C.A., 268 F.2d 882, cert. den. 80 S.Ct. 592, 361 U.S. 963, 4 L.Ed.2d 544.

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33.5. U.S.—Artvale, Inc. v. Rugby Fabrics Corp., D.C.N.Y., 232 F.Supp. 814, affd., C.A., 363 F.2d 1002.

37. U.S.—Aaron v. Florida Gas Transmission Co., C.A.Miss., 412 F.2d 802.

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37.5. U.S.—Stricker v. Morgan, D.C.Miss., 158 F.Supp. 830, affd., C.A., 268 F.2d 882, cert. den. 80 S.Ct. 592, 361 U.S. 963, 4 L.Ed.2d 544—Sadwith v. Lantry, D.C.N.Y., 219 F.Supp. 171.

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38. U.S.—Johnston v. Thomas, D.C.Ohio, 275 F.Supp. 32.

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44.10. U.S.—U.S. v. Sommerville, D.C.Pa., 211 F.Supp. 843, affd., C.A., 324 F.2d 712, cert. den. 84 S.Ct. 663, 376 U.S. 909, 11 L.Ed.2d 608.

45. U.S.—Reeves v. Tarvizian, C.A.Mass., 351 F.2d 889—Elliott v. Bumb, C.A.Cal., 356 F.2d 749, cert. den. 87 S.Ct. 67, 385 U.S. 829, 17 L.Ed.2d 66—Blaney v. Florida Nat. Bank at Orlando, C.A. Fla., 357 F.2d 27.

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48. U.S.—U.S. ex rel. and for Use of Tennessee Valley Authority v. Powelson, N.C., 63 S.Ct. 1047, 319 U.S. 266, 87 L.Ed. 1390, conf. to 138 F.2d 343, cert. den. 64 S.Ct. 612, 321 U.S. 773, 88 L.Ed. 1067—U.S. v. Causby, Ct.Cl., 66 S.Ct. 1062, 328 U.S. 256, 90 L.Ed. 1206, 106 Ct.Cl. 854—U.S. v. Gerlach Live Stock Co., 70 S.Ct. 955, 339 U.S. 725, 94 L.Ed. 1231, 20 A.L.R.2d 633—U.S. v. James J. Stevinson, Ct.Cl., 70 S.Ct. 955, 339 U.S. 725, 94 L.Ed. 1231, 20 A.L.R.2d 633.

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51. U.S.—Security Life & Acc. Ins. Co. v. U.S., C.A. Ala., 357 F.2d 145.

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52. U.S.—Boleck v. Underwood, C.A.N.M., 340 F.2d 816.

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53. State accountant—client privilege not followed in bankruptcy proceeding

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53.5. U.S.—National Equipment Rental, Limited v. Mercury Typesetting Co., C.A.N.Y., 323 F.2d 784.

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53.10. U.S.—Board of Regents of University of State of N.Y. v. Tomanio, N.Y., 100 S.Ct. 1790, 446 U.S. 478, 64 L.Ed 2d 440.

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55. U.S.—Galloway v. Beto, C.A.Tex., 421 F.2d 284, cert. den. 91 S.Ct. 137, 400 U.S. 912, 27 L.Ed.2d 151.

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58.5. U.S.—Levin v. United Air Lines, Inc., D.C. N.Y., 279 F.Supp. 860—Curry v. Maxson, D.C. Mo., 318 F.Supp. 842.

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66.5. U.S.—Metal Lubricants Co. v. Engineered Lubricants Co., C.A.Mo., 411 F.2d 426—Wheelabrator Corp. v. Fogle, C.A.La., 438 F.2d 1226.

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68.5. U.S.—Government Emp. Ins. Co. v. Ziarno, C.A.N.Y., 273 F.2d 645—Green v. Aetna Ins. Co., C.A.Tex., 397 F.2d 614—Larson Const. Co. v. Oregon Auto. Ins. Co., C.A.Or., 450 F.2d 1193.

69. U.S.—U.S. v. Nationwide Mut. Ins. Co., C.A. Wash., 499 F.2d 1355—Northwestern Flyers, Inc. v. Olson Bros. Mfg. Co., Inc., C.A.Iowa, 679 F.2d 1264.

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79.15. U.S.—Home Indem. Co. v. Allstate Ins. Co., C.A.Wash., 393 F.2d 593.

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79.35. U.S.—Brinson v. Brinson, C.A.N.C., 334 F.2d 155, 10 A.L.R.3d 795.

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80.2. U.S.—Baker v. American Ins. Co. of Newark, N.J., C.A.S.C., 324 F.2d 748.

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80.8. U.S.—St. Paul Fire & Marine Ins. Co. v. Coleman, D.C.Ark., 204 F.Supp. 713, affd., C.A., 316 F.2d 77, cert. den. 84 S.Ct. 191, 375 U.S. 903, 11 L.Ed.2d 143.

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(6) Other instances.

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13. U.S.—Roberts v. Berry, C.A.Tenn., 541 F.2d 607.

15. U.S.—U.S. v. Yazell, C.A.Tex., 334 F.2d 454, cert. gr. 85 S.Ct. 651, 379 U.S. 957, 13 L.Ed.2d 553—U.S. v. Yazell, Tex., 86 S.Ct. 500, 382 U.S. 341, 15 L.Ed.2d 404.

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33. U.S.—U.S. v. Gas & Oil Development Co., D.C. Wash., 126 F.Supp. 840, vac. on oth. grds., C.A., U.S. v. State of Wash., 233 F.2d 811.

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48. **Right to succeed, etc.**

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49. **Suits against personal representative**

(6) Other instances.

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50. U.S.—Doetsch v. Doetsch, C.A.Ill., 312 F.2d 323—In re Nissen's Estate, C.A.N.C., 345 F.2d 230—Ransom v. Brennan, C.A.Tex., 437 F.2d 513, cert. den. 91 S.Ct. 2205, 403 U.S. 904, 29 L.Ed.2d 680.

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(5) Effect of merger is controlled by state corporation law.

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53. U S.—Honigman v. Green Giant Co., C.A.Minn., 309 F.2d 667, cert. den. 83 S.Ct. 934, 372 U.S. 941, 9 L.Ed.2d 967.

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60. U.S.—First Agr. Nat. Bank of Berkshire County v. State Tax Commission, Mass., 88 S.Ct. 2173, 392 U.S. 339, 20 L.Ed.2d 1138.

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63.5. U.S.—McLeod v. Stevens, C.A.S.C., 617 F.2d 1038.

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69. **Federal law**

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72.5. U.S.—Griffin v. Missouri Pac. R. Co., C.A.La., 413 F.2d 99.

73. U.S.—Southern Ry. Co. v. Hutchings, C.A.Tenn., 288 F.2d 837.

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77. U.S.—Maryland Cas. Co. v. Williams, C.A.Miss., 377 F.2d 389, 35 A.L.R.3d 275.

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78. U.S.—Dunn v. Printing Corp. of America, D.C. Pa., 245 F.Supp. 875.

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79. U.S.—Samuelson v. Susen, C.A.Pa., 576 F.2d 546.

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80. U.S.—Lummus Co. v. Commonwealth Oil Refining Co., D.C.N.Y., 195 F.Supp. 47.

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90. U.S.—Gibson v. Blair, C.A.La., 467 F.2d 842.
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92. U.S.—Sandstrom v. Montana, Mont., 99 S.Ct. 2450, 442 U.S. 510, 61 L.Ed.2d 39, on remand 603 P.2d 244, 184 Mont. 391.
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(8) Other matters.

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93. U.S.—Sandstrom v. Montana, Mont., 99 S.Ct. 2450, 442 U.S. 510, 61 L.Ed.2d 39, on remand 603 P.2d 244, 184 Mont. 391.
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94. U.S.—Santosky v. Kramer, N.Y., 102 S.Ct. 1388, 455 U.S. 745, 71 L.Ed.2d 599, on remand 453 N.Y.S.2d 942, 89 A.D.2d 738, app. den. 445 N.E.2d 656, 58 N.Y.2d 605, 459 N.Y.S.2d 1029.
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(1) U.S.—Harville Rose Service v. Kellogg Co., C.A. Tex., 448 F.2d 1346, cert. den. 92 S.Ct. 1248, 405 U.S. 987, 31 L.Ed.2d 453—Vanston v. Connecticut General Life Ins. Co., C.A.Tex., 482 F.2d 337.
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(3) U.S.—Plum Tree, Inc. v. N. K. Winston Corp., D.C.N.Y., 351 F.Supp. 80.

(6) Other matters.
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98. U.S.—Mutual Life Ins. Co. of New York v. Bohlman, C.A.Okl., 328 F.2d 289—Croom v. Fiedler, C.A.Tenn., 341 F.2d 909—Renfro Hosiery Mills Co. v. National Cash Register Co., C.A.N.C., 552 F.2d 1061.

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(3) Other instances.

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4. U.S.—Moore v. Duckworth, 99 S.Ct. 3088, 443 U.S. 713, 61 L.Ed.2d 865.
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U.S.—Misco-United Supply, Inc. v. Petroleum Corp., C.A.Tex., 462 F.2d 75—New England Merchants Nat. Bank v. Rosenfield, C.A.Fla., 679 F.2d 467, cert. den. 103 S.Ct. 819, 459 U.S. 1173, 74 L.Ed.2d 1017.

5. U.S.—Sheptur v. Proctor & Gamble Distributing Co., C.A.Mich., 261 F.2d 221, 79 A.L.R.2d 476, cert. den. 79 S.Ct. 1136, 359 U.S. 1003, 3 L.Ed.2d 1031.

6. U.S.—Presser Royalty Co. v. Chase Manhattan Bank, C.A.N.Y., 272 F.2d 838—Sheptur v. Proctor & Gamble Distributing Co., C.A.Mich., 261 F.2d 221, 79 A.L.R.2d 476, cert. den. 79 S.Ct. 1136, 359 U.S. 1003, 3 L.Ed.2d 1031—Louisville Gas & Elec. Co. v. American Ins. Co., C.A.Ky., 412 F.2d 908.
Shelton v. Jones, D.C.Va., 272 F.Supp. 139.

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7. U.S.—Gold v. National Sav. Bank of City of Albany, C.A.Tenn., 641 F.2d 430, cert. den. 102 S.Ct. 116, 454 U.S. 826, 70 L.Ed.2d 100.

Testing sufficiency of circumstantial evidence

U.S.—Bennett v. Wood, C.A.Ark., 271 F.2d 349.

9. Functions in contract interpretation

U.S.—Meyers v. Selznick Co., C.A.N.Y., 373 F.2d 218.

10. U.S.—Rand v. Underwriters at Lloyd's London Subscribing Lloyd's Policy No. DB6/234, C.A. N.Y., 295 F.2d 342, cert. den. 82 S.Ct. 603, 368 U.S. 988, 7 L.Ed.2d 525—Shirey v. Louisville & N.R. Co., C.A.Fla., 327 F.2d 549—General Motors Corp. v. Muncy, C.A.Tex., 367 F.2d 493, cert. den. 87 S.Ct. 1476, 386 U.S. 1037, 18 L.Ed.2d 600, reh. den. 87 S.Ct. 2105, 388 U.S. 924, 18 L.Ed.2d 1378—Chicago, R.I. & P. Ry. Co. v. Howell, C.A.Okl., 401 F.2d 752.

11. U.S.—Prudential Ins. Co. of America v. Schroeder, C.A.Tex., 414 F.2d 1316, cert. den. 90 S.Ct. 751, 396 U.S. 1058, 24 L.Ed.2d 752.

The minimum standard of proof mandated by due process is a question of federal law which the Supreme Court may resolve.[12.5]

12.5. U.S.—Santosky v. Kramer, N.Y., 102 S.Ct. 1388, 455 U.S. 745, 71 L.Ed.2d 599, on remand 453 N.Y.S.2d 942, 89 A.D.2d 738, app. den. 445 N.E.2d 656, 58 N.Y.2d 605, 459 N.Y.S.2d 1029.

15. U.S.—Procella v. Beto, D.C.Tex., 319 F.Supp. 662.

16. U.S.—Blue Diamond Coal Co. v. United Mine Workers of America, C.A.Ky., 436 F.2d 551, cert. den. 91 S.Ct 1525, 402 U.S. 930, 28 L.Ed.2d 863.

17. U.S.—Sitton v. U.S., C.A.Tex., 413 F.2d 1386, cert. den. 90 S.Ct. 1118, 397 U.S. 988, 25 L.Ed.2d 395.
Accutest Corp. v. Accu Test Systems, Inc., D.C. Mass., 532 F.Supp. 416.

18. U.S.—Cook v. Kuljian Corp., D.C.Pa., 201 F.Supp. 531.

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20. U.S.—Marsh v. Buckeye S.S. Co., D.C.Ohio, 330 F.Supp. 972—Holmes v. Silver Cross Hospital of Joliet, Ill., D.C.Ill., 340 F.Supp. 125.

State law not followed

U.S.—James v. Home Const. Co. of Mobile, Inc., C.A. Ala., 621 F.2d 727.

21. U.S.—Hall v. E. I. Du Pont De Nemours & Co., Inc., D.C.N.Y., 345 F.Supp. 353.

State venue statute

U.S.—Middlesworth v. Kansas City Athletics Division of Chas. O. Finley, D.C.Fla., 293 F.Supp. 296.

22. U.S.—Wright v. Bell, D.C.Mont., 225 F.Supp. 746.

However, in a diversity case, venue, being a substantive right, is governed by state law.[23.5]

23.5. U.S.—Still v. Rossville Crushed Stone Co., C.A. Tenn., 370 F.2d 324, cert. den. 87 S.Ct. 2030, 387 U.S. 918, 18 L.Ed.2d 970.

Where claim arose

U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 291 F.Supp. 252.
Ryan v. Glenn, D.C.Miss., 52 F.R.D. 185.

24. For a discussion of Non-Resident Motorists Service of Process Acts, notice requirements, see 33 F.R.D. 151.

Federal venue statute prevails over venue provisions of state law

U.S.—Brown v. Pyle, C.A.Miss., 310 F.2d 95.

25. U.S.—Farrell v. Piedmont Aviation, Inc., C.A. N.Y., 411 F.2d 812, cert. den. 90 S.Ct. 103, 396 U.S. 840, 24 L.Ed.2d 91—Riggle v. State of Cal., C.A.Cal., 577 F.2d 579.
Stafford-Higgins Industries, Inc. v. Gaytone Fabrics, Inc., D.C.N.Y., 300 F.Supp. 65.

31. U.S.—Brennan v. Rooney, 139 F.Supp. 484—Lowrance v. Central Illinois Public Service Co., 161 F.Supp. 656—Booth v. General Dynamics Corp., D.C.Ill., 264 F.Supp. 465.

Suit by state attorney general as parens patriae of citizens

U.S.—Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., D.C.Pa., 309 F.Supp. 1057.

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33. U.S.—Longbottom v. Swaby, C.A.Fla., 397 F.2d 45.
George A. Fuller Co. v. Coastal Plains, Inc., D.C.La., 290 F.Supp. 911.

Real party in interest for diversity jurisdiction
U.S.—Peter Kiewit Sons Co. v. South Dakota State Highway Commission for and on Behalf of Dept. of Highways, State of S.D., D.C.S.D., 269 F.Supp. 333.

35. U.S.—Burns v. Turner Const. Co., D.C.Mass., 265 F.Supp. 768.

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46. U.S.—Aponte v. American Sur. Co., of N.Y., D.C.Puerto Rico, 171 F.Supp. 677, vac., C.A., 276 F.2d 678.

Other matters with respect to action by injured party against insurer have been adjudicated.[46.5]

46.5. **Law of forum, including conflicts rule, that law of place of tort controls matters of substance, applied**
U.S.—Posner v. Travelers Ins. Co., D.C.Ill., 244 F.Supp. 865.

47. U.S.—Simmons v. Continental Cas. Co., D.C. Neb., 285 F.Supp. 997, affd., C.A., 410 F.2d 881.
Sufficiency of pleading is a question of federal law.
U.S.—First Nat. Bank of Guthrie Center v. Anderson, Iowa, 46 S.Ct. 135, 269 U.S. 341, 70 L.Ed. 295—Staub v. City of Baxley, Ga., 78 S.Ct. 277, 355 U.S. 313, 2 L.Ed.2d 302.

49. U.S.—Ayers v. Ackerman, D.C.S.C., 324 F.Supp. 814.

53. **State decisions as to relation back**
U.S.—Martz v. Miller Bros. Co., D.C.Del., 244 F.Supp. 246.

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55. U.S.—Mountaire Feeds, Inc. v. Agro Impex, S.A., C.A.Ark., 677 F.2d 651.
Coniglio v. Holley, D.C.Iowa, 38 F.R.D. 302.

56. U.S.—Fraley v. Chesapeake & O. Ry. Co., C.A. Pa., 397 F.2d 1, on remand 294 F.Supp. 1193.

58. U.S.—Wilkerson v. Fortuna Corp., C.A.Tex., 554 F.2d 745, cert. den. 98 S.Ct. 430, 434 U.S. 939, 54 L.Ed.2d 299.
Montclair Electronics, Inc. v. Electra/Midland Corp., D.C.N.Y., 326 F.Supp. 839.

Interpretation of state statute, etc.
U.S.—Mechanical Contractors Ass'n of America, Inc. v. Mechanical Contractors Ass'n of Northern Cal., Inc., C.A.Cal., 342 F.2d 393.
Throwing Corp. of America v. Deering Milliken Research Corp., D.C.N.C., 302 F.Supp. 487.

Since the publication of Corpus Juris Secundum, the case of Shawe v. Wendy Wilson, Inc., D.C.N.Y., 171 F.Supp. 117 has been reversed, the court holding that the question is controlled by federal law.
U.S.—Shawe v. Wendy Wilson, Inc., C.A.N.Y., 282 F.2d 508.

59. U.S.—Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., C.A.Mass., 310 F.2d 20.
C.J.S. cited in Green v. Robertshaw-Fulton Controls Co., D.C.Ind., 204 F.Supp. 117, 128, 29 F.R.D. 490, 501—Thiele Engineering Co. v. Weldon Farm Products, Inc., D.C.Minn., 224 F.Supp. 809—Williams v. Connolly, D.C.Minn., 227 F.Supp. 539.

61. U.S.—Waltham Precision Instrument Co. v. McDonnell Aircraft Corp., C.A.Mass., 310 F.2d 20—Simpkins v. Council Mfg. Corp., C.A.Mo., 332 F.2d 733.

62. U.S.—Ross v. Venezuelan-American Independent Oil Producers Ass'n, D.C.Del., 230 F.Supp. 701.

Federal law applicable
U.S.—McNeely v. Clayton & Lambert Mfg. Co., D.C. Minn., 292 F.Supp. 232.

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The question of personal jurisdiction over a non-resident in a diversity case may depend on the longarm statute of the state of the forum.[62.5]

62.5. U.S.—Bethany Auto Sales, Inc. v. Aptco Auto Auction, Inc., C.A.Ariz., 564 F.2d 895—Scullin Steel Co. v. National Ry. Utilization Corp., C.A. Mo., 676 F.2d 309.
Malinow v. Eberly, D.C.Md., 322 F.Supp. 594—Conwed Corp. v. Nortene, S.A., 404 F.Supp. 497—Wilbourn v. Mostek Corp., D.C.Colo., 537 F.Supp. 302.

67. U.S.—Kossick v. United Fruit Co., D.C.N.Y., 166 F.Supp. 571, affd., C.A., 275 F.2d 500, revd. 81 S.Ct. 886, 365 U.S. 731, 6 L.Ed.2d 56, reh. den. 81 S.Ct. 1657, 366 U.S. 941, 6 L.Ed.2d 852.

68. U.S.—State of Md. for Use of Gliedman v. Capital Airlines, Inc., D.C.Md., 267 F.Supp. 298.

69. **Conditional order**
U.S.—Lumbermen's Mut. Ins. Co. v. Massachusetts Bonding & Ins. Co., C.A.Va., 310 F.2d 627.

74. U.S.—U.S. v. Helz, C.A.Mich., 314 F.2d 301.

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78. U.S.—McCann v. Chicago, G.W. Ry. Co., D.C. Minn., 191 F.Supp. 730—United Pac. Ins. Co. v. Timber Access Industries Co., D.C.Or., 277 F.Supp. 925.

81. U.S.—Shadis v. Beal, D.C.Pa., 520 F.Supp. 858, affd., C.A., 685 F.2d 824, cert. den. 103 S.Ct. 300, 459 U.S. 970, 74 L.Ed.2d 282.

State law controlling
U.S.—Henning v. Lake Charles Harbor and Terminal Dist., C.A.La., 387 F.2d 264, app. after remand 409 F.2d 932.
Lide v. Cline, D.C.Ark., 537 F.Supp. 643.

82. U.S.—Petition of Merry Queen Transfer Corp., D.C.N.Y., 269 F.Supp. 812.

84. **Security requirement applicable to pendent claim**
U.S.—Weitzen v. Kearns, D.C.N.Y., 262 F.Supp. 931, affd., C.A., 388 F.2d 310.

85. U.S.—Weitzen v. Kearns, D.C.N.Y., 262 F.Supp. 931, affd., C.A., 388 F.2d 310.

88. **Attorney fees**
U.S.—In re Schrader Body, Inc., D.C.Pa., 315 F.Supp. 1349.

Other cases have been adjudicated on the matter of attorney's fees.[88.5]

88.5. **State law held applicable**
U.S.—Bulova Watch Co. v. Rogers-Kent, Inc., D.C. S.C., 181 F.Supp. 340—Bass v. Spitz, D.C.Mich., 522 F.Supp. 1343—Brown v. Joinder Intern., Inc., D.C.Ga., 523 F.Supp. 333.

89. **Question of state law**
U.S.—Application of Cochran, D.C.Neb., 434 F.Supp. 1207.

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91. U.S.—Arteiro v. Coca Cola Bottling, Midwest, Inc., D.C.Minn., 47 F.R.D. 186.

Jury verdict
(2) Other instances.
U.S.—Chesapeake & O. Ry. Co. v. Barnaby, C.A.Mich., 414 F.2d 309.

Reversal for new trial
U.S.—Gault v. Poor Sisters of St. Frances Seraph of Perpetual Adoration, Inc., C.A.Tenn., 375 F.2d 539.

§ 191. Creation and Constitution

Library References

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1. U.S.—Vermont v. New York, Vt., 94 S.Ct. 2248, 417 U.S. 270, 41 L.Ed.2d 61.

2. **U.S. Supreme Court Rules**
Rules of the Supreme Court of the United States, Rule 1 et seq.

§ 193. In General

Library References

Federal Courts ⇐442.

3. U.S.—Marshall v. Gibson's Products, Inc. of Plano, C.A.Tex., 584 F.2d 668.

4. U.S.—Barthuli v. Board of Trustees of Jefferson Elementary School Dist., Cal., 98 S.Ct. 21, 434 U.S. 1337, 54 L.Ed.2d 52.
Perdue v. Supreme Court of U.S., C.A.Cal., 439 F.2d 806.
Spindel v. Spindel, D.C.N.Y., 283 F.Supp. 797.

Original jurisdiction of Supreme Court is conferred not by Congress but by Constitution.[4.5] This jurisdiction is self-executing and needs no legislative implementation.[4.10]

4.5. U.S.—California v. Arizona, 99 S.Ct. 919, 440 U.S. 59, 59 L.Ed.2d 144.

4.10. U.S.—California v. Arizona, 99 S.Ct. 919, 440 U.S. 59, 59 L.Ed.2d 144.

5. U.S.—Spindel v. Spindel, D.C.N.Y., 283 F.Supp. 797.

Purpose
U.S.—Burch v. Goodyear Tire & Rubber Co., D.C.Md., 420 F.Supp. 82, affd., C.A., 554 F.2d 633.

7. U.S.—Marshall v. Gibson's Products, Inc. of Plano, C.A.Tex., 584 F.2d 668.

10. U.S.—Utah v. U.S., 89 S.Ct. 761, 394 U.S. 89, 22 L.Ed.2d 99—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712—Washington v. General Motors Corp., Wash., 92 S.Ct. 1396, 406 U.S. 109, 31 L.Ed.2d 727.

Original jurisdiction of the United States Supreme Court is not an alternative to redress of grievances which can be sought in a normal appellate process if the remedy is timely sought.[10.5]

10.5. U.S.—Illinois v. Michigan, Ill., 93 S.Ct. 29, 409 U.S. 36, 34 L.Ed.2d 42.

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12. U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

The question of whether a case is appropriate for the exercise of original concurrent jurisdiction concerns the seriousness and dignity of the claim and the availability of alternative forums.[12.5]

12.5. U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

14.5. U.S.—Bell v. State of Md., Md., 84 S.Ct. 1814, 378 U.S. 226, 12 L.Ed.2d 822, on remand 204 A.2d 54, 236 Md. 356.

§ 194. Actions to Which State is a Party

Library References

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16. Concurrent jurisdiction

U.S.—State of Tex. v. Pankey, C.A.N.M., 441 F.2d 236.

(2) Supreme Court and federal district courts have concurrent jurisdiction of actions by states against corporations and trade associations, and the Supreme Court may decline to exercise original jurisdiction.

U.S.—Washington v. General Motors Corp., Wash., 92 S.Ct. 1396, 406 U.S. 109, 31 L.Ed.2d 727.

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18. Requisites of justiciable controversy

U.S.—Pennsylvania v. New Jersey, 96 S.Ct. 2333, 426 U.S. 660, 49 L.Ed.2d 124—Maryland v. Louisiana, 101 S.Ct. 2114, 451 U.S. 725, 68 L.Ed.2d 576.

Existence of controversy

(8) Other matters.

U.S.—State of Ariz. v. State of Cal., Ariz. & Cal., 83 S.Ct. 1468, 373 U.S. 546, 10 L.Ed.2d 542, decree entered 84 S.Ct. 755, 376 U.S. 340, 11 L.Ed.2d 757, am. on oth. grds. 86 S.Ct. 924, 383 U.S. 268, 15 L.Ed.2d 743—Pennsylvania v. New Jersey, 96 S.Ct. 2333, 426 U.S. 660, 49 L.Ed.2d 124.

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22. Escheat of undisbursed money held by telegraph company

U.S.—W.U. Tel. Co. v. Com. of Pa., by Gottlieb, Pa., 82 S.Ct. 199, 368 U.S. 71, 7 L.Ed.2d 139.

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25. U.S.—Maryland v. Louisiana, 101 S.Ct. 2114, 451 U.S. 725, 68 L.Ed.2d 576.

31. Effect of voluntary submission to state court jurisdiction

N.J.—Com. of Pa. v. Kervick, 274 A.2d 626, 114 N.J.Super. 1, revd. on oth. grds. 288 A.2d 289, 60 N.J. 289.

32. U.S.—Nebraska v. Iowa, Iowa, 92 S.Ct. 1379, 406 U.S. 117, 31 L.Ed.2d 733—California v. Texas, 102 S.Ct. 2335, 457 U.S. 164, 72 L.Ed.2d 755, reh. den. 103 S.Ct. 14, 458 U.S. 1131, 73 L.Ed.2d 1401.

"States" does not include political subdivisions

U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

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35. U.S.—Pennsylvania v. New Jersey, 96 S.Ct. 2333, 426 U.S. 660, 49 L.Ed.2d 124.

36. U.S.—Hawaii v. Standard Oil Co. of Cal., Hawaii, 92 S.Ct. 885, 405 U.S. 251, 31 L.Ed.2d 184.

Interests sufficient to give original jurisdiction

(7) Other matters.

U.S.—State of Ariz. v. State of Cal., Ariz. & Cal., 83 S.Ct. 1468, 373 U.S. 546, 10 L.Ed.2d 542, decree entered 84 S.Ct. 755, 376 U.S. 340, 11 L.Ed.2d 757, am. on oth. grds. 86 S.Ct. 924, 383 U.S. 268, 15 L.Ed.2d 743.

Escheat of property

U.S.—State of Tex. v. State of N.J., 85 S.Ct. 626, 379 U.S. 674, 13 L.Ed.2d 596, op. supp. 85 S.Ct. 1136, 380 U.S. 518, 14 L.Ed.2d 49, motion den. 85 S.Ct. 1762, 381 U.S. 931, 14 L.Ed.2d 698, motion den. 85 S.Ct. 1795, 381 U.S. 948, 14 L.Ed.2d 723.

Intervention

U.S.—State of Tex. v. State of N.J., 85 S.Ct. 626, 379 U.S. 674, 13 L.Ed.2d 596, op. supp. 85 S.Ct. 1136, 380 U.S. 518, 14 L.Ed.2d 49, motion den. 85 S.Ct. 1762, 381 U.S. 931, 14 L.Ed.2d 698, motion den. 85 S.Ct. 1795, 381 U.S. 948, 14 L.Ed.2d 723.

37. U.S.—Pennsylvania v. New Jersey, 96 S.Ct. 2333, 426 U.S. 660, 49 L.Ed.2d 124.

Violation of Eleventh Amendment to Constitution

U.S.—Hawaii v. Standard Oil Co. of Cal., Hawaii, 92 S.Ct. 885, 405 U.S. 251, 31 L.Ed.2d 184.

The term "states" as used in the statute conferring on the Supreme Court exclusive jurisdiction of all controversies between two or more states does not include political subdivisions.[37.5]

37.5. U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

38. U.S.—Nebraska v. Iowa, Neb., 92 S.Ct. 1379, 409 U.S. 117, 31 L.Ed.2d 733—Ohio v. Kentucky, Ky., Ohio, 93 S.Ct. 1178, 410 U.S. 641, 35 L.Ed.2d 560—Vermont v. New York, N.Y., 94 S.Ct. 2248, 417 U.S. 270, 41 L.Ed.2d 61.

Action held not to involve state boundary dispute

U.S.—Uhlhorn v. U.S. Gypsum Co., C.A.Ark., 366 F.2d 211, cert. den. 87 S.Ct. 753, 385 U.S. 1026, 17 L.Ed.2d 674.

Adoption of consent decree as not "compact" requiring congressional consent

U.S.—New Hampshire v. Maine, 96 S.Ct. 2113, 426 U.S. 363, 48 L.Ed.2d 701.

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40. U.S.—Illinois v. City of Milwaukee, Wis, 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712—California v. Texas, 102 S.Ct. 2335, 457 U.S. 164, 72 L.Ed.2d 755, reh. den. 103 S.Ct. 14, 458 U.S. 1131, 73 L.Ed.2d 1401.

42. Temporary injunction denied

U.S.—State of Tex. v. State of N.J., 85 S.Ct. 626, 379 U.S. 674, 13 L.Ed.2d 596, op. supp. 85 S.Ct. 1136, 380 U.S. 518, 14 L.Ed.2d 49, motion den. 85 S.Ct. 1762, 381 U.S. 931, 14 L.Ed.2d 698, motion den. 85 S.Ct. 1795, 381 U.S. 948, 14 L.Ed.2d 723.

The United States Supreme Court has held that where the Illinois Director of Insurance as liquidator of a workmen's compensation insurer was a party to a case decided by the Supreme Court of Michigan and in which liability was imposed on the insurer's reinsurer, review of the Michigan decision should have been sought in that case by means of a petition for a writ of certiorari and it would deny the motion of the State of Illinois for leave to file a complaint against Michigan on the theory that a reciprocal treaty between Illinois and Michigan was violated by the decision.[42.5]

42.5. U.S.—Illinois v. Michigan, Ill., 93 S.Ct. 29, 409 U.S. 36, 34 L.Ed.2d 42.

45. U.S.—U.S. v. Alaska, Alaska, 95 S.Ct. 2240, 422 U.S. 184, 45 L.Ed.2d 109, on remand, C.A., 519 F.2d 1376, reh. den. 96 S.Ct. 159, 423 U.S. 885, 46 L.Ed.2d 116—California, ex rel., State Lands Com'n v. U.S., 102 S.Ct. 2432, 457 U.S. 273, 73 L.Ed.2d 1, reh. den. 103 S.Ct. 14, 458 U.S. 1131, 73 L.Ed.2d 1401.

U.S. v. State of Cal., C.A.Cal., 328 F.2d 729, cert. den. 85 S.Ct. 34, 379 U.S. 817, 13 L.Ed.2d 29.

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49. U.S.—California v. Arizona, 99 S.Ct. 919, 440 U.S. 59, 59 L.Ed.2d 144.

U.S. v. State of Cal., C.A.Cal., 328 F.2d 729, cert. den. 85 S.Ct. 34, 379 U.S. 817, 13 L.Ed.2d 29.

§ 195. Actions Affecting Ambassadors, Public Ministers, or Consuls

Library References

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51. Exclusiveness of jurisdiction

U.S.—Haddad v. U.S., C.A.Cal., 349 F.2d 511, cert. den. 86 S.Ct. 193, 382 U.S. 896, 15 L.Ed.2d 153.

Persons within rule

(3) U.S.—Haddad v. U.S., C.A.Cal., 349 F.2d 511, cert. den. 86 S.Ct. 193, 382 U.S. 896, 15 L.Ed.2d 153.

(5) Other matters.

U.S.—U.S. v. Melekh, D.C.Ill., 193 F.Supp. 586—U.S. ex rel. Casanova v. Fitzpatrick, D.C.N.Y., 214 F.Supp. 425.

Public minister; representation

U.S.—U.S. v. Melekh, D.C.Ill., 193 F.Supp. 586.

Action held not to "affect" consul

U.S.—Haddad v. U.S., C.A.Cal., 349 F.2d 511, cert. den. 86 S.Ct. 193, 382 U.S. 896, 15 L.Ed.2d 153.

§ 196. Issuance of Writs

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52. U.S.—Quinn v. Laird, Cal., 89 S.Ct. 1491, 23 L.Ed.2d 34.

Operation of statute

(2) U.S.—U.S. ex rel. State of Wisconsin v. First Federal Sav. and Loan Ass'n, C.A.Wis., 248 F.2d 804, cert. den. 78 S.Ct. 543, 355 U.S. 957, 2 L.Ed.2d 533.

State Committee to Stop Sanguine v. Laird, D.C. Wis., 317 F.Supp. 664.

Injunction

(5) A previously granted injunction may be continued.

U.S.—Metlakatla Indian Community, Annette Island Reserve v. Eagan, Alaska, 80 S.Ct. 1321, 363 U.S. 555, 4 L.Ed.2d 1397.

§ 198. Procedure in Exercise of Original Jurisdiction

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59. Postponement of decision to await initiation and completion of proceedings in district court

U.S.—Herndon, In re, Ala., 89 S.Ct. 1107, 394 U.S. 399, 22 L.Ed.2d 367.

63. U.S.—Ohio v. Kentucky, Ky., Ohio, 93 S.Ct. 1178, 410 U.S. 614, 35 L.Ed.2d 560.

66. U.S.—Ohio v. Kentucky, Ky., Ohio, 93 S.Ct. 1178, 410 U.S. 614, 35 L.Ed.2d 560.

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As a general matter, the Supreme Court may decline to entertain a complaint by a state against citizens of another state or country where, and only where, it can be said with assurance that declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and the reasons of practical wisdom that persuade the court that it is not an appropriate forum are consistent with the proposition that its discretion is legitimatized by its use to keep this aspect of the Court's function attuned with its other responsibilities.[70.25]

70.25. Exercise of sound discretion

U.S.—Ohio v. Wyandotte Chemicals Corp., Ohio, 91 S.Ct. 1005, 401 U.S. 493, 28 L.Ed.2d 256.

Transfer of case to district court not appropriate in absence of a statutory jurisdictional basis.

U.S.—Ohio v. Wyandotte Chemicals Corp., Ohio, 91 S.Ct. 1005, 401 U.S. 493, 28 L.Ed.2d 256.

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70.10. U.S.—Illinois v. City of Milwaukee, Wis., 92 S.Ct. 1385, 406 U.S. 91, 31 L.Ed.2d 712.

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92. Reference to master

(4) Other matters.

U.S.—State of Ariz. v. State of Cal., Ariz. & Cal., 83 S.Ct. 1468, 373 U.S. 546, 10 L.Ed.2d 542, decree entered 84 S.Ct. 755, 376 U.S. 340, 11 L.Ed.2d 757, am. on oth. grds. 86 S.Ct. 924, 383 U.S. 268, 15 L.Ed.2d 743—California v. Nevada, 100 S.Ct. 2064, 447 U.S. 125, 65 L.Ed.2d 1.

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9.10. Mutual accommodation and agreement, etc.

U.S.—State of Ariz. v. State of Cal., Ariz. & Cal , 83 S.Ct. 1468, 373 U.S. 546, 10 L.Ed.2d 542, decree entered 84 S.Ct. 755, 376 U.S. 340, 11 L.Ed.2d 757, am. on oth. grds. 86 S.Ct. 924, 383 U.S. 268, 15 L.Ed.2d 743.

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13. U.S.—Pennsylvania v. New York, 92 S.Ct. 2075, 407 U.S. 206, 32 L.Ed.2d 693, reh. den. 93 S.Ct. 91, 409 U.S. 897, 34 L.Ed.2d 155.

Supreme Court must exercise "judicial power" but not mere arbitration

U.S.—Vermont v. New York, N.Y., 94 S.Ct. 2248, 417 U.S. 270, 41 L.Ed.2d 61.

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14. U.S.—City of Greenwood, Miss. v. Peacock, Miss., 86 S.Ct. 1800, 384 U.S. 808, 16 L.Ed.2d 944.

U.S. ex rel. Lawrence v. Woods, C.A.Ill., 432 F.2d 1072, cert. den. 91 S.Ct. 1658, 402 U.S. 983, 29 L.Ed.2d 148.

Spindel v. Spindel, N.Y., 283 F.Supp. 797.

Intervention in pending state proceeding warranted only in extraordinary circumstances

U.S.—MTM, Inc. v. Baxley, Ala., 95 S.Ct. 1278, 420 U.S. 799, 43 L.Ed.2d 636, app. after remand, C.A., 523 F.2d 1255.

Grave constitutional overtones

U.S.—U.S. v. Hale, Dist.Col., 95 S.Ct. 2133, 422 U.S. 171, 45 L.Ed.2d 99.

15. Local ordinances treated as state statutes

U.S.—Doran v. Salem Inn, Inc., N.Y., 95 S.Ct. 2561, 422 U.S. 922, 45 L.Ed.2d 648.

16. U.S.—Brown Shoe Co. v. U.S., Mo., 82 S.Ct. 1502, 370 U.S. 294, 8 L.Ed.2d 510.

American Commuters Ass'n v. Levitt, C.A.N.Y., 405 F.2d 1148.

16.5. U.S.—Key v. Doyle, Dist.Col., 98 S.Ct. 280, 434 U.S. 59, 54 L.Ed.2d 238, reh. den. 98 S.Ct. 753, 434 U.S. 1025, 54 L.Ed.2d 773.

An associate justice of the United States Supreme Court, when acting in the capacity of a Circuit Justice, acts as a surrogate for the entire Court.[19.5]

19.5. U.S.—Holtzman v. Schlesinger, 94 S.Ct. 8, 414 U.S. 1316, 38 L.Ed.2d 28—Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n, Wis., 96 S.Ct. 1, 423 U.S. 1301, 46 L.Ed.2d 7.

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21. U.S.—Securities and Exchange Commission v. Medical Committee for Human Rights, Dist.Col., 92 S.Ct. 577, 404 U.S. 403, 30 L.Ed.2d 560.

22. As precluding release on personal recognizance

U.S.—Bandy v. U.S., 82 S.Ct. 11, 7 L.Ed.2d 9.

32. U.S.—Brown Shoe Co. v. U.S., Mo., 82 S.Ct. 1502, 370 U.S. 294, 8 L.Ed.2d 510.

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33. U.S.—Brown Shoe Co. v. U.S., Mo., 82 S.Ct. 1502, 370 U.S. 294, 8 L.Ed.2d 510.

33.5. U.S.—U.S. v. Payner, Ohio, 100 S.Ct. 2439, 447 U.S 727, 65 L.Ed.2d 468, reh. den. 101 S.Ct. 25, 448 U.S. 911, 65 L.Ed.2d 1172, on remand, C.A., 629 F.2d 1181.

D.C.—Smith v. Katzenbach, C.A., 351 F.2d 810, 122 U.S.App.D.C. 113.

Power to prescribe standards

U.S.—McNabb v. U.S., 63 S.Ct. 608, 318 U.S. 332, 87 L.Ed.2d 819, reh. den. 63 S.Ct. 1322, 319 U.S. 784, 87 L.Ed. 1727.

Mode of trial

U.S.—Fitzgerald v. U.S. Lines Co., N.Y., 83 S.Ct. 1646, 374 U.S. 16, 10 L.Ed.2d 720, reh. den. 84 S.Ct. 26, 375 U.S. 870, 11 L.Ed.2d 99.

Dealing directly with district court

U.S.—Schlagenhauf v. Holder, Ind., 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152.

The dynamics of constitutional interpretation do not compel the constant extension of every doctrine announced by the United States Supreme Court.[33.10]

33.10. U.S.—U.S. v. Mandujano, 96 S.Ct. 1768, 425 U.S. 564, 48 L.Ed.2d 212, on remand 539 F.2d 106.

33.50. U.S.—Divans v. California, Cal., 98 S.Ct. 1, 434 U.S. 1303, 54 L.Ed.2d 14—Mincey v. Arizona, Ariz., 98 S.Ct. 23, 434 U.S. 1343, 54 L.Ed.2d 56.

33.55. U.S.—Richmond v. Arizona, Ariz., 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, reh. den. 98 S.Ct. 537, 434 U.S. 976, 54 L.Ed.2d 469—Haner v. U.S., 99 S.Ct. 1485, 440 U.S. 1308, 59 L.Ed.2d 762.

34. U.S.—U.S. v Haley, Tex., 83 S.Ct. 11, 371 U.S. 18, 9 L.Ed.2d 1—Kerr v. U.S. Dist. Court for Northern Dist. of California, 96 S.Ct. 2119, 426 U.S. 394, 48 L.Ed.2d 725—General Atomic Co. v. Felter, 98 S.Ct. 1939, 436 U.S. 493, 56 L.Ed.2d 480.

34.5. U.S.—Chandler v. Judicial Council of Tenth Circuit of U.S., 90 S.Ct. 1648, 398 U.S. 74, 26 L.Ed.2d 100, reh. den. 90 S.Ct. 2248, 399 U.S. 937, 26 L.Ed.2d 809.

34.10. Stay of disclosure order denied

U.S.—Chamber of Commerce of U.S. v. Legal Aid Soc. of Alameda County, Cal., 96 S.Ct. 5, 423 U.S. 1309, 46 L.Ed.2d 14—Barthuli v. Board of Trustees of Jefferson Elementary School Dist., Cal., 98 S.Ct. 21, 434 U.S. 1337, 54 L.Ed.2d 52—Peeples v. Brown, 100 S.Ct. 381, 444 U.S. 1303, 62 L.Ed.2d 300.

Stay of judgment denied

U.S.—Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n, Wis., 96 S.Ct. 1, 423 U.S. 1301, 46 L.Ed.2d 7.

Stay of order denied

U.S.—Pacific Union Conference of Seventh-Day Adventists v. Marshall, Cal., 98 S.Ct. 2, 434 U.S. 1305, 54 L.Ed.2d 17—Beame v. Friends of the Earth, N.Y., 98 S.Ct. 4, 434 U.S. 1310, 54 L.Ed.2d 23—Commodity Futures Trading Commission v. British American Commodity Options, N.Y., 98 S.Ct. 10, 434 U.S. 1316, 54 L.Ed.2d 28—National Socialist Party of America v. Village of Skokie, Ill., 98 S.Ct. 14, 434 U.S. 1327, 54 L.Ed.2d 38—Marten v. Thies, 100 S.Ct. 1744, 446 U.S. 1320, 64 L.Ed.2d 491.

Stay of judgment granted

U.S.—Wise v. Lipscomb, Tex., 98 S.Ct. 15, 434 U.S. 1329, 54 L.Ed.2d 41, injunction den. 98 S.Ct. 424, 434 U.S. 935, 54 L.Ed.2d 295—New Motor Vehicle Bd. of California v. Orrin W. Fox Co., Cal., 98 S.Ct. 359, 434 U.S. 1345, 54 L.Ed.2d 439.

Stay by circuit justice

U.S.—Atiyeh v. Capps, Or., 101 S.Ct. 829, 449 U.S. 1312, 66 L.Ed.2d 785.

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37. U.S.—Stuart v. Wilson, C.A.Tex., 282 F.2d 539. Miller v. Smith, D.C.Pa., 236 F.Supp. 927.

Proper remedy

U.S.—Fiumara v. Texaco, Inc., D.C.Pa., 240 F.Supp. 325.

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41. U.S.—Wirtz v. Robert E. Bob Adair, Inc., D.C. Ark., 224 F.Supp. 750.

§ 201(2). —— Decisions Reviewable

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60. U.S.—U.S. v. Clark, 100 S.Ct. 895, 445 U.S. 23, 63 L.Ed.2d 171.

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47. Sufficiently final

U.S.—City of New Orleans v. Dukes, 96 S.Ct. 2513, 427 U.S. 297, 49 L.Ed.2d 511, on remand C.A., 537 F.2d 856.

Order denying summary judgment

U.S.—Pacific Union Conference of Seventh-Day Adventists v. Marshall, Cal., 98 S.Ct. 2, 434 U.S. 1305, 54 L.Ed.2d 17.

52. Pragmatic approach required

U.S.—Brown Shoe Co. v. U.S., Mo., 82 S.Ct. 1502, 370 U.S. 294, 8 L.Ed.2d 510—Cox Broadcasting Corp. v. Cohn, Ga., 95 S.Ct. 1029, 420 U.S. 469, 43 L.Ed.2d 328, on remand, Sup., 214 S.E.2d 530, 234 Ga. 67.

54. U.S.—Brown Shoe Co. v. U.S., Mo., 82 S.Ct. 1502, 370 U.S. 294, 8 L.Ed.2d 510.

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66. Reconsideration suspends finality of judgment

U.S.—Communist Party of Indiana v. Whitcomb, Ind., 94 S.Ct. 656, 414 U.S. 441, 38 L.Ed.2d 635, reh. den. 97 S.Ct. 1476, 415 U.S. 952, 29 L.Ed.2d 568.

68. Interventions

(2) U.S.—Sam Fox Pub. Co. v. U.S., N.Y., 81 S.Ct. 1309, 366 U.S. 683, 6 L.Ed.2d 604.

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34. U.S.—Swann v. Adams, Fla., 87 S.Ct. 569, 385 U.S. 440, 17 L.Ed.2d 501.

§ 201(4). —— Presentation and Reservation in Lower Court of Grounds of Review

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57. U.S.—Lucas v. Forty-Fourth General Assembly of State of Colo., Colo., 84 S.Ct. 1459, 377 U.S. 713, 12 L.Ed.2d 632, on remand, D.C., 232 F.Supp. 797, affd. 85 S.Ct. 715, 379 U.S. 693, 13 L.Ed.2d 699—U.S. v. Continental Can Co., N.Y., 84 S.Ct. 1738, 378 U.S. 441, 12 L.Ed.2d 953—U.S. v. Speers, U.S. Ohio, 86 S.Ct. 411, 382 U.S. 266, 15 L.Ed.2d 314.

O'Neill v. U.S., C.A.Pa., 411 F.2d 139, app. after remand 450 F.2d 1012.

D.C.—Founding Church of Scientology of Washington, D.C. v. U.S., C.A., 409 F.2d 1146, 133 U.S.App. D.C. 229, cert. den. 90 S.Ct. 434, 396 U.S. 963, 24 L.Ed.2d 427.

Jurisdictional question

U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

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81. U.S.—New York Times Co. v. Sullivan, Ala., 84 S.Ct. 710, 376 U.S. 254, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, motion den. 84 S.Ct. 1130, two cases, 376 U.S. 967, 12 L.Ed.2d 83.

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61. U.S.—Pittsburgh Towing Co. v. Mississippi Val. Barge Line Co., Mo., 87 S.Ct. 195, 385 U.S. 32, 17 L.Ed.2d 31, reh. den. 87 S.Ct. 594, 385 U.S. 995, 17 L.Ed.2d 455.

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33. Notice of appeal timely filed

U.S.—Burns v. Richardson, Hawaii, 86 S.Ct. 1286, 384 U.S. 73, 16 L.Ed.2d 376—Communist Party of Indiana v. Whitcomb, Inc., 94 S.Ct. 656, 414 U.S. 441, 38 L.Ed.2d 635, reh. den. 94 S.Ct. 1476, 415 U.S. 952, 39 L.Ed.2d 568.

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37. Timely docketing is not a jurisdictional requisite

U.S.—Communist Party of Indiana v. Whitcomb, Ind., 94 S.Ct. 656, 414 U.S. 441, 38 L.Ed.2d 635, reh. den. 94 S.Ct. 1476, 415 U.S. 952, 39 L.Ed.2d 568.

§ 201(7). —— Effect of Transfer of Cause or Proceedings Therefor

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58. U.S.—Pugach v. Dollinger, C.A.N.Y., 280 F.2d 521.

§ 201(8). —— Supersedeas or Stay of Proceedings; Injunction

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61. Ariz.—Peabody Coal Co. v. Navajo County, 572 P.2d 797, 117 Ariz. 335.

62. U.S.—Rosenblatt v. American Cyanamid Co., N.Y., 86 S.Ct. 1, 15 L.Ed.2d 39—Communist Party of Ind. v. Whitcomb, Ind., 93 S.Ct. 16, 409 U.S. 1235, 34 L.Ed.2d 64.

U.S.—Russo v. Byrne, 93 S.Ct. 21, 409 U.S. 1219, 34 L.Ed.2d 30.

62.5. U.S.—Whalen v. Roe, N.Y., 96 S.Ct. 164, 423 U.S. 1313, 46 L.Ed.2d 18—Williams v. Zbaraz, Ill., 99 S.Ct. 2095.

If an application for a stay presents frivolous questions it should be denied, but if it tenders a ruling out of harmony with prior decisions, or questions of transcending public importance or issues which would likely induce granting certiorari, a stay should be granted.[62.10]

62.10. U.S.—Russo v. Byrne, 93 S.Ct. 21, 409 U.S. 1219, 34 L.Ed.2d 30.

Where a death sentence had been in litigation for a long period of time with careful review by both state and federal courts and the United States Supreme Court a stay of execution will be denied, as necessary to put an end to the process of consideration and reconsideration.[62.15]

62.15. Full decade

U.S.—Sullivan v. Wainwright, Fla., 104 S.Ct. 450, 464 U.S. 109, 78 L.Ed.2d 210.

65. U.S.—McLeod v. General Elec. Co., 87 S.Ct. 5, 17 L.Ed.2d 45—Smith v. Ritchey, 89 S.Ct. 54, 21 L.Ed.2d 253—Karr v. Schmidt, Tex., 91 S.Ct. 592, 401 U.S. 1201, 27 L.Ed.2d 797—Haywood v. National Basketball Ass'n, Cal., 91 S.Ct. 672, 401 U.S. 1204, 28 L.Ed.2d 206—Connor v. Johnson, Miss., 91 S.Ct. 1760, 402 U.S. 690, 29 L.Ed.2d 268, on remand 330 F.Supp. 521, reh. den. 91 S.Ct. 2220, 403 U.S. 924, 29 L.Ed.2d 702, vac. on oth. grds. 92 S.Ct. 656, 404 U.S. 549, 30 L.Ed.2d 704—Republican State Central Committee of Arizona v. Ripon Soc. Inc, Dist.Col., 93 S.Ct. 1475, 409 U.S. 1222—Mori v. International Broth. of Boilermakers, Cal., 102 S.Ct. 1046, 454 U.S. 1301, 70 L.Ed.2d 370.

Stay effected by order noting probable jurisdiction

U.S.—Georgia v. U.S., Ga., 93 S.Ct. 1702, 411 U.S. 526, 36 L.Ed.2d 472.

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66. U.S.—Arrow Transp. Co. v. Southern Ry. Co., Ala., 83 S.Ct. 1, 9 L.Ed.2d 36—Yasa v. Esperdy, 80 S.Ct. 1366, 4 L.Ed.2d 1717—Katzenbach v. McClung, Ala., 85 S.Ct. 6, 13 L.Ed.2d 15.—American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., N.Y., 87 S.Ct. 1, 17 L.Ed.2d 37—Harris v. U.S., 91 S.Ct. 4, 400 U.S. 1211, 27 L.Ed.2d 30—Cousins v. Wigoda, Ill., 92 S.Ct. 2610, 409 U.S. 1201, 34 L.Ed.2d 15—O'Brien v. Brown, Dist.Col., 92 S.Ct. 2718, 409 U.S. 1, 34 L.Ed.2d 1—Cousins v. Wigoda, Ill., 95 S.Ct. 541, 419 U.S. 477, 42 L.Ed.2d 595—California v. Prysock, 101 S.Ct. 1773, 451 U.S. 1301, 68 L.Ed.2d 185—South Park Independent School Dist. v. U.S., Tex., 102 S.Ct. 1, 453 U.S. 1301, 69 L.Ed.2d 1007—Metropolitan County Bd. of Ed. v. Kelley, 102 S.Ct. 3, 453 U.S. 1306, 69 L.Ed.2d 1012—Graddick v. Newman, Ala., 102 S.Ct. 4, 453 U.S. 928, 69 L.Ed.2d 1025.

68. U.S.—Graves v. Barnes, Tex., 92 S.Ct. 752, 405 U.S. 1201, 30 L.Ed.2d 769.

69. U.S.—Russo v. U.S., 92 S.Ct. 4, 404 U.S. 1209, 30 L.Ed.2d 13—O'Brien v. Skinner, N.Y., 93 S.Ct. 79, 409 U.S. 1240, 34 L.Ed.2d 211—New York Times Co. v. Jascalevich, N.J., 99 S.Ct. 6, 439 U.S. 1317, 58 L.Ed.2d 25, reapplication den. 99 S.Ct. 11, 439 U.S. 1331, 58 L.Ed.2d 38.

69.5. U.S.—Owen v. Kennedy, Miss., 84 S.Ct. 12, 11 L.Ed.2d 18—Mahan v. Howell, Va., 92 S.Ct. 1, 404 U.S. 1201, 30 L.Ed.2d 5—Graves v. Barnes, Tex., 92 S.Ct. 752, 405 U.S. 1201, 30 L.Ed.2d 769—Coleman v. Paccar, Inc., 96 S.Ct. 845, 424 U.S. 1301, 47 L.Ed.2d 67—Kimble v. Swackhamer, Nev., 99 S.Ct. 51, 439 U.S. 1385, 58 L.Ed.2d 225.

69.10. U.S.—Oden v. Brittain, Ala., 90 S.Ct. 4, 396 U.S. 1210, 24 L.Ed.2d 32—Gomperts v. Chase, Cal., 92 S.Ct. 16, 404 U.S. 1237, 30 L.Ed.2d 30.

69.25. U.S.—Meredith v. Fair, Miss., 83 S.Ct. 10, 9 L.Ed.2d 43—Williams v. Rhodes, Ohio, 89 S.Ct. 1, 21 L.Ed.2d 69—Locks v. Commanding General, Sixth Army, 89 S.Ct. 31, 21 L.Ed.2d 78—Smith v. Ritchey, 89 S.Ct. 54, 21 L.Ed.2d 253—Winters v. U.S., N.Y., 89 S.Ct. 57, 21 L.Ed.2d 80—Noyd v. Bond, N.M., 89 S.Ct. 1876, 395 U.S. 683, 23 L.Ed.2d 631—Republican State General Committee of Arizona v. Ripon Soc. Inc., Dist.Col., 93 S.Ct. 1475, 409 U.S. 1222—Warm Springs Dam Task Force v. Gribble, 94 S.Ct. 2542, 417 U.S. 1301, 41 L.Ed.2d 654—National League of Cities v. Brennan, Dist.Col., 95 S.Ct. 532, 419 U.S. 1321, 42 L.Ed.2d 633, stay continued 95 S.Ct. 770, 419 U.S. 1100, 42 L.Ed.2d 797—Nebraska Press Ass'n v. Stuart, 96 S.Ct. 237, 423 U.S. 1319, 46 L.Ed.2d 199—Houchins v. KQED, Inc., Cal., 97 S.Ct. 773, 429 U.S. 1341, 50 L.Ed.2d 733—Marshall v. Barlow's Inc., Idaho, 97 S.Ct. 776, 429 U.S. 1347, 50 L.Ed.2d 739—Railway Labor Executives' Ass'n v. Gibsons, 100 S.Ct. 2668, 448 U.S. 1301, 65 L.Ed.2d 1094, reh. den. 100 S.Ct. 3057, 448 U.S. 909, 65 L.Ed.2d 1140—Schweiker v. McClure, Cal., 101 S.Ct. 2298, 452 U.S. 1301, 69 L.Ed.2d 381—Republican Nat. Committee v. Burton, Cal., 102 S.Ct. 1240, 455 U.S. 1301, 71 L.Ed.2d 632.

Matters relating to elections

U.S.—Davis v. Adams, Fla., 91 S.Ct. 1, 400 U.S. 1203, 27 L.Ed.2d 20—Fowler v. Adams, Fla., 91 S.Ct. 2, 400 U.S. 1205, 27 L.Ed.2d 23.

Partial stay granted

U.S.—Times-Picayune Pub. Corp. v. Schulingkamp, La., 95 S.Ct. 1, 419 U.S. 1301, 42 L.Ed.2d 17.

Stay denied

U.S.—Spenkelink v. Wainwright, Fla., 99 S.Ct. 2091, 442 U.S. 1301, 60 L.Ed.2d 649—White v. Florida, Fla., 103 S.Ct. 1, 458 U.S. 1301, 73 L.Ed.2d 1385—Claiborne v. U.S., Nev., 104 S.Ct. 1401, 465 U.S. 1305, 79 L.Ed.2d 665.

Standards governing grant or stay application by single justice stated

U.S.—Williams v. Zbaraz, Ill., 99 S.Ct. 2095.

69.30. U.S.—Williams v. Rhodes, Ohio, 89 S.Ct. 1, 21 L.Ed.2d 69—Whalen v. Roe, N.Y., 96 S.Ct. 164, 423 U.S. 1313, 46 L.Ed.2d 18—National Broadcasting Co., Inc. v. Niemi, 98 S.Ct. 705, 434 U.S. 1354, 54 L.Ed.2d 742.

Stay denied

U.S.—O'Rourke v. Levine, 80 S.Ct. 623, 4 L.Ed.2d 615—U.S. v. FMC Corp., Cal., 84 S.Ct. 4, 11 L.Ed.2d 20—Board of School Com'rs of Mobile County v. Davis, Ala., 84 S.Ct. 10, 11 L.Ed.2d 26—Heart of Atlanta Motel, Inc. v. U.S., Ga., 85 S.Ct. 1, 13 L.Ed.2d 12—Wasmuth v. Allen, 85 S.Ct. 5, 13 L.Ed.2d 10—Public Service Bd. of State of Vt. v. U.S., Vt., 87 S.Ct. 3, 17 L.Ed.2d 41—Birtcher Corp. v. Diapulse Corp. of America, N.Y., 87 S.Ct. 6, 17 L.Ed.2d 43—Socialist Labor Party v. Rhodes, Ohio, 89 S.Ct. 3, 21 L.Ed.2d 72—Socialist Labor Party v. Rhodes, Ohio, 89 S.Ct. 4, 21 L.Ed.2d 74—Drifka v. Brainard, 89 S.Ct. 434, 21 L.Ed.2d 427—Parisi v. Davidson, Cal., 90 S.Ct. 497, 396 U.S. 1233, 24 L.Ed.2d 482—U.S. v. Edgar, Tex., 92 S.Ct. 8, 404 U.S. 1206, 30 L.Ed.2d 10—Dandridge v. Jefferson Parish School Bd., La., 92 S.Ct. 18, 404 U.S. 1219, 30 L.Ed.2d 23—Warm Springs Dam Task Force v. Gribble, Cal., 99 S.Ct. 54, 439 U.S. 1392, 58 L.Ed.2d 229—Synanon Foundation, Inc. v. California, Cal., 100 S.Ct. 496, 444 U.S. 1307, 62 L.Ed.2d 454—Corsetti v. Mass., Mass., 103 S.Ct. 3, 458 U.S. 1306, 73 L.Ed.2d 1391.

Stay reinstated

U.S.—Corpus Christi Independent School Dist. v. Cisneros, Tex., 92 S.Ct. 9, 404 U.S. 1211, 30 L.Ed.2d 15.

Only portion of judgment directing retroactive lump sum payments stayed

U.S.—Edelman v. Jordan, Ill., 94 S.Ct. 13, 414 U.S. 1301, 38 L.Ed.2d 15.

Standards governing grant of stay application by single justice stated

U.S.—Times-Picayune Pub. Corp. v. Schulingkamp, La., 95 S.Ct. 1, 419 U.S. 1301, 42 L.Ed.2d 17—City of Boston v. Anderson, Mass., 99 S.Ct. 50, 439 U.S. 1389, 58 L.Ed.2d 222, stay den. 99 S.Ct. 346, 439 U.S. 951, 58 L.Ed.2d 342.

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Supervisory powers of court not possessed by individual justice

U.S.—Ehrlichman v. Sirica, Dist.Col., 95 S.Ct. 6, 419 U.S. 1310, 42 L.Ed.2d 25.

Stay continued

U.S.—Reproductive Services, Inc. v. Walker, Tex., 99 S.Ct. 1, 439 U.S. 1307, 1354, 58 L.Ed.2d 16, 61.

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73. Amount held sufficient

U.S.—Arrow Transp. Co. v. Southern Ry. Co, Ala., 83 S.Ct. 1, 9 L.Ed.2d 36.

79. U.S.—Meredith v. Fair, Miss., 83 S.Ct. 10, 9 L.Ed.2d 43.

A justice of the Supreme Court, sitting as a single circuit justice, has power to dissolve a stay of a district court order issued by the court of appeals.[79.5]

79.5. U.S.—Postker v. Goldberg, 101 S.Ct. 1, 448 U.S. 1306, 65 L.Ed.2d 1098—In re Roche, 101 S.Ct. 4, 448 U.S. 1312, 65 L.Ed.2d 1103—McDaniel v. Sanchez, Tex., 101 S.Ct. 7, 448 U.S 1318, 65 L.Ed.2d 1142—Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas, 101 S.Ct. 12, 448 U.S. 1327, 65 L.Ed.2d 1151—Moore v. Brown, 101 S.Ct. 16, 448 U.S. 1335, 65 L.Ed.2d 1158—Gregory-Portland Independent School Dist. v. U.S., 101 S.Ct. 20, 448 U.S. 1342, 65 L.Ed.2d 1164.

Exercised with greatest caution

U.S.—Holtzman v. Schlesinger, 94 S.Ct. 8, 414 U.S. 1316, 38 L.Ed.2d 28.

Stay vacated on grounds of unconstitutionality

U.S.—Holtzman v. Schlesinger, 94 S.Ct. 8, 414 U.S. 1316, 38 L.Ed.2d 28.

Authority of full Court not broader

U.S.—Coleman v. Paccar, Inc., 96 S.Ct. 845, 424 U.S. 1301, 47 L.Ed.2d 67.

Applicant has burden of showing probable success

U.S.—Coleman v. Paccar, Inc., 96 S.Ct. 845, 424 U.S. 1301, 47 L.Ed.2d 67.

When jurisdiction exercised

U.S.—Coleman v. Paccar, Inc., 96 S.Ct. 845, 424 U.S. 1301, 47 L.Ed.2d 67.

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28. U.S.—Curtis Pub. Co. v. Butts, Ga. & Tex., 87 S.Ct. 1975, 388 U.S. 130, 18 L.Ed.2d 1094, conf. to, App., 418 S.W.2d 379, reh. den. 88 S.Ct. 11, 389 U.S. 889, 19 L.Ed.2d 197, reh. den. 88 S.Ct. 13, 389 U.S. 889, 19 L.Ed.2d 198, err. ref., cert. den. 88 S.Ct. 2036, 391 U.S. 966, 20 L.Ed.2d 880.

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50. Determination on merits

U.S.—New York Tel. Co. v. New York State Dept. of Labor, D.C.N.Y., 434 F.Supp. 810, revd. C.A., 566 F.2d 388, affd. 99 S.Ct. 1328, 440 U.S. 519, 59 L.Ed.2d 553.

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51. U.S.—Utah Public Service Commission v. El Paso Natural Gas Co., Utah, 89 S.Ct. 1860, 395 U.S. 464, 23 L.Ed.2d 474, reh. den. 90 S.Ct. 2235, 399 U.S. 937, 26 L.Ed.2d 809, on remand 358 F.Supp. 820, affd. in part, app. dism. in part, 93 S.Ct. 1439, 410 U.S. 962, 35 L.Ed.2d 697, affd. 93 S.Ct. 1440, three cases, 410 U.S. 962, 35 L.Ed.2d 697.

However there is an exception where the dismissal implicates a mandate the Supreme Court has entered in a cause.[52.5]

52.5. U.S.—Utah Public Service Commission v. El Paso Natural Gas Co., Utah, 89 S.Ct. 1860, 395 U.S. 464, 23 L.Ed.2d 474, reh. den. 90 S.Ct. 2225, 399 U.S. 937, 26 L.Ed.2d 809, on remand 358 F.Supp. 820, affd. in part, app. dism. in part, 93 S.Ct. 1439, 410 U.S. 962, 35 L.Ed.2d 697, affd. 93 S.Ct. 1440, three cases, 410 U.S. 962, 35 L.Ed.2d 697.

55. U.S.—Whitcomb v. Chavis, Ind., 91 S.Ct. 1858, 403 U.S. 124, 29 L.Ed.2d 363, on remand 57 F.R.D. 32.

58. U.S.—Virginians for Dulles v. Volpe, C.A.Va., 541 F.2d 442.

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60. Question held not moot

U.S.—Division 1287 of Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America v. State of Mo., Mo., 83 S.Ct. 1657, 374 U.S. 74, 10 L.Ed.2d 763, reh. den. 84 S.Ct. 29, 375 U.S. 870, 11 L.Ed.2d 100.

§ 201(12). —— Hearing and Rehearing; Advancing Cause

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82. U.S.—In re Permian Basin Area Rate Cases, N.M., 88 S.Ct. 1344, 390 U.S. 747, 20 L.Ed.2d 312, reh. den. 88 S.Ct. 2050, 393 U.S. 917, 20 L.Ed.2d 1379.

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88. Inexcusable failure to raise contention

U.S.—Carr v. F.T.C., C.A., 302 F.2d 688.

§ 201(13). —— Review

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96. U.S.—Polar Ice Cream & Creamery Co. v. Andrews, Fla., 84 S.Ct. 378, 375 U.S. 361, 11 L.Ed.2d 389—Bircher Corp. v. Diapulse Corp. of America, N.Y., 87 S.Ct. 6, 17 L.Ed.2d 43.

97. U.S.—Local No. 8-6, Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Missouri, Mo., 80 S.Ct. 391, 361 U.S. 363, 4 L.Ed.2d 373—North Carolina v. Rice, N.C., 92 S.Ct. 402, 404 U.S. 244, 30 L.Ed.2d 413.

Cause on questions held not moot

U.S.—Keyishian v. Board of Regents of University of State of N.Y., N.Y., 87 S.Ct., 675, 385 U.S. 589, 17 L.Ed.2d 629—Edgar v. Mite Corp., Ill., 102 S.Ct. 2629, 457 U.S. 624, 73 L.Ed.2d 269—Nixon v. Fitzgerald, Dist.Col., 102 S.Ct. 2690.

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11. U.S.—U.S. v. Carlo Bianchi & Co., Ct.Cl., 83 S.Ct. 1409, 373 U.S. 709, 10 L.Ed.2d 652.

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13.10. U.S.—U.S. v. Raines, Ga., 80 S.Ct. 519, 362 U.S. 17, 4 L.Ed.2d 524.

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51. Pleading

(4) U.S.—U.S. v. Mississippi, Miss., 85 S.Ct. 808, 380 U.S. 128, 13 L.Ed.2d 717, on remand, D.C., 256 F.Supp. 344.

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55. Intervention

U.S.—National Ass'n for Advancement of Colored People v. New York, Dist.Col., 93 S.Ct. 2591, 413 U.S. 345, 37 L.Ed.2d 648.

58. U.S.—Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., Tex., 80 S.Ct. 1326, 363 U.S. 528, 4 L.Ed.2d 1379, reh. den. 81 S.Ct. 31, 364 U.S. 854, 5 L.Ed.2d 78.

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64. U.S.—Salem v. U.S. Lines Co., N.Y., 82 S.Ct. 1119, 370 U.S. 31, 8 L.Ed.2d 313, reh. den. 82 S.Ct. 1578, 370 U.S. 965, 8 L.Ed.2d 834, on remand, 304 F.2d 672.

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82. U.S.—Dennis v. Denver & R.G.W.R. Co., Utah, 84 S.Ct. 291, 375 U.S. 208, 11 L.Ed.2d 256.

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86. U.S.—Dennis v. Denver & R.G.W.R. Co., Utah, 84 S.Ct. 291, 375 U.S. 208, 11 L.Ed.2d 256.

88. Jury prejudice

U.S.—Curtis Pub. Co. v. Butts, Ga. & Tex., 87 S.Ct. 1975, 388 U.S. 130, 18 L.Ed.2d 1094, conf. to, App., 418 S.W.2d 379, reh. den. 88 S.Ct. 11, 389 U.S. 889, 19 L.Ed.2d 197, reh. den. 88 S.Ct. 13, 389 U.S. 889, 19 L.Ed.2d 198, err. ref., cert. den. 88 S.Ct. 2036, 391 U.S. 966, 20 L.Ed.2d 880.

94. U.S.—Sentilles v. Inter-Caribbean Shipping Corp., Fla., 80 S.Ct. 173, 361 U.S. 107, 4 L.Ed.2d 142.

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95. U.S.—Irvin v. Dowd, Ind., 81 S.Ct. 1639, 366 U.S. 717, 6 L.Ed.2d 751.

98. When finding "clearly erroneous"

U.S.—C. I. R. v. Duberstein, N.Y., 80 S.Ct. 1190, 363 U.S. 278, 4 L.Ed.2d 1218. Conf. to, C.A., 283 F.2d 949.

2. U.S.—Guzman v. Pichirilo, Puerto Rico, 82 S.Ct. 1095, 369 U.S. 698, 8 L.Ed.2d 205.

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Errors of lower courts with respect to various other matters have been held to be prejudicial.[31.5]

31.5. Cross-examination

U.S.—Pierson v. Ray, Miss., 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288.

32. U.S.—Mercer v. Theriot, La., 84 S.Ct. 1157, 377 U.S. 152, 12 L.Ed.2d 206, reh. den. 84 S.Ct. 1643, 377 U.S. 973, 12 L.Ed.2d 743.

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56. U.S.—Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., Cal., 82 S.Ct. 1130, 370 U.S. 19, 8 L.Ed.2d 305, reh. den. 82 S.Ct. 1577, 370 U.S. 965, 8 L.Ed.2d 834—Continental Ore Co. v. Union Carbide & Carbon Corp., Cal., 82 S.Ct. 1404, 370 U.S. 690, 8 L.Ed.2d 777.

57. U.S.—Henry v. Collins, Miss., 85 S.Ct. 992, 360 U.S. 356, 13 L.Ed.2d 892, on remand, Sup., 176 So.2d 891, 253 Miss. 62, and 176 So.2d 891, 253 Miss. 34.

59. Failure to instruct held prejudicial

U.S.—United Mine Workers of America v. Pennington, Tenn., 85 S.Ct. 1585, 381 U.S. 657, 14 L.Ed.2d 626, on remand, D.C., 257 F.Supp. 815, affd. in part, revd. in part on oth. grds., C.A., 400 F.2d 806, cert. den. 89 S.Ct. 450, 393 U.S. 983, 21 L.Ed.2d 444, reh. den. 89 S.Ct. 616, 393 U.S. 1045, 21 L.Ed.2d

599, app. after remand 421 F.2d 1380, cert. den. 90 S.Ct. 2177, 398 U.S. 960, 26 L.Ed.2d 546.

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66. U.S.—Adickes v. S. H. Kress & Co., N.Y., 90 S.Ct. 1598, 398 U.S 144, 26 L.Ed.2d 142.

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73. U.S.—Communist Party of U.S. v. Subversive Activities Control Bd., App.D.C., 81 S.Ct. 1357, 367 U.S. 1, 6 L.Ed.2d 625, reh. den. 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72.

§ 201(14). —— Determination and Disposition of Cause

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75. Stay of execution

Although two Justices had denied application for stay of execution of condemned prisoner, in view of Court of Appeals divided vote on whether to grant certificate of probable cause for appeal from denial of habeas corpus by federal district court, in view of irrevocable nature of penalty being imposed, and in view of ability of full court to consider case within 36 hours at regular conference, application for stay until further action by entire court would be granted.

U.S.—Spinkellink v. Wainwright, Fla., 99 S.Ct. 2095.

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79. U.S.—Mitchell v. Robert De Mario Jewelry, Inc., Ga., 80 S.Ct. 332, 361 U.S. 288, 4 L.Ed.2d 323—Florida Lime & Avocado Growers, Inc. v. Paul, Cal., 83 S.Ct. 1210, 373 U.S. 132, 929, 10 L.Ed.2d 248, reh. den. 83 S.Ct. 1861, 374 U.S. 858, 10 L.Ed.2d 1082—Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., Ill., 86 S.Ct. 347, 382 U.S. 172, 15 L.Ed.2d 247—Abbott Laboratories v. Gardner, Del., 87 S.Ct. 1507, 387 U.S. 136, 18 L.Ed.2d 681.

Remand improper

(3) Where a point is clear Supreme court will decide issue itself rather than remand to Court of Appeals.

U.S.—Levin v. Mississippi River Fuel Corp., Mo., 87 S.Ct. 927, 386 U.S. 162, 17 L.Ed.2d 834—City of New Orleans v. Dukes, 96 S.Ct. 2513, 427 U.S. 297, 49 L.Ed.2d 511, on remand C.A., 537 F.2d 856.

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80. U.S.—U.S. v. State of Ala., Ala., 80 S.Ct. 924, 362 U.S. 602, 4 L.Ed.2d 982, reh. den. 80 S.Ct. 1608, 363 U.S. 857, 4 L.Ed.2d 1739.

Effect of change in law stated

U.S.—Linkletter v. Walker, La., 85 S.Ct. 1731, 381 U.S. 618, 14 L.Ed.2d 601.

82. Divided court

(1) U.S.—Lewis v. Benedict Coal Corp., Tenn., 80 S.Ct. 489, 361 U.S. 459, 4 L.Ed.2d 442.

U.S. v. Doe, D.C.N.Y., 321 F.Supp. 10.

83. U.S.—United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc., N.C., 86 S.Ct. 272, 382 U.S. 145, 15 L.Ed.2d 217.

Chief Freight Lines Co. v. U.S., D.C.Mo., 230 F.Supp. 79.

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85. U.S.—Illinois State Bd. of Elections v. Socialist Workers Party, Ill., 99 S.Ct. 983, 440 U.S. 173, 59 L.Ed.2d 230.

88.5. U.S.—Reynolds v. Sims, Als., 84 S.Ct. 1362, 377 U.S. 533, 12 L.Ed.2d 506, reh. den. 85 S.Ct. 12, 379 U.S. 870, 13 L.Ed.2d 76, and 85 S.Ct. 13, two cases, 379 U.S. 871, 13 L.Ed.2d 76, 77—Davis v. Mann, Va., 84 S.Ct. 1441, 377 U.S. 678, 12 L.Ed.2d 609, on remand, D.C., 238 F.Supp. 458, affd. 85 S.Ct. 713, 379 U.S. 694, 13 L.Ed.2d 698—Gillespie v. U.S. Steel Corp, Ohio, 85 S.Ct. 308, 379 U.S. 148, 13 L.Ed.2d 199.

Butterworth v Dempsey, D.C.Conn., 237 F.Supp. 302.

90. U.S.—United Mine Workers of America v. Gibbs, Tenn., 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed.2d 218.

Vacating decision

(2) Remanded for consideration of jurisdiction under federal question statute and for reconsideration of judgment in light of recent Supreme Court decisions.

U.S.—City of Kenosha, Wis. v. Bruno, Wis., 93 S.Ct. 2222, 412 U.S. 507, 37 L.Ed.2d 109.

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91. Reversal without considering merits

(1) In general.

U.S.—U S v. Corrick, Ill., 56 S.Ct. 829, 298 U.S. 435, 80 L.Ed.2d 1263, reh. den. 56 S.Ct. 951, 298 U.S. 692, 80 L.Ed. 1409—Great Southern Fireproof Hotel Co. v. Jones, Ohio, 20 S.Ct. 690, 177 U.S. 449, 44 L.Ed. 482.

(2) Even where the error is assigned by the party at whose instance it was committed merits will not be considered.

U.S.—Chicago, B. & Q.R. Co. v. Willard, Ill., 31 S.Ct. 460, 220 U.S. 413, 55 L.Ed. 521—Ayers v. Watson, Tex., 5 S.Ct. 641, 113 U.S. 594, 28 L.Ed. 1093—Mansfield, C. & L.M.R Co. v. Swan, Ohio, 4 S.Ct. 510, 111 U.S. 379, 28 L.Ed. 462—Capron v. Van Noorden, N.C., 6 U.S. 126, 2 Cranch 126, 2 L.Ed. 229.

25 C.J. p 784 note 58.

25 C.J. p 785 note 62[a].

(3) Even where neither party raised question below, reversal without considering merits if proper.

U.S.—U.S. v. Corrick, Ill., 56 S.Ct. 829, 298 U.S. 435, 80 L.Ed. 1263, reh. den. 56 S.Ct. 951, 298 U.S. 692, 80 L.Ed. 1409.

(4) Even though both parties express willingness to ignore defect, merits will not be considered.

U.S.—Jackson v. Ashton, Pa., 33 U.S. 148, 8 Pet. 148, 8 L.Ed. 898.

Merits considered under particular circumstances

U.S.—Grace v. American Cent. Ins. Co., N.Y., 3 S.Ct. 207, 109 U.S. 278, 27 L.Ed. 932.

95. U.S.—U.S. v. El Paso Natural Gas Co., Utah, 84 S.Ct. 1044, 376 U.S. 651, 12 L.Ed.2d 12.

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98. U.S.—Rayonier, Inc. v. U.S., Wash., 77 S.Ct. 374, 352 U.S. 315, 1 L.Ed.2d 354—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440—WMCA, Inc. v. Lomenzo, N.Y., 84 S.Ct. 1418, 377 U.S. 633, 12 L.Ed.2d 568—Lucas v. Forty-Fourth General Assembly of State of Colo., Colo., 84 S.Ct. 1459, 377 U.S. 713, 12 L.Ed.2d 632, on remand, D.C., 232 F.Supp. 797, affd. 85 S.Ct. 715, 379 U.S. 693, 13 L.Ed.2d 699—Scott v. Germano, Ill., 85 S.Ct. 1525, 381 U.S. 407, 14 L.Ed.2d 477—Rosenblatt v. Baer, N.H., 86 S.Ct. 669, 383 U.S. 75, 15 L.Ed.2d 597—Malat v. Riddell, Cal., 86 S.Ct. 1030, 383 U.S. 569, 16 L.Ed.2d 102.

99. U.S.—Wesberry v. Sanders, Ga., 84 S.Ct. 526, 376 U.S. 1, 11 L.Ed.2d 481.

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6.5. Reversal for want of jurisdiction

(1) Without prejudice.

U.S.—Willamette Iron Bridge Co. v. Hatch, Or., 8 S.Ct. 811, 125 U.S. 1, 31 L.Ed. 629.

(2) Where jurisdiction not affirmatively shown on record.

U.S.—U.S. v. Corrick, Ill., 56 S.Ct. 829, 298 U.S. 435, 80 L.Ed. 1263, reh. den. 56 S.Ct. 951, 298 U.S. 692, 80 L.Ed. 1409—McCormick v. Sullivant, Ohio, 23 U.S. 192, 10 Wheat. 192, 6 L.Ed. 300—Kempe's Lessee v. Kennedy, N.J., 9 U.S. 173, 5 Cranch 173, 3 L.Ed. 70—McNutt v. McHenry Chevrolet Co., Ind., 56 S.Ct. 785, 298 U.S. 190, 80 L.Ed. 1141—McNutt v. General Motors Acceptance Corporation of Indiana, Ind., 56 S.Ct. 780, 298 U.S. 178, 80 L.Ed. 1135.

7. Manner and terms of amendment

(2) Other matters.

D.C.—Spevack v. Strauss, C.A., 257 F.2d 208, 103 U.S.App.D.C. 204, cause remanded 79 S.Ct. 721, 359 U.S. 115, 3 L.Ed.2d 673.

10. U.S.—Florida Lime & Avocado Growers, Inc. v. Paul, Cal., 83 S.Ct. 1210, 373 U.S. 132, 929, 10 L.Ed.2d 248, reh. den. 83 S.Ct. 1861, 374 U.S. 858, 10 L.Ed.2d 1082—Linn v. United Plant Guard Workers of America, Local 114, Mich., 86 S.Ct. 657, 383 U.S. 53, 15 L.Ed.2d 582—Accardi v. Pennsylvania R. Co., N.Y., 86 S.Ct. 768, 383 U.S. 225, 15 L.Ed.2d 717, on remand, C.A., 369 F.2d 805—McLeod v. General Elec. Co., N.Y., 87 S.Ct. 637, 385 U.S. 533, 17 L.Ed.2d 588—Dandridge v. Williams, Md., 90 S.Ct. 1153, 397 U.S. 471, 25 L.Ed.2d 491, reh. den. 90 S.Ct. 1684, 398 U.S. 914, 26 L.Ed.2d 80.

Retention of jurisdiction to give state opportunity to comply with federal statute

U.S.—Rosado v. Wyman, N.Y., 90 S.Ct. 1207, 397 U.S. 397, 25 L.Ed.2d 442, on remand, D.C., 322 F.Supp. 1173, affd., C.A., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

11. Only Supreme Court has authority to alter or modify mandate

U.S.—Cascade Natural Gas Corp. v. El Paso Natural Gas Co., Utah, 87 S.Ct. 932, 386 U.S. 129, 17 L.Ed.2d 814, on remand 291 F.Supp. 3, vac. on oth. grds. 89 S.Ct. 1860, 395 U.S. 464, 23 L.Ed.2d 474, reh. den. 90 S.Ct. 2225, 399 U.S. 937, 26 L.Ed.2d 809, on remand 358 F.Supp. 820, affd. in part, app. dism. in part, 93 S.Ct. 1439, 410 U.S. 962, 35 L.Ed.2d 697, affd. 93 S.Ct. 1440, three cases, 410 U.S. 962, 35 L.Ed.2d 697.

Equitable discretion to fashion remedy

U.S.—Reynolds v. State Election Bd., D.C.Okl., 233 F.Supp. 323.

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12. U.S.—U.S. v. Wintner, D.C.Ohio, 247 F.Supp. 47.

Part of district court decision not reversed by Supreme Court

U.S.—U.S. v. First Nat. Bank & Trust Co. of Lexington, D.C.Ky., 263 F.Supp. 268.

13. U.S.—Brown v. Board of Ed. of Topeka, Kan., Del., Kan., S.C., & Va., 75 S.Ct. 753, 349 U.S. 294, 99 L.Ed. 1083.

La.—C.J.S. cited in State v. Anderson, 255 So.2d 348, 350, 260 La. 113.

Vacation or modification of judgment

(3) Other matters.

U.S.—Maddrix v. Dize, C.C.A.Md., 153 F.2d 274.

International Ry. Co. v. Davidson, D.C.N.Y., 65 F.Supp. 58.

No authority of attorney general to circumscribe authority of district court to see that mandate carried out

U.S.—Cascade Natural Gas Corp. v. El Paso Natural Gas Co., Utah, 87 S.Ct. 932, 386 U.S. 129, 17 L.Ed.2d 814. On remand 291 F.Supp. 3, vac. on oth. grds. 89 S.Ct. 1860, 395 U.S. 464, 23 L.Ed.2d 474, reh. den. 90 S.Ct. 2225, 399 U.S. 937, 26 L.Ed.2d 809, on remand 358 F.Supp. 820, affd. in part, app. dism. in part, 93 S.Ct. 1439, 410 U.S. 962, 35 L.Ed.2d 697, affd. 93 S.Ct. 1440, three cases, 410 U.S. 962, 35 L.Ed.2d 697.

14.5. U.S.—Moody v. Gallion, D.C.Ala., 286 F.Supp. 653.

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22. U.S.—U.S. v. E. I. Du Pont De Nemours & Co., Ill., 81 S.Ct. 1243, 366 U.S. 316, 6 L.Ed.2d 318, modification den. 81 S.Ct. 1913, 366 U.S. 956, 6 L.Ed.2d 1251.

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28. U.S.—U.S. v. Barnett, C.A.Miss., 330 F.2d 369, cert. ques. ans. 84 S.Ct. 984, 376 U.S. 681, 12 L.Ed.2d 23, reh. den. 84 S.Ct. 1642, 377 U.S. 973, 12 L.Ed.2d 742.

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37.5. U.S.—U.S. v. Barnett, Miss., 84 S.Ct. 984, 376 U.S. 681, 12 L.Ed.2d 23, reh. den. 84 S.Ct. 1642, 377 U.S. 973, 12 L.Ed.2d 742.

41. U.S.—Whitlock's Estate v. C. I. R., C.A., 547 F.2d 506, stayed den. 97 S.Ct. 803, 429 U.S. 1069, 50 L.Ed.2d 787, cert. den. 97 S.Ct. 1329, 430 U.S. 916, 51 L.Ed.2d 594.

43.5. 28 U.S.C.A. § 1255, was repealed in 1982.

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55. U.S.—G. D. Searle & Co. v. Cohn, N.J., 102 S.Ct. 1137, 455 U.S. 404, 71 L.Ed.2d 250, on remand, C.A., 677 F.2d 301, on remand 598 F.Supp. 965.

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66. Inapplicable to Puerto Rican statute

U.S.—Fornaris v. Ridge Tool Co., 91 S.Ct. 156, 400 U.S. 41, 27 L.Ed.2d 174.

67. U.S.—United Gas Pipe Line Co. v. Ideal Cement Co., Ala., 82 S.Ct. 676, 369 U.S. 134, 7 L.Ed.2d 623—Leroy v. Great Western United Corp., Tex., 99 S.Ct. 2710, 443 U.S. 173, 61 L.Ed.2d 464, on remand C.A., 602 F.2d 1246.

Appeals held proper

(1) U.S.—Dutton v. Evans, 91 S.Ct. 210, 400 U.S. 74, 27 L.Ed.2d 213, on remand 441 F.2d 657.

Decision merely applying state law

(3) Application of state constitution.

U.S.—City of Mesquite v. Aladdin's Castle, Inc., Tex., 102 S.Ct. 1070, 455 U.S. 283, 71 L.Ed.2d 152, on remand 713 F.2d 137, reh. den. 718 F.2d 1097, motion to recall den. 104 S.Ct. 329, 464 U.S. 927, 78 L.Ed.2d 300.

(4) Where exercise of authority under state law invalidated without reference to state statute.

U.S.—Silkwood v. Kerr-McGee Corp., Okl., 104 S.Ct. 615, 464 U.S. 238, 78 L.Ed.2d 443, reh. den. 104 S.Ct. 1430, 465 U.S. 1074, 79 L.Ed.2d 754, on remand 769 F.2d 1451.

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68. U.S.—California Medical Ass'n v. Federal Election Commission, Cal., 101 S.Ct. 2712, 453 U.S. 182, 69 L.Ed.2d 567.

From interlocutory or final order

U.S.—Parker v. Levy, Pa., 94 S.Ct. 2547, 417 U.S. 733, 41 L.Ed.2d 439.

69. U.S.—Tully v. Mobil Oil Corp., 102 S.Ct. 1047, 455 U.S. 245, 71 L.Ed.2d 120, on remand, Em. App., 689 F.2d 186.

Unauthorized appeal treated as petition for certiorari

U.S.—Fornaris v. Ridge Tool Co., 91 S.Ct. 156, 400 U.S. 41, 27 L.Ed.2d 174.

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93. U.S.—Odom v. U.S., 91 S.Ct. 112, 400 U.S. 23, 27 L.Ed.2d 122, reh. den. 91 S.Ct. 363, 400 U.S. 984, 27 L.Ed.2d 396—Butz v. Glover Livestock Commission Co., Inc., 93 S.Ct. 1455, 411 U.S. 182, 36 L.Ed.2d 142, reh. den. 93 S.Ct. 2746, 412 U.S. 933, 37 L.Ed.2d 162.

Pettway v. American Cast Iron Pipe Co., C.A. Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

Motion to withdraw certiorari petition

U.S.—Rees v. Peyton, Va., 86 S.Ct. 1505, 384 U.S. 312, 16 L.Ed.2d 583.

Purvis v. Great Falls Bldg. and Const. Trades Council, D.C.Mont., 266 F.Supp. 661.

Discretionary review

U.S.—Ross v. Moffitt, N.C., 94 S.Ct. 2437, 417 U.S. 600, 41 L.Ed.2d 341.

Unbriefed and unargued issues

U.S.—Doran v. Salem Inn, Inc., N.Y., 95 S.Ct. 2561, 422 U.S. 922, 45 L.Ed.2d 648.

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95. Denying leave to appeal

(2) U.S.—Pollard v. U.S., Minn., 77 S.Ct. 481, 352 U.S. 354, 1 L.Ed.2d 393.

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98. U.S.—F.T.C. v. Colgate-Palmolive Co., Mass., 85 S.Ct. 1035, 380 U.S. 374, 13 L.Ed.2d 904—Durham v. U.S., Or., 91 S.Ct. 858, 401 U.S. 481, 28 L.Ed.2d 200.

Rutherford v. American Medical Ass'n, C.A.Ill., 379 F.2d 641, cert. den. 88 S.Ct. 787, 389 U.S. 1043, 19 L.Ed.2d 835, reh den. 88 S.Ct. 1027, 390 U.S. 975, 19 L.Ed.2d 1195.

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1. U.S.—Com. of Massachusetts v. Painten, Mass., 88 S.Ct. 660, 389 U.S. 560, 19 L.Ed.2d 770.

2. U.S.—Rudolph v. U.S., Tex., 82 S.Ct. 1277, 370 U.S. 269, 8 L.Ed.2d 484, reh. den. 83 S.Ct. 15, 371 U.S. 854, 9 L.Ed.2d 93—U.S. v. Seeger, Cal. & N.Y., 85 S.Ct. 850, 380 U.S. 163, 13 L.Ed.2d 733—Textile Workers Union of America v. Darlington Mfg. Co., S.C., 85 S.Ct. 994, 380 U.S. 263, 13 L.Ed.2d 827—C. I. R. v. Noel's Estate, N.J., 85 S.Ct. 1238, 380 U.S. 678, 14 L.Ed.2d 159.

3. U.S.—Hanna v. Plumer, Mass., 85 S.Ct. 1136, 380 U.S. 460, 14 L.Ed.2d 8—Cheng Fan Kwok v. Immigration and Naturalization Service, N.J., 88 S.Ct. 1970, 392 U.S. 206, 20 L.Ed.2d 1037.

4. U.S.—Desist v. U.S., N.Y., 89 S.Ct. 1030, 394 U.S. 244, 22 L.Ed.2d 248, reh. den. 89 S.Ct. 1766, 395 U.S. 931, 23 L.Ed.2d 251—Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 90 S.Ct. 1739, 398 U.S. 281, 26 L.Ed.2d 234—Gilmore v. City of Montgomery, Ala., 94 S.Ct. 2416, 417 U.S. 556, 41 L.Ed.2d 304—Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 96 S.Ct. 579, 423 U.S. 326, 46 L.Ed.2d 533, on remand 562 F.2d 664, 183 U.S.App.D.C. 145, cert. den. 98 S.Ct. 2830, 436 U.S. 930, 56 L.Ed.2d 775.

Writ granted

(1) U.S.—Maxwell v. Bishop, Ark., 90 S.Ct. 1578, 398 U.S. 262, 26 L.Ed.2d 221—Welsh v. U.S., Cal., 90 S.Ct. 1792, 398 U.S. 333, 26 L.Ed.2d 308—Lego v. Twomey, Ill., 92 S.Ct. 619, 404 U.S. 477, 30 L.Ed.2d 618.

(2) U.S.—Herdman v. Pennsylvania R. Co., Ohio, 77 S.Ct. 455, 352 U.S. 518, 1 L.Ed.2d 508—Rogers v. Missouri Pac. R. Co., Ohio, 77 S.Ct. 459, 352 U.S. 521, 1 L.Ed.2d 515—Burnett v. New York Cent. R. Co., Ohio, 85 S.Ct. 1050, 380 U.S. 424, 13 L.Ed.2d 941.

(4) U.S.—Moses Lake Homes, Inc. v. Grant County, Wash., 81 S.Ct. 870, 365 U.S. 744, 6 L.Ed.2d 66, reh. den. 81 S.Ct. 1671, 366 U.S. 947, 6 L.Ed.2d 858—Sansone v. U.S., Mo., 85 S.Ct. 1004, 380 U.S. 343, 13 L.Ed.2d 882—Leary v. U.S., Tex., 89 S.Ct. 1532, 395 U.S. 6, 23 L.Ed.2d 57, app. after remand, C.A., 431 F.2d 85, on remand C.A., 544 F.2d 1266, reh. den. 548 F.2d 355—Woodward v. C. I. R., Iowa, 90 S.Ct. 1302, 397 U.S. 572, 25 L.Ed.2d 577.

(6) U.S.—United Steelworkers of America, AFL–CIO v. R. H. Bouligny, Inc., N.C., 86 S.Ct. 272, 382 U.S. 145, 15 L.Ed.2d 217.

(7) U.S.—Goett v. Union Carbide Corp., W.Va., 80 S.Ct. 357, 361 U.S. 340, 4 L.Ed.2d 341, on remand, C.A., 278 F.2d 319, cert. den. 81 S.Ct. 64, 364 U.S. 826, 5 L.Ed.2d 55—Miner v. Atlass, Ill., 80 S.Ct. 1300, 363 U.S. 641, 4 L.Ed.2d 1462, reh. den. 81 S.Ct. 31, 364 U.S. 854, 5 L.Ed.2d 78—Gutierrez v. Waterman S.S. Corp., Puerto Rico, 83 S.Ct. 1185, 373 U.S. 206, 10 L.Ed.2d 297, reh. den. 83 S.Ct. 1863, 374 U.S. 858, 10 L.Ed.2d 1082.

(11) U.S.—Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., Pa., 81 S.Ct. 523, 365 U.S. 127, 5 L.Ed.2d 464—Tampa Elec. Co. v. Nashville Coal Co., Tenn., 81 S.Ct. 623, 365 U.S. 320, 5 L.Ed.2d 580, on remand, D.C., 214 F.Supp. 647—Case-Swayne Co. v. Sunkist Growers, Inc., Cal., 88 S.Ct. 528, 389 U.S. 384, 19 L.Ed.2d 621, reh. den. 88 S.Ct. 846, 390 U.S. 930, 19 L.Ed.2d 995—Albrecht v. Herald Co., Mo., 88 S.Ct. 869, 390 U.S. 145, 19 L.Ed.2d 998, reh. den. 88 S.Ct. 1258, 390 U.S. 1018, 20 L.Ed.2d 169, on remand 321 F.Supp. 99, affd. in part, revd. in part on oth. grds., 452 F.2d 124.

(12) U.S.—Howard v. Lyons, Mass., 79 S.Ct. 1331, 360 U.S. 593, 3 L.Ed.2d 1454, reh. den. 80 S.Ct. 40, 361 U.S. 854, 4 L.Ed.2d 93.

(13) U.S.—Nixon v. Fitzgerald, Dist.Col., 102 S.Ct. 2690.

Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., C.A.Pa., 411 F.2d 88.

Henkin v. Rockower Bros., Inc., D.C.N.Y., 259 F.Supp. 202.

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5. U.S.—McGann v. U.S., 80 S.Ct. 629, 362 U.S. 214, 4 L.Ed.2d 666—Wolf v. Weinstein, N.Y., 83 S.Ct. 969, 372 U.S. 633, 10 L.Ed.2d 33, reh. den. 83 S.Ct. 1522, 373 U.S. 928, 10 L.Ed.2d 427—Brotherhood of Locomotive Firemen and Enginemen v. Bangor & A.R. Co., Dist.Col., 88 S.Ct. 437, 389 U.S. 327, 19 L.Ed.2d 560—O'Brien v. Brown, Dist.Col., 92 S.Ct. 2718, 409 U.S. 1, 34 L.Ed,2d 1.

§ 204(3). —— —— Particular Grounds for Grant or Refusal of Writ

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6. U.S.—Denver & R.G.W.R. Co. v. Brotherhood of R.R. Trainmen, Colo., 87 S.Ct. 1746, 387 U.S. 556, 18 L.Ed.2d 954—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295—U.S. v. W. M. Webb, Inc., La., 90 S.Ct. 850, 397 U.S. 179, 25 L.Ed.2d 207, on remand, C.A., 424 F.2d 1070, cert. den. 91 S.Ct. 138, 400 U.S. 902, 27 L.Ed.2d 138—U.S. v. Seckinger, Ga., 90 S.Ct. 880, 397 U.S. 203, 25 L.Ed.2d 224, reh. den. 90 S.Ct. 1255, 397 U.S. 1031, 25 L.Ed.2d 546—Hellenic Lines Limited v. Rhoditis, Ala., 90 S.Ct. 1731, 398 U.S. 306, 26 L.Ed.2d 252, reh. den. 91 S.Ct. 23, 400 U.S. 856, 27 L.Ed.2d 94—Tidewater Oil Co. v. U.S., 93 S.Ct. 408, 409 U.S. 151, 34 L.Ed.2d 375—Chaffin v. Stynchcombe, Ga., 93 S.Ct. 1977, 412 U.S. 17, 36 L.Ed.2d 714—N.L.R.B. v. Savair Mfg. Co., 94 S.Ct. 495, 414 U.S. 270, 38 L.Ed. 495.

D.C.—United Steelworkers of America, AFL–CIO v. N.L.R.B., C.A., 377 F.2d 140, 126 U.S.App.D.C. 255.

Certiorari granted as to particular conflicts

(6) U.S.—Flora v. U.S., Wyo., 78 S.Ct. 1079, 357 U.S. 63, 2 L.Ed.2d 1165, reh. den. 79 S.Ct. 112, 358 U.S. 871, reh. 80 S.Ct. 630, 362 U.S. 145, 4 L.Ed.2d 623, reh. den. 80 S.Ct. 953, 362 U.S. 972, 4 L.Ed.2d 902.

(7) Other matters.

U.S.—Idaho Sheet Metal Works, Inc. v. Wirtz, Idaho & Tenn., 86 S.Ct. 737, 383 U.S. 190, 15 L.Ed.2d 694,

reh. den. 86 S.Ct. 1219, 383 U.S. 963, 16 L.Ed.2d 305, and 86 S.Ct. 1219, 383 U.S. 963, 16 L.Ed.2d 306—Malat v. Riddell, Cal., 86 S.Ct. 1030, 383 U.S 569, 16 L.Ed.2d 102—U.S v. O'Malley, Ill., 86 S.Ct. 1123, 383 U.S. 627, 16 L.Ed 2d 145—U.S. v. Catto, Tex., 86 S.Ct. 1311, 384 U.S. 102, 16 L.Ed.2d 398, reh. den. 86 S Ct. 1857, 384 U.S. 981, 16 L.Ed.2d 692—F.T.C. v. Jantzen, Inc., 87 S.Ct. 998, 386 U.S. 228, 18 L.Ed.2d 11, on remand, C.A., 383 F.2d 981—Crown Coat Front Co. v. U.S., N.Y., 87 S.Ct. 1177, 386 U.S. 503, 18 L Ed 2d 256—Northeastern Pennsylvania Nat. Bank & Trust Co. v. U.S., Pa., 87 S.Ct. 1573, 387 U.S. 213, 18 L Ed.2d 726—Wyandotte Transp. Co. v. U.S., La., 88 S.Ct. 379, 389 U.S. 191, 19 L.Ed.2d 407—U.S. v. Correll, Tenn., 88 S.Ct. 445, 389 U.S. 299, 19 L.Ed.2d 537—Hopkins v. Cohen, Ind., 88 S.Ct. 1146, 309 U.S. 530, 20 L.Ed 2d 87—U.S. v. O'Brien, Mass., 88 S.Ct. 1673, 391 U.S. 367, 20 L.Ed.2d 672, reh. den. 89 S.Ct. 63, two cases, 393 U.S. 900, 21 L.Ed.2d 188—Snyder v. Harris, Kan. & Mo., 89 S.Ct. 1053, 394 U.S. 332, 22 L.Ed.2d 319, reh. den. 89 S.Ct. 1622, 394 U.S. 1025, 23 L.Ed.2d 50—Bingler v. Johnson, Pa., 89 S.Ct. 1439, 394 U.S. 741, 22 L.Ed.2d 695—Willingham v. Morgan, Kan., 89 S.Ct. 1813, 395 U.S. 402, 23 L.Ed.2d 396, on remand 424 F.2d 200.

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U.S.—U.S. v. Giordano, Md., 94 S.Ct. 1820, 416 U.S. 505, 40 L.Ed.2d 341—U.S. v. Chavez, Cal., 94 S.Ct. 1849, 416 U.S. 562, 40 L.Ed.2d 380, on remand 533 F.2d 491, cert. den. 96 S.Ct. 2237, 426 U.S 911, 48 L.Ed.2d 837.

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8. U.S.—Kossick v. United Fruit Co., N.Y., 81 S.Ct. 886, 365 U.S. 731, 6 L.Ed.2d 56, reh. den. 81 S.Ct. 1657, 366 U.S. 941, 6 L.Ed.2d 852—American Federation of Musicians v. Wittstein, N.Y., 85 S.Ct. 300, 379 U.S. 171, 13 L.Ed.2d 214.

First appearance in Supreme Court

(2) Other matters.

U.S.—Reading Co. v. Brown, Pa., 88 S.Ct. 1759, 391 U.S. 471, 20 L.Ed.2d 751.

Certiorari granted on this ground

(6) U.S.—Levine v. U.S., N.Y., 80 S.Ct. 1038, 362 U.S. 610, 4 L.Ed.2d 989, reh. den. 80 S.Ct. 1605, 363 U.S. 858, 4 L.Ed.2d 1739—Clay v. Sun Ins. Office Limited, Fla., 80 S.Ct. 1222, 363 U.S. 207, 4 L.Ed.2d 1170—Times Film Corp. v. City of Chicago, Ill., 81 S.Ct. 391, 365 U.S. 43, 5 L.Ed.2d 403, reh. den. 81 S.Ct. 798, 365 U.S. 856, 5 L.Ed.2d 820—Ashe v. Swenson, Mo., 90 S.Ct. 1189, 397 U.S. 436, 25 L.Ed.2d 469.

(8) U.S.—Palermo v. U.S., N.Y., 79 S.Ct. 1217, 360 U.S. 343, 3 L.Ed.2d 1287, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 94—Campbell v. U.S., Mass., 81 S.Ct. 421, 365 U.S. 85, 5 L.Ed.2d 428, on remand, C.A., 296 F.2d 527, on remand, D.C., 199 F.Supp. 605, op. supp., C.A., 303 F.2d 747, affd. 303 F.2d 747, on remand 206 F.Supp. 213.

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9. U.S.—N.L.R.B. v. Great Dane Trailers, Inc., Fla., 87 S.Ct. 1792.

Certiorari granted

(3) U.S.—Barenblatt v. U.S., App.D.C., 79 S.Ct. 1081, 360 U.S. 109, 3 L.Ed.2d 1115, reh. den. 80 S.Ct. 40, 361 U.S. 854, 4 L.Ed.2d 93.

(6) U.S.—Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., Ill., 81 S.Ct. 365, 364 U.S. 656, 5 L.Ed.2d 358—Monroe v. Pape, Ill., 81 S.Ct. 473, 365 U.S. 167, 5 L.Ed.2d 492—Wilkinson v. U.S., Ga., 81 S.Ct. 567, 365 U.S. 399, 5 L.Ed.2d 633, reh. den. 81 S.Ct. 1024, 365 U.S. 890, 6 L.Ed.2d 200—Wilson v. Schnettler, Ill., 81 S.Ct. 632, 365 U.S. 381, 5 L.Ed.2d 620, reh. den. 81 S.Ct. 1025, 365 U.S. 890, 6 L.Ed.2d 200—Egan v. City of Aurora, Ill., Ill., 81 S.Ct. 684, 365 U.S. 514, 5 L.Ed.2d 741—Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, App.D.C., 81 S.Ct. 1743, 367 U.S. 886, 6 L.Ed.2d 1230, reh. den. 82 S.Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70—Enochs v. Williams Packing & Nav. Co., Miss., 82 S.Ct. 1125, 370 U.S. 1, 8 L.Ed.2d 292, reh. den. 82 S.Ct. 1579, 370 U.S. 965, 8 L.Ed.2d 833—Pure Oil Co. v. Suarez, Fla., 86 S.Ct. 1394, 384 U.S. 202, 16 L Ed.2d 474—U.S. v. Rands, Or., 88 S Ct. 265, 389 U.S. 121, 19 L.Ed.2d 329—First Nat. Bank of Ariz. v. Cities Service Co., N.Y., 88 S.Ct. 1575, 391 U.S. 253, 20 L.Ed.2d 569, reh. den. 89 S Ct. 63, 393 U.S. 901, 21 L.Ed.2d 188.

10. **Certiorari granted**

(1) U.S.—Reisman v. Caplin, Dist.Col., 84 S.Ct. 508, 375 U.S. 440, 11 L.Ed.2d 459.

(3) Other cases.

U.S.—Chapman v. U.S., Ga., 81 S.Ct. 776, 365 U.S. 610, 5 L.Ed.2d 828—Kaiser Steel Corp. v. W. S. Ranch Co., N.M., 88 S Ct. 1753, 391 U.S. 593, 20 L.Ed.2d 835.

11. U.S.—Hess v. U.S., Or., 80 S.Ct. 341, 361 U.S. 314, 4 L.Ed.2d 305, on remand, C.A., 282 F.2d 633—U.S. v. Republic Steel Corp., Ill., 80 S.Ct. 884, 362 U.S. 482, 4 L.Ed.2d 903, reh. den. 80 S.Ct. 1605, 363 U.S. 858, 4 L.Ed.2d 1739, on remand 286 F.2d 875—U S. v. State of Ala., Ala., 80 S.Ct. 924, 362 U.S. 602, 4 L.Ed.2d 982, reh. den. 80 S.Ct. 1608, 363 U.S. 857, 4 L.Ed.2d 1739—Parr v. U.S., Tex., 80 S.Ct. 1171, 363 U.S 370, 4 L.Ed.2d 1277—Schilling v. Rogers, App D.C., 80 S.Ct. 1288, 363 U.S. 666, 4 L.Ed.2d 1478—U.S. v. American-Foreign S.S. Corp., N.Y., 80 S.Ct. 1336, 363 U.S. 685, 4 L.Ed.2d 1491, reh. den. 81 S.Ct. 30, 364 U.S. 854, 5 L.Ed.2d 77, on remand, C.A., 291 F.2d 598, cert. den. 82 S.Ct. 171, 172, 179, 368 U.S. 895, 7 L.Ed.2d 92—Continental Grain Co. v. The FBL-585, La., 80 S.Ct. 1470, 364 U.S. 19, 4 L.Ed.2d 1540—Dugan v Rank, App., 83 S.Ct. 999, 372 U.S. 609, 10 L Ed.2d 15—U.S. v. First Nat. City Bank, N.Y., 85 S.Ct. 528, 379 U.S. 378, 13 L.Ed.2d 365—International Union, United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield, U.S., 86 S.Ct. 373, 382 U.S. 205, 15 L.Ed.2d 272—Kent v. U.S., Dist.Col., 86 S.Ct. 1045, 383 U.S. 541, 16 L.Ed.2d 84—Wyandotte Transp. Co. v. U.S., La., 88 S.Ct. 379, 389 U.S. 191, 19 L.Ed.2d 407—Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, Ohio, 93 S.Ct. 493, 409 U.S. 249, 34 L.Ed.2d 454—Couch v. U.S., U.S. Va., 93 S.Ct. 611, 409 U.S. 322, 34 L.Ed.2d 548—Lau v. Nichols, Cal., 94 S.Ct. 786, 414 U.S. 563, 39 L.Ed.2d 1.

Certiorari granted

(1) U.S.—N.L.R.B. v. Drivers, Chauffeurs, Helpers, Local Union No. 639, App.D.C., 80 S.Ct. 706, 362 U.S. 274, 4 L.Ed.2d 710—Local Lodge No. 1424 v. N.L.R.B., App.D.C., 80 S.Ct. 822, 362 U.S. 411, 4 L.Ed.2d 832—N.L.R.B. v. Ochoa Fertilizer Corp., 82 S.Ct. 344, 368 U.S. 318, 7 L.Ed.2d 312—Retail Clerks Intern. Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., Ohio, 82 S.Ct. 541, 369 U.S. 17, 7 L.Ed.2d 503—N.L.R.B. v. Washington Aluminum Co., 82 S.Ct. 1099, 370 U.S. 9, 8 L.Ed.2d 298—General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Riss & Co., Ky., 83 S.Ct. 789, 372 U.S. 517, 9 L.Ed.2d 918—Boire v. Greyhound Corp., Fla., 84 S.Ct. 894, 376 U.S. 473, 11 L.Ed.2d 849—United Steelworkers of America, AFL-CIO v. N.L.R.B., N.Y., 84 S.Ct. 899, 376 U.S. 492, 11 L.Ed.2d 863, on remand, C.A., 332 F.2d 563, motion gr. 84 S.Ct. 1880, 377 U.S. 974, 12 L.Ed.2d 745—John Wiley & Sons, Inc. v. Livingston, N.Y., 84 S.Ct. 909, 376 U.S. 543, 11 L.Ed.2d 898—N.L.R.B. v. C & C Plywood Corp., 87 S.Ct. 559, 385 U.S. 421, 17 L.Ed.2d 486, reh. den. 87 S.Ct. 951, 386 U.S. 939, 17 L.Ed.2d 812—N.L.R.B. v. Acme Industrial Co., Ill., 87 S.Ct. 565, 385 U.S. 432, 17 L.Ed.2d 495—Wirtz v. Local 153, Glass Bottle Blowers Ass'n, Pa., 88 S.Ct. 643, 389 U.S. 463, 19 L.Ed.2d 705, on remand 405 F.2d 176—N.L.R.B. v. United Ins. Co. of America, 88 S.Ct. 988, 390 U.S. 254, 19 L.Ed.2d 1083—Thomas v. Consolidation Coal Co. (Pocahontas Fuel Co., Division), C.A.W.Va., 380 F.2d 69, cert. den. 88 S.Ct. 562, 389 U.S. 1004, 19 L.Ed.2d 599, reh. den. 88 S.Ct. 768, 389 U.S. 1059, 19 L.Ed.2d 862.

(2) U.S.—Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., Tex., 80 S.Ct. 1326, 363 U.S. 528, 4 L.Ed.2d 1379, reh. den. 81 S.Ct. 31, 364 U.S. 854, 5 L.Ed.2d 78—System Federation No. 91, Ry. Emp. Dept., AFL-CIO v. Wright, Ky., 81 S.Ct. 368, 364 U.S. 642, 5 L.Ed.2d 349—International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc., Tex., 83 S.Ct. 956, 372 U.S. 682, 10 L.Ed.2d 67, reh. den. 83 S Ct. 1533, 373 U.S. 947, 10 L.Ed.2d 702—Brotherhood of Locomotive Engineers v. Louisville & N.R. Co., Ky., 83 S.Ct. 1059, 373 U.S. 33, 10 L.Ed.2d 172.

(4) U.S.—Jones v. U.S., App.D.C., 80 S.Ct. 725, 362 U.S. 257, 4 L.Ed.2d 697, 78 A.L.R.2d 233—Wyatt v. U.S., Ala., 80 S.Ct. 901, 362 U.S. 525, 4 L.Ed.2d 931—Elkins v. U.S., Or., 80 S.Ct. 1437, 364 U.S. 206, 4 L.Ed.2d 1669—Carbo v. U.S., Cal., 81 S.Ct. 338, 364 U.S. 611, 5 L.Ed.2d 329—Lott v. U.S., Tex., 81 S.Ct. 1563, 367 U.S. 421, 6 L.Ed 2d 940—Fong Foo v. U.S., Mass., 82 S.Ct. 671, 369 U.S. 141, 7 L.Ed.2d 629—Cleary v. Bolger, N.Y., 83 S.Ct. 385, 371 U.S. 392, 9 L.Ed.2d 390—Platt v. Minnesota Min. & Mfg. Co., Ill., 84 S Ct. 769, 376 U.S. 240, 11 L.Ed.2d 674—Will v. U.S., Ill., 88 S.Ct. 269, 389 U.S. 90, 19 L.Ed.2d 305—Kaufman v. U.S., Mo., 89 S.Ct. 1068, 394 U.S. 217, 22 L.Ed.2d 227, on remand 323 F.Supp. 623, affd. 453 F.2d 798—Harris v. Nelson, Cal., 89 S.Ct. 1082, 394 U.S. 286, 22 L.Ed.2d 281, reh. den. 89 S.Ct. 1623, 394 U.S. 1025, 23 L.Ed.2d 50—McCarthy v. U.S., Ill., 89 S.Ct. 1166, 394 U.S. 459, 22 L.Ed.2d 418.

(5) U.S.—Southern Const. Co. v. Pickard, Tenn., 83 S.Ct. 108, 371 U.S. 57, 9 L.Ed.2d 31—Provident Tradesmens Bank & Trust Co. v. Patterson, Pa., 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936, on remand, C.A., 411 F.2d 88.

(6) U.S.—Allegheny County v. Frank Mashuda Co., Pa., 79 S.Ct. 1060, 360 U.S. 185, 3 L.Ed.2d 1163, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93.

(7) U.S.—F.T.C. v. Travelers Health Ass'n, 80 S.Ct. 717, 362 U.S. 293, 4 L.Ed.2d 724, on remand, C.A., 298 F.2d 820—F.T.C. v. Simplicity Pattern Co., App.D.C., 79 S.Ct. 1005, 360 U.S. 55, 3 L.Ed.2d 1079, reh. den. 80 S.Ct. 41, 361 U.S. 855, 4 L.Ed.2d 93.

(8) U.S.—U.S. v. Kaiser, Wis., 80 S.Ct. 1204, 363 U.S. 299, 4 L.Ed.2d 1233—U.S. v. Cannelton Sewer Pipe Co., Ind., 80 S.Ct. 1581, 364 U.S. 76, 4 L.Ed.2d 1581—Turnbow v. C. I. R., 82 S.Ct. 353, 368 U.S. 337, 7 L.Ed.2d 326—U.S. v. Patrick, S.C., 83 S.Ct. 618, 373 U.S. 53, 9 L.Ed.2d 580—U.S. v. Gilmore, Ct.Cl., 83 S.Ct. 623, 372 U.S. 39, 9 L.Ed.2d 570—U.S. v. Stapf, Tex., 84 S.Ct. 248, 375 U.S. 118, 11 L.Ed.2d 195, reh. den. 84 S.Ct. 477, 375 U.S. 981, 11 L.Ed.2d 428—U.S. v. State of Vt., Vt., 84 S.Ct. 1267, 377 U.S. 351, 12 L.Ed.2d 370—Fribourg Nav. Co. v. C. I. R., N.Y., 86 S.Ct. 862, 383 U.S. 272, 15 L.Ed.2d 751—U.S. v. Donruss Co., Tenn., 89 S.Ct. 501, 393 U.S. 297, 21 L.Ed.2d 495, reh. den. 89 S.Ct. 848, 393 U.S. 1112, 21 L.Ed.2d 812—Donaldson v. U.S., Fla., 91 S.Ct. 534, 400 U.S. 517, 27 L.Ed.2d 580—C. I. R. v. Lincoln Sav. & Loan Ass'n, Cal., 91 S.Ct. 1893, 403 U.S. 345, 29 L.Ed.2d 519.

(9) U.S.—Costello v. Immigration and Naturalization Service, N.Y., 84 S.Ct. 580, 376 U.S. 120, 11 L.Ed.2d 559.

(10) U.S.—Sunray Mid-Continent Oil Co. v. Federal Power Commission, 80 S.Ct. 1392, 364 U.S. 137, 4 L.Ed.2d 1623, reh. den. 81 S.Ct. 32, 364 U.S. 856, 5 L.Ed.2d 80—Atlantic Refining Co. v. Public Service Commission of State of N.Y., 79 S.Ct. 1246, 360 U.S. 378, 3 L.Ed.2d 1312, am. den. 80 S.Ct. 42, 361 U.S. 801, 4 L.Ed.2d 53—Federal Power Commission v. Tennessee Gas Transmission Co., 83 S.Ct. 211, 371 U.S. 145, 9 L.Ed.2d 199—Wisconsin v. Federal Power Commission, Dist.Col., 83 S.Ct. 1266, 373 U.S. 294, 10 L.Ed.2d 357, reh. den. 84 S.Ct. 25, 375 U.S. 870, 11 L.Ed.2d 99—Federal Power Commission v. Hunt, 84 S.Ct. 861, 376 U.S. 515, 11 L.Ed.2d 878—United Gas Imp. Co. v. Continental Oil Co., 85 S.Ct. 1517, 381 U.S. 392, 14 L.Ed.2d 466, on remand, C.A., 351 F.2d 670—United Gas Pipe Line Co. v. Federal Power Commission, La., 87 S.Ct. 265, 385 U.S. 83, 17 L.Ed.2d 181—In re Permian Basin Area Rate Cases, N.M., 88 S.Ct. 1344, 390 U.S. 747, 20 L.Ed.2d 312, reh. den. 88 S.Ct. 2050, 392 U.S. 917, 20 L.Ed.2d 1379.

(11) U.S.—Richards v. U.S., Okl., 82 S.Ct. 585, 369 U.S. 1, 7 L.Ed.2d 492.

(12) U.S.—Pate v. Robinson, Ill., 86 S.Ct. 836, 383 U.S. 375, 15 L.Ed.2d 815.

(14) Other matters.

U.S.—Hardin v. Kentucky Utilities Co., Tenn., 88 S.Ct. 651, 390 U.S. 1, 19 L.Ed.2d 787—Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, Fla., 88 S.Ct. 1157, 390 U.S. 414, 20 L.Ed.2d 1, reh. den. 88 S.Ct. 1649, 391 U.S. 909, 20 L.Ed.2d 425, on remand 471 F.2d

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10—U.S. v. Article of Drug . . . Bacto-Unidisk . . ., Mich., 89 S.Ct. 1410, 394 U.S. 784, 22 L.Ed.2d 726, reh. den. 89 S.Ct. 2013, 395 U.S. 954, 23 L.Ed.2d 473—Hodgson v. Local Union 6799, United Steelworkers of America, AFL-CIO, Cal., 91 S.Ct. 1841, 403 U.S. 333, 29 L.Ed.2d 510—Fein v. Selective Service System Local Bd. No. 7, Yonkers, N.Y., N.Y., 92 S.Ct. 1062, 405 U.S. 365, 31 L.Ed.2d 298.

Maintenance of antitrust and securities laws violations as class action

U.S.—Eisen v. Carlisle and Jacquelin, N.Y., 94 S.Ct. 2140.

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11.5. U.S.—Yellin v. U.S., Ind., 83 S.Ct. 1828, 374 U.S. 109, 10 L.Ed.2d 778—U.S. v. Davis, Tenn., 90 S.Ct. 1041, 397 U.S. 301, 25 L.Ed.2d 323, reh. den. 90 S.Ct. 1495, 397 U.S. 1071, 25 L.Ed.2d 695.

12. U.S.—Perma Life Mufflers, Inc. v. International Parts Corp., Ill., 88 S.Ct. 1981, 392 U.S. 134, 20 L.Ed.2d 982.

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13. U.S.—Afroyim v. Rusk, N.Y., 87 S.Ct. 1660, 387 U.S. 253, 18 L.Ed.2d 757—Perma Life Mufflers, Inc. v. International Parts Corp., Ill., 88 S.Ct. 1981, 392 U.S. 134, 20 L.Ed.2d 982.

13.5. Certiorari granted

(3) As to other matters.

U.S.—U.S. v. Consolidated Edison Co. of N.Y., Inc., N.Y., 81 S.Ct. 1326, 366 U.S. 380, 6 L.Ed.2d 356, reh. den. 82 S.Ct. 138, 368 U.S. 884, 7 L.Ed.2d 86—American Auto. Ass'n v. U.S., Ct.Cl., 81 S.Ct. 1727, 367 U.S. 687, 6 L.Ed.2d 1109, reh. den. 82 S.Ct. 24, 368 U.S. 870, 7 L.Ed.2d 70.

13.10. U.S.—Ward v. Atlantic Coast Line R. Co., Fla., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820—Spinelli v. U.S., Mo., 89 S.Ct. 584, 393 U.S. 410, 21 L.Ed.2d 637.

14. U.S.—J. I. Case Co. v. Borak, Wis., 84 S.Ct. 1555, 377 U.S. 426, 12 L.Ed.2d 423.

16. U.S.—The Monrosa v. Carbon Black Export, Inc., Tex., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986—Bandy v. U.S., 82 S.Ct. 11, 7 L.Ed.2d 9—Hodges v. U.S., App.D.C., 82 S.Ct. 235, 368 U.S. 139, 7 L.Ed.2d 184.

Amicus curiae held not "party" entitled to seek certiorari.

U.S.—International Union, United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield, U.S., 86 S.Ct. 373, 382 U.S. 205, 15 L.Ed.2d 272.

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16.5. U.S.—The Monrosa v. Carbon Black Export, Inc., Tex., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986.

Recovery on other cause of action

U.S.—The Monrosa v. Carbon Black Export, Inc., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986.

16.10. U.S.—The Monrosa v. Carbon Black Export, Inc., Tex., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986.

16.15. U.S.—The Monrosa v. Carbon Black Export, Inc., Tex., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986.

16.20. U.S.—The Monrosa v. Carbon Black Export, Inc., Tex., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986.

16.25. U.S.—The Monrosa v. Carbon Black Export, Inc., Tex., 79 S.Ct. 710, 359 U.S. 180, 3 L.Ed.2d 723, reh. den. 79 S.Ct. 1115, 359 U.S. 999, 3 L.Ed.2d 986.

16.30. Mootness determined when case considered not when filed

U.S.—Allee v. Medrano, Tex., 94 S.Ct. 2191, 416 U.S. 802, 40 L.Ed.2d 566.

Writ not dismissed as moot

U.S.—Warden, Lewisburg Penitentiary v. Marrero, Pa., 94 S.Ct. 2532, 417 U.S. 653, 41 L.Ed.2d 383, reh. den. 95 S.Ct. 334, 419 U.S. 1014, 42 L.Ed.2d 288.

§ 204(4). —— —— In Patent Cases

Library References

Federal Courts ⟹452.

19. U.S.—Aro Mfg. Co. v. Convertible Top Replacement Co., Mass., 81 S.Ct. 599, 365 U.S. 336, 5 L.Ed.2d 592, reh. den. 81 S.Ct. 1024, 365 U.S. 890, 6 L.Ed.2d 201—Brenner v. Manson, Cust. & Pat.App., 86 S.Ct. 1033, 383 U.S. 519, 16 L.Ed.2d 69.

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31. U.S.—Technograph Printed Circuits, Limited v. U.S., 372 F.2d 969, 178 Ct.Cl. 543.

§ 204(5). —— —— At What Stage of Proceedings

Library References

Federal Courts ⟹452.

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35. U.S.—New Haven Inclusion Cases, Conn., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691—New York, N.H. & H.R. Co., First Mortg. 4% Bondholder's Committee v. U.S., N.Y., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691.

§ 204(7). —— Who May Institute Proceedings; Parties

Library References

Federal Courts ⟹452.

39. Federal Trade Commission

U.S.—F.T.C. v. Colgate-Palmolive Co., Mass., 85 S.Ct. 1035, 380 U.S. 374, 13 L.Ed.2d 904.

39.10. Leave to intervene denied

(2) Other instances.

U.S.—Banco Nacional de Cuba v. Sabbatino, N.Y., 84 S.Ct. 923, 376 U.S. 398, 11 L.Ed.2d 804.

§ 204(8). —— Appeal and Certiorari in Same Case

Library References

Federal Courts ⟹452.

40. U.S.—City of El Paso v. Simmons, Tex., 85 S.Ct. 577, 379 U.S. 497, 13 L.Ed.2d 446, reh. den. 85 S.Ct. 879, 380 U.S. 926, 13 L.Ed.2d 813.

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41. U.S.—City of El Paso v. Simmons, Tex., 85 S.Ct. 577, 379 U.S. 497, 13 L.Ed.2d 446, reh. den. 85 S.Ct. 879, 380 U.S. 926, 13 L.Ed.2d 813.

Where perfected appeal was taken to the Court of Appeals in addition to direct appeal to the Supreme Court, appellant's jurisdictional statement would be treated as petition for certiorari prior to judgment of Court of Appeals.[41.5]

41.5. U.S.—Turner v. City of Memphis, Tenn., Tenn., 82 S.Ct. 805, 369 U.S. 350, 7 L.Ed.2d 762.

§ 204(10). —— Proceedings to Obtain Writ

Library References

Federal Courts ⟹453.

50. U.S.—Snider v. All State Administrators, Inc., Fla., 94 S.Ct. 771, 414 U.S. 685, 39 L.Ed.2d 90.

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50.40. Certiorari granted

U.S.—Gondeck v. Pan Am. World Airways, Inc., Fla., 86 S.Ct. 153, 382 U.S. 25, 15 L.Ed.2d 21.

§ 204(11). —— —— Time to Apply for Writ

Library References

Federal Courts ⟹453.

51. Delay of petitioner's attorney attributable to petitioner

U.S.—Link v. Wabash R. Co., Ind., 82 S.Ct. 1386, 370 U.S. 626, 8 L.Ed.2d 734, reh. den. 83 S.Ct. 115, 371 U.S. 873, 9 L.Ed.2d 112.

Discretion

U.S.—Self v. United States, D.C.Tenn., 434 F.Supp. 548, affd., C.A., 574 F.2d 363, cert. den. 99 S.Ct. 257, 439 U.S. 896, 58 L.Ed.2d 242.

52. U.S.—U.S. v. Gonzalez-Perez, C.A.Fla., 629 F.2d 1081.

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53.5. Time limitation held not jurisdictional

U.S.—Taglianetti v. U.S., R.I., 89 S.Ct. 1099, 394 U.S. 316, 22 L.Ed.2d 302—Schacht v. U.S., Tex., 90 S.Ct. 1555, 398 U.S. 58, 26 L.Ed.2d 44—Durham v. U.S., Or., 91 S.Ct. 858, 401 U.S. 481, 28 L.Ed.2d 200.

53.15. U.S.—F.T.C. v. Colgate-Palmolive Co., Mass., 85 S.Ct. 1035, 380 U.S. 374, 13 L.Ed.2d 904—Scofield v. N.L.R.B., Wis., 89 S.Ct. 1154, 394 U.S. 423, 22 L.Ed.2d 385.

53.20. U.S.—F.T.C. v. Colgate-Palmolive Co., Mass., 85 S.Ct. 1035, 380 U.S. 374, 13 L.Ed.2d 904.

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53.35. U.S.—Wilkins v. U.S., Pa., 99 S.Ct. 1829, 441 U.S. 468, 60 L.Ed.2d 365.

§ 204(12). —— —— Stay to Permit Application

Library References

Federal Courts ⟹453.

54. U.S.—Glick v. Ballentine Produce, Inc., C.A.Mo., 397 F.2d 590.

54.5. Stay denied

(2) Other instances.

U.S.—A. B. Chance Co. v. Atlantic City Elec. Co., N.Y., 83 S.Ct. 964, 10 L.Ed.2d 122.

54.10. U.S.—Commonwealth Oil Refining Co. v. Lummus Co., 82 S.Ct. 348, 7 L.Ed.2d 334.

Stay denied

(2) Other instances.

U.S.—Winters v. N.Y., 89 S.Ct. 34, 21 L.Ed.2d 76.

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55. U.S.—In re Stumes, C.A.S.D., 681 F.2d 524.

Supreme court has greater latitude

U.S.—Meredith v. Fair, C.A.Miss., 306 F.2d 374.

Coverage and enforcement of bond required by Court of Appeals

U.S.—Dragor Shipping Corp. v. Union Tank Car Co., C.A.Ariz., 371 F.2d 722.

Stay granted by justice of Supreme Court

U.S.—Harris v. U.S., 91 S.Ct. 4, 400 U.S. 1211, 27 L.Ed.2d 30.

Stay denied by justice of Supreme Court

U.S.—Hayakawa v. Brown, Cal., 94 S Ct. 1145, 415 U.S. 1304, 39 L.Ed.2d 457.

55.10. U.S.—Dolman v. U.S., 99 S.Ct. 551, 439 U.S 1395, 58 L.Ed.2d 641.

§ 204(13). —— Effect of Grant of Writ

Library References

Federal Courts ⚬=454.

56. U.S.—Glick v. Ballentine Produce, Inc., C.A.Mo., 397 F.2d 590.

§ 204(14). —— Effect of Refusal of Writ

Library References

Federal Courts ⚬=454.

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58. U.S.—Coggins v. Carpenter, D.C.Pa., 468 F Supp. 270.

59.10. U.S.—U.S. v. Barnett, Miss., 84 S.Ct. 984, 376 U.S. 681, 12 L.Ed.2d 23, reh. den. 84 S.Ct. 1642, 377 U.S. 973, 12 L.Ed.2d 742.

Snider v. Peyton, C.A.Va., 356 F.2d 626.

United Brick and Clay Workers of America, AFL–CIO, Dist. Council No. 11 v. Gladding, McBean & Co., D.C.Cal., 192 F.Supp. 64.

60. Wis.—State v. Nye, 312 N.W.2d 826, 105 Wis.2d 63.

Pursuant to the view that denial of certiorari by the Supreme Court carries no affirmation or inference of affirmation of the correctness of the lower court decision, a district court has declared itself not bound by a court of appeals holding as to which certiorari has been denied by the Supreme Court.[60.5]

60.5. U.S.—In re P.T.G. Grain Service, D.C.Minn., 185 F.Supp. 332.

§ 204(15). —— Dismissal of Writ

Library References

Federal Courts ⚬=452.

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63. U.S.—Jones v. State Bd. of Ed. of State of Tenn., Tenn., 90 S.Ct. 779, 397 U.S. 31, 25 L.Ed.2d 27, reh. den. 90 S.Ct. 1230, 397 U.S. 1018, 25 L.Ed.2d 432—Taggart v. Weinacker's, Inc., Ala., 90 S.Ct. 876, 397 U.S. 223, 25 L.Ed.2d 240—Monks v. New Jersey, N.J., 90 S.Ct. 1563, 398 U.S. 71, 26 L.Ed.2d 54—Moon v. Maryland, Md., 90 S.Ct. 1730, 398 U.S. 319, 26 L.Ed.2d 262—Piccirillo v. New York, N.Y., 91 S.Ct. 520, 400 U.S. 548, 27 L.Ed.2d 596—Bankers Trust Co. v. Mallis, N.Y., 98 S.Ct. 1117, 435 U.S. 381, 55 L.Ed.2d 357, reh. den. 98 S.Ct. 2259, 436 U.S. 915, 56 L.Ed.2d 416.

§ 204(16). —— Review on Certiorari

Library References

Federal Courts ⚬=460.

64.50. U.S.—Parker v. Randolph, Tenn., 99 S.Ct. 2132, 442 U.S. 62, 60 L.Ed.2d 713.

65. U.S.—Reliable Transfer Co., Inc. v. U.S., C.A. N.Y., 522 F.2d 1381.

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66.5. Interpretation of mandate

U.S.—Bailey v. Henslee, C.A.Ark., 309 F.2d 840.

Other matters relating to the review on certiorari have been adjudicated.[66.6]

66.6. U.S.—Cort v Ash, Pa., 95 S.Ct. 2080—Bowen v. U.S., Cal., 95 S.Ct. 2569, 422 U.S. 916, 45 L.Ed.2d 641.

Lower court opinion omitted

U.S.—N.L R.B. v. Sears, Roebuck & Co., Dist.Col., 95 S.Ct. 1504, 421 U.S. 132, 44 L.Ed.2d 29.

Failure to cross-petition

U.S.—U.S. v. ITT Continental Baking Co, Colo., 95 S.Ct. 926, 420 U.S. 223, 43 L.Ed.2d 148—U.S. v. Reliable Transfer Co., Inc., N.Y., 95 S.Ct. 1708, 421 U.S. 397, 44 L.Ed.2d 251, on remand, C.A., 522 F.2d 1381.

Controversy not moot

U.S.—Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 96 S Ct. 579, 423 U.S. 326, 46 L.Ed.2d 533, on remand 562 F.2d 664, 183 U.S. App.D.C. 145, cert. den. 98 S.Ct. 2380, 436 U.S. 930, 56 L.Ed.2d 775—Havens Realty Corp. v. Coleman, Va., 102 S.Ct. 1114, 455 U.S. 363, 71 L.Ed.2d 214—Firefighters Local Union No. 1784 v. Stotts, Tenn., 104 S.Ct. 2576, 467 U.S. 561, 81 L.Ed.2d 483, on remand 762 F 2d 1011.

66.10. U.S.—Bishop v. Wood, 96 S.Ct. 2074, 426 U.S. 341, 48 L.Ed.2d 684.

§ 204(17). —— —— Scope of Review in General

Library References

Federal Courts ⚬=460, 461.

69. U.S.—Pollard v. U.S., Minn., 77 S.Ct. 481, 352 U.S. 354, 1 L.Ed.2d 393—Raney v. Board of Ed. of Gould School Dist., Ark., 88 S.Ct. 1697, 391 U.S. 443, 20 L.Ed.2d 727.

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70. U.S.—U.S. v. Shotwell Mfg. Co., Ill., 78 S.Ct. 245, 355 U.S. 233, 2 L.Ed.2d 234, motion den. 80 S.Ct. 117, 361 U.S. 858, 4 L.Ed.2d 99—Morrissey v. Brewer, Iowa, 92 S.Ct. 2593, 408 U.S. 471, 33 L.Ed.2d 484—State Air Pollution Control Bd. v. Costle Dist.Col., 97 S.Ct. 1635, 431 U.S. 99, 52 L.Ed.2d 166, on remand C.A., 567 F.2d 1091, 186 U.S.App.D.C. 98—Environmental Protection Agency v. Brown, Cal., 97 S.Ct. 1635, 431 U.S. 99, 52 L.Ed.2d 166, on remand, C.A., 566 F.2d 665—Environmental Protection Agency v. Maryland, Md., 97 S.Ct. 1635, 431 U.S. 99, 52 L.Ed.2d 166—U.S. v. Frady, Dist.Col., 102 S.Ct. 1584, 456 U.S. 152, 71 L.Ed.2d 816, reh. den. 102 S.Ct. 2287, 456 U.S. 1001, 73 L.Ed.2d 1296.

Matters held part of record before court

U.S.—Surowitz v. Hilton Hotels Corp., Ill., 86 S.Ct. 845, 383 U.S. 363, 15 L.Ed.2d 807, reh. den. 86 S.Ct. 1333, 384 U.S. 915, 16 L.Ed.2d 367—Raney v. Board of Ed. of Gould School Dist., Ark., 88 S.Ct. 1697, 391 U.S. 443, 20 L.Ed.2d 727.

71. U.S.—Cory Corp. v. Sauber, Ill., 80 S.Ct. 1331, 363 U.S. 709, 4 L.Ed.2d 1508—Namet v. U.S., Mass., 83 S.Ct. 1151, 373 U.S. 179, 10 L.Ed.2d 278—J. I. Case Co. v. Borak, Wis., 84 S.Ct. 1555, 377 U.S. 426, 12 L.Ed.2d 423—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471—Mills v. Electric Auto-Lite Co., Ill., 90 S.Ct. 616, 396 U.S. 375, 24 L.Ed.2d 593. App. after remand, C.A.. 552 F.2d Ct. 616, 396 U.S. 375, 24 L.Ed.2d 593, 1239—Brennan v. Arnheim & Neely, Inc., Pa., 93 S.Ct. 1138, 410 U.S. 512, 35 L.Ed.2d 463, reh. den. 93 S.Ct. 1888, 411 U.S. 940, 36 L.Ed.2d 402—F. D. Rich Co., Inc. v. U.S. for Use of Indus. Lumber Co., Inc., Cal., 94 S.Ct. 2157, 417 U.S. 116, 40 L.Ed.2d 703—Cooper Stevedoring Co. v. Fritz Kopke, Inc., Tex., 94 S.Ct. 2174, 417 U.S. 106, 40 L.Ed.2d 694—Franks v. Bowman Transp. Co., Inc., 96 S.Ct. 1251, 424 U.S. 747, 47 L.Ed.2d 444—Radzanower v. Touche Ross & Co., 96 S.Ct. 1989, 426 U.S. 148, 48 L.Ed.2d 540—Ernst and Ernst v. Hochfelder, 96 S.Ct. 1375, 425 U.S. 185, 47 L.Ed.2d 668, reh. den. 96 S.Ct. 2194, 425 U.S. 986, 48 L.Ed.2d 811—Boeing Co. v. Van Gemert, N.Y., 100 S.Ct. 745, 444 U.S. 472, 62 L.Ed.2d 676.

Questions presented by briefs

(2) U.S.—U.S. v. O'Brien, Mass., 88 S.Ct. 1673, 391 U.S. 367, 20 L.Ed 2d 672. Reh. den. 89 S.Ct. 63, two cases, 393 U.S. 900, 21 L.Ed.2d 188.

(3) Question not presented in petition may be before court where fully briefed and argued at suggestion of court.

U S.—Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Ill., 91 S.Ct. 1434, 402 U.S. 313, 28 L.Ed.2d 788, on remand 334 F.Supp. 47, affd., C.A., 415 F.2d 380, cert. den. 93 S.Ct. 559, 409 U.S. 1061, 34 L.Ed.2d 513.

Matters not considered

U.S.—Odom v. U.S, 91 S Ct. 112, 400 U.S. 23, 27 L.Ed.2d 122, reh. den. 91 S.Ct. 363, 400 U.S. 984, 27 L.Ed.2d 396.

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72. U.S.—Aro Mfg. Co. v. Convertible Top Replacement Co., Mass., 84 S.Ct. 1526, 377 U.S. 476, 12 L.Ed.2d 457—Ryan v. U.S., Ky., 85 S.Ct. 232, 379 U.S. 61, 13 L.Ed.2d 122—Miree v. DeKalb County, Ga., Ga., 97 S.Ct. 2490, 433 U.S. 25, 53 L.Ed.2d 557, on remand C.A., 565 F.2d 1324, certified ques. ans. 249 S.E.2d 573, 242 Ga. 126, app. decided after ans. to certified ques. C.A., 588 F.2d 453—Patsy v. Board of Regents of State of Fla., 102 S.Ct. 2557, 457 U.S. 496, 73 L.Ed.2d 172, on remand, C.A., 693 F.2d 558—Rogers v. Herman Lodge, Ga., 102 S.Ct. 3272, 458 U.S. 613, 73 L.Ed.2d 1012, reh. den. 103 S.Ct. 198, 459 U.S. 899, 74 L.Ed.2d 160.

73. U S.—Sunray Mid-Continent Oil Co. v. Federal Power Commission, 80 S.Ct. 1392, 364 U.S. 137, 4 L.Ed.2d 1623, reh. den. 81 S.Ct. 32, 364 U.S. 856, 5 L.Ed.2d 80—Texas Gas Transmission Corp. v. Shell Oil Co., 80 S.Ct. 1122, 363 U.S. 263, 4 L.Ed.2d 1208—Michigan Nat. Bank v. Robertson, Neb., 83 S.Ct. 914, 372 U.S. 591, 9 L.Ed.2d 961, on remand 125 N.W.2d 66, 175 Neb. 871—Wisconsin v. Federal Power Commission, Dist.Col., 83 S.Ct. 1266, 373 U.S. 294, 10 L.Ed.2d 357, reh. den. 84 S.Ct. 25, 375 U.S. 870, 11 L.Ed.2d 99—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471—Wood v. Strickland, Ark., 95 S.Ct. 992, 420 U.S. 308, 43 L.Ed.2d 214, reh. den. 95 S.Ct. 1589, 421 U.S. 921, 43 L.Ed.2d 790, on remand, C.A., 519 F.2d 744—Rondeau v. Mosinee Paper Corp., Wis., 95 S.Ct. 2069, 422 U.S. 49, 45 L.Ed.2d 12—Cort v. Ash, Pa., 95 S.Ct. 2080—U.S. v. Ortiz, Cal., 95 S.Ct. 2585, 422 U.S. 891, 45 L.Ed.2d 623—Tennessee v. Dunlap, 96 S.Ct. 2099, 426 U.S. 312, 48 L.Ed.2d 660—G. D. Searle & Co. v. Cohn, N.J., 102 S.Ct. 1137, 455 U.S. 404, 71 L.Ed.2d 250, on remand, C.A., 677 F.2d 301, on remand 598 F.Supp. 965—Winberger v. Rossi, Dist.Col., 102 S.Ct. 1510, 457 U.S. 25, 71 L.Ed.2d 715.

Argument by amicus not raised by either party

U.S.—United Parcel Service, Inc. v. Mitchell, N.Y., 101 S.Ct. 1559, 451 U.S. 56, 67 L.Ed.2d 732.

Matters not considered by Court of Appeals

(1) U.S.—F.T.C. v. Travelers Health Ass'n, 80 S.Ct. 717, 362 U.S. 293, 4 L.Ed.2d 724, on remand, C.A., 298 F.2d 820—Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, N.Y., 91 S.Ct. 1999, 403 U.S. 388, 29 L.Ed.2d 619.

Waiver or abandonment in lower courts

(4) Other instances.

U.S.—New Haven Inclusion Cases, Conn., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691—New York, N.H. & H.R. Co., First Mortg. 4% Bondholder's Committee v. U.S., N.Y., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691.

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74. U.S.—Rogers v. U.S., La., 95 S.Ct. 2091, 422 U.S. 35, 45 L.Ed.2d 1, on remand, C.A., 519 F.2d 1084—Washington v. Davis, 96 S.C. 2040, 426

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U.S. 229, 48 L.Ed.2d 597—Vance v Terrazas, 100 S.Ct. 540, 444 U.S. 252, 62 L.Ed.2d 461, reh. den. 100 S.Ct. 1285, 445 U.S. 920, 63 L.Ed.2d 606, on remand D.C., 494 F.Supp. 1017, aff., C.A., 653 F.2d 285—City of Newport v. Fact Concerts, Inc., R.I., 101 S.Ct. 2748, 453 U.S. 247, 69 L.Ed.2d 616.

Jurisdiction

U.S.—Liberty Mut. Ins Co. v. Wetzel, 96 S.Ct. 1202, 424 U.S. 737, 47 L.Ed.2d 435.

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74.5. U.S.—Procunier v. Navarette, Cal., 98 S.Ct. 855, 434 U.S. 555, 55 L.Ed.2d 24, on remand, C.A., 581 F.2d 202—Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, N.J., 101 S.Ct. 2615, 453 U.S. 1, 69 L.Ed.2d 435.

§ 204(18). —— —— Questions of State or Local Law

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74.50. U.S.—U.S. v. Durham Lumber Co., N.C., 80 S.Ct. 1282, 363 U.S. 522, 4 L.Ed.2d 1371.

74.55. U.S.—Pierson v. Ray, Miss., 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295—U.S. v. Kimbell Foods, Inc., Ga., 99 S.Ct. 1448, 440 U.S. 715, 59 L.Ed.2d 711, on remand C.A., 600 F.2d 478.

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74.65. U.S.—U.S. v. Durham Lumber Co., N.C., 80 S.Ct. 1282, 363 U.S. 522, 4 L.Ed.2d 1371.

§ 204(19). —— —— Matters Not Necessary to Decision on Review

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75. U.S.—Parker v. Ellis, Tex., 80 S.Ct. 909, 362 U.S. 574, 4 L.Ed.2d 963—First Nat. Bank of Ariz. v. Cities Service Co., N.Y., 88 S.Ct. 1575, 391 U.S. 253, 20 L.Ed.2d 569, reh. den. 89 S.Ct. 63, 393 U.S. 901, 21 L.Ed.2d 188.

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76. U.S.—Roe v. Wade, Tex., 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed.2d 147, reh. den. 93 S.Ct. 1409, 410 U.S. 959, 35 L.Ed.2d 694.

Particular matters held moot

(6) U.S.—Aikens v. California, Cal., 92 S.Ct. 1931, 406 U.S. 813, 32 L.Ed.2d 511.

Particular matters held not moot

(6) U.S.—Gannett, Inc. v. DePasquale, N.Y., 99 S.Ct. 2898, 443 U.S. 368, 61 L.Ed.2d 608—Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 99 S.Ct. 3055, 443 U.S. 658, 61 L.Ed.2d 823, on remand, C.A., 605 F.2d 492, on remand 603 P.2d 819, 92 Wash.2d 939, app. after remand 641 F.2d 1311, mod. 100 S.Ct. 34, 444 U.S. 816, 62 L.Ed.2d 24, on remand 603 P.2d 819, 92 Wash.2d 939.

The state's obedience in a criminal case to the mandate of the Court of Appeals and the judgment of the District Court does moot the case before the Supreme Court.[76.1]

76.1. U.S.—Mancusi v. Stubbs, N.Y., 92 S.Ct. 2308, 408 U.S. 204, 33 L.Ed.2d 293.

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76.46. U.S.—Berenyi v. District Director, Immigration and Naturalization Service, Mass., 87 S.Ct. 666, 385 U.S. 630, 17 L.Ed.2d 656.

§ 204(21). —— —— Questions of Fact; Matters of Discretion

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76.62. U.S.—New Haven Inclusion Cases, Conn., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691—New York, N.H. & H R. Co., First Mortg. 4% Bondholder's Committee v. U.S., N.Y., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691.

Sufficiency of evidence before administrative board

(1) U.S.—N.L.R.B. v. Walton Mfg. Co., Ga. & Fla., 82 S.Ct. 853, 369 U.S. 404, 7 L.Ed.2d 829, on remand, C.A., 322 F.2d 187.

(2) Other decisions.

U.S.—Communist Party of U.S. v. Subversive Activities Control Bd., App.D.C., 81 S.Ct. 1357, 367 U.S. 1, 6 L.Ed.2d 625, reh. den. 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72.

76.64. U.S.—U.S. v. Durham Lumber Co., N.C., 80 S.Ct. 1282, 363 U.S. 522, 4 L.Ed.2d 1371—Golden State Bottling Co., Inc. v. N.L.R.B., 94 S.Ct. 414, 414 U.S. 168, 38 L.Ed.2d 388.

76.70. U.S.—Time, Inc. v. Pape, Ill., 91 S.Ct. 633, 401 U.S. 279, 28 L.Ed.2d 45, reh. den. 91 S.Ct. 1248, 401 U.S. 1015, 28 L.Ed.2d 552.

76.72. U.S.—Gutierrez v. Waterman S.S. Corp., Puerto Rico, 83 S.Ct. 1185, 373 U.S. 206, 10 L.Ed.2d 297, reh. den. 83 S.Ct. 1863, 374 U.S. 858, 10 L.Ed.2d 1082.

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78. "Two-court rule"

U.S.—Berenyi v. District Director, Immigration and Naturalization Service, Mass., 87 S.Ct. 666, 385 U.S. 630, 17 L.Ed.2d 656.

Salutary rule to be followed where applicable

U.S.—Neil v. Biggers, Tenn., 93 S.Ct. 375, 409 U.S. 188, 34 L.Ed.2d 401.

Fact findings of district courts accorded great weight

U.S.—Mayor of City of Philadelphia v. Educational Equality League, Pa., 94 S.Ct. 1323, 415 U.S. 605, 39 L.Ed.2d 630.

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78.30. Reasonableness of search, etc.

U.S.—Mapp v. Ohio, Ohio, 81 S.Ct. 1684, 367 U.S. 643, 6 L.Ed.2d 1081, 84 A.L.R.2d 933, reh. den. 82 S.Ct. 23, 368 U.S. 871, 7 L.Ed.2d 72.

§ 204(23). —— —— Questions of Jurisdiction

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80. U.S.—Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, Nev., 99 S.Ct. 1171, 440 U.S. 191, 59 L.Ed.2d 401, on remand D.C., 474 F.Supp. 901.

82. U.S.—Gutierrez v. Waterman S.S. Corp., Puerto Rico, 83 S.Ct. 1185, 373 U.S. 206, 10 L.Ed.2d 297, reh. den. 83 S.Ct. 1863, 374 U.S. 858, 10 L.Ed.2d 1082—Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, Cal., 99 S.Ct. 1171, 443 U.S. 307, 61 L.Ed.2d 560, reh. den. 100 S.Ct. 195, 444 U.S. 890, 62 L.Ed.2d 126—McCarthy v. Harper, 101 S.Ct. 827, 449 U.S. 1309, 66 L.Ed.2d 782.

§ 204(24). —— —— Matters Urged by Respondent

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83. U.S.—Massachusetts Mut. Life Ins. Co. v. Ludwig, 96 S.Ct. 2158, 426 U.S. 479, 48 L.Ed.2d 784.

89. U.S.—United States v. New York Tel. Co., N.Y., 98 S.Ct. 364, 434 U.S. 159, 54 L.Ed.2d 376.

§ 204(25). —— —— Presumptions and Burden of Showing Error

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92. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

Presumptions or assumptions not permissible

(3) Other presumptions or assumptions.

U.S.—Boulden v. Holman, Ala., 89 S.Ct. 1138, 394 U.S. 478, 22 L.Ed.2d 433.

94. U.S.—U.S. v. Neifert-White Co., Mont., 88 S.Ct. 959, 390 U.S. 228, 19 L.Ed.2d 1061.

Summary judgment against plaintiff

U.S.—Bishop v. Wood, 96 S.Ct. 2074, 426 U.S. 341, 48 L.Ed.2d 684.

§ 204(26). —— Determination and Disposition of Cause

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97. U.S.—New York, N.H. & H.R. Co. v. Henagan, Mass., 81 S.Ct. 198, 364 U.S. 441, 5 L.Ed.2d 183—King v. Smith, Ala., 88 S.Ct. 842, 19 L.Ed.2d 971—Cort v. Ash, Pa., 95 S.Ct. 2080—U.S. v. United Continental Tuna Corp., 96 S.Ct. 1319, 425 U.S. 164, 47 L.Ed.2d 653, on remand 550 F.2d 569—Ernst and Ernst v. Hochfelder, 96 S.Ct. 1375, 425 U.S. 185, 47 L.Ed.2d 668, reh. den. 96 S.Ct. 2194, 425 U.S. 986, 48 L.Ed.2d 811.

98. U.S.—Carnation Co. v. Pacific Westbound Conference, Cal., 86 S.Ct. 781, 383 U.S. 213, 932, 15 L.Ed.2d 709.

1. U.S.—U.S. v. Durham Lumber Co., N.C., 80 S.Ct. 1282, 363 U.S. 522, 4 L.Ed.2d 1371—Massachusetts Trustees of Eastern Gas and Fuel Associates v. U.S., Mass., 84 S.Ct. 1236, 377 U.S. 235, 12 L.Ed.2d 268—C. I. R. v. Bosch's Estate, Conn. & N.Y., 87 S.Ct. 1776, 387 U.S. 456, 18 L.Ed.2d 886, on remand, C.A., 382 F.2d 295.

2. U.S.—Ward v. Atlantic Coast Line R. Co., Fla., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820—Gondeck v. Pan Am. World Airways, Inc., Fla., 86 S.Ct. 153, 382 U.S. 25, 15 L.Ed.2d 21.

3. U.S.—Rios v. U.S., Cal., 80 S.Ct. 1431, 364 U.S. 253, 4 L.Ed.2d 1688.

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6. U.S.—Carpenters Pension Trust for Southern California v. Kronschnabel, C.A.Cal., 632 F.2d 745, cert. den. 101 S.Ct. 3159, 453 U.S. 922, 69 L.Ed.2d 1004.

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11. U.S.—City of Meridian v. Southern Bell Tel. & Tel. Co., Miss., 79 S.Ct. 455, 358 U.S. 639, 3 L.Ed.2d 562—C. I. R. v. Duberstein, N.Y., 80 S.Ct. 1190, 363 U.S. 278, 4 L.Ed.2d 1218, conf. to, C.A., 283 F.2d 949—Van Dusen v. Barrack, Pa., 84 S.Ct. 805, 376 U.S. 612, 11 L.Ed.2d 945, on remand, D.C., 236 F.Supp. 645—Calhoun v. Latimer, Ga., 84 S.Ct. 1235, 377 U.S. 263, 12 L.Ed.2d 288—Boulden v. Holman, Ala., 89 S.Ct. 1138, 394 U.S. 478, 22 L.Ed.2d 433—Scandifia v.

U.S., N.Y., Franzese v. U.S., N.Y., Natarelli v. U.S., N.Y., Randaccio v. U.S., N.Y., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297—Giordano v. U.S., Mich., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297—Hoffa v. U.S., Tenn., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297, on remand 307 F.Supp. 1129, affd. C.A., 437 F.2d 11, cert. den. 91 S.Ct. 1664, 402 U.S. 988, 29 L.Ed.2d 154—Stassi v. U.S., Fla., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297—Clay v. U.S., Tex., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297, app. after remand, C.A., 430 F.2d 165, cert. gr. 91 S.Ct. 457, 400 U.S. 990, 27 L.Ed.2d 438, revd. on oth. grds. 91 S.Ct. 2068, 403 U.S. 698, 29 L.Ed.2d 810, mand. conf. to 446 F.2d 1406—Aiuppa v. U.S., Kan., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297, app. after remand 440 F.2d 893, cert. den. 92 S.Ct. 60, 404 U.S. 871, 30 L.Ed.2d 114—Amabile v. U.S., Ill., Battaglia v. U.S., Ill., Di Pietto v. U.S., Ill, Evans v. U.S., Ill., Hoffa v. U.S., Ill., Dranow v. U.S., Ill., 89 S.Ct. 1163, 394 U.S. 310, 22 L.Ed.2d 297, on remand 307 F.Supp. 1129, affd., C.A., 437 F.2d 11, cert. den. 91 S.Ct. 1664, 402 U.S. 988, 29 L.Ed.2d 154—Goosby v. Osser, Pa., 93 S.Ct. 854, 409 U.S. 512, 35 L.Ed.2d 36—Steffel v. Thompson, Ga., 94 S.Ct. 1209, 415 U.S. 452, 39 L.Ed.2d 505, mand. conf. to 494 F.2d 691—Foster v. Dravo Corp., Pa., 95 S.Ct. 879, 420 U.S. 92, 43 L.Ed.2d 44, on remand 395 S.Ct. 536—U.S. v. New Jersey State Lottery Commission, N.J., 95 S.Ct. 941, 420 U.S. 371, 43 L.Ed.2d 260—Albermarle Paper Co. v. Moody, N.C., 95 S.Ct. 2362, 422 U.S. 405, 45 L.Ed.2d 280—International Broth. of Teamsters v. U.S., Tex., 97 S.Ct. 1843, 431 U.S. 324, 52 L.Ed.2d 396, app. after remand, C.A., 659 F.2d 690—Nashville Gas Co. v. Satty, Tenn., 98 S.Ct. 347, 434 U.S. 136, 54 L.Ed.2d 356—Vendo Co. v. Lektro-Vend Corp., Ill., 98 S.Ct. 702, 434 U.S. 425, 54 L.Ed.2d 659.

New hearing not required

U.S.—Terrazas v. Haig, C.A.Ill., 653 F.2d 285.

Motion for clarification

U.S.—Vendo Co. v. Lektro-Vend Corp., Ill., 98 S.Ct. 702, 434 U.S. 425, 54 L.Ed.2d 659.

11.5. Environmental Protection Agency

D.C.—District of Columbia v. Costle, C.A., 567 F.2d 1091, 186 U.S.App.D.C. 98.

12. U.S.—Petite v. U.S., Md., 80 S.Ct. 450, 361 U.S. 529, 4 L.Ed.2d 490—Cory Corp. v. Sauber, Ill., 80 S.Ct. 1331, 363 U.S. 709, 4 L.Ed.2d 1508—Nolan v. Transocean Air Lines, N.Y., 81 S.Ct. 555, 365 U.S. 293, 5 L.Ed.2d 571, on remand 290 F.2d 904, cert. den. 82 S.Ct. 177, 368 U.S. 901, 7 L.Ed.2d 96—Egan v. City of Aurora, Ill., Ill., 81 S.Ct. 684, 365 U.S. 514, 5 L.Ed.2d 741—Giles v. State of Md., Md., 87 S.Ct. 793, 386 U.S. 66, 17 L.Ed.2d 737, conf. to 227 A.2d 745, 245 Md. 342—Taylor v. McKeithen, La., 92 S.Ct. 1980, 407 U.S. 191, 32 L.Ed.2d 648, mand. conf. to, C.A., 499 F.2d 893—J. Truett Payne Co., Inc. v. Chrysler Motors Corp., Ala., 101 S.Ct. 1923, 451 U.S. 557, 68 L.Ed.2d 442, on remand, C.A., 670 F.2d 575, reh. den. 677 F.2d 117, two cases, cert. den. 103 S.Ct. 212, 459 U.S. 908, 74 L.Ed.2d 169—Mills v. Rogers, Mass., 102 S.Ct. 2442, 457 U.S. 291, 73 L.Ed.2d 16, on remand C.A., 738 F.2d 1.

13. U.S.—Quern v. Jordan, Ill., 99 S.Ct. 1139, 440 U.S. 332, 59 L.Ed.2d 358.

Particular causes remanded with directions

(3) U.S.—Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Or., 84 S.Ct. 748, 376 U.S. 315, 11 L.Ed.2d 732, on remand, C.A., 336 F.2d 124, cert, den. 85 S.Ct. 668, 379 U.S. 973, 13 L.Ed.2d 565.

State or federal law

(2) State court judgment vacated and cause remanded to permit that court to explicate whether or not its judgment relied on federal law.

U.S.—Ohio v. Gallagher, 96 S.Ct. 1438, 425 U.S. 257, 47 L.Ed.2d 722.

13.5. Formal mandates do not issue in cases from federal courts

U.S.—Vendo Co. v. Lektro-Vend Corp., Ill., 98 S.Ct. 702, 434 U.S. 425, 54 L.Ed.2d 659.

15. U.S.—Logue v. U.S., Tex., 93 S.Ct. 2215, 412 U.S. 521, 37 L.Ed.2d 121, on remand 488 F.2d 1090.

Habeas Corpus treated as certiorari and remanded to Court of Appeals

U.S.—Dennett v. Hogan, 94 S.Ct. 18, 414 U.S. 12, 38 L.Ed.2d 13.

Voting Rights Act

U.S.—Escambia County, Fla. v. McMillan, Fla., 104 S.Ct. 1577, 466 U.S. 48, 80 L.Ed.2d 36, on remand 748 F.2d 1037.

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16.5. U.S.—Beltran v. Myers, Cal., 101 S.Ct. 1961, 451 U.S. 625, 68 L.Ed.2d 495, on remand, C.A., 650 F.2d 1165, app. after remand 701 F.2d 91, cert. den. 103 S.Ct. 3115, 462 U.S. 1134, 77 L.Ed.2d 1369.

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18.5. U.S.—Mayor of City of Philadelphia v. Educational Equality League, Pa., 94 S.Ct. 1323, 415 U.S. 605, 39 L.Ed.2d 630—Board of Curators of University of Missouri v. Horowitz, Mo., 98 S.Ct. 948, 435 U.S. 78, 55 L.Ed.2d 124.

18.10. Decision and brief in related case

U.S.—Retail Clerks Intern. Ass'n Local 1625, AFL-CIO v. Schermerhorn, Fla., 83 S.Ct. 1461, 373 U.S. 746, 10 L.Ed.2d 678.

18.20. D.C.—District of Columbia v. Costle, C.A., 567 F.2d 1091, 186 U.S.App.D.C. 98.

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19. U.S.—Texaco, Inc. v. Federal Power Commission, C.A.Okl., 337 F.2d 253.

Change of legislative policy

(2) Other matters.

U.S.—Banco Naciona de Cuba v. Farr, D.C.N.Y., 243 F.Supp. 957, affd., C.A., 383 F.2d 166, cert. den. 88 S.Ct. 1038, 390 U.S. 956, 20 L.Ed.2d 1151, reh. den. 88 S.Ct. 1406, 390 U.S. 1037, 20 L.Ed.2d 298.

20. U.S.—Sunkist Growers, Inc. v Winckler & Smith Citrus Products, C.A., 316 F.2d 275.

21. U.S.—Griffin v. County School Bd. of Prince Edward County, Va., 84 Sct. 1226, 377 U.S. 218, 12 L.Ed.2d 256, motion gr. 84 S.Ct. 1627, 377 U.S. 950, 12 L.Ed.2d 496.

Gertz v. Robert Welch, Inc., C.A.Ill., 680 F.2d 527, cert. den. 103 S.Ct. 1233, 459 U.S. 1226, 75 L.Ed.2d 467.

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21.50. U.S.—M P I, Inc. v. McCullough, D.C.Miss., 463 F.Supp. 887.

22.5. U.S.—Cruz v. Estelle, C.A.Tex., 497 F.2d 496.

§ 204(29). —— Costs

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22.70. U.S.—U.S. for Benefit and on Behalf of Sherman v. Carter, C.A.Cal., 272 F.2d 363.

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25. U.S.—U.S. v. Arnold, Schwinn & Co., Ill., 87 S.Ct. 1856—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947—Gonzalez v. Automatic Emp. Credit Union, Ill., 95 S.Ct. 289, 419 U.S. 90, 42 L.Ed.2d 249—McLucas v. DeChamplain, Dist.Col., 95 S.Ct. 1365, 421 U.S. 21, 43 L.Ed.2d 699—Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), Dist.Col., 95 S.Ct. 2336, 422 U.S. 289, 45 L.Ed.2d 191—Washington v. Confederated Tribes of Colville Indian Reservation, Wash., 100 S.Ct. 2069, 447 U.S. 134, 65 L.Ed.2d 10, reh. den. 101 S.Ct. 25, 448 U.S. 911, 65 L.Ed.2d 1172—U.S. v. Darusmont, Cal., 101 S.Ct. 549, 449 U.S. 292, 66 L.Ed.2d 513.

U.S. v. St. Regis Paper Co., C.A.N.Y., 285 F.2d 607, affd. 82 S.Ct. 289, 368 U.S 208, 7 L.Ed.2d 240, reh. den. 82 S.Ct. 437, 368 U.S. 972, 7 L.Ed.2d 401, motion den. 82 S.Ct. 686, 369 U.S. 809, 7 L.Ed.2d 611—Lyons v. Davoren, C.A.Mass., 402 F.2d 890, cert. den. 89 S.Ct. 861, 393 U.S. 1081, 21 L.Ed.2d 774.

Dymytryshyn v. Esperdy, D.C.N.Y., 285 F.Supp. 507, affd. 89 S.Ct. 239, 393 U.S. 77, 21 L.Ed.2d 63.

Tex.—White v. State, Cr.App., 543 S.W.2d 366.

Appeals in cases involving Interstate Commerce, Sherman Anti-trust, or other like acts where United States is complainant.

U.S.—A L. Mechling Barge Lines, Inc. v. U.S., Mo., 82 S.Ct. 337, 368 U.S. 324, 7 L.Ed.2d 317—Railway Exp. Agency, Inc. v. U.S., 82 S.Ct. 466, 7 L.Ed.2d 432—Gilbertville Trucking Co. v. U.S., Mass., 83 S.Ct. 217, 371 U.S. 115, 9 L.Ed.2d 177—U.S. v. Falstaff Brewing Corp., R.I., 93 S.Ct. 1096, 410 U.S. 526, 35 L.Ed.2d 475, mand. conf. to 383 F.Supp. 1020.

Where parties would be deprived of appellate review

U.S.—U.S. v. Singer Mfg. Co., N.Y., 83 S.Ct. 1773, 374 U.S. 174, 10 L.Ed.2d 823, on remand, D.C., 231 F.Supp. 240.

Public importance of issues

U.S.—U.S. v. Nixon, Dist.Col., 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039.

26. U.S.—U.S. v. FMC Corp., Cal., 84 S.Ct. 4, 11 L.Ed.2d 20—Zemel v. Rusk, Conn., 85 S.Ct. 1271, 381 U.S. 1, 14 L.Ed.2d 179, reh. den. 86 S.Ct. 17, 382 U.S. 873, 15 L.Ed.2d 114—Allen v. State Bd. of Elections, Miss. & Va., 89 S.Ct. 817, 393 U.S. 544, 22 L.Ed.2d 1.

Direct appeal denied

U.S.—Shenandoah Val. Broadcasting, Inc. v. American Soc. of Composers, Authors and Publishers, N.Y., 84 S.Ct. 8, 375 U.S. 39, 11 L.Ed.2d 8, op. am. 84 S.Ct. 627, 375 U.S. 994, 11 L.Ed.2d 467, on remand, C.A., 331 F.2d 117, cert. den. 84 S.Ct. 1917, 377 U.S. 997, 12 L.Ed.2d 1048—Zemel v. Rusk, Conn., 85 S.Ct. 1271, 381 U.S. 1, 14 L.Ed.2d 179, reh. den. 86 S.Ct. 17, 382 U.S. 873, 15 L.Ed.2d 114—Middlewest Motor Freight Bureau v. U.S., C.A.Minn., 433 F.2d 212, cert. den. 91 S.Ct. 2169, 402 U.S. 999, 29 L.Ed.2d 165.

Inapplicable to action by United States to impose monetary penalty

U.S.—U.S. v. ITT Continental Baking Co., C.A.Colo., 462 F.2d 1104.

Three-judge court

U.S.—Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), Dist.Col., 95 S.Ct. 2336, 422 U.S. 289, 45 L.Ed.2d 191—Volvo of America Corp. v. Schwarzer, Cal., 97 S.Ct. 284, 429 U.S. 1331, 50 L.Ed.2d 273—Washington v. Confederated Tribes of Colville Indian Reservation, Wash., 100 S.Ct. 2069, 447 U.S. 134, 65 L.Ed.2d 10, reh. den. 101 S.Ct. 25, 448 U.S. 911, 65 L.Ed.2d 1172.

Wernick v. Matthews, 524 F.2d 543.

27. U.S.—Jenkins v. McKeithen, La., 89 S.Ct. 1843, 395 U.S. 411, 23 L.Ed.2d 404, reh. den. 90 S.Ct. 35, 396 U.S. 869, 24 L.Ed.2d 123.

28. U.S.—Bureau of Economic Analysis, U.S. Dept. of Commerce v. Long, Wash., 101 S.Ct. 1073.

29. U.S.—Tidewater Oil Co. v. U.S., 93 S.Ct. 408, 409 U.S. 151, 34 L.Ed.2d 375—U.S. v. Nixon, Dist. Col., 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039.

Clearly erroneous rule

U.S.—U.S. v. Singer Mfg. Co., N.Y., 83 S.Ct. 1773, 374 U.S. 174, 10 L.Ed.2d 823, on remand, D.C., 231 F.Supp. 240.

Review of question of law

U.S.—U.S. v. Singer Mfg. Co., N.Y., 83 S.Ct. 1773, 374 U.S. 174, 10 L.Ed.2d 823, on remand, D.C., 231 F.Supp. 240.

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31.5. U.S.—U.S. v. American Soc. of Composers, Authors and Publishers, C.A.N.Y., 341 F.2d 1003, app. dism. 86 S.Ct. 160, 382 U.S. 38, 15 L.Ed.2d 32, cert. den. 86 S.Ct. 160, 382 U.S. 877, 15 L.Ed.2d 119—Lee v. Macon County Bd. of Ed., C.A.Ala., 429 F.2d 1218.

31.10. **Question abandoned**

U.S.—U.S. v. Philadelphia Nat. Bank, Pa., 83 S.Ct. 1715, 374 U.S. 321, 10 L.Ed.2d 915.

32. U.S.—Bailey v. Patterson, Miss., 82 S.Ct. 549, 369 U.S. 31, 7 L.Ed.2d 512.

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46. U.S.—Florida Lime & Avocado Growers, Inc. v. Jacobsen, Cal., 80 S.Ct. 568, 362 U.S. 73, 4 L.Ed.2d 568—Polar Ice Cream & Creamery Co. v. Andrews, Fla., 84 S.Ct. 378, 375 U.S. 361, 11 L.Ed.2d 389—Anderson v. Martin, La., 84 S.Ct. 454, 375 U.S. 399, 11 L.Ed.2d 430—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440—Baggett v. Bullitt, Wash., 84 S.Ct. 1316, 377 U.S. 360, 12 L.Ed.2d 377—Kesler v. Department of Public Safety, Financial Responsibility Division, State of Utah, Utah, 82 S.Ct. 807, 369 U.S. 153, 7 L.Ed.2d 641—Paul v. U.S., Cal., 83 S.Ct. 426, 371 U.S. 245, 9 L.Ed.2d 292—Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co., Ark., 86 S.Ct. 594, 382 U.S. 423, 15 L.Ed.2d 501—Department of Employment v. U.S., Colo., 87 S.Ct. 464, 385 U.S. 355, 17 L.Ed.2d 414—Allen v. State Bd. of Elections, Miss. & Va., 89 S.Ct. 817, 393 U.S. 544, 22 L.Ed.2d 1—Turner v. Fouche, Ga., 90 S.Ct. 532, 396 U.S. 346, 24 L.Ed.2d 567—Roe v. Wade, Tex., 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed.2d 147, reh. den. 93 S.Ct. 1409, 410 U.S. 959, 35 L.Ed.2d 694—Philbrook v. Glodgett, Vt., 95 S.Ct. 1893, 421 U.S. 707, 44 L.Ed.2d 525—Hicks v. Miranda, Cal., 95 S.Ct. 2281, 422 U.S. 332, 45 L.Ed.2d 223—Weinberger v. Salfi, Cal., 95 S.Ct. 2457—U.S. v. Will, Ill., 101 S.Ct. 471, 449 U.S. 200, 66 L.Ed.2d 392.

U.S. v. Ramsey, C.A.Miss., 353 F.2d 650—B. F. Goodrich Co. v. Northwest Industries, Inc., C.A. Del., 424 F.2d 1349, cert. den. 91 S.Ct. 41, 400 U.S. 822, 27 L.Ed.2d 50—Mayhue's Super Liquor Store, Inc. v. Meiklejohn, C.A.Fla., 426 F.2d 142—Denner v. Petrucci, C.A.N.J., 441 F.2d 564—Bogue v. Faircloth, C.A.Fla., 441 F.2d 623—Coleman v. Yokum, C.A.La., 442 F.2d 351.

Bush v. Orleans Parish School Bd., D.C.La., 188 F.Supp. 916, affd., 81 S.Ct. 754, 365 U.S. 569, 5 L.Ed.2d 806—Rosado v. Wyman, D.C.N.Y., 304 F.Supp. 1350.

28 U.S.C.A. § 2281, was repealed in 1976.

Orders suppressing evidence

U.S.—Perez v. Ledesma, La., 91 S.Ct. 674, 401 U.S. 82, 27 L.Ed.2d 701.

A district court of three judges must be convened when otherwise required by law, or when an action is filed challenging the constitutionality of the apportionment of any statewide legislative body.[46.5]

46.5. 28 U.S.C.A. § 2284, as amended in 1976.

47.5. U.S.—Goldstein v. Cox, N.Y., 90 S.Ct. 671, 396 U.S. 471, 24 L.Ed.2d 663—Gonzalez v. Automatic Emp. Credit Union, Ill., 95 S.Ct. 289, 419 U.S. 90, 42 L.Ed.2d 249.

48. U.S.—MTM, Inc. v. Baxley, Ala., 95 S.Ct. 1278, 420 U.S. 799, 43 L.Ed.2d 636, app. after remand, C.A., 523 F.2d 1255.

Other statement of purpose

U.S.—Swift & Co. v. Wickham, N.Y., 86 S.Ct. 258, 382 U.S. 111, 15 L.Ed.2d 194.

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50. U.S.—Katzenbach v. McClung, Ala., 85 S.Ct. 377, 379 U.S. 294, 13 L.Ed.2d 290—Goldstein v. Cox, N.Y., 90 S.Ct. 671, 396 U.S. 471, 24 L.Ed.2d 663.

Mayhue's Super Liquor Store, Inc. v. Meiklejohn, C.A.Fla., 426 F.2d 142.

50.5. **Enactment of Commonwealth of Puerto Rico treated as "state statute"**

U.S.—Calero-Toledo v. Pearson Yacht Leasing Co., Puerto Rico, 94 S.Ct. 2080, 416 U.S. 663, 40 L.Ed.2d 452, reh. den. 94 S.Ct. 3187, 417 U.S. 977, 41 L.Ed.2d 1148.

56. U.S.—Goldstein v. Cox, N.Y., 90 S.Ct. 671, 396 U.S. 471, 24 L.Ed.2d 663—Gunn v. University Committee to End War in Viet Nam, Tex., 90 S.Ct. 2013, 399 U.S. 383, 26 L.Ed.2d 684—Schmidt v. Lessard, Wis., 94 S.Ct. 713, 414 U.S. 473, 38 L.Ed.2d 661, on remand 379 F.Supp. 1376, vac. on oth. grds. 95 S.Ct. 1943, 421 U.S. 957, 44 L.Ed.2d 445.

Appeal by successful party not proper

U.S.—Perez v. Ledesman, La., 91 S.Ct. 674, 401 U.S. 82, 27 L.Ed.2d 701.

58.5. U.S.—Oldroyd v. Kugler, C.A.N.J., 461 F.2d 535, on remand, D.C., 352 F.Supp. 27, affd. 93 S.Ct. 2753, 412 U.S. 924, 37 L.Ed.2d 153.

Three-judge court improperly convened

U.S.—Lee v. Thornton, Vt., 95 S.Ct. 853, 420 U.S. 139, 43 L.Ed.2d 85, on remand, D.C., 398 F.Supp. 970, revd. on oth. grds., C.A., 538 F.2d 27.

59. U.S.—Florida Lime & Avocado Growers, Inc. v. Jacobsen, Cal., 80 S.Ct. 568, 362 U.S. 73, 4 L.Ed.2d 568—Bailey v. Patterson, Miss., 82 S.Ct. 549, 369 U.S. 31, 7 L.Ed.2d 512—U.S. v. Georgia Public Service Commission, Ga., 83 S.Ct. 397, 371 U.S. 285, 9 L.Ed.2d 317—Wilson v. City of Port Lavaca, Tex., Tex., 88 S.Ct. 1502, 391 U.S. 352, 20 L.Ed.2d 636—Lynch v. Household Finance Corp., Conn., 92 S.Ct. 1113, 405 U.S. 538, 31 L.Ed.2d 424, reh. den. 92 S.Ct. 1611, 406 U.S. 911, 31 L.Ed.2d 822, on remand 360 F.Supp. 720—Sixty-Seventh Minnesota State Senate v. Beens, Minn., 92 S.Ct. 1477, 406 U.S. 187, 32 L.Ed.2d 1, on remand 349 F.Supp. 97—Chapman v. Meier, N.D., 95 S.Ct. 751, 420 U.S. 1, 42 L.Ed.2d 766, on remand 407 F.Supp. 649—Dothard v. Rawlinson, Ala., 97 S.Ct. 2720, 433 U.S. 321, 53 L.Ed.2d 786—Alexander v. Fioto, N.Y., 97 S.Ct. 1345, 430 U.S. 634, 51 L.Ed.2d 694.

Action by three judge court not required

(1) In general.

U.S.—Swift & Co. v. Wickham, N.Y., 86 S.Ct. 258, 382 U.S. 111, 15 L.Ed.2d 194—Moody v. Flowers, Ala. & N.Y., 87 S.Ct. 1544, 387 U.S. 97, 18 L.Ed.2d 643, on remand, D.C., 271 F.Supp. 497, revd. on oth. grds., C.A., 393 F.2d 457—Perez v. Ledesma, La., 91 S.Ct. 674, 401 U.S. 82, 27 L.Ed.2d 701—Moore v. Charlotte-Mecklenburg Bd. of Ed., N.C., 91 S.Ct. 1292, 402 U.S. 47, 28 L.Ed.2d 590.

(2) Supremacy clause issue where only federal and state laws conflict.

U.S.—Swift & Co. v. Wickham, N.Y., 86 S.Ct. 258, 382 U.S. 111, 15 L.Ed.2d 194—Pennsylvania Public Utility Commission v. Pennsylvania R. Co., Pa., 86 S.Ct. 423, 382 U.S. 281, 15 L.Ed.2d 324—Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co., Ark., 86 S.Ct. 594, 382 U.S. 423, 15 L.Ed.2d 501.

Reapportionment cases

U.S.—White v. Regester, Tex., 93 S.Ct. 2332, 412 U.S. 755, 37 L.Ed.2d 314, mand. conf. to 378 F.Supp. 640, vac. on oth. grds. 95 S.Ct. 2670, 422 U.S. 935, 45 L.Ed.2d 662, on remand, D.C., 408 F.Supp. 1050.

Skolnick v. State Electoral Bd. of Ill., D.C.Ill., 336 F.Supp. 839.

The fact that a three-judge court dismissed the action for lack of subject matter jurisdiction may not preclude the Supreme Court's direct appellate jurisdiction.[59.5]

59.5. U.S.—Lynch v. Household Finance Corp., Conn., 92 S.Ct. 1113, 405 U.S. 538, 31 L.Ed.2d 424, reh. den. 92 S.Ct. 1611, 406 U.S. 911, 31 L.Ed.2d 822, on remand 360 F.Supp. 720.

60. **Parish ordinance**

U.S.—Perez v. Ledesma, La., 91 S.Ct. 674, 401 U.S. 82, 27 L.Ed.2d 701.

61. U.S.—Carey v. Wynn, Ill., 99 S.Ct. 49, 439 U.S. 8, 58 L.Ed.2d 7.

Improper merger of orders into one judgment not conferring jurisdiction

U.S.—Perez v. Ledesma, La., 91 S.Ct. 674, 401 U.S. 82, 27 L.Ed.2d 701.

62. U.S.—Mengelkoch v. Industrial Welfare Commission, Cal., 89 S.Ct. 60, 393 U.S. 83, 21 L.Ed.2d 215, reh. den. 89 S.Ct. 443, 393 U.S. 993, 21 L.Ed.2d 458, app. after remand, C.A., 442 F.2d 1119—Hicks v. Pleasure House, Inc., Cal., 92 S.Ct. 5, 404 U.S. 1, 30 L.Ed.2d 1.

Firkins v. State of Colo., C.A.Colo., 434 F.2d 1232.

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The Supreme Court has noted probable jurisdiction of a case involving the discretion of the district court to abstain from deciding a challenge to the constitutionality of a state statute.[66.1]

66.1. U.S.—Zwickler v. Koota, N.Y., 88 S.Ct. 391, 389 U.S. 241, 19 L.Ed.2d 444, on remand 290 F.Supp. 244, revd. on oth. grds. 89 S.Ct. 956, 394 U.S. 103, 22 L.Ed.2d 113—New Haven Inclusion Cases, Conn., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691—New York, N.H. & H.R. Co., First Mortg. 4% Bondholder's Committee v. U.S., N.Y., 90 S.Ct. 2054, 399 U.S. 392, 26 L.Ed.2d 691.

66.5. **Remand for further proceedings**

(3) Other instances.

U.S.—Brown v. Board of Ed. of Topeka, Kan., Del., Kan., S.C., & Va., 75 S.Ct. 753, 349 U.S. 294, 99 L.Ed. 1083—Pennsylvania Public Utility Commission v. Pennsylvania R. Co., Pa., 86 S.Ct. 423, 382 U.S. 281, 15 L.Ed.2d 324—Moody v. Flowers, Ala. & N.Y., 87 S.Ct. 1544, 387 U.S. 97, 18 L.Ed.2d 643, on remand, D.C., 271 F.Supp. 497, revd. on oth. grds., C.A., 393 F.2d 457—Wilson v. City of Port Lavaca, Tex., Tex., 88 S.Ct. 1502, 391 U.S. 352, 20 L.Ed.2d 636—Mitchell v. Donovan, Minn., 90 S.Ct. 1763, 398 U.S. 427, 26 L.Ed.2d 378.

69. 28 U.S.C.A. §§ 2281, 2282, were repealed in 1976.

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A district court of three judges must be convened when otherwise required by law, or when an action is filed challenging the constitutionality of the apportionment of congressional districts.[70.5]

70.5. 28 U.S.C.A. § 2284, as amended in 1976.

72. U.S.—Flemming v. Nestor, App.D.C., 80 S.Ct. 1367, 363 U.S. 603, 4 L.Ed.2d 1435, reh. den. 81 S.Ct. 29, 364 U.S. 854, 5 L.Ed.2d 77.

Inapplicable to order granting or denying only declaratory judgment

U.S.—Mitchell v. Donovan, Minn, 90 S.Ct. 1763, 398 U.S. 427, 26 L.Ed.2d 378—Gerstein v. Coe, Fla., 94 S.Ct. 2246, 417 U.S. 279, 41 L.Ed.2d 68.

73. U.S.—I.C.C. v. New York, N.H. & H.R. Co, Conn., 83 S.Ct. 1038, 372 U.S. 744, 10 L.Ed.2d 108—Nash v. Florida Indus. Commission, Fla., 88 S.Ct. 362, 389 U.S. 235, 19 L.Ed.2d 438, conf. to 205 So.2d 700.

73.50. U.S.—U.S. v. Raines, Ga., 80 S.Ct. 519, 362 U.S. 17, 4 L.Ed.2d 524—Hannah v. Larche, La., 80 S.Ct. 1502, 363 U.S. 420, 4 L.Ed.2d 1307, reh. den. 81 S.Ct. 33, 364 U.S. 855, 5 L.Ed.2d 79, reh. den. 81 S.Ct. 34, 364 U.S. 855, 5 L.Ed.2d 79—Bond v. Floyd, Ga., 87 S.Ct. 339, 385 U.S. 116, 17 L.Ed.2d 235—Schneider v. Smith, Wash., 88 S.Ct. 682, 390 U.S. 17, 19 L.Ed.2d 799—U.S. v. Christian Echoes Nat. Ministry, Inc., Okl., 92 S.Ct. 663, 404 U.S. 561, 30 L.Ed.2d 716, app. after remand, C.A., 470 F.2d 849, cert. den. 94 S.Ct. 41, 414 U.S. 864, 38 L.Ed.2d 84—McLucas v. DeChamplain, Dist.Col., 95 S.Ct. 1365, 421 U.S. 21, 43 L.Ed.2d 699—California v. Grace Brethren Church, Cal., 102 S.Ct. 2498, 457 U.S. 393, 73 L.Ed.2d 93.

Appeal by unsuccessful intervenor

U.S.—National Ass'n for Advancement of Colored People v. New York, Dist. Col., 93 S.Ct. 2591, 413 U.S. 345, 37 L.Ed.2d 648.

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Where a finding of statutory unconstitutionality is not contested on appeal there is no entitlement to direct review in the Supreme Court.[74.10]

74.10. U.S.—Heckler v. Edwards, Cal., 104 S.Ct. 1532, 465 U.S. 870, 79 L.Ed.2d 878.

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78. U.S.—U.S. v. National Dairy Products Corp., Mo., 83 S.Ct. 594, 372 U.S. 29, 9 L.Ed.2d 561, reh. den. 83 S.Ct. 1011, 372 U.S. 961, 10 L.Ed.2d 13—U.S. v. Braverman, Cal., 83 S.Ct. 1370, 373 U.S. 405, 10 L.Ed.2d 444—U.S. v. Healy, Fla., 84 S.Ct. 553, 376 U.S. 75, 11 L.Ed.2d 527—U.S. v. Wiesenfeld Warehouse Co., Fla., 84 S.Ct. 559, 376 U.S. 86, 11 L.Ed.2d 536—U.S. v. Price, Miss., 86 S.Ct. 1152, 383 U.S. 787, 16 L.Ed.2d 267—U.S. v. Covington, Ohio, 89 S.Ct. 1559, 395 U.S. 57, 23 L.Ed.2d 94.

U.S. v. Sampson, C.A.Ga., 298 F.2d 826, transf. to 83 S.Ct. 173, 371 U.S. 75, 9 L.Ed.2d 136—U.S. v. Knox, 90 S.Ct. 363, 396 U.S. 77, 24 L.Ed.2d 275.

Purpose

U.S.—U.S. v. Mersky, N.Y., 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

Composite statement of requirements for government appeals

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

78.5. U.S.—U.S. v. Brewster, Dist.Col., 92 S.Ct. 2531, 408 U.S. 501, 33 L.Ed.2d 507.

Construction

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

After trial begins government appeals limited to decisions arresting judgment

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

Decision based on facts adduced at trial held not "arrest of judgment"

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

79. U.S.—U.S. v. Covington, Ohio, 89 S.Ct. 1559, 395 U.S. 57, 23 L.Ed.2d 94.

U.S. v. Blue, C.A.Cal., 350 F.2d 267.

Judgment dismissing information

(2) U.S.—U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, app. certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

Held not plea in bar

(3) Other matters.

U.S.—U.S. v Weller, Cal., 91 S.Ct. 602, 401 U.S. 254, 28 L.Ed.2d 26, on remand, C.A., 466 F.2d 1279.

Defendant held not in jeopardy

(2) Other instances

U.S.—U.S. v. Blue, Cal., 86 S.Ct. 1416, 384 U.S. 251, 16 L.Ed.2d 510—U.S. v. Marion, Dist.Col., 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468.

Appeal from motion-in-bar not sustained after jeopardy attaches

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

Motion in bar defined

U.S.—U.S. v. Weller, Cal., 91 S.Ct. 602, 401 U.S. 254, 28 L.Ed.2d 26, on remand, C.A., 466 F.2d 1279.

Held motion in bar

U.S.—U.S. v. Marion, Dist.Col., 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468.

79.5. U.S.—U.S. v. Blue, Cal., 86 S.Ct. 1416, 384 U.S. 251, 16 L.Ed.2d 510.

U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, app. certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

Substance, not form, as controlling

U.S.—U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, app. certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

Exculpation of accused

U.S.—U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, app. certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

Rule applies to "arresting judgment" provision

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

The Criminal Appeals Act, 18 U.S.C.A. § 3731, has been amended so as to give jurisdiction to the Court of Appeals instead of the Supreme Court on appeal by the United States upon dismissal of the indictment or information where defendant is not put in jeopardy.[79.10]

79.10. U.S.—**Amendment not applied retroactively**

U.S. v. Jorn, Utah, 91 S.Ct. 547, 400 U.S. 470, 27 L.Ed.2d 543—U.S. v. Marion, Dist.Col., 92 S.Ct. 455, 404 U.S. 307, 30 L.Ed.2d 468—U.S. v. Enmons, La., 93 S.Ct. 1007, 410 U.S. 396, 35 L.Ed.2d 379.

81. Effect of acquittal

U.S.—U.S. v. Sisson, Mass., 90 S.Ct. 2117, 399 U.S. 267, 26 L.Ed.2d 608.

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82.10. U.S.—U.S. v. Meyer, C.A.Fla., 266 F.2d 747, cert. den. 80 S.Ct. 138, 139, 361 U.S. 875, 4 L.Ed.2d 113.

83. U.S.—U.S. v. Fruehauf, N.Y., 81 S.Ct. 547, 365 U.S. 146, 5 L.Ed.2d 476, reh. den. 81 S.Ct. 899, 365 U.S. 875, 6 L.Ed.2d 864—U.S. v. Guest, Ga., 86 S.Ct. 1170, 383 U.S. 745, 16 L.Ed.2d 239—U.S. v. Brewster, Dist.Col., 92 S.Ct. 2531, 408 U.S. 501, 33 L.Ed.2d 507.

83.5. U.S.—U.S. v. Ketchum, C.A.N.Y., 320 F.2d 3, cert. den. 84 S.Ct. 194, 375 U.S. 905, 11 L.Ed.2d 145.

84. U.S.—U.S. v. Bitz, C.A.N.Y., 282 F.2d 465.

84.5. Reason for rule

U.S.—U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, app. certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

Dismissal based on regulation

(1) U.S.—U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

(2) U.S.—U.S. v. Mersky, N.Y., 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

U.S. v. Mersky, C.A.N.Y., 261 F.2d 40, app. certified to 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

(3) Rule inapplicable where regulation and statute not inextricably intertwined.

U.S.—U.S. v Weller, Cal., 91 S.Ct. 602, 401 U.S. 254, 28 L.Ed.2d 26, on remand, C.A., 466 F.2d 1279.

85. U.S.—U.S. v. Meyer, C.A.Fla., 266 F.2d 747, cert. den. 80 S.Ct. 138, 139, 361 U.S. 875, 4 L.Ed.2d 113.

88. U.S.—U.S. v. Knox, 90 S.Ct. 363, 396 U.S. 77, 24 L.Ed.2d 275.

88.5. U.S.—U.S. v. Mersky, N.Y., 80 S.Ct. 459, 361 U.S. 431, 4 L.Ed.2d 423.

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88.20. U.S.—U.S. v. Fabrizio, N.Y., 87 S.Ct. 457, 385 U.S. 263, 17 L.Ed.2d 351.

89. U.S.—U.S. v. Knox, 90 S.Ct. 363, 396 U.S. 77, 24 L.Ed.2d 275.

90. U.S.—U.S. v Ketchum, C.A.N.Y., 320 F.2d 3, cert. den. 84 S.Ct. 194, 375 U.S. 905, 11 L.Ed.2d 145.

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94. U.S.—U.S. v. Sweet, Dist.Col., 90 S.Ct. 1958, 399 U.S. 517, 26 L.Ed.2d 770.

§ 225. In General

Library References

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2. U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

§ 226. Alaska

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3. Delay in filing petition not fatal

Alaska—Bridges v. Alaska Housing Authority, 349 P.2d 149.

§ 228(1). Puerto Rico

Library References

Federal Courts ⇐491.

Since the publication of the bound volume, the statute, 28 U.S.C.A. § 1293, providing for appeals from the Supreme Court of Puerto Rico to the Court of Appeals for the First Circuit has been repealed. See now 28 U.S.C.A. §§ 1292, 1294, relating to the jurisdiction of the courts of appeals.

§ 228(2). Hawaii

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6.55. 28 U.S.C.A. § 2281, was repealed in 1976.

§ 233. —— By Certiorari

Library References

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22.50. U.S.—Honda v Clark, Dist.Col., 87 S.Ct 1188, 386 U.S. 484, 18 L.Ed.2d 244, on remand, D.C., 303 F.Supp. 213—Key v. Doyle, Dist Col., 98 S.Ct. 280, 434 U.S 59, 54 L.Ed.2d 238, reh. den. 98 S.Ct. 753, 434 U.S. 1025, 54 L.Ed.2d 773.

Reluctant to review matters of peculiarly local concern

U.S.—Pernell v. Southall Realty, Dist.Cal., 94 S.Ct. 1723, 416 U.S. 363, 40 L.Ed.2d 198.

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23. U.S.—Palmore v. U.S., Dist Col., 93 S.Ct. 1670, 411 U.S. 389, 36 L.Ed.2d 342.

24. U.S.—General Motors Corp. v. District of Columbia, Dist.Col., 85 S.Ct. 1156, 380 U.S. 553, 14 L.Ed.2d 68.

26. U.S.—General Motors Corp. v District of Columbia, Dist.Col., 85 S.Ct. 1156, 380 U S. 553, 14 L.Ed.2d 68.

§ 234. District Court of United States

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30. U.S.—U.S. v. Vuitch, Dist.Col., 91 S.Ct. 1294, 402 U.S. 62, 28 L.Ed.2d 601.

32. District of Columbia law held statute

U.S.—U.S. v. Vuitch, Dist.Col., 91 S.Ct. 1294, 402 U.S. 62, 28 L.Ed.2d 601.

§ 235. Court of Claims

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Barron and Holtzoff, Federal Practice and Procedure § 57.

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35. 28 U.S.C.A. § 2515, was amended in 1982 by substituting "United States claims court" for "court of claims".

36. 28 U.S.C.A. § 1255, was repealed in 1982.

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36.5. U.S.—U.S. v. Clark, 100 S.Ct. 895, 445 U.S. 23, 63 L.Ed.2d 171.

Exercise of judicial power

(1) U.S.—Glidden Co. v. Zdanok, N.Y. & App.D.C., 82 S.Ct. 1459, 370 U.S. 530, 8 L.Ed.2d 671, reh. den. 83 S.Ct. 14, 371 U.S. 854, 9 L.Ed.2d 93.

36.10. Certiorari granted

(2) U.S.—U.S. v. Carlo Bianchi & Co., Ct.Cl., 83 S.Ct. 1409, 373 U.S. 709, 10 L.Ed.2d 652—U.S. v. Zacks, Ct.Cl., 84 S.Ct. 178, 375 U.S. 59, 11 L.Ed.2d 128—U.S. v. Grace's Estate, Ct.Cl., 89 S.Ct. 1730, 359 U.S. 316, 23 L.Ed.2d 332, reh. den. 90 S.Ct. 147, 396 U.S. 881, 24 L.Ed.2d 141.

(4) Other instances.

U.S.—Pennsylvania R. Co. v. U.S., Ct.Cl., 80 S.Ct. 1131, 363 U.S. 202, 4 L.Ed.2d 1165—Armstrong v. U.S., 80 S.Ct. 1563, 364 U.S. 40, 4 L.Ed.2d 1554, on remand, 287 F.2d 577, 152 Ct.Cl. 731—U.S. v. Anthony Grace & Sons, Inc., Ct.Cl., 86 S.Ct. 1539, 384 U.S. 424, 16 L.Ed.2d 662—U.S. v. Utah Const. & Min. Co., Ct.Cl., 86 S.Ct. 1545, 384 U.S. 394, 16 L.Ed.2d 642—U.S. v. King, Ct.Cl., 89 S.Ct. 1501, 395 U.S. 1, 23 L.Ed.2d 52.

39.5. U.S.—U.S. v. Carlo Bianchi & Co. Ct.Cl., 83 S.Ct. 1409, 373 U.S. 709, 10 L.Ed.2d 652.

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Other particular matters with respect to the filing of a petition for writ of certiorari have been adjudicated by the Supreme Court.[43.5]

43.5. When time for filing begins to run

U.S.—U.S. v Adams, Ct.Cl., 86 S.Ct. 708, 383 U.S. 39, 15 L.Ed.2d 572

Service

U.S.—U.S v. Adams, Ct.Cl., 86 S.Ct 708, 383 U.S. 39, 15 L.Ed.2d 572.

47. U.S.—Bell v. U.S., Ct.Cl., 81 S.Ct. 1230, 366 U.S. 393, 6 L.Ed.2d 365.

48. U.S.—U.S. v. Mississippi Val. Generating Co., Ct.Cl., 81 S.Ct. 294, 364 U.S. 520, 5 L.Ed.2d 268, reh. den. 81 S.Ct. 798, 365 U.S. 855, 5 L.Ed.2d 820.

§ 236. Court of Customs and Patent Appeals

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59. D.C.—Continental Can Co. v. Schuyler, D.C., 326 F.Supp. 283.

28 U.S.C.A. § 1256, was repealed in 1982.

28 U.S.C.A. § 451, was amended in 1982 by striking out definition including court of customs and patent appeals.

Statute construed

U.S.—Brenner v. Manson, Cust. & Pat.App., 86 S.Ct. 1033, 383 U.S. 519, 16 L.Ed.2d 69.

Issues held before court

U.S.—Brenner v. Manson, Cust. & Pat.App., 86 S.Ct. 1033, 383 U.S. 519, 16 L.Ed.2d 69.

§ 238. In General

Library References

Federal Courts ⇐501.

62. U.S.—Huffman v. Pursue, Ltd., Ohio, 95 S.Ct. 1200, 420 U.S. 592, 43 L.Ed.2d 482, reh. den. 95 S.Ct. 1969, 421 U.S. 971, 44 L.Ed.2d 463.

Tex.—Bank of Texas v. Childs, App. 5 Dist., 634 S.W.2d 2.

Appeal not moot

U.S.—Kulko v. Superior Court of California In and For City and County of San Francisco, Cal., 98 S.Ct. 1690, 436 U.S. 84, 56 L.Ed.2d 132, reh. den. 98 S.Ct. 3127, 438 U.S. 908, 57 L.Ed.2d 1150.

65. U.S.—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440.

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67. U.S.—Wainwright v. Sykes, Fla., 97 S.Ct. 2497, 433 U.S. 72, 53 L.Ed.2d 594, reh. den. 98 S.Ct. 241, 434 U.S. 880, 54 L.Ed.2d 163.

Ill.—People v. Spahr, 371 N.E.2d 1261, 14 Ill.Dec. 208, 56 Ill.App.3d 434.

69.5. Point neither appealed nor argued

U.S.—City of Eastlake v. Forest City Enterprises, Inc., 96 S.Ct. 2358, 426 U.S. 668, 49 L.Ed.2d 132.

69.15. U.S.—Douglas v. State of Ala., Ala., 85 S.Ct. 1074, 380 U.S. 415, 13 L.Ed.2d 934.

Furthermore, the availability of federal remedies may preclude a review of a state court decision.[69.16]

69.16. Availability of habeas corpus in federal court

U.S.—Mattox v. Sacks, Ohio, 82 S.Ct. 992, 369 U.S. 656, 8 L.Ed.2d 178.

70. U.S.—Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 90 S.Ct. 1739, 398 U.S. 281, 26 L.Ed.2d 234—Michigan v. Tyler, Mich., 98 S.Ct. 1942, 436 U.S. 499, 56 L.Ed.2d 486—Gulf Offshore Co. v. Mobil Oil Corp., Tex., 101 S.Ct. 2870, 453 U.S. 473, 69 L.Ed.2d 784, on remand, App 14 Dist., 628 S.W.2d 171, cert. den. 103 S.Ct. 259.

§ 239. Status of Court Rendering Judgment

Library References

Federal Courts ⇐501.

72. U.S.—Gotthilf v. Sills, N.Y., 84 S.Ct. 187, 375 U.S. 79, 11 L.Ed.2d 159—National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, Ala., 84 S.Ct. 1302, 377 U.S. 288, 12 L.Ed.2d 325, on remand 167 So.2d 171, 277 Ala. 89.

What constitutes "court" of state

(4) Other tribunals held qualified.

U.S.—Metlakatla Indian Community, Annette Island Reserve v. Egan, Alaska, 80 S.Ct. 1321, 363 U.S. 555, 4 L.E.2d 1397—Metlakatla Indian Community, Annette Island Reserve v. Egan, Wash., 82 S.Ct. 552, 369 U.S. 45, 7 L.Ed.2d 562.

Judgment by division of court

(3) As qualifying for review by United States Supreme Court.

U.S.—Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co., Wash., 82 S.Ct. 571, 369 U.S. 95, 7 L.Ed.2d 593.

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73. U.S.—Nash v. Florida Indus. Commission, Fla., 88 S.Ct. 362, 389 U.S. 235, 19 L.Ed.2d 438, conf. to 205 So.2d 700.

U.S. ex rel. Carrono v. Richmond, D.C.Conn., 177 F.Supp. 504, affd., C.A., 279 F.2d 170.

Last state tribunal to which cause could be brought for review, etc.

(2) Other matters.

U.S.—U.S. ex rel. Carrono v. Richmond, C.A.Conn., 279 F.2d 170.

74. U.S.—U.S. ex rel. Carrono v. Richmond, D.C. Conn., 177 F.Supp. 504, affd., C.A., 279 F.2d 170.

§ 240. Final Character of Judgment

Library References

Federal Courts ⇐503.

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76.50. U.S.—North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., N.D., 94 S.Ct. 407, 414 U.S. 156, 38 L.Ed.2d 379, on remand 219 N.W.2d 140.

77. U.S.—Mercantile Nat. Bank at Dallas v. Langdeau, Tex., 83 S.Ct. 520, 371 U.S. 555, 9 L.Ed.2d 523, on remand 365 S.W.2d 783—Banks v. California, Cal., 89 S.Ct. 1901, 395 U.S. 708, 23 L.Ed.2d 653, reh. den. 90 S.Ct. 36, 396 U.S. 869, 24 L.Ed.2d 124—North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., N.D., 94 S.Ct. 407, 414 U.S. 156, 38 L.Ed.2d 379, on remand 219 N.W.2d 140—Mincey v. Arizona, Ariz., 98 S.Ct. 23, 434 U.S. 1343, 54 L.Ed.2d 56—New York v. Cathedral Academy, N.Y., 98 S.Ct. 340, 434 U.S. 125, 54 L.Ed.2d 346—Harlin v. Missouri, Mo., 99 S.Ct. 709, 439 U.S. 459, 58 L.Ed.2d 733—San Diego Gas & Elec. Co. v. City of San Diego, Cal., 101 S.Ct. 1287, 450 U.S. 621, 67 L.Ed.2d 551—Flynt v. Ohio, Ohio, 101 S.Ct. 1958, 451 U.S. 619, 68 L.Ed.2d 489—Minnick v. California Dept. of Corrections, Cal., 101 S.Ct. 2211, 452 U.S. 105, 68 L.Ed.2d 706—O'Dell v. Espinoza, Colo., 102 S.Ct. 1865, 456 U.S. 430, 72 L.Ed.2d 237.

Purpose of requirement

U.S.—Costarelli v. Massachusetts, Mass., 95 S.Ct. 1534, 421 U.S. 193, 44 L.Ed.2d 76.

77.20. U.S.—Gotthilf v. Sills, N.Y., 84 S.Ct. 187, 375 U.S. 79, 11 L.Ed.2d 159.

Judgments or decrees held final

(7) U.S.—National Ass'n for Advancement of Colored People v. Button, Va., 83 S.Ct. 328, 371 U.S. 415, 9 L.Ed.2d 405—Mercantile Nat. Bank at Dallas v. Langdeau, Tex., 83 S.Ct. 520, 371 U.S. 555, 9 L.Ed.2d 523, on remand, 365 S.W.2d 783—Local No. 438 Const. and General Laborers' Union, AFL-CIO v. Curry, Ga., 83 S.Ct. 531, 371 U.S. 542, 9 L.Ed.2d 514, on remand 131 S.E.2d 559, 219 Ga. 38—England v. Louisiana State Bd. of Medical Examiners, La., 84 S.Ct. 461, 375 U.S. 411, 11 L.Ed.2d 440—Rosenblatt v. American Cyanamid Co., N.Y., 86 S.Ct. 1, 15 L.Ed.2d 39—Miranda v. State or Ariz., Ariz., Cal. & N.Y., 86 S.Ct. 1602, 384 U.S. 436, 16 L.Ed.2d 694, reh. den. 87 S.Ct. 11, 385 U.S. 890, 17 L.Ed.2d 121—Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., Pa., 88 S.Ct. 1601, 391 U.S. 308, 20 L.Ed.2d 603—Organization for a Better Austin v. Keefe, Ill., 91 S.Ct. 1575, 402 U.S. 415, 29 L.Ed.2d 1—Miami Herald Pub. Co. v. Tornillo, Fla., 94 S.Ct. 2831, 418 U.S. 241, 41 L.Ed.2d 730—Cox Broadcasting Corp. v. Cohn, Ga., 95 S.Ct. 1029, 420 U.S. 469, 43 L.Ed.2d 328, on remand, Sup., 214 S.E.2d 530, 234 Ga. 67—Shaffer v. Heitner, Del., 97 S.Ct. 2569, 433 U.S. 186, 53 L.Ed.2d 683—National Socialist Party of America v. Village of Skokie, Ill., 97 S.Ct. 2205, 432 U.S. 43, 53 L.Ed.2d 96, on remand 366 N.E.2d 347, 9 Ill.Dec. 90, 51 Ill.App.3d 279, application den. 98 S.Ct. 14, 434 U.S. 1327, 54 L.Ed.2d 38, affd. in part, revd. in part on oth. grds. 373 N.E.2d 21, 14 Ill.Dec. 890, 69 Ill.2d 605—Abood v. Detroit Bd. of Ed., Mich., 97 S.Ct. 1782, 431 U.S. 209, 52 L.Ed.2d 261, reh. den. 97 S.Ct. 2989, 433 U.S. 915, 53 L.Ed.2d 1102—New York Times Co. v. Jascalevich, N.J., 99 S.Ct. 6, 439 U.S. 1331, 58 L.Ed.2d 38, reapplication denied 99 S.Ct. 11, 439 U.S. 1331, 58 L.Ed.2d 38—Bullington v. Missouri, Mo., 101 S.Ct. 1852, 451 U.S. 430, 68 L.Ed.2d 270, on remand 618 S.W.2d 671.

Judgments held not final

U.S.—Arceneaux v. State of La., La., 84 S.Ct. 777, 376 U.S. 336, 11 L.Ed.2d 750—Hudson Distributors, Inc. v. Eli Lilly & Co., Ohio, 84 S.Ct. 1273, 377 U.S. 386, 12 L.Ed.2d 394—Mills v. State of Ala., Ala., 86 S.Ct. 1434, 384 U.S. 214, 16 L.Ed.2d 484—Costarelli v. Massachusetts, Mass., 95 S.Ct. 1534, 421 U.S. 193, 44 L.Ed.2d 76.

Judgment treated as final

U.S.—American Export Lines, Inc. v. Alvez, N.Y., 100 S.Ct. 1673, 446 U.S. 274, 64 L.Ed.2d 284.

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77.30. U.S.—North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., N.D., 94 S.Ct. 407, 414 U.S. 156, 38 L.Ed.2d 179, on remand 219 N.W.2d 140.

77.35. U.S.—Konigsberg v. State Bar of Cal., Cal., 81 S.Ct. 997, 366 U.S. 36, 6 L.Ed.2d 105, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69.

Fla.—Callendar v. State, 181 So.2d 529.

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77.45. U.S.—Local No. 438 Const. and General Laborers' Union, AFL-CIO v. Curry, Ga., 83 S.Ct. 531, 371 U.S. 542, 9 L.Ed.2d 514, on remand 131 S.E. 559, 219 Ga. 38.

Fla.—Callendar v. State, 181 So.2d 529.

Tex.—Ex parte Young, Cr., 418 S.W.2d 824.

§ 242. Nature of Proceeding in State Court

Library References

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85.50. U.S.—McCarty v. McCarty, Cal., 101 S.Ct. 2728, 453 U.S. 210, 69 L.Ed.2d 589.

Moot case

U.S.—DeFunis v. Odegaard, Wash., 94 S.Ct. 1704, 416 U.S. 312, 40 L.Ed.2d 164, on remand 529 P.2d 438, 84 Wash.2d 617.

(2) Other instances.

U.S.—Liner v. Jafco, Inc., Tenn., 84 S.Ct. 391, 375 U.S. 301, 11 L.Ed.2d 347.

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85.55. U.S.—Liner v. Jafco, Inc., Tenn., 84 S.Ct. 391, 375 U.S. 301, 11 L.Ed.2d 347.

The existence of concurrent sentences does not remove the elements necessary to create a justiciable case or controversy.[85.56]

85.56. U.S.—Benton v. Maryland, Md., 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707, on remand 260 A.2d 86, 8 Md.App. 388.

87. U.S.—Barr v. City of Columbia, S.C., 84 S.Ct. 1734, 378 U.S. 146, 12 L.Ed.2d 766—Benton v. Maryland, Md., 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707, on remand 260 A.2d 86, 8 Md.App. 388.

N.C.—State v. Jarrette, 202 S.E.2d 721, 284 N.C. 625, vac in part on oth. grds. 96 S.Ct. 3205, 428 U.S. 903, 49 L.Ed.2d 1206.

Pa.—Com. v. Campana, 314 A.2d 854, 455 Pa. 622, cert. den. 94 S.Ct. 3172, 417 U.S. 969, 41 L.Ed.2d 1139.

90. Tex.—Ex parte Young, Cr., 418 S.W.2d 824.

§ 243. Substantial Character of Federal Question

Library References

Federal Courts ⚿502.

91. U.S.—Martin v. Walton, Kan., 82 S.Ct. 1, 368 U.S. 25, 7 L.Ed.2d 5, reh. den. 82 S.Ct. 376, 368 U.S. 945, 7 L.Ed.2d 341—Willner v. Committee on Character and Fitness, N.Y., 83 S.Ct. 1175, 373 U.S. 96, 10 L.Ed.2d 224, 2 A.L.R.3d 1254, clarification den. 84 S.Ct. 439, 375 U.S. 950, 11 L.Ed.2d 312—Liner v. Jafco, Inc., Tenn., 84 S.Ct. 391, 375 U.S. 301, 11 L.Ed.2d 347—Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, Wis., 101 S.Ct. 1010, 450 U.S. 107, 67 L.Ed.2d 82—Princeton University v. Schmid, N.J., 102 S.Ct. 867, 455 U.S. 100, 70 L.Ed.2d 855.

Judgment as protecting holder from liability

U.S.—W.U. Tel. Co. v. Com. of Pa., by Gottlieb, Pa., 82 S.Ct. 199, 368 U.S. 71, 7 L.Ed.2d 139.

Substantial federal question held not presented

U.S.—Ioannou v. New York, N.Y., 83 S.Ct. 6, 371 U.S. 30, 9 L.Ed.2d 5, reh. den. 88 S.Ct. 1864, 391 U.S. 604, 20 L.Ed.2d 843—Grisanti v. City of Cleveland, Ohio, 83 S.Ct. 111, 371 U.S. 68, 9 L.Ed.2d 119—Wetzel v. Ohio, Ohio, 83 S.Ct. 111, 371 U.S. 68, 9 L.Ed.2d 119—Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., Md., 90 S.Ct. 499, 396 U.S. 367, 24 L.Ed.2d 582—Stotland v. Pennsylvania, Pa., 90 S.Ct. 1552, 398 U.S. 916, 26 L.Ed.2d 83.

Dismissal for want of substantial federal question

U.S.—Heaney v. Allen, D.C.N.Y., 299 F.Supp. 1300, affd., C.A., 425 F.2d 869.

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92.5. U.S.—Hudson Distributors, Inc. v. Eli Lilly & Co., Ohio, 84 S.Ct. 1273, 377 U.S. 386, 12 L.Ed.2d 394—Sanks v. Georgia, Ga., 91 S.Ct. 593, 401 U.S. 144, 27 L.Ed.2d 741.

92.10. Discretionary power

(2) Other instances.

U.S.—Hudson Distributors, Inc. v. Eli Lilly Co., Ohio, 84 S.Ct. 1273, 377 U.S. 386, 12 L.Ed.2d 394.

92.20. U.S.—Hudson Distributors, Inc. v. Eli Lilly & Co., Ohio, 84 S.Ct. 1273, 377 U.S. 386, 12 L.Ed.2d 394—Richardson v. Ramirez, Cal., 94 S.Ct. 2655, 418 U.S. 24, 41 L.Ed.2d 551, on remand 117 Cal.Rptr. 562, 528 P.2d 378, 12 C.3d 912.

92.25. U.S.—Brockington v. Rhodes, Ohio, 90 S.Ct. 206, 396 U.S. 41, 24 L.Ed.2d 209—North Carolina v. Rice, N.C., 92 S.Ct. 402, 404 U.S. 244, 30 L.Ed.2d 413—Princeton University v. Schmid, N.J., 102 S.Ct. 867, 455 U.S. 100, 70 L.Ed.2d 855.

Question held not moot

(1) U.S.—Liner v. Jafco, Inc., Tenn., 84 S.Ct. 391, 375 U.S. 301, 11 L.Ed.2d 347.

§ 244. Materiality and Decision of Federal Question

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95. U.S.—Department of Mental Hygiene of Cal. v. Kirchner, Cal., 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753, on remand, Sup., 43 Cal.Rptr. 329, 400 P.2d 321—Parker v. Gladden, Or., 87 S.Ct. 468, 385 U.S. 363, 17 L.Ed.2d 420—Lear, Inc. v. Adkins, Cal., 89 S.Ct. 1902, 395 U.S. 653, 23 L.Ed.2d 610.

Criminal convictions

U.S.—Thomas v. District Court of Thirteenth Judicial Dist. of State of Mont., In and For Big Horn County, D.C.Mont., 270 F.Supp. 487.

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97. U.S.—Henry v. State of Miss., Miss., 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, reh. den. 85 S.Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174 So.2d 348, motion den. 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431, on remand, Sup., 198 So.2d 213—De-Backer v. Brainard, Neb., 90 S.Ct. 163, 396 U.S. 28, 24 L.Ed.2d 148—Parker v. North Carolina, N.C., 90 S.Ct. 1458, 397 U.S. 790, 25 L.Ed.2d 785—Agins v. City of Tiburon, 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106.

Henry v. Williams, D.C.Miss., 299 F.Supp. 36.

98.5. U.S.—Wolfe v. State of N.C., N.C., 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650, reh. den. 81 S.Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80—Jankovich v. Indiana Toll Road Commission, Ind., 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed.2d 439—Henry v. State of Miss., Miss., 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, reh. den. 85 S.Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174 So.2d 348, motion den. 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431, on remand, Sup., 198 So.2d 213.

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98.10. U.S.—Cramp v. Board of Public Instruction of Orange County, Fla., Fla., 82 S.Ct. 275, 368 U.S. 278, 7 L.Ed.2d 285, on remand, 137 So.2d 828—Fay v. Noia, N.Y., 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837—Jankovich v. Indiana Toll Road Commission, Ind., 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed.2d 439.

1. U.S.—Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., Colo., 83 S.Ct. 1022, 372 U.S. 714, 10 L.Ed.2d 84, on remand 383 P.2d 313—Wright v. State of Ga., Ga., 83 S.Ct. 1240, 373 U.S. 284, 10 L.Ed.2d 349, conf. to 131 S.E.2d 851, 219 Ga. 125.

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2. U.S.—Wolfe v. State of N.C., N.C., 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650, reh. den. 81 S.Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80—National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, Ala., 84 S.Ct. 1302, 377 U.S. 288, 12 L.Ed.2d 325, on remand 167 So.2d 171, 277 Ala. 89.

3.5. Proper mode of review

(3) Other matters.

U.S.—Barr v. City of Columbia, S.C., 84 S.Ct. 1734, 378 U.S. 146, 12 L.Ed.2d 766.

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12.5. U.S.—Wolfe v. State of N.C., N.C., 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650, reh. den. 81 S.Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80.

§ 246. Nature of Questions Involved

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12.50. U.S.—Uphaus v. Wyman, N.H., 81 S.Ct. 153, 364 U.S. 388, 5 L.Ed.2d 148—Zacchini v. Scripps-Howard Broadcasting Co., Ohio, 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965, on remand 376 N.E.2d 582, 54 Ohio St. 286, 8 O.O.3d 265—Pennsylvania v. Mimms, Pa., 98 S.Ct. 330, 434 U.S. 106, 54 L.Ed.2d 331, on remand 385 A.2d 334, 477 Pa. 553.

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13. U.S.—Richmond v. Arizona, Ariz., 98 S.Ct. 8, 434 U.S. 1323, 54 L.Ed.2d 34, reh. den. 98 S.Ct. 537, 434 U.S. 976, 54 L.Ed.2d 469.

15. U.S.—People of State of N.Y. v. O'Neill, Fla., 79 S.Ct. 564, 359 U.S. 1, 3 L.Ed.2d 585, on remand, Sup., 112 So.2d 837—Lathrop v. Donohue, Wis., 81 S.Ct. 1826, 367 U.S. 820, 6 L.Ed.2d 1191, reh. den. 82 S.Ct. 23, 368 U.S. 871, 7 L Ed.2d 72—National Bellas Hess, Inc. v. Department of Revenue of State of Ill., Ill., 87 S.Ct. 1389, 386 U.S. 753, 18 L.Ed.2d 505—Cohen v. California, Cal., 91 S.Ct. 1780, 403 U.S. 15, 29 L.Ed.2d 284, reh. den. 92 S.Ct. 26, 404 U.S. 876, 30 L.Ed.2d 124

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18. U.S.—MacKay v. Nesbett, C.A.Alaska, 412 F.2d 846, cert. den. 90 S.Ct. 435, 396 U.S. 960, 24 L.Ed.2d 425, reh. den. 90 S.Ct. 1111, 397 U.S. 1004, 25 L.Ed.2d 417.

21. U.S.—Wood v. Georgia, Ga., 82 S.Ct. 1364, 370 U.S. 375, 8 L.Ed.2d 569.

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(3) Other matters.

Minn.—State v. DeCloux, 136 N.W.2d 657, 272 Minn. 94.

§ 247. —— Denial of Due Process of Law

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24. U.S.—Hoyt v. State of Fla., Fla., 82 S.Ct. 159, 368 U.S. 57, 7 L.Ed.2d 118—Willner v Committee on Character and Fitness, N.Y., 83 S.Ct 1175, 373 U.S. 96, 10 L.Ed.2d 224, 2 A.L.R.3d 1254, clarification den. 84 S.Ct. 439, 375 U.S. 950, 11 L.Ed.2d 312—In re Roche, 101 S.Ct. 4, 448 U.S. 1312, 65 L.Ed.2d 1103.

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(4) Other matters.

U.S.—Reck v. Pate, Ill., 81 S.Ct. 1541, 367 U.S. 433, 6 L.Ed.2d 948.

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25. U.S.—Williamson v. Hopewell Redevelopment and Housing Authority, Va., 83 S.Ct. 315, 371 U.S. 234, 9 L.Ed.2d 495.

§ 248. —— Denial of Equal Protection of Law

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27.50. U.S.—Hoyt v. State of Fla., U.S. Fla., 82 S.Ct. 159, 368 U.S. 57, 7 L.Ed.2d 118.

28. U.S.—Robinson v. State of Fla., Fla., 84 S.Ct. 1693, 378 U.S. 153, 12 L.Ed.2d 771—Interstate Circuit, Inc. v. City of Dallas, Tex., 88 S.Ct. 1298, 390 U.S. 676, 20 L.Ed.2d 225—WHYY, Inc. v. Borough of Glassboro, N.J., 89 S.Ct. 286, 393 U.S. 117, 21 L.Ed.2d 242.

§ 250. —— Questions under Full Faith and Credit Clause of Constitution

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40. Res judicata under "full faith and credit" clause

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§ 256. —— Questions Relating to Bankruptcy and Liens

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61.5. N.Y.—In re De Kalb Ave. Reconstruction, Borough of Brooklyn, City of New York, 205 N.Y.S.2d 125, 11 A.D.2d 240, affd. 190 N.E.2d 240, 12 N.Y.2d 1051, 239 N.Y.S.2d 880.

§ 259. —— Questions Relating to Commerce and Navigable Waters

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66. U.S.—Central R. Co. of Pa. v. Com. of Pa., Pa., 82 S.Ct. 1297, 370 U.S. 607, 8 L.Ed.2d 720, reh. den. 83 S.Ct. 15, 371 U.S. 856, 9 L.Ed.2d 93—Allenberg Cotton Co., Inc. v. Pittman, Miss., 95 S.Ct. 260, 419 U.S. 20, 42 L.Ed.2d 195.

§ 260. —— Questions Relating to Taxation and Assessments

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68. U.S.—General Motors Corp. v. Washington, Wash., 84 S.Ct., 1564, 377 U.S. 436, 12 L.Ed.2d 430, reh. den. 85 S.Ct. 14, 379 U.S 875, 13 L.Ed.2d 79.

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69. U.S.—St. Martin Evangelical Lutheran Church v. South Dakota, S.D., 101 S.Ct. 2142, 451 U.S. 772, 68 L.Ed.2d 612.

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73. U.S.—Addington v. Texas, 99 S.Ct. 1804, 441 U.S. 418, 60 L.Ed.2d 323, on remand, Sup., 588 S.W.2d 569.

74. Privilege against self-incrimination

U.S.—Cohen v. Hurley, N.Y., 81 S.Ct. 954, 366 U.S. 117, 6 L.Ed.2d 156, reh. den. 83 S.Ct. 1860, 374 U.S. 857, 10 L.Ed.2d 1083, and 85 S.Ct. 11, 379 U.S. 870, 13 L.Ed.2d 76.

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74.15. U.S.—PruneYard Shopping Center v. Robins, Cal., 100 S.Ct. 2035, 447 U.S. 74, 64 L.Ed.2d 741—Minnesota v. Clover Leaf Creamery Co., Minn., 101 S.Ct. 715, 449 U.S. 456, 66 L.Ed.2d 659, reh. den., 101 S.Ct. 1735, 450 U.S. 1027, 68 L.Ed.2d 222, on remand, Sup., 304 N.W.2d 915.

§ 264. —— Construction of State Statutes

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75. U.S.—Uphaus v. Wyman, N.H., 81 S.Ct. 22, 5 L.Ed.2d 29—Robinson v. State of Cal., Cal., 82 S.Ct. 1417, 370 U.S. 660, 8 L.Ed.2d 758, reh. den. 83 S.Ct. 202, 371 U.S. 905, 9 L.Ed.2d 166—La Rose v. Tahash, Minn., 83 S.Ct. 172, 371 U.S. 114, 9 L.Ed.2d 168, reh. den. 83 S.Ct. 512, 371 U.S. 960, 9 L.Ed.2d 508—Lanza v. Wagner, N.Y., 83 S.Ct. 177, 371 U.S. 74, 9 L.Ed.2d 163—Arlan's Dept. Store of Louisville, Inc. v. Kentucky, Ky., 83 S.Ct. 277, 371 U.S. 218, 9 L.Ed.2d 264—Gooding v. Wilson, Ga., 92 S.Ct. 1103, 405 U.S. 518, 31 L.Ed.2d 408—Gurley v. Rhoden, Miss., 95 S.Ct. 1605, 421 U.S. 200, 44 L.Ed.2d 110.

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U.S.—Konigsberg v. State Bar of Cal., Cal., 81 S.Ct. 997, 366 U.S. 36, 6 L.Ed.2d 105, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69.

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77. U.S—Metlakatla Indian Community, Annette Island Reserve v. Egan, Alaska, 80 S.Ct. 1321, 363 U.S. 555, 4 L.Ed.2d 1397—Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo., Mo., 81 S.Ct. 1708, 367 U.S. 717, 6 L.Ed.2d 1127—Schroeder v. City of New York, N.Y., 83 S.Ct. 279, 371 U.S. 208, 9 L.Ed.2d 255, 89 A.L.R.2d 1398—Bantam Books, Inc. v. Sullivan, R.I., 83 S Ct. 631, 372 U.S. 58, 9 L.Ed.2d 584—American Oil Co. v. Neill, Idaho, 85 S.Ct. 1130, 380 U.S. 451, 14 L.Ed.2d 1—Warren Trading Post Co. v. Arizona State Tax Commission, Ariz., 85 S.Ct. 1242, 380 U.S. 685, 14 L.Ed.2d 165—Mishkin v. State of N.Y., N.Y., 86 S.Ct. 958, 383 U.S. 502, 16 L.Ed.2d 56, reh. den. 86 S.Ct. 1440, 384 U.S. 934, 16 L.Ed.2d 535—Garrity v. State of N.J., U.S.N.J., 87 S.Ct. 616, 385 U.S. 493, 17 L.Ed.2d 562—United Air Lines, Inc. v. Mahin, Ill., 93 S.Ct. 1186, 410 U.S. 623, 35 L.Ed.2d 545, on remand 298 N.E.2d 161, 54 Ill.2d 431.

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77.5. U.S.—United Air Lines, Inc. v. Mahin, Ill., 93 S.Ct. 1186, 410 U.S. 623, 35 L.Ed.2d 545, on remand 298 N.E.2d 161, 54 Ill.2d 431.

77.15. U.S.—U.S. v. Thirty-Seven (37) Photographs, Cal., 91 S.Ct. 1400, 402 U.S. 363, 28 L.Ed.2d 822,

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§ 265. —— Construction or Validity of Municipal Ordinances

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80. "Statute of any state"

(1) U.S.—City of New Orleans v. Dukes, 96 S.Ct. 2513, 427 U.S. 297, 49 L.Ed.2d 511, on remand, C.A., 537 F.2d 856.

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81.10. U.S.—Shuttlesworth v. City of Birmingham, Ala., 86 S.Ct. 211, 382 U.S. 87, 15 L.Ed.2d 176, on remand 181 So.2d 628.

Cal.—Pain v. Municipal Court of City and County of San Francisco, 73 Cal.Rptr. 862, 268 C.A.2d 151.

§ 266. —— Construction of Federal Statutes and Denial of Rights Thereunder

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82. U.S.—Moody v. McDaniel, D.C.Miss., 190 F.Supp. 24.

§ 267. —— Jurisdiction of State Courts

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85. U.S.—Wolfe v. State of N.C., N.C., 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650, reh. den. 81 S.Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80.

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86. Admission to bar

(2) Other matters.

U.S.—Konigsberg v. State Bar of Cal., Cal., 81 S.Ct. 997, 366 U.S. 36, 6 L.Ed.2d 105, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69.

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89. U.S.—Henry v. State of Miss., Miss., 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, reh. den. 85 S.Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174 So.2d 348, motion den. 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431 on remand, Sup., 198 So.2d 213.

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92. U.S.—Henry v. State of Miss., Miss., 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, reh. den. 85 S.Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174 So.2d 348, motion den. 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431, on remand, Sup., 198 So.2d 213.

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98. U.S.—Perez v. Ledesma, La., 91 S.Ct. 674, 401 U.S. 82, 27 L.Ed.2d 701.

99. Submission of case to jury

(1) Colo.—Colorado & S. Ry. Co. v. Lombardi, 400 P.2d 428, 156 Colo. 488.

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14. U.S.—Wilke & Holzheiser, Inc. v. Reimel, D.C. Cal., 266 F.Supp. 168.

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16. U.S.—Richmond Newspapers, Inc. v. Virginia, Va., 100 S.Ct. 2814, 448 U.S. 555, 65 L.Ed.2d 973.

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17. U.S.—Ryan Aeronautical Co. v. International Union, United Auto, Aircraft and Agr. Implement Workers of America, Local 506, D.C.Cal., 179 F.Supp. 1—Lenske v. Sercombe, D.C.Or, 266 F.Supp. 609.

18. Attack on tax assessment or levy, etc.

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21. U.S.—Rohr Aircraft Corp. v. San Diego County, Cal., 80 S.Ct. 1050, 362 U.S. 628, 4 L.Ed.2d 1002.

22. U.S.—Ungar v. Sarafite, N.Y., 84 S.Ct. 841, 376 U.S. 575, 11 L.Ed.2d 921, reh. den. 84 S.Ct. 1218, 377 U.S. 925, 12 L.Ed.2d 217—Lear, Inc. v. Adkins, Cal., 89 S.Ct. 1902, 395 U.S. 653, 23 L.Ed.2d 610.

§ 273. Persons Entitled to Review

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27. U.S.—Cramp v. Board of Public Instruction of Orange County, Fla., Fla., 82 S.Ct. 275, 368 U.S. 278, 7 L.Ed.2d 285, on remand, 137 So.2d 828.

Miss.—In Interest of Green, 203 So 2d 470, cert. den. 88 S.Ct. 2297, 392 U.S. 945, 20 L.Ed.2d 1407.

§ 274(1). Raising Federal Question in State Court

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29.50. U.S.—Pickering v. Board of Ed. of Township High School Dist. 205, Will County, Illinois, Ill., 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811—Cardinale v. Louisiana, La., 89 S.Ct. 1161, 394 U.S. 437, 22 L.Ed.2d 398—Monks v. New Jersey, N.J., 90 S.Ct. 1563, 398 U.S. 71, 26 L.Ed.2d 54—Fuller v. Oregon, Or., 94 S.Ct. 2116, 417 U.S. 40, 40 L.Ed.2d 642—Cousins v. Wigoda, Ill., 95 S.Ct. 541, 419 U.S. 477, 42 L.Ed.2d 595.

Torrance v. Salzinger, C.A.Pa., 297 F.2d 902, cert. den. 82 S.Ct. 1161, 369 U.S. 887, 8 L.Ed.2d 288.

32. U.S.—Slagle v. State of Ohio, Ohio, 81 S.Ct. 1076, 366 U.S. 259, 6 L.Ed.2d 277—McGowan v. State of Md., Md., 81 S.Ct. 1101, 366 U.S. 420, 6 L.Ed.2d 393—Head v. New Mexico Bd. of Examiners in Optometry, N.M., 83 S.Ct. 1759. 374 U.S. 424, 10 L.Ed.2d 983—Ungar v. Sarafite, N.Y., 84 S.Ct. 841, 376 U.S. 575, 11 L.Ed.2d 921, reh. den. 84 S.Ct. 1218, 377 U.S. 925, 12 L.Ed.2d 217—Chamberlin v. Dade County, Bd. of Public Instruction, Fla., 84 S.Ct. 1272, 377 U.S. 402, 12 L.Ed.2d 407, reh. den. 85 S.Ct. 18, 379 U.S. 871, 13 L.Ed.2d 78, on remand 171 So.2d 535—Johnson v. State of N.J., N.J., 86 S.Ct. 1772, 384 U.S. 719, 16 L.Ed.2d 882, reh. den. 87 S.Ct. 12, 385 U.S. 890, 17 L.Ed.2d 121—Cardinale v. Louisiana, La., 89 S.Ct. 1161, 394 U.S. 437, 22 L.Ed.2d 398—Simmons v. West Haven Housing Authority, Conn., 90 S.Ct. 1960, 399 U.S. 510, 26 L.Ed.2d 764, reh. den. 91 S.Ct. 23, 400 U.S. 856, 27 L.Ed.2d 94.

Or.—Thornton v. Johnson, 454 P.2d 647, 253 Or. 342.

33. U.S.—Chambers v. Mississippi, Miss., 93 S.Ct. 1038, 410 U.S. 284, 35 L.Ed.2d 297.

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35. U.S.—Cousins v. Wigoda, Ill., 95 S.Ct. 541, 419 U.S. 477, 42 L.Ed.2d 595.

§ 274(2). —— Time and Mode of Presenting Question

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36. U.S.—Willner v. Committee on Character and Fitness, N.Y. 83 S.Ct. 1175, 373 U.S. 96, 10 L.Ed. 224, 2 A.L.R.3d 1254, clarification den. 84 S.Ct. 439, 375 U.S. 950, 11 L.Ed.2d 312—Jenkins v. Georgia, Ga., 94 S.Ct. 2750, 418 U.S. 153, 41 L.Ed.2d 642.

37. U.S.—Cardinale v. Louisiana, La., 89 S.Ct. 1161, 394 U.S. 437, 22 L.Ed.2d 398—Street v. New York, N.Y., 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed.2d 572, on remand 250 N.E.2d 250, 24 N.Y.2d 1026, 302 N.Y.S.2d 848—DeBacker v. Brainard, Neb., 90 S.Ct. 163, 396 U.S. 28, 24 L.Ed.2d 148—Hankerson v. North Carolina, N.C., 97 S.Ct. 2339, 432 U.S. 233, 53 L.Ed.2d 306.

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(2) Other matters.

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40. Wyo.—C.J.S. cited in Richmond v. State, 554 P.2d 1217, 1237, reh. den. 558 P.2d 509.

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41. U.S.—Wolfe v. State of N.C., N.C., 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650, reh. den. 81 S.Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80—DeBacker v. Brainard, Neb., 90 S.Ct. 163, 396 U.S. 28, 24 L.Ed.2d 148.

42. U.S.—Ward v. Village of Monroeville, Ohio, Ohio, 93 S.Ct. 80, 409 U.S. 57, 34 L.Ed.2d 267.

43. U.S.—Bloeth v. State of N.Y., N.Y., 82 S.Ct. 661, 7 L.Ed.2d 780.

§ 277. Allowance and Issuance of Certiorari

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55. U.S.—Evans v. Delaware County, Com. of Pa., C.A.Pa., 390 F.2d 617, cert. den. 89 S.Ct. 164, 393 U.S. 873, 21 L.Ed.2d 143—Bricker v. Crane, C.A. N.H., 468 F.2d 1228, cert. den. 93 S.Ct. 1368, 410 U.S. 930, 35 L.Ed.2d 592.

Moran v. Paine, Webber, Jackson and Curtis, D.C.Pa., 279 F.Supp. 573, affirmed 389 F.2d 242, affd., C.A., 389 F.2d 242.

56. U.S.—Mishkin v. State of N.Y., N.Y., 86 S.Ct. 958, 383 U.S. 502, 16 L.Ed.2d 56, reh. den. 86 S.Ct. 1440, 384 U.S. 934, 16 L.Ed.2d 535—Gilbert

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56.5. Petition denied

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57. U.S.—Fay v. Noia, N.Y., 83 S.Ct. 822, 373 U.S. 391, 9 L.Ed.2d 837—Poafpybitty v. Skelly Oil Co., Okl., 88 S.Ct. 982, 390 U.S. 365, 19 L.Ed.2d 1238—Department of Motor Vehicles of State of Cal. v. Rios, Cal., 93 S.Ct. 1019, 410 U.S. 425, 35 L.Ed.2d 398, on remand 107 Cal.Rptr. 784, 509 P.2d 696, 9 C.3d 454—Kulko v. Superior Court of California In and For City and County of San Francisco, Cal., 98 S.Ct. 1690, 436 U.S. 84, 56 L.Ed.2d 132, reh. den. 98 S.Ct. 3127, 438 U.S. 908, 57 L.Ed.2d 1150.

58. U.S.—Williams v. Florida, Fla., 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446—Vale v. Louisiana, La., 90 S.Ct. 1969, 399 U.S. 30, 26 L.Ed.2d 409—California v. Byers, Cal., 91 S.Ct. 1535, 402 U.S. 424, 29 L.Ed.2d 9—Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Emp. of America v. Lockridge, Idaho, 91 S.Ct. 1909, 403 U.S. 274, 29 L.Ed.2d 473, reh. den. 92 S.Ct. 24, 404 U.S. 874, 30 L.Ed.2d 120, on remand 491 P.2d 739, 94 Idaho 475—Harris v. Washington, Wash., 92 S.Ct. 183, 404 U.S. 55, 30 L.Ed.2d 212—Gomez v. Perez, Tex., 93 S.Ct. 872, 409 U.S. 535, 35 L.Ed.2d 56.

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58.5. U.S.—Fay v. Noia, N.Y., 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837.

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U.S.—Gallick v. Baltimore & O.R. Co., Ohio, 83 S.Ct. 659, 372 U.S. 108, 9 L.Ed.2d 618.

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Miss.—Goldsby v. State, 124 So.2d 297, 240 Miss. 650.

Suitable opportunity for further explanation of prior holding

U.S.—Ker v. State of Cal., Cal., 83 S.Ct. 1623, 374 U.S. 23, 10 L.Ed.2d 726.

58.10. U.S.—Maynard v. Durham & S. Ry. Co., N.C., 81 S.Ct. 561, 365 U.S. 160, 5 L.Ed.2d 486—Marine Engineers Beneficial Ass'n v. Interlake S.S. Co., Minn., 82 S.Ct. 1237, 370 U.S. 173, 8 L.Ed.2d 418, conf. to 116 N.W.2d 505, 263 Minn. 582—State Bd. of Ins. v. Todd Shipyards Corp., Tex., 82 S.Ct. 1380, 370 U.S. 451, 8 L.Ed.2d 620—Jackson v. Lykes Bros. S.S. Co., La., 87 S.Ct. 1419, 386 U.S. 731, 18 L.Ed.2d 488—United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, Ill., 88 S.Ct. 353, 389 U.S. 217, 19 L.Ed.2d 426.

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58.40. U.S.—Newsom v. Smyth, Va., 81 S.Ct. 774, 365 U.S. 604, 5 L.Ed.2d 803—Smith v. Butler, Fla., 81 S.Ct. 937, 366 U.S. 161, 6 L.Ed.2d 184, reh. den. 81 S.Ct. 1657, 366 U.S. 941, 6 L.Ed.2d 852—Smith v. State of Miss., Miss., 83 S.Ct. 1265, 373 U.S. 238, 10 L.Ed.2d 321, on remand 166 So.2d 432—Johnson v. Com. of Mass., Mass., 88 S.Ct. 1155, 390 U.S. 511, 20 L.Ed.2d 69—Conway v. California Adult Authority, 90 S.Ct. 312, 396 U.S. 107, 24 L.Ed.2d 295, reh. den. 90 S.Ct. 544, 396 U.S. 1030, 24 L.Ed.2d 527—Duncan v. Tennessee, Tenn., 92 S.Ct. 785, 405 U.S. 127, 31 L.Ed.2d 86—Stanley v. Illinois, Ill., 92 S.Ct. 1208, 405 U.S. 645, 31 L.Ed.2d 551—Sarno v. Illinois Crime Investigating Commission, Ill., 92 S.Ct. 1677, 406 U.S. 482, 32 L.Ed.2d 243—Abood v. Detroit Bd. of Ed., Mich., 97 S.Ct. 1782, 431 U.S. 209, 52 L.Ed.2d 261, reh. den. 97 S.Ct. 2989, 433 U.S. 915, 53 L.Ed.2d 1102—Jones v. Hildebrant, Colo., 97 S.Ct. 2283, 432 U.S. 183, 53 L.Ed.2d 209—Zacchini v. Scripps-Howard Broadcasting Co., Ohio, 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965, on remand 376 N.E.2d 582, 54 Ohio St.2d 286, 8 O.O.3d 265—Hammett v. Texas, Tex., 100 S.Ct. 2905, 448 U.S. 725, 65 L.Ed.2d 1086—Minnick v. California Dept. of Corrections, Cal., 101 S.Ct. 2211, 452 U.S. 105, 68 L.Ed.2d 706—New York v. Uplinger, N.Y., 104 S.Ct. 2332, 467 U.S. 246, 81 L.Ed.2d 201.

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65. Tex.—White v. State, Cr.App., 543 S.W.2d 366.

Stay not granted

U.S.—New York Times Co. v. Jascalevich, N.J., 98 S.Ct. 3060, 439 U.S. 1304, 58 L.Ed.2d 11.

66. U.S.—Bloeth v. State of N.Y., N.Y., 82 S.Ct. 661, 7 L.Ed.2d 780.

Substantial federal question

(2) Other matters.

Miss.—Goldsby v. State, 124 So.2d 297, 240 Miss. 650.

66.5. Miss.—Goldsby v. State, 124 So.2d 297, 240 Miss. 650.

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69. Miss.—Goldsby v. State, 124 So.2d 297, 240 Miss. 650.

70.5. U.S.—Richmond v. Arizona, Ariz., 98 S.Ct. 8, 434 U.S 1323, 54 L.Ed.2d 34, reh. den. 98 S.Ct. 537, 434 U.S. 976, 54 L.Ed.2d 469.

Miss.—Goldsby v. State, 124 So.2d 297, 240 Miss. 650.

72. U.S.—U.S. v. Kras, U.S.N.Y., 93 S.Ct. 631, 409 U.S. 434, 34 L.Ed.2d 626—Hughes Tool Co. v. Trans World Airlines, Inc., U.S.N.Y., 93 S.Ct. 647, 409 U.S 363, 34 L.Ed.2d 577.

Lindbar, Inc. v. St. Louis Fuel & Supply Co., C.A.Tenn., 276 F.2d 882—Dairy Distributors, Inc. v. Western Conference of Teamsters, C.A.Utah, 294 F.2d 348, cert den. 82 S.Ct. 604, 368 U.S. 988, 7 L.Ed.2d 525—U.S. ex rel. o'Connor v. state of N.J., C.A.N.J., 405 F.2d 632, cert. den. 89 S.Ct. 1770, 395 U.S. 923, 23 L.Ed.2d 240.

De La Salle Institute v. U.S., D.C.Cal., 195 F.Supp. 891—Olson v. Board of Ed. of Union Free School Dist. No 12, Malverne, New York, D.C. N.Y., 250 F.Supp. 1000, app. dism., C.A., 367 F.2d 565—Resolute Ins. Co. v. State of N.C., D.C.N.C., 276 F.Supp. 660, affd., C.A., 397 F.2d 286, cert. den. 89 S.Ct. 446, 393 U.S. 978, 21 L.Ed.2d 439—Adams Dairy Co. v. National Dairy Products Corp., D.C.Mo., 293 F.Supp. 1135—Yarnal v. Brierley, D.C.Pa., 324 F.Supp. 311, affd., C.A., 468 F.2d 816, cert. den. 93 S.Ct. 1405, 410 U.S. 940, 35 L.Ed.2d 607.

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Tex.—Gulf, C. & S.F. Ry. Co. v. Deen, 317 S.W.2d 913, 159 Tex. 238, cert. den. 79 S.Ct. 725, 359 U.S. 945, 3 L.Ed.2d 678.

Marks final action on state criminal proceedings

U.S.—Brown v. Allen, 73 S.Ct. 397, 344 U.S. 443, 97 L.Ed. 469, reh. den. 73 S.Ct. 827, two cases, 345 U.S. 946, 97 L.Ed. 1370.

Goss v. State of Ill., C.A.Ill., 312 F.2d 257.

§ 279. Necessity and Sufficiency of Showing of Jurisdiction

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1. U.S.—Department of Mental Hygiene of Cal. v. Kirchner, Cal., 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753, on remand, Sup., 43 Cal.Rptr. 329, 400 P.2d 321.

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5. U.S.—Department of Mental Hygiene of Cal. v. Kirchner, Cal., 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753, on remand, Sup., 43 Cal.Rptr. 329, 400 P.2d 321.

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13.5. U.S.—Nostrand v. Little, Wash., 82 S.Ct. 464, 368 U.S. 436, 7 L.Ed.2d 426.

§ 280. Scope and Extent of Review

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15. U.S.—Rosenblatt v. American Cyanamid Co., N.Y., 86 S.Ct. 1, 15 L.Ed.2d 39.

Issue of standing

U.S.—Regents of University of California v. Bakke, Cal., 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed.2d 750.

15.5. U.S.—Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO v. Schermerhorn, Fla., 83 S.Ct. 1461, 373 U.S. 746, 10 L.Ed.2d 678.

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16. U.S.—Bell v. State of Md., Md., 84 S.Ct. 1814, 378 U.S. 226, 12 L.Ed.2d 822, on remand 204 A.2d 54, 236 Md. 356—New Jersey v. Portash, N.J., 99 S.Ct. 1292, 440 U.S. 450, 59 L.Ed.2d 501.

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17. U.S.—Uphaus v. Wyman, N.H., 79 S.Ct. 1040, 360 U.S. 72, 3 L.Ed.2d 1090, reh. den. 80 S.Ct. 40, 361 U.S. 856, 4 L.Ed.2d 95—Coleman v. Alabama, Ala., 90 S.Ct. 1999, 399 U.S. 1, 26 L.Ed.2d 387, mandate conf. to 239 So.2d 223, 46 Ala.App. 737.

Policy

(1) U.S.—U.S. ex rel. Sturdivant v. State of N.J., C.A.N.J., 289 F.2d 846, cert. den. 82 S.Ct. 109, 368 U.S. 864, 7 L.Ed.2d 61.

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17.10. U.S.—Scripto, Inc. v. Carson, Fla., 80 S.Ct. 619, 362 U.S. 207, 4 L.Ed.2d 660—Bell v. State of Md., Md., 84 S.Ct. 1814, 378 U.S. 226, 12 L.Ed.2d 822, on remand 204 A.2d 54, 236 Md. 356.

The Supreme Court of the United States has held that it is not its function to direct state courts how to manage their affairs, but only to make clear federal constitutional requirements.[17.15]

17.15. U.S.—Argersinger v. Hamlin, Fla., 92 S.Ct. 2006, 407 U.S. 25, 32 L.Ed.2d 530.

18. U.S.—Ciucci v. State of Ill., 78 S.Ct. 839, 356 U.S. 571, 2 L.Ed.2d 983, rehearing and modification denied 78 S.Ct. 1367, 357 U.S. 924, 2 L.Ed.2d 1375—Uphaus v. Wyman, N.H., 79 S.Ct. 1040, 360 U.S. 72, 3 L.Ed.2d 1040, reh. den. 80 S.Ct. 40, 361 U.S. 856, 4 L.Ed.2d 95—Eli Lilly & Co. v. Sav-On-Drugs, Inc., N.J., 81 S.Ct. 1316, 366 U.S. 276, 6 L.Ed.2d 288, reh. den. 81 S.Ct. 1913, 366 U.S. 978, 6 L.Ed.2d 1268—Federal Land Bank of Wichita v. Board of County Com'rs of Kiowa County, State of Kan., Kan., 82 S.Ct. 282, 368 U.S. 146, 7 L.Ed.2d 199—Thorpe v. Housing Authority of City of Durham, N.C., 89 S.Ct. 518, 393 U.S. 268, 21 L.Ed.2d 474—Lear, Inc. v. Adkins, Cal., 89 S.Ct. 1902, 395 U.S. 653, 23 L.Ed.2d 610—Ocala Star-Banner Co. v. Damron, Fla., 91 S.Ct. 628, 401 U.S. 295, 28 L.Ed.2d 57, app. after remand, App., 263 So.2d 291—U.S. v. District Court In and For Eagle County, Colo., Colo., 91 S.Ct. 998, 401 U.S. 520, 28 L.Ed.2d 278—Gardner v. Florida, Fla., 97 S.Ct. 1197, 430 U.S. 349, 51 L.Ed.2d 393—Zacchini v. Scripps-Howard Broadcasting Co., Ohio, 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965, on remand 376 N.E.2d 582, 54 Ohio St.2d 286, 8 O.O.3d 265.

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Issues raised in a criminal case before a state court, which are not before the Supreme Court must for purposes of appeal be treated as having been properly resolved by the state court.[18.18]

18.18. U.S.—Milton v. Wainwright, Fla., 92 S.Ct. 2174, 407 U.S. 371, 33 L.Ed.2d 1.

19. U.S.—Phillips Chemical Co. v. Dumas Independent School Dist., Tex., 80 S.Ct. 474, 361 U.S. 376, 4 L.Ed.2d 384, op. conformed to, Sup., 334 S.W.2d 779, reh. den. 80 S.Ct. 749, 362 U.S. 937, 4 L.Ed.2d 751—In re Anastaplo, Ill., 81 S.Ct. 978, 366 U.S. 82, 6 L.Ed.2d 135, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69—Ungar v. Sarafite, N.Y., 84 S.Ct. 841, 376 U.S. 575, 11 L.Ed.2d 921, reh. den. 84 S.Ct. 1218, 377 U.S. 925, 12 L.Ed.2d 217—Tacon v. Arizona, Ariz., 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d 346—Hankerson v. North Carolina, N.C., 97 S.Ct. 2339, 432 U.S. 233, 53 L.Ed.2d 306.

Closely related questions considered although not presented in petition for writ.

Va.—Boynton v. Com. of Va., Va., 81 S.Ct. 182, 364 U.S. 454, 5 L.Ed.2d 206.

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19.20. U.S.—Quilloin v. Walcott, Ga., 98 S.Ct. 549, 434 U.S. 246, 54 L.Ed.2d 511, reh. den. 98 S.Ct. 1477, 435 U.S. 918, 55 L.Ed.2d 511.

19.25. U.S.—Nelson v Los Angeles County, Cal., 80 S.Ct. 527, 362 U.S. 1, 4, L.Ed.2d 494.

U.S. ex rel. Williams v. La Vallee, C.A.N.Y., 276 F.2d 645, cert. den. 81 S.Ct. 287, 364 U.S. 922, 5 L.Ed.2d 261

19.30. U.S.—Phillips Chemical Co. v. Dumas Independent School Dist., Tex., 80 S.Ct. 474, 361 U.S. 376, 4 L.Ed.2d 384, op. conformed to, Sup., 334 S.W.2d 779, reh. den. 80 S.Ct. 749, 362 U.S. 937, 4 L.Ed.2d 751.

19.40. U.S.—Cupp v. Naughten, Or., 94 S.Ct. 396, 414 U.S. 141, 38 L.Ed.2d 368, on remand 489 F.2d 734.

19.45. Does not sit as court of criminal appeals

U.S.—Burgett v. State of Tex., Tex., 88 S.Ct. 258, 389 U.S. 109, 19 L.Ed.2d 319, conf. to, Cr.App., 422 S.W.2d 728.

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21. Review evidence

U.S.—In re Primus, S.C., 98 S.Ct. 1893, 436 U.S. 412, 56 L.Ed.2d 417.

22. U.S.—Wolfe v. State of N.C., N.C., 80 S.Ct. 1482, 364 U.S. 177, 4 L.Ed.2d 1650, reh. den. 81 S.Ct. 29, 364 U.S. 856, 5 L.Ed.2d 80—New York Times Co. v. Sullivan, Ala., 84 S.Ct. 710, 376 U.S. 254, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, motion den. 84 S.Ct. 1130, two cases, 376 U.S. 967, 12 L.Ed.2d 83—Time, Inc. v. Hill, N.Y., 87 S.Ct. 534, 385 U.S. 374, 17 L.Ed.2d 456—American Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n, Inc., Ala., 95 S.Ct. 409, 419 U.S. 215, 42 L.Ed.2d 399.

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22.5. U.S.—Eli Lilly & Co. v. Sav-On-Drugs, Inc., N.J., 81 S.Ct. 1316, 366 U.S. 276, 6 L.Ed.2d 288, reh. den. 81 S.Ct. 1913, 366 U.S. 978, 6 L.Ed.2d 1268—Bantam Books, Inc. v. Sullivan, R.I., 83 S.Ct. 631, 372 U.S. 58, 9 L.Ed.2d 584.

22.10. U.S.—Ker v. State of Cal., Cal., 83 S.Ct. 1623, 374 U.S. 23, 10 L.Ed.2d 726—New York Times Co. v. Sullivan, Ala., 84 S.Ct. 710, 376 U.S. 254, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, motion den. 84 S.Ct. 1130, two cases, 376 U.S. 967, 12 L.Ed.2d 83—Maryland Committee for Fair Representation v. Tawes, Md., 84 S.Ct. 1429, 377 U.S. 656, 12 L.Ed.2d 595—General Motors Corp. v. Washington, Wash., 84 S.Ct. 1564, 377 U.S. 436, 12 L.Ed.2d 430, reh. den. 85 S.Ct. 14, 379 U.S. 875, 13 L.Ed.2d 79—Cox v. State of La., La., 85 S.Ct. 453, 379 U.S. 536, 13 L.Ed.2d 471—Street v. New York, N.Y., 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed.2d 572, on remand 250 N.E.2d 250, 24 N.Y.2d 1026, 302 N.Y.S.2d 848—Bachellar v. Maryland, Md., 90 S.Ct. 1312, 397 U.S. 564, 25 L.Ed.2d 570—Greenbelt Co-op. Pub. Ass'n v. Bresler, Md., 90 S.Ct. 1537, 398 U.S. 6, 26 L.Ed.2d 6—Bose Corp. v. Consumers Union of U.S., Inc., Mass., 104 S.Ct. 1949, 466 U.S. 485, 80 L.Ed.2d 502, reh. den. 104 S.Ct. 3561, 82 L.Ed.2d 863.

Admission of confession

(2) Other matters.

U.S.—Haynes v. State of Wash., Wash., 83 S.Ct. 1336, 373 U.S. 503, 10 L.Ed.2d 513—Brooks v. Florida, Fla., 88 S.Ct. 541, 389 U.S. 413, 19 L.Ed.2d 643.

23. U.S.—Ker v. State of Cal., Cal., 83 S.Ct. 1623, 374 U.S. 23, 10 L.Ed.2d 726—Whitus v. State of Ga., U.S.Ga., 87 S.Ct. 643, 385 U.S. 545, 17 L.Ed.2d 599, conf. to 153 S.E.2d 446, 223 Ga. 127, and 153 S.E.2d 566, 223 Ga. 127—Turner v. Arkansas, Ark., 92 S.Ct. 2096, 407 U.S. 366, 32 L.Ed.2d 798.

Denial of due process of law

U.S.—Haynes v. State of Wash., Wash., 83 S.Ct. 1336, 373 U.S. 503, 10 L.Ed.2d 513.

Denial of right to assistance of counsel

U.S.—Hudson v. State of N.C., N.C., 80 S.Ct. 1314, 363 U.S. 697, 4 L.Ed.2d 1500.

The Supreme Court has held that the erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by New York Times v. Sullivan,[23.5] but appellate judges in such a case must exercise an independent judgment and determine whether the record establishes actual malice with convincing clarity.[23.10]

23.5. U.S.—Bose Corp. v. Consumers Union of U.S., Inc., Mass., 104 S.Ct. 1949, 466 U.S. 485, 80 L.Ed.2d 502, reh. den. 104 S.Ct. 3561, 82 L.Ed.2d 863.

23.10. U.S.—Bose Corp. v. Consumers Union of U.S., Inc., U.S.Mass., 104 S.Ct. 1949, 466 U.S. 485, 80 L.Ed.2d 502, reh. den. 104 S.Ct. 3561, 82 L.Ed.2d 863.

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24. U.S.—Haynes v. State of Wash., Wash., 83 S.Ct. 1336, 373 U.S. 503, 10 L.Ed.2d 513—New York Times Co. v. Sullivan, Ala., 84 S.Ct. 710, 376 U.S. 254, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, motion den. 84 S.Ct. 1130, two cases, 376 U.S. 967, 12 L.Ed.2d 83.

24.5. Ga.—Wood v. Georgia, Ga., 82 S.Ct. 1364, 370 U.S. 375, 8 L.Ed.2d 569.

26.5. U.S.—Greenbelt Co-op. Pub Ass'n v. Bresler, Md., 90 S.Ct. 1537, 398 U.S. 6, 26 L.Ed.2d 6.

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26.20. U.S.—General Motors Corp. v. Washington, Wash., 84 S.Ct. 1564, 377 U.S. 436, 12 L.Ed.2d 430, reh. den. 85 S.Ct. 14, 379 U.S. 875, 13 L.Ed.2d 79.

26.25. U.S.—Haynes v. State of Wash., Wash., 83 S.Ct. 1336, 373 U.S. 503, 10 L.Ed.2d 513.

§ 281. Determination and Disposition of Cause

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27. U.S.—Gallick v. Baltimore & O.R. Co., Ohio, 83 S.Ct. 659, 372 U.S. 108, 9 L.Ed.2d 618—Bell v. State of Md., Md., 84 S.Ct. 1814, 378 U.S. 226, 12 L.Ed.2d 822, on remand 204 A.2d 54, 236 Md. 356—Richardson v. Ramirez, Cal., 94 S.Ct. 2655, 418 U.S. 24, 41 L.Ed.2d 551, on remand 117 Cal.Rptr. 562, 528 P.2d 378, 12 C.3d 912.

U.S. ex rel. Dorey v. State of N.J., C.A.N.J., 560 F.2d 584.

Miss.—Goldsby v. State, 123 So.2d 429, 240 Miss. 647, cert. den. 81 S.Ct. 829, 365 U.S. 861, 5 L.Ed.2d 824.

Mont.—State v. Coleman, 605 P.2d 1000, 185 Mont. 299, cert. den. 100 S.Ct. 2952, 446 U.S. 970, 64 L.Ed.2d 831, reh. den. 101 S.Ct. 34, 448 U.S. 914, 65 L.Ed.2d 1177.

28. U.S.—Splawn v. California, Cal., 97 S.Ct. 1987, 431 U.S. 595, 52 L.Ed.2d 606—Regents of University of California v. Bakke, Cal., 98 S.Ct. 2733, 438 U.S. 265, 57 L.Ed.2d 750.

La.—State v. Anderson, 255 So.2d 348, 260 La. 113.

Judgment affirmed

(1) U.S.—Mills v. State of Louisiana, La., 79 S.Ct. 980, 360 U.S. 230, 3 L.Ed.2d 1193, reh. den. 80 S.Ct. 40, 361 U.S. 854, 4 L.Ed.2d 93.

Judgment reversed

(1) U.S.—Northern Natural Gas Co. v. State Corp. Commission of Kan., Kan., 83 S.Ct. 646, 372 U.S. 84, 9 L.Ed.2d 601, reh. den. 83 S.Ct. 1011, 372 U.S. 960, 10 L.Ed.2d 14.

N.H.—Baer v. Rosenblatt, 237 A.2d 130, 108 N.H. 368.

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28.15. U.S.—Nostrand v. Little, Wash., 80 S.Ct. 840, 362 U.S. 474, 4 L.Ed.2d 892, motion den. 81 S.Ct. 32, 364 U.S. 805, 5 L.Ed.2d 40, on remand 361 P.2d 551, app. dism. 82 S.Ct. 464, 368 U.S. 436, 7 L.Ed.2d 426—Aquilino v. U.S., N.Y., 80 S.Ct. 1277, 363 U.S. 509, 4 L.Ed.2d 1365, on remand 219 N.Y.S.2d 254, 10 N.Y.2d 271, 176 N.E.2d 826—Konigsberg v. State Bar of Cal., Cal., 81 S.Ct. 997, 366 U.S. 36, 6 L.Ed.2d 105, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69—Metlakatla Indian Community, Annette Island Reserve v. Egan, Alaska, 82 S.Ct. 552, 369 U.S. 45, 7 L.Ed.2d 562—Walton v. State of Ark., Ark., 83 S.Ct. 9, 371 U.S. 28, 9 L.Ed.2d 9, on remand 366 S.W.2d 707, 236 Ark. 439—Whipple v. C. I. R., Tex., 83 S.Ct. 1168, 373 U.S. 193, 10 L.Ed.2d 288, reh. den. 83 S.Ct. 1863, 374 U.S. 858, 10 L.Ed.2d 1082—Dresner v. City of Tallahassee, Fla., Fla., 84 S.Ct. 235, 375 U.S. 136, 11 L.Ed.2d 208, cert. ques. ans., Sup., 164 So.2d 208—New York Times Co. v. Sullivan, Ala., 84 S.Ct. 710, 376 U.S. 254, 11 L.Ed.2d 686, 95 A.L.R.2d 1412, motion den. 84 S.Ct. 1130, two cases, 376 U.S. 967, 12 L.Ed.2d 83—Yiatchos v. Yiatchos, Wash., 84 S.Ct. 742, 376 U.S. 306, 11 L.Ed.2d 724—Henry v. City of Rock Hill, S.C., 84 S.Ct. 1042, 376 U.S. 776, 12 L.Ed.2d 79—U.S. v. Continental Oil Co., N.M., 84 S.Ct. 1155, 377 U.S. 161, 12 L.Ed.2d 213—National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, Ala., 84 S.Ct. 1302, 377 U.S. 288, 12 L.Ed.2d 325, on remand 167 So.2d 171, 277 Ala. 89—Henry v. State of Miss., Miss., 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408, reh. den. 85 S.Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 174 So.2d 348, motion den. 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431, on remand, Sup., 198 So.2d 213—Department of Mental Hygiene of Cal. v. Kirchner, Cal., 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753, on remand, Sup., 43 Cal.Rptr. 329, 400 P.2d 321—Watts v. Seward School Bd., Alaska, 85 S.Ct. 1321, 381 U.S. 126, 14 L.Ed.2d 261, on remand 421 P.2d 586, reh. den. 423 P.2d 678, cert. gr. 88 S.Ct. 84, 389 U.S. 818, 19 L.Ed.2d 68, vac. on oth. grds. 88 S.Ct. 1753, 391 U.S. 592, 20 L.Ed.2d 842, on remand 454 P.2d 732, cert. den. 90 S.Ct. 899, 397 U.S. 921, 25 L.Ed.2d 101, reh. den. 90 S.Ct. 1495, 397 U.S. 1071, 25 L.Ed.2d 695—Case v. State of Neb., Neb., 85 S.Ct. 1486, 381 U.S. 336, 14 L.Ed.2d 422—Thorpe v. Housing Authority of City of Durham, N.C., 87 S.Ct. 1244, 386 U.S. 670, 18 L.Ed.2d 394, on remand 157 S.E.2d 147, 271 N.C. 468, cert. gr. 88 S.Ct. 1045, 390 U.S. 942, 19 L.Ed.2d 1130, rev. on oth. grds. 89 S.Ct. 518, 393 U.S. 268, 21 L.Ed.2d 474—Street v. New York, N.Y., 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed.2d 572, on remand 250 N.E.2d 250, 24 N.Y.2d 1026, 302 N.Y.S.2d 848—Benton v. Maryland, Md., 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707, on remand 260 A.2d 86, 8 Md.App. 388—Greenbelt Co-op. Pub. Ass'n v. Bresler, Md., 90 S.Ct. 1537, 398 U.S. 6, 26 L.Ed.2d 6—Huffman v. Boersen, Neb., 92

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S.Ct. 1598, 406 U.S. 337, 32 L.Ed.2d 107—California v. Krivda, Cal., 93 S.Ct. 32, 409 U.S. 33, 34 L.Ed.2d 45, reh. den. 93 S.Ct. 549, 409 U.S. 1068, 34 L.Ed.2d 520, on remand 105 Cal.Rptr. 521, 504 P.2d 457, 8 C.3d 623, cert. den. 93 S.Ct. 2734, 412 U.S. 919, 37 L.Ed.2d 145—Paschall v. Christie-Stewart, Inc., Okl., 94 S.Ct. 313, 414 U.S. 100, 38 L.Ed.2d 298, reh. den. 94 S.Ct. 884, 414 U.S. 1138, 38 L.Ed.2d 763, mand. conf. to Sup., 544 P.2d 505, cert. den. 96 S.Ct. 2648, 426 U.S. 935, 49 L.Ed.2d 386—Weaver v. Graham, Fla., 101 S.Ct. 960, 450 U.S. 24, 67 L.Ed.2d 17.

Davis v. Cameron, D.C.Iowa, 238 F.Supp. 462.

Ala.—Ex parte National Ass'n for Advancement of Colored People, 122 So.2d 396, 271 Ala. 33.

Minn.—Threlkeld v. Robbinsdale Federation of Teachers, Local 872 AFL-CIO, 316 N.W.2d 551, app. dism. 103 S.Ct. 24, 459 U.S. 802, 74 L.Ed.2d 40.

N.M.—Tiffany Const. Co., Inc. v. Bureau of Revenue, State of N.M., App., 629 P.2d 1233, 96 N.M. 304, affd. in part, revd. in part, on oth. grds., 629 P.2d 1225, 96 N.M. 296.

N.J.—State v. Carpentieri, 414 A.2d 966, 82 N.J. 546

Return of mandates for clarification held proper

Fla.—Callender v. State, 181 So.2d 529.

Moot questions

(3) Other instances.

Wash.—DeFunis v. Odegaard, 529 P.2d 438, 84 Wash.2d 617.

Wrong determination

(1) Reinterpretation of state law in light of federal statutes.

U.S.—Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., N.D., 104 S.Ct. 2267, 467 U.S. 138, 81 L.Ed.2d 113, on remand 364 N.W.2d 98, cert. gr. 106 S.Ct. 270, 88 L.Ed.2d 224.

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32. U.S.—Cross v. Bruning, C.A.Cal., 413 F.2d 678, cert. den. 90 S.Ct. 455, 396 U.S. 970, 24 L.Ed.2d 437, reh. den. 90 S.Ct. 760, 396 U.S. 1063, 24 L.Ed.2d 757.

Ala.—Local 1264, Intern. Broth. of Elec. Workers v. Broadcast Service of Mobile, Inc., 175 So.2d 460, 278 Ala. 29.

Alaska—Watts v. Seward School Bd., 454 P.2d 732, cert. den. 90 S.Ct. 899, 397 U.S. 921, 25 L.Ed.2d 101, reh. den. 90 S.Ct. 1495, 397 U.S. 1071, 25 L.Ed.2d 695.

Cal.—Ivanhoe Irr. Dist. v. All Parties and Persons, 3 Cal.Rptr. 317, 350 P.2d 69, 53 C.2d 692—Santa Barbara County Water Agency v. All Persons and Parties, 3 Cal.Rptr. 348, 350 P.2d 100, 53 C.2d 743—Gonzales v. International Ass'n of Machinists, 29 Cal.Rptr. 190, 213 C.A.2d 817.

La.—Natural Gas & Oil Corp. v. Waggonner, App., 165 So.2d 314—Humble Pipe Line Co. v. Waggonner, App., 165 So.2d 316.

N.Y.—Friedman v. State, 249 N.E.2d 369, 24 N.Y.2d 528, 301 N.Y.S.2d 484, am. on oth. grds. 252 N.E.2d 131, 25 N.Y.2d 905, 304 N.Y.S.2d 597, app. dism. 90 S.Ct. 1121, 397 U.S. 317, 25 L.Ed.2d 337.

Tex.—Carrington v. Rash, 389 S.W.2d 945.

Post-conviction relief under new court rule

Fla.—Gideon v. Wainwright, 153 So.2d 299.

Withholding of constitutional rights not excused

U.S.—Board of School Com'rs of Mobile County v. Davis, Ala., 84 S.Ct. 10, 11 L.Ed.2d 26.

32.5. U.S.—National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson, Ala., 79 S.Ct. 1001, 360 U.S. 240, 3 L.Ed.2d 1205, reh. den. 80 S.Ct. 43, 361 U.S. 856, 4 L.Ed.2d 96, on remand 122 So.2d 396, 271 Ala. 33—National Ass'n for Advancement of Colored People v. Alabama ex rel. Flowers, Ala., 84 S.Ct. 1302, 377 U.S. 288, 12 L.Ed.2d 325, on remand 167 So.2d 171, 277 Ala. 89.

Va.—Brotherhood of R.R. Trainmen v. Com. ex rel. Virginia State Bar, 149 S.E.2d 265, 207 Va. 182, cert. den. 87 S.Ct. 754, 385 U.S. 1027, 17 L.Ed.2d 675.

32.10. Kan.—Cities Service Gas Co. v. State Corp. Commission, 337 P.2d 640, 184 Kan. 540, cert. den. 80 S.Ct. 89, 361 U.S. 836, 4 L.Ed.2d 77.

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34. U.S.—Cardona v. Power, N.Y., 86 S.Ct. 1728, 384 U.S. 672, 16 L.Ed.2d 848—Puyallup Tribe, Inc. v. Department of Game of State of Wash., Wash., 97 S.Ct. 2616, 433 U.S. 165, 53 L.Ed.2d 667—Philadelphia Newspapers, Inc. v. Jerome, Pa., 98 S.Ct. 546, 434 U.S. 241, 54 L.Ed.2d 506, on remand 387 A.2d 425, 478 Pa. 484, app. dism. 99 S.Ct. 3104, 443 U.S. 913, 61 L.Ed.2d 877.

Ala.—National Ass'n for Advancement of Colored People v. State, 167 So.2d 171, 277 Ala. 89.

Cal.—People v. Phillips, 58 Cal.Rptr. 752, 250 C.A.2d 885.

Ga.—International Ass'n of Machinists v. Street, 122 S.E.2d 220, 217 Ga. 351—Evans v. Newton, 148 S.E.2d 329, 221 Ga. 870.

Georgia Southern & F. Ry. Co. v. Meeks, 137 S.E.2d 919, 110 Ga.App. 143.

Md.—State v. Giles, 227 A.2d 745, 245 Md. 342.

Miss.—Mason v. City of Biloxi, 202 So.2d 918.

N.Y.—Childs v. Childs, 419 N.Y.S.2d 533, 69 A.D.2d 406, app. dism., cert. den. 100 S.Ct. 1824, 446 U.S. 901, 64 L.Ed.2d 253.

Pa.—In re Girard College Trusteeship, 138 A.2d 844, 391 Pa. 434, app. dism. and cert. den. 78 S.Ct. 1383, 357 U.S. 570, 2 L.Ed.2d 1546, reh. den. 79 S.Ct. 14, 358 U.S. 858, 3 L.Ed.2d 92.

Tex.—Phillips Chemical Co. v. Dumas Independent School Dist., 334 S.W.2d 779, 160 Tex. 599.

Ex parte Carroll, Cr., 433 S.W.2d 1.

Humble Oil & Refining Co. v. Preston, Civ.App., 515 S.W.2d 929.

Abandonment of issue

(2) U.S.—National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson, Ala., 79 S.Ct. 1001, 360 U.S. 240, 3 L.Ed.2d 1205, reh. den. 80 S.Ct. 43, 361 U.S. 856, 4 L.Ed.2d 96, on remand 122 So.2d 396, 271 Ala. 33.

Reversal does not have effect of reinstating prior orders

Fla.—Palmore v. Sidoti, App. 2 Dist., 472 So.2d 843.

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34.15. Cal.—People v. Phillips, 58 Cal.Rptr. 752, 250 C.A.2d 885.

Ga.—Evans v. Abney, 165 S.E.2d 160, 224 Ga. 826, affd. 90 S.Ct. 628, 396 U.S. 435, 24 L.Ed.2d 634.

Tex.—Gulf, C. & S.F. Ry. Co. v. Deen, 312 S.W.2d 933, 158 Tex. 466, cert. den. 79 S.Ct. 111, 358 U.S. 874, 3 L.Ed.2d 105.

Issues under state law

(1) Colo.—Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 383 P.2d 313, 152 Colo. 524.

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34.20. U.S.—Addington v. Texas, 99 S.Ct. 1804, 441 U.S. 418, 60 L.Ed.2d 323, on remand, Sup., 588 S.W.2d 569.

34.30. U.S.—National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson, Ala., 79 S.Ct. 1001, 360 U.S. 240, 3 L.Ed.2d 1205, reh. den. 80 S.Ct. 43, 361 U.S. 856, 4 L.Ed.2d 96, on remand 122 So.2d 396, 271 Ala. 33—Stanton v. Stanton, Utah, 97 S.Ct. 717, 429 U.S. 501, 50 L.Ed.2d 723, on remand 564 P.2d 303, reh. den. 567 P.2d 625.

Tex.—Turner v. State, Cr., 485 S.W.2d 282—Ex parte Crain, Cr., 485 S.W.2d 286.

37.5. U.S.—Super Tire Engineering Co. v. McCorkle, C.A.N.J., 550 F.2d 903, cert. den. 98 S.Ct. 106, 434 U.S. 827, 54 L.Ed.2d 86, reh. den. 98 S.Ct. 753, 434 U.S. 1025, 54 L.Ed.2d 773.

N.J.—Kenny v. Byrne, 365 A.2d 211, 144 N.J.Super. 243, affd. 383 A.2d 428, 75 N.J. 458.

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42. U.S.—Konigsberg v. State Bar of Cal., Cal., 81 S.Ct. 997, 366 U.S. 36, 6 L.Ed.2d 105, reh. den. 82 S.Ct. 21, 368 U.S. 869, 7 L.Ed.2d 69—Bell v. State of Md., Md., 84 S.Ct. 1814, 378 U.S. 226, 12 L.Ed.2d 822, on remand 204 A.2d 54, 236 Md. 356—Sullivan v. Little Hunting Park, Inc., Va., 90 S.Ct. 400, 396 U.S. 229, 24 L.Ed.2d 386.

44. **Question not moot**

U.S.—Richardson v. Ramirez, Cal., 94 S.Ct. 2655, 418 U.S. 24, 41 L.Ed.2d 551, on remand 117 Cal.Rptr. 562, 528 P.2d 378, 12 C.3d 912.

48.5. U.S.—Metlakatla Indian Community, Annette Island Reserve v. Egan, Alaska, 80 S.Ct. 1321, 363 U.S. 555, 4 L.Ed.2d 1397.

§ 282. Creation of Court

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48.50. U.S.—Sablan v. Santos, C.A., 634 F.2d 1153.

Survey of courts of appeals see 42 F.R.D. 243.

49. U.S.—Young Properties Corp. v. United Equity Corp., 534 F.2d 847. Cert. den. 97 S.Ct. 90, 429 U.S. 830, 50 L.Ed.2d 94.

50.5. 28 U.S.C.A. § 41, was amended in 1982 increasing judicial circuits to thirteen.

The Federal Court Improvement Act of 1982 has created the court of appeals for the federal circuit.[53.1]

The new court is established by merging the court of claims and the court of customs and patent appeals, which in effect are abolished by the merger.[53.2]

53.1. 28 U.S.C.A. § 41 et seq.

53.2. 28 U.S.C.A. § 41 et seq. as amended in 1982.

§ 283. Personnel of Court

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56.25. 28 U.S.C.A. § 46(c), was amended in 1978 substituting "panel" for "division".

28. U.S.C.A. § 46(c), was amended in 1982 providing that court of appeals for the federal circuit may sit in panels of more than three judges if its rule so provides.

Federal Rules of Appellate Procedure

See F.R.A.P. Rule 35, 28 U.S.C.A.

Function is not to review alleged errors for benefit of losing litigants

U.S.—U.S. v. Rosciano, C.A.Ill., 499 F.2d 173.

56.30. U.S.—Allen v. Johnson, C.A.Miss., 391 F.2d 527.

56.35. U.S.—National Latex Products Co. v. Sun Rubber Co., C.A.Ohio, 276 F.2d 167.

Petition for rehearing en banc denied

D.C.—Application of President and Directors of Georgetown College, Inc., C.A., 331 F.2d 1010, 118 U.S.App.D.C. 90.

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56.45. U.S.—Shenker v. Baltimore & O.R. Co., Pa., 83 S.Ct. 1667, 374 U.S. 1, 10 L.Ed.2d 709.

§ 284. Rules and Conduct of Business

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61. U.S.—U.S. v. United Air Lines, Inc., D.C.Nev. & Wash., 216 F.Supp. 709, affd. in part and mod. in part on oth. grds., C.A.Cal., 335 F.2d 379, cert. dism. 85 S.Ct. 452, 379 U.S. 951, 13 L.Ed.2d 549.

Prior panel decisions not disturbed except en banc

U.S.—Hodge v. Seiler, C.A.La., 558 F.2d 284.

62. U.S.—U.S. v. Harue Hayashi, C.A.Hawaii, 282 F.2d 599, 84 A.L.R.2d 754.

Change in Rules

Fed.Rules Civ.Proc. Rules 73–76, are now F.R.A.P. Rule 3 et seq., 28 U.S.C.A.

The Federal Rules of Appellate Procedure now govern procedure in appeals to courts of appeals from district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.[62.6]

62.6. D.C.—American Paper Institute, Inc. v. I.C.C., C.A., 607 F.2d 1011, 197 U.S.App.D.C. 181.

F.R.A.P. Rule 1 et seq., 28 U.S.C.A.

Rules by courts of appeals

F.R.A.P. Rule 47, 28 U.S.C.A., expressly authorizes each court of appeals to make rules of practice not inconsistent with Federal Rules of Appellate Procedure.

63. U.S.—American Exp. Warehousing, Limited v. Transamerica Ins. Co., C.A.N.Y., 380 F.2d 277.

Cisneros v. Corpus Christi Independent School Dist., D.C.Tex., 330 F.Supp. 1377, affd. in part, mod. in part on oth. grds., remd., C.A., 467 F.2d 142.

Motions

F.R.A.P. Rule 27, 28 U.S.C.A.

School desegregation cases as extraordinary matter for expeditious review

U.S.—Mannings v. Board of Public Instructions of Hillsborough County, Fla., C.A.Fla., 427 F.2d 874—U.S. v. Sunflower County School Dist., C.A. Miss., 430 F.2d 839—Hilson v. Ouzts, C.A.Ga., 431 F.2d 955—Henry v. Clarksdale Municipal Separate School Dist., C.A.Miss., 433 F.2d 387, app. after remand, C.A., 480 F.2d 583.

Judicial council. Congress has enacted 28 U.S.C.A. § 332, requiring judicial councils of the circuit judges for each circuit for the purpose of making all necessary orders for effective and expeditious administration of business of the courts within the circuit.[66.5]

66.5. **Particular proceeding held "business of the courts" within statute**

U.S.—Jiminez v. Aristeguieta, C.A.Fla., 311 F.2d 547, motion den. 314 F.2d 649, cert. den. 83 S.Ct. 1302, 373 U.S. 914, 10 L.Ed.2d 415, reh. den. 83 S.Ct. 1867, 374 U.S. 858, 10 L.Ed.2d 1083.

§ 285. Jurisdiction in General

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66.50. U.S.—U.S. ex rel. Perkins v. Pate, C.A.Ill., 401 F.2d 9, cert. den. 89 S.Ct. 2110, 395 U.S. 965, 23 L.Ed.2d 751.

D.C.—Jones v. U.S., C.A., 342 F.2d 863, 119 U.S.App. D.C. 284.

Function to review decisions of district courts

U.S.—Hall v. St. Helena Parish School Bd., D.C.La., 268 F.Supp. 923.

General supervisory powers

U.S.—U.S. v. Cheramie, C.A.La., 520 F.2d 325.

67. U.S.—Russell v. Law Enforcement Assistance Administration, C.A., 637 F.2d 1255.

67.5. U.S.—Huckeby v. Frozen Food Exp., C.A.Tex., 555 F.2d 542—Ryan v. Occidental Petroleum Corp., C.A.Tex., 577 F.2d 298.

67.10. U.S.—U.S. v. June, C.A.Ark., 503 F.2d 442.

67.15. U.S.—Hoots v. Com. of Pa., C.A.Pa. 639 F.2d 972, on remand, D.C., 510 F.Supp. 615, cert. den. 101 S.Ct. 3113, 452 U.S. 963, 69 L.Ed.2d 974.

67.20. U.S.—Resnik v. La Paz Guest Ranch, C.A. Cal., 289 F.2d 814.

Smith v. General Motors Acceptance Corp., D.C. Mo., 324 F.Supp. 105.

D.C.—Valley Vision, Inc., v. F.C.C., C.A., 383 F.2d 218, 127 U.S.App.D.C. 291, transf. to 399 F.2d 511.

68. U.S.—Pollard v. Supreme Court for State of Mich., C.A.Mich., 334 F.2d 129.

Supervisory power over administration of justice

U.S.—U.S. v. Toscanino, C.A.N.Y., 500 F.2d 267, reh. den. 504 F.2d 1380, on remand 398 F.Supp. 916.

D.C.—Smith v. Katzenbach, C.A., 351 F.2d 810, 122 U.S.App.D.C. 113.

Supervisory jurisdiction denied

U.S.—U.S. v. Butera, C.A.Me., 420 F.2d 564—Henry v. U.S., C.A.Nev., 434 F.2d 1283.

D.C.—Ford v. U.S., C.A., 352 F.2d 927, 122 U.S.App. D.C., 259—U.S. v. Jones, C.A., 433 F.2d 1176, 140 U.S.App.D.C. 70, cert. den. 91 S.Ct. 1613, 402 U.S. 950, 29 L.Ed.2d 120.

70. U.S.—Glynn v. Donnelly, G.A.Mass., 470 F.2d 95.

70.15. U.S.—Transport Mfg. & Equipment Co. of Del. v. Trainor, C.A.Mo., 382 F.2d 793.

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70.25. U.S.—Hall v. St. Helena Parish School Bd., D.C.La., 268 F.Supp. 923.

Declaratory opinions

U.S.—Application of Edwards, C.A.N.Y., 375 F.2d 108.

Not inclined to oversee pleading progress

U.S.—D'Ippolito v. Cities Service Co., C.A.N.Y., 374 F.2d 643.

70.35. D.C.—U.S. v. Thomas, C.A., 449 F.2d 1177, 146 U.S.App.D.C. 101—U.S. v. Tonelli, C.A.N.J., 577 F.2d 194.

Criminal contempt

U.S.—U.S. v. Columbia Broadcasting System, Inc., C.A. Fla., 497 F.2d 107.

Court of appeals as an appellate court having jurisdiction over appeals from criminal prosecutions brought by a territorial government, also has supervisory power.[71.1]

71.1. U.S.—Government of Virgin Islands v. Lovell, C.A.Virgin Islands, 378 F.2d 799, app. after remand 410 F.2d 307, cert. den. 90 S.Ct. 440, 396 U.S. 964, 24 L.Ed.2d 428.

The court of appeals cannot avoid the application of harmless-error doctrine by asserting its supervisory powers.[71.2]

71.2. U.S.—U.S. v. Hasting, U.S., 103 S.Ct. 1974, 461 U.S. 499, 76 L.Ed.2d 96, on remand, C.A., 739 F.2d 1269, cert. den. 105 S.Ct. 1199, four cases, 1200, 83 L.Ed.2d 343.

The supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless.[71.3]

71.3. U.S.—U.S. v. Hasting, 103 S.Ct. 1974, 461 U.S. 499, 76 L.Ed.2d 96, on remand, C.A., 739 F.2d 1269, cert. den. 105 S.Ct. 1199, four cases, 1200, 83 L.Ed.2d 343.

§ 286(1). Issuance of Writs

Library References

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73. U.S.—Gurley v. Superior Court of Mecklenburg County, C.A.N.C., 411 F.2d 586.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592—Dellinger v. Mitchell, C.A., 442 F.2d 782, 143 U.S.App.D.C. 60.

Purpose of statute, etc.

(2) Other statements.

U.S.—Refractarios Monterrey, S. A. v. Ferro Corp., 606 F.2d 966, 67 CCPA 153, cert. den. 100 S.Ct. 1338, 445 U.S. 943, 63 L.Ed.2d 776.

State Committee to Stop Sanguine v. Laird, D.C. Wis., 317 F.Supp. 664.

Issuance by single judge authorized

D.C.—Application of President and Directors of Georgetown College, Inc., C.A., 331 F.2d 1000, 118 U.S.App.D.C. 80, 9 A.L.R.3d 1367 (Opinion of Wright, J., sitting alone). Reh. en banc den., C.A., 331 F.2d 1010, 118 U.S.App.D.C. 90, cert. den. 84 S.Ct. 1883, 377 U.S. 978, 12 L.Ed.2d 746.

73.5. U.S.—F.T.C. v. Dean Foods Co., 86 S.Ct. 1738, 384 U.S. 597, 16 L.Ed.2d 802.

Erie Bank v. U.S. Dist. Court for Dist. of Colo., C.A.Colo., 362 F.2d 539.

74. U.S.—Whitney Nat. Bank in Jefferson Parish v. Bank of New Orleans & Trust Co., Dist.Col., 85 S.Ct. 551, 379 U.S. 411, 13 L.Ed.2d 386.

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77. U.S.—F.T.C. v. Guignon, C.A.Mo., 390 F.2d 323.

Injunction granted

(2) Other instances.

U.S.—Harris v. Gibson, C.A.Ga., 322 F.2d 780, cert. den. 84 S.Ct. 661, 376 U.S. 908, 11 L.Ed.2d 606—Meredith v. Fair, C.A.Miss., 328 F.2d 586—U.S. v. Farrar, C.A.Miss., 414 F.2d 936.

Injunction refused

(3) Other matters.

U.S.—Hamer v. Campbell, C.A.Miss., 345 F.2d 787.

Reid v. Beto, D.C.Tex., 211 F.Supp. 162.

Mandatory injunction not granted

U.S.—Dunn v. Retail Clerks Intern. Ass'n, AFL–CIO, Local 1529, C.A.Tenn., 299 F.2d 873.

Issuance by single judge authorized

U.S.—Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000, 118 U.S. App.D.C. 80, 9 A.L.R.3d 1367 (opinion of Wright, J., sitting alone). Reh. en banc den., C.A., 331 F.2d 1010, 118 U.S.App.D.C. 90, cert. den. 84 S.Ct. 1883, 377 U.S. 978, 12 L.Ed.2d 746.

Burden of plaintiff seeking preliminary injunction

U.S.—Benoit v. Gardner, C.A.Mass., 345 F.2d 792.

78. U.S.—American Exp. Warehousing, Limited v. Transamerica Ins. Co., C.A.N.Y., 380 F.2d 277.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

Writ denied for lack of jurisdiction

(2) Other instances.

U.S.—Wolfson v. Palmieri, C.A.N.Y., 394 F.2d 7.

Writ denied to review of abrupt commencement of hearing

U.S.—Sperry & Hutchinson Co. v. U.S. Dist. Court for Southern Dist. of Cal., C.A.Cal., 321 F.2d 533.

78.5. Meaning of maxim see 14 C.J.S. p. 40.

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The Federal Rules of Appellate Procedure make provision with respect to the procedure for the issuance of a writ of prohibition and other extraordinary writs by counts of appeals.[78.6]

78.6. F.R.A.P. Rule 21, 28 U.S.C.A.

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78.10. U.S.—Stell v. Savannah-Chatham County Bd. of Ed., C.A.Ga., 318 F.2d 425, cert. den. 84 S.Ct. 661, 376 U.S. 908, 11 L.Ed.2d 606—Gurley v. Superior Court of Mecklenburg County, C.A N.C., 411 F.2d 586.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

78.15. U.S.—Stell v. Savannah-Chatham County Bd. of Ed., C.A.Ga., 318 F.2d 425, cert. den. 84 S.Ct. 661, 376 U.S. 908, 11 L.Ed.2d 606—Bigart v. Goodyear Tire & Rubber Co., C A.Vt., 361 F.2d 317—Erie Bank v. U.S. Dist. Court for Dist. of Colo., C.A.Colo., 362 F.2d 539.

D.C.—Ellis v. U.S., C.A., 416 F.2d 791, 135 U.S.App. D.C. 35.

78.20. U.S.—Will v. U.S., Ill., 88 S.Ct. 269, 389 U.S. 90, 19 L.Ed.2d 305.

Humble Oil & Refining Co. v. Bell Marine Service, Inc., C.A.Tex., 321 F.2d 53.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

Reasoned and principled exercise

U.S.—Bauman v. U.S. Dist., Court, C.A.Cal., 557 F.2d 650.

78.25. U.S.—Benton Harbor Malleable Industries v. International Union, United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO), C.A.Mich., 355 F.2d 70.

78.30. U.S.—Benton Harbor Malleable Industries v. International Union, United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO), C.A.Mich., 355 F.2d 70.

D.C.—Ellis v. U.S., C A., 416 F.2d 791, 135 U.S.App. D.C. 35.

78.35. U.S.—Hartley Pen Co. v. U.S. Dist. Court for Southern Dist. of Cal., Central Division, C.A.Cal., 287 F.2d 324.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

78.40. Coram nobis denied

U.S.—Spaulding v. Taylor, C.A.Kan., 336 F.2d 192.

78.50. U.S.—Miller v. Connally, C.A.Tex., 354 F.2d 206—In re Montes, C.A.Tex., 677 F.2d 415.

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78.55. D.C.—Hoffa v. Letts, C.A., 284 F.2d 283, 109 U.S.App.D.C. 149.

78.60. U.S.—McGraw-Edison Co. v. Van Pelt, C.A. Neb., 350 F.2d 361.

79. U.S.—Chappell & Co. v. Frankel, C.A.N.Y., 367 F.2d 197.

80. D.C.—Lake v. Cameron, CA., 331 F.2d 771, 118 U.S.App.D.C. 25.

Effect of Alaska enabling act, etc.

U.S.—Bridges v. Forbes, C.A.9, 269 F.2d 703, cert. den. 80 S.Ct. 592, 361 U.S. 964, 4 L.Ed.2d 544.

80.5. U.S.—Acree v. County Bd. of Ed. of Richmond County, C.A.Ga., 399 F.2d 151.

State court judgment

(2) Other statements.

U.S.—Watkins v. Wilson, C.A.Cal., 408 F.2d 351.

82. U.S.—Margolis v. Banner, Cust. & Pat.App., 599 F.2d 435.

83. Permission for blood transfusion to mother

U.S.—Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000, 118 U.S. App.D.C. 80, 9 A.L.R.3d 1367 (Opinion of Wright, J., sitting alone). Reh. en banc den., C.A., 331 F.2d 1010, 118 U.S.App.D.C. 90, cert. den. 84 S.Ct. 1883, 377 U.S. 978, 12 L.Ed.2d 746.

Unperfected appeal immaterial

U.S.—Application of President and Directors of Georgetown College, Inc., 331 F.2d 1000, 118 U.S. App.D C. 80, 9 A.L.R.3d 1367 (Opinion of Wright, J., sitting alone). Reh. en banc den., C.A., 331 F.2d 1010, 118 U.S.App.D.C. 90, cert. den. 84 S.Ct. 1883, 377 U.S. 978, 12 L.Ed.2d 746.

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84.5. U.S.—Eastern Greyhound Lines v Fusco, C.A. Ohio, 310 F.2d 632—Paramount Film Distributing Corp. v. Civic Center Theatre, Inc, C.A.Utah, 333 F.2d 358—Smoot v. Fox, C.A.Mich., 353 F.2d 830, cert. den. 86 S.Ct. 1342, 384 U.S. 909, 16 L.Ed.2d 361, reh. den. 86 S.Ct. 1568, 384 U.S. 958, 16 L.Ed.2d 553.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

Writs vacated

U.S.—Formulabs, Inc v. Hartley Pen Co., C.A.Cal, 306 F.2d 148.

84.15. U.S.—Humble Oil & Refining Co. v. Bell Marine Service, Inc., C.A.Tex., 321 F.2d 53—Miller v. Connally, C.A.Tex., 354 F.2d 206.

Writs denied

U.S.—University Nat Stockholders Protective Committee, Inc. v. University Nat. Life Ins. Co., C.A. Tenn., 328 F.2d 425, cert. den. 84 S.Ct. 1335, 377 U.S. 933, 12 L.Ed.2d 296.

Preliminary injunction

U.S —Benoit v. Gardner, C.A.Mass., 345 F.2d 792.

84.20. U S.—Securities and Exchange Commission v. Krentzman, C.A.Fla., 397 F.2d 55—Steward v. West, C.A.La., 449 F.2d 324.

Writs denied

U.S.—Benton Harbor Malleable Industries v. International Union, United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO), C.A. Mich., 355 F.2d 70—U.S. v. Grand Jury, Fla., 425 F.2d 327.

85. U.S.—Lampman v. U.S. Dist Court for Central Dist. of Cal., C.A.Cal., 418 F.2d 215, cert. den. 90 S.Ct. 926, 397 U.S. 919, 25 L.Ed.2d 100, and 90 S.Ct. 943, 397 U.S. 935, 25 L.Ed 2d 115, reh. den. 90 S.Ct. 1116, two cases, 397 U.S. 1003, 25 L.Ed.2d 416.

Writs denied

U.S.—Crowe v. Ragnar Bensen, Inc., C.A.Pa., 307 F.2d 73, cert. den 83 S.Ct. 319, 371 U.S. 940, 9 L.Ed.2d 275.

85.5. U.S.—Digital Data Systems, Inc. v. Carpenter, C.A.Tex., 387 F.2d 529.

The statutory power to issue extraordinary writs includes power to issue less strenuous relief.[85.20]

85.20. Stay entered

U.S.—Ex parte Tokio Marine & Fire Ins. Co., C.A.La., 322 F.2d 113.

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85.50. U.S.—Ehrlichman v. Sirica, Dist.Col., 95 S.Ct. 6, 419 U.S. 1310, 42 L.Ed.2d 25.

86. U.S.—Gonzalez v. Automatic Emp. Credit Union, Ill., 95 S.Ct. 289, 419 U.S. 90, 42 L.Ed.2d 249. Hamilton v. Morial, C.A.La., 644 F.2d 351.

Guidelines outlined

U.S.—Bauman v. U.S. Dist. Court, C.A.Cal., 557 F.2d 650.

86.5. D.C.—In re Halkin, C.A., 598 F.2d 176, 194 U.S.App.D.C. 257.

87. U.S.—U.S. v. U.S. Dist. Court for Southern Dist. of N.Y., N.Y., 68 S.Ct. 1035, 334 U.S. 258, 92 L.Ed. 1351—Hoffman v. Blaski, Ill., 80 S.Ct. 1084, 363 U.S. 335, 4 L.Ed.2d 1254—Schlagenhauf v. Holder, Ind., 85 S.Ct. 234, 379 U.S. 104, 13 L.Ed.2d 152—Will v. U.S., Ill., 88 S.Ct. 269, 389 U.S. 90, 19 L.Ed.2d 305.

D.C.—Filmon Process Corp. v. Sirica, C.A., 379 F.2d 449, 126 U.S.App.D.C. 395—Thornton v. Corcoran, C.A., 407 F.2d 695, 132 U.S.App.D.C. 232.

Unauthorized interlocutory orders

(3) Other of Appeals had jurisdiction, on petition for writ of mandamus, to review district court order directing the United States to make full disclosure to defendant in criminal proceedings of electronically monitored conversations, despite contention that such order was interlocutory and not appealable.

Mich.—U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, Mich., 92 S.Ct. 2125, 407 U.S. 297, 32 L.Ed.2d 752.

Mandamus held proper

(11) Other instances.

U.S.—U.S. v. Dooling, C.A.N.Y., 406 F.2d 192, cert. den. 89 S.Ct. 1744, 395 U.S. 911, 23 L.Ed.2d 224—Cancel v. Wyman, C.A.N.Y., 441 F.2d 553.

Mandamus held in abeyance pending renewal of request for consolidation

U.S.—Alexander v. Cox, C.A.Miss., 348 F.2d 894.

No power to issue writ

U.S.—Rastelli v. Platt, 534 F.2d 1011.

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88.5. U.S.—Sullivan v. Simons, C.A.S.C., 337 F.2d 239.

88.15. U.S.—Godtfredsen v. Banner, Cust. & Pat. App., 598 F.2d 589—U.S. v. Christian, C.A., 660 F.2d 892.

88.20. U.S.—Hoffman v. Blaski, Ill., 80 S.Ct. 1084, 363 U.S. 335, 4 L.Ed.2d 1254.

89. U.S.—Fisons Limited v. U.S., C.A.Ill., 458 F.2d 1241, cert. den. 92 S.Ct. 1312, 405 U.S. 1041, 31 L.Ed.2d 581

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90. U.S.—Munoz v. Hauk, C.A.Cal., 439 F.2d 1176, cert. den. 92 S.Ct. 738, 404 U.S. 1059, 30 L.Ed.2d 753.

92. U.S.—Dubnoff v. Goldstein, C.A.N.Y., 385 F.2d 717.

Mandamus may issue.

(2) U.S.—Atlass v. Miner, C.A.Ill., 265 F.2d 312, affd. 80 S.Ct. 1300, 363 U.S. 641, 4 L.Ed.2d 1462, reh. den. 81 S.Ct. 31, 364 U.S. 854, L.Ed.2d 78.

Necessity of allegation of unsuccessful request for certification under provision for interlocutory appeals

U.S.—Rapp v. Van Dusen, C.A.Pa., 350 F.2d 806.

Ruling of law

U.S.—Plekowski v. Ralston-Purina Co., C.A.Ga., 557 F.2d 1218.

92.5. U.S.—Stein v. Collinson, C.A.Mo., 499 F.2d 91.

92.10. U.S.—Grace Lines, Inc. v. Motley, C.A.N.Y., 439 F.2d 1028.

Writ denied

(5) Other instances.

U.S.—Weston v. Judges of U.S. Dist. Court for Dist. of Minn., C.A.Minn., 321 F.2d 278—Wilkins v. American Export-Isbrandtsen Lines, Inc., C.A. N.Y., 401 F.2d 151.

94. U.S.—Miller v. U.S., C.A.Conn., 403 F.2d 77.

The Federal Rules of Appellate Procedure make provision with respect to the procedure for the issuance of a writ of mandamus by courts of appeals.[94.1]

94.1. F.R.A.P. Rule 21, 28 U.S.C.A.

94.4. U.S.—River Valley, Inc. v. Dubuque County, C.A.Iowa, 507 F.2d 582.

Direction to decide case

(5) Other matters.

U.S.—Lutes v. U.S. Dist. Court for Western Dist. of Okl., C.A.Okl., 306 F.2d 948, modification den. 308 F.2d 574, cert. den. 83 S.Ct. 320, 371 U.S. 941, 9 L.Ed.2d 275, reh. den. 83 S.Ct. 550, 371 U.S. 970, 9 L.Ed.2d 540—U.S. v. Igoe, C.A.Ill., 331 F.2d 766, cert. den. 85 S.Ct. 1020, 380 U.S. 942, 13 L.Ed.2d 961, reh. den. 85 S.Ct. 1325, 380 U.S. 989, 14 L.Ed.2d 282.

D.C.—Svejkovsky v. Tamm, C.A., 326 F.2d 657, 117 U.S.App.D.C. 114.

Decision held not reviewable by mandamus

(5) Other decisions.

U.S.—Platt v. Minnesota Min. & Mfg. Co., Ill., 84 S.Ct. 769, 376 U.S. 240, 11 L.Ed.2d 674.

General Tire & Rubber Co. v. Watkins, C.A. Md., 331 F.2d 192, cert. den. 84 S.Ct. 1629, 377 U.S. 952, 12 L.Ed.2d 498—American Concrete Agr. Pipe Ass'n v. No-Joint Concrete Pipe Co., C.A.Cal., 331 F.2d 706.

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94.6. U.S.—Council of Federated Organizations v. Mize, C.A.Miss., 339 F.2d 898.

94.8. U.S.—U.S. v. Helstoski, C.A.N.J., 576 F.2d 511, affd. 99 S.Ct. 2432 and 99 S.Ct. 2445, 442 U.S 500, 61 L.Ed.2d 30.

94.10. U.S.—In re Union Leader Corp., C.A.Mass., 292 F.2d 381, cert. den. 82 S.Ct. 361, 368 U.S. 927, 7 L.Ed.2d 190.

94.12. U.S.—Evanson v. Union Oil Co. of California, Emp.App., 619 F.2d 72, cert. den. 101 S.Ct. 102, 449 U.S. 832, 66 L.Ed.2d 38.

94.14. Moot case

U.S.—Pollard v. Supreme Court for State of Mich., C.A.Mich., 334 F.2d 129—Musgrave v. Arnow, C.A.Fla., 497 F.2d 111.

94.16. U.S.—Filmore v. Kalbfleisch, C.A., 286 F.2d 171.

94.18. U.S.—Filmore v. Kalbfleisch, C.A., 286 F.2d 171—Evans Elec. Const. Co. v. McManus, C.A. Iowa, 338 F.2d 952—American Flyers Airline Corp. v. Farrell, C.A.N.Y., 385 F.2d 969, cert. den. 88 S.Ct. 1262, 390 U.S. 1012, 20 L.Ed.2d 162—Donlon Industries, Inc. v. Forte, C.A.N.Y., 402 F.2d 935—Mohasco Industries, Inc. v. Lydick, C.A.Cal., 459 F.2d 959.

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94.20. U.S.—Three J Farms, Inc. v. Alton Box Board Co., C.A.S.C., 609 F.2d 112, cert. den. 100 S.Ct. 1090, 445 U.S. 911, 63 L.Ed.2d 327.

94.22. U.S.—American Flyers Airline Corp. v. Farrell, C.A.N.Y., 385 F.2d 936, cert. den. 88 S.Ct. 1262, 390 U.S. 1012, 20 L.Ed.2d 162.

Petition denied

(2) Other instances.

U.S.—Paramount Film Distributing Corp. v. Civic Center Theatre, Inc., C.A.Utah, 333 F.2d 358—Evanson v. Union Oil Co. of California, Em.App., 619 F.2d 72, cert. den. 101 S.Ct. 102, 449 U.S. 832, 66 L.Ed.2d 38.

94.24. U.S.—U.S. v. Hankish, C.A.W.Va., 462 F.2d 316—U.S. v. Christian, C.A., 660 F.2d 892.

Application denied

(2) Other instances.

U.S.—National Equipment Rental, Limited v. Mercury Typesetting Co., C.A.N.Y., 323 F.2d 784.

Court of Appeals lacks jurisdiction to issue a writ of mandamus after an acquittal.[94.26a]

94.26a. U.S.—Fong Foo v. United States, 82 S.Ct. 671, 369 U.S. 141, 7 L.Ed.2d 629.

U.S. v. Grochowski, C.A.Wis., 454 F.2d 657—U.S. v. Ponto, C.A.Ill., 454 F.2d 657.

The court of appeals is not disposed to inquire into the necessity for issuing a writ of mandamus where the aggrieved party has not even sought to follow the procedure available under Federal Rules of Civil Procedure, Rule 54(b), 28 U.S.C.A.[94.27]

94.27. U.S.—Norte & Co. v. Defiance Industries, Inc, C.A.N.Y., 319 F.2d 336.

94.28. U.S.—Philip Carey Mfg. Co. v. Taylor, C.A. Tenn., 286 F.2d 782, cert. den. 81 S.Ct. 1903, 366 U.S. 948, 6 L.Ed.2d 1242—Butterick Co. v. Will, C.A.Ill., 316 F.2d 111—A. Olinick and Sons v. Dempster Bros., Inc., C.A.N.Y., 365 F.2d 439.

When judge should be answering party to answer

U.S.—Rapp v. Van Dusen, C.A.Pa., 350 F.2d 806.

Denial not abuse of discretion

U.S.—Young Properties Corp. v. United Equity Corp., 534 F.2d 847, cert. den. 97 S.Ct. 90, 429 U.S. 830, 50 L.Ed.2d 94.

Erroneous transfer

U.S.—Caleshu v. Wangelin, C.A.Mo., 549 F.2d 93.

Transfer abuse of discretion

U.S.—U.S. v. Lord, C A., 542 F.2d 719.

94.36. U.S.—Chemetron Corp. v. Perry, C.A.Ill., 295 F.2d 703—Butterick Co. v. Will, C.A.Ill., 316 F.2d 111—General Tire & Rubber Co. v. Watkins, C.A.Md., 373 F.2d 361, cert. den. 87 S.Ct. 1031, 386 U.S. 960, 18 L.Ed.2d 109, on remand, D.C. Ohio, 349 F.Supp. 333.

D.C.—Jones v. Gasch, C.A., 404 F.2d 1231, 131 U.S. App.D.C. 254, cert. den. 88 S.Ct. 1414, 390 U.S. 1029, 20 L.Ed.2d 286.

94.42. U.S.—Standard v. Stoll Packing Corp., C.A. Pa., 315 F.2d 626—Miller v. Connally, C.A.Tex., 354 F.2d 206.

94.44. U.S.—Technitrol, Inc. v. McManus, C.A.Iowa, 405 F.2d 84, cert. den. 89 S.Ct. 1591, 394 U.S. 997, 22 L Ed.2d 775.

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94.46. U.S.—Ackert v. Bryan, C.A., 299 F.2d 65.

94.48. U.S.—Swindell-Dressler Corp. v. Dumbauld, C.A.Pa., 308 F.2d 267—Rapp v. Van Dusen, C.A. Pa., 350 F.2d 806—Purex Corp. v. St. Louis Nat. Stockyards Co., C.A.Ill., 374 F.2d 998, cert. den. 88 S.Ct. 59, 389 U.S. 824, 19 L.Ed.2d 77—Pacific Car & Foundary Co. v. Pence, C.A.Hawaii, 403 F.2d 949.

94.62. U.S.—Technitrol, Inc. v. McManus, C.A.Iowa, 405 F.2d 84, cert. den. 89 S.Ct. 1591, 394 U.S. 997, 22 L.Ed.2d 775—McClellan v. Young, C.A. Ohio, 421 F.2d 690.

94.66. U.S.—Texas Gulf Sulphur Co. v. Ritter, C.A. Utah, 371 F.2d 145—Technitrol, Inc. v. McManus, C.A.Iowa, 405 F.2d 84, cert. den. 89 S.Ct. 1591, 394 U.S. 997, 22 L.Ed.2d 775.

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96. U.S.—Government of Virgin Islands v. Hamilton, C.A.Virgin Islands, 475 F.2d 529.

Alexander v. Groves, D.C.Md., 345 F.Supp. 848.

96.5. D.C.—Whittier v. Emmet, C.A., 281 F.2d 24, 108 U.S.App.D.C. 191, cert. den. 81 S.Ct. 380, 364 U.S. 935, 5 L.Ed.2d 367—Fields v. District of Columbia, C.A., 404 F.2d 1323, 131 U.S.App.D.C. 346.

Construction of statute

(2) Other statements.

U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697.

Exclusive jurisdiction

U.S.—Metallurgical, Inc. v. Renegotiation Bd., C.A. Minn., 382 F.2d 843.

D.C.—Valley Vision, Inc. v. F.C.C., C.A., 383 F.2d 218, 127 U.S.App.D.C. 291, transf. to 399 F.2d 511.

96.10. U.S.—Donovan v. Richland County Ass'n for Retarded Citizens, 102 S.Ct. 713, 454 U.S. 389, 70 L.Ed.2d 570.

Proceedings in another circuit

U.S.—Preston Corp. v. Raese, C.A.W.Va., 335 F.2d 827—Purex Corp. v. St. Louis Nat. Stockyards Co., C.A.Ill., 374 F.2d 998, cert. den. 88 S.Ct. 59, 389 U.S. 824, 19 L.Ed.2d 77.

Transfer order of district court embraced by another circuit

U.S.—Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., C.A.Ala., 689 F.2d 982.

The court of appeals for the federal circuit, established under the Federal Courts Improvement Act of 1982, differs from other courts of appeals in that its appellate jurisdiction is defined in terms of subject matter rather than geography.[96.15] The court has exclusive appellate jurisdiction over patents, government contracts, merit system protection, trademarks and international trade.[96.20]

96.15. 28 U.S.C.A. § 1295 et seq.

96.20. 28 U.S.C.A. §§ 1292(c, d), 1295.

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97.10. Statute liberally construed

(1) U.S.—Congress of Racial Equality v. Town of Clinton, C.A.La., 346 F.2d 911.

97.15. U.S.—Corn v. Guam Coral Co., C.A.Guam, 318 F.2d 622.

2. U.S.—Gong v. Kirk, C.A.Fla., 375 F.2d 728.

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3. U.S.—Hohensee v. Levy, C.A.Pa., 282 F.2d 564—Vorachek v. U.S., C.A.N.D., 337 F.2d 797.

4. U.S.—Crenshaw v. Great Central Ins. Co., C.A. Mo., 482 F.2d 1255—Miller v. Davis, 507 F.2d 308—Landrum v. Moats, C.A.Neb., 576 F.2d 1320, cert. den. 99 S.Ct. 282, 439 U.S. 912, 58 L.Ed.2d 258.

D.C.—Cox v. McCulloch, C.A., 315 F.2d 48, 114 U.S. App.D.C. 302.

Vestigial jurisdiction

U.S.—Marquez v. Aviles, C.A.Puerto Rico, 252 F.2d 715, cert. den. 78 S.Ct. 917, 356 U.S. 952, 2 L.Ed.2d 845.

Amount in controversy

U.S.—Peacock & Peacock, Inc. v. Stuyvesant Ins. Co., C.A.Ark., 332 F.2d 499.

Substance of complaint

U.S.—Smith v. Local No. 25, Sheet Metal Workers Intern. Ass'n, C.A.Tex., 500 F.2d 741.

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6. U.S.—Dove v. Bumpers, C.A.Ark., 497 F.2d 895.

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6.5. U.S.—Paul v. Dade County, Fla., C.A.Fla., 419 F.2d 10, cert. den. 90 S.Ct. 1504, 397 U.S. 1065, 25 L.Ed.2d 686—Rochester v. White, C.A.Del., 503 F.2d 263.

7. U.S.—Kash Industries, Inc. v. Petersen Mfg. Co., C.A.Neb., 332 F.2d 1002—Taylor v. Criminal Dist. Court No. 4, Dallas County, Tex., C.A.Tex., 431 F.2d 710.

8. U.S.—Fry v. Layne-Western Co., C.A.Mo., 282 F.2d 97—Armstrong v. U.S., C.A.Pa., 283 F.2d 122—Burkhardt v. Bates, C.A.Iowa, 296 F.2d 315.

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9. U.S.—Diamond Shamrock Oil & Gas Corp. v. Commissioner of Revenues, State of Ark., C.A. Ark., 422 F.2d 532.

11. U.S.—Wiltse v. Clarkson, C.A.Mich., 542 F.2d 363.

11.5. U.S.—Rheuark v. Shaw, D.C.Tex., 477 F.Supp. 897, affd. in part, revd. in part on oth. grds., C.A., 628 F.2d 297, cert. den. 101 S.Ct. 1392, 450 U.S. 931, 67 L.Ed.2d 365.

To constitute a controversy, etc.

(2) Other statements.

U.S.—Bingham v. Yingling Chevrolet Co., C.A.Kan., 297 F.2d 341.

At time of review

U.S.—Workman v. Mitchell, C.A.Wash., 502 F.2d 1201.

Justiciable issue required

U.S.—Sioux Val. Empire Elec. Ass'n, Inc. v. Butz, C.A.S.D., 504 F.2d 168.

12. U.S.—Mapp v. Board of Ed. of City of Chattanooga, Tenn., C.A.Tenn., 319 F.2d 571—Wirtz v. Local Unions 410, 410A, 410B, and 410C, Intern. Union of Operating Engineers, C.A.N.Y., 366 F.2d 438—U.S. v. Chandler, C.A.Md., 403 F.2d 531.

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15. U.S.—Troy State University v. Dickey, C.A.Ala., 402 F.2d 515.

§ 288. Mode of Exercising Jurisdiction

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15.50. U.S.—Fort Worth Nat. Corp. v. Federal Sav. & Loan Ins. Corp., C.A.Tex., 469 F.2d 47—Coca-Cola Co. v. F.T.C., C.A.Ga., 475 F.2d 299, cert. den. 94 S.Ct. 121, 414 U.S. 877, 38 L.Ed.2d 122.

Blair v. Delta Air Lines, Inc., D.C.Fla., 344 F.Supp. 367.

Ripeness

U.S.—In re Grand Jury, April, 1979, C.A.Okl., 604 F.2d 69.

16. U.S.—Rosenfield v. Kay Jewelry Stores, Inc., C.A. Okl., 384 F.2d 98, app. after remand 400 F.2d 89.

17. Issue as basis for abstention

U.S.—Santa Fe Land Imp. Co. v. City of Chula Vista, C.A.Cal., 596 F.2d 838.

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30. U.S.—National Equipment Rental, Limited v. Mercury Typesetting Co., C.A.N.Y., 323 F.2d 784.

D.C.—De Rodulfa v. U.S., C.A., 461 F.2d 1240, 149 U.S.App.D.C. 154, cert. den. 93 S.Ct. 270, 409 U.S. 949, 34 L.Ed.2d 220.

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Federal Rules of Civil Procedure, Rule 73, is now Federal Rules of Appellate Procedure, Rule 3, which provides that an appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court.[31.5]

31.5. F.R.A.P. Rule 3, 28 U.S.C.A.

32. Relief from judgment obtained by fraud

U.S.—Rohauer v. Friedman, C.A.Cal., 306 F.2d 933, 2 A.L.R.3d 1395.

34. U.S.—Will v. U.S., Ill., 88 S.Ct. 269, 389 U.S. 90, 19 L.Ed.2d 305.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

Mandamus

(1) U.S.—Huckeby v. Frozen Food Exp., C.A.Tex., 555 F.2d 542.

(3) Other statements.

U.S.—U.S. v. 91.69 Acres of Land, More or Less, in Oconee County, State of N.C., C.A.S.C., 334 F.2d 229.

34.5. D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

34.10. U.S.—Thorn v. Parkland Chevrolet Co., C.A. N.C., 416 F.2d 95.

37. True consolidation results in one judgment and one appeal

U.S.—State of Minn. v. U.S. Steel Corp., D.C.Minn., 44 F.R.D. 559.

§ 289. Right of Review

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37.50. U.S.—Occidental Petroleum Corp. v. Walker, C.A.Okl., 289 F.2d 1—Zeilstra v. Tarr, C.A. Mich., 466 F.2d 111—Paton v. La Prade, 524 F.2d 862.

38. Accepting benefits and appeal from adverse aspects of separate and divisible controversies

U.S.—U.S. v. Newton Livestock Auction Market, Inc., C.A.Kan., 336 F.2d 673.

38.5. U.S.—Duncan v. Duncan, C.A.Tenn., 377 F.2d 49, cert. den. 88 S.Ct. 239, 389 U.S. 913, 19 L.Ed.2d 260—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

39. U.S.—U.S. v. Shafter, C.A.N.Y., 424 F.2d 281, cert. den. 91 S.Ct. 54, 400 U.S. 827, 27 L.Ed.2d 57, reh. den. 91 S.Ct. 184, 400 U.S. 931, 27 L.Ed.2d 191—In re Grand Jury Proceedings, C.A. Pa., 654 F.2d 268, cert. den. 102 S.Ct. 671, 454 U.S. 1098, 70 L.Ed.2d 639—Dairyland Ins. Co. v. Makover, C.A.Ga., 654 F.2d 1120.

40. U.S.—Braddy v. Southern Bell Tel. & Tel. Co., C.A.Fla., 458 F.2d 666—Securities and Exchange Commission v. Lincoln Thrift Ass'n, C.A.Ariz., 577 F.2d 600—Bryant v. Technical Research Co., C.A.Idaho, 654 F.2d 1337.

D.C.—Hellman v. Ginberg, C.A., 284 F.2d 239, 109 U.S.App.D.C. 105.

41. U.S.—Sperry Rand Corp. v. Bell Tel. Laboratories, Inc. C.A.N.Y., 317 F.2d 491—In re Weaver, C.A.Ga., 632 F.2d 461.

D.C.—De Rodulfa v. U.S., C.A., 461 F.2d 1240, 149 U.S.App.D.C. 154, cert. den. 93 S.Ct. 270, 409 U.S. 949, 34 L.Ed.2d 220.

Separate appeals may be waived

U.S.—Hysell v. Iowa Public Service Co., C.A.Iowa, 559 F.2d 468.

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42. U.S.—Securities and Exchange Commission v. General Time Corp., C.A.N.Y., 407 F.2d 65, cert. den. 89 S.Ct. 637, 393 U.S. 1026, 21 L.Ed.2d 570.

43. U.S.—Mayer v. National Missile & Electronics, Inc., C.A.Cal., 326 F.2d 401.

45. U.S.—Seaboard Sur. Co. v. U.S., C.A.Wash., 306 F.2d 855.

46. U.S.—Sperry Rand Corp. v. Bell Tel. Laboratories, Inc., C.A.N.Y., 317.

48. U.S.—Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, Miss., 100 S.Ct. 1166, 445 U.S. 326, 63 L.Ed.2d 427, reh. den. 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804.

Webb v. Beverly Hills Federal Sav. & Loan Ass'n, C.A.Cal., 364 F.2d 146—Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters Dist. Council of United Broth. of Carpenters and Joiners of America, C.A.Ohio, 459 F.2d 579—U.S., for use of Celanese Coatings Co. v. Gullard, C.A. Alaska, 504 F.2d 466.

D.C.—Barry v. Distruct of Columbia Bd. of Elections and Ethics, C.A., 580 F.2d 695, 188 U.S.App.D.C. 432.

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49. U.S.—Schlothan v. Territory of Alaska, C.A.Alaska, 276 F.2d 806, cert. den. 80 S.Ct. 1079, 362 U.S. 990, 4 L.Ed.2d 1022—Taylor v. Board of Ed. of City School Dist. of City of New Rochelle, C.A.N.Y., 288 F.2d 600.

49.5. U.S.—Caswell v. Manhattan Fire & Marine Ins. Co., C.A.Fla., 399 F.2d 417, app. after remand 421 F.2d 169.

50. U.S.—Norton v. Lindsay, C.A.Colo., 350 F.2d 46.

Party held not aggrieved

U.S.—Lipsett v. U.S., C.A.N.Y., 359 F.2d 956.

52. U.S.—Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, Miss., 100 S.Ct. 1166, 445 U.S. 326, 63 L.Ed.2d 427, reh. den. 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804.

53. U.S.—Fuqua v. Bidwell, C.A.Ky., 281 F.2d 753—In re Glenn W. Turner Enterprises Litigation, C.A.Pa., 521 F.2d 775.

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55. U.S.—Alexander v. Gino's, Inc., C.A.Pa., 621 F.2d 71, cert. den. 101 S.Ct. 358, 449 U.S. 953, 66 L.Ed.2d 217.

Class actions

U.S.—Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, Miss., 100 S.Ct. 1166, 445 U.S. 326, 63 L.Ed.2d 427, reh. den. 100 S.Ct. 2177, 446 U.S. 947, 64 L.Ed.2d 804.

Winokur v. Bell Federal Sav. and Loan Ass'n, C.A.Ill., 560 F.2d 271, reh. den. 562 F.2d 1034, cert. den. 98 S.Ct. 1507, 435 U.S. 932, 55 L.Ed.2d 530.

Attorney-client privilege

U.S.—In re Grand Jury Proceedings, C.A.Pa., 604 F.2d 798.

56. U.S.—Bryant v. Yellen, Cal., 100 S.Ct. 2232, 447 U.S. 352, 65 L.Ed.2d 184, reh. den. 101 S.Ct. 25 and 101 S.Ct. 26, two cases, 448 U.S. 911, 65 L.Ed.2d 1172.

Guidry v. Kem Mfg. Co., C.A.La., 598 F.2d 402, reh. den. 604 F.2d 320, cert. den. 100 S.Ct. 1318, 445 U.S. 929, 63 L.Ed.2d 763, app. after remand, C.A., 693 F.2d 426.

57.5. U.S.—Preston v. U.S., C.A.Cal., 284 F.2d 514—Lipscomb v. Wise, C.A.Tex., 643 F.2d 319.

60. U.S.—Smartt v. Coca-Cola Bottling Co., C.A. Tenn., 337 F.2d 950, cert. den. 85 S.Ct. 941, 380 U.S. 934, 13 L.Ed.2d 822—Research Corp. v. Asgrow Seed Co., C.A.Ill., 425 F.2d 1059.

D.C.—Nuesse v. Camp, C.A., 385 F.2d 694, 128 U.S. App.D.C. 172—Port of New York Authority v. Baker, Watts & Co., C.A., 392 F.2d 497, 129 U.S.App.D.C. 173—Norman's on the Waterfront, Inc. v. Wheatley, C.A.Virgin Islands, 444 F.2d 1011.

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61. U.S.—Brennan v. Silvergate Dist. Lodge No. 50, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO, C.A.Cal., 503 F.2d 800—U.S. v. U.S. Steel Corp., C.A.Ala., 520 F.2d 1043, reh. den. 525 F.2d 1214, cert. den. 97 S.Ct. 61, two cases, 429 U.S. 817, 50 L.Ed.2d 77.

62. U.S.—Sekaquaptewa v. MacDonald, C.A.Ariz., 591 F.2d 1289.

63. U.S.—Research Corp. v. Asgrow Seed Co., C.A. Ill., 425 F.2d 1059.

64. U.S.—Securities and Exchange Commission v. Lincoln Thrift Ass'n, C.A.Ariz., 577 F.2d 600.

67. U.S.—U.S. v. Spilotro, C.A.Nev., 680 F.2d 612.

68. U.S.—Ackert v. Ausman, D.C.N.Y., 217 F.Supp. 934.

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80. Indenture trustee

U.S.—In re Equity Funding Corp. of America Securities Litigation, C.A.Cal., 603 F.2d 1353.

82. U.S.—U.S. v. Newton Livestock Auction Market, Inc., C.A.Kan., 336 F.2d 673.

Government as aggrieved in cross appeal of injunction suit

U.S.—Florida East Coast Ry. Co. v. U.S., C.A.Fla., 348 F.2d 682, affd. 86 S.Ct. 1420, 384 U.S. 238, 16 L.Ed.2d 501.

83. U.S.—Fields v. Blum, C.A.N.Y., 629 F.2d 825.

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92. U.S.—U.S. v. Furumizo, C.A.Hawaii, 381 F.2d 965—A. and N. Club v. Great Am. Ins. Co., C.A.Ohio, 404 F.2d 100—Collum v. Butler, C.A. Ill., 421 F.2d 1257—Moser v. Buskirk, C.A.Ind., 452 F.2d 147—Sea-Land Service, Inc. v. International Longshoremen's Ass'n of New York, New York, C.A.Fla., 625 F.2d 38.

Release

(2) Other instances.

U.S.—Putnam v. Continental Air Transport Co., C.A. Ill., 297 F.2d 501.

93. U.S.—Fosdick v. Dunwoody, C.A.Mass., 420 F.2d 1140—University of Southern Mississippi Chapter of Mississippi Civil Liberties Union v. University of Southern Miss., C.A.Miss., 452 F.2d 564—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

D.C.—National Ass'n for Mental Health, Inc. v. Weinberger, 68 F.R.D. 387.

Release of escrow funds

U.S.—Woodson v. Chamberlain, C.A.Va., 317 F.2d 245.

Obtaining judgment on third party complaint

U.S.—Bolack v. Underwood, C.A.N.M., 340 F.2d 816.

Particular matters not constituting waiver

U.S.—Gebhardt v. Wilson Freight Forwarding Co., C.A.Pa., 348 F.2d 129.

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95. U.S.—In re Casco Bay Lines, Inc., Bkrtcy.App. Me., 14 B.R. 18.

Motion to dismiss appeal denied

U.S.—Smith v. Martin, C.A.Kan., 336 F.2d 142.

Satisfaction of judgment as not precluding appeal for some purposes

U.S.—Cruz v. Pacific Am. Ins. Corp., C.A.Guam, 337 F.2d 746—Shaver Transp. Co. v. Chamberlain, C.A.Or., 399 F.2d 893.

A state rule that acquiescence in a judgment bars appeal does not apply in federal courts when payment may be enforced.[98.5]

98.5. U.S.—Hill v. Whitlock Oil Services, Inc., C.A. Kan., 450 F.2d 170.

2. U.S.—Stanford v. Utley, C.A.Mo., 341 F.2d 265—Martin Marietta Corp. v. F.T.C., C.A., 376 F.2d 430, cert. den. 88 S.Ct. 237, 389 U.S. 923, 19 L.Ed.2d 265—Thonen v. Jenkins, C.A.N.C., 455 F.2d 977.

Remittitur

(1) U.S.—Movible Offshore Co. v. Ousley, C.A.La., 346 F.2d 870—Minerals & Chemicals Philipp Corp. v. Milwhite Co., C.A.Fla., 414 F.2d 428.

(3) Under state statute acceptance under protest of suggested remittitur does not bar appeal.

U.S.—Mooney v. Henderson Portion Pack Co., C.A. Tenn., 334 F.2d 7—Gorsalitz v. Olin Mathieson Chemical Corp., C.A.Tex., 456 F.2d 180, cert. den. 92 S.Ct. 2463, 407 U.S. 921, 32 L.Ed.2d 807, reh. den. 93 S.Ct. 108, 409 U.S. 899, 34 L.Ed.2d 159.

(4) Other statements.

U.S.—Steinberg v. Indemnity Ins. Co. of North America, C.A.La., 364 F.2d 266.

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4. U.S.—U.S. for Use and Benefit of Westinghouse Elec. Corp. v. Sommer Corp., C.A.Canal Zone, 580 F.2d 179.

6. U.S.—Seven-Up Co. v. O-So-Grape Co. C.A.Ill., 283 F.2d 103, cert. den. 81 S.Ct. 903, 365 U.S. 869, 5 L.Ed.2d 859.

7.5. U.S.—Gadsden v. Fripp, C.A.S.C., 330 F.2d 545 —Geneva Towers Tenants Organization v. Federated Mortgage Investors, C.A.Cal., 504 F.2d 483.

7.15. U.S.—Ace Heating & Plumbing Co. v. Crane Co., C.A.Pa., 453 F.2d 30.

7.30. U.S.—Gadsden v. Fripp, C.A.S.C., 330 F.2d 545—Uyeda v. Brooks, C.A.Mich., 348 F.2d 633 —Geneva Towers Tenants Organization v. Federated Mortgage Investors, C.A.Cal., 504 F.2d 483.

Usual rule

U.S.—Woodson v. Chamberlain, C.A.Va., 317 F.2d 245.

8. U.S.—Woodson v. Chamberlain, C.A.Va., 317 F.2d 245—Newman v. Nelson, C.A.Kan., 350 F.2d 602.

Escrow holding pending final determination

U.S.—Nicholson v. Altona Corp., C.A.Virgin Islands, 320 F.2d 8.

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11. Accepting remittitur under protest

U.S.—Burnett v. Coleman Co., C.A.Tenn., 507 F.2d 726.

12. U.S.—Wohl v. Keene, C.A.Md., 476 F.2d 171.

Manifestation of intention to conclude litigation required

U.S.—Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co., C.A.Hawaii, 414 F.2d 750.

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18. U.S.—di Leo v. Greenfield, C.A.Conn., 541 F.2d 949.

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23. U.S.—Merino v. Hocke, C.A.Cal., 289 F.2d 636—Jones v. Branigin, C.A.Mich., 433 F.2d 576, cert. den. 91 S.Ct. 1205, 401 U.S. 977, 28 L.Ed.2d 327—Young Women's Christian Ass'n of Princeton, N.J. v. Kugler, C.A.N.J., 463 F.2d 203.

Cases to which reviewing power extends

(4) U.S.—U.S. v. Garfoli, C.A.Ill., 324 F.2d 909.

(5) Purpose of administering federal criminal justice is to avoid secret interrogation of persons accused of crime.

U.S.—Lee v. U.S., C.A.Tex., 322 F.2d 770.

Test

(2) Other matters.

U.S.—Covey Oil Co. v. Continental Oil Co., C.A.Utah, 340 F.2d 993, cert. den. 85 S.Ct. 1110, 380 U.S. 964, 14 L.Ed.2d 155.

Decisions not reviewable

(4) Court of appeals without jurisdiction to hear appeals directly from federal magistrates.

U.S.—U.S. v. Haley, C.A., 541 F.2d 678—U.S. v. Cline, C.A., 566 F.2d 1220—U.S. v. Renfro, C.A.Miss., 620 F.2d 497, cert. den. 101 S.Ct. 321, 449 U.S. 921, 66 L.Ed.2d 149.

Dismissal for failure to state cause of action not appealable

U.S.—Taylor v. Oxford, C.A.Ill., 575 F.2d 152.

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23.5. Advisory opinions unauthorized

U.S.—Zalkind v. Scheinman, C.C.A.N.Y., 139 F.2d 895, cert. den. 64 S.Ct. 1055, 322 U.S. 738, 88 L.Ed. 1572—Giova v. Rosenberg, C.A., 308 F.2d 347, revd. on oth. grds. 85 S.Ct. 156, 379 U.S. 18, 13 L.Ed.2d 90—Oliver v. U.S., C.A., 335 F.2d 724, 118 U.S.App.D.C. 302, cert. den. 85 S.Ct. 686, 379 U.S. 980, 13 L.Ed.2d 571.

27. U.S.—U.S. v. Haley, C.A.Mo., 541 F.2d 678.

28. U.S.—Benoit v. Gardner, C.A.Mass., 345 F.2d 792.

Review of decisions of court of customs and patent appeals

U.S.—Application of Wiechert, 370 F.2d 927, 54 CCPA 957.

29. U.S.—Columbus Coated Fabrics v. Industrial Commission of Ohio, 498 F.2d 408.

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29.5. U.S.—Curlott v. Campbell, C.A.Alaska, 598 F.2d 1175.

30. U.S.—Two Guys From Harrison-Allentown, Inc. v. McGinley, C.A.Pa., 273 F.2d 954, cert. den. 80 S.Ct. 876, 362 U.S. 961, 4 L.Ed.2d 876—U.S. v. Meyer, C.A.Fla., 266 F.2d 747, cert. den. 80 S.Ct. 138, 139, 361 U.S. 875, 4 L.Ed.2d 113—Mayhue's Super Liquor Store, Inc. v. Meiklejohn, C.A.Fla., 426 F.2d 142.

D.C.—U.S. v. Woodson, C.A., 302 F.2d 459, 112 U.S. App.D.C. 264, transf. to 83 S.Ct. 28, 371 U.S. 12, 9 L.Ed.2d 48.

Decision of statutory three-judge court

U.S.—Haining v. Roberts, C.A.Miss., 453 F.2d 1223, cert. den. 92 S.Ct. 2054, 406 U.S. 948, 32 L.Ed.2d 336—Oldroyd v. Kugler, C.A.N.J., 461 F.2d 535, on remand, D.C., 352 F.Supp. 27, affd. 93 S.Ct. 2753, 412 U.S. 924, 37 L.Ed.2d 153.

City of Gainesville, Ga. v. Southern Ry. Co., D.C.Ga., 296 F.Supp. 763.

(2) Decision appealable to court of appeals.

U.S.—Beal v. Doe, Pa., 97 S.Ct. 2366, 432 U.S. 438, 53 L.Ed.2d 464.

Lee v. Macon County Bd. of Ed., C.A.Ala., 453 F.2d 524—Young Women's Christian Ass'n of Princeton, N.J. v. Kugler, C.A.N.J., 463 F.2d 203.

(3) Order of three-judge district court dissolving itself is appealable to court of appeals.

U.S.—Lay v. City of Kingsport, Tenn., C.A.Tenn., 454 F.2d 345, cert. den. 93 S.Ct. 50, cert. den. 93 S.Ct. 50, 409 U.S. 846, 34 L.Ed.2d 87.

Injunctive proceedings; state statute

(1) U.S.—Steffel v. Thompson, Ga., 94 S.Ct. 1209, 415 U.S. 452, 39 L.Ed.2d 505, mand. conf. to 494 F.2d 691.

(4) U.S.—Borden Co. v. Liddy, C.A.Iowa, 309 F.2d 871, cert. den. 83 S.Ct. 951, 372 U.S. 953, 9 L.Ed.2d 977.

(6) While court of appeals is precluded from reviewing on the merits a case which should have originally been determined by a court of three judges, the court is not powerless to give guidance when a single judge has erroneously invaded the province of a three-judge court.

U.S.—Idlewild Bon Voyage Liquor Corp. v. Epstein, N.Y., 82 S.Ct. 1294, 370 U.S. 713, 8 L.Ed.2d 794.

Dismissal of counts of indictment

(1) U.S.—U.S. v. Meyer, 266 F.2d 747, cert. den. 80 S.Ct. 138, 139, 361 U.S. 875, 4 L.Ed.2d 113—U.S. v. Meyer, C.A.Fla., 266 F.2d 747, cert. den. 80 S.Ct. 138, 139, 361 U.S. 875, 4 L.Ed.2d 113.

31. U.S.—U.S. for Use of E. E. Black Limited v. Price-McNemar Const. Co., C.A.Hawaii, 320 F.2d 663.

Under Expediting Act

(1) Text rule applies to orders substantially affecting litigation in which the government is directly concerned.

U.S.—Olympic Refining Co. v. Carter, C.A.Cal., 332 F.2d 260, cert. den. 85 S.Ct. 186, 379 U.S. 900, 13 L.Ed.2d 175—U.S. v. Cities Service Co., C.A. Mass., 410 F.2d 662.

(2) Ancillary orders in which the government is not directly concerned held reviewable by Court of Appeals.

U.S.—Olympic Refining Co. v. Carter, C.A.Cal., 332 F.2d 260, cert. den. 85 S.Ct. 186, 379 U.S. 900, 13 L.Ed.2d 175.

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(3) Exclusive nature of Act prevents interlocutory appeals to Court of Appeals under the Interlocutory Appeals Act.

U.S.—Tidewater Oil Co. v. U.S., 93 S.Ct. 408, 409 U.S. 151, 34 L.Ed.2d 375.

However, the court of appeals has jurisdiction to review a decision of a single judge reached on Fourteenth Amendment grounds, which would require a direct appeal to the Supreme Court, where the same undisputed facts could support a decision on supremacy grounds.[30.5]

30.5. U.S.—Miller v. Anckaitis, C.A.Pa., 436 F.2d 115, cert. den. 91 S.Ct. 2203, 403 U.S. 910, 29 L.Ed.2d 688.

31. U.S.—Air Transport Ass'n of America (ATA) v. Professional Air Traffic Controllers Organization, D.C.N.Y., 516 F.Supp. 1108, affd., C.A., 667 F.2d 316.

Three judge court's dismissal for lack of jurisdiction

U.S.—Oldroyd v. Kugler, C.A.N.J., 461 F.2d 535, on remand, D.C., 352 F.Supp. 27, affd. 93 S.Ct. 2753, 412 U.S. 924, 37 L.Ed.2d 153.

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An order disqualifying counsel in a civil case is not a collateral order subject to immediate appeal.[33.1]

33.1 U.S.—Richardson-Merrell, Inc. v. Koller, D.C., 105 S.Ct. 2757, 86 L.Ed.2d 340.

Interlocutory orders or decrees as to injunctions and receivers see infra § 291(1) et seq.

34. U.S.—Brown v. Poland, C.A.Kan., 325 F.2d 984—Pioche Mines Consol., Inc. v. Dolman, C.A. Nev., 333 F.2d 257, cert. den. 85 S.Ct. 1081, 1082, 380 U.S. 956, 13 L.Ed.2d 972.

35. U.S.—Weinberger v. U.S., C.A.Fla., 559 F.2d 401.

38. Supplemental findings and conclusions of law, etc.

U.S.—Madden v. Perry, C.A.Ill., 264 F.2d 169, cert. den. 79 S.Ct. 1450, 360 U.S. 931, 3 L.Ed.2d 1544.

39. U.S.—Wagner v. Burlington Industries, Inc., C.A. Tenn., 423 F.2d 1319.

39.5. U.S.—Wieloch v. Rogers Cartage Co., C.A.Ill., 290 F.2d 235.

40. Duty of litigants

U.S.—Century Laminating, Ltd. v. Montgomery, C.A. N.M., 595 F.2d 563, cert. dism. 100 S.Ct. 516, 444 U.S. 987, 62 L.Ed.2d 417.

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41. U.S.—U.S. v. Collins, C.A.Mass., 300 F.2d 821—Highland Supply Corp. v. Reynolds Metals Co., C.A.Mo., 327 F.2d 725, on remand, D.C., 238 F.Supp. 561, motion den. in part and gr. in part 245 F.Supp. 510.

Memorandum opinion or memorandum of decision

U.S.—Legate v. Maloney, C.A.Mass., 308 F.2d 228, cert. den. 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720.

41.10. U.S.—Davis v. U.S., C.A.Ala., 422 F.2d 1139.

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42.5. U.S.—Amstar Corp. v. Southern Pac. Transport Co. of Texas and Louisiana, C.A.La., 607 F.2d 1100, cert. den. 101 S.Ct. 327, 449 U.S. 924, 66 L.Ed.2d 153.

42.15. U.S.—Securities and Exchange Commission v. Dennett, C.A.Utah, 429 F.2d 1303.

Any limitation on appeal from a consent order may not be applied to a later dispute respecting the order's scope.[42.16]

42.16. U.S.—New York Tel. Co. v. Communications Workers of America, AFL-CIO, C.A.N.Y., 445 F.2d 39.

§ 290(2). Decisions of Territorial and Similar Courts

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44. U.S.—Sigal v. Three K's, Limited, C.A.Virgin Islands, 456 F.2d 1242.

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(2) Other matters.

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U.S.—Corn v. Guam Coral Co., C.A.Guam, 318 F.2d 622.

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44.5. U.S.—Iglesias Costas v. Secretary of Finance of Puerto Rico, C.A.Puerto Rico, 220 F.2d 651—In re Sawyer, C.A.Hawaii, 260 F.2d 189, revd. on oth. grds. 79 S.Ct. 1376, 360 U.S. 622, 3 L.Ed.2d 1473, on remand 274 F.2d 356.

Since the publication of the bound volume, the statute, 28 U.S.C.A. § 1293, providing for appeals from the Supreme Court of Puerto Rico to the Court of Appeals for the First Circuit has been repealed. See now 28 U.S.C.A. §§ 1292, 1294, relating to the jurisdiction of the courts of appeals.

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47. Right of children to share in estate

U.S.—Marquez v. Aviles, C.A.Puerto Rico, 252 F.2d 715, cert. den. 78 S.Ct. 917, 356 U.S. 952, 2 L.Ed.2d 845.

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48. U.S.—C. Brewer Puerto Rico, Inc. v. Corchado, C.A.Puerto Rico, 303 F.2d 654.

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Jurisdiction held lacking

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54.5. U.S.—In re Sawyer, Hawaii, 79 S.Ct. 1376, 360 U.S. 622, 3 L.Ed.2d 1473, on remand, C.A., 274 F.2d 356.

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55. U.S.—Codex Corp. v. Milgo Electronic Corp., C.A.Mass., 553 F.2d 735, cert. den. 98 S.Ct. 185, 434 U.S. 860, 54 L.Ed.2d 133.

Kaiser Steel Corp. v. Fulton, D.C.Colo., 261 F.Supp. 997—E. F. Hutton & Co. v. Brown, D.C. Tex., 305 F.Supp. 371—Equal Employment Opportunity Commission v. Peoples Gas, Light, and Coke Co., D.C.Ill., 537 F.Supp. 105.

D.C.—Rogers v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A., C.A., 278 F.2d 268, 107 U.S.App.D.C. 388, cert. den. 81 S.Ct. 223, 364 U.S. 895, 5 L.Ed.2d 189.

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Me.—Boyle v. Share, 377 A.2d 458.

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U.S.—Miskiewicz v. Goodman, C.A.Md., 341 F.2d 828.

Purpose of statute to be considered

U.S.—Ex parte Tokio Marine & Fire Ins. Co., C.A.La., 322 F.2d 113.

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U.S.—Colon v. Tompkins Square Neighbors, Inc., D.C. N.Y., 294 F.Supp. 134.

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U.S.—Gialde v. Time, Inc., C.A.Mo., 480 F.2d 1295.

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56. U.S.—Abney v. U.S., Pa., 97 S.Ct. 2034, 431 U.S. 651, 52 L.Ed.2d 651—Pacific Union Conference of Seventh-Day Adventists v. Marshall, Cal., 98 S.Ct. 2, 434 U.S. 1305, 54 L.Ed.2d 17.

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D.C.—Redding & Co. v. Russwine Const. Corp., C.A., 417 F.2d 721, 135 U.S.App.D.C. 153.

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U.S.—Hendricks v. Alcoa S.S. Co., D.C.Pa., 206 F.Supp. 693.

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U.S.—U.S. v. Clarkson, C.A.S.C., 567 F.2d 270.

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56.5. U.S.—Judd v. First Federal Sav. and Loan Ass'n of Indianapolis, C.A.Ind., 599 F.2d 820—Quintana v. Harris, C.A.N.M., 663 F.2d 78, on remand, D.C., 491 F.Supp. 1044, and 88 F.R.D. 132.

57.5. U.S.—Switzerland Cheese Ass'n, Inc. v. E. Home's Market, Inc., Mass., 87 S.Ct. 193, 385 U.S. 23, 17 L.Ed.2d 23.

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57.15. U.S.—Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc., C.A. Mo., 564 F.2d 816.

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57.20. U.S.—Waters v. Heublein, Inc., Cal., 547 F.2d 466, cert. den. 97 S.Ct. 2988, 433 U.S. 915, 53 L.Ed.2d 1100.

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U.S.—Peterson v. Nadler, C.A.Iowa, 452 F.2d 754.

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U.S.—Cullen v. New York State Civil Service Commission, C.A.N.Y., 566 F.2d 846.

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57.25. U.S.—DeNubilo v. U.S., C.A.N.Y., 343 F.2d 455—Markham v. Holt, C.A.Fla., 369 F.2d 940, app. after remand 409 F.2d 542—Firestone Tire & Rubber Co. v. General Tire & Rubber Co., C.A. Ohio, 431 F.2d 1199, cert. den. 91 S.Ct. 1196, 401 U.S. 975, 28 L.Ed.2d 325.

Danger of denying justice outweighs piecemeal review

U.S.—Cullen v. New York State Civil Service Commission, C.A.N.Y., 566 F.2d 846.

Mere inability to secure review of an interlocutory order on appeal from final judgment may not warrant permitting an immediate review of such order.[57.26]

57.26. U.S.—Weight Watchers of Philadelphia, Inc. v. Weight Watchers Intern., Inc., C.A.N.Y., 455 F.2d 770, app. dism. and mandamus den. 55 F.R.D. 50.

57.30. U.S.—U.S. v. Nixon, Dist.Col., 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039.

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(2) U.S.—Fox v. City of West Palm Beach, C.A.Fla., 383 F.2d 189.

(6) Additional statements.

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57.40. U.S.—Merino v. Hocke, C.A.Cal., 289 F.2d 636—Fox v. City of West Palm Beach, C.A.Fla., 383 F.2d 189.

58. U.S.—Securities and Exchange Commission v. Lincoln Thrift Ass'n, C.A.Ariz., 577 F.2d 600.

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59. U.S.—Airstream Trailers, Inc. v. Cayo, C.A. Mich., 284 F.2d 455—McNutt v. Cardox Corp., C.A.Ky., 329 F.2d 107—In re U.S., C.A.N.Y., 680 F.2d 9.

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60. U.S.—Tilden Financial Corp. v. Palo Tire Service, Inc., C.A.Pa., 596 F.2d 604.

61. U.S.—Nixon v. Fitzgerald, Dist.Col., 102 S.Ct. 2690.

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61.10. U.S.—Johnson v. Trueblood, C.A.Pa., 629 F.2d 302.

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61.55. D.C.—Green v. Department of Commerce, C.A., 618 F.2d 836, 199 U.S.App.D.C. 352.

61.60. U.S.—Maddox v. Black, Raber-Kief & Associates, C.A.Guam, 303 F.2d 910—Associated Stores, Inc. v. Industrial Loan & Inv. Co., C.A.N.C., 313 F.2d 134.

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(1) U.S.—Paliaga v. Luckenbach S.S. Co., C.A.N.Y., 301 F.2d 403.

(3) Other statements.

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61.70. **Doctrinal exceptions to finality requirements**

U.S.—Freeman v. Califano, C.A.Ala., 574 F.2d 264.

62. D.C.—F.T.C v. Texaco, Inc., C.A., 517 F.2d 137, 170 U.S.App.D.C. 323. Reh. en banc 555 F.2d 862, 180 U.S.App.D.C. 390, cert. den. 97 S.Ct. 2939, 431 U.S. 974, 53 L.Ed.2d 1072, and 97 S.Ct 2940, two cases, 431 U.S. 974, 53 L.Ed.2d 1072, reh. den. 98 S.Ct. 250, 434 U.S. 883, 54 L.Ed.2d 168, reh. den. 98 S.Ct. 251, two cases, 434 U.S. 883, 54 L.Ed.2d 168.

62.5. U.S.—U.S. v. Cities Service Co., C.A.Mass., 410 F.2d 662—Carr v. Grace, C.A.Fla., 516 F.2d 502.

62.10. U.S.—Gillespie v. U.S. Steel Corp., Ohio, 85 S.Ct. 308, 379 U.S. 148, 13 L.Ed.2d 199.

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63. U.S.—Richerson v. Jones, C.A.Pa., 551 F.2d 918—In re Berkley and Co., Inc., C.A.Minn., 629 F.2d 548.

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63.5. U.S.—Associated Stores, Inc. v. Industrial Loan & Inv. Co., C.A.N.C., 313 F.2d 134.

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63.10. U.S.—Firestone Tire & Rubber Co. v. Risjord, Mo., 101 S.Ct. 669, 449 U.S. 368, 66 L.Ed.2d 571, on remand 718 F.2d 1106, app. after remand 756 F.2d 1322.

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U.S. v. Rogalsky, C.A.N.J., 575 F.2d 457.

64. U.S.—Gillespie v. U.S. Steel Corp., Ohio, 85 S.Ct. 308, 379 U.S. 148, 13 L.Ed.2d 199.

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66.5. U.S.—U.S. for Use of Hudson v. Peerless Ins. Co., C.A.Va., 374 F.2d 942.

67. U.S.—Bankers Trust Co. v. Mallis, N.Y., 98 S.Ct. 1117, 435 U.S. 381, 55 L.Ed.2d 357, reh. den. 98 S.Ct. 2259, 436 U.S. 915, 56 L.Ed.2d 416, disavowing anything to the contrary in United States v. Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202.

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68. U.S.—Eisen v. Carlisle & Jacquelin, C.A.N.Y., 370 F.2d 119, cert. den. 87 S.Ct. 1487, 386 U.S. 1035, 18 L.Ed.2d 598.

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68.10. U.S.—Eason v. Dickson, C.A.Cal., 390 F.2d 585, cert. den. 88 S.Ct. 2076, 392 U.S. 914, 20 L.Ed.2d 1373.

68.15. U.S.—U.S. v. 1,431.80 Acres of Land, More or Less, in Cross County, Ark., C.A.Ark., 466 F.2d 820.

69. U.S.—Lowe v. Warden and Commissioner of Holman Prison Unit, C.A.Ala., 450 F.2d 9.

70. U.S.—Albers v. Gant, C.A.Ga., 435 F.2d 146.

71. U.S.—Donovan v. Hayden, Stone, Inc., C.A.Ohio, 434 F.2d 619—Glass v. Pfeffer, C.A.Kan., 657 F.2d 252.

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72.5. U.S.—First Nat. Bank in Dodge City v. Johnson County Nat. Bank & Trust Co., C.A.Kan., 331 F.2d 325.

74. U.S.—American Smelting & Refining Co. v. United Steelworkers of America, AFL-CIO, C.A.Ind.,

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75. U.S.—Glen Oaks Utilities, Inc. v. City of Houston, C.A.Tex., 280 F.2d 330—United Bonding Ins. Co. v. Stein, C.A.Pa., 410 F.2d 483—Smith v. Grady, C.A.Miss., 411 F.2d 181.

D.C.—Continental Bank & Trust Co. v. Martin, C.A., 303 F.2d 214, 112 U.S.App.D.C. 354.

75.10. U.S.—Federal Deposit Ins. Corp. v. Santiago Plaza, C.A.Puerto Rico, 598 F.2d 634.

76. U.S.—U.S. v. 1,431.80 Acres of Land, More or Less, in Cross County, Ark., C.A.Ark., 466 F.2d 820.

77.5. U.S.—Sykes v. U.S., C.A.Ark., 392 F.2d 735, app. after remand 420 F.2d 324.

77.10. U.S.—Ryan v. Occidental Petroleum Corp., C.A.Tex., 577 F.2d 298.

78. U.S.—Holz v. Smullan, C.A.Ill., 277 F.2d 58—Knox v. U.S. Lines Co., C.A.Pa., 294 F.2d 354—Directory Services, Inc. v. U.S., C.A.Minn., 353 F.2d 299—U.S. v. Evans, C.A.Kan., 365 F.2d 95.

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79.55. U.S.—Kowalski v. Holden, C.A.Mich., 276 F.2d 359—Chrysler Corp. v. Fedders Corp., C.A.N.J., 670 F.2d 1316.

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79.60. U.S.—Caradelis v. Refineria Panama, S.A., C.A., Canal Zone, 384 F.2d 589.

79.75. U.S.—Union Tank Car Co. v. Isbrandtsen, C.A., 416 F.2d 96.

79.80. U.S.—U.S. to Use of Mustin v. AlCon Development Corp., C.A.Va., 271 F.2d 901.

80. U.S.—Com. of Pa. v. Brown, C.A.Pa., 373 F.2d 771, on remand, D.C., 270 F.Supp. 782, affd. 382 F.2d 120, 25 A.L.R.3d 724, cert. den. 88 S.Ct. 1811, 391 U.S. 921, 20 L.Ed.2d 657—Caradelis v. Refineria Panama, S.A., C.A.Canal Zone, 384 F.2d 589—Obin v. District No. 9 of Intern. Ass'n of Machinists and Aerospace Workers, C.A.Mo., 623 F.2d 521.

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(3) Other matters.

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81. U.S.—Gillespie v. U.S. Steel Corp., Ohio, 85 S.Ct. 308, 379 U.S. 148, 13 L.Ed.2d 199.

Bensalem Tp. v. American Fidelity Fire Ins. Co., C.A.Pa., 644 F.2d 990.

91. U.S.—Hamilton v. Stillwell Van & Storage Co., C.A.Pa., 343 F.2d 453.

92. U.S.—Taylor v. Board of Ed. of City School Dist. of City of New Rochelle, C.A.N.Y., 288 F.2d 600.

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94.50. U.S.—Benada Aluminum Products Co. v. Home Ins. Co., C.A.Fla., 368 F.2d 1001—Campbell v. Westmoreland Farm, Inc., C.A.N.Y., 403 F.2d 939.

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94.51. U.S.—Aetna Ins. Co. v. Newton, C.A.Del., 398 F.2d 729, on remand 315 F.Supp. 860, affd. 456 F.2d 655—Business Communications, Inc. v. Cahners Pub. Co., C.A.Ohio, 420 F.2d 535.

94.52. U.S.—Hamman v. U.S., C.A.Mont., 399 F.2d 673.

D.C.—Redding & Co. v. Russwine Const. Corp., C.A., 417 F.2d 721, 135 U.S.App.D.C. 153.

94.53. U.S.—Bush v. United Benefit Fire Ins. Co., C.A.La., 311 F.2d 893—Davis v. Williams, C.A. Va., 317 F.2d 299.

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94.55. U.S.—Chamberlain v. Harnischfeger Corp., D.C.Pa., 516 F.Supp. 428. Affd., C.A., 673 F.2d 1298, cert. den. 102 S.Ct. 2930, 457 U.S. 1118, 73 L.Ed.2d 1330.

94.57. Condition precedent, etc.

U.S.—Rabekoff v. Lazere & Co., C.A.N.Y., 323 F.2d 865.

Only one claim held made

U.S.—General Const. Co. v. Hering Realty Co., C.A.S.C., 312 F.2d 538—Rabekoff v. Lazere & Co., C.A.N.Y., 323 F.2d 865—Baca Land & Cattle Co. v. New Mexico Timber, Inc., C.A.N.M., 384 F.2d 701.

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94.58. U.S.—Shawe v. Wendy Wilson, Inc., D.C.N.Y., 25 F.R.D. 1.

Claim held not separate

U.S.—CMAX, Inc. v. Drewry Photocolor Corp., C.A.Cal., 295 F.2d 695.

94.59. U.S.—Davis v. National Mortg. Corp., C.A.N.Y., 320 F.2d 90.

94.60. U.S.—Seatrain Shipbuilding Corp. v. Shell Oil Co., Dist.Col., 100 S.Ct. 800, 444 U.S. 572, 63 L.Ed.2d 36, on remand, C.A., 682 F.2d 235, 220 U.S.App.D.C. 400.

Miller v. Steinbach, D.C.N.Y., 43 F.R.D. 275.

94.63. U.S.—Borskey v. American Pad & Textile Co., C.A.La., 296 F.2d 894.

Allegation of conspiracy

(1) U.S.—Bowling Machines, Inc. v. First Nat. Bank of Boston, C.A.Mass., 283 F.2d 39—Ferguson v. Bartels Brewing Co., Pa., C.A.N.Y., 284 F.2d 855.

1961 amendment

1961 amendment extended operation of Rule to actions involving multiple parties. Federal Rules of Civil Procedure, Rule 54(b), 28 U.S.C.A., U.S.—Backus Plywood Corp. v. Commercial Decal, Inc., C.A.N.Y., 317 F.2d 339, cert. den. 84 S.Ct. 146, 375 U.S. 879, 11 L.Ed.2d 110.

94.66. U.S.—Roth v. McAllister Bros., Inc., C.A.N.Y., 316 F.2d 143—Wittstein v. American Federation of Musicians of U.S. and Canada, C.A.N.Y., 326 F.2d 26, revd. on oth. grds. 85 S.Ct. 300, 379 U.S. 171, 13 L.Ed.2d 214—Crews v. Arundel Corp., C.A.Fla., 386 F.2d 528—Gottesman v. General Motors Corp., C.A.N.Y., 401 F.2d 510.

D.C.—Scholl v. District of Columbia, C.A., 331 F.2d 1018, 118 U.S.App.D.C. 98.

Certification not automatic

U.S.—Campbell v. Westmoreland Farm, Inc., C.A.N.Y., 403 F.2d 939.

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94.68. U.S.—Kincade v. C & L Rural Elec. Co-op. Corp., C.A.Miss., 276 F.2d 929—Peralta v. Quad Tool & Dye Supply Co., C.A.N.J., 370 F.2d 103—Ford Motor Credit Co. v. S. E. Barnhart & Sons, Inc., C.A.Pa., 664 F.2d 377.

94.69. U.S.—Blanchard v. Teledyne Movible Offshore, Inc., C.A.La., 612 F.2d 971.

Tiernan v. Westext Transport, Inc., D.C.R.I., 295 F.Supp. 1256.

D.C.—Southern Parkway Corp. v. Lakewood Park Corp., C.A., 273 F.2d 107, 106 U.S.App.D.C. 372—Marotta v. Milestone, C.A., 314 F.2d 242, 114 U.S.App.D.C. 237—Sass v. District of Columbia, C.A., 316 F.2d 366, 114 U.S.App.D.C. 365—Courembis v. Independence Ave. Drug Fair, Inc., C.A., 316 F.2d 658, 115 U.S.App.D.C. 7.

Order entered pending appeal

(2) Other instances.

U.S.—Williams v. Bernhardt Bros. Tugboat Service, Inc., C.A.Ill., 357 F.2d 883, app. after remand 416 F.2d 28. Cert. den. 90 S.Ct. 755, two cases, 396 U.S. 1060, 24 L.Ed.2d 753.

Refusal to keep appeal on docket while certificate sought

U.S.—Wolfson v. Blumberg, C.A.N.Y., 340 F.2d 89.

Request determined if and when certificate procured

U.S.—Wolfson v. Blumberg, C.A.N.Y., 340 F.2d 89.

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94.70. U.S.—Aetna Cas. & Sur. Co. v. Giesow, C.A.N.Y., 412 F.2d 468.

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94.75. U.S.—Kincaid & King Const. Co. v. U.S. for Use of Olday, C.A.Alaska, 299 F.2d 787.

94.76. U.S.—New Amsterdam Cas. Co. v. U.S. for Use of Carpenter Plumbing Co., C.A.Ga., 272 F.2d 754—American Cyanamid Co. v. Lincoln Laboratories, Inc., C.A.Ill., 403 F.2d 486.

§ 290(6). —— —— Finality as to All Parties

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95. U.S.—Cook v. Eizenman, C.A.Fla., 312 F.2d 134—Ryan v. Occidental Petroleum Corp., C.A.Tex., 577 F.2d 298—Maneikis v. Jordan, C.A.Ill., 678 F.2d 720, cert. den. 103 S.Ct. 346, 459 U.S. 990, 74 L.Ed.2d 386.

Delaware Valley Factors, Inc. v. Coma Export, Inc., D.C.Pa., 534 F.Supp. 552.

96. U.S.—Ferguson v. Bartels Brewing Co., Pa., C.A.N.Y., 284 F.2d 855—Local P-171, Amalgamated Meat Cutters and Butchers Workmen of North America v. Thompson Farms Co., C.A.Ill., 642 F.2d 1065.

97. U.S.—Huckeby v. Frozen Food Exp., C.A.Tex., 555 F.2d 542.

98. U.S.—Briggs v. American Air Filter Co., Inc., C.A.Ga., 630 F.2d 414.

§ 290(7). —— Appeal Advancing Termination of Litigation

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1.50. U.S.—Martorano v. Hughes, D.C.N.Y., 222 F.Supp. 789.

Rule applicable to civil actions only

D.C.—U.S. v. Boyle, D.C., 331 F.Supp. 1181.

Statute not pertinent to final orders

U.S.—Johnston v. Cartwright, C.A.Iowa, 355 F.2d 32.

1.52. U.S.—Continental Grain Co. v. Federal Barge Lines, Inc., C.A.La., 268 F.2d 240, affd. 80 S.Ct. 1470, 364 U.S. 19, 4 L.Ed.2d 1540—In re Chicken Antitrust Litigation American Poultry, C.A.Ga., 669 F.2d 228.

1.54. Exclusive nature of Expediting Act as controlling over the Interlocutory Appeals Act see supra § 290(1).

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1.56. **Limited purposes, etc.**

U.S.—Fisons Limited v. U.S., C.A.Ill, 458 F.2d 1241, 92 S.Ct. 1312, 405 U.S. 1041, 31 L.Ed.2d 511.

Exception from rule against piecemeal appeals

U S.—State of Mo. v. Stupp Bros. Bridge & Iron Co., D.C.Mo., 249 F.Supp. 111.

1.58. U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697.

1.60. U.S.—Morland v. Sprecher, 99 S.Ct. 3086, 443 U.S. 709, 61 L.Ed.2d 860.

Kraus v. Board of County Road Com'rs for Kent County, C.A.Mich., 364 F.2d 919—Control Data Corp. v. International Business Machines Corp., C.A.Minn., 421 F.2d 323.

Statement refused

U.S.—Thomas v. Hanover S.S. Corp., D.C.Md., 183 F.Supp. 537—Bouas v. Sociedad Maritima San Nicholas, S.A., 252 F.Supp. 286, certiorari denied Sociedad Maritima San Nicholas, S.A. v. Bouas, D.C.N.Y., 86 S.Ct. 646, cert. den. 86 S.Ct. 646, 382 U.S. 1025, 15 L.Ed.2d 539.

Strict construction required

U.S.—Switzerland Cheese Ass'n v. E. Horne's Market, Inc., C.A.Mass., 351 F.2d 552, affd. 87 S.Ct. 193, 385 U.S. 23, 17 L.Ed.2d 23.

1.62. U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697.

Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., D.C.Pa., 530 F.Supp. 910.

1.64. U.S.—U.S. Rubber Co. v. Wright, C.A.Or., 359 F.2d 784.

Haraburda v. U.S. Steel Corp., D.C.Mich., 187 F.Supp. 86—Winston v. Roe, D.C.Tenn., 246 F.Supp. 246—E. F. Hutton & Co. v. Brown, D.C. Tex., 305 F.Supp. 371.

1.66. U.S.—Kraus v. Board of County Road Com'rs for Kent County, C.A.Mich., 364 F.2d 919.

1.68. U.S.—Luckenbach S.S. Co. v. H. Muehlstein & Co., C.A.N.Y., 280 F.2d 755—Hanson v. Town of Flower Mound, C.A.Tex., 679 F.2d 497.

1.76. U.S.—Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp., D.C.Pa., 530 F.Supp. 910.

Shawe v. Wendy Wilson, Inc., D.C.N.Y., 25 F.R.D. 1—Trans World Airlines, Inc. v. Hughes, D.C.N.Y., 32 F.R.D. 604, affd. in part, C.A., 332 F.2d 602, cert. den. 85 S.Ct. 934, 380 U.S. 248, 13 L.Ed.2d 817, and 85 S.Ct. 934, 380 U.S. 249, 13 L.Ed.2d 818—Wainwright v. Kraftco Corp., D.C. Ga., 53 F.R.D. 78—Zahn v. International Paper Co., D.C.Vt., 53 F.R.D. 430, affd., C.A., 469 F.2d 1033, affd. 94 S.Ct. 505, 414 U.S. 291, 38 L.Ed.2d 511.

D.C.—Westinghouse Elec. Corp. v. City of Burlington, Vt., C.A., 351 F.2d 762, 122 U.S.App.D.C. 65, on remand, D.C., 246 F.Supp. 839.

Keogh v. Pearson, D.C., 244 F.Supp. 482.

1.78. U.S.—Switzerland Cheese Ass'n Inc. v. E. Horne's Market, Inc., Mass., 87 S.Ct. 193, 385 U.S. 23, 17 L.Ed.2d 23.

D.C.—Courembis v. Independence Ave. Drug Fair, Inc., C.A., 316 F.2d 658, 115 U.S.App.D.C. 7.

Beverly Hills Federal Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., D.C., 234 F.Supp. 698.

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1.82. U.S.—Adair Pipeline Co. v. Pipeliners Local Union No. 798, D.C.Tex., 203 F.Supp. 434, affd., C.A., 325 F.2d 206—State of Hawaii v. Standard Oil Co. of Cal., D.C.Hawaii, 301 F.Supp. 980.

Fenton v. McCrory Corp, D.C.Pa., 47 F.R.D. 260.

Granting of certificate held discretionary with trial court

U.S.—Ratner v. Chemical Bank New York Trust Co., D.C.N.Y., 309 F.Supp. 983.

Certificate denied

U.S.—Leighton v. New York, S. & W.R. Co., D.C. N.Y., 306 F.Supp. 513—Barnhart v. International Harvester Co., D C.Okl., 309 F.Supp. 206—Ratner v. Chemical Bank New York Trust Co., D.C.N.Y., 309 F.Supp. 983—Design Consultants Engineering Corp. v. Security Ins. Co. of Hartford, D.C.Pa., 309 F.Supp. 1141.

1.84. U.S.—A. Olinick and Sons v. Dempster Bros., Inc., C.A.N.Y., 365 F.2d 439.

1.86. U.S.—Schine v. Schine, C.A.N.Y., 367 F.2d 685—Leasco Data Processing Equipment Corp. v. Maxwell, C A.N.Y , 468 F.2d 1326, on remand 63 F.R.D. 94.

1.88. U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697.

§ 290(9). —— Discretionary Action; Matters of Practice

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3. U.S.—Donlon Industries, Inc. v. Forte, C.A.N.Y., 402 F.2d 935.

D.C.—Gray v. Evening Star Newspaper Co., C.A., 277 F.2d 91, 107 U.S.App.D.C. 292.

3.10. U.S.—Nichols-Morris Corp. v. Morris, C.A. N.Y., 272 F.2d 586—Jones v. WFYR Radio/RKO General, C.A.Ill., 626 F.2d 576.

4. U.S.—Darlington v Studebaker-Packard Corp., C.A.Ind., 261 F.2d 903, cert. den. 79 S.Ct. 1121, 359 U.S. 992, 3 L.Ed.2d 980—Donlon Industries, Inc. v. Forte, C.A.N.Y., 402 F.2d 935.

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6. U.S.—U.S. v. Fort Sill Apache Tribe of State of Okl., 507 F 2d 861, 205 Ct.Cl. 805.

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U.S.—Milliken v. Bradley, C.A., 468 F.2d 902, cert. den. 93 S.Ct. 45, 409 U.S. 844, 34 L.Ed.2d 83.

§ 290(10). Decisions as to Particular Matters

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7. U.S.—Durham v. Tasco, Inc., C.A.Mo., 630 F.2d 612.

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U.S.—Socialist Workers 1974 Nat. Campaign Committee v. Jennings, C.A., 567 F.2d 1133, 186 U.S.App. D.C. 140.

8. U.S.—Swindell-Dressler Corp. v. Dumbauld, C.A. Pa., 308 F.2d 267—Nolfi v. Chrysler Corp., C.A. Pa., 324 F.2d 373—U.S. v. Chelsea Towers, Inc., C.A.N.J., 404 F.2d 329—Matter of Macon Uplands Venture, C.A.Ga., 624 F.2d 26.

Order granting separate trials

U.S.—Travelers Indem. Co. v. Miller Mfg. Co., C.A., 276 F.2d 955.

9. U.S.—Schine v. Schine, C.A.N.Y., 367 F.2d 685—In re Massachusetts Helicopter Airlines, Inc., C.A. Mass., 469 F.2d 439.

§ 290(11). —— Transfer of Suit; Change of Venue

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9.50. U.S.—Pacific Car & Foundry Co. v. Pence, C.A.Hawaii, 403 F.2d 949.

9.60. U.S.—Stelly v. Employers' Nat. Ins. Co., C.A. La., 431 F.2d 1251, cert. den. 91 S.Ct. 866, 401 U.S. 908, 27 L.Ed.2d 806—In re Cement Antitrust Litigation (MDL No. 296), C.A.9, 673 F.2d 1020, affd. 103 S.Ct. 1172, 459 U.S. 1190, 75 L.Ed.2d 425.

Transfer for convenience of parties or witnesses

U.S.—Kasey v. Molybdenum Corp. of America, C.A. Cal., 408 F.2d 16.

Order of certification to municipal court of District of Columbia held final and appealable

D.C.—Brown v. Plant, Mun.App., 157 A.2d 289.

Multidistrict litigation

U.S.—In re Multidistrict Civil Actions Involving Air Crash Disaster Near Hanover, N.H., on October 25, 1968, D.C.N.H., 342 F.Supp 907.

9.65. U.S.—Bufalino v. Kennedy, C.A.Mich., 273 F.2d 71—Ackert v. Bryan, C.A.N.Y., 299 F.2d 65—Republic of Iraq v. First Nat. City Bank, C.A.N.Y., 313 F.2d 194—Vuono v. U.S., C.A. Md., 441 F.2d 271.

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Order appealable where it terminates case

U.S.—U.S. v. Berkowitz, C.A.Pa., 328 F.2d 358, cert. den. 85 S.Ct. 42, 379 U.S. 821, 13 L.Ed.2d 32—Grossman v. Pearlman, C.A.N Y., 353 F.2d 284, cert. den. 86 S.Ct. 1887, 384 U.S. 987, 16 L.Ed.2d 1004, reh. den. 87 S.Ct. 14, 385 U.S. 890, 17 L.Ed.2d 122.

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9.75. U.S.—Farrell v. Wyatt, C.A.N.Y., 408 F.2d 662.

A decision which grants or denies the removal of a case from a state court under the general removal statute is not appealable to the Court of Appeals.[9.95]

9.95. U.S.—Com. of Pa. ex rel. Gittman v. Gittman, C.A.Pa., 451 F.2d 155.

Appeal to United States Supreme Court see supra § 253.

§ 290(12). —— Conduct of Trial, Etc.

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10. U.S.—Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, C.A.Cal., 285 F.2d 162, cert. den. 81 S.Ct. 1095, 366 U.S. 919, 6 L.Ed.2d 241—River Valley, Inc. v. Dubuque County, C.A.Iowa, 507 F.2d 582.

Orders relating to

(4) Appointment of counsel.

U.S.—Randle v. Victor Welding Supply Co., C.A.Ind., 664 F.2d 1064.

Disqualification of trial judge

(3) U.S.—Albert v. U.S. Dist. Court for Western Dist. of Mich., Northern Division, C.A.Mich., 283 F.2d 61, cert. den. 81 S.Ct. 713, 365 U.S. 828, 5 L.Ed.2d 706—Rosen v. Sugarman, C.A.N.Y., 357 F.2d 794—Dubnoff v. Goldstein, C.A.N.Y., 385 F.2d 717—Robinson v. Largent, C.A.Pa., 419 F.2d 1327.

(7) U.S.—Darlington v. Studebaker-Packard Corp., C.A.Ind., 261 F.2d 903, cert. den. 79 S.Ct. 1121, 359 U.S. 992, 3 L.Ed.2d 980.

Order denying motion to disqualify counsel appealable

U.S.—Kroungold v. Triester, C.A.Pa., 521 F.2d 763.

Disqualification of trial judge

U.S.—Schloetter v. Railoc of Indiana, Inc., C.A.Ind., 546 F.2d 706.

Order granting motion to disqualify counsel appealable

U.S.—Fred Weber, Inc. v. Shell Oil Co., C.A.Mo., 566 F.2d 602, cert. den. 98 S.Ct. 2235, 436 U.S. 905, 56 L.Ed.2d 403.

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11. U.S.—Western Geophysical Co. of America v. Bolt Associates, Inc., C.A.Conn., 440 F.2d 765—Acton Corp. v. Borden, Inc., C.A.Mass., 670 F.2d 377.

Denial of continuance reviewable on appeal

U.S.—Bumpus v. Uniroyal Tire Co., Division of Uniroyal, Inc., D.C.Pa., 385 F.Supp. 711.

13. U.S.—Amdur v. Lizars, C.A.Md., 372 F.2d 103—Kelley v. Metropolitan County Bd. of Ed. of Nashville and Davidson County, Tenn., C.A.Tenn., 436 F.2d 865, app. after remand 463 F.2d 732, cert. den. 93 S.Ct. 409 U.S. 1001, 34 L.Ed.2d 262.

13.5. U.S.—Idlewild Bon Voyage Liquor Corp. v. Epstein, N.Y., 82 S.Ct. 1294, 370 U.S. 713, 8 L.Ed.2d 794—Schackman v. Arnebergh, Cal., 87 S.Ct. 1622, 387 U.S. 427, 18 L.Ed.2d 865, reh. den. 88 S.Ct. 16, 389 U.S. 893, 19 L.Ed.2d 204.

D.C.—Reed Enterprises v. Corcoran, C.A., 354 F.2d 519, 122 U.S.App.D.C. 387.

Where a single judge has jurisdiction to render a decision on the merits after the proper denial of a request for a three-judge court the denial of such request is not appealable prior to the rendition of a final judgment.[13.10]

13.10. U.S.—Lyons v. Davoren, C.A.Mass., 402 F.2d 890, cert. den. 89 S.Ct. 861, 393 U.S. 1081, 21 L.Ed.2d 774—Lindauer v. Oklahoma City Urban Renewal Authority, C.A.Okl., 439 F.2d 761.

Retention of jurisdiction of statutory issue

U.S.—Cancel v. Wyman, C.A.N.Y., 441 F.2d 553.

Jurisdiction limited

U.S.—Goosby v. Osser, Pa., 93 S.Ct. 854, 409 U.S. 512, 35 L.Ed.2d 36.

The refusal of a judge to request that a three-judge court be constituted is usually reviewable only as part of an otherwise reviewable order,[13.15] but where a matter giving rise to an order is not "required" to be heard by a three-judge court, an appeal properly lies to the court of appeals.[13.20]

13.15. U.S.—Ferrara v. State of La., C.A.La., 443 F.2d 344.

13.20. U.S.—Lee v. Macon County Bd. of Ed., C.A. Ala., 448 F.2d 746, app. after remand 455 F.2d 978—Tramel v. Schrader, C.A.Tex., 505 F.2d 1310.

An appeal may lie to a court of appeals from certain actions of a single district judge in a case required to be heard by three judges.[13.25]

13.25. **Temporary restraining order under three-judge statute**

U.S.—Hicks v. Pleasure House, Inc., Cal., 92 S.Ct. 5, 404 U.S. 1, 30 L.Ed.2d 1.

§ 290(13). —— Parties and Process

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14. U.S.—Coopers and Lybrand, v. Livesay, 98 S.Ct. 2454, 437 U.S. 463, 57 L.Ed.2d 351.

Hartford Fire Ins. Co. v. Herrald, C.A.Cal., 434 F.2d 638—Fowler v. Merry, C.A.N.M., 468 F.2d 242.

State of Wash. v. American Pipe & Const. Co., D.C.Cal., Hawaii, Or. & Wash., 274 F.Supp. 961.

Impleading third-party defendant

Ariz.—Moynahan v. Fritz, 367 P.2d 199, 90 Ariz. 144.

Order denying substitution held appealable

U.S.—Staggers v. Otto Gerdau Co., C.A.N.Y., 359 F.2d 292.

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U.S.—Riggle v. State of California, C.A.Cal., 577 F.2d 579.

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16. U.S.—Norte & Co. v. Defiance Industries, Inc., C.A.N.Y., 319 F.2d 336—Murphy v. Helena Rubenstein Co., C.A.N.J., 355 F.2d 553.

Martinez v. Karageorgis, D.C.Puerto Rico, 235 F.Supp. 1012.

One of several defendants

(1) U.S.—Cook v. Bostitch, Inc., C.A.N.Y., 328 F.2d 1.

17. U.S.—Edwin Raphael Co. v. Maharam Fabrics Corp., C.A.Ill., 283 F.2d 310—Peralta v. Quad Tool & Dye Supply Co., C.A.N.J., 370 F.2d 103.

17.5. U.S.—Grabner v. Willys Motors, Inc., C.A.Or., 282 F.2d 644, 86 A.L.R.2d 994—Cook v. Bostitch, Inc., C.A.N.Y., 328 F.2d 1—Korn v. Franchard Corp., 443 F.2d 1301.

Other matters relating to the appealability of decisions involving parties and process have been adjudicated.[18.5]

18.5. U.S.—Doe v. Stegall, C.A.Miss., 653 F.2d 180, reh. den. 659 F.2d 1075—In re Chicken Antitrust Litigation American Poultry, C.A.Ga., 669 F.2d 228.

Intervention

U.S.—Mendenhall v. Allen, C.A.Ill., 346 F.2d 326.

Class action

U.S.—United Airlines, Inc. v. McDonald, Ill., 97 S.Ct. 2464, 432 U.S. 385, 53 L.Ed.2d 423, reh. den. 98 S.Ct. 623, 434 U.S. 989, 54 L.Ed.2d 485, affd. C.A., 587 F.2d 357, cert. den. 99 S.Ct. 2869, 442 U.S. 934, 61 L.Ed.2d 303, reh. den. 100 S.Ct. 196, 444 U.S. 890, 62 L.Ed.2d 127—Coopers & Lybrand v. Livesay, 98 S.Ct. 2454, 437 U.S. 463, 57 L.Ed.2d 351.

Blackie v. Barrack, 524 F.2d 891. Cert. den. 97 S.Ct. 57, three cases, 429 U.S. 816, 50 L.Ed.2d 75—DeMasi v. Weiss, C.A.3, 669 F.2d 114.

Grand jury subpoenas

U.S.—In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., C.A.Tex., 566 F.2d 1293, reh. den. 569 F.2d 1155, two cases, cert. den. 98 S.Ct. 3092, 437 U.S. 905, 57 L.Ed.2d 1135.

§ 290(14). —— Pleadings

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19. U.S.—Louisville Trust Co. v. Smith, C.A.Ky., 295 F.2d 107—Waller v. Professional Ins. Corp., C.A. Fla., 316 F.2d 729—U.S. v. 210.43 Acres of Land, More or Less, in Woodbury County, Iowa, C.A. Iowa, 451 F.2d 667—U.S. v. 687.30 Acres of Land, More or Less, in Dakota and Thurston Counties, State of Neb., C.A.Neb., 451 F.2d 667, cert. den. 92 S.Ct. 1291, 405 U.S. 1026, 31 L.Ed.2d 486.

Denial of leave to amend counterclaim

U.S.—Bensalem Tp. v. American Fidelity Fire Ins. Co., C.A.Pa., 644 F.2d 990.

Judgment on pleadings

U.S.—Alexander v. Pacific Maritime Ass'n, C.A.Cal., 332 F.2d 266, cert. den. 85 S.Ct. 150, 379 U.S. 882, 13 L.Ed.2d 88.

Denial of leave to file counterclaim

U.S.—First Nat. Bank in Dodge City v. Johnson County Nat. Bank & Trust Co., C.A.Kan., 331 F.2d 325.

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20. U.S.—Hartford Fire Ins. Co. v. Herrald, C.A.Cal., 434 F.2d 638—Ryan v. Occidental Petroleum Corp., C.A.Tex., 577 F.2d 298—DeMelo v. Woolsey Marine Industries, Inc., C.A.5, 677 F.2d 1030.

No appeal in absence of certification

U.S.—D'Ippolito v. Cities Service Co., C.A.N.Y., 374 F.2d 643.

22. U.S.—Ratner v. Scientific Resources Corp., C.A. Fla., 462 F.2d 616.

Dismissal of count of complaint

U.S.—U.S. v. New York, N.H. & H.R. Co., C.A.N.Y., 276 F.2d 525, cert. den. 80 S.Ct. 877, 362 U.S. 961, 4 L.Ed.2d 876, and 80 S.Ct. 877, 362 U.S. 964, 4 L.Ed.2d 878—Com. of Pa. v. Brown, C.A.Pa., 373 F.2d 771, on remand, D.C., 270 F.Supp. 782, affd. 392 F.2d 120, 25 A.L.R.3d 724, cert. den. 88 S.Ct. 1811, 391 U.S. 921, 20 L.Ed.2d 657.

Rule applied to counterclaim

(1) U.S.—Wallin v. Keegan, C.A.Fla., 426 F.2d 1313—Aberle Hosiery Co. v. American Arbitration Ass'n, C.A.Pa., 461 F.2d 1005—U.S. v. Walter Nugent Enterprises, C.A.Mich., 506 F.2d 461, cert. den. 95 S.Ct. 1413, 420 U.S. 982, 43 L.Ed.2d 664.

Third-party complaint

(1) U.S.—Skelly Oil Co. v. Zimmerman, C.A.Kan., 332 F.2d 618.

Certification of appeal by district court

U.S.—Pettit v. American Stock Exchange, D.C.N.Y., 217 F.Supp. 21.

Denial of motion to strike class action

U.S.—Thill Securities Corp. v. New York Stock Exchange, C.A.Wis., 469 F.2d 14.

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22.5. U.S.—American Smelting & Refining Co. v. United Steelworkers of America, AFL-CIO, C.A. Ind., 271 F.2d 802.

22.15. U.S.—Local 179, United Textile Workers of America, AFL-CIO v. Federal Paper Stock Co., C.A.Mo., 461 F.2d 849.

Opportunity to amend

(1) U.S.—Dockery v. Dockery, C.A.Cal., 437 F.2d 898—Conway v. Slaughter, C.A.Cal., 440 F.2d 1278.

Rule limited

U.S.—Conway v. Slaughter, C.A.Cal., 440 F.2d 1278.

22.20. U.S.—Robert Stigwood Group Limited v. Hurwitz, C.A.N.Y., 462 F.2d 910.

22.25. U.S.—Richardson v. U.S., C.A.Alaska, 336 F.2d 265.

22.30. U.S.—Epton v. Hogan, C.A.N.Y., 355 F.2d 203—Jackson v. Nelson, C.A.Cal., 405 F.2d 872.

23. U.S.—Gillespie v. U.S. Steel Corp., Ohio, 85 S.Ct. 308, 379 U.S. 148, 13 L.Ed.2d 199.

D.C.—Slavitt v. Meader, C.A., 278 F.2d 276, 107 U.S. App.D.C. 396, cert. den. 81 S.Ct. 70, 364 U.S. 831, 5 L.Ed.2d 57.

Dismissal of complaint for lack of jurisdiction

U.S.—Bell v. U.S., D.C.Kan., 31 F.R.D. 32.

Failure to state claim for relief

(3) Other instances.

U.S.—Phillips v. Nash, C.A.Ill., 311 F.2d 513, cert. den. 83 S.Ct. 1700, 374 U.S. 809, 10 L.Ed.2d 1033—Dodd v. Spokane County, Wash., C.A.Wash., 393 F.2d 330.

Election to stand on complaint

(3) Other instances.

U.S.—Duane v. Altenburg, C.A.Ill., 297 F.2d 515—Rail-Trailer Co. v. ACF Industries, Inc., C.A.Ill., 358 F.2d 15.

Motion for amended and additional findings not required

U.S.—Keohane v. Swarco, Inc., C.A.Ohio, 320 F.2d 429.

§ 290(15). —— Intervention and Interpleader

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24. U.S.—Roach v. Churchman, C.A.Iowa, 457 F.2d 1101.

D.C.—Flight Engineers' Intern. Ass'n, EAL Chapter, AFL-cIO v. National Mediation Bd., C.A., 338 F.2d 280, 119 U.S.App.D.C. 171.

24. Partial intervention

U.S.—Equal Employment Opportunity Commission v. American Tel. & Tel. Co., C.A.Pa., 506 F.2d 735.

25.5. U.S.—Lipsett v. U.S., C.A.N.Y., 359 F.2d 956—Martin v. Kalvar Corp., C.A.La., 411 F.2d 552—Burns v. Board of School Com'rs of City of Indianapolis, Ind., C.A.Ind., 437 F.2d 1143.

D.C.—Hodgson v. United Mine Workers of America, C.A., 473 F.2d 118, 153 U.S.App.D.C. 407.

25.10. U.S.—Stoudenmire v. Braxton, C.A.Fla., 299 F.2d 846—Levin v. Ruby Trading Corp., C.A. N.Y., 333 F.2d 592.

26. U.S.—Union Central Life Ins. Co. v. Hamilton Steel Products Inc., C.A.Ill., 374 F.2d 820—Martin v. Kalvar Corp., C.A.La., 411 F.2d 552—Spangler v. U.S., C.A.Cal., 415 F.2d 1242—Petuskey v. Rampton, C.A.Utah, 431 F.2d 378 cert. den. 91 S.Ct. 882, 401 U.S. 913, 27 L.Ed.2d 812—Weiser v. White, C.A.Tex., 505 F.2d 912, cert. den. 95 S.Ct. 1998, 421 U.S. 993, 44 L.Ed.2d 482.

D.C.—Interstate Broadcasting Co. v. U.S., C.A., 286 F.2d 539, 109 U.S.App.D.C. 255—Nuesse v. Camp., C.A., 385 F.2d 694, 128 U.S.App.D.C. 172.

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26.5. U.S.—Brennan v. Silvergate Dist. Lodge No. 50, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO, C.A.Cal., 503 F.2d 800.

28. U.S.—Guy v. Citizens Fidelity Bank & Trust Co., C.A.Ky., 429 F.2d 828.

29. U.S.—New Amsterdam Cas. Co. v. U.S. for Use of Carpenter Plumbing Co., C.A.Ga., 272 F.2d 754—First Nat. Bank in Dodge City v. Johnson County Nat. Bank & Trust Co., C.A.Kan., 331 F.2d 325—Thompson v. American Airlines, Inc., C.A.Tex., 422 F.2d 350—Guy v. Citizens Fidelity Bank & Trust Co., C.A.Ky., 429 F.2d 828.

§ 290(16). —— Abatement or Revival of Action

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§ 290(17). —— Evidence, Discovery, and Similar Matters

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Reviewable decisions with respect to evidence are those which deal with admissibility or competence of evidence sought to be introduced.[31.30]

31.30. U.S.—Ridgway Nat. Bank v. North Am. Van Lines, Inc., C.A.Pa., 326 F.2d 934.

31.50. U.S.—Horvath v. Letay, C.A.N.Y., 343 F.2d 463—American Exp. Warehousing Limited v. Transamerica Ins. Co., C.A.N.Y.S., 380 F.2d 277—Borden Co. v. Sylk, C.A.Pa., 410 F.2d 843—Subscription Television, Inc. v. U.S. Dist. Court for Central Dist. of Cal., C.A.Cal., 430 F.2d 957—Gosa v. Securities Inv. Co., C.A.La., 449 F.2d 1330—Browning Debenture Holders' Committee v. DASA Corp., 524 F.2d 811.

D.C.—English v. Cunningham, C.A., 282 F.2d 838, 108 U.S.App.D.C. 355—U.S. v. Anderson, C.A., 464 F.2d 1390, 150 U.S.App.D.C. 336.

Order held appealable

U.S.—Ochsner v. Millis, C.A.Ky., 382 F.2d 618—Carr v. Monroe Mfg Co., C.A Miss., 432 F.2d 384, cert. den. 91 S.Ct. 456, 400 U.S. 1000, 27 L.Ed.2d 451—Dixon v. 80 Pine St. Corp, C.A.N.Y., 516 F.2d 1278—In re Rubin, C.A.Tex., 679 F.2d 29.

Nonparties

U.S.—David v. Hooker, Ltd., C.A.Cal., 560 F.2d 412.

Sanctions

U.S.—David v. Hooker, Ltd., C.A.Cal., 560 F.2d 412.

However, an order imposing preclusionary and monetary sanctions for noncompliance with discovery orders is final and an appealable order.[31.55]

31.55. U.S.—State of Ohio v. Arthur Andersen & Co., C.A.Colo., 570 F.2d 1370, cert. den. 99 S.Ct. 114, 439 U.S. 832, 58 L.Ed.2d 129.

32. U.S.—Reisman v. Caplin, Dist.Col., 84 S.Ct. 508, 375 U.S. 440, 11 L.Ed.2d 459.

D.C.—U.S. v. American Tel. and Tel. Co., C.A., 642 F.2d 1285, 206 U.S.App.D.C. 317.

Bank records; plea of privilege

(2) Other statements.

U.S.—City Nat. Bank of Sylacauga v. St. Paul Fire & Marine Ins. Co., C.A.Ala., 408 F.2d 371.

Order directing compliance with Internal Revenue summons

U.S.—D.I. Operating Co. v. U.S., C.A.Nev., 321 F.2d 586—U.S. v. Harrington, C.A.Vt., 388 F.2d 520—U.S. v. Solomon, C.A.Fla., 437 F.2d 110.

Order granting limited discovery in patent interference

U.S.—Natta v. Hogan, C.A.Okl., 392 F.2d 686.

Under collateral order doctrine

U.S.—In re Grand Jury Subpoena for New York State Income Tax Records, C.A.N.Y., 607 F.2d 566.

32.5. Order denying motion to produce documents

U.S.—Natta v. Zletz, C.A.Ill., 379 F.2d 615.

Attorney-client privilege

U.S.—In re Grand Jury Investigation of Ocean Transp., C.A., 604 F.2d 672, 196 U.S.App.D.C. 8, cert. den. 100 S.Ct. 229, 444 U.S. 915, 62 L.Ed.2d 169.

33. U.S.—Theriault v. U.S., C.A.Cal., 503 F.2d 390, on remand, D.C., 395 F.Supp. 637—Legal Aid Soc. of Alameda Co. v. Dunlop, C.A.Cal., 618 F.2d 48.

Expenditure of money immaterial

U.S.—Paramount Film Distributing Corp. v. Civic Center Theatre, Inc., C.A.Utah, 333 F.2d 358.

Inspection and copying

U.S.—Louie v. Carnevale, C.A.Cal., 443 F.2d 912.

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36.5. U.S.—Continental Oil Co. v. U.S., C.A.Ariz., 330 F.2d 347, 9 A.L.R.3d 1413—Covey Oil Co. v. Continental Oil Co., C.A.Utah, 340 F.2d 993, cert. den. 85 S.Ct. 1110, 380 U.S. 964, 14 L.Ed.2d 155—N.L.R.B. ex rel. International Union of Elec., Radio & Mach. Workers, AFL-CIO v. Consolidated Vacuum Corp., C.A.N.Y., 395 F.2d 416.

Denial of claim of statutory privilege made on behalf of state

U.S.—Carr v. Monroe Mfg. Co., C.A.Miss., 431 F.2d 384, cert. den. 91 S.Ct. 456, 400 U.S. 1000, 27 L.Ed.2d 451—Fears v. Burris Mfg. Co., C.A.Miss., 436 F.2d 1357.

36.10. U.S.—Hoffa v. U.S., C.A.Fla., 309 F.2d 680, cert. den. 83 S.Ct. 147, 371 U.S. 878, 9 L.Ed.2d 115.

D.C.—Westinghouse Elec. Corp. v. City of Burlington, Vt., C.A., 351 F.2d 762, 122 U.S.App.D.C. 65, on remand, D.C., 246 F.Supp. 839.

Order held appealable

U.S.—Horizons Titanium Corp. v. Norton Co., C.A. Mass., 290 F.2d 421.

36.15. U.S.—U.S. v. Ryan, Cal., 91 S.Ct. 1580, 402 U.S. 530, 29 L.Ed.2d 85, mand. conf. to 444 F.2d 1095.

In re Grand Jury, C.A.Pa., 619 F.2d 1022.

Order requiring compliance with subpoena prior to contempt

U.S.—Gross v. G.D. Searle & Co., C.A.N.J., 738 F.2d 600, declining to follow Covey Oil Co. v. Continental Oil Co., 340 F.2d 993.

36.20. U.S.—In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury), C.A.N.Y., 318 F.2d 533, cert. den. 84 S.Ct. 25, 375 U.S. 802, 11 L.Ed.2d 37—Lampman v. U.S. Dist. Court for Central Dist. of Cal., C.A.Cal., 418 F.2d 215, cert. den. 90 S.Ct. 926, 397 U.S. 919, 25 L.Ed.2d 100, and 90 S.Ct. 943, 397 U.S. 935, 25 L.Ed.2d 115, reh. den. 90 S.Ct. 1116, two cases, 397 U.S. 1003, 25 L.Ed.2d 416.

37. U.S.—U.S. v. Fried, C.A.N.Y., 386 F.2d 691.

Ordinarily, a nonparty may appeal either a contempt order or a discovery sanction before final judgment in the underlying action if the order or sanction is directed at him,[37.1] but the rule of appealability is not applicable if there is a substantial congruence of interest between the nonparty and a party to the action.[37.2]

37.1 U.S.—In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, C.A.Cal., 747 F.2d 1303, cert. den. 105 S.Ct. 2323, 85 L.Ed.2d 841.

37.2 Congruence of interest between attorney general and state

U.S.—In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, C.A.Cal., 747 F.2d 1303, cert. den. 105 S.Ct. 2323, 85 L.Ed.2d 841.

37.5. U.S.—U.S. v. Fabric Garment Co., C.A.N.Y., 383 F.2d 984.

38. U.S.—In re Letters Rogatory Issued by Director of Inspection of Government of India, C.A.N.Y., 385 F.2d 1017.

Order directing answer to interrogatories held not final order

U.S.—Formulabs, Inc. v. Hartley Pen Co., C.A.Cal., 318 F.2d 485, cert. den. 84 S.Ct. 352, 375 U.S. 945, 11 L.Ed.2d 275—Borden Co. v. Sylk, C.A.Pa., 410 F.2d 843—Gialde v. Time, Inc., C.A.Mo., 480 F.2d 1295.

Other matters relating to answering interrogatories held not appealable

U.S.—Alexander v. Pacific Maritime Ass'n, C.A.Cal., 332 F.2d 266, cert. den. 85 S.Ct. 150, 379 U.S. 882, 13 L.Ed.2d 88—U.S. v. McWhirter, C.A.Tex., 376 F.2d 102—Childs v. Kaplan, C.A.Mo., 467 F.2d 628.

Interlocutory

U.S.—David v. Hooker, Ltd., C.A.Cal., 560 F.2d 412.

39.5. Denial of motion for return or suppression of records as not appealable

U.S.—Hill v. U.S., C.A.Cal., 346 F.2d 175, cert. den. 86 S.Ct. 433, 382 U.S. 956, 15 L.Ed.2d 361, reh. den. 86 S.Ct. 614, 382 U.S. 1021, 15 L.Ed.2d 537.

Motion to suppress evidence not appealable

U.S.—U.S. v. Premises Known as 608 Taylor Ave., Apartment 302, Pittsburgh, Pa., C.A.Pa., 584 F.2d 1297.

Determination

U.S.—In re Grand Jury Proceedings, C.A.Pa., 604 F.2d 806.

Other orders have been held appealable.[39.11]

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39.11. Order denying motion to compel disclosure

U.S.—Republic Gear Co. v. Borg-Warner Corp., C.A. N.Y., 381 F.2d 551.

Request to review proceedings

U.S.—U.S. ex rel. Davidson v. Wilkinson, C.A.Ind., 618 F.2d 1215, cert. den. 101 S.Ct. 167, 449 U.S. 862, 66 L.Ed.2d 79.

39.15. U.S.—Babcock & Wilcox Co. v. Foster Wheeler Corp., D.C.N.J., 54 F.R.D. 474.

39.25. U.S.—Cimijotti v. Paulsen, C.A.Iowa, 323 F.2d 716—Merino v. Hocke, C.A.Cal., 326 F.2d 687—Honig v. E. I. duPont de Nemours & Co., C.A.Fla., 404 F.2d 410—In re Letters Rogatory from City of Haugesund, Norway, C.A.Or., 497 F.2d 378—Shattuck v. Hoegl, C.A.N.Y., 523 F.2d 509.

Manuel San Juan Co. v. American Intern. Underwriters Corp., D.C.Puerto Rico, 331 F.Supp. 1050, affd., C.A., 494 F.2d 317.

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39.45. U.S.—Lash v. Nighosian, C.A.Mass., 273 F.2d 185, cert. den. 80 S.Ct. 610, 362 U.S. 904, 4 L.Ed.2d 554—U.S. v. McDonald, C.A.N.Y., 313 F.2d 832—Daly v. U.S., C.A.Minn., 393 F.2d 873.

39.65. Order to attorney held appealable

U.S.—Bouschor v. U.S., C.A.Minn., 316 F.2d 451.

Other orders have been held appealable.[39.70]

39.70. Order denying taxpayer's request for pre-enforcement discovery

U.S.—U.S. v. Church v. Scientology of California, C.A. Cal., 520 F.2d 818.

§ 290(18). —— Dismissal, Discontinuance, or Nonsuit

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West's Federal Forms § 606.

40. U.S.—Langevin v. Chenango Court, Inc., C.A. N.Y., 447 F.2d 296—Gosa v. Securities Inv. Co., C.A.La., 449 F.2d 1330.

D.C.—Zassenhaus v. Evening Star Newspaper Co., C.A., 404 F.2d 1361, 131 U.S.App.D.C. 384.

Dismissal on merits

U.S.—Dougall v. Spokane, P. & S. Ry. Co., C.A.Or., 256 F.2d 601, cert. den. 79 S.Ct. 124, 358 U.S. 883, 3 L.Ed.2d 112.

Failure to state cause of action on claim for relief

(1) U.S.—Due v. Tallahassee Theatres, Inc., C.A. Fla., 833 F.2d 630—Bobby Jones Garden Apartments, Inc. v. Suleski, C.A.Fla., 391 F.2d 172.

A dismissal under forum non conveniens, etc.

U.S.—U.S. for Use and Benefit of Mosher Steel Co. v. Fluor Corp., C.A.N.Y., 436 F.2d 383, cert. den. 91 S.Ct. 1623, 402 U.S. 945, 29 L.Ed.2d 114.

Plaintiff's right of election

U.S.—222 East Chestnut St. Corp. v. Lakefront Realty Corp., C.A.Ill., 256 F.2d 513, cert. den. 79 S.Ct. 232, 358 U.S. 907, 3 L.Ed.2d 228.

Formal disclaimer of appeal not requisite

U.S.—United Steelworkers of America, AFL-CIO v. American Intern. Aluminum Corp., C.A.Fla., 334 F.2d 147, cert. den. 85 S.Ct. 702, 379 U.S. 991, 13 L.Ed.2d 611.

Voluntary dismissal not shown

U.S.—Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., C.A.N.Y., 393 F.2d 441, cert. den. 89 S.Ct. 131, 393 U.S. 846, 21 L.Ed.2d 117—Lyons v Davoren, C.A.Mass., 402 F.2d 890, cert. den. 89 S.Ct. 861, 393 U.S. 1081, 21 L.Ed.2d 774.

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41. U.S.—Rinieri v. News Syndicate Co., C.A.N.Y., 385 F.2d 818—Carr v. Grace, C.A.Fla., 516 F.2d 502.

Dismissals with or without prejudice equally appealable

U.S.—Allied Air Freight, Inc v. Pan Am. World Airways, Inc., C.A.N.Y., 393 F.2d 441, cert. den. 89 S.Ct. 131, 393 U.S. 846, 21 L.Ed.2d 117.

42. U.S.—Austracan, (U.S.A.) Inc. v. M/V Lemoncore, C.A.Fla., 500 F.2d 237.

D.C.—Pons v. Republic of Cuba, C.A., 288 F.2d 879, 110 U.S.App.D.C. 67.

42.5. U.S.—Smith v. Fairfax County School Bd., C.A. Va., 497 F.2d 899.

Companion action pending

U.S.—Brace v. O'Neill, C.A.Pa., 567 F.2d 237.

43. U.S.—Grantham v. McGraw-Edison Co., C.A.Ill., 444 F.2d 210.

44. U.S.—Lohr v. U.S., C.A.Fla., 264 F.2d 619, cert. den. 80 S.Ct. 51, 361 U.S. 814, 4 L.Ed.2d 61—Scholl v. Felmont Oil Corp., C.A.Ky., 327 F.2d 697—Ryan v Occidental Petroleum Corp., 577 F.2d 298.

46. U.S.—Berlin v. E.C. Publications, Inc., C.A.N.Y., 329 F.2d 541, 9 A.L.R.3d 612, cert. den. 85 S.Ct. 46, 379 U.S. 822, 13 L.Ed.2d 33.

47. U.S.—Wolfson v. Blumberg, C.A.N.Y., 340 F.2d 89—Moblard v. Klippenstein, C.A.Mich., 384 F.2d 994—Refrigerated Food Line, Inc. v. Republic Industries, Inc., C.A.Mo., 449 F.2d 756.

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49. U.S.—Champagne v. Schlesinger, C.A.Ill., 506 F.2d 979.

Weber v. Bartle, D.C.N.Y., 272 F.Supp. 201.

D.C.—English v. Cunningham, C.A., 282 F.2d 841, 108 U.S.App.D.C. 358.

Fla.—Sun Ins. Office, Limited v. Phillips, App., 230 So.2d 17.

Showing that action could not be saved by amendment

U.S.—Firchau v. Diamond Nat. Corp., C.A.Cal., 345 F.2d 269—Williams v. U.S., C.A.Cal., 389 F.2d 35.

Determination as to reason for delay and express direction for entry of judgment

U.S.—Woodby v. Chesapeake & O. Ry. Co., C.A.Mich., 345 F.2d 668.

Appeal permitted in discretion of court

U.S.—Hyde v. First and Merchants Nat. Bank, D.C. Va., 41 F.R.D. 527.

§ 290(19). —— —— Dismissal as to Less than All Parties

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50.50. U.S.—Waldron v. Cities Service Co., C.A. N.Y., 361 F.2d 671, affd. 88 S.Ct. 1575, 391 U.S. 253, 20 L.Ed.2d 569—Green v. Wolf Corp., C.A. N.Y., 406 F.2d 291, cert. den. 89 S.Ct. 2131, two cases, 395 U.S. 977, 23 L.Ed.2d 766.

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50.52. U.S.—Redding v. Walsh, C.A.Pa., 449 F.2d 1301—Levy v. New York Stock Exchange, C.A. Fla., 451 F.2d 591—McCormick v. Landrieu, C.A. La., 469 F.2d 673.

Yager v. Raisor, D.C.Ind., 211 F.Supp. 551.

Cause pending as to other defendants

(1) U.S.—Richards v. Smith, C.A.Ga., 276 F.2d 652—Mull v. Ackerman, C.A.N.Y., 279 F.2d 25—Ohio Cas. Ins. Co. v. Mohan, C.A.Pa., 350 F.2d 54.

(3) U.S.—Morgan Drive Away, Inc. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Ind., 268 F.2d 871, cert. den. 80 S.Ct. 199, 361 U.S. 896, 4 L.Ed.2d 152.

One claim or cause of action

(1) U.S.—Goldlawr, Inc. v. Heiman, C.A.N.Y., 273 F.2d 729.

(3) Other matters.

U.S.—Jewell v. Grain Dealers Mut. Ins. Co., C.A.La., 273 F.2d 422.

Individual and corporate defendants

(2) Other matters.

U.S.—Banana Distributors, Inc. v. Werner, D.C.N.Y., 375 F.2d 458.

50.54. U.S.—Lohr v. U.S., C.A.Fla., 264 F.2d 619, cert. den. 80 S.Ct. 51, 361 U.S. 814, 4 L.Ed.2d 61.

50.56. U.S.—Lohr v. U.S., C.A.Fla., 264 F.2d 619, cert. den. 80 S.Ct. 51, 361 U.S. 814, 4 L.Ed.2d 61.

50.58. U.S.—Johnston v. Cartwright, C.A.Iowa, 344 F.2d 773—Oswalt v. Scripto, Inc., C.A.Tex., 616 F.2d 191.

Dismissal for lack of jurisdiction

U.S.—Morgan Drive Away, Inc. v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.Ind., 268 F.2d 871, cert. den. 80 S.Ct. 199, 361 U.S. 896, 4 L.Ed.2d 152.

§ 290(20). —— Verdict

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The denial of defendant's motion to proceed with trial of his third-party claim against another, reduced to a claim for attorneys' fees and disbursement, after dismissal of the original action, has been held a final decision and appealable.[50.68]

50.68. U.S.—Paliaga v. Luckenbach S.S. Co., C.A. N.Y., 301 F.2d 403.

50.80. La.—C.J.S. cited in Stevens v. Patterson Menhaden Corp., App., 191 So.2d 692, 696, writ ref. 193 So.2d 524, 250 La. 5.

Appeal may be taken

U.S.—Narcisse v. Illinois Cent. Gulf R. Co., C.A.La., 620 F.2d 544.

51. U.S.—McNeil v. Lehigh Valley R. Co., C.A.N.Y., 387 F.2d 623, cert. den. 88 S.Ct. 1638, 390 U.S. 1040, 20 L.Ed.2d 302.

52.5. U.S.—Connolly v. Wabash R. Co., C.A.Ill., 342 F.2d 570.

§ 290(21). —— New Trial, Rehearing, and Reargument

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52.25. U.S.—Eady v. Foerder, C.A.Ill., 381 F.2d 980.

52.50. U.S.—Esneault v. Waterman S.S. Corp., C.A. La., 449 F.2d 1296.

D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C. 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 14 L.Ed.2d 85, on remand 308 F.Supp. 1152.

52.55. U.S.—Pellarino v. Ford Motor Co., C.A.Ohio, 424 F.2d 241—Compagnie Nationale Air France v. Port of New York Authority, C.A.N.Y., 427 F.2d 951—Richardson v. Communications Workers of America, C.A.Neb., 469 F.2d 333, cert. den. 94 S.Ct. 38, 414 U.S. 818, 38 L.Ed.2d 50.

Ariz.—Cano v. Neill, 473 P.2d 487, 12 Ariz.App. 562.

D.C.—Desmond v. Robertson, App., 211 A.2d 775.

La.—C.J.S. cited in Stevens v. Patterson Menhaden Corp., App., 191 So.2d 692, 696, writ ref. 193 So.2d 524, 250 La. 5.

New trial on court's own motion

(2) U.S.—Gilliland v. Lyons, C.A.Cal., 278 F.2d 56—Demeretz v. Daniels Motor Freight, Inc., C.A.Pa., 307 F.2d 469.

52.60. U.S.—Allied Chemical Corp. v. Daiflon, Inc., 101 S.Ct. 188, 449 U.S. 33, 66 L.Ed.2d 193.
Gilliland v. Lyons, C.A.Cal., 278 F.2d 56—Thorn v. Parkland Chevrolet Co., C.A.N.C, 416 F.2d 95—Compagnie Nationale Air France v. Port of New York Authority, C.A.N.Y., 427 F.2d 951.

Order appealable where entered without authority

U.S.—Central Microfilm Service Corp. v. Basic/Four Corp., C.A.Mo., 688 F.2d 1206, cert. den. 103 S.Ct. 1191, 459 U.S. 1204, 75 L.Ed.2d 436.

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52.65. U.S.—Bigart v. Goodyear Tire & Rubber Co., C.A.Vt., 361 F.2d 317.

52.75. U.S.—Mercer v. Theriot, C.A.La., 316 F.2d 635, revd. on oth grds. 84 S.Ct. 1157, 377 U.S. 152, 12 L.Ed.2d 206, reh. den. 84 S.Ct. 1643, 377 U.S. 973, 12 L.Ed.2d 743—Weir v. U.S., C.A Ark., 339 F.2d 82—Paluch v. Erie Lackawanna R. Co., C.A.N.J., 387 F.2d 996.

Verdict against weight of evidence

U.S.—Contomo v. Flota Mercante Grancolombiana, S.A., C.A.N.Y., 278 F.2d 719—Fischer v. U.S., C.A.Md., 318 F.2d 417.

52.80. U.S.—Chicago & N.W. Ry. Co. v. Britten, C.A.Neb., 301 F.2d 400.

52.85. U.S.—Chicago & N.W. Ry. Co. v. Britten, C.A.Neb., 301 F.2d 400—Conney v. Erickson, C.A.Wis., 317 F.2d 247—North Texas Producers Ass'n v. Metzger Dairies, Inc., C.A.Tex., 348 F.2d 189, cert. den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed.2d 468—Lecklikner v. Transandina Compania Naviera, S.A., C.A.Pa., 390 F.2d 179—Grace Lines, Inc. v. Motley, C.A.N.Y., 439 F.2d 1028.
D.C.—Desmond v. Robertson, App., 211 A.2d 775.

52.90. U.S.—Preble v. Johnson, C.A.Okl., 275 F.2d 275—Wheatley v. Beetar, C.A.N.Y., 637 F.2d 863, app. after remand 679 F.2d 1037.

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53. U.S.—Cooper v. Midwest Feed Products Co., C.A.Mo., 271 F.2d 177—Tsai v. Rosenthal, C.A. Minn., 297 F.2d 614.

Motion in alternative

(2) Other matters.
U.S.—State Farm Mut. Auto. Ins. Co. v. Hinds, C.A. Ala., 277 F.2d 441—Silverii v. Kramer, C.A.Pa., 314 F.2d 407—Wagner v. Burlington Industries, Inc., C.A.Tenn., 423 F.2d 1319.

Conditional order

(2) Other instances.
U.S.—Rothschild v. Drake Hotel, Inc., C.A.Ill., 397 F.2d 419—Wiggs v. Courshon, C.A.Fla., 485 F.2d 1281.

54. Jurisdiction of trial court

U.S.—Cooper v. Midwest Feed Products Co., C.A.Mo., 271 F.2d 177—Tsai v. Rosenthal, C.A.Minn., 297 F.2d 614—Demeretz v. Daniels Motor Freight, Inc., C.A.Pa., 307 F.2d 469.

54.5. U.S.—Oswald v. Cruz, C.A.Guam, 289 F.2d 488—Chicago & N.W. Ry. Co. v. Britten, C.A. Neb., 301 F.2d 400.

54.10. U.S.—Mercer v. Theriot, C.A.La., 316 F.2d 635, revd. on oth. grds. 84 S.Ct. 1157, 377 U.S. 152, 12 L.Ed.2d 206, reh. den. 84 S.Ct. 1643, 377 U.S. 973, 13 L.Ed.2d 743.

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55.5. U.S.—Paluch v. Erie Lackawanna R. Co., C.A. N.J., 387 F.2d 996—Cowger v. Arnold, C.A.Pa., 460 F.2d 219—Serzysko v. Chase Manhattan Bank, C.A.N.Y., 461 F.2d 699, cert. den. 93 S.Ct. 173, 409 U.S. 883, 34 L.Ed.2d 139, reh. den. 93 S.Ct. 470, 409 U.S. 1029, 34 L.Ed.2d 324.

55.10. D.C.—Piatek v. Government Services, Inc., C.A., 296 F.2d 430, 111 U.S.App.D.C. 308.

56. U.S.—Metal Fabricators, Inc. v. Granite City Steel Co., C.A.Mo., 357 F.2d 175—Brewster v. U.S., C.A.Fla., 423 F.2d 1061.

Motion in essence petition for rehearing

(2) U.S.—Walker v. Bank of America Nat Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

Where motion to correct memorandum and order of dismissal, etc.

U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

Rule not applicable

U.S.—Richey v. Wilkins, C.A.N.Y., 335 F.2d 1.

57. U.S.—Herbert Rosenthal Jewelry Corp. v. Grossbardt, C.A.N.Y., 428 F.2d 551.
DeLorenzo v. Federal Deposit Ins. Corp, D C N.Y., 268 F.2d 378.

Reason for rule

U.S.—Spampinato v. M. Breger & Co., C.A.N.Y., 270 F 2d 46, cert. den. 80 S.Ct. 409, 361 U.S. 944, 4 L.Ed.2d 363, reh den 80 S Ct. 597, 361 U.S 973, 4 L Ed.2d 553.

Denial may be appealable if new matter presented after original argument

U.S.—Maryland Tuna Corp. v. MS Benares, C.A.N.Y., 429 F.2d 307.

§ 290(22). —— Order or Judgment Directing Payment of Money

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59. D.C.—Pons v. Republic of Cuba, C.A., 294 F.2d 925, 111 U.S.App.D.C. 141, cert. den. 82 S.Ct. 406, 368 U.S. 960, 7 L.Ed.2d 392, reh. den. 82 S.Ct. 608, 368 U.S. 1005, 7 L Ed.2d 548.

60. U.S.—Ram v. Paramount Film Distributing Corp., C.A.S.C., 278 F.2d 191—Smith v. U.S., C.A.Iowa, 332 F.2d 731—Kotsopoulos v. Asturia Shipping Co., C.A.N.Y., 467 F.2d 91.

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64. U.S.—U.S. v. O'Connor, C.A.N.Y., 291 F.2d 520, 100 A.L.R.2d 858—Bass v. Olson, C.A.Cal., 327 F.2d 662—U.S. v. 91.69 Acres of Land, More or Less, in Oconee County, State of N.C., C.A.S.C., 334 F.2d 229.
D.C.—Washington Bldg. Services, Inc. v. United Janitorial Services, Inc., C.A., 352 F.2d 678, 122 U.S. App.D.C. 202.

66. U.S.—Williams v. Maxwell, C.A.W.Va., 396 F.2d 143.

§ 290(25). —— Summary Judgment

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66.50. U.S.—Poss v. Lieberman, C.A.N.Y., 299 F.2d 358, cert. den. 82 S.Ct. 1585, 370 U.S. 944, 8 L.Ed.2d 810—U.S. v. Various Articles of Drugs Consisting of Unknown Quantities of Prescription Drugs, C A.N.J., 314 F.2d 850—Lone Star Cement Corp. v. F.T.C., C.A.Wash., 339 F.2d 505—Stephenson v. Calpine Conifers II, Ltd., C.A.Cal., 652 F.2d 808.
Forrester v. Southern Ry. Co., D.C.Ga., 268 F.Supp. 194.

Summary judgments on one of several claims

(1) U.S.—Norris Mfg. Co. v. R.E. Darling Co., C.A. Md., 315 F.2d 633—Lemelson v. Ideal Toy Corp., C.A.N.Y., 408 F.2d 860—Bushie v. Stenocord Corp., C.A.Ariz., 460 F.2d 116.

66.52. U.S.—Century Inv. Corp. v. U.S., C.A.Wash., 277 F.2d 247—Gabbard v. Rose, C.A.Ky., 330 F.2d 705—Travelers Indem. Co. v. Erickson's Inc., C.A.Ga., 396 F.2d 134—Premier Indus. Corp. v. McGuire, C.A.La., 423 F.2d 1198—Spurlin v. General Motors Corp., C A.Ala., 426 F.2d 294.
Schroeter v. Ralph Wilson Plastics, Inc., D.C. N.Y., 49 F.R.D. 323.

Determination as to reason for delay

(2) Other instances.
U.S.—Burks' Estate v Ross, C.A, 418 F.2d 913—Business Communications, Inc. v. Cahners Pub. Co., C.A.Ohio, 420 F.2d 535—Jackson v. Hart, C.A. N.J., 435 F.2d 1293—Bailey v. Rowan Drilling Co., C.A.La., 441 F.2d 57.

66.54. U.S.—Miller v. American Export Lines, Inc, C.A.N.Y., 313 F.2d 218—U.S v. Various Articles of Drugs Consisting of Unknown Quantities of Prescription Drugs, C.A.N.J., 314 F.2d 850—Travelers Indem. Co. v. Erickson's, Inc., C.A.Ga., 396 F.2d 134—Leopold v. Fitzgerald, C A.N.Y., 421 F.2d 838.
D.C.—Yeager v. Drug Enforcement Administration, C.A., 678 F.2d 315, 220 U.S.App.D.C. 1.

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66.58. U.S.—Eluska v. Andrus, C.A.Alaska, 587 F.2d 996.

66.60. U.S.—Friedman v. Meyers, C.A.N.Y., 482 F.2d 435—Fluor Ocean Services, Inc. v. Hampton, C.A.La., 502 F.2d 1169—Tekton, Inc. v. Builders Bid Service of Utah, Inc., C.A.Utah, 676 F.2d 1352.
Ferraioli v. Cantor, D.C.N.Y., 281 F.Supp. 354—Sonobond Corp. v. Uthe Technology, Inc., D.C. Cal., 314 F.Supp. 878—American General Ins. Co. v. F.T.C., D.C.Tex., 359 F.Supp. 887, affd., C.A., 496 F.2d 197.

Denial justifying appeal under circumstances

U.S.—R. J. Reynolds Tobacco Co. v. Hudson, C.A.La., 314 F.2d 776.
King v. Grand Lodge of Intern. Ass'n of Machinists, D.C.Cal., 215 F.Supp. 351, affd., C.A., 335 F.2d 340. Cert. den. 85 S.Ct. 274, 379 U.S. 920, 13 L.Ed.2d 334.

66.66. U.S.—Liberty Mut. Ins. Co. v. Wetzel, 96 S.Ct. 1202, 424 U.S. 737, 47 L.Ed.2d 435.
Stephenson v. Calpine Conifers II, Ltd., C.A. Cal., 652 F.2d 808.
Delaware Valley Factors, Inc. v. Coma Export, Inc., D.C.Pa., 534 F.Supp. 552.

Effect of Federal Rule of Civil Procedure; certificate

U.S.—Backus Plywood Corp. v. Commercial Decal, Inc., C.A.N.Y., 317 F.2d 339, cert. den. 84 S.Ct. 146, 375 U.S. 879, 11 L.Ed.2d 110—Winfield v. St. Joe Paper Co., C.A.Fla., 663 F.2d 1031.

Multiple parties

U.S.—Backus Plywood Corp. v. Commercial Decal, Inc., C.A.N.Y., 317 F.2d 339, cert. den. 84 S.Ct. 146, 375 U.S. 879, 11 L.Ed.2d 110—Sullivan v. Delaware River Port Authority, C.A.Pa., 407 F.2d 58.
Ciprari v. Servicos Aereos Cruzeiro do sul, S.A. (Cruzeiro), D.C.N.Y., 245 F.Supp. 819, affd., C.A., 359 F.2d 855.

Appealable

U.S.—Stong v. Bucyrus-Erie Co., D.C.Wis., 476 F.Supp. 224.

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66.72. U.S.—Moran v. Paine, Webber. Ct. 980, 401 U.S. 953, 28 L.Ed.2d 436 F.2d 306, application den. 91 S. Jackson and Curtis, C.A.Pa., 389 F.2d 242.

66.74. U.S.—Oppenheimer v. Los Angeles County Flood Control Dist., C.A.Cal., 453 F.2d 895.

66.76. U.S.—Gialde v. Time, Inc., C.A.Mo., 480 F.2d 1295.

Partial summary judgment as to a separate and distinct cause of action constitutes a final judgment and may be appealable.[66.78]

66.78. U.S.—Bertschinger v. National Sur. Corp., C.A.Alaska, 449 F.2d 746.

§ 290(26). —— Orders and Proceedings after Judgment, Decree, or Prior Order

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67. U.S.—Plymouth Mut. Life Ins. Co v. Illinois Mid-Continent Life Ins. Co. of Chicago, Ill, C.A.Pa., 378 F.2d 389—Massachusetts Ass'n for Retarded Citizens v. King, C.A.Mass., 643 F.2d 899

D.C.—Redding & Co. v. Russwine Const. Corp., C.A., 417 F.2d 721, 135 U.S.App.D.C. 153.

Orders appealable

U.S.—In re Orbitec Corp., C.A.N.Y., 520 F.2d 358—Pagan v. American Airlines, Inc., C.A.Puerto Rico, 534 F.2d 990.

67.5. U.S.—Walker v. Mathews, C.A.Wash., 546 F.2d 814.

68. U.S.—Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, C.A.Va., 386 F.2d 193—Gautreaux v. Chicago Housing Authority C.A.Ill., 236, cert. den. 91 S.Ct. 1378, 402 U.S. 922, 28 L.Ed.2d 661.

68.5. U.S.—U.S. v. Allegheny-Ludlum Industries, C.A.Ala., 546 F.2d 1249, Op. supp. 558 F.2d 742, reh. gr. and withdrawn in part 568 F.2d 1073.

69. U.S.—Sleek v. J. C. Penney Co., C.A.Ra., 292 F.2d 256—Westerly Electronics Corp. v. Walter Kidde & Co., C.A.Conn., 367 F.2d 269.

Not a final order

U.S.—Petition of Trustees of Joint Welfare Fund of Intern, Union of Operating Engineers, Local Unions 14, 14B, 15, 15A, 15C, 15D, AFL–CIO, C.A.N.Y., 549 F.2d 871.

70. U.S.—Budke v. Kaiser-Frazer Co. of Anchorage, C.A.Alaska, 275 F.2d 217—Resnik v. La Paz Guest Ranch, C.A.Cal., 289 F.2d 814—Theodoropoulos v. Thompson-Starrett Co., C.A.N.Y., 418 F.2d 350, cert. den. 90 S.Ct. 1697, 398 U.S. 905, 26 L.Ed.2d 65.

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(1) U.S.—Crowe v. Ragnar Benson, Inc., C.A.Pa., 307 F.2d 73, cert. den. 83 S.Ct. 319, 371 U.S. 940, 9 L.Ed.2d 275—Murphy v. Helena Rubenstein Co., C.A.N.J., 355 F.2d 553.

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71. U.S.—Daly v. Stratton, C.A.Ill., 304 F.2d 666, cert. den. 83 S.Ct. 306, 371 U.S. 934, 9 L.Ed.2d 270, reh. den. 83 S.Ct. 540, 371 U.S. 965, 9 L.Ed.2d 512—Metal Fabricators, Inc. v. Granite City Steel Co., C.A.Mo., 357 F.2d 175—Jackson v. Seaboard Coast Line R. Co., C.A.Ga., 678 F.2d 992.

Order appealable under "collateral order" doctrine

U.S.—U.S. v. Schiavo, C.A.Pa., 504 F.2d 1, cert. den. 95 S.Ct. 690, 419 U.S. 1096, 42 L.Ed.2d 688.

73. U.S.—Rinieri v. News Syndicate Co., C.A.N.Y., 385 F.2d 818—Joseph F. Hughes & Co. v. United Plumbing & Heating, Inc., C.A.Ohio, 390 F.2d 629—U.S. v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, State of La., C.A. La., 663 F.2d 1328.

Default judgment

(1) U.S.—Hines v. Seaboard Air Line R. Co., C.A.N.Y., 341 F.2d 229.

Mistake, etc.

(1) U.S.—Russell v. Cunningham, C.A.Cal. & Guam, 279 F.2d 797—Greear v. Greear, C.A., 288 F.2d 466—Wagner v. U.S., C.A.N.Y, 316 F.2d 871—Hines v. Seaboard Air Line R. Co., C.A.N.Y., 341 F.2d 229—Aune v. Reynders, C.A.Wyo., 344 F.2d 835.

(3) Other matters.

U.S.—Hines v. Seaboard Air Line R. Co., C.A.N.Y., 341 F.2d 229—Canadian Ingersoll-Rand Co. v. Peterson Products of San Mateo, Inc., C.A.Cal., 350 F.2d 18.

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74. U.S.—Jones & Guerrero Co., Inc. v. Sealift Pac., C.A.Guam, 650 F.2d 1072.

74.5. U.S.—Darlington v. Studebaker-Packard Corp., C.A.Ind., 261 F.2d 903, cert. den. 79 S.Ct. 1121, 359 U.S. 992, 3 L.Ed.2d 980—Woodham v. American Cystoscope Co. of Pelham, N.Y., C.A.Ga., 335 F.2d 551—Welden v. Grace Line, Inc., C.A. N.Y., 404 F.2d 76.

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§ 290(27). —— Decisions in Relation to Executions, Satisfaction, Etc.

81. U.S.—U.S. v. "A" Mfg. Co., Inc., C.A.Tex., 541 F.2d 504.

§ 290(28). —— Costs, Fees, and Expenses

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85. U.S.—American Safety Table Co. v. Schreiber, C.A.N.Y., 287 F.2d 417—Alart Associates, Inc. v. Aptaker, C.A.N.Y., 402 F.2d 779—Donlon Industries, Inc. v. Forte, C.A.N.Y., 402 F.2d 935.

D.C.—Association of Western Railways v. Riss & Co., C.A., 320 F.2d 785, 116 U.S.App.D.C. 63.

Appealable as far as nonparty is concerned

U.S.—Reygo Pacific Corp. v. Johnston Pump Co., C.A. Cal., 680 F.2d 647—Liew v. Breen, C.A. Cal., 640 F.2d 1046—Kordich v. Marine Clerks Assn., C.A. Cal., 715 F.2d 1392.

Not appealable by nonparty

U.S.—Gross v. G.D. Searle & Co., C.A.N.J., 738 F.2d 600, declining to follow Kordich v. Marine Clerks Assn., 715 F.2d 1392; Reygo Pacific Corp. v. Johnston Pump Co., 680 F.2d 647 and Liew v. Breen, 640 F.2d 1046.

85.10. U.S.—Hill v. Whitlock Oil Services, Inc., C.A. Kan., 450 F.2d 170.

D.C.—Association of Western Railways v. Riss & Co., C.A., 320 F.2d 785, 116 U.S.App.D.C. 63.

85.15. **Attorney's fees and expenses**

U.S.—Hastings v. Maine-Endwell Central School Dist., New York, C.A.N.Y., 676 F.2d 893.

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85.20. U.S.—Twentieth Century Fox Film Corp. v. Goldwyn, C.A.Cal., 328 F.2d 190, cert. den. 85 S.Ct. 143, 379 U.S. 880, 13 L.Ed.2d 87.

Until the amount of attorney fees is set or the fund from which they are to be awarded is established, litigation over the extent of the parties' liabilities has not been terminated for purposes of appellate subject matter jurisdiction where the ultimate award of fees is part of the overall relief sought and granted.[85.25]

85.25. U.S.—Croker v. Boeing Co., C.A.Pa., 662 F.2d 975 overruling DeLong Corp. v. Raymond International, Inc., 622 F.2d 1135 and Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529—deMouy v. Ingvoldstad, C.A.Virgin Islands, 664 F.2d 21—In re Underwriters at Lloyd's, C.A.Md., 666 F.2d 55.

86. U.S.—U.S. Steel Corp. v. United Mine Workers of America, C.A.Pa., 456 F.2d 483, cert. den. 92 S.Ct. 2492, 408 U.S. 923, 33 L.Ed.2d 334.

87. U.S.—Obin v. District No. 9 of Intern. Ass'n of Machinists and Aerospace Workers, C.A.Mo., 651 F.2d 574.

89.10. U.S.—Donlon Industries, Inc. v. Forte, C.A. N.Y., 402 F.2d 935.

89.15. U.S.—Lee v. Western Wool Processors, Inc., C.A.Colo., 313 F.2d 13, 15 A.L.R.3d 563, cert. den. 83 S.Ct. 1695, 374 U.S. 806, 10 L.Ed.2d 1031.

The appealability of other decisions relating to security for costs, fees, or expenses has been adjudicated.[89.20]

89.20. **Order requiring security held not appealable**

U.S.—Klein v. Adams and Peck, C.A.N.Y., 436 F.2d 337.

Order denying application in forma pauperis appealable

U.S.—Caston v. Sears, Roebuck & Co., Hattiesburg, Miss., C.A.Miss., 556 F.2d 1305.

§ 290(29). —— Proceedings after Remand

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90. U.S.—Silver v. Secretary of Army, of Dept. of Army of U.S., C.A.Fla., 554 F.2d 664.

92. U.S.—Mercer v. Theriot, C.A.La., 316 F.2d 635, revd. on oth. grds. 84 S.Ct. 1157, 377 U.S. 152, 12 L.Ed.2d 206, reh. den. 84 S.Ct. 1643, 377 U.S. 973, 12 L.Ed.2d 743.

§ 290(30). —— Other Matters

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95. U.S.—Rincon Band of Mission Indians v. Escondido Mut. Water Co., C.A.Cal., 459 F.2d 1082. Slater v. Stoffel, D.C.Ind., 206 F.Supp. 534, revd. on oth. grds., C.A., 313 F.2d 175, cert. den. 84 S.Ct. 54, 375 U.S. 818, 11 L.Ed.2d 53—Joe Grasso & Son, Inc. v. U.S., D.C.Tex., 42 F.R.D. 329, affd., C.A., 380 F.2d 749.

Return of property seized

(1) U.S.—Goodman v. U.S., C.A.Cal., 369 F.2d 166.

(2) U.S.—U.S. v. Fields, C.A.Pa., 425 F.2d 883.

Denial of defense of qualified immunity

U.S.—Evans v. Dillahunty, C.A.Ark., 711 F.2d 828—Krohn v. U.S., C.A.Mass., 742 F.2d 24.

D.C.—McSurely v. McClellan, C.A., 697 F.2d 309, 225 U.S.App.D.C., 67, 67 A.L.R.Fed. 614, app. after remand 753 F.2d 88, 243 U.S.App.D.C. 270, cert. den. 106 S.Ct. 525, two cases, 88 L.Ed.2d 457.

Denial of appointment of counsel

U.S.—Bradshaw v. Zoological Soc. of San Diego, C.A. Cal., 662 F.2d 1301, 67 A.L.R.Fed. 889—Slaughter v. City of Maplewood, C.A.Mo., 731 F.2d 587—Robbins v. Blackburn, C.A.La., 750 F.2d 405.

Finding held appealable

U.S.—Borough of Ford City v. U.S., C.A.Pa., 345 F.2d 645, cert. den. 86 S.Ct. 236, 382 U.S. 902, 15 L.Ed.2d 156.

Acceptance of remittitur

U.S.—Howell v. Marmpegaso Compania Naviera, S.A., C.A.La., 566 F.2d 992.

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96. U.S.—Liberty Mut. Ins. Co. v. Wetzel, 96 S.Ct. 1202, 424 U.S. 737, 47 L.Ed.2d 435.

Loffland Bros. Co. v. Rougeau, C.A.Okl., 655 F.2d 1031.

D.C.—Chvala v. D.C. Transit System, Inc, C.A., 293 F.2d 519, 110 U.S.App.D.C. 331.

Default judgment

U.S.—McNutt v. Cardox Corp., C.A.Ky., 329 F.2d 107—D & H Marketers, Inc. v. Freedom Oil and Gas, Inc., C.A.Okl., 744 F.2d 1443.

Denial of appointment of counsel

U.S.—Appleby v. Meachum, C.A.Mass., 696 F.2d 145—Smith-Bey v. Petsock, C.A.Pa., 741 F.2d 22.

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97. U.S.—U.S. v. Shafter, C.A.N.Y., 424 F.2d 281, cert. den. 91 S.Ct. 54, 400 U.S. 827, 27 L.Ed.2d 57, reh. den. 91 S.Ct. 184, 400 U.S. 931, 27 L.Ed.2d 191.

97.5. U.S.—Tomlinson v. Florida Iron & Metal, Inc., C.A.Fla., 291 F.2d 333.

Important, unresolved question of law

U.S.—In re Continental Inv. Corp. C.A.Mass., 637 F.2d 1.

Granting motion

U.S.—Ah Ju Steel Co., Ltd. v. Armco, Inc., Cust. & Pat. App., 680 F.2d 751.

97.10. U.S.—Willheim v. Murchison, C.A.N.Y., 312 F.2d 399—Chugach Elec. Ass'n v. U.S. Dist. Court for Dist. of Alaska at Anchorage, C.A.Alaska, 370 F.2d 441, cert. den. 88 S.Ct. 40, 389 U.S. 820, 19 L.Ed.2d 71—Melamed v. ITT Continental Baking Co., C.A.Ohio, 592 F.2d 290, overruling Melamed v. ITT Continental Baking Co., C.A. Ohio, 534 F.2d 82.

Granting motion to disqualify

U.S.—Gibbs v. Paluk, C.A.Tex., 742 F.2d 181, disavowing Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020; Cossette v. Country Style Donuts, Inc., 647 F.2d 526; In re Corrugated Container Antitrust Litigation, 659 F.2d 1341

2. U.S.—Bazile v. Bisso Marine Co., Inc., C.A.La., 606 F.2d 101, reh. den. 613 F.2d 314, cert. den. 101 S.Ct. 94, 449 U.S. 829, 66 L.Ed.2d 33.

2.5. U.S.—Thaysen v. Lumbermens Mut. Cas. Co., C.A.Pa., 329 F.2d 149—Brough v. United Steelworkers of America, C.A.N.H., AFL-CIO, 437 F.2d 748.

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2.50. U.S.—Lipscomb v. U.S., C.A., 301 F.2d 905—Weller v. Dickson, C.A.Cal., 314 F.2d 598, cert. den. 84 S.Ct. 97, 375 U.S. 845, 11 L.Ed.2d 72—Spires v. Bottorff, C.A.Ind., 317 F.2d 273, on remand, D.C., 223 F.Supp. 441, affd., C.A., 332 F.2d 179—Flowers v. Turbine Support Division, C.A.Tex., 507 F.2d 1242.

D.C.—Fulwood v. Clemmer, C.A., 295 F.2d 171, 111 U.S.App.D.C. 184, cert. den. 85 S.Ct. 343, 379 U.S. 938, 13 L.Ed.2d 349, reh. den. 85 S.Ct. 674, 379 U.S. 985, 13 L.Ed.2d 579.

3. U.S.—Natta v. Zletz, C.A.Ill., 379 F.2d 615—Freeman v. Califano, C.A.Ala., 574 F.2d 264.

Order staying proceedings pending arbitration

U.S.—USM Corp. v. GKN Fasteners, Ltd., C.A.Mass., 574 F.2d 17.

§ 290(31). Decisions in Particular Actions or Proceedings

Library References

Federal Courts ⇐600.

4. U.S.—American Motors Corp. v. F.T.C., C.A. Mich., 601 F.2d 1329, cert. den. 100 S.Ct. 294, 444 U.S. 941, 62 L.Ed.2d 307.

8. U.S.—National Ass'n for Advancement of Colored People v. Thompson, C.A.Miss., 321 F.2d 199—Wirtz v. Mississippi Publishers Corp., C.A.Miss., 364 F.2d 603.

Orders held appealable

(3) Other orders.

U.S.—U.S. v. Ingersoll-Rand Co., C.A.Pa., 320 F.2d 509.

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8.5. U.S.—McCoy v. Louisiana State Bd. of Ed. C.A. La., 345 F.2d 720—New England Power Co. v. Asiatic Petroleum Corp., D.C.Mass., 456 F.2d 183.

Orders held not appealable

(1) U.S.—H. M. Kolbe Co. v. Armgus Textile Co., C.A.N.Y., 315 F.2d 70, 99 A.L.R.2d 390.

(5) Court's directions to its officers as not constituting injunction within statute.

U.S.—In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury), C.A.N.Y., 318 F.2d 533, cert. den. 84 S.Ct. 25, 375 U.S. 802, 11 L.Ed.2d 37.

(6) Other orders.

U.S.—In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury), C.A.N.Y., 318 F.2d 533, cert. den. 84 S.Ct. 25, 375 U.S. 802, 11 L.Ed.2d 37—U.S. v. FMC Corp., C.A.Cal., 321 F.2d 534, injunction den. 84 S.Ct. 4, 11 L.Ed.2d 20—Securities and Exchange Commission v. Investment Corp. of America, C.A.Ind., 369 F.2d 383.

Orders held appealable

U.S.—Parker v. Columbia Broadcasting System, Inc., C.A.N.Y., 320 F.2d 937—U.S. v. Lynd, C.A.Miss., 321 F.2d 26, cert. den. 84 S.Ct. 486, 375 U.S. 968, 11 L.Ed.2d 416, motion den. 334 F.2d 13.

8.25. Test

U.S.—Rogers v. Schering Corp., C.A.N.J., 262 F.2d 180, cert. den. 79 S.Ct. 1121, 359 U.S. 991, 3 L.Ed.2d 980.

Orders held appealable

(1) U.S.—Greenwich Marine, Inc. v. S.S. Alexandra, D.C.N.Y., 225 F.Supp. 671. Affd., C.A., 339 F.2d 901.

(3) U.S.—Rogers v. Schering Corp., C.A.N.J., 262 F.2d 180, cert. den. 79 S.Ct. 1121, 35. U.S. 991, 3 L.Ed.2d 980.

8.30. U.S.—Rogers v. Schering Corp., C.A.N.J., 262 F.2d 180, cert. den. 79 S.Ct. 1121, 359 U.S. 991, 3 L.Ed.2d 980.

Greenwich Marine, Inc. v. S.S. Alexandra, D.C. N.Y., 225 F.Supp. 671. Affd., C.A., 339 F.2d 901.

Orders held not appealable

(1) U.S.—Clark v. Kraftco Corp., C.A.N.Y., 447 F.2d 933.

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8.40. U.S.—Dickstein v. duPont, C.A.Mass., 443 F.2d 783.

8.45. U.S.—American Smelting & Refining Co. v. United Steelworkers of America, AFL-CIO, C.A. Ind., 271 F.2d 802—Greenstein v. National Skirt & Sportswear Ass'n, Inc., C.A.N.Y., 274 F.2d 430.

8.55. D.C.—Hussain v. Bache & Co., Inc., C.A., 562 F.2d 1287, 183 U.S.App.D.C. 339.

9. U.S.—American Oil Co. v. McMullin, C.A.Utah, 433 F.2d 1091.

10. U.S.—West v. Zurhorst, C.A.N.Y., 425 F.2d 919.

Wilcox v. Richmond, F. & P.R. Co., D.C.N.Y., 270 F.Supp. 454.

12. U.S.—American Mortg. Corp. v. First Nat. Mortg. Co., C.A.Ill., 345 F.2d 527—21 Turtle Creek Square, Limited v. New York State Teachers' Retirement System, C.A.Tex., 404 F.2d 31—West v. Zurhorst, C.A.N.Y., 425 F.2d 919—Mohasco Industries, Inc. v. Lydick, C.A.Cal., 459 F.2d 959.

14. U.S.—Farrell v. Piedmont Aviation, Inc., C.A. N.Y., 411 F.2d 812, cert. den. 90 S.Ct. 103, 396 U.S. 840, 24 L.Ed.2d 91.

15.5. U.S.—Tyson v. State of Iowa, C.A.Iowa, 283 F.2d 802—Bynum v. Liberty Nat. Bank & Trust Co. of Oklahoma City, C.A.Okl., 338 F.2d 412.

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15.10. U.S.—U.S. v. 93.970 Acres of Land, More or Less, Situate in Cook County, Ill., C.A.Ill., 258 F.2d 17, cert. den. 79 S.Ct. 354, 358 U.S. 947, 3 L.Ed.2d 352, revd. on oth. grds., 79 S.Ct. 1193, 360 U.S. 328, 3 L.Ed.2d 1275.

15.20. U.S.—In re U.S., C.A.Fla., 257 F.2d 844, cert. den. 79 S.Ct. 234, 358 U.S. 908, 3 L.Ed.2d 228.

15.30. U.S.—U.S. v. Georgia Pac. Corp., C.A.W.Va., 562 F.2d 294.

Orders and judgments held appealable

(1) U.S.—Sykes v. U.S., C.A.Ark., 392 F.2d 735, app. after remand 420 F.2d 324—U.S. v. 341.45 Acres of Land, More or Less, Located in St. Louis County, State of Minn., C.A.Minn., 633 F.2d 108, cert. den. 101 S.Ct. 2017, 451 U.S. 938, 68 L.Ed.2d 324.

D.C.—Loughran v. U.S., C.A., 317 F.2d 896, 115 U.S. App.D.C. 196.

Orders and judgments held not appealable

(1) U.S.—U.S. v. Cooper, C.A.Ga., 277 F.2d 863—In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury), C.A.N.Y., 318 F.2d 533, cert. den. 84 S.Ct. 25, 375 U.S. 802, 11 L.Ed.2d 37—U.S. v. Certain Land in City of Paterson, Passaic County, State of N.J., C.A.N.J., 322 F.2d 866.

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16. U.S.—Wark v. Spinuzzi, C.A.Tex., 376 F.2d 827—Securities and Exchange Commission v. Naftalin, C.A.Minn., 460 F.2d 471.

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22. U.S.—Boeing Co. v. Van Gemert, N.Y., 100 S.Ct. 745, 444 U.S. 472, 62 L.Ed.2d 676.

Garza v. Smith, C.A.Tex., 450 F.2d 790.

Johnson v. American Airlines, Inc., D.C.Tex., 531 F.Supp. 957.

D.C.—Morrow v. District of Columbia, C.A., 417 F.2d 728, 135 U.S.App.D.C. 160, on remand 259 A.2d 592.

Civil rights

U.S.—Stricklin v. Regents of University of Wis., C.A. Wis., 420 F.2d 1257.

23. U.S.—U.S. v. Fields, C.A.Pa., 425 F.2d 883—U.S. v. Alexander, C.A.Minn., 428 F.2d 1169.

24. U.S.—U.S. v. Alexander, C.A.Minn., 428 F.2d 1169.

§ 290(32). Decisions of Intermediate Appellate Courts

Library References

Federal Courts ⇐585.

25. U.S.—Save the Bay, Inc. v. U.S. Army, C.A.Miss., 639 F.2d 1100.

Statutory provisions

(4) U.S.—Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 901 v. Editorial "El Imparcial", Inc., C.A.Puerto Rico, 300 F.2d 125.

(6) The act of 1961 terminated the appellate jurisdiction of the Court of Appeals over the Supreme Court of Puerto Rico.

U.S.—Secretary of Treasury of Puerto Rico v. Esso Standard Oil Co., (P.R.), C.A.Puerto Rico, 332 F.2d 624.

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26. U.S.—Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 901 v. Editorial "El Imparcial", Inc., C.A.Puerto Rico, 300 F.2d 125.

27.5. U.S.—Ellison v. Califano, C.A.Ga., 546 F.2d 1162.

§ 291(1). Interlocutory Orders or Decrees as to Injunctions and Receivers

Library References

Federal Courts ⇐541, 753.

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29. U.S.—Massachusetts Ass'n for Retarded Citizens v. King, C.A.Mass., 643 F.2d 899.

30. N.Y.—Colangelo v. Colangelo, 389 N.Y.S.2d 76, 54 A.D.2d 1123.

31. U.S.—Hicks v. Pleasure House, Inc., Cal., 92 S.Ct. 5, 404 U.S. 1, 30 L.Ed.2d 1.

Oliver v. Kalamazoo Bd. of Ed., C.A.Mich., 640 F.2d 782.

Johnson v. American Airlines, Inc., D.C.Tex., 531 F.Supp. 957.

D.C.—Committee for Nuclear Responsibility, Inc. v. Seaborg, C.A., 463 F.2d 796, 149 U.S.App.D.C. 393.

Exclusive nature of Expediting Act as controlling over the Interlocutory Appeals Act see supra § 290(1).

Irreparable effect

(1) U.S.—New England Power Co. v. Asiatic Petroleum Corp, C.A.Mass., 456 F.2d 183.

(2) U.S.—Rodgers v. U.S. Steel Corp., C.A.Pa., 541 F.2d 365.

Dismissal of counterclaim

(4) An order dismissing only that part of counterclaim resting on particular statute, leaving possibility of securing full extent of relief prayed for, is not appealable.

U.S.—Western Geophysical Co. of America v. Bolt Associates, Inc., C.A.Conn., 440 F.2d 765.

Failure to make ruling as refusal

U.S.—U.S. v. Lynd, C.A.Miss., 301 F.2d 818, cert den. 83 S.Ct. 187, 371 U.S. 893, 9 L.Ed.2d 125.

Orders held not within statute

U.S.—International Products Corp. v. Koons, C.A. N.Y., 325 F.2d 403—City of New York v. International Pipe & Ceramics Corp., C.A.N.Y., 410 F.2d 295—United Bonding Ins. Co. v. Stein, C.A.Pa., 410 F.2d 483.

Incentive to enlarge class removed

U.S.—Cord v. Smith, C.A.Cal., 338 F.2d 516, mand. clarified 370 F.2d 418.

Reason for rule

U.S.—Gardner v. Westinghouse Broadcasting Co., C.A. Pa., 559 F.2d 209, affd. 98 S.Ct 2451, 437 U.S. 478, 57 L.Ed.2d 364.

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32. U.S.—Guy v. Citizens Fidelity Bank & Trust Co., C.A.Ky., 429 F.2d 828—Securities and Exchange Commission v. Lincoln Thrift Ass'n C.A.Ariz., 577 F.2d 600.

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33.5. U.S.—Glen Oaks Utilities, Inc. v. City of Houston, C.A.Tex., 280 F.2d 330—Taylor v. Board of Ed. of City School Dist. of City of New Rochelle, C.A.N.Y., 288 F.2d 600—Hyde Const. Co. v. Koehring Co., C.A.Okl., 388 F.2d 501, cert. den. 88 S.Ct. 1654, 391 U.S. 905, 20 L.Ed.2d 419—Belknap v. Leary, C.A.N.Y., 427 F.2d 496—JS & H Const. Co. v. Richmond County Hospital Authority, C.A.Ga., 473 F.2d 212—Meat Price Investigators Ass'n v. Spencer Foods, Inc., C.A.Iowa, 572 F.2d 163.

Particular orders

(9) Other orders.

U.S.—U.S. v. Shaheen, C.A.Ill., 445 F.2d 6.

33.10. U.S.—Bryant v. East Baton Rouge Parish School Bd., C.A.La., 466 F.2d 519.

Particular orders

(1) U.S.—General Tire & Rubber Co. v. Watkins, C.A.Md., 331 F.2d 192, cert. den. 84 S.Ct. 1629, 377 U.S. 952, 12 L.Ed.2d 498.

(9) Other orders.

U.S.—Austin v. U.S., C.A.N.C., 353 F.2d 512—Securities and Exchange Commission v. Investment Corp. of America, C.A.Ind., 369 F.2d 383—Tracy v. Robbins, C.A.S.C., 373 F.2d 13—Madry v. Sorel, C.A.Fla., 440 F.2d 1329.

34.5. U.S.—Virginia Nat. Bank v. Com. of Va. ex rel. State Corp. Commission, C.A.Va., 448 F.2d 425.

35. U.S.—Florida v. U.S., C.A.Ark., 285 F.2d 596—Miller v. U.S., C.A.Conn., 403 F.2d 77—Kershner v. Mazurkiewicz, C.A.Pa., 670 F.2d 440.

Refusal to remove or exclude attorneys

(2) U.S.—Fleischer v. Phillips, C.A.N.Y., 264 F.2d 515, cert. den. 79 S.Ct. 1139, 359 U.S. 1002, 3 L.Ed.2d 1030.

Statute interpreted in light of policy to discourage piecemeal appeals

U.S.—World Treadeways Shipping, Limited v. Nimpex Intern., Inc., C.A.N.Y., 373 F.2d 860, cert. den. 88 S.Ct. 228, 389 U.S. 901, 19 L.Ed.2d 224.

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41.15. U.S.—Weiss v. Duberstein, C.A.N.Y., 445 F.2d 1297—Safe Flight Instrument Corp. v. McDonnell-Douglas Corp., C.A.Cal., 482 F.2d 1086, cert. den. 94 S.Ct. 843, 414 U.S. 1113, 38 L.Ed.2d 740.

41.20. U.S.—Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., Mass., 87 S.Ct. 193, 385 U.S. 23, 17 L.Ed.2d 23.

§ 291(2). —— Stay of Proceedings

Library References

Federal Courts ⚷572, 573.

41.50. U.S.—Wallace v. Norman Industries, Inc., C.A.Ala., 467 F.2d 824.

D.C.—Travel Consultants, Inc v. Travel Management Corp., C.A., 367 F.2d 334, 125 U.S.App.D.C. 108, cert. den. 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 785.

42. U.S.—Glen Oaks Utilities, Inc. v. City of Houston, C.A.Tex., 280 F.2d 330—Alexander v. Pacific Maritime Ass'n, C.A.Cal., 332 F.2d 266, cert. den. 85 S.Ct. 150, 379 U.S 882, 13 L.Ed.2d 88—Jensenius v. Texaco, Inc., Marine Dept., C.A.Tex., 639 F.2d 1342.

Whether or not a stay of court proceedings is an appealable order granting or denying an injunction depends on what proceedings are stayed by what court.[42.1] Generally, where a court stays a proceeding on its own docket, that is not an appealable order, but where a court stays a proceeding in another court, that stay is considered to be an injunction.[42.2]

42.1. U.S.—Penoro v. Rederi A/B Disa, C.A.N.Y., 376 F.2d 125, cert. den. 88 S.Ct. 78, 389 U.S. 852, 19 L.Ed.2d 122, 676.

42.2. U.S.—Penoro v. Rederi A/B Disa, C.A.N.Y., 376 F.2d 125, cert. den. 88 S.Ct. 78, 389 U.S. 852, 19 L.Ed.2d 122, 676.

42.5. U.S.—Drexler v. Southwest Dubois School Corp., C.A.Ind., 504 F.2d 836.

D.C.—Travel Consultants, Inc. v. Travel Management Corp., C.A., 367 F.2d 334, 125 U.S.App.D.C. 108, cert. den. 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 785—Bethlehem Steel Corp. v. Grace Line, Inc., C.A., 416 F.2d 1096, 135 U.S.App.D.C. 81—McSurely v. McClellan, C.A., 426 F.2d 664, 138 U.S.App.D.C. 187, app. after remand 521 F.2d 1024, 172 U.S.App.D.C. 364, on reh. 553 F.2d 1277, 180 U.S.App.D.C. 101, cert. is dism. 98 S.Ct. 3116, 438 U.S. 189, 57 L.Ed.2d 704, app. after remand 697 F.2d 309, 225 U.S.App.D.C. 67, 67 A.L.R.Fed. 614, 753 F.2d 88, 243 U.S.App.D.C. 270, cert. den. 106 S.Ct. 525, two cases, 88 L.Ed.2d 457.

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42.10. U.S.—J. M. Huber & Co. v. M/V Plym, C.A. Va., 468 F.2d 166.

D.C.—Travel Consultants, Inc. v. Travel Management Corp., C.A., 367 F.2d 334, 125 U.S.App.D.C. 108, cert. den. 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 785.

A stay of an action for injunctive relief may be appealable on ground that the stay operates as a refusal of a temporary injunction when such refusal is the essence of what was done by the trial court.[43.5]

43.5. D.C.—Dellinger v. Mitchell, C.A., 442 F.2d 782, 143 U.S.App.D.C. 60.

44. U.S.—Penoro v. Rederi A/B Disa, C.A.N.Y., 376 F.2d 125, cert. den. 88 S.Ct. 78, 389 U.S. 852, 19 L.Ed.2d 122, 676—Hart v. Orion Ins. Co., C.A. Colo., 427 F.2d 528.

D.C.—McSurely v. McClellan, C.A., 426 F.2d 664, 138 U.S.App.D.C. 187, app. after remand 521 F.2d 1024, 172 U.S.App.D.C. 364, on reh. 553 F.2d 1277, 180 U.S.App.D.C. 101, cert. is dism. 98 S.Ct. 3116, 438 U.S. 189, 57 L.Ed.2d 704, app. after remand 697 F.2d 309, 225 U.S.App.D.C. 67, 67 A.L.R.Fed. 614, 753 F.2d 88, 243 U.S.App.D.C. 270, cert. den. 106 S.Ct. 525, two cases, 88 L.Ed.2d 457.

Rule inapplicable where no proceedings at law but only equitable

U.S.—Schine v. Schine, C.A.N.Y., 367 F.2d 685.

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44.10. U.S.—Ets-Hokin & Galvan, Inc. v. U.S. for Use and Benefit of Albert S. Pratt, Inc., C.A.Ariz., 350 F.2d 871—Boeing Co. v. International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW, AFL–CIO), C.A.Pa., 370 F.2d 969—Carcich v. Rederi A/B Nordie, C.A.N.Y., 389 F.2d 692.

D.C.—Carey v. Carter, C.A., 344 F.2d 567, 120 U.S. App.D.C. 182.

44.20. U.S.—Warren Bros. Co. v. Cardi Corp., C.A. Mass., 471 F.2d 1304—Wren v. Sletten Const. Co., C.A.Mont., 654 F.2d 529—Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. C.A.Tex., 720 F.2d 1446.

D.C.—Travel Consultants, Inc. v. Travel Management Corp., C.A., 367 F.2d 334, 125 U.S.App.D.C. 108, cert. den. 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 785.

44.25. U.S.—Southeastern Enameling Corp. v. General Bronze Corp., C.A.Ala., 434 F.2d 330.

44.30. U.S.—Jos. L. Muscarelle, Inc. v. American Timber & Trading Co., C.A.Canal Zone, 404 F.2d 467.

44.35. U.S.—Greater Continental Corp. v. Schechter, C.A.N.Y., 422 F.2d 1100.

§ 291(3). —— Transfer of Cases

Library References

Federal Courts ⚷574.

45. U.S.—Armor Elevator Co., Inc. v. Phoenix Urban Corp., D.C.Mass., 493 F.Supp. 876.

47.10. U.S.—Fischer v. First Nat. Bank of Omaha, C.A.Iowa, 466 F.2d 511—Wallace v. Norman Industries, Inc., C.A.Ala., 467 F.2d 824.

Polin v. Conductron Corp., D.C.Pa., 311 F.Supp. 362.

§ 291(4). —— Preliminary or Temporary Injunction; Temporary Restraining Order

Library References

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47.50. U.S.—Carson v. American Brands, Inc., Va., 101 S.Ct. 993, 450 U.S. 79, 67 L.Ed.2d 59, on remand, C.A., 654 F.2d 300.

National Ass'n for Advancement of Colored People, Lansing Branch v. Lansing Bd. of Ed., C.A. Mich., 485 F.2d 569—Plymouth County Nuclear Information Committee, Inc. v. Boston Edison Co., C.A.Mass., 655 F.2d 15.

D.C.—Dorfmann v. Boozer, C.A., 414 F.2d 1168, 134 U.S.App.D.C. 272.

Denial held appealable

U.S.—Ferrara v. State of La., C.A.La., 443 F.2d 344.

D.C.—Flight Engineers' Intern. Ass'n, EAL Chapter, AFL-CIO v. National Mediation Bd., C.A., 338 F.2d 280, 119 U.S.App.D.C. 171.

Decree not ordinarily disturbed

U.S.—Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., C.A.Fla., 418 F.2d 387, cert. den. 90 S.Ct. 907, 397 U.S. 910, 25 L.Ed.2d 90, reh. den. 90 S.Ct. 1256, 397 U.S. 1030, 25 L.Ed.2d 543.

Statute construed

U.S.—Gardner v. Westinghouse Broadcasting Co., Pa., 98 S.Ct. 2451, 437 U.S. 478, 57 L.Ed.2d 364.

When available

U.S.—Roberts v. St. Regis Paper Co., C.A.Fla., 653 F.2d 166.

47.55. U.S.—Austin v. Altman, C.A.N.Y., 332 F.2d 273—Leslie v. Penn Cent. R. Co., C.A.Mich., 410 F.2d 750—Smith v. Grady, C.A.Miss., 411 F.2d 181—Belknap v. Leary, C.A.N.Y., 427 F.2d 496—Weintraub v. Hanrahan, C.A.Ill., 435 F.2d 461—Mercury Motor Exp., Inc. v. Brinke, C.A.Fla., 475 F.2d 1086, app. after remand 494 F.2d 39—Belo Broadcasting Corp. v. Clark, C.A.Tex., 654 F.2d 423.

Denial held appealable where order constituted "final decision"

U.S.—U.S. v. Wood, C.A.Miss., 295 F.2d 772, cert. den. 82 S.Ct. 933, 369 U.S. 850, 8 L.Ed.2d 9—Woods v. Wright, C.A.Ala., 334 F.2d 369.

Denial held not appealable

U.S.—Smith v. Jackson State College, C.A.Miss., 441 F.2d 278—Massachusetts Air Pollution and Noise Abatement Committee v. Brinegar, C.A.Mass., 499 F.2d 125.

Held appealable

U.S.—Nassau County v. Cost of Living Council, Em. App., 499 F.2d 1340.

49. Dissolution of restraining order held appealable

U.S.—Petuskey v. Rampton, C.A.Utah, 431 F.2d 378, cert. den. 91 S.Ct. 882, 401 U.S. 913, 27 L.Ed.2d 812.

50. U.S.—Silva v. Romney, C.A.Mass., 473 F.2d 287, app. after remand 482 F.2d 1282—Belo Broadcasting Corp. v. Clark, C.A.Tex., 654 F.2d 423—Smith v. Eggar, C.A.Cal., 655 F.2d 181.

Determination of appealability, etc.

(2) Matters held proper for consideration.

U.S.—Austin v. Altman, C.A.N.Y., 332 F.2d 273.

Substantial length of time

(1) D.C.—National Mediation Bd. v. Air Line Pilots Ass'n, Intern., C.A., 323 F.2d 305, 116 U.S.App.D.C. 300.

Also, denial of a motion for injunctive relief taken after full presentation by both parties may be appealable.[50.5]

50.5. U.S.—Dilworth v. Riner, C.A.Miss., 343 F.2d 226—ITT Lamp Division of International Tel. & Tel. Corp., v. Minter, C.A.Mass., 435 F.2d 989, cert. den. 91 S.Ct. 1526, 402 U.S. 933, 28 L.Ed.2d 868, reh. den. 92 S.Ct. 27, 404 U.S. 874, 30 L.Ed.2d 120—Graham v. Minter, C.A.Mass., 437 F.2d 427.

§ 291(5). —— Vacating Receivership

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52. U.S.—U.S. v. Chelsea Towers, Inc., C.A.N.J., 404 F.2d 329.

§ 292(1). In General

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54. U.S.—Travelers Ins. Co. v. Childs, C.A.N.Y., 272 F.2d 855.

The Federal Rules of Appellate Procedure now govern procedure in appeals to courts of appeals from district courts and the Tax Court of the United States; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give.[54.5]

54.5. F.R.A.P. Rule 1 et seq., 28 U.S.C.A.

Rules by courts of appeals

F.R.A.P. Rule 47, 28 U.S.C.A., expressly authorizes each court of appeals to make rules of practice not inconsistent with Federal Rules of Appellate Procedure.

§ 292(2). Presentation and Reservation in Lower Court of Grounds of Review

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Federal Courts ⚫611–617.

55.50. U.S.—Skogen v. Dow Chemical Co., C.A. Minn., 375 F.2d 692—Preferred Ins. Exchange v. Coshow, C.A.Cal., 444 F.2d 362

55.55. U.S.—U.S. ex rel. Huisinga v. Commanding Officer, Armed Forces Examining and Entrance Station, Minneapolis, Minn., C.A.Minn., 446 F.2d 124.

56. Washington Gas Light Co. v. Virginia Elec. & Power Co., C.A.Va., 438 F.2d 248—Goff v. Continental Oil Co., C.A.Tex., 678 F.2d 593.

D.C.—Leedom v. International Broth. of Elec. Workers, Local Union No. 108, AFL-CIO, C.A., 278 F.2d 237, 107 U.S.App.D.C. 357—Dart Drug Corp. v. Parke, Davis & Co., C.A., 344 F.2d 173, 120 U.S.App.D.C. 79.

General rule not absolute

U.S.—Green v. Brown, C.A.N.Y., 398 F.2d 1006.

Pure question of law

(2) Other instances.

U.S.—Foster v. U.S., C.A.N.Y., 329 F.2d 717—American Sur. Co. of New York v. Coblentz, C.A.Fla., 381 F.2d 185, app. after remand 416 F.2d 1059, motion gr. 421 F.2d 187—Bartlett-Collins Co. v. Surinam Nav. Co., C.A.Okl., 381 F.2d 546—Commodity Futures Trading Com'n v. Co Petro Marketing Group, Inc., C.A.Cal., 680 F.2d 573, app. after remand C.A., 700 F.2d 1279.

Failure to file cross-appeal not fatal to review

U.S.—French v. Estelle, C.A.5, 696 F.2d 318, reh. den. 698 F.2d 1216, cert. den. 103 S.Ct. 2108.

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56.5. U.S.—Pruett v. Marshall, C.A.Ala., 283 F.2d 436—Citron v. Aro Corp., C.A.Pa., 377 F.2d 750, cert. den. 88 S.Ct. 473, 389 U.S. 973, 19 L.Ed.2d 466—American Sur. Co. of New York v. Coblentz, C.A.Fla., 331 F.2d 185, app. after remand 416 F.2d 1059, motion gr. 421 F.2d 187—Bartlett-Collins Co. v. Surinam Nav. Co., C.A.Okl., 381 F.2d 546—D. H. Overmyer Co. v. Loflin, C.A.Miss., 440 F.2d 1213, cert. den. 92 S.Ct. 87, 404 U.S. 851, 30 L.Ed.2d 90.

D.C.—In re Elmore, C.A., 382 F.2d 125, 127 U.S.App. D.C. 176.

56.10. U.S.—Pruett v. Marshall, C.A.Ala., 283 F.2d 436—Blier v. U.S. Lines Co., C.A.N.Y., 286 F.2d 920, cert. den. 82 S.Ct. 32, 368 U.S. 836, 7 L.Ed.2d 37—Ramsey v. Travelers Ins. Co., C.A. S.C., 317 F.2d 300.

Rule not extended

U.S.—Andrews v. Olin Mathieson Chemical Corp., C.A.Iowa, 334 F.2d 422.

56.15. U.S.—Connor v. Finch, Miss., 97 S.Ct. 1828, 431 U.S. 407, 52 L.Ed.2d 465.

Nuelsen v. Sorensen, C.A.Cal., 293 F.2d 454—Green v. Brown, C.A.N.Y., 398 F.2d 1006.

57. U.S.—Bricker v. Crane, C.A.N.H., 468 F.2d 1228, cert. den. 93 S.Ct. 1368, 410 U.S. 930, 35 L.Ed.2d 592—Dothard v. Rawlinson, Ala., 97 S.Ct. 2720, 433 U.S. 321, 53 L.Ed.2d 786—Rohler v. TRW, Inc., C.A.Ind., 576 F.2d 1260—Payne v. McLemore's Wholesale & Retail Stores, C.A.La., 654 F.2d 1130, reh. den. 660 F.2d 497, cert. den. 102 S.Ct. 1630, 455 U.S. 1000, 71 L.Ed.2d 866.

D.C.—Doe v. McMillan, C.A., 459 F.2d 1304, 148 U.S.App.D.C. 280, affd. in part, revd. in part on oth. grds., 93 S.Ct. 2018, 412 U.S. 306, 36 L.Ed.2d 912, motion den. 95 S.Ct. 614, 419 U.S. 1043 42 L.Ed.2d 637.

Particular actions or claims

(1) U.S.—Wilsey-Bennett Trucking Co. v. Frost, C.A.N.M., 275 F.2d 144—Waddell v. Bow Corp., C.A. N.M., 408 F.2d 772.

(5) U.S.—Wiles v. Nationwide Life Ins. Co., C.A. N.C., 334 F.2d 296—State Farm Mut. Auto. Ins. Co. v. Xaphes, C.A.Vt., 384 F.2d 640.

(6) Claims in stockholders' derivative suit.

D.C.—Reiter v. Universal Marion Corp., C.A., 273 F.2d 820, 107 U.S.App.D.C. 6.

(7) Actions involving Indians.

U.S.—Torockio v. Chamberlain Mfg. Co., 456 F.2d 1087, on remand, D.C., 56 F.R.D. 82, affd., C.A., 474 F.2d 1340.

Question held properly raised below

U.S.—U.S. by Mitchell v. Hayes Intern. Corp., C.A. Ala., 415 F.2d 1038.

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58.5. U.S.—Nuelsen v. Sorensen, C.A.Cal., 293 F.2d 454.

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58.10. U.S.—Textile Banking Co., Inc. v. Rentschler, C.A.Ill., 657 F.2d 844.

58.15. U.S.—Petty v. Porter, C.A.Tenn., 322 F.2d 308, cert. den. 84 S.Ct. 1358, 377 U.S. 948, 12 L.Ed.2d 310—Country Mut. Ins. Co. v. Eastman, C.A.La., 356 F.2d 880—U.S. v. L. N. White & Co., C.A.N.Y., 359 F.2d 703—Kurdziel v. Pittsburgh Tube Co., C.A.Ohio, 416 F.2d 882.

D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S. App.D.C. 367.

58.20. U.S.—Scott v. Central Commercial Co., C.A. Vt., 272 F.2d 781, cert. den. 80 S.Ct. 1241, 363 U.S. 806, 4 L.Ed.2d 1149—Nuelsen v. Sorensen, C.A.Cal., 293 F.2d 454—Petty v. Porter, C.A. Tenn., 322 F.2d 308, cert. den. 84 S.Ct. 1358, 377 U.S. 948, 12 L.Ed.2d 310.

D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S. App.D.C. 367.

58.25. U.S.—Goodis v. United Artists Television, Inc., C.A.N.Y., 425 F.2d 397.

58.30. U.S.—Resident Advisory Bd. v. Rizzo, C.A. Pa., 564 F.2d 126, cert. den. 98 S.Ct. 1457, two cases, 435 U.S. 908, 55 L.Ed.2d 499, and 98 S.Ct. 1458, 435 U.S. 908, 55 L.Ed.2d 499.

58.35. U.S.—Galloway v. Attorney General, C.A.Ga., 451 F.2d 357.

D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S. App.D.C. 367.

60. U.S.—Savage v. McNeany, C.A.N.M., 372 F.2d 199.

60.5. U.S.—Myers v. Alvey-Ferguson Co., C.A.Ohio, 326 F.2d 590—Stanspec Corp. v. Jelco, Inc., C.A. Colo., 464 F.2d 1184.

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60.10. U.S.—Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern, C.A.Minn., 373 F.2d 136, cert. den. 88 S.Ct. 77, 389 U.S. 827, 19 L.Ed.2d 83.

61. U.S.—U.S. v. Donnelly's Estate, 90 S.Ct. 1033, 397 U.S. 286, 25 L.Ed.2d 312.
Guy James Const. Co. v. Trinity Industries, Inc., C.A.Tex., 644 F.2d 525, mod. on oth. grds. 650 F.2d 93—Kramer v. Secretary, U.S. Dept. of Army, C.A.N.Y., 653 F.2d 726.
D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S. App.D.C. 367.

Contributory negligence or assumption of risk
U.S.—Quinones v. Upper Moreland Tp., C.A.Pa., 293 F.2d 237, on remand, D.C., 199 F.Supp. 758—Lowery v. Clouse, C.A.Minn., 348 F.2d 252.

Former adjudication of cause
U.S.—Schramm v. Oakes, C.A.N.M., 352 F.2d 143—Badway v. U.S., C.A.R.I., 367 F.2d 22—Travelers Indem. Co. v. U.S. for Use of Construction Specialties Co, C.A.Colo., 382 F.2d 103.

Presentation not necessary where record completely negates both defenses
D.C.—Kosty v. Lewis, C.A., 319 F.2d 744, 115 U.S. App.D.C. 343, cert. den. 84 S.Ct. 482, 375 U.S. 964, 11 L.Ed.2d 414.

Failure to mitigate damages
U.S.—Investors Preferred Life Ins. Co. v. Abraham, C.A.Okl., 375 F.2d 291.

Illegality
U.S.—John R. Lewis Inc. v. Newman C.A.Tex., 446 F.2d 800.

Dismissal before responsive pleading
U.S.—Green v. White, C.A.Mo., 605 F.2d 376, cert. den. 100 S.Ct. 1038, 444 U.S. 1083, 62 L.Ed.2d 767, and 100 S.Ct. 1060, 444 U.S. 1093, 62 L.Ed.2d 782, app. after remand C.A., 628 F.2d 1126, on remand 525 F.Supp. 81, affd. 693 F.2d 45, cert. den. 103 S.Ct. 2464, 462 U.S. 1111, 77 L.E.2d 1341.

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61.5. U.S.—Grantham v. McGraw-Edison Co, 444 F.2d 210—Altman v. Altman, C.A.Pa., 653 F.2d 755.
D.C.—Imperial Ins., Inc. v. Employers' Liability Assur. Corp., C.A., 442 F.2d 1197, 143 U.S.App.D.C. 173.

61.10. U.S.—U.S. v. Pixley, C.A.Cal., 285 F.2d 586—Badway v. U.S., C.A.R.I., 367 F.2d 22—Langdon v. Jackson, C.A.Cal., 404 F.2d 319—Murphy v. Dyer, C.A.Colo., 409 F.2d 747, 37 A.L.R.3d 414—Kramer v. Secretary, U.S. Dept. of Army, C.A. N.Y., 653 F.2d 726, on remand 623 F.Supp. 505.

61.15. Matters considered
U.S.—Val Decker Packing Co. v. Corn Products Sales Co., C.A.Ohio, 411 F.2d 850.

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61.20. U.S.—Pan-American Life Ins. Co. v. Alvarez, C.A.Fla., 374 F.2d 92, cert. den. 88 S.Ct. 89, 389 U.S. 829, 19 L.Ed.2d 85—City of North Kansas City, Mo. v. Sharp, C.A.Mo., 414 F.2d 359—Russom v. Insurance Co. of North America, C.A. Tenn., 421 F.2d 985.

Statute of frauds
(1) U.S.—Island Block Corp. v. Jefferson Const. Overseas, Inc., C.A.Virgin Islands, 349 F.2d 322.
D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S. App.D.C. 367.
(3) Question considered where absence of signature on purchase order urged from beginning.
U.S.—Island Block Corp. v. Jefferson Const. Overseas, Inc., C.A.Virgin Islands, 349 F.2d 322.

61.25. Sovereign immunity
U.S.—McDonald v. State of Illinois, C.A.Ill., 557 F.2d 596, cert. den. 98 S.Ct. 508, 434 U.S. 966, 54 L.Ed.2d 453.
U.S.—Lewis v. BT Inv. Managers, Inc., 100 S.Ct. 2009, 447 U.S. 27, 64 L.Ed.2d 702.
Frommhagen v. Klein, C.A.Cal., 456 F.2d 1391.

Constitutionality considered
U.S.—Federal Election Commission v. Lance, C.A.Ga., 635 F.2d 1132, app. dism., cert. den. 101 S.Ct. 3151, 453 U.S 917, 69 L.Ed.2d 999.

Question raising due process considered
U.S.—Gomes v. Williams, C.A.N.M., 420 F.2d 1364.

62.5. U.S.—Connecticut General Life Ins. Co. v. Breslin, C.A.Fla., 332 F.2d 928—United Steelworkers of America v. CCI Corp., C.A.Okl., 395 F.2d 529, cert. den. 89 S.Ct. 627, 393 U.S. 1019, 21 L.Ed.2d 564—Wratchford v. S. J. Groves & Sons Co., C.A.Md., 405 F.2d 1061.

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63. U.S.—Walker v. Continental Life & Acc. Co., C.A.Ariz., 445 F.2d 1072.

Theory held not changed
U.S.—Pritchard v. Liggett & Myers Tobacco Co., C.A. Pa., 350 F.2d 479, cert. den. 86 S.Ct. 549, 382 U.S. 987, 15 L.Ed.2d 475, am. on oth. grds., C.A., 370 F.2d 95, cert. den. 87 S.Ct. 1350, 386 U.S. 1009, 18 L.Ed.2d 436.

64. U.S.—U.S ex rel. Huisinga v. Commanding Officer, Armed Forces Examining and Entrance Station, Minneapolis, Minn., C.A.Minn, 446 F.2d 124.
D.C.—Euresti v. Washington Terminal Co., C.A., 280 F.2d 629, 108 U.S.App.D.C. 81—Pardo v. Wilson Line of Washington, Inc., C A., 414 F.2d 1145, 134 U.S.App.D.C. 249.

65.5. U.S.—Reliford v. Eastern Coal Corp., C.A.Ky., 260 F.2d 447, cert. den. 79 S.Ct. 797, 359 U.S. 958, 3 L.Ed.2d 765—National Equipment Rental, Limited v Stanley, C.A.N.Y., 283 F.2d 600.

66. U.S.—Ansul Co. v. Uniroyal, Inc., C.A.N.Y., 448 F.2d 872, cert. den 92 S.Ct. 680, two cases, 404 U.S. 1018, 30 L.Ed.2d 666.
D.C.—Filmon Process Corp. v Spell-Right Corp., C.A., 404 F.2d 1351, 131 U.S.App.D.C. 374.

67. U.S.—Wagner v. Retail Credit Co., C.A.Ind., 338 F.2d 598—Autrey v. Williams and Dunlap, C.A La., 343 F.2d 730, reh. den 346 F.2d 1007—Crompton-Richmond Co., Inc. Factors v. Smith, C.A.Pa., 392 F.2d 577.

69. U.S.—Tromza v. Tecumseh Products Co., C.A. Pa., 378 F.2d 601.

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71. U.S.—Laguna Royalty Co. v. Marsh, C.A.Tex., 350 F.2d 817.

73. Prejudgment interest
U.S.—Sandoval v. Mitsui Sempaku K.K. Tokyo, C.A. Canal Zone, 460 F.2d 1163.

74. U.S.—Caldwell v. Ogden Sea Transport, Inc., C.A.Va., 618 F.2d 1037, on remand, D.C., 518 F.Supp. 1229.
D.C.—Communist Party of U.s. v. Subversive Activities Control Bd., C.A., 277 F.2d 78, 107 U.S.App.D.C. 279, affd. 81 S.Ct. 1357, 367 U.S. 1, 6 L.Ed.2d 625, reh. den. 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72.

Matter held properly presented
(4) Other matters.
U.S.—McLearn v. Cowen & Co., C.A.N.Y., 660 F.2d 845—Gargiulo v. Delsole, C.A.2 (Conn.), 769 F.2d 77.

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74.10. U.S.—Bakersfield City School Dist. of Kern County v. Boyer, C.A.Cal., 610 F.2d 621.

§ 292(3). —— Objections and Motions and Rulings Thereon

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75. U.S.—Morrow v. Topping, C.A.Cal., 437 F.2d 1155—Dimmitt Agri Industries, Inc. v. CPC Intern. Inc., C.A.Tex., 679 F.2d 516, cert. den. 103 S.Ct. 1770, two cases, 460 U.S. 1082, 76 L.Ed.2d 344.
Barlow v. Brunswick Corp., D.C.Pa., 311 F.Supp. 209.
Haynes v. U.S., 418 F.2d 1380, 190 Ct.Cl. 9.

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76. U.S.—Colonial Refrigerated Transp., Inc. v. Mitchell, C.A.Tex., 403 F.2d 541—Sheppard Federal Credit Union v. Palmer, C.A.Tex., 408 F.2d 1369—Howard v. Gonzales, C.A.Tex., 658 F.2d 352.

77. U.S.—Blier v. U.S. Lines Co., C.A.N.Y., 286 F.2d 920, cert. den. 82 S.Ct. 32, 368 U.S. 836, 7 L.Ed.2d 37—Agee v. Lofton, C.A.Iowa, 287 F.2d 709—Freifield v. Hennesyy, C.A.Pa., 353 F.2d 97—Nimrod v. Sylvester, C.A.Mass., 369 F.2d 870—Sheppard Federal Credit Union v. Palmer, C.A.Tex., 408 F.2d 1369—Taylor v. National Trailer Convoy, Inc., C.A.Okl., 433 F.2d 569.

78. U.S.—Wilson v. Ward Baking Co., C.A.Ohio, 318 F.2d 674—Segal v. Cook, C.A.Ohio, 329 F.2d 278—Brotherhood of R. R. Trainmen v. Central of Georgia Ry. Co., C.A.Ga., 415 F.2d 403, cert. den. 90 S.Ct. 564, 396 U.S. 1008, 24 L.Ed.2d 500.
D.C.—Communist Party of U.S. v. Subversive Activities Control Bd., C.A., 277 F.2d 78, 107 U.S.App.D.C. 279, affd. 81 S.Ct. 1357, 367 U.S. 1, 6 L.Ed.2d 625, reh. den. 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72.

When objection timely
(3) U.S.—Krock v. Electric Motor & Repair Co., C.A.Mass., 327 F.2d 213, cert. den. 84 S.Ct. 1338, 377 U.S. 934, 12 L.Ed.2d 298

79. U.S.—Nimrod v. Sylvester, C.A.Mass., 369 F.2d 870—Securities and Exchange Commission v. Bartlett, C.A.Ark., 422 F.2d 475.

79.5. U.S.—King v. Ford Motor Co., C.A.Ala., 597 F.2d 436.

80. U.S.—Curko v. William Spencer & Son, Corp., C.A.N.Y., 294 F.2d 410—Avern Trust v. Clarke, C.A.Ill., 415 F.2d 1238, cert. den. 90 S.Ct. 997, 397 U.S. 963, 25 L.Ed.2d 255—Gay v. P. K. Lindsay Co., Inc., C.A.N.H., 666 F.2d 710, cert. den. 102 S.Ct. 2240, 456 U.S. 975, 72 L.Ed.2d 849.

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80.5. U.S.—Meitz v. Garrison, C.A.Mo., 413 F.2d 895—Oglesby v. Blazer Financial Services, Inc., C.A.Ga., 622 F.2d 779.

80.10. U.S.—Cann v. Ford Motor Co., C.A.N.Y., 658 F.2d 54, cert. den. 102 S.Ct. 2036, 456 U.S. 960, 72 L.Ed.2d 484.

81. U.S.—Williams v. Union Pac. R.R., C.A.Or., 286 F.2d 50—Davis v. Food Mart, Inc., C.A.Tex., 334 F.2d 27—Markel Service, Inc. v. National Farm Lines, C.A.Okl., 426 F.2d 1123.

81.5. U.S.—Chiodo v. General Waterworks Corp., C.A.Utah, 380 F.2d 860, cert. den. 88 S.Ct. 562, 389 U.S. 1004, 19 L.Ed.2d 599.

Failure to move for directed verdict does not preclude a party's seeking review on basis that the trial court erred in not granting its motion for a new trial.[81.10]

81.10. U.S.—Special Promotions, Inc. v. Southwest Photos, Ltd., C.A.Tex., 559 F.2d 430—Jones v. Miles, C.A.Ga., 656 F.2d 103.

82. U.S.—Dale Benz, Inc., Contractors v. American Cas. Co. of Reading, Pa., C.A.Ariz., 305 F.2d 641—Complete Auto Transit, Inc. v. Wayne Broyles Engineering Corp., C.A.Ala., 351 F.2d 478.

82.5. U.S.—Communist Party of U.S. v. Subversive Activities Control Bd., C.A., 277 F.2d 78, 107 U.S.App.D.C. 279, affd. 81 S.Ct. 1357, 367 U.S. 1, 6 L.Ed.2d 625, reh. den. 82 S.Ct. 20, 368 U.S. 871, 7 L.Ed.2d 72.

§ 292(4). —— —— Nature of Proceedings; Consolidation of Actions

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83. U.S.—Lee v. Hodges, C.A.S.C., 321 F.2d 480.

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84. U.S.—Ikerd v. Lapworth, C.A.Ind., 435 F.2d 197—Commodity Futures Trading Commission v. Board of Trade of City of Chicago, C.A.Ill., 657 F.2d 124, app. after remand 701 F.2d 653.

§ 292(5). —— —— Jurisdiction and Venue

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Federal Courts ⟹622.

85. U.S.—Peoples Loan & Finance Corp. v. Halbeisen Motors Co., C.A.Ga., 271 F.2d 538.

Failure to remand removed case after determination of federal phase

U.S.—Murphy v. Kodz, C.A.Ariz., 351 F.2d 163.

86. U.S.—Flast v. Cohen, N.Y., 88 S.Ct. 1942, 392 U.S. 83, 20 L.Ed.2d 947.

Csibi v. Fustos, C.A.Cal., 670 F.2d 134.

D.C.—Peoples v. U.S. Dept. of Agriculture, C.A., 427 F.2d 561, 138 U.S.App.D.C. 291.

Objection held not to involve jurisdiction, etc.

U.S.—Federal Sav. & Loan Ins. Corp. v. Quinn, C.A. Ill., 419 F.2d 1014.

Lack of jurisdiction of district court on removal

U.S.—Young Spring & Wire Corp. v. American Guarantee & Liability Ins. Co., D.C.Mo., 220 F.Supp 222.

Issue held raised in lower court

U.S.—Randall v. Newark Housing Authority, C.A.N.J., 384 F.2d 151, cert. den. 89 S.Ct. 158, 393 U.S 870, 21 L.Ed.2d 139.

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87. U.S.—Chicago, B. & Q.R. Co. v. City of North Kansas City, Mo., C.A.Mo., 276 F.2d 932.

88. U.S.—Rogers v. Bates, C.A.Neb., 431 F.2d 16—Albert v. Chafee, C.A.Hawaii, 465 F.2d 367.

A motion or plea objecting to venue, unless venue by statute is itself jurisdictional, does not preserve a jurisdictional issue.[89.5]

89.5. U.S.—Guardian Title Co. v. Sulmeyer, C.A. Cal., 417 F.2d 1290.

Where a federal district court has jurisdiction of the parties at the time it enters judgment in a case removed from a state court, the validity of the removal procedure followed may not be raised for the first time on appeal.[89.10]

89.10. U.S.—Grubbs v. General Elec. Credit Corp., Tex., 92 S.Ct. 1344, 405 U.S. 699, 31 L.Ed.2d 612.

§ 292(6). —— —— Parties

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91. U.S.—Summers v. Interstate Tractor & Equipment Co., C.A.Or., 466 F.2d 42—Newman v. Prior, C.A.Va., 518 F.2d 97.

92. U.S.—Lynn v. Smith, C.A.Pa., 281 F.2d 501.

Nonjoinder

U.S.—Compania Trasatlantica Espanola, S.A. v. Melendez Torres, C.A.Puerto Rico, 358 F.2d 209.

94. U.S.—Gorsuch v. Fireman's Fund Ins. Co., C.A. Ariz., 360 F.2d 23—In re Las Colinas, Inc., C.A. Puerto Rico, 426 F.2d 1005, app. after remand 453 F.2d 911, cert. den. 92 S.Ct. 1502, 405 U.S. 1067, 31 L.Ed.2d 797.

Protecting nonparty on court's own initiative

U.S.—Provident Tradesmens Bank & Trust Co v. Patterson, Pa., 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936, on remand, C.A., 411 F.2d 88

§ 292(7). —— —— Process, Motions, and Provisional Remedies

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97. U.S.—Jacobson & Co., Inc. v. Armstrong Cork Co., C.A.N.Y., 548 F.2d 438.

97.5. Motion in limine

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(4) U.S.—Cross v. Pasley, C.A.Mo., 270 F.2d 88, cert. den. 80 S.Ct. 608, 362 U.S. 902, 4 L.Ed.2d 554.

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2. U.S.—Breier v. Northern Cal. Bowling Proprietors' Ass'n, C.A.Cal., 316 F.2d 787—Brunwasser v. Suave, C.A.Va., 400 F.2d 600, cert. den. 89 S.Ct. 868, 393 U.S. 1083, 21 L.Ed.2d 777.

4. U.S.—Kern v. Prudential Ins. Co. of America, C.A. Mo., 293 F.2d 251, cert. den. 82 S.Ct. 443, 368 U.S. 969, 7 L.Ed.2d 397—U.S. Steel v. Warner, C.A.Utah, 378 F.2d 995—Caribou Four Corners, Inc. v. Truck Ins. Exchange, C.A.Utah, 443 F.2d 796.

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10.5. U.S.—Vergott v. Deseret Pharmaceutical Co., C.A.Tex., 463 F.2d 12.

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(2) Question preserved.

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12. U.S.—Purer & Co. v. Aktiebolaget Addo, C.A. Cal., 410 F.2d 871, cert. den. 90 S.Ct. 90, 396 U.S. 834, 24 L.Ed.2d 84—Randall v. Warnaco, Inc., Hirsch-Weis Division, C.A.N.D., 677 F.2d 1226, app. after remand 712 F.2d 1275.

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(2) U.S.—Magill v. Westinghouse Elec. Corp., C.A. Pa., 464 F.2d 294.

(3) U.S.—N.L.R.B. v. Local 490, Intern. Hod Carriers Bldg. and Const. Laborers Union, AFL-CIO, C.A., 300 F 2d 328—Taylor v. Baltimore & O R. Co., C.A. N.Y., 344 F.2d 281, cert. den. 86 S.Ct. 72, 382 U.S. 831, 15 L.Ed.2d 75—Anderson v. Swift & Co., C.A.Ky., 380 F.2d 988—U.S. for Use of Planet Corp. v. MacDonald Const. Co., C.A.Mo., 417 F.2d 687.

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13. U.S.—Trade Development Bank v. Continental Ins. Co., C.A.N.Y., 469 F.2d 35—Petrocelli v. Gallison, C.A.Mass., 679 F.2d 286.

14. U.S.—Taylor v. Gulf States Utilities Co., C.A.La., 375 F.2d 949, cert. den. 88 S.Ct. 154, 389 U.S. 871, 19 L.Ed.2d 151.

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15. U.S.—Whitehead v. Salyer, C.A.Okl., 346 F.2d 207—U.S. v. Harry Barfield Co., C.A.Ga., 359 F.2d 120—Ramsey v. Complete Auto Transit, Inc., C.A.Ind., 393 F.2d 41—Bryant v. Sears, Roebuck & Co., C.A.W.Va., 435 F.2d 953.

16. U.S.—Atlas v. Eastern Air Lines, Inc., C.A.Mass., 311 F.2d 156, cert. den. 83 S.Ct. 1290, 373 U.S. 904, 10 L.Ed.2d 199—Donley v. Christopher, C.A. Kan., 320 F.2d 24—Traylor v. Pickering, C.A. Tex., 324 F.2d 655—Rogers v. Baltimore & O.R. Co., C.A.Ohio, 325 F.2d 134—Vaughn v. National Tea Co., C.A.Ind., 328 F.2d 128—Livergood v. S. J. Groves & Sons Co., C.A.Pa., 361 F.2d 269—Bacon v. Kansas City Southern Ry. Co., C.A.La., 373 F.2d 515.

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16.5. U.S.—Dale Benz, Inc., Contractors v. American Cas. Co. of Reading Pa., C.A.Ariz., 305 F.2d 641.

16.15. U.S.—Delta Engineering Corp. v. Scott, C.A. La., 322 F.2d 11, reh. den. 325 F.2d 432, cert. den. 84 S.Ct. 1164, 377 U.S. 905, 12 L.Ed.2d 176—Complete Auto Transit, Inc. v. Wayne Broyles Engineering Corp., C.A.Ala., 351 F.2d 478—Warner v. Kewanee Machinery & Conveyor Co., C.A. Mich., 411 F.2d 1060, cert. den. 90 S.Ct. 1685, 398 U.S. 906, 26 L.Ed.2d 65.

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16.25. Objections, requests, or motions

(1) U.S.—Twentieth Century Fox Film Corp. v. Goldwyn, C.A.Cal., 328 F.2d 190, cert. den. 85 S.Ct. 143, 379 U.S. 880, 13 L.Ed.2d 87.

16.50. U.S.—Talley v. Mitchell, C.A.Tenn., 275 F.2d 244—Traylor v. Pickering, C.A.Tex., 324 F.2d 655—Trapp v. 4-10 Inv. Corp., C.A.N.D., 424 F.2d 1261.

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17. U.S.—Hines v. Prudential Ins. Co. of America, C.A.Tenn., 357 F.2d 726—Nowell v. Dick, C.A. Tex., 413 F.2d 1204—Downing v. Kunzig, C.A. Mich., 454 F.2d 1230.

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(4) Other instances.

U.S.—Sheehy v. Southern Pac. Transp. Co., C.A.Cal., 631 F.2d 649.

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(1) U.S.—Esqure Restaurant, Inc. v. Commonwealth Ins. Co. of New York, C.A.Ill., 393 F.2d 111.

17.20. U.S.—Codell-Oman Const. Co. v. Sorensen, C.A.Ala., 273 F 2d 703—Independent Iron Works, Inc. v. U.S. Steel Corp., C.A.Cal., 322 F.2d 656, cert. den. 84 S.Ct. 267, 375 U.S. 922, 11 L.Ed.2d 165—Kuzma v. U.S. Rubber Co., C.A.Pa., 323 F.2d 657—Carona v. Pioneer Life Ins. Co., C.A. Miss., 357 F.2d 477

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17.25. U.S.—Solomon Dehydrating Co. v. Guyton, C.A.Neb., 294 F.2d 439, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192.

17.30. U S.—Intermountain Rural Elec. Ass'n v. Colorado Central Power Co, C.A.Colo., 322 F.2d 516.

17.40. U.S—Johnson v. Hill, C.A.N.D., 274 F.2d 110—Solomon Dehydrating Co. v. Guyton, C.A. Neb., 294 F.2d 439, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192—Marrone v. U.S., C.A. Conn., 355 F.2d 238—Brunwasser v. Suave, C.A. Va., 400 F.2d 600, cert. den. 89 S.Ct. 868, 393 U.S. 1083, 21 L.Ed.2d 777—Krause v. Chartier, C.A.R.I., 406 F.2d 898, cert. den. 89 S.Ct. 2102, 395 U.S. 960, 23 L.Ed.2d 747—Murphy v. Dyer, C.A.Colo., 409 F.2d 747, 37 A.L.R.3d 414—Hallberg v. Brasher, C.A.Mo., 679 F.2d 751.

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17.45. Error affecting substantial rights or parties

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17.50. U.S.—Harris v. Smith, C.A.Neb., 372 F.2d 806.

17.55. U.S.—Marrone v. U.S., C.A.Conn., 355 F.2d 238—Panotex Pipe Line Co. v. Phillips Petroleum Co., C.A.Tex., 457 F.2d 1279, cert. den. 93 S.Ct. 48, 409 U.S. 845, 34 L.Ed.2d 86.

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18. U.S.—Aetna Ins. Co. v. Barnett Bros., Inc., C.A. Iowa, 289 F.2d 30.

18.5. U.S.—Urti v. Transport Commercial Corp., C.A.La., 479 F.2d 766.

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(1) U.S.—Audano v. U.S., C.A.Tex., 428 F.2d 251—Hommel v. Jackson-Atlantic, Inc., C.A.Ala., 438 F.2d 307—Bouley v. Continental Cas. Co., C.A.R.I., 454 F.2d 85—Ratchford v. Manchester Life & Cas. Management Corp., C.A.Mo., 679 F.2d 741.

(2) U.S.—Massaro v. U.S. Lines Co., C.A.Pa., 307 F.2d 299.

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(1) U.S.—Gillentine v. McKeand, C.A.Mass., 426 F.2d 717.

(5) Other instances.

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18.15. U.S.—Rochester Civic Theatre, Inc. v. Ramsay, C.A.Minn., 368 F.2d 748.

18.35. U.S.—Jenkins v. Associated Transport, Inc., C.A.Tenn., 330 F.2d 706—Centraal Stikstof Verkoopkanter, N.V. v. Walsh Stevedoring Co., C.A. Ala., 380 F.2d 523—Toyomenka, Inc. v. Mount Hope Finishing Co., C.A.N.C., 432 F.2d 722.

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19. U.S.—Nowell v. Dick, C.A.Tex., 413 F.2d 1204—Hyman v. Life Ins. Co. of North America, C.A. Fla., 481 F.2d 441.

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19.15. D.C.—Lillycrop v. Kinsky, C.A., 300 F.2d 736, 112 U.S.App.D.C. 144.

19.20. U.S.—Nowell v. Dick, C.A.Tex., 413 F.2d 1204.

19.30. U.S.—Sill Corp. v. U.S., C.A.Okl., 343 F.2d 411, cert. den. 86 S.Ct. 88, 382 U.S. 840, 15 L.Ed.2d 81—Country Mut. Ins. Co. v. Eastman, C.A.La., 356 F.2d 880—San Antonio v. Timko, C.A.N.Y., 368 F.2d 983.

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19.50. U.S.—Wegner v. Rodeo Cowboys Ass'n, C.A. Colo., 417 F.2d 881, cert. den. 90 S.Ct. 1688, 398 U.S. 903, 26 L.Ed.2d 60.

20. U.S.—Fredonia Broadcasting Corp., Inc. v. RCA Corp., C.A.Tex., 481 F.2d 781, app. after remand 569 F.2d 251, reh. den. 572 F.2d 320, cert. den. 99 S.Ct. 177, 439 U.S. 859, 58 L.Ed.2d 167.

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(2) Other matters.

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21. U.S.—Rogers v. Baltimore & O.R. Co., C.A.Ohio, 325 F.2d 134—Toth v. Corning Glass Works, C.A.Ohio, 411 F.2d 912.

Question properly preserved for review

U.S.—First Nat. Bank, Henrietta v. Small Business Administration, C.A.Tex., 429 F.2d 280.

21.5. U.S.—Bender v. Wallace-Murray Co., C.A.S.D., 432 F.2d 50—Smith v. Coy, C.A.Pa., 460 F.2d 1226—Fox v. Ford Motor Co., C.A.Wyo., 575 F.2d 774.

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(3) U.S.—Nowell v. Dick, C.A.Tex., 413 F.2d 1204.

(7) U.S.—Pruett v. Marshall, C.A.Ala., 283 F.2d 436—Sears v. Southern Pac. Co., C.A.Cal., 313 F.2d 498—Andrews v. Olin Mathieson Chemical Corp., C.A.Iowa, 334 F.2d 422.

(8) Other statements.

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21.50. U.S.—Continental Oil Co. v. Brack, C.A. N.M., 381 F.2d 682.

22. U.S.—Adkins v. Ford Motor Co, C.A.Tenn., 446 F.2d 1105.

D.C.—Imperial Ins., Inc. v. Employers' Liability Assur. Corp., C.A., 442 F.2d 1197, 143 U.S.App D.C. 173.

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(4) U.S.—Hardware Mut Ins. Co. v. Lukken, C.A. Okl., 372 F.2d 8—Iannacito v. Denver & R.G.W.R R., C.A.Colo., 380 F.2d 1019.

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23. U.S.—Hampson v. Bucyrus-Erie Co., C.A.Pa., 464 F.2d 562.

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23.5. U.S.—Ammar v. American Export Lines, Inc., C.A.N.Y., 326 F.2d 955, cert. den. 84 S.Ct. 1634, 377 U.S. 955, 12 L.Ed.2d 499—Jenkins v. Associated Transport, Inc., C.A.Tenn., 330 F.2d 706—Swain v. Boeing Airplane Co., C.A.N.Y., 337 F.2d 940, cert. den. 85 S.Ct. 1083, 380 U.S. 951, 13 L.Ed.2d 969.

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(2) Held not shown.

U.S.—Porter v. American Export Lines, Inc., C.A.Pa., 387 F.2d 409.

23.10. U.S.—Reiner v. Bankers Sec. Corp., C.A.Pa., 305 F.2d 189—O'Brien v. Willys Motors, Inc., C.A.Mich., 385 F.2d 163.

23.15. U.S.—Tromza v. Tecumseh Products Co., C.A.Pa., 378 F.2d 601—O'Brien v. Willys Motors, Inc., C.A.Mich., 385 F.2d 163—Edwards v. Mayes, C.A.N.C., 385 F.2d 369—Choy v. Bouchelle, C.A.Virgin Islands, 436 F.2d 319.

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(1) U.S.—Smith v. Travelers Ins. Co., C.A.Tenn., 438 F.2d 373, cert. den. 92 S.Ct. 79, 404 U.S. 832, 30 L.Ed.2d 62.

(2) U.S.—Hargrave v. Wellman, C.A.Mont., 276 F.2d 948.

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23.25. U.S.—Mazer v. Lipschutz, C.A.Pa., 327 F.2d 42—Trent v. Atlantic City Elec. Co., C.A.N.J., 334 F.2d 847.

23.35. U.S.—Thompson v. Laskas Motor Lines, Inc., C.A.N.Y., 274 F.2d 205—Sowizral v. Hughes, C.A.Pa., 333 F.2d 829—Trent v. Atlantic City Elec. Co., C.A.N.J., 334 F.2d 847—Morrison v. New York Cent. R. Co., C.A.Ohio, 361 F.2d 319—Wilson v. American Chain & Cable Co., C.A.Pa., 364 F.2d 558.

23.50. U.S.—Ludwig v. Marion Laboratories, Inc., C.A.Mo., 465 F.2d 114.

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23.52. U.S—Ferrara v. Sheraton McAlpin Corp., C A.N.Y., 311 F.2d 294.

23.54. U.S.—Barney v. Staten Island Rapid Transit Ry. Co., C.A.N.J., 316 F 2d 38, cert. den. 84 S.Ct. 67, 375 U S. 826, 11 L.Ed.2d 58—Ratay v. Lincoln Nat. Life Ins. Co., C.A.Pa., 378 F.2d 209, cert. den. 88 S.Ct. 472, 389 U.S. 973, 19 L.Ed.2d 465, app. after remand 405 F.2d 286—Chicago, R.I. & P.R Co., v. Speth, C.A.Neb., 404 F.2d 291—Delancey v. Motichek Towing Service, Inc., C.A.La., 427 F.2d 897.

General objection sufficient

U.S.—Clappier v. Flynn, C A.Wyo., 605 F.2d 519.

23.56. U.S.—Chicago, R.I. & P.R. Co. v. Speth, C.A. Neb., 404 F.2d 291.

Held insufficient

(3) Other instances.

U.S—Arkwright Mut. Ins. Co. v. Philadelphia Elec. Co., C.A.Pa., 427 F.2d 1273.

Granting objections but refusal to hear reasons

U.S—Southern Natural Gas Co. v. Wilson, C.A.Miss., 304 F.2d 253.

Held sufficient

U.S.—New Orleans & N.E.R. Co. v. Hewett Oil Co., C.A.Ala., 341 F.2d 406

23.58. U.S.—Standard Oil Co. of Cal. v. Perkins, C.A.Or., 347 F.2d 379—Hardware Mut. Ins. Co. v. Lukken, C.A.Okl., 372 F.2d 8—Delancey v. Motichek Towing Service, Inc., C.A.La., 427 F.2d 897—Taylor v. Denver & R.G.W.R. Co., C.A. Colo., 438 F.2d 351—American Nat. Bank & Trust Co. v. Aetna Ins. Co., C.A.Ill., 447 F.2d 680.

23.60. U.S.—La Barge Water Well Supply Co. v. U.S., C.A.Mo., 325 F.2d 798—Erwin v. Keck, C A.Ky., 351 F.2d 403—Monsma v. Central Mut. Ins. Co., C.A.Alaska, 392 F.2d 49—Gillentine v McKeand, C.A.Mass., 426 F.2d 717.

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23.64. U.S.—Clay v. Greyhound Corp., C.A.Pa., 275 F.2d 41—Robie v. Ofgant, C.A.Mass., 306 F.2d 656—Swift v. Southern Ry. Co., C.A.N.C., 307 F.2d 315—Davis v. Food Mart, Inc., C.A.Tex., 334 F.2d 27—Stiles v. Gove, C.A.Mont., 345 F.2d 991—Murphy v. Dyer, C.A.Colo., 409 F.2d 747, 37 A.L.R.3d 414—First Nat. Bank, Henrietta v. Small Business Administration, C.A.Tex., 429 F.2d 280.

23.66. U.S.—Porter v. American Export Lines, Inc., C.A.Pa., 387 F.2d 409—Bogacki v. American Mach. & Foundry Co., C.A.Pa., 417 F.2d 400.

Jackson v. Baldwin-Lima-Hamilton Corp., D.C. Pa., 252 F.Supp. 529, cert. den. 87 S.Ct. 189, 385 U.S. 803, 17 L.Ed.2d 117.

23.68. U.S.—Cone v. Beneficial Standard Life Ins. Co., C.A.Mo., 388 F.2d 456—Martin v. Erie-Lackawanna R. Co., C.A.Ohio, 388 F.2d 802—Grey v. First Nat. Bank in Dallas, C.A.Tex., 393 F.2d 371, cert. den. 89 S.Ct. 398, 393 U.S. 961, 21 L.Ed.2d 374.

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23.74. U.S.—Ballantine v. Central R. of New Jersey, C.A.Pa., 460 F.2d 540, cert. den. 93 S.Ct. 133, 409 U.S. 879, 34 L.Ed.2d 133.

Motion for directed verdict, etc.

(2) Other matters.

U.S.—Traders & General Ins. Co. v. Malitz, C.A.La., 315 F.2d 171

Question properly preserved for review

(4) Refusal to submit special issues.

U S.—First Nat. Bank, Henrietta v. Small Business Administration, C.A.Tex., 429 F.2d 280.

§ 292(15). —— —— Trial, Verdict, Findings, Judgment, and Costs

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24. U.S.—Cleary v. Indiana Beach, Inc. C.A.Ind., 275 F.2d 543, cert. den 81 S.Ct 62, 364 U.S. 825, 5 L Ed.2d 53—Pennsylvania Nat. Mut. Cas. Ins. Co v. Nathan, C.A.Tex., 361 F.2d 18—Cutter v. Cincinnati Union Terminal Co., C.A.Ohio, 361 F.2d 637.

Held not plain error

(2) Other instances

U.S.—Nimrod v. Sylvester, C.A.Mass., 369 F.2d 870.

25. U.S.—Braunstein v. Massachusetts Bank & Trust Co., C.A.Mass., 443 F.2d 1281—Young v. Taylor, C.A.Utah, 466 F.2d 1329.

26. U S—Altvater v. Battocletti, C.A.W.Va., 300 F.2d 156—American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., C.A. N.Y., 388 F.2d 272, on remand 45 F.R.D. 38, aff. after remand 446 F.2d 1131, cert. den. 92 S.Ct. 737, 404 U.S. 1063, 30 L.Ed.2d 752—Lea v. Cone Mills Corp., C.A.N.C., 467 F.2d 277.

Findings of fact and conclusions of law

(1) U.S.—McMahon v. Caribbean Mills, Inc., C.A. Okl., 332 F.2d 641.

(7) U.S.—Hidden Splendor Min. Co. v. General Ins. Co. of America, C.A.N.M., 370 F.2d 515.

Special verdict finding

U.S.—Clinton v. Ingram Corp., C.A.Miss., 455 F.2d 741, cert. den. 93 S.Ct. 333, 409 U.S. 990, 34 L.Ed.2d 257.

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27. U.S.—Anthony v. Community Loan & Inv. Corp., C.A.Ga., 559 F.2d 1363, reh. den. 564 F.2d 416.

28. U.S.—Lindbeck v. Wyatt Mfg. Co., C.A.Kan., 324 F.2d 807—City of Greeley, Kan. v. U.S., C.A. Kan., 335 F.2d 896—U.S. v. Cline, C.A.Ariz., 410 F.2d 1337—Meadows & Walker Drilling Co. v. Phillips Petroleum Co., C.A.Tex., 417 F.2d 378—Shepard v. General Motors Corp., C.A.N.H., 423 F.2d 406.

Double recovery considered

U.S.—Hunt v. BP Exploration Co. (Libya) Ltd., D.C. Tex., 492 F.Supp. 885.

Excessiveness of verdict, etc.

(2) Other matters.

U.S.—Vaught v. Childs Co., C.A.N.Y., 277 F.2d 516.

Interest

(1) U.S.—Stanspec Corp. v. Jelco, Inc., C.A.Colo., 464 F.2d 1184.

(2) U.S.—Steenberg Const. Co. v. Prepakt Concrete Co., C.A.Utah, 381 F.2d 768.

29. U.S.—Ferguson v. Bartels Brewing Co. (Pa.), C.A. N.Y., 284 F.2d 855—Trans World Airlines, Inc. v. Shirley, C.A.Cal., 295 F.2d 678—U.S. v. Village of Alsip, C.A.Ill., 345 F.2d 365, cert. den. 86 S.Ct. 242, 382 U.S. 906, 15 L.Ed.2d 158—Small Business Administration v. Taubman, C.A.Cal., 459 F.2d 991.

Motion for judgment

(3) Other matters.

U.S.—Woods v. National Life & Acc. Ins. Co., C.A.Pa., 347 F.2d 760—Chambers v. U.S., C.A.Mo., 357 F.2d 224—Berman v. Palatine Ins. Co., C.A.Ill.,

379 F.2d 371—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106

Failure to utilize the procedure specified by Federal Rules bars appeal

U.S.—Rohauer v. Friedman, C.A.Cal., 306 F.2d 933, 2 A.L.R.3d 1395.

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30. U.S.—Harrington v. Texaco, Inc., C.A.Tex., 339 F.2d 814, cert. den. 85 S.Ct 1538, 381 U.S. 915, 14 L.Ed.2d 435—Kansas City Southern Ry. Co v. Caruso, C.A.Tex., 387 F.2d 602.

31. U.S—U.S. v. United Services Auto. Ass'n, C.A. Tex., 431 F.2d 735, cert. den. 91 S.Ct. 459, 400 U.S. 992, 27 L.Ed.2d 440, reh. den. 91 S Ct. 1188, 401 U.S. 984, 28 L.Ed.2d 338—Schneider v. Electric Auto-Life Co., C.A.Ohio, 456 F.2d 366.

Right to object not waived

U.S.—Pennsylvania R. Co. v. Chicago, M. St P. and P.R. Co., C.A.Ill., 389 R.2d 67.

§ 292(16). —— Exceptions

Library References

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33. U.S.—Horton v. Moore-McCormack Lines, Inc., C.A.N.Y., 326 F 2d 104—Woods v Allied Concord Financial Corp. (Del.), C.A.Ga., 373 F 2d 733—Steinhauser v. Hertz Corp., C.A.N.Y., 421 F.2d 1169.

D.C.—Mitzner v. Baylies, C.A., 424 F.2d 814, 137 U.S.App.D.C. 326.

35. U.S.—General Beverage Sales Co. v. East-Side Winery, C.A.Wis., 568 F.2d 1147.

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36. "Plain error", etc.

U.S.—Agee v. Lofton, C.A.Iowa, 287 F.2d 709.

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44. Conduct or remarks

(1) U.S.—Agee v. Lofton, C.A.Iowa, 287 F.2d 709—National Aviation Underwriters, Inc. v. Fischer, C.A. Minn., 386 F.2d 582.

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49. U.S.—Marquez v. American Export Lines, C.A. N.Y., 384 F.2d 920—National Aviation Underwriters, Inc. v. Fischer, C.A.Minn., 386 F.2d 582.

§ 292(17). —— Motions for New Trial or Judgment Notwithstanding Verdict

Library References

Federal Courts ⚖644.

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57. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

U.S. v. Harue Hayashi, C.A.Hawaii, 282 F.2d 599, 84 A.L.R.2d 754—Jenkins v. Associated Transport, Inc., C.A.Tenn., 330 F.2d 706—Woods v. National Life & Acc. Ins. Co., C.A.Pa., 347 F.2d 760—Kiernan v. Van Schaik, C.A.Del., 347 F.2d 775—Turner v. Ohman House Corp., C.A.Tenn., 376 F.2d 347.

Community Nat. Life Ins. Co. v. Insurance Co. of North America, D.C.Okl., 52 F.R.D. 139.

Review confined to "plain error" in absence of motion for new trial

U.S.—Weir v. U.S., C.A.Ark., 339 F.2d 82.

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57.5. U.S.—Trout v. Pennsylvania R. Co., C.A.Pa., 300 F.2d 826—Joseph T. Ryerson & Son, Inc. v. H. A. Crane & Brother, Inc., C.A.N.J., 417 F.2d 1263.

Motion held sufficient

U.S.—Krolikoswki v. Allstate Ins. Co., C.A.Wis., 283 F.2d 889—Cone v. Beneficial Standard Life Ins. Co., C.A.Mo., 388 F.2d 456.

Necessity for motion

(1) In general.

U.S.—Baker v. Dillon, C.A.Ga., 389 F.2d 57—Meadows & Walker Drilling Co. v. Phillips Petroleum Co., C.A.Tex., 417 F.2d 378.

(2) Excessive or inadequate damages.

U.S.—Baker v. Dillon, C.A.Ga., 389 F.2d 57—Braunstein v. Massachusetts Bank & Trust Co., C.A. Mass., 443 F.2d 1281.

D.C.—Ryen v. Owens, C.A., 446 F.2d 1333, 144 U.S. App D.C. 332

(3) Timeliness.

U.S.—Cone v. Beneficial Standard Life Ins. Co, C.A. Mo., 388 F.2d 456.

Failure to object to the form and contents of a formal order on a motion for new trial prevents review.[57.6]

57.6. U.S.—Segars v. Atlantic Coast Line R. Co., C.A.S.C., 286 F.2d 767.

57.10. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

Jackson v. Seaboard Coast Line R. Co., C.A.Ga., 678 F.2d 992.

§ 292(18). Parties

Library References

Federal Courts ⚖545.

57.50. U.S.—Diehl v. U.S., C.A.Tex., 438 F.2d 705, cert. den. 92 S.Ct. 67, 404 U.S. 830, 30 L.Ed.2d 59—Duke & Co. Inc. v. Foerster, C.A.Pa., 521 F.2d 1277.

58. U.S—U.S. Parole Commission v. Geraghty, Pa., 100 S.Ct. 1202, 445 U.S. 388, 63 L.Ed.2d 479, on remand D.C., 552 F.Supp. 276, affd. C.A., 719 F.2d 1199, cert. den. 104 S.Ct. 1602.

Bynum v. Burns, C.A.Ark., 379 F.2d 229—Bryant v. Technical Research Co., C.A.Idaho, 654 F.2d 1337.

§ 292(19). —— Appellants

Library References

Federal Courts ⚖545.

59. U.S.—Blassie v. Kroger Co., C.A.Mo., 345 F.2d 58.

United States held proper appellant

U.S.—U.S. v. Mayton, C.A.Ala., 335 F.2d 153.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 74, are now in F.R.A.P. Rule 3(b), 28 U.S.C.A.

59.5. U.S.—McShane v. U.S., C.A.Cal., 366 F.2d 286—Henderson for and on Behalf of N.L.R.B. v. International Union of Operating Engineers, Local 701, C.A.Or., 420 F.2d 802.

Under the Federal Rules of Appellate Procedure, if two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant.[59.6]

59.6. F.R.A.P. Rule 3(b), 28 U.S.C.A.

§ 292(20). —— Appellees

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64. U.S.—Union Central Life Ins. Co. v. Hamilton Steel Products, Inc., C.A.Ill., 448 F.2d 501.

§ 292(21). —— Intervention

Library References

Federal Courts ⚖546.

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74.50. U.S.—U.S. v. Ahmad, C.A.Pa., 499 F.2d 851.

75.5. Quantum of interest required for intervention

D.C—City of Houston, Tex. v. C.A.B., C.A., 317 F.2d 158, 115 U.S.App.D.C. 94.

76. U.S.—McKenna v. Pan Am. Petroleum Corp., C.A.La., 303 F.2d 778—Blakeney v. Fairfax County School Bd., C.A.Va., 334 F.2d 239, on remand, D.C., 231 F.Supp. 1006—Mattice v. Meyer, C.A. Neb., 353 F.2d 316—Securities and Exchange Commission v. Everest Management Corp., C.A. N.Y., 475 F.2d 1236.

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77.10. U.S.—International Union United Auto., Aerospace and Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield, 86 S.Ct. 373, 382 U.S. 205, 15 L.Ed.2d 272.

McKenna v. Pan Am. Petroleum Corp., C.A.La., 303 F.2d 778—San Francisco-Oakland Newspaper Guild v. Kennedy for and on Behalf of N.L.R.B., C.A.Cal., 404 F.2d 37—U.S. by Mitchell v. Choctaw County Bd. of Ed., C.A.Ala., 417 F.2d 838, on remand, D.C., 310 F.Supp. 804—Nichols v. Mobile Bd. of Realtors, Inc., C.A.Ala., 675 F.2d 671.

Rule of court as to actions to review administrative orders held not to require establishment of venue

U.S.—Sunray DX Oil Co. v. Federal Power Commission, C.A., 351 F.2d 395.

§ 292(22). —— Transfer or Devolution of Interest

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Federal Courts ⚖545.

82.20. Under 1961 amendment to Rule 25, substitution of successor of public officer is automatic.

Federal Rules of Civil Procedure, Rule 25(d)(1), 28 U.S.C.A.

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82.25. Federal Rules of Appellate Procedure

See F.R.A.P. Rule 43(c), 28 U.S.C.A.

§ 292(23). —— Death of Party

Library References

Federal Courts ⚖545.

82.65. U.S.—U.S. v. State of Miss., C.A.Miss., 339 F.2d 679—Devany v. U.S. by Veterans Administration, C.A.N.Y., 366 F.2d 807.

82.70. U.S.—Kingsberry Homes Corp. v. Collins, C.A.Ala., 347 F.2d 351—Devany v. U.S. by Veterans Administration, C.A.N.Y., 366 F.2d 807—Gamble v. Thomas, C.A.Tex., 655 F.2d 568.

Substitution by heirs of appellant

U.S.—Blanchard v. Commonwealth Oil Co., C.A.Tex., 294 F.2d 834.

Federal Rules of Appellate Procedure

See F.R.A.P. Rule 43(a), 28 U.S.C.A.

84. U.S.—East v. Crowdus, C.A.Mo., 302 F.2d 645.

85. U.S.—Hackin v. Lockwood, C.A.Ariz., 361 F.2d 499, cert. den. 87 S.Ct. 396, 385 U.S. 960, 17 L.Ed.2d 305.

§ 293(1). In General

Library References

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96. D.C.—Buckley v. Valeo, C.A., 519 F.2d 817, 171 U.S.App.D.C. 168.

Change in Rules

Fed.Rules Civ.Proc. Rule 73, is now F.R.A.P. Rule 3, 28 U.S.C.A.

97. U.S.—McFall v. Tooke, C.A.Ky., 308 F.2d 617—Equal Employment Opportunity Commission v. University of New Mexico, Albuquerque, New Mexico, C.A.N.M., 504 F.2d 1296—Haffa v. U.S., C.A.Ill., 516 F.2d 931.

Notice of appeal gives appellate court jurisdiction

U.S.—Donovan v Esso Shipping Co., C.A.N.J., 259 F.2d 65, cert. den. 79 S.Ct. 583, 359 U.S. 907, 3 L.Ed.2d 572—Cord v. Smith, C.A.Cal., 370 F.2d 418.

Filing in Court of Appeals held not fatal

U.S.—Richey v. Wilkins, C.A.N.Y., 335 F.2d 1.

97. Change in Rules

Fed.Rules Civ.Proc. Rule 73, is now F.R.A.P. Rule 3, 28 U.S.C.A.

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98. U.S.—Olympic Ins. Co. v. H. D. Harrison, Inc., C.A.La., 413 F.2d 973, reh. den. 418 F.2d 669.

99. U.S.—Olympic Ins. Co. v. H. D. Harrison, Inc., C.A.La., 413 F.2d 973, reh. den. 418 F.2d 669.

99.10. U.S.—Richland Knox Mut. Ins. Co. v. Kallen, C.A.Mich., 376 F.2d 360.

99.20. Change in Rules

Fed.Rules Civ.Proc. Rule 73, is now F.R.A.P. Rule 3, 28 U.S.C.A.

Under the Federal Rules of Appellate Procedure an appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court,[99.21] and failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.[99.21a]

99.21. F.R.A.P. Rule 3, 28 U.S.C.A.

99.21a. U.S.—Hebel v. Ebersole, C.A.Ill., 543 F.2d 14.

F.R.A.P. Rule 3, 28 U.S.C.A.

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99.22. U.S.—Pfizer, Inc. v. Lord, C.A.Minn., 522 F.2d 612, cert. den. Government of India v. Pfizer, Inc., 96 S.Ct. 1421, 424 U.S. 950, 47 L.Ed.2d 356, and Imperial Government of Iran v. Pfizer, Inc., 96 S.Ct. 1422, 424 U.S. 950, 47 L.Ed.2d 356.

The Federal Rules of Appellate Procedure now govern the manner in which an appeal by permission of a court of appeals obtained under 28 U.S.C.A. §. 1292(b) may be taken. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C.A. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within a specified time after the entry of such order in the district court with proof of service on all other parties to the action in the district. Provision is also made with respect to the contents of the petition and answer in opposition.[99.23]

99.23. U S.—Arlinghaus v. Ritenour, C.A.N.Y., 543 F.2d 461.

F.R.A.P. Rule 5, 28 U.S.C.A.

99.24. U.S.—Barfield v. Weinberger, C.A.Ga , 485 F.2d 696.

99.28. U.S.—Xerox Corp. v. SCM Corp., 534 F.2d 1031.

99.36. Notice of appeal held not required

U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697.

§ 293(2). Requisites and Sufficiency of Notice of Appeal

Library References

Federal Courts ⟹665, 666.

1. U.S.—Elfman Motors, Inc. v. Chrysler Corp., C.A., 567 F.2d 1252—Hanson v. Town of Flower Mound, C.A.Tex., 679 F.2d 497.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(b), are now in F.R.A.P. Rule 3(c), 28 U.S.C.A.

Form of notice of appeal

F.R.A.P. Rule 3(c), 28 U.S.C.A., states that Form 1 in the Appendix of Forms to Federal Rules of Appellate Procedure is a suggested form of a notice of appeal.

Abusive documents

U.S.—Theriault v. Silber, C.A.Tex., 574 F.2d 197.

Signature of appellant

U.S.—Covington v. Allsbrook, C.A.N.C., 636 F.2d 63, cert. den. 101 S.Ct. 1990, 451 U.S. 914, 68 L.Ed.2d 305.

1.5. Notice held to be in compliance with requirements

U.S.—Cheney v. Moler, C.A.Kan., 285 F.2d 116.

2. Intent given effect

U.S.—Hammond v. Public Finance Corp., C.A.Ga., 568 F.2d 1362.

3. U.S.—Markham v. Holt, C.A.Fla., 369 F.2d 940, app. after remand 409 F.2d 542.

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3.15. U.S.—Ruby v. Secretary of U.S. Navy, C.A. Cal., 365 F.2d 385, cert. den. 87 S.Ct. 1358, 386 U.S. 1011, 18 L.Ed.2d 442.

Absence of records held fatal to appeal

U.S.—Smith v. U.S., C.A.Cal., 272 F.2d 228, cert. den. 80 S.Ct. 868, 362 U.S. 954, 4 L.Ed.2d 871, reh. den. 80 S.Ct. 1080, 362 U.S. 992, 4 L.Ed.2d 1024.

4. U.S.—Great Lakes Stamp & Mfg. Co. v. Reese Finer Foods, Inc., C.A.Ill., 402 F.2d 346—Davis v. Department of Corrections, C.A.Cal., 446 F.2d 644—Pitts v. Vaughn, C.A.Del., 679 F.2d 311.

Notice insufficient

U.S.—In re K.M.A., Inc., C.A.Fla., 652 F.2d 398.

Substantial compliance sufficient

(2) Other matters.

U.S.—Graves v. General Ins. Corp., C.A.N.M., 381 F.2d 517.

Notice held sufficient

U.S.—Carter v. Campbell, C.A.Tex., 285 F.2d 68—Graves v. General Ins. Corp., C.A.N.M., 381 F.2d 517—Nissho-Iwai Co., Ltd. v. M/T Stolt Lion, C.A.N.Y., 617 F.2d 907, app. after remand 719 F.2d 34.

Determination not for clerk

U.S.—Graves v. General Ins. Corp., C.A.N.M., 381 F.2d 517.

4.5. U S.—Jones v. Chaney & James Const. Co., C.A. Ala., 399 F.2d 84.

4.10. U.S.—Foman v. Davis, Mass., 83 S.Ct. 227, 371 U.S. 178, 9 L.Ed 2d 222, on remand 316 F.2d 254.

Change in Rules

Fed.Rules Civ.Proc. Rule 71, is now F.R.A.P. Rule 3, 28 U.S.C.A.

Intent to appeal

U.S.—Cel-A-Pak v. California Agr. Labor Relations Bd., C.A.Cal., 680 F.2d 664, cert. den. 103 S.Ct. 491, 459 U.S. 1071, 74 L.Ed.2d 633.

4.15. U.S.—Fitzsimmons v. Yeager, 391 F.2d 849, cert. den. 89 S.Ct. 154, 393 U.S. 868, 21 L.Ed.2d 137.

Smith v. Tinsley, D.C.Colo., 35 F.R.D. 1.

5. U.S.—Knuth v. Erie-Crawford Dairy Co-op. Ass'n, C.A.Pa., 395 F.2d 420, on remand, D.C., 326 F.Supp. 48, affd. in part, revd. in part on oth. grds. 463 F.2d 470, cert. den. 93 S.Ct. 966, 410 U.S. 913, 35 L.Ed.2d 278, on remand, D.C., 58 F.R.D. 646, affd. 487 F.2d 1394—Jones v. Chaney & James Const. Co., C.A.Ala., 399 F.2d 84—Vigil v. U.S., C.A.Colo., 430 F.2d 1357.

6. U.S.—Yanow v. Weyerhaeuser S.S. Co., C.A.Or., 274 F.2d 274, cert. den. 80 S.Ct. 671, 362 U.S. 919, 4 L.Ed.2d 739—Donovan v. Esso Shipping Co., C.A.N.J., 259 F.2d 65, cert. den. 79 S.Ct. 583, 359 U.S. 907, 3 L.Ed.2d 572.

6.2. U.S.—Tryforos v. Icarian Development Co., S.A., C.A.Ill., 518 F.2d 1258, cert. den. 96 S.Ct. 887, 423 U.S 1091, 47 L.Ed.2d 103.

D.C.—Pasternack v. C. I. R., C.A., 478 F.2d 588, 155 U.S.App.D.C. 384.

6.4. Amendment allowed

U.S.—Preble v. Johnson, C.A.Okl., 275 F.2d 275.

An appeal must not be dismissed for informality of form or title of the notice of appeal.[6.10]

6.10. F.R.A.P. Rule 3(c), 28 U.S.C.A., as amended in 1979.

§ 293(3). —— Designation of Parties

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6.20. U.S.—Hendry Corp. v. American Dredging Co., C.A.Fla., 318 F.2d 299—Van Hoose v. Eidson, C.A.Ky., 450 F.2d 746.

Error of designation held not mere irregularity

U.S.—Cook & Sons Equipment, Inc. v. Killen, C.A. Alaska, 277 F.2d 607.

Omission held fatal

U.S.—Cook & Sons Equipment, Inc. v. Killen, C.A. Alaska, 277 F.2d 607.

Striking of names

U.S.—U.S. for Use and Benefit of Browne & Bryan Lumber Co. v. Massachusetts Bonding & Ins. Co., C.A.N.Y., 303 F.2d 823, cert. den. 83 S.Ct. 317, 371 U.S. 942, 9 L.Ed.2d 276, reh. den. 83 S.Ct. 871, 372 U.S. 932, 9 L.Ed.2d 736.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(b), are now in F.R.A.P. Rule 3(c), 28 U.S.C.A.

6.26. Change in Rules

Fed.Rules Civ.Proc. Rule 73, is now F.R.A.P. Rule 3, 28 U.S.C.A.

6.40. U.S.—U.S. ex rel. Frederick v. Martin, C.A. N.Y., 282 F.2d 90.

Some provisions formerly in Rule 73(b) of the Federal Rules of Civil Procedure are now in Rule 3(d) of the Federal Rules of Appellate Procedure.[6.45]

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6.45. F.R.A.P. Rule 3(d), 28 U.S.C.A.

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6.60. U.S.—Eisenberg v. Smith, C.A.Pa., 263 F.2d 827, cert. den. 79 S.Ct. 1436, 360 U.S. 918, 3 L.Ed.2d 1534—Franks v U.S. Lines Co., C.A. N.Y., 324 F.2d 126.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(b), are now in F.R.A.P. Rule 3(c), 28 U.S.C.A.

6.70. U.S.—Blitzstein v. Ford Motor Co., C.A.Ala., 288 F.2d 738.

6.75. U.S.—Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D., C.A.S.D., 259 F.2d 553, cert. den. 79 S.Ct. 320, 358 U.S. 932, 3 L.Ed.2d 304—Ruckman & Hansen, Inc. v. Contracting & Material Co., C.A.Ind., 328 F.2d 744—Benenson v. U.S., C.A.N.Y., 385 F.2d 26—Scaramucci v. Dresser Industries, Inc., C.A.Okl., 427 F.2d 1309—Terkildsen v. Waters, C.A.N.Y., 481 F.2d 201.

D.C.—Whitehead v. American Sec. & Trust Co., C.A., 285 F.2d 282, 109 U.S.App.D.C. 202—Weedon v. Gaden, C.A., 419 F.2d 303, 136 U.S.App.D.C. 1.

Notice held not to limit scope of appeal under circumstances

U.S.—Boson v. Rippy, C.A.Tex., 275 F.2d 850.

Theory not asserted by notice

U.S.—Fireman's Fund Ins. Co. v. S.E.K. Const. Co., C.A.Okl., 436 F.2d 1345.

6.80. U.S.—Donovan v. Esso Shipping Co., C.A.N.J., 259 F.2d 65, cert. den. 79 S.Ct. 583, 359 U.S. 907, 3 L.Ed.2d 572—Yoder v. Nutrena Mills, Inc., C.A.Iowa, 294 F.2d 505

7. U.S.—Cleveland v. Southern Pac. Co., C.A.Or., 436 F.2d 77.

7.25. U.S.—Maryland Tuna Corp. v. MS Benares, C.A.N.Y., 429 F.2d 307.

Not step in appellate procedure

U.S.—Bancroft Nav. Co. v. Chadale S.S. Co., C.A.N.Y., 349 F.2d 527.

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7.30. U.S.—Ginsburg v. Ginsburg, C.A.Ariz., 276 F.2d 94—Holz v. Smullan, C.A.Ill., 277 F.2d 58—Donovan v. Esso Shipping Co., C.A.N.J., 259 F.2d 65, cert. den. 79 S.Ct. 583, 359 U.S. 907, 3 L.Ed.2d 572—Lumbermen's Mut. Ins. Co. v. Massachusetts Bonding & Ins. Co., C.A.Va., 310 F.2d 627—U.S. v. Goldberg, C.A.Pa., 349 F.2d 633—Markham v. Holt, C.A.Fla., 369 F.2d 940, app. after remand 409 F.2d 542.

Appeal from new trial denial effective as from "final judgment"

U.S.—Herron v. Rozelle, C.A.Okl., 480 F.2d 282.

7.35. U.S.—Mills Music, Inc. v. State of Ariz., C.A. Ariz., 591 F.2d 1278.

§ 293(5). Time for Taking and Perfecting

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9. U.S.—Crosby v. Bradstreet Co., C.A.N.Y., 312 F.2d 483, cert. den. 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412—Fassler v. Moran, C.A.Ariz., 576 F.2d 1372—Hanson v. Town of Flower Mound, C.A.Tex., 679 F.2d 497.

Premature appeals

U.S.—Blanchard v. Commonwealth Oil Co., C.A.Tex., 294 F.2d 834—Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc., C.A.Pa., 665 F.2d 466, app. after mand 727 F.2d 279.

Change in Rules

F.R.A.P. Rule 4(a), 28 U.S.C.A., now contains provisions formerly in Fed.Rules Civ.Proc. Rule 73.

Immediate appeal

U.S.—Duplan Corp. v. Deering Milliken, Inc., D.C. S.C., 397 F.Supp. 1146.

10. U.S.—Michaels v. Chappell, C.A.Cal., 279 F.2d 600, cert. den. 81 S.Ct. 1663, 366 U.S. 940, 6 L.Ed.2d 851—Pettibone v. Cupp, C.A.Or., 666 F.2d 333.

However, the Federal Rules of Civil Procedure now govern admiralty proceedings. See Rule 1, 28 U.S.C.A., as amended in 1966.

United States held not party

U.S.—Maryland Cas. Co. v. Conner, C.A.Colo., 382 F.2d 13.

Change in Rules

U.S.—Reynolds v. Hunt Oil Co., C.A.Fla., 643 F.2d 1042.

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

10.5. U.S.—Wimberly v. Rogers, C.A.Mont., 557 F.2d 671.

Time for taking appeal tolled

U.S.—Hammond v. Public Finance Corp., C.A.Ga., 568 F.2d 1362.

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11. U.S.—Gibbs v. Town of Frisco City, Alabama Police Dept., C.A.Ala., 626 F.2d 1218.

14.5. U.S.—Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., C.A.Fla., 523 F.2d 744, cert. den. 96 S.Ct. 1725, 425 U.S. 950, 48 L.Ed.2d 194, on remand, D.C., 465 F.Supp. 478—Briggs v. Lucas, C.A.Miss., 678 F.2d 612.

D.C.—Whitehead v. American Sec. & Trust Co., C.A., 285 F.2d 282, 109 U.S.App.D.C. 202—Weedon v. Gaden, C.A., 419 F.2d 303, 136 U.S.App.D.C. 1.

Filing of notice held timely

U.S.—Blanchard v. Commonwealth Oil Co., C.A.Tex., 294 F.2d 834—Borough of Ford City v. U.S., C.A.Pa., 345 F.2d 645, cert. den. 86 S.Ct. 236, 382 U.S. 902, 15 L.Ed.2d 156—Kurdziel v. Pittsburgh Tube Co., C.A.Ohio, 416 F.2d 882—Gregson & Associates Architects v. Government of Virgin Islands, C.A.Virgin Islands, 675 F.2d 589.

Purpose of rule

U.S.—Kurdziel v. Pittsburgh Tube Co., C.A.Ohio, 416 F.2d 882—Files v. City of Rockford, C.A.Ill., 440 F.2d 811.

Appeal held accelerated by stay in district court

U.S.—Bradley v. School Board of City of Richmond, Va., C.A.Va., 456 F.2d 6.

15. U.S.—Browder v. Director, Dept. of Corrections of Illinois, Ill., 98 S.Ct. 556, 434 U.S. 257, 54 L.Ed.2d 521, reh. den. 98 S.Ct. 1286, 434 U.S. 1089, 55 L.Ed.2d 795.

Winchell v. Lortscher, C.A.Neb., 377 F.2d 247—Lindsey v. Perini, C.A.Ohio, 409 F.2d 1341—Theodoropoulos v. Thompson-Starrett Co., C.A.N.Y., 418 F.2d 350, cert. den. 90 S.Ct. 1697, 398 U.S. 905, 26 L.Ed.2d 65.

Exception to rule based on unique circumstances

U.S.—Files v. City of Rockford, C.A.Ill., 440 F.2d 811.

15.5. U.S.—Shay v. Agricultural Stabilization and Conservation State Committee for Ariz., C.A. Ariz., 299 F.2d 516—Gager v. Bob Seidel, C.A., 300 F.2d 727, 112 U.S.App.D.C. 135, cert. den. 82 S.Ct. 1612, 370 U.S. 959, 8 L.Ed.2d 835—East v. Crowdus, C.A.Mo., 302 F.2d 645—Markham v. Holt, C.A.Fla., 369 F.2d 940, app. after remand 409 F.2d 542—Montano v. Lee, C.A.Conn., 384 F.2d 172.

Gould v. Members of New Jersey Division of Water Policy and Supply, D.C.N.J., 431 F.Supp. 1237, remd., C.A., 555 F.2d 340.

15.10. U.S.—Browder v. Director, Dept. of Corrections of Illinois, Ill., 98 S.Ct. 556, 434 U.S. 257, 54 L.Ed.2d 521, reh. den. 98 S.Ct. 1286, 434 U.S. 1089, 55 L.Ed.2d 795.

Winchell v. Lortscher, C.A.Neb., 377 F.2d 247—Levisa Stone Corp. v. Elkhorn Stone Co., C.A.Ky., 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104—Albers v. Gant, C.A.Ga., 435 F.2d 146—Gulf-Tampa Drydock Co. v. Vessel Virginia Trader, C.A.Fla., 435 F.2d 150.

Exception to rule

U.S.—Martinez v. Trainor, C.A.Ill., 556 F.2d 818.

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16. U.S.—Martin v. Wainwright, C.A.Fla., 469 F.2d 1072, cert. den. 93 S.Ct. 1538, 411 U.S. 909, 36 L.Ed.2d 199.

Dismissal for want of jurisdiction

U.S.—U.S. v. Caruso, C.A.Pa., 272 F.2d 799—U.S. for Use and Benefit of Charles R. Joyce & Son, Inc., v. F. A. Baehner, Inc., C.A.N.Y., 309 F.2d 154.

Appeal held timely

U.S.—Swam v. U.S., C.A.Ill., 327 F.2d 431, cert. den. 85 S.Ct. 98, 379 U.S. 852, 13 L.Ed.2d 55—Powers v. Citizens Union Nat. Bank & Trust Co., C.A.Ky., 329 F.2d 507—Gary v. U.S. Oil Screw Echo, C.A. N.C., 334 F.2d 199—Silk v. Sandoval, C.A.Mass., 435 F.2d 1266, cert. den. 91 S.Ct. 2189, 402 U.S. 1012, 29 L.Ed.2d 435, reh. den. 92 S.Ct. 29, 404 U.S. 876, 30 L.Ed.2d 123.

Appeal held not timely

U.S.—Eastman Kodak Co. v. Fotomat Corp., C.A.Ga., 441 F.2d 1079.

16.5. U.S.—Walker v. Mathews, C.A.Wash., 546 F.2d 814.

16.10. U.S.—Edwards v. Joyner, C.A.Ga., 566 F.2d 960.

17. U.S.—Chance v. Board of Examiners and Bd. of Ed. of City of New York, 534 F.2d 993, cert. den. 97 S.Ct. 2920, 431 U.S. 965, 53 L.Ed.2d 1060, reh. den. 98 S.Ct. 243, 434 U.S. 881, 54 L.Ed.2d 164.

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17.10. However, the Federal Rules of Civil Procedure now govern admiralty proceedings. See Rule 1, 28 U.S.C.A., as amended in 1966.

Change in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

20. U.S.—Century Laminating, Ltd. v. Montgomery, C.A.N.M., 595 F.2d 563, Cert. dism. 100 S.Ct. 516, 444 U.S. 987, 62 L.Ed.2d 417.

20.65. D.C.—Lee v. Habib, C.A., 424 F.2d 891, 137 U.S.App.D.C. 403.

20.70. Changes in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

The Federal Rules of Appellate Procedure, Rules 7, 12, now govern the time for filing a bond for costs and docketing the appeal,[20.80] and the Federal Rules of Appellate Procedure, Rule 3(a), provides that failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.[20.85]

20.80. F.R.A.P. Rules 7, 12, 28 U.S.C.A.

20.85. F.R.A.P. Rule 3(a), 28 U.S.C.A.

§ 293(6). —— Final or Interlocutory Decisions

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20.90. U.S.—Lohr v. U.S., C.A.Fla., 264 F.2d 619, cert. den. 80 S.Ct. 51, 361 U.S. 814, 4 L.Ed.2d 61—Glass v. Pfeffer, C.A.Kan., 657 F.2d 252.

Change in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P Rule 4(a), 28 U.S.C.A.

21. U.S.—Hayes v. Sealtest Foods Division of Nat. Dairy Products Corp., C.A.Pa., 396 F.2d 448—C-Thru Products, Inc. v. Uniflex, Inc., C.A.N.Y., 397 F.2d 952.

22. U.S.—In re O'Bryan, C A.Okl , 399 F.2d 916, cert den. 89 S.Ct. 1014, 394 U.S 906, 22 L.Ed.2d 217, reh. den. 89 S.Ct. 1456, 394 U.S 994, 22 L.Ed.2d 772—Encoder Communications, Inc. v. Telegen, Inc., C.A.N.Y., 654 F.2d 198.

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25.50. U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697—Borskey v. American Pad & Textile Co., C.A.La., 296 F.2d 894.

Application held timely

U.S.—Mueller v. Rayon Consultants, Inc., C.A.N.Y., 271 F.2d 591—Sperry Rand Corp. v. Bell Tel. Laboratories, Inc., C.A.N.Y., 272 F.2d 29—U.S. v. Preston, C.A.Cal., 352 F.2d 352.

Federal Rules of Appellate Procedure

See F.R.A.P. Rule 5, 28 U.S.C A.

§ 293(7). —— During Transition from Old Procedure to New

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25.64. Changes in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

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25.74. U.S.—Jarva v. U.S., C.A.Cal., 280 F.2d 892—Corning Glass Works v. Puerto Rico Water Resources Authority, Inc., C.A.Puerto Rico, 396 F.2d 421.

Rule inapplicable

U.S.—In re O'Bryan, C.A.Okl., 399 F.2d 916, cert. den. 89 S.Ct. 1014, 394 U.S. 906, 22 L.Ed.2d 217, reh. den. 89 S.Ct. 1456, 394 U.S. 994, 22 L.Ed.2d 772.

Change in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

25.78. U.S.—U.S. v. American Soc. of Composers, Authors and Publishers, C.A.N.Y., 331 F.2d 117, cert. den. 84 S.Ct. 1917, 377 U.S. 997, 12 L.Ed.2d 1048.

25.88. Changes in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

§ 293(8). What Constitutes Taking and Perfecting Proceedings

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26. U.S.—Graves v. General Ins. Corp., C.A.N.M., 381 F.2d 517.

Changes in Rules

Some provisions formerly in Fed.rules Civ.Proc. Rule 73, are now in F.R.A.P. Rule 3, 28 U.S.C.A.

26.5. U.S.—Ward v. Atlantic Coast Line R. Co., C.A. Fla., 265 F.2d 75, revd. on oth. grds., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820—Graves v. General Ins. Corp., C.A.N.M., 381 F.2d 517.

26.15. Delivery to post office box

U.S.—Ward v. Atlantic Coast Line R. Co., C.A.Fla., 265 F.2d 75, revd. on oth. grds., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820.

26.20. U.S.—Ward v. Atlantic Coast Line R. Co., C.A.Fla., 265 F.2d 75, revd. on oth. grds., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820.

26.25. U.S.—Johnson v. University of Bridgeport, C A., 629 F.2d 828.

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32. U.S.—Adamian v. Jacobsen, C.A.Nev., 523 F.2d 929, app. after remand C.A., 608 F.2d 1224, cert. den. 100 S.Ct. 2158, 446 U.S. 938, 64 L.Ed.2d 791.

D.C.—Weedon v. Gaden, C.A., 419 F.2d 303, 136 U.S.App.D.C. 1.

Acceptance of remittitur

U.S.—Howell v. Marmpegaso Compania Naviera, S.A., C.A.La., 566 F.2d 992.

Entry of judgment not required

U.S.—A. O. Smith Corp. v. Sims Consol. Ltd., C.A. Colo., 647 F.2d 118.

34. U.S.—U.S. v. Dixie Highway Exp., Inc., Miss., 88 S.Ct. 539, 389 U.S. 409, 19 L.Ed.2d 639, on remand, D.C., 287 F.Supp. 473.

Does not supersede first judgment

U.S.—Dubose v. Harris, D.C.Conn., 434 F.Supp. 227.

36.5. U.S.—Gary v. U.S. Oil Screw Echo, C.A.N.C., 334 F.2d 199.

36.50. U.S.—Nichols-Morris Corp. v. Morris, C.A. N.Y., 272 F.2d 586—Superior Life Ins. Co. v. U.S., C.A.S.C., 462 F.2d 945—Sepia Enterprises, Inc. v. City of Toledo, C.A.Ohio, 462 F.2d 1315.

Federal Rules of Civil Procedure, Rule 58, 28 U.S. C.A., was amended in 1963, eliminating such provision and provides that every judgment shall be set forth on a separate document and a judgment is effective only when so set forth and when entered as provided in Rule 79(a).

Change in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

Date judgment recorded on "separate document" controls

U.S.—U.S. v. Indrelunas, Ill., 93 S.Ct. 1562, 411 U.S. 216, 36 L.Ed.2d 202.

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37. U.S.—Nichols-Morris Corp. v. Morris, C.A.N.Y., 272 F.2d 586.

D.C.—Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, C.A., 500 F.2d 808, 163 U.S.App.D.C. 140.

Prior to amendment of rule 77d period commenced running from date of notice of entry.

U.S.—Nichols-Morris Corp. v. Morris, C.A.N.Y., 279 F.2d 81.

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37.34. Federal Rules of Civil Procedure, Rule 58, 28 U.S.C.A., was amended in 1963, to include the general verdict of a jury.

37.40. U.S.—Caperton v. Beatrice Pocahontas Coal Co., C.A.Va., 585 F.2d 683.

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37.42. U.S.—Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D., C.A.S.D., 259 F.2d 353, cert. den. 79 S.Ct. 320, 358 U.S. 932, 3 L.Ed.2d 304—Beacon Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., C.A.Wis., 266 F.2d 246, cert. den. 80 S.Ct. 70, 361 U.S. 823, 4 L.Ed.2d 67.

37.44. U.S.—Beacon Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., C.A.Wis., 266 F.2d 246, cert. den. 80 S.Ct. 70, 361 U.S. 823, 4 L.Ed.2d 67.

37.46. U.S.—Johann Maria Farina Gegenuber Dem Neumarkt v. Roger & Gallet, C.A.N.Y., 296 F.2d 119.

37.48. U.S.—Danzig v. Virgin Isle Hotel, Inc., C.A. Virgin Islands, 278 F.2d 580—Associated Press v. Taft-Ingalls Corp., C.A.Ohio., 323 F.2d 114.

Phan v. Friders, D.C.Ill., 91 F.R.D. 408.

37.52. U.S.—Funk v. Franklin Life Ins. Co., C.A.Ill., 392 F.2d 913.

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37.80. U.S.—Lundgren v. Freeman, C.A., 292 F.2d 489.

37.82. U.S.—U.S. for Use of Hudson v. Peerless Ins. Co., C.A Va., 374 F.2d 942.

39. U.S.—Howze v. Arrow Transp. Co., C.A.Ala., 280 F.2d 403, cert. den. 81 S.Ct. 285, 364 U.S. 920, 5 L.Ed.2d 260.

Appeal held timely

U.S.—Lundgren v. Freeman, C.A., 292 F.2d 489.

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42. U.S.—Williams v. Town of Okoboji, C.A.Iowa, 599 F.2d 238.

43.10. U.S.—Farmington Dowel Products Co. v. Forster Mfg. Co., C.A.Me., 421 F.2d 61, app. after remand 436 F.2d 699.

Limitation to specifically enumerated motions

U.S.—Sonneblick-Goldman Corp. v. Nowalk, C.A.Pa., 420 F.2d 858.

43.15. U.S.—Gila River Ranch, Inc. v. U.S., C.A. Ariz., 368 F.2d 354.

§ 293(12). —— —— Motions Extending or Not Extending time

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43.50. U.S.—Scola v. Boat Frances, R., Inc., C.A. Mass., 618 F.2d 147.

Motion for judgment non obstante veredicto

U.S.—Pierre v. Jordan, C.A.Cal., 333 F.2d 951.

Rule 73(a) of the Federal Rules of Civil Procedure is now Rule 4(a) of the Federal Rules of Appellate Procedure, which enumerates the motions which will terminate the running of time for appeal.[43.51]

43.51. F.R.A.P. Rule 4(a), 28 U.S.C.A.

43.55. U.S.—Keohane v. Swarco, Inc., C.A.Ohio, 320 F.2d 429—Markham v. Holt, C.A.Fla., 369 F.2d 940, app. after remand 409 F.2d 542.

As depending on whether judgment is materially and substantially modified

U.S.—U.S. v. 1,674.34 Acres of Land, More or Less, in Benton County, Ark., D.C.Ark., 220 F.Supp. 893.

43.65. U.S.—Motteler v. J. A. Jones Const. Co., C.A. Ind., 447 F.2d 954.

Motion construed as to alter or amend judgment

U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed 2d 361.

(2) Other instances

U.S.—Lieberman v. Gulf Oil Corp., C.A.N.Y., 315 F.2d 403, cert. den. 84 S Ct. 62, 375 U.S. 823, 11 L.Ed.2d 56—Pierre v Jordan, C.A.Cal., 333 F.2d 951—Theodoropoulos v. Thompson-Starrett Co., C.A.N.Y., 418 F 2d 350, cert. den. 90 S.Ct. 1697, 398 U.S. 905, 26 L.Ed.2d 65

Motion construed as not to alter or amend judgment

(2) Other instances.

U.S.—Conerly v. Flower, C.A.Ark., 410 F.2d 941.

Motion to reconsider

U.S.—Woodham v. American Cystoscope Co. of Pelham, N.Y., C.A.Ga., 335 F.2d 551.

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44. U.S.—Albers v. Gant, C.A.Ga., 435 F.2d 146—U.S. v. 1,431.80 Acres of Land, More or Less, in Cross County, Ark., C.A.Ark., 466 F.2d 820.

44.5. U.S.—Lieberman v. Gulf Oil Corp., C.A.N.Y., 315 F.2d 403, cert. den. 84 S.Ct. 62, 375 U.S. 823, 11 L.Ed.2d 56.

44.10. U.S.—Sutherland v. Fitzgerald, C.A.Colo., 291 F.2d 846—Muhs v. Acme-Hamilton Mfg. Co., C.A.N.J., 319 F.2d 843—Swam v. U.S., C.A.Ill., 327 F.2d 431, cert. den. 85 S.Ct. 98, 379 U S. 852, 13 L.Ed.2d 55.

44.15. U.S.—Shay v. Agricultural Stabilization and Conservation State Committee for Ariz., C.A. Ariz., 299 F.2d 516.

45.5. U.S.—Wimberly v. Rogers, C.A.Mont., 557 F.2d 671.

Vacation of order of dismissal

U.S.—Dockery v. Travelers Co. of Hartford, Conn., C.A.Ga., 349 F.2d 1017.

Time not tolled by motion to vacate order

(2) Other instances.

U.S.—Foman v. Davis, C.A.Mass., 292 F.2d 85, cert. gr. 82 S.Ct. 396, 368 U.S. 951, 7 L.Ed.2d 385.

Motion to vacate and re-enter judgment held not to extend time for appeal.

D.C.—Lord v. Helmandollar, C.A., 348 F.2d 780, 121 U.S.App.D.C. 168, cert. den. 86 S.Ct. 929, 383 U.S. 928, 15 L.Ed.2d 847, reh. den. 86 S.Ct. 1453, 384 U.S. 947, 16 L.Ed.2d 545.

Time for interlocutory appeal not extended by vacation and refiling of order to permit timely application

U.S.—Woods v. Baltimore & O.R. Co., C.A.Ohio, 441 F.2d 407.

Time not extended

U.S.—Textile Banking Co., Inc. v. Rentschler, C.A.Ill., 657 F.2d 844.

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45.50. U.S.—Wirtz v. International Harvester Co., C.A.Tex., 331 F.2d 462, cert. den. 85 S.Ct. 36, 379 U.S. 845, 13 L.Ed.2d 50—Director of Revenue, State of Colo. v. U.S., C.A.Colo., 392 F.2d 307—Miller v. Leavenworth-Jefferson Elec. Co-op., Inc., C.A.Kan., 653 F.2d 1378.

Glick v. White Motor Co., D.C.Pa., 317 F.Supp. 42, affd., C.A., 458 F.2d 1287.

Changes in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

46. U.S.—Yanow v. Weyerhaeuser S.S. Co., C.A.Or., 274 F.2d 274, cert. den. 80 S.Ct. 671, 362 U.S. 919, 4 L.Ed.2d 739.

D.C.—Yates v. Behrend, C.A., 280 F.2d 64, 108 U.S. App.D.C. 56.

46.4. U.S.—Morris v. Uhl & Lopez Engineers, Inc., C.A.N.M., 442 F.2d 1247, app. after remand 468 F.2d 58.

46.6. U.S.—Sleek v J. C. Penney Co., C.A.Pa., 292 F.2d 256—Gainey v. Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp and Station Emp., C.A.Pa, 303 F.2d 716—Pacific Maritime Ass'n v. Quinn, C.A.Cal., 465 F.2d 108—Gibson v. Local 40, Super-Cargoes and Checkers of Intern. Longshoremen's and Warehousemen's Union, C.A.Or., 465 F.2d 108—Richerson v Jones, C.A.Pa., 572 F.2d 89.

D C—Roscoe v. Roscoe, C.A., 379 F.2d 94, 126 U.S. App.D.C. 317.

46.8. U.S.—Gainey v Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp, C.A.Pa., 303 F.2d 716—Vine v. Beneficial Finance Co., C.A.N Y., 374 F.2d 627, cert. den 88 S.Ct. 463, 389 U S. 970, 19 L.Ed.2d 460—Maryland Tuna Corp. v. MS Benares, C.A N.Y., 429 F.2d 307.

46.12. U.S.—Vine v. Beneficial Finance Co., C.A. N.Y., 374 F.2d 627, cert. den 88 S Ct 463, 389 U.S. 970, 19 L.Ed.2d 460—Theodoropoulos v. Thompson-Starrett Co, C A N.Y, 418 F.2d 350, cert. den 90 S Ct. 1697, 398 U.S. 905, 26 L.Ed.2d 65.

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46.14. D.C.—American Sec. Bank, N.A. v. John Y. Harrison Realty, Inc., C.A., 670 F.2d 317, 216 U.S.App D.C. 159.

Motion for reconsideration of prior order

(2) Other matters.

U.S.—Dockery v. Travelers Co. of Hartford, Conn., C.A.Ga., 349 F.2d 1017.

§ 293(13). —— —— Timeliness; Entertainment by Court

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46.40. U.S.—Grantham v. McGraw-Edison Co., C.A. Ill., 444 F.2d 210—Black v. U.S., C.A.Utah, 444 F.2d 1215—Watkins v. Grover, C.A.Cal., 452 F.2d 1197—Torockio v. Chamberlain Mfg. Co., C.A.Pa., 456 F.2d 1084, on remand 56 F.R.D. 82.

Changes in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

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46.42. U.S.—Fowler v. Smiser, C.A.Okl., 274 F.2d 335, cert. den. 80 S.Ct. 1076, 362 U.S. 988, 4 L.Ed.2d 1022.

Notification of intention to file motion insufficient

U.S.—Wagoner v. Fairview Consol. School Dist. No. 5, C.A.Colo., 289 F.2d 480, cert. den. 82 S.Ct. 241, 368 U.S. 921, 7 L.Ed.2d 135.

46.48. U.S.—Squillacote v. Local 248, Meat and Allied Food Workers, 534 F.2d 735.

46.54. U.S.—Schlink v. Chesapeake & O. Ry. Co., C.A.Mich., 276 F.2d 116—Sonnenblick-Goldman Corp. v. Nowalk, C.A.Pa., 420 F.2d 858.

Motion for new trial or rehearing

U.S.—Fowler v. Smiser, C.A.Okl., 274 F.2d 335, cert. den. 80 S.Ct. 1076, 362 U.S. 988, 4 L.Ed.2d 1022—Wagoner v. Fairview Consol. School Dist. No. 5, C.A.Colo., 289 F.2d 480, cert. den. 82 S.Ct. 241, 368 U.S. 921, 7 L.Ed.2d 135—Hulson v. Atchison, T. & S.F. Ry. Co., C.A.Ill., 289 F.2d 726, cert. den. 82 S.Ct. 61, 368 U.S. 835 7 L.Ed.2d 36—Martin v. Wainwright, C.A.Fla., 469 F.2d 1072, cert. den. 93 S.Ct. 1538, 411 U.S. 909, 36 L.Ed.2d 199.

Motion to vacate judgment

U.S.—Demers v. Brown, C.A.R.I., 343 F.2d 427, cert. den. 86 S.Ct. 40, 382 U.S. 818, 15 L.Ed.2d 64, reh. den. 86 S.Ct. 309, 382 U.S. 933, 15 L.Ed.2d 345.

Request for three-judge court hearing

U S.—Demers v. Brown, C.A.R.I., 343 F.2d 427, cert. den. 86 S.Ct. 40, 382 U S. 818, 15 L.Ed.2d 64, reh. den. 86 S.Ct. 309, 382 U.S. 933, 15 L.Ed.2d 345.

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46.60. U.S.—Sutherland v. Fitzgerald, C.A.Colo., 291 F.2d 846.

46.64. U.S.—Crawford v. West India Carriers, Inc., D.C.Fla., 56 F.R.D. 32.

§ 293(14). —— —— Disposition of Motion

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50.40. U.S.—U.S. v. Pan Am. World Airways Inc., C.A.Fla., 299 F.2d 74, cert. den. 82 S.Ct. 1556, 370 U.S. 918, 8 L.Ed 2d 499, reh. den. 83 S.Ct. 17, 371 U.S. 856, 9 L.Ed.2d 93, revd. on oth. grds. 86 S.Ct. 153, 382 U.S. 25, 15 L.Ed.2d 21—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247.

D.C.—Gager v. Bob Seidel, C.A., 300 F.2d 727, 112 U.S.App D.C. 135, cert. den. 82 S.Ct. 1612, 370 U.S. 959, 8 L.Ed.2d 835.

50.41. U.S.—Yanow v. Weyerhaeuser S.S. Co., C.A. Or., 274 F.2d 274, cert. den. 80 S.Ct. 671, 362 U.S. 919, 4 L.Ed.2d 739.

50.42. Changes in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C A.

50.44. U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361.

D.C.—Yates v. Behrend, C.A., 280 F.2d 64, 108 U.S. App.D.C. 56.

"Disposition" construed

U.S.—Calhoun v. U.S., C.A.Cal., 647 F.2d 6.

§ 293(15). Extension of Time

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50.60. U.S.—Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., Ill., 83 S.Ct. 283, 371 U.S. 215, 9 L.Ed.2d 261, on remand 313 F.2d 864, cert. den. 84 S.Ct. 59, 375 U.S. 821, 11 L.Ed.2d 55.

Bond v. Western Auto Supply Co., C.A.La., 654 F.2d 302.

Federal Rules of Civil Procedure, Rule 73(a), 28 U.S.C.A., was amended in 1966, deleting phrase "based on the failure of a party to learn of the entry of the judgment." Rule 73(a) is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

Term "party" viewed in context of rule

U.S.—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247.

No extension by appellate court

U.S.—Martinez v. Trainor, C.A.Ill., 556 F.2d 818.

Wesley v. Israel, D.C.Wis., 525 F.Supp. 646.

The Federal Rules of Appellate Procedure provide that upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the Rules. Such an extension may be granted before or after the time otherwise prescribed has expired; but if a request for an extension is made after such time has expired, it shall be

made by motion with such notice as the court shall deem appropriate.[50.60a]

50.60a. U.S.—Benoist v. Brotherhood of Locomotive Engineers, C.A.Mo., 555 F.2d 671.

Wesley v. Israel, D.C.Wis., 525 F.Supp. 646.

Burden of establishing excusable neglect

U.S.—Craig v. Garrison, C.A.N.C., 549 F.2d 306.

F.R.A.P. Rule 4(a) 28 U.S.C.A.

Excusable neglect not shown

U.S.—Import Specialties, Inc. v. Mylee Digital Sciences, Inc., D.C.Wis., 518 F.Supp. 1295.

Extension not warranted by engagement of counsel in other matters

U.S.—Maryland Cas. Co. v. Conner, C.A.Colo., 382 F.2d 13—Files v. City of Rockford, C.A.Ill., 440 F.2d 811.

50.61. U.S.—Diffenderfer v. Homer, C.A.Fla., 408 F.2d 1344—Levisa Stone Corp. v. Elkhorn Stone Co., C.A.Ky., 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104—Gann v. Smith, C.A.Miss., 443 F.2d 352—Chinese Maritime Trust, Limited v. Carolina Shipping Co., C.A.S.C., 456 F.2d 192.

Right must be clearly established

U.S.—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247.

Time for ex parte extension

U.S.—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247.

50.63. U.S.—Beacon Federal Sav. and Loan Ass'n v. Federal Home Loan Bank Bd., C.A.Wis., 266 F.2d 246, cert. den. 80 S.Ct. 70, 361 U.S. 823, 4 L.Ed.2d 67.

50.65. U.S.—Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., Ill., 83 S.Ct. 283, 371 U.S. 215, 9 L.Ed.2d 261, on remand 313 F.2d 864, cert. den. 84 S.Ct. 59, 375 U.S. 821, 11 L.Ed.2d 55.

Federal Rules of Civil Procedure, Rule 73(a), 28 U.S.C.A., was amended in 1966, deleting reference to neglect based on the failure of a party to learn of the entry of the judgment.

Rule 73(a) is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

Requisite showing held not made

U.S.—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247—Gilroy v. Erie Lackawanna R. Co., C.A.N.Y., 421 F.2d 1321.

Russo v Flota Mercante Grancolombiana, D.C. N.Y., 303 F.Supp. 1404.

Burden of proof

U.S.—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247.

50.66. U.S.—Long v. Emery, C.A.Kan., 383 F.2d 392—Levisa Stone Corp. v. Elkhorn Stone Co., C.A.Ky., 411 F.2d 1208, cert. den. 90 S.Ct. 913, 397 U.S. 925, 25 L.Ed.2d 104.

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50.67. U.S.—Swanson v. American Consumer Industries, Inc., C.A.Ill., 517 F.2d 555.

50.69. U.S.—Harlan v. Graybar Elec. Co., C.A.Cal., 442 F.2d 425.

Other construction as rendering rule meaningless

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

Fed.Rules Civ.Proc. Rule 73(b), is now F.R.A.P. Rule 3(c), 28 U.S.C.A.

50.70. U.S.—Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., Ill., 83 S.Ct. 283, 371 U.S. 215, 9 L.Ed.2d 261, on remand 323 F.2d 864, cert. den. 84 S.Ct. 59, 375 U.S. 821, 11 L.Ed.2d 55.

Reed v. People of State of Mich., C.A.Mich., 398 F.2d 800—Pasquale v. Finch, C.A.R.I., 418 F.2d 627.

50.71. U.S.—Crosby v. Bradstreet Co., C.A.N.Y., 312 F.2d 483, cert. den. 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412—Pasquale v. Finch, C.A.R.I., 418 F.2d 627—Grantham v. Morgan Linen Serv. Inc., C.A.Ill., 426 F.2d 237.

Vacating and reentering judgment ineffective to start appeal time anew.

U.S.—Polara v. Trans World Airlines, Inc., D.C.N.Y., 179 F.Supp. 957.

Total period limited to 60 days

U.S.—Winchell v Lortscher, C.A.Neb., 377 F.2d 247.

Additional excuses not considered

U.S.—Winchell v. Lortscher, C.A.Neb., 377 F.2d 247.

Delay held jurisdictional defect

U.S.—Russo v. Flota Mercante Grancolombiana, D.C. N.Y., 303 F.Supp. 1404.

50.72. U.S.—Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., Ill., 83 S.Ct. 283, 371 U.S. 215, 9 L.Ed.2d 261, on remand 313 F.2d 864, cert. den. 84 S.Ct. 59, 375 U.S 821, 11 L.Ed.2d 55.

C-Thru Products, Inc. v. Uniflex, Inc., C.A N.Y., 397 F.2d 952—Pasquale v. Finch, C.A.R.I., 418 F.2d 627—Grantham v. Morgan Linen Serv. Inc., C.A.Ill., 426 F.2d 237.

D.C.—Yates v. Behrend, C.A., 280 F.2d 64, 108 U.S. App.D.C. 56.

Denial not abuse of discretion

U.S.—Nichols-Morris Corp. v. Morris, C.A.N.Y., 279 F.2d 81.

Fraud, deception, coercion, or duress

U.S.—Thompson v. Trent Maritime Co., C.A.Pa., 343 F.2d 200.

Matter of discretion

D C.—In re Buckingham Super Markets, Inc., C.A., 534 F.2d 976, 175 U.S.App.D.C. 239.

50.73. U.S.—Cohen v. Plateau Natural Gas Co., C.A. Kan., 303 F.2d 273, cert. den. 83 S.Ct. 45, 371 U.S. 825, 9 L.Ed.2d 64—Plant Economy, Inc. v. Mirror Insulation Co, C.A.N.J., 308 F.2d 275.

50.74. U.S.—Cohen v. Plateau Natural Gas Co., C.A. Kan., 303 F.2d 273, cert. den. 83 S.Ct. 45, 371 U.S. 825, 9 L.Ed.2d 64—Diffenderfer v. Homer, C.A.Fla., 408 F.2d 1344—Way v. Gaffney, C.A. Kan., 434 F.2d 996—Files v. City of Rockford, C.A.Ill., 440 F.2d 811.

50.80. Extension of time denied

U.S.—U.S. v. Bowen, C.A.Fla., 306 F.2d 620, adhered to 310 F.2d 45—U.S. v. Bowen, C.A.Fla., 310 F.2d 45.

Change in Rules

Fed.Rules Civ.Proc. Rules 73(e), 73(g) have been abrogated, and provisions for extension of time for perfecting appeal are now in F.R.A.P. Rules 11, 26(b), 28 U.S.C.A.

50.85. U.S.—Thompson v. Immigration and Naturalization Service, Ill., 84 S.Ct. 397, 375 U.S. 384, 11 L.Ed.2d 404, on remand, C.A., 332 F.2d 167.

Gilroy v. Erie Lackawanna R. Co., C.A.N.Y., 421 F.2d 1321.

Matters held not to require extension

U.S.—U.S. v. Bowen, C.A.Fla., 310 F.2d 45.

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50.90. Dismissal

U.S.—Gilroy v. Erie Lackawanna R. Co., C.A.N.Y, 421 F.2d 1321.

52. U.S.—In re Orbitec Corp., C.A.N.Y., 520 F.2d 358.

§ 293(16). Premature Appeal

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57. U.S.—Trice v. Commercial Union Assur. Co., C.A.Tenn., 334 F.2d 673, cert. den. 85 S.Ct. 895, 380 U.S. 915, 13 L.Ed.2d 801, app. after remand 397 F.2d 889, cert. den. 89 S.Ct. 623, 393 U.S. 1018, 21 L.Ed.2d 563—Union Tank Car Co. v. Isbrandtsen, C.A., 416 F.2d 96.

Sampson v. Ampex Corp., D.C.N.Y., 335 F.Supp. 242.

Appeal not dismissed as premature

U.S.—Great Am. Ins. Co. v. Harleysville Mut. Cas. Co., C.A.N.C., 285 F.2d 262—Markham v. Holt, C.A. Fla., 369 F.2d 940, app. after remand 409 F.2d 542.

Matter pending as to some of several defendants as premature

U.S.—Haldane v. Chagnon, C.A.Cal., 345 F.2d 601.

57.5. U.S.—Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd., C.A.Fla., 650 F.2d 633.

57.20 U.S.—Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., C.A.La., 746 F.2d 278, reh. gr. in part 760 F.2d 86.

57.30 U.S.—Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., C.A La., 746 F.2d 278, reh. gr. in part 760 F.2d 86

57.35. U.S.—Coopers and Lybrand v. Livesay, 98 S.Ct. 2454, 437 U.S. 463, 57 L.Ed.2d 351.

Richardson v. U.S., C.A.Alaska, 336 F.2d 265—Smith v. Fairfax County School Bd., C.A.Va., 497 F.2d 899.

57.45. Change in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 4(a), 28 U.S.C.A.

57.50. U.S.—Sanchez v. Breed, C.A.Cal., 464 F.2d 448.

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58.5. U.S.—Markham v. Holt, C.A.Fla., 369 F.2d 940, app. after remand 409 F.2d 542.

58.10. U.S.—Walker v. Bank of America Nat. Trust and Sav. Ass'n, C.A.Cal., 268 F.2d 16, cert. den. 80 S.Ct. 211, 361 U.S. 903, 4 L.Ed.2d 158, reh. den. 80 S.Ct. 367, 361 U.S. 941, 4 L.Ed.2d 361—Gaudiosi v. Mellon, C.A.Pa., 269 F.2d 873, cert. den. 80 S.Ct. 311, 361 U.S. 902, 4 L.Ed.2d 157.

58.20. U.S.—Gaudiosi v. Mellon, C.A.Pa., 269 F.2d 873, cert. den. 80 S.Ct. 211, 361 U.S. 902, 4 L.Ed.2d 157—Turner v. HMH Pub. Co., C.A.Ga., 328 F.2d 136.

Since the publication of Corpus Juris Secundum, the cases of Segundo v. U.S., C.C.Cal., 221 F.2d 296, and RFC v. Mouat, C.A.Mont., 184 F.2d 44 have been overruled to the extent of inconsistency with the holding that the notice of appeal remains on file during the pendency of the post-judgment motions and becomes effective when the judgment becomes final on the denial of the motions.

U.S.—Song Jook Suh v. Rosenberg, C.A.Cal., 437 F.2d 1098.

59.5. U.S.—Sykes v. U.S., C.A.Ark., 392 F.2d 735, app. after remand 420 F.2d 324.

Notice of appeal remains in abeyance

U.S.—Song Jook Suh v. Rosenberg, C.A.Cal., 437 F 2d 1098.

59.10. U.S.—Serio v. Badger Mut. Ins. Co., C.A. Miss., 266 F.2d 418, cert. den. 80 S.Ct 81, 361 U.S. 832, 4 L.Ed.2d 73—Ryan v. Occidental Petroleum Corp., C.A.Tex., 577 F.2d 298.

59.15. U.S.—Rabekoff v. Lazere & Co., C.A.N.Y., 323 F.2d 865—Tracy v. Robbins, C.A.S.C., 373 F.2d 13.

59.20. U.S.—Ryan v. Occidental Petroleum Corp., C.A.Tex., 577 F.2d 298.

Ill.—Bloom v. Landy, 389 N.E.2d 1286, 27 Ill.Dec. 878, 72 Ill.App 3d 383

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59.30. U.S.—General Const. Co. v. Hering Realty Co., C.A.S.C., 312 F.2d 538.

The Federal Rules of Civil Procedure provide that when more than one claim for relief is presented in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims of the parties where there is no just reason for delay.[59.35] Although there is authority to the contrary,[59.40] under this Rule where an appellant prematurely appeals from a nonfinal order of a district court, but obtains a district court certification of

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appeal rendering the order final and appealable prior to a court of appeals' consideration of the appeal, a court of appeal has jurisdiction over the appeal,[59.45] at least where appellees do not seek dismissal of the appeal for lack of appellate jurisdiction[59.50] and do not claim prejudice as a result of the district court's belated action.[59.55]

59.35 Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.

59.40 U.S.—Oak Const. Co. v. Huron Cement Co., C.A.Mich., 475 F.2d 1220—Kirtland v. J. Ray McDermott & Co., C.A.La., 568 F.2d 1166—Mullins v. Nickel Plate Mining Co., Inc., C.A.Ala., 691 F.2d 971—A. O. Smith Corp. v. Sims Consol. Ltd., C.A.Colo., 647 F.2d 118

59.45 U.S.—Gumer v. Shearson, Hammill & Co., Inc., C.A.N.Y., 516 F.2d 283—Dawson v. Chrysler Corp., C.A.N.J., 630 F.2d 950, cert. den. 101 S.Ct. 1418, 450 U.S. 959, 67 L.Ed.2d 383—Freeman v. Hittle, C.A.Wash., 747 F.2d 1299—Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis., C.A.Wis., 760 F.2d 177 declining to follow Mullins v. Nickel Plate Mining Co., 691 F.2d 971, A.O. Smith Corp. v. Sims Consolidated Ltd., 647 F.2d 118, Kirtland v. J. Ray McDermott & Co., 568 F.2d 1166; Oak Construction Co. v. Huron Cement Co., 475 F.2d 1220.

Certification treated as equivalent to certification under Rule 54

U.S.—Local P-171, Amalgamated Meat Cutters and Butchers Workmen of North America v. Thompson Farms Co., C.A.Ill., 642 F.2d 1065.

59.50 U.S.—Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis., C.A.Wis., 760 F.2d 177.

59.55 U.S.—Dawson v. Chrysler Corp., C.A.N.J., 630 F.2d 950, cert. den. 101 S.Ct. 1418, 450 U.S. 959, 67 L.Ed.2d 383—Freeman v. Hittle, C.A.Wash., 747 F.2d 1299—Lac Courte Oreilles Band of Lake Superior Chippewa Indians, State of Wis., C.A. Wis., 760 F.2d 177.

Permissive appeals. Under 28 U.S.C.A. § 1292(b), appeals from interlocutory decisions not otherwise appealable are premature where the district judge does not certify that an immediate appeal therefrom would materially advance the termination of the litigation.[59.75]

59.75. U.S.—U.S. to Use of Mustin v. Al-Con Development Corp., C.A.Va., 271 F.2d 901—Cullen v. Margiotta, C.A.N.Y., 618 F.2d 226.

Statement of reasons

U.S.—Rothenberg v. Security Management Co., Inc., C.A.Ga., 617 F.2d 1149, reh. den. 623 F.2d 711, cert. den. 101 S.Ct. 359, 449 U.S. 954, 66 L.Ed.2d 218.

Under this statute a district court may certify an interlocutory order for immediate appellate review notwithstanding that the defendant has filed a notice of appeal on another issue.[59.80]

59.80 U.S.—Marrese v. American Academy of Orthopaedic Surgeons, Ill., 105 S.Ct. 1327, 84 L.Ed.2d 274, reh. den. 105 S.Ct. 2127, 85 L.Ed.2d 491.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis., C.A.Wis., 760 F.2d 177.

§ 293(17). Application for, and Allowance of, Appeal

Library References

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60. U.S.—Rhodes v. Sigler, C.A.Neb., 448 F.2d 1237.

Appeal a matter of right

(2) Other statements.

U.S.—Liles v. South Carolina Dept. of Corrections, C.A.S.C., 414 F.2d 612—In re Continental Inv. Corp., C.A.Mass., 637 F.2d 1.

Expedited certification procedure

D.C.—International Ass'n of Machinists and Aerospace Workers v. Federal Election Commission, C.A., 678 F.2d 1092, 220 U.S.App.D.C. 45, affd. 103 S.Ct. 335, 459 U.S. 983, 74 L.Ed.2d 379.

Failure to seek immediate review not waiver

D.C.—Jacksonville Port Authority v. Adams, C.A., 556 F.2d 52, 181 U.S.App.D.C. 175.

60.5. U.S.—Donovan v. Esso Shipping Company, C.A.N.J., 259 F.2d 65, cert. den. 79 S.Ct. 583, 359 U.S. 907, 3 L.Ed.2d 572.

Rule 73(a) of the Federal Rules of Civil Procedure has been abrogated and Rules 3, 4(a) of the Federal Rules of Appellate Procedure now provide how and when appeals as of right are taken.[60.6]

60.6. U.S.—Glass v. Pfeffer, C.A.Kan., 657 F.2d 252.
F.R.A.P Rules 3, 4(a), 28 U.S.C.A.

60.10. U.S.—Fernandez-Roque v. Smith, C.A.Ga., 671 F.2d 426, on remand, D.C., 539 F.Supp. 925.

60.15. U.S.—Hullom v. Burrows, C.A.Mich., 266 F.2d 547, cert. den. 80 S.Ct. 262, 361 U.S. 919, 4 L.Ed.2d 187.

In the absence of a showing that class certification affects substantial rights of the parties, it is doubtful that reversal of certification on appeal is ever appropriate.[60.20]

60.20. U.S.—Board of Ed. of Tp. High School Dist. No. 214, Cook County, Ill. v. Climatemp, Inc., D.C.Ill., 91 F.R.D. 245.

D.C.—Dellums v. Powell, C.A., 566 F.2d 167, 184 U.S.App.D.C. 275, cert. den. 98 S.Ct. 3146, 438 U.S. 916, 57 L.Ed.2d 1161, reh. den. 99 S.Ct. 234, 439 U.S. 886, 58 L.Ed.2d 201, on remand, D.C., 490 F.Supp. 70, affd. in part, revd. in part on oth. grds., C.A., 660 F.2d 802, 212 U.S.App.D.C. 403.

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63.25. **Appeal dismissed**

U.S.—Kramer v. Scientific Corp., 534 F.2d 1085, cert. den. 97 S.Ct. 90, 429 U.S. 830, 50 L.Ed.2d 94.

63.50. U.S.—Bounds v. Smith, N.C., 97 S.Ct. 1491, 430 U.S. 817, 52 L.Ed.2d 72.

Richardson v. Communications Workers of America, C.A.Neb., 469 F.2d 333, cert. den. 94 S.Ct. 38, 414 U.S. 818, 38 L.Ed.2d 50—In re Massachusetts Helicopter Airlines, Inc., C.A.Mass., 469 F.2d 439—DeMelo v. Woolsey Marine Industries, Inc., C.A.5, 677 F.2d 1030.

Steele v. Wiedemann Mach. Co., D.C.Pa., 178 F.Supp. 870, cause remd., C.A., 280 F.2d 380.

Leave denied

U.S.—President and Directors of Georgetown College v. Madden, C.A.Md., 660 F.2d 91.

Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 401 F.Supp. 637—In in Exterior Siding and Aluminum Coil Litigation, D.C.Minn., 538 F.Supp. 45.

D.C.—Lattisaw v. Lattisaw, C.A., 359 F.2d 258, 123 U.S.App.D.C. 274.

Majority of panel of Court of Appeals required

U.S.—Hadjipateras v. Pacifica, S.A., C.A.Canal Zone, 290 F.2d 697.

Federal Rules of Appellate Procedure

(1) Time.

U.S.—Aparicio v. Swan Lake, C.A.Canal Zone, 643 F.2d 1109.

See F.R.A.P. Rule 5, 28 U.S.C.A.

One consideration

U.S.—DeWitt v. American Stock Transfer Co., D.C. N.Y., 440 F.Supp. 1084.

63.55. U.S.—Falik v. U.S., C.A.N.Y., 343 F.2d 38—Ryan v. Occidential Petroleum Corp., C.A.Tex., 577 F.2d 298—Page v. Preisser, C.A.Iowa, 585 F.2d 336.

In re Exterior Siding and Aluminum Coil Litigation, D.C.Minn., 538 F.Supp. 45.

63.60. U.S.—Matter of Doe, C.A.N.Y., 546 F.2d 498—New York City Health and Hospitals Corp. v. Blum, C.A.N.Y., 678 F.2d 392, app. after remand 708 F.2d 880.

No substantial grounds

U.S.—Feder v. Turkish Airlines, D.C.N.Y., 441 F.Supp. 1273.

63.65. U.S.—In re U.S. Financial Securities Litigation, 69 F.R.D. 24.

Difference of opinion

(1) U.S.—Gottesman v. General Motors Corp., D.C. N.Y., 171 F.Supp. 661, app. den., C.A., 268 F.2d 194.

63.70. U.S.—Kraus v. Board of County Road Com'rs for Kent County, C.A.Mich., 364 F.2d 919.

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63.75. U.S.—Kirtland v. J. Ray McDermott & Co., C.A.La., 568 F.2d 1166.

De George v. Mandata Poultry Co., D.C.Pa., 196 F.Supp. 192.

§ 293(18). Payment of Costs and Fees

Library References

Federal Courts ⟹661.

64.5. **Validity of notice of appeal not affected by untimely payment**

U.S.—Brennan v. U.S. Gypsum Co., C.A.Colo., 330 F.2d 728.

64.10. U.S.—Brennan v. U.S. Gypsum Co., C.A. Colo., 330 F.2d 728.

65. U.S.—Campbell v. Beto, C.A.Tex., 460 F.2d 765.

Exemption of payments in District Court not extended to payments in Appellate Court

U.S.—Williford v. People of State of Cal., C.A.Cal., 329 F.2d 47.

67.15. Federal Rules of Civil Procedure, Rule 75(m), 28 U.S.C.A., was deleted in 1966.

Under the Federal Rules of Appellate Procedure, if the motion of a party for leave to proceed on appeal in forma pauperis is granted, such party may proceed without prepayment of fees or costs, and he may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.[67.25]

67.25. F.R.A.P. Rule 24, 28 U.S.C.A.

§ 293(19). —— Payment for Transcript

Library References

Federal Courts ⟹661.

68. U.S.—King v. Carmichael, C.A.Mich., 268 F.2d 305, cert. den. 80 S.Ct. 597, 361 U.S. 968, 4 L.Ed.2d 548.

Ortiz v. Greyhound Corp., D.C.Md., 192 F.Supp. 903.

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68.10. U.S.—King v. Carmichael, C.A.Mich., 268 F.2d 305, cert. den. 80 S.Ct. 597, 361 U.S. 968, 4 L.Ed.2d 548—Moss v. Thomas, C.A.Ky., 299 F.2d 729.

"Substantial question" held reasonably debatable one

U.S.—Ortiz v. Greyhound Corp., D.C.Md., 192 F.Supp. 903.

Decision as to "substantial question" purely objective one

U.S.—Ortiz v. Greyhound Corp., D.C.Md., 192 F.Supp. 903.

Motion denied

U.S.—Douglas v. Green, C.A.Ohio, 327 F.2d 661.

§ 293(20). Bond on Appeal

Library References

Federal Courts ⚷661.

69.50. Change in Rules

Fed.Rules Civ.Proc. Rule 73(c), is now, with changes, F.R.A.P. Rule 7, 28 U.S.C.A.

Under the Federal Rules of Appellate Procedure, unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs.[69.55]

69.55. U.S.—Carr v. Grace, C.A.Fla., 516 F.2d 502. F.R.A.P. Rule 7, 28 U.S.C.A.

Appeals by permission under 28 U.S.C.A. § 1292(b)

F.R.A.P. Rule 5(d), 28 U.S.C.A.

70. U.S.—Powers v. Citizens Union Nat. Bank & Trust Co., C.A.Ky., 329 F.2d 507.

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70.5. U.S.—Powers v. Citizens Union Nat. Bank & Trust Co., C.A.Ky., 329 F.2d 507.

Appeal bond discretionary

D.C.—Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, C.A., 636 F.2d 755, 205 U.S.App.D.C. 47.

71. Time to execute bond granted

U.S.—Powers v. Citizens Union Nat. Bank & Trust Co., C.A.Ky., 329 F.2d 507.

§ 293(21). —— Proceedings in Forma Pauperis

Library References

Federal Courts ⚷662.

73. U.S.—Smith v. Swenson, D.C.Mo., 333 F.Supp. 1258.

D.C.—Lee v. Habib, C.A., 424 F.2d 891, 137 U.S.App. D.C. 403.

For a discussion of in forma pauperis appeals see 43 F.R.D. 343.

73.10. U.S.—Perkins v. Cingliano, C.A.Md., 296 F.2d 567.

73.15. No right to entire transcript at government expense.

75. U.S.—Brooks v. Britton, C.A.Ala., 669 F.2d 665.

Smith v. Firestone Tire & Rubber Co., D.C.Pa., 255 F.Supp. 905.

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76. U.S.—Smith v. Firestone Tire & Rubber Co., D.C.Pa., 255 F.Supp. 905.

76.5. U.S.—Schweitzer v. Scott, D.C.Cal., 469 F.Supp. 1017.

D.C.—In re Green, C.A., 669 F.2d 779, 215 U.S.App. D.C. 393.

77.5. U.S.—Javor v. Brown, C.A.Cal., 295 F.2d 60—Peterson v. Nadler, C.A.Iowa, 452 F.2d 754.

Test in determining good faith, etc.

U.S.—John v. Gibson, C.A.Cal., 270 F.2d 36, cert. den. 80 S.Ct. 601, 361 U.S. 970, 4 L.Ed.2d 549—U.S. ex rel. Gardner v. Madden, C.A.Cal., 352 F.2d 792.

Determination necessarily included in order granting leave

U.S.—Williford v. People of State of Cal., C.A.Cal., 329 F.2d 47.

Determination that good faith lacking held warranted

U.S.—Cohen v. Curtis Pub. Co., C.A.Minn., 333 F.2d 974, cert. den. 85 S.Ct. 923, 380 U.S. 921, 13 L.Ed.2d 808, reh. den. 85 S.Ct. 1351, 380 U.S. 989, 14 L.Ed.2d 283.

78. U.S.—Hullom v. Burrows, C.A.Mich., 266 F.2d 547, cert. den. 80 S.Ct. 262, 361 U.S. 919, 4 L.Ed.2d 187—Boag v. Boies, C.A.Ariz., 455 F.2d 467, cert. den. 92 S.Ct. 2509, 408 U.S. 926, 33 L.Ed.2d 338.

Smith v. Firestone Tire & Rubber Co., D.C.Pa., 255 F.Supp. 905—Grisom v. Logan, D.C.Cal., 334 F.Supp. 273.

79. U.S.—Schweitzer v. Scott, D.C.Cal., 469 F.Supp. 1017.

§ 293(22). —— —— Persons Entitled

Library References

Federal Courts ⚷662.

81. U.S.—Weaver v. Pate, C.A.Ill., 326 F.2d 353, cert. den. 84 S.Ct. 795, 376 U.S. 939, 11 L.Ed.2d 659.

82. U.S.—Thomas v. Computax Corp., C.A.Cal., 631 F.2d 139.

Roberts v. I-T-E Circuit Breaker Co., D.C. Minn., 316 F.Supp. 133.

A showing of hardship alone, etc.

U.S.—Martin v. Gulf States Utilities Co., D.C.La., 221 F.Supp. 757.

82.5. U.S.—Zaun v. Dobbin, C.A.Ill., 628 F.2d 990.

Appellant not required to become public charge

(2) Other matters.

U.S.—Martin v. Gulf States Utilities Co., D.C.La., 221 F.Supp. 757.

§ 293(23). —— —— Procedure

Library References

Federal Courts ⚷664.

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85.80. U.S.—U.S. ex rel. Brabson v. Silberglitt, C.A. N.Y., 283 F.2d 534.

86. U.S.—Smith v. Firestone Tire & Rubber Co., D.C.Pa., 255 F.Supp. 905.

D.C.—In re Green, C.A., 669 F.2d 779, 215 U.S.App. D.C. 393.

Petition untimely

U.S.—Honolulu Lumber Co. v. American Factors, Limited, D.C.Hawaii, 265 F.Supp. 578.

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86.5. D.C.—Maloney v. E. I. DuPont de Nemours & Co., C.A., 396 F.2d 939, 130 U.S.App.D.C. 58, cert. den. 90 S.Ct. 585, 396 U.S. 1030, 24 L.Ed.2d 525, reh. den. 90 S.Ct. 936, 397 U.S. 930, 25 L.Ed.2d 112.

Duties of district court

(1) To apprise indigent prisoner of proper procedures for appealing final decision.

U.S.—Liles v. South Carolina Dept. or Corrections, C.A.S.C., 414 F.2d 612.

(2) To transmit case records to Court of Appeals for review.

U.S.—Liles v. South Carolina Dept. of Corrections, C.A.S.C., 414 F.2d 612.

The Federal Rules of Appellate Procedure make provision with respect to the procedure for leave to proceed on appeal in forma pauperis.[86.10]

F.R.A.P. Rule 24, 28 U.S.C.A.

86.10. D.C.—Davis v. Clark, C.A., 404 F.2d 1356, 131 U.S.App.D.C. 379.

Good faith requirement

U.S.—Brown v. Pena, D.C.Fla., 441 F.Supp. 1382, affd. C.A., 589 F.2d 1113.

The Rules provide that a party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial. Notwithstanding the above provisions, a party who has been permitted to proceed in an action in the district court in forma pauperis may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.[86.15]

86.15. F.R.A.P. Rule 24(a), 28 U.S.C.A.

Only prospective action authorized

U.S.—Bryan v. Liberty Mut. Ins. Co., C.A.Tex., 418 F.2d 486, cert. den. 90 S.Ct. 972, 397 U.S. 950, 25 L.Ed.2d 131.

Motion denied

U.S.—Brown v. Pena, D.C.Fla., 441 F.Supp. 1382, affd. C.A., 589 F.2d 1113.

87. U.S.—Perkins v. Cingliano, C.A.Md., 296 F.2d 567—Kelly v. Butler County Bd. of Com'rs, C.A. Pa., 399 F.2d 132.

90. U.S.—Bryan v. Liberty Mut. Ins. Co., C.A.Tex., 418 F.2d 486, cert. den. 90 S.Ct. 972, 397 U.S. 950, 25 L.Ed.2d 131.

Martin v. Henderson, D.C.Tenn., 289 F.Supp. 411.

Statutory requirements not met

U.S.—Yager v. Raisor, D.C.Ind., 211 F.Supp. 551.

90.5. U.S.—Lynott v. Henderson, C.A.Ga., 610 F.2d 340.

Under the Federal Rules of Appellate Procedure, a party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit showing his inability to pay fees and costs or to give security therefor, his belief that he is entitled to redress, and a statement of the issues which he intends to present on appeal.[90.10]

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90.10. F.R.A.P. Rule 24(a), 28 U.S.C.A.

91. U.S.—Grisom v. Logan, D.C.Cal., 334 F.Supp. 273.

Testing truth of affidavit

U.S.—Martin v. Gulf States Utilities Co., D.C.La., 221 F.Supp. 757.

92. U.S.—Schweitzer v. Scott, D.C.Cal., 469 F.Supp. 1017.

92.5. U.S.—Yager v. Raisor, D.C.Ind., 211 F.Supp. 551.

93. U.S.—Dupont v. Southern Pac. Co., D.C.La., 231 F.Supp. 601.

93.5. U.S.—Martin v. Gulf States Utilities Co., D.C. La., 221 F.Supp. 757.

Apparent that substantial question is presented

U.S.—Yager v. Raisor, D.C.Ind., 211 F.Supp. 551—Martin v. Gulf States Utilities Co., D.C.La., 221 F.Supp. 757.

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93.10. U.S.—Zaun v. Dobbin, C.A.Ill., 628 F.2d 990.

Affidavit held insufficient

U.S.—Bartlett v. Duty, C.A., 271 F.2d 264.

Yager v. Raisor, D.C.Ind., 211 F.Supp. 551—Dupont v. Southern Pac. Co., D.C.La., 231 F.Supp. 601.

94.5. U.S.—Williford v. People of State of Cal., C.A. Cal., 329 F.2d 47.

§ 293(24). —— —— Allowance

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5. U.S.—Kremer v. Clarke, C.A.Ky., 285 F.2d 735, cert. den. 81 S.Ct. 1098, 366 U.S. 920, 6 L.Ed.2d 243, reh. den. 81 S.Ct. 1932, 366 U.S. 978, 6 L.Ed.2d 1268.

Cagle v. Ciccone, D.C.Mo., 299 F.Supp. 550—Roberts v. I-T-E Circuit Breaker Co., D.C.Minn., 316 F.Supp. 133.

D.C.—In re Green, C.A., 669 F.2d 779, 215 U.S.App. D.C. 393.

Doubts resolved in favor of indigent

D.C.—Lee v. Habib, C.A., 424 F.2d 891, 137 U.S.App. D.C. 403.

Failure of petitioner to appear for questioning

U.S.—Ross v. T. C. Bateson Const. Co., C.A.Ala., 270 F.2d 796, withdrawn 274 F.2d 823.

Granting leave without restricting scope of relief

U.S.—Williford v. People of State of Cal., C.A.Cal., 329 F.2d 47.

The Federal Rules of Appellate Procedure provide that if the motion for leave to proceed in forma pauperis is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.[5.1]

5.1. F.R.A.P. Rule 24(a), 28 U.S.C.A.

Proceedings held in abeyance until reasons for denial given

D.C.—Davis v. Clark, C.A., 404 F.2d 1356, 131 U.S. App.D.C. 379.

5.5. U.S.—John v. Gibson, C.A.Cal., 270 F.2d 36, cert. den. 80 S.Ct. 601, 361 U.S. 970, 4 L.Ed.2d 549.

5.10. D.C.—Maloney v. E. I. DuPont de Nemours & Co., C.A., 396 F.2d 939, 130 U.S.App.D.C. 58, cert. den. 90 S.Ct. 585, 396 U.S. 1030, 24 L.Ed.2d 525, reh. den. 90 S.Ct. 936, 397 U.S. 930, 25 L.Ed.2d 112.

6. D.C.—Maloney v. E. I. DuPont de Nemours & Co., C.A., 396 F.2d 939, 130 U.S.App.D.C. 58, cert. den. 90 S.Ct. 585, 396 U.S. 1030, 24 L.Ed.2d 525, reh. den. 90 S.Ct. 936, 397 U.S. 930, 25 L.Ed.2d 112.

7. U.S.—Kremer v. Clarke, C.A.Ky., 285 F.2d 735, cert. den. 81 S.Ct. 1098, 366 U.S. 920, 6 L.Ed.2d 243, reh. den. 81 S.Ct. 1932, 366 U.S. 978, 6 L.Ed.2d 1268.

7.5. U.S.—John v. Gibson, C.A.Cal., 270 F.2d 36, cert. den. 80 S.Ct. 601, 361 U.S. 970, 4 L.Ed.2d 549.

Permission to appeal improvidently granted

U.S.—Scott v. California Supreme Court, C.A.Cal., 426 F.2d 300.

7.10. Appeal untimely

U.S.—Walker v. Mathews, C.A.Wash., 546 F.2d 814.

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7.15. U.S.—John v. Gibson, C.A.Cal., 270 F.2d 36, cert. den. 80 S.Ct. 601, 361 U.S. 970, 4 L.Ed.2d 549.

Yager v. Raisor, D.C.Ind., 211 F.Supp. 551.

§ 293(25). —— Requisites and Sufficiency

Library References

Federal Courts ⚡661.

9. Change in Rules

Fed.Rules Civ.Proc. Rule 73(c), is now F.R.A.P. Rule 7, 28 U.S.C.A.

13.5. Federal Rules of Civil Procedure, Rule 73(c), 28 U.S.C.A., was amended in 1966, to provide for a bond or equivalent security. Rule 73(c) is now F.R.A.P. Rule 7, 28 U.S.C.A.

13.10. Change in Rules

Fed.Rules Civ.Proc. Rule 73(e), is now F.R.A.P. Rule 26(b), 28 U.S.C.A.

13.15. U.S.—Hagan v. Whitman, C.A.Cal., 356 F.2d 742.

13.25. U.S.—Hagan v. Whitman, C.A.Cal., 356 F.2d 742.

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17. U.S.—Ingle v. Sears, Roebuck and Co., D.C. Tenn., 470 F.Supp. 260.

Fed.Rules Civ.Proc. Rule 73(c), is now F.R.A.P. Rule 7, 28 U.S.C.A., which provides for a bond or equivalent security.

19. Federal Rules of Civil Procedure, Rule 73(c), 28 U.S.C.A., was amended in 1966, to provide for a bond or equivalent security. Rule 73(c) is now F.R.A.P. Rule 7, 28 U.S.C.A.

§ 293(26). —— Effect of Defects; Amendments and New or Additional Bonds

Library References

Federal Courts ⚡661.

19.50. Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(a), are now in F.R.A.P. Rule 3, 28 U.S.C.A.

§ 293(27). Service of Notice of Appeal

Library References

Federal Courts ⚡665–670.

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23.50. U.S.—Evans v. Jones, C.A.N.C., 366 F.2d 772—Yates v. Mobile County Personnel Bd., C.A. Ala., 658 F.2d 298.

Change in Rules

Fed.Rules Civ.Proc. Rule 73(b), is now F.R.A.P. Rule 3(d), 28 U.S.C.A.

Failure to file notice of appeal

U.S.—U.S. v. Lucienne D'Hotelle de Benitez Rexach, C.A.Puerto Rico, 558 F.2d 37.

Premature notice treated as timely filed

U.S.—Leonhard v. U.S., C.A.N.Y., 633 F.2d 599, cert. den. 101 S.Ct. 1975, 451 U.S. 908, 68 L.Ed.2d 295.

§ 293(28). Entry or Docketing

Library References

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38. U.S.—Adoue v. Texas Gulf Producing Co., C.A. Utah, 289 F.2d 607—Brennan v. U.S. Gypsum Co., C.A.Colo., 330 F.2d 728.

Appeal not dismissed

U.S.—Mikkelson v. Young Men's Christian Ass'n of Chicago, C.A.Ill., 317 F.2d 78.

Change in Rules

Fed.Rules Civ.Proc. Rule 73(g), is now F.R.A.P. Rule 12(a), 28 U.S.C.A.

Jurisdictional

U.S.—Whittaker v. Whittaker Corp., C.A.Cal., 639 F.2d 516, cert. den. 102 S.Ct. 566, 454 U.S. 1031, 70 L.Ed.2d 473.

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39. U.S.—U.S. v. Binder, C.A.Mich., 313 F.2d 243.

Appeal timely

U.S.—U.S. v. Columbus Municipal Separate School Dist., C.A.Miss., 558 F.2d 228, cert. den. 98 S.Ct. 728, 434 U.S. 1013, 54 L.Ed.2d 757.

40. U.S.—U.S. v. Bowen, C.A.Fla., 310 F.2d 45.

41. U.S.—Matter of GAC Corp., C.A.Fla., 640 F.2d 7.

§ 293(29). Appearance in Appellate Court

Library References

Federal Courts ⚡671.

47. U.S.—Bauers v. Heisel, C.A.N.J., 361 F.2d 581, cert. den. 87 S.Ct. 1367, 386 U.S. 1021, 18 L.Ed.2d 457.

Effect of nonappearance

U.S.—Ruckman & Hansen, Inc. v. Contracting & Material Co., C.A.Ind., 328 F.2d 744—Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 524 v. Billington, C.A.Wash., 402 F.2d 510.

§ 294(1). In General

Library References

Federal Courts ⚡684–686.

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48. U.S.—Sibron v. State of N.Y., N.Y., 88 S.Ct. 1889, 392 U.S. 40, 20 L.Ed.2d 917.

§ 294(2). Operation of Appeal as Supersedeas or Stay

Library References

Federal Courts ⚡684–686.

50. U.S.—Nalco Chemical Co. v. Hall, C.A.La., 347 F.2d 90—United Bonding Ins. Co. v. General Cable Corp., C.A.Fla., 381 F.2d 753.

Butts v. Curtis Pub. Co., D.C.Ga., 242 F.Supp. 390—Time Life Broadcast Co. v. Boyd, D.C.Ind., 289 F.Supp. 219—Sampson v. Ampex Corp., D.C. N.Y., 335 F.Supp. 242.

Docketing appeal as ousting lower court jurisdiction

U.S.—Ryan v. U.S. Lines Co., C.A.N.Y., 303 F.2d 430—Board of Ed. of Independent School Dist. 89, Oklahoma County v. York, C.A.Okl., 429 F.2d 66, cert. den. 91 S.Ct. 968, 401 U.S. 954, 28 L.Ed.2d 237.

Interlocutory appeal normally has effect of stay

U.S.—Ely v. Velde, D.C.Va., 356 F.Supp. 726.

51. U.S.—U.S. v. Verlinsky, C.A.Fla., 459 F.2d 1085.

53. U.S.—Barnett v. Life Ins. Co. of the Southwest, C.A.Okl., 562 F.2d 15.

§ 294(3). Right to, and Allowance of, Supersedeas or Stay

Library References

Federal Courts ⟹684–686.

54. U.S.—Securities and Exchange Commission v. Charles Plohn & Co., C.A.N.Y., 433 F.2d 376—Dockendorf v. Dakota County State Bank, C.A. Neb., 673 F.2d 961.

Rules for stay or injunction pending appeal

F.R.A.P. Rule 8, 28 U.S.C.A.

Mootness

U.S.—Ahrens v. Thomas, D.C.Mo., 434 F.Supp. 873, affd. in part, mod. in part on oth. grds., C.A., 570 F.2d 286.

55. U.S.—Nebraska Press Ass'n v. Stuart, 96 S.Ct. 251, 423 U.S. 1327, 46 L.Ed.2d 237.

Ruiz v. Estelle, C.A.Tex., 666 F.2d 854, affd. in part, revd. in part, C.A., 679 F.2d 1115, am. in part and vac. in part, C.A., 688 F.2d 266.

Under Federal Rules of Civil Procedure, Rule 62(g) the court or a judge or justice thereof has power to grant an injunction pending an appeal or make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

D.C.—Application of President and Directors of Georgetown College, Inc., C.A., 331 F.2d 1000, 118 U.S.App.D.C. 80, 9 A.L.R.3d 1367, (Opinion of Wright, J., sitting alone), reh. en banc den., 311 F.2d 1010, 118 U.S.App.D.C. 90, cert. den. 84 S.Ct. 1883, 377 U.S. 978, 12 L.Ed.2d 746.

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56. U.S.—In re Massachusetts Helicopter Airlines, Inc., C.A.Mass., 469 F.2d 439.

U.S. v. Blackburn, D.C.Fla., 538 F.Supp. 1385.

In re Pine Lake Village Apartment Co., D.C. N.Y., 21 B.R. 395.

D.C.—Hobson v. Hansen, D.C., 44 F.R.D. 18.

Discretion abused

U.S.—In re Swift Aire Lines, Inc., Bkrtcy.App., 21 B.R. 12.

56.5. Extraordinary remedy

U.S.—U.S. v. State of Tex., D.C.Tex., 523 F.Supp. 703.

D.C.—Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. v. National Mediation Bd., C.A., 374 F.2d 269, 126 U.S.App.D.C. 55.

56.10. U.S.—Nebraska Press Ass'n v. Stuart, 96 S.Ct. 251, 423 U.S. 1327, 46 L.Ed.2d 237.

Harris v. U.S., C.A.Cal., 413 F.2d 314—DeMelo v. Woolsey Marine Industries, Inc., C.A.5, 677 F.2d 1030.

Eagle-Picher Co. v. Sperry, D.C.Mo., 227 F.Supp. 153.

D.C.—Salsbury v. U.S., C.A., 356 F.2d 822, 123 U.S. App.D.C. 69.

Composite statement of factors required to support stay

U.S.—Coleman v. Paccar, Inc., 96 S.Ct. 845, 424 U.S. 1301, 47 L.Ed.2d 67.

Difficult legal question

D.C.—Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., C.A., 559 F.2d 841, 182 U.S.App.D.C. 220.

56.15. U.S.—In re Turner, C.A.N.Y., 309 F.2d 69—Belcher v. Birmingham Trust Nat. Bank, C.A. Ala., 395 F.2d 685—Miltenberger v. Chesapeake & O. Ry. Co., C.A.Md., 450 F.2d 971.

Resident Advisory Bd. v. Rizzo, D.C.Pa., 429 F.Supp. 222—U.S. v. Blackburn, D.C.Fla., 538 F.Supp. 1385.

56.20. U.S.—Florida Businessmen for Free Enterprise v. City of Hollywood, C.A.Fla., 648 F.2d 956.

Teleflex Indus. Products, Inc. v. Brunswick Corp., D.C.Pa., 294 F.Supp. 256.

56.25. U.S.—Belcher v. Birmingham Trust Nat. Bank, C.A.Ala., 395 F.2d 685.

Research Corp. v. Pfister Associated Growers, Inc., D.C.Ill., 310 F.Supp. 1377—U.S. v. Blackburn, D.C.Fla., 538 F.Supp. 1385.

In re Scardino, Bkrtcy.Pa., 18 B.R. 589.

56.30. U.S.—Belcher v. Birmingham Trust Nat. Bank, C.A.Ala., 395 F.2d 685—James River Flood Control Ass'n v. Watt, C.A.S.D., 680 F.2d 543.

Halderman v. Pennhurst State School and Hospital, D.C.Pa., 533 F.Supp. 668.

57. U.S.—Norris Mfg. Co. v. R. E. Darling Co., C.A.Md., 338 F.2d 326.

D.C.—Edwards v. Habib, C.A., 366 F.2d 628, 125 U.S.App.D.C. 49.

57.5. U.S.—American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., N.Y., 87 S.Ct. 1, 17 L.Ed.2d 37.

Ivor B. Clark Co. v. Hogan, D.C.N.Y., 296 F.Supp. 407.

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60. U.S.—Carpenter Bros., Inc. v. Duval Sales Corp., D.C.Wis., 440 F.Supp. 1150.

61. U.S.—Equal Employment Opportunity Commission v. United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, Local Union No. 189, C.A.Ohio, 427 F.2d 1091.

62. U.S.—Teleflex Indus. Products, Inc. v. Brunswick Corp., D.C.Pa., 294 F.Supp. 256—State of Md. v. Brown, D.C.Md., 311 F.Supp. 1164, affd., C.A., 426 F.2d 809.

D.C.—Blankenship v. Boyle, C.A., 447 F.2d 1280.

§ 294(4). —— Appeal from Order Granting or Refusing Injunction

Library References

Federal Courts ⟹684–687.

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63. U.S.—Securities and Exchange Commission v. Charles Plohn & Co., C.A.N.Y., 433 F.2d 376.

Camden Industries Co. v. Carpenters Local Union No. 1688, United Broth. of Carpenters and Joiners of America, D.C.N.H., 246 F.Supp. 259.

Final and conclusive order

U.S.—Krivacek v. U.S., D.C.Kal., 508 F.Supp. 246.

Vacation of preliminary injunction properly denied

U.S.—Ideal Toy Corp. v. Sayco Doll Corp., C.A.N.Y., 302 F.2d 623.

64. U.S.—Fortune v. Molpus, C.A.Miss., 431 F.2d 799—Walker v. Lockhart, C.A.Ark., 678 F.2d 68.

Allegations of complaint taken as true

D.C.—Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. v. National Mediation Bd., C.A., 374 F.2d 269, 126 U.S.App.D.C. 55.

64.5. U.S.—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 411 F.2d 998, reh. den. 415 F.2d 1376.

J. Weingarten, Inc. v. Potter, D.C.Tex., 233 F.Supp. 833.

Possible appeal

U.S.—Corpus Christi Peoples' Baptist Church, Inc. v. Texas Dept. of Human Resources, D.C.Tex., 481 F.Supp. 1101, affd., C.A., 621 F.2d 438.

65.5. U.S.—Board of Ed. of School Dist. of City of Detroit v. Bradley, C.A.Mich., 475 F.2d 819—Walker v. Lockhart, C.A.Ark., 678 F.2d 68.

Dayton Christian Schools v. Ohio Civil Rights Com'n, D.C.Ohio, 604 F.Supp. 101.

66. U.S.—Great Lakes Carbon Corp. v. Continental Oil Co., C.A.La., 332 F.2d 588—Lakefront Dock & R. Terminal Co. v. International Longshoremen's Ass'n, C.A.Ohio, 333 F.2d 549.

Stop H-3 Ass'n v. Volpe, D.C.Hawaii, 353 F.Supp. 14.

Restraining order, injunction, or stay refused

U.S.—Press v. Pasadena Independent School Dist., D.C. Tex., 326 F.Supp. 550.

Discretion held not abused

U.S.—Sweeney v. Bond, C.A.Mo., 669 F.2d 542, cert. den. 103 S.Ct. 174, 459 U.S. 878, 74 L.Ed.2d 143.

66.5. U.S.—Greene v. Fair, C.A.Miss., 314 F.2d 200—Ruiz v. Estelle, C.A.Tex., 650 F.2d 555, affd. in part, revd. in part on oth. grds. C.A., 679 F.2d 1115, vac. in part on oth. grds., C.A., 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

Equal Employment Opportunity Commission v. Los Angeles County, D.C.Cal., 531 F.Supp. 122.

Protective order denied

U.S.—U.S. v. Nutrition Service, Inc., D.C.Pa., 234 F.Supp. 578, affd., C.A., 347 F.2d 233—Dewey v. Reynolds Metals Co., D.C.Mich., 304 F.Supp. 1116.

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69. U.S.—Greenstein v. National Skirt & Sportswear Ass'n, Inc., C.A.N.Y., 274 F.2d 430—U.S. v. Lynd, C.A.Miss., 301 F.2d 818, cert. den. 83 S.Ct. 187, 371 U.S. 893, 9 L.Ed.2d 125—Greene v. Fair, C.A.Miss., 314 F.2d 200.

United Aircraft Corp. v. Boreen, D.C.Pa., 296 F.Supp. 1144.

Heavy burden

U.S.—Kawecki Berylco Industries, Inc. v. Fansteel, Inc., D.C.Pa., 517 F.Supp. 539.

70. U.S.—Reed v. Rhodes, C.A.Ohio, 549 F.2d 1046—James River Flood Control Ass'n v. Watt, C.A. S.D., 680 F.2d 543.

71. Injunction vacated under circumstances

D.C.—Reiter v. Universal Marion Corp, C.A., 273 F.2d 820, 107 U.S.App.D.C. 6.

72. U.S.—McCoy v. Louisiana State Bd. of Ed., C.A. La., 332 F.2d 915—Bayless v. Martine, C.A.Tex., 430 F.2d 872.

73. U.S.—Dewey v. Reynolds Metals Co., D.C.Mich., 304 F.Supp. 1116.

An application for an injunction pending appeal in an injunction suit on the ground of mootness of such appeal has been denied.[73.5]

73.5. Where petitioner may prevent mootness of appeal application will be denied.

U.S.—Meredith v. Fair, C.A.Miss., 305 F.2d 341, mandate recalled 306 F.2d 374.

§ 294(5). Bond or Security

Library References

Federal Courts ⟹687.

73.50. U.S.—Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc., C.A.La., 600 F.2d 1189.

Holmes v. Danner, C.A.Ga., 191 F.Supp. 394—Trans World Airlines, Inc. v. Hughes, D.C.N.Y., 314 F.Supp. 94—Strama v. Peterson, D.C.Ill., 537 F.Supp. 668.

D.C.—Redding & Co. v. Russwine Const. Corp., C.A., 417 F.2d 721, 135 U.S.App.D.C. 153.

73.60. U.S.—United States v. Kurtz, D.C.Pa., 528 F.Supp. 1113.

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73.65. U.S.—In re Walton Plywood, D.C.Wash., 227 F.Supp. 319—Dewey v. Reynolds Metals Co., D.C.Mich., 304 F.Supp 1116.

Stay terminating when time expires without complying with condition imposed

U.S.—Western Lighting Corp. v. Smoot-Holman Co., C.A.Cal., 352 F.2d 1019

Bond not required under circumstances

D.C.—Redding & Co. v. Russwine Const. Corp., C.A., 417 F.2d 721, 135 U.S.App D.C. 153.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(d), are now in F.R.A.P. Rule 8, 28 U.S.C.A.

An appeal from a judgment, when no statute requires a supersedeas bond to effect a suspension, ordinarily suspends judgment without such a bond.[73.70]

73.70. U.S.—Berryhill v. Gibson, D.C.Ala., 331 F.Supp. 122, probable jur. noted 92 S.Ct. 2487, 408 U.S 920, 33 L.Ed.2d 331.

75.55. U.S.—International Paper Co. v. Whitson, C.A.Okl., 595 F.2d 559.

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79. U.S.—In re Swift Aire Lines, Inc., Bkrtcy.App., 21 B.R. 12.

80. **Subsequent proper bond after initial improper bond**

U.S.—Consolidated Sun Ray, Inc. v. Oppenstein, C.A. Mo., 335 F.2d 801.

83. U.S.—Solomon Dehydrating Co. v. Guyton, C.A., 283 F.2d 247.

In re Swift Aire Lines, Inc., Bkrtcy.App., 21 B.R. 12.

Unnecessarily excessive

U.S.—Sochanski v. Sears, Roebuck & Co., D.C.Pa., 504 F.Supp. 187.

83.5. **Change in Rules**

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(d), are now in F.R.A.P. Rule 8, 28 U.S.C.A.

84. **Change in Rules**

Federal Rules of Civil Procedure, Rule 75(j), is now F.R.A.P. Rule 11(g), 28 U.S.C.A.

§ 294(6). Modification or Vacation of Supersedeas or Stay

Library References

Federal Courts ⚖684–686.

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87. U.S.—Ruiz v. Estelle, C.A.Tex., 666 F.2d 854, affd. in part, revd. in part on oth. grds., C.A., 679 F.2d 1115, am. in part and vac. in part, C.A., 688 F.2d 266.

Stay by single justice

U.S.—Meredith v. Fair, C.A.Miss., 306 F.2d 374.

§ 294(7). Operation and Effect

Library References

Federal Courts ⚖684–686.

89. U.S.—Houston Fire & Cas. Ins. Co. v. Ivens, C.A.Fla., 323 F.2d 112—Jones v. Chaney & James Const. Co., C.A.Ala., 399 F.2d 84.

Onyx Refining Co. v. Evans Production Corp., D.C.Tex., 182 F.Supp. 253—O'Brien v. Avco Corp., D.C.N.Y., 309 F.Supp. 703.

Vac-Air, Inc. v. John Mohr & Sons, Inc., D.C. Wis., 54 F.R.D. 580.

D.C.—English v. Cunningham, C.A., 282 F.2d 829, 108 U.S.App.D.C. 346.

92. U.S.—Houston Fire & Cas. Ins. Co. v. Ivens, C.A.Fla., 323 F.2d 112.

Macon v. Bailar, D.C.Va., 428 F.Supp. 182.

Execution

U.S.—Universal Athletic Sales Co. v. American Gym, D.C.Pa., 480 F.Supp. 408.

§ 294(8). Proceedings in Violation of Supersedeas or Stay

Library References

Federal Courts ⚖684–686.

94. **Formal stay not essential**

U.S.—Griffin v. County School Bd. of Prince Edward County, Va., C.A.Va., 363 F.2d 206, cert. den. 87 S.Ct. 395, 385 U.S. 960, 17 L.Ed.2d 305.

§ 294(9). Effect of Failure to Obtain Supersedeas or Stay

Library References

Federal Courts ⚖684–686.

96. U.S.—Sirloin Room, Inc. v American Emp. Ins. Co., C.A.La., 360 F.2d 160.

D.C.—Thorpe v. Thorpe, C.A., 364 F.2d 692, 124 U.S.App D.C. 299.

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D.C.—Thorpe v. Thorpe, C.A., 364 F.2d 692, 124 U.S.App D.C. 299

§ 294(10). Effect of Transfer of Cause or Proceedings Therefor

Library References

Federal Courts ⚖681–683.

97. U.S.—Wolf v. Nazareth Enterprises, Inc., C.A. N.Y., 303 F.2d 152—Keohane v. Swarco, C.A. Ohio, 320 F.2d 429—Zimmer v. McKeithen, C.A. La., 467 F.2d 1381, reh. 485 F.2d 1297, cert. gr. 95 S.Ct. 2677, 422 U.S. 1055, 45 L.Ed.2d 707, affd. 96 S.Ct. 1083, 424 U.S. 636, 47 L.Ed.2d 296.

Suburban Trust Co. v. National Bank of Westfield, D.C.N.J., 223 F.Supp. 259—Federal Sav. & Loan Ins. Corp. v. Lawn Sav. & Loan Ass'n, D.C.Ill., 285 F.Supp. 793.

In re Bialac, Bkrtcy.App. 9, 15 B.R. 901, affd., C.A., 694 F.2d 625.

Stipulation of parties

(3) Stipulation to dismiss appeal.

U.S.—Williams v. W. R. Grace & Co., D.C.Tenn., 252 F.Supp. 821.

98. D.C.—Hobson v. Hansen, D.C., 44 F.R.D. 18.

99. U.S.—State of N.Y. v. Nuclear Regulatory Commission, C.A.N.Y., 550 F.2d 745—S & E Shipping Corp. v. Chesapeake & O. Ry. Co., C.A.Ohio, 678 F.2d 636.

DeLee v. School Dist. No. 3, Dorchester County, S.C., D.C.S.C., 306 F.Supp. 905.

Amendments to pleadings

(1) U.S.—Asher v. Harrington, C.A.Wis., 461 F.2d 890.

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99.5. U.S.—Resnik v. La Paz Guest Ranch, C.A.Cal., 289 F.2d 814—Janousek v. Doyle, C.A.S.D., 313 F.2d 916—Sykes v. U.S., C.A.Ark., 392 F.2d 735, app. after remand 420 F.2d 324.

Cleveland-Cliffs Iron Co. v. Grosse Ile Bridge Co., D.C.Mich., 239 F.Supp. 872—Williams v. W. R. Grace & Co., D.C.Tenn., 252 F.Supp. 821—Rolle v. New York City Housing Authority, D.C. N.Y., 294 F.Supp. 574.

In re Butcher Boy Meat Market, Inc., Bkrtcy. Pa., 10 B.R. 258.

99.10. U.S.—Cochran v. Birkel, C.A.Ohio, 651 F.2d 1219, cert. den. 102 S.Ct. 1020, 454 U.S. 1152, 71 L.Ed.2d 307.

1. U.S.—Silverthorne v. Laird, C.A.Tex., 460 F.2d 1175.

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2. U.S.—Armstrong v Board of Ed. of City of Birmingham, Jefferson County, Ala., C.A.Ala., 323 F.2d 333, cert. den. 84 S.Ct. 661, 376 U.S. 908, 11 L.Ed 2d 606.

3. U.S.—Plaquemines Parish Commission Council v. U.S., by Mitchell, C.A.La., 416 F.2d 952—U.S. v. Board of School Com'rs of City of Indianapolis, Indiana, C.A.Ind., 503 F.2d 68, cert. den. 95 S.Ct. 1654, two cases, 1655, 421 U.S. 929, 44 L.Ed.2d 86, on remand, D.C., 419 F.Supp. 180, affd., C.A., 541 F.2d 1211, vac. on oth. grds. 97 S.Ct. 800, 801, three cases, 429 U.S. 1068, 50 L.Ed.2d 786, 802, two cases, 429 U.S. 1068, 50 L.Ed.2d 786, on remand C.A., 573 F.2d 400, on remand D.C., 456 F.Supp. 183, cert. den. 99 S.Ct. 93, 439 U.S. 824, 58 L.Ed.2d 116, affd. in part, vac. in part on oth. grds., C.A., 637 F.2d 1101.

Boyle v. Leviton Mfg. Co., Inc., D.C.Ind., 94 F.R.D. 33.

Order directing separate trial of one claim, etc.

U.S.—Gaudiosi v. Mellon, C.A.Pa., 269 F.2d 873, cert. den. 80 S.Ct. 211, 361 U.S. 902, 4 L.Ed.2d 157.

4. U.S.—Walker v. Felmont Oil Corp., C.A.Ky., 262 F.2d 163, cert. den. 80 S.Ct. 61, 361 U.S. 840, 4 L.Ed.2d 78—Ferguson v. Tabah, C.A.N.Y., 288 F.2d 665—Janousek v. Doyle, C.A.S.D., 313 F.2d 916—DePinto v. Provident Sec. Life Ins. Co., C.A.Ariz., 374 F.2d 50.

4.5. U.S.—Smith v. Insurance Co. of North America, D.C.Tenn., 213 F.Supp. 675, affd. in part and revd. in part on oth. grds., C.A., 334 F.2d 673. Cert. den. 85 S.Ct. 895, 380 U.S. 915, 13 L.Ed.2d 801, app. after remand 397 F.2d 889, cert. den. 89 S.Ct. 623, 393 U.S. 1018, 21 L.Ed.2d 563—Hamer v. Campbell, C.A.Miss., 358 F.2d 215, cert. den. 87 S.Ct. 76, 385 U.S. 851, 17 L.Ed.2d 79.

Jurisdiction to dismiss action

U.S.—Janousek v. Doyle, C.A.S.D., 313 F.2d 916.

Trial on merits not precluded

U.S.—U.S. v. Lynd, C.A.Miss., 321 F.2d 26, cert. den. 84 S.Ct. 486, 375 U.S. 968, 11 L.Ed.2d 416, motion den. 334 F.2d 13.

Venue

U.S.—Dixie Portland Flour Mills, Inc. v. Dixie Feed & Seed Co., C.A.Tenn., 382 F.2d 830.

5. U.S.—Hodgson v. Mahoney, C.A.Mass., 460 F.2d 326, cert. den. 93 S.Ct. 519, 409 U.S. 1039, 34 L.Ed.2d 488.

Premature filing of notice of appeal

U.S.—Stevenson v. Grentec, Inc., C.A.Cal., 652 F.2d 20, cert. den. 102 S.Ct. 2008, 456 U.S. 943, 72 L.Ed.2d 465.

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6. U.S.—Sumida v. Yumen, C.A.Hawaii, 409 F.2d 654, app. after remand 444 F.2d 1281, cert. den. 92 S.Ct. 1168, 405 U.S. 964, 31 L.Ed.2d 240, reh. den. 92 S.Ct. 1308, 405 U.S. 1048, 31 L.Ed.2d 591—Hogg v. U.S., C.A.Ky., 411 F.2d 578.

DeLee v. School Dist. No. 3, Dorchester County, S.C., D.C.S.C., 306 F.Supp. 905—O'Brien v. Avco Corp., D.C.N.Y., 309 F.Supp. 703.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(a), are now in F.R.A.P. Rule 3, 28 U.S.C.A.

7. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

7.15. U.S.—Smith v. Insurance Co. of North America, D.C.Tenn., 213 F.Supp. 675, affd. in part and revd. in part on oth. grds., C.A.; 334 F.2d 673, cert. den. 85 S.Ct. 895, 380 U.S. 915, 13 L.Ed.2d 801, app. after remand 397 F.2d 889, cert. den. 89 S.Ct. 623, 393 U.S. 1018, 21 L.Ed.2d 563.

8. U.S.—Wolf v. Nazareth Enterprises, Inc., C.A. N.Y., 303 F.2d 152.

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8.5. U.S.—Schempp v. School Dist. of Abington Tp., Pa., D.C.Pa., 184 F.Supp. 381.

8.10. U.S.—Weiss v. Hunna, C.A.N.Y., 312 F.2d 711, cert. den. 83 S.Ct. 1920, 374 U.S. 853, 10 L.Ed.2d 1073, reh. den. 84 S.Ct. 37, 375 U.S. 874, 11 L.Ed.2d 104.

Ritter v. Hilo Varnish Corp., C.A.N.Y., 186 F.Supp. 625—Price v. U.S., D.C.Va., 195 F.Supp. 203.

Caputo v. Globe Indem. Co., D.C.Pa., 41 F.R.D. 239.

Motion for dismissal, made prior to notice of appeal, determined.

U.S.—Hawkins v. Lindsley, C.A.N.Y., 327 F.2d 356.

8.15. U.S.—Falzarano v. U.S., C.A.Mass., 607 F.2d 506.

8.20. U.S.—Transit Cas. Co. v. Security Trust Co., C.A.Fla., 441 F.2d 788, cert. den. 92 S.Ct. 211, 404 U.S. 883, 30 L.Ed.2d 164.

8.25. U.S.—Aune v. Reynders, C.A.Wyo., 344 F.2d 835.

9. U.S.—Diapulse Corp. of America v. Curtis Pub. Co., C.A.N.Y., 374 F.2d 442.

9.5. U.S.—Binks Mfg. Co. v. Ransburg Electro-Coating Corp., C.A.Ind., 281 F.2d 252, cert. gr. 81 S.Ct. 353, 364 U.S. 926, 5 L.Ed.2d 265, cert. dism. 81 S.Ct. 1091, 366 U.S. 211, 6 L.Ed.2d 239—Aune v. Reynders, C.A.Wyo., 344 F.2d 835.

9.10. U.S.—Greear v. Greear, C.A., 288 F.2d 466—Creamette Co. v. Merlino, C.A., 289 F.2d 569—Aune v. Reynders, C.A.Wyo , 344 F.2d 835.

Henderson 66 Sales, Inc. v. Harvison, D.C.Tex., 58 F.R.D. 408.

10. U.S.—Merritt-Chapman & Scott Corp. v. City of Seattle, Wash., C.A.Wash., 281 F.2d 896—Keohane v. Swarco, Inc., C.A.Ohio, 320 F.2d 429—Segal v. Gordon, C.A.N.Y., 467 F.2d 602.

DeLee v. School Dist. No. 3, Dorchester County, S.C., D.C.S.C., 306 F.Supp. 905.

11. U.S.—Janousek v. Doyle, C.A.S.D., 313 F.2d 916.

§ 295(1). In General

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11.50. U.S.—Soley v. Star & Herald Co., C.A.Canal Zone, 390 F.2d 364.

Change in Rules

Provisions formerly in Fed.Rules Civ.Proc., Rules 73(g), 75, 76, respectively, are now in F.R.A.P. Rules 11, 10.

11.55. U.S.—Ogletree v. McNamara, C.A.Ohio, 449 F.2d 93.

Incorporation by reference disapproved

U.S.—Bobsee Corp. v. U.S., C.A.Fla., 411 F.2d 231.

11.60. U.S.—Kincaid & King Const. Co. v. U.S. for Use of Olday, C.A.Alaska, 299 F.2d 787.

§ 295(2). Matters to Be Shown by Record

Library References

Federal Courts ⚖692.

11.80. U.S.—Wirtz v. Young Elec. Sign Co., C.A. Utah., 315 F.2d 326—Eutsler v. U.S., C.A.Utah, 376 F.2d 634—Soley v. Star & Herald Co., C.A. Canal Zone, 390 F.2d 364—Chicago, R.I. & P.R. Co. v. Speth, C.A.Neb., 404 F.2d 291—New Mexico Sav. & Loan Ass'n v. U.S. Fidelity & Guaranty Co., C.A.N.M., 454 F.2d 328.

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12. U.S.—Diamond Shamrock Oil & Gas Corp. v. Commissioner of Revenues, State of Ark., C.A. Ark., 422 F.2d 532.

D.C.—Brown v. Collins, C.A., 402 F.2d 209, 131 U.S. App.D.C. 68—Lee v. Habib, C.A., 424 F.2d 891, 137 U.S.App.D.C. 403.

13. U.S.—Ideal Structures Corp. v. Levine Huntsville Development Corp., C.A.Ala., 396 F.2d 917—Wyndham Associates v. Bintliff, C.A.N.Y., 398 F.2d 614, cert. den. 89 S.Ct. 444, 393 U.S. 977, 21 L.Ed.2d 438.

22. Federal Rules of Civil Procedure, Rule 75(g), etc.

(2) Federal Rules of Civil Procedure, Rule 75(g), 28 U.S.C.A., was deleted in 1966, F.R.A.P. Rule 10(a), 28 U.S.C.A., sets forth the composition of the record on appeal.

23. U.S.—Groh v. Brooks, C.A.Pa., 421 F.2d 589.

D.C.—Blumenthal v. Blumenthal, C.A., 274 F.2d 751, 107 U.S.App.D.C. 93, app. allowing, 155 A.2d 525—Evans v. Sheraton Park Hotel., C.A., 503 F.2d 177, 164 U.S.App.D.C. 86.

Application to injunction

(2) Other instances.

D.C.—Carey v. Carter, C.A., 344 F.2d 567, 120 U.S. App.D.C. 182.

§ 295(3). —— Presentation and Reservation of Grounds of Review

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28. U.S.—Freed v. The Travelers, C.A.Ill., 300 F.2d 395—Sleek v. J. C. Penney Co., C.A.Pa., 324 F.2d 467—L & E Co. v. U.S.A. ex rel. Kaiser Gypsum Co., C.A.Cal., 351 F.2d 880—Southern Ry. Co. v. Vaughn, C.A.Ga., 359 F.2d 424.

29. U.S.—Jacobson v. Rose, C.A.Nev., 592 F.2d 515, cert. den. 99 S.Ct. 2861. 442 U.S. 930, 61 L.Ed.2d 298.

30. U.S.—Burns v. Travelers Ins. Co., C.A.La., 344 F.2d 70.

35. U.S.—Green v. Hale, C.A.Tex., 433 F.2d 324.

36. U.S.—Smith v. Serna, C.A.N.M., 367 F.2d 324.

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38. U.S.—Sullivan v. Hopkins, C.A.Cal., 435 F.2d 1128.

39.5. U.S.—Brest v. Philadelphia Transp. Co., C.A. Pa., 273 F.2d 22.

40. U.S.—Alamo Water Transp. Co. v. U.S., C.A. Tex., 404 F.2d 54—Standard Oil Co. v. State of Iowa, C.A.Iowa, 408 F.2d 1171—Dicks v. Cleaver, C.A.Miss., 433 F.2d 248.

D.C.—Ammerman v. City Stores Co., C.A., 394 F.2d 950, 129 U.S.App.D.C. 325, 38 A.L.R.3d 1042.

42. U.S.—Miller v. Premier Corp., C.A.S.C., 608 F.2d 973.

43. U.S.—Walker Inv., Inc. v. American Exp. Field Warehousing Corp., C.A.Fla., 276 F.2d 591—Andrews v. Olin Mathieson Chemical Corp., C.A. Iowa, 334 F.2d 422—Wyller v. Fairchild Hiller Corp., C.A.Alaska, 503 F.2d 506.

44. U.S.—Morgan v. Labiak, C.A.Colo., 368 F.2d 338.

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46.5. U.S.—Riley v. University of Lowell, C.A.Mass., 651 F.2d 822, cert. den. 102 S.Ct. 974, 454 U.S. 1125, 71 L.Ed.2d 112.

§ 295(5). Scope and Contents of Record

Library References

Federal Courts ⚖693.

53.50. Federal Rules of Civil Procedure, Rule 75(g), 28 U.S.C.A., was deleted in 1966. F.R.A.P. Rule 10(a), 28 U.S.C.A., sets forth the composition of the record on appeal.

Provisions formerly in Fed.Rules Civ.Proc. Rule 75, are now in F.R.A.P. Rule 10, 28 U.S.C.A.

The Federal Rules of Appellate Procedure provide that the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.[54.5]

54.5. F.R.A P. Rule 10(a), 28 U.S.C.A.

55. U.S.—Dairy Foods Inc. v. Dairy Maid Products Co-op., C.A.Wis., 297 F.2d 805.

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56. U.S.—Todd v. Nello L. Teer Co., C.A.Fla., 308 F.2d 397.

Federal Rules of Civil Procedure, Rule 75(a), 28 U.S.C.A., was deleted in 1966. Rule 75, as amended in 1966, does not contain any similar provision. Rule 75 is now F.R.A.P. Rule 10, 28 U.S.C.A.

57. U.S.—Kauffman v. Johnston, C.A.Pa., 454 F.2d 267.

58. U.S.—Aquascutum of London, Inc. v. S.S. American Champion, C.A.N.Y., 426 F.2d 205—Beltran v. Myers, C.A.Cal., 677 F.2d 1317.

Federal Rules of Civil Procedure, Rule 75(e), 28 U.S.C.A., was deleted in 1966.

60. U.S.—Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221, cert. den. 97 S.Ct. 239, 429 U.S. 886, 50 L.Ed.2d 168

60.5. U.S.—Dunn v St. Louis-San Francisco Ry. Co., C.A.Okl., 370 F.2d 681.

60.20. U.S.—Republic Gear Co. v. Borg-Warner Corp., C.A.N.Y., 381 F.2d 551.

Depositions

U.S.—Daiflon, Inc. v. Allied Chemical Corp., 534 F.2d 221, cert. den. 97 S.Ct. 239, 429 U.S. 886, 50 L.Ed.2d 168.

60.25. U.S.—Paramount Film Distributing Corp. v. Civil Center Theatre, Inc., C.A.Utah, 333 F.2d 358.

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61. Federal Rules of Civil Procedure, Rule 75(g), 28 U.S.C.A., was deleted in 1966. F.R.A.P. Rule 10(a) 28 U.S.C.A., sets forth the composition of the record on appeal.

62. U.S.—U.S. v. Manarite, C.A.N.Y., 430 F.2d 656.

63. U.S.—Stephenson v. Duriron Co., C.A.Ohio, 428 F.2d 387.

68. Federal Rules of Civil Procedure, Rule 75(f), 28 U.S.C.A., was deleted in 1966. F.R.A.P. Rule 10(a) 28 U.S.C.A., providing that the parties may agree by written stipulation that designated parts of the record need not be transmitted to the court of appeals.

69. Fed.Rules Civ.Proc. Rule 76, is now F.R.A.P. Rule 10(d), 28 U.S.C.A.

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70. Federal Rules of Civil Procedure, Rule 75(g), 28 U.S.C.A., was deleted in 1966. F.R.A.P. Rule 10(a) 28 U.S.C.A., sets forth the composition of the record on appeal.

71. U.S.—Campbell v. Village of Silver Bay, Minn., C.A.Minn., 315 F.2d 568.

75. U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp., C.A.Mich., 394 F.2d 36—Thomas v. Computax Corp., C.A.Cal., 631 F.2d 139.

D.C.—Ramsey v. U.S., C.A., 463 F.2d 815, 149 U.S. App.D.C. 412, affd. 506 F.2d 1322, cert. den. 95 S.Ct. 1569, 421 U.S. 913, 43 L.Ed.2d 778.

76. Changes in Rules

Fed.Rules Civ.Proc. Rules 75(a)-(c), are now F.R. A.P. Rule 10, 28 U.S.C.A.

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82. U.S.—Wyoming Farm Bureau Mut. Ins. Co. v. Smith, C.A.Mont., 377 F.2d 918—Heard v. Lowe, C.A.La., 427 F.2d 846.

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Federal Rules of Civil Procedure, Rule 75(e), 28 U.S.C.A., was deleted in 1966.

§ 295(6). Necessity of Bill of Exceptions

Library References

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84. Change in Rules

Fed.Rules Civ.Proc. Rule 75, is now F.R.A.P. Rules 10, 11, 28 U.S.C.A.

§ 295(7). Contents, Making, and Settlement of Bill of Exceptions

Library References

Federal Courts ⚩636.

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94. Change in Rules

Fed.Rules Civ Proc. Rule 75, is now F.R.A.P. Rule 10, 28 U.S.C.A.

§ 295(8). Contents, Making, and Settlement of Statement of Case

Library References

Federal Courts ⚩696.

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38. Change in Rules

Fed.Rules Civ.Proc. Rule 76, is now F.R.A.P. Rule 10(d), 28 U.S.C.A.

§ 295(9). Statement of Evidence

Library References

Federal Courts ⚩696.

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43. Federal Rules of Civil Procedure, Rule 75(c), 28 U.S.C.A., was deleted in 1966

Under the Federal Rules of Appellate Procedure, if no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.[43.5]

43.5. F.R.A.P. Rule 10(c), 28 U.S.C.A.

44. Statement held insufficient

U.S.—Valley Stream Flooring Corp. v. Green Manor Const. Co., C.A.Mass., 336 F.2d 6.

46. U.S.—St. Paul Fire & Marine Ins. Co. v. Arkla Chemical Corp., C.A.Ark., 431 F.2d 959.

47. Change in Rules

Fed.Rules Civ.Proc. Rule 75, is now F.R.A.P. Rule 10, 28 U.S.C.A.

§ 295(10). Making, Form, and Requisites of Record; Transcript

Library References

Federal Courts ⚩694, 695.

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55. U.S.—Blitzstein v. Ford Motor Co., C.A.Ala., 288 F.2d 738—London v Troitino Bros., Inc, C.A. Va., 301 F.2d 116—Cox v. General Elec. Co, C.A Mich., 302 F.2d 389—Chernack v. Radlo, C.A.R.I., 331 F.2d 170—Moran Towing Corp. v. M. A. Gammino Const. Co., C.A.R.I, 363 F.2d 108, on remand 292 F.Supp. 134, affd. in part, and remd. 409 F.2d 917—Green v. Aetna Ins. Co, C.A.Tex., 397 F.2d 614—Business Forms Finishing Service, Inc. v. Carson, C.A Ill., 463 F.2d 966.
Dantzler v. Defender Shipping Co, D.C.Pa., 285 F.Supp. 541, affd., C.A., 411 F.2d 792

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56. U.S.—Dantzler v. Defender Shipping Co., D.C. Pa., 285 F.Supp. 541, affd., C.A., 411 F.2d 792.

57. U.S.—Blitzstein v. Ford Motor Co., C.A.Ala, 288 F.2d 738.

Federal Rules of Civil Procedure, Rule 75(a), 28 U.S.C.A., was deleted in 1966.

The Federal Rules of Appellate Procedure do not contain provisions with respect to the designation method of preparing the record on appeal, but provide that the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.[58.1]

58.1. F.R.A.P. Rule 10(a), 28 U.S.C.A.

The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court, unless thereafter the court of appeals shall order or any party shall request their transmittal.[58.2]

58.2. F.R.A.P. Rule 11(f), 28 U.S.C.A.

58.5. U.S.—Pound v. Insurance Co. of North America, C.A.N.M., 439 F.2d 1059.
Dantzler v. Defender Shipping Co., D.C.Pa., 285 F.Supp. 541, affd., C.A., 411 F.2d 792.

59. Federal Rules of Civil Procedure, Rule 75(b), 28 U.S.C.A., was amended in 1966, deleting such provision, and providing that appellant shall order a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. Rule 75(b) is now F.R.A.P. Rule 10(b), 28 U.S.C.A.

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62. Similar provision under rule of court of appeals

U.S.—Mitchell v. Robert De Mario Jewelry, Inc., C.A. Ga., 260 F.2d 929, revd. on oth. grds., 80 S.Ct. 332, 361 U.S. 288, 4 L.Ed.2d 323.

66.15. Federal Rules of Civil Procedure, Rule 75(e), 28 U.S.C.A., was deleted in 1966.

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66.20. Federal Rules of Civil Procedure, Rule 75(e), 28 U.S.C.A., was deleted in 1966.

A court reporter has no authority to abbreviate or edit when recording the proceedings or transcribing the record.[66.65]

66.65. U.S.—Grau v. Procter & Gamble Co., D.C. Ala., 32 F.R.D 199.

71. Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A, was deleted in 1966. See F.R.A.P. Rule 10(b), 28 U.S.C.A. requiring appellant to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed.

73. U.S.—Rachbach v. Cogswell, C.A.Colo., 547 F.2d 502.

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80. Federal Rules of Civil Procedure, Rule 75(i), 28 U.S.C.A., was deleted in 1966. F.R.A.P. Rule 10(a), 28 U.S.C.A., provides that the original papers and exhibits filed in the district court shall constitute, among other things, the record on appeal in all cases.

80.5. U.S.—U.S. v. Benning, C.A.Cal., 295 F.2d 705.
F.R.A.P. Rule 10(a), 28 U.S.C.A.

Exhibits of modest size to be forwarded with transcript

U.S.—U.S. v. Ross, C.A.N.Y., 321 F.2d 61, cert. den. 84 S.Ct. 170, 175, 375 U.S. 894, 11 L.Ed.2d 123.

Change in Rules

Federal Rules of Civil Procedure, Rule 75(*o*), is now F.R.A.P. Rule 11, 28 U.S.C.A.

Motion for supplemental record denied

(1) Other instances.

U.S.—Kemlon Products and Development Co. v. U.S., C.A.Tex., 646 F.2d 223.

Change in Rules

Federal Rules of Civil Procedure, Rule 75(h), is now F.R.A.P. Rule 10(e), 28 U.S.C.A.

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82. U.S.—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

Change in Rules

Federal Rules of Civil Procedure, Rule 75(k), is now F.R.A.P. Rule 11, 28 U.S.C.A.

§ 295(11). Authentication and Certification

Library References

Federal Courts ⚩691.

86. U.S.—Northland Paper Co. v. Mohawk Tablet Co., D.C.N.Y., 271 F.Supp. 763.

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90. Under Federal Rule of Civil Procedure, Rule 75(g), etc.

(2) Federal Rules of Civil Procedure, Rule 75(g), 28 U.S.C.A. was deleted in 1966.

§ 295(12). Printing of Record

Library References

Federal Courts ⚩691.

96. Federal Rules of Civil Procedure, Rule 75(*l*), 28 U.S.C.A., was deleted in 1966.

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98. Federal Rules of Civil Procedure, Rule 75(*l*), 28 U.S.C.A., was deleted in 1966.

The Federal Rules of Appellate Procedure make provision with respect to the form of papers on appeal.[98.5]

98.5. F.R.A.P. Rule 32, 28 U.S.C.A.

2. Matter of discretion

(2) Other instances.

U.S.—Pioneer Credit Corp. v. Bloomberg, C.A.Mass., 323 F.2d 992.

§ 295(13). Transmission and Filing of Record

Library References

Federal Courts ⚡697.

5. Change in Rules

Fed.Rules Civ.Proc. Rule 73(g), is now F.R.A.P. Rule 11, 28 U.S.C.A.

The Federal Rules of Appellate Procedure provide that the record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under the rules. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals.[6.5]

6.5. F.R.A.P. Rule 11, 28 U.S.C.A.

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7. U.S.—Hill v. Whitlock Oil Services, Inc, C.A.Kan., 450 F.2d 170.

D.C.—Lee v. Habib, C.A., 424 F.2d 891, 137 U.S.App. D.C. 403.

Routine extensions not to be allowed

U.S.—Thompson v. American Airlines, Inc., C.A.Tex., 422 F.2d 350.

Change in Rules

F.R.A.P. Rule 11(d), 28 U.S.C.A., was abrogated in 1979.

Fed.Rules Civ.Proc. Rule 73(g), is now F.R.A.P. Rule 11(d), 28 U.S.C.A.

13. Extension denied

(1) U.S.—Weinberger v. Group, C.A.Puerto Rico, 339 F.2d 34.

§ 295(14). —— Effect of Failure to File in Time

Library References

Federal Courts ⚡697.

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17. U.S.—Brennan v. U.S. Gypsum Co., C.A.Colo., 330 F.2d 728—Brennan v. Rock Wool Insulating Co., C.A.Colo., 337 F.2d 849—Murphy v. L & J Press Corp., C.A.Mo., 577 F.2d 27.

Change in Rules

F.R.A.P. Rule 12(c), 28 U.S.C.A., was abrogated in 1979.

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 3, 28 U.S.C.A., and Fed.Rules Civ.Proc. Rule 73(g) is now F.R.A.P. Rule 12(c), 28 U.S.C.A.

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19. U.S.—King v. Laborers Intern. Union of North America, Union Local No. 818, C.A.Tenn., 443 F.2d 273.

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22. U.S.—U.S. v. Binder, C.A.Mich., 313 F.2d 243—Brennan v. U.S. Gypsum Co., C.A.Colo., 330 F.2d 728.

§ 295(15). Defects or Omissions in Record

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Federal Courts ⚡698.

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28. Dismissal not warranted

(3) Other instances.

U.S.—Hogg v. U.S., C.A.Ky., 411 F.2d 578.

29. U.S.—Island Creek Coal Co. v. Local Union No 1827 of United Mine Workers of America, C.A.Ky., 568 F.2d 7.

29.5. U.S.—Leonhard v. U.S., C.A.N.Y., 633 F.2d 599, cert. den. 101 S.Ct. 1975, 451 U.S. 908, 68 L.Ed.2d 295.

30. U.S.—Chapman v. Rudd Paint & Varnish Co., C.A.Wash., 409 F.2d 635.

31. U.S.—Foley Lumber Industries, Inc. v. Buckeye Cellulose Corp., C.A.Fla., 286 F.2d 697, cert. den. 81 S.Ct. 1922, 366 U.S 966, 6 L.Ed.2d 1257—Equal Employment Opportunity Commission v. United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, Local Union No. 189, C.A.Ohio, 438 F.2d 408, cert. den. 92 S.Ct. 77, 404 U.S. 832, 30 L.Ed.2d 62.

33. U.S.—Wimberly v. Rogers, C.A.Mont., 557 F.2d 671.

§ 295(16). —— Amendment and Correction of Record

Library References

Federal Courts ⚡699.

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34.50. U.S.—Fisher v. Flynn, C.A.Miss., 598 F.2d 663.

36. U.S.—Arnold Productions, Inc. v. Favorite Films Corp., C.A.N.Y., 291 F.2d 94—Rogers v. Baltimore & O.R. Co., C.A.Ohio, 325 F.2d 134—Carmichael v. City of Greenwood, Miss., C.A.Miss., 352 F.2d 86, reh. 369 F.2d 698.

37. U.S.—Sanford Bros. Boats, Inc. v. Vidrine, C.A.La., 412 F.2d 958—Mogge v. District 8, Intern. Ass'n of Machinists, AFL-CIO, C.A.Ill., 454 F.2d 510.

Supplemental record

U.S.—Fleming v. Gulf Oil Corp., C.A.Okl., 547 F.2d 908.

The preparation of the transcript is a continuing matter and must proceed in the district court although jurisdiction over the case in which it will be filed may have passed to the appellate court.[37.5]

37.5. D.C.—N.L.R.B. v. Sagamore Shirt Co., C.A., 401 F.2d 925, 130 U.S.App.D.C. 384.

Certification of new trial

If District Court would be of opinion that satisfactory record could not be obtained for appeal pending in Court of Appeals and that new trial was required, upon certification by District Court judge, pending motion for remand for failure of former official court reporter to have testimony fully transcribed would be granted.

U.S.—Hydramotive Mfg. Corp. v. Securities and Exchange Commission, C.A.Okl., 355 F.2d 179.

Remand not necessary

U.S.—Hydramotive Mfg. Corp. v. Securities and Exchange Commission, C.A.Okl., 355 F.2d 179.

Continued supervision of reporter's duties

U.S.—Hydramotive Mfg. Corp. v. Securities and Exchange Commission, C.A.Okl., 355 F.2d 179.

38. U.S.—Frankfort Oil Co. v. Snakard, C.A.Okl., 279 F.2d 436, cert. den. 81 S.Ct. 283, 364 U.S. 920, 6 L.Ed.2d 259—Foley Lumber Industries, Inc. v. Buckeye Cellulose Corp., C.A.Fla., 286 F.2d 697, cert. den. 81 S.Ct. 1922, 366 U.S. 966, 6 L.Ed.2d 1257—S & E Shipping Corp. v. Chesapeake & O. Ry. Co., C.A.Ohio, 678 F.2d 636.

Stipulation that depositions be added to record

U.S.—Gomes v. Williams, C.A.N.M., 420 F.2d 1364.

Change in Rules

Federal Rules of Civil Procedure, Rule 75(h), is now F.R.A.P. Rule 10(e), 28 U.S.C.A.

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39. Change in Rules

Federal Rules of Civil Procedure, Rule 75(h), is now F.R.A.P. Rule 10(e), 28 U.S.C.A.

40. U.S.—Foley Lumber Industries, Inc. v. Buckeye Cellulose Corp, C.A.Fla., 286 F.2d 697, cert. den. 81 S.Ct. 1922, 366 U.S. 966, 6 L Ed.2d 1257—Wilkin v. Sunbeam Corp., C.A.Kan., 405 F.2d 165, app. after remand 466 F.2d 714. Cert. den. 93 S.Ct. 940, 409 U.S. 1126, 35 L.Ed.2d 258.

Ritter v. Hilo Varnish Corp., D.C.N.Y., 186 F.Supp. 625.

Denial of motion to amend not error under circumstances

U.S.—Cox v. General Elec. Co., C.A.Mich., 302 F.2d 389.

Remaking record disapproved

U.S.—U.S. Cas. Co. v. Schlein, C.A.Tex., 338 F.2d 169.

Certificate of trial judge includable in record

U.S.—Cockrell v. Ferrier, C.A.Ala., 375 F.2d 889.

42. U.S.—Grau v. Procter & Gamble Co., D.C.Ala., 32 F.R.D. 199.

43. U.S.—Ritter v. Hilo Varnish Corp, D.C.N.Y., 186 F.Supp. 625.

Grau v Procter & Gamble Co., D.C.Ala., 32 F.R.D. 199.

44. U.S.—Maneikis v. St. Paul Ins. Co. of Illinois, C.A.Ill., 655 F.2d 818.

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45. U.S.—McKinney v. Boyle, C.A.Ariz., 404 F.2d 632, cert. den. 89 S.Ct. 1481, 394 U.S. 992, 22 L.Ed.2d 767, reh. den. 89 S.Ct. 2003, 395 U.S. 941, 23 L.Ed.2d 459, app. after remand 447 F.2d 1091.

Motion to augment record denied

U.S.—Gunston v. U.S., C.A.Cal., 358 F.2d 303, cert. den. 86 S.Ct. 1904, 384 U.S. 993, 16 L.Ed.2d 1010, reh. den. 87 S.Ct. 387, 385 U.S. 964, 17 L.Ed.2d 309.

45.5. U.S.—Cook & Sons Equipment, Inc. v. Killen, C.A.Alaska, 277 F.2d 607.

46. U.S.—Pruitt v. Campbell, C.A.Va., 429 F.2d 642.

47. U.S.—U.S. v. Chesapeake & O. Ry. Co., C.A.Va., 281 F.2d 698—U.S. for Use and Benefit of Air Comfort, Inc. v. Jones Coal Co., C.A.Tenn., 325 F.2d 877.

D.C.—Ramsey v. U.S., C.A., 463 F.2d 815, 149 U.S. App.D.C. 412, affd. 506 F.2d 1322, cert. den. 95 S.Ct. 1569, 421 U.S. 913, 43 L.Ed.2d 778.

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48. U.S.—Aetna Life Ins. Co. v. Barnes, C.A.Tex., 361 F.2d 685.

§ 295(17). —— Waiver and Cure of Defense or Objections, and Striking

Library References

Federal Courts ⚡699.

54. Waiver may be effected

(5) Other instances.

U.S.—Illinois Cent. R. Co. v. Riley, C.A.Ky., 392 F.2d 787.

55. Findings and conclusions

U.S.—Carey, Baxter & Kennedy, Inc. v. Wilshire Oil Co. of Tex., C.A.Okl., 346 F.2d 110.

55.10. Change in Rules

Fed.Rules Civ.Proc. Rule 75(b), in now F.R.A.P. Rule 10(b), 28 U.S.C.A.

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59. Motion denied

D.C.—Connelly v. Nitze, C.A., 401 F.2d 416, 130 U.S. App.D.C. 351.

§ 295(19). Conclusiveness and Effect of Record

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69. U.S.—Superior Mfg. Corp. v. Hessler Mfg. Co., C.A.Colo., 267 F.2d 302, cert. den. 80 S.Ct. 139, 361 U.S. 876, 4 L.Ed.2d 114.

70. D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S.App.D.C. 367

72. U.S.—Security Ben. Life Ins. Co. v. Jackson, C.A Mo., 318 F.2d 846.

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77. Change in Rules

Fed.Rules Civ.Proc. Rule 75, is now F.R.A.P. Rule 10, 28 U.S.C.A.

79.5. Change in Rules

Fed.Rules Civ.Proc., Rule 75(h), is now F.R.A.P. Rule 10(e), 28 U.S.C.A.

§ 295(20). Questions Presented for Review

Library References

Federal Courts ⚡701.

80. U.S.—Ingraham v. Wright, C.A.Fla., 498 F.2d 248, reh. 525 F.2d 909, affd. 97 S.Ct. 1401, 430 U.S. 651, 51 L.Ed.2d 711—Paton v. La Prade, 524 F.2d 862.

Wymer v. Wymer, Bkrtcy.App.Cal., 16 B.R. 497.

D.C.—Franklin Inv. Co. v. Boyd, App., 201 A.2d 871.

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80.5. U.S.—Pellerin Laundry Machinery Sales Co. v. Reed, C.A.Ark., 300 F.2d 305.

80.10. U.S.—Ries v. Lynskey, C.A.Ill., 452 F.2d 172.

82.10. U.S.—Caston v. Sears, Roebuck & Co., Hattiesburg, Miss., C.A.Miss., 556 F.2d 1305.

82.15. U.S.—U.S. v. Reilly, C.A.N.M., 373 F.2d 737.

84. Privilege

(2) Other statements.

D.C.—Brown v. Collins, C.A., 402 F.2d 209, 131 U.S. App.D.C. 68.

Res judicata

(2) Other matters.

U.S.—Abramson v. Pennwood Inv. Corp., C.A.N.Y., 392 F.2d 759.

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85. U.S.—Jaconski v. Avisun Corp., C.A.Pa., 359 F.2d 931.

90. U.S.—Del Rey Air v. Expressway Airpark, Inc., C.A.Okl., 468 F.2d 187.

91. U.S.—Mastrom, Inc. v. Professional Management, Inc., C.A.S.C.. 459 F.2d 172—Hunt v. Rodriguez, C.A.Tex., 462 F.2d 659, reh. granted in part, den. in part 468 F.2d 615.

91.5. U.S.—Johnson v. Grim-Smith Hospital, C.A. Mo., 453 F.2d 1253.

D.C.—Ramsey v. U.S., C.A., 463 F.2d 815, 149 U.S. App.D.C. 412, affd. 506 F.2d 1322, cert. den. 95 S.Ct. 1569, 421 U.S. 913, 43 L.Ed.2d 778.

92. D.C.—Mitzner v. Baylies, C.A., 424 F.2d 814, 137 U.S.App.D.C. 326.

95. U.S.—Aetna Ins. Co. v. Barnett Bros., Inc., C.A. Iowa, 289 F.2d 30—Arnold v. Loose, C.A.Pa., 352 F.2d 959—McCarthy v. Kroger Co., C.A.Pa., 385 F.2d 150—Howard D. Jury, Inc. v. R & G Sloane Mfg. Co., Inc., C.A.Colo., 666 F.2d 1348.

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97. U.S.—Kauffman v. Johnston, C.A.Pa., 454 F.2d 264.

Review in absence of record

U.S.—Commercial Credit Equipment Corp. v. L & L Contracting Co., Inc., C.A.Miss., 549 F.2d 979, reh. den. 553 F.2d 100.

98. U.S.—Dickerson v. Continental Oil Co., C.A.La., 449 F.2d 1209, cert. den. 92 S.Ct. 942, 405 U.S. 934, 30 L.Ed.2d 809, app. after remd. 476 F.2d 635—Armour & Co. v. Nard, C.A.Iowa, 463 F.2d 8, motion den. 56 F.R.D. 610.

99. U.S.—Community Nat. Life Ins. Co. v. Parker Square Sav. and Loan Ass'n, C.A.Okl., 406 F.2d 603.

§ 295(21). —— Questions Dependent on Evidence in General

Library References

Federal Courts ⚡703.

2. U.S.—Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., C.A.La., 414 F.2d 872—Whitelock v. Leatherman, C.A.Colo., 460 F.2d 507.

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8. U.S.—Carey v. Lykes Bros. S.S. Co, C.A.Ala., 455 F.2d 1192.

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11. U.S.—Moorhead v. Stearns-Roger Mfg. Co., C.A. N.M., 320 F.2d 26—McMain v. Twomey, C.A. N.M., 368 F.2d 63—Guest v. Bailes, C.A.Tenn., 448 F.2d 433.

15. U.S.—McGraw-Edison Co. v. Central Transformer Corp., C.A.Ark., 308 F.2d 70—Lindsey v. Moyle, C.A.Idaho 358 F.2d 727—Daleiden v. Carborundum Co., C.A.Minn., 438 F.2d 1017.

§ 295(22). —— As to Instructions

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Federal Courts ⚡704.

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22. U.S.—Campbell v. Clark, C.A.Kan., 283 F.2d 766—Murphy v. St. Paul Fire & Marine Ins. Co., C.A.La., 314 F.2d 30, cert. den. 84 S.Ct. 197, 375 U.S. 906, 11 L.Ed.2d 146—Lusich v. Bloomfield S.S. Co., C.A.La., 355 F.2d 770—Hardware Mut. Ins. Co. v. Lukken, C.A.Okl., 372 F.2d 8—Morris v. Gimbel Bros., Inc., C.A.Pa, 394 F.2d 143.

23. U.S.—Eulo v. Deval Aerodynamics, Inc., C.A.Pa., 430 F.2d 325, cert. den. 91 S.Ct. 1191, 401 U.S. 974, 28 L.Ed.2d 323.

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24. U.S.—Garland v. Material Service Corp., C.A.Ill., 291 F.2d 861, 91 A.L.R.2d 832—Fischer Const. Co. v. Fireman's Fund Ins. Co., C.A.Okl., 420 F.2d 271.

25. U.S.—Sims v. Texas & N.O.R. Co., C.A.La., 267 F.2d 37, cert. den. 80 S.Ct. 163, 361 U.S. 888, 4 L.Ed.2d 123—Sears, Roebuck & Co. v. Daniels, C.A.Neb., 299 F.2d 154.

§ 295(23). —— As to Findings and Decisions

Library References

Federal Courts ⚡705.

28. U.S.—Jensen v. U.S., C.A.Cal., 326 F.2d 891—Kelley v. Dunne, C.A.Mass., 369 F.2d 627—Green v. Aetna Ins. Co., C.A.Tex., 397 F.2d 614—Barber v. Kimbrell's Inc., C.A.N.C., 577 F.2d 216, cert. den. 99 S.Ct. 329, 439 U.S. 934, 58 L.Ed.2d 330.

29. U.S.—Kruger v. Purcell, C.A.Virgin Islands, 300 F.2d 830.

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32. District court's findings are subject to attack, etc.

Fed.Rules Civ.Proc. Rule 75, is now F.R.A.P. Rule 10, 28 U.S.C.A.

33.5. U.S.—Eulo v. Deval Aerodynamics, Inc., C.A. Pa., 430 F.2d 325, cert. den. 91 S.Ct. 1191, 401 U.S. 914, 28 L.Ed.2d 323.

D.C.—Franklin Inv. Co. v. Boyd, App., 201 A.2d 871.

§ 295(24). Matters Not Apparent of Record

Library References

Federal Courts ⚡707.

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34.50. U.S.—Williams v. Pennsylvania R. Co., C.A. N.Y., 313 F.2d 203, on remand, D.C., 267 F.Supp. 495.

35. U.S.—Hong v. U.S., C.A.Hawaii, 363 F.2d 116—Tidewater Patent Development Co. v. Kitchen, C.A.Va., 371 F.2d 1004, cert. den. 88 S.Ct. 46, 389 U.S. 821, 19 L.Ed.2d 74, app. after remand 421 F.2d 680—Creason v. American Bridge, C.A.Kan., 384 F.2d 475—Carcia v. American Marine Corp., C.A.La., 432 F.2d 6—Hassenflu v. Pyke, C.A. Tex., 491 F.2d 1094.

Wymer v. Wymer, Bkrtcy.App.Cal., 16 B.R. 497

Particular matters not considered because not in record

(4) Other matters.

U.S.—Gunn v. U.S., C.A.Ark., 283 F.2d 358—Rawson v. Calmar S.S. Corp., C.A.Wash., 304 F.2d 202.

37. U.S.—Metropolitan Life Ins. Co. v. Butte, C.A. Utah, 333 F.2d 82—People of State of Cal. v. General Motors Corp., C.A.Cal., 431 F.2d 732.

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38. U.S.—In re Frank Fehr Brewing Co., C.A.Ky., 268 F.2d 170, cert. den. 80 S.Ct. 880, 362 U.S. 963, 4 L.Ed.2d 878, reh. den. 80 S.Ct 1250, 363 U.S. 817, 4 L Ed.2d 1157—In re Strubbe, C.A. N.J., 347 F.2d 217—U.S. ex rel. Bradshaw v. Alldredge, C.A.Pa., 432 F.2d 1248—U.S. v. Gazda, C.A.Pa., 499 F.2d 161.

Appendix to brief

(2) Other matters.

U.S.—Oster v. Union Pac. R. Co., C.A.Mont., 274 F.2d 447.

Mere statement not evidence

U.S.—Thornton v. U.S., C.A.Pa., 493 F.2d 164.

40. D.C.—Lillycrop v. Kinsky, C.A., 300 F.2d 736, 112 U.S.App.D.C. 144.

42. U.S.—U.S. v. Wood, C.A.Miss., 295 F.2d 772, cert. den. 82 S.Ct. 933, 369 U.S. 850, 8 L.Ed.2d 9—Stearns v. Hertz Corp., C.A.Mo., 326 F.2d 405, cert. den. 84 S.Ct. 1338, 377 U.S. 934, 12 L.Ed.2d 298—Weissinger v. U.S., C.A.Fla., 423 F.2d 795—U.S. ex rel. Bradshaw v. Alldredge, C.A.Pa., 432 F.2d 1248—Sperry Rand Corp. v. A-T-O, Inc., C.A.Va., 459 F.2d 19, cert. den. 93 S.Ct. 117, 409 U.S. 892, 34 L.Ed.2d 150, reh. den. 93 S.Ct. 119, 409 U.S. 892, 34 L.Ed.2d 950.

Depositions

(1) U.S.—Jaconski v. Avisun Corp., C.A.Pa., 359 F.2d 931.

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43. U.S.—Cox v. Northwest Airlines, Inc., C.A.Ill., 379 F.2d 893, cert. den. 88 S.Ct. 788, two cases, 389 U.S. 1044, 19 L.Ed.2d 836.

D.C.—Deep South Broadcasting Co. v. F.C.C., C.A., 347 F.2d 459, 120 U.S.App.D.C. 365.

44. U.S.—Kalimian v. Liberty Mut. Fire Ins. Co., C.A.N.Y., 300 F.2d 547.

Facts admitted in argument and in briefs

U.S.—Flight Engineers' Intern, Ass'n, AFL-CIO, TWA Chapter v. Trans World Airlines, Inc., C.A.Mo., 305 F.2d 675.

46. U.S.—Kalimian v. Liberty Mut. Fire Ins. Co., C.A.N.Y., 300 F.2d 547.

48. U.S.—American Pipe v. Steel Corp. v. Firestone Tire & Rubber Co., C.A.Cal., 292 F.2d 640.

49. U.S.—Wells Benz, Inc. v. U.S., for Use of Mercury Elec. Co., C.A.Cal., 333 F.2d 89—U.S v. Cornish, C.A.Or., 348 F.2d 175—Southern Pac. Land Co. v. U.S., C.A.Cal., 367 F.2d 161, cert. den. 87 S.Ct. 1478, 386 U.S. 1030, 18 L.Ed.2d 592.

Use to supplement of explain, but not to contradict, permissible

U.S.—Frankel v. Moody, C.A.Pa., 393 F.2d 279.

50. U.S.—W. H. Elliott & Sons Co. v. E. & F. King & Co., C.A.N.M., 291 F.2d 79—American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., C.A.Cal., 292 F.2d 640—Premier Roof Co. v. U.S. for Use and Benefit of Alpaca Elec. Corp., C.A.Cal., 315 F.2d 18—U.S. for Use of R.W. Vaught Co. v. F. D. Rich Co., C.A.Mo., 439 F.2d 895.

§ 296(1). Assignment of Errors or Statement of Points

Library References

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50.55. Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966.

51. U.S.—Blitzstein v. Ford Motor Co., C.A.Ala., 288 F.2d 738.

Under the Federal Rules of Appellate Procedure, unless the entire transcript is to be included, the appellant shall file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal.[51.10]

51.10. F.R.A.P. Rule 10(b), 28 U.S.C.A.

52. Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966. See F.R.A.P. Rule 10(b), 28 U.S.C.A.

53.10. Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966.

§ 296(2). —— Consideration of Errors on Failure to File Statement of Points

Library References

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53.50. U.S.—Martin v. Atlantic Coast Line R. Co., C.A.Fla., 289 F.2d 414—Holt v. Sarver, C.A.Ark., 442 F.2d 304, on remand, D.C., 363 F.Supp. 194, revd. on oth. grds., 505 F.2d 194, on remand 410 F.Supp. 251, affd. 548 F.2d 740.

53.60. U.S.—Martin v. Reynolds Metals Corp. C.A.Or., 297 F.2d 49—Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Intern., C.A.Minn., 373 F.2d 136, cert. den. 88 S.Ct. 77.

53.65. U.S.—Calvert v. Katy Taxi, Inc., C.A.N.Y., 413 F.2d 841.

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56. **Jurisdiction**

(1) U.S.—Firemen's Ins. Co. of Newark, N.J. v. Robbins Coal Co., C.A.Ala., 288 F.2d 349, cert. den. 82 S.Ct. 122, 368 U.S. 375, 7 L.Ed.2d 77.

57. U.S.—Jensen v. U.S., C.A.Cal., 326 F.2d 891.

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58.15. U.S.—Andrews v. Olin Mathieson Chemical Corp., C.A.Iowa, 334 F.2d 422.

Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966.

See F.R.A.P. Rule 10(b), 28 U.S.C.A.

59.5. U.S.—U.S. v. Chesapeake & O. Ry. Co., C.A.Va., 281 F.2d 698—Jensen v. U.S., C.A.Cal., 326 F.2d 891—Spellacy v. Southern Pac. Co., C.A.Or., 428 F.2d 619.

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63. U.S.—Texaco, Inc. v. Lirette, C.A.La., 410 F.2d 1064.

65. U.S.—Barnard-Curtiss Co. v. U.S. for Use and Benefit of D.W. Falls Const. Co., C.A.N.M., 257 F.2d 565, cert. den. 79 S.Ct. 230, 233, 358 U.S. 906, 3 L.Ed.2d 227.

67.5. **Power exercised only in exceptional cases**

U.S.—Nowell v. Dick, C.A.Tex., 413 F.2d 1204.

§ 296(3). —— Assignment of Cross Errors

Library References

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68.10. **Errors not considered on failure to make cross assignment**

U.S.—Pan-American Life Ins. Co. v. Alvarez, C.A.Fla., 374 F.2d 92, cert. den. 88 S.Ct. 89, 389 U.S. 829, 19 L.Ed.2d 85.

§ 296(4). —— Form, Scope, and Effect

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72. U.S.—Blitzstein v. Ford Motor Co., C.A.Ala., 288 F.2d 738.

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78. **Weight and sufficiency**

(1) U.S.—John Fabick Tractor Co. v. Lizza & Sons, Inc., C.A.N.Y., 298 F.2d 63.

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85. Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966. See F.R.A.P. Rule 10(b), 28 U.S.C.A.

§ 296(5). Briefs

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92. U.S.—Hungerford v. U.S., C.A.Cal., 307 F.2d 99—Minnesota Mut. Life Ins. Co. v. Wright, C.A.Minn., 312 F.2d 655—Robert A. Johnston Co. v. Southland Dairy Distributing Co., C.A.N.C., 368 F.2d 993—FMC Corp. v. Keizer Equipment Co., C.A.Mich., 433 F.2d 654—Childs v. Kaplan, C.A.Mo., 467 F.2d 628.

Supplemental, additional, or amended briefs, etc.

U.S.—Montgomery Ward & Co. v. Steele, C.A.Mo., 352 F.2d 822—Maneikis v. St. Paul Ins. Co. of Illinois, C.A.Ill., 655 F.2d 818.

Plaintiff seeking new trial on defendant's appeal from denial of judgment n.o.v.

U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

Right to file a reply brief

U.S.—Equal Employment Opportunity Commission v. Union Bank, C.A.Cal., 408 F.2d 867.

93. U.S.—Chicago M., St. P. & P.R. Co. v. Brotherhood of Locomotive Firemen and Enginemen, C.A.Ill., 397 F.2d 541, cert. den. 89 S.Ct. 630, 393 U.S. 1022, 21 L.Ed.2d 566—Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 524 v. Billington, C.A.Wash., 402 F.2d 510.

94. U.S.—Crane Co. v. Aeroquip Corp., C.A.Ill., 504 F.2d 1086.

Appeal in forma pauperis, etc.

U.S.—Harvey v. Sadler, C.A.Cal., 331 F.2d 387.

If the district court sees fit to vacate its judgment and render substantially the same judgment in conformity with Rule 54(b), and if an appeal is taken from that judgment, the parties need not reprint briefs.[94.10]

94.10. U.S.—Southern Parkway Corp. v. Lakewood Park Corp., 273 F.2d 107, 106 U.S.App.D.C. 372.

D.C.—Chvala v. D.C. Transit System, Inc., C.A., 293 F.2d 519, 110 U.S.App.D.C. 331.

95. U.S.—Turner v. West Tex. Utilities Co., C.A.Tex., 290 F.2d 191, cert. den. 82 S.Ct. 242, 368 U.S. 920, 7 L.Ed.2d 136—North Texas Producers Ass'n v. Metzger Dairies, Inc., C.A.Tex., 348 F.2d 189, cert. den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed.2d 468.

The Federal Rules of Appellate Procedure now make provision with respect to the form and contents of briefs.[95.1]

95.1. F.R.A.P. Rule 28 et seq., 28 U.S.C.A.

95.15. U.S.—Lipscomb v. U.S., C.A., 301 F.2d 905.

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95.35. U.S.—Bogus v. American Speech and Hearing Ass'n., C.A.Pa., 582 F.2d 277.

95.40. U.S.—Beshear v. Weinzapfel, C.A.Ind., 474 F.2d 127.

95.45. U.S.—Black v. Payne, C.A.Cal., 591 F.2d 83, cert. den. 100 S.Ct. 139, 444 U.S. 867, 62 L.Ed.2d 90, reh. den. 100 S.Ct. 493, 444 U.S. 985, 62 L.Ed.2d 414.

95.50. U.S.—Kincaid & King Const. Co. v. U.S. for Use of Olday, C.A.Alaska, 299 F.2d 787—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

§ 296(6). —— Length of Briefs

Library References

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95.60. **Federal Rules of Appellate Procedure**

F.R.A.P. Rule 28(g), 28 U.S.C.A.

§ 296(7). —— Limitation to Matters in Record

Library References

Federal Courts ⇐712.

95.80. U.S.—U.S. v. Howard, C.A.Pa., 360 F.2d 373—Bonn v. Puerto Rico Intern. Airlines, Inc., C.A.Puerto Rico, 518 F.2d 89.

References in briefs to the record

F.R.A.P. Rule 28(e), 28 U.S.C.A.

95.82. U.S.—Day v. United Auto., Aerospace and Agr. Implement Workers of America, Local 36 of UAW, C.A.Mich., 466 F.2d 83.

§ 296(8). —— Specification or Statement of Points or Errors

Library References

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Under the Federal Rules of Appellate Procedure, a brief shall contain a statement of the issues presented for review. It should also contain a statement of the case; the statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below, and there shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.[96.10]

96.10. F.R.A.P. Rule 28(a), 28 U.S.C.A.

97. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254—City of Greeley, Kan. v. U.S., C.A.Kan., 335 F.2d 896—Martin v. Reynolds Metals Co., C.A.Or., 336 F.2d 876.

97.2. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254—Mississippi River Corp. v. F.T.C., C.A., 454 F.2d 1083.

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97.12. U.S.—George E. Hoffman & Sons, Inc. v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local No. 627, C.A.Ill., 617 F.2d 1234, cert. den. 101 S.Ct. 335, 449 U.S. 937, 66 L.Ed.2d 160.

97.18. U.S.—Automated Bldg. Components, Inc. v. Hydro-Air Engineering, Inc., C.A.Mo., 362 F.2d 989—Daly v. Sprague, C.A.Tex., 675 F.2d 716, cert. den. 103 S.Ct. 1448, 460 U.S. 1047, 75 L.Ed.2d 802, app. after remand C.A., 742 F.2d 896, reh. den. 747 F.2d 1465.

Designation of points held insufficient

U.S.—Brennan v. Rock Wool Insulating Co., C.A.Colo., 337 F.2d 849.

97.20. U.S.—Walker Transp. Co. v. Neylon, C.A. Mo., 396 F.2d 558.

97.24. U.S.—Slaughter v. Philadelphia Nat. Bank, C.A.Pa., 417 F.2d 21.

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97.32. Rule disregarded in proper case

U.S.—Hargrave v. Wellman, C.A.Mont., 276 F.2d 948.

97.38. U.S.—Smith v. Illinois Cent. R. Co., C.A. Tenn., 394 F.2d 254.

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97.46. Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966. See F.R.A.P. Rule 10(b), 28 U.S.C.A.

§ 296(9). —— —— Effect of Failure to Specify Errors Relied on

Library References

Federal Courts ⚡714.

97.60. U.S.—Ehlers v. Vinal, C.A.Neb., 382 F.2d 58.

97.62. U.S.—U.S. v. Certain Lands in City of Statesboro, Bulloch County, State of Ga., C.A.Ga., 341 F.2d 742—Travelers Ins. Co. v. Davis, C.A.Fla., 411 F.2d 244—Chicago & Western Indiana R. Co. v. Motorship Buko Maru, C.A.Ill., 505 F.2d 579.

97.64. U.S.—Business Forms Finishing Service, Inc. v. Carson, C.A.Ill., 463 F.2d 966—In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, C.A.Ill., 644 F.2d 594, cert. den. 102 S.Ct. 358, 454 U.S. 878, 70 L.Ed.2d 187—A & A Concrete, Inc. v. White Mountain Apache Tribe, C.A.Ariz., 676 F.2d 1330.

Matters not required to be considered

(5) Objections to instructions.

U.S.—Illingworth v. Industrial Molasses Corp., C.A. Iowa, 272 F.2d 845.

(6) Other matters.

U.S.—Autrey v. Williams and Dunlap, C.A.La., 343 F.2d 730, reh. den. 346 F.2d 1007.

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97.68. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254—Preservation Coalition, Inc. v. Pierce, C.A.Idaho, 667 F.2d 851.

97.70. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254.

Federal Rules of Civil Procedure, Rule 75(d), 28 U.S.C.A., was deleted in 1966.

See F.R.A.P. Rule 10(b), 28 U.S.C.A.

97.78. U.S.—Indemnity Ins. Co. of North America v. Pioneer Val. Sav. Bank, C.A.Iowa, 343 F.2d 634.

97.80. U.S.—Indemnity Ins. Co of North America v. Pioneer Va. Sav. Bank, C.A.Iowa, 343 F.2d 634—Harris v. Smith, C.A.Neb., 372 F.2d 806—McDougall v. Dunn, C.A.N.C., 468 F.2d 468.

97.82. U.S.—Brotherhood of Locomotive Firemen and Enginemen v. Butte, A. & P. Ry. Co., C.A. Mont., 286 F.2d 706, cert. den. 81 S.Ct. 1650, 366 U.S. 929, 6 L.Ed.2d 388.

97.88. U.S.—Childs v. Kaplan, C.A.Mo., 467 F.2d 628.

97.90. U.S.—Harris v. Smith, C.A.Neb., 372 F.2d 806.

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97.92. U.S.—Locust Cartage Co. v. Transamerican Freight Lines, Inc., C.A.Mass., 430 F.2d 334, cert. den. 91 S.Ct. 365, 400 U.S. 964, 27 L.Ed.2d 383—Boles v. Greeneville Housing Authority, C.A.Tenn., 468 F.2d 476.

Admissions. Unless controverted by appellee, statements in appellant's brief pertinent to the issues will be taken as true.[97.95]

97.95. U.S.—Investment Funds Corp. v. Bomar, C.A. Fla., 306 F.2d 32.

99. U.S.—El Salto, S.A. v. PSG Co., C.A.Or., 444 F.2d 477, cert. den. 92 S.Ct. 273, 404 U.S. 940, 30 L.Ed.2d 253.

Contention frivolous

D.C.—Bunz v. Moving Picture Mach. Operators' Protective Union Local 224, C.A., 567 F.2d 1117, 186 U.S.App.D.C. 124.

§ 296(10). —— Arguments and Citation of Authorities

Library References

Federal Courts ⚡714.

1. U.S.—Harman v. Diversified Medical Investments Corp., 524 F.2d 361, cert. den. 96 S.Ct. 1727, 425 U.S. 951, 48 L.Ed.2d 195.

The Federal Rules of Appellate Procedure provide that a brief shall contain an argument, and that it may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.[1.1]

1.1. F.R.A.P. Rule 28(a), 28 U.S.C.A.

Reproduction of statutes, rules, regulations, etc.

Under F.R.A.P. Rule 28(f), 28 U.S.C.A., if determination of the issues presented required the study of statutes, rules, regulations, etc. or relevant parts thereof, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

1.10. Waiver

U.S.—Gulf, M. & O.R. Co. v. Thornton, C.A.Mo., 294 F.2d 104.

§ 296(11). —— Appendix

Library References

Federal Courts ⚡713.

1.52. U.S.—Mitchell v. Trade Winds Co., C.A.Ga., 289 F.2d 278—Haddad v. Border Exp., Inc., C.A. Mass., 303 F.2d 134—Mahoney v. Federal Sav & Loan Ins. Corp., C.A.Ill., 393 F.2d 156, cert. den. 89 S.Ct. 112, 393 U.S. 837, 21 L.Ed.2d 107—U.S. v. Seaboard Coast Line R.R., C.A.Va., 517 F.2d 881.

The Federal Rules of Appellate Procedure provide for the appendix to the briefs, including form, contents, number of copies, and time for filing.[1.52a] Under the Rules, a court of appeals may by rule applicable to all cases, or to classes of cases, or by order in specific cases, dispense with the requirement of an appendix and permit appeals to be heard on the original record, with such copies of the record, or relevant parts thereof, as the court may require.[1.52b]

1.52a. F.R.A.P. Rule 30, 28 U.S.C.A.

1.52b. F.R.A.P. Rule 30(f), 28 U.S.C.A.

Appeal dismissed in absence of permission

U.S.—FMC Corp. v. Knowles Elec., Inc., C.A.W.Va., 438 F.2d 1220.

If the district court sees fit to vacate its judgment and render substantially the same judgment in conformity with Rule 54(b), and if an appeal is taken from that judgment, the parties need not reprint appendices.[1.53]

1.53. D.C.—Southern Parkway Corp. v. Lakewood Park Corp., C.A., 273 F.2d 107, 106 U.S.App. D.C. 372—Chvala v. D.C. Transit System, Inc., C.A., 293 F.2d 519, 110 U.S.App.D.C. 331.

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1.54. U.S.—Markowitz & Co. v. Toledo Metropolitan Housing Authority, C.A.Ohio, 608 F.2d 699.

1.56. U.S.—Sparrow v. Yellow Cab Co., C.A.Ill., 273 F.2d 1—A. O. Smith Corp. v. Pre-Fab Transit Co., C.A.Ill., 287 F.2d 210.

1.58. U.S.—Arnold Productions, Inc. v. Favorite Films Corp., C.A.N.Y., 291 F.2d 94—Doyn Aircraft, Inc. v. Wylie, C.A.Kan., 443 F.2d 579.

Effect of omission

(3) Other matters.

U.S.—Torres v. International General Elec., S.A., Inc., C.A.Puerto Rico, 303 F.2d 615—Chernack v. Radlo, C.A.R.I., 331 F.2d 170.

1.62. U.S.—Marcinak v. West Indies Inv. Co., C.A. Virgin Islands, 299 F.2d 821.

1.64. U.S.—Torres v. International General Elec. S.A. Inc., C.A.Puerto Rico, 303 F.2d 615.

Effect of failure to include

U.S.—Potomac Ins. Co. v. Stanley, C.A.Ind., 281 F.2d 775.

1.70. Matters not to be included

(2) Other matters.

U.S.—Aquascutum of London, Inc. v. S.S. American Champion, C.A.N.Y., 426 F.2d 205.

1.72. U.S.—Morrison v. Texas Co., C.A.Ill., 289 F.2d 382.

In absence of joint appendix, separate appendix required

U.S.—Globe Motors, Inc. v. Studebaker-Packard Corp., C.A.Pa., 328 F.2d 645.

Cooperation by parties in preparation of single index

U.S.—Alger v. Hayes, C.A.Minn., 452 F.2d 841.

1.74. U.S.—Morrison v. Texas Co., C.A.Ill., 289 F.2d 382—Alnajjar v. Ford Motor Co., C.A.Mich., 523 F.2d 6.

§ 296(12). —— Abusive or Other Improper Language

Library References

Federal Courts ⇐713.

2. U.S.—Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp., C.A.Ill., 523 F.2d 543.

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2.5. U.S.—Ginsburg v. Stern, C.A.Pa., 295 F.2d 698, cert. den. 82 S.Ct. 603, 368 U.S. 987, 7 L.Ed.2d 525.

§ 296(13). —— Effect of Failure to Comply with Rules

Library References

Federal Courts ⇐716.

3. U.S.—Sparrow v. Yellow Cab Co., C.A.Ill., 273 F.2d 1—A. O. Smith Corp. v. Pre-Fab Transit Co., C.A.Ill., 287 F.2d 210—Morrison v. Texas Co., C.A.Ill., 289 F.2d 382.

Court may take drastic action

U.S.—Braniff Airways, Inc. v. Curtiss-Wright Corp., C.A.N.Y., 411 F.2d 451, cert. den. 90 S.Ct. 431, 396 U.S. 959, 24 L.Ed.2d 423, reh. 424 F.2d 427, cert. den. 91 S.Ct. 59, 400 U.S. 829, 27 L.Ed.2d 59.

4. U.S.—Morrison v. Texas Co., C.A.Ill., 289 F.2d 382—Walters v. Shari Music Pub. Corp., C.A. N.Y., 298 F.2d 206—Lowe v. Taylor Steel Products Co., C.A.Iowa, 373 F.2d 65, cert. den. 88 S.Ct. 85, 389 U.S. 858, 19 L.Ed.2d 122—Business Forms Finishing Service, Inc. v. Carson, C.A.Ill., 463 F.2d 966.

5. U.S.—Dyer v. Securities and Exchange Commission, C.A.Mo., 291 F.2d 774.

5.5. U.S.—Lycon v. Walker, C.A.Mo., 279 F.2d 478—Potomac Ins. Co. v. Stanley, C.A.Ind., 281 F.2d 775—Logan Square Auto Mart, Inc. v. C. I. R., C.A., 291 F.2d 136—Burton v. Martin Oil Service, Inc., C.A.Ind., 295 F.2d 679—Werner v. Hearst Pub. Co., C.A.Cal., 297 F.2d 145—General Elec. Co. v. Sciaky Bros., Inc., C.A.Mich., 304 F.2d 724—Minnesota Min. & Mfg. Co. v. Technical Tape Corp. C.A.Ill., 309 F.2d 55, cert. den. 83 S.Ct. 936, 372 U.S. 942, 9 L.Ed.2d 968—Ramsey v. U.S., C.A.Cal., 329 F.2d 432—Harris v. Palm Springs Alpine Estates, Inc., C.A.Cal., 329 F.2d 909—St. Paul Fire & Marine Ins. Co. v. Arkla Chemical Corp., C.A.Ark., 431 F.2d 959.

Under the Federal Rules of Appellate Procedure, if an appellee fails to file his brief, he will not be heard at oral argument except by permission of the court.[5.6]

5.6. F.R.A.P. Rule 31(c), 28 U.S.C.A.

5.15. U.S.—King v. Laborers Intern. Union of North America, Union Local No. 818, C.A.Tenn., 443 F.2d 273.

6. U.S.—Delaware Val. Marine Supply Co. v. American Tobacco Co., C.A.Pa., 297 F.2d 199, cert. den. 82 S.Ct. 867, 369 U.S. 839, 7 L.Ed.2d 843—Rudick v. Prineville Memorial Hospital, C.A.Or., 319 F.2d 764—U.S. v. Harris, C.A.Ill., 446 F.2d 129, cert. den. 92 S.Ct. 533, 404 U.S. 994, 30 L.Ed.2d 546—Silverthorne v. Laird, C.A.Tex., 460 F.2d 1175.

7.5. U.S.—Sparrow v. Yellow Cab Co., C.A.Ill., 273 F.2d 1—Potomac Ins. Co., v. Stanley, C.A.Ind., 281 F.2d 775—Pickett v. Travelers Indem. Co., C.A.Wis, 283 F.2d 835—Fagan v. Schroeder, C.A.Ill., 284 F.2d 666.

§ 296(14). —— Printing, Service, and Filing

Library References

Federal Courts ⇐712.

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8. Relief from requirements of printing appendix granted under circumstances

U.S.—Arnold Productions, Inc. v. Favorite Films Corp., C.A.N.Y., 291 F.2d 94.

The Federal Rules of Appellate Procedure make provision with respect to the form of briefs, which may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper; carbon copies of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis.[9.1] Provision is also made as to the service and filing of briefs, including the number of copies to be filed and served.[9.2]

9.1. F.R.A.P. Rule 32(a), 28 U.S.C.A.

9.2. F.R.A.P. Rule 31, 28 U.S.C.A.

9.5. U.S.—Carroll v. Frontera Compania Naviera, S.A., C.A.Pa., 390 F.2d 311.

Cross appellant, etc.

U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254.

10. U.S.—Walker v. Mathews, C.A.Wash., 546 F.2d 814.

The Federal Rules of Appellate Procedure make provision with respect to the time for serving and filing briefs,[11.1] and if an appellant fails to file his brief within the time provided by the Rules, or within the time as extended, an appellee may move for dismissal of the appeal.[11.2]

11.1. F.R.A.P. Rule 31(a), 28 U.S.C.A.

11.2. F.R.A.P. Rule 31(c), 28 U.S.C.A.

11.20. D.C.—Winter v. Crowley, C.A., 374 F.2d 317, 126 U.S.App.D.C. 103.

12. U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. U.S., C.A.N.C., 272 F.2d 11.

12.5. U.S.—Everest & Jennings, Inc. v. E & J Mfg. Co., C.A.Cal., 263 F.2d 254, cert. den. 79 S.Ct. 1284, 360 U.S. 902, 3 L.Ed.2d 1254.

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12.15. After filing notice of appeal trial court motions do not extend time

U.S.—Myers v. Civil Service Commission, C.A.Ohio, 493 F.2d 1246.

12.20. Federal Rules of Appellate Procedure

See F.R.A.P. Rule 26(b), 28 U.S.C.A.

§ 296(16). In General

Library References

Federal Courts ⇐721.

15. U.S.—Waters v. Western Co. of North America, C.A.N.M., 436 F.2d 1072.

Even after expiration of term

U.S.—Yanow v. Weyerhaeuser S.S. Co., C.A.Or., 274 F.2d 274, cert. den. 80 S.Ct. 671, 362 U.S. 919, 4 L.Ed.2d 739.

16.5. Narrow exception to principle that court deprived of jurisdiction

U.S.—Sykes v. U.S., C.A.Ark., 392 F.2d 735, app. after remand 420 F.2d 324.

Under Federal Rule

Provisions formerly in Fed.Rules Civ.Proc. Rule 73(a), are now in F.R.A.P. Rule 42(a), 28 U.S.C.A.

The Federal Rules of Appellate Procedure provide for dismissal in the Court of Appeals.[16.10]

16.10. F.R.A.P. Rule 42(b), 28 U.S.C.A.

Courts of appeal should make all allowances possible in favor of persons appearing in propria persona.[16.15]

16.15. U.S.—Wimberly v. Rogers, C.A.Mont., 557 F.2d 671.

17. U.S.—Matter of Penn Cent. Transp. Co., C.A., 630 F.2d 183.

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18. U.S.—Lane v. Swingspout Measure Co., C.A.Ill., 340 F.2d 40—Matter of Penn Cent. Transp. Co., C.A., 630 F.2d 183.

Voluntary dismissal held inappropriate

U.S.—Blount v. State Bank & Trust Co., C.A.N.C., 425 F.2d 266.

§ 296(17). Grounds

Library References

Federal Courts ⇐541, 722, 725–727.

20. U.S.—Hering Realty Co. v. General Const. Co., C.A.S.C., 272 F.2d 371—Ferguson v. Tabah, C.A. N.Y., 288 F.2d 665—Atchison, T. & S.F. Ry. Co. v. Brotherhood of R.R. Trainmen, C.A.Ill., 324 F.2d 899.

D.C.—Dart Drug Corp. v. Brenner, C.A., 363 F.2d 679, 124 U.S.App.D.C. 192—Murray v. Buchanan, C.A., 720 F.2d 689, 232 U.S.App.D.C. 42.

Discretion

U.S.—U.S. v. State of Wash., Dept. of Fisheries, C.A. Wash., 573 F.2d 1117.

21. U.S.—Harvey v. Sadler, C.A.Cal., 331 F.2d 387.

D.C.—Alton & Southern Ry. Co. v. International Ass'n of Machinists and Aerospace Workers, C.A., 463 F.2d 872, 150 U.S.App.D.C. 36.

21.5. U.S.—Lee v. Monroe County Bd. of Ed., C.A. Ala., 554 F.2d 1287, app. after remand 640 F.2d 755.

21.10. D.C.—Unsinn v. Wilson, C.A., 285 F.2d 273, 109 U.S.App.D.C. 193.

Granted only in extreme cases

U.S.—Cohen v. Curtis Pub. Co., C.A.Minn., 333 F.2d 974, cert. den. 85 S.Ct. 923, 380 U.S. 921, 13 L.Ed.2d 808, reh. den. 85 S.Ct. 1351, 380 U.S. 989, 14 L.Ed.2d 283—Moist v. Belk, C.A.Mich., 380 F.2d 721, cert. den. 88 S.Ct. 338, 389 U.S. 960, 19 L.Ed.2d 369.

22. U.S.—Wallach v. Lieberman, C.A.N.Y., 366 F.2d 254—Jones v. Chaney & James Const. Co., C.A. Ala., 399 F.2d 84—Sterling v. Blackwelder, C.A. Va., 405 F.2d 884.

D.C.—Lord v. Helmandollar, C.A., 348 F.2d 780, 121 U.S.App.D.C. 168, cert. den. 86 S.Ct. 929, 383 U.S. 928, 15 L.Ed.2d 847, reh. den. 86 S.Ct. 1433, 384 U.S. 947, 16 L.Ed.2d 545.

23. U.S.—Willis v. U.S. Bd. of Parole, C.A.Ga., 451 F.2d 659—Morris v. Ross, C.A.Fla., 663 F.2d

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1032, cert. den. 102 S.Ct. 2303, 456 U.S. 1010, 73 L.Ed.2d 1306.

Appeal held not frivolous

(2) Other instances.

U.S.—U.S. ex rel. Gardner v. Madden, C.A.Cal., 352 F.2d 792—Chagas v. Berry, C.A.Tex., 369 F.2d 637, cert. den. 88 S.Ct. 161, 389 U.S. 872, 19 L.Ed.2d 154.

Appeal held frivolous

U.S.—John v. Gibson, C.A.Cal., 270 F.2d 36, cert. den. 80 S.Ct. 601, 361 U.S. 970, 4 L.Ed.2d 549.

(2) Other instances.

U.S.—Gallizzi v. Williams, C.A.Fla., 423 F.2d 1213.

Granted only in extreme cases

U.S.—Cohen v. Curtis Pub. Co., C.A.Minn., 333 F.2d 974, cert. den. 85 S.Ct. 923, 380 U.S. 921, 13 L.Ed.2d 808, reh. den. 85 S.Ct. 1351, 380 U.S. 989, 14 L.Ed.2d 283.

Dismissal not favored

U.S.—Moist v. Belk, C.A.Mich., 380 F.2d 721, cert. den. 88 S.Ct. 338, 389 U.S. 960, 19 L.Ed.2d 369.

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23.5. Appeal held not taken merely for purpose of delay

U.S.—Southern Farm Bureau Cas. Ins. Co. v. Morgan, C.A.La., 339 F.2d 755.

23.10. Granted only in extreme cases

U.S.—Cohen v. Curtis Pub. Co., C.A.Minn., 333 F.2d 974, cert. den. 5 S.Ct. 923, 380 U.S. 921, 13 L.Ed.2d 808, reh. den. 85 S.Ct. 1351, 380 U.S. 989, 14 L.Ed.2d 283.

24. U.S.—South Omaha Terminal Ry. Co. v. Armour & Co., C.A.Neb., 449 F.2d 1265.

24.5. U.S.—Wark v. Spinuzzi, C.A.Tex., 376 F.2d 827.

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25. U.S.—Barnes v. American Broadcasting Co., C.A. Ill., 259 F.2d 858, cert. den. 79 S.Ct. 727, 359 U.S. 946, 3 L.Ed.2d 679.

25.5. U.S.—Stuart v. Pearce, C.A.Mich., 275 F.2d 283—Larkin v. United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, AFL-CIO, Local 53, C.A. Mass., 338 F.2d 335, cert. den. 85 S.Ct. 1337, 380 U.S. 975, 14 L.Ed.2d 270—Tidwell v. Dees, C.A. La., 464 F.2d 1297.

25.30. U.S.—U.S. v. Boccuto, C.A.N.J., 274 F.2d 860.

27. U.S.—Young v. Hale, C.A.Ala., 390 F.2d 871.

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28. U.S.—McKinney v. Boyle, C.A.Ariz., 404 F.2d 632, cert. den. 89 S.Ct. 1481, 394 U.S. 992, 22 L.Ed.2d 767, reh. den. 89 S.Ct. 2003, 395 U.S. 941, 23 L.Ed.2d 459, app. after remand 447 F.2d 1091.

Misrepresentation of fact not requiring dismissal

U.S.—Standard Oil Co. of Cal. v. Perkins, C.A.Or., 347 F.2d 379.

29.5. U.S.—Moore v. Tangipahoa Parish School Bd., C.A.La., 421 F.2d 1407.

§ 296(18). —— Want of Actual Controversy

Library References

Federal Courts ⇐541, 723, 724.

29.40. U.S.—Bryant v. Blackwell, C.A.Ga., 431 F.2d 1203—American Horse Protection Ass'n, Inc. v. Watt, C.A.Nev., 679 F.2d 150.

D.C.—Reiter v. Universal Marion Corp., C.A., 273 F.2d 820, 107 U.S.App.D.C. 6—Gaddis v. Dixie Realty Co., C.A., 420 F.2d 245, 136 U.S.App.D.C. 403.

Questions held moot

(1) U.S.—Gautreaux v. Romney, C.A.Ill., 457 F.2d 124—American Horse Protection Ass'n, Inc. v. Watt, C.A.Nev., 679 F.2d 150

Appeal not moot

U.S.—McLaughlin v. Hoffman, C.A.Ala., 547 F.2d 918.

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29.41. U.S.—Logan v. West Orange-Cove Independent School Dist., C.A.Tex., 440 F.2d 1076.

Other proceedings

(1) U.S.—Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., C.A.Fla., 392 F.2d 716—Dodd v. Spokane County, Wash., C.A.Wash., 393 F.2d 330

D.C.—Industrial Bank of Washington v. Tobriner, C.A., 405 F.2d 1321, 132 U.S.App.D.C. 51.

Passage of statute

U.S.—Romeo J. Roy, Inc. v Northern Nat. Bank, C.A.Me., 740 F.2d 111.

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29.43. U.S.—Gilliam v. School Bd. of City of Hopewell, Va., C.A.Va., 332 F.2d 460—Grathwohl v. U.S., C.A.Fla., 401 F.2d 166—Banger v. Philadelphia Elec. Co., C.A.Pa., 419 F.2d 1322.

D.C.—Lesmark, Inc. v. Pryce, C.A., 334 F.2d 942, 118 U.S.App.D.C. 194.

29.44. U.S.—Samoff for and on Behalf of N.L.R.B. v. International Ass'n of Machinists Dist. Lodge No. 1, C.A.Pa., 420 F.2d 952, cert. den. 90 S.Ct. 2171, 398 U.S. 965, 26 L.Ed.2d 548.

29.45. U.S.—Green v. Hershey, C.A.Tex., 422 F.2d 1319.

29.47. U.S.—Mirin v. Taxi Cab Authority of Clark County, Nev., C.A.Nev., 441 F.2d 1123, cert. den. 92 S.Ct. 240, 404 U.S. 914, 30 L.Ed.2d 188.

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29.53. U.S.—Ruby v. Pan Am. World Airways, Inc., C.A.N.Y., 360 F.2d 691.

29.54. U.S.—Bursten v. Phillips, C.A.Cal., 351 F.2d 616—Richland v. Crandall, C.A.N.Y., 353 F.2d 183—F. H. Vahlsing, Inc., Tex. v. U.S., C.A.Tex., 367 F.2d 577—N.L.R.B. v. Nashville Bldg. and Const. Trades Council, C.A.Tenn., 383 F.2d 562—Texas Committee on Natural Resources v. U.S., C.A.Tex., 430 F.2d 1315.

Dismissal of appeal improper

U.S.—St. Louis-San Francisco Ry. Co. v. Railroad Yardmasters of America, AFL-CIO, C.A.Tex., 347 F.2d 983.

29.55. U.S.—Hoover v. Hoover Co., C.A.Ohio, 370 F.2d 524.

29.56. U.S.—Morris v. Affleck, C.A.R.I., 437 F.2d 82.

29.57. U.S.—Rosado v. Wyman, C.A.N.Y., 437 F.2d 619, affd. 91 S.Ct. 2169, 402 U.S. 991, 29 L.Ed.2d 157.

29.60. U.S.—Mkwanazi v. Kenray Associates, Inc., C.A.N.Y., 410 F.2d 1143—Morrison v. U.S. Marshal, Del Rio, Tex., C.A.Tex., 417 F.2d 334.

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29.62. U.S.—Jones v. Snead, C.A.Mo., 431 F.2d 1115—Marden v. International Ass'n of Machinists and Aerospace Workers, C.A.Fla., 576 F.2d 576.

D.C.—Flight Engineers' Intern. Ass'n, EAL Chapter, AFL-CIO v. National Mediation Bd., C.A., 338 F.2d 280, 119 U.S.App.D.C. 171—Allen v. Hickel, C.A., 424 F.2d 944, 138 U.S.App.D.C. 31, on remand 333 F.Supp. 1088, revd. on oth. grds. 495 F.2d 65, 161 U.S.App.D.C. 239.

Cases held not moot

(1) U.S.—Moore v. Ogilvie, Ill., 89 S.Ct. 1493, 394 U.S. 814, 23 L.Ed.2d 1.

Chicago and Northwestern Transp. Co. v. United Transp. Union, C.A.Ill., 656 F.2d 274.

D.C.—Industrial Bank of Washington v. Tobriner, C.A., 405 F.2d 1321, 132 U.S.App.D.C. 51—Thompson v Mazo, C.A., 421 F.2d 1156, 137 U.S.App.D.C 221.

29.63. U.S.—Symington Wayne Corp. v. Dresser Industries, Inc., C.A.N.Y., 383 F.2d 840—National Wildlife Federation v. Costle, C.A., 629 F.2d 118, 203 U.S.App.D.C. 84.

Continuing controversy

U.S.—Bullock v. Carter, Tex., 92 S.Ct. 849, 405 U.S. 134, 31 L.Ed.2d 92.

GAF Corp. v. Milstein, C.A.N.Y., 453 F.2d 709, cert. den. 92 S.Ct. 1510, two cases, 406 U.S. 910, 31 L.Ed.2d 821.

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29.66. U.S.—Oklahoma High School Athletic Ass'n v. Bray, C.A.Okl., 321 F.2d 269.

29.67. U.S.—Serio v. Liss, C.A.N.J., 300 F.2d 386—Cypress v. Newport News General and Nonsectarian Hospital Ass'n, C.A.Va., 375 F.2d 648.

29.71. U.S.—Tidwell v. Schweiker, C.A.Ill., 677 F.2d 560, cert. den. 103 S.Ct. 1874, 461 U.S. 905, 76 L.Ed.2d 806.

§ 296(20). Procedure; Motion to Dismiss

Library References

Federal Courts ⇐728, 729.

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32.50. Federal Rules of Appellate Procedure

F.R.A.P. Rule 42(b), 28 U.S.C.A.

33.10. Burden of proof on movant

D.C.—Jefferson School of Social Science v. Subversive Activities Control Bd., C.A., 331 F.2d 76, 118 U.S.App.D.C. 2.

33.25. U.S.—Mayes v. Vincent, C.A.Tenn., 388 F.2d 727, cert. den. 88 S.Ct. 2039, 391 U.S. 968, 20 L.Ed.2d 881.

34. U.S.—Baxter v. Lancer Industries, Inc., C.A.N.Y., 324 F.2d 286—Jones v. Perrigan, C.A.Tenn., 459 F.2d 81.

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34.5. U.S.—Richards v. Smith, C.A.Ga., 276 F.2d 652—Marshall v. Sawyer, C.A.Nev., 301 F.2d 639.

35.10. U.S.—Allegheny Airlines, Inc. v. LeMay, C.A. Ind., 448 F.2d 1341, cert. den. 92 S.Ct. 565, 404 U.S. 1001, 30 L.Ed.2d 553.

38.5. U.S.—John v. Gibson, C.A.Cal., 270 F.2d 36, cert. den. 80 S.Ct. 601, 361 U.S. 970, 4 L.Ed.2d 549—Rhodes v. Germain, C.A.Neb., 471 F.2d 26.

39. U.S.—Brookhaven Landscape & Grading Co., Inc. v. J. F. Barton Contracting Co., C.A.Ga., 681 F.2d 734.

40.5. U.S.—H. K. Porter Co., Inc. v. Metropolitan Dade County, C.A.Fla., 650 F.2d 778.

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U.S.—Lamb v. Farmers Ins. Co., Inc., C.A.Mo., 586 F.2d 96.

41. U.S.—Chatham Shipping Co. v. Fertex S.S. Corp., C.A.N.Y., 352 F.2d 291.

42. U.S.—Israel Aircraft Industries, Ltd. v. Standard Precision, C.A.N.Y., 559 F.2d 203.

New appeal

U.S.—Rappaport v. U.S., C.A.Ill., 557 F.2d 605.

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44. U.S.—French v. Bashful, C.A.La., 425 F.2d 182, cert. den. 91 S.Ct. 232, 400 U.S. 941, 27 L.Ed.2d 244.

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§ 296(21). Order; Dismissal without Prejudice

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46.50. U.S.—U.S. v. Cohan, C.A.Ga., 470 F.2d 503, on remand 358 F.Supp. 1217.
D.C.—Greene v. Howard University, C.A., 412 F.2d 1128, 134 U.S.App.D.C. 81.
48. U.S.—Atlantic Las Olas, Inc. v. Joyner, C.A.Fla., 466 F.2d 496.

49.5. Denial not ruling on merits
U.S.—Duarte v. Bank of Hawaii, C.A.Hawaii, 287 F.2d 51, cert. den. 81 S.Ct. 1938, 366 U.S. 972, 6 L.Ed.2d 1261.

§ 296(22). Effect of Dismissal

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50. U.S.—Lee v. Monroe County Bd. of Ed., C.A Ala., 554 F.2d 1287, app. after remand 640 F.2d 755.

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50.15. U.S.—McCann v. Kerner, C.A.Wis., 436 F.2d 1342.
C.J.S. quoted at length in Boussom v. City of Elkhart, D.C.Ind., 567 F.Supp. 1382, 1390.

Vacation of lower court's order
U.S.—Kuahulu v. Employers Ins. of Wausau, C.A.Hawaii, 557 F.2d 1334.
52. U.S.—First Federal Sav. & Loan Ass'n of Puerto Rico v. Zequeira, D.C.Puerto Rico, 305 F.Supp. 37.
52.5. U.S.—Madden v. Perry, C.A.Ill., 264 F.2d 169, cert. den. 79 S.Ct. 1450, 360 U.S. 931, 3 L.Ed.2d 1544.
52.10. U.S.—Hilton v. W. T. Grant Co., D.C.Pa., 212 F.Supp. 126.
52.15. U.S.—Madden v. Perry, C.A.Ill., 264 F.2d 169, cert. den. 79 S.Ct. 1450, 360 U.S. 931, 3 L.Ed.2d 1544.

52.25. Order dismissing certain parties subject to review
U.S.—Tracy v. Robbins, C.A.S.C., 373 F.2d 13.
52.35. U.S.—Goldlawr, Inc. v. Heiman, C.A.N.Y., 273 F.2d 729.

By withdrawing his appeal, an appellant reinvests the district court with its prior jurisdiction.[52.55]

52.55. U.S.—Babcock & Wilcox Co. v. Foster Wheeler Corp., D.C.N.J., 54 F.R.D. 474.

§ 296(23). Abandonment

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53. Abandonment shown
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§ 296(24). Vacation of Order and Reinstatement of Appeal

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§ 297(1). Scope and Extent of Review

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55.50. U.S.—Apex Min. Co. v. Chicago Copper & Chemical Co., C.A.Mo., 306 F.2d 725.
55.60. U.S.—Allis v. Allis, C.C.Tex., 378 F.2d 721, cert. den. 88 S.Ct. 337, 389 U.S. 953, 19 L.Ed.2d 363.
D.C.—Miller v. Avirom, C.A., 384 F.2d 319, 127 U.S. App.D.C. 367.
56. U.S.—Raulie v. U.S., C.A.N.M., 400 F.2d 487.

56.5. Moot questions
U.S.—Western Elec. Co., Inc. v. Milgo Electronic Corp., C.A.Fla., 568 F.2d 1203, reh. den., C.A., 573 F.2d 255, cert. den. 99 S.Ct. 255, cert. den. 99 S.Ct. 255, 439 U.S. 895, 58 L.Ed.2d 241.

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57. U.S.—U.S. v. Cruz, C.A.Tex., 581 F.2d 535, reh. den. 587 F.2d 277.
58. U.S.—Tilley v. U.S., C.A.S.C., 375 F.2d 678.
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58.15. U.S.—Western Elec. Co., Inc. v. Milgo Electronic Corp., C.A.Fla., 568 F.2d 1203, reh. den., C.A., 573 F.2d 255, cert. den. 99 S.Ct. 255, cert. den. 99 S.Ct. 255, 439 U.S. 895, 58 L.Ed.2d 241.
59. U.S.—June T., Inc. v. King, C.A.Fla., 290 F.2d 404.

60. Arbitrability
U.S.—Necchi S.p.A v. Necchi Sewing Mach. Sales Corp., C.A N.Y., 348 F.2d 693, cert. den. 86 S.Ct. 892, 383 U.S. 909, 15 L.Ed.2d 664.
61. U.S.—Walker v. Mathews, C.A.Wash., 546 F.2d 814.

Entire judgment
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61.5. U.S.—Henry v. Department of Housing and Urban Development (HUD), Washington, D.C., 451 F.2d 355.

§ 297(2). —— Review Dependent on Whether Questions Are of Law or Fact

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62.50. U.S.—Osborn v. Sinclair Refining Co., C.A. Md., 286 F.2d 832, cert. den. 81 S.Ct. 1924, 366 U.S. 963, 6 L.Ed.2d 1255, on remand, D.C., 207 F.Supp. 856, revd. on oth. grds., C.A., 324 F.2d 566—Smith v. U.S., C.A.Va., 336 F.2d 165—Frost v. Davis, C.A.Fla., 346 F.2d 82, reh. den. 356 F.2d 513—Hoskins v. Blalock, C.A.Tenn., 384 F.2d 169.
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62.55. U.S.—Charter Oak Fire Ins. Co. v. Mann, C.A.Ark., 304 F.2d 166—Walker v. Sinclair Refining Co., C.A.Pa., 405 F.2d 885—U.S. v. Moore, C.A.Pa., 444 F.2d 475—Leather's Best, Inc. v. S.S. Mormaclynx, C.A.N.Y., 451 F.2d 800, on remand 346 F.Supp. 962.
Weisman v. MCA Inc., D.C.Del., 45 F.R.D. 530.

Failure to find facts as precluding application of legal principles
U.S.—Anderson v. City of Albany, C.A.Ga., 321 F.2d 649.
63. U.S.—Taylor v. Local No. 7, Intern. Union of Journeymen Horseshoers of U.S. and Canada (AFL-CIO), C.A.Md., 353 F.2d 593, cert. den. 86 S.Ct. 1859, 384 U.S. 969, 16 L.Ed.2d 681—Wirtz v. First State Abstract & Ins. Co., C.A.Ark., 362 F.2d 83—Hill York Corp. v. American Intern. Franchises, Inc., C.A.Fla., 448 F.2d 680—U.S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp., C.A.Hawaii, 577 F.2d 568.

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63.5. U.S.—Ralston Purina Co. v. General Foods Corp., C.A.Mo., 442 F.2d 389—Director General of India Supply Mission for and on Behalf of President of Union of India v. Steamship Maru, C.A.N.Y., 459 F.2d 1370, cert. den. 93 S.Ct. 898, 409 U.S. 1115, 34 L.Ed.2d 699—Risher v. U.S., C.A.Ala., 465 F.2d 1.
64. U.S.—Brooks v. Volpe, C.A.Wash., 460 F.2d 1193, on remand 350 F.Supp. 269, op. sup. 350 F.Supp. 287, affd., C.A., 487 F.2d 1344.
65. U.S.—U.S. v. Hanna Nickel Smelting Co., C.A. Or., 400 F.2d 944—Bowen v. Watkins, C.A.Miss., 669 F.2d 979, app. after remand 705 F.2d 753, reh. den. 710 F.2d 837.

Particular questions or findings, etc.
(6) U.S.—Hinds v. Plantation Pipe Line Co., C.A. Ala., 455 F.2d 902—U.S. v. Fernon, C.A.Fla., 640 F.2d 609.

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67.10. Meaning of contract clause
U.S.—Palmer v. Howard, C.A.N.M., 493 F.2d 830.
72. U.S.—Dupeck v. Union Ins. Co. of America, C.A. Mo., 329 F.2d 548—Glasson v. City of Louisville, C.A.Ky., 518 F.2d 899, cert. den. 96 S.Ct. 280, 423 U.S. 930, 46 L.Ed.2d 258.

Particular questions held legal questions on undisputed facts
(1) U.S.—Clark v. U.S., C.A.Va., 402 F.2d 950.
75. U.S.—Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., C.A.Wash., 626 F.2d 95, cert. den. 101 S.Ct. 861, 449 U.S. 1079, 66 L.Ed.2d 802.
77. U.S.—First Nat. Bank of Miami v. Insurance Co. of North America, C.A.Fla., 495 F.2d 519, app. after remand 535 F.2d 284—U.S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp., C.A.Hawaii, 577 F.2d 568.

Appellate courts have untrammeled, etc.
U.S.—Cordovan Associates, Inc. v. Dayton Rubber Co., C.A.Ohio, 290 F.2d 858—Emor, Inc. v. Cyprus Mines Corp., C.A.Pa., 467 F.2d 770.

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U.S.—Wiesmueller v. Interstate Fire & Cas. Co., C.A. Wis., 568 F.2d 40—Healy Tibbitts Const. Co. v. Insurance Co. of North America, C.A.Cal., 679 F.2d 803.
77.5. U.S.—Eastmount Const. Co. v. Transport Mfg. & Equipment Co., C.A.Mo., 301 F.2d 34—U.S. for Use and Benefit of Humble Oil & Refining Co. v. Fidelity & Cas. Co. of New York, C.A.Va., 402 F.2d 893—Corex Corp. v. U.S., 524 F.2d 1017, cert. den. 96 S.Ct. 1508, 425 U.S. 912, 47 L.Ed.2d 762, app. after remand, C.A., 638 F.2d 119.

Standard applicable to question of law
U.S.—McLeod, For and on Behalf of N.L.R.B. v. Business Mach. and Office Appliance Mechanics Conference Bd., Local 459 Intern. Union of Elec. Radio and Mach. Workers, AFL-CIO, C.A.N.Y., 300 F.2d 237—McLeod for and on Behalf of N.L.R.B. v. Local 282, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, C.A.N.Y., 345 F.2d 142.
D.C.—Pennsylvania Ave. Development Corp. v. One Parcel of Land in District of Columbia, C.A., 670 F.2d 289, 216 U.S.App.D.C. 131.
78. U.S.—Securities and Exchange Commission v. Bausch & Lomb Inc., C.A.N.Y., 565 F.2d 8.

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80. U.S.—Silverstein v. U.S., C.A.Ill., 419 F.2d 999, cert. den. 90 S.Ct. 1362, 397 U.S. 1041, 25 L.Ed.2d 652—International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., C.A.Hawaii, 518 F.2d 913, on remand D.C., 449 F.Supp. 1158—Southwest Indus. Import & Export, Inc. v. Wilmod Co., Inc., 524 F.2d 468.

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Other matters held questions of law

(6) U.S.—S.S. Silberblatt, Inc. v. Seaboard Sur. Co., C.A.Mo., 417 F.2d 1043, app. after remand 448 F.2d 1279—Joseph Lupowitz Sons, Inc. v. C. I. R., C.A., 497 F.2d 862.

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81. U.S.—Ashland Oil & Refining Co. v. Kenny Const. Co., C.A.Ky., 395 F.2d 683.

§ 297(3). —— Matters Not Necessary to Decision on Review

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81.50. U.S.—Roe v. Wade, Tex., 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed.2d 147, reh. den. 93 S.Ct. 1409, 410 U.S. 959, 35 L.Ed.2d 694.

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D.C.—Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, C.A., 384 F.2d 323, 127 U.S.App.D.C. 371.

82. U.S.—Kupferman v. Consolidated Research & Mfg. Corp., C.A.N.Y., 459 F.2d 1072—Zucker v. State of Cal., C.A.Cal., 469 F.2d 663.

Carroll v. Associated Musicians of Greater New York, D.C.N.Y., 206 F.Supp. 462, affd., C.A., 316 F.2d 574.

D.C.—Peoples v. U.S. Dept. of Agriculture, C.A., 427 F.2d 561, 138 U.S.App.D.C. 291—United Auto. Aerospace and Agr. Implement Workers of America, UAW v. N.L.R.B., C.A., 462 F.2d 298, 149 U.S.App.D.C. 194.

Particular matters or questions not considered

(7) U.S.—Bernstein v. Levenson, C.A.W.Va., 437 F.2d 756.

Particular matters or questions considered

(4) Other matters or questions.

U.S.—Schmidt v. Oakland Unified School Dist., Cal., 102 S.Ct. 2612, 457 U.S. 594, 73 L.Ed.2d 245.

Connecticut General Life Ins. Co. v. Craton, C.A.Fla., 405 F.2d 41—Green v. Wolf Corp., C.A. N.Y., 406 F.2d 291, cert. den. 89 S.Ct. 2131, two cases, 395 U.S. 977, 23 L.Ed.2d 766—Hudak v. Economic Research Analysts, Inc., C.A.Fla., 499 F.2d 996, cert. den. 95 S.Ct. 805, 419 U.S. 1122, 42 L.Ed.2d 821.

D.C.—Rodenbur v. Kaufmann, C.A., 320 F.2d 679, 115 U.S.App.D.C. 360.

82.5. U.S.—Krone v. Lacy, C.A.Neb., 305 F.2d 245.

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83. U.S.—Duhart v. Carlson, C.A.Kan., 469 F.2d 471, cert. den. 93 S.Ct. 1431, 410 U.S. 958, 35 L.Ed.2d 692—Canadian American Oil Co. v. Union Oil Co. of California, C.A.Cal., 577 F.2d 468, cert. den. 99 S.Ct. 283, 439 U.S. 912, 58 L.Ed.2d 258—Backus v. Spears, C.A.S.C., 677 F.2d 397.

Questions or issues held moot

(5) U.S.—First Nat. Bank of Ariz. v. Cities Service Co., N.Y., 88 S.Ct. 1575, 391 U.S. 253, 20 L.Ed.2d 569, reh. den. 89 S.Ct. 63, 393 U.S. 901, 21 L.Ed.2d 188.

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Questions or issues held not moot

(3) U.S.—Grinnell Corp. v. Hackett, C.A.R.I., 475 F.2d 449, cert. den. 94 S.Ct. 59, 414 U.S. 879, 38 L.Ed.2d 124, and 94 S.Ct. 164, 414 U.S. 858, 38 L.Ed.2d 108, app after remand 519 F.2d 595, cert. den. 96 S.Ct. 566, 423 U.S. 1033, 46 L.Ed.2d 407, reh. den. 98 S.Ct. 1514, 435 U.S. 938, 55 L.Ed.2d 534.

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84. U.S.—Clark v. John Lamula Investors, Inc., C.A. N.Y., 583 F.2d 594

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(2) Other matters.

U.S.—Mallory v. Citizens Utilities Co., C.A Vt. 342 F.2d 796—Chicago & N.W. Ry. Co. v. Minnesota Transfer Ry. Co., C.A.Minn., 371 F.2d 129.

85. U.S.—Pettus v. Grace Line, Inc., C.A.N.Y., 305 F.2d 151—Oppenheimer v. Morton Hotel Corp., C.A.Mich., 324 F.2d 766.

85.5. U.S.—Pegues v. Bakane, C.A.Ala., 445 F.2d 1140—Oppenheimer v. Roth, C.A.Cal., 468 F.2d 901.

Jurisdiction

(2) Other instances.

U.S.—Gillette Co. v. "42" Products Limited, C.A.Cal., 435 F.2d 1114.

Interest

U.S.—Berner v. British Commonwealth Pac. Airlines, Limited, C.A.N.Y., 346 F.2d 532, cert. den. 86 S.Ct. 559, 382 U.S. 983, 15 L.Ed.2d 472.

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87. U.S.—Ordner v. Reimold, C.A.Okl., 278 F.2d 532—Bowman v. Kaufman, C.A.N.Y., 387 F.2d 582.

Poston v. U.S., D.C.Hawaii, 262 F.Supp. 22.

87.5. U.S.—DeWitt v. Brown, C.A.Ark., 669 F.2d 516.

Poston v. U.S., D.C.Hawaii, 262 F.Supp. 22.

88. U.S.—Forsman v. Pennsylvania R. Co., C.A.Pa., 280 F.2d 315—Lumbermens Mut. Ins. Co. v. Bowman, C.A.N.M., 313 F.2d 381—Delancey v. Motichek Towing Service, Inc., C.A.La., 427 F.2d 897.

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89. U.S.—Reamer v. U.S., C.A.Minn., 318 F.2d 43, cert. den. 84 S.Ct. 129, 375 U.S. 869, 11 L.Ed.2d 95.

The court will not avoid review of issues which are of a recurring nature even though they are not necessary to the decision under review.[90.25]

90.25. U.S.—ITT Lamp Division of International Tel. & Tel. Corp. v. Minter, C.A.Mass., 435 F.2d 989, cert. den. 91 S.Ct. 1526, 402 U.S. 933, 28 L.Ed.2d 868, reh. den. 92 S.Ct. 27, 404 U.S. 874, 30 L.Ed.2d 120.

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91.15. U.S.—Eastern Iowa Light and Power Co-op. v. McKenzie, C.A.Iowa, 296 F.2d 295—Guyot v. Pierce, C.A.Miss., 372 F.2d 658.

§ 297(4). —— Questions Involving Application of Local Law

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91.50. U.S.—Simpson v. Skelly Oil Co., C.A.Iowa, 371 F.2d 563—Savage v. McNeany, C.A.N.M., 372 F.2d 199—Foundation Reserve Ins. Co. v. Kelly, C.A.N.M., 388 F.2d 528—Stephens Industries, Inc. v. Haskins and Sells, C.A.Colo., 438 F.2d 357—Smith v. Sturm, Ruger & Co., Inc., 524 F.2d 776—Loveridge v. Dreagoux, C.A.Utah, 678 F.2d 870.

Laws of state as not governing scope of review

U.S.—Travelers Ins. Co. v. Childs, C.A.N.Y., 272 F.2d 855.

Important question and dissenting opinion

U.S.—Green v. American Tobacco Co., C.A.Fla., 304 F.2d 70, cert. ques. ans., Sup., 154 So.2d 169, conf. to 325 F.2d 673, cert. den. 84 S.Ct. 1349, 1351, 377 U.S. 943, 12 L.Ed.2d 306.

Assumption that state law was applicable

U.S.—Industrial Indem. Co. v. Continental Cas. Co., C.A.Okl., 375 F.2d 183.

91.55. U.S.—Southern Ry. Co. v. State Farm Mut. Auto. Ins. Co., C.A.Ga., 477 F.2d 49, reh. den. 477 F.2d 596—Bergstreser v. Mitchell, C.A.Mo., 577 F.2d 22—Feldman v. Simkins Industries, Inc., C.A.Cal., 679 F.2d 1299.

Particular matter held doubtful question of local law

(1) U.S.—Greene v. Werven, C.A.N.D., 275 F.2d 134—Wray M. Scott Co. v. Daigle, C.A.Neb., 309 F.2d 105.

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91.60. U.S.—Capital Ins. & Sur. Co. v. Globe Indem. Co., C.A.Guam, 382 F.2d 623.

Permissibility, not correctness, as test

U.S.—Jennings v. McCall Corp., C.A.Mo., 320 F.2d 64.

Holding held legally permissible

U.S.—U.S. v. Myers, C.A.Mo., 331 F.2d 591—H. K. Porter Co. v. Wire Rope Corp. of America, Inc., C.A.Mo., 367 F.2d 653.

91.65. U.S.—Western Cas. & Sur. Co. v. Herman, C.A.Mo., 318 F.2d 50, 1 A.L.R.3d 1184—Weisser v. Otter Tail Power Co., C.A.N.D., 318 F.2d 375—Jennings v. McCall Corp., C.A.Mo., 320 F.2d 64—Baker v. U.S., C.A.Iowa, 343 F.2d 222—Candaso v. Manibusan, C.A.Guam, 405 F.2d 623—Petersen v. Klos, C.A.Miss., 433 F.2d 911.

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91.70. U.S.—Walker Trasp. Co. v. Neylon, C.A.Mo., 396 F.2d 558.

91.75. U.S.—Lowes v. Pan-American Life Ins. Co., C.A.Mo., 355 F.2d 433—Stool v. J. C. Penney Co., C.A.Tex., 404 F.2d 562.

91.80. U.S.—Owens v. Childrens Memorial Hospital, Omaha, Neb., C.A.Neb., 480 F.2d 465—Insurance Co. of North America v. Howard, C.A.Or., 679 F.2d 147.

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(2) Other matters.

U.S.—Sun Ins. Office, Limited v. Clay, C.A.Fla., 319 F.2d 505, revd. on oth. grds. 84 S.Ct. 1197, 377 U.S. 179, 12 L.Ed.2d 229.

92. U.S.—Beck v. Pennsylvania Nat. Mut. Cas. Ins. Co., C.A.Fla., 429 F.2d 813, reh. den. 432 F.2d 563.

§ 297(5). —— Review Dependent on Mode of Trial in Lower Court

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92.50. U.S.—Klinge v. Lutheran Charities Ass'n of St. Louis, C.A.Mo., 523 F.2d 56—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

Failure to hold evidentiary hearing

U.S.—Forts v. Ward, C.A.N.Y., 566 F.2d 849, on remand, D.C., 471 F.Supp. 1095, vac. in part on oth. grds., C.A., 621 F.2d 1210.

93. U.S.—Riess v. Murchison, C.A.Cal., 329 F.2d 635, cert. den. 86 S.Ct. 1196, 383 U.S. 946, 16 L.Ed.2d 209, app. after remand, C.A., 384 F.2d 727, 32 A.L.R.3d 363, op. after remand 503 F.2d 999, cert. den. 95 S.Ct. 1430, 420 U.S. 993, 43 L.Ed.2d 674.

94. U.S.—Indemnity Ins. Co. of North America v. Pioneer Val. Sav. Bank, C.A.Iowa, 343 F.2d 634—Williams v. Board of Regents of University System of Georgia, C.A.Ga., 629 F.2d 993, reh. den. 629 F.2d 1350, cert. den. 101 S.Ct. 3063, 452 U.S. 926, 69 L.Ed.2d 428.

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(6) U.S.—S.S. Silberblatt, Inc. v. Seaboard Sur. Co., C.A.Mo., 417 F.2d 1043, app. after remand 448 F.2d 1279—Joseph Lupowitz Sons, Inc. v. C. I. R., C.A., 497 F.2d 862.

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81. U.S.—Ashland Oil & Refining Co. v. Kenny Const. Co., C.A.Ky., 395 F.2d 683.

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81.50. U.S.—Roe v. Wade, Tex., 93 S.Ct. 705, 410 U.S. 113, 35 L.Ed.2d 147, reh. den. 93 S.Ct. 1409, 410 U.S. 959, 35 L.Ed.2d 694.

Williams v. Maxwell, C.A.W.Va., 396 F.2d 143.

D.C.—Southern Ry. Co. v. Brotherhood of Locomotive Firemen and Enginemen, C.A., 384 F.2d 323, 127 U.S.App.D.C. 371.

82. U.S.—Kupferman v. Consolidated Research & Mfg. Corp., C.A.N.Y., 459 F.2d 1072—Zucker v. State of Cal., C.A.Cal., 469 F.2d 663.

Carroll v. Associated Musicians of Greater New York, D.C.N.Y., 206 F.Supp. 462, affd., C.A., 316 F.2d 574.

D.C.—Peoples v. U.S. Dept. of Agriculture, C.A., 427 F.2d 561, 138 U.S.App.D.C. 291—United Auto. Aerospace and Agr. Implement Workers of America, UAW v. N.L.R.B., C.A., 462 F.2d 298, 149 U.S.App.D.C. 194.

Particular matters or questions not considered

(7) U.S.—Bernstein v. Levenson, C.A.W.Va., 437 F.2d 756.

Particular matters or questions considered

(4) Other matters or questions.

U.S.—Schmidt v. Oakland Unified School Dist., Cal., 102 S.Ct. 2612, 457 U.S. 594, 73 L.Ed.2d 245.

Connecticut General Life Ins. Co. v. Craton, C.A.Fla., 405 F.2d 41—Green v. Wolf Corp., C.A. N.Y., 406 F.2d 291, cert. den. 89 S.Ct. 2131, two cases, 395 U.S. 977, 23 L.Ed.2d 766—Hudak v. Economic Research Analysts, Inc., C.A.Fla., 499 F.2d 996, cert. den. 95 S.Ct. 805, 419 U.S. 1122, 42 L.Ed.2d 821.

D.C.—Rodenbur v. Kaufmann, C.A., 320 F.2d 679, 115 U.S.App.D.C. 360.

82.5. U.S.—Krone v. Lacy, C.A.Neb., 305 F.2d 245.

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83. U.S.—Duhart v. Carlson, C.A.Kan., 469 F.2d 471, cert. den. 93 S.Ct. 1431, 410 U.S. 958, 35 L.Ed.2d 692—Canadian American Oil Co. v. Union Oil Co. of California, C.A.Cal., 577 F.2d 468, cert. den. 99 S.Ct. 283, 439 U.S. 912, 58 L.Ed.2d 258—Backus v. Spears, C.A.S.C., 677 F.2d 397.

Questions or issues held moot

(5) U.S.—First Nat. Bank of Ariz. v. Cities Service Co., N.Y., 88 S.Ct. 1575, 391 U.S. 253, 20 L.Ed.2d 569, reh. den. 89 S.Ct. 63, 393 U.S. 901, 21 L.Ed.2d 188.

D.C.—Labor Youth League v. Subversive Activities Control Bd., C.A., 322 F.2d 364, 116 U.S.App.D.C. 151—Ackerly v. Ley, C.A., 420 F.2d 1336, 137 U.S.App.D.C. 133.

Questions or issues held not moot

(3) U.S.—Grinnell Corp. v. Hackett, C.A.R.I., 475 F.2d 449, cert. den. 94 S.Ct. 59, 414 U.S. 879, 38 L.Ed.2d 124, and 94 S.Ct. 164, 414 U.S. 858, 38 L.Ed.2d 108, app after remand 519 F.2d 595, cert. den. 96 S.Ct. 566, 423 U.S. 1033, 46 L.Ed.2d 407, reh. den. 98 S.Ct. 1514, 435 U.S. 938, 55 L.Ed.2d 534.

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84. U.S.—Clark v. John Lamula Investors, Inc., C.A. N.Y., 583 F.2d 594.

Matters relating to advisory jury

(2) Other matters.

U.S.—Mallory v. Citizens Utilities Co., C.A.Vt. 342 F.2d 796—Chicago & N.W. Ry. Co. v. Minnesota Transfer Ry. Co., C.A.Minn., 371 F.2d 129.

85. U.S.—Pettus v. Grace Line, Inc., C.A.N.Y., 305 F.2d 151—Oppenheimer v. Morton Hotel Corp., C.A.Mich., 324 F.2d 766.

85.5. U.S.—Pegues v. Bakane, C.A.Ala., 445 F.2d 1140—Oppenheimer v. Roth, C.A.Cal., 468 F.2d 901.

Jurisdiction

(2) Other instances.

U.S.—Gillette Co. v. "42" Products Limited, C.A.Cal., 435 F.2d 1114.

Interest

U.S.—Berner v. British Commonwealth Pac. Airlines, Limited, C.A.N.Y., 346 F.2d 532, cert. den. 86 S.Ct. 559, 382 U.S. 983, 15 L.Ed.2d 472.

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87. U.S.—Ordner v. Reimold, C.A.Okl., 278 F.2d 532—Bowman v. Kaufman, C.A.N.Y., 387 F.2d 582.

Poston v. U.S., D.C.Hawaii, 262 F.Supp. 22.

87.5. U.S.—DeWitt v. Brown, C.A.Ark., 669 F.2d 516.

Poston v. U.S., D.C.Hawaii, 262 F.Supp. 22.

88. U.S.—Forsman v. Pennsylvania R. Co., C.A.Pa., 280 F.2d 315—Lumbermens Mut. Ins. Co. v. Bowman, C.A.N.M., 313 F.2d 381—Delancey v. Motichek Towing Service, Inc., C.A.La., 427 F.2d 897.

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89. U.S.—Reamer v. U.S., C.A.Minn., 318 F.2d 43, cert. den. 84 S.Ct. 129, 375 U.S. 869, 11 L.Ed.2d 95.

The court will not avoid review of issues which are of a recurring nature even though they are not necessary to the decision under review.[90.25]

90.25. U.S.—ITT Lamp Division of International Tel. & Tel. Corp. v. Minter, C.A.Mass., 435 F.2d 989, cert. den. 91 S.Ct. 1526, 402 U.S. 933, 28 L.Ed.2d 868, reh. den. 92 S.Ct. 27, 404 U.S. 874, 30 L.Ed.2d 120.

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91.15. U.S.—Eastern Iowa Light and Power Co-op. v. McKenzie, C.A.Iowa, 296 F.2d 295—Guyot v. Pierce, C.A.Miss., 372 F.2d 658.

§ 297(4). —— Questions Involving Application of Local Law

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91.50. U.S.—Simpson v. Skelly Oil Co., C.A.Iowa, 371 F.2d 563—Savage v. McNeany, C.A.N.M., 372 F.2d 199—Foundation Reserve Ins. Co. v. Kelly, C.A.N.M., 388 F.2d 528—Stephens Industries, Inc. v. Haskins and Sells, C.A.Colo., 438 F.2d 357—Smith v. Sturm, Ruger & Co., Inc., 524 F.2d 776—Loveridge v. Dreagoux, C.A.Utah, 678 F.2d 870.

Laws of state as not governing scope of review

U.S.—Travelers Ins. Co. v. Childs, C.A.N.Y., 272 F.2d 855.

Important question and dissenting opinion

U.S.—Green v. American Tobacco Co., C.A.Fla., 304 F.2d 70, cert. ques. ans., Sup., 154 So.2d 169, conf. to 325 F.2d 673, cert. den. 84 S.Ct. 1349, 1351, 377 U.S. 943, 12 L.Ed.2d 306.

Assumption that state law was applicable

U.S.—Industrial Indem. Co. v. Continental Cas. Co., C.A.Okl., 375 F.2d 183.

91.55. U.S.—Southern Ry. Co. v. State Farm Mut. Auto. Ins. Co., C.A.Ga., 477 F.2d 49, reh. den. 477 F.2d 596—Bergstreser v. Mitchell, C.A.Mo., 577 F.2d 22—Feldman v. Simkins Industries, Inc., C.A.Cal., 679 F.2d 1299.

Particular matter held doubtful question of local law

(1) U.S.—Greene v. Werven, C.A.N.D., 275 F.2d 134—Wray M. Scott Co. v. Daigle, C.A.Neb., 309 F.2d 105.

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91.60. U.S.—Capital Ins. & Sur. Co. v. Globe Indem. Co., C.A.Guam, 382 F.2d 623.

Permissibility, not correctness, as test

U.S.—Jennings v. McCall Corp., C.A.Mo., 320 F.2d 64.

Holding held legally permissible

U.S.—U.S. v. Myers, C.A.Mo., 331 F.2d 591—H. K. Porter Co. v. Wire Rope Corp. of America, Inc., C.A.Mo., 367 F.2d 653.

91.65. U.S.—Western Cas. & Sur. Co. v. Herman, C.A.Mo., 318 F.2d 50, 1 A.L.R.3d 1184—Weisser v. Otter Tail Power Co., C.A.N.D., 318 F.2d 375—Jennings v. McCall Corp., C.A.Mo., 320 F.2d 64—Baker v. U.S., C.A.Iowa, 343 F.2d 222—Candaso v. Manibusan, C.A.Guam, 405 F.2d 623—Petersen v. Klos, C.A.Miss., 433 F.2d 911.

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91.70. U.S.—Walker Trasp. Co. v. Neylon, C.A.Mo., 396 F.2d 558.

91.75. U.S.—Lowes v. Pan-American Life Ins. Co., C.A.Mo., 355 F.2d 433—Stool v. J. C. Penney Co., C.A.Tex., 404 F.2d 562.

91.80. U.S.—Owens v. Childrens Memorial Hospital, Omaha, Neb., C.A.Neb., 480 F.2d 465—Insurance Co. of North America v. Howard, C.A.Or., 679 F.2d 147.

Construction of state court judgment

(2) Other matters.

U.S.—Sun Ins. Office, Limited v. Clay, C.A.Fla., 319 F.2d 505, revd. on oth. grds. 84 S.Ct. 1197, 377 U.S. 179, 12 L.Ed.2d 229.

92. U.S.—Beck v. Pennsylvania Nat. Mut. Cas. Ins. Co., C.A.Fla., 429 F.2d 813, reh. den. 432 F.2d 563.

§ 297(5). —— Review Dependent on Mode of Trial in Lower Court

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92.50. U.S.—Klinge v. Lutheran Charities Ass'n of St. Louis, C.A.Mo., 523 F.2d 56—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

Failure to hold evidentiary hearing

U.S.—Forts v. Ward, C.A.N.Y., 566 F.2d 849, on remand, D.C., 471 F.Supp. 1095, vac. in part on oth. grds., C.A., 621 F.2d 1210.

93. U.S.—Riess v. Murchison, C.A.Cal., 329 F.2d 635, cert. den. 86 S.Ct. 1196, 383 U.S. 946, 16 L.Ed.2d 209, app. after remand, C.A., 384 F.2d 727, 32 A.L.R.3d 363, op. after remand 503 F.2d 999, cert. den. 95 S.Ct. 1430, 420 U.S. 993, 43 L.Ed.2d 674.

94. U.S.—Indemnity Ins. Co. of North America v. Pioneer Val. Sav. Bank, C.A.Iowa, 343 F.2d 634—Williams v. Board of Regents of University System of Georgia, C.A.Ga., 629 F.2d 993, reh. den. 629 F.2d 1350, cert. den. 101 S.Ct. 3063, 452 U.S. 926, 69 L.Ed.2d 428.

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3. U.S.—Aerojet-General Corp. v. American Arbitration Ass'n, C.A.Cal., 478 F.2d 248.

§ 297(6). —— —— Absence of Findings by Court

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13.50. U.S.—Waters v. Western Co. of North America, C.A.N.M., 436 F.2d 1072.

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13.60. U.S.—Securities and Exchange Commission v. Frank, C.A.N.Y., 388 F.2d 486—Laguna Lake Mobile Home Park v NAA Emp. Federal Credit Union, C.A.Cal., 439 F.2d 4.

13.65. U.S.—Greer v. U.S., C.A.Ky., 334 F.2d 209—Finney v. Arkansas Bd. of Correction, C.A.Ark., 505 F.2d 194, on remand, D.C., 410 F.Supp. 251, affd., C.A., 548 F.2d 740, affd. 98 S.Ct. 2565, 437 U.S. 678, 57 L.Ed.2d 522, reh. den. 99 S.Ct 1035, 439 U.S. 1122, 59 L.Ed.2d 83.

13.70. U.S.—Gautreaux v. Kumm, C.A.Cal., 410 F.2d 905.

§ 297(7). —— Theory and Grounds of Decision of Lower Court

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13.90. U.S.—Zdanok v. Glidden Co., Durkee Famous Foods Division, C.A.N.Y., 327 F.2d 944, cert. den. 84 S.Ct. 1338, 377 U.S. 934, 12 L.Ed.2d 298.

14. U.S.—United Elec., Radio and Mach. Workers of America v. Honeywell Inc., C.A.Ill., 522 F.2d 1221.

D.C.—Founding Church of Scientology of Washington, D.C. v. U.S., C.A., 409 F.2d 1146, 133 U.S.App. D.C. 229, cert. den. 90 S.Ct. 434, 396 U.S. 963, 24 L.Ed.2d 427—Blackhawk Heating & Plumbing Co. v. Driver, C.A., 433 F.2d 1137, 140 U.S.App.D.C. 31.

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16. U.S.—Pound v. Insurance Co. of North America, C.A.N.M., 439 F.2d 1059—Picture Music, Inc. v. Bourne, Inc., C.A.N.Y., 457 F.2d 1213, cert. den. 93 S.Ct. 320, 409 U.S. 997, 34 L.Ed.2d 262—U.S. v. Finn, C.A.Ill., 502 F.2d 938—Mims v. Board of Ed. of City of Chicago, C.A.Ill., 523 F.2d 711—Pettway v. American Cast Iron Pipe Co., C.A. Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526—Weingart v. Allen & O'Hara, Inc., C.A.Fla., 654 F.2d 1096.

D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C. 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

Any legally sustainable theory supported by proof

U.S.—U.S. v. Gregory, C.A.N.M., 300 F.2d 11, 99 A.L.R.2d 1011.

17. U.S.—French v. Corrigan, C.A.Ill., 432 F.2d 1211, cert. den. 91 S.Ct. 890, 401 U.S. 915, 27 L.Ed.2d 814—Barrett v. Baylor, C.A.Ill., 457 F.2d 119—Sanchez v. Trans World Airlines, Inc., C.A. N.M., 499 F.2d 1107—Blackwelder v. Millman, C.A.Va., 522 F.2d 766—Bickford v. International Speedway Corp., C.A.Ala., 654 F.2d 1028—Escobar v. Mobil Oil Corp., C.A.Conn., 678 F.2d 398.

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17.5. U.S.—Southard v. Southard, C.A.N.Y., 305 F.2d 730—Roach v. Churchman, C.A.Iowa, 431 F.2d 849, app. after remand 457 F.2d 1101.

Ground not raised in, or considered by, court below

(1) U.S.—Robertson v. Interstate Securities Co, C.A. Mo., 435 F.2d 784.

18. U.S.—Employers Mut. Cas. Co. v. Hinshaw, C.A. Iowa, 309 F.2d 806—Zinnsky v. Sheehan, C.A. Minn., 413 F.2d 481, cert. den. 90 S.Ct. 754, 396 U.S. 1059, 24 L.Ed.2d 753—Lusk v Eastern Products Corp., C.A.Md., 427 F.2d 705.

19. U.S.—Olympic Fastening Systems, Inc. v. Textron Inc., C.A.Ohio, 504 F.2d 609, cert. den. 95 S.Ct. 1447, 420 U.S 1004, 43 L.Ed.2d 762.

20. U.S.—Grosz v. Andrus. C.A.Wash., 556 F.2d 972.

21. U.S.—Horner v. Ferron, C.A.Cal., 362 F.2d 224, cert. den. 87 S.Ct. 397, 385 U.S. 958, 17 L.Ed.2d 305—S & S Logging Co. v. Barker, C.A.Wash., 366 F.2d 617—City of Grandview, Mo. v. Hudson, C.A.Mo., 377 F.2d 694—DiMarco v. Greene, C.A. Ohio, 385 F.2d 556—Mindes v. Seaman, C.A.Fla., 453 F.2d 197, app. after remand, 501 F.2d 175—Tramel v. Schrader, C.A.Tex., 505 F.2d 1310.

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22.5. U.S.—Guyton v. Solomon Dehydrating Co., C.A.Neb., 302 F.2d 283, cert. den. 83 S.Ct. 32, 371 U.S. 817, 9 L.Ed.2d 58—Jones v. U.S., C.A.Kan., 387 F.2d 1004, cert. den. 88 S.Ct. 2284, 392 U.S. 927, 20 L.Ed.2d 1385—Burns v. Massachusetts Institute of Technology, C.A.Mass., 394 F.2d 416.

23. U.S.—Oser v. Wilcox, C.A.Cal., 338 F.2d 886.

23.5. U.S.—Peters v. Fitzpatrick, C.A.Ill., 310 F.2d 704.

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24. U.S.—Dubern v. Girard Trust Bank, C.A.Pa., 454 F.2d 565.

24.5. U.S.—Reynolds Metals Co. v. Yturbide, C.A. Or., 258 F.2d 321, cert. den. 79 S.Ct. 66, 358 U.S. 840, 3 L.Ed.2d 76.

24.15. U.S.—Fairview Park Excavating Co., Inc. v. Al Monzo Const. Co., Inc., C.A.Pa., 560 F.2d 1122.

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29. U.S.—Williford v. People of Cal., C.A.Cal., 352 F.2d 474—Great Am. Ins. Co. v. Louis Lesser Enterprises, Inc., C.A.Mo., 353 F.2d 997.

Three reasons given

U.S.—Carrigan v. California State Legislature, C.A.Cal., 263 F.2d 560, cert. den. 79 S.Ct. 901, 359 U.S. 980, 3 L.Ed.2d 929.

30. U.S.—Simpson v. U.S., C.A.Tenn., 454 F.2d 691.

34.5. U.S.—Lindsey v. Dayton-Hudson Corp., C.A. Okl., 592 F.2d 1118, cert. den. 100 S.Ct. 116, 444 U.S. 856, 62 L.Ed.2d 75.

34.10. U.S.—Davis v. Liberty Mut. Ins. Co., 525 F.2d 1204, reh. den. 528 F.2d 928.

It is inappropriate to affirm a summary judgment on grounds not considered by the lower court.[34.11]

34.11. U.S.—City of Kingsport, Tenn. v. Steel & Roof Structure, Inc., C.A.Tenn., 500 F.2d 617, on remand, D.C., 429 F.Supp. 96.

§ 297(8). —— —— Rulings Not Objected to as Law of Case

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35. U.S.—Bank of Utah v. Commercial Sec. Bank, C.A.Utah, 369 F.2d 19, cert. den. 87 S.Ct. 1374, 386 U.S. 1018, 18 L.Ed.2d 456.

Consent to reference

U.S.—Charles A. Wright, Inc. v. F. D. Rich Co., C.A.Mass., 354 F.2d 710, cert. den. 86 S.Ct. 1586, 384 U.S. 960, 16 L.Ed.2d 673, reh. den. 87 S.Ct. 14, 385 U.S. 890, 17 L.Ed.2d 122.

36. U.S.—Johnson v. U.S., C.A.Mo., 434 F.2d 340.

Objection sufficiently made

U.S.—Ringsby Truck Lines, Inc. v. Beardsley, C.A.Mo., 331 F.2d 14—Mays v. Dealers Transit, Inc., C.A. Ind., 441 F.2d 1344.

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36.15. U.S.—Lyons v. Empressa Hondurena De Vapores, S.A., C.A.N.Y., 273 F.2d 317, cert. den. 80 S.Ct. 879, 362 U.S. 963, 4 L.Ed.2d 877—Woodruff v. Southeastern Fire Ins. Co., C.A.Ala., 426 F.2d 555.

§ 297(9). —— Review Dependent on Nature of Decision Appealed from

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36.50. U.S.—American Pipe and Const. Co. v. Pence, C.A.Cal., Or. & Wash., 393 F.2d 568, cert. den. 89 S.Ct. 122, 393 U.S. 842, 21 L.Ed.2d 113—Grausam v. Murphy, C.A.Pa., 448 F.2d 197, cert. dism. 92 S.Ct. 1207, 405 U.S. 981, 31 L.Ed.2d 257—Firestone v. Time, Inc., C.A.Fla., 460 F.2d 712, cert. den. 93 S.Ct. 120, 409 U.S. 875, 34 L.Ed.2d 127—In re Chicken Antitrust Litigation American Poultry, C.A.Ga., 669 F.2d 228.

Review of trial court's refusal to disturb special findings of jury

U.S.—Ellis v. Dannen Grain & Mill. Co., C.A.Ill., 275 F.2d 352.

Appeal from final and nonfinal orders

U.S.—Maddox v. Black, Raber-Kief & Associates, C.A. Guam, 303 F.2d 910.

Order granting class action status

U.S.—Katz v. Carte Blanche Corp., C.A.Pa., 496 F.2d 747, cert. den. 95 S.Ct. 152, 419 U.S. 885, 42 L.Ed.2d 125.

Absent district court order authorizing class treatment

U.S.—Roberts v. American Airlines, Inc., 526 F.2d 757, cert. den. 96 S.Ct. 1726, 425 U.S. 951, 48 L.Ed.2d 195.

Label not binding

U.S.—Murray v. Gelderman, C.A.La., 566 F.2d 1307.

36.55. U.S.—Santa Clara Valley Distributing Co., Inc. v. Pabst Brewing Co., C.A.Cal., 556 F.2d 942.

37. U.S.—Clarke v. Tatum, C.A.Va., 284 F.2d 125—Delancey v. Motichek Towing Service, Inc., C.A. La., 427 F.2d 897.

Judgment notwithstanding verdict

U.S.—Odorizzi v. A. O. Smith Corp., C.A.Ill., 452 F.2d 229—J & H Auto Trim Co., Inc. v. Bellefonte Ins. Co., C.A.Fla., 677 F.2d 1365.

D.C.—Calloway v. Central Charge Service, C.A., 440 F.2d 287, 142 U.S.App.D.C. 259.

On appeal from judgment entered on verdict

U.S.—Kraklau v. Bayman, C.A.Ind., 318 F.2d 400.

On appeal from motion after failure of jury to agree

U.S.—McKay v. Upson-Walton Co., C.A.Ill., 317 F.2d 826.

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38. U.S.—Davis v. Roadway Exp., Inc., C.A.Tex., 590 F.2d 140, on reh. 621 F.2d 775.

39. U.S.—Davis v. Secretary, Dept. of Health, Ed. and Welfare, C.A.Md., 386 F.2d 429.

39.10. U.S.—Male v. Crossroads Associates, C.A. N.Y., 469 F.2d 616.

39.15. U.S.—Willits v. Richardson, C.A.Fla., 497 F.2d 240.

40. U.S.—Parsons Inv. Co. v. Chase Manhattan Bank, C.A.Mich., 466 F.2d 869—Douglas v. Beneficial Finance Co. of Anchorage, C.A.Alaska, 469 F.2d 453—Graves v. Romney, C.A.Mo., 502 F.2d 1062, cert. den. 95 S.Ct. 1354, 420 U.S. 963, 43 L.Ed.2d 440.

Entire order reviewed

U.S.—McNally v. Pulitzer Pub. Co., C.A.Mo., 532 F.2d 69, cert. den. 97 S.Ct. 150, 429 U.S. 855, 50 L.Ed.2d 131.

Entire order reviewed

U.S.—Gaines v. Sunray, C.A.Ark., 539 F.2d 1136.

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41. U.S.—Allen v. Mississippi Commission of Law Enforcement, C.A.Miss., 424 F.2d 285—Machlett Laboratories, Inc. v. Techny Industries, Inc., C.A. Ill., 665 F.2d 795.

42. U.S.—Delaware & H. Ry. Co. v. United Transp. Union, C.A., 450 F.2d 603, 146 U.S.App.D.C. 142, cert. den. 91 S.Ct. 2209, 403 U.S 911, 29 L.Ed.2d 689.

43. D.C.—F.T.C. v. Cinderella Career & Finishing Schools, Inc., C.A., 404 F.2d 1308, 131 U.S.App. D.C. 331—Delaware & H. Ry. Co. v. United Transp. Union, C.A., 450 F.2d 603, 146 U.S.App. D.C. 142, cert. den. 91 S.Ct. 2209, 403 U.S. 911, 29 L.Ed.2d 689—Natural Resources Defense Council, Inc. v. Morton, C.A., 458 F.2d 827, 148 U.S.App.D.C. 5.

43.5. U.S.—Holiday Magic, Inc. v. Warren, C.A.Wis., 497 F.2d 687.

Delaware & H. Ry. Co. v. United Transp. Union, C.A., 450 F.2d 603, 146 U.S.App.D.C. 142, cert. den. 91 S.Ct. 2209, 403 U.S. 911, 29 L.Ed.2d 689.

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43.15. Jurisdiction and sufficiency of complaint

U.S.—U.S. v. First Nat. City Bank, C.A.N.Y., 321 F.2d 14, revd. on oth. grds. 85 S.Ct. 528, 379 U.S. 378, 13 L.Ed.2d 365.

44. U.S.—Erving v. Virginia Squires Basketball Club, C.A.N.Y., 468 F.2d 1064.

47.5. U.S.—U.S. v. Allegheny-Ludlum Industries, Inc., C.A.Ala., 517 F.2d 826, cert. den. 96 S.Ct. 1684, two cases, 425 U.S. 944, 48 L.Ed.2d 187.

Scope of review extremely narrow

U.S.—Martin Marietta Corp. v. F.T.C., C.A., 376 F.2d 430, cert. den. 88 S.Ct. 237, 389 U.S. 923, 19 L.Ed.2d 265.

48. U.S.—Asher v. Harrington, C.A.Wis., 461 F.2d 890—Runnels v. Rosendale, C.A.Cal., 499 F.2d 733—Decker-Ruhl Ford Sales, Inc. v. Ford Motor Credit Co., C.A.Mo., 523 F.2d 833—Spector v. L Q Motor Inns, Inc., C.A.Tex., 517 F.2d 278, reh. den. 521 F.2d 815, cert. den. 96 S.Ct. 786, 423 U.S. 1055, 46 L.Ed.2d 644.

Dismissal treated as summary judgment

(1) U.S.—Smith v. Atlantic Coast Line R. Co., C.A. Fla., 421 F.2d 1400.

(3) Motion for dismissal treated as motion for summary judgment.

U.S.—International Longshoremen's and Warehousemen's Union v. Kuntz, C.A.Wash., 334 F.2d 165—Thompson v. New York Cent. R. Co., C.A.N.Y., 361 F.2d 137.

Affidavits examined in fresh light

U.S.—Israel Aircraft Industries, Ltd. v. Standard Precision, C.A.N.Y., 559 F.2d 203.

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49. U.S.—Whitner v. Davis, C.A.Wash., 410 F.2d 24—Nelson v. Keefer, C.A.Pa., 451 F.2d 289—Miskow v. Boeing Co., C.A.Cal., 664 F.2d 205, cert. den. 102 S.Ct. 1717, 455 U.S. 1020, 72 L.Ed.2d 138.

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U.S.—Lay v. City of Kingsport, Tenn., C.A.Tenn., 454 F.2d 345, cert. den. 93 S.Ct. 50, 409 U.S. 846, 34 L.Ed.2d 87—Holiday Magic, Inc. v. Warren, C.A. Wis., 497 F.2d 687.

50.15. U.S.—Edwards v. Selective Service Local Bd. No. 111, C.A.Ga., 432 F.2d 287, cert. den. 91 S.Ct. 1637, 402 U.S. 952, 29 L.Ed.2d 122.

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50.20. U.S.—Mumford v. Glover, 503 F.2d 878.

50.25. U.S.—Bossard v. Exxon Corp., C.A.La., 559 F.2d 1040, reh. den. 564 F.2d 97, cert. den. 98 S.Ct. 1510, 435 U.S. 934, 55 L.Ed.2d 532.

The court of appeals must scrutinize a dismissal of an action brought under a civil rights statute with special care.[50.36]

50.36. U.S.—Lucarell v. McNair, C.A Ohio, 453 F.2d 836—Azar v. Conley, C.A.Ohio, 456 F.2d 1382, app. after remand 480 F.2d 220.

50.40. U.S.—Country Gas Service, Inc. v. U.S., C.A. Mass., 405 F.2d 147—Kirk v. Home Indem. Co., C.A.Ill., 431 F.2d 554—Mintz v. Mathers Fund, Inc., C.A.Ill, 463 F.2d 495.

D.C.—E. P. Hinkel & Co., Inc. v. Manhattan Co., C.A., 506 F.2d 201, 165 U.S.App D.C. 140.

Genuine issues of material fact

U.S.—Proctor v. Sagamore Big Game Club, C.A.Pa., 265 F.2d 196, cert. den. 80 S.Ct. 81, 361 U.S. 831, 4 L.Ed.2d 73—Vickery v. Fisher Governor Co., C.A.Cal., 417 F.2d 466.

Matters considered

U.S.—Adams v. U.S., C.A.Cal., 318 F.2d 861.

Evidence not weighed on review

U.S.—Molitor v. American President Lines, Limited, C.A.Cal., 343 F.2d 217.

50.45. U.S.—Southwest Forest Industries, Inc. v. Westinghouse Elec. Corp., C.A.Ariz., 422 F.2d 1013, cert. den. 91 S.Ct. 138, 400 U.S. 902, 27 L.Ed.2d 138.

50.50. U.S.—Vetter v. Frosch, C.A.Tex., 599 F.2d 630.

51. U.S.—Bennett v. Passic, C.A.Utah, 545 F.2d 1260.

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52.5. U.S.—Wilkerson v. McCarthy, Utah, 69 S.Ct. 413, 336 U.S. 53, 93 L.Ed. 497, reh. den. 69 S.Ct. 744, 336 U.S. 940, 93 L.Ed. 1098.

Marquis v. Chrysler Corp., 577 F.2d 624.

D.C.—Seganish v. District of Columbia Safeway Stores, Inc., C.A., 406 F.2d 653, 132 U.S.App.D.C. 117—Klein v. District of Columbia, C.A., 409 F.2d 164, 133 U.S.App.D.C. 129.

53.5. U.S.—Jones v. Concrete Ready-Mix, Inc., C.A. Miss., 464 F.2d 1323.

55. U.S.—Harrington v. U.S., C.A.R.I., 504 F.2d 1306.

57. U.S.—Euson v. Starrett, C.A.Ill., 277 F.2d 73—State Farm Mut. Auto. Ins. Co. v. Jackson, C.A. Ark., 346 F.2d 484.

58. U.S.—Epoch Producing Corp. v. Killiam Shows, Inc., C.A.N.Y., 522 F.2d 737, cert. den. 96 S.Ct. 1429, 424 U.S. 955, 47 L.Ed.2d 360.

59. U.S.—DeSantis v. Parker Feeders, Inc., C.A.Wis., 547 F.2d 357.

63. U.S.—Compagnie Nationale Air France v. Port of New York Authority, C.A.N.Y., 427 F.2d 951—Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc., C.A.Mo., 466 F.2d 179, cert. den. 93 S.Ct. 1371, 410 U.S. 930, 35 L.Ed.2d 592.

63.5. U.S.—Russell v. United Parcel Service, Inc., C.A.Mo., 666 F.2d 1188.

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63.10. U.S.—Simblest v. Maynard, C.A.Vt., 427 F.2d 1—Reeves v. General Foods Corp., C.A.Tex., 682 F.2d 515.

63.25. U.S.—J. H. Horne & Sons Co. v. Bath Fibre Co., C.A.N.H., 272 F.2d 8.

63.35. U.S.—Hoover, Inc. v. McCullough Industries, Inc., C.A.Ala., 380 F.2d 798, on remand 456 F.2d 170.

§ 297(10). —— Review Dependent on Mode of Review

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67.5. Certification from district court

U.S.—Ocasio v. Bryan, C.A.Virgin Islands, 374 F.2d 11.

§ 297(12). —— Matters or Evidence Considered

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70. U.S.—U.S. v. Gurley, C.A.Fla., 415 F.2d 144—Schy v. Susquehanna Corp., C.A.Ill., 419 F.2d 1112, cert. den. 91 S.Ct. 51, 400 U.S. 826, 27 L.Ed.2d 55—Gomes v. Williams, C.A.N.M., 420 F.2d 1364—Garola v. American Marine Corp., C.A.La., 432 F.2d 6.

71. U.S.—Royal Services, Inc. v. Maintenance, Inc., C.A.Fla., 361 F.2d 86.

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71.5. U.S.—Panotex Pipe Line Co. v. Phillips Petroleum Co., C.A.Tex., 457 F.2d 1279, cert. den. 93 S.Ct. 48, 409 U.S. 845, 34 L.Ed.2d 86.

71.10. U.S.—Ralston Purina Co. v. General Foods Corp., C.A.Mo., 442 F.2d 389—Davis Co. v. United Furniture Workers of America, AFL-CIO, C.A.Tenn., 674 F.2d 557, cert. den. 103 S.Ct. 296, 459 U.S. 968, 74 L.Ed.2d 279.

Technicalities disregarded where appellant represents self

D.C.—Gager v. Bob Seidel, C.A., 300 F.2d 727, 112 U.S.App.D.C. 135, cert. den. 82 S.Ct. 1612, 370 U.S. 959, 8 L.Ed.2d 825.

Appeal from grant of motion for summary judgment

U.S.—Balowski v. International Union, United Auto., Aerospace and Agr. Implement Workers of America, (UAW), AFL-CIO, C.A.Mich., 372 F.2d 829, 34 A.L.R.3d 872.

72. U.S.—Krist v. Smith, C.A.Ga., 439 F.2d 146—Hardy v. Hull Corp., C.A.Ariz., 446 F.2d 34—Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., C.A.Fla., 669 F.2d 1026.

D.C.—Jannenga v. Nationwide Life Ins. Co., C.A., 288 F.2d 169, 109 U.S.App.D.C. 385.

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U.S.—Ace Beer Distributors, Inc. v. Kohn, Inc., C.A. Ohio, 318 F.2d 283, cert. den. 84 S.Ct. 267, 375 U.S. 922, 11 L.Ed.2d 166, reh. den. 84 S.Ct. 479, 375 U.S. 982, 11 L.Ed.2d 428.

Submission on affidavits

U.S.—Doff v. Brunswick Corp., C.A.Cal., 372 F.2d 801, cert. den. 88 S.Ct. 39, 389 U.S. 820, 19 L.Ed.2d 71.

73. U.S.—Deville v. Shell Oil Co., C.A.Alaska, 366 F.2d 123—Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO, C.A.Ind., 447 F.2d 945.

Effect of statement that matter at most for jury

U.S.—Bryant v. Standard Life & Acc. Ins. Co., C.A. Tex., 348 F.2d 649.

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74. U.S.—Bradford v. Textile Workers of America, AFL-CIO, Local 1093, C.A.S.C., 563 F.2d 1138.

No objection by counsel

U.S.—State Wholesale Grocers v. Atlantic & Pacific Tea Co., C.A.Ill., 258 F.2d 831, cert. den. 79 S.Ct. 353, 358 U.S. 947, 3 L.Ed.2d 352, on remand, D.C., 24 F.R.D. 510.

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75. U.S.—U.S. v. Tyrrell, C.A.Ill., 329 F.2d 341.

75.15. U.S.—Denny v. Barber, C.A.N.Y., 576 F.2d 465.

Jury's decisional processes

U.S.—Domeracki v Humble Oil & Refining Co., C.A. Pa., 443 F.2d 1245, cert. den. 92 S.Ct. 212, 404 U.S. 883, 30 L.Ed.2d 165.

75.25. U.S.—Parrent v. Midwest Rug Mills, Inc., C.A.Ill., 455 F.2d 123

76. U.S.—Munson v. Janklow, C.A.S.D., 563 F.2d 933.

77. Recital of facts considered

U.S.—U.S. for Use and Benefit of Austin v. Western Elec. Co., C.A.Cal., 337 F 2d 568.

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U.S.—Beneficial Life Ins. Co. v. Knobelauch, C.A.Cal., 653 F.2d 393.

77.10. U.S.—Powe v. City of Chicago, C A.Ill., 664 F.2d 639.

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78.15. U.S.—Long v. Hank, C.A.Okl., 457 F.2d 40—Mercer v. Long Mfg. N.C., Inc., C.A.Tex., 665 F.2d 61, reh. den. 671 F.2d 946.

79. U.S.—Oliveras v. U.S. Lines Co., C.A.N.Y., 318 F.2d 890—Ridgway Nat. Bank v. North Am. Van Lines, Inc., C.A.Pa., 326 F.2d 934—Lumbermens Mut. Cas. Co. v. Nolan, C.A.La., 331 F.2d 711.

82. U.S.—Miller v. Baum, C.A.Tex., 400 F.2d 176.

§ 297(13). Interlocutory, Collateral, and Supplementary Proceedings and Questions

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89. U.S.—Walker v. Mathews, C.A.Wash., 546 F.2d 814.

Grant of new trial in first trial considered on appeal from final judgment in second

D.C.—Desmond v. Robertson, App., 211 A.2d 775.

Interlocutory order leading to entry of final judgment

D.C.—Desmond v. Robertson, App., 211 A.2d 775.

89.5. U.S.—De Fonce Const. Co. v. City of Miami, C.A.Fla., 256 F.2d 425, cert. den. 79 S.Ct. 115, 358 U.S. 875, 3 L.Ed.2d 105.

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89.50. U.S.—Fox v. City of West Palm Beach, C.A. Fla., 383 F.2d 189—South Side Bank & Trust Co. v. Walston & Co., C.A.Ill., 425 F.2d 40.

O'Donnell v. Watson Bros. Transp. Co., D.C.Ill., 183 F.Supp. 577.

Transfer order of district court of another circuit

U.S.—American Fidelity Fire Ins. Co. v. U.S. Dist. Court for Northern Dist. of California, C.A.Cal., 538 F.2d 1371.

90. U.S.—Hilton v. Mumaw, C.A.Wash., 522 F.2d 588.

Speir v. Robert C. Herd & Co., D.C.Md., 189 F.Supp. 436—Control Data Corp. v. International Business Machines Corp., D.C.Minn., 306 F.Supp. 839, app. den., C.A., 421 F.2d 323, affd. 430 F.2d 1277.

Burkhalter v. Montgomery Ward and Co., Inc., D.C.Ark., 92 F.R.D. 361.

D.C—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S App D.C. 110, cert. den. 90 S Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

Mass.—McCourt Co., Inc. v. FPC Properties, Inc., 434 N.E.2d 1234, 386 Mass 145.

91. U.S.—Scholl v. Felmont Oil Corp., C.A.Ky., 327 F.2d 697.

93. U.S.—Hyde Const. Co v. Koehring Co., C.A. Okl., 388 F.2d 501, cert. den. 88 S.Ct. 1654, 391 U.S. 905, 20 L.Ed.2d 419.

94. U.S.—A.B.C. Packard, Inc. v. General Motors Corp., C.A.Wash., 275 F.2d 63—Plaquemines Parish School Bd. v. U.S., C.A.La., 415 F.2d 817.

Ruling at end of first trial

U.S.—Basciano v. Reinecke, C.A.N.Y., 313 F.2d 542.

95. U.S.—U.S. v. 210.43 Acres of Land, More or Less, in Woodbury County, Iowa, C.A.Iowa, 451 F.2d 667—U.S v. 687.30 Acres of Land, More or Less, in Dakota and Thurston Counties, State of Neb., C.A.Neb., 451 F.2d 667, cert. den. 92 S.Ct. 1291, 405 U S. 1026, 31 L.Ed.2d 486.

D.C.—Courembis v. Independence Ave. Drug Fair, Inc., C.A., 316 F.2d 658, 115 U.S.App.D.C. 7.

Mass.—Demoulas Super Markets, Inc. v. Peter's Market Basket, Inc., 370 N.E.2d 719, 5 Mass.App. 750.

96. U.S.—Yamamoto v. Omiya, C.A.Hawaii, 564 F.2d 1319.

97. U.S.—Arthur v. Nyquist, C.A.N.Y., 547 F.2d 7.

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97.10. U.S—Cotten v. Treasure Lake, Inc., C.A. Ohio, 518 F.2d 770, cert. den. 96 S.Ct. 281, 423 U.S. 930, 46 L.Ed.2d 259.

D.C.—Gordon v. Federal Deposit Ins. Corp., C.A., 427 F.2d 578, 138 U S.App D.C. 308.

Refusal of amendment

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1.5. U.S.—New York, N.H. & H.R. Co. v Henagan, C.A.Mass., 272 F.2d 153, revd. on oth. grds. 81 S.Ct. 198, 364 U.S. 441, 5 L.Ed.2d 183.

2. U.S.—Wiggs v. Courshon, C.A.Fla., 485 F.2d 1281.

D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C. 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

3. U.S.—Conway v. Chemical Leaman Tank Lines, Inc., D.C.Tex., 87 F.R.D. 712, affd. 644 F.2d 1059, reh. den. 650 F.2d 282, app. after remand 687 F.2d 108, reh. den. 693 F.2d 133.

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8. U.S.—Florida v. U.S., C A.Ark., 285 F.2d 596.

12.15. U.S.—U.S. v. Lynd, C.A.Miss., 349 F.2d 790.

Conditional disposition of motion for new trial after grant of judgment n.o.v.

U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

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13. U.S.—Drop Dead Co. v. S. C. Johnson & Son, Inc., C.A.Cal., 326 F.2d 87, cert. den. 81 S.Ct. 1167, 377 U.S. 907, 12 L.Ed.2d 177—J. C. Trahan Drilling Contractor, Inc., v. Sterling, C.A.La., 335 F.2d 65—State of Minn. v. U.S. Steel Corp., C.A. Minn., 438 F.2d 1380—Continental Life & Acc. Co. v. Doig, C.A.Ariz., 443 F.2d 27.

D.C.—Industrial Bank of Washington v. Tobriner, C.A., 405 F.2d 1321, 132 U.S.App.D.C. 51.

Other matters held reviewable

U.S.—Stewart-Warner Corp. v. Westinghouse Elec. Corp., C A.N.Y., 325 F.2d 822, cert den. 84 S.Ct 800, 376 U.S. 944, 11 L.Ed.2d 767.

Matters considered

U.S.—Dodd v. Fawcett Publications, Inc., C.A.Okl., 329 F.2d 82.

14.5. U.S.—Structural Steel & Forge Co. v. Union Pac. R. Co., C.A.Utah, 269 F.2d 714, cert. den. 80 S.Ct. 157, 361 U.S. 886, 4 L.Ed.2d 121—Kysor Indus. Corp. v. Pet, Inc., C.A.Mich., 459 F.2d 1010, cert. den. 93 S.Ct. 314, 409 U.S. 980, 34 L.Ed.2d 243—Fentron Industries, Inc. v. National Shopmen Pension Fund, C.A.Wash., 674 F.2d 1300.

15. U.S.—Hurwitz v. Directors Guild of America, Inc., C.A.N.Y., 364 F.2d 67, cert. den. 87 S.Ct. 508, 385 U.S. 971, 17 L.Ed.2d 435—Allstate Ins. Co. v. NcNeill, C.A.N.C., 382 F.2d 84, cert. den. 88 S.Ct. 2290, 392 U.S. 931, 20 L.Ed.2d 1390.

Liberty Lobby, Inc. v. Pearson, C.A., 390 F.2d 489.

Validity of removal

U.S.—Structural Steel & Forge Co. v Union Pac. R. Co., C.A.Utah, 269 F.2d 714, cert. den. 80 S.Ct. 157, 361 U S. 886, 4 L.Ed.2d 121.

Consideration and decision on merits

U.S.—Johnson v. England, C.A.Cal., 356 F.2d 44, cert. den. 86 S.Ct. 1587, 384 U.S. 961, 16 L.Ed.2d 673.

15.5. U.S.—Dow Chemical Co. v Metlon Corp., C.A. N.C., 281 F.2d 292—Piedmont Heights Civic Club, Inc v. Moreland, C A.Ga., 637 F.2d 430.

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15.15. Related matters held subject to review

U.S.—U.S. v. O'Connor, C A.N.Y., 291 F.2d 520, 100 A.L.R.2d 858—National Equipment Rental, Limited v. Mercury Typesetting Co., C.A.N.Y., 323 F.2d 784—U.S. v. 93 Court Corp., C.A.N.Y., 350 F.2d 386, cert. den. 86 S.Ct. 560, 382 U.S. 984, 15 L.Ed.2d 473.

§ 297(16). —— On Appeal from Subsequent Order or Judgment

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16. U.S.—Hines v. Seaboard Air Line R. Co., C.A. N.Y., 341 F.2d 229—1507 Corp. v. Henderson, C.A.Wis., 447 F.2d 540.

17. U.S.—Hines v. Seaboard Air Line R. Co., C.A. N.Y., 341 F.2d 229.

18.10. Change in Rules

Fed.Rules Civ.Proc. Rule 73(a), is now F.R.A.P. Rule 3, 28 U.S.C.A.

18.15. U.S.—Securities and Exchange Commission v. Farm & Home Agency. Inc., C.A.Ind., 270 F.2d 891, cert. den. 80 S.Ct. 612, 362 U.S. 903, 4 L.Ed.2d 555—Wagner v. U.S., C.A.N.Y., 316 F.2d 871.

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19. U.S.—Fetzer v. Cities Service Oil Co., C.A.Ark., 572 F.2d 1250, app. after remand 601 F.2d 356—Carreathers v. Alexander, C.A.Colo., 587 F.2d 1046.

20. U.S.—U.S. v. Burgreen, C.A.Ala., 591 F.2d 291.

24. U.S.—Lincoln Bank & Trust Co. v. Exchange Nat. Bank & Trust Co., Ardmore, Okl., C.A.Okl., 383 F.2d 694.

28. U.S.—Rizal Commercial Banking Corp. v. Putnam, C.A.Or., 429 F.2d 1112—In re J. A. Thompson & Son, Inc., C.A.Cal., 665 F.2d 941.

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Appellant to have opportunity to answer

U.S.—Dejay Stores v. Ryan, C.A.N.Y., 229 F.2d 867—Spokane County v. Air Base Housing, Inc., C.A. Wash., 304 F.2d 494.

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28.5. U.S.—Emerson v. Labor Inv. Corp., C.A.Okl., 284 F.2d 946—Harp v. Montgomery Ward & Co., C.A.Or., 336 F.2d 255—Waterman S.S. Corp. v. Gay Cottons, C.A.Cal., 414 F.2d 724.

29. U.S.—Emerson v. Labor Inv. Corp., C.A.Okl., 284 F.2d 946.

30. U.S.—Colautti v. Franklin, Pa., 99 S.Ct. 675, 439 U.S. 379, 58 L.Ed.2d 596.

31. U.S.—Washington Steel Corp. v TW Corp., C.A. Pa., 602 F.2d 594.

31.5. U.S.—Third Nat. Bank in Nashville v. U.S., C.A.Tenn., 454 F.2d 689—Lucas v. Gulf & Western Industries, Inc., C.A.N.J., 666 F.2d 800.

32. U.S.—In re Middletown Packing Co., D.C.Conn., 199 F.Supp. 657—North Texas Producers Ass'n v. Metzger Dairies, Inc., C.A.Tex., 348 F.2d 189, cert den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed.2d 468—National Life & Acc. Ins. Co. v. U.S., C.A. Tenn., 385 F.2d 832—First Pennsylvania Banking & Trust Co. v. U.S. Life Ins. Co. in City of New York, C.A.Pa., 421 F.2d 959—Securities and Exchange Commission v. Fifth Ave. Coach Lines, Inc., C.A.N.Y., 435 F.2d 510—Jamesbury Corp. v. Worcester Valve Co., C.A.Mass., 443 F.2d 205—Alford v. City of Lubbock, Tex., C.A.Tex., 664 F.2d 1263, cert. den. 102 S.Ct. 2239, 456 U.S. 975, 72 L.Ed.2d 848.

Enlargement to obtain interest

U.S.—Lettsome v. U.S., C.A.Fla., 434 F.2d 907, app. after remand 453 F.2d 395.

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33. Where appellee failed to appeal he cannot complain

(4) U.S.—Schildhaus v. Moe, C.A.N.Y., 319 F.2d 587.

(7) Other matters.

U.S.—Gold Master Corp. v. Miller, C.A.N.Y., 380 F.2d 128.

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35.5. U.S.—U.S. ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, C.A.Cal., 293 F.2d 816, cert. den. 82 S.Ct. 601, 368 U.S. 987, 7 L.Ed.2d 524.

35.15. U.S.—Chouinard v. Chouinard, C.A.Ga., 568 F.2d 430.

35.25. U.S.—Cooper v. Nix, C.A.La., 496 F.2d 1285.

Where defendant appeals from a denial of his motion for judgment n.o.v., plaintiff who has presented his grounds for new trial or voluntary nonsuit in the trial court should have opportunity to press the same or different grounds in the appellate court.[35.30]

35.30. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den., 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

36. U.S.—International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Zantop Air Transport Corp., C.A.Mich., 394 F.2d 36—Young v. Taylor, C.A.Utah, 466 F.2d 1329.

§ 297(18). —— Waiver of, or Estoppel to Allege, Error

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38.50. U.S.—Continental Life & Acc. Co. v. Doig, C.A.Ariz., 443 F.2d 27.

38.60. U.S.—Thomas Wilson & Co. v. Irving J. Dorfman Co., C.A.N.Y., 433 F.2d 409, cert. den. 91 S.Ct. 1200, 401 U.S. 977, 28 L.Ed.2d 326—Lunz v. Preiser, 524 F.2d 289.

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40. U.S.—Sanders v. Buchanan, C.A.Colo., 407 F.2d 161—Director General of India Supply Mission for and on Behalf of President of Union of India v. Steamship Maru, C.A.N.Y., 459 F.2d 1370, cert. den. 93 S.Ct. 898, 409 U.S. 1115, 34 L.Ed.2d 699.

D.C.—Brotherhood of R.R. Trainmen v. Chicago, M., St. P. & P.R. Co., C.A., 380 F.2d 605, 126 U.S. App.D.C. 58, cert. den. 88 S.Ct. 289, two cases, 389 U.S. 928, 19 L.Ed.2d 279.

42.15. U.S.—Sill Corp. v. U.S., C.A.Okl., 343 F.2d 411, cert. den. 86 S.Ct. 88, 382 U.S. 840, 15 L.Ed.2d 81—U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., C.A.Ill., 665 F.2d 781.

42.20. U.S.—Brumby Metals, Inc. v. Bargen, C.A. Wis., 275 F.2d 46—Case & Co., Inc. v. Board of Trade of City of Chicago, C.A.Ill., 523 F.2d 355.

43.5. U.S.—Young v. Brashears, C.A.Ill., 560 F.2d 1337.

44. U.S.—U.S. v. Hudspeth, C.A.Or., 384 F.2d 683.

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46. U.S.—Curtis v. A. Garcia y Cia, Ltda., C.A.Pa., 272 F.2d 235, 85 A.L.R.2d 1186—National Compressor Corp. v. Carrow, C.A.Mo., 417 F.2d 97—Ridley v. Phillips Petroleum Co., C.A.Okl., 427 F.2d 19—Henry C. Beck Co. v. Ross Island Sand & Gravel Co., C.A.Or., 456 F.2d 316.

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49. U.S.—Skibs A/S Gylfe v. Hyman-Michaels Co., C.A.Mich., 438 F.2d 803, cert. den. 92 S.Ct. 73, 404 U.S. 831, 30 L.Ed.2d 61.

49.10. U.S.—Lowe v. Pate Stevedoring Co., C.A.Fla., 558 F.2d 769.

51. U.S.—Jeffries v. Georgia Residential Finance Authority, C.A.Ga., 678 F.2d 919, cert. den. 103 S.Ct. 302, 459 U.S. 971, 74 L.Ed.2d 283.

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U.S.—Air-Exec, Inc. v. Two Jacks, Inc., C.A.Okl., 584 F.2d 942.

53. U.S.—Howard v. Green, C.A.Ark., 555 F.2d 178.

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53.5. U.S.—Dow v. Shoe Corp. of America, C.A.Ill., 276 F.2d 165.

55. U.S.—Household Goods Carriers' Bureau v. Terrell, C.A.Tex., 417 F.2d 47, reh. 452 F.2d 152, app. after remand 494 F.2d 16, reh. den. 496 F.2d 878, cert. dism. 95 S.Ct. 246, 419 U.S. 987, 42 L.Ed.2d 260.

57. U.S.—Drop Dead Co. v. S. C. Johnson & Son, Inc., C.A.Cal., 326 F.2d 87, cert. den. 84 S.Ct. 1167, 377 U.S. 907, 12 L.Ed.2d 177—Parris v. Harris, C.A.Okl., 351 F.2d 52.

Objection to admission not waived under circumstances

U.S.—Rice v. Louisville & N.R. Co., C.A.Ky., 309 F.2d 930.

60. U.S.—Rucker v. Wabash R. Co., C.A.Ill., 418 F.2d 146.

61. U.S.—Roberts v. U.S., C.A.N.J., 316 F.2d 489.

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61.5. U.S.—Cordle v. Allied Chemical Corp., C.A. Ky., 309 F.2d 821.

61.20. U.S.—Cranston Print Works Co. v. Public Service Co. of N.C., C.A.N.C., 291 F.2d 638—Independent Iron Works, Inc. v. U.S. Steel Corp., C.A.Cal., 322 F.2d 656, cert. den. 84 S.Ct. 267, 375 U.S. 922, 11 L.Ed.2d 165.

64. U.S.—Alcoa S.S. Co. v. Charles Ferran & Co., C.A.La., 383 F.2d 46, cert. den. 89 S.Ct. 111, 393 U.S. 836, 21 L.Ed.2d 107.

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The rule of invited error has been applied with respect to other matters pertaining to witnesses.[67.25]

67.25. Qualification of witnesses

U.S.—Cleveland v. Southern Pac. Co., C.A.Or., 436 F.2d 77.

68. U.S.—Lor Productions, Inc. v. Valley Music Hall, Inc., C.A.Utah, 447 F.2d 1010—Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767.

Supplemental charge

U.S.—Staplin v. Maritime Overseas Corp., C.A.N.Y., 519 F.2d 969.

69. U.S.—R. P. Farnsworth & Co. v. Tri-State Const. Co., C.A.Ga., 271 F.2d 728, cert. den. 80 S.Ct. 807, 362 U.S. 941, 4 L.Ed.2d 770—Hargrave v. Wellman, C.A.Mont., 276 F.2d 948—Garland v. Material Service Corp., C.A.Ill., 291 F.2d 861, 91 A.L.R.2d 832—Arkla Exploration Co. v. Boren, C.A.Ark., 411 F.2d 879—Johnston v. Holiday Inns, Inc., C.A.Mass., 565 F.2d 790.

70. U.S.—Eastern Coal Corp. v. McNally Pittsburg Mfg. Corp., C.A.Ky., 274 F.2d 157—Silverman v. Travelers Ins. Co., C.A.La., 277 F.2d 257—Solomon Dehydrating Co. v. Guyton, C.A.Neb., 294 F.2d 439, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192—Arley v. United Pac. Ins. Co., C.A. Or., 379 F.2d 183, cert. den. 88 S.Ct. 1039, 390 U.S. 950, 19 L.Ed.2d 1140.

71. U.S.—Lohr v. Tittle, C.A.Kan., 275 F.2d 662—La Barge Water Well Supply Co. v. U.S., C.A.Mo., 325 F.2d 798—Spellacy v. Southern Pac. Co., C.A.Or., 428 F.2d 619.

74. U.S.—Derewecki v. Pennsylvania R. Co., C.A.Pa., 353 F.2d 436.

May not assign as error giving and failure to give same instruction

U.S.—Arley v. United Pac. Ins. Co., C.A.Or., 379 F.2d 183, cert. den. 88 S.Ct. 1039, 390 U.S. 950, 19 L.Ed.2d 1140.

74.5. U.S.—Logan v. Empresa Lineas Maritimas Argentinas, C.A.Mass., 353 F.2d 373, cert. den. 86 S.Ct. 1276, 383 U.S. 970, 16 L.Ed.2d 310.

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77. U.S.—Ramsey v. Travelers Ins. Co., C.A.S.C., 317 F.2d 300.

78. U.S.—Ramsey v. Travelers Ins. Co., C.A.S.C., 317 F.2d 300—First Nat. Bank, Henrietta v. Small Business Administration, C.A.Tex., 429 F.2d 280.

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83. U.S.—Fiedler v. Marumsco Christian School, C.A.Va., 631 F.2d 1144.

87. Failure to bring to attention of court considerations requiring exercise of discretion

U.S.—Murphy v. Kodz, C.A.Ariz., 351 F.2d 163.

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88. U.S.—Garcia v. American Marine Corp., C.A.La., 432 F.2d 6.

Not estopped

U.S.—Slay v. State of Ala., C.A.Ala., 636 F.2d 1045, reh. den. 642 F.2d 1210.

91. U.S.—Dean Foods Co. v. Albrecht Dairy Co., C.A.Mo., 396 F.2d 652—Freeman v. Aetna Cas. & Sur. Co., C.A.La., 398 F.2d 808—Cypert v. Baker, C.A.Okl., 399 F.2d 927—Schy v. Susquehanna Corp., C.A.Ill., 419 F.2d 1112, cert. den. 91 S.Ct. 51, 400 U.S. 826, 27 L.Ed.2d 55—Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., C.A.Ill., 669 F.2d 490, cert. den. 103 S.Ct. 257, 459 U.S. 943, 74 L.Ed.2d 201.

Additional matters as to which one may not complain on appeal, because of waiver or estoppel, have been considered.[92.5]

92.5. Prisoner's right to contact spiritual adviser
U.S.—Pierce v. La Vallee, C.A.N.Y., 293 F.2d 233.

Application of parol evidence rule
U.S.—Liberty Combustion Co. v. Thoreson Sales Co., C.A.Tex., 322 F.2d 790.

No waiver or estoppel
U.S.—Goldberg v. Sorvas, C.A.Pa., 294 F.2d 841.

Privilege against self-incrimination
U.S.—Securities and Exchange Commission v. MacElvain, C.A.Ala., 417 F.2d 1134, cert. den. 90 S.Ct. 1087, 397 U.S. 972, 25 L.Ed.2d 265.

§ 297(19). —— —— Assent to, or Recognition of, Validity of Proceedings

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93. U.S.—Himalayan Industries v. Gibson Mfg. Co., C.A.Cal., 434 F.2d 403.

94. U.S.—Cooper v. R. J. Reynolds Tobacco Co., C.A.Mass., 256 F.2d 464, cert. den. 79 S.Ct. 112, 358 U.S. 875, 3 L.Ed.2d 105—Geehan v. Monahan, C.A.Wis., 382 F.2d 111—Himalayan Industries v. Gibson Mfg. Co., C.A.Cal., 434 F.2d 403.

97. U.S.—Hoosier Home Imp. Co. v. U.S., C.A.Ind., 350 F.2d 640—Hassel v. Holt, C.A.Pa., 371 F.2d 543—Glick v. White Motor Co., C.A.Pa., 458 F.2d 1287.

98. U.S.—Sill Corp. v. U.S., C.A.Okl., 343 F.2d 411, cert. den. 86 S.Ct. 88, 382 U.S. 840, 15 L.Ed.2d 81.

99. U.S.—Livergood v. S. J. Groves & Sons Co., C.A.Pa., 361 F.2d 269—Kirkendoll v. Neustrom, C.A.Kan., 379 F.2d 694.

Irregularity in trying case on affidavits, etc.
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99.5. Plaintiff's refusal to retry case pursuant to grant of new trial to defendant
D.C.—Desmond v. Robertson, App., 211 A.2d 775.

1. U.S.—DeGioia v. U.S. Lines Co., C.A.N.Y., 304 F.2d 421—Safeway Stores, Inc. v. Dial, C.A.Tex., 311 F.2d 595, reh. den. 314 F.2d 33.

4. U.S.—Alioto v. Cowles Communications, Inc., C.A. Cal., 623 F.2d 616, cert. den. 101 S.Ct. 897, 449 U.S. 1102, 66 L.Ed.2d 827.

5. U.S.—Geehan v. Monahan, C.A.Wis., 382 F.2d 111.

6. U.S.—Westerman v. Sears, Roebuck & Co., C.A. Fla., 577 F.2d 873.

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9. U.S.—White v. Travelers Indem. Co., C.A.Tenn., 416 F.2d 870—Slaughter v. Philadelphia Nat. Bank, C.A.Pa., 417 F.2d 21.

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14.5. U.S.—Walker v. Felmont Oil Corp., C.A.Ky., 262 F.2d 163, cert. den. 80 S.Ct. 61, 361 U.S. 840, 4 L.Ed.2d 78.

15. U.S.—Practical Const. Co. v. Granite City Housing Authority, C.A.Ill., 416 F.2d 540—Denny v. Barber, C.A.N.Y., 576 F.2d 465.

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17. U.S.—Henry v. Department of Housing and Urban Development (HUD), Washington, D.C., C.A. Minn., 451 F.2d 355.

20. U.S.—Gibson v. U.S., C.A.N.J., 457 F.2d 1391.

23. U.S.—Carwile v. Public Service Co. of Ind., C.A. Ind., 315 F.2d 301—Blanchard v. Terry & Wright, Inc. C.A.Ky., 331 F.2d 467, cert. den. 85 S.Ct. 62, 379 U.S. 831, 13 L.Ed.2d 40 C.A.Kan., 451 F.2d 1287.

Probable existence of jurisdiction
U.S.—Keene Lumber Co. v. Leventhal, C.A.Mass., 165 F.2d 815—Garcia v. Bernabe, C.A.Puerto Rico, 288 F.2d 60.

23.5. U.S.—Firemen's Ins. Co. of Newark, N.J. v. Robbins Coal Co., C.A.Ala., 288 F.2d 349, cert. den. 82 S.Ct. 122, 368 U.S. 875, 7 L.Ed.2d 77.

24. U.S.—Eagle Star Ins. Co. v. Maltes, C.A.Fla., 313 F.2d 778—John Birch Soc. v. National Broadcasting Co., C.A.N.Y., 377 F.2d 194.

25. U.S.—John Birch Soc. v. National Broadcasting Co., C.A.N.Y., 377 F.2d 194.

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26. U.S.—Cash v. Murphy, C.A.Tex., 339 F.2d 757—Louisiana High School Athletic Ass'n v. St. Augustine High School, C.A.La., 396 F.2d 224.

29.5. Motion denied
U.S.—Tilden v. Pate, C.A.Ill., 390 F.2d 614.

29.10. Provision of postal manual considered
U.S.—Kempinski v. Greene, C.A.Pa., 292 F.2d 820.

Evidence treated as if admitted in trial court considered
U.S.—Teti v Firestone Tire & Rubber Co., C.A.Ohio, 392 F.2d 294.

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30. U.S.—Delhomme Industries, Inc. v. Houston Beechcraft, Inc., C.A.La., 669 F.2d 1049, app. after remand 735 F.2d 177.

30.15. U.S.—Los Angeles Extension Co. v. U.S., C.A. Cal., 315 F.2d 1—Summers v. Watkins Motor Lines, C.A.S.C., 323 F.2d 120.

30.20. U.S.—Zenith Radio Corp. v. Hazeltine Research Inc., Ill., 89 S.Ct. 1562, 395 U.S. 100, 23 L.Ed.2d 129, on remand, C.A., 418 F.2d 21, revd. on oth. grds. 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, reh. den. 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552.

Charles Schmitt & Co. v. Barrett, C.A.Mo., 670 F.2d 802.

Trial de novo in First Amendment libel case
U.S.—Firestone v. Time, Inc., C.A.Fla., 460 F.2d 712, cert. den. 93 S.Ct. 120, 409 U.S. 875, 34 L.Ed.2d 127.

30.25. U.S.—Bankers Life & Cas. Co. v. Kirtley, C.A.Iowa, 307 F.2d 418.

30.30. U.S.—Phoenix Assur. Co. of New York v. Singer, C.A.Mo., 331 F.2d 10—U.S. v. Ironworkers Local 86, C.A.Wash., 443 F.2d 544, cert. den. 92 S.Ct. 447, 404 U.S. 984, 30 L.Ed.2d 367.

30.35. U.S.—Callwood v. Callwood, D.C.Virgin Islands, 127 F.Supp. 179.

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48. U.S.—Cooper v. Midwest Feed Products Co., C.A.Mo., 271 F.2d 177—Associated Press v. Taft-Ingalls Corp., C.A.Ohio, 323 F.2d 114—Bullock v. Northern Ins. Co. of New York, C.A.N.M., 331 F.2d 431—1700 Ocean Ave. Corp. v. GBR Associates, C.A.Cal., 354 F.2d 993.

49. D.C.—Berenter v. Staggers, C.A., 362 F.2d 971, 124 U.S.App.D.C. 141.

50.5. D.C.—Berenter v. Staggers, C.A., 362 F.2d 971, 124 U.S.App.D.C. 141.

52. U.S.—Udall v. Littell, C.A., 366 F.2d 668, 125 U.S.App.D.C. 89, cert. den. 87 S.Ct. 713, 385 U.S. 1007, 17 L.Ed.2d 545, reh. den. 87 S.Ct. 952, 386 U.S. 939, 17 L.Ed.2d 812.

52.5. U.S.—U.S. for Use and Benefit of Citizens Nat. Bank of Orlando v. Stringfellow, C.A.Tex., 414 F.2d 696.

D.C.—Bellevue Gardens, Inc. v. Hill, C.A., 297 F.2d 185, 111 U.S.App.D.C. 343.

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53. U.S.—O'Brien v. Metro-Goldwyn-Mayer, Inc., C.A.Cal., 319 F.2d 294.

D.C.—Powers v Metropolitan Life Ins. Co., C.A., 439 F.2d 605, 142 U.S.App.D.C. 95.

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70. U.S.—U.S. v. Preston, C.A.Cal., 352 F.2d 352.

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(15) U.S.—Gulf Oil Corp. v. Olivier, C.A.La., 412 F.2d 938—Ionian Shipping Co. v. British Law Ins. Co., C.A.N.Y., 426 F.2d 186.

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72.10. U.S.—Fitzgerald v. U.S. Lines Co., C.A.N.Y., 306 F.2d 461, revd. on oth. grds. 83 S.Ct. 1646, 374 U.S. 16, 10 L.Ed.2d 720, reh. den. 84 S.Ct. 26, 375 U.S. 870, 11 L.Ed.2d 99, motion den. 84 S.Ct. 655, 376 U.S. 901, 11 L.Ed.2d 604—Williams v. Murdoch, C.A.Pa., 350 F.2d 840—Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., C.A.Mo., 368 F.2d 679.

73. U.S.—Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, C.A.Cal., 285 F.2d 162, cert. den. 81 S.Ct. 1095, 366 U.S. 919, 6 L.Ed.2d 241.

§ 297(24). Questions of Local Law

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75.50. U.S.—Hennigan v. Chargers Football Co., C.A.Tex., 431 F.2d 308.

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75.70. U.S.—Massachusetts Bonding & Ins. Co. v. Julius Seidel Lumber Co., C.A.Mo., 279 F.2d 861—Village of Brooten v. Cudahy Packing Co., C.A. Minn., 291 F.2d 284.

75.64. U.S.—City of Aurora, Colorado v. Bechtel Corp., C.A.Colo., 599 F.2d 382—Kinney v. International Broth. of Elec. Workers, C.A.Nev., 669 F.2d 1222.

75.74. U.S.—Cox v. City of Freeman, Mo., C.A.Mo., 321 F.2d 887—State Farm Mut. Auto. Ins. Co. v. Pennington, C.A.Ark., 324 F.2d 340.

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76. U.S.—Zogg v. Penn Mut. Life Ins. Co., C.A.N.Y. 276 F.2d 861—Smith v. Humble Oil & Refining Co., C.A.Tex., 425 F.2d 1287, cert. den. 91 S.Ct 138, 400 U.S. 902, 27 L.Ed.2d 138.

D.C.—Alata v. Dulles, C.A., 221 F.2d 52, 95 U.S.App. D.C. 182—Soccodato v. Dulles, C.A., 226 F.2d 243, 96 U.S.App.D.C. 337—Gonzalez-Jasso v. Rogers, C.A., 264 F.2d 584, 105 U.S.App.D.C. 11

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84. U.S.—West v. Capitol Federal Sav. and Loan Ass'n, C.A.Kan., 558 F.2d 977.

85. U.S.—Henock v. Yeamans, C.A.Fla., 340 F.2d 503.

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86. U.S.—St. Michael's Convalescent Hospital v. State of Cal., C.A.Cal., 643 F.2d 1369.

D.C.—Early Settlers Ins. Co. v. Schweid, App., 221 A.2d 920.

90.5. U.S.—Beckman v. Local No. 46 Intern. Ass'n of Bridge, Structural and Ornamental Iron Workers, C.A.Ill., 314 F.2d 848.

§ 297(28). —— Striking Out or Dismissal; Demurrer

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91. U.S.—City of Milwaukee v. Saxbe, C.A.Wis., 546 F.2d 693.

91.5. U.S.—McClure v. First Nat. Bank of Lubbock, Texas, C.A.Tex., 497 F.2d 490, reh. den. 502 F.2d 1167, cert. den. 95 S.Ct. 1132, 420 U.S. 930, 43 L.Ed.2d 402

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91.10. U.S.—Belt v. Johnson Motor Lines, Inc., C.A. Ala., 458 F.2d 443—Hilliard v. Williams, C.A. Tenn., 465 F.2d 1212, cert. den. 93 S.Ct. 461, 409 U.S. 1029, 34 L.Ed.2d 322, app. after remand 516 F.2d 1344, cert. den. 96 S.Ct. 805, 423 U.S. 1066, 46 L.Ed.2d 656, vac. on oth. grds. 96 S.Ct. 1453, 424 U.S. 961, 47 L.Ed.2d 729, on remand, C.A., 540 F.2d 220—Davis v. Paul, C.A.Ky., 505 F.2d 1180, revd. on oth. grds. 96 S.Ct. 1155, 424 U.S. 693, 47 L.Ed.2d 405, reh. den. 96 S.Ct. 2194, 425 U.S. 985, 48 L.Ed.2d 811—Walling v. Beverly Enterprises, C.A.Cal., 476 F.2d 393—Price v. Moody, C.A.Mo., 677 F.2d 676.

D.C.—Wagner v. Wagner, C.A., 293 F.2d 533, 110 U.S.App.D.C. 345—Ammerman v. Miller, C.A., 432 F.2d 621, 139 U.S.App.D.C. 188, app. after remand 488 F.2d 1285, 159 U.S.App.D.C. 385—Lodge 1858, Am. Federation of Government Emp. v. Paine, C.A., 436 F.2d 882, 141 U.S.App.D.C. 152.

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(4) Other allegations.

U.S.—Phillips v. Nash, C.A.Ill., 311 F.2d 513, cert. den. 83 S.Ct. 1700, 374 U.S. 809, 10 L.Ed.2d 1033.

91.15. U.S.—Frissell v. Rizzo, C.A.Pa., 597 F.2d 840, cert. den. 100 S.Ct. 82, 444 U.S. 841, 62 L.Ed.2d 54.

92. U.S.—Herpich v. Wallace, C.A.La., 430 F.2d 792.

D.C.—Elmo Division of Drive-X Co. v. Dixon, C.A., 348 F.2d 342, 121 U.S.App.D.C. 113.

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92.10. D.C.—Cooper v. Isaacs, C.A., 448 F.2d 1202, 145 U.S.App.D.C. 279.

94. U.S.—Martin v. King, C.A.Colo., 417 F.2d 458—Ricci v. Chicago Mercantile Exchange, C.A.Ill., 447 F.2d 713, affd. 93 S.Ct. 573, 409 U.S. 289, 34 L.Ed.2d 525, reh. den. 93 S.Ct. 1411, 410 U.S. 960, 35 L.Ed.2d 697—Lucarell v. McNair, C.A. Ohio, 453 F.2d 836.

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(4) Other pleadings.

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95.15. U.S.—Hills v. Eisenhart, C.A.Cal., 256 F.2d 609, cert. den. 79 S.Ct. 53, 358 U.S. 832, 3 L.Ed.2d 70, reh. den. 79 S.Ct. 228, 358 U.S. 914, 3 L.Ed.2d 235.

§ 297(29). —— Amendments Regarded as Made

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98. U.S—Halprin v Babbitt, C.A.Mass., 303 F.2d 138—Pierre v. Jordan, C.A.Cal., 333 F.2d 951—City of Green Cove Springs v. Donaldson, C.A. Fla., 348 F.2d 197.

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1. U.S—Williams v. Dowling, C.A.Virgin Islands, 318 F.2d 642.

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2. U.S.—National Farmers Union Property & Cas. Co. v. Fisher, C.A.Minn., 284 F.2d 421.

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4. Federal Rule

(1) U.S.—Hopkins v. Metcalf, C.A.Okl., 435 F.2d 123—Howell v. Cataldi, C.A.Pa., 465 F.2d 272.

(3) Other matters.

U.S.—Wickahoney Sheep Co. v. Sewell, C A.Idaho, 273 F.2d 767—Purofied Down Products Corp. v. Travelers Fire Ins. Co., C.A.N.Y., 278 F.2d 439.

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5. To create claim not spelled out in pleadings

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§ 297(30). Interlocutory Matters and Provisional Remedies

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9. U.S.—Congress of Racial Equality v. Douglas, C.A. Miss., 318 F.2d 95, cert. den. 84 S.Ct. 73, 375 U.S. 829, 11 L.Ed.2d 61.

10.5. U.S.—Sewell v. Pegelow, C.A.Va., 291 F.2d 196.

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U.S.—Automatic Radio Mfg. Co. v. Ford Motor Co., C.A.Mass., 390 F.2d 113, cert. den. 88 S.Ct. 1807, 391 U.S. 914, 20 L.Ed.2d 653.

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27. U.S.—Lew Moon Cheung v. Rogers, C.A.Cal., 272 F.2d 354—Independent Nail & Packing Co. v. Mitchell, C.A.Mass., 343 F.2d 819—Wagner Tractor, Inc. v. Shields, C.A.Or., 381 F.2d 441, 24 A.L.R.3d 1423—First Nat. Bank of Decatur v. Insurance Co of North America, C.A.Ill., 424 F.2d 312, cert. den. 90 S.Ct. 1844, 398 U.S. 939, 26 L.Ed.2d 272.

29. U.S.—Wagner Tractor, Inc. v. Shields, C.A.Or., 381 F.2d 441, 24 A.L.R.3d 1423.

§ 297(34). Dismissal

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34. U.S.—Shafer v. Mountain States Tel. & Tel. Co., C.A.Ariz., 335 F.2d 932.

36.5. D.C.—Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller, C.A., 292 F.2d 775, 110 U.S.App.D.C. 282, cert. den. 82 S.Ct. 243, 368 U.S. 921, 7 L.Ed.2d 136.

§ 297(35). —— View of Evidence Taken by Reviewing Court

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39.50. U.S.—Lemelson v. Kellogg Co., C.A.N.Y., 440 F.2d 986—Rogers v. Mascari, C.A.Tenn., 455 F.2d 963—U.S. v. Hastings Motor Truck Co., C.A.Neb., 460 F.2d 1159—U.S. v. Doyle, C.A. Colo., 468 F.2d 633.

D.C.—Schuler v. U.S., 617 F.2d 605, 199 U.S.App.D.C. 23, on reh. 628 F.2d 199, 202 U.S.App.D.C. 199.

39.60. U.S.—In re Multidistrict Vehicle Air Pollution M.D.L. No. 31 C.A.Cal., 481 F.2d 122, cert. den. 94 S.Ct. 551, 414 U.S. 1045, 38 L.Ed.2d 336, on remand, D.C., 367 F.Supp. 1298, reh. den. 94 S.Ct. 905, 414 U.S. 1148, 39 L.Ed.2d 104, affd., C.A., 538 F.2d 231.

39.65. U.S.—Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., C.A.Cal., 331 F.2d 1.

39.75. Case tried by jury

U.S.—Sano v. Pennsylvania R. Co., C.A.Pa., 282 F.2d 936.

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40. U.S.—Presser Royalty Co. v. Chase Manhattan Bank, C.A.N.Y., 272 F.2d 838—Honey v. Goodman, C.A.Ky., 432 F.2d 333.

D.C.—Constructores Civiles de Centroamerica, S.A. (CONCICA) v. Hannah, C.A., 459 F.2d 1183, 148 U.S.App.D.C. 159.

41. U.S.—Johnson v. Chicago, M., St. P. & P.R. Co., C.A.Idaho, 400 F.2d 968—Jeanes v. Milner, C.A. Ark., 428 F.2d 598.

41.5. U.S.—Rivers v. Royster, C.A.Va., 360 F.2d 592—Royal Services, Inc. v. Maintenance, Inc., C.A. Fla., 361 F.2d 86—Sahm v. V-1 Oil Co., C.A. Utah, 402 F.2d 69—Tenopir v. State Farm Mut. Co., C.A.Alaska, 403 F.2d 533—U.S. v. Waterman S.S. Corp., C A.Ala., 471 F.2d 186.

41.20. U.S.—Brown v. U.S. Fidelity & Guaranty Co., C.A.N.Y., 314 F.2d 675.

§ 297(37). Taking Case from Jury; Direction of Verdict

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45. U.S.—Mahone v. Waddle, C.A.Pa., 564 F.2d 1018, cert. den. 98 S.Ct. 3122, 438 U.S. 904, 57 L.Ed.2d 1147.

47.50. U.S.—Phillips v. Chesapeake & O. Ry. Co., C.A.Va., 475 F.2d 22.

47.52. U.S.—Stevens v. Continental Can Co., C.A. Mich., 308 F.2d 100, cert. den. 83 S.Ct. 1702, 374 U.S. 810, 10 L.Ed.2d 1034—McKay v. Upson-Walton Co., C.A.Ill., 317 F.2d 826—Girardi v. Gates Rubber Co. Sales Division, Inc., C.A.Cal., 325 F.2d 196.

47.56. U.S.—State Farm Mut. Auto. Ins. Co. v. Borg, C.A.Minn., 396 F.2d 740.

47.60. U.S.—Pewatts v. J. C. Penney Co., C.A.Pa., 356 F.2d 586.

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48. U.S.—Simmons v. City Stores Co., C A.Ala., 412 F.2d 897.

49. U.S.—Clyde v. Hodge, C.A.Pa., 460 F.2d 532.

D.C.—Aylor v. Intercounty Const. Corp., C.A., 381 F.2d 930, 127 U.S.App.D.C. 151.

49.5. U.S.—Texas Continental Life Ins. Co. v. Dunne, C.A.Ky., 307 F.2d 242.

49.10. U.S.—Hartel v. Long Island R. Co., C.A.N.Y., 476 F.2d 462, cert. den. 94 S.Ct. 273, 414 U.S. 980, 38 L.Ed.2d 224.

D.C.—Seganish v. District of Columbia Safeway Stores, Inc., C.A., 406 F.2d 653, 132 U.S.App.D.C. 117—Kanelos v. Kettler, C.A., 406 F.2d 951, 132 U.S. App.D.C. 133—Canterbury v. Spence, C.A., 464 F.2d 772, 150 U.S.App.D.C. 263, cert. den. 93 S.Ct. 560, 409 U.S. 1064, 34 L.Ed.2d 518.

Similar statements

(1) D.C.—Morse v. Moretti, C.A., 403 F.2d 564, 131 U.S.App D.C. 158.

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50. U.S.—A. B. McMahan Co. v. Amphenol Corp., C.A.Minn., 443 F.2d 1072—New England Merchants Nat. Bank v. Rosenfield, C.A.Fla., 679 F.2d 467, cert. den. 103 S.Ct. 819, 459 U.S. 1173, 74 L.Ed.2d 1017.

D.C.—Seganish v. District of Columbia Safeway Stores, Inc., C.A., 406 F.2d 653, 132 U.S.App.D.C. 117.

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50.15. U.S.—Herndon v. Southern Pest Control Co., C.A.S.C., 307 F.2d 753—Mikkelson v. Young Men's Christian Ass'n of Chicago, C.A.Ill., 317 F.2d 78—Palmentere v. Campbell, C.A.Mo., 344 F.2d 234.

52. U.S.—Smith v. Allen, C.A.Va., 297 F.2d 235.

54. U.S.—Miller v. Concordia Teachers College of Seward, Neb., C.A.Neb., 296 F.2d 100.

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56. U.S.—MacDonald Engineering Co. v. Hover, C.A. Iowa, 290 F.2d 301—Figge Auto Co. v. Taylor, C.A.Iowa, 325 F.2d 899—Helene Curtis Industries, Inc. v. Pruitt, C.A.Tex., 385 F.2d 841, cert. den. 88 S.Ct. 1806, 391 U.S. 913, 20 L.Ed.2d 652. McMullin v. Palmer, D.C.Miss., 40 F.R.D. 368.

D.C.—Princemont Const. Corp. v. Smith, C.A., 433 F.2d 1217, 140 U.S.App.D.C. 111.

57. U.S.—Hardware Mut. Ins. Co. v. Lukken, C.A. Okl., 372 F.2d 8—Lentz v. Schafer, C.A.Ill., 404 F.2d 516—Fortunato v. Ford Motor Co., C.A. N.Y., 464 F.2d 962, cert. den. 93 S.Ct. 517, 409 U.S. 1038, 34 L.Ed.2d 487—Steele v. Louisville & N.R. Co., C.A.Ohio, 506 F.2d 315.

58. U.S.—Lyons v. J. C. Penney Co., C.A.Ind., 316 F.2d 753—Diapulse Corp. of America v. Birtcher Corp., C.A.N.Y., 362 F.2d 736, cert. dism. 87 S.Ct. 9, 385 U.S. 801, 17 L.Ed.2d 48—Prudential Ins. Co. of America v. Schreffler, C.A.Fla., 376 F.2d 397, cert. den. 88 S.Ct. 564, 389 U.S. 1005, 19 L.Ed.2d 601.

59. U.S.—Keaton v. Atchison, T. & S.F. Ry. Co., C.A.Ill., 321 F.2d 317.

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59.5. U.S.—Marmo v. Chicago, R.I. & P.R. Co., C.A.Ill., 350 F.2d 234, 11 A.L.R.3d 1—Weekes v. Michigan Chrome & Chemical Co., C.A.Mich., 352 F.2d 603.

60. U.S.—Equitable Life Assur. Soc. of U.S. v. Fry, C.A.Ga., 386 F.2d 239.

61. U.S.—Hannigan v. Sears, Roebuck & Co., C.A. Ill., 410 F.2d 285, cert. den. 90 S.Ct. 214, 396 U.S. 902, 24 L.Ed.2d 178.

§ 297(38). Instructions

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68. U.S.—Thomas v. S. H. Pawley Lumber Co., C.A. Ind, 303 F.2d 604—Casko v. Elgin, J. & E. Ry. Co., C.A.Ind., 361 F.2d 748—Flentie v. American Community Stores Corp., C.A.Iowa, 389 F.2d 80.

Inferences favorable to objections to charge

U.S.—Curko v. William Spencer & Son, Corp., C.A. N.Y., 294 F.2d 410.

70. U.S.—Spillers v. Tri-State Glass Lined Storage, Inc., C.A.Ind., 325 F.2d 322.

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78. U.S.—Pruett v. Marshall, C.A.Ala., 283 F.2d 436—Dunn v. St. Louis-San Francisco Ry. Co., C.A. Okl., 370 F.2d 681.

81. U.S.—Eisbach v. Jo-Carroll Elec. Co-op., Inc., C.A.Ill., 440 F.2d 1171.

84. U.S.—Revlon, Inc. v. Buchanan, C.A.Ga., 271 F.2d 795, 81 A.L.R.2d 222.

§ 297(39). Custody and Conduct of Jury

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Other matters relating to presumptions involving the custody and conduct of jury have been adjudicated.[89.10]

89.10. Consideration of all affidavits regarding misconduct

U.S.—Jayson v. U.S., C.A.Tex., 294 F.2d 808.

§ 297(40). Verdict

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89.50. U.S.—City of Richmond v. Atlantic Co., C.A. Va., 273 F.2d 902.

90. U.S.—Boehm v. Fox, C.A.Kan., 473 F.2d 445.

93. U.S.—Bill Hunter Truck Lines, Inc. v. Jernigan, C.A.Miss., 384 F.2d 361.

94. U.S.—Barnes v Omark, Industries, Inc., C.A.Mo., 369 F.2d 4—Weber v. Continental Cas. Co., C.A. Okl., 379 F.2d 729—Mays v. Dealers Transit, Inc., C.A.Ind., 441 F.2d 1344.

95. U.S.—Gray v. Shell Oil Co., C.A.Cal., 469 F.2d 742, cert. den. 93 S.Ct. 2773, 412 U.S. 943, 37 L.Ed.2d 403.

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95.5. U.S.—Yeargain v. National Dairy Products Corp., C.A.Mo., 317 F.2d 779.

96. U.S.—Republic Gear Co. v. Borg-Warner Corp., C.A.Ill., 406 F.2d 57, cert. den. 89 S.Ct. 1596, 394 U.S. 1000, 22 L.Ed.2d 777.

96.10. U.S.—W. H. Elliott & Sons Co. v. E. & F. King & Co., C.A.N.H., 291 F.2d 79.

§ 297(41). —— Sufficiency of Evidence to Support

Library References

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97. U.S.—Ross v. Newsome, C.A.Ga., 289 F.2d 209—Solomon Dehydrating Co. v. Guyton, C.A.Neb., 294 F.2d 439, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192—O'Brien v. Stover, C.A.Iowa, 443 F.2d 1013.

Synopsis of evidence stated most favorably to verdict

U.S.—Nesmith v. Alford, C.A.Ala., 318 F.2d 110, reh. den. 319 F.2d 859, cert. den. 84 S.Ct. 489, 375 U.S. 975, 11 L.Ed.2d 420.

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1. U.S.—Eldred v. Town of Barton, N.Y., 505 F.2d 186—Wheatley v. Ford, C.A.N.Y., 679 F.2d 1037.

D.C.—Price v. Neyland, C.A., 320 F.2d 674, 115 U.S. App.D.C. 355, 99 A.L.R.2d 1391—Engle v. Stull, C.A., 377 F.2d 930, 126 U.S.App.D.C. 291.

Particular evidence considered favorably to plaintiff

(1) U.S.—Trent v. Atlantic City Elec. Co., C.A.N.J., 334 F.2d 847.

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2. U.S.—Bryne v. Shell Oil Co., C.A.Ill., 295 F.2d 797—Cordle v. Allied Chemical Corp., C.A.Ky., 309 F.2d 821—Peterson v. Mountain States Tel. & Tel. Co., C.A.Ariz., 349 F.2d 934—Lyle v. Bentley, C.A.Tex., 406 F.2d 325.

Facts assumed to have been established

(1) U.S.—Wray M. Scott Co. v. Daigle, C.A.Neb., 309 F.2d 105.

2.15. U.S.—Ragnar Benson, Inc. v. Kassab, C.A.Pa., 325 F.2d 591.

3. U.S.—Little v. Green, C.A.Fla., 428 F.2d 1061, cert. den. 91 S.Ct. 366, 400 U.S. 964, 27 L.Ed.2d 384—Rivers v. Angf. A/B Tirfing, C.A.Fla., 450 F.2d 12—Nuclear Corp. of America v. Lang, C.A. Neb., 480 F.2d 990.

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4. U.S.—Orta v. Schafer, C.A.N.C., 284 F.2d 114—Associated Engineers, Inc. v. Job, D.C.S.D., 370 F.2d 633, cert. den. 88 S.Ct. 59, 389 U.S. 823, 19 L.Ed.2d 77—Prudential Ins. Co. of America v. Schreffler, C.A.Fla., 376 F.2d 397, cert. den. 88 S.Ct. 564, 389 U.S. 1005, 19 L.Ed.2d 601—Meeks v. State Farm Mut. Auto. Ins. Co., C.A.Fla., 460 F.2d 776.

5. U.S.—Byrne v. Shell Oil Co., C.A.Ill., 295 F.2d 797.

5.5. U.S.—Knapp v. Styer, C.A.S.D., 280 F.2d 384—New Hampshire Fire Ins. Co. v. Virgil & Frank's Locker Service, Inc., C.A.Mo., 302 F.2d 780.

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5.15. U.S.—Knapp v. Styer, D.C.S.D., 280 F.2d 384.

5.20. U.S.—New York Cent. R. Co. v. Chernew, C.A.Mo., 285 F.2d 189.

5.25. U.S.—Sowizral v. Hughes, C.A.Pa., 333 F.2d 829.

§ 297(43). Findings of Fact and Conclusions of Law

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10. U.S.—Smith v. James Irvine Foundation, C.A. Cal., 402 F.2d 772, cert. den. 89 S.Ct. 1595, 394 U.S. 1000, 22 L.Ed.2d 777—Purer & Co. v. Aktiebolaget Addo, C.A.Cal., 410 F.2d 871, cert. den. 90 S.Ct. 90, 396 U.S. 834, 24 L.Ed.2d 84—Cherokee Nation v. State of Okl., C.A.Okl., 461 F.2d 674, cert. den. 93 S.Ct. 521, 409 U.S. 1039, 34 L.Ed.2d 489, app. after remand, 490 F.2d 521, cert. den. 94 S.Ct. 3070, 417 U.S. 946, 41 L.Ed.2d 666—Quarles v. Fuqua Industries, Inc., C.A.Kan., 504 F.2d 1358.

D.C.—Gould v. DeBeve, C.A., 330 F.2d 826, 117 U.S. App.D.C. 360.

Finding embodied in conclusion of law

U.S.—Barryhill v. U.S., C.A.Iowa, 300 F.2d 690.

Presumed to reflect thinking of judge signing

U.S.—Continental Connector Corp. v. Houston Fearless Corp., C.A.Cal., 350 F.2d 183.

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12. U.S.—St. Louis Typographical Union No. 8, AFL–CIO v. Herald Co., C.A.Mo., 402 F.2d 553.

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13.5. U.S.—Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co., C.A.N.Y., 505 F.2d 989.

D.C.—Case v. Morrisette, C.A., 475 F.2d 1300, 155 U.S.App.D.C. 31.

Interpretation of contract

(2) Other contracts.

U.S.—Northern Natural Gas Co. v. Roth Packing Co., C.A.Neb., 323 F.2d 922—Chicago, M., St. P. & P.R. Co. v. Famous Brands, Inc., C.A.Minn., 324 F.2d 137.

13.10. U.S.—Lawlor v. National Screen Service Corp., C.A.Pa., 270 F.2d 146, cert. den. 80 S.Ct. 676, 362 U.S. 922, 4 L.Ed.2d 742.

16. U.S.—Byer v. International Paper Co., C.A.Okl., 314 F.2d 831.

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16.5. **Adoption of proposed findings submitted by counsel held suspect**

U.S.—In re Las Colinas, Inc., C.A.Puerto Rico, 426 F.2d 1005, app. after remand 453 F.2d 911, cert. den. 92 S.Ct. 1502, 405 U.S. 1067, 31 L.Ed.2d 797.

18.5. Scotco, Inc. v. Dormeyer Industries, C.A.Ind., 402 F.2d 336.

19.5. U.S.—Illinois Cent. R. Co. v. Gulf, M. & O.R. Co, C.A.La., 308 F.2d 374—Gulf, C. & S.F. Ry. Co v. Coca-Cola Bottling Co. of Cleburne, C.A. Tex., 363 F.2d 465—Hohenstein v. S.M.H. Trading Corp., C.A.Ga., 382 F.2d 530.

§ 297(44). —— Evidence Considered by Trial Court

Library References

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20. U.S.—U.S. v. 1,078.27 Acres of Land, More or Less, Situated in Galveston County, Tex., C.A. Tex., 446 F.2d 1030, cert. den. 92 S.Ct. 945, 405 U.S. 936, 30 L.Ed.2d 811.

21. U.S.—U.S. v. 396 Corp., C.A.N.Y., 264 F.2d 704, cert. den. 80 S.Ct. 60, 361 U.S. 817, 4 L.Ed.2d 64—Harris v. Chas. Pfizer & Co., C.A.Mo., 385 F.2d 766.

22. U.S.—Community Action Group v. City of Columbus, C.A.Ga., 473 F.2d 966, reh. den. 475 F.2d 1404.

Advisory jury

Where trial judge entered judgment pursuant to verdict of advisory jury without making any clarifying statements, there was no presumption that judge had not relied on testimony improperly admitted.

U.S.—Mallory v. Citizens Utilities Co., C.A.Vt., 342 F.2d 796.

§ 297(45). —— Sufficiency of Evidence to Support Findings

Library References

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26. U.S.—Rovegno v. Geppert Bros., Inc., C.A.Pa., 677 F.2d 327.

26.5. **Facts favorable to appellant accepted**

(2) Other matters.

U.S.—Rodriguez v. Secretary of Treasury of Puerto Rico, C.A.Puerto Rico, 276 F.2d 344.

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29.10. U.S.—Summers v. Watkins Motor Lines, C.A. S.C., 323 F.2d 120—American Football League v. National Football League, C.A.Md., 323 F.2d 124.

29.15. **Applicable in civil and criminal cases**

D.C.—U.S. v. Reid, C.A., 533 F.2d 1255, 175 U.S.App. D.C. 120.

29.20. U.S.—Sypherd v. Haeckl's Exp., Inc., C.A. Ohio, 341 F.2d 65—A.L.B. Theatre Corp. v. Loew's Inc., C.A.Ill., 355 F.2d 495—Southern Arizona York Refrigeration Co v Bush Mfg. Co., C.A.Cal., 361 F.2d 336—Ventura County v. Blackburn, C.A.Cal., 362 F.2d 515—W. S. Shamban & Co. v. Commerce & Industry Ins. Co., C.A.Cal., 475 F.2d 34.

29.25. U.S.—Tenore v. American & Foreign Ins. Co. of N.Y., C.A.Ill., 256 F.2d 791, 79 S.Ct. 119, 358 U.S. 880, 3 L.Ed.2d 110.

30. U.S.—KLPR TV, Inc. v. Visual Electronics Corp. C.A.Ark., 465 F.2d 1382.

All conflicts in evidence, etc.

U.S.—City of West Plains, Mo. v Loomis, C.A.Mo., 279 F.2d 564, 92 A.L.R.2d 459.

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30.5. U.S.—Komie v. Boehler Corp., C.A.Ariz., 449 F.2d 644.

31. U.S.—Baker v. U.S., C.A.Iowa, 343 F.2d 222—Manning v. Jones, C.A.Mo., 349 F.2d 992—Nelson v. Keefer, C.A.Pa., 451 F.2d 289.

31.10. U.S.—U.S. v. Skolness, C.A.Minn., 279 F.2d 350.

§ 297(46). —— Findings Implied and Interpreted; Conclusions of Law

Library References

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34. U.S.—Boyles Galvanizing & Plating Co. v. Hartford Acc. & Indem. Co., C.A.Okl., 372 F.2d 310.

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36.10. U.S.—Bradick v. Israel, C.A.N.Y., 377 F.2d 262, cert. den. 88 S.Ct. 101, 389 U.S. 858, 19 L.Ed.2d 124.

§ 297(47). —— By Master

Library References

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40. U.S.—C. H. Codding & Sons v. Armour & Co., C.A.Okl., 404 F.2d 1.

§ 297(48). Amount of Recovery

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51.50. U.S.—Jaeco Pump Co. v. Inject-O-Meter Mfg. Co., C.A.N.M., 467 F.2d 317.

52. U.S.—Rivera v. Rederi A/B Nordstjernan, C.A. Puerto Rico, 456 F.2d 970, cert. den. 93 S.Ct. 124, 409 U.S. 876, 34 L.Ed.2d 128.

53. U.S.—Rivera v. Rederi A/B Nordstjernan, C.A. Puerto Rico, 456 F.2d 970, cert. den. 93 S.Ct. 124, 409 U.S. 876, 34 L.Ed.2d 128.

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56.5. U.S.—Manning v. Jones, C.A.Mo., 349 F.2d 992—Manning v. Jones, C.A.Mo., 349 F.2d 992.

§ 297(49). Order as to New Trial of Setting Aside of Verdict

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58.50. D.C.—Ryen v. Owens, C.A., 446 F.2d 1333, 144 U.S.App.D.C. 332.

58.60. U.S.—Lebrecht v. Bethlehem Steel Corp., C.A. N.Y., 402 F.2d 585, 37 A.L.R.3d 1072—Gulf Ins. Co. v. Kolob Corp., C.A.Utah, 404 F.2d 115, 35 A.L.R.3d 784.

§ 297(50). Judgment or Decree

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58.90. U.S.—George v. American Airlines, Inc., C.A. Ill., 295 F.2d 311.

59. **Oral pronouncement not judgment**

U.S.—Burke v. C. I. R., C.A.Mass., 301 F.2d 903.

65. U.S.—Richfield Oil Corp. v. Karseal Corp., C.A. Cal., 271 F.2d 709, cert. den. 80 S.Ct. 590, 361 U.S. 961, 4 L.Ed.2d 543—Johnson v. Hill, C.A. N.D., 274 F.2d 110—Cleary v. Indiana Beach, Inc., C.A.Ind., 275 F.2d 543, cert. den. 81 S.Ct. 62, 364 U.S. 825, 5 L.Ed.2d 53—Wineberg v. Park, C.A.Or., 321 F.2d 214.

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66. U.S.—Ford Motor Co. v. Mondragon, C.A.Iowa, 271 F.2d 342—Hartford Acc. & Indem. Co. v. Shaw, C.A.Mo., 273 F.2d 133—Weiby v. Farmers Mut. Auto. Ins. Co., C.A.Minn., 273 F.2d 327—Dunlop Tire & Rubber Corp. v. Thompson, C.A. Ark., 273 F.2d 396—Wineberg v. Park, C.A.Or., 321 F.2d 214.

§ 297(51). —— Judgment Notwithstanding Verdict

Library References

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68.50. U.S.—Hampton v. Magnolia Towing Co., C.A. Miss., 338 F.2d 303—Helene Curtis Industries, Inc. v. Pruitt, C.A.Tex., 385 F.2d 841, cert. den. 88 S.Ct. 1806, 397 U.S. 913, 20 L.Ed.2d 652.

68.55. U.S.—Sparrow v. Yellow Cab Co., C.A.Ill., 273 F.2d 1—Craig Funeral Home, Inc. v. State Farm Mut. Auto. Ins. Co., C.A.Fla., 280 F.2d 337—Hampton v. Magnolia Towing Co., C.A. Miss., 338 F.2d 303—Hardware Mut. Ins. Co., v. Lukken, C.A.Okl., 372 F.2d 8.

69. U.S.—Gillham v. Admiral Corp., C.A.Ohio, 523 F.2d 102, cert. den. 96 S.Ct. 1113, 424 U.S. 913, 47 L.Ed.2d 318—Harris v. Pirch, C.A.Mo., 677 F.2d 681.

70. U.S.—Cockrum v. Whitney, C.A.Mont., 479 F.2d 84—Sterling v. Commercial Union Ins. Co., C.A. Ark., 674 F.2d 697.

70.5. U.S.—Collins v. Risner, C.A.S.C., 269 F.2d 654, cert. den. 80 S.Ct. 293, 361 U.S. 924, 4 L.Ed.2d 240—Jines v. General Elec. Co., C.A.Wash., 303 F.2d 76—Hunt v. Rhodes, C.A.Mass., 369 F.2d 623—Schneider v. Chrysler Motors Corp., C.A. Neb., 401 F.2d 549.

70.10. U.S.—Equitable Life Assur. Soc. of U.S. v. Fry, C.A.Ga., 386 F.2d 239.

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70.15. U.S.—Hansen v. Firestone Tire & Rubber Co., C.A.Mich., 276 F.2d 254.

70.20. U.S.—Craig Funeral Home, Inc. v. State Farm Mut. Auto. Ins. Co., C.A.Fla., 280 F.2d 337.

71. U.S.—Hanson v. Ford Motor Co., C.A.Minn., 278 F.2d 586—Silverii v. Kramer, C.A.Pa., 314 F.2d 407.

72.10. U.S.—Hanson v. Ford Motor Co., C.A.Minn., 278 F.2d 586.

72.15. U.S.—Collins v. Risner, C.A.S.C., 269 F.2d 654, cert. den. 80 S.Ct. 293, 361 U.S. 924, 4 L.Ed.2d 240—Daniel v. Pittsburgh & L.E.R. Co., C.A.Pa., 389 F.2d 922.

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On appeal from a judgment rendered against plaintiff at the close of his case, the court of appeals will take the facts, and the inferences to be drawn

therefrom, in the light most favorable to plaintiff.[73.11]

73.11. U.S.—Abernethy v. Utica Mut. Ins. Co., C.A. N.C., 373 F.2d 565.

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73.25. U.S.—Shawver & Son, Inc. v. Oklahoma Gas & Elec. Co., C.A.Okl., 463 F.2d 204—Daly v. Sprague, C.A.Tex., 675 F.2d 716, cert. den. 103 S.Ct. 1448, 460 U.S. 1047, 75 L.Ed.2d 802, app. after remand C.A., 742 F.2d 896, reh. den. 747 F.2d 1465.

73.30. U.S.—Steed v. Central of Georgia Ry. Co., C.A.Ala., 477 F.2d 1303, app. after remand 529 F.2d 833, reh. den. 535 F.2d 659, 660, cert. den. 97 S.Ct. 396, 429 U.S. 966, 50 L.Ed.2d 334.

73.35. U.S.—Doff v. Brunswick Corp., C.A.Cal., 372 F.2d 801, cert. den. 88 S.Ct. 39, 389 U.S. 820, 19 L.Ed.2d 71.

73.40. U.S.—Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., C.A. Utah, 303 F.2d 527—Mahler v. U.S., C.A.Pa., 306 F.2d 713, cert. den. 83 S.Ct. 290, 371 U.S. 923, 9 L.Ed.2d 231—Massengale v. Transitron Electronic Corp., C.A.Mass., 385 F.2d 83.

73.45. U.S.—Manganaro v. Delaval Separator Co., C.A.Me., 309 F.2d 389—Tracerlab, Inc. v. Industrial Nucleonics Corp., C.A.Mass., 313 F.2d 97—U.S. v. Bob Chrislaw, Inc., C.A.Wis., 341 F.2d 887—Wilson v. Taylor, C.A.Fla., 658 F.2d 1021, app. after remand 733 F.2d 1539.

73.50. U.S.—Scott v. Stocker, C.A.Okl., 380 F.2d 123.

D.C.—Davis v. Brucker, C.A., 275 F.2d 181, 107 U.S. App.D.C. 152.

74. U.S.—Bryan v. Aetna Cas. & Sur. Co., C.A.Ark., 381 F.2d 872—Goodis v. United Artists Television, Inc., C.A.N.Y., 425 F.2d 397—James v. Atchison, T. & S.F. Ry. Co., C.A.N.M., 464 F.2d 173.

74.5. U.S.—Proctor v. Sagamore Big Game Club, C.A.Pa., 265 F.2d 196, cert. den. 80 S.Ct. 81, 361 U.S. 831, 4 L.Ed.2d 73.

74.10. U.S.—Proctor v. Sagamore Big Game Club, 265 F.2d 196, cert. den. 80 S.Ct. 81, 361 U.S. 831, 4 L.Ed.2d 73—Entin v. City of Bristol, C.A.Conn., 368 F.2d 695—F. S. Smithers & Co., Inc. v. Federal Ins. Co., C.A.Cal., 631 F.2d 1364.

D.C.—Murray v. Lichtman, C.A., 339 F.2d 749, 119 U.S.App.D.C. 250.

74.15. U.S.—Proctor v. Sagamore Big Game Club, C.A.Pa., 265 F.2d 196, cert. den. 80 S.Ct. 81, 361 U.S. 831, 4 L.Ed.2d 73.

74.20. U.S.—Broniman v. Great Atlantic & Pac. Tea Co., C.A.Mich., 353 F.2d 559, cert. den. 86 S.Ct. 1343, 394 U.S. 907, 16 L.Ed.2d 360—Van Horn v. Gulf Atlantic Towing Corp., C.A.Va., 388 F.2d 636—Coastwide Packet Co. v. U.S., C.A.Mass., 398 F.2d 77, cert. den. 89 S.Ct. 300, 393 U.S. 937, 21 L.Ed.2d 274—Potrero Hill Community Action Committee v. Housing Authority of City and County of San Francisco, C.A.Cal., 410 F.2d 974—Kletschka v. Driver, C.A.N.Y., 411 F.2d 436.

D.C.—Overseas Media Corp. v. McNamara, C.A., 385 F.2d 308, 128 U.S.App.D.C. 48.

Facts alleged in complaint and stipulated by parties

U.S.—Wolverine Ins. Co. v. Tower Iron Works, Inc., C.A.Mass., 370 F.2d 700.

74.30. U.S.—Shinabarger v. United Aircraft Corp., C.A.Conn., 381 F.2d 808—Larsen v. General Motors Corp., C.A.Minn., 391 F.2d 495.

74.40. U.S.—Aetna Ins. Co. v. Loveland Gas & Elec. Co., C.A.Ohio, 369 F.2d 648.

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80. Burden of proof

U.S.—Resnik v. La Paz Guest Ranch, C.A.Cal., 289 F.2d 814.

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87. U.S.—Jayson v. U.S., C.A.Tex., 294 F.2d 808.

Arroyo v. Chardon, D.C.Puerto Rico, 90 F.R.D. 603

Appellate interference kept to minimum

U.S.—Syracuse Broadcasting Corp. v. Newhouse, C.A. N.Y., 295 F.2d 269.

88. U.S.—Sampson v. Radio Corp. of America, C.A. N.Y., 434 F.2d 315—Ace Heating & Plumbing Co. v. Crane Co., C.A.Pa., 453 F.2d 30—Beefy King Intern., Inc. v. Veigle, C.A.Fla., 464 F.2d 1102—Schaeffer v. First Nat. Bank of Lincolnwood, C.A.Ill., 465 F.2d 234—Taylor v. Safeway Stores, Inc., 524 F.2d 263—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526—Weingart v. Allen & O'Hara, Inc., C.A. Fla., 654 F.2d 1096—Matter of Chicago, M., St. P. and Pac. R. Co., C.A.Ill., 654 F.2d 1218—Alber v. Norfolk & W. Ry. Co., C.A.Mo., 654 F.2d 1271.

Seven-Up Co. v. O-So Grape Co., D.C.Ill., 179 F.Supp. 167.

D.C.—Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller, C.A., 292 F.2d 775, 110 U.S.App.D.C. 282, cert. den. 82 S.Ct. 243, 368 U.S. 921, 7 L.Ed.2d 136.

Construction of rule or decree

(3) Entitled to considerable weight.

U.S.—McFarland v. Gregory, C.A.N.Y., 376 F.2d 12.

Rulings as to particular matters, etc.

(1) U.S.—In re United Corp., C.A.Del., 283 F.2d 593.

(2) U.S.—Cox v. General Elec. Co., C.A.Mich., 302 F.2d 389—Louisville & N.R. Co. v. Williams, C.A.Ala., 370 F.2d 839—Metropolitan Paving Co. v. International Union of Operating Engineers, C.A.Okl., 439 F.2d 300, cert. den. 92 S.Ct. 68, 404 U.S. 829, 30 L.Ed.2d 58.

(4) U.S.—Tomlin v. Pope & Talbot, Inc., C.A.Or., 282 F.2d 447.

(7) U.S.—Greyhound Lines, Inc. v. Miller, C.A.Mo., 402 F.2d 134.

(15) U.S.—Kinnear-Weed Corp. v. Humble Oil & Refining Co., D.C.Tex., 324 F.Supp. 1371, affd., 441 F.2d 631, cert. den. 92 S.Ct. 285, 404 U.S. 941, 30 L.Ed.2d 255, reh. den. 92 S.Ct. 532, 404 U.S. 996, 30 L.Ed.2d 549.

(16) U.S.—Cypress v. Newport News General and Nonsectarian Hospital Ass'n, C.A.Va., 375 F.2d 648.

(21) Other matters.

U.S.—City of New York v. International Pipe & Ceramics Corp., C.A.N.Y., 410 F.2d 295—Waters v. Western Co. of North America, C.A.N.M., 430 F.2d 1072—State of W. Va., v. Chas. Pfizer & Co., C.A.N.Y., 440 F.2d 1079, cert. den. 92 S.Ct. 81, 404 U.S. 871, 30 L.Ed.2d 115—Turf Paradise, Inc. v. Arizona Downs, C.A.Ariz., 670 F.2d 813, cert. den. 102 S.Ct. 2308, 456 U.S. 1011, 73 L.Ed.2d 1308.

In re Casco Bay Lines, Inc., Bkrtcy.App., 17 B.R. 946.

D.C.—Zangardi v. Tobriner, C.A., 330 F.2d 224, 117 U.S.App.D.C. 350—Sheaffer v. Warehouse Emp. Union, Local No. 730, C.A., 408 F.2d 204, 132 U.S.App.D.C. 401, cert. den. 89 S.Ct. 1996, 395 U.S. 934, 23 L.Ed.2d 449.

La.—Goudeau v. Texas Gas Transmission Corp., App., 225 So.2d 679.

Ill-advised reason disregarded as surplusage

U.S.—Santos v. Immigration and Naturalization Service, C.A.Cal., 375 F.2d 262.

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90. U.S.—N.L.R.B. v. Guernsey-Muskingum Elec. Co-op., Inc., C.A., 285 F.2d 8.

91. Clear error of judgment

U.S.—McBee v. Bomar, C.A.Tenn., 296 F.2d 235.

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94. U.S.—N.L.R.B. v. Guernsey-Muskingum Elec. Co-op., Inc, C.A., 285 F.2d 8.

95. Appellate court will not substitute its own judgment, etc.

U.S.—Skogen v. Dow Chemical Co., C.A.Minn., 375 F.2d 692.

95.5. U.S.—Lind v. Schenley Industries, Inc., C.A. N.J., 278 F.2d 79, cert. den. 81 S.Ct. 58, 364 U.S. 835, 5 L.Ed.2d 60.

Discretion deriving from statutory source

D.C.—Gage v. Riggs Nat. Bank of Washington, D.C., C.A., 320 F.2d 715, 115 U.S.App.D.C. 396.

97.5. U.S.—Ward v. Buehler, C.A.Fla., 472 F.2d 1170.

97.10. U.S.—Lykes Bros. S.S. Co. v. Sugarman, C.A. N.Y., 272 F.2d 679—Texas Gulf Sulphur Co. v. Ritter, C.A.Utah, 371 F.2d 145—William A. Smith Contracting Co., Inc. v. Travelers Indem. Co., C.A.Kan., 467 F.2d 662—U.S. v. Ponder, C.A.La., 475 F.2d 37.

Watson, Inc. v. Henry Valve Co., D.C.N.Y., 232 F.Supp. 38—Thomas v. Silver Creek Coal Co., D.C.Pa., 264 F.Supp. 833.

§ 297(56). Parties, Process, and Pleadings

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98. U.S.—McDonald v. E. J. Lavino Co., C.A.Ala., 430 F.2d 1065—Gabriel v. Standard Fruit & S.S. Co., C.A.La., 448 F.2d 724—Korioth v. Brisco, 523 F.2d 1271.

D.C.—Nuesse v. Camp, C.A., 385 F.2d 694, 128 U.S. App.D.C. 172.

Timeliness

U.S.—U.S. v. U.S. Steel Corp., C.A.Ala., 548 F.2d 1232—Equal Employment Opportunity Commission v. Westinghouse Elec. Corp., C.A.Mo., 675 F.2d 164.

Intervention

U.S.—Stallworth v. Monsanto Co., C.A.Fla., 558 F.2d 257.

98.5. U.S.—General Elec. Co. v. Irvin, C.A.Tenn., 274 F.2d 175.

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98.10. U.S.—Matter of Covington Grain Co., Inc., C.A.Ala., 638 F.2d 1357.

Refusal to drop party based on misconception of law will be reversed

U.S.—Anderson v. Moorer, C.A.Ala., 372 F.2d 747.

99.5. Subpoena duces tecum

U.S.—Shotkin v. Nelson, C.C.A.Colo., 146 F.2d 402—Sue v. Chicago Transit Authority, C.A.Ill., 279 F.2d 416—In re Surety Ass'n of America, C.A. N.Y., 388 F.2d 412.

Other matters relating to the review of discretionary rulings with respect to parties have been considered by the courts.[99.10]

99.10. U.S.—R. J. Enstrom Corp. v. Interceptor Corp., C.A.Okl., 555 F.2d 277.

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Class action

U.S.—Johnson v Georgia Highway Exp., Inc., C.A.Ga., 417 F.2d 1122, app. after remand 488 F.2d 714—Girsh v. Jepson, C.A.Pa., 521 F.2d 153—Tidwell v. Schweiker, C.A.Ill., 677 F.2d 560, cert. den. 103 S.Ct. 1874, 461 U.S. 905, 76 L.Ed.2d 806.

Brown v. Cameron-Brown Co., D.C.Va., 92 F.R.D. 32.

1.5. U.S.—Prestole Corp. v. Tinnerman Products, Inc., C.A.Ohio, 271 F.2d 146, cert. den. 80 S.Ct. 593, 361 U.S. 964, 4 L.Ed.2d 545—Carrigan v. California State Legislature, C.A.Cal., 263 F.2d 560, cert. den. 79 S.Ct. 901, 359 U S 980, 3 L.Ed.2d 929.

Counterclaim

(2) Other matters.

U.S.—Stewart-Warner Corp. v. Westinghouse Elec. Corp., C.A.N.Y., 325 F.2d 822, cert. den. 84 S.Ct. 800, 376 U.S. 944, 11 L.Ed.2d 767—Rohner, Gehrig & Co. v. Capital City Bank, C.A.Ga., 655 F.2d 571.

Reluctant to uphold dismissal for failure to state claim

U.S.—Goff v. Jones, C.A.Tex., 500 F.2d 395.

2. U.S.—Lyons v. Board of Ed. of Charleston Reorganized School Dist. No. 1 of Mississippi County, Missouri, C.A.Mo., 523 F.2d 340.

D.C.—Saddler v. Safeway Stores, Inc., App., 227 A.2d 394.

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4. Heavy burden

U.S.—Minnesota Min. & Mfg. Co. v. Superior Insulating Tape Co., C.A.Mo., 284 F.2d 478.

5. U.S.—In re Beef Industry Antitrust Litigation, MDL Docket No. 248, C.A.Tex., 600 F.2d 1148, reh. den. 616 F.2d 569, eleven cases, cert. den. 101 S.Ct. 280, four cases, 281, 449 U.S. 905, 66 L.Ed.2d 137, on remand D.C., 542 F.Supp. 1122, affd. C.A., 710 F.2d 216, reh. den. 716 F.2d 901, three cases, cert. den. 104 S.Ct. 1326, 465 U.S. 1052, 79 L.Ed.2d 721.

§ 297(57). Provisional Remedies; Proceedings before Trial

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6. U.S.—Altman v. Connally, C.A.N.Y., 456 F.2d 1114—Jensen v. Dole, C.A.N.D., 677 F.2d 678.

7. U.S.—Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), Dist.Col., 93 S.Ct. 1, 409 U.S. 1207, 34 L.Ed.2d 21.

D.C.—Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, C.A., 429 F.2d 206, 139 U.S.App. D.C. 22.

Question for review; test

(1) U.S.—Washington Capitols Basketball Club, Inc. v. Barry, C.A.Cal., 419 F.2d 472—Atomic Oil Co. of Okl. v. Bardahl Oil Co., C.A.Okl., 419 F.2d 1097, cert. den. 90 S.Ct. 1500, 397 U.S. 1063, 25 L.Ed.2d 685.

(7) Other statements.

U.S.—Graham v. Triangle Publications, Inc., C.A.Pa., 344 F.2d 775—W. E. Bassett Co. v. Revlon, Inc., C.A.N.Y., 354 F.2d 868.

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8. U.S.—International Union of Elec., Radio and Mach. Workers (AFL-CIO) v. General Elec. Co., C.A.N.Y., 341 F.2d 571.

8.5. U.S.—Helene Curtis Industries, Inc. v. Church & Dwight Co., Inc., C.A.Ill., 560 F.2d 1325, cert. den. 98 S.Ct. 1252, 434 U.S. 1070, 55 L.Ed.2d 772.

8.10. U.S.—Slater v. Stoffel, C.A.Ind. 411 F.2d 653—Allied Theatre Owners of Indiana, Inc. v. Volpe, C.A.Ind., 426 F.2d 1002, cert. den. 91 S.Ct. 238, 400 U.S. 941, 27 L.Ed.2d 245—U.S. by Clark v. Dillion Supply Co., C.A.N.C., 429 F.2d 800—Kolz v. Board of Ed. of City of Chicago, C.A.Ill., 576 F.2d 747.

D.C.—Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, C.A., 429 F.2d 206, 139 U.S.App. D.C. 22

9. U.S.—Scherr v. Volpe, C.A.Wis., 466 F.2d 1027.

D.C.—Maas v. U.S., C.A., 371 F.2d 348, 125 U.S.App. D.C 251—District 50, United Mine Workers of America v. International Union, United Mine Workers of America, C.A., 412 F.2d 165, 134 U.S.App.D.C. 34.

10. U.S.—Barton v. Eichelberger, C.A.Pa., 451 F.2d 263—Milsen Co. v. Southland Corp., C.A.Ill., 454 F.2d 363—Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC v. Com. of Mass., C.A.Mass., 666 F.2d 618, cert. den. 102 S.Ct. 2928, 457 U.S. 1117, 73 L.Ed.2d 1329.

D.C.—Maas v. U.S., C.A., 371 F.2d 348, 125 U.S.App. D.C. 251.

11. U.S.—Capital City Gas Co. v. Phillips Petroleum Co., C.A.Vt., 373 F.2d 128.

12. U.S.—Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac v. Alexander's Dept. Stores, Inc., C.A.N.Y., 299 F.2d 33, 1 A.L.R.2d 752—Atomic Oil Co. of Okl. v. Bardahl Oil Co., C.A.Okl., 419 F.2d 1097, cert. den. 90 S.Ct. 1500, 397 U.S. 1063, 25 L.Ed.2d 685.

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14. U.S.—Jones v. Village of Proctorville, Ohio, C.A. Ohio, 290 F.2d 49.

20. U.S.—Beshear v. Weinzapfel, C.A.Ind., 47 F.2d 127—Kotzen v. Levine, C.A.Fla., 678 F.2d 140.

Burgess v. Atlantic Coast Line R. Co., D.C.S.C., 39 F.R.D. 588.

Dismissal with prejudice

U.S.—Davis v. Operation Amigo, Inc., C.A.Wyo., 378 F.2d 101.

In re Santa Barbara Like It Is Today Copyright Infringement Litigation, D.C.Nev., 94 F.R.D. 105.

Dismissal for lack of prosecution

U.S.—Peterson v. Term Taxi Inc., C.A.N.Y., 429 F.2d 888—Petnel v. American Tel. & Tel. Co., C.A. N.Y., 434 F.2d 645—Spering v. Texas Butadiene & Chemical Corp., C.A.Del., 434 F.2d 677, cert. den. 92 S.Ct. 97, 404 U.S. 854, 30 L.Ed.2d 95.

(2) Other statements.

U.S.—Navarro v. Chief of Police, Des Moines, Iowa, C.A.Iowa, 523 F.2d 214.

22.5. U.S.—Wilver v. Fisher, C.A.Okl., 387 F.2d 66.

Where the question on a motion for dismissal is susceptible of an answer applicable to all cases, the appellate court may substitute its judgment in order to achieve consistency among the district judges in the same circuit.[22.10]

22.10. U.S.—Noonan v. Cunard S.S. Co., C.A.N.Y., 375 F.2d 69.

25. U.S.—Rossano v. Blue Plate Foods, Inc., C.A.Ga., 314 F.2d 174, cert. den. 84 S.Ct. 139, 375 U.S. 866, 11 L.Ed.2d 93—Mosley v. General Motors Corp., C.A.Mo., 497 F.2d 1330.

26. U.S.—Dupont v. Southern Pac. Co., C.A.La., 366 F.2d 193, cert. den. 87 S.Ct. 1027, 386 U.S. 958, 18 L.Ed.2d 106.

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27. U.S.—Fairway Center Corp. v. U.I.P. Corp., C.A. Iowa, 502 F.2d 1135.

Discretion held not abused

D.C.—Bressler v. Bressler, C.A., 274 F.2d 91, 107 U.S.App.D.C. 29.

Other matters relating to the review of discretionary rulings in proceedings before trial have been considered by the courts.[27.5]

27.5. U.S.—Davis v. United Fruit Co., C.A.N.Y., 402 F.2d 328, cert. den. 89 S.Ct. 869, 393 U.S. 1085, 21 L.Ed.2d 777—McKnight v. Blanchard, C.A. Tex., 667 F.2d 477.

Questions asked on voir dire examination of jurors

U.S.—Goosman v. A. Duie Pyle, Inc., C.A.Md., 320 F.2d 45, app. after remand 336 F.2d 151—Hinkle v. Hampton, C.A.Okl., 388 F.2d 141—Socony Mobil Oil Co. v. Taylor, C.A.Tex., 388 F.2d 586, app. after remand 421 F.2d 1248, cert. den. 90 S.Ct. 1868, 398 U.S. 950, 26 L.Ed.2d 289.

Discovery matters

U.S.—Montecatini Edison S. p. A. v. E. I. du Pont de Nemours & Co., C.A.Del., 434 F.2d 70.

Pretrial matters

U.S.—Davis v. Duplantis, C.A.La., 448 F.2d 918—Federal Deposit Ins. Corp. v. Glickman, C.A.Cal., 450 F.2d 416.

Settlement approval

U.S.—Young v. Katz, C.A.Tex., 447 F.2d 431—United Founders, Life Ins. Co. v. Consumers Nat. Life Ins. Co., C.A.Ind., 447 F.2d 647—Parker v. Anderson, C.A.Tex., 667 F.2d 1204, reh. den. 671 F.2d 1378, cert den. 103 S.Ct. 63, 459 U.S. 828, 74 L.Ed.2d 65.

D.C.—Spann v. Commissioners of District of Columbia, C.A., 443 F.2d 715, 143 U.S.App.D.C. 300.

Issue tried by consent

D.C.—Laffey v. Northwest Airlines, Inc., C.A., 567 F.2d 429, 185 U.S.App.D.C. 322, cert. den. 98 S.Ct. 1281, 434 U.S. 1086, 55 L.Ed.2d 792, on remand D.C., 481 F.Supp. 199.

§ 297(58). Proceedings at Trial

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28. U.S.—Gafford v. Star Fish & Oyster Co., C.A. Ala., 475 F.2d 767—Thomas v. E. J. Korvette, Inc., C.A.Pa., 476 F.2d 471.

Matters to which rule has been applied

(1) U.S.—Cranston v. Baltimore & O.R. Co., C.A. Pa., 258 F.2d 630, cert. den. 79 S.Ct. 731, 359 U.S. 946, 3 L.Ed.2d 678.

(4) U.S.—Diniero v. U.S. Lines Co., C.A.N.Y., 288 F.2d 595, 91 A.L.R.2d 770, cert. den. 82 S.Ct. 54, 368 U.S. 831, 7 L.Ed.2d 34—Robison v. Transamerica Ins. Co., C.A.Utah, 368 F.2d 37.

(7) U.S.—Cleary v. Indiana Beach, Inc., C.A.Ind., 275 F.2d 543, cert. den. 81 S.Ct. 62, 364 U.S. 825, 5 L.Ed.2d 53.

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29. U.S.—American Medical Ass'n v. Weinberger, C.A.Ill., 522 F.2d 921—Goff v. Continental Oil Co., C.A.Tex., 678 F.2d 593.

Rulings relating to reception

(1) U.S.—U.S. v. Kalmutz, C.A.Fla., 309 F.2d 437.

(3) U.S.—University Computing Co. v. Lykes-Youngstown Corp., C.A.Ga., 504 F.2d 518, reh. den. 505 F.2d 1304—Odeco, Inc. v. Avondale Shipyards, Inc., C.A.La., 663 F.2d 650, reh. den. 667 F.2d 92.

Kern v. Tri-State Ins. Co., D.C.Mo., 260 F.Supp. 378, affd., C.A., 386 F.2d 754.

(5) U.S.—Guest v. Bailes, C.A.Tenn., 448 F.2d 433.

D.C.—Watts v. Smith, App., 226 A.2d 160.

(8) U.S.—Unitec Corp. v. Beatty Safway Scaffold Co. of Or., C.A.Or., 358 F.2d 470.

(9) Experimental evidence.

U.S.—Wagner v. International Harvester Co., C.A. Minn., 611 F.2d 224.

31. U.S.—Miley v. Delta Marine Drilling Co., C.A. La., 473 F.2d 856, reh. den. 472 F.2d 1405, cert. den. 94 S.Ct. 93, 414 U.S. 871, 38 L.Ed.2d 89—McGregor-Doniger Inc. v. Drizzle Inc., C.A.N.Y., 599 F.2d 1126.

D.C.—Cohen v. Berry, D.C.App., 188 A.2d 302.

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(1) U.S.—Murphy v. Dyer, C.A.Colo., 409 F.2d 747, 37 A.L.R.3d 414—Dyas v. Kansas City Southern Ry. Co., C.A.Tex., 425 F.2d 1073—Bryant v. Sears, Roebuck & Co., C.A.W.Va., 435 F.2d 953—Crawford v. Worth, C.A.Miss., 447 F.2d 738—Cardwell v. Chesapeake & Ohio Ry. Co., C.A.Ohio, 504 F.2d 444.

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D.C.—Engle v. Stull, C.A., 377 F.2d 930, 126 U.S.App. D.C. 291.

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(1) U.S.—Santana Marine Service, Inc. v. McHale, C.A.Fla., 346 F.2d 147—Whitehead v. Salyer, C.A.Okl., 346 F.2d 207.

30. U.S.—Lis v. Robert Packer Hospital, C.A.Pa., 579 F.2d 819, cert. discharged 99 S.Ct. 354, 439 U.S. 955, 58 L.Ed.2d 346.

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33. U.S.—Garza v Indiana & Michigan Elec. Co., C.A.Mich., 338 F.2d 623—Leavitt v. Scott, C.A. Utah, 338 F.2d 749—Grain Dealers Mut. Ins. Co. v. Farmers Union Co-op. Elevator & Shipping Ass'n, Kirwin, Kan., C.A.Kan., 377 F.2d 672—Fears v. Burris Mfg. Co., C.A.Miss., 436 F.2d 1357.

34. U.S.—Burns v. Travelers Ins. Co., C.A.La., 344 F.2d 70—O'Connor v. Venore Transp. Co., C.A. Mass., 353 F.2d 324.

36. U.S.—Curtis v. Greenstein Trucking Co., C.A. Ind., 397 F.2d 483—Arkwright Mut. Ins. Co. v. Philadelphia Elec. Co., C.A.Pa., 427 F.2d 1273—Zeigler v. Seaboard Coast Line R. Co., C.A.Ga., 437 F.2d 80—Slade v. Slade, C.A.Ariz., 439 F.2d 130—Maxworthy v. Horn Elec. Service, Inc., C.A. Md., 452 F.2d 1141—Vanskike v. ACF Industries, Inc., C.A.Mo., 665 F.2d 188, cert. den. 102 S.Ct. 1632, 455 U.S. 1000, 71 L.Ed.2d 867, app. after remand C.A., 725 F.2d 1146.

37. U.S.—Alamance Industries, Inc. v. Filene's, C.A. Mass., 291 F.2d 142, cert. den. 82 S.Ct. 53, 368 U.S. 831, 7 L.Ed.2d 33.

Dismissal for failure to prosecute

U.S.—Terhune v. Prudential S.S. Corp., C.A.N.Y., 283 F.2d 467—Connolly v. Papachristid Shipping Ltd., C.A.Ala., 504 F.2d 917.

40. U.S.—Padgett v. Southern R. Co., C.A.Tenn., 396 F.2d 303.

The action of the trial court under Federal Rules of Civil Procedure, Rule 54(b), as to express direction of entry of judgment on multiple claims, is not reviewable in the absence of abuse of discretion.[40.5]

40.5. U.S.—Atkins, Kroll (Guam), Limited v. Cabrera, C.A.Guam, 277 F.2d 922—Gottesman v. General Motors Corp., C.A.N.Y., 401 F.2d 510.

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41. U.S.—Ruiz v. Hamburg-American Line, C.A.Cal., 478 F.2d 29—J & H Auto Trim Co., Inc. v. Bellefonte Ins. Co., C.A.Fla., 677 F.2d 1365.

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42. U.S.—Bartlett-Collins Co. v. Surinam Nav. Co., C.A.Okl., 381 F.2d 546.

43. Scope of review extremely limited

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44. U.S.—Silverman v. Travelers Ins. Co., C.A.La., 277 F.2d 257—Allstate Ins. Co. v. Springer, C.A. Mich., 269 F.2d 805, cert. den. 80 S.Ct. 370, 361 U.S. 932, 4 L.Ed.2d 353.

45. U.S.—Pool v. Leone, C.A.Colo., 374 F.2d 961, cert. den. 88 S.Ct. 309, 389 U.S. 943, 19 L.Ed 2d 300.

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U.S.—Natural Resources, Inc. v. Wineberg, C.A.Cal., 349 F.2d 685, cert. den. 86 S.Ct. 617, 382 U.S. 1010, 15 L.Ed.2d 525.

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50. Mistaken response on voir dire

U.S.—McDonough Power Equipment, Inc. v. Greenwood, Kan., 104 S.Ct. 845, 464 U.S. 548, 78 L.Ed.2d 663, on remand 731 F.2d 690.

52. U.S.—Ross v. Newsome, C.A.Ga., 289 F.2d 209—Brown v. Burr-Brown Research Corp., C.A.Tex., 378 F.2d 822—Jones v. Miles, C.A.Ga., 656 F.2d 103.

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U.S.—Boothe v. Holmes, C.A.Miss., 399 F.2d 495.

52.5. U.S.—Duncan v. Duncan, C.A.Tenn., 377 F.2d 49, cert. den. 88 S.Ct. 239, 389 U.S. 913, 19 L.Ed.2d 260—Champion Home Builders v. Shumate, C.A.Kan., 388 F.2d 806—Ketchum v. Nall, C.A.Okl., 425 F.2d 242.

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U.S.—Lind v. Schenley Industries, Inc., C.A.N.J., 278 F.2d 79, cert. den. 81 S.Ct. 58, 364 U.S. 835, 5 L.Ed.2d 60—Grove v. Dun & Bradstreet, Inc., C.A.Pa., 438 F.2d 433, cert. den. 92 S.Ct. 204, 404 U.S. 898, 30 L.Ed.2d 175.

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U.S.—Porterfield v. Burlington Northern Inc., 534 F.2d 142.

53. U.S.—Gelco Builders & Burjay Const. Corp. v. U.S., 369 F.2d 992, 177 Ct.Cl. 1025.

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54. U.S.—Mechanical Wholesale, Inc. v. Universal-Rundle Corp., C.A.Tex., 432 F.2d 228—Austin v. Euclid-Memphis Sales, Division of Trippeer Organizations, Inc., C.A.Ark., 434 F.2d 285—Perry v. Bertsch, C.A.N.D., 441 F.2d 939—Delesdernier v. Porterie, C.A.La., 666 F.2d 116, cert. den. 103 S.Ct. 86, 459 U.S. 839, 74 L.Ed.2d 81.

D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C., 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

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(3) Other statements.

U.S.—Grunenthal v. Long Island R. Co., N.Y., 89 S.Ct. 331, 393 U.S. 156, 21 L.Ed.2d 309.

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55. U.S.—U.S. v. Heasley, C.A.N.D., 283 F.2d 422.

58. U.S.—Murdoch's Estate v. Com. of Pa., City of Philadelphia, C.A.Pa., 432 F.2d 867—Hand v. U.S., C.A.La., 441 F.2d 529—Brennan v. Midwestern United Life Ins. Co., C.A.Ind., 450 F.2d 999, cert. den. 92 S.Ct. 957, 405 U.S. 921, 30 L.Ed.2d 792—Harman v. Pauley, C.A.W.Va., 678 F.2d 479.

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(1) U.S.—General Tel. Corp. v. General Tel. Answering Service, C.A.Fla., 277 F.2d 919.

(3) Other statements.

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59. D.C.—Harjo v. Andrus, C.A., 581 F.2d 949, 189 U.S.App.D.C. 171—Equal Employment Opportunity Commission v. Safeway Stores, Inc., C.A. Colo., 611 F.2d 795, cert. den. 100 S.Ct. 2918, 446 U.S. 925, 64 L.Ed.2d 809—Huff v. Metropolitan Life Ins. Co., C.A.Ohio, 675 F.2d 119.

60. U.S.—Wise v. DeWerd, C.A.Virgin Islands, 373 F.2d 306—K-S-H Plastics, Inc. v. Carolite, Inc., C.A.Cal., 408 F.2d 54, cert. den. 90 S.Ct. 69, 396 U.S. 825, 24 L.Ed.2d 76—Oscar Gruss and Son v. Lumbermens Mut. Cas. Co., C.A.N.Y., 422 F.2d 1278—St. Paul Fire & Marine Ins. Co. v. Lack, C.A.N.C., 476 F.2d 583.

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(2) Other statements

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62. U.S.—Taylor v. Safeway Stores, Inc., 524 F.2d 263—Muscare v. Quinn, C.A.Ill., 680 F.2d 42.

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63. U.S.—U.S. v. Code Products Corp., C.A.Pa., 362 F.2d 669.

67. U.S.—Bell v. School Bd. of Powhatan County, Va., C.A.Va., 321 F.2d 494.

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70. U.S.—Zenith Radio Corp. v. Hazeltine Research, Inc., Ill., 89 S.Ct. 1562, 395 U.S. 100, 23 L.Ed.2d 129, on remand, C.A., 418 F.2d 21, revd. on oth. grds. 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, reh. den. 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552.

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71. U.S.—Marcum v. U.S., C.A.Ala., 452 F.2d 36.

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(2) U.S.—Century Indem. Co. v. Serafine, C.A.Ill., 311 F.2d 676—Simpson v. Simpson, C.A.Colo., 311 F.2d 770.

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(1) U.S.—Caddy-Imler Creations, Inc. v. Caddy, C.A.Cal., 299 F.2d 79.

(2) U.S.—John Blue Co. v. Dempster Mill Mfg. Co., C.A.Neb, 275 F.2d 668—Jackson v. Hartford Acc. & Indem. Co., C.A.Mo., 422 F.2d 1272, cert. den. 91 S.Ct. 86, 400 U.S. 855, 27·L.Ed.2d 92.

(4) Other statements

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72. U.S.—Mann v. Anderson, C.A.Ind., 447 F.2d 533.

73. U.S.—Kelly v. Layton, C.A.Mo., 309 F.2d 611—Welders Supply, Inc. v. American Emp. Ins. Co., C.A.Ohio, 342 F.2d 972, reh. 358 F.2d 593.

73.5. U.S.—Covey Inv. Co. v. U.S., C.A.Utah, 377 F.2d 403—Lones v. Detroit T. & I.R. Co., C.A. Ohio, 398 F.2d 914, cert. den. 89 S.Ct. 714, 393 U.S. 1063, 21 L.Ed.2d 705—National Farmers Union Service Corp. v. U.S., C.A.Colo., 400 F.2d 483—Rivas v. Jefferson, C.A.Cal., 412 F.2d 769.

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73.5. U.S.—Wymer v. Wymer, Bkrtcy.App.Cal., 16 B.R. 497.

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74. U.S.—Hardesty v. Sloane, C.A.Fla., 341 F.2d 109—Carr v. American Universal Ins. Co., C.A. Tenn., 341 F.2d 220—A. O. Smith Corp. v. N.L. R.B., C.A.Ill., 343 F.2d 103—Beavers v. Secretary of Health, Ed. and Welfare, C.A.Ky., 577 F.2d 383.

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75. U.S.—Davis v. Cities Service Oil Co., C.A.Kan., 420 F.2d 1278.

76. U.S.—Clostermann v. Gates Rubber Co., C.A.Or., 394 F.2d 794—Lones v. Detroit, T. & I.R. Co., C.A.Ohio, 398 F.2d 914, cert. den. 89 S.Ct. 714, 393 U.S. 1063, 21 L.Ed.2d 705.

77. U.S.—U.S. v. Mills, C.A.Ga., 399 F.2d 944—Thetford v. U.S., C.A.Okl., 404 F.2d 301—Parke-Davis & Co. v. Stromsodt, C.A.N.D., 411 F.2d 1390.

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78. U.S.—Compton v. U.S., C.A.Ark., 377 F.2d 408—Rosenfield v. Kay Jewelry Stores, Inc., C.A. Okl., 384 F.2d 98, app. after remand 400 F.2d 89.

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78.5. U.S.—Davis v. Cities Service Oil Co., C.A.Kan., 420 F.2d 1278—North River Energy Corp. v. United Mine Workers of America, C.A.Ala., 664 F.2d 1184.

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79. U.S.—Barryhill v. U.S., C.A.Iowa, 300 F.2d 690—N.L.R.B. v. Southern Transport, Inc., C.A.Ark., 355 F.2d 978, 24 A.L.R.3d 694—Holsapple v. Woods, C.A.Ill., 500 F.2d 49, cert. den. 95 S.Ct. 185, 419 U.S. 901, 42 L.Ed.2d 147—Stepp v. Estelle, 524 F.2d 447.

80. U.S—Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 524 v. Billington, C.A.Wash., 402 F.2d 510.

81. U.S.—International Minerals & Chemical Corp. v. Moore, C.A.Tex., 361 F.2d 849—Oliveras v. American Export Isbrandtsen Lines, Inc., C.A. N.Y., 431 F.2d 814.

84. U.S.—Devex Corp. v. Houdaille Industries, Inc., C.A.Ill., 382 F.2d 17.

85. U.S.—Durso v. K-Mart No. 4195, Division of S.S. Kresge Co., C.A.Tex., 559 F.2d 1274.

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(1) U.S.—Cross v. Thompson, C.A.Tenn., 298 F.2d 186—Nussbaum v. Warehime, C.A.Ind., 333 F.2d 462, cert. den. 85 S.Ct. 682, 379 U.S. 979, 13 L.Ed.2d 570—Indemnity Ins. Co. of North America v. Southeastern Inc., C.A.Okl., 402 F.2d 259.

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86. U.S.—Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited, Pa., 82 S.Ct. 780, 369 U.S. 355, 7 L.Ed.2d 798, reh. den. 82 S.Ct. 1137, 369 U.S. 882, 8 L.Ed.2d 284, motion den. 83 S.Ct. 15, 371 U.S. 803, 9 L.Ed.2d 51—Aetna Life Insurance Co. v. Ward, N.J., 11 S.Ct. 720, 140 U.S. 76, 35 L.Ed. 371.

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87. U.S.—U.S. v. Kalmutz, C.A.Fla., 309 F.2d 437—Williamson v. Daspit Bros. Marine Divers, Inc., C.A.La., 337 F.2d 337—Lumbermen's Mut. Cas. Co. v. Norris Grain Co., C.A.Mo., 343 F.2d 670—Woody v. U.S., C.A.Or., 368 F.2d 668—Lloyd v. Grynberg, C.A.Colo., 464 F.2d 622.

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88. U.S.—Manchack v. S.S. Overseas Progress, 524 F.2d 918.

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(2) U.S.—Grey v. First Nat. Bank in Dallas, C.A. Tex., 393 F.2d 371, cert. den. 89 S.Ct. 398, 393 U.S. 961, 21 L.Ed.2d 374.

(3) U.S.—Jarrell v. Ford Motor Co., C.A.W.Va., 327 F.2d 233.

(4) U.S.—Appleman v. U.S., C.A.Ill., 338 F.2d 729, cert. den. 85 S.Ct. 1090, 380 U.S. 956, 13 L.Ed.2d 972—U.S. v. Simmons, C.A.Ga., 346 F.2d 213—Mannke v. Benjamin Moore & Co., C.A.Pa., 375 F.2d 281.

89. U.S.—Trade Development Bank v. Continental Ins. Co., C.A.N.Y., 469 F.2d 35—King v. Deutsche Dampfs-Ges, C.A.N.Y., 523 F.2d 1042.

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90. U.S.—Ahmann v. United Air Lines, Inc., C.A. Mo., 313 F.2d 274—Bernardo v. Bethlehem Steel Co., C.A.N.Y., 314 F.2d 604.

90.5. U.S.—Liberty Mut. Ins. Co. v. Falgoust, C.A. La., 386 F.2d 248—Torrence v. Union Barge Line Corp., C.A.La., 408 F.2d 873.

D.C.—Zaiko v. District of Columbia, C.A., 427 F.2d 606, 138 U.S.App.D.C. 336.

91. U.S.—North River Ins. Co. v. Hubbard, C.A.Tex., 391 F.2d 863—Torrence v. Union Barge Line Corp., C.A.La., 408 F.2d 873.

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93. U.S.—Basham v. Pennsylvania R. Co., N.Y., 83 S.Ct. 965, 372 U.S. 699, 10 L.Ed.2d 80.

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(1) U.S.—American Cas. Co. of Reading, Pa. v. Myrick, C.A.Tex, 304 F.2d 179, 96 A.L.R.2d 1352.

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93.5. U.S.—Johnson v. Hill, C.A.N.D., 274 F.2d 110—U.S. v. Kalmutz, C.A.Fla., 309 F.2d 437—Badger Mut. Ins. Co. v. Morgan, C.A.Fla., 313 F.2d 783.

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93.10. U.S.—Hardware Mut. Cas. Co. v. Jones, C.A. Va., 363 F.2d 627—Dillon v. M. S. Oriental Inventor, C.A.La., 426 F.2d 977, cert. den. 91 S.Ct. 140, 400 U.S. 903, 27 L.Ed.2d 140—Thompson v. Kerr-McGee Refining Corp., C.A.Okl., 660 F.2d 1380, cert. den. 102 S.Ct. 1716, 455 U.S. 1019, 72 L.Ed.2d 137.

93.15. U.S.—Nivens v. St. Louis Southwestern Ry. Co., C.A.Tex., 425 F.2d 114, cert. den. 91 S.Ct. 121, 400 U.S. 879, 27 L.Ed.2d 116.

93.20. U.S.—Yancey v. Union Carbide Corp., C.A. Tex., 353 F.2d 672—McDonough v. Government Emp. Ins. Co., C.A.Alaska, 469 F.2d 653.

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94. U.S.—Equitable Life Assur. Soc. of U.S. v. Fry, C.A.Ga., 386 F.2d 239—Liberty Mut. Ins. Co. v. Falgoust, C.A.La., 386 F.2d 248—Remington Arms Co., Inc. (Peters Cartridge Division) v. Wilkins, C.A.Ala., 387 F.2d 48.

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95. U.S.—Liberty Mut. Ins. Co. v. Falgoust, C.A.La., 386 F.2d 248—American Airlines, Inc. v. U.S., C.A.Tex., 418 F.2d 180.

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(1) U.S.—Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp., C.A.Pa., 325 F.2d 2—General Motors Corp. v. Muncy, C.A.Tex., 367 F.2d 493, cert. den. 87 S.Ct. 1476, 386 U.S. 1037, 18 L.Ed.2d 600, reh. den. 87 S.Ct. 2105, 388 U.S. 924, 18 L.Ed.2d 1378.

(2) U.S.—Peters v. Fitzpatrick, C.A.Ill., 310 F.2d 704.

95.5. Verdict not shown to be result of passion and prejudice

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96. U.S.—Ballwanz v. Isthmian Lines, Inc., C.A.Md., 319 F.2d 457, cert. den. 84 S.Ct. 1136, 376 U.S. 970, 12 L.Ed.2d 84—Kiff v. Travelers Ins. Co., C.A.La., 402 F.2d 129.

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98. U.S.—Caskey v. Village of Wayland, C.A.N.Y., 375 F.2d 1004—Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, C.A.Va., 386 F.2d 193—Ketchum v. Nall, C.A.Okl., 425 F.2d 242—Martin v. City of New Orleans, C.A.La., 678 F.2d 1321, reh. den. 683 F.2d 1373, cert. den. 103 S.Ct. 1189, 459 U.S. 1203, 74 L.Ed.2d 435.

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99. U.S.—Austin v. Euclid-Memphis Sales, Division of Trippeer Organizations, Inc., C.A.Ark., 434 F.2d 285 Martin v. City of New Orleans, C.A.La., 678 F.2d 1321, reh. den. 683 F.2d 1373, cert. den. 103 S.Ct. 1189, 459 U.S. 1203, 74 L.Ed.2d 435—Wheatley v. Ford, C.A.N.Y., 679 F.2d 1037.

D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C. 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

1. U.S.—Gee v. Owens-Illinois, Inc., C.A.Ga., 384 F.2d 704.

2. U.S.—Calvert v. Katy Taxi, Inc., C.A.N.Y., 413 F.2d 841.

Thompson v. Trent Maritime Co., D.C.Pa., 222 F.Supp. 221, motion den., C.A., 343 F.2d 200.

Grossly excessive or monstrous

U.S.—Emaldio v. Pocahontas S.S. Co., C.A.Va., 355 F.2d 55—Barzelis v. Kulikowski, C.A.Ariz., 418 F.2d 869.

Although occasion to do so is rare, etc.

U.S.—Wicks v. Henken, C.A.N.Y., 378 F.2d 395.

Punitive damages

U.S.—Lanfranconi v. Tidewater Oil Co., C.A.Vt., 376 F.2d 91, cert. den. 88 S.Ct. 334, 389 U.S. 951, 19 L.Ed.2d 361.

2.5. U.S.—Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, C.A.Va., 386 F.2d 193.

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2.15. U.S.—Fruit Industries, Inc. v. Petty, C.A.Fla., 268 F.2d 391, cert. den. 80 S.Ct. 261, 361 U.S. 915, 4 L.Ed.2d 186—Union Pac. R. Co. v. Jarrett, C.A.Idaho, 381 F.2d 597—Anderson v. Eagle Motor Lines, Inc., C.A.Miss., 423 F.2d 81.

The disagreement of the trial court with conclusions reached by the jury is not a valid reason for setting aside such conclusions.[3.5]

3.5. U.S.—Badger Mut. Ins. Co. v. Morgan, C.A.Fla., 313 F.2d 783—Compania Transatlantica Espanola, S.A. v. Melendez Torres, C.A.Puerto Rico, 358 F.2d 209—Commercial Union Ins. Co. v. Gonzalez Rivera, C.A.Puerto Rico, 358 F.2d 480.

§ 297(63). —— Application of Rules

Library References

Federal Courts ⟹847, 855–869.

6.50. U.S.—Standard Oil Co. of Cal. v. Perkins, C.A.Or., 347 F.2d 379—Nowell v. Dick, C.A.Tex., 413 F.2d 1204—Ramseyer v. General Motors Corp., C.A.Neb., 417 F.2d 859—Reicheneder v. Skaggs Drug Center, C.A.Tex., 421 F.2d 307.

Punitive damages

U.S.—McGrath v. Zenith Radio Corp., C.A.Ill., 651 F.2d 458, cert. den. 102 S.Ct. 136, 454 U.S. 835, 70 L.Ed.2d 114.

Seaworthiness determinable on undisputed facts.

U.S.—Savard v. Marine Contracting, Inc., C.A.Conn., 471 F.2d 536, cert. den. 93 S.Ct. 2778, 412 U.S. 943, 37 L.Ed.2d 404.

6.53. U.S.—Dependahl v. Falstaff Brewing Corp., C.A.Mo., 653 F.2d 1208, cert. den. 102 S.Ct. 512, 454 U.S. 968, 70 L.Ed.2d 384 and 102 S.Ct. 641, 454 U.S. 1084, 70 L.Ed.2d 619. Equal Employment Opportunity Commission v. Universal Underwriters Ins. Co., C.A.Mo., 653 F.2d 1243—Piva v. Xerox Corp., C.A.Cal., 654 F.2d 591.

6.54. U.S.—Cannon v. Travelers Indem. Co., C.A.Mo., 314 F.2d 657.

6.61. U.S.—Smith v. Lloyd's of London, C.A.Ga., 568 F.2d 1115—Hayes Bros., Inc. v. Economy Fire & Cas. Co., C.A.Iowa, 634 F.2d 1119.

6.62. U.S.—Emick v. Dairyland Ins. Co., C.A.Va., 519 F.2d 1317.

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6.64. U.S.—New York Life Ins. Co. v. Dick, C.A.N.D., 252 F.2d 43, revd. on oth. grds. 79 S.Ct. 921, 359 U.S. 437, 3 L.Ed.2d 935—Equitable Life Assur. Soc. of U.S. v. Fry, C.A.Ga., 386 F.2d 239.

6.65. U.S.—Moore-McCormack Lines, Inc. v. Richardson, C.A.N.Y., 295 F.2d 583, 96 A.L.R.2d 1085, cert. den. 82 S.Ct. 606, 368 U.S. 989, 7 L.Ed.2d 526, and 82 S.Ct. 1577, 370 U.S. 937, 8 L.Ed.2d 806, reh. den. 82 S.Ct. 1580, 370 U.S. 965, 8 L.Ed.2d 835—Hanover Fire Ins. Co. v. Sides, C.A.La., 320 F.2d 437.

Amount of verdict

U.S.—Solomon Dehydrating Co. v. Guyton, C.A.Neb., 294 F.2d 439, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192—Barnett v. Love, C.A.S.C., 294 F.2d 585.

6.66. U.S.—Lieberman v. Gulf Oil Corp., C.A.N.Y., 331 F.2d 160.

6.67. D.C.—Daniels v. Hadley Memorial Hospital, C.A., 566 F.2d 749, 185 U.S.App.D.C. 84.

6.69. U.S.—Clinton Foods, Inc. v. Youngs, C.A.Iowa, 266 F.2d 116, cert. den. 80 S.Ct. 77, 361 U.S. 828, 4 L.Ed.2d 71—Price v. H. B. Green Transp. Line, Inc., C.A.Ill., 287 F.2d 363—Ilnicki v. Montgomery Ward Co., C.A.Ind., 371 F.2d 195.

Damages

U.S.—Steinbock v. Schiewe, C.A.Or., 330 F.2d 510—Dowd v. Webb, C.A.N.J., 337 F.2d 93—Parker v. Wideman, C.A.Fla., 380 F.2d 433—Spears v. Hough, C.A.S.D., 458 F.2d 529, cert. den. 93 S.Ct. 130, 409 U.S. 878, 34 L.Ed.2d 131.

6.70. Amount of award

U.S.—U.S. v. Sommers, C.A.Colo., 351 F.2d 354.

6.71. U.S.—Thompson v. Illinois Cent. R. Co., C.A.Ky., 423 F.2d 1257.

6.72. U.S.—Merchant's Fast Motor Lines, Inc. v. Lane, C.A.Tex., 259 F.2d 336, cert. den. 79 S.Ct. 651, 359 U.S. 935, 3 L.Ed.2d 636—Sayen v. Rydzewski, C.A.Wis., 387 F.2d 815.

6.73. U.S.—Great Am. Ins. Co. v. Cutrer, C.A.La., 298 F.2d 79—Meadows & Walker Drilling Co. v. Phillips Petroleum Co., C.A.Tex., 417 F.2d 378—Falcon v. Auto Buses Internacionales, C.A.Tex., 418 F.2d 673.

6.74. U.S.—Maillard v. American Export Isbrandtson Lines, Inc., C.A.N.Y., 406 F.2d 322.

6.75. U.S.—Standard Oil Co. of Ky. v. Illinois Cent. R. Co., C.A.Miss., 421 F.2d 201.

6.77. U.S.—Meadows & Walker Drilling Co. v. Phillips Petroleum Co., C.A.Tex., 417 F.2d 378.

6.79. U.S.—Ford Motor Co. v. Webster's Auto Sales, Inc., C.A.Mass., 361 F.2d 874.

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6.81. U.S.—Siegrist v. Delaware, L. & W.R. Co., C.A.N.Y., 263 F.2d 616, cert. den. 79 S.Ct. 1435, 360 U.S. 917, 3 L.Ed.2d 1533—Kubersky v. New York Cent. R. Co., C.A.N.Y., 359 F.2d 90, cert. den. 87 S.Ct. 1475, 386 U.S. 1036, 18 L.Ed.2d 600—Valo v. Monessen Southwestern Ry. Co., C.A.Pa., 407 F.2d 1400—Missouri-Kansas-Texas Ry. Co. v. Hearson, C.A.Kan., 422 F.2d 1037.

Amount of verdict

U.S.—Hayes v. New York Cent. R. Co., C.A.N.Y., 311 F.2d 198.

Apportionment of damages, etc.

U.S.—Atlantic Coast Line R. Co. v. Anderson, C.A.Fla., 267 F.2d 329, cert. den. 80 S.Ct. 83, 361 U.S. 841, 4 L.Ed.2d 79, reh. den. 80 S.Ct. 205, 361 U.S. 904, 4 L.Ed.2d 159.

6.82. U.S.—Emaldio v. Pocahontas S.S. Co., C.A.Va., 355 F.2d 55—McBride v. Loffland Bros. Co., C.A.La., 422 F.2d 363.

6.83. U.S.—United Mine Workers of America v. Meadow Creek Coal Co., C.A.Tenn., 263 F.2d 52, cert. den. 79 S.Ct. 1149, 359 U.S. 1013, 3 L.Ed.2d 1038—Sheet Metal Workers Intern. Ass'n, Local Union No. 223, AFL-CIO v. Atlas Sheet Metal Co. of Jacksonville, C.A.Fla., 384 F.2d 101.

§ 297(64). Findings of Court

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7. U.S.—Stoody Co. v. Royer, C.A.Okl., 374 F.2d 672.

8. U.S.—Smith v. Custom Transport, Inc., C.A.Va., 451 F.2d 1313.

D.C.—Smith v. Smith, App., 210 A.2d 831—Hoffheins v. Heslop, App., 210 A.2d 841.

Adequate evidence

U.S.—Aetna Cas. & Sur. Co. v. Tryniecki, C.A.La., 293 F.2d 289.

Findings prepared by counsel scrutinized carefully

U.S.—Ceco Corp. v. Bliss & Laughlin Industries, Inc., C.A.Cal., 557 F.2d 687.

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9. U.S.—Tyson v. State of Iowa, C.A.Iowa, 283 F.2d 802—Mamiye Bros. v. Barber S.S. Lines, Inc., C.A.N.Y., 360 F.2d 774, cert. den. 87 S.Ct. 80, 385 U.S. 835, 17 L.Ed.2d 70.

Purpose of rule was to adopt prevailing equity practice

U.S.—Lundgren v. Freeman, C.A.Or., 307 F.2d 104.

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10. U.S.—Zenith Radio Corp. v. Hazeltine Research Inc., Ill., 89 S.Ct. 1562, 395 U.S. 100, 23 L.Ed.2d 129. On remand, C.A., 418 F.2d 21, revd. on oth. grds. 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, reh. den. 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552.

B's Co. v. B. P. Barber & Associates, Inc., C.A.S.C., 391 F.2d 130—Gulf Banana Co. v. Reefer Shipping Corp., C.A.Fla., 391 F.2d 287—Uniroyal, Inc. v. Mumford, C.A.Ill., 454 F.2d 1233—U.S. v. Reddoch, C.A.Ala., 467 F.2d 897.

Oral testimony

(2) Other matters.

U.S.—Saul v. International Harvester Co., C.A.Wis., 276 F.2d 361.

11. U.S.—Inwood Laboratories, Inc. v. Ives Laboratories, Inc., N.Y., 102 S.Ct. 2182, 456 U.S 844, 72 L.Ed.2d 606.

Wilkin v. Sunbeam Corp., C.A.Kan., 466 F.2d 714—Hutton v. U.S., C.A.Tenn., 501 F.2d 1055—U.S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp., C.A.Hawaii, 577 F.2d 568—U.S. v. Van Scoy, C.A.Pa., 654 F.2d 257, cert. den. 102 S.Ct. 977, 454 U.S. 1126, 71 L.Ed.2d 114—Payne v. McLemore's Wholesale & Retail Stores, C.A.La., 654 F.2d 1130, reh. den. 660 F.2d 497, cert. den. 102 S.Ct. 1630, 455 U.S. 1000, 71 L.Ed.2d 866—American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc., C.A.Ga., 678 F.2d 1379, reh. den., mod. on oth. grds., C.A., 698 F.2d 1098.

D.C.—Superior Oil Co. v. Udall, C.A., 409 F.2d 1115, 133 U.S.App.D.C. 198, motion den. 421 F.2d 1089, two cases, 137 U.S.App.D.C. 154.

In probate proceeding

(2) Federal Rules of Civil Procedure, Rule 81(a)(1), 28 U.S.C.A., was amended in 1966, removing the exception with respect to probate proceedings.

Rule applies to findings prepared by counsel, etc.

U.S.—Edward Valves, Inc. v. Cameron Iron Works, Inc., C.A.Tex., 289 F.2d 355—Atwood v. Humble Oil & Refining Co., C.A.Tex., 338 F.2d 502, cert. den. 85 S.Ct. 1562, 381 U.S. 926, 14 L.Ed.2d 684, reh. den. 85 S.Ct. 1804, 381 U.S. 956, 14 L.Ed.2d 729.

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Power of trial court

U.S.—Raulie v. U.S., C.A N.M., 400 F 2d 487.

Phillips v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 560, D.C.N.J., 209 F.Supp. 768.

Different construction and conclusion by court of appeals

U.S.—Strickler v. Pfister Associated Growers, Inc., C.A.Ky., 319 F 2d 788.

Evaluation of expert testimony

U.S.—U.S. ex rel. Carter-Schneider-Nelson, Inc. v. Campbell, C.A.Cal., 293 F.2d 816, cert. den. 82 S.Ct. 601, 368 U.S. 987, 7 L.Ed.2d 524.

Nothing pointed out at variance

U.S.—Spratler v. Georgia Art Supply Co., C.A.Ga., 295 F.2d 379.

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12. U.S.—Eastside Church of Christ v National Plan, Inc., C.A.Tex., 391 F.2d 357, cert. den. 89 S.Ct. 234, 240, 393 U S. 913, 21 L.Ed.2d 198, app. after remand 428 F.2d 401—Griffin v. Missouri Pac. R. Co., C.A.La., 413 F.2d 9—Troupe v. Seby, C.A. Ariz., 416 F 2d 514—Aunt Mid, Inc. v. Fjell-Oranje Lines, C.A.Ill., 458 F.2d 712, cert. den. 93 S.Ct. 130, 409 U.S. 877, 34 L.Ed.2d 131—Equal Employment Opportunity Commission v. Chesapeake & O. Ry. Co., C.A.Va., 577 F.2d 229, on remand D.C., 457 F.Supp. 674.

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2.5. U.S.—Hodgson v. H. Morgan Daniel Seafoods, Inc., C.A.Tex., 433 F.2d 918—City of New Orleans for Use and Benefit of Sewerage and Water Bd. of New Orleans v. American Commercial Lines, Inc., C.A.La., 662 F.2d 1121.

).C.—Orient Mid-East Lines, Inc. v. Cooperative for Am. Relief Everywhere, Inc., C.A., 410 F.2d 1006, 133 U.S.App.D.C. 307.

I.D.—C.J.S. cited in Peterson v. Hart, 278 N.W.2d 133, 136.

Motive and intent

(3) Other cases.

J.S.—Smith v. U.S., C.A.Tex., 287 F.2d 299.

2.10. U.S.—Purer & Co. v. Aktiebolaget Addo, C.A. Cal., 410 F.2d 871, cert. den. 90 S.Ct. 90, 396 U.S. 834, 24 L.Ed.2d 84.

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2.15. U.S.—U.S. v. Diapulse Corp. of America, C.A. N.Y., 457 F.2d 25—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

nferences

(2) Other statements.

I.S.—Boudoin v. J. Ray McDermott & Co., C.A.La., 281 F.2d 81—Watts v. Roberts, C.A.N.M., 282 F.2d 565.

3. U.S.—U.S. v. 79.95 Acres of Land, More or Less, in Rogers County, State of Okl., C.A.Okl., 459 F.2d 185.

).C.—Bellevue Gardens, Inc. v. Hill, C.A., 297 F.2d 185, 111 U.S.App.D.C. 343.

Reasonable and discernible basis for result achieved

I.S.—Evans v. U.S., C.A.Mass., 319 F.2d 751.

3.5. U.S.—Sabol v. Snyder, 524 F.2d 1009—Charles Schmitt & Co. v. Barrett, C.A.Mo., 670 F.2d 802.

Mere disagreement, etc.

I.S.—B's Co. v. B. P. Barber & Associates, Inc., C.A. S.C., 391 F.2d 130.

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4. U.S.—Montgomery v. Goodyear Aircraft Corp., C.A.N.Y., 392 F.2d 777, cert. den. 89 S.Ct. 121, 393 U.S. 841, 21 L.Ed.2d 112.

Although the practice of unconditionally adopting the findings submitted by one of the parties is disapproved,[14.5] such adoption does not affect the standard of review.[14.10]

14.5. U.S.—Edward Valves, Inc. v. Cameron Iron Works, Inc., C.A.Tex., 289 F.2d 355—Railex Corp. v. Speed Check Co., C.A.Ga., 457 F.2d 1040, cert. den. 93 S.Ct. 125, 409 U.S. 876, 34 L.Ed.2d 128.

14.10. U.S.—Railex Corp. v. Speed Check Co., C.A. Ga., 457 F.2d 1040.

15. U.S.—Dayton Bd. of Ed. v. Brinkman, Ohio, 99 S Ct. 2971, 443 U.S. 526, 61 L.Ed.2d 720, reh. den. 100 S.Ct. 186, 444 U.S. 887, 62 L.Ed.2d 121

Pivar v. Moseley, C.A.Virgin Islands, 476 F.2d 113.

N.D.—C.J.S. cited in Peterson v. Hart, 278 N.W.2d 133, 136.

Clearly erroneous standard not applicable

U.S.—Parson v. Kaiser Aluminum & Chemical Corp, C.A.La., 575 F.2d 1374, reh. den. 583 F.2d 132, cert. den. 99 S.Ct. 2417, 441 U.S. 968, 60 L.Ed.2d 1073, on remand, D.C., 497 F.Supp. 339, affd. C.A., 727 F.2d 473, cert. den. 104 S.Ct. 3516, 82 L.Ed.2d 824.

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15.5. U.S.—Cosby v. Shackelford, C.A.N.M., 408 F.2d 1144—Farmers & Bankers Life Ins. Co. v. Allingham, C.A.Colo., 457 F.2d 21—U.S. v. 47.14 Acres of Land, More or Less, Situate in Polk County, State of Iowa, C.A.Iowa, 674 F.2d 722.

Guess and speculation

(2) Other statements.

U.S.—Commercial Standard Ins. Co. v. Liberty Plan Co., C.A.Okl., 283 F.2d 893.

Flimsy testimonial foundation

U.S.—Armour & Co. v. Celic, C.A.N.Y., 294 F.2d 432.

16. U.S.—Raulie v. U.S., C.A.N.M., 400 F.2d 487—Armstrong v. Laird, C.A.Mass., 456 F.2d 521.

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16.5. U.S.—Securities and Exchange Commission v. Koscot Interplanetary, Inc., C.A.Ga., 497 F.2d 473—Power v. Union Pac. R. Co., C.A.Wash., 655 F.2d 1380.

D.C.—J. D. Hedin Const. Co. v. F. S. Bowen Elec. Co., C.A., 273 F.2d 511, 106 U.S.App.D.C. 386.

16.10. U.S.—Hodgson v. American Bank of Commerce, C.A.Tex., 447 F.2d 416.

17. U.S.—Williams v. Eaton, C.A.Wyo., 468 F.2d 1079.

D.C.—Gary v. Dane, C.A., 411 F.2d 711, 133 U.S.App. D.C. 397.

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18. U.S.—Davis v. Cities Service Oil Co., C.A.Kan., 420 F.2d 1278—Luttrell v. U.S., C.A.Or., 423 F.2d 1197, cert. den. 91 S.Ct. 173, 400 U.S. 915, 27 L.Ed.2d 154—Hodgson v. Frisch Dixie, Inc., C.A.Ky., 469 F.2d 82.

D.C.—Sawyer v. U.S., C.A., 298 F.2d 333, 112 U.S. App.D.C. 5.

Findings sustained, etc.

(6) U.S.—Reliance Nat. Life Ins. Co. v. Hackelman, C.A.Or., 372 F.2d 133.

19. U.S.—Jackson v. Hartford Acc. & Indem. Co., C.A.Mo., 422 F.2d 1272, cert. den. 91 S.Ct. 86, 400 U.S. 855, 27 L.Ed.2d 92.

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19.5. U.S.—U.S. v. Kaplan, C.A.Fla., 277 F.2d 405—Smoczynski v. U.S., C.A.Ill., 352 F.2d 44—Markiewicz v. Greyhound Corp., C.A.Ind., 358 F.2d 26, cert. den. 87 S.Ct. 64, 385 U.S. 828, 17 L.Ed.2d 65.

19.10. U.S.—Zenith Radio Corp. v. Hazeltine Research, Inc., Ill., 89 S.Ct. 1562, 395 U.S. 100, 23 L.Ed.2d 129. On remand, C.A., 418 F.2d 21, revd. on oth. grds. 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, reh. den. 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552—Inwood Laboratories, Inc. v. Ives Laboratories, Inc., N.Y., 102 S.Ct. 2182, 456 U.S. 844, 72 L.Ed.2d 606.

Gupta v. East Texas State University, C.A.Tex., 654 F.2d 411.

In re Doyle-Lunstra Sales Corp., D.C.S.D., 19 B.R. 1003.

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20. U.S.—Pullman-Standard v. Swint, Ala., 102 S.Ct. 1781, 456 U.S. 273, 72 L.Ed.2d 66, on remand, C.A., 692 F.2d 1031.

Dixie Products, C A.Ark, 424 F.2d 356, mand. conf. to, D.C., 314 F.Supp. 1192, motion gr. in part, denied in part, 317 F.Supp. 152, affd. in part, revd. in part on oth. grds. 440 F.2d 916.

Constitutional rights

U.S.—Guzick v. Drebus, C.A.Ohio, 431 F.2d 594, cert. den. 91 S.Ct. 941, 401 U.S. 948, 28 L.Ed.2d 231.

21. U.S.—Casner v. C.I.R., C.A.Tex., 450 F.2d 379—McConnell v. Anderson, C.A.Minn., 451 F.2d 193, cert. den. 92 S.Ct. 1312, 405 U.S. 1046, 31 L.Ed.2d 588—B & M Co. v. U.S., C.A.Miss., 452 F.2d 986.

21.5. U.S.—Acme Highway Products Corp. v. D. S. Brown Co., C.A.Ohio, 473 F.2d 849, cert. den. 94 S.Ct. 125, 414 U.S. 824, 38 L.Ed.2d 57—K & M Joint Venture v. Smith Intern., Inc., C.A.Ohio, 669 F.2d 1106.

In re Schwen's, Inc., D.C.Minn., 20 B.R. 638, affd., C.A., 693 F.2d 48.

D.C.—B. J. Semel Associates, Inc. v. United Fireworks Mfg. Co., C.A., 355 F.2d 827, 122 U.S.App.D.C. 402—Case v. Morrisette, C.A., 475 F.2d 1300, 155 U.S.App.D.C. 31.

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21.10. U.S.—Allstate Ins. Co. v. Cook, C.A.Ohio, 324 F.2d 752—Paul Sachs Originals Co. v. Sachs, C.A. Cal., 325 F.2d 212—General Elec. Co. v. Sciaky Bros., Inc., C.A.Mich., 415 F.2d 1068—Collins v. Thompson, C.A.Wash., 679 F.2d 168.

21.15. U.S.—Cole v. Neaf, C.A.Mo., 334 F.2d 326—Worthen Bank & Trust Co. v. Franklin Life Ins. Co., C.A.Ark., 370 F.2d 97—Snider v. England, C.A.Cal., 374 F.2d 717.

21.25. U.S.—Consolidated Sun Ray, Inc. v. Lea, C.A. Pa., 401 F.2d 650, cert. den. 89 S.Ct. 688, 393 U.S. 1050, 21 L.Ed.2d 692.

Scope of review enlarged

(2) Other statements.

U.S.—Mayo v. Pioneer Bank & Trust Co., C.A.La., 297 F.2d 392—Goldberg v. P. & L. Equipment Co., C.A.Tex., 311 F.2d 88—Yorke v. Thomas Iseri Produce Co., C.A.Ill., 418 F.2d 811.

22. U.S.—First Nat. Bank of Fort Smith, Ark. v. Mattingly, C.A.Okl., 312 F.2d 603—Roberts v. Ross, C.A.Virgin Islands, 344 F.2d 747—Manning v. Jones, C.A.Mo., 349 F.2d 992.

23. U.S.—Chared Corp. v. U.S., C.A.Tex., 446 F.2d 745, cert. gr. 455 F.2d 928—U.S. v. Weingarden, C.A.Mich., 473 F.2d 454.

23.5. U.S.—Central R. Co. of New Jersey v. Manufacturers Hanover Trust Co., C.A.N.J., 421 F.2d 604, cert. den. 90 S.Ct. 1867, 398 U.S. 949, 26 L.Ed.2d 289—Pouncy v. Prudential Ins. Co. of America, C.A.Tex., 668 F.2d 795.

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D.C.—Glassie v. King, C.A., 360 F.2d 503, 123 U.S. App.D.C. 369.

33.242. U.S.—Nevin v. Hoffman, 431 F.2d 43.

33.244. U.S.—Sturtevant v. Hart, C.A.Ky., 327 F.2d 695—Rainbo Gold Mines v. Magnus, C.A.Utah, 398 F.2d 347.

33.246. U.S.—Abraham v. H. v. Middleton, Inc., C.A.N.M., 279 F.2d 107—Stool v. J. C. Penney Co., C.A.Tex., 404 F.2d 562—Cherokee Nation v. State of Okl., C.A.Okl., 461 F.2d 674, cert. den. 93 S.Ct. 521, 409 U.S. 1039, 34 L.Ed.2d 489, app. after remand 490 F.2d 521, cert. den. 94 S.Ct. 3070, 417 U.S. 946, 41 L.Ed.2d 666.

33.248. U.S.—Mayhew v. Callard, C.A.Ind., 312 F.2d 295—Hill v. Field, C.A.Okl., 384 F.2d 829.

33.252. U.S.—Seaver v. U.S. Plywood Corp., C.A. Or., 273 F.2d 36.

33.256. U.S.—U.S. Gypsum Co. v. Greif Bros. Cooperage Corp., C.A.Ark., 389 F.2d 252—Walton v. U.S., C.A.Wyo., 415 F.2d 121.

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33.272. U.S.—Zenith Radio Corp. v. Hazeltine Research, Inc., Ill., 89 S.Ct. 1562, 395 U.S. 100, 23 L.Ed.2d 129. On remand, C.A., 418 F.2d 21, revd. on oth. grds. 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, reh. den. 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552.

D.C.—Fisher v. North Branch Products, Inc., C.A., 312 F.2d 880, 114 U.S.App. D.C. 153, cert. den. 83 S.Ct. 1302, 373 U.S. 913, 10 L.Ed.2d 413—Filmon Process Corp. v. Spell-Right Corp., C.A., 404 F 2d 1351, 131 U.S.App.D.C. 374.

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33.276. U.S.—A. H. Emery Co. v. Marcan Products Corp., C.A.N.Y., 389 F.2d 11, cert. den. 89 S.Ct. 109, 393 U.S. 835, 21 L.Ed.2d 106.

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D.C.—Permian Corp. v. U.S., C.A., 665 F.2d 1214, 214 U.S.App.D.C. 396.

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Natural Gas Act

U.S.—Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Commission, C.A. N.J., 464 F.2d 1358, cert. den. 93 S.Ct. 909, 409 U.S. 1118, 34 L.Ed.2d 701.

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33.294. U.S.—Gaugler v. U.S., C.A.N.Y., 312 F.2d 681—Goodman v. U.S., C.A.Cal., 369 F.2d 166—U.S. v. Smith, C.A.Tex., 418 F.2d 589—Garcia v. U.S., C.A.Tex., 421 F.2d 1231—U.S. v. Hershberger, C.A.Kan., 475 F.2d 677.

33.296. U.S.—Aunt Mid, Inc. v. Fjell-Oranje Lines, C.A.Ill., 458 F.2d 712, cert. den. 93 S.Ct. 130, 409 U.S. 877, 34 L.Ed.2d 131—La Fortune v S.S. Irish Larch, C.A.N.Y., 503 F.2d 952.

33.298. U.S.—Hodgson v. Square D Co., C.A.Ky., 459 F.2d 805, cert. den. 93 S.Ct. 293, 409 U.S. 967, 34 L.Ed.2d 232—Hodgson v. Golden Isles Convalescent Homes, Inc., C.A.Fla., 468 F.2d 1256—Hodgson v. Behrens Drug Co., C.A.Tex., 475 F.2d 1041, cert. den. 94 S.Ct. 121, 414 U.S. 822, 38 L.Ed.2d 55.

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U.S.—Hodgson v. First Victoria Nat. Bank, C.A.Tex., 446 F.2d 47—Hodgson v. American Bank of Commerce, C.A.Tex., 447 F.2d 416.

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33.300. U.S.—Pittsburgh Nat. Bank v. Pennsylvania R. Co., C.A.Pa., 315 F.2d 606—Eaton v. Long Island R. Co, C.A.N.Y., 398 F.2d 738—Canton R. Co. v. American Smelting & Refining Co., Inc., C.A.Md., 504 F 2d 1377

33.302. U.S.—Lightenburger v. U.S., C.A.Cal., 460 F.2d 391, cert. den. 93 S.Ct. 323, 409 U.S. 983, 34 L.Ed.2d 248—Deweese v. U.S., C.A.Colo., 576 F.2d 802—A & D Intern., Inc. v. U.S., C.A.Fla., 665 F.2d 669.

Amount of award

U.S.—Chesser v. U.S., C.A.Ala., 387 F 2d 119.

33.308. U.S.—Dardar v. Louisiana State Dept. of Highways, C.A.La., 447 F.2d 952, cert. den. 92 S.Ct. 943, 405 U.S. 918, 30 L.Ed.2d 788, reh. den. 92 S.Ct. 1308, 405 U.S. 1048, 31 L.Ed.2d 591—Chisholm v. Sabine Towing & Transp. Co., Inc., C.A.Tex., 679 F.2d 60.

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33.310. U.S.—Parmer v. National Cash Register Co., C.A.Ohio, 503 F.2d 275.

33.312. U.S.—U.S. for Use of Nelson v. Reliance Ins. Co., C.A.Kan., 436 F.2d 1366.

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33.318. U.S.—Ruby v. American Airlines, Inc., C.A. N.Y., 323 F.2d 248, cert. den. 84 S.Ct. 658, 376 U.S. 913, 11 L.Ed.2d 611—Illinois Cent. R. Co. v. Brotherhood of Locomotive Engineers, C.A.Ill., 443 F.2d 136.

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35. U.S.—Collins v. Murray, C.A.Ill., 313 F.2d 215—Har-Pen Truck Lines, Inc. v. Mills, C.A.Ga., 378 F.2d 705.

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35.5. U.S.—London v. Troitino Bros., Inc., C.A.Va., 301 F.2d 116.

36. U.S.—Haverhill Gazette Co. v. Union Leader Corp., C.A.Mass., 333 F.2d 798, motion den. 333 F.2d 808, cert. den. 85 S.Ct. 329, 379 U.S. 931, 13 L.Ed.2d 343, reh. den. 85 S.Ct. 645, 379 U.S. 984, 13 L.Ed.2d 578.

37. U.S.—London v. Troitino Bros., Inc., C.A.Va., 301 F.2d 116—Sauget v. Johnston, C.A.Guam, 315 F.2d 816.

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39. U.S.—Fulton Nat. Bank v. Tate, C.A.Ga., 363 F.2d 562.

40. U.S.—Bernes v. Henning, C.A.Ga., 310 F.2d 127—Fluor Corp. v. Illinois Power Co., C.A.Ill., 326 F.2d 374.

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41. U.S.—McIntosh v. Noonan, C.A.Mass., 402 F.2d 431.

Assistance of counsel in determination of question

U.S.—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

"Substantial evidence"

U.S.—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

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41.5. U.S.—In re U.S.A. Motel Corp., C.A.Cal., 450 F.2d 499, app. after remand 521 F.2d 117.

41.10. U.S.—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

44.10. U.S.—N.L.R.B. v. Bancroft Mfg. Co, Inc., C.A., 635 F.2d 492, cert. den. 101 S.Ct. 3053, 452 U.S. 917, 69 L.Ed.2d 421.

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45. U.S.—Geddes v. Daughters of Charity of St. Vincent De Paul, Inc., C.A.La., 348 F.2d 144—Lifetime Siding, Inc. v. U.S., C.A.N.Y., 359 F.2d 657, cert. den. 87 S.Ct. 233, 385 U.S. 921, 17 L.Ed.2d 144—Miller v. Baum, C.A.Tex., 400 F.2d 176—Schneider v. Chrysler Motors Corp., C.A.Neb., 401 F.2d 549.

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46. U.S.—Maurice A. Garbell, Inc. v. Boeing Co., C.A.Cal., 546 F.2d 297, cert. den. 97 S.Ct. 2677, 431 U.S. 955, 53 L.Ed.2d 272.

47. U.S.—Kiner v. Northcutt, C.A.Colo., 424 F.2d 222.

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50. U.S.—Litherland v. Petrolane Offshore Const. Services, Inc., C.A.La., 546 F.2d 129.

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50.55. U.S.—Tugwell v. A. F. Klaveness & Co., C.A. Tex., 320 F.2d 866, cert. den. 84 S.Ct. 967, 376 U.S. 951, 11 L.Ed.2d 970.

51. U.S.—Breeding v. Massey, C.A.Ark., 378 F.2d 171—Thompson v. Underwood, C.A.Tenn., 407 F.2d 994—General Business Services, Inc. v.

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Fletcher, C.A.N.C., 435 F.2d 863—Klingbiel v. Commercial Credit Corp., C.A.Kan., 439 F.2d 1303—Gilliam v. City of Omaha, 524 F.2d 1013.

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52. U.S.—Los Angeles Trust Deed & Mortg. Exchange v. Securities and Exchange Commission, C.A.Cal., 285 F.2d 162, cert. den. 81 S.Ct. 1095, 366 U.S. 919, 6 L.Ed.2d 241—U.S. v. O'Connor, C.A.N.Y., 291 F.2d 520 100 A.L.R.2d 858—Potts v. Flax, C.A.Tex., 313 F.2d 284—U.S. v. Lagerbusch, C.A.Pa., 361 F.2d 449.

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52.10. U.S.—Vickers v. Tumey, C.A.Miss., 290 F.2d 426.

53. D.C.—Manbeck v. Ostrowski, C.A., 384 F.2d 970, 128 U.S.App.D.C. 1, cert. den. 88 S.Ct. 1077, 390 U.S. 966, 19 L.Ed.2d 1170.

Prejudicial error

U.S.—Thermo King Corp. v. White's Trucking Service, Inc., C.A.Fla., 292 F.2d 668.

Cautionary instructions

U.S.—Skogen v. Dow Chemical Co., C.A.Minn., 375 F.2d 692.

55. U.S.—Lovell v. Alderete, C.A.Ga., 630 F.2d 428.

56. U.S.—Casino Foods Corp. v. Kraftco Corp., C.A., 546 F.2d 301.

57. U.S.—U.S. v. Keeler, C.A.Wash., 308 F.2d 424, cert. den. 83 S.Ct. 1534, 373 U.S. 932, 10 L.Ed.2d 689—Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co., C.A.Cal., 333 F.2d 89—Cisneros v. Cities Service Oil Co., C.A.N.Y., 334 F.2d 232.

Particular favorable errors

(3) Since the publication of Corpus Juris Secundum, he case of Ward v. Atlantic Coast Line R. Co., C.A. Fla., 255 F.2d 75 has been reversed, the court holding hat reversible error was committed under the circumstances.

J.S.—Ward v. Atlantic Coast Line R. Co., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820.

Pinto v. States Marine Corp. of Del., C.A.N.Y., 296 F.2d 1, cert. den. 82 S.Ct. 874, 369 U.S. 843, 7 L.Ed.2d 847, reh. den. 82 S.Ct. 1156, 369 U.S. 891, 8 L.Ed.2d 291—Flentie v. American Community Stores Corp., C.A.Iowa, 389 F.2d 80.

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8. U.S.—Bell v. Swift & Co., C.A.Ala., 283 F.2d 407—Huff v. N. D. Cass Co. of Ala., C.A.Ala., 468 F.2d 172, reh. 485 F.2d 710.

297(74). Presumptions and Burden of Proof as to Effect of Error

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). U.S.—Price v. U.S., C.A.Ala., 335 F.2d 671—Flanigan v. Burlington Northern Inc., C.A.Mo., 632 F.2d 880, cert den. 101 S.Ct. 1370, 450 U.S. 921, 67 L.Ed.2d 349.

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).10. U.S.—Bell v. Swift & Co., C.A.Ala., 283 F.2d 407.

).15. U.S.—Andrews v. Olin Mathieson Chemical Corp., C.A.Iowa, 334 F.2d 422—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

).20. U.S.—Air Line Pilots Ass'n, Intern. v. Northwest Airlines, Inc., C.A.Minn., 415 F.2d 493, cert. den. 90 S.Ct. 931, 397 U.S. 924, 25 L.Ed.2d 103.

). U.S.—Degelos v. Fidelity & Cas. Co. of New York, C.A.La., 313 F.2d 809—Frito-Lay, Inc. v. Morton Foods, Inc., C.A.Okl., 316 F.2d 298—Northern Pac. Ry. v. Herman, C.A.Mont., 478 F.2d 1167—Watz v. Zapata Off-Shore Co., C.A. Tex., 500 F.2d 628.

Evidence

(2) U.S.—Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., C.A.Cal., 284 F.2d 1, mod. on oth. grds. and reh. den., C.A., 289 F.2d 933, revd. on oth. grds., 82 S.Ct. 1130, 370 U.S. 19, 8 L.Ed.2d 305, reh den 82 S.Ct. 1577, 370 U.S. 965, 8 L.Ed.2d 834.

Reference to insurance or workmen's compensation

U.S.—Mangan v. Broderick & Bascom Rope Co., C.A. Ill., 351 F.2d 24, cert. den. 86 S.Ct. 930, 383 U.S. 926, 15 L.Ed.2d 846—Langley v. Turner's Exp., Inc., C.A.Va., 375 F.2d 296.

Denial or impairment of right to peremptory challenge

U.S.—Langley v. Turner's Exp., Inc., C.A Va., 375 F.2d 296.

60.10. U.S.—Eichmann v. Dennis, C.A.Pa., 347 F.2d 978.

60.15. U.S.—Sessoms v. Union Sav. & Trust Co., C.A.Ohio, 342 F.2d 751.

§ 297(75). Application of Rules to Particular Errors

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61. U.S.—Stockton v. Altman, C.A.Tex., 432 F.2d 946, cert. den. 91 S.Ct. 1232, 401 U.S. 994, 28 L.Ed.2d 532—Gill v. Allstate Ins. Co., C.A.Mich., 458 F.2d 577—Smith v. U.S., C.A.Ohio, 466 F.2d 535, cert. den. 93 S.Ct. 974, 410 U.S. 912, 35 L.Ed.2d 275.

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Tiernan v. Westext Transport, Inc., D.C.R.I., 295 F.Supp. 1251.

Departure from pretrial order

U.S.—U.S. v. First Nat. Bank of Circle, C.A.Mont., 652 F.2d 882.

Error held prejudicial

U.S.—Lynn v. Smith, C.A.Pa., 281 F.2d 501—Prochot v. Drew, C.A.Ill., 283 F.2d 904—Dupont v. Southern Pac. Co., C.A.La., 366 F.2d 193, cert. den. 87 S.Ct. 1027, 386 U.S. 958, 18 L.Ed.2d 106—Central Distributors, Inc. v. M.E.T., Inc., C.A.Fla., 403 F.2d 943.

Permitting jury to draw infavorable inferences from failure to produce evidence

U.S.—Yeargain v. National Dairy Products Corp., C.A. Mo., 317 F.2d 779.

Permitting discovery

U.S.—U.S. v. Garrett, C.A.Miss., 571 F.2d 1323.

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62. U.S.—Oklahoma Morris Plan Co. v. Security Mut. Cas. Co., C.A.Mo., 455 F.2d 1209—Burkhalter v. Montgomery Ward and Co., Inc., C.A.Ark., 676 F.2d 291.

Denial of intervention

U.S.—Stewart-Warner Corp. v. Westinghouse Elec. Corp., C.A.N.Y., 325 F.2d 822, cert. den. 84 S.Ct. 800, 376 U.S. 944, 11 L.Ed.2d 767—Securities and Exchange Commission v. Charles Plohn & Co., C.A.N.Y., 448 F.2d 546.

Substitution of parties

U.S.—La-Tex Supply Co. v. Fruehauf Trailer Division, Fruehauf Corp., C.A.Tex., 444 F.2d 1366, cert. den. 92 S.Ct. 287, 404 U.S. 942, 30 L.Ed.2d 256.

63. U.S.—Weir v. Chicago Plastering Institute, C.A. Ill., 272 F.2d 883—Schwab v. Erie Lackawanna R. Co., C.A.Pa., 438 F.2d 62—U.S. v. Burns, C.A. Cal., 441 F.2d 544—Trans World Airlines, Inc. v. Hughes, C.A.N.Y., 449 F.2d 51, revd. on oth. grds. 93 S.Ct. 647, 409 U.S. 363, 34 L.Ed.2d 577, reh. den. 93 S.Ct. 1434, 1435, 410 U.S. 975, 35 L.Ed.2d 707, on remand, D.C., 359 F.Supp. 783—Powe v. City of Chicago, C.A.Ill., 664 F.2d 639.

Error held prejudicial

U.S.—Pennebaker v. Chamber, C.A.Pa., 437 F.2d 66.

64. U.S.—Clay v. Southern Ry. Co., C.A.Ga., 284 F.2d 152—Ohio Cas. Ins. Co. v. Smith, C.A.Ind., 297 F.2d 265—Lee v. Southern Ry. Co., C.A. Tenn., 303 F.2d 880—Rental Development Corp. of America v. Lavery, C.A.Ariz., 304 F.2d 839—Goodman v. U.S. ex rel. Rineer, C.A.Cal., 398 F.2d 879—Toth v. Corning Glass Works, C.A. Ohio, 411 F.2d 912.

D.C.—Fielding v. Brebbia, C.A., 399 F.2d 1003, 130 U.S.App.D.C. 270.

Answer

U.S.—Lieberman v. Gulf Oil Corp., C.A.N.Y., 331 F.2d 160.

Error held prejudicial

U.S.—Sanders v. Beach, C.A.N.M., 283 F.2d 946.

Service of answer by third-party defendant

U.S.—DeGioia v. U.S. Lines Co., C.A.N.Y., 304 F.2d 421.

64.10. U.S.—Whelan v. Penn Central Co., C.A.N.Y., 503 F.2d 886.

D.C.—Saddler v. Safeway Stores, Inc., App., 227 A.2d 394.

Error held prejudicial

U.S.—Standard Lumber Co. v. Interstate Trust Co., C.C.A.Fla., 82 F.2d 346.

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65. U.S.—Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc., C.A.Pa., 367 F.2d 625, on remand 286 F.Supp. 899, vac. on oth. grds. 308 F.Supp. 1068, revd. on oth. grds. 438 F.2d 433, cert. den. 92 S.Ct. 204, 404 U.S. 898, 30 L.Ed.2d 175—Monod v. Futura, Inc., C.A.Colo., 415 F.2d 1170—Hecht v. Harris, Upham & Co., C.A.Cal., 430 F.2d 1202.

Particular motions

U.S.—MacKay v. American Potash & Chemical Co., C.A.Cal., 268 F.2d 512, reh. den. 270 F.2d 646.

(1) U.S.—Lipsett v. U.S., C.A.N.Y., 359 F.2d 956.

66. U.S.—Intermountain Rural Elec. Ass'n v. Colorado Central Power Co., C.A.Colo., 322 F.2d 516—Price v. U.S., C.A.Ala., 335 F.2d 671.

67. U.S.—General Motors Corp. v. Buha, C.A.Mich., 623 F.2d 455.

68. Injunction

(1) U.S.—Leighton v. One William St. Fund, Inc., C.A.N.Y., 343 F.2d 565—Winston Research Corp. v. Minnesota Min. & Mfg. Co., C.A.Cal., 350 F.2d 134—Griggs v. Cook, C.A.Ga., 384 F.2d 705.

(2) U.S.—U.S. v. Logue, C.A.Ala., 344 F.2d 290—First-Citizens Bank & Trust Co. v. Camp, C.A.N.C., 432 F.2d 481.

69. U.S.—Sauget v. Johnston, C.A.Guam, 315 F.2d 816—Kent v. Walter E. Heller & Co., C.A.Ga., 349 F.2d 480.

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U.S.—Diapulse Corp. of America v. Curtis Pub. Co., C.A.N.Y., 374 F.2d 442.

69.5. U.S.—National Sur. Corp. v. Musgrove, C.A. Ala., 310 F.2d 256, cert. den. 84 S.Ct. 482, 375 U.S. 974, 11 L.Ed.2d 420—Swofford v. B & W, Inc., C.A.Tex., 336 F.2d 406, cert. den. 85 S.Ct. 653, 379 U.S. 962, 13 L.Ed.2d 557—Seattle First Nat. Bank v. Hilltop Realty, C.A.Wash., 383 F.2d 309, cert. den. 88 S.Ct. 1411, 390 U.S. 1025, 20 L.Ed.2d 282—U.S. v. Williams, C.A.Ga., 441 F.2d 637.

Error held prejudicial

U.S.—Cargill, Inc. v. Commodity Credit Corp., C.A. N.Y., 275 F.2d 745.

Ruling subject to exacting scrutiny

U.S.—City of Morgantown, W. Va. v. Royal Ins. Co., 69 S.Ct. 1067, 337 U.S. 254, 93 L.Ed. 1347.

King v. United Ben. Fire Ins. Co., C.A.Okl., 377 F.2d 728, cert. den. 88 S.Ct. 99, 389 U.S. 857, 19 L.Ed.2d 124.

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70. U.S.—McDonough Power Equipment, Inc. v. Greenwood, Kan., 104 S.Ct. 845, 464 U.S. 548, 78 L.Ed.2d 663, on remand 731 F.2d 690

Sutton v. Anderson, Clayton & Co., C.A.Kan., 448 F.2d 293.

Error held prejudicial

U.S.—Socony Mobil Oil Co. v. Taylor, C.A.Tex., 388 F.2d 586, app. after remand 421 F.2d 1248, cert. den. 90 S.Ct. 1868, 398 U.S. 950, 26 L.Ed.2d 289—Abbott v. Mines, C.A.Ky., 411 F.2d 353—John Long Trucking, Inc. v. Greear, C.A.Okl., 421 F.2d 125—Kuzniak v. Taylor Supply Co., C.A. Mich., 471 F.2d 702.

71. U.S.—Miley v. Delta Marine Drilling Co., C.A. La., 473 F.2d 856, reh. den. 472 F.2d 1405, cert. den. 94 S.Ct. 93, 414 U.S. 93, 414 U.S. 871, 38 L.Ed.2d 89—Bassett Furniture Industries of North Carolina, Inc. v. NVF Co., C.A.Ga., 576 F.2d 1084, am. on oth. grds. and reh. den. 583 F.2d 778—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

D.C.—Lillycrop v. Kinsky, C.A., 300 F.2d 736, 112 U.S.App.D.C. 144.

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U.S.—Loffland Bros. Co. v. Roberts, C.A.La., 386 F.2d 540, cert. den. 88 S.Ct. 778, 389 U.S. 1040, 19 L.Ed.2d 830.

Error held prejudicial

(1) U.S.—Citron v. Aro Corp., C.A.Pa., 377 F.2d 750, cert. den. 88 S.Ct. 473, 389 U.S. 973, 19 L.Ed.2d 466—Schaffer v. Universal Rundle Corp., C.A.Tex., 397 F.2d 893.

Continuance

U.S.—U.S. v. Bell, C.A.Nev., 448 F.2d 40.

72. U.S.—Benson v. American Export Isbrandtsen Lines, Inc., C.A.Pa., 478 F.2d 152, cert. den. 94 S.Ct. 898, 414 U.S. 1145, 39 L.Ed.2d 100—Evans v. Wright, C.A.Va., 505 F.2d 287—New England Merchants Nat. Bank v. Rosenfield, C.A.Fla., 679 F.2d 467, cert. den. 103 S.Ct. 819, 459 U.S. 1173, 74 L.Ed.2d 1017.

Mach v. Pennsylvania R. Co., D.C.Pa., 207 F.Supp. 233, affd., C.A., 317 F.2d 761.

D.C.—Wabisky v. D.C. Transit System, Inc., C.A., 326 F.2d 658, 117 U.S.App.D.C. 115.

Error held prejudicial

U.S.—Greener v. Green, C.A.Pa., 460 F.2d 1279—Garman v. Griffin, C.A.Mo., 666 F.2d 1156.

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73. U.S.—Kowalski v. Pennsylvania R. Co., C.A.Pa., 455 F.2d 470—Vanskike v. ACF Industries, Inc., C.A.Mo., 665 F.2d 188, cert. den. 102 S.Ct. 1632, 455 U.S. 1000, 71 L.Ed.2d 867, app. after remand C.A., 725 F.2d 1146.

D.C.—Borger v. Conner, App., 210 A.2d 546.

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73.5. U.S.—Class v. Norton, C.A.Conn., 507 F.2d 1058—Lambert v. Midwest City Memorial Hospital Authority, C.A.Okl., 671 F.2d 372.

74. U.S.—Hynson, Westcott & Dunning, Inc. v. Richardson, C.A., 461 F.2d 215, mod. on oth. grds. 93 S.Ct. 2469, 412 U.S. 609, 37 L.Ed.2d 207—Gilliam v. City of Omaha, 524 F.2d 1013.

Error held prejudicial

U.S.—McDonnell Douglas Corp. v. Green, Mo., 93 S.Ct. 1817, 411 U.S. 792, 36 L.Ed.2d 668, on remand, D.C., 390 F.Supp. 501, affd., C.A., 528 F.2d 1102.

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D.C.—Bulluck v. Washington, C.A., 468 F.2d 1096, 152 U.S.App.D.C. 39.

76. U.S.—Rodriguez v. Delray Connecting R.R., C.A. Mich., 473 F.2d 819.

Error held prejudicial

U.S.—Fritts v. Toledo Terminal R. Co., C.A.Ohio, 293 F.2d 360—Lusich v. Bloomfield S.S. Co., C.A.La., 355 F.2d 770.

77. U.S.—Brauer v. Republic Steel Corp., C.A.Kan., 460 F.2d 801—Slotkin v. Willmering, C.A.Mo., 464 F.2d 418—Miller v. Borden, Inc., C.A.Tex., 664 F.2d 543.

Since the publication of Corpus Juris Secundum, the case of Ward v. Atlantic Coast Line R. Co., C.A.Fla., 265 F.2d 75 has been reversed, the court holding that reversible error was committed under the circumstances.

U.S.—Ward v. Atlantic Coast Line R. Co., 80 S.Ct. 789, 362 U.S. 396, 4 L.Ed.2d 820.

Error held prejudicial

U.S.—Basista v. Weir, C.A.Pa., 340 F.2d 74—Gulf, C. & S.F. Ry. Co. v. McClelland, C.A.Tex., 355 F.2d 196.

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77.5. U.S.—Mittlieder v. Chicago & N.W. Ry. Co., C.A.Neb., 413 F.2d 77, app. after remand 441 F.2d 52—Haskins v. Point Towing Co., C.A.Pa., 421 F.2d 532, cert. den. 91 S.Ct. 68, 400 U.S. 834, 27 L.Ed.2d 66—Rivera v. Farrell Lines, Inc., C.A. N.Y., 474 F.2d 255, cert. den. 94 S.Ct. 122, 414 U.S. 822, 38 L.Ed.2d 55—Thomas v. E. J. Korvette, Inc., C.A.Pa., 476 F.2d 471—Cann v. Ford Motor Co., C.A.N.Y., 658 F.2d 54, cert. den. 102 S.Ct. 2036, 456 U.S. 960, 72 L.Ed.2d 484.

Particular errors

(1) D.C.—District of Columbia v. Nordstrom, C.A., 327 F.2d 863, 117 U.S.App.D.C. 165.

(2) U.S.—Albergo v. Reading Co., C.A.Pa., 372 F.2d 83, cert. den. 87 S.Ct. 1284, 386 U.S. 983, 18 L.Ed.2d 232.

(3) Submission of issue of contributory negligence where no evidence to support defense.

U.S.—Bern v. Evans, C.A.Neb., 349 F.2d 282.

78. U.S.—Bain v. New York Cent. R.R., C.A.N.Y., 342 F.2d 801.

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79. U.S.—Sanders v. Buchanan, C.A.Colo., 407 F.2d 161—Nordmann v. National Hotel Co., C.A.La., 425 F.2d 1103—Womble v. J. C. Penney Co., C.A.Tenn., 431 F.2d 985.

Error held prejudicial

U.S.—Petrole v. George A. Fetter, Inc., C.A.Pa., 411 F.2d 5—Weinell v. McKeesport Connecting R. Co., C.A.Pa., 411 F.2d 510.

80. U.S.—Odekirk v. Sears Roebuck & Co., C.A.Ill., 274 F.2d 441, cert. den. 80 S.Ct. 1060, 362 U.S. 974, 4 L.Ed.2d 1011—Doyle v. Nels Johnson Const. Co., C.A.Wis., 382 F.2d 735—Almendarez v. Atchison, T. & S.F. Ry. Co., C.A.Tex., 426 F.2d 1095.

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U.S.—Louisiana & A. Ry. Co. v. Hughes, C.A.Tex., 374 F.2d 106—Dicks v. Cleaver, C.A.Miss., 433 F.2d 248.

81. U.S.—Cupples v. Transport Ins. Co., C.A.Tex., 498 F.2d 1091—Empire Transport, Inc. v. U.S., 524 F.2d 1—Garris v. Rowland, C.A.Tex., 678 F.2d 1264, cert. den. 103 S.Ct. 143, 459 U.S. 864, 74 L.Ed.2d 121.

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81.5. U.S.—Douglas v. Brown, C.A.Mass., 358 F.2d 711—Royal Netherlands S.S. Co. v. Strachan Shipping Co., C.A.Tex., 362 F.2d 691, cert. den. 87 S.Ct. 708, 710, 385 U.S. 1004, 17 L.Ed.2d 543—Telex Corp. v. Balch, C.A.Minn., 382 F.2d 211—Barr Rubber Products Co. v. Sun Rubber Co., C.A.N.Y., 425 F.2d 1114, cert. den. 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed.2d 115.

81.10. U.S.—Huard-Steinheiser, Inc. v. Henry, C.A. Mich., 280 F.2d 79—Kokomo Opalescent Glass Co. v. Arthur W. Schmid Intern., Inc., C.A.Ind., 371 F.2d 208.

81.15. U.S.—Dopp v. Franklin Nat. Bank, C.A.N.Y., 461 F.2d 873, on remand 374 F.Supp. 904—Finney v. Arkansas Bd. of Correction, C.A.Ark., 505 F.2d 194, on remand, D.C., 410 F.Supp. 251, affd. 548 F.2d 740, affd. 98 S.Ct. 2565, 437 U.S. 678, 57 L.Ed.2d 522, reh. den. 99 S.Ct. 1035, 439 U.S. 1122, 59 L.Ed.2d 83.

82. U.S.—Diaz v. Southern Drilling Corp., C.A.Tex., 427 F.2d 1118, cert. den. 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed.2d 115, reh. den. 91 S.Ct. 580, 400 U.S. 1025, 27 L.Ed.2d 638.

Error held prejudicial

U.S.—Wilson v. Moore & Associates, Inc., C.A.Hawaii, 564 F.2d 366.

82.5. U.S.—Pierce v. New York Cent. R. Co., C.A. Mich., 409 F.2d 1392, on remand, D.C., 304 F.Supp. 44.

82.10. U.S.—Parker v. Columbia Broadcasting System, Inc., C.A.N.Y., 331 F.2d 297—North Texas Producers Ass'n v. Metzger Dairies, Inc., C.A. Tex., 348 F.2d 189, cert. den. 86 S.Ct. 545, 382 U.S. 977, 15 L.Ed.2d 468.

82.15. U.S.—Fender v. General Elec. Co., C.A.N.C., 380 F.2d 150—Owens v. White, C.A.Idaho, 380 F.2d 310—Foster v. New York Cent. System, C.A.Ind., 402 F.2d 312—Ikerd v. Lapworth, C.A. Ind., 435 F.2d 197.

Error held prejudicial

U.S.—Wilshire Medical Properties, Inc. v. U.S., C.A. Cal., 314 F.2d 333—Weber v. Schlemmer, C.A. Ohio, 365 F.2d 323—Rachal v. Hill, C.A.Tex., 435 F.2d 59, cert. den. 91 S.Ct. 2203, 403 U.S. 904, 29 L.Ed.2d 680.

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83. U.S.—Hopkins v. Wasson, C.A.Tenn., 329 F.2d 67, cert. den. 85 S.Ct. 102, 379 U.S. 854, 13 L.Ed.2d 57.

Motion for new trial

U.S.—Schutter Candy Co. v. Stein Bros. Paper Box Co., C.A.Ill., 371 F.2d 340.

Insufficient record held reversible error

U.S.—Calhoun v. U.S., C.A.Miss., 384 F.2d 180, app. after remand 473 F.2d 1389, reh. den. 475 F.2d 1404, cert. den. 94 S.Ct. 448, 414 U.S. 1024, 38 L.Ed.2d 315.

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84. U.S.—Magnuson v. Fairmont Foods Co., C.A. Wis., 442 F.2d 95—L & S Enterprises Co. v. Great Am. Ins. Co., C.A.Ill., 454 F.2d 457—Clinton v. Ingram Corp., C.A.Miss., 455 F.2d 741, cert. den. 93 S.Ct. 333, 409 U.S. 990, 34 L.Ed.2d 257—Osguthorpe v. Anschutz Land & Livestock Co., C.A. Utah, 456 F.2d 996—U.S. v. Christie Industries, Inc., C.A.N.J., 465 F.2d 1002—Olin Corp. v. Central Industries, Inc., C.A.Miss., 576 F.2d 642—Hallberg v. Brasher, C.A.Mo., 679 F.2d 751.

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84.5. U.S.—Vannoy v. Chicago, B. & Q.R. Co., C.A. Mont., 462 F.2d 186—Citizens State Bank v. Penn Cent. Transp. Co., C.A.Ind., 463 F.2d 611—Young v. Taylor, C.A.Utah, 466 F.2d 1329—Noto v. Pico Peak Corp., C.A.Vt., 469 F.2d 358—Hyde v. Land-of-Sky Regional Council, C.A.N.C., 572 F.2d 988—Sikes v. McGraw-Edison Co., C.A. Tex., 665 F.2d 731, reh. den. 671 F.2d 150, cert. den. 102 S.Ct. 3488, 458 U.S. 1108, 73 L.Ed.2d 1369.

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84.10. U.S.—Maryland Cas. Co. v. Dondlinger & Sons Const. Co., C.A.Mo., 420 F.2d 1368—Wright v. Marzo, C.A.Utah, 427 F.2d 907—Clinton v. Ingram Corp., C.A.Miss., 455 F.2d 741, cert. den. 93 S.Ct. 333, 409 U.S. 990, 34 L.Ed.2d 257—Baynum v. Chesapeake & O. Ry. Co., C.A.Ohio, 456 F.2d 658—Gantt v. Mobil Chemical Co., C.A. Tex., 463 F.2d 691—Davis v. Partenreederei M.S. Normannia, C.A.Cal., 657 F.2d 1048.

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U.S.—Gibson v. Erie-Lackawanna R. Co., C.A.Ohio, 378 F.2d 476.

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U.S.—Brents v. Freeman's Oil Field Service, Inc., C.A. La., 448 F.2d 601.

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D.C.—Trueworthy v. Gelman Const. Co., C.A., 455 F.2d 1377, 147 U.S.App.D.C. 309.

84.15. U.S.—Lamb Enterprises, Inc. v. Toledo Blade Co., C.A.Ohio, 461 F.2d 506, cert. den. 93 S.Ct. 325, 409 U.S. 1001, 34 L.Ed.2d 262—Chavis v. Finnlines Ltd., O/Y, C.A.Va., 576 F.2d 1072—Zrust v. Spencer Foods, Inc., C.A.Neb., 667 F.2d 760.

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84.25. U.S.—Jones v. Goodlove, C.A.Iowa, 334 F.2d 90—Hallberg v. Brasher, C.A.Mo., 679 F.2d 751.

85. U.S.—Industrial Development Bd. of Town of Section, Ala. v. Fuqua Industries, Inc., 523 F.2d 1226—Wilson v. Burlington Northern, Inc., C.A. Neb., 670 F.2d 780, cert. den. 102 S.Ct. 2934, 457 U.S. 1120, 73 L.Ed.2d 1333.

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(3) U.S.—Chicago, R.I. & P.R. Co. v. Speth, C.A. Neb., 404 F.2d 291.

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87. U.S.—Emery v. Northern Pac. R. Co., C.A.N.D., 370 F.2d 1009, app. after remand 407 F.2d 109—Sanderlin v. Martin, C.A.Va., 373 F.2d 447—Paluch v. Erie Lackawanna R. Co., C.A.N.J., 387 F.2d 996.

88. U.S.—Employers' Liability Assur. Corp. v. Butler, C.A.La., 318 F.2d 67.

89. U.S.—Horne v. Georgia S. & F. Ry. Co., C.A. Fla., 421 F.2d 975—DeLaughter v. Borden Co., C.A.La., 431 F.2d 1354—Toyomenka, Inc. v. Mount Hope Finishing Co., C.A.N.C., 432 F.2d 722—Austin v. Loftsgaarden, C.A.Minn., 675 F.2d 168, app. after remand 768 F.2d 949, cert. gr. 106 S.Ct. 379, 88 L.Ed.2d 333.

Case justifying directed verdict

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90. U.S.—Taylor v. National Trailer Convoy, Inc., C.A.Okl., 433 F.2d 569.

91. U.S.—Green v. Sanitary Scale Co., C.A.Pa., 431 F.2d 371—Hopkins v. Metcalf, C.A.Okl., 435 F.2d 123—Harrison v. Prather, C.A.Miss., 435 F.2d 1168, cert. den. 92 S.Ct. 67, 404 U.S. 829, 30 L.Ed.2d 58, reh. den. 92 S.Ct. 306, 404 U.S. 960, 30 L.Ed.2d 278—Hallberg v. Brasher, C.A.Mo., 679 F.2d 751.

D.C.—Piatek v. Government Services, Inc., C.A., 296 F.2d 430, 111 U.S.App.D.C. 308.

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U.S.—Spryszynatyk v. General Motors Corp., C.A. N.D., 771 F.2d 1112.

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92. U.S.—Rogers v. Mascari, C.A.Tenn., 455 F.2d 963—Gumsey v. Crawford, C.A.Ohio, 679 F.2d 666, cert. den. 103 S.Ct. 307, 459 U.S. 973, 71 L.Ed.2d 287.

Pruett v. Everett Lowrance, Inc., D.C.Tenn., 314 F.Supp. 282.

Error held harmless

(1) U.S.—Campbell v. Barnett, C.A.N.M., 351 F.2d 342.

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U.S.—Quadrino v. S.S. Thereon, C.A.N.Y., 436 F.2d 959.

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92.5. U.S.—McGuire v. Davis, C.A.Ga., 437 F.2d 570—Roberts v. Hollocher, C.A.Mo., 664 F.2d 200.

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92.50. U.S.—Douglas Equipment, Inc. v. Mack Trucks, Inc., C.A.Ill., 471 F.2d 222—Abdel v. U.S., C.A.Ill., 670 F.2d 73.

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93. U.S.—Gilliam v. City of Omaha, 524 F.2d 1013—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

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Error held prejudicial

(1) U.S.—Haddigan v. Harkins, C.A.Pa., 441 F.2d 844.

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93.5. U.S.—Steinberg v. Indemnity Ins. Co. of North America, C.A.La., 364 F.2d 266—Martin v. Travelers Indem. Co., C.A.Miss., 450 F.2d 542.

93.10. U.S.—Huff v. N. D. Cass Co. of Ala., C.A. Ala., 468 F.2d 172, reh. 485 F.2d 710.

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93.15. U.S.—Barr Rubber Products Co. v. Sun Rubber Co., C.A.N.Y., 425 F.2d 1114, cert. den. 91 S.Ct. 118, 400 U.S. 878, 27 L.Ed.2d 115.

93.20. U.S.—Campbell v. Barnett, C.A.N.M. 351 F.2d 342.

93.25. U.S.—Natta v. Zletz, C.A.Ill., 379 F.2d 615—Spurr v. LaSalle Const. Co., C.A.Ill., 385 F.2d 322.

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U.S.—Robie v. Ofgant, C.A.Mass., 306 F.2d 656.

93.30. U.S.—Ulmer v. Hartford Acc. & Indem. Co., C.A.La., 380 F.2d 549—Spurr v. LaSalle Const. Co., C.A.Ill., 385 F.2d 322.

95. U.S.—Lehrman v. Gulf Oil Corp., C.A.Tex., 500 F.2d 659, reh. den. 503 F.2d 1403, cert. den. 95 S.Ct. 1128, 420 U.S. 929, 43 L.Ed.2d 400—In re King Enterprises, C.A.Ark., 678 F.2d 73.

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95.10. U.S.—Cohen v. Western Hotels, Inc., C.A. Cal., 276 F.2d 26—Eckis v. Graver Tank & Mfg. Co., C.A.Or., 289 F.2d 335—Tropea v. Shell Oil Co., C.A.N.Y., 307 F.2d 757—Joynor v. Berman Leasing Co., C.A.Tex., 398 F.2d 875—University Computing Co. v. Lykes-Youngstown Corp., C.A. Ga., 504 F.2d 518, reh. den. 505 F.2d 1304.

Harmless

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U.S.—Burger Chef Systems, Inc. v. Govro, C.A.Mo., 407 F.2d 921.

Prejudicial

U.S.—Berguido v. Eastern Air Lines, Inc., C.A.Pa., 317 F.2d 628, cert. den. 84 S.Ct. 170, 375 U.S. 895, 11 L.Ed.2d 124—Ozark Air Lines, Inc. v. Larimer, C.A.Iowa, 352 F.2d 9.

96. U.S.—Allstate Ins. Co. v. Winnemore, C.A.Fla., 413 F.2d 858—Brody v. Aetna Cas. & Sur. Co., C.A.La., 438 F.2d 1148, cert. den. 92 S.Ct. 273, 404 U.S. 940, 30 L.Ed.2d 253.

Similar statements

U.S.—Breeding v. Massey, C.A.Ark., 378 F.2d 171—Severi v. Seneca Coal & Iron Corp., C.A.N.Y., 381 F.2d 482.

96.5. U.S.—Hamilton v. Chaffin, C.A.Miss., 506 F.2d 904.

Peterson v. Calmar S.S. Corp., D.C.Pa., 296 F.Supp. 8.

Error not cured

U.S.—E. L. Cheeney Co. v. Gates, C.A.Tex., 346 F.2d 197.

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96.10. U.S.—Gerhart v. Henry Disston & Sons, Inc., C.A.Pa., 290 F.2d 778—Lieberman v. Gulf Oil Corp., C.A.N.Y., 331 F.2d 160.

96.15. U.S.—Gilam v. J. C. Penney Co., C.A.Ind., 341 F.2d 457.

96.20. U.S.—Ellis v. Capps, C.A.Ala., 500 F.2d 225.

96.25. U.S.—Gillette Dairy, Inc. v. Hydrotex Industries, Inc., C.A.Neb., 440 F.2d 969.

D.C.—General Motors Acceptance Corp. v. Froelich, C.A., 273 F.2d 92, 106 U.S.App.D.C. 357.

96.30. U.S.—Trade Development Bank v. Continental Ins. Co., C.A.N.Y., 469 F.2d 35.

Admission held erroneous

U.S.—Rexall Drug Co. v. Nihill, C.A.Cal., 276 F.2d 637, 79 A.L.R.2d 419—Salsman v. Witt, C.A.Okl., 466 F.2d 76.

97. U.S.—Kennedy v. Delaware Leasing & Rental Corp., C.A.Mich., 441 F.2d 562.

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U.S.—Mullins v. Seals, C.A.Vt., 562 F.2d 326.

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98. U.S.—Pursche v. Atlas Scraper & Engineering Co., C.A.Cal., 300 F.2d 467, cert. den. 83 S.Ct. 251, 371 U.S. 911, 9 L.Ed.2d 170, reh. den. 83

S.Ct. 499, 371 U.S. 959, 9 L.Ed.2d 507—Joseph A. Bass Co. v. U.S., to Use of Peter Kiewit Sons' Co., C.A.N.D., 340 F.2d 842—Holt v. Sarver, C.A. Ark., 442 F.2d 304, on remand, D.C., 363 F.Supp. 194, revd. on oth. grds. 505 F.2d 194, on remand 410 F.Supp. 251, affd. 548 F.2d 740—Plummer v. Western Intern. Hotels Co., Inc., C.A.Or., 656 F.2d 502.

D.C.—U.S. v. I. C. C., D.C., 221 F.Supp. 584.

Judgment otherwise supported

(1) U.S.—Willmark Service System, Inc. v. Wirtz, C.A.Minn., 317 F.2d 486, cert. den. 84 S.Ct. 170, 375 U.S. 897, 11 L.Ed.2d 125—Caldwell v. Craighead, C.A. Tenn., 432 F.2d 213, cert. den. 91 S.Ct. 1617, 402 U.S. 953, 29 L.Ed.2d 123.

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99. U.S.—Higgs v. Grissom, C.A.Tenn., 455 F.2d 951—U.S. v. 1,253.14 Acres of Land, More or Less, in Jefferson and Douglas Counties, State of Colo., C.A.Ohio, 455 F.2d 1177—Plummer v. Western Intern. Hotels Co., Inc., C.A.Or., 656 F.2d 502.

By other evidence

U.S.—Smith v. Travelers Ins. Co., C.A.Tenn., 438 F.2d 373, cert. den. 92 S.Ct. 79, 404 U.S. 832, 30 L.Ed.2d 62.

1. U.S.—Eisenhauer v. Burger, C.A.Ohio, 431 F.2d 833.

Error held cured

(2) U.S.—Haddigan v. Harkins, C.A.Pa., 441 F.2d 844.

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3. U.S.—Martin v. Travelers Indem. Co., C.A.Miss., 450 F.2d 542.

Error held not cured

(1) U.S.—Page v. St. Louis Southwestern Ry. Co., C.A.Tex., 349 F.2d 820—Sprynczynatyk v. General Motors Corp., C.A.N.D., 771 F.2d 1112.

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4. U.S.—Charles Stores, Inc. v. Aetna Ins. Co., C.A. Miss., 428 F.2d 989, on remand D.C., 327 F.Supp. 525, app. after remand 490 F.2d 64—LaCombe v. A-T-O, Inc., C.A.La., 679 F.2d 431.

4.5. U.S.—Lizza & Sons, Inc. v. D'Onfro, C.A.Mass., 282 F.2d 175—B. F. Goodrich Tire Co. v. Lyster, C.A.Ala., 328 F.2d 411—Prater v. Sears, Roebuck & Co., C.A.Ohio, 372 F.2d 447.

5. U.S.—Fortunato v. Ford Motor Co., C.A.N.Y., 464 F.2d 962, cert. den. 93 S.Ct. 517, 409 U.S. 1038, 34 L.Ed.2d 487—Jackson v. Chevron Chemical Co., C.A.Miss., 679 F.2d 463.

Where error cured by finding

U.S.—Gould v. Aronson, C.A.Mont., 291 F.2d 21.

5.5. U.S.—Redding v. Picard Motor Sales, Inc., C.A. R.I., 403 F.2d 788.

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5.5. U.S.—O'Neal v. Morgan, C.A.N.Y., 637 F.2d 846, cert. den. 101 S.Ct. 2050, 451 U.S. 972, 68 L.Ed.2d 351.

5.10. U.S.—Rundle v. Grubb Motor Lines, Inc., C.A. N.C., 300 F.2d 333—Russell v. Page Aircraft Maintenance, Inc., C.A.Ala., 455 F.2d 188—Bassett Furniture Industries of North Carolina, Inc. v. NVF Co., C.A.Ga., 576 F.2d 1084, am. on oth. grds. and reh. den. 583 F.2d 778.

D.C.—Gerber v. Columbia Palace Corp., Mun.App., 183 A.2d 398.

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5.15. U.S.—Gilliam v. City of Omaha, 524 F.2d 1013.

5.25. U.S.—Johnson v. Hill, C.A.N.D., 274 F.2d 110.

6. U.S.—U.S. for Use and Benefit of D'Agostino Excavators, Inc. v. Heyward-Robinson Co., C.A. Conn., 430 F.2d 1077, cert. den. 91 S.Ct. 582, 400 U.S. 1021, 27 L.Ed.2d 632.

Appellant not entitled to favorable decision in any event

U.S.—Gorham & Johnson, Inc. v. Chrysler Corp., C.A. Tex., 308 F.2d 462, cert. den. 83 S.Ct. 725, 372 U.S. 912, 9 L.Ed.2d 719.

7. U.S.—Johnston v. Baker, C.A.Virgin Islands, 445 F.2d 424—Oberst v. International Harvester Co., Inc., C.A.Ill., 640 F.2d 863—Petrocelli v. Gallison, C.A.Mass., 679 F.2d 286.

D.C.—Butler v. District of Columbia, C.A., 417 F.2d 1150, 135 U.S.App.D.C. 203.

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8. U.S.—Miley v. Delta Marine Drilling Co., C.A.La., 473 F.2d 856, reh. den. 472 F.2d 1405, cert. den. 94 S.Ct. 93, 414 U.S. 871, 38 L.Ed.2d 89.

D.C.—Gager v. Bob Seidel, C.A., 320 F.2d 776, 116 U.S.App.D.C. 54, cert. den. 84 S.Ct. 356, 375 U.S. 947, 11 L.Ed.2d 277—Williams v. Rawlings Truck Line, Inc., C.A., 357 F.2d 581, 123 U.S.App.D.C. 121.

8.5. U.S.—Colonial Refrigerated Transp., Inc. v. Mitchell, C.A.Tex., 403 F.2d 541.

D.C.—Raza v. Sullivan, C.A., 432 F.2d 617, 139 U.S. App.D.C. 184, cert. den. 91 S.Ct. 458, 400 U.S. 992, 27 L.Ed.2d 440.

§ 297(79). —— Witnesses

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8.50. U.S.—Boulter v. Chesapeake & O.R. Co., C.A. Mich., 442 F.2d 335—Glick v. White Motor Co., C.A.Pa., 458 F.2d 1287—Collins v. Penn Central Transp. Co., C.A.N.Y., 497 F.2d 1296—Collins By and Through Kay v. Seaboard Coast Line R. Co., C.A.Ga., 675 F.2d 1185.

D.C.—W.M. & A. Transit Co. v. Radecka, C.A., 302 F.2d 921, 112 U.S.App.D.C. 336—Engle v. Stull, C.A., 377 F.2d 930, 126 U.S.App.D.C. 291—Canterbury v. Spence, C.A., 464 F.2d 772, 150 U.S. App.D.C., 263, cert. den. 93 S.Ct. 560, 409 U.S. 1064, 34 L.Ed.2d 518.

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8.55. U.S.—Brangier v. Rosenthal, C.A.Hawaii, 337 F.2d 952—Ellis v. City of Chicago, C.A.Ill., 667 F.2d 606.

Hypothetical questions

U.S.—Bosse v. Ideco Division of Dresser Industries, Inc., C.A.Okl., 412 F.2d 567.

8.60. U.S.—Black v. Penn Central Co., C.A.Ohio, 507 F.2d 269—Ellis v. City of Chicago, C.A.Ill., 667 F.2d 606.

D.C.—Phillips v. Kitt, C.A., 290 F.2d 377, 110 U.S. App.D.C. 186.

Error held prejudicial

U.S.—Rice v. Louisville & N.R. Co., C.A.Ky., 309 F.2d 930—Union Auto. Indem. Ass'n v. Capitol Indem. Ins. Co., C.A.Ind., 310 F.2d 318—Pierson v. Ray, C.A.Miss., 352 F.2d 213, affd. in part and revd. in part on oth. grds. 87 S.Ct. 1213, 386 U.S. 547, 18 L.Ed.2d 288—Mahon v. Reading Co., C.A.Pa., 367 F.2d 25—Wiseman v. Reposa, C.A.R.I., 463 F.2d 226.

D.C.—Pulvari v. Greyhound Corp., C.A., 375 F.2d 322, 126 U.S.App.D.C. 146.

8.65. U.S.—American Airlines, Inc. v. U.S., C.A. Tex., 418 F.2d 180—Walther v. Pueblo Supermarket of St. Thomas, Inc., C.A.Virgin Islands, 433 F.2d 935.

8.70. U.S.—Dickinson Supply, Inc. v. Montana-Dakota Utilities Co., C.A.N.D., 423 F.2d 106—Howard v. Gonzales, C.A.Tex., 658 F.2d 352.

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8.75. U.S.—Gray v. L. J. Navy Trucking Co., Inc., C.A.Ohio, 475 F.2d 545—Josephs v. Harris Corp., C.A.Pa. 677 F.2d 985.

D.C.—Abrams v. Gordon, C.A., 276 F.2d 500, 107 U.S.App.D.C. 254.

Exclusion of competent impeaching testimony

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§ 297(80). Error Waived in Appellate Court

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9. U.S.—Donovan v. Wilson Sporting Goods Co., C.A.Mass., 285 F.2d 714.

§ 297(81). —— Implied Waiver

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11. U.S.—Brown v. Sielaff, C.A.Pa., 474 F.2d 826—Hupp v. Gray, C.A.Ill., 500 F.2d 993—Hilton v. Mumaw, C.A.Wash., 522 F.2d 588.

Smallwood v. Warden, Md. Penitentiary, D.C. Md., 205 F.Supp. 325.

D.C.—In re Search Warrant Dated July 4, 1977, for Premises at 2125 S St., Northwest, Washington, D.C., C.A., 667 F.2d 117, 215 U.S.App.D.C. 74, cert. den. 102 S.Ct. 1971, 456 U.S. 926, 72 L.Ed.2d 441.

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12. U.S.—Aetna Cas. & Sur. Co. v. U.S., C.A.Tex., 435 F.2d 1082.

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U.S.—Dower v. United Air Lines, Inc., C.A.Cal., 329 F.2d 684—Earle R. Hanson and Associates v. Farmers Co-op. Creamery Co. of Clear Lake, Wis., C.A.Minn., 403 F.2d 65.

13. U.S.—Moore v. Midgette, C.A.N.C., 375 F.2d 608—Deane Hill Country Club, Inc. v. City of Knoxville, C.A.Tenn., 379 F.2d 321, cert. den. 88 S.Ct. 476, 389 U.S. 975, 19 L.Ed.2d 467—Kletschka v. Driver, C.A.N.Y., 411 F.2d 436.

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15. Contention

U.S.—Mid-Southern Foundation v. C. I. R., C.A., 262 F.2d 134, cert. den. 79 S.Ct. 1120, 359 U.S. 991, 3 L.Ed.2d 979.

15.5. U.S.—Harris v. Smith, C.A.Neb., 372 F.2d 806—Platis v. U.S., C.A.Utah, 409 F.2d 1009.

20. Excessiveness of verdict

U.S.—Keaton v. Atchison, T. & S.F. Ry. Co., C.A.Ill., 321 F.2d 317.

§ 297(82). Decisions of Intermediate Courts

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23. U.S.—Bendix Corp. v. Balax, Inc., C.A.Wis., 471 F.2d 149, cert. den. 94 S.Ct. 43, 414 U.S. 819, 38 L.Ed.2d 51.

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26.5. U.S.—Duarte v. Bank of Hawaii, C.A.Hawaii, 287 F.2d 51, cert. den. 81 S.Ct. 1938, 366 U.S. 972, 6 L.Ed.2d 1261.

§ 297(83). Subsequent Appeals

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27.50. U.S.—Lumbermen's Mut. Cas. Co. v. Wright, C.A.La., 322 F.2d 759—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den.

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581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3515.

28. U.S.—Spock v. David, C.A.N.J., 502 F.2d 953, revd. on oth. grds. 96 S.Ct. 1211, 424 U.S. 828, 47 L.Ed.2d 505—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3515—Eubank Heights Apartments, Ltd. v. Lebow, C.A. Mass., 669 F.2d 20.

D.C.—Scholl v. District of Columbia, C.A., 331 F.2d 1018, 118 U.S.App.D.C. 98—D.C. Federation of Civic Associations v. Volpe, C.A., 459 F.2d 1231, 148 U.S.App.D.C 207, cert. den. 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489, app. after remand 520 F.2d 451, 172 U.S.App.D.C. 51, on remand D.C., 71 F.R.D. 206.

Prior decision of Court of Appeals sitting en banc

U.S.—Terrell v. Household Goods Carriers' Bureau, C.A.Tex., 494 F.2d 16, reh. den. 496 F.2d 878, cert. dism. 95 S.Ct. 246, 419 U.S. 987, 42 L.Ed.2d 260.

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31. U.S.—Smith v. Pittsburgh Gage & Supply Co., C.A.Pa., 464 F.2d 870.

Claim for attorney's lien

U.S.—Fleming v. Lake Delton Development Co., C.A. Wis., 267 F.2d 254, cert. den. 80 S.Ct. 153, 361 U.S. 882, 4 L.Ed.2d 118.

32. U.S.—Zdanok v. Glidden Co., Durkee Famous Foods Division, C.A.N.Y., 327 F.2d 944, cert. den. 84 S.Ct. 1338, 377 U.S. 934, 12 L.Ed.2d 298.

33. U.S.—De Nafo v. Finch, C.A.N.J., 436 F.2d 737—Hawkes v. Internal Revenue Service, C.A.Tenn., 507 F.2d 481.

35. U.S.—DePinto v. Landoe, C.A.Ariz., 411 F.2d 297.

Preliminary injunction

D.C.—Berrigan v. Sigler, C.A., 499 F.2d 514, 162 U.S. App.D.C. 378.

36. U.S.—Alexander v. Nash-Kelvinator Corp., C.A. N.Y., 271 F.2d 524.

39. U.S.—Lincoln Nat. Life Ins. Co. v. Roosth, C.A. Tex., 306 F.2d 110, cert. den. 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720—U.S. v. Ramsey, C.A. Miss., 353 F.2d 650.

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40. U.S.—Emery v. Northern Pac. R. Co., C.A.N.D., 407 F.2d 109—Manning v. M/V "Sea Road", C.A.Fla., 417 F.2d 603—Prop-Jets, Inc. v. Chandler, C.A.Okl., 575 F.2d 1322.

Change in state rule

(1) U.S.—Chicago, R.I. & P.R. Co. v. Hugh Breeding, Inc., C.A.Okl., 247 F.2d 217, cert. dism. 78 S.Ct. 138, 355 U.S. 880, 2 L.Ed.2d 107.

(2) Other instances.

U.S.—Connor v. New York Times Co., C.A.Ala., 310 F.2d 133—Maryland Cas. Co. v. Hallatt, C.A.Fla., 326 F.2d 275, cert. den. 84 S.Ct. 1335, 377 U.S. 932, 12 L.Ed.2d 296.

Intervening change in law by Supreme Court

U.S.—Page v. St. Louis Southwestern Ry. Co., C.A. Tex., 349 F.2d 820.

40.5. U.S.—Archer-Daniels-Midland Co. v. Paull, D.C.Ark., 199 F.Supp. 319. Affd., C.A., 313 F.2d 612—Lumbermen's Mut. Cas. Co. v. Wright, C.A. La., 322 F.2d 759.

40.10. U.S.—Lehrman v. Gulf Oil Corp., C.A.Tex., 500 F.2d 659, reh. den. 503 F.2d 1403, cert. den. 95 S.Ct. 1128, 420 U.S. 929, 43 L.Ed.2d 400.

41. U.S.—Eubank Heights Apartments, Ltd. v. Lebow, C.A.Mass., 669 F.2d 20.

D.C.—Laffey v. Northwest Airlines, Inc., C.A., 642 F.2d 578, 206 U.S.App.D.C. 173.

42.5. U.S.—Crown Coat Front Co. v. U.S., C.A.N.Y., 395 F.2d 160, cert. den. 89 S.Ct. 123, 393 U.S. 853, 21 L.Ed.2d 122—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, cert. dism. 104 S.Ct. 3526.

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44. U.S.—Raxton Corp. v. Anania Associates, Inc., C.A.Mass., 668 F.2d 622.

50. U.S.—C.J.S. cited in Calhoun v. Bernard, C.A. Cal., 359 F.2d 400, 401—Phillips v. Osborne, C.A. Wash., 444 F.2d 778—Webb v. Standard Oil Co., C.A.Ga., 451 F.2d 284.

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51. U.S.—Consumers Union of U.S., Inc. v. Veterans Administration, C.A.N.Y., 436 F.2d 1363—Ney v. State of Cal., C.A.Cal., 439 F.2d 1285.

52. U.S.—Sticker Indus. Supply Corp. v. Blaw-Knox Co., C.A.Ill., 405 F.2d 90.

53. U.S.—Alexander v. Nash-Kelvinator Corp., C.A. N.Y., 271 F.2d 524.

56. U.S.—Romero v. Garcia & Diaz., Inc., C.A.N.Y., 286 F.2d 347, cert. den. 81 S.Ct. 905, 365 U.S. 869, 5 L.Ed.2d 860—U.S. v. Stanton, C.A.N.Y., 287 F.2d 876.

57. U.S.—Hermann v. Brownell, C.A.Idaho, 274 F.2d 842—Union Carbide Corp. v. Goett, C.A.W.Va., 278 F.2d 319, cert. den. 81 S.Ct. 64, 364 U.S. 826, 5 L.Ed.2d 55.

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64. Decision affirming court rejection of settlement

U.S.—Breault v. Feigenholtz, C.A.Ill., 380 F.2d 90, cert. den. 88 S.Ct. 591, 389 U.S. 1014, 19 L.Ed.2d 660.

68. U.S.—Prudential Ins. Co. of America v. Morrow, C.A.Tex., 368 F.2d 813.

70. U.S.—Petition of U.S., C.A.Mass., 418 F.2d 264.

71. Measure of damages

U.S.—Lehrman v. Gulf Oil Corp., C.A.Tex., 500 F.2d 659, reh. den. 503 F.2d 1403, cert. den. 95 S.Ct. 1128, 420 U.S. 929, 43 L.Ed.2d 400.

72. D.C.—Fisher v. North Branch Products, Inc., C.A., 312 F.2d 880, 114 U.S.App.D.C. 153, cert. den. 83 S.Ct. 1302, 373 U.S. 913, 10 L.Ed.2d 413.

73. U.S.—Dragor Shipping Corp. v. Union Tank Car Co., C.A.Ariz., 378 F.2d 241.

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75. U.S.—Foster v. City of Detroit, Mich., C.A.Mich., 405 F.2d 138, motion den. 423 F.2d 660.

79. Exception inapplicable where issue not left open by prior appeal

U.S.—National Airlines, Inc. v. International Ass'n of Machinists and Aerospace Workers, C.A.Fla., 430 F.2d 957, cert. den. 91 S.Ct. 456, 400 U.S. 992, 27 L.Ed.2d 440, app. after remand, C.A., 478 F.2d 1062.

81. U.S.—Lincoln Nat. Life Ins. Co. v. Roosth, C.A. Tex., 306 F.2d 110, cert. den. 83 S.Ct. 726, 372 U.S. 912, 9 L.Ed.2d 720—Green v. Paltimore & O.R. Co., C.A.Ohio, 337 F.2d 673.

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50.50. U.S.—Legal Aid Soc. of Alameda County v. Brennan, C.A.Cal., 608 F.2d 1319, cert. den. 100 S.Ct. 3010, 447 U.S. 921, 65 L.Ed.2d 1112—Barnes v. U.S., C.A.Pa., 678 F.2d 10.

Hearing not denied

U.S.—Poss v. Ribicoff, C.A.N.Y., 289 F.2d 10, cert. den. 82 S.Ct. 178, 368 U.S. 902, 7 L.Ed.2d 96, reh. den. 82 S.Ct. 393, 368 U.S. 963, 7 L.Ed.2d 393.

Accelerated briefing and hearing

D.C.—Newell v. Ignatius, C.A., 407 F.2d 715, 132 U.S.App.D.C. 252.

In accordance with rules of court in the Fifth Circuit, placement of the case on the summary calendar for summary disposition of the appeal without oral argument is appropriate whenever the court concludes on the merits that the case is of such character as not to justify oral argument,[50.55] or where an appellant fails to file his brief within the time fixed by rules.[50.60]

A system of screening by a panel of judges is provided whereby, before a case goes on the summary calendar for disposition without argument, there must be unanimous action of the panel members; and in disposing of it, the decision must likewise be unanimous.[50.65]

50.55. U.S.—George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc., C.A.Fla., 502 F.2d 1045.

Further testimony serving no useful purpose

U.S.—Health v. Wainwright, C.A.Fla., 408 F.2d 1020.

Petitioner without counsel

U.S.—Markham v. Holt, C.A.Fla., 409 F.2d 542.

Matters relating to jurisdiction

U.S.—Louisiana State Bd. of Medical Examiners v. Howze, C.A.La., 445 F.2d 586.

Matters becoming moot

U.S.—Quevedo v. Collins, C.A.Tex., 414 F.2d 796—Green v. Hershey, C.A.Tex., 422 F.2d 1319—Calbillo v. San Jacinto Junior College, C.A.Tex., 446 F.2d 887.

Action dismissed as frivolous

U.S.—Willard v. U.S., C.A.Miss., 422 F.2d 810, cert. den. 90 S.Ct. 1714, 398 U.S. 913, 26 L.Ed.2d 76—Gallizzi v. Williams, C.A.Fla., 423 F.2d 1213—U.S. v. Stuart, C.A.La., 436 F.2d 580.

Habeas corpus proceedings

U.S.—Young v. State of Ala., C.A.Ala., 443 F.2d 854, cert. den. 92 S.Ct. 1202, 405 U.S. 976, 31 L.Ed.2d 251—Wilson v. Beto, C.A.Tex., 446 F.2d 1384.

Claims of seamen, longshoremen, or stevedores

U.S.—Stein v. Sea-Land Services, Inc., C.A.La., 440 F.2d 1181.

Members of armed forces and civilian employees

U.S.—Lawson v. Laird, C.A.Tex., 443 F.2d 617.

Bankruptcy matters

U.S.—In re Delta Food Processing Corp., C.A.Miss., 446 F.2d 437.

Deportation proceedings

U.S.—Glaros v. Immigration and Naturalization Service, C.A.Ga., 434 F.2d 685.

Matters relating to labor relations

U.S.—N.L.R.B. v. South Atlantic & Gulf Coast Dist. Intern. Longshoremen's Ass'n, AFL-CIO, C.A. Tex., 443 F.2d 218.

Miller Act proceedings

U.S.—U.S. for Use and Benefit of Harris Paint Co. v. Seaboard Sur. Co., C.A.Fla., 437 F.2d 37.

Matters relating to prisoners

U.S.—Cowan v. U.S., C.A.Tex., 445 F.2d 855.

Actions relating to railroads

U.S.—Taylor County Sand Co. v. Seaboard Coast Line R. Co., C.A.Ga., 446 F.2d 853.

School desegregation matters

U.S.—Wright v. Board of Public Instruction of Alachua County, Fla., C.A.Fla., 431 F.2d 1200.

Claims for social security benefits

U.S.—Cross v. Finch, C.A.Ga., 427 F.2d 406—King v. Finch, C.A.Tex., 428 F.2d 709—Brown v. Finch, C.A.Tex., 429 F.2d 80—Cooper v. Finch, C.A.Ala., 433 F.2d 315—Iglinsky v. Richardson, C.A.La., 433 F.2d 405—Richardson v. Richardson, C.A. Fla., 437 F.2d 109—Ratliff v. Richardson, C.A. Fla., 445 F.2d 440—Grant v. Richardson, C.A Tex., 445 F.2d 656.

Matters relating to taxes

U.S.—Jones v. C. I. R., C.A.Tex., 444 F.2d 508—Urban v. U.S., C.A.Tex., 445 F.2d 641, cert. den. 92 S.Ct. 675, 404 U.S. 1015, 30 L.Ed.2d 663—Dance Town, U.S.A., Inc. v. U.S., C.A.Tex., 446 F.2d 882—U.S. v. Firtel, C.A.Fla., 446 F.2d 1005.

Civil rights matters

U.S.—Schack v. Starr, C.A.Fla., 440 F.2d 378—Fluker v. Alabama State Bd. of Ed., C.A.Ala, 441 F.2d 201—McDaniel v. Jones, C.A.Tex., 447 F.2d 490, app. after remand 456 F.2d 1254.

Insurance matters

U.S.—Cumbest v. Phoenix of Hartford Ins. Co., C.A. Miss., 438 F.2d 1222—Kuklis v. United Services Auto. Ass'n, C.A.Fla., 442 F.2d 1045—Empire Life Ins. Co. of America v. Lorenz, C.A.Tex., 445 F.2d 293—Transit Cas. Co. v. Gator Systems, Inc., 445 F.2d 813.

Proceedings in nature of mandamus

U.S.—Lawrenson v. Blackwell, C.A.Ga., 443 F.2d 365.

Matters relating to forfeiture of property seized

U.S.—U.S. v. One Olivetti Underwood Elec. Adding Mach., C.A.Fla., 443 F.2d 372.

Matters relating to municipalities

U.S.—Shabarekh v. City of Miami, C.A.Fla., 443 F.2d 992.

Injunction proceedings

U.S.—Dawson v. Hillsborough County, Fla., School Bd., C.A.Fla., 445 F.2d 308.

Matters relating to government contracts

U.S.—Allen M. Campbell Co. General Contractors, Inc. v. Lloyd Wood Const. Co., C.A.Ala., 446 F.2d 261.

Matters relating to federal detainer

U.S.—Combs v. Carroll, C.A.Tex., 446 F.2d 893.

50.60. U.S.—Sanders v. U.S., C.A.Ga., 438 F.2d 918—U.S. ex rel. Arnold v. Faircloth, C.A.Fla., 441 F.2d 1157.

Matters relating to prisoners

U.S.—Wren v. Smith, C.A.Ga., 410 F.2d 390—Anderson v. Blackwell, C.A.Ga., 428 F.2d 879—Bryant v. Blackwell, C.A.Ga., 431 F.2d 1203—Saal v. U.S., C.A.Ga., 441 F.2d 272.

Habeas corpus proceedings

U.S.—Alligood v. Wainwright, C.A.Fla., 440 F.2d 642.

Members of armed forces and civilian employees

U.S.—Stanford v. U.S., C.A.Ala., 413 F.2d 1048.

50.65. U.S.—Murphy v. Houma Well Service, C.A. La., 409 F.2d 804, reh. den. 413 F.2d 509—Huth v. Southern Pac. Co., C.A.Tex., 417 F.2d 526.

As pointed out in N.L.R.B. v. Amalgamated Clothing Workers of America, AFL–CIO, Local 990, under Rules of the Court of Appeals of the Fifth Circuit, when the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.[50.70] On one or more of the factors delineated in this case numerous other cases in the Fifth Circuit have been placed on the summary calendar and decided without opinion.[50.75]

50.70. U.S.—N.L.R.B. v. Amalgamated Clothing Workers of America, AFL–CIO, Local 990, C.A. Ala., 430 F.2d 966—Gardner v. Crain, C.A.Ga., 443 F.2d 25—Vaughn v. Coppinger, C.A.Ala., 443 F.2d 71.

50.75. U.S.—U.S. v. Chandler, C.A.Miss., 449 F.2d 347—Frank v. Wilmath, C.A.Fla., 449 F.2d 351—Guajardo v. Beto, C.A.Tex., 449 F.2d 780—Williams v. U.S., C.A.Ga., 449 F.2d 781.

Screening procedures adopted by other circuits have been discussed.[50.80]

50.80. U.S.—In re Amendment of Rule 3, C.A.9, 440 F.2d 847.

51.5. U.S.—Terket v. Lund, C.A.Ill., 623 F.2d 29.

51.10. Priority granted in other instances

U.S.—Superior Oil Co. v. Udall, C.A., 409 F.2d 1115, 133 U.S.App.D.C. 198, motion den. 421 F.2d 1089, two cases, 137 U.S.App.D.C. 154.

The Federal Rules of Appellate Procedure provide that appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.[51.15]

51.15. F.R.A.P. Rule 3(b), 28 U.S.C.A.

52. U.S.—Alabama State Bd. of Ed. v. Dickey, C.A. Ala., 394 F.2d 490, on reinstatement of app. 402 F.2d 515—O'Quinn v. Neuman, C.A.La., 429 F.2d 1374.

Pending decision by state court

U.S.—Giguere v. U.S. Steel Corp., C.A.Ill., 262 F.2d 189, cert. den. 79 S.Ct. 1452, 360 U.S. 934, 3 L.Ed.2d 1545, reh. den. 80 S.Ct. 46, 361 U.S. 855, 4 L.Ed.2d 95.

(2) Other instances.

U.S.—Phillips v. Murchison, C.A.N.Y., 383 F.2d 370, cert. den. 88 S.Ct. 1050, 390 U.S. 958, 10 L.Ed.2d 1154.

54.5. U.S.—Hullom v. Burrows, C.A.Mich., 266 F.2d 547, cert. den. 80 S.Ct. 262, 361 U.S. 919, 4 L.Ed.2d 187.

D.C.—Weinberg v. Macy, C.A., 360 F.2d 816, 124 U.S.App.D.C. 1.

Sixth Amendment, etc.

U.S.—Hullom v. Burrows, 266 F.2d 547, cert den. 80 S.Ct. 262, 361 U.S. 919, 4 L.Ed.2d 187.

Counsel appointed under particular circumstances

U.S.—Drummond v. Fulton County Dept. of Family and Children's Services, C.A.Ga., 532 F.2d 1001.

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The Federal Rules of Appellate Procedure make provision with respect to oral argument.[57.5]

57.5. F.R.A.P. Rule 34, 28 U.S.C.A.

Prehearing conference. The Federal Rules of Appellate Procedure provide that the court may direct the attorneys for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in the disposition of the proceeding by the court.[58.1]

58.1. F.R.A.P. Rule 33, 28 U.S.C.A.

58.5. U.S.—U.S. v. Williams, C.A.Tex., 447 F.2d 1285, cert. den. 92 S.Ct. 1168, 405 U.S. 954, 31 L.Ed.2d 231, reh. den. 92 S.Ct. 1308, 405 U.S. 1048, 31 L.Ed.2d 591.

Oral arguments on preliminary motions ordinarily not granted

U.S.—Krakoff v. U.S., C.A.Ohio, 431 F.2d 847.

Permitting oral arguments discretionary

U.S.—Securities and Exchange Commission v. Texas Gulf Sulphur Co., C.A.N.Y., 446 F.2d 1301.

See F.R.A.P. Rule 35, 28 U.S.C.A.

58.25. D.C.—Edison Pharmaceutical Co., Inc. v. Food and Drug Administration, C.A., 517 F.2d 164, 170 U.S.App.D.C. 350.

Petition for hearing en banc denied

U.S.—U.S. v. Clay, C.A.Tex., 422 F.2d 1330.

§ 300(2). Rehearing

Library References

Federal Courts ⚬744.

59. D.C.—Washington Mobilization Committee v. Jefferson, C.A., 617 F.2d 848, 199 U.S.App.D.C. 266.

60. U.S.—Rumbaugh v. Winifrede R. Co., C.A.W. Va., 331 F.2d 530, cert. den. 85 S.Ct. 322, two cases, 379 U.S. 929, 13 L.Ed.2d 341—White v. Brown, C.A.Cal., 468 F.2d 301.

60.2. U.S.—U.S. v. United Steelworkers of America, C.A.Pa., 271 F.2d 676, affd. 80 S.Ct. 1, 361 U.S. 39, 4 L.Ed.2d 12, cert. den. 80 S.Ct. 669, 362 U.S. 917, 4 L.Ed.2d 738, motion den. 80 S.Ct. 1256, 363 U.S. 817, 4 L.Ed.2d 1515, reh. den. 81 S.Ct. 34, 364 U.S. 855, 5 L.Ed.2d 79.

60.6. See F.R.A.P. Rule 35, 28 U.S.C.A. 28 U.S.C.A. § 46(c), was amended in 1978 substituting "panel" for "division".

28 U.S.C.A. § 46(c), was amended in 1982 providing that court of appeals for the federal circuit may sit in panels of more than three judges if its rule so provides.

Senior judges not authorized to participate in determination

U.S.—Moody v. Albemarle Paper Co., N.C., 94 S.Ct. 2513.

60.10. U.S.—Shenker v. Baltimore & O.R. Co., Pa., 83 S.Ct. 1667, 374 U.S. 1, 10 L.Ed.2d 709.

60.12. U.S.—Shenker v. Baltimore & O.R. Co., Pa., 83 S.Ct. 1667, 374 U.S. 1, 10 L.Ed.2d 709.

Rehearing not ordered

U.S.—U.S. v. Grasso, C.A.Conn., 568 F.2d 899.

Petition granted

U.S.—U.S. v. Allegheny-Ludlum Industries, Inc., C.A. Ala., 568 F.2d 1073.

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60.14. Power sparingly used

D.C.—Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, C.A., 284 F.2d 173,

109 U.S.App.D.C. 39, affd. 81 S.Ct. 1743, 367 U.S 886, 6 L.Ed.2d 1230, motion den. 81 S Ct. 1912, 366 U.S. 956, 6 L.Ed.2d 1251, reh. den. 82 S Ct. 22, 368 U.S. 869, 7 L.Ed.2d 70.

60.16. Authorized judge must request rehearing en banc

U.S.—General Ins. Co. of America v. U.S. for Use of Audley Moore and Son, C.A.Tex., 409 F.2d 1326, cert. den. 90 S.Ct. 214, 396 U.S. 902, 24 L.Ed.2d 178—Travelers Ins. Co. v. Davis, C.A.Fla., 411 F.2d 244.

Active judge must request vote on rehearing en banc

U.S.—Miller v. School Dist. No. 167, Cook County, Illinois, C.A.Ill., 500 F.2d 711.

60.20. U.S.—Shenker v. Baltimore & O.R. Co., Pa., 83 S.Ct. 1667, 374 U.S. 1, 10 L.Ed.2d 709.

60.34. U.S.—National Latex Products Co. v. Sun Rubber Co., C.A.Ohio, 276 F.2d 167

60.36. U.S.—Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., C.A.Tex., 383 F.2d 97, cert. den. 88 S.Ct. 816, two cases, 390 U.S. 904, 19 L.Ed.2d 870.

§ 300(3). —— Grounds for Rehearing

Library References

Federal Courts ⚖744.

60.60. U.S.—U.S. v. Ahtanum Irr. Dist., C.A.Wash., 338 F.2d 307—Mixon v. Atlantic Coast Line R. Co., C.A.Ga., 389 F.2d 770.

Rehearing granted

(1) U.S.—U.S. v. Ward, C.A.La., 352 F.2d 329.

D.C.—Meehan v. Macy, C.A., 425 F.2d 469, 138 U.S. App.D.C. 38, reh. 425 F.2d 472, 138 U.S.App.D.C. 41.

Rehearing denied

(1) U.S.—U.S. v. Mills, C.A.Md., 317 F.2d 764—Seguros Tepeyac, S.A., Compania Mexicana de Seguros Generales v. Bostrom, C.A.Tex., 360 F.2d 154—U.S. v. LePatourel, C.A.Neb., 571 F.2d 405, on remand, C.A., 463 F.Supp. 264, reh. en banc 593 F.2d 827.

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61. U.S.—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

62. U.S.—Bishop v. Bishop, C.A.Virgin Islands, 257 F.2d 495, cert. den. 79 S.Ct. 578, 359 U.S. 914, 3 L.Ed.2d 576—Brown v. Dravo Corp., C.A.Pa., 258 F.2d 704, cert. den. 79 S.Ct. 800, 359 U.S. 960, 3 L.Ed.2d 767.

D.C.—Aratani v. Kennedy, C.A., 323 F.2d 427, 115 U.S.App.D.C. 97, cert. gr. 84 S.Ct. 147, 375 U.S. 877, 11 L.Ed.2d 110.

63. U.S.—Amerada Petroleum Corp. v. Federal Power Commission, C.A., 285 F.2d 737.

64. U.S.—Anderson v. Knox, C.A.Hawaii, 300 F.2d 296.

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73. U.S.—International Ass'n of Machinists, AFL–CIO v. Hayes Corp., C.A.Ala., 316 F.2d 90.

75. U.S.—Partenweederei, MS Belgrano v. Weigel, C.A.Or., 313 F.2d 423—Stephens v. Arrow Lumber Co., C.A.Alaska, 354 F.2d 732.

D.C.—Savage v. Hadlock, C.A., 296 F.2d 417, 111 U.S.App.D.C. 295.

Arguments presented for first time, etc.

U.S.—Kelley v. Dunne, C.A.Mass., 344 F.2d 129.

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76. U.S.—De Witt v. Sorenson, C.A.Tex., 290 F.2d 562.

Appellant could not challenge fact admitted in court below, etc.

U.S.—Minute Maid Corp. v. United Foods, Inc., C.A. Tex., 291 F.2d 577, cert. den. 82 S.Ct. 364, 368 U.S. 928, 7 L.Ed.2d 192.

77. Held not exceptional case

U.S—Partenweederei, MS Belgrano v. Weigel, C.A.Or., 313 F.2d 423.

Other matters constituting ground for rehearing have been adjudicated.[78.1]

78.1. U.S.—Life Ins. Co. of Va. v. Shifflet, C.A.Fla., 370 F.2d 555—McDonald v. Bennett, C.A.Tex., 679 F.2d 415.

Important question not yet answered by state supreme court

U.S.—Green v. American Tobacco Co., C.A.Fla., 304 F.2d 70, cert. ques. ans., Sup., 154 So.2d 169, conf. to 325 F.2d 673, cert. den. 84 S.Ct. 1349, 1351, 377 U.S. 943, 12 L.Ed.2d 306.

78.5. U.S.—Kuehnert v. Texstar Corp, C.A.Tex., 412 F.2d 700.

78.10. U.S.—U.S. Steel Corp. v. United Mine Workers of America, 534 F.2d 1063.

78.30. U.S.—Marcello v. C. I. R., C.A.La., 380 F.2d 499, cert. den. 88 S.Ct. 787, 389 U.S. 1044, 19 L.Ed.2d 835, app. after remand 414 F.2d 268.

78.35. U.S.—Greco v. Seaboard Coast Line R. Co., C.A.Fla., 468 F.2d 822, cert. den. 93 S.Ct. 1502, 410 U.S. 990, 36 L.Ed.2d 190.

§ 300(4). —— Application for Rehearing

Library References

Federal Courts ⚖744.

78.60. U.S.—Olympic Ins. Co. v. H. D. Harrison, Inc., C.A.La., 413 F.2d 973, reh. den. 418 F.2d 669.

Rehearing denied

U.S.—Southern Ry. Co. v. Lanham, C.A.Ga., 408 F.2d 348.

The Federal Rules of Appellate Procedure make provision with respect to a petition for rehearing, including its form, contents, and service and filing.[78.65]

78.65. F.R.A.P. Rule 40, 28 U.S.C.A.

Frivolous

U.S.—U.S. v. Barnette, C.A.Ala., 549 F.2d 398.

79. U.S.—U.S. v. Doe, C.A.Mass., 455 F.2d 753, vac on oth. grds. and remd. 92 S.Ct. 2614, 408 U.S. 606, 33 L.Ed.2d 583, reh. den. 93 S.Ct. 98, two cases, 409 U.S. 902, 34 L.Ed.2d 165.

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81.10. U.S.—Cross Baking Co. v. N.L.R.B., C.A., 453 F.2d 1346.

Under the Federal Rules of Appellate Procedure, a petition for rehearing shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present.[81.15]

81.15. F.R.A.P. Rule 40(a), 28 U.S.C.A.

83. U.S.—Lummus Co. v. Commonwealth Oil Refining Co., C.A.Puerto Rico, 280 F.2d 915, 91 A.L.R.2d 912, cert. den. 81 S.Ct. 274, 364 U.S. 911, 5 L.Ed.2d 225.

87. Petition treated as seeking reconsideration by the panel

U.S.—In re Grand Jury Investigation of Violations of 18 U.S.C. § 1621 (Perjury), C.A.N.Y., 318 F.2d 533, cert. den. 84 S.Ct. 25, 375 U.S. 802, 11 L.Ed.2d 37.

89. U.S.—Anderson v. Knox, C.A.Hawaii, 300 F.2d 296—Monoz v. U.S. Dist. Court for Central Dist. of Cal., C.A.Cal., 446 F.2d 434.

D.C.—Armour & Co. v. Freeman, C.A., 304 F.2d 404, 113 U.S.App.D.C. 37, cert. den. 82 S.Ct. 1559, 370 U.S. 920, 8 L.Ed.2d 500.

Under the Federal Rules of Appellate Procedure, a petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order.[89.5]

89.5. F.R.A.P. Rule 40(a), 28 U.S.C.A.

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92. Automatic extensions not authorized

D.C.—Armour & Co. v. Freeman, C.A., 304 F.2d 404, 113 U.S.App.D.C. 37, cert. den. 82 S.Ct. 1559, 370 U.S. 920, 8 L.Ed.2d 500.

Extension refused under circumstances

D.C.—Armour & Co. v. Freeman, C.A., 304 F.2d 404, 113 U.S.App.D.C. 37, cert. den. 82 S.Ct. 1559, 370 U.S. 920, 8 L.Ed.2d 500.

Extension granted under circumstances

U.S.—Braniff Airways, Inc. v. Curtiss-Wright Corp., C.A.N.Y., 424 F.2d 427, cert. den. 91 S.Ct. 59, 400 U.S. 829, 27 L.Ed.2d 59.

96.25. U.S.—National Latex Products Co. v. Sun Rubber Co., C.A.Ohio, 276 F.2d 167.

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The Federal Rules of Appellate Procedure provide that no answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request.[97.6]

97.6. F.R.A.P. Rule 40(a), 28 U.S.C.A.

97.10. Request for poll of court

U.S.—DuVernay v. U.S., C.A.La., 394 F.2d 979, affd. 89 S.Ct. 1186, 394 U.S. 309, 22 L.Ed.2d 306, reh. den. 89 S.Ct. 1740, 295 U.S. 917, 23 L.Ed.2d 232.

§ 300(5). —— Scope and Conduct of Hearing and Relief Granted

Library References

Federal Courts ⚖744.

97.50. U.S.—Duarte v. Bank of Hawaii, C.A.Hawaii, 287 F.2d 51, cert. den. 81 S.Ct. 1938, 366 U.S. 972, 6 L.Ed.2d 1261.

Under the Federal Rules of Appellate Procedure, if a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.[97.55]

97.55. F.R.A.P. Rule 40(a), 28 U.S.C.A.

99. U.S.—General Acc. Fire & Life Assur. Corp. v. Smith & Oby Co., C.A.Ohio, 274 F.2d 819—Guy James Const. Co. v. Trinity Industries, Inc., C.A. Tex., 650 F.2d 93.

2. U.S.—Byrd v. Hunt Tool Shipyards, Inc., C.A.La., 650 F.2d 44.

The denial of a rehearing following an unsuccessful appeal does not foreclose the trial court from considering the effect, if any, of laws and regulations enacted and promulgated while the appeal was pending.[3.20]

3.20. U.S.—Movement Against Destruction v. Volpe, C.A.Md., 500 F.2d 29.

§ 301(1). In General

Library References

Federal Courts ⚬=921.

3.50. U.S.—Friends of the Earth, Inc. v. Coleman, C.A.Cal., 518 F.2d 323.

D.C.—In re Elmore, C.A., 382 F.2d 125, 127 U.S.App. D.C. 176.

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4. U.S.—U.S. v. O'Connor, C.A.N.Y., 291 F.2d 520, 100 A.L.R.2d 858—Ruby v. American Airlines, Inc., C.A.N.Y., 323 F.2d 248, cert. den. 84 S.Ct. 658, 376 U.S. 913, 11 L.Ed.2d 611—Massachusetts Mut. Life Ins. Co. v. Brock, C.A.Fla., 405 F.2d 429, cert. den. 89 S.Ct. 1748, 395 U.S. 906, 23 L.Ed.2d 220.

D.C.—Lodge 1858, Am. Federation of Government Emp. v. Paine, C.A., 436 F.2d 882, 141 U.S.App. D.C. 152.

Summary judgment

U.S.—Berry v. Atlnatic Coast Line R. Co., C.A.S.C., 273 F.2d 572, cert. den. 80 S.Ct. 1060, 362 U.S. 976, 4 L.Ed.2d 1011.

Authority to set out appropriate subsequent disposition below

U.S.—Glazer v. Glazer, C.A.La., 374 F.2d 390, cert. den. 88 S.Ct. 100, 389 U.S. 831, 19 L.Ed.2d 90, on remand, D.C., 274 F.Supp. 471, on remand 278 F.Supp. 476.

Procedure regarding access to documents set forth

D.C.—U.S. v. American Tel. & Tel. Co., C.A., 567 F.2d 121, 185 U.S.App.D.C. 254.

6. U.S.—Hanover Tp. Federation of Teachers, Local 1954 (AFL-CIO) v. Hanover Community School Corp., C.A.Ind., 457 F.2d 456.

D.C.—Ditlow v. Shultz, C.A., 517 F.2d 166, 170 U.S. App.D.C. 352.

Entry of judgment

F.R.A.P. Rule 36, 28 U.S.C.A.

7. U.S.—Thomas v. Shaw, C.A.Tex., 497 F.2d 123.

Court of Appeals should have wide latitude in their decisions of whether or how to write opinions, especially with respect to summary affirmances.[8.5]

8.5. U.S.—Taylor v. McKeithen, La., 92 S.Ct. 1980, 407 U.S. 191, 32 L.Ed.2d 648, mand. conf. to C.A., 499 F.2d 893.

What the Court of Appeals says in the opinions in a particular case is not as important to the particular litigants as what the court actually does with the case.[8.10]

8.10. U.S.—Brown v. Dade Christian Schools, Inc., C.A.Fla., 581 F.2d 472, reh. den. 585 F.2d 520.

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10. D.C.—Reiter v. Universal Marion Corp., C.A., 273 F.2d 820, 107 U.S.App.D.C. 6.

11. U.S.—Berko v. Securities and Exchange Commission, C.A., 297 F.2d 116.

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17. **Relief against such parties denied**

U.S.—Haluska v. Celebrezze, C.A.Minn., 342 F.2d 860, cert. den. 86 S.Ct. 39, 382 U.S. 844, 15 L.Ed.2d 84.

In other instances, attorney fees on appeal are properly included and taxed as part of costs in the Court of Appeals.[19.16]

19.16. U.S.—Twentieth Cenury Fox Film Corp. v. Goldwyn, C.A.Cal., 328 F.2d 190, cert. den 85 S.Ct. 143, 379 U.S. 880, 13 L.Ed.2d 87.

§ 301(2). Delay Pending Decision in Another or Higher Court

Library References

Federal Courts ⚬=921, 923.

On interlocutory appeal, the court of appeals shall dispose of all controversies as expeditiously as is consistent with proper judicial administration.[19.25]

19.25. U.S.—Board of Managers of Ark. Training School for Boys at Wrightsville v. George, C.A. Ark., 377 F.2d 228, cert. den. 88 S.Ct. 105, 389 U.S. 845, 19 L.Ed.2d 114.

19.50. **Case involving public interest**

U.S.—State of Tenn, by Wolfenbarger, ex rel. Atchley v. Taylor, C.A.Tenn., 169 F.2d 626.

19.55. **Decision reserved and jurisdiction retained as to matter involved in another case in court below.**

U.S.—Kuchenig v. California Co., C.A.La., 350 F.2d 551, cert. den. 86 S.Ct. 561, 382 U.S. 985, 15 L.Ed.2d 473—Bowers Wholesale Corp. v. Norge Sales Corp., C.A.Va., 368 F.2d 997.

Absence of request pending probable appeal in similar case in state court

U.S.—Roginsky v. Richardson-Merrell, Inc., C.A.N.Y., 378 F.2d 832.

Other matters will respect to delay pending decision in another court have been considered.[22.15]

22.15. D.C.—In re Pope, C.A., 580 F.2d 620, 188 U.S.App.D.C. 357.

Refusal to grant stay pending determination of novel issue by state court held error

U.S.—Kaiser Steel Corp. v. W. S. Ranch Co., N.M., 88 S.Ct. 1753, 391 U.S. 593, 20 L.Ed.2d 835.

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Since the publication of the bound volume, the statute, 28 U.S.C.A. § 1293, providing for appeals from the Supreme Court of Puerto Rico to the Court of Appeals for the First Circuit has been repealed. See now 28 U.S. C.A. §§ 1292, 1294, relating to the jurisdiction of the courts of appeals.

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30. U.S.—Mosley v. U.S., C.A.N.C., 499 F.2d 1361, on remand, D.C., 405 F.Supp. 357, affd., C.A., 538 F.2d 555—Moorer v. Griffin, C.A.Ohio, 575 F.2d 87.

D.C.—Olenick v. Brucker, C.A., 273 F.2d 819, 107 U.S.App.D.C. 5—Blackhawk Heating & Plumbing Co. v. Driver, C.A., 433 F.2d 1137, 140 U.S.App. D.C. 31—Thompson v. Sawyer, C.A., 678 F.2d 257, 219 U.S.App.D.C. 393.

31.5. U.S.—Goerg v. Schweiker, C.A.Cal., 643 F.2d 582.

32. U.S.—Jean v. Nelson, Fla., 105 S.Ct. 2992, 86 L.Ed.2d 664.

Weise v. Syracuse University, C.A.N.Y., 522 F.2d 397—Dominican Maritime, S.A. v. M/V Inagua Beach, C.A.Puerto Rico, 572 F.2d 892—Regional Properties, Inc. v. Financial and Real Estate Consulting Co., C.A.Tex., 678 F.2d 552, app. after remand 752 F.2d 178.

D.C.—Wertz v. Brown & Root, Inc., C.A., 316 F.2d 392, 114 U.S.App.D.C. 391—Bond v. Vance, C.A., 327 F.2d 901, 117 U.S.App.D.C. 203.

Case remanded to determine

(4) Other matters.

U.S.—Arey v. Peyton, C.A.Va., 378 F.2d 930.

D.C.—Washington Sportservice, Inc. v. M. J. Uline Co., C.A., 276 F.2d 523, 107 U.S.App.D.C. 277.

Grounds for withholding privileged matter from inspection

U.S.—U.S. v. Johnson, C.A.Fla., 465 F.2d 793.

Basis for fixing attorney fees in school desegregation case

U.S.—Monroe v. County Bd. of Ed. of Madison County, Tennessee, C.A.Tenn., 505 F.2d 109.

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33. U.S.—Jarrett v. Pacific Indem. Co., C.A.Tex., 413 F.2d 1014.

Direction to vacate order and transfer case to proper court

D.C.—Den v. Den, C.A., 375 F.2d 328, 126 U.S.App. D.C. 152.

33.10. U.S.—A & S Liquidating Co. v. Carter, C.A. Tex., 465 F.2d 359—McGinty v. Beranger Volkswagen, Inc., C.A.Mass., 633 F.2d 226.

D.C.—Davis v. Brucker, C.A., 275 F.2d 181, 107 U.S. App.D.C. 152—Brandt v. Brandt, C.A., 276 F.2d 488, 107 U.S.App.D.C. 242—Stearns v. Veterans of Foreign Wars, C.A., 500 F.2d 788, 163 U.S.App. D.C. 120, on remand 394 F.Supp. 138, affd. 527 F.2d 1387, 174 U.S.App.D.C. 78, cert. den. 97 S.Ct. 72, 429 U.S. 822, 50 L.Ed.2d 83.

34.30. U.S.—Lincoln Bank & Trust Co. v. Exchange Nat. Bank & Trust Co., Ardmore, Okl., C.A.Okl, 383 F.2d 694.

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34.35. U.S.—Smith v. Industrial Acc. Commission of State of Cal., C.A.Cal., 366 F.2d 479, cert. den. 87 S.Ct. 857, 386 U.S. 915, 17 L.Ed.2d 788, reh. den. 87 S.Ct. 1301, 386 U.S. 1000, 18 L.Ed.2d 356.

No remand for resubmission of certificate

U.S.—Ex parte Tokio Marine & Fire Ins. Co., C.A.La., 322 F.2d 113.

35. U.S.—U.S. v. Ueber, C.A.Mich., 299 F.2d 310—Tucson Gas, Elec. Light & Power Co. v. Trico Elec. Co-op., Inc., C.A.Ariz., 315 F.2d 299—Pure Oil Co. v. Superior Oil & Tire Co., C.A.Ky., 317 F.2d 330—Mosley v. U.S., C.A.N.C., 499 F.2d 1361, on remand, D.C., 405 F.Supp. 357, affd., C.A., 538 F.2d 555.

35.10. U.S.—Brennan v. Goose Creek Consol. Independent School Dist., C.A.Tex., 519 F.2d 53.

36. U.S.—U.S. v. Hudspeth, C.A.Or., 384 F.2d 683.

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39.10. U.S.—Atchison, T. & S.F. Ry. Co. v. Brotherhood of R.R. Trainmen, v. Brotherhood of R.R. Trainmen, U.S., C.A.Ala., 328 F.2d 502.

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39.15. U.S.—Atwood v. Humble Oil & Refining Co., C.A.Tex., 338 F.2d 502, cert. den. 85 S.Ct. 1562, 381 U.S. 926, 14 L.Ed.2d 684, reh. den. 85 S.Ct. 1804, 381 U.S. 956, 14 L.Ed.2d 729.

39.25. U.S.—Southern Ry. Co. v. U.S., C.A.Ga., 306 F.2d 119.

Where a case is remanded to the district court for further findings of fact, the court of appeals may direct that such findings be certified to it as a supplemental record on appeal, and until such time it may retain jurisdiction of the appeal.[39.61]

39.61. U.S.—Cross v. Pusley, C.A.Mo., 267 F.2d 824—U.S. v. Ueber, C.A.Mich., 299 F.2d 310—Pure Oil Co. v. Superior Oil & Tire Co., C.A.Ky., 317 F.2d 330.

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39.80. U.S.—Travelers Health Ass'n v. F.T.C., C.A.8, 262 F.2d 241, vac. 80 S.Ct. 717, 362 U.S. 293, 4 L.Ed.2d 724, on remand 298 F.2d 820—Banco Nacional de Cuba v. Farr, C.A.N.Y., 383 F.2d 166, cert. den. 88 S.Ct. 1038, 390 U.S. 956, 19 L.Ed.2d 1151, reh. den. 88 S.Ct. 1406, 390 U.S. 1037, 20 L.Ed.2d 298.

40. U.S.—Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98, on remand 533 F.2d 942, cert. den. 96 S.Ct. 1685, 425 U.S. 944, 48 L.Ed.2d 188—U.S. v. Garrett, C.A.Miss., 571 F.2d 1323—Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc., C.A.R.I., 572 F.2d 883, cert. den. 99 S.Ct. 112, 439 U.S. 833, 58 L.Ed.2d 128—Williams v. St. Joseph Hospital, C.A.Ill., 629 F.2d 448—Ruiz v. Estelle, C.A.Tex., 679 F.2d 1115, am. in part, vac. in part on oth. grds. 688 F.2d 266, cert. den. 103 S.Ct. 1438, 460 U.S. 1042, 75 L.Ed.2d 795.

In re Cummins, Bkrtcy.App.Cal., 20 B.R. 652.

40.5. U.S.—Pugh v. Rainwater, C.A.Fla., 572 F.2d 1053.

40.10. U.S.—Hawkes v. Internal Revenue Service, C.A.Tenn., 467 F.2d 787, app. after remand 507 F.2d 481—Seals v. Quarterly County Court of Madison County, Tennessee, C.A.Tenn., 496 F.2d 76, app. after remand 526 F.2d 216, app. after remand 562 F.2d 390—Thompson v. Madison County Bd. of Ed., C.A.Miss., 496 F.2d 682.

D.C.—In re Elmore, C.A., 382 F.2d 125, 127 U.S.App.D.C. 176.

40.15. U.S.—Williams v. Singer Co., C.A.Tenn., 457 F.2d 799—Advance Mach. Co. v. Consumer Product Safety Commission, C.A.Minn., 666 F.2d 1166.

Slaughter v. Elkins, D.C.Va., 260 F.Supp. 835.

40.25. U.S.—Bradley v. General Motors Corp., C.A.Tenn., 463 F.2d 239, app. after remand 512 F.2d 602—Brewer v. School Bd. of City of Norfolk, Va., C.A.Va., 500 F.2d 1129.

Henderson v. S. C. Loveland Co., Inc., D.C.Fla., 396 F.Supp. 658.

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40.35. U.S.—Watson v. Stynchombe, C.A.Ga., 504 F.2d 393.

D.C.—Wilson v. Shultz, C.A., 475 F.2d 997, 155 U.S.App.D.C. 4.

40.40. U.S.—Bartolotta v. Liberty Mut. Ins. Co., C.A.Conn., 411 F.2d 115.

41. U.S.—Merriweather v. Burson, C.A.Ga., 439 F.2d 1092.

Rule inapplicable where no reliance on prior decision

U.S.—Church of Scientology of Cal. v. Richardson, C.A.Cal., 437 F.2d 214.

41.5. U.S.—Gaito v. Strauss, C.A.Pa., 368 F.2d 787, cert. den. 87 S.Ct. 1173, 386 U.S. 977, 18 L.Ed.2d 139—Rodriguez v. Swank, C.A.Ill., 496 F.2d 1110, cert. den. 95 S.Ct. 151, 419 U.S. 885, 42 L.Ed.2d 125.

42. U.S.—Jarrett v. Reser, C.A.Cal., 426 F.2d 213.

43. U.S.—Creamette Co. v. Merlino, C.A., 289 F.2d 569—Universal Underwriters Ins. Co. v. Wagner, C.A.Neb., 367 F.2d 866—Rossin v. Southern Union Gas Co., C.A.N.M., 472 F.2d 707.

D.C.—National Treasury Emp. Union v. Reagan, C.A., 663 F.2d 239, 214 U.S.App.D.C. 62.

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44. U.S.—Wirtz v. Local Unions 410, 410A, 410B, and 410C, Intern. Union of Operating Engineers, C.A.N.Y., 366 F.2d 438—Chacon v. Hodgson, C.A.Wis., 465 F.2d 307—Scott v. Jones, C.A.Tex., 492 F.2d 130.

Gulf Oil Corp. v. Simon, Em.App., 502 F.2d 1154.

44.5. U.S.—Moblard v. Klippenstein, C.A.Mich., 384 F.2d 994—DeBremaecker v. Short, C.A.Tex., 433 F.2d 733—Securities and Exchange Commission v. Mick Stack Associates, Inc., C.A.Kan., 675 F.2d 1148.

D.C.—Distinti v. Cunningham, C.A., 272 F.2d 528, 106 U.S.App.D.C. 299—In re Elmore, C.A., 382 F.2d 125, 127 U.S.App.D.C. 176—Tinker Nat. Bank v. Union Sav. Bank of Long Island, C.A., 400 F.2d 771, 130 U.S.App.D.C. 300.

Stay on dismissal of appeal

U.S.—Davis v. National Mortg. Corp., C.A.N.Y., 320 F.2d 90.

46.5. U.S.—Kittrell v. Blackwell, C.A.Pa., 326 F.2d 752.

§ 301(7). Findings of Fact and Conclusions of Law

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47.52. U.S.—Rural Electrification Administration v. Central Louisiana Elec. Co., C.A.La., 354 F.2d 859, cert. den. 87 S.Ct. 34, 385 U.S. 815, 17 L.Ed.2d 54, reh. den. 87 S.Ct. 388, 385 U.S. 964, 17 L.Ed.2d 309—Hill York Corp. v. American Intern. Franchises, Inc., C.A.Fla., 448 F.2d 680—Alpha Distributing Co. of Cal., Inc. v. Jack Daniel Distillery, Lem Motlow, Prop., Inc., C.A.Cal., 454 F.2d 442, app. after remand 493 F.2d 1355, cert. den. 95 S.Ct. 74, 419 U.S. 842, 42 L.Ed.2d 70.

47.54. U.S.—Perkins v. Standard Oil Co. of Cal., Or., 89 S.Ct. 1871, 395 U.S. 642, 23 L.Ed.2d 599, reh. den. 90 S.Ct. 36, 396 U.S. 871, 24 L.Ed.2d 126.

47.58. U.S.—Degelos v. Fidelity & Cas. Co. of New York, C.A.La., 313 F.2d 809—Traylor v. U.S., C.A.Ky., 396 F.2d 837, app. after remand 418 F.2d 262.

47.60. U.S.—Mitchell v. Mitchell Truck Line, Inc., C.A.Tex., 286 F.2d 721—Woods Const. Co. v. Pool Const. Co., C.A.Okl., 314 F.2d 405.

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47.66. U.S.—Liston Zander Credit Co. v. U.S., C.A.Tex., 276 F.2d 417—Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission, C.A.Pa., 387 F.2d 768.

Does not circumscribe appellate review

U.S.—Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., C.A.Fla., 549 F.2d 368.

47.74. U.S.—Atkins v. Greenville Shipbuilding Corp., C.A.Miss., 411 F.2d 279, cert. den. 90 S.Ct. 105, 396 U.S. 846, 24 L.Ed.2d 96.

§ 301(8). Affirmance

51.50. U.S.—Alga, Inc. v. Crosland, C.A.Ala., 459 F.2d 1038, cert. den. 93 S.Ct. 272, 409 U.S. 950, 34 L.Ed.2d 221—Smith v. Young Men's Christian Ass'n of Montgomery, Inc., C.A.Ala., 462 F.2d 634.

Case not sent back for entry of formal order

U.S.—Kelly v. Greer, C.A.Pa., 295 F.2d 18.

Partial summary affirmance

U.S.—Barnes v. U.S., C.A.Pa., 678 F.2d 10.

55.15. Time extended for good cause

U.S.—N.L.R.B. v. ITT Telecommunications, C.A., 415 F.2d 768.

Time for filing motion waived

U.S.—FMC Corp. v. Keizer Equipment Co., C.A.Mich., 433 F.2d 654.

§ 301(9). —— Grounds for Affirmance

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47.66. Matter of law

D.C.—Holtze v. Equitable Life Assur. Soc. of U.S., C.A., 548 F.2d 1037, 179 U.S.App.D.C. 82.

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55.50. U.S.—Anderson v. Wolff, C.A.Neb., 468 F.2d 252—Whelan v. Penn Central Co., C.A.N.Y., 503 F.2d 886—Darrow v. Southdown, Inc., C.A.Tex., 574 F.2d 1333, cert. den. 99 S.Ct. 574, 439 U.S. 984, 58 L.Ed.2d 655.

D.C.—Mora v. McNamara, C.A., 387 F.2d 862, 128 U.S.App.D.C. 297, cert. den. 88 S.Ct. 282, 389 U.S. 934, 19 L.Ed. 287, reh. den. 88 S.Ct. 584, 389 U.S. 1025, 19 L.Ed.2d 275.

Injunction

(3) Other instances.

U.S.—Packard Instrument Co. v. ANS, Inc., C.A.N.Y., 416 F.2d 943—Karpinski v. Resor, C.A.Pa., 419 F.2d 531—Eastern Freight Ways, Inc. v. Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers, C.A.N.Y., 422 F.2d 351—Koen v. Long, C.A.Mo., 428 F.2d 876, cert. den. 91 S.Ct. 877, 401 U.S. 923, 27 L.Ed.2d 827.

Affirmance held proper

(4) Other instances.

U.S.—Jones v. Uris Sales Corp., C.A.N.Y., 373 F.2d 644—Olin's Tire Service, Inc. v. U.S. Rubber Co., C.A.Fla., 382 F.2d 852.

56. U.S.—Frank v. Volkswagenwerk, A.G. of West Germany, C.A.Pa., 522 F.2d 321.

Compromise and settlement

U.S.—Schwartzman v. Tenneco Mfg. Co., C.A.Del., 375 F.2d 123.

56.5. U.S.—Nichols v. Hartford Acc. & Indem. Co., C.A.La., 310 F.2d 704—U.S. v. Perry, C.A.N.C., 333 F.2d 1012, cert. den. 85 S.Ct. 73, 379 U.S. 838, 13 L.Ed.2d 45—Gallegly v. White, C.A.Va., 334 F.2d 172.

56.10. U.S.—Edmundson v. Hebert, C.A.La., 329 F.2d 627—American Motorists Ins. Co. v. Cohen, C.A.Fla., 358 F.2d 730—U.S. v. Moore, C.A.Va., 361 F.2d 494—Amsley v. West Virginia Racing Commission, C.A.W.Va., 410 F.2d 393, cert. den. 90 S.Ct. 963, 397 U.S. 945, 25 L.Ed.2d 127.

56.15. U.S.—McGraw-Edison Co. v. Central Transformer Corp., C.A.Ark., 308 F.2d 70—Noel v. Linea Aeropostal Venezolana, C.A.N.Y., 318 F.2d 710—Siragusa v. Travelodge Corp., C.A.Ala., 352 F.2d 516.

56.20. U.S.—Alfa-Lite v. U.S., C.A.Miss., 338 F.2d 699—Economy v. Gardner, C.A.Tex., 396 F.2d 115.

57. U.S.—Page v. Bailey, C.A.Tex., 290 F.2d 483.

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57.5. U.S.—Stuyvesant Ins. Co. v. Kelly, C.A.N.Y., 382 F.2d 991.

58. U.S.—Routledge v. Chaitoff, C.A.Ohio, 286 F.2d 249—Taddeo Const. & Leasing Corp. v. Cain Roofing & Sheet Metal, Inc., C.A.Ala., 344 F.2d 95—Denny v. Barber, C.A.N.Y., 576 F.2d 465.

58.5. U.S.—Ginsburg v. American Bar Ass'n, C.A. Ill., 277 F.2d 801, cert. den. 81 S.Ct. 69, 364 U.S. 829, 5 L.Ed.2d 57, remand den. 81 S.Ct. 270, 364 U.S. 907, 5 L.Ed.2d 223.

59. U.S.—Smith v. State of Cal., C.A.Cal., 336 F.2d 530.

60. Denial of injunction affirmed where housing project substantially completed

U.S.—North Avondale Neighborhood Ass'n v. Cincinnati Metropolitan Housing Authority, C.A.Ohio, 464 F.2d 486.

61. U.S.—O'Brien v. Metro-Goldwyn-Mayer, Inc., C.A.Cal., 319 F.2d 294—Imperial Cas. & Indem. Co. v. C. C. Lemonds Trucking Co., C.A.Fla., 330 F.2d 609—Kletschka v. Driver, C.A.N.Y., 411 F.2d 436.

D.C.—Pulliam v. Pulliam, C.A., 478 F.2d 935, 156 U.S.App.D.C. 25.

Howard v. Lightner, App., 214 A.2d 474, 9 A.L.R.3d 513.

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U.S.—Sulentich v. Interlake S.S. Co., C.A.Ill., 257 F.2d 316, cert. den. 79 S.Ct. 125, 358 U.S. 885, 3 L.Ed.2d 113, reh. den. 79 S.Ct. 311, 358 U.S. 938, 3 L.Ed.2d 310.

62. U.S.—Lamb Enterprises, Inc. v. City of Toledo, C.A.Ohio, 437 F.2d 59.

63. Absence of essential finding

U.S.—Retail Clerks Intern. Ass'n, Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., C.A.Ohio, 341 F.2d 715. Cert. den. 86 S.Ct. 87, 382 U.S. 839, 15 L.Ed.2d 81.

63.5. U.S.—Lloyd v. Brown & Williamson Tobacco Corp., C.A.Ga., 301 F.2d 32—Krumbolz v. Goff, C.A.Ky., 315 F.2d 575, reh. den. 318 F.2d 911.

63.10. U.S.—Chicago & N.W. Ry. Co. v. Minnesota Transfer Ry. Co., C.A.Minn., 371 F.2d 129—Reliance Nat. Life Ins. Co. v. Hackleman, C.A.Or., 372 F.2d 133.

63.25. U.S.—Pacific Indem. Co. v. Broward County, C.A.Fla., 465 F.2d 99.

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64.10. U.S.—D'Ippolito v. Cities Service Co., C.A. N.Y., 374 F.2d 643—Koll v. Wayzata State Bank, C.A.Minn., 397 F.2d 124—Trucking Unlimited v. California Motor Transport Co., C.A.Cal., 432 F.2d 755, affd., remd. 92 S.Ct. 609, 404 U.S. 508, 30 L.Ed.2d 642.

D.C.—Lodge 1858, Am. Federation of Government Emp. v. Paine, C.A., 436 F.2d 882, 141 U.S.App. D.C. 152.

64.30. U.S.—Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionary Works Intern., AFL-CIO, C.A.N.Y., 294 F.2d 399, affd. 82 S.Ct. 1346, 370 U.S. 254, 8 L.Ed. 474—Farrand Optical Co. v. U.S., C.A.N.Y., 317 F.2d 875.

Appeal retained for further proceedings not previously reached

U.S.—Farrand Optical Co. v. U.S., C.A.N.Y., 317 F.2d 875.

Affirmance with leave to seek further relief has been made in other instances.[64.50]

64.50. Temporary injunction order

U.S.—Beechwood Music Corp. v. Vee Jay Records, Inc., C.A.N.Y., 328 F.2d 728.

§ 301(10). —— Effect of Affirmance

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65. U.S.—U.S. v. Leary, C.A.Conn., 330 F.2d 497, cert. den. 85 S.Ct. 72, 379 U.S. 837, 13 L.Ed.2d 44—Pendleton v. Reliance Ins. Co., C.A.La., 360 F.2d 167—Seese v. Volkswagenwerk, A.G., C.A. N.J., 679 F.2d 336.

Affirmance by equally divided court

U.S.—Berlin v. E.C. Publications, Inc., C.A.N.Y., 329 F.2d 541, 9 A.L.R.3d 612, cert. den. 85 S.Ct. 46, 379 U.S. 822, 13 L.Ed.2d 33.

Recognition of retention of jurisdiction by district court

U.S.—Layton v. Selb Mfg. Co., D.C.Mo., 244 F.Supp. 178, affd., C.A., 359 F.2d 715, cert. den. 87 S.Ct. 288, 385 U.S. 919, 17 L.Ed.2d 211, reh. den. 87 S.Ct. 701, 385 U.S. 1021, 17 L.Ed.2d 560.

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U.S.—Bassis v. Universal Lines, S.A., C.A.N.Y., 436 F.2d 64.

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68.5. U.S.—Stewart v. U.S., C.A.Idaho, 620 F.2d 740.

68.15. U.S.—Curtis v. A. Garcia y Cia., Ltda., C.A. Pa., 272 F.2d 235, 85 A.L.R.2d 1186.

69. U.S.—Colorado & W. Ry. Co. v. Colorado & S. Ry. Co., C.A.Colo., 469 F.2d 483.

Long Island R. Co. v. New York Cent. R. Co., D.C.N.Y., 26 F.R.D. 145.

69.5. U.S.—Securities and Exchange Commission v. Farm & Home Agency, Inc., C.A.Ind., 270 F.2d 891, cert. den. 80 S.Ct. 612, 362 U.S. 903, 4 L.Ed.2d 555.

§ 301(11). —— Conditional Affirmance; Remittitur

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71. U.S.—Achilles v. New England Tree Expert Co., C.A.Vt., 369 F.2d 72—Lanfranconi v. Tidewater Oil Co., C.A.Vt., 376 F.2d 91, cert. den. 88 S.Ct. 334, 389 U.S. 951, 19 L.Ed.2d 361—Lebrecht v. Bethlehem Steel Corp., C.A.N.Y., 402 F.2d 585, 37 A.L.R.3d 1072—Wheatley v. Ford, C.A.N.Y., 679 F.2d 1037.

Error held not curable by remittitur

U.S.—Bankers Life & Cas. Co. v. Kirtley, C.A.Iowa, 307 F.2d 418.

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71.5. U.S.—Allied Materials Corp. v. Superior Products Co., Inc., C.A.Okl. 620 F.2d 224.

73. U.S.—Glazer v. Glazer, D.C.La., 274 F.Supp. 471.

D.C.—Yost v. Sauter, C.A., 420 F.2d 79, 136 U.S.App. D.C. 237.

74. D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C. 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

74.5. U.S.—Shingleton v. Armor Velvet Corp., C.A. Ga., 621 F.2d 180.

76.10. U.S.—Arnold v. Eastern Air Lines, Inc., C.A. N.C., 681 F.2d 186, cert. den. 103 S.Ct. 1801, 460 U.S. 1102, 76 L.Ed.2d 366, on reh. C.A., 712 F.2d 899, cert. den. 104 S.Ct. 703, 464 U.S. 1040, 79 L.Ed.2d 168.

§ 301(12). —— Rendering Final Judgment or Directing Further Proceedings

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81. U.S.—Morton v. Browne, C.A.Puerto Rico, 438 F.2d 1205—Marston v. Red River Levee and Drainage Dist., C.A.La., 632 F.2d 466.

81.5. U.S.—Whitelock v. Leatherman, C.A.Colo., 460 F.2d 507.

81.10. U.S.—Moviecolor Limited v. Eastman Kodak Co., C.A.N.Y., 288 F.2d 80, 90 A.L.R.2d 252, cert. den. 82 S.Ct. 39, 368 U.S. 821, 7 L.Ed.2d 26.

So also, the court of appeals may, on affirming a judgment which denies an injunction, order the issuance of an injunction to maintain the status quo.[81.20]

81.20. Pending suit for injunction in state court

U.S.—Milk Drivers and Dairy Emp. Union Local No. 338 v. Dairymen's League Co-op. Ass'n, C.A.N.Y., 304 F.2d 913.

82. U.S.—Asher v. Harrington, C.A.Wis., 461 F.2d 890.

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87.50. U.S.—Goland v. Central Intelligence Agency, C.A., 607 F.2d 339, 197 U.S.App.D.C. 25, cert. den. 100 S.Ct. 1312, 445 U.S. 927, 63 L.Ed.2d 759.

88. U.S.—Provident Tradesmens Bank & Trust Co. v. Patterson, Pa., 88 S.Ct. 733, 390 U.S. 102, 19 L.Ed.2d 936, on remand, C.A., 411 F.2d 88—Ven-Fuel, Inc. v. Department of the Treasury, C.A. Fla., 673 F.2d 1194.

Limited modification

U.S.—U.S. v. Erdner, C.A.N.J., 422 F.2d 835.

89. U.S.—Green v. Santa Fe Industries, Inc., C.A. N.Y., 562 F.2d 4.

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90. U.S.—Blaney v. Florida Nat. Bank at Orlando, C.A.Fla., 357 F.2d 27.

Precise legal conclusions

U.S.—American Oil Co. v. Hart, C.A.Fla., 356 F.2d 657, 27 A.L.R.3d 658.

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97. U.S.—College of Virgin Islands v. Vitex Mfg. Co., C.A.Virgin Islands, 393 F.2d 481.

99. U.S.—Ronsick v. Phariss, C.A.Kansas, 286 F.2d 316—Greyhound Lines, Inc. v. City of Chicago, C.A.Ill., 398 F.2d 36.

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6. U.S.—Stringer v. Dilger, C.A.Colo., 313 F.2d 536—Simpson v. U.S., C.A.Tex., 322 F.2d 688—DeVilliers v. Atlas Corp., C.A.N.M., 360 F.2d 292.

Reduction of amount held unauthorized

(3) In absence of showing that damage award duplicated expense items.

U.S.—Cates v. U.S., C.A.Fla., 451 F.2d 411.

7.15. U.S.—Morgan v. Dun & Bradstreet, Inc., C.A. Fla., 421 F.2d 1241.

10.5. Other cases involving modification to provide interest on judgments

U.S.—U.S. v. Wells, C.A.Tex., 337 F.2d 615.

11. U.S.—Mixing Equipment Co. v. Philadelphia Gear, Inc., C.A.Pa., 436 F.2d 1308—State of Wash. v. Central Contractors Ass'n, C.A.Wash., 453 F.2d 383—American News Co. v. Ladas, C.A. Mich., 454 F.2d 1237—Hodgson v. First Federal Sav. & Loan Ass'n of Broward County, Fla., C.A.Fla., 455 F.2d 818.

D.C.—Cefalo v. Moffett, C.A., 449 F.2d 1193, 146 U.S.App.D.C. 117.

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12.50. U.S.—Cameron v. E. M. Adams & Co., C.A. Or., 547 F.2d 473.

12.55. U.S.—Del Rey Air v. Expressway Airpark, Inc., C.A.Okl., 468 F.2d 187—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, cert. dism. 104 S.Ct. 3526—Daniels v. Bilbreath, C.A.Okl., 668 F.2d 477.

D.C.—Toregas v. Susser, C.A., 290 F.2d 368, 110 U.S. App.D.C. 177—Nader v. Volpe, C.A., 466 F.2d 261, 151 U.S.App.D.C. 90.

Reversal refused

U.S.—Astro Cinema Corp. v. Mackell, C.A.N.Y., 422 F.2d 293.

13. U.S.—Obieli v. Campbell Soup Co., C.A.Okl., 623 F.2d 668.

13.10. U.S.—Stone v. Egeler, C.A.N.D., 506 F.2d 287.

13.15. D.C.—Natural Resources Defense Council, Inc. v. Morton, C.A., 458 F.2d 827, 148 U.S.App. D.C. 5.

Summary disposition held not justified

U.S.—Jones v. Caddo Parish School Bd., C.A.La., 392 F.2d 721.

D.C.—Committee for Nuclear Responsibility, Inc. v. Seaborg, C.A., 463 F.2d 796, 149 U.S.App.D.C. 393.

Summary reversal warranted

D.C.—Vietnam Veterans Against The War/Winter Soldier Organization v. Morton, C.A., 506 F.2d 53, 164 U.S.App.D.C. 391.

§ 301(15). —— Grounds

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14. U.S.—Pettway v. American Cast Iron Pipe Co., C.A.Ala., 576 F.2d 1157, reh. den. 581 F.2d 267, cert. den. 99 S.Ct. 1020, 439 U.S. 1115, 59 L.Ed.2d 74, app. after remand C.A., 681 F.2d 1259, and 721 F.2d 315, cert. den. 104 S.Ct. 3515, 82 L.Ed.2d 824, cert. dism. 104 S.Ct. 3526.

King-Seeley Thermos Co. v. Aladdin Industries, Inc., C.A.Conn., 418 F.2d 31, on remand, D.C., 320 F.Supp. 1156.

Reversal for mootness as not determining propriety

U.S.—St. Louis-San Francisco Ry. Co. v. Railroad Yardmasters of America, AFL–CIO, C.A.Tex., 347 F.2d 983—Tyson v. Cazes, C.A.La., 363 F.2d 742.

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18.10. U.S.—Kelly v. Page, C.A.Ga., 335 F.2d 114.

D.C.—Quaker Action Group v. Hickel, C.A., 429 F.2d 185, 139 U.S.App.D.C. 1, app. after remand 460 F.2d 854, 148 U.S.App.D.C. 346, on remd. 362 F.2d 1161, affd. in part, remd. in part 516 F.2d 717, app. after remand 559 F.2d 716, 182 U.S.App. D.C. 95.

19. U.S.—Swanner v. U.S., C.A.Ala., 406 F.2d 716, on remand 309 F.Supp. 1183—Petition of U.S. Steel Corp., C.A.Ohio, 436 F.2d 1256, cert. den. 91 S.Ct. 1649, 1660, 1665, 402 U.S. 987, 29 L.Ed.2d 153, reh. den. 91 S.Ct. 2227, 403 U.S. 924, 29 L.Ed.2d 703, and 91 S.Ct. 2247, 403 U.S. 940, 29 L.Ed.2d 720, app. after remand 479 F.2d 489, cert. den. 94 S.Ct. 71, 414 U.S. 859, 38 L.Ed.2d 110.

19.5. U.S.—Wirtz v. International Harvester Co., C.A.Tex., 331 F.2d 462, cert. den. 85 S.Ct. 36.

21. U.S.—Council of Federated Organizations v. Mize, C.A.Miss., 339 F.2d 898—Davis v. Operation Amigo, Inc., C.A.Wyo., 378 F.2d 101.

23. U.S.—Reeves v. City of Jackson, Miss., C.A.Miss., 608 F.2d 644.

23.5. U.S.—Commonwealth Ins. Co. of N.Y. v. O. Henry Tent & Awning Co., C.A.Ill., 273 F.2d 163.

27. U.S.—Connecticut Fire Ins. Co. v. Ferrara, C.A. Mo., 277 F.2d 388, cert. den. 81 S.Ct. 231, 364 U.S. 903, 5 L.Ed.2d 195—Wiseman v. Sinclair Refining Co., C.A.N.Y., 290 F.2d 818, cert. den. 82 S.Ct. 63, 368 U.S. 837, 7 L.Ed.2d 37—Simpson v. Skelly Oil Co., C.A.Iowa., 371 F.2d 563.

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32. **Absence of necessary party**

(3) Other instances.

U.S.—Gorsuch v. Fireman's Fund Ins. Co., C.A.Ariz., 360 F.2d 23.

34. U.S.—Schaeper v. Edwards, C.A.Ohio, 306 F.2d 175.

§ 301(16). —— —— Technical, Formal, or Trivial Defects or Errors

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36. U.S.—Bryan v. Kershaw, C.A.Tex., 366 F.2d 497, cert. den. 87 S.Ct. 1030, 386 U.S. 959, 18 L.Ed.2d 108—Burns v. Massachusetts Institute of Technology, C.A.Mass., 394 F.2d 416—Parris v. St. Johnsbury Trucking Co., C.A.Vt., 395 F.2d 543.

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38. U.S.—U.S. v. Northside Realty Associates, Inc., C.A.Ga., 474 F.2d 1164. App. after remand 501 F.2d 181, reh. den. 518 F.2d 884, cert. den. 96 S.Ct. 1483, 424 U.S. 977, 47 L.Ed.2d 747, reh. den. 96 S.Ct. 2192, 425 U.S. 985, 48 L.Ed.2d 810.

45. **Variance**

U.S.—DeKorwin v. First Nat. Bank of Chicago, C.A. Ill., 318 F.2d 176, cert. den. 84 S.Ct. 266, 375 U.S. 922, 11 L.Ed.2d 165.

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55. U.S.—George v. U.S., C.A.Ill., 295 F.2d 310.

56. U.S.—Tracy v. Baker, C.A.Hawaii, 282 F.2d 431.

§ 301(17). —— —— Amount or Extent of Recovery

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64. U.S.—Bank of Utah v. Commercial Sec. Bank, C.A.Utah, 369 F.2d 19, cert. den. 87 S.Ct. 1374, 386 U.S. 1018, 18 L.Ed.2d 456.

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66. U.S.—Wicks v. Henken, C.A.N.Y., 378 F.2d 395.

69. U.S.—Schaeper v. Edwards, C.A.Ohio, 306 F.2d 175—Industrial Development Bd. of Town of Section, Ala. v. Fuqua Industries, Inc., 523 F.2d 1226.

71. U.S.—NBO Industries Treadway Companies, Inc. v. Brunswick Corp., C.A.N.J., 523 F.2d 262, vac. 97 S.Ct. 690, 429 U.S. 477, 50 L.Ed.2d 701, cert. den. 97 S.Ct. 1099, 429 U.S. 1090, 51 L.Ed.2d 535.

§ 301(18). —— Scope and Extent of Relief in General

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72. U.S.—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

Attorneys' fee award reversed

U.S.—Spectrofuge Corp. v. Beckman Instruments Inc., C.A.Fla., 575 F.2d 256, reh. den. 582 F.2d 41, two cases. Cert. den. 99 S.Ct. 1289, 440 U.S. 939, 59 L.Ed.2d 499.

73. D.C.—Hynning v. Partridge, C.A., 359 F.2d 271, 123 U.S.App.D.C. 287, cert. den. 87 S.Ct. 232, 385 U.S. 922, 17 L.Ed.2d 145.

74. U.S.—Smith v. North Carolina State Bd. of Ed., C.A.N.C., 444 F.2d 6—Wulp v. Corcoran, C.A. Mass., 454 F.2d 826.

75. U.S.—Pappas v. Moss, C.A.N.J., 393 F.2d 865, on remand 303 F.Supp. 1257.

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78. U.S.—W. H. Elliott & Sons Co. v. E. & F. King & Co., C.A.N.H., 291 F.2d 79—Magee v. Nelson, C.A.Cal., 400 F.2d 393.

78.5. D.C.—Edmonds, Inc. v. Vojka, C.A., 332 F.2d 309, 118 U.S.App.D.C. 109.

Nonappealing party

U.S.—Hegger v. Green, C.A.N.Y., 646 F.2d 22.

§ 301(19). —— Rendering or Ordering Final Judgment

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79.50. U.S.—Altec, Inc. v. FWD Corp., C.A.Ala., 399 F.2d 860—Trans World Airlines, Inc. v. Hughes, C.A.N.Y., 449 F.2d 51, revd. on oth. grds. 93 S.Ct. 647, 409 U.S. 363, 34 L.Ed.2d 577, reh. den. 93 S.Ct. 1434, 1435, 410 U.S. 975, 35 L.Ed.2d 707, on remand, D.C., 359 F.Supp. 783.

80. U.S.—Carroll v. American Federation of Musicians of U.S. and Canada, C.A.N.Y., 310 F.2d 325.

82. U.S.—Duke v. Sun Oil Co., C.A.Tex., 323 F.2d 518.

83. **Remand for clearer statement of position**

D.C.—F.T.C. v. Atlantic Richfield Co., C.A., 567 F.2d 96, 185 U.S.App.D.C. 229.

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84.5. U.S.—Walker v. State of Ga., C.A.Ga., 417 F.2d 1.

D.C.—Gulf Oil Corp. v. Reed, C.A., 334 F.2d 960, 118 U.S.App.D.C. 212.

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85. U.S.—Hudak v. Economic Research Analysts, Inc., C.A.Fla., 499 F.2d 996, cert. den. 95 S.Ct. 805, 419 U.S. 1122, 42 L.Ed.2d 821.

Monday v. U.S., D.C.Wis., 342 F.Supp. 1271, affd., C.A., 478 F.2d 1404, two cases, cert. den. 94 S.Ct. 233, 414 U.S. 910, 38 L.Ed.2d 148.

D.C.—Morgan v. Garris, C.A., 307 F.2d 179, 113 U.S. App.D.C. 222—Ingalls v. Brown, C.A., 377 F.2d 151, 126 U.S.App.D.C. 266.

86. U.S.—First Nat. Bank in Yonkers v. Maryland Cas. Co., C.A.N.Y., 290 F.2d 246.

87. U.S.—Black Warrior Elec. Membership Corp. v. Mississippi Power Co., C.A.Ala., 413 F.2d 1221.

88. U.S.—American State Bank v. U.S., C.A.Wis., 279 F.2d 585, cert. den. 81 S.Ct. 170, 364 U.S. 881, 5 L.Ed.2d 103.

89. U.S.—Vera Cruz v. Chesapeake & O.R.R. C.A. Ind., 312 F.2d 330, cert. den. 84 S.Ct. 44, 375 U.S. 813, 11 L.Ed.2d 49—Hurwitz v. Directors Guild of American, Inc., C.A.N.Y., 364 F.2d 67, cert. den. 87 S.Ct. 508, 385 U.S. 971, 17 L.Ed.2d 435.

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U.S.—U.S. v. Ward, C.A.La., 349 F.2d 795, reh. 352 F.2d 329—U.S. v. Palmer, C.A.La., 356 F.2d 951.

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90. U.S.—McAleer v. McNally Pittsburg Mfg. Co., C.A.Pa., 329 F.2d 273.

D.C.—Kosty v. Lewis, C.A., 319 F.2d 744, 115 U.S. App.D.C. 343, cert. den. 84 S.Ct. 482, 375 U.S. 964, 11 L.Ed.2d 414.

91. D.C.—Nozet v. District of Columbia, C.A., 300 F.2d 735, 112 U.S.App.D.C. 143—Detroit Fire Fighters Ass'n, Local No. 344, I.A.F.F. v. Dixon, C.A.Mich., 572 F.2d 557.

93.10. U.S.—Fehringer v. Bluebeard's Castle, Inc., C.A.Virgin Islands, 430 F.2d 426.

95. U.S.—Iacurci v. Lummus Co., N.Y., 87 S.Ct. 1423, 387 U.S. 86, 18 L.Ed.2d 581—Fehringer v. Bluebeard's Castle, Inc., C.A.Virgin Islands, 430 F.2d 426.

96. U.S.—U.S. v. Duke, C.A.Miss., 332 F.2d 759—Yeager v. J. R. Christ Co., C.A.Pa., 364 F.2d 96.

99. **No inflexible rule proscribing judgment for defendant**

U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

Disposition of issues and termination of litigation

U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

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2.5. U.S.—Bardin v. Mondon, C.A.N.Y., 298 F.2d 235.

2.15. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

2.20. U.S.—Chicago, R.I. & P.R. Co. v. Breckenridge, C.A.Iowa, 333 F.2d 990—Oliveras v. American Export Isbrandtsen Lines, Inc., C.A.N.Y., 431 F.2d 814.

2.25. U.S.—Gebhard v. Royce Aluminum Corp., 296 F.2d 17—Oliveras v. American Export Isbrandtsen Lines, Inc., C.A.N.Y., 431 F.2d 814.

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2.30. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366, 386 U.S. 1027, 18 L.Ed.2d 471.

Howes v. Great Lakes Press Corp., C.A.N.Y., 679 F.2d 1023, cert. den. 103 S.Ct. 452, 459 U.S. 1038, 74 L.Ed.2d 605.

5. D.C.—Bennett v. D.C. Transit System, Inc., C.A., 298 F.2d 325, 111 U.S.App.D.C. 411.

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Other matters with respect to disposition of appeal on denial of judgment n.o.v. have been considered.[6.15]

6.15. U.S.—Neely v. Martin K. Eby Const. Co., Colo., 87 S.Ct. 1072, 386 U.S. 317, 18 L.Ed.2d 75, reh. den. 87 S.Ct. 1366 386 U.S. 1027, 18 L.Ed.2d 471—U.S. for Use of Acme Granite & Tile Co. v. F. D. Rich Co., C.A.Wash., 437 F.2d 549, op. adhered to, reh. den. 441 F.2d 1143, cert. den. 92 S.Ct. 48, two cases, 404 U.S. 823, 30 L.Ed.2d 51, app. after remand 520 F.2d 886.

7. U.S.—Hansen v. Firestone Tire & Rubber Co., C.A.Mich., 276 F.2d 254.

10. U.S.—Davis v. Board of School Com'rs of Mobile County, Ala., C.A.Ala., 322 F.2d 356, cert. den. 84 S.Ct. 170, 375 U.S. 894, 11 L.Ed.2d 123, reh. den. 84 S.Ct. 656, 376 U.S. 928, 11 L.Ed.2d 628.

11. U.S.—Gautreaux v. Romney, C.A.Ill., 448 F.2d 731.

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12. U.S.—Susquehanna Corp. v. Pan Am. Sulphur Co., C.A.Tex., 423 F.2d 1075—Engelman v. Cahn, C.A.N.Y., 425 F.2d 954, cert. den. 90 S.Ct. 1238, 397 U.S. 1009, 25 L.Ed.2d 422.

13. U.S.—Electronic Specialty Co. v. International Controls Corp., C.A.N.Y., 409 F.2d 937.

14.10. U.S.—U.S. v. Harrison County, Miss., C.A. Miss., 414 F.2d 784, cert. den. 90 S.Ct. 925, 397 U.S. 918, 25 L.Ed.2d 99, app. after remand 445 F.2d 276, app. after remand 463 F.2d 1328—Armour & Co. v. Scott, C.A.Pa., 438 F.2d 354.

Relief ordered

U.S.—Tri-State Generation & Transmission Ass'n v. Public Service Commission of Wyo., C.A.Wyo., 412 F.2d 115, cert. den. 90 S.Ct. 1348, 397 U.S. 1043, 25 L.Ed.2d 654.

§ 301(20). —— —— Want of Jurisdiction of Lower Court

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15.50. U.S.—Bond v. Doig, D.C.N.J., 433 F.Supp. 243.

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16. U.S.—Lathan v. Baltimore & O.R. Co., C.A.N.Y., 274 F.2d 507.

17.5. **Insufficient allegations of diversity of citizenship**

U.S.—Garcia v. Bernabe, C.A.Puerto Rico, 288 F.2d 60.

19. U.S.—Hunt v. Local Bd. No. 197, C.A.Pa., 438 F.2d 1128.

§ 301(21). —— —— Insufficient Cause of Action or Sufficient Defense

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20. U.S.—Hurwitz v. Directors Guild of America, Inc., C.A.N.Y., 364 F.2d 67, cert. den. 87 S.Ct. 508, 385 U.S. 971, 17 L.Ed.2d 435.

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24. U.S.—Friarton Estates Corp. v. City of New York, C.A.N.Y., 681 F.2d 150.

24.5. U.S.—Stein v. Oshinsky, C.A.N.Y., 348 F.2d 999, cert. den. 86 S.Ct. 435, 382 U.S. 957, 15 L.Ed.2d 361.

25. U.S.—U.S. v. West Gulf Maritime Ass'n, C.A. Tex., 460 F.2d 1231—Merkey v. Board of Regents of State of Fla., C.A.Fla., 493 F.2d 790, reh. den. 496 F.2d 878—DeSimone v. Linford, C.A.Ga., 494 F.2d 1186.

25.5. D.C.—Reiter v. Universal Marion Corp., C.A., 273 F.2d 820, 107 U.S.App.D.C. 6.

§ 301(22). —— —— Sufficient Cause of Action and Insufficient Defense

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26. U.S.—Kirkland v. Wallace, C.A.Ala., 403 F.2d 413.

§ 301(26). —— Ordering New Trial or Other Proceeding in Lower Court

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34.50. U.S.—Clarke v. District Director of Internal Revenue Service, C.A., 457 F.2d 1011—Blizard v. Fielding, C.A.Mass., 572 F.2d 13, on remand, D.C., 454 F.Supp. 318, affd., C.A., 601 F.2d 1217—House v. Mine Safety Appliances Co., C.A.Idaho, 573 F.2d 609, cert. den. 99 S.Ct. 182, 439 U.S. 862, 58 L.Ed.2d 171—Continental Oil Co. v. State of Okl. ex rel. Oklahoma Employment Sec. Commission, C.A.Okl., 574 F.2d 1016—Potomac Elec. Power Co. v. Fugate, C.A.Va., 574 F.2d 1163—Putaturo v. Crook, C.A.Tex., 653 F.2d 1027—Matter of Fashion Optical, Ltd., C.A.Okl., 653 F.2d 1385—Royal v. Missouri Highway and Transp Commission, C.A.Mo., 665 F.2d 159. On remand, D.C., 549 F.Supp. 681, affd. C.A., 714 F.2d 867—Blake v. Hall, C.A.Mass., 668 F.2d 52, cert. den. 102 S.Ct. 2257, 456 U.S. 983, 72 L.Ed.2d 862.

D.C.—Hannah v. U.S., C.A.D.C., 410 F.2d 1049, 133 U.S.App.D.C. 350—Moody v. Internal Revenue Service, C.A., 654 F.2d 795, 210 U.S.App.D.C. 80, on remand, D.C., 527 F.Supp. 535, affd. in part, remd. in part, C.A., 682 F.2d 266, 221 U.S.App. D.C. 11.

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35. U.S.—Pullman-Standard v. Swint, Ala., 102 S.Ct. 1781, 456 U.S. 273, 72 L.Ed.2d 66, on remand, C.A., 692 F.2d 1031.

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D.C.—Gould, Inc. v. Chafee, C.A., 450 F.2d 667, 146 U.S.App.D.C. 206.

Reconsideration in light of court of appeals opinion

U.S.—Alexander v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers, AFL–CIO, C.A.Tenn., 565 F.2d 1364, cert. den. 98 S.Ct. 2849, 436 U.S. 946, 56 L.Ed.2d 787.

Nev.—Greear v. Greear, C.A.Nev., 303 F.2d 893.

Issuance of injunction

U.S.—Goldberg v. Cockrell, C.A.Miss., 303 F.2d 811.

Reconsideration in light of state court's final resolution of issue

U.S.—Carpa, Inc. v. Ward Foods, Inc., C.A.Tex., 567 F.2d 1316.

Remand to proceed under Civil Rights Act

U.S.—Lister v. Commissioners Court, Navarro County, C.A.Tex., 566 F.2d 490.

Exhaustion of administrative remedies

U.S.—Clary v. U.S., C.A.Tex., 566 F.2d 529.

Remand upon change in law or facts

U.S.—Concerned Citizens of Vicksburg v. Sills, C.A. Miss., 567 F.2d 646.

Reconsideration in light of Supreme Court decision

U.S.—Wild v. Lykes Bros. S.S. Corp., C.A.La., 665 F.2d 519, on remand D.C., 595 F.Supp. 313, affd. C.A., 734 F.2d 1124—Washington v. Finlay, C.A. S.C., 664 F.2d 913, cert. den. 102 S.Ct. 2933, 457 U.S. 1120, 73 L.Ed.2d 1333.

36. U.S.—W.R.B. Corp. v. Geer, C.A.Tex., 313 F.2d 750.

37. U.S.—Burke v. Gateway Clipper, Inc., C.A.Pa., 441 F.2d 946.

D.C.—Blumenthal v. Blumenthal, C.A., 274 F.2d 751, 107 U.S.App.D.C. 93, app. allowing, 155 A.2d 525—Robinson v. Diamond Housing Corp., C.A., 463 F.2d 853, 150 U.S.App.D.C. 17.

New trial before another judge

U.S.—Tanner Motor Livery, Limited v. Avis, Inc., C.A. Cal., 316 F.2d 804, cert. den. 84 S.Ct. 59, 375 U.S. 821, 11 L.Ed.2d 55—Haverhill Gazette Co. v. Union Leader Corp., C.A.Mass., 333 F.2d 798, motion den. 333 F.2d 808, cert. den. 85 S.Ct. 329, 379 U.S. 931, 13 L.Ed.2d 343, reh. den. 85 S.Ct. 645, 379 U.S. 984, 13 L.Ed.2d 578.

New trial before another judge not warranted

U.S.—Kerr v. Shanks, C.A.Cal., 466 F.2d 1271.

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38. U.S.—Horton v. Orange County Bd. of Ed., C.A. N.C., 464 F.2d 536.

Evidence in record pointing in one direction only

D.C.—Kosty v. Lewis, C.A., 319 F.2d 744, 115 U.S. App.D.C. 343, cert. den. 84 S.Ct. 482, 375 U.S. 964, 11 L.Ed.2d 414.

Issuance of injunction

U.S.—Goldberg v. Mathews, C.A.Miss., 303 F.2d 814.

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38.5. U.S.—Lundeen v. Cordner, C.A.Minn., 356 F.2d 169.

38.10. U.S.—Dwyer v. Socony-Vacuum Oil Co., C.A. N.Y., 276 F.2d 653.

§ 301(27). —— —— Nature and Extent and Proceedings Ordered

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42.50. U.S.—Ernst and Ernst v. U.S. Dist. Court for Southern Dist. of Tex., C.A.Tex., 439 F.2d 1288, op. supp. 457 F.2d 1399—Keller v. Dravo Corp., C.A.La., 441 F.2d 1289, cert. den. 92 S.Ct. 679, 404 U.S. 1017, 30 L.Ed.2d 665.

D.C.—Baurer v. Planning Group, Inc., C.A., 669 F.2d 770, 215 U.S.App.D.C. 384.

Consolidation of cases

U.S.—Kalimian v. Liberty Mut. Fire Ins. Co., C.A. N.Y., 300 F.2d 547.

Remand with directions to seek specified relief

U.S.—Wikle v. Chohon, C.A.Cal., 337 F.2d 45.

Pretrial hearing

U.S.—Freehill v. Lewis, C.A.Va., 355 F.2d 46.

Determination of acquaintance of veniremen with attorneys

U.S.—Progner v. Eagle, C.A.N.C., 377 F.2d 461.

Determination by three-judge court

U.S.—Langford v. Barlow, C.A.Tex., 417 F.2d 628—Campanuolo v. Harder, C.A.Conn., 440 F.2d 1225.

Redetermination in award of attorney fees

U.S.—Aaacon Auto Transport, Inc. v. Medlin, C.A. Fla., 575 F.2d 1102, reh. den. 580 F.2d 1052.

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42.52. U.S.—Henriques v. Gulf Oil Corp., C.A.N.M., 305 F.2d 51.

42.54. U.S.—May v. Atlas Magazines, Inc., C.A. Mich., 380 F.2d 58—Van Geldern v. Chavez, C.A. Cal., 392 F.2d 578.

42.60. U.S.—Russell v. U.S., C.A.Ky., 465 F.2d 1261—Montgomery v. Otis Elevator Co., C.A.La., 472 F.2d 243—Cummins Sales & Service, Inc. v. London & Overseas Ins. Co., C.A.Tex., 476 F.2d 498, reh. den. C.A., 478 F.2d 1402, cert. den. 94 S.Ct. 359, 414 U.S. 1003, 38 L.Ed.2d 239—Boazman v. Economics Laboratory, Inc., C.A.Ga., 537 F.2d 210—Van Den Broeke v. Bellanca Aircraft Corp., C.A.Miss., 576 F.2d 582.

D.C.—Doe v. General Hospital of District of Columbia, C.A., 434 F.2d 427, 140 U.S.App.D.C. 153.

42.64. U.S.—Edwards v. Imperial Cas. & Indem. Co., C.A.Fla., 418 F.2d 570—Powers v. U.S. Postal Service, C.A.Ind., 671 F.2d 1041.

42.68. U.S.—Farmington Dowel Products Co. v. Forster Mfg. Co., C.A.Me., 436 F.2d 699.

42.70. D.C.—Hayes v. Livermont, C.A., 279 F.2d 818, 108 U.S.App.D.C. 43.

42.72. U.S.—Moore v. Missouri Pac. R. Co., C.A. Tex., 264 F.2d 754, cert. den. 80 S.Ct. 119, 361 U.S. 861, 4 L.Ed.2d 103.

43. U.S.—U.S. v. Alvarez, C.A.N.J., 519 F.2d 1036—Loose v. Offshore Nav., Inc., C.A.La., 670 F.2d 493, 68 A.L.R. Fed. 318.

D.C.—Souza v. Corvick, C.A., 441 F.2d 1013, 142 U.S.App.D.C. 323.

44. U.S.—Equal Employment Opportunity Commission v. Woolco Dept. State, C.A.La., 460 F.2d 301—Comeaux v. T. L. James & Co., Inc., C.A. La., 666 F.2d 294, op. supp., 702 F.2d 1023.

Error requiring complete new trial

(2) Other matters.

U.S.—Sylvania Elec. Products, Inc. v. Flanagan, C.A. Mass., 352 F.2d 1005.

D.C.—Mathews v. Lindsay, C.A., 281 F.2d 927, 108 U.S.App.D.C. 292.

Constitutional questions

(2) Other statements.

U.S.—Kirkland v. Wallace, C.A.Ala., 403 F.2d 413.

To determine reasonable cost of completing contract

U.S.—Green Manor Const. Co. v. Highland Painting Service, Inc., C.A.Mass., 345 F.2d 657.

45. D.C.—Jalil v. Hampton, C.A., 460 F.2d 923, 148 U.S.App.D.C. 415, cert. den. 93 S.Ct. 112, 409 U.S. 887, 34 L.Ed.2d 144.

Remand for further proceedings

U.S.—Bonanno v. Thomas, C.A.Ariz., 309 F.2d 320.

Appellant failing to move for judgment notwithstanding verdict

U.S.—Local 978, United Broth. of Carpenters and Joiners of America, AFL–CIO v. Markwell, C.A.Mo., 305 F.2d 38.

Validity of county taxing

U.S.—Spokane County v. Air Base Housing, Inc., C.A. Wash., 304 F.2d 494.

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45.5. U.S.—Pioneer Nat. Title Ins. Co. v. American Cas. Co. of Reading, Pa., C.A.Ga., 459 F.2d 963—Hill v. Rowland, C.A.N.C., 474 F.2d 1374—Asea, Inc. v. Southern Pac. Transp. Co., C.A.Cal., 669 F.2d 1242.

46. U.S.—Whisenant v. Brewster-Bartle Offshore Co., C.A.La., 446 F.2d 394—Barnd v. City of Tacoma, C.A.Wash., 664 F.2d 1339.

D.C.—Morgan v. Garris, C.A., 307 F.2d 179, 113 U.S. App.D.C. 222.

Issue as to jurisdiction of court

U.S.—Willis v. Craig, C.A.Cal., 555 F.2d 724.

New trial as to separate party

U.S.—Larson v. Straff, C.A.Pa., 340 F.2d 180.

47. U.S.—Boire v. Miami Herald Pub Co., C.A.Fla., 343 F.2d 17, cert. den. 86 S.Ct. 56, 382 U.S. 824, 15 L.Ed.2d 70—Wolff v. Selective Service Local Bd. No. 16, C.A.N.Y., 372 F.2d 817.

D.C.—Tuck v. Pan American Health Organization, C.A., 668 F.2d 547, 215 U.S.App.D.C. 201.

47.5. U.S.—Dazenko v. James Hunter Mach. Co., C.A.Ill., 393 F.2d 287—T. J. Stevenson & Co., Inc. v. 81,193 Bags of Flour, C.A.Ala., 629 F.2d 338, reh. den. 651 F.2d 779, and 651 F.2d 779.

D.C.—Sherwin v. Welch, C.A., 319 F.2d 729, 115 U.S.App.D.C. 328.

48. U.S.—Taylor v. Safeway Stores, Inc., 524 F.2d 263—Davis v. Smith, C.A.Ark., 638 F.2d 66—Hallberg v. Brasher, C.A.Mo., 679 F.2d 751.

Interest

U.S.—Robert C. Herd & Co. v. Krawill Machinery Corp., C.A.Md., 256 F.2d 946, affd. 79 S.Ct. 766, 359 U.S. 297, 3 L.Ed.2d 820.

(2) Other matters.

U.S.—Hertz v. Graham, C.A.N.Y., 292 F.2d 443, cert. den. 82 S.Ct. 366, 368 U.S. 929, 7 L.Ed.2d 192—McCrea v. Harris County Houston Ship Channel Nav. Dist., C.A.Tex., 423 F.2d 605. Cert. den. 91 S.Ct. 189, 400 U.S. 927, 27 L.Ed.2d 186.

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48.5. **Remand for remittitur or new trial on issue of damages**

U.S.—Glazer v. Glazer, C.A.La., 374 F.2d 390, cert. den. 88 S.Ct. 100, 389 U.S. 831, 19 L.Ed.2d 90, on remand, D.C., 274 F.Supp. 471, on remand 278 F.Supp. 476—McDonald v. Bennett, C.A.Tex., 679 F.2d 415.

D.C.—Taylor v. Washington Terminal Co., C.A., 409 F.2d 145, 133 U.S.App.D.C. 110, cert. den. 90 S.Ct. 93, 396 U.S. 835, 24 L.Ed.2d 85, on remand 308 F.Supp. 1152.

48.20. U.S.—Pitner v. U.S., C.A.Tex., 388 F.2d 651—Plumbers and Fitters, Local 761 v. Matt J. Zaich Const. Co., C.A.Cal., 418 F.2d 1054—Poster Exchange, Inc. v. National Screen Service Corp., C.A.Ga., 431 F.2d 334, cert. den. 91 S.Ct. 880, 401 U.S. 912, 27 L.Ed.2d 811, reh. den. 91 S.Ct. 1250, 401 U.S. 1015, 28 L.Ed.2d 552.

Other matters relating to attorneys' fees

U.S.—Serbin, Inc. v. Key West Hand Print Fabrics, Inc., C.A.Fla., 381 F.2d 735.

48.30. U.S.—Rosa v. City of Chester, C.A.Pa., Pa., 278 F.2d 876—Hasbrouck v. Texaco, Inc., C.A. Wash., 663 F.2d 930, cert. den. 103 S.Ct. 63, 459 U.S. 828, 74 L.Ed.2d 65.

48.35. U.S.—Caskey v. Village of Wayland, C.A. N.Y., 375 F.2d 1004.

50.15. Ind.—Salk v. Weinraub, 390 N.E.2d 995, 271 Ind. 115.

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54. U.S.—U.S. v. Hardy, C.A.Utah, 368 F.2d 191—Esposito v. Klinger C.A.Cal., 381 F.2d 13—Hunter v. U.S., C.A.Cal., 388 F.2d 148.

55. U.S.—Hines v. Delta Air Lines, Inc., C.A.Fla., 461 F.2d 576.

56. U.S.—Stahl v. Ohio River Co., C.A.Pa., 424 F.2d 52.

57.5. U.S.—Fry v. Layne-Western Co., C.A.Mo., 282 F.2d 97—Texaco-Cities Service Pipe Line Co. v. Aetna Cas. & Sur. Co., C.A.Mo., 283 F.2d 144—Buell v. Sears, Roebuck & Co., C.A.Colo., 321 F.2d 468.

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64.50. U.S.—Atkins v. State Bd. of Ed. of N.C., C.A.N.C., 418 F.2d 874—Boles v. Greeneville Housing Authority, C.A.Tenn., 468 F.2d 476—Johnson v. San Francisco Unified School Dist., C.A.Cal., 500 F.2d 349—Fleming v. Citizens for Albemarle, Inc., C.A.Va., 577 F.2d 236, cert. den. 99 S.Ct. 842, 439 U.S. 1071, 59 L.Ed.2d 37.

65. D.C.—Cooper v. Lish, C.A., 318 F.2d 262, 115 U.S.App.D.C. 291.

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68. U.S.—Moreno v. Collins, C.A.Ill., 362 F.2d 176.

68.10. U.S.—Parham v. Southwestern Bell Tel. Co., C.A.Ark., 433 F.2d 421.

68.20. U.S.—McCleneghan v. Union Stock Yards Co. of Omaha, C.A.Neb., 298 F.2d 659.

68.50. U.S.—Burns v. Paddock, C.A.Ill., 503 F.2d 18—Illinois Cent. Gulf R. Co. v. Southern Rock, Inc., C.A.Miss., 644 F.2d 1138—Squirt Co. v. Seven-Up Co., C.A.Mo., 628 F.2d 1086.

D.C.—Rogers v. Lion Transfer & Storage Co., C.A., 345 F.2d 80, 120 U.S.App.D.C. 186—Klein v. District of Columbia, C.A., 409 F.2d 164, 133 U.S. App.D.C. 129.

Remand for taking further evidence held unnecessary

U.S.—Burriss v. Texaco, Inc., C.A.S.C., 361 F.2d 169.

68.55. U.S.—Federal Open Market Committee of Federal Reserve System v. Merrill, Dist.Cal., 99 S.Ct. 2800, 443 U.S. 340, 61 L.Ed.2d 587, on remand, D.C., 516 F.Supp. 1028.

Cowger v. Arnold, C.A.Pa., 460 F.2d 219—Petty v. U.S., C.A.Iowa, 679 F.2d 719, on remand D.C., 592 F.Supp. 687, affd., C.A., 740 F.2d 1428.

D.C.—D.C. Federation of Civic Associations v. Volpe, C.A., 459 F.2d 1231, 148 U.S.App.D.C. 207, cert. den. 92 S.Ct. 1290, 405 U.S. 1030, 31 L.Ed.2d 489, app. after remand 520 F.2d 451, 172 U.S.App.D.C. 51, on remand, D.C., 71 F.R.D. 206.

Cause remanded for:

(1) U.S.—Graham v. Acme Markets, Inc., C.A.Pa., 401 F.2d 539, on remand, D.C., 299 F.Supp. 1304.

(3) U.S.—McManus v. Midland Val. Lumber Co., C.A.S.C., 348 F.2d 898—C. H. Codding & Sons v. Armour & Co., C.A.Okl., 404 F.2d 1.

(5) Other purposes.

D.C.—Bakery and Confectionery Workers Intern. Union of America v. Ratner, C.A., 335 F.2d 691, 118 U.S.App.D.C. 269, on remand, D.C., F.Supp. 347.

Remand for findings held unnecessary

U.S.—Janzen v. Goos, C.A.Neb., 302 F.2d 421—Riess v. Murchison, C.A.Cal., 384 F.2d 727, 32 A.L.R.3d 363, op. after remand 503 F.2d 999, cert. den. 95 S.Ct. 1430—Guidry v. Texaco, Inc., C.A.Tex., 430 F.2d 781.

D.C.—Clark v. Marsh, C.A., 665 F.2d 1168, 214 U.S. App.D.C. 350.

Pro forma conclusions insufficient

U.S.—Corley v. Jackson Police Dept., C.A.Miss., 566 F.2d 994, app. after remand 639 F.2d 1296.

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68.60. U.S.—Lemelson v. Kellogg Co., C.A.N.Y., 440 F.2d 986—McCord, Condron & McDonald Inc. v. Carpenters Local Union No. 1822, C.A.Tex., 464 F.2d 1036.

§ 301(28). —— —— Errors and Defects in Trial or Proceedings

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70. U.S.—Cooley v. Board of Ed. of Forrest City School Dist., C.A.Ark., 453 F.2d 282.

D.C.—Spann v. Commissioners of District of Columbia, C.A., 443 F.2d 715, 143 U.S.App.D.C. 300.

71. U.S.—Aetna Ins. Co. v. Stanford, C.A.Tex., 273 F.2d 150—U.S. v. Moran Towing & Transp. Co., C.A.Md., 409 F.2d 961, on remand, D.C., 302 F.Supp. 600—Stewart v. Hall, C.A.4 (Va.), 770 F.2d 1267.

Error in submitting issue

(2) Other instances.

U.S.—Schultz v. Tecumseh Products, C.A.Mich., 310 F.2d 426.

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74. U.S.—Ramsey v. Mellon Nat. Bank & Trust Co., C.A.Ohio, 350 F.2d 874—Edwards v. Mayes, C.A. N.C., 385 F.2d 369.

75. U.S.—People of State of Cal. v. Pobuta, C.A.Cal., 437 F.2d 1200, app. after remand 452 F.2d 109—Baca Land & Cattle Co. v. Sabage, C.A.N.M., 440 F.2d 867.

D.C.—Cooper v. Lish, C.A., 318 F.2d 262, 115 U.S. App.D.C. 291—Gordon v. Federal Deposit Ins. Corp., C.A., 427 F.2d 578, 138 U.S.App.D.C. 308.

Improper jury list

U.S.—Broadway v. Culpepper, C.A.Ga., 439 F.2d 1253.

77. U.S.—Zuckerman v. Berg Mfg. & Sales Co., C.A. Ill., 279 F.2d 904—Owen Laboratories, Inc. v. Schroeder, C.A.Ill., 284 F.2d 445.

78. U.S.—Ford Motor Co. v. Dallas Power & Light Co., C.A.Tex., 499 F.2d 400.

D.C.—Ackerly v. Ley, C.A., 420 F.2d 1336, 137 U.S. App.D.C. 133—McSurely v. McClellan, C.A., 426 F.2d 664, 138 U.S.App.D.C. 187, app. after remand 521 F.2d 1024, 172 U.S.App.D.C. 364, on reh. 553 F.2d 1277, 180 U.S.App.D.C. 101, cert. is dism. 98 S.Ct. 3116, 438 U.S. 189, 57 L.Ed.2d 704, app. after remand 697 F.2d 309, 225 U.S.App.D.C. 67, 67 A.L.R.Fed. 614, 753 F.2d 88, 243 U.S.App.D.C. 270, cert. den. 106 S.Ct. 525, two cases, 88 L.Ed.2d 457.

Remand held unnecessary

U.S.—Elmore v. U.S., C.A.Tenn., 404 F.2d 56.

79. U.S.—Hartley & Parker, Inc. v. Florida Beverage Corp., C.A.Fla., 348 F.2d 161.

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80. U.S.—Barnes v. West Point Foundry & Mach. Co., C.A.Ala., 441 F.2d 532.

82. U.S.—National Union Fire Ins. Co. v. San Nicolas, C.A.Guam, 291 F.2d 539—U.S. v. Various Articles of Drugs Consisting of Unknown Quantities of Prescription Drugs, C.A.N.J., 314 F.2d 850—Peper v. Cedarbrook Farms, Inc., C.A.N.J., 437 F.2d 1209—California Trucking Ass'n v. Brotherhood of Teamsters & Auto Truck Drivers, Local 70, C.A.Cal., 679 F.2d 1275, cert. den. 103 S.Ct. 299, 459 U.S. 970, 74 L.Ed.2d 281.

Reversal not required

U.S.—Herndon v. City of Massillon, C.A.Ohio, 638 F.2d 963.

§ 301(30). —— Effect of Reversal

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83.50. U.S.—Royal Business Machines, Inc. v. Lorraine Corp., C.A.Ind., 633 F.2d 34.

D.C.—American Federation of Government Emp., AFL–CIO v. Carmen, C.A., 669 F.2d 815, 216 U.S.App.D.C. 17.

83.55. U.S.—Imperial Chemical Industries Limited v. National Distillers & Chemical Corp., C.A.N.Y., 354 F.2d 459, 19 A.L.R.3d 492.

84. U.S.—Michigan Sur. Co. v. Service Machinery Corp., C.A.Fla., 277 F.2d 531—Troy State University v. Dickey, C.A.Ala., 402 F.2d 515—In re Imperial "400" Nat., Inc., C.A.N.J., 456 F.2d 926—Zeilstra v. Farr, C.A.Mich., 466 F.2d 111.

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84.10. U.S.—W. R. Grace and Co. v. Local Union No. 759, Intern Union of United Rubber, Cork, Linoleum and Plastic Workers of America, C.A. Miss., 652 F.2d 1248, reh. den. 659 F.2d 1076, affd. 103 S.Ct. 2177, 461 U.S. 757, 76 L.Ed.2d 298.

85. U.S.—Yanow v. Weyerhaeuser S S. Co., C.A.Or., 274 F.2d 274, cert. den. 80 S.Ct. 671, 362 U.S. 919, 4 L.Ed.2d 739.

87.10. U.S.—Annat v. Beard, C.A.Fla., 277 F.2d 554, cert. den. 81 S.Ct. 270, 364 U.S. 908, 5 L.Ed.2d 223.

89. U.S.—American Infra-Red Radiant Co. v. Lambert Industries, Inc., D.C.Minn., 41 F.R.D. 161.

90. U.S.—Saylor v. Lindsley, D.C.N.Y., 302 F.Supp. 1174.

§ 301(31). Amendment, Modification, and Setting Aside of Its Judgment by Court of Appeals

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91. U.S.—Lim Kwock Soon v. Brownell, C.A.Tex., 369 F.2d 808—C.J.S. cited in Spinelli v. U.S., C.A.Mo., 382 F.2d 871, 877, cert. gr. 88 S.Ct. 1025, 390 U.S. 942, 19 L.Ed.2d 1130, mod. on oth. grds. 88 S.Ct. 1834, 3911 U.S. 933, 20 L.Ed.2d 853, revd. 89 S.Ct. 584, 393 U.S. 410, 21 L.Ed.2d 637—William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., C.A.Cal., 668 F.2d 1014, cert. den. 103 S.Ct. 57, 58, 459 U.S. 825, 74 L.Ed.2d 61.

School desegregation

U.S.—Bush v. Orleans Parish School Bd., C.A.La., 308 F.2d 491—Ross v. Dyer, C.A.Tex., 312 F.2d 191.

97. D.C.—Dillard v. Dillard, C.A., 275 F.2d 878, 107 U.S.App.D.C. 214.

§ 301(32). Mandate and Proceedings in Lower Court

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Receipt of mandate

99. U.S.—Vuitton Et Fils S.A. v. J. Young Enterprises, Inc., C.A.Cal., 644 F.2d 769.

Tkaczyk v. Gallagher, D.C.Conn., 265 F.Supp. 791.

1. U.S.—C.J.S. cited in Gill v. C. I. R., C.A.Ala., 306 F.2d 902, 906.

3. Remand held not defective

U.S.—F.T.C. v. J. Weingarten, Inc., C.A.Tex., 336 F.2d 687, cert. den. 85 S.Ct. 890, 380 U.S. 908, 13 L.Ed.2d 796.

Under the Federal Rules of Appellate Procedure, a certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue.[4.5]

4.5. F.R.A.P. Rule 41(a), 28 U.S.C.A.

5. U.S.—Atlas Scraper & Engineering Co. v. Pursche, C.A.Cal., 357 F.2d 296, cert. den. 87 S.Ct. 47, 385 U.S. 846, 17 L.Ed.2d 76, reh. den. 87 S.Ct. 699, 385 U.S. 1020, 17 L.Ed.2d 559.

6. U.S.—Bailey v. Henslee, C.A.Ark., 309 F.2d 840—Noel v. United Aircraft Corp., C.A.Del., 359 F.2d 671.

9. U.S.—U.S. v. Mills, C.A.Md., 317 F.2d 764.

The Federal Rules of Appellate Procedure expressly provides for the time of issuance of the mandate and for stay of the mandate.[10.20]

10.20. F.R.A.P. Rule 41, 28 U.S.C.A.

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11.50. U.S.—Brown v. Dade Christian Schools, Inc., C.A.Fla., 581 F.2d 472, reh. den. 585 F.2d 520.

11.55. U.S.—Crane Co. v. American Standard, Inc., C.A.N.Y., 326 F.Supp. 766, revd. in part on oth. grds., C.A., 490 F.2d 332, on remand, D.C., 429 F.Supp. 945, affd. in part, revd. in part on oth. grds. C.A., 603 F.2d 244.

12.5. U.S.—Kearns v. Field, C.A.Cal., 453 F.2d 349—Gulf Coast Bldg. & Supply Co. v. International Broth. of Elec. Workers, Local No. 480, AFL–CIO, C.A.Ala., 460 F.2d 105.

Holdeen v. Ratterree, D.C.N.Y., 190 F.Supp. 752, affd. in part and revd. in part, on oth. grds., C.A., 292 F.2d 338—A. C. Becken Co. v. Gemex Corp., D.C.Ill., 199 F.Supp. 544, affd., C.A., 314 F.2d 839, cert. den. 84 S.Ct. 49, 68, 375 U.S. 816, 11 L.Ed.2d 51—Butler v. Bazemore, D.C.La., 227 F.Supp. 221.

13. U.S.—Bailey v. Henslee, C.A.Ark., 309 F.2d 840.

Particular decisions construed

U.S.—Muth v. Atlass, C.A.Ill., 375 F.2d 122, cert. den. 87 S.Ct. 1484, 386 U.S. 1037, 18 L.Ed.2d 601—Costello Pub. Co. v. Rotelle, C.A., 670 F.2d 1035, 216 U.S.App.D.C. 216.

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14. U.S.—Bailey v. Henslee, C.A.Ark., 309 F.2d 840.

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15. U.S.—Bailey v. Henslee, C.A.Ark., 309 F.2d 840—Imperial Chemical Industries Limited v. National Distillers & Chemical Corp., C.A.N.Y., 354 F.2d 459, 19 A.L.R.3d 492.

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17.5. Stay denied

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§ 301(34). —— —— Law of the Case

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Conn.—Hoblitzelle v. Frechette, 240 A.2d 864, 156 Conn. 253.

D.C.—Lester v. Dunn, C.A., 475 F.2d 983, 154 U.S. App.D.C. 399.

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U.S.—Archer-Daniels-Midland Co. v. Paull, D.C.Ark., 199 F.Supp. 319, affd., C.A., 313 F.2d 612.

Six-year lapse prior to retrial

U.S.—Cunningham v. Erie R. Co., D.C.N.Y., 243 F.Supp. 571, affd., C.A., 358 F.2d 640.

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19. U.S.—Conway v. Chemical Leaman Tank Lines, Inc., D.C.Tex., 87 F.R.D. 712, affd. 644 F.2d 1059, reh. den. 650 F.2d 282, app. after remand 687 F.2d 108, 693 F.2d 133.

20. U.S.—Bertha Bldg. Corp. v. National Theatres Corp., C.A.N.Y., 369 F.2d 785, cert. den. 80 S.Ct. 585, 361 U.S. 960, 4 L.Ed.2d 542.

21. U.S.—Skehan v. Board of Trustees of Bloomsburg State College, D.C.Pa., 436 F.Supp. 657, affd. and remd. C.A., 590 F.2d 470, cert. den. 100 S.Ct. 61, 444 U.S. 832, 62 L.Ed.2d 41. On remand, D.C., 501 F.Supp. 1360.

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22. U.S.—Fontainebleau Hotel Corp. v. Crossman, C.A.Fla., 286 F.2d 926—Clark v. Travelers Indem. Co., C.A.Ind., 328 F.2d 819.

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U.S.—Kestenbaum v. Falstaff Brewing Corp., C.A.Tex., 575 F.2d 564, reh. den. 580 F.2d 1052, cert. den. 99 S.Ct. 1218, 440 U.S. 909, 59 L.Ed.2d 457.

24.5. U.S.—Delano v. Kitch, C.A.Kan., 663 F.2d 990, cert. den. 102 S.Ct. 2012, 456 U.S. 946, 72 L.Ed.2d 468.

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25. U.S.—Watz v. Zapata Off-Shore Co., C.A.Tex., 500 F.2d 628.

D.C.—Sherwin v. Welch, C.A., 319 F.2d 729, 115 U.S.App.D.C. 328.

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26. U.S.—Smoot v. State Farm Mut. Auto. Ins. Co, C.A.Ga., 299 F.2d 525—R.B. Co. v. Aetna Ins. Co., C.A.Tex., 299 F.2d 753.

27. U.S.—Poletti v. C. I. R., C.A.Mo., 351 F.2d 345.

Bertha Bldg. Corp. v. National Theatres Corp., D.C.N.Y., 166 F.Supp. 805, affd., C.A., 269 F.2d 785, cert. den. 80 S.Ct. 585, 361 U.S. 960, 4 L.Ed.2d 542.

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28. U.S.—Bertha Bldg. Corp. v. National Theatres Corp., D.C.N.Y., 166 F.Supp. 805, affd., C.A., 269 F.2d 785, cert. den. 80 S.Ct. 585, 361 U.S. 960, 4 L.Ed.2d 542—Offshore Logistics Services, Inc. v. Mutual Marine Office, Inc., D.C.La., 520 F.Supp. 237.

29. U.S.—Bertha Bldg. Corp. v. National Theatres Corp., D.C.N.Y., 166 F.Supp. 805, affd., C.A., 269 F.2d 785, cert. den. 80 S.Ct. 585, 361 U.S. 960, 4 L.Ed.2d 542.

However, the principle of the law of the case is not absolute or inflexible and on remand, courts have inherent power to correct earlier error if it becomes apparent, and to avoid injustice.[32.5]

32.5. U.S.—Capital Investors Co. v. Executors of Morrison's Estate, C.A.Va., 584 F.2d 652, cert. den. 99 S.Ct. 1790, 440 U.S. 981, 60 L.Ed.2d 241.

34. U.S.—Bertha Bldg. Corp. v. National Theatres Corp., C.A.N.Y., 269 F.2d 785, cert. den. 80 S.Ct. 585, 361 U.S. 960, 4 L.Ed.2d 542.

35. U.S.—Pyramid Life Ins Co. v. Curry, C.A.Mo., 291 F.2d 411.

36. U.S.—Raxton Corp. v. Anania Associates, Inc., C.A.Mass., 668 F.2d 622.

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36.5. U.S.—Federal Deposit Ins. Corp. v. Alker, D.C. Pa., 30 F.R.D. 527, affd., C.A., 316 F.2d 236, cert. den. 84 S.Ct. 150, 375 U.S. 880, 11 L.Ed.2d 111, reh. den. 84 S.Ct. 345, 375 U.S. 949, 11 L.Ed.2d 280, and 84 S.Ct. 656, 376 U.S. 929, 11 L.Ed.2d 628, and 84 S.Ct. 1178, 377 U.S. 920, 12 L.Ed.2d 189.

36.10. U.S.—Job v. Grand Elec. Co-op., Inc., D.C. S.D., 295 F.Supp. 872.

38. U.S.—Grigsby v. Coastal Marine Service of Tex., Inc., D.C.La., 317 F.Supp. 1113.

40. U.S.—Colby v. McClaskey, C.A.Ohio, 354 F.2d 226.

42. U.S.—Cohen v. Illinois Institute of Technology, C.A.Ill., 581 F.2d 658, cert. den. 99 S.Ct. 1058, 439 U.S. 1135, 59 L.Ed.2d 97.

43. U.S.—Cranston v. Hardin, C.A.N.Y., 504 F.2d 566.

43.5. U.S.—Metropolitan Housing Development Corp. v. Village of Arlington Heights, D.C.Ill., 469 F.Supp. 836. Affd. C.A., 616 F.2d 1006—Conway v. Chemical Leaman Tank Lines, Inc., C.A. Tex., 644 F.2d 1059, reh. den. 650 F.2d 282, app. after remand 687 F.2d 108, reh. den. 693 F.2d 133.

45. U.S.—Woods v. National Life & Acc. Ins. Co., C.A.Pa., 380 F.2d 843.

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45.5. U.S.—Gorso v. Bell Equipment Corp., D.C.Pa., 376 F.Supp. 1027.

45.50. U.S.—Anderson v. Wainwright, D.C.Fla., 446 F.Supp. 763.

§ 301(35). —— Powers and Duties of Lower Court Generally

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D.C.—Women Strike for Peace v. Hickel, C.A., 420 F.2d 597, 137 U.S.App.D.C. 29, app. after remand 472 F.2d 1273, 153 U.S.App.D.C. 198.

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(3) Other matters.

U.S.—Braniff v. Jackson Ave.-Gretna Ferry, Inc., C.A. La., 280 F.2d 523, reh. den. 289 F.2d 939—Soley v. Star & Herald Co, C.A.Canal Zone, 390 F.2d 364.

D.C.—Rogers v. Cheng Fu Sheng, C.A., 294 F.2d 262, 111 U.S.App.D.C. 66.

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48. U.S.—Fidelity & Deposit Co. of Maryland v. USAFORM Hail Pool, Inc., C.A.Fla., 523 F.2d 744, cert. den. 96 S.Ct. 1725, 425 U.S. 950, 48 L.Ed.2d 194, on remand, D.C., 465 F.Supp. 478.

Millhollin v. Ford Motor Credit Co., D.C.Or., 531 F.Supp. 379.

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(2) Other instances.

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48.5. U.S.—Greater Iowa Corp. v. McLendon, C.A. Iowa, 378 F.2d 783.

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49. U.S.—Price v. U.S., D.C.Va., 195 F.Supp. 203—Archer-Daniels-Midland Co. v. Paull, D.C.Ark., 199 F.Supp. 319, affd., C.A., 313 F.2d 612—Wright v. City of Montgomery, Ala., D.C.Ala., 282 F.Supp. 291—Smith v. Pittsburgh Gage & Supply Co., D.C.Pa., 323 F.Supp. 256, affd., C.A., 464 F.2d 870—Marcum v. Dahl, D.C.Okl., 535 F.Supp. 48.

50. U.S.—Green v. White, C.A.Mo., 628 F.2d 1126, on remand, D.C., 525 F.Supp. 81, affd., C.A., 693 F.2d 45, cert. den. 103 S.Ct. 2464, 462 U.S. 1111, 77 L.Ed.2d 1341.

51. U.S.—Imperial Chemical Industries Limited v. National Distillers & Chemical Corp., C.A.N.Y., 354 F.2d 459, 19 A.L.R.3d 492.

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54. U.S.—Idlewild Bon Voyage Liquor Corp. v. Epstein, N.Y., 82 S.Ct. 1294, 370 U.S. 713, 8 L.Ed.2d 794.

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U.S.—Monte v. Southern Delaware County Authority, C.A.Pa., 335 F.2d 855.

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55. U.S.—Monday v. U.S., D.C.Wis., 342 F.Supp. 1271, affd., C.A., 478 F.2d 1404, two cases, cert. den. 97 S.Ct. 233, 414 U.S. 910, 38 L.Ed.2d 148.

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56. U.S.—U.S. v. Parke, Davis & Co., App.D.C., 81 S.Ct. 433, 365 U.S. 125, 5 L.Ed.2d 457.

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61. U.S.—Williams v. Sahli, C.A., 292 F.2d 249, cert. den. 82 S.Ct. 482, 368 U.S. 977, 7 L.Ed.2d 439—Mefford v. Gardner, C.A.Tenn., 383 F.2d 748.

62. U.S.—Lee v. Terminal Transport Co., C.A.Ind., 301 F.2d 234—Mefford v. Gardner, C.A.Tenn., 383 F.2d 748.

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62.5. U.S.—Mefford v. Gardner, C.A.Tenn., 383 F.2d 748—Hartz v. U.S., C.A.Ga., 415 F.2d 259—Tapco Products Co. v. Van Mark Products Corp., C.A.Mich., 466 F.2d 109.

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63.10. U.S.—Monday v. U.S., D.C.Wis., 342 F.Supp. 1271, affd., C.A., 478 F.2d 1404, two cases, cert. den. 94 S.Ct. 233, 414 U.S. 910, 38 L.Ed.2d 148.

65. U.S.—Stiller v. Squeez-A-Purse Corp., C.A.Ohio, 296 F.2d 504—Heasley v. U.S., C.A.N.D., 312 F.2d 641.

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71.5. U.S.—Crumady v. The Joachim Hendrik Fisser, D.C.N.J., 176 F.Supp. 595, affd., C.A., 272 F.2d 396.

71.55. U.S.—Korck v. Electric Motor & Repair Co., C.A.Mass., 339 F.2d 73.

§ 301(38). —— —— Granting New Trial or Rehearing

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75. U.S.—Socony Mobil Oil Co. v. Taylor, C.A.Tex., 388 F.2d 586, app. after remand 421 F.2d 1248, cert. den. 90 S.Ct. 1868, 398 U.S. 950, 26 L.Ed.2d 289.

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76. U.S.—Law Wenzel & Co. of Southern California, Inc. v. London Litho Supply Co., Inc., C.A.Cal., 563 F.2d 1367.

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77. U.S.—Bray v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, C.A.5, 664 F.2d 1045.

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82.5. U.S.—Tkaczyk v. Gallagher, D.C.Conn., 265 F.Supp. 791.

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91.5. U.S.—McNellis v. Raymond, D.C.N.Y., 329 F.Supp. 1038, affd., C.A., 445 F.2d 1404—Fernandez-Roque v. Smith, D.C.Ga., 539 F.Supp. 925.

Geuder, Paeschke & Frey Co. v. Clark, D.C.Wis., 26 F.R.D. 223, affd., C.A., 288 F.2d 1, 85 A.L.R.2d 766, cert. den. 82 S.Ct. 47, 368 U.S. 826, 7 L.Ed.2d 30.

91.10. U.S.—Alexander v. Nash-Kelvinator Corp., C.A.N.Y., 271 F.2d 524.

92. U.S.—Manuel San Juan Co. v. American Intern. Underwiters Corp., D.C.Puerto Rico, 331 F.Supp. 1050, affd., C.A., 494 F.2d 317.

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92.5. U.S.—Bryant v. Partenreederei-Ernest Russ, C.A.Md., 352 F.2d 614—Miller v. Miller, C.A.Or., 504 F.2d 1067.

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92.10. U.S.—Geuder, Paeschke & Frey Co. v. Clark, 288 F.2d 1, 85 A.L.R.2d 766, cert. den. 82 S.Ct. 47, 368 U.S. 826, 7 L.Ed.2d 30.

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92.25. U.S.—Beightol v. Kunowski, D.C.Pa., 382 F.Supp. 985.

93.5. D.C.—Kintner v. Toll, C.A., 276 F.2d 486, 107 U.S.App.D.C. 240.

93.20. U.S.—Green v. Aetna Ins. Co., C.A.Tex., 349 F.2d 919, app. after remand 397 F.2d 614.

93.25. U.S.—Martin v. Duffie, C.A.N.M., 463 F.2d 464.

Archer-Daniels-Midland Co. v. Paull, D.C.Ark., 199 F.Supp. 319. Affd., C.A., 313 F.2d 612.

Additional evidence not required

(4) Other instances.

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(5) Refusal held not abuse of discretion.

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93.30. U.S.—Kelly v. Page, C.A.Ga., 335 F.2d 114—White v. Rimrock Tidelands, Inc., C.A.La., 414 F.2d 1336.

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93.35. U.S.—Scaduto v. Orlando, C.A.N.Y., 381 F.2d 587—U.S. v. Harrison County, Miss., C.A.Miss., 445 F.2d 276, app. after remand 463 F.2d 1328.

93.45. U.S.—Paull v. Archer-Daniels-Midland Co., C.A.Ark., 313 F.2d 612.

94. U.S.—Alexander v. Nash-Kelvinator Corp., C.A.N.Y., 271 F.2d 524—A. C. Becken Co. v. Gemex Corp., C.A.Ill., 314 F.2d 839, cert. den. 84 S.Ct. 49 and 84 S.Ct. 68—Robert L. Marwin & Co. v. Strong, C.A.Virgin Islands, 429 F.2d 50.

97.5. U.S.—Millworth Converting Corp. v. Slifka, D.C.N.Y., 188 F.Supp. 629.

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1.5. U.S.—Imperial Chemical Industries Limited v. National Distillers & Chemical Corp., C.A.N.Y., 354 F.2d 459, 19 A.L.R.3d 492—Wm. G. Roe & Co. v. Armour & Co., C.A.Fla., 414 F.2d 862—Baird v. Benton County Bd. of Ed., C.A.Miss., 421 F.2d 700.

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1.10. U.S.—California Packing Corp. v. Sun-Maid Raisin Growers of Cal., D.C.Cal., 165 F.Supp. 245, affd., C.A., 273 F.2d 282.

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2. U.S.—R. M. Smythe & Co. v. Chase Nat. Bank of City of New York, C.A.N.Y., 291 F.2d 721—Eisen v. Carlisle and Jacquelin, C.A.N.Y., 891 F.2d 555, on remand, D.C., 50 F.R.D. 471, and 52 F.R.D. 253, revd. on oth. grds. 479 F.2d 1005, vac. on oth. grds. 94 S.Ct. 2140, 417 U.S. 156, 40 L.Ed.2d 732.

4.5. U.S.—Williams v. City of Wichita, Kan., C.A. Kan., 279 F.2d 375.

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6.50. U.S.—Burden v. Yates, C.A.Ga., 644 F.2d 503.

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8.50. U.S.—Borders v. Rippy, D.C.Tex., 195 F.Supp. 732—Davis v. East Baton Rouge Parish School Bd., D.C.La., 269 F.Supp. 60—Chris-Craft Industries, Inc. v. Piper Aircraft Corp., D.C.N.Y., 384 F.Supp. 507, affd. in part, vac. in part on oth. grds., C.A., 516 F.2d 172.

10. U.S.—Firth v. U.S., C.A.Cal., 554 F.2d 990.
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12. U.S.—Fuchstadt v. U.S., C.A.N.Y., 442 F.2d 400.
Del Bourgo v. Mansfield, D.C.Cal., 300 F.Supp. 502.

D.C.—Hynning v. Partridge, C.A., 359 F.2d 271, 123 U.S.App.D.C. 287, cert. den. 87 S.Ct. 232, 385 U.S. 922, 17 L.Ed.2d 145.

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13. U.S.—Paull v. Archer-Daniels-Midland Co., C.A. Ark., 313 F.2d 612.

16.15. U.S.—Rachal v. Allen, C.A.Tex., 376 F.2d 999.

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16.50. U.S.—Quinones v. Upper Moreland Tp., D.C. Pa., 199 F.Supp. 758.

17. Post-judgment interest

(1) Direction in mandate held condition precedent to allowance.

U.S.—Bankers Life & Cas. Co. v. Bellanca Corp., C.A. Ill., 308 F.2d 757.

(2) Mandate held to award interest.

U.S.—Bankers Life & Cas. Co. v. Bellanca Corp., C.A. Ill., 308 F.2d 757.

20. Pre-judgment interest

U.S.—Bankers Life & Cas. Co. v. Bellanca Corp., C.A. Ill., 308 F.2d 757.

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22. U.S.—U.S. v. Board of Public Ed. for City of Savannah and Chatham County, C.A.Ga., 405 F.2d 925—Aquascutum of London, Inc. v. S.S. American Champion, C.A.N.Y., 426 F.2d 205.

23. U.S.—Lagarde Finance Co. v. Vinet, C.A.La., 346 F.2d 846.

26.5. U.S.—Newman v. Piggie Park Enterprises, Inc., C.A.S.C., 377 F.2d 433, affd. 88 S.Ct. 964, 390 U.S. 400, 19 L.Ed.2d 1263—Cooper v. Allen, C.A. Ga., 467 F.2d 836, app. after remand 493 F.2d 765, reh. den. 495 F.2d 1372—Johnson v. San Francisco Unified School Dist., C.A.Cal., 500 F.2d 349—Hamilton v. Nielsen, C.A.Ill., 678 F.2d 709.

D.C.—San Soucie v. Schmidt, C.A., 282 F.2d 833, 108 U.S.App.D.C. 350.

26.10. U.S.—Falcone v. Dantinne, C.A.Pa., 420 F.2d 1157—Kahan v. Rosenstiel, C.A.Del., 424 F.2d 161, cert. den. 90 S.Ct. 1870, 398 U.S. 950, 26 L.Ed.2d 290, on remand 315 F.Supp. 1391.

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U.S.—Lagarde Finance Co. v. Vinet, C.A.La., 346 F.2d 846.

26.20. U.S.—Alexander v. Groves, D.C.Md., 345 F.Supp. 848.

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26.50. Restitution or surety bond

U.S.—Gadsden v. Fripp, C.A.S.C., 343 F.2d 824, cert. den. 86 S.Ct. 300, 382 U.S. 921, 15 L.Ed.2d 235, reh. den. 86 S.Ct. 572, 382 U.S. 1002, 15 L.Ed.2d 492.

27. U.S.—Gould v. Hiram Walker & Sons, Inc., C.A. Ill., 266 F.2d 249, cert. den. 80 S.Ct. 83, 361 U.S. 833, 4 L.Ed.2d 74—Gadsden v. Fripp, C.A.S.C., 330 F.2d 545.

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39. U.S.—Davis v. Murphy, C.A.Wis., 587 F.2d 362.

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46. U.S.—Wheatley v. Beetar, C.A.N.Y., 637 F.2d 863, app. after remand 679 F.2d 1037.
Williams v. Eaton, D.C.Wyo., 333 F.Supp. 107, affd., C.A., 468 F.2d 1079.

D.C.—Sherwin v. Welch, C.A., 319 F.2d 729, 115 U.S.App.D.C. 328—Doe v. General Hospital of District of Columbia, C.A., 434 F.2d 427, 140 U.S.App.D.C. 153—National Wildlife Federation v. Marsh, C.A., 665 F.2d 390, 214 U.S.App.D.C. 234.

Failure to appeal issue

U.S.—Slaughter v. Philadelphia Nat. Bank, C.A.Pa., 417 F.2d 21.

Supplement record

U.S.—Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers, Local Union No. 396, C.A.Mo., 568 F.2d 558, on remand D.C., 471 F.Supp. 1335.

46.5. Recent decision of state court

(2) Other matters.

U.S.—Progress Development Corp. v. Mitchell, D.C.Ill., 219 F.Supp. 156.

46.10. U.S.—Delta Engineering Corp. v. Scott, C.A. La., 322 F.2d 11, reh. den. 325 F.2d 432, cert. den. 84 S.Ct. 1164, 377 U.S. 905, 12 L.Ed.2d 176—U.S. v. Texas Ed. Agency, C.A.Tex., 452 F.2d 1203, app. after remand 459 F.2d 600—Purex Corp. v. Procter & Gamble Co., C.A.Cal., 664 F.2d 1105, cert. den. 102 S.Ct. 2256, 456 U.S. 983, 72 L.Ed.2d 861.

D.C.—Sherwin v. Welch, C.A., 319 F.2d 729, 115 U.S.App.D.C. 328.

46.15. U.S.—Emmanuel v. Omaha Carpenters Dist. Council, C.A.Neb., 560 F.2d 382.

47. U.S.—Martin v. Atlantic Coast Line R. Co., C.A. Fla., 289 F.2d 414.

Plaintiff not estopped

U.S.—International Tel. & Tel. Corp. v. General Tel. & Electronics Corp., D.C.Hawaii, 449 F.Supp. 1158.

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48. U.S.—Wright v. Heizer Corp., D.C.Ill., 503 F.Supp. 802.

49.5. Jury trial not required

(2) Other matters.

U.S.—Braniff v. Jackson Ave.-Gretna Ferry, Inc., C.A. La., 280 F.2d 523, reh. den. 289 F.2d 939.

Jury trial permissible

(2) Other statements.

U.S.—McGowan v. U.S., C.A.Fla., 296 F.2d 252, on remand 222 F.Supp. 329, affd. 323 F.2d 655.

49.10. U.S.—Shelkofsky v. Broughton, C.A.Fla., 388 F.2d 977.

Filing of briefs

U.S.—International Union, United Auto., Aircraft and Agr. Implement Workers of America v. Piasecki Aircraft Corp., D.C.Del., 241 F.Supp. 385.

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57. U.S.—Cromling v. Pittsburgh & L.E.R. Co., C.A. Pa., 327 F.2d 142.

Evidence properly refused

U.S.—Northern Oil Co. v. Socony Mobil Oil Co., C.A. Vt., 368 F.2d 384.

59. U.S.—Interstate Plywood Sales Co. v. Interstate Container Corp., C.A.Cal., 331 F.2d 449—Opelika Nursing Home, Inc. v. Richardson, C.A.Ala., 448 F.2d 658, on remand, D.C., 356 F.Supp. 1338, app. after remand 490 F.2d 841.

Failure to consider new matter held error

U.S.—World Airways, Inc. v. Northeast Airlines, Inc., C.A.Mass., 358 F.2d 691, on remand 286 F.Supp. 362, affd. 413 F.2d 335.

60.5. U.S.—Gross v. Southern Ry. Co., C.A.Ga., 446 F.2d 1057.

Sufficiency of evidence produced on new trial considered

U.S.—E. L. Cheeney Co. v. Gates, C.A.Tex., 346 F.2d 197.

The sufficiency of evidence on retrial is a matter for initial determination by the trial judge.[60.10]

60.10. U.S.—Garrett v. American Airlines, Inc., C.A. Tex., 332 F.2d 939, 3 A.L.R.3d 930—Chagas v. Berry, C.A.Tex., 369 F.2d 637, cert. den. 88 S.Ct. 161, 389 U.S. 872, 19 L.Ed.2d 154.

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62. U.S.—Lehrman v. Gulf Oil Corp., C.A.Tex., 500 F.2d 659, reh. den. 503 F.2d 1403, cert. den. 95 S.Ct. 1128, 420 U.S. 929, 43 L.Ed.2d 400.

§ 301(47). —— Failure to Follow Decision or Comply with Mandate

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63. U.S.—Century Inv. Corp. v. U.S., C.A.Wash., 277 F.2d 247.

D.C.—James v. Pennsylvania General Ins. Co., C.A., 371 F.2d 736, 125 U.S.App.D.C. 271.

§ 301(48). Jurisdiction and Proceedings of Appellate Court after Remand

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67.50. U.S.—Ferrell v. Estelle, C.A.Tex., 573 F.2d 867.

Yablonski v. United Mine Workers of America, C.A., 454 F.2d 1032, 147 U.S.App.D.C. 193, cert. den. 92 S.Ct. 1609, 406 U.S. 906, 31 L.Ed.2d 816.

68. U.S.—Alphin v. Henson, C.A.Md., 552 F.2d 1033, cert. den. 98 S.Ct. 67, 434 U.S. 823, 54 L.Ed.2d 80.

71. U.S.—Pierce v. Cook & Co., Inc., C.A.Okl., 518 F.2d 720, cert. den. 96 S.Ct. 866, 423 U.S. 1079, 47 L.Ed.2d 89—American Trucking Associations, Inc. v. I.C.C., C.A.5, 669 F.2d 957, cert. den. 103 S.Ct. 1272, 460 U.S. 1022, 75 L.Ed.2d 493, app. after remand 770 F.2d 535.

Interpretation not binding on Supreme Court

U.S.—Bailey v. Henslee, C.A.Ark., 309 F.2d 840.

Continuing power

D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

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74. D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

77.5. Matters required to be shown

U.S.—Meredith v. Fair, C.A.Miss., 306 F.2d 374.

In particular circumstances, a stay of mandate has been denied.[77.6]

77.6. After mandate issued stay held tool late

U.S.—Meredith v. Fair, C.A.Miss., 306 F.2d 374.

Stay subjecting successful litigant to injustice of delay

U.S.—Meredith v. Fair, C.A.Miss., 306 F.2d 374.

77.15. U.S.—Schramm v. Oakes, C.A.N.M., 352 F.2d 143—Northcross v. Board of Ed. of Memphis, Tenn. City Schools, C.A.Tenn., 420 F.2d 546, affd. 90 S.Ct. 891, 397 U.S. 232, 25 L.Ed.2d 246, on remand, D.C., 312 F.Supp. 1150, case remd. 444 F.2d 1179.

§ 301(49). —— Recall, Amendment, or Correction of Mandate

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77.50. U.S.—Meredity v. Fair, C.A.Miss., 306 F.2d 374—Bankers Life & Cas. Co. v. Bellanca Corp., C.A.Ill., 308 F.2d 757—Lovallo v. Froehlke, C.A. N.Y., 468 F.2d 340, cert. den. 93 S.Ct. 1555, 411 U.S. 918, 36 L.Ed.2d 310.

D.C.—Dilley v. Alexander, C.A., 627 F.2d 407, 200 U.S.App.D.C. 354.

Power surviving end of term as better view

U.S.—Aerojet-General Corp. v. American Arbitration Ass'n, C.A.Cal., 478 F.2d 248.

77.60. U.S.—Weiser v. White, C.A.Tex., 505 F.2d 912, cert. den. 95 S.Ct. 1998, 421 U.S. 993, 44 L.Ed.2d 482.

D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

79.20. U.S.—Bankers Life & Cas. Co. v. Bellanca Corp., C.A.Ill., 308 F.2d 757.

"Fraud on court" rather than "mistake of judgment" required

D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

79.30 U.S.—Oneida of Thames Band v. State of N.Y., C.A.N.Y., 771 F.2d 51

D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

Relief held not warranted

(2) Other matters.

U.S.—Lee v. Terminal Transport Co., C.A.Ind., 301 F.2d 234—Haverhill Gazette Co. v. Union Leader Corp., C.A.Mass., 333 F.2d 808.

Relief warranted

U.S.—American Iron and Steel Institute v. Environmental Protection Agency, C.A., 560 F.2d 589, cert. den. 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

79.40. U.S.—American Iron and Steel Institute v. Environmental Protection Agency, C.A., 560 F.2d 589, cert. den. 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

79.45. U.S.—American Iron and Steel Institute v. Environmental Protection Agency, C.A., 560 F.2d 589, cert. den. 98 S.Ct. 1467, 435 U.S. 914, 55 L.Ed.2d 505.

Showing need to avoid injustice

D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

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81.15. U.S.—Legate v. Maloney, C.A.Mass., 348 F.2d 164—Foster v. City of Detroit, Mich., C.A.Mich., 423 F.2d 660.

D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

82. D.C.—Dilley v. Alexander, C.A., 627 F.2d 407, 200 U.S.App.D.C. 354.

89. U.S.—Yanow v. Weyerhaeuser S.S. Co., C.A.Or., 274 F.2d 274, cert. den. 80 S.Ct. 671, 362 U.S. 919, 4 L.Ed.2d 739.

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D.C.—Greater Boston Television Corp. v. F.C.C., C.A., 463 F.2d 268, 149 U.S.App.D.C. 322.

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96.15. U.S.—Tribble v. Bruin, C.A.S.C., 279 F.2d 424.

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U.S.—Krock v. Electric Motor & Repair Co., C.A. Mass., 339 F.2d 73.

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98.15. Relief held not warranted

U.S.—Cord v. Smith, C.A.Cal., 370 F.2d 418.

99. U.S.—Kinnear-Weed Corp. v. Humble Oil & Refining Co., C.A.Tex., 296 F.2d 215, cert. den. 82 S.Ct. 142, 368 U.S. 890, 7 L.Ed.2d 89, reh. den. 82 S.Ct. 359, 368 U.S. 936, 7 L.Ed.2d 198.

99.5. Overruling of decision of one panel by another

U.S.—Manning v. M/V "Sea Road", C.A.Fla., 417 F.2d 603.

§ 301(53). Performance or Breach of Condition to Pay or Satisfy Judgment

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16.50. U.S.—Moore v. Townsend, C.A.Ill., 577 F.2d 424.

Change in Rules

Fed.Rules Civ.Proc. Rule 73(d), is now F.R.A.P. Rule 8, 28 U.S.C.A.

16.55. Satisfaction of judgment not precluded by dismissal of appeal

U.S.—Tully v. Kerguen, D.C.Virgin Islands, 304 F.Supp. 1225.

16.70. Reversal as to one of several parties

(2) Resort to fund furnished by successful appellant allowed.

U.S.—Scholz Homes, Inc. v. Larson, C.A.Ill., 437 F.2d 1060.

§ 301(56). Extent of Liability

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23.50. D.C.—Brem v. U.S. Fidelity & Guaranty Co., App., 206 A.2d 404, applying Virginia law.

24. U.S.—Aviation Credit Corp. v. Conner Air Lines, Inc., C.A.Fla., 307 F.2d 685, cert. den. 83 S.Ct. 510, 371 U.S. 954, 9 L.Ed.2d 501.

25. Consideration of real or presumed intention of parties required

U.S.—Aviation Credit Corp. v. Conner Air Lines, Inc., C.A.Fla., 307 F.2d 685, cert. den. 83 S.Ct. 510, 371 U.S. 954, 9 L.Ed.2d 501.

26. Change in Rules

Fed.Rules Civ.Proc. Rule 73(d), is now F.R.A.P. Rule 8, 28 U.S.C.A.

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31. U.S.—Moore v. Townsend, C.A.Ill., 577 F.2d 424.

34.5. U.S.—Moore v. Townsend, C.A.Ill., 577 F.2d 424.

37. U.S.—Moore v. Townsend, C.A.Ill., 577 F.2d 424.

§ 301(58). Summary Remedies

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61. Change in Rules

Fed.Rules Civ.Proc. Rule 73(f), is now F.R.A.P. Rule 8(b), 28 U.S.C.A.